

The New Religious Prisons and Their Retributivist Commitments

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I. INTRODUCTION

The rise of the religious, or “faith-based,” prison¹ at the turn of the twenty-first century bears witness to the remarkable resilience of religion in shaping the philosophy of punishment. In the last decade, prisons that incorporate religion in various ways have sprouted around the country—in Florida, Iowa, Kansas, Minnesota, and Texas²—and there are some indications, though preliminary, inconclusive, and hotly contested, that inmates who participate in religious instruction and “programming”³ recidivate at significantly lower rates than those who do not.⁴ The early success of these programs (and,

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1. Prisons have incorporated programs for prisoners with religious content in a variety of ways. Throughout the text, this article uses the phrase “religious prisons” to mean prisons that have instituted programs (for example, classes, other activities, and particular concepts) with religious content systematically and affirmatively to advance penological interests. In this way, the article distinguishes religious prisons from prisons that merely accommodate inmates’ religious needs but which take no active interest in religion as a way to promote government objectives.

2. Siobhan Morrissey, *Good-Faith Efforts: Despite Their Promise, ‘Faith-Based’ Prisons in Florida Raise Constitutional Concerns*, 3 A.B.A. J. E-REPORT 20 (2004).

3. The phrase “religious programming” is frequently used in newspaper accounts to describe programs and activities in which prisoners take part that include religious content. “Programming” carries with it pejorative connotations, conjuring images of brainwashing that are unfortunately loaded in this context. Despite these associations, this admittedly infelicitous phrase is used throughout for convenience and *faute de mieux*. It is intended to mean the systematic inclusion of religious ideas in the programs (as described above) in which prisoners participate.

4. See MICHAEL EISENBERG & BRITTANI TRUSTY, CRIMINAL JUSTICE POLICY COUNCIL, INITIAL PROCESS AND OUTCOME EVALUATION OF THE INNERCHANGE FREEDOM INITIATIVE: THE FAITH-BASED PRISON PROGRAM IN TDCJ 23 (2003), <http://www.nicic.org/Library/019013>. This article touches on some of these results and the ambiguities in the early data. See generally *id.*; see also Byron R. Johnson, *Reviewing and*

some say, the preferential treatment accorded to participants in them) has resulted in high demand and long waiting lists.⁵ Florida has recently opened its second faith-based prison, this one for women,⁶ and more such programs are presently being planned and implemented.⁷

Religious prisons raise very serious questions of constitutionality and effectiveness, and most of the critical commentary to date has focused either on the various, complicated Establishment Clause concerns or the programs' inconclusive recidivism results.⁸ This essay explores the criminological commitments of religious prisons. Though religious prisons serve rehabilitative aims, this essay emphasizes the importance of their retributive goals—what Professor R.A. Duff has termed the censure-communicating purpose of punishment and the “Three ‘R’s of Punishment” (repentance, reform, and reconciliation)⁹—in justifying the use of religious programming in prisons. The focus of this article is narrow: it offers an argument in response to skeptics who claim that

Clarifying the Role of Religion in Reducing Crime and Delinquency, FED. PROBATION, Dec. 2001, at 49, 51 (“A number of studies have documented that faith-based programs are effective, especially when compared to a non-faith-based intervention. Preliminary evaluations of faith-based drug treatment and offender rehabilitation programs in prisons as well as aftercare settings, based on overtly religious modalities, find them more effective in reducing relapse and lowering recidivism.”) (footnotes omitted).

5. Morrissey, *supra* note 2.

6. *Id.*; see also Alan Cooperman, *An Infusion of Religious Funds in Fla. Prisons: Church Outreach Seeks to Rehabilitate Inmates*, WASH. POST, Apr. 25, 2004, at A1, available at <http://www.washingtonpost.com/ac2/wp-dyn/A39834-2004Apr24?language=printer>.

7. See, e.g., Java Ahmed, *Governor Champions Faith-Based Prison Initiative: ‘PLUS’ Program Hopes to Stop Repeat Offenders*, Sept. 7, 2005, <http://www.in.gov/indcorrection/news/0705plusopenhouse.htm> (Indiana); Carlos Campos, *Faith Behind Bars: Programs Aim to Uplift, But Foes Say State Oversteps Bounds*, ATL. J-CONST., Aug. 22, 2004, at 4C, available at <http://www.religionandsocialpolicy.org/news/article.cfm?id=1843> (Georgia); David Dishneau, *Prisoners’ Rights of Passage*, WASH. TIMES, Jan. 9, 2005, available at <http://www.washtimes.com/metro/20050108-113648-7084r.htm> (Maryland).

8. See, e.g., Enrique Armijo, *Belief Behind Bars: Religious Freedom in Prison, RLUIPA, and the Establishment Clause*, 31 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 297 (2005); Lynn S. Branham, “*Go and Sin No More*”: *The Constitutionality of Governmentally Funded Faith-Based Prison Units*, 37 U. MICH. J.L. REFORM 291 (2004); Douglas Roy, Note, *Doin’ Time in God’s House: Why Faith-Based Rehabilitation Programs Violate the Establishment Clause*, 78 S. CAL. L. REV. 795 (2005). For an especially persuasive, recent critique emphasizing Establishment Clause concerns, see Ira C. Lupu & Robert W. Tuttle, *The Faith-Based Initiative and the Constitution*, 55 DEPAUL L. REV. 1, 110-12 (2005).

9. R.A. DUFF, PUNISHMENT, COMMUNICATION, AND COMMUNITY 106-07 (2001).

religious programming serves no criminological purpose absent an unequivocal showing of rehabilitative effectiveness. It claims that even if the evidence of reduced recidivism has been inflated or manipulated, as many critics claim, religious programming can be justified in theory by reference to its potential for a special manifestation of retribution that might not otherwise exist.

The article, in Part II, provides a brief history of the use of religious programming in prisons in the United States in order to trace the shifting influence of religion in American prisons. In Part III, the article discusses two organizational models of religious programming that have emerged in the last decade—Florida’s religious prisons (the Lawtey and Hillsborough Correctional Institutions) and the InnerChange Freedom Initiative, a Christian non-profit organization operating in several state prisons. Part IV explores the two conceptions of punishment that best justify religious programming in prison: rehabilitation and retribution. Rehabilitation is the most obvious and has received the most attention, partly because of the prisons’ emphasis on curtailing recidivism rates and the scrutiny applied to allegedly positive results on that front. But the prisons’ capacity to use religion to impose a particular kind of penance¹⁰ that is connected to the historical justifications for introducing religion into prison life has not yet been studied in any detail. After surveying the place of penance in several world religions, this section examines whether penance can serve retributivist aims, drawing substantially on Professor Duff’s theory of secular penance in *Punishment, Communication, and Community*,¹¹ as well as that of Professor Stephen Garvey and others. In Part V, the essay next considers how and whether various manifestations of religious penance—a significant part of the programming offered by some of the new religious prisons—are compatible with Duff’s theory of secular penance. The article concludes by positing that there may be potential value in religious penance as both a rehabilitative and retributive instrument of criminal punishment.

10. For a discussion of the concept of “penance as punishment,” see *infra* notes 147-58 and accompanying text.

11. DUFF, *supra* note 9.

An important qualification is in order before proceeding: none of this discussion is intended to minimize what are undeniably significant Establishment Clause concerns generated by religious prisons and state-sponsored religious penance. Those concerns are legitimate and raise thorny and possibly insoluble problems that this article neither addresses nor denies. Rather, this article asks the reader to set these important doubts aside for the moment and consider here the range of possible secular justifications for reintroducing religious penance as punishment into prison life. While this discussion does nothing to allay what for many (including myself) may be considerable doubts about the constitutionality of religious prisons, it does seek to explore the extent to which religion can and cannot support our secular, criminological commitments. One may ask whether such an inquiry is useful if the constitutional questions loom so large. The answer is that the new religious prisons raise various kinds of questions; some of these relate to constitutionality and others do not. It is important to consider and address each category of question on its own terms: an attempt to achieve greater clarity with respect to one class of questions is worthwhile even if that analysis and discussion has little impact on a different inquiry.

II. THE USE OF RELIGION IN UNITED STATES PRISONS: A BRIEF HISTORY

In order to understand the new religious prisons, it is helpful to explore briefly the history of religion in American prisons beginning in the late eighteenth century. Early in their treatise on the American penitentiary system, Gustave de Beaumont and Alexis de Tocqueville observed that it was the religious sensibilities of the Philadelphia Quakers against “shedding of blood” that spurred some of the reforms of early colonial penitentiaries.¹² Beaumont and Tocqueville remarked on the reformatory role of religious and “moral” education in Philadelphia’s Walnut Street prison:

12. GUSTAVE DE BEAUMONT & ALEXIS DE TOCQUEVILLE, ON THE PENITENTIARY SYSTEM IN THE UNITED STATES AND ITS APPLICATION IN FRANCE 37 (Francis Lieber trans., S. Ill. Univ. Press 1964) (1833).

Moral and religious instruction forms, in this respect, the whole basis of the system. In all penitentiary systems, those who have not learned to read are instructed in it. These schools are voluntary. Though no convict is obliged to join them, they consider it as a favor to be admitted The free choice left to the prisoners to join or not the school, makes those who enter it thus voluntarily, much more zealous and docile. . . . The minister who administers this service, accompanies it almost always with a sermon, in which he abstains from every dogmatical discussion, and treats only of religious morals; so that the instruction of the minister is as fit for the Catholic as for the Protestant, for the Unitarian as for the Presbyterian. . . . Each prisoner has a Bible, given by the state, in his cell, in which he may read the whole time that he is not engaged in labor. . . .

In Philadelphia, the moral situation in which the convicts are placed, is eminently calculated to facilitate their regeneration.¹³

Religion certainly played a crucial role in the American Puritan era that preceded the late eighteenth century reformatory movement (the philosophy of punishment of the earlier era has been called “a curious mix of religion, English barbarity, and pragmatism”).¹⁴ However, the conversion of Walnut Street prison and others like it (e.g., Pennsylvania’s Eastern Penitentiary at Cherry Hill) was spurred by a more overtly humane religious vision: inmates were required to read the Bible, contemplate God, and repent of their crimes with the

13. *Id.* at 82-83. The ecumenical Christian appeal of the prison sermons perceived by Beaumont and Tocqueville should not be discounted as the quaint concern of a bygone era. Interdenominational strife among Christian sects was arguably one of the chief problems confronting the founding era. See *Wallace v. Jaffree*, 472 U.S. 38, 104 (1985) (Rehnquist, J., dissenting) (citing Justice Joseph Story’s belief that “[t]he real object of the [First] [A]mendment was not to countenance, much less to advance, Mahometanism, or Judaism, or infidelity, by prostrating Christianity; but to exclude all rivalry among Christian sects” (quoting JOSEPH STORY, 2 COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1877, at 631-32 (Melville M. Bigelow ed., William S. Hein & Co., Inc. 5th ed. 1994) (1891))).

14. Matthew W. Meskell, Note, *An American Revolution: The History of Prisons in the United States from 1777 to 1877*, 51 STAN. L. REV. 839, 841 (1999); see also Nancy L. Cook, *The Sky in a Box: Reflections on Prisons, Preachers, Storytelling and Salvation*, 3 FLA. COASTAL L.J. 135, 139 (2002) (“Crime and sin were viewed by the Puritans as essentially the same . . . and thus were treated equally. . . . People were sent to prison for the purpose of instilling fear in other local inhabitants; the goal was to remind the entire community of believers about the dangers of sin.”).

soteriological goals of spiritual cleansing and improvement.¹⁵ This more rehabilitative conception of religion introduced the new reformatory potential of imprisonment in the United States.¹⁶ Furthermore, as noted by Beaumont and Tocqueville, religious instruction was often accompanied by reading lessons and training in other basic skills.¹⁷ Nevertheless, the use of religion as an instrument of personal improvement retained an austere character, one exuding the feel of a deserved punishment as much as a benevolent interest in emancipating the prisoner from his criminal ways.¹⁸

The early prisons represented the fusion of two philosophies of punishment: retribution and reformation.¹⁹ Or, as one commentator has observed, the early reformers “may have moved the focus of punitive pain from the body to the soul,

15. See David J. Rothman, *Perfecting the Prison: United States, 1789-1865*, in THE OXFORD HISTORY OF THE PRISON: THE PRACTICE OF PUNISHMENT IN WESTERN SOCIETY 111, 118 (Norval Morris & David J. Rothman eds., 1995). The philosophical contrast between the Calvinism of the founding era and the emergent, more optimistic Protestant faiths also played an important role in altering the conceptions of just punishment.

16. BLAKE MCKELVEY, AMERICAN PRISONS: A STUDY IN AMERICAN SOCIAL HISTORY PRIOR TO 1915, at 6 (1936). As Professor Nigel Walker has observed, the belief in the powers of religion to ennoble the spirit is not strictly a Benthamist utilitarianism. Nigel Walker, *Desert: Some Doubts*, in PRINCIPLED SENTENCING: READINGS ON THEORY & POLICY 156, 158 (Andrew Von Hirsch & Andrew Ashworth eds., 2d ed. 1998).

17. See W. DAVID LEWIS, FROM NEWGATE TO DANNEMORA: THE RISE OF THE PENITENTIARY IN NEW YORK, 1796-1848, at 32-33 (1965) (detailing the educative efforts of Thomas Eddy, the first warden of Newgate prison in New York).

18. The ways in which religious instruction and programming can serve retributive aims are explored in Section V. See *infra* notes 159-85 and accompanying text.

19. Alex Ricciardulli, *Getting to the Roots of Judges' Opposition to Drug Treatment Initiatives*, 25 WHITTIER L. REV. 309, 319 (2003). That retribution was at least a subconscious motivation for the kinds of punishment imposed is suggested by descriptions of the “lockstep” in the Auburn penitentiary in New York:

The Auburn program introduced the lockstep to maintain silence in the movement of large numbers of convicts from their cells to the workshops. The convicts were out of step with society, and their movement around the prison was designed to be performed as graceless [sic] as possible. They were to move at a slow pace, the “right arm outstretched with the hand on the right shoulder of the man in front of him.” They were “not permitted to hold their heads up, as would befit free men.” The prisoners were compelled to turn their heads to the right, and cast their eyes downward as they shuffled forward, a constant reminder of their low estate.

Melvin Gutterman, “*Failure to Communicate: The Reel Prison Experience*,” 55 SMU L. REV. 1515, 1518 (2002) (quoting NEW YORK STATE SPECIAL COMMISSION ON ATTICA, ATTICA: THE OFFICIAL REPORT OF THE NEW YORK STATE SPECIAL COMMISSION ON ATTICA 1, 10-11 (1972)) (footnotes omitted).

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as Foucault has remarked”²⁰ Thus, William Bradford wrote in 1793:

When he looks into the narrow cells prepared for the more atrocious offenders—When he realizes what it is to subsist on coarse fare, to languish in the solitude of a prison, to wear out his tedious days and long nights in feverish anxiety; to be cut off from his family, from his friends, from society,²¹ from all that makes life dear to the heart; when he realizes this he will no longer think the punishment inadequate to the offence.²²

Reflection on the Bible and repentance for one’s misdeeds were to be carried out in monastic solitude and silence; verbal expression and social interaction with other inmates were forbidden.²³ In addition, many of the penitentiaries designed a rigorous work program for their inmates to complement the religious instruction and reflection; all of this was meant to foster a healthy blend of “spiritual redemption as well as painful bodily punishment,”²⁴ with rehabilitative and retributive objectives frequently overlapping. The success and profitability of these early prisons²⁵ encouraged other states to take notice, and by the mid-nineteenth century Georgia, Kentucky, Maryland, Massachusetts, New Hampshire, New Jersey, Ohio, Vermont, and Virginia all had their own prisons.²⁶

20. Markus Dirk Dubber, *The Right to Be Punished: Autonomy and Its Demise in Modern Penal Thought*, 16 LAW & HIST. REV. 113, 124 (1998).

21. The prison in Philadelphia “isolated each prisoner for the entire period of his confinement” and “placed maximum emphasis on preventing the prisoners from communicating with anyone else” DAVID J. ROTHMAN, *THE DISCOVERY OF THE ASYLUM: SOCIAL ORDER AND DISORDER IN THE NEW REPUBLIC* 82 (1971).

22. WILLIAM BRADFORD, *AN ENQUIRY HOW FAR THE PUNISHMENT OF DEATH IS NECESSARY IN PENNSYLVANIA* 31 (1793).

23. Rothman, *supra* note 15, at 117-18, 121 (noting that at Walnut Street, prisoners remained in their cells for long periods of the day and new inmates were required to wear hoods as they walked past other inmates’ cells). The Auburn penitentiary did not require this degree of silence and isolation. *See id.* at 117.

24. DAVID GARLAND, *PUNISHMENT AND MODERN SOCIETY: A STUDY IN SOCIAL THEORY* 204 (1990).

25. ORLANDO F. LEWIS, *THE DEVELOPMENT OF AMERICAN PRISONS AND PRISON CUSTOMS, 1776-1845*, at 29 (Patterson Smith 1967) (1922) (noting that crime rates in Philadelphia dropped after the renovation of Walnut Street).

26. U.S. DEP’T OF JUSTICE, *5 ATTORNEY GENERAL’S SURVEY OF RELEASE PROCEDURES: PRISONS* 4 (1940).

By 1870, the reformative ideals of the earlier generation had fallen victim to newly emerging social pressures and patterns.²⁷ Chief among these were the population explosion and the consequent prison overcrowding, rendering impossible the solitude and seclusion so valued by the early prisons for their punitive and rehabilitative powers.²⁸ Moreover, the changing face of the prison population, partially the result of the rapid influx of Irish and other immigrants and the resulting loss of the “local character” of the prisons and their inmates, did little to foster the reformative ideal. “State legislators, with little sympathy for the immigrant, saw even less reason to invest in making the prisons anything but custodial.”²⁹ Fiscal concerns now dominated the agendas of prison designers and administrators as cell size was decreased to dangerous dimensions and two or three inmates were packed into spaces originally intended for one.³⁰

As these structural problems multiplied, the reforms instituted by the earlier generation, including the religious reforms, rapidly disappeared. In their 1867 report commissioned by the New York Prison Association on the state of penal methods, Enoch Cobb Wines and Theodore Dwight found that none of the state prisons was seeking or using methods aimed at the reformation of its inmates as a primary goal.³¹ Instead, corporal physical punishment (whipping, in particular) had reemerged as the principal method of inmate management and discipline as guards and wardens became more

27. Rothman, *supra* note 15, at 125 (observing that prisons of the later nineteenth century were increasingly characterized by “overcrowding, brutality, and disorder”).

28. *See id.*

29. *Id.* at 126.

30. Edgardo Rotman, *The Failure of Reform: United States, 1865-1965*, in *THE OXFORD HISTORY OF THE PRISON*, *supra* note 15, at 169, 170-71. The prisons’ budgetary problems resulted in most states’ preference for the system developed at Auburn, which emphasized the importance of labor and created surpluses, as opposed to the greater isolation and spiritual reflection required in the “Philadelphia model,” where prisons continually lost money. *See* HARRY ELMER BARNES, *THE EVOLUTION OF PENOLOGY IN PENNSYLVANIA: A STUDY IN AMERICAN SOCIAL HISTORY* 282-83 (1927).

31. Rotman, *supra* note 30, at 172; *see also* E.C. WINES & THEODORE W. DWIGHT, *REPORT ON THE PRISONS AND REFORMATORIES OF THE UNITED STATES AND CANADA* 62 (1867) (“They are all . . . lacking in a supreme devotion to the right aim . . . and all lacking in the employment of a wise and effective machinery to keep the whole in healthy and vigorous action.”).

cynical about the idea of reform.³² During this period, “[r]udimentary educational programs, prison libraries, and the intercessions of official chaplains affected only an insignificant portion of the prison population.”³³

The so-called “Progressive” era of criminal punishment, spanning approximately the last two decades of the nineteenth century and the first half of the twentieth century, reintroduced a rehabilitative ethos. Now, however, the approach to rehabilitation was that of scientific healing—medical, biological, and behavioral science found favor, motivated by the underlying belief that criminals were sick and needed to be cured.³⁴ The “treatment” or “psychotherapeutic” model of rehabilitation that emerged, reflecting the seminal theories of such influential thinkers as Cesare Lombroso³⁵ and Herbert Spencer (emphasizing biological factors), and Franz von Liszt of Germany and Adolphe Prinz of Belgium (emphasizing the role of family and social forces in “creating” the criminal),³⁶ minimized or devalued traditional religious perspectives as instruments of criminal reform.

32. See Rothman, *supra* note 15, at 126. One exception to this trend were the “reformatories” of the late nineteenth century, such as the one at Elmira, New York, which included classes in “general subjects, sports, religion, and military drill.” Rotman, *supra* note 30, at 174. But the reformatory movement also failed to live up to its promise because of the prison population explosion.

33. Rotman, *supra* note 30, at 175.

34. Erik Luna, *Punishment Theory, Holism, and the Procedural Conception of Restorative Justice*, 2003 UTAH L. REV. 205, 252-53 (2003) (referring specifically to juvenile justice theory).

35. Talk of Lombroso often elicits raised eyebrows because of his belief in phrenology, but Lombroso’s positivism had a profound effect on theories of crime at the turn of the twentieth century and thereafter. Specifically,

Lombroso affected law because criminal anthropology culminating in modern criminology did not merely use scientific methods, but it also posited that both natural and social sciences could share a single scientific methodology. Furthermore, it separated morality from science as well as from law. . . . Generally, the Lombrosian contribution to law lies in its emphasis on rehabilitation rather than retribution.

Jeanne Gaakeer, “*The Art to Find the Mind’s Construction in the Face*,” *Lombroso’s Criminal Anthropology and Literature: The Example of Zola, Dostoevsky, and Tolstoy*, 26 CARDOZO L. REV. 2345, 2349-50 (2005).

36. See Patricia O’Brien, *The Prison on the Continent: Europe, 1865-1965*, in *THE OXFORD HISTORY OF THE PRISON*, *supra* note 15, at 199, 210.

Émile Durkheim, writing slightly later and from an entirely different tradition, shares these writers' skepticism about the continuing value of traditional religious belief in effecting positive social change. Durkheim's contributions to the theory of religious belief as essentially social in nature are vast and too complex to assess in any meaningful way in this essay.³⁷ Nevertheless, some of his writings provide a general sense of the changing role of religion in twentieth-century punishment theory. One commentator has summarized Durkheim's beliefs, specifically as they relate to understanding the altered role of traditional religious thought for punishment, as follows:

As [Durkheim] conceives it, the task of modern education is to develop a secular, rational morality and to find the best means of socializing the child into this new *conscience collective*. The role of punishment in this setting is thus precisely the same as its role in the wider society—it is an expression and an enforcement of social morality An important aspect of Durkheim's argument is that modern secular moralities—which are open to rational discussion and do not depend upon the mysticism and blind faith characteristic of religions—are none the less perceived to be in some way 'sacred' and 'transcendental' In the light of these considerations, Durkheim argues, we ought to give up thinking of punishment as a utilitarian instrument and instead consider it in its true role, as an expressive form of moral action. The proper task of punishment is to uphold moral sensibilities by censuring all offenses against them. In essence punishment is a means of conveying a

37. See, e.g., ÉMILE DURKHEIM, *LES FORMES ÉLÉMENTAIRES DE LA VIE RELIGIEUSE: LE SYSTÈME TOTÉMIQUE EN AUSTRALIE* 65 (Presses Univ. de France 1960) (1915) (emphasis omitted). Durkheim offered the following definition of religion:

A religion is a unified system of beliefs and practices relative to sacred things, that is to say, things set apart and forbidden—beliefs and practices which unite into one single moral community called a Church, all those who adhere to them. The second element which thus finds a place in our definition is no less essential than the first; for by showing that the idea of religion is inseparable from that of the Church, it makes clear that religion should be an eminently collective thing.

Id. (quoting English translation in ÉMILE DURKHEIM, *THE ELEMENTARY FORMS OF THE RELIGIOUS LIFE* 47 (Joseph Ward Swain trans., George Allen & Unwin Ltd. 2d ed. 1976) (1915) (emphasis omitted)).

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moral message, and of indicating the strength of feeling that lies behind it.³⁸

Progressive penal reformers of the early twentieth century often invoked the “hospital” metaphor, but also drew from Durkheimian sociological theory to justify their punishment programs; their designs for everyday prison life were modeled on the social operation of the community.³⁹ For example, Howard Gill, an economist in charge of the construction in 1927 of the Norfolk Prison Colony in Massachusetts, classified its prisoners into small groups of under fifty; each group was housed and fed separately, and the aim was to provide greater individualized attention for the problems of each group’s members.⁴⁰ Every man received “individualized physical, mental, social, vocational, and avocational [training].”⁴¹ Furthermore, the groups were organized into a political body called the Norfolk Council, “which operated on the principle of joint officer-inmate responsibility for the governance of the institution.”⁴² In the same years, psychotherapeutic treatments became fashionable, and by 1926, sixty-seven prisons employed psychiatrists and forty-five had psychologists.⁴³ The influence of religion as either a rehabilitative or punitive force did not figure as a prominent, or even a relevant, feature of these programs.

Indeed, through the waves of prison reform that followed—from the drab monotony and depersonalization of the “Big House”⁴⁴ to the increasing and often highly intrusive use of

38. GARLAND, *supra* note 24, at 42-44.

39. Rotman, *supra* note 30, at 179.

40. *Id.* at 181.

41. *Id.*

42. *Id.*

43. *Id.* at 178.

44. See JOHN IRWIN, *PRISONS IN TURMOIL* 3-4 (1980). Irwin describes the Big House as

a walled prison with large cell blocks that contained stacks of three or more tiers of one- or two-man cells. On the average, it held 2,500 men. Sometimes a single cell block housed over 1,000 prisoners in six tiers of cells. . . . [C]ell blocks were harsh worlds of steel and concrete, of unbearable heat and stench in the summer and chilling cold in the winter, of cramped quarters, and of constant droning, shouting, and clanking noise.

Id.

psychotherapy in “correctional institutions”⁴⁵ of the 1950s and 1960s, with their abiding faith in the assessments of experts⁴⁶—religious programming was rarely part of the prescribed regimen. The profound disillusionment with rehabilitation that exploded in the 1980s, coupled with skepticism about the long-standing system of indeterminate sentencing,⁴⁷ led to a rejection of the old theories of punishment and an embrace of what has been caustically described as the “warehouse” conception of prison.⁴⁸ In the warehouse prison (our present model), offenders are “largely idle and live in a divided inmate subculture weakened by internecine conflict”; they are provided with food, shelter from the elements, clothing, medical treatment, opportunities for exercise, and little else.⁴⁹ A bleak, resigned theory of incapacitation, coupled with a coarse belief in harsh punishment, best explains the philosophical underpinnings of the warehouse prison—one that “operates without the pretense that it does anything other than store and recycle offenders.”⁵⁰

Into this state of penal affairs—with rehabilitation under attack as an unrealistic pipedream, the prison population and prison violence steadily growing,⁵¹ the length of prison terms increasing, and the political rhetoric of “law and order” punishment at a heated pitch—religion has, after so long an absence, once again shown itself. This article next discusses some of the emerging models of religious programming in state prisons.

45. Existing prisons were renamed “correctional institutions” in a bow to the prevailing philosophy of punishment of the day. See Jonathan Simon, *Sanctioning Government: Explaining America’s Severity Revolution*, 56 U. MIAMI L. REV. 217, 218 (2001).

46. *Id.* at 237.

47. For the notable catalyst of anti-indeterminacy, see MARVIN FRANKEL, *CRIMINAL SENTENCES: LAW WITHOUT ORDER* (1973).

48. James E. Robertson, *Houses of the Dead: Warehouse Prisons, Paradigm Change, and the Supreme Court*, 34 HOUS. L. REV. 1003, 1022-26 (1997).

49. *Id.* at 1023 (footnote omitted).

50. *Id.* at 1015.

51. See *Number of Women in Prisons Is on Rise*, N.Y. TIMES, Oct. 24, 2005, at A18 (reporting that since 1995 the country’s state and federal prison population—excluding state and federal prisoners held in local jails—has grown an average of 3.4% per year, though for 2004 the rate of increase dropped to 2.6%) [hereinafter *Number of Women*].

III. RELIGIOUS PRISONS IN THE TWENTY-FIRST CENTURY

The American socio-political climate of the last two or so decades has been surprisingly congenial to the reinvigoration of religion as a powerful legal and political instrument. Congress championed religious freedom and government accommodation of religious interests⁵² with little dissent in the sweeping Religious Freedom Restoration Act of 1993 (“RFRA”),⁵³ which requires that government demonstrate a compelling interest in legislation that poses a substantial burden to religious interests.⁵⁴ After the Supreme Court partially invalidated RFRA as to states and localities,⁵⁵ Congress passed the Religious Land Use and Institutionalized Persons Act of 2000 (“RLUIPA”).⁵⁶ RLUIPA specifically governs the accommodation of prisoners’ religious interests, reimposing the compelling interest standard on government to justify substantial burdens on free exercise.⁵⁷ The Supreme Court recently held that this section of RLUIPA does not violate the Establishment Clause.⁵⁸

The last decade has also witnessed the determined and systematic reintroduction of religion as an instrument for ostensibly promoting secular, governmental ends. One of President George W. Bush’s first and most controversial executive orders established the “White House Office of Faith-Based and Community Initiatives,” whose policy aims sprang from the belief that:

52. See generally Marci A. Hamilton, *Religion and the Law in the Clinton Era: An Anti-Madisonian Legacy*, 63 LAW & CONTEMP. PROBS. 359, 388-89 (2000).

53. 42 U.S.C. §§ 2000bb to 2000bb-4 (2000).

54. RFRA aimed to nullify the holding of *Employment Division v. Smith*, 494 U.S. 872 (1990), that neutral laws of general application need not be justified by a compelling government interest. 42 U.S.C. § 2000bb.

55. *City of Boerne v. Flores*, 521 U.S. 507 (1997). The Supreme Court recently considered the application of RFRA with respect to the federal government’s interest in enforcing the Controlled Substances Act against the religious use of a hallucinogenic tea, finding against the government at the preliminary injunction stage. *Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal*, 126 S. Ct. 1211 (2006).

56. 42 U.S.C. §§ 2000cc to 2000cc-5 (2000).

57. 42 U.S.C. § 2000cc-1(a).

58. See *Cutter v. Wilkinson*, 125 S. Ct. 2113 (2005). *Cutter* did not involve the land use provisions of RLUIPA. See generally *id.*

Faith-based and other community organizations are indispensable in meeting the needs of poor Americans and distressed neighborhoods. Government cannot be replaced by such organizations, but it can and should welcome them as partners. The paramount goal is compassionate results, and private and charitable community groups, including religious ones, should have the fullest opportunity permitted by law to compete on a level playing field, so long as they achieve valid public purposes, such as curbing crime, conquering addiction, strengthening families and neighborhoods, and overcoming poverty.⁵⁹

Encouraged by the generally auspicious political mood, prison administrators around the country have begun to offer religious programming for inmates. This article focuses on two models for the use of religion in prisons, Florida's Lawtey and Hillsborough prisons, and the InnerChange Freedom Initiative, which has been incorporated in several state prisons.⁶⁰

A. Lawtey and Hillsborough

Located in Raiford, Florida, Lawtey Correctional Institution "was established in 1973 as a community vocational center housing work release inmates."⁶¹ In 1977, it became a male prison.⁶² In 2004, Lawtey was converted by Governor Jeb Bush into a "male Faith and Character Institution."⁶³ Lawtey houses 788 inmates and oversees its prisoners in "medium," "minimum," and "community" levels of security.⁶⁴

59. Exec. Order No. 13,199, 66 Fed. Reg. 8499 (Jan. 29, 2001).

60. Both models, especially Lawtey and Hillsborough, are relatively new and have not been studied extensively. In later portions of this article, these models are called the "new religious prisons" to distinguish them from American penitentiaries that historically used religion for penological purposes.

61. Florida Department of Corrections, Lawtey Correctional Institution, <http://www.dc.state.fl.us/facilities/region2/255.html>.

62. *Id.*

63. *Id.*

64. *Id.* Florida defines "medium" security as "inmates eligible for placement at a work camp with a secure perimeter, but who are not eligible for placement in an outside work assignment without armed supervision." Florida Department of Corrections, Frequently Asked Questions Regarding Custody, <http://www.dc.state.fl.us/oth/inmates/custody.html>. "Minimum" security "[r]efers to inmates eligible for outside work assignments, but not for placement at a community residential facility." *Id.* "Community" security, the least restrictive, "[r]efers to inmates eligible for placement at a community residential facility." *Id.*

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All Florida prisoners were informed in 2003 that Lawtey was converting to a religious format. Inmates at Lawtey who preferred to transfer elsewhere were permitted to do so (over 100 transferred).⁶⁵ Additionally, prisoners from other institutions who were relatively problem-free while incarcerated (that is, without any discipline problems for at least a year prior to the requested transfer) and approaching their release date were permitted to apply for transfer to Lawtey.⁶⁶

Lawtey employs volunteers to run its religious programming, all of which is funded by private religious groups.⁶⁷ Though committed in theory to offering programming for multiple faiths, Christianity predominates as the preferred faith of the majority of the inmates and the volunteers.⁶⁸ The religious programming is explicit for those who desire it. It includes Bible reading, morning prayers, reflection on and discussion about Jesus and the good Christian life, religious counseling on issues such as anger management, musical and community events, choir practice, and the Friday evening "Evangelism Explosion," a thirteen-week course in converting others to embrace Christ in their lives.⁶⁹ Religion is also an undercurrent in the job and basic life skills training (e.g., writing a résumé), addiction treatment, and parenting skills offerings (e.g., discussions with volunteers about how to be a better father).⁷⁰ Churches that sponsor specific dormitories are required to spend a minimum of \$10,000 for new equipment, and some churches have donated as much as \$30,000, not including their volunteers' time, for such amenities as ceiling fans, textbooks, Bibles, and computers.⁷¹ This largesse stands in stark contrast to Florida's recent reduction of daily expenses from \$40 to \$35 per prisoner.⁷²

65. Brendan Farrington, *Gov. Bush Dedicates 1st Faith-Based Prison*, MIAMI HERALD, Dec. 25, 2003, at 7B; *see also* Cooperman, *supra* note 6.

66. Farrington, *supra* note 65. Prisoners who have discipline problems after their transfer to Lawtey are immediately transferred out. *See id.* As of May 21, 2004, Lawtey had a waiting list of as many as 1200 inmates. Morrissey, *supra* note 2.

67. *See* Cooperman, *supra* note 6.

68. *Id.* This has been a major constitutional criticism of Lawtey as well as programs that are expressly Christian, such as IFI.

69. *See id.*

70. *Id.*

71. *Id.*

72. *See* Cooperman, *supra* note 6.

In April 2004, Governor Bush announced that Hillsborough Prison in Riverview, Florida, would be converted to a female, faith-based format, modeled on Lawtey (though with less than half the inmate population).⁷³ At Hillsborough, women receive “instruction on topics such as anger management, job skills, résumé preparation, vocational classes, substance abuse, parenting, and strengthening marriages.”⁷⁴ Religious programming with the goal of “change” and “self betterment” is offered and possibly encouraged, but participation in the religious programs is not officially required.⁷⁵

The basic thrust of the religious instruction at Lawtey and Hillsborough is rehabilitative in nature:⁷⁶ inmates are urged to use the considerable resources at their disposal—volunteer mentorship, physical amenities, ample opportunities for instruction, textbooks, computers, and one another—to reform their characters so that once they leave they will not return. A significant part of the religious programming, however, also focuses on the “sinfulness” of inmates’ past ways, “self-reflection” with the aim of cultivating a kind of deep-seated guilt for misdeeds, and recognition that punishment is deserved.⁷⁷ Whether the philosophy undergirding this aspect of the programming is rehabilitative or instead a form of hybrid retributivism is explored below.

73. See Florida Department of Corrections, *DOC Opens Female Faith-Based Prison*, CORRECTIONAL COMPASS (May/June 2004), available at <http://www.dc.state.fl.us/pub/compass/0405/10.html> [hereinafter *Female Faith-Based Prison*]. Though women account for a fraction of the national prison population (about 7%), the rate of their incarceration is substantially outpacing the male rate. *Number of Women*, *supra* note 51 (“The number of women incarcerated in state and federal prisons in 2004 was up 4 percent compared with 2003, more than double the 1.8 percent increase among men, the Bureau of Justice Statistics reported.”).

74. *Female Faith-Based Prison*, *supra* note 73.

75. *Id.* The Florida Department of Corrections announcement is unclear about precisely what this means, but it appears that a prisoner can elect to participate in, for example, the reading classes without being forced to participate in the religious programming that often accompanies the secular instruction. Again, how this is accomplished as a practical matter is not explained.

76. See Joyce Howard Price, *Where Punishment Must Fit the Faith; Florida Jailhouse Is First in U.S.*, WASH. TIMES, Dec. 30, 2003, at A1 (reporting the statement of Governor Jeb Bush that the best way to rehabilitate prisoners is to “lead them to God”).

77. See *Female Faith-Based Prison*, *supra* note 73 (reporting the comments of Alia Faraj, Spokesperson for Governor Bush).

B. InnerChange Freedom Initiative

The InnerChange Freedom Initiative (“IFI”) is a branch of Prison Fellowship Ministries (“PFM”), a Christian nonprofit organization “dedicated to ministering to and providing religious services for prisoners.”⁷⁸ PFM was founded in 1976 by Charles Colson, former aide to President Richard Nixon, who became an evangelical Christian during his prison term for his role in the Watergate scandal.⁷⁹ IFI, which was first introduced to a Texas prison in 1997, currently also operates in prisons in Iowa, Kansas, and Minnesota.⁸⁰

Unlike Lawtey and Hillsborough, IFI explicitly promotes a Christian message (though it formally accepts inmates of all denominations, as well as atheists). It aims at prisoners’ “spiritual and moral transformation,” taking the following passage from Romans 6:18 as its motto: “You have been set free from sin and become the slaves of righteousness.”⁸¹ If a state department of corrections chooses to incorporate it at a particular prison, IFI occupies an entire wing of the prison and requires state funds for security (e.g., the prison guards’ salaries) and the provision of food, clothing, and other necessities for prisoners.⁸² IFI designs and implements the religious programming, using private donations and volunteers.⁸³ The curriculum integrates Bible study into all aspects of its instructional regimen, which includes courses in earning a GED, vocational training, and computer skills training.⁸⁴ Though greater resources are available to IFI’s inmates than to others, they are subject to stricter disciplinary requirements. “The men can stay up longer. They see more visitors. But they also have a more disciplined regimen; no TV except for the news, up for prayer and worship at 6 AM, Bible study several hours a day, as

78. Roy, *supra* note 8, at 801.

79. Daniel Brook, *When God Goes to Prison*, LEGAL AFF., May-June 2003, at 24.

80. The InnerChange Freedom Initiative, <http://www.ifiprison.org/channelroot/home/states.htm>.

81. *Id.*, <http://www.ifiprison.org/channelroot/home/aboutprogram.htm>.

82. Roy, *supra* note 8, at 801.

83. *Id.*

84. *Id.* at 802.

well as vocational training, workshops, mentoring programs, all by Christians.”⁸⁵

IFI’s programming strongly emphasizes “repentance and reconciliation” as crucial components: “Repentance is . . . an indispensable part of the conversion process that takes place under the . . . power of the Holy Spirit. But repentance is also a continuing state of mind. . . . [B]elievers prove their repentance by their deeds. Without a continuing repentant attitude . . . Christian growth is impossible.”⁸⁶ Likewise, IFI aims to instill the values of “responsibility and restoration” by compelling inmates (those that have agreed to its programming) to reflect on and feel guilt about the sinfulness of their past and to reform their relationships with God, their families, and their communities.⁸⁷ Crimes are deemed rooted in sin and therefore an alienation from God.⁸⁸ Some of the classes foster repentance directly by introducing inmates to the (willing) victims of crimes and their families, attempting to evoke remorse from the inmates and allowing the inmates to offer a “symbolic act of restitution.”⁸⁹ IFI therefore strives for more than merely the reduction of recidivism and it eschews what it believes is the currently fashionable psychotherapeutic and somewhat narcissistic approach to rehabilitation. IFI wants to “transform” inmates’ lives by an intense and continuing experience with the Divine, a relationship that often begins with profound feelings of guilt and culminates in a desire for penance and redemption through God.⁹⁰

85. Barbara Bradley, “Morning Edition” Visits Bible-Based Prison Program (NPR broadcast Sept. 7, 2001), available at http://www.pfm.org/AM/Template.cfm?Section=About_Prison_Fellowship1&template=/CM/HTMLDisplay.cfm&ContentID=2674.

86. The InnerChange Freedom Initiative, <http://www.ifiprison.org/channelroot/home/aboutprogram.htm> (quoting CHARLES COLSON, *LOVING GOD* 109-10 (Zondervan 1997) (1983)) (footnote omitted).

87. *Id.*

88. *Id.*

89. Brook, *supra* note 79, at 25.

90. *See generally id.*

IV. THEORIES OF PUNISHMENT IN THE NEW RELIGIOUS PRISONS: REHABILITATION AND RETRIBUTION COMMINGLED

It is clear from the preceding discussion that the new religious prisons, like the American prisons of the late eighteenth and early nineteenth centuries, prize religious programming for its alleged potential to rehabilitate character. Moreover, some of the techniques and approaches developed by the religious programming mirror those of the most recent rehabilitative theories. For example, Professor Sue Rex has written of the effectiveness of “strengthening community ties,” such as marriage and employment, as well as the importance that a “moral dimension” be added to the development of cognitive skills and that the person in power speak credibly from a position of moral authority.⁹¹

The primary motivating rationale for introducing religion to Lawtey and Hillsborough and through IFI is quintessentially consequentialist: proponents argue that the religious programming greatly reduces violence in prison as well as the rate of recidivism.⁹² Does any empirical evidence support this claim? It is still too early to pronounce final judgment, but there is some preliminary evidence of positive results in the IFI programs.⁹³ No one questions that inmate violence within IFI-operated wings is significantly lower than in the state-run system, though many have argued persuasively that this is attributable to the significantly greater resources (financial and otherwise) and freedom enjoyed by IFI inmates.⁹⁴ A 2003 study states that the rate of recidivism among “graduates” of IFI’s program in Texas is roughly half that of non-graduates,⁹⁵ but

91. Sue Rex, *A New Form of Rehabilitation?*, in *PRINCIPLED SENTENCING: READINGS ON THEORY & POLICY*, *supra* note 16, at 36-37.

92. See DUFF, *supra* note 9, at 4 (stating that “reducing the incidence of [crime]” is the primary consequentialist objective).

93. Few if any studies of the effectiveness of the programming at Lawtey (or Hillsborough) are yet available.

94. Brook, *supra* note 79, at 28-29.

95. See Alexandra Alter, *Study Touts Faith-Based Rehabilitation Program*, THE PEW F. ON RELIGION & PUB. LIFE, June 19, 2003, available at <http://pewforum.org/news/display.php?NewsID=2333> (reporting on a study by the University of Pennsylvania’s Center for Research on Religion and Urban Civil Society); see also MARCI A. HAMILTON, *GOD VS. THE GAVEL: RELIGION AND THE RULE OF LAW* 165 (2005) (“There appears to be

some have rightly pointed out that only 75 of the 177 participants in IFI since 1997 “graduated” from the program, which IFI defines as having completed at least sixteen months of programming and six months of “aftercare,” as well as finding employment, being an active member of a church for at least three months, and maintaining a relationship with an IFI mentor.⁹⁶ When all 177 IFI participants were compared with other relevant prison populations, the recidivism rates for IFI participants were slightly higher.⁹⁷

IFI and Lawtey have also been roundly criticized for carefully controlling the criteria for admission to their programs. Whatever positive results have been achieved, it is claimed, mask the reality that the more serious violent offenders, as well as anyone not already “predisposed” to succeed, were not counted.⁹⁸ Furthermore, critics contend that no one has established that it is specifically the religious component of the programming that makes a significant contribution to the success of the prisons in reducing recidivism. Religious or not, critics claim, any program that puts a premium on job training and life skills, is administered by eager and committed volunteers, possesses sufficient funds and resources to meet its aims, provides a relatively safe environment, and offers its inmates special perks and somewhat greater liberties than those enjoyed by their fellows in other wings, would produce similar results.⁹⁹

The controversy over the effectiveness of the new religious prisons in reducing the recidivism rate will doubtless continue for some time, with new empirical studies and challenges to the results both on their own terms and in relation to the wisdom of using religion for rehabilitative purposes generally. In the remaining portion, this article sets these empirical questions aside and considers another possible justification for religious programming. Borrowing heavily from the work of R.A. Duff, it argues that, whether or not its rehabilitative value is ultimately

an increasing amount of evidence that suggests that some religious programming in the prisons can reduce the recidivism rate.”) [hereinafter HAMILTON, GOD VS. THE GAVEL].

96. See Roy, *supra* note 8, at 803 n.80.

97. *Id.* at 803 & n.80.

98. HAMILTON, GOD VS. THE GAVEL, *supra* note 95, at 169.

99. See, e.g., *id.*; Roy, *supra* note 8, at 804.

vindicated, religious programming may be worthwhile because it is an effective method of communicating the censure of a significant portion of the offender's community. Religious programming like that carried out at Lawtey and by IFI is specially equipped to do this by imposing a specifically religious penance, demanding that prisoners: (1) repent of their crimes, which itself requires cultivating and confronting a profound guilt, (2) reform themselves, with commitments not only to the fact of reform in response to a particular misdeed, but also to the manner in which the reform should be effected, and (3) become reconciled to their victims and their communities. In making these claims, it is vital to recognize the objection both that the concept of penance carries with it overtly Christian—most particularly Roman Catholic—overtones and that the new religious prisons, to date, have been almost exclusively Christian in orientation. One should rightly ask, “What of Muslim or Hindu prisoners? What can a theory of penance as punishment offer them?” Before addressing these important points in the context of Professor Duff's theory and its application to the new religious prisons, a brief discussion of the importance of the concept of penance for several of the most influential world religions is necessary.

A. Penance and Religion: An Overview

It is far beyond the scope of this article to explore the complicated and multifaceted concept of penance in religion generally or even its relevance for the “major” world religions in any kind of systematic fashion. Moreover, I am not a theologian or historian of religion and am not qualified to undertake such a thoroughgoing exposition. Nevertheless, certain limited observations about the centrality of penance in various religious systems may provide some insight into penance's general conceptual relevance for punishment theory.

Penance, or atonement,¹⁰⁰ is central to many Christian faith systems, though it takes on different meanings given the great

100. Penance and atonement are not necessarily synonymous and can have very different religious connotations, but they are used synonymously here. *See, e.g.*, RICHARD SWINBURNE, *RESPONSIBILITY AND ATONEMENT* 81 (1989) (listing penance as one of the four elements of atonement).

theological variety within Christianity. However, most Christian perspectives

hold in common that the end of atonement is the reconciliation of God and man. Properly understood, atonement establishes the ground of justice for reconciliation between an offended party and the offender. Similarly, civil justice [to include, here, criminal justice] should establish the ground of justice for reconciliation of victim and offender and the restoration of both.¹⁰¹

St. Anselm's seminal work, *Why God Became Man*,¹⁰² begins with the premise that atonement is required when man robs God of His due, the paradigmatic example of which is original sin. Since God's punishment would destroy man, God demands, as it were, to be "made whole."¹⁰³ Anselmian atonement, with its emphasis on the idea of satisfaction, has traditionally dominated both Catholic and Protestant theologies,¹⁰⁴ though the concept of penance institutionalized as the Sacrament of Reconciliation¹⁰⁵ is distinctly Catholic.¹⁰⁶

In early American history, the concept of penance played an important role in the efforts of Protestant prison reformers to do away with public shaming punishments.¹⁰⁷ Though it is no

101. Jeffrey C. Tuomala, *Christ's Atonement as the Model for Civil Justice*, 38 AM. J. JURIS. 221, 222 (1993).

102. CUR DEUS HOMO, in ST. ANSELM: BASIC WRITINGS 191, 215-21 (S.N. Deane trans., 2d ed. 1962); see also Stephen P. Garvey, *Punishment as Atonement*, 46 UCLA L. REV. 1801, 1809 (1999).

103. See John Lyden, *From Sacrifice to Sacrament: Repentance in a Christian Context*, in REPENTANCE: A COMPARATIVE PERSPECTIVE 43, 47 (Amitai Etzioni & David E. Carney eds., 1997) [hereinafter REPENTANCE].

104. See generally J. DENNY WEAVER, THE NONVIOLENT ATONEMENT (2001).

105. "Private confession to a priest at least once a year was . . . obligatory in the thirteenth century. Luther dispensed with closed confession for Protestants; the Catholics continued it . . ." KARL MENNINGER, *WHATEVER BECAME OF SIN?* 26 (1973).

106. Harold J. Berman & Charles J. Reid, Jr., *Roman Law in Europe and the Jus Commune: A Historical Overview with Emphasis on the New Legal Science of the Sixteenth Century*, 20 SYRACUSE J. INT'L L. & COM. 1, 15 (1994).

107. James Q. Whitman, *What Is Wrong with Inflicting Shame Sanctions?*, 107 YALE L.J. 1055, 1080-81 (1998). Whitman writes:

Not surprisingly, this long Christian tradition of favoring private penance over public humiliation has played a role in the decline of western shame sanctions. . . . The penitentiary movement [in early Philadelphia] conceived of and presented itself as an enlightened, Christian alternative to the older system of shame sanctions, one that would replace the primitive order of public display and shame with a modern order of isolation and guilt.

Id.

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doubt true that penance occupies a far less prominent place as a crucial theological tradition in the mainline Protestant faiths than in Roman Catholicism, the general concepts of repentance, remorse, and forgiveness are universally important for Christian faith systems.¹⁰⁸

The Christian concept of repentance presupposes belief in a personal God and an awareness of sin and what it does to human relationships with God. For Christianity, repentance involves more than an internalized awareness of failure or fault, which we might designate as aversion, as turning away from that of which one is ashamed. It also involves aversion, turning to God, to the personal God whose active gift of grace first makes self-understanding and repentance possible, and whose redemptive love then responds to repentance with forgiveness and restoration.¹⁰⁹

Atonement also is central to the Jewish tradition, as manifested in the *teshuva*:¹¹⁰

The principle of *teshuva* is fundamental to Jewish law and philosophy. Jewish law views it as apparent that human beings are, by their very nature, fallible and incapable of avoiding all sin, and thus through the possibility—indeed the obligation—of *teshuva*, God provides humans a means of achieving atonement for wrongdoings.¹¹¹

The Jewish festival of Yom Kippur is devoted to repentance: “various rituals are performed to obtain forgiveness of sins and pardon for misdemeanours against neighbours.”¹¹² Like the Christian penance, the Jewish *teshuva* imposes obligations on both the offender and the victim—repentance, apology,

108. See generally Harvey Cox, *Repentance and Forgiveness: A Christian Perspective*, in REPENTANCE, *supra* note 103, at 21, 24.

109. Harold O.J. Brown, *Godly Sorrow, Sorrow of the World: Some Christian Thoughts on Repentance*, in REPENTANCE, *supra* note 103, at 31, 31-32.

110. “The Hebrew word . . . *teshuvah* [derives] from the root for return, and the concept is generally understood to mean returning to God from a situation of estrangement.” Jacob Neusner, *Repentance in Judaism*, in REPENTANCE, *supra* note 103, at 60, 61.

111. Samuel J. Levine, *Teshuva: A Look at Repentance, Forgiveness and Atonement in Jewish Law and Philosophy and American Legal Thought*, 27 *FORDHAM URB. L.J.* 1677, 1678-79 (2000) (footnotes omitted).

112. Mike Hepworth & Brian S. Turner, *On the Universality of Confession: Compulsion, Constraint, and Conscience*, in *CONFESSION: STUDIES IN DEVIANCE AND RELIGION* 66, 69 (1982).

reparation, and reconciliation—all of which mirror the Christian penitential elements.¹¹³ Moreover, in certain ways, the Jewish tradition is more similar than the Christian penitential doctrine to the secular justification for penance as a punishment in response to specific wrongful acts against other human beings (crimes, for example):

God forgives sinners who atone and repent, and asks of humanity that same act of grace—but no greater. For forgiveness without a prior act of repentance not only violates the rule of justice but also humiliates the law of mercy, cheapening and trivializing the superhuman act of forgiveness by treating as compulsive what is an act of human, and divine, grace.¹¹⁴

Despite these differences in emphasis, the basic components of the penitential process are very similar, as is the overall importance of repentance in the two traditions.¹¹⁵

Islamic salvation,¹¹⁶ achieved both by faith and works,¹¹⁷ depends upon repentance as “an essential element of the Qur’anic world view.”¹¹⁸ Repentance figures prominently, both as a concept central to Qur’anic law and piety, and as amplified in the *hadith*, the moral and spiritual injunctions of Mohammed.¹¹⁹ The principal Qur’anic term for repentance is *tawbah*, whose meaning—“frequently returning to” or “turning

113. Levine, *supra* note 111, at 1678-79; see generally CHAIM NUSSBAUM, THE ESSENCE OF *TESHUVAH*: A PATH TO REPENTANCE (1993); see also Elliot N. Dorff, *The Elements of Forgiveness: A Jewish Approach*, in DIMENSIONS OF FORGIVENESS: PSYCHOLOGICAL RESEARCH & THEOLOGICAL PERSPECTIVES 38-39, 42, 44 (Everett L. Worthington, Jr. ed., 1998) (discussing Moses Maimonides’s theory of atonement).

114. Neusner, *supra* note 110, at 61.

115. *Id.* at 61-62 (“For Judaism the conception of repentance—regretting sin, determining not to repeat it, seeking forgiveness for it—defines the key to the moral life. No single component of the human condition takes higher priority in establishing the right relationship with God, and none bears more profound implications for this-worldly attitudes and actions.”).

116. It is of course true that “Islam,” like “Christianity,” is not constituted of a single, monolithic set of beliefs. In offering a few generalities about Islamic notions of repentance, this article does not claim any kind of universal acceptance among the many Islamic sects (or across different eras) of these ideas.

117. Daveed Gartenstein-Ross, *No Other Gods Before Me: Spheres of Influence in the Relationship Between Christianity and Islam*, 33 DENV. J. INT’L L. & POL’Y 223, 240 (2005).

118. Mahmoud Ayoub, *Repentance in the Islamic Tradition*, in REPENTANCE, *supra* note 103, at 96, 96.

119. *Id.*

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toward someone, or some place”—is reminiscent of the meaning of Jewish *teshuva*.¹²⁰ The elements of Islamic repentance are also familiar and highly practical: “awe in the presence of the Holy, awareness of sin and genuine remorse for it, regret over lost opportunities, sincere contrition and the resolve to mend one’s ways.”¹²¹ Unlike some Christian and Jewish traditions, however, Islam has no official doctrine of redemption; in part, this is because divine grace, rather than any particular human act, is always required to achieve a true *tawbah*.¹²² Nevertheless, and again as a practical matter, “[e]xpiation may . . . be attained by means of certain acts of penance and restitution.”¹²³ The reassurance of God’s mercy is used, both in the Qur’an and the *hadith*, to encourage sinners to repent and turn to God for forgiveness.¹²⁴

The *hadith* offer several evocative allegories of repentance, only two of which are reproduced here:

The Prophet is said to have asserted that God stretches out His hand during the night for those who had sinned by day to repent, and He stretches it during the day for the sinners of the night to do likewise. This He will do until the sun shall rise from the west, that is, until the day of Resurrection. According to yet another tradition, there is a door of divine mercy in the place of the setting of the sun whose width is the distance of a seventy-year journey. This door will remain open until the sun shall rise from its direction. Then, “the faith of any person will avail him nothing, unless he had believed beforehand and through his faith had earned some good.”¹²⁵

Islamic penitential doctrine also distinguishes between sins against God and sins against other human beings, and the manifestations of repentance that each requires:

a person should repent in secret, between himself and God for sins against God, such as evil thoughts or neglect of obligatory acts of worship. As for the sins against others, they include wrongdoing, slander, willful deception,

120. *Id.* at 97-98 (suggesting a possibly Semitic root to the word).

121. *Id.* at 98.

122. *Id.* at 99-100.

123. Ayoub, *supra* note 118, at 99-100.

124. *Id.* at 101.

125. *Id.* at 101-02 (quoting Qur’an 6:158) (footnotes omitted).

treachery, and any physical or moral injury. Repentance in such cases should be accompanied by restitution and a humble request for forgiveness from the victim. . . .

The best expiation for a public offense is to confess it publicly and accept its consequences.¹²⁶

The public quality of repentance for sins against other human beings and its relationship with “secular” (if that is the right word) or legal punishment reflects the close association of the state and religion in many Islamic countries.

Hinduism and Buddhism also enjoy developed and complex penitential traditions. “Evidence for humble repentance in Hinduism, including even imperfect contrition, is found to be much earlier than both the Israelite and Christian records, going as far back as the Vedic period (6000-2000 B.C.E.) in India.”¹²⁷ The Vedic conception of sin—that of a break in the balance of order that must be repaired—correspondingly resulted “not only [in] disorder (*anrita*), but [also in] a debt [*rina*] that had to be repaid in full”¹²⁸ Later (ca. 500 B.C.E-200 C.E.), the *Manu-Samhitā*, a sacred Hindu text discussing various sins and their atonements, enumerated scores of penances that “formed the core of the ancient Indian criminal code” and represented another early “congruence of canon and civil law.”¹²⁹ Of the major world religions surveyed here, Buddhism is arguably least concerned with penance, primarily because of its rejection of theistic underpinnings. Nevertheless, though “Buddhists may make little room for God, . . . they are deeply concerned about practices of self-examination, feelings of remorse, the renunciation of unwholesome patterns of life, and the possibility of radical moral change.”¹³⁰ Foundational Buddhist stories,¹³¹ “along with the rituals of monastic confession, depict a drama of

126. *Id.* at 102-03.

127. Guy L. Beck, *Fire in the Ātman: Repentance in Hinduism*, in REPENTANCE, *supra* note 103, at 76, 77.

128. *Id.* at 78.

129. *Id.* at 81.

130. Malcolm David Eckel, *A Buddhist Approach to Repentance*, in REPENTANCE, *supra* note 103, at 122, 122.

131. For example, that of Asoka, the “cruel king, bent on conquest and domination,” who, overcome by sorrow and remorse after an especially bloody campaign, “decided to adopt the Buddha’s teaching as a program for action in his kingdom.” *Id.* at 125.

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guilt, remorse, confession, and transformation,”¹³² one that largely resembles the patterns of penance in the other religious traditions.

This cursory review has been unavoidably brief in its treatment of the role of penance in each of these major religious traditions and has neglected altogether the penitential doctrines and practices of many other religions. Nevertheless, enough has been said to demonstrate that penance in each of the traditions discussed contains universal elements and manifests itself in remarkably similar social practices, notwithstanding the variation among and within the traditions. The relevance of this commonality for the incorporation of religious penance into secular punishment will be discussed later in the article.

B. Penance as Retributive

It may strike the reader as highly unusual to talk of penance, which appears to focus on the characteristics and actions of the offender rather than the offense and ultimately may aim at some future, personal redemption, as in any recognizable sense “retributivist.” Traditionally, retributivism has justified punishment “not prospectively in punishment’s consequences . . . but retrospectively in punishment’s relation to a past offense.”¹³³ The moral desert or blameworthiness of the offense, rather than the possible utility of punishment to the offender, is the only relevant touchstone.¹³⁴

More recently, however, the justification for retributivism has been amplified to embrace and reflect a more civic and communicative spirit. For example, Professor Stephen Garvey writes that punishment “is in the first instance the means by which the state condemns or censures the offender’s wrongdoing. Punishment expresses the resentment and

132. *Id.* at 137.

133. Russell L. Christopher, *Time and Punishment*, 66 OHIO ST. L.J. 269, 283 n.46 (2005).

134. See Joel Feinberg, *Punishment*, in PHILOSOPHY OF LAW 514, 515 (Joel Feinberg & Hyman Gross eds., 2d ed. 1980) (“Punishment is justified only on the ground that wrongdoing merits punishment. It is morally fitting that a person who does wrong should suffer in proportion to his wrongdoing. That a criminal should be punished follows from his guilt, and the severity of the appropriate punishment depends on the depravity of the act.”).

indignation to which, among members of a community, crime naturally and properly gives rise.”¹³⁵

In what way is such a theory of punishment at least partially retributive?¹³⁶ Here, it is necessary to return to Professor Duff. In what has alternately been called punishment’s “expressive”¹³⁷ or “communicative”¹³⁸ purpose, because punishment serves to condemn or censure the particular criminal conduct and is directed at the offender himself,¹³⁹ it is, in the first instance, “backward-looking.”¹⁴⁰ More substantively, it is committed to reinforcing criminal norms against those who have broken them for the sake of the victims of crime (because such censuring reinforcement is “owed” to them), society writ large (to demonstrate and reaffirm that the norms are valued), and the offender himself,

since an honest response to another’s wrongdoing, a response that respects him as a responsible moral agent, is criticism or censure of that wrongdoing. To take crimes seriously (as the law purports to take them seriously in declaring them to be wrong) as the wrongdoings of responsible agents is to be committed to censuring those who commit them¹⁴¹

Of course, the communicative censure that inheres in “hard treatment” (which includes the traditional modes of criminal punishment—“imprisonment, fines, and compulsory community service”)¹⁴² could be advanced on consequentialist grounds: for example, its deterrent potential, its usefulness in defusing private vengeance and maintaining compliance with the law among the

135. Stephen P. Garvey, *Lifting the Veil on Punishment*, 7 BUFF. CRIM. L. REV. 443, 461 (2004) [hereinafter Garvey, *Lifting the Veil*].

136. It is extremely difficult to maintain the conceptual purity of these philosophies of punishment. The aim here is simply to discuss those aspects of penance that are at least partially retributive in nature, without denying that there are also important consequentialist justifications for penance (indeed, some of these are noted in what follows).

137. See generally Jean Hampton, *An Expressive Theory of Retribution*, in RETRIBUTIVISM AND ITS CRITICS 1 (Wesley Cragg ed., 1992).

138. DUFF, *supra* note 9, at 79. Duff favors this formulation. See *id.*

139. *Id.* at 27; see also ANDREW VON HIRSCH, CENSURE AND SANCTIONS 9-14 (1993).

140. DUFF, *supra* note 9, at 27.

141. *Id.* at 28-29 (citing VON HIRSCH, *supra* note 139, at 6-19).

142. *Id.* at 29.

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law-abiding, or its enhancement of social solidarity by having the law-abiding conduct rituals of condemnation, thereby cleansing the community.¹⁴³

But Professor Duff distances himself from these consequentialist arguments:

I offer an alternative account of why we should use penal hard treatment to communicate the censure that offenders deserve by portraying punishment as a species of secular *penance*. That account is retributivist: it justifies punishment as the communication of deserved censure. Unlike other forms of retributivism, however, it also gives punishment the *forward-looking* purpose of persuading offenders to repent their crimes (communicative actions in general typically have a forward-looking purpose). This is not to say, however, that my account is a partly consequentialist one—that it seeks to marry a retributivist concern for desert with a consequentialist concern for future benefits: for the relation between punishment and its aim is not, as it is for consequentialists, contingent and instrumental but internal.¹⁴⁴

Duff's theory is therefore highly "inclusive;" it claims to address the offender as a morally accountable agent and member of the community, and to impose a punishment that is owed to him, i.e., the moral censure of the community.¹⁴⁵ Moreover, contra consequentialism in this respect, the potential for successful communication through the penitential process does not determine whether the effort should be made. Rather, the attempt is always worth making "since in making it we show that we do take crime seriously as a public wrong and address the offender as someone who is not beyond redemption"¹⁴⁶

143. See generally ÉMILE DURKHEIM, *THE DIVISION OF LABOR IN SOCIETY* 60-64 (W.D. Halls trans., 1984) (1933) (arguing that punishment "serves to sustain the common consciousness itself").

144. DUFF, *supra* note 9, at 30 (citation omitted). One need not accept Duff's rejection of consequentialist arguments to agree that he has identified here at least a *partially* retributivist argument for the use of penance as punishment.

145. See *id.* at 115. An "exclusive" theory is one which, like incapacitation, treats offenders "not as members of the community but as dangerous enemies against whom 'we', the law-abiding, must protect ourselves" *Id.* at 78.

146. *Id.* at 115.

C. Penance as Punishment

Professor Duff identifies three stages of penance as punishment: repentance, reform, and reconciliation.¹⁴⁷ Repentance is the offender's recognition and acceptance both that what he did was wrongful and that he should suffer for that wrongdoing.¹⁴⁸ Conceptually, repentance greatly resembles guilt. Referring to Duff's argument, Professor Garvey explains: "Ideally, a wrongdoer will experience guilt when he realizes what he's done. Far from fearing punishment, he will welcome it as a form of secular penance through which he can expiate his guilt."¹⁴⁹ Or, as Professor Michael Moore has put it, "to feel guilty is to judge that we must suffer,"¹⁵⁰ because guilt intrinsically and psychologically demands expiation.

Professor Duff believes that the processes of criminal mediation (in which the offender and the victim confront one another, with the victim explaining her suffering and the offender being prohibited from offering justifications or explanations for his actions)¹⁵¹ and probation can induce repentance. Hard treatment is necessary because the feelings of guilt should "go deep with the wrongdoer and must therefore occupy his attention, his thoughts, his emotions, for some considerable time."¹⁵² True repentance, particularly for serious wrongdoing, requires a sustained effort; for that reason, a simple, one-time expression of remorse is generally insufficient. Of the three elements in Duff's theory of penance, the element of repentance is the most persuasively "backward-looking."

The natural implication of the offender's deep recognition of wrongdoing is to disown that wrongdoing, both as past event and future possibility. This is the element of "reform," and Duff struggles mightily, though less than entirely convincingly, to distinguish reform's inherently consequentialist overtones: reform is worthwhile "not to re-form the wrongdoer as an object that we must mold to our wishes, but to persuade her of the need

147. *Id.* at 106-12.

148. DUFF, *supra* note 9, at 107.

149. Garvey, *Lifting the Veil*, *supra* note 135, at 462.

150. MICHAEL MOORE, *PLACING BLAME: A GENERAL THEORY OF THE CRIMINAL LAW* 148 (1997).

151. DUFF, *supra* note 9, at 93.

152. *Id.* at 108.

to reform herself.”¹⁵³ The proper penance will make clear that reform is necessary, but it will also address the question of *how* an offender can reform himself.¹⁵⁴ Reform involves the process of thinking “carefully and remorsefully about the nature and implications of [one’s] crime,” with an eye toward avoiding similar future crimes.¹⁵⁵

Finally, criminal wrongdoing generally necessitates a “forceful and weighty kind of apology,” one that the offender chooses to make freely.¹⁵⁶ The apology may be verbal, but it will often take other forms, such as reparation, or burdensome work undertaken by the offender for the benefit of the victim or the community at large.¹⁵⁷ The “communicative” aspect of this element of punishment manifests itself in the imposition of a formalized ritual of public apology. In this way, the offender becomes “reconciled” to the victim and society, having “‘paid her debt’ of apology and reparation.”¹⁵⁸

These are only the bare essentials of Duff’s theory, and he undertakes their thorough defense in the remainder of his book. The next section explores to what extent a theory of religious penance, as practiced in the new religious prisons, is compatible with Duff’s formulation.

V. DUFFIAN PENANCE IN THE NEW RELIGIOUS PRISONS: POSSIBILITIES AND OBJECTIONS

Can traditional religious penance play any role in Professor Duff’s secular penance theory? As discussed earlier, the concepts of penance, repentance, reform, and reconciliation are generally associated with and important for the Christian, Jewish, Islamic, Hindu, and to some extent the Buddhist religions, and possibly many others; and, on the surface, religious penance appears to fit comfortably within Duff’s theory of punishment.¹⁵⁹ Moreover, the possibility of moral

153. *Id.*

154. *Id.*

155. *Id.* at 109.

156. DUFF, *supra* note 9, at 109.

157. *Id.* at 109-10.

158. *Id.*

159. This is not surprising, since the language and practices of religious penance served as the early model for prison reform. Brown, *supra* note 109, at 38 (“The introduction of the word ‘penitentiary’ instead of ‘prison’ in the [nineteenth] century

communication, so important to Duff and others, presupposes a shared moral language that could convey an appropriately censorious message to the offender. Duff looks to the moral language of secular rationality for this purpose,¹⁶⁰ but the language of religious conviction, for those receptive to it, may perhaps be an equally powerful mode of communicating the message of censure. One reason is that the moral bonds of religious conviction, for someone who is devoted to them or wishes to accept them (as in the case of perhaps at least some of the participating and wait-listed inmates at Lawtey and the IFI-operated prisons), will often be deeply felt and will pervade an offender's day-to-day consciousness (which is critical in satisfying the aims of repentance in Duff's scheme) more acutely in a pluralistic society such as the United States than the type of community-wide moral bonds described by Duff and Garvey.¹⁶¹ Robert Wuthnow has commented that "[r]epentance has traditionally held meaning because it was understood within particular cultural (often religious) traditions It cannot easily be put into purely legal contexts without losing much of its traditional meaning."¹⁶² Wuthnow goes on to argue that the idea of "community" is itself "reemerging as a sacred concept,"¹⁶³ but even if this point is accepted, the religious traditions still retain considerable power *for believers* in rendering the concept of penance alive and meaningful.

reflected the hope that prisoners would become penitents, that is to say, would repent and would be able to return to society as . . . people on whose decency and constancy their fellow citizens can subsequently rely. There was and often still is a religious component to this secular penitential hope.").

160. See DUFF, *supra* note 9, at 113.

161. For Professor Garvey's formulation, see Stephen P. Garvey, *Punishment as Atonement*, 46 UCLA L. REV. 1801, 1810 (1999) ("My suggestion is this: Theological accounts of atonement depend critically on treating God as the object of the sinner's identification. Consequently, we can *mutatis mutandis* derive a secular account of atonement if we take the object of identification not to be God, but one's community and its members.").

162. Robert Wuthnow, *Repentance in Criminal Procedure: The Ritual Affirmation of Community*, in REPENTANCE, *supra* note 103, at 171, 183.

163. *Id.*

It should be emphasized that this article claims neither (1) that religiously derived moral norms inherently and always elicit greater devotion than secular norms (this is surely not true—atheists can be more devoted to particular moral norms than religious believers), or (2) that religiously derived moral norms are always deeply felt by those receptive to them (there are many tepid religious feelings). The point is a narrow one: for prisoners who are inclined to accept the moral norms of a particular religious faith, those norms may exert a more profound and pervasive effect on prisoners' behavior than might norms of an underspecified "community." The primary reason is that, under the circumstances described, the prisoner is himself desirous of accepting and living by the religious norms; religion has engaged him in a way that secular morality, if presented to him as such, may not be able to duplicate.

A second and related benefit of religious penance from the standpoint of communicative efficacy derives from its highly developed structure, traditions, and procedural formality. Religion can serve as an instrument for rendering Duffian penance more accessible and concrete. Inmates can draw from specific traditions of spiritual insight and moral teaching about penance—that is, insight as to how to "do penance" successfully—to understand better what is required of them.¹⁶⁴

One important objection to this claim is that these types of concrete examples of penitential ritual and symbolism are highly specific to Christian religions¹⁶⁵ (and perhaps only to certain Christian religions), and that other religions may not have such penitential traditions from which inmates might draw. Though, as noted earlier, I am not qualified to produce a comprehensive account of the place of penance in the great array of world religions, there are at least two responses to this objection. First, as things presently stand in American prisons, it must be noted that Christianity is one of the religions in greatest demand from the prison population, and so the Christian penitential traditions

164. Some may object that prisoners are not likely to receive especially rich versions of such traditions, but this is not necessarily true and, in any event, they can at least receive some exposure to these traditions.

165. See Beck, *supra* note 127, at 76 ("At first glance, the notion of repentance . . . is easily identified with Christianity.")

should represent at least one focus of the discussion.¹⁶⁶ However, it is probable that Christianity predominates because it is simply the only religion on offer (as is certainly true for IFI-operated wings); this situation should be corrected by introducing other religious traditions as possibilities for those receptive to them.

Second, and more importantly, as this article has briefly demonstrated,¹⁶⁷ there are rich penitential traditions in the Jewish, Islamic, Hindu, and Buddhist faiths (and probably many others), replete with religious stories and rituals, from which prisoners *could* draw, were the resources and infrastructure for religious programming in those faiths adequately developed. Of course, it is no doubt true that states choose to incorporate programs like IFI in large part because of their ability to pay for themselves,¹⁶⁸ and this considerable financial obstacle presents a substantial problem for those interested in developing programs with other religious orientations that have fewer resources at their disposal. Nevertheless, in the case of Islam in particular, there are important institutional, political, and social reasons for the state's involvement in the development of religious programming. Prisons are "fertile grounds for radical Muslim chaplains to recruit" adherents, as inmates are already disaffected with American government.¹⁶⁹ The shortage of Muslim clerics for the prison population has resulted not only in the prevalence of more extremist versions of Islam in prisons, but also in greater numbers of inmates leading their own Islamic religious services, distorting Islam, and themselves espousing beliefs that are hostile to democratic political governance.¹⁷⁰

166. See Frank O. Bowman, III, *Murder, Meth, Mammon, and Moral Values: The Political Landscape of American Sentencing Reform*, 44 WASHBURN L.J. 495, 514 (2005) (noting that approximately four in ten American prisoners are white, "many of them the sons and daughters, fathers and mothers, brothers and sisters of the congregants of white evangelical churches across America"); see also MARTIN E. MARTY, EDUCATION, RELIGION, AND THE COMMON GOOD: ADVANCING A DISTINCTLY AMERICAN CONVERSATION ABOUT RELIGION'S ROLE IN OUR SHARED LIFE 56 (2000) ("Most Americans respond to the Judeo-Christian tradition, which means that they derive morality from the same sources.").

167. See *supra* notes 100-32 and accompanying text.

168. Roy, *supra* note 8, at 817.

169. HAMILTON, GOD VS. THE GAVEL, *supra* note 95, at 145.

170. *Id.* at 147 (citing Jerry Seper, *Prisons Breeding Ground for Terror?: Moderate Muslim Chaplains in Short Supply, Justice Report Warns*, WASH. TIMES, May 6, 2004, at A11).

Prison administrators should be concerned to ameliorate this problem; but they must not do so either by suppressing Islamic faith in the prisons or blithely ignoring it as a dangerous but unalterable reality of prison life. Instead, administrators should involve themselves, to whatever constitutionally acceptable degree (if any such involvement is constitutional), in arranging for access to and instruction in Islamic doctrine for inmates who desire it, emphasizing those religious views and practices that dovetail with and advance secular punitive objectives.

Yet another possible objection is that the theory of religio-secular penance discussed here somewhat outruns the reality of the types of religious programming implemented at Lawtey and by IFI. A related objection is that Evangelical Protestantism, whose traditions appear to influence much of the programming, doctrinally has little use for penance. It is true that much of the religious programming in these prisons does not emphasize penance and is instead reminiscent of the intensely rehabilitationist “correctional institutions” of the 1950s, though having incorporated a motivational, revivalist religious element (e.g., Lawtey’s “Evangelism Explosion”). But there are decidedly penitential components as well: the classes at IFI that foster guilt and repentance in the inmates and encourage them to atone for their crimes with their victims, as well as some of the religious doctrine supporting those classes,¹⁷¹ fit comfortably within the framework of penance as punishment discussed here. Thus, the ancient theological contest between Protestantism and Roman Catholicism over the nature of faith—i.e., the Lutheran belief in “justification by faith alone” (the “Pauline” doctrine)¹⁷² and the Roman Catholic teaching that “faith without works is dead”¹⁷³—interesting as it may be historically, need not detain us here. IFI, notwithstanding its Protestant Evangelical orientation, has clearly opted for theological heterodoxy on this particular score. Moreover, religious programming in prison, particularly the programming at Lawtey and Hillsborough, is still in an embryonic stage. Though instruction and activities

171. See *supra* notes 81-90 and accompanying text.

172. See W.D. DAVIES, *JEWISH AND PAULINE STUDIES* 94 (1984).

173. See, e.g., Daniel John Hettich & Erica Lee Dinger, *They Answer to a Higher Standard: The Ethical Obligations of Church Attorneys in Sexual Abuse Cases*, 16 *GEO. J. LEGAL ETHICS* 635, 638 (2003).

that emphasize religious penance do not appear to be major components of the programming currently available at the religious prisons in Florida, the discussion here explores possible justifications for the incorporation of religious penance as part of that programming.

There is at least one important way in which the concept of religious penance does not sit easily with Professor Duff's theory. An important part of what grounds Duff's justification for penance as punishment is its vindication of certain community-wide norms—that is to say, the norms of the criminal law. It is the “public,” universal character of those norms, and the interests of the offender, victim, and society in reaffirming them, that matter. Religious interests and beliefs are usually conceived as private interests *par excellence*; not everyone shares the moral commitments that ground them. Thus, it could be argued that the imposition of a religious penance, or a secular penance that makes use of religious influences, is improper because it does not render to the community (including the victim and the offender) what is “owed” to it—i.e., the affirmation of public morality.

This objection is powerful but it could be at least partially deflected in two ways.¹⁷⁴ First, and as Duff says, “The ‘private’ is not a metaphysical given What counts as ‘public’ or as ‘private’ depends on the nature of the community in which the distinction is drawn.”¹⁷⁵ As a purely conceptual matter, therefore, there could well be societies in which prevailing community norms are entirely religious in nature; what would be “owed,” in that case, is precisely a vindication of those religious norms. This might be the case in theocratic societies. But the political structure of the United States and many other modern Western societies operates to a far greater degree on the premise that religious beliefs are often inaccessible to those who do not share them and therefore should not be used—even indirectly—to support the justification for coercive judgments

174. For purposes of this discussion, this article puts aside any constitutional difficulties arising from the imposition of a religious penance; by doing this, it in no way means to suggest that there are no such difficulties (indeed, the Establishment Clause problems may be significant).

175. DUFF, *supra* note 9, at 127.

(e.g., the imposition of criminal punishment).¹⁷⁶ This argument can be rejoined *to a degree* by claiming that though the policy maker (legislator, judge, sentencing commissioner, etc.) cannot justify the imposition of penance as punishment by reference to religious reasons, she could nevertheless countenance religious reasons as ancillary or instrumental support for the secular justification. The ultimate justification for the imposition of penance, therefore, would remain secular, but the offender would be free to make the most of her secular penance, if she wished, by reference to religious convictions and ritual. The state's facilitation of the cultivation of religious conviction in this context could be explained on grounds analogous to those that commend secular penance. Religious belief is and continues to be of crucial importance to a large number of Americans.¹⁷⁷ In considering the justification for imposing a secular penance (that is, in deciding what is "owed" to the community), the vindication of certain kinds of religious beliefs (e.g., the belief in the equal worth of all human beings, or the belief that all human beings deserve respect) might be a relevant factor.¹⁷⁸

Second, and relatedly, the policy maker need not deem secular and religious penances as necessarily mutually exclusive. In fact, as a practical matter, they might often overlap and strengthen one another. Religion may provide an additional

176. See generally KENT GREENAWALT, PRIVATE CONSCIENCES AND PUBLIC REASONS 39-40, 85-95 (1995). Greenawalt writes,

What I mean by "not generally accessible" [is that] the believer lacks bases to show others the truth of what he believes. . . . This does not mean that reason plays no part in the development of religious convictions. Possible religious understandings may be measured against various tests of reasonableness. But something more is involved: a choice or judgment based on personal experience that goes beyond what reason can establish.

Id. at 39-40. A belief based on revelation would in most circumstances not be accessible, unless the believer can point to a historical, evidentiary record to support it. *Id.* at 41.

This is not to say that members of the political community who do not share the religious conviction could not understand the basis for a religious penance. The religious penance could be intelligible to them, though still not accessible.

177. See STEPHEN L. CARTER, THE CULTURE OF DISBELIEF: HOW AMERICAN LAW AND POLITICS TRIVIALIZE RELIGIOUS DEVOTION 4 (1993).

178. However, other religious beliefs that do not overlap with secular aims (e.g., the religious norm against blasphemy or the norm demanding weekly church attendance) would not meet this test. There may also be significant Establishment Clause difficulties with this justification.

reason or justification for undertaking a serious penance which could complement Duff's secular reasons. In setting forth arguments for religious institutional autonomy from government regulation (admittedly a different context), Professor Mark Tushnet offers a helpful view:

We want institutions to socialize people well, meaning that they should induce people to avoid inflicting secular harms. To accomplish that socialization, institutions must teach their members or subjects that certain behavior is undesirable or unacceptable. But, the argument is, sometimes an institution that is autonomous of external supervision is a more effective teacher than one that is subject to such supervision

For religions that define harm similarly to legislatures, the net effect of recognizing institutional autonomy is the reduction of secular harms.¹⁷⁹

If, through religious penance, the new religious prisons can more effectively communicate the secular values of Duffian penance (and this article has explored some reasons why this might be so), then community norms may be well served by imposing penances that incorporate religious elements.

Professor Duff himself addresses the potential overlap of secular and religious reasons motivating repentance when he supposes an offender who has, before her conviction and punishment, already repented of her crime: "She has faced up to the fact and character of her wrongdoing. She feels the pangs of remorse. She is determined to reform her future conduct."¹⁸⁰ One imagines that the motivation for such a "premature" penance might well be religious. Should such a person, if her religious penance is sufficiently profound and thorough, nevertheless be punished? Duff believes that she should:

What she has done or undergone might suffice to reconcile herself with God or with her conscience, even with her individual victim if she made some private reparative apology to him. But she has not done what is required to

179. Mark Tushnet, *Defending a Rule of Institutional Autonomy on "No-Harm" Grounds*, 2004 BYU L. REV. 1375, 1377, 1379 (2004). Of course, Professor Tushnet is making an argument for norm reinforcement based on religious autonomy from the state, while this article considers the state's use of religion to effect norm reinforcement.

180. DUFF, *supra* note 9, at 118.

reconcile herself with the political community whose laws and values she has infringed.¹⁸¹

If we suppose that religious and secular criminal norms will overlap to some extent (as many of them do), then we can *at least partially* justify penance by reference to religious norms. An offender who has already undertaken a thoroughgoing religious penance *may*, depending on the belief system framing the penance, have traveled a significant distance in expiating for her offense on secular moral grounds as well. Her secular punishment might account for this possibility.¹⁸² Indeed, for Duff to admit that a “private” penance (such as a religious penance) could reconcile the offender to herself, as well as to her particular victim, concedes the possibility that the offender may have, to some degree, begun the process of Duffian penance before its formal imposition. Nevertheless, even in the rare case of true premature penance, Professor Duff is undoubtedly correct that there will always be an important secular penitential residuum for the state to impose. Part of the reason (one that implicates the value of deterrence, though Duff would perhaps dispute this) is that the official act of state-imposed penance might communicate more clearly, or more “publicly,” to the community the censure for the offense than a private penance could. Another more straightforwardly retributivist reason is that a private, religious penance, no matter how thorough, can never completely fulfill its obligations to the political community.¹⁸³

181. *Id.* at 119 (emphasis added).

182. How it should do so (e.g., judges deciding whether a defendant’s religious system of penance overlaps with a secular penance, and if so in what degree and with what consequence) is an enormously difficult practical question and one that implicates the Establishment Clause. Nevertheless, as a theoretical matter, if the justification for secular and religious penance overlaps, then the imposition of penance as punishment should not work a “double-punishment.”

183. In the main, and as Duff argues, any mitigation calculations on the basis of a premature penance should be avoided. Rewarding or encouraging penance (particularly repentance) with the promise of a shorter sentence can foster dishonest practices and other morally problematic scenarios, such as pressure on the innocent to plead guilty in order to avoid a longer sentence if they are wrongfully convicted. DUFF, *supra* note 9, at 120.

The question of the relationship between religious repentance and the state’s imposition of punishment strikingly parallels the debate among Islamic scholars about the power of repentance to obviate the need for punishment:

Most Hanbalite jurists have argued on the basis of the Qur’an and *hadith* tradition that repentance annuls all punishment both legally and in fact. This

Religious penance therefore could play an important role in communicating the secular censure that is central to Professor Duff's theory. As discussed earlier, the new religious prisons frequently employ the language and rituals of religious penance, and these could, if deployed carefully and in a non-discriminatory way, prove to be a powerful instrument in effective communication. Nor does such a use of religious penance convert it from a retributive to a purely consequentialist theory. The religiously inclined offender is not being persuaded to repent (or reform or reconcile) for the sake of some greater social good that we have in mind for him but which he does not see. Instead, he is encouraged to repent, to sense the wrongfulness of his actions for himself, from both religious and secular viewpoints, because the censure of the community is "owed" to him.

As has been repeatedly observed, none of this speaks to the constitutional problems raised by what seems, as this article has explored it, to trench on the Establishment Clause. Indeed, the problem of discrimination against religions, particularly lesser-known religions or religions unfairly perceived to be inherently dangerous to the community (Islam, for example), looms especially large.¹⁸⁴ While the new religious prisons have shown some early (and as yet unsubstantiated) promise as rehabilitative instruments, the Establishment Clause problems that they raise are significant.¹⁸⁵ This article, however, has considered the criminological commitments of religious penance in prisons, exploring the possibility of justifying religious penance partially retributively and by reference to secular ideals. By exploring the theory of penance as punishment within its original religious context, the new religious prisons may, in some cases,

means that no punishment should be inflicted after repentance. Others held the opposite view, namely that repentance has no effect on the punishment of a person who violates the rights of individual human beings. Still others . . . held that both repentance and punishment are expiatory acts that cleanse the offender from the consequences of sin. While either would be sufficient in obtaining divine forgiveness, it is of greater merit to endure punishment along with the harsh discipline of repentance.

Ayoub, *supra* note 118, at 107.

184. On this question, see the discussion in Lupu & Tuttle, *supra* note 8, at 110-12.

185. For some treatments of the various Establishment Clause problems, see *supra* note 8.

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effectively communicate the secular censure that animates Professor Duff's conception of punishment.

