PUTTING FAITH IN PRISON PROGRAMS, AND ITS CONSTITUTIONALITY UNDER THOMAS JEFFERSON'S FAITH-BASED INITIATIVE

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> In what appears now to be a bit of theological irony, . . . Thomas Jefferson rooted his ideas about [the] doctrine [of separation between church and state not in secularism but] in the *religious belief* "that Almighty God has created the mind free . . . [and, therefore] the Holy Author . . . chose not to propagate [religion] by coercion . . . as was in his Almighty power to do . . . ." This Court makes no such assertions about the ultimate source of the law it must interpret. Just as the Court asserts no theological expertise in this matter, the Court is also not an expert in the field of prisoner rehabilitation.[1]
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> *~Americans United for Separation of Church & State v. Prison Fellowship Ministries*

With these words, the Honorable Robert W. Pratt, Chief Judge of the U.S. District Court for the Southern District of Iowa, attempted to narrow the issues in this significant case involving faith, prison reform, and the Establishment Clause. Yet in specifically excluding these "theological" (actually historical) and prisoner rehabilitation issues, Chief Judge Pratt missed the backdrop essential to understanding the First Amendment issues raised in this case, and

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1. Ams. United for Separation of Church & State v. Prison Fellowship Ministries, 432 F. Supp. 2d 862, 866 (S.D. Iowa 2006) (alterations in original) (citation omitted) (footnote omitted), *aff'd in part, rev'd in part*, 509 F.3d 406 (8th Cir. 2007).

foreclosed from the states the tools they "desperate[ly] need" to reduce the crime wave that occurs when prisoners are released.[2]

This Article addresses the issues that Chief Judge Pratt purposely and explicitly omitted in his decision. Part I examines the "faith factor" in prisoner rehabilitation, including the current involvement of religious organizations in prisoner rehabilitation and the question of whether faith transforms the lives of prisoners. Part II discusses the "theological irony"[3] noted by Judge Pratt and confirms what he instinctively sensed: the Founders' intent with respect to the Establishment Clause was to protect the religious conscience of Americans, not to prohibit the flow of public funds to faith-based organizations to perform social services effectively. The effectiveness of the organization providing the service, regardless of whether the organization is religious, irreligious, or areligious, is a primary focus of President Bush's Faith-Based & Community Initiative,[4] which this Article briefly addresses in Part III.

I. THE FAITH FACTOR IN PRISONER REHABILITATION

Thomas Jefferson realized that faith-based organizations ("FBOs") are often the most effective deliverer of social services, a fact demonstrated when he recommended federal funding for the Roman Catholic Church to provide religious services to assimilate Native Americans into American belief and culture.[5] The effectiveness of FBOs is, of course, not limited to culture assimilation, but is found in many social areas, including prisoner rehabilitation. This Part, after looking at the crisis in America's prisons, discusses the role people of faith play in prisoner rehabilitation (including some promising faith-based programs identified for the U.S. Department of Justice), and then looks at whether faith itself can play a role in rehabilitating prisoners.

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2. *Id.*; *see also* 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 3, Ams. United for Separation of Church & State v. Prison Fellowship Ministries, 509 F.3d 406 (8th Cir. 2007) (No. 06-2741) [hereinafter State AG Brief].

3. *Prison Fellowship Ministries*, 432 F. Supp. 2d at 866.

4. *See infra* note 215 and accompanying text.

5. *See infra* notes 203–05 and accompanying text.

A. *American Prisons in Crisis*

The Attorneys General of Virginia, Alabama, Arkansas, Colorado, Florida, Kansas, Missouri, South Carolina, and Texas considered Chief Judge Pratt's examination of prison reform and the Establishment Clause in *Americans United for Separation of Church & State v. Prison Fellowship Ministries*[6] significant enough to file an amicus brief urging him to uphold the constitutionality of Iowa's contract with Prison Fellowship Ministries.[7] In their brief, the nine Attorneys General reported that their states face a public safety crisis fueled by the dramatic growth in the prison population; according to the Attorneys General, the number of people in state or federal prison jumped from 1,585,586 in 1995, to 2,135,901 in 2004, an increase of almost 35% in this ten-year period.[8]

This growth in prison population[9] will not abate soon. Pew Charitable Trusts gathered experts to project the prison population in 2011, and they concluded that between 2007 and 2011 the prison population in state and federal prisons will *increase* by another 192,000 inmates to a total of 1.7 million, a number that exceeds the entire populations of Atlanta, Baltimore, and Denver combined.[10] This new growth carries a hefty price tag of $27.5 billion ($15 billion in new operating costs and $12.5 billion in new capital costs),[11] which must be added to the present cost of $60 billion, which is in turn a tremendous leap over the $9 billion spent in 1980.[12]

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6. 432 F. Supp. 2d 862.

7. *See* State AG Brief, *supra* note 2.

8. *Id.* at 3 n.5 (citing PAIGE M. HARRISON & ALLEN J. BECK, U.S. DEP'T JUSTICE, NCJ 210677, PRISONERS IN 2004, at 2–4 (2005), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/p04.pdf); *see also* PUBLIC SAFETY PERFORMANCE PROJECT, PEW CHARITABLE TRUSTS, PUBLIC SAFETY, PUBLIC SPENDING: FORECASTING AMERICA'S PRISON POPULATION 2007–2011, at ii (2007), *available at* http://www.pewcenteronthestates.org/uploadedFiles/Public%20Safety%20Public%20Spending.pdf (stating that between 1970 and 2005 there was a 700% increase in the national prison population).

9. This growth in prison population is due, at least in part, to the retention of prisoners for a longer period of time. The tough federal truth-in-sentencing standards, which require the most violent offenders to serve at least 85% of their sentence before release eligibility, were adopted by thirty states and the District of Columbia by 2000. TIMOTHY HUGHES & DORIS JAMES WILSON, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, REENTRY TRENDS IN THE UNITED STATES, *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/reentry.pdf (last visited Jan. 23, 2008).

10. PUBLIC SAFETY PERFORMANCE PROJECT, *supra* note 8, at ii.

11. *Id.*

12. *Id.* at iv.

The rising number of prisoners in the past was caused in part by fewer prisoners being released because of stiffer sentencing laws.[13] This drop in release of prisoners was, however, only temporary. Now, because of prison overcrowding and the fact that the tougher sentencing laws only delayed prisoner release, since 95% of all state prisoners are eventually released from prison, the number of prisoners released is actually increasing.[14] The U.S. Department of Justice's Bureau of Justice Statistics ("BJS") reported that "[i]n 2001, 592,000 offenders were released from State prison, a 46% increase over the 405,400 offenders that were released in 1990."[15] In 2003, more than 656,000 state and federal inmates were released to the community.[16]

The release of hundreds of thousands of prisoners per year has resulted in a crime wave.[17] In 2002, BJS examined the recidivism

13. Serving more of the sentenced term resulted in prisoner release rates declining from 37% in 1990 to 31% in 1994. HUGHES & WILSON, *supra* note 9.

14. *Id.*

15. *Id.*

16. JUSTICE POLICY CTR., URBAN INST., UNDERSTANDING THE CHALLENGES OF PRISONER REENTRY: RESEARCH FINDINGS FROM THE URBAN INSTITUTE'S PRISONER REENTRY PORTFOLIO 2 (2006), *available at* http://www.njisj.org/pubdocs/2006/red_033106_urbaninst_findings.pdf.

17. New crimes committed by recently released prisoners are not new phenomena. Over one hundred years ago, the California State Board of Charities and Corrections claimed that "[i]t is no exaggeration . . . to say that our state prisons in their present condition are simply schools for crime." Benjamin Justice, *"A College of Morals": Educational Reform at San Quentin Prison, 1880–1920*, 40 HIST. EDUC. Q. 279, 287 (2000) (internal quotation marks omitted). Indeed, James A. Johnston, warden of both Folsom and San Quentin Prisons, recognized the need for social rehabilitation in the 1930s. *Id.* at 294–95. He stated that:

> To take hate-filled, mentally warped men into prison and just let them serve their sentences without making earnest effort to correct their wrong notions and replace their anti-social tendencies with better ideas, seemed to me a sure guaranty that they would leave the prison worse than when they had entered.

JAMES A. JOHNSTON, PRISON LIFE IS DIFFERENT 61 (1937).

Religion has often been an instrument used for reforming prisoners. During the early 1830s, famed French social commentator Alexis de Tocqueville researched the American penal system and co-authored a book in which he noted that "the reform of prisons has been of a character essentially religious. Men, prompted by religious feelings, have conceived and accomplished every thing which has been undertaken [in prison reform] . . . ." GUSTAVE DE BEAUMONT & ALEXIS DE TOCQUEVILLE, ON THE PENITENTIARY SYSTEM IN THE UNITED STATES AND ITS APPLICATION IN FRANCE 93 (Francis Lieber trans., Augustus M. Kelley Publishers 1970) (1833). These "religious feelings" have also changed the lives of prisoners by transforming their minds and giving them what Tocqueville called "habits of order." Joel Schwartz, *The Penitentiary and Perfectibility in Tocqueville*, 38 W. POL. Q. 7, 20 (1985). Schwartz views the role of religion in prisoner rehabilitation as "indispensable, because it produces habits of orderliness

(defined as re-arrests within three years of release) of prisoners released in 1994.[18] Of the 272,111 prisoners released from fifteen state prisons in 1994,[19] 67.5% had been re-arrested within three years of release.[20] Because not all arrests result in convictions, BJS also reviewed how many prisoners released actually returned to prison. BJS found that of the prisoners released in 1994, 51.8% were back in prison within three years of release, either for parole violations or for the commission of a new crime.[21] In short, two out of three prisoners released from prison are re-arrested within three years, and one out of two prisoners released are sent back to prison within three years.

In addition to calculating the percentages for re-arrest and re-incarceration within three years of release, BJS calculated the number of crimes the prisoners released in 1994 had committed. BJS found that these 272,111 prisoners had

> accumulated more than 4.1 million arrest charges prior to their current imprisonment and acquired an additional 744,000 arrest charges in the 3 years following their discharge in 1994—an average of about 18 criminal arrest charges per offender during their criminal careers. These charges included almost 21,000 homicides, 200,000 robberies, 50,000 rapes and sexual assaults and almost 300,000 assaults.[22]

With an average of almost three arrest charges per former prisoner within three years of release, there are literally thousands of new victims each year from released prisoners.

The devastating effect of unreformed prisoners, however, is not limited to public safety and the thousands of new victims. Prisoner release affects "public health, economic and community well-being, and family networks."[23] With limited employment prospects, former

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and reliability" and encourages the prisoners "to abandon the pursuit of instantaneous gratification, and to accept the lesser but legal pleasure of deferred gratification in its stead." *Id.*

18. *See* HUGHES & WILSON, *supra* note 9.

19. These prisoners constituted about two-thirds of the prisoners released from state prisons in 1994. *Id.*

20. *Id.*

21. *Id.*

22. Press Release, Bureau of Justice Statistics, U.S. Dep't of Justice, Two-Thirds of Former State Prisoners Rearrested for Serious New Crimes (June 2, 2002), http://www.ojp.usdoj.gov/bjs/pub/press/rpr94pr.htm.

23. JUSTICE POLICY CTR., *supra* note 16, at 2; *see also* JEANETTE M. HERCIK, U.S. DEP'T OF HEALTH & HUMAN SERVS., PRISONER REENTRY, RELIGION AND RESEARCH 3, *available at* http://

prisoners struggle with "temptations from old friends, fatigue, employment difficulties, transportation problems, adjustments to a new environment, . . . impatience, relational issues with family members and girlfriends, and financial struggles."[24] According to the Urban Institute's study of prisoner reentry, people entering prison have weak educational or vocational skills and limited work experience, along with many health issues (mental health, substance abuse, and communicable diseases).[25] While receiving little help with reintegration upon release from prison, these former prisoners must still face the same challenges that adversely affect their families, their neighborhoods (which typically lack the resources to meet these challenges), and society in general.[26]

With the violence in prisons spilling into the streets because of the reentry of unreformed prisoners, with public health and safety deteriorating because of reentry, and with at-risk communities being placed even more at risk because of reentry, it is no surprise that the nine Attorneys General who filed the amicus brief in *Prison Fellowship Ministries* concluded that their correctional systems have failed and "the States are in *desperate need* of prisoner rehabilitation programs that actually reduce recidivism and are cost effective."[27] These top elected law-enforcement officials recognized that faith-based programs such as Prison Fellowship Ministries, challenged in Iowa, are a viable alternative to failed correctional systems.[28]

B. *The Role of Churches and People of Faith in Prisoner Rehabilitation*

Historically, religious beliefs have influenced the theories underlying punishment and prisoner rehabilitation, and have guided modern corrections.[29] Religious belief was the "foundation for the

peerta.acf.hhs.gov/pdf/prisoner_reentry.pdf (last visited Jan. 23, 2008) ("Prisoner reentry carries the potential for profound collateral consequences, including public health risks, disenfranchisement, homelessness, and weakened ties among families and communities.").

24. 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 33 (2003), *available at* http://www.manhattan-institute.org/pdf/crrucs_innerchange.pdf.

25. JUSTICE POLICY CTR., *supra* note 16, at 2.

26. *Id.*

27. State AG Brief, *supra* note 2, at 3 (emphasis added).

28. *See id.* at 3–4.

29. HERCIK, *supra* note 23, at 3.

first U.S. laws governing criminal and delinquent behaviors,"[30] and America's "first 'penitentiaries' were founded on the religious philosophy that the offenders should make amends with society and accept responsibility for their own misdeeds."[31] The religious community has historically provided prisoners, ex-prisoners, and their families with goods and services that include clothing, food, shelter, education, substance abuse counseling, victim assistance, and employment.[32] The legacy of religious influence on U.S. penitentiaries continues today, as FBOs provide services to more than seventy million Americans every year, financed by over $20 billion in privately contributed funds.[33] More could certainly be done, since many religious volunteers and FBOs serving their communities are "often starved for public and private financial support, technical assistance, and other help."[34]

Religious teaching within the criminal justice system "focus[es] on promoting pro-social values and morals, imparting accountability and

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30. JEANETTE M. HERCIK ET AL., DEVELOPMENT OF A GUIDE TO RESOURCES ON FAITH-BASED ORGANIZATIONS IN CRIMINAL JUSTICE: FINAL REPORT 51 (2004), *available at* http://peerta.acf.hhs.gov/pdf/666013FinalReport.pdf. This report is the result of a contract issued by the Department of Justice's National Institute of Justice to two well-known government contractors, Caliber Associates and the Urban Institute, for developing a guide to resources on FBOs in the field of criminal justice. In performing this contract, Caliber Associates and the Urban Institute conducted:

> (1) a comprehensive literature review to examine the relationship between religion and faith, and delinquency and crime; (2) a broad-based environmental scan to identify promising faith-based programs supporting criminal justice initiatives; (3) a research brief to contextualize prior research findings and make recommendations for further research; and (4) systematic case studies to distinguish key elements of innovative faith-based interventions in criminal justice.

Id. at 1.

31. RUSSELL K. VANVLEET, JEFF COCKAYNE & TIMOTHY R. FOWLES, EXAMINING RELIGION AS A PREVENTATIVE FACTOR TO DELINQUENCY 5 (1999), http://www.justice.utah.gov/Research/Juvenile/Religion.pdf. As noted by the State Attorneys General: "[T]he 'penitentiary'—an invention of early Quakers—was originally envisioned as a place where 'penitent' criminals would labor and study the Bible as a means of reforming their lives." State AG Brief, *supra* note 2, at 2 n.3 (citing State v. Maberry, 380 P.2d 604, 605 (Ariz. 1963)).

32. HERCIK, *supra* note 23, at 3; *see also* HERCIK ET AL., *supra* note 30, at 28 ("Today, thousands of FBOs provide a range of services to individuals returning to their communities from prisons and jails. Services include emergency and long-term shelter, job training, mentoring of young adults and children of former prisoners, and treatment for addiction.").

33. BYRON R. JOHNSON ET AL., CTR. FOR RES. ON RELIGION & URB. CIV. SOC'Y, OBJECTIVE HOPE: ASSESSING THE EFFECTIVENESS OF FAITH-BASED ORGANIZATIONS: A REVIEW OF THE LITERATURE 7, 12–13 (2002), *available at* http://www.manhattan-institute.org/pdf/crrucs_objective_hope.pdf.

34. *Id.* at 6.

responsibility, and provid[ing] social support networks and skills, all of which can affect behavioral and social change."[35] The theory behind prisoner rehabilitation through religion adheres to the belief that inmates can "undergo a spiritual and cultural transformation, using unconditional love, human valorization, evangelism, community restoration, and restoration . . . as a turning point in [their] life, leading to desistance from crime."[36] Perhaps because of the emphasis placed on this theory in America's correctional system, each U.S. prison offers worship services and over 90% have prayer groups.[37] In addition, FBOs sponsor personal development and parenting classes in more than 70% of prison systems, meditation groups and marriage classes in 68%, and peer mentoring to assist with religious studies in 39%.[38] Sixteen states offer faith-based pre-release residential programming, with Texas having more than one hundred volunteer religious programs for prisoners about to be released.[39] These pre-release services include shelter, vocational training, mentoring, and treatment for addiction.[40]

Mentoring the children of prisoners and former prisoners is also important, since research shows that these children "disproportionately suffer aggression, anxiety, and depression," and evidence a "greater risk for alcohol and drug abuse, a variety of problem behaviors including delinquency and crime, and subsequent incarceration at some point in their lives."[41] In 2004, more than two million children in the United States had a father or mother serving time in prison, and many more had experienced having a parent incarcerated in the past.[42] The plight of these children can be mitigated by the intervention of structured mentoring programs that reconnect youth with adults, prevent negative behavior, and promote "positive youth development."[43] One example of a successful program that provides mentoring for the children of prisoners is the Amachi program, whose motto is "People of Faith Mentoring

35. HERCIK ET AL., *supra* note 30, at 28.
36. *Id.*
37. *Id.* at 29.
38. *Id.*
39. *Id.*
40. *Id.* at 28.
41. *Id.* at 54.
42. *Id.* at 122.
43. *Id.* at 147.

Children of Promise."[44] The program operates through a partnership of secular and FBOs, recruiting volunteers who provide one-on-one mentoring services to the at-risk children of current or former prisoners.[45]

In assisting prisoners and former prisoners and their families, FBOs are "uniquely positioned" to harness volunteer resources,[46] which is particularly important today because fiscal restraints have required the cutting of prison pre-release and transitional housing resources.[47] The FBOs' ability to attract caring and competent volunteers, driven by their religious convictions to devote their own time, talent, and money to providing services to prisoners and their families, offers a very attractive alternative to the state. Even Chief Judge Pratt noted that many of InnerChange's rehabilitative programs, the programs at issue in *Prison Fellowship Ministries*, provided substantial benefits at a lower cost—in part because InnerChange supervised the inmates in its program, thereby relieving Iowa's own limited prison staff.[48] Judge Pratt quoted the testimony of the Newton facility's warden, Terry Mapes:

> [For $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 offenders either in classes, in activities, in recreation by somebody other than the limited staff that I have.[49]

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44. *Id.* at 63.

45. *Id.* This mentoring relationship is very important, as research has shown that one-on-one mentoring can potentially improve a child's academic performance, interpersonal relationships, and decrease involvement in delinquency. *Id.* at 147. By the end of the start-up period, the Amachi program had "created partnerships with 42 local churches, recruited over 400 potential mentors, and identified/located over 800 children." *Id.* at 150–51. The Amachi program to date has partnered with more than 6000 churches and served more than 60,000 children. Amachi, People of Faith Mentoring Children of Promise, http://www.amachimentoring.org (last visited Jan. 23, 2008). There are currently 250 programs in forty-eight states that either use the Amachi model or were inspired by it. *See id.*

46. HERCIK ET AL., *supra* note 30, at 55.

47. *Id.* at 28.

48. Ams. United for Separation of Church & State v. Prison Fellowship Ministries, 432 F. Supp. 2d 862, 914 (S.D. Iowa 2006), *aff'd in part, rev'd in part*, 509 F.3d 406 (8th Cir. 2007).

49. *Id.* (alteration in original).

More important than the cost effectiveness of FBOs is the fact that they share with criminal justice agencies the objective of increasing rehabilitation and decreasing recidivism. FBOs "share a common compassion for people—and a passion for empowering lives, fostering families, and improving community wellbeing."[50] The passion of FBOs for improving the well-being of individuals and communities in America is historical, dating back to the colonial era as evidenced by the work of churches with Native Americans.[51] Because of this work, Native Americans became much attached to the missionaries and their supporting churches and, therefore, these churches became prime candidates to receive funding from Congress as recommended by the Presidents during the Founding Era.[52]

C. *Is Faith Effective in Altering the Behavior of Criminals?*

With each prison having religious programming and over 90% of prisons offering opportunities for prayer groups, one can legitimately ask whether faith has any effect on prisoners. That is, with this vast amount of religious programming given prisoners by people of faith, why is recidivism so high? Does religious programming have any positive effect on prisoners with respect to recidivism? Does faith alter the behavior of criminals at all?

A partial response to these questions is that the availability of religious programming does not mean that the prisoners will make use of it. Religious services for prisoners are not mandatory and therefore can be avoided completely. With respect to the last question—the "faith factor"—some researchers contend that there is no inverse relationship at all between faith and delinquent behavior. Travis Hirschi and Rodney Stark, for instance, wrote in 1969 that church attendance was "essentially unrelated to delinquency" among junior and senior high school students in California.[53] Their failure to identify any relationship between religion and crime "resulted in a tireless effort by sociologists and criminologists to either refute or qualify this non-relationship."[54] This "tireless effort" resulted in a

50. HERCIK ET AL., *supra* note 30, at 2.

51. *See infra* note 186.

52. *See infra* text accompanying notes 171, 199–205.

53. Travis Hirschi & Rodney Stark, *Hellfire and Delinquency*, 17 SOC. PROBS. 202, 204, 211 (1969).

54. HERCIK ET AL., *supra* note 30, at 7.

reformulation of theories about the relationship between religion and crime.[55]

A discussion of these theories, and the empirical evidence supporting or refuting them, is considerably beyond the scope of this Article,[56] but a few observations are worth highlighting. Research suggests that increasing levels of religious involvement in one's formative development can result in a wide variety of positive physical and social benefits, including longer life, reducing hypertension, lessening depression and the risk of suicide, and lowering the level of alcohol and drug use and abuse.[57] And, importantly for the subject of this Article, increased levels of religious involvement also result in "lower rates of delinquency among youth, and reduced criminal activity among adults."[58] Over the past three decades, research literature is generally consistent in confirming that "religious beliefs are inversely related to crime and delinquency."[59] Research has also shown that "the effect of religion on physical and mental health outcomes is remarkably positive," and is associated with increased levels of "well-being, hope, purpose, meaning in life, and educational attainment."[60]

Although the research indicates that religion is associated with better mental and physical health and generally protects individuals from harm (e.g., hypertension, depression, suicide, and delinquency),[61] a legitimate question is whether increased religious involvement in prison results in changed prison conditions or reduced recidivism. The answer depends upon the level of involvement. Within existing research,[62] anecdotal and statistical evidence seems to demonstrate

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55. *Id.*

56. For a discussion of these theories, the empirical evidence which supports them, and methodological and measurement issues related to this area, see *id.* at 7–23.

57. JOHNSON ET AL., *supra* note 33, at 13.

58. *Id.*

59. HERCIK ET AL., *supra* note 30, at 134.

60. JOHNSON ET AL., *supra* note 33, at 15.

61. *Id.*

62. Unfortunately, "rigorous evaluations of faith-based programming in criminal justice are few and far between." HERCIK ET AL., *supra* note 30, at 35. In general, research concerning the influence of religion on crime and delinquency is divided into two categories: "(1) organic religion, [which is] research examining the influence or impact of religion on an array of social and behavioral outcomes; and (2) intentional or programmatic religion, [which is] research assessing the effectiveness of faith-based organizations or interventions." Byron R. Johnson, *Religious Programs and Recidivism Among Former Inmates in Prison Fellowship Programs: A Long-Term Follow-Up Study*, 21 JUST. Q. 329, 330 (2004). Although intentional or programmatic religion is the

that a "negative relationship [exists] between crime [and] recidivism and *moderate to high* levels of participation in religious programs."[63] One study found that "*higher* levels of inmate religiousness were associated with better psychological adjustment to the prison environment and fewer self-reported disciplinary confinements."[64] Furthermore, "research confirms that, for parolees who had successfully completed parole, religious conversion and spiritual transformation were significant factors in their gaining and retaining employment and in overcoming other key reentry obstacles."[65]

Byron R. Johnson has conducted extensive research into the relationship between religion and delinquency and, with a series of colleagues, has explored what impact, if any, religious programming in prison has had on prisoner recidivism. In an early study from 1996, Johnson and David B. Larson studied whether religion was even relevant in helping the rehabilitation of inmates, and found that "religious programs combat the negative effects of prison culture."[66] The following year, Johnson, Larson, and Timothy C. Pitts studied two matched groups of inmates from four adult male prisons in New York State to determine what effect religious programming had on institutional adjustment (measured by infractions) and recidivism (defined as arrests during the one-year follow-up period).[67] One of

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category most pertinent to the positive effect of religion on prisoner rehabilitation, there is some usefulness in examining "organic religion" because "if a relationship can be established between religious practice and overall health and well-being, then there may be additional justification for assuming that intentional religion via FBOs may yield similar outcomes as to those found among organic studies." JOHNSON ET AL., *supra* note 33, at 9. Although researchers have studied the positive effect of "organic religion" more than "programmatic religion," research done on the effectiveness of faith-based programs is both positive and encouraging, and they "appear to have advantages over comparable secular institutions in helping individuals overcome difficult circumstances (e.g., imprisonment and drug abuse)." *Id.* at 9, 21. Considering the prevalence of FBOs that work with offenders, prisoners, ex-prisoners, and their families, research is likely to expand concerning intentional or programmatic religion, as "its public policy implications are now being debated at local, state, and federal levels." *See* Johnson, *supra*, at 332.

63. Charles McDaniel et al., *Charitable Choice and Prison Ministries: Constitutional and Institutional Challenges to Rehabilitating the American Penal System*, 16 CRIM. JUST. POL'Y REV. 164, 167 (2005) (emphasis added) (internal quotation marks omitted).

64. Johnson, *supra* note 62, at 334–35 (emphasis added).

65. *Id.* at 352.

66. HERCIK ET AL., *supra* note 30, at 55–56. In the same study, Johnson and Larson further found that "local church volunteers are a largely untapped resource pool available to administer quality educational, vocational, and treatment services at little or no cost." *Id.* at 56.

67. Byron R. Johnson, David B. Larson & Timothy C. Pitts, *Religious Programs, Institutional Adjustments, and Recidivism Among Former Inmates in Prison Fellowship Programs*, 17 JUST. Q. 145, 145, 149–50 (1997).

the matched groups had participated in Prison Fellowship Ministries Bible studies, and the other had not. The study found that the inmates who were *most active* in the Bible studies (ten or more sessions) "were significantly less likely . . . to be arrested during the [one-year] follow-up period (14% versus 41%)," whereas those inmates who were less active in the studies (nine or fewer) differed little from the control group.[68]

In 2004, Johnson performed a follow-up study on the same New York inmates to see how they fared over a period of eight years. He discovered, once again, that prisoners with higher levels of participation in Bible studies were less likely to be re-arrested or re-incarcerated at two and three years after release, though the effect continued to decrease over time.[69] He further concluded that by the fourth year, there was no difference between the Prison Fellowship Ministries and non-Prison Fellowship Ministries groups on either re-arrest or re-incarceration regardless of level of Bible study participation.[70] Apparently, according to the results of this study, Prison Fellowship Ministries Bible studies alone are insufficient to alter the behavior of ex-prisoners more than three years after release.

Finally, in 2003, Johnson and Larson evaluated Prison Fellowship Ministries' InnerChange Freedom Initiative, a faith-based, sixteen- to twenty-four-month pre-release residential program, and a six- to twelve-month aftercare program.[71] Results from the study found a dramatic difference in recidivism for its program graduates, both in re-arrest and re-incarceration, especially when associated with mentor contact.[72] These results confirmed that "individuals who had a greater religious orientation with respect to values at their time of release were less likely to recidivate," and that "inmates who increase participation in religious programs after release had lower re-arrest rates" than those who did not.[73]

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68. *Id.* at 145, 152, 155–57, 161.

69. Johnson, *supra* note 62, at 348.

70. *Id.* at 351.

71. JOHNSON & LARSON, *supra* note 24, at 9. For a more complete description of this study, as well as the InnerChange program generally, its success in reducing recidivism, and an explanation as to why its program graduates succeeded while its low-level Bible study participants did not, see *infra* notes 105–34 and accompanying text.

72. JOHNSON & LARSON, *supra* note 24, at 22.

73. HERCIK ET AL., *supra* note 30, at 30–31; Melvina T. Sumter, Religiousness and Post-Release Community Adjustment (Aug. 3, 1999) (Ph.D dissertation, Florida State University), *available at* http://www.ncjrs.gov/pdffiles1/nij/grants/184509.pdf).

"[F]aith is perhaps the forgotten factor in reducing crime and recidivism—the sine qua non of desirable criminal justice program interventions."[74] As a result, FBOs must "not be overlooked as important pieces of a more comprehensive strategy in achieving a successful aftercare transition."[75] A description of several successful faith-based prison programs follows.

D. *Faith-Based Ministries Operating Programs in Prison*

In September of 2004, Caliber Associates and the Urban Institute ("Caliber/Urban"), pursuant to a contract with the Department of Justice's National Institute of Justice ("NIJ"), performed a "comprehensive environmental scan to identify faith-based prison programs for further research," with the primary purpose of developing a resource guide to assist the NIJ in "framing a faith-based research agenda."[76] The methodology used by Caliber/Urban involved initially performing an exhaustive search on the Internet of more than five hundred faith-based sponsored programs that support criminal justice system initiatives.[77] Next, Caliber/Urban solicited expert opinions to identify "promising" programs and pare the list down to fifty programs based on three criteria: the target population, the type of services performed, and the point in the criminal justice process where the faith-based intervention occurred.[78] The following are a few of the promising FBOs that were identified for further research by Caliber/Urban.

The Kairos Horizon Communities Corporation ("Horizon") is an outgrowth of Kairos Prison Ministry, a nondenominational Christian ministry operating in over two hundred fifty prisons in thirty states.[79] Horizon's model has two steps: (1) an introductory three-day weekend to "provide[] participants with the experience of living in a Christian community" and to "help prisoners discover God's divine purpose and plan for their lives," and (2) continued faith-based instruction from Horizon volunteers.[80] The Horizon model differs

74. HERCIK ET AL., *supra* note 30, at 2.
75. Johnson, *supra* note 62, at 352.
76. HERCIK ET AL., *supra* note 30, at 58.
77. *Id.* at 59.
78. *Id.* at 59–60.
79. *Id.* at 89.
80. *Id.* at 156.

from the original Kairos model in that it, like the InnerChange model, is residential and therefore permits social reinforcement of the lessons. Developed in 1999 in collaboration with the Florida Department of Corrections and the Florida Commission on Responsible Fatherhood, Horizon is "a self-governing faith-based residential unit that houses approximately 64 inmates for one year in a separate unit from the rest of the prison compound."[81] After starting out with a traditional Kairos spiritual retreat weekend, the prisoners in the Horizon program participate each night of every week in a community-led faith-based program.[82] These nightly programs focus, among other things, on developing and strengthening relationships, communication, anger management, parenting skills, addiction issues, and spiritual disciplines.[83] The religious programs include a choice of daily devotionals, praise and worship, and prayer services.[84]

Inmate participation in the Horizon program is voluntary and "residents are assured that there is no requirement for religious conversion."[85] During the interview process, sponsors tell applicants that the program has a Christian point of view and that local church volunteers present program materials.[86] Participants are selected from the candidacy pool based on honesty, openness, and willingness to participate.[87]

An important aspect of the Horizon program is "Godparent Visitation," an unstructured system of mentoring in which local church volunteers develop relationships with prisoners that routinely extend beyond program completion and release from prison.[88] The "Godparents serve as role models for responsible living and are expressions of the caring faith community"; many participants report that this relationship was "the first time a positive role model was

81. *Id.* at 89.

82. *Id.*

83. *Id.* See *id.* at 155–59 for a more complete description of the program contents.

84. *Id.* at 155.

85. *Id.*

86. *Id.* at 156.

87. *Id.* at 159. Although brochures are distributed throughout the entire inmate population, successful applicants must meet custody level requirements, have a desire to improve their lives, and be willing to participate in program activities for an entire year. *Id.* at 156. Program rules include prohibitions against abusive language, excessive noise, and pornography. *Id.* at 159.

88. *Id.* at 157.

willing to listen."[89] The importance of these volunteers was emphasized during case study interviews with Caliber, during which the local church volunteers were identified as perhaps "the most critical component of the program."[90] The volunteers are "instrumental in fostering and restoring individual, group, and family relationships" and "the key to building pro-social relationships and strengthen[ing] social bonds to achieve the goals of the program."[91] These volunteers are "essential to creating caring communities that equip and assist individuals of multiple faiths in both correctional and neighborhood environs."[92]

Another key aspect of Horizon is the segregated living environment that promotes personal accountability.[93] Participants living in the segregated community are not only committed to the goals of the program, but by monitoring the activities of others, they also reinforce the community's ethical and moral values. Program participants, therefore, are encouraged not only to take responsibility for their own actions, but also to help their fellow participants with the goals and objectives of the program.[94]

Caliber Associates evaluated the Horizon program and found that program participation increased prison safety and "potentially promotes public safety."[95] Although the recidivism rate for released participants was similar to comparison sample members, "the treatment sample had a longer period of time until their first rearrest," so participation "appears to delay the onset of rearrest among returning prisoners."[96] In 2002, the Florida legislature deemed the program such a success that it ordered the Florida Department of

89. *Id.*

90. *Id.* at 160.

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.* at 161.

95. *Id.* Specifically regarding prison safety, Hercik noted that:

> Horizon program participants had significantly lower rates of discipline reports and segregation stays—compared to both the matched and waiting list comparison samples. These findings lend support to the claim that program participation promotes a safer correctional environment, particularly during and immediately following program participation.

Id.

96. *Id.*

Corrections to implement six faith-based programs modeled after the Horizon program.[97]

Two FBOs that focus specifically on prisoner reentry issues are East of the River Clergy, Police, Community Partnership ("ERCPCP"), located in Washington, D.C., and Transition of Prisoners ("TOP"), located in Detroit. ERCPCP is an alliance of over thirty-five religious organizations, fourteen law enforcement entities, and fifty-five community or government organizations that reach out to Washington, D.C.'s southeast section, home of the city's highest rates of homicide and teen pregnancy and the lowest rate of educational achievement.[98] Among other services, ERCPCP's Faith Based Reintegration Initiative assists ex-offenders by offering job training and placement, literacy training, life skills classes, substance abuse prevention, clothing, and transitional housing assistance.[99]

Likewise, TOP is designed to help African-American men successfully make the transition from prison to the Detroit community by "developing their relationship with God and the church; increasing their attachment to work, family, education, politics, and religion; reducing attachment to substance abuse and criminal friends and ways of thinking; and reducing recidivism."[100] The TOP program uses the Level of Services Inventory-Revised ("LSI-R") test to determine key risk and need areas for the released prisoner; based upon these results, the released prisoner's case manager develops a one-year formal transition plan and establishes goals.[101] The program also matches the participant with a mentor, who provides accountability for the participant and seeks to increase the participant's involvement with a church and its pastor.[102] Every six months, the case manager reviews the participant's progress and re-administers the LSI-R, making any necessary adjustments to the service plan.[103] A study of TOP found that LSI-R scores fell during participants' first six months, indicating a lower risk of recidivism.[104]

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97. *Id.* at 160.

98. *Id.* at 77.

99. East of the River Clergy Police Community Partnership Homepage, ERCPCP Re-entry Program, http://www.charityadvantage.com/ercpcp/ReentryInitiative.asp (last visited Jan. 30, 2008).

100. HERCIK ET AL., *supra* note 30, at 31.

101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.* at 32.

Another ministry well known for partnering with churches across the nation is Prison Fellowship Ministries ("PFM"),[105] whose purpose is to "exhort, equip, and assist the Church" in (1) "its ministry to prisoners, ex-prisoners, victims, and their families" and (2) its promotion of "biblical standards of justice in the criminal justice system."[106] In 1997, PFM established the "first-ever, 24 hour-a-day, 7 day-a-week Christian prison program" in the United States, called the InnerChange Freedom Initiative ("IFI").[107] IFI is a "Christ-centered, Bible-based prison program that supports prison inmates through a spiritual and moral transformation beginning while incarcerated and continuing after release."[108] As a "faith saturated" program, IFI is designed 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."[109] The program is expressly Christian, and candidates for the program volunteer for it recognizing its expressly Christian nature, although the program is not restricted to Christian prisoners.[110]

PFM launched the first IFI program in Texas in cooperation with the Texas Department of Criminal Justice ("TDCJ"), with IFI responsible for "implementing, administering, and funding inmate programs," and TDCJ responsible for "housing and security matters."[111] The program,[112] which is "[a]nchored in biblical teaching,

105. PFM "is the largest prison ministry in the United States, with more than 50,000 trained volunteers providing various kinds of intentional religious programming such as Bible studies and seminars." Johnson, *supra* note 62, at 334.

106. HERCIK ET AL., *supra* note 30, at 96 (internal quotation marks omitted).

107. *Id.*

108. *Id.*

109. JOHNSON & LARSON, *supra* note 24, at 8. "At the core of Prison Fellowship's mission is the premise that crime is fundamentally a moral and spiritual problem that requires a moral and spiritual solution." *Id.* at 7. Consequently, PFM embraces five themes of spiritual transformation in its IFI program: (1) "I'm not who I used to be" ("spiritual rebiographing" or emphasizing that members are a new creation with a new identity in Christ; in short, they are forgiven by God); (2) "Spiritual growth" (developmental process to transform deviant histories); (3) "God versus the prison code" (spiritually transforming individuals to hold each other accountable, choose good over evil, and choose God over the usual prison culture of antisocial behavior); (4) "Positive outlook on life" (encouraging a positive outlook on their current situation and future prospects; in a word, proclaiming hope); and (5) "The need to give back to society" (overcoming the feeling that society owes them, but instead expressing a gratitude for their new life accompanied with an overwhelming need to give back to society and the community when they are released). *Id.* at 26–31.

110. HERCIK ET AL., *supra* note 30, at 32.

111. JOHNSON & LARSON, *supra* note 24, at 4.

life-skills education, and group accountability," has three phases that begin anywhere between sixteen to twenty-four months before release of the inmate, and continue for another six to twelve months after release.[113] Phase I of the program, which lasts about twelve months, focuses on establishing the prisoner's spiritual and moral foundation and providing him with educational and survival skills.[114] Phase I heavily emphasizes, among other things, biblical education, substance-abuse prevention, tutoring for certificates of General Educational Development (commonly referred to as a GED), life skills, support groups, and mentoring.[115] IFI volunteers are Christians who meet with prisoners one-on-one for a minimum of two hours per week, starting six months into Phase I.[116]

Phase II continues the educational and spiritual formation begun in Phase I, but emphasizes leadership components.[117] The goal of Phase II, which lasts from six to twelve months, is to test the inmate's value system in real-life settings by allowing the participants to do community service work during the day outside of the prison.[118] Phase III, which also lasts six to twelve months and is commonly known as the aftercare stage, is the reentry component of IFI, and is designed to help the inmate return to the community.[119] Phase III relies heavily upon the mentoring established in Phase I, and IFI staff help the released prisoner with housing and employment referrals and connecting the ex-inmate with a church that will nurture his spiritual growth.[120]

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112. IFI's programming generally follows the Association for Protection and Assistance of the Condemned program model founded in 1973 by Dr. Mario Ottoboni, which reports a recidivism rate of less than 5% and is now followed in eighty prisons throughout Brazil. HERCIK ET AL., *supra* note 30, at 84. This less than 5% recidivism rate is the same rate reported for Humaita Prison in Brazil, which PFM has operated for more than twenty-seven years, and compares favorably with the 75% rate for inmates released from state-operated Brazilian prisons. McDaniel et al., *supra* note 63, at 168.

113. JOHNSON & LARSON, *supra* note 24, at 9.

114. *Id.*

115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.* The IFI program is currently being challenged in Iowa, and the program is discussed at considerable length in the appellate decision. *See* Ams. United for Separation of Church & State v. Prison Fellowship Ministries, 509 F.3d 406, 413–16 (8th Cir. 2007).

The efficacy of IFI's program in reducing prisoner recidivism (defined as re-arrests and re-incarcerations within two years of release) was tested by the University of Pennsylvania's Center for Research on Religion and Urban Civil Society. In this study, Johnson and his colleagues compared 177 prisoners who participated in some of the IFI programs (including seventy-five inmates who graduated from the program[121]) with a group of 1754 inmates who met the IFI criteria for selection, but did not take part in the program.[122] Johnson found:

> (1) . . . ;
>
> (2) IFI program graduates were significantly less likely than the matched group to be arrested (17.3% vs. 35%) during the two-year post-release period;
>
> (3) IFI program graduates were significantly less likely than the matched group to be incarcerated (8% vs. 20.3%) during the two-year follow-up period; and
>
> (4) Mentor contact is associated with lower rates of recidivism.[123]

In addition to the quantitative study, Johnson conducted a qualitative study to learn, among other things, why program graduates committed fewer new crimes. From the interviews conducted, Johnson and his colleagues learned that for prisoner reentry, the relationship between the mentor and the IFI participant is "pivotal."[124] Immediately after reentry, there is typically frequent contact between

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121. "Graduate" is carefully defined:

> [T]o qualify as a graduate of IFI a participant must: (1) complete 16 months in the IFI program . . . ; (2) complete 6 or more months in aftercare; (3) hold a job and have been an active member in church for the previous 3 months prior to graduation; and (4) verify that he has satisfactorily completed the aftercare requirements.

JOHNSON & LARSON, *supra* note 24 at 15.

122. *Id.* at 4.

123. *Id.* at 22. Interestingly, there was no statistically significant difference in re-arrests or re-incarcerations after two years between the IFI program *participants* and the matched group. That is, the IFI *participants* who did not *graduate* (fifty-one were paroled early, twenty-four voluntarily quit the program, nineteen were removed for disciplinary reasons, seven were removed at the request of staff, and one quit because of a serious medical problem) fared no better, and in fact did worse, than the matched group. *Id.* at 18.

124. *Id.* at 47.

mentors and participants, but the frequency diminishes over time as participants move, change telephone numbers, or change jobs. This growing infrequency of contact was considered "the first step on a path to post-release failure," and often was the result of the participant's wanting to distance himself from those likely to hold him accountable for his behavior.[125]

Johnson cited four common characteristics among the *unsuccessful* IFI participants: (1) the unsuccessful participants failed to build and sustain consistent contact with churches, and therefore did not tap the resources of this social support network with many positive role models; (2) they had a diminishing relationship with mentors that resulted in a declining sense of accountability; (3) they tended to isolate themselves from those individuals most likely to help them; and (4) many of the failed participants either denied their current problems, had a pessimistic outlook, or blamed their problems on the IFI program.[126] Johnson noted that these four characteristics were not only "central to their return to criminal activity," but also directly contradicted the five spiritual transformation themes in IFI's program.[127]

Johnson's qualitative study underscores the importance of keeping a released prisoner in a moral community. This is relatively easy for a prisoner in Phase I, since IFI staff and fellow IFI participants encourage the prisoner and hold him accountable. Remaining in a moral community becomes more difficult after release, however, when past bad influences on the released prisoner return. In this critical stage, the released prisoner must remain firmly attached to his mentor and seek social and moral sustenance from his adopted church in order to successfully resist prior destructive behavior. Remaining in a moral community is what distinguished the graduate from the mere participant in Johnson's IFI study, as well as the graduate from the unsuccessful Bible study participant in Johnson's earlier New York study.[128]

Contrary to research conducted in the 1970s which concluded that nothing works to reduce recidivism,[129] subsequent research has shown that effective secular rehabilitation programs have at least one

125. *Id.*

126. *Id.* at 48.

127. *Id.* See *supra* note 109 for the five spiritual transformation themes.

128. *See supra* text accompanying notes 67–68.

129. JOHNSON & LARSON, *supra* note 24, at 6 (citing Robert Martinson, *What Works? Questions and Answers About Prison Reform*, 35 PUB. INTEREST 22 (1974)).

of the following: academic skills training, vocational skills training, cognitive skills programs, and drug abuse treatment.[130] These "successful" secular programs, however, typically reduce recidivism by only 5–10%.[131] As noted above, IFI program graduates have significantly lower re-arrest rates than the matched group (17% versus 35%), and they also have significantly lower rates of incarceration than the matched group (8% versus 20%). Therefore, the recidivism reductions found in the University of Pennsylvania's two-year post-release study of IFI are over 17% for arrest and 12% for incarceration—both of which are significantly higher than the 5–10% recidivism reduction for successful secular programs.[132] These results are "promising and considerably higher than most reported within the correctional literature."[133] The success of the Texas InnerChange program has served as the model for similar PFM programs in Arkansas, Kansas, Minnesota, and the one ruled unconstitutional by Chief Judge Pratt in Iowa, whose decision was recently affirmed by the Eighth Circuit.[134]

Confronted with high rates of recidivism in their penal systems, the states are in desperate need of prisoner rehabilitation programs that effectively reduce recidivism and are cost effective.[135] Studies

130. *Id.* at 6–7.

131. *Id.* at 7 (citing JOAN PETERSILIA, WHEN PRISONERS COME HOME: PAROLE AND PRISONER REENTRY 177 (2003)). An example of a successful secular program is the Life Skills Program in the Delaware Department of Corrections, which is available twice a year for up to 150 minimum- and medium-security inmates each cycle. PETER FINN, U.S. DEP'T OF JUSTICE, THE DELAWARE DEPARTMENT OF CORRECTION: LIFE SKILLS PROGRAM 2 (1998), *available at* http://www.ncjrs.gov/pdffiles/169589.pdf. The program has three components, which occupy its participants for three hours each weekday: academics, violence reduction, and applied life skills. *Id.* At the heart of the violence reduction program is Moral Reconation Therapy ("MRT"), which is "a step-by-step process of raising the moral reasoning level of students through a series of 16 hierarchically graded moral and cognitive stages." *Id.* at 5. MRT "alter[s] the way individuals *act* by changing the way they *think*." *Id.* An independent evaluation of the program found that, "for the first program cycle, 19 percent of Life Skills students in the four State prisons reoffended within 1 year after release, compared with 27 percent of a group of inmates who did not participate." *Id.* at 2.

132. JOHNSON & LARSON, *supra* note 24, at 19.

133. *Id.*

134. Ams. United for Separation of Church & State v. Prison Fellowship Ministries, 509 F.3d 406 (8th Cir. 2007), *aff'g in part, rev'g in part* 432 F. Supp. 2d 862, 866 (S.D. Iowa 2006); JOHNSON & LARSON, *supra* note 24, at 8; The InnerChange Freedom Fact Sheet, http://www.demossnewspond.com/ifi/presskit/IFIfactsheet.htm (last visited Feb. 6, 2008).

135. In addition to this effort on the state level, the federal government is also searching for solutions to the prisoner reentry problem.

suggest that "faith is the forgotten factor in solving crime problems—personal religiosity (belief in God) and religious participation (ritual) reduce crime, delinquency, and recidivism."[136] Therefore, "Federal and State funding for promising faith-based programs to continue their 'good works' in partnership with criminal justice agencies is expected to increase."[137] This funding and the many effective faith-based prison programs discussed above, however, are threatened by the judiciary's current understanding of the Establishment Clause—an understanding that is based on a faulty view of history as discussed in the next Part. Assuming that the programs pass constitutional muster, funding "will likely be based on a cost-benefit analysis of which groups provide the best service, achieving the lowest rates of recidivism and simultaneously requiring the fewest number of employees at the lowest cost per prisoner."[138] Decisions on funding will, in other words, follow the primary criterion of the most effective service for the least cost, a criterion that the "Purchaser of the Louisiana Territory" understood.

> [I]n 2003, the US Departments of Justice, Labor, Housing and Urban Development, and Health and Human Services established the Serious and Violent Offender Reentry Initiative (SVORI), a large-scale program providing over $100 million to 69 grantees to develop programming, training, and state-of-the-art reentry strategies at the community level. The SVORI programs are intended to reduce recidivism, as well as to improve employment, housing, and health outcomes of participating released prisoners.

Serious and Violent Offender Reentry Initiative, Initiative Background, https://www.svori-evaluation.org/index.cfm?fuseaction=dsp_initiative_background (last visited Jan. 28, 2008).

SVORI is designed to address three stages an offender goes through when returning to the community: (1) protect and prepare: offers education, mental health and substance abuse treatment, parenting instruction, vocational training, life skills programs, mentoring, and full diagnostic and risk assessment while offenders are incarcerated; (2) control and restore: offers services and supervision as offenders reenter the community; and (3) sustain and support: connects offenders to networks of agencies and individuals to support their transition toward becoming productive and law-abiding members of their communities. *E.g.*, NORTH CAROLINA'S SERIOUS & VIOLENT OFFENDER REENTRY INITIATIVE: GOING HOME, *available at* http://northcarolina tasc.org/reentry.PDF (last visited Mar. 25, 2008). *See generally* Serious and Violent Offender Reentry Initiative (SVORI), Program Overview, https://www.svori-evaluation.org/%5Cdocuments %5Cnationalportrait%5CSVORI_NP_Section3.pdf (last visited Jan. 28, 2008).

136. HERCIK ET AL., *supra* note 30, at 127.

137. *Id.* at 52.

138. McDaniel et al., *supra* note 63, at 178.

II. LESSONS LEARNED FROM THOMAS JEFFERSON'S FAITH-BASED INITIATIVE

The concept of value, of getting the most effective product or service for the least cost, is ingrained in the nature of Americans. Every day, merchandise hawkers from Madison Avenue to Main Street flood America with stimuli urging Americans to buy valuable products and services for less than the normal retail price. Witness simply the newspapers that Americans read every day, the signs in the windows of stores they pass in the mall, and point-of-sale ads on supermarket shelves. If Madison Avenue is not convincing Americans to buy a specific product or service, it is using its considerable influence to convince Americans to buy a product or service now when it is on sale. Generally, where the habits, traditions, and desires of the public rest also lie the pattern and practice of the government. Accordingly, government purchasing generally seeks competitive bids from two or more competent contractors so that the government can obtain the best product or service at the least cost. There are exceptions to this general rule, of course, but these exceptions are generally limited to where there exists a very special expertise or where a particular security is required. As a general rule, the more competent contractors there are bidding on a product or service, the greater the competition and therefore the more likely that the government will get the best possible product and service for the least possible cost.

The American way of best service for least cost is so ingrained in Americans that we find restrictions on competition unfair. American consumers grumble when OPEC decides to raise the price of foreign oil, thereby limiting the competition between foreign countries. Teddy Roosevelt achieved acclaim by busting up the trusts that monopolized American commerce. For decades the Department of Justice has used the Sherman Anti-Trust Act to promote competition, and the Federal Trade Commission goes after unfair trade practices that can result in monopolies. Americans want every competent provider to be eligible to compete for public grants and contracts to heighten the competition, which is why many Americans chafe when FBOs are deemed ineligible to compete because they are "too religious."

The rationale given for this discriminatory treatment of FBOs is, of course, the current interpretation of the Establishment Clause.[139] For most of its existence, the State of Iowa could have contracted with PFM's InnerChange Freedom Initiative without any application of the First Amendment. This changed, of course, in 1947 when Justice Hugo Black penned the majority decision in *Everson v. Board of Education* that four other members of the Court found acceptable.[140] Justice Black's opinion, for the first time in 156 years, imposed the requirements of the First Amendment's Establishment Clause upon the states.[141] In addition, Justice Black's opinion contained dicta[142] that interpreted the Establishment Clause expansively to preclude much

139. U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion . . . .").

140. Everson v. Bd. of Educ., 330 U.S. 1 (1947).

141. *See id.* at 13–15.

142. Because of subsequent judicial focus on the language which appears *infra* note 144, one can forget that the Court in *Everson* through Justice Black upheld the New Jersey statutory provision granting private school children the same free bus transportation provided to public school children. The Court stated that, although the Establishment Clause may prohibit spending tax revenue to support "an institution which teaches the tenets and faith of any church," the Free Exercise Clause prohibits the government from excluding any of its citizens the benefits of public welfare legislation because of his or her faith. *Id.* at 16. The Court wanted "to be sure that [it did] not inadvertently prohibit New Jersey from extending its general state law benefits to all its citizens without regard to their religious belief." *Id.*

In upholding New Jersey's spending of tax-raised funds to pay the bus fares of parochial school students, the *Everson* majority through Justice Black admitted that this program helped children to get to church schools, and that perhaps some of the children would not be sent to parochial schools without this assistance. *Id.* at 17. The Court analogized this aid, however, to police and fire protection, connections for sewage disposal, and public highways and sidewalks. *Id.* at 17–18. The Court noted that:

> [C]utting off church schools from these services, *so separate and so indisputably marked off from the religious function*, would make it far more difficult for the schools to operate. But such is obviously not the purpose of the First Amendment. That Amendment requires the state to be a neutral in its relations with groups of religious believers and non-believers; it does not require the state to be their adversary. State power is no more to be used so as to handicap religions than it is to favor them.

Id. at 18 (emphasis added).

The question of what functions are "so separate and so indisputably marked off from the religious function," and therefore can be paid by state funds is one that continues to haunt the judiciary. For instance, in *Prison Fellowship Ministries*, Chief Judge Pratt recognized that the rehabilitative programs offered by PFM were separate and distinct in time from the required praise and worship services, but could not be funded by the government because of PFM's "pervasively sectarian" nature. Ams. United for Separation of Church & State v. Prison Fellowship Ministries, 432 F. Supp. 2d 862, 917–25 (S.D. Iowa 2006), *aff'd in part*, *rev'd in part*, 509 F.3d 406 (8th Cir. 2007).

more than simply barring the federal government from establishing a national church, as most of the states had done for decades prior to independence from England.[143] Rather, this dicta prohibited both the federal government and the states from passing "laws which aid one religion, aid all religions, or prefer one religion over another,"[144] even though the Court's *holding* determined that the State of New Jersey could constitutionally provide aid for transporting students to private Christian schools.[145] This *holding* contradicted Justice Black's *dicta*, which prohibited state and federal governments from levying a "tax in any amount, large or small . . . to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion."[146]

As support for his dicta, Justice Black invoked a metaphor Thomas Jefferson used in a private letter to the Baptists of Danbury, Connecticut a decade after the passage of the First Amendment: "The First Amendment has erected a wall between church and state. That wall must be kept high and impregnable. We could not approve the

143. Given the establishment of the Congregational churches in Massachusetts, New Hampshire, and Connecticut, all of which survived the passage of the First Amendment, and the former establishment of the Anglican Church in Virginia, the Carolinas, and Georgia, there is no question that the Establishment Clause prohibited the establishment of a national church. *See* Lee J. Strang, *The Meaning of "Religion" in the First Amendment*, 40 DUQ. L. REV. 181, 220 (2002); Joel H. Swift, *To Insure Domestic Tranquility: The Establishment Clause of the First Amendment*, 16 HOFSTRA L. REV. 473, 497 (1988).

144. *Everson*, 330 U.S. at 15 (dictum). Justice Black's interpretation of the Establishment Clause is:

> The "establishment of religion" clause of the First Amendment means at least this: 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 to 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*. In the words of Jefferson, the clause against establishment of religion by law was intended to erect "a wall of separation between church and State."

Id. at 15–16 (quoting Reynolds v. United States, 98 U.S. 145, 164 (1878)).

145. *Id.* at 17 (majority opinion).

146. *Id.* at 16 (dictum).

slightest breach."[147] A lengthy critique of Jefferson's private letter to the Danbury Baptists is beyond the scope of this Article.[148] Justice Black's focus on the metaphor in this private letter, rather than the public acts of Jefferson as President, is not.

In Jefferson's own opinion, his letter to the Danbury Baptists did not rank on the scale of the Virginia Statute of Religious Liberty of 1786, the Declaration of Independence, or the founding of the University of Virginia.[149] This does not mean, of course, that Jefferson considered the letter unimportant or chose his words flippantly.[150] Nevertheless, there is no evidence that Jefferson foresaw that this letter, among his hundreds of letters, would have a "pervasive and enduring impact . . . on American politics and jurisprudence two centuries later."[151] This lack of foresight is certainly understandable. Although Jefferson championed for many years the cause of religious liberty, he had little impact on the wording of the First Amendment, since he was in France during its drafting, debate, and congressional passage.[152]

The focus of the correspondence between Jefferson and the Danbury Baptists was, of course, religious liberty. The Baptists were duly concerned with this subject, since they were a religious minority

147. *Id.* at 18. *Compare id.*, *with* Letter from Thomas Jefferson to Messrs. Nehemiah Dodge and Others, a Comm. of the Danbury Baptist Ass'n, in the State of Conn. (Jan. 1, 1802), *reprinted in* THOMAS JEFFERSON, WRITINGS 510 (Merrill D. Peterson ed., 1984) [hereinafter Letter from Jefferson] ("I contemplate with sovereign reverence that act of the whole American people which declared that their legislature should 'make no law respecting an establishment of religion, or prohibiting the free exercise thereof,' thus building a wall of separation between church and State." (quoting U.S. CONST. amend. I)).

148. For an excellent critique and analysis of this letter and its historical context, see DANIEL L. DREISBACH, THOMAS JEFFERSON AND THE WALL OF SEPARATION BETWEEN CHURCH AND STATE 25–42 (2002).

149. Jefferson did not consider his letter to the Danbury Baptists to be worthy of including on his tombstone. *See infra* note 190.

150. Prior to sending the letter, he circulated a copy for comment to both Attorney General Levi Lincoln and Postmaster General Gideon Granger, two New England Republicans, and Jefferson redrafted the letter after receiving Lincoln's comments. DREISBACH, *supra* note 148, at 26. Moreover, since the early Presidents used private correspondence to help shape public opinion, Jefferson undoubtedly thought that his letter would likely be published, which it was soon after it was written. *Id.* at 26–27, 30. Perhaps that was his intent, since his letter is political in nature, as evidenced by the events surrounding the letter and his cover note to Lincoln. *Id.* at 26–30.

151. *Id.* at 30.

152. *See* Wallace v. Jaffree, 472 U.S. 38, 92 (1985) (Rehnquist, J., dissenting).

in Connecticut dominated by an established Congregational Church.[153] After acknowledging Jefferson's long-standing reputation on behalf of religious freedom, the letter from the Danbury Baptists to Jefferson stated:

> Our Sentiments are uniformly on the side of Religious Liberty—That Religion is at all times and places a Matter between God and Individuals—That no man ought to suffer in Name, person, or effects on account of his religious Opinions—That the legitimate Power of civil Government extends no further than to punish the man who *works ill to his neighbour*.[154]

Religious liberty, however, was not considered in Connecticut an inalienable right, but a "favor" granted by the Connecticut legislature.[155] With this strong focus on religious liberty, the Danbury Baptists commiserated with Jefferson that his refusal to employ civil power to promote the Kingdom of Christ was used unjustly to attack him as "an enemy of religion[,] Law & good order."[156] Finally, while acknowledging the limitations of the President (he is "not the national Legislator") and the national government (it "cannot destroy the Laws of each State"), the Danbury Baptists expressed their hope that Jefferson's "sentiments" would become "like the radiant beams of the Sun, will shine & prevail through all these States and all the world till Hierarchy and tyranny be destroyed from the Earth."[157]

In response, Jefferson assured the Danbury Baptists that he also adhered to the position that a man's religious conscience was a private matter between him and God, and that they had no reason

153. ANSON PHELPS STOKES & LEO PFEFFER, CHURCH AND STATE IN THE UNITED STATES 74 (rev. ed. 1964). Connecticut disestablished the church in 1818. *Id.* at 74–75.

154. Letter from Nehemiah Dodge et al., Danbury Baptist Ass'n in Conn., to Thomas Jefferson (Oct. 7, 1801), *in* DREISBACH, *supra* note 148, at 31, 31.

155. *Id.*

156. *Id.* The Danbury Baptists stated:

> It is not to be wondered at therefore; if those, who seek after *power & gain* under the pretence *of government & Religion* should reproach their fellow men—should reproach their chief Magistrate, as an enemy of religion[,] Law & good order, because he will not, dares not assume the prerogative of Jehovah and make Laws to govern the Kingdom of Christ.

Id.

157. *Id.* at 32.

for concern about the U.S. government interfering with their free exercise of religion.[158] In fact, Jefferson's response assured the Danbury Baptists that both the Free Exercise and the Establishment Clauses guaranteed citizens their right to conscience.

Jefferson's assurances that the First Amendment's religion clauses protect the Danbury Baptists' right of conscience must, of course, be considered in context. As noted above, the Danbury Baptists resided in a state with an established church. The nature and degree of this establishment, however, had changed a little less than twenty years prior to this exchange of correspondence. In 1784, Connecticut adopted a Toleration Act, which allowed "those who were not orthodox Congregationalists and who wished to be exempt from the tax for the Established Church . . . to pay their tax to their own body, provided they were regular attendants at another church."[159] In other words, since 1784, the Baptists in Connecticut could pay their religious taxes to their Baptist churches rather than to the Congregational Churches. Their complaint, therefore, was one of principle, although it aided in practice those who did not regularly attend a church (who had to therefore pay the religious tax to the Congregational Church), or those regular church-goers who wanted to contribute less than the amount of the tax.

Similarly, those of no or little faith today could claim that their right of conscience is violated if the government collects their taxes and gives them to one or more churches or one or more organizations like PFM that integrate faith into their program. Those of no or little faith, however, do not have exclusivity with respect to conscience. People of faith have a similar right that is violated if

158. Letter from Jefferson, *supra* note 147. In the letter, he stated:

> Believing with you that religion is a matter which lies solely between man and his God, that he owes account to none other for his faith or his worship, that the legislative powers of government reach actions only, and not opinions, I contemplate with sovereign reverence that act of the whole American people which declared that their legislature should "make no law respecting an establishment of religion, or prohibiting the free exercise thereof," thus building a wall of separation between church and State. Adhering to this expression of the supreme will of the nation in behalf of the rights of conscience, I shall see with sincere satisfaction the progress of those sentiments which tend to restore to man all his natural rights, convinced he has no natural right in opposition to his social duties.

Id. (quoting U.S. CONST. amend. I).

159. STOKES & PFEFFER, *supra* note 153, at 75.

FBOs are *denied* the right to compete for government grants for social services. Discrimination against FBOs affects not only those people of faith who want to *perform* social services with the aid of the public, but also the *recipients* of social services who would prefer services from an FBO rather than a secular organization with no faith component or commitment.

The fair and equal treatment of both faith-based and secular organizations is one of the central thrusts of Justice Thomas's opinion in *Mitchell v. Helms*, where he noted that if the religious, areligious, and irreligious are all treated alike, "it is a mystery which view of religion the government has established, and thus a mystery what the constitutional violation would be."[160] In other words, given a valid secular purpose like the reduction of crime committed by those released from prison, the proper question to ask is which organization can best achieve the valid secular objective for the least cost (such as those listed in Part I), rather than focusing on the philosophical underpinnings of the organization.

Thomas Jefferson recognized this principle of neutrality in his official acts as President. As noted above, Jefferson had little if any part in the drafting and ratification of the Bill of Rights,[161] but, like every other President, he interpreted the Constitution in his role as President.[162] In this regard, Jefferson clearly knew the scope of the religion clauses and refrained from acting as President when he suspected his action violated the Constitution. One often-cited example in this regard is his failure to follow the precedent set by Presidents Washington[163] and Adams[164] in issuing Thanksgiving Day

160. Mitchell v. Helms, 530 U.S. 793, 827 (2000) (plurality opinion).

161. *See* Wallace v. Jaffree, 472 U.S. 38, 92 (1985) (Rehnquist, J., dissenting).

162. George Washington's first veto, for example, was on the basis of the Constitution. *See* Message from George Washington to the House of Representatives, 2d Congress, 1st Sess. (Apr. 5, 1792).

163. On October 3, 1789, George Washington issued the following National Thanksgiving Proclamation:

> Whereas it is the duty of all nations to acknowledge the Providence of Almighty God, to obey his will, to be grateful for his benefits, and humbly to implore his protection and favor . . . .
>
> Now, therefore, I do recommend and assign Thursday, the twenty-sixth day of November next, to be devoted by the people of these States to the service of that great and glorious Being, who is the Beneficent Author of all the good that was, that is, or that will be; that we may then all unite in rendering unto him our sincere and humble thanks for his kind care and protection of the people of this country previous to their becoming a

Proclamations urging the citizens to give thanks to God and imploring them to seek forgiveness for their waywardness. Although Jefferson had issued similar proclamations as Governor of Virginia,[165] he refused to do so as President on the grounds of federalism.[166] Jefferson, in his role as leader of the struggle for

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> nation; . . . for the peaceable and rational manner in which we have been enabled to establish constitutions of government for our safety and happiness, and particularly the national one now lately instituted; for the civil and religious liberty with which we are blessed . . . .
>
> And, also, that we may then unite in most humbly offering our prayers and supplications to the great Lord and Ruler of Nations, and beseech him to pardon our national and other transgressions; . . . to render our national government a blessing to all the people, by constantly being a government of wise, just, and constitutional laws, discreetly and faithfully executed and obeyed; . . . to promote the knowledge and practice of true religion and virtue, and the increase of science, among them and us; and, generally, to grant unto all mankind such a degree of temporal prosperity as he alone knows to be best.

GEORGE WASHINGTON, PROCLAMATION FOR A NATIONAL THANKSGIVING (Oct. 3, 1789), *reprinted in* 12 THE WRITINGS OF GEORGE WASHINGTON: BEING HIS CORRESPONDENCE, ADDRESSES, MESSAGES, AND OTHER PAPERS, OFFICIAL AND PRIVATE 119–20 (1834).

164. Like Washington, Adams issued a National Proclamation to encourage prayer and fasting. His classically Christian Proclamation of March 6, 1799, urged the people of the United States to perform their religious duties. It stated, in pertinent part:

> I have thought proper to recommend, and I do hereby recommend accordingly, that Thursday, the twenty-fifth day of April next, be observed, throughout the United States of America, as a day of solemn humiliation, fasting, and prayer; that the citizens, on that day, abstain as far as may be from their secular occupations, devote the time to the sacred duties of religion, in public and in private; that they call to mind our numerous offences against the most high God, confess them before him with the sincerest penitence, implore his pardoning mercy, through the Great Mediator and Redeemer, for our past transgressions, and that, through the grace of his Holy Spirit, we may be disposed and enabled to yield a more suitable obedience to his righteous requisitions in time to come; that he would interpose to arrest the progress of that impiety and licentiousness in principle and practice, so offensive to himself and so ruinous to mankind; that he would make us deeply sensible, that "righteousness exalteth a nation, but that sin is the reproach of any people" . . . .

JOHN ADAMS, PROCLAMATION FOR A NATIONAL FAST (Mar. 6, 1799) (quoting *Proverbs* 14:34), *reprinted in* 9 THE WORKS OF JOHN ADAMS, SECOND PRESIDENT OF THE UNITED STATES 172, 173 (1850).

165. *See, e.g.*, DANIEL L. DREISBACH, REAL THREAT AND MERE SHADOW: RELIGIOUS LIBERTY AND THE FIRST AMENDMENT 109 (1987).

166. *See* STOKES & PFEFFER, *supra* note 153, at 88.

> I consider the government of the United States as interdicted by the Constitution from intermeddling with religious institutions, their doctrines, discipline, or exercises. This results not only from the provision that no law shall be made respecting the establishment or free exercise of religion, but from that also which reserves to the States the powers not delegated to the United States. Certainly, no power to prescribe any religious exercise, or to assume authority in religious discipline, has been delegated to the General Government. It must then rest with the States, as far as it can be in any human authority. . . . Fasting and

religious freedom (the disestablishment of the Episcopal Church in Virginia), railed against the abuses that accompanied an established church.[167] Given this strident opposition to the established church, plus Jefferson's unorthodox beliefs,[168] it is ironic that he is an example of a President with a "faith-based initiative" that puts in proper perspective the role of church and state in our Constitution, and more accurately reflects Jefferson's true position on church-state relations, a position much different than the one portrayed by Justice Black in *Everson.*

Jefferson's "faith-based initiative" involved a treaty with a Native American tribe. Treaties with Native Americans are exclusively within the authority of the federal government[169] and therefore posed no federalism

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> prayer are religious exercises; the enjoining them an act of discipline. Every religious society has a right to determine for itself the times for these exercises, and the objects proper for them, according to their own particular tenets; and this right can never be safer than in their own hands, where the Constitution has deposited it.

Id. (quoting Letter from Thomas Jefferson to a Presbyterian Clergyman (1808)).

167. Jefferson wrote:

> Several acts of the Virginia assembly of 1659, 1662, and 1693, had made it penal in parents to refuse to have their children baptized; had prohibited the unlawful assembling of Quakers; had made it penal for any master of a vessel to bring a Quaker into the state; had ordered those already here, and such as should come thereafter, to be imprisoned till they should abjure the country; provided a milder punishment for their first and second return, but death for their third; had inhibited all persons from suffering their meetings in or near their houses, entertaining them individually, or disposing of books which supported their tenets. . . .
>
> . . . By our own act of assembly of 1705, c. 30, if a person brought up in the Christian religion denies the being of a God, or the Trinity, or asserts there are more Gods than one, or denies the Christian religion to be true, . . . he is punishable on the first offence by incapacity to hold any office or employment ecclesiastical, civil, or military; on the second by disability to sue, to take any gift or legacy, to be guardian, executor, or administrator, and by three years imprisonment, without bail.

Response of Thomas Jefferson to Virginia Query XVII, Religion (1781–1782), *reprinted in* THOMAS JEFFERSON, WRITINGS, *supra* note 147, at 283, 283–84.

168. Both now and in his lifetime (particularly during the presidential campaign of 1800), the orthodoxy and depth of Jefferson's faith had been a subject of much debate. JOHN EIDSMOE, CHRISTIANITY AND THE CONSTITUTION: FAITH OF OUR FOUNDING FATHERS 215–46 (1987). One author, after reviewing Jefferson's life and writings, concluded that Jefferson was neither orthodox nor a deist, but rather similar to the Unitarians of his day. *Id.* at 245. Jefferson was a monotheist, and believed that God was the Creator and Sustainer of the universe, the Giver of natural and moral laws, the Author of human rights and liberties, and an active Intervener in human affairs. *Id.* Jefferson denied, however, the Bible as the inspired Word of God, and he further denied the deity of Christ, although he considered Jesus the greatest example and teacher of morals. *Id.*

169. U.S. CONST. art. I, § 10, cl. 3 ("No State shall, without the Consent of Congress, . . . enter into any Agreement or Compact with . . . a foreign Power . . . .").

issues for the drafter of the Kentucky Resolutions of 1798.[170] This treaty stated in part:

> *And whereas*, The greater part of the said tribe have been baptised and received into the Catholic church to which they are much attached, the United States will give annually for seven years one hundred dollars towards the support of a priest of that religion, who will engage to perform for the said tribe the duties of his office and also to instruct as many of their children as possible in the rudiments of literature. And the United States will further give the sum of three hundred dollars to assist the said tribe in the erection of a church.[171]

By these words written in 1803—little more than a decade after the ratification of the Bill of Rights—Congress provided direct aid to a Christian body for the construction of a church and to support a priest to perform "the duties of his office," which included celebrating the Mass and administering the other Sacraments, praying, and evangelizing. This direct aid to the Catholic Church to carry out inherently religious activities was in a public treaty negotiated by William Henry Harrison (future President of the United States), and recommended to Congress by the third President of the United States (yes, none other than Thomas Jefferson) almost twenty months *after* his private letter to the Danbury Baptists.[172] The creator of the metaphor of a wall separating church and state apparently had little problem constitutionally with breaching that wall *as President*. Yet, one can hardly conceive of a more significant breach of the infamous wall than to recommend that Congress provide direct aid to a church for the performance of inherently religious activities, the construction of a building to house these activities, and yes, even providing children with a pervasively sectarian education.

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170. The Kentucky Resolutions of 1798, secretly drafted by Jefferson, declared that the Constitution was a compact between the states, presumably allowing a state to withdraw under certain conditions. The Resolutions also declared that the federal government had no authority to exercise powers not specifically delegated to it in the Constitution, and that any act by the federal government pursuant to an undelegated power was void. *See* Thomas Jefferson, *Draft of the Kentucky Resolutions* (Oct. 1798), *in* THOMAS JEFFERSON, WRITINGS, *supra* note 147, at 449. The Kentucky Resolutions, therefore, asserted the right of the states to decide whether congressional acts were constitutional.

171. Treaty, U.S.-Kaskaskia Tribe of Indians, art. III, Aug. 13, 1803, 7 Stat. 78, 79 [hereinafter Kaskaskia Treaty].

172. Louis Fisher, *Indian Religious Freedom: To Litigate or Legislate?*, 26 AM. INDIAN L. REV. 1, 2 (2001). *Compare* Kaskaskia Treaty, *supra* note 171 (proclaiming the Kaskaskia Treaty on August 13, 1803), *with* Letter from Jefferson, *supra* note 147, at 510 (indicating that the letter was composed on January 1, 1802, approximately nineteen and a half months earlier).

There is no question that a federal court today following stare decisis would quickly strike down the provisions recommended by Jefferson and enacted by Congress in 1803. The Roman Catholic church built with U.S. taxpayer funds for the benefit of the Kaskaskia Tribe would not, of course, be limited exclusively to secular activities (e.g., job training, skill instruction, or recreation), but would also be used for activities such as daily Mass, religious instruction, worship of God, and evangelizing those who did not believe in God. According to Supreme Court precedent now almost thirty-five years old,[173] public funds for constructing a church where inherently religious activities like Sacraments and worship are performed would suffer the constitutional one-two punch of primarily advancing religion in contravention of the *Lemon* test[174] by (1) flowing to a "pervasively sectarian" institution,[175] *and* (2) funding a "specifically religious activity."[176]

The seven-year funding for the Catholic priest in the Kaskaskia Treaty suffers the same infirmity as the construction of the church.[177]

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173. Hunt v. McNair, 413 U.S. 734, 744 (1973); *see also* Roemer v. Bd. of Pub. Works, 426 U.S. 736, 762 (1976).

174. Lemon v. Kurtzman, 403 U.S. 602, 612–13 (1971) (requiring a statute to (1) have a secular purpose; (2) have a primary effect that does not advance or inhibit religion; and (3) foster no "excessive government entanglement with religion").

175. "Pervasively sectarian" describes "an institution in which religion is so pervasive that a substantial portion of its functions are subsumed in the religious mission." *Hunt*, 413 U.S. at 743. A plurality of the Court in *Mitchell v. Helms* sharply criticized the pervasively sectarian test, calling it "unnecessary," "offensive," and having a "shameful pedigree." Mitchell v. Helms, 530 U.S. 793, 828 (2000) (plurality opinion). Speaking for the plurality, Justice Thomas stated: "This doctrine, born of bigotry, should be buried now." *Id.* at 829. After *Mitchell*, there is a split in the circuits as to whether the pervasively sectarian test survived. *Compare* Columbia Union Coll. v. Oliver, 254 F.3d 496, 504 (4th Cir. 2001) ("The O'Connor concurring opinion, which is the controlling opinion from *Mitchell*, replaced the pervasively sectarian test with a principle of 'neutrality plus.'" (footnote omitted)), *with* Steele v. Indus. Dev. Bd., 301 F.3d 401, 409 (6th Cir. 2002) ("It is for the Supreme Court . . . to jettison the pervasively sectarian test, which it has not done."). Curiously, the Eighth Circuit panel that considered the appeal in the *Prison Fellowship Ministries* case rejected Chief Pratt's use of the "pervasively sectarian" test. *See* Ams. United for Separation of Church & State v. Prison Fellowship Ministries, 509 F.3d 409, 424 n.4 (8th Cir. 2007). Importantly, retired Supreme Court Justice O'Connor sat on the panel and joined the opinion, thereby also rejecting the "pervasively sectarian" test. *See id.* at 413. For a more in-depth analysis of the "pervasively sectarian" test, especially in light of the opinion in *Prison Fellowship Ministries*, see James A. Davids, *A Silent Stake in the Heart of the "Pervasively Sectarian" Test*, 7 AVE MARIA L. REV. (forthcoming 2008).

176. *Hunt*, 413 U.S. at 743.

177. The seven-year funding cycle for the Catholic priest would have carried over the appropriation obligation to the administration of the fourth President of the United States, the "Father of the Constitution," and the leading figure in the fight for disestablishment in Virginia. There is no indication that President Madison hesitated at all in signing the appropriation bill granting the Roman Catholic Church money to fund a priest "to perform for said tribe the duties of his office."

This funding was specifically intended to support a priest to perform "the duties of his office." The duties of the office of priest in the Catholic Church currently include the celebration of the Eucharist, the daily recitation of the Liturgy of the Hours, the administering of the Sacrament of Penance, the Anointing of the Sick, and receiving the consent of the spouses in marriage.[178] Given the deliberative nature of the Catholic Church, the duties of the office of a priest today differ little from "the duties of his office" in 1803. Each of these duties is, of course, a "specifically religious activity," and therefore public funds spent to perform these activities would violate *Hunt*.[179]

The third element of the Kaskaskia Treaty, authorization to pay the Catholic Church public funds for a priest "to instruct as many of [the Kaskaskia] children as possible in the rudiments of literature,"[180] is also unconstitutional by today's standards. The Catholic Church, even when serving in an educational function, is still arguably a "pervasively sectarian" institution, and therefore, any payments made directly to it would violate *Hunt* and its progeny.[181] Similarly,

178. CATECHISM OF THE CATHOLIC CHURCH ¶¶ 1174, 1516, 1565–66, 1623 (2d ed. 1997); 1983 CODE cc.276, §§ 2–3, 900, 965, 1003, 1108.

179. In *Hunt*, the plaintiff challenged a South Carolina statutory scheme aiding colleges through issuance of revenue bonds for construction projects. The statute prohibited the bonds from being used for facilities where sectarian study or religious worship was conducted. *Hunt*, 413 U.S. at 735–37. Plaintiff contended, inter alia, that the Establishment Clause prohibited the statute from benefiting a Baptist-affiliated college. *Id.* at 736. In rejecting this argument, the Court stated that it had never rejected public aid to a religiously affiliated organization simply because of its religious affiliation:

> Whatever may be its initial appeal, the proposition that the Establishment Clause prohibits any program which in some manner aids an institution with a religious affiliation has consistently been rejected. Stated another way, the Court has not accepted the recurrent argument that all aid is forbidden because aid to one aspect of an institution frees it to spend its other resources on religious ends.

Id. at 742–43 (citations omitted). With respect to the second part of the test enunciated in *Lemon*, 403 U.S. at 612 ("[The statute's] principal or primary effect must be one that neither advances nor inhibits religion . . . ."), the *Hunt* Court noted that the statute prohibited any revenue bonds for buildings or facilities used for religious purposes. *Hunt*, 413 U.S. at 744. In the absence of any evidence to the contrary, the Court concluded that the bonds would only be used for the construction of facilities used for secular purposes. *Id.*

180. Kaskaskia Treaty, *supra* note 171, at 79.

181. *See* Gerard V. Bradley, *An Unconstitutional Stereotype: Catholic Schools as "Pervasively Sectarian,"* 7 TEX. REV. L. & POL. 1, 2–3 (2002) (describing the Court's treatment of Catholic parochial schools under the pervasively sectarian test, but arguing that such treatment presents an unconstitutional stereotype as applied to the Catholic schools). If the Treaty had limited the direct funding of the priest to instructing the Kaskaskia children "in the rudiments of literature," the Treaty probably would survive a facial challenge. The Court, however, would be very interested in learning whether any of these funds had been diverted from secular use, since

the Court has consistently found Catholic K–12 schools to be "pervasively sectarian," even though it has not similarly ruled with respect to any religiously affiliated colleges or non-Catholic religious schools.[182]

The public funding for educating Kaskaskia children is not saved by the "indirect" funding mechanism based on true private choice, as delineated in *Zelman*,[183] *Zobrest*,[184] or *Witters*.[185] In the Kaskaskia Treaty recommended by President Jefferson, the public funding did not follow the educational choice of the parents of the Kaskaskia children. Since the Kaskaskia Treaty preceded the advent of public education in the United States (which was followed much, much later by public educational opportunities for Native American children),[186]

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the Court presently prohibits anything more than a de minimis diversion of the aid to what it calls "religious indoctrination." Mitchell v. Helms, 530 U.S. 793, 794, 813, 835 (2000) (plurality opinion); *cf.* Freedom From Religion Found., Inc. v. Bugher, 249 F.3d 606, 608 (7th Cir. 2001) (holding that unrestricted direct cash assistance to a faith-based organization violates the Establishment Clause); Freedom From Religion Found., Inc. v. McCallum, 179 F. Supp. 2d 950, 954 (W.D. Wis. 2002) (same). The phrase "religious indoctrination" refers to inherently religious practices such as worship, proselytizing, prayer, devotional Bible reading, the teaching of Scripture or confessional religion, and veneration of the Ten Commandments. *See, e.g.*, Stone v. Graham, 449 U.S. 39, 41–42 (1980) (per curiam) (holding that posting the Ten Commandments in schools has a pre-eminent religious purpose and is, therefore, prohibited under the Establishment Clause); Abington Sch. Dist. v. Schempp, 374 U.S. 203, 223–24 (1963) (holding that prayer and devotional Bible reading cannot be dismissed as advancing the secular purpose of promoting moral values, contradicting materialism, or perpetuating national institutions); Engel v. Vitale, 370 U.S. 421, 424–25 (1962) (holding that prayer is a specifically religious activity, and cannot be distinguished as a mere part of the nation's spiritual heritage); McCollum v. Bd. of Educ., 333 U.S. 203, 210 (1948) (concluding that "'[n]o 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'" (quoting Everson v. Bd. of Educ., 330 U.S. 1, 16 (1946))).

182. Bradley, *supra* note 181, at 5.

183. Zelman v. Simmons-Harris, 536 U.S. 639, 649, 662–63 (2002).

184. Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 1, 10–11, 13–14 (1993).

185. Witters v. Wash. Dep't of Servs. for the Blind, 474 U.S. 481, 487–88 (1986).

186. *See* ROBERT L. CORD, SEPARATION OF CHURCH AND STATE: HISTORICAL FACT AND CURRENT FICTION 63–79 (1982). Professor Cord incorporates documents from the 1820s showing the numerous federal funds flowing to religious organizations to "civilize" the Native Americans. Professor Cord, after listing the names of the Baptist, United Brethren, Episcopal, Catholic, and other missionary organizations that have received federal funding to establish schools for Native American tribes, noted that:

> [T]he schools of no single Christian sect were being supported with federal money to the exclusion of others, and thus no particular sect was being elevated to a preferred religious status. Nor does the appropriation of federal monies to Christian schools indicate discriminatory aid to religion, for . . . the number of professed non-Christians were minute in the early years of the Federal Republic.

the parents of the Kaskaskia children only had one choice in deciding on the education of their children. This obviously falls considerably short of the requirement of a "true private choice" as required in *Zelman*.[187]

Who is to blame for so clearly missing the intent of the Founders as determined by Justice Hugo Black in *Everson v. Board of Education*?[188] One potential culprit is, of course, Jefferson, who recommended the Kaskaskia Treaty to Congress. Aside from the fact that Jefferson was a Founder, and therefore should know a little more about the Founders' intent concerning the Constitution than Justice Black, one could still nevertheless argue that, with respect to the First Amendment, Jefferson should be somewhat ignored since he was in France at the time of its consideration in the First Congress and subsequent ratification by many of the States.[189] There is no question as to the dedication of Jefferson to the cause of disestablishment,[190] yet it still can be argued that Jefferson had little to do with the exact wording of the First Amendment given his absence and the slowness of trans-Atlantic communication in the 1780s and 1790s.[191] Such an argument, of course, undercuts completely

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Id. at 80.

187. *Zelman*, 536 U.S. at 653.

188. 330 U.S. 1 (1947).

189. *See* Wallace v. Jaffree, 472 U.S. 38, 92 (1985) (Rehnquist, J., dissenting).

190. Jefferson was, of course, the primary author of the Virginia Statute of Religious Liberty of 1786, and was so proud of his accomplishment in this regard that he listed this statute on his tombstone, together with two other notable achievements: "Author of the Declaration of American Independence" and "Father of the University of Virginia." CORD, *supra* note 186, at 36. Jefferson omitted from his tombstone such other notable achievements as the Third President of the United States, the "Purchaser of the Louisiana Territory," the "First Secretary of State," and "Minister to France." *See id.*

191. Jefferson realized his limited impact on both the Constitution and the Bill of Rights. He wrote the following to Dr. Joseph Priestley on June 19, 1802, to correct Priestley's statements about Jefferson's impact on the Constitution:

> One passage, in the paper you enclosed me, must be corrected. It is the following, "and all say it was yourself more than any other individual, that planned and established it," *i.e.*, the Constitution. I was in Europe when the Constitution was planned, and never saw it till after it was established. On receiving it I wrote strongly to Mr. Madison, urging the want of provision for the freedom of religion, freedom of the press, trial by jury, habeas corpus, the substitution of militia for a standing army, and an express reservation to the States of all rights not specifically granted to the Union. He accordingly moved in the first session of Congress for these amendments, which were agreed to and ratified by the States as they now stand. This is all the hand I had in what related to the Constitution.

the reliance of Justice Black and others on Jefferson's view of the Establishment Clause.

As the President of the United States, Jefferson's official acts should certainly carry more weight than his private letters. Jefferson had various alternatives at his disposal with respect to the proposed Treaty and would have pondered these alternatives in light of his official duties. He could have asked the negotiators to reconsider the Treaty with the Kaskaskia Tribe and eliminate the constitutional flaw by removing public funding for the church construction and the payment for priestly "duties." Even better, Jefferson could have insisted that the funds go to the Kaskaskia Tribe in an unspecified manner, giving the Tribe the opportunity to choose whether to construct a Catholic church or allow other missionaries the opportunity to school their children. Giving the Kaskaskia the unfettered ability to choose between suppliers of knowledge would have saved at least this provision under the *Zelman-Zobrest-Witters* line of cases. Moreover, such public funding to Native Americans for unspecified purposes was not uncommon during this time, as evidenced by the Treaty with the Wyandots, proclaimed April 24, 1806, and the Treaty with the Cherokee Nation, proclaimed May 23, 1807, both during the Jefferson administration.[192] Jefferson apparently ignored these alternatives, perhaps because he did not think direct public aid to religious missions to help those least fortunate in society violated the Establishment Clause, even when federal law expressly mandated those funds to be used to erect a church and to support a Catholic priest to perform his priestly duties.

Perhaps Jefferson believed the Kaskaskia Treaty did not violate the Establishment Clause because technically it was not a congressional act.[193] That is, the First Amendment prohibits *Congress* from making any law respecting an establishment of religion, whereas the Kaskaskia Treaty only needed the recommendation of the *President* and the concurrence of two-thirds of the *Senate*.[194] Despite the surface attractiveness of this argument, it must be quickly rejected because the Treaty was subject to the appropriation process.

Letter from Thomas Jefferson to Dr. Joseph Priestley (June 19, 1802), *in* 10 THE WRITINGS OF THOMAS JEFFERSON 325 (The Thomas Jefferson Mem'l Ass'n ed., 1903).

192. CORD, *supra* note 186, at 39.

193. A treaty needs no action by the House of Representatives in order to be binding. *See* U.S. CONST. art. II, § 2.

194. *Compare* U.S. CONST. amend. I, *with* U.S. CONST. art. II, § 2.

Congress appropriated the funds for the construction of the church, and *Congress* appropriated funds each year for seven years so the Roman Catholic priest could teach and perform his "duties,"[195] including praying and administering the Sacraments (e.g., Baptism, the Eucharist, last rites), in which the Native Americans received Christ Himself, according to the teaching of the Church.[196]

If Jefferson for political reasons cannot be a culprit for the clearly unconstitutional nature of the Kaskaskia Treaty by today's standards, perhaps blame can be laid on the Senate of the Eighth Congress for ratifying the Treaty, and the entire Eighth Congress for passing the initial "clearly unconstitutional" appropriations bill. This argument, of course, would rest on the almost complete turnover between the First and the Eighth Congresses.[197] The obvious flaw in this argument is that, although there was almost a complete turnover in Congress, the Eighth Congress is certainly closer temporally to the First Congress than Justice Black was in 1947! Fewer than fourteen years divided the Eighth Congress considering the Kaskaskia Treaty and the First Congress considering the religion clauses.[198] The Congressmen and Senators in the Eighth Congress were certainly more attuned to the culture, language, and customs of the post-Revolutionary War period than was Justice Black in the aftermath of the Second World War. With so many of the Founders still alive and available for a correcting influence, the Eighth Congress, fourteen years after the congressional passage of the First Amendment, was in a better position to understand what the First Congress meant than Justice Black 156 years after the fact.

Even more telling is the fact that in providing public funds directly to the Roman Catholics for their work in civilizing the Kaskaskia Tribe, the Eighth Congress was merely following the precedent developed by previous Congresses. George Washington and the Third Congress entered a Treaty with the Oneida, Tuscorora,

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195. *See* Kaskaskia Treaty, *supra* note 171. For the duties of a Roman Catholic priest, see *supra* note 178 and accompanying text.

196. *See, e.g.*, CATECHISM OF THE CATHOLIC CHURCH, *supra* note 178, pt. 2, § 2 (presenting the Church's teaching on the seven Sacraments).

197. Comparing a list of the members of the First Congress with the members of the Eighth Congress reveals that only nine of the 199 members of the Eighth Congress were also members of the First Congress. *See* BIOGRAPHICAL DIRECTORY OF THE UNITED STATES CONGRESS 1774–2005, H.R. DOC. NO. 108-222, at 45–46, 62–64 (2005).

198. *Compare* S. Res. 27, 1st Cong. § 1 (1789), *with* Kaskaskia Treaty, *supra* note 171 (indicating that the Kaskaskia Treaty was signed on Aug. 13, 1803).

and Stockbridge Indians in which the United States promised to pay one thousand dollars to a religious society to build a church on the Oneida property in upstate New York.[199] The Fourth Congress, in a June 1, 1796, Act, directed the surveyor general at public expense to survey twelve thousand acres in Ohio that had been given by the United States to the "society of the United Brethren for propagating the gospel among the heathen."[200] As noted by Professor Robert L. Cord, this Society of the United Brethren did more than simply control land set aside by the United States, in trust, for Indians already Christian; rather, the Society used revenues generated from the land to send missionaries "to convert souls 'from among the neighboring heathen.'"[201] Professor Cord stated:

> [M]ost significant is the fact that, after the adoption of the Establishment of Religion Clause, the United States Government in effect purchased, with grants of land amounting up to 12,000 acres placed in a controlling trust, the services of a religious evangelical order to settle in western U.S. lands to aid the Christian Indians. This action was tantamount to underwriting the maintenance and spreading of Christianity among the Indians.[202]

Jefferson, with his unorthodox beliefs, would not necessarily disagree with Professor Cord's assessment. Trouble with Native Americans continued throughout the Founding Era, and Jefferson expressed his concern over the violence between Native Americans and citizens of the new United States.[203] Jefferson, in a slap against

199. Treaty, U.S.-Oneida, Tuscorora, and Stockbridge Indians, Dwelling in the Country of the Oneidas, Dec. 2, 1794, art. IV, 7 Stat. 47, 48.

200. CORD, *supra* note 186, at 42–43 (emphasis omitted).

201. *Id.* at 43.

202. *Id.* George Washington, of course, presided at the Constitutional Convention and was President when the First Congress passed the Bill of Rights. He was also President during the Fourth Congress which passed the bill to aid the Society of United Brethren. Apparently, the "Father of His Country" had a significantly different interpretation of the religion clauses than Justice Black and Chief Judge Pratt.

203. *See* Letter from Thomas Jefferson to Charles Carroll (Apr. 15, 1791), *in* THOMAS JEFFERSON, WRITINGS, *supra* note 147, at 976, 977.

> Our news from the westward is disagreeable. Constant murders committing [sic] by the Indians, and their combination threatens to be more and more extensive. I hope we shall give them a thorough drubbing this summer, and then change our tomahawk into a golden chain of friendship. The most economical as well as most humane conduct towards them is to bribe them into peace, and to retain them in peace by eternal bribes.

multi-cultural relativism, determined that the best way to resolve issues with the Native Americans was to civilize them, to absorb them into the United States and American culture.[204] The instrument recommended by Jefferson for this task with respect to the Kaskaskia Tribe was the Roman Catholic Church. The reason for this recommendation is self-evident from the Treaty itself: the Catholic Church had already baptized and received the greater part of the Kaskaskia Tribe into the Church, and the Kaskaskia Tribe was "much attached" to the Church.[205] In other words, through its many years serving the Kaskaskia Tribe as missionaries, the Catholic Church had developed a significant rapport with and gained the trust of the Kaskaskia Tribe. The Catholic Church, therefore, had become for the United States the most effective instrument in civilizing the Kaskaskia Tribe, of assimilating the Kaskaskia Tribe into the United States and American culture. It is inconceivable, of course, that Episcopalians like Washington[206] and Jefferson[207] sought, with the help of the respective Congresses, to "establish" the Roman Catholic Church or the Society of the United Brethren. Catholics were a distinct minority in the United States when the Treaty with the Kaskaskia Tribe was

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Id.

204. Letter from Thomas Jefferson to Benjamin Hawkins (Feb. 18, 1803), *in* THOMAS JEFFERSON, WRITINGS, *supra* note 147, at 1113, 1115.

> In truth, the ultimate point of rest & happiness for [the Native Americans] is to let our settlements and theirs meet and blend together, to intermix, and become one people. Incorporating themselves with us as citizens of the U.S., this is what the natural progress of things will of course bring on, and it will be better to promote than to retard it. Surely it will be better for them to be identified with us, and preserved in the occupation of their lands, than be exposed to the many casualties which may endanger them while a separate people. I have little doubt but that your reflections must have led you to view the various ways in which their history may terminate, and to see that this is the one most for their happiness.

Id.

205. Kaskaskia Treaty, *supra* note 171.

206. Washington "was a lifelong member of the Episcopal Church" and "served for many years as a vestryman and churchwarden for Truro Parish." Paul F. Boller, Jr., *George Washington and Religious Liberty*, 17 WM. & MARY Q. 486, 487–88 (1960).

207. Jefferson was a member of St. Anne's Parish in Charlottesville, Virginia, and even became one of the founding members of the Calvinistical Reformed Church in Charlottesville. Mark A. Beliles, *The Christian Communities, Religious Revivals, and Political Culture of the Central Virginia Piedmont, 1737–1813*, *in* RELIGION AND POLITICAL CULTURE IN JEFFERSON'S VIRGINIA 3, 10 (Garrett Ward Sheldon & Daniel L. Dreisbach eds., 2000). Jefferson not only contributed to the support of this church but continued his support of the Anglican St. Anne's Parish. *Id.* at 11. His beliefs, however, did not follow church orthodoxy. *See supra* note 168.

proclaimed,[208] and the thought of an established Catholic Church surely repelled "mainstream" Protestants who comprised the overwhelming majority of citizens of the nascent United States[209] and whose forefathers had bitterly fought with the Catholics only a century before.[210] In short, for much of its history, little love has existed in America for the "Papists," and therefore the thought that the Eighth Congress and President Jefferson "established" the Roman Catholic Church by funding her assimilation of the Kaskaskia Tribe is preposterous. Professor Cord summarizes this point well:

> Jefferson's treaty and the federal land grant trust laws that he signed neither created a national church nor put any religious sect into a preferred position. In the 1803 treaty with the Kaskaskia Indians, the Catholic Church was funded because priests were working with the Indians, many of whom had become Catholics. Therefore, it made abundant sense to help the Catholic Church in that instance. Clearly, this was not favoritism to the Catholic Church because where it made sense to give aid to the United Brethren in U.S. land grant trusts in Ohio because they were working with the Indians there, Jefferson and the "law-extention" acts followed the same policy. In short, neither sect was favored because of a national religious policy to put any religion or sect into a preferred position.[211]

Just as the Treaty with the Kaskaskia Indians and the bill providing resources to the Society of United Brethren "for propagating the gospel among the heathen" did not establish either the Catholic Church or the United Brethren in the eyes of the Founders, neither does the contract between the State of Iowa and PFM establish Christianity in Iowa. As proven through scientific evaluation, the InnerChange Freedom Initiative process works. Unlike colonial Anglican Virginia, which attempted to coerce its citizens into the Christian faith,[212] IFI has no requirement that any

208. *See* JAY P. DOLAN, THE AMERICAN CATHOLIC EXPERIENCE 101–02 (1992) (stating that in the late eighteenth century, Catholics "were a minority group in terms of their numbers and religious beliefs").

209. *See* Roger Finke & Rodney Stark, *How the Upstart Sects Won America: 1776–1850*, 28 J. SCI. STUDY RELIGION 27, 31 illus.1 (1989).

210. The Peace of Westphalia ended the Thirty Years' War in Germany between Catholics and Protestants in 1648. J.M. ROBERTS, A CONCISE HISTORY OF THE WORLD 326–29 (1995).

211. CORD, *supra* note 186, at 47.

212. *See* Response of Thomas Jefferson to Virginia Query XVII, *supra* note 167.

prisoner participate in this program. That is, contrary to the "establishment" in Virginia prior to the Declaration of Independence,[213] there is no fine levied against any prisoner in the Newton, Iowa facility who refuses to participate in the IFI program. Given the fact that there is no coercion involved, there is no violation of religious conscience with which Thomas Jefferson was particularly concerned.[214]

III. THE CURRENT FAITH-BASED & COMMUNITY INITIATIVE

Thomas Jefferson and the Eighth Congress's funding of the Catholic Church to help assimilate the Kaskaskia Indians follows the same criterion present in the current Faith-Based & Community Initiative: funding "should go to the providers who can provide the most effective assistance and who can boast the best civic outcomes."[215] In other words, good old American value—the best service for the lowest price should prevail. This American value, resulting from full "no-barrier" competition, is not easily attainable, however, because there are barriers to participation in publicly funded social services by FBOs like the excellent ones discussed in Part I. These barriers were the subject of a report issued by the White House in 2001 after it received and reviewed the audits of the various Faith-Based & Community Initiative offices embedded in five federal administrative agencies: the Departments of Justice, Health and Human Services, Housing and Urban Development, Labor, and

213. *See supra* note 167 and accompanying text.

214. *See* Thomas Jefferson, A Bill for Establishing Religious Freedom (1777), *reprinted in* THOMAS JEFFERSON, WRITINGS, *supra* note 147, at 347 ("[N]o man shall be compelled to frequent or support any religious worship, place, or ministry whatsoever, nor shall be enforced, restrained, molested, or burthened in his body or goods, nor shall otherwise suffer, on account of his religious opinions or belief . . . .").

215. CTRS. FOR FAITH-BASED & CMTY. INITIATIVES TASKFORCE, UNLEVEL PLAYING FIELD: BARRIERS TO PARTICIPATION BY FAITH-BASED AND COMMUNITY ORGANIZATIONS IN FEDERAL SOCIAL SERVICE PROGRAMS 8 (2001), *available at* http://www.whitehouse.gov/news/releases/2001/08/ 20010816-3-report.pdf [hereinafter UNLEVEL PLAYING FIELD].

> The Federal grants system is intended to put taxpayer dollars to the most effective use by enlisting the best nongovernmental groups to provide various social services, either through discretionary grants (also called competitive grants) awarded directly by Federal officials or through formula grants (including block grants) administered by State and local governments. The funds should go to the providers who can provide the most effective assistance and who can boast the best civic outcomes.

Id.

Education.[216] Based on these audits, the White House concluded that the "one overarching impediment" to full participation in federally funded programs by FBOs was the "overriding perception by Federal officials that close collaboration with religious organizations is legally suspect."[217] The White House specifically identified two examples of federal officials whose perception of First Amendment law ruled out participation by FBOs:

> As the Labor Department's report notes, reviewers of grant applications assume that Jefferson's "wall of separation" metaphor automatically disqualifies all but the most secularized providers, leading to Federal resistance to collaborating with religious groups, and thus the actual exclusion of faith-based organizations despite the absence of any constitutional or statutory basis. One Education Department official asserted that the Constitution flatly forbids the use of grant funds even for activities that merely have a religious component. Such restrictive attitudes beget an administrative bias against religion and religious organizations where the Constitution requires that there be none.[218]

This pervasive suspicion of FBOs' participation in federally funded programs, born in a 1947 Supreme Court case that misinterpreted history, has inhibited federal, state, and local governments from seeking more meaningful partnership opportunities with the fine FBOs highlighted above (and many, many others) doing prisoner reentry work. The "armies of compassion,"[219] the thousands of volunteers provided by FBOs who seek to love their neighbor as themselves and therefore help those less fortunate, are discouraged by decisions rendered by judges like Chief Judge Pratt who, consistent with a flawed understanding of the First Amendment, bar them from helping in meaningful and effective programs that reduce crime and therefore protect society.

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216. *Id.* at 2.

217. *Id.* at 10.

218. *Id.* at 11.

219. *See* George W. Bush, *Foreword* to RALLYING THE ARMIES OF COMPASSION (2001), *available at* http://www.whitehouse.gov/news/reports/faithbased.pdf.

CONCLUSION

This Article has focused on only one area of publicly funded social services, the correctional system. There are myriad areas in which FBOs have historically played vital roles.[220] Faith-based organizations, like the ones discussed in Part I, are often the most effective in delivering these services because faith makes a difference in outcome, and faith-based organizations bring many volunteers driven by faith to provide free or low-cost services.

The primary barrier to the participation of faith-based organizations in federally funded programs is the perception among federal, state, and local officials that "Jefferson's 'wall of separation' metaphor automatically disqualifies all but the most secularized providers, leading to Federal resistance to collaborating with religious groups."[221] This perception is based on a flawed view of history, as discussed in Part II above. As the late Chief Justice Rehnquist noted: "The 'wall of separation between church and State' is a metaphor based on bad history, a metaphor which has proved useless as a guide to judging. It should be frankly and explicitly abandoned."[222] After reviewing in detail the history of the Establishment Clause, then-Justice Rehnquist reached the following conclusion:

> The Framers intended the Establishment Clause to prohibit the designation of any church as a "national" one. The Clause was also designed to stop the Federal Government from asserting a preference for one religious denomination or sect over others. Given the "incorporation" of the Establishment Clause as against the States via the Fourteenth Amendment in *Everson*, States are prohibited as well from establishing a religion or discriminating between sects. As its history abundantly shows, however, nothing in the Establishment Clause requires government to be strictly neutral between religion and irreligion, nor does that Clause prohibit Congress or the States

220. Soup kitchens, tutoring, housing for the poor and destitute, and job training are some that come readily to mind, and are undoubtedly the reason why the White House initially has set up offices for the Faith-Based & Community Initiative in the Departments of Agriculture, Education, Housing & Urban Development, Labor, Health & Human Services, and Justice.

221. UNLEVEL PLAYING FIELD, *supra* note 215, at 11.

222. Wallace v. Jaffree, 472 U.S. 38, 107 (1985) (Rehnquist, J., dissenting).

> from pursuing legitimate secular ends through nondiscriminatory sectarian means.[223]

Given Jefferson's dedication to federalism and his "Faith-Based Initiative" with the Kaskaskia Indians as discussed in Part II above, Jefferson would agree with Justice Rehnquist's assessment.

The late Chief Justice was not the only member of the Court who considered Establishment Clause jurisprudence to be "neither principled nor unified."[224] In fact, there appears to be a growing consensus that Establishment Clause jurisprudence must be reassessed and revamped. Justice Souter, for instance, observed in 2002 that the Court's Establishment Clause jurisprudence had reached "doctrinal bankruptcy."[225] Justice Souter's opinion in this regard is shared by Justice Thomas, who stated seven years earlier that the Court's "Establishment Clause jurisprudence is in hopeless disarray."[226] Two years prior to Justice Thomas's statement, Justice Scalia used a geometric metaphor to express his bewilderment with this area, stating that the Court's "Establishment Clause [cases constitute a] geometry of crooked lines and wavering shapes."[227] Thirteen years prior to Justice Scalia's assessment, Justice Stevens claimed that the Court's Establishment Clause precedents have presented to the courts "the sisyphean task of trying to patch together 'the blurred, indistinct and variable barrier' described in *Lemon*," the Court's leading Establishment Clause precedent.[228] If these present

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223. *Id.* at 113.

224. *Id.* at 107.

> [I]n the 38 years since *Everson* our Establishment Clause cases have been neither principled nor unified. Our recent opinions, many of them hopelessly divided pluralities, have with embarrassing candor conceded that the "wall of separation" is merely a "blurred, indistinct, and variable barrier," which "is not wholly accurate" and can only be "dimly perceived."

Id. (footnote omitted).

225. Zelman v. Simmons-Harris, 536 U.S. 639, 688 (2002) (Souter, J., dissenting).

226. Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 861 (1995) (Thomas, J., concurring); *accord* Van Orden v. Perry, 545 U.S. 677, 697–98 (2005) (Thomas, J., concurring) ("[A] more fundamental rethinking of our Establishment Clause jurisprudence remains in order.").

227. Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 399 (1993) (Scalia, J., concurring in the judgment).

228. Comm. for Pub. Educ. and Religious Liberty v. Regan, 444 U.S. 646, 671 (1980) (Stevens, J., dissenting) (quoting Lemon v. Kurtzman, 403 U.S. 602, 614 (1971)).

Justices find Establishment Clause jurisprudence serpentine, one can only imagine the confusion in the lower courts.[229]

Given the history of President Jefferson, the Eighth Congress, and the Treaty with the Kaskaskia Indians, it is time for the Court to reconsider the meaning of the Establishment Clause. The Court must concur with the conclusion of the White House that:

> [B]oth faith-based and community organizations should have an equal opportunity to obtain [federal] funding, if they choose to seek it. A sensible, results-driven policy requires the Government to examine outcomes—that is, what an organization achieves with the funds—rather than to the character of the organization. That is, whether it is too religious, "too religious," [sic] or "secular enough." Federal agencies should use grants to underwrite the most effective programs. Because grassroots organizations, sacred and secular, are close to, and trusted by, communities, families, and individuals in need, the Federal grants process should welcome rather than discourage the contributions of such groups that offer effective programs.[230]

It is, frankly, time to reassess the religion clauses and thereby stop the "pervasive suspicion about faith-based organizations" by governmental officials. By no longer discriminating against religious organizations in their competition for public grants and contracts in the area of correctional services, America will see more competition to achieve a common goal of less crime and stronger, more stable communities.

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229. For example, the Court of Appeals for the Fifth Circuit observed in *Helms v. Picard*, 151 F.3d 347, 350 (5th Cir. 1998), *rev'd sub nom.* Mitchell v. Helms, 530 U.S. 793 (2000), that Establishment Clause jurisprudence is a "vast, perplexing desert." In *Koenick v. Felton*, 190 F.3d 259, 263 (4th Cir. 1999), the Fourth Circuit chafed at having to "venture into the often-dreaded and certainly murky area of Establishment Clause jurisprudence." The Tenth Circuit likewise shuddered upon entry into the Establishment Clause thicket in *Bauchman v. W. High Sch.*, 132 F.3d 542, 561 (10th Cir. 1997), because of "the inherent difficulty of attempting to discern an individual's unexpressed or psychological motive, [which] exacerbate[s] what is already perceived to be a morass of inconsistent Establishment Clause decisions." The U.S. District Court for the District of Utah has described Establishment Clause case law as "notoriously confused and difficult." First Unitarian Church v. Salt Lake City Corp., 146 F. Supp. 2d 1155, 1174 (D. Utah 2001), *rev'd*, 308 F.3d 1114 (10th Cir. 2002).

230. UNLEVEL PLAYING FIELD, *supra* note 215, at 25.