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A WELFARE STATE OF CIVIL RIGHTS: THE TRIUMPH OF THE THERAPEUTIC IN AMERICAN CONSTITUTIONAL LAW

Daniel F. Piar*

ABSTRACT

This Article examines the influence of the therapeutic culture on the modern constitutional law of civil rights. The therapeutic culture is defined as one in which the central moral question is individual fulfillment. That culture has sprung up to replace older cultures such as Protestantism and classical republicanism, which are no longer capable of appealing to a nation as diverse as the United States. Instead of asking whether individuals or the nation conform to some external moral system, the therapeutic culture asks whether individuals are happy or fulfilled. This Article demonstrates that the therapeutic culture has had a significant effect on the constitutional law of civil rights. Drawing on an interdisciplinary approach, including history, sociology, and law, it offers a reading of some of the most important civil rights cases of the last hundred years to demonstrate how concepts of personal fulfillment, such as emotional comfort and psychic integrity, have been used to draw the boundaries of state action and declare the meaning of the Constitution. While this development has led to the recognition of many new rights, it also poses threats to liberties that are endemic to the therapeutic culture. These include the aggrandizement of state authority in the name of therapy and the danger of dependence on the courts rather than ourselves as agents of therapeutic change.

INTRODUCTION

One of the most important features of the last century of American law has been the growing role of the courts in policing civil rights. From the early days of due process through the Warren Court's "rights revolution" to the most recent line of cases extending concepts of personal autonomy, the courts have consistently expanded the reach of law by defining and enforcing new rights.¹ Various explanations have been offered for this "rights explosion." Some point to the success of the desegregation movement in the courts, which inspired confidence in lawsuits as a means of

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¹ See *infra* Part II.

vindicating civil rights.² Others suggest that dissatisfaction with the slow pace of representative politics has made the courts a more attractive alternative for those seeking protection or redress.³ Still others note that the proliferation of lawyers and the adversarial trend of America's legal culture have glorified litigation above the political arts of legislation and compromise.⁴ And it has been pointed out that the Fourteenth Amendment has accelerated the growth of rights law by expanding the federal power of judicial review.⁵

There is truth in all these accounts, and a phenomenon as complex as the rights explosion surely demands more than one explanation. But one of the most important explanations, which has been largely overlooked, is the connection between the modern law of civil rights and the American therapeutic culture. Over the last century, therapeutic ideals have permeated American life, and the law has not been immune.⁶ Both the content of rights law and its increasingly broad scope can be seen as direct responses to the demands of the culture for therapeutic government. Understanding this connection can give us a greater appreciation of the ways in which culture influences law and of the rewards and the risks of the present direction of both law and society.

The therapeutic culture has been studied by historians, sociologists, and other observers since at least the 1960s. Briefly defined, it is a culture in which the central question is the fulfillment of the individual rather than the individual's compliance with collective goals or moral authority outside the self.⁷ In this it departs from older cultural paradigms such as Protestantism, classical republicanism, and Lockean liberalism, all of which tended to treat the self as less important than the moral or civic order.⁸ In the therapeutic culture, the self *is* the moral order, and the development or happiness of the self is among the highest goals of society. In its simplest form, the therapeutic culture looks to doctors to treat and heal individuals. But therapy has escaped the psychiatrist's couch to permeate modern life: it appears in the workplace, where employers are expected to safeguard the emotional well-being of their employees;⁹ in schools, which are expected to do the same for their students;¹⁰ in entertainment, as evidenced by the popularity of figures such as Oprah and Dr. Phil;¹¹

² MARY ANN GLENDON, *RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE* 5–7 (1991).

³ *Id.*; ROBERT A. KAGAN, *ADVERSARIAL LEGALISM: THE AMERICAN WAY OF LAW* 45–46 (2001).

⁴ KAGAN, *supra* note 3, at 55–56.

⁵ GLENDON, *supra* note 2, at 4–5.

⁶ *See infra* Part I.

⁷ *See, e.g.*, JAMES L. NOLAN, JR., *THE THERAPEUTIC STATE: JUSTIFYING GOVERNMENT AT CENTURY'S END* 2–5 (1998).

⁸ *Id.* at 27–36.

⁹ *See infra* notes 60–64 and accompanying text.

¹⁰ *See infra* note 59 and accompanying text.

¹¹ *See infra* notes 51–52 and accompanying text.

and even in one's relationship with oneself, as shown by the bourgeoning genre of self-help literature.¹²

Most importantly for our purposes, therapy is also sought from government, a phenomenon that has directly influenced the development of modern civil rights law. The American state has long been in the business of providing material aid to its citizens, from subsidized housing to medical care to food stamps.¹³ It has also been clear for some time that the state is in the business of providing—or requiring—therapy. Many of the same welfare programs that provide food, shelter, and clothing also seek to provide mental or emotional aid.¹⁴ The criminal justice system has frequently taken on the task of therapy as well as punishment, as in programs of counseling for drug, domestic violence, and drunk driving offenders.¹⁵ The juvenile and domestic court systems are dedicated to the therapeutic oversight of young delinquents and family relationships.¹⁶ And in the civil courts, emotional wholeness has become an interest protected by tort law.¹⁷ There is an entire government apparatus dedicated to fostering and fixing the self, an emotional parallel to the longer-standing forms of physical government aid.

In this context, it is not surprising that the therapeutic ethic should also play a role in the law of civil rights. The major rights decisions of the past century have increasingly adopted the rhetoric of therapy in determining the content of individual liberties and the scope of constitutional law. In a series of landmark cases, the Supreme Court has analyzed legal problems in light of therapeutic concerns, and in this process the boundaries of state power have repeatedly been set with reference to the emotional, spiritual, or psychic needs of the citizenry. As early as 1943, the Court identified “a right of self-determination in matters that touch individual opinion and personal attitude”¹⁸ and forbade government to trespass on “the sphere of intellect and spirit.”¹⁹ A decade later the Court struck down school segregation on the grounds that it “generates a feeling of inferiority” detrimental to minority schoolchildren.²⁰ The

¹² See *infra* note 50 and accompanying text.

¹³ Contrary to popular belief, intensive government regulation dates back to the early nineteenth century. See generally WILLIAM J. NOVAK, *THE PEOPLE'S WELFARE: LAW AND REGULATION IN NINETEENTH-CENTURY AMERICA* (1996) (discussing the pervasiveness of government regulation in nineteenth-century America).

¹⁴ ANDREW J. POLSKY, *THE RISE OF THE THERAPEUTIC STATE* 4 (1991).

¹⁵ NOLAN, *supra* note 7, at 292–96.

¹⁶ EVA S. MOSKOWITZ, *IN THERAPY WE TRUST: AMERICA'S OBSESSION WITH SELF-FULFILLMENT* 72–75 (2001).

¹⁷ Rodney A. Smolla, *Let the Author Beware: The Rejuvenation of the American Law of Libel*, 132 U. PA. L. REV. 1, 11, 18–21 (1983) (“Tort law has undergone a relaxation of rules that formerly prohibited recovery for purely emotional or psychic injury, a doctrinal evolution that parallels the growth of the ‘me-generation.’”).

¹⁸ *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 631 (1943).

¹⁹ *Id.* at 642.

²⁰ *Brown v. Bd. of Educ.*, 347 U.S. 483, 494 (1954).

Court went on to develop an “endorsement test” for Establishment Clause cases, which bars government action that makes people feel like “outsiders, not full members of the political community.”²¹ It has struck down school prayer that causes non-believing students to feel “offense,” “isolation,” and “affront.”²² It has disallowed regulation that it sees as interfering with “the right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life.”²³ And it has emphasized that legally protected liberty must be understood not only in the “spatial” dimensions of bodily freedom, but also in the “more transcendent dimensions” of spiritual autonomy.²⁴ These and other cases discussed below illustrate the degree to which concepts of therapy have come to determine the content of civil rights law.

The capture of law by the therapeutic culture is a remarkable occurrence. If the life of the law once was reason, logic, or experience, it is now good feeling, individual fulfillment, and therapeutic healing. This represents a profound shift in both culture and law, the consequences of which have yet to be fully appreciated. This triumph of the therapeutic has transformed the role of law in American life in ways both hopeful and dangerous. One result of the therapeutic approach to civil rights has been to expand the roster of constitutionally protected liberties, making the modern age ostensibly one of great personal freedom.²⁵ But such freedom has its price, for the therapeutic culture ironically risks fostering dependence in the name of self-fulfillment. The very term “therapeutic” implies that the self is fragile, or ill, and that some form of healing is needed. The individual, by definition emotionally or spiritually weak, must rely on the ministrations of some therapeutic authority for complete fulfillment. Whether that authority is a physician, a counselor, a government program, or a court, the therapeutic enterprise is frequently founded on dependence, not autonomy. Therapy often presumes weakness, not strength; submission, not self-determination; compliance, not independence. Thus, while we may justly celebrate our individual freedoms, we should be mindful that the therapeutic dependence on the courts risks the atrophy of our faculties of self-determination, just as the therapeutic culture in general jeopardizes the American ideal of self-reliance.

I. THE THERAPEUTIC CULTURE AND THE THERAPEUTIC STATE

Before discussing the effect of the therapeutic ethic on law, it will be helpful to trace the growth and characteristics of this distinctive phase of American culture. The principal catalyst of the therapeutic culture has been the decline of older cultures that once governed American life, in particular Protestantism, classical republicanism, and

²¹ *Lynch v. Donnelly*, 465 U.S. 668, 688 (1984) (O’Connor, J., concurring).

²² *Lee v. Weisman*, 505 U.S. 577, 594 (1992).

²³ *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 851 (1992).

²⁴ *Lawrence v. Texas*, 539 U.S. 558, 562 (2003).

²⁵ *See infra* Part II.

Lockean liberalism.²⁶ Of these, the decline of Protestantism is perhaps the most important because it had been a dominant presence in American society for most of the nineteenth century, ordering law, political relations, and private life to an extraordinary degree.²⁷ But like Christian cultures throughout the west, American Protestantism did not survive unscathed into modern times. By the early twentieth century, the homogeneity of ethnicity, temperament, and belief that had kept Protestantism in the fore was passing from the scene. Increased immigration introduced new groups with diverse goals and ideas, not all of which could be assimilated into the Protestant culture.²⁸ Urbanization and industrialization threw the new cultures together with the old in ways that made it impossible to contain their mutual influence.²⁹ Darwinism, scientific rationalism, and the shocks of the Civil and First World Wars combined to shake a society's collective faith. The rise of capitalism shifted cultural priorities from spiritual satisfaction to the production and consumption of goods, further displacing religion as a culturally unifying force.³⁰ As the culture changed, increasingly rigid legal doctrines of separation of church and state began formally to excise religion from public life and law.³¹ By the first decades of the twentieth century, American culture was nearing the end of what Philip Rieff calls "[t]he long period of deconversion" from Christianity,³² or what Robert Handy has termed "The Second Disestablishment."³³ In a nation filled with diverse voices clamoring for diverse wants, in a society that

²⁶ NOLAN, *supra* note 7, at 27–36.

²⁷ See generally ROBERT T. HANDY, *A CHRISTIAN AMERICA: PROTESTANT HOPES AND HISTORICAL REALITIES* (1971) (discussing Protestants' effects on American civilization); MARTIN E. MARTY, *RIGHTEOUS EMPIRE: THE PROTESTANT EXPERIENCE IN AMERICA* (1970) (discussing the history of American Protestants and the Protestant experience in America); Daniel F. Piar, *Majority Rights, Minority Freedoms: Protestant Culture, Personal Autonomy, and Civil Liberties in Nineteenth-Century America*, 14 WM. & MARY BILL RTS. J. 987, 992–98 (2006) (describing the dominant effects of Protestant culture and beliefs on nineteenth-century American culture and society).

²⁸ NOLAN, *supra* note 7, at 18–19.

²⁹ *Id.*; T. J. Jackson Lears, *From Salvation to Self-Realization: Advertising and the Therapeutic Roots of the Consumer Culture, 1880–1930*, in *THE CULTURE OF CONSUMPTION: CRITICAL ESSAYS IN AMERICAN HISTORY, 1880–1980*, at 1, 6–7 (Richard Wightman Fox & T. J. Jackson Lears, eds., 1983).

³⁰ NOLAN, *supra* note 7, at 2–3; Lears, *supra* note 29, at 3–6.

³¹ See NOLAN, *supra* note 7, at 36–37; Piar, *supra* note 27, at 1021; H. Frank Way, *The Death of the Christian Nation: The Judiciary and Church-State Relations*, 29 J. CHURCH & ST. 509 (1987). For a detailed study of both legal and cultural demands for separation in the late nineteenth and early twentieth centuries, see PHILIP HAMBURGER, *SEPARATION OF CHURCH AND STATE* 285–478 (2002).

³² PHILIP RIEFF, *THE TRIUMPH OF THE THERAPEUTIC: USES OF FAITH AFTER FREUD* 2 (1966).

³³ HANDY, *supra* note 27, at 184. The same factors that undermined Protestant culture also contributed to the decline of classical republicanism and Lockean liberalism. See NOLAN, *supra* note 7, at 27–39.

increasingly glorified the competition inherent in capitalist markets, in a world experiencing the shock of large-scale warfare and the challenge to faith posed by new forms of science, the voices in the sky seemed to have fallen silent. The Virgin gave way to the Dynamo.³⁴ This is not to say that private religiosity disappeared, but it is to say that religion gradually lost much of its power to explain the world and ceased to be a widespread or even an acceptable form of shared public discourse.³⁵

With the decline of the older moral systems, the therapeutic culture emerged as a replacement. The therapeutic culture is one in which the central moral issue is not surrender to some higher authority or collective goal, but rather the fulfillment of the self.³⁶ As Warren Susman has observed, "The vision of self-sacrifice began to yield to that of self-realization. There was fascination with the peculiarities of the self, especially the sick self."³⁷ Phillip Rieff wrote in his seminal book, *The Triumph of the Therapeutic*, that the "self, improved, is the ultimate concern of modern culture."³⁸ More recently, Lawrence Friedman has summarized some of the major traits of the therapeutic ethic:

In our *individualistic* age the state, the legal system, and organized society in general thus seem more and more dedicated to one fundamental goal: to permit, foster, and protect the self, the person, the individual. A basic social creed justifies this aim: each person . . . ought to have the right to create or build up a way of life for ourselves, and to do it through free, open, and untrammelled choice. These are the unspoken premises of popular culture.³⁹

This new cultural paradigm, like the decline of the old ones, was an outgrowth of the altered conditions of modern America. Made anxious by the pace of change in the

³⁴ The metaphor is Henry Adams's. See HENRY ADAMS, *THE EDUCATION OF HENRY ADAMS: AN AUTOBIOGRAPHY* 379–90 (1918); see also NOLAN, *supra* note 7, at 2–3, 18–19, 37.

³⁵ Moreover, in modern times even the private exercise of religion seems to have been co-opted by its replacement, the therapeutic culture. There are indications that religion is frequently pursued for the sake of therapeutic self-development rather than surrender to higher moral authority. See, e.g., ROBERT N. BELLAH ET AL., *HABITS OF THE HEART: INDIVIDUALISM AND COMMITMENT IN AMERICAN LIFE* 63–65, 232–33 (1st California Paperback ed. 1996); FRANK FUREDI, *THERAPY CULTURE: CULTIVATING VULNERABILITY IN AN UNCERTAIN AGE* 17–18 (2004).

³⁶ See *supra* note 7 and accompanying text.

³⁷ WARREN I. SUSMAN, *CULTURE AS HISTORY: THE TRANSFORMATION OF AMERICAN SOCIETY IN THE TWENTIETH CENTURY* 276 (1984).

³⁸ RIEFF, *supra* note 32, at 62.

³⁹ LAWRENCE M. FRIEDMAN, *THE REPUBLIC OF CHOICE: LAW, AUTHORITY, AND CULTURE* 8–9 (1990).

world around them,⁴⁰ and already disposed toward individualism, Americans increasingly turned to self-fulfillment as the answer to the challenges of modern life:

Plagued by anxiety, depression, vague discontents, a sense of inner emptiness, the “psychological man” of the twentieth century seeks neither individual self-aggrandizement nor spiritual transcendence but peace of mind, under conditions that increasingly militate against it. Therapists, not priests or popular preachers of self-help or models of success like the captains of industry, become his principal allies in the struggle for composure; he turns to them in the hope of achieving the modern equivalent of salvation, “mental health.” Therapy has established itself as the successor both to rugged individualism and to religion⁴¹

Unlike the older paradigms, the therapeutic ethic was compatible with the increasing heterogeneity of American society because it drew no distinctions based on race, ethnicity, class, or religion.⁴² It dovetailed perfectly with the capitalist consumer culture, which likewise focused on personal desire and its satisfaction.⁴³ And by promising health, happiness, and well-being, it offered a seductive appeal instead of making the sometimes inconvenient demands of other, older moral systems.

This shift from external morality to inner fulfillment, from religion to therapy, marks a major change in American culture. If Protestant man had asked, “Am I saved?” or “Are we a Godly nation?,” therapeutic man asks, “Am I happy?” or “Am I the best person I can be?” Thus, by contrast to earlier times, “modern man now appears ready to attempt a life built upon no other ideal than happiness: comfort and self-expression.”⁴⁴ In Rieff’s summation, “That a sense of well-being has become the end, rather than a by-product of striving after some superior communal end, announces a fundamental change of focus in the entire cast of our culture.”⁴⁵

⁴⁰ One source offers a persuasive account of “American nervousness” as a major catalyst of the therapeutic culture. See BELLAH ET AL., *supra* note 35, at 117–21. Jackson Lears likewise points to a widespread sense of unreality and self-doubt in nineteenth-century life as laying the groundwork for the rise of the therapeutic ethic. See Lears, *supra* note 29, at 3–17; see also FRIEDMAN, *supra* note 39, at 2–3.

⁴¹ CHRISTOPHER LASCH, *THE CULTURE OF NARCISSISM: AMERICAN LIFE IN AN AGE OF DIMINISHING EXPECTATIONS* 13 (Warner Books ed. 1979).

⁴² NOLAN, *supra* note 7, at 19.

⁴³ Lears’s work shows how consumer capitalism both grew from and reinforced the therapeutic ethic. See Lears, *supra* note 29.

⁴⁴ JOHN H. SCHAAER, *LEGITIMACY IN THE MODERN STATE* 15, 32 (1981); see also FRIEDMAN, *supra* note 39, at 8.

⁴⁵ RIEFF, *supra* note 32, at 261.

Evidence of what Rieff dubbed “the triumph of the therapeutic”⁴⁶ can readily be found in modern America.⁴⁷ The consumer culture has built an entire economy on the creation and satisfaction of personal desire.⁴⁸ Advertising seizes on people’s innermost desires—to be happier, healthier, prettier, better-regarded—and uses these therapeutic susceptibilities to push products.⁴⁹ In popular culture, an immense publishing industry has sprung up to satisfy the demand for therapy, as a visit to the “self-help” or “recovery” sections of any major bookstore will show.⁵⁰ Television shows such as *The Oprah Winfrey Show* and *Dr. Phil* cater to the therapeutic ethic by offering story after story about self-improvement and personal well-being.⁵¹ The title of one of Dr. Phil’s best-selling books is emblematic: *Self Matters*.⁵²

The medical and counseling professions are another central part of the therapeutic culture. To aid people in pursuing therapeutic wellness, twelve-step programs abound, and new psychological “syndromes” are diagnosed to explain a variety of unwanted behaviors.⁵³ The number of Americans who have consulted mental health professionals has risen dramatically, from around fourteen percent of the population in the 1960s to well over half by the dawn of the twenty-first century.⁵⁴ The pursuit of good feeling through drugs such as Prozac has become part of everyday life, to such a degree that a new term, “cosmetic psychopharmacology,” has been coined to describe it.⁵⁵

In the news media, reaction to public events often reflects the prevailing concern with therapy. When actor Mel Gibson uttered an anti-Semitic remark during a drunk-driving arrest, the news was filled with demands for his rehabilitation, discussion of the emotional wounds he had caused, and the offender’s contrite admission that he was

⁴⁶ *Id.* at 243.

⁴⁷ See NOLAN, *supra* note 7, at 19. For a detailed survey, see MOSKOWITZ, *supra* note 16, at 1–9.

⁴⁸ See generally GARY CROSS, AN ALL-CONSUMING CENTURY: WHY COMMERCIALISM WON IN MODERN AMERICA (2000) (discussing the historic influence of commercialism in America).

⁴⁹ Lears, *supra* note 29, at 18–19.

⁵⁰ MOSKOWITZ, *supra* note 16, at 1, 245.

⁵¹ *Id.* at 260–69. On Winfrey’s methods and influence, see Christopher John Farley, *Queen of All Media*, TIME, Oct. 5, 1998, at 82; Lee Siegel, *The Strange Genius of Oprah: Thank You for Sharing*, THE NEW REPUBLIC, June 5 & 12, 2006, at 19. On those of McGraw, see Michelle Cottle, *The Bad Doctor: Daddy Knows*, THE NEW REPUBLIC, Dec. 27, 2004–Jan. 10, 2005, at 19; Marc Peyser, *Paging Doctor Phil*, NEWSWEEK, Sept. 2, 2002, at 50.

⁵² PHILLIP C. MCGRAW, SELF MATTERS: CREATING YOUR LIFE FROM THE INSIDE OUT (2003).

⁵³ MOSKOWITZ, *supra* note 16, at 5, 257–59.

⁵⁴ FUREDI, *supra* note 35, at 9.

⁵⁵ PETER D. KRAMER, LISTENING TO PROZAC, at xvi (1993). For more on the rise of psychopharmacology, see RONALD W. DWORKIN, ARTIFICIAL HAPPINESS: THE DARK SIDE OF THE NEW HAPPY CLASS 2–3, 33–35 (2006); DAVID HEALY, THE ANTIDEPRESSANT ERA (1997). For a journalistic look at the widespread use of mood-altering drugs, see Ariel Levy, *Pill Culture Pops*, N.Y. MAG., June 9, 2003, at 24.

ill and needed help.⁵⁶ One wire service quoted Gibson as seeking “the appropriate path for healing” those he had hurt; that quote was coupled with an offer by a Jewish leader to “help him with his . . . rehabilitation to combat this disease of prejudice.”⁵⁷ After Congressman Mark Foley resigned in the wake of allegations that he was a pedophile, he issued successive statements acknowledging his homosexuality, confessing his alcoholism, and alleging that he had been the victim of childhood sexual abuse at the hands of a priest.⁵⁸ In reporting these stories, it was not sufficient merely to note that Gibson might be a bigot or that Foley may have engaged in sexually suspect behavior—newsworthy as those facts might have been. Full coverage now requires the exploration of the therapeutic aspects of events, including the emotional, psychological, and pathological dimensions of offenders and victims.

The cultural yen for therapy has led Americans to demand it and to provide it in a surprising variety of contexts. Public education, for example, is now designed as much to foster self-esteem and positive mental outlooks as to impart knowledge or discipline.⁵⁹ In the workplace, employers are often expected to meet their employees’ emotional needs as well as their need for a paycheck. Employee assistance programs, which provide emotional counseling, are an increasingly common part of employee benefits packages.⁶⁰ Workplace training in diversity awareness and sensitivity to others has become standard fare in many companies.⁶¹ In response to workplace disasters, employers are often called upon to address the emotional impact of events upon their employees. For example, a recent news story reported an attack on five pedestrians in the parking lot of a fast-food restaurant.⁶² The story related that while the police were investigating the crime, the employer was providing counseling for its employees who had witnessed the event.⁶³ In Seattle, where an urban bridge has become a site of frequent suicides, employers regularly provide counseling for employees who witness the tragic events from nearby office buildings.⁶⁴ Sometimes therapy is extended to customers or their families. In the wake of a recent airplane

⁵⁶ See, e.g., Associated Press, *Gibson Admits Remarks, Says He’s Not a Bigot*, Aug. 1, 2006, <http://www.msnbc.msn.com/id/14135464/>.

⁵⁷ *Id.*

⁵⁸ Abby Goodnough, *Foley Was Sexually Abused as a Youth, His Lawyer Says*, N.Y. TIMES, Oct. 4, 2006, at A26.

⁵⁹ See NOLAN, *supra* note 7, at 150–81 (discussing the role of the therapeutic ethos in American public education).

⁶⁰ See, e.g., Tyler D. Hartwell et al., *Aiding Troubled Employees: The Prevalence, Cost, and Characteristics of Employee Assistance Programs in the United States*, 86 AM. J. PUB. HEALTH 804 (1996).

⁶¹ NOLAN, *supra* note 7, at 293–95.

⁶² Associated Press, *Smiling Driver Runs over Five People*, CHARLESTON GAZETTE (Charleston, W. Va.), May 24, 2006, at 4C.

⁶³ *Id.*

⁶⁴ Donna Gordon Blankinship, *Bridge Suicides Unnerve Seattle*, CHI. TRIB., Jan. 26, 2007, at 2.

crash in Kentucky, for instance, the airline's reaction included not only cooperating with safety officials and assessing what went wrong, but also providing therapy for the bereaved through airline-sponsored "care teams," groups of workers who would assist the victims' families with everything from travel arrangements to mental health care.⁶⁵ The presence of therapy in such diverse settings further illustrates the hold that therapeutic ideals have on our culture. Taken together, these and many other examples that could be cited show that therapy has replaced religion as a common language of American society.

The therapeutic ethic has also had an enormous impact on the scope and character of the American state. Not only have Americans sought therapy from employers, schools, and the media, but they have also sought it from government.⁶⁶ In his comprehensive study of the therapeutic state, James Nolan sees this as a response to our modern "legitimation deficit."⁶⁷ If government can no longer claim to be ordained by God or supported by traditional civic paradigms, then it must justify itself by our new cultural standard of therapy.⁶⁸ This has led to state-sponsored therapeutic intervention in a wide variety of human affairs. A battery of social welfare programs seek "to give recipients better psychological tools and stronger emotional resources."⁶⁹ These "include juvenile courts, child welfare departments, vocational rehabilitation and training centers, shelters for the homeless, community mental health programs, public assistance departments, chemical dependency treatment clinics, shelters for battered women, and Veterans' Administration services," not to mention privately contracted support services paid for by public money.⁷⁰ "All told," writes Andrew Polsky, "the number of persons brought under the domain of [this] human service apparatus ranges into the millions."⁷¹ Consequently, as Robert Nagel has pointed out, "It is now widely taken for granted that the central government is responsible not only for material welfare but also for psychic gratification."⁷²

As the state has become enmeshed in the therapeutic culture, there has been an increasing reliance on the courts as agents of therapy. In the criminal justice system, drug courts commonly allow offenders to avoid imprisonment in exchange for completing programs of treatment and rehabilitation.⁷³ In such cases, the traditionally

⁶⁵ Sharon Thompson & Barbara Isaacs, *Area Support Services Offer Help Amid Loss*, LEXINGTON HERALD-LEADER, Aug. 29, 2006, at A6.

⁶⁶ See, e.g., NOLAN, *supra* note 7, at 219–20 (discussing the effect of the therapeutic ethos on welfare policy).

⁶⁷ *Id.* at 27.

⁶⁸ See *id.* at 45.

⁶⁹ POLSKY, *supra* note 14, at 4.

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² ROBERT F. NAGEL, *THE IMPLOSION OF AMERICAN FEDERALISM* 140 (2001) (citing NOLAN, *supra* note 7).

⁷³ See generally NOLAN, *supra* note 7, at 78–112 (discussing drug courts and their role in the criminal justice system).

authoritarian roles of judges, prosecutors, and probation officers are frequently relaxed into a personalized, helping approach that looks more like caretaking than the usual administration of justice.⁷⁴ Prisons, institutions once devoted to punishment and incapacitation, now attempt healing and reform through programs of counseling and training.⁷⁵ In drunk-driving cases, alcohol treatment and counseling are standard requirements, whether or not an offender is clinically an alcoholic.⁷⁶

The civil courts have also turned increasingly to the therapeutic. The juvenile and domestic courts administer justice with deliberate attention to the emotional, psychic, and therapeutic dynamics of family problems.⁷⁷ In civil litigation, the courts more readily accept mental health professionals as expert witnesses, a development that reflects the general rise in the status of psychology and psychiatry as key parts of the therapeutic culture.⁷⁸ Tort law has responded to therapeutic ideals by recognizing emotional injury as a basis for damages.⁷⁹ In the context of libel law, Rodney Smolla describes this change as affording “new legal shelter for mental and emotional calm” in an effort to protect “psychic equanimity.”⁸⁰ The law, like the rest of American culture, has become dedicated to guarding and fostering the self.⁸¹

Within this changed legal landscape, the therapeutic culture has had a profound effect on the law of civil rights. While the nineteenth century shaped its rights law based on Protestant values such as individual moral autonomy or classic republican values such as personal responsibility, modern rights law has turned to therapeutic concepts of personal fulfillment and psychic comfort to determine what state action is and is not permissible. Part II will trace these developments through a series of landmark Supreme Court decisions of the past century to show how thoroughly our modern legal concepts of rights have been influenced by the therapeutic culture.

II. THERAPY IN THE LAW OF CIVIL RIGHTS

The therapeutic culture began to influence civil rights law most strongly in the 1940s and 1950s, but to fully appreciate its emergence we should glance backward at the prevailing legal culture of the nineteenth century, as well as the changing legal conditions of the early decades of the twentieth.

I have written elsewhere on the connections between the nineteenth-century Protestant culture and the law of civil rights.⁸² To summarize briefly, that culture

⁷⁴ *Id.* at 91–98.

⁷⁵ *Id.* at 112–27.

⁷⁶ *Id.* at 292–93.

⁷⁷ MOSKOWITZ, *supra* note 16, at 72–75; POLSKY, *supra* note 14, at 80–81.

⁷⁸ See NOLAN, *supra* note 7, at 68–72.

⁷⁹ See *id.* at 46–68.

⁸⁰ Smolla, *supra* note 17, at 20–21.

⁸¹ FRIEDMAN, *supra* note 39, at 8–9.

⁸² See Piar, *supra* note 27.

viewed individuals as morally autonomous and morally capable, especially when it came to matters of spirituality and internal being.⁸³ This meant that the law typically was not viewed as playing a role in protecting the emotional or psychic states of individuals because that was something individuals were expected to do for themselves.⁸⁴ Consequently, claims of right based on personal belief, such as attacks on Sunday closing laws, school prayer laws, or blasphemy laws, were typically rebuffed by the courts, who saw the maintenance of self in the face of legal handicaps as the responsibility of the individual.⁸⁵ This approach naturally limited the role of law in public life, as the courts declined to extend their powers to entire categories of civil rights claims.⁸⁶

The transition to a therapeutic view of rights law began to emerge most clearly near the dawn of the twentieth century. An early indicator was Warren and Brandeis's famous 1890 article on the right to privacy, in which they wrote that the "recognition of man's spiritual nature, of his feelings and his intellect," should trigger new legal protection for "[t]houghts, emotions, and sensations."⁸⁷ Although the Supreme Court did not immediately accept the invitation, around this time it began a process that would lead it to base large swaths of civil rights law on precisely these internal considerations. It should be noted that the centrality of the Supreme Court to this process was something new. Most nineteenth-century rights litigation took place in the state courts, as the Fourteenth Amendment had either not been passed or was not yet viewed as allowing federal courts to oversee the laws of the states.⁸⁸ But in the closing decades of the century, as the law of the Fourteenth Amendment matured, the federal courts took a more active role in policing state activities. Naturally, the Supreme Court led the way and thus began a consolidation of judicial power that would make it easy for the Court to steer law as it—or the culture of which it was a part—saw fit.

In the early twentieth century, the Supreme Court showed a willingness to place the imperatives of the individual above the commands of positive law, a development that laid the groundwork for the advent of the therapeutic approach a few decades later. One of the earliest cases in this transition was *Lochner v. New York*.⁸⁹ *Lochner* involved a challenge to a New York state law limiting the hours of employment for bakers.⁹⁰ The law was a progressive public-welfare act designed to protect laborers from fatigue, exposure to harmful substances such as flour dust, and (most likely)

⁸³ *Id.* at 988.

⁸⁴ *Id.*

⁸⁵ *Id.* at 989.

⁸⁶ *Id.* at 990.

⁸⁷ Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 193, 195 (1890).

⁸⁸ *See, e.g.*, *The Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1873).

⁸⁹ 198 U.S. 45 (1905).

⁹⁰ *Id.* at 68–69 (Harlan, J., dissenting).

exploitation by over-demanding employers.⁹¹ Nonetheless, the Court struck down the law as a violation of the employer's right to buy labor and the employee's right to sell it: "The general right to make a contract in relation to his business is part of the liberty of the individual protected by the Fourteenth Amendment of the Federal Constitution. . . . The right to purchase or to sell labor is part of the liberty protected by this amendment"⁹² Justice Holmes, in his famous dissent, criticized the Court for subverting a rational exercise of legislative power, thereby preventing "the natural outcome of a dominant opinion."⁹³ And, of course, later commentators have savaged the decision as an example of judicial overreaching and reactionary politics.⁹⁴

Lochner is an easy target if it is read as an ode to laissez-faire capitalism, but it can more sensitively be read as an ode to individual autonomy. If a baker wants to breathe flour dust for more than ten hours each day, why should he be prevented from doing so? If he decides that it is in his best interest to work more than sixty hours per week in front of hot ovens, who is the government to oppose him? As the Court asked rhetorically,

Is this a fair, reasonable and appropriate exercise of the police power of the State, or is it an unreasonable, unnecessary and arbitrary interference with the right of the individual to his personal liberty or to enter into those contracts in relation to labor which may seem to him appropriate or necessary for the support of himself and his family?⁹⁵

Lochner is important because of the degree to which it favored the individual in this balance, even though it now seems apparent to most that the state's action was both reasonable and beneficial to those affected. Thus, *Lochner* remains useful not for its holding, but as an early example of the twentieth-century placement of individual rights at the center of the constitutional scheme. From here, it would be a fairly short step to enlisting law to protect the individual's psyche in addition to his contractual liberty.

The work begun in *Lochner* continued as the century unfolded. In *Meyer v. Nebraska*, decided eighteen years later, the Court struck down a state law barring the teaching of German to schoolchildren.⁹⁶ The narrow basis for the opinion was that the Due Process Clause gave parents the right "to control the education of their own," which meant that the state could not bar the teaching of a foreign language if the

⁹¹ *Id.* at 69–72.

⁹² *Id.* at 53 (majority opinion).

⁹³ *Id.* at 76 (Holmes, J., dissenting).

⁹⁴ See, e.g., Jack M. Balkin, "Wrong the Day It Was Decided": *Lochner* and Constitutional Historicism, 85 B.U. L. REV. 677 (2005).

⁹⁵ *Lochner*, 198 U.S. at 56 (majority opinion).

⁹⁶ *Meyer v. Nebraska*, 262 U.S. 390 (1923).

parents wished it.⁹⁷ But the Court went further by positing a broader sphere of due process rights, encompassing “the right of the individual . . . generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.”⁹⁸ The Court did not purport to list all of those rights, which meant that the concept of due process was apparently to be open-ended and defined by the judiciary as cases arose. The individual was becoming increasingly important as an object of judicial attention, and his “pursuit of happiness” was becoming a judicially enforceable goal. These were further indications that the therapeutic culture was taking hold in the law.

Lochner and *Meyer* showed that the Court would protect what might be called behavioral liberty—the right of persons to engage in particular kinds of conduct. But just a few years later, in *Olmstead v. United States*, Justice Brandeis showed that it was possible to think of law as affording emotional protection, even in the unexpected context of a criminal appeal.⁹⁹ In dissenting from the majority’s affirmation of a conviction based on wiretap evidence, he explained:

The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man’s spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the Government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men.¹⁰⁰

Feelings, emotions, and sensations are not the usual stuff of criminal adjudication. And Brandeis, of course, was writing in dissent. But his reliance on the interior realm as a measure of state action was a portent of things to come.

Fifteen years after *Olmstead*, in *West Virginia State Board of Education v. Barnette*, the Court came around to Brandeis’s view by defining individual liberty in psychic as well as physical terms.¹⁰¹ *Barnette* involved a challenge by a group of parents to a state law requiring that schoolchildren salute the United States flag each day while reciting the Pledge of Allegiance.¹⁰² The parents, who were Jehovah’s Witnesses, claimed that the flag salute required obeisance to a graven image, which

⁹⁷ *Id.* at 401.

⁹⁸ *Id.* at 399.

⁹⁹ 277 U.S. 438 (1928).

¹⁰⁰ *Id.* at 478 (Brandeis, J., dissenting).

¹⁰¹ *W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943).

¹⁰² *Id.* at 626–29.

offended their religion.¹⁰³ Justice Jackson, writing for the majority, bypassed the obvious First Amendment freedom of religion claim to phrase the issue in terms of state power versus internal autonomy: "The sole conflict is between authority and rights of the individual," he wrote.¹⁰⁴ The plaintiffs "stand on a right of self-determination in matters that touch individual opinion and personal attitude."¹⁰⁵ Stated this way, the debate was over as soon as it began. "[T]he Bill of Rights," Jackson wrote, was based on the assumption that "the individual was the center of society."¹⁰⁶ The flag-salute law ran afoul of this priority by requiring "affirmation of a belief and an attitude of mind,"¹⁰⁷ thereby trespassing on a realm that was beyond government interference. "[N]o official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. . . . [This law] invades the sphere of intellect and spirit"¹⁰⁸ Accordingly, the Court declared the law unconstitutional.¹⁰⁹

Barnette marks an important moment in the law of individual rights because it expanded the idea of constitutionally protectable autonomy from the external realm of conduct, found in *Lochner* and *Meyer*, to the internal realm of thought, feeling, and "spirit." The significance of this change was reflected in Justice Frankfurter's dissent, which looked back to the older, "external" concept of rights law to criticize the majority's result.¹¹⁰ To Frankfurter, the decision made no sense because the realm of "intellect and spirit" referenced by the majority could not be reached even under the law as it stood.¹¹¹ Surely, he wrote, a child could stand and recite the Pledge without believing what it said, or while harboring internal reservations.¹¹² Likewise, the child's parents remained free to teach the child that the Pledge was wrong or to take other steps to instill their own beliefs.¹¹³ There was nothing in the case to indicate that the state had changed anyone's mind by requiring the flag salute or that children were being brainwashed instead of merely being required to participate in an exercise in which they might not believe. On this view, the state's sin lay not in mind control but in endorsing a position that a minority might find disagreeable, which was generally not a matter for judicial involvement.¹¹⁴

¹⁰³ *Id.* at 629.

¹⁰⁴ *Id.* at 630.

¹⁰⁵ *Id.* at 631.

¹⁰⁶ *Id.* at 639.

¹⁰⁷ *Id.* at 633.

¹⁰⁸ *Id.* at 642.

¹⁰⁹ *Id.*

¹¹⁰ *See id.* at 655 (Frankfurter, J., dissenting) ("Law is concerned with external behavior and not with the inner life of man.").

¹¹¹ *Id.* at 664.

¹¹² *See id.* ("Saluting the flag suppresses no belief nor curbs it.").

¹¹³ *See id.*

¹¹⁴ *See id.* at 662.

Frankfurter's view likely would have carried the day in the nineteenth century, but things were changing. According to the majority, the Constitution would safeguard the autonomy of the individual, which now appeared to be spiritual as well as physical. *Barnette* thus suggested a right to some sort of psychic integrity free from influence or even disturbance by government. This premise marked a significant step toward a therapeutic view of civil rights, as the Court began to make the mental and spiritual states of individuals a touchstone of constitutional law.

Later cases would build upon this growing commitment to law as a tool for therapeutic regulation. *Brown v. Board of Education*¹¹⁵ is a landmark in this process. The plaintiffs' lawyers in *Brown* based their case in large part on a claim that segregation did psychological damage to its victims.¹¹⁶ Their strategy worked, and the Court adopted the language of therapy in rejecting the concept of "separate but equal" in public education.¹¹⁷ In perhaps the most famous passage of the opinion, the Court relied on therapeutic concepts to effect a sea change in American law: "To separate [schoolchildren] from others . . . solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone."¹¹⁸ This statement was a telling indication of the Court's commitment to law as a therapeutic tool, for there were other grounds on which the Court could have decided the case. It could have held that separation was inherently unequal, as it had begun to hint at in earlier cases addressing segregated higher education.¹¹⁹ It could have held that intentional segregation was barred because the Reconstruction Amendments were meant to protect blacks from just such oppression, following the *Slaughter-House Cases*¹²⁰ and Justice Harlan's famous dissents in *Plessy v. Ferguson*¹²¹ and the *Civil Rights Cases*.¹²² Or it could have held that intentional segregation was one of the "badges and incidents of slavery" that could be banished by Congress under the Thirteenth Amendment.¹²³ Instead, it linked the

¹¹⁵ 347 U.S. 483 (1954).

¹¹⁶ For a detailed account of the development of this theory, see MOSKOWITZ, *supra* note 16, at 179–92.

¹¹⁷ See *Brown*, 347 U.S. at 494.

¹¹⁸ *Id.*

¹¹⁹ See, e.g., Mark Strasser, *Was Brown's Declaration of Per Se Invalidity Really Out of the Blue? The Evolving "Separate but Equal" Education Jurisprudence from Cumming to Brown*, 47 How. L.J. 769 (2004).

¹²⁰ 83 U.S. (16 Wall.) 36, 71–72 (1873).

¹²¹ 163 U.S. 537, 555–56 (1896) (Harlan, J., dissenting).

¹²² 109 U.S. 3, 26–62 (1883) (Harlan, J., dissenting); see also Patrick J. Kelley, *An Alternative Originalist Opinion for Brown v. Board of Education*, 20 S. ILL. U. L.J. 75 (1995).

¹²³ See *The Civil Rights Cases*, 109 U.S. at 20; see also *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 440 (1968). For other explorations of possible bases for the *Brown* opinion, see JACK M. BALKIN ET AL., *WHAT BROWN V. BOARD OF EDUCATION SHOULD HAVE SAID: THE NATION'S TOP LEGAL EXPERTS REWRITE AMERICA'S LANDMARK CIVIL RIGHTS DECISION* (2001).

constitutional violation to emotional well-being. "The sin of segregation," Lawrence Friedman wrote in assessing the Court's approach, "was its failure to allow full development of the souls of black children."¹²⁴ This approach made explicit *Barnette*'s implication that law was to be a tool for safeguarding psychic wellness, not merely ensuring freedom of action.¹²⁵ As Eva Moskowitz has observed, "Never before had the constitutionality of a government policy turned upon the feelings it engendered."¹²⁶ But if *Brown* was the first such case, it was far from the last.

A decade after *Brown*, the Court expanded its use of therapeutic ideas to include the emerging right of privacy. In a 1965 decision, *Griswold v. Connecticut*, the Court relied on general considerations of privacy and the dignity of marriage to invalidate a state ban on contraceptive use by married couples.¹²⁷ A few years later, reviewing a Massachusetts law banning such use by *unmarried* couples, the Court referred to individual emotional needs as well as privacy considerations in striking down the law:

It is true that in *Griswold* the right of privacy in question inhered in the marital relationship. Yet the marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional makeup. If the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.¹²⁸

Although the Court was not more specific as to the precise role of one's "intellectual and emotional makeup" in the civil rights calculus, its reference to these factors, and its quotation of Brandeis's *Olmstead* dissent, portended an important role for such concerns in the emerging right of privacy.

That role was fully realized the following year in *Roe v. Wade*.¹²⁹ The opinion has been criticized for being vague about its legal sources, though it seemed ultimately to turn on the general concept of substantive due process.¹³⁰ Whatever its legal theory, though, the decision owed much to therapeutic ideals. Writing for the Court, Justice

¹²⁴ FRIEDMAN, *supra* note 39, at 63.

¹²⁵ See *supra* notes 101–14 and accompanying text.

¹²⁶ MOSKOWITZ, *supra* note 16, at 189.

¹²⁷ 381 U.S. 479 (1965).

¹²⁸ *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972). The Court then quoted Justice Brandeis's dissent in *Olmstead*, discussed *supra* notes 99–100 and accompanying text. *Eisenstadt*, 405 U.S. at 453 n.10.

¹²⁹ 410 U.S. 113 (1973).

¹³⁰ The classic critique is John Hart Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920 (1973).

Blackmun made clear that the mental and emotional burdens of maternity were a major factor in striking down the law:

The detriment that the State would impose upon the pregnant woman by denying this choice [of abortion] altogether is apparent. . . . Maternity, or additional offspring, may force upon the woman a distressful life and future. Psychological harm may be imminent. Mental and physical health may be taxed by child care. There is also the distress, for all concerned, associated with the unwanted child, and there is the problem of bringing a child into a family already unable, psychologically and otherwise, to care for it. In other cases, as in this one, the additional difficulties and continuing stigma of unwed motherhood may be involved.¹³¹

Here, as in *Brown*, emotional distress, psychological hardship, and psychic “stigma” were used as legally significant factors in determining the boundaries of state action and individual rights.

The cases from *Lochner* to *Roe* turned mainly on the Due Process Clause of the Fourteenth Amendment, but therapeutic ideals came to inform other areas of law as well. *Plyler v. Doe*,¹³² like *Brown*, was an equal protection case, in which the children of illegal immigrants challenged a Texas law that would have denied them public education.¹³³ Striking down the law, the Court expressed its disapproval of “governmental barriers presenting unreasonable obstacles to advancement on the basis of individual merit. . . . [B]y depriving the children of any disfavored group of an education, we foreclose the means by which that group might raise the level of esteem in which it is held by the majority.”¹³⁴ The therapeutic content of this passage is striking. The therapeutic focus on individual fulfillment is nicely captured in the Court’s concern with “advancement on the basis of individual merit.” The therapeutic emphasis on good feeling and psychic well-being is shown by granting constitutional protection to methods of increasing one’s “esteem” in the eyes of others. To further its therapeutic analysis, the Court drew on the same concern for psychological damage that it had used in *Brown*: “The inestimable toll of that deprivation [of education] on the social, economic, intellectual, and psychological well-being of the individual, and the obstacle it imposes to individual achievement . . . [violate] the Equal Protection Clause.”¹³⁵

First Amendment law also felt the impact of therapeutic lawmaking. *Roberts v. United States Jaycees* involved a Minnesota law that required a private, all-male civic

¹³¹ *Roe*, 410 U.S. at 153.

¹³² 457 U.S. 202 (1982).

¹³³ *Id.* at 206.

¹³⁴ *Id.* at 222.

¹³⁵ *Id.*

group to admit women as members.¹³⁶ At issue was whether the law unduly infringed upon the members' First Amendment associational rights.¹³⁷ While the Court upheld the statute, its explanation of associational rights offered a further example of the therapeutic approach to rights law: "[I]ndividuals draw much of their emotional enrichment from close ties with others. Protecting these relationships from unwarranted state interference therefore safeguards the ability independently to define one's identity that is central to any concept of liberty."¹³⁸ The First Amendment, on this view, protects more than free speech; it protects the pursuit of "emotional enrichment." And constitutionally protected liberty consists of more than a lack of constraints on behavior; it also includes the ability "to define one's identity." Constitutional law was becoming ever more closely allied with the therapeutic project of self-fulfillment.

Therapeutic analysis also found a place in the religion cases with the advent of the "endorsement test" in Establishment Clause law. This test first appeared in Justice O'Connor's concurrence in *Lynch v. Donnelly*, a case that upheld a town's placement of a Christian nativity scene in a municipal holiday display.¹³⁹ In O'Connor's view, state-sponsored religious displays should be measured to see whether they send a message of endorsement or disapproval of religion.¹⁴⁰ Any such message should be prohibited because of its effects on the psyches of the auditors: "Endorsement sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community. Disapproval sends the opposite message."¹⁴¹ The endorsement test continued the Court's therapeutic project by making individual feelings (here, of belonging or alienation) a touchstone of civil rights law in the religion cases, as well as in other contexts.

Another example in the Establishment Clause context is *Lee v. Weisman*, in which the Court struck down a nonsectarian prayer offered at a high school graduation ceremony.¹⁴² The fatal flaw, as the Court saw it, was that the prayer required non-believing students either to stand in apparent assent or to remain seated in obvious

¹³⁶ 468 U.S. 609 (1984).

¹³⁷ *Id.* at 615.

¹³⁸ *Id.* at 619.

¹³⁹ 465 U.S. 668 (1984).

¹⁴⁰ *Id.* at 688–89 (O'Connor, J., concurring).

¹⁴¹ *Id.* at 688. This message-sending test has twice commanded a majority of the Court. See *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 309–10 (2000); *Sch. Dist. v. Ball*, 473 U.S. 373, 389–90 (1985) (finding that a program providing education to parochial students at public expense in parochial schools could send a "message" of government approval of religion and could confer a "significant symbolic benefit to religion in the minds of some"). For other uses of this test, see *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 773–78 (1995) (O'Connor, J., concurring); *Lee v. Weisman*, 505 U.S. 577, 606 & n.9 (1992) (Blackmun, J., concurring); *County of Allegheny v. ACLU*, 492 U.S. 573, 626–27 (1989) (O'Connor, J., concurring); *Tex. Monthly, Inc. v. Bullock*, 489 U.S. 1, 9 & n.1 (1989) (plurality opinion).

¹⁴² *Lee*, 505 U.S. 577.

dissent.¹⁴³ Standing up might violate the students' principles, while remaining seated might cause them to look conspicuous.¹⁴⁴ This "dilemma," in turn, could cause "embarrassment and . . . intrusion" for the student, thereby imposing a sense of "offense," "isolation," and "affront" that rendered the prayer unconstitutional.¹⁴⁵ Where *Barnette* had prohibited the seeming coercion of political orthodoxy, *Lee* went further: not only is the government forbidden to compel outward statements of belief, but it is also barred from creating conditions that might cause psychic discomfort. "[T]he Court's psycho-journey," as Justice Scalia labeled it in dissent,¹⁴⁶ emphasized yet more strongly that therapeutic consequences could determine the boundaries of state action.

Here we might pause to glance back at an analogous case from the nineteenth century. In 1876, in *Ferriter v. Tyler*, the Vermont Supreme Court upheld the expulsion of 150 Catholic children from public school for skipping class to attend church on a Catholic feast day.¹⁴⁷ The plaintiffs claimed that this expulsion punished them for their beliefs and therefore injured their right to freedom of conscience guaranteed under the Vermont constitution.¹⁴⁸ But in typical nineteenth-century fashion, the court was completely unsympathetic: "It would seem to be trifling with a momentous subject, to claim that [the constitution] was designed to prohibit the Legislature from enacting any law . . . which might interfere with the wishes, and tastes, and feelings of any of the citizens in the matter of religion."¹⁴⁹ The contrast to *Lee* could hardly be more stark. In *Ferriter*, individual feeling was expressly rejected as a basis for invoking judicial power. In *Lee*, however, those feelings were the central reason why the Court struck down the state's action. The difference graphically illustrates the shift from the nineteenth century's anti-therapeutic approach to the twentieth-century therapeutic ideal of rights.

The Court's therapeutic jurisprudence reached new heights several days after *Lee* was decided in *Planned Parenthood of Southeastern Pennsylvania v. Casey*.¹⁵⁰ Ostensibly, *Casey* was about whether a state could regulate abortion by imposing requirements of informed consent, parental notification, spousal notification, and record-keeping.¹⁵¹ But *Casey* was also a manifesto of the Court's vision of the therapeutic role of law in American life. In the case's central therapeutic passage, the Court made clear that it was dealing not only with discrete questions of abortion law, but also with a grand therapeutic project:

¹⁴³ *Id.* at 593.

¹⁴⁴ *Id.*

¹⁴⁵ *Id.* at 593–94.

¹⁴⁶ *Id.* at 643 (Scalia, J., dissenting).

¹⁴⁷ 48 Vt. 444 (1876).

¹⁴⁸ *Id.*

¹⁴⁹ *Id.* at 465.

¹⁵⁰ 505 U.S. 833 (1992).

¹⁵¹ *Id.* at 844.

At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.

These considerations begin our analysis of the woman's interest in terminating her pregnancy¹⁵²

This passage was the Court's most sweeping statement yet of the therapeutic project of the law. Individual liberty under the Constitution encompasses not merely specific, defined rights, such as the right to use contraception, to have an abortion, to educate one's children, or to worship as one pleases, but also one's thoughts, one's feelings, one's worldview, and one's approach to the mysteries of life and the universe. In short, it encompasses one's very soul. As applied to the law before the Court, this meant that the stakes were not merely bodily liberty, but one's unique cosmic purposes: "The destiny of the woman must be shaped to a large extent on her own conception of her spiritual imperatives"¹⁵³ A case that could technically have been about the law of abortion and the application of precedent was transformed into a manifesto of personal fulfillment. The transformation of a legal problem into a spiritual one showed that the therapeutic had triumphed in the law of individual rights.

A decade later the Court drew on *Casey*'s therapeutic vision in *Lawrence v. Texas*, striking down a state law criminalizing homosexual sodomy.¹⁵⁴ The Court took the occasion again to affirm the therapeutic character of constitutional law: "Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct. The instant case involves liberty of the person both in its spatial and in its more transcendent dimensions."¹⁵⁵ In *Lawrence*, this "transcendent" liberty again took the form of psychic fulfillment. According to the Court, the Texas law was wrong not only because it infringed on private sexual conduct, but also because the regulation of such conduct meant that the state had impermissibly sought to "demean [the plaintiffs'] existence or control their destiny."¹⁵⁶ Once again, the Court relied on therapy to explain the content of constitutional law.

Many of these therapeutic decisions can be crudely classified as "liberal," favoring individual rights over state action. But in its last term, the Court showed that the therapeutic approach can be used by those on the other side of the aisle, as well. In *Gonzales v. Carhart*, a conservative majority upheld Congress's ban of partial-birth abortions.¹⁵⁷ As part of its justification, the majority relied on the emotional impact

¹⁵² *Id.* at 851–52.

¹⁵³ *Id.* at 852.

¹⁵⁴ *Lawrence v. Texas*, 539 U.S. 558 (2003).

¹⁵⁵ *Id.* at 562.

¹⁵⁶ *Id.* at 578.

¹⁵⁷ *Gonzales v. Carhart*, 127 S. Ct. 1610 (2007).

of the banned procedures, imagining a woman who procured an abortion only to learn later of the distasteful method used by her doctor to terminate the pregnancy.¹⁵⁸ Congress, the Court said, had a legitimate interest in protecting women from the psychic damage that such knowledge might bring:

It is, however, precisely this lack of information concerning the way in which the fetus will be killed that is of legitimate concern to the State. The State has an interest in ensuring so grave a choice is well informed. It is self-evident that a mother who comes to regret her choice to abort must struggle with grief more anguished and sorrow more profound when she learns, only after the event, what she once did not know: that she allowed a doctor to pierce the skull and vacuum the fast-developing brain of her unborn child, a child assuming the human form.¹⁵⁹

Thus, the Court used a therapeutic rationale—protecting a “grave” choice and guarding the woman from “grief,” “anguish,” and “sorrow”—to justify its decision.¹⁶⁰ *Gonzales* shows that the therapeutic approach to law has become an established method of adjudication, not merely a vehicle for specific political views.

The Court’s uses of therapy show how greatly the concept of rights has changed since the nineteenth century. While in the nineteenth century the internal realm and the realm of behavior were separate, now they are conflated. Restraints on behavior have become equated with assaults on the spirit. The boundaries of individual liberty and state power are set with reference to individual happiness and fulfillment rather than older concepts of duty, civic virtue, or democratic power-sharing.¹⁶¹ The Court has come to review state action for its emotional, spiritual, and psychic effects, and it will strike down laws that hinder self-concept or self-fulfillment. Thus, to require the recitation of a pledge has become an incursion on the realm of “intellect and spirit.”¹⁶² To expose a young adult to state-sponsored prayer is to expose her to “offense,” “isolation,” and “affront.”¹⁶³ To restrict the obtaining of abortions is to trample on one’s “spiritual imperatives” and ability to ponder one’s own concept of “meaning” and “the mystery of human life.”¹⁶⁴ To restrict sexual behavior is to “demean” one’s very “existence” or to control one’s “destiny.”¹⁶⁵ The demands of

¹⁵⁸ *Id.* at 1634.

¹⁵⁹ *Id.* (citation omitted).

¹⁶⁰ *Id.*

¹⁶¹ *See supra* Part I.

¹⁶² *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943).

¹⁶³ *Lee v. Weisman*, 505 U.S. 577, 594 (1992).

¹⁶⁴ *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 851–52 (1992).

¹⁶⁵ *Lawrence v. Texas*, 539 U.S. 558, 578 (2003).

internal self-fulfillment determine the boundaries of state action, and the therapeutic has become a touchstone of constitutional law.

It is worth noting that while the U.S. Supreme Court may have led the way in importing therapeutic concepts into civil rights, it has not been alone. It is a testament to the ubiquity of the therapeutic culture that many state supreme courts have also adopted therapeutic ideals in interpreting their own constitutions. An early, if slightly offbeat, example was an Alaska case that recognized a privacy right to smoke marijuana in one's home.¹⁶⁶ The state supreme court relied expressly on concepts of self-definition, with a local twist:

The privacy amendment to the Alaska Constitution was intended to give recognition and protection to the home. Such a reading is consonant with the character of life in Alaska. Our territory and now state has traditionally been the home of people who prize their individuality and who have chosen to settle or to continue living here in order to achieve a measure of control over their own lifestyles which is now virtually unattainable in many of our sister states.¹⁶⁷

Individual rights are determined here, as in the U.S. Supreme Court cases, with reference to the therapeutic concerns of "individuality" and one's preferred "lifestyle."

More conventionally, other states have applied therapeutic concepts in addressing claims related to abortion, homosexual relationships, and sex discrimination. The Supreme Court of California, for example, drew upon some of the same therapeutic concepts expressed in *Casey* to strike down a law requiring a minor to obtain parental consent or judicial permission before having an abortion.¹⁶⁸ "The right of choice," the plurality wrote, "also may implicate a woman's deepest philosophical, moral, and religious concerns, including her personal beliefs regarding the meaning of human existence and the beginning of human life."¹⁶⁹ This decision, implicating as it did "personal bodily integrity" and the "ability to define and adhere to her ultimate values regarding the meaning of human existence and life," was beyond the power of the state to control.¹⁷⁰ The plurality noted that "the statute at issue in this case unquestionably impinges upon an interest fundamental to personal autonomy."¹⁷¹ The New Jersey Supreme Court, striking down a similar law, rested its decision on "a woman's right to control her body and her future," as well as her personal "destiny."¹⁷² Six years

¹⁶⁶ *Ravin v. State*, 537 P.2d 494 (Alaska 1975).

¹⁶⁷ *Id.* at 503–04.

¹⁶⁸ *Am. Acad. of Pediatrics v. Lungren*, 940 P.2d 797 (Cal. 1997) (plurality opinion).

¹⁶⁹ *Id.* at 813.

¹⁷⁰ *Id.* at 816.

¹⁷¹ *Id.* at 818 (internal quotations omitted).

¹⁷² *Planned Parenthood of Cent. N.J. v. Farmer*, 762 A.2d 620, 621, 632 (N.J. 2000).

later, the same court held that committed same-sex couples were entitled to the same public benefits as heterosexual married couples.¹⁷³ As one basis for its decision, the court pointed to the “social indignities” visited on homosexual couples by reason of their different status under current law and held that the law as it stood thus breached the values of “human dignity and autonomy.”¹⁷⁴ Similarly, the Massachusetts Supreme Court has recognized a fundamental right to same-sex marriage under the state constitution, noting that marriage “is among life’s momentous acts of self-definition,” fulfilling “yearnings for security, safe haven, and connection that express our common humanity.”¹⁷⁵ “Without the right to marry,” the court commented, “one is excluded from the full range of human experience”¹⁷⁶ and deprived “of access to an institution of fundamental legal, personal, and social significance.”¹⁷⁷ In a case involving adultery, the Virginia Supreme Court drew on the therapeutic ethic to strike down the state’s criminal fornication statute.¹⁷⁸ Citing *Lawrence*’s concerns about the “demeaning” of personal “existence” by restrictions on sexual behavior, the court concluded that the state law “improperly abridge[s] a personal relationship that [is] within the liberty interest of persons to choose.”¹⁷⁹ And in a case involving a challenge to a country club’s men-only dining room, the Louisiana Supreme Court struck down the policy, branding it a deprivation of “personal dignity” that inflicts “stigmatizing injury” on those denied access.¹⁸⁰

All of these cases show an unmistakable change in the law of rights in both the state and federal courts. With individual well-being as the new barometer, the function of rights law has become the fostering of personal happiness and psychic fulfillment. The law of civil rights has become entwined with therapy.

III. LAW, THERAPY, AND DEPENDENCE

The “rights revolution,” aided as we have seen by the therapeutic culture, has ostensibly expanded individual freedoms. Persons, activities, and interests that once were suppressed or punished now receive the full protection of law. We may justly celebrate our age’s commitment to liberty and the heightened protections brought about by these court decisions. But the therapeutic approach to law is not an unqualified blessing. The therapeutic culture has allowed government to exercise increasing power in the name of therapy, and it has allowed law to annex to its empire the most sacred domain of our inner selves. As a result, it has made possible new forms of

¹⁷³ *Lewis v. Harris*, 908 A.2d 196 (N.J. 2006).

¹⁷⁴ *Id.* at 202, 217.

¹⁷⁵ *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 955 (Mass. 2003).

¹⁷⁶ *Id.* at 957.

¹⁷⁷ *Id.* at 958.

¹⁷⁸ *Martin v. Zihlerl*, 607 S.E.2d 367 (Va. 2005).

¹⁷⁹ *Id.* at 370.

¹⁸⁰ *Albright v. S. Trace Country Club of Shreveport, Inc.*, 879 So.2d 121, 124 (La. 2004).

state control and contributed significantly to the proliferation of law in modern life. While it would be alarmist to call the civil rights cases despotic, in the way that other examples of therapeutic power threaten to be, they nonetheless bolster the assumption that the inner lives of persons are a proper subject of state concern. They, and the rest of the therapeutic state, therefore deserve our careful and critical examination.

As the therapeutic culture expands state power, it also threatens to diminish individual autonomy by discouraging self-reliance and encouraging dependence on therapeutic authority. It is a central premise of the therapeutic culture that the self is weak and in need of healing.¹⁸¹ This typically is accomplished through the guidance of some authority outside the self: the doctor, the counselor, or the bureaucratic expert.¹⁸² To this list we may now add the courts, who are increasingly asked, and are increasingly willing, to exercise therapeutic authority over diverse aspects of American life.¹⁸³ Problems of inner disequilibrium may now be addressed by seeking relief from the courts instead of using the more old-fashioned techniques of regulating one's own feelings, developing skills of psychic self-reliance, or persuading one's fellows that their offensive course of action is undesirable. We have created, in effect, a welfare state of civil rights, in which government assumes responsibility for our spiritual and psychic well-being as well as our material needs. Thus, while the therapeutic uses of law ostensibly expand individual liberty, they may also have the effect of increasing state power at the expense of the self-reliance and personal autonomy necessary for true democratic freedom.

A. Therapeutic Power and the Aggrandizement of Law

The introduction of therapeutic concepts to law has played a key role in what I will call the aggrandizement of law, the American tendency to give law an ever-increasing presence in national and personal life. To fully appreciate the contribution of the therapeutic culture to this process, it may be helpful to sketch briefly the rise of law in American society.

Law has always had a strong presence in American life. As early as 1776, Thomas Paine could declare that "in America the law is king."¹⁸⁴ Constitutionalism was a hallmark of the early Republic, and robust government regulation of commerce, public safety, and other matters was commonplace from at least the early nineteenth century.¹⁸⁵ But nineteenth-century culture also imposed limits on law. As I have

¹⁸¹ See *supra* note 41 and accompanying text.

¹⁸² See *supra* notes 53–55, 66–72 and accompanying text.

¹⁸³ See *supra* notes 73–81 and accompanying text.

¹⁸⁴ THOMAS PAINE, COMMON SENSE (1776), reprinted in COMMON SENSE, THE RIGHTS OF MAN, AND OTHER ESSENTIAL WRITINGS OF THOMAS PAINE 23, 49 (Sidney Hook ed., NAL Penguin 1984) (emphasis omitted).

¹⁸⁵ See generally NOVAK, *supra* note 13 (discussing government regulation in nineteenth-century America).

explained previously, the nineteenth-century courts were largely unwilling to extend their power to civil rights claims based on states of feeling or belief.¹⁸⁶ The Protestant culture presumed that the individual was morally capable and morally autonomous, which meant that he could regulate his own internal state regardless of how government might require him to behave.¹⁸⁷ For the blasphemer punished as a criminal, the non-believing schoolchild forced to pray, or the Jewish shopkeeper required to close on Sunday, most courts had the same answer: no one has prevented your believing what you wish; it is merely your actions that are constrained.¹⁸⁸ This was, in a sense, an anti-therapeutic state, premised on the notion that law was limited in what it could be expected to do, while the individual, in his inner space of conscience, belief, and self, was not.¹⁸⁹ Thus, as James Willard Hurst points out, for much of the nineteenth century, law was used primarily to govern what might be called “external” matters, such as the economy, trade, or the taming of the natural environment.¹⁹⁰ It generally was not involved with the internal states of individuals.

But this limited view of law was not to last. As discussed above, the decline of older moral paradigms, and the increasing diversity of the American nation, left a vacuum to be filled by other sources of shared meaning.¹⁹¹ One of these, we have seen, was the therapeutic culture. Another was law. Like the therapeutic culture, and unlike the older cultural paradigms, law offers a system of meaning that is capable of satisfying the diverse members of the modern American state. In America the law is famously declared to be no respecter of persons; it is not Catholic, not Protestant, not Irish nor Jewish nor WASP. Mary Ann Glendon notes that “[w]ith increasing heterogeneity, it has become quite difficult to convincingly articulate common values by reference to a shared history, religion, or cultural tradition.”¹⁹² This accounts for “our increasing tendency to look to law as an expression and carrier of the few values that are widely shared in our society: liberty, equality, and the ideal of justice under law.”¹⁹³ Similarly, Lawrence Friedman attributes the rise of law to the decline of the older sources of authority that it replaces: the “expansion” and “ubiquity” of law have brought about a society in which “[n]othing is nonjusticiable” and in which “law appears to be a kind of replacement, a substitute for traditional authority.”¹⁹⁴ Law,

¹⁸⁶ See Piar, *supra* note 27.

¹⁸⁷ See NOLAN, *supra* note 7, at 34–36.

¹⁸⁸ See *id.* at 988.

¹⁸⁹ *Id.*

¹⁹⁰ See JAMES WILLARD HURST, *LAW AND THE CONDITIONS OF FREEDOM IN THE NINETEENTH-CENTURY UNITED STATES* 39, 84–85 (1956).

¹⁹¹ See *supra* notes 26–35 and accompanying text.

¹⁹² GLENDON, *supra* note 2, at 3; see also PAUL W. KAHN, *THE CULTURAL STUDY OF LAW: RECONSTRUCTING LEGAL SCHOLARSHIP* 9 (1999) (“Without a common ethnic, racial, or religious heritage, American identity is peculiarly dependent on the idea of law.”).

¹⁹³ GLENDON, *supra* note 2, at 3.

¹⁹⁴ FRIEDMAN, *supra* note 39, at 16–17; see also KAGAN, *supra* note 3, at 37–40. For

like the therapeutic ethic, has proven to be one of the few systems of meaning that can attain universal currency in an increasingly diverse nation.

While Americans were becoming more enamored of law, they were also demanding progressively more state action. The growth of the regulatory welfare state that began in the nineteenth century was accelerated by the penury of the Great Depression and, despite occasional calls for its curtailment, shows no real signs of stopping.¹⁹⁵ As Calvin Woodard wrote in the early 1960s, “[W]e all take for granted so much governmental action that Sir William Harcourt’s famous comment . . . that ‘we are all socialists now’—is far truer today than it was when he spoke.”¹⁹⁶ American government has expanded at an ever-increasing rate, with more spending, more programs, and of course more regulation.¹⁹⁷ The law has kept pace with this growth and the expectations that it fosters. The story of the Supreme Court’s 1937 “switch in time” is an oft-told one and may be the most vivid example of older legal notions of limited government yielding to the new realities.

The growth of law in the regulatory state was paralleled by the growth of rights law. Civil rights litigation in the nineteenth century had largely taken place in the state courts, but by the dawn of the twentieth century, the shift to the federal courts was well under way. Despite some initial stumblings, such as the *Slaughter-House Cases*¹⁹⁸ and the *Civil Rights Cases*,¹⁹⁹ the Fourteenth Amendment soon gave the federal courts a wide-ranging power of review over the activities of the states. Evolving concepts of equal protection and substantive due process encouraged the Supreme Court to exercise that power more and more frequently.²⁰⁰ This consolidation of federal authority made it easier for the Court to push the law in directions dictated by its own will or by the demands of the culture. By the late twentieth century it seemed that very little lay beyond law’s reach, from the most minute details of trade and commerce to the

another sustained look at the cultural demand for law, see LAWRENCE M. FRIEDMAN, *TOTAL JUSTICE* (1985).

¹⁹⁵ Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231, 1236–37 (1994); see also THEODORE CAPLOW, *AMERICAN SOCIAL TRENDS* 107–12 (1991); FRIEDMAN, *supra* note 39, at 79–80; KAGAN, *supra* note 3, at 181–82; WILLIAM E. LEUCHTENBERG, *FRANKLIN D. ROOSEVELT AND THE NEW DEAL, 1932–1940*, at 61, 331–35 (1963); NOLAN, *supra* note 7, at 38–40.

¹⁹⁶ Calvin Woodard, *Reality and Social Reform: The Transition from Laissez-Faire to the Welfare State*, 72 YALE L.J. 286, 323 (1962).

¹⁹⁷ CAPLOW, *supra* note 195, at 107–12; NOLAN, *supra* note 7, at 38–40.

¹⁹⁸ 83 U.S. (16 Wall.) 36 (1872).

¹⁹⁹ 109 U.S. 3 (1883).

²⁰⁰ Historian John Semonche reports that from the beginning of Fourteenth Amendment litigation in the 1870s to 1921, the Supreme Court overturned state laws in “less than seven percent” of due process cases. From 1921 through 1926, the rate climbed to twenty-eight percent. JOHN E. SEMONCHE, *CHARTING THE FUTURE: THE SUPREME COURT RESPONDS TO A CHANGING SOCIETY, 1890–1920*, at 424–25 (1978); see also GLENDON, *supra* note 2, at 4–5 (explaining that the Court in the 1960s began to vigorously expand individual rights).

largest questions “of existence, of meaning, of the universe, and of the mystery of human life.”²⁰¹

This aggrandizement of law has been aided significantly by the rise of the therapeutic culture, which has opened yet another avenue for state expansion. In his landmark study of nineteenth-century law, Hurst observed that law moved from regulation of the natural and social environments to regulation of the “individual’s internal environment.”²⁰² Consequently, he wrote, “[W]e began to use law with growing consciousness of a need to meet the challenge of the personal environment, set by individuals’ emotional response to circumstance.”²⁰³ Even though Hurst was not focused on the therapeutic culture directly, his insights about the inward movement of law and state power accurately describe the therapeutic aggrandizement of law. The modern state concerns itself “not only with behavior but with the internal workings of individuals,” which enables it to “expand itself still further into the private lives of its citizens.”²⁰⁴ With the rise of the therapeutic, law now regulates not only the external environment, but also our internal environment—“the sphere of intellect and spirit” identified in *Barnette*²⁰⁵ and “the right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life” identified in *Casey*.²⁰⁶

This union of law and therapy has yielded new forms of legal power and control. A “normalizing intervention”²⁰⁷ in people’s lives has become an accepted state activity, as the emotional states of individuals have become “not simply a personal matter, but a legitimate subject for public concern.”²⁰⁸ One consequence of this is what James Nolan calls “therapeutic coercion,” whereby the state insists on the achievement of certain psychic states as part of its rule.²⁰⁹ Examples include alcoholism treatments for drunk-driving offenders, whether or not they are actually alcoholics; the conditioning of criminal parole on the achievement of certain approved psychological insights; state-required workplace sensitivity training in both the public and private sectors; the expansive state supervision imposed on drug offenders in therapeutically oriented drug courts; and public schools’ insistence that some children be medicated even over the objections of their parents.²¹⁰ Criminal defendants are often forced in the name of therapy to confess to addictions or pathologies they do not believe they have, while participants in workforce sensitivity training are urged to acknowledge antisocial feelings that they may not share in order to demonstrate that

²⁰¹ *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 851 (1992).

²⁰² HURST, *supra* note 190, at 39.

²⁰³ *Id.* at 85.

²⁰⁴ NOLAN, *supra* note 7, at 292.

²⁰⁵ *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943).

²⁰⁶ *Casey*, 505 U.S. at 851.

²⁰⁷ POLSKY, *supra* note 14, at 80.

²⁰⁸ FUREDI, *supra* note 35, at 198.

²⁰⁹ NOLAN, *supra* note 7, at 292.

²¹⁰ *Id.* at 150, 292–97; *see also* FUREDI, *supra* note 35, at 199.

they are being “fixed.”²¹¹ In the prison system, therapeutic concepts of rehabilitation and treatment are used to justify the indefinite detention of insanity acquittees or those convicted of crimes until the state deems them healed.²¹² In the welfare system, Andrew Polsky has detailed the proscriptive tendencies of various public aid programs, in which the subjects of state-sponsored therapy “find their most intimate behavior a matter of official concern and regulation.”²¹³ They are frequently “obliged to reveal their disreputable behaviors and personal weaknesses, and then . . . required to conform to any standard of conduct public caseworkers and probation officers might establish.”²¹⁴ Recipients of government aid “have faced demands that they change how they rear their children, adopt different spending habits, find a new residence, maintain sexual abstinence, and more; refusal to comply can mean the breakup of a family or incarceration.”²¹⁵ Therapeutic goals thus provide innumerable occasions for the exercise of state power and expand the scope of legal control.

The modern civil rights cases are an important part of the therapeutic aggrandizement of law. Unlike the more reticent nineteenth-century courts, the Supreme Court now appears to be willing, if not eager, to bring law to bear on the internal problems of the individual. State action that causes bad feeling, emotional injury, or existential harm has become forbidden.²¹⁶ The Constitution, it seems, has something to say about our psychic states as well as our social and economic interrelations. What was once a significant limitation on law—its unsuitability for solving the individual’s internal problems—has fallen away, and law’s empire has annexed yet another territory.

It is true that the rights cases do not at first glance look like the most sinister manifestations of the therapeutic state. Their ostensible intent has been to expand personal freedom, not to tell people how to think or feel. Nonetheless, beneath this surface gentility lies a very tangible form of state control. As some have observed, law is inherently coercive.²¹⁷ By its nature it commands obedience, and by definition it presupposes the use of state-sanctioned force to uphold its rule.²¹⁸ H. Jefferson Powell has gone so far as to declare that “constitutionalism is one of the most seductive masks

²¹¹ NOLAN, *supra* note 7, at 292–97; *see also* POLSKY, *supra* note 14, at 16, 81–82.

²¹² *See, e.g.,* Jones v. United States, 463 U.S. 354 (1983) (upholding the indefinite commitment of insanity acquittees); Monica Davey & Abby Goodnough, *Doubts Rise as States Hold Sex Offenders After Prison*, N.Y. TIMES, Mar. 4, 2007, at 1.

²¹³ POLSKY, *supra* note 14, at 82; *see also id.* at 6, 16, 81–84 (arguing that state-sponsored therapy facilitates intrusion into subjects’ personal lives).

²¹⁴ *Id.* at 82.

²¹⁵ *Id.* at 16.

²¹⁶ *See supra* text accompanying notes 161–65.

²¹⁷ *See, e.g.,* GIANFRANCO POGGI, THE DEVELOPMENT OF THE MODERN STATE: A SOCIOLOGICAL INTRODUCTION 135 (1978).

²¹⁸ *See id.* For a more extreme view, *see* Robert M. Cover, *Violence and the Word*, 95 YALE L.J. 1601 (1986) (arguing that judicial interpretation must be understood in the context of the violence occasioned by interpretive acts).

worn by state violence.”²¹⁹ Some of this talk can sound slightly hyperbolic; after all, the Supreme Court has yet to call out the troops. But there is also truth in the idea that even constitutional cases, in which the courts speak in terms of rights, aspirations, and ideals, have winners and losers. There is always someone on the short end of a decision who must obey or risk consequences. This authority—or violence, if one is so inclined—now finds further justification in the name of therapy. The courts routinely dictate to other state actors what they may and may not do based on judicial views of what therapy requires. And much state action, it should be remembered, expresses not the will of some faceless machine, but the desires of political majorities to order their communities in ways that may accord with their own concepts of self. Therapeutic claims now provide an occasion for litigants to invoke judicial power and to trump these majority interests if they can convince a therapeutically inclined court that their internal demands should be met. Thus, the courts have come to sit as therapeutic censors of state action, approving some political encounters and disapproving others, depending on their therapeutic implications. Powell may overstate the case for law as violence, but he is right to see that the seductive appeal of therapeutic adjudication is merely another guise for the same old exercise of judicial authority. Power is still power, even when it cloaks itself in the softened tones “of meaning, of the universe, and of the mystery of human life.”²²⁰ In fact, it is power aggrandized, because it has found a new, and to some, more appealing basis on which to expand its reach.

In this way, the civil rights cases go well beyond the resolution of specific disputes to reinforce the therapeutic state in all its guises. By linking the content of law to therapeutic ideals, the cases reinforce the premise that individual emotions, feelings, and fulfillment are proper subjects of state concern. If the Supreme Court may link the therapeutic to the law, then why should the drug court, the welfare bureaucrat, the parole officer, or any other state actor not do the same? These cases thereby legitimize the wider apparatus of therapeutic power and in so doing contribute significantly to the expansive reach of law in our time.

B. Therapy, Dependence, and Conformity

As the therapeutic culture expands the reach of legal power, it also presents a second, related threat to liberty: the decline of personal autonomy in favor of dependence on therapeutic authority. While the therapeutic ethic is ostensibly dedicated to human fulfillment, it proceeds from a view of human nature that can be more enfeebling than empowering. As Robert Bellah points out, “The very term *therapeutic*

²¹⁹ H. JEFFERSON POWELL, *THE MORAL TRADITION OF AMERICAN CONSTITUTIONALISM: A THEOLOGICAL INTERPRETATION* 47 (1993).

²²⁰ *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 851 (1992).

suggests a life focused on the need for cure.”²²¹ The healthy, after all, do not need therapy, and so the therapeutic culture presumes that we are in some sense ill.²²² It then seeks to remedy this weakness through the administration of therapy. Writing on the welfare state’s treatment of the poor and dispossessed, Andrew Polsky notes that “public therapeutic intervention aimed at marginal citizens proceeds from the assumption that they cannot govern their own lives. The state therefore seeks to ‘normalize’ them.”²²³ Christopher Lasch, remarking on the medical-therapeutic state, points out that “[t]herapy legitimates deviance as sickness, but it simultaneously pronounces the patient unfit to manage his own life and delivers him into the hands of a specialist.”²²⁴ Even the more sanguine of observers have noted that the therapeutic urge proceeds, if not from clinical maladies, then from the desire for a happiness not readily attained in a complex, unstable world.²²⁵ The therapeutic ethic thus “posits the self in distinctly fragile and feeble form and insists that the management of life requires the continuous intervention of therapeutic expertise.”²²⁶

This expertise is provided through the ministrations of therapeutic authority. But while the promise of healing may sound benevolent, its delivery can be more problematic. The doctor is therapy’s original authority figure, but, as Bellah notes, the doctor-patient relationship, especially in the mental health field, is “tightly regulated and carefully balanced.”²²⁷ The paradigmatic image is that of the psychiatrist tersely saying, “our time is up,” doling out treatment in fifty-minute increments in a relationship where certain kinds of intimacy are strictly proscribed, and there is no question who is in charge.²²⁸ In the wider therapeutic culture, authority figures include bureaucrats, counselors, teachers, judges, and everyone else charged with administering the therapeutic apparatus at all its levels.²²⁹ At times, as we have seen, this authority can be coercive.²³⁰ In other settings therapy is sought voluntarily, but even then surrender to authority is part of the program. Millions of people turn to the medical establishment and its drugs for the professional management of their emotions.²³¹ Others hang

²²¹ BELLAH ET AL., *supra* note 35, at 47.

²²² See generally FUREDI, *supra* note 35 (arguing that the therapeutic imperative promotes self-limitation and constant therapeutic intervention); LASCH, *supra* note 41 (arguing that the therapeutic sensibility is pervasive in contemporary life); POLSKY, *supra* note 14 (arguing that public therapeutic intervention assumes marginal citizens cannot manage their own lives).

²²³ POLSKY, *supra* note 14, at 4.

²²⁴ LASCH, *supra* note 41, at 231.

²²⁵ See, e.g., FRIEDMAN, *supra* note 39, at 192; FUREDI, *supra* note 35, at 4–8; MOSKOWITZ, *supra* note 16, at 2–3.

²²⁶ FUREDI, *supra* note 35, at 21; see also *id.* at 106–26 (arguing that therapeutic culture presupposes a fundamentally vulnerable self that depends on therapeutics for its realization).

²²⁷ BELLAH ET AL., *supra* note 35, at 127.

²²⁸ See *id.* at 123–24.

²²⁹ See *supra* text accompanying note 66.

²³⁰ See *supra* Part III.A.

²³¹ See *supra* notes 53–55 and accompanying text.

on the words of self-help gurus from Oprah to Dr. Phil.²³² The therapeutic culture promotes the “professionalisation of everyday life,”²³³ in which informal, organic sources of guidance such as family, friends, and neighbors have been steadily replaced by the therapist, the social worker, the bureaucrat, the doctor, and the professional helper.²³⁴ The therapeutic state thus “renders people’s self-identity dependent on professionals and institutions.”²³⁵ It has sanctioned the “disorganisation of the private sphere” in favor of professional control.²³⁶ It “has replaced personal dependence not with bureaucratic rationality . . . but with a new form of bureaucratic dependence.”²³⁷ In this sense, therapy creates new authorities to replace the old. Whether state-sponsored or self-initiated, “[t]he institutionalisation of the therapeutic ethos can also be interpreted as the constitution of a regime of social control.”²³⁸ The therapeutic culture, far from fostering self-reliance, in fact encourages the surrender of personal autonomy to therapeutic authority.

One might think that the therapeutic emphasis on self-fulfillment would encourage diversity, but, in a further irony, therapeutic authority frequently seeks to impose conformity as part of its normalizing project. Whether on the doctor’s couch or in the wider therapeutic state, therapy frequently requires that certain behaviors, feelings, or thoughts be suppressed. Frank Furedi explains:

The distinguishing feature of therapeutic culture is not an openness towards emotions, but the unusual interest it takes in the management of people’s internal life. It transforms the private feelings of people into a subject matter for public policy-making and cultural concern. But at the same time it adopts a selective attitude towards what emotions can and what emotions cannot be displayed. The cultivation of certain emotional attitudes and the repression of others is systematically pursued by institutions and professionals devoted to the management of how people ought to feel.²³⁹

Polsky likewise notes that the social-welfare programs of the therapeutic state routinely demand conformity to models of feeling or behavior deemed appropriate by officials.²⁴⁰ In this way, “[t]he modern self’s expressive freedom goes hand in hand

²³² See *supra* notes 51–52 and accompanying text.

²³³ FUREDI, *supra* note 35, at 98.

²³⁴ See *id.* at 98–99.

²³⁵ *Id.* at 174.

²³⁶ *Id.* at 103; see also LASCH, *supra* note 41, at 218.

²³⁷ LASCH, *supra* note 41, at 229.

²³⁸ FUREDI, *supra* note 35, at 199.

²³⁹ *Id.* at 197.

²⁴⁰ POLSKY, *supra* note 14, at 16, 81–82.

with the modern world's instrumental control."²⁴¹ The therapeutic ideal begins with freedom, but through a subtle sleight of hand frequently ends with authority, conformity, and oversight.

These observations also hold true for the therapeutic approach to law. Here, too, the contrast to earlier legal culture is instructive. In the nineteenth century, the law tended to view human capacity more generously than it does today.²⁴² A central premise of the Protestant legal culture was individual moral autonomy: because people were strong enough to fend for themselves, whether in a spiritual or a political sense, law was given a secondary role in defining and enforcing individual liberty.²⁴³ In other words, nineteenth-century culture could limit the role of law because it believed individuals to be strong enough to control their own feelings, or their own destinies, without the aid of the courts. But the modern view, in which courts have become the guardians of psychic well-being, suggests that the law is no longer willing to give the individual so much credit. *Planned Parenthood of Southeastern Pennsylvania v. Casey* provides a prime example.²⁴⁴ In a passage on the abortion right, the majority wrote, "At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life."²⁴⁵ This sounds like an empowering statement until one reads the next sentence: "Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State."²⁴⁶ In one breath, the Court assumed that humans have the capacity to determine meaning and lend content to their own lives. But in the next, it presumed that a law regulating behavior—the terms on which one may obtain an abortion—will forcibly change one's beliefs about the questions of the self. The Court seems to have assumed that beliefs about one's self are so fragile that they must be protected from the corrosive influence of contrary government policies. Thus, in *Casey*, a limit on the availability of abortion became an attack on a person's entire concept of life and self. In *Lee v. Weisman*, exposure to school prayer inflicted emotional wounds sufficient to justify constitutional intervention.²⁴⁷ In *Plyler v. Doe*, obstacles to gaining the "esteem" of one's fellow citizens were deemed illegal.²⁴⁸ In the endorsement test cases, public displays of religion hurt feelings in ways that required the judicial power of the United States to prevent.²⁴⁹ Nowhere in these cases does one find the idea that individuals can transcend these bumps and bruises of everyday life; instead, people must be kept safe from even the most mild emotional upset. The tone and content of

²⁴¹ BELLAH ET AL., *supra* note 35, at 124.

²⁴² See *supra* notes 82–86 and accompanying text.

²⁴³ See Piar, *supra* note 27.

²⁴⁴ 505 U.S. 833 (1992); see *supra* notes 150–53 and accompanying text.

²⁴⁵ *Casey*, 505 U.S. at 851.

²⁴⁶ *Id.*

²⁴⁷ *Lee v. Weisman*, 505 U.S. 577 (1992); see *supra* notes 142–46 and accompanying text.

²⁴⁸ *Plyler v. Doe*, 457 U.S. 202 (1982); see *supra* notes 132–35 and accompanying text.

²⁴⁹ See *supra* notes 139–41 and accompanying text.

modern therapeutic adjudication send the message that the courts are guarding weak and fragile persons not the robust, self-reliant individuals of an earlier culture.

If the courts are unwilling to give the individual much credit for personal autonomy, individuals in turn seem willing to accept this condescension and to depend on courts for the vindication of their emotional interests. In this, they partake of the system of dependence and control that characterizes the therapeutic state in so many of its aspects. Increasingly, problems of individual emotion and response to circumstance are being addressed by the courts, not by autonomous individuals in the harbor of their own minds and hearts. Increasingly, the great social questions of our time are being determined by judges based on their ideas of what a therapeutic culture requires, not by individuals acting in political bodies. If someone feels aggrieved by state action, whether an abortion restriction, a prayer, or some other psychically troubling event, it is no longer necessary for that person to convince his fellow citizens of his position or to resolve any emotional fallout in the confines of his own self. Instead, he can seek relief by going to the courts, who are now the guardians of his psychic well-being as well as his physical freedoms.

This process risks the atrophy of the individual's powers of self-determination. Why cultivate emotional self-reliance when you can count on a court to force others to behave in ways that will not hurt you? Why develop political skill or build community consensus when you know that a court will shortcut the political process in the name of therapy? The legal-therapeutic state threatens to "obliterate the indigenous aspirations that form the basis for all real political self-determination,"²⁵⁰ turning citizens into perpetual petitioners instead of political and emotional actors. The citizen becomes a passive recipient of legal charity rather than an active shaper of his own thoughts, feelings, and self.²⁵¹

As in the therapeutic culture more generally, the therapeutic use of law also exacts a cost in conformity. Like the doctor encouraging "right" thoughts and discouraging "wrong" ones, the courts use therapeutic ideals to police the line between "right" and "wrong" state actions. By this process, therapeutic rulings are imposed on entire states or on the entire nation, even in settings where reasonable persons might differ, where the state action under review represents a democratic compromise, or where individuals might be able to make their own choices without the paternalistic guidance of the

²⁵⁰ POLSKY, *supra* note 14, at 84.

²⁵¹ *See id.* at 128–29. This problem has not been lost on some members of the Supreme Court. *See Plyler*, 457 U.S. at 254 (Burger, C.J., dissenting) ("[W]hen this Court rushes in to remedy what it perceives to be the failings of the political processes, it deprives those processes of an opportunity to function. When the political institutions are not forced to exercise constitutionally allocated powers and responsibilities, those powers, like muscles not used, tend to atrophy."). The atrophying process about which Burger is concerned is the same for the psychic faculties as it is for the political faculties.

courts. Political communities are no longer free to govern themselves if that government runs afoul of court-approved therapeutic ideals. Increasingly, in the words of H. Jefferson Powell, “the central moral commitment of constitutionalism” is “the ‘protection’ of the atomistic individual from moral involvement with anyone other than the omnipresent state,”²⁵² or at least with anyone who offers the kinds of interactions of which the therapeutic courts disapprove.²⁵³ We thus have established a kind of emotional welfare state, in which we look to the central government to provide for our psychic well-being as well as our material security.

CONCLUSION: THE KINDLY APOCALYPSE

“I am aware that these speculations may be thought to contain some parodies of an apocalypse. But what apocalypse has ever been so kindly? What culture has ever attempted to see to it that no ego is hurt?”²⁵⁴

The triumph of the therapeutic in American constitutional law may accelerate the kindly apocalypse predicted by Rieff. If therapy were merely a matter of the one-on-one of the psychiatrist’s couch, or even the domain of a few large but limited bureaucratic programs, the reach of the therapeutic ethic might be rather small. But when therapy is wedded to law, it attains a power orders of magnitude greater than before. In a nation as devoted to constitutionalism as the United States, the constitutional courts wield vast influence. And when the therapeutic culture determines the meaning of the Constitution, we in effect become ruled by therapy. It is a phenomenon unique to our age that the constitutional courts shape law to safeguard individual feelings and psychic well-being. Never before has the content of our nation’s supreme law been dictated by the demands of therapy—or, to be more precise, five lawyers’ views of what therapy requires. If there is some absurdity in this, it is only a measure of how strongly the therapeutic culture has taken hold, that we are willing to rely on its principles even in the very temple of reason. Further, it appears that we are willing in the process to risk our powers of self-determination by ceding them to courts, who, we expect, administer the therapy that we seem to crave. If we congratulate ourselves on achieving a state in which rights are expanded, we should not forget that therapeutic power is still power and, like all power, is difficult to take back once given away.

²⁵² POWELL, *supra* note 219, at 263 n.14.

²⁵³ In addition to the cases discussed above, see generally ROBERT F. NAGEL, *JUDICIAL POWER AND AMERICAN CHARACTER: CENSORING OURSELVES IN AN ANXIOUS AGE* 103–21 (1994) (“[I]n pursuing our own moral visions, we necessarily attempt to inflict on others the very types of control that we tend to think would be illegitimate if inflicted on us.”). Nagel’s thesis, which has something in common with my own, is that American culture has allowed the courts to expand their power in the name of self-censorship, out of fear of the conflicts and imperfections inherent in the political process. *See id.* at 3–7.

²⁵⁴ RIEFF, *supra* note 32, at 27.

In the glow of *Brown*²⁵⁵ it is easy to forget the lessons of *Dred Scott v. Sandford*²⁵⁶ and *Korematsu v. United States*.²⁵⁷ Nor should we forget the special dangers of dependence and control that the therapeutic culture brings. Andrew Polsky's warning about therapeutic bureaucracy rings equally true for therapeutic adjudication:

[O]ur reliance on the therapeutic approach slowly erodes the foundations for democratic citizenship. Personal autonomy, however flawed, is a prerequisite for membership in a democratic political community. . . . [I]ntervention often leads not to self-sufficiency but rather to ongoing surveillance and further episodes of tutelage. Marginal populations lose the space in which to define their problems in their own terms, one of the basic conditions for democratic politics.²⁵⁸

By endowing the law with therapeutic authority, we risk becoming the emotional and psychic wards of the courts rather than contributors to our own destinies. The seductive promise of constitutional freedom may turn out to be nothing more than a welfare state of civil rights.

²⁵⁵ *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954); see *supra* notes 115–26 and accompanying text.

²⁵⁶ 60 U.S. (19 How.) 393 (1856).

²⁵⁷ 323 U.S. 214 (1944).

²⁵⁸ POLSKY, *supra* note 14, at 217.