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"GO AND SIN NO MORE": THE CONSTITUTIONALITY OF GOVERNMENTALLY FUNDED FAITH-BASED PRISON UNITS

Lynn S. Branham*

This Article discusses faith-based prison programs that immerse prisoners living in residential units within a prison in a religious atmosphere. Part One analyzes the constitutionality of these programs under the Establishment Clause of the First Amendment. It notes that state action in the prison context receives more deference from courts than outside the prison context, and that prisoners' constitutional rights are more constricted than free persons'. Part I proceeds to analyze the constitutionality of faith immersion programs in prisons, in light of the Supreme Court's precedents dealing with prisoners' rights and the Establishment Clause. States can defend immersion programs on the grounds that these programs are reasonably related to several important penological objectives, including the interests in reducing recidivism rates, protecting institutional security, promoting the aims of restorative justice, and accommodating inmates' religious needs. In addition, the immersion programs can be constructed in ways that meet the "voluntariness" and "neutrality" requirements subsumed within the Establishment Clause.

Part II of this Article discusses how religious immersion programs in prison can best be structured to survive First Amendment challenges. Part II proposes several important features of an immersion program that will likely enable it to survive or avoid Establishment Clause challenges: prisoners must be fully informed about the nature and requirements of an immersion program before they enter it; prisoners must be allowed to freely chose whether or not to enter such a program, and should not face a penalty either for deciding not to enter the program or for attempting to exit the program; prisons must adopt policies and training regimens designed to ensure that immersion programs continue to comply with the commands of the Establishment Clause; prisons must not allow conditions in a faith-based section of a prison to diverge too widely from conditions in sections of the prison with a comparable security level; and prison officials ought to allow the religious aspects of an immersion program to be conducted largely by individuals from the private sector, rather than government employees. Part II concludes that, properly constructed, immersion programs hold substantial promise to advance penological objectives while surviving constitutional challenges.

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It was March 4, 1998. The Texas prison which I had just entered seemed, in many ways, like the many other prisons I had visited over the years. After hearing the familiar clanking of the security gate as it shut behind me, I realized I had walked into a place that appeared to fit the prison prototype: a drab world of concrete and steel. Uniformed correctional officers. And, within the prison population, a sea of mostly black faces.

But this place was different from the other prisons I had visited. Profoundly different.

"Greetings in the name of the Lord!" exclaimed the smiling "community manager," one of the staff persons who worked in the unit. "Greetings!" over seventy prisoners exuberantly responded. After an inmate-led prayer, the singing began . . . and the clapping. Unrestrained, seemingly joy-filled clapping.

One of the inmates who was helping lead what was denominated a "community meeting" called out to his fellow prisoners: "Anybody find any peace that surpassed understanding?" An inmate stood up: "I don't know why I feel so much peace. . . . No matter how many times you sin, God forgives you." Another inmate stood up: "Jesus died on the cross for us," he declared, triggering a chorus of "Amens" across the room.

The inmate leader then opened his Bible and began to read: "Peace I leave with you; my peace I give you. I do not give to you as the world gives. Do not let your hearts be troubled and do not be afraid."[1]

The "meeting"—an eclectic blend of singing, worshipping, praying, and sharing of personal insights about God and Jesus—continued for an hour. Typical inmate comments uttered during the meeting included: "God is real. He has a plan for each of us. If you sin, God will lift you up." Another inmate announced confidently: "I have direct access to Jesus!"

At the end of the meeting, the community manager concluded: "Everything we need is tied up in Jesus. . . . Our goal is to live a spirit-filled life. It isn't about doing right. It's about living a righteous and holy life in the presence of God. Then prison is far from us."[2]

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1. *John* 14:27 (New International).
2. The community manager then read from Scripture:

> But a time is coming, and has come, when you will be scattered, each to his own home. You will leave me all alone. Yet I am not alone for my Father is with me.

In 1998, the prison unit I visited, part of a minimum-security prison near Houston, was like none other in the United States. Operated by Prison Fellowship, a Christian organization that ministers to prisoners, ex-prisoners, victims, and their families,[3] the faith-based program, which is called "InnerChange Freedom Initiative," has since been replicated in three other states—Iowa, Kansas, and Minnesota.[4] And though in their infancy, other kinds of faith-based prison units are appearing in a few other prisons across the country. For example, in 2002, the Federal Bureau of Prisons (BOP) issued guidelines for the piloting of five faith-based residential programs in federal prisons across the country.[5] Like the InnerChange Freedom Initiative, the BOP's "Life Connections" program is designed to provide prisoners with "intense opportunities for spiritual growth and deepening their religious roots."[6] But unlike the InnerChange model, the BOP plans to individually contract with "religious/spiritual leaders" from five prescribed faiths—Catholic, Jewish, Muslim, Native-American, and Protestant—to provide spiritual guidance to inmates in the faith-based unit.[7] In addition, because one goal of Life Connections is to promote religious tolerance between persons of different faiths, or those with no defined faith, the programming in the BOP units includes multi-faith as well as faith-specific components.[8]

The question, of course, is whether these cutting-edge correctional programs comport with constitutional requirements, in particular, the prohibition in the First Amendment of a

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> I have told you these things, so that in me you may have peace. In this world you will have trouble. But take heart! I have overcome the world.

Id. 16:32–33.

3. Prison Fellowship Ministries, Values-Based Pre-Release Program Proposal Submitted to Texas Department of Criminal Justice 3 (Oct. 16, 1996) (on file with the University of Michigan Journal of Law Reform) [hereinafter *Prison Fellowship Proposal*].

4. Alan Cooperman, *Suits Contest Iowa Prison Ministry Program*, WASH. POST, Feb. 13, 2003, at A3.

5. Fed. Bureau of Prisons, U.S. Dep't of Justice, Operation Memorandum No. 021-2002 (5360) 1 (May 10, 2002). The prisons designated as the sites of the faith-based programs are located in Victorville, California; Leavenworth, Kansas; Milan, Michigan; Carswell, Texas; and Petersburg, Virginia, and the prisons have varying security levels—low, medium, and high. *Id.*

6. FED. BUREAU OF PRISONS, U.S. DEP'T OF JUSTICE, RESIDENTIAL RE-ENTRY PROGRAM: LIFE CONNECTIONS (2002) [hereinafter LIFE CONNECTIONS].

7. Fed. Bureau of Prisons, U.S. Dep't of Justice, Combine Solicitation, Various RFQs—Religious/Spiritual Leaders 1–2 (Oct. 30, 2002) (on file with the University of Michigan Journal of Law Reform).

8. LIFE CONNECTIONS, *supra* note 6.

governmental "establishment of religion." Part I of this Article analyzes this seminal constitutional question. Part II follows with a set of recommendations for policymakers designed to avert successful Establishment Clause challenges to faith-based prison units.

I. THE CONSTITUTIONALITY OF FAITH-BASED PRISON UNITS

The First Amendment, which applies to the states via the Due Process Clause of the Fourteenth Amendment,[9] protects religious freedom in two ways. First, the Amendment prohibits the enactment of laws "respecting an establishment of religion." Second, the Amendment forbids governmental prohibitions on the "free exercise" of religion.

Determining whether faith-based prison units violate the First Amendment's Establishment Clause first requires an understanding of the non-archetypal way in which the Supreme Court has interpreted the scope of constitutional protections in the prison context. Following a discussion of the Supreme Court's construction of prisoners' rights in general and their religious rights in particular, this section of the Article reviews the current permutations of the Supreme Court's Establishment Clause jurisprudence, a body of law that has been wracked by transitory rules and doctrinal shifts. Drawing upon these two lines of authority—Supreme Court caselaw on prisoners' rights and its decisions interpreting the constraints the Establishment Clause imposes on the government—the section concludes with an analysis of the constitutionality of faith-based prison units.

A. The Modulated Scope of Prisoners' Constitutional Rights

The line of Supreme Court cases construing the scope of prisoners' constitutional rights reveals one consistent theme: the Constitution applies differently within prisons. One reason for the different, and decidedly constricted, scope of prisoners' rights is the Court's marked unwillingness to intercede in the operation of

9. 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 489 n.1 (1996).

prisons and jails. This unwillingness is the outgrowth of several concerns: First, the Court is fearful that judicial edicts will undermine institutional security, imperiling the safety and lives of correctional staff and inmates.[10] Second, the Court is wary that because of judges' lack of expertise in corrections, their decisions will impede the realization of the deterrent, retributive, and other penological aims of incarceration.[11] Third, and relatedly, separation-of-powers concerns underlie Supreme Court opinions narrowly interpreting the scope of prisoners' constitutional rights; the Court has appeared reticent to usurp what it considers the general authority of the legislative and executive branches of the government to operate and manage prisons.[12] Fourth, and finally, the Supreme Court has cited federalism as an interest dictating federal courts' restraint in adjudicating the constitutional claims of state and local inmates.[13]

These amalgamated concerns account for the recurrent emphasis in Supreme Court opinions on the need for courts adjudicating prisoners' constitutional claims to defer to correctional officials' assessments of what steps are needed to protect institutional security and further correctional goals.[14] Moreover, application of this stated deferential norm when engaging in judicial fact-finding has transmogrified into the adoption of a legal standard, known as the *Turner* test,[15] whose application makes it difficult, and usually impossible, for prisoners to prevail on their constitutional claims.

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10. *See, e.g.*, Pell v. Procunier, 417 U.S. 817, 827 (1974) (observing that the determination of the level at which the number of prison visitors will endanger institutional security falls "peculiarly within the province and professional expertise of corrections officials").

11. *See, e.g.*, O'Lone v. Estate of Shabazz, 482 U.S. 342, 349 (1987) (noting that the "evaluation of penological objectives is committed to the considered judgment of prison administrators"). *See also* Procunier v. Martinez, 416 U.S. 396, 404–05 (1974) ("[T]he problems of prisons in America are complex and intractable, and, more to the point, they are not readily susceptible of resolution by decree. Most require expertise, comprehensive planning, and the commitment of resources, all of which are peculiarly within the province of the legislative and executive branches of government.").

12. *See, e.g.*, Turner v. Safley, 482 U.S. 78, 85 (1987) (stating that because prison administration falls within the domain of the legislative and executive branches of the government, "separation of powers concerns counsel a policy of judicial restraint").

13. *Id. See also Martinez*, 416 U.S. at 405.

14. *See, e.g.*, Shaw v. Murphy, 532 U.S. 223, 229–31 (2001); *O'Lone*, 482 U.S. at 349–50; Bell v. Wolfish, 441 U.S. 520, 547–48 (1979); Jones v. N.C. Prisoners' Labor Union, Inc., 433 U.S. 119, 125–26 (1977); *Pell*, 417 U.S. at 827.

15. The Supreme Court first enunciated this test in *Turner*, 482 U.S. at 89, although the Court began to lay the foundation for the adoption of this test in earlier cases, beginning with *Pell*, 417 U.S. at 822–28. For the Supreme Court's discussion of the *Turner* test's precursors, see *Turner*, 482 U.S. at 86–89.

The Supreme Court's decision in *O'Lone v. Estate of Shabazz* is, for our purposes, the most pertinent example of the Court's application of the *Turner* test, because the Court in *O'Lone* analyzed the scope of prisoners' religious rights under the First Amendment's Free Exercise Clause.[16] In that case, a group of Muslim prisoners confined in a New Jersey prison filed a lawsuit under 42 U.S.C. § 1983 after prison officials adopted several policies whose cumulative effect was to prevent many Muslim prisoners from attending Jumu'ah, a congregational worship service for Muslims held on Fridays.[17] The Koran mandates attendance at Jumu'ah and prescribes the time period in the afternoon during which the service must be held.[18]

One of the new prison policies whose implementation foreclosed some Muslim inmates' attendance at Jumu'ah prohibited prisoners assigned to off-site work details from returning to the main prison building during the day.[19] Prison officials effected this policy change to stave off the security problems and administrative hassles they had encountered when individual inmates were permitted to leave their work crews and return to the main building during the day.[20]

Another prison policy at issue in *O'Lone* generally required the inmates with the two lowest custody classifications—"gang minimum" and "full minimum"—to work outside the main prison building.[21] The purposes of this policy were to alleviate overcrowding within the main prison unit during the day and to reserve work details within the prison for the maximum-custody inmates, who for security reasons could not be assigned to outside work details.[22]

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16. O'Lone v. Estate of Shabazz, 482 U.S. 342 (1987).

17. *Id.* at 344–47.

18. *Id.* at 345.

19. *Id.* at 347.

20. Prison officials considered the gate through which prisoners returned to the prison to be a high-risk area from a security standpoint, because all vehicles and pedestrians entering the prison passed through this gate. *Id.* at 342. Consequently, whenever a prisoner passed through this gate, all vehicular traffic had to be halted while certain entry requirements were met, including a search of the prisoner. *Id.*

In addition, whenever a prisoner working off-site returned to the prison, his entire crew had to stop working and accompany the prisoner on the return trip, because only one correctional officer supervised each work crew. *Id.* According to the prison officials, allowing prisoners to return midday to the prison, therefore, disrupted the rehabilitative aims of the work details, frustrating prison officials' goal to simulate working conditions in the outside world. *Id.* at 351.

21. *Id.* at 345–46.

22. *Id.* at 345–46, 350–51. *See also id.* at 363–64 (Brennan, J., dissenting).

In determining whether the prison officials had unconstitutionally abridged the Muslim inmates' religious rights in *O'Lone*, the Supreme Court applied the *Turner* test.[23] Under this test, prison rules and practices that allegedly encumber prisoners' constitutional rights must be "reasonably related to legitimate penological interests" to pass constitutional muster.[24] This test has four components. As a threshold requirement, a policy that inhibits the exercise of a constitutional right must have a "valid, rational connection" to a "legitimate" and "neutral" governmental interest.[25] If the connection between the prison policy and this interest is so attenuated that the policy is, in the words of the Supreme Court, "arbitrary or irrational," the policy constitutes an unconstitutional encroachment on prisoners' rights.[26] On the other hand, if the contested policy meets the threshold requirement needed to sustain its constitutionality, a court applying the *Turner* test will balance three remaining factors: one, whether the inmates have other ways of exercising the right in question; two, the availability of alternative means of achieving the legitimate penological objectives furthered by the restrictive prison policy; and three, the impact that accommodating the inmates' asserted right will have on correctional officers, other inmates, and correctional resources.[27]

The *Turner* test's general framework is rather unremarkable, at least at first glance. Before *Turner*, the Supreme Court had long embraced a reasonableness standard when assessing prisoners' constitutional claims, a standard under which the burden ensuing from a restriction on prisoners' asserted constitutional rights is balanced against the need for the particular restriction.[28] All that *Turner* did was to elaborate on the structure and components of this reasonableness standard.

But what is striking about the Court's application of the *Turner* test is the way in which the *Turner* factors are crafted (or, critics might contend, contrived) to generally foreordain a finding against a prisoner's constitutional claim. For example, when

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23. *Id.* at 349.

24. *Turner*, 482 U.S. at 89.

25. *Id.* For a discussion of the meaning of this neutrality requirement, see *infra* notes 88–92 and accompanying text.

26. *Id.* at 89–90.

27. *Id.* at 90–91.

28. In *Turner*, the Supreme Court discussed four earlier cases that laid the foundation for the *Turner* test: *Pell v. Procunier*, 417 U.S. 817 (1974); *Jones v. North Carolina Prisoners' Labor Union, Inc.*, 433 U.S. 119 (1977); *Bell v. Wolfish*, 441 U.S. 520 (1979); and *Block v. Rutherford*, 468 U.S. 576 (1984). *See Turner*, 482 U.S. at 86–89.

assessing the second *Turner* factor—the existence of alternative means of exercising the claimed constitutional right, the *O'Lone* Court acknowledged that the Muslim prisoners barred from returning to the main prison building on Friday afternoon had no other way to attend Jumu'ah.[29] Nonetheless, the Court's inquiry focused on whether the inmates could participate in "other Muslim religious ceremonies."[30] Underscoring that the Muslim prisoners had not been deprived of "all forms of religious exercise," the Court concluded that the second *Turner* factor weighed in favor of the prison policies' constitutionality.[31]

The Supreme Court's expansive interpretation of what constitutes a viable alternative means for inmates to exercise a constitutional right stands in marked contrast to its constrictive interpretation of the third *Turner* factor—whether there exists a viable alternative means for prison officials to meet the legitimate penological objectives that purportedly justify an incursion on inmates' constitutional rights. In *Turner*, the Court indicated that if a correctional alternative entails more than *de minimis* costs, a court should not consider it the kind of "obvious, easy" alternative whose existence belies the restriction's constitutionality.[32] Inmates will almost always have an alternative way of exercising a right, while prison officials usually will not have what the courts consider a "ready"[33] alternative means of meeting their penological objectives.

O'Lone v. Shabazz exemplifies how the Court's shaping of the third *Turner* factor almost invariably tilts the constitutional calculus towards a finding that favors prison officials. The Muslim prisoners in that case cited several alternative ways that prison officials could accommodate the prisoners' religious obligation to attend Jumu'ah without undermining the penological objectives of the policies that prevented their attendance.[34] The prisoners suggested, for example, that Muslim inmates be assigned to an inside work

29. *O'Lone*, 482 U.S. at 351.

30. *Id.* at 352.

31. *Id.* The Court noted that the Muslim prisoners could meet together for congregate prayer during non-working hours, were given special pork-free meals to accommodate their religious scruples, had access to an imam (the Muslim equivalent to a priest, rabbi, or minister), and were permitted to eat at different times than the rest of the prison population during the holy month of Ramadan. *Id. See also Turner*, 482 U.S. at 92 (finding it significant that inmates generally barred from corresponding with other inmates had not been deprived of "all means of expression").

32. *Id.* at 90–91.

33. *Id.* at 90.

34. *O'Lone*, 482 U.S. at 352.

detail on Fridays or that they work on the weekends instead of Fridays.[35] The Supreme Court summarily rebuffed these suggestions. Inside work details would, according to the Court, conflict with the prison officials' goal of alleviating institutional crowding during the day.[36] And weekend details would result in the incursion of more than *de minimis* costs. Staff would be needed to supervise those details, and the creation of an "affinity group," in this case Muslim inmates, might lead to a sense of empowerment amongst the Muslim prisoners, increasing the likelihood that they would challenge prison officials' authority.[37] The Supreme Court furthermore noted that creating special work details for Muslim inmates might spawn allegations of favoritism from other inmates who resented what they perceived as the special treatment of Muslims.[38]

The Supreme Court rendered its decision in *O'Lone v. Shabazz* against the backdrop of *Cruz v. Beto*,[39] a prisoners' rights case that had come before the Court fifteen years earlier. The plaintiff in *Cruz*, a Buddhist prisoner, contended that the district court had erroneously dismissed his complaint alleging an abridgement of two constitutional rights—his First Amendment right to religious freedom and his Fourteenth Amendment right to be afforded the equal protection of the law.[40] In his complaint, the plaintiff claimed that prison officials had punished him for sharing his religious beliefs with other prisoners, placing him in solitary confinement in retaliation for his proselytizing.[41] In addition, the plaintiff protested what he considered prison officials' more favorable treatment of prisoners of other faiths. According to the plaintiff, prison officials paid only Catholic, Protestant, and Jewish chaplains to minister to the inmates, afforded prisoners access to worship

35. *Id.*

36. *Id.* at 352–53.

37. *Id.* at 353.

38. *Id.* In his dissenting opinion, Justice Brennan, joined by Justices Marshall, Blackmun, and Stevens, was quick to note what he considered the prison officials' discrepant treatment of Muslim prisoners. The officials were, for example, able and willing to provide the staffing needed to enable Jewish and Christian inmates to attend worship services on the weekend. *Id.* at 365 (Brennan, J., dissenting). Nor were the officials concerned that congregations of Jewish and Christian inmates constituted "affinity groups" that would jeopardize institutional security. *Id.* at 366. Justice Brennan furthermore emphasized that the prison officials appeared wholly unconcerned that the accommodation of Christian and Jewish inmates' religious "preferences" would spark resentment amongst other inmates. *Id.* at 366–67.

39. 405 U.S. 319 (1972) (per curiam).

40. *Id.* at 319–21.

41. *Id.* at 319.

services conducted for these dominant religions only, and distributed Bibles bought by the state, but no other state-purchased religious texts, to inmates.[42] The plaintiff also alleged that prisoners attending the religious services of "orthodox" religions earned points that could help secure more desirable work assignments and even early parole release.[43]

The Supreme Court concluded that the district court had erred in dismissing the plaintiff's complaint.[44] The Court emphasized that if the factual allegations of the complaint were true, as a court must assume when adjudicating a motion to dismiss, the plaintiff had suffered an abridgement of his constitutional rights under both the First and Fourteenth Amendments.[45] Prison officials, according to the Court, must provide the plaintiff with "a reasonable opportunity of pursuing his faith comparable to the opportunity afforded fellow prisoners who adhere to conventional religious precepts."[46] In a footnote, the Supreme Court elaborated that prisoners are constitutionally entitled to avail themselves of "reasonable opportunities" to practice their religion "without fear of penalty."[47]

The Court took pains in *Cruz* to emphasize that the comparability requirement it had iterated did not require that the opportunities afforded inmates of one faith to engage in religious practices be identical to those afforded inmates of other faiths.[48] The assignment of facilities and personnel to accommodate prisoners' religious needs could vary, for example, based on the number of adherents within the prison population of a particular religion.[49] Specifically, the Court stated:

> We do not suggest, of course, that every religious sect or group within a prison—however few in number—must have identical facilities or personnel. A special chapel or place of worship need not be provided for every faith regardless of size; nor must a chaplain, priest, or minister be provided without regard to the extent of the demand.[50]

42. *Id.* at 319–20.
43. *Id.* at 320.
44. *Id.* at 323.
45. *Id.* at 322.
46. *Id.*
47. *Id.* at 322 n.2.
48. *Id.*
49. *Id.*
50. *Id.*

B. The Establishment Clause Circa 2003: A General Overview

The Establishment Clause has two main purposes. First, like its First Amendment counterpart, the Free Exercise Clause, the Establishment Clause is designed to protect religious liberty.[51] The Supreme Court has interpreted the scope of the religious liberty safeguarded by the Establishment Clause's disapprobation of governmental favoritism towards religion broadly, holding that the constitutional provision safeguards the freedom to be either religious or irreligious as well as the freedom to adhere to the tenets of a particular religious sect.[52]

The Establishment Clause's second main purpose is to insulate religion from the adverse effects of what the Supreme Court has described as "corrosive secularism."[53] This objective springs from the recognition that the infiltration of the government into religious affairs can sap religions of their vitality, because religious groups might distort their religious practices to fit the strictures set forth in governmental edicts and rules.[54]

For years, the Supreme Court has grappled with the task of defining the test to be applied when adjudicating Establishment Clause claims. What has proven to be an arduous struggle for the Court has culminated in the adoption of three different, though overlapping, Establishment Clause tests. The test applied most frequently is, as one commentator has observed, "aptly named" the "*Lemon* test."[55] In its original formulation, this test had three components, each of which had to be met in order for governmental linkages with religious groups to not contravene the Establishment

51. In calling for congruent interpretations of the Free Exercise and Establishment Clauses "in light of the single end which they are designed to serve," Justice Goldberg observed: "The basic purpose of the religion clause of the First Amendment is to promote and assure the fullest possible scope of religious liberty and tolerance for all and to nurture the conditions which secure the best hope of attainment of that end." Abington Sch. Dist. v. Schempp, 374 U.S. 203, 305 (1963) (Goldberg, J., concurring).

52. *See, e.g.*, Lee v. Weisman, 505 U.S. 577, 589 (1992) (referring to the protection the Establishment Clause accords the "dissenting nonbeliever").

53. School Dist. of Grand Rapids v. Ball, 473 U.S. 373, 385 (1985). *See also* Abington Sch. Dist. v. Schempp, 374 U.S. at 259 (Brennan, J., concurring) ("It is not only the nonbeliever who fears the injection of sectarian doctrines and controversies into the civil polity, but in as high degree it is the devout believer who fears the secularization of a creed which becomes too deeply involved with and dependent upon the government.").

54. *Weisman*, 505 U.S. at 608 (Blackman, J., concurring).

55. Michael W. McConnell, *Religious Freedom at a Crossroads*, 59 U. CHI. L. REV. 115, 118 (1992). The Supreme Court first articulated this test in Lemon v. Kurtzman, 403 U.S. 602, 612–13 (1971).

Clause. First, the legislation or governmental program challenged on First Amendment grounds had to have a secular purpose.[56] Second, the "principal or primary effect" of the statute or program had to be something other than the advancement or curtailment of religion.[57] And third, the contested actions of the government could not spawn "excessive government entanglement with religion."[58]

The Supreme Court has modified the *Lemon* test somewhat. In *Agostini v. Felton*, the Court concluded that the *Lemon* test's third prong—its prohibition of "excessive" governmental entanglement in religious affairs—duplicates its second prong—the bar on governmental actions whose dominant impact is to promote or inhibit religion.[59] Consequently, the Court has condensed the *Lemon* test into a two-part test, with the examination of the extent to which the government is entangled with religion subsumed within the broader inquiry into the primary effect of a statute or governmental program.[60]

Another test propounded by the Supreme Court for the evaluation of Establishment Clause claims is known as the "endorsement test."[61] Simply stated, under this test actions that would be perceived by the "reasonable observer" as reflecting governmental endorsement of religion contravene the Establishment Clause.[62]

The "coercion test" is the third and final test that the Supreme Court has applied in cases in which claimants asserted that the government had transgressed the boundaries imposed by the Establishment Clause.[63] This test, as its name suggests, proscribes governmental compulsion to adhere to or disavow certain religious tenets or to engage in or refrain from engaging in certain religious

56. *Lemon*, 403 U.S. at 612.

57. *Id.*

58. *Id.* at 613.

59. Agostini v. Felton, 521 U.S. 203, 232–33 (1997).

60. *Id.* at 233.

61. Freiler v. Tangipahoa Parish Bd. of Educ., 185 F.3d 337, 343 (5th Cir. 1999).

62. Zelman v. Simmons-Harris, 536 U.S. 639, 655 (2002). Courts are, however, to charge the "reasonable observer" with an understanding of the "history and context" of a program that has sparked an Establishment Clause challenge. Good News Club v. Milford Cent. Sch., 533 U.S. 98, 119 (2001) (quoting Capitol Square Review and Advisory Bd. v. Pinette, 515 U.S. 753, 780 (1995) (O'Connor, J., concurring in part and concurring in judgment)).

63. *Freiler*, 185 F.3d at 343.

practices.[64] At the heart of this test is a revulsion for "state-created orthodoxy" in religious matters.[65]

C. Assessing the Constitutionality of Faith-Based Prison Units Under the Establishment Clause

1. Application of the Turner *Test*

a. The Case for Applying the Turner *Test to Prisoners' Establishment Clause Claims*—In determining whether faith-based units in prisons invariably abridge the Establishment Clause, the threshold question is what test or tests are to be applied when making that determination—the *Turner* test, the tests applied when analyzing Establishment Clause claims outside the prison context, or some alternative test. The Supreme Court has stated unequivocally that the *Turner* test is to be applied "to *all* circumstances in which the needs of prison administration implicate constitutional rights."[66] Thus far, the Supreme Court has applied the *Turner* test to prisoners' claims alleging impingements of their First Amendment right to freedom of speech,[67] their constitutional right to marry,[68] their right to associate with friends and family members via prison visits,[69] their right to freely exercise their religious freedom,[70] their due-process right not to be medicated involuntarily with antipsychotic drugs,[71] and their constitutional right to have access to the courts.[72]

Shaw v. Murphy illustrates what appears to be the Supreme Court's current penchant to apply the *Turner* test to the brunt of prisoners' constitutional claims.[73] In *Turner*, the Court had already resolved that the constitutional standard enunciated in that case applied to prisoners' claims alleging that restrictions on nonlegal, prisoner-to-prisoner correspondence abridged their communicative rights

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

65. *Id.* at 592.

66. Washington v. Harper, 494 U.S. 210, 224 (1990) (emphasis added). Significantly, and a bit ironically, the pivotal question before the Court in *Harper* was whether the *Turner* test applies only to claims asserted under the First Amendment. *Id.*

67. Shaw v. Murphy, 532 U.S. 223, 228, 231 (2001); Thornburgh v. Abbott, 490 U.S. 401, 404 (1989); Turner v. Safley, 482 U.S. 78, 91–93 (1987).

68. *Turner*, 482 U.S. at 97–99.

69. Overton v. Bazzetta, 123 S.Ct. 2162, 2167–70 (2003).

70. O'Lone v. Estate of Shabazz, 482 U.S. 342, 350–53 (1987).

71. *Harper*, 494 U.S. at 224–27.

72. Lewis v. Casey, 518 U.S. 343, 361–62 (1996).

73. Shaw v. Murphy, 532 U.S. 223 (2001).

subsumed within the First Amendment.[74] But in *Shaw*, the prisoner-plaintiff contended that this lax standard should not be extended to restrictions on legal correspondence between prisoners, in other words, to restrictions on correspondence involving a legal claim that might be or had been asserted by or against a prisoner.[75]

The Supreme Court spurned this argument, emphasizing that *Turner* had iterated a "unitary, deferential standard for reviewing prisoners' constitutional claims."[76] The Court refused to vary the rigor with which it analyzed a constitutional claim based on its perception of the "value" of the content of a communication.[77] In other words, the Court was unwilling to assume that correspondence between prisoners regarding legal matters was more important, and therefore more worthy of constitutional protection, than correspondence on nonlegal matters.

The Court in *Shaw* also asserted another reason for its reluctance to craft an exception to the *Turner* test. Wary that such an exception would augment federal-court intrusion into the prolixities of prison administration, the Court refused to abate, even in this limited context, its deferential review of the constitutionality of prison officials' actions that purportedly further legitimate penological interests.[78]

The line of Supreme Court cases, including *Shaw v. Murphy*, in which the Court has applied the *Turner* test to an array of prisoners' constitutional claims seems to support the application of that test to prisoners' claims alleging violations of the Establishment Clause.[79] Application of an elevated standard of review to Establishment

74. *Turner*, 482 U.S. at 91–93.

75. *Shaw*, 532 U.S. at 528.

76. *Id.* at 229.

77. *Id.* at 230 ("To increase the constitutional protection based upon the content of a communication first requires an assessment of the value of that content. But the *Turner* test, by its terms, simply does not accommodate valuations of content.").

78. *Id.* at 230–31.

79. The lower courts are currently divided on the question whether the *Turner* test applies to prisoners' Establishment Clause claims. Some courts have held that the *Turner* test applies to such claims. *See, e.g.*, Howard v. United States, 864 F. Supp. 1019, 1025 (D. Colo. 1994). Other courts have applied the same tests to prisoners' Establishment Clause claims that are applied to nonprisoners' claims. *See, e.g.*, Williams v. Lara, 52 S.W.3d 171, 188–92 (Tex. 2001). Still other courts have adopted a middle-of-the-road position, holding that the *Turner* test does not apply unless the prison program contested on Establishment Clause grounds is designed to accommodate the religious needs of other inmates. *See, e.g.*, Scarpino v. Grosshiem, 852 F. Supp. 798, 804–05 (S.D. Iowa 1994) (applying the *Lemon* test to a prison's alcoholic rehabilitation program patterned after Alcoholics Anonymous that the court found, based on the record before it, was not designed to accommodate participants' religious needs).

Clause claims would seem to connote that religious communications with and between prisoners are more or less deserving of constitutional protection than other kinds of communications, a conclusion at odds with *Shaw*'s premise that application of the *Turner* test should not be modulated based on "valuations of content."[80]

In addition, exempting Establishment Clause claims from the *Turner* test's rubric would lead to the dissonant treatment of prisoners' free-exercise claims and their claims rooted in the Establishment Clause. As mentioned earlier,[81] the Supreme Court has already concluded that the *Turner* test applies to prisoners' claims predicated on the First Amendment's Free Exercise Clause.[82] Since the Free Exercise Clause and the Establishment Clause share a commonality of purpose—to protect religious liberty—assigning preeminent value to the Establishment Clause seems discordant, not in keeping with the overarching goal of what one would assume should be complimentary, not conflicting, constitutional provisions. Indeed, it is difficult to envision that the analysis of the Supreme Court and the result in *O'Lone v. Shabazz* would have been different if the prisoners asserting a free-exercise claim in that case had instead or in addition challenged the more favorable treatment of Christian and Jewish inmates on establishment-of-religion grounds.[83]

Applying a heightened standard of review to prisoners' Establishment Clause claims would also conflict with the deferential mode of constitutional adjudication embraced by the Supreme Court in prisoners' cases. As mentioned earlier,[84] the Supreme Court has touted four reasons for the judicial deference to prison officials' penological judgments embodied in the *Turner* test—the importance of safeguarding institutional security; the interest in ensuring that judges do not impede the realization of penological objectives because of their lack of correctional expertise; the need to respect the boundaries subsumed within the separation of powers; and the primacy of the interest in limiting the encroachment on states' authority that ensues when federal courts intervene in what the Supreme Court has termed the "formidable task" of managing state and local correctional institutions.[85] None of these

80. *Shaw*, 532 U.S. at 230.
81. *See supra* notes 23–24 and accompanying text.
82. O'Lone v. Estate of Shabazz, 482 U.S. 342, 350–53 (1987).
83. For a discussion of this case, see *supra* notes 16–38 and accompanying text.
84. *See supra* notes 10–13 and accompanying text.
85. *O'Lone*, 482 U.S. at 342.

reasons are implicated any less when there has been an argued affront to the Establishment Clause as opposed to some other constitutional provision, a point whose validity will become evident when the penological objectives that can be served by faith-based prison units are discussed later in this Article.

b. The Constitutionality of Faith-Based Prison Units Under the Turner *Test*—Assuming that the *Turner* test is the appropriate test to apply when adjudicating prisoners' Establishment Clause claims (or is at least the appropriate starting point when adjudicating such claims), the next step is to apply that test in assessing the constitutionality of faith-based prison units. That assessment is, of course, impeded by the reality that faith-based prison units can vary greatly from a programmatic perspective. They can, for example, prescribe very different requirements—both substantive and procedural—that must be met in order for a prisoner to be admitted into a faith-based prison unit. They can also vary in the extent to which and ways in which they accommodate prisoners with differing religious preferences, if they accommodate them at all. And faith-based prison units can differ substantially in their day-to-day operations, including the extent to which religious practices and explicit discussions of religion suffuse the program.

The varied ways in which faith-based units may be structured and operated forecloses a finding that such units are invariably constitutional.[86] What can be determined feasibly, though, is whether faith-based units are invariably unconstitutional, in other words, whether a faith-based prison unit can be incorporated into a correctional facility's programming options in a way that comports with the requirements of the Establishment Clause. It is to that general question that this Article now turns.

i. The First Turner *Factor*—As noted earlier,[87] in order for a prison policy or program that allegedly impinges on a constitutional right to pass muster under the *Turner* test, the policy or program must, as an initial matter, have a "valid, rational connection" to a "legitimate" and "neutral" governmental interest. At first glance, it might appear that a faith-based prison unit abridges the

86. A faith-based unit structured to conform to a warden's edict that the unit reflect and adhere to the warden's personal views regarding what are the "correct" religious precepts, for example, would clearly abridge the Establishment Clause. *See, e.g.*, Williams v. Lara, 52 S.W.3d 171, 191–92 (Tex. 2001) (holding the jail's "Chaplain's Education Unit," that the sheriff admitted was operated to accord with "the yardstick of [his] own belief system," violated the Establishment Clause).

87. *See supra* notes 25–26 and accompanying text.

neutrality requirement of the first *Turner* factor, because the government, by establishing the unit, arguably has signified its support for the religious views communicated to, and inculcated within, that unit's prisoners.

The way in which the Supreme Court has defined "neutrality" within the meaning of the *Turner* test, however, forecloses this argument. In *Thornburgh v. Abbott*,[88] the Supreme Court considered a First Amendment challenge to prison regulations restricting the publications prisoners could receive. The Court acknowledged in that case its statement in *Turner* that it was "important" to determine whether an alleged incursion on a prisoner's First Amendment rights operated "without regard to the content of the expression."[89] The Court also admitted that regulations providing for the censorship of communications to prisoners might appear to flout this content-neutrality requirement, because censorship decisions are grounded "to some extent, on content."[90] Nonetheless, the Supreme Court concluded that the censorship regulations did not violate *Turner*'s neutrality requirement, constrictively interpreting the scope of that requirement in the process. According to the Court, a regulation or practice is "neutral" within the meaning of the *Turner* test as long as it advances an " 'important or substantial governmental interest unrelated to the suppression of expression.' "[91] Because the censorship restrictions at issue in *Thornburgh* were "rationally related" to the interest in safeguarding institutional security, the Court found that they met this narrowly defined neutrality requirement.[92]

Turner's requirement that a prison policy or program challenged on constitutional grounds be rationally connected to a "legitimate" governmental interest poses an equally surmountable constitutional hurdle for faith-based prison units. These units appear reasonably related to a number of legitimate governmental interests, some of the most significant of which are highlighted below.

First, faith-based prison units are rationally connected to the government's legitimate, and indeed compelling, interest in reducing recidivism rates. The track record of prisons in reducing recidivism rates has, thus far, been abysmal. The most current national data on recidivism rates reveal that within three years after

88. 490 U.S. 401 (1989).

89. *Id.* at 415 (quoting Turner v. Safley, 482 U.S. 78, 90 (1987) (internal quotations omitted)).

90. *Thornburgh*, 490 U.S. at 415.

91. *Id.* (quoting Procunier v. Martinez, 416 U.S. 396, 413 (1974)).

92. 490 U.S. at 415–16.

their release from prison, 68% of ex-prisoners are rearrested for a crime, typically a felony or serious misdemeanor.[93] During that same time period, more than half (52%) of the released prisoners are reimprisoned, whether for having committed a crime or for having otherwise violated a condition of their release from prison.[94] It is therefore no wonder that prison officials would want to explore and institute alternative prison programming that might curb the proclivity of many prisoners to persist in committing crimes after they are released from prison. And social-science research suggests that faith-based units hold promise in meeting that objective.

Researchers have striven to determine the impact, if any, of religion on crime and delinquency.[95] A person's religiousness can be measured in a number of different ways. One way is to assess religiousness based on self-reports—on a person's reported religious beliefs and perceptions of his or her own religiousness.[96] Another common way of measuring religiousness is to calculate the frequency with which a person participates in particular kinds of religious activities, such as attendance at a church, synagogue, or mosque.[97]

Most studies have found that there is an inverse relationship between religiousness, however it is measured, and crime and delinquency.[98] In other words, religion seems to have an inhibiting effect on the commission of crimes. In addition, researchers have repeatedly found a negative correlation between religion and cer-

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93. PATRICK A. LANGAN & DAVID J. LEVIN, BUREAU OF JUST. STAT. SPECIAL REP.: RECIDIVISM OF PRISONERS RELEASED IN 1994, at 1, 3–4 (U.S. Dep't of Justice, 2002). This recidivism study was conducted in fifteen states. Of the 744,480 crimes with which the rearrested ex-prisoners in those states were charged, over 100,000 were violent crimes, including 2900 homicides. For a further breakdown of the crimes with which the released prisoners were charged, see *id.* at 4.

94. *Id.* at 1. In the national study from which these statistics were drawn, approximately 25% of the released prisoners were resentenced to prison for a new crime. *Id.* Slightly over 26% were returned to prison for a "technical violation" of a release condition. *Id.* Failing a drug test and failing to meet with a parole officer at a directed time are classic examples of such technical violations. *Id.*

95. *See* BYRON R. JOHNSON ET AL., OBJECTIVE HOPE: ASSESSING THE EFFECTIVENESS OF FAITH-BASED ORGANIZATIONS: A REVIEW OF THE LITERATURE 33 (2002) (listing forty-six studies that have examined the relationship between religion and crime or delinquency). *See also* Colin J. Baier & Bradley R.E. Wright, *"If You Love Me, Keep My Commandments": A Meta-Analysis of the Effect of Religion on Crime*, 38 J. RES. CRIME & DELINQ. 3 (Feb. 2001).

96. Baier & Wright, *supra* note 95, at 13.

97. *Id.*

98. For the cumulative results of these studies, see *id.* at 16 and JOHNSON ET AL., *supra* note 95, at 7, 12–13.

tain other deviant behaviors that are closely linked with crime and delinquency. In particular, researchers have concluded that religious beliefs or involvement in a religion can curb the drug and alcohol abuse that is often a precursor to crime.[99] For example, a study conducted by the National Center on Addiction and Substance Abuse at Columbia University found that adults who consider their religious beliefs to be "unimportant" are three times likelier than adults who strongly believe that their religious beliefs are important to binge drink, six times likelier to smoke marijuana, and four times likelier to use an illicit drug other than marijuana.[100] Regular attendance at religious services is also negatively correlated with alcohol and drug abuse. Adults who do not attend religious services are seven times likelier to binge drink, eight times likelier to smoke marijuana, and five times likelier to use illicit drugs other than marijuana than adults who attend religious services at least once a week.[101]

Research findings on the effects of faith-based prison units on recidivism rates are also promising, though very preliminary. A recent evaluation of Prison Fellowship's InnerChange Freedom Initiative (IFI) found that offenders who completed the program had a much lower recidivism rate than several other groups of prisoners with whom they were compared.[102] Over a two-year period, 8% of the IFI "graduates" were reincarcerated.[103] By contrast, 19% of the offenders who volunteered for, but did not participate in, IFI were reincarcerated as were 22% of the offenders deemed eligible for the program but who did not participate either because they did not volunteer or were not selected.[104] And another

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99. *See, e.g.*, JOHNSON ET AL., *supra* note 95, at 7, 12; NAT'L CENTER ON ADDICTION AND SUBSTANCE ABUSE, SO HELP ME GOD: SUBSTANCE ABUSE, RELIGION AND SPIRITUALITY 2, 7–10 (2001).

100. *Id.* at 2, 8. Similarly, teenagers who depreciate the significance of their religious beliefs are much more prone to engage in binge drinking and to consume illegal drugs. *Id.* at 2 (reporting that teens who rate their religious beliefs as unimportant are three times likelier to binge drink, four times likelier to smoke marijuana, and seven times likelier to use other illicit drugs).

101. *Id.* at 2, 7. The comparative differences between teenagers who do not attend religious services and those who attend such services at least weekly are equally stark, with the nonattenders more than three times as likely to binge drink and use marijuana and almost four times as likely to use other kinds of illegal drugs. *Id.* at 2, 9.

102. CRIMINAL JUSTICE POLICY COUNCIL, INITIAL PROCESS AND OUTCOME EVALUATION OF THE INNERCHANGE FREEDOM INITIATIVE: THE FAITH-BASED PRISON PROGRAM IN TDCJ 23 (2003).

103. *Id.* at 23.

104. *Id.*

matched group of prisoners who met IFI's selection criteria but did not participate in the program had a 20% reincarceration rate.[105]

A second legitimate penological objective to which faith-based prison units are linked, and rationally so, is the paramount governmental interest in protecting institutional security. It is tautological, but true, that prisoners are subject to a host of rules and restrictions during the period of their incarceration. One overarching purpose of these constraints on prisoners is to safeguard institutional security and to maintain discipline and order within the correctional facility. Specifically, many prison rules are designed to facilitate the monitoring of prisoners by correctional staff, to avert inmate attacks on other inmates or staff, to limit damage to, or theft of, property, and to prevent prison escapes.

The problem of prisoners breaking prison rules is pervasive and recurrent. More than half of all prisoners are charged with one or more disciplinary infractions during their term of confinement,[106] and this statistic, of course, does not include prisoners who commit disciplinary infractions that go undetected or do not result in the filing of charges. Many, though not all, disciplinary infractions are also crimes. Thus, prisoners who, for example, steal, intentionally damage property, attempt to escape from prison, or assault others can be subject to internal administrative sanctions as well as criminal prosecutions.[107]

Because so many disciplinary infractions are also crimes, the research data revealing that religion is, in one researcher's words, a "persistent . . . inhibitor of adult crime"[108] provides empirical support for the proposition that religion can have an inhibitory effect on disciplinary infractions. But has this proposition been established definitively to be true? The answer, in a nutshell, is no. The research on the impact of religion (including participation in religious activities) on the misconduct of prisoners is sparse, although one of the most comprehensive analyses of this subject to date

105. *Id.*

106. JAMES STEPHAN, BUREAU OF JUST. STAT. SPECIAL REP.: PRISON RULE VIOLATORS 1 (1989) (reporting that 53% of surveyed prisoners had committed one or more rule violations since the incipiency of their confinement).

107. As a practical matter, prosecutors are often reluctant, however, to file criminal charges against inmates. This reticence stems, at least in part, from the difficulty of proving an inmate's guilt beyond a reasonable doubt when the witnesses to the crime are often other inmates, whose credibility is discredited. Mark Hansen, *Brutal Findings: Prison Rapists Go Unpunished, Victims Go Unrepresented*, A.B.A. J., July 2001, at 16.

108. Byron R. Johnson et al., *Religious Programs, Institutional Adjustment, and Recidivism Among Former Inmates in Prison Fellowship Programs*, 14 JUST. Q. 145, 163 (1997).

found a statistically significant inverse relationship between inmates' religiousness and their confinement for disciplinary infractions.[109] In addition, the limited research that has thus far been conducted to measure the tangible effects of religion on inmates' conduct inside and outside prisons has been plagued with methodological problems.[110]

However, these gaps in the empirical research do not foreclose a finding of a "valid, rational connection" between faith-based prison units and the legitimate governmental interest in preserving institutional security. The Supreme Court has never required conclusive proof or even empirical evidence that a prison policy or regulation actually reduces security problems in order for the policy or regulation to survive a constitutional challenge. For example, in *Jones v. North Carolina Prisoners' Labor Union, Inc.*,[111] the Supreme Court considered whether prison regulations that prohibited prisoner union meetings, barred inmates from soliciting other inmates to join the union, and banned the bulk mailing of union materials to prisoners violated the First Amendment.[112] Prison officials invoked institutional security in defending the constitutionality of these restrictions.[113] Specifically, the prison officials argued that prisoners who joined a labor union could act collectively to defy prison officials' authority, provoking chaos and even violence within the state's prisons.[114] The district court, however, emphasized that the prison officials had failed to adduce any evidence that prisoner unions had in fact disrupted prison operations in the past.[115] Consequently, the

109. Todd Clear et al., *Prisoners, Prison, and Religion: Religion and Adjustment to Prison*, 35 J. OFFENDER REHAB. 152 (2002).

110. Some of these methodological problems include small and unrepresentative samples and a dearth of long-term, longitudinal studies. *See, e.g.*, Johnson et al., *supra* note 108, at 160–61; Mark C. Young et al., *Long-Term Recidivism Among Federal Inmates Trained as Volunteer Prison Ministers*, 22 J. OFFENDER REHAB. 97, 115 (1995). *See generally* JOHNSON ET AL., *supra* note 95, at 21 (citing examples of the methodological problems that typify studies of the efficacy of faith-based programs, problems that can be traced in part to the lack of adequate funding of this kind of research).

111. 433 U.S. 119 (1977).

112. The Supreme Court also addressed whether the no-meeting rule and the prohibition on the bulk mailing of union materials violated the prisoner labor union's right to be accorded equal protection of the law. *Id.* at 122–23. This equal-protection claim was predicated on the fact that two other organizations, the Jaycees and Alcoholics Anonymous, were permitted to hold meetings in the prison and to distribute bulk mail to prisoners. *Id.* at 123.

113. *Id.* at 126–27.

114. *Id.* at 127.

115. *Id.* at 124. Specifically, the district court noted: "There is not one scintilla of evidence to suggest that the Union has been utilized to disrupt the operation of the penal institutions." N. C. Prisoners' Labor Union, Inc., v. Jones, 409 F. Supp. 937, 944 (E.D.N.C. 1976).

district court ruled that the restrictions on prisoner labor unions were unconstitutional.[116]

The Supreme Court reversed this ruling, underscoring the solicitous regard that courts should accord prison officials' judgments regarding the best means of protecting and promoting institutional security.[117] Specifically, the Court noted that because the prisoners had failed to demonstrate that the prison officials' beliefs regarding the steps they needed to take to safeguard institutional security were "unreasonable," the district court had erred in requiring the prison officials to further corroborate their claim that the restrictions on prisoner labor unions would make the state's prisons safer and more secure.[118] The burden was not, according to the Court, on the prison officials to prove the accuracy of their security assessments and the efficacy of the measures employed to diminish perceived risks to institutional security.[119] Instead, the burden of proof lay with the prisoners; "in the absence of substantial evidence in the record to indicate that the officials have exaggerated their response" to institutional security concerns, courts should, the Supreme Court remonstrated, "ordinarily defer to [prison officials'] expert judgment" on security matters.[120]

Requiring empirical validation of prison officials' judgment that faith-based prison units can make their prisons safer and easier to manage conflicts with the deferential norm espoused in *Jones* and the panoply of other Supreme Court cases narrowly interpreting the scope of prisoners' rights.[121] In addition, requiring such statistical proof of a prison program's effectiveness would substantially undercut the ability of prison officials to adopt cutting-edge programs as well as new prison rules to curb security problems and meet other legitimate penological objectives. When prison programs and rules are truly innovative, the data confirming their efficacy simply will not exist.

A third touted purpose of faith-based prison units is to promote what is commonly known as "restorative justice."[122] Restorative justice stands in stark contrast to the retributive ethos that still

116. *Id.* at 944–45.

117. *Jones*, 433 U.S. at 128.

118. *Id.* at 127–28.

119. *Id.* at 128.

120. *Id.* (citing Pell v. Procunier, 417 U.S. 817, 827 (1974)).

121. For examples of Supreme Court cases manifesting this deferential norm, see *supra* note 14.

122. *See, e.g.*, PROGRAMS & SERVICES DIV., TEXAS DEP'T OF CRIMINAL JUSTICE, "INNER CHANGE": FAITH-BASED PRE-RELEASE PROGRAM 2 (2000) [hereinafter *TDCJ Report*].

permeates most criminal-justice systems in this country.[123] In jurisdictions that subscribe to retribution as the paramount penological objective of the criminal-justice system, criminal sanctions are imposed primarily for punitive purposes—quite simply, because it is felt that offenders deserve to be punished for their wrongdoing.[124]

By contrast, the focus of restorative justice is on reparation and reconciliation.[125] One of the underlying premises of restorative justice is that offenders need to recognize the error and real-life impact of their aberrant behavior and then assume responsibility to repair, to the extent possible, the harm their criminal conduct has caused their victims and their community.[126] In short, the goal of a criminal-justice system grounded on restorative-justice principles is to foster the accountability of, and victim empathy within, criminal offenders and to provide victims with the opportunity, if they choose, to experience the healing that can ensue from engaging in a constructive dialogue with the offender and identifying through a collaborative process how the offender can make amends to the victim and others harmed by his or her criminal conduct.

Victim-offender mediation programs are a classic means through which restorative-justice principles are implemented.[127] Typically, a victim and offender participating in one of these programs meet together in the presence of a trained mediator.[128] The victim is first afforded the chance to describe the impact of the offender's crime on the victim and to seek the answers to questions that may have been haunting the victim, such as why the offender chose to commit the crime.[129] The offender, in turn, can discuss the crime from his or her perspective, including the impetus for the crime.[130] This dialogue between the victim and the offender often culminates in an expression of remorse by the offender for the crime.[131] In addition, during the mediation session, the offender

123. For a list of the many distinctions between restorative justice and retribution, see HOWARD ZEHR, RESTORATIVE JUSTICE, RETRIBUTIVE JUSTICE, NEW PERSPECTIVES ON CRIME AND JUSTICE 18 (1985).

124. WAYNE R. LAFAVE, CRIMINAL LAW 29–30 (4th ed. 2003).

125. DANIEL VAN NESS & KAREN HEETDERKS STRONG, RESTORING JUSTICE 31–34, 41 (1997).

126. MARK S. UMBREIT, THE HANDBOOK OF VICTIM OFFENDER MEDIATION xxviii, xxxi (2001).

127. MARK S. UMBREIT, VICTIM MEETS OFFENDER: THE IMPACT OF RESTORATIVE JUSTICE AND MEDIATION 5 (1994).

128. UMBREIT, *supra* note 126, at xxvii.

129. *Id.* at xxxviii, 51–52.

130. *Id.* at 51.

131. VAN NESS & STRONG, *supra* note 125, at 71; UMBREIT, *supra* note 127, at 9.

and the victim typically enter into an agreement outlining the reparative measures, such as the payment of restitution or the performance of community-service work, that the offender will undertake to remedy the harm that his or her criminal conduct caused the victim and the community.[132]

Faith-based prison units represent a new paradigm for the implementation of restorative-justice principles. Such units can broaden the scope, and potentially enhance the efficacy, of the reparative efforts undergirding restorative-justice programs. For example, one of the precepts underlying Prison Fellowship's InnerChange Freedom Initiative is that before an offender can truly accept the forgiveness proffered by a victim, the offender must first have forgiven himself or herself.[133] Without this self-forgiveness, full healing and restoration—for the victim, the offender, their families, and the community—cannot, it is felt, occur.

Of course, the self-forgiveness that a faith-based prison unit can help cultivate is, to many religious believers, closely linked to an understanding of, and depth of appreciation for, another kind of forgiveness, one that is a centerpiece of InnerChange[134]—God's forgiveness. The question is whether the religious roots of the self-forgiveness that faith-based prison units may strive to encourage and nurture in prisoners living in those units illegitimatizes the governmental interest in restorative justice to which faith-based prison units are connected.

For at least three reasons, the answer to that question is and should be no. First, and importantly, other penological objectives that the Supreme Court has already deemed "legitimate" from a constitutional perspective also have religious roots. For example, one of the early incantations of, and foundations for, retribution can be found in the Old Testament verse importuning that "life

132. VAN NESS & STRONG, *supra* note 125, at 71. The victim and the offender may also identify steps that the offender should take to rectify the problems, such as substance abuse, that helped to catalyze the offender's decision to engage in criminal behavior. *Id.* at 71–72.

133. *Prison Fellowship Proposal*, *supra* note 3, at 24.

134. *See, e.g.*, *TDCJ Report*, *supra* note 122, at 2 (stating that InnerChange reflects a "'restorative justice' model, that is, the offender's restoring of himself to his family, his community, his victims, to himself and ultimately to God"); *Prison Fellowship Proposal*, *supra* note 3, at 23 (citing InnerChange's emphasis on prisoners' "need for restoration with their family, community, and Jesus Christ").

shall go for life, eye for eye, tooth for tooth, hand for hand, foot for foot."[135]

Second, history itself contraindicates abnegating a governmental interest's legitimacy simply because that interest or the means through which it is implemented has its origins in a religious belief or practice. Otherwise, penitentiaries would themselves be *ipso facto* unconstitutional, because they were, as their name suggests, first devised to propel prisoners, through a period of forced isolation, to become penitent before God for their past crimes, making it less likely that they would commit other crimes in the future.[136] And state laws prohibiting the execution of insane prisoners on death row might arguably be unconstitutional, because those laws are grounded, in part, on the religious conviction that prisoners should be able to seek God's forgiveness for their sins before being put to death.[137]

Third, although the adherents of some religious sects might dispute this point, the self-forgiveness that can facilitate the reconciliatory aims of restorative justice is a secular concept, even though self-forgiveness can have sectarian origins; in other words, self-forgiveness is not invariably forged through, nor is it always the byproduct of, the acceptance of God's forgiveness. The government can, therefore, appropriately establish and support programs to encourage prisoners to first forgive themselves—to, in secular terms, "put their pasts behind them"—so that they can make amends more effectively to their victims and the community aggrieved by their criminal behavior. The government's support for restorative-justice mechanisms that place an emphasis on self-forgiveness does not necessarily undercut the legitimacy of the interest in restorative justice furthered by faith-based prison units, whether or not that self-forgiveness is derived from religious beliefs or the imparting of such beliefs.

A fourth legitimate governmental interest to which faith-based prison units are linked is the interest in accommodating prisoners' religious freedom. Courts have uniformly recognized that this interest permits prison officials to hire chaplains to minister to

135. *Deuteronomy* 19:21 (King James) (emphasis in the original). In *Hudson v. Palmer*, 468 U.S. 517, 524 (1984), the Supreme Court, with seeming approval, cited retribution as one penological objective.

136. AMERICAN CORRECTIONAL ASS'N, THE AMERICAN PRISON: FROM THE BEGINNING 31, 38 (1983).

137. *See* Ford v. Wainwright, 477 U.S. 399, 407 (1986). In *Ford*, the Supreme Court held that executing an insane prisoner violates the Eighth Amendment's prohibition of cruel and unusual punishments. *Id.* at 409–10.

inmates without abridging the Establishment Clause.[138] These holdings spring from the recognition that many prisoners' religious needs would go unfulfilled without this and other forms of governmental subsidization of religion in the prison context.[139] Because incarceration can foreclose inmates' access to religious groups and services in the outside world, prison officials can therefore constitutionally take, and have a legitimate interest in taking, affirmative steps to mitigate the effects of government-erected barriers facing prisoners who want to grow and develop spiritually or simply learn more about religion.

Affording inmates access to a faith-based prison unit presents inmates with a more complete continuum of options in the area of religious programming. Prisoners can, of course, choose to totally spurn religious practices and beliefs. Or they can choose to explore spiritual matters on their own—through reading, reflection, and prayer. Alternatively or in addition, prisoners can congregate with others in an effort to nurture their spiritual growth, meeting together, for example, to study the tenets of a particular religion or to worship. And finally, with the addition of faith-based prison units, prisoners can choose a kind of immersion approach to religion, which enables prisoners to continually assess their thought processes, the decisions they make, and their behavior, including criminal behavior, from a spiritual perspective.

Within correctional systems, there are analogs for this kind of programming continuum.[140] For example, inmates with substance-abuse problems may simply participate in educational programs that provide instruction on the perils of drug and alcohol abuse and other related subjects. Alternatively, inmates with a history of drug or alcohol abuse may participate in treatment programs that typically include counseling, whether individual or group, at speci-

138. *See, e.g.*, Williams v. Lara, 52 S.W.3d 171, 192 (Tex. 2001); Theriault v. Silber, 547 F.2d 1279, 1280 (5th Cir. 1977); Protestants & Other Americans United for Separation of Church & State v. O'Brien, 272 F. Supp. 712, 721 (D.D.C. 1967).

139. *See* Montano v. Hedgepeth, 120 F.3d 844, 850 n.10 (8th Cir. 1997) ("[S]tates might commit a technical violation of the Establishment Clause by even hiring prison chaplains. Nonetheless, this is condoned as a permissible accommodation for persons whose free exercise rights would otherwise suffer."). In similarly holding that the hiring of chaplains to minister to military personnel comports with the Establishment Clause, courts have reasoned that the religious needs of persons in the military might not otherwise be met, in part because of their physical isolation from religious providers. *See, e.g.*, Katcoff v. Marsh, 755 F.2d 223, 227–28, 234 (2d Cir. 1985).

140. *See, e.g.*, BEST PRACTICES: EXCELLENCE IN CORRECTIONS 428 (Edward E. Rhine ed., 1998) (listing the gradation of drug-abuse treatment services within the Federal Bureau of Prisons).

fied times. Finally, inmates in some prisons can be housed in "therapeutic" drug-treatment units.[141] In those therapeutic units, the treatment of the prisoners is interwoven into the formal, day-to-day programming within the unit as well as into informal interactions with staff.[142] Thus, incorporating faith-based units into a prison system, like therapeutic treatment units, is in keeping with the recognition that a one-size-fits-all approach to meeting prisoners' needs will often not work—whether prison officials are striving to meet inmates' physical, spiritual, or treatment needs.

In sum, faith-based prison units are rationally connected to a number of legitimate governmental interests, including the interest in reducing released prisoners' recidivism rates, the interest in protecting institutional security, the interest in promoting restorative justice, and the interest in accommodating prisoners' religious needs. These units therefore pass scrutiny under the first *Turner* factor.

ii. The Second Turner *Factor*—The second factor to be considered when analyzing a prisoner's constitutional claim under the *Turner* test is the extent to which the prisoner has an alternative means of exercising the right in question.[143] This factor seems inapposite when a prisoner is asserting an Establishment Clause violation. A prisoner's claim grounded on the Establishment Clause is essentially a claim to be free from governmentally ordained religion. In other words, the prisoner is invoking what might be described as a "negative right"—the right not to be subjected or exposed to something that is constitutionally proscribed. It is therefore a *non sequitur* to speak of alternative ways to insulate a prisoner from something whose very existence is unconstitutional.

But does the inaptness of the second *Turner* factor mean that the *Turner* test has no bearing in the Establishment Clause context? The Supreme Court's decision in *Washington v. Harper*[144] suggests otherwise. One of the prisoner-plaintiff's claims in that case was that he had a constitutional right, grounded in due process, not to have antipsychotic medication administered to him over his objection unless he had been found incompetent to give

141. For a description of the inner workings of one such unit, see BUREAU OF JUST. ASSISTANCE, U.S. DEP'T OF JUSTICE, THE WISCONSIN DRUG ABUSE TREATMENT UNIT (1990).

142. *Id.* at 2 (reporting that therapeutic drug-treatment units "operate on the assumption that the possibility of changing behavior is greatly enhanced if the inmate's entire waking life is a corrective learning experience").

143. Turner v. Safley, 482 U.S. 78, 90 (1987).

144. 494 U.S. 210 (1990).

consent.[145] Like a prisoner alleging a violation of the Establishment Clause, the prisoner in *Harper* was invoking a "negative right"—in that case, a right not to be subjected to something that the prisoner contended was inherently unconstitutional—psychotropic drugs that were administered involuntarily.

In evaluating this substantive due process claim, the Supreme Court applied the *Turner* test.[146] Yet at the outset, the Court acknowledged that only three of the four factors the Court had outlined in *Turner* as components of that test were relevant in the case before it—the nature of the connection between the prison regulation authorizing the involuntary administration of antipsychotic medication in defined circumstances and the legitimate governmental interests that it purportedly advanced; the existence of less drastic means of achieving the regulation's objectives; and the impact that accommodating the inmate's asserted constitutional right would have on correctional officers, other inmates, and prison resources.[147] Because it would have been nonsensical to examine alternative ways that the prisoner could enjoy the right he claimed not to be medicated involuntarily—he either was involuntarily medicated or he was not, the Supreme Court did not, because it could not, incorporate the second *Turner* factor into its constitutional analysis. Nonetheless, the Court proceeded to apply those components of the *Turner* test that could be applied feasibly to the constitutional claim before it. Thus, although the second *Turner* factor weighs neither in favor of nor against the constitutionality of faith-based prison units, its irrelevance to the constitutional calculus does not counsel against applying the *Turner* test when assessing those units' constitutionality under the Establishment Clause.

iii. The Third and Fourth Turner *Factors*—The third *Turner* factor encapsulates whatever less drastic means exist to achieve the legitimate penological objectives of a policy or program whose constitutionality is contested, while the fourth factor examines whether and how other people and prison resources would be adversely affected if prison officials were required to recognize the constitutional right asserted by a prisoner.[148] In reality, these two factors are not wholly distinct; they overlap considerably. The Supreme

145. *Id.* at 222.
146. *Id.* at 225–27.
147. *Id.* at 224–25.
148. *Turner*, 482 U.S. at 90–91.

Court has said that a purportedly less restrictive means of furthering a legitimate penological objective will not be considered a viable option depreciating the constitutionality of a prison policy or program if the adoption of that alternative would lead to the incursion of more than *de minimis* costs.[149] Likewise, the fourth *Turner* factor entails an assessment of the costs, both pecuniary and nonpecuniary, that would be incurred if prisoners were accorded a claimed constitutional right. Consequently, it is appropriate to conjoin the analysis of the third and fourth *Turner* factors when assessing the constitutionality of faith-based prison units under the Establishment Clause, just as the Supreme Court itself has done on occasion.[150]

When examining whether there are "obvious, easy alternatives"[151] to the incorporation of faith-based units into a prison system, it is important to remember that it is not incumbent on prison officials to demonstrate that alternatives that do not arguably implicate the Establishment Clause do not exist or are unworkable. In the words of the Supreme Court, "prison officials do not have to set up and then shoot down every conceivable alternative method of accommodating the claimant's constitutional complaint."[152] Instead, the burden rests with prisoners to prove that prison officials have an alternative means of accomplishing the legitimate governmental objectives of a faith-based prison unit—an alternative that would result in the incursion of no more than *de minimis* costs.[153]

This is a burden that prisoners simply cannot meet, in no small part because faith-based units represent a cutting-edge innovation in correctional operations. As mentioned earlier in this Article, the research on the effects of faith-based prison units is at a preliminary stage, although research findings suggest, thus far, that these units can have recidivism-reducing and security-enhancing benefits.[154] Consequently, prisoners cannot establish that adopting some other recourse to accommodate prisoners' religious needs will only have trivial negative effects on the interests in crime control and institutional security.

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149. *Id.* at 91.

150. *See* O'Lone v. Estate of Shabazz, 482 U.S. 342, 352–53 (1987). In concluding in *O'Lone* that both the third and fourth *Turner* factors supported the constitutionality of the prison policies that prevented Muslim inmates from participating in Jumu'ah, the Court cited the adverse consequences that might ensue if the alternatives propounded by the prisoners were adopted. *Id.*

151. *Turner*, 482 U.S. at 90.

152. *Id.* at 90–91.

153. *Id.* at 91.

154. *See supra* notes 102–05, 109 and accompanying test.

Even if a study were to find that a faith-based prison unit had only a nominal effect on the rate with which released prisoners recidivate and on institutional security, that finding would not, for at least two reasons, compel the conclusion that the costs of foreclosing this housing and programming option for prisoners are only *de minimis*. First, the data results would likely be program-specific. In other words, the data would bear on the efficacy, in terms of recidivism reduction and the diminution of disciplinary infractions, of a particular faith-based unit or units. But the effectiveness of a program may vary greatly depending on how it is structured. Thus, inconclusive or even disappointing research findings on the effects of a particular faith-based unit on recidivism and prison security might simply mean that the way in which the unit is structured and operated needs to be further refined. Preventing prison officials, because of preliminary research findings, from calibrating these pilot or first-generation programs to better achieve their objectives would itself impose a substantial cost on correctional operations, precluding the "'local experimentation'" that the Supreme Court has recognized can be a critical ingredient to the improved delivery of services to prisoners.[155]

The second reason why a research finding that a faith-based unit has had little inhibitory effect on prisoners' future criminal behavior or their breaching of prison rules would not foreordain the conclusion that the third and fourth *Turner* factors point against the constitutionality of that and other units is that the adoption of an alternative to faith-based prison units might still negatively affect the realization of some of the other more intangible, though no less important, goals of those units. Most significantly, if prison officials were to pursue a means, other than a faith-based prison unit, of achieving their goal of reducing crime and infraction rates, that alternative, even if religious or otherwise spiritual in its orientation, would deny prisoners the option of choosing to participate in a holistic, twenty-four-hour-a-day program that they believe is the optimal way of meeting their spiritual needs. In other words, the alternative would pose more than *de minimis* costs to prison officials' legitimate objective to accommodate inmates' religious

155. *See* Lewis v. Casey, 518 U.S. 343, 352 (1996) (quoting Bounds v. Smith, 430 U.S. 817, 832 (1996)). In *Lewis*, the Supreme Court reiterated that it is important for courts to allow prison officials to experiment as they determine how best to ensure that prisoners have the "meaningful" access to the courts to which they are constitutionally entitled. *Lewis*, 518 U.S. at 351–52 (internal quotations omitted).

freedom and interests by providing them with a broader spectrum of religious programming options from which to choose.

Thus, it seems fairly evident that the third and fourth *Turner* factors weigh in favor of the constitutionality of faith-based prison units. Compelling the closure or precluding the establishment of such units would thwart the potential of these units to reduce crime and to make prisons safer and more secure. In addition, the adoption of alternatives to faith-based prison units would foreclose prison officials from meeting prisoners' religious needs in the way that the prisoners themselves have deemed most beneficial to their growth and development, spiritual or otherwise.

2. Application of a Hybrid Test to Prisoners' Establishment Clause Claims—As discussed earlier in this Article,[156] the case for applying the *Turner* test to prisoners' Establishment Clause claims appears, at least at first glance, strong. The Supreme Court has stated that this test is to be applied to all constitutional claims brought by prisoners,[157] and since *Turner* was decided, the Supreme Court has generally adhered to this unequivocal pronouncement.[158] Exempting Establishment Clause claims from the *Turner* test's rubric would, in effect, accord this constitutional provision more favored treatment than other constitutional protections, including others subsumed within the First Amendment. Most notably, instead of construing the two constitutional provisions designed to protect religious liberty *in pari materia*, an elevated standard of review would be applied to Establishment Clause claims, while the *Turner* test, with all its laxity, would be applied to claims grounded on the Free Exercise Clause.[159]

But applying the *Turner* test in its original form to prisoners' Establishment Clause claims could lead to results both discomfiting and at odds with the overarching purpose of both religion

156. *See supra* notes 66–85 and accompanying text.

157. Washington v. Harper, 494 U.S. 210, 224 (1990) ("[T]he standard of review we adopted in Turner applies to all circumstances in which the needs of prison administration implicate constitutional rights.").

158. See the cases cited in notes 67–72, *supra*. The Supreme Court has not applied the *Turner* test to prisoners' Eighth Amendment claims. *See, e.g.*, Farmer v. Brennan, 511 U.S. 825, 834 (1994) (holding that the plaintiff, who alleged that prison officials had subjected him to cruel and unusual punishment by failing to protect him from another inmate's assault, must prove that the officials acted with "deliberate indifference" to a "substantial risk of serious harm"). The Court has also not applied the *Turner* test to inmates' procedural, as opposed to substantive, due process claims. *See* Washington v. Harper, 494 U.S. 210, 225, 228–35 (1990) (applying the *Turner* test to the prisoner-plaintiff's substantive due process claim, but not his procedural due process claims, asserted against a prison policy under which he was involuntarily medicated with antipsychotic drugs).

159. *See supra* notes 23–24 and accompanying text.

clauses—the protection and nurturing of religious liberty. For example, as discussed earlier in this Article, faith-based prison units pass the *Turner* test, because they are "reasonably related" to a number of "legitimate" and "neutral" governmental interests, including the interest in diminishing the recurrence of criminal activity by released prisoners. Yet if this reasonable relationship is all that is needed to obviate Establishment Clause problems, then prison officials likely could force prisoners to live in faith-based units, no matter how vociferous the prisoners' objections to this housing assignment and how antithetical the religious beliefs and practices that suffuse those units are to prisoners' own religious precepts (or lack thereof). Such compelled assignments would be constitutional provided that the requisite link exists between the prisoners' presence, even though involuntary, within the unit and a legitimate penological objective, such as the goal of reducing recidivism rates.[160]

However, such government-compelled involvement in religion would flout the central command of the Establishment Clause—that "government may not coerce anyone to support or participate in religion or its exercise. . . ."[161] Consequently, because the Establishment Clause is, in some respects, *sui generis*, it appears as though the *Turner* test would need to be somewhat amplified to accommodate the Clause's unique underpinnings.

a. The Proscription of Governmental Coercion—The absence of governmental coercion in a prisoner's decision to live and participate in a faith-based unit is obviously a critical ingredient of the unit's constitutionality. In a number of Supreme Court cases, some of them quite recent, upholding the constitutionality of transmitting government funds to religious schools,[162] the Court underscored

160. If assignments to faith-based units were involuntary, then they would clearly no longer be reasonably related to the legitimate interest in accommodating prisoners' religious freedom and preferences. In addition, such compulsory assignments would seem at odds with the faith-based units' objective of promoting restorative justice, because a key premise underlying restorative justice is that victims' and offenders' participation in restorative-justice programs should be voluntary to achieve their reconciliative objectives. AMERICAN BAR ASSOCIATION, VICTIM-OFFENDER MEDIATION/DIALOGUE PROGRAM REQUIREMENTS, RECOMMENDATION APPENDIX TO REP. 101B, SUMMARY OF ACTION OF THE HOUSE OF DELEGATES, 1994 ANNUAL MEETING (1994). Yet studies might (or might not) someday reveal that faith-based units reduce recidivism or infraction rates even amongst prisoners who initially resisted an assignment to such a unit.

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

162. *See, e.g.*, Zelman v. Simmons–Harris, 536 U.S. 639, 663 (2002) (upholding school voucher program under which tuition aid was funneled to parents and then to the elementary school of their choice, including private religious schools); Mitchell v. Helms, 530 U.S.

that the funneling of government money to a religious group or institution was the end-product of "genuine and independent choices of private individuals."[163] For example, in *Zelman v. Simmons-Harris*, the Court upheld a tuition-aid program through which state funds were transmitted to elementary public and private schools, including religious schools.[164] Invoking a circuit-breaker analogy, the Court concluded that the "true private choice" of students to attend a religious school severed "the circuit" between government and religion.[165] As a result, any Establishment Clause concerns with the tuition-aid program were, according to the Court, nullified.

But how, one might ask, can a prisoner's coerced presence in a faith-based prison unit be differentiated from a voluntary assignment to such a unit? Obviously, in order for this housing and programming assignment to be considered the "true private choice" of a prisoner, the decision whether or not to be transferred to the faith-based unit must be remitted to the prisoner. In other words, prison officials cannot exercise their typically unmitigated discretion to house an inmate in a prison and, more specifically, in a particular part of a prison that best meets the needs of, and risks posed by, the prisoner.[166] Officials cannot, in short, direct that the prisoner be placed in a faith-based unit.[167]

793, 830–31 (2000) (plurality) (finding a school-aid program constitutional under which federal funds were transmitted to state and local agencies which, in turn, purchased books, computers, and other materials and equipment to be loaned to public and private schools, including parochial schools); Agostini v. Felton, 521 U.S. 203, 228 (1997) (holding program through which public school teachers were sent into parochial schools to provide remedial education to students who opted to attend those schools to be constitutional); Zobrest v. Catalina Foothills School Dist., 509 U.S. 1, 10, 12–13 (1993) (holding that the Establishment Clause permits government officials to accord parents the "freedom to select a school of their choice," including a religious school, into which a government-paid interpreter will be sent to provide services to their deaf child); Witters v. Washington Dep't of Services for the Blind, 474 U.S. 481, 488 (1986) (concluding that vocational-assistance program did not abridge the Establishment Clause even though the state was subsidizing a blind person's education at a Christian college; "the decision to support religious education is made by the individual, not by the State").

163. *Zelman*, 536 U.S. at 649.

164. *Id.* at 663.

165. *Id.* at 652.

166. For a discussion of Supreme Court cases holding that prisoners typically have no liberty interest in being assigned to, or remaining in, a particular prison or section of a prison, *see infra* notes 168–83 and accompanying text.

167. That does not necessarily mean that prison officials must acquiesce in a prisoner's request to be transferred to a faith-based unit. Legitimate considerations, including institutional-security concerns and limited space in the program, may foreclose such a transfer. For example, prison officials could appropriately refuse to transfer a prisoner classified at a maximum-custody level to a faith-based unit in a minimum-security prison. Thus, while the Establishment Clause prohibits prison officials from requiring prisoners to

Nor can prison officials pressure prisoners to opt for such a placement. But that rather self-evident point raises a question whose answer is less clear: Does the existence of more favorable conditions in a faith-based unit, such as a lower rate of inmate-on-inmate assaults, place the kind of pressures on an inmate to live in the unit that constitute governmental coercion in the constitutional sense? Both Supreme Court caselaw and pragmatic considerations suggest otherwise.

i. Supreme Court Caselaw—A number of Supreme Court cases buttress the conclusion that the disparity between the conditions of a faith-based unit and those in other parts of the prison or in other prisons typically does not exert governmental compulsion on a prisoner to opt for a placement in the faith-based unit. In the first line of arguably relevant Supreme Court cases, the Court confronted the question of when the transfer of a prisoner effects a deprivation of a "liberty interest," thereby triggering the protections of due process. One of those cases was *Meachum v. Fano*.[168] In that case, several prisoners filed a civil-rights suit after they were transferred to prisons with "substantially less favorable conditions" because of their suspected involvement in setting fires within the prison in which they were confined initially.[169] The plaintiffs, most of whom were transferred from a medium-security prison to a maximum-security prison, contended that the transfers deprived them of "liberty" within the meaning of the Due Process Clause.[170] However, the Supreme Court responded that a conviction and prison sentence extinguish a prisoner's liberty to the extent that correctional officials can place a convicted offender in any prison that they deem most suitable.[171] Prisoners therefore have no constitutionally-derived liberty interest to be assigned to, or remain within, a particular prison.[172]

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live in a faith-based prison unit, the officials are vested with what is, in effect, a veto power; they can bar a prisoner's transfer to such a unit, at least if their decision is grounded on a legitimate governmental interest.

168. 427 U.S. 215 (1976).

169. *Id.* at 216–18, 221.

170. *Id.* at 222.

171. *Id.* at 224.

172. *Id.* at 225 ("Confinement in any of the State's institutions is within the normal limits or range of custody which the conviction has authorized the State to impose. That life in one prison is much more disagreeable than in another does not in itself signify that a Fourteenth Amendment liberty interest is implicated when a prisoner is transferred to the institution with the most severe rules.").

State law is an alternative source of the liberty to which the Due Process Clause affords protection,[173] but the Supreme Court has signaled that the transfer of an inmate to a prison or section of a prison with more oppressive conditions normally does not implicate a state-created liberty interest either.[174] Specifically, in *Sandin v. Conner*, the Court held that the transfer of a prisoner from the general-population unit of a prison to the disciplinary-segregation unit for thirty days did not deprive him of "liberty" within the meaning of the Due Process Clause.[175] Consequently, the prison officials were not obliged to incorporate any procedural safeguards into the disciplinary process to avert the arbitrary or unfounded imposition of this kind of disciplinary sanction. Only if the prison officials had inflicted an "atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life" would he be entitled potentially to the protections of due process.[176] And according to the Court, confinement in a cell in the disciplinary unit for twenty-three hours or more a day, compared to twelve to sixteen hours a day in the general-population unit, did not subject the prisoner to an "atypical and significant hardship."[177]

The fact-specific nature of *Sandin v. Conner* arguably limits its prognosticative value in predicting, whether within or outside the due-process context, the outcome of cases examining the constitutional repercussions of subjecting prisoners to differing conditions of confinement. In *Sandin*, the defendant was sentenced to solitary confinement for "only" thirty days,[178] leaving open the possibility that disciplinary confinement for more extended periods of time would trigger the protections of due process.[179] In addition, the

173. Sandin v. Conner, 515 U.S. 472, 483–84 (1995).

174. *See id.* at 486. *See also Meachum*, 427 U.S. at 226–27 (holding that transfers of prisoners from a medium– to a maximum–security prison because of suspected misconduct did not deprive them of a state-created liberty interest).

175. *Sandin*, 515 U.S. at 486.

176. *Id.* The Supreme Court inferred that even this kind of aberrational treatment of a prisoner might not implicate due process when it said: "We hold that Conner's discipline in segregated confinement did not present the type of atypical, significant deprivation in which a state might conceivably create a liberty interest." *Id.* (emphasis added).

177. *Id.* at 486 & n.8.

178. While the Supreme Court seemed dismissive in *Sandin* about the adverse effects of segregation for this period of time, researchers have consistently found that solitary confinement for a period of time longer than ten days has negative psychological repercussions on persons subjected to such confinement, triggering psychosis, depression, outbursts of anger, and suicidal ideation and attempts. Craig Haney & Mona Lynch, *Regulating Prisons of the Future: A Psychological Analysis of Supermax and Solitary Confinement*, 23 N.Y.U. REV. L. & SOC. CHANGE 477, 530 (1997).

179. *Cf.* Lee v. Coughlin, 26 F. Supp. 2d 615, 635–36 (S.D.N.Y. 1998) (finding that prisoner confined in disciplinary segregation for 376 days was deprived of a liberty interest).

Supreme Court emphasized in *Sandin* that state officials had expunged the guilty finding that had led to the plaintiff's disciplinary segregation.[180] Underscoring that the finding would not "inevitably affect the duration of [the plaintiff's] sentence," the Court intimated that the outcome of the case would have been different if state law had required the parole board to deny the plaintiff parole because of his disciplinary record or, alternatively, had required the board to grant parole in the absence of such misconduct.[181]

Despite *Sandin*'s potentially limited scope, its holding is consistent with a theme that has permeated the Supreme Court cases examining the question of when a prison housing assignment deprives an inmate of "liberty" within the meaning of the Due Process Clause: variations in prison conditions, including exposure at times to "much more disagreeable" conditions,[182] are the operative norm in corrections.[183] This norm, to which prisoners have long been accustomed, has implications for the question of whether the existence of somewhat more favorable conditions in a faith-based unit places unconstitutional pressure on a prisoner to agree to live in such a unit. In other words, it is arguable that conditions outside the faith-based unit that do not inflict an "atypical and significant hardship" on prisoners do not place the kind and degree of coercive pressures on an inmate that would make the unit's very existence an abridgement of the Establishment Clause.

The Supreme Court's decision in *McKune v. Lile*[184] is another indicator that even if conditions of confinement in a faith-based unit are in certain ways less draconian, those differences do not necessarily mean that correctional officials are unconstitutionally coercing prisoners to request an assignment to the unit. In that case, the Supreme Court considered a prisoner's claim that he was

180. *Sandin*, 515 U.S. at 486, 487 n.10.

181. *Id.* at 487.

182. Meachum v. Fano, 427 U.S. 215, 225 (1976).

183. In concluding in *Hewitt v. Helms*, 459 U.S. 460 (1983) that prison officials had not deprived the plaintiff of a constitutionally-derived liberty interest when transferring him from the general-population unit to administrative segregation, where he was confined in his cell almost twenty-four hours a day, the Supreme Court observed: "It is plain that the transfer of an inmate to less amenable and more restrictive quarters for nonpunitive reasons is well within the terms of confinement ordinarily contemplated by a prison sentence." *Id.* at 468. The Court did find that the transfer deprived the plaintiff of a state-created liberty interest, one that emanated from prison regulations that circumscribed prison officials' discretion to initiate such transfers. *Id.* at 472. However, in *Sandin*, the Supreme Court jettisoned the test under which the existence of a state-created liberty interest hinged on the particular phrasing of a statute or regulation. 515 U.S. at 483–84.

184. 536 U.S. 24 (2002).

being subjected to compulsion falling within the proscriptions of the Fifth Amendment—specifically, that the government was compelling him to incriminate himself. The inmate, a convicted sex offender, had been ordered by prison officials to participate in a Sexual Abuse Treatment Program (SATP).[185] In order to participate in the program, sex offenders had to sign an "Admission of Responsibility" form in which they acknowledged their culpability of the offense of which they had been convicted.[186] In addition, inmates participating in the program had to fill out a sexual-history form in which they recounted details about their sex lives, including their commission of sex crimes with which they had not been charged.[187] A prisoner's incriminating admissions in these forms might have a number of deleterious consequences for the prisoner, exposing him, for example, to the risk of a criminal prosecution for the uncharged crimes he had admitted committing and making him vulnerable to a prosecution for perjury if he had denied at trial committing the crime for which he was incarcerated but for which he had now admitted responsibility.[188]

The prisoner who filed suit in *McKune* challenging the constitutionality of the SATP claimed that prison officials were compelling him to incriminate himself in contravention of the Fifth Amendment.[189] The prisoner noted that if he refused to make the incriminating admissions that were a precondition to participation in the program, he would be transferred from a medium- to a maximum-security unit.[190] There, he would be housed in a cell with four, rather than two, persons, and his freedom to move outside his cell would be further limited.[191] In addition, his prison privileges, including work opportunities and earnings, visitation rights, and access to personal property would be reduced dramatically.[192] For example, while the plaintiff could earn up to the minimum wage at his current classification level (Level III), the remuneration for Level II inmates was capped at sixty cents a day.[193]

Despite the patent pressures exerted on the plaintiff to inculpate himself, the Supreme Court, in a 5–4 decision, spurned the

185. *Id.* at 30.
186. *Id.*
187. *Id.*
188. *Id.* at 55 & n.1 (Stevens, J., dissenting).
189. *Id.* at 29.
190. *Id.* at 31.
191. *Id.*
192. *Id.* at 30–31.
193. *Id.* at 63 (Stevens, J., dissenting). In addition, Level II inmates could spend only $20 each pay period at the canteen, while Level III inmates could spend $140. *Id.*

suggestion that these pressures were tantamount to the compulsion proscribed by the Fifth Amendment. The majority, however, split as to its reasoning. A plurality of the Court—Justices Kennedy, Rehnquist, Scalia, and Thomas—opined that the analysis of whether a prisoner is facing compulsion within the meaning of the Fifth Amendment substantially tracks the analysis undertaken when determining whether a prisoner is being deprived of a liberty interest.[194] In other words, unless a prisoner will have to endure "atypical and significant hardships" for refusing to make inculpatory statements, correctional officials are not placing the kind or level of pressures on the prisoner that would subvert his or her privilege against self-incrimination.[195]

Justice O'Connor rendered the decisive fifth vote in *McKune*, rejecting, like the plurality, the plaintiff's Fifth Amendment claim. In her concurring opinion, Justice O'Connor disagreed with the plurality that in the prison context, compulsion in the Fifth Amendment sense and deprivation of "liberty" in the Due Process sense are largely congruent concepts.[196] Justice O'Connor agreed with the four dissenters that a prisoner might be subject to the compulsion barred by the Fifth Amendment without necessarily being deprived of the "liberty" that garners the protections of Due Process.[197] In other words, the compulsion the Fifth Amendment prohibits encapsulates more than the deprivation of liberty.

What is significant, for our purposes, about the plurality and concurring opinions in *McKune* is not their differences, but their concordant assessment of the impact on prisoners of being transferred from a medium-security to a maximum-security prison and of having their classification level ("privilege status") reduced. The plurality was dismissive about the injurious consequences that

194. The plurality in *McKune* alluded to the possibility that the Fifth Amendment analysis might vary somewhat from the test applied when determining whether a prisoner has been deprived of a state-created liberty interest. *See id.* at 37 ("The determination under *Sandin* whether a prisoner's liberty interest has been curtailed may not provide a precise parallel for determining whether there is compelled self-incrimination, but it does provide useful instruction for answering the latter inquiry."). In fact, as part of its analysis in *McKune*, the plurality first examined whether the SATP was reasonably related to a legitimate penological interest before turning to the question whether the adverse consequences that followed a refusal to participate in the program constituted "atypical and significant hardships" compared to those prisoners typically faced in prison. *Id.* at 36–38.

195. *Id.* at 37–38.

196. *Id.* at 48 (O'Connor, J., concurring).

197. *Id.* ("I agree with Justice Stevens that the Fifth Amendment compulsion standard is broader than the 'atypical and significant hardship' standard we have adopted for evaluating due process claims in prisons . . . .").

would ensue from the plaintiff's decision not to incriminate himself, describing them as more like "*de minimis* harms" than the kind of grievous consequences that would trigger Fifth Amendment concerns.[198] And while Justice O'Connor acknowledged that the conditions of the plaintiff's confinement would now be "more unpleasant," the adverse consequences triggered by his refusal to participate in the sex-offender treatment program in accordance with its terms were, in her opinion, relatively "minor."[199]

McKune v. Lile arguably provides support for the proposition that just because conditions in a faith-based prison unit are in certain ways less onerous than those in other parts of the prison or other prisons does not mean that prison officials are coercing inmates' participation in the unit, in violation of the Establishment Clause. However, Justice O'Connor added a caveat in her concurring opinion in *McKune* that could limit its import and scope significantly. Responding to the plaintiff's argument that prison officials were coercing him to inculpate himself by threatening to transfer him to what the district court had described as a "more dangerous" prison unit if he did not acknowledge and disclose past sex crimes, Justice O'Connor noted that the trial court had not entered a finding specifying with exactitude the degree to which the maximum-security unit was more dangerous than the medium-security unit in which the plaintiff was currently housed.[200] This allusion to an evidentiary gap leaves open the possibility that the outcome of *McKune* might have been different—that a majority of the Court would have found that correctional officials were compelling the plaintiff to make a particular choice, in that case, the choice to incriminate himself—if the plaintiff had proven, and the trial court had found, that the rate of assaults on prisoners was significantly higher within the maximum-security unit in which he would be housed if he refused to incriminate himself.[201]

McKune confirms that the Supreme Court is reticent to find that confronting inmates with the prospect of being confined in a place with more austere conditions automatically or generally represents governmental coercion to make the choice that will enable them to avoid being subjected to those conditions. But the qualification in

198. *Id.* at 41.

199. *Id.* at 51 (O'Connor, J., concurring).

200. *Id.*

201. *See id.* ("Because it is respondent's burden to prove compulsion, we may assume that the prison is capable of controlling its inmates so that respondent's personal safety is not jeopardized by being placed in the maximum-security area of the prison, at least in the absence of proof to the contrary.").

Justice O'Connor's concurring opinion still leaves unanswered the question whether a lower victimization rate in a faith-based unit would effectively coerce inmates to live in those units. The pragmatic considerations that bear on the resolution of that question in the Establishment Clause context are discussed below.

ii. Pragmatic Considerations—Concluding that the comparative safety benefits of living in faith-based units (assuming that there are such benefits) place undue and unconstitutional pressure on inmates to choose to live in such units would result in a perverse irony. One of the purposes of those units, as mentioned earlier,[202] is to reduce the violation of prison rules by inmates, making prisons safer for both inmates and correctional staff. Yet the more effective faith-based units were in achieving this objective, the more patent would be their unconstitutionality if statistical differences in assault rates were equated with governmental coercion. In other words, the very efficacy of faith-based units from a correctional perspective would foreordain a finding that they are unconstitutional.

There is nothing in either logic or precedent that would dictate such a nonsensical result. A high assault rate outside a faith-based unit could, it is true, be indicative of a constitutional violation in some circumstances. Prison officials have a constitutional obligation to meet prisoners' basic safety needs, and the officials' "deliberate indifference" to a "substantial risk" that inmates in a non-faith-based unit will be attacked by other inmates violates the Eighth Amendment's prohibition of cruel and unusual punishments.[203] But if prison officials are meeting this constitutional baseline in protecting inmates from assaults in non-faith-based units, the fact that assault rates are still lower in faith-based units would not signify that officials are orchestrating their prison operations to propel prisoners into requesting an assignment to those units.[204] Instead, and more likely, the lower level of assaults in faith-based units would be attributable to one or both of two phenomena.

First, prisoners who request an assignment to a faith-based unit might already be less prone to violence. In this situation, prison officials would be no more responsible for the less violent proclivities of

202. *See supra* notes 106–121 and accompanying text.

203. Farmer v. Brennan, 511 U.S. 825, 834 (1994).

204. *Cf.* McKune v. Lile, 536 U.S. 24, 48 (2002) ("There is . . . no indication that the SATP is merely an elaborate ruse to skirt the protections of the privilege against compelled self-incrimination.").

these prisoners than they are for the reduced penchant of female prisoners to attack other inmates, which results, according to most studies, in a lower level of inmate-on-inmate assaults in women's prisons than in men's prisons.[205]

Second, fewer assaults in faith-based units might be the by-product of behavioral changes, perhaps sparked by an internal spiritual transformation, within prisoners confined in the faith-based units. But the laudable decision by private individuals (in this case, prisoners) to refrain from maladaptive behaviors can hardly be described as governmental coercion. Nor could it be said to be the proper role of prison officials to refrain from taking actions that are reasonably related to a legitimate governmental interest, merely to quell prisoners' spiritual growth.

In short, just because a faith-based program outperforms a non-faith-based program on certain outcome measures does not mean that the government is unconstitutionally skewing private choices whether to participate in the sectarian or secular program. To the contrary, the decision to participate in the faith-based program may be wholly voluntary—in Establishment Clause terms, the product of "true private choice"[206]—even though the individual may be naturally inclined to participate in the program that has proven to be the most effective in meeting certain objectives.

iii. The Import of Zelman v. Simmons-Harris—The Supreme Court's decision in *Zelman v. Simmons-Harris*[207] further affirms that just because a sectarian program offers advantages, even significant advantages, over its secular counterparts does not eviscerate the "true private choice" to participate in the religious program that is a requisite for certain kinds of governmental linkages with that program to meet the strictures of the Establishment Clause. The pilot tuition-aid program whose constitutionality was at issue in that case had been implemented in Cleveland because the city's public-school system was in shambles. The school district, which had failed every one of the state's eighteen standards for "minimal acceptable performance," was in the throes of what auditors described as a "crisis that is perhaps unprecedented in the history of American education."[208] Nine out of ten ninth graders could not pass a basic proficiency test, and the majority of high-school students never

205. Anthony E. Bottoms, *Interpersonal Violence and Social Order in Prison*, *in* PRISONS 234 (Michael Tonry & Joan Petersila eds., 1999).

206. Zelman v. Simmons-Harris, 536 U.S. 639, 653 (2002).

207. *Id.*

208. *Id.* at 644.

graduated.[209] Of the minority who did, few could match the academic performance of students in other cities.[210]

The state undertook several initiatives to combat this sordid state of affairs in Cleveland's public schools. For example, the state started up ten "community schools," which were operated by independent school boards, not by the local school district, and also opened up magnet schools, public schools with a thematic or other specialty designed to attract students to the schools and improve the quality of the educational services the students received.[211] The state also instituted the tuition-aid program under which state funds were transferred to participating public and private schools based on students' enrollment decisions.[212]

In his dissenting opinion in *Zelman* in which Justices Stevens, Ginsburg, and Breyer joined, Justice Souter highlighted some of the deficiencies and drawbacks in the community and magnet schools that were cited by the majority as viable secular alternatives to the religious schools to which state funds were being transmitted when a student elected to attend such a school.[213] Justice Souter noted, for example, that the students' academic performance was sub-par in many of the community schools.[214] Some of the community schools also did not offer classes to students in certain grades, and one of the schools targeted low-performing students with behavioral problems, making it, in Justice Souter's words, "not an attractive 'choice' for most parents."[215]

The majority of the Court, however, refused to be drawn into this imbroglio in which courts would have to scrutinize secular schools' curricular offerings, the type of clientele they provide services to, statistics on their students' academic performance, and other variables to ascertain whether governmental officials were coercing parents to enroll their children in religious schools. Instead, the Court simply cited the multiple options from which parents could choose when deciding whether to send their children to a religious school, indicating that the availability of these options was a relevant criterion factored into its Establishment

209. *Id.*
210. *Id.*
211. *Id.* at 647–48.
212. *Id.* at 644–45.
213. *Id.* at 701 n.9, 702 n.10 (Souter, J., dissenting).
214. *Id.* at 702 n.10.
215. *Id.*

Clause analysis.[216] In the ensuing discussion, the relevance of secular alternatives to the constitutionality of governmental funding of faith-based programs in the prison context is more fully fleshed out.

iv. The Relevance of Secular Alternatives to the Constitutionality of Faith-Based Prison Units—Unlike the parents in *Zelman* who could select from a range of secular alternatives when deciding whether to send their children to a religious school whose expenses would then be defrayed by a government subsidy, prisoners confronted with the opportunity to be placed in a faith-based unit generally would not have an array of secular alternative placements from which to choose. Prisoners, not surprisingly, do not normally decide in which prison they will be incarcerated or in which part of a particular prison they will be confined.[217] Those decisions are instead made by correctional officials based on a number of factors, including security considerations, resource constraints, and inmates' programming, medical-care, and other needs. Prisoners, in short, generally live where prison officials tell them to live.

But the fact that prisoners often might be presented with only two choices regarding their housing assignment—either be placed, for example, in the general-population unit of a minimum-security prison or be housed in the faith-based unit at that prison—does not mean that a prisoner's decision to live in a faith-based unit is the end-product of governmental coercion. The conundrum faced by prisoners deciding whether to be confined in a prison's protective-custody unit affirms the verity of this conclusion.

Confinement in a prison's general-population unit can pose augmented hazards for certain inmates, such as those who are young and slightly built (making them more likely targets for sexual and other physical assaults) and those with known enemies from rival gangs housed in that unit.[218] Those dangers can be averted, or at least diminished, through confinement in a protective-custody unit, where prisoners are isolated from the general

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216. Those options included attending the public schools, with or without the tutorial aid now offered within those schools, attending a community school, attending a magnet school, or enrolling in a secular private school to which a state tuition subsidy would be transmitted. *Id.* at 655.

217. *See* Hewitt v. Helms, 459 U.S. 460, 468 (1983) (concluding that a prison sentence, as a general rule, implicitly authorizes the prisoner's transfer to any part of a prison, including a unit with more draconian conditions); Meachum v. Fano, 427 U.S. 215, 224 (1976) (observing that a state has the power to confine a prisoner in any of its prisons).

218. See HUMAN RIGHTS WATCH, NO ESCAPE: MALE RAPE IN U.S. PRISONS (2001), *available* at http://www.hrw.org/reports/2001/prison/report4.html (on file with the University of Michigan Journal of Law Reform).

population. Prisoners who want to be confined in, and meet the eligibility criteria for confinement in, the protective-custody unit, however, face the proverbial "Hobson's choice." If they remain in the general-population unit, they may be assaulted, raped, or even killed. But if they are transferred, at their request, to the protective-custody unit, their freedom of movement will be curtailed dramatically. Prisoners in protective-custody units are often confined in their cells up to twenty-three hours a day, and their work opportunities and access to educational, vocational-training, and other programs are reduced significantly.[219] Thus, prisoners deciding whether to request or accept an assignment to protective custody frequently face a wrenching choice—a choice between enhanced safety, on the one hand, and more expansive freedom and privileges, on the other.

Nonetheless, courts have generally not found that differences in the conditions in the protective-custody and general-population units make a prisoner's decision to be placed in one of those units involuntary, provided, of course, that the conditions in both units, though perhaps harsh, are not unconstitutional.[220] In other words, the fact that a prisoner may face a difficult choice between two alternative, even unpalatable, housing assignments does not vitiate the inmate's freedom to choose.

If, as the courts have held, the diminished freedom and privileges enjoyed by prisoners confined in protective custody do not unconstitutionally coerce them to opt for a placement in general population, it is difficult to envision how the differences that one would normally expect to find between a faith-based unit and a non-faith-based unit would nullify the validity of the choice made by a prisoner to live in a faith-based unit.[221] The Establishment

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219. For descriptions of the conditions that typically prevail in protective-custody units, see *Zatler v. Wainwright*, 802 F.2d 397, 403 n.7 (11th Cir. 1986), and *Graham v. Perez*, 121 F. Supp. 2d 317, 323 n.10 (S.D.N.Y. 2000).

220. *See, e.g.*, Harding v. Jones, 768 F. Supp. 275, 277–78 (E.D. Mo. 1991) (holding that the plaintiff's decision to remain in the general prison population rather than be confined in the protective-custody unit was "voluntary" even though an inmate with whom he had an ongoing dispute was also confined in the general-population unit). *Cf. Zatler*, 802 F.2d at 403 (concluding that prison officials did not act with reckless disregard for the plaintiff's need for protection when the plaintiff had failed to request an assignment to the protective-custody unit, whose conditions, though harsh, were constitutional).

221. Of course, as alluded to earlier, if conditions in the secular unit were so inhumane that they violated the Eight Amendment's prohibition of cruel and unusual punishments, the "choice" whether or not to remain in that unit would be ephemeral—in short, not a real choice when viewed from the perspective of a reasonable person presented with the opportunity to escape such barbaric and potentially life-threatening conditions. For an example of

Clause does not require, nor could courts realistically expect, that the conditions in a faith-based unit exactly mirror those in the general-population unit, the most likely secular alternative to a placement in the faith-based unit. Faith-based units, as their name suggests, are inherently different from other prison units. Faith-based units, like prison chaplaincy services, are mechanisms for delivering religious-programming services to prisoners, and religious precepts will often permeate the day-to-day programming within the units as well as informal interactions with staff. To demand uniformity in the conditions in faith-based and non-faith-based units in order for a prisoner's decision to be confined in a faith-based unit to be considered uncoerced is to demand, in the end, the impossible.[222]

Supreme Court pronouncements on the scope of prisoners' rights to religious freedom under the First Amendment's Free Exercise Clause provide further, though indirect, support for the proposition that a prisoner's decision to reside in a faith-based unit can be the end result of the "true private choice" required by the Establishment Clause even though prison officials present the inmate with only one alternative housing assignment from which to choose and that alternative has some downsides not shared by the faith-based unit. In *Cruz v. Beto*, the Supreme Court observed that prison officials do not contravene the Free Exercise Clause when they afford inmates who are adherents of more prevalent religions with access to a state-provided chaplain of their faith while refusing to provide inmates from minority religious sects with access to a state-paid chaplain from their religious sect.[223] The Court underscored that prisoners do not have to be offered "identical" opportunities to practice their religion, such as similar facilities or personnel support, in order for those opportunities to be considered "reasonable" and "comparable" to those afforded inmates of other faiths.[224]

Similarly, one might argue that a non-faith-based unit is a "reasonable" alternative to a faith-based unit and a "comparable" housing and programming assignment for Establishment Clause

such conditions, see *Hutto v. Finney*, 437 U.S. 678, 682–84, 687 (1978) (holding that prisoners who were fed less than 1000 calories a day and were confined in filthy 8' x 10' cells with up to four and sometimes as many as eleven other prisoners, many of whom were assaultive, were subjected to cruel and unusual punishment).

222. In addition, were faith-based units essentially carbon copies of non-faith-based units, the very reasons for establishing faith-based units in the first place would be undermined.

223. 405 U.S. 319, 322 n.2 (1972).

224. *Id.* at 322 n.2.

purposes, even though the non-faith-based unit is dissimilar from the faith-based unit and provides prisoners less extensive support services. Indeed, it would seem incongruent were courts to adopt a lax interpretation of what constitutes a "reasonable" and "comparable" opportunity for a prisoner to exercise his or her religious freedom for free-exercise purposes and then adopt a narrow and constrictive definition of what constitutes a "reasonable" and "comparable" opportunity to refrain from participating in a religious program in the Establishment Clause context.[225]

In sum, an inmate's decision to live in a faith-based unit would not invariably, or even usually, be the end result of proscribed governmental compulsion even though the alternative housing option proffered the inmate is, in some respects, inferior to the faith-based unit. However, even in the absence of such compulsion, faith-based units might still transgress constitutional boundaries if prison officials failed to meet another requirement of the Establishment Clause. That requirement is discussed below.

b. The Governmental Neutrality Requirement—One theme permeating the Supreme Court cases defining the contours of the Establishment Clause is that the government must be neutral when dispensing funds whose beneficiaries include religious groups, organizations, or institutions.[226] The Supreme Court is still grappling with questions concerning the meaning of this neutrality requirement[227] and the way in which these questions should be resolved

225. In *O'Lone v. Estate of Shabazz*, 482 U.S. 342 (1987), the Supreme Court also adopted a very loose definition of what constitutes a viable alternative for exercising an alleged religious right when the Court applied the *Turner* test to the claim of certain Muslim prisoners that prison regulations that effectively barred their participation in Jumu'ah violated their First Amendment right to freely exercise their religion. In examining in that case whether the prisoner-plaintiffs had "'alternative means of exercising the right'" in question, the Court underscored that they had not been "deprived of all forms of religious exercise." *Id.* at 351–52 (quoting Turner v. Safley, 482 U.S. 78, 90 (1987)). While the plaintiffs could not attend Jumu'ah, the religious service in which they wanted to participate, they could, for example, meet with a state-paid imam and celebrate Ramadan, a month marked by prayer and fasting. *Id.* at 352. *O'Lone* provides additional, though once again more tangential, support for the postulate that the operations of, and conditions within, secular alternatives to faith-based units need not exactly or even largely parallel those in the faith-based unit to comport with First Amendment requirements.

226. This neutrality requirement has been profiled in recent cases in which the Court upheld the constitutionality of transmitting certain pecuniary benefits or other governmental aid to religious, in addition to nonreligious, schools. See the cases cited in note 162, *supra*.

227. *See, e.g.*, Zelman v. Simmons-Harris, 536 U.S. 639, 652 (2002) (emphasizing that tuition-aid program was "neutral" towards religion, while at the same time noting that the

outside the prison context is beyond the scope of this Article. But in a correctional setting, it is evident that "neutrality" means, at a minimum, two things: first, that the government cannot signify that it favors faith-based units and the prisoners confined within them or, conversely, secular units and the prisoners residing in them; and second, that the government (as opposed to inmates) cannot evince a preference for one kind of religious sect over another when making decisions regarding the structuring of faith-based units.[228]

One can envision a number of ways in which prison officials might abridge this neutrality requirement. First, if prison officials were to affirmatively counsel prisoners to request a placement in a faith-based unit or to refrain from making such a request, their recommendations could potentially represent an abandonment of the requisite position of neutrality on the question of whether prisoners should or should not avail themselves of religious programming opportunities at the prison.[229] Second, if prisoners faced the prospect of either a shortened or lengthened term of confinement if housed in the faith-based unit, the discrepant treatment of prisoners would be an overt indicator of governmental non-neutrality between religion and irreligion.[230] Thus, offering prisoners in faith-based units more or fewer good-time credits or earlier

aid was funneled directly to parents, who then endorsed the checks over to the schools of their choice).

228. *Cf.* Larson v. Valente, 456 U.S. 228, 244 (1982) ("The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another.").

229. *But see* Freedom from Religion Foundation, Inc., v. McCallum, 324 F.3d 880 (7th Cir. 2003), a case in which the Seventh Circuit upheld the constitutionality of a privately operated halfway house with a programming emphasis on Christianity. Although a parole officer could recommend that an offender request a placement in the halfway house, the officer could not mandate such a placement even if the placement were deemed to be in the offender's best interests. *Id.* at 881. In addition, a parole officer would not tender this kind of recommendation to an offender if he was not a Christian or otherwise interested in religion. *Id.* at 882. The officer also explained to the offender that the halfway house had a Christian theme, underscored that the officer's recommendation was not binding, and offered a secular alternative placement to the offender. *Id.* at 881–82.

230. Such variable treatment of prisoners because of their religious convictions or lack of such convictions would also likely render a prisoner's decision to opt for or against a housing assignment to the faith-based unit involuntary. *Cf.* McKune v. Lile, 536 U.S. 24, 38 (2002) (noting, in support of its conclusion that prison officials were not unconstitutionally compelling the prisoner-plaintiff to incriminate himself, that the prisoner's refusal to participate in the sex-offender treatment program would not extend the length of his sentence or adversely affect his eligibility for good-time credits or parole release). *See also* Sandin v. Conner, 515 U.S. 472, 487 (1995) (citing the fact that the prisoner-plaintiff's confinement in disciplinary segregation would not "inevitably affect the duration of his sentence" in support of the Court's conclusion that the confinement did not deprive the plaintiff of the "liberty" that triggers due-process safeguards).

or later parole release than their counterparts in non-faith-based units would clearly contravene the Establishment Clause.

Third, prison officials would walk on treacherous ground, and invite an Establishment Clause challenge, were they to exclude inmates of certain faiths (or no faith) from participating in a faith-based unit. The adoption and application by governmental officials of what would be, in effect, a kind of religious litmus test that must be met before inmates could be considered eligible to live in the faith-based unit would not be consonant with the neutrality principle embodied within the Establishment Clause. (Nor would a policy of exclusivity comport with the practical reality that individuals' religious and spiritual beliefs evolve and change over time and that it is not uncommon for people who adhere to one set of religious beliefs to convert to another religion.) By making adherence or nonadherence to a particular religion an entry requirement for admission into a faith-based unit, prison officials would not only be according preferential treatment to prisoners of certain faiths but would be assuming the role of religious gatekeepers, who could open or close "the gate" to the unit based on their or their surrogates' assessment of prisoners' religious scruples and convictions.

While the above three constraints on the operation of faith-based units are, in this author's opinion, core ingredients of the Establishment Clause's neutrality requirement, contracting with a private group or entity to operate such units raises other questions concerning the scope of the neutrality requirement whose answers are more difficult to discern. One of those questions is whether a request for proposals (RFP) can limit submissions to groups affiliated with certain religions. The visceral response to that question is that an RFP that essentially said, "Christians only should apply" or "Only applications from Muslim organizations are welcome" would be perceived by the "reasonable observer" as governmental favoritism towards one set of religious beliefs.[231] This overt favoritism would, at least as a general rule, clearly flout the Establishment Clause's command that the government be neutral, and take reasonable measures to appear neutral, on religious matters.

There is, however, a potential exception to this general rule. The Supreme Court has instructed that when determining whether

231. In determining whether a governmental program impermissibly endorses religion, the Supreme Court has assessed the program from the perspective of a "reasonable observer." *See, e.g.*, Zelman v. Simmons-Harris, 536 U.S. 639, 655 (2002).

governmental connections with religion impermissibly foster the "public perception" that the government is endorsing certain religious beliefs and practices, the "reasonable observer" is to be charged with an understanding of the "history and context" of the program whose constitutionality has been contested.[232] Thus, the overall context in which a faith-based unit is established and operated would need to be considered when assessing whether a predetermined decision that a unit will be a locus for Christian, Muslim, Native-American, or some other kind of religious programming violates constitutional strictures. And it might be that in some limited contexts, restricting the submission of proposals to groups that will provide services designed primarily to meet the needs of inmates of a particular faith group would not violate the Establishment Clause.

For example, assume that a state's department of corrections adopts a comprehensive religious-programming plan to accommodate the religious needs of its prisoners. As part of this plan, which will provide a continuum of services for inmates, three pilot, faith-based units will be established, one geared primarily for Native-American inmates, one for Muslim prisoners, and one for Christian inmates. These three religions represent the religions to which most inmates in the state's prison population say they adhere or in which they have expressed an interest. When viewed in isolation, the RFP for any one of these units—for example, the RFP soliciting applications to operate the Native-American unit—might appear to unconstitutionally cast the government's imprimatur on one particular religion. Yet when viewed in context, as part of the broader framework for expanding the opportunities for prisoners to exercise their religious freedom and to learn about other religious faiths, the RFP containing a faith-based criterion would signify, not a policy of religious exclusivity, but one of inclusiveness, though admittedly one in keeping with the Supreme Court's acknowledgment that prison officials need not expend (nor could they afford to expend) the resources to provide inmates of multitudinous faiths with identical religious programming opportunities.[233]

Another question concerning the meaning of the Establishment Clause's neutrality requirement is whether it is abridged when the criteria delineated in an RFP as a precondition to the dissemination of government funds can only be met by one or a small handful of the diverse array of religious sects. Once again, this

232. *Id.* (internal quotations omitted).

233. *See* Cruz v. Beto, 405 U.S. 319, 322 n.2 (1972).

question cannot be fully answered in a factual vacuum. If, for example, the RFP was drafted not to reflect the level of demand for certain kinds of religious services by prisoners, but instead to conform with the religious predilections of prison officials, a violation of the Establishment Clause would likely ensue.[234]

On the other hand, just because there may be few candidates that can currently meet an RFP's terms does necessarily mean that prison officials are violating, or even attempting to circumvent, the constitutional prohibition on governmental "establishment of religion." To the contrary, Supreme Court caselaw confirms that a governmental aid program may transmit a disproportionate amount of funds to one particular religious sect without contravening the Establishment Clause. For example, in *Zelman v. Simmons-Harris*, it was irrelevant to the Court that Catholic schools would receive the lion's share of the tuition aid funneled to private religious schools due to the simple fact that Catholics have long opted to establish, operate, and financially support parochial schools, more so than most other religions in this country.[235] Similarly, if a provider of religious services has already manifested a strong commitment to ministering to inmates and is thus more likely to respond to an RFP soliciting proposals for the operation of a faith-based unit, the likelihood that this provider may be one of only a few applicants, or perhaps the only applicant, to operate the unit would not disqualify the provider from receiving the government funds earmarked to accommodate the programming interests and preferences of the inmates who have applied for admission into the unit.

Another unanswered question concerning the meaning of the Establishment Clause's neutrality requirement in the prison context is whether the government can underwrite the costs of providing religious services to inmates in the faith-based unit, in addition to security, medical-care, and other nonsectarian services. The government might pay for the religious-programming costs in at least one of two ways—by contracting for those services with a private provider or by hiring personnel to provide those services. The question raised is an important one, because without governmental assumption of the responsibility to pay all or most of these

234. *Cf.* Williams v. Lara, 52 S.W.3d 171, 191–92 (Tex. 2001) (holding that jail's faith-based unit that sheriff directed be operated in accordance with the "orthodox Christian biblical principles" to which he subscribed violated the Establishment Clause).

235. 536 U.S. 639, 681 (2002) (Thomas, J., concurring).

programming costs, faith-based units will be a rarity in prisons across the country. Providers of religious services at this point generally do not have the resources that would enable them to pay the programming costs of operating more than a smattering of faith-based units.[236]

Individuals who contend that direct governmental funding of religious programming in faith-based units violates the Establishment Clause would undoubtedly cite the caveat repeated by the Supreme Court in some cases upholding the constitutionality of various programs in which governmental aid was transmitted to religious groups or organizations, typically religious schools—that the aid was not being used to proselytize but was being used for a secular purpose only, such as to teach children math or English.[237] By contrast, proselytization will typically be one of the hallmarks of a faith-based prison unit. Of course, the inner workings of faith-based units could be described in more banal terms in an effort to ward off an Establishment Clause challenge to their institution. For example, it could be said, and accurately so, that faith-based units are designed to enable prisoners to explore their spirituality or, conversely, their lack of spirituality and to decide for themselves the significance, if any, that religion has and will have in their lives. But this verbal sleight of hand would not alter what happens and would most likely continue to happen in faith-based units, particularly if they are to significantly further the legitimate governmental objectives for which they were established. Prisoners would be encouraged to consider what is professed to be the reality of God's, Yahweh's, Allah's, or some other Supreme Being's existence; to recognize and appreciate the depth of God's love for them; and to be transformed by their newfound understanding of their relationship with God in a way that affects, for the better, the way in which they conduct their day-to-day lives. In short, the proselytization of prisoners would be interwoven, though perhaps seamlessly, into the operation of faith-based units.

But those who would adduce from some prior Supreme Court cases an across-the-board, no-proselytization rule would be

236. Prison Fellowship has reported that it incurs $600,000 in programming costs to enable two hundred inmates to participate in the InnerChange Freedom Initiative for an eighteen-month period. *See* PRISON FELLOWSHIP, A STRATEGIC PLAN TO REDUCE CRIME THROUGH A PUBLIC-PRIVATE PARTNERSHIP TO EXPAND THE INNERCHANGE FREEDOM INITIATIVE 16 (2000).

237. *See, e.g.*, Agostini v. Felton, 521 U.S. 203, 234 (1997) (upholding program under which public school teachers provided remedial education in parochial schools, in part because the aid did not lead to "governmental indoctrination").

overlooking the unique environs in which a faith-based unit would operate—a prison. As mentioned earlier, because the government is responsible for isolating prisoners from the outside world, the government can, and in some instances must, take affirmative steps to dissipate the deleterious effects of incarceration on prisoners.[238] Thus, while the government could not normally hire chaplains to preach and otherwise minister to nonprisoners without impinging upon the Establishment Clause, the Constitution permits the government to hire chaplains, whether as employees or independent contractors, to provide religious services to inmates.[239]

If it is constitutional for the government to pay for chaplains to help meet the religious needs of prisoners, it is difficult to envision how providing prisoners with a greater range of options from which to choose when they are deciding how their own spiritual needs can best be met would betray a lack of neutrality on the part of the government on religious matters. On the contrary, one might argue that, at least sometimes, the reticence of prison officials to even explore the policy implications of expanding religious-programming options for prisoners by making faith-based units available to them reflects antipathy, not neutrality, towards religion, particularly when officials have made a concerted effort in other programming areas, such as education, vocational training, and substance-abuse treatment, to tailor those programs to meet the varied needs of prisoners.[240]

Thus, the Establishment Clause's neutrality requirement has, and must have, a different meaning in the prison context than it has outside the confines of a prison. This conclusion is certainly in keeping with the Supreme Court's declaration that "neutrality" within the meaning of another First Amendment provision, the Free Speech Clause, means something very different when the concept is being applied to restrictions on prisoners', as opposed

238. For example, prison officials must take steps to ensure that prisoners have " 'a reasonably adequate opportunity to present claimed violations of fundamental constitutional rights to the courts,' " despite their incarceration. Lewis v. Casey, 518 U.S. 343, 351 (1996) (quoting Bounds v. Smith, 430 U.S. 817, 825 (1977)).

239. *See supra* notes 138–39 and accompanying text.

240. In some circumstances, though, other considerations, such as cost and institutional-security concerns or uncertainty about the constraints the Establishment Clause places on the operation of faith-based units, might account for the failure of prison officials to delve deeply into the question whether faith-based units should be incorporated into the correctional system.

to nonprisoners', asserted right to freedom of speech.[241] In addition, this conclusion averts what would otherwise be an irreconcilable conflict in some instances between prisoners' right to exercise religious freedom and their corresponding right to be insulated from a governmental "establishment of religion."

II. RECOMMENDATIONS FOR AVERTING ESTABLISHMENT CLAUSE CHALLENGES TO FAITH-BASED PRISON UNITS

While the Establishment Clause does not pose an insuperable barrier to the establishment and operation of faith-based prison units funded in whole or large part by the government, the units will, as have other cutting-edge correctional innovations, undoubtedly spark an intense constitutional and policy debate until the units become commonplace across the country.[242] In order to avert constitutional challenges to faith-based prison units and to prevail when such challenges are mounted against the units, there are steps that correctional officials can and should take when planning and operating those units. Some of the more critically important steps are outlined below:

1. *Provide prisoners with detailed information, communicated both in writing and verbally, about the faith-based unit or units.* Prison officials may offer prisoners the option of being housed in a faith-based unit at different junctures during their period of confinement. Some correctional systems may allow prisoners to move directly into a faith-based unit from the reception center, where prisoners are processed when first entering the prison system. Other systems may restrict admission to a faith-based unit until prisoners have been incarcerated a specified period of time, have reached a defined point before their potential or expected release date from

241. *See* Thornburgh v. Abbott, 490 U.S. 401, 407, 415–16 (1989) (concluding that while governmental censorship of publications "would raise grave First Amendment concerns outside the prison context," the regulations authorizing the censorship of publications received by prisoners were "'neutral' in the technical sense in which we meant and used that term in *Turner*").

242. The "privatization" of prisons—the contracting with private companies to operate prisons—sparked a national outcry and debate in the 1980s. *See* Ira P. Robbins, *Privatization of Corrections: Defining the Issues*, 69 JUDICATURE 324, 326 (1986). By 2002, thirty-one states and the federal Bureau of Prisons reported housing inmates in privately-run correctional facilities. PAIGE M. HARRISON & ALLEN J. BECK, BUREAU OF JUST. STAT. BULL., PRISONERS IN 2002, at 6 (U.S. Dep't of Justice, 2003) (noting that private correctional facilities held 5.8% of state prisoners and 12.4% of federal prisoners at yearend 2002).

prison, or have reached some other benchmark during their incarceration.

At whatever point prisoners are offered the choice of being placed in or transferred to a faith-based unit, prison officials should explain, both verbally and in writing, the way in which the faith-based unit is structured and operates. These explanations should be in terms that are clear and understandable to prisoners, the majority of whom have deficient reading skills.[243] Among other information relayed to the prisoners, they should be apprised of the following:

- That inmates of all faiths or no faith are eligible for a placement in or transfer to a faith-based unit, as long as they meet all other eligibility criteria, such as custody level, for such a placement.
- That an inmate can be housed in a faith-based unit only if the inmate wants and requests such a placement and the inmate has confirmed that his or her decision to be placed in a faith-based unit is a voluntary one.
- That the prisoner's decision to either request or not request an assignment to a faith-based unit will have no effect on the length of time the prisoner is incarcerated, including the accumulation of good-time credits or the prisoner's parole-release date in a state in which a parole system is in place.
- That the inmate's decision to either request or not request an assignment to a faith-based unit will have no effect on the inmate's classification level (privilege status) or on the security level at which the inmate is confined.
- That the establishment and operation of the faith-based unit and the operation of non-faith-based units reflect neither an endorsement nor disapproval by the government or governmental officials of any particular kind of religion, religion in general, agnosticism, or atheism.

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243. A study conducted by the National Center for Education Statistics found that seven out of every ten inmates perform at the lowest literacy levels. KARL O. HAIGLER ET AL., U.S. DEP'T OF EDUC., LITERACY BEHIND PRISON WALLS: PROFILES OF THE PRISON POPULATION FROM THE NATIONAL ADULT LITERACY SURVEY, xviii, 17–19 (1994).

- That the faith-based unit is designed to give prisoners a greater range of options from which to choose as they determine how their spiritual needs, if any, can best be met during the period of their confinement.
- That religious programs and services will still be available to prisoners who prefer to be housed in the non-faith-based units but also wish to avail themselves of such programs and services.
- That the prisoner will not be penalized in any way if the inmate initially decides to live in a faith-based unit but later changes his or her mind.

2. *Ensure that inmates who want to be assigned to a faith-based unit sign a written form requesting this housing assignment.* If, after being provided with detailed information regarding a faith-based unit and its secular alternative or alternatives, an inmate indicates that he or she wants to be housed in a faith-based unit, the inmate should be asked to read and sign a form denominated, "Request for Assignment to a Faith-Based Unit" or words to that effect. The essential point is that the form should not be entitled a "Consent Form," a title which arguably suggests the prison officials have entreated the prisoner to agree to be transferred to the faith-based unit and the prisoner has succumbed to their overtures. Instead, the form should confirm with unmistakable clarity that after being informed about both non-faith-based and faith-based programming and housing options, it is the prisoner, not a prison official or some other third party, who is initiating the request for a placement in the faith-based unit.

The request form to be signed and dated by the inmate should attest that the inmate has been provided, both orally and in writing, with detailed information about the faith-based unit and its non-faith-based counterparts; that the inmate has had an opportunity to ask questions about those units; that the prisoner is requesting of his or her own free will to be placed in the faith-based unit; that the prisoner has not been ordered, coerced, or pressured in any way by any governmental official or any other person affiliated with the faith-based program or correctional system to request this assignment; and that no governmental official or person affiliated with the faith-based program or correctional system has recommended that the inmate tender this request. Before the inmate signs the request form, its contents should be read to the inmate, and the person who recited its provisions to the inmate

should certify to this recitation and to the fact that the inmate signed the request form in his or her presence.

3. *Adopt policies and training protocols designed to ensure that faith-based units conform with the Establishment Clause's voluntariness and neutrality requirements.* When consistent with the legitimate governmental objectives for which a faith-based unit was established, the policies that govern the administration of faith-based units should generally mirror those applied to prisoners housed elsewhere at a security level comparable to that of the faith-based unit. For example, conduct that would lead to the imposition of disciplinary sanctions on a prisoner confined in the general prison population should also evoke sanctions when the maladaptive conduct occurs in the faith-based unit. Such parallel treatment of prisoners, whether they are inside or outside the faith-based unit, will help to obviate any perceived coercive pressures on inmates to opt for a placement in a faith-based unit or, conversely, in a non-faith-based unit. Avoiding substantially dissimilar treatment of prisoners in faith- and non-faith-based units, except when the differential treatment is reasonably related to the legitimate governmental interests that the faith-based unit is intended to further, will also serve as an indicator of the government's neutrality on religious matters.

Obviously, prison officials will have to draft some additional policies that bear on the operation of what is, in effect, a specialized unit. Some supplementary policies will be especially important in advancing the goals of neutrality and noncoerciveness in the institution and operation of faith-based units, including the following: First, any policies related to the faith-based unit should include a disclaimer denoting the fact that the government's efforts, through the faith-based unit and other religious programs and services, to meet the religious needs and interests of individuals whom it has incarcerated does not signify that it is endorsing or disavowing any discrete religion, religion in general, agnosticism, or atheism.

Second, a policy statement should cite the legitimate governmental interests that are propelling the establishment of the faith-based unit. The statement might, for example, refer to the government's interest in determining, through a pilot project or series of pilot projects, the extent to which faith-based units can curb recidivism, reduce institutional-security problems, or advance the secular goals of restorative justice. The policy statement should also

refer to the government's valid interest in accommodating inmates' religious interests and needs when such accommodation does not conflict with other legitimate governmental interests, such as the preservation of institutional security. The policy statement's description of the faith-based unit's purposes should be drafted with great care to avoid any language that could be interpreted or misinterpreted as governmental endorsement of religion or of one particular religious sect.[244]

Third, a policy should specifically outline the selection criteria that a prisoner must meet in order to be admitted into the faith-based unit. The policy statement should underscore that inmates of all religions as well as nonadherents of religion can apply for admission into the unit and that affiliation or lack of affiliation with a particular religion or religious denomination is not a sine qua non for admission.[245] When there are more applicants for admission to a faith-based unit than there are available spots in the unit, the policy statement should describe the process that will be followed in determining who will be assigned to the unit. That process should be structured to ensure that an inmate's religious convictions or lack thereof do not foreclose admission into the unit.

Fourth, the policy statement should specify the circumstances that will lead to a prisoner's removal from the faith-based unit, such as commission by a prisoner of certain kinds of disciplinary infractions, or a prisoner's request for a transfer out of the unit. This portion of the policy statement should emphasize that a prisoner's agreement or disagreement with the religious tenets to which others within the unit subscribe will not be grounds for expulsion of the inmate from the unit.

4. *Limit, to the extent possible, disparities between the conditions in a non-faith-based unit and its faith-based alternative.* As discussed earlier in this Article, Supreme Court caselaw strongly suggests that conditions in a faith-based unit can differ, even significantly so, from

244. For an example of one government document containing language that might be so misinterpreted, see *TDCJ Report*, *supra* note 122, at 2 (noting that the "program components" of the faith-based unit "address the 'restorative justice' model, that is, the offender's restoring of himself to his family, his community, his victims, to himself and ultimately to God").

245. For security and other legitimate penological reasons, prison officials could, however, require that the faith-based unit be comprised of inmates from diverse faith groups. Prison officials might decide, for example, to establish a pluralistic, faith-based unit in order to avoid the creation of "affinity groups" that might challenge the authority of prison officials and jeopardize institutional security. *See* O'Lone v. Estate of Shabazz, 482 U.S. 342, 353 (1987).

those within its non-faith-based counterpart without compromising the voluntariness of a prisoner's decision to be housed or not housed in a faith-based unit. When those differences are attributable to legitimate security or other penological concerns or physical-plant variations that would be cost-prohibitive to eliminate, the differing conditions also do not signify governmental non-neutrality either for or against religion.

At the same time, palpable differences between the conditions in a non-faith-based unit and those in its faith-based alternative will likely invite Establishment Clause challenges, even though those challenges may prove non-meritorious. To ward off the filing of such lawsuits, prison officials should therefore eliminate, to the extent possible, differences between the conditions in the two kinds of units. And where it is not feasible, due to cost, security, programmatic, or other reasons, for particular conditions in a faith-based unit to correspond with those in the non-faith-based unit, prison officials should document the legitimate governmental interests that foreclose the duplication of conditions in the two units.

5. *Optimally, prison officials should contract, through a competitive bidding process, with private individuals or entities to provide religious services to prisoners in faith-based units.* The Establishment Clause clearly does not erect a *per se* bar on the hiring of employees by the government to provide religious services to inmates. Otherwise, prison chaplaincy programs across the country would be unconstitutional. In many ways, faith-based units are simply an extension of these chaplaincy programs. But instead of faith-based services being rendered to an inmate by one individual for, at most, a few hours a month, several individuals provide those services for much or most of each day.

While prison chaplaincy programs are an indicator that the Establishment Clause permits prison chaplains and perhaps other governmental employees to provide ecclesiastical or other religiously oriented services to prisoners in faith-based units in at least some circumstances, the parameters of the Establishment Clause in the prison setting are still unclear. In this uncertain constitutional climate, it might therefore be prudent for prison officials to erect a buffer between the government and the direct providers of religious services in the faith-based unit to further guard against any misperception that the faith-based unit is a mechanism for religious indoctrination by the government. One way to construct

such a barrier is to contract with private providers, whether individuals or entities, to provide religious services to inmates confined in the faith-based unit. Of course, that raises the question as to what constitute the "religious services" that should be provided, at least largely, by individuals who are not governmental employees if the effort to stave off Establishment Clause claims asserted against faith-based units is to prove successful. Since the Supreme Court has yet to fully flesh out the contours of the Establishment Clause in the correctional context, prison officials would be well-advised to err on the side of caution when resolving this question. Thus, if the encouragement of inmates to assess the decisions they have made or are making from a spiritual perspective or to apply a religious framework to some other subject is a feature of a traditionally secular program, such as life-skills training or substance-abuse treatment, it would be preferable if that program were staffed by nongovernmental employees.

6. *The operations of a faith-based unit should be monitored and evaluated to ensure compliance with the Establishment Clause's voluntariness and neutrality requirements.* Even when a prison unit is generally operating in conformance with constitutional requirements, there may be times when an individual employee engages in aberrant behavior, in contravention of prison policies, that violates the Constitution. For example, even though the humane treatment of prisoners may be an ingrained professional norm in a particular prison, a maverick correctional officer may flout this norm and batter a prisoner, in violation of the Eighth Amendment's prohibition of cruel and unusual punishments.

Because of the inevitability of human fallibility, prison officials can and should put evaluation mechanisms in place to unearth potential constitutional problems, including Establishment Clause violations, in the operation of a prison. Prison officials can, for example, monitor the grievances filed by prisoners housed in faith-based units or administer surveys to those prisoners to detect any signs of slippage in adherence to the Establishment Clause's voluntariness and neutrality requirements. The officials can then undertake ameliorative measures, such as augmented training, when needed, to avert the recurrence of isolated instances of arguably unconstitutional conduct by individuals connected with the faith-based program.

Some correctional officials might protest that the results of these monitoring and evaluation processes might be used against them in a lawsuit, providing ammunition to those who, because of their

misconstruction of the Establishment Clause or hostility towards religion, oppose the establishment of faith-based prison units. But in fact, the visible efforts of prison officials to avert violations of the Establishment Clause and to ferret out violations of that constitutional provision should provide tangible evidence of the government's compliance with the Establishment Clause's neutrality requirement, serving as a manifestation of the government's commitment to both being and appearing neutral with regard to an inmate's decision whether to be housed in a non-faith-based or faith-based unit. In addition, these and other evaluation mechanisms can be helpful in identifying and eradicating coercive pressures that some prisoners may perceive are being exerted on them to request a placement in a faith-based unit. This overt governmental responsiveness in quelling such coercive pressures should itself reaffirm to prisoners that their decision to be housed in a faith-based unit must be voluntary, as they were indeed told when being apprised of their non-faith-based and faith-based housing options. In short, these evaluation processes should, if constructed appropriately, avert lawsuits alleging that prisoners are being coerced into choosing an assignment to a faith-based unit.

III. CONCLUSION

In a long line of Supreme Court cases, the Court has consistently interpreted the rights of prisoners differently from those of nonprisoners. Mindful of the daunting challenges prison officials face in operating a prison safely and securely and of the difficulty of achieving the crime-control objectives of incarceration, the Court in the past has almost obsequiously deferred to the judgment of prison officials regarding the permissible encroachments on what, outside the prison context, would be constitutional rights. Prison officials can, for example, forbid prisoners from corresponding or meeting with certain persons,[246] can censor what prisoners read,[247] and can prohibit them from attending a worship service that conflicts with institutional security or other penological needs.[248] At the same time, because the government is responsible for having iso-

246. Shaw v. Murphy, 532 U.S. 223, 231 (2001); Kentucky Dep't of Corrections v. Thompson, 490 U.S. 454, 460 (1989); Turner v. Safley, 482 U.S. 78, 93 (1987).

247. Thornburgh v. Abbott, 490 U.S. 401, 419 (1989).

248. O'Lone v. Estate of Shabazz, 482 U.S. 342, 353 (1987).

lated prisoners from the outside world, governmental officials can take steps to dissipate the effects of that isolation that they could not take constitutionally outside the correctional realm. For example, prison officials can hire chaplains to meet the spiritual needs of prisoners even though the Establishment Clause would generally, though not always, bar government-paid chaplaincy services in the free world.

It is against this backdrop that the constitutionality of faith-based prison units must be assessed. The Supreme Court has stated unequivocally that courts are to apply the *Turner* test when adjudicating any prisoner's claim that impedes "the needs of prison administration."[249] Faith-based units clearly implicate, or to invoke the nomenclature of the *Turner* test, have a "rational connection" to,[250] such needs, including the need to achieve incarceration's crime-control objectives, to preserve institutional security, to further the aims of restorative justice, and to accommodate prisoners' right to religious freedom and their religious needs in a way that reflects the diversity of those needs. And, as is usually the case when courts apply the *Turner* test to a prisoner's constitutional claim, faith-based units pass constitutional muster under this test.

Applying the *Turner* test in its original form to prisoners' Establishment Clause claims would, however, largely eviscerate its core purposes—to protect religious liberty and prohibit governmentally ordained religious orthodoxy. For example, the *Turner* test would condone compelling prisoners to meet with a minister or rabbi, read the Bible or Koran, attend congregate worship services, or live in a faith-based unit if such activities could be rationally linked to the government's interests in abating crime or in making prisons safer and more secure. Yet such propulsion of prisoners into religious activities prescribed by prison officials would seem to be a paradigmatic example of the governmental "establishment of religion" proscribed by the First Amendment.

The *Turner* test therefore needs to be somewhat amplified in the Establishment Clause context to avert the subversion of that constitutional provision's core purposes. Specifically, a voluntariness requirement and a neutrality requirement need to be added to the basic constitutional framework. Under this approach, a kind of "*Turner* test with teeth," governmental funding of religious services and programs for prisoners, whether rendered inside or outside a

249. Washington v. Harper, 494 U.S. 210, 224 (1990).
250. *Turner*, 482 U.S. at 89.

faith-based unit, is constitutional if three requirements are met: one, the monetary outlays are reasonably related to the furtherance of a legitimate governmental interest; two, a prisoner's receipt of those services or participation in those programs is the result of his or her own voluntary choice; and three, the funding program, when viewed from the perspective of a reasonable person with an awareness of the overall context in which the funding program has been implemented, manifests neutrality between religion and irreligion and between various religious sects.

To add still further requirements to the list of those that must be met when a prisoner asserts an Establishment Clause claim, however, would effectively establish a constitutional hierarchy under which the right protected by the Establishment Clause is at the apex. According such preferential treatment to the Establishment Clause would not be in keeping with the deferential norm that has been the consistent trademark of Supreme Court caselaw on prisoners' rights for the past three decades. In addition, applying a significantly different and more rigorous constitutional standard to prisoners' Establishment Clause claims, as compared to their claims grounded on the Free Exercise Clause, would result in a paradoxical disequilibrium between the two constitutional provisions: prison officials would be granted great leeway when their actions restrict inmates' exercise of their religious beliefs, but prison officials' discretion would be narrowly constrained when their actions would facilitate inmates' exercise of their religious beliefs. The end and ironical result would be a constitutional double standard—the very antithesis of the governmental neutrality on religious matters that the Establishment Clause demands.