

# The Constitutional Possibilities of Prison Vouchers

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*Faith-based prisons, as currently constituted, mostly violate the Establishment Clause. They generally aren't chosen by a process that is neutral as between religious and non-religious providers; they generally result in religious indoctrination; they might offer greater benefits to participants so as to qualify as "coercion"; and they might delegate governmental power to religious organizations.*

*In this Article, I propose a novel method of allocating prisoners: a system of "prison vouchers," by which prisoners could choose which prison to go to, including, where available, a private, religious prison. Under such a system, faith-based prisons would be fully constitutional: if prisons are selected neutrally, without regard to religion, and if inmates can choose any available prison, the Establishment Clause problems disappear. Prisoners would have the "genuine and independent private choice" that would bring religious prisons within the protection of *Zelman v. Simmons-Harris*.*

*Prison vouchers would offer prisons greater leeway in other ways as well, entirely unrelated to religion. Under the unconstitutional conditions doctrine, prisons under a voucher system would have greater ability than prisons do today to "offer" at least some "constitutionally noncompliant packages" that would be attractive to inmates.*

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## I. INTRODUCTION

From 1999 to 2008, Prison Fellowship Ministries operated a faith-based prison program called the InnerChange Freedom Initiative at the Newton Correctional Facility, a men’s medium-security prison in Iowa.<sup>1</sup> InnerChange described itself as “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. [InnerChange] is committed to Christ and the Bible. We try to base everything we do on biblical truth.”<sup>2</sup>

The wing of the prison devoted to the InnerChange program was nicknamed “the ‘God Pod.’”<sup>3</sup> The program included, on the one hand, prayer and classes with names like “Experiencing God,” and on the other hand, classes like “Substance Abuse, Anger Management, Victim Impact, Criminal Thinking, Financial Management, . . . and Marriage/Family/Parenting”;<sup>4</sup> but even the secularly themed classes were religious. As the program itself acknowledged, “Biblical principles are integrated into the entire course curriculum of [InnerChange], rather than compartmentalized in specific classes. In other words, the application of Biblical principles is not an agenda item—it is the agenda.”<sup>5</sup>

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<sup>1</sup> WINNIFRED FALLERS SULLIVAN, PRISON RELIGION: FAITH-BASED REFORM AND THE CONSTITUTION 19 (2009).

<sup>2</sup> *Ams. United for Separation of Church & State v. Prison Fellowship Ministries*, 509 F.3d 406, 413–14 (8th Cir. 2007) (alteration in original).

<sup>3</sup> SULLIVAN, *supra* note 1, at 21.

<sup>4</sup> *Ams. United*, 509 F.3d at 415–16.

<sup>5</sup> *Id.* at 414 (alteration in original).

The InnerChange program was challenged for violating the Establishment Clause; the district court,<sup>6</sup> and later the Eighth Circuit,<sup>7</sup> declared it unconstitutional. The State and Prison Fellowship Ministries defended the constitutionality of the InnerChange program by likening it to the school voucher program upheld in *Zelman v. Simmons-Harris*.<sup>8</sup> At least beginning in 2005, when the state switched from direct cost reimbursement to per diem payment,<sup>9</sup> InnerChange's "access to contract funds . . . depend[ed] *entirely* on inmates' decision to choose InnerChange as their rehabilitation service provider: if inmates participate in InnerChange, [it] gets the money; if they don't, it doesn't."<sup>10</sup> Thus, according to Prison Fellowship Ministries, money was paid to InnerChange as a result of the inmate's "genuinely independent private choice,"<sup>11</sup> as *Zelman* mandates.<sup>12</sup>

This *Zelman* argument was a loser. The Eighth Circuit held that genuine choice was absent here:

The inmate could direct the aid only to InnerChange. . . . For the inmate to have a genuine choice, funding must be "available generally without regard to the sectarian-nonsectarian, or public-nonpublic nature of the institution benefited" and the inmates must "have full opportunity to expend . . . aid on wholly secular" programs.<sup>13</sup>

Though Prison Fellowship Ministries and InnerChange emphasized they "received funds only if the inmate chose them," the proper viewpoint under *Zelman*, according to the Eighth Circuit, "is the chooser's (there, the parents'), not the provider's (there, the private schools'). Here, the inmate had no genuine and independent private choice because he had only one option."<sup>14</sup>

The district court's and Eighth Circuit's analysis seems correct, and poses a problem for any faith-based prison programs that go beyond basic provision of chaplains and visits by religious volunteers.<sup>15</sup> But let's indulge in a little thought experiment and imagine two versions of the InnerChange program.

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<sup>6</sup> *Ams. United for Separation of Church & State v. Prison Fellowship Ministries*, 432 F. Supp. 2d 862, 934 (S.D. Iowa 2006).

<sup>7</sup> *Ams. United*, 509 F.3d at 425–26.

<sup>8</sup> 536 U.S. 639 (2002); *see also* SULLIVAN, *supra* note 1, at 24, 209.

<sup>9</sup> *Ams. United*, 509 F.3d at 425.

<sup>10</sup> Brief of Defendants-Appellants Prison Fellowship Ministries & InnerChange Freedom Initiative at 49, *Ams. United*, 509 F.3d 406 (No. 06-2741).

<sup>11</sup> *Id.* at 48.

<sup>12</sup> *See Zelman*, 536 U.S. at 652; *see also* State Appellants' Brief at 45–46, *Ams. United*, 509 F.3d 406 (No. 06-2741).

<sup>13</sup> *Ams. United*, 509 F.3d at 425 (second omission in original) (quoting *Witters v. Wash. Dep't of Servs. for the Blind*, 474 U.S. 481, 488 (1986)).

<sup>14</sup> *Id.* at 426 (citation omitted).

<sup>15</sup> For a discussion of different sorts of faith-based programs, *see* Marc O. DeGirolami, *The New Religious Prisons and Their Retributivist Commitments*, 59 ARK. L. REV. 1, 1–2, 13–19 (2006).

Version A is the version that actually existed in Iowa, operating at a public prison that received prisoners by mandatory assignment.

For Version B, let's be more imaginative than the Iowa parties and fully internalize the lessons of *Zelman*. Imagine that a convicted criminal defendant, instead of being sent to a particular prison based on the allocation decisions of a Department of Corrections bureaucrat, was handed a voucher, good for one incarceration, which he would be required to redeem at a participating prison. As in school voucher programs, suppose the inmate could go to a public prison if he chose; or, if he wanted to, he could choose any available private prison, whether secular or religious, provided the prison was within his security level (e.g., medium security). Rather than, as in the Iowa case, choosing a program that happened to exist at his own prison, an inmate could choose *among* prisons, based on religion, amenities, safety, geography, or anything else. And suppose the "God Pod" described above operated in a religious prison under such a voucher scheme.<sup>16</sup>

In this Article, I argue that Version A has rightly been held unconstitutional. Even when funding follows the prisoner (which has not always been the case in such programs), faith-based prison programs generally suffer from the Establishment Clause problems of endorsement, coercion, and delegation of government power, and are not saved by the *Zelman* doctrine of "genuine and independent private choice."<sup>17</sup>

However, I also argue that Version B overcomes all these problems, and comes within *Zelman*, by allowing prisons to participate on a neutral basis, independent of religion, and allowing prisoners to choose among any available prison, public or private.

Prison vouchers have never been seriously proposed. But vouchers in the prison context are actually less radical than they may seem at first glance. A wide variety of prison-related and similar services are currently distributed in roughly this way. States contract with organizations to run halfway houses to provide twenty-four hour residential care for supervised offenders (and offenders are not required to accept placement with a religious provider).<sup>18</sup> States contract with child care agencies to provide residential programs for abused, neglected, or delinquent children (again, with an opt-out for religious providers).<sup>19</sup> States mandate that inmates, parolees, or probationers attend one of a variety of privately run alcoholism or drug addiction programs.<sup>20</sup> And Ontario, and England and Wales, have implemented vouchers for criminal defense lawyers for the indigent.<sup>21</sup>

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<sup>16</sup> See *supra* note 3 and accompanying text.

<sup>17</sup> *Zelman v. Simmons-Harris*, 536 U.S. 639, 652 (2002).

<sup>18</sup> See *infra* text accompanying notes 95–98, 105–07.

<sup>19</sup> See *infra* text accompanying notes 99–104.

<sup>20</sup> See *infra* text accompanying notes 192–95.

<sup>21</sup> Stephen J. Schulhofer & David D. Friedman, *Rethinking Indigent Defense: Promoting Effective Representation Through Consumer Sovereignty and Freedom of Choice for All Criminal Defendants*, 31 AM. CRIM. L. REV. 73, 110 (1993).

In all these cases, participating providers might be public or private, religious or secular. The inmate's ability to choose from a variety of providers, not all of which are religious, is what makes these programs voucher-like.

Prison vouchers have a more ambitious scope, but in their technical operation, they aren't that different. In the simple form described above, they're nothing more than a rule of voluntary assignment and, possibly, the opportunity for voluntary transfer at-will or at regular intervals (say, every few years).<sup>22</sup>

And prison vouchers would do more than make the current batch of faith-based prison programs constitutional (under the U.S. Constitution—state constitutions are another matter<sup>23</sup>). When faith-based prison programs operate today, they necessarily try to be ecumenical to some extent.<sup>24</sup> But suppose a religious organization isn't satisfied with such a program, just as it might not be satisfied with ecumenical prayers and other watered-down expressions of

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<sup>22</sup> There actually might be some constitutional difference between a voluntary assignment-and-transfer rule and an actual voucher scheme—whether the money really passes through the hands of the inmate may affect whether the scheme is valid under *Zelman*. See *infra* text accompanying notes 60–69. In my other work, I discuss more complicated schemes where the concept of “voucher” is doing even more work. For example, each voucher could represent a monetary amount that varies from prisoner to prisoner depending on his medical or other needs (with needier prisoners getting a larger voucher) or on his criminal record (with more heinous or repeat offenders getting a smaller voucher); prisoners with larger vouchers would thus be able to “afford” a wider range of prisons. See Alexander Volokh, *Prison Vouchers*, 160 U. PA. L. REV. (forthcoming 2012) (manuscript at 21), available at <http://ssrn.com/abstract=1856108>. But the simple version is all that is necessary for our purposes here.

<sup>23</sup> I don't discuss state constitutional issues in this Article. But it's worth noting that voucher proposals may still violate certain state constitutional provisions; thus, since *Zelman*, school voucher litigation has shifted to state courts. See Preston C. Green III & Peter L. Moran, *The State Constitutionality of Voucher Programs: Religion Is Not the Sole Determinant*, 2010 BYU EDUC. & L.J. 275, 277–78; Ira C. Lupu & Robert W. Tuttle, *Zelman's Future: Vouchers, Sectarian Providers, and the Next Round of Constitutional Battles*, 78 NOTRE DAME L. REV. 917, 957–72 (2003); Irina D. Manta, *Missed Opportunities: How the Courts Struck Down the Florida School Voucher Program*, 51 ST. LOUIS U. L.J. 185 (2006). Some of these constitutional provisions, for instance “Blaine Amendments,” are education-specific. See, e.g., N.Y. CONST. art. XI, § 3 (“[T]he state [ ] or any subdivision thereof shall [not] use . . . any public money, . . . directly or indirectly, in aid . . . of any school . . . under the control or direction of any religious denomination . . .”). But others are potentially more general, and could apply to religious prisons. For instance, the Arizona Constitution prevents appropriations of public money “to any religious worship, exercise, or instruction, or to the support of any religious establishment,” ARIZ. CONST. art. II, § 12, and prevents taxes or appropriations “in aid of any church, or private or sectarian school, or any public service corporation,” *id.* art. IX, § 10. And the Massachusetts Constitution prevents public money from being used to aid “any infirmary, hospital, institution, primary or secondary school, or charitable or religious undertaking which is not publicly owned and under the exclusive control, order and supervision of public officers or public agents . . .” MASS. CONST. art. XVIII, § 2.

<sup>24</sup> See, e.g., SULLIVAN, *supra* note 1, at 157–61.

religion in public schools.<sup>25</sup> Under a voucher system, it could become far more ambitious. A religious group could run its own prison and advertise inmate rehabilitation through intensive, and intensely sectarian, exposure to religion. Vouchers could be the best, or perhaps even the only, way to save faith-based prisons.

Why should we care about saving faith-based prison programs through vouchers? The theory behind such programs—that religion can be a rehabilitative force—is familiar and plausible. Even the non-religious should be open to the idea, at the very least because we all have an interest in the rehabilitation of inmates. If faith-based prisons work, it would be a shame for them to be unnecessarily unconstitutional.

*If* faith-based prisons work. Do they? I discuss the empirical evidence at length elsewhere; my conclusion is that, unfortunately, so far there is little empirical evidence in their favor.<sup>26</sup> Religious rehabilitative theory may be plausible, but that doesn't make it true. On the other hand, there is also little evidence that the theory is false. The bottom line is that there is little evidence, period; moreover, not every program evaluation is uniformly negative. Ultimately, the idea of experimentation is more important than particular research results. A better-designed program might yet work; or, perhaps, some existing programs already work but have not been adequately tested with the right research design. Provided one can do so consistently with the Constitution, it seems desirable to allow prison systems to experiment with such programs so that a program may emerge that can be shown to work.

But another potential benefit of prison vouchers has little to do with faith-based prisons. Rather, the potential benefit is the voucher system itself. As I argue in my other work,<sup>27</sup> prison vouchers have the potential to dramatically improve certain aspects of prison conditions that have proven remarkably resistant to judicial or political solution.

Prison vouchers also have strong potential negatives, so I am not advocating their broad-scale adoption. The main point of this Article is more targeted: vouchers, as I explain in Part II, can save faith-based prisons from violating the Establishment Clause.

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<sup>25</sup> See, e.g., Richard F. Duncan, *Public Schools and the Inevitability of Religious Inequality*, 1996 BYU L. REV. 569, 572 (“In my house, we do not offer prayers ‘to whom it may concern.’”); Paul Finkelman, *School Vouchers, Thomas Jefferson, Roger Williams, and Protecting the Faithful: Warnings from the Eighteenth Century and the Seventeenth Century on the Danger of Establishments to Religious Communities*, 2008 BYU L. REV. 525, 551–52 (noting that the school prayer at issue in *Engel v. Vitale*, 370 U.S. 421 (1962), “would hardly be recognized as ‘prayer’ in any meaningful way by people of faith who take religion seriously” and “was exactly what we would expect from a state agency trying to create a prayer that would offend no one, side with no one, and not run counter to anyone’s faith”).

<sup>26</sup> See generally Alexander Volokh, *Do Faith-Based Prisons Work?*, 63 ALA. L. REV. 43 (2011) (discussing the empirical evidence on the subject).

<sup>27</sup> See Volokh, *supra* note 22.

In Part III, I go beyond the Establishment Clause and argue that a prison voucher system would also liberate prisons (if not their inmates) in other, non-religious ways.

Prisoners have dramatically reduced constitutional rights, but they still retain some. In general, people—prisoners or not—may benefit from being able to waive their constitutional rights in exchange for other benefits. In the prison context, inmates may agree to waive some part of their due process rights—for instance, in exchange for better health care. A prison's ability to offer such a package is limited by the unconstitutional conditions doctrine. I argue that, in a prison system that is more competitive from the inmate's point of view, prisons would have more leeway to offer packages that would otherwise be unconstitutional.

## II. VOUCHERS AND CONSTITUTIONAL FAITH-BASED PRISONS

In this Part, I explain why faith-based prisons, as currently constituted, likely violate the Establishment Clause, and how the Establishment Clause problems disappear with prison vouchers.

To be constitutional, faith-based prisons must comply with the following requirements:

- If monetary aid is involved, the aid must not have the principal effect of advancing religion. In particular, the program should be free of indoctrination, which includes domination by overtly religious material. This is so regardless of whether the reimbursement is per diem, per capita, or lump sum.<sup>28</sup>
- In addition, the government must not choose the faith-based organization for its own sake, but rather by a process that is neutral with respect to religion.<sup>29</sup>
- There must be no endorsement of religion. Direct monetary payments to religious groups are one way of endorsing religion, but even without money, government approval of the religious materials used is also endorsement, as can the mere fact that the only available program is based on the principles of a particular religion, or on religious principles generally.<sup>30</sup>
- There must be no coercion, which includes any subtle pressure to join the program or legal benefits from joining the program, like a greater likelihood of parole or reduced security restrictions, or perhaps even a markedly higher quality of life.<sup>31</sup>
- There must be no delegation of government power specifically to a religious group. At the very least, this means that religious groups that

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<sup>28</sup> See *infra* text accompanying notes 37–42.

<sup>29</sup> See *infra* text accompanying notes 44–53.

<sup>30</sup> See *infra* Part II.A.2.

<sup>31</sup> See *infra* Part II.B.

run faith-based wings can't be in charge of keeping order and discipline, but the prohibition may even extend to non-coercive aspects of running a religious program.<sup>32</sup>

A faith-based prison might be able to comply with all these conditions, but it would be difficult. The biggest problems seem to be those associated with endorsement—for instance, avoiding indoctrination and choosing providers on a religion-neutral basis. To avoid indoctrination, the material would have to be so watered down as to not be associated with any particular religion, or even not be associated with religion at all. Or, if the program were to retain its religious character, the prison would have to allow a broad range of groups, defined without reference to religion, to operate. The former option will seem unattractive to many who seriously believe that religion can have a rehabilitative effect; the latter option seems unfeasibly expensive. In addition, prisons would have to make sure there were no severe quality differences between religious and non-religious programs. And—at a minimum—the religious program staff couldn't participate in order and discipline-related decisions, which might make it harder for religious groups to induce participating inmates to engage productively with the material.

I then explain how these problems would largely disappear in a world of vouchers. *Zelman v. Simmons-Harris* establishes that, when money is funneled to religious providers by the genuine, independent choice of beneficiaries, there is no government advancement or endorsement of religion.<sup>33</sup> When inmates choose freely among a wide range of providers selected without reference to religion, coercion becomes moot, and so does delegation.

### A. Religious Effects

The main problem of faith-based programs that look like InnerChange is that they have “the effect of advancing . . . religion.”<sup>34</sup>

Often this happens through the method of reimbursement: direct reimbursement to a religious organization is unconstitutional if the aid “result[s] in governmental indoctrination” or “define[s] its recipients by reference to religion,”<sup>35</sup> and the analysis is the same whether the payment is lump sum or per diem. Even if we pretend that per diem payments are like private choice programs, the aid is still invalid unless the religious organization is chosen as the result of a religion-neutral process.

But a faith-based program can impermissibly advance religion even without any money payments, just by endorsing the religious message.

As long as service providers are chosen non-neutrally, these problems seem difficult to overcome. However, under a prison voucher system, these problems

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<sup>32</sup> See *infra* Part II.C.

<sup>33</sup> See 536 U.S. 639, 652 (2002).

<sup>34</sup> *Agostini v. Felton*, 521 U.S. 203, 223 (1997) (internal quotation marks omitted).

<sup>35</sup> *Id.* at 234.



essentially disappear, for the same reason that “genuine . . . private choice” saved the school program in *Zelman v. Simmons-Harris*.<sup>36</sup> The following section elaborates on this point, with a concluding discussion of whether it changes anything that prisons—unlike the private schools at issue in *Zelman*—are state actors.

## 1. *Monetary Aid*

### a. *Direct Reimbursement*

The Eighth Circuit invalidated the 2000 to 2004 portion of the contract between Iowa and InnerChange for exactly the reasons stated above. The direct reimbursement arrangement in effect during those years<sup>37</sup> unconstitutionally advanced religion because it “result[ed] in governmental indoctrination”<sup>38</sup> (a not-too-difficult conclusion in light of the “Bible study, Christian classes, religious revivals, and church services” that “dominated” the program<sup>39</sup>) and the aid “define[d] its recipients by reference to religion”<sup>40</sup> (since inmates, to qualify, had to be “willing to productively participate in a program that is Christian-based”<sup>41</sup>).

What would it take for a faith-based prison program to be constitutional, if we take the direct-reimbursement business model as given?<sup>42</sup>

First, one would have to remove domination by Christian material and stop insisting on inmates’ productive participation in such material.<sup>43</sup> In the eyes of some, this would mean watering down the material so much as to make the religious material unrecognizable. Would this even be attractive to religious groups anymore?

In addition, the aid would have to be “offered to a broad range of groups or persons without regard to their religion.”<sup>44</sup> Providing a single secular alternative

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<sup>36</sup> 536 U.S. at 652.

<sup>37</sup> *Ams. United for Separation of Church & State v. Prison Fellowship Ministries*, 509 F.3d 406, 423 (8th Cir. 2007).

<sup>38</sup> *Agostini*, 521 U.S. at 234.

<sup>39</sup> *Ams. United*, 509 F.3d at 424.

<sup>40</sup> *Agostini*, 521 U.S. at 234.

<sup>41</sup> *Ams. United*, 509 F.3d at 425.

<sup>42</sup> The direct grant model may make sense for many social services, which must maintain capacity regardless of fluctuations in the number of participants. See Ira C. Lupu & Robert W. Tuttle, *The Faith-Based Initiative and the Constitution*, 55 DEPAUL L. REV. 1, 74 (2005).

<sup>43</sup> See *id.* at 86–89.

<sup>44</sup> *Mitchell v. Helms*, 530 U.S. 793, 809 (2000) (plurality opinion). It has been argued that the faith-based initiatives program during the Bush Administration, despite its facial neutrality, “target[ed] Christian groups and reward[ed] those organizations politically friendly to the administration’s policies.” See Megan A. Kemp, Comment, *Blessed Are the Born Again: An Analysis of Christian Fundamentalists, the Faith-Based Initiative and the Establishment Clause*, 43 HOUS. L. REV. 1523, 1555 (2007); see also Lupu & Tuttle, *supra*

side-by-side with the single religious alternative<sup>45</sup> seems inadequate for the “broad range.”<sup>46</sup> And there is clearly not enough space in any given prison for every single religious and secular organization to run its own program in its own wing. But could a more limited number of programs, representing the major faith traditions, plus a comparable secular alternative, be constitutional?<sup>47</sup>

Even such a program, if it did provide the necessary “broad range,”<sup>48</sup> would fail the “offered . . . without regard to . . . religion” criterion.<sup>49</sup> As long as certain religions are chosen for their own sake (for instance, because they represent the “major faith traditions” at the prison), it still seems that the program would be vulnerable to an Establishment Clause challenge, at least by lone dissenters from minority religions. In fact, even if *every* sect could be accommodated, the program would still seem dubious given *Illinois ex rel. McCollum v. Board of Education*,<sup>50</sup> in which the Supreme Court held that it was unconstitutional for public schools to host teachers of various religions (Catholic, Protestant, and Jewish, with a secular alternative) to offer thirty-minute religious classes to willing students.<sup>51</sup> In such a program, Justice Black wrote that the State was “afford[ing] sectarian groups an invaluable aid in that it [was helping] to provide pupils for their religious classes through use of the State’s compulsory public school machinery.”<sup>52</sup>

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note 42, at 42–43, 61–62 (discussing *Freedom from Religion Foundation v. Montana Office of Rural Health*, No. CV 03-30-BU-RWA (D. Mont. Oct. 26, 2004)). The faith-based program has continued under the Obama Administration with only modest changes. See, e.g., Peter Steinfelds, *Despite a Decade of Controversy, the ‘Faith-Based Initiative’ Endures*, N.Y. TIMES, Aug. 1, 2009, at A11; *Obama and the ‘Faith-Based’ Initiative*, AMS. UNITED FOR SEPARATION CHURCH & STATE (Jan. 2011), <http://www.au.org/media/church-and-state/archives/2011/01/obama-and-the-faith-based.html>.

<sup>45</sup> As suggested by Anthony R. Picarello, Jr., *The Good News of InnerChange*, 7 AVE MARIA L. REV. 25, 54 (2008).

<sup>46</sup> *Mitchell*, 530 U.S. at 809 (plurality opinion).

<sup>47</sup> See Lynn S. Branham, “Go and Sin No More”: *The Constitutionality of Governmentally Funded Faith-Based Prison Units*, 37 U. MICH. J.L. REFORM 291, 339 (2004).

<sup>48</sup> *Mitchell*, 530 U.S. at 809 (plurality opinion). Accommodation of only *major* religions may be insufficient. See, e.g., *Americans United Files Litigation Challenging Veterans Administration Bias Against Wiccans*, AMS. UNITED FOR SEPARATION CHURCH & STATE (Nov. 13, 2006), <http://www.au.org/media/press-releases/archives/2006/11/files-litigation.html>.

<sup>49</sup> *Mitchell*, 530 U.S. at 809 (plurality opinion).

<sup>50</sup> 333 U.S. 203 (1948).

<sup>51</sup> *Id.* at 207–10.

<sup>52</sup> *Id.* at 212; see also Katerina Semyonova, *In the Big House with the Good Book: An Examination of the Constitutionality of Faith-Based Prisons*, 8 N.Y. CITY L. REV. 209, 230–31 (2005). *McCollum* is apparently still good law. See *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 116 n.6 (2001) (distinguishing *McCollum*).

So the prison would not only have to have a broad range of programs,<sup>53</sup> but the criteria for choosing the programs would also have to be unrelated to religion.

The preceding discussion assumed that a prison could afford a range of programs. But even a small number of programs could be prohibitively resource-intensive, especially if, like Iowa's "God Pod," they are residential. Iowa officials sought out the InnerChange program precisely because the state could not afford anything else.<sup>54</sup> One could imagine a scheme where a prison offered every religious and secular organization a chance to run its own rehabilitative operation and then invited as many programs into the prison as it could accommodate. Perhaps the "broad range"<sup>55</sup> requirement can be applied with the necessary sensitivity to the space restrictions in prisons; perhaps it would be acceptable even if there were only one program, which was religious, provided the religious provider legitimately won a neutral bidding process.<sup>56</sup> (However, this wouldn't overcome the "coercion" aspect of the doctrine, which I discuss below.<sup>57</sup>) In any event, realistically, this might still result in just a few programs at any given prison,<sup>58</sup> with the number and scope dependent on the resources available to it.<sup>59</sup>

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<sup>53</sup> See Maya Anderson, *The Constitutionality of Faith-Based Prison Programs: A Real World Analysis Based in New Mexico*, 37 N.M. L. REV. 487, 530 (2007).

<sup>54</sup> See SULLIVAN, *supra* note 1, at 21–22.

<sup>55</sup> *Mitchell v. Helms*, 530 U.S. 793, 809 (2000) (plurality opinion).

<sup>56</sup> See Branham, *supra* note 47, at 340, 348–49.

<sup>57</sup> See *infra* Part II.B.

<sup>58</sup> George W. Knox, *The Problem of Gangs and Security Threat Groups (STGs) in American Prisons Today: Recent Research Findings from the 2004 Prison Gang Survey*, NAT'L GANG CRIME RES. CTR. (2005), <http://www.ngcrc.com/ngcrc/corr2006.html> ("The average American prison provides time and space to just over six different religious groups." The average among surveyed facilities was 6.3, with a high of 22 groups meeting at one surveyed prison.)

<sup>59</sup> Some commentators raise the issue of entanglement. Suppose InnerChange had tried to solve its "indoctrination attributable to the state" problem, see *Mitchell*, 530 U.S. at 809 (plurality opinion), by keeping its accounts so as to avoid the diversion of public funds to religious uses. (Five Justices in *Mitchell* believe that divertibility is problematic even when neutrality is present; see *id.* at 840–44 (O'Connor, J., concurring in the judgment); *id.* at 890–95 (Souter, J., dissenting)). Could the resulting "state surveillance," "inspection," and "evaluation," see *Lemon v. Kurtzman*, 403 U.S. 602, 619–20 (1971), fix the attributable indoctrination problem but in the process cause an entanglement problem? See *id.*; Lupu & Tuttle, *supra* note 42, at 89–93; Kemp, *supra* note 44, at 1554–55. Perhaps not. "[P]ervasive monitoring," *Mitchell*, 530 U.S. at 861 (O'Connor, J., concurring in the judgment), isn't required to avoid diversion. One can have "constitutionally sufficient" safeguards against diversion, based on self-auditing and occasional monitoring visits, see *id.* at 861–62, without creating excessive entanglement. See, e.g., *Conley v. Jackson Twp. Trs.*, 376 F. Supp. 2d 776, 786–87 (N.D. Ohio 2005). (There is such a thing as undermonitoring, see, e.g., *ACLU v. Foster*, No. Civ.A. 02-1440, 2002 WL 1733651, at \*5, \*7 (E.D. La. July 24, 2002); Lupu & Tuttle, *supra* note 42, at 100–02, but it's a problem that now seems not too hard to overcome).

So, most basically, faith-based programs are probably unconstitutional under a regime of direct-cost reimbursement unless the religious content is toned down significantly. This alone may make directly reimbursed faith-based programs unattractive to religious groups. In addition, the prison has to offer a broad range of groups, chosen neutrally with respect to religion, the opportunity to operate faith-based groups would only be allowed if they pass a religion-neutral selection process. The selection of a faith-based group might require the selection of other groups as well, which may be very costly.

b. *Per Diem Reimbursement*

i. *How to Treat Per Diem Reimbursement*

One might wonder why we should care about the constitutionality of direct reimbursement. Even if some social services require large up-front payments,<sup>60</sup> private prisons today generally work based on per diem reimbursement,<sup>61</sup> and this is how the Iowa InnerChange program worked in its later years.<sup>62</sup> And surely per diem or per capita reimbursement systems should be considered equivalent to voucher systems. As Judge Posner said in the context of state funding of attendance at a religious halfway house, in such cases:

[T]he state has dispensed with the intermediate step by which the recipient of the publicly funded private service hands his voucher to the service provider. But so far as the policy of the establishment clause is concerned, there is no difference between giving the voucher recipient a piece of paper that directs the public agency to pay the service provider and the agency's asking the recipient to indicate his preference and paying the provider whose service he prefers.<sup>63</sup>

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Prisons are naturally different from schools in some relevant respects: they'll certainly require much more monitoring than schools, since they keep prisoners twenty-four hours a day and exercise pervasive control over them—control that, in a great many cases, severely implicates the prisoners' constitutional rights. Of course, the Establishment Clause concern isn't pervasive monitoring as such, but pervasive monitoring that leads to entanglement with religion. (Pervasive monitoring of prison health care, for instance, needn't connect with religion at all.) Monitoring can intersect with religion, for instance, to the extent the prison is suspected of rewarding or punishing prisoners based on religious factors. So it's possible, but not certain, that entanglement may be a greater problem for prisons.

<sup>60</sup> See Lupu & Tuttle, *supra* note 42.

<sup>61</sup> See, e.g., RICHARD W. HARDING, PRIVATE PRISONS AND PUBLIC ACCOUNTABILITY 104 (1997).

<sup>62</sup> See *Ams. United for Separation of Church & State v. Prison Fellowship Ministries*, 509 F.3d 406, 425 (8th Cir. 2007).

<sup>63</sup> *Freedom from Religion Found., Inc. v. McCallum*, 324 F.3d 880, 882 (7th Cir. 2003).

And in the Iowa case itself, the Eighth Circuit panel—on which Justice O'Connor, by then retired, was sitting by designation<sup>64</sup>—analyzed the per-diem phase of the InnerChange program under *Zelman v. Simmons-Harris*.<sup>65</sup>

While this approach makes sense—indeed, the opposite approach seems unduly formalistic—it seems incorrect as a matter of doctrine. In her separate opinion in *Mitchell v. Helms*,<sup>66</sup> which is controlling,<sup>67</sup> Justice O'Connor argued that per capita-aid programs should *not* be treated like “true private-choice programs”<sup>68</sup> of the sort that would arise in *Zelman*. In her view, in a true voucher program, voucher recipients would retain more control over how their vouchers were used, there would be less perception of government endorsement of religion, and the government would not be in the position of making money payments directly to religious organizations.<sup>69</sup>

Thus, even if a faith-based prison program operates on a per diem basis, it arguably still fits within the direct aid category, and the analysis would proceed as in the previous subsection.<sup>70</sup>

## ii. *Per Diem Reimbursement as Private Choice*

But let us suppose that Judge Posner and the Eighth Circuit panel in the Iowa case were right to treat per diem reimbursement under *Zelman*. Would this save a faith-based program? Probably not.

To survive a *Zelman* analysis, the Eighth Circuit panel held, “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.’”<sup>71</sup>

And, as we saw in the Introduction,<sup>72</sup> such genuine choice was absent because “[t]he inmate could direct the aid only to InnerChange.”<sup>73</sup> It didn’t

<sup>64</sup> *Ams. United*, 509 F.3d at 413 n.1.

<sup>65</sup> 536 U.S. 639 (2002); *Ams. United*, 509 F.3d at 425–26.

<sup>66</sup> 530 U.S. 793 (2000).

<sup>67</sup> The plurality opinion was joined by four Justices, *id.* at 801, and Justice O’Connor’s concurrence in the judgment, which was joined by Justice Breyer, was the only other opinion supporting the judgment. *Id.* at 836.

<sup>68</sup> *Id.* at 842 (O’Connor, J., concurring in the judgment).

<sup>69</sup> *Id.* at 842–44; *see also* *Am. Jewish Cong. v. Corp. for Nat’l & Cmty. Serv.*, 399 F.3d 351, 358–59 (D.C. Cir. 2005); *Lupu & Tuttle*, *supra* note 42, at 69–72.

<sup>70</sup> *See supra* Part II.A.1.a.

<sup>71</sup> *Ams. United for Separation of Church & State v. Prison Fellowship Ministries*, 509 F.3d 406, 425 (8th Cir. 2007) (quoting *Zelman v. Simmons-Harris*, 536 U.S. 639, 652 (2002)).

<sup>72</sup> *See supra* text accompanying notes 12–14.

<sup>73</sup> *Ams. United*, 509 F.3d at 425; *see also* Tim Eicher, *Scaling the Wall: Faith-Based Prison Programs and the Establishment Clause*, 5 *GEO. J.L. & PUB. POL’Y* 221, 231–32 (2007).

matter that the program was voluntary.<sup>74</sup> Coercion raises its own set of Establishment Clause problems,<sup>75</sup> but *Zelman* is about a different issue: whether a program “has the forbidden ‘effect’ of advancing . . . religion,”<sup>76</sup> or whether the “advancement of a religious mission, or the perceived endorsement of a religious message, is reasonably attributable to . . . the government.”<sup>77</sup>

What would it take to find genuine choice in this context?

Obviously, the program would have to be chosen neutrally, just as in the preceding subsection.

The resource problem seems to apply here as well. In the direct reimbursement case, the focus was on the neutral criteria for choosing the organizations that received aid. But if we are right to consider per diem reimbursement as analogous to vouchers, the recipient of the aid is now the inmate himself. As the Eighth Circuit panel put it, the proper viewpoint “is the chooser’s (there [i.e., in *Zelman*], the parents’), not the provider’s (there, the private schools’). Here, the inmate had no genuine and independent private choice because he had only one option.”<sup>78</sup>

The *Zelman* analysis requires us to consider all alternatives available to inmates.<sup>79</sup> In *Zelman* itself, “remain[ing] in public school as before”<sup>80</sup> was one of the alternatives that contributed to a finding of genuine choice, even though the Court particularly stressed the non-“usual” alternatives, like community schools and magnet schools.<sup>81</sup> It’s plausible that in the prison context, merely remaining in the general prison population shouldn’t count as an alternative to the faith-based program—if we think of the faith-based program as not just a place to be while in prison but as a therapeutic program. But as Prison Fellowship Ministries and InnerChange pointed out, the Iowa Department of Corrections provided “more than one hundred other treatment programs” and ran “six therapeutic communities,” including “an intensive post-release” program.<sup>82</sup> Still, the district court discounted the other options because “no other program offer[ed] the full range of recommended treatment modules,”<sup>83</sup> and the Eighth Circuit panel ignored the other options entirely.<sup>84</sup> Perhaps the

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<sup>74</sup> See Branham, *supra* note 47, at 331–36.

<sup>75</sup> See *infra* Part II.B.

<sup>76</sup> *Zelman*, 536 U.S. at 649.

<sup>77</sup> *Id.* at 652.

<sup>78</sup> *Ams. United*, 509 F.3d at 426 (citing *Zelman*, 536 U.S. at 655–56).

<sup>79</sup> See *Zelman*, 536 U.S. at 655; *id.* at 663 (O’Connor, J., concurring).

<sup>80</sup> *Id.* at 655 (majority opinion).

<sup>81</sup> See *id.* at 659; *id.* at 663–64 (O’Connor, J., concurring).

<sup>82</sup> Brief of Defendants-Appellants Prison Fellowship Ministries & InnerChange Freedom Initiative, *supra* note 10, at 48.

<sup>83</sup> *Ams. United for Separation of Church & State v. Prison Fellowship Ministries*, 432 F. Supp. 2d 862, 930 (S.D. Iowa 2006); see also SULLIVAN, *supra* note 1, at 24–25 (discussing superior treatment options in God Pod).

<sup>84</sup> *Ams. United for Separation of Church & State v. Prison Fellowship Ministries*, 509 F.3d 406, 425–26 (8th Cir. 2007).

district court inappropriately “ratchet[ed] up the similarity requirements”<sup>85</sup> to find that there was no true choice; or maybe it was merely following Justice O’Connor’s view that, “to qualify as [a] genuine option[],” a therapeutic program needs only to be an “adequate substitute[].”<sup>86</sup>

So let us suppose that, instead, Iowa’s Newton Correctional Facility had offered a single, reasonably comparable secular alternative. Would there have been sufficient choice to satisfy *Zelman*? Perhaps, though this is not totally clear.<sup>87</sup> But even if two choices are enough, having to provide those two could be a significant drain on resources.

If we were to find true private choice here, we would be able to dispense with some of the limitations present in the direct reimbursement case. For instance, indoctrination wouldn’t be attributable to the state, so we wouldn’t need to insist on watering down religious content.<sup>88</sup> But even so, the resources problem may prove to be substantial.

### c. Taking “True Private Choice” Seriously

To recap: Direct reimbursement of faith-based prison programs is likely unconstitutional, at least unless the religious content is significantly watered

<sup>85</sup> Brief of Defendants-Appellants Prison Fellowship Ministries & InnerChange Freedom Initiative, *supra* note 10, at 48.

<sup>86</sup> *Zelman*, 536 U.S. at 670 (O’Connor, J., concurring).

<sup>87</sup> *Zelman* suggested that the set of schools that could accept vouchers not only was selected neutrally but also was substantial—or at least, there was no limitation on the set. The Cleveland voucher program permitted “the participation of *all* schools within the district.” *Id.* at 653 (majority opinion). Cleveland children enjoyed “a range of educational choices.” *Id.* at 655; *see also id.* at 673 (O’Connor, J., concurring). If the Cleveland program had allowed no more than one or two private schools to operate, perhaps the analysis would have come out differently, and perhaps this same limitation would doom a two-option choice in prisons, unless courts would be willing to be more forgiving of prisons’ space and resource limitations.

<sup>88</sup> Similarly, it seems that we wouldn’t have to worry about diversion of funds to religious uses, or potential entanglement issues that may arise from auditing schemes designed to police diversion. *See supra* note 59; *cf. Zelman*, 536 U.S. at 688–89, 691–93 (Souter, J., dissenting) (discussing divertibility concerns). Recall, *supra* note 59, that, because of monitoring requirements, entanglement might be a greater concern for prisons than for schools, even after *Mitchell v. Helms*, 530 U.S. 793 (2000); but, since divertibility is no longer problematic in a true voucher program, then even a very heavy monitoring regime need not worry about diversion of public funds to religious uses.

This isn’t the end of the story: entanglement can arise not only from policing diversion, but also from making sure prisoners weren’t being illegitimately rewarded or punished based on religious factors. Would religious punishment be expected and permissible in a religious prison? Perhaps not, since the punishment function would be an “exclusive public function” and therefore, to the extent it punishes, rather than just presents religious material, the prison would continue to be a state actor. *See infra* text accompanying notes 176–85. So, to this extent, it remains an open question whether one can design a monitoring scheme sufficient to detect impermissible religiously based punishment but not excessively entangling.

down; even then, there is a duty to choose programs on religion-neutral grounds. Current doctrine requires that per-diem reimbursement be treated like direct reimbursement, not like a true private choice program. But even if, hypothetically, we treat per diem reimbursement like true private choice (in which case, again, programs must be chosen on religion-neutral grounds), true private choice will be lacking unless there is at least one comparable secular program.

What would change under a true voucher program? First, any problems associated with direct reimbursement would disappear, and there would be no need to water down religious content. Second, a true voucher program would fall within the *Zelman* analysis because the benefits would go directly to the inmates, not to the prisons or program providers. Third, a voucher program would guarantee that providers would be chosen neutrally because the voucher would be available to any prison that satisfied certain minimum penological requirements, such as security and the like.

And, most importantly, a voucher program would solve the resource problem. No prison would have to offer more than a single program. The choice would be guaranteed by inmates' ability to select one prison over another. Constitutionally, there would be no need to give inmates the ability to choose among different programs within a single prison. And a voucher program could be structured to be largely cost-neutral, for instance if the voucher is equal to the average cost of a single inmate's incarceration. An inmate who chooses one prison over another, or who transfers between prisons, alters the allocation of government funds, but he doesn't force the government to spend more. In fact, to the extent private provision costs less than public provision, either because of cost savings in the private sector<sup>89</sup> or because religious prisons are subsidized from the outside,<sup>90</sup> a voucher program can provide vouchers that are worth less than the average cost of public incarceration, so that transfers to private prisons (including religious ones) actually *save* the government money.<sup>91</sup>

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<sup>89</sup> See, e.g., *Developments in the Law—The Law of Prisons*, 115 HARV. L. REV. 1838, 1875–77 (2002) (my student note); Geoffrey F. Segal & Adrian T. Moore, *Weighing the Watchmen: Evaluating the Costs and Benefits of Outsourcing Correctional Services*, REASON PUB. POL'Y INST., 2–3 (Jan. 2002), <http://reason.org/files/50b944ab1f7d1cb15d8943c0c334df56.pdf> (Policy Study No. 290). *But see* DOUGLAS McDONALD ET AL., ABT ASSOCS. INC., PRIVATE PRISONS IN THE UNITED STATES: AN ASSESSMENT OF CURRENT PRACTICE 33–46 & app.1 (July 16, 1998) (private prisons may not save money, and current empirical studies are inadequate to test the proposition); Brad Lundahl et al., *Prison Privatization: A Meta-Analysis of Cost Effectiveness and Quality of Confinement Indicators*, UTAH CRIM. JUST. CTR., 2 (Apr. 26, 2007), <http://ucjc.law.utah.edu/wp-content/uploads/86.pdf> (“Cost savings from privatizing prisons are not guaranteed and appear minimal.”).

<sup>90</sup> See SULLIVAN, *supra* note 1, at 23–24; *Ams. United for Separation of Church & State v. Prison Fellowship Ministries*, 509 F.3d 406, 417 (8th Cir. 2007).

<sup>91</sup> School voucher programs typically provide vouchers that are worth less than the average cost of public education. See, e.g., *Zelman*, 536 U.S. at 654; Caroline M. Hoxby,



I have said that prison vouchers would indisputably be analyzed under a *Zelman* framework. But whether they would pass depends on whether the necessary freedom of choice can be guaranteed.

On the most obvious level, there must, at least, be a secular choice for any inmate who wants one. In the terms of Justice O'Connor's concurrence in *Zelman*, the secular option must be an "adequate substitute[]" for it to be a "genuine option[]," even if it "need not be superior to [the religious option] in every respect."<sup>92</sup> This requirement is connected to the "coercion" strand of the Establishment Clause doctrine, and so I will discuss it below in connection with coercion.<sup>93</sup>

In addition, there must be not only the formal possibility of choice but also no inappropriate pressure for inmates to accept the religious program. Given the prison's total control over the inmate's existence and the potential obstacles to prisoners' receiving good information,<sup>94</sup> this is a non-trivial requirement, but one should be able to craft an acceptable program if one goes about it with due respect for inmates' vulnerability.

Such problems have already arisen in the related contexts of probation and juvenile delinquency.

- The Wisconsin Department of Corrections contracted with Faith Works, a faith-based organization, "to operate a halfway house providing twenty-four hour supervised residential care and related services" for "supervised offenders."<sup>95</sup> The department also contracted with other providers, both secular and religious, though Faith Works was the only organization that provided a long-term program.<sup>96</sup> On a motion for summary judgment, the district court in *Freedom from Religion Foundation, Inc. v. McCallum* found that the program resulted in religious indoctrination, so that it was invalid unless the state could show that it wasn't responsible for the indoctrination.<sup>97</sup> Whether the state could show this was uncertain at the summary judgment stage. The undisputed facts didn't conclusively establish whether the program was freely chosen by the offender. A state official made the initial recommendation of a program for the offender, and it was unclear how much latitude the offender had to reject the recommendation. It was

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*School Choice and School Competition: Evidence from the United States*, 10 SWED. ECON. POL'Y REV. 9, 13 (2003).

<sup>92</sup> *Zelman*, 536 U.S. at 670 (O'Connor, J., concurring).

<sup>93</sup> See *infra* Part II.B. In addition, the requirement is connected to "endorsement," see *infra* Part II.A.2, since if the government, as a practical matter, steers people toward religion, it may be said to be endorsing religion.

<sup>94</sup> But see *infra* notes 217–18 (questioning the magnitude of the information problem).

<sup>95</sup> *Freedom from Religion Found., Inc. v. McCallum*, 179 F. Supp. 2d 950, 960 (W.D. Wis. 2002).

<sup>96</sup> *Id.* at 960–62.

<sup>97</sup> *Id.* at 966–70.

also possible that an offender's court order could require a *long-term* treatment program, for which Faith Works was the only provider.<sup>98</sup>

- Michigan's Family Independence Agency contracted with ninety-six private child care agencies, including thirty-five faith-based providers, to provide residential programs for abused, neglected, or delinquent children.<sup>99</sup> A child was initially assigned to one provider by a "computerized grid,"<sup>100</sup> but could opt out of a religious provider if he chose.<sup>101</sup> The district court in *Teen Ranch, Inc. v. Udow* held, and the Sixth Circuit agreed, that, especially in light of "the youth and vulnerability of the class of citizens at issue,"<sup>102</sup> an opt-out was insufficient to provide "true private choice."<sup>103</sup> Therefore, the state couldn't fund placements with faith-based providers without violating the Establishment Clause.<sup>104</sup>

These programs shouldn't be hard to fix.

Thus, in *McCallum*, the district judge ultimately determined what was unclear at the summary judgment stage—that offenders entered the Faith Works program as a result of their "genuinely independent, private choice."<sup>105</sup> Faith Works was one of several programs under contract with the state; no one was forced to participate; and though Department of Corrections agents could initially recommend Faith Works, they were "instructed repeatedly to tell offenders that Faith Works is a religious treatment program and that offenders do not have to participate in the program."<sup>106</sup> Judge Posner agreed with the district court.<sup>107</sup>

The facts of *McCallum* aren't too different from those of *O'Connor v. California*,<sup>108</sup> where a district court ruled that, in light of the presence of a secular alternative, it was not unconstitutional for a county to incorporate Alcoholics Anonymous in the set of self-help programs that one could take as part of DUI probation.<sup>109</sup>

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<sup>98</sup> *Id.* at 971.

<sup>99</sup> *Teen Ranch, Inc. v. Udow*, 479 F.3d 403, 406 (6th Cir. 2007).

<sup>100</sup> *Id.*

<sup>101</sup> *Id.* at 409.

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

<sup>103</sup> *Teen Ranch, Inc. v. Udow*, 389 F. Supp. 2d 827, 835–36 (W.D. Mich. 2005); *see also Teen Ranch*, 479 F.3d at 409.

<sup>104</sup> *Teen Ranch*, 389 F. Supp. 2d at 837.

<sup>105</sup> *Freedom from Religion Found., Inc. v. McCallum*, 214 F. Supp. 2d 905, 907 (W.D. Wis. 2002).

<sup>106</sup> *Id.* at 910.

<sup>107</sup> *Freedom from Religion Found., Inc. v. McCallum*, 324 F.3d 880, 882 (7th Cir. 2003).

<sup>108</sup> 855 F. Supp. 303 (C.D. Cal. 1994).

<sup>109</sup> *Id.* at 308.

And in *Teen Ranch*,<sup>110</sup> rather than give juveniles an initial assignment and subsequent opt-out right, the state could simply allow the juveniles to choose from a list of providers, which would include both secular and faith-based options.

This should take care of the argument that nominally choice-based systems may in fact pressure beneficiaries to choose the religious option. But one could imagine a more radical version of the argument. Perhaps prisoners are unable to freely choose because, being prisoners, they are under “duress”;<sup>111</sup> “the concept of ‘voluntary consent’ is simply meaningless”<sup>112</sup> under such “inherently coercive conditions.”<sup>113</sup> Perhaps their capacity to choose is reduced, for instance, if they are substance abusers.<sup>114</sup> Perhaps, on this view, the very idea of incarceration is inconsistent with the idea of free choice.

Prisoners are placed in an environment that, by its nature, restricts their freedom. They have no privacy rights under the Fourth Amendment.<sup>115</sup> All sex, including consensual sex, is forbidden in prisons, except in the limited context of conjugal visitation programs.<sup>116</sup> Moreover, they are not allowed to exercise choice in a range of activities; for instance, their right to consent to medical studies is extremely limited.<sup>117</sup> Some prisoners, whose choices on the outside have been self-destructive and who have been unable to control their impulses, even experience prison as a refuge where they are freed from having to make choices.<sup>118</sup>

However, the mere fact that prisoners’ choice is *sometimes*—or even *usually*—restricted doesn’t mean that prisoners are incapable of exercising choice. Prisoners retain a whole range of constitutional rights,<sup>119</sup> even if these can generally be significantly curtailed in the interests of prison management.<sup>120</sup>

<sup>110</sup> *Teen Ranch, Inc. v. Udow*, 479 F.3d 403 (6th Cir. 2007).

<sup>111</sup> Lupu & Tuttle, *supra* note 42, at 28.

<sup>112</sup> GIORGIO AGAMBEN, *HOMO SACER: SOVEREIGN POWER AND BARE LIFE* 157–58 (Daniel Heller-Roazen trans., 1998).

<sup>113</sup> Bernard E. Harcourt, *Making Willing Bodies: Manufacturing Consent Among Prisoners and Soldiers, Creating Human Subjects, Patriots and Everyday Citizens 2* (Univ. of Chi. Law & Econ., Olin Working Paper No. 544; Univ. of Chi., Pub. Law Working Paper No. 341, 2011), available at [http://papers.ssm.com/sol3/papers.cfm?abstract\\_id=1758829](http://papers.ssm.com/sol3/papers.cfm?abstract_id=1758829).

<sup>114</sup> See Lupu & Tuttle, *supra* note 23, at 989.

<sup>115</sup> See *Hudson v. Palmer*, 468 U.S. 517, 525–26 (1984).

<sup>116</sup> See Christopher Hensley, *Introduction: Life and Sex in Prison*, in *PRISON SEX: PRACTICE AND POLICY* 1, 10 (Christopher Hensley ed., 2002).

<sup>117</sup> See INST. OF MED., *ETHICAL CONSIDERATIONS FOR RESEARCH INVOLVING PRISONERS* 114 (Lawrence O. Gostin et al. eds., 2007); Ian Urbina, *Panel Suggests Using Inmates in Drug Trials*, N.Y. TIMES, Aug. 13, 2006, at A1.

<sup>118</sup> See MARTHA GRACE DUNCAN, *ROMANTIC OUTLAWS, BELOVED PRISONS: THE UNCONSCIOUS MEANINGS OF CRIME AND PUNISHMENT* 21–23, 30–31, 48–50 (1996).

<sup>119</sup> See *Wolff v. McDonnell*, 418 U.S. 539, 555–56 (1974) (“[A] prisoner is not wholly stripped of constitutional protections when he is imprisoned for crime. There is no iron curtain drawn between the Constitution and the prisons of this country.”).

<sup>120</sup> See *Turner v. Safley*, 482 U.S. 78, 84 (1987).

Many of these rights—for instance, free speech, free exercise of religion, and marriage rights<sup>121</sup>—are premised on the idea that, despite their unfree condition, prisoners are able to make autonomous moral choices. In fact, prisoners' ability to experience religious freedom,<sup>122</sup> combined with outrage at prison officials' arbitrary treatment of various meritorious religious claims,<sup>123</sup> motivated the passage of the Religious Land Use and Institutionalized Persons Act;<sup>124</sup> this act was such that "in principle, inmate religious claims against states are given *more* solicitous consideration than are nonprisoner religious claims against states."<sup>125</sup> Prisoners are generally not required to work while in prison.<sup>126</sup> They are allowed to control the course of their own litigation, and indeed, various cases presume that prisoners are allowed to make "voluntary" choices in the context of, say, participation in prison programs<sup>127</sup> or declining an offer of protective custody.<sup>128</sup>

Moreover, even if a prisoner values prison and its coercive nature because he doesn't like to make choices, this doesn't mean that a prisoner wouldn't want to make *some* choices. Prisoners have always been thought able to use their incarceration to experience religious and spiritual renewal;<sup>129</sup> and, even outside of the religious context, a prisoner who values being free from everyday concerns and the overwhelming choices of freedom<sup>130</sup> may value the ability to choose a place with better medical care or lower assault or rape rates. Finally, prisoners' (or anyone else's) religious (or free speech, or marriage) rights are not generally thought to vary according to whether they are substance abusers.

There are various reasons for restricting prisoners' freedom. One may want to exact retribution against evildoers, or incapacitate them, or deter others from committing similar crimes. One may want to protect them from other prisoners—and a prohibition on sexual contact may be justified by a surmise that what looks like consensual sex may often be rape in disguise. One may want to protect them from hard-to-detect coercion from other sources, as perhaps in the case of participation in medical studies—one may be concerned about the inevitable power imbalances between medical researchers and

<sup>121</sup> See *infra* notes 348–59.

<sup>122</sup> See Lynn S. Branham, "The Devil Is in the Details": A Continued Dissection of the Constitutionality of Faith-Based Prison Units, 6 AVE MARIA L. REV. 409, 427–29 (2008).

<sup>123</sup> See, e.g., *Cutter v. Wilkinson*, 544 U.S. 709, 716–17 & n.5 (2005).

<sup>124</sup> The "institutionalized persons" section of the Act is at 42 U.S.C. § 2000cc-1 (2006).

<sup>125</sup> *Developments in the Law—The Law of Prisons*, *supra* note 89, at 1895.

<sup>126</sup> See Christopher Stafford, Note, *Finding Work: How to Approach the Intersection of Prisoner Reentry, Employment, and Recidivism*, 13 GEO. J. ON POVERTY L. & POL'Y 261, 272 (2006).

<sup>127</sup> See *McKune v. Lile*, 536 U.S. 24, 44–45 (2002).

<sup>128</sup> See *Harding v. Jones*, 768 F. Supp. 275, 277–78 (E.D. Mo. 1991).

<sup>129</sup> See, e.g., *Duffy v. Cal. State Pers. Bd.*, 283 Cal. Rptr. 622, 629 (Ct. App. 1991); DUNCAN, *supra* note 118, at 32–37; MALCOLM X WITH ALEX HALEY, THE AUTOBIOGRAPHY OF MALCOLM X 155–90 (Ballantine Books 1992) (1964).

<sup>130</sup> DUNCAN, *supra* note 118, at 26–27.

inmates, especially in light of past abuses.<sup>131</sup> But all this is consistent with a recognition that, in whatever free space is left to them, prisoners are able to make autonomous choices much like anyone else.

Ira Lupu and Robert Tuttle take a different tack, arguing that vouchers outside of the education context “stand on less certain ground” than in *Zelman*,<sup>132</sup> but not because of problems with the notion of consent.

For some services, they argue, “the pool of providers tends to be dominated by faith-based providers.”<sup>133</sup> “Substance abuse treatment programs” fall into this category; likewise, they write, “rehabilitation of prisoners” is “likely to attract a high percentage of providers that use explicitly religious methods to try to transform those with whom they are engaged.”<sup>134</sup> In these cases, they write, the “government may be under considerable pressure to bring secular providers into the service market, although *Zelman* liberates the government from any obligation to ensure that the secular options are as plentiful or as attractive as the religious ones.”<sup>135</sup>

It isn’t clear, however, that the prisoner rehabilitation field will inevitably be as dominated by religious providers as Lupu and Tuttle claim. In the first place, to take the example of education, the prevalence of religious schools in voucher *experiments* doesn’t necessarily indicate that religious schools will dominate in actual voucher programs: it’s the existence of widespread and adequate funding through vouchers that would bring entrepreneurial secular operators into the field.<sup>136</sup>

Moreover, in the case of prisons, we don’t have to speculate because we can already observe substantial rehabilitative programs being run by the two largest private prison companies:<sup>137</sup> the Corrections Corporation of America<sup>138</sup> and the GEO Group.<sup>139</sup> These two corporations house about three-quarters of all

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<sup>131</sup> See Urbina, *supra* note 117. *But see* Harcourt, *supra* note 113, at 4–5 (discussing possibilities for true prisoner choice to consent to medical studies in context of finding malaria treatments for soldiers in World War II and Vietnam Wars); Christian Longo, Op-Ed., *Giving Life After Death Row*, N.Y. TIMES, Mar. 6, 2011, at WK12 (death row inmate desiring to donate organs).

<sup>132</sup> Lupu & Tuttle, *supra* note 23, at 985.

<sup>133</sup> *Id.*; see also Kemp, *supra* note 44, at 1557–58.

<sup>134</sup> Lupu & Tuttle, *supra* note 23, at 985–86.

<sup>135</sup> *Id.* at 986; see also Lupu & Tuttle, *supra* note 42, at 27–28.

<sup>136</sup> See Caroline M. Hoxby, *Preface: School Choice in the Wake of the Supreme Court Decision on Vouchers*, in *THE ECONOMICS OF SCHOOL CHOICE*, at xi–xii (Caroline M. Hoxby ed., 2003) (arguing that because current voucher programs are limited in scope and of uncertain permanence, they have not provided an economic incentive for the private sector to create new schools).

<sup>137</sup> See Alexander Volokh, *Privatization and the Law and Economics of Political Advocacy*, 60 STAN. L. REV. 1197, 1237 (2008).

<sup>138</sup> See *Inmate Rehabilitation*, CORRS. CORP. OF AM., <http://www.correctionscorp.com/facility-operations/inmate-programs/> (last visited Nov. 9, 2011).

<sup>139</sup> See *Evidence-Based Rehabilitative Programs*, GEO GROUP, INC., <http://www.thegeogroupinc.com/Programs.asp> (last visited Oct. 10, 2011).

prisoners in private facilities<sup>140</sup>—and prisoners in private facilities are about 8% of the total number of prisoners nationally.<sup>141</sup> The GEO Group reports that “[o]n any given day, more than 15,000 offenders are enrolled in programs at GEO facilities . . . , ranging from academic and vocational programs to substance abuse treatment (both psycho-educational and Therapeutic Communities).”<sup>142</sup> In addition to academic education, vocational education, and prison industries programs, GEO has behavior/life skills programs, substance abuse programs, and residential drug abuse programs—as well as religious programming, including chaplain services.<sup>143</sup> Corrections Corporation of America’s portfolio is basically similar.<sup>144</sup>

Thus, there don’t seem to be any major obstacles standing in the way of finding that a prison voucher system provides the requisite true private choice for purposes of the *Zelman* doctrine.

## 2. Endorsement Without Money

The arguments against faith-based prisons canvassed in the previous section focused on the permissibility of monetary aid to religious organizations. But government can impermissibly advance religion by endorsing it even when no money is changing hands. (This is the case, for instance, when a religious display is on public property or when public officials are involved.<sup>145</sup>) Endorsement sends a message that nonadherents of the endorsed belief “are outsiders, not full members of the political community”; it also sends “an accompanying message to adher[e]nts that they are insiders, favored members of the political community.”<sup>146</sup>

This concern has been relevant for faith-based prison programs.<sup>147</sup> In the Chaplain’s Education Unit (“CEU”) at the jail in Tarrant County, Texas,

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<sup>140</sup> In 2005, Corrections Corporation of America had a 54% market share, *see* Michael Brush, *Company Focus: 3 Prison Stocks Poised to Break Out*, MSN MONEY (Jan. 5, 2005), <http://web.archive.org/web/20050105215726/http://moneycentral.msn.com/content/P105034.asp> (accessed by searching MSN Money in the Internet Archive Index). GEO has a 25% U.S. private corrections market share, *see Facts*, GEO GROUP, INC., <http://www.thegeogroupinc.com/facts.asp> (last visited Oct. 10, 2011).

<sup>141</sup> HEATHER C. WEST ET AL., U.S. DEP’T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, PRISONERS IN 2009, at 34 app. tbl.20 (2010), *available at* <http://bjs.ojp.usdoj.gov/content/pub/pdf/p09.pdf>.

<sup>142</sup> *Evidence-Based Rehabilitative Programs*, *supra* note 139.

<sup>143</sup> *Id.*

<sup>144</sup> *See Inmate Rehabilitation*, *supra* note 138.

<sup>145</sup> *See, e.g., Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 305–10 (2000); *Cnty. of Allegheny v. ACLU*, 492 U.S. 573, 592–94 (1989); *Lynch v. Donnelly*, 465 U.S. 668, 688 (1984) (O’Connor, J., concurring); *see also Anderson*, *supra* note 53, at 526–27.

<sup>146</sup> *Santa Fe*, 530 U.S. at 309–10 (quoting *Lynch*, 465 U.S. at 688 (O’Connor, J., concurring)).

<sup>147</sup> *See Kemp*, *supra* note 44, at 1558–59.

consenting inmates were taught “orthodox Christian biblical principles,”<sup>148</sup> as determined by the sheriff and jail chaplain.<sup>149</sup> No other religious view could be taught in the CEU; inmates could meet with spiritual advisors of other religions, but only “across a glass window via telephone.”<sup>150</sup> The Texas Supreme Court, in *Williams v. Lara*,<sup>151</sup> had little trouble concluding that the sheriff’s and chaplain’s actions “could be perceived as reflecting county endorsement of the specific religious content offered in the CEU.”<sup>152</sup>

Admittedly, this fact pattern is unusual: prison management usually doesn’t explicitly approve theological content. Government clearly can’t “take a position on questions of religious belief.”<sup>153</sup> But in determining whether the government is endorsing religion, it isn’t important that the religious message is in fact delivered by a private organization, for instance Prison Fellowship Ministries. “[T]he Establishment Clause prohibits . . . the government’s lending its support to the communication of a religious organization’s religious message.”<sup>154</sup>

Thus, in *Griffin v. Coughlin*,<sup>155</sup> a requirement that an inmate participate in an in-prison Alcoholics Anonymous program, which has religious content, has been struck down for endorsing religion,<sup>156</sup> though the religious content came entirely from the group running the program and not from the prison itself. In *Griffin*, there was no secular alternative available, but it is plausible that—just as when money payments are at issue—any process for choosing providers that wasn’t neutral with respect to religion would raise endorsement problems.

A voucher program would cure any endorsement problem. *Zelman* was particularly concerned with government aid, but it also spoke more generally in terms of endorsement:

[W]here a government aid program is neutral with respect to religion, and provides assistance directly to a broad class of citizens who, in turn, direct government aid to religious schools wholly as a result of their own genuine and independent private choice, . . . [t]he incidental advancement of a religious mission, or the perceived endorsement of a religious message, is reasonably attributable to the individual recipient, not to the government.<sup>157</sup>

Because reasonable observers are “deemed aware of the history and context underlying a challenged program,”<sup>158</sup> “no reasonable observer would think a

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<sup>148</sup> *Williams v. Lara*, 52 S.W.3d 171, 176 (Tex. 2001).

<sup>149</sup> *Id.*

<sup>150</sup> *Id.* at 177.

<sup>151</sup> 52 S.W.3d 171.

<sup>152</sup> *Id.* at 191.

<sup>153</sup> *Cnty. of Allegheny v. ACLU*, 492 U.S. 573, 594 (1989).

<sup>154</sup> *Id.* at 601.

<sup>155</sup> *Griffin v. Coughlin*, 673 N.E.2d 98 (N.Y. 1996)

<sup>156</sup> *See id.* at 108.

<sup>157</sup> *Zelman v. Simmons-Harris*, 536 U.S. 639, 652 (2002) (emphasis added).

<sup>158</sup> *Id.* at 655 (internal quotation marks omitted).

neutral program of private choice, where state aid reaches religious [providers] solely as a result of the numerous independent decisions of private individuals, carries with it the *imprimatur* of government endorsement.”<sup>159</sup>

### 3. *But Aren't All Prisons State Actors?*

One may, at this point, think that one shouldn't too quickly import the *Zelman* framework, which was developed for schools, into the prison context.

The most salient difference relates to state action. Private schools participating in a voucher program generally aren't state actors.<sup>160</sup> It's therefore uncontroversial that a private school can teach religion, and, since *Zelman*, it's clear that such a religious school can be included in a voucher program.<sup>161</sup>

But prisons aren't like schools. The Supreme Court has actually never held that private prison firms are state actors in suits brought by inmates, though it has assumed it.<sup>162</sup> But appellate courts have held this, mostly based on the “public function” theory,<sup>163</sup> and they have certainly been right to do so. State action is present when a private party exercises powers “traditionally exclusively reserved to the State,”<sup>164</sup> and while education doesn't fit within this

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<sup>159</sup> *Id.*

<sup>160</sup> The state-action doctrine itself lays out the exceptional cases when a private school may be considered a state actor. For instance, a private school may be a state actor to the extent that the specific actions complained of are “compelled” or “influenced” by the government, *see Rendell-Baker v. Kohn*, 457 U.S. 830, 841 (1982), or if the school willfully participates in “joint activity” with the government, *see Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 941 (1982) (quoting *United States v. Price*, 383 U.S. 787, 794 (1966)), or if the government “insinuate[s] itself into a position of interdependence” with the school, *see Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 725 (1961), or if the government is “entwined in [its] management or control,” *see Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 296 (2001). It's clear from the case law, *see Rendell-Baker*, 457 U.S. at 841–42, that such cases are the exception, not the norm.

<sup>161</sup> 536 U.S. 639.

<sup>162</sup> *See Richardson v. McKnight*, 521 U.S. 399, 413 (1997); *cf. Alba v. Montford*, 517 F.3d 1249, 1254 (11th Cir. 2008) (also assuming this).

<sup>163</sup> *See, e.g., Rosborough v. Mgmt. & Training Corp.*, 350 F.3d 459, 460–61 (5th Cir. 2003); *Smith v. Cochran*, 339 F.3d 1205, 1215–16 (10th Cir. 2003); *Skelton v. Pri-Cor, Inc.*, 963 F.2d 100, 102 (6th Cir. 1991); *cf. West v. Atkins*, 487 U.S. 42, 54–57 (1988) (holding private doctor contracted to provide medical care to prisoners at a public prison to be a state actor).

<sup>164</sup> *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 352 (1974).



category,<sup>165</sup> surely imprisonment does.<sup>166</sup> Inmates in private prisons are entitled to the same constitutional protections that they would have in public prisons.<sup>167</sup>

Does this pose a problem for the constitutionality of religious prisons? Surely, the state can't teach any religious doctrine as true. "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in . . . religion . . ."<sup>168</sup> How, then, can we envision a religious prison, if even a private prison remains a state actor?

To answer this question, we need to be clear on what it means to be a "state actor" and how it differs from actually being the "state." Unfortunately, the Supreme Court hasn't always spoken clearly on the matter. Some cases talk as though state actors *are* the state: "[t]he fundamental inquiry" in a state action case "is whether the [defendant] is a governmental actor to whom the prohibitions of the Constitution apply."<sup>169</sup> Others merely focus on the challenged *action*, asking whether that action "must in law be deemed to be that of the State."<sup>170</sup> Others take an even milder tone, asking merely whether the action "may be *fairly treated as* that of the State itself."<sup>171</sup> Still others just ask whether the challenged action is "fairly attributable to the State"<sup>172</sup> or "chargeable to the State"<sup>173</sup> or whether the state is "*responsible* for the specific conduct of which the plaintiff complains."<sup>174</sup> The Supreme Court even cites many of these formulations simultaneously, as though they were equivalent.<sup>175</sup>

<sup>165</sup> See *Rendell-Baker*, 457 U.S. at 842; *Logiodice v. Trs. of Me. Cent. Inst.*, 296 F.3d 22, 26 (1st Cir. 2002).

<sup>166</sup> While the private sector has been involved in incarceration throughout American history, see, e.g., Sharon Dolovich, *State Punishment and Private Prisons*, 55 DUKE L.J. 437, 450–62 (2005), the requirement that one be locked up has always, in the United States, come from the government.

<sup>167</sup> For a discussion of the non-Establishment Clause implications of this, see *infra* Part III.A. That public prisons are state actors is not only obvious but is also implied by *Wolff v. McDonnell*, 418 U.S. 539, 555–56 (1974).

<sup>168</sup> *W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943).

<sup>169</sup> *S.F. Arts & Athletics, Inc. v. U.S. Olympic Comm.*, 483 U.S. 522, 542 (1987); see also *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 937 (1982); *Evans v. Newton*, 382 U.S. 296, 299 (1966).

<sup>170</sup> *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982).

<sup>171</sup> *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 351 (1974) (emphasis added).

<sup>172</sup> *Lugar*, 457 U.S. at 937; see also *West v. Atkins*, 487 U.S. 42, 55–56 (1988).

<sup>173</sup> *Lugar*, 457 U.S. at 937.

<sup>174</sup> *Blum*, 457 U.S. at 1004.

<sup>175</sup> See, e.g., *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 295 (2001) (citing the "fairly treated" language of *Jackson* and using its own "fairly attributable" language); *Blum*, 457 U.S. at 1004 (using "fairly . . . attribut[able]" and "State is *responsible*" language and also citing "fairly treated" and "must in law be deemed" language); *Lugar*, 457 U.S. at 937 (using "fairly attributable" language, but folding into the "fair attribution" question a requirement that "the party charged with the deprivation . . . be a person who may fairly be said to be a state actor," but at the same time making clear that a "state actor" finding could be limited to specific actions, for instance if one conduct were

All these statements are arguably consistent with each other. But the last view—the one that focuses on the attributability of particular actions—is the clearest statement of what state action means. Actual employees of the state are state actors whenever they’re on the job.<sup>176</sup> But if an apparently private party is found to be a state actor, it doesn’t become tantamount to the state in all cases and for all purposes. The Eagle Coffee Shoppe, located in a public Wilmington parking structure, may be a state actor insofar as it discriminates against black patrons,<sup>177</sup> but surely it remains private enough to not have to provide due process before firing its employees.<sup>178</sup> The New Perspectives School, which educates problem students for the state of Massachusetts at the state’s expense, may not be a state actor insofar as it may fire its employees without due process and in retaliation for their speech,<sup>179</sup> but it is perhaps public enough that some constitutional duties may apply to decisions involving students.<sup>180</sup> A creditor may become a state actor if he uses certain prejudgment attachment statutes to seize his debtor’s assets,<sup>181</sup> but surely if that creditor is a church, being a state actor doesn’t prevent it from conducting Sunday Mass. A religious nonprofit

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“chargeable to the State”); *Rendell-Baker v. Kohn*, 457 U.S. 830, 847 (1982) (using “attributable” language and also “regarded as governmental action”).

<sup>176</sup> See *Lugar*, 457 U.S. at 936 n.18 (“[S]tate employment is generally sufficient to render the defendant a state actor . . .”). But see David A. Strauss, *State Action After the Civil Rights Era*, 10 CONST. COMMENT. 409, 411 (1993) (arguing that “the automatic treatment of all actions of the government as ‘state action’—or at least as all *equally* state action—should be qualified in favor of a more thoroughgoing functionalism”).

<sup>177</sup> *Burton v. Wilmington Parking Auth.*, 365 U.S. 715 (1961).

<sup>178</sup> *Burton* is actually written broadly enough to suggest the opposite:

Specifically defining the limits of our inquiry, what we hold today is that when a State leases public property in the manner and for the purpose shown to have been the case here, the proscriptions of the Fourteenth Amendment must be complied with by the lessee as certainly as though they were binding covenants written into the agreement itself.

*Id.* at 726. But the opinion itself heavily focuses, in a fairly fact-based way, on the state’s “participation and involvement in [racially] discriminatory action.” *Id.* at 724. So, to the extent that *Burton* suggests that the entire Fourteenth Amendment applies wholesale, this is dictum and probably not good law today.

<sup>179</sup> *Rendell-Baker*, 457 U.S. at 830.

<sup>180</sup> The majority’s argument that the personnel decisions at issue weren’t “compelled or even influenced by any state regulation,” *id.* at 841, implies that the result could be different in an area where the school was more heavily regulated. See also *id.* at 851 (Marshall, J., dissenting) (“[The majority] would apparently concede that actions directly affecting the students could be treated as under color of state law, since the school is fulfilling the State’s obligations to those children under [state law]. It suggests, however, that the State has no interest in personnel decisions.”); cf. *Logiodice v. Trs. of Me. Cent. Inst.*, 296 F.3d 22, 27 (1st Cir. 2002) (“Admittedly, . . . *Rendell-Baker* . . . involved claims to due process protection made by teachers and not students; our own decisions . . . held out the possibility that students might have a better claim.”).

<sup>181</sup> *Lugar*, 457 U.S. at 922.

may be a state actor under the public function theory to the extent that it operates a contract postal unit on church property,<sup>182</sup> but the *entire* nonprofit (outside of the immediate postal area) doesn't serve a public function "any more than selling shovels becomes a public function when a [contract postal unit] is located in a hardware store."<sup>183</sup>

Once we properly conceptualize the state action inquiry as being not about "who *is* the state" but about "when is one's conduct *attributable* to the state," things become clearer. Private prisons aren't state actors in the abstract. For instance, various circuit courts have held, no doubt correctly, that private prisons are still private when firing employees;<sup>184</sup> the Fourth Circuit has even held, much more dubiously, that a private prison remains private when providing medical care to inmates.<sup>185</sup> But when private prisons are fulfilling the "exclusive public function" of incarceration,<sup>186</sup> their incarcerative functions, like restricting prisoners' freedom and meting out punishment, are certainly state action. Rewarding and punishing inmates based on religious factors will thus continue to be unconstitutional. But to find out whether their offer of religious services is likewise state action, we need to dig deeper.

Fortunately, we don't need to dig *that much* deeper. Consider the following language from *Zelman*:<sup>187</sup>

[W]here a government aid program is neutral with respect to religion, and provides assistance directly to a broad class of citizens who, in turn, direct government aid to religious schools wholly as a result of their own genuine and

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<sup>182</sup> Cooper v. U.S. Postal Serv., 577 F.3d 479, 484, 492 (2d Cir. 2009).

<sup>183</sup> *Id.* at 493.

<sup>184</sup> See Cornish v. Corr. Servs. Corp., 402 F.3d 545, 550 (5th Cir. 2005); George v. Pacific-CSC Work Furlough, 91 F.3d 1227, 1230 (9th Cir. 1996) (per curiam).

<sup>185</sup> See Holly v. Scott, 434 F.3d 287, 292–94 (4th Cir. 2006) ("The inadequate medical care alleged in this case unquestionably arises out of defendants' operation of the prison, not the fact of Holly's incarceration.").

<sup>186</sup> See *supra* text accompanying notes 163–66.

<sup>187</sup> The state action doctrine applies somewhat differently in the Establishment Clause context than elsewhere. Some commentators characterize the two strands of doctrine as inconsistent, see *Developments in the Law—State Action and the Public/Private Distinction*, 123 HARV. L. REV. 1248, 1280 (2010), while others see the Establishment Clause strand as "a specialized application" of the general doctrine, see Michael W. McConnell, *State Action and the Supreme Court's Emerging Consensus on the Line Between Establishment and Private Religious Expression*, 28 PEPP. L. REV. 681, 682 (2001). Carl Esbeck argues that the Establishment Clause is properly regarded as a structural restraint on governmental power, not a rights provision, see Carl H. Esbeck, *The Establishment Clause as a Structural Restraint on Governmental Power*, 84 IOWA L. REV. 1, 2 (1998); under this view, it would not be surprising if the state action doctrine applied differently than for traditional rights provisions. (Note, though, that Esbeck, too, adopts a "fairly attributed" line, *id.* at 85, under which the basic inquiry would be similar.) Regardless, the Establishment Clause cases do take a somewhat distinct approach to the matter, so it is appropriate to look to Establishment Clause cases to see when private action is attributable to the government for Establishment Clause purposes.

independent private choice, the program is not readily subject to challenge under the Establishment Clause. A program that shares these features permits government aid to reach religious institutions only by way of the deliberate choices of numerous individual recipients. The incidental advancement of a religious mission, or the perceived endorsement of a religious message, is *reasonably attributable to the individual recipient, not to the government*, whose role ends with the disbursement of benefits.<sup>188</sup>

“Reasonably attributable” and “fairly attributable,” I suggest, are the same. If a voucher program passes the *Zelman* test as described above,<sup>189</sup> the religious content of any faith-based program isn’t reasonably attributable to the government.<sup>190</sup> This is true not because of a mechanical application of the words of *Zelman* (which were, after all, written with schools, not prisons, in mind), but because of the logic of true private choice: neutrality with respect to religion, combined with individual control over who gets the voucher, makes the recipient, not the government, responsible for the religious message as a general matter, whether we’re talking about schools or prisons.

So, even though any prison continues to be a state actor for certain purposes, it remains a private actor for purposes of running a faith-based program, for instance, the exposure to sectarian material.<sup>191</sup>

## B. Coercion

Faith-based prison programs have also been criticized for running afoul of the “coercion” strand of Establishment Clause jurisprudence.

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<sup>188</sup> *Zelman v. Simmons-Harris*, 536 U.S. 639, 652 (2002) (emphasis added).

<sup>189</sup> See *supra* Part II.A.1.

<sup>190</sup> In a mandatory system, if, by regulation, an inmate can only get religious materials through a chaplain, and if the chaplain position is delegated to a private religious organization, then—on a rationale based on *West v. Atkins*, 487 U.S. 42 (1988)—that organization may become a state actor when it takes over the state’s role of controlling access to religious materials. *Florer v. Congregation Pidyon Shevuyim*, 603 F.3d 1118, 1123 (9th Cir. 2010), *withdrawn*, 611 F.3d 1097, 1098 (9th Cir. 2010); see also *Phelps v. Dunn*, 965 F.2d 93, 101–02 (6th Cir. 1992). In *Pidyon*, the Ninth Circuit ultimately concluded that the inmate *could* get religious materials elsewhere (or, at least, the inmate hadn’t shown otherwise), so the religious organization ended up *not* being a state actor. *Florer v. Congregation Pidyon Shevuyim*, 639 F.3d 916, 925–26 (9th Cir. 2011).

<sup>191</sup> *Cooper* isn’t to the contrary, though it might appear so at first glance. In *Cooper v. Postal Service*, the Second Circuit held that a nonprofit’s religious display at a contract postal unit in the immediate postal area violated the Establishment Clause. 577 F.3d 479, 493–96 (2d Cir. 2009). Why, then, wouldn’t it be similarly invalid for a religious organization to preach religion while incarcerating inmates? The answer is that in *Cooper*, the court found that the display violated the first prong of the *Lemon* test—there was no secular purpose. *Id.* at 495. By contrast, preaching religion while incarcerating inmates does have the secular purpose of rehabilitation and is thus only vulnerable at prong two. It is at prong two that the *Zelman* framework saves voucherized religious prisons by negating government responsibility for the religious message.

Coercion is implicated, for instance, if an offender—whether in prison,<sup>192</sup> on parole,<sup>193</sup> or on probation<sup>194</sup>—is required to attend Alcoholics Anonymous or Narcotics Anonymous meetings, which have a substantial religious component, and isn't allowed to choose a secular program.<sup>195</sup> Conversely, coercion is absent when a secular alternative to Alcoholics Anonymous is available.<sup>196</sup> Coercion is also implicated when participation in a religious therapeutic program is made a condition of earning good time credits.<sup>197</sup>

One might think that most faith-based prison programs are immune from the coercion problem, since participation in these programs is always voluntary. But “coercion,” in Establishment Clause jurisprudence, also includes “subtle coercive pressure”<sup>198</sup> (like the desire not to be shunned by one's peers<sup>199</sup>), as well as having to make a “difficult choice”<sup>200</sup> and “forfeit . . . benefits as the price of resisting conformance to state-sponsored religious practice.”<sup>201</sup> In the public school context, the question has arisen in the context of prayers at graduations and football games, which raise questions of both peer pressure and the opportunity to attend school events that are felt to be important. Of course, it could be that the high school students that appear in the Supreme Court's cases are different from prisoners; inmates, who are generally adults,<sup>202</sup> are less “impressionable”<sup>203</sup> than schoolchildren and “presumably are not readily susceptible to unwilling religious indoctrination.”<sup>204</sup> On the other hand, the

<sup>192</sup> *Kerr v. Farrey*, 95 F.3d 472, 473–74, 479–80 (7th Cir. 1996); *Griffin v. Coughlin*, 673 N.E.2d 98, 105–07 (N.Y. 1996).

<sup>193</sup> *Inouye v. Kemna*, 504 F.3d 705, 709–10, 712–14 (9th Cir. 2007).

<sup>194</sup> *Warner v. Orange Cnty. Dep't of Prob.*, 115 F.3d 1068, 1069–70, 1074–77 (2d Cir. 1997).

<sup>195</sup> *Inouye*, 504 F.3d at 709–10, 712–14 (parole); *Warner*, 115 F.3d at 1069–70, 1074–77 (probation); *Kerr*, 95 F.3d at 473–74, 479–80 (prison).

<sup>196</sup> See *O'Connor v. California*, 855 F. Supp. 303, 308 (C.D. Cal. 1994); *In re Garcia*, 24 P.3d 1091, 1096–97 (Wash. Ct. App. 2001). Similar issues may arise outside of prison—for instance, consider a parent who, as a condition of receiving benefits under the Temporary Assistance to Needy Families with Children program, is required to work, which will often imply a duty to find child care. To what extent should the government be held responsible if the parent is unable to find secular child care? See Ira C. Lupu & Robert Tuttle, *Sites of Redemption: A Wide-Angle Look at Government Vouchers and Sectarian Service Providers*, 18 J.L. & POL. 539, 563–65 (2002).

<sup>197</sup> See *Nusbaum v. Terrangi*, 210 F. Supp. 2d 784, 788–89 (E.D. Va. 2002); *Ross v. Keelings*, 2 F. Supp. 2d 810, 818 (E.D. Va. 1998).

<sup>198</sup> *Lee v. Weisman*, 505 U.S. 577, 592 (1992).

<sup>199</sup> See *id.* at 592–93; see also *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 311 (2000).

<sup>200</sup> *Santa Fe*, 530 U.S. at 312.

<sup>201</sup> *Lee*, 505 U.S. at 596.

<sup>202</sup> See, e.g., *id.* at 593; *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 298–99 (1963) (Brennan, J., concurring); *id.* at 307 (Goldberg, J., concurring).

<sup>203</sup> *Wallace v. Jaffree*, 472 U.S. 38, 81 (1985) (O'Connor, J., concurring in the judgment).

<sup>204</sup> *Id.*; see also *Branham*, *supra* note 122, at 427–29; *Eicher*, *supra* note 73, at 229.

coercion doctrine is about more than just peer pressure. Coercion is everywhere in inmates' lives,<sup>205</sup> so that while one can certainly call some activities "voluntary,"<sup>206</sup> perhaps one should still be alert for subtle coercive pressures.

Thus, in *Moeller v. Bradford County*, a vocational training program in a Pennsylvania prison run by the Firm Foundation was challenged on Establishment Clause grounds.<sup>207</sup> The Firm Foundation, which received grants from various federal, state, and local authorities, described its program as a prison ministry, and the program—the only vocational training program available to inmates in that facility—spent a great deal of time on "religious discussions, religious lectures, and prayer," as well as "routinely proselytiz[ing] to the inmates in the . . . program."<sup>208</sup>

On a motion to dismiss, the district court held that the plaintiffs challenging the program had stated a valid Establishment Clause claim based on coercion.<sup>209</sup> The court stated that "the choice between foregoing educational and vocational training in prison or enduring the Firm Foundation's efforts to proselytize may be no choice at all."<sup>210</sup> In other words, the government's "coercion" here was no more than the failure to offer educational and vocational training outside of the program. If the coercion doctrine applies in prisons in full force,<sup>211</sup> faith-based prison programs may be unconstitutionally coercive even apart from the obvious problems of literal coercion and the "soft coercion" of offering important programs that are unavailable to non-participating inmates. At the most coercive end would be programs that offer "a better possibility of parole"<sup>212</sup> (at least if participation in the program as such is factored into the parole decision) or reduced security restrictions.<sup>213</sup> At the least coercive end would be programs that merely offer a higher "quality of life."<sup>214</sup>

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<sup>205</sup> See Eicher, *supra* note 73, at 229.

<sup>206</sup> See *supra* text accompanying notes 120–28.

<sup>207</sup> *Moeller v. Bradford Cnty.*, 444 F. Supp. 2d 316, 318 (M.D. Pa. 2006); *Moeller v. Bradford Cnty.*, No. 3:05CV334, 2006 WL 319288, at \*2 (M.D. Pa. Feb. 10, 2006).

<sup>208</sup> *Moeller*, 444 F. Supp. 2d at 318.

<sup>209</sup> *Id.* at 235. There were other possible Establishment Clause problems as well. *Id.* at 332–35; *Moeller*, 2006 WL 319288, at \*5–6 & n.6.

<sup>210</sup> *Moeller*, 2006 WL 319288, at \*6.

<sup>211</sup> But see Lisa A. Biron, Note, *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. 107, 107 (2008) (suggesting a different coercion doctrine).

<sup>212</sup> Richard R.W. Fields, *Perks for Prisoners Who Pray: Using the Coercion Test to Decide Establishment Clause Challenges to Faith-Based Prison Units*, 2005 U. CHI. LEGAL F. 541, 561; see also Eicher, *supra* note 73, at 228–29; Semyonova, *supra* note 52, at 228–29; cf. Anderson, *supra* note 53, at 528–29 (discussing possible avenues of coercion in a faith-based prison).

<sup>213</sup> See, e.g., Douglas Roy, Note, *Doin' Time in God's House: Why Faith-Based Rehabilitation Programs Violate the Establishment Clause*, 78 S. CAL. L. REV. 795, 804–05 (2005).

<sup>214</sup> Fields, *supra* note 212, at 561. Some commentators have suggested that since incarceration carries substantial stigma, the very existence of an effective rehabilitative program, if it is religious, can be subtly coercive. See Anderson, *supra* note 53, at 528. Or,

Programs that offer benefits like “a safer environment” might be somewhere in between, since—as Justice O’Connor argues in her concurrence in *McKune v. Lile*<sup>215</sup>—at some point, a reduction in safety can be so significant that it can be said to be coercive when the government obtains a waiver of a constitutional right by “offering” the higher safety level.<sup>216</sup>

Under a voucher system, it is much less likely that there will be coercion. The operation of the voucher system itself provides full choice, in a formal sense. One may be concerned that prisoners won’t have sufficient information about available options, just as some are concerned that parents may not know the actual quality of schools.<sup>217</sup> But one can find out about prisons from several sources: (1) by word of mouth, from friends or neighbors who have been in prison, or from one’s lawyer; (2) through advertising by prisons and prison reviews by current or former inmates, perhaps on the Internet; and (3) through reports of monitoring agencies or performance measures like the Logan quality of confinement index.<sup>218</sup> The government could require all sorts of information disclosure.<sup>219</sup> Moreover, prisoners should be highly motivated to find out about prisons, since they’re the ones who will be experiencing the prison they go to.

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since religious inmates are “better people” (i.e., less violent) than other inmates, a program that puts inmates with religious inmates is of inherently better quality (and thus subtly coercive) from the participant’s point of view. *See* Semyonova, *supra* note 52, at 228–29. These forms of “coercion” seem too subtle even for the Supreme Court’s coercion jurisprudence; but it’s hard to rule these arguments out since it’s unclear where to draw the line.

<sup>215</sup> *McKune v. Lile*, 536 U.S. 24, 48–54 (2002) (O’Connor, J., concurring in the judgment).

<sup>216</sup> *Id.*; Fields, *supra* note 212, at 561. At some point, this sort of argument bleeds into an “unconstitutional conditions” argument. *See infra* Part III.B.

<sup>217</sup> KEVIN B. SMITH & KENNETH J. MEIER, *THE CASE AGAINST SCHOOL CHOICE: POLITICS, MARKETS, AND FOOLS* 126 (1995) (“The market solution assumes parents and students will have enough information to make a decision on what school offers the ‘best’ education. This assumption appears to be patently insupportable.”); Byron W. Brown, *Why Governments Run Schools*, 11 *ECON. EDUC. REV.* 287, 292 (1992) (“Elementary and secondary schooling are excellent examples of input-based relationships between agents (schools) and their clients (students, parents and taxpayers). Furthermore, the relationships are based on an inherent uncertainty in the production process that places the task of monitoring output somewhere between expensive and impossible.”); Richard F. Elmore, *Choice as an Instrument of Public Policy: Evidence from Education and Health Care*, in 1 *CHOICE AND CONTROL IN AMERICAN EDUCATION: THE THEORY OF CHOICE AND CONTROL IN EDUCATION* 285, 298–303 (William H. Clune & John F. Witte eds., 1990) (“In education and medical care there are at least two *a priori* reasons for skepticism about informed choice. One reason is that the practice of education and medicine, and the organization of that practice, are relatively complex. . . . A second reason . . . is that providers . . . have relatively strong incentives to limit clients’ access to information.” (citation omitted)).

<sup>218</sup> *See* HARDING, *supra* note 61, at 113–15; *Developments in the Law—The Law of Prisons*, *supra* note 89, at 1889–90.

<sup>219</sup> For instance, one could require that prisons publish, as part of their advertising, publication of the length of the wait list and the rate of transfer out of the prison. *Cf.* Schulhofer & Friedman, *supra* note 21, at 102. One possible model for prison information

But what if the religious prisons are better than the secular prisons? As Judge Posner has written:

[Q]uality cannot be coercion. That would amount to saying that a city cannot adopt a school voucher system if the parochial schools in the city are better than the public or secular private schools. . . .

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.”<sup>220</sup>

While a strict “quality is coercion” view would prevent the government from deliberately skewing the playing field toward religious providers by underfunding secular alternatives, it would also, perversely, penalize effective programs for their success if they happen to be religious.<sup>221</sup>

At some point, large enough quality differences could constitute coercion. But this danger is much less under a voucher system, which, to be valid under *Zelman*, already requires “true private choice.” The requirements of true private choice might not necessarily be identical to the coercion standard. But at the very least, true private choice requires that, on a system-wide level, the secular options be “adequate substitutes” for the religious options, even if they might “not be superior . . . in every respect.”<sup>222</sup> If this exists, coercion is much less likely; conversely, if the secular options aren’t adequate substitutes, this may be enough of a quality difference to constitute coercion.

The government would thus have a continuing duty, even under a voucher system, not to let secular options become too unattractive. But this duty could be fulfilled differently under a voucher system than it is today. Today, the religious option must not be too much more attractive than the secular option *at the same prison*. But within a prison voucher system, the inmate chooses the prison as a whole, not just a particular program. A voucher program can provide substantial geographic flexibility—many inmates may want to choose a prison near their families and communities, but there may be a few such prisons in any given case; and other inmates may choose prisons further away based on weather conditions, amenities, or other factors. The government’s duty of secular quality maintenance should apply not at the prison level, but at the system-wide level. There must be enough sufficiently good secular spaces for

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disclosure would be the federal government’s “Nursing Home Compare” site, <http://www.medicare.gov/NHCompare>, which conveniently pulls together nursing home information already collected by the government.

<sup>220</sup>Freedom from Religion Found., Inc. v. McCallum, 324 F.3d 880, 884 (7th Cir. 2003); see also Branham, *supra* note 122, at 437–38.

<sup>221</sup>See Branham, *supra* note 47, at 330–31.

<sup>222</sup>*Zelman v. Simmons-Harris*, 536 U.S. 639, 670 (2002) (O’Connor, J., concurring).



any inmate who wants one, and the duty to provide the compliant spot would belong to the government, not to the individual provider.<sup>223</sup>

The government should be able to fulfill this requirement either by running adequate secular public prisons or, in a hypothetical world of complete private provision, contracting with prisons to accommodate prisoners who want an adequate secular alternative. For instance, a Christian prison may choose to accept “constitutional” prisoners, who could be housed in a different wing, and be exposed to different material, than its “voluntary” prisoners.

### C. Delegation of Governmental Power

A religious organization’s actual *management* of its own wing may be unconstitutional because, in the words of *Larkin v. Grendel’s Den, Inc.*,<sup>224</sup> it would “enmesh[ a] church[] in the exercise of substantial governmental powers.”<sup>225</sup> In *Larkin*, the Supreme Court struck down a Massachusetts statute allowing churches to veto liquor license applications within a 500-foot radius.<sup>226</sup> Such a power, the Court held, is “ordinarily vested in agencies of government.”<sup>227</sup> And “vesting discretionary governmental powers in religious bodies,” the Court continued, would “substantially breach[]” the “‘wall’ of separation” between church and state.<sup>228</sup> The Court continued, “[t]he Framers did not set up a system of government in which important, discretionary governmental powers would be delegated to or shared with religious institutions.”<sup>229</sup>

The Supreme Court later relied on *Larkin* in *Board of Education of Kiryas Joel Village School District v. Grumet*,<sup>230</sup> striking down a New York statute drawing a special school district to coincide with a village of Hasidic Jews.<sup>231</sup> The Court held that the statute was “tantamount to an allocation of political power on a religious criterion,”<sup>232</sup> “delegat[ing] a power [that] ‘ranks at the very apex of the function of a State,’ to an electorate defined by common religious belief and practice, in a manner that fails to foreclose religious

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<sup>223</sup> Cf. Gillian E. Metzger, *Privatization as Delegation*, 103 COLUM. L. REV. 1367, 1483 (2003) (suggesting that the duty to provide constitutional accountability should rest with the privatizing government rather than with the individual private operator).

<sup>224</sup> 459 U.S. 116 (1982).

<sup>225</sup> *Id.* at 126. This doctrine has been likened to a form of “entanglement” that fits into the *Lemon* test. See *Lynch v. Donnelly*, 465 U.S. 668, 687–88 (1984) (O’Connor, J., concurring).

<sup>226</sup> *Larkin*, 459 U.S. at 117.

<sup>227</sup> *Id.* at 122.

<sup>228</sup> *Id.* at 123; see also *Farris v. Minit Mart Foods, Inc.* No. 37, 684 S.W.2d 845, 847–48 (Ky. 1984) (similar to *Larkin*).

<sup>229</sup> *Larkin*, 459 U.S. at 127.

<sup>230</sup> 512 U.S. 687 (1994).

<sup>231</sup> *Id.* at 690–91.

<sup>232</sup> *Id.* at 690.

favoritism.”<sup>233</sup> Justice Souter wrote (for a plurality) that the statute departs from the constitutional command of neutrality toward religion “by delegating the State’s discretionary authority over public schools to a group defined by its character as a religious community, in a legal and historical context that gives no assurance that governmental power has been or will be exercised neutrally.”<sup>234</sup> As in *Larkin*, “civic and religious authority” were “united.”<sup>235</sup> Then, writing for a majority of the Court, Justice Souter wrote that, as in *Larkin*, there was no “‘effective means of guaranteeing’ that governmental power will be and has been neutrally employed.”<sup>236</sup> Because of the “anomalously case-specific nature” of the state statute, the Court had no way to make sure that government was not preferring one religion to another.<sup>237</sup>

Other courts have similarly applied the *Larkin/Kiryas Joel* rule against delegation of governmental power to religious organizations.<sup>238</sup> For instance, the Fourth Circuit struck down a Baltimore ordinance criminalizing the fraudulent sale of non-kosher food as kosher,<sup>239</sup> where “kosher” was defined as compliant with “the orthodox Hebrew religious rules and requirements”<sup>240</sup> and inspection and reporting duties were delegated to a Bureau of Kosher Meat and Food Control consisting of three Orthodox rabbis and laymen recommended by Orthodox organizations.<sup>241</sup> Similarly, a district court found that a town’s lease of public school space from a Catholic church, under a lease that “requires that the Town not use the rented facilities in any manner which is inconsistent with the teachings of the Roman Catholic Church [and] requires the Town to rely upon and defer to the teaching authority of the Roman Catholic Archbishop of Boston,” was likely unconstitutional.<sup>242</sup> In addition—though this has apparently never been litigated—it has been argued that certain divorce statutes, which

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<sup>233</sup> *Id.* at 709–10 (citation omitted).

<sup>234</sup> *Id.* at 696 (plurality opinion).

<sup>235</sup> *Id.* at 697.

<sup>236</sup> *Kiryas Joel*, 512 U.S. at 703 (majority opinion).

<sup>237</sup> *Id.*

<sup>238</sup> In *United Christian Scientists v. Christian Science Board of Directors, First Church of Christ, Scientist*, 829 F.2d 1152, 1159 (D.C. Cir. 1987), the D.C. Circuit invalidated a private law giving the estate of Mary Baker Eddy, the founder of the Christian Science Church, an extended copyright in one of the church’s founding documents; the court likened the Church’s “veto power” over dissident sects’ publication of the works to the “veto power, over even a less ideologically significant benefit,” *id.* at 1170, disapproved in *Larkin*. However, this is probably wrong, as the power to enforce a copyright probably isn’t a governmental power.

<sup>239</sup> *Barghout v. Bureau of Kosher Meat & Food Control*, 66 F.3d 1337, 1340 (4th Cir. 1995).

<sup>240</sup> *Id.* at 1338; see also N.Y. GEN. BUS. LAW § 349-a(2), (2)(b) (McKinney 2004).

<sup>241</sup> *Barghout*, 66 F.3d at 1339; accord *Ran-Dav’s Cnty. Kosher, Inc. v. State*, 608 A.2d 1353, 1355 (N.J. 1992); see also Mark A. Berman, *Kosher Fraud Statutes and the Establishment Clause: Are They Kosher?*, 26 COLUM. J.L. & SOC. PROBS. 1, 48 (1992).

<sup>242</sup> *Spacco v. Bridgewater Sch. Dep’t*, 722 F. Supp. 834, 834 (D. Mass. 1989).

grant clergymen a limited veto power over a civil divorce, are unconstitutional on *Larkin* grounds.<sup>243</sup>

It seems plausible that running a wing of a prison is a governmental power—“[t]he supervision and rehabilitation of inmates ranks near the apex of the power of government.”<sup>244</sup> If zoning power, kosher enforcement, and (possibly) divorce finalization are governmental powers, then surely running a prison is, too.

Of course, prisons’ power wouldn’t be standardless—which was the *Larkin* Court’s complaint about churches exercising a zoning veto.<sup>245</sup> Prisons would be subject to comprehensive constitutional and statutory regulations, as well as judicial review.<sup>246</sup> But the *Larkin* Court’s other objections still hold. There would still be the symbolism of a “joint exercise of . . . authority by Church and State.”<sup>247</sup> And religious organizations would be “enmeshe[d] . . . in the

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<sup>243</sup> A New York statute provides that someone seeking a civil divorce must take “all steps solely within his or her power to remove any barrier to the [other spouse’s subsequent] remarriage,” including religious barriers. N.Y. DOM. REL. LAW § 253(2)(i); see also *id.* at § 253(3)(i), (6). In particular, the statute was designed to alleviate the plight of the woman whose husband refuses to grant her a *get*, or Jewish bill of divorce. Berman, *supra* note 241, at 67–68 & n.342. Without a *get*—which only the husband can give—a woman cannot remarry within Orthodox or Conservative Judaism. See Kent Greenawalt, *Religious Law and Civil Law: Using Secular Law to Assure Observance of Practices with Religious Significance*, 71 S. CAL. L. REV. 781, 824 (1998). The statute thus conditions civil divorce on the husband’s granting of a *get* to his wife where necessary. Compelling a man, as a condition of divorce, to perform a religious act may be unconstitutional all by itself. See Patti A. Scott, *New York Divorce Law and the Religion Clauses: An Unconstitutional Exorcism of the Jewish Get Laws*, 6 SETON HALL CONST. L.J. 1117, 1162–67 (1996); Lawrence C. Marshall, Comment, *The Religion Clauses and Compelled Religious Divorces: A Study in Marital and Constitutional Separations*, 80 NW. U. L. REV. 204, 212–35 (1985); cf. Berman, *supra* note 241, at 68–70 (rebutting arguments that granting a *get* is not a religious act). But see Irving Breitowitz, *The Plight of the Agunah: A Study in Halacha, Contract, and the First Amendment*, 51 MD. L. REV. 312, 385–93 (1992); Marc Feldman, *Jewish Women and Secular Courts: Helping a Jewish Woman Obtain a Get*, 5 BERKELEY WOMEN’S L.J. 139, 153–56 (1990); Greenawalt, *supra*, at 828–29. However, the New York statute goes even further, decreeing that a civil divorce can’t go forward “if the clergyman or minister who has solemnized the marriage” certifies that the party seeking a divorce has failed to take all steps to remove barriers to remarriage. N.Y. DOM. REL. LAW § 253(7) (McKinney 2010). This “clergyman veto” provision is probably unconstitutional—again, on *Larkin*-style grounds—because it gives the rabbi authority to prevent a civil divorce from proceeding. See Greenawalt, *supra*, at 834; Scott, *supra*, at 1179–80; Marshall, *supra*, at 254–55. But see Breitowitz, *supra*, at 390–91; Feldman, *supra*, at 157–59.

<sup>244</sup> Patrick B. Cates, Comment, *Faith-Based Prisons and the Establishment Clause: The Constitutionality of Employing Religion as an Engine of Correctional Policy*, 41 WILLAMETTE L. REV. 777, 821 (2005); cf. *supra* Part II.A.3 (discussing the analogous issue of whether incarceration is an “exclusive public function”).

<sup>245</sup> *Larkin v. Grendel’s Den, Inc.*, 459 U.S. 116, 125 (1982).

<sup>246</sup> See, e.g., *infra* text accompanying notes 348–60.

<sup>247</sup> *Larkin*, 459 U.S. at 125.

processes of government”<sup>248</sup>—again, here, in the sense of the state functions of incarceration and discipline.<sup>249</sup>

The delegation problem thus seems implicated if the officials of the religious organization have a role in keeping order in their wing, keeping track of disciplinary infractions, and the like. A religious organization may thus want to divest itself from keeping order and discipline, leaving these coercive functions to state corrections officers (or at least secular corrections officers unaffiliated with the religious group), and limit itself to conducting religious activities. But even this may not be enough to escape the delegation problem.

In *Griffin v. Coughlin*,<sup>250</sup> which we saw in the section on coercion,<sup>251</sup> the New York Court of Appeals held that when the state mandated that an inmate attend an in-prison Alcoholics Anonymous program, it had “delegate[d] to [the religious program] a crucial part of the State’s discretionary authority to conduct mandatory treatment programs for alcohol- and drug-addicted inmates in the State’s prison system.”<sup>252</sup> It is true that in this case, the AA program was mandatory, not optional.<sup>253</sup> But the Court of Appeals could have rested its analysis on coercion alone<sup>254</sup> and not bothered with delegation. And if merely *conducting* a program is an exercise of the state’s discretionary authority, it’s unclear why the state’s discretionary authority doesn’t also include the authority to run optional programs.

So while a religious organization’s divesting itself of disciplinary functions may be enough to avoid delegation problems, the caselaw is unclear on the subject.

But vouchers would make this problem moot—even if the religious organization retains disciplinary functions. As with the other Establishment Clause problems, neutrality is the key to avoiding forbidden delegations. The problem in *Larkin* wasn’t that a veto power over liquor licenses happened to be held by a church. Rather, the problem was that churches *as such* (together with schools) were allowed a veto power,<sup>255</sup> to the exclusion of others. A statute that allowed *any* landowner within a 500-foot radius to veto a liquor license would presumably be immune from an Establishment Clause challenge, even if the veto power were exercised by a church in a particular case. Or, even under the current statute, probably a religious *school* would have been able to exercise the veto power, based on the generic grant of veto power to schools.

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<sup>248</sup> *Id.* at 127.

<sup>249</sup> See Eicher, *supra* note 73, at 233–34.

<sup>250</sup> 673 N.E.2d 98 (N.Y. 1996).

<sup>251</sup> See *supra* text accompanying note 156.

<sup>252</sup> *Griffin*, 673 N.E.2d. at 107.

<sup>253</sup> *Id.* at 99.

<sup>254</sup> Coercion was, indeed, one of the bases for invalidation of the program. See *id.* at 105–06.

<sup>255</sup> *Larkin v. Grendel’s Den, Inc.*, 459 U.S. 116, 117 (1982).

None of this is discussed in *Larkin* explicitly, but it's the most plausible reading of *Larkin*, especially in light of the later analysis in *Kiryas Joel*.<sup>256</sup> In his plurality opinion, Justice Souter comments on the "united civic and religious authority"<sup>257</sup> presented by the case, writing that "[w]here 'fusion' is an issue, the difference lies in the distinction between a government's purposeful delegation on the basis of religion and a delegation on principles neutral to religion, to individuals whose religious identities are incidental to their receipt of civic authority."<sup>258</sup> Justice Souter identified "[t]he origin of the district in a special Act of the legislature, rather than the State's general laws governing school district reorganization" as "anomalous."<sup>259</sup> (The initial organization of the village of Kiryas Joel in 1977, as opposed to the later creation of the school district, was precisely according to such a neutral law.<sup>260</sup>) Justice Souter continued:

Because the district's creation ran uniquely counter to state practice, following the lines of a religious community where the customary and neutral principles would not have dictated the same result, we have good reasons to treat this district as the reflection of a religious criterion for identifying the recipients of civil authority.<sup>261</sup>

Justice Souter—in the portion of his opinion that was for the Court—further noted:

The fact that this school district was created by a special and unusual Act of the legislature . . . gives reason for concern whether the benefit received by the Satmar community is one that the legislature will provide equally to other religious (and nonreligious) groups. . . .

The fundamental source of constitutional concern here is that the legislature itself may fail to exercise governmental authority in a religiously neutral way.<sup>262</sup>

In short, it was the favoritism of this unusual act toward a specific religious community that doomed it,<sup>263</sup> not any general prohibition against delegating governmental power to religious groups among others.<sup>264</sup>

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<sup>256</sup> Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet, 512 U.S. 687 (1994).

<sup>257</sup> *Id.* at 697 (plurality opinion).

<sup>258</sup> *Id.* at 699.

<sup>259</sup> *Id.* at 700–01.

<sup>260</sup> *Id.* at 691 (majority opinion).

<sup>261</sup> *Id.* at 702 (plurality opinion).

<sup>262</sup> *Kiryas Joel*, 512 U.S. at 702–03 (majority opinion). Justice O'Connor's opinion similarly stresses that neutrality would have saved the scheme. *Id.* at 717 (O'Connor, J., concurring in part and concurring in the judgment). And Justice Kennedy, who didn't join any part of Justice Souter's opinion, argued to the same effect in his concurrence. *Id.* at 722, 731 (Kennedy, J., concurring in the judgment).

<sup>263</sup> *Id.* at 706–08 & n.10 (majority opinion).

A statute that neutrally allowed different groups, religious or secular, to run a program in a prison, or even a wing of a prison, or even an entire prison, would thus not fall within the prohibition on religious delegations: “[W]e have frequently relied explicitly on the general availability of any benefit provided religious groups or individuals in turning aside Establishment Clause challenges.”<sup>265</sup> Divesting oneself of disciplinary functions wouldn’t even be necessary.<sup>266</sup>

#### D. *Any Other Way Forward for Faith-Based Prisons?*

There are a few arguments that, despite the problems discussed above, faith-based prison programs as currently constituted are nonetheless constitutional. I think these arguments ultimately fail, but I’ll mention them anyway because they appear in the literature.

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<sup>264</sup> The previous cases would surely have come out differently had the delegation been neutral with respect to religion. Kosher fraud enforcement schemes, *see supra* text accompanying notes 239–41, are uncontroversial when they are mere trademark enforcement. *See* *Union of Orthodox Jewish Congregations of Am. v. Royal Food Distribs.*, 665 F. Supp. 2d 434 (S.D.N.Y. 2009); Greenawalt, *supra* note 243, at 789–90; Irina D. Manta, *Privatizing Trademarks*, 51 ARIZ. L. REV. 381, 402 & n.116 (2009). In the Christian Science copyright case, even if it was correctly decided, surely the only problem was the fact that the copyright extension was granted by a Private Law. *See* *United Christian Scientists v. Christian Sci. Bd. of Dirs., First Church of Christ, Scientist*, 829 F.2d 1152, 1169 (D.C. Cir. 1987). The *get* statutes, *see* sources cited *supra* note 243 and accompanying text, are probably unsalvageable, but that is because they involve several constitutional problems simultaneously, including the compulsion of a religious act and the court’s need to judge religious doctrine in determining the validity of the *get*. *Cf., e.g.,* *Serbian E. Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 709–10 (1976) (“[T]he First Amendment severely circumscribes the role that civil courts may play in resolving church property disputes.”) (quoting *Presbyterian Church v. Hull Church*, 393 U.S. 440, 449 (1969))). Whether the fact pattern in *Spacco v. Bridgewater School Department*, 722 F.Supp. 834 (D. Mass. 1989), can be salvaged by neutrality is interesting and complicated, but too tangential to discuss here.

<sup>265</sup> *Kiryas Joel*, 512 U.S. at 704.

<sup>266</sup> One case contradicts this view, but it’s probably wrong: *State v. Pendleton*, 451 S.E.2d 274 (N.C. 1994), where the North Carolina Supreme Court held unconstitutional a Baptist university’s establishment of a police force. The neutrally worded statute allowed “[a]ny educational institution . . . [to] apply to the Attorney General to commission such persons as the institution . . . may designate to act as policemen for it.” *Id.* at 276 (second omission in original). However, the court held that the statute was unconstitutional as applied to Campbell University, a religious university, because the state had delegated the police power to a religious institution. *Id.* at 281.

Because of the neutral delegation—and as the dissent in that case remarked, *id.* at 284 (Whichard, J., dissenting)—it should have been held valid under *Kiryas Joel* (which had come out just half a year earlier). The Indiana Court of Appeals recognized as much in *Myers v. State*, 714 N.E.2d 276 (Ind. 1999), noting that a similar statute made “no distinction between religious and secular institutions” and applied “to all educational institutions of higher learning.” *Id.* at 281.

First, modern-day faith-based prison programs are more likely to be found constitutional if courts defer to prison officials under *Turner v. Safley*.<sup>267</sup> Courts have taken different positions on this question,<sup>268</sup> but the dominant view seems to be that *Turner* doesn't apply to Establishment Clause claims.<sup>269</sup> This seems to be the better view: the *Turner* test is aimed at evaluating the permissibility of restrictions on inmates' freedom, while Establishment Clause challenges often involve not restrictions on individual freedom but a broader right to be "free" from governmental endorsement of or entanglement with religion.<sup>270</sup> Indeed, the second prong of *Turner*, which asks "whether . . . alternative means of exercising the right . . . remain open to prison inmates,"<sup>271</sup> makes sense for Free Exercise Clause challenges but not for Establishment Clause challenges.<sup>272</sup>

Second, current faith-based prison programs are more likely to be constitutional if they can be characterized as an "accommodation"<sup>273</sup> that "alleviates exceptional government-created burdens on private religious exercise."<sup>274</sup> In prisons, where "the government exerts a degree of control unparalleled in civil society and severely disabling to private religious exercise,"<sup>275</sup> such accommodations usually don't run afoul of the Establishment Clause. It is thus uncontroversial that prisons may pay chaplains.<sup>276</sup> But it's a stretch to liken a residential, faith-based immersion program to a chaplaincy program. The accommodation principle "contain[s] the seeds of [its] own

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<sup>267</sup> 482 U.S. 78 (1987); see Branham, *supra* note 122, at 420–24; Branham, *supra* note 47, at 303–06; Eicher, *supra* note 73, at 238.

<sup>268</sup> See Branham, *supra* note 47, at 304 n.79; Semyonova, *supra* note 52, at 222–26.

<sup>269</sup> See *Williams v. Lara*, 52 S.W.3d 171, 188 (Tex. 2001) (agreeing with the "overwhelming majority" of courts).

<sup>270</sup> See Semyonova, *supra* note 52, at 224.

<sup>271</sup> *Turner*, 482 U.S. at 90.

<sup>272</sup> See Semyonova, *supra* note 52, at 225.

<sup>273</sup> *Cutter v. Wilkinson*, 544 U.S. 709, 721 (2005).

<sup>274</sup> *Id.* at 720; see also *Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 334–35 (1987) ("[T]he government may (and sometimes must) accommodate religious practices and . . . it may do so without violating the Establishment Clause." (quoting *Hobbie v. Unemployment Appeals Comm'n of Fla.*, 480 U.S. 136, 144–45 (1987) (internal quotation marks omitted))); Branham, *supra* note 122, at 419 n.62, 430–31; Branham, *supra* note 47, at 340–42, 348–49; Eicher, *supra* note 73, at 236; Scott Roberts, *The Constitutionality of Prison-Sponsored Religious Therapeutic Communities*, 15 REGENT U. L. REV. 69, 72–78 (2002).

<sup>275</sup> *Cutter*, 544 U.S. at 720–21.

<sup>276</sup> See, e.g., *Johnson-Bey v. Lane*, 863 F.2d 1308, 1309 (7th Cir. 1988); *Rudd v. Ray*, 248 N.W.2d 125, 128–29 (Iowa 1976); cf. *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 296–97 (1963) (Brennan, J., concurring) (military chaplains and other examples); *Carter v. Broadlawns Med. Ctr.*, 857 F.2d 448, 457 (8th Cir. 1988) (hospital chaplain); *Duffy v. State Pers. Bd.*, 283 Cal. Rptr. 622, 627–28 (Ct. App. 1991).

limitation”;<sup>277</sup> it’s hard to argue that Iowa’s “God Pod,” for instance, is doing nothing more than alleviating government-created burdens.<sup>278</sup>

So faith-based prisons are unlikely to get much support from either the *Turner* deference rule or the accommodation principle. For a program to be constitutional under the current regime, it will have to avoid the pitfalls outlined in the previous sections:

- Its religious content must be significantly watered down, so that one cannot find “religious indoctrination” as in the Iowa case.<sup>279</sup>
- It must be chosen by a process that is neutral as between religious and non-religious programs. Thus, the process that chose it must have been capable of selecting a secular program.<sup>280</sup>
- There must be at least one, and possibly several, comparable secular programs.<sup>281</sup>
- The program must not only be formally voluntary but also not offer significantly greater benefits—for instance, a greater possibility of parole or a safer environment—than secular alternatives.<sup>282</sup>
- Program officials must not play any role in maintaining order or meting out discipline, though even divesting oneself of these governmental roles may not be good enough.<sup>283</sup>

Some are skeptical that it’s possible to fulfill all these conditions.<sup>284</sup> Perhaps the most inclusive faith-based programs might be constitutional—one example may be the Federal Bureau of Prisons’ Life Connections program, which “hires spiritual guides of different faiths, links inmates with mentors of their own faith, and provides no special privileges to participants.”<sup>285</sup> The program is also open to non-believers: “those of no designated faith engage in

<sup>277</sup> Lupu & Tuttle, *supra* note 42, at 110.

<sup>278</sup> See *Wallace v. Jaffree*, 472 U.S. 38, 84 (1985) (O’Connor, J., concurring in the judgment); *Schempp*, 374 U.S. at 296–99 (Brennan, J., concurring).

<sup>279</sup> See *supra* text accompanying notes 37–43.

<sup>280</sup> See *supra* text accompanying notes 44–53, 255–64.

<sup>281</sup> See *supra* text accompanying notes 44–45; see also Picarello, *supra* note 45, at 53–54; Semyonova, *supra* note 52, at 219–20, 232.

<sup>282</sup> See *supra* text accompanying notes 211–16; see also Branham, *supra* note 47, at 347–48; Picarello, *supra* note 45, at 55–56.

<sup>283</sup> See *supra* text accompanying notes 250–54.

<sup>284</sup> See, e.g., Cates, *supra* note 244, at 779, 824.

<sup>285</sup> *Id.* at 824–25. Cates also points to the program at Lawtey Correctional Institution in Florida as “a closer case . . . . Full-time chaplains recruit volunteers to lead programs covering religious material, anger management, and addiction counseling, in which only half the inmates participate . . . . The program is theoretically faith and character-based, rather than based on a view of a specific religion . . . .” *Id.* at 825. However, the emphasis on “faith,” even if not “a specific religion,” is likely insufficient to save the constitutionality of this program. Moreover, as noted above, the reduced security precautions offered at Lawtey may result in *Lee v. Weisman*-style coercion. On Lawtey, see also Eicher, *supra* note 73, at 239; Semyonova, *supra* note 52, at 226–32.



individual study during chapel times.”<sup>286</sup> Thomas O’Connor and Jeff Duncan explain:

The Life Connections Program . . . is basically a reentry preparation program that brings people of all different faiths together to work on a common curriculum that was designed by a group of chaplains in consultation with the Change Company. As part of the program, the members of the different faith groups work on the common curriculum. Program participants then take that work back to volunteers from their own faith tradition, where they work the material again in the context of discovering what the resources of their own faith tradition have to say about the content of the curriculum. For example, part of the common curriculum concerns “spirituality” in general, and part of it concerns “building community,” but each faith tradition might work with and understand these topics in a faith-specific way. Because the program is truly a multi-faith program that supports many different faith traditions, it avoids many of the constitutional difficulties of the religious prison units that are single-faith programs.<sup>287</sup>

But to the extent that the Life Connections Program is constitutional, it’s because it’s basically a secular program (which poses no Establishment Clause problem) combined with extensive, optional extracurricular use of chaplains and volunteers (which likewise poses no Establishment Clause problem).

One shouldn’t be surprised if advocates of programs like InnerChange are disappointed that they can’t run something more all-encompassing. In light of the need to avoid indoctrination, any permissible program may be too watered down for the tastes of some religious groups. Accommodating secular inmates may be cheap enough within the volunteer-based Life Connections Program, but within a more all-encompassing program, running one or more comparable secular programs may be too expensive for the prison system itself. And giving up order and disciplinary functions may compromise a program’s ability to make sure that the inmates are engaging productively with the material. “Order and discipline,” after all, may be something as simple as “You can’t stay here anymore because you aren’t participating.”

But whether or not one could design a constitutional faith-based program under the current regime, it should be clear that faith-based prison programs are on much more solid ground in a world of prison vouchers.

Indeed, if the foregoing analysis is correct, faith-based prison programs are entirely constitutional under a voucher system, provided any organization (that can satisfy technical requirements, for instance related to security) can

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<sup>286</sup> *Federal Bureau of Prisons Life Connections Pilot Program*, OHIO DEP’T OF REHABILITATION & CORRECTION, [http://www.drc.ohio.gov/web/iej\\_files/200702\\_McFarland\\_FederalLifeConnections.pdf](http://www.drc.ohio.gov/web/iej_files/200702_McFarland_FederalLifeConnections.pdf) (last visited Nov. 14, 2011) (note the misspelling of “Connections” in the filename).

<sup>287</sup> Thomas P. O’Connor & Jeff B. Duncan, *Religion and Prison Programming: The Role, Impact, and Future Direction of Faith in Correctional Systems*, OFFENDER PROGRAMS REP., Mar.–Apr. 2008, at 81, 87 .

participate, and provided there is a comparable secular spot for any inmate who wants one. This last requirement is much easier to satisfy under a voucher system because the comparable secular spot doesn't need to be at the same prison as the religious program. Rather, the government's duty to provide such a spot is system-wide: it could provide the spot at a public prison, at a private secular prison, or even by contract at a religious prison (which would have to provide a religion-free environment for the objecting inmate, perhaps in a different wing of the prison). So even if there isn't enough space at a prison, or if a particular prison doesn't have enough resources to run more than one program, there's no constitutional problem as long as the objecting inmate can easily transfer to a "compliant" prison.

The mention in the last paragraph of a "religious prison" bears clarification. Under the current system of mandatory assignment, all we can talk about is religious programs that operate *within* a single prison. For the entire prison to be religious would, at the very least, violate the coercion strand of Establishment Clause jurisprudence. (By analogy, think of education: even the most ambitious current proposals to integrate religion into public schools typically go no further than introducing non-denominational prayer and teaching creationism.) But under a voucher system, if the duty to maintain a secular alternative is system-wide, not prison-specific, there should be no bar to a religious organization's building and operating its own prison. If the voucher statute allows it, Prison Fellowship Ministries could run not only an InnerChange program in a prison, but also an entire InnerChange prison that incorporates religion to a degree unthinkable under the current regime.<sup>288</sup> (Just as, if a school voucher system allows vouchers to be redeemed at religious schools, the Catholic Church is free to run voucher-accepting schools that feature prominent crucifixes, teach religion from an exclusively Catholic perspective, and expose children to vocal group prayer.<sup>289</sup>) The prison's punitive function would still be an "exclusive public function" and therefore state action, so (unlike a school) it couldn't reward and punish based on religion,<sup>290</sup> but intensive programming based on a single religion's material would be permissible.

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<sup>288</sup> It's possible that the voucher statute *must* allow it, and that refusal to allow it would violate the Free Exercise Clause. The debate over whether religious schools *must* be included in school voucher schemes—that is, over the reach of *Locke v. Davey*, 540 U.S. 712 (2004)—is thus directly applicable to the prison voucher context. On *Locke*, compare Lupu & Tuttle, *supra* note 42, at 28–30, 46–47, and Marci Hamilton, *The Supreme Court Issues a Monumental Decision: Equal State Scholarship Access for Theology Students Is Not Required by the Free Exercise Clause*, FINDLAW (Feb. 27, 2004), <http://writ.news.findlaw.com/hamilton/20040227.html>, with Thomas C. Berg & Douglas Laycock, *The Mistakes in Locke v. Davey and the Future of State Payments for Services Provided by Religious Institutions*, 40 TULSA L. REV. 227, 246–52 (2004), and Douglas Laycock, *Theology Scholarships, the Pledge of Allegiance, and Religious Liberty: Avoiding the Extremes but Missing the Liberty*, 118 HARV. L. REV. 155, 184–86 (2004).

<sup>289</sup> See *Locke*, 540 U.S. at 719; Lupu & Tuttle, *supra* note 42, at 27.

<sup>290</sup> See *supra* text accompanying notes 176–83.

In sum, prison vouchers would substantially cure the Establishment Clause problems that currently plague faith-based prisons, thus providing a way forward for advocates of faith-based prisons that doesn't involve watering down religious content or giving up on discipline.

### *E. Is This Exercise Worthwhile?*

Should we be glad about this? On balance, I believe we should, even though there is no strong evidence that faith-based prisons work.

Elsewhere,<sup>291</sup> I analyze the available empirical evidence on the effectiveness of prison religious programs in reducing either in-prison infractions or some measure of post-release recidivism. I conclude that very few studies have any statistical validity.

The only credible studies to date are those that compare (voluntary) participants in faith-based programs with people who volunteered for the program but were rejected. Among those studies, several find no statistical effect of the religious program.

Finally, even studies that find a statistically significant effect seem to compare participation in the program with the alternative of no program at all, rather than participation in a comparably funded secular program. Thus, even if a religious program is better than nothing at all, it could be because of the access to treatment resources (for instance, mentors and counselors) and not because of the religious content of the program.

So there seems to be little empirical reason to believe that faith-based prisons work. On the other hand, there is also no proof that they *don't* work. Perhaps future research will answer this question. More important than whether any particular program works is whether we allow the experimentation that would allow us to discover programs that work in the future. Even if most programs don't work, we can consider that the effort is a success if we find *one* program that does work and are able to replicate it more widely. It is therefore sensible to experiment with such programs, provided someone wants to run them, provided someone wants to enroll in them, and provided the programs operate constitutionally—for instance, through a prison voucher system, as I have explained here.

Let's move past these empirical questions, and on to another one. Might faith-based prisons be affirmatively harmful beyond the narrow question of recidivism? Some commentators have expressed concern that prisons are "fertile grounds for radical Muslim chaplains to recruit" adherents and foster terrorism;<sup>292</sup> and allowing faith-based prisons may well concentrate adherents

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<sup>291</sup> Volokh, *supra* note 26.

<sup>292</sup> DeGirolami, *supra* note 15, at 34 (quoting MARCI A. HAMILTON, *GOD VS. THE GAVEL: RELIGION AND THE RULE OF LAW* 145 (2005)); *see also* John W. Popeo, *Combating Radical Islam in Prisons Within the Legal Dictates of the Free Exercise Clause*, 32 *NEW ENG. J. ON CRIM. & CIV. CONFINEMENT* 135 (2006).

of particular religions, including Islam, in particular prisons. Should we adopt a system that could lead to a Muslim prison?

I take no position here on whether the concern over radicalization is well-founded. In 2004, the DOJ's Office of the Inspector General raised concerns about in-prison radicalization and noted that domestic terrorists Richard Reid and Jose Padilla had been converted and radicalized in prison,<sup>293</sup> but otherwise gave little information on the magnitude of the problem. Paul Rogers, president of the American Correctional Chaplains Association, told a Senate committee in 2003 that terrorist recruitment in prisons and jails was a "potentially serious concern," but that reports of actual terrorist infiltration had been "blown way out of proportion."<sup>294</sup>

But to the extent the concern has some basis, prison vouchers might actually alleviate the problem. Some of the concern does stem from the activities of Muslim *clerics*,<sup>295</sup> but many blame primarily an *inmate*-driven "breed of 'Prison Islam' that distorts [traditional] Koranic teaching to promote violence and gang loyalty."<sup>296</sup> The heavy involvement of radical inmates in Muslim observance in prison, in turn, stems from an "acute [Muslim] clerical shortage"; as of 2006, there was one chaplain for every 900 inmates.<sup>297</sup> Moreover, those who are concerned about Muslim religious activity cite not only the radicalization of existing Muslims but also the conversion of non-Muslims.<sup>298</sup> Allowing Muslim prisoners to self-segregate may alleviate the clerical shortage (if there are economies of scale in chaplaincy), and may also reduce the amount of recruitment among non-Muslims.

As I've mentioned, this is ultimately an empirical question. I bring this up as a possible argument, but overall, I remain agnostic on the issue.

But the case for (or against) prison vouchers is broader than the mere promise (or threat) that it would allow experimentation with faith-based prisons, and even broader than any religion-based aspect. Even if we had no reason to

<sup>293</sup> U.S. DEP'T OF JUSTICE, OFFICE OF THE INSPECTOR GEN., A REVIEW OF THE FEDERAL BUREAU OF PRISONS' SELECTION OF MUSLIM RELIGIOUS SERVICES PROVIDERS 6 (2004) [hereinafter OIG REPORT], available at <http://www.justice.gov/oig/special/0404/final.pdf>.

<sup>294</sup> *Terrorist Recruitment and Infiltration in the United States: Prisons and Military as an Operational Base: Hearing Before the S. Comm. on the Judiciary*, 108th Cong. (2003) (statement of Paul Rogers), available at <http://judiciary.senate.gov/hearings/hearing.cfm?id=4f1e0899533f7680e78d03281ff19bc6> (witness testimony may be accessed from this page).

<sup>295</sup> See Popeo, *supra* note 292, at 140, 150.

<sup>296</sup> DeGirolami, *supra* note 15, at 34–35; *Primary Sources: "Prison Islam,"* ATLANTIC MONTHLY, Sept. 2004, at 48, 48 (citing OIG REPORT, *supra* note 293, at 8); cf. Knox, *supra* note 58 ("about half [of prisons surveyed] allow inmates to be the spiritual leader of other inmates . . . an average of 1.3 religious services are [led] by inmates inside the typical American prison").

<sup>297</sup> Popeo, *supra* note 292, at 138 (quoting *Primary Sources*, *supra* note 296, at 48); see also *Terrorist Recruitment and Infiltration*, *supra* note 294.

<sup>298</sup> Popeo, *supra* note 292, at 137 (citing *Terrorist Recruitment and Infiltration*, *supra* note 294).

expect anything from faith-based prisons, there may be some reason to think that prison vouchers are a good idea in their own right.

There are serious problems at prisons, including—to name just a few—high rates of violence (including rape) and low-quality health care. These problems have proven resistant to democratic or legal reform—voters are often unsympathetic to prisoners' concerns, individual prisoner lawsuits and institutional reform litigation are difficult, and, even where private prisons exist, whether a higher-quality facility enters the market depends on the competence and incentives of state procurement officers.

Letting prisoners choose their own prisons could, for the first time, give prisons a meaningful market incentive to improve. Unfortunately, prison vouchers also have strong negatives, like facilitating the self-segregation of prisoners according to gang affiliation, which might increase the power of the gang in the outside world, as well as make life worse for inmates at a prison dominated by a gang that is not their own.

In any event, the constitutionality of faith-based prisons is a side effect of prison vouchers, which have their own advantages and disadvantages. I discuss all of this at length elsewhere.<sup>299</sup> However one comes out on the merits, the availability of faith-based prisons probably intensifies the case for or against vouchers because there will be a greater set of competing prisons with a greater set of governing philosophies. If one thinks prison competition for inmates is positive overall, more competitive pressure will probably be beneficial. On the other hand, if such competition primarily caters to inmates' antisocial preferences, more competition may exacerbate the problem.

### III. BEYOND THE ESTABLISHMENT CLAUSE

I have argued above that private prisons operating under a voucher system would, like private schools, be largely freed from Establishment Clause constraints.<sup>300</sup> However, a voucher system may have other constitutional effects entirely separate from the Establishment Clause issue of whether faith-based prisons are permissible—in fact, entirely unrelated to religion.

Suppose, for instance, a prison wanted to save money, or improve security, by instituting a (perhaps partial) ban on incoming mail. Or suppose—again to save money or improve security—a prison wanted to get rid of its prison grievance system.

Prisons can't do this unilaterally, because they're still state actors, and, even under a voucher system, prisoners' constitutional rights are unchanged. But what if prisons *offered* such a system to prisoners, perhaps in exchange for other benefits that prisoners valued, like better health care or gym facilities?

State actors' ability to "offer" such "deals" is governed by the unconstitutional conditions doctrine. As I explain below, prisons under a

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<sup>299</sup> Volokh, *supra* note 22.

<sup>300</sup> See *supra* Part II.

voucher system would be freer to offer such deals than under the current system, because competition between prisons would mitigate the risk that prisons would abuse their power over inmates.

Below, I first recall (in section A) that because prisons (public or private, assigned or chosen) continue to be state actors, vouchers won't alter prisoners' constitutional rights. Next, I describe (in section B) how the unconstitutional conditions doctrine works and (in section C) how a voucher system is likely to change its operation.

### A. Prisoners Keep All Their Rights Under Vouchers

If we were talking about schools, a shift from a system of mandatory assignment to schools (at least public ones<sup>301</sup>) to a voucher system (where some or all of the choice schools are private) would have simple and profound constitutional consequences. Because private schools are generally *not* state actors, to the extent that a school voucher system leads to an exodus of students from public to private schools, the students arriving in private schools will have lost a considerable amount of constitutional protection. Depending on one's point of view, one can find this desirable or undesirable. Private school students have only whatever protection they can expect from market competition, government regulation of private schools, and the conditions attached to the vouchers.

However, this won't happen in the prison context. Private prisons remain state actors, whether they are mandatory or "chosen" within a voucher context.<sup>302</sup> Thus, prisoners who leave for private prisons under a voucher system won't lose any constitutional protection. Inmates at any prison, public or private, mandatory or chosen, have the same rights.<sup>303</sup> As I have explained, the Establishment Clause consequences of vouchers would be substantial—fully religious prisons would now be constitutional—but from the perspective of prisoners' individual rights, the constitutional consequences of prison vouchers would not be nearly so momentous.

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<sup>301</sup> See *Logiodice v. Trs. of Me. Cent. Inst.*, 296 F.3d 22, 26 (1st Cir. 2002) (publicly assigned private school not state actor when disciplining student); *cf. Caviness v. Horizon Cmty. Learning Ctr.*, 590 F.3d 806, 808 (9th Cir. 2010) (charter school not state actor when firing teacher).

<sup>302</sup> See *supra* Part II.A.3.

<sup>303</sup> Indeed, inmates at private prisons may have even greater *remedies* than inmates at public prisons, since correctional officers at private prisons, unlike their public counterparts, do not get qualified immunity in § 1983 suits. See *Richardson v. McKnight*, 521 U.S. 399, 401 (1997).

## B. *The Unconstitutional Conditions Doctrine in Prisons*

### 1. *The Doctrine Generally*

But even though state actors must respect constitutional rights, they still have some flexibility when it comes to what deals they may offer to those with whom they interact. The government's ability to limit your speech increases to some extent when you take a job as a public schoolteacher<sup>304</sup>—or any government job, for that matter.<sup>305</sup> The federal government might not be able to force states to adopt a minimum drinking age of twenty-one,<sup>306</sup> but it may offer federal highway funds to states that do.<sup>307</sup> The government can't force a landowner to surrender property without compensation,<sup>308</sup> but, within certain limits, it can offer a development permit to landowners who are willing to surrender certain property.<sup>309</sup>

These examples all take the form of “deals” or “contracts,” and involve three steps. First, someone holds a constitutional right. Second, the government controls a benefit which it is under no obligation to grant. Third, the government offers the benefit in exchange for the waiver of the right. (Unconstitutional conditions claims may sometimes look like retaliation claims, when the offer of a discretionary benefit takes the form of a threat to withdraw an existing discretionary benefit.<sup>310</sup>)

One could adopt a laissez-faire attitude and allow such deals generally, on the theory that this contract, like most voluntary transactions, presumptively benefits both parties.<sup>311</sup> Or one could fear that, because of the great power of government to induce behavior it likes by virtue of its control over massive resources, the government generally shouldn't be able to achieve indirectly, by conditions attached to benefits, what it couldn't achieve by direct regulation.<sup>312</sup>

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<sup>304</sup> See *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968).

<sup>305</sup> See, e.g., *Garcetti v. Ceballos*, 547 U.S. 410, 421–22 (2006).

<sup>306</sup> See *South Dakota v. Dole*, 483 U.S. 203, 218 (1987) (O'Connor, J., dissenting).

<sup>307</sup> See *id.* at 205–12 (majority opinion).

<sup>308</sup> See U.S. CONST. amend. V.

<sup>309</sup> See *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 856 (1987).

<sup>310</sup> But not all retaliation claims are unconstitutional conditions claims in disguise. Most retaliation isn't advertised ahead of time, so it can't be characterized as a deal, contract, offer, or threat.

<sup>311</sup> See *W. Union Tel. Co. v. Kansas*, 216 U.S. 1, 53 (1910) (Holmes, J., dissenting); *McAuliffe v. Mayor of New Bedford*, 29 N.E. 517 (Mass. 1892) (Holmes, J.).

<sup>312</sup> Philip Hamburger's view is close to this end of the spectrum. See generally Philip Hamburger, *Unconstitutional Conditions: The Irrelevance of Consent*, 98 VA. L. REV. (forthcoming 2012). Others, such as Richard Epstein and Kathleen Sullivan, have argued for somewhat weaker, though still strong, limits on the government's ability to offer conditional benefits. See Richard A. Epstein, *The Supreme Court, 1987 Term—Foreword: Unconstitutional Conditions, State Power, and the Limits of Consent*, 102 HARV. L. REV. 4 (1988); Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413 (1989); see also *id.* at 1419–21.

In practice, the law has steered a middle course and tried to distinguish valid conditions from invalid ones. The resulting body of law is the “unconstitutional conditions doctrine,”<sup>313</sup> though calling it a “doctrine” may be somewhat charitable, since it’s more like a number of apparently unrelated (and perhaps incoherent<sup>314</sup>) subdoctrines in different constitutional fields. Takings analysis of exactions requires an “essential nexus”<sup>315</sup> and “rough proportionality.”<sup>316</sup> Tenth Amendment analysis of spending conditions requires “germaneness.”<sup>317</sup> Fourth Amendment analysis of waivers of the right to be free from unreasonable searches depends on the context, but at least in the employment context, it requires nothing more than ordinary “reasonableness,” where the fact of consent is taken into account as part of the reasonableness calculus.<sup>318</sup> The First Amendment unconstitutional conditions doctrine is strict in theory,<sup>319</sup> complicated in fact.<sup>320</sup>

## 2. *The Doctrine in Prisons Today*

How does this doctrine apply in the prison context? Suppose, for instance, that a prison offered a Sexual Abuse Treatment Program for sex offenders, but conditioned participation on willingness to complete and sign an “Admission of Responsibility” form, listing all prior sexual activities, including uncharged criminal offenses.<sup>321</sup> And suppose this form wasn’t privileged, so that the information could be used in later criminal prosecutions.<sup>322</sup>

Prisoners retain their Fifth Amendment right to not incriminate themselves, but what if they were willing to waive their right in order to participate in the program? As a twist, suppose that waiver was necessary not only to obtain the positive benefit of participation in the program but also to avoid loss of various other benefits, like visitation rights, work opportunities, and residence in a safer unit of the prison.<sup>323</sup> In *McKune v. Lile*, the Supreme Court upheld the program; the “minimal incentives to participate” in the program did not amount to compelled self-incrimination.<sup>324</sup>

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<sup>313</sup> See, e.g., *United States v. Knights*, 534 U.S. 112, 118 n.4 (2001) (Fourth Amendment); *Dolan v. City of Tigard*, 512 U.S. 374, 385 (1994) (takings); *Rutan v. Republican Party of Ill.*, 497 U.S. 62, 69 (1990) (First Amendment); *Doyle v. Cont’l Ins. Co.*, 94 U.S. 535, 543 (1876) (Bradley, J., dissenting) (in the foreign incorporation context).

<sup>314</sup> See *Sullivan*, *supra* note 312, at 1416.

<sup>315</sup> *Nollan v. Cal. Coastal Comm’n*, 483 U.S. 825, 837 (1987).

<sup>316</sup> *Dolan*, 512 U.S. at 391.

<sup>317</sup> *South Dakota v. Dole*, 483 U.S. 208, 208–09 n.3 (1987).

<sup>318</sup> *Nat’l Treasury Emps. Union v. Von Raab*, 489 U.S. 656, 664, 671 n.2, 678–79 (1989); see also *United States v. Scott*, 450 F.3d 863, 866–68 (9th Cir. 2006).

<sup>319</sup> *Bd. of Cnty. Comm’rs v. Umbehr*, 518 U.S. 668, 674 (1996).

<sup>320</sup> See generally *Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968).

<sup>321</sup> *McKune v. Lile*, 536 U.S. 24, 30 (2002) (plurality opinion).

<sup>322</sup> *Id.*

<sup>323</sup> *Id.* at 30–31.

<sup>324</sup> *Id.* at 29; *id.* at 48–49 (O’Connor, J., concurring in the judgment).



While *Lile* is a case where the benefits-for-rights deal was held valid, other cases show that courts are willing to invalidate certain deals. For instance, a Nevada Department of Prisons regulation required that, as a condition of prison employment, inmates sign an agreement waiving the right to receive, among other things, interest on their prison savings accounts.<sup>325</sup> The NDOP couldn't confiscate an inmate's accrued interest outright.<sup>326</sup> But could it constitutionally induce an inmate to give up the interest as a condition of continued employment? Or—presenting the question instead in “retaliation” form—could it fire existing employees who refused to sign the new form?

Though I've presented these two questions as the same, the Ninth Circuit, in *Vance v. Barrett*,<sup>327</sup> answered them separately. Rather, it declined to answer the first question; because the law on unconstitutional conditions in this context was fairly undeveloped, the court was able to dispose of this question on qualified immunity grounds.<sup>328</sup> But, though the court noted an “utter lack of precedent and standards” on the subject,<sup>329</sup> the Nevada prison administrators didn't dispute that such an unconstitutional conditions claim might be successful.<sup>330</sup> The second (“retaliation”) question, on which there was more case law, came out better for the inmates. Because the prison administrators didn't establish that their retaliation had a “legitimate goal,” the court held that it was unconstitutional and not shielded by qualified immunity.<sup>331</sup>

The Ninth Circuit's division of the question into “unconstitutional conditions” and “retaliation” components was probably unsound.<sup>332</sup> But the resolution of the case does indicate generally that there are certain deals the government may not strike, even if it can find a willing partner.

The following examples further illustrate that the unconstitutional conditions doctrine has some bite, even in prisons:

- An inmate, because of child-molesting-related convictions,<sup>333</sup> had an objectively reasonable fear for his safety in prison,<sup>334</sup> which implicated an Eighth Amendment right to physical protection.<sup>335</sup> He requested to

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<sup>325</sup> *Vance v. Barrett*, 345 F.3d 1083, 1087 (9th Cir. 2003).

<sup>326</sup> *Id.* at 1090–91.

<sup>327</sup> 345 F.3d 1083.

<sup>328</sup> *Id.* at 1092.

<sup>329</sup> *Id.*

<sup>330</sup> *Id.*

<sup>331</sup> *Id.* at 1094.

<sup>332</sup> See *supra* note 310 and accompanying text; cf. Frank H. Easterbrook, *Insider Trading, Secret Agents, Evidentiary Privileges, and the Production of Information*, 1981 SUP. CT. REV. 309, 348 (“[A]ny doctrine that draws a distinction between a price for the exercise of a right and a reward for the nonexercise of a right probably begs all the important questions.”).

<sup>333</sup> *Wojtczak v. Cuyler*, 480 F. Supp. 1288, 1292–93 (E.D. Pa. 1979).

<sup>334</sup> *Id.* at 1294–95.

<sup>335</sup> *Id.* at 1303.

be transferred to a maximum-security segregated unit.<sup>336</sup> This unit had severely limited amenities, including no chair, desk, or table; no access to work, rehabilitative programs, or religious services; restricted bathing and shaving times; no visitation rights; and no ability to spend more than an hour a day outside the cell.<sup>337</sup> In *Wojtczak v. Cuyler*,<sup>338</sup> the district court held that the denial of opportunities available to other prisoners as a condition of the protection he was entitled to under the Eighth Amendment violated the unconstitutional conditions doctrine.<sup>339</sup>

- A sex offender was denied parole because he hadn't participated in sex offender treatment.<sup>340</sup> But the reason he didn't participate was that the program required him to admit his guilt.<sup>341</sup> In *In re Personal Restraint of Dyer*<sup>342</sup>—a case reminiscent of *McKune v. Lile*<sup>343</sup>—the Washington Supreme Court refused to reach this argument,<sup>344</sup> but the dissent argued that conditioning his parole on his willingness to incriminate himself violated the unconstitutional conditions doctrine.<sup>345</sup>

### 3. *What Deals Might Prisoners Like?*

More generally, consider some right that isn't very valuable to the inmate and that the prison would like the inmate to waive. In *Lile*, the prison wanted its sex offender inmates to participate in a treatment program, and it's plausible that admitting responsibility improves the benefit an inmate receives from the program. Moreover, most sex offenders probably don't mind the condition: it usually doesn't hurt them to admit crimes for which they've already been convicted, and no one will know if they omit undiscovered sex crimes. Even if they do mind the condition, they probably prefer the proposed benefit more.

Such cases are good opportunities for the voluntary waiver of a constitutional right in exchange for some benefit. To get a sense of what other rights prisoners might be willing to trade away, it's useful to first have a sense of what other rights prisoners have.

It almost goes without saying that prisoners' rights are severely restricted, so prisoners have fewer rights to trade away than free people. (On the other hand, their benefits are also severely restricted, so they may be more willing to trade away rights for benefits than free people.) Some rights, like the right to be

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<sup>336</sup> *Id.* at 1294.

<sup>337</sup> *Id.* at 1290–91.

<sup>338</sup> 480 F. Supp. 1288.

<sup>339</sup> *Wojtczak*, 480 F. Supp. at 1303–06.

<sup>340</sup> *In re Pers. Restraint of Dyer*, 189 P.3d 759, 763–64 (Wash. 2008).

<sup>341</sup> *Id.*

<sup>342</sup> 189 P.3d 759.

<sup>343</sup> See *supra* text accompanying notes 321–24.

<sup>344</sup> *Dyer*, 189 P.3d at 769 n.7.

<sup>345</sup> *Id.* at 776–77 (Sanders, J., dissenting).

free from unreasonable searches, don't apply at all in prisons.<sup>346</sup> And almost all other rights are severely limited in prisons; a "regulation imping[ing] on inmates' constitutional rights . . . is valid if it is reasonably related to legitimate penological interests."<sup>347</sup> But these rights do still exist. For instance:

- Procedures for revoking good-time credits must comply with certain minimal due process requirements.<sup>348</sup>
- Racial discrimination in prisons is reviewed under strict scrutiny.<sup>349</sup> Racial discrimination in prison job assignment can violate equal protection,<sup>350</sup> and residential segregation in prisons seems legally doubtful.<sup>351</sup>
- Inmates have free speech rights,<sup>352</sup> and appellate courts have invalidated prison regulations prohibiting prisoners from receiving standard-rate mail<sup>353</sup> or material printed from the Internet.<sup>354</sup>
- Prisons can't deny inmates of minority religions "a reasonable opportunity of pursuing [their] faith comparable to the opportunity afforded fellow prisoners who adhere to conventional religious precepts."<sup>355</sup>
- The prohibition on cruel and unusual punishment<sup>356</sup> implies a prohibition on "the unnecessary and wanton infliction of pain,"<sup>357</sup> which includes "deliberate indifference to serious medical needs of prisoners."<sup>358</sup> And this implies not just the usual sorts of negative rights that apply to free people, but also affirmative obligations on the government to provide, within limits, food, shelter, clothing, medical care (including mental health care), and protection from other inmates.

<sup>346</sup> See *Hudson v. Palmer*, 468 U.S. 517, 525–26 (1984).

<sup>347</sup> *Washington v. Harper*, 494 U.S. 210, 224 (1990); *Turner v. Safley*, 482 U.S. 78, 89 (1987). Equal protection isn't subject to *Turner* balancing. See *Johnson v. California*, 543 U.S. 499, 510 (2005); cf. text accompanying *supra* note 269 (explaining that the Establishment Clause isn't subject to *Turner* balancing).

<sup>348</sup> See *Wolff v. McDonnell*, 418 U.S. 539, 557 (1974).

<sup>349</sup> See *Johnson*, 543 U.S. at 505.

<sup>350</sup> See *Walker v. Gomez*, 370 F.3d 969, 973 (9th Cir. 2004); *Black v. Lane*, 824 F.2d 561, 562 (7th Cir. 1987).

<sup>351</sup> See *Johnson*, 543 U.S. at 507; *Lee v. Washington*, 390 U.S. 333, 333 (1968).

<sup>352</sup> See *Pell v. Procunier*, 417 U.S. 817, 822 (1974).

<sup>353</sup> See *Prison Legal News v. Cook*, 238 F.3d 1145, 1151 (9th Cir. 2001).

<sup>354</sup> See *Clement v. Cal. Dep't of Corrs.*, 364 F.3d 1148, 1152 (9th Cir. 2004) (per curiam).

<sup>355</sup> See *Cruz v. Beto*, 405 U.S. 319, 332 (1972) (per curiam); see also *Cooper v. Pate*, 378 U.S. 546, 546 (1964) (per curiam).

<sup>356</sup> See *Rhodes v. Chapman*, 452 U.S. 337, 347 (1981); *Coleman v. Schwarzenegger*, No. CIV-5-90-0520 LKK JFM P, 2009 WL 2430820, at \*6 (E.D. Cal. Aug. 4, 2009) (ordering release of California prisoners due to unconstitutional overcrowding).

<sup>357</sup> *Estelle v. Gamble*, 429 U.S. 97, 104 (1976).

<sup>358</sup> *Id.*

- Prisoners have some substantive due process rights, like the right to marry.<sup>359</sup>
- Prisoners have some access-to-court rights enforceable against prisons, possibly resting on the Petition Clause.<sup>360</sup>

For instance, what if—given the prevalence of racial gang violence<sup>361</sup>—a prison wanted to suggest, and some prisoners would prefer, a system of “separate but equal” racial segregation?

What if, to save mailroom costs or perhaps to maintain security,<sup>362</sup> a prison wanted to suggest, and some prisoners would not mind, a (perhaps partial) ban on incoming mail?<sup>363</sup>

What if a prison wanted to suggest, and some prisoners would welcome, a system of summary punishment that would do away with due process but might reduce inmate-on-inmate violence? Or what if doing away with some elements of due process would simply save money, and the prison proposed investing those savings in other benefits that some prisoners would value more, such as improved medical care, more vocational training programs, or better gym equipment?<sup>364</sup>

These are questions that the unconstitutional conditions doctrine should answer.

<sup>359</sup> See *Turner v. Safley*, 482 U.S. 78, 96 (1987).

<sup>360</sup> See *Bounds v. Smith*, 430 U.S. 817, 828 (1977); *id.* at 839–40 (Rehnquist, J., dissenting); see also *Hudson v. Palmer*, 468 U.S. 517, 523 (1984); *Johnson v. Avery*, 393 U.S. 483, 485–86 (1969).

<sup>361</sup> See *Johnson v. California*, 543 U.S. 499, 532–34 (2005) (Thomas, J., dissenting).

<sup>362</sup> See, e.g., *Turner*, 482 U.S. at 91–93 (ban on correspondence related to security concerns); *Bell v. Wolfish*, 441 U.S. 520, 548–52 (1979) (security-related “publisher-only” rule for books and magazines); *Prison Extremism and the First Amendment*, ANTI-DEFAMATION LEAGUE, [http://www.adl.org/civil\\_rights/prison\\_ex.asp](http://www.adl.org/civil_rights/prison_ex.asp) (last visited Sept. 10, 2011) (“Regulations that exclude publications from a prison because of security concerns have been found constitutional when the regulations have required individualized review of any material before it is banned . . .”).

<sup>363</sup> See *Clement v. Cal. Dep’t of Corrs.*, 364 F.3d 1148, 1150–51 (9th Cir. 2004) (per curiam).

<sup>364</sup> The Prison Litigation Reform Act has limited the scope of prison consent decrees; now “[p]arties to prison reform consent decrees can no longer provide remedies above the constitutional minimum.” Shima Baradaran-Robison, Comment, *Kaleidoscopic Consent Decrees: School Desegregation and Prison Reform Consent Decrees After the Prison Litigation Reform Act and Freeman-Dowell*, 2003 BYU L. REV. 1333, 1359. Thus, in a lawsuit alleging due process violations, a prison can’t settle the lawsuit in exchange for extra (not constitutionally required) security measures. But despite the PLRA limitations, these questions are still interesting because a voucher prison could suggest such “deals” on its own, not prompted by any litigation.

#### 4. *Do the Modern Cases Make Sense?*

Whether or not the particular prison cases cited above are right, it makes sense that the unconstitutional conditions doctrine should apply in some way in prisons. Kathleen Sullivan argues that the unconstitutional conditions doctrine is, in large part, about preserving “the overall distribution of power between government and rightholders generally, and among classes of rightholders,”<sup>365</sup> and I’ll adopt her analysis here for illustrative purposes. Conditions attached to government benefits can affect this distribution in three ways:

- *The relationship between government and rightholders.* “Preferred constitutional liberties generally declare desirable some realm of autonomy that should remain free from government encroachment. Government freedom to redistribute power over presumptively autonomous decisions from the citizenry to itself through the leverage of permissible spending or regulation would jeopardize that realm.”<sup>366</sup>
- *Horizontal relationships among classes of rightholders.* Conditions “necessarily discriminate[] facially between those who do and those who do not comply with the condition. If government has an obligation of evenhandedness or neutrality with regard to a right, this sort of redistribution is inappropriate.”<sup>367</sup>
- *Vertical relationships among rightholders.* “[T]o the extent that a condition discriminates de facto between those who do and do not depend on a government benefit, it can create an undesirable caste hierarchy in the enjoyment of constitutional rights.”<sup>368</sup>

Sullivan sees the second argument as primarily affecting constitutional rights that “entail . . . obligations of evenhandedness,”<sup>369</sup> like the free speech and religion clauses.<sup>370</sup> Thus, any condition attached to a prison benefit that would promote one viewpoint over another should probably be unconstitutional both before and after vouchers.

Religion is a special case, though. Conditions promoting one religion over another, or promoting religion over irreligion, are rightly considered unconstitutional now. But as discussed above, vouchers would fundamentally alter this result by providing the “genuine and independent private choice” demanded by Establishment Clause doctrine. Perhaps, in a world of vouchers, it would make sense for a Christian prison not only to offer a Christian immersion experience (which is an Establishment Clause issue) but also to require, as a corollary, the waiver of any inconsistent religious freedom rights that an inmate

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<sup>365</sup> Sullivan, *supra* note 312, at 1490.

<sup>366</sup> *Id.* The heading of this bullet point is from *id.* at 1491.

<sup>367</sup> *Id.* at 1490. The heading of this bullet point is from *id.* at 1491.

<sup>368</sup> *Id.* at 1490. The heading of this bullet point is from *id.* at 1491.

<sup>369</sup> *Id.* at 1496.

<sup>370</sup> *Id.* at 1496–97.

might have under the Free Exercise Clause or RLUIPA,<sup>371</sup> like the right to have a Buddhist chaplain.

The third anti-caste argument, in Sullivan's view, applies to "[t]he fundamental rights branch of equal protection doctrine,"<sup>372</sup> and it would certainly apply as well to the suspect classifications branch, which is most directly concerned with caste. Thus, prisoners, both before and after vouchers, would be unable to trade away their right to equal treatment based on race. (Thus, voucher prisons advertising themselves as "separate but equal" with respect to race would likely be unconstitutional, though one can still envision prisoners segregating themselves voluntarily, with different prisons attracting prisoners of different races.<sup>373</sup>)

But the first argument—that the unconstitutional conditions doctrine prevents the government from using "the strategic manipulation of gratuitous benefits to aggrandize public power"<sup>374</sup>—is potentially the most interesting for our purposes. "On this view, government overreaches when it offers benefits in order to gain leverage over constitutional rights. The state may have many good reasons to deal out regulatory exemptions and subsidies, but gaining strategic power over constitutional rights is not one of them."<sup>375</sup> Richard Epstein makes a similar argument, though one that sounds in efficiency: "By barring some waivers of constitutional rights, the doctrine of unconstitutional conditions allows disorganized citizens to escape from what would otherwise be a socially destructive prisoner's dilemma game."<sup>376</sup>

The danger of government acquiring power over benefit recipients differs according to context. Epstein fears that if government can constitutionally freeze all development and then offer landowners "parcel-by-parcel exemptions in exchange for easements across beachside backyards without further compensation," it will have circumvented the just compensation requirement of the Takings Clause.<sup>377</sup> Charles Reich fears that government, with its massive resources, can reduce the scope of individual rights not by impermissible regulation but simply by granting benefits to those who agree not to exercise certain disfavored rights.<sup>378</sup>

In prisons, this danger seems fairly acute. Prisoners are guaranteed a constitutional minimum of rights, but in many areas, this minimum is extremely low. Most *actual* prison conditions, however bad, are substantially above the

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<sup>371</sup> Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. § 2000cc-1 (2006).

<sup>372</sup> Sullivan, *supra* note 312, at 1498.

<sup>373</sup> This is of course constitutional under *Washington v. Davis*, 426 U.S. 229 (1976), and its progeny.

<sup>374</sup> Sullivan, *supra* note 312, at 1493.

<sup>375</sup> *Id.*

<sup>376</sup> Epstein, *supra* note 312, at 22.

<sup>377</sup> See Sullivan, *supra* note 312, at 1494; see also Epstein, *supra* note 312, at 62.

<sup>378</sup> See Sullivan, *supra* note 312, at 1494; see also Charles Reich, *The New Property*, 73 YALE L.J. 733, 764 (1964).

constitutional minimum, and this gives the government a huge amount of leverage.

Consider, for instance, the Eighth Amendment guarantee against cruel and unusual punishment, which, the Supreme Court reminds us, “does not outlaw cruel and unusual ‘conditions.’”<sup>379</sup> Prisons are not responsible for substandard medical care, inmate-on-inmate violence, or any other condition of imprisonment, unless prison officials (whether doctors or guards) show “deliberate indifference” to a substantial risk of serious harm.<sup>380</sup> When such indifference is lacking, it is a given that prisons can be uncomfortable, unpleasant, brutal places.<sup>381</sup>

Moreover, much of prisoners’ treatment isn’t even subject to the fairly minimal standards of the Due Process Clause. “[P]rison officials have broad administrative and discretionary authority over the institutions they manage,” and “lawfully incarcerated persons retain only a narrow range of protected liberty interests.”<sup>382</sup> “As long as the conditions or degree of confinement to which the prisoner is subjected is within the sentence imposed upon him and is not otherwise violative of the Constitution, the Due Process Clause does not in itself subject an inmate’s treatment by prison authorities to judicial oversight.”<sup>383</sup>

Thus, in *Hewitt v. Helms*,<sup>384</sup> an inmate was transferred from the general prison population to administrative segregation, where he had “no access to vocational, educational, recreational, and rehabilitative programs,” nearly continuous confinement in his cell, and virtually no showers some months.<sup>385</sup> The Supreme Court held 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” and that “administrative segregation is the sort of confinement that inmates should reasonably anticipate receiving at some point in their incarceration.”<sup>386</sup> Because the transfer to administrative segregation did not implicate any liberty interest covered by the Due Process Clause, prison officials would have been free to transfer Helms without process of any kind—indeed, on a whim—if the state didn’t happen to have regulations with mandatory language restricting such transfers to specified circumstances.<sup>387</sup>

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<sup>379</sup> *Farmer v. Brennan*, 511 U.S. 825, 837 (1994).

<sup>380</sup> *Rhodes v. Chapman*, 452 U.S. 337, 345–47 (1981); *Estelle v. Gamble*, 429 U.S. 97, 104–06 (1976).

<sup>381</sup> *Farmer*, 511 U.S. at 858–59 (Thomas, J., dissenting); see *Chapman*, 452 U.S. at 349; *McGill v. Duckworth*, 944 F.2d 344, 348 (7th Cir. 1991).

<sup>382</sup> *Hewitt v. Helms*, 459 U.S. 460, 467 (1983).

<sup>383</sup> *Montanye v. Haymes*, 427 U.S. 236, 242 (1976).

<sup>384</sup> 459 U.S. 460 (1983).

<sup>385</sup> *Id.* at 479 n.1 (Stevens, J., dissenting).

<sup>386</sup> *Id.* at 468 (majority opinion).

<sup>387</sup> *Id.* at 471–72.

The same goes for denials of parole<sup>388</sup> and transfers to other prisons,<sup>389</sup> as well as denials of good-time credit,<sup>390</sup> “despite the undoubted impact of such credits on the freedom of inmates.”<sup>391</sup>

In such a context, the possibilities for government overreaching through attaching conditions to benefits seem nearly unlimited. The Epstein fear—that government would overregulate and yield back development rights—would require an initial round of overregulation, which is of course possible but does require spending some political capital. The Reich fear—that government would buy up people’s liberty by offering valuable “New Property” benefits—would require an initial round of taxation to finance these strategic benefits; this would be visible, on-budget, and an expensive mechanism of social control.<sup>392</sup>

None of this applies in prisons. Prison officials *already* have all the legal authority they need to make an inmate’s prison experience substantially less pleasant with absolutely no judicial oversight by underinvesting in prison security and health care—so that there need not be “*deliberate* indifference”—and by removing anything that isn’t part of inmates’ liberty interest.

Consider *McKune v. Lile*,<sup>393</sup> which I have discussed above,<sup>394</sup> where inmates had to waive their Fifth Amendment rights to participate in a sexual abuse treatment program. Those who didn’t participate not only lost the benefits of the program, but also lost visitation rights and work opportunities and had to live in a less safe unit of the prison.<sup>395</sup> The “benefit” being offered wasn’t just the carrot of participation in the program, but also the stick of losing valuable existing prison benefits. Of course, in the prison context, it’s entirely valid to consider all that part of the “benefit,” since neither visitation, nor prison employment, nor residence location is part of the baseline of prisoners’ rights.

Faced with such a choice, few inmates would hold on to their constitutional rights. They would accept the benefit, even when it’s inferior to their status quo ante, simply because it is superior to their threatened status quo post.

The constitutional and political processes that prevent the government from “offering” not to remove existing portions of would-be beneficiaries’ endowments (“agree to warrantless searches of your public housing, or else you’ll lose not only the housing but also your job,” or “agree to build a bike path, or else you’ll lose not only your development permit but also your car”) are largely absent. Prison officials’ self-interest may sometimes do the job: television and gym equipment are offered not because they’re required or because there is a political constituency in their favor, but because they reduce

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<sup>388</sup> *Greenholtz v. Inmates of Neb. Penal & Corr. Complex*, 442 U.S. 1, 7–8 (1979).

<sup>389</sup> *Meachum v. Fano*, 427 U.S. 215, 224–25 (1976).

<sup>390</sup> *Wolff v. McDonnell*, 418 U.S. 539, 557 (1974).

<sup>391</sup> *Helms*, 459 U.S. at 467–68.

<sup>392</sup> See Sullivan, *supra* note 312, at 1495; see also Pennell v. City of San Jose, 485 U.S. 1, 22 (1988) (Scalia, J., concurring in part and dissenting in part).

<sup>393</sup> 536 U.S. 24 (2002).

<sup>394</sup> See *supra* text accompanying notes 321–24.

<sup>395</sup> *Lile*, 536 U.S. at 30–31.



in-prison violence.<sup>396</sup> But if their threats are sufficiently draconian, inmates will systematically waive their rights rather than forgo their benefits, so prison officials will rarely have to actually make good on the threat and cut off television and gym privileges.

The threat that, in the absence of an unconstitutional conditions doctrine, government would offer benefits strategically in order to induce the waiver of rights—especially those rights that actually make life more difficult for prison administrators—is thus very real.

### C. *The Doctrine in a World of Vouchers*

The unconstitutional conditions doctrine should probably apply differently in a world of prison vouchers. Prisons should have more leeway than they do now to offer prisoners “deals” in which the prisoners waive constitutional rights in exchange for some benefit.

In the previous subsection, I have argued that the risks of government offering benefits strategically to induce a waiver of rights are substantial in the prison context. But all this is very fact-specific. How willing we should be to impose a strong unconstitutional conditions doctrine depends on how acute the risk seems in the context at hand.

And in a world of prison vouchers, where prisons are competing—and, moreover, are competing to make themselves more attractive to prisoners—these risks of abuse are seriously attenuated. Indeed, perhaps the problem is the opposite—perhaps, with prison vouchers, we should worry that prisons will become *too* good from prisoners’ perspectives, diluting the deterrent value of prison. Perhaps, in a world of prison vouchers, the government should actively intervene in the prison market to prevent prison conditions from becoming too good, or from catering to prisoners’ less desirable preferences (like self-segregating on the basis of gang affiliation).<sup>397</sup> However that may be, there seems to be much less reason to fear that prisons will take advantage of inmates by unreasonably inducing them to waive constitutional rights.

If competition is sufficient, we should be less worried about the risks that the unconstitutional conditions doctrine addresses.<sup>398</sup> Moreover, as discussed earlier,<sup>399</sup> the government should have a continuing responsibility to assure “constitutionally compliant spots”: any inmate should be able to choose a space in a prison, provided either directly by the government or indirectly by contract with a private provider, where all of the usual constitutional requirements apply,

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<sup>396</sup> See, e.g., PETER M. CARLSON & JUDITH SIMON GARRETT, *PRISON AND JAIL ADMINISTRATION: PRACTICE AND THEORY* 93 (2d ed. 2008).

<sup>397</sup> See Volokh, *supra* note 22 (manuscript at 38–39).

<sup>398</sup> Cf. Epstein, *supra* note 312, at 68 (suggesting that the unconstitutional conditions doctrine has little role to play in government employment because the competitive nature of employment markets minimizes the chance that government is acting strategically against employees’ interests).

<sup>399</sup> See *supra* text accompanying notes 223, 288.

including a strong unconstitutional conditions doctrine. Otherwise, an inmate—who, of course, is required to go to some prison—could be faced with a choice of prisons that *all* require the waiver of some constitutional right. If every inmate is guaranteed a “constitutionally compliant” spot, we may be more confident that, when a voucher prison offers a benefit with strings attached, it’s not *improperly* inducing the waiver of rights.

#### IV. CONCLUSION

Throughout this Article, I have been taking a doctrine developed in the context of education and applying it to prisons. It is worth thinking whether the resulting doctrine of prison vouchers can now tell us anything interesting about education.

I’ve noted, on a few occasions, that under a system of prison vouchers, the government should have a continuing duty to guarantee a constitutionally compliant spot for anyone who wants one. “Constitutional compliance” means just secularity for the purposes of the Establishment Clause analysis,<sup>400</sup> but for the purposes of the unconstitutional conditions analysis it means observing all the usual constitutional rights and not offering any “deals” that would be considered impermissible under current doctrine.<sup>401</sup>

So far, this issue rarely, if ever, comes up in the education context. Students almost always have the option of attending a public school, which, because it is directly run by the government, is subject to all the usual constitutional restrictions. But imagine a voucherized world where the government has abandoned the provision of education but hasn’t abandoned compulsory education. (Or it need not even be a voucherized world. Suppose the government chooses not to run its own public school but just assigns students to a local private school—a situation confronted by the First Circuit in *Logiodice v. Trustees of Maine Central Institute*.<sup>402</sup>)

It seems that, in such a world, there should be a similar requirement for the government to provide the full complement of constitutional rights to any student who wants them, either by running a public school of last resort, or by contracting with a private school to provide the rights. This requirement should exist as long as education is compulsory—and the government could relieve itself of this duty simply by making education non-compulsory (not an option for prisons, of course).

This seems like it *should* be the rule, but I doubt that current doctrine can get us there. Private schools aren’t state actors on a “public function” theory, nor does the government’s requirement that children attend *some* school convert *every* school into a state actor. The First Circuit declined, in *Logiodice*, to find

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<sup>400</sup> See *supra* text accompanying notes 223, 288.

<sup>401</sup> See *supra* text accompanying note 399.

<sup>402</sup> 296 F.3d 22 (1st Cir. 2002). In *Logiodice*, the Maine communities of Pittsfield, Burnham, and Detroit chose not to operate a local high school and instead contracted with the private Maine Central Institute. *Id.* at 24.

state action in the disciplining of a student by the only available free school, though it understood the “impulse to expand the state action doctrine” to reach the “threat of wrongful expulsion from the local school of last resort (at least for those who cannot pay).”<sup>403</sup> But the analysis here suggests a possible change to state action doctrine as it relates to education: with respect to their status as custodians of schoolchildren subject to compulsory education, schools *should* be considered state actors, though, like prisons, they should have enhanced ability to negotiate the waiver of students’ rights in exchange for other benefits as long as a fully constitutionally compliant alternative is available.

The intuitive reason is the same as it is for prisons—prisons and schools may be different in all sorts of ways, but as long as education is compulsory, they are similar in that people are *forced* to be there.<sup>404</sup> Private providers should have broad leeway to negotiate alternative, non-constitutional deals as long as the unwilling “consumers” (i.e., students or inmates) have a constitutionally compliant option at their disposal. The government can provide this option either by running its own public schools or by contracting with private schools to provide a constitutionally compliant education for those who want one.

Even now, the educational system contains both “compulsory” and “voluntary” students, depending on whether they’re above the statutory compulsory education age. A private school in a fully voucherized world without public schools might then have some students with whom it must observe constitutional norms (based on a constitutional-school-of-last-resort contract with the government), and others, students with whom it needn’t.

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But let’s return to prisons. In this Article, I have explored how a system of prison vouchers would affect constitutional analysis.

The main result has been that faith-based prisons would be fully constitutional. Faith-based prisons, under a voucher system, wouldn’t have to tone down their religious material (and, on the contrary, could tone it up substantially); they wouldn’t have to divest themselves from disciplinary

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<sup>403</sup> *Id.* at 29. “[C]reating new exceptions is usually the business of the Supreme Court . . .” *Id.*

<sup>404</sup> The Supreme Court has occasionally noted the connection between children’s constitutional rights and the existence of compulsory education laws, though, at public schools, this connection has not been very important, since the mere fact that public schools are staffed by government employees is sufficient for state action. *See* *New Jersey v. T.L.O.*, 469 U.S. 325, 336 (1985); *Ingraham v. Wright*, 430 U.S. 651, 662 (1977); *cf.* *Illinois ex rel. McCollum v. Bd. of Educ.*, 333 U.S. 203, 209 (1948) (“The operation of the state’s compulsory education system thus assists and is integrated with the program of religious instruction . . . Pupils compelled by law to go to school for secular education are released in part from their legal duty upon the condition that they attend the religious classes.”); *see also* *Wallace v. Jaffree*, 472 U.S. 38, 81 (1985) (O’Connor, J., concurring in the judgment); *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 307 (1963) (Goldberg, J., concurring).

matters; and no individual prison would have to have a variety of programs, secular or otherwise.

The secondary result has been that prisons under a voucher scheme would have greater leeway to propose waivers of constitutional rights in exchange for other benefits. This applies in the religious context (a religious prison could demand the waiver of various free exercise rights) and in contexts entirely separate from religion (a prison could offer cutting back on its grievance system in exchange for better medical care).

A system of prison vouchers has many potential advantages and disadvantages. On the plus side, it would finally give prisons an incentive to compete on dimensions that are valuable to prisoners and prison reformers alike, such as decent medical care or low rates of assault or rape. On the negative side, it would also give prisons an incentive to compete on socially negative dimensions, such as looking the other way as prisoners smuggled in contraband; it would facilitate the self-segregation of prisoners by gang affiliation; and, more generally, to the extent that prisons became less unpleasant places from inmates' points of view, the deterrent value of prison would be lessened.

The positives and negatives are both substantial, and I remain agnostic about whether prison vouchers are a sensible reform proposal. But whichever way one comes out, the constitutional ramifications, in particular the effect on the constitutionality of faith-based prisons, should be part of the analysis. As for the rest of the analysis, it is a subject I leave to other work.<sup>405</sup>

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<sup>405</sup> See generally Volokh, *supra* note 22.