
DOIN' TIME IN GOD'S HOUSE: WHY FAITH-BASED REHABILITATION PROGRAMS VIOLATE THE ESTABLISHMENT CLAUSE

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I. INTRODUCTION

On December 24, 2003, the Governor of Florida, Jeb Bush, attended a special Christmas Mass at a state correctional facility about forty miles north of Gainesville, Florida.¹ More than just celebrating the Christian holiday with the prison's almost 800 inmates, Governor Bush was attending a milestone in modern American criminal rehabilitation.² He was there to dedicate the Lawtey Correctional Institution ("Lawtey") as the nation's first completely faith-based prison.³

The conversion of Lawtey to a faith-based format is one of the most recent examples of the growing political trend to allow more open participation of religious organizations in government supported and funded social welfare programs. This trend is in line with the much talked about charitable choice provision, which allows religious groups access to federal welfare funds without having to establish a secular service provider component.⁴ The provision also allows religious groups to incorporate their

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1. Brendan Farrington, *Gov. Bush Dedicates 1st Faith-Based Prison*, MIAMI HERALD, Dec. 25, 2003, at 7B, 2003 WLNR 6180173.

2. *See id.*

3. *Id.*

4. The Center for Public Justice, *Charitable Choice: A Guide to Charitable Choice: Questions and Answers*, at <http://www.cpjustice.org/charitablechoice/guide/qanda> (last visited Mar. 15, 2005).

religious message into social programs and to consider religion when hiring and disciplining employees.⁵

The vision of Lawtey is to infuse religious instruction into the rehabilitation process in an effort to ameliorate the deplorable rate of criminal recidivism that plagues Florida.⁶ Incorporating religion into prison life is certainly not a new idea. State facilities are required by law to make religious practice available to all inmates,⁷ and states have long supported inmate participation in twelve step groups, such as Alcoholics Anonymous and Narcotics Anonymous, which use religious principles in an attempt to rid inmates of addiction.

Lawtey, however, is representative of a drastic change that is currently taking place in state correctional facilities nationwide—the trend to not simply make religion available to prisoners, but to allow religious groups to take over the role of developing and executing the entire rehabilitation process. Recently in Texas, the Tarrant County Sheriff began a program called the Chaplain Education Unit, in which he operated a unit of cells dubbed the “God Pod” according to his strict evangelical beliefs, until the Texas Supreme Court shut it down in 2001.⁸ In 1997, the InnerChange Freedom Initiative (“IFI”) took over an entire wing of a prison in Texas, and has since spread to prisons in Minnesota, Kansas, and Iowa.⁹ Based on a strict Christian philosophy and aimed at the “spiritual and moral regeneration of prisoners,”¹⁰ IFI commandeers the entire rehabilitation process, combining educational and psychological programming with religious instruction and providing one-on-one mentoring and postrelease support.¹¹

This faith-based approach to penal rehabilitation has captured the attention and concern of various civil liberties groups, including the

The provision does, however, prevent groups from requiring religious participation from service beneficiaries and from using funds for worship services or proselytization purposes. *See id.*

5. *See id.*

6. *See Farrington, supra* note 1.

7. *See Cruz v. Beto*, 405 U.S. 319, 322 n.2 (1972).

8. *Williams v. Lara*, 52 S.W.3d 171 (Tex. 2001); Daniel Brook, *When God Goes to Prison*, LEGAL AFF., May–June, 2003, at 28–29, WL 2003-JUN LEGAFF 22.

9. Brook, *supra* note 8, at 24; The InnerChange Freedom Initiative, *About-IFI Program*, at <http://www.ifiprison.org/channelroot/home/aboutprogram.htm#About%20IFI> (last visited Mar. 15, 2005) [hereinafter *About-IFI Program*].

10. *About-IFI Program, supra* note 9.

11. *See* MICHAEL EISENBERG & BRITTANI TRUSTY, CRIMINAL JUSTICE POLICY COUNCIL, OVERVIEW OF THE INNERCHANGE FREEDOM INITIATIVE: THE FAITH-BASED PRISON PROGRAM WITHIN THE TEXAS DEPARTMENT OF CRIMINAL JUSTICE 5, 7, 8 (2002), available at <http://www.cjpc.state.tx.us/reports/alphalist/IFI.pdf>.

American Civil Liberties Union (“ACLU”), Americans United for Separation of Church and State (“Americans United”), and Americans for Religious Liberty.¹² These groups are concerned with the effect a state prison operating a completely religious penal program has on the Establishment Clause of the Constitution. As articulated by Americans United Director Barry Lynn, “[a] state can no more create a faith-based prison than it could set up faith-based public schools or a faith-based police department.”¹³

Yet programs such as these continue to operate and boast of impressive results.¹⁴ Lawtey has received the public support of Governor Bush,¹⁵ and supporters of IFI are hopeful that the program will receive support in the Supreme Court as well.¹⁶ This Note will consider the constitutionality of programs such as Lawtey by discussing what is known about the program and how courts have recently interpreted the Establishment Clause. Part II gives a factual background of the Lawtey prison and of IFI. Part III offers a brief history of Establishment Clause jurisprudence. Part IV analyzes the constitutionality of Lawtey and IFI. Part V explores how courts have dealt with the “God Pod” and other state-sponsored religious programs in the recent cases of *Williams v. Lara*¹⁷ and *Freedom from Religion Foundation v. McCallum*.¹⁸ Part VI concludes that, though it may be difficult to discern a definitive test for such constitutional issues, both Lawtey and IFI violate the Establishment Clause. Finally, this Note asks, when determining if a fundamental constitutional protection has been violated, should society allow encroachment on the Constitution in light of the clear success and benefits of the potentially threatening policy, in this case faith-based rehabilitation programs?

II. FACTUAL BACKGROUND

While similar in purpose and vision, Lawtey and IFI embody different structures and present different issues concerning the Establishment Clause.

12. See, e.g., Brook, *supra* note 8, at 28; Farrington, *supra* note 1; Joyce Howard Price, *Where Punishment Must Fit the Faith*, WASH. TIMES, Dec. 30, 2003, at A1, 2003 WLNR 762345.

13. Price, *supra* note 12.

14. Mark Earley & Jim Tonkowich, *The Story of InnerChange Freedom Initiative: From Crime and Punishment to Compassion and Productivity*, LIBERTY ONLINE, Sept.–Oct. 2003, at <http://www.libertymagazine.org/article/articleview/380/1/69> (last visited Mar. 15, 2005).

15. *Message from Governor Bush*, IN THE NEWS, Dec. 29, 2003, at <http://www.myflorida.com/myflorida/governoroffice/pdfs/itn20031229.pdf> (last visited Mar. 15, 2005).

16. See Brook, *supra* note 8, at 28–29.

17. *Williams v. Lara*, 52 S.W.3d 171 (Tex. 2001).

18. *Freedom from Religion Found. v. McCallum*, 324 F.3d 880 (7th Cir. 2003).

This Section will explain some of the details about each program as well as consider their sources of funding, who is developing their individual programming, and what arguments sponsors and opponents are making as to their usefulness and legality.

A. LAWTEY CORRECTIONAL INSTITUTION

After an initial barrage of press following its dedication as a completely faith-based rehabilitation center, officials in the Florida Department of Corrections have released very few specifics about the programming at Lawtey.¹⁹ What is known about the facility and the new program has come through press releases from the Governor's office and media coverage.²⁰

Lawtey is a medium security prison that has been in operation since 1977.²¹ Housing about 800 inmates, it is one of approximately 121 facilities operated by the Florida Department of Corrections.²² Near the end of 2003, inmates at Lawtey were informed that the prison was being converted to an all faith-based program and were given the option to transfer to another facility.²³ Approximately 100 prisoners did so.²⁴

At the same time, inmates at other Florida prisons were also informed of Lawtey's change and were given the opportunity to submit requests to transfer there.²⁵ Certain prerequisites apply: participants must be free of any disciplinary infractions for at least twelve months and must be approaching their release date.²⁶ On December 24, 2003 the program officially started with 791 inmates and 500 religious volunteers.²⁷

19. See, e.g., Alan Cooperman, *An Infusion of Religious Funds in Fla. Prisons, Church Outreach Seeks to Rehabilitate Inmates*, WASH. POST, Apr. 25, 2004, at A01; Farrington, *supra* note 1; Price, *supra* note 12.

20. See, e.g., Farrington, *supra* note 1; Jeff Brumley, *State to Have Faith-Based Prison*, TC-PALM.COM, Dec. 23, 2003 (on file with the *Southern California Law Review*); *Message From Governor Bush*, *supra* note 15.

21. See Fla. Dep't of Corr., *Lawtey Correctional Institution*, at <http://www.dc.state.fl.us/facilities/region2/255.html> (last visited Mar. 15, 2005).

22. Fla. Dep't of Corr., *Introduction to Information on Florida Correctional Facilities*, at <http://www.jc.state.fl.us/facilities/index.html> (last visited Mar. 15, 2005). The 121 facilities include prisons, work camps, work release centers, and road prisons. *Id.*

23. Farrington, *supra* note 1.

24. *Id.*

25. *Id.*

26. Cooperman, *supra* note 19; Price, *supra* note 12.

27. See Farrington, *supra* note 1.

Participation in the program is completely voluntary,²⁸ and, while religious, Lawtey is open to all faiths and creeds. According to Sterling Ivey, spokesperson for the Florida Department of Corrections, the almost 800 inmates represent at least twenty-six faiths and include Roman Catholics, Protestants, Jews, Muslims, Jehovah's Witnesses, Seventh-day Adventists, Mormons, Rastafarians, Buddhists, and followers of American Indian beliefs.²⁹

Religious belief is not a prerequisite to joining Lawtey³⁰ (eighty-eight inmates reported to have no religious affiliation);³¹ however, the program provides religious instruction seven days a week.³² Moreover, religion permeates into all aspects of the correctional programming, from job training to parenting skills to character building.³³ Inmates also have the opportunity to attend prayer groups, religious study groups, and choir practice.³⁴ Despite this intense religious programming, however, the atmosphere is one of tolerance, not fanaticism. As Paul Smith, a member of the Lawtey steering committee and program chaplain, said, "[I]t is our responsibility to honor every man's faith, to not proselytize anyone, to only share our own faith when asked . . . You can be in a faith-based dorm and you don't have to do anything but not disturb your fellow inmates."³⁵

Although it is unclear exactly who is developing the programming, it is financially supported by the efforts and funding of volunteers.³⁶ While the Lawtey facility remains within the Florida Department of Corrections, the state's Web site insists that no state funds are being expended for religious instruction.³⁷

During the dedication, the program was praised by Governor Jeb Bush, who stated that he and his brother, President George W. Bush, share the view that the best way to rehabilitate criminals is to "lead them to God."³⁸ Governor Bush announced he was proud that Florida was taking

28. *Id.*

29. Price, *supra* note 12.

30. See Jacqui Goddard, *Florida's New Approach to Inmate Reform: A 'Faith-Based' Prison*, CHRISTIAN SCI. MONITOR, Dec. 24, 2003, <http://www.csmonitor.com/2003/1224/01s04-usju.html> (last visited Mar. 15, 2005).

31. Price, *supra* note 12.

32. See Farrington, *supra* note 1.

33. Goddard, *supra* note 30; Price, *supra* note 12.

34. Price, *supra* note 12.

35. Brumley, *supra* note 20.

36. See Cooperman, *supra* note 19; Brumley, *supra* note 20.

37. Fla. Dep't of Corr., *supra* note 21; *Message from Governor Bush*, *supra* note 15.

38. Price, *supra* note 12.

such an innovative step in its efforts to reduce its thirty-eight percent criminal recidivism rate.³⁹

Other groups were not so excited by the change in Lawtey's format. Americans for Religious Liberty President Edd Doerr released a press statement asserting that the program was not only unconstitutional, but also bereft of any empirical evidence as to its advantages over secular programs.⁴⁰ Americans United has already threatened to file legal action, and has requested materials from Lawtey officials, including documents relating to the prison, contracts between the state and religious groups, and documents regarding the sources of the program's funding.⁴¹ The ACLU, which called the program one aspect of "a major constitutional showdown on the legality of [Governor Bush's] preference to replace government programs with religious programs,"⁴² stated that it would await the results of a test case challenging the use of school vouchers for parochial schools before deciding whether or not to take action against Lawtey.⁴³

The decision to reinvent Lawtey has also been questioned by the media. In an April 2004 article, the *Washington Post* revealed that, while the program is marketed as multi-faith, an overwhelming majority of volunteers, church sponsors, and religious leaders providing the instruction are Southern Baptists and other evangelical Christians.⁴⁴ Churches sponsoring dorms within the prison are required by the facility to make a \$10,000 donation for new equipment.⁴⁵ Beaches Chapel Church alone has donated over \$30,000, not including the cost of its volunteers' time, for amenities such as ceiling fans, sound systems, and food and candy.⁴⁶ All this in a state that recently cut daily expenses from \$40 to \$35 per prisoner and slashed the Department of Corrections' chaplaincy funding, firing thirteen chaplains and sixty support staff.⁴⁷ And while Lawtey does consist of members of various faiths, some non-Christians are complaining that, while open to everyone on paper, in practice the program is a "Christian

39. See Farrington, *supra* note 1.

40. Press Release, Americans for Religious Liberty, Jeb Bush's Faith-Based Prison Plan Panned, (Dec. 16, 2003) (on file with the *Southern California Law Review*).

41. Press Release, Americans United for Separation of Church and State, Americans United Files Request for Public Records on New 'Faith-Based' Prison in Florida (Jan. 12, 2004), at http://www.au.org/site/News2?abbr=pr&pg=NewsArticle&id=5977&news_iv_ctrl=1362.

42. Farrington, *supra* note 1.

43. See *id.*

44. Cooperman, *supra* note 19.

45. *Id.*

46. *Id.*

47. *Id.*

dictatorship.”⁴⁸ Muslim participants complain that they are provided too little instruction in their faith and too little access to Islamic clerics.⁴⁹ Christians, however, are offered a variety of options throughout the week.⁵⁰ Options like the Friday night Evangelism Explosion, a thirteen-week course on how to convert others to Christ, which culminated, the newspaper reports, in a pizza party for the participants.⁵¹

B. INNERCHANGE FREEDOM INITIATIVE

Working out of prisons in Texas, Minnesota, Kansas, and Iowa, IFI has enjoyed impressive, if not controversial, success over the past six years. It is a branch of Prison Fellowship, a Christian nonprofit organization dedicated to ministering to and providing religious services for prisoners.⁵² Chuck Colson, the founder of Prison Fellowship, who himself found religion while serving time on Watergate-related charges,⁵³ based IFI's program on a Brazilian program that has operated almost eighty prisons on a Christian format for over thirty years and boasts a recidivism rate of less than five percent.⁵⁴ Colson, eager to bring the program to the United States, enlisted the help of former Houston District Attorney Carol Vance and approached and eventually won the support of then-Governor of Texas, George W. Bush.⁵⁵

The concept is simple yet innovative: IFI answers the call of a state's Department of Corrections' need for volunteer support with a program that would, in fact, take the entire rehabilitation responsibility off the state's shoulders.⁵⁶ Occupying an entire wing of the prison,⁵⁷ IFI requires state funds for the security of the prison and the provision of necessities, such as food and clothing, for the prisoners.⁵⁸ IFI, with donated funds and volunteered manpower, designs and executes the programming regime.⁵⁹

48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.*

52. Prison Fellowship, *Frequently Asked Questions*, at <http://www.wsthelp.com> (last visited Mar. 15, 2005).

53. See Brook, *supra* note 8, at 24.

54. *About-IFI Program*, *supra* note 9.

55. Brook, *supra* note 8, at 26.

56. See The InnerChange Freedom Initiative, *About-FAQ's*, at <http://www.ifiprison.org/channelroot/home/aboutfaqs.htm> (last visited Mar. 15, 2005) [hereinafter *About-FAQ's*].

57. Brook, *supra* note 8, at 24.

58. See *About-IFI Program*, *supra* note 9.

59. See Brook, *supra* note 8, at 24, 26–27.

The program integrates Bible study into a methodology focused on instilling prisoners with such core values as personal integrity, fellowship, and responsibility for their crimes.⁶⁰ IFI provides vocational programming and helps inmates earn their GEDs and learn computer skills.⁶¹ With a network of community volunteers, IFI matches the inmates with mentors to support them during the first year of their release, often introducing them into their own church congregation and helping them secure jobs.⁶²

Participation in the program is completely voluntary.⁶³ Inmates who apply must be within eighteen to twenty-four months of their release date, must be healthy and literate, and must have no enemies in the program.⁶⁴ While Christian affiliation is not a prerequisite, inmates are advised that they are entering a program that is strictly and exclusively Christian.⁶⁵ Outside of the state's regulation or control, IFI is free to interpret and advocate the Christian faith as it sees fit.⁶⁶ While seemingly tolerant of participants with different religious beliefs—the program allows Muslim participants access to prayer groups and time to pray throughout the day⁶⁷—the curriculum is unequivocally based on evangelical Christianity. During one session in the Texas program, an instructor, giving a lesson on personal responsibility, adamantly asserted the crux of his lesson: “For those of you who are Muslim, Jesus is God. . . . I’m sorry if I’ve offended you, but Jesus is God.”⁶⁸

By taking over the entire wing of the facility, IFI hopes to implement an entirely new model of rehabilitation. Instead of the traditional therapeutic model, IFI advocates a transformational model to achieve its mission “to create and maintain a prison environment that fosters respect for God’s law and rights of others, and to encourage the spiritual and moral regeneration of prisoners.”⁶⁹ IFI believes that the way to keep released inmates from returning to crime is to have them undergo a “radical transformation from the inside out that is only possible through the miraculous power of God’s love.”⁷⁰ Instead of instructing inmates that

60. Early & Tonkovich, *supra* note 14.

61. Brook, *supra* note 8, at 27.

62. *See id.*

63. *About-FAQ's*, *supra* note 56.

64. *Id.*

65. *Id.*

66. *See* Brook, *supra* note 8, at 26.

67. *See id.* at 27.

68. *Id.* at 26.

69. *About-IFI Program*, *supra* note 9.

70. *Id.*

crime is an alienation from productive society and teaching them how to sublimate frustrations about family or financial situations, the transformational model attempts to turn inmates' lives over to God.⁷¹ Crimes are considered rooted in sin—an alienation from God—and it is through the reconnection with God that rehabilitation will occur through the instantaneous miracle of salvation.⁷² More than simply reacclimating an inmate into lawful society, the transformational model seeks to cure prisoners from crime by urging them to reject sin and to accept Jesus into their lives.⁷³

The instantaneous miracle of transformation is achieved through a curriculum that integrates Biblical study into all aspects of every course.⁷⁴ Inmates attend classes that are led by volunteers and IFI professionals.⁷⁵ These volunteers are screened by IFI officials to comport with its teaching—a process that includes a full record check and a signing of a statement of faith.⁷⁶ Books and guides are provided for meditation between classes and help explain the tenets of evangelical Christianity while warning inmates against the dangers of such “abomination[s] to God” as Ouija boards, Dungeons and Dragons board games, and daily horoscopes.⁷⁷

IFI's goal is not to simply reduce the probability that these inmates will return to crime upon release, but to send them into society a changed person. While acknowledging that the primary goal of the state in implementing these programs is a reduction in recidivism rates, IFI states that its principle objective is “a fundamental shift of value and worldview as an essential step of long-term behavioral change” of former convicts.⁷⁸

While it is still too early to glean any evidence as to its long-term success, the program is producing impressive results. Violence within the program is rare and inmates are frequently found to be supportive of each other.⁷⁹ Early reports suggest that inmates who have graduated from IFI's program are half as likely to be rearrested as those released from traditional state-run programs.⁸⁰ This is encouraging news for politicians who are

71. *See id.*

72. *See id.*

73. *See id.*

74. *See id.*

75. *About-FAQ's*, *supra* note 56.

76. *Id.*

77. Brook, *supra* note 8, at 26.

78. *About-FAQ's*, *supra* note 56.

79. *See* Brook, *supra* note 8, at 27–28.

80. This percentage includes only participants who have graduated from the program—defined by IFI as having completed at least sixteen months of programming and six months of aftercare,

dismayed by what the Bureau of Justice reports to be a nearly sixty-eight percent rate of recidivism within three years in fifteen states surveyed.⁸¹

It is yet to be shown, however, exactly how much of IFI's success can be directly attributed to its faith-based approach.⁸² While early reports are encouraging, it is clear that the test group is benefiting from a prison environment that is not exactly comparable to that of state-run facilities. What this means is that when looking at the success rate of a group that includes only literate, nonviolent, healthy individuals isolated from their possible enemies, it is not surprising that they have fared well. Add to that the fact that due to the influx of volunteers that want to contribute to the program, IFI is able to provide each inmate with one-on-one mentoring, both during and after incarceration. More individualized attention leads to better chances at learning the material and succeeding on the GED test. More donated computers and volunteer instructors mean availability for any interested inmate to get Microsoft certified—a program that, while offered in state-run institutions, often has a waiting list that it is nearly impossible to get off.⁸³ Finally, more postrelease attention means that inmates are more likely to secure jobs quickly and find support systems through local church communities.

Moreover, with success comes perks. In its Texas program, IFI officials recently allowed inmates to attend a Christmas party and invited the inmates' children to join the party and open presents with their fathers.⁸⁴ This is a luxury not found in other Texas penitentiaries, where

employed and an active member of a church for the prior three months, and maintained association with an IFI mentor. Graduates make up only forty-two percent (seventy-five offenders) of the total 177 participants of the program since 1997. When considering all 177 offenders, including the fifty-four who completed the programming but failed to complete the aftercare or secure a job, the recidivism rate after two years was slightly higher than that of comparison groups. BRITTANI TRUSTY & MICHAEL EISENBERG, CRIMINAL JUSTICE POLICY COUNCIL, INITIAL PROCESS AND OUTCOME EVALUATION OF THE INNERCHANGE FREEDOM INITIATIVE: THE FAITH-BASED PRISON PROGRAM IN TDCJ (2003), <http://www.cjpc.state.tx.us/Reports/Alphalist/IFIInitiative.pdf>.

81. Brook, *supra* note 8, at 24.

82.

An immediate criticism of Colson's program is that it accepts only those candidates most likely to succeed. First, participants are selected based in part on their willingness to join a religious program. Second, the definition of graduate—someone who completes the in-prison phase, gets a job, and goes to church for several months after release—seems too narrow. Mark Kleiman, who teaches public policy at UCLA, sees only a failed program at work. Writing in *Slate*, he accuses the ministry of "counting the winners and ignoring the losers."

Joseph Loconte, *Faith Healing*, at <http://www.heritage.org/About/Staff/loader.cfm?url=/commonspot/security/getfile.cfm&PageID=68005> (last visited Mar. 15, 2005).

83. Brook, *supra* note 8, at 27.

84. *Id.*

the congregation of inmates and the presence of children would present too high a risk of riot and hostage taking.⁸⁵

Predictably, the success and attractive environment of IFI has made it a popular option among inmates. While the program continues to have strong application numbers, it is difficult to parse out who is interested in religious enlightenment and who just wants to get out of the violence-ridden state system.⁸⁶ Critics claim that in states like Texas, which reports over 600 incidents of inmate-on-inmate violence a year, providing a safe environment in exchange for participating in religious programming is essentially state coercion.⁸⁷

While a legal challenge has been filed against the program in Iowa,⁸⁸ IFI officials seem to be undeterred. IFI may soon expand its program in Texas and implement its first facility for female inmates.⁸⁹ The program's fate, ultimately to be determined by the court system, is heavily dependent on continued favorable statistics and a changing judicial viewpoint of religious groups' role within the confines of the First Amendment.

III. CONSTITUTIONAL HISTORY

In a country founded on both a Puritan heritage and the ideals of individual liberties, Americans have long struggled to find a balance between uninhibited religious expression and secular government. The basic framework, which is both sharply precise and frustratingly broad, is contained in the words of the First Amendment of the Constitution: "Congress shall make no law respecting an establishment of religion, or

85. *Id.*

86. *See id.* at 28.

87. *Id.*

88. Associated Press, *Group Sues Iowa over Religious Prison Program* (Feb. 2, 2003), at http://firstamendmentcenter.org/rel_liberty/publiclife/news.aspx?id=6309. Americans United filed a lawsuit against IFI and Iowa prison officials in U.S. District Court in Des Moines in February 2003. *Id.* The advocacy group alleges that state officials "use profits from inmates' telephone accounts and proceeds from the state's tobacco settlement" to fund the program and that ninety-nine percent of the program's total revenues are derived from state funding from Iowa and Kansas. *Id.* While this creates additional concern over the constitutionality of IFI, the alleged funding of the Iowa program is not the focus of this Note. This Note instead argues that IFI's program is constitutionally impermissible regardless of direct state funding.

89. Brook, *supra* note 8, at 24. The fact that IFI's program is presently for men only causes additional constitutional concern apart from the Establishment Clause issue. By offering men a uniquely beneficial rehabilitation option that is not available for women, states that implement the program face equal protection claims. While acknowledging the importance and interest of this issue, the equal protection argument is outside of the scope of this Note.

prohibiting the free exercise thereof.”⁹⁰ This provision, which is imputed to state governments through the Fourteenth Amendment,⁹¹ traditionally has been split into two clauses, the Establishment Clause and the Free Exercise Clause, and thought to represent two separate guarantees.⁹² The Establishment Clause is a restriction on government that prevents the founding of a state or national religion, the endorsement of any one religion over another, and the preference of religion over secularism.⁹³ The Free Exercise Clause is a guarantee of the people’s right to practice any religion they choose without governmental interference or consequence.⁹⁴ While both clauses are equally important, this Note will focus only on the Establishment Clause and how it is affected by the creation of faith-based rehabilitation programs in state-run prisons.

A. THE MOVEMENT FROM STRICT SEPARATION TO RELIGIOUS NEUTRALITY

While it has always been maintained that, at a minimum, the Establishment Clause prohibits the creation of a national religion,⁹⁵ there is debate over how close is too close in the relationship between church and state. While the debate is far from decided, the U.S. Supreme Court, over the past fifty years, has shifted in its interpretation of the Establishment Clause from a strict separation theory to one of neutrality toward religion.⁹⁶

In 1947, the Court in *Everson v. Board of Education*—the first modern case dealing with this issue—announced a high bar for government aid to religion.⁹⁷ The case considered the constitutionality of a state statute that provided public funds to parents for expenses incurred by busing their

90. U.S. CONST. amend. I.

91. *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940).

92. *See, e.g.*, ERWIN CHERMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 1140–41 (2d ed. 2002).

93. *See id.* at 1140, 1157–63.

94. *See id.* at 1200.

95. *See* County of Allegheny v. ACLU, 492 U.S. 573, 590 (1989) (“[T]his Court has come to understand the Establishment Clause to mean that government may not promote or affiliate itself with any religious doctrine or organization.”); *Sch. Dist. of Abington v. Schempp*, 374 U.S. 203, 216 (1963) (“[T]his Court has rejected unequivocally the contention that the Establishment Clause forbids only government preference of one religion over another.”); *Everson v. Bd. of Educ.*, 330 U.S. 1, 15 (1947) (“Neither a state nor the Federal Government can set up a church.”).

96. Some cases exemplifying this transition include *Rosenberger v. Rector & Visitors of the University of Virginia*, 515 U.S. 819 (1995); *Allegheny*, 492 U.S. 573; *Everson*, 330 U.S. 1. *See also* CHERMERINSKY, *supra* note 92, at 1149–56.

97. *Everson*, 330 U.S. at 15–18.

children to parochial as well as public schools.⁹⁸ In analyzing the history of the Establishment Clause, the Court recognized that the Drafters believed that religious liberty is best protected by a government that is unable to become involved with religion in any meaningful way.⁹⁹

While the Court eventually upheld the statute on grounds¹⁰⁰ more in line with the neutrality theory of later years, the case has maintained its position as the stalwart expression of strict separation because of the strong rhetoric of its dicta that

[n]either a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called.¹⁰¹

In his famous allusion to the words of Thomas Jefferson,¹⁰² Justice Black wrote for the majority, “[t]he First Amendment has erected a wall between church and state. That wall must be kept high and impregnable.”¹⁰³

This wall of separation was seen as crucial to protect both personal liberty and religious integrity.¹⁰⁴ By preventing the governmental endorsement of a religion, the Constitution ensures to religious minorities the opportunity to maintain their beliefs without fear of persecution or exclusion by the government.¹⁰⁵ Also, by limiting the relationship between government and religion, the Constitution helps to prevent the politicization of religion and the potential corruption that comes with aligning with the political machine.¹⁰⁶ In an effort to protect both the political and religious spheres from the influence of the other, the First

98. *Id.* at 3–4.

99. *See id.* at 11, 13.

100. Criticized by the dissent for encouraging the very entanglement it claimed to prohibit, the *Everson* opinion is seemingly paradoxical in its holding. While extrapolating for a considerable length about the firm boundaries set by the Establishment Clause, the decision is eventually reached by weighing its restrictions against the guarantee of the Free Exercise Clause. The Court found that the state was doing nothing more than providing accommodation for education and that restricting the bus program to only public schools would be a hindrance on the parent’s right to choose a religious education for their children. *See id.* at 8–18.

101. *Id.* at 15–16.

102. *See Reynolds v. United States*, 98 U.S. 145, 164 (1878).

103. *Everson*, 330 U.S. at 18.

104. *See Marsh v. Chambers*, 463 U.S. 783, 802–06 (1983) (Brennan, J., dissenting).

105. *Id.* at 803–05 (Brennan, J., dissenting).

106. *See id.* at 803–04 (Brennan, J., dissenting).

Amendment was viewed as taking “every form of propagation of religion out of the realm of things which could directly or indirectly be made public business.”¹⁰⁷

In recent years, the Court has taken a less formalistic approach to the demands of the Establishment Clause. It has acknowledged that complete separation is not a realistic possibility in a country so deeply rooted in religious tradition.¹⁰⁸ A few Justices have also argued that this tradition, and our history as a religious people, has etched out a justified and prevalent role for religion in the lives of Americans that the government must accommodate.¹⁰⁹ The current Court has therefore replaced the strict separation approach with one that attempts to treat religious groups in a neutral, and therefore equal, manner with nonreligious groups. While still wary of the dangers of intertwining government and religion, the Court has announced that the Constitution “affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any.”¹¹⁰ The goal is to prevent a group’s religious affiliation from becoming a stumbling block that prevents it from receiving otherwise entitled governmental support.¹¹¹ While the neutrality approach has allowed the Court to stray from strict formalism in order to consider the specific merits of each contested activity, it has led to a series of vague and somewhat unworkable guidelines, discussed below, by which courts are to abide.

B. THE *LEMON* TEST AND OTHER FACTORS

In 1971, the Court in *Lemon v. Kurtzman* announced a three-prong test to determine if state aid to religion violates the Establishment Clause.¹¹² In overturning two state statutes that subsidized the salaries of private and parochial school teachers, the Court held that in order for a government action to survive constitutional analysis (1) it “must have a secular legislative purpose, [(2)] its principle or primary effect must be one that neither advances nor inhibits religion, [and (3) it] must not foster ‘an excessive government entanglement with religion.’”¹¹³

107. *Everson*, 330 U.S. at 26 (Jackson, J., dissenting).

108. *Lemon v. Kurtzman*, 403 U.S. 602, 614 (1971).

109. *See, e.g., Lee v. Weisman*, 505 U.S. 577, 631–33 (1992) (Scalia, J., dissenting).

110. *Lynch v. Donnelly*, 465 U.S. 668, 673 (1984).

111. *See Everson*, 330 U.S. at 16 (acknowledging that if the state extends public services to nonpublic school students, it cannot deny the services to parochial school students solely because of their religious affiliations).

112. *Lemon*, 403 U.S. at 612–13 (1971).

113. *Id.* (internal citation omitted) (quoting *Walz v. Tax Comm’n*, 397 U.S. 664, 674 (1970)).

While subsequent Courts never proclaimed the *Lemon* test to be the bright-line rule in Establishment Clause cases, they have used the *Lemon* analysis as their main guideline.¹¹⁴ The test, however, has fallen out of favor in recent years.¹¹⁵ Criticized for not adequately addressing the concerns of the First Amendment,¹¹⁶ the Court has claimed that the test is “no more than [a] helpful [signpost]’ in dealing with Establishment Clause challenges.”¹¹⁷ Although never overruling the test, the Justices have recently made only brief references to¹¹⁸ or ignored it completely before addressing other concerns.¹¹⁹ In calling for its demise, Justice Scalia compared the test to a

ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried.

It is there to scare us . . . when we wish it to do so, but we can command it to return to the tomb at will. When we wish to strike down a practice it forbids, we invoke it; when we wish to uphold a practice it forbids, we ignore it entirely.¹²⁰

While it has yet to articulate a clear and definitive replacement to *Lemon*, the Court has expressed frustration with the test as a whole and disagreement as to the relevance of its individual elements. The first prong, the requirement of a secular governmental purpose, has been strongly criticized by Justices Rehnquist and Scalia.¹²¹ They argue that the requirement has no basis in the history of the First Amendment and that it is impossible and unhelpful to attempt to isolate one discernable purpose of any action.¹²² Recent case law, however, has shown that the inquiry, no

114. See, e.g., *Bowen v. Kendrick*, 487 U.S. 589, 602 (1988); *Lynch*, 465 U.S. at 679.

115. See, e.g., *Lee v. Weisman*, 505 U.S. 577, 644 (1992) (Scalia, J., dissenting); *County of Allegheny v. ACLU*, 492 U.S. 573, 655–57 (1989) (Kennedy, J., concurring in part and dissenting in part); *Wallace v. Jaffree*, 472 U.S. 38, 108–12 (1985) (Rehnquist, J., dissenting).

116. See *Lynch*, 465 U.S. at 688–89 (O’Connor, J., concurring) (“It has never been entirely clear, however, how the three parts of the [*Lemon*] test relate to the principles enshrined in the Establishment Clause.”).

117. *Mueller v. Allen*, 463 U.S. 388, 394 (1983) (alterations in original) (quoting *Hunt v. McNair*, 413 U.S. 734, 741 (1973)).

118. See, e.g., *Allegheny*, 492 U.S. at 592 (mentioning *Lemon*’s role in prior Establishment Clause cases before proceeding to decide the case under an endorsement rationale).

119. See, e.g., *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98 (2001) (deciding an Establishment Clause issue without reference to *Lemon*); *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819 (1995) (same).

120. *Lamb’s Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 398–99 (1993) (Scalia, J., concurring in judgment) (internal citations omitted).

121. CHEMERINSKY, *supra* note 92, at 1160.

122. *Edwards v. Aguillard*, 482 U.S. 578, 636–38 (1987) (Scalia, J., dissenting); *Wallace v. Jaffree*, 472 U.S. 38, 108–12 (1985) (Rehnquist, J., dissenting).

matter how difficult, is still important to the Court.¹²³ Consideration of government intent is also consistent with other forms of constitutional analysis, such as cases dealing with racial or gender discrimination.¹²⁴

Lemon's third prong, the prohibition against excessive entanglement, is best illustrated by cases involving state aid to education. For example, when determining the constitutionality of a state's direct subsidization of secular programs within parochial schools, the Court has carefully considered this prong when recognizing the potentially uncomfortable relationship that arises from the state's continued supervision of the school's allocation and use of its funds.¹²⁵ Unfortunately, in other contexts, it has been more difficult to ascertain what characteristics indicate excessive entanglement, and the Court often reaches its conclusions without detailed explanation.¹²⁶ Finally, in the 1997 case *Agostini v. Felton*, which addressed the constitutionality of the City of New York's congressionally mandated program that sent "public school teachers into parochial schools to provide remedial education to disadvantaged children,"¹²⁷ the Court effectively overruled *Lemon's* separate excessive entanglement analysis. It did so by holding that excessive entanglement is to be treated "as an aspect of the inquiry into a statute's effect," which is analyzed under *Lemon's* second prong.¹²⁸ While *Agostini* has set a new standard for cases dealing with state aid to education, it is unclear whether the Court intends to extend the analysis to other types of Establishment Clause challenges.

The second prong of the *Lemon* test—that the action's effect neither promote nor inhibit religion—continues to be the crux of the analysis and the main focus of the Court's attention. In its reworking of *Lemon*, the *Agostini* Court announced that a state action has an impermissible effect if it (1) "results in governmental indoctrination, [(2)] defines [the aid's] recipients by religion, and [(3)] results in the excessive entanglement of

123. See *Mitchell v. Helms*, 530 U.S. 793, 807–08 (2000) (acknowledging that the secular purpose prong, though unchallenged here, is still important); *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 308–09 (2000) (evaluating whether the challenged law had a secular purpose without directly invoking the *Lemon* test).

124. CHEMERINSKY, *supra* note 92, at 1161.

125. See *Lemon v. Kurtzman*, 403 U.S. 602, 620–21 (1971).

126. See, e.g., *Bowen v. Kendrick*, 487 U.S. 589, 616–17 (1988) (mentioning that excessive entanglement must be considered, then, without explanation, holding that although the policy does require government supervision of a religious group, the supervision does not amount to excessive entanglement).

127. *Agostini v. Felton*, 521 U.S. 203, 208 (1997).

128. See *id.* at 232–33.

church and state.”¹²⁹ It is unclear how the second prong of the *Lemon* test is to be applied outside of the context of government aid to schools, since the Court has yet to apply *Agostini* to other Establishment Clause cases. What is left is the simple assurance that *Lemon* cannot be relied on to produce a predictable and dependable decision from the current Court. Instead, what is found in the case law is a procession of opinions in which different Justices attempt to extract from *Lemon* the principle that articulates the concern over government’s relationship with religion.¹³⁰ Three major visions of that principle—the endorsement, coercion, and accommodation rationales—emerge, each offering an understanding of the role and limits of the Establishment Clause.

1. Endorsement

In her 1984 concurring opinion in *Lynch v. Donnelly*, Justice O’Connor wrote for the first time of the endorsement principle.¹³¹ She warned that, in addition to forbidding the establishment of an official religion, the First Amendment also prohibits governmental endorsement of any one religion or of religion in general.¹³² This prohibition prevents government from taking any position that would “mak[e] adherence to a religion relevant in any way to a person’s standing in the political community.”¹³³ For, as she wrote in a subsequent opinion, “government cannot endorse the religious practices and beliefs of some citizens without sending a clear message to nonadherents that they are outsiders or less than full members of the political community.”¹³⁴ In order to determine endorsement, courts must identify, on a case-by-case basis, what message the government intended by its action and what message was actually conveyed.¹³⁵

O’Connor agreed with the *Lynch* majority that a town’s Christmas display, which included a crèche and other traditional figures, did not amount to an Establishment Clause violation.¹³⁶ Instead of relying on *Lemon*, however, O’Connor considered whether the display was an

129. *Id.* at 234.

130. *See, e.g.,* Mitchell v. Helms, 530 U.S. 793 (2000); Lee v. Weisman, 505 U.S. 577 (1992); County of Allegheny v. ACLU, 492 U.S. 573 (1989).

131. *Lynch v. Donnelly*, 465 U.S. 668, 687–94 (1984) (O’Connor, J., concurring).

132. *Id.* at 688 (O’Connor, J., concurring).

133. *Id.* at 687 (O’Connor, J., concurring).

134. *Allegheny*, 492 U.S. at 627 (1989) (O’Connor, J., concurring).

135. *Lynch*, 465 U.S. at 690 (O’Connor, J., concurring).

136. *Id.* at 693, 694 (O’Connor, J., concurring).

endorsement of the holiday's religious message.¹³⁷ She found that the holiday setting and the inclusion of traditionally secular Christmas figures—such as reindeer, a Christmas tree, and Santa's sleigh—negated the effect of any religious endorsement and instead conveyed the secular message of the observance of a nationally celebrated holiday.¹³⁸ By asserting a secular message of celebration in a manner that could not be reasonably interpreted as promoting a religious message, the government in *Lynch* was not endorsing a faith in any way that would alienate nonbelievers. This factor indicates compliance with the Establishment Clause.

2. Coercion

Discussing a similar point, Justice Kennedy writes frequently on the problem of coercion.¹³⁹ While acknowledging the cultural and traditional importance of religion in American society, he asserted in *Lee v. Weisman* that “[i]t is beyond dispute that, at a minimum, the Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise.”¹⁴⁰ Writing for the majority, Kennedy invalidated a school board's policy of inviting a clergyman to high school and middle school graduations to begin the ceremonies with benedictions.¹⁴¹ Although attendance at graduation was optional and the brief introductory benediction was the only religious aspect of the ceremony, Kennedy wrote that the threat of having to forfeit the cultural milestone of graduation or be subjected to a “religious conformance compelled by the State” was inconsistent with the First Amendment.¹⁴² The dissent criticized the scope of the argument, claiming that it was hardly coercive for the school to expect attendants to simply sit quietly through a momentary and nondenominational blessing.¹⁴³ Kennedy nevertheless defended his reasoning by declaring the Establishment Clause to be a “lesson that in the hands of government what might begin as tolerant expression of religious views may end in a policy to indoctrinate and coerce.”¹⁴⁴

137. *See id.* at 692 (O'Connor, J., concurring).

138. *Id.*

139. *E.g.*, *Lee v. Weisman*, 505 U.S. 577, 586–99 (1992); *Allegheny*, 492 U.S. at 659–63 (Kennedy, J., concurring in judgment in part, dissenting in part).

140. *Lee*, 505 U.S. at 587.

141. *Id.* at 580, 584–86.

142. *Id.* at 595–96.

143. *Id.* at 637 (Scalia, J., dissenting).

144. *Id.* at 591–92.

3. Accommodation

The accommodation principle most closely adheres to the neutrality approach by holding that the government does not violate the Establishment Clause as long as it is blind in its treatment of religious and nonreligious groups.¹⁴⁵ In the illustrative 1995 case, *Rosenberger v. Rector & Visitors of the University of Virginia*, the Court used the accommodation principle to require a public university to reimburse a student-run religious newspaper according to the same subsidization plan it extended to secular publications.¹⁴⁶ Since the purpose of the paper was to encourage discussion on a range of topics—a purpose it shared with the secular papers—the university was unable to discriminate against it based on its religious content.¹⁴⁷ Against arguments that such reimbursement would produce a governmental benefit to religion, the Court chose to consider the “nature of the benefit received by the recipient” rather than “focusing on the money that is undoubtedly expended by the government.”¹⁴⁸ Since the university’s support of the paper did not extend past its secular policy of reimbursing printing costs to student publications in order to facilitate student expression and public debate, “[a]ny benefit to religion [was] incidental to the government’s provision of secular services for secular purposes on a religion-neutral basis.”¹⁴⁹

Accommodation also plays a special role in the context of the criminal justice system. In order to fully protect every individual’s right to freely exercise the religion of their choosing, the government must sometimes take assertive steps to provide access to and materials for religious services.¹⁵⁰ This is the case when, as with prisons and the military, the government necessarily controls and restricts an individual’s freedom and exposure to society. As Judge Posner explained,

[p]atients in public hospitals, members of the armed forces in some circumstances . . . and prisoners[] have restricted or even no access to religious services unless government takes an active role in supplying those services. That role is not an interference with, but a precondition of, the free (or relatively free) exercise of religion The religious

145. See *Mitchell v. Helms*, 530 U.S. 793, 809–10 (2000) (“[I]f the government . . . offers aid on the same terms, without regard to religion, to all who adequately further that purpose, then it is fair to say that any aid going to a religious recipient only has the effect of furthering that secular purpose.”) (internal citation omitted).

146. *Rosenberg v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819 (1995).

147. See *id.* at 840.

148. *Id.* at 843.

149. *Id.* at 843–44.

150. *Johnson-Bey v. Lane*, 863 F.2d 1308, 1312 (7th Cir. 1988).

establishments that result are . . . indeed required by[] the overall purpose of the First Amendment's religion clauses.¹⁵¹

Courts have ruled that prison inmates retain all constitutional rights not inconsistent with incarceration.¹⁵² Since state and federal governments confine prisoners and control their exposure to outside influences, they have an active duty to make reasonable allowances for religious services within prisons.¹⁵³ These include the employment and provision of a chaplaincy system at the expense of the state.¹⁵⁴ As with the military, government funds for the access and materials required for religious practice in prison are not only allowed, but also required by the First Amendment.¹⁵⁵

C. CONCLUSION

What is left in the wake of *Lemon* is a string of cases that rely on different considerations and can be somewhat difficult to synthesize into one overarching principle.

For example, in 1989, the plurality in *County of Allegheny v. ACLU* asserted that the endorsement principle "provides a sound analytical framework" for determining the effect of governmental use of religious symbols.¹⁵⁶ Concurring with that decision, Justice O'Connor warned that a standard that prohibits only coercion is dangerously inadequate.¹⁵⁷ In his dissent, however, Justice Kennedy suggested that the governmental establishment of religion is impossible without some level of coercion and that "[a]bsent coercion, the risk of infringement of religious liberty by passive or symbolic accommodation is minimal."¹⁵⁸ He also criticized the endorsement principle for failing to account for the legality of historical endorsements, such as opening legislative sessions with prayer or printing "In God We Trust" on currency, without creating "artificial exceptions" to the rule.¹⁵⁹

151. *Id.*

152. *Hudson v. Palmer*, 468 U.S. 517, 523 (1984).

153. *Cruz v. Beto*, 405 U.S. 319, 322 n.2 (1972).

154. *Duffy v. Cal. State Pers. Bd.*, 232 Cal. App. 3d 1, 11, 19 (Ct. App. 1991). *See Katcoff v. Marsh*, 755 F.2d 223, 232 (2d Cir. 1985) (upholding Army chaplainry despite its violations of the *Lemon* test).

155. *Johnson-Bey*, 863 F.2d at 1312.

156. *County of Allegheny v. ACLU*, 492 U.S. 573, 595 (1989).

157. *Id.* at 627-28 (O'Connor, J., concurring).

158. *See id.* at 659, 662. (Kennedy, J., dissenting in part).

159. *Id.* at 669-73 (Kennedy, J., dissenting in part).

The plurality in *Mitchell v. Helms*, however, made a radical assertion that, at least in the case of aid to education, all that is required is a showing of neutrality.¹⁶⁰ Justice Thomas wrote, “[I]f the government, seeking to further some legitimate secular purpose, offers aid on the same terms, without regard to religion, to all who adequately further that purpose, then it is fair to say that any aid going to a religious recipient only has the effect of furthering that secular purpose.”¹⁶¹ Justice Souter, in his dissent, accused the plurality of attempting to redefine the constitutional analysis¹⁶² and incorrectly equating neutrality of support with evenhandedness of aid.¹⁶³

With such uncertainty in the current jurisprudence, the best we can do is to attempt to consider all of the above-mentioned factors. While the Supreme Court has yet to consider the constitutionality of programs such as Lawtey or IFI, case law has provided a range of parameters with which to analyze them. The remainder of this Note will analyze these programs according to the principles that seem to be the most relevant to the current Court: endorsement, coercion, and accommodation, with a brief mention to secular purpose. While it is not at all clear how the Justices of the current Court would rule, the programs raise certain issues that appear problematic with regard to all of the above considerations and should be considered both by state legislatures and the judicial system.

IV. CONSTITUTIONAL ANALYSIS

A. STATE ACTION

As with any question of constitutional law, we must first consider whether an ascertainable state action exists. The Constitution only governs acts by state and federal governments; private action is outside of the Constitution's authority.¹⁶⁴ Supporters of IFI assert that the program is separated enough from states' correctional departments that the activities of

160. *Mitchell v. Helms*, 530 U.S. 793, 809 (2000).

161. *Id.* at 810 (internal citation omitted).

162. *See id.* at 869 (Souter, J., dissenting).

163. *Id.* at 877–78 (Souter, J., dissenting). Souter argues that neutrality, as originally used in *Everson*, referred to the government's equal treatment of both religious and nonreligious entities vis-à-vis its obligation to provide universal public benefits—for example, police and fire protection. *Id.* This is fundamentally different from the plurality's assertion that government, in its allocation of supplementary and nonessential aid, must offer support to religious groups to the same extent as to secular ones.

164. CHEMERINSKY, *supra* note 92, at 486.

IFI's program cannot be considered state action.¹⁶⁵ The state only contributes to the program what it would contribute to any other prison—namely the cost of providing administration and security for the facility and food and clothing for the inmates. States do not participate in the development or execution of the religious curriculum, which is provided completely by the nonprofit parent group, Prison Fellowship, and by donation and volunteer support by private individuals.

Supporters claim that the state is working within its rights by contracting out to any group that can provide an effective method for reducing recidivism;¹⁶⁶ in the case of IFI, the group chosen just happens to employ a religious methodology. Allowing religious groups to participate in the contract bidding and in inmate rehabilitation is not only permitted by the Constitution, but required by the accommodation principle.¹⁶⁷ When compared to the U.S. military, which is allowed to finance and maintain a large chaplaincy at the cost of the government, supporters feel that state sponsorship of IFI appears to pose much less of a constitutional threat, since the government here is not footing the bill.

Opponents of the program, however, claim that the close ties between IFI and the government is enough to amount to state action. By providing the services essential to the continuance of the program, the state is in effect supporting and promoting IFI's existence. Regardless of the fact that the government may not be signing the checks, it is nonetheless prevented from contracting out work that it is itself constitutionally barred from doing.¹⁶⁸ When viewed in comparison with cases like *Lee*, where the only government involvement was its invitation to a rabbi to lead graduating students in a momentary benediction,¹⁶⁹ state action in the present case seems readily apparent. In *Lee*, the school board, acting on behalf of the state, decided the invocation should occur and chose the religious leader to be involved.¹⁷⁰ While the relationship only lasted for the afternoon and no state funds were expended, the Court found that “[t]he government involvement with religious activity in this case is pervasive, to the point of creating a state-sponsored and state-directed religious exercise in a public

165. See, e.g., Scott Roberts, *The Constitutionality of Prison-Sponsored Religious Therapeutic Communities*, 15 REGENT U. L. REV. 69, 78–83 (2002–2003).

166. See *About-FAQ's*, *supra* note 56.

167. See *supra* Part III.B.3.

168. See *Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 396–97 (1995) (“It surely cannot be that government, state or federal, is able to evade the most solemn obligations imposed in the Constitution by simply resorting to the corporate form.”).

169. *Lee v. Weisman*, 505 U.S. 577, 581 (1992).

170. *Id.* at 587.

school.”¹⁷¹ Here, the state Department of Corrections is doing at least as much by approving a program that is pervasively and exclusively Christian and making the decision to relinquish any further input in the rehabilitation process to this group.

Until more details are made public about the state's involvement in the development and funding of Lawtey, conclusions cannot be made about the level of state action. On its face, however, the Lawtey program is more troubling than IFI. Instead of merely opening up the wing of a prison to an outside charity group, Lawtey represents the conversion of an entire state-run prison to a faith-based institution. This conversion carries the endorsement of the governor, who not only praised the initiative, but also presided over its dedication. Finally, there is no clear private intermediary in the case of Lawtey who competed and was awarded a contract to take the rehabilitation program away from the control of the state.

B. SECULAR PURPOSE¹⁷²

It is undeniable that states have a legitimate secular interest in the rehabilitation of prisoners and the reduction of the state criminal recidivism rate.¹⁷³ At least in the case of IFI, the state has attempted to satisfy this interest by contracting with an outside group that will relieve the state of its burden and promises miraculous results. While there will always be claims that the state has ulterior motives in choosing a program promoting evangelical Christianity, it is of little doubt that IFI was chosen, at least in part, because of its ability to pay for itself and to produce impressive short-term success rates. Although states are not permitted to save a pervasively religious program simply by pointing to a remote secular interest,¹⁷⁴ case law dictates that deference must be shown to a state's legitimate interests and that it is irrelevant whether the state could have achieved its purpose

171. *Id.*

172. Although the *Lemon* test, while technically good law, carries questionable weight with the current Court, secular purpose has been addressed in recent Establishment Clause cases. *See Mitchell v. Helms*, 530 U.S. 793, 794 (2000); *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 308–09 (2000). This Note will quickly consider the subject before moving on to a more detailed analysis of endorsement, coercion, and accommodation.

173. *See, e.g., Parke v. Raley*, 506 U.S. 20, 27 (1992); *Hilton v. Braunskill*, 481 U.S. 770, 777 (1987); *Rummel v. Estelle*, 445 U.S. 263, 284 (1980).

174. *See Griffin v. Coughlin*, 673 N.E.2d 98, 108 (N.Y. 1996) (“Our cases simply do not support the notion that a law found to have a ‘primary’ effect to promote some legitimate end under the State’s police power is immune from further examination to ascertain whether it also has the direct and immediate effect of advancing religion.”) (emphasis omitted).

through nonreligious avenues.¹⁷⁵ As such, irrespective of the fact that the admitted main goal of IFI officials is the fundamental shift of prisoners' values and worldview, the state's proper secular interest is enough for both IFI and Lawtey to pass the secular purpose requirement of the *Lemon* test.

C. ENDORSEMENT

The endorsement principle prohibits the government from participating in any symbolic endorsement of a religious message that would necessarily alienate or marginalize nonadherents.¹⁷⁶ A state's participation in religious activities or affiliation with religious groups is permissible only to the extent that its support cannot reasonably be interpreted as a promotion of the religious message.¹⁷⁷ To allow otherwise would be to permit governmental favoritism of religion and would send "a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community."¹⁷⁸ In order to determine if state action has the effect of endorsing religion, courts must consider both the intended message of the government and the actual message that the activity conveys.¹⁷⁹

Sponsor states of IFI's programs no doubt contend that the message they wish to convey is simply one of openness to innovative methods in order to solve the problem of increasingly high recidivism rates. With a secular agenda and religion-neutral criteria, the states assert that they are merely offering an equal opportunity to any group that proposes an efficient and effective program. By choosing IFI from a pool of applicants and not placing a religion requirement or restriction on the application process, the states send a message that, on its face, does not endorse religion.

When considering what message is actually conveyed, however, we must consider what group was actually selected by the state and why. If states are truly only interested in the secular goal of selecting a cheap yet effective program, then any group promising reduced recidivism at no cost to the state should and would receive equal consideration.

175. See, e.g., *Lynch v. Donnelly*, 465 U.S. 668, 681 n.7 (1984); *Lemon v. Kurtzman*, 403 U.S. 602, 613 (1971) ("[W]e find nothing here that undermines the stated legislative intent; it must therefore be accorded appropriate deference.")

176. See *Lynch*, 465 U.S. at 688, 692 (O'Connor, J., concurring).

177. *County of Allegheny v. ACLU*, 492 U.S. 573, 593 (1989).

178. *Lynch*, 465 U.S. at 688 (O'Connor, J., concurring).

179. *Id.* at 690 (O'Connor, J., concurring).

By this logic, groups such as the Nation of Islam, the Aryan Nation, or even the Branch Davidians should be allowed to compete with Christian groups, so long as they can pay for themselves and produce data that would indicate that they can keep ex-convicts out of prison.

Yet, instinctively, it seems unlikely that these groups would receive state backing. And it is questionable whether it is good policy to have inmates reacclimated by groups whose ideology incorporates antigovernment messages, no matter how much they may reduce recidivism. This demonstrates that it is impossible to remove the message from the method. Religious groups cannot, and IFI does not claim to, separate out its belief system from a program that instructs prisoners how to reorganize their lives. And the government cannot put a group in that kind of position of authority without implicitly endorsing the message that the group promotes. The running of rehabilitation programming inherently carries with it a methodology and a vision that must be either affirmatively supported or rejected by the state government.

By turning over an entire wing of a prison to a private group, the state is effectively announcing to the prisoners and the general community that it believes the program will be beneficial and effective. In the case of IFI, this support is given to a program that is unmistakably and exclusively Christian; a program that, while permissive of other religious adherents, does not hesitate to enlighten their spiritual misguidance by informing them, “[f]or those of you who are Muslim, Jesus is God.”¹⁸⁰ By allowing this kind of programming in a state facility, the government has effectively given that message its stamp of approval. And “[w]hen the government puts its imprimatur on a particular religion, it conveys a message of exclusion to all those who do not adhere to the favored beliefs. A government cannot be premised on the belief that all persons are created equal when it asserts that God prefers some.”¹⁸¹

Civil liberties groups fear that programs like IFI will act as conduits for the indoctrination of prisoners by groups whose faith is shared by the political majority. By controlling which religious groups will be allowed to develop these programs, officials are using state authority to educate inmates according to “the dominant political religion It is not surprising[, therefore,] that it’s not the Wiccans running this program or the

180. Brook, *supra* note 8, at 26.

181. Lee v. Weisman, 505 U.S. 577, 606–07 (1992) (Blackmun, J., concurring) (emphasis omitted).

Jews or the Catholics for that matter, who don't carry the same political clout."¹⁸²

It is insignificant that state officials are not conducting the actual proselytizing. For, "the Establishment Clause does not limit only the religious content of the government's own communications. It also prohibits the government's support and promotion of religious communications by religious organizations."¹⁸³ This is especially true in the prison setting where prisoners are not as readily exposed to outside and unfiltered expressions or opinions. Just as government has a unique responsibility for providing accommodation of religion to prisoners because of their restricted access to the outside world, it has an equally important responsibility not to endorse any particular one religion or religion in general.

It is also insignificant that inmate participation in these programs is voluntary. When considering *School District of Abington v. Schempp*, a case concerning a school board's practice of opening each school day with a reading from the Bible, the Supreme Court was not persuaded by the fact that student participation was not obligatory.¹⁸⁴ As Justice Clark wrote for the majority, "these required exercises [are not] mitigated by the fact that individual students may absent themselves, for that fact furnishes no defense to a claim of unconstitutionality under the Establishment Clause."¹⁸⁵ The action in question is whether or not the government in any way endorsed religion, not whether or not the endorsement was forced on citizens.

Further, the Lawtey program is not saved by the variety of religious beliefs it represents. The Supreme Court "ha[s] consistently held the Clause applicable no less to governmental acts favoring religion generally than to acts favoring one religion over others."¹⁸⁶ If anything, the state of Florida is perhaps more fervently endorsing religious programming than states sponsoring IFI. Florida officially dedicated an entire facility to faith-based rehabilitation and its governor announced his hopes that the program "lead[s] them to God."¹⁸⁷

182. Brook, *supra* note 8, at 28.

183. *County of Allegheny v. ACLU*, 492 U.S. 573, 600 (1989).

184. *Sch. Dist. of Abington v. Schempp*, 374 U.S. 203, 224–25 (1963).

185. *Id.*

186. *Lee*, 505 U.S. at 610 (Souter, J., concurring).

187. *See supra* discussion Part II.A. *See also* Price, *supra* note 12.

In its delegation of the duty to rehabilitate inmates to private groups, the state cannot choose a group without sending a message of endorsement. By choosing a religious group, the state must then consider whether that religion's belief system is appropriate for the inmate population. And in so choosing, the state is effectively endorsing that system of beliefs to both the prison community and the general population. In selecting IFI and, more dramatically, in dedicating Lawtey, the state has drawn a line in the sand and demonstrated its support of religious indoctrination as the way to achieve rehabilitation.

D. COERCION

Another factor to consider is the presence of governmental coercion in the inmate's choice to apply for and participate in programs such as Lawtey and IFI. While a finding of governmental coercion is not a required element of Establishment Clause violations, it is a sufficient indicator.¹⁸⁸

Coercion is most easily identified when the government conditions special benefits or consequences on a citizen's participation in religious activities. Both *Kerr v. Farrey* and *Griffin v. Coughlin* dealt with the coercion issue in the context of incarceration.¹⁸⁹ In *Kerr*, the Seventh Circuit considered a state prison's requirement that inmates with chemical dependencies attend Narcotics Anonymous meetings or face a higher security risk classification with negative effects on parole eligibility.¹⁹⁰ The New York Court of Appeals, in *Griffin*, invalidated a prison policy that conditioned an inmate's eligibility to participate in the Family Reunion Program on his continued participation in Alcoholics Anonymous.¹⁹¹ Both courts held that the prisoners were unlawfully coerced into participating in a religious-affiliated program by the state's quid pro quo.¹⁹²

Lee demonstrated that governmental coercion could occur in more subtle ways. In the case involving religious benedictions at school graduation, the students were under no obligation to participate in the benediction or to even attend the ceremony.¹⁹³ Neither nonattendance nor refraining from prayer would have resulted in a withholding of the

188. *Lee*, 505 U.S. at 604 (Blackmun, J., concurring) ("Government pressure to participate in a religious activity is an obvious indication that the government is endorsing or promoting religion.").

189. *Kerr v. Farrey*, 95 F.3d 472 (7th Cir. 1996); *Griffin v. Coughlin*, 673 N.E.2d 98 (N.Y. 1996).

190. *Kerr*, 95 F.3d at 473.

191. *Griffin*, 673 N.E.2d at 99.

192. *Kerr*, 95 F.3d at 474; *Griffin*, 673 N.E.2d at 105, 108.

193. *Lee*, 505 U.S. at 583, 593.

diploma.¹⁹⁴ In fact, the dissent noted that the only “coercion” to participate in the religious aspect of the ceremony was the expectation that attendees “stand . . . or, at least, maintain respectful silence.”¹⁹⁵ This, nevertheless, was found to be unsuitable to the Court, who found that students were essentially forced to participate in or endure the prayer or miss out on a ceremony provided for the enjoyment of those who shared in the state-sponsored expression of religion.¹⁹⁶

It is clear that no state has mandated participation in Lawtey or any IFI program. All of these programs are strictly voluntary and the choice to apply or not to apply has no effect on security classification or parole eligibility. No cases have been filed claiming that an inmate was adversely affected by his choice to attend or not attend Lawtey or IFI.

But by making such programs possible and available, the government does exert a pressure on inmates in deciding whether to apply to the religious program. With IFI, the government offers inmates the opportunity of serving out their sentence in a safer environment where they are isolated from their enemies. It provides the option to attend a better-equipped facility, one with a greater inmate-to-instructor ratio and more opportunities for vocational certification. Through IFI, it offers a postrelease program with individual mentors who spend six to twelve months introducing prisoners to support systems of church and work. Some states, as noted in IFI’s Texas program, provide direct perks to participants by reducing security precautions to reflect the safer environments. Florida, by dedicating Lawtey, offers an entire facility where all you have to do is “not disturb your fellow inmates.”¹⁹⁷ All of this is made available in exchange for participation in a program that is, at the most liberal, multi-faith and, in the case of IFI, exclusively and exhaustively Christian.

The coercion associated with IFI is analogous to that in *Lee*, only the options here are more severe. If accepted into the program, inmates must choose to participate in or endure a program that is geared to change their worldview and indoctrinate them in the ways of Christ or to remain in a prison system wrought with violence, with little or no vocational training and no postrelease support. And while it is true that members of other faiths are also allowed to participate in this decision, why should they have the extra burden of compromising their beliefs and enduring Christian

194. *Id.* at 586.

195. *Id.* at 637 (Scalia, J., dissenting).

196. *See id.* at 595–96.

197. Brumley, *supra* note 20.

proselytization? As the head of the legal department of the American Jewish Congress noted, “Why should Jewish inmates have to suffer in a regular Texas penitentiary when a Christian inmate can get into this cushy prison?”¹⁹⁸ Offering a “cushy prison” at the cost of two years of evangelical Christian indoctrination is surely more offensive to the Constitution than having to suffer through a two-minute benediction to enjoy the pomp and circumstance of graduation.

The Supreme Court has explicitly held that a school cannot “persuade or compel a student to participate in a religious exercise.”¹⁹⁹ In many ways, inmates and students exist in similar relationships to the state. Both are legally required to submit themselves to the supervision and authority of a state institution. By the same token, the state exerts a certain level of control and restriction over both. Both are influenced by the desires of the state in a way that average citizens are not, in that compliance with state wishes brings success and a timely exit to the system, while resistance can bring consequences and a loss of privileges.

Since prisoners stand in an analogous relationship to the state as students, the same standards should apply when questioning whether state action equals coercion. Here, the state is forcing inmates to decide between a safe and productive program at the cost of indoctrination and a secular program at the cost of violence and disregard. This is a choice that for some means life or death, success or failure. When applying the standards set out in *Lee*, it is apparent that the government is not allowed to provide such an optional program where the privilege is provided for the enjoyment of religious participants and withheld from nonparticipants.

E. ACCOMMODATION

The accommodation argument calls for governments to acknowledge religion's role in our society and to treat religious groups equally with secular groups. Recognizing American government as pluralistic, rather than secular, the accommodation principle does not place a disability on religious groups but rather seeks to approach religion blindly.²⁰⁰ The offering of governmental support to both religious and nonreligious activities, with preference to neither, is what is demanded by the

198. Brook, *supra* note 8, at 28.

199. *Lee*, 505 U.S. at 599.

200. See CHEMERINSKY, *supra* note 92, at 1153–55.

Establishment Clause; anything less is an “unacceptable hostility to religion.”²⁰¹

In *Bowen v. Kendrick*, the Supreme Court considered a federal grant program set up to address the problems associated with adolescent sexuality and pregnancy.²⁰² The Court upheld the language of the grant act even though it required recipients to incorporate services from religious organizations.²⁰³ The Court found that the government had a secular interest in the prevention of teenage pregnancy and abortion and in the development of family- and community-based solutions.²⁰⁴ In maintaining neutrality among religious and nonreligious groups, the Court held that Congress is free to recognize “the important part that religion or religious organizations may play in resolving certain secular problems,” and to consider their contribution alongside “charitable organizations, voluntary associations, and other groups in the private sector.”²⁰⁵ Incorporating the message of local religious organizations that discourage teenage promiscuity adequately addressed the government’s interests, regardless of the fact that it also coincided with the religious agenda of some of the groups.²⁰⁶ Any benefit received by any one particular group was found to be an “incidental and remote” by-product of the action’s secular purpose.²⁰⁷

The Court also upheld a provision in the grant that allowed for religious groups to apply for and receive the funding directly.²⁰⁸ Since religious affiliation was not a criterion for selection, the statute was found to be neutral on its face with the effect of funding the most viable solution, be it religious or otherwise.²⁰⁹ The Court noted that it has “never held that religious institutions are disabled by the First Amendment from participating in publicly sponsored social welfare programs.”²¹⁰

The *Bowen* holding suggests that the Court would allow direct governmental funding of a public works program by a religious organization when the funding criteria are religion-neutral and based on the achievement of a secular purpose and when the applicant pool includes

201. *Id.*

202. *Bowen v. Kendrick*, 487 U.S. 589, 593–94 (1988).

203. *Id.* at 617–18.

204. *Id.* at 602–04.

205. *Id.* at 607 (internal citations and quotations omitted).

206. *See id.* at 605–07.

207. *See id.* at 607.

208. *See id.* at 608, 618.

209. *See id.* at 609–10.

210. *Id.* at 609.

both religious and nonreligious groups. While the holding does not speak to Lawtey (where it is still unknown how the programming is selected), it seems to support the legality of IFI. IFI is created in response to a state's request for outside assistance for the secular purpose of reducing criminal recidivism. While it does so in a strictly religious manner, IFI is only one applicant in a selection process that is, presumably, open to any group, religious or otherwise, that can keep released inmates out of prison. The fact that the Department of Corrections chooses only one program, as opposed to the variety of groups funded in *Bowen*, should not matter as long as the state offers its support in a religion-blind manner.

However, the *Bowen* dissent pointed out an important distinction about the concept of neutral consideration in public works programs. Although the Constitution permits and encourages governments to consider the contribution of religious organizations in social welfare, these groups should only be considered in the capacity that they can provide truly secular services. The dissent warned,

[t]here is a very real and important difference between running a soup kitchen or a hospital, and counseling pregnant teenagers The risk of advancing religion at public expense, and of creating an appearance that the government is endorsing the medium and the message, is much greater when the religious organization is directly engaged in pedagogy, with the express intent of shaping belief and changing behavior, than where it is neutrally dispensing medication, food, or shelter.²¹¹

This concern is also articulated in the concurrence of *Lemon*, in which Justice Douglas wrote,

[t]he government may, of course, finance a hospital though it is run by a religious order The government itself could enter the hospital business; and it would, of course, make no difference if its agents who ran its hospitals were Catholics, Methodists, agnostics, or whatnot. For the hospital is not indulging in religious instruction or guidance or indoctrination.²¹²

These two opinions point out valid policy concerns that cause alarm in the cases of both Lawtey and IFI. Far from merely providing secular welfare support, these programs are in the very business of shaping beliefs and changing behavior. Much like in the pedagogical setting, these organizations are set up in an authoritative position by the state for the purpose of educating the state's inmates according to a particular doctrine.

211. *Id.* at 641 (Blackmun, J., dissenting).

212. *Lemon v. Kurtzman*, 403 U.S. 602, 633 (1971) (Douglas, J., concurring).

In selecting a program that, by its nature instructs and indoctrinates inmates according to a particular philosophy, the state cannot provide support at an arm's-length. Far from being neutral, a state's choice to replace its rehabilitation program with that of a Christian evangelical group is an affirmative sanction and advancement of a religious message.

It is also important to note when analyzing Lawtey and IFI in light of *Bowen* that the Court found the grant program to be constitutional *on its face*, but remanded the case for a finding of its constitutionality *as applied*.²¹³ *Bowen* left open the possibility that the program could be in violation of the First Amendment if it was found that aid was going to a "pervasively sectarian" institution and was used to fund "specifically religious activit[ies] in an otherwise substantially secular setting."²¹⁴ So, while the accommodation argument of *Bowen* may help to legitimize the state's consideration of a sectarian program to aid in rehabilitation, *Bowen* is ineffective in arguing that the state's choice of IFI's or Lawtey's format is constitutional.

This caveat presents problems for both IFI and Lawtey. IFI adheres to "a program that is explicitly Christian in both content and delivery"²¹⁵ with "intensive exposure to faith-based programming."²¹⁶ Lawtey, while multi-faith, also incorporates religion in every aspect of its programming. And while prisons have long accommodated the religious interests of prisoners, rehabilitation has historically been a secular responsibility of the state. IFI hopes to change this by replacing the secular therapeutic model of rehabilitation with its transformational one.²¹⁷ In seeking to cure inmates of lawless behavior by leading them to Christ, IFI's Web site admits that, "IFI and therapeutic models have some similar methodologies, but they have very different goals, and are rooted in entirely different philosophies."²¹⁸

Proponents of the accommodation argument may nevertheless attempt to validate faith-based programs based on a comparison with the *Rosenberger* case, which dealt with the student-run religious newspaper.²¹⁹ The majority in *Rosenberger* wrote that courts should focus, not on the amount of government funds spent on the program, but on the "nature of

213. *Bowen*, 487 U.S. at 622.

214. *Id.* at 621 (quotations omitted).

215. *About-FAQ's*, *supra* note 56.

216. *Id.*

217. *See About-IFI Program*, *supra* note 9.

218. *Id.*

219. *See Brook*, *supra* note 8, at 28–29.

the benefit received by the recipient.”²²⁰ It held that the reimbursement of printing costs to facilitate public expression and student enterprise was a religion-blind policy and did not advance any particular religious message.²²¹ Therefore, the university could not exclude the religious group from participating in the program without discriminating against religion generally and instead was required to accommodate the paper’s religious purpose. State governments, similarly, may be barred from denying IFI the right to participate in a contract that is open to a variety of groups who provide their best business plan for the job.

The flaw in this argument is that, unlike providing support to student papers, where government is merely accommodating a group in its religious expression, the state here is assigning its responsibility in inmate rehabilitation to one particular group, therefore endorsing it to act as their agent. Putting a religious group in charge of the programming in a wing of a prison—or indeed the entire prison—is very different from merely providing them with equal opportunity to produce “a publication involved in a pure forum for the expression of ideas.”²²²

For Justice O’Connor, *Rosenberger* could be decided on the issue of private choice.²²³ The university was providing a secular service of reimbursing printing costs to all eligible publications. It was the recipient’s private choice to use that reimbursement for a publication that promoted a religious agenda. Therefore, any benefit to religion cannot be reasonably attributable to the university. Comparisons can be made to the case of IFI, where the state is simply offering support to any outside rehabilitation program and it is Prison Fellowship’s private choice to base its IFI program on a Christian methodology. But, again, this argument fails because of the fundamental differences in subsidizing newspapers and transferring a state responsibility to a private group. Where the university was simply making funds available for a student group to express their ideas, religious or otherwise, the states sponsoring IFI have made an affirmative choice in considering and selecting one group’s methodology over that of another. Since the decision of how to effectively rehabilitate prisoners ultimately belongs to the state, it cannot decide to entrust that responsibility to an evangelical Christian group and then claim that the benefit to religion was the result of the group’s private choice.

220. *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 843 (1995).

221. *See id.* at 840.

222. *Id.* at 844.

223. *See id.* at 848–52 (O’Connor, J., concurring).

F. CONCLUSION

Each of the three announced factors in determining Establishment Clause violations—endorsement, coercion, and accommodation—pose severe problems for both Lawtey and IFI. By replacing traditional correctional practices with religious methodologies, states affirmatively announce their support and endorsement of the belief system encapsulated by the new programs. In creating a more appealing and advantageous prison environment that is contingent on religious participation, states exert a coercive pressure on inmates to join in a pervasively religious activity. And while the Constitution requires the government to allow religious groups to contribute to social welfare, when the intrinsic differences between providing secular services and commandeering the process of rehabilitating citizens are recognized, it is apparent that states supporting the Lawtey and IFI models are doing more than merely accommodating the existence of religious programming—they are affirmatively and directly benefiting the agenda of the religious groups.

V. COMPARISONS TO CASE LAW DEALING WITH RELIGIOUS PROGRAMMING IN CRIMINAL REHABILITATION

Courts have yet to rule on faith-based programs in state prisons run by private organizations. It is, however, beneficial to look to how lower courts have dealt with similar issues dealing with religious programming in criminal rehabilitation. By considering how lower courts have used the Supreme Court's First Amendment jurisprudence, a better understanding of how courts are likely to treat cases like the ones that may be brought against Lawtey and IFI is ascertained.

A. WILLIAMS V. LARA

In 2001, the Texas Supreme Court ruled on the only case to date dealing with the constitutionality of an exclusively faith-based rehabilitation program, *Williams v. Lara*.²²⁴ *Williams* involved the Tarrant County Correctional Center, which ran a program out of a segregated cluster of cells called the Chaplain's Education Unit ("CEU") and known popularly as the God Pod.²²⁵ The CEU was a voluntary 120 day program based on "orthodox Christian principles" and was developed by the Tarrant

224. *Williams v. Lara*, 52 S.W.3d 171 (Tex. 2001).

225. *Id.* at 175; Brook, *supra* note 8, at 26.

County sheriff and the prison chaplain.²²⁶ In an effort to promote rehabilitation and to reduce prison violence, the sheriff and chaplain hand-picked a staff of volunteers and teaching materials, all of which conformed with their personal religious views and vision of the program.²²⁷ Both the sheriff and the chaplain admitted that they rigorously screened both the staff and the materials, not for their pedagogic or penological value, but to ensure that they comport with their personal beliefs.²²⁸

The programming in CEU consisted of four hours a day of religious instruction, during which no religious viewpoints other than those of the approved Christian tenets were discussed.²²⁹ Non-class time was used for inmates to complete assignments, which included study of the Bible and other approved religious materials.²³⁰ Apart from a Tuesday night prayer service, which was open to the entire prison population, participation in CEU was the only opportunity afforded to inmates for group religious worship or study.²³¹ Inmates seeking individual religious consultation were allowed to meet with outside religious representatives, but only with the approval of the local affiliated religious organization and only through a glass window via telephone.²³²

The Texas Supreme Court invalidated the operation of CEU for violating the First Amendment.²³³ Applying the *Lemon* test and the Endorsement principle, the court found that the state did have a legitimate secular purpose, but that the operation of CEU constituted a state endorsement of the religious beliefs of the county sheriff and chaplain.²³⁴ While recognizing the voluntariness of the program and the state's obligation to accommodate inmate's religious needs, the court nevertheless found that the sheriff and chaplain, as agents of the state, had used their authority to endorse their personal beliefs in violation of the Establishment Clause.²³⁵

While CEU has striking similarities to IFI's program, CEU differs from both IFI and Lawtey in several very significant respects. Religious programming in IFI and, supposedly, in Lawtey are developed and

226. *See Williams*, 52 S.W.3d at 176.

227. *Id.* at 176–77.

228. *Id.* at 191.

229. *See id.* at 176.

230. *Id.*

231. *Id.* at 177.

232. *Id.*

233. *Id.* at 192.

234. *Id.* at 189–92.

235. *Id.* at 191–92.

executed exclusively by independent, non-governmental groups. Because the programming is developed devoid of influence by state employees, there is no evidence that the messages in the program are tailored to fit the personal beliefs of any state actor. No state funds are used in the execution of the program, except the secular administration and security of the facility. Finally, both the Florida Department of Corrections and the administration of facilities sponsoring IFI programs provide inmates with access to religious representatives and group services to all inmates, regardless of their participation in the faith-based format.

While this decision provides insight into the type of analysis that needs to be done when looking at IFI and Lawtey, the crucial distinction of who is developing the programs fatally separates IFI and Lawtey from the *Williams* holding. The ruling does not answer the question of whether the state's choice of a religious program is a de facto endorsement of that religion or whether the co-partnership of the state and the program amounts to the state establishment of religion. While the ruling does leave open the possibility of a constitutional religious rehabilitation program run by non-state actors, it falls short of giving an affirmative ruling on the cases of IFI or Lawtey.

B. FREEDOM FROM RELIGION FOUNDATION V. MCCALLUM

In 2003, the Seventh Circuit upheld the state subsidization of Faith Works, a Christian-affiliated halfway house.²³⁶ Faith Works was a faith-based halfway house in Milwaukee that provided services on a voluntary basis to ex-inmates on parole or probation.²³⁷ It was one of several such institutions in Milwaukee, and was the only one that used a nonsecular format.²³⁸ State paid parole officers would make suggestions to recently released inmates to help them find the best available program; however, when recommending Faith Works, officers were careful to inform the inmates of the religious format and to make clear that their suggestion was in no way binding.²³⁹ All offenders choosing halfway houses, including Faith Works, were eligible to receive partial reimbursement by the state.²⁴⁰ Unique to Faith Works, however, was that due to the fact that it offered a nine month program, instead of the usual three month service, "the state

236. *Freedom from Religion Found. v. McCallum*, 324 F.3d 880, 881–82 (7th Cir. 2003).

237. *Id.* at 881.

238. *Id.* at 881, 883.

239. *Id.* at 881.

240. *Id.* at 882.

waived the usual bidding requirements when it contracted with Faith Works.”²⁴¹

Writing for the court, Judge Posner held that the state did not violate the Establishment Clause in its recommendation of Faith Works or in its reimbursement to Faith Works participants.²⁴² Using the accommodation rationale, Posner found no violation when inmates were offered a variety of religious and nonreligious options and when the choice was entirely up to the inmate.²⁴³ Moreover, recommendation by parole officers was not seen as an endorsement of religion because Faith Works provided unique services and empirical evidence of success.²⁴⁴ In addition, the parole officer's recommendation was not viewed as coercive because noncompliance did not result in a detriment to the inmate and other options were provided.²⁴⁵ Finally, Posner rejected the argument that since Faith Works did in fact provide the best program, eligible inmates had no “real choice” in deciding between the religious and secular programs.²⁴⁶ Posner wrote that penalizing Faith Works for its success would encourage them to reduce the quality of their services, and its competitors would be encouraged to do the same in an effort to accentuate the “violation” of Faith Works.²⁴⁷ The result would be a judicially created “race to the bottom.”²⁴⁸

The importance of this case is to distinguish the government's role from the activity of the states in the IFI and Lawtey cases. In *McCallum*, the government was providing an opportunity for the inmate to choose a religious program among many secular options. The governments sponsoring IFI and Lawtey are presenting inmates with a decision between two unequal correctional programs contingent on religious participation.

It is also important to highlight the difference between the losing argument that Faith Works was too effective and the argument that IFI's cushy prison amounts to coercion. The state's decision to subsidize an offender's stay in a halfway house is a policy decision made to encourage

241. *Id.*

242. *Id.* at 882–84.

243. *See id.* at 882–83. By analogizing the recommendation to a school voucher program, Posner justified the constitutionality of the program when the government grants equal access to both secular and religious options and when the preference of one over the other rests strictly with the individual participant. *See generally id.*

244. *See id.* at 883–84.

245. *See id.* at 884.

246. *See id.* at 883–84.

247. *Id.* at 884.

248. *Id.*

offenders to seek postrelease assistance. By providing the secular service of reimbursement in a religion-neutral manner, the government was acting consistently with the Supreme Court's requirements in *Rosenberger*. The state cannot be penalized if, after offering both religious and nonreligious options, offenders more frequently choose religious assistance. However, in the case of IFI, the obligation to house and to rehabilitate prisoners is the primary responsibility of the state. By allowing the implementation of a significantly safer and more appealing environment in exchange for religious participation, the state is acting much more affirmatively than by simply allowing for religious options. It has essentially given the inmates an ultimatum: undergo the indoctrination of the religious program, or remain in the inferior system. By running a correctional system in which prisoners must face such an ultimatum, the state is no longer providing its secular service in a religion-neutral manner.

VI. CONCLUSION

In the wake of *Agostini*, and in an era where the Court gives little or no credence to *Lemon*, it is difficult to reconcile the case law and come up with a clear definitive test with which to analyze IFI and Lawtey. It is acknowledged that, by seeking assistance in a religion-neutral manner, the states supporting these programs are acting in an evenhanded way with reference to the program's religious message. But by recognizing that running a prison is fundamentally different than merely accommodating religious expression, it is clear that there is more to consider than mere evenhandedness in considering the participation of religious groups in criminal rehabilitation.²⁴⁹

What should be considered is the effect of the state's delegation of its immense responsibility of resocializing prisoners to a group whose admitted agenda is "the transformation of the inmate from the inside out through the miraculous power of God's love."²⁵⁰ By inviting these programs into its facilities, the state is allowing a fiercely doctrinal group to take over the government's role of instilling inmates with the skills and values necessary to be a productive and law-abiding citizen. The effect is that the government is affirmatively endorsing the program's methodology in its decision to entrust it with authority over its prisoners. Though not

249. See *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 882 (1995) (Souter, J., dissenting) ("Evenhandedness as one element of a permissibly attenuated benefit is, of course, a far cry from evenhandedness as a sufficient condition of constitutionality for direct financial support of religious proselytization.").

250. *About-IFI Program*, *supra* note 9.

running the program outright, the state has created a situation where it has conditioned the privilege of attending a “cushy” prison on the endurance of prolonged religious indoctrination. While the state is not paying for these services, it has entangled itself in a dependent relationship with religious groups by providing them the audience and means to carry out their mission in exchange for relief in its duty to provide correctional programming to prisoners.

As *Bowen* has explained, “[a]id normally may be thought to have a primary effect of advancing religion when it flows to an institution in which religion is so pervasive that a substantial portion of its functions are subsumed in the religious mission.”²⁵¹ In IFI programs, “Biblical principles are integrated into the entire course curriculum of IFI, rather than compartmentalized in specific classes. In other words, the application of Biblical principles is not an agenda item—it is the agenda.”²⁵²

However, in a country with over two million people living in incarceration and a recidivism rate of over sixty percent,²⁵³ we must ask if beggars can afford to be choosers. It is obvious that the state system is not working. There is evidence that religious programs like IFI can make a real difference. The Center for Research on Religion and Urban Civil Society has published a study that claims that IFI “graduates” are about fifty percent less likely to be rearrested and about sixty percent less likely to be reincarcerated than inmates leaving the state system.²⁵⁴

Even civil liberties groups, while not overly happy with the program, have been reluctant to pursue legal remedies or injunctions against IFI. With all of the problems that plague the country’s prisons, it seems somewhat self-defeating to try to shut down a program that is actually helping. When asked why her organization has not filed legal action, a spokesperson from the ACLU National Prison Project responded, “[w]hen you have a prisoner dying, that tends to take precedence. At least these religious programs are doing something.”²⁵⁵

However, this country is founded on nothing if not its Constitution. While programs like IFI and Lawtey may have laudable goals and produce

251. *Bowen v. Kendrick*, 487 U.S. 589, 610 (1988) (quoting *Hunt v. McNair*, 413 U.S. 734, 743 (1973)).

252. *About-IFI Program*, *supra* note 9.

253. Brook, *supra* note 8, at 24.

254. BYRON R. JOHNSON & DAVID B. LARSON, CTR. FOR RESEARCH ON RELIGION AND URBAN CIVIL SOC’Y, *THE INNERCHANGE FREEDOM INITIATIVE: A PRELIMINARY EVALUATION OF A FAITH-BASED PRISON PROGRAM* 11, 19 (2003).

255. Brook, *supra* note 8, at 27.

impressive results, they require an impermissible relationship between state government and the Christian agenda. Case law dictates that we cannot sacrifice the principles of the Constitution for any program, no matter how beneficial or productive.²⁵⁶ As difficult as it may be, states must find another way to improve the correctional system, one that does not compromise the separation between church and state, for “it is no defense to urge that the religious practices here may be relatively minor encroachments on the First Amendment. The breach of neutrality that is today a trickling stream may all too soon become a raging torrent.”²⁵⁷

256. See *Bowen*, 487 U.S. at 639–40 (Blackmun, J., dissenting) (“It should be undeniable by now that religious dogma may not be employed by government even to accomplish laudable secular purposes such as ‘the promotion of moral values, the contradiction to the materialistic trends of our times, the perpetuation of our institutions and the teaching of literature.’” (quoting *Sch. Dist. of Abington v. Schempp*, 374 U.S. 203, 223 (1963)); *Lemon v. Kurtzman*, 403 U.S. 602, 625 (1971) (“The merit and benefits of these [programs], however, are not the issue before us in these cases. The sole question is whether state aid to these schools can be squared with the dictates of the Religion Clauses.”); *Sch. Dist. of Abington v. Schempp*, 374 U.S. 203, 280 (1963) (Brennan, J., concurring) (“The fact that purely secular benefits may eventually result does not seem to me to justify the exercises.”).

257. *Abington*, 374 U.S. at 225.

