Guardians as Gatekeepers and Other Issues of the Establishment Clause and Parole

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The United States is relatively unique compared to other countries in two particular areas: how religious its citizens profess to be and how many of its citizens are incarcerated. This Note examines how these two characteristics interact in the parole context with an emphasis on the role of the chaplaincy in such proceedings. Federal courts have wrestled — relatively inconclusively — with where to draw the line between permissible and coercive consideration of religious attributes in the parole setting. Giving religious factors too much weight could potentially pressure inmates into adopting insincere religious habits in the hopes of obtaining favorable treatment; conversely, too little weight could fail to recognize the secular attributes of religious participation that often lend themselves toward rehabilitation. This Note suggests that limited inquiry by parole boards into the structural- or community-based (as opposed to philosophical- or tenet-based) components of an inmate's religion may be appropriate. So too may be the parole board's acceptance of a letter of reference from a prison chaplain. Conversely, this Note argues that prison chaplains overstep their bounds and violate the Establishment Clause when they serve on parole boards by putting a coercive force on inmates to become religious or follow a certain religion. This Note ultimately strives to flesh out the complicated and varied ways in which inmates' freedoms of and from religion intersect with their attempts to obtain freedom through parole.

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I. INTRODUCTION

> [P]risons are[,] perhaps ironically, places where one cannot get away from the state's relationship to religion. The modern state is also perhaps at its most religious when it exerts total control over its citizens and attempts to coercively remake them into new human beings. Religious and political authority and sovereignty in prison are homologous with each other in several ways: state/church, judge/god, crime/sin, prisoner/penitent. Even when explicitly religious language is absent, the sacred haunts the prison and all who work there.[1]

Religion and prison have an interconnected nature in the United States. Despite the many restrictions on inmates in prison, they are also allowed many religious liberties. As prisons try to reshape and rehabilitate their inmates, however, these institutions and their agents can also threaten to unconstitutionally manipulate their inmates' religious views. This Note highlights certain situations where the ties between religion and prison are distinctly present: in parole considerations and in prisoners' relationships with the chaplain. Courts have looked favorably on accommodating religion in prisons through chaplaincy programs. The justification for doing so has generally put the chaplaincy program in a rather tenuous position, focusing on the need to accommodate inmates' rights to free exercise over the problems such a program poses as a religious establishment within prison.[2] This Note primarily suggests that the constitutionality of chaplains serving in certain parole-related functions should be reexamined. On the one hand, the provision of letters of support by chaplains for granting parole may be minor, so as not to violate the Establishment Clause. On the other hand, placing chaplains on parole boards takes an institution already precariously placed at the nexus between free exercise and establishment too far over the line towards an establishment of religion.

Part II of this Note discusses how parole works in the United States and potential ways in which religion implicates parole considerations; it also examines the potential "con game" of in-

1. WINNIFRED FALLERS SULLIVAN, PRISON RELIGION: FAITH-BASED REFORM AND THE CONSTITUTION 6 (2009) (citations omitted).

2. *See infra* Part III.

mates who may attempt to exploit a perception (founded or not) that higher religiosity leads to a higher likelihood of parole. Part III briefly examines the constitutionality of chaplains in government settings, such as prisons, to set the stage for discussing the chaplain's role in the parole setting. Part IV provides a short overview of federal case law involving parole in the Establishment Clause context, including religion's role in parole hearings and conditions. Part V builds on this information to provide a prospective analysis of situations where religion is used as a partial basis for parole consideration. It ultimately concludes that letters of reference supplied by chaplains on behalf of inmates and limited inquiry by parole boards about religious behavior may withstand constitutional scrutiny. On the other hand, it argues that when chaplains serve on parole boards, they impermissibly put pressure on inmates in violation of the Establishment Clause.

II. PAROLE AND RELIGIOSITY IN THE UNITED STATES

A. PAROLE GENERALLY

The United States Bureau of Justice Statistics defines parole as when "criminal offenders . . . are conditionally released from prison to serve the remaining portion of their sentence in the community. Prisoners may be released to parole either by a parole board decision (discretionary release/discretionary parole) or according to provisions of a statute (mandatory release/mandatory parole)."[3] As a condition of their parole, parolees are often required to follow certain rules and meet certain conditions, or else risk returning to prison. When this Note uses the term parole, it refers primarily to discretionary parole.

The U.S. Sentencing Guidelines, established by the Sentencing Reform Act provisions of the Comprehensive Crime Control Act of 1984, spelled the end of federal parole (except for prisoners

3. In contrast, probation is generally defined as when courts put offenders "on supervision in the community through a probation agency, generally in lieu of incarceration." *FAQ Detail: What is the difference between probation and parole?*, BUREAU OF JUSTICE STATISTICS, http://www.bjs.gov/index.cfm?ty=qa&iid=324 [https://perma.cc/R48Q-VA7D] (last visited Mar. 3, 2017); U.S DEP'T OF JUSTICE, HISTORY OF THE FEDERAL PAROLE SYSTEM 2 (2003), https://www.justice.gov/sites/default/files/uspc/legacy/2009/10/07/history.pdf.

convicted of crimes committed before November 1, 1987).[4] Nevertheless, during sentencing, federal judges may still add a period of supervised release to the end of a prisoner's sentence.[5] In contrast to the federal system, each state has its own version of a parole board, although sixteen states have abolished discretionary parole.[6] Governors appoint parole boards in the vast majority of states.[7] In New Jersey, for example, the Governor, with the advice and consent of the Senate, designates a Parole Board Chairperson along with fourteen Associate Board Members and three Alternates.[8] Under the New Jersey system, an inmate becomes eligible for parole after serving one-third of his or her prison sentence (except where the offender's sentence dictated that he or she would be ineligible for parole). That system has four different hearings the Parole Board undergoes to evaluate potential parolees' fitness: (1) the Initial Hearing; (2) the Panel Hearing; (3) the Rescission Hearing; and (4) the Revocation Process.[9]

At the Initial Hearing, an officer reviews the current and any prior criminal offenses as well as "the inmate's social, physical, educational, and psychological progress, and an objective social and psychological risk and needs assessment[,]" which is reported to Parole Board Members.[10] At the Panel Hearing, two members of the Board decide whether to grant parole. The Board evaluates whether the inmate is likely to violate the terms of his or her parole or commit a new crime if released. If the panel denies parole, it sets a Future Eligibility Term, which determines the next time the prisoner will become eligible for parole consideration.[11]

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4. U.S. SENTENCING COMM'N, AN OVERVIEW OF THE UNITED STATES SENTENCING COMMISSION 2 (2011), http://www.ussc.gov/sites/default/files/pdf/about/overview/USSC_Overview.pdf [https://perma.cc/DQ85-26UH].

5. See U.S DEP'T OF JUSTICE, *supra* note 3, at 1–2.

6. Those states are Arizona, California, Delaware, Florida, Illinois, Indiana, Kansas, Maine, Minnesota, Mississippi, North Carolina, Ohio, Oregon, Virginia, Washington, and Wisconsin. *Reentry Trends In The U.S.: Releases from State Prison*, BUREAU OF JUSTICE STATISTICS, http://www.bjs.gov/content/reentry/releases.cfm [https://perma.cc/8VDY-ETGB] (last visited Mar. 3, 2017). And four other states (Alaska, Louisiana, New York, and Tennessee) have abolished parole with respect to violent offenders. *See id.*

7. Beth Schwartzapfel, *How Parole Boards Keep Prisoners in the Dark and Behind Bars*, WASH. POST (July 11, 2015), https://www.washingtonpost.com/national/the-power-and-politics-of-parole-boards/2015/07/10/49c1844e-1f71-11e5-84d5-eb37ee8eaa61_story.html [https://perma.cc/29EA-3MHR].

8. *Membership of the Parole Board*, N.J. PAROLE BD., http://www.nj.gov/parole/hearings.html [https://perma.cc/XK7F-XN9B] (last visited Mar. 3, 2017).

9. *Id.*

10. *Id.*

11. *Id.*

If, on the other hand, the panel grants parole, the panel may set conditions on that parole, above and beyond the boilerplate conditions, including that the "parolee seek employment, submit to random drug tests, or undergo substance abuse counseling."[12] If the Board grants parole, it sets a date for the inmate's release; if the Board obtains negative new information relevant to its parole decision, the Board holds a Rescission Hearing where it determines whether there is good cause to withdraw its grant of parole.[13]

As another example, the Kentucky Parole Board looks at a number of factors, including: the seriousness of the offense, the inmate's prior criminal record, history of parole and probation violations, oral and written input from victims and others affected by the crime, institutional conduct, participation in rehabilitation programs, psychological evaluations, history of alcohol and drug use, an evaluation of community resources available to help the offender re-enter society, statements from the sentencing judge or prosecuting attorneys, attitude toward authority, history of deviant behavior, education and job skills, and health or illness.[14]

The Pew Center reported in 2008 that one in 100 American adults was incarcerated, and, in 2009, that one out of every thirty-one adults in the United States was either incarcerated, on probation, or on parole.[15] As of 2004, approximately 43.3% of inmates released on parole were sent back to prison within three years of their release.[16] These statistics demonstrate how greatly the prison system affects American citizens, making the impact of parole considerations all the more significant.

12. *Id.*
13. *Id.*
14. *Frequently Asked Questions: Parole Board Hearings and Reviews*, KY. JUSTICE & PUB. SAFETY CABINET, http://justice.ky.gov/Pages/Parole-Board-FAQ.aspx#1 [https://perma.cc/VE4Q-22HU] (last visited Mar. 3, 2017).
15. PEW CTR. ON STATES, STATE OF RECIDIVISM: THE REVOLVING DOOR OF AMERICA'S PRISONS 1 (Apr. 2011), http://www.pewtrusts.org/~/media/legacy/uploadedfiles/wwwpewtrustsorg/reports/sentencing_and_corrections/staterecidivismrevolvingdoor americaprisons20pdf.pdf [https://perma.cc/7QJG-5HW7].
16. *Id.* at 2.

B. RELIGIOUS BASES FOR PAROLE CONSIDERATION

The United States is relatively unique in its high level of incarceration. But the United States is also unique in another dimension: professed religiosity.[17] As Winnifred Fallers Sullivan, professor and chair of the Department of Religious Studies at Indiana University Bloomington, explains,

> [In] the prison context, [the] religious culture [of the United States] . . . is shaped by the convergence of two ways in which the United States is distinctive in comparison to other advanced industrial societies, differences that, arguably, have become more pronounced in recent decades. Americans are unusual compared to the citizens of these other societies in the extent to which they profess attachment to religion and in the high rate at which they incarcerate their fellows.[18]

1. *Religion and Recidivism*

How do these two qualities of American society manifest in the parole context? One way to answer this question is to look at how one's religiosity may impact his or her likelihood of returning to prison. In the *Handbook of Religion and Health*, the authors conducted a review of studies pertaining to the relationship of the two elements that comprise the handbook's title. A section about the research on religion, delinquency, and crime relayed that seventy-nine percent of the studies conducted both before and after the year 2000 "found statistically significant or near significant inverse relationships between [religion/spirituality] and delinquency or crime."[19] In one of the studies the authors rated highest in terms of quality — *Discriminators of types of recidivism among boot camp graduates in a five-year follow-up study* — the researchers examined over 500 male prisoners who had attended

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17. *See* PEW RESEARCH CTR., U.S. PUBLIC BECOMING LESS RELIGIOUS 11 (Nov. 3, 2015), *available at* http://assets.pewresearch.org/wp-content/uploads/sites/11/2015/11/201.11.03_RLS_II_full_report.pdf [https://perma.cc/N2JL-T89D] (noting three-quarters of U.S. adults say religion is at least 'somewhat' important in their lives; more than half, or 53%, say it is 'very' important).

18. SULLIVAN, *supra* note 1, at 2.

19. HAROLD G. KOENIG ET AL., HANDBOOK OF RELIGION AND HEALTH 248 (2d ed. 2012).

a boot camp in a Southern state and looked to determine the relationship, if any, between recidivism and twenty-four characteristics of the respondents (for example, marriage, employment, children).[20] Boot camps are "in-prison programs that resemble military basic training[ ]" with an emphasis on physical activity and little unstructured time.[21] One of the characteristics evaluated was religiosity, which was defined on a six-item scale (three factors were, for example, religious services attendance, private prayer, and talking about religion with others). The study evaluated the respondents after five years on parole and found that religiosity correlated with non-recidivism at a strength of 0.30. For perspective, other factors that were examined that also correlated with non-recidivism were employment (0.68) and number of children (0.68).

2. *Direct and Indirect Religion-Based Decisionmaking*

Little data is kept on the religious affiliations of inmates in the United States prison system,[22] making it difficult to determine an exact statistical relationship between religiosity and parole decisions. There are, however, several plausible routes through which religiosity may — and perhaps does — influence the decision of parole boards. First, it is possible that prisoners, either genuinely or otherwise, will claim to be religious or to have found religion.[23] A connection to religion may give the impression of morality, a factor a parole board may take into consideration. Further, as the studies in the previous section assert, religiosity does have an inverse correlation to recidivism, and reducing re-

20. Brent Benda et al., *Discriminators of Types of Recidivism Among Boot Camp Graduates in a Five-year Follow-up Study*, 31 J. CRIM. JUST. 539, 539–51 (2003).

21. U.S. DEP'T OF JUST., CORRECTIONAL BOOT CAMPS: LESSONS FROM A DECADE OF RESEARCH 2 (2003), https://www.ncjrs.gov/pdffiles1/nij/197018.pdf [https://perma.cc/6R2N-7WXV].

22. *See* PEW RESEARCH CTR., THE PEW FORUM ON RELIGION & PUBLIC LIFE, RELIGION IN PRISONS: A 50-STATE SURVEY OF PRISON CHAPLAINS 1, 12 (2012), http://www.pewforum.org/files/2012/03/Religion-in-Prisons.pdf [https://perma.cc/QED9-FS7U] ("The U.S. Bureau of Justice Statistics routinely reports on several characteristics of the U.S. prison population, such as age, gender and racial/ethnic composition, but it does not usually report on the religious affiliation of inmates, and independent surveys of inmates rarely are permitted." (footnote omitted)).

23. Harry R. Dammer, *The Reasons for Religious Involvement in the Correctional Environment*, 35 J. OFFENDER REHAB. 35, 42 (2002) ("[A]mong inmates who practiced religion while incarcerated there were a considerable number that were 'insincere' in their religious practice.").

cidivism is one of the primary goals of a parole board. Even if parole boards are not factoring religion and spirituality into their assessments of prisoners, research suggests that some prisoners think at least the appearance of being religious will help their ability to obtain parole, though it is unclear exactly to what degree.[24]

In some states, such as New York, parole boards rely, at least in part, on computer software in making their decisions. One article in *The Wall Street Journal* stated, "[d]riven to cut ballooning corrections costs, more states are requiring parole boards to make better decisions about which convicts to keep in prison and which to release. Increasingly, parole officials are adopting data- and evidence-based methods, many involving software programs, to calculate an inmate's odds of recidivism."[25] Mentioned in the article is the COMPAS software, used by the New York parole board, which employs a ninety-five-question assessment instrument, the latter half of which is an offender questionnaire. In that forty-eight-question section, two questions directly inquire about religion: "[#77] I attend religious activities regularly[; and #78,] I have found a religion or spiritual path that I truly believe in."[26] The respondent may choose among three options: "Mostly Disagree," "Uncertain Don't Know," and "Mostly Agree."[27] The responses to the entire assessment instrument are broken down into various scales, such as "Violence," "Recidivism," "Financial Problems," and "Social Isolation."[28] Religious questions, as well as other questions about jobs and boredom in general, are invoked in the "Life Goals/Idleness" scale, which "focuses on the presence of positive life goals, commitment and interest in a career or job, a positive future, [and] commitment to a religion in contrast to a life that is purposeless and characterized by idleness and boredom."[29] Clearly, then, this computerized metric of determining the candidates most suitable for parole — at least in

24. *See, e.g.*, *id.* at 54.

25. Joseph Walker, *State Parole Boards Use Software to Decide Which Inmates to Release*, WALL ST. J. (Oct. 11, 2013), http://www.wsj.com/articles/SB10001424052702304626104579121251595240852 [https://perma.cc/P92X-2EHF].

26. SHARON LANSING, N.Y. DIV. OF CRIM. JUST. SERVS., NEW YORK STATE COMPAS-PROBATION RISK AND NEED ASSESSMENT STUDY: EXAMINING THE RECIDIVISM SCALE'S EFFECTIVENESS AND PREDICTIVE ACCURACY 28 (2012), http://www.criminaljustice.ny.gov/crimnet/ojsa/opca/compas_probation_report_2012.pdf [https://perma.cc/6JXS-2CUH].

27. *Id.*

28. *Id.* at 30–34.

29. *Id.* at 34.

small part — relies on information concerning religion and favors those who purport to have found it.

Another route allowing religion to influence the decisionmaking process of the parole board is through prison chaplains. While the specific role of the chaplain in the parole process varies state by state, in many states the chaplain can write a letter of reference for an inmate to the parole board. A 2002 study of two Northeast prisons revealed that prisoners believed the chaplain was a "good person to ask for a letter of reference before a parole board hearing" and that "an inmate would likely attend religious services immediately prior to his parole hearing."[30] According to a Pew poll of chaplains from all fifty states, 73% of chaplains tend to think religious-related programs are "absolutely critical" to the rehabilitation of inmates, and 78% think religious group support is "absolutely critical" to successful re-entry into society.[31]

For example, on the Oregon Department of Corrections (DOC) website, in a section on Offender Management & Rehabilitation, one article entitled, "Spirituality, Religion and What Works: Religious Outcomes This Side of Heaven," coauthored by various administrators of religious services at state corrections departments, states:

> Saint Paul gives us a theological way of understanding spirituality — that sense of personal connectedness or belonging with other people, a higher power, and the world — in his letter to the Romans where he says "The love of God has been poured out in our hearts through the Holy Spirit who has been given to us (Rm:5:5)." This passage, like similar passages from other Holy Scriptures, basically informs us that we are spiritual beings and suggests that our spiritual nature must be integrated with our physical, emotional, and intellectual natures.

30. Dammer, *supra* note 23, at 51. The author even found one instance where a chaplain wrote a letter of reference for "an inmate who 'found religion' just prior to his parole hearing." *Id.* at 52.

31. PEW RESEARCH CTR., *supra* note 22, at 11.

> When people in prison get involved in religious services and begin to lead a richer spiritual life along with their physical, emotional, and intellectual life then they have more inner resources available to them. Because spirituality is essentially about love and connectedness a person who is spiritually alive will be less likely to hurt other people or to do wrong.[32]

Such overtly religious sentiments receive greater weight when prison officials sanction them and even more so when official DOC websites provide a permanent place for them. The inevitable message of such statements is that religion generally and certain types of religion specifically are fundamental to rehabilitation in the eyes of the speakers. Prisoners are perhaps most justified in thinking that the religious and ideological beliefs of the prison chaplain, such as those quoted above, matter when he or she sits on the parole board. In that capacity, the chaplain serves not just as a source for spiritual guidance and not just as someone who can help support their appeals for parole but as an individual who weighs considerations and gives judgment on their receipt of parole. Having examined several routes in which an inmate's religion and religiosity (or lack thereof) can potentially impact his or her parole decision, this Note now turns to some cases involving the constitutionality of chaplains.

III. THE CONSTITUTIONALITY OF THE CHAPLAIN

One scholar has called the chaplaincy — at least in the military context — "the ultimate confrontation between the establishment clause and the free exercise clause of the first amendment."[33] Another has described the military chaplaincy as "the quintessential . . . example of government-sponsored religion . . . that the First Amendment's 'Congress shall make no law' Establishment Clause purports to prevent."[34] How do these comments

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32. *Spirituality, Religion and What Works*, OR. DEP'T. OF CORRS.: DOC OFFENDER MGMT. & REHAB., http://www.oregon.gov/doc/OMR/pages/religious_services/rs_article2.aspx [https://perma.cc/5JTU-RGDG] (last visited Mar. 6, 2017).

33. William T. Cavanaugh, Jr., *The United States Military Chaplaincy Program: Another Seam in the Fabric of Our Society?*, 59 NOTRE DAME L. REV. 181, 181 (1983) (footnotes omitted).

34. Captain Malcolm H. Wilkerson, *Picking Up Where* Katcoff *Left Off: Developing A Framework for A Constitutional Military Chaplaincy*, 66 OKLA. L. REV. 245, 246 (2014).

carry over from the military to the prison? In that context, one scholar began her article about prison chaplains in 1998 by pronouncing "[l]ittle is known today about prison chaplains or the work they perform."[35] She concluded that her "findings indicate that chaplains balance the biblical call to minister to inmates with the need to function in an institution of social control."[36] As Professor Sullivan has explained:

> Chaplaincies both normalize religion through the situating of religious work alongside that of other modern bureaucracies and set it apart through the multiple allegiances of the chaplain herself and the client; it is an unstable encounter between strangers, strangers stranded in the gaps created by modern life. Chaplains trained by religious communities minister to a clientele often unmarked at that moment by any specific religious identity, and they do so on behalf of a secular institution bound, at least theoretically, to rational epistemologies. Chaplaincies are, one might say, a placeholder for the sovereign exception, with all of the troubling references implied by those curious words. The chaplain has, without paradox, become a priest of the secular.[37]

In 1985, the Second Circuit tackled the question of whether "furnishing chaplains as part of our armed forces to enable soldiers to practice the religions of their choice[ ] violate[s] the Constitution."[38] The complaint alleged not that a military chaplain was unconstitutional in and of itself but that a "privately funded and controlled" chaplaincy program would better serve the constitutional rights of Army members.[39] The Army, on the other hand, "proceeded on the premise that having uprooted the soldiers from their natural habitats it owes them a duty to satisfy their Free Exercise rights, especially since the failure to do so would diminish morale, thereby weakening our national defense."[40] The Second Circuit held that "[s]ince the [Army chaplaincy] program

35. Jody L. Sundt & Francis T. Cullen, *The Role of the Contemporary Prison Chaplains*, 78 PRISON J. 271, 271 (1998).

36. *Id.* at 293.

37. WINNIFRED FALLERS SULLIVAN, A MINISTRY OF PRESENCE: CHAPLAINCY, SPIRITUAL CARE, AND THE LAW 3 (2014).

38. Katcoff v. Marsh, 755 F.2d 223, 224 (2d Cir. 1985).

39. *Id.* at 229 (internal quotation marks and citation omitted).

40. *Id.* at 228.

meets the requirement of voluntariness by leaving the practice of religion solely to the individual soldier, who is free to worship or not as he chooses without fear of any discipline or stigma, it might be viewed as not proscribed by the Establishment Clause."[41] The Court also paid heed to the history of military chaplains, noting that Congress's authorization of a military chaplain contemporaneously with the adoption of the Establishment Clause suggested that such a practice was allowed under the Clause.[42]

The Supreme Court has not tackled the subject of chaplaincies often. In a case that declared school-sponsored Bible readings unconstitutional, however, Justice Brennan strongly endorsed prison chaplaincies in a concurring opinion, stating that "[t]here are certain practices, conceivably violative of the Establishment Clause, the striking down of which might seriously interfere with religious liberties also protected by the First Amendment. . . . [The] provision by state and federal governments for chaplains in penal institutions may afford [one] example."[43] He also noted that chaplaincy programs were distinguishable from daily Bible reading and prayer in the school setting, because the primary audience in the military and in prison is composed of adults, not children, and "there is no element of coercion present in the appointment of military or prison chaplains; the soldier or convict who declines the opportunities for worship would not ordinarily subject himself to the suspicion or obloquy of his peers."[44]

Over forty years later, in 2005, the Supreme Court heard a case which, according to one scholar, "finally put [it] on record as allowing the chaplaincy program."[45] The case, *Cutter v. Wilkinson*,[46] involved state prisoners suing under Section 3 of the Religious Land Use and Institutionalized Persons Act (RLUIPA),[47] which raised the standard the government has to meet in order to "impose a substantial burden on the religious

41. *Id.* at 231–32 (quoting Everson v. Bd. of Educ., 330 U.S. 1, 15–16 (1947); Zorach v. Clauson, 343 U.S. 306, 314 (1952) in discussing why compelled church attendance constitutes an establishment of religion).

42. *Id.* at 232.

43. Sch. Dist. of Abington Twp., Pa. v. Schempp, 374 U.S. 203, 296–97 (1963) (Brennan, J., concurring) (footnotes omitted).

44. *Id.* at 298.

45. Steven Goldberg, Cutter *and the Preferred Position of the Free Exercise Clause*, 14 WM. & MARY BILL RTS. J. 1403, 1411 (2006).

46. Cutter v. Wilkinson, 544 U.S. 709 (2005).

47. *Id.* at 712–13.

exercise" of a prison inmate.[48] Justice Ginsburg, writing for a unanimous court,[49] held that Section 3 of RLUIPA "does not, on its face, exceed the limits of permissible government accommodation of religious practices."[50] The Court, in overturning the Court of Appeals, noted in a footnote that "[r]espondents argue, in line with the Sixth Circuit, that RLUIPA goes beyond permissible reduction of impediments to free exercise. The Act, they project, advances religion by encouraging prisoners to 'get religion,' and thereby gain accommodations afforded under RLUIPA."[51]

The Court had two arguments for why that line of reasoning did not hold muster. First, the Court claimed that most perceived benefits under RLUIPA were likely too small to convert nonbelievers into believers. Second, the Court noted that the argument "founders on the fact that Ohio already facilitates religious services for mainstream faiths [for example by] provid[ing] chaplains."[52] Elsewhere in the opinion, the Court noted that following the Sixth Circuit's approach would cause "all manner of religious accommodations [to] fall. . . . [For example, t]he State provides inmates with chaplains but not publicists or political consultants."[53] In other words, the Court held in some situations religious accommodations are permitted, and prison chaplains are one such instance.

Professor Kent Greenawalt has provided a framework for determining when both military and prison chaplains should be permitted, noting they are alike in several respects yet also differ critically. He explains that the provision of military chaplains "easily surmounts the first hurdle of possible objections" since "the practice is warranted to preserve opportunities for religious exercise that exist in civilian life."[54] Professor Greenawalt complicates this initial view concerning the propriety of military chaplains by asking about chaplaincies that go above the minimum necessary to facilitate "religious guidance and access to worship."[55] To evaluate potential overreach, he raised five poten-

48. 42 U.S.C. § 2000cc-1(a) (2012).
49. *See also Cutter*, 544 U.S. at 726 (Thomas, J., concurring).
50. *Id.* at 714 (majority opinion).
51. *Id.* at 721 n.10 (citations omitted).
52. *Id.*
53. *Id.* at 724 (internal quotation marks and citation omitted).
54. 2 KENT GREENAWALT, RELIGION AND THE CONSTITUTION: ESTABLISHMENT AND FAIRNESS 209 (2008).
55. *Id.* at 208.

tial, additional features of chaplains that may create constitutional concern:

1. more active promotion of religion than is justified
2. provision of chaplains in settings where they are unnecessary
3. a tighter connection between the military and chaplaincy than is warranted
4. relatedly, unnecessary constraints on the religious exercise of chaplains, and
5. favoritism of some religions over others.[56]

When it comes to extending this reasoning from military chaplains to prison chaplains, Professor Greenawalt has more reservations. He notes the constitutional basis for government-hired prison chaplains is "thinner" than for military chaplains because "there are fewer duties that hired chaplains can perform that outsiders could not; issues of training and subjection to orders are less acute; and what is at stake in trying an alternative to government employment is less momentous."[57] He points out, for example, that prison chaplains are unlikely to have to travel outside the country as part of a unit to provide their services as military chaplains might.[58] Thus, because a military setting by nature has more complications necessitating the government provision of chaplains than does a prison setting, the basis for government involvement in the latter is less constitutionally grounded.

One of Professor Greenawalt's approaches for justifying chaplains' promotion of religion in the military, however, had an eye toward prison promotion of religion:

> [I]n specific contexts where individuals live in total (or near total) government environments, government promotion of religion is acceptable, both for the welfare of individuals and in the interest of broader government objectives. . . . If most people in jail are poorly integrated into society, hostile and alienated, their lives may be better if they become involved in religion. Further, their chances of committing crimes when they are released may be reduced.[59]

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56. *Id.*
57. *Id.* at 220.
58. *Id.* at 219.
59. *Id.* at 211.

This approach is helpful in evaluating the role of the chaplain in prison settings and in the parole context specifically. Although this Note does not challenge the mere presence of chaplains in prisons as violating the Establishment Clause, it questions the degree to which a chaplain in a prison may promote religion, specifically through the chaplaincy's relationship to parole. Professor Sullivan poignantly frames the issue: "[t]he constitutional difficulty in harmonizing the two [religion] clauses in the case of justifying government chaplaincy reveals an ongoing unresolved tension between them. When does the accommodation of religion become an establishment?"[60] Prisons, like schools and military service, are environments where the audience is essentially held captive — that is, these environments tend to be highly coercive. Prisoners, even those who are responsible to some degree for their placement in prison, do not choose whether to remain there. Prisons also tend to be high-pressure environments that can lend themselves toward group and even gang mentalities.

Therefore, in prisons, like in schools and military service, but unlike in normal civilian life, greater caution should be paid to potentially coercive behavior because its effects may be stronger. The American Correctional Chaplains Association, the American Catholic Correctional Chaplains Association, and the Jewish Prisoner Services International seem to suggest as much in an amicus brief in support of a ruling that held a religious prison program in Iowa unconstitutional:

> While chaplaincy programs may seek to address the specific faith needs of a particular inmate, they may not indoctrinate or compel attendance at any religious service or program. Inmates, even more so than beneficiaries of social service programs, represent a vulnerable population subject to subtle, if not overt, pressures from those in authority. For a chaplain or volunteer to impose his or her religious beliefs on an inmate, to pressure an inmate to participate in religious activities, or to make religious acquiescence a *quid pro quo* of receiving services is . . . a violation of the power and trust relationships that exist in such situations.[61]

60. SULLIVAN, *supra* note 37, at 148.

61. Brief for Am. Corr. Chaplains Assoc. et al. as Amici Curiae Supporting Appellees at 14–15, Ams. United for Separation of Church & State v. Prison Fellowship Ministries, Inc., No. 403-cv-90074 (8th Cir. Sept. 25, 2006).

Adding to the delicateness of this relationship is the volatility of inmates' religious beliefs. Among prison chaplains, fifty-one percent noted at least "some" religious switching among inmates, while twenty-six percent noted "a lot."[62] As addressed earlier,[63] prisoners have many reasons for turning to religion, sincerely or not. Among the potential rationales are intrinsic reasons, such as dealing with guilt, finding a new way of life, and/or dealing with loss, and extrinsic reasons, such as seeking safety, material comforts, and/or social interaction.[64] Thus, while chaplains have an important role to play in helping provide inmates religious guidance, chaplains also have the potential to easily go beyond the constitutionality of their role's purpose and function.

IV. FEDERAL CASE LAW ON THE ESTABLISHMENT CLAUSE AND PAROLE

Only a handful of federal cases concern the Establishment Clause and certain dimensions of parole. This Part overviews the relevant case law on the subject, summarizing cases concerning two distinct but related areas: (A) religion in the parole hearing, and (B) religion as part of parole conditions. The first category of cases involves religious interference in the decisionmaking process of the parole board; it includes subsections on (1) religious favoritism by the parole board and (2) the chaplain's role in the parole hearing. The second category involves situations where parole is granted but conditioned on some degree of religious adherence including (1) mandatory faith-based rehabilitation programs and (2) the funding of faith-based parole programs. While the second category concerning parole conditions deals with important issues, they are mostly settled and fall less within the scope of this Note, which focuses more directly on the parole hearings themselves.

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62. PEW RESEARCH CTR., *supra* note 22, at 21. Interestingly, one of our only windows into the types of religious changes that go on in prison is through this poll of prison chaplains.

63. *See supra* Part II.

64. *See generally* Todd R. Clear et al., *The Value of Religion in Prison: An Inmate Perspective*, 16 J. CONTEMP. CRIM. JUST. 53 (2000).

A. RELIGION IN THE PAROLE HEARING

1. *Religious Favoritism by the Parole Board*

In *Granguillhome v. Utah Board of Pardons*, several inmates at a Utah state prison filed a claim against the parole board as a whole and the individual members comprising it, alleging that board practices violated both Religion Clauses, as well as the Equal Protection Clause.[65] The inmates claimed that the Board of Pardons "gave preferential treatment to inmates convicted of sexual offenses who are members of The Church of Jesus Christ of Latter-Day Saints (LDS Church)," known colloquially as the Mormon Church, which has a large following in Utah.[66] To support their claim, they alleged that the parole board statistically favored LDS members over non-LDS members in regards to both how quickly they came before the board after incarceration and how much time they ultimately served before being paroled.[67] With respect to the inmates' Establishment Clause claims, the court analyzed the parole board's actions under the three-part test introduced by *Lemon v. Kurtzman*.[68] First, a challenged government action "must have a secular legislative purpose; second, [the action's] principal or primary effect must be one that neither advances nor inhibits religion; [and,] finally, the [action] must not foster an excessive government entanglement with religion."[69]

The court relied on Tenth Circuit precedent, which stated that a court should be reluctant to find unconstitutional motives where it can find a plausible secular purpose. In *Granguillhome*, the court said:

65. Granguillhome v. Utah Board of Pardons, No. 204-cv-260-TC, 2006 WL 3672901, at *2 (D. Utah Dec. 8, 2006).

66. *Id.* at *1.

67. *Id.* at *2.

68. *Id.* at *6 (internal quotation marks and citation omitted) (quoting Lemon v. Kurtzman, 403 U.S. 602, 612–13 (1971)).

69. *Id.*

> [T]he Board's practice of making individualized parole determinations based on a number of relevant factors, rather than following hard and fast rules as proposed by Plaintiffs, is clearly supported by a secular purpose. Namely, protecting the public by ensuring that parole decisions are based foremost on a wide-ranging assessment of the offender's likelihood to re-offend.[70]

Thus, the court found the Board's actions passed the first prong of the *Lemon* test. Although the court noted that there was no evidence showing that the Board favored LDS members, the court also seemed to suggest that parole boards' inquiries into certain facets of religion or religiosity might be permissible so long as the purpose for doing so was secular.[71] That is, the court reasoned that such questioning might be permissible if done to help determine an inmate's likelihood to reoffend.[72]

With respect to the second prong, the court found that the Board's practices did not have the primary effect of advancing or endorsing religion.[73] Specifically, the court considered the evidence the inmates had brought forward and deemed them meritless.[74] It found that the Board rarely inquired into religion, and the Board in this case specifically said it had not made such inquiries.[75] The court also found that plaintiffs' statistical evidence showing alleged discrepancies between treatment of LDS inmates and other religiously affiliated inmates was "totally unauthenticated."[76] Furthermore, the court held that there was no evidence that the Board favored the LDS offenders at all.[77] Thus, the court found that the Board's actions passed the *Lemon* test's second prong. This line of reasoning suggests that the court might have struck down a practice by a parole board inquiring about an inmate's religion or religiosity, but that the claims here were simply meritless.

Finally, the court considered the entanglement prong. The court found that one instance where a member of the parole

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70. *Id.* at *7.
71. *Id.*
72. *Id.*
73. *Id.*
74. *Id.*
75. *Id.*
76. *Id.* at *5.
77. *Id.* at *7.

board had inquired into an inmate's religious beliefs "to give [the inmate] a last chance to admit his crime" was "troubling," though not routine.[78] Therefore, because the court found that the parole board rarely inquired into religious behavior, there was little or no entanglement between government and religion.[79]

Taken together, the court found that the inmates had not satisfied their burden to survive summary judgment. The court did not indicate what evidence would be required for it to rule differently, but the impression the court gave was that the evidence here was simply too tenuous to substantiate any Establishment Clause claim.

2. *The Chaplain's Role in the Parole Hearing*

As discussed above, chaplains can and do play a role in the parole hearings of inmates. How much impact should chaplains have in that process? Is it permissible for a chaplain to submit a letter on an inmate's behalf? Is it permissible for the chaplain to sit on a parole board? This Note tackles these questions in Part V, but in this Part provides an informative review of the limited relevant federal case law.

The primary federal case concerning such questions is *Remmers v. Brewer*.[80] The inmates alleged that it was an Establishment Clause violation for the two prison chaplains — who belonged to different religious faiths than the petitioners — to serve as members of a seven-panel Diagnostic Committee, which could submit reports and make recommendations to the parole board.[81] The district court recognized that the Constitution did not preclude the state from providing chaplains per se, so long as "no particular religion [was] fostered."[82] However, the inmates argued they could feel obligated or coerced into taking part in religious activities to obtain a positive report from the chaplain for their parole hearings, thus "entangl[ing] church and state."[83] The court found that:

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78. *Id.* at *7–8 (internal quotation marks and citation omitted).
79. *Id.*
80. Remmers v. Brewer, 361 F. Supp. 537 (S.D. Iowa 1973), *aff'd*, 494 F.2d 1277 (8th Cir. 1974).
81. *Id.* at 539, 543.
82. *Id.* at 543.
83. *Id.*

> The involvement of the chaplains in the parole process at Fort Madison is neither direct nor substantial. Since the seven-member Diagnostic Committee meets in groups of three when interviewing prospective parolees, it is doubtful that a chaplain is always on the interviewing team. Nor is it established that the reports prepared by the chaplains deal solely or primarily with religious activities or lack thereof. The Court can find no basis to ban a person from sitting on any public body merely because he is a member of a particular religion or even a minister of that religion.[84]

The court went on to say that, "allowing these chaplains to submit oral or written reports or letters to the Diagnostic Committee does not violate the First Amendment unless it is established that a particular religion is fostered thereby."[85]

The Eighth Circuit affirmed.[86] With respect to the role of chaplain-sponsored letters, the Eighth Circuit "recognize[d] that this is a sensitive area" and stated that, "[g]reat care must be exercised to avoid even the appearance of reliance on 'religious reports' as determinative of one's status for parole eligibility."[87] The Supreme Court denied certiorari.[88]

Although the Supreme Court created the *Lemon* test just a few years prior,[89] neither the district nor the circuit court applied *Lemon* to the case. Additionally, *Lee v. Weisman*, the case that provided the test for examining coercive religious behavior by the government, came several years later.[90] Of note, the *Remmers* district court suggested that too much involvement from a chaplain might lead to a violation of the Establishment Clause.[91] The court, in its analysis of the reports sent by chaplains to the Diagnostic Committee, indicated that such reports would violate the Establishment Clause only if "a particular religion" was fostered.[92] The court never truly addressed the issue of preference of religion over non-religion that the chaplain's letters certainly

84. *Id.*
85. *Id.*
86. Remmers v. Brewer, 494 F.2d 1277 (8th Cir. 1974).
87. *Id.* at 1278.
88. Remmers v. Brewer, 419 U.S. 1012 (1974).
89. Lemon v. Kurtzman, 403 U.S. 602 (1971).
90. Lee v. Weisman, 505 U.S. 577 (1992).
91. Remmers v. Brewer, 361 F. Supp. 537, 543 (S.D. Iowa 1973), *aff'd*, 494 F.2d 1277 (8th Cir. 1974).
92. *Id.*

evoke. Perhaps, however, the court's acknowledgement that chaplains do not violate the Constitution by their mere presence in prisons is meant to give some latitude toward the role of the chaplain. Later courts, perhaps most notably the Second Circuit, wrote affirmatively about the constitutionality of chaplains in the military context.[93] Academics have also written affirmatively about the constitutionality of the chaplaincy.[94] Nonetheless, there is a difference between the role of the chaplain in prison life generally and the role of the chaplain in parole hearings.

The other important federal case involving chaplains in the parole process, *Theriault v. Carlson*,[95] struck a different balance in evaluating chaplain reports given to a parole board. Harry Theriault was a federal prisoner and the self-proclaimed leader of a Church of the New Song group. The New Song group challenged both the constitutionality of a prison's offering of only Protestant and Catholic chaplains and those chaplains sending reports to a parole board under the Establishment Clause.[96] The court denied the former claim but granted the latter:

> These reports [prepared by chaplains and commenting on an inmate's participation in religious activities], together with reports from other staff members, are culled by the caseworkers and form part of the inmates' profiles which are presented to the Board of Parole when the inmates are being considered for release on parole. It is not inconceivable that the grant or denial of parole is based, to some degree, on the religious reports submitted by the chaplains.
>
> In the court's view, the submission of religious reports by [the prison chaplains] involves the Government in a violation of the neutrality it must maintain with respect to religion. There can be no doubt that an inmate whose file contains a positive religious report stands a better chance of being released on parole than an inmate with a neutral or negative religious report. Indeed, it is likely that the inmates' very knowledge of the existence of these religious reports may compel some to participate in religious activities.

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93. Katcoff v. Marsh, 755 F.2d 223 (2d Cir. 1985).
94. *See, e.g.*, SULLIVAN, *supra* note 37, at 139–72.
95. 339 F. Supp. 375 (N.D. Ga. 1972), *vacated and remanded*, 495 F.2d 390 (5th Cir. 1974).
96. *Id.* at 377–78.

> The Government, by allowing these religious reports to be submitted, is in effect promoting religion among inmates and indirectly punishing the atheist, agnostic, or Eclatarian who declines to participate in these religious programs. This is unconstitutional.[97]

Ultimately, the Fifth Circuit vacated the orders of the lower court and remanded.[98] The court questioned as a threshold matter whether Theriault truly subscribed to the Church of the New Song and whether it was a legitimate religion.[99] In particular, the court focused on evidence that the "religion" was in actuality "a disruptive, anti-authoritarian political movement" and that the district court had suspected it was in actuality "a game."[100] In doing so, as one scholar has noted, the Court of Appeals "did not address the Establishment Clause issue, but rather focused on the religious sincerity of Theriault's free exercise claims."[101] That author recognized, however, that the Establishment Clause issues raised by this case provide:

> an excellent example of the difficulty of deciding when coercion begins. If the allegations of Theriault's Establishment Clause claim are based upon fact, then the participation of a priest, minister or rabbi in prison discipline or in evaluating an inmate's eligibility for parole or other benefits, considering that at the same time the chaplain's primary duty is to provide religious guidance, warrants serious examination.[102]

In particular, the language of *Theriault* stands almost opposite the language in *Remmers*. Exactly how to square these two cases is among the questions this Note explores in Part V.

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97. *Id.* at 381–82.
98. Theriault v. Carlson, 495 F.2d 390 (5th Cir. 1974).
99. *Id.* at 395.
100. *Id.*
101. Donald L. Beschle, *Paradigms Lost: The Second Circuit Faces the New Era of Religion Clause Jurisprudence*, 57 BROOK. L. REV. 547, 553 n.39 (1991) (citation omitted).
102. *Id.* at 581.

B. RELIGION AS PART OF PAROLE CONDITIONS

1. *Mandatory Faith-Based Programs*

Although the Supreme Court has not explicitly handled the question of whether mandatory faith-based rehabilitation programs violate the Establishment Clause, several circuit courts have found them unconstitutional.[103]

In one of the earliest circuit court decisions on the issue, the Seventh Circuit evaluated whether it would violate the Establishment Clause for a state correctional institution to "require an inmate, upon pain of being rated a higher security risk and suffering adverse effects for parole eligibility, to attend a substance abuse counseling program with explicit religious content."[104] The Seventh Circuit found that such requirements violated the Establishment Clause, reversing the lower court's decision to grant summary judgment in favor of the prison.[105] Plaintiff was forced to observe Narcotics Anonymous (NA) meetings, along with all other inmates with chemical dependence problems at the prison.[106] The Seventh Circuit accepted, on appeal from summary judgment, that the effect of not attending these meetings was detrimental to one's parole eligibility.[107]

To determine whether NA was a faith-based rehabilitation program, the district court had examined the NA brochure used, which set out twelve steps that successful NA participants had employed.[108] Several of the steps involved the inmate's devotion to God and discussed God's role in helping the inmate acknowledge and correct his or her flaws.[109] The prison warden admitted that inmates were obligated to observe, though not to participate in, NA meetings.[110] The Seventh Circuit criticized the district court for applying the *Lemon* test without incorporating more recent Establishment Clause jurisprudence, such as the coercion test from *Lee v. Weisman*.[111] The court wrote:

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103. BORIS I. BITTKER, SCOTT C. IDLEMAN & FRANK S. RAVITCH, RELIGION AND THE STATE IN AMERICAN LAW 846 nn.290, 292 & 293 (2015) (collecting cases).
104. Kerr v. Farrey, 95 F.3d 472, 473 (7th Cir. 1996).
105. *Id.*
106. *Id.* at 474.
107. *Id.*
108. *Id.* at 474.
109. *Id.*
110. *Id.*
111. *Id.* at 479.

> In our view, when a plaintiff claims that the state is coercing him or her to subscribe to religion generally, or to a particular religion, only three points are crucial: first, has the state acted; second, does the action amount to coercion; and third, is the object of the coercion religious or secular?[112]

The court found that the prison's actions clearly met the first two prongs, noting that Kerr's parole consideration was affected by his refusal to attend meetings.[113] Finally, the court found that the third element was met because the use of the word "God" was not merely incidental to the NA meetings.[114] Several circuits have followed this line of thought, including the Ninth Circuit, which adopted the test used in *Kerr*.[115]

In a similar case in the Second Circuit, *Warner v. Orange County Department of Probation*, the court relied on *Lee v. Weisman* and a coercion analysis to come to a similar result.[116] The district court granted the petitioner, Warner, attorneys' fees and one dollar in nominal damages because the Department of Probation impermissibly required Warner to attend Alcoholics Anonymous meetings, and the Department appealed.[117] The Second Circuit substantially affirmed the district court but remanded as to whether Warner's failure to object at sentencing resulted in a waiver of his claim.[118] With respect to the issue of coercion, the majority explicitly compared Warner's situation to the claimant's in *Lee v. Weisman*:

> Orange County argues that even if Warner was forced to attend the meetings, he was not required to participate in the religious exercises that took place. The County argues that, as a mature adult, Warner was less susceptible to such pressure than the children who were required to stand in respectful silence during a school prayer in *Lee v. Weisman*; it points out that the Supreme Court expressly questioned

112. *Id.*
113. *Id.*
114. *Id.* at 479–80.
115. Inouye v. Kemna, 504 F.3d 705, 713 (9th Cir. 2007).
116. Warner v. Orange Cty. Dep't of Prob., 115 F.3d 1068 (2d Cir. 1996). Although *Warner* involves probation, and not parole, the manner in which both are treated in this case appears essentially the same.
117. *Id.* at 1069.
118. *Id.* at 1082.

> whether the obligation imposed by the school in *Lee* might have been constitutionally tolerable "if the affected citizens [had been] mature adults."
>
> We do not find Orange County's argument convincing. Although it is true Warner was more mature, his exposure was more coercive than the school prayer in *Lee*. The plaintiff in *Lee* was subjected only to a brief two minutes of prayer on a single occasion. Warner, in contrast, was required to participate in a long-term program of group therapy that repeatedly turned to religion as the basis of motivation. And when he appeared to be pursuing the Twelve Steps of the A.A. program with insufficient zeal — "Thirteen Stepping" in A.A. parlance — the probation officer required that he attend "Step meetings" to intensify his motivation.[119]

In *Warner*, however, unlike in *Kerr*, one judge dissented. Judge Ralph Winter dissented on two grounds: (1) that the inmate petitioner's voluntary attendance at A.A. meetings "before any involvement by the probation office in order to convince the sentencing judge that his voluntary selection of this particular rehabilitative program obviated the need for a stiffer sentence" mooted his claims for monetary damages; and (2) reliance on the Establishment Clause, rather than the Free Exercise Clause, "portends changes in our penal system that are not required. . . ."[120] Judge Winter feared that reliance on Establishment Clause jurisprudence would lead to the demise of prison chaplains, as well as sentences to do community service work at soup kitchens run by religious groups.[121] Regardless, instead of applying *Lee*, Judge Winter went through a *Lemon* test analysis and found that (1) there was a secular purpose of rehabilitation, (2) any advancement of religion was "incidental," and (3) there was no excessive entanglement of religion, a finding which he "doubt[ed would create] substantial disagreement."[122] Nevertheless, Judge Winter suggested that Warner would have had a valid argument under the Free Exercise Clause, noting that "[c]ompulsory attendance

119. *Id.* at 1075–76 (citations omitted).
120. *Id.* at 1077–78 (Winter, J., dissenting).
121. *Id.* at 1080.
122. *Id.* at 1080–81.

at religious ceremonies as part of a penal sentence surely raises serious [constitutional] issues."[123]

2. *Funding of Faith-Based Parole Programs*

In 2003, the Seventh Circuit addressed whether the funding of a halfway house that incorporated Christianity into its treatment program constituted an establishment of religion in a case called *Freedom From Religion Foundation, Inc. v. McCallum*.[124] As the court explained, halfway houses serve as alternatives to re-incarceration for parolees who violate the terms of their parole, and officers may recommend various halfway houses.[125] The halfway house at issue, Faith Works, incorporated religion into its conversations about "employment needs, drug and alcohol addiction, and parental responsibility. . . ."[126] Judge Posner, writing for the court, stressed that the decision about which halfway house to attend was always a decision held by the parolee, not an officer:

> Parole officers have recommended Faith Works to some parolees, but have been careful to explain that it is a non-binding recommendation and that Faith Works is a Christian institution and its program of rehabilitation has a significant Christian element. Parole officers who recommend Faith Works are required to offer the offender a secular halfway house as an alternative. And although Faith Works will enroll an offender even if he is not a Christian, a parole officer will not recommend Faith Works to an offender who has no Christian identity and religious interest and will not advise anyone to convert to Christianity in order to get the most out of Faith Works.
>
> There is no evidence that in recommending Faith Works a parole officer will be influenced by his own religious beliefs. His end is secular, the rehabilitation of a criminal, though

123. Warner v. Orange Cty. Dep't of Prob., 115 F.3d 1068, 1081 (2d Cir. 1996) (Winter, J., dissenting); *see also* Derek P. Apanovitch, Note, *Religion and Rehabilitation: The Requisition of God by the State*, 47 DUKE L.J. 785, 811 n.143 (1998).

124. Freedom from Religion Found., Inc. v. McCallum, 324 F.3d 880 (7th Cir. 2003).

125. *Id.* at 881.

126. *Id.*

> the means include religion when the offender chooses Faith Works.[127]

The court also strongly rebuked the appellants' argument that by recommending Faith Works, officers steer offenders to a religious program, which effectively amounts to government support for the program. Judge Posner called the implications of this argument "unacceptable" and emphasized that "[s]uggestion is not a synonym for coercion."[128] As an analogy, Judge Posner noted that it would not violate the Establishment Clause to rank high schools, even if a parochial school took the top position; likewise, he argued that simply because there are fewer standards by which to assess halfway houses does not mean that officers cannot recommend the one that has many obvious advantages, even if it contains religious elements.[129] Thus, Judge Posner explained that a mere correlation between a government-made selection and a religious entity does not imply a causal relationship that would violate the Establishment Clause.

V. ESTABLISHMENT CLAUSE ISSUES ARISING FROM PAROLE

This Note has already examined why a parole board might consider religiosity — namely that there is a positive correlation between religiosity and non-recidivism — and one of a parole board's main goals is to release inmates who are least likely to reoffend. This Part examines where courts and, equally importantly, prisons and parole boards should draw lines in permitting various forms of religious involvement in parole hearings. Specifically, it looks at the propriety of inquiries by a parole board or information supplied to it concerning an inmate's religious views and degree of religiosity. Additionally, this Part analyzes the role of chaplains in the parole context, including whether chaplains should be permitted to provide a letter of reference for an inmate and whether they should be allowed to serve on a parole board.

In answering these questions, this Note focuses on potential violations of the Establishment Clause rather than the Free Exercise Clause. This is because, though certain religious issues

127. *Id.* at 881–82.
128. *Id.* at 883.
129. *Id.*

invoke both clauses, the issue with regard to parole is not primarily that the prison is not accommodating certain religious practices as one might expect in Free Exercise cases (for example, accommodations for religious dietary restrictions, or religious allowances to violate prison uniform and appearance requirements). Rather, there is more of a concern that prisons — and parole boards more specifically — operate in such a way that either promotes religion over non-religion or a specific religion over other religions through the manner in which such boards assess parole eligibility. In some sense, that dilemma invokes the Free Exercise clause because the government is essentially making it more difficult for one to practice one's religion if it does not coincide with what the prison or parole officials want. Yet nearly any Establishment Clause issue could be read as a Free Exercise issue under so broad a definition. For example, as Judge Winter's dissent in *Warner* suggests, it is possible to frame the use of mandatory faith-based rehabilitation programs as Free Exercise violations. However, the majority of cases in this area, including *Warner*, have contemplated such issues under an Establishment Clause lens.[130]

A. WRITING LETTERS OF REFERENCE AND INQUIRY INTO RELIGION/RELIGIOSITY

This Note contends that a prison chaplain writing a letter of reference on behalf of an inmate up for parole board review does not violate the Establishment Clause so long as the letter is sufficiently restricted to the parolee's character and not his or her religious views. For instance, one factor in evaluating a potential parolee's likelihood to reoffend is his or her opportunity to have continued structure and community outside of a prison setting.[131] If a prisoner has demonstrated a commitment to a positive, structured activity, the parole board should hear such evidence. If the prisoner has been engaged in some form of education or has demonstrated proficiency in a work-release program while at prison, hearing comments from the prisoner's educators or employers would make good sense. Similarly, so too would hearing from a chaplain that a prisoner has meaningfully participated in

130. *See, e.g.*, Warner v. Orange Cty. Dep't of Prob., 115 F.3d 1068 (2d Cir. 1996).
131. *See, e.g.*, Benda et al., *supra* note 20, at 541, 547.

a religious arena. When considering the parolee's likelihood to reoffend, these structural- and community-based aspects of religion are most critical for consideration, as opposed to philosophical- or tenet-based aspects of religious participation.

Of course, such lines can be hard to differentiate. While a potential parolee's character might be easily separated from his or her religious views in a work setting, where does evaluation of a participant's character split off from religious underpinnings observed in a religious setting? Despite this difficulty, a chaplain's role in providing information to a parole board should generally be limited to secular attributes. For example, attributes such as "optimistic about the future," "seeking forgiveness," "works well with others," and "attends services regularly," among others, would be appropriate commentary for a parole board to hear. However, more religiously-focused phrasing such as "devoted to God" and other similar phrases may violate the Establishment Clause. The tension, alluded to earlier,[132] between *Remmers* and *Theriault* helps illustrate this difficulty in distinguishing between religious and secular components of religious involvement. Whereas on the one hand, the *Remmers* district court held that reports sent by chaplains did not violate the Establishment Clause unless a particular religion was endorsed, the *Theriault* district court held, on the other hand, that allowing chaplains to write these reports was coercive and punished individuals who did not follow the chaplain's religion. While the latter argument seems to be that any sort of religious reporting to the parole board violates the Establishment Clause, measures of how inmates spend time in structured and community-based environments can be important to take into account, especially when secular alternatives that promote similar norms exist and can be considered in a parole evaluation. The former court recognizes the propriety of these characteristics, while curtailing more religiously focused reports. The court in *Granguillhome* also suggested that parole boards should be able to hear about such information, reasoning that when parole boards consider a variety of factors that concern recidivism, they may not violate the Establishment Clause.

Extending this reasoning, very limited questioning by the parole board into the religious commitment of potential parolees

132. *See supra* Part IV.A.2.

may be acceptable, so long as the questioning is limited to commitment to religious practice, rather than about the religious practice itself. In fact, inquiries into attendance, for example, may be good gauges for religious- and/or community-based follow-up outside of prison; indeed, it may violate the Establishment Clause to consider other activities prisoners participate in that lend themselves toward lower rates of recidivism, but *not* to consider religious activities (thereby, favoring secular activities over comparable religious ones). For example, it would be hard to argue that religious-based group therapy could not be considered by the parole board when secular group therapy could be, or that daily attendance at woodworking could be considered but not daily attendance at religious services.

However, this Note suggests that parole boards should refrain from inquiring into the specific religious practices of the individual. That is, the board should not inquire about the potential deity worshipped or specific customs of the religion. Such inquiries provide stronger evidence that the parole board would look positively on religious activity it condones and perhaps more negatively on religious activity it does not. The court in *Granguillhome* alluded to this notion by calling inquiry into the inmate's religion there "troubling."[133] As the district court in *Remmers* said, "allowing . . . chaplains to submit oral or written reports or letters to the Diagnostic Committee does not violate the First Amendment unless it is established that a particular religion is fostered thereby."[134] While the district court in *Theriault* and at least one scholar who agreed with its reasoning suggest that the provision of any chaplain reports on an inmate's religious activities may violate the Establishment Clause, this Note posits that limited reporting on such topics may not arouse Establishment Clause concerns.[135] This rationale suggests the two questions on the parole software, discussed earlier, are proper: "[#77] I attend religious activities regularly[; and #78] I have found a religion or

133. Granguillhome v. Utah Bd. of Pardons, No. 204-cv-260-TC, 2006 WL 3672901, at *7–8 (D. Utah Dec. 8, 2006).

134. Remmers v. Brewer, 361 F. Supp. 537, 543 (S.D. Iowa 1973), *aff'd*, 494 F.2d 1277 (8th Cir. 1974).

135. Theriault v. Carlson, 339 F. Supp. 375 (N.D. Ga. 1972), *vacated and remanded*, 495 F.2d 390 (5th Cir. 1974); *see* Barbara B. Knight, *Religion in Prison: Balancing the Free Exercise, No Establishment, and Equal Protection Clauses*, 26 J. CHURCH & ST. 437, 447–48 (1984).

spiritual path that I truly believe in."[136] These questions are limited in number and in scope, and they focus on "Life Goals/Idleness" as part of a broader category that includes both secular and religious interpretations of that objective.[137]

B. SERVING ON PAROLE BOARDS

The area of most intense disagreement with current jurisprudence stems from chaplains sitting on parole boards. While it is difficult to know the number of chaplains who take on this additional role, the issues posed by this relationship are of serious concern, even assuming there are only a few chaplains who sit on parole boards. Besides *Remmers v. Brewer*, where chaplains served as part of a diagnostic panel that interviewed potential parolees,[138] a few other examples suggest that prison chaplains have served and continue to serve on parole boards. For a historical illustration, from 1909 to 1915, North Dakota designated one spot on the Board of Experts, which oversaw parole cases, specifically for a prison chaplain.[139] Much more recent examples include a Kentucky Parole Board member who worked as a chaplain,[140] a thirty-five-year prison chaplain appointed to the Virgin Islands parole board in 2013,[141] and a chaplain currently sitting on the Texas Board of Criminal Justice.[142]

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136. *See* LANSING, *supra* note 26, at 28.

137. *Id.*

138. Remmers v. Brewer, 361 F. Supp. 537, 539 (S.D. Iowa 1973), *aff'd*, 494 F.2d 1277 (8th Cir. 1974).

139. *Parole and Probation*, N.D. STATE HISTORICAL SOC'Y, http://www.history.nd.gov/archives/stateagencies/paroleprobation.html [https://perma.cc/P2P8-26UV] (last visited Mar. 6, 2017).

140. KY. PAROLE BD., BIENNIAL REPORT 1999–2001 6 (2001), http://www.e-archives.ky.gov/Pubs/justice/parolebd_biennialrpt2001.pdf [https://perma.cc/9Q2Z-DPWM]. The report is unclear as to whether the individual continued in such a capacity after joining the parole board. To be clear, this Note only argues against allowing prison chaplains to serve on parole boards for prisons whose populations they simultaneously provide religious guidance to.

141. Bill Kossler, *Senate Overrides Veto to Allow Some Retirees to Double Dip*, V.I. SOURCE, June 29, 2013, http://visourcearchives.com/content/2013/06/29/senate-overrides-veto-allow-some-retirees-double-dip/ [https://perma.cc/3GM9-SAMV]. Here, too, the report is unclear whether the parole board member continued working as a prison chaplain.

142. *Texas Board of Criminal Justice*, TEX. DEP'T OF CRIMINAL JUSTICE, http://www.tdcj.state.tx.us/tbcj/ [https://perma.cc/LS3E-KVT5] (last visited Mar. 6, 2017). While the individual on the parole board is a volunteer chaplain for a Texas city's parole office, this role does not necessitate the chaplain's service on a parole board (as just so happens to be the case here). Rather, "parole chaplains" in Texas "perform routine ministerial clergy work, and assist the offenders, their families and parole division staff. Their

Applying the three-part test adopted in *Kerr*, the answer to the first question — whether the state has acted — is yes. The state has allowed and often appointed the chaplain to sit on the parole board. The second question about whether such action amounts to coercion is difficult, but applying Professor Greenawalt's framework for justifying the chaplaincy generally, as well as his questions about potential chaplain overreach,[143] is helpful. In particular, a chaplain's involvement on a parole board seems coercive because there is "more active promotion of religion than is justified," largely because of the "provision of chaplains in settings where they are unnecessary" and because of "a tighter connection between the [prison] and chaplaincy than is warranted."[144] That is, the placement of a chaplain on a parole board strains the justifications for a prison chaplain and is "unnecessary," since presumably there are many qualified individuals, besides the prison chaplain, who could serve on the board. While limited interaction by the chaplain with the parole board could be warranted in order *not* to violate the Establishment Clause, it strains credulity to believe that this means parole boards *must* have sitting chaplains. The chaplain's primary role is to provide religious guidance and counseling to those who seek it, to help administer religious services, and similar functions. By giving the chaplaincy power beyond its intended purpose, which happens when the chaplain acts as a gatekeeper for potential parolees, the chaplain's presence may suggest to prisoners that religious involvement is not just helpful in obtaining parole but almost necessary; this implication amounts to a "more active promotion of religion than is justified." As the Ninth Circuit framed the issue of requiring parolees to attend an Alcoholics Anonymous/Narcotics Anonymous program which contained religious elements, "[t]he Hobson's choice offered [by the parole officer to the parolee] — to be imprisoned or to renounce his own religious beliefs — offends the core of Establishment Clause jurisprudence."[145]

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primary role is resource networking with community organizations to develop community-based resources, pastoral counseling, crisis intervention support, and faith-based education programs." Tom Mechler, *TDCJ Chaplains Impact the Agency's Mission*, 20 CRIM. JUST. CONNECTIONS 1, 1 (2013), https://www.tdcj.state.tx.us/connections/JanFeb2013/images/JanFeb2013_bulletin.pdf [https://perma.cc/YR8G-KGJB].

143. *See supra* notes 54–59 and accompanying text.

144. GREENAWALT, *supra* note 54, at 208.

145. Inouye v. Kemna, 504 F.3d 705, 714 (9th Cir. 2007) (footnote omitted).

Although the district court in *Remmers* determined that the involvement of the two chaplains on the diagnostic committee that reports to the parole board was "neither direct nor substantial" since they comprised only two of the seven parole board members, who conducted hearings in groups of three, the risk of pressuring prisoners into following religious practices nonetheless seems high.[146] Bizarrely, the Eighth Circuit, in its affirmation, stressed that chaplain-sponsored letters are a "sensitive area" that necessitates "[g]reat care . . . to avoid even the appearance of reliance on 'religious reports' as determinative of one's status for parole eligibility," though it scarcely gave any similar admonition to chaplains acting in roles that directly precede the parole board.[147] The court even emphasized in a footnote that often a counselor — as opposed to a chaplain — compiled the information that went to a member of the diagnostic committee, without truly acknowledging that chaplains comprised a substantial portion of the diagnostic committee itself.[148]

Regardless, since the development of coercion jurisprudence, including *Lee*,[149] chaplain involvement on parole boards may itself violate the Establishment Clause because of the message it sends to prisoners. In *Lee*, the Supreme Court found that a rabbi's roughly two-minute speech to a graduating public high school class included religious language and thus violated the Establishment Clause.[150] In the parole context, the chaplain similarly bears "the imprint of the State" because of his or her role working for the prison and likewise puts religious objectors in a difficult position.[151] Of course, just generally being near someone of another religion is not enough to coerce an individual, but arguably being evaluated for parole by the State's representative of religion in prison places significant pressure on that individual. Fur-

146. Remmers v. Brewer, 361 F. Supp. 537, 543 (S.D. Iowa 1973), *aff'd*, 494 F.2d 1277 (8th Cir. 1974).

147. Remmers v. Brewer, 494 F.2d 1277, 1278 (8th Cir. 1974).

148. *Id.* at 1278 n.2.

149. *See* Lee v. Weisman, 505 U.S. 577 (1992). This Note recognizes that many frameworks have been used to evaluate the constitutionality of chaplains but chooses one to demonstrate potential issues that may arise. *See* Ira C. Lupu & Robert W. Tuttle, *Instruments of Accommodation: The Military Chaplaincy and the Constitution*, 110 W. VA. L. REV. 89, 92 (2007) (recognizing courts and scholars tend to use different paradigms to evaluate the constitutionality of chaplains, including Establishment Clause history, public funding of religion, and governmental display of religious messages).

150. *See Lee*, 505 U.S. 577.

151. *Id.* at 590.

ther, unlike Judge Posner's decision in *McCallum*, where the parolee had options between religious and secular halfway houses, the choice of which did not affect parole (since the prisoner was already on parole), here the prisoner has no choice to pick the members of his or her parole board, who ultimately decide whether he or she receives parole. Thus, the answer to the third *Kerr* question — whether such coercion was secular or religious — is clearly religious, due to the chaplain's nature as a religious employee at the prison.

In sum, the role of the chaplain on a parole board strains not only freedom of religion and freedom from religion, but also freedom itself. The defense against Establishment Clause arguments for chaplains' presence in prison is often that chaplains help aid prisoners in the free exercise of their religions. But when a chaplain is on a parole board, it can actually hinder the free exercise the chaplain was instituted to enable. When those who are designed to administer religion in prison are also those who hold the keys to leaving it, the coercive pressure placed on inmates is too large to withstand constitutional scrutiny.

1. *Application to Non-Chaplain Prison Workers or Parole Board Members*

This Note's suggestion that allowing chaplains to serve on a parole board violates the Establishment Clause is limited only when such chaplains work at prisons whose inmates could appear before such a board. This suggestion does not encompass parole board members who are merely religious themselves, or even priests, ministers, rabbis or other religious officials who do not work at prisons but who serve on parole boards. It also would not encompass work done by such religious officials who work at the prison on whose board they serve in other, non-religious capacities. The conflict occurs specifically when those whose role is to provide spiritual and religious guidance to inmates are also those who determine an inmate's parole status on parole boards.

The reason for this differentiation may not appear obvious at first; a few examples help illustrate the point. Assume, for example, that a correctional officer in charge of allocating job assignments to inmates within the prison is an observant Muslim. Perhaps inmates might feel some pressure to convert to Islam to gain favor with the officer. While evidence of religious favoritism

would be troubling, simply having a Muslim correctional officer in charge of job assignments would not bear a coercive weight violating an inmate's First Amendment rights. Further, disallowing a religious individual from serving as a correctional officer likely would violate his or her own rights. To extend the analogy to an extreme, if one could bring Establishment Clause claims in that situation, criminal defendants could raise Establishment Clause claims for having judges preside over their hearings who share different or stronger religious beliefs than themselves. Such claims would twist the Establishment Clause to an absurdity. Being surrounded by individuals with different faiths and different types of worship is part of being an American citizen. These sorts of claims would fail the *Lemon* test and the *Kerr* test, because simply being a person of faith is not intrinsically coercive.

Likewise, with respect to a parole hearing, simply being religious or a religious minister outside the prison is not enough to invoke the Establishment Clause. Assume a devout Catholic, for example, sits on the parole board at his local prison. While inmates may assume that the religious parole board member would prefer to grant parole to prisoners who are religious over those who are not, or that such a member would prefer to grant parole to Catholic inmates over inmates subscribing to different faiths, such assumptions — without more — cannot amount to an Establishment Clause violation. *Granguillhome* illustrates that point in its holding that individualized parole determinations without concrete evidence of religious favoritism are not enough to constitute Establishment Clause violations.[152] The main difference between the prison chaplain and other religious individuals is that the religious component of the prison chaplaincy is inherently stronger from an inmate's perspective. The chaplain is the symbol of religion in prison. A prisoner's likelihood of knowing the religiosity of any given parole board member is low, but presumably all inmates know that the chaplain's function is intrinsically religious. Further, an inmate is much more likely to know the particular religious affiliation of the chaplain than of a parole board member, and the inmate's opportunity to try to curry favor is less available than it is with a chaplain with whom he or she can interact frequently. Finally, and relatedly, the chaplain's

152. Granguillhome v. Utah Board of Pardons, No. 204-cv-260-TC, 2006 WL 3672901, at *7 (D. Utah Dec. 8, 2006).

ability to influence and interact with prisoners is much greater than it is for other parole board members.

2. *The Free Exercise Rights of the Chaplain*

One potential counterargument is that restricting a chaplain's ability to serve on a parole board may violate the chaplain's free exercise right. This reasoning, however, is flawed. Scholars, for instance, have suggested that limitations on the actions of chaplains in certain contexts may be constitutionally required when chaplains exceed the bounds of their purpose.[153] One professor, Steven Green, has discussed a related issue in the context of the military: whether military chaplains "possess any personal free exercise and free speech interests to engage in religious activity that conflicts with the wishes of the military."[154] He explains that the justification for the chaplaincy is to help individuals in their own free exercise of religion.[155] He notes that, compared with servicemembers:

> There is no comparable burden on the religious activity of chaplains that the government should be required to lift, unless one argues that chaplains experience the same burdens on religion that are imposed on servicemembers generally, but such logic becomes circular and self-fulfilling: by providing a religiously pluralistic chaplaincy system, the military has burdened the religious needs of chaplains who exist to provide a pluralistic religious accommodation.[156]

He also recognizes that the chaplain acts as a government agent, whereas servicemembers act in their individual capacities.[157] Thus, while a chaplain's actions or statements can be imputed to

153. *See, e.g.*, Lupu & Tuttle, *supra* note 149, at 164 ("Pastoral care by military chaplains is justified as a religious accommodation for the needs of service members, but the administration of that practice must be responsive to those needs — including needs borne of their particular vulnerability in the very settings that call for the existence of the chaplaincy. At the very least, the military should prohibit pro-active, chaplain-initiated religious persuasion by chaplains in any context in which service members might be regarded as both vulnerable and deprived of adequate choice of religious confidant [to be 'constitutionally defensible'].").

154. Steven K. Green, *Reconciling the Irreconcilable: Military Chaplains and the First Amendment*, 110 W. VA. L. REV. 167, 182 (2007).

155. *See id.*

156. *Id.*

157. *Id.*

the government in some respect, a servicemember's actions or statements cannot.

Professor Green goes on, taking into account that chaplains are hybrid government employees, accountable both to their religions and to their superiors:

> When performing official ceremonial functions the chaplain is acting in his official duties as a government agent and may be required to tote [sic] the official line. Only when the chaplain acts in the military-created free religious expression forums does he retain the freedom to preach "war is wrong" or "pluralism is bad."[158]

Professor Green's analysis easily lends itself to the prison chaplain context. Under his logic, prison chaplains retain free exercise rights when they act in a more overtly religious setting that lends itself to expression — when speaking at a sermon, reciting a prayer, or providing confidential counseling, for example. However, when they act in other capacities, outside of those forums, prison chaplains lose their claim to a free exercise interest in their actions. Thus, an Establishment Clause prohibition of prison chaplains serving on parole boards could — and would likely — survive a chaplain's free exercise claim.

VI. CONCLUSION

The role of religion in parole decisions is complex. Not considering factors of religious participation in a parole hearing may violate the Establishment Clause, but so too may inclusion of certain religious factors. Prison chaplains' involvement straddles that same line. This Note suggests that while parole boards taking into account religion and religiosity in making parole decisions — including letters of support from chaplains — does not inherently violate the Establishment Clause, allowing chaplains to sit on parole boards may suggest unlawful religious coercion due to positions of power occupied by such individuals in both the prison and on the board.

158. *Id.* at 183, 185–86.