

**Privilege Through Prayer:  
Examining Bible-Based Prison Rehabilitation  
Programs Under the Establishment Clause**

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## ABSTRACT

In early June of 2006, an Iowa federal judge found a publicly-funded prison ministry to be in violation of the Establishment Clause and ordered it stopped. The program in question, the InnerChange Freedom Initiative, conceived and maintained by Prison Fellowship Ministries, utilized an overtly Christian model to rehabilitate inmates through spiritual and moral regeneration. In the eyes of the court, the failure of the state of Iowa to provide a reasonable secular alternative had the primary effect of advancing religion and fostered excessive governmental entanglement under a traditional *Lemon* analysis. The fallout from *Americans United for a Separation of Church and State v. Prison Fellowship Ministries*, 432 F.Supp.2d 862, could not only impact future decisions of prison administrators but potentially limit the application of the Bush Administration's controversial Faith-Based Initiative.

Equally important in the court's decision was the lack of conclusive evidence demonstrating a positive effect upon recidivism rates of InnerChange inmates compared with the rates of inmates within the general Iowa prison population. This comment addresses the seemingly endless problem of inmate recidivism in light of both studies evaluating the effectiveness of the InnerChange program, as well as more general solutions proposed under the Faith-Based Initiative. While the court in *Americans United* found the actions of the state of Iowa constituted impermissible governmental coercion, this comment concludes that the use of spirituality to enhance the success of voluntary social service programs, including within the prison context, is not something that mandates governmental concern. Furthermore, the use of religious social service programs such as Alcoholics Anonymous, which is outlined in the final section of this comment, have been shown to provide important secular services, even though based on a religious model.

## I. INTRODUCTION

In early June of 2006, the Federal Bureau of Prisons (FBP) announced that it would suspend plans for Bible-based treatment facilities in six prisons.<sup>1</sup> The announcement came less than a week after a federal judge in Iowa found a prison ministry program to be in violation of the Establishment Clause of the United States Constitution.<sup>2</sup> The decision opens up further questions of constitutionality regarding President Bush's attempt to mix religion and social services with his "Faith-based Initiative." The legislation was enacted to "level the playing field" in favor of religious social service providers amidst allegations of discrimination within the federal grant system.<sup>3</sup>

One of the areas of reform targeted by the Faith-Based Initiative was the American correctional system.<sup>4</sup> At Iowa's Newton Correctional Facility, inmates could apply for enrollment into the facility's InnerChange program.<sup>5</sup> The program, directed and conceived by Evangelical Christian organization Prison Fellowship Ministries, offered participating inmates the opportunity to receive drug and alcohol treatment, adult education and individualized counseling.<sup>6</sup> Admittance into the program, however, was conditioned upon the inmates' agreement to include the Bible in the treatment process.<sup>7</sup> The suit brought forth on behalf of

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<sup>1</sup> Eric Niller, *Bible Based Treatment Program Shelved*, NPR, June 7, 2006, <http://www.npr.org/templates/story/story.php?storyId=5456293>.

<sup>2</sup> See *Americans United For Separation of Church and State v. Prison Fellowship Ministries*, 432 F.Supp.2d 862 (S.D. Iowa 2006).

<sup>3</sup> The White House, *Unlevel Playing Field: Barriers to Participation by Faith-Based and Community Organizations in Federal Social Service Programs*, <http://www.whitehouse.gov/news/releases/2001/08/unlevelfield.html> (last visited Nov. 11, 2006).

<sup>4</sup> The White House, *President's Remarks at Faith-Based and Community Initiatives Conference*, <http://www.whitehouse.gov/news/releases/2004/03/20040303-13.html> (last visited Nov. 11, 2006). "In my State of the Union, I talked about 600,000 inmates that will be released from prison. I really think we need to think differently about how we help save lives of people in prison and coming out of prison...it seems to me that a wise approach to prisoner reentry is the faith-based program, where the prisoner is able to be welcomed by a person of faith as part of the probation experience or parole experience."

<sup>5</sup> *Americans United*, 432 F.Supp.2d at 875.

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

certain prisoners and their families by the organization, Americans United For Separation of Church and State, alleged that the program's motives were not only to provide treatment to prisoners but to indoctrinate them into Christianity.<sup>8</sup> In light of the public funding which the program received and discrimination demonstrated against inmates of other faiths, Iowa federal judge, Robert Pratt, ruled that the program promoted religion and ordered it stopped.<sup>9</sup>

The failure of prison facilities to successfully administer rehabilitative services has been a well documented problem and is partially blamed for the high recidivism rates that plague the United States prison system.<sup>10</sup> In an era where many states are doing away with treatment programs due to budgetary constraints, the defendants argued that non-profit religious organizations can provide treatment without the bureaucratic red tape present in secular organizations.<sup>11</sup> By refusing to allow programs that use religion as a treatment device, States impermissibly discriminate against such organizations.<sup>12</sup>

The presence of religion within social welfare programs has served as a lightning rod for controversy since President Bush first unveiled the Faith-Based Initiative at the beginning of his first term.<sup>13</sup> Part II of this note will discuss the origins of the Faith-Based Initiative and how it has been applied during President Bush's presidency. Part III will outline the InnerChange Program and its parent organization, Prison Fellowship Ministries. Part IV will set forth the tests courts have applied when evaluating challenges brought forth under the Establishment Clause. Part V and VI will discuss the background and reasoning behind the decision in *Americans*

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<sup>8</sup> *Id.* at 865.

<sup>9</sup> *Id.* at 920.

<sup>10</sup> Prison Fellowship, *IFI and the Ruling*, <http://www.ifiprison.org/generic.asp?ID=5588> (last visited Nov. 11, 2006).

<sup>11</sup> *Americans United*, 432 F.Supp.2d at 881.

<sup>12</sup> *Id.*

<sup>13</sup> Scott M. Michelman, *Recent Development: Faith-Based Initiatives*, 39 HARV. J. ON LEGIS. 475, 479 (2002). "Both liberals and conservatives, including leaders of the religious right, have expressed concern that faith-based initiatives would violate the Establishment Clause by providing impermissible government support for, or engendering excessive government entanglement in, religious organizations."

*United For Separation of Church and State v. Prison Fellowship Ministries*, 432 F. Supp. 2d 862 (S.D. Iowa 2006). Finally, Part VII will conclude that the decision reached by the court was correct and analyze the validity of the argument posed by the defendants during trial, namely, the InnerChange program's positive effect upon recidivism, and also discuss the application of religiously-based treatment programs in our society.

## II. RELIGION'S ROLE IN SOCIETAL IMPROVEMENT: PRESIDENT BUSH'S FAITH-BASED INITIATIVE

On January 29, 2001, nine days after assuming the U.S. presidency, George W. Bush signed two Executive Orders establishing the Faith-Based and Community Initiative (FBCI) and the White House Office of Faith-Based and Community Initiatives (OFBCI).<sup>14</sup> The Initiative was hailed as a triumph by religious leaders who had for years sought to unite religious organizations and governmental agencies with the goal of solving societal problems.<sup>15</sup>

The idea of increased collaboration between the government and faith-based providers first gained national attention during President Bush's 2001 presidential campaign.<sup>16</sup> While the concept of a social service system operated by religious charities instead of government bureaucracies originally gained notoriety through the works of journalist Marvin Olasky, the legislative roots of the Faith-Based Initiative can be traced to a welfare reform concept proposed by Senator John Ashcroft in 1996.<sup>17</sup> The legislation, referred to as "Charitable Choice," allowed

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<sup>14</sup> Ira C. Lupu and Robert W. Tuttle, *The Faith Based Initiative and the Constitution*, 55 DEPAUL L. REV. 1, 3 (2005). The Executive Order establishing the FBCI and the OFBCI was 13,198.

<sup>15</sup> The White House, *White House Office Faith-Based and Community Initiatives*, <http://www.whitehouse.gov/government/fbci/president-initiative.html> (last visited Nov. 11, 2006).

<sup>16</sup> Robert W. Carter, Jr., *Faith-Based Initiatives: Expanding Government Collaboration With Faith-Based Social Service Providers*, 27 SETON HALL LEGIS. J. 305, 307 (2003).

<sup>17</sup> *Id.* See Steven K. Green, "A Legacy of Discrimination?" *The Rhetoric and Reality of the Faith-Based Initiative: A Oregon Case Study*, 84 OR. L. REV. 725, 734 (2005); David Saperstein, *Symposium: Public Values in an Era of Privatization: Public Accountability and Faith-Based Organizations: A Problem Best Avoided*, 116 HARV. L. REV. 1353, 1367 n.45 (2003). Marvin Olasky, a University of Texas journalism professor and President Bush confidant, is considered the architect of the charitable choice concept which gave rise to the current Faith-Based Initiative. Advocating for "compassionate conservatism," Olasky describes the "pernicious influence of government on religious charities" as "supplanting, regulating, [and] corrupting" the social services system. "Repeatedly, the lure

religious organizations providing service under a number of welfare programs to receive disbursement of federal funding on the same level as secular organizations.<sup>18</sup> Under this legislation, religious organization would maintain their identity without fear of government discrimination when seeking federal funding.<sup>19</sup>

Permitting religion into an area, social service, which had been primarily reserved for secular organizations was a focal point of the Bush presidential campaign.<sup>20</sup> The legislation, according to the Bush administration, is necessary to “level the playing-field” in a federal system deemed inhospitable to faith-based organizations.<sup>21</sup> However, it has been met with fierce opposition not only from liberal secularists but conservative religious believers as well.<sup>22</sup> The decision by the court in *Americans United* will have the effect of limiting the applicability of the Faith-Based Initiative in an area where the President felt it may have one of its greatest applications, prison reform.

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of governmental funds has made it hard for organizations to remain dedicated to compassion that is challenging, personal, and spiritual.” Marvin Olasky, *The Corruption of Religious Charities*, in *TO EMPOWER PEOPLE: FROM STATE TO CIVIL SOCIETY* 94, 104 (Peter L. Berger & Richard John Neuhaus eds., 1996).

<sup>18</sup> Sean T. McLaughlin, *More Than Meets the Eye: President Bush’s Faith-Based Imitative*, 33 U. MEM. L. REV. 41, 43 (2002). See also Michelman, *supra* note 13, at 477-478. Instead of funding only organizations that, while religiously-affiliated, provided entirely secular services, the Charitable Choice legislation allowed state and the federal governments to contract with pervasively sectarian organizations, including churches themselves.

<sup>19</sup> *Id.* Under the legislation the government could not regulate religious dogma or internal governance, nor could they force religious organizations to “remove religious art, icons. . . or other symbols.”

<sup>20</sup> Lupu, *supra* note 9, at 8 n.29.

<sup>21</sup> The White House, *Unlevel Playing Field: Barriers to Participation by Faith-Based and Community Organizations in Federal Social Service Programs*, <http://www.whitehouse.gov/news/releases/2001/08/unlevelfield.html> (last visited Nov. 11, 2006). The Faith-Based Initiative builds on religious good works while demanding secular progress. See Carter, *supra* note 11, at 309-310. The term “faith-based organizations” can refer to a variety of organizations and programs, including “local congregations, small non-profit organizations, and neighborhood groups.” Because of their diversity, such organizations are typically placed into one of five categories: faith-saturated, faith-centered, faith-related, faith-background, and faith-secular partnerships. “While such categories do not necessarily determine the mission or effectiveness of these organizations, their organizational character does affect their ability to receive government funding.”

<sup>22</sup> McLaughlin, *supra* note 13, at 42.

### III. HISTORY OF THE INNERCHANGE PROGRAM

The InnerChange program is the brainchild of former Nixon aid and Watergate co-conspirator, Chuck Colson.<sup>23</sup> The program, originally conceived while Colson himself was serving a seven month prison sentence as a result of the Watergate investigation, has become the largest prison ministry in the world, active in 112 countries.<sup>24</sup> Prison Fellowship, together with its subsidiary corporation, InnerChange Freedom Initiative (IFI), operate a religious pre-release program, also under the name of InnerChange Freedom Initiative.<sup>25</sup> Characterized as Evangelical Christian in nature,<sup>26</sup> the mission of Prison Fellowship is to “exhort, equip and assist the Church in its ministry to prisoners, ex-prisoners, victims, and their families, and in its promotion of biblical standards of justice in the criminal justice system.”<sup>27</sup> Under the Prison Fellowship model, all problems in life are a direct result of sin and can be addressed and remedied through a meaningful and continued relationship with God.<sup>28</sup>

The IFI program, according to prison administrators, was brought to Iowa in hopes of providing a low-cost alternative to state-run rehabilitation programs.<sup>29</sup> In addition to providing activities and supervision for the inmates, the program was primarily conceived to address the

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<sup>23</sup> See Adam Cohen, *Charles Colson and the Mission That Began With Watergate*, N.Y. Times, July 25, 2005, at A1; David Plotz, *Charles Colson: How a Watergate Crook Became America's Greatest Christian Conservative*, SLATE, Mar. 10, 2000, <http://www.slate.com/id/77067/>. Colson allegedly sought to hire Teamsters thugs to beat up anti-war demonstrators, and he plotted to raid or firebomb the Brookings Institution.

<sup>24</sup> *Id.* Colson stepped down as head of operations of Prison Fellowship Ministries in 2002. Mark Earley, a former Virginia attorney general, now occupies the position.

<sup>25</sup> *Americans United*, 432 F.Supp.2d at 871.

<sup>26</sup> *Id.* at 872-874. At trial, the court found convincing the testimony of Dr. Winnifred Faller Sullivan who stated that Prison Fellowship is not an organized church, but a para-church organization focused on providing ministry to prisoners and their families. Dr. Sullivan helped the court to understand that those who do not share InnerChange's theological position may face discrimination. For example, Evangelical Christians tend to be anti-sacramental and believe that true conversion is an adult religious experience, beliefs which may conflict even with those of other sects of affirmed Christians.

<sup>27</sup> *Id.* at 871.

<sup>28</sup> *Id.* at 875-876.

<sup>29</sup> *Id.* at 875.

widespread problem of prisoner recidivism rates.<sup>30</sup> The IFI program meshes an Evangelical Christian religious message of its parent organization, Prison Fellowship, with a pre-release correctional model.<sup>31</sup> The voluntary program, classified as “transformational”<sup>32</sup> in nature, provides “an all-encompassing regimen of day and night prayer meetings, classes, and rehabilitation programs for prisoners.”<sup>33</sup>

In addition to the IFI program at the Newton Facility, Prison Fellowship operates religiously-based treatment programs at state prisons in Texas, Minnesota, Kansas, Tennessee, Arkansas, and Missouri.<sup>34</sup> While the idea for a biblically-based prison model originated in South America, all programs operated domestically can be traced to the Carol Vance Unit in Richmond, Texas.<sup>35</sup> Established in April of 1997, the Vance Unit was the first attempt by Prison Fellowship to devote an entire prison wing to InnerChange.<sup>36</sup> Constructed ostensibly to avoid First Amendment violations, unique safeguards such as using taxpayer money only for secular

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<sup>30</sup> For discussion of recidivism, see *infra* §VII(a).

<sup>31</sup> *Americans United*, 432 F.Supp.2d at 875. The complete text states, “This [sic] mission of InnerChange is to create and maintain a prison environment that fosters respect for God’s law and rights of others, and to encourage the spiritual and moral regeneration of prisoners. Therefore, they may develop responsible and productive relationships with their Creator, families and communities.”

<sup>32</sup> *Id.* at 875-877. The majority of treatment programs utilize “therapeutic” treatment models as opposed to the “transformational” method employed by InnerChange. Though the goals of the InnerChange Program and traditional therapeutic models have very much the same methodologies, the goals and philosophy employed are quite different. The therapeutic model seeks to reconcile the relationship of the prisoner to other human beings, while the IFI model, in contrast, seeks to reconcile people through changing their relationship with God.

<sup>33</sup> *Id.* at 876, 893, 894 n.26. While not required to accept Jesus Christ as the Savior, prior to admittance, all inmates must express a desire to change and sign a release agreeing to participate in a program that is overtly Christian in content and delivery. Upon acceptance into the program, each InnerChange inmate is given a copy of the Field Guide, which explains the voluntary nature of the program as well as the rules, guidelines, and doctrinal information of the InnerChange Program. The opening paragraph of the InnerChange Field Guide, entitled “An Overview of IFI” states: “The InnerChange Freedom Initiative is an intensive, voluntary, faith-based program of work and study within a loving community that promotes transformation from the inside out through the miraculous power of God’s love.”

<sup>34</sup> Prison Fellowship, *About IFI*, [http://www.ifiprison.org/site\\_hmpg.asp](http://www.ifiprison.org/site_hmpg.asp) (last visited Nov. 11, 2006).

<sup>35</sup> Patrick B. Cates, *Faith-Based Prisons and the Establishment Clause: The Constitutionality of Employing Religion as an Engine of Correctional Policy*, 41 WILLAMETTE L. REV. 777, 779-780 (2005).

<sup>36</sup> *Id.* at 780.

purposes, like guard salaries and food expenses, were put in place.<sup>37</sup> All religious aspects of the program were funded solely by private donations.<sup>38</sup> Hailed as an affordable cure for recidivism, the approach of the Vance unit drew considerable attention from prison administrators across the country.<sup>39</sup>

#### IV. LEMON LAW? WHERE TO BEGIN WHEN EXAMINING CHALLENGES BROUGHT FORTH UNDER THE ESTABLISHMENT CLAUSE

The First Amendment of the United States Constitution states that “Congress shall make no law respecting an establishment of religion.”<sup>40</sup> Applied to the states through the Fourteenth Amendment, the “Establishment Clause” serves the dual purpose of protecting individual liberty by condemning governmental favoritism of religion and guarding against what has been termed “corrosive secularism.”<sup>41</sup> The Establishment Clause has been interpreted by the Supreme Court to mean “that government may not promote or affiliate itself with any religious doctrine or organization, may not discriminate among persons on the basis of their religious beliefs and practices, may not delegate a governmental power to a religious institution, and may not involve

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<sup>37</sup> Daniel Brook, *When God Goes to Prison*, LEGAL AFFAIRS, May/June 2003, [http://www.legalaffairs.org/issues/May-June-2003/feature\\_brook\\_mayjun03.html](http://www.legalaffairs.org/issues/May-June-2003/feature_brook_mayjun03.html). By the time Vance Unit opened *Williams v. Lara*, 52 S.W. 3d 1171 (Tex. 2000), was working its way through the Texas courts. The American Civil Liberties Union and the American Jewish Congress challenged the constitutionality of an evangelical prison wing in Tarrant County, TX, known as the “God Pod,” managed by the county sheriff. The programming at the God Pod was similar to IFI’s; an all-day schedule of evangelical classes as well as secular education and job training. In 2001, the Texas Supreme Court, overruling a series of lower court decisions, unanimously held the program to be unconstitutional. The court determined the program endorsed a particular Christian view while excluding others, and was an unconstitutional preference of one religion over another. Additionally, the fact that the program was managed by the county sheriff, a government official, it crossed the line into government endorsement of a particular religion.

<sup>38</sup> *Americans United*, 432 F.Supp.2d at 780.

<sup>39</sup> *Id.* Then-Texas Governor George W. Bush proclaimed, “InnerChange is a program that works to change people’s lives by changing their hearts.”

<sup>40</sup> U.S. Const. amend. I.

<sup>41</sup> Lynn S. Branham, *Go Sin No More: The Constitutionality of Governmentally Funded Faith-Based Prison Units*, 37 U. MICH. J. L. REFORM 291, 301 (2004) (citing *School Dist. of Grand Rapids v. Ball*, 473 U.S. 373, 385 (1985)). See also *Abington Sch. Dist. v. Schempp*, 374 U.S. 203, 259 (Brennan, J., concurring). “It is not only the nonbeliever who fears the injection of sectarian doctrines and controversies into the civil polity, but in as high degree it is the devout believer who fears the secularization of a creed which becomes too deeply involved with and dependent upon the government.”

itself too deeply in such an institution's affairs."<sup>42</sup> When analyzing Establishment Clause contests, courts typically apply one of three tests: 1) The Agostini-Lemon Test; 2) The Endorsement Test; or 3) The Coercion Test.<sup>43</sup>

#### A. *The Agostini-Lemon Test*

While the test initially set forth by the Court in *Lemon v. Kurtzman* has been modified to an extent, it has not been overruled and remains the starting point for all Establishment challenges.<sup>44</sup> *Lemon* involved the challenge of statutes in Pennsylvania and Rhode Island which provided state aid for teachers at parochial schools.<sup>45</sup> Though both statutes had a stated secular purpose, providing salary supplements to teachers of secular subjects in nonpublic schools, the fact that the benefited schools embodied the religious mission of the church, was deemed to be excessively entangled with religion and thus, unconstitutional.<sup>46</sup> The test set forth by the Court was threefold: 1) does the state action have a secular legislative purpose; 2) is the state action's principle or primary effect one that neither advances nor inhibits religion; and 3) does the state action not foster an excessive government entanglement with religion?<sup>47</sup>

In *Agostini v. Felton*, a case involving a New York City program which sent public school teachers into parochial schools to provide remedial education to disadvantaged students, the Court formally addressed the overlap between the second and third prongs of the *Lemon*

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<sup>42</sup>*County of Allegheny v. American Civil Liberties Union, Greater Pittsburgh Chapter*, 492 U.S. 573 (1989) (quoting *Lynch v. Donnelly*, 465 U.S. 668, 694 (1984)). "Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa.

<sup>43</sup> Richard R.W. Fields, *Punishment and Crime: Perks for Prisoners who Pray: Using the Coercion Test to Decide Establishment Clause Challenges to Faith-Based Prison Units*, 2005 U. CHI. LEGAL F. 541 (2006).

<sup>44</sup> *Americans United*, 432 F.Supp.2d at 914.

<sup>45</sup> *Lemon v. Kurtzman*, 403 U.S. 602, 609 (1971).

<sup>46</sup> *Id.* at 627.

<sup>47</sup> *Id.* at 612-13 (citing *Board of Education v. Allen*, 392 US 236, 243 (1968)).

test.<sup>48</sup> The Court found that the government aid in question did not unconstitutionally fund religious indoctrination.<sup>49</sup> However, prompted by the potential for burden and expense when making the determination of whether an organization is excessively entangled with religion, the Court chose to simplify the analysis it set forth in *Lemon*.<sup>50</sup> Following *Agostini*, a court must determine “whether the government acted with the purpose of advancing or inhibiting religion” and “whether the aid has the ‘effect’ of advancing or inhibiting religion.”<sup>51</sup> Under the current *Lemon-Agostini* test a publicly funded program does not violate the Establishment Clause if: 1) it has a secular purpose; 2) it does not result in governmental indoctrination; 3) it does not define its participants by reference to religion; and 4) it does not create excessive entanglement.<sup>52</sup>

#### B. *The Endorsement Test*

The second test utilized by courts when evaluating Establishment Clause litigation, first enunciated by Justice O’Connor in her concurring opinion in *Lynch v. Donnelly*, is known as the “Endorsement Test.”<sup>53</sup> The challenge in *Lynch*, revolved around an annual Christmas display in Pawtucket, Rhode Island.<sup>54</sup> In addition to a Santa Claus house, a Christmas tree, and a banner that read “Seasons Greetings,” the display included a crèche, or Nativity scene, which had been part of the display for over 40 years.<sup>55</sup> Plaintiffs claimed that the inclusion of the Nativity scene violated the Establishment Clause of the First Amendment.<sup>56</sup> Reversing the circuit court decision in favor of the plaintiffs, the Court held that the Constitution does not require complete

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<sup>48</sup> *Americans United*, 432 F.Supp.2d at 914-915.

<sup>49</sup> *Cates*, *supra* note 35, at 792.

<sup>50</sup> *Fields*, *supra* note 43, at 555.

<sup>51</sup> *Cates*, *supra* note 35, at 792.

<sup>52</sup> *Id.*

<sup>53</sup> *Lynch v. Donnelly*, 465 U.S. 668 (1984)(O’Connor, J., concurring).

<sup>54</sup> *Id.* at 670.

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

separation of church and state, “it affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any.”<sup>57</sup>

Concurring with the majority, Justice O’Connor attempted to clarify the imbroglio of Establishment Clause litigation by creating a two-fold test she felt better resolved the questions initially addressed by the Court in *Lemon*.<sup>58</sup> She stated that the government can run afoul of the prohibition against adherence to a particular religion in two ways: 1) by becoming excessively entangled with religious institutions; or 2) by endorsing or disapproving of religion.<sup>59</sup> Excessive entanglement with religious organizations may interfere with the independence of an institution or provide benefits not fully shared by nonadherents of the religion.<sup>60</sup> Endorsement, on the other hand, directly infringes the religious rights of citizens by sending a dual message; nonadherents are outsiders, while adherents are insiders, favored within the political community.<sup>61</sup> The crucial assessment is whether a government practice has the effect of communicating a message of government endorsement or disapproval of religion.<sup>62</sup> It is only such practices, whether intentionally or unintentionally, that make religion relevant to status in the political community.<sup>63</sup>

Under the Endorsement Test, each questioned government practice must be judged on a case by case basis upon its own unique circumstances.<sup>64</sup> Pawtucket’s display of the crèche did not communicate a message that the government intended to endorse Christian beliefs.<sup>65</sup> Any

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<sup>57</sup> *Id.* at 673. *See, e.g., Zorach v. Clauson*, 343 U.S. 306, 314, 315 (1952); *Illinois ex rel. McCollum v. Board of Education*, 333 U.S. 203, 211 (1948).

<sup>58</sup> *Id.* at 687-688 (O’Connor, J., concurring).

<sup>59</sup> *Id.*

<sup>60</sup> *Id.* *E.g., Larkin v. Grendel’s Den*, 459 U.S. 116 (1982).

<sup>61</sup> *Id.* *See, generally, Abington*, 374 U.S. 203 (1963).

<sup>62</sup> *Id.* at 692.

<sup>63</sup> *Id.*

<sup>64</sup> *Id.* at 694.

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

governmental practice that purport to celebrate or acknowledge events with religious significance must be subjected to careful judicial scrutiny.<sup>66</sup>

### C. *The Coercion Test*

The third test applied by courts in cases asserting Establishment Clause violations is known as the “Coercion Test.”<sup>67</sup> The test, as its name suggests, “proscribes governmental compulsion to adhere to or disavow certain religious tenets or to engage in or refrain from engaging in certain religious practices.”<sup>68</sup> The Coercion Test is most commonly applied in situations where children may be pressured to engage in a religious exercise, but is not strictly confined to such situations.<sup>69</sup>

The modern coercion test first garnered a majority in *Lee v. Weisman*, a suit commenced in reaction to a “nonsectarian” prayer service performed at a junior high graduation.<sup>70</sup> A middle school principal invited a rabbi to offer prayer services for the presentation, during which time students were required to stand and remain silent.<sup>71</sup> The plaintiffs sought a permanent injunction preventing inclusion of invocations and benedictions in the form of prayer in public school graduation ceremonies.<sup>72</sup> The Court held that, given a dissenter of high school age could reasonably believe that standing or remaining silent signified participation in, or approval of, the group exercise, the requirement constituted an impermissible violation of the Establishment Clause.<sup>73</sup>

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<sup>66</sup> *Id.*

<sup>67</sup> Branham, *supra* note 41, at 302.

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

<sup>69</sup> *Allegheny*, 492 U.S. at 661 (Kennedy, J., concurring in judgment in part and dissenting in part).

<sup>70</sup> *Lee v. Weisman*, 505 U.S. 577 (1992).

<sup>71</sup> *Id.* at 580.

<sup>72</sup> *Id.* at 584.

<sup>73</sup> *Id.* at 593.

The Court dismissed the defendants' argument that, upon learning of the conflict with her religious beliefs, the plaintiff could simply not attend the ceremony.<sup>74</sup> Subtle coercive pressures exists where a party has no real alternative which would have allowed them to avoid the fact or appearance of participation.<sup>75</sup> The Establishment Clause was inspired by "the lesson that in the hands of government what might begin as a tolerant expression of religious views may end in a policy to indoctrinate and coerce."<sup>76</sup> At a minimum, the Constitution guarantees that the government may not coerce anyone to support or participate in religion or its exercise.<sup>77</sup>

#### V. SPREADING THE WORD: INTRODUCTION OF THE INNERCHANGE PROGRAM TO THE IOWA CORRECTIONAL SYSTEM

The central issue before the court in *Americans United for Separation of Church and State v. Prison Fellowship Ministries*, was not whether the InnerChange program at the Newton Facility could help Iowa inmates in the rehabilitation process, but whether the contractual relationship between the state of Iowa Department of Corrections and InnerChange impermissibly advanced religion in violation of the Establishment Clause of the First Amendment.<sup>78</sup> With the plaintiffs' amended complaint<sup>79</sup> requesting both declaratory judgment

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<sup>74</sup> *Id.* at 593-594.

<sup>75</sup> *Id.* In this society, school graduation is one of life's most significant occasions, asserting that nonattendance validates a sectarian exercise in a public venue fails to conform with the basic tenets of the Establishment Clause.

<sup>76</sup> *Id.* at 591-592.

<sup>77</sup> *Id.* at 587. See *County of Allegheny*, 492 U.S. at 591 (quoting *Everson*, 330 U.S. at 15-16).

<sup>78</sup> *Americans United*, 432 F.Supp.2d at 862. The Plaintiffs also brought a state claim under a section of the Iowa Constitution that, in relevant part, mirrors the language found in the Establishment Clause of the Federal Constitution. Iowa CONST. art. 1, § 3. The Plaintiffs' other state claim arose under Article 1, § 4, of the Iowa Constitution which states, "No religious test shall be required as a qualification to any officer, or public trust, and no person shall be deprived of any of this rights, privileges, or capacities, or disqualified from the performance of any of his public or private duties...in consequence of his opinions on the subject of religion." With no indication that Iowa state courts would treat the establishment clauses in the state and federal constitution differently, the court analyzed the state claims concomitantly under federal law.

<sup>79</sup> *Id.* at 862 n.1, 869 n.7. At the initial proceeding, the court granted the defendants' motion for summary judgment for the plaintiffs' lack of standing for failure to present a particularized harm. In the amended complaint, the plaintiff list included Ardene McKeag, Dorothy Redd, and Sandra Sobotka, all contributors to the Iowa State Telephone Fund. In the Iowa Department of Corrections, inmate phone privileges are paid through individual inmate phone accounts. Inmates and those interested in them--family and friends--deposit money into the individual accounts. For each inmate telephone use, funds are withdrawn from these individual accounts to pay for the telephone. The court found that all telephone fund contributors have a protected interest in the fund being used

and injunctive relief under 42 U.S.C §1982, the court conducted a fourteen-day bench trial, which included a visit to the Newton Correctional Facility.<sup>80</sup> The District Court held: 1) for the purposes of amenability to suit under §1983, the InnerChange program was operating under the color of law; 2) the program itself was pervasively sectarian; 3) the program did not involve payments made at the direction of inmates, which would not violate the Establishment Clause; 4) the program fostered excessive entanglement of government with religion; 5) the contract being the State of Iowa and InnerChange, violated the Establishment Clause; and 6) InnerChange was enjoined from further contract performance, would not be paid amounts due under the contract, and would be forced to return payments received.<sup>81</sup>

#### *A. Introduction of the InnerChange Program to Iowa*

From 1997 until 2002, Walter “Kip” Kautzky served as Director of the Iowa Department of Corrections.<sup>82</sup> Kautzky, a long time business associate of Prison Fellowship co-founder Charles Colson, was the official responsible for bringing the InnerChange program to Iowa.<sup>83</sup>

While Kautzky was aware of the InnerChange program in Texas, he testified that he was not interested in establishing a connection between Prison Fellowship and the Iowa Department

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legally for the benefit of the prisoners. Additional funding for the InnerChange program was provided from the Healthy Iowans Tobacco Trust fund, created by the office of the Iowa State Treasurer, from the master tobacco settlement entered into by most states with tobacco manufacturers.

<sup>80</sup> *Id.* at 865. The injunctive relief sought by the plaintiffs was a complete prohibition on InnerChange operating within the Iowa correctional system or, in the alternative, a similar type of values-based program made available to non-InnerChange inmates from secular or non-Christian standpoint. Additionally, the plaintiffs sought reinstatement of inmates removed from Unit E to make room for the InnerChange program and a *pro rata* refund of all state funds used to pay InnerChange.

<sup>81</sup> *Id.* at 865 n.3. The court found that the named state defendants, sued in their official capacities, fell under the auspices of the Civil Rights Act. InnerChange and Prison Fellowship, though private parties, were “persons acting under the color of state law” for the purposes of the Civil Rights Act of 1871. Private persons, jointly engaged with state officials in a prohibited action, are acting “under color” of law for purposes of the statute. The rehabilitation treatment provided by InnerChange was a function traditionally and exclusively reserved to the state, thereby qualifying InnerChange’s activity as a state action under the public function doctrine.

<sup>82</sup> *Id.* at 878.

<sup>83</sup> *Id.* Kautzky and Colson have known each other for over 20 years and collaborated on a number of projects. The projects include a mission to establish a state-wide prison outreach team of volunteers in North Carolina and serving together as consultants on problems to the Washington State Penitentiary in Walla Walla, Washington. In addition to professional collaboration, Kautzky has personally donated to Prison Fellowship and admitted that during his career, “[He] has tried to help Prison Fellowship along the way.”

of Corrections.<sup>84</sup> His arrival in Iowa, however, coincided with both the completion of the Newton Facility as well as a state-wide prison budgetary and overcrowding crisis.<sup>85</sup> Facing budgetary constraints, prison overcrowding, and a lack of appropriate programming opportunities for inmates, Kautzky and his leadership team set forth in search of innovative ways to meet the challenges.<sup>86</sup> An inquiry was ordered into any organization that could deliver the desired programming service.<sup>87</sup> According to trial testimony, at the time the Iowa Department of Corrections was conducting its search, eight organizations offered rehabilitation programs which met minimum treatment requirements.<sup>88</sup> However, the only organization which offered a long-term, values-based, residential program with excellent post-release aftercare services was InnerChange.<sup>89</sup>

Trial testimony revealed that not all Iowa officials were thrilled with bringing a program with such strong religious connotations to the Newton Facility.<sup>90</sup> Kenneth Burger, Coordinator for Offender Services and executive in charge of gathering information about the InnerChange program in Texas, testified that he had hoped to design a program without the overt religious message present in the InnerChange model.<sup>91</sup> However, it was InnerChange's unrivaled aftercare program, with its donor-supported cost structure, that finally convinced Burger.<sup>92</sup> On

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<sup>84</sup> *Id.* at 879.

<sup>85</sup> *Id.* at 880.

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

<sup>87</sup> *Id.* According to evidence introduced at trial, Prison Fellowship and InnerChange were included in the search despite knowledge of the significant constitutional issues which could arise.

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

<sup>89</sup> *Id.* at 881.

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

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

<sup>92</sup> *Id.*

March 24<sup>th</sup>, 1999, Prison Fellowship, InnerChange and the Iowa Department of Corrections entered into a contract providing for the operation of InnerChange at the Newton Facility.<sup>93</sup>

### *B. Nature of the Iowa Program*

Modeled after the program at the Vance facility, InnerChange, in partnership with the State of Iowa and Prison Fellowship, established the first and only Iowa prison to offer a 24-hour a day, 7-days a week treatment program at the Newton facility.<sup>94</sup> The program, staffed by a combination of Department of Corrections employees and InnerChange volunteers,<sup>95</sup> was 18 months in duration and consisted of four phases designed to prepare inmates for reintroduction into society.<sup>96</sup> As of July 31, 2005, 977 Iowa inmates had enrolled in the InnerChange program.<sup>97</sup>

To recruit participants for the program, members of the InnerChange staff visited prisons across the state.<sup>98</sup> Inmates interested in InnerChange, were invited to attend an introductory program at the Newton Facility.<sup>99</sup> During the introduction, inmates were prompted to sign a consent form acknowledging, among other things, the voluntariness of the program and its ineffect upon parole and good time considerations.<sup>100</sup> It was during the introductory sessions

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<sup>93</sup> *Id.* at 884. In the first year of the program, beginning on September 1, 1999, the Department of Corrections paid Prison Fellowship up to \$229,950.

<sup>94</sup> *Id.* The program was initially labeled as “pre-release,” intended primarily for inmates nearing release, but in reality inmates who may have been years from their release were permitted to enroll.

<sup>95</sup> *Id.* at 913. At the Newton Facility, InnerChange calculated that approximately 4,000 volunteer hours were donated annually. The volunteers, motivated “by the love of Christ to bring a faith-based approach to their volunteer program participation” were especially valuable to the program because of their ability to demonstrate “the transforming power of the love of Christ and the importance of having caring friends who care because of the love of Christ, and not because they are paid to care.”

<sup>96</sup> *Id.* at 901.

<sup>97</sup> *Id.* at 895.

<sup>98</sup> *Id.* at 893-94.

<sup>99</sup> *Id.*

<sup>100</sup> *Id.* at 894. The consent form, actually titled the Participation & Release of Information Form, stated, in relevant part: “I, the above mentioned member of the InnerChange Freedom Initiative agree to voluntarily participate in the Value Bases Pre-Release Program (the “Program”) conduct [sic] by Prison Fellowship Ministries at the Newton Iowa [sic]. I understand the following: that my decision to participate in the Program is of my own free will; that my decision to participate in the Program will not affect my consideration for parole; that my good time will not be increased because I participated in the Program; that the Program contains religious content and is based upon

that inmates were first introduced to the six core values stressed in the InnerChange curriculum:

1) integrity; 2) restoration; 3) responsibility; 4) fellowship; 5) affirmation; and 6) productivity.<sup>101</sup>

Following the introductory period, prospective inmates began a four-week orientation program, at which time inmates imprisoned elsewhere would be formally transferred to the Newton Facility.<sup>102</sup> The orientation program was designed to give candidates more knowledge about the InnerChange program and also allow InnerChange staff to assess the qualifications of the candidates.<sup>103</sup> In addition to settling preliminary matters, the orientation program introduced inmates to the IFI model by providing evening Bible study classes led by InnerChange peer facilitators.<sup>104</sup> At the conclusion of orientation, inmates were informed that, although they may have otherwise met criteria established by the Department of Corrections or InnerChange, the InnerChange program may not be appealing to everyone.<sup>105</sup> Inmates of religious faiths other than Christianity were cautioned of potential conflicts between the program and their faith.<sup>106</sup>

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Christian values and principles; that I do not have to be of the Christian faith to participate in the Program; that I will be assigned inmate work as well as treatment; that my activities and schedule will be different from those to which I have been accustomed; that I can discontinue my participation in the Program; I also understand that Prison Fellowship Ministries has the right to dismiss me from the Program if it so chooses; that I will not be penalized in any way if I withdraw from the Program.

<sup>101</sup> *Id.* at 896-97. The Defendants posited that the core values of the InnerChange program simply recreate the universal ideals in which all religions have in common. So, in theory, inmates, regardless of faith, could join InnerChange, participate in its Christian worship services, devotionals, community meetings, classes, and revivals for eighteen months and receive the intended benefits of the program.

<sup>102</sup> *Id.* at 894.

<sup>103</sup> *Id.* The admission requirements imposed by the Department of Corrections were a commitment to complete the InnerChange program, ability to meet the criteria for medium or minimum custody, and suitable for housing in multi-person dry cells.

<sup>104</sup> *Id.* at 895. Additionally, during the orientation program inmates would sign the “Accountability Covenant,” a document, which in the eyes of the court represented the first of many examples of the all pervasive use of Biblical text to underscore and explain nearly all aspects of the InnerChange program. The signatory of the Accountability Covenant agrees to, among other things, understand that the principles of Matthew 18:12-35 will be applied in my life within the IFI community.

<sup>105</sup> *Id.* 895-96.

<sup>106</sup> *Id.* The “Closing Comments” section of the InnerChange Field Guide orientation manual states: “When prisoners are screened for IFI, there is no discrimination based on ethnicity, race or religion. Suppose you are not a Christian, or you are a person of another faith, such as a Jew or Muslim. You are still considered for IFI on an equal basis with those who are Christians. If you are a religion other than Christianity, you may have special requests that relate to that religion. Those are handled according to DOC policies and procedures. We will try to grant those requests. But they will not be granted if they keep you from fully taking part in the IFI program or if they prevent

### *C. Four Phases of the InnerChange Program*

As stated previously, the InnerChange program is divided into four phases.<sup>107</sup> Phase I, which consumes the first twelve months of an inmate's enrollment, provides a busy, highly-structured environment, consistent with the InnerChange unit-based model.<sup>108</sup> Inmates attend community meetings, devotionals, receive biblically-based instruction, participate in one-on-one counseling with InnerChange staff, and even complete homework assignments.<sup>109</sup> All aspects, including Friday night revivals and Sunday morning worship services, are required curriculum in order for an inmate to remain in InnerChange.<sup>110</sup>

In addition to the required aspects of the InnerChange program, inmates were given the option of participating in voluntary education and treatment classes.<sup>111</sup> Programming in Phase I offers all the educational and treatment classes traditionally prescribed for inmates in the Iowa correctional system, including: certified substance abuse treatment, anger management, victim impact, criminal thinking, and marriage/family planning.<sup>112</sup> Inmates could also choose to participate in skill building classes such as computer or financial management courses.<sup>113</sup> While the majority of the classes were offered through traditional Department of Corrections channels,

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you from meeting every program requirement. Suppose you see that you cannot fully practice your religion in IFI, then you may choose not to join the program. These decisions should be made before you join IFI.”

<sup>107</sup> *Id.* at 901.

<sup>108</sup> *Id.*

<sup>109</sup> Prison Fellowship, *IFI and the Ruling*, <http://www.pfm.org/generic.asp?ID=345> (last visited Nov. 11, 2006). Phase One: focuses on the prisoner's internal transformational process and seeks to build spiritual and moral filters. A heavy emphasis on education, work and support helps create a new foundation for productive growth

<sup>110</sup> *Americans United*, 432 F.Supp.2d at 903. Both the Department of Corrections and InnerChange retain the right to expel inmates from the program at any time. Inmates are typically expelled from InnerChange for one of two reasons; non-compliance with a behavior contract or rule violations which results in a behavior report. A behavior contract is an agreement between an inmate and correctional staff to address particular problems or issues facing the inmate. There are two types of reports-major and minor reports. Major reports are reserved for serious rule violations—contraband, fighting, etc. Minor reports are for less serious offenses. Seven minor reports will result in a major report.

<sup>111</sup> *Id.* at 905.

<sup>112</sup> *Id.*

<sup>113</sup> *Id.* at 906. Irrespective of the subject, all of these courses, with the sole exception of a computer-skills class, are Bible-based, integrating Biblical references and principles.

budgetary constraints and limited class size often caused interested inmates in the general prison population to wait until they were close to their expected release date to enroll.<sup>114</sup> InnerChange inmates, on the other hand, were allowed to take the classes at any point during the program.<sup>115</sup> Trial testimony revealed that, not surprisingly, the Iowa Parole Board would look favorably upon inmates who took the initiative and completed recommended programming as early as possible.<sup>116</sup>

Phase II of the InnerChange program was six months in duration and continued the schedule established during Phase I with the exception of the replacement of one morning religion class with two hours of either work or school.<sup>117</sup> During Phase II is when inmates first begin preparation for their transition from prison life to life outside.<sup>118</sup> Phase II also marked the beginning of a volunteer mentoring program which paired inmates with a member of a local church who served as a “friend and a guide supporting [the inmate] in living the Christian life through the rest of [their] incarceration and for up to one year after [their] release.”<sup>119</sup>

Phases III and IV of the program were considered “aftercare programming” and were limited to inmates eligible for release from prison.<sup>120</sup> Both phases, which were significantly less regimented, required inmates to attend church on a weekly basis, maintain employment, and go to a mid-week activity that InnerChange considers pro-social in scope.<sup>121</sup> Phase III began when an inmate was placed in a Department of Corrections work release center.<sup>122</sup> Phase IV, on the

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<sup>114</sup> *Id.* at 904.

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

<sup>116</sup> *Id.* at 903-04.

<sup>117</sup> *Id.* at 902.

<sup>118</sup> Prison Fellowship, *IFI and the Ruling*, <http://www.pfm.org/generic.asp?ID=345> (last visited Nov. 11, 2006). Phase Two tests the inmate’s value system in real-life settings and prepares him for life after prison. Inmates may spend much of the day in off-site prison work programs or involved in the re-entry portion of the IFI curriculum.

<sup>119</sup> *Id.*

<sup>120</sup> *Americans United*, 432 F.Supp.2d at 909.

<sup>121</sup> *Id.*

<sup>122</sup> *Id.* at 910.

other hand, took place once an InnerChange inmate was released from prison.<sup>123</sup> Once an inmate was released, InnerChange counselors helped them to secure housing, employment, a church, and provided additional aftercare services such as case management, intervention in crisis situations, and assistance with securing immediate needs such as clothing and hygiene items.<sup>124</sup> IFI inmates graduated from the program if, for a period of six months after release, they attended church, maintained steady employment, maintained contact with their mentor, and demonstrated a lifestyle consistent with the principles taught in the InnerChange in-prison program.<sup>125</sup>

#### VI. AND NOW YOU'RE TAKING OUR RELIGION? THE FEDERAL COURT DECISION IN AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE V. PRISON FELLOWSHIP MINISTRIES

To determine the constitutionality of the InnerChange Program, the court crafted its analysis around the three-part test established by the Supreme Court in *Lemon v. Kurtzman*.<sup>126</sup> Under the *Lemon* test, a government practice is permissible for purposes of Establishment Clause analysis if: 1) it has a secular purpose; 2) its principal or primary effect neither advances nor inhibits religion; 3) it does not foster an excessive entanglement with religion.<sup>127</sup> While the court found that reducing recidivism was the state's primary purpose in bringing the InnerChange program to Iowa, within the coercive context of the prison environment, the overt religious nature of the program combined with the lack of true alternative programs available to inmates, negated any potential secular benefit.<sup>128</sup> In light of these findings, the court concluded that from the viewpoint of the "reasonable observer" the state of Iowa's contractual relationship with

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<sup>123</sup> *Id.*

<sup>124</sup> *Id.*

<sup>125</sup> *Id.* Part of an appropriate InnerChange lifestyle includes an inmate's promise to maintain "sexual purity." Sexual purity, regardless of marital status, requires an inmate to refrain from "sexual intercourse" participate in "heavy petting or other inappropriate physical contact."

<sup>126</sup> *Cates, supra* note 35, at 792.

<sup>127</sup> *Lemon*, 403 U.S. at 612-13.

<sup>128</sup> *See infra* § VI(a)-(e).

Prison Fellowship and InnerChange promoted excessive entanglement and had the primary effect of endorsing religion.<sup>129</sup>

#### A. *Secular Purpose*

The Plaintiffs argued that the selection process by which the InnerChange program was initially brought to Iowa was motivated by corrections officials' intent to advance Evangelical Christianity, not by a valid secular purpose.<sup>130</sup> While the determination of secular purpose may appear to be nothing more than a preliminary matter, the court stressed the importance of the purpose inquiry in determining governmental intent.<sup>131</sup> The facts of the case illustrated that, while the majority of corrections officials were not necessarily deterred by the religious leanings of the InnerChange program, the objective history of the selection process demonstrated that state officials at all levels were motivated by a variety of factors, primarily, reducing recidivism among Iowa inmates.<sup>132</sup> Therefore, the court held that the evidence posited by the defendants established that reducing recidivism was the primary reason for bringing the InnerChange program to Iowa, a valid secular purpose under *Lemon*.<sup>133</sup>

#### B. *Pervasively Sectarian*

Although the defendants were able to demonstrate a valid secular purpose, under *Lemon*, a religious organization is presented with additional hurdles when attempting to establish the validity of its public funding. Establishment Clause precedent has illustrated that public funding

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<sup>129</sup> *Americans United*, 432 F.Supp.2d at 933.

<sup>130</sup> *Id.* at 915. Evidence revealed that, even before the initial Request for Proposal (RFP) was issued, Director Kautzky had every intention of bringing the program to Iowa. An RFP is the process by which any state agency must undergo to advertise publicly and request services that a state agency may require from a public vendor. The RFP is designed to ensure fair competition in the advertisement process.

<sup>131</sup> *Id.* See *McCreary County, KY. v. A.C.L.U. of KY*, 545 U.S. 844 (2005).

<sup>132</sup> *Id.* While the court found that recidivism was the underlining factor in bringing InnerChange to Iowa, facts introduced at trial illustrated that highly placed corrections officials such as Director Kautzky and Iowa Parole Board Member Chuck Hurley were interested in the InnerChange program because of their belief that spiritual transformation would be a tonic for the ills of recidivism.

<sup>133</sup> *Id.* at 917.

to religious organizations is valid under the Establishment Clause when: 1) no state aid goes to institutions that are so “pervasively sectarian” that secular activities cannot be separated from sectarian ones; and 2) if secular activities can be separated out, they must alone be funded.<sup>134</sup> A government entity is at the greatest risk of impermissibly advancing religion when it makes direct payments to sectarian institutions.<sup>135</sup> Although case law has permitted government funding of secular functions performed by sectarian organizations, specifically colleges and universities, precedent explicitly forbids the use of public funds to finance religion.<sup>136</sup>

Despite creative arguments from the defense, the court found the InnerChange program to be pervasively sectarian in nature.<sup>137</sup> Unlike the cases involving colleges and universities, the

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<sup>134</sup> *Id.* While the plurality opinion in *Mitchell v. Helms*, 530 U.S. 793, 840, maligned the “pervasively sectarian” inquiry, it remains the law. Despite the uncertain future of the pervasively sectarian inquiry, the court stated that it was “bound to follow the law as it stands, rather than speculat[e] as to how it may develop.” See *Agostini*, 521 U.S. at 237-238. See also *Hunt v. McNair*, 413 U.S. 734 (1973). “Aid normally may be thought to have a primary effect of advancing religion when it flows to an institution in which religion is so pervasive that a substantial portion of its functions are subsumed in the religious mission or when it funds a specifically religious activity in an otherwise substantially secular setting.”

<sup>135</sup> *Id.* Indirect payments may also implicate Establishment Clause protections. See *Committee For Public Education and Religious Liberty v. Nyquist*, 413 U.S. 756 (1973). In *Nyquist*, a New York statute authorized funding of nonpublic elementary and secondary school through maintenance grants, tuition reimbursements, and tax benefits available to parents of students who attended the schools. The fact that the tuition reimbursements were delivered to the parents and not the school itself had the effect of providing financial support for nonpublic, sectarian schools.

<sup>136</sup> *Id.* See *Hunt*, 413 U.S. 734 (1973). In *Hunt*, the challenged statute authorized the use of revenue bonds, monitored by a state agency, to assist the Baptist College at Charleston to finance construction and other related projects. No state general funds were used to fund the project. Though the Baptist Church was manifestly a religious-affiliated school and governed by a religious organization, the Court found that the education was not pervasively sectarian; See also *Tilton v. Richardson*, 403 U.S. 672 (1971) where litigation involved the use of federal grants for the expansion of college and university facilities, including grants to religiously-affiliated institutions. The Court found no evidence that the Roman Catholic colleges in question used the federally financed buildings for religious indoctrination. The parties stipulated that each of these areas of study was “taught according to the academic requirements intrinsic to the subject matter...rather than religious indoctrination. The four defendant colleges did not fit the “composite profile” of typically sectarian institutions of higher learning that could preclude funding under the Establishment Clause. Pervasively sectarian institutions, in the eyes of the Court, would, among other things, impose “religious restrictions on admissions, require attendance at religious activities, compel obedience to the doctrines and dogmas of faith, require instruction in theology and doctrine, and do every [they could] to propagate a particular religion (p.47); See also *Roemer v. Bd. Of Pub. Works of MD.*, 426 U.S. 736 (1976) where the Court relied upon *Hunt* and *Tilton* to find, again, that colleges or universities could receive state funds when those institutions were relatively free from denominational control, religious exercises were not mandatory, religious practice—including prayers in class—was merely encouraged, and each institution was committed to the principles of intellectual freedom and academic excellence.

<sup>137</sup> *Americans United*, 432 F.Supp.2d at 897, 919-920. The defendants maintained that the InnerChange program was not pervasively sectarian because its use of secular values could be separated from the program’s religious

InnerChange program was not characterized by an atmosphere of academic freedom but was “devoted to inculcating religion as described by Prison Fellowship and in its own explanation of the transformational model.”<sup>138</sup> The InnerChange program insisted upon participation in a number of religious activities simply to continue participation in the program.<sup>139</sup> While an inmate could conceivably graduate from the program without converting to Christianity, the required worship services, religious community meetings, weekly revivals, prayer sessions, personal devotions, and innumerable other examples of Evangelical Christian principles and philosophy created a coercive environment which demanded obedience to dogmas and doctrines.<sup>140</sup> The government aid in this case had the primary effect of funding a program with religious aspects so pervasive that all secular activities were subsumed by its religious nature.<sup>141</sup>

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viewpoint. However, the court found that the issue presented was not whether a “standard moral code,” as the defendants described it, could be taught at the Newton Facility from different religious or nonreligious vantage points, but whether that moral code presented by InnerChange could be separated from the state-funded, religious vehicle in which it was presented. This argument was dispelled by the testimony of inmates from the program who spoke, when questioned about what they were taught in InnerChange, not in terms of universal civic principles of morality, but in overt religious and biblical language about the nature of the curriculum. The defendants also attempted to take stand behind cases protecting private religious speech or the accommodation of religion. *See Rosenberger v. Rector and Visitors of University of Virginia*, 515 U.S. 819, 822-823 (1995). This argument failed because in this case InnerChange and Prison Fellowship, were not private actors but state actors. As a state actor, InnerChange speaks on behalf of the government. This fact distinguishes the case at hand from *Rosenberger* where the state of Virginia funded a broad range of student-run publications, one of which happened to support a Christian editorial viewpoint. The object of the fund was to open a forum for free speech and support student various student enterprises, not support any particular religion. As providers of a state-funded treatment program, InnerChange was burdened with the same responsibilities of any state employee; to respect the civil rights of all persons, including the First Amendment’s prohibition on indoctrinating others in their form of religion.

<sup>138</sup> *Id.* at 920. All InnerChange instructors and volunteers were only allowed to teach a pre-set religious curriculum specifically authorized by InnerChange and Prison Fellowship.

<sup>139</sup> *Id.*

<sup>140</sup> *Id.* at 909. When asked at trial, the Assistant Program Manager for InnerChange, Steven Casteneda, could not think of one non-Christian inmate in the InnerChange program located in the Newton release center. *See Cates, supra* note 30, 781 (*citing* Brook, *supra* note 32, [http://www.legalaffairs.org/issues/May-June-2003/feature\\_brook\\_mayjun03.html](http://www.legalaffairs.org/issues/May-June-2003/feature_brook_mayjun03.html)). About a dozen Vance Unit Muslim inmates have completed the Texas program and most, but not all, converted to Christianity. Prison Fellowship Founder Chuck Colson is quoted as saying, “Muslims in [InnerChange] prisons can see that [Christianity] is something far superior” to Islam, which he has called “a religion which breeds hatred.”

<sup>141</sup> *Americans United*, 432 F.Supp.2d at 921.

C. *Can God Be Removed from the Treatment? Separating the  
Secular Aspects of InnerChange from the Sectarian*

While a state may not provide funding for a program or institution which is shown to be undeniably sectarian, the defendants argued that government funding of a sectarian institution is not forbidden when the religious nature of the institution can be separated from its secular work.<sup>142</sup> To support their argument, the defendants pointed to a complex accounting procedure by which it was claimed that Iowa taxpayers were only charged for non-secular aspects of the InnerChange program.<sup>143</sup> The court found, however, that the accounting procedures amounted to little more than a façade enacted to discourage Establishment Clause challenges; the secular and sectarian aspects of the InnerChange program were virtually indistinguishable from one another.<sup>144</sup>

The physical setting, the programming, and the daily schedule caused the court to conclude that the InnerChange program at the Newton Facility was, “a sort of modern, Evangelical Christian monastic setting in which every waking hour is devoted to living out an intentional Christian experience.”<sup>145</sup> The religious atmosphere for inmates within the InnerChange program at the Newton Facility was not simply an overlay or a secondary effect it

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<sup>142</sup> A religious impetus on behalf of a party providing secular services does not necessarily transform the services performed into religious activity. *See Bowen v. Kendrick*, 487 U.S. 589, 621 (1988). In the statutory challenge in *Bowen*, the matter at hand involved grants to institutions to promote responsible adolescent pre-marital sexual behavior. The Court decided that the projects contemplated by the statute—pregnancy testing, adoption counseling, prenatal and postnatal care, educational services, child care, consumer protection—were not “themselves specifically religious duties and...are not converted into such activities by the fact they are carried out by organizations with religious affiliations.” *See also Hunt*, 413 U.S. at 743 “[I]t is not enough to show that the recipient of a challenged grant is ... ‘religiously inspired’.... [A] district court should also consider whether ... [government] aid has been used to fund ‘specifically religious activities in an otherwise substantially secular setting.’”

<sup>143</sup> *Americans United*, 432 F.Supp.2d at 921.

<sup>144</sup> *Id.*

<sup>145</sup> *Id.* at 909.

was the program.<sup>146</sup> Even otherwise traditional rehabilitation classes were saturated with references to Christian principles<sup>147</sup> and taught by the same InnerChange personnel who led communal workshop services and graded inmates for signs of “authentic progress.”<sup>148</sup> The defendants’ accounting procedures which purported to charge Iowa taxpayers only for secular aspects of the InnerChange program, were overly complicated and, in the eyes of the court, failed to adequately protect Iowa taxpayers from religious charges.<sup>149</sup> What made the InnerChange Program unique in the prison reform arena was its ability to generate funds from private donations which would be used to fund the religious aspects of the program.<sup>150</sup> Although the agreement between Prison Fellowship and the State of Iowa was to use public funds only for the secular aspects of the program, the court cited numerous examples of Iowa taxpayers being charged for services unquestionably sectarian in nature.<sup>151</sup>

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<sup>146</sup> *Id.* at 922. The defendants failed to recognize that prisons are inherently coercive environments, something the Supreme Court has recognized in the context of delivering medical services. *See West v. Atkins*, 487 U.S. 108, 57 n.15 (1987).

<sup>147</sup> *Id.* at 907-908, 921-922. InnerChange considered its substance abuse treatment classes to be secular in nature and made the remarkable contention that “the [secular] benefit of this instruction likely makes the religious element incidental from a legal perspective.” Prior to trial, the Executive Director of InnerChange assured Lowell Brandt, the Department of Corrections Director of Programming, that “approximately 80% of staff time is not related to [religious instruction], being of the interest to the State because of the religious accommodations of inmates. The court found, if anything, the reverse was true, the substantial amount of time spent teaching InnerChange classes was overtly sectarian in nature. Had InnerChange been serious about isolating religious elements of the program, the court suggested that selecting teachers without reference to religion or basing course curriculum on standardized materials other than religious orientation may have had some impact on the outcome.

<sup>148</sup> *Id.* InnerChange teachers and counselors cannot be employed without first accepting the basic InnerChange propositions, including; sin is the root of all problems and every answer to personal dilemmas can be solved by a conversion to belief in Christ.

<sup>149</sup> *Id.* at 887-890. Though the funding of InnerChange at the Newton Facility came from private sources through its parent, Prison Fellowship, a substantial portion of its programming came from state funding. The Defendants argued that the state of Iowa pays, pursuant to the contract terms, for only those aspects of the program that were non-sectarian in nature. InnerChange, on its bills to Iowa, assigned a “sectarian” percentage and a “non-sectarian” percentage to the time of each of its staff members and, subject to the appropriate limits allowed for each fiscal year, bills the Department of Corrections for what InnerChange had designated as “non-sectarian” percentage. For example, the Assistant Program Director’s salary was billed at 31% nonsectarian and 69% sectarian. The percentages were calculated by an InnerChange accountant.

<sup>150</sup> *Id.* at 881.

<sup>151</sup> *Id.* at 890. The accounting methods employed in the InnerChange local office reflected, to say the least, confusion. InnerChange staff did not divide class or counseling time into non-sectarian and sectarian portions. They also did not record time spent on each individual task, nor create any other records accounting for time in sectarian and non-sectarian categories. Such items as the InnerChange phone bill, internet account, copying costs,

The court concluded that any separation of the religious and secular elements of InnerChange was impossible. The intentional submersion of inmates into what constituted an Evangelical congregation subsumed any and all secular benefits which could be derived from the program.<sup>152</sup>

#### *D. The Permissibility of Indirect Aid*

After concluding that religion was inextricably tied to all aspects of the InnerChange program, the court addressed a second argument brought forth by the defendants, that enrollment by inmates in the InnerChange program was permissible because their participation was the product of the true private choice of the inmates.<sup>153</sup>

The Supreme Court has established a two-prong inquiry for use in circumstances where the permissibility of state funding of religious organizations has been questioned: 1) does the program administer aid in a neutral fashion, without differentiation based on the religious status of beneficiaries or providers of services; and 2) do beneficiaries of indirect aid have a genuine choice among religious and nonreligious organizations when determining the organization to which they direct that aid?<sup>154</sup> A failure to answer either query in the affirmative invalidates a program under the Establishment Clause; the court found Iowa's funding of the InnerChange failed on both counts.<sup>155</sup>

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postage meter, and computer repair were coded and billed to the state of Iowa as non-sectarian. "Jesus is Lord" and "Psalm 23" key rings used as InnerChange graduation gifts were also coded as nonsectarian. The court noted that InnerChange's 2002 recruiting brochure, "A Prison Like No Other," was printed and copied completely through state funding.

<sup>152</sup> *Id.* at 922.

<sup>153</sup> *Id.* at 925. The defendants' argument was premised upon a line of Supreme Court precedent which has recognized that government aid programs that are neutral with respect to religion are not subject to challenge under the Establishment Clause where the assistance is provided directly to a broad class of citizens who, in turn, direct government aid to religious entities wholly as a result of their own genuine and independent private choice. *See, e.g., Zelman*, 536 U.S. at 663; *Mueller v. Allen*, 463 U.S. 388 (1983); *Witters v. Washington Department of Services for the Blind*, 474 U.S. 481, 487-89 (1986).

<sup>154</sup> *Id.* at 669 (O'Connor, J., concurring).

<sup>155</sup> *Americans United*, 432 F.Supp.2d at 926.

1. Was the Aid Administered by the State of Iowa Awarded in a Neutral Fashion?

To uphold the public funding of religious organizations, the Supreme Court has required conclusive evidence demonstrating that no preference was granted to the religious organization.<sup>156</sup> The facts of the case made clear that, not only was InnerChange the only real contender in the bid process,<sup>157</sup> but institutional-level corrections officials viewed the religious nature of the program as a potential benefit.<sup>158</sup> Additionally, in light of the incentives offered to InnerChange inmates, in the form of improved conditions, and the lack of a real alternative program available to non-InnerChange inmates, the program had the effect of impermissibly advancing religion.<sup>159</sup>

Unit E of the Newton Facility, previously reserved as an honor unit, offered InnerChange inmates an opportunity to experience “incremental moments of normalcy unavailable to other Department of Corrections inmates.”<sup>160</sup> The court stressed that what may appear insignificant to

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<sup>156</sup> *Id.* See *Mitchell v. Helms*, 530 U.S. 793, 847-848. In *Mitchell*, the Court found that there was no evidence that the government preferred what was actually being taught at religious schools over others.

<sup>157</sup> *Id.* at 881-882. The court found that budgetary constraints combined with Director Kautzky’s own positive views of Prison Fellowship’s role in rehabilitating prisoners through a process of spiritual transformation meant that the selection of InnerChange as the pre-release service provider was a “foregone conclusion by the time an official RFP from the Department of Corrections went out in August 1998.”

<sup>158</sup> *Id.* at 882, 915. The court found that Iowa officials ignored customary principles of the selection process in order to meet the desires of state officials who advocated for a values-based release program defined by religious doctrine. Prior to the RFP release on April 9, 1998, the Iowa Department of Corrections and Prison Fellowship had already entered into negotiations. In a letter dated April 27, 1998, some local Newton area ministers received an invitation to attend an informational event where InnerChange staff from Houston, Texas, “share[d] the vision, outline[d] the program, and discuss[ed] the role of the local church and volunteers in Iowa’s Inner-Change prison unit.”

<sup>159</sup> *Id.* See *Zelman*, 536 U.S. at 663. While disincentives are not necessary, their presence dispels the idea that a program is unconstitutional for these reasons.

<sup>160</sup> *Americans United*, 432 F.Supp.2d at 880, 893, 900 n.32, 927-930. In addition to a safer, quieter environment, inmates in Unit E enjoyed privileges and autonomy not available elsewhere in the prison. The cells in Unit E were “dry cells” with wooden doors. The “dry cells,” originally constructed not as an intended benefit to the prisoners but as a result of budgetary constraints, lacked the toilet/sink unit present in general cells. As a result, an inmate enjoyed a greater aggregate cell size while using separate community bathrooms. The toilets in the community bathrooms of Unit E were made of porcelain, compared with stainless steel in Units A, B, C, and D, and were separated into stalls by dividers and have doors with sliding locks. Unit E cells had wooden doors with knobs that can be turned, cell doors elsewhere in the prison have fixed handles that cannot be turned. According to one inmate at the time of trial, while discussing his preference for Unit E, “You always feel better about yourself, that you’re doing good, and about your environment when you have a little bit of control over your environment, whether it be as small as the door to your cell that the guards can get in at any time, or whether it’s somebody not flushing a toilet a foot way from your bed, it just makes you feel good inside. You ain’t as prone to be aggressive. You tend to let

non-prisoners, can be of great value and import to someone whose entire life is managed by others.<sup>161</sup> While there is nothing wrong with offering incentives to encourage better behavior, the state's use of honor unit incentives to endorse and promote religious transformation demonstrated differentiation based upon the religious status of beneficiaries, in this case, InnerChange inmates.<sup>162</sup>

## 2. Did the Inmates at the Newton Facility Have a True Choice Among Religious and Nonreligious Organizations?

The court next addressed the defendants' argument that state support of the InnerChange program was permissible because the beneficiaries of the indirect aid, the inmates, had a genuine choice of whether or not to enroll in the program.<sup>163</sup> Courts have held that while the Department of Corrections was not required to offer identical treatment programs, due to the religious nature of the InnerChange, without real, genuine choice by the inmates among similar alternatives, the state of Iowa impermissibly advanced religion.<sup>164</sup> The plaintiffs' argument was not conditioned upon the InnerChange program being merely unattractive to them but that the lack of alternative

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things slide because being on E means you're responsible enough--or somebody thinks you're responsible enough to be there."

<sup>161</sup>*Id.* at 901, 912, 928-929. In addition to the benefit of the superior accommodations, inmates in Unit E received other advantages unavailable to the general prison population, including; communal movies; pizza, sandwiches, and the company of friends and family at graduation ceremonies. While inmates in other, non-InnerChange groups or programs must pay for any outside food, the food provided at the InnerChange ceremonies was coded as non-sectarian. The court found other benefits enjoyed by InnerChange inmates to include; use of everyday items such as, pens and paper, permission to wear a t-shirt with the InnerChange logo, as opposed to traditional prison garb required for other inmates, and allowing InnerChange inmates to exceed the prison policy of no more than 10 books in their cell at once. The court also noted examples of InnerChange inmates listening to streaming audio broadcast of a baseball game and relaxing the strict Department of Corrections policies governing inmate phone use.

<sup>162</sup>*Id.* at 929.

<sup>163</sup>*Id.* at 925.

<sup>164</sup>*Freedom from Religion Foundation, Inc. v. McCallum*, 214 F.Supp.2d 905, 916 (W.D. Wis. 2002). Even though the other non-religious programs were shorter in length (30-90 days compared to a 9-12 month program) and did not provide the same quality of treatment, the non-religious alternatives met the state's post-release requirements for probation, parole, or alternative to revocation. When Wisconsin inmates demurred for religious content they were immediately made aware and allowed to participate in other, secular programs they found more appealing.

programs at the Newton Facility which offered benefits similar to those available to inmates within the InnerChange program failed to create a true choice.<sup>165</sup>

While the nonexistence of reasonable alternative programs was an important consideration, the court found that the religious nature of InnerChange and the limitations imposed upon inmates within the program itself, demonstrated the absence of true choice.<sup>166</sup> As set forth above, enrollment in InnerChange was limited to those inmates who were willing to engage in a spiritual transformation guided by Evangelical Christian counselors and programming.<sup>167</sup> Though the defendants argued that all Iowa inmates were welcome in InnerChange, the court received credible testimony that the intensive religious content of the program served as a substantial disincentive for non-Evangelical Christian inmates and inmates professing no faith.<sup>168</sup> The court found that the “choice” presented to inmates unwilling or unable to participate in the InnerChange program, was to enroll in a program which may directly

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<sup>165</sup> *Americans United*, 432 F.Supp.2d at 930. The Newton Facility did offer two programs in addition to InnerChange; the RIVERS and the TOW program. Both closely resemble InnerChange but were offered only to limited selections of inmates. RIVERS is only for youthful offenders, TOW is for those inmates with mental health or developmental disabilities.

<sup>166</sup> *Id.*

<sup>167</sup> *Id.* at 909-910, 931. The court received testimony that the InnerChange program’s own material cast aspersions upon the human experience of homosexuality as well as other faith groups. In an InnerChange class entitled “Spiritual Freedom,” inmates read *Bondage Breaker*, a text authored by Neil T. Anderson. In the text, the author states that “[t]he first step toward experiencing your freedom in Christ is to renounce (verbally reject) all past or present involvement with occult practices, cult teachings, and rituals, as well as non-Christian religions. Among the religions inmates were invited to renounce, included: “Superstition,” “Mormonism,” Jehovah’s Witness,” “New Age,” Christian Science,” “Church of Scientology,” “Unitarianism/Universalism,” “Hare Krishna,” “Native American spirit worship,” “Islam,” “Hinduism,” “Buddhism (including Zen),” “Black Muslim,” “and any other non-Christian religion or cults.”

<sup>168</sup> *Id.* at 874, 898-900 n.31. The court held that evidence demonstrating the voluntary enrollment of inmates of other faith traditions did not mean that the State of Iowa did not endorse Evangelical Christianity by allowing InnerChange to function within its prison walls. During trial the court received testimony from a self-described Reorganized Latter Day Saint, a Sunni Muslim, a member of the Nation of Islam, a Lubavich Jew, and inmate practicing Native American traditions, all stating that enrollment in the InnerChange program would either conflict or constitute direct blasphemy of their religious beliefs. Additionally, the characteristics of InnerChange curriculum even conflicted with other sects of Christianity. Evangelical Christianity tends to be anti-sacramental, which means it downplays the traditional sacramental Christian events-baptism, holy communion or Eucharist, marriage, ordination, as appropriate ways to interact or meet God.

or indirectly conflict with personal religious holdings or participate in no program at all.<sup>169</sup> The State of Iowa, through its choice of program, funding, and in-kind aid disregarded the overwhelmingly religious nature of the InnerChange program in violation of the Establishment Clause.<sup>170</sup>

#### *E. Conclusion and Remedy*

In the end, the court concluded that the state's contractual relationship which provided direct funding to Prison Fellowship and InnerChange had the primary effect of endorsing religion.<sup>171</sup> Though the state appropriation was enacted to fight recidivism, trial testimony demonstrated that, prior to the initial selection process, the defendants were aware of the pervasive religious nature of the InnerChange program and even believed that such a model would be an asset to the Department of Corrections.<sup>172</sup> The gerrymandered RFP all but guaranteed a state contract with InnerChange.<sup>173</sup> Furthermore, incentives provided to InnerChange inmates and the absence of a non-sectarian pre-release treatment program made the program that more insipid in the eyes of the court.<sup>174</sup> The contractual relationship between the state of Iowa, as managed and directed by the named state Defendants, InnerChange and Prison Fellowship, violated the plaintiffs' Establishment Clause rights as contained in the U.S. Constitution.<sup>175</sup>

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<sup>169</sup> *Id.* See *supra* § 5(c). Trial testimony revealed that, not surprisingly, the Iowa Parole Board would look favorably upon any inmate who took the initiative and completed his recommended programming as early as possible.

<sup>170</sup> *Id.*

<sup>171</sup> *Id.* Based on the court's conclusion that for all practical purposes, the state literally established an Evangelical Christian congregation within the walls of the Newton Facility, the facts and conclusions drawn above leave no room to doubt that the state of Iowa is excessively entangled with religion through the InnerChange program in the traditional *Lemon* inquiry.

<sup>172</sup> *Id.* at 934.

<sup>173</sup> *Id.*

<sup>174</sup> *Id.*

<sup>175</sup> *Id.* at 934-935, 941. As a result of the decision, the court granted a declarative judgment and injunctive relief in favor of the plaintiffs. InnerChange was given sixty days to cease operation at the Newton Facility and was permanently enjoined from operating in any other publicly funded institution within the state of Iowa. The court also ordered all payments to InnerChange and Prison Fellowships to cease and ordered a *pro rata* refund of all state

VII. ARE YOU SURE GOD DIDN'T CHANGE YOUR LIFE?  
IS THIS SIMPLY WISHFUL THINKING OR CAN BIBLE-  
BASED TREATMENT PROGRAMS REDUCE RECIDIVISM?

Administrators in the American correctional system are presented with the complex task of developing a prison environment which is safe, secure, and humane for the inmate residents but also serves punitive objectives and prepares inmates for reintegration into society.<sup>176</sup> Due to the difficulty involved in balancing such concerns, courts have typically demurred to policy decisions made by prison officials so long as such decisions are reasonably related to a legitimate penological goal.<sup>177</sup> However, use of the *Turner* test, as it has been referred, in the context of religiously-based prison treatment programs would lead to discomforting results; the allowance of the forced religious indoctrination of prisoners, so long as such indoctrination was reasonably related to a legitimate penological goal.<sup>178</sup>

It was just such an argument brought forth by the defendants which was dismissed by the court in *Americans United*.<sup>179</sup> The defendants attempted to demonstrate, by pointing to studies which showed a correlation between religion and a reduction in crime, that the InnerChange

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funds paid since the beginning of the contractual relationship in 1996. The amount owed totaled \$1,529,182,07; \$843,150 from the Telephone Fund and \$686,032.70 from the Tobacco Fund. Subsequently, the court ordered a stay on both the injunctive and equitable relief to facilitate the impending appeal of the defendants.

<sup>176</sup> Branham, *supra* note 41, at 310. Specifically, many prison rules are designed to facilitate the monitoring of prisoners by correctional staff, to avert inmate attacks on other inmates or staff, to limit damage to, or theft of, property, and to prevent prison escapes. The problem of prisoners breaking prison rules is pervasive and recurrent. More than half of all prisoners are charged with one or more disciplinary infractions during their term of confinement, and this statistic, of course, does not include prisoners who commit disciplinary infractions that go undetected or do not result in the filing of charges.

<sup>177</sup> Fields, *supra* note 43, at 551. In *Turner*, synthesizing the holdings in prior prisoners'-rights cases, the Court established a four-part test to determine if prison regulations that restrict prisoners' constitutional rights are in fact unconstitutional: 1) the policy must have a valid, rational connection to the legitimate government interest put forward to justify it; 2) are there other ways for inmates to exercise the right in question; 3) are there alternative means of achieving the legitimate penological objectives furthered by the restrictive prison policy; and 4) how accommodating the inmates' rights will affect correctional officers, other inmates, and institutional resources. The *Turner* test has been used to uphold prison regulations that restrict prisoners' free speech, marriage, associate with friends and family, free exercise of religion, due process, and court access rights.

<sup>178</sup> *Id.* Indeed, use of the *Turner* test, even in cases with a legitimate penological objective, has been limited by recent court decisions. In *Johnson v California*, 543 U.S. 499 (2005), the majority held that *Turner* only applied when evaluating claims for rights that are "inconsistent with proper incarceration," without defining the contours of this new term of art. In dissent, Justice Thomas noted that the Court had "eviscerated" the *Turner* test.

<sup>179</sup> *Americans United*, 432 F.Supp.2d at 915 n.36.

program would be directly related to the legitimate penological goals of maintaining safe prison facilities and reducing recidivism.<sup>180</sup> However, the court determined that the standards established in *Turner* are not applicable in the Establishment Clause context.<sup>181</sup>

Regardless of the applicability of the *Turner* standard, the defendants' argument is certainly intriguing. In 2002, after the implementation of the InnerChange program, the Iowa Board of Corrections reported that 400 offenders, department-wide, were still serving sentences longer than necessary because of an inability to receive substance abuse programming.<sup>182</sup> This statistic is becoming increasingly prevalent as solutions to American recidivism rates continue to elude prison administrators in the ever expanding American prison system.<sup>183</sup> Creative solutions to prison safety and recidivism, even including the use of religion, would certainly appear to be welcome by prison administrators.<sup>184</sup>

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<sup>180</sup> Branham, *supra* note 41, at 310 (citing Byron R. Johnson et al., *Religious Programs, Institutional Adjustment, and Recidivism Among Former Inmates in Prison Fellowship Programs*, 14 JUST. Q. 145, 163 (1997), available at [http://www.pfm.org/media/ifi/Docs/crrucs\\_innerchange.pdf](http://www.pfm.org/media/ifi/Docs/crrucs_innerchange.pdf).) Research data has illustrated that religion is a "persistent ... inhibitor of adult crime" provides empirical support for the proposition that religion can have an inhibitory effect on disciplinary infractions. Researchers have repeatedly found a negative correlation between religion and certain other deviant behaviors that are closely linked with crime and delinquency, particularly drug and alcohol abuse. For example, a study conducted by the National Center on Addiction and Substance Abuse at Columbia University found that adults who consider their religious beliefs to be "unimportant" are three times likelier than adults who strongly believe that their religious beliefs are important to binge drink, six times likelier to smoke marijuana, and four times likelier to use an illicit drug other than marijuana. The research on the impact of religion (including participation in religious activities) on the misconduct of prisoners is sparse, although one of the most comprehensive analyses of this subject to date found a statistically significant inverse relationship between inmates' religiousness and their confinement for disciplinary infractions.

<sup>181</sup> *Americans United*, 432 F.Supp.2d at 915 n.36.

<sup>182</sup> *Id.* at 880.

<sup>183</sup> U.S. Department of Justice, Bureau of Justice Statistics, *Prison and Jail Inmates at Midyear 2005*, available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/pjim05.pdf>. At midyear 2005, the nation's prisons and jails incarcerated 2,186, 230 persons, that is 488 people per 100,000 U.S. citizens. In the decade from 1995-2005, the incarceration population grew by an average of 3.4% annually. At yearend in 2004, the federal system was operating 40% above rated capacity.

<sup>184</sup> The White House, *Statement on the Second Chance Act of 2004*, <http://www.whitehouse.gov/news/releases/2004/06/20040623-13.html> (last visited Nov. 11, 2005). We know from experience that if they can't find work, or a home, or help, they are much more likely to commit a crime and return to prison. In January of 2004, the President proposed a new prisoner re-entry initiative based on expanding job training and placement services, providing transitional housing, and helping newly released prisoners get mentoring. See Heather Rowison, *Sin No More: Recidivism and Non-Traditional Punishment in Wyoming*, 58 BAYLOR L. REV. 289, 290 (Winter 2006). In-prison programs, such as vocational, educational, and substance abuse counseling, have been shown to have an effect upon recidivism as have job training, and placement programs. The National Institute of Literacy reports that correctional

### *A. Recidivism in the American Prison System*

Providing adequate treatment programming not only accelerates parole opportunities for those presently incarcerated, but is considered the key in keeping those released from prison from coming back.<sup>185</sup> Prisoner recidivism rates in the United States have proven to be exceedingly troublesome to corrections officials.<sup>186</sup> According to the latest data from the Bureau of Justice Statistics recidivism rates continue to hover around 70%.<sup>187</sup> Recidivism is typically studied by tracking a released prisoner's interactions with the justice system for a set number of years after their release.<sup>188</sup> If the former inmate returns to prison, they are said to have recidivated.<sup>189</sup> Recidivism is thought to be a strong indicator of the success of the criminal justice system as a whole.<sup>190</sup>

By all accounts, in 1998, the time at which the Iowa Department of Corrections decided to contract with InnerChange, it was in the throes of a major budgetary crisis.<sup>191</sup> As a result, Director Kautzky and his leadership team set about searching for innovative ways to meet the programming requirements at the Newton Facility.<sup>192</sup> According to prison administrators, providing effective programming ranks second only to overcrowding when addressing prisoner

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facility education programs reduced recidivism by 29% and that vocational training programs reduced recidivism by 33%. On a more creative note, the Wyoming correctional system, incorporates, in addition to inmate work programs, a conservation camp that includes community service projects and firefighter training, a boot camp, and an honor farm that helps inmates learn through training horses.

<sup>185</sup> *Americans United*, 432 F.Supp.2d at 881.

<sup>186</sup> U.S. Department of Justice-Bureau of Justice Programs, *Criminal Offenders Statistics*, available at <http://www.ojp.usdoj.gov/bjs/crimoff.htm#recidivism>. Of the 272,111 persons released from prisons in 15 States in 1994, an estimated 67.5% were rearrested for a felony or serious misdemeanor within 3 years, 46.9% were reconvicted, and 25.4% resented to prison for a new crime.

<sup>187</sup> *Id.*

<sup>188</sup> Johnson, *supra* note 180, available at [http://www.pfm.org/media/ifi/Docs/crrucs\\_innerchange.pdf](http://www.pfm.org/media/ifi/Docs/crrucs_innerchange.pdf). The University of Pennsylvania researchers analyzed inmates two years after their release.

<sup>189</sup> Rowlinson, *supra* note 184, at 289.

<sup>190</sup> *Id.*

<sup>191</sup> *Americans United*, 432 F.Supp.2d at 879-882. The overcrowding problem was so severe that extra bunks were added to general population cells, converting two-person cells into three-person cells. Low-risk security inmates were even moved to the Newton Facility before construction was complete. The accelerated inmate transfer to the Newton Facility meant that the full menu of treatment programs and classes were not yet in place for the arriving inmates.

<sup>192</sup> *Id.* at 882.

security and safety concerns.<sup>193</sup> In addition to providing activities and stimulation for inmates, prison programming combats overcrowding, directly, by ensuring that inmates have access to classes necessary for early release determinations by the Iowa Parole Board and indirectly, by lowering recidivism rates.<sup>194</sup>

While InnerChange was able to provide inmates with a full range of classes and activities at a cost affordable to the Department of Corrections, it was the lack of conclusive data demonstrating the success of the InnerChange transformational model in reducing recidivism that proved most significant in the eyes of the court.<sup>195</sup> Aside from anecdotes, the defendants offered no definitive proof regarding the effects of the InnerChange Program upon recidivism rates.<sup>196</sup> On its website, Prison Fellowship points to a 1997 study conducted by the University of Pennsylvania's Center for Research on Religion and Urban Civil Society to illustrate the success of the IFI program.<sup>197</sup> The study reports that IFI program graduates have been rearrested and reimprisoned at significantly lower rates than the matched control group (17.3% vs. 35%) and either of two comparison groups—the screened group (34.9%), and the volunteered group (29.3%).<sup>198</sup> Similarly, those completing the IFI program had significantly lower rates of

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<sup>193</sup> *Id.* at 880.

<sup>194</sup> *Id.* The InnerChange program, according to Terry Mapes, Warden of the Newton Facility, was able to provide such program at a price within the budget of the Iowa Department of Corrections; “[F]or \$310,000, I get a substance abuse program, I get a victim impact program, I get a computer education program, I get pro-social skills programs, and I get engaged inmates who are actively involved in something constructive, keeping them busy, which even inmates have testified to that’s a positive thing, and I get supervision of offender either in classes, in activities, in recreation by somebody other than the limited staff I have.”

<sup>195</sup> *Id.* at 914. Warden Mapes’ predecessor, Warden Mathes, communicated his desire early on in the initial RFP process that accountability for the program be included in the contractual agreement between the parties. Specifically, he requested “at least annual program evaluations to include, but not limited to, re-incarceration rates and other measurable outcomes.” But, in fact, there was no information presented at trial about whether InnerChange participants are more or less prone to recidivism than other inmates.

<sup>196</sup> *Id.*

<sup>197</sup> Johnson, *supra* note 180, available at [http://www.pfm.org/media/ifi/Docs/crrucs\\_innerchange.pdf](http://www.pfm.org/media/ifi/Docs/crrucs_innerchange.pdf).

<sup>198</sup> *Id.* The researchers described the four groups involved in the study as follows: 1) IFI Group-prisoners who met the selection criterion and entered the program between April 1997 and January of 1999, and were released from prison prior to September 1, 1999; 2) Match Group-prisoners selected from the records of inmates released during the evaluation period that met program selection criteria but did not enter the program; 3) Screened Group-prisoners selected from the records of inmates released during the evaluation period that met program selection criteria and

incarceration than the matched group (8% vs. 20.3%), as well as the screened group (22.3%), and the volunteered group (19.1%).<sup>199</sup> Considering the attention nationwide recidivism rates have garnered, the results seemed impressive. However, according to critics, the advertised percentages represented a clear cut example of “cooking the books.”<sup>200</sup>

Selection bias on behalf of the researchers attempted to conceal that, when viewed in light of the whole, InnerChange inmates actually did somewhat worse than the control group.<sup>201</sup> InnerChange started with 177 volunteer prisoners but only 75 “graduated.”<sup>202</sup> As discussed previously, an InnerChange inmate only graduates from the program after progressing through the four phases of the program, including Phase IV’s requirement of getting and keeping a job.<sup>203</sup> It seems to follow that, based upon the fact that getting and maintaining a job has been linked affirmatively to lower recidivism rates, that InnerChange inmates would have lower recidivism rates.<sup>204</sup> Where critics find fault in the study is with the recidivism rates of the 102 inmates who were paroled early, dropped out, or were removed from the InnerChange program.<sup>205</sup>

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were screened as eligible but did not volunteer or were not selected for program participation; and 4) Volunteer Group-prisoners selected from the records of inmates released during the evaluation period that actually volunteered for the IFI program, but did not participate either because they did not have a minimum-out custody classification, their remaining sentence was not between the required length (18-30 months) to be considered, or they were not planning to return to the Houston area following [sic] area.

<sup>199</sup> *Id.*

<sup>200</sup> Mark A.R. Kleiman, *Faith-Based Fudging: How a Bush-promoted Christian Prison Program Fakes Success By Massaging Data*, SLATE, Aug. 5, 2003, <http://www.slate.com/id/2086617/> (last visited Nov. 11, 2006). Dr. Kleiman, a Ph.D. in Public Policy from Harvard, is currently a Professor of Public Policy and the Director of the Drug Policy Analysis Program with the University of California at Los Angeles School of Public Affairs. Kleiman quotes Harvard public policy professor Anne Piehl, who reviewed the study before it was published, as stating that the study was an example of researchers “cooking the books.”

<sup>201</sup> *Id.*

<sup>202</sup> *Id.*

<sup>203</sup> See *supra* § V(c).

<sup>204</sup> Kleiman, *supra* note 200, at <http://www.slate.com/id/2086617/>. See also Julian V. Roberts, *The Role of Criminal Record in the Sentencing Process*, 22 CRIM. & JUST. 303, 352 (1997). Unemployed offenders are a greater recidivism risk than those with steady jobs.

<sup>205</sup> *Id.* Of the 102 inmates who did not graduate from the program, 51 were released via parole or mandatory release, 19 for disciplinary reasons, 7 at the request of the IFI staff, 1 for medical problems, and 24 at the voluntary request of the applicant. Johnson, *supra* note 180, available at [http://www.pfm.org/media/ifi/Docs/crrucs\\_innerchange.pdf](http://www.pfm.org/media/ifi/Docs/crrucs_innerchange.pdf). As discussed previously, InnerChange reserves the right to remove inmates at its discretion. Admission required inmates to sign the Participation and Release of Information Form, in which the inmate acknowledged that Prison

While the success of the InnerChange graduates is encouraging, data revealed that inmates who were enrolled in the program but did not graduate were more likely to be both arrested and incarcerated during the two year period than any other group in the study.<sup>206</sup> If InnerChange's 177 entrants were truly matched to the control group but ended up having higher recidivism rates, then either the apparent success of the graduates was due to research bias or the program somehow managed to make its dropouts worse than when they started.<sup>207</sup> If the program genuinely helped its graduates and did not harm its dropouts, and if the whole group of entrants was truly matched to the controls, then the group of 177 InnerChange participants should have performed better than the controls.<sup>208</sup> Even John DiIulio, the first director of the Bush Administration's Faith-Based Initiatives and founder of the Pennsylvania research center, acknowledged that the results were less than ideal.<sup>209</sup>

Prisoners reentering society face substantial challenges.<sup>210</sup> The median educational level of released prisoners is eleventh grade, approximately three quarters of released prisoners have a history of substance abuse, and about 16% of released prisoners suffer from some form of mental illness, which is often untreated.<sup>211</sup> In-prison vocational and educational programs, combined with substance abuse counseling and post-release job training and placement programs have

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Fellowship Ministries had the right to dismiss an inmate from the Program if it so chooses. Indeed, instances of questionable removals were cited by the court. *See Americans United*, *supra* note 110, at 894.

<sup>206</sup> Johnson, *supra* note 180, available at [http://www.pfm.org/media/ifi/Docs/crrucs\\_innerchange.pdf](http://www.pfm.org/media/ifi/Docs/crrucs_innerchange.pdf). The Pennsylvania study distinguished between participants in the IFI program and graduates. Inmates who graduated from the program were much less likely than participants who did not complete the program to be arrested (17.3% vs. 50%) and incarcerated (8% vs. 36.3%) during the two year period of analysis.

<sup>207</sup> Kleiman, *supra* note 200, at <http://www.slate.com/id/2086617/>.

<sup>208</sup> *Id.*

<sup>209</sup> *Id.* In Kleiman's article, DiIulio points out that a single study almost never provides a conclusive answer on a program concept. "The orthodox believers point to a single positive result and say it proves faith-based programs always work. The orthodox secularists point to a single negative result and say it proves faith-based programs never work. They're both wrong."

<sup>210</sup> Rowleson, *supra* note 184, at 292.

<sup>211</sup> *Id.*

shown promise in reducing recidivism rates.<sup>212</sup> But the simple fact is, as illustrated by three out of four inmates finding themselves back in jail within two years of their release, there is no proven method of effectively lowering the recidivism rates. Prison Fellowship's transformational model created to reduce recidivism through spiritual and moral regeneration, is attractive and certainly has potential to succeed in an area of great societal interest, but, as held by the court, the model has failed to yield conclusive results of reduced recidivism.<sup>213</sup>

### *B. The Effect of the Decision upon the Faith-Based Initiative*

The Bush Administration followed through on campaign promises to deregulate the federal grant system deemed inhospitable to faith-based organizations. By "leveling the playing field" in favor of faith-based providers, President Bush believes America's needy will be the ultimate beneficiaries in a system where those in need are paired with organizations most capable of meeting their complex needs.<sup>214</sup>

In the eyes of its supporters, the Faith-Based Initiative has been an overwhelming success. In 2005, while addressing the Second White House National Conference on Faith-Based and Community Initiatives, President Bush announced that, for the third consecutive year, competitive grants increased to faith-based organizations.<sup>215</sup> More than \$2.1 billion in grants, nearly 11% of the total funding, were awarded to over 130 religious organizations in 28 program

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<sup>212</sup> *Id.*

<sup>213</sup> US States News, *Faith-Based Prison Programs Claim to Reduce Recidivism, But There's Little Evidence Says Florida State University Research*, Oct. 4, 2006. Researchers at Florida State University found a similar lack of evidence supporting reduced levels of recidivism in faith-based prisons. Dan Mears, an associate professor in the FSU College of Criminology and Criminal Justice, co-authored the review, "Faith-based efforts to improve prisoner reentry: Assessing the logic and evidence." According to Mears, "We undertook this review while evaluating a faith-based prisoner reentry program. During that evaluation, we found precious little theoretical foundation or empirical research," he said. "What we did find was weak support for a religion-crime relationship, inconsistent measurements of 'faith' and 'religion,' few methodologically rigorous studies, and significant questions about program implementation and the theoretical foundations of faith-based initiatives." The review found few studies that had generated data credible enough to justify public support-or outright rejection-of faith-based programming.

<sup>214</sup> The White House, *Fact Sheet: Compassion in Action: Producing Real Results for Americans Most in Need*, <http://www.whitehouse.gov/news/releases/2006/03/20060309-3.html> (last visited Nov. 11, 2006).

<sup>215</sup> *Id.* Up from 2004, where \$2.004 billion in grants were awarded to faith-based groups across the same agencies.

areas.<sup>216</sup> The White House even celebrated two Federal Court decisions upholding the current administration's approach to providing funding to faith-based organizations.<sup>217</sup> However, while the full effect of the *Americans United* remains to be seen, the decision's impact upon Prison Fellowship, one of the shining stars in the Bush administration's faith-based social services movement, could easily translate to limitations imposed upon other providers of faith-based services.<sup>218</sup>

While the decision in *Americans United* has been wildly unpopular among religious groups and organizations supporting a governmental partnership between religion and social services,<sup>219</sup> critics have been unable to conclusively establish that faith-based programs, especially in the prison context, work.<sup>220</sup> A major component of the Faith-Based Initiatives' appeal is premised upon the assumption that religious organizations do a better job in the delivery of social services than their secular counterparts.<sup>221</sup> While supporters of faith-based

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<sup>216</sup> *Id.* Since 2003, the Departments of Human and Health Services, Housing and Urban Development, Justice, Labor, and Education have seen a 38% increase in the number of grants to faith-based groups - an increase of 616 grants over 2003; and a 21% increase in grant money awarded to faith-based organizations - an increase of more than \$239 million.

<sup>217</sup> See *American Jewish Congress v. Corporation for National and Community Service*, 399 F.3d 351 (C.A.D.C., 2005). The U.S. Court of Appeals for the District of Columbia upheld the right of AmeriCorps grant recipients to teach religious and secular subjects in religiously affiliated schools. See also *Lown v. Salvation Army*, 393 F.Supp.2d 223 (S.D.N.Y., 2005). A Federal District Court for the Southern District of New York ruled that churches and religious organizations retain their hiring autonomy when they receive Federal financial assistance. The court recognized FBOs do not become an arm of the government merely by receiving funding to provide social services.

<sup>218</sup> Candace Rondeaux, *Global Ministry Supports Offenders Here at Home; Prison Fellowship Works With Churches, County*, THE WASHINGTON POST, August 31, 2006. See also Plotz, *supra* note 22, at <http://www.slate.com/id/77067/>. InnerChange has been referred to as the "show horse" of President Bush's Faith-Based Initiative.

<sup>219</sup> Jody Brown, *Judge Rules Christian Prison Program Unconstitutional*, <http://www.crosswalk.com/news/religiontoday/1401004.html> (last visited Nov. 11, 2006) According to Prison Fellowship President, Mark Early the decision in *Americans United* "has attacked the right of people of faith to operate on a level playing field in the public arena and to provide services to those who volunteered to receive them" and will "enshrine" religious discrimination consistent with the current "lock 'em up and throw away the key" approach to fighting crime. "The courts took God out of America's schools—now they are on the path to take God out of America's prisons."

<sup>220</sup> See *supra* § VII(a). The court in *Americans United* stated that InnerChange and Prison Fellowship presented, other than anecdotes, no conclusive evidence of reduced recidivism.

<sup>221</sup> PBS, *The Jesus Factor: The Faith-Based Initiative Controversy*, <http://www.pbs.org/wgbh/pages/frontline/shows/jesus/president/faithbased.html>. C. Welton Gaddy, President of Interface Alliance thinks the faith-based initiative is based on some very questionable assumptions. "The major false assumption is that religious

organizations rely heavily upon broad generalizations and unsubstantiated data to justify governmental funding, one area of particular interest to prison administrators, the arena of addiction treatment,<sup>222</sup> has been dominated for years by a respected religiously-based program with a demonstrated record of success. Alcoholics Anonymous, the blueprint for numerous substance abuse programs, utilizes religion in both philosophy and application to help participants confront and overcome their addiction.<sup>223</sup>

Since its inception in 1935, Alcoholics Anonymous has been a major force in the treatment of alcoholism.<sup>224</sup> Credited with changing society's view of alcoholism from a character flaw to a treatable illness, A.A. is probably the most widely sought after intervention for those with alcohol problems.<sup>225</sup> Although it is often referred to as a secular organization, A.A. has firm roots in Christianity.<sup>226</sup> Founders Bill Wilson and Robert Smith, were strongly influenced by the teachings of the Oxford Group, a religious organization which advocated a return to the ethos of early Christianity, with a particular emphasis on aggressive evangelicalism.<sup>227</sup> The Oxford Group's principles of admitting fault and seeking recovery

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organizations do a better job in the delivery of social services than do their secular counterparts. That generalization bears all the flaws of any generalization. It's partly right, and it's partly wrong.”

<sup>222</sup> Rowlison, *supra* note 184, at 292. Approximately three quarters of released prisoners have a history or substance abuse.

<sup>223</sup> Alcoholics Anonymous, *A Brief Guide to Alcoholics Anonymous*, available at [http://www.alcoholics-anonymous.org/en\\_pdfs/p-42\\_abriefguidetooa.pdf](http://www.alcoholics-anonymous.org/en_pdfs/p-42_abriefguidetooa.pdf). A.A. stands for the proposition that for an alcoholic to overcome his/her addiction he/she must “quit playing God.” Skepticism of the idea that man is God, or that man can actually comprehend God, is a feature of the world's three great monotheistic religions. A.A.'s admonition to participants to stop playing God, and instead to look to a higher power for guidance constitutes religious dogma, along the same lines that various strands of Jewish, Christian, and Islamic philosophies have set forth. Derek P. Apanovitch, *Religion and Rehabilitation: The Requisition of God By The State*, 47 DUKE L.J. 785, 844 (February 1998).

<sup>224</sup> Morris Jenkins, Bradene Moore, Eric Lambert, and Alan Clarke, *DUI Treatment Programs and Religious Freedom: Does Cutter v. Wilkinson Change the Analysis?* 5 RRG 351, 361 (2005).

<sup>225</sup> Ethan G. Kalett, *Twelve Steps, You're Out (Of Prison): An Evaluation of “Anonymous Programs” as Alternative Sentences*, 48 HASTINGS L.J. 129, 140-141 (1996). In 1994, A.A. claimed over 90,000 groups worldwide tallying over 2 million alcoholics and drug addicts. The ranks of Twelve Step Program members have also grown due to hundreds of “offshoot” programs utilizing the Twelve Steps, such as Narcotics Anonymous (N.A.), Cocaine Anonymous (C.A.) and Overeaters Anonymous.

<sup>226</sup> Apanovitch, *supra* note at 223, at 790.

<sup>227</sup> *Id.* Nondenominational and theologically conservative, the Oxford Group was formed in Britain in the early twentieth century and reached its peak in the late 1920s and early 1930s.

through God, form the basic tenets of A.A.'s philosophy.<sup>228</sup> The text, *Alcoholics Anonymous: The Story of How Many Thousands of Men and Women Have Recovered From Alcoholism*, also known as "The Big Book," outlines the basic principles of the A.A. program.<sup>229</sup>

While quantitative success varies from study to study,<sup>230</sup> in long-term studies of alcoholics who have undergone formal alcohol treatment programs, the only reliable predictor of sobriety during the ten years after discharge is frequent attendance of A.A. meetings and functions.<sup>231</sup> Furthermore, there is evidence to suggest that individuals who embrace the spiritual aspect of A.A. are more successful in maintaining sobriety.<sup>232</sup> While A.A. and other

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<sup>228</sup> *Id.*

<sup>229</sup> Alcoholics Anonymous World Servs., Inc., *Alcoholics Anonymous: The Story of How Many Thousands of Men and Women Have Recovered From Alcoholism* (3d ed. 1976) [Hereinafter *The Big Book*]. The Big Book contains interpretive analyses of A.A.'s principles, personal stories of selected members and, maybe most importantly, sets forth the twelve steps which form the foundation of A.A.'s system of recovery. Highly religious in nature, the twelve steps have been compared by some commentators to the Ten Commandments. See Apanovitch, *supra* note 217, at 844. The Big Book's twelve steps, routinely recited at A.A. meetings, are:

1. We admitted we were powerless over alcohol - that our lives had become unmanageable.
2. Came to believe that a Power greater than ourselves could restore us to sanity.
3. Made a decision to turn our will and our lives over to the care of God as we understood Him.
4. Made a searching and fearless moral inventory of ourselves.
5. Admitted to God, to ourselves, and to another human being the exact nature of our wrongs.
6. Were entirely ready to have God remove all these defects of character.
7. Humbly asked Him to remove our shortcomings.
8. Made a list of all persons we had harmed, and became willing to make amends to them all.
9. Made direct amends to such people wherever possible, except when to do so would injure them or others.
10. Continued to take personal inventory and when we were wrong promptly admitted it.
11. Sought through prayer and meditation to improve our conscious contact with God as we understood Him, praying only for knowledge of His will for us and the power to carry that out.
12. Having had a spiritual awakening as the result of these steps, we tried to carry this message to alcoholics, and to practice these principles in all our affairs.

<sup>230</sup> Kalett, *supra* note 225, at 144-145. Depending upon which study you read results range from fewer than one-third of A.A. members staying sober for more than five years, to a 75% overall success rate. See Jenkins, Moore, Lambert, and Clarke, *supra* note 224, at 368-369. A study in Massachusetts, found that the recidivism rate for individuals on probation with the conditions of alcohol treatment or education was lower than the recidivism rate for DUI offenders on probation with no conditions of treatment or education. Some common problems in studies include; assumptions and cultural biases of the researchers, lack of consistency in the definition of an "A.A. member" (how many meetings must they attend) and the matter of relapse. Since regular attendance at A.A. is strongly linked to continued abstinence, this lack of definition significantly impedes accurate measurements of the program's success. Additionally difficult to measure is the phenomenon of relapse (when an addict returns to drinking or uses drugs after a period of abstinence). Most studies of A.A.'s effectiveness differ in their consideration of relapse (for example, whether it represents total failure or a mere setback).

<sup>231</sup> Jenkins, Moore, Lambert, and Clarke, *supra* note 224, at 363.

<sup>232</sup> *Id.* at 365. In a study of 172 men and women, it was found that those individuals who reported to have gained higher spirituality from attending Alcoholics Anonymous meetings had fewer negative consequences.

similar self-help groups arguably fall outside the domain of formal religion,<sup>233</sup> the strategies offered do aid individuals in attaining the ultimate meaning of life.<sup>234</sup>

Prison Fellowship's strategy, rehabilitating prisoners by stimulating moral and spiritual growth and development, is similar to the method successfully employed by A.A. However, the difference between free individuals attending A.A. meetings to battle addiction and publicly funding a religious organization within a state prison, is striking. Indeed courts, even in light of the recognized secular goal of helping alcoholics overcome their addiction, frown upon the mandatory use of A.A. in connection with punishment stemming from a criminal conviction.<sup>235</sup>

Due to the reliance A.A. places upon religion in its treatment, state-supported A.A. programs

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<sup>233</sup> According to an official A.A. publication, one of the most common misconceptions about the program is that it is a religious organization. See Alcoholics Anonymous-A Newsletter for Professionals, *The A.A. Program-Spiritual But Never Religious*, available at [http://www.alcoholics-anonymous.org/en\\_pdfs/f-13\\_fall03.pdf](http://www.alcoholics-anonymous.org/en_pdfs/f-13_fall03.pdf) (last visited Nov. 11, 2006). The A.A. Preamble includes the passage, "A.A. is not affiliated with any sect, denomination, politics, organization or institution." In step two, God is defined as a "Power greater than ourselves" and in steps three and eleven the phrase "God as we understand him" is inserted. According to Rev. Samuel Shoemaker, the choice to exclude a formal religion has allowed A.A. to remain relevant to a wide population of people. "[I]n emphasizing the reality of the [recovery] experience, and acknowledging that it came from a higher Power than human...[the A.A. founders] left the theory and theology...to the churches to which people belong...and if they belonged to no church...then they give themselves to God they see in other people." See also Michael J. Honeyman, Jr., *Alcoholics Anonymous As a Condition of Drunk Driving Probation: When Does it Amount To Establishment of Religion?* 97 COLUM. L. REV. 437 (1997). Although A.A. characterizes its principles as spiritual and not religious, courts cannot merely defer to its self-definition. The fact that A.A. relies to some extent upon traditional religious principles has led some courts to conclude that, in the context of Establishment Clause jurisprudence, A.A. conforms to the definition of "religious." See, e.g., *Kerr v. Farrey*, 95 F.3d 472, 479-80 (7th Cir. 1996); *Griffin v. Coughlin*, 673 N.E.2d 98, 103 (N.Y. 1996).

<sup>234</sup> Jenkins, Moore, Lambert, and Clarke, *supra* note 224, at 368. Participation in A.A. has been tied to positive outcomes regardless of motivation or psychopathology, suggesting that it is an effective treatment intervention for those suffering from alcohol drinking disorders.

<sup>235</sup> Honeyman, *supra* note 233, at 460. "Because A.A. qualifies as a religious program, when the state orders a probationer to attend A.A. it violates the mandate that government may not coerce anyone to participate in religious exercise, and concomitantly violates the principle of neutrality—if not neutrality among religions, at least neutrality between religion and nonreligion. For this reason the Establishment Clause is violated regardless of the probationer's preference." See *Warner v. Orange County Dept. of Probation*, 968 F.Supp. 917 (S.D.N.Y., 1997). In *Warner*, as a result of three alcohol-related driving offenses within a little over a year, the offender was sentenced to three years of probation and required to attend Alcoholics Anonymous at the direction of his probation officer. Because the sentencing judge did not offer any alternative rehabilitation programs, Warner, a self-described atheist, the District Court found that the mandatory participation in A.A. as a probationary condition violated the Establishment Clause. See also *DeStefano v. Emergency Housing Group Inc.*, 247 F.3d 397 (N.Y. 2001). The Second Circuit held that a state-funded private alcoholic treatment center which required clients to attend religious Alcoholic Anonymous meetings violated constitutional protections. The court held that, for the purposes of Establishment Clause analysis, A.A. constituted a religion and the direct funding of personnel who embodied the religious beliefs "crossed the vague but palpable line between permissible and impermissible government action under the First Amendment."

only survive constitutional scrutiny in the absence of serious state compulsion and when secular treatment alternatives are shown to exist.<sup>236</sup>

While the inmate treatment options in the InnerChange program were not mandatory, trial testimony revealed that they might as well have been. Department of Corrections officials testified that parole board decisions were not infrequently based upon an inmate's enrollment or completion of voluntary treatment programs.<sup>237</sup> Obviously, the earlier an inmate enrolled, the greater chance they would have of serving less than their entire sentence.<sup>238</sup> As mentioned previously, overcrowding and budgetary constraints prevented many general population inmates from enrolling in treatment programs until they were very close to their estimated release date.<sup>239</sup> Ignoring other incentives available to InnerChange inmates, this inability to comply with state-mandated treatment programming, drove inmates to seek enrollment in the InnerChange

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<sup>236</sup> See *Honeyman*, *supra* note 233, at 461-462; *Apanovitch*, *supra* note 217, 813-815. In *Warner*, the court had left open the question of whether a state violates the Establishment Clause when the offender is offered a reasonable choice of therapy providers. This issue was officially addressed by the Federal District Court for the Central District of California in *O'Connor v. California*, 855 F.Supp. 303, 304 (C.D. Cal. 1994). Unlike *Warner*, the plaintiff in *O'Connor* was not compelled to attend A.A. in particular. The court found, even considering A.A.'s monotheistic foundation, frequent prayer and reference to God or a Higher Power, that Establishment Clause violation requires more state involvement than the incorporation of the concept of God in a program in which the State encourages participation. "Where the state offers the probationer a choice between A.A. and a nonreligious alternative, or instructs the probationer to attend the self-help group of his choice, there is no Establishment Clause violation. In this context, the state does not coerce the petitioner to attend A.A., but rather requires an independent choice among service providers and thus remains neutral." The *O'Connor* decision prompted the California Department of Alcohol and Drug Programs to amend California Administrative Code §9860. Under the amended version of the code, if the county opts to impose participation in a self-help program as an condition of sentence, it must develop a list of self-help groups that the probation may choose attend. Under this list, A.A. is classified as sectarian. When sectarian groups, such as A.A., are listed, the county is required to list nonsectarian alternatives. In the event that the only self-help groups available in the county are sectarian, or if nonsectarian groups are not available or accessible to the probationer, the county must select a different additional program requirement.

<sup>237</sup> See *Americans United*, *supra* note 104, at 903-904. While the court found no evidence to support the Plaintiffs' contention that the Iowa Parole Board treats InnerChange inmates differently than other non-InnerChange inmates that come before it, trial testimony revealed that, not surprisingly, the Iowa Parole Board would likely look favorably on any inmate who took the initiative and completed his recommended programming as early as possible. However, as with any sentencing decision, which is by its very nature, individualized, the Iowa Parole Board looked to additional factors besides early completion of recommended classes to determine eligibility for early release.

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

<sup>239</sup> *Id.* at 905. From late 2002 through late 2003, there was no substance abuse treatment program at the Newton Facility, except through InnerChange.

program.<sup>240</sup> Left with only one true option with which to complete required programming, non-Christian, as well as atheist and agnostic inmates, were presented with the dilemma of choosing between early release and compromising personal beliefs; it is understandable why an inmate would choose the latter.<sup>241</sup> The decision between secular and nonsecular treatment programs is a decision that should be made by the individual, not the state.<sup>242</sup> By failing to provide viable treatment alternatives to the programs available to inmates enrolled in InnerChange, the state of Iowa made this decision in favor of religion.

The inherent coercive nature of the prison environment when combined with the overt religiousness of the InnerChange program and incentives offered to inmate participants, transformed the Newton Facility into a conduit for Christianity.<sup>243</sup> The use of spirituality to enhance the success of voluntary treatment programs, such as Alcoholics Anonymous, is not something that mandates governmental concern.<sup>244</sup> This same reasoning has been applied within the prison context where courts have upheld the constitutionality of voluntary religious programs such as prison chaplaincies and the administration of voluntary drug and alcohol treatment.<sup>245</sup>

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<sup>240</sup> *Id.* at 899 n.32, 927. The evidence presented at trial illustrated that the state of Iowa and InnerChange provided incentives in the form of better conditions, once reserved solely for honor unit inmates, and an opportunity to complete the required courses of rehabilitation classes before it would be otherwise possible. The inability to participate in rehabilitation classes was just one prong of the limitation imposed upon non-InnerChange inmates. The Court found credible the testimony of inmate Kevin Watson who stated that, as a member of the Nation of Islam, he could not join InnerChange without compromising his faith. Watson, serving a fifty-year sentence for sexual abuse, was not close enough to his release date to qualify for participation in treatment classes, including a parenting class in which he expressed interest. Comparable classes within the InnerChange program were available to inmates regardless of their release date if they meet the other Dept. of Corrections and InnerChange requirements for entry.

<sup>241</sup> See *supra* note 164, *McCallum*, 214 F.Supp.2d 905. Even though the other non-religious programs were shorter in length (30-90 days compared to a 9-12 month program) and did not provide the same quality of treatment, the non-religious alternatives met the state's post-release requirements for probation, parole, or alternative to revocation. When Wisconsin inmates demurred for religious content they were immediately made aware and allowed to participate in other, secular programs they found more appealing.

<sup>242</sup> *Honeyman*, *supra* note 232, at 460.

<sup>243</sup> *Americans United*, *supra* note 184, at 922.

<sup>244</sup> *Jenkins, Moore, Lambert, and Clarke*, *supra* note 224, at 363. A.A.'s model, not only has an accepted secular purpose, but a documented record of success. In long-term studies the only reliable predictor of sobriety is regular attendance of A.A. meetings.

<sup>245</sup> *Theriault v. Silber*, 547 F.2d 1279 (5th Cir. 1977); *Johnson-Bey v. Lane*, 863 F.2d 1308, 1312 (7th Cir. 1988).

The Constitution does not require a complete removal of religion from the institutional setting, it is only once an individual is subjected to governmental coercion that constitutional safeguards are activated.

The facts of *Americans United* set forth that, although enrollment in the InnerChange program was voluntary, that lack of a reasonable alternative, amounted to governmental coercion.<sup>246</sup> Allowing InnerChange, a program with the recognized goal of promoting the Christian faith, to remain in a public institution without first establishing any ability to accomplish its stated purpose of lowering recidivism rates, would compromise the firm division established between the governmental and religious facets of our country.

## VII. CONCLUSION

The decision by in *Americans United* invalidated a program in which a great deal of hope to many Americans had been placed. The decision weakens President Bush's Faith-Based Initiative, as demonstrated by the Bureau of Prisons already halting similar faith-based prison programs set to begin elsewhere. The Bush Administration's goal of religion playing a part in healing society's ills failed to notice the wall which had been erected in years past. While some faith-based organizations, notably Alcoholic Anonymous, have demonstrated an impressive record of success, allowing religious organizations into the inherently coercive prison environment, will not pass constitutional muster without strict safeguards and a proven ability to meet stated goals. Though the decision was correct, considering current Establishment Clause jurisprudence, the question of how to effectively reduce recidivism in the American prison system remains a very real problem in our society today.

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<sup>246</sup> See *supra* § 6(d)(2).