

COULD MODERN FAITH-BASED PRISON PROGRAMS HAVE SURVIVED CONSTITUTIONAL SCRUTINY DURING RECONSTRUCTION?

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INTRODUCTION

This Note will focus on the common understanding of the Establishment Clause during Reconstruction in the time surrounding the formation and ratification of the Fourteenth Amendment to the United States Constitution. Specifically, I will try and discern if the modern version of faith-based prisons, currently being implemented throughout the country, would have been considered acceptable under the Establishment Clause at the time of the framing and ratification of the Fourteenth Amendment. This is important because the Fourteenth Amendment re-ratifies our understanding of the Establishment Clause and what the Establishment Clause means in regards to the individual states. As states begin to develop and implement faith-based prison programs, it is important for us to understand how

the Reconstruction Congress intended the Establishment Clause to interact with the states.

Though the doctrine of incorporation has been repeatedly debated by scholars, the entirety of that debate is outside of the scope of this paper. Incorporation as a practical matter is settled doctrine and is extremely unlikely to be overturned. This Note only seeks to determine if faith-based prisons would have been considered an acceptable use of state power and funds during Reconstruction.

Part I of this Note will focus on the common understanding of the Establishment Clause during Reconstruction. By examining law treatises of the period as well as various secondary sources, one should be able to establish a baseline and fundamental understanding of the positions on the Establishment Clause which were generally held to be acceptable during Reconstruction. Part II of this Note will examine faith-based prison schemes as they are currently being implemented throughout the country. Because these schemes vary, there may be different results depending on the differences in the schemata and implementation of the faith-based program. In Part III of this Note, I will attempt to amalgamate the first two sections to determine if faith-based prisons, in their present form and structure, would have been considered an acceptable use of state funds, or if the creation and implementation of faith-based prisons would have constituted a violation of the Establishment Clause as it was understood by the Reconstruction generation. Although this Note will focus on the Establishment Clause, I will occasionally include free exercise issues in the discussion of Reconstruction in an effort to fully understand the complexity of the religion statutes and regulations discussed as they were understood during the 1860s. The reason it is important to examine the topic at hand is because our understanding of how the Establishment Clause affects the states is directly attributable to the adoption of the Fourteenth Amendment. By understanding how the Reconstructionists understood the Establishment Clause, we can interpret which state actions were considered to be an acceptable use of public funds and therefore constitutionally acceptable.

PART I

A. Reconstruction: Putting Humpty Dumpty Together Again

The Civil War was arguably the most devastating period in the history of the United States.¹ The Reconstruction was the most difficult task Con-

1. At least 618,000 Americans died in the Civil War, and some experts say the toll reached 700,000. These casualties exceed the nation's loss in all of its other wars combined, from the Revolution through Vietnam. BURKE DAVIS, *THE CIVIL WAR: STRANGE AND FASCINATING FACTS* 217

gress had faced since the Constitutional Convention. “Both North and South have been guilty before God” and only “repentance, justice and mercy” could save the nation from God’s wrath.² These heart-wrenching words come from the conclusion of Harriet Beecher Stowe’s *Uncle Tom’s Cabin*. Stowe’s seminal work is often credited as helping to fortify the abolitionist movement and further bolster the resolve of the Union to reign in the southern states.³ Upon personally meeting Stowe for the first time, President Lincoln spoke of her incredible influence, “[s]o you’re the little woman who wrote the book that made this great war!”⁴ While *Uncle Tom’s Cabin* spoke directly to those who could feel the impending crush of a civil war, her words also echoed strongly in the thoughts, motives, theories, and actions behind the Reconstruction following the Union’s victory. The end of the Confederacy’s attempted usurpation brought forth one main question. How would the populace in the rebellious districts be civilly reorganized?⁵ This task, it was decided, should ultimately be left to the legislature.⁶

Most English speaking school children are familiar with the nursery rhyme which features Humpty Dumpty as the protagonist. The origin of Humpty Dumpty, though not entirely clear,⁷ is often believed to be a metaphor whose roots date back to the English Civil War.⁸ Following Humpty’s “great fall,” the nursery rhyme tells us that “[a]ll the King’s horses and all the King’s men, [c]ouldn’t put Humpty together again.”⁹ This literary analogy, though admittedly imperfect, is useful for our purposes. Following the American Civil War, the United States was broken and battered. It would be the job of the Reconstructionists to put the country together again.¹⁰ Unlike the King’s unsuccessful assemblage, those in charge of the U.S. Reconstruction were able to restore the nation to its full faculties.¹¹ The Reconstructionists used the tools of the legislature¹² to imple-

(1982).

2. HARRIET BEECHER STOWE, *UNCLE TOM’S CABIN: OR, LIFE AMONG THE LOWLY* 634 (Henry Altimus Co. 1900) (1852).

3. See CHARLES EDWARD STOWE, *HARRIET BEECHER STOWE: THE STORY OF HER LIFE* 138–50 (1911).

4. *Id.* at 203.

5. JOHN W. BURGESS, *RECONSTRUCTION AND THE CONSTITUTION 1866–1876*, at 6 (Da Capo Press 1970) (1902).

6. *Id.*

7. KELLY GALLAGHER, *DEEPER READING: COMPREHENDING CHALLENGING TEXTS*, 4–12, at 82 (2004).

8. *Id.*

9. *Id.* at 81.

10. See BURGESS, *supra* note 5.

11. See generally *id.*

12. HEATHER COX RICHARDSON, *THE DEATH OF RECONSTRUCTION: RACE, LABOR, AND POLITICS IN THE POST-CIVIL WAR NORTH, 1865–1901*, at 31 (2001) (“[I]n 1866 Congress extended the Freedmen’s Bureau, which had become an arbiter of labor disputes between black workers and white landowners, and enacted . . . a civil rights law that guaranteed African-Americans the same

ment a comprehensive plan to subjugate the rebellious states until a full restoration and voluntary mending could take place.¹³

The use of these legislative tools included the creation of the Fourteenth Amendment.¹⁴

On Monday, December 4, 1865, the 39th Congress convened for its first session. On that day Representative Thaddeus Stevens of Pennsylvania offered a resolution creating a Joint Committee, nine Representatives and six Senators, to “inquire into the condition of the States which formed the so-called Confederate States of America, and report whether they or any of them are entitled to be represented in either House of Congress.” This measure was adopted . . . and so brought into being the Joint Committee on Reconstruction, the “Committee of Fifteen,” wherein the Fourteenth Amendment originated.¹⁵

Ultimately, the Fourteenth Amendment was compromise legislation “designed to guarantee the rights and freedoms of African-Americans”¹⁶ while it was also intended to “destroy the power of the Southern aristocracy”¹⁷ that had led to the formation of the Confederacy and worked to undermine Reconstruction.¹⁸ The Fourteenth Amendment would ultimately be interpreted by the United States Supreme Court as incorporating the Bill of Rights, including the Establishment Clause, upon the states.¹⁹

B. Standing on the Shoulders of Giants: Establishment Clause Theory During Reconstruction

“If I have seen farther, it is by standing on the shoulders of giants.”²⁰ This quote, famously attributed to Sir Isaac Newton, is informative outside the realm of science. It is “[o]ften described as Newton’s nod to the scientific discoveries of Copernicus, Galileo, and Kepler before him.”²¹ Simi-

rights for protection of person and property as whites.”).

13. Many argue that a full mending did not take place until the Civil Rights Acts of the 1960s. See generally THE CIVIL RIGHTS ACT OF 1964: THE PASSAGE OF THE LAW THAT ENDED RACIAL SEGREGATION (Robert D. Loevy ed., State Univ. of N.Y. Press 1997).

14. See Charles Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights?*, 2 STAN. L. REV. 5, 6–7 (1949).

15. *Id.*

16. RICHARDSON, *supra* note 12, at 32.

17. *Id.*

18. *Id.*

19. See *Everson v. Bd. of Educ. of Ewing Tp.*, 330 U.S. 1, 8 (1947) (holding that the liberty safeguarded by the Fourteenth Amendment’s due process clause includes the First Amendment’s ban against establishments of religion).

20. STEVEN HAWKING, ON THE SHOULDERS OF GIANTS 725 (2002).

21. *Id.*

larly, the 39th Congress—and the Reconstructionists as a whole—owe a nod to James Madison²² and the others who worked tirelessly to construct and lobby for the ratification of the Bill of Rights. Were it not for the inclusion of the Establishment Clause in the First Amendment, we would not need to ascertain the clause's general understanding at the time of the drafting and ratification of the Fourteenth Amendment. To extrapolate further, were it not for the giants of 1776, there would have been no constitution for the 39th Congress to amend. We are all, inevitably, the dwarves in Newton's metaphor.²³

“Christianity, general christianity is and always has been, a part of common law . . . not Christianity founded on any particular religious tenets; not christianity with an established church, and tithes, and spiritual courts; but Christianity with liberty of conscience to all men.”²⁴ This quote speaks to the religious history of the common law in the United States. Yet, the Reconstruction leaders may have been one of the first generations of Americans to enjoy a complete separation of church and state.²⁵ These leaders had a unique perspective on the Constitution and its applicability to the states. Like those who fought for the nation's independence from King George's grasp, those who persevered through the Civil War had a keen sense of the “fight” for rights and liberties. Unlike the aforementioned leaders, the Reconstructionists had the benefit of seeing the Constitution in action for almost 100 years. While the Founding Fathers had ideas and ideals for the new nation, the Reconstructionists had practical experience from legislating under the Constitution that had been created by their predecessors.

[T]he original Establishment Clause had both a prohibitive and a protective aspect; it was intended to both prohibit establishments at the *federal* level while at the same time protecting establishments at the *state* level. Similarly, the principle of nonestablishment, which was by Reconstruction generally thought to inform the Clause, also had a prohibitive and a protective aspect; no government could legitimately prefer (prohibit) one religion over another

22. See GARY WILLS, JAMES MADISON (2002).

23. The origin behind Newton's famous quote was first described by the philosopher Bernard of Chartres, “who compared his generation's relation to the classics as to that of dwarves ‘who have alighted on the shoulders of giants’ and ‘see more numerous and distant things not by virtue of their own keen vision or their own stature but because they are raised aloft by the giants’ magnitude.” ERWIN PANOFSKY, RENAISSANCE AND RENASCENCES IN WESTERN ART 110 (1972).

24. Kurt T. Lash, *The Second Adoption of the Establishment Clause: The Rise of the Nonestablishment Principle*, 27 ARIZ. ST. L.J. 1085, 1100 (1995) (citing *Updegraff v. Commonwealth*, 11 Serg. & Rawle 394 (Pa. 1824)).

25. The last religious assessment was struck down in 1833 leading many scholars to suggest this date be recognized for the “triumph of separationism in the states.” *Id.* at 1101. However, Lash and others argue that this may be an overstatement since “state power over the subject of religion remained alive and well in the states long after the fall of the last tax assessment.” *Id.*

or attempt to suppress (protect) religious exercise on religious grounds.²⁶

Further, in contrast to its original understanding, some Reconstruction-era state courts went as far as interpreting the Establishment Clause to offer an inherent personal religious liberty.²⁷ Contemporary commentators saw nonestablishment as offering dual protection:

It is as much an “establishment” to make a distinction *against* “one class or sect” as it is to make a distinction *in favor* of one class or sect. Today, we think of establishment as government *support* of religion. In the mid-nineteenth century, however, government suppression of “heretical beliefs,” forced religious observance of the Lord’s Day, interference with church decisions involving their own doctrine and government, or forced participation in public school religious exercises were all “establishment” issues.²⁸

“[T]he principle of nonestablishment was understood to prohibit any government from either supporting *or* suppressing religion as religion.”²⁹ Further, it was understood that no government could establish a favored religion, nor could it place “‘disadvantages or penalties’ upon disfavored religious beliefs.”³⁰

The varied state constitutions as they stood in 1868 provided a cacophony of establishment-related rules which occasionally illustrated two sides of the same coin whose dividing line was often straddling the Mason-Dixon.³¹ Though there was a religious test clause in the Federal Constitution,³² many southern states such as Tennessee, Arkansas, and Mississippi still held that the denial of the existence of God³³ or the denial of “a future state of rewards and punishments”³⁴ would prohibit one from holding a public office.³⁵ However, many frontier and northern states “expressly

26. *Id.* at 1134.

27. *Id.* at 1133.

28. *Id.* at 1134.

29. *Id.* at 1089.

30. *Id.* at 1135.

31. See THOMAS M. COOLEY & VICTOR HUGO LANE, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 664 (7th ed., Little Brown and Co. 1903).

32. U.S. CONST. art. VI., cl. 3.

33. These statutes referred to “God” as it was known by Protestants. See COOLEY & LANE, *supra* note 31, at 664–67. For further discussion and understanding of the Religious Test clauses, see Paul Horwitz, *Religious Tests in the Mirror: The Constitutional Law and Constitutional Etiquette of Religion in Judicial Nominations*, 15 WM. & MARY BILL RTS. J. 75 (2006).

34. COOLEY & LANE, *supra* note 31, at 664.

35. *Id.* at 661.

forbid religious tests as a qualification for office or public trust.”³⁶ The religious tests were not the only venue for Establishment Clause disputes. Other venues included debates over blasphemy statutes³⁷ and the determination of days of religious observation.³⁸

While there were differences among the states in regards to some establishment-related issues, many of those issues were considered by the Reconstruction generation to be settled law.³⁹ A contemporary treatise lays out five such issues:

Those things which are not lawful under *any* of the American constitutions may be stated thus:—1. Any law respecting an establishment of religion. The *legislatures* have not been left at liberty to effect a union of Church and State, or to establish preferences by law in favor of any one religious denomination or mode of worship. . . . 2. [c]ompulsory support, by taxation or otherwise, of religious instruction. . . . [A]ll support of religious instruction must be entirely voluntary. 3. Compulsory attendance upon religious worship. . . . 4. Restraints upon the free exercise of religion according to the dictates of the conscience [and]. . . . 5. Restraints upon the expression of religious belief.⁴⁰

Two important things to take away from the treatise’s entry are the word “any” in reference to which constitutions were covered in the statement and the use of the plural when describing the legislatures. Cooley is clearly intimating that the five prohibitions apply to all legislatures regardless of the constitution by which they were elected.

Juxtaposing the previous quotation from Cooley’s 1903 work (which is identical to the 1868 text) to a separate work by Cooley printed in 1880, we find a similar passage with altered meaning. In the 1880 text, Cooley has modified the text to no longer speak of state prohibitions but of the religious guarantees made by the states.⁴¹ The 1880 text also makes no mention of religious equality among the varied denominations but instead states “[a]ll religions are equally respected by the law; one is not to be favored at the expense of others, or to be discriminated against, nor is any distinction to be made between them.”⁴² This drastic, and presumably de-

36. *Id.* at 662–63. The states expressly forbidding religious tests included Alabama, Kansas, Virginia, West Virginia, Maine, Delaware, Illinois, Indiana, Iowa, Oregon, Ohio, Maryland, New Jersey, Nebraska, Texas, and Wisconsin.

37. *Id.* at 669.

38. *Id.* at 671–73.

39. *Id.* at 664.

40. *Id.* at 663–64 (emphasis added).

41. THOMAS M. COOLEY, *THE GENERAL PRINCIPLES OF CONSTITUTIONAL LAW IN THE UNITED STATES OF AMERICA* 206 (Boston, Little Brown and Co. 1880).

42. *Id.*

liberate,⁴³ change in wording leads one to believe that the 1880 text reflects a dynamic change in constitutional interpretation where Jews, “Mahometan[s],”⁴⁴ and other religions might now be understood to be officially protected against action undertaken by the individual states.

The 1860s were a time of nonestablishment,⁴⁵ which may come as a surprise since the leaders of the era were just one generation removed from the “Second Great Awakening.”⁴⁶ This nonestablishment theory was exemplified through the “disentangle[ment of] blasphemy and Sabbath laws from their religious origins.”⁴⁷ Even though these laws had been disentangled they were still being enforced.⁴⁸ However, now these regulations were being enforced on the basis of not offending the “religious sensibilities of the community.”⁴⁹ Cooley’s treatise speaks to this point directly in regard to the blasphemy statutes: “[s]ome acts would be offensive to public sentiment in a Christian community, and would tend to public disorder, which, in a Mahometan or Pagan country, might be passed without notice, or even be regarded as meritorious,”⁵⁰ and further that “[t]he moral sense is measurably regulated and controlled by the religious belief; and therefore it is that those things which, estimated by a Christian standard, are profane and blasphemous are properly punished as offen[s]es. . . .”⁵¹

Similarly, the Sunday closing laws were being upheld in the 1860s on the basis of civil regulations as opposed to religious observation.⁵² Cooley is not entirely convinced that the Sunday closing laws are defensible on the grounds of civil regulations:

[w]hatever deference the Constitution or the laws may require to be paid in some cases to the conscientious scruples or religious convictions of the majority, the general policy always is to carefully avoid any compulsion which infringes on the religious scruples

43. Since both texts were written by the same author (one as the 14th was being ratified and the other some 12 years following the ratification), it appears likely the change was purposeful and deliberate. Returning to the Humpty Dumpty reference previously cited, Lewis Carroll’s incantation of the character famously states, “[w]hen I use a word . . . it means just what I choose it to mean—neither more nor less.” LEWIS CARROLL, *Through the Looking Glass*, in THE COMPLETE WORKS OF LEWIS CARROLL 196 (1939).

44. COOLEY & LANE, *supra* note 31, at 669.

45. Lash, *supra* note 24, at 1117.

46. *Id.* The Second Great Awakening “sparked a dramatic increase in religious fervor and church attendance.” *Id.* at 1117–18.

47. *Id.*

48. *Id.*

49. *Id.*

50. COOLEY & LANE, *supra* note 31, at 669.

51. *Id.*

52. Lash, *supra* note 24, at 110.

of any, however little reason may seem to other persons to underlie them.⁵³

Cooley justified this position on the grounds of securing the rights of the individual conscience.⁵⁴

[T]he Jew, who is forced to observe the first day of the week, when his conscience requires of him the observance of the seventh also, may plausibly urge that the law discriminates against his religion, and, by forcing him to keep a second Sabbath in each week, unjustly, though by indirection, punishes him for his belief.⁵⁵

Moreover, “[b]y distinguishing between the religion of the people and the law of State, courts could uphold laws that provided special protections to the Christian Sabbath while at the same time distancing themselves from the [] idea that civil power could be exercised on religious grounds.”⁵⁶ These “rights of conscience” were interpreted by mid-19th century legislators to include both Establishment Clause and free exercise components.⁵⁷

Cooley not only discusses what the state can not do but he also explicitly states what the state may do without contravening the Establishment Clause.⁵⁸ The Reconstruction generation was likely well aware that

[n]o principle of constitutional law is violated when thanksgiving or fast days are appointed; when chaplains are designated for the army and navy; when legislative sessions are opened with prayer or the reading of the Scriptures, or when religious teaching is encouraged by exempting houses of religious worship from taxation for the support of the State government.⁵⁹

Though outside the bounds of this particular Note, the most intriguing question raised by Cooley’s statement on permissible conduct of the legislature is whether “Scriptures” from any religion or denomination would be acceptable or, as previously seen with the blasphemy laws⁶⁰ and Sunday

53. COOLEY & LANE, *supra* note 31, at 676.

54. *Id.* at 674.

55. *Id.*

56. Lash, *supra* note 24, at 1111.

57. *Id.* at 1144.

58. COOLEY & LANE, *supra* note 31, at 669.

59. *Id.*

60. Lash, *supra* note 24, at 1117.

closing statutes,⁶¹ if the legislators would be forced to abide by the standard of not offending public sentiment.⁶²

In sum, the 1860s were a time of disestablishment.⁶³ It was believed that “no government could legitimately prefer (prohibit) one religion over another or attempt to suppress (protect) religious exercise on religious grounds.”⁶⁴ In the words of Cooley, the Reconstruction generation understood that

[t]here is not religious liberty where any one sect is favored by the State and given an advantage by law over other sects. Whatever establishes a distinction against one class or sect is, to the extent to which the distinction operates unfavorably, a persecution; and, if based on religious grounds, is religious persecution. *It is not toleration which is established in our system, but religious equality.*⁶⁵

Originally, the Establishment Clause was understood to stand for the proposition that “religious establishments were neither good nor bad—they were simply a matter left to the states.”⁶⁶ It was the Reconstruction generation who ratified into the Constitution the judgment that religious establishments were indeed “bad” and that no level of government had the authority to say otherwise. The Reconstructionists established their position by standing on the shoulders of the giants before them. Whether their view from this lofty perch was enlightened, misinformed, or just plain wrong is beyond the scope of this paper.

C. Reconstruction-Era Prisons

Reconstruction-era prisons were run by political appointees who saw their position as an opportunity to turn a profit⁶⁷ as opposed to one containing a moral obligation.⁶⁸ “Legislatures saw money spent on reform as wasteful and a hindrance to covering prison expenses.”⁶⁹ While religious observation was required in many early American prisons,⁷⁰ by the time of

61. *Id.*

62. COOLEY & LANE, *supra* note 31, at 669. Based on the rationale used to justify Sunday closings and blasphemy statutes, it is conceivable that had a legislator in the 39th Congress opened session with a reading from the Koran he would have been censured for having offended public sentiment.

63. Lash, *supra* note 24, at 1134.

64. *Id.*

65. COOLEY & LANE, *supra* note 31, at 663–64 (emphasis added).

66. Lash, *supra* note 24, at 1092.

67. See Mathew W. Meskell, *An American Revolution: The History of Prisons in the United States from 1777–1877*, 51 STAN. L. REV. 839, 860 (1999).

68. *Id.*

69. *Id.*

70. See Marc O. DeGirolami, *The New Religious Prisons and Their Retributivist Commitments*, 59 ARK. L. REV. 1, 5–8 (2006).

Reconstruction using religion as a means for reformation was an afterthought at best.⁷¹ In 1867, Enoch Wines and Theodore Dwight submitted a report to the legislature of New York that is considered one of the seminal works on Reconstruction-era prisons.⁷² Wines and Dwight “lamented the almost total lack of religious teaching and noted that no institution required chaplains to converse with prisoners with any regularity.”⁷³

Northern and southern prisons differed in their implementation of punishment but one commonality in both regions of the freshly joined country was the belief that inmates must earn their keep.⁷⁴ The northern prisons required inmates to work under a contract system⁷⁵ that entailed the prisoners working “within the prison shops to produce finished goods for private entrepreneurs.”⁷⁶ The southern prisons began a system of convict leasing.⁷⁷

Convict leasing was a system by which the state leased its inmates to private contractors for a specified sum and in exchange relinquished physical control over the prisoner.⁷⁸ While the contractor assumed control over the prisoner, “[t]here was no financial or moral incentive to treat the convict well, or even keep him alive beyond his sentence.”⁷⁹ Convict leasing was a way for the South to restore their empty state treasuries⁸⁰ while simultaneously meeting the labor needs the plantations were experiencing following the emancipation of four million slaves.⁸¹ Convict leasing would force many blacks into work situations far worse than they had ever experienced under the slave system.⁸² W.E.B. Dubois wrote that convict leasing made blacks “‘slaves in everything but name,’ since those who left their old plantations to seek better work could be arrested for vagrancy, ‘whipped, and sold into slavery.’”⁸³ Convict leasing was technically based upon criminality and not race, but, since over 90%⁸⁴ of the inmates were black, it is clear that this point was lost upon the southern states. The pris-

71. Meskell, *supra* note 67, at 860.

72. *Id.*

73. *Id.* (citing ENOCH COBB WINES & THEODORE W. DWIGHT, REPORT ON THE PRISONS AND REFORMATORIES OF THE UNITED STATES AND CANADA, MADE TO THE LEGISLATURE OF NEW YORK, JANUARY 1867 (1867)).

74. *See id.*

75. *Id.* at 861.

76. *Id.*

77. Melvin Gutterman, “Failure to Communicate”: *The Reel Prison Experience*, 55 SMU L. REV. 1515, 1527 (2002).

78. *Id.* at 1528.

79. *Id.* at 1529.

80. *Id.*

81. *Id.*

82. *Id.*

83. Alec C. Ewald, “Civil Death”: *The Ideological Paradox of Criminal Disenfranchisement Law in the United States*, 2002 WIS. L. REV. 1045, 1132 (2002) (footnote omitted).

84. Gutterman, *supra* note 77, at 1528.

on systems of the 1860s lend little insight into the constitutionality of faith-based prisons.

PART II: "YOU HAVE BEEN SET FREE FROM SIN AND BECOME SLAVES OF RIGHTEOUSNESS"⁸⁵: FAITH-BASED PRISONS IN AMERICA

Throughout the entirety of the history of the United States, legislators have tried to find ways to solve the prison dilemma.⁸⁶ With recidivism climbing to an alarming rate,⁸⁷ many states⁸⁸ are turning to faith-based correctional facilities and programs to stem the tide of recidivism and to help inmates develop the skills needed to lead productive lives once they return to society at large.⁸⁹ In 2001 President G. W. Bush, by power of executive order, created the Office of Faith-Based and Community Initiatives⁹⁰ to help provide a federal resource for those entities seeking funding for faith-based projects and organizations⁹¹ and additionally to "level the playing field" in favor of religious social service providers amidst allegations of discrimination within the federal grant system."⁹² Though they had fallen out of favor for almost two hundred years, faith-based prison programs are certainly not a new concept in America.⁹³ In a treatise on the American Penitentiary System, Alexis De Tocqueville wrote of the influence of the Quakers at Philadelphia's Wall Street Prison:

Moral and religious instruction [is] the whole basis of the system. . . . The free choice left to the prisoners to join or not the school, makes those who enter it thus voluntarily, much more zealous and docile. . . . The minister who administers this service, accompanies it almost always with a sermon, in which he abstains from every dogmatical discussion, and treats only of religious morals; so that the instruction of the minister is as fit for the Catholic as for the Protestant, for the Unitarian as for the Presbyterian. . . . Each prisoner has a Bible, given by the state, in his cell, in

85. *Romans* 6:18.

86. See DeGirolami, *supra* note 70, at 5.

87. "Each year more than 650,000 men and women return from prison. Department of Justice studies of this population indicate that almost two-thirds of those individuals will return to prison within three years of release, many within the first few months." *Prisoner Re-Entry Initiative*, <http://georgewbush-whitehouse.archives.gov/government/fbci/pri.html> (last visited Feb. 2, 2009).

88. Currently the states of Florida, Iowa, Minnesota, Texas, Ohio, Arkansas, and Pennsylvania have some form of faith-based penitentiary. See Associated Press, *Faith-based Prisons Multiply Across U.S.*, FOXNEWS.COM, Oct. 13, 2007, <http://www.foxnews.com/story/0,2933,301600,00.html>.

89. See *id.*

90. See Exec. Order No. 13,199, 66 Fed. Reg. 21 (Jan. 29, 2001).

91. *Id.*

92. Nathaniel Odle, *Privilege Through Prayer: Examining Bible-Based Prison Rehabilitation Programs Under the Establishment Clause*, 12 TEX. J. C.L. & C.R. 277, 277 (2007).

93. See DeGirolami, *supra* note 70, at 5.

which he may read the whole time that he is not engaged in labor. . . .⁹⁴

In 1793 William Bradford spoke similarly when describing the life of an inmate in a contemporary prison: “[r]eflection on the Bible and repentance for one’s misdeeds were to be carried out in monastic solitude and silence; verbal expression and social interaction with other inmates were forbidden . . . this was meant to foster a healthy blend of ‘spiritual redemption as well as painful bodily punishment. . . .’”⁹⁵

A. *The InnerChange Freedom Initiative*

One of the leading organizations in the creation of modern faith-based prisons is Prison Fellowship Ministries (PFM).⁹⁶ “The philosophy of PFM is simple: ‘[T]he best way to transform our communities is to transform the people within those communities—and truly restorative change comes only through a relationship with Jesus Christ.’”⁹⁷ The way PFM attempts to act upon this philosophy is by “exhort[ing], equip[ing] and assist[ing] the Church in its ministry to prisoners, ex-prisoners, victims, and their families, and in its promotion of biblical standards of justice in the criminal justice system.”⁹⁸ PFM specifically designs the parameters of its program, known as the InnerChange Freedom Initiative (IFI),⁹⁹ in an effort to avoid first amendment violations. “[T]axpayer money is ostensibly used only for secular purposes, like guard salaries and food expenses. The religious programs are paid for by private donations.”¹⁰⁰ IFI inmate selection is based on a purely voluntary process.¹⁰¹ In order to maintain their residence in the IFI wing, the inmates must “be willing to productively participate in a program that is explicitly Christian in both content and delivery.”¹⁰² While IFI is overtly a Christian program, it formally accepts inmates of all religions, as well as atheists.¹⁰³ IFI’s curriculum integrates biblical study into “all aspects of its instructional regimen, which includes

94. *Id.* (citing GUSTAVE DE BEAUMONT & ALEXIS DE TOCQUEVILLE, ON THE PENITENTIARY SYSTEM IN THE UNITED STATES AND ITS APPLICATION IN FRANCE 37 (Francis Lieber trans., S. Ill. Univ. Press 1964) (1833)).

95. DeGirolami, *supra* note 70, at 7, 8.

96. Patrick B. Cates, *Faith-based Prisons and the Establishment Clause: The Constitutionality of Employing Religion as an Engine of Correctional Policy*, 41 WILLAMETTE L. REV. 777, 779 (2005). PFM was started by Charles Colson, a former aide to President Nixon, while serving a prison sentence for his role in the Watergate crimes. *Id.*

97. *Id.*

98. Odle, *supra* note 92, at 280–81 (quoting *Ams. United For Separation of Church and State v. Prison Fellowship Ministries*, 432 F. Supp. 2d 862, 871 (S.D. Iowa 2006)).

99. *See* Cates, *supra* note 96, at 780.

100. *Id.*

101. *See id.* at 781.

102. *Id.*

103. DeGirolami, *supra* note 70, at 17.

courses in earning a GED, vocational training, and computer skills training.”¹⁰⁴ Though inmates in IFI facilities have access to resources outside of what is available to other inmates, they are also forced to abide by stricter disciplinary requirements.¹⁰⁵

IFI aims to “‘transform’ inmates’ lives by an intense and continuing experience with the Divine.”¹⁰⁶ One way they attempt to meet their aim is by encouraging the inmates to focus on repentance and reconciliation.¹⁰⁷ “Repentance is . . . an indispensable part of the conversion process that takes place under the . . . power of the Holy Spirit.”¹⁰⁸ “Without a continuing repentant attitude . . . Christian growth is impossible.”¹⁰⁹ While governor of Texas, George W. Bush publicly stated that PFM created a “program that works to change people’s lives by changing their hearts.”¹¹⁰ Challengers to a PFM facility in Iowa have alleged that the IFI program uses “psychological coercion [to force acceptance of religious indoctrination by giving inmates] keys to their own cells and access to private bathrooms.”¹¹¹ Challengers further allege that, since the state pays a portion of the salaries of some PFM employees who “must subscribe to a fundamentalist Christian Statement of Faith,”¹¹² the state is financing employment discrimination.¹¹³ Iowa officials responded to the allegations with an alternate theory: “the state is not contracting for religious programming . . . they are contracting to reduce recidivism.”¹¹⁴

B. Florida’s Character and Faith-Based Prisons

Florida’s version of faith-based prisons takes a decidedly different approach than its IFI counterpart. In 2003 then-Governor Jeb Bush dedicated Lawtey Correctional Institute as America’s first faith-based prison.¹¹⁵ “The

104. *Id.* at 18.

105. *Id.* Inmates in IFI facilities must be up for prayer every morning at 6 A.M. and participate in several hours of Bible study a day, and they are not allowed to watch TV except for news programs.
Id.

106. *Id.*

107. *See id.* at 17.

108. *Id.* at 18 (internal quotation marks omitted) (quoting CHARLES COLSON, *LOVING GOD* 109–10 (Zondervan 1997) (1983).

109. *Id.*

110. Cates, *supra* note 96, at 780 (quoting Daniel Brook, *When God Goes to Prison*, *LEGAL AFFAIRS*, May/June 2003, available at http://www.legalaffairs.org/issues/May-June-2003/feature_brook_mayjun03.msp).

111. *Id.* at 782 (internal quotation marks omitted) (quoting First Amended Compl. at 2, *Ams. United for Separation of Church and State v. Prison Fellowship Ministries*, 432 F. Supp. 2d 862 (S.D. Iowa 2006) (No. 4:03-CV-90074), available at <http://members.au.org/site/DocServer/InnerChangeBrief.pdf?docID=163>).

112. *Id.*

113. *Id.*

114. *Id.* at 783 (quoting Joseph Loconte, *Faith Healing*, *THE PUBLIC INTEREST*, Apr. 1, 2004, at 89, available at 2004 WLNR 11431126).

115. ShortNews.com, *Gov. Bush Dedicates the Nation’s First Faith-based Prison*, Dec. 25, 2003,

governor put his plan into motion by stating ‘people of all faith, people who believe in a higher power are compelled to take actions in their lives that improve their chances of living a wholesome life that is crime-free.’”¹¹⁶ Unlike the PFM programs (where separate wings of prisons are converted into faith-based wings), the faith-based prisons in Florida¹¹⁷ are entirely run by the State Department of Corrections and feature volunteers who provide the spiritual instruction.¹¹⁸ The aforementioned Florida prisons are purported to be “faith and character-based institutions”¹¹⁹ who welcome volunteers from all religious faiths, though the great majority of the volunteers are Evangelical Christians.¹²⁰ The Florida programs encompass over twenty-five religions and over six hundred volunteers.¹²¹ At the Florida facilities, inmates are encouraged to participate in programs “covering religious material, anger management, and addiction counseling.”¹²² These programs are explicitly religious when requested by the prisoners.¹²³ The center piece of the rehabilitation program at the faith-based prison in Lawtey, Florida is the “‘Evangelism Explosion,’ a thirteen-week course in converting others to embrace Christ in their lives.”¹²⁴ Inmates in the faith-based prisons in Florida receive extra amenities “such as ceiling fans, musical instruments, sound systems, games, books, and candy” which are provided by the volunteers.¹²⁵ A significant part of the programs at the faith-based prisons in Florida focus on “the ‘sinfulness’ of inmates’ past ways . . . with the aim of cultivating a kind of deep-seated guilt for misdeeds, and recognition that punishment is deserved.”¹²⁶

C. The Federal Government’s Faith-Based Prison Plan

The Federal Bureau of Prisons (BOP) operates its own faith-based programs, known as Life Connections (LC), at multiple facilities around the country.¹²⁷ “Through these programs, the BOP provides opportunities

<http://www.shortnews.com/start.cfm?id=35424> (last visited July 22, 2009).

116. Vicki Mabrey & Sarah Rosenberg, *High Hopes for Faith-based Prisons*, ABC NEWS: NIGHTLINE, Jan. 27, 2006, <http://www.abcnews.go.com/Nightline/story?id=1550733> (last visited July 22, 2009).

117. Florida has created three faith-based prisons (two for men and one for women). Associated Press, *Faith-based Prisons Multiply Across U.S.*, FOXNEWS.COM, Oct. 13, 2007, <http://www.foxnews.com/story/0,2933,301600,00.html>.

118. *Id.*

119. *Id.* (internal quotation marks omitted).

120. *Id.*; see also Cates, *supra* note 96, at 825.

121. See Mabrey & Rosenberg, *supra* note 116.

122. Cates, *supra* note 96, at 825.

123. See DeGirolami, *supra* note 70, at 15.

124. *Id.*

125. Cates, *supra* note 96, at 825.

126. DeGirolami, *supra* note 70, at 17.

127. See FEDERAL BUREAU OF PRISONS LIFE CONNECTIONS PILOT PROGRAM, http://www.drc.state.oh.us/web/iej_files/200702_McFarland_FederalLifeConnections.pdf (last visited

for the development and maturation of the participating inmate's faith commitment, with a goal of reducing recidivism rates."¹²⁸ The Life Connections program is a voluntary option for inmates who are within 24 to 60 months of release.¹²⁹ The inmates at the BOP program are led by "volunteer mentors of their faith or philosophy"¹³⁰ through a secular life skills curriculum where they discuss "what their sacred text (Quran, Bible, Torah) says about [each particular] subject (e.g., responsible parenting; budgeting; marriage enrichment; religious tolerance and respect)."¹³¹ Unlike the IFI programs, "the BOP plans to individually contract with 'religious/spiritual leaders' from five prescribed faiths—Catholic, Jewish, Muslim, Native American, and Protestant—to provide spiritual guidance to inmates in the faith-based unit."¹³² The BOP claims to offer no incentives for participation in the program "other than a desire to change and grow."¹³³ The cellblocks in the LC facility are the same as any other cellblock in the prison, and the strict community service requirements reduce the number of hours a prisoner would be able to work, "thus cutting in half their monthly earnings."¹³⁴

PART III: WWRD: WHAT WOULD THE RECONSTRUCTIONISTS DO?

One of the Religious Right's most successful marketing campaigns consists of t-shirts, books, bracelets, and other related paraphernalia bearing but four letters: "WWJD?" This acronym stands for "What Would Jesus Do?" In light of the nature of the prison programs under examination, it seems appropriate to ask in like fashion: What would the Reconstructionists do?

A: The InnerChange Freedom Initiative Under the Historical Microscope

In an era of non-establishment, the Reconstructionists likely would have exhibited a great level of scrutiny over the faith-based programs which are currently being implemented throughout the states. The IFI program would have presented the most challenging analysis for the Reconstructionists. Among the issues that would require examination would be

Dec. 15, 2007). As of fiscal year 2007, the BOP had 5 Life Connections pilot programs. *Id.*

128. U.S. DEPARTMENT OF JUSTICE FEDERAL PRISON SYSTEM FY 2008 PERFORMANCE BUDGET, http://www.usdoj.gov/jmd/2008justification/pdf/38_bop_se.pdf (last visited Dec. 15, 2007).

129. See FEDERAL BUREAU OF PRISONS LIFE CONNECTIONS PILOT PROGRAM, *supra* note 127.

130. *Id.*

131. *Id.*

132. Lynn S. Branham, *Go and Sin No More: The Constitutionality of Governmentally Funded Faith-based Prisons*, 37 U. MICH J.L. REFORM 291, 293 (2004).

133. FEDERAL BUREAU OF PRISONS LIFE CONNECTIONS PILOT PROGRAM, *supra* note 127.

134. *Id.*

the voluntary nature of the program, the possibility of tax dollars funding the program, and the favoring of one religious sect over another.

One of the tenets explicitly stated in Cooley's 1868 treatise is that "compulsory attendance upon religious worship"¹³⁵ is "not lawful under any of the American constitutions."¹³⁶ While IFI is technically a voluntary program, there is a significant level of coercion involved since IFI inmates are treated differently from their non-IFI counterparts.¹³⁷ It could be argued that the voluntary nature of this program is the equivalent of stating that church attendance was voluntary in Massachusetts during the lifetimes of Roger Williams and Anne Hutchinson.¹³⁸ The benefits associated with participating in IFI are such that one may be willing to put aside their personal aspersion to the message in order to receive them. Likewise, the benefits associated with being a member in good standing of the Colonial Church likely kept many who were not as strong-willed as Williams and Hutchinson in the pews even though they did not subscribe to the specific ideology being espoused from the pulpit. Cooley's treatise also states that "[w]hoever is not led by choice or a sense of duty to attend upon the ordinances of religion is not to be compelled to do so by the State."¹³⁹ The free choice of the prisoners is difficult to measure. If the state is not providing a safe environment in the prisoners' current wing, then the adversely affected prisoners may apply for the IFI program—not in effort to exercise their religious freedoms or to fulfill a sense of duty, but to get away from the violent offenders who prey upon them.¹⁴⁰ Is it really "free choice" if prisoners are forced to choose between staying in a dangerous and often deadly environment or a safer option which mandates religious indoctrination?

Also stated in Cooley's text is the prohibition of governmental monetary support for religious instruction.¹⁴¹ It has been argued that the taxpayer money IFI receives from the state is directly allocated to "secular purposes, like guard salaries and food expenses" while the private donations received by IFI are used to provide the religious instruction¹⁴² and therefore, there is no use of governmental financial support for the religious

135. COOLEY & LANE, *supra* note 31, at 663–64.

136. *Id.*

137. See FEDERAL BUREAU OF PRISONS LIFE CONNECTIONS PILOT PROGRAM, *supra* note 127, for details regarding extra benefits received by IFI participants.

138. See WALTER A. MCDUGALL, FREEDOM JUST AROUND THE CORNER: A NEW AMERICAN HISTORY 1585–1828, at 64 (2004).

139. COOLEY & LANE, *supra* note 31, at 663–64.

140. An inmate in an IFI facility spoke to this point: "In my other prison, on a daily basis there was rape, drugs When you come to Carol Vance, it's like a load is lifted. It's like heaven." Associated Press, *Faith-based Prisons Multiply Across U.S.*, FOXNEWS.COM, Oct. 13, 2007, <http://www.foxnews.com/story/0,2933,301600,00.html>.

141. COOLEY & LANE, *supra* note 31, at 663–64.

142. Cates, *supra* note 96, at 780.

programs. The Reconstructionists might find this argument plausible since Cooley's treatise states that "the American constitutions contain no provisions which prohibit the authorities from such solemn recognition of a super-intending Providence in public transactions and exercises as the general religious sentiment of mankind inspires, and as seems meet in finite and dependent beings."¹⁴³ Just as the legislatures of the 1860s were able to justify their laws prohibiting blasphemy based upon non-religious grounds,¹⁴⁴ so too could they likely have justified the IFI scheme as deference "to the religious sentiments of the community."¹⁴⁵ The Reconstructionists would have found religious worship to be acceptable not entirely on the basis of "what is due to the Supreme Being himself . . . [but also] to foster religious worship and religious institutions, as conservators of the public morals, and valuable, if not indispensable assistants to the preservation of the public order."¹⁴⁶ PFM would likely stand by this interpretation of their program since they publicly state the purpose of the IFI program is to "reduce recidivism, increase public safety, and reduce the burden on government."¹⁴⁷

"There is not religious liberty where any one sect is favored by the State and given an advantage by law over other sects."¹⁴⁸ With anti-Catholic animus at a fever pitch during the 1860s,¹⁴⁹ this excerpt from Cooley's treatise provides grounds for a troublesome debate. Does "where any one sect is favored" mean no monotheistic religion shall be favored over another,¹⁵⁰ or does it mean no one Christian denomination shall be favored over another Christian denomination? Cooley's treatise lends us contradictory information on the matter. On one hand, Cooley informs us that when Christian precepts are enforced against the populace, it is not on the grounds of their "sacred character or divine origin," but because these precepts are universally recognized.¹⁵¹ Contrastingly, in discussing Christianity's role in the common law, he quotes Justice Story's opinion, "although Christianity is a part of the common law of the state, it is only so in this qualified sense, *that its divine origin and truth are admitted*, and therefore it is not to be maliciously and openly reviled and blasphemed

143. COOLEY & LANE, *supra* note 31, at 663-64.

144. *See id.* at 669.

145. Lash, *supra* note 24, at 1117.

146. COOLEY & LANE, *supra* note 31, at 669.

147. Cates, *supra* note 96, at 781.

148. COOLEY & LANE, *supra* note 31, at 663.

149. *See* Lash, *supra* note 24, at 1145.

150. Cooley's text indicates that Atheism would not factor into the equation of one religion over another, as it states, "[w]hatever may be the shades of religious belief, all must acknowledge the fitness of recognizing in important human affairs the superintending care and control of the great Governor of the universe." COOLEY & LANE, *supra* note 31, at 669.

151. COOLEY & LANE, *supra* note 31, at 670-71.

against . . . to the injury of the public.”¹⁵² Justice Story’s statement does not appear to leave much wiggle room for those seeking to practice Judaism or Islam. In light of the contradictory information, the IFI program shall be evaluated under both interpretations.

If “any one sect” is indeed referring to the prospect that no religion shall be given preference over another religion, then the IFI program would likely have failed a constitutional evaluation performed by the Reconstructionists. IFI is openly and unabashedly a Christian organization that uses the Bible as the exclusive sacred text in its programs.¹⁵³ In juxtaposition, if “any one sect” means the government shall not favor one Christian denomination over another, then IFI will likely once again fail to pass the scrupulous eyes of the Reconstructionists. While IFI allows admittance from those who follow any religion or denomination, its message is Protestant in practice and all IFI employees “must subscribe to a fundamentalist Christian Statement of Faith.”¹⁵⁴ Furthermore, Roman Catholics enrolled in the program have alleged that IFI’s strict fundamentalist teachings were hostile toward their faith,¹⁵⁵ and a court has ruled that while the “ministry itself does not condone hostility toward Catholics, Roman Catholic inmates heard their faith criticized by staff members and volunteers from local evangelical churches.”¹⁵⁶

The IFI program likely would not have been an acceptable prison program in the eyes of the Reconstructionists. While the program could have likely survived the challenges presented due to governmental funding by claiming to uphold the program out of respect for public sentiment, IFI likely would not have been able to justify its existence against challenges that it was forcing compulsory attendance in religious meetings, nor could it withstand an assault based upon a claim that it favored one sect over another.

B: Florida’s Faith and Character Based Institutions Step Up to the Plate

Florida’s faith-based prisons would likely have been an easier constitutional pill to swallow for the Reconstructionists. Once again we will examine the prison program based upon criteria laid forth in Cooley’s treatise. First, does the program violate the restraint against compulsory religious attendance? Second, does the program result in an unconstitutional receipt of taxpayer funds? Finally, does the prison program prefer “any one sect” over another?

152. *Id.*

153. DeGirolami, *supra* note 70, at 17.

154. Cates, *supra* note 96, at 782.

155. Associated Press, *Faith-based Prisons Multiply Across U.S.*, FOXNEWS.COM, Oct. 13, 2007, <http://www.foxnews.com/story/0,2933,301600,00.html>.

156. *Id.*

Unlike the IFI facilities, Florida's faith-based prison programs do not require that the inmates admitted to the program participate in religious instruction,¹⁵⁷ though the "programming is [religiously] explicit for those who desire it."¹⁵⁸ Because there is no requirement for the inmates to participate in religious programs—though they may be encouraged to do so¹⁵⁹—we do not encounter the same problem in regard to free choice that was previously examined with the IFI facilities. While they may be seeking the asylum of a less violent environment,¹⁶⁰ Florida inmates asking to be sent to one of the faith-based institutions in their state will not necessarily have to sacrifice their individual conscience to do so.

The argument concerning the improper use of taxpayer funds is also less complicated in Florida since the prisons do not require a specific religious treatment program. By this measure it cannot be said, as it can with the IFI facilities, that the state is funding the guards and necessities for an entirely Christian facility. Though the Florida facilities are run by the state, all of the religious programming is provided by volunteers that are privately funded by various charitable groups.¹⁶¹ The state of Florida and the volunteer organizations provide the exact same resources to all of the prisoners in the faith-based facility regardless of whether they choose to participate in the religious programs.¹⁶²

The third and final factor to be examined concerns whether the Florida programs offer preferential or discriminatory treatment to "any one sect." In contrast to the IFI programs, the Florida programs are committed to "offering programming for multiple faiths."¹⁶³ Though Christianity dominates as the preferred religion of most of the prisoners and volunteers,¹⁶⁴ Florida's three faith-based prisons are the home to "more than two dozen [faith-based] offerings ranging from various Christian denominations to Orthodox Judaism to Scientology."¹⁶⁵ It appears certain that regardless of the interpretation used to determine the precise meaning of "any one sect," Florida's faith-based prison operations would steer clear of any of the constitutional road blocks raised by that specific complaint.

157. DeGirolami, *supra* note 70, at 16.

158. *Id.* at 15.

159. *Id.* at 16.

160. The Florida Department of Corrections claims that inmates at the three faith-based prisons "committed 30 percent fewer infractions than comparable inmates elsewhere." Associated Press, *Faith-based Prisons Multiply Across U.S.*, FOXNEWS.COM, Oct. 13, 2007, <http://www.foxnews.com/story/0,2933,301600,00.html>.

161. DeGirolami, *supra* note 70, at 15.

162. *Id.*

163. *Id.*

164. *Id.*

165. Diana B. Henriques & Andrew Lehren, *Religion for Captive Audiences, with Taxpayers Footing the Bill*, N.Y. TIMES, Dec. 10, 2006, available at <http://www.nytimes.com/2006/12/10/business/10faith.html>.

Florida's faith-based prison programs would likely pass an examination given by Reconstruction-era judges or legislators with flying colors. Then-Governor Jeb Bush's brain child¹⁶⁶ provides an environment that allows inmates to choose a variety of religious programs (or none at all) while simultaneously avoiding the favoring of any one sect (regardless of interpretation) over another, thus resulting in a proper use of government-provided funds.

C. Life Connections: The Fed's Get Their Close-Up

The Bureau of Prisons (BOP) prisoner re-entry pilot program (Life Connections) is a residential multi-faith restorative justice program. "The 18-month program is open to adult volunteer inmates in both male and female facilities in five BOP facilities across the country."¹⁶⁷ Life Connections (LC) is much more similar—and therefore likely acceptable to the Reconstructionists—to the program being instituted in Florida as compared to the IFI programs. There does not appear to be any coercion present as admission to the program is voluntary and there are no requirements to attend religious programming.¹⁶⁸ Because there is no explicitly religious programming,¹⁶⁹ there is little risk of taxpayer funds being used to support religious instruction. Finally, because the LC program is open to multiple faiths and does not institute inherently religious indoctrination, there is little chance that it will favor any one sect over another in the eyes of the Reconstructionists. Though some religions might attempt to make a claim that their polytheistic religion is being discriminated against, the Reconstructionists likely would have had little sympathy for their plight.¹⁷⁰ Though beyond the scope of this Note, it would be interesting to examine in further detail whether the allowance of taxpayer funds to provide secular instruction through the interpretations taught in the Koran and the Torah would have been considered an affront to the public sentiments of the Reconstruction-era legislators.

166. At the re-opening of Lawtey Prison, Governor Bush stated, "For the people who are skeptical about this initiative, I am proud that Florida is the home to the first faith-based prison in the United States." *Florida's Gov. Bush Dedicates the Nation's First Faith-based Prison*, CNN.COM, Dec. 25, 2003, [available at](http://www.ifapray.org/ScienceArtCulture/Science_Art_Culture_Archives/Florida's%20Gov.%20Bush%20dedicates%20the%20Nation's%20First%20Faith-based%20Prison.html) http://www.ifapray.org/ScienceArtCulture/Science_Art_Culture_Archives/Florida's%20Gov.%20Bush%20dedicates%20the%20Nation's%20First%20Faith-based%20Prison.html.

167. DeGirolami, *supra* note 70, at 2 n.7 (internal citation omitted).

168. FEDERAL BUREAU OF PRISONS LIFE CONNECTIONS PILOT PROGRAM, *supra* note 127.

169. *Id.*

170. There would be scant support for those advocating polytheistic religions during the 1860s. *See generally* COOLEY & LANE, *supra* note 31.

CONCLUSION

The generation after the Reconstruction of the United States lived in a time of non-establishment with regard to Establishment Clause jurisprudence. By examining the modern faith-based prison schemes through the eyes of the Framers of the Fourteenth Amendment, we can attempt to glean an idea of what these austere gentlemen had in mind when constructing and ratifying the document that would champion the causes of many, while simultaneously being the bane of the existence of law professors and legal scholars for over one hundred and thirty years.

Scott L. Tindle