Constitutionally Coerced: Why Sentencing a Convicted Offender to a Faith-Based Rehabilitation Program Does Not Violate the Establishment Clause

LISA A. BIRON[†]

I. INTRODUCTION

"CONGRESS SHALL make no law respecting an establishment of religion . . . ."[1]

Imagine that you are a judge in the criminal court system. Before you, in your courtroom, sits an offender whose drug and alcohol problems have played a primary role in his run-ins with the law. He is facing substantial time behind bars, where he may or may not get treatment for substance addiction. You want to offer the offender a chance at rehabilitation[2] and have become aware of a long-term residential treatment program that has a fantastic record of success. It is, however, a Christian faith-based program. You then offer this offender the choice between successfully completing this program or completing his sentence in prison. He chooses the treatment program. Have you just coerced the offender into this faith-based program in violation of the First Amendment's Establishment Clause? Must you offer the option of a secular program? What if there is no secular program available, or none that is equivalent—in length, cost, or features—to the faith-based program?

Many people that end up in drug and alcohol treatment programs arrive by way of the criminal justice system.[3] Faith-based programs are advantageous and must remain a valid option in offender sentencing. This article examines the constitutional implications of sentencing an offender to a faith-based treatment program. Can faith-based treatment sentencing

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[†] Juris Doctor, Regent University School of Law, 2008; B.A., Criminal Justice, Franklin Pierce University, 2005 valedictorian. I thank Professor John Tuskey for his helpful comments and edits. I also thank my husband Mike and my daughter Rachael for their patience, encouragement, and emotional support.

[1] U.S. CONST. amend. I.

[2] Because of the magnitude of offenses perpetrated by substance addicted offenders, some jurisdictions have implemented Drug Courts, a specialized court to deal with drug and alcohol addicted offenders. *See* ELIZABETH A. PEYTON & ROBERT GOSSWEILER, TREATMENT SERVICES IN ADULT DRUG COURTS: REPORT ON THE 1999 NATIONAL DRUG COURT TREATMENT SURVEY 3 (1999).

[3] U.S. DEPT. OF HEALTH & HUMAN SERV., SUBSTANCE ABUSE TREATMENT FOR ADULTS IN THE CRIMINAL JUSTICE SYSTEM 91 (2005).

be accomplished without violating the Establishment Clause? This article proposes that it can.

Section II examines the different ideologies that are at the root of most Establishment Clause jurisprudence, and continues with a brief summary of the various analytical frameworks used by the Supreme Court to decide alleged Establishment Clause violations. Section II also discusses the basics of the *Lemon* test,[4] the "endorsement" test,[5] and the "neutrality" test.[6] Section III introduces the "coercion" test,[7] and offers a critical examination of the Supreme Court's standard for coercion. Section IV surveys decisions by various courts that have dealt with the issue of faith-based sentencing of offenders in the context of coercion. Section V offers some critical thoughts on the proper standard for coercion, and explains when an offender's voluntary choice to attend a faith-based program negates any Establishment Clause violation claims. Section VI discusses the options that may be offered to an offender to give him a voluntary, and thus, constitutional choice in the matter. Section VII examines the philosophy and methodology of a Christian faith-based treatment program. Section VIII concludes with a look at the magnitude of the drug and alcohol problem in this country, and a plea to the Supreme Court to alter their approach in this area of Establishment Clause jurisprudence.

II. A BRIEF SUMMARY OF ESTABLISHMENT CLAUSE JURISPRUDENCE

From the time of the first modern Establishment Clause case[8] until now, the Supreme Court has become sharply divided as to the proper application of the Establishment Clause to the states[9] and has set forth

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[4] Lemon v. Kurtzman, 403 U.S. 602, 612–13 (1971).

[5] Lynch v. Donnelly, 465 U.S. 668, 687 (1984) (O'Connor, J., concurring) (setting forth the Endorsement principle for the first time).

[6] Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 839 (1995).

[7] Lee v. Weisman, 505 U.S. 577, 586–87 (1992).

[8] Everson v. Bd. of Educ., 330 U.S. 1 (1947). Justice Hugo Black first employed the now familiar mantra, "wall of separation", a phrase used by Thomas Jefferson in his 1802 letter to the Danbury Baptists. This "separationist interpretation" of the First Amendment's Establishment Clause prevailed through the 1970s, generally resulting in the banning of prayer in public schools and the banning of state aid to religious schools. These decisions were usually handed down by lopsided majorities. FRANCIS GRAHAM LEE, CHURCH-STATE RELATIONS xxii, 19 (2002); In *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940), the Supreme Court first ruled that the Establishment Clause applies to state legislatures under the Due Process Clause of the Fourteenth Amendment.

[9] There exists a valid and compelling argument that elaborates on and provides credible historical constitutional scholarship to support Justice Thomas' federalist view that the Establishment Clause was never meant to apply against the states. Vincent Phillip Munoz, *The Original Meaning of the Establishment Clause and the Impossibility of It's Incorporation*, 8 U. PA. J. CONST. L. 585, 600–03 (2006). The very wording of the First Amendment's Establishment Clause, "*Congress* shall make no law respecting an establishment of religion . . .", lends credence to this view that the Establishment Clause was intended to prevent the Federal Government from interfering with the sovereign states' right to establish a state religion or not. *Id.* at 620–21 (emphasis added).

anything but a predictable and solid line of case law on the matter.[10] This section aims to provide a brief summary of the Supreme Court's Establishment Clause jurisprudence in order to establish a foundation for the discussion that follows. The following is by no means an exhaustive study of Establishment Clause canon, as a comprehensive study could fill volumes and is beyond the scope of this article. But, before delving into the varied Establishment Clause analytical frameworks, and in order to understand the non-uniformity and fluctuation in Establishment Clause jurisprudence, a brief explanation of the Supreme Court's diametrically opposed philosophical underpinnings is necessary.

A. The Ideologies

The differences in ideologies found among the Supreme Court Justices at any given time tend to govern the outcome of an Establishment Clause case more than any test or precedent.[11] The most basic breakdown of the differing ideologies finds the different Justices in one of two groups: those who are separationists, who believe in the complete separation of government and religion; and those who are accomodationists, who believe that government and religion may cooperate to reach important secular goals.[12] An honest examination of this country's political and legal history from its inception supports the latter view. The Court itself has stated that our "institutions presuppose a Supreme Being . . . ."[13] Likewise, "[i]t is true that religion has been closely identified with our history and government . . . . The fact that the Founding Fathers believed devotedly that there was a God and that the unalienable rights of man were rooted in Him is clearly evidenced in their writings . . . ."[14]

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[10] *Rosenberger*, 515 U.S. at 861. (Thomas, J., concurring) (noting that "our Establishment Clause jurisprudence is in hopeless disarray . . . ."); "[O]ur Nation's protection, that fortress which is our Constitution, cannot possibly rest upon the changeable philosophical predilections of the Justices of this Court . . . ." *Lee*, 505 U.S. at 632 (Scalia, J., with whom Rehnquist, C.J., White, J., & Thomas, J., joined, dissenting).

[11] *See Lee*, 505 U.S. at 632 (Scalia, J., dissenting) (noting the "changeable philosophical predilections of the Justices of this Court . . ."); Van Orden v. Perry, 545 U.S. 677, 697–98 (2005) (Thomas, J., concurring) (noting the outcomes of cases rest on "personal preferences of judges").

[12] LEE, *supra* note 8, at 4.

[13] *Van Orden*, 545 U.S. at 709 n.4 (quoting Zorach v. Clauson, 343 U.S. 306, 313 (1952)).

[14] *Id.* at 683 (quoting School Dist. of Abington Twp. v. Schempp, 374 U.S. 203, 212–13 (1963)). By looking at the Supreme Court's First Amendment jurisprudence over the past several decades, it would appear that the Founders and the Ratifiers of the Constitution were strong supporters of a strict separation of church and state. This is not the case. A look at the early Supreme Court decisions, rendered by justices who were around when the Constitution was written and ratified, tell a completely different story. DAVID BARTON, THE MYTH OF SEPARATION: WHAT IS THE CORRECT RELATIONSHIP BETWEEN CHURCH AND STATE? 47–82 (6th ed. 1992) (quoting many early Supreme Court decisions stating that America is a religious nation, and specifically, a Christian nation). After surveying the historical evidence of America's founding, Justice Brewer, writing for the Court, stated, "that this is a Christian nation." Church of The Holy Trinity v. United States, 143 U.S. 457, 471 (1892).

The differing tests surrounding the Establishment Clause amount to little more than judicial discretion and make Establishment Clause jurisprudence unpredictable. The tests and precedents are often ignored or abandoned.[15] Justice Breyer has written, "I see no test-related substitute for the exercise of legal judgment."[16] By "legal judgment," Justice Breyer does not mean discovering and applying the controlling Constitutional law, but an "I'll-know-it-when-I-see-it" approach to determining Establishment Clause violations.[17] This approach, untethered to any "test-related substitute," gives way to unlimited judicial activism that should have no place in a democratic society.[18] The resulting implications are manifold and are beyond the scope of this article. The following subsections highlight the various standards the Supreme Court has used in Establishment Clause cases.

B. The Lemon *Test*

The *Lemon* test,[19] in its original form, contained three prongs that were used to determine if a statute violated the Establishment Clause. "First, the statute must have a secular purpose; second, its principle or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster 'an excessive government entanglement in religion.'"[20] The third prong has changed in its original application since the 1997 Supreme Court case, *Agostini v. Felton*.[21] *Agostini* essentially changed *Lemon*'s excessive entanglement prong into "simply one criterion relevant to determining [the second prong of the *Lemon* test]."[22] The Court then set forth the following revised criteria for determining when a statute does not have the effect of advancing religion: the second prong is not violated when "[i]t does not result in governmental indoctrination; define its

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[15] This is not to say that wrong Supreme Court decisions should not be overturned. The Constitution's text should be the standard by which all constitutional cases are decided. In essence, stare decisis in the U.S. Supreme Court's constitutional analysis can be considered unconstitutional because the Supreme Court justices have sworn an oath to uphold the Constitution, rather than prior Supreme Court decisions. When precedent does not comport with the Constitution it must not be followed. Michael Stokes Paulsen, *The Irrepressible Myth of Marbury*, 101 MICH. L. REV. 2706, 2731–32 (2003).

[16] *Van Orden*, 545 U.S. at 700 (Breyer, J. concurring).

[17] Referring to Justice Breyer's "exercise of legal judgment" analysis in *Van Orden*, Justice Thomas noted that: "The outcome of constitutional cases ought to rest on firmer grounds than the personal preferences of judges." *Id.* at 697.

[18] "That is, a small group of people decide arbitrarily what, from their viewpoint, is for the good of society at that precise moment and they make it law, binding the whole society by their personal arbitrary decisions." FRANCIS A. SCHAEFFER, A CHRISTIAN MANIFESTO 48 (1982).

[19] Lemon v. Kurtzman, 403 U.S. 602, 612–13 (1971).

[20] *Id.*

[21] Agostini v. Felton, 521 U.S. 203, 222–23 (1997).

[22] Mitchell v. Helms, 530 U.S. 793, 808 (2000) (citing *Agostini*, 521 U.S. at 232–33).

recipients by reference to religion; or create an excessive entanglement."[23] Originally set forth to determine the constitutionality of a statute, the *Lemon* test as revised by *Agostini*[24] is now used, when the Court chooses, to determine the constitutionality of any government action or program that touches religion.[25]

The *Lemon* test's first prong, finding a secular purpose, is the easiest part of the test to satisfy. Statutes and programs enacted by states are generally always intended to accomplish a secular purpose.[26] A sentencing or probation guideline that would allow an offender to be placed in a drug and alcohol facility has the secular purpose of curbing crime and addiction by treating the substance abuse problem of the convicted offender. It is with the second prong of the *Lemon* test, weighing a statute or program's primary or principle effect, where most litigation has focused. The following tests and analytical frameworks can come into play when analyzing the *Lemon* test's second prong.

C. The Endorsement Test

The "endorsement" test posits that the government may not put its stamp of approval or disapproval on religion.[27] The endorsement test was first introduced during a *Lemon* effect-prong analysis demonstrating that, at times, the Court weighs whether the government is supporting or condemning religion while conducting an analysis of *Lemon*'s second prong.[28] Apart from being used as a factor in the *Lemon* test, the endorsement test has also been used frequently to evaluate Establishment Clause cases regarding government sponsored displays or speech.[29] Other

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[23] *Id.* (quoting *Agostini*, 521 U.S. at 234).

[24] Hereinafter, the *Lemon* test as altered by *Agostini* will continue to be referred to as the *Lemon* test.

[25] "[A] program violates the Establishment Clause when it allows or requires 'the government itself . . . through its own activities and influences' to advance or inhibit religion." Gray v. Johnson, 436 F. Supp. 2d 795, 801 (W.D. Va. 2006) (citing Madison v. Riter, 355 F.3d 310, 318 (4th Cir. 2003)).

[26] *But see*, *e.g.*, Edwards v. Aguillard, 482 U.S. 578, 582 (1987) (Louisiana Creationism Act violated secular purpose prong); Wallace v. Jaffree, 472 U.S. 38, 56 (1985) (Alabama statute authorizing a moment of silence in public schools for voluntary prayer or meditation violated secular purpose prong).

[27] Lynch v. Donnelly, 465 U.S. 668, 692 (1984).

[28] *Id.* at 691–92 (O'Connor, J., concurring) (first mentioned the endorsement test in the context of applying the *Lemon* test, stating that "[f]ocusing on the evil of government endorsement or disapproval of religion makes clear that the effect prong of the *Lemon* test is properly interpreted"). In *Zelman*, Justice O'Connor acknowledges her role in coining the endorsement test analysis, stating: "[A]s I have put it, of 'endorsing or disapproving religion'." Zelman v. Simmons-Harris, 536 U.S. 639, 669 (2002) (O'Connor, J., concurring) (citing *Lynch*, 465 U.S. at 691–692 (O'Connor, J., concurring)); *see also Gray*, 436 F. Supp. 2d at 800 n.4 (noting how various circuits have analyzed the second prong of the *Lemon* test).

[29] *See* Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 33–34 (2004) (O'Connor, J., concurring) (noting the appropriate use of the Endorsement Test in cases of speech and displays); *see*

nuanced forms of analysis are found under the umbrella of endorsement, but are beyond the scope of this article. Regardless of the context in which it is used, the endorsement test looks to whether the government has, in effect, communicated an opinion—good or bad—about religion. It does not matter if the governmental action does or does not actually advance or inhibit religion.[30] In endorsing religion, Justice O'Connor explained, "[the government] sends a message to non-adherents that they are outsiders, not full members of the political community . . . ."[31]

The endorsement test has been criticized strongly by those who interpret American history as having religious faith and tradition as interwoven and inseparable parts of our society.[32] When neither the *Lemon* test nor the endorsement test can lead to the desired outcome, the neutrality test is yet another form of analysis used in Establishment Clause cases.

D. The Neutrality Test

The "neutrality" test is used most often in situations that involve the government conferring a benefit to a religion or a religious program. This doctrine of neutrality is especially relevant since President George W. Bush announced two new Executive Orders that would open the way for faith-based social service providers to compete with secular social service providers for government funding and contracts.[33] The neutrality test requires that government benefits provided to a religious program must be received without favoring the affiliated religion or without any religious indoctrination being attributable to the state.[34] But, the Court cautioned, it must "be sure that we do not inadvertently prohibit [the government] from

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also, e.g., Capital Square Review v. Pinette, 515 U.S. 753, 772–73 (1995) (display of a cross in a plaza next to state capital) (O'Connor, J., concurring); County of Allegheny v. Greater Pittsburgh ACLU, 492 U.S. 573, 627 (1989) (display of a crèche in county court house and menorah outside city and county buildings) (O'Connor, J., concurring); *Wallace*, 472 U.S. at 70 (statute authorizing a meditative moment of silence in classroom) (O'Connor, J., concurring); *Lynch*, 465 U.S. at 688 (inclusion of Nativity scene in city government's Christmas display) (O'Connor, J., concurring).

[30] *Lynch*, 465 U.S. at 691–92 (O'Connor, J., concurring).

[31] Texas Monthly v. Bullock, 489 U.S. 1, 9 n.1 (1989) (internal citations ommitted).

[32] In *Texas Monthly*, Justice Scalia noted in his dissent:

> As a judicial demolition project, today's decision is impressive. The machinery employed . . . is no more substantial than the antinomy that accommodation of religion may be required but not permitted, and the bold but unsupportable assertion (given such realities as the text of the Declaration of Independence, the national Thanksgiving Day proclaimed by every President since Lincoln, the inscriptions on our coins, the words of our Pledge of Allegiance, the invocation with which sessions of our Court are opened and, come to think of it, the discriminatory protection of freedom of religion in the Constitution) that government may not "convey a message of endorsement of religion".

Id. at 29–30 (Scalia, J., dissenting).

[33] *See* IRA C. LUPU & ROBERT W. TUTTLE, *The Roundtable on Religion and Social Welfare Policy, The State of the Law 2003*, 2 (2003).

[34] *See, e.g.*, Good News Club v. Milford Cent. Sch., 533 U.S. 98, 114 (2001) (citing Mitchell v. Helms, 530 U.S. 793, 809 (2000)); Zelman v. Simmons-Harris, 536 U.S. 639, 649 (2002).

extending its general state law benefits to all its citizens without regard to their religious belief."[35]

The endorsement test and the neutrality test may either be used by themselves or in combination with each other, whether as part of or separate from a *Lemon* test analysis. All of the above tests are, at best, arbitrary and capricious.[36] The following and final test addressed in this article—the coercion test—is no exception, and yet is particularly relevant in order to analyze the constitutionality of sending a convicted offender to a faith-based rehabilitation program.

III. THE NOT-SO-COERCIVE COERCION STANDARD

Although coercion may be used as a factor for determining if the second prong of the *Lemon* test has been violated,[37] it is not an essential element. In contrast, the Supreme Court has opined that coercion alone could be enough to find a violation of the Establishment Clause.[38] Accordingly, some courts have used the coercion test in lieu of the *Lemon* test. In the context of faith-based rehabilitation program sentencings, courts have looked to whether the program participant had been coerced into participating in the religious program.[39] If coercion is found, the Establishment Clause is violated and no further analysis is necessary.[40] But what exactly is coercion? The Supreme Court has not set forth a standard for coercion that is appropriate for a convict facing a choice between prison and a faith-based treatment program.

The coercion test was first articulated by Justice Kennedy in *Lee v. Weisman*,[41] and has set forth a standard for coercion that bears little resemblance to what the Constitution's Framers would have considered to be "coercion" or the establishment of a religion.[42] The majority in *Lee*

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[35] Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 839 (1995) (quoting Everson v. Bd. of Ed. of Ewing, 330 U.S. 1, 16 (1947)).

[36] *See Rosenberger*, 515 U.S. at 839; Lee v. Weisman, 505 U.S. 577, 586–87 (1992).

[37] *See* Gray v. Johnson, 436 F. Supp. 2d 795, 800 n.4 (W.D. Va. 2006).

[38] *Lee*, 505 U.S. at 604 (Blackmun, J., concurring). "[A] *per se* rule focusing on coercion is a permissible substitute for the traditional *Lemon* test . . . ." Nusbaum v. Terrangi, 210 F. Supp. 2d 784, 788 (E.D. Va. 2002). The Court has noted that "the Free Exercise Clause is predicated on coercion while the Establishment Clause violation need not be so attended." School Dist. of Abington Twp. v. Schempp, 374 U.S. 203, 223 (1963).

[39] *See, e.g.*, Warner v. Orange County Dep't of Prob., 115 F.3d 1068 (2d Cir. 1996) (holding that coerced participation in religious Alcoholics Anonymous meetings violated the Establishment Clause); Kerr v. Farrey, 95 F.3d 472 (7th Cir. 1996) (holding that coerced participation in religious Narcotics Anonymous meetings violated the Establishment Clause); *Nusbaum*, 210 F. Supp. 2d 784 (holding that a Therapeutic Community Program emphasizing religion violated the Establishment Clause).

[40] *See Lee*, 505 U.S. at 604 ("Although our precedents make clear that proof of government coercision is not necessary to prove an Establishment Clause violation, it is sufficient.").

[41] *Id.* at 586–99.

[42] Van Orden v. Perry, 545 U.S. 677, 693–94 (2005) (Thomas, J., concurring). Justice Thomas stated:

ruled in a five-four split decision that the recitation of a non-sectarian prayer at a public school graduation was an establishment of religion because "*subtle coercive pressures* exist[ed] and . . . the student had no real alternative [no meaningful choice] . . . to avoid the fact *or appearance* of participation."[43] The Majority explained that the "subtle coercive pressure" to either stand up with the group or to remain seated in silence, was a type of psychological pressure brought on by peer pressure.[44] "This pressure, though subtle and indirect, can be as real as any overt compulsion."[45] Although attendance at the graduation ceremony was voluntary, the majority decided that attendance was not truly voluntary, because graduation was such an important and significant event in a young person's life.[46] The majority concluded that "the State, in a school setting, in effect required participation in a religious exercise."[47]

This psychological coercion standard has been regarded by some legal scholars as inappropriate in determining alleged Establishment Clause violations;[48] the test can be characterized as tenuous at best. Justice Kennedy, on behalf of the Court in *Lee* acknowledged that this indirect subtle psychological coercion rationale might not hold true with mature adults.[49] As Justice Scalia noted in his dissent, the majority was playing psychologist.[50] Justice Scalia suggested that an Establishment Clause test that "invalidate[s] longstanding traditions cannot be a proper reading of the Clause."[51] He admonished that it is not possible to measure psychological

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> Much, if not all, of this [Court's unintelligible Establishment Clause precedent] would be avoided if the Court would return to the views of the Framers and adopt coercion as the touchstone for our Establishment Clause inquiry. Every acknowledgment of religion would not give rise to an Establishment Clause claim. Courts would not act as theological commissions, judging the meaning of religious matters. Most important, our precedent would be capable of consistent and coherent application.

Id. at 697.

[43] *Lee*, 505 U.S. at 588 (emphasis added).

[44] *Id.* at 593. *See generally* Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 310–11 (2000) (no meaningful choice amounts to coercion when school district's policy permitting student-led, student-initiated prayer at football games violated the Establishment Clause).

[45] *Lee*, 505 U.S. at 593.

[46] *Id.* at 595.

[47] *Id.* at 594.

[48] *See, e.g.*, Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 45 (2004) (Thomas, J., concurring) (criticizing the *Lee* coercion standard).

[49] *Lee*, 505 U.S. at 597. *See also* School Dist. of Abington Twp. v. Schempp, 374 U.S. 203, 307 (1963) (Goldberg, J., concurring) (finding mandatory Bible reading in public school unconstitutional, but limiting the holding to the fact that young children are impressionable and are required by law to attend school).

[50] *See infra* note 53.

[51] *Lee*, 505 U.S. at 631 (Scalia, J., dissenting) (quoting County of Allegheny v. Greater Pittsburgh ACLU, 492 U.S. 573, 627 (1989) (Kennedy, J., concurring in part and dissenting in part)).

coercion, and this makes such a test endlessly manipulable.[52] Justice Scalia remarked that the Court has no business in the practice of psychology.[53]

This article proposes that the proper standard for coercion in an alleged Establishment Clause violation in the case of a convicted offender's faith-based treatment sentence is actual legal coercion, or coercion by force of law or legal penalty,[54] and not peer pressure. This standard of coercion itself will be examined after the case summaries in Section IV, but, for the present, it will suffice to say that legal coercion involves the state using the force of law or the threat of legal penalty in order to compel an offender to enter a faith-based program.[55] The courts in the following cases have not directly applied the psychological-coercion standard from *Lee*, but have fallen well short of applying an appropriate standard of actual legal coercion. No appropriate standard has yet been established for them to follow.

IV. A SYSTEM OF SABOTAGE: TYING THE HANDS OF THE CRIMINAL JUSTICE SYSTEM AS IT ATTEMPTS TO TREAT AN EPIDEMIC

Several courts have considered the Establishment Clause's implications of sending an offender to a religiously-themed drug and alcohol treatment program. In finding that the government has coerced participation in a faith-based program, these courts have confused the coercion that is an inherent part of the criminal justice system with coercion under the Establishment Clause. These courts have found coercion where there is no force of law or legal penalty.

The Sentencing Guidelines for the United States Courts state that "[c]ommunity confinement may be imposed as a condition of probation or supervised release."[56] The Commentary to this Section defines "community confinement" as "*residence in a community treatment center*, halfway house, restitution center, mental health facility, *alcohol or drug rehabilitation center* . . . ."[57] This article focuses on the constitutionality of committing an offender to a faith-based residential drug and alcohol treatment center that is not within the confines of a correctional facility—

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[52] *Id.* at 632.

[53] *Lee*, 505 U.S. at 636 (Scalia, J., dissenting) (comparing the psycho-coercion decision in *Lee* to the Court's interior decorating-type scrutiny regarding holiday displays in its Establishment Clause jurisprudence). "But interior decoration is a rock-hard science compared to psychology practiced by amateurs. . . . The Court's argument that state officials have 'coerced' students to take part in the invocation and benediction at graduation ceremonies is, not to put too fine a point on it, incoherent." *Id.*

[54] *See generally* Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 45–54 (2004) (Thomas, J., concurring) (explaining that historically the establishment of religion involved actual legal coercion).

[55] *See infra* Section IV.A (discussing actual legal coercion by force of law or threat of legal penalty).

[56] 18 U.S.C.S., U.S Sentencing Guidelines Manual *App.* § 5F1.1 (2006).

[57] *Id.* at cmt. 1 (emphasis added).

i.e., as an alternative to incarceration or as a condition of parole or probation. Some of the following cases involve inmate treatment programs that are inside jail or prison; however, the Establishment Clause implications and analysis of legal coercion should be the same in either scenario.

In *Griffin v. Coughlin*, the New York Court of Appeals ruled that an offender was coerced into a religious exercise in violation of the Establishment Clause through participation in the state correctional facility's Alcohol and Substance Abuse Program ("ASAT").[58] The ASAT program was deemed to be a religious program because it included Alcoholics Anonymous (A.A.) as part of its curriculum.[59] Acknowledging the Supreme Court split in *Lee*, the New York Court of Appeals did not use the psychological coercion test *per se*, but instead articulated a standard somewhere in between psychological coercion and legal coercion.[60] The court found that conditioning an inmate's participation in the Family Reunion Program[61] upon his attendance at the ASAT Program amounted to governmental pressure and thus coercion.[62]

Similarly, in *Warner v. Orange County*, the Second Circuit ruled that a three-time drunk driver was coerced into a religious activity when he was ordered to attend A.A. as a condition of his probation.[63] The Orange County Department of Probation's report recommended six special conditions that were routinely recommended to offenders with alcohol

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[58] Griffin v. Coughlin, 673 N.E.2d 98 (N.Y. 1996).

[59] *Id.* at 101 (The New York Court of Appeals overruled the lower court that found that the Establishment Clause was not violated because the A.A. program is not a religious program. A.A. or Narcotics Anonymous (N.A.) is commonly made a requirement of an offender's parole or probation agreement, and some have complained that this requirement violates the Establishment Clause.). The Supreme Court has not ruled on this issue and there are serious problems in labeling these programs as religious and, therefore, capable of violating the Establishment Clause. The courts are split on this issue. *Compare e.g.*, Feasel v. Willis, 904 F. Supp. 582, 583 (N.D. Tex. 1995) (finding there was no established precedent that the A.A. program was a forced indoctrination into religion); O'Connor v. California, 855 F. Supp. 303, 307 (C.D. Cal. 1994) (finding A.A. not religious because participants did not have to renounce their own religious convictions); Stafford v. Harrison, 766 F. Supp. 1014, 1016–17 (D. Kan. 1991) (finding the spiritual nature of A.A. not properly categorized as a religion); *with* Warner v. Orange County Dep't of Prob., 115 F.3d 1068 (2d Cir. 1996) (finding that A.A., being based on the belief in a monotheistic God or Supreme being, is a religion); Kerr v. Farrey, 95 F.3d 472, 480 (7th Cir. 1996) (finding that, although the "higher-power" can be any belief, it is a religious concept); Both A.A. and N.A. subscribe to the "Step-program" which encourages the participant to believe in and lean on a higher power, but this "higher power" can be anything—as A.A. and N.A. state—"god as we understand him." People of all faiths as well as people of no faith are welcome to participate. W. BILL ET AL., ALCOHOLICS ANONYMOUS WORLD SERVICES INC. 59 (3d ed. 1976). Programs so loosely "religious" as that of A.A. or N.A. should not, in any way, implicate the Establishment Clause.

[60] *See Griffin*, 673 N.E.2d at 103–06.

[61] The Family Reunion Program allowed offenders to have expanded family visitation periods. *Id.*

[62] *Id.* at 111.

[63] *Warner*, 115 F.3d at 1069.

problems.[64] The court said that if the offender had been offered a secular alternative to the A.A. program—a choice—the results may have been different.[65] Although the offender in *Warner* was an adult and not as susceptible to pressure as the children in *Lee*, the court pointed out that the student plaintiff in *Lee* would only have to endure one brief prayer. The offender in *Warner*, on the other hand, was recommended to a long-term program with repeated exposure to religion.[66]

Likewise, the Seventh Circuit, in *Kerr v. Farrey*, reversed the district court in holding that Wisconsin violated the Establishment Clause by coercing the plaintiff to participate in Narcotics Anonymous (N.A.), a religious program.[67] This state-coercion consisted of encouraging an inmate to attend and observe N.A. meetings, where attendance at the N.A. program would reflect positively on the inmate's security risk rating and consideration for parole.[68] The inmates were not required to participate actively in the meeting. In *Kerr*, the Seventh Circuit articulated its own Establishment Clause coercion test.[69] Criticizing the lower court for using the *Lemon* test, and without citing a single authority, the Seventh Circuit declared that, in its view, a plaintiff may show that the state is coercing a party to subscribe to religion or to a particular religion in violation of the Establishment Clause by answering three crucial questions: "first, has the state acted; second, does the action amount to coercion; and third, is the object of the coercion religious or secular?"[70] The court found all three of the elements satisfied in *Kerr*.[71] First, the state was acting, because it required observation of the N.A. meeting, and second, the risk of a higher security classification that might affect the inmate's parole was deemed to be coercion.[72] The third element was satisfied because the court determined the N.A. program was religious.[73]

In *Nusbaum v. Terrangi*, the Eastern District Court of Virginia decided that a correctional center coerced an offender into a religious program and violated the Establishment Clause because the offender would not earn good conduct credits if he did not participate in the Therapeutic

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[64] *Id.* at 1070.

[65] *Id.* at 1075.

[66] *Id.* at 1076.

[67] Kerr v. Farrey, 95 F.3d 472, 474 (7th Cir. 1996); *see also* 18 U.S.C.S., U.S Sentencing Guidelines Manual *App.* § 5F1.1 (2006).

[68] *Kerr*, 95 F.3d at 474–75.

[69] *Id.*

[70] *Id.* at 479.

[71] *Id.*

[72] *Id.*

[73] *Id.* at 479–80. The Supreme Court has listed Secular Humanism as one of the religions found in America: "Among religions in this country which do not teach what would generally be considered a belief in the existence of God are Buddhism, Taoism, Ethical Culture, *Secular Humanism* and others." Torcaso v. Watkins, 367 U.S. 488, 495 n.11 (1961) (emphasis added). This prompts the question of how any state ordered rehabilitation program would survive the Seventh Circuit's analysis.

Community Program.[74] The court noted that the *Warner* and *Kerr* courts did not use the *Lemon* test and agreed that coercion alone was enough to prove a constitutional violation.[75] *Nusbaum* determined that "as a practical matter, a *per se* rule focusing on coercion is a permissible substitute for the traditional *Lemon* test in this context because the mere fact that coercion is exerted by the state is enough to fail the second prong of the test."[76]

It is understandable that the above courts found coercion where no legal coercion existed, as there has been no clear, applicable standard set forth for them to follow. The next Section argues that coercion does not exist when offering a convicted offender a faith-based program option.

V. AN ACTOR IS NOT COERCED INTO A FAITH-BASED PROGRAM IF HE CAN CHOOSE NOT TO DO IT AND HIS CHOICE IS NOT PENALIZED

Cases in which a convicted offender is sentenced by the state to attend a faith-based treatment program generally hinge, rightly or wrongly,[77] on whether the offender was coerced into participating. The feeble coercion standard set forth by Lee has left courts with no applicable standard for cases involving convicted criminal offenders.[78] Consequently, courts are propagating the rule that "[c]oercion is . . . impermissible when it takes the form of subtle coercive pressure that interferes with an individual's real choice . . . ."[79]

This subtle coercive pressure, or psychological coercion standard, should not amount to the standard of coercion that violates the Establishment Clause in cases of convicted criminal offenders.[80] The *Lee* precedent is a weak standard for coercion even as applied to impressionable school children. Accordingly, the courts should not look to the *Lee* decision at all when analyzing an Establishment Clause violation claim by an adult criminal offender that has been presented with the option

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[74] Nusbaum v. Terrangi, 210 F. Supp. 2d 784, 788 (E.D. Va. 2002). "It is a progressive program of building on the core basic skills and demonstrating that those skills have been applied and are being used in terms of staying away from criminal thinking as well as substance abuse." Commonwealth of Virginia Board of Corrections, Jan. 15, 2005 meeting notes, *available at* http://www.vadoc.virginia.gov/boards/minutes/2005/1-2005mins.doc.

[75] *Nusbaum*, 210 F. Supp. 2d at 787.

[76] *Id.* at 788.

[77] *See* Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 53–54 (2004) (Thomas, J., concurring) (noting that coercive actions by the government regarding religion may also "implicate the Free Exercise Clause and are perhaps better analyzed in that framework").

[78] *See generally Kerr*, 95 F.3d 472; Warner v. Orange County Dep't of Prob., 115 F.3d 1068 (2d Cir. 1996); Edmondson v. Curry, No. 05-CV-445-JD, 2006 U.S. Dist. LEXIS 30416 (D.N.H. Apr. 3, 2006); DeStefano v. Emergency Housing Group, Inc., 247 F.3d 397 (2d Cir. 2001); Griffin v. Coughlin, 673 N.E.2d 98 (N.Y. 1996).

[79] *Edmondson*, 2006 U.S. Dist. LEXIS 30416, at *15–16 (quoting *DeStefano*, 247 F.3d at 412).

[80] Justice Scalia regarded the Court's argument in *Lee* as "incoherent" and nothing like the historical coercion envisioned by the Framers. *See* Lee v. Weisman, 505 U.S. 577, 636 (1992) (Scalia, J., dissenting); *see also*, *supra* notes 32, 53 and accompanying text.

of attending a drug and alcohol treatment program with religious components.[81] The standard for coercion that violates the Establishment Clause should be no less than actual legal coercion.[82] This article suggests that coercion does not exist when: 1) the offender has the option not to participate—a choice; and 2) where his choice not to participate is not penalized by legal penalty or force of law.

A. Legal Coercion: "By Force of Law or Legal Penalty"[83]

The concept of coercion of religion in American history bears no resemblance to the psychological coercion standard set forth in *Lee*. The establishment of a religion, at the time the Constitution was ratified by the States, involved actual legal coercion.[84] Examining the text of the Constitution in historical context brings to light a proper understanding of when coercion equals an establishment of religion.[85] "The coercion that was a hallmark of historical establishments of religion was coercion of religious orthodoxy and of financial support *by force of law and threat of penalty*."[86] This level of legal coercion generally required attendance at the state church, observation of the Sabbath, and taxation to support the church and minister.[87] People that did not follow those laws faced civil penalties.[88]

In the context of convicted offenders, withholding good conduct credits, being deemed uncooperative or a higher security risk, or not being paroled or released early, do not amount to coercion by force of law.[89] Withholding benefits and privileges are not threats or legal penalties. It is not coercive by force of law to offer a benefit or a privilege to the participant in a faith-based program. Nor is it coercive by force of law to withhold a benefit or privilege from one who does not participate in the program.

For example, if one gives a donation to a religious organization, he will be eligible for a tax benefit. If one does not give the donation to the religious organization, he would not qualify for the tax benefit. This hardly means that the government would be coercing one to support religion by

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[81] *See generally Lee*, 505 U.S. at 593 (noting the psychological coercion standard may not apply to adults).

[82] Of course actual illegal force such as a state officer holding a gun to a person's head and saying "pray or I'll kill you" is *actual* coercion that would violate the Constitution and other laws.

[83] Van Orden v. Perry, 545 U.S. 677, 693 (2005) (Thomas, J., concurring) (quoting *Lee*, 505 U.S. at 640 (Scalia, J., dissenting)).

[84] *Id.* (quoting Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 52 (2004) (Thomas, J., concurring)).

[85] *Id.*

[86] *Id.* (quoting *Lee*, 505 U.S. at 640) (emphasis added).

[87] *Id.* (quoting Cutter v. Wilkinson, 544 U.S. 709, 729 (2005) (Thomas, J., concurring)).

[88] *Newdow*, 542 U.S. at 52 (Thomas, J., concurring) (quoting *Lee*, 505 U.S. at 640–41 (Scalia, J., dissenting)).

[89] *See* Nusbaum v. Terrangi, 210 F. Supp. 2d 784, 789 (E.D. Va. 2002); *See supra* Part III.

giving the benefit in the former case and withholding the benefit in the latter. The same should hold true with the benefit of receiving good conduct credits, the benefit of participating in other coveted programs, the benefit of being paroled, and the benefit of being considered a low security risk. These benefits are a reward for a chosen path, not methods of coercion. In none of the cases discussed in Section IV does an offender get more time added to his sentence. An offender may earn good conduct credits or be looked upon favorably at parole for attending these programs, but his sentence is his sentence; it is the penalty rendered after conviction by a court of law. The mere fact that his sentence may be shortened because of his willing participation in a rehabilitation program cannot be considered coercion.

A convict is not a *Lee*-schoolboy.[90] Requiring the convict to observe a group meeting is not coercion of a religious belief by force of law—the convict receives no penalty except that which he has already received. Much of the courts' confusion about coercion is due to the inherent coerciveness of criminal justice. This topic will be discussed further throughout the remainder of this article. Apart from the lack of coercion in the above cases, each of the offenders had a choice; and that choice, as the Supreme Court has ruled,[91] should have negated any alleged coercion.

B. "I Don't Like My Options" is Not Equivalent to "I Have No Choice"

When a person makes a decision to choose one thing over the other, it is, many times, because he has found one of the two options undesirable or offensive. Giving a person the option of life or death is an example of an extreme choice, but it is, nonetheless, a choice.[92] Judge Posner wrote:

> It is a misunderstanding of freedom . . . to suppose that choice is not free when the objects between which the chooser must choose are not equally attractive to him. It would mean that a person was not exercising his free will when in response to the question whether he preferred vanilla or chocolate ice cream he said vanilla, because it was the only honest answer that he could have given and therefore 'he had no choice.'[93]

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[90] *See supra* Part IV and notes 53 and 80 and accompanying text; *see also Lee*, 505 U.S. at 593.

[91] *See infra* Part V(B).

[92] "I have set before you life and death . . . . Now *choose* life . . . ." *Deuteronomy* 30:19 (emphasis added); "*Choose* life and not death!" *2 Kings* 18:32 (emphasis added). Unless otherwise noted, all Biblical references are from the New International Version of the Bible.

[93] Freedom From Religion Found., Inc. v. McCallum, 324 F.3d 880, 884 (7th Cir. 2003) *affirming* Freedom From Religion Found., Inc. v. McCallum, 214 F. Supp. 2d 905 (W.D. Wis. 2002).

In the cases discussed in Section IV, coercion did not exist because, in each case, the offender had a free choice to attend the program or not. The choice was made voluntarily, without penalty. The options may have been limited by lack of a secular program option, but there was still a choice–even when the only other option was prison. Courts have made the mistake of characterizing the option of time in prison as a legal penalty imposed for the choice not to participate in a faith-based program, thus finding legal coercion. However, the incarceration time is not a penalty for the choice; *the incarceration time is the other option.* The time in prison or jail has been garnered independently by the offender as payment for his conviction. The incarceration term has been set, regardless of whether there is another option offered to the offender.

The confusion over the coercion debate is understandable, because the criminal justice system is inherently coercive. No person wants to go to prison, or to be compelled to perform restrictive conditions of parole. The convict is coerced. Care must be taken not to transfer the coercive nature of criminal justice to legal coercion under the Establishment Clause. Understanding this difference is crucial, particularly in cases in which an offender is recommended to serve in a faith-based treatment program. The offender's choice negates coercion under the Establishment Clause.

The Supreme Court has ruled that when a private party voluntarily chooses, the Establishment Clause is not implicated.[94] This concept of free private choice arose in the context of school voucher programs. The voucher programs, which allowed individuals to receive government-funded vouchers for use in schools of the parents' choice, were challenged under the Establishment Clause.[95] It was argued that because the religious private schools far outnumbered the secular private school choices that there was no genuine choice aside from religious schools.[96] This, it was argued, meant that the vouchers would overwhelmingly be used for attendance at religious schools, and thus were unconstitutional.[97] However, the Court found that the voucher program did not violate the Establishment Clause: "The Establishment Clause question is whether [the state] is *coercing* parents into sending their children to religious schools, and that question must be answered by evaluating *all* options . . . only one of which is to obtain a program scholarship and then choose a religious school."[98]

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[94] Zelman v. Simmons-Harris, 536 U.S. 639, 655–56 (2002) (recognizing, in the context of government funding to religious schools, that no reasonable observer would determine the state had endorsed a religion when the funds reached the school by the private choice of individuals).

[95] *Id.*

[96] *Id.* at 658.

[97] *Id.* at 656–58 & n.4.

[98] *Zelman*, 536 U.S. at 655–56 (first emphasis added).

The reasoning is that where there is true private choice, the causal connection between the state and the religious program is broken.

This rationale works just as well in the context of the state offering an offender a faith-based treatment program. For example, if an offender is given the choice to attend a faith-based rehabilitation program or a secular rehabilitation program, his choice nullifies any coercion on the part of the state. Likewise, if an offender is given the choice between attending a faith-based program or doing his time in jail or prison, his choice nullifies any coercion.

The inmate in *Griffin* was not coerced into a religious program, because he could choose not to attend. The inmate was given the voluntary choice to participate in the ASAT program. If the inmate participated, he would then be allowed to participate in the Family Reunion Program.[99] However, the majority of the court agreed that because no secular program was offered that would give the inmate the benefit of participating in the Family Reunion Program, that this was coercion.[100] The majority ruled that the State "has exercised coercive power to advance religion by denying benefits to atheist and agnostic inmates who object and refuse to participate in religious activity . . . ."[101] But where there is true private choice, conferring a benefit on an inmate for participation in ASAT—in this case eligibility for a family visitation program—is not coercion.[102]

In *Warner,* the court found religious coercion in violation of the Establishment Clause because of the lack of choice given to the offender.[103] The judge, upon recommendation from the probation department, ordered the offender to attend A.A. The Second Circuit asserted that "[h]ad [the offender] been offered a reasonable choice of therapy providers, so that he was not compelled by the state's judicial power to enter a religious program, the considerations would be altogether different."[104] But, this assertion is not true: the offender did have a choice; he could have completed the sentence that he was given for his three drunk driving convictions in one year.[105] Again, the argument that the option of incarceration amounts to legal coercion fails, because the incarceration is not a penalty (or force of law) for the offender's choice. The incarceration

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[99] *See* Griffin v. Coughlin, 673 N.E.2d 98, 99 (N.Y. 1996).

[100] *Id.* at 111–12.

[101] *Id.* at 105. By the wording in the court's holding, it appears that only people that do not believe in God—atheists and agnostics—can be *coerced* into the ASAT program. One wonders how the court would have ruled in the case of a Muslim, Buddhist, Christian, or an observer of any other religion.

[102] *See supra* Part IV.

[103] Warner v. Orange County Dep't of Prob., 115 F.3d 1068 (2d Cir. 1996)

[104] *Id.*

[105] *Id.* at 1078 (Winter, Cir. J., dissenting) (noting the court had let this offender out on probation when he agreed to condition his probation on participation in the A.A. program and that "[t]his lawsuit is an instance of remarkable gall").

time is the penalty for the offender's criminal offense. There is a huge difference—the former is an Establishment Clause violation, the later is not. For example, coercion would occur in a situation in which the government gave an offender the option to choose between a faith-based program or incarceration when the offender's actions did not warrant time behind bars. In that case, the penalty and force of law—in this case, incarceration—would be levied as punishment for not attending a faith-based program. Clearly this situation would be unconstitutional.

Freedom From Religion Foundation, Inc. v. McCallum presents a slightly different scenario from the previous cases, as it involved an offender who was given a choice between prison, a faith-based rehabilitation program and, in theory, a secular program. *Freedom From Religion Foundation, Inc. v. McCallum* was decided by the United States District Court for the Western District of Wisconsin (*McCallum I*)[106] and later upheld by the Seventh Circuit (*McCallum II*).[107] This Establishment Clause case involved several offenders and a Christian faith-based program sentence.[108] In *McCallum I* and *II*, both courts determined that the offenders had made a free choice and were, therefore, not coerced into the program in violation of the Establishment Clause.[109]

In *McCallum I*, the state of Wisconsin gave offenders who were facing a return to prison because of parole violations the opportunity to enter the Christian faith-based rehabilitation program Faith Works instead of prison.[110] The state contracted with Faith Works and provided funding for five beds over nine months.[111] According to the contract, Faith Works would provide the following services: "twenty-four hour residential care, services and supervision; individual and group counseling; sufficient qualified staff; intake assessments; individual treatment and supervision plans for each resident; programming; monitoring; transportation; drug screening; entrance physical examinations; medical services; and aftercare plans. . . ."[112]

The Wisconsin Division of Community Corrections had a policy in place to refer probationers to Faith Works. The probation and parole agents would recommend that convicted offenders enter the program if they thought Faith Works was appropriate.[113] The offenders were informed that

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[106] Freedom From Religion Found., Inc. v. McCallum, 214 F. Supp. 2d 905 (W.D. Wis. 2002).

[107] Freedom From Religion Found., Inc. v. McCallum, 324 F.3d 880 (7th Cir. 2003).

[108] The case involved state funding to a faith-based provider which may require greater Establishment Clause scrutiny than a faith-based sentence alone. The funding issue is beyond the scope of this article, but was found to be constitutional and not an establishment of religion.

[109] *McCallum*, 214 F. Supp. 2d at 920; *McCallum*, 324 F.3d at 884.

[110] *McCallum*, 214 F. Supp. 2d at 910–11.

[111] *Id.* at 908.

[112] *Id.*

[113] *Id.* at 910.

the program was religious, and were asked if they objected.[114] "[O]ne agent stated that she wanted desperately to enroll an offender in Faith Works if a bed was available . . . [and] was most interested in the long-term, supervised residential aspect of the program . . . ."[115] The policy stated that offenders who were referred to Faith Works were to be offered an alternative secular option.[116] However, secular treatment programs in the area were typically filled to capacity, and because of waiting lists could not offer the necessary extended stay that the Department of Corrections required.[117] Although the offenders wanted to avoid formal parole revocation, the agents that made Faith Works referrals believed that the offenders "would not have hesitated to object to a religious treatment program if they were opposed."[118] The District Court summarized that:

> According to the stipulated facts, agents recommend a program, but inform offenders of the religious content . . . ; they obtain the offender's consent to participate in the program; they document that consent; and they inform the offender that he cannot be ordered to participate in a religious treatment program. . . . None of the offenders referred to Faith Works objected to its religious component [and] . . . participate[d] in the Faith Works program as the result of their own private, independent choice.[119]

The District Court noted that Faith Works' uniqueness raised questions about the offenders' opportunity to choose, but that "the Constitution does not require that the religious and non-religious options offered to an offender have *identical features*, but only that they be *reasonable alternatives*."[120] The District Court went on to hold that because the state selected the treatment options that the offender could choose from, his choice was restricted, but this did not mean he was deprived of a real choice.[121]

The Seventh Circuit affirmed the decision on appeal.[122] The court agreed that the parole officers' recommendation of the faith-based program

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[114] *Id.* at 911.
[115] *Id.* at 910–11.
[116] *Id.* at 913.
[117] *Id.*
[118] *Id.* at 911.
[119] *Id.* at 915 (previous policy did not require the agents to offer a specific secular alternative).
[120] *Id.* at 916 (emphasis added); *see supra* pp. 122–25.
[121] *Id.* at 916.
[122] Freedom From Religion Found., Inc. v. McCallum, 324 F.3d 880, 884 (7th Cir. 2003).

was not an establishment of religion.[123] The Seventh Circuit stated that "[i]f recommending a religious institution constituted an establishment of religion, a public school guidance counselor could not recommend that a student apply to a Catholic college . . . ."[124] Additionally, the court acknowledged that a choice is a free choice even though the options are not "equally attractive" to the chooser.[125] As the facts of *McCallum* showed that although offenders were offered an alternative secular program "on paper," the reality was that the secular programs in the area were usually full, and in addition could not provide the time-length the offenders needed.[126] Thus, the only meaningful choice was between the faith-based program and prison.

The choice between prison and a faith-based program is still a free choice. Suppose that an offender is facing prison and the offender himself suggests he enter a faith-based program instead of prison. This situation is no different than an offender agreeing to a faith-based program upon recommendation from the state. Prison and faith-based programs may often be the only available and satisfactory options.

VI. ALL OPTIONS ARE NOT CREATED EQUAL

When sentencing an offender to residential treatment, a secular option should be provided if available. Any program must, of course, meet the minimum requirements that the state wants to impose on the convicted offender. Among the most important requirements is the duration of the program,[127] which may pose a problem with the secular option. Generally, secular programs are much shorter than faith-based programs.[128] States cannot be expected to offer a short-term secular rehabilitation program as a valid alternative to a long-term faith-based program when the offender deserves a lengthy confinement. The offender has been convicted of a crime, and whether that crime is repeated DWIs, robbery, drug sales, or gang-related activities, he is deserving of punishment. The criminal justice system is based on punishment[129] and punishment should be meted out to the convicted offender through sentences of appropriate length. The time in a residential treatment program must thus be taken into account in terms of

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[123] *Id.*

[124] *Id.* at 883.

[125] *Id.* at 884.

[126] *McCallum*, 214 F. Supp. 2d at 913.

[127] Program duration is important both in terms of punishment and in terms of the success of the program—the longer is better. *See id.*

[128] *See id.* at 910–11.

[129] RICHARD J. BONNIE ET AL., CRIMINAL LAW 2 (2d ed. 2004). ("For many years, criminal law scholars have identified four main goals of punishment: retribution, deterrence, incapacitation, and rehabilitation.").

adequate punishment. The length of the program is one of the major points of inadequacy that may disqualify the secular rehabilitation option.

Secular residential programs generally last for thirty days; some last as long as ninety days.[130] Faith-based residential programs commonly run for a much longer time. Teen Challenge[131] is a Christian faith-based program that runs from fifteen to twenty months, with six months of aftercare.[132] When an offender has received a substantial prison sentence, what judge would seriously contemplate allowing the offender to choose a program that may last merely thirty or ninety days in lieu of that prison time?

There are also differences in treatment options between secular and faith-based treatment programs. If it is determined by a court that an offender needs a program that offers job training, parenting skills, or anger management techniques, he would have to choose a program that included all of these requirements. Faith-based programs such as Teen Challenge can offer all of these programs and more.[133] It may be possible for an offender to satisfy a durational requirement by combining secular programs, either through an extension of the program or by combining secular programs together. In addition to serving as necessary punishment, the length of treatment has also proven indicative of the success of the treatment as longer programs yield greater success rates.[134]

Another area of concern with secular programs is their cost. There is generally a vast difference in the cost of a secular program as compared with a faith-based program, especially when the length of the program is taken into account. Secular programs can be extremely expensive, making faith-based programs a far better economic option. Thirty days in a secular

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[130] *See, e.g.*, Drug Rehab Program, Spencer Recovery Centers, Inc., http://www.spencerrecovery.com (last visited Mar. 25, 2008) (Spencer Recovery Centers Primary Care lasts 21 or 28 days; Extended Care can last up to another 60 days); Welcome to Oasis Treatment Center- Intensive Inpatient Treatment, http://www.oasistreatment.org (last visited Feb. 8, 2008) (Oasis Treatment Center Primary Phase is 1–30 days; Structured Phase is 30–60 days; Betty Ford Center, http://www.bettyfordcenter.org (last visited Feb. 8, 2008 (Structured Sober Living Phase is 60–90 days) (Betty Ford Residential Care can last 60–90 days); Drug and Alcohol Rehab, http://southcoastrecovery.com (last visited Feb. 8, 2008) (South Coast Recovery offers 30, 60, or 90 day residential programs); Residential Treatment Center- The Orchard Recover Center, http://www.orchardrecovery.com (last visited Feb. 8, 2008) (The Orchard Recovery and Treatment Center offers 28 or 42 day residential care.).

[131] Center Locations: Teen Challenge USA, http://www.teenchallengeusa.com/locations.php?type=1#results (last visited Feb. 8, 2008). The name *Teen* Challenge is a misnomer because the majority of the program participants are adults. Nationwide there are 94 facilities for adult males, 43 facilities for adult females, 15 facilities for adolescent males and 18 facilities for adolescent females.

[132] Teen Challenge New England, http://www.tcnewengland.org/tcne%20intake%20form%202006.pdf (last visited Feb. 8, 2008).

[133] *See infra* Part VI (discussing the Teen Challenge Program and curriculum).

[134] Allen Nace, An Examination of Treatment Outcomes Impacted by Inpatient Substance Abuse Treatment During the Period of 2000 and 2001, A Case Study 6 (2004) (unpublished Master of Arts thesis, State Univ. of N.Y., Empire State College) (on file with author); Arthur J. Lurigio, *Drug Treatment Availability and Effectiveness*, 27 CRIM. JUST. & BEHAV. 495, 501 (2000).

program can cost from $6,000–21,000.[135] The Teen Challenge program has a $750 induction fee and a $500 monthly cost, paid through sponsorship that can be waived for hardship.[136] The total cost for one year at Teen Challenge is $6,750.[137] Additionally, in many cases, the state will pay up to a certain amount toward the cost of the program.[138] This state funding is inadequate to pay for an expensive secular program, but could pay virtually all of the low cost of the faith-based program.[139] If some or all of the cost is passed to the offender, his inability to pay will restrict his options. As the court in *McCallum I* noted, a restricted choice is still a choice.[140]

In addition to the need for affordable care, the success of the program is a factor. The success of faith-based programs is an area in need of more study.[141] In fact, the studies done on treatment outcome in general are insufficient and inconclusive because of the different measures of success. One study on short-term residential treatment outcomes noted the difficulties with the various research studies.[142] Different treatment approaches have different values and, therefore, different outcome goals. These differences make it hard to measure success rates in treatment. For example, some researchers use the "harm reduction approach" while others measure success by total abstinence.[143] Success can also be measured differently by various societal groups. For example, the criminal justice system will measure success in terms of reduced criminal activity or recidivism, while society in general may measure success in terms of productivity and self-sufficiency.[144]

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[135] The Oasis Treatment Center costs $18,500 for the first 30 days; an additional 31–60 days is an additional $7,000 and another $3,000 for the Structured Sober Living Phase. Welcome to Family Counseling, http://www.oasistreatment.org (last visited Feb. 8, 2008). The Betty Ford Center's 30 day residential care program costs $24,000 and the 90 day program costs $39,000. Alcohol and Drug Rehabilitation- Betty Ford Center Programs, http://www.bettyfordcenter.org/programs (last visited Feb. 8, 2008).

[136] Teen Challenge New England, http://www.tcnewengland.org/tcne%20intake%20form%2020 06.pdf (last visited Feb. 8, 2008).

[137] *Id.*

[138] *See* U.S. DEPT. OF JUSTICE, RESIDENTIAL SUBSTANCE ABUSE TREATMENT FOR STATE PRISONERS PROGRAM: FY 2007 FORMULA GRANT ANNOUNCEMENT 3, *available at* http://www.ojp.usdoj.gov/BJA/grant/08RSATsol.pdf (last visited Feb. 8, 2008).

[139] There are several requirements that must be met before a program can receive federal grant money. The program must be residential and last for at least six months. *Id.* at 2. Applicants that receive funding must provide data that measures the results of their work. One of the categories of data examined is the cost of the treatment per offender. *Id.* at 2–3. Common sense dictates that because the funding is not unlimited, the more cost effective programs are the better option.

[140] Freedom From Religion Found., Inc. v. McCallum, 214 F. Supp. 2d 905, 916 (W.D. Wis. 2002).

[141] *See* D.K. Pace, *The Potential of Christianity to Rehabilitate Criminals*, 37 J. AM. SCI. AFFILIATION (1985), *available at* http://www.asa3.org/ASA/PSCF/1985/JASA6-85Pace.html (last visited Feb. 26, 2008).

[142] Nace, *supra* note 134.

[143] *Id.* at 3–4 ("Harm reduction" focuses on lessening the negative results of substance abuse.).

[144] *Id.* at 4.

Research by the National Institute on Drug Abuse has recognized several variables that affect treatment outcome, including: the history of the substance abuser, his motivation for seeking treatment, and the legal issues and family issues involved.[145] These many factors make determining the effectiveness of different treatments difficult.[146] One thing is certain: as the need for effective treatment increases, the demand exceeds the supply.[147]

One study done on the faith-based Teen Challenge Program, administered by the National Institute on Drug Abuse, showed a success rate of 70 percent.[148] Seven years after completing the Teen Challenge Program, 67 percent of the graduates tested drug-free by passing a urinalysis test;[149] 72 percent of the graduates continued their education upon completion of the program; and 75 percent indicated their current status as employed.[150] Of the graduates, 87.5 percent did not require any additional treatment although 90 percent considered themselves addicted before entering the program; 67 percent now regularly attended church, and 57 percent were involved in church work.[151] Also, 92 percent reported good to excellent health.[152]

A realistic and constitutional option for the offender would be to choose a program that includes all of the treatment options that the sentencing judge requires. If a qualified secular option is available, it should certainly be offered as an option to the faith-based program. However, if there is no adequate secular option, either due to lack of vacancy, cost, inadequate program length, or insufficient program features, then providing a choice between a faith-based program and the prison sentence is a valid constitutional option. As the Supreme Court has ruled, options give the offender a choice that negates any coercion that would

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[145] DEPT. OF HEALTH AND HUMAN SERVICES, NATIONAL INSTITUTE ON DRUG ABUSE, DRUG ABUSE TREATMENT OUTCOME STUDY: DESCRIPTION & CITATION—STUDY, No. 2258, *available at* http://webapp.icpsr.umich.edu/cocoon/SAMHDA-STUDY/02258.xml#scope-of-study (last visited Feb. 8, 2008).

[146] Nace, *supra* note 134 at 5.

[147] *Id.* at 5–6.

[148] Specifically:

> This study focused on all students in the class of 1968 that entered Brooklyn, NY, Teen Challenge, and then transferred to Rehersburg, PA, for the second half of their training. This follow-up study seven years later (1975) sought to determine six variables: what proportion of the program participants were still drug free, no legal involvements, employed or pursuing education, a part of a family unit, participating in church activities and physical and mental health.

Center Locations: Teen Challenge USA, http://www.teenchallengeusa.com/studies2.php (last visited Feb. 3, 2008).

[149] *Id.* "Drug-free" included those participants free from narcotics, marijuana, alcohol and cigarettes.

[150] *Id.*

[151] *Id.*

[152] *Id.*

violate the Establishment Clause.[153] Unfortunately for the convicted substance addicted or abusing offenders, in all but one of the preceding cases, the courts have failed to recognize that the offender had a valid choice.

VII. THE PHILOSOPHY AND METHODOLOGY OF THE CHRISTIAN FAITH-BASED PROGRAM

After examining the constitutional implications of a state's use of a faith-based treatment program in the criminal justice system, it is time to take a look into a faith-based program. It is appropriate to examine a Christian faith-based program because all of the challenged programs discussed in this article involved that faith.[154] Looking into the methodology and workings of a faith-based program is not a constitutional function of the state, but is appropriate here. All that the state need know in order to fulfill the secular purpose and effect prongs of the *Lemon* test is that faith-based programs curtail crime.[155] But how does a Christian faith-based program work? What is the philosophy and methodology behind it?

Christian faith-based programs, in general,[156] treat addiction in a radically different way than secular programs. To the secular world, addiction is a disease that cannot be cured, will last throughout a person's lifetime, and may only be controlled through chronic treatment.[157]

Christian-based programs are grounded in a Christian worldview, which holds that the root of addiction is sin.[158] Sin permeated the world when Adam and Eve disobeyed God by eating the forbidden fruit in the Garden of Eden.[159] This caused mankind's separation from God.[160]

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[153] Zelman v. Simmons-Harris, 536 U.S. 639, 655–56 (2002).

[154] The Faith Works program challenged in *McCallum* was a Christian program. Freedom From Religion Found., Inc. v. McCallum, 324 F.3d 880, 881 (7th Cir. 2003). The ASAT program in *Griffin* involved a recitation of "the Lord's Prayer, which is a specifically Christian prayer." Griffin v. Coughlin, 673 N.E.2d 98 (N.Y. 1996). The voucher program in *Zelman* was challenged because of the Christian doctrine that the religious schools would teach. *Zelman*, 536 U.S. at 687 & n.2. The A.A. program challenged in *Warner* "always ended with a Christian prayer." Warner v. Orange County Dep't of Prob., 115 F.3d 1068 (2d Cir. 1996).

[155] Pace, *supra* note 141. Of course a program may accomplish other secular goals, but *Lemon* requires one secular purpose rather than several. *See supra* Part II.

[156] This Section describes the Christian faith-based program that is Christ-centered or Biblically based. The author acknowledges that there may be programs that are "Christian" in name only and do not combat addiction from a Biblical standpoint. It should also be acknowledged that an attempt was made to research long-term faith-based rehabilitation programs based on other religions, but a search for Jewish, Buddhist and Muslim faith-based programs produced no results. They may exist, but the author could not locate any.

[157] National Institute on Alcohol Abuse and Alcoholism, FAQs for the General Public, http://www.niaaa.nih.gov.

[158] *I Corinthians* 5:11.

[159] *Genesis* 3:1-24; *Romans* 3:23, 5:12-21; WILLIAM W. MENZIES & STANLEY M. HORTON, BIBLICAL DOCTRINES: A PENTECOSTAL PERSPECTIVE 87–92 (1993).

[160] *See* Teen Challenge New England, http://www.tcnewengland.org/tcne%20intake%20form%20

Christian-based programs teach that this separation from God is at the root of mankind's sin-problem,[161] and that some people fill this separation with addiction. Participants are taught that Jesus Christ died on the cross as payment for the sins of mankind,[162] completed the victory over sin, and bridged the separation from God when he rose from the dead.[163] By accepting Christ as their Lord and Savior, participants restore their personal connection with God.[164] Christian-based programs teach that the power derived from the belief in Christ allows the believer to break the bonds of addiction to drugs and alcohol.[165]

This new belief in Christ gives the offender motivation, guidance, and power to rehabilitate the soul to cure the addictions and bad habits.[166] The motivation stems from the believer's new hope that God can change anyone through faith in Christ.[167] The guidance comes from the Bible and other Christian literature. Additionally, ministers and other Christians guide the new believer and teach him how to live a life in keeping with Christian values. This guidance is crucial[168] to the offender's rehabilitation, and is found in abundance throughout the Christian faith-based residential program. Many who have overcome drugs and alcohol problems stay to work with others involved in the program.[169] There are intense study programs based on Biblical principles, and the typical curriculum includes the Bible and other Christian books.[170] The Christian faith-based programs additionally offer programs such as work-readiness, parental training,

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[161] *Romans* 3:23, 5:12-21; *see Ephesians* 2 (explaining man's separation from God by sin and prospect of reconciliation through Christ).

[162] *See Ephesians* 2 (explaining Christ's sacrifice for sin).

[163] *Id.*; *Romans* 8 (describing victory over sin for those "who are in Christ Jesus").

[164] *See Ephesians* 2; *Romans* 8 (explaining Christ's sacrifice for sin and believer's victory over sin); "For God so loved the world that he gave his one and only Son, that whoever believes in him shall not perish but have eternal life." *John* 3:16.

[165] "This righteousness from God comes through faith in Jesus Christ to all who believe. There is no difference, for all have sinned and fall short of the glory of God, and are justified freely by his grace through the redemption that came by Christ Jesus." *Romans* 3:22-25.

[166] *Id.*

[167] *Romans* 5:1-11 (explaining the hope and justification in Christ); "While we were still sinners, Christ died for us." *Romans* 5:8.

[168] JERRY DUNN, GOD IS FOR THE ALCOHOLIC 117 (Moody Press 1986).

[169] RICHARD E. OMOHUNDRO, JR., TRUE LIFE TESTIMONIES OF VICTORY OVER DRUG ADDICTION: THEY OVERCAME (Tcne Publishing, 2001) (telling the stories of several healed from addiction in the Teen Challenge Program that are now counseling and ministering to participants).

[170] Teen Challenge USA: Group Studies for New Christians, http://www.teenchallengeusa.com/gsnc/index.html (last visited Jan. 26, 2008). A selection from the Teen Challenge Curriculum includes group study classes such as: *Attitudes*; *Temptations*; *Successful Christian Living*; *Growing through Failure*; *Anger and Personal Rights*; *Love and Accepting Myself*; and *Personal Relationships with Others*.

General Educational Development (G.E.D.) testing, and marriage counseling.[171]

Motivation and guidance are crucial elements in the Christian faith-based recovery programs, but the most essential element in overcoming addiction is the belief in the power to change. The programs teach that this power to change comes from the Holy Spirit that can now be found in the participant's regenerated spirit.[172] It is this power that makes freedom from addiction and bad life-choices possible, and which will enable the successful participant to withstand temptation throughout his life by living a new life in Christ.[173]

VIII. CONCLUSION

Substance abuse has become a serious problem across America. According to the U.S. Department of Health and Human Services, 19.1 million people in the United States ages twelve and older use illicit drugs.[174] Over 16.5 million people misuse or abuse alcohol. Of the people incarcerated in the criminal justice system, 50–80 percent have some connection with alcohol; they are either addicted or test positive for use, and alcohol has played a part in their convictions.[175] In 1996, alcohol-related deaths topped 110,000.[176] In 1995, substance abuse triggered healthcare costs of over $114 billion.[177] "Substance abuse places tremendous psychological and financial burdens on families . . . . Three out of 10 adults report that drinking has been a cause of trouble in their family, and nearly 20 percent say that drug abuse has been a source of family problems."[178] In reality, these figures are believed to be much higher because such problems are not readily reported.[179] Drug and alcohol abuse are factors in more than three quarters of the cases in which children are placed in foster care, and can be found in over 75 percent of domestic abuse cases against women.[180] As of December 30, 1999, more than 35,000 persons under the supervision of U.S. Probation and Pretrial Services

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[171] Teen Challenge USA, http://www.teenchallengeusa.com/studies3.php. This selection of program features is found in the Teen Challenge program.

[172] *Luke* 9:1 (power to heal), 24:49 (Holy Spirit will come with power); *Acts* 1:8 (power will come when the Holy Spirit comes upon them).

[173] Pace, *supra* note 141.

[174] *Road to Recovery Series: Addiction and the Justice System: Deciphering the Maze*, (Substance Abuse and Mental Health Services Agency Webcast July 5, 2006), http://ncadi.samhsa.gov/multimedia/webcasts/w.aspx?ID=481 (last visited June 27, 2008).

[175] *Id.*

[176] SCHNEIDER INSTITUTE FOR HEALTH POLICY, BRANDEIS UNIV., SUBSTANCE ABUSE: THE NATION'S NUMBER ONE HEALTH PROBLEM 51 (The Robert Wood Johnson Foundation 2001).

[177] *Id.* at 61.

[178] *Id.* at 62.

[179] *Id.*

[180] *Id.* at 65.

officers were receiving substance abuse treatment.[181] These statistics are staggering. Something more must be done.

The Supreme Court has stated that some advancement of religion is bound to result from government action that touches religion, and the Court has rejected a rigid, absolutist application of Establishment Clause analysis that leads to extremes.[182] Perhaps, in the future, the Supreme Court may clarify or overturn its coercion ruling in *Lee*, and establish a reasonable coercion standard that will allow an offender to choose to attend a faith-based rehabilitation program.

The criminal justice system may soon be left with very few options for treating substance abusing or addicted offenders. At the very least, the courts should not continue to make Establishment Clause decisions that may ultimately prove harmful to society. High-minded, ideologically-driven Establishment Clause rulings translate into untenable results on a practical level. Giving a convicted offender the option of completing his incarceration term or, in the alternative, completing a faith-based rehabilitation program, should not be considered coercion of religion in violation of the Establishment Clause.

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[181] ADMIN. OFFICE OF THE U.S. CTS., FEDERAL CORRECTIONS & SUPERVISION DIV., COURT & COMMUNITY: AN INFORMATION SERIES ABOUT U.S. PROBATION & PRETRIAL SERVICES, SUBSTANCE ABUSE TREATMENT (2000).

[182] Lynch v. Donnelly, 465 U.S. 668, 683 (1984); Griffin v. Coughlin, 673 N.E.2d 98, 113–14 (N.Y. 1996); *see also* Walz v. Tax Comm'r, 397 U.S. 664, 678–79 (1970).