

“INNERCHANGE”: CONVERSION AS THE PRICE OF FREEDOM AND COMFORT—A CAUTIONARY TALE ABOUT THE PITFALLS OF FAITH-BASED PRISON UNITS

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In the State of Iowa’s prison system, enrolling in a program called “The InnerChange Freedom Initiative” could bring an inmate many benefits. Inmates, for example, drew closer to parole because treatment credits they needed for release were more easily available through the program.¹ Entering the program also allowed inmates to move into what many Iowa prisoners considered the most desirable living unit in the state’s most desirable prison.² And the program’s inmates received greater contact with their family members, guarantees of jobs in the prison, increased access to computers and training on how to use them, and various other perks.³

There was only one catch: InnerChange was an intensive, day-and-night religious program that indoctrinated inmates into one particular version of Christianity.⁴ Inmates who did not subscribe to the program’s religious teachings faced discrimination and pressure

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Editor’s Note: This Article is the first segment of a two-part debate about the merits and constitutionality of faith-based prison units. Anthony R. Picarello, Jr., the attorney who represented Prison Fellowship Ministries on appeal in the Iowa case, will provide the second segment of the debate, in support of faith-based prison units, in the forthcoming volume of the *Ave Maria Law Review*.

1. See *infra* text accompanying notes 118–24.
2. See *infra* text accompanying notes 125–30.
3. See *infra* text accompanying notes 131–42.
4. See *infra* Part I.A.

to convert.⁵ Roman Catholic inmates, for example, were told that many of their beliefs were wrong.⁶ Indeed, one Catholic inmate reported that a program counselor prayed in front of the inmate that Jesus lead the inmate away from Catholicism so that he would not burn in Hell.⁷ Likewise, InnerChange's counselors told a Native American inmate that his religion's sweat lodge rituals were a form of witchcraft and sorcery, and they repeatedly asked him whether he had been saved, believed in Jesus, and had become a Christian.⁸

The discriminatory and proselytizing nature of InnerChange was just one of the many aspects of the program that rendered it unconstitutional as a matter of law and abhorrent as a matter of policy. Inmates were drawn into the program by its material benefits and coerced to stay by penalties associated with withdrawal.⁹ State correctional officials granted program staff power over the daily lives of prison inmates and lent the weight of governmental authority to enforcement of the program's religious mandates.¹⁰ And public resources were used to support the program's efforts to indoctrinate and convert.¹¹

The InnerChange program in Iowa was not an isolated experiment. Over the last decade, faith-based prison units have spread across the country, and one state has even established entire faith-based prisons.¹² Of course, not all faith-based units and prisons share all the flaws of the InnerChange program. But many of the program's defects—most commonly, the domination of instruction by one sect and the linkage of material benefits with participation—have been reported to be present in many of the other faith-based units and prisons around the country.¹³

And although proponents of faith-based prison programs contend that the programs reduce recidivism, there is no scientific evidence supporting such a claim.¹⁴ In any event, even if it were shown that

5. *See infra* Part I.B.

6. *See infra* text accompanying note 100.

7. *See infra* text accompanying note 97.

8. *See infra* text accompanying note 106.

9. *See infra* Part I.D.

10. *See infra* text accompanying notes 153–58 and 161–65.

11. *See infra* text accompanying notes 65–66.

12. *See infra* text accompanying notes 168–75.

13. *See infra* text accompanying notes 176–92.

14. *See infra* Part III.A.

religious instruction prevents criminal behavior from reoccurring, this would not justify the constitutional violations associated with faith-based prison programs.¹⁵

To avoid the constitutional issues and policy concerns raised by many faith-based prison programs, prison officials and religious organizations should move away from the recently popularized in-prison-faith-immersion model. Religious practice and study can certainly do a great deal of good for those who desire it. Within prison, however, religious programs should not be linked to a prisoner's living arrangements or to other material benefits and should be offered in a manner that minimizes state involvement and the risk of coercion. More intensive religious programs are best saved for presentation to interested criminal offenders after they are released from prison, when the dangers of excessive entwinement between government and religion are lower, and there is less of a threat that religious training will be used for material gain by those who lack genuine desire to deepen their faith. Through this path, people of faith can do the most good for those who share or are open to their faith, while the rights of those of other faiths and of the secular can be respected and protected.

I. THE INFIRMITIES OF THE INNERCHANGE PROGRAM

Americans United for Separation of Church & State v. Prison Fellowship Ministries—a lawsuit filed in federal district court by Iowa taxpayers and inmates challenging Iowa's sponsorship of the InnerChange program—illuminated the program's many flaws.¹⁶ After a three-week trial, the district court found—based on voluminous evidence—that the InnerChange program sought to convert inmates to its doctrines, discriminated against those who did not share in its dogmas, and provided vital material benefits to those who were willing to submit to its creed.¹⁷ The district court accordingly concluded that Iowa's support of the program violated the Establishment Clause of the First Amendment to the U.S. Constitution.¹⁸ The U.S. Court of Appeals for the Eighth Circuit

15. See *infra* Part III.B.

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

17. *Id.* at 864, 898–900, 913, 927–29.

18. *Id.* at 934.

affirmed this ruling in December 2007.¹⁹ No party asked the Supreme Court to review the case, and Iowa terminated the program's operations in March 2008.²⁰

The Establishment Clause prohibits government bodies from making any "law respecting an establishment of religion."²¹ The U.S. Supreme Court has held that the Establishment Clause bars the government from engaging in conduct that has the purpose or effect of advancing religion.²² Governmental conduct can have the unconstitutional effect of advancing religion in a number of ways: The government must not sponsor or finance religious indoctrination, or otherwise provide cash or in-kind aid to religious organizations that use the aid to support religious activity.²³ The state cannot discriminate among persons based on religion.²⁴ The government must not coerce individuals to take part in religious activity²⁵ or otherwise provide individuals "any incentive to modify their religious beliefs or practices" or "to undertake religious indoctrination."²⁶ And the state is prohibited both from becoming excessively entangled in the affairs of religious institutions²⁷ and from delegating governmental power to

19. *Ams. United for Separation of Church & State v. Prison Fellowship Ministries*, 509 F.3d 406, 425 (8th Cir. 2007). The Eighth Circuit affirmed the district court's ruling in its entirety, except that the Eighth Circuit rolled back an order by the district court that had required the InnerChange program to return to the State of Iowa all funds paid to the program by the state. *Id.* at 428. The Eighth Circuit held that InnerChange had to return only the funds it received for services rendered after the district court's ruling. *Id.*

20. William Petroski, *Prison Will End Religious Treatment Program*, DES MOINES REG., Feb. 24, 2008, at 1B, available at LEXIS, News Library, Allnews File.

21. U.S. CONST. amend. I.

22. *Zelman v. Simmons-Harris*, 536 U.S. 639, 648–49 (2002); *County of Allegheny v. ACLU*, 492 U.S. 573, 592 (1989); *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971).

23. *See Mitchell v. Helms*, 530 U.S. 793, 840, 845, 857 (2000) (O'Connor, J., concurring); *Agostini v. Felton*, 521 U.S. 203, 219, 230 (1997); *Bowen v. Kendrick*, 487 U.S. 589, 621–22 (1988); *Roemer v. Bd. of Pub. Works*, 426 U.S. 736, 755 (1976) (plurality opinion of Blackmun, J., joined by Burger, C.J. and Powell, J.); *id.* at 770–71 (Brennan, J., dissenting, joined by Marshall, J.); *Hunt v. McNair*, 413 U.S. 734, 742–43 (1973); *Tilton v. Richardson*, 403 U.S. 672, 683 (1971) (plurality opinion of Burger, C.J., joined by Harlan, J., Stewart, J., and Blackmun, J.); *id.* at 690–92 (Douglas, J., concurring in part and dissenting in part, joined by Black, J. and Marshall, J.); *Everson v. Bd. of Educ.*, 330 U.S. 1, 15–16 (1947); *Prison Fellowship Ministries*, 509 F.3d at 424.

24. *County of Allegheny*, 492 U.S. at 590; *Prison Fellowship Ministries*, 509 F.3d at 425.

25. *Lee v. Weisman*, 505 U.S. 577, 587 (1992).

26. *See Agostini*, 521 U.S. at 231–32; *accord Zelman*, 536 U.S. at 650; *Comm. for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 786 (1973); *Sloan v. Lemon*, 413 U.S. 825, 832 (1973).

27. *Agostini*, 521 U.S. at 232; *Lemon*, 403 U.S. at 613.

such institutions.²⁸

Iowa's relationship with InnerChange ran afoul of all of these prohibitions, as we will now see in detail.

A. *InnerChange Indoctrinated Inmates in the Teachings of a Particular Religious Sect and Sought to Convert Them*

The InnerChange program was developed and operated by Prison Fellowship Ministries.²⁹ Prison Fellowship Ministries is the largest prison ministry in the world.³⁰ The organization describes itself as "Compelled to Evangelize."³¹ It states that its goal is to "establish the Gospel of Jesus Christ" to inmates, that it "is in the business of saving souls for Christ," and that it used InnerChange to "realize souls won for the Kingdom of God."³²

InnerChange described itself as a "24-hour-a-day, Christ-centered, biblically based, program that promotes personal transformation of prisoners through the power of the Gospel."³³ Inmates in the program were housed in a separate unit of an Iowa prison—the Newton Correctional Facility.³⁴ Religious material was on display throughout InnerChange's living and programming areas, and the atmosphere was overtly religious.³⁵ The in-prison portion of the program lasted eighteen months, and a post-release phase lasted at least six months.³⁶

During the in-prison phase, every weekday morning InnerChange inmates were required to attend devotions where they prayed and read Christian Scriptures.³⁷ Every weekday afternoon the inmates

28. *County of Allegheny*, 492 U.S. at 590–91; *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116, 127 (1982).

29. *Ams. United for Separation of Church & State v. Prison Fellowship Ministries*, 432 F. Supp. 2d 862, 871, 887, 920 (S.D. Iowa 2006), *aff'd in part, rev'd in part*, 509 F.3d 406 (8th Cir. 2007).

30. Appendix of Plaintiffs-Appellees at 78, *Ams. United for Separation of Church & State v. Prison Fellowship Ministries*, 509 F.3d 406 (8th Cir. 2007) (No. 06-2741) [hereinafter Appendix].

31. *Id.* at 219.

32. *Id.* at 61, 103, 1379.

33. *Prison Fellowship Ministries*, 509 F.3d at 418.

34. *Id.* at 413–14.

35. See Appendix, *supra* note 30, at 64, 478–544, 1030.

36. *Ams. United for Separation of Church & State v. Prison Fellowship Ministries*, 432 F. Supp. 2d at 901, 909–10 (S.D. Iowa 2006), *aff'd in part, rev'd in part*, 509 F.3d 406 (8th Cir. 2007).

37. *Prison Fellowship Ministries*, 509 F.3d at 415.

had to go to community meetings where they prayed, made prayer requests, sang religious songs, and read Scripture.³⁸ On Friday nights the inmates were required to attend revivals, which were essentially worship services featuring Christian singing and sermons.³⁹ Every Sunday morning the inmates had to participate in church services led by InnerChange staff.⁴⁰ The inmates spent approximately four hours each weekday in InnerChange's classes.⁴¹

All InnerChange classes and program components were used to indoctrinate inmates in and convert them to InnerChange's Christian beliefs, for that was the program's central goal.⁴² According to an InnerChange handbook for inmates, "[t]ransformation" was the "[m]ajor purpose of the program" and was "brought about by depending on Christ and living according to the Bible."⁴³ "True transformation begins with salvation, also called conversion," and "[c]onversion is when you turn away from what is negative and turn to Christ."⁴⁴ InnerChange's operations manual stated, "It is the earnest desire of IFI [InnerChange] that residents convert to Christ and follow His ways that lead to transformation."⁴⁵

InnerChange's classes were the fulcrum of the program's efforts to convert. Some of InnerChange's classes were overwhelmingly devotional in nature—entirely religious and inherently intended to indoctrinate.⁴⁶ And while other InnerChange classes encompassed secular subjects such as substance abuse and finances, those classes were also used to indoctrinate.⁴⁷ InnerChange instructors relied on biblical Scripture to support all of their teachings on secular topics.⁴⁸ Program staff taught that all the answers to life's difficulties are found

38. *Id.*

39. *Id.*; *Prison Fellowship Ministries*, 432 F. Supp. 2d at 902.

40. *Prison Fellowship Ministries*, 509 F.3d at 415; *Prison Fellowship Ministries*, 432 F. Supp. 2d at 901.

41. *Prison Fellowship Ministries*, 432 F. Supp. 2d at 901; Stipulation of Facts ¶ 30, *Prison Fellowship Ministries*, 432 F. Supp. 2d 862 (No. 4:03-cv-90074).

42. *See Prison Fellowship Ministries*, 509 F.3d at 413–15.

43. Appendix, *supra* note 30, at 167.

44. *Id.* at 169.

45. *Id.* at 206.

46. *Prison Fellowship Ministries*, 509 F.3d at 415; *Prison Fellowship Ministries*, 432 F. Supp. 2d at 905.

47. *Prison Fellowship Ministries*, 509 F.3d at 415–16; *Prison Fellowship Ministries*, 432 F. Supp. 2d at 906–07.

48. *Prison Fellowship Ministries*, 509 F.3d at 413–14, 416; Appendix, *supra* note 30, at 823–28.

in the Bible and through conversion to Christ.⁴⁹ InnerChange's curricular materials were filled with statements designed to convert inmates to the program's particular version of Christianity.⁵⁰ Inmates in the program had to read and complete books and workbooks with titles such as "Experiencing God: Knowing and Doing the Will of God," "Step by Step Through the New Testament," "Step by Step Through the Old Testament," "The Man God Uses," "In God's Presence," "Walking With God: Friendship With God," "Experiencing God Together," and "Hearing God's Voice."⁵¹

InnerChange forced all of its inmates to memorize Bible verses and gave the inmates homework assignments and graded weekly tests that required the inmates to write down the verses from memory and answer questions about biblical doctrines.⁵² Assignments that inmates were required to complete had names such as "Obedience to God," "Lamb of God," "Innocent Blood," "Who is God?," "The Wages of Sin," "The Lord is My Shepherd," "When I Think About God," and "Freedom in Christ."⁵³

Inmates were required to attend all InnerChange program components—including devotions, community meetings, revivals, church services, and classes.⁵⁴ InnerChange encouraged inmates to pray at these events and even placed inmates in a "praise and worship" class that taught them to worship in an exuberant manner.⁵⁵ At community meetings, each inmate had to take a turn leading a Christian group prayer and giving a devotional message.⁵⁶ At revivals, inmates who had not accepted Christ into their hearts were encouraged to do so, and those inmates who accepted the invitation—sometimes about twenty to thirty during one revival—came to the

49. See *Prison Fellowship Ministries*, 509 F.3d at 414–16; *Prison Fellowship Ministries*, 432 F. Supp. 2d at 922; Appendix, *supra* note 30, at 1067–68.

50. See *Prison Fellowship Ministries*, 432 F. Supp. 2d at 905–07.

51. Trial Transcript at 1138, 1144–48, *Prison Fellowship Ministries*, 432 F. Supp. 2d 862 (No. 4:03-cv-90074).

52. *Prison Fellowship Ministries*, 432 F. Supp. 2d at 902; Plaintiffs' Trial Exhibit No. 30, Defendants' Response to Plaintiffs' Separate Statement of Undisputed Material Facts in Support of Plaintiffs' Motion for Summary Judgment ¶¶ 268–76, *Prison Fellowship Ministries*, 432 F. Supp. 2d 862 (No. 4:03-cv-90074) [hereinafter Plaintiffs' Exhibit No. 30].

53. Brief of Plaintiffs-Appellees at 7–8, *Prison Fellowship Ministries*, 509 F.3d 406 (No. 06-2741).

54. *Prison Fellowship Ministries*, 509 F.3d at 415; Stipulation of Facts, *supra* note 41, ¶ 30.

55. *Prison Fellowship Ministries*, 432 F. Supp. 2d at 902–03; Appendix, *supra* note 30, at 1338–41.

56. *Prison Fellowship Ministries*, 432 F. Supp. 2d at 902, 920.

front of the assembly and were led through a prayer in which they accepted Christ as their savior.⁵⁷ InnerChange also periodically held baptism ceremonies in its prison unit, which all of its inmates were required to attend; during each ceremony, numerous inmates—sometimes sixty to one hundred—were baptized.⁵⁸ In the post-release phase of the program, inmates had to weekly attend a church approved by InnerChange.⁵⁹ InnerChange further taught inmates that once they have accepted Christ themselves, they should evangelize others, including other inmates.⁶⁰

Program staff considered inmates' spiritual growth in evaluating them.⁶¹ Inmates who missed program components such as church, did poorly on Bible-verse memorization tests, or committed disciplinary violations were placed on "behavior contracts" that obliged the inmates to fulfill religious requirements—such as writing biblical essays or passing a Bible-verse memorization test—or face expulsion from the program.⁶² Reasons InnerChange provided for expelling inmates included: "a continued lack of growth and development in your spirituality," "Unteachable Spirit," "Your Focus is not on God and His Son to Change you," and failure to actively participate in religious singing and worship at community meetings.⁶³ Thus some inmates faked professions of Christian belief in order to make it through the program.⁶⁴

What is more, InnerChange's indoctrination and conversion efforts were sponsored and supported by the State of Iowa. Starting in 1999, Iowa entered into annual contracts with InnerChange for its services, and Iowa paid InnerChange more than \$1.5 million through

57. Appendix, *supra* note 30, at 1003–04, 1048–49.

58. *Prison Fellowship Ministries*, 432 F. Supp. 2d at 912; Appendix, *supra* note 30, at 1112.

59. *Prison Fellowship Ministries*, 509 F.3d at 416; Appendix of Exhibits of Defendants-Appellants Prison Fellowship Ministries and InnerChange Freedom Initiative at 865, *Prison Fellowship Ministries*, 509 F.3d 406 (No. 06-2741) [hereinafter Exhibits].

60. Appendix, *supra* note 30, at 821–23; Trial Transcript, *supra* note 51, at 580–84.

61. *Prison Fellowship Ministries*, 509 F.3d at 416; Appendix, *supra* note 30, at 228–33.

62. *Prison Fellowship Ministries*, 432 F. Supp. 2d at 912; Trial Transcript, *supra* note 51, at 1155–58; Plaintiffs' Exhibit No. 30, *supra* note 52, ¶¶ 281–83.

63. *Prison Fellowship Ministries*, 509 F.3d at 416; Appendix, *supra* note 30, at 858–60, 1102–04.

64. Declaration of Jamie Rhone ¶ 19, *Prison Fellowship Ministries*, 432 F. Supp. 2d 862 (No. 4:03-cv-90074); Declaration of John Lyons ¶¶ 20–21, *Prison Fellowship Ministries*, 432 F. Supp. 2d 862 (No. 4:03-cv-90074).

2007.⁶⁵ Iowa also provided InnerChange with substantial non-cash (“in-kind”) aid, including a modular building devoted exclusively to the program that InnerChange used for classes and office space, utilities and maintenance for this program building, additional office space in the InnerChange living unit, furniture for InnerChange offices and events, and pay for inmate jobs in which inmates performed services for InnerChange.⁶⁶

InnerChange was not able to limit its use of state aid to non-religious activity, so both the cash and the in-kind aid directly supported religious indoctrination.⁶⁷ The Establishment Clause, as noted above, prohibits the provision of governmental aid for such use. As explained by Justice O’Connor in *Agostini v. Felton* and *Mitchell v. Helms*, the Establishment Clause bars the government from sponsoring or financing religious indoctrination.⁶⁸ *Agostini* and *Mitchell* are only the latest in a long line of Supreme Court cases holding that the use of governmental funds to support religious activity is generally prohibited. In *Bowen v. Kendrick*, for instance, the Supreme Court stated that public money cannot be used “to fund ‘specifically religious activit[ies].’”⁶⁹ And, in its seminal 1947 decision *Everson v. Board of Education*, the Court ruled, “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.”⁷⁰

The courts have also held that it is unconstitutional for the government to finance or provide a physical facility for the exclusive

65. See *Prison Fellowship Ministries*, 509 F.3d at 417–18. From July 1, 2007 until the program’s termination in March 2008, InnerChange operated without direct cash aid from the State of Iowa. See *id.* at 418; Petroski, *supra* note 20.

66. *Prison Fellowship Ministries*, 432 F. Supp. 2d at 891–93.

67. *Prison Fellowship Ministries*, 509 F.3d at 418–19, 424; *Prison Fellowship Ministries*, 432 F. Supp. 2d at 924.

68. *Mitchell v. Helms*, 530 U.S. 793, 840, 845, 857 (2000) (O’Connor, J., concurring); *Agostini v. Felton*, 521 U.S. 203, 219, 230 (1997). Because there was no majority opinion in *Mitchell*, and Justice O’Connor concurred in the judgment on narrower grounds than those set forth in the plurality opinion, her opinion represents the holdings of *Mitchell*. *Comty. House, Inc. v. City of Boise*, 490 F.3d 1041, 1057–58 (9th Cir. 2007); *Columbia Union Coll. v. Oliver*, 254 F.3d 496, 504 n.1 (4th Cir. 2001); *DeStefano v. Emergency Hous. Group, Inc.*, 247 F.3d 397, 418–19 (2d Cir. 2001); *Johnson v. Econ. Dev. Corp.*, 241 F.3d 501, 510 n.2 (6th Cir. 2001).

69. *Bowen v. Kendrick*, 487 U.S. 589, 621 (1988) (alteration in original) (quoting *Hunt v. McNair*, 413 U.S. 734, 743 (1973)); accord *Roemer v. Bd. of Pub. Works*, 426 U.S. 736, 755 (1976) (plurality opinion of Blackmun, J., joined by Burger, C.J. and Powell, J.); *id.* at 770 (Brennan, J., dissenting, joined by Marshall, J.).

70. *Everson v. Bd. of Educ.*, 330 U.S. 1, 16 (1947).

use of a religious institution unless the facility is reserved for secular activities.⁷¹ Although the government can allow the use of governmental facilities for religious activities if the facilities are available to both secular and religious groups on a nondiscriminatory basis,⁷² Iowa's provision of physical facilities to InnerChange was not defensible under that theory because Iowa granted InnerChange exclusive dominion over the facilities.⁷³

To be sure, based on the principle that governmental conduct does not have the effect of advancing religion so long as it does no more than "accommodate religion" by lifting a government-imposed burden on religious exercise, the courts have held that the Constitution permits the government to fund chaplains in prisons, the military, and public hospitals—*but only if* the chaplains' services are reasonably necessary to enable those whose movement is restricted to freely exercise their religions; are nonsectarian and provided to all religions on a non-discriminatory basis; are non-proselytizing; and are only provided to the extent desired by their recipients.⁷⁴ The InnerChange program did not fit this rubric: it was not needed to enable inmates to exercise their religion, for the Newton prison already had a comprehensive chaplaincy program;⁷⁵ InnerChange discriminated among religions;⁷⁶ it proselytized;⁷⁷ and it required inmates to take part in religious activities.⁷⁸

The fact that all of the religious activities in InnerChange's state-supported program were mandatory was particularly damning from a constitutional standpoint. As the Iowa federal district court stated in finding the program unconstitutional, "The Establishment

71. See *Tilton v. Richardson*, 403 U.S. 672, 683 (1971) (plurality opinion of Burger, C.J., joined by Harlan, J., Stewart, J., and Blackmun, J.); *id.* at 692 (Douglas, J., concurring in part and dissenting in part, joined by Black, J., and Marshall, J.); *Cnty. House*, 490 F.3d at 1059.

72. See, e.g., *Widmar v. Vincent*, 454 U.S. 263, 273–74 (1981).

73. *Ams. United for Separation of Church & State v. Prison Fellowship Ministries*, 509 F.3d 406, 414 (8th Cir. 2007).

74. See *Montano v. Hedgepeth*, 120 F.3d 844, 850 n.10 (8th Cir. 1997); *Carter v. Broadlawns Med. Ctr.*, 857 F.2d 448, 455–56, 458 (8th Cir. 1988); *Baz v. Walters*, 782 F.2d 701, 709 (7th Cir. 1986); *Katcoff v. Marsh*, 755 F.2d 223, 228, 235 (2d Cir. 1985).

75. *Ams. United for Separation of Church & State v. Prison Fellowship Ministries*, 432 F. Supp. 2d 862, 913–14 (S.D. Iowa 2006), *aff'd in part, rev'd in part*, 509 F.3d 406 (8th Cir. 2007); Trial Transcript, *supra* note 51, at 636–38.

76. See *infra* Part I.B.

77. See *supra* text accompanying notes 42–60.

78. See *supra* text accompanying note 54.

Clause . . . abhors coercion in any form.”⁷⁹ The Second Circuit has thus held that “when state funds are used to coerce worship or prayer, the Establishment Clause has been violated.”⁸⁰ This is so because the Supreme Court has ruled that “[i]t is beyond dispute . . . that government may not coerce anyone to support or participate in religion or its exercise,”⁸¹ and that “[i]t is . . . axiomatic that a state may not induce, encourage or promote private persons to accomplish what it is constitutionally forbidden to accomplish.”⁸²

B. *InnerChange Discriminated Against Inmates Who Did Not Share Its Faith*

Likewise, the Supreme Court has held that the Establishment Clause “mean[s] that government may not . . . discriminate among persons on the basis of their religious beliefs and practices,”⁸³ and that “the Constitution does not permit the State to aid discrimination.”⁸⁴ Yet that is exactly what Iowa did here, for the state-supported InnerChange program discriminated against inmates of faiths other than its own.

Not only did InnerChange teach one religion—Christianity—it taught a particular version of Christianity. All InnerChange employees

79. *Prison Fellowship Ministries*, 432 F. Supp. 2d at 923 n.40.

80. *DeStefano v. Emergency Hous. Group, Inc.*, 247 F.3d 397, 412 (2d Cir. 2001) (footnote omitted).

81. *Lee v. Weisman*, 505 U.S. 577, 587 (1992).

82. *Norwood v. Harrison*, 413 U.S. 455, 465 (1973) (alteration in original) (quoting *Lee v. Macon County Bd. of Educ.*, 267 F. Supp. 458, 475–76 (M.D. Ala. 1967), *aff’d sub nom. Wallace v. United States*, 389 U.S. 215 (1967) (mem.)); *accord* *Rutan v. Republican Party of Ill.*, 497 U.S. 62, 77–78 (1990) (“What the First Amendment precludes the government from commanding directly, it also precludes the government from accomplishing indirectly.”); *City of Richmond v. J. A. Croson Co.*, 488 U.S. 469, 492–93 (1989) (plurality opinion) (citing *Norwood*, 413 U.S. at 465); *Young v. City of Simi Valley*, 216 F.3d 807, 819 (9th Cir. 2000) (“[A] city cannot accomplish through private parties that which it is forbidden to do directly under the First Amendment”); *Nat’l Black Police Ass’n v. Velde*, 712 F.2d 569, 580 (D.C. Cir. 1983) (“Activities that the federal government could not constitutionally participate in directly cannot be supported indirectly through the provision of support for other persons engaged in such activity.”).

83. *County of Allegheny v. ACLU*, 492 U.S. 573, 590 (1989).

84. *Norwood*, 413 U.S. at 465–66; *accord* *Gilmore v. City of Montgomery*, 417 U.S. 556, 568–69 (1974) (“[A]ny tangible state assistance . . . is constitutionally prohibited if it has ‘a significant tendency to facilitate, reinforce, and support private discrimination.’” (quoting *Norwood*, 413 U.S. at 466)); *Brown v. Califano*, 627 F.2d 1221, 1235 (D.C. Cir. 1980) (“The Constitution’s prohibition against governmental support of . . . invidious discrimination is too obvious and well-established to require elaboration”).

and volunteers were required to sign and abide by Prison Fellowship Ministries' Statement of Faith.⁸⁵ All teachings presented and materials used in the InnerChange program had to be consistent with this Statement of Faith.⁸⁶ The Statement of Faith sets forth beliefs that are commonly held by many persons who identify themselves as Evangelical Christians, but that are not accepted by many other Christians—including that everything in the Bible is literally true, that a born-again experience as an adult is necessary for salvation, and that Jesus Christ (not a church-structured sacramental system) “is the only mediator between God and man.”⁸⁷

Though InnerChange employees and volunteers may have been passionate believers in their faith, the trial of the federal lawsuit revealed many instances in which the passion of InnerChange staff to promote their faith was so unyielding that it resulted in discrimination against and denigration of other faiths. The most prevalent incidents of discrimination discovered in the lawsuit turned out to have victimized Roman Catholic inmates,⁸⁸ which does not necessarily mean that InnerChange had any special animus against Catholicism, but may well have been a product of circumstance. Prior to joining InnerChange, non-Christian inmates were informed that they would be taught religious beliefs different from their own if they enrolled in the program, and so were typically dissuaded from enrolling;⁸⁹ Catholic inmates, on the other hand, were not warned before entering the program that the version of Christianity the program taught differed from Catholicism.⁹⁰

Trial testimony revealed a particularly egregious example of the denigration of Catholicism within the InnerChange program: an InnerChange volunteer stated to an InnerChange class that a pope would be the Antichrist.⁹¹ When one inmate went to his InnerChange counselor to complain about what had happened, the counselor

85. *Ams. United for Separation of Church & State v. Prison Fellowship Ministries*, 432 F. Supp. 2d 862, 871–72 (S.D. Iowa 2006), *aff'd in part, rev'd in part*, 509 F.3d 406 (8th Cir. 2007); Trial Transcript, *supra* note 51, at 2386.

86. *Prison Fellowship Ministries*, 432 F. Supp. 2d at 875, 920; Appendix, *supra* note 30, at 223.

87. *Prison Fellowship Ministries*, 432 F. Supp. 2d at 871–74.

88. See *infra* text accompanying notes 91–104.

89. See *Prison Fellowship Ministries*, 432 F. Supp. 2d at 898–900; Stipulation of Facts, *supra* note 41, ¶ 17.

90. Trial Transcript, *supra* note 51, at 435, 489, 688–89.

91. *Id.* at 240.

responded by making an analogy between the Pope and Adolf Hitler.⁹²

An InnerChange counselor also stated in class that two of the books of the Catholic Bible were absolute nonsense.⁹³ InnerChange staff further prohibited InnerChange inmates from reading out of books that are part of the Catholic Bible but not part of the Protestant Bible when giving devotions in the morning or at community meetings.⁹⁴ When an InnerChange counselor explained at an InnerChange community meeting why such reading was being prohibited, he disparagingly likened the books of the Catholic Bible to the Koran.⁹⁵ And InnerChange staff even barred inmates from saying prayers before and after small group meetings as a result of Catholic InnerChange inmates giving Catholic “Hail Mary” prayers during those times.⁹⁶

What is more, an InnerChange counselor prayed in front of a Catholic InnerChange inmate that Jesus lead the inmate away from Catholicism so that he would not burn in Hell.⁹⁷ InnerChange volunteers distributed to inmates pamphlets that were derogatory toward the Catholic faith.⁹⁸ More generally, InnerChange presented its inmates teachings that were different from Catholic teachings: for example, contrary to Catholic doctrine, InnerChange taught that one must be fully immersed in water as an adult in order to be validly baptized.⁹⁹ InnerChange staff and volunteers in fact directly told Catholic InnerChange inmates that various Catholic beliefs were wrong: for instance, that a Catholic inmate’s baptism was not a real baptism because he was not fully immersed; that Catholics are wrong in believing that Christ drank wine; and that, contrary to Catholic belief, one does not have to go to a priest to confess one’s sins.¹⁰⁰ Indeed, a program guidebook for InnerChange inmates depicted Catholicism as a “different religion” from Christianity.¹⁰¹

92. *Id.* at 241.

93. *Id.* at 1917–18.

94. *Id.* at 403, 624.

95. *Id.* at 403.

96. *See id.* at 409–10.

97. *Id.* at 1932–33.

98. *Id.* at 241.

99. *Id.* at 239, 411, 434–36.

100. *Id.* at 259, 411, 1926.

101. *Ams. United for Separation of Church & State v. Prison Fellowship Ministries*, 432 F. Supp. 2d 862, 896 n.29 (S.D. Iowa 2006), *aff’d in part, rev’d in part*, 509 F.3d 406 (8th Cir. 2007).

Testimony at trial disclosed many other instances of negative treatment of Catholicism and Catholic inmates by InnerChange staff,¹⁰² and also that InnerChange inmates openly made anti-Catholic comments that InnerChange staff did not stop.¹⁰³ In light of the program's treatment of Catholicism, it is far from surprising that one Catholic inmate testified at trial that he left InnerChange because he "felt spiritually crushed."¹⁰⁴

Catholicism was not the only religion denigrated by InnerChange personnel. In an InnerChange class, an InnerChange counselor stated that Jews would be doomed to Hell if they did not turn their hearts over to Christ.¹⁰⁵ InnerChange's counselors told a Native American inmate that his religion's sweat lodge rituals were a form of witchcraft and sorcery, and they repeatedly asked him whether he had been saved, believed in Jesus, and had become a Christian.¹⁰⁶ InnerChange employees and volunteers also made snide anti-Lutheran comments.¹⁰⁷

Moreover, InnerChange provided inmates with curricular materials that contained statements that denigrated or negatively portrayed the above-mentioned faiths and various others, including Islam, Hinduism, Buddhism, and Mormonism.¹⁰⁸ InnerChange staff used terms such as "unsaved," "lost," "pagan," "of Satan," "sinful," and "of darkness" to refer to persons who hold non-Christian beliefs.¹⁰⁹ And, based on InnerChange's interpretations of Scripture, the program presented anti-gay teachings that depicted homosexuality as wrong and sinful, and the program also taught that women should be submissive to their husbands.¹¹⁰

If an inmate who held religious beliefs different from those taught in InnerChange did enroll in the program, he could attend services or activities of his own religion only if the events did not conflict with

102. Trial Transcript, *supra* note 51, at 42, 482–84.

103. *Id.* at 407–08, 578–79.

104. *Id.* at 400, 429.

105. *Id.* at 1927.

106. *Prison Fellowship Ministries*, 432 F. Supp. 2d at 900.

107. Trial Transcript, *supra* note 51, at 576.

108. *Prison Fellowship Ministries*, 432 F. Supp. 2d at 899 n.31; Appendix, *supra* note 30, at 828.

109. *Prison Fellowship Ministries*, 432 F. Supp. 2d at 900; Appendix, *supra* note 30, at 1055–56.

110. *Prison Fellowship Ministries*, 432 F. Supp. 2d at 909–10; Appendix, *supra* note 30, at 603–04, 682–83.

InnerChange program requirements and only if InnerChange gave him permission.¹¹¹ Inmates of faiths different from that of InnerChange could not substitute their own religious studies for InnerChange classes or assignments, were prevented from expressing distinguishing aspects of their faith in group settings, and could pursue their own religion only in the small amount of free time the program allotted them.¹¹²

Accordingly, even though InnerChange claimed that its program was open to all inmates regardless of what their religion was, inmates who did not adhere to the version of Christianity presented in the program were effectively precluded from participating in it.¹¹³ For instance, several Muslim inmates testified at trial that they could not participate in InnerChange because, if they had, they would have committed blasphemy, turned their backs on God, and desecrated and denied their faiths.¹¹⁴ They explained that if they were to profess a belief in Jesus Christ, pray to Him, or even be present in a room where persons are praying to Christ, they would be committing an unforgivable sin against God that would doom them to Hell.¹¹⁵ Likewise, an Orthodox Jewish inmate testified that it would have been impossible for him to participate in InnerChange, because he could not have stayed true to his religious beliefs if he had attended a prayer service at which people around him were worshipping Jesus Christ, adding that if he himself were to worship Christ, he would be turning his back on God, which would be akin to committing suicide.¹¹⁶

111. *Prison Fellowship Ministries*, 432 F. Supp. 2d at 900, 910–11; Exhibits, *supra* note 59, at 860, 866.

112. *Prison Fellowship Ministries*, 432 F. Supp. 2d at 911; Plaintiffs' Exhibit No. 30, *supra* note 52, ¶¶ 309, 356; *see also* Trial Transcript, *supra* note 51, at 2263–64 (indicating that, in group settings, Catholic inmates were not allowed to pray the "Hail Mary" prayer, and Pentecostal inmates were not allowed to speak in tongues).

113. *Prison Fellowship Ministries*, 432 F. Supp. 2d at 898, 910, 930–31.

114. *Id.* at 899–900; Trial Transcript, *supra* note 51, at 291–92.

115. Trial Transcript, *supra* note 51, at 161–63, 291–92, 912.

116. *Prison Fellowship Ministries*, 432 F. Supp. 2d at 900; Trial Transcript, *supra* note 51, at 188–91.

C. *Inmates Who Enrolled in InnerChange Received Many Material Benefits and Privileges That Other Inmates Did Not*

The State of Iowa compounded InnerChange's discriminatory aspects by providing inmates in the program many unique material benefits that were not available to other inmates.¹¹⁷ Foremost among these was an opportunity to complete treatment classes required for parole earlier than otherwise possible.¹¹⁸ The Iowa Parole Board and the Iowa Department of Corrections ("Department") prescribe certain treatment classes for inmates, and completing the classes increases inmates' parole chances, while failing to do so greatly reduces them.¹¹⁹ Inmates can take only those classes that the Department allows them to take and can do so only when the Department allows, which typically does not occur until an inmate is close to his anticipated release date.¹²⁰ Because of the Department's limited treatment resources, numerous inmates have not been able to enroll in treatment classes in a timely manner and have therefore served longer sentences than they otherwise would have.¹²¹

But by completing the first year of InnerChange, inmates obtained credit for all the treatment classes that the vast majority of Iowa inmates need for parole.¹²² And inmates could enroll in InnerChange when they had a long time left on their sentences or when they were otherwise precluded from participating in the Department's secular treatment programs.¹²³ Enrolling in InnerChange thus brought inmates closer to parole, and some inmates were in fact able to obtain quick paroles by taking part in the program.¹²⁴

117. *Prison Fellowship Ministries*, 432 F. Supp. 2d at 927–28; see also *Ams. United for Separation of Church & State v. Prison Fellowship Ministries*, 509 F.3d 406, 414, 415 n.3 (8th Cir. 2007).

118. *Prison Fellowship Ministries*, 432 F. Supp. 2d at 904, 927; see also Appendix, *supra* note 30, at 980.

119. *Prison Fellowship Ministries*, 432 F. Supp. 2d at 903–05; Plaintiffs' Exhibit No. 30, *supra* note 52, ¶¶ 652–55.

120. See *Prison Fellowship Ministries*, 432 F. Supp. 2d at 903–05; Appendix, *supra* note 30, at 1236.

121. *Prison Fellowship Ministries*, 432 F. Supp. 2d at 880; see also Appendix, *supra* note 30, at 374.

122. *Prison Fellowship Ministries*, 432 F. Supp. 2d at 903, 905; see also Appendix, *supra* note 30, at 936–37.

123. *Prison Fellowship Ministries*, 432 F. Supp. 2d at 895, 900 n.32; Appendix, *supra* note 30, at 939, 1241.

124. See Trial Transcript, *supra* note 51, at 2945–46; Appendix, *supra* note 30, at 980–81.

Enrolling in InnerChange also may have been the easiest way—and, for some inmates, the only way—to be transferred to the Newton prison.¹²⁵ Newton is a relatively safe facility and is centrally located in Iowa near Des Moines, which makes it easier for many inmates' family members to visit.¹²⁶ Inmates cannot be transferred to Newton just because they desire relocation, but enrolling in InnerChange would take them there.¹²⁷

Within Newton, InnerChange inmates received the prison's most attractive living arrangements.¹²⁸ They lived in what previously was an "honor unit" used to house the prison's best-behaved inmates.¹²⁹ The unit has many unique advantages: inmates have keys to their own cells; toilets are in a separate restroom facility with private stalls, not in the cells, so inmates need not suffer the indignity of performing their bodily functions in plain view of their cellmates; the cells have more usable space; and the environment is safer.¹³⁰

In addition, InnerChange inmates received opportunities that were not provided to other inmates for special contact with family members. Inmates in InnerChange participated in a three-month program during which the inmates had weekly meetings with family members that did not count against the Newton prison's limit on the number of visits an inmate could have per week and that took place on a day on which other inmates could not have visits.¹³¹ Furthermore, InnerChange inmates were sometimes allowed to make free telephone calls to family members from counselors' phones in circumstances under which other inmates could not.¹³²

125. *Prison Fellowship Ministries*, 432 F. Supp. 2d at 894–95; Trial Transcript, *supra* note 51, at 137, 1724–25.

126. *Prison Fellowship Ministries*, 432 F. Supp. 2d at 891, 929; *see also* Appendix, *supra* note 30, at 1297–98.

127. *Prison Fellowship Ministries*, 432 F. Supp. 2d at 894–95; Appendix, *supra* note 30, at 1298.

128. *See Prison Fellowship Ministries*, 432 F. Supp. 2d at 927–28; Appendix, *supra* note 30, at 869.

129. *Ams. United for Separation of Church & State v. Prison Fellowship Ministries*, 509 F.3d 406, 414 (8th Cir. 2007); *Prison Fellowship Ministries*, 432 F. Supp. 2d at 892, 927; State Appellants' Appendix at 174–75, *Prison Fellowship Ministries*, 509 F.3d 406 (No. 06-2741).

130. *Prison Fellowship Ministries*, 509 F.3d at 414; *Prison Fellowship Ministries*, 432 F. Supp. 2d at 893, 927–28.

131. *Prison Fellowship Ministries*, 432 F. Supp. 2d at 911; Stipulation of Facts, *supra* note 41, ¶¶ 193–96.

132. *Prison Fellowship Ministries*, 432 F. Supp. 2d at 901; Trial Transcript, *supra* note 51, at 503–04, 696–99, 1644–45.

What is more, all InnerChange inmates received prison jobs, whereas about half of the remaining inmates at the Newton prison, including many who wanted work, were unemployed.¹³³ Inmates who enrolled in InnerChange even received monetary payments just for participating in the program (although such payments were also made to non-InnerChange inmates who were in full-time treatment programming, they were not made to inmates in part-time treatment or in no treatment).¹³⁴

InnerChange inmates further received greater access to computers and computer training than other inmates.¹³⁵ The InnerChange inmates also had exclusive access to electrical musical instruments and a room where they could practice music.¹³⁶ And the program's inmates were subject to less supervision and surveillance by prison security.¹³⁷

InnerChange inmates received various other benefits,¹³⁸ and though some of these benefits may seem trivial to one who is not in prison, they can take on great importance to those who must live daily with the restrictions and deprivations of incarceration.¹³⁹ For instance, at program graduation ceremonies, InnerChange inmates received free pizza from Pizza Hut or sandwiches from Subway, while other inmates had to pay to obtain any food aside from standard prison food.¹⁴⁰ Inmates in the program received free supplies—such as paper, pens, pencils, folders, and binders—that could be used both for study and personal purposes.¹⁴¹ Finally, unlike other inmates, InnerChange enrollees were permitted to watch movies together in a large group.¹⁴²

133. Trial Transcript, *supra* note 51, at 71, 877; Appendix, *supra* note 30, at 878–79.

134. *Prison Fellowship Ministries*, 432 F. Supp. 2d at 903; Stipulation of Facts, *supra* note 41, ¶ 192.

135. *Prison Fellowship Ministries*, 509 F.3d at 415.

136. *Prison Fellowship Ministries*, 432 F. Supp. 2d at 891–92, 901; Stipulation of Facts, *supra* note 41, ¶¶ 188–89; Plaintiffs' Exhibit No. 30, *supra* note 52, ¶¶ 817–21.

137. *Prison Fellowship Ministries*, 432 F. Supp. 2d at 892, 901; Appendix, *supra* note 30, at 878.

138. *Prison Fellowship Ministries*, 432 F. Supp. 2d at 901, 910–11, 928–29.

139. *Id.* at 927–28.

140. *Id.* at 911, 928.

141. *Id.* at 928; Appendix, *supra* note 30, at 953.

142. *Prison Fellowship Ministries*, 432 F. Supp. 2d at 928; Trial Transcript, *supra* note 51, at 76. InnerChange inmates, however, were not permitted to have televisions in their cells, while general population inmates were. *Id.* at 75–76.

By providing all of these unique material benefits to participants in a religious program that inmates of other faiths could not join—at least without compromising or abandoning their own faiths¹⁴³—Iowa discriminated among inmates based on religion. Iowa’s relationship with InnerChange thereby violated the cardinal Establishment Clause principle that the government must not “discriminate among persons on the basis of their religious beliefs and practices.”¹⁴⁴ As the Supreme Court stated in *Larson v. Valente*, “[t]he clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another.”¹⁴⁵ Indeed, “the Constitution mandates that the government remain secular, rather than affiliate itself with religious beliefs or institutions, precisely in order to avoid” what occurred in Iowa due to the state’s involvement with InnerChange—“discriminatio[n] among citizens on the basis of their religious faiths.”¹⁴⁶

D. *Inmates Were Coerced to Enroll and Remain in InnerChange*

The many benefits Iowa tied to participation in InnerChange also created strong incentives for inmates to join the program.¹⁴⁷ In fact, testimony at trial showed that many inmates enrolled in InnerChange not because of any reason relating to faith, but because of the material

143. *Ams. United for Separation of Church & State v. Prison Fellowship Ministries*, 509 F.3d 406, 425 (8th Cir. 2007); *Prison Fellowship Ministries*, 432 F. Supp. 2d at 910; *see also supra* text accompanying notes 113–16.

144. *County of Allegheny v. ACLU*, 492 U.S. 573, 590 (1989); *accord* Sch. Dist. of Grand Rapids v. Ball, 473 U.S. 373, 381 (1985) (“[G]overnmental programs discriminating among religions are unconstitutional.”), *overruled on other grounds by* *Agostini v. Felton*, 521 U.S. 203 (1997).

145. *Larson v. Valente*, 456 U.S. 228, 244 (1982).

146. *See County of Allegheny*, 492 U.S. at 610. The Supreme Court also stated in *County of Allegheny*:

[T]he prohibition against governmental endorsement of religion preclude[s] government from conveying or attempting to convey a message that religion or a particular religious belief is *favored or preferred*. . . . [A]nd this Court long since has held that government may not . . . promote one religion or religious theory against another

. . . The Establishment Clause . . . prohibits government from appearing to take a position on questions of religious belief or from making adherence to a religion relevant in any way to a person’s standing in the political community.

Id. at 593–94 (alteration in original) (citations omitted) (internal quotation marks omitted).

147. *Prison Fellowship Ministries*, 432 F. Supp. 2d at 927–29.

advantages associated with the program—most typically, improvement of parole chances and placement in the Newton prison or the living unit that housed the program.¹⁴⁸

But the Supreme Court has held that the Establishment Clause prohibits the government from providing individuals “any incentive to modify their religious beliefs or practices” or “to undertake religious indoctrination.”¹⁴⁹ Indeed, tying incentives such as those described above to participation by inmates in a religious program has been held to be unconstitutional coercion.¹⁵⁰ The Supreme Court has ruled, as noted earlier, that “[i]t is beyond dispute . . . that government may not coerce anyone to support or participate in religion or its exercise.”¹⁵¹ And as stated by the Supreme Court in the seminal *Everson* decision, “Neither a state nor the Federal Government . . . 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.”¹⁵²

Yet Iowa’s coercive actions did not stop after inmates were induced to enter the InnerChange program by the special benefits associated with it. Once inmates were in the program, the state’s coercive powers were used to ensure that the inmates participated in InnerChange’s religious activities and to deter inmates from leaving the program. Iowa correctional officers enforced rules requiring InnerChange inmates to attend all components of the program,

148. Appendix, *supra* note 30, at 1016–17, 1038.

149. *Agostini v. Felton*, 521 U.S. 203, 231–32 (1997); *accord* *Zelman v. Simmons-Harris*, 536 U.S. 639, 650 (2002); *Sloan v. Lemon*, 413 U.S. 825, 832 (1973); *Comm. for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 786 (1973).

150. *See* *Kerr v. Farrey*, 95 F.3d 472, 474–75, 479–80 (7th Cir. 1996) (finding coercion where an inmate could suffer an adverse notation on his record that could affect his chances for parole, as well as classification to a higher security-risk category that could cause him to be transferred to a higher-security prison, as a penalty for failure to attend or observe religious meetings); *Griffin v. Coughlin*, 673 N.E.2d 98, 111 (N.Y. 1996) (finding coercive the denial of increased family contact for refusal to attend meetings with significant religious content); *cf.* *Remmers v. Brewer*, 494 F.2d 1277, 1278 (8th Cir. 1974) (finding no Establishment Clause violation in submission by prison chaplains of reports—which did not primarily concern religious activities—to a committee that could make parole recommendations, but exhorting that “[g]reat care must be exercised to avoid even the appearance of reliance on ‘religious reports’ as determinative of one’s status for parole eligibility”).

151. *Lee v. Weisman*, 505 U.S. 577, 587 (1992).

152. *Everson v. Bd. of Educ.*, 330 U.S. 1, 15 (1947).

including church.¹⁵³ And if an InnerChange inmate missed any program component—including worship services or devotions—he could receive a major disciplinary report from the Department and could also be expelled from the program by InnerChange staff.¹⁵⁴ Receipt of major disciplinary reports greatly reduces an inmate’s parole chances and can further cause an inmate to lose “good time” credits that can shorten the length of his prison stay.¹⁵⁵

What is more, if an inmate was expelled or resigned from InnerChange, Newton correctional officers took him in handcuffs to the semi-lockdown unit of the Newton prison—an undesirable place in which inmates are subject to many restrictions that are not applicable to inmates in the prison’s general population—where he could remain for weeks or months.¹⁵⁶ Also, if an inmate resigned from the InnerChange program while he was in the middle of a treatment class that he needed for parole, he would not receive any credit for the treatment, and he would not be permitted to join a secular Department treatment class in midstream.¹⁵⁷ InnerChange inmates were made well aware of both of these consequences of leaving.¹⁵⁸

Iowa thus grossly violated one of the most fundamental protections of the Establishment Clause—that “[n]o person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance.”¹⁵⁹ The state’s involvement in the enforcement of InnerChange’s religious mandates also contravened another keystone Establishment Clause prohibition—that government must not become excessively entangled with religious institutions.¹⁶⁰

153. *Ams. United for Separation of Church & State v. Prison Fellowship Ministries*, 432 F. Supp. 2d 862, 903, 911 (S.D. Iowa 2006), *aff’d in part, rev’d in part*, 509 F.3d 406 (8th Cir. 2007); Trial Transcript, *supra* note 51, at 1273–74.

154. *Prison Fellowship Ministries*, 432 F. Supp. 2d at 903, 911; Appendix, *supra* note 30, at 1412; Stipulation of Facts, *supra* note 41, ¶ 48.

155. Appendix, *supra* note 30, at 941–42; Trial Transcript, *supra* note 51, at 865, 2472–73.

156. *Prison Fellowship Ministries*, 432 F. Supp. 2d at 891, 903; Appendix, *supra* note 30, at 1006–07, 1041, 1114–15.

157. *Prison Fellowship Ministries*, 432 F. Supp. 2d at 903.

158. *Id.*; Trial Transcript, *supra* note 51, at 1117–18.

159. *Everson v. Bd. of Educ.*, 330 U.S. 1, 15–16 (1947).

160. *Agostini v. Felton*, 521 U.S. 203, 232 (1997); *Lemon v. Kurtzman*, 403 U.S. 602, 613 (1971).

E. *Iowa Delegated Governmental Authority to InnerChange*

Not only did Iowa place its coercive authority in the service of InnerChange's religious conversion efforts, but the state also delegated some of that authority directly to InnerChange. Indeed, Prison Fellowship Ministries described its InnerChange operation at Newton as "one of the prisons Prison Fellowship actually runs as a Christian institution."¹⁶¹ "For all practical purposes," concluded the Iowa federal district court in its post-trial opinion, "the state . . . literally established an Evangelical Christian congregation within the walls of one [of] its penal institutions, giving the leaders of that congregation, i.e., InnerChange employees, authority to control the spiritual, emotional, and physical lives of hundreds of Iowa inmates."¹⁶²

InnerChange staff thus had command over the daily lives of program inmates.¹⁶³ The Department even empowered InnerChange staff to write disciplinary reports against both InnerChange and non-InnerChange inmates for violations of prison rules and to control the discipline received by InnerChange inmates for certain infractions.¹⁶⁴ And the discipline InnerChange imposed often required inmates to complete religious mandates, such as writing biblical essays or passing tests on Bible verses.¹⁶⁵

The Supreme Court has held, however, that it is unconstitutional for "important, discretionary governmental powers [to] be delegated to or shared with religious institutions,"¹⁶⁶ because a "core rationale underlying the Establishment Clause is preventing 'a fusion of governmental and religious functions.'"¹⁶⁷ Yet that is exactly what happened in the Newton prison in Iowa—one of the many ways in which the InnerChange program contravened the Constitution.

161. Appendix, *supra* note 30, at 105.

162. *Prison Fellowship Ministries*, 432 F. Supp. 2d at 933.

163. *Id.* at 923, 933; see Appendix, *supra* note 30, at 105, 108.

164. *Prison Fellowship Ministries*, 432 F. Supp. 2d at 865 n.3, 912, 923; Appendix, *supra* note 30, at 1212–13.

165. *Prison Fellowship Ministries*, 432 F. Supp. 2d at 912; Trial Transcript, *supra* note 51, at 1156–57.

166. *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116, 127 (1982); *accord* *County of Allegheny v. ACLU*, 492 U.S. 573, 590–91 (1989).

167. *Larkin*, 459 U.S. at 126 (quoting *Abington Sch. Dist. v. Schempp*, 374 U.S. 203, 222 (1963)).

II. MANY OTHER FAITH-BASED UNITS AND PRISONS PRESENT CONSTITUTIONAL AND POLICY CONCERNS SIMILAR TO THOSE ASSOCIATED WITH THE INNERCHANGE PROGRAM

The InnerChange program in Iowa was far from a unique phenomenon. Five other states currently have InnerChange programs in their prisons: Arkansas, Kansas, Minnesota, Missouri, and Texas.¹⁶⁸ State and local correctional systems have created “faith-based dorms”—special housing units for prisoners that focus on religion-based rehabilitation—in many states,¹⁶⁹ including in six Georgia prisons,¹⁷⁰ three Louisiana prisons,¹⁷¹ three Indiana prisons,¹⁷² and an Ohio prison.¹⁷³ The Corrections Corporation of America, a private company that operates prisons pursuant to contracts with states, has opened twenty-two such “faith pods” in prisons in nine states.¹⁷⁴ And Florida has converted three entire correctional facilities into “faith-based prisons” that concentrate on religious rehabilitation and is considering turning six additional prisons into faith-based facilities.¹⁷⁵

Not surprisingly, newspaper accounts about InnerChange programs in other states have reported distressing facts similar to those disclosed about the Iowa program during the federal court trial.

168. The InnerChange Freedom Initiative: Program Details, States, <http://www.ifiprison.org/contentindex.asp?ID=976> (last visited Apr. 4, 2008).

169. David Crary, *Inmates Find God, Purpose Behind Bars: Faith-Based Prisons Touted As Path to Success Outside, Cure for Recidivism*, COM. APPEAL (Memphis), Oct. 14, 2007, at A4, available at 2007 WLNR 20250550.

170. Don Schanche, Jr., *Prison Program Holds Graduation: Seven Women Make It Through Faith-Based Project's First Year*, MACON TELEGRAPH, Aug. 5, 2005, at 1A.

171. Laura Maggi, *Jails Chief Takes Aim at Recidivism: He Says Preparation Helps Inmates Adjust*, TIMES-PICAYUNE (New Orleans), Mar. 9, 2005, at A2, available at 2005 WLNR 3715006; Paul Rioux, *“A Chance for a Fresh Start”: Rayburn Inmates Join the Prison's Faith-Based Programs to Gain a Shot at Redemption, Religious and Otherwise*, TIMES-PICAYUNE (New Orleans), Jan. 28, 2007, at A1.

172. Lesley Stedman Weidenbener, *Indiana Prisons Trying to Build Character: Programs Based on Faith, Values*, COURIER-JOURNAL (Louisville), July 27, 2005, at B1.

173. Alan Johnson, *Task Force Wants to Retool Programs to Help Prisoners*, COLUMBUS DISPATCH, Nov. 20, 2006, at B1.

174. Russ Bynum, *Prisons Devoting Dorms to Bible Studies to Help Set Inmates Straight*, ASSOCIATED PRESS, Feb. 26, 2005, 2/26/05 APALERTGA 16:59:46 (Westlaw).

175. Claire Hughes, *States Pursue Faith-Based Prison Programs Despite Murky Legal Climate*, ROUNDTABLE ON RELIGION & SOC. WELFARE POL'Y, Jan. 9, 2007, http://www.socialpolicyandreligion.org/article_index/article_display.cfm?id=5850&SiteTopicRequest=17&TOPIC_TITLE=Prison%20Programs.

In Texas, many inmates enroll in InnerChange due to the material benefits associated with the program there, such as improving their parole chances, moving into a desirable prison facility that inmates refer to as a “Cadillac Unit,” receiving increased visiting opportunities, enjoying air conditioning in the program’s classrooms, and obtaining computer training.¹⁷⁶ Similarly, in Kansas, enrolling in InnerChange grants inmates advantages with respect to release chances, gives some an opportunity to move into a prison closer to their families, places them in a safer environment, grants them access to a computer lab, and allows them to have catered pizza at special events.¹⁷⁷ As in Iowa, these arrangements in Texas and Kansas run afoul of the constitutional prohibition against tying material benefits to participation in religious activity.¹⁷⁸ Media accounts about the Texas and Kansas programs also report that some inmates are converted to Christianity by InnerChange, while others fake professions of faith in order to make it through the program.¹⁷⁹

Unfortunately, such troubling reports about faith-based prison facilities are not limited to the InnerChange program. One element that many of the faith-based facilities have in common is that they are dominated by one particular religious group: Evangelical Christians. Like InnerChange, the faith-based program that the Corrections Corporation of America has implemented in many of its prisons presents instruction based on Evangelical Christian beliefs, such as the inerrancy of every word of the Bible, even though the program claims to be open to inmates of all faiths.¹⁸⁰ Indeed, a lawsuit against the Corrections Corporation of America charges that a company faith-based prison pod for women teaches them—based on fundamentalist Christian beliefs—to be submissive to male authority.¹⁸¹

Similarly, in Florida’s faith-based prisons, which are also technically open to inmates of any religion, the volunteers who

176. Scott Nowell, *Doing Time with JC in the TDCJ*, HOUS. PRESS, Sept. 18, 2003, available at <http://www.houstonpress.com/2003-09-18/news/doing-time/1>.

177. See Ben Paynter, *Jesus Is in the Big House: Putting It’s [sic] Faith in a Prison Ministry, the Kansas Department of Corrections Saves Money if Not Souls*, PITCH (Kan. City), Feb. 12, 2004, available at <http://www.pitch.com/2004-02-12/news/jesus-is-in-the-big-house/>.

178. See *supra* notes 147–52 and accompanying text.

179. See Nowell, *supra* note 176; Paynter, *supra* note 177.

180. See Bynum, *supra* note 174; Jane Lampman, *A Captive Audience for Salvation: For-Profit Prison Company Stirs Hope—and Church-State Issues—Pursuing Partnerships with Evangelical Christian Ministries*, CHRISTIAN SCI. MONITOR, Apr. 19, 2006, at 14.

181. Lampman, *supra* note 180.

present religious programming are almost entirely from the Evangelical Christian tradition, and the programming reflects their beliefs.¹⁸² Though the volunteers in Florida's faith-based facilities are instructed by prison officials not to attempt to convert inmates, some of the volunteers teach inmates to evangelize other inmates, and inmates often try to convert non-Christian inmates to Christianity.¹⁸³

Some faith-based prison programs even go beyond InnerChange and explicitly discriminate in admissions based on religion. For example, a faith-based prison pod in Biloxi, Mississippi is open only to inmates who show "a willingness to have a personal relationship with Jesus Christ,"¹⁸⁴ and a Maryland rehabilitation program admits only inmates who register themselves as Christians.¹⁸⁵ Such facial religious discrimination in government-sponsored programs is unquestionably prohibited by the Establishment Clause.¹⁸⁶

As with InnerChange, material benefits that are unrelated to religion are tied to participation in many faith-based prison programs. Inmates who enroll in certain faith-based programs in California, Tennessee, and Georgia can gain release from prison earlier as a result.¹⁸⁷ By taking part in a faith-based program, inmates may also be able to obtain substantive instruction—which may not otherwise be available to them—on nonreligious topics such as finance and computers.¹⁸⁸ Increasing the risk that secular rehabilitation options

182. Alan Cooperman, *An Infusion of Religious Funds in Fla. Prisons: Church Outreach Seeks to Rehabilitate Inmates*, WASH. POST, Apr. 25, 2004, at A1.

183. See Alexandra Alter, *Fla. Tries Putting Faith Behind Bars: Religion-Based Rehab Experiment Expands, as Does Criticism*, PHILA. INQUIRER, Nov. 26, 2006, at A16, available at 2006 WLNR 20503637; Cooperman, *supra* note 182.

184. Robin Fitzgerald, *Program Aims to Heal: Prison Ministry Seeks Male Mentors to Volunteer Time, Share Knowledge*, SUN HERALD (Biloxi, Miss.), Jan. 24, 2005, at A3, available at 2005 WLNR 22860237.

185. Brett Zongker, *Maryland Prisons Adopt Religious Program from Popular Book*, ASSOCIATED PRESS, Aug. 10, 2004, 8/10/04 APALERTDE 03:53:04 (Westlaw).

186. See *County of Allegheny v. ACLU*, 492 U.S. 573, 590–91 (1989); *Sch. Dist. of Grand Rapids v. Ball*, 473 U.S. 373, 381 (1985), *overruled on other grounds by Agostini v. Felton*, 521 U.S. 203, 236 (1997); *Ams. United for Separation of Church & State v. Prison Fellowship Ministries*, 509 F.3d 406, 425 (8th Cir. 2007).

187. See Bynum, *supra* note 174; Brian Lazenby, *Judges Give Mixed Reviews to Faith-Based Option to Jail*, CHATTANOOGA TIMES FREE PRESS, Sept. 19, 2006, at B1; John Leland, *Offering Ministry, and Early Release, to Prisoners*, N.Y. TIMES, June 10, 2004, at A1.

188. See Jeff Coen, *Inmates Find "Christian Tier" a Haven from Troubles of Jail*, CHI. TRIB., Oct. 10, 2005, § 2, at 1; Cooperman, *supra* note 182; Christina Murphy, *Faith-Based Partnerships on Saxman's List*, NEWS LEADER (Staunton, Va.), Apr. 28, 2005, at A3; Lindsay Pollard, *Inmates Escape—Through Faith*, TALLAHASSEE DEMOCRAT, Jan. 22, 2005, at 1D; Don Schanche, Jr., *Prison*

will be insufficient or oversubscribed, some states have reduced funding for nonreligious rehabilitation programming as they have expanded their faith-based programs.¹⁸⁹

Inmates sometimes transfer to a faith-based prison or unit because many such units—in at least some cases due to strict admissions policies that only permit enrollment of inmates with good disciplinary records—have safer and quieter environments than does the typical prison.¹⁹⁰ One of Florida's faith-based prisons has special physical amenities and equipment, including ceiling fans, musical instruments, a sound system, and computers.¹⁹¹ And a faith-based dormitory in another Florida prison provides similar special benefits that draw inmates to enroll for nonreligious reasons, such as ceiling fans that are not available in the rest of the prison and freedom of movement greater than what other inmates in that prison receive.¹⁹² As discussed above, it is unconstitutional for governmental bodies to provide such material incentives for entry into religious programming.¹⁹³

What is more, aside from the constitutional and policy issues raised thus far, governmental support of religious evangelization may create cause for concern from another standpoint. In this day of violent religious fanaticism across the world, when any group of passionate religious believers in this country is focusing its efforts on spreading its faith—especially efforts in which converts are taught to continue spreading that faith—on persons who have already proven themselves to be violent and unstable, there is potential for misdirected zeal. If there is anything that the events that have occurred since the dawn of this century should have brought home to

Program Aims to Help Inmates Develop Faith, Skills to Make It in Outside World, MACON TELEGRAPH, Aug. 23, 2004, 2004 WLNR 18970016.

189. Nowell, *supra* note 176; *see also* Paynter, *supra* note 177; John Riley, *Hoping Faith Will Stop Crime*, NEWSDAY (Long Island), May 23, 2004, at A4; Schanche, *supra* note 188.

190. *See* Alexandra Alter, *Faith Finds a Home Behind Prison Walls*, MIAMI HERALD, Nov. 11, 2006, at A1, *available at* 2006 WLNR 19600533; Bynum, *supra* note 174; Carlos Campos, *Faith Behind Bars: Programs Aim to Uplift, but Foes Say State Oversteps Bounds*, ATLANTA J.-CONST., Aug. 22, 2004, at C4; Coen, *supra* note 188; Hughes, *supra* note 175; Ron Word, *Faith-Based Florida Prisons Aim to Cut Recidivism*, ST. LOUIS POST-DISPATCH, May 15, 2004, at 18.

191. *See* Cooperman, *supra* note 182.

192. *See* Alter, *supra* note 190; Jane Musgrave, *Religion As Rehabilitation*, PALM BEACH POST, Jan. 11, 2004, at 1A.

193. *See supra* text accompanying notes 147–52.

all of us, it is how dangerous the combination of deep religious belief and a violent nature can be.

III. STATE INTERESTS IN REDUCING RECIDIVISM CANNOT RENDER IN-PRISON RELIGIOUS IMMERSION PROGRAMS CONSTITUTIONAL

A. *No Evidence Exists that Faith-Based Prison Programs Reduce Recidivism*

Some proponents of intensive in-prison religious rehabilitation programs contend that the programs are effective at reducing recidivism by criminal offenders, and that any constitutional and policy concerns that the programs pose should therefore be minimized or ignored.¹⁹⁴ There is no scientific evidence, however, that faith-based rehabilitation programs are in fact effective at reducing recidivism.

Much of the controversy about this question, not surprisingly, has focused on the InnerChange program. In 2003, a study was released concerning the effect on recidivism of the InnerChange program in Texas.¹⁹⁵ InnerChange issued a press release claiming that the study showed that the program was successful.¹⁹⁶ The study's actual conclusion, however, was, "[s]imply stated, participation in the IFI [InnerChange] program is not related to recidivism reduction."¹⁹⁷ The study reported that, while inmates who graduated from the InnerChange program fared better at staying out of prison after release than did a control group, those who entered the program but failed to complete it fared substantially worse, and the combined

194. See, e.g., Brief of Amici Curiae Alliance Defense Fund et al. in Support of Defendants-Appellants at 2, 15-17, *Ams. United for Separation of Church & State v. Prison Fellowship Ministries*, 509 F.3d 406 (8th Cir. 2007) (No. 06-2741); Brief of the Commonwealth of Virginia and the State of Alabama as well as Seven Other States as Amici Curiae in Support of the Appellants at 1-16, *Prison Fellowship Ministries*, 509 F.3d 406 (No. 06-2741).

195. BYRON R. JOHNSON & DAVID B. LARSON, CTR. FOR RESEARCH ON RELIGION & URBAN CIVIL SOC'Y, *THE INNERCHANGE FREEDOM INITIATIVE: A PRELIMINARY EVALUATION OF A FAITH-BASED PRISON PROGRAM 4* (2003), available at http://www.manhattan-institute.org/pdf/crrucs_innerchange.pdf.

196. InnerChange Freedom Initiative, *Graduates of Faith-Based Prison Program Less Likely to Return to Prison*, June 18, 2003, <http://www.demosnewspond.com/ifi/releases/IFIstudy061803.htm>.

197. JOHNSON & LARSON, *supra* note 195, at 18.

population of all inmates who entered InnerChange (both graduates and dropouts) fared worse than the controls.¹⁹⁸

What is more, in order to be a “graduate” of the InnerChange program for purposes of the study, an inmate had to stay out of prison for at least six months after release and hold down a job for at least three consecutive months.¹⁹⁹ But inmates are at greatest risk of being rearrested during their first six months after release,²⁰⁰ and holding down employment is strongly associated with avoiding reincarceration.²⁰¹ In other words, the study’s report of a lower recidivism rate for InnerChange graduates showed not that intensive faith-based rehabilitation reduces recidivism, but only confirmed the unremarkable conclusion that inmates who are able to avoid trouble with the law and hold down a job during the first six months after their release have a better chance of staying out of prison afterward.²⁰²

That the study does not support InnerChange’s claim concerning recidivism is further evidenced by the study’s finding that inmates who had lower risk scores (scores given to inmates by correctional authorities to assess how dangerous they are;²⁰³ higher risk scores indicate greater danger) were more likely than inmates with higher risk scores to graduate from the InnerChange program.²⁰⁴ This is understandable, since inmates with greater self-control and self-discipline are more likely to progress successfully through an intensive and lengthy religious program;²⁰⁵ of course, the same characteristics also help an inmate stay out of prison after release.²⁰⁶ As UCLA Professor of Public Policy Mark A.R. Kleiman explained, what the InnerChange program in Texas did is called “creaming”: InnerChange cherry-picked as graduates those inmates who were

198. *Id.* at 5, 19; see also 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> (reporting that entrants into the program fared “somewhat worse than the controls”); Nowell, *supra* note 176 (reporting that those who joined the program were “more likely to return to prison” than the control group).

199. JOHNSON & LARSON, *supra* note 195, at 15; Trial Transcript, *supra* note 51, at 2212–13, 2215; see also Stipulation of Facts, *supra* note 41, ¶ 28.

200. Trial Transcript, *supra* note 51, at 2211–12.

201. See Kleiman, *supra* note 198.

202. See *id.*

203. JOHNSON & LARSON, *supra* note 195, at 53 n.31.

204. *Id.* at 18.

205. The in-prison phase of the Texas program lasted at least sixteen months at the time of the study. *Id.* at 15.

206. See Kleiman, *supra* note 198.

least likely to recidivate in the first place and then claimed that its program reduced recidivism.²⁰⁷

The litigation in Iowa indicated that InnerChange did the same thing there. InnerChange claimed that data in an Iowa state audit concerning substance abuse programs showed that the InnerChange program reduced recidivism because the raw recidivism rates reported for Iowa InnerChange graduates were lower than those reported for many other Iowa treatment programs.²⁰⁸ But the audit also reported statistics showing that the characteristics associated with increased recidivism include high risk scores, mental illness, youth, and minority race or ethnicity,²⁰⁹ and that InnerChange's inmate population had substantially lower percentages of inmates with these high-risk characteristics than did other Iowa treatment programs,²¹⁰ including a secular program at the Newton prison whose graduates had recidivism rates that were comparable to those of InnerChange.²¹¹

The auditor who reported the data concluded that the disproportionately lower risk levels of the InnerChange inmate population were probably what was responsible for the lower recidivism rates of InnerChange graduates.²¹² Of course, InnerChange has full discretion to refuse inmates entry into its program and to expel them.²¹³ And there was evidence in the Iowa litigation that InnerChange—in order to improve its recidivism statistics—

207. *Id.*; Posting of Mark Kleiman to Reality-Based Community, *More Faith-Based Fudge from Charles Colson*, http://www.samefacts.com/archives/crime_control_/2003/08/more_faithbased_fudge_from_charles_colson.php (Aug. 14, 2003, 00:42); *see also* Nowell, *supra* note 176.

208. Letter from Anthony R. Picarello, Jr. et al., Attorneys for Defendants-Appellants Prison Fellowship Ministries, and InnerChange Freedom Initiative, The Becket Fund for Religious Liberty, to Michael E. Gans, Clerk of the Court, U.S. Court of Appeals for the Eighth Circuit (June 29, 2007) (on file with the Ave Maria Law Review) (citing IOWA DEP'T OF MGMT. PERFORMANCE AUDIT PROGRAM, DOES PRISON SUBSTANCE ABUSE TREATMENT REDUCE RECIDIVISM? 11, 65 (2007)).

209. IOWA DEP'T OF MGMT. PERFORMANCE AUDIT PROGRAM, *supra* note 208, at 24–33, 67, 72, 78, 81.

210. *See id.* at 66, 71, 75, 80, 83.

211. *See id.* at 11, 18–19, 65, 71, 75, 80, 83.

212. Anne Farris, *Controversial Christian Prison Program Cites Recent Supreme Court Ruling in Its Appeal*, ROUNDTABLE ON RELIGION & SOC. WELFARE POL'Y, July 2, 2007, <http://www.religionandsocialpolicy.org/newsletters/article.cfm?id=6699>.

213. Stipulation of Facts, *supra* note 41, ¶ 232.

intentionally used that power to remove from its Iowa program inmates who were likely to recidivate.²¹⁴

More generally, a recent scientific analysis of various studies that had been done on faith-based rehabilitation programs (both InnerChange and others) concluded, “To date, there simply is no credible evidence that such programs reduce recidivism or improve other post-release outcomes.”²¹⁵ The analysis explained that the studies conducted thus far have not been able to overcome the obstacle that doomed the InnerChange evaluations: “selection bias”—the likelihood that the inmates who enter and complete faith-based programs happen to be the ones with the motivation or other characteristics that make inmates less likely to recidivate in the first place.²¹⁶

B. *Even a Compelling Governmental Interest in Reducing Recidivism Cannot Override the Protections of the Establishment*

214. Declaration of Earl Freeman ¶ 3, *Ams. United for Separation of Church & State v. Prison Fellowship Ministries*, 432 F. Supp. 2d 862 (S.D. Iowa 2006) (No. 4:03-cv-90074), *aff'd in part, rev'd in part*, 509 F.3d 406 (8th Cir. 2007); Trial Transcript, *supra* note 51, at 2018–19; *cf.* JOHNSON & LARSON, *supra* note 195, at 43 (reporting that the Texas InnerChange program refused to grant a graduation certificate to an inmate even though he completed the entire eighteen-month in-prison portion of the program, because the program staff did not have “confidence” in him and viewed him as a “typical ‘con’”).

215. Daniel P. Mears, *Faith-Based Reentry Programs: Cause for Concern or Showing Promise?*, CORRECTIONS TODAY, Apr. 2007, at 30, 31 [hereinafter Mears, *Concern or Promise?*] (summarizing conclusions of Daniel P. Mears et al., *Faith-Based Efforts to Improve Prisoner Reentry: Assessing the Logic and Evidence*, 34 J. CRIM. JUST. 351, 359–60 (2006) [hereinafter Mears et al., *Logic and Evidence*]); accord DURRANT GROUP, STATE OF IOWA SYSTEMATIC STUDY FOR THE STATE CORRECTIONAL SYSTEM 45 (2007), available at <http://www.doc.state.ia.us/Documents/SystematicStudyForTheStateCorrectionalSystem.pdf> (concluding that “[t]here is no current credible research to demonstrate that institutional faith-based programs (i.e., InnerChange) reduce recidivism among [their] completers”); Lampman, *supra* note 180.

216. Mears, *Concern or Promise?*, *supra* note 215, at 32; Mears et al., *Logic and Evidence*, *supra* note 215, at 360; accord Lampman, *supra* note 180; see also *Study Hints at Efficacy of Florida’s Faith-Based Prisons*, ASCRIBE NEWSWIRE, Oct. 19, 2007, <http://newswire.ascribe.org/cgi-bin/hold.pl?ascribeid=20071019.080709&time=08%2035%20PDT&year=2007&public=0> (discussing a study that concluded that, a year after release, there was no significant difference in recidivism between graduates of Florida faith-based prisons and a control group of inmates with similar characteristics from other Florida prisons); Ron Jenkins, *Faith-Based Program Analyzed*, ASSOCIATED PRESS, Aug. 23, 2007, 8/23/07 APALERTOK 21:54:08 (Westlaw) (reporting that a member of the Oklahoma Sentencing Commission concluded that recidivism data received by the state showed that a faith-based prison program had no statistically significant impact on recidivism because, although the recidivism rate of program graduates as a whole was lower than that of other inmates, a disproportionate percentage of inmates in the program were female, and male graduates of the program had the same recidivism rate as other male inmates).

Clause

Even if faith-based programs were effective at reducing recidivism, this would not justify programming that does not comply with the Establishment Clause. The Establishment Clause—under the Supreme Court’s decision in *Lemon v. Kurtzman* and its progeny—is violated by governmental conduct that has the primary purpose or a principal effect of advancing religion,²¹⁷ and not even a compelling governmental interest can render governmental actions that run afoul of either of these prohibitions constitutional.

In *Committee for Public Education & Religious Liberty v. Nyquist*, the Supreme Court declared unconstitutional a state program that aided religious schools, despite recognizing that the program was supported by state interests in preventing the state’s public school system from becoming overburdened, promoting a healthy and safe educational environment for schoolchildren, promoting pluralism and diversity in schools, and promoting the free exercise of religion.²¹⁸ Discussing James Madison’s *Memorial and Remonstrance Against Religious Assessments*,²¹⁹ the Court explained that even if it is assumed that

“[t]he general diffusion of Christian knowledge hath a natural tendency to correct the morals of men, restrain their vices, and preserve the peace of society . . . [.]” [s]uch secular objectives, no matter how desirable . . . cannot serve today any more than they could 200 years ago to justify . . . a direct and substantial advancement of religion.²²⁰

Likewise, in *Church of Scientology Flag Service Organization v. City of Clearwater*, the Eleventh Circuit explained that “the [purpose and effect] criteria adopted in *Lemon* and elaborated in its progeny are absolute in themselves, and a law that fails to meet any of them is

217. *McCreary County v. ACLU of Ky.*, 545 U.S. 844, 864–65 (2005); *Comm. for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 783 n.39 (1973); *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971).

218. *Nyquist*, 413 U.S. at 773–74, 788–89.

219. James Madison, *Memorial and Remonstrance Against Religious Assessments*, in BASIC DOCUMENTS RELATING TO THE RELIGIOUS CLAUSES OF THE FIRST AMENDMENT 7 (1965).

220. *Nyquist*, 413 U.S. at 783 n.39 (citation omitted) (quoting A Bill Establishing a Provision for Teachers of the Christian Religion, H.D. (Va. 1784), *reprinted in* *Everson v. Bd. of Educ.*, 330 U.S. 1 supplemental app. at 72 (1947) (Rutledge, J., dissenting)).

per se invalid.”²²¹ The court further stated, “Unlike the limitations placed upon government power to protect the individual’s freedoms of expression and conscience under other clauses of the First Amendment, limitations which are themselves circumscribed by the flexible analysis of compelling interests, those imposed by *Lemon* provide a prophylactic wall of separation between church and state.”²²² The court added, “The Establishment Clause prevents seemingly important justifications from becoming a shield to defend the subtle and incremental advance of government administration into the field of church activities.”²²³

Thus, just as our society would not accept using electroshock therapy to rehabilitate inmates even if such therapy were proven to effectively modify their behavior, so we should not accept using religion to rehabilitate inmates—regardless of how well it works—if there is genuine risk that inmates may be coerced to submit to religious indoctrination or that their rights might otherwise be violated.

IV. CONCLUSIONS: PRISON OFFICIALS AND RELIGIOUS ORGANIZATIONS SHOULD USE THEIR RESOURCES TO REHABILITATE INMATES THROUGH AVENUES OTHER THAN IN-PRISON-FAITH-IMMERSION PROGRAMS

Since faith-based prisoner rehabilitation programs have raised many constitutional and policy concerns, and since there is no evidence that they work, should they be entirely abandoned? No, for there is much good that the study and observance of faith can do for many people. But governments and religious organizations should channel their resources in a manner that minimizes the risk of constitutional violations, ensures that all inmates are treated equally regardless of their faith, and delivers aid to those who need it most in the manner likeliest to make the greatest difference.

To do so, prison officials and religious organizations should turn away from the faith-based-prison-unit model, for the problems reported about InnerChange and other existing faith-based units and prisons may naturally arise from the form of that model itself. This is

221. *Church of Scientology Flag Serv. Org. v. City of Clearwater*, 2 F.3d 1514, 1539 (11th Cir. 1993).

222. *Id.*

223. *Id.* at 1540.

particularly so with respect to faith-based facilities that teach or are dominated by a single faith. When those presenting a religious program are persons who are deeply convinced in their hearts that their religion is correct—that it is the one true faith—it will be difficult for them not to attempt to proselytize or convert. And when one passionately feels that one's beliefs in matters of faith are right and that others should be brought over to those same beliefs, it may be quite hard to persuade others of one's perceived truth without communicating that the others' beliefs are wrong. Indeed, deep believers may genuinely think that they are helping inmates of other faiths by trying to bring them over to the believers' own religion, without even understanding or appreciating the great harm they can do by attacking the faith of another.

Not only can the faith-based-prison-unit model trigger efforts to proselytize and convert, it can also easily generate circumstances that induce inmates to enroll for reasons having nothing to do with religion. Living conditions differ among prisons and prison units; prison officials excited about a new faith-based program may want to ensure the program's success; and those who want to operate a faith-based program may desire that it be placed in a location that entices inmates to join, or at least (in order to avoid logistical impediments to program implementation) that the program be placed in a unit that has lesser restrictions on inmates' movement. As a result, prison officials may find it difficult to refrain from placing a faith-based program in a prison unit that inmates generally view as desirable. In addition, even if the program is housed in a unit that is not otherwise desirable, inmates who want to transfer into the prison that houses that unit in order to be closer to family members (or for any other reason) may sign up for the faith-based program just to obtain that transfer.

Providing instruction, as part of a faith-based program, in substantive subjects that can qualify an inmate for parole should especially be avoided. Where such linkage exists, prison officials may be unable—due to the resource constraints that many prison systems face²²⁴—to offer inmates, in as timely a manner as the faith-based program does, opportunities to obtain through secular programming the treatment credits inmates need for release. And once inmates enroll in a faith-based program that incorporates such substantive

224. See *supra* text accompanying note 121.

instruction, they may be coerced to remain in the program even if they become uncomfortable with the program's religious nature, for they may fear that leaving the program will set them back in their progress toward parole. The decision whether to undergo religious education should be based on what is in one's heart, not material inducements or pressures, and preventing ties between religious education and material advantages will not just protect inmates' rights to be free from religious coercion, but will also protect people of faith from being taken advantage of by those who falsely profess religious belief.

Furthermore, dedicating a prison block or an entire prison to a religious program can easily lead to excessive entanglement between governmental and religious authority. A religious immersion program that is granted its own prison unit may—in order to generate an environment that it thinks will promote the program's goals—create special rules associated with particular religious tenets for program participants. If governmental personnel become responsible for enforcing such rules, the hand of government may find itself enforcing religious mandates. If religious personnel are given that responsibility, then they can become vested with the powers of the government. Either option carries with it the risks of religious coercion of inmates and corruption of public or ecclesiastical authorities.

Finally, state funds should not be used to support religious rehabilitation instruction. It is the responsibility of the government to ensure that all of the imprisoned are given equal opportunities for rehabilitation, regardless of their religion. When governmental funds are used for rehabilitation programming that is appropriate only for inmates who hold certain religious beliefs, governmental resources are allocated in a manner that discriminates based on religion. That a religious organization may be willing to provide religious rehabilitation programming at a cost to the public fisc lower than that of government-provided secular programming should not justify such religious discrimination. Indeed, when a prison system sacrifices the rights of those in its custody in order to reduce expenses, and a religious organization presents discounted or free rehabilitation services, not out of a pure desire to aid inmates, but at least in part to win converts, the bargain is not one that is worthy of praise from any perspective.

For these reasons, in lieu of faith-immersion-cell-blocks or prisons, religious programming in correctional facilities should be returned toward the more traditional model in which religious volunteers present discrete religious classes or theological study sessions for any inmates who wish to attend them.²²⁵ Participation in religious programming should not be tied to where an inmate lives, to treatment credits that may be considered in the parole process, or to any other material benefits or conditions. Inmates should be free to attend or not attend the sessions of a particular religious program as they see fit, and they should be permitted to terminate their participation in a program at any time without penalty. And public funds should not be used to support religious programming beyond what is reasonably necessary to enable prisoners' free exercise of religion.

Religious organizations should save more intensive programming for presentation outside of prison, after inmates have been released. In that context, the pitfalls associated with in-prison-religious-immersion units can be better avoided. There will be less danger that criminal offenders will be induced by material pressures or incentives to enter religious programming, and it will be more likely that those who do enroll will genuinely wish to deepen their faith. It will be feasible to keep governmental involvement with the programming to a minimum. What is more, the period after their return to society is when former prisoners may need the most help.²²⁶ Through this course, the rights of inmates to be free from religious coercion and discrimination can be best protected, while the resources of people of faith who wish to aid the downtrodden can be channeled where they can make the greatest difference.

225. See, e.g., Harry R. Dammer, *Religion in Prison*, in 3 ENCYCLOPEDIA OF CRIME AND PUNISHMENT 1375, 1377–78 (David Levinson ed., 2002).

226. See, e.g., Gary Zajac, *Aftercare and Successful Offender Reentry*, 5 RESEARCH IN REVIEW 2, 2–3 (2002), available at <http://www.cor.state.pa.us/doc/lib/stats/RIR/Volume%205%20-%202002/RIRV5N1.pdf>; see also Neely Tucker, *Ministry Targets Vulnerable Population: Ex-Prisoners: Community Partnership Offers Employment Programs, Job Training, Church Mentors*, WASH. POST, May 2, 2004, at C5 (reporting that ministry programs for persons who serve time in prison are “most needed” beyond the prison walls).