

**THE RELIGIOUS RIGHTS OF INCARCERATED
PERSONS: THE GEORGIA CLERGY PRIVILEGE,
RLUIPA, AND THE FREE EXERCISE CLAUSE**

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I. INTRODUCTION

In dealing with religion, as in many other areas of domestic policy, the United States Supreme Court (the “Court”) only permits the executive and legislative branches limited discretionary authority. These limits are often unclear and tend to vary over time depending upon the predilections of a ruling

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coalition of at least five justices. This is painfully apparent in the area of the religious rights of incarcerated persons. As is often said, such persons do not forfeit their constitutional rights as a consequence of incarceration,¹ although limitations may be placed on the exercise of those rights based on the needs of the penal system as ultimately determined by the courts.²

Monitoring communicant-spiritual advisor discussions,³ banning books,⁴ limiting beard length,⁵ not providing footbaths,⁶ not accommodating special diets,⁷ not providing spiritual advisors,⁸ cutting hair,⁹ not transporting prisoners for religious observances,¹⁰ not allowing proselytizing,¹¹ denying

1. *Bell v. Wolfish*, 441 U.S. 520, 545 (1979).

2. *Turner v. Safley*, 482 U.S. 78, 81 (1987) (those limitations must not be extraordinary or beyond the normal range for like offenses); *see Meachum v. Fano*, 427 U.S. 215, 225 (1976).

3. *See Tramel v. United States*, 445 U.S. 40 (1980); *see infra* text accompanying note 102.

4. *See Washington v. Klem*, 497 F.3d 272 (3d Cir. 2007) (limiting the number of books available to a prisoner who needed to read a certain number in order to practice his religion a substantial burden).

5. *Gooden v. Crain*, 405 F.Supp.2d 714 (E.D. Tex. 2005) (beards not fundamental to religious belief for a Muslim. Prison authorities had compelling government interest in having accurate pictures of inmates); *Dakar v. Wetherington*, 469 F.Supp.2d 1231 (N.D.Ga. 2007) (facial hair prohibited unless medically indicated is permissible).

6. *Perez v. Frank*, 433 F.Supp.2d 955 (W.D. Wis. 2006) (not providing foot bath opportunities for Muslims 24/7 a mere inconvenience).

7. *See Abdul-Malik v. Goord*, (S.D.N.Y. 1997) (discussing special diets as a possible burden on scarce prison resources); *Baranowski v. Hart*, 486 F.3d 112 (5th Cir. 2007) (observance of Kosher diet a religious exercise); *Madison v. Riter*, 240 F.Supp.2d 566 (W.D. Va. 2003), *judgment rev'd on other grounds*, 355 F.3d 310 (4th Cir. 2003), *cert. denied*, 545 U.S. 1103 (2005) (prohibiting a Kosher diet a substantial burden); *LaFevers v. Saffle*, 936 F.2d 1117, 1119-20 (10th Cir. 1991) (prisoners have a constitutional right to a diet conforming to their religious beliefs).

8. *See Cruz v. Beto*, 405 U.S. 319 (1972).

9. *Warsoldier v. Woodford*, 418 F.3d 989 (9th Cir. 2005) (hair length restrictions must be justified and if justified must be the least restrictive means of serving the interest claimed).

10. *Price v. Caruso*, 451 F.Supp.2d 889 (E.D. Mich. 2006) (prison authorities might be required to transport prisoners if there is an insufficient number for services).

11. *See Spratt v. Rhode Island Dep't of Corr.*, 482 F.3d 33 (11th Cir. 2007) (ban on preaching by inmates is a substantial burden).

access to religious services as punishment,¹² impeding compliance with rituals required by some religions particularly Islam,¹³ confiscating religious jewelry,¹⁴ and denying prisoner requests to be segregated according to religious beliefs¹⁵ are all claimed to place substantial burdens on religious exercise. If these are substantial burdens, prison authorities must defend those actions as being the least restrictive means to further a compelling government interest. And to make matters even more difficult, case law and the Religious Land Use and Institutionalized Persons Act (“RLUIPA”)¹⁶ make clear that strict scrutiny does not only apply to what is fundamental in religious observances.

When considering the law applicable to the situations above, are RLUIPA, the Free Exercise Clause¹⁷ and the Georgia Clergy Privilege¹⁸ cumulative or redundant? This Article demonstrates that in view of RLUIPA and Free Exercise jurisprudence, the Georgia Clergy Privilege is generally superfluous. When RLUIPA applies, prison authorities must justify any limitations on the free exercise of prisoners under strict scrutiny, rather than the rational basis test. Hence, for clerics—broadly

12. *See* *Mayweathers v. Terhune*, 328 F.Supp.2d 1086 (E.D. Cal. 2004) (Muslim prisoners were disciplined for missing work assignments to go to religious services). This suggests that prisoners can not be denied religious services absent a compelling government interest specific for the situation; *see also* *Banks v. Havener*, 234 F.Supp. 27 (E.D.Va. 1964) (Muslim prisoners were prohibited by practicing their religion after a riot against prison authority).

13. *See* *Shidler v. Moore*, 446 F.Supp.2d 942 (N.D. Ind. 2006); *Meyer v. Teslik*, 411 F.Supp.2d 983 (W.D. Wis. 2006); *Henderson v. Ayers*, 476 F.Supp.2d 1168 (C.D. Cal 2007) (these cases involved impeding religious exercises).

14. *Charles v. Frank*, 101 Fed. Appx. 634 (7th Cir. 2004) (can restrict wearing and size of jewelry, at least, outside of attendance at religious services).

15. *See* *Lee v. Washington*, 390 U.S. 333, 334 (1968) (racial segregation absent “the necessities of prison security and discipline” is unconstitutional); *Steel v. Guilfoyle*, 76 P.3d 99 (Okla. Civ. App. 2003) (Muslim prisoners prayed four times a day outside of his cell. Having to pray once in the company of a non-Muslim is not a substantial burden but merely an inconvenience).

16. 42 U.S.C. §§ 2000cc *et. seq.*(2007).

17. U.S. CONST. amend. I, § 1.

18. *See infra*, text accompanying notes 27-28.

defined—the laws are redundant. For prisoner-communicants, the laws are cumulative since the protections applied to their speech and actions vary depending upon the circumstances and traditions of the religion involved.

Complaints brought pursuant to RLUIPA often also invoke a §1983 action.¹⁹ RLUIPA seems to only allow injunctive relief while a §1983 action provides that persons “shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.”²⁰ Even if prison officials may be liable in their individual capacity, qualified immunity provides “complete protection for government officials sued in their capacities if their conduct ‘does not violate a clearly established statutory or constitutional right of which a reasonable person would have known.’”²¹ Its purpose is to “allow government officials to carry out their discretionary duties without the fear of personal liability or harassing litigation, protecting from suit all but the plainly incompetent or one who is knowingly violating the federal law.”²²

Note that the discussion applicable to RLUIPA, which applies to the states, is also germane to the Religious Freedom Restoration Act (“RFRA”),²³ which applies only to federal prisons, although RFRA unlike RLUIPA limits strict scrutiny to the “central tenets” and “mandated” practices of a religion.²⁴

II. ISSUES CONSIDERED

First, is the Georgia privilege statute facially unconstitutional in that it limits the exercise of the privilege to interactions with

19. 42 U.S.C. § 1983 (2003) (Civil action for deprivation of rights).

20. See *Dakar v. Ferraro*, 475 F.Supp.2d 1325, 1334-38 (N.D. GA 2007), for a discussion of the availability of monetary damages against prison officials.

21. *Vinyard v. Wilson*, 311 F.3d 1340, 1346 (11th Cir. 2002) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)).

22. *Lee v. Ferraro*, 284 F.3d 1188, 1194 (11th Cir. 2002).

23. 42 U.S.C. §§ 2000bb (2007).

24. *Kikumara v. Hurley*, 242 F.3d 950 (10th Cir. 2001) (applied RLUIPA to a request for religious exercise not mandated or compelled). The court held that the burden shifted to the prisoner-plaintiff as to whether the denial of his non-mandated ritual could be exercised by an alternative method less burdensome on the prison and whether the denial constituted a substantial burden. *Id.* at 962.

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Christian and Jewish spiritual advisors—clerics and those analogous to clerics? The short answer is yes. However, recent Georgia cases indicate that the limitation to Christian and Jewish spiritual advisors will be ignored when applying the privilege.

Second, does the privilege statute really make any difference to free exercise rights in view of RLUIPA and the Supreme Court's Free Exercise jurisprudence? The answer is no in the context of incarceration, although when it applies it serves as a protection against compelled testimony.

Third, is the limitation of the privilege to matters of spiritual guidance constitutionally valid? That answer is yes, with two caveats. The sacrament of Confession recognized by the Roman Catholic Church may under the Court's rulings dealing with accommodating religion and its willingness to take into account differences in religious practices in protecting free exercise, make it too limiting for Roman Catholic clerics. A similar sacrament is recognized in certain Anglican confessions. In addition, under RLUIPA and the Free Exercise Clause, the privilege may be too limiting in its protective reach.

Fourth, in view of the Court's limitation on the ability of Congress to expand rights beyond what the Court decides are constitutional rights, is RLUIPA's imposition of the strict scrutiny/compelling government interest test for limits on free exercise in prisons an expansion of the historic view of the Court that such restrictions must only pass the rational basis test? The Court seems content with allowing this expansion of its religious accommodationist jurisprudence,²⁵ at least when tied to the spending power or Commerce Clause. At the same time, the "substantial burden" language of RLUIPA, which triggers the least restrictive means, may be given a flexible interpretation.

Fifth, may prison authorities act differently towards literature provided by and practices engaged in by clerics of different religions based upon whether they are consistent with prison security concerns? This implicates the jurisprudence of closed forums, speech potentially inciting behavioral breeches, and speech inciting to criminal activity. It will surprise no one familiar with the Court's decisions that this question may be

25. See *infra* text accompanying notes 48-76.

unanswerable until the Court fashions its latest constitutional interpretation. It is a safe bet, however, that facially violent literature meant to be immediately acted upon and religious speech advocating immediate proscribed action or such literature or speech that has led to such action can be banned despite any claim of substantial burden.

Sixth, may prison authorities take into account the allegedly violent and separatist nature of certain religious literature, including passages in the Quran and hadith,²⁶ and treat such texts differently than the Christian Bible and Jewish Scriptures? This question is related to prior questions raised in issues four and five above. One likely result is the elimination by prison authorities of much religious literature in an attempt to be “neutral.” This may well result in the elimination of constitutionally protected expression and raise issues of prior-restraint as well as run afoul of the RLUIPA requirement that limits on religious expression be accomplished by the “least restrictive” means. Alternatively, if RLUIPA does not apply, neutrally applied regulations—that is, regulations that are not directed at religious free speech—may well pass the reasonableness test.

III. THE GEORGIA CLERGY PRIVILEGE GENERALLY

Georgia’s statutory clergy privilege reads as follows:

Communication to ministers, priests and rabbis: Every communication made by any person professing religious faith, seeking spiritual comfort, or seeking counseling to any Protestant minister of the Gospel, and priest of the Roman Catholic faith, any priest of the Greek Orthodox Catholic faith, any Jewish rabbi, or to any Christian or Jewish minister, by whatever name called, shall be deemed privileged. No such minister, priest, or rabbi shall disclose any communications made to him by any such person professing religious faith, seeking spiritual guidance, or seeking counseling, nor shall such minister, priest, or rabbi be competent or compellable to testify with reference to any such communication in any court.²⁷

Whether this statute is actually an evidentiary competency

26. See *infra* text accompanying notes 174-202.

27. O.C.G.A. § 24-9-22 (2007).

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statute, rather than a privilege statute, will be left to others.²⁸ The definition of cleric will be assumed to refer to those persons recognized by a religious faith as spiritual leaders even if not formally members of an established clergy. The statute clearly distinguishes between those religious beliefs that are traditionally thought of as the basis of Western Civilization and those that are not.²⁹ In short, it privileges Christianity and Judaism while ignoring other religions, inviting a facial challenge. Perhaps, when the privilege was statutorily established in 1951, other religions, such as Islam, were not on the legislative radar screen or were considered not worthy of notice—cults of various sorts. As applied, however, Georgia courts likely will ignore the limitations.³⁰

The privilege covers communications “professing religious faith, seeking spiritual comfort” and after a 1986 amendment, to those “seeking counseling” or more generally, spiritual guidance. This raises interesting issues with regard to Muslim clerics and those Muslims who serve in positions roughly analogous to Christian clergy or Jewish rabbis, particularly with regard to service as chaplains in prisons, since Islam provides its adherents with an all-encompassing set of rules without any separation of the secular and the sacred.³¹

28. *See* *Sec. Life Ins. Co. v. Newsome*, 176 S.E.2d 463 (1970) (dicta in concurring opinion states that statute creates an incompetency that cannot be waived); but, *see*, *Alpharetta First United Methodist Church v. Stewart*, 472 S.E.2d 532 (1996) (where the Georgia court treated the clergy-parishioner communication as a waivable privilege.).

29. *See, e.g.*, CHRISTOPHER DAWSON, *THE HISTORIC REALITY OF CHRISTIAN CULTURE* (1965); M. STANTON EVANS, *THE THEME IS FREEDOM: RELIGION, POLITICS, AND THE AMERICAN TRADITION* (Regnery Publishing, 1994); ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 316 (Vintage, 1955 Vol. 1) (“There is no country in the world where the Christian religion retains a greater influence over the souls of men than in America... it must be regarded as the first of their political institutions, for if it does not impart a taste for freedom it facilitates the use of it...”).

30. *Parnell v. State*, 581 S.E. 2d. 263, 264 (2003); *Morris v. State*, 571 S.E. 2d. 358 (2002). Both cases referred to a clergy person privilege without the words of limitation in the statute.

31. Islam means “submission.” One who has so submitted is a Muslim. F.E. PETERS, *THE MONOTHEISTS: JEWS, CHRISTIANS AND MUSLIMS IN CONFLICT AND COMPETITION* 90 (Princeton University Press, 2003); *see infra* text accompanying note 202.

The restriction of the privilege to spiritual guidance is illustrated in *Parnell v. State*,³² wherein a criminal defendant admitted his participation in a home invasion to a minister not in the context of seeking spiritual guidance. Therefore, the statements were not privileged.³³ If, however, the admission was made to a Roman Catholic priest during the sacrament of Confession, the privilege may have been held to be too limiting under the Free Exercise Clause. Generally a privilege belongs to the alleged wrongdoer, that is, a person seeking spiritual guidance. In Georgia, because written as an evidentiary incompetency statute, it is an open question as to whether the privilege can be waived by the wrongdoer or even if waived by the wrongdoer, whether the clergyman could testify. In other jurisdictions, the privilege is waivable by the person seeking spiritual guidance. Under the Free Exercise Clause, religious observance is accommodated, protecting both the person seeking guidance and the cleric exercising religious duties, such as keeping confidential what is said during a Roman Catholic Confession even if not for the purpose of spiritual guidance. Thus, even in the absence of a statutory privilege, certain communications are protected from discovery.

Georgia has two constitutional provisions protecting religious observance. One provides for “Freedom of conscience.” It states:

Each person has the natural and inalienable right to worship God, each according to the dictates of that person’s own conscience; and no human authority should, in any case, control or interfere with such right of conscience.³⁴

The others, entitled “Religious opinions; freedom of religion” provides that:

No inhabitant of this state shall be molested in person or property or be prohibited from holding any public office or trust on account of religious opinions; but the right of freedom of religion shall not be so construed as to excuse acts of licentiousness or justify practices inconsistent with the peace and safety of the state.³⁵

32. *Parnell v. State*, 581 S.E.2d 263 (2003).

33. *Id.* at 214.

34. GA. CONST. art. I, § 1, ¶ 3.

35. GA. CONST. art. I, § 1, ¶ 4.

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The Georgia Constitution does not differentiate according to whether one professes Christianity or Judaism on one hand or another religion such as Islam or Hinduism on the other hand. The Georgia clergy privilege statute, but not the Georgia Constitution, is facially discriminatory. By favoring Christianity and Judaism, prison authorities could interfere with, for example, a Muslim prisoner's rights of conscience which could entail certain means of worship and the reading of certain literature. Any such restrictions, pursuant to the Georgia Constitution, must be justified under the limitations set forth in article I, section 1, paragraph 4. Relying on the United States and Georgia Constitutions, the Supreme Court of Georgia held that:

While there is no power to control what a person may believe about religion or the type of religion he may adopt or profess, yet there is a power under the law to limit his acts, even though to do such acts may be part of his religious belief. The constitutional guarantee of the exercise of religious freedom does not extend to acts which are inimical to the peace, good order, and morals of society . . . A person's right to exercise religious freedom, which may be manifested by acts, ceases where it overlaps and transgresses the rights of others. Every one's rights must be exercised with due regard to the rights of others.³⁶

Applying this principle and citing the police power, the Supreme Court of Georgia upheld a regulation restricting the time and places for a religious group to sell literature on a public street, which interfered with the purpose of the street, that is, for the passage of persons and the transportation of goods.³⁷ Similar time, place, and manner restrictions may be placed on prisoners as well.

And, as a general proposition the Court, through the Spending Clause and via the Fourteenth Amendment of the U.S. Constitution, applies federal standards to issues of free exercise. The standard to be met—strict scrutiny or rational basis—may differ according to which route controls.

36. *Jones v. City of Moultrie*, 27 S.E.2d 39, 42 (1943).

37. *Id.* at 43.

IV. THE GEORGIA CLERGY PRIVILEGE IS FACIALLY UNCONSTITUTIONAL

If the Georgia Clergy privilege statute is violative of the current religion clauses jurisprudence, it would be subject to a challenge as being facially unconstitutional if applied only to Christians and Jews. In *Everson v. Board of Education*, the United States Supreme Court stated:

Neither can [a state nor the Federal Government] pass laws which aid one religion, aid all religions, or prefer one religion over another. . . . In the words of Jefferson, the clause against established religion by law was intended to erect “a wall of separation between Church and State.” Further, “[t]hat wall must be kept high and impregnable. We could not approve the slightest breach.”³⁸

The Court quoted from the letter by Thomas Jefferson to Danbury Baptist Association (Jan. 1, 1802). Jefferson also wrote in the same letter “that the legislative powers of government reach actions only, and not opinions. . . .”³⁹

In *Sherbert v. Vernon*,⁴⁰ the Court applied the strict scrutiny/compelling state interest test to any state action infringing on free exercise. In *Sherbert*, a Seventh Day Adventist was fired for refusing to work on a Saturday, the Sabbath for that faith. According to the Court, this amounted to a penalty for the exercise of religious liberty, thus establishing a religious exemption from otherwise neutral generally applicable laws.⁴¹

In *Board of Education of Kiryas Joel v. Grumet*,⁴² the Court reiterated its ban on favoring one religion over another or religion over non-religion citing the Establishment Clause,⁴³ although, the Court pursuant to the *Sherbert* reasoning allows government to accommodate religion citing the Free Exercise Clause.⁴⁴ Hence, a government may make distinctions among

38. *Everson v. Bd. of Educ.*, 330 U.S. 1, 15-16 (1947).

39. *Id.* at 18.

40. *Sherbert v. Verner*, 374 U.S. 398, 404-05 (1963).

41. *Id.*

42. *Bd. of Educ. of Kiryas Joel v. Grumet*, 512 U.S. 687 (1994).

43. *Id.* at 696.

44. *Sherbert*, 374 U.S. 398; *see also* *Charles v. Verhagon*, 348 F.3d. 601

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religious groups if necessary to accommodate a particular religious practice not threatening a compelling government interest. But if a governmental action benefits one religion as opposed to others, that action must satisfy strict scrutiny. This allows an accommodation if all religions are equally affected or, if necessary, to accommodate a particular religious practice without discriminating against other religions, if the government act is neutral in effect. In this way, the Court avoids decision-making under the Establishment Clause while deciding cases under the Free Exercise Clause.

The distinction between the two clauses is apparent – a violation of the Free Exercise Clause is predicated on coercion while the Establishment Clause violation need not be so attended. . . . To be sure, the endorsement test depends on a sensitivity to the unique circumstances and context of a particular challenged practice and, like any test that is sensitive to context, it may not always yield results with unanimous agreement at the margins. But that is true of many standards in constitutional law, and even the modified coercion test offered by Justice Kennedy involves judgment and hard choices at the margin.⁴⁵

In fact, RLUIPA provides that its provisions do not affect Establishment Clause jurisprudence.⁴⁶ Clearly, the Georgia clergy privilege but not the Georgia Constitution discriminates among religious beliefs without any factual predicate for such discrimination. This favoritism could conceivably have a coercive effect on prisoners seeking acceptance by other prisoners, giving added support to a finding of a violation of the Establishment Clause as well as an unacceptable burden on free exercise.⁴⁷

V. RLUIPA AND FREE EXERCISE

The limitation to Christian clergy and Jewish rabbis is inconsistent with the Georgia Constitution, as discussed above.

(7th Cir. 2003) (RLUIPA merely accommodates and protects free exercise which the Constitution permits).

45. *Sch. District of Abington Tp., Pa. v. Schempp*, 374 U.S. 203, 223 (1963).

46. 42 U.S.C. § 2000cc-4.

47. *Everson*, 330 U.S. at 15-16.

Since the statute itself is discriminatory, it violates the second prong of the *Lemon v. Kurtzman*⁴⁸ test in that it advances Christianity and Judaism while inhibiting other religions.⁴⁹ In effect, the statute is an endorsement of two religions which constitutes an Establishment Clause violation.

To accommodate religion is not to endorse any religion. The opinion of Justice O'Connor in *Allegheny*,⁵⁰ concurring in part and concurring in the judgment, specifies that the government "avoid endorsing religion or favoring particular beliefs over others."⁵¹ O'Connor seemed concerned with affirmative acts by the government. It is hard not to characterize the Georgia privilege as an affirmative act favoring Christianity and Judaism. The Establishment Clause instead of supporting the Free Exercise Clause as the Founders intended, becomes a limitation on religious free speech. According to the Supreme Court, the state has a compelling interest in avoiding an Establishment Clause violation.⁵²

The Court seemed to shift between the strict separation language illustrated by *Everson*⁵³ and the neutrality language of *Kiryas Joel*⁵⁴ for Establishment Clause purposes as compared with the accommodationist approach for Free Exercise Clause purposes. The Court then decided *Employment Dept. of Human Resources of Oregon v. Smith*.⁵⁵ Congress, responding to *Smith* wherein ". . .the Supreme Court virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral towards religion"⁵⁶ passed

48. *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

49. *Id.* at 612.

50. *County of Allegheny v. American Civil Liberties Union Greater Pittsburgh Chapter*, 492 U.S. 573 (1989).

51. *Id.* at 631.

52. RLUIPA does not violate the Establishment Clause. It has a legitimate secular purpose of minimizing government entanglement with religion even though it provided for strict scrutiny review for prisoners' religious rights while excluding other fundamental rights from such review. *Madison v. Ritter*, 355 F.3d 310 (4th Cir. 2003) *cert. denied*, 125 S.Ct. 2536 (2005).

53. *Everson*, 330 U.S. 1.

54. *Kiryas Joel*, 512 U.S. 687.

55. *Employment Dep't of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990).

56. 42 U.S.C. § 2000bb(a)(4).

RFRA,⁵⁷ mandating the compelling interest test for striking sensible balances between religious liberty and competing governmental interests which, in essence, required the government to take an accommodationist approach towards religion. The Supreme Court responded by declaring the Act unconstitutional as applied to state and local governments as an attempt by Congress to create new rights or expand the scope of rights which, according to that eminent tribunal, is beyond Congress' power under Section 5 of the Fourteenth Amendment.⁵⁸ The Court's opinions, including the dissents, emphatically iterated the supremacy of the Supreme Court when it comes to the recognition of rights.⁵⁹ The Court held that legislation passed pursuant to Section 5 of the Fourteenth Amendment must be "proportionate" and "congruent," as defined by the Court, to the constitutional violation to be remedied.⁶⁰

Justice O'Connor's dissent raised the issue of whether *Smith* was wrongly decided, in that it rejected strict scrutiny for challenges to laws of general applicability that burdened religion, at least in the area of criminal violations.⁶¹ On its face, *Smith* seemed inconsistent with *Sherbert*⁶² and *Wisconsin v. Yoder*.⁶³ In *Smith*, unlike *Sherbert*, a criminal law was violated by communicants to the Native American Church, which led to their dismissal from employment. The Court, while reiterating the unconstitutionality of a government targeting "acts or abstentions only when they are engaged in for religious reasons," also said that when "prohibiting the exercise of religion. . . is not the object. . . but merely the incidental effect. . .

57. 42 U.S.C. §§ 2000bb *et seq.*

58. *City of Boerne v. Flores*, 521 U.S. 507, 519 (1997) ("The design of the [Fourteenth] Amendment and the text of [Section] 5 are inconsistent with the suggestion that congress has the power to decree the substance of the Fourteenth Amendment's restrictions on the states. Legislation which alters the meaning of the Free Exercise Clause cannot be said to be enforcing the Clause.").

59. *See, e.g., id.* at 519 (opinion of Kennedy, J.); *id.* at 545 (O'Connor, J., dissenting) ("In short, Congress lacks the ability independently to define or expand the scope of constitutional rights by statute.").

60. *Id.* at 519-20.

61. *Id.* at 544-45 (O'Connor, J., dissenting).

62. *Sherbert*, 374 U.S. at 404-05.

63. *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

.the First Amendment has not been offended.”⁶⁴ The Court cited *Reynolds v. United States*⁶⁵ and distinguished *Smith* from *Sherbert* on the basis that *Smith* involved a criminal law violation which the state does not have to accommodate under *Reynolds*.⁶⁶ This, in a sense, marked a return to the conscience/acts dichotomy of 19th Century jurisprudence, with the caveat that that jurisprudence privileged Christianity which would not pass constitutional muster today.⁶⁷ *Smith* arguably replaced strict scrutiny with the rational basis test which was the test historically used to judge prison regulations. This was the view of Congress when Congress first passed RFRA in 1993 and then RLUIPA in 2000. The stated purpose of RFRA is to “restore the compelling interest test as set forth in *Sherbert v. Verner* and *Wisconsin v. Yoder*” and to guarantee its application in all cases where free exercise is substantially burdened.⁶⁸

In *Yoder*, like *Smith*, the violation of state law was criminal, but unlike *Smith* the issue of whether the Amish could violate the compulsory education laws was considered a matter fundamental for the free exercise of the Amish’s religion rather than merely incidental. In other words, the belief was sincerely held, central, and forced a choice between a religious mandate and adherence to a secular law.

Justice Scalia’s concurring opinion in *City of Boerne v. Flores*⁶⁹ took issue with the view that *Smith* departed from previous Court holdings, pointing out that the *Smith* majority and dissent were really not that far apart. Justice Scalia stated that:

Assuming, however, that the affirmative protection of religion accorded by the early “free exercise” enactments sweeps as broadly as the dissent’s theory would require, those enactments do not support the dissent’s view, since

64. *Smith*, 494 U.S. at 878.

65. *Reynolds v. U.S.*, 98 U.S. 145 (1878).

66. *Smith*, 494 U.S. at 884-885.

67. See *Lynch v. Donnelly*, 465 U.S. at 718 (Brennan, J., dissenting). Brennan, in dissenting, distanced the Court from “Christian Nation,” stating that it would be “a long step backwards to the days when Justice Brown could arrogantly declare for the Court that this is a Christian nation.” *Id.* (citing *Church of the Holy Trinity v. U.S.*, 143 U.S. 457, 471 (1892)).

68. 42 U.S.C. § 2000bb(b)(1).

69. *City of Boerne*, 521 U.S. at 537.

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they contain “provisos” that significantly qualify the affirmative protection they grant. According to the dissent, the “provisos” support its view because they would have been “superfluous” if “the Court was correct in *Smith* that generally applicable laws are enforceable regardless of religious conscience.” . . . I disagree. In fact, the most plausible reading of the “free exercise” enactments (if their affirmative provisions are read broadly, as the dissent’s view requires) is a virtual restatement of *Smith*: Religious exercise shall be permitted so long as it does not violate general laws governing conduct.⁷⁰

While affirming *Smith*, that as a “general proposition . . . a law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice,” the Court in *Church of Lukumi Babala Aye, Inc. v. Hialeah*⁷¹ struck down a law aimed at a specific religious practice of a specific religion, stating that such a law “must be justified by a compelling interest and must be narrowly tailored to advance that interest.”⁷²

Reacting to this legislative mess created by the Court, Congress passed RLUIPA to require strict scrutiny for free exercise claims. The Act provides in relevant part:

Protection of religious exercise of institutionalized persons:
(a) General rule - No government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution, as defined in section 1997 of this title, even if the burden results from a rule of general applicability, unless the government demonstrates that imposition of the burden on that person—(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest⁷³

70. *Id.* at 539.

71. *Church of Lukumi Babala Aye, Inc. v. Hialeah*, 508 U.S. 520 (1993).

72. *Id.*

73. 42 U.S.C. § 2000cc-1(a)(1)-(2); see Christine M. Peluso, *Cong. Intent v. Judicial Reality: The Practical Effects of the Religious Land Use and Institutionalized Persons Act of 2000*, 6 RUTGERS J. L. & RELIGION 5 (2004) (for a history leading to the enactment of RLUIPA). The Court upheld this law from an Establishment Clause challenge to it as impermissively favoring religion over non-religion citing its current accommodationist jurisprudence.

RLUIPA requires strict scrutiny when a statute or regulation burdens religion involving land and institutionalized persons. The first is not germane to this discussion. The authority to regulate in the second area is based on the federal government's spending power.⁷⁴ Under *Smith*, the Free Exercise Clause cannot be used to challenge neutral state and local laws of general application. RLUIPA, applicable to the states, requires strict scrutiny of state and local enactments burdening the free exercise of religion by institutionalized persons including prisoners if federal spending or the Commerce Clause is involved. In effect, RLUIPA imposed the *Sherbert-Yoder* test to "any exercise of religion, whether or not compelled, or central to a system of religious belief"⁷⁵ if the state action results in a substantial burden on free exercise.

The legislative history of RLUIPA defines "substantial burden by reference to Supreme Court jurisprudence."⁷⁶ The legislative rules of construction provide that "[t]his Act shall be construed in favor of a broad protection of religious exercise, to the maximum extent permitted by the terms of this Act and the Constitution."⁷⁷ In protecting religious exercise, the Court has articulated various definitions of substantial burden. They include instances when a government puts "substantial pressure on an adherent to modify his behavior and to violate his

See Cutter v. Wilkerson, 544 U.S. 709 (2005).

74. *See Chapinsky v. New Hampshire*, 315 U.S. 568, 572 (1942). The deference to Congress when acting pursuant to its spending power is demonstrated in *United States v. American Library Association*, 539 U.S. 194, 195-96 (2003), where the Court permitted Congress to require public libraries to use internet filtering software as a condition for receiving federal funds. The Court's plurality stated, "[t]o fulfill [the libraries] traditional missions of facilitating learning and cultural enrichment, public libraries must have broad discretion to decide what material to promote to new patrons." *Id.* The plurality further remarked that "heightened judicial scrutiny" is "incompatible with the broad discretion that public libraries... have to consider content..." but the libraries are not public forums and even if some constitutionally protected speech is blocked, the government in providing funds to a program is "broadly" entitled to define the programs limits" *Id.* (citing *Rust v. Sullivan*, 500 U.S. 173 (1991)).

75. 42 U.S.C. §2000 cc-5(7)(A); *Cutter v. Wilkerson*, 544 U.S. 704, 715 (2005).

76. 146 Cong. Rec. § 7776 (July 27, 2000).

77. 42 U.S.C. §2000cc-3(g).

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beliefs,”⁷⁸ and when an individual is required to “choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion. . . on the other.”⁷⁹ The Court also held that there was no substantial burden where government action interfered with, but did not coerce, an individual’s religious beliefs.⁸⁰ Of similar reasoning was the opinion in *Lyng v. Northwest Indian Cemetery Protective Ass’n*.⁸¹

The Court explained that a tendency not to coerce translates to no substantial burden. *Lyng* dealt with the federal government’s plans to harvest timber and build a highway through part of a National Forest used for religious purposes by members of three Native American religions. The members claimed that the noise and pollution from the highway would “diminish the sacredness of the area”⁸² and interfere with the religious experience of the members using the area. The Court rejected the position that “incidental effects of government programs, which may make it more difficult to practice certain religions but which has no tendency to coerce individuals into acting contrary to their religious beliefs, require government to bring forward a compelling justification for its otherwise lawful actions.”⁸³

This is distinguishable from *Thomas v. Review Bd. of Indiana Employment Sec. Division*,⁸⁴ where rather than merely interfering with a religious exercise, the state conditioned the receipt of a benefit upon conduct proscribed by the adherent’s religious faith.⁸⁵ Similarly, in *Sherbert* the state regulation tended to inhibit, not merely interfere with a constitutionally protected activity.⁸⁶

78. *Hobbie v. Unemployment Appeals Comm’n of Florida*, 480 U.S. 136, 141 (1981).

79. *Sherbert*, 374 U.S. at 404.

80. *Bowen v. Roy*, 476 U.S. 693, 707-08 (1986).

81. *Lyng v. Northwest Indian Cemetery Protective Ass’n*, 485 U.S. 439 (1988).

82. *Id.* at 448.

83. *Id.* at 450-51.

84. *Thomas v. Review Bd. of Indiana Employment Sec. Div.*, 450 U.S. 707 (1981).

85. *Id.* at 717-18.

86. *Sherbert*, 374 U.S. at 406 n.6.

In applying the Court's definitions, the lower federal courts have not been entirely consistent. In *Murphy v. Missouri Dept. of Corrections*,⁸⁷ a prisoner-member of the Christian Separatist Church Society, which maintains that Caucasians are uniquely blessed and must segregate themselves from non-Caucasians, challenged the denial by prison officials of group worship services.⁸⁸ This matter was initially remanded to the district court⁸⁹ and is again on appeal. Murphy alleged that:

[D]enial of his request violated the Establishment Clause, the Equal Protection Clause, RLUIPA, and his right to the free exercise of religion. Murphy also alleged that the appellees violated his right to free speech when, pursuant to the MDOC's censorship policy, prison officials refused to provide him with Issue # 36 of 'The Way,' a CSC publication that Murphy received in the mail. . . . [W]e reversed the district court's grant of summary judgment only on Murphy's RLUIPA and First Amendment free speech claims.⁹⁰

Murphy's RLUIPA claim was based on a jury instruction as follows:

Your verdict must be for the plaintiff on his religious exercise claim against the defendants if all of the following elements have been proved by the greater weight of the evidence:

First, Plaintiff requested racially-segregated group services for the Christian Separatist Church; and

Second, Defendants denied racially-segregated group services for the Christian Separatist Church; and

Third, Racially-segregated group services are a sincerely held tenet or belief *central or fundamental* to Christian Separatist Church doctrine; and

Fourth, Plaintiff's right to freely exercise his sincerely held religious beliefs is substantially burdened by the denial of

87. *Murphy v. Missouri Dep't of Corr.*, 506 F.3d 1111 (8th Cir. 2007).

88. *Id.* at 1114.

89. *Murphy v. Missouri Dep't of Corr.*, 372 F.3d 979, *rehearing and rehearing en banc denied* (2004) *cert. denied* 843 U.S. 991 (2004).

90. *Murphy*, 506 F.3d at 1114.

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racially-segregated group services for the Christian Separatist Church.

A “substantial burden” must be more than just an inconvenience. A “substantial burden” is instead *government conduct that pressures the plaintiff to commit an act forbidden by his religion or prevents him from engaging in conduct mandated by his faith*. However, your verdict must be for the defendants if any of the above elements has not been proved by the greater weight of the evidence or if the defendants are entitled to a verdict under [the next] Instruction. (emphasis added).

The appeals court although citing Murphy’s argument that RLUIPA does not require the restricted religious exercise to be central or mandated,⁹¹ held that it is necessary to show that the existence of a *sincerely held* tenet or belief that is central or fundamental to an individual’s religion is a prerequisite to a “substantially burdened” claim under RLUIPA.⁹² The court pointed out that:

In *Murphy I*, we explained that, to constitute a substantial burden, the government actions must significantly inhibit or constrain conduct or expression that manifests some central tenet of a [person’s] individual [religious] beliefs; must meaningfully curtail a [person’s] ability to express adherence to his or her faith; or must deny a [person] reasonable opportunities to engage in those activities that are fundamental to a [person’s] religion. . . . We additionally implied that the religious belief must be sincerely held.⁹³

Perhaps what the court meant is that even if a practice is not central or mandated, if it is central for an individual’s exercise, it implicates RLUIPA.

In attempting to clarify what a substantial burden on religious exercise is, the Fifth Circuit requires answers to two questions: (1) Is the burdened activity “religious exercise,” and if so (2) is the burden “substantial?”⁹⁴ They stated:

The plaintiff has the burden of persuasion on whether the challenged government practice substantially burdens the

91. See 42 U.S.C. §2000cc-5(7)(A).

92. *Murphy*, 506 F.3d at 1115.

93. *Id.* at 1116 n.7.

94. *Adkins v. Kaspar*, 393 F.3d 559 (5th Cir. 2004).

plaintiff's exercise of religion. Once the plaintiff establishes this, the government bears the burden of persuasion that application of its substantially burdensome practice is in furtherance of a compelling governmental interest and is the least restrictive means of furthering that interest.⁹⁵

Adkins rejected *Murphy* insofar as it adopted the substantial burden test as only applicable to central or mandated religious exercise as is the situation under RFRA.⁹⁶ Citing to *Sherbert* and *Thomas*,⁹⁷ the Fifth Circuit defined substantial burden as:

Where the state conditions receipt of an important benefit upon conduct proscribed by a religious faith, or where it denies such a benefit because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs.⁹⁸

If the incidental effects of a government's actions are only to make "it more difficult to practice certain religions but which have no tendency to coerce individuals into acting contrary to their religious beliefs," then the government has no duty "to bring forward a compelling justification for its otherwise lawful actions."⁹⁹ The Fifth Circuit claimed its reading of RLUIPA on the issue of substantial burden is consistent with the Seventh Circuit¹⁰⁰ and the Ninth Circuit.¹⁰¹

The Eleventh Circuit reviewed its "substantial burden" jurisprudence in *Midrash Sephardi, Inc. v. Town of Surfside*:¹⁰²

95. *Id.* at 567 (citing 42 U.S.C. § 2000cc-2; 146 CONG. REC. §7776 (July 27, 2000)).

96. *Id.* at 567.

97. *Thomas*, 450 U.S. 707.

98. *Adkins*, 393 F.3d at 569.

99. *Id.*

100. See *Civil Liberties for Urban Believers v. City of Chicago*, 342 F.3d 752, 761 (7th Cir. 2003), *cert. denied*, 541 U.S. 1096 (2004) ("[I]n the context of the RLUIPA's broad definition of religious exercise, a ... regulation that imposes a substantial burden on religious exercise is one that necessarily bears direct, primary, and fundamental responsibility for rendering religious exercise ... effectively impracticable").

101. *San Jose Christian Coll. v. City of Morgan Hill*, 360 F.3d 1024, 1034 (9th Cir. 2004) (substantial burden as one that imposes a significantly great restriction as ones upon such experience).

102. *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214 (11th Cir. 2004), *cert. denied*, 573 U.S. 1146 (2005).

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We have held that an individual's exercise of religion is "substantially burdened" if a regulation completely prevents the individual from engaging in religiously mandated activity, or if the regulation requires participation in an activity prohibited by religion. See *Cheffer v. Reno*, 55 F.3d 1517, 1522 (11th Cir. 1995) (applying the Religious Freedom Restoration Act, we found no substantial burden when religion did not require particular means of expressing religious view and alternative means of religious expression were available); *Church of Scientology Flag Serv. Org., Inc. v. City of Clearwater*, 2 F.3d 1514, 1550 (11th Cir. 1993) (finding a substantial burden when regulation had the effect of mandating religious conduct). . . The combined import of these articulations leads us to the conclusion that a "substantial burden" must place more than an inconvenience on religious exercise; a "substantial burden" is akin to significant pressure which directly coerces the religious adherent to conform his or her behavior accordingly. Thus, a substantial burden can result from pressure that tends to force adherents to forego religious precepts or from pressure that mandates religious conduct.¹⁰³

Perhaps the most comprehensive review of substantial burden was attempted by the Third Circuit, which defined the concept in *Washington v. Klem*.¹⁰⁴ A practitioner of the Children of the Sun Church claimed that a restriction on the number of books allowed in his cell substantially burdened his free exercise since the reading of a certain number of cult related books was "in essence the religion itself."¹⁰⁵ The limitation was justified based upon security, hygiene, and safety reasons.¹⁰⁶ In making its decision, the Third Circuit adopted the "disjunctive test" that couples the holdings of *Sherbert* and *Thomas*.

For the purposes of RLUIPA, a substantial burden exists where: 1) a follower is forced to choose between following the precepts of his religion and forfeiting benefits otherwise generally available to other inmates versus abandoning one of the precepts of his religion in order to receive a benefit; or 2) the government puts substantial pressure on an adherent to substantially modify his behavior and to violate his

103. *Id.* at 1227.

104. *Washington v. Klem*, 497 F.3d 272 (3d Cir. 2007).

105. *Id.* at 275.

106. *Id.*

beliefs.¹⁰⁷

In criticizing *Murphy* and rejecting *Lyng*, the Third Circuit adopted the *Adkins* standard for substantial burden, which incorporates the holdings of both *Sherbert* and *Thomas*. The Third Circuit went on to say:

This [Adkins] definition accords with § 5(g) of RLUIPA and the statute's legislative history in that it recognizes that Congress intended to create a broad definition of substantial burden. We recognize that this definition is narrower than the dictum in footnote six of *Sherbert* and the negative implication of *Lyng*, but is still broad enough to accurately reflect the statute's plain text and to effect its purpose. Using an expansive definition of "substantial burden" derived from language not essential to the holdings of either *Sherbert* or *Lyng* poses at least two problems. First, post-*Sherbert*, the Supreme Court has not squarely adopted its dictum in footnote six of *Sherbert* as a holding in a Free Exercise or RLUIPA case. Second, there is reason to question whether *Lyng* can be read to hold that any incidental effect of a government program which may have some tendency to coerce individuals into acting contrary to their religious beliefs satisfies the substantial burden standard. Such a reading fails to take into account that the discussion of "substantial burden" in *Lyng* occurred while the Court approvingly discussed *Sherbert* and *Thomas*. The "any incidental effect/some tendency" standard would also conflict with other statements in *Lyng* where the Court decided whether the Government's actions constituted a substantial burden. See *Lyng*, 485 U.S. at 451, 108 S. Ct. 1319 (no substantial burden even though "we can assume that the threat to the efficacy of at least some religious practices is extremely grave"); *Id.* at 452, 108 S. Ct. 1319 ("However much we might wish that it were otherwise, government simply could not operate if it were required to satisfy every citizen's religious needs and desires.").¹⁰⁸

Applying the above definitions, the Third Circuit held that the limitation on books for the prisoner was "a substantial burden because it inhibits his ability to read [the requisite

107. *Id.* at 280; see also *Spratt v. Rhode Island Dep't of Corrs.*, 482 F.3d 33 (1st Cir. 2007); *Lovelace v. Lee*, 472 F.3d 174, 187 (4th Cir. 2006).

108. *Washington*, 497 F.3d at 280.

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number of] new books a day.”¹⁰⁹ The burden shifts to the government to show that this restriction must serve a compelling government interest and is the least restrictive means of furthering that interest.¹¹⁰ In recognizing a compelling government interest, the *Klem* court then stated that “[e]ven in light of the substantial deference given to prison authorities, the mere assertion of security or health reasons is not, by itself, enough for the Government to satisfy the compelling governmental interest requirement. Rather, the particular policy must further this interest.”¹¹¹ In analyzing the policy, the court pointed out that the prison authorities had several other options in dealing with their security concerns and could have accommodated the prisoners.¹¹²

The circuits considering the substantial burden test all cite to *Cutter*.¹¹³ *Cutter* involved a challenge under RLUIPA from adherents of non-mainstream religions to Ohio prison practices. The Court, citing *Kiryas Joel*,¹¹⁴ made plain that RLUIPA must be “administered neutrally among different faiths.”¹¹⁵ To be consistent with Supreme Court precedent, RLUIPA does not allow officials to differentiate among bona fide faiths. “It confers no privileged status on any particular religious sect, and singles out no bona fide faith for disadvantageous treatment.”¹¹⁶

VI. FREE EXERCISE, RLUIPA, AND SPIRITUAL GUIDANCE

Although proposed Federal Rule of Evidence 506,¹¹⁷ providing for a federal clergy privilege, was rejected, current Federal Rule of Evidence 501 provides:

Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules

109. *Id.* at 282.

110. *Id.* at 282; see 42 U.S.C. §2000cc-2(b).

111. *Klem*, 497 F.3d at 282.

112. *Id.* at 285-86.

113. *Cutter v. Wilkerson*, 544 U.S. 709 (2005).

114. *Kiryas Joel*, 512 U.S. 687.

115. *Cutter*, 544 U.S. at 720.

116. *Id.* at 724.

117. See CHARLES ALAN WRIGHT AND KENNETH W. GRAHAM, JR., FEDERAL PRACTICE AND PROCEDURE, §5612 Chapter 6, Privileges: Rejected Rule 506, Penitent’s Privilege (2007).

prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law.¹¹⁸

Although the privilege is to be determined in accordance with state law, such privilege cannot limit free exercise rights nor can the state apply less than strict scrutiny to the exercise of religion by prisoners if federal aid is involved. Support for the view that a privilege cannot limit a statute or constitutional provision comes from this statement by Justice Scalia in his *City of Boerne* concurring opinion:

The closest one can come in the period prior to 1850 is the decision of a New York City municipal court in 1813, holding that the New York Constitution of 1777, required acknowledgement of a priest-penitent privilege, to protect a Catholic priest from being compelled to testify as to the contents of a confession. *People v. Phillips*, Court of General Sessions, City of New York (June 14, 1813), excerpted in *Privileged Communications to Clergymen*, 1 *Cath. Lawyer* 199 (1955). Even this lone case is weak authority, not only because it comes from a minor court, but also because it did not involve a statute, and the same result might possibly have been achieved (*without invoking constitutional entitlement*) by the court's simply modifying the common-law rules of evidence to recognize such a privilege.¹¹⁹

The federally recognized common law privilege generally provides that a communication is privileged if it is made to a cleric for spiritual guidance with a reasonable expectation of privacy. This is analogous to the Georgia privilege.

From all of the foregoing, some variation of a clergy privilege will be recognized under Georgia state law, if not by statute then the Georgia Constitution, and as mandated by the

118. FED. R. EVID. 501.

119. *City of Boerne*, 521 U.S. at 543 (emphasis added).

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Free Exercise Clause as an accommodation to religion. In fact, the Georgia statute and the Georgia Constitution do not go far enough with regard for the Roman Catholic sacrament of Confession.

The Georgia privilege is consistent with U.S. constitutional and common law in that it covers communications “professing religious faith, seeking spiritual comfort” and after a 1986 amendment, to those “seeking counseling” or as stated above the privilege extends to spiritual guidance.¹²⁰ Although notions of spiritual guidance in the Christian or Jewish faiths is based on familiarity with those faiths, that is not necessarily so for the Muslim faith.¹²¹ Free exercise is not merely a question of spiritual guidance.

In this respect the protection afforded spiritual guidance which is held to be a compelling government interest along with the imposition of the compelling interest test for interference with free exercise are cumulative. Courts have determined that for an action to be successfully challenged under RLUIPA (1) the burden must fall on a sincerely held religious belief rather than a philosophy or lifestyle, and (2) it must prevent the adherent from engaging in conduct or having a religious experience, if not central, then important to free exercise. If central or mandated, prison authorities would be hard pressed to comply with RLUIPA by providing alternative means without demonstrating a compelling government interest needing prompt action. For example, the compelling government interest of maintaining control over prison inmates justified authorities handcuffing of inmates during a scheduled prayer service when a confrontation between the Muslim chaplain and prison officers became heated.¹²² Inconvenience to a religious

120. O.C.G.A. § 24-9-22 (2003).

121. The Five Pillars of Sunni Islam are mainly concerned with mandated acts. They are: (1) Profession of Faith; (2) Ritual Prayer Five Times Per Day; (3) Fasting During Ramadan; (4) Tax on the Community for support of the poor; and (5) Pilgrimage to Mecca (hajj). Shiites recognize additional pillars or practices which include jihad and doing good. F.E. PETERS, *THE MONOTHEISTS: JEWS, CHRISTIANS AND MUSLIMS IN CONFLICT AND COMPETITION*, Vol. II at 107 (Princeton University Press 2003); Wikipedia.org/wiki/Five_Pillars_of_Islam.

122. *Asad v. Bush*, 170 Fed. Appx. 668 (11th Cir. 2006) (prison officials were reasonable in anticipating imminent danger).

belief, not central, makes it more difficult to establish a substantial burden.¹²³

In *Reynolds*, the Court stated that “Congress was deprived [by the First Amendment] of all legislative power over mere opinion, but was free to reach actions.”¹²⁴ Under RLUIPA as well as current free exercise jurisprudence, state authorities are not necessarily free to reach actions.¹²⁵ The Court, however, recognizes that public safety is a compelling state interest that may justify curtailment of religious liberty. In *Prince v. Massachusetts*,¹²⁶ the Court said “the right to practice religion freely does not include liberty to expose the community . . . to ill health or death.”¹²⁷ This, of course, is reflected in *Lemon* wherein the Court stated it would not strike down regulations incidentally burdening a religion if the primary purpose is secular.¹²⁸ Additionally, any law that creates a denominational preference is always subject to strict scrutiny unless narrowly tailored to further a compelling governmental interest.¹²⁹

Until 1990, the Court was not clear in its application of strict scrutiny to laws that burdened religiously motivated conduct. Whether *Smith* clarified or changed the law with respect to state action that burdened religious exercise is a matter of dispute. That case upheld an Oregon law banning peyote possession with no allowance for sacramental use of drugs. Accordingly, the State could deny unemployment benefits to persons dismissed from their jobs because of their religiously inspired

123. See *San Jose Christian Coll. v. City of Morgan Hill*, 2001 WL 186224 (N.D. Cal. 2001); *Christian Gospel Church, Inc. v. City of Courts of San Francisco*, 896 F.2d 1221, 1224 (9th Cir. 1990) (dealing with the denials of rezoning requests); *Perez v. Frank*, 433 F.Supp.2d 955 (W.D. Wis. 2006) (not providing footbath opportunities 24/7).

124. *Reynolds*, 98 U.S. at 164.

125. See 146 CONG. REC. § 7774-01, 7775, 7776 (daily ed. July 27, 2000) (setting forth Congress’ intent not to change the meaning of the phrase “substantial burden previously established by the Supreme Court”).

126. *Prince v. Massachusetts*, 321 U.S. 158 (1944).

127. *Id.* at 166 (upholding child labor laws from a free exercise challenge).

128. *Smith*, 494 U.S. at 878-82 (First Amendment’s Free Exercise Clause does not inhibit enforcement of otherwise valid laws of general application that incidentally burden religious conduct).

129. *Id.* at 890.

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peyote use.¹³⁰ The Court did recognize that the political branches could shield religious exercise through legislative accommodation, for example, by making an exception to proscriptive drug laws for sacramental peyote use if they choose to do so.¹³¹ On the other hand, the Court refused to allow a state to deny unemployment benefits to someone who quit his job rather than violate his religious-based belief against producing military equipment.¹³²

In summary, the belief/behavior or conscience/acts dichotomy along with the Court's historical recognition of the Judeo-Christian underpinnings for Western civilization generally and the specifically Protestant influence on American culture led the Court to grant a privileged position to Christian inspired regulations of behavior including enforcing blasphemy laws, Sabbath Lord's Day closing laws and Bible reading in public schools.¹³³ The Court had no difficulty in labeling the United States a Christian Nation.¹³⁴ By 1991, the privileged place of religion over non-religion and Christianity in particular were no more.¹³⁵

Under current law, protection goes to both speech and actions stemming from sincerely held religious beliefs. Mandating violation of a religious belief considered central is a most obvious substantial burden on free exercise. As to burdens on beliefs or actions not central or religiously mandated, prison authorities have more discretion with considerations of conserving limited resources more likely to meet the test of a compelling government interest, particularly when an

130. *Id.*

131. *Id.*

132. *Kiryas Joel*, 512 U.S. 687.

133. See Daniel F. Piar, *Majority Rights, Minority Freedoms: Protestant Culture, Personal Autonomy, and Civil Liberties in Nineteenth-Century America*, 14 WM & MARY BILL RTS. J. 987, 999-1015 (2006); see also LAWRENCE R. BROWN, *THE MIGHT OF THE WEST* (Joseph. J. Binns 1963); see also M. STANTON EVANS, *THE THEME IS FREEDOM* (Regnery Publishing 1994).

134. See *Vidal v. Gerard's Executors*, 43 U.S. 127 (1844) (Christianity as the "law of the land" according to Daniel Webster); JOSEPH STORY, *COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES* (Carolina Academic Press 1987).

135. *Lee v. Weisman*, 505 U.S. 577, 593-594 (1992); see *supra* notes 33 and 60.

alternative means can be provided such as substituting a candle for a fire pit or providing a secure rather than a general prison area to practice the rites of a particular cult.¹³⁶

Similarly, when adequate opportunity for religious exercise is provided and the prisoner requested activity is not central, a prisoner does not suffer a substantial burden by the denial of his request.¹³⁷ Although, Muslims, by rule, are not to be seen naked by strangers, the compelling government interest in prison security allows strip searches when reasonable.¹³⁸

Generally, statements made to or by clergy for purposes other than spiritual guidance are not privileged and are subject to discovery unless free exercise jurisprudence is implicated. This is the rule in Georgia and comports with the federal common law privilege. Alabama, apparently taking note of the Catholic priest-penitent privilege, extends the privilege further to communications made to clergyman in the clergyman's professional capacity and in a confidential manner.¹³⁹ *Trammel v. United States*¹⁴⁰ is of similar import. There the Court held: "[t]he priest-penitent privilege recognizes the human need to disclose to a spiritual counselor, in total and absolute confidence, what are believed to be flawed acts or thoughts and to receive priestly consolation and guidance in return."¹⁴¹

This suggests that under the Free Exercise Clause, the sacrament of Confession of the Roman Catholic Church will be recognized as protected even if beyond the state or federal common law privilege. The Florida privilege is similar in that it extends to communications made "in the usual course of his or her practice or discipline."¹⁴² However, in *Nussbaumer v. State* the court cited the Florida privilege statute and went on to state

136. See *Smith v. Allen*, 502 F.3d 1255 (11th Cir. 2007).

137. *Sparone v. City of New York*, 420 F.Supp.2d 236 (S.D.N.Y. 2005) (city jail did not offer Catholic Bible study even though offered to Protestants); *Orafan v. Goord*, 411 F.Supp.2d 153 (N.D.N.Y. 2006) (Shiites could attend allegedly Sunni services when the service was considered "unified," there were other religious activities available to Shiites, and there weren't many Shiites).

138. *Jean-Laurent v. Wilkerson*, 438 F.Supp.2d 318 (S.D.N.Y. 2006).

139. ALA. R. EVID. 505.

140. *Trammel v. United States*, 445 U.S. 40 (1980).

141. *Id.* at 51.

142. FLA. STAT. ANN. § 90.505(1)(b) (West 1999).

that “the clergy communications privilege does not apply unless the confider consults the member of the clergy ‘for the purpose of seeking spiritual counsel or advice,’”¹⁴³ making it narrower than a free exercise right while providing for confidentiality.

In *Nussbaumer*, a pastor was subpoenaed to produce records relating to his counseling of the defendant, who was being prosecuted for child molestation.¹⁴⁴ The defendant moved to quash the subpoena on the grounds that his communications with the pastor were protected under Florida’s clergy communications privilege. The evidence showed that the defendant referred to the pastor as “Pastor,” that he was aware of the pastor’s role as a clergy member, and that he sought him out precisely for that reason.¹⁴⁵ Moreover, counseling sessions between the defendant and the pastor were conducted either in church itself or on church property,¹⁴⁶ hence, the Court held that the defendant’s communications to the pastor were made in the usual course of the pastor’s practice or discipline.¹⁴⁷

“Thus, considering the plain meaning of the words in the phrase ‘in the clergyman’s professional capacity’ and the observations of the *Nussbaumer* court, we hold that the phrase means that the clergyman is serving in his professional capacity when he is serving as a specialist in the spiritual matters of his religious organization.”¹⁴⁸ Whether a communication is made to a clergyman “in the clergyman’s professional capacity” must be examined on a case-by-case basis.¹⁴⁹ “The common thread in such cases ‘is that the privilege may not be invoked to enshroud conversations with wholly secular purposes solely because one of the parties to the conversation happened to be a religious minister.’”¹⁵⁰ But how is one to know that, particularly if the deciding court must consider the Free Exercise Clause in addition to any privilege statute, that is, must it decide from the cleric’s view as well as the communicant’s

143. *Nussbaumer v. State*, 882 So.2d 1067 (Fla. Dist. Ct. App. 2004).

144. *Id.* at 1070.

145. *Id.* at 1076.

146. *Id.*

147. *Id.*

148. *Ex parte Zoghby*, 958 So.2d 314 (Ala. 2006).

149. *Id.* at 322.

150. *Nussbaumer*, 882 So.2d at 1075 (quoting *People v. Carmona*, 82 N.Y.2d 60 (N.Y. 1993)).

view?

Florida and Alabama seemingly expand the privilege beyond Georgia's by referring to communications generally made to the clergyman in his professional capacity. Under the RLUIPA provision entitled "Rules of Construction" the following appears:

(a) Religious belief unaffected. Nothing in this chapter shall be construed to authorize any government to burden any religious belief.

(b) Nothing in this chapter shall create any basis for restricting or burdening religious exercise or for claims against a religious organization including any religiously affiliated school or university, not acting under color of law.¹⁵¹

A fair reading of the free exercise jurisprudence combined with RLUIPA would establish the following: (1) as to what is protected, free exercise jurisprudence controls; (2) as to the standard to be applied for restrictions on religious exercise in prison, RLUIPA applies if federal aid is involved; and (3) as to what is privileged, the federal evidentiary rules reflecting federal common law and the state privilege laws will control unless the privilege is so limited so as to place a burden on religious exercise not justified by a compelling government interest. There are, however, competing compelling government interests.

The North Carolina privilege which is called a competency statute provides:

No priest, rabbi, accredited Christian Science practitioner, or a clergyman or ordained minister of an established church shall be competent to testify in any action, suit or proceeding concerning any information which was communicated to him and entrusted to him in his professional capacity, and necessary to enable him to discharge the functions of his office according to the usual course of his practice or discipline, wherein such person so communicating such information about himself or another is seeking spiritual counsel and advice relative to and growing out of the information so imparted, provided, however, that this section shall not apply where communicant in open court waives the

151. 42 U.S.C. § 2000cc-3(a)-(b).

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privilege conferred.¹⁵²

In construing the North Carolina Constitution from which the above statute is derived, the North Carolina Supreme Court stated:

We think it clear that the term ‘rights of conscience’ as used in [a]rticle I, [section] 26, of the Constitution of North Carolina, must be construed in relation to the right to worship God according to the dictates of one’s own conscience. Consequently, the freedom protected by this provision of the State Constitution is no more extensive than the freedom to exercise one’s religion, which is protected by the First Amendment to the Constitution of the United States. Clearly, these constitutional provisions do not provide immunity for every act which one’s conscience permits him to do, or even for every act which one’s conscience classified as required by ethics, nor do they shield the defendant from a command by the State that he do an act merely because he believes it morally or ethically wrong. It is the right to exercise one’s religion, or lack of it, which is protected, not one’s sense of ethics.

The freedoms protected by these constitutional provisions are not limited to clergymen. Indeed, they are not limited to members of an organized religious body, and consequently, are not contingent upon proof that others share the views of the individual who asserts his own constitutional right to the freedom to exercise his religion or ‘right of conscience.’ Thus, if a clergyman, not otherwise privileged to refuse to testify, is protected from compulsion to do so by these constitutional provisions, because he believes that for him to so testify would violate his religious duty, a layman having such belief would also be protected from compulsion to testify. The constitutional provisions extend their protection to the unorthodox, unusual and unreasonable belief as truly as to the belief shared by many. This, a holding that these constitutional provisions grant to the clergymen a privilege against compulsion to disclose upon the witness stand information given him in confidence because such disclosure would violate the clergyman’s concept of religious duty, may well give rise to claims of a like privilege by laymen. The consequence might well be to deprive the courts of testimony necessary in order to administer justice, or to

152. N.C. GEN. STAT. § 8-53.2 (2007).

require them to embark upon the hazardous undertaking of determining the sincerity of the belief asserted.¹⁵³

The North Carolina privilege does not establish the outer limits with regard to testamentary compulsion. The North Carolina constitutional provision is held to be coextensive with the Free Exercise Clause while the definition of clergy is broad and not restricted to the formally ordained or licensed. Even if a communicant may be prevented from exercise of a religious requirement, a clergyman cannot be compelled to testify if doing so would violate his religious duties. A Georgia court considering the Georgia Clergy privilege statute and the Georgia Constitutional provisions previously cited should reach the same conclusion as the North Carolina Supreme Court.

A government's avoidance of a free exercise violation is a compelling interest, so too, is a government's interest in the security of a prison.¹⁵⁴ To foster the first, religious liberty must be constitutionally accommodated by the recognition of a clergy privilege although the privilege like other privileges limits access to probative evidence. The privilege's ultimate justification rests on the presumed idea that such privilege fosters religious tolerance, will lead to repentance, spiritual absolution and more importantly, from a societal viewpoint behavioral reform.¹⁵⁵ The protection for free exercise has no such underpinnings as the case law demonstrates. Not only is freedom of conscience and religious speech recognized as a constitutional mandate, but so to is the performance of certain physical acts, although the court also recognized that there is a greater limit to individual autonomy in a prison setting than on the civilian community. Specifically, the Court recognized a government's "countervailing compelling interest in not facilitating inflammatory . . . activity that could imperil prison

153. *In re Williams*, 152 S.E.2d 317 (1967).

154. *See Benning v. Georgia*, 391 F.3d 1299 (11th Cir. 2004).

155. *See, e.g., Jaffee v. Redmond*, 518 U.S. 1 (1996); *see also* Fred L. Kuhlmann, *Communications to Clergymen – When are They Privileged?* 2 VAL. U. L. REV. 265 (1968). Whether the privilege survives the recent enactments of duty-to-report statutes, generally directed at child abuse, depends upon the state of enactment. *See* R. Michael Cassidy, *Sharing Sacred Secrets: Is It (Past) Time for a Dangerous Person Exception to the Clergy – Penitent Privilege?* 44 WM. & MARY L. REV. 1627, 1666-74 (2003).

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security.”¹⁵⁶ Further, “should inmate requests for religious accommodations become excessive, impose unjustified burdens on other institutionalized persons, or jeopardize the effective functioning of an institution, the facility would be free to resist the imposition. In that event, adjudication in as-applied challenges would be in order.”¹⁵⁷

Citing favorably to *Reimann v. Murphy*,¹⁵⁸ the Court seemed to approve wide discretionary authority for prison officials to prevent violence even if not imminent.¹⁵⁹ In that case, decided under RFRA, prison officials excluded racist literature advocating violence as “the least restrictive mean of furthering the compelling state interest in preventing prison violence.”¹⁶⁰ The *Reimann* decision actually held that the literature at issue which was “replete with racial hatred and language inciting violence” was not “a required or important part of [the] religion or that [a person] would be unable to practice his religion without [this literature].”¹⁶¹ Not being a burden on religion and not being fundamental to it, the exclusion of such literature was decided under the rational basis standard. A similar withholding which burdens religious exercise would be subject to the compelling interest standard assuming RLUIPA applied. Since prisons are a closed forum context matters,¹⁶² which permits wider discretion to authorities. Lawmakers were mindful of this and anticipated that the courts would apply RLUIPA with “due deference to the experience and expertise of prison and jail administrators in establishing necessary regulations and procedures to maintain good order, security, and discipline, consistent with consideration of costs and limited resources.”¹⁶³

This is consistent with the “special needs” doctrine allowing a deviation from otherwise constitutional norms.¹⁶⁴ For

156. *Cutter* 544 U.S. at 725.

157. *Cutter* at 720.

158. *Reimann v. Murphy*, 897 F.Supp. 398, 402-403 (E.D. Wis. 1995).

159. *Cutter* 544 U.S. at 723.

160. *Id.* at 723 n.11.

161. *Reimann*, 897 F.Supp. at 402-403.

162. *Grutter v. Bollinger*, 539 U.S. 306 (2005) (citing *Cutter*, 544 U.S. at 723).

163. *Cutter*, 544 U.S. at 723.

164. *Vernonia School Dist. 47J v. Acton*, 515 U.S. 646, 653 (1995)

example, under the special needs doctrine a suspicionless search may be permitted absent individual suspicion of wrongdoing.¹⁶⁵ *Reimann* may be reanalyzed for the purpose of RLUIPA by arguing that the literature was so inflammatory that it was presumptively dangerous.

To qualify as requiring strict scrutiny, the religious exercise need not be central or compelled by a system of belief.¹⁶⁶ The literature at issue in *Reimann* not only advocated violence but did so without exception or cause except for a person's race. It did not merely justify violence or advocate violence under certain defined provocations such as certain Islamic literature does. This left prison authorities no real choice except to ban it, thus explaining the court's finding that banning was the "least restrictive means."¹⁶⁷

VII. PRISON AUTHORITIES ARE NOT COMPELLED TO ALLOW RELIGIOUS AUTHORITY TO THREATEN THE SECURITY OF PRISONS

There is no question that prison authorities may prevent clerics from open advocacy of violence and other dangerous activities. The issue is, under the guise of spiritual guidance and relying on the clergy privilege or the Free Exercise Clause, whether prison authorities must refrain from limiting the activities of some clerics determined in the sound discretion of prison authorities to be a danger to the peace and security of a prison?

Strict scrutiny, unlike a lower level of scrutiny, shifts the burden to the government to establish that a law, regulation, or action serves a compelling government interest. To survive strict scrutiny, a law, regulation, or act must be justified by a compelling government interest, such as the security of a prison, must be narrowly tailored, and must be the least restrictive means to achieve the government's compelling interest. The narrowly tailored requirement may be seen as forbidding over-inclusiveness.¹⁶⁸ To be the least restrictive, means the avoidance of unnecessary limitations on First Amendment

(random drug testing for student athletes permitted).

165. *Samson v. California*, 547 U.S. 843, 848, 852 (2006).

166. 42 U.S.C. § 2000cc-5(7)(A).

167. *Reimann*, 897 F.Supp. at 402.

168. *Schad v. Mt. Ephraim*, 421 U.S. 61, 71-74 (1981).

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rights.¹⁶⁹ Under RLUIPA, it would substantially burden a prisoner's free exercise to limit access to a cleric. It would also limit a prisoner's First Amendment rights to deprive that prisoner of the clergy privilege.

It should be understood that the clergy-communicant privilege as recognized in the early 19th century in *People v. Phillips*¹⁷⁰ is directed at protecting the religious duties of the clergyman, in that case the Roman Catholic sacrament of Confession. The Georgia privilege which seems to redefine the privilege as an incompetency rule is, in effect, both the clergyman's and the communicant's. The Georgia Constitutional provision protects the free exercise of both the communicant and the cleric up to the point where such exercise "overlaps and transgresses the rights of others."¹⁷¹ These aspects of Georgia law would not contravene the Establishment Clause or RLUIPA and should withstand challenge for a case where state law controls if the deciding court severs or reinterprets the statute's unconstitutional provisions

This leaves the discussion of the effect of the Free Exercise Clause on the privilege. *Sherbert*¹⁷² and *Presbyterian Church in U.S. v. Mary Elizabeth Blue Hall Memorial Presbyterian Church*¹⁷³ both recognized the Church Autonomy Doctrine. This arose from the Free Exercise Clause and the anti-entanglement prong of Establishment Clause jurisprudence as described in *Mockaitis v. Harcleroad*.¹⁷⁴ As previously indicated, the Free Exercise Clause may be used to protect more activities of a clergy than are covered by a typical privileges statute.

In a recent op-ed piece in the *Atlanta Journal Constitution*,

169. *McIntyre v. Ohio Elections Com.* 514 U.S. 334 (1995).

170. *City of Boerne*, 521 U.S. at 543.

171. *Anderson v. State*, 65 S.E.2d 848, 851 (1951).

172. *Sherbert*, 374 U.S. 404-05.

173. *Presbyterian Church in U.S. v. Mary Elizabeth Blue Hall Memorial Presbyterian Church* 393 U.S. 440, 449 (1960) (recognizing the church autonomy doctrine springing from both the Free Exercise Clause and the anti-entanglement prong of Establishment Clause jurisprudence as set forth in *Lemon*.)

174. *Mockaitis v. Harcleroad*, 104 F.3d 1522 (9th Cir. 1997) (regarding the state's claim of necessity for taping the confession of a priest to his archbishop on both Free Exercise and RFRA grounds).

Melissa Robinson, a convert to Islam, told of a sermon by an Imam in an Atlanta mosque wherein the Imam “vilified the ‘West’” and “told the congregation that Islam is incompatible with ‘Western values, and that the ‘West’ is a corruption.”¹⁷⁵ This is not to suggest that this attitude necessarily pervades Muslim attitudes, but it raises an issue of what spiritual guidance actually is in the Muslim faith. If it is so that there is a governmental interest in establishing a general clergy or communicant privilege because protecting confidentially leads to repentance and socially desirable behavioral changes, then it is necessary to know what is being protected.

Since Muslims are a rapidly growing segment of the United States population as well as the prison population, some understanding of what constitutes spiritual guidance and free exercise for a Muslim is necessary. One must begin by understanding the way Muslims view the Quran and the Prophetic Reports known as the hadith. There is much publicly available material for the interested reader.

The Quran is viewed as a recitation of God’s words with Muhammad as the conduit of God’s revelation. The Quran is inimitable in both context and language. It is literally the Word of God.¹⁷⁶ The allegorical tradition of both Jewish and Christian exegesis has virtually no influence in contemporary Islam.¹⁷⁷ Any apparent contradictions or inconsistencies between two or more passages in the Quran are explained in suras 2:106, 13:39, 16:101 and 17:86 as a result of God substituting one verse for another, thereby abrogating or canceling the earlier verse. “God abrogates and confirms what He pleases.”¹⁷⁸ This makes it incumbent on Muslims to determine the chronological order of the suras or chapters.¹⁷⁹

This is especially so since a number of suras are nonviolent and advocate tolerance. For example Quran 2:256 states “There

175. Melissa Robinson, Op.-Ed., ATLANTA J. CONST., Nov. 8, 2007 at 134.

176. THE KORAN (Trans. N.J. Dawood 1956) Published with a Parallel Arabic Text in 1990, sura 13:39 at 253. Similarly, sura 2:106 “If we abrogate a verse or cause it to be forgotten, we will replace it with a better one or one similar.” at IX.

177. Peters, *supra* note 31, at 48-54, 227-37.

178. Dawood, *supra* note 175, at 16.

179. *Id* at IX.

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shall be no compulsion in religion.”¹⁸⁰ Sura 5:8 states “Do not allow your hatred of other men to turn you away from justice.”¹⁸¹ Sura 29:46 states that Muslims should “[b]e courteous when you argue with the people of the Book [Christian and Jews], except with those among them who do evil.”¹⁸² Sura 60:8 states: “God does not forbid you to be kind and equitable to those who have neither made war on your religion nor driven you from your homes. God loves the equitable.”¹⁸³ In apparent contradiction to sura 60:8 is sura 9:29 which states “Fight against such of those to whom the Scriptures were given as believe neither in God nor the Last Day, who do not forbid what God and His apostle have forbidden, and do not embrace the true Faith, until they pay tribute out of hand and are utterly subdued.”¹⁸⁴

The Quran, however, is not organized chronologically but rather by descending length.¹⁸⁵ Scholars establish a chronological order by separating suras by style with the Meccan suras divided into early, middle and late followed by the much longer Medinan suras which contain detailed regulations for the converted as well as abrogating the earlier inconsistent Meccan suras.¹⁸⁶

Muslim scholars insist the doctrine of abrogation must be mastered by those who wish to achieve competency in understanding the Quran.¹⁸⁷ Most scholars cite sura 9 of the Quran as the last or next to last revealed to Muhammad.¹⁸⁸ It contains numerous violent passages and pursuant to the doctrine of abrogation apparently supersedes earlier peaceful revelations.

180. *Id.* at 41.

181. Dawood, *supra* note 175, at 107.

182. *Id.* at 401. See generally Farroq Ibrahim, *The Problem of Abrogation in the Quran*, www.answering_islam.org/Authors/Farooq_Ibrahim/abrogation.

183. *Id.* at 549.

184. *Id.* at 190.

185. RICHARD BELL, INTRODUCTION TO THE QUR'AN (Edinburgh University Press 1953) at 57-61.

186. See generally Peters, *supra* note 31, at 105-06.

187. See DAVID BUKAY, THE MIDDLE EAST QUARTERLY, PEACE OR JIHAD? ABROGATION IN ISLAM, Fall 2007 Vol. XIV, No. 4 n.14, 15 and text related thereto.

188. *Id.*, see *supra* text accompanying note 176.

For example, sura 9:73 is said to abrogate earlier suras advocating tolerance. It states: "Prophet, make war on the unbelievers and the hypocrites and deal rigorously with them. Hell shall be their home: an evil fate."¹⁸⁹ Sura 9:5 (the verse of the sword) seems to make it obligatory for Muslims to kill non-Muslims. That verse and the proceeding state:

Proclaim a woeful punishment to the unbelievers, except to those idolaters who have honored their treaties with you in every detail and aided none against you. With these keep faith, until their treaties have run their term. God loves the righteous. When the sacred months are over slay the idolaters wherever you find them. Arrest them, besiege them, and lie in ambush everywhere for them. If they repent and take to prayer and render the alms levy, allow them to go their way. God is forgiving and merciful.¹⁹⁰

The hadith purport to record the sayings and acts of Muhammad and serve as a guide to Muslim behavior.¹⁹¹ The hadith regarded as constituting a Muslim's guide to behavior are known as the "sunna" of the Prophet.¹⁹² Those provide an authoritative guide to permitted and forbidden actions and beliefs. The Shiite and Sunni versions of the hadith are somewhat different but that is not important to this discussion.

If the goals of spiritual guidance are to live a life as demanded by the Deity worshiped and to achieve salvation after death, then it becomes quite relevant what a cleric advises his communicants and whether that advice is consistent with ordered liberty as provided for by the laws of the United States and the states and in the exercise of the police power. Freedom

189. Dawood, *supra* note 176, at 198.

190. *Id.* at 186.

191. Maulana Muhammad Ali, *A Manual of Hadith*, www.sacred_texts.com/isl/bakhari/bhl_23.htm.

192. Mohammad Omar Farooq, *Islamic Law and the use and abuse of Hadith*, (http://www.globalwebpost.com/farooq/writings/islamic/law_hadith.html). See *supra* note 142. For example, hadith 1:24 provides: Allah's Apostle said: "I have been ordered (by Allah) to fight against the people until they testify that none has the right to be worshiped but Allah and that Muhammad is Allah's Apostle, and offer the prayers perfectly and give the obligatory charity, so if they perform a that, then they save their lives and property from me except for Islamic laws and then their reckoning (accounts) will be done by Allah."

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of conscience is historically protected in the United States.¹⁹³ In fact, the mere advocacy of revolution or violence is not actionable absent a context that would make it so.¹⁹⁴ But constraints on actions have always been recognized as well as constraints on speech that may reasonably lead to criminal behavior or otherwise threaten the safety of the public.¹⁹⁵ Objections to limits on acts or speech do not rely on a privilege but on free exercise rights.¹⁹⁶

Many speak of Islam and Islamism as implying different attitudes.¹⁹⁷ However, many Muslim scholars, as well as non-Muslim scholars including Robert Spencer,¹⁹⁸ Bat Ye'or¹⁹⁹ and Bernard Lewis²⁰⁰ consider Islam as a way of life encompassing legal, social, political, and economic rules. If this is so, then the Imam quoted in Ms. Robinson's op-ed is correct that Islam is incompatible with the West.²⁰¹ It might be that spiritual

193. *Supra* text accompanying notes 36, 39, 124.

194. *Infra* text accompanying notes 227-28.

195. *Supra* text accompanying notes 36, 125-126.

196. *Supra* text accompanying notes 36, 76.

197. See [Wikipedia.org/wiki/Islamism](http://en.wikipedia.org/wiki/Islamism).

198. Robert Spencer, author of *The Truth About Muhammad: Founder of the World's Most Intolerant Religion.*, is a Catholic American writer on Islam. He has published seven books, including two bestsellers, on topics related to Islam and terrorism. See http://en.wikipedia.org/wiki/Robert_Spencer.

199. Bat Ye'or, author of *Islam and Dhimmitude: Where Civilizations Collide*, an Egyptian-born British historian specializing in the history of non-Muslims in the Middle East, and in particular the history of Christian and Jewish dhimmis living under Islamic governments, See http://en.wikipedia.org/wiki/Bat_Ye'or.

200. Bernard Lewis, widely read Expert on the Middle East, See http://en.wikipedia.org/wiki/Bernard_Lewis.

201. See Ann Elizabeth Mayer, *The Islam and Human Rights Nexus: Shifting Dimensions*, THE MUSLIM WORLD J. OF HUMAN RIGHTS, Vol. 4, Issue 1, Art. 4 (2007). Although Prof. Mayer takes the politically correct position that Islamic hostility to human rights is America's fault, her analysis is provocative and gives some hope that significant segments of Muslim society are trying to "reverse the impression that Islam is inherently incompatible with human rights [which] has been encouraged by the reservations that many Muslim countries have continued to enter when they ratify human rights conventions. These reservations invoke supposedly unchangeable Islamic rules that are said to bar accepting any human rights that contravene them. Thus, for example, in 1996 when ratifying the

guidance and free exercise based on the Quran and hadith is not the spiritual guidance and free exercise of the Judeo-Christian West and other religions which seem more adaptable to Western values such as Hinduism and its near relative, Buddhism. If Islam is a “deen”²⁰² rather than a religion, that is, is concerned with the entire conduct of life including spiritual and temporal, religious and secular, moral and material, social, cultural, economic, and political as many Muslim scholars maintain then there are no other sources of law except the Quran and hadith.²⁰³ That is not the premise behind the District court

convention on the Rights of the Child, Saudi Arabia entered “reservations with respect to all such articles as are in conflict with the provisions of Islamic law.” In similar fashion, Saudi Arabia in reserving to the Convention on Elimination of All Forms of Discrimination Against Women in 2000 warned: ‘In case of contradiction between any term of the Convention and the norms of Islamic law, the Kingdom is not under obligation to observe the contradictory terms of the Convention.’” *Id.* at 5.

202. “Deen is defined by Imam Mohamed Baiananie at the Islamic Center of Raleigh, N.C., Dec. 27, 1996 as follows: “These four linguistic meanings constitute the concept of the word *deen* in the *Qur’an* where it implies a comprehensive system of life that is composed of four parts: (1) The rulership and the authority belong to *Allah*; (2) The obedience and submission to this rulership and authority by those who embraced this *deen*; (3) The comprehensive system (intellectual and practical) established by this authority (*Allah*); and (4) The reward given by this authority (*Allah*) to those that followed the system and submitted to it and the punishment inflicted upon those rebel against it and disobey it. *Id.*

Based on this definition of *deen*, we can summarize that *deen* is *submission, following and worship by man for the creator, the ruler, the subjugator in a comprehensive system of life with all its belief, intellectual, moral and practical aspects.*

After understanding this definition of the Arabic word *deen*, we realize that it is wrong to translate it to the English word “*religion*”. But, we should take precaution and warn Muslims against these conspiracies that are plotted against Muslims to keep them away from the reality of their *deen* and distort the concept of *deen* or restrict it to one aspect of life- like they (None Muslim) did with their religion and church after the French Revolution.

“[S]haria constituted the prescribed pattern of Muslim behavior and originated in only one ground, God’s will. Sharia is made available to its intended beneficiaries either through his formal revelation in the Quran or mediated through the instructions or example . . . of his chosen Prophet, Muhammad.” Peters, *supra* note 134, at 105.

203. Peters, *supra* note 134. Quranic verses include “140 on dogmatic and devotional matters like prayer, fasting, pilgrimage, and the like, 70 on

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decision in *Knuckles v. Prasse*.²⁰⁴ Prison authorities did not permit Black Muslims to gather for what they considered non-religious purposes on the basis that such gatherings were not necessary for the exercise of religion and presented a clear and present danger to prison security.²⁰⁵ The Third Circuit in affirming the District court and referring to the differences in First Amendment rights based on the context, agreed that Black Muslim religious doctrine absent prior peaceful interpretations by a Muslim cleric could be banned.²⁰⁶ Although not decided under RLUIPA, the decision would not change. Prison authorities were dealing with literature that seemed to advocate immediate and violent action against others solely on account of race. No claim was made that the Quran itself was “so inflammatory as to be harmful to prison security.”²⁰⁷ Nevertheless, a number of cases have found that Black Muslims, in particular, are disruptive and a threat to security if their activities are not restricted.²⁰⁸ Prison authorities are allowed wide discretion in banning literature based on experience, and even if unsaid, on a reasonable fear of imminent danger.

The determination of a reasonable fear of imminent danger involving literature requires the application of the tests set forth in *Thornburgh v. Abbott*.²⁰⁹ In order to avoid a claim of prior restraint by a prisoner, *Thornburgh* established a requirement for clear standards.²¹⁰ The censorship policy must further a “substantial government interest unrelated to the suppression of expression,” merely because of its content.²¹¹ The literature must be reviewed before-hand to determine if the literature

questions of personal status (marriage, divorce, inheritance, etc.), 70 more on commercial transactions (sales, loans, usury), 30 on crimes and punishments, another 30 on justice, and a final 10 on economic matters.” at 107 “Prophetic reports (hadith) . . . form the bases of the Muslims’ legal exegesis of the Quran.” at 48.

204. *Knuckles v. Prasse*, 302 F.Supp. 1036 (D.C.Pa. 1969).

205. *Id.*

206. *Knuckles v. Prasse*, 435 F.2d 1255 (3d Cir. 1970).

207. *Id.*

208. *See Knuckles*, 302 F.Supp. at 1053-59.

209. 490 U.S. 401 (1989).

210. *Id.* at 416-17.

211. *Id.* at 415.

created “an intolerable risk of disorder under the considerations of a particular prison at a particular time,”²¹² does not involve a pre-determined judgment, is not too broad, and has “procedural safeguards for both the recipient and the sender” to review any decision.²¹³ This last requirement seems to implicate due process. The Fourth Circuit agreed²¹⁴ and required notice and an opportunity to be heard for both recipients and senders.²¹⁵ Prison regulations banning literature that are too vague²¹⁶ or based on banning literature advocating unpopular or even repugnant ideas are violative of either due process or the First Amendment.²¹⁷ The *Thornburg* tests should be read with those factors set forth in *Turner v. Safley*²¹⁸ which, although based on a rational relationship test, are still applicable but must be judged against the higher compelling interest standard.

Fearing prison disruption after 9/11, the Federal Bureau of Prisons, after ascertaining that terrorists Jose Padilla and Richard Reed had converted to Islam while in prison and Al-Qaeda had actively recruited in prisons, instituted a blanket moratorium on the hiring of new Muslim chaplains.²¹⁹ Such a blanket ban cannot be justified under RLUIPA and would be difficult to justify under RFRA and current Free Exercise jurisprudence. The author of “The Silence of Prayer”²²⁰ argues that this ban has the affect of criminalizing Islam and has a disparate impact, at least, in part because the number of Black Muslims in prisons and because it targets a specific religion.²²¹ The regulation should have targeted specific practices

212. *Id.* at 416.

213. *Id.* at 416-17.

214. *Moncalm Publishing Corp. v. Hodges*, 80 F.3d 105 (4th Cir 1996).

215. *Id.* at 106.

216. *Procurier v. Martinez*, 416 U.S. 396, 405 (1974) (*overruled by Thornburgh v. Abbott*, 490 U.S. 401 (1989)); *Ustrak v. Fairman*, 781 F.2d 573, 580 (7th Cir. 1986).

217. For a discussion of cases dealing with sexually explicit literature see MICHAEL MUSHLIN, RIGHTS OF PRISONERS, 1 Rights of Prisoners §5.3 (3d ed) (2007); *see also* accompanying text, *supra* notes 55-83.

218. *Infra* note 272.

219. *See* Stephen Seymour, *The Silence of Prayer: An Examination of the Federal Bureau of Prisons' Moratorium on the Hiring of Muslim Chaplains*, 37 COLUM. HUM. RTS. L. REV. 523 (2006).

220. *Id.*

221. *Id.* at 526.

threatening prison security and discipline rather than the scattershot approach adopted in order to withstand challenge.²²² This is despite the prevalence of terrorist recruitment in prisons.

In short, if experience indicated that following a meeting with a Muslim cleric or the receipt of Muslim literature, prison peace and security were compromised, prison authorities are justified in restricting such practices including individual meetings with Muslim clerics. The *Knuckles* court went on to distinguish practices of a religious and non-religious nature, presuming that Muslims recognized the limited sphere of religion as do Christian and Jews.²²³ This would seem to be a reasonable assumption if United States constitutional values are respected, even if not in accord with Muslim teaching. Otherwise the narrowly tailored test, combined with the accommodation jurisprudence, might leave prison authorities with a serious problem in defining religious exercise for Muslims. This raises several issues, including: (1) What are the limits to free speech where violence or disruption is possible in the context of a prison where prisoners request spiritual guidance from a clergyman?; (2) What constitutes a reasonable apprehension of disruption or violence in a prison setting?; (3) How much discretion do prison authorities have?; (4) What language can be constitutionally prohibited?; and (5) Is there a special rule for religious language?

Constitutional guarantees of freedom of speech forbid states to punish use of words or language not within narrowly limited classes of speech including fighting words, and speech which incites imminent lawlessness.²²⁴

Fighting words are defined as personally abusive epithets which by their very utterance are likely to incite immediate physical retaliation in the ordinary citizen. For example, the Court held that the following words “. . . I’ll kill you . . . you son of a bitch . . . I’ll choke you to death” did not tend to cause

222. *Id.*; see also *supra* notes 10, 11, and 13. See Terrorist Recruitment and Infiltration in the United States: Prison and Military as Operational Base: Hearing Before the Subcomm. on Terrorism, Technology, and Homeland Security of the Senate Comm. on the Judiciary, 108th Cong. (2003).

223. *Knuckles*, 302 F.Supp. at 1057-58.

224. *Gooding v. Wilson*, 405 U.S. 518 (1972).

an immediate breach of the peace.²²⁵ This is because mere offensive language that is unlikely to incite an immediate breach of the peace may not serve as a basis of prosecution because such words do not fall into the relatively narrow definition of fighting words.²²⁶

With respect to advocacy of illegal conduct, the Court has said:

[C]onstitutional guarantees of free speech do not permit a State to forbid or proscribe advocacy of the use of force or a law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action. . . . 'the mere abstract teaching of the moral propriety or even moral necessity for a resort of force and violence is not the same as preparing a group for violent action and steeling it to such action.'²²⁷

Applying this principle, the Court in *Brandenburg* reversed a conviction of an individual involved with organizing a Ku Klux Klan meeting wherein violence was advocated.²²⁸ Violence or disruption has to be imminent in order for the speech not to be protected by the First Amendment. Thus if violence or disruption is merely possible then the speech is protected and restrictions must be supported by a substantial government interest. However, in the context of a prison setting, speech which would not otherwise rise to the level of unprotected speech may be prohibited because of the uniqueness of the prison setting. This applies to limiting activities to those which are compatible with the intended purposes of the forum.²²⁹ After all, a prison is a closed forum with certain purposes and goals including punishment and rehabilitation.²³⁰

225. *Gooding*, 405 U.S. at 518.

226. *Id.*

227. *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (quoting *Noto v. U.S.*, 367 U.S. 290, 297-98 (1961)).

228. *Id.*

229. *Carlow v. Mruk* 425 F. Supp.2d 225 (D.R.I. 2006).

230. Closed or non-public forums are government institutions or properties that are not open for public communication based on a traditional time, place and manner analysis. *See Renton v. Playtime Theatres, Inc.* 475 U.S. 41, 48 (1986); *Lebron v. National R.R. Passenger Corp. Amtrak*, 69 F.3d 650 (2d Cir. 1995), *opinion amended on other grounds on denial of reh'g*, 89 F.3d. 39 (2d Cir. 1995), *cert. denied* 517 U.S. 1188 (1996).

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To summarize, to be upheld against a First Amendment attack, the regulation and practice alleged to infringe First Amendment rights of prisoners must further a legitimate penological interest unrelated to the suppression of expression and furthering security, order, and rehabilitation.²³¹ This included materials that are psychologically inflammatory. In *McCabe v. Arave*, the Ninth Circuit, in weighing the above factors, held that a prison regulation that restricted inmates access to literature advocating racial purity, but not advocating violence or illegal activity as means of achieving that goal, was not so racially inflammatory to be reasonably likely to cause violence.²³²

In *Jones v. North Carolina Prisoners' Labor Union*, the Court held that as long as it was reasonable for the correction officials to believe that union would create friction, there was no burden on the officials to show affirmatively that the union would be detrimental to proper penological objectives or would constitute a clear and present danger to security and order.²³³ This case can be reanalyzed for purposes of RLUIPA which includes burden-shifting. A prisoner union might justifiably be considered presumptively dangerous as well as a clear and present danger to prison authority. Prison authorities have discretion to determine what constitutes a reasonable apprehension of disruption or violence. The Supreme Court has recognized "judgments regarding prison security are particularly within the province and professional expertise of corrections officials, and in the absence of substantial evidence in the record to indicate that the officials have exaggerated their response to these considerations, courts should ordinarily defer to their expert judgment in such matters."²³⁴ However, this discretion is only valid when the prison authority posits a legitimate security interest, and evenhandedly imposes

231. *Thornburgh v. Abbott*, 490 U.S. 401, 408 (1989) (unnecessarily broad censorship of inmate correspondence invalid).

232. *McCabe v. Arave*, 827 F.2d 634 (9th Cir. 1987); *Nichols v. Nix*, 810 F. Supp 1448 (S.D. Iowa 1993), *aff'd* 16 F.3d 1228 (8th Cir. 1994) (ban on publication of religious material of white supremacist church invalid as no threat to security).

233. *Jones v. North Carolina Prisoners' Labor Union*, 433 U.S. 119 (1977).

234. *Turner*, 482 U.S. at 86 (quoting *Jones*, 433 U.S. 119).

restrictions on religious practices that might threaten those interests.

Many previous decisions are based on the rational basis test, not strict security as required by RLUIPA and often by RFRA. If certain decisions are reanalyzed based on the higher standard, it is not clear whether prison authorities would prevail. The neutrality test of *Smith* with its content neutral and rational basis baggage is not equivalent to the least restrictive test under RLUIPA and RFRA.

The Court, in another context, held that “[f]or liability to be imposed by reason of association alone, it is necessary to establish that the group itself possessed unlawful goals and that the individual held a specific intent to further those illegal aims.”²³⁵ Advocacy alone is protected, that is, it is not enough to establish a reason for government proscription of speech.²³⁶ The government does, however, have a freer hand in restricting expressive conduct.²³⁷ Conceding for the sake of argument that there are many Islamic leaders and scholars that support and even encourage violent behavior by Muslims directed at those who differ with the particular world-view espoused, including toward other Muslims, and that such advocacy alone generally cannot be restricted by government applying a strict scrutiny standard, where does that leave prison authorities? RLUIPA explicitly applies strict scrutiny to prison regulations by its reference to “exercise of religion,”²³⁸ which is beyond the usual time, place, and manner analysis whose restrictions survive constitutional challenge if reasonable in furthering a legitimate governmental interest, are content neutral, and are narrowly tailored rather than having to meet the least restrictive test.

Applying the least restrictive test under RFRA, courts have upheld regulations on hair length,²³⁹ unbraiding dreadlocks when transferring to and from a prison,²⁴⁰ and refusing religiously-based requests for segregated living quarters.²⁴¹ On

235. *NAACP v. Claiborne Hardware Co.*, 558 U.S. 886, 920 (1982).

236. *See Healy v. James*, 408 U.S. 169, 186 (1972).

237. *See Texas v. Johnson*, 491 U.S. 397, 406 (1968).

238. 42 U.S.C. § 2000cc-1.

239. *Diaz v. Collins*, 114 F.3d 69 (5th Cir. 1997); *Davie v. Wingard*, 958 F.Supp. 1244 (D. Ohio 1997).

240. *May v. Baldwin*, 522 U.S. 921 (1997).

241. *Ochs v. Thalacter*, 90 F.3d 292 (8th Cir. 1996).

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the other hand, regulations of general application specifying hair length may not survive under RLUIPA,²⁴² but under certain circumstances excessive hair or beard length may be considered presumptively dangerous because of the possibility of hiding weapons. Although, RLUIPA doesn't seem to have actually institutionalized the least restrictive standard²⁴³ since the language of reasonableness is often used, restrictions found to be too broad, such as forbidding all beards, not just excessively long ones, apparently will not be upheld.²⁴⁴

There are only a few reported Georgia cases decided after the enactment of RLUIPA. In *Hearns v. Terhune*, the plaintiff Hearns was a Muslim inmate at Calipatria State Prison.²⁴⁵ Hearns reported to the Muslim chaplain that, what he referred to as, a ruling Muslim group stole prayer oil from another Muslim inmate.²⁴⁶ Hearns planned a secret delivery of a later prayer oil shipment intended by Hearns to avoid another theft.²⁴⁷ The Muslim group learned of the street delivery and Hearns was attacked by a member of the Muslim group in a prison chapel.²⁴⁸ The Muslim chaplain reportedly informed other Muslim inmates that Hearns held beliefs which required him to be killed under the teachings of Islam.²⁴⁹ It would seem that this particular Muslim chaplain had the specific intent to incite prisoner violence sufficient to ban him from the prison despite any claim that such incitement is mandated by Islam.

In *Pell v. Procunier*,²⁵⁰ the court pointed out that a prisoner's First Amendment rights extend only so far as they:

[A]re not inconsistent with his status as a prisoner or with the legitimate penological objectives of the corrections system. Thus, challenges to prison

242. *Hoevenar v. Lazaroff*, 276 F.Supp.2d 811, *rev'd*, 108 Fed. Appx. 250, 2004 WL1664043 (6th Cir.), *vacated, cert. denied*, 2004 WL2372177 (2006).

243. *See Lindell v. McCallum*, 352 F.3d 1107, *on remand* 2004 WL 230935 (2004).

244. *Mayweathers v. Terhune*, 328 F.Supp.2d 1086 (E.D. Cal. 2004).

245. *Hearns v. Terhune*, 413 F.3d 1036 (N.D.Ga. 2005).

246. *Id.* at 1038.

247. *Id.*

248. *Id.*

249. *Id.* at 1038-39.

250. *Pell v. Procunier*, 417 U.S. 817 (1974).

restrictions that are asserted to inhibit First Amendment interests must be analyzed in terms of the legitimate policies and goals of the corrections system to whose custody and care the prisoner has been committed in accordance with due process of law.²⁵¹

In *McCree v. Pocock*, McCree was a Muslim inmate housed at the Atlanta City Detention Center (“ACDC”).²⁵² Plaintiff requested that ACDC permit him to transfer between prison housing units on Fridays in order to participate in a Muslim religious exercise called Jumu’ah.²⁵³ Muslim religious doctrine prevents Muslims chaplains from performing more than two Jumu’ah services on a given Friday.²⁵⁴ ACDC houses Muslim inmates in more than four housing units and does not allow them to transfer to other pods for this weekly prayer.²⁵⁵ Therefore, McCree was prevented from meeting with one of these two Muslim leaders if neither chose to visit his pod for one of their two Jumu’ah services.²⁵⁶

The Georgia court applied a two-prong test for determining whether a prisoner’s rights of religious exercise were violated under RLUIPA. “Under the provisions of RLUIPA, an inmate must make a prima facie case, demonstrating that: (1) A prison official imposed a ‘substantial burden’ on his religious exercise; and (2) This burden was either imposed in a program or activity receiving federal funding or that affects interstate commerce.”²⁵⁷ The second element was not an issue in this case. Neither party disputed that ACDC receives federal funding for its housing of inmates. “If a prima facie case is demonstrated, the burden then shifts to the government to show that this imposition was both (1) in furtherance of the compelling government interest; and (2) the least restrictive means of furthering that interest.”²⁵⁸

The court examined two separate issues in determining whether not allowing Plaintiff McCree to gather with other

251. *Id.* at 822.

252. *McCree v. Pocock*, slip op. at 2007 WL 1810143 (N.D.Ga. 2007).

253. *Id.* at 2.

254. *Id.*

255. *Id.*

256. *Id.*

257. *Id.* at 2-3.

258. *Id.* at 3.

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Muslims and an Imam for Jumu'ah substantially burdened his religious exercise. First, the court considered whether Jumu'ah prayer is so important to the Muslim faith that its denial constitutes a substantial burden on McCree's religious exercise; and, second, what is required for a Muslim adherent to perform Jumu'ah. Neither party disputed that denying the Jumu'ah ceremony would be a substantial burden on McCree's religious exercise, so the court decided to base their determination on what was required to perform Jumu'ah. The court discovered that an Imam allegedly told the prison chaplain that an Imam was not required for Jumu'ah, but that many Muslims feel more comfortable with one present.²⁵⁹ The court determined that, if no Imam is required, then no substantial burden has been imposed by the Imam's absence. Also, the court discovered if two or three Muslim men were present, they could perform Jumu'ah.²⁶⁰

The court then determined that if McCree is able to demonstrate a substantial burden on his religious exercise, jail authorities must show that its refusal to permit him to congregate with other Muslims in other housing units for Jumu'ah constituted the least restrictive means of furthering a compelling state interest.²⁶¹ Here, jail authorities argued that it has a significant security and safety interest in refusing to accommodate the Plaintiff's request. The court pointed out, however, that they cited no instances of prison violence at ACDC arising out of religious exercise.²⁶²

Despite the alleged security and safety concerns, the court found a genuine issue of fact existed by finding that ACDC allows the majority of Muslim inmates to congregate in one housing unit during the last night of Ramadan.²⁶³ The jail administrator testified that the prison officials in charge of Ramadan looked only at the files for each attendee and "who is in maximum security and what for."²⁶⁴ The court concluded that no real explanation was provided as to why this same procedure could not be performed on a weekly basis. There

259. *Id.* at 4.

260. *Id.* at 5.

261. *Id.*

262. *Id.*

263. *Id.* at 6.

264. *Id.*

was evidence in the record that inmates are reclassified each week based on potential changes in their behavior after court appearances. Plaintiff contends that because of this necessity for reclassification, no additional burden existed in requiring authorities to determine whether an inmate should be permitted to transfer each Friday for Jumu'ah. Based on these contentions, the court inferred that ACDC's main concern in refusing to grant Plaintiff's request appears to be lack of resources.²⁶⁵ Accordingly, the Georgia District court stated that a lack of resources argument must be heavily scrutinized and both Eleventh Circuit precedent and RLUIPA's legislative history indicates that a concern for lack of resources may not meet RLUIPA's strict scrutiny requirements.²⁶⁶

Another alternative suggested by Plaintiff was for the prison to permanently house all Muslims in a few selected units in order to permit sufficiently large groups of Muslim inmates to worship together. The court ascertained that at least one other Muslim lived in Plaintiff's housing unit and Defendant offered no evidence why ACDC could not place at least three Muslims in a given housing unit. Therefore, the court found that this alternative would not constitute a "radical departure" from ACDC's normal operating procedures.²⁶⁷

The court concluded that a genuine issue of fact existed as to whether Defendant engaged in the least restrictive means of furthering its compelling government interest and security of its facility. Accordingly, the court found that awarding summary judgment to either party was unwarranted.²⁶⁸

The perception of a problem arising in *McCree* is not enough to meet strict scrutiny although the facts in *McCree* would have met the reasonable basis or neutrality tests. *Hearns*, unlike *McCree*, dealt with the actual conduct that ensued from the activities of a Muslim cleric.

In *Daker v. Ferrero*,²⁶⁹ the District court, among a number of other issues, was asked to rule on the restriction of access to certain publications and a restriction on the times and places a

265. *Id.* at 7.

266. *Id.*

267. *Id.*

268. *Id.* at 8.

269. *Daker v. Ferrero*, 475 F.Supp.2d 1325 (N.D.Ga. 2007).

Muslim inmate could wear certain headwear. If the District court had really applied the least restrictive standard, it is probable that a ban on literature directly advocating immediate violence or security breaches, rather than a generalized rationale for violence as found in the Quran and the hadith, may be banned whereas the latter cannot. As for headgear restrictions, they can be upheld generally as necessary to limit the flow of contraband but under RLUIPA probably must be allowed during religious ceremonies.²⁷⁰

VIII. LEGITIMATE PENOLOGICAL INTERESTS

The regulation and the limitation of First Amendment freedoms must be no greater than is necessary or essential to the protection of the particular governmental interest involved.²⁷¹ In determining whether a regulation restricting constitutional rights of a prisoner bears a reasonable relationship to legitimate penological interests, a court is to consider factors such as: (1) whether the regulation has a logical connection to the legitimate government interests invoked to justify it; (2) whether there are alternative means of exercising the rights that remain open to the inmates; (3) the impact that accommodation of the asserted constitutional right will have on other inmates, guards, and prison resources; and (4) the presence or absence of ready alternatives that fully accommodate the prisoner's rights at *de minimis* cost to valid penological interests.²⁷²

A logical connection to legitimate government interest of security and safety was found where the court in *McCabe* upheld prison authorities' refusal to permit group worship by close-custody prisoners led by an inflammatory religious leader but reversed the District court which had upheld a ban on racially charged literature.²⁷³ In *Turner*, the United States Supreme Court held that a prohibition on a prisoner's

270. *Id.* at 1350 (Court did not decide issue of head gear during religious services under RLUIPA standard.).

271. *James v. North Carolina Prisoners' Labor Union, Inc.*, 433 U.S. 119 (1977).

272. *Turner*, 482 U.S. at 89-91.

273. *McCabe*, 827 F.2d at 637-38 (literature standing alone did not create an imminent danger to security); *see also supra* text accompanying notes 87-90, 232.

communication with other inmates is justified as preventing a potential impetus to criminal behavior which was a legitimate penological interest in prison, as even contact between former inmates outside of prison creates a potential for criminal behavior.²⁷⁴ In another case a court held that prohibiting an inmate in a sexual offender treatment program from keeping his or her written prose does not violate the inmate's First Amendment rights, where the restriction is reasonably related to a legitimate penological interest in rehabilitation. *O'Lone v. Estate of Shabazz*²⁷⁵ involved a challenge to policies adopted by prison officials which resulted in the plaintiffs, members of the Islamic faith, being unable to attend weekly Muslim congregational service during working hours.²⁷⁶ The United States Supreme Court upheld the policies, stating that prison officials are not required by the Constitution to sacrifice legitimate penological objectives if there were "alternative means of exercising the right . . . remaining open to prison inmates."²⁷⁷ Although, the restriction in this case left no alternative means for the inmates to practice their religious beliefs at a particular time, the Court refused to strike down the regulation based on a legitimate penological interest in administration and security. The Court stated that the proper inquiry is whether the inmates were deprived of "all means of expression."²⁷⁸ Since the inmates retained the ability to participate in other Muslim religious ceremonies, alternative

274. *Turner*, 482 U.S. at 91, 92.

275. *O'Lone v. Estate of Shabazz*, 482 U.S. 342 (1987).

276. *Id.*

277. *Id.* at 351 (citing *Turner*, 482 U.S. at 89-90).

278. Compare *O'Lone*, 482 U.S. 342, to *Cruz v. Beto*, 405 U.S. 319 (1972). Prison authorities did not provide a Buddhist with access to the prison chapel nor did they permit him to share his religious materials while at the same time Christian and Jewish prisoners were rewarded for religious activity. *Id.* at 1080. The Court said in vacating the lower court's denial of relief: "We do not suggest, of course, that every religious sect or group within a prison-however few in number- must have identical facilities or personnel. A special chapel or place of worship need not be provided for every faith regardless of size; nor must a chaplain, priest, or minister be provided without regard to the extent of the demand. But reasonable opportunities must be afforded to all prisoners to exercise the religious freedom guaranteed by the First and Fourteenth Amendment without fear of penalty." *Id.* at 1081 n. 2.

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avenues of expressing the religious expression existed, and the restrictions at issue were reasonable. *O'Lone*, decided in 1987, cannot be relied upon today. *O'Lone* involved a prison regulation interfering with Muslim inmates' attendance at Jumu'ah as commanded by the Quran. Suit was brought under 42 U.S.C. §1983 alleging interference with the Free Exercise rights. In deciding *O'Lone*, the Court applied the "reasonableness test which is less restrictive than that ordinarily applied to alleged infringements of fundamental constitutional rights."²⁷⁹ In citing *Turner*, the Court specifically rejected a "more rigorous" scrutiny test.²⁸⁰

In rejecting the Court of Appeals decision which "established a separate burden on prison officials to prove 'that no reasonable method exists by which [prisoners'] religious rights can be accommodated without creating bona fide security problems,'" the Court adopted the District court's reasonableness analysis.²⁸¹ RLUIPA shifts the burden to prison officials to demonstrate that an accommodation, here to a mandatory religious duty, would imperil a compelling governmental interest. In discussing the proposed accommodation, the Court said:

[That] the case for the validity of these regulations is strengthened by examination of the impact that accommodation of respondents' asserted right would have on other inmates, on prison personnel, and on allocation of prison resources generally. *See Turner, supra* at 2. Respondents suggest several accommodations of their practices, including placing all Muslim inmates in one or two inside work details or providing weekend labor for Muslim inmates . . . As noted by the District Court, however, each of respondents' suggested accommodations would, in the judgment of prison officials, have adverse effects on the institution. Inside work details for gang minimum inmates would be inconsistent with the legitimate concerns underlying [the regulation] and the District Court found that the extra supervision necessary to establish weekend details for Muslim prisoners "would be a drain on scarce human resources" at the prison . . . Prison officials determined that the alternatives would also threaten prison security by

279. *O'Lone*, 482 U.S. at 349.

280. *Id.* at 350.

281. *Id.*

allowing “affinity groups” in the prison to flourish. Administrator O’Lone testified that “we have found out and think almost every prison administrator knows that any time you put a group of individuals together with one particular affinity interest . . . you wind up with . . . a leadership role and an organizational structure that will almost invariably challenge the institutional authority.” Finally, the officials determined that special arrangements for one group would create problems as “other inmates [see] that a certain segment is escaping a rigorous work detail” and perceive favoritism. These concerns of prison administrators provide adequate support for the conclusion that accommodations of respondents’ request to attend Jumu’ah would have undesirable results in the institution. These difficulties also make clear that there are no “obvious, easy alternatives to the policy adopted by petitioners.”²⁸²

Justice Brennan’s dissent seems more consistent with RLUIPA and current accommodationist jurisprudence.

The religious ceremony that these respondents seek to attend is not presumptively dangerous, and the prison has completely foreclosed respondents’ participation in it. I therefore would require prison officials to demonstrate that the restrictions they have imposed are necessary to further an important government interest, and that these restrictions are no greater than necessary to achieve prison objectives.²⁸³

The constitution was not adopted as a means of enhancing the efficiency with which government officials conduct their affairs, nor as a blueprint for ensuring sufficient reliance on administrative expertise. Rather, it was meant to provide a bulwark against infringements that might otherwise be justified as necessary expedients of governing . . . While we must give due consideration to the needs of those in power, this Court’s role is to ensure that fundamental *restraints* on that power are enforced . . . Where exercise of the asserted right is not presumptively dangerous, however, and where the prison has completely deprived an inmate of that right, then prison officials must show that “a particular restriction is necessary to further an important governmental interest, and that the limitations on freedoms occasioned by the restrictions are no greater than necessary to effectuate the

282. *Id.* at 352-53.

283. *Id.* at 354.

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governmental objective involved” . . . The prison in this case has completely prevented respondent inmates from attending the central religious service of their Muslim faith. I would therefore hold prison officials to the standard articulated in *Abdul Wali*, and would find their proffered justifications wanting. The State has neither demonstrated that the restriction is necessary to further an important objective nor proved that less extreme measures may not serve its purpose. Even if accepted the Court’s standard of review, however, I could not conclude on this record that prison officials have proved that it is reasonable to preclude respondents from attending Jumu’ah. [Prison officials] have provided mere unsubstantiated assertions that the plausible alternatives proposed by respondents are infeasible.²⁸⁴

Jumu’ah is a core religious ceremony and under RLUIPA and RFRA must be accommodated absent an imminent threat, since it is not presumptively dangerous as, for example, allowing prisoners to organize a union or allowing a beard to grow so long as to enable a prisoner to hide a weapon in it. In fact, as Justice Brennan pointed out, the then relevant Federal Bureau of Prisons regulations required:

[T]he adjustment of work assignments to permit inmate participation in religious ceremonies, absent a threat to “security, safety, and good order.” The Bureau’s Directive implementing the regulations on Religious Beliefs and Practices of Committed Offenders, 28 *C.F.R.* §§548.10-548.15 (1986), states that, with respect to scheduling religious observances, “[t]he central the religious activity is to the tenets of the inmate’s religious faith, the greater the presumption is for relieving the inmate from the institution program or assignment.”²⁸⁵

It is apparent that the sincerity and facially reasonable arguments of prison officials, although prevailing in *O’Lone* would not prevail today.

IX. THE FIRST AMENDMENT AND RELIGIOUS EXERCISE IN
PRISON

In general, regulations which infringe on free speech with

284. *Id.* at 356.

285. *Id.*

respect to religious language must at times withstand a higher scrutiny than when non-religious language is involved. The Supreme Court, in passing upon the limitations that can be imposed upon freedom of religious expression, said in *Cantwell v. Connecticut* that while freedom of conscience (that is the freedom to believe) cannot be restricted by law as it safeguards the free exercise of one's chosen form of religion, the freedom to speak, in the nature of things, cannot be absolute.²⁸⁶ Despite the effects of those who use religion as a means of racial or ethnic stigmatization or polarization, prisoners' religious rights and freedoms are not to be adjudged on the basis of the philosophical or sociological soundness of the concepts they espouse in the name of their religion.²⁸⁷ Prison authorities have the right to subject the practices of the followers of any religion to reasonable regulations necessary for the protection and welfare of the community involved. This means that while religious language in general must not be restricted based on the popularity of the content, religious language advocating acts of aggression against others, or disobedience to those in lawful authority can be regulated.²⁸⁸

In *Banks v. Havener*, the court stated that regulations prohibiting the exercise of religion must meet the clear and present danger test.²⁸⁹ Prison officials must prove by satisfactory evidence that the teachings and practices of the particular religious group create a clear and present danger to prison security or to the orderly functioning of the institution. Teachings and practices create a clear and present danger if prison officials have a reasonable belief that religious language is readily susceptible to an interpretation that encourages aggressive hostility toward other prisoners and prison officials as well as toward those prisoners of the same affiliation who refuse to conform.²⁹⁰ Even in the absence of actual threat or harm, language which can reasonably be interpreted to encourage prisoners to act contrary to the demands of orderly prison administration, may lead to increased tension, instability and an increased probability of hostile outbursts, conflict among

286. *Cantwell v. Connecticut*, 310 U.S. 296 (1940).

287. *Knuckles*, 435 F.2d at 1255.

288. *Id.* at 1256.

289. *Banks*, 234 F. Supp. at 27.

290. *Knuckles*, 435 F.2d at 1256.

the prisoners, or other breaches of prison discipline may be prohibited.²⁹¹ For example, in *Knuckles*, the Third Circuit found that words used by members of the Muslim religion which referred to members of the Caucasian race as devils, enslavers, and the national enemy of Negroes and other non-white races, could be restricted as a clear and present danger even in the absence of actual breach of prison discipline by Muslim prisoners following and/or attributable to the preaching of their Muslim leader.²⁹²

Pursuant to RLIUPA, the rationale for labeling such references as a clear and present danger needs to go beyond its mere content. There must be something about the time, specific place, or audience that precipitated a restrictive reaction by prison authorities. Prison officials, therefore, must show more than mere antipathy of inmates and staff to justify suppression of practice of religion.²⁹³ In *Banks*, Black Muslim religious followers were prohibited from the free exercise of Muslim rituals and doctrines, including the right to preach their beliefs. The prohibition followed a violent reprisal against prison authority, although there was evidence that participants in the riot included non-Muslims and prisoners from other religions. Prison authorities believed that the Muslims were the motivating influence of the riot and stated that the practice of the religion created a clear and present danger to the security of the institution and its inmates, because it created tensions which seriously jeopardized the therapeutic program instituted for the rehabilitation of the prisoners.²⁹⁴ The court struck down the restrictions holding that the evidence was not conclusive that the riots were instigated or lead by members of the Black Muslims because other inmates of other religions equally participated in the riots. Further, the probability of Muslim-inspired future riots was speculative at best. The court recognized that there was no clear and present danger and the restriction on religious expression was invalid.²⁹⁵

In *Long v. Parker*, the Court reversed an order of summary judgment in favor of prison officials who denied Black Muslims

291. *Banks*, 234 F. Supp. at 31.

292. *Knuckles*, 302 F.Supp. at 1059.

293. *Banks*, 234 F. Supp. at 30.

294. *Id.*

295. *Id.*

the right to receive books because they were considered racist and highly inflammatory.²⁹⁶ There were material issues of fact regarding whether the literature created clear and present dangers. The prison officials conceded that the doctrines and teachings of the Quran did not constitute any grave problems for prison administrators, nor was the language so inflammatory as to be harmful to prison security.²⁹⁷

In *McCabe v. Arave*, a case decided before the enactment of RLUIPA,²⁹⁸ the Ninth Circuit considered prison authorities' banning of group worship for close-custody adherents of a white supremacist religion and a ban of their literature.²⁹⁹ In upholding the ban on group worship, the court found that such a ban was neutrally applied to all close-custody prisoners, plus the clergyman involved, preached "racial hatred, revenge, and violence."³⁰⁰ Authorities did "permit the prisoners to visit individually with [their] ministers."³⁰¹ Under RLUIPA it is doubtful that the neutrally applied rule would be found significant but because the prisoners were considered dangerous, the minister involved preached violence, and alternative means of receiving religious instruction—so to speak—was provided, the ban would likely be upheld as protecting against an imminent or clear and present danger. Citing *Turner*, the Circuit court reversed the ban on literature as a content regulation infringing of the First Amendment rights of prisoners.³⁰² The court indicated that the books, although advocating racial purity, did not advocate violence, a factor that may not be germane under RLUIPA absent evidence of imminent danger or a clear and present danger.

X. THE BURDEN IMPOSED ON PRISON AUTHORITIES

Prison authorities must demonstrate that in placing a substantial burden on an inmate's religious practice, such

296. *Long v. Parker*, 390 F.2d 816 (3d Cir. 1968).

297. *Id.* at 821.

298. *McCabe*, 827 F.2d at 634.

299. *Id.* at 636. The Church was identified as the "Church of Jesus Christ Christian."

300. *Id.* at 637.

301. *Id.*

302. *Id.* at 638.

burden is the least restrictive means of furthering a compelling government interest. RLUIPA places the evidentiary burden on prison officials to identify alternatives, if possible, and to rebut prisoner claims of the inaccessibility of such alternatives.³⁰³ In analyzing the validity of prison regulations under the Constitution and the Congressional mandates of RLUIPA and RFRA, prison authorities restricting religious exercise may well have to demonstrate that any action is imposed as a result of an imminent danger, a presumptively dangerous situation, or a clear and present danger. In addition, a court may take into account the availability of prison resources including personnel and money.

XI. CONCLUSION

The Georgia statutory privilege, whatever its continuing viability in other contexts, is generally superfluous in the prison context. It might, however, cloak prisoner-clergy conversations meant to be private and claimed to be for spiritual guidance and, if an applicable privilege statute so provides, occurring as part of the clergy's professional responsibilities. This might well limit the legality of prison authority monitoring of such conversations.

Such monitoring would violate the very purpose of the privilege which entails society's interest in repentance, reform, and rehabilitation. This, of course, is not the motivation behind the protection of religious exercise generally, which should be obvious from the protection currently afforded to various allegedly religious beliefs which involve the advocacy of racial purity, hostility to non-adherents and even the encouragement of violence. The messenger and the messages only need to reflect sincerely held "religious" beliefs to trigger RLUIPA, RFRA, and free exercise protections.

When the spending power or Commerce Clause is involved, RLUIPA combined with free exercise jurisprudence will protect both the prisoner and his spiritual advisor from restrictions on religious meetings, speech, and activities based on sincerely held religious beliefs absent a competing compelling governmental interest based on the safety, security, or excessive

303. *See, e.g., Sanders v. Ryan*, 484 F.Supp. 2d 1028 (D. Ariz. 2007).

administrative burden on religious exercise. Even if RLUIPA is not involved, RFRA will impose the same burdens on federal prison authorities, at least, insofar as central or mandatory acts are involved.

When neither RLUIPA nor RFRA is applicable, free exercise jurisprudence will protect prisoner rights although the standard for restricting such rights will be the rational basis test.

Because of the ambiguity of the least restrictive means requirement which may be applied very differently depending upon the resources and facilities available to prison authorities and the varying demands of various religions, old and newly conceived, with regard to religious rituals, litigation is likely to continue unabated. The all-encompassing nature of Islam, its non-separation of the secular and the sacred, its rejections of Western values, and its many specific behavioral mandates, including those seen as a threat to prison safety and security, will continue to create a disproportionate litigation burden involving Muslim prisoners. Attempts at limiting religious literature in a neutral manner as an excuse for not confronting the violent nature of much religious literature will fail. On the other hand, banning the Quran and hadith will fail because although they may contain justifications for violent behavior towards others, there is both alternative interpretations and the advocated violence is not directed at immediate specific targets. Any literature that advocates immediate violent action can be banned. Clerics' speech can not be monitored while engaged in spiritual guidance but if their presence has led to violence, they can be barred.

The burden that must be met in restricting free exercise might, depending upon the circumstances, include evidence that the activity is presumptively dangerous or is a clear and present danger or constitutes an imminent threat. The test becomes whether the speech or activity is likely to trigger a response threatening the compelling government interest in safety and security taking into account the time, place, and audience. If there is an alternative mode of expression not implicating the valid concerns of prison authorities, and such authorities wish to restrict the activity, those authorities must provide alternatives that are narrowly tailored based on a compelling government interest and meet the least restrictive test.

Put differently, the 19th Century conscience/acts dichotomy has been replaced by an accommodationist approach to actions

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even when applying the traditional time, place, and manner regulations. In the prison context, limitations may be placed on presumptively dangerous activities and literature. Activities not presumptively dangerous, whether or not central to religious observance, cannot be restricted unless there are readily available alternatives. The exception to this rule of non-restriction is the presence of a competing compelling government interest with the restriction narrowly tailored. Banning allegedly dangerous literature requires a prior review by the prison authorities and a chance to challenge such banning by both the intended recipient and the sender. In short, in order to merit judicial deference to any limitations on free exercise, prison authorities must present credible evidence to support their stated penological goals.

By effectively mandating the United States Supreme Court's accommodationist jurisprudence to a prison setting, Congress has placed a severe burden on prison authorities. Perhaps this is an inevitable result of the Supreme Court's legislating limitations to the 19th Century conscience/acts dichotomy and the privileged position of Christianity. Perhaps it is because the courts, particularly the federal courts, so expert in the creation and manipulation of abstract principles, often have little competence in dealing with reality.