

January 2011

Prison Ain't Hell: An Interview with the Son of Sam—David Berkowitz, and Why State-Funded Faith-Based Prison Rehabilitation Programs Do Not Violate the Establishment Clause

Rebekah Binger
Pace University School of Law, rbinger@law.pace.edu

Follow this and additional works at: <http://digitalcommons.pace.edu/plr>

 Part of the [Law Enforcement and Corrections Commons](#), and the [Religion Law Commons](#)

Recommended Citation

Rebekah Binger, *Prison Ain't Hell: An Interview with the Son of Sam—David Berkowitz, and Why State-Funded Faith-Based Prison Rehabilitation Programs Do Not Violate the Establishment Clause*, 31 *Pace L. Rev.* 488 (2011)

Available at: <http://digitalcommons.pace.edu/plr/vol31/iss1/10>

Prison Ain't Hell: An Interview with the Son of Sam—David Berkowitz, and Why State-Funded Faith-Based Prison Rehabilitation Programs Do Not Violate the Establishment Clause

Rebekah Binger*

I. Introduction

A short while ago I returned to my prison cell after attending this evening's Bible study class. . . . [During the class] about twenty of us sat in a circle in the chapel, and as I scanned the faces of these men – a mix of different races, backgrounds and nationalities – I found my heart bursting with love and hope. Now this may sound foolish to many, but as I looked at this collection of convicted felons, I saw the reality of God's grace to mankind. . . . I saw men who've been rescued from the road to destruction. They've been redeemed by the blood of Jesus Christ, and saved from the fires of an eternal hell. . . . Society, of course, may only see them as a group of criminals who've become "religious." But I believe the Almighty God sees them as His children.¹

* J.D. candidate 2011, Pace University School of Law Presidential Scholar; B.A. 2008, Pace University Prorzheimer Honors College summa cum laude. The author wishes to thank David Berkowitz, the Binger family, Stephen A. Blake, and the Editors and members of the Pace Law Review for their support and assistance with this Article.

1. David Berkowitz, *A Mix of Men*, ARISEANDSHINE.ORG (Feb. 12, 2008), <http://ariseandshine.org/February%202008.html>.

It will likely come as a shock to many that the soft, eloquent words above flowed from the pen of notorious serial killer David Berkowitz, popularly known as the Son of Sam. Most remember the infamous .44 caliber killer for his more ominous past statements, like those found in a handwritten letter from April 1977 left at a double murder scene in the Bronx, New York.² Reading in part: “I am the ‘Son of Sam’. . . . I love to hunt. Prowling the streets looking for fair game — tasty meat. . . . I’ll be back. I’ll be back. . . . [B]ang, bang, bang . . . Yours in murder, Mr. Monster.”³

Undoubtedly, the majority of Americans, especially those living in New York and its surrounding neighborhoods, still picture Berkowitz as a monster responsible for the brutal murders of six innocent people and the injuring of seven others—a monster that terrorized an entire city for close to a year.⁴ In reality, however, Berkowitz—or Brother David as he is known amongst friends in the Christian community—has spent the last twenty plus years taming the monster that once consumed him, a monster which he claims drove him to kill.⁵ In writing this article, I corresponded with Berkowitz over a period of several months, including visits with him at Sullivan Correctional Facility (“Sullivan Correctional”), his home for the past twenty-two years.⁶ The maximum-security prison, located

2. Police found the letter on April 17, 1977 while investigating the scene after the fatal shootings of Alexander Esau, 20, and Valentina Suriani, 18.

3. *Serial Killer Profile: David Berkowitz*, TRUE LIFE CRIMES, http://www.truelifecrimes.com/david_berkowitz.html (last visited Oct. 18, 2010). A police officer discovered a hand-written letter, addressed to then NYPD Captain Joseph Borrelli. Berkowitz used mostly capital, and some lower-case letters.

4. Shortly following his arrest, Berkowitz plead guilty to all six murders and was sentenced to six life sentences in prison, making his maximum term 365 years. Later, he claimed that he did not act alone, rather that other members of a satanic cult in which he participated masterminded and even carried out some of the murders he plead guilty to committing. While Berkowitz’s evidence regarding other assailants did cause then Queens County District Attorney John Santucci to reopen the case. To date, no other arrests have been made in connection with the killings. See TERRY MAURY, *THE ULTIMATE EVIL* (1988).

5. Interview with David Berkowitz, in Fallsburg, N.Y. (Jan. 14, 2009) (on file with author).

6. After his arrest on August 10, 1977, the state placed Berkowitz in the

in the foothills of the Catskill Mountains in Fallsburg, New York, also served as the setting of Berkowitz's conversion to Christianity and subsequent internal transformation.⁷

At the outset, it is important to note that this article aims to analyze the constitutionality of faith-based rehabilitation programs in prison as they relate to the Establishment Clause of the United States Constitution. During his time in prison, Berkowitz's participation in faith-based programs consisted mainly of Bible studies and chapel services, and not those generally called into question by civil liberties groups. Therefore, although similar, Berkowitz's experience with religious programs in prison does not sit on all fours with the types of programs evaluated below. Still, Berkowitz's undeniable account of transformation behind bars from what many consider the "ultimate evil,"⁸ to a mild-mannered, well-liked member of the prison population, and positive contributor to outside society, serves as the perfect lens through which one should view the debate over what place religion ought to hold in the American prison system.

Part II narrates Berkowitz's metamorphosis from the Son of Sam to his preferred moniker, the Son of Hope, and the role faith-related prison programs played in this dramatic transformation. Part III offers a brief overview of the theories of punishment drawn upon in American jurisprudence. Part IV outlines the current controversy over the constitutionality of long-term, faith-based, rehabilitation programs in prisons, both

psychiatric ward of Kings County Hospital in Brooklyn, N.Y. About a year later he moved to Clinton Correctional Facility in Dannemora, N.Y., before a four-month stay at the Central New York Psychiatric Center in Marcy, N.Y. In 1978, Berkowitz became an inmate at Attica Correctional Facility, in Attica, N.Y., notorious for a prison riot that claimed the lives of at least 40 people (inmates and guards alike) just seven years prior to Berkowitz's entry. He went back to Clinton Correctional Facility for seven years before coming to Sullivan Correctional Facility in Fallsburg, N.Y. in December 1987, where he remains incarcerated today.

7. Interview with David Berkowitz, *supra* note 5.

8. In 1988, investigative journalist Terry Maury published *The Ultimate Evil: An Investigation into America's Most Dangerous Satanic Cult*, a book that disclosed uncovered evidence that Maury argues strongly support the idea that a violent offshoot of the Process Church was responsible for the Son of Sam murders and many other crimes.

federal and state, with a close look at the program struck down by the Eighth Circuit in *Americans United for Separation of Church & State v. Prison Fellowship Ministries*.⁹ This part will examine the original purpose of the Establishment Clause, as well as how faith-based programs fair under current constitutional frameworks. Lastly, Part V will set forth the reasons why critics of these programs are wrong and why it makes the most sense, and serves the most public good, to continue the growth of faith-based rehabilitation programs on both a statewide and national scale.

II. Berkowitz's Story

I did not know what to expect as a guard led me through several double-steel doors and barbed wire encased outer walkways to the visitor's room at Sullivan Correctional. Living in Westchester County, many members of the baby-boomer generation had shared with me in great detail their memories of David Berkowitz. One couple, now in their mid-fifties, vividly recounted the total panic that captured the community and how it interfered with their initial courtship. They avoided spending time outside or in the car together, for fear of becoming his next victims.¹⁰ They told their tale as if it happened yesterday, with panic still fresh on their faces. These accounts, juxtaposed against reports of his dramatic conversion, filled my head as I waited for Berkowitz in a non-descript cafeteria-like room. My mind wondered as I waited. What if they wheeled him out like Anthony Hopkins in *Silence of the Lamb*, complete with muzzle and straightjacket? Or what if he had deranged eyes and a prison-yard tattoo on his forehead like Charles Manson?

Instead, and in an almost anti-climactic fashion, Berkowitz greeted me with open arms and a jovial smile. "Hi Becky!" he

9. 509 F.3d 406 (8th Cir. 2007) [hereinafter *Ams. United II*].

10. The police and news media at the time profiled the at-large killer as targeting young women with long, dark hair and/or young couples parked in cars.

exclaimed; “What a blessing to finally meet you.”¹¹ He more resembled a retired police officer than a former serial killer: husky, with a shaved-down head and neat mustache, dressed in a yellow polo shirt and olive green pants.¹² I observed his most notable features: piercing sky blue eyes and a six-inch long scar across the left side of his neck. During the course of our meetings, and throughout our correspondence, Berkowitz shared with me his compelling journey from the greatly feared Son of Sam, to a self-proclaimed Son of Hope.¹³

A. *Early Life*

David Berkowitz told me that from an early age he felt a cloud of darkness hovering over his life, constantly pulling on him. “When I was little, like five or six, I used to just lay under my bed in the dark,”¹⁴ he said. “Even as a child I had this fascination with death.”¹⁵ Born Richard David Falco, Nathan and Pearl Berkowitz of the Bronx adopted him at birth and switched the order of his first and middle name.¹⁶ At age five, Berkowitz’s parents told him about the adoption.¹⁷ Acting on the advice of psychologists, they told him that his mother had died during childbirth, and that his father could not care for him alone, causing him to give him up for adoption.¹⁸ In reality, his mother, Betty Broder, was very much alive and had conceived Berkowitz with married Brooklyn businessman Joseph Kleinman after her husband, Anthony Falco, had left her.¹⁹ Broder served as Kleinman’s longtime mistress, and he encouraged her to give the baby up for adoption.²⁰ Berkowitz

11. Interview with David Berkowitz, *supra* note 5.

12. Inmates at Sullivan Correctional must wear green clothing as mandated by the prison uniform.

13. See 1 DAVID BERKOWITZ, SON OF HOPE: THE PRISON JOURNALS OF DAVID BERKOWITZ (2006).

14. Interview with David Berkowitz, *supra* note 5.

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.*

now says that he thinks he would have been better off knowing the harsh truth.²¹ “I felt so guilty my whole young life about my mom dying. That it was my fault,” Berkowitz painfully told me.²² “I acted out all the time and was very spiteful to my adoptive parents, even thought they treated me with so much love.”²³ He said that the public school he attended made him meet with a psychologist, but that the meetings did not help him, and he still had “suicidal impulses.”²⁴

Berkowitz’s adoptive mother died from breast cancer when he was thirteen, a loss he still has great difficulty dealing with.²⁵ His father worked six days a week at a local hardware store he owned in their Bronx neighborhood.²⁶ “I was basically a latchkey kid,” Berkowitz said.²⁷ He joined the United States Army in 1971, after graduating high school, and served on active duty until his honorable discharge in 1974.²⁸ During his service, he patrolled the Demilitarized Zone in South Korea and did not engage in any combat.²⁹ In 1974, Berkowitz located his birth mother and she disclosed to him the story of his illegitimate birth.³⁰ Despite the reunion, Berkowitz said he felt alone and downtrodden back in New York City.³¹ “[A]ll my friends [that I knew before entering the military] had either married or moved away,” he said.³² He worked as a night security guard at a warehouse along the Hudson River and became involved with a group of friends he claims were members of the occult.³³ He also began to set fires around New York City, and delved deeply into satanic rituals.³⁴

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.*

32. BERKOWITZ, *supra* note 13, at 2.

33. *Id.*

34. Colin Moynihan & Sewell Chan, *Recalling a City in Fear During the*

B. *The Murders*

David Berkowitz does not like to discuss the crimes for which he sits behind bars. “It’s painful to be reminded of my past deeds and crimes. It tears me apart,” he told me.³⁵ The facts remain that between July 1976 and July 1977, police linked the murders of six people and the injuring of seven others in the New York City area to Berkowitz.³⁶ The search for the serial killer, who taunted police and the press with apocalyptic letters, was “the biggest police manhunt in the city’s history,”³⁷ and still very much remembered by many Americans today.

The year-long killing spree turned New York City and its surrounding areas upside down with fear. “Some women wore wigs or hats to deter the killer, who was said to target those with long, dark hair. Young people avoided quiet streets and remote byways, where several victims had been shot while sitting in cars.”³⁸ Police eventually identified Berkowitz as the killer and tracked him down by way of a traffic ticket.³⁹ He quickly pled guilty to all of the murders.⁴⁰ His sentence: six consecutive twenty-five years to life sentences, totaling more than 300 years incarceration.⁴¹

Year of ‘Son of Sam’, N.Y. TIMES, Aug. 7, 2007, at B2, available at http://topics.nytimes.com/topics/reference/timestopics/people/b/david_berkowitz/index.html (Louis B. Schlesinger, a professor of forensic psychology at John Jay, contends that Berkowitz set nearly 1,500 fires in his life).

35. Interview with David Berkowitz, *supra* note 5.

36. Moynihan & Chan, *supra* note 34.

37. Sam Roberts, *1977, Summer of Paranoia; Spike Lee’s New Film Evokes Not Just the Son of Sam Killings, But the City’s State of Mind*, N.Y. TIMES, July 1, 1999, at E1, available at <http://www.nytimes.com/1999/07/01/movies/1977-summer-paranoia-spike-lee-s-new-film-evokes-not-just-son-sam-killings-but.html>.

38. Moynihan & Chan, *supra* note 34.

39. *Id.*

40. Interview by Larry King, Host of *Larry King Live*, with David Berkowitz, in Fallsburg, N.Y. (Oct. 26, 2002), transcript available at <http://transcripts.cnn.com/TRANSCRIPTS/0210/26/klw.00.html>.

41. *Id.*

C. *Prison*

David Berkowitz entered prison in 1978.⁴² Guards placed him under twenty-four-hour observation at Clinton Correctional Facility, before psychologists diagnosed him criminally insane and transferred him to the Central New York Psychiatric Center.⁴³ Soon after, Berkowitz was moved to the notorious Attica Correctional Facility (“Attica”).⁴⁴ While at Attica, then prison guard Robert Alexander spent many hours with Berkowitz, whom he labeled a “troubled soul.”⁴⁵ “He had pornography all over his cell,”⁴⁶ Alexander recalled during a radio interview for Dr. James Dobson’s national *Focus on the Family* broadcast.⁴⁷ “Sometimes he got to the point where he was howling at night.”⁴⁸ Alexander said Berkowitz used to show him letters that he received from occult members, supposedly written with blood of sacrificed babies.⁴⁹ “We used to call him ‘David Berzerk-owitz,’” Alexander said.⁵⁰

Berkowitz admits he experienced the tremendous difficulty transitioning to life in prison. “It was a cruel, cold, and often emotionally detached world in which . . . many of the men would prey on one another,”⁵¹ he wrote me. “I would listen to a lot of music on my little Walkman cassette player, mostly to escape the endless noise of screams and shouting.”⁵² He also went in and out of deep depression and frequently

42. Interview with David Berkowitz, *supra* note 5.

43. Written interview with David Berkowitz, from Fallsburg, N.Y. (Nov. 17, 2009) (on file with author).

44. *Id.*

45. *David Berkowitz: Son of Hope 3* (Focus on the Family broadcast May 29, 2009), available at http://www.focusonthefamily.com/popups/media_player.aspx?MediaId=%7BF403C1A-574C-4FC8-A585-9B8FAD70677E%7D.

46. *Id.*

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.*

51. Written Interview with David Berkowitz, *supra* note 43.

52. *Id.*

contemplated suicide.⁵³ In 1979, another inmate attempted to kill Berkowitz by sticking him in the neck with a razor, explaining the large scar on the left side of his neck.⁵⁴ Prison doctors said the blade came less than an inch from piercing a major artery and killing Berkowitz.⁵⁵

After almost three years in Attica, Berkowitz received a punishment of ninety days in “The Box” for fighting.⁵⁶ He then moved back to Clinton Correctional.⁵⁷ There, he stayed in the Assessment Preparation Program Unit, a unit designated for offenders who officials consider victim-prone in prison.⁵⁸ In 1987, Berkowitz transferred to Sullivan Correctional, his home for the last twenty-two years.⁵⁹

D. *Finding Faith*

In his published “testimony,”⁶⁰ Berkowitz writes of his change from Satan worshiper to born again Christian:

Ten years into my prison sentence, when I was feeling despondent and without hope, another inmate came up to me as I was walking the prison yard one winter’s evening. He introduced himself and began to tell me that

53. *Id.*

54. Interview with David Berkowitz, *supra* note 5.

55. See *David Berkowitz: Son of Hope 1* (Focus on the Family broadcast May 27, 2009), available at http://www.focusonthefamily.com/popups/media_player.aspx?MediaId=%7B5ABF6766-5D93-4FEF-9F13-172F4606D8F8%7D.

56. Written Interview with David Berkowitz, *supra* note 43.

57. *Id.*

58. See *Program Services - Substance Abuse Treatment Services*, N.Y. ST. DEPT OF CORR. SERVS., <http://www.docs.state.ny.us/ProgramServices/substanceabuse.html#appu> (last visited Oct. 18 2010).

59. Written Interview with David Berkowitz, *supra* note 43.

60. In the Christian faith, a “testimony” is a person’s recitation of how they came to accept and believe in Jesus Christ as their Lord and Savior and consequently become “born again.” Since its release in 1999, more than 500,000 copies of his David Berkowitz’s testimony pamphlet have been printed in English and another 100,000 copies printed in Spanish.

Jesus Christ loved me and wanted to forgive me. . . . I wanted to mock him because I did not think that God would ever forgive me or that He would want anything to do with me. Still, this man persisted. . . . He gave me a Gideon Pocket Testament and asked me to read the Psalms. . . . One night I was reading Psalm 34. I came upon the 6th verse which says, "This poor man cried, and the Lord heard him, and saved him out of all his troubles." It was at this moment, in 1987, that I began to pour my heart to God. . . . Late that night in my cold cell I got down on my knees and began to cry to Jesus. I told him that I was sick and tired of doing evil. I asked Jesus to forgive me for all my sins. . . . When I got up it felt as if a heavy but invisible chain that had been around me for so many years was broken. A peace flooded over me. I did not understand what was happening. In my head I just knew that somehow my life was going to be different.⁶¹

While Berkowitz's circumstances did not change after the night he cried out to Jesus for forgiveness—he remained in prison with no real chance of ever getting out—his behavior changed dramatically.⁶² Berkowitz began to attend "all the services and Bible studies that were being offered in the chapel."⁶³ There, he met and befriended inmates with similar dark pasts also seeking a higher power in their quests to become better men.⁶⁴ "I also began to read my Bible regularly and eagerly. I found a lot of hope and encouragement within its pages,"⁶⁵ he wrote me. "It was if I had lived all my life wearing a blindfold over my eyes, and now the blindfold was suddenly

61. David Berkowitz, *Son of Hope*, MOMENTS WITH THE BOOK, <http://www.mwtb.org/pages/display.php?id=201330> (last visited Nov. 3, 2010).

62. *Id.*

63. Written Interview with David Berkowitz, *supra* note 43.

64. *Id.*

65. *Id.*

removed so that I could see.”⁶⁶ He told me he believes that if he did not find faith when he did, he would have eventually taken his own life.⁶⁷

David Berkowitz’s transformation did not dissipate quickly as many predicted, but rather, it remains constant through today. “Before I used to act out. I was considered wild, crazy. People were afraid of me. Now, today, 30 years later, I’m like a trustee in the prison,”⁶⁸ he said. “I’ve become the proverbial ‘model inmate.’”⁶⁹ Even former prison guard Robert Alexander, now a town court Judge in upstate New York, who nicknamed him “Berzerk-owitz,” admits he sees a legitimate one-hundred and eighty degree change in the former serial killer’s life.⁷⁰ After seeing Berkowitz tell of his transformation in a 1999 *Larry King Live* interview, a skeptical Alexander visited him at Sullivan Correctional.⁷¹ “Where once there was so much evil, where once there was so much hate, this tormented soul now had peace,”⁷² Alexander said after his visit with Berkowitz.

E. Faith-Based Programs

Upon his finding of faith, David Berkowitz became heavily immersed in the Christian community at Sullivan Correctional.⁷³ To Berkowitz, this meant attending chapel services and programming, as well as Bible studies offered at the prison.⁷⁴ Today, Berkowitz is an elder at the prison chapel and sometimes leads the services there.⁷⁵ In the course of his participation in these programs, Berkowitz began to form

66. *Id.*

67. Interview with David Berkowitz, *supra* note 5.

68. Interview with David Berkowitz, *supra* note 5. Berkowitz further explained that by “trustee” he meant he is trusted in the prison community by inmates and guards alike and maintains a certain level of responsibility in the Chapel, as well as in his work with disabled inmates.

69. Written Interview with David Berkowitz, *supra* note 43.

70. *Son of Hope 3*, *supra* note 45.

71. *Id.*

72. *Id.*

73. Written Interview with David Berkowitz, *supra* note 43.

74. *Id.*

75. Interview with David Berkowitz, *supra* note 5.

bonds with other inmates and develop a sense of community.⁷⁶ “[T]hrough the religious programs that are offered, a man has a sense of belonging to a church, to a larger spiritual community which encompasses the world. Now the sense of confinement having to be in prison is not as suffocating,”⁷⁷ Berkowitz said.

Berkowitz believes that faith-based rehabilitation programs in prison can radically change the course of an inmate’s life, as they have his.⁷⁸ “The prison should offer any program that gives a man or woman hope and a way to look at life differently now than they did selfishly in the past,”⁷⁹ he said. “They change a person morally and encourage someone’s character to change for the better.”⁸⁰ For those who will get out of prison, Berkowitz speculated that they would turn away from their lives of crime because of what they learned from the programs.⁸¹ “It helps with self-discipline, personal responsibility, respect for the lives and property of others.”⁸² Likewise, for someone who will never go back to ordinary society, like Berkowitz, the transformation can turn him or her from a “problem” into a contributing inmate. “For a person doing life in prison, it changes one’s outlook. It gives them hope, a reason to get up in the morning,”⁸³ Berkowitz said.

For Berkowitz personally, the faith-based programs at Sullivan Correctional helped him work through issues he had battled his entire life. “Overall, my participation in the various religious programs which are offered here has helped me to control my anger,”⁸⁴ he told me. Berkowitz completed a two-part Quaker-run program called “Alternatives to Violence.”⁸⁵ “I

76. Written Interview with David Berkowitz, *supra* note 43.

77. *Id.*

78. *Id.*

79. Interview with David Berkowitz, *supra* note 5.

80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.*

84. Written Interview with David Berkowitz, *supra* note 43.

85. Both programs last for three days and upon successful completion an inmate is awarded a certificate. See *Program Services - Ministerial, Family and Volunteer Services*, N.Y. ST. DEP’T OF CORR. SERVS, <http://www.docs.state.ny.us/ProgramServices/ministerial.html#volunteer> (last

have long since stopped being the occasional disciplinary problem that I once was. I am no longer assaultive like I was during the first approximately ten years of my prison sentence,” he said.⁸⁶ “My personal prison cell epiphany experience of some twenty plus years ago, plus the daily encouragement provided by the chapel services and Bible studies has resulted in changes that have been dramatic and prolonged. And both the prison’s staff as well as my fellow inmates have noticed these changes.”⁸⁷ During my second visit, a prison guard who wished to remain anonymous told me that Berkowitz has long since stopped being a disruption at the prison, and is known as someone who keeps to himself and spends most of his time in the chapel.⁸⁸

Faith-based programs provide an escape from the every day dreadfulness of life in prison. “The chapel setting provided me with positive encounters as opposed to the general atmosphere of gloom, anger and negativity which permeates much of the prison,”⁸⁹ Berkowitz explained. While many may not believe inmates deserve any such escape in light of the crimes they committed to warrant their incarceration, such positive encounters are necessary for rehabilitation. Certainly, society should not deny a man who desires to change for the better the opportunity to do so. “We’re all tired of crime and hurting others. Tired of being failures in the eyes of society,”⁹⁰ Berkowitz said about other inmates he encountered at these religious meetings. He said that on occasion, former inmates who participated in the faith-based programs would return to visit the prison and share their stories of change and rehabilitation, and how they went “from crime to Christ.”⁹¹ “For prisoners like me, all forms of Bible studies plus related faith-based programs have been instrumental in allowing our spirituality to develop as well as becoming better, although not

visited Oct. 18, 2010).

86. Written Interview with David Berkowitz, *supra* note 43.

87. *Id.*

88. Interview on file with author.

89. Written Interview with David Berkowitz, *supra* note 43.

90. Interview with David Berkowitz, *supra* note 5.

91. Written Interview with David Berkowitz, *supra* note 43.

perfect, men.”⁹²

F. *Going Forward*

Today, at fifty-seven years old, David Berkowitz claims to be a changed man, unrecognizable in personality from the notorious cold-blooded killer of the 1970s.⁹³ He spends his days behind bars reaching out to others. “Unbeknownst to the general public, I do a lot of good here,”⁹⁴ Berkowitz told me. He works in the Intermediate Care Program (“ICP”),⁹⁵ where he assists mentally ill inmates dealing with alcohol and substance abuse problems.⁹⁶ He also acts as a peer counselor to these men.⁹⁷ In addition, Berkowitz stays very busy corresponding with people across the United States and the world. He receives approximately eighty to one hundred letters a month, mostly from those who have heard his Christian testimony.⁹⁸ From his cell, Berkowitz participates in several Christian outreach ministries by sharing his story of dramatic personal renovation.⁹⁹ He is featured in a video entitled “The Choice is Yours” alongside youth from well-known faith-based drug rehabilitation program Teen Challenge.¹⁰⁰ The video is used to target at risk youth. It was recently shown to such individuals in a Chicago, Illinois housing projects by community

92. *Id.* “In the chapel setting and through Bible studies we learn to be better people,” Berkowitz said to me.

93. Interview with David Berkowitz, *supra* note 5.

94. *Id.*

95. According to the New York State Department of Corrections, ICP is a modified Alcohol and Substance Abuse Treatment Program (“ASAT”) designed to meet the substance abuse treatment needs of inmates who have co-occurring mental health and chemical abuse disorders. The ASAT competencies are combined with the ICP core curriculum to meet the special substance abuse treatment considerations of the mentally ill inmate. *Substance Abuse Treatment Services*, N.Y. ST. DEPT OF CORR. SERVS., <http://www.docs.state.ny.us/ProgramServices/substanceabuse.html#mica2> (last visited Oct. 16, 2010).

96. Interview with David Berkowitz, *supra* note 5.

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.*

organization Just Released Ministries.¹⁰¹

Despite his many strides forward, Berkowitz admits to occasional battles with depression and great remorse over his past sins.¹⁰² “I wish there was somehow I could erase all of that. I wish to dear God it never happened,”¹⁰³ he said to me with pain in his voice. In addition to this ever present internal reminder, Berkowitz is often brought back to the summer of 1977 by the media who, more than thirty years later, are still fascinated by his crime spree and follow his every move.¹⁰⁴

In 2007, Berkowitz issued a public apology for his crimes.¹⁰⁵ Berkowitz said he prays daily for those he injured and the families of those he killed.¹⁰⁶ Surprisingly, forgiveness

101. *Id.*

102. *Id.*

103. *Id.*

104. See *OUT OF THE DARKNESS* (CBS Films 1985); *SON OF SAM* (Lionsgate 2008); *SUMMER OF SAM* (Touchstone Pictures 1999); *The Bronx is Burning* (ESPN Television 2007). Also see ariseandshine.org for a list of interviews given by David Berkowitz.

105. David Berkowitz’s public apology as found on his web site ariseandshine.org (2007). It reads:

As I have communicated many times throughout the years, I am deeply sorry for the pain, suffering and sorrow I have brought upon the victims of my crimes. I grieve for those who are wounded, and for the family members of those who lost a loved one because of my selfish actions. I regret what I've done and I'm haunted by it.

Not a day goes by that I do not think about the suffering I have brought to so many. Likewise I cannot even comprehend all the grief and pain they live with now. And these individuals have every right to be angry with me, too.

Nevertheless, I apologize for the crimes I committed. My continual prayer is that, as much as is possible, these hurting individuals can go on with their lives.

In addition, I am not writing this apology for pity or sympathy. I simply believe that such an apology is the right thing to do. And, by the grace of God, I hope to do my very best to make amends whenever and wherever possible, both to society, and to my victims.

ARISEANDSHINE.ORG, <http://www.ariseandshine.org/David's-Apology.html> (last visited Oct. 16, 2010).

106. Interview with David Berkowitz, *supra* note 5.

did eventually come to him from Neysa Moskowitz, the mother of his last victim, Stacey Moskowitz.¹⁰⁷ All the same, his faith and practice of Christianity keeps him going. “For it is an inner hope which is not based on circumstances. Rather it is based on my faith in God who, even now, I believe is using my life for a good purpose,”¹⁰⁸ Berkowitz told me.

The structure of his sentencing makes Berkowitz eligible for parole every two years. In March 2002, he sent a letter to then New York Governor George Pataki stating that he did not wish to be released at that time.¹⁰⁹ The letter read in part: “In all honesty, I believe that I deserve to be in prison for the rest of my life. I have, with God’s help, long ago come to terms with my situation and I have accepted my punishment.”¹¹⁰ Two years later, Berkowitz was denied a second parole hearing after he stated that he did not want one.¹¹¹ According to records, the parole board recognized Berkowitz’s good record in the prison programs, but nonetheless decided that the brutality of his crimes called for him to remain imprisoned.¹¹² The board, once again, denied parole in June 2006, on similar grounds, with Berkowitz not in attendance at the hearing.¹¹³ Berkowitz told me that he is unsure as to whether or not he will attend his next parole hearing.¹¹⁴

III. Theories of Punishment

The surprising behind bars transformation story of David

107. See ‘*Son Of Sam*’ Serial Killer Finds Salvation, TAPH.COM (May 16, 2007), <http://www.taph.com/serial-killers/son-of-sam-serial-killer-finds-salvation-2.html>.

108. Written Interview with David Berkowitz, *supra* note 43.

109. *Son of Hope 3*, *supra* note 45.

110. *David Berkowitz Denied Parole*, N.Y. TIMES, July 10, 2002, available at <http://www.nytimes.com/2002/07/10/nyregion/metro-briefing-new-york-albany-david-berkowitz-denied-parole.html>.

111. Bootie Cosgrove-Mather, *No Parole For ‘Son Of Sam’ Killer*, CBS NEWS.COM (June 11, 2004), available at <http://www.cbsnews.com/stories/2004/06/11/national/main622733.shtml>.

112. *Id.*

113. *Son of Hope 3*, *supra* note 45.

114. Interview with David Berkowitz, *supra* note 5.

Berkowitz—Satan worshipping serial killer, turned Christian counselor—compels one to take a closer look at the reasons underpinning state or federal run punishment of criminals in the United States. An examination of the varying theories of punishment drawn upon in American jurisprudence will shed some light on how Berkowitz's tale is possible, and whether or not it constitutes a success or waste of prison resources. The varying theories of punishment fall under two general philosophies: utilitarian and retributive.¹¹⁵ The utilitarian approach looks forward in time and seeks to punish offenders as a means to discourage or deter future wrongdoing.¹¹⁶ The retributive philosophy, on the other hand, seeks to punish offenders simply because they deserve to be punished.¹¹⁷

Arising in the 18th century, utilitarianism originally addressed social policy as a basis for penal reform and legislation.¹¹⁸ Under this philosophy, laws should operate to maximize the happiness of society as a whole.¹¹⁹ Thus, because crime and punishment are not consistent with happiness, both should be used as little as possible.¹²⁰ Since utilitarians understand that a crime-free society does not exist in reality, they attempt to exact only as much punishment as is required to prevent future crimes, and not any more.¹²¹ By recognizing that punishment brings with it consequences for the offender and society, the utilitarian theory is "consequentialist" in nature, and holds that "the total good produced by the punishment should exceed the total evil."¹²² So, punishment should not be unlimited.

English legal philosopher Jeremy Bentham founded the

115. See Roberta Allen, *Divine Punishment as a Problem in Theodicy* (1985) (unpublished Ph.D. dissertation, Westminster College, Oxford), available at <http://www.kton.demon.co.uk/theology.htm>.

116. *See id.*

117. *Id.*

118. *Id.*

119. *Theories of Punishment*, JRANK, <http://law.jrank.org/pages/9576/Punishment-THEORIES-PUNISHMENT.html> (last visited Oct. 17, 2010).

120. *Id.*

121. *Id.*

122. *Id.*

popular utilitarian theory of “deterrence.”¹²³ Deterrence theories stem from the idea that fear of a threatened punishment may dissuade a person from committing a crime.¹²⁴ As Bentham put it, “[g]eneral prevention ought to be the chief end of punishment, as it is its real justification.”¹²⁵ Legal theorists usually differentiate between specific deterrence, which is the effect of a current punishment on the person who has been convicted, and general deterrence, which refers to the effect of a punishment on society as a whole.¹²⁶

Similar to deterrence theory, “rehabilitative” theories look to punishment as a means to a result beneficial to society, and not an end in itself.¹²⁷ The rehabilitative theory refers to “the notion that the sanctions of the criminal law should or must be employed to achieve fundamental changes in the character, personalities, and attitudes of convicted offenders, not only in the interest of the social defense, but also in the interest of the well-being of the offender himself.”¹²⁸ At its core, this theory proposes that criminal law sanctions should be used to affect a transformation in the offender, maintaining concurrent aims to protect society and enhance the well being of the offender.¹²⁹ Rehabilitative theory most supports the addition of faith-based programs in prison as a means to improve the offender. The “success story” of David Berkowitz lends credence to this sometimes-controversial theory.

As the counterpart to the utilitarian philosophy, the retributivist theory of punishment “rests upon the idea that a tribute, or price, must be paid to vindicate the law (general retribution) or avenge the victim and allow the criminal to

123. Allen, *supra* note 115.

124. See Martha Grace Duncan, “Cradled on the Sea”: Positive Images of Prison and Theories of Punishment, 76 CALIF. L. REV. 1201, 1240 (1988).

125. JEREMY BENTHAM, PRINCIPLES OF PENAL LAW (1843), reprinted in 1 THE WORKS OF JEREMY BENTHAM 365, 396 (John Bowring ed., Thoemmes Press 1995).

126. See Duncan, *supra* note 124, at 1240.

127. See *id.* at 1243.

128. Francis A. Allen, *The Decline of the Rehabilitative Ideal in American Criminal Justice*, 27 CLEV. ST. L. REV. 147, 148 (1978).

129. See Duncan, *supra* note 124, at 1243.

expiate his sins through suffering (special retribution).¹³⁰ In other words, retributivists believe that an offender ought to get his “just deserts.”¹³¹ Rather than looking forward to future crime prevention, this view of society’s justification for punishment looks backwards at the wrongful act.¹³² Realistically, it is not easy to proportionally match punishments and crimes. Who can say whether the moral depravity of a particular crime balances objectively with the painfulness of specific punishments? Retributivists most likely see no need for the faith-based programming in prison, and would view Berkowitz’s prison-assisted transformation both as a waste of resources, and inappropriate in light of the severity of the crimes he committed.

“Incapacitation” serves as the final traditional theory of punishment. It argues that people are justified in punishing offenders through isolation from society in order to prevent them from committing more crimes during the course of their punishment.¹³³ Little controversy surrounds this theory, as it amounts to common sense. In the case of faith-based rehabilitative programming in prison, such programs may serve to prevent/incapacitate an offender from engaging in criminal conduct while inside the prison, such as assaults, gang participation and smuggling contraband.

IV. The Eighth Circuit Weighs In

In *Americans United for Separation of Church and State v. Prison Fellowship Ministries*,¹³⁴ the Eighth Circuit struck down a successful faith-based prison rehabilitation program because the state funded it.¹³⁵ Ultimately, the Court left open the

130. *Id.* at 1242.

131. *Id.*

132. *Id.* “In H.L.A. Hart’s words, the ‘application to the offender of the pain of punishment is itself a thing of value.’” *Id.*

133. *Id.* at n.173.

134. 509 F.3d 406 (8th Cir. 2007).

135. *Id.* at 425. The appellate court reversed the district court’s judgment such that the recoupment of government funds was limited to payments for services rendered after the program was declared

possibility for the program, known as InnerChange, to continue so long as it received no government aid.¹³⁶ Still, the Court held that the prison rehabilitation program, as funded by the Iowa Department of Corrections, violated the Establishment Clause because the program had the effect of advancing or endorsing religion, under the criteria set forth in *Agostini v. Felton*.¹³⁷ The dispute surrounding the InnerChange program showcased the legal firestorm that occurs when two of the United States' most controversial institutions—prison and religion—intersect.

The InnerChange Freedom Initiative (“InnerChange”) functions as an arm of Prison Fellowship Ministries (“PFM”), a Christian nonprofit organization. Founded in 1976 by Charles “Chuck” Colson, PFM dedicates its resources to “ministering to and providing religious services for prisoners.”¹³⁸ PFM came out of Colson’s own redemption story. As an aid to President Richard M. Nixon, Colson was convicted for crimes relating to the infamous Watergate cover up scandal. While serving his sentence in an Alabama prison, he became an evangelical Christian.¹³⁹ Upon exiting prison, a fellow inmate challenged Colson not to forget about him and other men like him, and to do something to help them.¹⁴⁰ Colson took up the challenge, growing PFM into the world’s largest outreach to prisoners, ex-prisoners and their families.¹⁴¹ Domestically, InnerChange now operates in prisons in Arkansas, Kansas, Minnesota and Missouri, and prior to the Eighth Circuit decision in *Americans United*, provided programming in Iowa.¹⁴²

unconstitutional. The district court’s judgment was otherwise affirmed, and the case was remanded. See *Ams. United for Separation of Church & State v. Prison Fellowship Ministries, Inc.*, 432 F. Supp. 2d 862, 941 (S.D. Iowa 2006) [hereinafter *Ams. United I*].

136. *Ams. United II*, 509 F.3d at 428.

137. 521 U.S. 203 (1997).

138. Marc O. DeGirolami, *The New Religious Prisons and Their Retributivist Commitments*, 59 ARK. L. REV. 1, 17 (2006).

139. *Id.*

140. *Chuck Colson: Founder, PRISON FELLOWSHIP*, <http://www.prisonfellowship.org/why-pf/bios-of-key-staff/297> (last visited Oct. 17, 2010).

141. *Id.* Under the name Prison Fellowship International, Colson’s organization operates in 113 countries around the globe.

142. THE INNERCHANGE FREEDOM INITIATIVE,

The *Americans United* decision focused on the constitutionality of the InnerChange program as it functioned in Iowa's Newton Facility from 1997 to 2005.¹⁴³ During that time period, the Iowa Department of Corrections contracted with InnerChange to establish the first and only Iowa prison rehabilitation program to offer 24-hour-a-day, 7-day-a-week treatment.¹⁴⁴ In 2003, civil liberties group Americans United for Separation of Church and State filed suit in federal district court on behalf of Iowa taxpayers and inmates challenging the state's sponsorship of the rehabilitation program.¹⁴⁵ The case culminated in a three-week trial, with the Court finding that the InnerChange program impermissibly endorsed religion, and that Iowa's funding of it, therefore, violated the Establishment Clause of the First Amendment.¹⁴⁶ The Court ordered InnerChange to repay the Department of Corrections (DOC) the \$1.5 million that it had been paid by the State.¹⁴⁷ The Eighth Circuit, with former U.S. Supreme Court Justice Sandra Day O'Connor sitting by designation, affirmed the ruling in substance, holding that InnerChange violated the constitution by supporting the indoctrination of inmates and

<http://www.ifiprison.org/state-programs> (last visited Oct. 17, 2010). The men's program is located at the Tucker unit, which is located 25 miles northeast of Pine Bluff, Arkansas. The women's program is located at the Wrightsville, which is 10 miles south off Little Rock, Arkansas. IFI Kansas is located at the Lansing Correctional Facility ("LCF"), in Lansing, Kansas, which is a maximum custody facility. In Minnesota, the program operates at Lino Lakes Correctional Facility on the North edge of the Twin Cities. It started with an original class of 47 men in July 2002, increasing to a current capacity of up to 200. The Missouri program is located at the Algoa Correctional Center, which is located in Jefferson City, MO. Located at the Carol S. Vance Unit near Houston, IFI Texas offers programming for 300 offenders. *Id.*

143. *Ams. United for Separation of Church & State v. Prison Fellowship Ministries, Inc.*, 432 F. Supp. 2d 862, 878 (S.D. Iowa 2006).

144. Nathaniel Odle, *Privilege Through Prayer: Examining Bible-Based Prison Rehabilitation Programs Under the Establishment Clause*, 12 TEX. J. ON C.L. & C.R. 277, 288 (2007).

145. Alex J. Luchenitser, "InnerChange": *Conversion as the Price of Freedom and Comfort—A Cautionary Tale About the Pitfalls of Faith-Based Prison Units*, 6 AVE MARIA L. REV. 445, 447 (2008).

146. *Id.*

147. *Ams. United I*, 432 F. Supp. 2d at 941.

discrimination against non-Christian inmates.¹⁴⁸ The appellate court, however, reversed the order of recoupment.¹⁴⁹

A. *InnerChange at the Newton Facility*

Undeniably evangelical Christian in nature, InnerChange aimed “to create and maintain a prison environment that fosters respect for God’s law and rights of others, and to encourage the spiritual and moral regeneration of prisoners. Therefore, they may develop responsible and productive relationships with their Creator, families and communities.”¹⁵⁰ Moreover, through its curriculum, the voluntary rehabilitation program stressed six core values to participants: (1) integrity; (2) restoration; (3) responsibility; (4) fellowship; (5) affirmation; and (6) productivity.¹⁵¹ In contrast to traditional, therapeutic prisoner rehabilitation models based in secular approaches, consistent with its name, InnerChange employed a self-described “transformational” model at the Newton Facility.¹⁵² The program maintained that “as inmates are transformed by the power of God, they learn to turn from a sinful past . . .”¹⁵³ Suitably, repentance served as a cornerstone of the program.¹⁵⁴

Inmates who participated in the Newton InnerChange program committed themselves to eighteen months of intensive self-reflection and a strict schedule.¹⁵⁵ Participants lived in a

148. Luchenitser, *supra* note 145, at 447-48.

149. *Ams. United for Separation of Church & State v. Prison Fellowship Ministries, Inc.*, 509 F.3d 406, 428 (8th Cir. 2007). Under the Eighth Circuit decision, InnerChange must only repay state monies used for the program after June 2006—when the district court held it unconstitutional.

150. 432 F. Supp. 2d at 875. Each participating inmate received a Field Guide that stated: “The InnerChange Freedom Initiative (IFI) is an intensive, voluntary, faith-based program of work and study within a loving community that promotes transformation from the inside out through the miraculous power of God’s love. IFI is committed to Christ and the Bible. We try to base everything we do on biblical truth. In other words, IFI is Christ-centered and Bible-based.” *Id.* at 876-77.

151. *Id.* at 896.

152. *Id.* at 877.

153. *Id.* at 876.

154. DeGirolami, *supra* note 138, at 18.

155. *Ams. United for Separation of Church & State v. Prison Fellowship*

separate unit of the prison and the program consisted of four phases.¹⁵⁶ “Phase I” was twelve months long, and “Phase II,” which began immediately after, lasted six months.¹⁵⁷ An inmate entered “Phase III” if he was placed in a DOC work release center.¹⁵⁸ Lastly, an inmate experienced “Phase IV” if he was released from prison and living in the community.¹⁵⁹

All parts of the program unabashedly centered on Christian beliefs and practices. During the in-prison phases, InnerChange inmates attended required morning devotions consisting of praying and reading Christian scriptures.¹⁶⁰ In the afternoon, the inmates went to community meetings where they sang Christian songs, prayed, shared prayer requests and read the Bible.¹⁶¹ Homework included Bible verse memorization.¹⁶² The weekends began with a revival service on Friday nights, composed of singing and sermons.¹⁶³ On Sunday mornings, the InnerChange inmates participated in church services led by program staff.¹⁶⁴

Using Biblical principles to support all of their teachings, InnerChange offered classes to inmates on varied subjects. These subjects included substance abuse, finances, anger management, victim impact, Old and New Testament scriptures, parenting, marriage/family, and spiritual freedom.¹⁶⁵ Program administrators continually encouraged inmate participants to embrace “salvation” and become “born-again,” i.e. accept Jesus Christ in to their hearts as their messiah and savior.¹⁶⁶ Periodic baptisms held by InnerChange

Ministries, Inc., 432 F. Supp. 2d 862, 901 (S.D. Iowa 2006).

156. *Id.*

157. *Id.*

158. *Id.* at 909.

159. *Id.*

160. Luchenitser, *supra* note 145, at 449.

161. *Id.*

162. *Id.* at 451.

163. *Id.* at 449-50.

164. *Id.* at 450.

165. *Ams. United for Separation of Church & State v. Prison Fellowship Ministries, Inc.*, 432 F. Supp. 2d 862, 904-05 (S.D. Iowa 2006).

166. Luchenitser, *supra* note 145, at 451.

confirmed the inmates' acceptance of Jesus.¹⁶⁷ In the post-release portion of the program, former inmates were required to attend weekly services at a church approved by InnerChange.¹⁶⁸ InnerChange reserved the right to terminate an inmate's participation if he neglected to complete any phase of the program to its satisfaction.¹⁶⁹

Since its commencement at the Newton Facility in 1999, the state of Iowa financed portions of the InnerChange program.¹⁷⁰ Through annual contracts, Iowa paid InnerChange for its services, totaling more than \$1.5 million through 2007.¹⁷¹ Also, the state provided InnerChange with other aid, including a modular building for the program at the prison, furniture and pay for inmate jobs when inmates assisted InnerChange.¹⁷² InnerChange's attempt to use state funds solely for nonsectarian administrative costs, and no religious programming costs, proved unsuccessful in the eyes of both the trial and appellate courts.¹⁷³

B. *Constitutional Analysis*

The Eighth Circuit condemned the Iowa InnerChange program as a violation of the Establishment Clause of the First Amendment to the U.S. Constitution using the framework set out by the Supreme Court in *Agostini v. Felton*.¹⁷⁴ Under that test, the court must "ask whether the government acted with the purpose of advancing or inhibiting religion, and . . .

167. *Id.* at 451-52.

168. *Id.* at 452.

169. *Id.* Some reasons for inmate expulsion from the program included "a continued lack of spiratual growth and development," "unteachable spirit," and failure to participate in singing at the various religious services offered. *Id.*

170. *Id.*

171. *Id.* "Originally, the program was funded by a surcharge on inmate telephone calls. In 2002, the Iowa State Legislature agreed to finance InnerChange." See Gail Halloran, *Shame on Us for Funding Religious Coercion*, IOWA CITY PRESS CITIZEN, Mar. 16, 2008, at A7.

172. Luchenitser, *supra* note 145, at 453.

173. *Id.*

174. 521 U.S. 203 (1997) (citations marks omitted).

whether the aid has the ‘effect’ of advancing or inhibiting religion.”¹⁷⁵ The circuit court agreed with the district court’s conclusion that the Iowa Department of Corrections’ (DOC) purpose in contracting with and funding InnerChange was secular.¹⁷⁶ Sufficient evidence presented showed that the DOC aimed to offer comprehensive programming to inmates and reduce recidivism.¹⁷⁷ “The DOC officials ‘considered the long term nature of the InnerChange program, its supportive communal environment, and its extensive post-release care program, as the best indicators that the InnerChange program could reduce recidivism’”¹⁷⁸ Moreover, the court agreed that the Iowa government did not act with the purpose of advancing or inhibiting religion.¹⁷⁹

The court found, however, that the InnerChange rehabilitation program failed the other elements of the *Agostini* test, in that it had the effect of advancing or endorsing religion.¹⁸⁰ In analyzing whether such an advancement or endorsement effect exists, three criteria are decisive: whether government aid (1) results in governmental indoctrination; (2) defines recipients by reference to religion; or (3) creates excessive entanglement.¹⁸¹ While the Eighth Circuit found that the program resulted in governmental indoctrination, and that it defined recipients by reference to religion, it did not find that it created excessive government entanglement.

The court found that Iowa’s funding of the Christian-based InnerChange rehabilitation program amounted to

175. *Id.* at 222-23.

176. *Ams. United for Separation of Church & State v. Prison Fellowship Ministries, Inc.*, 509 F.3d 404, 423-424 (2007).

177. *Id.*

178. *Id.* (citations omitted).

179. *Id.*

180. *Id.* at 425.

181. *Id.* at 424 (citing *Agostini v. Felton*, 521 U.S. 203, 234-35 (1997)). The district court, while it stated the *Agostini* test, actually focused on a “pervasively sectarian” analysis in order to determine whether the government aid had the effect of advancing religion. The appellate court noted this, and stated, “This court will apply the clear framework in *Agostini*.” *Id.* at n.4.

governmental indoctrination:¹⁸²

[T]he InnerChange program resulted in inmate enrollment in a program dominated by Bible study, Christian classes, religious revivals, and church services. The DOC also provided less tangible aid to the InnerChange program. Participants were housed in living quarters that had, in previous years, been used as an 'honor unit,' and which afforded residents greater privacy than the typical cell. Among other benefits, participants were allowed more visits from family members and had greater access to computers.¹⁸³

The court further held that the InnerChange program discriminated against inmates based on their religion.¹⁸⁴ "[I]n administering aid, a government may not define recipients by reference to religion. The aid must be 'allocated on the basis of neutral, secular criteria that neither favor nor disfavor religion, and is made available to both religious and secular beneficiaries on a nondiscriminatory basis.'"¹⁸⁵ The court concluded that in the case of Newton's InnerChange program, in order to receive state aid, inmates must have been "willing to productively participate in a program that is Christian-based."¹⁸⁶ In addition, an inmate's religious beliefs (or lack thereof) precluded their participation.¹⁸⁷

In terms of the third criteria, the court found no pervasive monitoring by the DOC, and hence it did not amount to excessive entanglement between InnerChange and the Iowa government.¹⁸⁸ Nevertheless, "[b]ecause the indoctrination and definition criteria indicate that InnerChange had the effect of

182. *Id.* at 424-25.

183. *Id.* at 424.

184. *Id.* at 425.

185. *Id.* (citing *Mitchell v. Helms*, 530 U.S. 793, 813 (2000)).

186. *Id.*

187. *Id.*

188. *Id.*

advancing or endorsing religion during the contract years 2000 to 2004, the direct aid to InnerChange violated the Establishment clauses of the United States and Iowa Constitutions.”¹⁸⁹

C. *Establishment Clause Jurisprudence*

“Congress shall make no law respecting an establishment of religion”¹⁹⁰ Since the penning of these words more than two hundred years ago, the Supreme Court’s application of this mandate to the states¹⁹¹ has been anything but predictable. Justice Thomas, in his concurrence in *Rosenberger v. Rector & Visitors of University of Virginia*,¹⁹² went as far as to categorize the Court’s Establishment Clause jurisprudence as being in

189. *Id.* In an attempt to make InnerChange an indirect aid program, in the 2005, 2006, and 2007 contract years, funding from the DOC to InnerChange changed *from* cost reimbursement *to* per diem payment. Nevertheless, the Court still found the state violated the Establishment Clause during these years by providing funds to InnerChange. The Court reasoned that, in order to comply with the Establishment Clause, indirect aid programs must be neutral with respect to religion, and provide assistance directly to a broad class of citizens who, in turn, direct government aid to religious organizations wholly as a result of their own genuine and independent private choice. In the case of InnerChange, the Court found that there was no genuine and independent private choice. The inmate could direct the aid only to InnerChange. The legislative appropriation could not be directed to a secular program, or to general prison programs. Thus, the per diem structure, as administered, violated the Establishment clauses of the United States and Iowa Constitutions. *Id.* at 425-26 (citations omitted).

190. U.S. CONST. amend. I.

191. See Lisa A. Biron, *Constitutionally Coerced: Why Sentencing a Convicted Offender to a Faith-Based Rehabilitation Program Does Not Violate the Establishment Clause*, 7 CONN. PUB. INT. L. J. 263, 264 n.9 (2008) (explaining the existence of a valid and compelling argument supporting Justice Thomas; federalist view that the Establishment Clause was never meant to apply against the states); Vincent Phillip Munoz, *The Original Meaning of the Establishment Clause and the Impossibility of its Incorporation*, 8 U. PA. J. CONST. L. 585, 600-03 (2006). The wording of the First Amendment’s Establishment Clause, “Congress shall make no law respecting an establishment of religion” reinforces the view that the clause was intended to prevent the Federal Government from interfering with the sovereign states’ right to establish a state religion or not. *Id.* at 620-21.

192. 515 U.S. 819, 839 (1995).

“hopeless disarray.”¹⁹³ Needless to say, a solid line of case law on the matter does not exist, making Establishment Clause controversies daunting, and their results often unsettling. This section aims to provide a brief summary of the Supreme Court’s Establishment Clause jurisprudence, but is by no means an exhaustive study.

To begin, it cannot be ignored that, for better or worse, ideology has played a large role in the evolution of Establishment Clause canon, molding it into the non-uniform, fluctuating doctrine it is today. Most simply, the often diametrically opposed Justices on the Court fall into one of two groups: “those who are separationists, who believe in the complete separation of government and religion; and those who are accomodationists, who believe that government and religion may cooperate to reach important secular goals.”¹⁹⁴ A true examination of this country’s legal and political history, beginning at its inception, most supports the accomodationist view.¹⁹⁵ But while the Court itself has stated that our “institutions presuppose a Supreme Being,”¹⁹⁶ Supreme Court jurisprudence of recent decades would make it appear that the Founders and Ratifiers of the Constitution strictly supported an austere separation of church and state. Such an interpretation is simply inaccurate, as Court decisions handed down at the time of ratification brand the United States as a religious nation.¹⁹⁷ Nevertheless, the ideological variances between the Supreme Court Justices at any given time tend to direct the outcome of an Establishment Clause case more than any test or precedent.¹⁹⁸

The deluge of judicial discretion deemed acceptable in

193. *Id.* at 861.

194. Biron, *supra* note 191, at 265.

195. *Id.*

196. *Van Orden v. Perry*, 545 U.S. 677, 709 n.4 (2005) (quoting *Zorach v. Clauson*, 343 U.S. 306, 313 (1952)).

197. See DAVID BARTON, *THE MYTH OF SEPARATION: WHAT IS THE CORRECT RELATIONSHIP BETWEEN CHURCH AND STATE?* 47-82 (6th ed. 1992); see also *Church of The Holy Trinity v. United States*, 143 U.S. 457, 471 (1892) (Justice Brewer, after surveying the historical evidence of America’s founding, writing for the court, stated, “that this is a Christian nation”).

198. Biron, *supra* note 191, at 265.

deciding Establishment Clause violations has not amounted to a principled approach tethered to any substantiated framework, but rather to an “I’ll-know-it-when-I-see-it” mindset among the Justices.¹⁹⁹ Improper judicial activism is often the result when Justices apply the facts of a given case to the constitutional tests such that they comport with their own particular ideology. The following subsections outline some of the various standards the Supreme Court has used in Establishment Clause cases.

1. The *Lemon* Test

In the 1971 landmark case *Lemon v. Kurtzman*,²⁰⁰ the Supreme Court set forth a three-pronged test used to determine if a statute violated the Establishment Clause. “First, the statute must have a secular purpose; second, its principle or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster ‘an excessive government entanglement in religion.’”²⁰¹ In the 1997 case *Agostini v. Felton*,²⁰² the Court changed the original application of the third excessive entanglement prong into “simply one criterion relevant to determining [the second prong of the *Lemon* test].”²⁰³ To clarify precisely when a statute does not have the effect of advancing religion, the Court later delineated the following revised criteria: the second prong is not violated when “[i]t does not result in governmental indoctrination; define its recipients by reference to religion; or create an excessive entanglement.”²⁰⁴ Today, the *Lemon* test, as

199. *Id.*; see *Van Orden*, 545 U.S. at 700 (Breyer, J., concurring) (Justice Breyer argues that “legal judgment” should be used in deciding Establishment Clause cases). Referring to Justice Breyer’s “exercise of legal judgment” analysis, Justice Thomas stated that “[t]he outcome of constitutional cases ought to rest on firmer grounds than the personal preferences of judges.” *Id.* at 697 (Thomas, J., concurring).

200. 403 U.S. 602 (1971).

201. *Id.* at 612-13.

202. 521 U.S. 203, 222-23 (1997).

203. *Mitchell v. Helms*, 530 U.S. 793, 808 (2000) (citing *Agostini*, 521 U.S. at 232-33).

204. *Id.* (quoting *Agostini*, 521 U.S. at 234).

modified by *Agostini*, is used not solely to determine the constitutionality of a statute, but also, when the Court pleases, to ascertain the constitutionality of any government program or action that touches religion.²⁰⁵

Since programs and statutes enacted by states are generally intended to accomplish a secular purpose, the *Lemon* test's first prong, finding a secular purpose, is often easily established.²⁰⁶ A state-funded faith-based rehabilitation program has the secular purpose of reforming an offender's criminal behavior by teaching him to turn away from violence and instilling a desire to contribute positively to society. This programming fosters a more peaceful prison environment and ultimately curbs an offender's tendencies to commit crime if released from incarceration, therefore reducing recidivism.²⁰⁷

As it was in *Americans United*, most Establishment Clause litigation focuses on the second prong—weighing a statute or program's primary or principle effect.²⁰⁸ As discussed above, the Eighth Circuit held out three criteria as determinative to whether state aid for such faith-based programs had the effect of advancing or endorsing religion: “whether government aid (1) results in governmental indoctrination; (2) defines recipients by reference to religion; or (3) creates excessive entanglement.”²⁰⁹ Along the same lines, the following analytical frameworks and tests may become important factors in analyzing the *Lemon* test's second prong.

2. The Endorsement Test

The “endorsement” test holds impermissible the government's commending or discouraging of religion.²¹⁰ In other words, the endorsement test “looks to whether the

205. See Biron, *supra* note 191, at 267.

206. *Id.* at 267 n.26 (noting cases in which the Supreme Court found a secular purpose prong violation).

207. *Ams. United for Separation of Church & State v. Prison Fellowship Ministries, Inc.*, 509 F.3d 406, 424-25 (8th Cir. 2007).

208. *Id.*

209. *Id.* at 424 (quoting *Agostini*, 521 U.S. at 234-35).

210. See *Lynch v. Donnelly*, 465 U.S. 668, 692 (1984).

government has, in effect, communicated an opinion—good or bad—about religion.”²¹¹ It is irrelevant “whether the government action does or does not actually advance or inhibit religion.”²¹² Justice O’Connor has opined that “[f]ocusing on the evil of government endorsement or disapproval of religion makes clear that the effect prong of the *Lemon* test is properly interpreted. . . .”²¹³ Moreover, O’Connor explained that when the government endorses religion, it “sends a message to nonadherents that they are outsiders, not full members of the political community”²¹⁴

a. *Delegation*

The allegation of government endorsement becomes more difficult to overcome when the State appears to delegate one of its traditional functions to a religious organization, as was arguably the case in *InnerChange* where the state gave over a portion of the prison to the program. Similarly, in *Board of Education of Kiryas Joel Village School District v. Grumet*,²¹⁵ the Supreme Court invalidated a school zoning plan that created a public school district exactly matched to the boundaries of a village of Satmar Hasidic Jews.²¹⁶ The plan gave the group state funding for special education programs, so that handicapped children would not have to break with religious tradition by leaving the village for school.²¹⁷ Finding endorsement, the Majority held that the zoning plan was “tantamount to an allocation of political power on a religious criterion and neither presupposes nor requires governmental impartiality towards religion.”²¹⁸ The Court further held, “that a State may not delegate its civic authority to a group chosen

211. Biron, *supra* note 191, at 268.

212. *Id.*

213. *Lynch*, 465 U.S. at 691-92 (O’Connor, J., concurring).

214. *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 9 n.1 (1989) (citations omitted).

215. 512 U.S. 687 (1994).

216. *Id.*

217. *Id.* at 691-92.

218. *Id.* at 690.

according to a religious criterion.”²¹⁹

In faith-based prison rehabilitation programs like InnerChange, the State turns over nearly every responsibility associated with running a particular sector of the prison, to a religious group, and, thus, appears to directly conflict with the Establishment Clause.²²⁰ After all, the incarceration and rehabilitation of offenders is considered within the core functions of government in the United States. Since state DOCs, in the cases of programs like InnerChange, irrefutably give sectarian groups opportunities to take over entire sections of a prison, it is difficult to argue against delegation.

It should not go unnoted that much criticism of the endorsement test comes from those who interpret this country’s history as “having religious faith and tradition as interwoven and inseparable parts of our society”—accommodationists.²²¹ All the same, when the *Lemon* test and the endorsement test fail to resolve the Establishment Clause controversy in a given case, the neutrality test can be used in the Court’s analysis.

3. The Neutrality Test

The “neutrality” test comes into play most often when it is alleged that the government is conferring a benefit to a religion or a religious program.²²² Neutrality requires that government benefits provided to a religious program must be “received without favoring the affiliated religion or without any religious indoctrination being attributable to the state.”²²³ The endorsement test and the neutrality test may be used either by themselves or together, as a component of the *Lemon* test, or in an independent analysis. As discussed above, the court in

219. *Id.* at 698 (citing *Larkin v. Grendel’s Den*, 459 U.S. 116 (1982)) (invalidating a Massachusetts statute giving churches the power to veto liquor license applications for stores operating nearby).

220. See Tim Eicher, *Scaling the Wall: Faith-Based Prison Programs and the Establishment Clause*, 5 GEO. J. L. & PUB. POLY 221, 234 (2007).

221. Biron, *supra* note 191, at 268.

222. *Id.*

223. *Id.*; see, e.g., *Zelman v. Simmons-Harris*, 536 U.S. 639, 649 (2002); *Good New Club v. Milford Cent. Sch.*, 533 U.S. 98, 114 (2001).

Americans United held that the Iowa DOC failed the neutrality test as to both the ban on indoctrination and discrimination.²²⁴

4. The Coercion Standard

First pronounced by Justice Kennedy in *Lee v. Weisman*,²²⁵ the Supreme Court has suggested that coercion alone could be enough to find a violation of the Establishment Clause.²²⁶ In analyzing the issues presented by inmate participation in faith-based rehabilitation programs, “courts have looked to whether the program participant had been coerced into participating in the religious program.”²²⁷ If coercion is found, the Court does not conduct any further analysis, and summarily holds the program in violation of the Establishment Clause.²²⁸

In *Lee*, by a five to four decision, the majority ruled that the recitation of a non-sectarian prayer to be held at a public school graduation violated the Establishment Clause.²²⁹ The court reasoned that “subtle coercive pressures exist[ed] and . . . the student had no real alternative [no meaningful choice] . . . to avoid the fact or appearance of participation.”²³⁰ Moreover, that this “subtle coercive pressure” to stand and join the group in the prayer, or continue sitting in silence, served as a psychological pressure imposed by peer pressure.²³¹ What’s more, the majority ruled that attendance was not truly voluntary, because of the significance of graduation in the life

224. *Ams. United for Separation of Church & State v. Prison Fellowship Ministries, Inc.*, 509 F.3d 406, 425 (8th Cir. 2007).

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

226. *See id.* (Blackmun, J., concurring). “[A] per se rule focusing on coercion is a permissible substitute for the traditional *Lemon* test . . .” *Ross v. Keelings*, 2 F. Supp. 2d 810, 817 (E.D. Va. 1998). At the same time, the coercion test can be used as a factor for determining if there has been a violation of the second prong of the *Lemon* test. *See Gray v. Johnson*, 436 F. Supp. 2d 795, 800 n.4 (W.D. Va. 2006).

227. *Biron*, *supra* note 191, at 269.

228. *Id.*

229. *See Lee*, 505 U.S. at 588.

230. *Id.*

231. *Id.* at 593.

of a young person.²³² They held that “the State, in a school setting, in effect required participation in a religious exercise.”²³³

Justices Scalia and Thomas, as well as other legal scholars, have regarded this “psychological coercion standard” as inappropriate in determining alleged Establishment Clause violations.²³⁴ In his dissent in *Lee*, Justice Scalia charged the majority with playing psychologist, and suggested that a test of the Establishment Clause which “invalidate[s] longstanding traditions cannot be a proper reading of the Clause.”²³⁵ Even Justice Kennedy, writing for the Majority in *Lee*, acknowledged that rationale based on indirect subtle psychological coercion might not hold true with mature adults.²³⁶ In sum, opponents to the *Lee* “coercion” test, as it stands today, contend that the test looks drastically different than what the Framers of the Constitution would have considered to be either “coercion” or the establishment of a religion.²³⁷

V. A Different Framework For Faith-Based Rehabilitation Programs

Even though the Eighth Circuit struck down the InnerChange program as it was funded in Iowa, other courts should not follow suit, and instead recognize that the prison context presents a unique situation warranting different analysis than what has normally been applied to Establishment Clause challenges. While politicians and legal scholars alike may disagree on the propriety of such programs, none can deny that the American prison system is broken. Time behind bars generally fails to rehabilitate inmates and does not return them to society as contributors, thus leading to high recidivism rates.²³⁸ Since the current model of prison

232. *Id.* at 595.

233. *Id.* at 594.

234. Biron, *supra* note 191, at 270.

235. *Lee*, 505 U.S. at 631 (Scalia, J., dissenting).

236. *Id.* at 593 (majority opinion).

237. Biron, *supra* note 191, at 270.

238. See PATRICK A. LANGAN & DAVID J. LEVIN, BUREAU OF JUSTICE

rehabilitation does not work, it makes little sense to bar a new approach that aims to achieve the very goal the state desperately needs to reach.

The argument that eliminating an inmate's option to choose to enroll in a religious program with the aim of improving himself somehow protects his right to autonomy is both illogical and self-defeating. First, because each offender maintains a choice to attend the faith-based program or not, without penalty for abstaining, no government coercion can exist. Courts should not hold the mistaken belief that if a prison has a section or wing dedicated to a program like InnerChange, an inmate who decided not to participate would be punished by having to carry out his sentence in another part of the prison. The option to serve time in a rehabilitation program in prison, or serve time in the general population, is still an option. This reasoning is in accord with that of Judge Posner on the subject of free choice:

It is a misunderstanding of freedom . . . to suppose that choice is not free when the objects between which the chooser must choose are not equally attractive to him. It would mean that a person was not exercising his free will when in response to the question whether he preferred vanilla or chocolate ice cream he said vanilla, because it was the only honest answer that he could have given and therefore 'he had no choice.'²³⁹

In a country with more than two million people

STATISTICS, RECIDIVISM OF PRISONERS RELEASED IN 1994 (2002), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/rpr94.pdf>. The study found that, overall, 67.5% of released prisoners were rearrested for a new crime within three years of release. *Id.* The highest rates of rearrest were among those convicted for drug offense (66.7%) and property offenses like larceny and arson (73.8%). *Id.*

239. *Freedom From Religion Found., Inc. v. McCallum*, 324 F.3d 880, 884 (7th Cir. 2003), *aff'g* 214 F. Supp. 2d 905 (W.D. Wis. 2002).

incarcerated and a recidivism rate of over sixty percent,²⁴⁰ state and federal governments are the ones left with no choice—no choice but to try something new, and something that works.

Programs like InnerChange deliver on what they promise. The Center for Research on Religion and Urban Civil Society published a study in 2003 finding that graduates of InnerChange are approximately fifty percent less likely to be rearrested and about sixty percent less likely to be reincarcerated than inmates leaving the state system who do not go through the program.²⁴¹ Testimonials from former inmates and InnerChange graduates who have made successful transitions from prison to the outside world fill the Prison Fellowship Ministries website.²⁴²

Daniel Wickman went from a rebellious, cold-hearted, murderer at age sixteen, to a kind and caring lover of the arts, and resident of Minneapolis, Minnesota at age thirty-eight.²⁴³ Wickman completed the InnerChange program while serving his sentence at Minnesota Correctional Facility-Lino Lakes.²⁴⁴ Although he turned his life around while still behind bars, Wickman admitted that living on the outside was a challenge he could not have overcome on his own. “My church, many of my friends, my job, my apartment—all of these things I have as an ex-offender are in some way connected to the generosity of people in Prison Fellowship and [InnerChange],” he said. “I can see how difficult it is without a network like this, and I want to

240. Daniel Brook, *When God Goes to Prison*, LEGAL AFF., May/June 2003, at 24, available at WL 2003-JUN LEGAFF 22.

241. BYRON R. JOHNSON & DAVID B. LARSON, CTR. FOR RESEARCH ON RELIGION & URBAN CIVIL SOC'Y, THE INNERCHANGE FREEDOM INITIATIVE: A PRELIMINARY EVALUATION OF A FAITH-BASED PRISON PROGRAM 11, 19 (2003). To be fair, the study reported that, while inmates who graduated from the InnerChange program fared better at staying out of prison after release than did a control group, those who entered the program but failed to complete it fared worse. Luchenitser, *supra* note 145, at 471.

242. *Transformed Life Stories*, PRISON FELLOWSHIP, <http://www.prisonfellowship.org/pf-stories-nav/transformed-life-stories> (last visited Oct. 22, 2010).

243. Becky Beane, *Conquered by God*, PRISON FELLOWSHIP, <http://www.prisonfellowship.org/pf-stories-nav/transformed-life-stories/428-conquered-by-god> (last visited Oct. 22, 2010).

244. *Id.*

be a supporter of it, and to give glory to God for the work He has done in and through me.”²⁴⁵

These faith-based programs also make sense financially. During the *Americans United* trial in Iowa District Court, Newton facility’s warden Terry Mapes testified that:

[For \$310,000], I get a substance abuse program, I get a victim impact program, I get a computer education program, I get pro-social skills programs, and I get engaged inmates who are actively involved in something constructive keeping them busy, which even inmates have testified to that’s a positive thing, and I get supervision of offenders either in classes in activities, in recreation by somebody other than the limited staff that I have.²⁴⁶

With Iowa spending \$313 million taxpayer dollars in fiscal year 2007 on corrections, the lower the financial burden of a successful rehabilitation program the better.²⁴⁷

A. *Constitutional Frameworks That Should Be Used to Analyze Programs Like InnerChange*

Amidst the array of ideological frameworks that miss the mark, some legal scholars have proposed using analysis in Establishment Clause cases that serve the greater goal of prisoner rehabilitation. The appellants in *Americans United* argued that the Eighth Circuit should evaluate alleged Establishment Clause violations using the standard set out in *Turner v. Safley*.²⁴⁸ That case, which centered on the

245. *Id.*

246. *Ams. United for Separation of Church & State v. Prison Fellowship Ministries, Inc.*, 432 F. Supp. 2d 862, 914 (S.D. Iowa 2006).

247. *In Your State: Prison Costs*, PBS, <http://www.pbs.org/now/shows/419/states-prisons.html#here> (last visited Feb. 5, 2011).

248. *Ams. United for Separation of Church & State v. Prison Fellowship Ministries, Inc.*, 509 F.3d 406, 426 (8th Cir. 2007).

constitutionality of certain prison regulations, stands for the proposition that courts should defer the formulation of prison policy to the judgment of prison officials where the policy is “reasonably related to legitimate penological objectives.”²⁴⁹ On its face and in practice, faith-based rehabilitation programs unarguably serve a legitimate penological interest—to rehabilitate incarcerated offenders thereby reducing their chances of returning to prison. The court, however, chose not to apply the *Turner* standard in *Americans United*, reasoning that the precedent does not apply to Establishment Clause cases.²⁵⁰

1. Direct vs. Indirect Government Funding

Where the faith-based rehabilitation program channels state funds solely into secular aspects of the program, no Establishment Clause violation can exist. To start, Supreme Court precedent holds that the “effects” of government aid under the Establishment Clause depends on whether the aid flows “directly” or “indirectly” to religious institutions.²⁵¹ In the case of direct aid, the Court uses “three primary criteria . . . to evaluate whether government aid has the effect of advancing religion [W]here a direct aid program does not result in governmental indoctrination; define its recipients by reference to religion; or create an excessive entanglement,” it will then be deemed constitutional.²⁵²

249. *Turner v. Safley*, 482 U.S. 78, 79 (1987). In *Turner*, the Court upheld a regulation that prohibited inmates at one prison from corresponding with those at another, but struck another regulation that prohibited inmates from marrying without the permission of the warden.

250. *Ams. United II*, 509 F.3d 406 at 426; *see also* *Williams v. Lara*, 52 S.W.3d 171, 189 (Tex. 2001). The Court has in the past applied the *Turner* standard in First Amendment cases like in *O’Lone v. Shabazz*, 482 U.S. 342 (1987), where the Court applied *Turner* deference with equal force to Free Exercise Clause claim.

251. *See Zelman v. Simmons-Harris*, 536 U.S. 639, 649 (2002). “[O]ur decisions have drawn a consistent distinction between government programs that provide aid directly to religious schools, and programs of true private choice, in which government aid reaches religious schools only as a result of the genuine and independent choices of private individuals.” *Id.*

252. *Mitchell v. Helms*, 530 U.S. 793, 809 (2000); *Agostini v. Felton*, 521 U.S. 203, 234 (1997).

On the other hand, where aid is indirect, with non-governmental actors channeling “government aid to religious [institutions] wholly as a result of their own genuine and independent private choice, the program is not readily subject to challenge under the Establishment Clause.”²⁵³ In that case, the law need only be “neutral with respect to religion” and provide aid to “a broad class of citizens.”²⁵⁴ In *Americans United*, InnerChange argued that even when they received direct aid from the state, they diverted the funds and only used it for secular aspects of the program, and not towards indoctrination.²⁵⁵ The Eighth Circuit declined to apply the *Turner* framework, reasoning that the case did not involve any Free Exercise or accommodation claims, but only Establishment claims, and *Turner* was not traditionally used in such types of cases.²⁵⁶

2. Historical Perspectives

Other legal scholars like R.A. Duff, assert that, regardless of its constitutional implications, “religious programming may be worthwhile because it is an effective method of communicating the censure of a significant portion of the offender’s community.”²⁵⁷ Duff’s argument revolves around the belief that religious penance can serve retributivist aims. InnerChange is specially equipped to do this “by imposing a specifically religious penance, demanding that prisoners: (1) repent of their crimes, which itself requires cultivating and confronting profound guilt, (2) reform themselves, with commitments not only to the fact of reform in response to a particular misdeed, but also to the manner in which the reform should be effected, and (3) become reconciled to their victims

253. *Zelman*, 536 U.S. at 652.

254. *Id.*

255. Brief of Defendants-Appellants at 37, *Ams. United v. Prison Fellowship Ministries, Inc.*, 509 F.3d 406 (8th Cir. 2007) (No. 06-2741). “[T]he aid covered less than 40% of the direct costs of operating InnerChange at [Newcomb Correctional Facility].” *Id.*

256. 509 F.3d at 426.

257. DeGirolami, *supra* note 138, at 21.

and their communities.”²⁵⁸

Although unexpected, there is credence to the contention that even President Thomas Jefferson, famous for the so-called “wall of separation” metaphor, would endorse faith-based rehabilitation programs in prison.²⁵⁹ Jefferson understood that faith-based organizations are frequently the most effective deliverer of social services.²⁶⁰ During his presidency, Jefferson recommended federal funding be allocated to the Roman Catholic Church so that it could provide religious services to Native Americans to assimilate them into American belief and culture.²⁶¹ Jefferson’s belief concurs with that of the White House under the Bush Administration, which stated that: “Both faith-based and community organizations should have an equal opportunity to obtain [federal] funding, if they choose to seek it. A sensible, results-driven policy requires the Government to examine outcomes—that is, what an organization achieves with the funds—rather than to the character of the organization.”²⁶²

B. *Learning From InnerChange*

With the Eighth Circuit holding the InnerChange program in violation of the Establishment Clause, and no sign of a change in the Supreme Court’s interpretation of the Constitution in this regard, other faith-based programs must take care to operate within specific bounds. First, a program must make sure that any state funds are used strictly for secular purposes and keep accurate records of fund dispersal. Second, programs should publicize their offerings as open to all who wish to join, including members of varying religions. In doing so, “[these programs] would quell criticism that its exclusive status is a State endorsement of religion and would

258. *Id.*

259. See generally James A. Davids, *Putting Faith in Prison Programs, and its Constitutionality Under Thomas Jefferson’s Faith-Based Initiative*, 6 AVE MARIA L. REV. 341, 342 (2008).

260. *Id.*

261. *Id.*

262. *Id.* at 386.

also create a quasi-market system for rehabilitation programs that might prove [its] effectiveness by comparison.”²⁶³ The proof will be in the results as far as whether these faith-based programs can show to be more successful than those of alternative secular programs.

Programs like InnerChange should not, in their efforts to pass constitutional muster, relax their “strict orthodoxy.”²⁶⁴ The inmate’s professed acceptance of Christ, while most controversial, is also the most essential catalyst for the inner-change that turns individuals from convicts to social contributors. “This new belief in Christ gives the offender motivation, guidance, and power to rehabilitate the soul to cure the addictions and bad habits. The motivation stems from the believer’s new hope that God can change anyone through faith in Christ.”²⁶⁵ A watered-down version of Christianity would only serve to diminish a program’s effectiveness.

VI. Conclusion

David Berkowitz entered prison more than thirty years ago as the poster child for what society deems evil. He killed numerous people in cold blood, taunted his victims’ family members, worshiped Satan, set hundreds of fires around New York City, and was addicted to pornography. In prison, his vicious behavior garnered him the nickname Berzerk-owitz. He was a man seemingly beyond rehabilitation. That all changed when he accepted Jesus Christ, repented of his sins, and began to practice Christianity. Berkowitz said he felt “reborn.”²⁶⁶ He told me that where despair, anger, and malice had once lived, happiness and peace began to take over.²⁶⁷ Today, the Son of Sam sits behind bars a changed man—truly a son of hope. A deep look into his piercing blue eyes does not unmask a monster, but a triumph of what prison rehabilitation can do for

263. Eicher, *supra* note 220, at 238.

264. *Id.* at 239.

265. Biron, *supra* note 191, at 286.

266. Written Interview with David Berkowitz, *supra* note 43.

267. *Id.*

even the most reviled of offenders. Religious prison programs offered at the various institutions in which Berkowitz served his sentence kept him on the straight and narrow, and removed him from the category of prison troublemaker to a sort of prison trustee. His story must not be dismissed or ignored.

By 2011, experts project that the prison population in the United States will be close to two million.²⁶⁸ “With an average of almost three arrest charges per former prisoner within three years of release, there are literally thousands of new victims each year from released prisoners.”²⁶⁹ Should society continue to ignore the hard fact that the vast majority of these offenders are simply not getting rehabilitated while in prison? The minuscule amount of social programming provided is not enough in quantity or quality. They may treat an inmate’s heart and mind, but not his soul. Criminal justice scholar Jeanette M. Hercik put it best: “Faith is perhaps the forgotten factor in reducing crime and recidivism—the *sin qua non* of desirable criminal justice program interventions.”²⁷⁰

The Supreme Court should also stop forgetting the incalculable value faith has historically added to American life, history, politics and jurisprudence. The current constitutional frameworks used with regard to the Establishment Clause are arbitrary, capricious, and simply incorrect concerning their analysis of faith-based prison rehabilitation cases. A prison should be given great deference as to the implementing of such programs, as it is in most other regulatory matters. The Court must not lose the forest for the trees by allowing personal ideology to stand in the way of a great societal goal: to rehabilitate offenders for their own benefit, and the benefit of society. New precedent should encourage the reduction of recidivism, which is a proven result of faith-based rehabilitation programs.²⁷¹

268. See Davids, *supra* note 259, at 343.

269. *Id.*

270. JEANETTE M. HERCIK ET AL., DEVELOPMENT OF A GUIDE TO RESOURCES ON FAITH-BASED ORGANIZATIONS IN CRIMINAL JUSTICE: FINAL REPORT 51 (2004), available at <http://peerta.acf.hhs.gov/pdf/666013FinalReport.pdf>.

271. This notion of the justice system’s responsibility to rehabilitate and not just return offenders has persisted over time. “To take hate-filled,

mentally warped men into prison and just let them serve their sentences without making earnest effort to correct their wrong notions and replace their anti-social tendencies with better ideas, seemed to me a sure guaranty that they would leave the prison worse than when they had entered." Davids, *supra* note 259, at n.17 (quoting JAMES A. JOHNSTON, PRISON LIFE IS DIFFERENT 61 (1937)).