THE CONSTITUTIONALITY OF PRISON-SPONSORED RELIGIOUS THERAPEUTIC COMMUNITIES

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I. INTRODUCTION

The primary purpose of this article is to explain why the Establishment Clause of the United States Constitution does not prohibit government prisons and jails from using around-the-clock religious rehabilitation programs. These programs, sometimes called religious therapeutic communities ("RTCs"), respond to the desires of inmates who voluntarily want to reform their lives along religious lines. Incarceration, a government-imposed burden, prevents inmates from obtaining these services outside the prison. To compensate for the restrictions that prison life places on the religious liberty of inmates, prisons with these programs provide inmates with education, staff support, and community affirmation designed to change or manage wrong behavior. Participants typically reside together in a society separated from the rest of the prison population. A good example of these programs is InnerChange Freedom Initiative, which operates twenty-four-hour-per-day religious rehabilitation programs in prisons in Texas, Iowa, and Kentucky.[1]

This article begins by briefly examining the recent history and current state of Establishment Clause jurisprudence. The article then analyzes two legal defenses these programs have against Establishment Clause challenges. The first defense, which will be referred to as the accommodation principle, is that state actors do not violate the Establishment Clause by providing religious aid to compensate for the burdens that incarceration places on religious freedom. The second defense is that the religious activity of religious therapeutic communities does not qualify as state action, a necessary prerequisite for a finding of a First Amendment violation.

Next, the article examines a related issue: whether state actors may decline to contract with non-governmental providers of rehabilitative services on the ground that those services are religious. The analysis

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[1] *See* Chuck Colson, *A Word from Chuck Colson*, The InnerChange Freedom Initiative, *at* http://www.ifiprison.org (last modified June 7, 2002).

concludes that to exclude religious providers on this ground is hostility toward religion and is prohibited by the First Amendment.

The last substantive section analyzes in detail the Texas Supreme Court case *Williams v. Lara*,[2] the only reported opinion to address whether a religious rehabilitation unit complies with the Establishment Clause of the United States Constitution. The *Williams* court invalidated the program.[3] While the court's result was likely consistent with current Establishment Clause jurisprudence, the decision omits important points. The decision could be misleading or unhelpful to later courts evaluating programs that do not have the fatal defect the court found in *Williams* – that top government authorities abused the program to advance their personal religious beliefs and suppress all others.[4] Because this is not ordinarily true of other programs, the analysis in *Williams* is largely inapplicable to other situations.

II. RELIGIOUS THERAPEUTIC COMMUNITIES DO NOT VIOLATE THE ESTABLISHMENT CLAUSE

A. The Recent History and Current State of the Establishment Clause

While a complete discussion of the Establishment Clause is beyond the scope of this article, a brief review will be helpful. The First Amendment reads, in part, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ."[5] The Establishment Clause was originally intended to limit only the federal government's power.[6] After the passage of the Fourteenth Amendment, however, the Supreme Court extended application of the Establishment Clause to state governments.[7] It is settled, though, that the Establishment Clause applies only to state actors; it does not affect private conduct or activity.[8]

Modern Establishment Clause jurisprudence began in 1947.[9] In *Everson v. Board of Education*, the Supreme Court announced the then-novel doctrine that a wall of separation sits between church (expanded to

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

3 *Id.* at 194-95.

4 *Id.* at 192-93.

5 U.S. CONST. amend. I.

6 *See, e.g.*, Cantwell v. Connecticut, 310 U.S. 296, 303 (1940) (noting that the First Amendment did not apply to the states until the passage of the Fourteenth Amendment).

7 *Id.* at 303-04.

8 Shelley v. Kraemer, 334 U.S. 1, 13 (1948) ("[T]he principle has become firmly embedded in our constitutional law that the action inhibited by the first section of the Fourteenth Amendment is only such action as may fairly be said to be that of the States.").

9 ROBERT CORD, SEPARATION OF CHURCH AND STATE: HISTORICAL FACT AND CURRENT FICTION 15 (Baker Book House 1988) (1982) (providing a historical survey of Establishment Clause jurisprudence).

mean religion generally, not merely ecclesiastical institutions) and state.[10] The *Everson* view lacked textual and historical objectivity, which made defining workable rules difficult. The Court has since developed several tests to determine whether a practice violates the Establishment Clause.[11] The *Lemon* test[12] is perhaps the best known. Other tests the Court has used include history,[13] endorsement,[14] governmental preference,[15] coercion,[16] neutrality,[17] and purposes and effects.[18] One commentator has rightly observed the following: "These judge-made tests have proved to be of little use in predicting how actual cases before

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[10] Everson v. Bd. of Educ., 330 U.S. 1, 15–16 (1947). The relevant excerpt of the Court's view is as follows:

> 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. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and *vice versa*. In the words of Jefferson, the clause against establishment of religion by law was intended to erect "a wall of separation between church and State."

Id.

[11] *See infra* notes 12-18 and accompanying text.

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

[13] Marsh v. Chambers, 463 U.S. 783, 792-95 (1983).

[14] Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753 (1995); County of Allegheny v. ACLU, 492 U.S. 573 (1989); Lynch v. Donnelly, 465 U.S. 668, 690-92 (1984) (O'Connor, J., concurring). This test focuses on whether the government conveys a message that it favors one religion over another. *County of Allegheny*, 492 U.S. at 593. Some courts view this as a version of the second prong of the *Lemon* test. Granzeier v. Middleton, 173 F.3d 568, 573 (6th Cir. 1999).

[15] Wallace v. Jaffree, 472 U.S. 38, 91-106 (1985) (Rehnquist, J., dissenting).

[16] *County of Allegheny*, 492 U.S. at 659 (Kennedy, J., concurring in part and dissenting in part). The focus of this test is on whether the government obliges participation in religious activity. *Id.* Some courts view this as a version of the third prong of the *Lemon* test. Suhre v. Haywood County, 55 F. Supp. 2d 384 (W.D.N.C. 1999).

[17] Bd. of Educ. v. Grumet, 512 U.S. 687, 696 (1994); Lee v. Weisman, 505 U.S. 577, 627 (1992) (Souter, J., concurring); Comm. for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 792-93 (1973); Gillette v. United States, 401 U.S. 437, 449 (1971) ("The central purpose of the Establishment Clause [is to] . . . ensur[e] governmental neutrality in matters of religion."); Epperson v. Arkansas, 393 U.S. 97, 103-04 (1968); *see also* Douglas Laycock, *"Nonpreferential" Aid to Religion: A False Claim About Original Intent*, 27 WM. & MARY L. REV. 875, 922 (1986) ("The principle that best makes sense of the establishment clause is the principle of the most nearly perfect neutrality toward religion and among religions.").

[18] Sch. Dist. v. Schempp, 374 U.S. 203, 222 (1963).

the Court will be decided, as well as to be of limited durability, as the test in current favor waxes and wanes even among individual Justices."[19]

In spite of this confusion, two legal defenses to Establishment Clause challenges are relevant to therapeutic communities. The first doctrine provides that state actors may legally provide religious aid to counterbalance government restrictions on an individual's ability to freely exercise his or her religion. Examples of these circumstances are chaplaincies in prisons and the military.

The second relevant doctrine concerns activity by state contractors or employees that is at odds with state control. Such activity, even though performed by state employees at the state's request, is not state action.[20] The religious activity of the rehabilitation unit, the activity that opponents of religious rehabilitation programs would protest, is not state action. Because state action is a necessary prerequisite to finding an Establishment Clause violation, the religious activity cannot serve as a ground for a violation.[21] Both of these situations are discussed in detail below.

B. State Actors Have Wide Discretion Under the Constitution to Provide Religious Aid to Counterbalance the Burdens They Place on the Ability of Individuals to Freely Exercise Religion

A violation of the Establishment Clause does not occur merely because state actors provide religious aid to individuals whose ability to freely exercise their religion has been substantially burdened by the government.[22] Judge Posner of the Seventh Circuit Court of Appeals explains the reasons for this conclusion:

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[19] Carl H. Esbeck, *The Establishment Clause as a Structural Restraint on Governmental Power*, 84 IOWA L. REV. 1, 11 n.38 (1998); *see also* Tilton v. Richardson, 403 U.S. 672, 678 (1971) ("[C]andor compels the acknowledgment that we can only dimly perceive the boundaries of permissible government activity in this sensitive area . . . ."); Lemon v. Kurtzman, 403 U.S. 602, 671 (1971) (White, J., concurring in judgment).

[20] Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n, 531 U.S. 288, 303 (2001).

[21] Shelley v. Kraemer, 334 U.S. 1, 13 (1948) ("[T]he principle has become firmly embedded in our constitutional law that the action inhibited by the first section of the Fourteenth Amendment is only such action as may fairly be said to be that of the States.").

[22] Johnson-Bey v. Lane, 863 F.2d 1308, 1310-11 (7th Cir. 1988); Carter v. Broadlawns Med. Ctr., 857 F.2d 448 (8th Cir. 1988); Katcoff v. Marsh, 755 F.2d 223, 234-35 (2d Cir. 1985); Rudd v. Ray, 248 N.W.2d 125, 128-29 (Iowa 1976); Duffy v. Cal. State Pers. Bd., 283 Cal. Rptr. 622, 630 (Ct. App. 1991).

> By necessity government has deprived members of the armed forces and inmates of the opportunity to practice their faith at places of their choice. To accommodate the fundamental and constitutionally recognized need of these persons to exercise their religious beliefs, government has long relied on the practical substitute of providing for chaplains representative of the religious creeds of those deprived of their freedom and placed in their care.

> Patients in public hospitals, members of the armed forces in some circumstances (e.g., the crew of a ballistic missile submarine on duty) – and prisoners – have restricted or even no access to religious services unless government takes an active role in supplying those services. That role is not an interference with, but a precondition of, the free (or relatively free) exercise of religion by members of these groups. The religious establishments that result are minor and seem consistent with, and indeed required by, the overall purpose of the First Amendment's religion clauses, which is to promote religious liberty.[23]

For inmates, military personnel, and patients in public hospitals, the government controls virtually all access to basic necessities of life, including food, clothing, shelter – and religious activity. If the government does not provide these necessities, the individuals are helpless to obtain them on their own. In other words, if the government does not provide these essentials, nobody does.

Of the necessities mentioned above, only the right to freely exercise one's religion is explicitly guaranteed by the United States Constitution.[24] Courts have been willing to accommodate government religious aid when the government restricts citizens' access to religious services and materials. Courts have approved government-sponsored prison chaplaincies,[25] military chaplaincies,[26] and hospital chaplaincies.[27] The Supreme Court has relied on the presumed constitutionality of the military chaplaincy in deciding *Lynch v. Donnelly*, a case dealing with the Establishment Clause.[28] Several individual justices have also expressed approval of the military chaplaincy.[29]

The principle that the government may affirmatively accommodate individuals' free exercise rights applies whenever the government has burdened the individuals' ability to freely exercise religion. The accommodation doctrine is not tied to any particular test (such as the *Lemon* test or the endorsement test). Some courts do not identify a

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Johnson-Bey, 863 F.2d at 1310-11 (7th Cir. 1988).

[23] *Johnson-Bey*, 863 F.2d at 1312.

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

[25] Theriault v. Silber, 547 F.2d 1279 (5th Cir. 1977); *Duffy*, 283 Cal. Rptr. at 630, 632-33; *Rudd*, 248 N.W.2d at 128-29; Malyon v. Pierce County, 935 P.2d 1272, 1285, 1289 (Wash. 1997).

[26] *Katcoff*, 755 F.2d at 234-35, 237-38.

[27] *Carter*, 857 F.2d 448 at 456.

[28] Lynch v. Donnelly, 465 U.S. 668, 676 (1984) (citing with approval the public funding of military chaplains).

[29] Marsh v. Chambers, 463 U.S. 783, 812 (1983) (Brennan, J., dissenting); Sch. Dist. v. Schempp, 374 U.S. 203, 296-98 (1963) (Brennan, J., concurring) (justifying government provisions for military chaplaincy because the military deprives soldiers of their free exercise opportunity); *Id.* at 309 (Stewart, J., dissenting); Engel v. Vitale, 370 U.S. 421, 449 n.4 (1962) (Stewart, J., dissenting); McCollum v. Bd. of Educ., 333 U.S. 203, 254 (1948) (Reed, J., dissenting).

particular test but instead rely solely on the accommodation principle to find that religious aid does not violate the Establishment Clause.[30] For cases that apply particular tests, the theoretical application of the accommodation principle differs depending on which analysis is used.

The endorsement test, for example, treats the accommodation principle as controlling which message government religious aid conveys.[31] The test prohibits state actors from communicating approval of one religion over another.[32] Because the Free Exercise Clause permits state actors to compensate for government-imposed burdens on the freedom to exercise religion, state provision of religious aid does not communicate a message of endorsement. One California appellate court explained, "The message conveyed is that government has an obligation to, and through prison chaplaincies does, afford reasonable opportunities to inmates to exercise the religious freedom guaranteed by the First and Fourteenth Amendments."[33]

Some courts have chosen to apply the *Lemon* test to situations involving state accommodation of government-imposed burdens on religion. While all of these cases apply the accommodation principle, exact analyses differ. This phenomenon is exemplified in the different

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[30] *See, e.g., Theriault*, 547 F.2d at 1280; *see also* Johnson-Bey v. Lane, 863 F.2d 1308, 1310-11 (7th Cir. 1988) (stating that a person cannot put "arbitrary obstacles in the way" of inmates' religious practices).

[31] *See, e.g.*, Duffy v. Cal. State Pers. Bd., 283 Cal. Rptr. 622, 627 (Cal. Ct. App. 1991).

[32] *See* Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S 753, 763-64 (1995).

[33] *Duffy*, 283 Cal. Rptr. at 631. Justice O'Connor has made the same point:

> The text of the Free Exercise Clause speaks of laws that prohibit the free exercise of religion. On its face, the Clause is directed at government interference with free exercise. Given that concern, one can plausibly assert that government pursues Free Exercise Clause values when it lifts a government-imposed burden on the free exercise of religion. If a statute falls within this category, then the standard Establishment Clause test should be modified accordingly. It is disingenuous to look for a purely secular purpose when the manifest objective of a statute is to facilitate the free exercise of religion by lifting a government-imposed burden. Instead, the Court should simply acknowledge that the religious purpose of such a statute is legitimated by the Free Exercise Clause. I would also go further. In assessing the effect of such a statute – that is, in determining whether the statute conveys the message of endorsement of religion or a particular religious belief – courts should assume that the "objective observer," is acquainted with the Free Exercise Clause and the values it promotes. Thus individual perceptions, or resentment that a religious observer is exempted from a particular government requirement, would be entitled to little weight if the Free Exercise Clause strongly supported the exemption.

Wallace v. Jaffree, 472 U.S. 38, 83 (1985) (O'Connor, J., concurring) (citation omitted); *see also* Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327, 345 n.5 (Brennan, J., concurring); *id.* at 346-49 (O'Connor, J., concurring).

approaches used to evaluate state-run chaplaincies. Some courts hold that chaplaincies meet each of the three prongs of the *Lemon* test.[34] The Iowa Supreme Court treated the accommodation principle as an exception to the *Lemon* test.[35] The Second Circuit held that such an application of the *Lemon* test was inappropriate.[36] Still, all of these cases found that the accommodation principle justified government use of chaplains.

Whatever tests have been used, the results are consistent: state actors may provide religious aid to accommodate government-imposed burdens on the free exercise of religion. The consistency of these results is significant, considering the unpredictability of Establishment Clause jurisprudence.[37]

C. Religious Therapeutic Communities Are Permissible Government Accommodations

Prisoners retain all constitutional rights that are compatible with incarceration.[38] These include the right to freely exercise religion.[39] Because the government burdens prisoners' religious rights, the government has an affirmative duty to aid the religious exercise of prisoners.[40] For example, in certain circumstances, prisons have affirmative obligations to permit inmates to attend religious services,[41] accommodate prisoners' religious dietary rules,[42] accommodate inmate visitations with clergy,[43] provide ritual instruments to inmates,[44] permit

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[34] Carter v. Broadlawn Med. Ctr., 857 F.2d 448, 455-57 (8th Cir. 1988); Malyon v. Pierce County, 935 P.2d 1272, 1286-89 (Wash. 1997).

[35] Rudd v. Ray, 248 N.W.2d 125, 128-29 (Iowa 1976). Judge Posner, while not expressly using the *Lemon* test, similarly treats Free Exercise concerns as an exception, noting that even though chaplaincies might be considered minor establishments of religion, these concerns are outweighed by Free Exercise goals. Johnson-Bey v. Lane, 863 F.2d 1308, 1312 (7th Cir. 1988).

[36] Katcoff v. Marsh, 755 F.2d 223, 235 (2d Cir. 1985).

[37] *See supra* notes 9 through 19 and accompanying text.

[38] Hudson v. Palmer, 468 U.S. 517, 524 (1984) (holding that prisoners retain rights consistent with incarceration); *see also* Turner v. Safely, 482 U.S. 78, 95-97 (1987) (right to marry); Bounds v. Smith, 430 U.S. 817, 821 (1977) (right to access courts); Wolff v. McDonnell, 418 U.S. 539, 556 (1974) (right to due process); Lee v. Washington, 390 U.S. 333, 333-34 (1968) (right to protection under the Fourteenth Amendment).

[39] Cruz v. Beto, 405 U.S. 319, 322 n.2 (1972).

[40] *Id.*

[41] Salahuddin v. Coughlin, 993 F.2d 306, 308 (2d Cir. 1993) ("It is well established that prisoners have a constitutional right to participate in congregate religious services."); United States *ex rel.* Jones v. Rundle, 453 F.2d 147, 149-50 (3d Cir. 1971).

[42] Kahane v. Carlson, 527 F.2d 492, 495 (2d Cir. 1975).

[43] O'Malley v Brierley, 477 F.2d 785, 795-96 (3d Cir. 1973).

[44] Howard v. United States, 864 F. Supp. 1019, 1030 (D. Colo. 1994).

inmates to wear their hair in a religious fashion,[45] permit inmates to receive religious literature,[46] and permit inmates to correspond with spiritual authorities.[47] These obligations are a mere floor for prisoner religious rights. In fact, as will be demonstrated later, prison authorities have the discretion to provide further aid.

Because prisons must aid prisoners' religious exercise, courts have regularly rejected Establishment Clause claims that allege that such aid is unconstitutional. For example, courts have upheld prison chaplaincies[48] and prison administration of voluntary religious drug- and substance-abuse rehabilitation programs.[49]

Unfortunately, no caselaw directly addresses the constitutionality of prison operation of a religious therapeutic community by a neutral administration.[50] Other cases, however, that address settings with comparable government restrictions on the free exercise of religion demonstrate the breadth of discretion that state actors have in providing religious aid. The best example of this is the military chaplaincy. The case that discusses the propriety of the military chaplaincy most thoroughly is *Katcoff v. Marsh* from the United States Court of Appeals for the Second Circuit.[51] *Katcoff* has been cited with approval by numerous courts, including the United States Supreme Court in a concurring opinion,[52] the Second Circuit,[53] the Seventh Circuit,[54] the Eighth Circuit,[55] the Tenth Circuit,[56] the Washington Supreme Court,[57] and various federal district courts.[58]

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[45] Longstreth v. Maynard, 961 F.2d 895, 902-03 (10th Cir. 1992); Weaver v. Jago, 675 F.2d 116, 118-19 (6th Cir. 1982).

[46] Walker v. Blackwell, 411 F.2d 23, 28-29 (5th Cir. 1969).

[47] *Id.* at 29.

[48] Theriault v. Silber, 547 F.2d 1279 (5th Cir. 1977); *see also* Johnson-Bey v. Lane, 863 F.2d 1308, 1312 (7th Cir. 1988) (stating that prison chaplaincies are constitutional).

[49] O'Connor v. California, 855 F. Supp. 303 (C.D. Cal. 1994).

[50] As of the publication of this article, the only case that directly addresses a religious education unit of a prison is Williams v. Lara, 52 S.W.3d 171 (Tex. 2001). The type of program in *Williams* differs materially from the type of program being defended in this article and will be discussed extensively below.

[51] Katcoff v. Marsh, 755 F.2d 223 (2d Cir. 1985).

[52] Lee v. Weisman, 505 U.S. 577, 626 (1991).

[53] Wilder v. Bernstein, 848 F.2d 1338, 1342 (2d Cir. 1988).

[54] Johnson-Bey v. Lane, 863 F.2d 1308, 1312 (7th Cir. 1988).

[55] Carter v. Broadlawn Med. Ctr., 857 F.2d 448, 454-55 (8th Cir. 1987).

[56] Murphy v. Derwinski, 990 F.2d 540, 547 (10th Cir. 1993).

[57] Malyon v. Pierce County, 935 P.2d 1272, 1285 (Wash. 1997).

[58] Lewis v. United States Army, 697 F. Supp. 1385, 1389 (E.D. Pa. 1988). As noted above, several other cases affirm (in dicta or otherwise) the validity of the military chaplaincy. *See, e.g.*, Lynch v. Donnelly, 465 U.S. 668, 676 (1984) (citing with approval the public funding of military chaplains); Marsh v. Chambers, 463 U.S. 783, 812 (1983) (Brennan, J., dissenting); Sch. Dist. v. Schempp, 374 U.S. 203, 296-98 (1963) (Brennan, J.,

In *Katcoff*, two law students challenged the constitutionality of the United States Army chaplaincy, alleging that it violated the Establishment Clause of the United States Constitution.[59] The plaintiffs accurately described the Army chaplaincy as a complete ecclesiastical institution.[60]

The Army chaplaincy is large. At the time the *Katcoff* suit was filed, the chaplaincy had 1427 active chaplains, 10 auxiliary chaplains, 1383 chaplain's assistants, and 48 Directors of Religious Education.[61] Chaplains are all members of the Army, hold rank, and wear uniforms.[62] The Chief of Chaplains, a major general in rank, heads the Office of the Chief of Chaplains.[63] This office has three divisions: (1) Administration and Management, (2) Plans, Programs, and Policies, and (3) Personnel and Ecclesiastical Relations.[64]

The Army supplies many resources to the chaplaincy. The government pays the salaries of chaplains and other religious personnel.[65] Public funds support a religious library for the chaplaincy.[66] The Army pays for religious facilities, sacred items, denominational literature, and chaplain kits.[67] The chaplaincy receives and uses religious materials that the Army publishes.[68] Taxpayers also fund missions, retreats, and professional religious training.[69]

Even though Army chaplains are government employees, they have a wide variety of religious duties. Chaplains must oversee religious services, such as worship services, marriages, baptisms, funerals, and

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concurring) (stating that government provisions for military chaplaincy are justifiable because the military deprives soldiers of free-exercise opportunities); *id.* at 309 (Stewart, J., dissenting); Engel v. Vitale, 370 U.S. 421, 449 n.4 (1962) (Stewart, J., dissenting); McCollum v. Bd. of Educ., 333 U.S. 203, 254 (1948) (Reed, J., dissenting).

[59] Katcoff v. Marsh, 755 F.2d 223, 224-25 (2d Cir. 1985).

[60] *Id.* at 224-31. Two opinions from lower courts are helpful in fleshing out the facts of the case. Katcoff v. Alexander, 599 F. Supp. 987, 988 (E.D.N.Y. 1980); Katcoff v. Marsh, 582 F. Supp. 463, 465-66 (E.D.N.Y. 1984), *aff'd in part*, Katcoff v. Marsh, 755 F.2d 223 (2d Cir. 1985). The 1984 opinion, which concerns the summary judgment decided by the Second Circuit, notes the following about the factual record and the relevance of the 1980 opinion: "The material facts are undisputed, and many were clearly set forth in Judge Mishler's Opinion of August 20, 1980. Accordingly, I need do no more than broadly outline the operation of the Chaplaincy Program." Katcoff v. Marsh, 582 F. Supp. at 465. Consequently, references will be made to all of these opinions to demonstrate the structure of the Army chaplaincy.

[61] Katcoff v. Marsh, 755 F.2d at 225.

[62] *Id.*

[63] *Id.* at 225, 228.

[64] *Id.* at 228.

[65] Katcoff v. Alexander, 599 F. Supp. 987, 988 (E.D.N.Y. 1980).

[66] *Id.*

[67] *Id.*

[68] *Id.*

[69] *Id.*

prayer breakfasts.[70] Duties also include providing religious education, including classes in religious doctrine, individual instruction in matters of religion, cultural groups, choral groups, leadership development programs, religious dance, religious drama, and religious film.[71] A chaplain also acts in a pastoral role by visiting with soldiers and members of their families to provide spiritual counseling.[72]

Although the Army chaplaincy resembles a complete religious institution, funded and operated by the government, the Second Circuit upheld its constitutionality.[73] The Court explained, "The purpose and effect of the program is to make religion, religious education, counseling and religious facilities available to military personnel and their families under circumstances where the practice of religion would otherwise be denied as a practical matter to all or a substantial number."[74] *Katcoff* demonstrates the wide discretion that the government has in providing religious aid to those for whom it would otherwise be inaccessible.

Similarities between a religious therapeutic community and the Army chaplaincy will vary from program to program. The primary religious components of RTCs are doctrinal instruction and counseling, which are also parts of the military chaplaincy. The Army chaplaincy is a constitutional entity despite the fact that it is a sprawling government-operated religious organization with vast state funding and resources. Likewise, no RTC program should be found to violate the Establishment Clause on the ground that it provides too much aid to religion. Like the Army chaplaincy, religious therapeutic communities alleviate the burden on religious freedom caused by state action. Any attempts by the government to replicate the religious freedom inmates would have outside of prison should be permissible, at least in terms of scope. This conclusion is bolstered because courts must also accord wide-ranging deference to the "expert judgment" of prison officials, interfering with the internal administration of prisons only in extraordinary circumstances.[75]

D. Religious Therapeutic Programs Do Not Constitute State Action

In addition to the accommodation principle discussed above, prisons operating religious therapeutic communities have a second defense to charges of Establishment Clause violations: the religious activity of

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[70] *Id.*

[71] *Id.*

[72] *Id.*

[73] Katcoff v. Marsh, 755 F.2d 223, 236 (2d Cir. 1985).

[74] *Id.* at 237.

[75] Block v. Rutherford, 468 U.S. 576, 584-85 (1984); Jones v. N.C. Prisoners' Labor Union, 433 U.S. 119, 126 (1977).

RTCs does not constitute state action. As noted above, only state action can violate the Establishment Clause.[76]

RTCs can be operated directly by the state or by a non-governmental organization ("NGO") hired by the state. The religious activities of RTCs are not imputed to the state under either circumstance. Because the most direct caselaw addresses RTCs operated by the state, those will be addressed first, followed by brief comments about NGOs.

RTCs that are operated by the state typically have features common to state actors: public funding, employees hired by the state, state creation, and state oversight. If the analysis regarding whether an RTC is a state actor were limited to these factors, RTCs' religious activity could be mistaken for state action. The Supreme Court has recognized, however, that "[e]ven facts that suffice to show public action (or, standing alone, would require such a finding) may be outweighed in the name of some value at odds with finding public accountability in the circumstances."[77]

The classic example of this principle is illustrated in *Polk County v. Dodson*, which analyzed whether a public defender's legal representation of a client was state action.[78] The Supreme Court recognized that the defender was a full-time state employee who worked in a program that was funded and heavily regulated by the state.[79] Although activity performed by a full-time state employee while acting in a state capacity generally qualifies as state action,[80] a crucial factor mitigated against this finding. In representing criminal defendants, the public defender opposed the interests and goals of the state. This adversarial role against the state precluded the public defender's professional work from being characterized as state action.[81]

The principle that some "value at odds with finding public accountability" can outweigh a finding of state action has been applied in

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[76] *See supra* notes 5-8 and accompanying text. There are a number of concepts in constitutional jurisprudence related to state action. For example, 42 U.S.C. § 1983 requires activity to be "under color of any statute, ordinance, regulation, custom, or usage, of any State." The Fourteenth Amendment to the Constitution has a similar requirement, although worded differently. The Supreme Court treats the "color of law" requirement of § 1983 as the equivalent of the "state action" requirement under the Constitution. *See* West v. Atkins, 487 U.S. 42, 49 (1988); Rendell-Baker v. Kohn, 457 U.S. 830, 838 (1982). For purposes of this article, these concepts will be referred to generally as "state action."

[77] Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n, 531 U.S. 288, 303 (2001).

[78] Polk County v. Dodson, 454 U.S. 312, 322 (1981).

[79] *Id.* at 321-22.

[80] West v. Atkins, 487 U.S. 42, 50 (1988); *accord* Lugar v. Edmondson Oil Co., 457 U.S. 922, 935 n.18 (1982).

[81] *West*, 487 U.S. at 50-51.

other contexts.[82] For example, courts recognize that editorial decisions of state-operated newspapers (such as those of government schools) enjoy First Amendment freedom of speech and press protections.[83] These rights normally prohibit the government body that oversees the newspaper from interfering with newspaper editorial decisions – even though the state entity created and funds the newspaper.[84] As a consequence, editorial decisions generally do not constitute state action,[85] although other actions by the newspaper may.[86] Other examples of those who would otherwise be state actors, except for a conflict with some other value, include political parties,[87] court appointed estate administrators,[88] court-appointed attorneys,[89] the Legal Aid Society,[90] and court-appointed guardians ad litem.[91] All these situations have in common some reason or value that makes state action inconsistent with the rightful purpose or action of the person or entity.[92]

State oversight of religion is inconsistent with the Constitution. That the government may not interfere with religious doctrines and teachings was established by the Supreme Court as early as 1871 in *Watson v. Jones*.[93] Commenting on *Watson*, the Supreme Court later observed, "The opinion radiates, however, a spirit of freedom for religious organizations, and independence from secular control or manipulation – in short, power to decide for themselves, free from state interference, matters of church government as well as those of faith and

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[82] *Brentwood*, 531 U.S. at 822.

[83] Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 273 (1988).

[84] Yeo v. Town of Lexington, 131 F.3d 241, 254-55 (1st Cir. 1997); Leeds v. Meltz, 85 F.3d 51, 54-55 (2d Cir. 1996); Sinn v. Daily Nebraskan, 829 F.2d 662, 666 (8th Cir. 1987); Miss. Gay Alliance v. Goudelock, 536 F.2d 1073, 1075 (5th Cir. 1976); *see also* the well-reasoned Sinn v. Daily Nebraskan, 638 F. Supp. 143 (D. Neb. 1986), *aff'd*, 829 F.2d 662 (8th Cir. 1987), on which the appellate court heavily relies.

[85] *Yeo*, 131 F.3d at 254.

[86] *Id.* at 254-55 (citing Polk County v. Dodson, 454 U.S. 312, 324-25 (1981), to demonstrate that state action analysis shifts according to the function of the defendant); *Sinn*, 829 F.2d at 666 (noting that a student newspaper can be a state actor for some purposes).

[87] LaRouche v. Fowler, 152 F.3d 974, 993, 995 (D.C. Cir. 1998) (assuming, without deciding, that a political party is a state actor).

[88] Lloyd v. Lloyd, 731 F.2d 393, 398 (7th Cir. 1984).

[89] Rodriguez v. Weprin, 116 F.3d 62, 65-66 (2d Cir. 1997); Malachowski v. City of Keene, 787 F.2d 704, 710 (1st Cir. 1986).

[90] Schnabel v. Abramson, 232 F.3d 83 (2d Cir. 2000); Daniel v. Safir, 135 F. Supp. 2d 367, 374 (E.D.N.Y. 2001).

[91] Meeker v. Kercher, 782 F.2d 153, 155 (10th Cir. 1986); Snyder v. Talbot, 836 F. Supp. 19, 24 (Me. 1993).

[92] Brentwood Acad. v. Tenn. Secondary Sch. Athletic Assoc'n, 531 U.S. 288, 303 (2001).

[93] Watson v. Jones, 80 U.S. 679, 733 (1871).

doctrine."[94] This freedom derives from the First Amendment of the United States Constitution.[95] The First Amendment's protection is so strong that civil courts are generally divested of jurisdiction when resolution of a case would involve interfering with religious belief or polity.[96]

For example, Establishment Clause and Free Exercise Clause concerns prohibit courts from resolving suits concerning the following: a religious charity's alleged sex discrimination against an employee;[97] a para-church organization's removal of its executive director;[98] a religious school's alleged wrongful termination of a teacher;[99] a seminary's alleged discrimination against its faculty;[100] a university's dismissal of a chaplain;[101] the alleged defamation of a priest by a bishop;[102] the expulsion of members from religious orders;[103] the expulsion of members of churches;[104] a dispute between factions within a religious organization about who has rightful authority over the organization;[105] the propriety of a church's removal of officers;[106] and a church's allegedly tortious publication of embarrassing facts about members in a disciplinary process.[107]

This freedom that religious organizations enjoy is similar to the professional freedom of public defenders, which the Supreme Court in *Dodson* determined was not state action.[108] Both freedoms arise from constitutional obligations. The state has an obligation not to interfere

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[94] Kedroff v. Saint Nicholas Cathedral of Russian Orthodox Church, 344 U.S. 94, 116 (1952).

[95] *Id.*

[96] *See generally* David J. Young and Steven W. Tigges, *Into the Religious Thicket—Constitutional Limits on Civil Court Jurisdiction over Ecclesiastical Disputes*, 47 OHIO ST. L.J. 475 (1986).

[97] McClure v. Salvation Army, 460 F.2d 553 (5th Cir. 1972).

[98] Bell v. Presbyterian Church (U.S.A.), 126 F.3d 328, 331-32 (4th Cir. 1997).

[99] Dayton Christian Schs., Inc. v. Ohio Civil Rights Comm'n, 766 F.2d 932, 961 (6th Cir.), *rev'd on other grounds*, 477 U.S. 619 (1986); Gabriel v. Immanuel Evangelical Lutheran Church, 640 N.E.2d 681 (Ill. App. Ct. 1994); Sabatino v. Saint Aloysius Parish, 654 A.2d 1033 (N.J. Super. Ct. Law Div. 1994).

[100] EEOC v. Southwestern Baptist Theological Seminary, 651 F.2d 277 (5th Cir. 1981).

[101] Schmoll v. Chapman Univ., 83 Cal. Rptr. 2d 426 (Ct. App. 1999).

[102] Kaufmann v. Sheehan, 707 F.2d 355 (8th Cir. 1983).

[103] Kral v. Sisters of the Third Order Regular of St. Francis, 746 F.2d 450 (8th Cir. 1984).

[104] Schoenhals v. Mains, 504 N.W.2d 233 (Minn. Ct. App. 1993).

[105] Nunn v. Black, 506 F. Supp. 444 (W.D. Va. 1981), *aff'd mem.*, 661 F.2d 925 (4th Cir. 1981).

[106] Rolfe v. Parker, 968 S.W.2d 178 (Mo. Ct. App. 1998).

[107] Hadnot v. Shaw, 826 P.2d 978 (Okla. 1992).

[108] Polk County v. Dodson, 454 U.S. 312, 321-22 (1981).

with the professional activity of a public defender.[109] Likewise, the state is obliged to respect the freedom of religious functionaries hired by the state.[110] Consequently, the state's treatment of each should be the same.

If religious functionaries, like chaplains and religious education program teachers, are not allowed to operate independently of the state – even though they are hired or otherwise retained by the state – state interference with religious doctrine and teaching will necessarily follow. *Montano v. Hedgepeth* best illustrates this principle.[111] An adherent of Messianic Judaism (Montano) sued a Protestant prison chaplain for allegedly depriving him of his constitutional rights.[112] The Chaplain, who was paid by the government to perform religious services and ceremonies, excommunicated Montano from the Chaplain's services because the Chaplain determined that Montano held and taught false doctrines.[113] An Eighth Circuit panel held that no deprivation occurred because the Chaplain was not a state actor while he acted in a religious capacity.[114] The panel relied in part on *Polk County v. Dodson*.[115] Applying the United States Supreme Court's reasoning, the *Montano* Court stated,

> Applying the functional view of state action announced in *Polk County* and endorsed by subsequent courts, we do not think that the state can be held accountable for conduct undertaken by a prison chaplain acting purely in a clerical capacity. Just as a public defender performs many functions which are free from the shackles of state control, a prison chaplain, although a state employee, sometimes behaves in ways which are beyond the bounds of governmental authority. In matters of faith, a pastor, probably even more so than an attorney acting on behalf of a client, is not answerable to an administrative supervisor. The teachings endorsed and practiced by recognized spiritual leaders are not, and should not be, subject to governmental pressures, and the canons which underlie most of the world's denominations are typically thought to derive from divine, rather than worldly, inspiration. As was the case in *Polk County*, this independence is memorialized in our Constitution. It is hard to imagine any greater affront to the First Amendment than a state's attempt to influence a prison chaplain's interpretation and application of religious dogma. During the course of his employment, a prison chaplain might, among many other things, deliver sermons, take confessions, grant forgiveness for sins, and counsel inmates on the

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109 *Id.*

110 *See supra* notes 93-107 and accompanying text.

111 Montano v. Hedgepeth, 120 F.3d 844, 848 (8th Cir. 1997).

112 *Id.* at 845.

113 *Id.* at 846-47.

114 *Id.* at 850.

115 *Id.* (citing Polk County v. Dodson, 454 U.S. 312, 320 (1981)).

> proper reading of sacred texts. It is peculiarly difficult to detect any color of state law in such activities.[116]

The types of religious activities performed by religious rehabilitation programs (mainly doctrinal instruction and counseling) are all variations of the types of activities performed by chaplains. Consequently, the religious activities of religious therapeutic communities do not constitute state activity.

Montano is also applicable to an issue sensitive to modern minds: proselytizing. For some reason, the modern mind often is repulsed by the idea that religious speech could be used to persuade others to embrace particular religious doctrines.[117] For example, in invalidating a religious rehabilitation program, an intermediate Texas court of appeals based its decision almost exclusively on its belief that the program was used to convert inmates to a particular religion.[118] As *Montano* demonstrates, attempts by religious functionaries (even ones hired by the government) to convert people or persuade adherents to particular doctrines are consistent with the role of a chaplain.[119] The purpose of the excommunication in that case was to cause the plaintiff to change his religious beliefs.[120] Like other forms of religious activity, proselytizing and indoctrination are not state action, as long as inmate participation is voluntary. Consequently, religious content, even if intended to persuade, is not the establishment of a religion.

In the case of RTCs operated by non-governmental organizations, the connection between religious activity and state action is even more removed. By their nature NGOs are not governmental; they are private. Volunteers and employees of the NGO are likewise private, not government, actors. Private action, by definition, is not state action. Consequently, RTCs operated by NGOs have an even stronger defense against charges of Establishment Clause violations than RTCs operated by the state.

III. A STATE MAY NOT DISCRIMINATE AGAINST THERAPEUTIC COMMUNITIES OPERATED BY NON-GOVERNMENTAL ORGANIZATIONS MERELY BECAUSE THEY ARE RELIGIOUS

Many states authorize their criminal justice departments to contract with non-governmental organizations for rehabilitative and

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[116] *Id.* (citation omitted).

[117] There are obvious free speech concerns as well. However, these are beyond the scope of this article.

[118] Lara v. Williams, 986 S.W.2d 310, 319 (Tex. App. 1999), *vacated in part*, Williams v. Lara, 52 S.W.3d 171 (Tex. 2001).

[119] *Montano*, 120 F.3d at 850.

[120] *Id.* at 847 (finding that the plaintiff was denied fellowship until he showed "true repentance").

educational services for offenders.[121] States may not disqualify a vendor of a rehabilitation program simply because the program offered is religious. To deny religious programs the opportunity to participate violates the Free Exercise Clause of the First Amendment.

The Supreme Court has held that "the First Amendment forbids an official purpose to disapprove of a particular religion, or of religion in general."[122] A government action, whose object is to infringe or restrict a practice because of religious motivation, must be narrowly tailored to advance a compelling government interest.[123]

Hartmann v. Stone, from the Sixth Circuit, illustrates this principle in the context of a government entity using a vendor's religious perspective to disqualify its participation in a government program.[124] The United States Army operated an on-base daycare program called Family Child Care ("FCC").[125] Through the FCC, the Army certified Care Providers who would provide daycare to children of Army personnel.[126] FCC regulations prohibited participating Care Providers from operating religious daycares.[127] One regulation stated, "The dissemination of religious information (e.g., grace) or materials is prohibited as well as providing program activities that teach or promote religious doctrine . . . ."[128] Another declared, "Religious materials or activities specifically designed to teach or promote religious doctrine are not permitted."[129] The regulation expressly prohibited Bible stories, pictures, prayers, including saying grace at meals, and special-purpose "religious" FCC homes.[130] The Sixth Circuit invalidated these regulations because they violated the First Amendment.[131]

Similarly, state correctional facilities cannot use religion as a ground to reject proposals by vendors who provide services to offenders. These illegal regulations would likely appear in requests for proposals, statutes outlining criteria for state cooperation with non-governmental service providers, and other governing regulations. These types of criteria essentially put religious service providers in the position of

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[121] *See, e.g.*, TEX. GOV'T CODE ANN. § 495.001 (Vernon 1998) (permitting Texas Board of Criminal Justice to contract with private vendors to manage facilities).

[122] Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 532 (1993).

[123] *Id.* at 533.

[124] Hartmann v. Stone, 68 F.3d 973 (6th Cir. 1995).

[125] *Id.* at 975.

[126] *Id.* at 977.

[127] *Id.*

[128] *Id.* (citing Army Regulation 608-10, § 1-8i).

[129] *Id.* (citing Army Regulation 608-10, C-10 Compliance Item 9).

[130] *Id.*

[131] *Id.* at 975.

either recanting their religious viewpoint or being excluded by the government. The First Amendment prohibits this kind of governmental hostility toward religion.

IV. *WILLIAMS V. LARA*

Only one reported case addresses a program resembling a religious therapeutic prison community. In *Williams v. Lara*, the Texas Supreme Court held that a program known as the Chaplain's Education Unit violated the Establishment Clause of the United States Constitution.[132] Given the facts as stated in the opinion, the result was consistent with post-*Everson* Establishment Clause jurisprudence. Omissions in the Court's analysis, however, warrant critique because the opinion could misdirect later courts facing different situations. This section will first examine *Williams* in detail and then analyze its effect on other religious prison programs.

A. The Court's Reasoning

The court's decision rested on the following facts. A county jail devoted a cluster of jail cells, known as a pod, to a religious education program called the Chaplain's Education Unit ("CEU").[133] Inmates applied to the program after being fully informed of its religious nature.[134] Those accepted were admitted for 120 days and then released back into the general jail population.[135] During their time in the CEU, inmates received intensive religious instruction.[136] The program was administered by two county employees, the Sheriff, the Chaplain, and various volunteers.[137]

The CEU was one part of a larger plan by the Sheriff and Chaplain to use government resources to impose their religious views on inmates and to suppress all other views.[138] The CEU curriculum was an expression of the Sheriff's personal religious beliefs.[139] The Sheriff and Chaplain openly confessed that they screened the doctrinal content of CEU materials not for penological reasons, but rather to exclude those views contrary their own.[140] CEU teachers could teach only from this screened curriculum, ensuring that only the Sheriff's views were

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[132] Williams v. Lara, 52 S.W.3d 171 (Tex. 2001).

[133] *Id.* at 176.

[134] *Id.*

[135] *Id.*

[136] *Id.*

[137] *Id.* at 176-77.

[138] *Id.* at 176-77, 191.

[139] *Id.* at 191.

[140] *Id.*

propagated.[141] In order to suppress dissent, the Sheriff required that all public religious teaching, even for meetings not associated with the CEU, conform to the contents of the CEU doctrines.[142] He prohibited inmates not in the CEU from attending public religious worship services that did not accord with the curriculum of the CEU.[143]

Because the court believed that these facts were established as a matter of law,[144] invalidation of the CEU is understandable. Still, there are two problems with the court's analysis that warrant discussion. First, the court should not have used the endorsement test because the program was facially biased toward a particular denomination. Second, the court's discussion of the endorsement test, even if it had been appropriate, was deficient. These two points are addressed below.

The first problem with the court's analysis is that it should not have used the endorsement test. For cases involving laws relating to denominational preference, the initial inquiry is to determine whether the law facially differentiates among religions.[145] If the program facially differentiates among religions, it violates the Establishment Clause.[146] Only where no facial preference exists should courts proceed to other tests, such as the *Lemon* test or the endorsement test.[147]

The *Williams* facts demonstrate facial bias. Key county officials expressly confessed that they operated the rehabilitation program with an eye toward denominational preference:

> Sheriff Williams and Chaplain Atwell acknowledged that they were personally involved in selecting and screening the religious teachings offered in the CEU, *not for penological reasons, but to ensure compliance with their own personal religious beliefs.* In fact, Chaplain Atwell acknowledged that he had never considered allowing other religious views to be taught in the CEU. Sheriff Williams admitted to making "no bones about the fact that [he] applies the yardstick of [his] own belief system to what may permissibly go on in the CEU." He also conceded that denying the existence of the Holy Trinity would have been a sufficient reason for excluding certain instruction from being part of the CEU. Although Williams and Atwell expressed a willingness to allow representatives from other religions to instruct

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141 *Id.*

142 *Id.* at 193 (noting that the Sheriff and Chaplain denied the Jehovah's Witnesses' request for public service "because they feared the Jehovah's witnesses would proselytize"). *See also id.* at 177.

143 *Id.* at 177.

144 *Id.*

145 Hernandez v. Commissioner, 490 U.S. 680, 695 (1989).

146 *See id.*

147 *Id.*

> TCCC inmates, that instruction had to be based on the CEU curriculum; other religious instruction was prohibited.[148]

It is evident from these facts that the government officials in charge of the CEU invested the government program with a preference inappropriate under current law.

Indeed, the efforts of the Sheriff and Chaplain to spread their religious views were not limited to the operation of the CEU described above. The only opportunity for public group study available to inmates outside the CEU was a Tuesday night service.[149] The Sheriff and the Chaplain limited all teaching at these services to the contents of the CEU curriculum – in other words, to the personal views of the Sheriff and Chaplain.[150] The Sheriff and the Chaplain would not allow groups with different religious views to hold similar services, out of fear that speakers would proselytize inmates to join religions other than the one approved by the Sheriff and Chaplain.[151] The only opportunity for inmates with other religious views to receive instruction was to have one-on-one visitations by spiritual advisers from the community.[152] These meetings were conducted through a glass window using a telephone.[153] These facts facially violate post-*Everson* law prohibiting denominational favoritism.[154] Consequently, the Texas Supreme Court's analysis should have ended there, rather than proceeding to another test, such as the endorsement test.

B. The Court's Discussion of the Endorsement Test

Even assuming that it was appropriate to apply the endorsement test, the court's analysis suffers from a second problem: an inadequate description of the relevant law. The rationale for this test is best explained by Justice O'Connor, who first proposed it in *Lynch v. Donnelly*.[155] She said, "The Establishment Clause prohibits government from making adherence to a religion relevant in any way to a person's

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[148] Williams v. Lara, 52 S.W.3d 171, 191 (Tex. 2001) (emphasis added); *see also id.* at 192 ("But the County cannot, consistent with the Establishment Clause, convey a message that endorses the personal religious beliefs of county officials in attempting to rehabilitate criminal offenders. Such an endorsement of religion is, by any test of which we are aware, unconstitutional.").

[149] *Id.* at 177.

[150] *Id.*

[151] *Id.* at 176.

[152] *Id.* at 177.

[153] *Id.*

[154] *See* Hernandez v. Commissioner, 490 U.S. 680, 695 (1989); *see also* Larson v. Valente, 456 U.S. 228, 244-45 (1982).

[155] Lynch v. Donnelly, 465 U.S. 668, 687-95 (1984) (O'Conner, J., concurring).

standing in the political community."[156] The endorsement test focuses on the religious message of the government: "Endorsement sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community. Disapproval sends the opposite message."[157]

Determining whether government activity endorses religion involves the use of an objective standard: "[T]he applicable observer is similar to the 'reasonable person' in tort law, who 'is not to be identified with any ordinary individual, who might occasionally do unreasonable things,' but is 'rather a personification of a community ideal of reasonable behavior, determined by the [collective] social judgment.'"[158] In addition and of particular importance in a prison situation, this observer is presumed to understand the Free Exercise Clause.[159] As Justice O'Connor explained,

> The text of the Free Exercise Clause speaks of laws that prohibit the free exercise of religion. On its face, the Clause is directed at government interference with free exercise. Given that concern, one can plausibly assert that government pursues Free Exercise Clause values when it lifts a government-imposed burden on the free exercise of religion. If a statute falls within this category, then the standard Establishment Clause test should be modified accordingly. It is disingenuous to look for a purely secular purpose when the manifest objective of a statute is to facilitate the free exercise of religion by lifting a government-imposed burden. Instead, the Court should simply acknowledge that the religious purpose of such a statute is legitimated by the Free Exercise Clause. I would also go further. In assessing the effect of such a statute – that is, in determining whether the statute conveys the message of endorsement of religion or a particular religious belief – courts should assume that the "objective observer" is acquainted with the Free Exercise Clause and the values it promotes. Thus individual perceptions, or resentment that a religious observer is exempted from a particular government requirement, would be entitled to little weight if the Free Exercise Clause strongly supported the exemption.[160]

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[156] *Id.* at 687.

[157] *Id.* at 688.

[158] Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753, 779-80 (1995) (O'Connor, J., concurring) (alteration in original).

[159] Wallace v. Jaffree, 472 U.S. 38, 83 (1985) (O'Connor, J., concurring).

[160] *Id.* (citation omitted); *see also* Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327, 345 n.5 (1987) (Brennan, J., concurring); *id.* at 346-49 (O'Connor, J., concurring).

These principles are completely consistent with the caselaw concerning religious aid provided by prisons to inmates.[161] The *Williams* court leaves these issues vague.

The court's discussion fails to properly explain the balancing that occurs between the Establishment Clause and the Free Exercise Clause. The opinion makes a statement that is consistent with these principles, although it is incomplete: "Providing moral guidance to inmates is certainly an important mission, and we recognize that hiring a chaplain may be necessary to secure prisoners' rights under the Free Exercise Clause."[162] The court should have described the wide discretion that prisons have to provide religious aid in order to compensate for state-imposed restrictions on religious liberty. While the opinion notes that hiring a chaplain may be "necessary,"[163] it does not address what type of aid is discretionary if not necessary.

The court should have explained that the accommodation principle did not apply, because the program was not being used to accommodate inmates' religious needs. Rather, as the primary government witnesses confessed, the purpose of the CEU was to spread their personal religious views.[164] They admitted that their screening of materials for objectionable doctrines was not for penological purposes.[165] In other words, these officials were intentionally using an organ of the state to prefer one religion over others. After *Everson*, the Supreme Court has disallowed this type of conduct.

C. What Williams *Means for Other Programs*

The *Williams* decision should thwart attempts by state actors to impose denominational biases in religious rehabilitation programs. County officials should not use government machinery as a vehicle to advance their personal religious beliefs and suppress contrary views.[166]

Because the court's entire analysis turns on the county officials' use of the program for personal religious reasons rather than for penological

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[161] *See supra* notes 22-75 and accompanying text.

[162] Williams v. Lara, 52 S.W.3d 171, 192 (Tex. 2001).

[163] *Id.*

[164] *Id.* at 191.

[165] *Id.*

[166] *Id.* at 192. The court explained, "But the County cannot, consistent with the Establishment Clause, convey a message that endorses the personal religious beliefs of county officials in attempting to rehabilitate criminal offenders. Such an endorsement of religion is, by any test of which we are aware, unconstitutional." *Id.* The key fact in this case was that government officials were using the instrumentalities of the state to advance personal religious beliefs.

purposes,[167] the opinion does not present a problem for programs that do not suffer from this defect. The court does not disapprove of religious education units or religious rehabilitation programs in general. Instead, the court expressly observes, "[W]e acknowledge that prison programs that involve religious instruction can comport with the Constitution."[168] The court later expanded, "Providing moral guidance to inmates is certainly an important mission, and we recognize that hiring a chaplain may be necessary to secure a prisoners' rights under the Free Exercise Clause."[169] Indeed, the court even remanded for trial one plaintiff's claim that the jail violated his First Amendment Free Exercise rights because, in an effort to suppress competing religious views, the jail denied his sect's request for group religious discussion and worship.[170]

Further, the court did not use the quantity of religious aid as a factor in finding an Establishment Clause violation.[171] Inmates received four hours of religious instruction per day.[172] The remainder of the day was spent reading the Bible, completing religious homework, and reviewing other religious materials.[173] But the court considered none of this in concluding that the program violated the Establishment Clause.[174] This omission is consistent with caselaw discussed above concerning the extensive amount of religious aid state actors may provide to offset government-imposed burdens on the exercise of religion.[175] The extent and nature of the religious aid provided by the CEU has no adverse impact on a program's constitutionality.

The facts that caused a finding of unconstitutionality in *Williams* are far removed from mainstream religious therapeutic programs, such as Prison Fellowship's Innerchange Freedom Initiative ("IFI"). The IFI curriculum is created and maintained by a non-governmental organization, Prison Fellowship, not by state officials, such as the sheriff. The state has no say in the religious content of the curriculum and takes no part in screening for objectionable doctrines. Further, the program itself is operated by employees paid by a non-governmental organization, not the state, and volunteers trained by the NGO, not the

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[167] *Id.* at 191 (stating that the Sheriff and Chaplain screened the content of the curriculum "not for penological reasons, but to ensure compliance with their own personal religious beliefs").

[168] *Id.*

[169] *Id.* at 192.

[170] *Id.* at 192-94.

[171] *See id.* at 190-91.

[172] *Id.* at 176.

[173] *Id.*

[174] *Id.* at 191.

[175] *See, e.g.*, Johnson-Bey v. Lane, 863 F.2d 1308 (7th Cir. 1988); Katcoff v. Marsh, 755 F.2d 223 (2d Cir. 1985).

state. State employees do not teach or otherwise assist in the program. The function of the state is limited to traditional command-and-control issues like prison security. The state's only role is to request a rehabilitation program and to consider IFI on the merits. Once IFI is selected, the state has virtually no involvement in its operation. Consequently, IFI is insulated from the kinds of abuse that caused the program in *Williams* to fail.

V. CONCLUSION

Many prisoners want to reform their lives according to religious principles, and there are organizations that are willing to provide the needed services. Prison walls are all that separate the two groups. The government erects this burden, and the government is free to remove it. One way the government can remove the burden it created is by operating a religious rehabilitation unit.

Religious rehabilitation units designed and operated for legitimate penological purposes do not violate the Constitution for several reasons. First, providing extensive religious aid is permissible because it counterbalances government-imposed burdens on religion. Imprisonment deprives inmates of the opportunity and ability to practice their religion as freely as if they were not incarcerated. State actors have wide latitude in remedying this deprivation by providing religious aid to inmates who voluntarily choose to accept it. Second, the religious activity of religious functionaries hired by the state does not constitute state action. Consequently, properly designed and maintained rehabilitation programs should survive constitutional challenge. Courts should not deny prisoners the opportunity to reform their lives according to religious principles.