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United States v. Lemon: Judicial Consideration of Religious Association as an Aggravating Factor at Criminal Sentencing

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UNITED STATES V. LEMON: JUDICIAL CONSIDERATION OF RELIGIOUS ASSOCIATION AS AN AGGRAVATING FACTOR AT CRIMINAL SENTENCING

The first amendment prohibits the government from infringing upon an individual's freedom of religion, freedom of association, and freedom of speech. In accordance with first amendment principles, no state may criminally prosecute individuals for exercising their first amendment rights. Consequently, a state is also precluded from using such constitutionally protected activity as a basis for aggravating a criminal sentence. Yet, in recent months, the United States District Court for the District of Columbia has specifically used religious association and religious membership as factors for aggravating the criminal sentences of associates and members of the Black Hebrew religion. Despite the well-established first

1. The first amendment provides that Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances. U.S. CONST. amend. I. See generally L. Tribe, AMERICAN CONSTITUTIONAL LAW, chs. 12 & 14 (1978 & Supp. 1979).

2. See, e.g., Gregory v. City of Chicago, 394 U.S. 111 (1969) (protesters permitted to hold peaceful and orderly march); Terminiello v. Chicago, 337 U.S. 1, 4-5 (1949) (conviction reversed for violating breach of the peace ordinance that prohibited speech which "stirs the public to anger, invites dispute, brings about a condition of unrest or creates a disturbance . . ."); Saia v. New York, 334 U.S. 558 (1948) (conviction of Jehovah’s Witness reversed for violating city ordinance prohibiting use of sound amplification devices for reasons other than news, athletic activities or issues of public concern); Murdock v. Pennsylvania, 319 U.S. 105 (1943) (conviction reversed for distributing religious literature without first purchasing license); Cantwell v. Connecticut, 310 U.S. 296 (1940) (state prohibited from requiring Jehovah's Witness to obtain certificate before soliciting religious contributions); Schneider v. State (Town of Irvington), 308 U.S. 147 (1939) (conviction of Jehovah's Witness reversed for distributing religious circulars and soliciting contributions without permit); O'Brien v. United States, 376 F.2d 538, 542 (1st Cir. 1967), vacated on other grounds, 391 U.S. 367 (1968) (sentence of war protestor may have been based on political expression rather than illegal act of burning draft card); see generally A. Campbell, LAW OF SENTENCING § 88, at 284 (1978).

amendment principles of freedom of religion and freedom of association, the district court concluded that these criminal defendants should receive stiffer sentences for their criminal activity because they either associate with or are members of the Black Hebrew religious sect.

Most recently, however, in a case of first impression, the United States Court of Appeals for the District of Columbia Circuit overturned one of the two decisions of the district court, declaring in United States v. Lemon that religious association cannot be considered as an aggravating factor in a criminal sentencing proceeding. Despite traditional appellate deference to trial judges in sentencing matters, the appellate court vacated the length of the defendant's sentence and remanded the case to the district court, reasoning that there had been an abuse of discretion and a violation of the first amendment freedom of association. The circuit court emphasized that not until Lemon had a lower court so severely overstepped the constitutional boundaries of the first amendment.

This Comment will utilize the circuit court decision in Lemon as a means of exploring first amendment principles in the area of sentencing criminal defendants. Part I will describe the factual background of the Lemon case and will discuss the precise holdings and legal issues raised by the district court and the circuit court decisions. Part II will set forth prior case law, highlighting the first amendment principles needed to resolve the Lemon case as well as discuss the general principles of criminal sentencing. Part III will address the presentence inquiry and will analyze the two-tiered test enunciated by the circuit court in Lemon by examining its consistency with prior case law. Finally, Part IV will apply a more comprehensive constitutional analysis to the Lemon case and also suggest the appropriate outcome of the resentencing hearing mandated by the circuit

notes 6-41, 174-78 and accompanying text. [Hereinafter these cases are cited as the Black Hebrew Cases].

4. There are two clauses within the first amendment which protect the freedom of religion. The "establishment" clause prohibits preference of religion over nonreligion while the "free exercise" clause provides protection for the practice of all religions. U.S. Const. amend. I. In the Black Hebrew Cases, however, the government has interfered with neither the establishment nor the exercise of the Black Hebrew religion. Instead, the government has impinged upon the defendants' first amendment freedom of association. Lemon, 82-2327 (D.C. Cir. Nov. 29, 1983); Kegler, No. 83-219 (D.D.C. 1983). This Comment, therefore, will focus on prior case law concerning freedom of association under the first amendment.

5. See infra note 24 and accompanying text.
7. Id. at 41-42.
8. See infra notes 51-54 and accompanying text.
9. Lemon, No. 82-2327, slip op. at 40-42.
10. Id. at 41-42.
court. In addition, this Comment will question the validity of criminal sentences which are aggravated only in part by constitutionally invalid factors.

I. The Lemon Case: Facts, Holdings and Issues

The defendant in United States v. Lemon,11 was convicted in the United States District Court for the District of Columbia of interstate transportation of a stolen security12 for transporting a stolen check across state lines and depositing it in a bank account.13 At the sentencing hearing, Judge Jackson was presented with a copy of the presentence report14 which contained information concerning Lemon's background. Specifically, the


12. This offense is defined by federal statute in relevant part:

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transports or causes to be transported, or induces any person to travel in, or to be transported in interstate commerce in the execution or concealment of a scheme or artifice to defraud that person of money or property having a value of $5,000 or more . . . [s]hall be fined not more than $10,000 or imprisoned not more than ten years, or both.


13. Brief for Appellant at 7, Lemon, No. 82-234 (D.D.C. 1982). Lemon was indicted in the District of Columbia in August 1982 for two separate violations of § 2314 after having been arrested in Ohio for allegedly depositing one stolen and one counterfeit check in his bank account. One month later, Lemon entered a plea of guilty to one count, while as part of the plea agreement, the second count was subsequently dismissed. Id.; see also Government's Opposition to Defendant's Motion for Review of Conditions of Release at 1, Lemon, No.82-234 (D.D.C. 1982) [hereinafter cited as Government's Motion to Oppose Review].

14. One experienced trial attorney has described the typical presentence report in the following manner:

The probation officer in charge of the case . . . [has the responsibility of preparing the presentence report for the court] narrating in detail the defendant's family history (including childhood matters), school history, medical history, work history, military record, criminal record, circumstances surrounding the present offense (generally with an exploration of the events that led up to it, including any unusual pressures on the defendant, extenuating circumstances, aggravating circumstances, and so forth; and sometimes with an indication of the defendant's present attitude toward the offense), home and neighborhood environment, family attitudes, financial status, present employment situation or prospects, prognosis with respect to any medical or psychiatric problem, and other matters he thinks (or has learned from experience with the court that the court thinks) relevant to sentence, which may include the defendant's religious attitudes. The probation officer's report usually contains a sentencing recommendation, with supporting reasoning. It summarizes and has attached to it any psychological or psychiatric reports that have been made of the defendant.

presentence report indicated that Lemon was currently an active member of the Black Hebrew religion.15

Although religious affiliation is routinely found within the presentence report, the introduction of religion in the Lemon case is significant because the prosecution specifically requested that Lemon’s membership in the Black Hebrew religious sect be considered as a basis for aggravating his sentence.16 In a Memorandum in Aid of Sentencing, the government urged the judge to impose a “lengthy sentence” because Lemon was a member of the Black Hebrew religion.17 The government asked that Lemon’s crime not be considered an isolated incident, but as part of a nationwide pattern of criminal activity involving Black Hebrews.18 In an attempt to link Lemon’s crime to the illegal activities of other group members, the government pointed to similar crimes of fraud that had been committed by other Black Hebrews.19 Those crimes involved the fraudulent use of birth certificates, passports, airline tickets, credit cards and bank accounts.20 The government reasoned that a more severe sentence would deter other Black Hebrews from committing similar crimes of fraud in the future.21

The defense attorney in the sentencing hearing specifically requested that Judge Jackson disregard the representations of the government concerning Lemon’s membership in the Black Hebrew religion.22 The judge, however, denied this motion without explanation.23 The judge then im-

15. Presentence Report for Appellant, Lemon, No. 82-234 (D.D.C. 1982). Additionally, the presentence report stated that Lemon’s parents had been divorced since he was a child, that he had received a Bachelor of Arts in Communications from Howard University, and that he had been employed as an announcer and operator at the Howard University Radio Station for almost 10 years. Id.

The defense counsel in Lemon argued, however, that the government’s information supporting Lemon’s alleged membership in the Black Hebrew religion constituted unsubstantiated hearsay. The defense counsel pointed to the fact that the government had presented a report by an unidentified source that Lemon was in the company of two Black Hebrews and was riding in the car of a suspected member of the Black Hebrews at the time of his arrest. Brief for Appellant at 4-10, Lemon, No. 82-234 (D.D.C. 1982).

16. Government’s Memorandum on Sentencing at 6, Lemon, No. 82-234 (D.D.C. 1982) [hereinafter cited as Lemon Sentencing Memorandum]. In a related issue, the government also recommended that the judge consider Lemon’s membership in the Black Hebrew sect when setting bail. Government’s Motion to Oppose Review, supra note 13, at 4.


18. Id. at 5-6.

19. Id.; Government’s Motion to Oppose Review, supra note 13, at 4.


23. Id. at 10.
posed a sentence of sixteen months to four years—a sentence that was unusually harsh for a first offender with the defendant's background.24

The length of Lemon's sentence was then appealed to the United States Court of Appeals for the District of Columbia Circuit, which vacated the sentence and remanded the case to the district court for resentencing.25 The circuit court began its analysis with a determination of whether the defendant's alleged membership in the Black Hebrew religion or purported association with members of the sect had actually influenced the length of Lemon's sentence.26 Noting that Judge Jackson had failed to provide an explanation for his selection of such an unusually harsh sentence,27 the circuit court found that several factors demonstrated that the trial judge had considered Lemon's association with members of the Black Hebrews as an aggravating factor at sentencing.28

The court first pointed to Judge Jackson's parole recommendation form, prepared on the date of sentencing.29 After ascertaining that Judge Jack-

24. Id. at 14. On appeal, the government conceded at oral argument that the length of Lemon’s sentence was unusually severe for a first offender. Lemon, No. 82-2327, slip op. at 13.

The sentencing practice that developed in the Lemon case cannot be dismissed as an isolated incident. The issue of Black Hebrew membership again surfaced as an aggravating factor three months later, in the same court, in United States v. Kegler, No. 83-219 (D.D.C. 1983), appeal docketed, No. 83-1219 (D.C. Cir. Mar. 1, 1983). The defendant had been convicted in a jury trial of two counts of interstate transportation of stolen property. Once again, the government added to the list of traditional aggravating factors the fact that the defendant was a Black Hebrew. In an attempt to correlate Black Hebrew membership directly with criminal activity, the government declared that “the defendant had shown no intention to refrain from further illegal conduct by cutting ties with the Black Hebrews involved with her in this crime.” Government Memorandum of Sentencing at 1, 6-7, Kegler, No. 83-219 (D.D.C. 1983). In accordance with the government’s request, Judge Jackson imposed a sentence that appeared to penalize the defendant’s Black Hebrew affiliation. Id.

25. Lemon, No. 82-2327, slip op. at 40.

26. Id. at 13-14.

27. Id. at 13.

28. See infra notes 29-32 and accompanying text.

29. Lemon, No. 82-2327, slip op. at 14. Known as Form A.O. 235, it typically contains the sentencing judge's comments regarding the suitability of parole in light of the defendant's recent offense, prior criminal background, and any mitigating or aggravating factors. Id. at 14 n.26. In the Lemon case, Form A.O. 235 included the following pertinent language: “[Lemon’s] unwillingness to cooperate with the U.S. Attorney's Office in its investigation of an organization known as the Black Hebrews, whether or not he is a member of it, casts considerable doubt on the genuineness [sic] of any expression of remorse or protestations of reform.” Report on Sentenced Offender by United States District Judge at 1, Lemon, No. 82-234 (D.D.C. 1983). At the time of Lemon’s sentencing, the parole form did not require the sentencing judge to explain the sentence imposed on defendant or resolve matters in dispute prior to sentencing the defendant. The Federal Rules of Criminal Procedure, however, were recently amended to eliminate these inadequate aspects of Form A.O. 235. Nearly one year after the Lemon sentencing, on Aug. 1, 1983, a new rule, Fed. R. Crim P.
son had given substantial weight to the government's representations of Lemon's association with members of the Black Hebrews, the circuit court concluded that it was reasonable to infer that the judge also had given considerable weight to that information in selecting Lemon's sentence.\(^3\) The court also found significant Judge Jackson's express denial of defense counsel's motion to disregard the government's representations of Lemon's association with the Black Hebrews.\(^3\) Finally, the appellate court stressed that on appeal both defense counsel and government counsel had conceded that Lemon's unusually severe sentence reflected Judge Jackson's reliance on prejudicial information concerning the Black Hebrews.\(^3\)

Having found that the sentencing judge did rely on the government's representations concerning Lemon's association with the Black Hebrews in setting the length of sentence, the circuit court then proceeded to analyze the three separate but interrelated constitutional issues raised by this practice: (i) whether the government's actual evidence of Lemon's association with the Black Hebrews was sufficiently corroborated and reliable to satisfy due process considerations;\(^3\) (ii) whether the first amendment prohibits the consideration of religious association as an aggravating factor at sentencing; (iii) whether Lemon's mere knowledge of Black Hebrew activities and his refusal to cooperate with the government's investigation of the sect could serve as an independent basis for aggravating his sentence.

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32 (C)(3)(d), became effective. Thus, the new rule will apply to the resentencing proceeding in the Lemon case. Lemon, No. 82-2327, slip op. at 15 n.29.

30. Lemon, No. 82-2327, slip op. at 14-17.

31. Id. at 17-18.

32. Id. at 18-19.

33. Id. at 37-40. The Lemon appeal was not restricted to the first amendment issue of freedom of association. Lemon also contended that the sentencing judge violated his due process rights under the fourteenth amendment by considering the government's uncorroborated hearsay allegations that he belonged to the Black Hebrew religion. The circuit court found that the sentencing judge had violated the defendant's due process rights by relying on inaccurate, unsubstantiated representations of the government regarding Mr. Lemon's association with the Black Hebrews. Lemon, No. 82-2327, slip. op. at 20, 37-40. The court, however, explained that at the resentencing hearing, the government would have an opportunity to present new, reliable evidence linking Mr. Lemon's crime to the illegal aims of the Black Hebrew organization and establish that the defendant's crime was committed in furtherance of the organization's illegal goals. Id. at 40. But the Lemon court recognized that even if the government successfully meets its burden on remand, it will have severe difficulty overcoming the protection provided to the Black Hebrew religion by the first amendment. Id. at 36, 42.

The scope of this Comment is limited to the first amendment, which provides a more stringent constitutional analysis than the fourteenth amendment. Under a due process analysis, the court would apply a balancing test which falls short of the strict scrutiny test mandated by the first amendment. Thus, this Comment will only test the Lemon case under the most rigid constitutional standard of review. L. Tribe, supra note 1, at 474-77, 501-63.
Judicial Consideration of Religion

In addressing the issue of due process, the court found the government’s evidence of Lemon’s purported association with the Black Hebrews so severely unreliable as to require exclusion of this evidence in the sentencing determination.\(^4\) The circuit court then took its analysis one step further and declared that even if the evidence had been reliable, Lemon’s association with members of the Black Hebrews would still be an improper subject for consideration under the well-established principles of the first amendment.\(^5\) Finally, the court rejected the government’s argument concerning the defendant’s alleged refusal to cooperate in the investigations of the Black Hebrews.\(^6\)

Based on these constitutional rulings, the circuit court vacated the defendant’s sentence and remanded the case for resentencing.\(^7\) The court stated that the government would have an opportunity at the resentencing hearing to present additional evidence to justify the sentencing judge’s use of Lemon’s association with the Black Hebrews as an aggravating factor.\(^8\) In order to use religious association as an aggravating factor, the court explained that the evidence must reliably demonstrate that Lemon intended to further the illegal activities of the Black Hebrews\(^9\) or that

\(^{34}\) Lemon, No. 82-2327, slip op. at 37-40.

\(^{35}\) Id. at 40. The circuit court suggested the appropriate test for determining whether affiliation with a certain group is protected by the first amendment freedom of association:

Association with the Black Hebrews, whether or not their beliefs were ultimately determined to be religious, is protected by the broad guarantee of freedom of association unless the groups were found to be a sham whose members did not sincerely share the beliefs they asserted, but only used them cynically to conceal a criminal conspiracy.

\(^{36}\) Lemon, No. 82-2327, slip op. at 40.

\(^{37}\) Id.

\(^{38}\) Id.

\(^{39}\) Id.

The circuit court suggested that the strongest evidence of the defendant’s intent to further the illegal aims of the Black Hebrew religion would be reliable evidence substantiating that the proceeds of Lemon’s crime “were intended to benefit the Black Hebrews.” \(^{40}\) The court further explained that

\[^{40}\]This does not mean . . . the government must necessarily show that the proceeds of the offense for which the defendant was convicted were intended to benefit the Black Hebrews. Such a showing would of course be the strongest evidence of the defendant’s intent to further the illegal aims of the Black Hebrews, but it is not the only evidence that would establish the requisite intent and satisfy the first amendment.

\(^{41}\) The court failed, however, to provide specific examples of ways to satisfy the intent requirements. This Comment will conclude that prior case law mandates that the only evidence that may be used to establish intent is evidence showing that the proceeds of Lemon’s
Lemon had sufficient knowledge of the illegal activities of the Black Hebrews to permit the judge to treat his refusal to cooperate in government investigations as an aggravating factor. The circuit court emphasized, however, that the government's showing would have to satisfy the "heightened degree of scrutiny" mandated by the first amendment.

The central issues raised by the Black Hebrew Cases are whether the presentence report can legitimately contain religious association and whether religious association can ever be used to aggravate a criminal sentence. The government's presentencing procedure of asking defendants whether they practice a religion and with whom they associate arguably interferes with the defendants' first amendment freedom of association. Moreover, assuming judges inadvertently obtain such information during presentencing proceedings, there may be constitutional limitations on the use of that information.

If it is determined that in appropriate cases judicial consideration of religious association is sanctioned by the first amendment, then it will be necessary to ascertain what first amendment limitations, if any, exist. Thus, it will be crucial to determine what religious goals are beyond the protection of the first amendment, and whether the Black Hebrew religion encom-
passes unprotected goals. In essence, the analysis will have to isolate which activities the first amendment protects on the basis of freedom of association.

In the following section, this Comment will criticize the Lemon Court for disregarding the issue of whether the presentence report can legitimately contain the religious association of the defendant. Moreover, it will examine whether the circuit court's holding is consistent with prior case law on the first amendment. This Comment will further determine whether the circuit court would have reached the identical holding even if it had employed a pure first amendment analysis without intermixing due process considerations.

II. GENERAL PRINCIPLES OF FIRST AMENDMENT LAW AND CRIMINAL LAW

A. Background

Unlike the guarantees of freedom of speech and freedom of religion, freedom of association is not expressly found within the first amendment. Freedom of association, however, is implicitly guaranteed by the first amendment and thus, is subject to the same analysis as the enumerated first amendment rights.

Generally, principles of first amendment law dictate that the courts must implement the strict scrutiny test when a state directly or indirectly interferes with an individual's freedom of association. Only a compelling state interest will tip the scales in favor of the state. Thus, if the state fails to present such an interest, the law will be struck down as unconstitu-

43. See supra note 1 and accompanying text.
45. Bates v. City of Little Rock, 361 U.S. at 524; NAACP v. Alabama ex rel. Patterson, 357 U.S. at 460-61. Most frequently, however, the courts employ a balancing test, providing the state with a greater opportunity to protect its interests. Under the balancing approach, a state must show that its interest outweighs the first amendment interest of the individual. See generally L. Tribe, supra note 1, at 580-84.
46. Bates v. City of Little Rock, 361 U.S. at 524. See also Jehovah's Witness in State of Washington v. King County Hosp., 278 F. Supp. 488, 504-08 (W.D. Wash. 1967) (per curiam), aff'd, 390 U.S. 598 (1968) (per curiam) (pregnant woman could be forced to submit to blood transfusion, over her religious objection, to save the life of her child); Prince v. Massachusetts, 321 U.S. 158, 166 (1943) (state may prevent individuals from physically harming or exploiting their own children; Supreme Court prohibits adults from using children as street proselytizers); Jacobson v. Massachusetts, 1917 U.S. 11 (1905) (state may force all citizens, regardless of their religious beliefs, to obtain vaccinations in order to protect the health and safety of the community).
tional for infringing upon the individual's freedom of association.\textsuperscript{47}

Before turning to relevant case law on the first amendment, it is useful to briefly review the criminal law principles which form the backdrop for this discussion. Case law on the issue of criminal sentencing generally falls into three broad categories: (i) the propriety of the length of the sentence;\textsuperscript{48} (ii) the fairness of the procedure that was employed in selecting and imposing the sentence;\textsuperscript{49} and (iii) the propriety of the judge's consideration of certain aggravating or mitigating factors in determining the length of incarceration.\textsuperscript{50}

Judicial decisions on the length of sentence are of limited number, for it is in this area that appellate courts most frequently defer to the discretion of the trial judge.\textsuperscript{51} The judge is required only to observe the maximum and minimum sentence limitations imposed by statute.\textsuperscript{52} As long as the sentence remains within these statutory guidelines, the judge has full discretion in selecting the length of incarceration.\textsuperscript{53} Rarely will a judge be reversed for imposing a sentence that is so excessive as to constitute cruel and unusual punishment under the eighth amendment.\textsuperscript{54}

\textsuperscript{47} See, e.g., Bates v. City of Little Rock, 361 U.S. at 524; NAACP v. Alabama ex rel. Patterson, 357 U.S. at 461.
\textsuperscript{48} See infra notes 51-54 and accompanying text.
\textsuperscript{49} See infra notes 55-57 and accompanying text.
\textsuperscript{50} See infra notes 58-64 and accompanying text.
\textsuperscript{51} See generally A. Campbell, supra note 2, at §§ 126-128. Although the majority of jurisdictions disallow appellate review of sentencing, the number of jurisdictions providing for sentencing review is steadily increasing. The current trend gained momentum in 1976 when the Supreme Court upheld the constitutionality of various death penalty statutes providing for automatic review of sentencing in capital cases. For discussion of these cases, see Liebman & Shepard, Guiding Capital Sentencing Discretion Beyond the "Boiler Plate": Mental Disorder as a Mitigating Factor, 66 Geo. L.J. 757, 762-77 (1978). Nevertheless, even in those jurisdictions where review is available, appellate courts often avoid sentencing issues by remanding troublesome cases to the original sentencing judge for resentencing. Many appellate judges believe the trial court judge is in the best position to tailor the sentence to fit the offender because the trial judge had the opportunity to observe the behavior of the defendant in court. See generally A. Campbell, supra note 2, at §§ 126-128.
\textsuperscript{52} United States v. Tucker, 404 U.S. 443, 447 (1972) ("A sentence imposed by a federal district judge, if within statutory limits, is generally not subject to review."); Gore v. United States, 357 U.S. 386, 393 (1958). Cf. Yates v. United States, 356 U.S. 363, 366 (1958) (Supreme Court set aside sentence upon second appeal: "The district court appears not to have exercised its discretion in light of the reversal of the judgment but, in effect to have sought merely to justify the original sentence."). See generally A. Campbell, supra note 2, at §§ 126-128.
\textsuperscript{53} See supra note 52 and accompanying text.
\textsuperscript{54} Recently, in Solem v. Helm, 103 S. Ct. 3001 (1983), the Supreme Court found that a habitual criminal cannot be sentenced to life imprisonment without the possibility of parole for committing a seventh nonviolent felony. In Helm, a habeas corpus petitioner was sentenced to life imprisonment under a South Dakota recidivist statute for writing a bad check in the amount of $100.00. The Supreme Court held that Helm's criminal sentence consti-
The bulk of the decisions on criminal sentencing relate to the fairness of the sentencing process. For example, the courts have established constitutional safeguards to ensure that the information heard by the judge is reliable, that the judge actually considers the available information in making an individualized sentencing determination, and that the defendant has an opportunity to address the court on the question of sentencing.

The final category—the selection of aggravating and mitigating factors—is the primary concern of this Comment. The courts have generally recognized that sentencing judges have broad discretion in selecting the

55. The sentencing judge must exercise "informed discretion." United States v. Tucker, 404 U.S. 443, 447 (1972). This requires that the judge not act on "assumptions" that are "materially untrue." Townsend v. Burke, 334 U.S. 736, 741 (1948). Sentences which have been based on unsubstantiated hearsay were reversed on appeal. See United States v. Bass, 535 F.2d 110 (D.C. Cir. 1976) (sentencing judge prohibited from relying on uncorroborated hearsay concerning defendant's other criminal activities which defendant denied); United States v. Weston, 448 F.2d 626 (9th Cir. 1971), cert. denied, 404 U.S. 1061 (1972) (sentencing judge prevented from considering unsubstantiated hearsay in a presentence report in imposing sentence).

56. In United States v. Daniels, 446 F.2d 967 (6th Cir. 1971), a sentencing judge was found to have abused his discretion where he sentenced a selective service violator to five years in prison without considering all available sentencing information. The United States Court of Appeals for the Sixth Circuit held that the district court judge had acted improperly by handing down a "mechanical sentence" in defiance of Congress' implied legislative intent to impose a lesser sentence where appropriate. Specifically, the Court found the sentencing judge abused his discretion by refusing to consider the mitigating factors surrounding the case, including the defendant's religious beliefs, good character, model behavior, and willingness to serve in a civilian capacity. Id. at 972.

57. See generally A. CAMPBELL, supra note 2, at 231-34. The formal inquiry by the sentencing judge and the response by the defendant as to why the sentence should not be imposed is known as "allocution." Approximately half the states recognize the "right" of allocution in a variety of contexts. Id. See, e.g., Brown v. State, 235 Ga. 644, 220 S.E.2d 922 (1975) (state constitutional right); Columbus v. Herrell, 247 N.E.2d 770 (1969) (court rule); CAL. PENAL CODE § 1200 (West 1972) (statutory provision).
kind of information\textsuperscript{58} and sources\textsuperscript{59} upon which to base a sentence.\textsuperscript{60} In determining the length of incarceration, the sentencing judge evaluates the information contained within the presentence report.\textsuperscript{61} A sentencing judge is encouraged to consider all of the aggravating and mitigating\textsuperscript{62} aspects of the defendant's background and character, as well as the circumstances of the offense.\textsuperscript{63} Given the liberal evidentiary guidelines, a sentencing judge is rarely reversed for considering too much information.\textsuperscript{64}

Having identified the general first amendment and criminal law principles governing this area, it is now appropriate to move to specific prior cases to extrapolate constitutional requirements governing the use of protected first amendment activity as an aggravating factor in criminal sentencings. The following discussion will focus on basically three types of cases which will be described as the Disclosure Cases, the Communist Cases and the Bail Cases. After examining each of these groups of cases,

\begin{itemize}
  \item \textsuperscript{58} United States v. Tucker, 404 U.S. at 446. "A trial judge may appropriately conduct an inquiry broad in scope, largely unlimited either as to the kind of information he may consider, or the source from which it may come." See Williams v. New York, 337 U.S. 241, 247 (1949) (A sentencing judge should consider the "fullest information [available] concerning the defendant's life and characteristics."). In the federal court system, Congress has incorporated these principles into statutes by providing that: "[N]o limitation shall be placed on the information concerning the background, character, and conduct of a convicted offender which a federal judge may consider for sentencing purposes." 18 U.S.C. \textsection 3577 (1982).
  \item \textsuperscript{59} A sentencing judge may also consider "responsible unsworn or 'out of court' information relative to the circumstances of the crime and to the convicted person's life and characteristics." Williams v. Oklahoma, 358 U.S. 576, 584 (1959). Such use of hearsay information, however, is subject to certain minimal due process safeguards. See supra note 55.
  \item \textsuperscript{60} See supra notes 58-59; see generally A. Campbell, supra note 2, at \textsection 69, 85-90.
  \item \textsuperscript{61} See supra note 14.
  \item \textsuperscript{62} Aggravating factors are circumstances surrounding a crime which add to the defendant's guilt and increase the defendant's length of incarceration. In contrast, mitigating factors are extenuating circumstances which lessen the defendant's guilt and reduce the defendant's length of punishment. Black's Law Dictionary 712 (5th ed. 1979).
  \item \textsuperscript{63} See Williams v. Oklahoma, 358 U.S. 576, 585-86 (sentencing judge properly considered the murder and other factors surrounding the kidnapping in determining the appropriate sentence).
  \item \textsuperscript{64} See generally A. Campbell, supra note 2, at 225-26. Nevertheless, there have been those instances where a sentencing judge has been found to have abused his discretion. See, e.g., United States v. Thompson, 483 F.2d 527 (3d Cir. 1973) (allegation of personal bias required judge's disqualification from presiding over case where sentencing judge announced that he sentenced all selective service violators to thirty months in prison); United States v. Daniels, 446 F.2d 967 (9th Cir. 1971) (sentencing judge refused to consider mitigating factors surrounding the case); People v. Jacque, 131 Ill. App. 2d 365, 266 N.E.2d 514 (1970) (sentencing judge failed to set a sufficient time period between minimum and maximum terms to provide incentive for rehabilitation); People v. Lillie, 79 Ill. App. 2d 174, 223 N.E.2d 716 (1967) (sentencing judge considered past offenses in setting the minimum, instead of the maximum, prison sentence).
\end{itemize}
this Comment will propose a comprehensive framework for first amendment analysis of the *Lemon* case.

**B. The Disclosure Cases**

The government's presentencing procedure of asking defendants whether they practice a religion and with whom they associate arguably interferes with the defendants' first amendment freedom of association. To resolve this issue, it is necessary to analyze prior case law.

Many constitutional issues concerning disclosure of association have arisen in the context of an individual's application to the state bar. A state's criteria for bar admission was challenged by the Supreme Court in *Schware v. Board of Examiners*. In *Schware*, the Supreme Court reversed New Mexico's refusal to allow Schware to take the bar exam on the ground that he was unfit to practice law because he was a former member of the Communist Party and thus, of bad moral character. In reversing the state's decision, the Supreme Court found that the state had no rational justification for its decision because there was no evidence that Schware participated in illegal activities as a member of the Communist Party.

Similarly, the Supreme Court addressed the constitutionality of questions which appeared on the application for admission to the California state bar in *Konigsberg v. State Bar of California*. In *Konigsberg*, the California state bar refused to admit the petitioner because he refused to answer a question on the bar application concerning his membership in the Communist Party. The state argued that the information was necessary for a thorough investigation of his qualifications. In upholding the state's decision, the Supreme Court balanced the competing interests of the state and the petitioner, concluding that the disclosure of prior associations was a legitimate government concern. The Court found that the state could deny admission to the bar on the ground that an applicant refuses to

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66. *Id.* at 232-38. The state also considered Schware's prior arrests and use of aliases in evaluating his character. *Id.* at 240-43.
67. *Id.* at 239-40, 243-47.
68. 366 U.S. 36 (1961) (*Konigsberg II*). The Supreme Court heard the *Konigsberg* case for the first time in 1957. In *Konigsberg v. State Bar of California*, 353 U.S. 252 (1957) (*Konigsberg I*), the Supreme Court remanded the case to the California State Supreme Court, finding no rational basis for the state's refusal to admit Konigsberg to the bar. The state had argued that Konigsberg's refusal to answer questions concerning his past membership in the Communist Party supported the inference that he was of bad moral character and advocated the violent overthrow of the government.
69. 366 U.S. at 37-38.
70. *Id.* at 40-44.
71. *Id.* at 51-52. See, *e.g.*, Martin-Trigona v. Underwood, 529 F.2d 33 (7th Cir. 1975).
respond to relevant questions even though the state could not base its decision on an affirmative answer to those questions.\(^7\) Thus, the Court concluded that the grounds for disqualification were more limited than the scope of the inquiry.\(^3\)

In *Shelton v. Tucker*,\(^4\) the Supreme Court was confronted with the question of disclosure in a different context.\(^5\) In *Shelton*, the Supreme Court struck down a statute which required every teacher in a state-supported school or college to disclose all organizations with which he or she had been associated during the past five years.\(^6\) The Supreme Court applied a balancing test, finding that although the state may have a legitimate interest in inquiring into a teacher's associations, it could use a less restrictive alternative\(^7\) to achieve this end.\(^8\) Thus, the Court emphasized the impropriety of the scope of the inquiry.\(^9\)

More recently, in the case of *Baird v. State of Arizona*,\(^10\) the Supreme Court appears to have retreated from its holding in *Konigsberg*. The *Baird* case involved a petitioner who was denied admission to the state bar on the ground that she refused to answer a question on the bar application concerning her past membership in any subversive organization.\(^11\) In a plurality opinion, the Supreme Court struck down the state statute on the basis that the first amendment prohibits a state from denying an individual

\(^7\) 366 U.S. at 52-53.

\(^3\) *Id*. The *Konigsberg II* rationale was upheld in subsequent cases dealing with similar issues. *See*, e.g., Law Students Civil Rights Research Council, Inc. v. Wadmond, 401 U.S. 154 (1971) (requiring bar applicant to answer limited questions concerning “knowing membership”); *In re Stolar*, 401 U.S. 23 (1971) (reversing denial of admission to bar because questions were overly broad and beyond legitimate state interest).

\(^4\) 364 U.S. 479 (1960).

\(^5\) *Id*.

\(^6\) *Id*.

\(^7\) *Id* at 488. In *Schneider v. State*, 308 U.S. 147 (1939), the Supreme Court laid the groundwork for the least restrictive means requirement. In *Schneider*, the Supreme Court reversed the conviction of a Jehovah's Witness who had been convicted of violating a municipal ordinance which required that an individual obtain a police permit in order to distribute religious literature or solicit contributions on behalf of his religion. The Court reasoned that the purpose of the town ordinance—to keep the streets free from litter—could be accomplished by a less restrictive means. Specifically, the Court suggested that the town could prosecute those individuals who actually threw paper on the street, instead of suppressing the legitimate exercise of speech and press. *See also* Murdock v. Pennsylvania, 319 U.S. 105 (1943); Cantwell v. Connecticut, 310 U.S. 296 (1940). *See generally* L. TRIBE, *supra* note 1, at ch. 14.

\(^8\) 364 U.S. at 488-90; *see also* NAACP v. Alabama, 377 U.S. 288 (1964); Dilmore v. Stubbs, 636 F.2d 966 (5th Cir. 1981).

\(^9\) 364 U.S. at 488-90.

\(^10\) 401 U.S. 1 (1971).

\(^11\) *Id*. at 1-5.
access to a profession or penalizing an individual because he or she has certain beliefs or belongs to a political organization. Additionally, the Court stressed that under the first amendment, a state has limited power to inquire into a person's beliefs or associations. The Supreme Court determined that in order for a state to probe into an individual's beliefs and associations, the state must show both that the inquiry is necessary to protect a compelling state interest and that there is no less restrictive alternative for achieving the legitimate end. The Court stressed that such broad inquiries might deter individuals from joining an association of their choice.

The Disclosure Cases illustrate that a state may have a legitimate interest in inquiring into an individual's association. That interest, however, must be weighed against the individual's freedom of association under the first amendment. First Amendment principles further dictate that the scope of inquiry cannot be unnecessarily broad.

C. The Communist Cases

In addition to cases discussing whether a state may require disclosure of an individual's associations, several cases address constitutional problems which arise once it is established that an individual belongs to certain organizations. The Supreme Court has repeatedly recognized the right of an individual to join the political group of his choice. In several cases, members of the Communist party have challenged the constitutional validity of the so-called membership clause of the Smith Act. That clause

82. *Id.* at 6-8.
83. *Id.* at 6.
84. *Id.* at 6-8.
85. *Id.* at 6. *Cf.* *In re* Summers, 325 U.S. 561 (1945). In *Summers*, the Supreme Court upheld the exclusion of a conscientious objector from the Illinois state bar on the ground that he refused to take a mandatory oath in support of the state constitution. The Supreme Court found that the interests of the state bar outweighed the conscientious objector's deeply rooted beliefs. The Court concluded that each state has ultimate control over the members of its bar if its requirements do not offend the first and fourteenth amendments. 325 U.S. at 570-73.
86. See *supra* notes 65-85 and accompanying text.
88. The Smith Act provides in relevant part:

Whoever organizes or helps or attempts to organize any society, group, or assembly of persons who teach, advocate, or encourage the overthrow or destruction of any such government by force or violence; or becomes or is a member of, or affiliates with, any such society, group, or assembly of persons, knowing the purposes thereof—[s]hall be fined not more than $20,000 or imprisoned not more than
prohibits membership in any organization which advocates the overthrow of the United States government by force or violence.\textsuperscript{89} 

In \textit{Dennis v. United States},\textsuperscript{90} the first case to interpret the constitutional validity of the Smith Act, the Supreme Court relied on the clear and present danger test in upholding the membership clause.\textsuperscript{91} The \textit{Dennis} Court found high-ranking members of the National Board of the Communist Party guilty of conspiracy to teach and advocate the violent overthrow of the government by reorganizing the Communist Party.\textsuperscript{92} The Court applied a balancing test to determine whether the likelihood of danger to the government outweighed the Communists' first amendment protections of freedom of association and freedom of speech.\textsuperscript{93} After balancing the competing interests of the parties, the Court found that the activities of the Communist leaders constituted a clear and present danger to society because the group was prepared to make an attempt to overthrow the government.\textsuperscript{94} Although the Court acknowledged that the Communists had not made an attempt to overthrow the government, the Court concluded that the mere existence of the conspiracy constituted a clear and present
danger.

\textsuperscript{89} Id.
\textsuperscript{90} 341 U.S. 494 (1951).
\textsuperscript{91} Id. at 502-17. The development of the clear and present danger test spanned nearly fifty years. The clear and present danger test orginated during World War I in \textit{Schenck v. United States}, 249 U.S. 47 (1919), where the constitutionality of the Espionage and Sedition Acts were challenged under the first amendment guarantee of freedom of speech. In \textit{Schenck}, the United States Supreme Court explained that “the question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent.” During the Cold War, in \textit{Yates v. United States}, 354 U.S. 298 (1957), the Supreme Court limited the application of the clear and present danger test. The \textit{Yates} Court developed a balancing test which weighed the likelihood of unlawful action against an individual's first amendment freedoms of speech and association. For a further discussion of \textit{Yates}, see infra notes 96-99 and accompanying text. By the late 1960's, however, the Court narrowed the clear and present danger test further into a more focused test in \textit{Brandenburg v. Ohio}, 395 U.S. 444 (1969). In \textit{Brandenburg}, the Supreme Court held that individuals may not be penalized for exercising their first amendment right of advocacy of action unless the advocacy is directed to or likely to incite others to unlawful action.

\textsuperscript{92} 341 U.S. at 516-17.
\textsuperscript{93} Id. at 509-11.
\textsuperscript{94} Id. The Supreme Court adopted the rule of clear and present danger from the lower court opinion written by Chief Judge Learned Hand. Chief Judge Hand stated: “In each case courts must ask whether the gravity of the ‘evil,’ discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger.” \textit{Id.} at 510 (quoting United States v. Dennis, 183 F.2d 201, 212 (2d Cir. 1950)).
danger to society.\textsuperscript{95}

The Supreme Court narrowed the clear and present danger test discussed in \textit{Dennis}, six years later, in \textit{Yates v. United States.}\textsuperscript{96} In \textit{Yates}, the Supreme Court reversed the convictions of a number of low-ranking members of the Communist Party who were convicted of conspiring to overthrow the government under the membership clause of the Smith Act.\textsuperscript{97} The Supreme Court found that the Smith Act did not prohibit advocacy in the abstract, but instead, prohibited advocacy of action.\textsuperscript{98} In conclusion, the Supreme Court determined that the clear and present danger test articulated in \textit{Dennis} must be limited to situations where the individual is urged to take immediate or future action and not merely where the individual believes in taking action.\textsuperscript{99}

Finally, in \textit{Scales v. United States},\textsuperscript{100} the Court clarified the \textit{Dennis} and \textit{Yates} decisions and provided a useful framework for similar association cases. The Supreme Court acknowledged that "quasi-political parties or other groups . . . may embrace both legal and illegal aims."\textsuperscript{101} The Court determined that the government can punish only those active group members that have knowledge of the group's illegal aims and the specific intent to carry them out.\textsuperscript{102} Since the membership clause does not prohibit mere membership in the Communist Party, the Court stated that the government cannot convict those members who adhere to the lawful aims of the group.\textsuperscript{103}

Similarly, in \textit{Noto v. United States},\textsuperscript{104} the Supreme Court emphasized the need to establish specific intent.\textsuperscript{105} The Court stated that specific intent

\textsuperscript{95} 341 U.S. at 510-11.
\textsuperscript{96} 354 U.S. 298 (1957).
\textsuperscript{97} \textit{Id}.
\textsuperscript{98} \textit{Id} at 312-27.
\textsuperscript{99} \textit{Id}.
\textsuperscript{100} 367 U.S. 203 (1961).
\textsuperscript{101} \textit{Id} at 229. In \textit{Scales}, the Supreme Court drew a distinction between a group that embraces both legal and illegal aims and a technical conspiracy. The Court noted that a technical conspiracy is defined only by its criminal purpose. Therefore, the activities of conspiracy members are not protected under the first amendment. \textit{Id.} \textit{See, e.g.}, United States v. Fatico, 579 F.2d 707 (2d Cir. 1978) (first amendment protection does not attach to membership in the Mafia because the goal of the organization is to commit crimes). Accordingly, membership in the Mafia may properly be considered as an aggravating factor at sentencing.
\textsuperscript{102} 367 U.S. at 229-30; \textit{see also} Elfbrandt v. Russell, 384 U.S. at 15-16; \textit{Noto v. United States}, 367 U.S. at 299-300.
\textsuperscript{103} \textit{Scales v. United States}, 367 U.S. at 229. "If there were a . . . blanket prohibition of association with a group having both legal and illegal aims, there would indeed be a real danger that legitimate political expression would be impaired. . . ." \textit{Id}.
\textsuperscript{104} 367 U.S. 290 (1961).
\textsuperscript{105} \textit{Id} at 299-300.
must be judged by a strict standard to ensure the protection of legitimate political expression and association under the first amendment. In conclusion, the Supreme Court found the membership clause of the Smith Act constitutional because it punished only those with the specific intent to bring about the violent overthrow of the government.

Six years later, the Supreme Court applied the legal principles articulated in *Scales* and *Noto* to *Elfrandt v. Russell*. In that case, the Court tested the constitutional validity of the loyalty oath administered to all Arizona state employees. The Court found the loyalty oath unconstitutional under the first amendment because it made mere membership in the United States Communist Party a criminal act. Unlike the Smith Act, the Arizona law failed to limit punishment to those Communists having the specific intent to further the illegal aims of the organization. In conclusion, the Supreme Court emphasized that "guilt by association" has no place in our criminal justice system.

The legal principles extrapolated from the *Disclosure Cases* and *Communist Cases* were incorporated into the Supreme Court's analysis in *Keyishian v. Board of Regents*. In *Keyishian*, faculty members of the State University of New York challenged the constitutional validity of state statutes and regulations requiring state employees to sign a certificate swearing that they had never belonged to the Communist Party. The stated purpose of the law was "to prevent the appointment or retention of 'subversive' persons in state employment." Under this statutory scheme,

106. *Id.* The Court stated that specific intent:

must be judged *strictissimi juris*, for otherwise there is a danger that one in sympathy with the legitimate aims of such an organization, but not specifically intending to accomplish them by resort to violence might be punished for his adherence to lawful and constitutionally protected purposes, because of other and unprotected purposes which he does not necessarily share.

107. *Id.* at 298-300. In *Noto*, the Court reversed the conviction of a Communist Party member because he did not "present[ly]" advocate the overthrow of the government. The Court noted that under the Smith Act, future advocacy was not criminal.


109. *Id.* at 12-13.

110. *Id.* at 16-18.

111. *Id.*

112. *Id.* at 19; see also *Schware v. Board of Bar Examiners*, 353 U.S. 232, 246 (1957); *Schneiderman v. United States*, 320 U.S. 118, 136 (1942).


114. *Id.* at 589-93. The New York loyalty statutes and regulations are best known as the "Feinberg Law." Under the Feinberg Law, the Board of Regents is required to formulate rules and regulations for the disqualification or dismissal of persons from the public school system. *Id.* at 593-95.

115. *Id.* at 591-92.
failure to sign the certificate would result in dismissal from employment.\textsuperscript{116} The Supreme Court found the statutory language overly broad in that it excluded all members of the Communist Party from state employment without requiring a showing of the individual's specific intent to further the unlawful aims of the organization.\textsuperscript{117} The Court also noted that mere membership in the Communist Party could not be used by the state to support a finding of bad moral character to justify dismissal.\textsuperscript{118} In conclusion, the Court held the loyalty statutes were unconstitutional because they were overly broad and effectively deprived Communist Party members of their freedom of association under the first amendment.\textsuperscript{119}

Finally, in \textit{United States v. Robel},\textsuperscript{120} a member of the Communist Party challenged the validity of section 5(a)(1)(D) of the Subversive Activities Control Act of 1950 which prohibited the employment of Communists in defense facilities.\textsuperscript{121} Upon review, the United States Supreme Court found the statute unconstitutionally broad because it penalized all members of the Communist Party without considering active membership and specific intent.\textsuperscript{122} The Court concluded that the government could protect national security by selecting a less restrictive means which would not abridge the individual's right of association protected by the first amendment.\textsuperscript{123}

The Supreme Court clarified the \textit{Robel} analysis in its final footnote.\textsuperscript{124} The Court explicitly stated that it did not apply a balancing test in \textit{Robel} but instead, limited its analysis to the constitutional infirmity of the statute.\textsuperscript{125} In dictum, however, the Court noted that a balancing test may be appropriate on occasion.\textsuperscript{126} Specifically, the Court suggested that given a narrowly drawn statute, the government's interest in national security

\begin{footnotes}
\item[116] Id. at 605-10.
\item[117] Id. at 607; see also Schware v. Board of Examiners, 353 U.S. 232 (1957).
\item[119] 389 U.S. 265-66.
\item[120] 389 U.S. at 266-68.
\item[122] 389 U.S. at 265-66.
\item[123] Id. at 267-68.
\item[124] Id. at 268 n.20.
\item[125] Id.
\item[126] Id. at 266-68.
\end{footnotes}
could possibly outweigh the individual’s right of association depending upon the type of employment.127

The Communist Cases demonstrate that associations and organizations may have both legal and illegal goals. Yet, all members may not share the organization’s illegal goals. These cases also demonstrate that only those active group members who join an organization with the knowledge of the organization’s illegal aims and who have the specific intent to further those illegal aims may be criminally punished for their membership in the group.

D. The Bail Cases

Cases involving bail determinations have also provided the courts with an opportunity to balance first amendment interests against the interests of the state. In 1950, in Williamson v. United States,128 Communist Party leaders were convicted of conspiring to advocate and teach the violent overthrow of the United States government.129 After the defendants’ convictions had been affirmed by the United States Court of Appeals for the Second Circuit, the defendants appealed to the Supreme Court.130 The government asked that bail be revoked pending certiorari because the defendants posed a clear and present danger to the national security of the United States.131 Writing as Circuit Judge for the Second Circuit, Justice Jackson stated that under the first amendment the courts may not deny bail to members of political groups because of anticipated but uncommitted crimes.132 Thus, Justice Jackson explained that courts may not utilize their discretionary privileges contrary to the first amendment.133

Similarly, in United States ex rel Means v. Solem,134 the United States District Court for the District of South Dakota held that the state trial court was in violation of the law when it granted American Indian Movement leader Russell Means bail on the stipulation that he comply with one

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127. Id. at 266 n.17. Employees who hold nonsensitive positions in defense facilities do not pose as great a threat as those who hold sensitive positions. Id.
128. 184 F.2d 280 (2d Cir. 1950), aff’d sub nom. Dennis v. United States, 341 U.S. 494 (1951). This case was appealed to the United States Supreme Court on the constitutionality of the Smith Act. See supra notes 90-95 and accompanying text.
129. 184 F.2d 280 (2d Cir. 1950).
130. Id. at 281.
131. Id.
132. Id. at 282. Jailing persons to protect society from “predicted but unconsummated” criminal acts may be carried to such extremes that “I am loath to resort to it . . . .” Id.
133. Id. at 283.
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condition for release. Means was granted bail on the condition that he refrain from participating in various American Indian Movement activities such as marches, assemblies, making speeches, and writing literature. The district court found the condition unconstitutional because it infringed upon the defendant's first amendment rights of freedom of association and freedom of speech. The court stated that only a "compelling state interest" can justify the invasion of first amendment liberties.

The Bail Cases indicate that either a clear and present danger or a compelling state interest will outweigh the individual's first amendment right of freedom of association. These cases also illustrate that members of groups unpopular with the government may not be punished for their anticipated but uncommitted crimes. Finally, the Bail Cases demonstrate that courts are prohibited from granting or denying discretionary privileges in violation of first amendment freedoms of association and speech.

III. PUTTING PRIOR CASE LAW IN PERSPECTIVE

A. Legality of Inquiring into Defendant's Religion

The common shortcoming of the court's decisions in the Black Hebrew Cases is the failure to address the threshold issue of whether the presentence inquiry into a defendant's religion is constitutionally valid. It is the thesis of this Comment that failure to recognize this threshold question violates constitutional principles of first amendment law.

After reviewing the prior case law, it is apparent that the inquiry into the defendant's religion in the presentence report requires a balancing of the interests of the state against the first amendment freedoms of the individual. Although the state may have a legitimate interest in obtaining such information, the scope of the inquiry must be reasonable and thus, not overly broad.

The state's interest in inquiring into the religion of the defendant is to obtain full disclosure of all relevant information in pursuit of its goal of

135. Id. at 549-50.
136. Id.
137. Id. at 550.
138. Id. at 551.
139. See Lemon, No. 82-2327 (D.C. Cir. Nov. 29, 1983). Kegler, No. 83-219 (D.D.C. 1983). Moreover, research has not revealed a single case which discusses the propriety of such an inquiry. Although the defendants in Lemon and Kegler did not challenge the government's presentence inquiry into their religion, the issue is of sufficient constitutional importance to be acknowledged by the court.
140. See infra notes 141-51.
141. See supra text accompanying notes 71, 78.
142. See supra notes 65-85 and accompanying text.
protecting the welfare of its citizens. Disclosure of religious affiliation may provide the court with additional information concerning the defendant's values and attitudes toward society. For example, regular participation in church activities may reflect a defendant's substantial ties to his or her community. Active involvement in church-sponsored programs designed to benefit children or the disadvantaged would certainly be an important mitigating consideration at sentencing. The state's interest in full disclosure, however, must be weighed against the defendant's interest in freedom of religious association. Admittedly, the state's interest in protecting its citizens is a substantial concern. Therefore, the state's limited questioning regarding religious association appears to be within the requirement of the Disclosure Cases. Since the mere inquiry does not appear to place an undue burden on the defendant's first amendment freedom of religious association, the court may uphold the scope of the presentence inquiry.

In failing to recognize the inquiry issue, however, the court does not acknowledge the problem that exists for the defendant who adheres to no religion or who associates with unfavored groups. For example, are the first amendment rights of that individual unconstitutionally infringed upon because his or her sentence is not mitigated or is aggravated on the basis of the group or religion he or she does or does not associate with? If the court were to extend this line of reasoning, any inquiry concerning association would be inappropriate since the defendant has the right to choose his associations without the threat of being penalized by the sentencing judge for choosing one association over another.

It is unclear how future courts will resolve this question, since guidance from Supreme Court cases is inconsistent. Perhaps this issue will, therefore, merit attention from the Court in the near future. Under the Konigsberg analysis, the Court would probably uphold the inquiry, but would prohibit a sentencing judge from taking affirmative action based upon the inquiry. Conversely, the Baird analysis would arguably preclude the government from making the inquiry concerning the defendant's association unless it could demonstrate that the inquiry is narrowly tailored to protect a compelling state interest.

Under the Baird analysis, it is more likely that the Court would find the

143. See supra notes 14, 58-60.
144. See supra text accompanying notes 71, 78.
145. See supra notes 65-85 and accompanying text.
146. Id.
147. See supra notes 68-73 and accompanying text.
148. See supra notes 80-85 and accompanying text; see also Shelton, 364 U.S. at 479.
presentence inquiry constitutionally invalid. For example, the Court may take the position that only if an association presents a clear and present danger to society may the government inquire into a defendant's association on the presentence report. On the other hand, the Court may retreat from its strong first amendment language in Baird and find compelling the government's argument that an effective criminal justice system requires full information about all defendants and their associations. If the Court finds this a sufficiently compelling state interest, the presentence inquiry would be found constitutional even under the Baird analysis.

Although the state may have a legitimate interest in making the initial presentence inquiry into the defendant's religion, the Supreme Court has determined that there are limits on how that information may be used. Thus, assuming the Court upholds the constitutional validity of the presentence inquiry, the question now arises whether the disclosure of religion on the presentence report may be used as an aggravating factor at sentencing.

B. Legality of Using Religious Association as an Aggravating Factor: Extrapolating a General Framework for Analysis

The single greatest flaw in the Lemon circuit court decision is the interweaving of three essentially unconnected standards of constitutional analysis. Throughout the opinion, the court mixes its due process discussion of the reliability of the factual evidence concerning the defendant's Black Hebrew associations with its first amendment analysis of the propriety of considering any evidence on this subject matter at all. For example, the court begins by analyzing the government's showing in terms of due process reliability, then switches to the question of the first amendment parameters concerning any use of such information, and then, in an apparent turnabout, asks whether the information was sufficiently reliable to satisfy due process in an area so affected by first amendment concerns. In the midst of all this, the court interweaves the separate question of the defendant's refusal to cooperate with government authorities by turning over information about the Black Hebrews. This issue is treated by the court as a mixture of due process and first amendment issues.

149. See supra notes 82-85 and accompanying text.
150. See supra note 84 and accompanying text.
151. See supra notes 65-85 and accompanying text.
152. See supra notes 33-36 and accompanying text.
153. Lemon, No. 82-2327 (D.C. Cir. Nov. 29, 1983), slip op. at 19-36.
154. Id. at 36.
155. Id.
This Comment, however, is concerned exclusively with the first amendment questions raised by the use of religious association as an aggravating factor in a criminal sentencing proceeding. Careful reading of the circuit court decision demonstrates that the court adopted the following holding: an individual may not be penalized for associating with members of a protected organization unless the organization has illegal aims and the individual intends to further those aims.\footnote{156}

Although prior case law has not directly addressed the issue of whether a convicted criminal may have his or her religious association considered as an aggravating factor at sentencing, the \textit{Communist Cases} and the \textit{Bail Cases} do highlight relevant principles of first amendment law and suggest appropriate concerns in structuring an analysis. In accordance with prior law, the proper analysis must balance the concerns of the first amendment with the interests of the criminal justice system. Furthermore, the general principles of criminal law dictate that a sentencing judge must consider the "fullest information" available regarding the defendant's life and characteristics in determining the length of incarceration.\footnote{157}

In accordance with the \textit{Communist Cases},\footnote{158} the framework for analysis of this issue should carefully distinguish between crimes that arise from a general illegal aim of an organization and crimes committed by members of an association as isolated incidents.\footnote{159} Thus, the inquiry should determine whether the individual's activity constitutes an associational aim and furthermore, whether the individual in question subscribes to that aim.\footnote{160}

The proper framework for analysis therefore must include three-tiers. Tier I would ask whether the association to which the defendant belongs has illegal goals.\footnote{161} Tier II would determine whether the crime the defendant committed constitutes one of the illegal goals of the association.\footnote{162} Finally, Tier III would apply the \textit{Scales} test to determine whether the defendant is an active member of the organization and committed the crime with the knowledge and specific intent of furthering the organization's illegal goals.\footnote{163} Under this analysis, a state may interfere with the defendant's freedom of association only if all three tiers are satisfied.\footnote{164}

\begin{footnotes}
\item[156] \textit{Id.} at 34-35.
\item[157] \textit{See supra} notes 14, 58-60.
\item[158] \textit{See supra} notes 87-127.
\item[159] \textit{See supra} notes 100-07 and accompanying text.
\item[160] \textit{See supra} notes 100-23 and accompanying text.
\item[161] \textit{See supra} notes 101-03 and accompanying text.
\item[162] \textit{See supra} notes 102-03 and accompanying text.
\item[163] \textit{See supra} notes 102-03 and accompanying text.
\item[164] \textit{See supra} notes 101-03 and accompanying text. The three-tiered analysis developed in this Comment may be applied equally to cases involving Black Hebrew association as
\end{footnotes}
Using its mixture of due process and first amendment analysis, the circuit court in *Lemon* derived a two-tiered constitutional framework. The court's framework looked first to whether the organization had legal or illegal goals. Assuming that the organization did have illegal goals, the court's framework then considered whether the particular individual's crime was committed with the knowledge of those illegal goals and an intent to further those goals.¹⁶⁵

The primary difference between the circuit court's framework and the analytic framework extrapolated from prior case law in this Comment is that the court failed to establish a middle tier for determining whether the crime the defendant committed constituted one of the illegal goals of the association. The court subsumed this issue within a discussion of the individual's intent to further the illegal goals of the organization.¹⁶⁶ Moreover, the court suggested that this issue was more properly a matter of due process analysis rather than first amendment analysis.¹⁶⁷ As the foregoing discussion has shown,¹⁶⁸ however, the issue is quite properly one of first amendment law. Thus, it merits a separate tier of analysis.

The court's framework also failed to specifically consider whether the defendant is an active member of the organization. As the previous discussion also has demonstrated,¹⁶⁹ this is a threshold inquiry in applying the *Scales* test of intent to further the illegal goals of the organization. Although the circuit court adopted the *Scales* test, it inexplicably omitted this key element of the analysis.

The final difference between the court's analysis and the framework extrapolated in this Comment is that the court recognized an exception to the *Scales* test. After declaring the general invulnerability of the first amendment freedom of association, the court then retreated from its position and stated that a defendant could be penalized for failing to cooperate with the government in turning over information about the individuals with whom he or she associates.¹⁷⁰ The court attempted to narrow this exception by

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¹⁶⁵ *Lemon*, No. 82-2327, slip op. at 34-35.
¹⁶⁶ *Id.* at 35-36.
¹⁶⁷ *Id.* at 35 n.53. "Although the first amendment does not require such a showing, the due process clause may." *Id.*
¹⁶⁸ See supra notes 44-47, 87-138, 152-64 and accompanying text.
¹⁶⁹ See supra notes 100-27, 158-64 and accompanying text.
¹⁷⁰ *Lemon*, No. 82-2327, slip op. at 36.
limiting the principle to cases in which the government has reliably demonstrated that the defendant had personal knowledge of the organization's illegal activities, and further emphasized that the government has a heavy burden to sustain in making this showing. Yet, it is evident that such an exception could consume the rule. For example, every time that the government desires to reap the benefits of "guilt by association," without overstepping the protection of the first amendment, the government could simply demand a defendant to reveal information about those with whom he or she associates and if the defendant fails to disclose the information, the government could request the judge to increase the defendant's sentence. In order to preserve the sanctity of the first amendment protections in this area, it is essential that the protections be absolute and that the court's exception be abandoned.

Having determined that the analysis developed in this Comment provides a more comprehensive framework than the circuit court's analysis, the next section will apply this more extensive framework to the facts of the *Lemon* case. The result of the three-tiered test will then be compared to the conclusion reached by the circuit court. The following section will also suggest the appropriate outcome of the resentencing hearing mandated by the circuit court.

171. *Id.* at 28-29, 36.
    
    Even this limited use of representations about the defendant's associations with a constitutionally protected group, in the absence of a reliable showing that he had the intent to further its illegal purposes, must withstand the heightened degree of scrutiny . . . necessary to insure that the defendant is not penalized for mere association with members of a religious group.

*Id.* at 36.

172. *Id.* at 36, 42.

173. It would seem that the circuit court in *Lemon* felt bound to create this exception because of the United States Supreme Court's decision in *Roberts v. United States*, 445 U.S. 552 (1980). In *Roberts*, the Court held that a sentencing judge may properly consider as an aggravating factor a defendant's failure to cooperate with a government investigation of a criminal conspiracy in which the defendant was a confessed participant. However, careful assessment of the *Roberts* decision reveals that it is unnecessary to read an exception into the first amendment analysis in order to preserve the *Roberts* holding. Unlike the defendant in *Lemon*, Roberts did not deny that he had information which would prove useful in the government investigation. In *Lemon*, however, not only did the defendant deny any knowledge of the Black Hebrew organization, but there was no reliable evidence to the contrary. *Lemon*, No. 82-2327, slip op. at 27, 40.
IV. PUTTING THE BLACK HEBREWS TO THE TEST: APPLICATION OF THE CONSTITUTIONAL CRITERIA TO THE FACTS OF THE LEMON CASE

A. Applying the Three-Tiered Test to the Current Factual Record

We begin the analysis by closely examining the nature and goals of the Black Hebrew organization. The Black Hebrews are an established religious organization.174 The Black Hebrew religion has existed since 1963,175 and worldwide membership in the religion is estimated between 15,000 and 100,000.176 The association has concrete religious beliefs founded in Biblical history177 and has specifically designated religious practices and holidays.178

Under Tier I of the framework for analysis, we must first consider whether the Black Hebrew religion has any illegal objectives.179 The government stressed that the following facts reflect the purported criminality of the sect: a number of individual Black Hebrews have committed crimes of fraud in the past;180 twenty-four members of the Black Hebrew religion are currently being sought by the FBI for their participation in fraudulent criminal activity;181 these fugitives are being harbored from justice by members of the Black Hebrew religion who have established houses throughout the United States where fugitives can receive food, clothing and shelter;182 and finally, according to the government, the twenty-four

174. See generally THE BLACK HEBREWS: AN ENGLISH SUMMARY OF THE SPECIAL COMMITTEE REPORT, Jerusalem (June 13, 1980) (Report on file with Catholic University Law Review) [hereinafter cited as Black Hebrew Report]. This document was prepared by a committee of the Knesset, the Israeli Parliament, to determine the immigration policy of the Israeli government toward members of the Black Hebrew religious sect. See generally Wash. Post, Nov. 15, 1983, at D1, col. 1. The Black Hebrews are not to be confused with the Black Jews of Ethiopia. The Ethiopian Jews, also known as the Falashas, have practiced their ancient, isolated form of Judaism for centuries. V. FERM, AN ENCYCLOPEDIA OF RELIGION, 271 (1945).

176. Id. at 3.
177. Id. at 3-5. The Black Hebrews believe they are descendants of the Ten Lost Tribes, a sect of ancient Hebrews who were exiled from Israel because of their sins. The group believes they have paid for their sins and now wish to return to Israel to establish a permanent homeland. Id.
178. Id. Members of the Black Hebrew sect choose hebrew names, follow a strict vegetarian diet, wear head coverings and prayer shawls, and circumcise their sons. They observe the Sabbath and celebrate the traditional High Holy Days with the exception of Hanukkah. In addition, the Black Hebrews have created their own holy day known as Kingdom Passover, which marks the beginning of their journey back to Israel. Id.
179. See infra text accompanying notes 101-03.
180. See infra text accompanying notes 19-20.
182. Id.
fugitives had committed fraudulent crimes specifically to benefit the Black Hebrew community. The central flaw in the government’s presentation, however, is that these facts, even when accepted as true, do not demonstrate that the Black Hebrews—as an organization—endorse criminal activity. They merely show that certain individual members of the Black Hebrew religion have committed crimes. The same could be said of members of almost any religion. The government simply failed to establish that crime represents a general goal of the Black Hebrew religion.

Let us assume for the moment, however, for purposes of this analysis, that the government had succeeded in satisfying Tier I. We would then proceed to Tier II and ask whether the defendant’s crime constitutes one of the association’s illegal goals. Only if the government could establish that crimes of fraud were an illegal goal of the Black Hebrews and that Lemon committed a crime of fraud to benefit the Black Hebrew religion, would the second tier of the analysis also be satisfied.

Clearly, Lemon committed a crime of fraud. The government asserted that this crime was intended to benefit the Black Hebrew organization. However, all of the available evidence indicates that Lemon committed his crime for personal gain. As the government itself acknowledged, Lemon spent the proceeds of the stolen check to purchase personal items. These items included clothing, shoes and stereo equipment. It is significant also that Lemon committed the crime only eight months after he lost the job he had held for ten years. Lemon explained to the court that his crime was motivated by financial need, and that he had been too proud to ask his family for assistance because of the high value they placed on professional achievement. Thus, the evidence indicated that Lemon’s criminal involvement was motivated by his financial status rather than his membership in the Black Hebrew religion.

Let us once again assume, for the sake of argument, that the government had satisfied its burden under Tier II. We would then continue to Tier III and ask whether the defendant is an active member of the association and determine whether he joined the association with the knowledge of its ille-

183. See supra notes 18-20 and accompanying text.
184. See supra text accompanying notes 102-03.
185. Id.
186. See supra notes 18-20 and accompanying text.
188. Id.
190. Id. at 9-13.
191. Id. at 11-13.
gal goals and with the specific intent to carry them out.\textsuperscript{192}

First, the government failed to establish that Lemon was an active member of the Black Hebrew religion. Given the limited information concerning Lemon's ties to the Black Hebrews, we may only conclude that Lemon associates with individual members of the Black Hebrews.\textsuperscript{193} Lemon's friendship with members of the sect does not demonstrate that he himself is a member of the religion.

Similarly, the government offered no evidence that Lemon had knowledge of the alleged criminal goals of the organization. The government also did not present any evidence that Lemon joined the organization with the specific intent to carry out illegal goals of the Black Hebrew religion. It is important to recognize that in this case, there was no direct relationship between the crime committed and the organization. As discussed earlier under Tier II, Lemon's crime of fraud was motivated by his personal need rather than by his membership in the Black Hebrew religion.\textsuperscript{194}

Thus, application of the three-tiered test produces the identical result as the one reached by the circuit court under its two-tiered approach: the sentence must be vacated and the case remanded for resentencing. The additional tier and the more extensive analysis simply provide additional constitutional support for this result.

\textbf{B. The Resentencing Hearing}

On remand the circuit court stated that the government will have an opportunity to produce new evidence of any illegal activities by the Black Hebrews, any participation by Lemon in such illegal activities, and any knowledge he might have about these activities even if he did not participate in them.\textsuperscript{195} At the resentencing hearing, the government can attempt to satisfy the three-tiered test and thereby overcome the first amendment protections that attach to the Black Hebrews and to Lemon's alleged association with the organization's members. But as the circuit court emphasized, the government must make a very substantial showing to overcome the "heightened degree of scrutiny" generated by the first amendment protections.\textsuperscript{196}

It appears very unlikely that the government will be able to produce any additional evidence to discredit the Black Hebrew organization. Despite more than a decade of government surveillance of this religious associa-

\textsuperscript{192} See supra notes 102-03 and accompanying text.
\textsuperscript{193} See supra note 15.
\textsuperscript{194} See supra notes 187-91 and accompanying text.
\textsuperscript{195} Lemon, No. 82-2327, slip op. at 40.
\textsuperscript{196} Id. at 36, 42.
tion, no government agency has as yet produced any credible evidence establishing that the organization as a whole subscribes to illegal goals.\textsuperscript{197} The evidence thus far has merely shown isolated criminal activities by some members of the organization.\textsuperscript{198} This evidence is simply insufficient to establish the criminality of the entire organization. Similarly, an in-depth study of Black Hebrews in Israel failed to provide any credible evidence to support allegations of crimes by the sect. Indeed, police statistics in Israel demonstrated that criminality among the Black Hebrew sect was less than among other Israeli citizens.\textsuperscript{199}

It cannot be anticipated whether the government will be able to uncover any new evidence of Lemon's participation in or knowledge of illegal activities by Black Hebrews. It might be speculated, however, that the reasons why the government relied on “guilt by association” in the original record in \textit{Lemon} was that there simply was no concrete evidence to support the government’s allegations. The resolution of this issue, however, will have to await the government's presentation at the resentencing hearing.

Although the government may have a legitimate interest in conducting the initial presentence inquiry into the defendant’s religious associations,\textsuperscript{200} this Comment has demonstrated that there are substantial limitations on how that information may be used. Under the appropriate constitutional analysis, the sentencing judge should determine whether the defendant’s crime arose from the illegal goals of the association to which he belongs.\textsuperscript{201} Only if the defendant is found to be an active member of the association and to have committed the crime in furtherance of the association’s illegal goals, may religious association be considered as an aggravating factor at sentencing.\textsuperscript{202}

\textbf{C. Appellate Review of Cases Involving Religious Association as an Aggravating Factor}

The \textit{Lemon} case presented a clear-cut factual situation for first amendment analysis, in that the only aggravating factor considered by the trial judge was constitutionally protected activity. In many other cases, however, appellate courts will be confronted by the more complex situation of a criminal sentence which may have been based partially on valid aggra-

\begin{itemize}
\item \textsuperscript{197} See generally Black Hebrew Report, \textit{supra} note 174, at 15-18.
\item \textsuperscript{198} See \textit{supra} notes 18-20, 179-83 and accompanying text.
\item \textsuperscript{199} Black Hebrew Report, \textit{supra} note 174, at 15-18.
\item \textsuperscript{200} See \textit{supra} notes 65-85 and accompanying text.
\item \textsuperscript{201} See \textit{supra} note 101-03 and accompanying text.
\item \textsuperscript{202} See \textit{supra} note 102-03 and accompanying text.
\end{itemize}
vating factors (such as a lengthy prior record or a particularly heinous present offense) and only partially on the defendant's constitutionally protected religious association. In these cases, the appellate courts will have to address an issue left unresolved by the Lemon decision: the ability of certain valid aggravating factors to sustain a sentence which is partially tainted by constitutionally invalid aggravating factors.

This issue is resolved, at least in the first amendment context, by the Supreme Court's decision in Stromberg v. California203 and its progeny.204

203. 283 U.S. 359 (1931). In Stromberg, a member of the Young Communist League was convicted of violating a statute which prohibited the public display of a red flag for any of three reasons. On appeal, the California Court of Appeals questioned the constitutional validity of the first clause of the statute. Nevertheless, the California Court of Appeals sustained Stromberg's conviction because the remaining clauses of the statute were constitutionally valid. The United States Supreme Court refused to support the state court's reasoning. The Supreme Court noted that Stromberg's conviction was based on a general jury verdict and there was no record to show under which clause her conviction had been obtained. The Court reasoned that since there was a danger that the jury may have found Stromberg guilty of violating the constitutionally invalid clause of the statute, the conviction of Stromberg could not stand. Id. at 368-70.

204. In Street v. New York, 394 U.S. 576 (1969), the defendant was convicted under a state statute of public desecration of the American flag. On appeal, Street's conviction was affirmed. Street then appealed to the United States Supreme Court on the ground that his conviction was unconstitutional because it was based solely or in part on his spoken words. The Supreme Court noted that Street was governed by the same principles as Stromberg. As in Stromberg, Street's conviction was based on a general verdict. In Street, however, the verdict was handed down by a judge, not a jury. The Supreme Court stated that under the general verdict it is impossible to ascertain whether Street's conviction was based solely on constitutional grounds. Moreover, the Court reasoned that there was a danger that the judge had considered both Street's spoken words and his act as "intertwined" when determining his guilt under the statute. Thus, the Court concluded that since Street's conviction may have been based on both constitutional and unconstitutional grounds, the judgment must be reversed. Id. at 588, 594.

In the recent Supreme Court decision of Zant v. Stephens, 103 S. Ct. 2733 (1983), the holdings of the Supreme Court in Stromberg and Street were limited to first amendment activity. A Georgia state court jury found Zant guilty of murder and imposed the death penalty. Prior to sentencing, the trial judge instructed the jury that in order to sentence respondent to death, they must find and identify in writing one or more statutory aggravating circumstances. The jury subsequently identified two aggravating circumstances in writing and imposed the death penalty.

While Zant's appeal was pending, the Georgia Supreme Court found in another case that one of the aggravating circumstances, on which Zant's sentence was based, was unconstitutionally vague. Nevertheless, the Georgia Supreme Court upheld the death penalty in respondent's case because the other aggravating circumstance supported the death penalty. 103 S. Ct. at 2750.

On appeal, the United States Supreme Court held that a death sentence that is supported by at least one valid aggravating circumstance need not be vacated because the second aggravating circumstance is invalid. Unlike Stromberg, the Court reasoned that the jury did not return a general verdict but indicated the specific aggravating circumstances on which it based its decision. The Court noted that under Georgia law, a jury needed only one valid
Under these decisions, any ambiguity in the source of the sentence must be resolved in favor of the defendant. Where a sentence may be based on both a constitutional and unconstitutional factor, it must be reversed to eliminate the possibility of an unconstitutional basis for decision.

V. Conclusion

This Comment has focused on the constitutional parameters of inquiring into a defendant’s religion on the presentence report and then using the defendant’s religious association as an aggravating factor at criminal sentencing. The discussion has shown that although the circuit court reached the correct result in Lemon, it failed to employ the proper constitutional analysis. The court in the Black Hebrew Cases inadvertently failed to make the initial determination of whether the government may inquire into the defendant’s religious association in the presentence report. In resolving this issue, this Comment has concluded that a narrow inquiry may satisfy the criminal justice system's legitimate goal of gathering information necessary to protect the health, safety and general welfare of the public. Assuming the inquiry is valid, the discussion developed a comprehensive three-tiered test for determining whether religious association can be considered an aggravating factor at criminal sentencing proceedings.

In many respects, it is surprising that these issues have never before been addressed by the courts. The lack of case law seems to reflect the universal recognition that a sentencing judge cannot apply a standard of “guilt by association.” It was not until the Black Hebrew Cases that a judge dared to penalize defendant’s for their choice of associates. The decisive action by the circuit court in Lemon served to reaffirm the sanctity of the fundamental principles embodied in the first amendment.

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aggravating circumstance to support the death penalty. Moreover, the Court distinguished the situation in Zant from Street in that the Zant jury sentence was based on two independent aggravating circumstances, while the Street jury verdict was based on a single count indictment where the defendant had engaged in both constitutionally protected and constitutionally unprotected conduct. In conclusion, the Supreme Court emphasized that there was no danger that the death penalty in Zant was based on an aggravating circumstance which involved protected first amendment activity. Thus, the death penalty in Zant could not be vacated on the grounds that it was inconsistent with the holdings in Stromberg and Street. Id. at 2746-50.

205. See supra notes 203-04.
206. See supra notes 203-04.