

Religious Exercise in Today's Jails:

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Basics

- Prisoners do not lose all constitutional rights as a consequence of incarceration
- One of the rights prisoners retain is their right to Freedom of Religion
- Freedom of Religion guarantees that individuals have the right to freely exercise the religion of their choice without fear of discrimination by the government

- “While those convicted of crime in our society lawfully forfeit a great many civil liberties, Congress has (repeatedly) instructed that the *sincere exercise of religion should not be among them — at least in the absence of a compelling reason*. In this record we can find no reason like that”
- **Yellowbear v. Lampert, Wyoming** DOC, Civ. No. 12-8048 (10th Cir. January 23, 2014)

Religious Rights: Overview

- **First Amendment:**

- Free Exercise of Religion; and
- Establishment Clauses
- Supreme Court Decisions:
 - **Turner v. Safley**, 482 U.S. 78 (1987)
 - **O’Lone v. Estate of Shabazz**, 482 U.S. 342 (1987)

- **RLUIPA:**

- Religious Land Use and Institutionalized Persons Act of 2000 42 U.S.C. §2000cc-1(a)-(2) (RLUIPA)
- Supreme Court Decisions
 - **Cutter v. Wilkinson**, 44 U.S. 709 (2005)
 - **Sossamon v. Texas**, No. 08–1438 (U.S. April 20, 2011)
 - **Holt v Hobbs**, ___ U.S. ___ (January 20, 2015)

Leading Supreme Court Decision Regarding Corrections

- U.S. Supreme Court requires lower federal courts to give deference to the expertise, judgment, and “*substantial*” discretion of corrections officials.
 - **Florence v. Board of Chosen Freeholders of the County of Burlington**, (566 U.S. – 2012)
- Before the courts can assume jurisdiction, they must consider “4” factors to determine whether a violation of the First Amendment exists.
Turner v. Safley, 482 U.S. 78 (1987).

Turner TEST (You have to know it)

- 1. Is there a ‘valid, *rational connection* between the regulation and the *legitimate governmental interest* put forward to justify it?
- 2. Are there *alternative means* of exercising the basic right that remain available to the inmate?
- 3. The impact accommodation of the asserted right will have on officers and other inmates and on the allocation of prison resources? (*ripple effect*)
- 4. The existence of obvious, easy alternatives-
“*exaggerated response*”

Infringement on Prisoner Rights

- Although prisoners enjoy the same basic rights that are enjoyed by those who are not incarcerated, jails and prisons may find it necessary to infringe upon those rights for the safe and efficient operation of the facility
- Generally, if a jail regulation impinges upon a prisoner's constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests. **Turner v. Safley**, 482 U.S. 78 (1987)
- In **Olon v. Shabazz**, 482 U.S. 342 (1987), the USSC applied the Turner "reasonable relationship test" to a free exercise challenge by Muslim inmates, and upheld a prison regulation that made it impossible for Muslim inmates to attend Friday religious services

Free Exercise Clause-Test

FIRST AMENDMENT

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

Facts:

- Muslim inmates assigned to work detail outside of the prison asked to be returned to the facility at noon on Fridays to attend Jumu'ah for prayer.
- Request Denied.
- No First Amendment Violation.

Establishment Clause-Test

First Amendment

- **An action (institutional regulation) is unconstitutional if:**
 - it lacks a secular (non-religious) purpose,
 - its primary effect either advances or inhibits religion; or
 - it fosters an excessive entanglement of government with religion.

Ways to violate without even realizing it.....

- Passing out material
- Religious volunteers
- Christmas Trees/Christmas Cards
- Nondenominational Room for Services
- **REMEMBER-THE INMATE MUST INITIATE THE CONTACT OR MAKE THE REQUEST**

Establishment Clause

American Humanist Association v. United States, Civ. No. 14-00565 (October 30th, 2014) District of Oregon

- Inmate challenged BOP's policy to exclude a secular humanism group, "an ethical and life-affirming philosophy free of belief in any gods and other supernatural forces," stating it violated the Establishment Clause.
 - Inmates wanted a humanist study group
- Requested it be recognized as a religion.
 - *Ninth Circuit has definitively held in Pelozav Capistrano Unified School Dist., that Humanism is not a religion for Establishment Clause purposes. 37 F.3d 517,521(9th Cir. 1994).*
- Trial court agreed finding that denying secular humanists equal rights with other theistic religions could violate the Establishment of Religion Clause of the First Amendment. **"The court finds that Secular Humanism is a religion for Establishment Clause purposes"**

- *Ninth Circuit appears to be moving toward the view that the disparate treatment of theistic and non-theistic religions is as offensive to the Establishment Clause as disparate treatment of theistic religions. Faith Ctr. Church Evangelistic Ministries v Glover, 480 F.3d 891, 902 (9th Cir. 2007) (Bybee, J., dissenting). Such a view is consistent with longstanding Supreme Court jurisprudence.*
- *In **Torcaso v Watkins**, the Supreme Court said that the government must not aid those religions based on a belief in the existence of God as against those religions founded on different beliefs. 367 U.S. 488, 495 (1961). Among these latter religions, in a footnote the Court included Secular Humanism. Id at 495n11. Therefore, the court finds that Secular Humanism is a religion for Establishment Clause purposes.*

Establishment Clause: Secular Purpose

Lamb v. Arpaio , CV-09-0052 (D. Ariz. 2009)

- Constant and continuous playing of Christmas music between 9am-7pm in the day room, forced Lamb “...to take part in and observe a relig[i]ous holiday without being given a choice” in violation of the Establishment Clause.
- Arpaio argued that he played the music to boost inmate morale and improve security during a difficult time of the year and that the music was “multi-cultural”.
- No violation of the Establishment Clause:
 - *Secular purpose (both Christian and non-Christian music)*
 - *Lamb could avoid it!*
 - *No excessive entanglement: MP3 loop; donated CD's*

Involuntary Treatment: Substance Abuse Programs

- An atheist parolee was entitled to compensatory damages when the court found that his *First Amendment rights to religious freedom were violated* when his parole was revoked because he refused to participate in a residential drug treatment program that contained a requirement that he acknowledge the existence of a higher power.
- He suffered the injury of imprisonment as a result, and should have been granted a new trial after a jury awarded him nothing. *A claim for injunctive relief was not moot as there appeared to have been no steps taken to provide an alternative non-religious program.* **Hazle v. Crofoot**, Civ. No. 11-15354, (9th Cir. October 14th, 2014)

Involuntary Treatment: Substance Abuse Programs

- An atheist prisoner left a substance abuse program with required meetings and which invoked religious tenets by using a "serenity prayer" and religious meditations. He claimed that he was then denied early release on parole for failure to complete the program, and that this violated his First Amendment rights to religious freedom. A federal appeals court held that these *allegations adequately stated a claim for an Establishment Clause violation.* **Jackson v. Nixon**, 2014 U.S. App. Lexis 5721 (8th Cir.).

Involuntary Treatment: Substance Abuse Programs

- In a suit by prisoner alleging requirement that he participate in a chemical-dependency programs which conflicted with his Native American religious faith.
- *The inmate failed to specify his Native American faith* (of which there are many), his beliefs consistent with that faith, or how the prison program conflicts with his Native American beliefs, whatever they may be; without that information prison officials were without notice of the basis for plaintiff's allegations
- *The complaint failed*, therefore, the state a claim upon which relief could be granted, and the district court properly granted judgment for defendants. **Brooks v. Roy**, Civ No. 14-1301 (8th Cir. January 27, 2015)

Involuntary Treatment: Substance Abuse Programs

- **IF** the alcohol or drug treatment program requires an acknowledgement of the existence of a higher power- Provide an alternative non-religious program, if the inmate objects.

RFRA

- **The Religious Freedom Restoration Act of 1993** (RFRA) was Congress' first attempt to accord religious exercise heightened protection from government-imposed burdens
- RFRA prohibited government from “substantially burdening” a persons exercise of religion unless the government can demonstrate that the burden;
 - *Is in furtherance of a compelling government interest, AND*
 - *Is the least restrictive means of furthering that interest*
- The USSC found that that Congress had exceeded its power when it enacted RFRA, and declared it unconstitutional. **City of Boerne v. Flores, 521 US 507 (1997)**
- *RFRA is still applicable in Federal Facilities.*

RFRA-Satanism

- **Davila v. Gladden**, Civ. No. 13-10739 (January 9th, 2015 11th Circuit)
 - In June 2011, Mr. Davila, then and now a prisoner at the Federal Correctional Institution in Jesup, Georgia, made a request under the Federal Bureau of Prisons (BOP) regulations to have his personal Santeria necklaces and Cowrie shells delivered to him in prison by his goddaughter, who is a Santeria priestess. Dr. Cox, the prison's Supervising Chaplain, *denied the request*, stating that religious items must be received only from "*approved vendors*" listed in the prison catalog, and that "[f]or the purpose of security, authorization to grant family members, friends, and acquaintances send in [sic] religious articles for inmates will be prohibited."
 - The requested *were not infused with animal blood* and minerals as requested by the inmate.
 - It isn't enough to say there is a compelling governmental interest. Describe it. Say "why"/rationale.
 - *Case was remanded.*

Religious Rights: **RLUIPA**

- **RLUIPA** (Religious Land Use and Institutionalized Persons Act of 2000 42 U.S.C. §2000cc-1(a)-(2))

RLUIPA

- In response to the **City of Boerne** decision, Congress enacted the Religious Land Use and Institutionalized Persons Act (RLUIPA)
- During Congressional hearings on RLUIPA, there were reports that inmates were not being permitted to practice their faith in prisons
- For example:
 - *Jewish inmates were deprived of matzo and prayer shawls*
 - *Catholic inmates were deprived small amounts of sacramental wine*
 - *Bibles, Talmuds, and Korans were confiscated*

RLUIPA-TEST

- “[n]o government shall impose a **substantial burden** on the religious exercise of a person residing in or confined to an institution” *unless* the burden “is in furtherance of a **compelling governmental interest**” and “is the **least restrictive means**” of furthering that interest. 42 U.S.C. §2000cc-1(a).

Supreme Court

RLUIPA-TEST

Cutter v. Wilkinson, 544 U.S. 709 (2005); 125 S.Ct. 2113 (2005)

- In a unanimous decision by the United States Supreme Court, Justice Ginsberg delivering the opinion stated:
- “On its face,” ...“the Act [RLUIPA] qualifies as a permissible legislative accommodation of religion that is not barred by the Establishment Clause.”

Religious Rights: RLUIPA

- **RLUIPA** replaces the Jail/Prison user-friendly rational and legitimate penological interest requirements of **Turner v. Safley** and the specific dictates of **O’Lone v. Estate of Shabazz**.

Religious Rights: RLUIPA

- There is no reason to anticipate that abusive prisoner litigation will overburden state and local institutions. *However, should inmate requests for religious accommodations become excessive, impose unjustified burdens on other institutionalized persons, or jeopardize an institution's effective functioning, the facility would be free to resist the imposition.* In that event, adjudication in as-applied challenges would be in order. Pp. 13-16. **Cutter v. Wilkinson**, U.S. (2007)

Religious Rights: RLUIPA

- Though not defined in **RLUIPA**, “appropriate relief” may be awarded to a successful plaintiff/inmate
- **RLUIPA** *does not* amend PLRA, meaning an inmate must still exhaust their administrative remedies prior to seeking federal relief.

Religious Rights: RLUIPA

- How to Apply The RLUIPA Test?

Religious Rights: RLUIPA

- Not all regulation of religious activity or expression triggers the protection of RLUIPA.
- The statutory protections of RLUIPA are required only if restrictions *impose a substantial burden* on a prisoner's religious practices.

RLUIPA -TEST

- Has the policy **substantially burdened** the exercise of the religion?
- *If “yes”* is there a **compelling governmental interest** for its actions.
- *If “yes”* then the religious practice must be restricted in the **least restrictive means**.

RLUIPA -TEST

- Has the policy **substantially burdened** the exercise of the religion? Inmate must prove.
 - A. *The Supreme Court “assumed” that the religions in question were bona fide religions.* (Nonmainstream religions involved in Cutter: Satanist; Wicca; Asatru; and Church of Jesus Christ Christian)

What is Religion?

- “[T]he term ‘religion’ has reference to one's views of his relations to his Creator, and to the obligations they impose of reverence for his being and character, and of obedience to his will.” **Davis v. Beason**, 133 U.S. 333 (1890)
- All sincere beliefs “based upon a power or being, or upon a faith, to which all else is subordinate or upon which all else is ultimately dependent.” **United States v. Seeger**, 380 U.S. 163 (1965)

What is Religion?

- Purely secular views or personal preferences do not constitute religious beliefs and will not support a Free Exercise claim. **Wisconsin v. Yoder**, 406 U.S. 205 (1972)
- Religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection. **Thomas V. Review Bd.**, 450 U.S. 707 (1981)
- Focus on the behavior versus the ideology

RLUIPA -TEST

- 1. Has the policy substantially burdened the exercise of the religion? Inmate must prove.
 - B. Is the burdened activity **“religious exercise,”**
 - Religious Exercise defined: **“any exercise of religion, whether or not compelled by, or central to, a system of religious belief.”**
 - **No matter what, the inmate** does not have to prove that the “exercise” is “compelled by or central to” their religious beliefs.

What is “Religious Exercise” under RLUIPA?

- Any exercise of religion, *whether or not compelled by, or central to*, a system of religious belief
- **RLUIPA** protects any act of religion whether or not it is mandated by the individual’s religion
- *Religious act need not be “central”* to a particular religion to have protection

RLUIPA -TEST

- **1. Has the policy substantially burdened the exercise of the religion? Inmate must prove.**
 - A. Is the religion “bona fide?”-Interesting Question
 - B. Is the burdened activity “religious exercise?”
 - C. If so, is the burden “**substantial**”?
 - More difficult to define
 - “Sincerity of Belief”?
 - *SC explained that a burden on religious exercise is “substantial” and, therefore, impermissible when it influences an adherent to act in a way that violates his or her sincerely held religious beliefs. (Bitner v. Williams; Kosher kitchen example-wearing gloves?)*

“Sincerity” Under RLUIPA

RLUIPA -TEST

- “Although RLUIPA bars inquiry into whether a particular belief or practice is "central" to a prisoner's religion, *the Act does not preclude inquiry into the sincerity of a prisoner's professed religiosity*” **Cutter v. Wilkinson**, 544 U.S. 709,, 725 (U.S. 2005).

Religious Belief Must Be Sincere

- **RLUIPA** does not preclude inquiry into the sincerity of a prisoner's professed religion. **Cutter v. Wilkinson**, 544 U.S. 709, 725 n. 13 (2005)
- '[T]he "truth" of a belief is not open to question'; rather, the question is whether the objector's beliefs are 'truly held.' **Gillette v. U.S.**, 401 U.S. 437 (1971), quoting **U.S. v. Seeger**, 380 U.S. 163 (1965)

Determining Sincerity

- Sincerity is *generally presumed* or easily established
- Primarily look at the *words or actions* of the inmate
- “The important inquiry was what the prisoner claimed was important to him.” **McAllister v. Livingston**, 348 Fed.Appx. 923 (5th Cir. 2009).

Determining Sincerity

- **Form**
 - *Not a test of knowledge*
 - *Rabbi?*
 - *Synagogue?*
 - *Father Jewish?*
 - *Hebrew Name?*
 - *Converted?*
- **Words and Actions**

RLUIPA-TEST

- 1. Has the policy *substantially burdened* the exercise of the religion? Inmate must prove.
- 2. If “yes” is there a *compelling governmental interest* for its actions. Burden shifts to Security Staff
 - *Jail/Prison bears the burden* of persuasion that application of its substantially burdensome practice is in furtherance of a compelling governmental interest...(Safety, Security, Order, Control, Discipline...)
 - *Articulate your rationale* for your decision.
 - *Must offer more than conclusory statements*

RLUIPA-TEST

- 3. If “yes” then the religious practice must be *restricted in the least restrictive means*. Burden is on Security Staff
 - ...and is the least restrictive means of furthering that need. (Must be more than “just because”)
 - *Use objective criteria;* and
 - *Make a genuine effort to consider alternatives.*

RLUIPA: LEADING SUPREME COURT DECISION

Holt v. Hobbs, (8th Cir. 2013) Supreme Court ruled January 20, 2015

- Issues: Presented on a handwritten petition (BEARDS)
 - *(1) Whether the Arkansas Department of Corrections' no beard growing policy violates the Religious Land Use and Institutionalized Persons Act (RLUIPA) or the First Amendment; and*
 - *(2) whether a 1/2 inch beard would satisfy the security goals sought by the policy.*
- Holt (Abdul Malik Muhammad) said his Muslim beliefs required him to grow a beard (1/2" was a compromise to the outright ban. 1/4" beards were allowed for medical reasons)
- Arkansas corrections officials claimed their grooming policy prohibiting beards promotes hygiene and safety.

RLUIPA: Beards

- Judgment REVERSED and case REMANDED. Alito, J., delivered the opinion for a unanimous Court. Ginsburg, J., filed a concurring opinion, in which Sotomayor, J., joined. Sotomayor, J., filed a concurring opinion.
- The Supreme Court determined that the defendants are ***not entitled to absolute discretion*** when rendering decisions regarding RLUIPA.
- ***RLUIPA is a three part test and the defendants are required to demonstrate that they restricted the religious practice in the least restrictive means possible.***
- They didn't. They cited only safety and security concerns (hiding contraband, altering identity).....
- ***Defendants failed to show why they couldn't accommodate the beard by conducting additional security checks etc.... especially in light of the fact that a beard for medical reasons was allowed.***

RLUIPA: Beards

- 39 other states allow 1/2 beards
 - Persuasive to the Supreme Court. Puts the burden on the agency why they need to take a different course.
- *RLUIPA demands a more focused inquiry* and requires the government to demonstrate that the compelling interest test is satisfied through the application of the challenged law to the particular claimant.
- *Scrutinize the asserted harm of granting specific exemptions to particular religious claimant and to look to the marginal interest in enforcing the challenged government action in that particular context.*

RLUIPA: LEAST RESTRICTIVE

Yellowbear v. Lampert, Civ. No 12-8048 (10th Cir. January 23rd, 2014)

- A Native American prisoner serving a life sentence for murdering his daughter claimed that correctional officials violated his constitutional and statutory rights to religious freedom by denying him access to the prison's sweatlodge.
- Prison officials claimed that the cost of providing the necessary security to accompany him from the special protective unit he was housed in to the sweatlodge was "unduly burdensome."

RLUIPA: LEAST RESTRICTIVE

The federal appeals court disagreed, finding that the burden to his exercise of religion was high, given that he was granted no access of any kind, ever, to a religious exercise, and the cost to the prison left undefined by the record and thus presumably low.

Under these circumstances, the appeals court concluded, a reasonable fact finder could find a violation of the prisoner's statutory right to religious freedom. **Remanded**

RLUIPA: LEAST RESTRICTIVE

- “While those convicted of crime in our society lawfully forfeit a great many civil liberties, Congress has (repeatedly) instructed that the sincere exercise of religion should not be among them — at least in the absence of a compelling reason. In this record we can find no reason like that”
- **Prison just outright denied. No access. No alternative.**
- No one questioned the sincerity of his faith.
- No one questioned that the sweat lodge is a form of his religious exercise.

RLUIPA-TEST

- **The test for religious exercise cases is that of a compelling necessity/least restrictive means.**
 - Security is a compelling governmental interest.
 - **Due Deference** to the expertise of correctional officials is expected.
 - Must make genuine efforts to accommodate.
 - **Err on the side of “yes” rather than “no”**
 - **If deny, deny because it poses a threat to safety and security, not because it is religious in nature.**
 - **Length of stay is relevant.**

Prison Litigation Reform Act

- Under the PLRA, “[n]o action shall be brought with respect to prison conditions . . . by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted.” 42 U.S.C. § 1997e(a). *“[T]he PLRA pre-filing exhaustion requirement is mandatory and non-discretionary.”*

RLUIPA

- ***Seek outside assistance*** from various religious and legal authorities if in doubt.
- In addition, articulate all the other ***alternative means*** available for the inmate to practice their respective faith.
- ***Do not judge, mock or retaliate*** against an inmate for their chosen belief.
- Expect an increase in litigation. Pay close attention to your ***grievances***.

RLUIPA -TEST

- Has the policy *substantially burdened* the exercise of the religion?
- *If “yes”* is there a *compelling governmental interest* for its actions.
- *If “yes”* then the religious practice must be restricted in the *least restrictive means*.

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