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IN THE BIG HOUSE WITH THE GOOD BOOK: AN EXAMINATION OF THE CONSTITUTIONALITY OF FAITH-BASED PRISONS

*Katerina Semyonova**

INTRODUCTION

On Christmas Eve 2003, Florida Governor Jeb Bush christened Lawtey Correctional Institution (Lawtey) as the nation's first fully "faith-based" prison.[1] Lawtey, built in 1973 about fifty miles southeast of Jacksonville, has become the prototype for the growing movement toward faith-based incarceration.[2] Florida's religiously-oriented incarceration functions like President George W. Bush's national faith-based initiatives program in reverse. Instead of the state distributing funds to religious groups for providing social services, Florida's faith-based prison system receives the apparently pro bono services of religious organizations as they provide an unprecedented array of social services to prisoners.[3] The benefit to religious groups is not state funds, but rather access to the state's prisoners.

More than one thousand inmates are currently on the waiting list for one of Lawtey's eight hundred beds.[4] To qualify for transfer to Lawtey, prisoners must be within three years of release, have low-

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1 Paul Pinkham, *Bush Dedicates Nation's First Faith-Based Prison*, FLA. TIMES-UNION, Dec. 25, 2003, *available at* http://jacksonville.com/tu-online/stories/122503/met_14389635.shtml.

2 The nation's first faith-based prison for women opened in Tampa, Florida in the summer of 2004. *See Faith-Based Prison for Women Opens in Florida,* 7 CORR. EDUC. BULL. 10 June 25, 2004. Faith-based reform has also reached juveniles. *See* Megan O'Matz, *Juvenile Inmates to Get 'Jesus Method'; Evangelical Groups to Take Entertainers on Tour of Prisons*, S. FLA. SUN-SENTINEL, Apr. 17, 2004, at B5. In 2002, Florida's Department of Corrections opened six faith-based dormitories within traditional prisons. Cary McMullen, *Partnership Launched Faith-Based Dormitories in Florida Prisons*, LEDGER, June 8, 2003, at A12. Florida has also allowed 26,000 probationers to be supervised by the Salvation Army, a Christian group. *See* Rob Boston, *Bush's Faith-Based Revival: President Pushes Ahead with Religion Funding Scheme as a Way to "Save Americans one Soul at a Time,"* 57 CHURCH & STATE 7 (Mar. 1, 2004).

3 Alan Cooperman, *An Infusion of Religious Funds in Fla. Prisons: Church Outreach Seeks to Rehabilitate Inmates*, WASH. POST, Apr. 25, 2004, at A1.

4 Siobhan Morrissey, *Good Faith Efforts,* 3 No. 20 A.B.A. J. E. Rep. 3 (2004).

security status, and have a clean disciplinary record.[5] The program is open to inmates of all faiths, but is overwhelmingly populated by Christians.[6] Christian churches provide most of the volunteers, and the educational programs and spiritual activities are geared toward "born-again" Christianity.[7] Nonetheless, prison officials make clear that inmates can abstain from any program offensive to their own religious beliefs.[8]

Under Governor Bush, Florida has decreased state spending on prisons with various cost-cutting measures such as not providing ceiling fans and a moratorium on spending for recreational equipment.[9] In all, in the face of rising prison populations, the state has cut more than $20 million from secular rehabilitation programs.[10] At the same time, it has allowed churches to spend lavishly. Faith-based groups may sponsor dormitories at Lawtey by making an initial capital investment of $10,000 to pay for ceiling fans, musical equipment, and bibles.[11] Reverend Steve McCoy of Beaches Chapel Church,[12] confirmed that his congregation spent: "$1,163 for ceiling fans, $4,000 for musical instruments, $1,500 for a sound system, $2,500 for computers, $500 for Bibles, $840 for books, $2,500 for food, games, and candy," and other sundries totaling more than $30,000 since Lawtey opened. Rev. McCoy and over a hundred volunteers from Beaches Chapel Church visit Lawtey regularly to conduct bible classes, job hunting lessons, and computer training.[13]

There has yet to be a legal challenge to Lawtey's faith-based program, perhaps because of the far superior conditions of incarceration at Lawtey as opposed to traditional prisons. According to one inmate, "[t]he difference between this and my last prison,

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5 *See Nation's First Faith-Based Prison Continues to Stir Concerns*, 9 CORR. PROF'L 20, July 30, 2004; *see also* Pinkham, *supra* note 1.

6 Boston, *supra* note 2, at 7.

7 *See generally* Tim Padgett, *When God Is the Warden: The Nation's First Faith-Based Prison Mixes Religion and Rehab — and Stirs Up Controversy*, TIME, June 7, 2004, at 50.

8 *See* John Riley, *Hoping Faith Will Stop Crime: Florida Has the Nation's First 'Faith-Based' Prison as a Trend to Use Religion in Correction Grows*, NEWSDAY, May 23, 2004, at A7 (noting that all programs organized by chaplains "are offered to all inmates on a take-it-or-not basis.").

9 *See* Cooperman, *supra* note 4, at A1.

10 *See* Padgett, *supra* note 7, at 51.

11 Cooperman, *supra* note 3.

12 Rev. Steve McCoy was named the Florida Department of Corrections Volunteer of the Year 2004. *See* Christopher F. Aguilar, *Pastor, Congregation Honored For Example; Church Began Faith-Based Prison Program*, FLA. TIMES-UNION, July 7, 2004, at L1, *available at* http://www.religionandsocialpolicy.org/news/article.cfm?id=1712.

13 *Id.*

where I was mixed in with violent criminals, is heaven and hell."[14] Amy Fettig of the ACLU National Prison Project commented that while faith-based prisons are "potentially problematic," the ACLU has not received complaints from inmates, and the organization has chosen to "focus on other conditions like deprivation of food, crowding, and violence."[15] This Article does not dispute that the most grievous constitutional violations in prisons arise under the Eighth Amendment rather than the Establishment Clause. However, this Article addresses the constitutionality of faith-based prisons under the Establishment Clause[16] in the hope that the political will to maintain faith-based prisons will force constitutional compliance in the form of improving prison conditions for all prisoners and providing secular as well as religious options for rehabilitation.

Part I of this Article reviews the Supreme Court's Establishment Clause jurisprudence and presents the various tests lower courts may employ to examine the constitutionality of faith-based prisons. Part II considers recent federal and state Establishment Clause decisions arising out of the prison context and examines the propriety of applying a lower standard to prisoners' claims of constitutional violations. Part III discusses the constitutionality of Lawtey's particular brand of faith-based prison under the Supreme Court's current Establishment Clause tests.

I. Supreme Court's Establishment Clause Jurisprudence

The Supreme Court's Establishment Clause jurisprudence has been aptly described as a "geometry of crooked lines and wavering shapes."[17] The Court's various tests in the area often appear poorly defined or in danger of blending into one another. The jurisprudence also leaves unclear the specific factual predicate that will call up one particular test over another. The difficulty of the tests may be ascribed to problems interpreting the sparse language of the Establishment Clause and to conflicting judicial analysis of the broader principles underlying the Establishment Clause.[18] Calls for abandoning some of these tests have not been heeded and an

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14 Padgett, *supra* note 7, at 51.

15 Samantha M. Shapiro, *Jails for Jesus*, Mother Jones, Nov./Dec. 2003, at 55-59.

16 The First Amendment states in pertinent part: "Congress shall make no law respecting an establishment of religion . . ." U.S. Const. amend. I.

17 Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 399 (1993) (Scalia, J., concurring) (noting the effect of the intermittent use and transformation of the Court's *Lemon* test).

18 *See* Frank S. Ravitch, *A Funny Thing Happened on the Way to Neutrality: Broad Principles, Formalism, and the Establishment Clause*, 38 Ga. L. Rev. 489, 490-97 (2004).

understanding of all the tests remains necessary for interpreting the constitutionality of faith-based prisons.

A. The Lemon *Test*

The Court last approximated unanimity in its Establishment Clause jurisprudence in *Lemon v. Kurtzman*, where for varying reasons, nine justices held unconstitutional at least one provision of a state statutory scheme that provided financial assistance to church-affiliated schools.[19] At this high water mark for coherence, while acknowledging that they only "dimly perceive[d] the lines of demarcation in this extraordinary sensitive area of constitutional law,"[20] the Court prescribed a three-part test for Establishment Clause questions. Under the *Lemon* test, the constitutionality of state action hinges on: 1) a secular legislative purpose; 2) a principal or primary effect that neither advances nor inhibits religion; and 3) the absence of excessive government entanglement with religion.[21]

The first prong of the *Lemon* test rarely proves a high hurdle for state action.[22] In considering the purpose of a piece of legislation, courts are prepared to afford great deference to the legislature,[23] and will not attribute unconstitutional motives to states when a "plausible secular purpose may be discerned from the face of the statute."[24] Thus, the brunt of the Establishment Clause analysis falls to *Lemon's* second and third prongs, which consider the legislation's primary effect and the possibility of excessive entanglement with religion.

While placing the analytical burden on these prongs, the *Lemon* Court failed to articulate the type of inquiry it required. In response to this analytical vacuum, reasoning has emerged that attempts to differentiate between legislative action that has the effect of advancing religion and legislative action that allows religious or-

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19 403 U.S. 602 (1971).

20 *Id.* at 612.

21 *Id.* at 612-13.

22 The deference afforded to state legislatures and the Court's willingness to accept any plausible secular purpose has resulted in the vast majority of religiously-oriented legislation passing the initial *Lemon* inquiry. *But see* Edwards v. Aguillard, 482 U.S. 578 (1987) (striking down a Louisiana law that required creationism to be discussed with evolution in public schools); Stone v. Graham, 449 U.S. 39 (1980) (finding that legislation requiring the posting of the Ten Commandments in public schools failed *Lemon's* purpose prong).

23 *Lemon*, 403 U.S. at 613.

24 Mueller v. Allen, 463 U.S. 388, 394-95 (1983).

ganizations or individuals to advance religion.[25] The difficult distinction requires that impermissible primary effects be perceived by analogy to prior decisions.

The *Lemon* Court provided only marginally more guidance on the excessive entanglement prong, instructing lower courts to "examine the character and purposes of the institutions that are benefited, the nature of the aid that the state provides, and the resulting relationship between the government and the religious authority."[26] This guidance aside, the excessive entanglement inquiry has focused on the amount of governmental monitoring of sectarian institutions required to maintain the secular nature of a governmental program. "[P]rophylactic contacts [typically by state administrators] will involve excessive and enduring entanglement between state and church"[27] and raise the specter of constitutional violation.

The ambiguity of the *Lemon* test is most apparent from decisions applying its three prongs. The post-*Lemon* years are marked by a kind of line-by-line audit of legislative action seemingly unworthy of the Supreme Court. For instance, in *Wolman v. Walter*, the Court upheld a state program providing various therapeutic services to children in non-public schools and the loaning of textbooks to religious schools, but barred state loans of instructional equipment such as slide projectors and state funding for field trips.[28] The Court feared that "the individual teacher who makes a field trip meaningful" might unacceptably foster religion.[29] In *Tilton v. Richardson*, the Court upheld a federal funding program authorized grants for the construction of secular buildings at religious colleges, but struck a provision that allowed the building to be used for religious purposes in the future.[30] Two years later, the Court held unconstitutional in its entirety a similar state program that provided funds to non-public schools for building improvements.[31]

Even in its good years, the Court called the *Lemon* test, "no more than [a] helpful signpost" in dealing with Establishment

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[25] Bd. of Educ. of Kiryas Joel Sch. Dist. v. Grumet, 512 U.S. 687, 719 (1994) (O'Connor, J., concurring). *See also* Corp. of Presiding Bishop of Church of Latter Day Saints v. Amos, 483 U.S. 327, 336-37 (1987) (O'Connor, J., concurring); Larkin v. Grendel's Den, Inc., 459 U.S. 116, 125-26 (1982).

[26] *Lemon*, 403 U.S. at 615.

[27] *Id.* at 619.

[28] Wolman v. Walter, 433 U.S. 229, 230 (1977).

[29] *Id.* at 253.

[30] 403 U.S. 672 (1971).

[31] Comm. for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756 (1973).

Clause challenges.[32] In later years, the *Lemon* test was identified as a pariah, "a bad test [that] may drive out the good" and that continually required tinkering, "making it more and more amorphous and distorted."[33] Justice Scalia equated the *Lemon* 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 . . . ."[34] This clear distaste for the *Lemon* test may have caused its partial premature retirement[35] and certainly spawned a proliferation of other tests. But *Lemon's* retirement is by no means certain; it has not been forgotten by the lower courts and the test serves as a foundation for others.[36]

B. The Agostini *Test*

For all of her abhorrence of the *Lemon* test, Justice O'Connor's *Agostini* test retains the lamentable ambiguity that she attributed to *Lemon*. The *Agostini* test is little more than a mutation of *Lemon*, retaining its first prong and collapsing its second and third. The test's second inquiry into impermissible effect and purpose is answered with reference to "three primary criteria": 1) whether the action or program results in governmental indoctrination; 2) whether the program defines its recipients by reference to religion; and 3) whether the governmental action creates excessive entanglement.[37] The primary embellishment on *Lemon* is that the second criterion focuses on the neutrality of the governmental program and the fostering of religion through private choice.

In *Agostini*, the Court overruled *Aguilar v. Felton*[38] and *School District of Grand Rapids v. Ball*,[39] decisions that twelve years earlier, applying the *Lemon* test, found that enrichment classes provided by state-funded employees on parochial school grounds constituted excessive entanglement.[40] The reversal was premised not only on the new test, but on decisions since *Aguilar* and *Ball* in which the Court shifted its understanding of the factual predicate for exces-

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32 Mueller v. Allen, 463 U.S. 388, 394 (1983) (internal citations omitted).

33 *Kiryas Joel*, 512 U.S. at 720 (O'Connor, J., concurring).

34 Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 398 (1993) (Scalia, J., concurring).

35 *See* Michael Stokes Paulsen, *Lemon Is Dead*, 43 CASE W. RES. L. REV. 795 (1993).

36 For use of *Lemon* by the lower courts, *see, e.g.*, Newdow v. United States Congress, 292 F.3d 597, 609-11 (9th Cir. 2002); Modrovich v. Allegheny, 385 F.3d 397, 403 (3d Cir. 2004).

37 Agostini v. Felton, 521 U.S. 203, 232-34 (1997).

38 473 U.S. 402 (1985).

39 473 U.S. 373 (1985).

40 *Agostini*, 521 U.S. at 222.

sive entanglement.[41]

By recognizing that indoctrination and entanglement are more difficult to prove, the *Agostini* test focuses on the neutrality of the government program. The focus on neutrality allows the government to provide aid to sectarian and secular institutions alike as long as the aid is provided without reference to religious criteria and can be traced back to "true private choice" rather than governmental action.[42]

For example, in upholding the constitutionality of Cleveland's school voucher program through which ninety-six percent of participating children used state-funded vouchers to attend private religious schools, the Court found that the voucher program was itself religiously neutral and that governmental assistance was distributed to a broad class of individuals who in turn directed government funds to religious institutions.[43] Thus, where true private choice prevails, governmental advancement of religion is merely "incidental" and "perceived endorsement of a religious message is reasonably attributable to the individual recipient, not the government."[44]

Further, an apparent dearth of choice does not lead to unconstitutionality. It is only constitutionally important that vouchers provide parents with financial assistance for an array of private schools. No constitutional significance attaches to the majority of program participants choosing to employ vouchers to attend religious schools, or to vouchers providing financial support sufficient only for enrollment in lower cost religious schools, not their more costly secular counterparts.[45]

C. The Endorsement Test

Judge Easterbrook of the Seventh Circuit criticized the endorsement test as "requiring scrutiny more commonly associated with interior decorators than with the judiciary."[46] However, at first glance, the test appears to be yet another version of *Lemon*, asking the familiar *Lemon* trilogy but expanding the effects prong

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41 The Court relied in large part on *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1 (1993), which upheld the use of a state funded sign language interpreter for a student attending a religious school.

42 *See* Zelman v. Simmons-Harris, 536 U.S. 639, 650 (2002).

43 *Id.* at 653.

44 *Id.* at 652.

45 *Id.* at 688 (Souter, J., dissenting).

46 Am. Jewish Cong. v. Chicago, 827 F.2d 120, 129 (7th Cir. 1987) (Easterbrook, J., dissenting).

to include an inquiry into whether government has endorsed religion.[47] The test recognizes that the Establishment Clause "prohibits [the] government from appearing to take a position on questions of religious belief or from 'making adherence to a religion relevant in any way to a person's standing in the political community.'"[48] Judge Easterbrook's dissent attacked the fact-intensive application of the test to municipal holiday displays.[49]

The context of the government's message is key in determining whether the message's religious effect will be neutralized, for instance where a religious painting is exhibited in a museum,[50] or heightened by the nakedness of the display. Under this logic, a crèche surrounded by a frame which "like all good frames, serves only to draw one's attention to the message inside"[51] constituted impermissible endorsement of religion while a crèche displayed alongside other holiday paraphernalia including Santa Claus, candy-striped poles, and clowns created no impermissible endorsement.[52] Similarly, no unconstitutional message was conveyed by an eighteen-foot menorah standing below a Christmas tree more than twice its size and next to a sign saluting liberty.[53]

The haphazard nature of the context inquiry extends to the perception inquiry. In order for government action to remain constitutional, it must not convey a message that religious belief is in any way relevant to standing in the political community. While deciding that constitutionality hinged on public perception, the *Allegheny* Court failed to create a coherent methodology for testing public perception. Justice Blackmun favored the examination of government messages from the perspective of the reasonable observer.[54] Justices O'Connor, Brennan, and Stevens would have examined government action from the perspective of an observer familiar with the history of the nation.[55] The historically sensitive

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47 Lynch v. Donnelly, 465 U.S. 668, 690 (1984).

48 County of Allegheny v. ACLU, 492 U.S. 573, 594 (1989) (quoting *Lynch*, 465 U.S. at 687).

49 *Am. Jewish Cong.*, 827 F.2d at 128-29.

50 *Allegheny*, 492 U.S. at 595.

51 *Id.* at 599.

52 *Lynch*, 465 U.S. at 671-72.

53 In *Allegheny*, a plurality of the Court found no constitutional violation because the religious symbols neutralized one another and provided for a secular celebration of pluralism. 492 U.S. 573.

54 *Id.* at 620.

55 *Id.* at 630-31 (O'Connor, J., concurring). In her concurrence, joined by Justices Brennan and Stevens, Justice O'Connor wrote that the "'history and ubiquity' of a practice is relevant because it provides part of the context in which a reasonable observer evaluates whether a challenged governmental practice conveys a message of

observer would not be offended by governmental sponsorship of religious practices where the practices date back to the founding.[56] In a later embellishment, Justice Rehnquist credited the public observer with knowledge of the challenged action's history and context.[57] While the Supreme Court has to date confined the test to municipal displays, lower courts have applied it more broadly;[58] therefore, the test could be used in assessing the constitutionality of faith-based prisons.

D. The Coercion Test

The coercion test can be traced back to 1946, when in its first Establishment Clause case, the Supreme Court recognized that at bottom, the Establishment Clause prohibits the state from "forc[ing] or influenc[ing] 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."[59] This limiting principle was resurrected as a doctrinal test in *Lee v. Weisman* where the Court held unconstitutional "civic or non-sectarian" prayers recited by a school-approved rabbi at a public school graduation.[60] The Court reasoned that school-initiated prayer placed students in the untenable position of choosing between joining in the prayer, maintaining a respectful silence, or protesting.[61] The pressure inherent in the choice, though subtle and indirect, was found to be as real as any overt compulsion.[62] The Court also dismissed as formalistic the argu-

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endorsement of religion." *Id.* Later, in *Capital Square Review & Advisory Bd. v. Pinette*, Justice Stevens accused Justice O'Connor of requiring an "'ultrareasonable observer' who understands the vagaries of this Court's First Amendment jurisprudence." 515 U.S. 753, 807 (1996).

56 Justice O'Connor's model observer would accommodate the Court's decision in *Marsh v. Chambers*, 463 U.S. 783, 786 (1983), which upheld legislative prayer at the start of the session.

57 In *Zelman v. Simmons-Harris*, 536 U.S. 639, 655 (2000), Justices O'Connor, Scalia, Thomas, and Kennedy signed on to Justice Rehnquist's opinion asserting that a reasonable observer must be deemed aware of the history and context of a challenged program.

58 Newdow v. United States Congress, 292 F.3d 597, 607-08 (9th Cir. 2002) (applying the endorsement test to the pledge of allegiance); Williams v. Lara, 52 S.W.3d 171, 189-92 (Tex. 2001) (considering the constitutionality under the endorsement test of a religious education unit within a Texas prison).

59 Everson v. Bd. of Educ., 330 U.S. 1, 15 (1947).

60 505 U.S. 577, 598 (1992). The roots of the coercion test are outlined in Justice Brennan's concurrence in *Sch. Dist. of Abington Township v. Schempp*, 374 U.S. 203, 240 (1963). Additionally, Justice Goldberg's concurrence reasoned that putatively voluntary school prayer violated the Establishment Clause because of the inherently coercive setting for school children compelled by law to attend school. *Id.* at 307.

61 *Id.* at 593.

62 *Id.*

ment that attendance at graduation was voluntary, noting instead that the importance of the event made it all but compulsory.[63]

Dissenting, Justice Scalia characterized the decision as creating a "boundless and boundlessly manipulable test of psychological coercion."[64] Per Justice Scalia, religious coercion violates the Establishment Clause, but only where the coercion is "by force of law or threat of penalty,"[65] not peer pressure.

Seemingly carving out a schoolhouse niche for the coercion test, in *Santa Fe v. Doe*, a solid six-member majority again applied the test, without fragmented concurrences, to strike down student-led prayer at high school football games.[66] As in *Lee*, the Court was particularly solicitous of the social pressures endured by school age children, and found that students should not be forced to choose between acquiescence and protest at socially important football games.[67] The Court extended *Lee* by finding the pre-game appeals to divine assistance coercive despite the institution of the practice through student elections, thereby holding that a decision by the majority of the student body could not cleanse the coercive nature of the invocation.[68]

In both *Lee* and *Santa Fe*, the Court expressed no opinion on the applicability of the coercion test to adults.[69] However, it is clear that the baseline of the coercion test, the legal coercion test as advocated by Justice Scalia, would apply in all Establishment Clause cases regardless of the plaintiff's age. The psychological coercion test may also logically apply to prisoners who face more insidious coercion than adults in the general population and who, by virtue of their confinement, have a diminished capacity to make choices.[70]

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63 *Id.* at 595.

64 *Id.* at 632.

65 *Id.* at 640.

66 Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290 (2000).

67 *See id.* at 310-11. The Court dismissed the school district's argument that participation in extracurricular football games was voluntary and therefore distinct from high school graduations. "To assert that high school students do not feel immense social pressure, or have a truly genuine desire, to be involved in the extracurricular event that is American high school football is 'formalistic in the extreme.'" *Id.* (quoting *Lee*, 505 U.S. at 595).

68 *Santa Fe*, 530 U.S. at 304-05.

69 *Lee*, 505 U.S. at 593.

70 For instance, the Court distinguished legislative prayer upheld in *Marsh v. Chambers*, 463 U.S. 783 (1983), noting that legislators mill around during the prayer and are free to come and go as they choose. *Lee*, 505 U.S. at 596-97.

II. Establishment Clause in Prison

A. Prisoner Claims Stemming From Mandatory Rehabilitative Programs with Religious Content

> To date, state and federal cases considering prisoners' Establishment Clause claims have arisen primarily in the context of state mandated Alcoholics Anonymous (AA) or Narcotics Anonymous (NA) programs, where prisoner participation is required as a condition of parole or as a condition of beneficial treatment while in prison.[71] A majority of the cases considering mandatory participation in AA have applied the coercion test in holding the programs unconstitutional. To implicate the Establishment Clause, however, courts must find as a preliminary matter that AA or NA programs are religious.[72] Courts finding that such programs are merely spiritual have found no Establishment Clause violation.[73]

Courts that apply the coercion test to mandatory AA programs have largely reduced the test to a three part inquiry, examining: 1) whether the state has acted; 2) whether the action constitutes coercion; and 3) whether the object of coercion is religious.[74] Courts have had little difficulty concluding that participation in religious programs is coerced when prisoners are threatened with loss of good-conduct credits,[75] inability to earn new good-conduct credits,[76] higher security risk ratings,[77] diminished parole eligibility,[78] and decreased visitation rights.[79]

However, courts applying the coercion test to prison programs where participation in a religious program is one of several means of earning advantageous treatment have not found coercion so

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71 *See, e.g.,* Rachel F. Calabro, *Correction Through Coercion: Do State Mandated Alcohol and Drug Treatment Programs in Prisons Violate the Establishment Clause?*, 47 DePaul L. Rev. 565 (1998).

72 For decisions finding that Alcoholics Anonymous is a religious program, see *Kerr v. Farrey,* 95 F.3d 472 (7th Cir. 1996); *In re Garcia*, 24 P.3d 1091, 1096 (Wash. App. Div. 1 2001); *Griffin v. Coughlin*, 88 N.Y.2d 674 (1996).

73 Where AA programs are considered nonreligious, mandatory participation does not offend the Establishment Clause. *See* Stafford v. Harrison, 766 F. Supp. 1014 (D. Kan. 1991) (finding AA merely spiritual); Feasel v. Willis, 904 F. Supp. 582, 586 (N.D. Tex. 1995); Jones v. Smid, No. 4-89-CV-20857, 1993 WL 719562, at *4 (S.D. Iowa Apr. 29, 1993).

74 *See, e.g., Kerr*, 95 F.3d 472; Nusbaum v. Terrangi, 210 F. Supp. 2d 784 (E.D. Va. 2002).

75 *Nusbaum*, 210 F. Supp. 2d at 785.

76 *Id.*; Warburton v. Underwood, 2 F. Supp. 2d 306 (W.D.N.Y. 1998).

77 *Kerr,* 95 F.3d 472.

78 *Id.*

79 *Griffin*, 88 N.Y.2d at 677 (1996).

long as a secular option is available to the prisoner.[80] They have instead concluded that "the absence or presence of choice is sometimes determinative in deciding whether coercion took place."[81] These courts have not considered the position of the *Lee v. Weisman* majority, and thus have failed to analyze whether choice is truly tenable in the prison context.[82] Courts have instead relied on the lowest common denominator of the coercion test: the prohibition of legal coercion.[83]

Except in situations where a religious program is one among a series of options, the coercion test is the kindest to prisoners' claims. Courts applying other tests such as *Lemon* or *Agostini* in the mandatory treatment context typically find no Establishment Clause violation. For instance, applying the *Lemon* test, the Northern District of New York found that requiring participation in AA for eligibility for the prison's family reunification program furthered the secular goals of reducing recidivism and abating addiction.[84] Participation in AA also did not have the effect of promoting or inhibiting religion and did not create excessive entanglement as participation was voluntary and the state did not control the AA group.[85]

In applying *Agostini* to a taxpayer suit challenging the state funding of treatment centers that provide AA programs, the Western District of Wisconsin found no violation of the Establishment Clause as a valid secular purpose supported the funding of the program and any resulting indoctrination could not be attributed to the state where individuals freely chose to participate.[86] In a similar suit challenging state financing and encouragement of participation in AA at state-funded alcohol treatment centers, the Second Circuit, applying *Lemon-Agostini* found a valid secular purpose and that funding only indirectly, if at all, reached AA.[87] Further, the court held that state employees urging attendance at AA meetings were sufficiently distant from the state for their actions not to be

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80 *See* In re *Garcia*, 24 P.3d 1091, 1096 (Wash. App. 2001); O'Connor v. California, 855 F. Supp. 303 (C.D. Cal. 1994).

81 In re *Garcia*, 24 P.3d at 1096.

82 505 U.S. 577, 598.

83 Lee v. Weisman, 505 U.S. at 632 (Scalia, J., dissenting) (applying a standard of legal, actual coercion for violation of the Establishment Clause).

84 Boyd v. Coughlin, 914 F. Supp. 828, 831-32 (N.D.N.Y. 1996).

85 *Id.* at 833.

86 Freedom From Religion Found. Inc., v. McCallum, 214 F. Supp. 2d 905, 914-20 (W.D. Wis. 2002).

87 DeStefano v. Emergency Hous. Group, Inc., 247 F.3d 397, 413-16 (2d Cir. 2001).

construed as state-sponsored indoctrination.[88]

Despite the poor success rate of establishment claims under *Lemon* and *Agostini*, these tests should not necessarily be fatal to prisoners' claims. The difficulty stems not from the tests themselves but from the Court's increasing tolerance of entanglement and its reliance on free choice to distance support of religion from state actors. Further, the disparate results under the coercion, *Lemon,* and *Agostini* tests are inconsistent with the *Lemon* doctrine as "coercion exerted by the state is enough to fail the second prong of *Lemon*."[89]

B. Prisoner Claims Stemming From Religious Programs in Prisons

A situation distinct from mandatory participation in AA, and most akin to Florida's faith-based system, presented itself in *Williams v. Lara*[90] where the Texas Supreme Court considered the constitutionality of the Chaplain's Education Unit (CEU) located at the Tarrant County Corrections Center. In the CEU, a Texas sheriff and his staff taught "orthodox Christian biblical principles" to willing inmates who met other eligibility criteria.[91] Upon challenge by nonparticipating inmates and taxpayers under the Establishment Clause, the Texas Supreme Court considered the *Lemon*, coercion, and endorsement tests, and found that although the program had the valid secular purpose of rehabilitating criminal offenders, it impermissibly endorsed the religious beliefs of the sheriff to the exclusion of all others.[92] The state's demonstrable preference for one religious view was inconsistent with the Establishment Clause even where inmate participation in the program was strictly voluntary.[93]

A pending case challenging faith-based prisons in Iowa has focused on the state's financial support of InnerChange,[94] a group

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88 *Id.* at 416-19.

89 *Nusbaum*, 210 F. Supp. 2d at 788.

90 52 S.W.3d 171, 175 (Tex. 2001); *see* Daniel Brook, *When God Goes to Prison*, LEGAL AFFAIRS, May/June 2003.

91 Williams v. Lara, 52 S.W.3d at 176 (Tex. 2001). Prisoners spent four hours a day learning orthodox Christian teachings and spent the rest of their time completing bible assignments and reviewing religious books or videotapes.

92 *Id.* at 192.

93 *Id.* at 191-92.

94 InnerChange is the brainchild of Charles Colson, formal special counsel to Richard Nixon. He served seven months in prison after pleading guilty to obstruction of justice in the Watergate-related Daniel Ellsberg case. *See also* Shapiro, *supra* note 16, at 57. InnerChange is "a revolutionary, Christ-centered, Bible-based prison program supporting prison inmates through their spiritual and moral transformation," *available at* http://www.ifiprison.org/about.shtml (last visited Dec. 15, 2004).

that has contracted with the state to provide prisoners with the "choice of embracing a new life in Christ and personal transformation."[95] Since 1999, InnerChange has received approximately $880,000 in Iowa state funds, which the group contends serves only to support the secular aspects of its Christ-based teachings.[96] In defending the InnerChange program, the state argued that it mirrored other "free-choice" programs such as school vouchers.[97] The case may have implications for InnerChange programs in Texas, Minnesota, and Kansas but may not reach faith-based programs that are not directly financed by the state.[98]

C. Diminished Establishment Clause Rights for Prisoners

Professor Lynn S. Branham, one of the few scholars to make a legal argument supporting the constitutionality of faith-based prisons,[99] posited that prisoners' claims under the Establishment Clause should be considered under the doctrine set forth in *Turner v. Safley*[100] and *O'Lone v. Estate of Shabazz*.[101] Professor Branham relied on *Turner* and *O'Lone* as their standards are typically fatal to prisoners' claims of constitutional violation.[102]

In *Turner*, the Court considered Missouri prison regulations barring inmate-to-inmate mail and the state's odd restrictions on inmate marriage. The Court held that prison regulations that impinge on prisoners' constitutional rights survive legal challenge if they are reasonably related to the state's penalogical objectives.[103] In assessing the reasonableness of regulations, courts are to examine whether the regulation is validly and rationally connected to its stated penalogical goal and whether any alternative means of

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95 Laurie Goodstein, *Group Sues Christian Program at Iowa Prison*, N. Y. TIMES, Feb. 13, 2003, at A39.

96 *Id.*

97 Telephone interview with Alex J. Luchenitser, Litigation Counsel, Americans United for Separation of Church and State (Jan. 27, 2004).

98 *Id.*

99 Lynn S. Branham, *Go and Sin No More*, 37 U. MICH. J.L. REFORM 291, 303 (2004).

100 482 U.S. 78 (1987).

101 482 U.S. 342 (1987).

102 Branham, *supra* note 99, at 304-05. *See also* Derek P. Apanovitch, *Religion and Rehabilitation: The Requisition of God By the State*, 47 DUKE L.J. 785, 831 (1998) ("Because *Turner* is essentially a rational basis test, prisoners' Establishment Clause claims will almost always lose when assessed under *Turner*.").

103 *Turner*, 482 U.S. at 89. The new standard announced by *Turner*, signaled a change from a "hands-off" policy toward constitutional violations in prison, to one where the court considered prisoners' claims, but afforded states substantial deference where prison policies arguably furthered penalogical objectives. Matthew P. Blischak, *O'Lone v. Estate of Shabazz: The State of Prisoners' Religious Free Exercise Rights*, 37 AM. U. L. REV. 453 (1988).

exercising the impacted constitutional right remains open to the prisoner.[104]

In *O'Lone*, the Court applied this test to deny Muslim prisoners' claims that a new prison regulation that required that prisoners remain all day at their work assignments violated their rights under the Free Exercise Clause because the regulation foreclosed participation in Jumu'ah, a weekly congregational service held on Friday afternoons.[105] The *Turner/O'Lone* doctrine stresses deference to prison officials and waters down constitutional protections for prisoners because of the special concerns of the prison environment.[106] In all, the Supreme Court has applied the *Turner* test to prisoners' claims under the First Amendment's Free Speech Clause[107] and Free Exercise Clause,[108] and to Fourteenth Amendment due process claims not to be involuntarily medicated,[109] and to have contact visits[110] and access to the courts.[111] The Supreme Court has yet to consider prisoner claims under the Establishment Clause.

Professor Branham argues that *Turner* should extend equally to Establishment Clause claims because the clause is designed only to protect individual religious liberty and to shelter religion from the corrosive effects of secularism.[112] By limiting the Establishment Clause to these two anemic purposes, Professor Branham can largely dismiss the latter as inapplicable and allow the former to succumb to the deference that the Supreme Court has traditionally afforded prison officials in managing inmates. In short, there is little danger of state meddling in religion where religious groups have open and free access to prisoners, and the Court has already limited prisoners' rights in terms of their freedom to practice religion. However, Professor Branham failed to consider the broader

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104 *Turner*, 482 U.S. at 89-90.

105 O'Lone v. Estate of Shabazz, 482 U.S. 342, 347 (1987). In *O'Lone*, prisoner work details were supervised by one guard, and when a prisoner needed to return to the prison compound, all prisoners were obligated to return, necessitating movement past the front gates and posing security problems.

106 *See* Owen J. Rarric, *Kirsch v. Wisconsin Dep't of Corrections: Will the Supreme Court Say "Hands Off" Again?*, 35 AKRON L. REV. 305 (2002).

107 Thornburgh v. Abbott, 490 U.S. 401, 404 (1989) (censorship of publications detrimental to institutional security); Shaw v. Murphy, 532 U.S. 223, 228 (2001) (prohibition on inmates providing legal advice to other inmates); Pell v. Procunier, 417 U.S. 817 (1974) (limitation on media access to prisoners).

108 *O'Lone*, 482 U.S. at 342.

109 Washington v. Harper, 494 U.S. 210, 227 (1990).

110 Overton v. Bazzetta, 539 U.S. 126, 132 (2003).

111 Lewis v. Casey, 518 U.S. 343, 360 (1996).

112 Branham, *supra* note 99, at 303.

purposes of the Establishment Clause, which include preventing government from endorsing religion, making religion relevant to community standing,[113] and forcing people to go to or remain away from church.[114] Professor Branham also relied on what she optimistically calls a conflict between state and federal courts on the application of the *Turner* test to Establishment Clause claims.[115]

The *Turner/O'Lone* line of reasoning makes little sense as a barrier to Establishment Clause claims. The Court has applied the *Turner* test to claims where prisoners challenge the infringement of an individual constitutional right. *Turner* is appropriate to such individual rights claims because "[l]awful incarceration brings about the necessary withdrawal or limitation of many privileges and rights."[116] However, when a prisoner complains of an Establishment Clause violation, he does not assert an individual right to engage in certain behavior, but rather a community right to be free from the governmental imposition of religion. Like the Eighth Amendment right to be free from cruel and unusual punishment, Establishment Clause claims should not be subject to review that grants broad deference to the state.[117]

Contrary to reason, the deferential standard of *Turner* would allow cruel and unusual punishment and forced practice of religion as long the practices furthered some institutional goal.[118] In a recent case considering a prisoner's challenge to California's race-based segregation policy, the Supreme Court held that "the right not to be discriminated against based on one's race is not subject to the logic of *Turner*."[119] Thus, the deferential standard in *Turner* applies "*only* to rights that are inconsistent with proper incarceration."[120]

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113 *County of Allegheny v. ACLU*, 492 U.S. at 573, 594 (1989).

114 *Everson*, 330 U.S. at 15.

115 Branham, *supra* note 99, at 304 n.79. ("The lower courts are currently divided on the question whether the *Turner* test applies to prisoners' Establishment Clause claims. Some courts have held that the *Turner* test applies to such claims.") (citing Howard v. United States, 864 F. Supp. 1019, 1025 (D. Colo. 1994) (as applying the *Turner* test)); Williams v. Lara, 52 S.W.3d 171, 188 (Tex. 2001) (not applying the *Turner* test); Scarpino v. Grosshiem, 852 F. Supp. 798 (S.D. Iowa 1994) (adopting a middle-of-the-road approach).

116 Price v. Johnston, 334 U.S. 266, 285 (1948).

117 Gates v. Cook, 376 F.3d 323 (5th Cir. 2004); Spain v. Procunier, 600 F.2d 189, 193-94 (9th Cir. 1979) ("[T]he full protections of the Eighth Amendment most certainly remain in force [in prison].).

118 Under the logic of *Turner*, a reduced rate of recidivism in participants in religiously oriented incarceration programs could warrant forced religious practice in penitentiaries.

119 Johnson v. California, ___ U.S. ___, 125 S. Ct. 1141, 1149 (2005).

120 *Id.* (internal citations omitted).

Further, courts considering prisoners' Establishment Clause claims have largely found the *Turner* test inapplicable.[121] Cases that Professor Branham relies on as evincing a circuit split are instead cases where an inmate asserts a free exercise claim, for example complaining that prison officials denied him space to perform satanic rituals,[122] and the inmate tacks on an Establishment Clause claim stemming from the same action. The state of the case law on prisoners' claims challenging the establishment of religion cannot properly be called a split. One court noted that virtually every court that has considered Establishment Clause challenges has done so without relying on *Turner*.[123] The conclusion that the *Turner* test should not be applied to Establishment Clause claims may also be driven by the fact that the *Turner* test itself is largely nonsensical in the Establishment Clause context. The second prong of the *Turner* test, whether any means of exercising the impacted constitutional right remain open to the prisoner, cannot be answered with respect to an Establishment Clause inquiry where a prisoner asserts that the government has coerced him into practicing religion, or has endorsed one religion over another or religion generally.

Lastly, the deferential standard of *Turner* and *O'Lone* serves to insulate the "day-to-day judgments of prison officials" from searching review by a judiciary far removed from the realities of prison life.[124] Regulations and judgments regarding prison security "are particularly within the province and professional expertise of corrections officials" and "courts should ordinarily defer to their expert judgment in such matters."[125] Application of this deferential

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121 *See, e.g.,* Kerr v. Farrey, 95 F.3d 472, 476-80 (7th Cir.1996) (analyzing an Establishment Clause claim without applying *Turner*); Muhammad v. City of N.Y. Dep't of Corr., 904 F.Supp. 161, 195-99 (S.D.N.Y. 1995) (applying *Turner* to Free Exercise claims but not to Establishment Clause claims stemming from the jail's refusal to provide inmates with Nation of Islam ministers and services); Scarpino v. Grosshiem, 852 F. Supp. 798, 804 (S.D. Iowa 1994) (rejecting the *Turner* test in a case challenging a religious rehabilitation program in prison and noting that "when accommodation issues do not arise, Establishment Clause rights are not rights which 'may necessarily be limited due to the unique circumstances of imprisonment'").

122 Howard v. United States, 864 F. Supp. 1019, 1021 (D. Colo. 1994). Howard argued that he was unfairly denied space to conduct satanic rituals. Applying the *Turner* test, the court found that in light of the prison's accommodation of other inmate religious practices, its refusal was largely pretextual and unrelated to penalogical objectives. *Id.* at 1029-30.

123 *See Williams*, 52 S.W.3d at 188 ("Since *Turner* was decided, an overwhelming majority of the courts that have considered an inmate's Establishment Clause challenge have declined to apply *Turner* in assessing the constitutionality of a prison's actions.").

124 *Turner*, 482 U.S. at 89.

125 *Id.* at 86.

standard has been limited to spot judgments of corrections personnel and to regulations promulgated by specific agencies to which state legislatures have delegated authority to manage and control prisons.[126] In Florida, where the decision to maintain faith-based units is made by a legislative body far removed from the realities of "day-to-day" prison administration, the case for deference to prison experts is much less compelling.

III. The Constitutionality of Lawtey Correctional Institution

A. Lawtey Correctional Institute's Avoidance of Clear Constitutional Violation

Cognizant of the potential for Establishment Clause violation, the Florida legislature and Governor Bush crafted Lawtey in a manner that avoided some of the minefields of the Court's Establishment Clause jurisprudence. Lawtey's secular goals of reducing recidivism by helping inmates assume personal responsibility and adjust to incarceration are provided by statute.[127] Lawtey employees are called on to "[d]evelop community linkages with churches, synagogues, mosques, and other faith-based institutions,"[128] but do not themselves minister to inmates. The arrangement avoids the unconstitutionality of Texas's *Williams v. Lara,* where Sheriff Williams preached Christianity to a self-selected group of prisoners.[129] Lawtey's use of volunteers also circumvents the problems of excessive monitoring and direct subsidies to religious groups.

Further, Lawtey espouses the language of neutrality and free choice characteristic of the Court's recent jurisprudence.[130] Lawtey is open to all inmates regardless of their personal religious

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126 *Turner*, 482 U.S. at 81 (applying deference to regulations promulgated by the Missouri Division of Corrections); *O'Lone*, 482 U.S. 342, 344 (applying deference to prison officials' implementation of New Jersey Department of Corrections Standard 853); Washington v. Harper, 494 U.S. 210, 214-15 (applying deference to Washington's Special Offender Center Policy 600.30 regarding involuntary medication); Lewis v. Casey, 518 U.S. 343, 346 (applying deferential review to Arizona Department of Corrections' personnel regarding access to the prison's legal library and legal assistance).

127 Fla. Stat. Ann § 944.803(1) (West 2001).

128 *Id.* § 944.803(2)(c). "It is the intent of the legislature that the Department of Corrections and the private vendors operating private correctional facilities shall continuously: . . . develop community linkages with churches, synagogues, mosques, and other faith-based institutions to assist inmates in their release back into the community . . . ." *Id.*

129 *See supra* Part II.B.

130 *See, e.g.,* Zelman v. Simmons-Harris, 536 U.S. 639 (2000).

beliefs. Selection criteria are apparently neutral: the prison relies on security status, infractions while in prison, and release date.[131] Like Cleveland's voucher program, Lawtey is accessible to all eligible inmates, subject to space limitations, who choose to pass their incarceration in the facility. Lawtey also nominally accepts the participation of a wide array of faith-based groups in providing religious and educational services to inmates.[132] Relying on the Court's emphasis on neutrality,[133] Florida legislators could conclude that it is immaterial that the vast majority of participating religious groups and inmates are Christian,[134] and that the appearance of endorsement or entanglement is diluted through the free choice of inmates and volunteers.

Lawtey's approach to avoiding unconstitutionality is largely formalistic. It mixes pieces of doctrine that best suit it without addressing concerns stemming from possible coercion of inmates and endorsement in an institutional context where true free choice cannot really exist. Lawtey's greatest insulation from constitutional challenge is its novelty. It creates an Establishment Clause issue in a new setting with the twist of using volunteers rather than state employees for the lion's share of the theological work. Americans United for Separation of Church and State has taken a traditional tack in exploring Lawtey's constitutionality by filing public records act requests for funding information that could reveal problems of direct sponsorship of religious programs.[135] Even in the absence of direct financial entanglement, the faith-based program is susceptible to a finding of constitutional violation under the Supreme Court's prevailing tests.

B. Examining the Constitutionality of Lawtey Correctional Institute

A district court confronted with a challenge to Lawtey will likely apply all of the Supreme Court's Establishment Clause tests. However, if prisoners present a clear claim that the state is forcing them to participate in religious programs under the threat of meaningful penalties, the coercion test is most appropriate to their

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131 *Nation's First Faith-Based Prison Continues to Stir Concerns*, 9 CORR. PROF'L 20, July 30, 2004.

132 *See supra* notes 6-10.

133 *See supra* Part I.B.

134 John Riley, *Hoping Faith Will Stop Crime*, NEWSDAY, May 23, 2004, at A28-29 (noting that the "vast majority" of Lawtey's volunteers are Christian and noting a predominately Christian inmate population).

135 *See* Americans United Files Request For Public Records On New "Faith-Based" Prison In Florida, *at* http://www.au.org/site/News2?page=newsArticle&id=5977&abbr=pr&news_iv_ ctrl=1362 (last visited Apr. 18, 2004).

claims. The coercion test is a logical point of departure as other tests rely in large part on true independent choice to dispose of claims of entanglement and endorsement.

1. Application of the Coercion Test to Lawtey

Analysis of Lawtey's faith-based program should mirror that of mandatory AA and NA programs. Courts should examine: 1) whether the state has acted; 2) whether the action amounts to coercion; and 3) whether the object of the coercion is secular or religious.[136] Florida has acted in creating a prison system that allows religious institutions a monopoly on the provision of rehabilitation services. Rehabilitation is offered at Florida state prisons by religious organizations to whom the state has awarded access to prisoners. It is irrelevant that the promoters of rehabilitation through religion are not employed by the state, as state employees need not minister to inmates in order to satisfy the threshold requirement of state action.[137]

The difference between Florida's traditional prisons and its faith-based facilities sufficiently demonstrates that the putative choice to transfer to a faith-based facility is coercive. It makes little difference in the outcome of the coercion analysis whether Florida actually obliges prisoners to attend faith-based facilities or makes transfer to faith-based facilities a condition of better treatment. Prisoners in Florida can either transfer to Lawtey where they are offered fans, a variety of religious and non-religious classes, and a safer prison environment, or remain in a standard Florida penitentiary without fans, outside mentors, or secular readjustment classes.[138] The difference between these options could not be more stark. Temperatures in central Florida facilities without fans or air conditioning frequently reach 100 degrees.[139] Faith-based dormitories also tend to be less crowded and populated by "better" inmates because inmates are chosen in part for their good behavior in prison. Inmates in the faith-based dormitory near Tallahassee receive nightly classes in religion, job skills, literacy, and drug rehabilitation, while the prisoners in the adjacent prison at Wakulla

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136 *See* discussion *supra* Section II.A.

137 *See, e.g.*, Kerr v. Farrey, 95 F.3d 472, 479 (7th Cir. 1996) ("The fact that NA ran the treatment program is of no moment, since it is clear that the prison officials required inmates to attend NA meetings.").

138 See *supra* Introduction.

139 *See* Chandler v. Crosby, No. 03-012017, 379 F.3d 1278, 1285 (11th Cir. 2004); Gates v. Cook, 376 F.3d 323, 334 (5th Cir. 2004) (evaluating effect of temperatures in unairconditioned death row unit in the Mississippi delta).

Correctional Institution enjoy no evening activities whatsoever.[140]

In the same sense that an inmate has no real choice between attending AA or NA programs and opting for diminished visitation rights and parole possibilities,[141] prisoners cannot be expected to freely elect prison conditions that are more violent, materially inferior, and lacking in opportunities to learn skills that are useful upon release. No comparable secular alternative to faith-based prisons exists in Florida since the state has "slashed spending" for secular rehabilitation and job training programs.[142] Inmates in Florida have but one option if they want education and better living conditions: faith-based prisons. Where conditions of confinement vary, to the degree that residence in a faith-based prison amounts to a lighter sentence, the state has coerced inmates into "choosing" religion over non-religion.

Less severe "choices" have been recognized as psychologically coercive by the Supreme Court. Prayer at high school graduations, which are "in a fair and real sense obligatory," puts students in the untenable and coercive position of saying the prayer, maintaining a respectful silence, or protesting.[143] Similarly, pre-game prayer at football games unconstitutionally makes submission to public prayer a prerequisite to a popular high school social activity.[144] Consideration of psychological coercion in addition to legal coercion may properly be extended from schoolhouses to prisons because of the nature of the prison environment.

Florida will not be able to seriously dispute the religious nature of its faith-based prisons. While prisoners are not forced to attend religious activities contrary to their beliefs, they are encouraged to participate in the predominately Christian environment.[145] Inmates at Lawtey, like others across the state, perform manual labor during the morning, but unlike other inmates, in-

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140 Thomas B. Pfankuch, *Faith-Based Prison Dorms, Programs Raise Questions*, FLA. TIMES-UNION, Apr. 29, 2002, at B1.

141 *See supra* Section II.A.

142 *See* Cooperman, *supra* note 3, at A6.

143 Lee v. Weisman, 505 U.S. 577, 586 (1992).

144 Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 312 (2000) ("Even if we regard every high school student's decision to attend a home football game as purely voluntary, we are nevertheless persuaded that the delivery of a pre-game prayer has the improper effect of coercing those present to participate in an act of religious worship.").

145 *See* Cooperman, *supra* note 3, at A6. Critiquing the faith-based prison, an inmate described Lawtey as "under Christian dictatorship" and a professor noted the unconstitutional implications of faith-based prisons, which essentially require "giv[ing] your life to Jesus Christ, our Lord, and savior" in exchange for a more comfortable prison atmosphere.

mates at Lawtey spend their afternoons and evenings participating in spiritual and secular study led by church volunteers.[146] Attendance at a weekly community night, which includes chaplain-led spiritual testimonials, is mandatory.[147] On Friday nights prisoners may participate in a program called Evangelical Explosion, which is geared toward teaching inmates how to convert others to Christianity.[148] Evangelical Explosion may also be combined with a church-sponsored pizza party.[149] The atmosphere is one in which religion of one kind or another permeates all facets of incarcerated life.

2. Application of the Lemon *and* Agostini *Tests to Lawtey*

Under the *Lemon* and *Agostini* tests, the Florida Attorney General will have little difficulty demonstrating a secular purpose in rehabilitating prisoners and reducing recidivism. Since courts are disinclined to engage in an exploration of legislative purpose, they likely will not get to the bottom of how the purpose of reducing recidivism can be a genuine goal when programs geared toward that end have been eliminated in prisons housing the vast majority of the state's prisoners.[150] In considering whether the principal or primary purpose of the program seeks to advance religion, challengers of faith-based programs will also have to contend with precedent that has allowed public funds in the form of vouchers to sponsor admission to predominately sectarian elementary schools. Thus, the thrust of any argument on the unconstitutionality of faith-based prisons will have to address *Lemon's* third prong: excessive entanglement.

In a pre-cursor to *Lemon*, the Court found an impermissible relationship between church and state at public elementary schools in a situation that mirrored Lawtey. In *McCollum v. Board of Education*, the Supreme Court considered the constitutionality of a program that excused willing public school students from class for thirty to forty-five minutes a week for religious instruction administered by Catholic and Protestant clergy in school classrooms.[151]

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146 *Id.*
147 *Id.*
148 *Id.*
149 *Id.*
150 Florida has more than 81,000 prisoners. *See* Florida Department of Corrections, *available at* http://www.dc.state.fl.us/pub/annual/0304/stats/im_pop.html (last visited Apr. 18, 2005). Only 800 men are housed at Lawtey Correctional Institute. *See supra* notes 2-4. Approximately 300 women will be housed at Hillsborough Correctional Institute, a faith-based prison for women. *See supra* note 2, *Faith-Based Prison for Women Opens in Florida.*
151 333 U.S. 203 (1948).

Students whose parents elected not to enroll their children in religious classes were sent to another room to continue their secular instruction.[152] The Court found unacceptable the "close cooperation" between church authorities and the state, as well as the program's utilization of a tax-established and tax-supported school system to allow religious groups to spread their faith.[153] Like Lawtey, the school program functioned through the use of volunteers, without the apparent direct financial assistance of the state.[154] Instead, the religious program relied on the existing school infrastructure and students' legal obligation to attend school to provide willing students with religious instruction.[155]

The degree of entanglement fostered at Lawtey is indistinguishable. Lawtey also impermissibly entangles church and state through state solicitation of religious organizations for participation in the faith-based program.[156] The embellishments on *Lemon* through the *Agostini* test provide little assistance for the state. While Lawtey may be termed a neutral program that does not identify participants on the basis of religion, the coercive nature of the program forecloses the possibility that any incidental aid accruing to religions is the product of free individual choice.

3. Application of the Endorsement Test to Lawtey

Under the endorsement test, the relevant context of Florida's faith-based prisons is the legislative decision to defund secular rehabilitation programs in favor of the faith-based model. Thus, the context is not analogous to a menorah standing next to a Christmas tree and a sign saluting liberty because Florida has presented faith-based programs as the sole state-approved method of rehabilitating prisoners. It is of little import that faith-based programs, at least nominally, provide prisoners with access to volunteers of various faiths as the context remains pervasively religious rather than secular.

Within this context, the state conveys the message that religion is relevant to standing in the community by demonstrating that only those who choose to transfer to faith-based dormitories are worthy of the state's rehabilitative efforts. Prisoners who do not apply or fail to qualify for transfer, or are simply on Lawtey's long

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152 *Id.* at 209.
153 *Id.*
154 *Id.* at 207-09. *See* discussion *supra* Introduction.
155 *Id.* at 209. *See* discussion *supra* Introduction.
156 FLA. STAT. ANN § 944.803(1) (West 2001).

waiting list, are warehoused in prisons that lack fans, volunteers, and vocational classes.[157] The qualities that the court may attribute to its reasonable observer are immaterial to the overall finding of endorsement in the faith-based prison setting. As faith-based prisons are a relatively new phenomenon,[158] prior acquiescence to the practice is irrelevant to the perception of the reasonable observer. The reasonable observer also cannot attribute perceived state endorsement of religion to the private choice of prisoners as no true choice can be made by prisoners in this context.

CONCLUSION

The only constitutional way to maintain popular faith-based prisons is to provide inmates at ordinary state facilities the same access to rehabilitative programs, community volunteers, and improved prison conditions as enjoyed by prisoners at faith-based facilities. State administrators responsible for reaching out to religious communities for volunteers[159] should similarly recruit secular volunteers. The provision of an equally attractive alternative to faith-based incarceration would circumvent the problems of coercion that exist when the state provides only one religiously infused option for improved conditions of confinement. A secular alternative to faith-based incarceration would also alleviate the problems of entanglement and endorsement because where comparable secular alternatives truly exist, any perceived endorsement of religion can be attributed to the individual prisoner rather than to the state.

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157 *See* Cooperman, *supra* note 3, at A1.

158 In the 19th century, Quaker-influenced prison reform in Pennsylvania provided for the isolation of all prisoners and their exclusive instruction by ministers. *See* Michael Vitiello, *Reconsidering Rehabilitation*, 65 TUL. L. REV. 1011, 1039 (1991); Melvin Gutterman, *Prison Objectives and Human Dignity*: *Reaching a Mutual Accommodation*, 1992 B.Y.U. L. REV. 857, 911 (1992).

159 *See* FLA. STAT. ANN § 944.803(1) (West 2001).