

## INTRODUCTION

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WHAT IS THE FAITH IN “faith-based”? After ten years of public policy promoting the greater integration of faith-based organizations into the ranks of government funded social service providers, the nature and role of faith in this effort remains elusive. This book takes a close look at a recent trial concerning one such faith-based provider with a view to understanding better what faith-based reform is about and why so many Americans think it makes sense.

In December 2006, in Des Moines, Iowa, a U.S. District Court judge found unconstitutional a faith-based, in-prison rehabilitation program operating in the Newton Facility of the Iowa Department of Corrections, a program known as InnerChange Freedom Initiative (IFI).<sup>1</sup> The lawsuit, brought by Americans United for Separation of Church and State (AU), had complained that the contract governing the rehabilitation program—an agreement between the State of Iowa and Prison Fellowship Ministries (PFM)—constituted “a law respecting an establishment of religion,” and was, thus, in violation of the First Amendment to the United States Constitution as applied to the states through the Fourteenth Amendment. After the decision, pending appeals, IFI continued to operate in the Iowa prison without state cash reimbursement—the state discontinued funding in June 2007—although it continued to receive in-kind aid. Approximately a year after the District Court’s decision, the U.S. Court of Appeals for the Eighth Circuit found Prison Fellowship Ministries at the Iowa prison to be acting “under color of state law” in a program of conversion and discrimination.<sup>2</sup> The Iowa Department of Corrections finally terminated its contract with InnerChange on March 10, 2008. (IFI programs are currently present in the prisons of five other states: Arkansas, Kansas, Minnesota, Missouri, and Texas. Private faith-based prison programs managed by other religious groups also exist in many states. Some states, including Florida, have initiated their own state-run, in-prison, faith-based programs. Because of variations in contracting arrangements, the effect of the Iowa court’s decision on these other programs remains unclear.)

*AU v. PFM* is acknowledged to be one of the most significant recent court cases considering the application of the establishment clause of the First Amendment to the U.S. Constitution to the new “faith-based” social services. A legal and social climate substantially more hospitable to government/religion partnership than in the recent past has made possible an increase in the number of government contracts with private, “faith-

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based” social service providers, particularly those operating in prisons. Through a close reading of the background and events of the trial in *AU v. PFM*, this book considers the ongoing reintegration and “naturalizing” of religion in the United States and its intersection with evolving understandings of the meaning of “disestablishment.” By “naturalizing” I refer to a legal and social process by which religion and spirituality are increasingly seen in the U.S. to be a natural, and largely benign—if varied—aspect of the human condition, one that is to be accommodated rather than segregated by government. Notwithstanding the actual decision in the case, set in the larger context of religion in the United States, the trial testimony reveals a religious culture in which the sacred and the secular can be seen to be sinuously and ambiguously intertwined and support for religious authority more thoroughly located in the individual rather than in traditional institutions.

In the prison context, this religious culture, which is at once an establishment and a disestablishment, is shaped by the convergence of two ways in which the United States is distinctive in comparison to other advanced industrial societies, differences that, arguably, have become more pronounced in recent decades. Americans are unusual compared to the citizens of these other societies in the extent to which they profess attachment to religion and in the high rate at which they incarcerate their fellows. By most measures—including surveys concerning frequency of prayer and regularity of worship, reports of church membership, and charitable giving to religious organizations, as well as ethnographic research—the U.S. is a place where religion proudly and independently flourishes. The U.S. is also a place where a higher percentage of the population is incarcerated than in any other country in the world. Both of these distinctions have become more marked in the last thirty-five years.<sup>3</sup>

An examination of the convergence and mutual dependence of these two distinctions, as exemplified in the new faith-based prison programs, will be used in this book to display the peculiar relationship of religion and law in the United States, one that makes disestablishment virtually impossible. Paradoxically, perhaps, disestablished religion depends on government for enforcement of moral norms. In a populist democracy, these norms are defined by majoritarian religious prejudices. Whereas countervailing checks exist to the worst excesses of this partnership—including internal religious practices of prophecy and dissent, and enforcement of the provisions of the Bill of Rights—popular religion and popular justice can reinforce each other in ways, sometimes difficult to detect and almost impossible to eliminate, that can be traced throughout U.S. history—from the Puritans to the so-called “values voters” of the early twenty-first century.

As with all such claims to exceptionalism, this one invites counterexamples. Conventionally the United States is compared to what are regarded as the more secularized countries of Europe, including the United Kingdom and the countries of the former British Commonwealth, but countries to which the U.S. ought to be compared depends on the purpose of the comparison. Religious, social, and political conditions are rapidly changing in Europe and other parts of the world. Virtually every country contains multiple religious minorities and boasts of legal protection for religious freedom. Rates of incarceration are also rising in many countries. Perhaps the comparison group should include countries such as India, which is a pluralist democracy that shares a legal tradition with the United States and has religious and political cultural formations that are parallel in interesting ways to the U.S.<sup>4</sup> It is also important to note that Europe—particularly an expanded Europe—is arguably more religious than generally acknowledged. Nonetheless, I believe it is still useful to regard the United States, as a result of its unusual history and demography, as distinctive with respect to what are called church-state issues.

Among relevant American distinctions are the absence of any history of the comprehensive legal and cultural privileging of a single religious tradition; the religious and ethnic diversity produced by conquest, slavery, and immigration; the pervasiveness of egalitarian and capitalist ideologies; the competitive style of American religion; and the highly mobile nature of the population.<sup>5</sup> As Grace Davie explains with respect to the vaunted secularism of Europe,

The crucial point to grasp is that Europeans, by and large, regard their churches as public utilities rather than as competing firms. . . . Most Europeans look at their churches with benign benevolence—they are useful social institutions, which the great majority of the population are likely to need at one time or another in their lives . . . this attitude of mind, . . . rather than the absence of a market accounts for a great deal of the data.<sup>6</sup>

The persistence of established religious institutions in Europe does not mean that institutional religious authority in Europe has not declined, but it does mean that the decline is less likely to have been accompanied by a rise in entrepreneurial religion, as in the United States. Instead, Davie argues, self-appointed guardians of traditional religious institutions conserve memory on behalf of the community.<sup>7</sup> Davie's observation would be relevant in many countries.

Importantly, religious and Enlightenment influences have not been mutually exclusive in the United States. The Puritans believed in reason. Reasonable Christianity, a theological tradition emerging out of seventeenth- and eighteenth-century philosophical inquiry, has a strong legacy in the

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United States. Evangelicalism and immigration deeply changed the contours of this American Christianity over the next two centuries, but confidence in the rationality and effectiveness of religion persisted. Religious revival and law-and-order populism are not unique to the United States, but the U.S. stands out in both respects. The two are connected, historically and sociologically, and the story of either one cannot be fully told without implicating the other.

The religion discussed in this book happens in a prison. Prisons are a post-Enlightenment invention. Before the nineteenth century, punishment in Europe, its colonies, and most of the rest of the world, for ordinary criminal offenses, was usually corporal: whipping, branding, public shaming, exile, or hanging. Confinement had been used before the nineteenth century mostly for pretrial detainment or, occasionally, for detaining debtors, but not usually for punishment. Prisons, as we know them, were invented in the late eighteenth century in England by Christians.

In the United States, prisons were promoted in the early Republic as a more humane form of punishment, a more Christian alternative to what was perceived to be the casual brutality of corporal punishment as practiced in Europe.<sup>8</sup> Early prototypes of the enlightened prison were the Auburn State Prison in New York and the Eastern Penitentiary in Pennsylvania. Famous U.S. visitors such as Alexis de Tocqueville and Gustave Beaumont traveled to see these newly created American prisons where solitude, work, silence, and religious instruction and exhortation were intended to lead to penitence and reform.<sup>9</sup> They were often viewed as the place, par excellence, for the formation of the democratic subject, also understood as a religious project.<sup>10</sup> The subsequent history of prisons in the United States is often characterized as exhibiting a cyclical pattern of alternating periods of corruption and overcrowding followed by well-meaning reforms. The history of U.S. prisons is also intimately bound up with the history of slavery, particularly in the southern states where a harsh post-emancipation system of leasing prisoners to private contractors was common into the twentieth century.<sup>11</sup>

Prisons are a persistent trope in the imagining of modernity. Scholars and writers have repeatedly turned to prisons in the hopes of finding clues to understanding the modern condition. This, David Rothman suggests, is partly because prisons, although they now seem an entirely natural part of the landscape, when viewed in the context of the longer history of punishment, are a strange invention. “Why invent a system of incarceration?” Rothman asks, and then continues:

Why substitute confinement in segregated spaces and invent a system of bell-ringing punctuality and steady labor? Why channel the impulse

to do good into creating something as strange as prisons and mental hospitals—a system that more than 150 years later can still prompt an inmate to want to meet the man who dreamed it all up, convinced that he must have been born on Mars?<sup>12</sup>

Rothman and other historians of the prison have found the answers to these questions in a troubling mix of genuine benevolence, a disciplinary dark side to liberal governance, the growth of scientific knowledge about human behavior, and a coming together of fear and self-interest, all of which are evident from the earliest projects of religiously as well as secularly motivated prison reform.<sup>13</sup>

Norval Morris and David Rothman, in their introductory essay to *The Oxford History of the Prison*, discuss what they describe as “the basic dysfunction of the prison itself.” Notwithstanding that imprisonment has become the punishment of choice in many places, the authors write, “most students of the prison have increasingly come to the conclusion that imprisonment should be used as the sanction of last resort, to be imposed only when other measures of controlling the criminal have failed or in situations in which those other measures are clearly inadequate.” To be sure, they add, “the usual public response to such a proposition is that it could be made only by someone who cared not at all, or certainly too little, for citizens’ safety. . . . [T]he public has always overwhelmingly supported whatever punishments were inflicted as a means of either reducing or preventing an increase in crime.” However, they conclude, “research into the use of imprisonment over time and in different countries has failed to demonstrate any positive correlation between increasing the rate of imprisonment and reducing the rate of crime.”<sup>14</sup>

Prisons do not work, Morris and Rothman conclude, yet new ones are being built every day. In many depressed areas in the United States they are seen simply as opportunities for private industry and job creation.<sup>15</sup> Law professor Melvin Gutterman states it starkly:

Today, as at the beginning, the most serious social consequence of the prison system is the disintegration of the human personality of those committed to its confines. The prisoners suffer from what may be called a loss of autonomy as they are constantly “subjected to a vast body of rules . . . which are designed to control their behavior in minute detail.” The deprivation of autonomy represents a serious threat to their self-image as adults. . . . While attempting to “re-impose the subservience of youth,” the convicts are told to take their medicine like adults. As the normative form of punishment, imprisonment may not be much of an improvement over corporal punishment. Even public flogging did not contribute to the degradation and disintegration of the human personality as much as conditions do in our prisons today.<sup>16</sup>

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Gutterman insists that, “a prisoner, to be prepared for a life of freedom, must be trained in some sort of social environment, which, as to his liberty and responsibility, has a fair resemblance to the society he will re-enter.”<sup>17</sup>

Punishment is usually understood to be a core function of the modern state; it is what distinguishes the modern state from premodern societies, where punishment was a private prerogative for settling scores or obtaining compensation.<sup>18</sup> The power of the state might be understood to be concentrated in the prisoner’s situation and in the shadow the prisoner casts across the landscape.<sup>19</sup> But prisons are perhaps ironically, places where one cannot get away from the state’s relationship to religion.<sup>20</sup> The modern state is also perhaps at its most religious when it exerts total control over its citizens and attempts to coercively remake them into new human beings. Religious and political authority and sovereignty in prison are homologous with each other in several ways: state/church, judge/god, crime/sin, prisoner/penitent. Even when explicitly religious language is absent, the sacred haunts the prison and all who work there.<sup>21</sup>

Indeed, both the prison and religion, as distinct institutions, emerge with the modern state. The gradual articulation of secular power distinct from church power, the separation of national citizenship from religious identity, and the contemporaneous discovery of “other” religions made possible the invention of “religion” as we know it—as a universal and *sui generis* institution within human societies,<sup>22</sup> an articulation that is simultaneous with the sacralization of state power.<sup>23</sup> Although all religion in modern states occurs within spaces determined by the rule of law, the modern state’s comprehensive authority over prisoners makes possible a particular intimacy in the way in which such spaces are created. U.S. courts have, in the last quarter of the twentieth century, found in the Constitution an obligation on the part of the state to affirmatively provide religious opportunities to prisoners, but that obligation is understood to be seriously limited by judicial deference to the demands of prison governance, domestic security, and national defense. Religion in prisons and prison religions are distinctive products of the modern state and its ongoing interest in producing certain kinds of subjects.

Notwithstanding the common acceptance of the prison as the preferred form of punishment in the modern West, lingering questions remain: “Why imprison?” Does prison work? Under what circumstances should a modern democratic state restrict the freedom of one of its citizens or of any person under its control? The existence of the U.S. detention center at Guantanamo Bay is a daily reminder of the unsettled nature of this issue. But the millions of Americans who are confined in state and federal prisons throughout the United States are no less a matter of concern. A commonplace among scholars of criminology is that little or no data or theory of human behavior or society exists to support reliance on the

prison as *the* answer to crime. No theory of justice, and no theory of how best to prepare prisoners for return to society, can justify the many lengthy sentences meted out by U.S. courts. Furthermore, given the meager resources dedicated to the rehabilitation of prisoners in the United States, there is little hope for addressing the needs of those prisoners; 90 percent of them suffer from substance abuse and 50 percent from mental health problems and a substantial number are nonliterate.<sup>24</sup> Under these conditions, what can imprisonment hope to accomplish other than the temporary removal of some of society's members and emotional satisfaction for those who fear them?

These persistent issues with respect to prisons are a subset of a larger set of questions about law in late modernity. In the last century the claim that law is a carrier of the best of modern liberalism has been substantially undermined by nationalist abuses of legalism, by various schools of legal realism, as well as by postmodern critiques.<sup>25</sup> David Luban, in his book *Legal Modernism*, quotes the legal philosopher Roberto Unger describing “‘a basic, common experience in modern society’” as that of having “‘the sense of being surrounded by injustice without knowing where justice lies.’”<sup>26</sup> Luban himself understands the modernist crisis in law as created partly by an over-reliance on scientific models, forsaking the critical need for narrative.<sup>27</sup> Richard Sherwin sees law undermined through its fusion with popular culture.<sup>28</sup> Countless articles and books have considered the legal conditions of early-twenty-first-century man as those of a person who has undertaken the responsibility of perpetual self-reflection and criticism in a situation of unstable foundations. Great hopes are pinned on the global possibilities of the rule of law, a rule that continues to carry with it the dark figure of the prisoner.

Although not often noted by legal scholars, religion is a part of this modern legal story, and not just in prisons. Some see religion as the cause of law's problems,<sup>29</sup> whereas others see it as the solution.<sup>30</sup> A growing number see law and religion as intimately related. Rejecting an ideologically driven separatist worldview, many historians are reexamining the interesting and perduring connections between law and religion. The legal secular, as Vincent Pecora and others have noted, emerges in relationship to a constant imagining of the religious “other.”<sup>31</sup> In other words, the secular, in its critique of religion, necessarily preserves religion but at the same time takes on some of the tasks of the religious.

Modernity has, among other effects, resulted in the continuing elaboration of two domains, the religious and the secular. Until quite recently, the relationship between the two has been understood to be primarily embodied in the formal bureaucratic division of labor between church and the state. That understanding is continuously challenged and undermined, however, by local forms of non-Christian religion, by antinomian

popular religion, and by romantic elaborations of the value of individual subjectivity.<sup>32</sup> Over time, the secularization of law has played a central role in enabling both the separation and the ongoing cooperation between church and state.<sup>33</sup>

Imprisonment is extremely seductive as a metaphor for life. It is as if the prison is not only where the state is most state-like and most church-like but perversely where the individual is most human. We use the narrative of the prison experience for our own purposes, turning it into an opportunity to ponder life in general—sometimes, in the process, effacing the squalid, inherently violent, and humiliating particularities of imprisonment itself. To be human in the United States today is to be free to make rational choices. We expect our free modern selves to choose everything, including religion. How might one live as oneself in prison? It would be easy to see the recurrent eruption of the religious in the prison, indeed in law generally, as a symptom of this unfinished business.

I am acutely aware of my own privileged position in relation to the experiences of prisoners. I am not a specialist in the criminal justice system, and I do not pretend to speak for all U.S. prisoners, or even for any of the individuals whose testimony is retold in this book. I take their public action of filing a lawsuit and their public testimony in that action as an intervention in a public debate about an issue that is of moment today in the United States and elsewhere: how to think about the relation of religion and religious differences to law in our pluralistic, egalitarian society in which religious authority has been formally disavowed as an explicit partner of the state.

Massive incarceration and religious revitalization are converging today in prisons around the world, challenging us to think carefully about what we mean by religion, religious freedom, and the separation of church and state. This book concerns one religiously based—now commonly known in the United States as “faith-based”—rehabilitation program in an Iowa prison that a U.S. District Judge, in 2006, declared an unconstitutional establishment of religion. I focus on the way that lawyers, witnesses, and judges used various religious discourses in that trial, suggesting that we need to rethink the validity of the theoretical structure underlying disestablishment. Although there are reasons to find the Iowa arrangement inappropriate, it is not possible to locate those reasons in the isolation and separation of the “religious” for the purposes of public law and policy.

This book forms a pair with my previous one, *The Impossibility of Religious Freedom*,<sup>34</sup> where I considered the impossibility of isolating religion for the purposes of protecting its free exercise. Here I examine the implications of that impossibility in relation to disestablishment. In each

case, the privileging of religion in an egalitarian context of radical diversity and deregulation in the religious field, one in which religious authority has shifted to the individual, leads to discrimination and legal incoherence. In the correctional context, in what one might call a parody of theories of the modern self, prisoners participating in the InnerChange Freedom Initiative are asked to reinvent themselves as free moral subjects by using the tools of a populist and punitive theory of justice combined with various forms of vernacular Christianity, all the while disadvantaged by addiction, illiteracy, racism, and childhood abuse.

Echoes of larger political issues about the nature of the state and its relation to the individual can be seen at every step in the evolving institution of the prison in the United States and the evolving cultural politics of religion. The limits and constraints of secularization as a basis from which to describe and theorize the modern are under active reconsideration today from various disciplinary and political perspectives. While set in the context of the interpretation of the religion clauses of the First Amendment to the U.S. Constitution, particularly the establishment clause, this study is inspired by the current debate on secularization, particularly by Talal Asad and his proposal to reconsider the secular and its varying relationships to the sacred, as a formation of the modern, and by José Casanova's widely read challenge to rethink the ongoing presence of public religions in the modern world.<sup>35</sup>

The public discussion of religion, law, and politics in the United States today is highly polarized, with the language itself so stale from excessive use as to discourage anyone who would seek a sane conversation. Stanley Fish, in his essay "How the Right Hijacked the Magic Words," described this linguistic stalemate.<sup>36</sup> In his inimitable style, Fish explained how "the Right" uses such words as equality, rights, and freedom to mean the very opposite of what "the Left" means by them. So, he points out, affirmative action, it turns out, is a denial of, rather than a means to, the realization of equality—and Christians turn out to be a minority with rights just as African Americans are. While explaining how this "sleight of hand," as he calls it, is performed rhetorically, largely by focusing on the motivations and intentions of particular individuals rather than on large-scale structures and effects, Fish mocks the Left for standing by with their mouths open while the language is stolen from them. He concludes his essay—and the book in which it appears—with the words: "and before we know it all the plovers will be gone and all the subcontractors will be white."<sup>37</sup> And, many liberals would add, the United States will be a theocracy.

The culture wars, as played out in the U.S. legal-political context, have been described as a struggle over control of the language. Specifically,

who decides what the words mean? Although in the American political context this struggle is often seen as the result of a deliberate, carefully planned, and subversive campaign by conservatives, something larger and more complex is at work here. The “linguistic turn” in law is beyond the scope of this book; however, the need to pay attention to the meaning of words as a way to understand the culture is certainly evident in debates over constitutional interpretations and the purported universalism of the language of international legal instruments. The need to attend to the meanings of words has many explanations, but in the U.S. context, it is heightened by the extraordinary biblicism of U.S. religious culture, sometimes derisively termed “bibliolatry.”<sup>38</sup>

Is what Fish regards as a hijacking of words by the Right simply a cynical rhetorical trick to disarm and distract the Left so that conservatives can reverse the course of history? Worse yet, is it a trick authorized and legitimized by religion? Is this effort, one the Right might prefer to describe as an attempt to repossess rather than hijack the words—part of a concerted effort to reject the Enlightenment and return us to a premodern world of divine authority and hierarchy, a world without equality, rights, *or* freedom? Is the religion of conservatives, indeed, any religion, the antithesis of all that is most cherished about free, liberal, and open societies, societies that are governed by the rule of law? That is a view widely held in U.S. legal circles.

A source of genuine amazement (often accompanied by fear) to most liberals is that religious conservatives wish to participate in the common political culture. Particularly puzzling to the Left is that the so-called Religious Right goes further and boldly lays claim to the universal, a realm liberals regard as their own. Religion is supposed to know its place, and its place, at most, is as a minority party. Most liberals in the United States seem most comfortable with religion that is “sectarian,” sociologically speaking, religion that stands apart from the larger culture.<sup>39</sup> As long as entry and exit from sectarian religious communities are understood to be voluntary, then consenting adults wishing to live in these religious societies are to be tolerated, even occasionally admired and respected for their discipline, whether they are Amish, Orthodox Jews, Buddhists, or members of any number of religions. Liberals also seem to be comfortable with religious rhetoric and culture in the service of what they understand to be political liberation agendas such as the prophetic language that is conventionally understood to have propelled the civil rights movement.<sup>40</sup> The problem the Left has with religion emerges when people who are perceived as religious or who use religious language are not content simply to live in their own worlds or provide freedom songs or cultural color, but instead want to challenge common politics and culture, to “hijack”

*our* words and, worse, *our* politics, indeed our very definition of what it means to be human.

The only version of public political religion that many liberals can imagine is what is often derisively called theocracy—either of the premodern European Christian type or, now more commonly, that of the imagined return of the Islamic caliphate. Liberals assume that the Religious Right secretly wants a religious state.<sup>41</sup> What is universal is modern and is understood to be secular. Universalist anthropologies, cosmologies, and values are to be secularly derived and expressed. Religion is particular, a vestige of the premodern. The particular is to be controlled and governed by the modern and universal, that is, by the rule of law. These prejudices among liberals not only make it difficult for them to hear what religious conservatives are saying; they make it extremely difficult for liberals to achieve their proclaimed goals.

Religious conservatives in the United States, for their part, are divided within themselves. Like most liberals, most of these conservatives believe strongly in the separation of church and state, and in voluntary religious affiliation. Protestants, by and large, are the group that rejected state authority in religious matters. It was mostly Protestants who rejected ritual and other outward forms of observance in favor of an interior and subjective religious experience. Many Protestant conservatives today, however, also want to participate in creating the values of a pluralistic society. In sociological terms, they want to be both a church and a sect.<sup>42</sup> American religious conservatives do not want a theocracy; they do not desire rule by priests, for they believe in universal priesthood. They do want to rid the world of what they understand to be the pernicious human-centered pessimism of moral relativism and secular humanism. They want to convert the world to an anthropology of values that are transcendental and eternal, and founded in biblical truth. To do that, they must find ways to translate their religiously derived values into universal ones, and to use state authority to impose those values on all.<sup>43</sup>

Fish would say that the problem is the liberals' failure to see the particularism of their version of the universal. The Left should simply admit that their realm is not universal and simply be willing to defend it as "better."<sup>44</sup> Pecora and others would argue that we have now come to a point at which it is clear that both are right, and the practical political task of learning to reinvent the universal together becomes more urgent by the day.

In this book I explore the lack of understanding and communication across the cultural divide in the United States by examining the notion of the legal and religious self implicit in faith-based social service programs. The current argument in the United States about the role of religion is

between groups that have largely shared a modern legacy concerning the nature of human beings<sup>45</sup> and are ambivalent as to whether social-scientific approaches are a viable basis for law, social policy, and practices that can reform individuals. Much has been written recently by philosophers and social scientists about the “self”—about subjectivity, consciousness, and the social imaginary—in an effort to describe what is peculiar to the anthropology, epistemology, and sociology of the modern.<sup>46</sup> Several aspects of the models of the self are implied in the lawsuit, models that exemplify the convergences, and divergences, that I see between liberal and conservative social imaginaries, and the selves they imply. When we consider these questions in the context of faith-based social services for prisoners, we can see the practical consequences of losing faith in freedom, equality, rights, and reason.

I will describe PFM and IFI as evangelical, notwithstanding its contested meaning today both in the scholarly community and among evangelicals themselves.”Evangelical” in its narrowest etymological sense can be used to modify any Christian activity that derives from the writings of the Evangelists, that is, the writers of the four canonical gospels. The word has been used throughout Christian history in many languages and cultural contexts, but I am most concerned here with describing and understanding certain aspects of the evangelical Christianity that has flourished and evolved in the United States since the American Revolution. That modern U.S. form of Christianity is, of course, related to a larger, religious event that traces its roots to early modern Europe and has since spread around the globe, but it takes a particular form in the United States, in part because of the legal structuring of religion in U.S. life. I discuss American evangelical Christianity at greater length in chapter 2.

American evangelicals and their liberal critics share much of the modern social imaginary, as well as practices of self-discipline, born in the early modern period. What the Right, and the Left, in the United States want, for the most part, are disciplined and productive citizens. Both understand authority and the capacity to change to reside in the individual.<sup>47</sup> Troubling evidence suggests, however, that self-discipline, even self-discipline with God’s help, cannot adequately cope with current emerging and pressing issues on that individual: the pathos of the divided self, globalization, and radical epistemological and normative pluralism, religious *and* secular.<sup>48</sup>

One of the most visible areas in which the politics of religion in the United States is being reinvented has resulted from the deliberate effort to involve new religious groups in the delivery of social services. Government contracting with private agencies (both profit and nonprofit) to provide social

services has greatly expanded in the United States in recent years.<sup>49</sup> Coinciding, to a certain extent, with this privatization of government has been a concerted effort, at the local, state, and federal levels, particularly since the election of George W. Bush, to extend such contracts to what are called “faith-based” providers.<sup>50</sup> “Charitable choice,” as that effort is often known, is based on an asserted right to equal opportunity for certain new religious providers as well as on the assertion that neither the government nor the traditional, large, religiously affiliated providers, such as Catholic Charities, are adequately delivering social services. Equal opportunity is said to be necessary to “level the playing field,” giving small-scale (that is congregational) and evangelical religious groups, allegedly previously discriminated against by the government, an opportunity to compete for government funds on a par with large established §501(c)(3) religious social service providers. Lew Daly argues convincingly that the most serious shortcoming of the new faith-based initiatives is that they are intended to, and, in fact, do, benefit religious groups rather than the poor.<sup>51</sup> But it is also claimed by those who advocate on behalf of faith-based initiatives that local churches and para-church organizations that use “faith” in their service plans can do the work better because they treat clients holistically. Faith is understood to be both more effective and more efficient for delivering certain social services.<sup>52</sup> The need is great, they say, and there are armies of compassion just waiting to be tapped.

After more than ten years of experience with faith-based initiatives, many questions remain. When we speak about “faith-based” groups, whose faith and whose right to equal opportunity is being invoked—the provider’s or the client’s? Is faith the motivation for the service or a component of the service? How do we evaluate these efforts? And to what extent is the expression “faith-based” not substantive but merely rhetorical and strategic, just code words concealing partisan constituencies and agendas? Religion scholars would argue that “faith” is not the defining characteristic of many religious traditions outside Protestant Christianity.<sup>53</sup> To translate religion as faith from this perspective is itself to discriminate against the religious practices of those other religious communities. Although welfare has certainly been transformed in the last ten to fifteen years, and religion itself adapts in protean ways to the new legal and social environment, currently there is little hard evidence that the much-vaunted faith-based component of the new social services accomplishes the grand goals claimed for it.<sup>54</sup> Little rigorously peer-reviewed quantitative data are available concerning the effectiveness of faith-based social services, partly because there has not been enough time for long-term longitudinal studies. Specifically regarding prisoner rehabilitation, claims concerning the greater efficacy of faith-based programs are largely anecdotal or self-promoting. It is also difficult to compare private and

public programs in all areas of social services, as private agencies have greater discretion in who they admit to their programs and when clients can be expelled.

A comprehensive study of the effectiveness of faith-based interventions in crime was commissioned by the Department of Justice in 2004. The final report, prepared by Caliber Associates, contains a description of studies of the relationship between religiosity and crime over the last half century, a discussion of sociological research concerning the relationship of religiosity to delinquent behavior, and a list of exemplary faith-based organizations in this field, including PFM and IFI.<sup>55</sup> Asserting that “religion is a broad and complex theoretical construct” and emphasizing the inconclusive results of current research, the study reviewed various intervention theories, including hellfire theory, social control theory, social bond theory, and social learning theory, and concluded that, in a general way, “faith does work” for crime prevention and that further research is needed along with partnering with faith-based organizations to address crime prevention.<sup>56</sup>

In the end, though, bids for government contracts have been fewer than expected from faith-based organizations. Many smaller religious organizations lack the infrastructure necessary for government contracting, and some are simply not interested in the work. There has been no increase in dedicated government funds for such purposes, although there is evidence that a higher percentage of available funds has gone to faith-based providers in the last several years.<sup>57</sup> Meanwhile, while there is enormous variety among the states, most states lack the resources to monitor contract compliance (as to efficacy, fiscal responsibility or constitutionality).<sup>58</sup> Private studies are few and their results inconclusive. Some real gains do seem to exist, although the evidence is mostly anecdotal and ambitions remain high—nowhere more so than in the case of prisoner rehabilitation.

I do not review comprehensively the recent proliferation of faith-based prison rehabilitation programs in the United States; many religiously based projects exist in both state and federal prisons.<sup>59</sup> Instead, I focus on one evangelical Christian rehabilitation program implemented in one Iowa prison. An enormous variety of religion is everywhere in U.S. prisons, religion facilitated by prison chaplains, various external organizations, and groups attached to the large conglomerates of world religious traditions, as well as every form of small-scale and new religious movement. Prisoners themselves also initiate investigations into religion through mail-order courses, reading projects, bodily practices, renewal of family religious traditions, explorations of ethnic and racial identities, meetings with fellow prisoners, and negotiations with prison authorities. For the most part, prison authorities welcome such interest

and activity by prisoners unless it appears to be clearly aimed at undermining prison authority.

What is new in the last decade, however, is the effort to design and implement extended and holistic *residential* prison reform efforts based on explicitly religious cosmologies and anthropologies. Echoing the projects of early-nineteenth-century Christian prison reformers, these programs require the prisoners' full immersion in a Christian environment of penitence and reform. This book will use the record in the trial, *AU v. PFM*, to reflect on contemporary discourses about religion and the models for the creation of selves that are used by philosophers, social scientists, lawyers, and religious reformers. Should the projects of evangelical faith-based prison rehabilitation programs be understood as attempts to *re-sacralize*, in a traditional sense, society and the modern self? The version of the self that these programs evince is firmly rooted in modern refashionings of the self that were first imagined by Protestant reformers and liberal political thinkers, both religious and secular, in the seventeenth century. But these refashionings continue, albeit in new and transformed ways, to partake of the dominant modern understanding of the self that undergirds projects of self-discipline worldwide in the twenty-first century, both religious and secular, an understanding influenced as much by global capitalism, deracination, and the mass media as by religion.

One more caveat. In the landscape of faith-based social services, it is important to distinguish between the types of social services provided. Although constitutional issues have been raised across the board—for example, regarding discrimination in hiring—it is particularly those social services that are designed to effect personal transformation that most acutely focus attention on *religious* “technologies of the self.”<sup>60</sup> Faith-based soup kitchens, homeless shelters, and medical clinics, as well as child care, after school, and job training programs, while catering to vulnerable populations and arguably requiring a heightened attention to constitutional standards of care, are less directly concerned with personal transformation in a comprehensive sense. Family counseling, substance-abuse programs,<sup>61</sup> and prison rehabilitation, on the other hand, are explicitly directed at the creation of new selves. What new selves do Americans want to create? How is that to be done? Where are these questions to be debated? And what does the U.S. Constitution and the rule of law permit when these selves are prisoners of the state?

The faith-based rehabilitation program at issue in the trial, InnerChange Freedom Initiative (IFI), is a subsidiary of Prison Fellowship Ministries (PFM). Unlike previous PFM prison programs, IFI was designed to be a comprehensive pre-release program, preparing prisoners over the course of eighteen months for life on the outside. It is described in its own litera-

ture and on its Web site as an eighteen-month, 24/7, “Christ-centered,” “Bible-based” course designed to reduce recidivism through personal transformation. As administered by IFI in Iowa, the program was run by paid counselors and volunteers, and included an “aftercare” mentorship to assist prisoners in returning to the world. The description here of IFI’s Iowa program is based on the trial transcript and findings of the district court, as well as on publicly available information from PFM and IFI. Self-descriptions of PFM and its in-prison program, InnerChange Freedom Initiative, can be found at [www.pfm.org](http://www.pfm.org) and [www.ifi.org](http://www.ifi.org).<sup>62</sup> As of June 2, 2006, approximately \$1.7 million (35–40 percent of the total cost of the program) in direct payments had been made to IFI for its program in Iowa, the money largely coming from the Healthy Iowans Tobacco Trust and the Inmate Telephone Rebate Fund.<sup>63</sup>

Nine Iowa prisoners and their families, supported by Americans United for Separation of Church and State,<sup>64</sup> brought the action challenging the constitutionality of Iowa’s contract with PFM. It was tried before Judge Pratt<sup>65</sup> over a three-week period in the fall of 2006. The plaintiffs were represented during the trial by two staff lawyers for Americans United, Alex Luchenitser and Heather Weaver, as well as by a Des Moines attorney, Dean Stowers. The defendants, PFM and IFI, were represented by the Richmond, Virginia, office of the national law firm Troutman, Sanders, L.L.P. The lead trial attorney for the defendants was Anthony Troy. The State of Iowa was represented at trial by Gordon Allen, Deputy Attorney General, and Lorraine Wallace, Assistant Attorney General. I was an unpaid expert witness in this trial, and I will briefly describe my testimony. My role is not the focus of this book. (My evidence is discussed in chapter 5.)

Trials are complex events, and many different stories can be told about any one trial. An entire literature has explored what happens in the courtroom. Particularly helpful to me in writing this book were Robert P. Burns’s *A Theory of the Trial* and Dominic LaCapra’s “*Madame Bovary on Trial*.”<sup>66</sup> Burns argues that, contrary to the received wisdom—that the trial “is the institutional device for the actualization of the rule of law”—the trial is, in fact, a complex performance of practical morality that, at best, provides knowledge of the practical truth about a situation. In trials, Burns says, decisions about the truth of what happened are always connected to judgments about what should be done about it. The collective performance of a trial, he observes, is to “think the concrete,” to give “consistent attention to the thing itself,” and “to achieve a truth beyond storytelling.”<sup>67</sup> Ideally, he says, the trial aims to achieve “moral realism,” in the sense explored by Iris Murdoch.<sup>68</sup> Although Burns concedes that not every trial completely succeeds as an act of moral realism, his detailed reconstruction of what goes into the making of a trial “force[s] the mind

downward toward the concrete, intensif[ies] the competition over the meaning of the events being tried, and cultivate[s] the suspension of judgment until all aspects of the situation are explored.”<sup>69</sup>

As an accomplished trial lawyer and philosopher of law, Burns is primarily interested in defending the justice of what happens in the courtroom. His performative reading makes another claim, however, a descriptive one. Like anthropologists of the law, Burns treats law as a social and cultural form that incorporates the assumptions underlying the wider cultures in which it is embedded. Along with Lawrence Rosen and others,<sup>70</sup> Burns insists on the particular as necessary to understanding and making real the general. Dominick LaCapra’s account of the trial of Gustave Flaubert’s *Madame Bovary* for immorality adds to these the peculiar intertextuality that results when a cultural artifact is put on trial. Misreadings of the novel by both prosecutor and defense reinforced the instability of the text itself and the difficulty of identifying the moral. “Secularization,” LaCapra comments, “itself furthered the tendency of a desire for transcendence to merge unsettlingly with the possibility of transgression.”<sup>71</sup>

Trial witnesses are not ethnographic informants in the usual sense. Their words are shaped in a special way by the legal context. The prisoners in this case were not there to represent their religious communities but were selected through the logic of constitutional advocacy litigation. But all texts and all speakers are shaped by their circumstances and speak to multiple audiences out of multiple histories. Trial transcripts are texts that can be read using the tools of textual analysis, informed by an understanding of the peculiar demands of the law and of the moral realism of which Burns speaks. Words matter in the courtroom in a special way. That they have such a purpose does not diminish their value as resources for cultural understanding. This is true particularly of words about religion in the United States, words that have historically been shaped by law.

This book offers an ethnographic reading of the trial transcript and other texts relevant to the civil lawsuit *AU v. PFM*. I contend that by paying close attention to the language and arguments of the witnesses, the judge, and the lawyers, and to the circumstances surrounding trials that center on the twin religion clauses of the First Amendment, we may better understand what counts as religion today, and how it might be fairly regulated in a democratic pluralist society? Should religion be specially protected—or specially restricted—by law, or should law treat equally those who call themselves religious and those who do not? Does law have a choice?

Religion, as conveyed by the traditional word “church,” particularly in the way it is related to the European state, is rapidly disappearing. Religion in various forms appears to be a persistent aspect of human (and

perhaps nonhuman) life, but it has taken different forms in different places. New forms of religion require new forms of law. I believe that “religion” is not a useful term for U.S. law today, because there is no longer any generally accepted referent that is relevant for defensible political reasons. I think it is valuable to use the word “religion” outside of legal contexts. In wishing to use religion-neutral language in the law, I am not claiming that religion does not exist or that neutrality is achievable in a comprehensive way.

The first chapter presents the Iowa program as the prisoners described it at the trial. The second chapter looks at the purpose and theology of PFM, setting that purpose and theology within the longer historical context of American evangelical Christianity. Chapter 3 examines religious and secular theories of crime and punishment, and the ambiguities of their interrelationship as exemplified in IFI. Chapter 4 considers the nature of religion today in the United States and in contemporary life generally, and chapter 5 reconsiders disestablishment in the U.S. in light of this trial and its contexts. The conclusion discusses the trial in the light of the category of the secular.