

FAITH-BASED REHABILITATION PROGRAMS AND THE  
ESTABLISHMENT CLAUSE: WHAT LOWER COURTS ARE  
GETTING WRONG IN THE ABSENCE OF SUPREME COURT  
PRECEDENT AND HOW TO FIX IT

by  
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*The United States is by far the most carceral nation in the world. Many criminal offenders end up in the criminal justice system because of drug or alcohol addictions. Thus, in an effort to reduce crime and mass incarceration, policymakers green-lighted prison programs that use religious faith to rehabilitate criminal offenders living with addiction issues. Many scholars have written about these faith-based prison programs and examined their constitutionality under the Supreme Court's convoluted Establishment Clause jurisprudence. However, the Supreme Court applies different Establishment Clause tests in different contexts and has not yet said which test to apply in the context of faith-based rehabilitation programs. Accordingly, lower courts were left to devise tests and rules of their own. The most widely applied rule, adopted by several circuits, prohibits the state from requiring offenders to attend a faith-based rehabilitation program and penalizing them if they refuse. Such a Hobson's choice would amount to unconstitutional coercion. This Comment agrees with that rule, but takes issue with the two exceptions that have grown out of it and which threaten to swallow it altogether. First, contrary to the first exception, this Comment argues that offenders should not have to raise religious objections in order to bring a coercion-based claim. Second, contrary to the second exception, this Comment argues that the availability of a secular alternative rehabilitation program does not necessarily negate coercion. Instead of these per se rules and exceptions, this Comment proposes using a totality-of-the-circumstances inquiry to determine whether, even in the absence of direct coercion, indirect coercion nevertheless exists. Only then can the Establishment Clause's proscription of religious coercion truly be honored.*

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## I. INTRODUCTION

Not everything that is unconstitutional is a bad idea. For example, some policymakers might think it a good idea to coerce criminal offenders to participate in religious faith-based rehabilitation programs designed to treat drug and alcohol addiction. And, considering the role drugs and alcohol play in the enormous American criminal justice system, it is no wonder policymakers are willing to resort to religious coercion in reaching a solution. The United States is the most carceral country in the world,<sup>1</sup> currently incarcerating 693 of every 100,000 residents,<sup>2</sup> a rate more than five times higher than that of most other countries.<sup>3</sup> As of 2016, 2.3 million people were confined to correctional

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<sup>1</sup> Peter Wagner & Alison Walsh, *States of Incarceration: The Global Context 2016*, PRISON POLICY INITIATIVE (June 16, 2016), <https://www.prisonpolicy.org/global/2016.html>.

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

facilities.<sup>4</sup> One in five of those people, almost half a million total, were incarcerated for a drug offense.<sup>5</sup> Moreover, about 80 percent of criminal offenders abuse drugs or alcohol, and almost 50 percent of inmates are clinically addicted to drugs or alcohol.<sup>6</sup> With substance abuse and addiction so closely related to crime, incarceration, and recidivism, the government has a great interest in rehabilitating its criminal offenders.<sup>7</sup>

That is where religion comes in. Various churches and religious organizations run faith-based rehabilitation programs for criminal offenders across the country<sup>8</sup> and empirical studies show that they are effective, or at least that they are not ineffective.<sup>9</sup> However, the U.S. Constitution prescribes limits on what government may do, regardless of the policy reasons in favor of the government action. In the case of faith-based rehabilitation programs for criminal offenders, the limit is the Establishment Clause of the First Amendment.<sup>10</sup> The question is—whether or not they work—when do such programs run afoul of the Establishment Clause? The Supreme Court’s Establishment Clause jurisprudence is convoluted, with various tests used or cast aside in various contexts,<sup>11</sup> making the answer to that question nearly impossible to predict.

With little guidance from the Supreme Court, lower courts have fashioned their own test, which asks whether the state’s action amounts to coercion and whether “the object of [that] coercion [is] religious or secular.”<sup>12</sup> Where a state official requires a criminal offender to attend a faith-based rehabilitation program and refusal would result in some

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<sup>4</sup> Peter Wagner & Bernadette Rabuy, *Mass Incarceration: The Whole Pie 2016*, PRISON POLICY INITIATIVE (Mar. 14, 2016), <https://www.prisonpolicy.org/reports/pie2016.html>.

<sup>5</sup> *Id.*

<sup>6</sup> *Alcohol, Drugs and Crime*, NAT’L COUNCIL ON ALCOHOLISM & DRUG DEPENDENCE, INC. (June 27, 2015), <https://www.ncadd.org/about-addiction/alcohol-drugs-and-crime>.

<sup>7</sup> *See id.* This Comment uses the term “rehabilitate” to refer specifically to drug and alcohol rehabilitation—the focus of the Comment—as opposed to general rehabilitation of prisoners.

<sup>8</sup> U.S. Dep’t of Justice, Nat’l Inst. of Corrections, *Residential Faith-Based Programs in State Corrections*, SPECIAL ISSUES IN CORRECTIONS, Sept. 2005, <https://s3.amazonaws.com/static.nicic.gov/Library/020820.pdf>.

<sup>9</sup> Sasha Volokh, *Do Faith-Based Prisons Work?*, WASH. POST (Feb. 10, 2014), [https://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/02/10/do-faith-based-prisons-work/?utm\\_term=.eac62770aea9](https://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/02/10/do-faith-based-prisons-work/?utm_term=.eac62770aea9).

<sup>10</sup> U.S. CONST. amend. I.

<sup>11</sup> *See infra* Part II.B.

<sup>12</sup> *Kerr v. Farrey*, 95 F.3d 472, 479 (7th Cir. 1996). The word “object” as used here is not a synonym for the state’s purpose or intent; rather, it describes the thing being acted upon by the state. Thus, the inquiry is whether the activity being coerced is religious or secular in nature.

adverse consequence to the offender, those questions must be answered affirmatively, meaning the court must find that the offender was subjected to unconstitutional coercion in violation of his or her Establishment Clause rights.<sup>13</sup> Furthermore, in addition to this coercion-centric test and resultant rule, lower courts have prescribed two *per se* exceptions:

[First,] [f]or there to be a constitutional violation . . . the plaintiff must object to attending the program on religious grounds and be forced to attend over objection. Otherwise there is no coercion and consequently no constitutional violation. [Second,] [w]here there are secular alternatives . . . that the plaintiff may attend, there can be no coercion.<sup>14</sup>

Unfortunately, the courts relying on those exceptions do not explain why coercion cannot exist where an offender has not objected to the faith-based program or where there are alternative secular programs, nor do they explain what qualifies as an “alternative.”

This Comment does not take issue with the lower courts’ test for unconstitutional coercion in the context of faith-based rehabilitation programs, nor with their rule that requiring participation on pain of imprisonment or some other penalty fails the test. Rather, this Comment contends that the lower courts were wrong to conclude that a criminal offender must actively object on religious grounds to participating in a faith-based program in order to have a valid coercion claim. Certainly, there are circumstances in which an offender would not feel comfortable raising an objection or even realize that objecting was an option. Furthermore, this Comment contends that the lower courts were wrong to conclude that the availability of an alternative secular program *necessarily* cures any Establishment Clause problem. It might, but only if the alternative meets standards sufficient to provide the offender with a true choice. While it might be tempting to require something less in the face of concerns such as reducing mass incarceration and treating substance abusers, such policy concerns are not sufficient justification to trump a constitutional imperative: separation of church and state.<sup>15</sup>

Before diving into those contentions, Part II of this Comment provides background information on the types of faith-based rehabilitation programs in the United States and their effectiveness at

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<sup>13</sup> *Inouye v. Kemna*, 504 F.3d 705, 714 (9th Cir. 2007) (“While we in no way denigrate the fine work of AA/NA, attendance in their programs may not be coerced by the state.”).

<sup>14</sup> *Goodwin v. Hamilton*, No. 10-CV-11909, 2011 WL 893118, at \*4 (E.D. Mich. Mar. 14, 2011); *see also infra* notes 110 & 111 (collecting cases).

<sup>15</sup> *See* Thomas Jefferson, *Jefferson’s Letter to the Danbury Baptists*, 57 LIBRARY OF CONGRESS INFORMATION BULLETIN (June 1998), <http://www.loc.gov/loc/lcib/9806/danpre.html>.

rehabilitating criminal offenders. Part II goes on to briefly introduce the reader to the religion clauses of the Constitution before laying out the Supreme Court's winding Establishment Clause jurisprudence and its treatment of individual rights in the prison context. Part II then addresses existing scholarship on Establishment Clause implications of faith-based rehabilitation programs. Finally, Part II examines how lower courts have analyzed offenders' Establishment Clause claims in the absence of clear Supreme Court guidance. More specifically, it introduces the test most often employed in these cases and explores how that test has spread across jurisdictions.

Part III of this Comment suggests that the circuit courts and states that have not adopted this test should do so for two reasons: first, because it hinges on the factor most important in the prison context, coercion; and second, because the test already enjoys widespread use and acceptance, so much so that it repeatedly has been held "clearly established" for purposes of 42 U.S.C. § 1983 claims.<sup>16</sup> Part III then argues that the lower courts are wrong to require criminal offenders to object to religious aspects of faith-based programs. Instead, offenders should be offered, up front, a secular alternative, regardless of whether they have expressed a religious conflict or even made the state aware of their religious beliefs from which a conflict might stem. Moreover, Part III argues that the lower courts also are wrong to conclude that the availability of *any* secular alternative negates a claim of coercion. Rather, courts should engage in a fact-specific inquiry to determine whether an alternative program is sufficient to give the offender a true, non-coercive choice. Accordingly, Part III proposes using a totality-of-the-circumstances test. Lastly, Part III addresses a potential objection to recognizing indirect coercion claims by criminal offenders.

In short, the lower courts were right to create a rule against state coercion of religious exercise, even if for the purpose of rehabilitating criminal offenders. But the lower courts erred in creating two exceptions to that rule so broad in scope as to nearly swallow it.<sup>17</sup> The result is a policy biased heavily toward allowing the state to encourage faith-based programs and thus toward establishing a state religion in our nation's enormous prison population.

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<sup>16</sup> *Inouye*, 504 F.3d at 714–17 (“This uncommonly well-settled case law alone is enough for us to hold that the law was clearly established . . .”).

<sup>17</sup> Rarely do offenders win on their coercion claims. One example of a winning plaintiff is found in *Hazle v. Crofoot*, 727 F.3d 983, 986 (9th Cir. 2013), in which a parolee repeatedly objected to participating in a residential faith-based drug treatment program. When he nevertheless was assigned to the program, he refused to participate, which resulted in his arrest, revocation of his parole, and an additional 100 days of imprisonment. *Id.* But see *infra* notes 110, 111, 116, and 118 for losing-plaintiff cases, which are much more common.

## II. BACKGROUND: FAITH-BASED REHABILITATION PROGRAMS AND THE ESTABLISHMENT CLAUSE

### A. *Faith-Based Rehabilitation Programs*

There are many types of faith-based rehabilitation programs for criminal offenders. They exist at all stages of the criminal justice system: during probation, as an alternative to prison; during prison, as an incentive for early release; and after prison, during parole or other post-prison supervision.<sup>18</sup> These programs exist at Federal Bureau of Prisons institutions, as well as state prisons and jails.<sup>19</sup> They may be run by a church; a non-profit organization; or a private corporation, such as Corrections Corporation of America (CCA),<sup>20</sup> and their funding schemes vary widely.<sup>21</sup> Many faith-based rehabilitation programs are directed at drug or alcohol abusers, while others are offered to criminal offenders in general.<sup>22</sup> They vary in capacity, duration, and of course method.<sup>23</sup> This Comment does not limit its scope to examination of a particular type of faith-based rehabilitation program, as the constitutional analysis should be the same, give or take the relevance of certain factors, for all of them.<sup>24</sup>

The effectiveness of faith-based rehabilitation programs usually is measured using recidivism (assumedly caused by relapse) as a proxy for success.<sup>25</sup> There have been many empirical studies on the effectiveness of

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<sup>18</sup> See generally JAMIE YOON & JESSICA NICKEL, COUNCIL OF STATE GOV'TS JUSTICE CTR., REENTRY PARTNERSHIPS: A GUIDE FOR STATES & FAITH-BASED AND COMMUNITY ORGANIZATIONS (2008) (describing faith-based and community organizations and how the government may better partner with them to improve treatment for prisoners).

<sup>19</sup> JANEEN BUCK WILLISON ET AL., URBAN INST., FAITH-BASED CORRECTIONS AND REENTRY PROGRAMS: ADVANCING A CONCEPTUAL FRAMEWORK FOR RESEARCH AND EVALUATION 11–12 (2010) (draft final report), <https://www.ncjrs.gov/pdffiles1/nij/grants/234058.pdf>.

<sup>20</sup> *Id.* at 3; *Faith-Based Programs*, CORR. CORP. OF AM., <http://www.cca.com/inmate-services/inmate-reentry-preparation/faith-based-programs> (last visited Oct. 28, 2017).

<sup>21</sup> WILLISON ET AL., *supra* note 19, at 25–26.

<sup>22</sup> See *id.* at 24.

<sup>23</sup> *Id.* at 5–6.

<sup>24</sup> However, as mentioned *supra* note 7, this Comment focuses on and speaks in terms of drug and alcohol rehabilitation programs, as those are most common.

<sup>25</sup> See Stephen V. Monsma, *Are Faith-Based Programs More Effective?*, CTR. FOR PUB. JUSTICE (2001), [https://www.cpjustice.org/public/page/content/faith\\_based\\_programs](https://www.cpjustice.org/public/page/content/faith_based_programs). It is not clear why recidivism is the measure of success (or failure) since an offender could not relapse and yet reoffend. Arguably, the answer is that keeping track of people once they exit the criminal justice system is just too hard, whereas determining whether someone returned to prison or reoffended is much easier. Moreover, measuring recidivism at least tells us whether prisoners are rehabilitated

such programs; however, it is disputed how reliable those studies are.<sup>26</sup> In 2011, Professor Alexander Volokh undertook a comprehensive examination of all then-existing studies and found that most studies were methodologically flawed, mostly due to self-selection of participants and somewhat due to lack of controls.<sup>27</sup> “Those few empirical studies [approaching] methodological validity,” Volokh concluded, fail to persuasively show that faith-based rehabilitation programs work *or* that they do not work.<sup>28</sup> Nevertheless, Volokh argued, the programs are *promoted* as effective,<sup>29</sup> and policymakers desperate to reduce crime or at least prison population sizes may well be tempted to incorporate a faith-based program, whether or not they themselves are religious.

Of course, even a successful program should not—and may not—be part of our criminal justice system if violative of the Constitution. Not surprisingly, many Establishment Clause challenges to faith-based programs have been brought, with varying success. Perhaps most famously, the Eighth Circuit in 2007 stuck down the residential program operated by InnerChange Freedom Initiative (IFI) in a medium-security Iowa state prison.<sup>30</sup> The court found that the state’s direct funding of the program constituted an unconstitutional endorsement of religion, in particular because the program resulted in religious indoctrination of participants and because participants were selected based on their religious beliefs, a non-neutral criteria.<sup>31</sup> Moreover, participants could not use the state aid toward a secular program, meaning the aid did not reach InnerChange as a result of an independent, private choice.<sup>32</sup>

The same and similar aspects of other faith-based programs have resulted in their challenge in scholarly articles (in addition to their challenge in courts), which this Comment addresses in Part II.C below. To understand the various contentions raised requires understanding the U.S. Constitution’s religion clauses, their relationship, and the Supreme Court’s winding Establishment Clause jurisprudence. It is to those topics this Comment now turns.

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*such that they do not reoffend*, even if any continued drug or alcohol use affects their lives in other ways.

<sup>26</sup> Alexander Volokh, *Do Faith-Based Prisons Work?*, 63 ALA. L. REV. 43, 45 (2011).

<sup>27</sup> *Id.* at 50–51.

<sup>28</sup> *Id.* at 45.

<sup>29</sup> *Id.*

<sup>30</sup> *Ams. United for Separation of Church & State v. Prison Fellowship Ministries, Inc.*, 509 F.3d 406, 426 (8th Cir. 2007).

<sup>31</sup> *Id.* at 424–25.

<sup>32</sup> *Id.* at 425–26.

*B. The Supreme Court's Establishment Clause Jurisprudence*

The First Amendment to the U.S. Constitution contains two religion clauses,<sup>33</sup> both of which have been made applicable to the states by incorporation into the Fourteenth Amendment.<sup>34</sup> The first, the Establishment Clause, controls the fate of the rehabilitation programs at issue in this Comment. It forbids the government from establishing a state church and from favoring (monetarily or otherwise) religion.<sup>35</sup> The second religion clause, the Free Exercise Clause, forbids the government from interfering with citizens' religious beliefs<sup>36</sup> and, to an extent, practices.<sup>37</sup> The relationship between the two clauses—*i.e.*, whether they work together or are in tension—has long been debated.<sup>38</sup> For purposes of this Comment, it is sufficient to note that the two clauses leave “room for play in the joints” such that the government may accommodate free exercise without establishing a religion.<sup>39</sup> However, that premise does not answer the question of under what circumstances the government may prescribe a faith-based rehabilitation program to a criminal offender, a pure Establishment Clause issue.

Early Establishment Clause decisions by the Supreme Court reflected a uniformly shared belief that the Clause demanded strict separation

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<sup>33</sup> “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . .” U.S. CONST. amend. I, cl. 1–2.

<sup>34</sup> *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940).

<sup>35</sup> *Everson v. Bd. of Educ.*, 330 U.S. 1, 15 (1947) (“The ‘establishment of religion’ clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another.”).

<sup>36</sup> *Emp’t Div. v. Smith*, 494 U.S. 872, 877 (1990) (“The free exercise of religion means, first and foremost, the right to believe and profess whatever religious doctrine one desires.”).

<sup>37</sup> Laws targeting religious practice are, of course, presumptively invalid free exercise interferences. *Id.* at 877–88. And neutral *federal* laws of generally applicability that substantially burden religious practice are presumptively forbidden by the Religious Freedom Restoration Act of 1993 (RFRA). 42 U.S.C. § 2000bb-1 (2012). However, similar neutral *state* laws of general applicability are subject to only rational basis review, unless a state statute or constitution says otherwise. *See City of Boerne v. Flores*, 521 U.S. 507, 536 (1997) (holding RFRA unconstitutional with respect to state and local laws).

<sup>38</sup> *See, e.g.*, Carl H. Esbeck, *Differentiating the Free Exercise and Establishment Clauses*, 42 J. CHURCH & ST. 311, 311 (2000); F. Philip Manns, Jr., *Finding the “Free Play” Between the Free Exercise and Establishment Clauses*, 71 TENN. L. REV. 657, 661–62 (2004); John Norton Moore, *The Supreme Court and the Relationship Between the “Establishment” and “Free Exercise” Clauses*, 42 TEX. L. REV. 142, 142 (1963); Note, *The Free Exercise and Establishment Clauses: Conflict or Coordination?* 48 MINN. L. REV. 929, 929–30 (1964).

<sup>39</sup> *Walz v. Tax Comm’n.*, 397 U.S. 664, 669 (1970) (“Short of those expressly proscribed governmental acts there is room for play in the joints productive of a benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference.”).



between church and state.<sup>40</sup> All the justices agreed on upholding a wall between the two; they just did not always agree on precisely how high that wall needed to be.<sup>41</sup> The “high water mark”<sup>42</sup> of this separationist era is *Lemon v. Kurtzman*, in which the Supreme Court created a new Establishment Clause test: “First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster an excessive government entanglement with religion.”<sup>43</sup> In devising this test, the Court recognized that its precedents “[did] not call for a total separation between church and state,” which it said was “not possible in an absolute sense.”<sup>44</sup> However, *Lemon’s* immediate progeny continued to reflect a strict separationist attitude from the Court.<sup>45</sup>

Beginning the Supreme Court’s shift away from strict separationism<sup>46</sup> was *Agostini v. Feltman*,<sup>47</sup> in which the Court slightly revised the *Lemon*

<sup>40</sup> See *Zorach v. Clauson*, 343 U.S. 306, 312 (1952) (“There cannot be the slightest doubt that the First Amendment reflects the philosophy that Church and State should be separated. And so far as interference with the ‘free exercise’ of religion and an ‘establishment’ of religion are concerned, the separation must be complete and unequivocal.”); *Everson*, 330 U.S. at 18 (“The First Amendment has erected a wall between church and state. That wall must be kept high and impregnable. We could not approve the slightest breach.”).

<sup>41</sup> See, for example, *Everson*, in which the majority upheld a tax-funded aid program that reimbursed school transportation costs, including those of children attending Catholic parochial schools. 330 U.S. at 18. It did so on the grounds that the program was for the public welfare and neutral toward religion, meaning that it neither “handicap[ped]” nor “favor[ed]” religion. *Id.* The dissent, on the other hand, would uphold no aid to religious institutions except that which funded public safety measures. *Id.* at 20 (Jackson, J., dissenting). However, all nine justices agreed that the Establishment Clause “outlaws all use of public funds for religious purposes.” *Id.* at 33.

<sup>42</sup> VINCENT PHILLIP MUÑOZ, *GOD AND THE FOUNDERS: MADISON, WASHINGTON, AND JEFFERSON* 141 (2009).

<sup>43</sup> *Lemon v. Kurtzman*, 403 U.S. 602, 612–13 (1971) (internal citations and quotations omitted).

<sup>44</sup> *Id.* at 614.

<sup>45</sup> See *Meek v. Pittenger*, 421 U.S. 349, 366 (1975), *overruled by Mitchell v. Helms*, 530 U.S. 793 (2000) (finding aid in the form of neutral, secular materials impermissible because of the sectarian nature of the school); *Comm. for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 797–98 (1973) (finding New York’s three religiously neutral financial aid programs for private schools impermissible because they could or did have the effect of advancing the sectarian aspects of religious schools).

<sup>46</sup> See Laura B. Muttperl, Note, *Employment at (God’s) Will: The Constitutionality of Antidiscrimination Exemptions in Charitable Choice Legislation*, 37 HARV. C.R.-C.L. L. REV. 389, 396 (2002).

<sup>47</sup> 521 U.S. 203 (1997).

Test. It recognized that the same factors<sup>48</sup> used to determine “effect” were used to determine “entanglement” and thus merged the two prongs, using entanglement “as an aspect of the inquiry into a statute’s effect.”<sup>49</sup> However, in the modern era, the Court has continued to use the *Lemon* Test, sometimes unmodified,<sup>50</sup> while also introducing other tests. For example, in a concurring opinion,<sup>51</sup> Justice O’Connor devised what has come to be known as the Endorsement Test: “The purpose prong of the *Lemon* test asks whether the government’s *actual* purpose is to endorse or disapprove of religion. The effect prong asks whether . . . the practice under review *in fact* conveys a message of endorsement or disapproval.”<sup>52</sup> Just eight years later, another test emerged when the Court considered a public school’s practice of inviting a rabbi to deliver an invocation and benediction at a middle school graduation ceremony.<sup>53</sup> The practice was held to violate the Establishment Clause at least in part because the Court found coercive pressure on the students to participate.<sup>54</sup> This new Coercion Test<sup>55</sup> again was applied in *Santa Fe Independent School District v. Doe*<sup>56</sup> to strike down a public school’s practice of allowing students to deliver an “invocation and/or message,” most often a prayer, before football games, signifying its continued use by and favor with the Court.<sup>57</sup>

In addition to the three tests outlined above, the Supreme Court has applied two other approaches to resolving Establishment Clause issues. First, in *Marsh v. Chambers*, the Court, in an opinion by Justice Burger, upheld Nebraska’s practice of opening its legislative sessions with a prayer based on history and tradition.<sup>58</sup> Second, in *Van Orden v. Perry*,<sup>59</sup> Justice Breyer, in a decisive concurring opinion, upheld a display around

<sup>48</sup> These factors include “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 religious authority.” *Id.* at 232.

<sup>49</sup> *Id.* at 232–33.

<sup>50</sup> See, e.g., *McCreary Cty. v. ACLU of Ky.*, 545 U.S. 844, 861–63 (2005) (applying *Lemon* and refusing to “abandon,” “truncate,” or “trivializ[e]” its purpose inquiry).

<sup>51</sup> *Lynch v. Donnelly*, 465 U.S. 668, 687 (1984) (O’Connor, J., concurring).

<sup>52</sup> *Id.* at 690 (emphases added).

<sup>53</sup> See *Lee v. Weisman*, 505 U.S. 577, 580 (1992).

<sup>54</sup> *Id.* at 593.

<sup>55</sup> *Id.* at 587 (“It is beyond dispute that, at a minimum, the Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise . . .”).

<sup>56</sup> 530 U.S. 290 (2000).

<sup>57</sup> *Id.* at 302–06. Again, the Court’s decision was based also on a finding of endorsement. *Id.* at 306.

<sup>58</sup> *Marsh v. Chambers*, 463 U.S. 783, 786–91 (1983) (“This unique history leads us to accept the interpretation of the First Amendment draftsmen who saw no real threat to the Establishment Clause arising from a practice of prayer similar to that now challenged.”).

<sup>59</sup> 545 U.S. 677 (2005).

the Texas Capitol that included a Ten Commandments statue by using his “legal judgment” rather than any test to determine whether the display violated the purposes of the Establishment Clause.<sup>60</sup> Lastly, justices have argued in non-majority opinions that references to God that serve to solemnize an occasion—such as the national motto and the national anthem—should be immunized from Establishment Clause challenge under the doctrine of Ceremonial Deism.<sup>61</sup> The Court, however, has yet to apply this approach.<sup>62</sup>

It is also worth noting at the outset how the prison context affects judicial analyses. Individual rights are diminished in prison as compared to in the free world.<sup>63</sup> For example, in *Turner v. Safley*, the Supreme Court held that “a lesser standard of scrutiny” may be used to examine the constitutionality of prison rules.<sup>64</sup> Specifically, “when a prison regulation impinges on inmates’ constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests.”<sup>65</sup> The Court also listed four factors as relevant to the analysis.<sup>66</sup> The third such factor was “the impact accommodation of the asserted constitutional right will have on guards and other inmates, and on the allocation of prison resources generally.”<sup>67</sup> Where that impact is significant, courts should defer to corrections officers.<sup>68</sup> This deference to the violator or alleged violator of constitutional rights in the prison context is important to keep in mind for purposes of this Comment. To be sure, *Turner* is a Free Exercise case; however, lower courts sometimes rely on it in deciding Establishment Clause questions. For example, in *Warburton v. Underwood*, the district court stated that, “because plaintiff is a prisoner challenging a

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<sup>60</sup> Justice Breyer reasoned that in “difficult borderline cases,” no test was more useful than “the exercise of legal judgment,” which “must reflect and remain faithful to the underlying purposes of the Clauses, and . . . must take account of context and consequences measured in light of those purposes.” *Id.* at 700. (Breyer, J., concurring in the judgment).

<sup>61</sup> See, e.g., *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 35–36 (2004) (O’Connor, J., concurring in the judgment); *Lynch v. Donnelly*, 465 U.S. 668, 716 (1984) (Brennan, J., dissenting).

<sup>62</sup> See *Cty. of Allegheny v. ACLU*, 492 U.S. 573, 603 (1989) (“We need not return to the subject of ‘ceremonial deism[]’ because there is an obvious distinction between crèche displays and references to God in the motto and the pledge.” (internal citation omitted)).

<sup>63</sup> See *Procunier v. Martinez*, 416 U.S. 396, 405 (1974) (recognizing that “courts are ill equipped to deal with the increasingly urgent problems of prison administration and reform” and thus should exercise judicial restraint in the prison context).

<sup>64</sup> *Turner v. Safley*, 482 U.S. 78, 81 (1987).

<sup>65</sup> *Id.* at 89.

<sup>66</sup> *Id.* at 89–91.

<sup>67</sup> *Id.* at 90.

<sup>68</sup> *Id.*

Department of Corrections directive, the *Lemon* test is tempered by the test laid out by the Supreme Court in *Turner v. Safley*.<sup>69</sup> Courts have taken *Turner* to mean that prison regulations valid under its standard may impinge on inmates' constitutional rights or First Amendment rights generally, not just their Free Exercise rights.<sup>70</sup> This idea of deference in the prison context running in the back of judges' minds may explain why Establishment Clause analyses of faith-based prison programs tend to be biased in favor of the government, at least in application.

*C. Existing Scholarship on the Establishment Clause Implications of Faith-Based Rehabilitation Programs*

Before adding to the extensive commentary on this topic, the existing scholarship must be noted. A significant portion of that scholarship covers the InnerChange residential program—a particularly infamous example of egregious Establishment Clause violations—and the Eighth Circuit decision finding it unconstitutional.<sup>71</sup> One student author argues that faith-based rehabilitation programs do not violate the Establishment Clause, period, but she bases her argument on policy grounds rather than doctrinal ones.<sup>72</sup> Another student author who would find no violation reaches that conclusion using a strict standard of coercion that does not include psychological coercion.<sup>73</sup> On the other hand, many scholars argue faith-based rehabilitation programs do violate

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<sup>69</sup> Warburton v. Underwood, 2 F. Supp. 2d 306, 316 (W.D.N.Y. 1998).

<sup>70</sup> See, e.g., Kerr v. Farrey, 95 F.3d 472, 475, 481 (7th Cir. 1996) (discussing the district court opinion, which concluded (without explanation) that the NA program at issue satisfied *Lemon*) (“The court found support for its result in *Turner v. Safley*.”).

<sup>71</sup> See Alex J. Luchenitser, “InnerChange”: *Conversion as the Price of Freedom and Comfort—A Cautionary Tale About the Pitfalls of Faith-Based Prison Units*, 6 AVE MARIA L. REV. 445, 468–70 (2008) (arguing that the problems with InnerChange are present in other faith-based programs); Patrick B. Cates, Comment, *Faith-Based Prisons and the Establishment Clause: The Constitutionality of Employing Religion as an Engine of Correctional Policy*, 41 WILLAMETTE L. REV. 777, 826 (2005) (concluding that “state support of [InnerChange] has an impermissible purpose and produces the unconstitutional effects of government indoctrination, endorsement, and coercion”); Tim Eicher, Note, *Scaling the Wall: Faith-Based Prison Programs and the Establishment Clause*, 5 GEO. J.L. & PUB. POL’Y 221, 239–40 (2007) (concluding the same but arguing courts should use another approach to uphold the programs); Nathaniel Odle, Note, *Privilege Through Prayer: Examining Bible-Based Prison Rehabilitation Programs Under the Establishment Clause*, 12 TEX. J. ON C.L. & C.R. 277, 301 (2007) (considering application of the *Turner* Test with reducing recidivism as the legitimate penological goal).

<sup>72</sup> Rebekah Binger, Comment, *Prison Ain’t Hell: An Interview with the Son of Sam—David Berkowitz, and Why State-Funded Faith-Based Prison Rehabilitation Programs Do Not Violate the Establishment Clause*, 31 PACE L. REV. 488, 524–27 (2011).

<sup>73</sup> Lisa A. Biron, Note, *Constitutionally Coerced: Why Sentencing a Convicted Offender to a Faith-Based Rehabilitation Program Does Not Violate the Establishment Clause*, 7 CONN. PUB. INT. L.J. 107, 118–25 (2008).

the Establishment Clause, applying the Supreme Court's various tests to reach that conclusion.<sup>74</sup> Some authors who would find Establishment Clause violations nevertheless recognize the policy reasons for allowing faith-based rehabilitative programming and thus propose ways to constitutionalize faith-based programs.<sup>75</sup> What is missing from the scholarship, then, is what this Comment provides: an in-depth analysis of what the lower courts—*i.e.*, the courts actually considering these cases—are doing. Some articles mention or briefly discuss *Kerr v. Farrey*,<sup>76</sup> the leading case on the topic of faith-based prison programs,<sup>77</sup> but none address *Kerr's* widespread adoption and use. More important, as of this writing, no scholarship exists regarding the two *per se* exceptions to finding coercion under *Kerr's* second prong.<sup>78</sup> That is the gap this Comment attempts to fill.

#### D. *The Lower Courts' Treatment of Faith-Based Rehabilitation Programs*

Just as scholars disagree about whether and when faith-based rehabilitation programs violate the First Amendment, so too do courts of law. In the absence of clear Supreme Court precedent, lower courts must read the tea leaves of the Court's Establishment Clause opinions to discern which test or tests the Court would apply in the prison context and how. Some lower courts apply *Lemon*,<sup>79</sup> while others apply *Lee*.<sup>80</sup> But one approach, derived from Supreme Court precedent but not explicit therein, has risen above all others in popularity.

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<sup>74</sup> See, e.g., Rachel F. Calabro, Comment, *Correction Through Coercion: Do State Mandated Alcohol and Drug Treatment Programs in Prisons Violate the Establishment Clause?*, 47 DEPAUL L. REV. 565, 606–08 (1998) (yes, under *Lee*); see also *infra* note 75.

<sup>75</sup> See, e.g., Lynn S. Branham, "Go and Sin No More": *The Constitutionality of Governmentally Funded Faith-Based Prison Units*, 37 U. MICH. J.L. REFORM 291, 343–50 (2004); Max Dehn, *How It Works: Sobriety Sentencing, the Constitution, and Alcoholics Anonymous*, 10 MICH. ST. U. J. MED. & L. 255, 294–96 (2006); Christopher M. Meissner, Note, *Prayer or Prison: The Unconstitutionality of Mandatory Faith-Based Substance Abuse Treatment*, 54 CLEV. ST. L. REV. 671, 703–04, 708 (2006).

<sup>76</sup> 95 F.3d 472 (7th Cir. 1996). See, e.g., Meissner, *supra* note 75, at 689–90 (discussing *Kerr*).

<sup>77</sup> See *infra* Part II.D.1.

<sup>78</sup> However, Professor Branham argues that a secular alternative, even if its conditions are harsh as compared to those in the faith-based program, provides an offender with a non-coercive choice: "[T]he fact that a prisoner may face a difficult choice between two alternative, even unpalatable, housing assignments does not vitiate the inmate's freedom to choose." Branham, *supra* note 75, at 333–36.

<sup>79</sup> See, e.g., *Ams. United for Separation of Church & State v. Prison Fellowship Ministries, Inc.*, 509 F.3d 406, 424–25 (8th Cir. 2007).

<sup>80</sup> See, e.g., *Coronel v. Walker*, No. 2:05CV120-P-D, 2006 WL 2923152, at \*10–14 (N.D. Miss. Sept. 14, 2006) (considering the *Lemon*, Endorsement, and Coercion Tests, and choosing to apply the latter).

1. *The Kerr Coercion Test and Its Progeny*

In 1996, the Seventh Circuit decided a case in which a minimum-security prison inmate, Kerr, complained that his required attendance at Narcotics Anonymous (NA) meetings violated the Establishment Clause.<sup>81</sup> Because Kerr had a “chemical dependence problem[,]” his attendance was mandatory.<sup>82</sup> NA does not promote a particular religion, but it does invoke God in several of the 12 steps of its well-known 12-step treatment program.<sup>83</sup> For that reason, Kerr “found [the program] offensive to his personal religious beliefs,” but no alternative, non-faith-based program was available.<sup>84</sup> In fact, Kerr was threatened with being sent to a medium-security prison and losing the possibility of parole if he did not at least observe, if not participate in, the NA meetings.<sup>85</sup> Nevertheless, the district court, applying the *Lemon* Test, upheld the prison program.<sup>86</sup>

On appeal, the Seventh Circuit noted the Supreme Court’s winding Establishment Clause jurisprudence.<sup>87</sup> In its view, the cases fell into two categories: outsider cases, “where the state is imposing religion on an unwilling subject,” and insider cases, “in which existing religious groups seek some benefit from the state.”<sup>88</sup> Because Kerr claimed he was being coerced to attend NA meetings, his case fell into the “outsider” category. Rather than decide what the controlling test should be, the court stated that

when a plaintiff claims that the state is coercing him or her to subscribe to religion generally, or to a particular religion, only three points are crucial: first, has the state acted; second, does the action amount to coercion; and third, is the object of the coercion religious or secular?<sup>89</sup>

Applying the first prong—“has the state acted”—the court found that the state had acted, although the program was run by NA, in that state prison officials required inmate attendance at meetings.<sup>90</sup> At prong two—“does the action amount to coercion”—the court had no trouble finding coercion: the threat of being classified to a higher security risk

<sup>81</sup> Kerr v. Farrey, 95 F.3d 472, 474–75 (7th Cir. 1996).

<sup>82</sup> *Id.* at 474.

<sup>83</sup> *Id.* (For example, Step 11 reads, “We sought through prayer and meditation to improve our conscious contact with God, as we understood Him, praying only for knowledge of His will for us, and the power to carry that out.”).

<sup>84</sup> *Id.*

<sup>85</sup> *Id.* at 474–75.

<sup>86</sup> *Id.* at 475.

<sup>87</sup> *Id.* at 477 (“It would be an understatement to say that the Supreme Court has wrestled with the precise content of these principles over the years . . .”).

<sup>88</sup> *Id.*

<sup>89</sup> *Id.* at 479.

<sup>90</sup> *Id.*

category and loss of parole eligibility.<sup>91</sup> Finally, at prong three—“is the object of the coercion religious or secular”—the court rejected that NA was non-religious because it referred to God in a general way, left up to participants’ interpretations.<sup>92</sup> Pointing to the text of the 12 steps, the court found that “God” was meant monotheistically and the steps were “fundamentally based on a religious concept of a Higher Power.”<sup>93</sup> For those reasons, the NA prison program violated the Establishment Clause by favoring religion over non-religion.<sup>94</sup>

Later that same year, the Second Circuit decided *Warner v. Orange County Department of Probation*, in which a New York sentencing judge ordered Warner to attend Alcoholics Anonymous (AA) meetings as a special condition of his three years’ probation for drunken driving.<sup>95</sup> In assessing Warner’s Establishment Clause challenge, the court cited no test, observing just one guiding principle: “The Supreme Court has repeatedly made clear that, ‘at a minimum, the Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise. . . .’”<sup>96</sup> Because the AA meetings involved religious exercises and Warner was compelled to attend them or else violate his probation, possibly resulting in imprisonment, the court found unconstitutional coercion.<sup>97</sup> In so finding, the court cited *Kerr* for the proposition that coercion “indisputably raises an Establishment Clause question.”<sup>98</sup> The two cases have since come to stand for the same rule: that requiring participation in a faith-based treatment program violates an offender’s First Amendment Establishment Clause rights.<sup>99</sup>

More than a decade later, the Ninth Circuit was faced with a similar case, *Inouye v. Kemna*, in which parolee Inouye was required to attend AA/NA meetings as a condition of his parole.<sup>100</sup> When Inouye, a Buddhist, refused to participate in the program, his parole was revoked.<sup>101</sup> The court noted that the Seventh and Second Circuits had held such compulsion unconstitutionally coercive and adopted the Seventh Circuit’s three-part test, which it called “particularly useful” for “determining whether there was governmental coercion of religious activity.”<sup>102</sup>

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<sup>91</sup> *Id.*

<sup>92</sup> *Id.* at 479–80.

<sup>93</sup> *Id.* at 480.

<sup>94</sup> *Id.*

<sup>95</sup> *Warner v. Orange Cty. Dep’t of Prob.*, 115 F.3d 1068, 1069–70 (2d Cir. 1996).

<sup>96</sup> *Id.* at 1074 (quoting *Lee v. Weisman*, 505 U.S. 577, 587 (1992)).

<sup>97</sup> *Id.* at 1075.

<sup>98</sup> *Id.* (quoting *Kerr*, 95 F.3d at 479).

<sup>99</sup> *See Turner v. Hickman*, 342 F. Supp. 2d 887, 895 (E.D. Cal. 2004).

<sup>100</sup> *Inouye v. Kemna*, 504 F.3d 705, 710 (9th Cir. 2007).

<sup>101</sup> *Id.*

<sup>102</sup> *Id.* at 713.

## 2. Kerr-Inouye's Reach and Manipulation

Since then, the Eighth Circuit joined its sister circuits in adopting the *Kerr* Test for examining the constitutionality of faith-based rehabilitation programs.<sup>103</sup> In addition, three district courts—one in the First Circuit,<sup>104</sup> one in the Fourth,<sup>105</sup> and one in the Eleventh<sup>106</sup>—have adopted *Kerr*'s three-part test. Finally, at least two state courts have adopted the *Kerr* Test.<sup>107</sup> Moreover, the Third Circuit, as well as numerous other courts across the states and federal circuits, cite *Kerr* for its holding that requiring participation in a treatment program with a religious component is unconstitutionally coercive.<sup>108</sup> While those cases do not apply *Kerr*'s test, they do apply *Kerr*'s holding as a rule to strike down factually analogous programs.<sup>109</sup> This reveals that *Kerr* has a much broader reach and influence than appears from just counting jurisdictions that have formally adopted its test.

Of course, as courts take up cases with differing factual circumstances, distinctions are drawn and new rules are crafted around them. In the caselaw that has grown out of *Kerr* and *Inouye*, two such rules, or rather exceptions to *Kerr*'s rule, took root. The first is that there can be no coercion where the offender does not raise a religious

<sup>103</sup> *Jackson v. Nixon*, 747 F.3d 537, 542 (8th Cir. 2014) (“We agree that *Kerr* is ‘particularly useful’ ‘with regard to determining whether there was governmental coercion of religious activity.’” (quoting *Inouye*, 504 F.3d at 713)). The Eighth Circuit, however, described the *Kerr* Test as a “formulation of the *Lee* coercion test.” *Id.*

<sup>104</sup> See *Marrero-Méndez v. Pesquera*, No. 13-1203 (JAG), 2014 WL 4109518, at \*4 (D.P.R. Aug. 19, 2014), *aff'd sub nom.* *Marrero-Méndez v. Calixto-Rodríguez*, 830 F.3d 38 (1st Cir. 2016). The First Circuit affirmed the district court’s finding of coercion, but did not itself adopt the *Kerr* Test, citing *Lee* instead. *Marrero-Méndez*, 830 F.3d at 44.

<sup>105</sup> See *Ross v. Keelings*, 2 F. Supp. 2d 810, 818 (E.D. Va. 1998); *Nusbaum v. Terrangi*, 210 F. Supp. 2d 784, 788–89 (E.D. Va. 2002). A magistrate judge from the Western District of Virginia also applied *Kerr* in *Gray v. Johnson*, No. 7:04 CV 00634, 2005 WL 3036644, at \*4–5 (W.D. Va. Nov. 9, 2005); however, after trial, the district court judge declined to adopt the *Kerr* Test, noting that the Fourth Circuit “has endorsed the *Lemon* test” and incorporates other tests into *Lemon*’s second prong. *Gray v. Johnson*, 436 F. Supp. 2d 795, 800 (W.D. Va. 2006).

<sup>106</sup> See *Raines v. James*, No. 2:98CV290-MHT, 2006 WL 691236, at \*2 (M.D. Ala. Mar. 17, 2006).

<sup>107</sup> *In re Garcia*, 24 P.3d 1091, 1095, *modified*, 33 P.3d 750 (Wash. Ct. App. 2001); *McGill v. Pa. Dep’t of Health*, 758 A.2d 268, 275 (Pa. Commw. Ct. 2000).

<sup>108</sup> See *Bobko v. Lavan*, 157 F. App’x 516, 518 (3d Cir. 2005); *Bader v. Wren*, 532 F. Supp. 2d 308, 314 (D.N.H. 2008); *Armstrong v. Beauclair*, No. CV06-49-S-EJL, 2007 WL 1381790, at \*5 (D. Idaho Mar. 29, 2007); *Arnold v. Tenn. Bd. of Paroles*, 956 S.W. 2d 478, 484 (Tenn. 1997); *People v. Walton*, No. F037668, 2002 WL 1376077, at \*8 (Cal. Ct. App. June 25, 2002); see also *Goodwin v. Hamilton*, No. 10-CV-11909, 2011 WL 893118, at \*4 (E.D. Mich. Mar. 14, 2011); *Cain v. Caruso*, No. 08-14699, 2010 WL 2757995, at \*8 (E.D. Mich. May 24, 2010).

<sup>109</sup> This makes logical sense. If the facts of a case clearly fall within *Kerr*’s rule, as often is the case, there is no need for a court to ask the *Kerr* Test’s three questions.



objection to the faith-based program.<sup>110</sup> The second is that there can be no coercion where the offender is provided with a secular alternative to the faith-based program.<sup>111</sup> Neither of these two exceptions is expressed in the *Kerr* or *Inouye* opinions, as in both cases there *was no* alternative program and the offender *did* object to the faith-based program<sup>112</sup> (although courts often cite them as standing for these propositions anyway<sup>113</sup>). In fact, in *Inouye*, the plaintiff objected repeatedly to the faith-based program.<sup>114</sup> Thus, the court said he was faced with an unconstitutionally coercive Hobson's choice: "to be imprisoned or to renounce his own religious beliefs."<sup>115</sup>

The rule that the offender must object to the religious aspects of a faith-based program or otherwise put the state on notice of his or her conflicting religious beliefs is most prevalent in the Ninth Circuit.<sup>116</sup> Perhaps that is because the Ninth Circuit decided *Inouye*. For example, in *Burnight v. Sisto*, the petitioner's practice of Wicca *was* raised in his parole

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<sup>110</sup> See, e.g., *People v. Almodovar*, No. D069567, 2016 WL 6122783, at \*2 (Cal. Ct. App. Oct. 20, 2016) ("[T]his record does not establish the selection of the AA program was over appellant's objection."); *Goodwin*, 2011 WL 893118, at \*5 ("For there to be a constitutional violation . . . the plaintiff must object to attending the program on religious grounds and be forced to attend over objection.").

<sup>111</sup> See, e.g., *Goodwin*, 2011 WL 893118, at \*4 ("Where there are secular alternatives to NA/AA that the plaintiff may attend, there can be no coercion."); *Hatzfeld v. Eagen*, No. 9:08-CV-283 (LES DRH), 2010 WL 5579883, at \*7 (N.D.N.Y. Dec. 10, 2010) ("[T]he Second Circuit has held that 'as long as a secular alternative . . . is provided, it does not violate the Establishment Clause to 'include a noncoercive use of 'an alcohol or substance abuse treatment program that contains religious components.'" (alteration in original) (quoting *Miner v. Goord*, 354 Fed. App'x 489, 492 (2d Cir. 2009)).

<sup>112</sup> *Kerr v. Farrey*, 95 F.3d 472, 474 (7th Cir. 1996); *Inouye v. Kemna*, 504 F.3d 705, 709–10 (9th Cir. 2007).

<sup>113</sup> See, e.g., *Ohio v. Miller*, Nos. WD-13-054, WD-14-006, 2014 WL 4824387, at \*2 (Ohio Ct. App. Sept. 30, 2014) ("Significantly, relevant precedent on this issue consistently turns on case specific factors including both whether or not the party clearly and adequately conveyed religious-based concerns or objections to AA attendance, and [if so], whether secular alternatives to AA were offered." (citing in whole both *Inouye* and *Kerr*)).

<sup>114</sup> *Inouye* sued state officials for placing him in faith-based drug treatment programs while in prison. Before *Inouye*'s release from prison, his attorney sent a letter preemptively objecting to his being placed in faith-based programs while on parole. *Inouye* nevertheless was ordered to attend such a program as a condition of his parole, which he did but while refusing to participate. *Inouye*, 504 F.3d at 709–10.

<sup>115</sup> *Id.* at 714.

<sup>116</sup> See, e.g., *Neasman v. Swarthout*, No. 2:11-CV-0259 MCE EFB P, 2012 WL 4038508, at \*8 (E.D. Cal. Sept. 12, 2012) (no coercion where petitioner did not express that his religious beliefs conflicted with the religious programming); *Smith v. Sisto*, No. CIV S-08-0653 GEB EFB P, 2011 WL 572173, at \*4 (E.D. Cal. Feb. 15, 2011) (same); *Burnight v. Sisto*, No. CIV S-08-1894 MCE CHS P, 2011 WL 533979, at \*3 (E.D. Cal. Feb. 11, 2011) (same).

suitability hearing, but that was not enough: The petitioner needed to expressly state to the parole board “that his religious beliefs conflicted with participation in the substance abuse programs offered at his institution.”<sup>117</sup> This rule has caught on and been applied outside the Ninth Circuit to reject plaintiffs’ coercion-based claims.<sup>118</sup> Unfortunately, courts give little to no reasoning as to why coercion does not exist without some objection from the offender. This Comment takes the opposite stance, as is explained in Part III.B, *infra*.

Similarly, in applying the second rule that has grown out of *Inouye*—that a secular alternative nullifies the Establishment Clause problem with a faith-based program—courts again leave much to be desired in terms of reasoning. Significantly, courts do not inquire into the specifics of the secular alternative to determine whether it provides the offender with a true, non-coercive choice or just a Hobson’s choice.<sup>119</sup> For example, courts are not considering the relative efficacy, safety, benefits, or consequences of the rehabilitation programs.<sup>120</sup> Without any indication to the contrary, it seems simply providing an option, however bad it may be, is enough to escape a coercion claim.<sup>121</sup> This Comment concedes that providing an alternative secular program *can* make offering a faith-based program non-coercive; however, its presence alone does not necessarily do so.<sup>122</sup>

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<sup>117</sup> *Burnight*, 2011 WL 533979, at \*3.

<sup>118</sup> *See, e.g., Malipurathu v. Jones*, No. CIV-11-646-W, 2012 WL 3822206, at \*7–8 (W.D. Okla. June 14, 2012) (distinguishing *Inouye* because the plaintiff had not alleged that the drug court official was aware of his religious conflict); *see also supra* note 110.

<sup>119</sup> *See, e.g., Cain v. Caruso*, No. 08-14699, 2010 WL 2757995, at \*8 (E.D. Mich. May 24, 2010) (no violation where, after the plaintiff complained, “Defendants found him a secular treatment program placement”); *see also supra* note 111.

<sup>120</sup> *See, e.g., Volokh, supra* note 9, at 47 (discussing the lack of legal literature on empirical data to support public policy).

<sup>121</sup> In fact, some courts have found it enough that a plaintiff was exempted from just the religious *components* of a faith-based program but otherwise still required to participate. *See, e.g., Anderson v. Craven*, No. CV07-246-BLW, 2009 WL 804691, at \*4 (D. Idaho Mar. 26, 2009) (denying a motion for summary judgment because the court could not factually determine “to what extent the [faith-based] [p]rogram was modified to remove any religious component”).

<sup>122</sup> *See infra* Part III.C.

### III. BUILDING ON THE LOWER COURTS' COERCION TEST: KEEPING *KERR*, REJECTING THE *KERR* EXCEPTIONS, AND ENSURING TRUE CHOICE

#### A. *Keep the Kerr Test*

As mentioned in Section II.D.2, *supra*, not all federal circuits or states have adopted *Kerr's* test, nor has the Supreme Court blessed it. However, it enjoys more widespread use and acceptance than any other option for determining the constitutionality of faith-based rehabilitation programs. This Comment favors use of the *Kerr* Test—and thus encourages other courts to adopt it—for two main reasons, one doctrinal and one practical: First, the *Kerr* Test hinges on coercion, which is the most relevant Establishment Clause concern in religious “outsider” cases, as well as in the prison context. Second, the *Kerr* Test has persisted for so long and its rule applied so consistently in the circuits that have adopted it that courts have held it “clearly established” for purposes of qualified immunity defenses raised by government officials.<sup>123</sup> That means that plaintiffs are actually able to recover against those defendants.

##### 1. *Doctrinal Justification: Coercion is Key*

Beginning with the doctrinal justification for the *Kerr* Test—the *Kerr* opinion itself provides ample justification for its choice of inquiries. It distills the Supreme Court’s Establishment Clause cases into two categories: cases involving religious outsiders and cases involving religious insiders.<sup>124</sup> In insider cases, where the government would benefit an existing religious group either monetarily or otherwise, coercion is not applicable. Instead, the core concern is whether the government is establishing religion through its support.<sup>125</sup> To tease that out, the classic *Lemon* Test and its next-generation iteration, the Endorsement Test, are particularly apt because they address whether the government action “advances” or “endorses” religion.<sup>126</sup> On the other hand, in outsider cases, such as those at issue in this Comment, where an offender claims the government is coercing religion on him or her, a coercion-centric test is most useful. That is because, as the Supreme Court told us in *Lee*, “at a minimum, the Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise . . . .”<sup>127</sup> In other words, where there is religious coercion, there is an Establishment Clause violation, regardless of whether the *Lemon* or

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<sup>123</sup> See *supra* note 16 and accompanying text; *infra* Part III.A.2.

<sup>124</sup> See *Kerr v. Farrey*, 95 F.3d 472, 477–79 (7th Cir. 1996).

<sup>125</sup> *Id.* at 479.

<sup>126</sup> *Id.*

<sup>127</sup> *Lee v. Weisman*, 505 U.S. 577, 587 (1992).

Endorsement Tests' prongs also would be met.<sup>128</sup> Or, as Justice Blackmun put it in his *Lee* concurrence: "Although . . . proof of government coercion is not necessary to prove an Establishment Clause violation, it is sufficient. Government pressure to participate in a religious activity is an obvious indication that the government is endorsing or promoting religion."<sup>129</sup> Of course, as *Kerr* ensures the government has not gone below the Establishment Clause *floor* by coercing a plaintiff-offender, it may well be that a court finds no coercion under the *Kerr* Test, but then goes on to apply the *Lemon* Test, the Endorsement Test, or both to the plaintiff's other claims. For example, a plaintiff might claim that the faith-based program—even if he or she was not coerced into it—nevertheless advances religion. In that situation, the court would and should go beyond *Kerr*.

In other words, this Comment does not propose that courts dispose of other Establishment Clause tests; rather, it argues that, when the plaintiff's claim is that he or she is being coerced to participate in religious activity, courts should *at least* inquire whether the plaintiff has in fact been coerced, as that alone is sufficient to prove an Establishment Clause violation. And that is exactly what the *Kerr* Test does. *Kerr*'s first prong—"has the state acted"—ensures that the coercion, if any, came from the government, which is actionable, and not from a private party, which would not be actionable under the Establishment Clause.<sup>130</sup> The second prong—"does the action amount to coercion"—is the core of the test; it asks courts to determine, under the particular facts and circumstances of a case, whether coercion is present.<sup>131</sup> Finally, the third prong—"is the object of the coercion religious or secular"—recognizes that only coercion toward a religious end is actionable under the Establishment Clause.<sup>132</sup> These prongs, as applied in the context of faith-based rehabilitation programs, create a *per se* rule against government officials coercing criminal offenders to engage in religion.<sup>133</sup> That is unquestionably the correct result. Moreover, it is reached in a manner in keeping with the Supreme Court's teachings on coercion in this Establishment Clause context.<sup>134</sup> As such, why reinvent the wheel as to this minimum constitutional guarantee?<sup>135</sup>

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<sup>128</sup> *Kerr*, 95 F.3d at 479 ("Individuals may disagree in a particular case over other issues, such as whether it is the state who has acted, or whether coercion is present, or whether religion or something else is the aim of the coercion. But in general, a coercion-based claim indisputably raises an Establishment Clause question.").

<sup>129</sup> *Lee*, 505 U.S. at 604 (Blackmun, J., concurring).

<sup>130</sup> *Kerr*, 95 F.3d at 479.

<sup>131</sup> *Id.*

<sup>132</sup> *Id.*

<sup>133</sup> See *supra* notes 108–09 and accompanying text.

<sup>134</sup> See *Lee*, 505 U.S. at 587 ("[A]t a minimum, the Constitution guarantees that government may not coerce anyone to support or participate in religion or its

Granted, the Supreme Court has not considered a coercion claim brought by a prisoner or other criminal offender, but its reasoning in the cases it has considered applies with at least equal force here. For example, in *Lee*, the plaintiff prevailed on a theory of indirect coercion, where the Court recognized that a school's "supervision and control" of a graduation ceremony would pressure students to stand for, and thus participate in, a group prayer.<sup>136</sup> While most of the criminal offenders sent to rehab probably are older than the high schoolers in *Lee*, they are nonetheless capable of being coerced. For one thing, the prison context and broader criminal justice system context are inherently coercive<sup>137</sup> in that the state "supervis[es] and control[s]" an offender's near every move.<sup>138</sup> The state has the power to inflict all sorts of punishments on an offender, including imprisonment and even death.<sup>139</sup> As such, a gaping power disparity lies between government officials and criminal offenders.<sup>140</sup> The offender occupies the most vulnerable of positions and is likely to go along with whatever he or she is told in order to avoid adverse consequences.<sup>141</sup> Therefore, *Kerr's* coercion-based test is well-suited, as a policy matter, in that it accounts for this unique power dynamic.

## 2. *Practical Justification: Consistency, Uniformity, and Qualified Immunity*

The second and more practical justification for retaining *Kerr* is that doing so promotes consistency and uniformity in the law and its application. Four circuits already have formally adopted the *Kerr* Test (a

exercise."); *Everson v. Bd. of Educ.*, 330 U.S. 1, 15 (1947) ("Neither [a state nor the Federal Government] . . . can force nor influence a person to go to . . . church against his will or force him to profess a belief or disbelief in any religion.").

<sup>135</sup> Two authors advocate for applying the Unconstitutional Conditions Doctrine to resolving these cases. See Mitchell N. Berman, *Coercion Without Baselines: Unconstitutional Conditions in Three Dimensions*, 90 GEO. L.J. 1, 84–88 (2001); Derek P. Apanovitch, Note, *Religion and Rehabilitation: The Requisition of God by the State*, 47 DUKE L.J. 785, 849–50 (1998). That approach aligns with the argument for recognizing indirect coercion made in this Comment; however, it is impractical, for reasons discussed *infra*, to introduce an entirely new test.

<sup>136</sup> *Lee*, 505 U.S. at 593.

<sup>137</sup> See Linda Radzik, *Making Amends*, in HANDBOOK OF RESTORATIVE JUSTICE 200 (Gerry Johnstone & Daniel W. Van Ness eds., 2007).

<sup>138</sup> See *Lee*, 505 U.S. at 593.

<sup>139</sup> See, e.g., 18 U.S.C. § 3551 (2017) (listing authorized federal criminal sentences).

<sup>140</sup> See Robert M. Cover, *Violence and the Word*, 95 YALE L.J. 1601, 1608 (1986) ("The experience of the prisoner is, from the outset, an experience of being violently dominated, and it is colored from the beginning by the fear of being violently treated.").

<sup>141</sup> See *id.* at 1607 ("[I]t is unquestionably the case in the United States that most prisoners walk into prison because they know they will be dragged or beaten into prison if they do not walk.").

fourth has adopted its holding as a rule), as have district courts in three other circuits and two state appellate courts.<sup>142</sup> The more jurisdictions to adopt *Kerr*, the more uniform the law will be across the country, as should be the case for federal constitutional rights, which apply equally in all states.<sup>143</sup> Such uniformity helps ensure that similarly situated individuals around the country are treated consistently. That in turn enables those individuals to know their rights and thus when they can and should object to what amounts to religious coercion. Moreover, consistent application of the law puts government officials on notice of what they must do to comply. In short, widespread adoption of *Kerr* could actually deter coercion and, consequently, reduce coercion-based lawsuits.

In addition, putting government officials on notice allows plaintiffs to recover against them in civil rights lawsuits. There are two sources of federal civil rights causes of action that give rise to damages: 42 U.S.C. § 1983, which allows suits against state and local officials for violations of constitutional rights,<sup>144</sup> and the *Bivens* doctrine, which allows suits against federal officials for the same.<sup>145</sup> Under both sources, even if the plaintiff prevails in proving a constitutional violation, the government official may be (and usually is) qualifiedly immune. Individual officers performing discretionary functions are immune from liability so long as they do not violate “clearly established . . . rights of which a reasonable person would have known.”<sup>146</sup> Whether the legal right was clearly established at the time the official acted is a jurisdictional matter, and whether a reasonable officer would have known is a matter of timing.<sup>147</sup> There are no set answers to these objective legal questions, but the more courts agree and the more time they have been in agreement, the more likely a court is to find the qualified immunity defense inapplicable.<sup>148</sup> This qualified immunity standard is a tough one, strongly biased in favor of defendants;<sup>149</sup> nevertheless, the Ninth Circuit and some district courts have found *Kerr*’s rule clearly established.<sup>150</sup> Furthermore, other circuits

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<sup>142</sup> See *supra* Part II.D.2.

<sup>143</sup> See *Gitlow v. New York*, 268 U.S. 652 (1925) (credited as the genesis for the Incorporation doctrine, which holds that the federal Bill of Rights applies to the states).

<sup>144</sup> See 42 U.S.C. § 1983 (2012).

<sup>145</sup> *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 393–96 (1971).

<sup>146</sup> *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).

<sup>147</sup> See *id.* at 818–19.

<sup>148</sup> See *id.*

<sup>149</sup> See *Malley v. Briggs*, 475 U.S. 335, 341 (1986) (“As the qualified immunity defense has evolved, it provides ample protection to all but the plainly incompetent or those who knowingly violate the law.”).

<sup>150</sup> See, e.g., *Inouye v. Kemna*, 504 F.3d 705, 714–17 (9th Cir. 2007) (starting the trend); *Jackson v. Crawford*, No. 12-4018-CV-C-FJG, 2016 WL 5417204, at \*15 (W.D. Mo. Sept. 26, 2016) (“[P]laintiff points to a great deal of clearly established, long-

are likely to conclude the same when provided with a case. Again, it does not make sense to upset clearly established law that is working to put defendants on notice of their obligations and plaintiffs on notice of their rights. Other circuits, therefore, should follow *Kerr*'s lead rather than apply a different test; otherwise, government officials will be able to claim the law was not "sufficiently clear." That in turn would hurt plaintiffs by preventing their recoveries.<sup>151</sup> Of course, if the Supreme Court itself spoke, the law then would be "clearly established" across jurisdictions, even if the Court came up with an entirely new test. But until that time, plaintiffs and defendants alike would benefit from the lower courts being on the same page.

*B. Do Not Require Offenders to Object to the Faith-Based Program or to Raise Their Own Religious Beliefs or Conflicts Stemming Therefrom*

While this Comment favors continued use of the *Kerr* Test because of its doctrinal consistency and status as "clearly established," the two exceptions to finding coercion at prong two should be rejected. The first of those exceptions, that no coercion exists where an offender has not objected to the faith-based program, should be disavowed as contrary to the very coercion cases on which the *Kerr* Test is premised. In *Lee*, not only were the students not directly coerced into participating in the graduation prayers, they were not even required to attend the graduation ceremony.<sup>152</sup> However, the court recognized the presence of indirect, or psychological, coercion where the school district controlled the ceremony and students might feel peer pressured to fit in with what the majority of students were doing.<sup>153</sup> Similarly, in *Santa Fe*, which involved prayer at high school football games, the Court rejected that voluntary attendance precluded finding coercion, recognizing the social pressure to attend such social and extracurricular events.<sup>154</sup> This line of cases shows that the Supreme Court recognizes that coercion wears many costumes; as such, the Court is willing to look past form and into the

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standing precedent supporting a claim that requiring a person to participate in AA while in prison, without offering secular treatment options, violates the First Amendment." (citing *Kerr*); *Cullen v. Saddler*, No. 12-CV-1032, 2015 WL 1058355, at \*4 (C.D. Ill. Mar. 6, 2015) ("The defendants in *Kerr* were granted qualified immunity, but that was nearly 19 years ago. *Kerr* clearly established a constitutional right to be free from the coercion Plaintiff experienced.").

<sup>151</sup> See *Anderson v. Creighton*, 483 U.S. 635, 635 (1987) ("In order to conclude that the right which the official allegedly violated is 'clearly established,' the contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right.").

<sup>152</sup> *Lee v. Weisman*, 505 U.S. 577, 583 (1992).

<sup>153</sup> *Id.* at 593.

<sup>154</sup> *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 311–12 (2000).

substance of a situation.<sup>155</sup> In no case did the Court require the plaintiffs to have objected or assume voluntariness in the absence of an objection.

Lower courts should adhere to that precedent and not require criminal offenders to raise religious objections. There are many reasons why offenders might not feel comfortable doing so. For one, they are not in a position to negotiate the terms of their sentence and thus are likely to “go along to get along.” Similarly, offenders belonging to a minority religion or no religion (religious outsiders) might fear repercussions not just from officials but from other offenders, particularly in prison, where cliques and gangs are formed around races and religious affiliations.<sup>156</sup> Or an offender might not know they *can* object. Those caught in the criminal justice system do not often have choices about anything. In prison especially, offenders “are told when to get up, when to sleep, when to go outside, when to eat, and even with whom they can associate.”<sup>157</sup> So, when told to attend a faith-based rehabilitation program, they are simply not likely to question that assignment, no matter how they feel about it. Therefore, the rule that offenders must object is based on a false assumption that they can and will. Accordingly, courts should not require offenders to object and instead should recognize, as the Supreme Court’s coercion opinions do, that coercion is not always overt, nor must it be to raise a cognizable Establishment Clause claim.

For the same reasons, courts should not require offenders to make officials aware of their religious persuasions, as at least the Ninth Circuit requires.<sup>158</sup> In every case, secular rehabilitation programs should be offered right alongside religious ones, so that offenders may choose. The offender’s religious leanings should be of no moment to the official, for a Christian cannot be required to attend a Christian program any more than an atheist can. The Establishment Clause prohibits government from pushing religion on its citizens, period.<sup>159</sup> This approach comports not just with the Court’s Establishment Clause jurisprudence but also with its Free Exercise analysis of federal laws. Under the Religious Freedom Restoration Act (RFRA), government may only burden religious exercise where the burden furthers a compelling interest and is the least restrictive means of doing so.<sup>160</sup> But for RFRA to apply, claimants must make a threshold showing of a burden on their sincerely held

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<sup>155</sup> See *Lee*, 505 U.S. at 595 (“Law reaches past formalism.”).

<sup>156</sup> See generally GEORGE W. KNOX, THE PROBLEM OF GANGS AND SECURITY THREAT GROUPS (STG’S) IN AMERICAN PRISONS TODAY: RECENT RESEARCH FINDINGS FROM THE 2004 PRISON GANG SURVEY, NAT’L GANG CRIME RESEARCH CTR. (2005) (discussing the relationship between prison gangs and religion throughout).

<sup>157</sup> See Eicher, *supra* note 71, at 229.

<sup>158</sup> See *supra* note 116 and accompanying text.

<sup>159</sup> See *Everson v. Bd. of Educ.*, 330 U.S. 1, 15 (1947).

<sup>160</sup> Religious Freedom Restoration Act of 1993, 42 U.S.C. § 2000bb-1 (2012).



religious beliefs.<sup>161</sup> On the issue of sincerity, the Supreme Court consistently—both before and after RFRA’s enactment—has deferred to the claimant on the sincerity of his or her beliefs, recognizing the impropriety of inquiring too deeply and, in effect, deciding what religions or religious ideas are or are not valid.<sup>162</sup> Likewise, in the Establishment Clause context, offenders’ religious beliefs should not matter to courts or government officials. Regardless, they cannot compel religious participation.<sup>163</sup> Therefore, they should offer the secular program up front, in every case, whether or not they know an offender has a religious conflict with the faith-based program.

*C. Examine the Totality of the Circumstances to Determine Whether a Secular Alternative Program Provides the Offender with a True Choice*

In addition, courts should reject the second exception to finding coercion under the *Kerr Test*’s second prong: that no coercion exists where a secular alternative program is available to the offender. Certainly, a secular alternative would preclude finding coercion if the offender freely chose it, but its availability alone does not necessarily negate coercion. Just as there are situations in which an offender would not readily raise a religious objection, so too are there situations in which an offender would not readily choose a secular program, even where he or she objects to the faith-based one. For example, the secular program might not be as effective as evidenced by recidivism rates. Or it might preclude an offender from working, which for inmates means not having money to pay restitution, often a condition of probation or parole.<sup>164</sup> Or it might put the offender at a greater risk of assault, *e.g.*, if it entails living with the general prison population instead of with a safer residential unit.<sup>165</sup> Or, in the other direction, the faith-based program might come with all sorts of benefits, including favorable treatment from sentencing judges.<sup>166</sup> In all those instances, the offender would be faced with a

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<sup>161</sup> See *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 426 (2006) (The government conceded the burden and sincerity issues before raising its RFRA defense.).

<sup>162</sup> See, *e.g.*, *Thomas v. Review Bd.*, 450 U.S. 707, 713–16 (1981) (“Particularly in this sensitive area, it is not within the judicial function and judicial competence to inquire whether the petitioner . . . correctly perceived the commands of [his] common faith. Courts are not arbiters of scriptural interpretation.”).

<sup>163</sup> See *Bader v. Wren*, 532 F. Supp. 2d 308, 314 (D.N.H. 2008).

<sup>164</sup> See, *e.g.*, OR. REV. STAT. § 161.685 (2015).

<sup>165</sup> See Richard R.W. Fields, Comment, *Perks for Prisoners Who Pray: Using the Coercion Test to Decide Establishment Clause Challenges to Faith-Based Prison Units*, 2005 U. CHI. LEGAL F. 541, 547 (providing explanations for enhanced safety in a faith-based residential unit).

<sup>166</sup> See *id.* at 544–49 (discussing the benefits of living in a faith-based residential unit).

Hobson's choice, not a true choice. Therefore, courts should do more than just look to whether there is a secular alternative; they should determine whether the alternative is sufficient to provide the offender with a true, non-coercive choice. To answer that question, courts should consider the totality of the circumstances, putting themselves in the shoes of the offender. They must grapple with the facts and apply their reasoned judgment, which is exactly what *Kerr's* open-ended second prong allows them to do.

For example, if the faith-based program comes with significant, material benefits the secular program is lacking, the offender has no real choice. If the secular alternative leaves the offender at risk of assault from which the faith-based program would protect him, he has no real choice. If participating in the faith-based program allows the offender to leave prison early, he has no real choice. All of these "choices" put the offender between the proverbial rock and hard place. On the other hand, if the secular alternative is slightly less effective at rehabilitating offenders than is the faith-based program, the offender has a true choice, just as he would if a faith-based residential program had slightly better beds or other minor benefits. Considering the totality of the circumstances does not mean that courts cannot apply their common sense. Along with everything else, they will take into account that the offender is an adult who is not reasonably likely to choose to falsely profess belief in a higher power in order to gain access to, say, a bathroom with better water pressure. Plaintiff-offenders should bear the burden of production and persuasion on their coercion claims, and thus will have to convince the court they were faced with a coercive Hobson's choice. In short, the totality-of-the-circumstances inquiry is meant to ensure courts assess the offender's situation in a non-superficial, non-formal way; however, it is not meant to take away judges' ability to judge using common sense and reason.

This fact-based, totality-of-the-circumstances approach comports with the Supreme Court's coercion cases discussed in Part III.B, *supra*. To repeat, the Court in both *Lee* and *Santa Fe*, rather than taking a formal, bright-line approach, looked to the factual circumstances, such as setting, culture, and the age of the plaintiffs, in order to determine whether there might be indirect coercion.<sup>167</sup> More specifically, the Court did not stop at finding that the students had a choice in attending football games or their graduation ceremony. It went on to consider the pressures on students to attend, including extracurricular requirements, peer pressure, and even self-imposed pressure to fit in.<sup>168</sup> Just as the Supreme Court was willing to look at all the facts to determine whether the

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<sup>167</sup> See *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 311–12 (2000); *Lee v. Weisman*, 505 U.S. 577, 593 (1992).

<sup>168</sup> See *supra* note 167.

students had a true choice or a coercive Hobson's choice, so too should courts when determining the same for criminal offenders.

In addition to finding support in the Supreme Court's coercion cases, the totality-of-the-circumstances test is supported by the Court's insider cases involving state aid. In the modern era, religiously neutral aid is permissible if indirect and provided through independent private choice.<sup>169</sup> In determining whether aid recipients have a true choice of where to spend the money, the Court's inquiry does not stop at finding alternative options; rather, the Court looks deeper into those options to determine whether they in fact provide the recipient with a choice. For example, in *Zelman*, the Court considered an aid program that allowed students at a failing Ohio public school district to attend other schools, religious or secular.<sup>170</sup> The Court did not satisfy itself that the choice of where to enroll was truly independent based on the existence of secular options, but went on to determine whether "financial incentives . . . skew[ed] the program toward religious schools."<sup>171</sup> Concededly, *Zelman* did not involve coercion and thus is not precisely on point for purposes of this Comment; however, it does show that the Court, in determining whether there is a choice, goes beyond finding that there is more than one option. It looks at the surrounding circumstances to determine whether the choice of options is nevertheless coercive.

In addition, a totality-of-the-circumstances approach to determining whether a secular alternative program provides offenders with a true choice comports with the Supreme Court's treatment of other highly fact-dependent questions. For example, in the Fourth Amendment<sup>172</sup> context, in determining whether law enforcement officials have the reasonable suspicion required to stop and frisk someone or the probable cause required to arrest or search someone, the Court, with few exceptions,<sup>173</sup> has rejected bright line rules in favor of totality-of-the-circumstances tests.<sup>174</sup> For example, in *Illinois v. Gates*, the Court noted that "probable cause is a fluid concept—turning on the assessment of probabilities in particular factual contexts—not readily, or even usefully,

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<sup>169</sup> *Zelman v. Simmons-Harris*, 536 U.S. 639, 652–53 (2002).

<sup>170</sup> *Id.* at 644–46.

<sup>171</sup> *Id.* at 653–54 (internal quotations omitted).

<sup>172</sup> U.S. CONST. amend. IV.

<sup>173</sup> See generally Kit Kinports, *Probable Cause and Reasonable Suspicion: Totality Tests or Rigid Rules?*, 163 U. PA. L. REV. ONLINE 75 (2014) (examining two recent exceptions).

<sup>174</sup> See, e.g., *Illinois v. Gates*, 462 U.S. 213, 230–32 (1983) (rejecting the existing two-part test for determining probable cause based on an informant's tip in favor of a totality of the circumstances test); *United States v. Cortez*, 449 U.S. 411, 417 (1981) ("Courts have used a variety of terms to capture the elusive concept of what cause is sufficient to authorize police to stop a person. . . . But the essence of all that has been written is that the totality of the circumstances—the whole picture—must be taken into account.").

reduced to a neat set of legal rules.”<sup>175</sup> Thus, it chose to apply a totality-of-the-circumstances test, which it found better suited for reviewing the issuing magistrate’s “practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him,” probable cause to search exists.<sup>176</sup> Likewise, whether the availability of a secular alternative rehabilitation program provides an offender with a true, non-coercive choice turns on myriad factors that all must be considered. This requires a totality-of-the-circumstances approach. Courts should reject the contrary *per se* rule as unworkably rigid.

*D. Potential Objection: Criminal Offenders Should Be Treated Differently Than Schoolchildren*

One potential counterargument this Comment has not yet addressed is that the Supreme Court has stated that “the concern [of indirect coercion] . . . is most pronounced” in the public school context,<sup>177</sup> and thus the Court may not (or should not) recognize claims of indirect coercion by criminal offenders. That argument could be bolstered by the fact that the Court is hyper-deferential to the government in the prison context.<sup>178</sup> However, the *Lee* Court left open the possibility of finding an Establishment Clause violation based on indirect coercion alone in other contexts.<sup>179</sup> And the criminal justice system, with its inherent power disparity between government official and private individual, is a perfect candidate. Criminal offenders, like students, are especially susceptible to coercion.<sup>180</sup> In fact, criminal justice settings, especially prisons, are quite like public schools. For example, both are funded by the government; both offenders and students are subject to others’ control; and in both settings, constitutional rights are diminished.<sup>181</sup> Moreover, *Kerr’s* second prong, the coercion prong, is open-ended and thus gives courts the flexibility to consider the offender’s situation and decide whether, *relative to its context*, coercion is present. At that step, courts naturally will be deferential to the government in that they will require more, in terms of adverse consequences, to find coercion in the criminal justice system context than they would in the public school context (*e.g.*, loss of parole

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<sup>175</sup> *Gates*, 462 U.S. at 232.

<sup>176</sup> *Id.* at 238.

<sup>177</sup> *Lee v. Weisman*, 505 U.S. 577, 592 (1992).

<sup>178</sup> *See supra* Part II.B.

<sup>179</sup> *Lee*, 505 U.S. at 592.

<sup>180</sup> *See Eicher, supra* note 71, at 229 (“By design, incarceration reinforces for every inmate the notion that he is under constant coercion by the State.”).

<sup>181</sup> *See generally* Molly Knepfel, *When High School Students Are Treated Like Prisoners*, ROLLING STONE (Sept. 12, 2013), <http://www.rollingstone.com/politics/news/when-high-school-students-are-treated-like-prisoners-20130912> (comparing students to prisoners and discussing the school-to-prison pipeline).

versus missing graduation). In other words, some level of deference is built into the *Kerr* Test itself.

#### IV. CONCLUSION

In conclusion, with so many Americans entering the criminal justice system on drug and alcohol-related offenses, policymakers are understandably interested in rehabilitating criminal offenders with addiction problems, and faith-based programs may seem like an effective way to do so. Courts, too, may be tempted to defer to policymakers' judgment, especially in the prison context. Despite no Supreme Court case on point and the Court's ever-changing Establishment Clause doctrine, lower courts fashioned an effective test for evaluating the constitutionality of faith-based rehabilitation programs. Unfortunately, they created two major exceptions to their rule against coercing offenders to engage in these programs, and neither is supported by Supreme Court caselaw. Contrary to the lower courts' position, a criminal offender should not have to object to a faith-based program, nor does the presence of a secular alternative necessarily cure any Establishment Clause problem. The facts and circumstances of a particular offender's situation, as well as the details of what a secular alternative program entails, must be taken into account, and *per se* rules and exceptions do not leave room for factual inquiries. Courts should resist the temptation to rubber stamp the decisions of government officials and instead uphold the Establishment Clause's anti-coercion imperative by examining whether *in fact*, considering the totality of the circumstances, criminal offenders are given a true choice in rehabilitation programs.