

PRISON RELIGION: FAITH-BASED REFORM AND THE CONSTITUTION. By Winnifred Fallers Sullivan. Princeton University Press 2009. Pp. x, 305. \$35.00. ISBN: 0-691-13359-X.

Winnifred Fallers Sullivan believes the religion clauses of the U.S. Constitution are incoherent. In her previous book, *The Impossibility of Religious Freedom*,¹ she “considered the impossibility of isolating religion for the purposes of protecting its free exercise.” (8) Now, in *Prison Religion*, she does the same for the Establishment Clause, arguing that “the privileging of religion in an egalitarian context of radical diversity and deregulation in the religious field, one in which religious authority has shifted to the individual, leads to discrimination and legal incoherence.” (9) Or: “The individualization and naturalization of religion—the recognition by the courts, one might say, of religious discipline as a form of the modern secular—may make disestablishment anachronistic as a legal project.” (181) While, she says, establishment doctrine is well suited for combating the inroads of institutionalized religion, it cannot combat *individualized* religion “without violating personal integrity, an integrity acknowledged in the right to privacy and . . . freedom of speech and of association.” (181)

Her vehicle for showing this incoherence is the constitutional challenge to the Iowa Department of Corrections’ contract with the InnerChange Freedom Initiative (IFI) program, a voluntary, “Christ-centered” (26) program run by Prison Fellowship Ministries (PFM) and operating from 1999 to 2008. The book culminates in a discussion of federal district judge Robert W. Platt’s 2006 opinion in *Americans United for Separation of Church and State v. Prison Fellowship Ministries, Inc.*, and its partial affirmance on appeal in 2007.²

Prison Religion begins by describing the history and workings of IFI. The program, nicknamed “The God Pod,” provided “an enveloping environment exclusively with other IFI prisoners as they received treatment, counseling, post-release mentoring, and other services as a total package.” (24)

1. WINNIFRED FALLERS SULLIVAN, *THE IMPOSSIBILITY OF RELIGIOUS FREEDOM* (Princeton Univ. Press 2005).

2. *Am. United for Separation of Church & State v. Prison Fellowship Ministries, Inc.*, 432 F. Supp. 2d 862 (S.D. Iowa 2006), *aff’d in part, rev’d in part*, 509 F.3d 406 (8th Cir. 2007).

The book contextualizes IFI in three ways. First, Sullivan places IFI's program in the context of U.S. evangelical Christianity, describing IFI's practices as the product of two Protestant styles: "an often dualistic and dogmatic neo-Calvinist revival" and "a more loosely textured pietist and pragmatic American lay evangelism as old as the country." (64) Sullivan tells the history of PFM and the recent evangelical movement; of particular interest is the longstanding tension among Christians between seeing themselves, on the one hand, "as small communities of believers living exemplary lives apart from the world," and, on the other hand, as "insiders actively engaged in, and inevitably compromised by, the wider culture." (81) This tension is mirrored in PFM's expansion from its earlier, small-scale outreach and ministry programs to its later creation of a holistic, Christian prison experience "substantially funded and assisted by government" and aspiring "to work within, and to discipline—even to replace—the entire prison culture." (81)

Second, Sullivan places IFI in the context of the history of American penology. She discusses the history of American penal policy, arguing that the "modernist" emphasis on rehabilitation and treatment has yielded to a "premodern" retributivism and a "late modern capitalist model of managerialism that normalizes crime and relies on rational choice theory." (97-98) According to Sullivan, this evolution parallels the evolution of American religion, from "a liberal 'modernist' religion" to a religion that is "late-modern (consumerist and managerial) and premodern (pietist, moralistic, expressive, and superstitious), and possibly postmodern." (101) IFI's program, Sullivan argues, is "a curious hybrid," merging—like early 19th-century religiously inspired penal projects—a crime-as-sin theology with a modernist "social psychological theory" that promotes "treatment." (106)

Third, Sullivan places the IFI program in the context of Establishment Clause doctrine. She discusses the initial resolution of the case, in which Judge Pratt found that Iowa's contract with IFI had the impermissible "primary effect" of advancing religion because IFI was "pervasively sectarian." Pratt held that the required religious activities made the program "coercive," and that prisoners had "no real choice of treatment programs because of the significant incentives to join the IFI program and the virtual absence of alternative programs." (144) While Judge Pratt's remedy—restitution of all funds that Iowa had paid to IFI—was reversed on appeal, the constitutional holding was largely affirmed.

Sullivan suggests that disestablishment, as understood in First Amendment doctrine, may be "anachronistic as a legal project," because

“separation” of religion from government is best suited for “premodern, hierarchical, and institutionalized religion,” not “individual religion.” (181) The trend in First Amendment jurisprudence is “toward treating religion as not different”; this trend is exemplified by the *Employment Division v. Smith*³ decision in the Free Exercise context and the “equal access to government places and money” principle in the Establishment Clause context. But Sullivan argues that “[i]f religion is not institutionally distinct, then the religion clauses cannot be made coherent.” (224)

Sullivan concludes by suggesting a third option for government policy toward religion, beyond “affirmative government support for all ‘bona fide’ religion” (IFI’s “religious secularism”) and the “‘wall of separation’ between church and state” (“irreligious secularism”). This option—“areligious secularism” (in the terms of Clark Gilpin)—“acknowledges the impossibility of both separation and accommodation in their traditional forms” (228) and recognizes “the universality of ‘spiritual’ practices for Americans.” (232) As an example, Sullivan points to *Freedom from Religion Foundation v. Nicholson*,⁴ a 2007 district court case that upheld the constitutionality of the Department of Veteran Affairs’ “clinical chaplaincy program,” in which religious services are (with the patient’s consent) integrated into the care of every patient. The opinion seems to approve of

government fostering of an areligious space for religion that acknowledges the eclectic and adaptive nature of contemporary religion where authority is vested in the individual. In legal terms, it is a way for law to deal with a religion that is no longer about churches but about persons who are less and less likely to be firmly embedded in, and subject to the authority of, religious communities. (233)

Prison Religion is, in the end, somewhat disappointing, perhaps because the IFI case is ill-suited to proving Sullivan’s grand thesis. The book provides a fascinating look into faith-based prisons, their context, how their management and staff conceptualize their mission, and how inmates receive the experience—and, through direct quotation from the district court proceedings, Sullivan largely lets the participants tell the story in their own terms. But whatever the merits of her thesis about the incoherence of the religion clauses, the IFI story offers scant support for it.

3. 494 U.S. 872 (1990).

4. 469 F.Supp.2d 609 (W.D. Wis. 2007), *vacated & remanded on other grounds*, 536 F.3d 730 (7th Cir. 2008).

Iowa's contract with IFI was deemed unconstitutional for a fairly simple reason: because, depending on the funding mechanism at the time, Iowa either *directly* funded people who talked to prisoners about God, Jesus, and the Bible, or *indirectly* funneled money to such people without guaranteeing "genuine and independent private choice" among a broad range of providers. Perhaps the doctrine is "anachronistic" or not "coherent," or "violat[es] personal integrity," but Sullivan does not adequately explain how.

Relatedly, while Sullivan shows how the PFM/IFI theology (66-80) fits with evangelical Christianity (80-88), it is unclear how this relates to the lawsuit. As an expert witness, Sullivan was asked to testify that IFI is "pervasively sectarian" (143), and while she had reservations about that term, she did testify that PFM/IFI is "evangelical." (148-49) But on appeal, Sullivan's testimony was held irrelevant and its admission an abuse of discretion—though the error was harmless because one could proceed identically based on PFM/IFI's "sincere statements of their beliefs." (218) (Sullivan calls this evidentiary ruling "[s]trange[]" since the panel "substantially confirmed Judge Pratt's findings that IFI was coercive and discriminatory" (217), but this ruling was surely correct as a legal matter.) The resolution would have been identical regardless of PFM's religious label. Thus, the theological material sits uneasily with the focus on the legal proceedings.

Finally, the IFI story raises an intriguing possibility, though it goes beyond Sullivan's project here. Running through Sullivan's book is the defendants' attempt to insulate themselves from constitutional challenge by making the funding mechanism resemble the school-voucher plan approved in *Zelman v. Simmons-Harris*.⁵ (24) Indeed, on appeal, defendants argued that voluntary enrollment plus per-diem reimbursement was enough to make IFI voucher-like and therefore valid. (209) But this argument was a loser: *Zelman* did not apply because government money was not directed to IFI as a result of the prisoners' "genuine and independent private choice." (217)

We may ask, then, what is next for faith-based prisons. If similar reasoning prevails in other lawsuits—as it probably will—it is hard to see a way forward. But perhaps prison officials have not sufficiently internalized *Zelman*. Surprisingly, no one has seriously raised, even as a thought experiment, the possibility of "prison vouchers," under which convicted criminals would be issued a voucher that they could redeem at the public or private prison of their choice. The merits of such a system

5. 536 U.S. 639 (2002).

are too complicated to discuss here,⁶ but at the very least, a voucher system holds the promise of fully bringing prisons within the *Zelman* framework. Moreover, as with schools, a voucher system would arguably allow for integration of religion to a much greater extent—indeed, to an extent that would be unthinkable under the current direct-contracting model. For all of Iowa prison officials’ half-hearted emulation of school vouchers, perhaps only a true voucher system, embodying genuine inmate choice, would allow faith-based prisons to survive—and maybe even flourish.

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6. Alexander Volokh, Prison Vouchers, unpublished draft, *available at* http://works.bepress.com/alexander_volokh/43/ (last visited Jan. 21, 2010).

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