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Look Forward, Angel: Prison Abolition Through Multifaith-Inspired Restorative Justice

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I. Introduction

"*Remember to imagine and craft the worlds you cannot live without, just as you dismantle the ones you cannot live within.*" – Ruha Benjamin

When the car finally stopped careening, it was a mangled mass. The metal frame reminiscent of crumbled tin foil discarded after use. Inside, only one of the three passengers was breathing. Marshall "Scooter" Williams[1], the driver, lay penned against the steering wheel, unconscious. His wife and three-year-old son were not as lucky. The cause of the accident was a number of factors—an argument, black ice, and drug use. The result of the accident, for Scooter, was a one-year felony sentence in state prison for vehicular homicide.

The accident itself left behind a trail of consequences. For family members, they were understandably aggrieved. Their loss created a palpable hole not yet filled. For Scooter, his year in prison made returning to the community difficult. His felony conviction resulted in barriers against driving, employment, and financial assistance. When asked if Scooter's imprisonment for the death of his wife and child provided the family with any relief, they all flatly said no. To this day, an odd forty years later, Scooter still does not have a license to drive and continues a battle with drug abuse. Following vignettes like these, it is not so hard to begin to consider the question: why prisons?

Presumably, the answer to that question is that prisons exist as a form of justice. The commission of a crime requires a punishment. In the U.S. criminal justice system, the contemporary use of prisons circulates around three main theories and goals of punishment:

[1] At full disclosure, Marshall "Scooter" Williams is my father and this is his personal story, retold with permission. I offer this information for transparency and a grounding of my reasoning for research and work in the topic. As Bryan Stevenson remarked in his own personal story: "[t]he closer we get to mass incarceration and extreme levels of punishment, the more I believe it's necessary to recognize that we all need mercy, we all need justice, and—perhaps—we all need some measure of unmerited grace." BRYAN STEVENSON, JUST MERCY: A STORY OF JUSTICE AND REDEMPTION 18 (2014).

retribution (for victims), rehabilitation (for offenders), and incapacitation (for public safety).[2] Yet, as Scooter's story (and the stories of countless others) shows, depending on the offense, prison as punishment has little to no impact on meeting those goals. Rather, qualitative narratives and quantitative data actually demonstrate that the use of prisons run counter to those aims and put both victims and offenders in worse positions than before.[3] In fact, the collective, egregious harm caused by incarceration continues to beg the same question: why prisons?

The likely answer to that repeated question is simply because the overall population cannot see a society without the prison. The contemporary prison is a unique creation of the U.S., but its use and expansion in recent years makes it a cornerstone of public life. Despite its nefarious nature, the prison is maintained for the lack of imagining a different model of justice. However, there are better models that can beget equitable justice—they just need to be imagined, philosophically, and implemented, legally. This article is a call for the abolishment of prisons in the U.S. and a suggestion for that different model. It is a call framed in a historical, humanistic, and legal analysis under faith-inspired programming, and that is on purpose.

The case for prison abolition is not novel, but it is unsettling for those unaccustomed to the idea. In a society that for many has always endured the U.S. prison, there is no other way to handle criminal offenses and punishment. Yet, practices in restorative justice that prioritize community engagement arguably can engender justice that benefits affected parties much more than prison as punishment. Understanding the unease that many may feel in breaking away from such a deeply rooted institution as the U.S. prison system, this article suggests the introduction of restorative

[2] These notions are derived from Joshua Dressler's "Theories of Punishment" for which he divides the rationale of punishment into two modes: utilitarianism and retribution. In Dressler's theory, utilitarianism includes both the goal of rehabilitation and incapacitation. JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 16-9 (2018).
[3] RACHEL ELISE BARKOW, PRISONERS OF POLITICS: BREAKING THE CYCLE OF MASS INCARCERATION 88 (2019).

justice under faith-inspired programming. That is because, whether one identifies to a particular faith or not, the American sentiment toward punishment began under religious banners.[4]

The attachment to religious notions of retribution and redemption spurred the contemporary U.S. prison and prove fitting to reorganize the model.[5] Further, whether self-realized or not, scholars note the prevalence of religious tenets toward justice in America and its use can be helpful in an individual's adoption of alternative practices such as restorative justice.[6] However, government bodies cannot so easily utilize practices that advance or curtail the interests of any one religion because of the First Amendment's Establishment Clause. To complicate matters further, the Supreme Court's handling of Establishment Clause cases has not followed a consistent course—use of various tests and departures from previous standards have left analysis uncertain. Bearing in mind that malleability, these newly imagined federal and state criminal justice practices will need to tiptoe a fine line of being religiously inspired without being religiously based in order not to run afoul of U.S. Constitutional law.

To that end, Section I of this article begins by conceptualizing the contemporary prison in U.S. society through its historical, religious roots, while also taking stock of where that ended. Then, by understanding those religious underpinnings, Section II moves to examining the failures of the current system of mass incarceration. Hopefully, by highlighting the disconnect of the redemptive desires of punishment against the failures of U.S. prisons, an imagination of faith-inspired restorative justice in Section III becomes less improbable for those still unsettled with prison abolition. Finally, as the use of faith-based programming encounters legal hurdles in relation

[4] *See* JOSHUA DUBLER & VINCENT W. LLOYD, BREAK EVERY YOKE: RELIGION, JUSTICE, AND THE ABOLITION OF PRISONS 3 (2020).
[5] *Id*.
[6] *See, e.g., id*.; TANYA ERZEN, GOD IN CAPTIVITY: THE RISE OF FAITH-BASED PRISON MINISTRIES IN THE AGE OF MASS INCARCERATION (2017); Kathryn Getek Soltis, *The Christian Virtue of Justice and the U.S. Prison*, 8 J. OF CATHOLIC SOCIAL THOUGHT 37 (2011).

to the Establishment Clause, Section IV concludes with an analysis demonstrating that restorative justice as a means to abolish prisons is pragmatic both philosophically and legally, if constructed in an inspirational rather than government endorsing manner. That analysis will entail prospective line drawing of restorative justice programming in order to demonstrate viability against perceived, but uncertain, Establishment Clause attacks. Essentially, this is all possible. All one has to do is just imagine. And then do the work.

II. A Quick History of Punishment in U.S. Prisons

"To accept one's past—one's history—is not the same thing as drowning in it; it is learning how to use it." – James Baldwin

Imprisonment as a tool is not exceptional. The use of constraints and barriers to confine an individual dates back for humans time immemorial. However, in imprisonment's relation to punishment, it was traditionally only a means to detain until an offender received swift, and often violent, penalty.[7] Imprisonment as punishment itself, alternatively, is a distinctively U.S. creation, and a creation that began uniquely religious with redemptive qualities.[8] In a sense, the contemporary U.S. prison began with good intentions, but its current state as an actor of control is far astray from that start.

While the U.S. prison has persisted, its enduring lifespan follows three main periods with widely different objectives. These periods are thematically and temporally grounded as: redemptive, political, and economic.[9] By closely examining each of these periods and their

[7] *See* Matthew W. Meskell, *An American resolution: the history of prisons in the United States from 1777 to 1877*, 51 STAN. L. REV. 839 (1999).
[8] *See* DUBLER & LLOYD, *supra* note 4 at 2.
[9] Joshua Dubler and Vincent W. Lloyd follow a similar account of political and economic reasonings for the expansion of mass incarceration as this article does for the history of punishment in general. Their analysis also includes an overview of race considerations. *Id*. at 3-5.

histories, it becomes easier to see when and where the intent of the U.S. prison went off-course.[10] This examination also permits one to begin to imagine models of justice that align with that original intent of redemption and can abolish prisons entirely.

A. The Redemptive Phase

At the outset, punishment in colonial America has been described as a "curious mix of religion, English barbarity, and pragmatism."[11] Extremely community focused, the penalty for criminal offenses ranged from bodily harm to public humiliation. Punishment was either swift and exacting or a prolonged public penance.[12] Those forms of punishment did, to some extent, entail the use of confinement, but initially imprisonment was too costly to be anything other than short-term control. The prison as punishment itself arguably began in the early 1800s when Quaker, Calvinist, and Methodist reformers sought for the redemption of offenders with the creation of the penitentiary.[13] The penitentiary, and its faith-based qualities, was the bedrock for the contemporary U.S. prison and mass incarceration.

As colonial towns began to grow, and populations began to rise, so did the amount of criminal offenses in these communities.[14] The prior models of punishment that entailed physical harm or community shame and expulsion simply became unfeasible. These traditional community-based, self-policing practices proved tenable when the communities were small, but exacting large

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[10] The histories explored in this section are limited in scope to the histories of prison as a form of punishment and does not cover an expansive history of the creation and changes of the U.S. prison system overall. That being said, historical narratives concerning the U.S. prison landscape are widely documented and fascinating. Their coverage can also prove helpful in conceptualizing and pinpointing the failures of the contemporary U.S. prison system. It is strongly recommended to supplement the limited histories presented here with those of greater detail—many of which are available in the Oxford primer. *See generally,* NORVAL MORRIS & DAVID J. ROTHMAN, THE OXFORD HISTORY OF THE PRISON: THE PRACTICE OF PUNISHMENT IN WESTERN SOCIETY (1997).

[11] *See* Meskell, *supra* note 7 at 841.

[12] *Id*.

[13] ERZEN, *supra* note 6 at 39.

[14] Meskell, *supra* note 7 at 842.

and public punishments failed administratively and optically.[15] To that end, throughout the northeast, and eventually into the south, the construction of jails served as a new form of punishment within newly developed criminal codes. The number of criminal offenses that received corporal punishment dropped severely and became replaced with confinement and hard labor.[16] Yet, these early jails proved ineffective in asserting control over its charges because of collective confinement. Larger masses were unruly and difficult to contain.[17] As such, to regain control within imprisonment, prison guards again utilized physical harm against prisoners, which led to increased scrutiny and criticism. To remedy, the notion of private and cellular imprisonment became the new model.[18] At this point, religious reformers saw an opportune time to use "religious redemption [as] the antidote to physical punishment."[19]

To break away from the Calvinistic doctrines teaching that all humans were evil and can only be deterred from crime and not reformed, religious reformers began to imagine the penitentiary. The penitentiary's formation centralized the idea that, while imprisoned, the criminal could reawaken and seek personal retribution through both prayer and labor.[20] The model emphasized discipline in faith and reforming the individual by acts of penance. During the day, the prisoner could toil away and demonstrate to God a commitment to reform. At night, within the cell, the prisoner could perform prayer to compound on that commitment and seek revival of a pure spirit. Aside from these performed acts, prisoners received opportunity to learn basic life

[15] *Id*. at 842-3.
[16] *Id*.
[17] *Id*.
[18] Much of this remedy actually involved the overhaul of the architecture of prisons in general. Initial prison design congregated prisoners in one space, but this led to hostility amongst guards and prisoners. Connecting self-reflection with design, the new penitentiaries created the cellular, divided model that has continued in many prisons today. *See* ANDREW SKOTNICKI, RELIGION AND THE DEVELOPMENT OF THE AMERICAN PENAL SYSTEM 30 (2000).
[19] ERZEN, *supra* note 6 at 39.
[20] *See* W. DAVID LEWIS, FROM NEWGATE TO DANNEMORA: THE RISE OF THE PENITENTIARY IN NEW YORK, 1796-1848, at 2 (1965).

skills, including reading instruction if illiterate.[21] Without a clear answer to why, these notions and practices proved successful. During the early years of the penitentiary's creation, and upon prisoner release, crime rates in practicing areas decreased steadily.[22]

Despite the reformative successes of the penitentiary model on the prisoner and community-at-large, those successes conflicted with increased populations and limited budgets.[23] More prisoners led to less space for solitary reflection, but also led to more bodies for labor profits.[24] While initially focused on a religious outlook, the power of profit in the prison quickly outweighed and tipped the scale.[25] This, coupled with the growing diversity in faith, race, and ethnicity in the U.S.[26], led to the deterioration of the penitentiary and the creation of the rehabilitative center.[27] The prison persisted as the form of punishment, but the religious inklings faded. By the end, the short-lived model fell to the warehouse prison[28], which continued, relatively unchanged until the politically charged era beginning in the late 1960s.[29]

B. The Political Phase

[21] *Id*. at 4.
[22] Meskell, *supra* note 7 at 847.
[23] *See* LEWIS, *supra* note 20 at 7.
[24] *See* ERZEN, *supra* note 6 at 43.
[25] It would be remiss to forgo noting the stark difference between labor use for prisoners in the northern penitentiaries and southern convict lease system. While the penitentiary model exhibited arguably humane labor punishment in confinement under religious values, these same values were used to justify violent acts against convicts (many former slaves) toiling crops such as sugar cane on former slave plantations. *See* ROBERT PERKINSON, TEXAS TOUGH: THE RISE OF AMERICA'S PRISON EMPIRE 8 (2010).
[26] ERZEN, *supra* note 6 at 45.
[27] Often the names for spaces of confinement are used in an umbrella sense. At first glance, terms such as "penitentiary," "rehabilitation center," "correctional facility," and "criminal justice center" fall into the generic of "prison." From a delve into academic literature and media, these terms are often used interchangeably. It is interesting to note, however, if used accurately, each term can actually define and color the practices of a particular "prison."
[28] The term "warehouse prison" serves as a general reference to the prison as a place that stores "dangerous and violent" criminal offenders and does little else to offer reform or rehabilitation. *See* JOHN IRWIN, THE WAREHOUSE PRISON: DISPOSAL OF THE NEW DANGEROUS CLASS (2014).
[29] *See* SKOTNICKI, *supra* note 18 at 56.

The theories behind its power and influence may vary between scholars, but in regard to its history and creation, almost all invariably agree mass incarceration in the U.S. began at one seminal moment: Barry Goldwater's 1964 acceptance speech at the Republication National Convention.[30] Taking advantage of the public's current dissatisfaction with a response to crime, Goldwater introduced the words "law and order" into the political vocabulary.[31] As Michael Flamm frames the topic, "[a]nxious whites now saw how national policies affected their neighborhoods; eager conservatives discovered how to exploit local fears."[32] Now, the traditionally localized issue of crime became a national concern that could not be ignored or deferred. In the years following Goldwater's speech, government response to crime rose from an issue to, arguably, the most important issue in presidential campaigns.[33] This response led to the practices of large scale imprisonment of bodies that engendered mass incarceration.

At the start of the 1960s, crime in all of its forms (petty, violent, property, etc.) was on the rise.[34] To this day, its rise has been considered an anomaly without a clear-cut answer to why. The traditional cited factors of poverty or unemployment do not hold because these numbers were actually low during the same time.[35] Drug use proves unlikely, as well, since its boom occurs later in U.S. history.[36] In any event, crime rose. Between 1960 and 1970, violent crime in of itself

[30] While, overwhelmingly, many contend that Goldwater's speech and the spur of action following ignited mass incarceration through "tough on crime" policies, scholar Naomi Murakawa suggests that the "law and order" politics actually began during the liberal Civil Rights Movement in the late 1940s. Yet, no matter the start, all take stock of the dramatic increase in punishment of old and new crimes in the years following 1964. *See* NAOMI MURAKAWA, THE FIRST CIVIL RIGHT: HOW LIBERALS BUILT PRISON AMERICA 3 (2014).
[31] DUBLER & LLOYD, *supra* note 4 at 77.
[32] *See* MICHAEL W. FLAMM, LAW AND ORDER: STREET CRIME, CIVIL UNREST, AND THE CRISIS OF LIBERALISM IN THE 1960s X (2007).
[33] *See* Jonathan Simon, Governing through Crime: How the War on Crime Transformed American Democracy and Created a Culture of Fear X (2009).
[34] *See* Lauren-Brooke Eisen, *America's Faulty Perception of Crime Rates*, BRENNAN CENTER (Mar. 16, 2015), https://www.brennancenter.org/our-work/analysis-opinion/americas-faulty-perception-crime-rates.
[35] *See* BARRY LATZER, THE RISE AND FALL OF VIOLENT CRIME IN AMERICA X (2016).
[36] *Id*.

jumped 126 percent and climbed another 64 percent between 1970 and 1980.[37] Those situated near areas of high crime activity understandably knew of and feared these numbers. Yet, in areas with lower crime rates (such as suburban and rural settings), the fear and call to change also existed.[38]

Local and national media played a large part in stoking fear of crime and sensationalizing stories for larger attention. Daily and nightly news reports to this day consistently cover crime and specifically provide coverage of violent crime that will engage viewers knowing the populist obsession.[39] With national news outlets reporting on the increase in violent crime throughout the country, conservative politicians such as Goldwater took the opportunity to chide the liberals in charge for their failure to address the issue.[40] Before this point, response to crime was a local concern relegated to local leaders—the majority of criminal offenses are handled through municipal and state laws and have limited federal reach, anyway. However, with these pressures from citizens, the media, and political opponents, the response to crime could no longer be ignored nationally and became a bipartisan political agenda item.[41]

Prior to the rampant crime narrative's move from the periphery to the center stage, the liberals-in-charge (perhaps understandably) believed the effective way to address the crime surge was through a War on Poverty—evidenced outwardly during Lyndon B. Johnson's State of the Union address in January of 1964.[42] Providing social welfare and resources to combat health and income disparities would, in their view, lead to a decrease in the factors that promoted criminal offenses in the first place.[43] However, the conservative attack did not allow this approach to continue. It had now become politically unsound to present "soft on crime" and a social welfare

[37] *Id*.
[38] *See* FLAMM, *supra* note 32 at X.
[39] *See* BARKOW, *supra* note 3 at 106.
[40] *See* DUBLER & LLOYD, *supra* note 4 at 81.
[41] *See* MURAKAWA, *supra* note 30 at 3.
[42] *See id*. at 8.
[43] *Id*.

approach would simply not do.[44] While Goldwater's campaign ultimately failed, the conservative's presentation of crime nationally as a dire issue altered the political response on both sides until at least the 2010s.[45]

The liberal War on Poverty quickly altered to a bipartisan War on Crime. At the risk of oversimplification for the sake of brevity, it is sufficient to note that between the 1970s and late 1990s, numerous crime bills and acts drastically altered the prison and punishment landscape.[46] During these years, as the political narrative required a "tough on crime" rhetoric no matter the political party, the prison population grew from an estimated 329,821 in 1980 to 1,312,354 at the start of 2000.[47] Instead of addressing root causes for crime and attempting to alleviate through social welfare efforts, newly created crimes and harsher penalties for existing offenses expanded those incarcerated solely for political clout.[48] The locking away of bodies served a political purpose with no attachment to well-being of the prisoner. At no surprise, the increase of prisoners required the increase of prisons and their construction skyrocketed, as well.[49] Following this

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[44] *Id*.

[45] Despite historical trends for politicians to tout being "tough on crime," current trends in media actually show that it has become politically unsound to not at least present "smart on crime." Interestingly, this approach seemingly appears across party lines, with both Republican and Democratic officials calling for criminal justice reform. Arguably, this is largely due to the increased coverage of, and attention paid to, movements against police violence. Yet, some note that these reforms will do little, if nothing, to address the inequities that mass incarceration creates. *See* MAYA SCHENWAR & VICTORIA LAW, PRISON BY ANY OTHER NAME: THE HARMFUL CONSEQUENCES OF POPULAR REFORMS 3-4 (2020).

[46] During this time, myriad legislation appeared that significantly strengthened state and federal powers to police and punish. The Law Enforcement Assistance Act of 1965 provided state and local agencies grant opportunities for increasing and training their personnel. The Omnibus Crime Control and Safe Streets Act of 1968 aimed to expand law enforcement powers that had begun to be limited by the Warren led Supreme Court. And the largest crime bill, the Violent Crime Control and Law Enforcement Act of 1994 introduced new and increasingly more punitive measures concerning guns, violence against women and children, death penalty uses, and creations of sex offender registries.

[47] Perhaps unsurprisingly, the prison population has only continued to grow. As of early 2020, state prisons alone house 1,291,000, local jails with 631,000, and federal jails and prisons holding 226,000 individuals. *See* Peter Wagner & Wendy Sawyer, *Mass Incarceration: The Whole Pie 2020*, PRISON POLICY INITIATIVE (Mar. 24, 2020), https://www.prisonpolicy.org/reports/pie2020.html.

[48] *See* BARKOW, *supra* note 3 at 106.

[49] *See* RUTH WILSON GILMORE, GOLDEN GULAG: PRISONS, SURPLUS, CRISIS, AND OPPOSITION IN GLOBALIZING CALIFORNIA 8 (2007).

prison-building boom, the economic backed era of the "prison industrial complex" witnessed today began.[50]

C. The Economic Phase

If any thematic period of the prison seemingly has the least connection to the actual care of the prisoner, it is the economic phase that has placed prison profit making over any restorative punitive practices. Despite crime rates dropping, and continuing to decrease, significantly since the 2000s, the number of those incarcerated, the lengths of their sentences, and the number of prisons used to contain have continued to grow exponentially.[51] This is largely attributable to the economic, cost-benefit analysis imprisonment provides to the U.S.[52] Through this lens, there is a presumed benefit to preventing crime and assisting the public by locking away individuals. This benefit is then compounded with the tangible benefits of prison labor and creating jobs in industry-starved rural areas with prison-building.[53] These practices have become known as the prison-industrial complex. Under this system, many scholars believe mass incarceration and increased prison-building is simply a means to increase economic benefits for all parties involved.

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[50] Leading abolitionist scholar, Angela Davis, coined the term "prison industrial complex" and defines it as "the symbiotic relationship between public and private interests that employ imprisonment, policing, surveillance, the courts, and their attendant cultural apparatuses as a means of maintaining social, economic, and political inequities." *See What is the PIC? What is Abolition?*, CRITICAL RESISTANCE, https://www.criticalresistance.org/about/not-so-common-language.

[51] *See* Kara Gotsch & Vinay Basti, *Capitalizing on Mass Incarceration: U.S. Growth in Private Prisons*, SENTENCING PROJECT (Aug. 2, 2018), https:// https://www.sentencingproject.org/publications/capitalizing-on-mass-incarceration-u-s-growth-in-private-prisons/.

[52] Logically, it follows that with crime rates decreasing, the appearance of emptying prisons necessitated measures such as sentence enhancing and newly punishable offenses for the simple economic sake of refilling "stock." Ruth Wilson Gilmore argues that the surplus of free bodies created a crisis of concern for white business and land owners. The response to that crisis was to defeat the development of class consciousness by using the surpluses of land and population to contain the underclass (mostly, here, Black Americans) in prisons. *See* WILSON GILMORE, *supra* note 49 at 47.

[53] *Id*.

While the use of labor as a form of punishment may seem reminiscent to that of the penitentiary, its sheer volume of participating bodies and industrialized presence in the contemporary prison limits comparison quickly. For the government and contracted businesses, prisoners provide an extremely cost efficient labor source.[54] Courts have routinely held that prisoners do not enjoy all of the same legal protections toward their labor that free workers receive for the same jobs.[55] This provides interested parties no fears of strikes or union organizing and no need to provide benefits including health insurance or workers' compensation.[56] Further, government regulations and lessened requirements for oversight reporting erase opportunities for prisoners to bring forward claims such as discrimination and unsafe working conditions.[57]

The jobs that prisoners often perform are manual labor driven and range from factory line production, to managing call centers, to even putting out fires in the California landscape.[58] The host of these jobs would typically receive at least a state's minimum wage, but compensation for prison labor is not a requirement.[59] On average, prisoners that receive any compensation earn around 40 cents per hour for their work.[60] When it comes to products produced by prisoners, many

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[54] *Id*.
[55] *See No Equal Justice: The Prison Litigation Reform Act in the United States*, HUMAN RIGHTS WATCH (June 16, 2009), https:// https://www.hrw.org/report/2009/06/16/no-equal-justice/prison-litigation-reform-act-united-states
[56] *See* Genevieve LeBaron, *Rethinking Prison Labor: Social Discipline and the State in Historic Perspective*, 15 J. OF LABOR & SOCIETY 327 (2012).
[57] The Prison Litigation Reform Act (PLRA) is one such piece of legislation that limits traditionally received rights from prisoners. Enacted in 1996 during the increase of the prison population under Clinton's tenure, the act's creation was arguably in response to the increased number of grievance cases filed against the government—a likely correlation since more individuals were now locked away. The act limits the start of previously successful attempts at litigation by requiring prisoners to exhaust all internal grievance procedures with a correctional facility before court filing, restricting claims of mental harm, and reinforcing the filing of court fees in full before proceeding. *See* Meredith Booker, *20 years is enough: Time to repeal the Prison Litigation Reform Act*, PRISON POLICY INITIATIVE (May 5, 2016), http://prisonpolicy.org/blog/2016/05/05/20years_plra.
[58] Many know of the trope that prisoners make license plates on factory lines, and other various items, but permissible prison labor encompasses many forms. In Georgia, prisoners work in industries ranging from telecommunications to golf course maintenance. Most surprising, in California, some prisoners serve to assist annual forest fire season with the California Department of Forestry and Fire Protection.
[59] *See* Wendy Sawyer, *How much do incarcerated people earn in each state?*, PRISON POLICY INITIATIVE (Apr. 10, 2017), https://www.prisonpolicy.org/blog/2017/04/10/wages.
[60] Wages for those incarcerated vary substantially between states. The Prison Policy Initiative reported in 2017 that prison wages were the lowest, and on a substantial decline, since 2001. *See Id*.

states then require local government entities to purchase those specific products for their inventories.[61]

Aside from just the economic benefits of inmate labor, the profits of the prison have also provided rural communities financial incentives to create more jails and house more inmates. In communities that struggle with loss of jobs and resources because of shuttered industries in agriculture and textiles, surplus labor and land beg attention and use. A June 2017 report compiled by the Vera Institute of Justice found that a number of rural communities have substantially overbuilt inmate housing far exceeding local needs.[62] The reasoning for the overexpansion centered upon rural jails then soliciting to overcrowded urban jails and immigration detention centers housing options for competitive pricing per inmate (ranging from $25 to $169 per person).[63] Local counties can easily contract with larger state and federal entities to exchange jail beds for these per diem payments of housing. Once closed factories and empty plots are revitalized with a revenue source and the creation of jobs for the community.

As these, albeit limited, historical and thematic overviews show, the contemporary U.S. prison is drastically detached from its religiously redemptive roots. Now constructed as places to punish that satisfy political agendas and spheres of outstanding economic benefit, the prison has new purpose. Yet, the critical inquiry remains to determine whether politics and economics should be the serving model. If the institution should exist to provide some remedy to victims and some response to offenders, then the existing models are likely not meeting that goal. Rather, a break

[61] *See* JB Nicholas, *How NY Prison 'Slave Labor' Powers a $50 Million Manufacturing Enterprise*, GOTHAMIST (Nov. 2, 2017), https://gothamist.com/news/how-ny-prison-slave-labor-powers-a-50-million-manufacturing-enterprise.
[62] *See* JACOB KANG-BROWN & RAM SUBRAMANIAN, OUT OF SIGHT: THE GROWTH OF JAILS IN RURAL AMERICA 18 (2017).
[63] *Id*. at 21.

from these manifestations and move to restorative practices with faith-inspired attributes could satisfy those goals.

III. Goals and Failures of the U.S. Prison

"Prisons do not disappear social problems, they disappear human beings. Homelessness, unemployment, drug addiction, mental illness, and illiteracy are only a few of the problems that disappear from public view when the human beings contending with them are relegated to cages." – Angela Davis

Many have dubbed the U.S. a prison nation—even going as far as remarking that mass incarceration is the country's claim to fame (or infamy, in this regard).[64] Those remarks are not without some merit. Recent reports detail that 2.2 million people currently reside in the nation's jails and prisons.[65] The U.S., on its own, holds 22 percent of the global prison population.[66] And even China, having a total population nearly one billion people more than the U.S., imprisons 400,000 fewer individuals.[67] These facts holds true despite crime in the country decreasing, rather steadily, since the mid-1990s.[68] As with any industry that faces such glaring problems but continues functioning and profiting, due diligence requires a consultative inquiry. It is simply malpractice not to address even if considered "too big to fail."

In establishing the legitimacy and continuance of any institution, it is imperative to evaluate whether its stated intentions are being realized. This best practice serves the interests of related parties by ensuring that their wants and needs are met without waste. If those intentions are not effectuated, then it would be the time to reevaluate and create new models, as necessary. The

[64] *See* Yasmin Nair, *Beth Richie on race, gender, and the 'prison nation,'* WINDY CITY TIMES (May 22, 2013); BETH RICHIE, ARRESTED JUSTICE: BLACK WOMEN, VIOLENCE, AND AMERICA'S PRISON NATION 3-4 (2012).
[65] *See* Wagner & Sawyer, *supra* note 47.
[66] *Id*.
[67] *Id*.
[68] *Id*.

prison, as an institution, is no different. That being said, the prison is presumed to offer punishment for three primary parties and purposes. Punishment to victims for the purposes of retribution, to offenders for the aim of rehabilitation, and to the public for the securement of incapacitation and public safety. Unfortunately, a close examination of those intentions proves paltry at best and non-existent at worst. Upon this recognition of the prison's institutional failure toward its related parties, it becomes the time to imagine dismantling and begin reorganization.

A. Goal of Retribution

The victim of a criminal offense understandably holds a vested interest in the administration of justice and punishment toward an offender. As structured, a prison sentence seemingly offers a victim adequate retribution for their harm. In the typical view, the act of locking away the offender provides just deserts and those victimized can now rest a little easier seeing justice done. In some situations, that might be the case. Further, without inspection, that conclusion might invariably feel correct. Yet, as surveys and inquiries have revealed, in actuality, victims are often left unsatisfied and unfulfilled with prison sentences alone—and many have no interest in prison as punishment whatsoever.[69]

Notwithstanding pushes toward more expansive victim's rights, more often than not, the only recognized retribution victims "tangibly" receive is seeing an offender put behind bars. Interestingly, while some victims report an initial satisfaction with prison as punishment, this satisfaction is short-lived.[70] Rather, most victims prefer to see efforts and assistance toward social welfare for their harms as a prison sentence does not provide any long-term benefit. In fact, according to a 2016 report by the Alliance for Safety and Justice that surveyed over 800 victims

[69] *See Crime Survivors Speak*, ALLIANCE FOR SAFETY AND JUSTICE (2016).
[70] *Id*.

of varying crimes, an overwhelming majority supported responses that did not include any imprisonment.[71] For those victims surveyed, 15 to 1 preferred programming for education, 10 to 1 preferred job creation efforts, and 7 to 1 preferred mental health treatment over incarceration of offenders.[72] These efforts, in victims' own opinion, would lead to much better outcomes to their peace of mind and the community-at-large. If victims themselves are not content with incarcerating offenders, then the aim of retribution for their benefit simply fails as a reasoning for the prison.

B. Goal of Rehabilitation

With monikers such as "department of corrections" and "rehabilitative center," one assumes that while in prison those detained are not just undergoing punishment, but are also receiving care and services to "reform" the individual. Sitting idly behind bars, however, will not do much to meet that goal. Generally, people know of drug rehab, occupational training, and educational programming that prisoners receive during their sentences. In actuality, many of these programs no longer exist, or are underfunded to such a capacity that participation is simply not possible.[73] This is an unfortunate realization since, at-large, varying reformative programs have successful impact rates on recidivism.[74] Yet, even when some of these programs do function, their administration and outcomes now prove less productive than before. Arguably, as well, all of these effective programs can be executed outside of the prison in the first place.

Take, for instance, job training and worker programs present currently in prisons. In the past, these programs provided practical skills and pathways to certification for careers such as

[71] *Id*.
[72] *Id*.
[73] See BARKOW, *supra* note 3 at 62.
[74] *Id*. at 63.

plumbing, electrical maintenance, and agriculture.[75] Today, most prison work serves prison functions and profits—custodial, food services, and distribution, providing no new skills upon release.[76] Further, depending on an individual's type of conviction, some trained skills apply to jobs that bar those formerly incarcerated from employment.[77]

With the push to punish more drug possession offenses with prison sentences during the "war on drugs," an obvious increase of those incarcerated with drug addiction occurred. Access to drug treatment programs consistently proves to be effective in rehabilitating individuals by both reducing recidivism of crime, and more importantly, relapse into drug abuse.[78] Again, unfortunately, these programs continue to decline or do not match the level of need. Moreover, while the programs prove effective during confinement, assistance is often discontinued shortly after release or costs are passed along to the participant proving financially difficult to maintain.[79]

Many of those incarcerated have had their formal schooling interrupted and benefit greatly from educational programming in prisons.[80] Often, prisons strive to provide GED-prep courses and access to testing opportunities to make-up for this loss. The existence of these programs have luckily persisted. However, increasingly, individuals are not at the educational level to succeed in these prep courses—factors composed of learning disorders and discontinuing schooling as early as third grade.[81] Another detrimental realization is that many formerly incarcerating are limited in continuing their education to the college level even after obtaining a GED because of laws restricting financial aid for those convicted.[82]

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[75] *Id*.
[76] *Id*.
[77] *See* JEREMY TRAVIS, BUT THEY ALL COME BACK: FACING THE CHALLENGES OF PRISONER REENTRY 107 (2005).
[78] *See* BARKOW, *supra* note 3 at 62.
[79] *Id*.
[80] *See* Caroline Wolf Harlow, *Education and Correctional Populations*, BUREAU OF JUSTICE STATISTICS (Jan. 1, 2003) https://www.bjs.gov/content/pub/pdf/ecp.pdf
[81] *Id*.
[82] *See* Barkow, *supra* note 3 at 65.

Even if these programs prove to be effective in reforming an individual and reducing recidivism, the programs are meaningless if they are only on the books and not implemented or properly funded. With incarceration rights rising and rehabilitative programs decreasing, it is not a drastic leap to presume that prisons are investing in increased sentences over the aim to reform. To that end, the prison again fails to meet one of its goals.

C. Goal of Public Safety

Locking away a criminal offender will prevent the crime from continuing to occur. That, in turn, promotes public safety. This logically seems true. Removing someone from the community certainly prevents them from harming the community. Yet, what many forget to realize, despite lengthened sentences, is that the majority of those incarcerated are eventually released.[83] The prison is not always meant to incapacitate an individual forever. That being said, the consequences and realities individuals face upon release regularly prove to be criminogenic—eroding any presumed public safety benefit.[84]

In the situations of many formerly incarcerated, failure for reentry is set at the beginning of release. Access to resources such as housing and education become administratively restricted.[85] Employment also proves difficult depending on hiring practices or post-release curfews and electronic monitoring.[86] For instance, those charged as sex offenders usually must sign up to state

[83] *See id*. at 5.

[84] During a 2016 inquiry, members of the Charles Colson Task Force on Federal Corrections determined that the collateral consequences of spending time in jail or prisons, even short stays, had such detrimental effects on individuals that created factors for committing future crime. Essentially, when punitive measures continue to follow an individual upon release, and it is impossible to meet basic needs, since many are already accustomed to committing an offense, the impetus to commit even a petty criminal offense is drastically increased. Incarceration simply creates a cycle of crime—making it criminogenic. *See* CHARLES COLSON TASK FORCE ON FEDERAL CORRECTIONS, TRANSFORMING PRISONS, RESTORING LIVES (2016).

[85] *Id*.

[86] *Id*.; electronic monitoring has been dubbed its own time of prison for those released early or on probation—Michelle Alexander refers to it as "e-carceration." *See* Michelle Alexander, *The Newest Jim Crow*, NY Times (Nov. 8, 2018);

registries before release and can be prevented from receiving public housing.[87] Other offenders sometimes require lengthy post-release curfews restrictions preventing working later hour shifts at jobs—regularly some of the only opportunities available.[88] Moreover, some states even prevent the receipt of food stamps for anyone ever convicted of a drug offense, which reaches the collateral harm out to the entire family.[89] Ultimately, without the ability to receive benefits or even to work, the need to support one's self and family creates the undesired impetus to commit crimes in the first place.[90] These restrictions and post-release punishment fail to engender any public safety.

IV. Abolition through Multifaith-Inspired Restorative Justice

"The master's tools will never dismantle the master's house. They may allow us temporarily to beat him at his own game, but they will never enable us to bring about genuine change." – Audre Lorde

As an industry that utilizes surpluses of bodies and land to simultaneously punish and profit, the machinery of the contemporary U.S. prison is firing on all cylinders. Yet, as a redemptive and restorative space meant to address the interests of victims, offenders, and the public, it is failing to start. That is all evidenced by the proceeding sections of this article. And this disconnect has not gone unnoticed. In recent years, calls for prison reform have grown and received bipartisan support politically.[91] But the attempts at reform have arguably only created advanced forms of

Maya Schenwar and Victoria Law detail the story of a woman released with an electronic monitor who inevitably relapsed with drug abuse because of her feelings of boredom and isolation in forced confinement at home. In the end, she expressed relief in being sent back to prison over electronic monitoring. *See* Schenwar & Law, *supra* note 45 at 2-3.

[87] Rachel Barkow details how, in Miami, after being placed on a sexual offender registry the laws are so restrictive that the only available place for a registrant to live is under a causeway. *See* Barkow, *supra* note 3 at 95.

[88] *See* CHARLES COLSON TASK FORCE ON FEDERAL CORRECTIONS, *supra* note 84.

[89] *Id*.

[90] *Id*.

[91] *See* SCHENWAR & LAW, *supra* note 45 at 8.

imprisonment under different names.[92] The root problems and harms remain. Rather than continue wasteful attempts at reform, the contemporary U.S. prison must be abolished and reorganized (or reimagined) into a different construct. In its stead, it should be replaced with restorative justice models that focuses on the parties directly involved. More than that, these new models should be multifaith-inspired, tapping into the redemptive ideologies and languages of many religions present in the U.S.

Restorative justice is not a novel idea.[93] Prior to its formalization as an administrative practice, various communities throughout the world employed its tenets to address harms.[94] Moreover, its current use proves to be effective and often preferred by involved parties for grievances that the U.S. criminal justice system routinely handles.[95] Its use, however, is small and relatively unnoticed. That being said, the U.S. prison system and mass incarceration is a colossal institution. To abolish a Goliath with a David will require support across many channels.

As abolitionist scholar, Angela Davis, has noted, the prison persists because it "is considered so 'natural' that it is extremely hard to imagine life without it."[96] Essentially, the impetus to abolish will require a collective imagining to dismantle. That is where multifaith-inspired programming comes into play. First, albeit small, many of the current restorative justice

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[92] *Id*. Aside from electronic monitoring as an example of other types of "imprisonment," overly restrictive curfews, mandatory drug testing without accompanying drug abuse treatment plans, and hefty administrative dues and fees upon release prove to "confine" those formally incarcerated just as much as traditional imprisoning. Simply put, release from actual, physical confinement into restrictive conditions without appropriate resources often leads individuals to perform more crimes and offenses out of necessity.

[93] Restorative Justice as a practice seeks a trend away from traditional punitive practices in redressing harms amongst victims and offenders. It takes as its main concern the restoration of individuals for the good of the community. To that end, many iterations of restorative justice models completely remove penal confinement as any such remedy. Instead, it replaces the penal response with practices such as victim-offender group conferencing, sentencing circles (where all parties decide on a fitting or appropriate remedy), and determinations of victim support for individuals and/or the community. *See Toolkit on Diversion and Alternatives to Detention*, UNICEF (Oct. 18, 2010) https://www.unicef.org/tdad/index_56370.html

[94] *See* Douglas J. Sylvester, *Interdisciplinary Perspectives on Restorative Justice: Myth in Restorative Justice History*, 1 UTAH L. REVIEW 471 (2003).

[95] *See Crime Survivors Speak*, *supra* note 69.

[96] *See* ANGELA DAVIS, ARE PRISONS OBSOLETE? 10 (2003).

programs are already run by faith-based organizations. Utilizing their expertise and experience is both pragmatic and effective. Second, to create a new system that can be imagined and then realized will require widespread acceptance. This acceptance will likely prove more likely by tapping into an American ideology that blends redemption with justice.

Despite secular practices and identities in the U.S., "American culture is steeped in religious languages, practice, and themes."[97] Referencing the languages of hope, change, and community present in so many faiths can provide for the transformative spirit needed for changemakers. Accordingly, this section will present restorative justice models that have proven effective by faith-based organizations and then seek to ground the use of spiritual beliefs to the dismantling of prison with examples of other abolition movements.

A positive attribute to restorative justice, and its use in place of imprisonment, is that its makeup of different models and programs allows for multiple paths of remedy for victims, offenders, and the public. Administratively, effectuating prison abolition requires only the end of prison sentencing in the current criminal justice system. Rather, after a determination of guilt, the first step should be the identification of an appropriate remedial program. Types and suggestions of varying programs can run exhaustive. In current restorative justice practices, programs such as victim assistance and restitution, community service and parole, and grievance conferencing have been used consistently and proven effective. Their exploration can be a window into the alternatives for prison abolition.

All criminal situations will have a victim and an offender. These are ultimately the most concerned parties for remedies of harm. And as research has shown, victims do not care for, or receive much benefit from, imprisonment of offenders.[98] A better alternative is to provide the

[97] *See* DUBLER & LLOYD, *supra* note 4 at 2.
[98] *See Crime Survivors Speak*, *supra* note 69.

victim with the specific assistance needed to become whole again. This burden, and any attenuating costs, can be passed to the offender. Or, perhaps an offender's harm has reached to the whole community and necessitates remedy to not just one person, but many other individuals. Grievance counseling and meditation can also be useful routes in reconciling issues between varying stakeholders. These practices, possibly unique in their obviousness, are the cornerstone of faith-based groups like the Centre for Justice and Reconciliation founded under Prison Fellowship International.[99]

Aside from just holding the offender accountable to a victim, harm reduction and public safety also entails restoring and rehabilitating an offender through effective means. Court sanctioned diversion programs currently attempt this remedy, but often their punitive nature and lack of funding limits participation and increases recidivism.[100] Interestingly, even if mandatory, rehabilitative drug abuse and anger management programs that have faith-based affiliations have proven to be more effective with longer participation and success at decreasing future violence and drug abuse.[101] Cited factors for this realization is acknowledgment of the individual and the capacity for their redemption.[102] All of these suggestions center reconciliation and future harm reduction through practices of understanding, forgiveness, and neighborly love. These are the same religious languages that can facilitate the support needed for abolition.

A system that sees itself as performing well and functioning just as intended, like the U.S. prison system arguably sees itself, will never seek to make adjustments. It would be of no interest for an economic body to make any adjustments that would decrease profits. Any dismantling of

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[99] *See generally Restoring Justice*, PRISON FELLOWSHIP INTERNATIONAL (2019) https://pfi.org/what-we-do/restoring-justice.
[100] *See* SCHENWAR & LAW, *supra* note 45 at 55.
[101] *See Research Shows Correlation between Faith and Recovery*, FAITH COUNTS (Sep. 11, 2019) https://nadadventist.org/news/research-shows-correlation-between-faith-and-recovery.
[102] *Id*.

the prison industrial complex will require bottom-up and grassroots support from a collective of coalitions. Too often, however, calls for prison abolition meet concerns from the public asking about the murderers and rapists and their punishments. It is difficult and uneasy for those less initiated and connected to mass incarceration to see its harm even to offenders.

Understanding that unease and need for ignition, religious studies scholars Joshua Dubler and Vincent W. Lloyd contend that a "religious attitude…is essential" to the abolitionist cause.[103] By tapping into how many faiths promote the call for compassion and forgiveness, reformers and shakers can remember to see the individual and not just the criminal label affixed to them. Moreover, these are the same precepts and languages used by the leaders and members who brought about nineteenth-century abolition and twentieth-century civil rights.[104] Arguably, mass incarceration and its supplier, the prison industrial complex, can be abolished if restorative justice replaces the current punitive and sentencing phase of the U.S. criminal justice system. This policy shift can be accomplished through community and coalition efforts just as abolitionists past have done to end monetary bail, death-penalty sentencing, and even slavery. Following the examples of current faith-based partners and inspiring through religious languages will be the tools to gather that support.

Before addressing the constitutionality of any alternative to the prison, it will be useful to utilize the above-mentioned models and themes to suggest an imagined, new prototype that can be examined carefully under constitutional case law to demonstrate its pragmatism. Such a prototype appears below. This model takes the form of a fully government-run and -funded process (without any large-scale administrative changes to how current criminal justice processes perform). The significant difference is that solely penal confinement is no longer an option for punishment.

[103] *See* DUBLER & LLOYD, *supra* note 4 at 17.
[104] *See id*. at 11.

Rather, the punitive paths are remedies and programs that reference faith-based redemption qualities that can engender restoration amongst parties instead of continuing the system of mass incarceration.

The process would begin in a criminal prosecution at the juncture when the jury makes a determination of guilt. An individual found guilty of a crime would then face sentencing before a judge, but this sentencing would no longer entail an option of prison confinement based solely on punishment. Largely dependent on the type of offense, the judge would pick an appropriate path that would produce an appropriate remedy. While not definitive or exhaustive, for the limited purposes of this article, those paths entail: (1) victim restitution, (2) drug rehabilitation programs, (3) mental health resources, (4) community service, and (5) incapacitation efforts. These paths arguably represent the prevailing goals of restoration and rehabilitation within punishment and can be infused with faith-inspired language to encourage acceptance and completion. Moreover, at times, multiple paths might be required in order to properly remedy the situation.

Assuming the thought-process of a judge, victim restitution might be an appropriate path if an offender caused physical or property damage to another. Or, perhaps too, the offender may be required to enter a drug rehabilitation or mental health program if those are present factors that contributed to the offense and would be beneficial to the offender's restoration. Sometimes, as well, a victim is not solely an individual, but also the community. In that regard, mandated community service or restitution for damage to the community may be the right path. Further, in extremely limited situations, there may be no path that can remedy or restore an individual's offense (e.g. crimes and individuals deemed extremely heinous and unable to reform) truly necessitating incapacitation and removal from communities. This option, however, would be considered a last resort in order to not recreate efforts at mass incarceration. What these paths and

efforts show, however, is that there are many options outside of the prison and penal confinement to address harms. And their effectiveness can be produced by replacing the current government-run models that are cold and detached with programs that inspire through redemption and restoration narratives that exist in faith-inspired languages.

V. Surviving Constitutional Scrutiny

"It is the spirit and not the form of law that keeps justice alive." – Chief Justice Earl Warren

Whether tapping into religiously charged language and the redemptive American spirit is enough to motivate abolitionist movements and dismantle the prison or not, this call is moot if barred by the U.S. Constitution's Establishment Clause within the First Amendment. As such, crafting restorative justice programming that can respect and appease Establishment Clause parameters will require careful and calculated line drawing.[105] However, Supreme Court jurisprudence in regard to Establishment Clause cases has been anything but consistent, which makes fashioning an appropriate model more than a one-size-fits-all task.

In its simplification, the Establishment Clause is just: "Congress shall make no law respecting an establishment of religion…"[106] Of course, those ten words alone implicate countless court decisions and individual rights and liberties. The earliest cases touching on Establishment Clause issues quoted the surely known phrase of a wall of separation between church and state.[107]

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[105] As a country, the U.S. bifurcates criminal justice into the sovereignty of both federal and state governments. Calling for an end to mass incarceration through prison abolition would implicate both federal and state prisons and actions. And any governmental adjustments would need to conform to constitutional provisions. The dual sovereignty of criminal justice, however, is of little concern for this article's calls for abolition. The goal is to dismantle the prison in all spheres. If the change to restorative justice programming survives constitutional scrutiny at the federal level, it will also apply to states by the incorporation of the First Amendment, and all of its clauses, through the Fourteenth Amendment.

[106] U.S. CONST. amend. I, cl. 1.

[107] *See Reynolds v. United States*, 98 U.S. 145, 164 (1878); *Everson v. Bd. Of Educ.*, 330 U.S. 1, 18 (1947) ("The…wall between church and state…must be kept high and impregnable. We could not approve the slightest breach."); *Zorach v. Clauson*, 343 U.S. 306, 312 (1952) ("the separation [of church and state] must be complete and unequivocal.").

This insinuated that religion and government should never touch. Yet, as noted already in this article and evidenced through history and Supreme Court Establishment Clause decisions, the U.S.'s attachment to religion makes any separation difficult to manage and the purported wall essentially became more of a fence.

The need for flexibility and accommodation of religion into governmental affairs led this figurative fence to bear three rails that would protect against the "three main evils" of government sponsorship, financial support, and active involvement of any non-secular sort.[108] To safeguard against those evils, but allow for some crossover, the Supreme Court began a path of test making to address Establishment Clause issues as they have seen fit. The first formalized test arrived in *Lemon v. Kurtzman* and has maintained as the standard beginning for addressing claims. That being said, while often referenced and never being overruled, the *Lemon* test has arguably corroded over time. Various Justices, dissatisfied with its application and results, have shaped alternatives or complete departures from *Lemon* in order to address their specific rationales.

In consequence of these alterations, there is little means to predict a trajectory of, or even root for, a particular test. The best practice, in light of such, is to address the viability of the above-crafted state-run multifaith-inspired restorative justice program by examining the handful of consistently inconsistent tests or departures from such tests.[109] This section will do just that by surveying the major *Lemon*, Endorsement, and Coercion tests, alongside contemporary jurisprudence, to demonstrate how the program can survive under each.

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[108] *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971).

[109] While this section concerns itself only with major Establishment Clause tests, there is cause to mention *Turner v. Safely*—a Supreme Court case addressing Establishment Clause claims toward prisoner's rights. In *Turner*, the Court actually decided to afford strong deference to the running and creation of prison programs to prison administrators since their expertise in penology far outweighed that of the judicial branch. This, arguably, would be extremely beneficial to drafting and running a restorative justice program. However, since this article's call is for outright prison abolition, a prisoner's rights are essentially a non-issue. *See, e.g.*, *Turner v. Safely*, 482 U.S. 78, 81 (1987).

A. The *Lemon* Test

Seminally, the Supreme Court started factor-based testing of Establishment Clause issues with the 1971 decision in *Lemon v. Kurtzman*. As highlighted above, the suitably named *Lemon* test has fallen into less-use, but presumably its precedence and importance has afforded its reference in many Establishment Clause cases (and certainly warrants its analysis here).

Lemon, topically, addressed the constitutionality of religious schools and teachers receiving state-aid for non-religious instruction and materials. For a way to examine this issue, Chief Justice Burger put forth a test to collect the myriad criteria the Court had developed over preceding years.[110] This culminated into a checklist of requiring that legislation (1) must have a secular purpose, (2) with its principal or primary effect neither advancing or inhibiting religion, and (3) without creating an excessive governmental entanglement with religion.[111] These factors would enable the appropriate measure of interaction between the church and the state because complete separation was impossible "in an absolute sense."[112]

Despite its continued reference and persistence, the Court has never tackled a criminal justice-related case under *Lemon* (or even adjudicated such a case under Establishment Clause violations claims generally).[113] That being said, the Court has addressed rehabilitative and social service programs under Establishment Clause violation claims that can prove tangentially informative to restorative justice models. Take, for an illuminative example, the Court's rationale

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[110] *Id*. at 612.
[111] Some commentators take note of a consistency of the Court blending the second and third factors of the *Lemon* test because of the analysis by the Court in *Agostini v. Felton*, 521 U.S. 203 (1997), but this blending has not been consistent and actually any reference to abandonment has been rejected by the Court in *McCreary Cty. v. ACLU of Ky.*, 545 U.S. 844, 861 (2005).
[112] *Lemon*, 403 U.S. at 614.
[113] Most Establishment Clause cases before the Court addressing funding have concerned secular education materials, teacher staffing, and transportation to religious affiliated private schools. *See Mueller v. Allen*, 463 U.S. 388 (1983); *Mitchell v. Helms*, 530 U.S. 793 (2000); *Felton*, 521 U.S. 203 (1997).

process in *Bowen v. Kendrick*.[114] In *Bowen*, a group consisting of federal taxpayers, affinity groups, and clergy members filed an Establishment Clause violation claim against the Adolescent Family Life Act (AFLA) because it provided federal grant funds to religious and religiously-affiliated groups for family planning and preventative programming for premarital and adolescent sex.[115] The AFLA, in and of itself, also required use of certain "necessary services" that included educational programming or services that related to family life and issues connected with adolescent premarital sex.[116] The group challenging argued that provision of funds to religiously-affiliated groups would make it possible to teach elements of religious beliefs and practices and subsequently advance a particular religion, referencing specific concern because of the educational services deemed necessary for funding.[117] Under an implementation of the *Lemon* test and its three factors, the Court did not find an Establishment Clause violation.[118]

In undertaking the investigation of a secular purpose under the first *Lemon* factor, the Court ultimately provides a deference to the stated goals of the legislation and permits some interaction with religion, so long as the primary purpose remains religiously removed.[119] Essentially, if the legislation involves a matter that the government typically handles, and the intent behind the legislation purports secularity, then the Court will agree unless facially untrue. As in *Bowen*, the Court found the AFLA to be facially motivated by a legitimate secular purpose—addressing the social and economic problems attendant to adolescent sex, pregnancy, and parenthood.[120] While

[114] *Bowen v. Kendrick*, 487 U.S. 589, 593 (1988).
[115] *Id*. at 594.
[116] *Id*.
[117] *Id*. at 597.
[118] *Id*. at 622.
[119] *McCreary Cty.*, 545 U.S. at 860-61.
[120] *Bowen*, 487 U.S. at 602.

the Court noted that the AFLA could arguably have had a religiously-touched motivation, it still had a legitimate secular purpose under general social service programming.[121]

Bearing in mind the Court's silence on criminal justice and the first *Lemon* factor, given the related precedents such as *Bowen*, the primary goals of the faith-inspired restorative justice programs undoubtedly have a secular purpose. Namely, drug abuse and other related rehabilitation programs have the purpose (and positive evidence to show) of reducing recidivism. Further, any program addressing criminal punishment has the presumed purpose of promoting public safety. And, with the countless legislation, statutes, and codes concerned with criminal activity, the government unquestionably has a purpose to effectuate punishment. Even if the restorative justice programming utilizes religiously-inspired redemptive language, that small attribute does not even rise to the level of religious programming and educational services that the Court approved of under *Bowen*.

Even in regard to the second factor of the *Lemon* test, brushings with religion and religious inspiration are not enough to invalidate government legislation—emphasizing the importance to the "primary purpose" stipulation advancing or inhibiting religion. Returning to the rationale presented in *Bowen*, the Court did not find the AFLA to fail the second *Lemon* factor because it did not require recipients to be religiously affiliated organizations.[122] Recipients could be of a number of social service providing groups thus not promoting any one religion or not. Further, while provision of those funds to a religiously affiliated organization might produce some religiously aligned teachings (particularly toward the types of necessary educational services),

[121] *Id*.
[122] *Id*. at 604.

those references were likely at best "incidental and remote" and, again, not the primary purpose of the use of funds and not enough to advance a religion.[123]

Tailoring restorative justice programming to pass through the gate of the second *Lemon* factor will be a non-issue given the *Bowen* decision. The fact that the Court references the acceptable nature of "religiously inspired" programming bolsters this determination. The point of any restorative justice program imagined would be to create opportunities of collective repair on the part of victims, offenders, and the community. Tropes and languages of forgiveness, healing, and salvation may resonate faithfully to participants. However, that resonation would not be the primary goal and would never require participation be predicated on a particular religion or adherence to such. In contrast, it is the crystallization to warrant the acceptance of abolition.

Coming to the third factor of the *Lemon* test, it is often the most difficult to determine. Part of that difficulty arises because it requires determining just what "excessive government entanglement" with religion actually is.[124] Another difficulty is the best take at analysis requires another miniature test. What the Court has definitively prohibited is any official endorsement of a religion by the government and any full delegation of government power to a fully religious entity—those events would be explicit entanglement.[125] The mini-test then entails (1) ensuring a non-need of pervasive monitoring by authorities for religious activity, (2) no requirement of cooperation between governmental and religious figures, and (3) a safeguard against dangers of political divisiveness.[126]

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[123] *Id*. at 607.

[124] Under *Bowen*, which has been central to this article's Lemon analysis thus far, the Court found no issue with government entanglement. While the government would need to review and regulate how the funds were being used (as stipulated in application requirements), this practice was for all recipients and ultimately no different than many other government grant funding procedures. *Id*. at 615.

[125] *See Larkin v. Grendel's Den*, 459 U.S. 116, 124-5 (1982) (holding that no level of government, be it city, state, or federal, may delegate power to a religious entity—here being a complete veto power of liquor license permit applications by churches within 500 feet of an applicant to the zoning board).

[126] *Aguilar v. Felton*, 473 U.S. 402, 416 (1985).

Taking in all of those stipulations, the multi-faith inspired programs will need to carefully follow broad lines, but can survive constitutional scrutiny. First, as multi-faith inspired programs, any of the restorative justice practices will be secular and have no issues with endorsement of a religion or delegation of power to a religious affinity group. Rather, the programs would be administered by the government system itself and not be delegated. A potential challenge could be that the use of religiously inspired language may suggest an endorsement of religion, but that would require the Court to ignore other longstanding government matters that are religiously touched.[127] In regard to the mini-test, this, too, would not be much of a challenge to tiptoe given the ultimate secularity of multi-faith inspiration rather than a basing. With no formal religious affinity group attachment, there is no need for the monitoring of religious activity and no cooperation requirement between religious figures and the government. Eliminating political divisiveness, further, is one of the goals of utilizing multi-faith inspiration for the abolition cause, so if the intent of the programs are working as planned, then this mini-factor is met, as well.

B. The Endorsement Test

Despite its continued use and reference, the *Lemon* test has never fully satisfied members of the Court.[128] In one of the first breakaways from the standard, Justice O'Connor sought to clarify the *Lemon* test with her concurring opinion in *Lynch v. Donnelly*.[129] The modifications suggested have become known as the Endorsement test and has resulted in consistent mentioning.[130]

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[127] Take, for instance, the penitentiary mentioned in Section II of this article, which was founded on the religious principles of penance and forgiveness. Further, the permissive notion of using religious charged language by the Court has been explicitly supported by Justices. *See, e.g. Church of The Holy Trinity v. United States*, 143 U.S. 457, 471 (1892) (Justice Brewer calling the U.S. a "Christian Nation").

[128] *See generally*, Wirt P. Marks IV, *The Lemon Test Rears Its Ugly Head Again: Lamb's Chapel v. Center Moriches Union Free School District*, 27 U. RICH L. REV. 1153 (1993).

[129] *Lynch v. Donnelly*, 465 U.S. 668, 688 (1984).

[130] *See e.g., Capitol Square Review & Advisory Board v. Pinette* 515 U.S. 752 (1995); *Mitchell v. Helms*, 530 U.S. 793 (2000); *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002).

Namely, O'Connor believed the factors of the *Lemon* test (and their ultimate application) often resulted in only examining the purpose and effect of government activity toward religion. Marking simplification of *Lemon*, O'Connor noted there is an Establishment Clause violation only in the event of that purpose or effect endorsing or disapproving of a religion.[131] The standard for that determination rests on the reasonable observer's understanding of whether there exists a mingling of religion with the government action.[132] Further, the government activity must ensure political equality for all those involved by safeguarding against giving government actors more benefits dependent on religion. Without such a protection, O'Connor argued that the creation of political alignments amongst religious lines could occur and also create "outsiders" in the political community. Yet, still, the interplay for violation would need to be more than a mere reference.[133] Moreover, for O'Connor, this determination would need to be fact-specific and unique to each and every case.[134]

As highlighted, the Supreme Court has yet to address Establishment Clause concerns with the interaction of faith-based programming and criminal sanctioned punitive practices. When O'Connor manufactured the Endorsement test in *Lynch*, the case dealt with the constitutionality of an outdoor Christian nativity display during the winter holiday season in the town center. That being said, the notably publicized 8th Circuit case, *Americans United for Separation of Church & State v. Prison Fellowship Ministries, Inc.*, does deal with such an issue and proves instructive on how the Court might apply Endorsement test principles.[135] Encouraging that assumption is the fact

[131] *Lynch*, 465 U.S. at 689.
[132] *Id*.
[133] *Id*. at 692.
[134] *Id*. at 694.
[135] *Ams. United for Separation of Church & State v. Prison Fellowship Ministries*, 432 F. Supp. 2d 862, 925 (S.D. Iowa 2006).

that O'Connor actually joined the opinion for *Prison Fellowship Ministries* during her designation as a retired justice on the 8th Circuit panel.[136]

Of concern in *Prison Fellowship Ministries* was whether a state government funded pre-release prisoner program violated the Establishment Clause because of its Christian-based programming and affiliations. The program, InnerChange, was run inside the Newton Correctional Facility of the Iowa prison system by the Christian non-profit Prison Fellowship Ministries.[137] Prison Fellowship Ministries and the Iowa Department of Corrections contracted through state government funds to administer the program.[138] Participants of InnerChange followed an intensive program that utilized specifically Christian texts and teachings in order to "cure" prisoners of their sins.[139] This "transformation" would then allow prisoners that successfully completed the Christian programming to properly reenter society upon release.[140] While the InnerChange program contained many different rehabilitative programs (e.g. group therapy sessions, substance abuse classes, educational services), each program had extensive references and reliance on either Christian biblical texts or ideals.[141]

In light of the overt Christian aspects and affiliations of the InnerChange program, plaintiffs composed of prisoners, affinity groups, and other non-profits challenged the constitutionality of the program under the Establishment Clause.[142] Plaintiffs alleged, in part, that the InnerChange program exuded a much too high level of indoctrination into the Christian faith and created a government endorsement of religion because of the use state funding of the

[136] *Ams. United for Separation of Church & State v. Prison Fellowship Ministries, Inc.*, 509 F.3d 406 (8th Cir. 2007).
[137] *Prison Fellowship Ministries*, 432 F. Supp. 2d at 875.
[138] *Id*. at 878.
[139] *Id*. at 908.
[140] *Id*.
[141] *Id*.
[142] *Id*. at 875.

program.[143] The district court ultimately agreed.[144] In receiving state funds to administer the program, the district court found Prison Fellowship Ministries and InnerChange to be a state actors and representative of the state inside the prison.[145] As a state actor, the programming must refrain from being pervasively sectarian. If not, then the sectarian attributes would effectuate government endorsement of a religion and violate the Establishment Clause. For the district court, InnerChange's transformation model, steeped in adherence to the Christian faith through biblical readings and affirmations, could not be adequately separated into secular and sectarian aspects enough not to be pervasively sectarian.[146]

By consciously staying away from the InnerChange program model, and adhering to the more simplified requirements of the Endorsement test, the multi-faith inspired restorative justice model suggested above would still be a viable consideration. As a purely government-funded program, it would receive the same designation as a state actor as the district court found the InnerChange program to be, as well. To that end, there exists increased examination as to whether there is a government endorsement of religion. However, unlike InnerChange, the restorative justice programs would not be so steeped in any religious teachings or practices as to create the impossibility of separating secular and sectarian aspects. In fact, by only utilizing religiously sounding language of redemption, the restorative justice programs arguably provide little to no endorsement of any religion. The restorative justice model provides a religious hue, but does not

[143] *Id*.
[144] Interestingly, while formally the district court stated its use of the *Lemon* test, it took effort to note the existence and use of other Establishment Clause testing regimes. Further, the district court ran its analysis primarily examining endorsement and citing O'Connor's *Lynch* concurrence. This proved fruitful on 8th Circuit appeal when O'Connor joined the decision affirming. *Id*. at 939.
[145] *Id*. at 875.
[146] "The overtly religious atmosphere of the InnerChange program is not simply an overlay or a secondary effect of the program—it is the program." *Id*. at 922.

emphasize a particular religion or employ practices and programs that attach to any religious beliefs as did InnerChange's attachment to Christianity and biblical texts.

C. The Coercion Test

Subtle corrosion of *Lemon* did not stop with O'Connor and *Lynch*. Just eight years later, members of the Court began to peel away the skin of the factored analysis by limiting review to one element—coercion. Rather than spend time evaluating each individual *Lemon* factor, a closely divided decision in *Lee v. Weisman*, led by Justice Kennedy, held that forcing or providing no alternative but participation in religious activity warranted an Establishment Clause violation.[147] While even more simplistic than the Endorsement test championed by O'Connor, this Coercion test has merited less use and received more scrutiny from other Justices. In any event, its existence warrants its analysis as a proper practice.

The factual background within *Lee* provides an interesting understanding of the Coercion test and its application. The situation entailed a public school system allowing a Jewish religious leader to perform prayers during formal school graduation ceremonies. While a student was not required to attend to receive their diploma or to graduate (meaning no legal coercion), Justice Kennedy took issue with the psychological coercion, such as peer pressure, that an adolescent would have in making their free choice to attend or not.[148] Failing to fully address legal coercion did not sit well with the dissenting Justices and led them to break.[149] Furthermore, in dissent, Justice Scalia reiterated the pervasiveness and historical acceptance of prayer at school functions

[147] *Lee v. Weisman*, 505 U.S. 577 (1992).
[148] *Id*. at 594.
[149] *Id*. at 642 ("Thus, while I have no quarrel with the Court's general proposition [of coercion], I see no warrant for expanding the concept of coercion beyond acts backed by threats of penalty.") (Scalia, J., dissenting).

like graduation to find no coercion into a particular faith.[150] Arguably, then, Kennedy's Coercion test, accepted by a slim margin in *Lee*, addresses only the psychological pressures that forced religious practices can have on an individual when in a government setting.

The distinction between psychological peer pressure and legal mandating under the Coercion test is important to examining the multi-faith inspired restorative justice programs. If strictly viewed under a legal coercion standard, there may be some cause for concern in a criminally sanctioned individual not having an alternative (although, as continually emphasized in this article, no particular faith is promoted with the language being inspired). However, psychology proved fundamental to Kennedy's determination, evidenced with his use of research to back his findings. If psychological influence is key to the compulsion required under the Coercion test, then the multi-faith inspired models will prove sustainable. The programs, as inspired, will not reference specific religions and seek to tap into pervasive ideas that even Scalia recognized as acceptable in dissent.

D. The Contemporary Court and *Lemon*

Noted before, the *Lemon* test has always had its detractors. Scalia, at one point, called it a "ghoul in a late night horror movie that repeatedly sits up in its grave…after being repeatedly killed and buried."[151] That remark, in obvious dissent, highlights how its use had been squeezed into different forms or dropped to rot throughout the years.[152] Yet, considerably, the Court began a great shift from *Lemon*'s application in *Van Orden v. Perry* when the majority outright rejected its

[150] *Id*. at 641.
[151] *See Lamb's Chapel v. Ctr. Moriches Union Free School Dist.*, 508 U.S. 384, 389 (1993) (Scalia, J., concurring).
[152] Since even 2005, the Court has either expressly declined to employ *Lemon* or remained silent on the case altogether. *See, generally.*, *Cutter v. Wilkinson*, 544 U.S. 709 (2005); *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, 565 U.S. 171 (2012); *Town of Greece v. Galloway*, 572 U.S. 565 (2014).

use.[153] The current Court has come to the point today where it ostensibly employs no test at all, with a "know it when I see it" feel.[154] As dark and grim as Scalia's ghoul-like image of *Lemon* may be, the burial of the test and rather recent Court decisions could present a unique opportunity. It could be just the light forward for the timely introduction of multi-faith inspired programming to carry out prison abolition in the U.S.

While a clear path has never been on the roadmap for Establishment Clause jurisprudence, with the recent and explicit decision in *American Legion v. American Humanist Association*, the current Court introduced a somewhat static compass for guidance. Importantly, the 7-2 decision in *American Legion* introduced two notable assessments. First, the Court developed and set forth how it would handle Establishment Clause issues in situations concerning religiously expressive symbols or practices in governmental settings. Second, each of the Justices took effort to announce their stance on the *Lemon* test and analysis in general. These assessments are both useful to understanding the future direction of the Court concerning the Establishment Clause, and even more so, the attitude toward religiously inspired government programs.

In regard to the first assessment, the majority held that when examining whether a religious symbol in a governmental setting violates the Establishment Clause, the inquiry should examine the history and embeddedness of the symbol or expression to the specific context.[155] Meaning, essentially, that while a symbol or expression may be of a religious nature, its pervasive use in U.S. culture may also dilute its religiosity to an almost secular level that would not offend the Constitution. Explicitly, the majority opinion noted "the passage of time gives rise to a strong

[153] *Van Orden v. Perry*, 545 U.S. 677 (2005). However, despite rejection or silence, it is important to note that *Lemon* has never been overruled and survives. As Scalia has pointed out, the Court may employ its use when deemed necessary or relevant to the specific case at issue.
[154] *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964).
[155] *See American Legion v. American Humanist Association*, 139 S. Ct. 2067, 2084 (2019).

presumption of constitutionality."[156] As such, the majority determined that a considerably large Christian cross monument on public space as a war memorial that received public funds for upkeep was not an Establishment Clause violation.[157] For the majority, the Christian cross had become too much of a transformed symbol because, while affiliated with religion, its other secular uses historically had detached its overt religiosity.[158] To some the cross may be a Christian symbol, to others it may just be a shape. In either event, the cross had become a culturally religious symbol with historical and personal community attachments.[159] This arguably detached the cross memorial from a practice or recognition of religion.[160]

Although the majority of Justices signed onto the decision that the cultural nature of the cross insulated it from an explicit government recognition of religion, the assessment of *Lemon* did not receive as much uniform treatment. As a consensus, the Court did seem to continue the dismissal of the test and its consistent unviability, but its replacement received different suggestions.[161] For Justices Alito, Kennedy, and Kavanaugh, departing from *Lemon* would entail a regular historical and cultural analysis used in their present decision.[162] For them, the hopes that *Lemon* could provide a stable frame for all Establishment Clause decision had proven not to work.[163] When Justices Breyer and Kagan provided their concurrence, the dismissal of *Lemon* requires a substitution of looking into whether the religious use is a "real threat [or a] mere shadow" and that "no single formula" is useful in resolving.[164] Interestingly, in dissent, Justices Ginsburg

[156] *Id*. at 2085.
[157] *Id*.
[158] *Id*. at 2085.
[159] *Id*.
[160] *Id*.
[161] The majority of Justices presented alternatives to the *Lemon* test, but Justice Thomas continued to call for its complete dismissal and to overrule its use. *Id*. at 2087.
[162] *Id*. at 2080.
[163] *Id*.
[164] *Id*. at 2091.

and Sotomayor make no effort of assessment toward *Lemon*, but ground their argument against the cross' display on whether it is endorsing religion—suggesting use of O'Connor's championed test.[165] These varying assessments only strengthen the determination that the Court is ready to "shelve *Lemon*" and continue making judgments based on their particular leanings.[166]

These assessments are a promising opening for the multi-faith inspired programs advocated for in this article. Given the recency of the decision, and state of affairs in the U.S. now, it is further an opportune time to engender abolition within the models. The restorative justice programs would be employing the religiously charged and redemptive language that, while not fully non-sectarian, that is so pervasive in U.S. culture it is rendered commonplace. That recognition is identical to the permissible attachment of religious symbols and expressions in *American Legion*. The current Court has now demonstrated its acceptance toward government and religious crossover for embedded religious ideas that have a secularized feel. This acceptance is actually much broader than the multi-faith inspired restorative justice models need to survive Constitutional scrutiny. The religious languages, tropes, and themes are those of many faiths and are much more firmly embedded across the board than the singularly approved Christian cross in *American Legion*.

VI. Conclusion

Mass incarceration in the U.S. is simply a practice that cannot continue if ensuring the equitable treatment of citizens is the country's intention. As the histories and data explored in this article has shown, the prison as an institution effectuates harm at such a scale that any presumed benefits cannot substantiate its personal costs. And attempts at reform have only created different

[165] *Id*. at 2106.
[166] *Id*. at 2102.

types of punishments with different types of violent costs. Experience shows, then, that abolition can be the only path.

Abolition can occur, and justice can still be served, by using effective restorative justice practices that concentrate on victims, offenders, and the public. And while the novelty of such programming may cause unease to new participants, tapping into the religious spirits of forgiveness, redemption, and change ever-so-present in U.S. culture can cure those fears. These spirits are inherently the spirit of abolition and will lead to the end of a system just like the U.S. has ended oppressive systems before.