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Jailhouse Islamophobia: Anti-Muslim Discrimination in American Prisons

Kenneth L. Marcus

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Abstract The post 9/11 surge in America's Muslim prison population has stirred deep-seated fears, including the specter that American prisons will become a breeding system for "radicalized Islam." With these fears have come restraints on Muslim religious expression. Mistreatment of Muslim prisoners violates the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), which Congress passed in part to protect prisoners from religious discrimination. Despite RLUIPA, prisoners still face the same challenge that preceded the legislation. Ironically, while Congress directed courts to apply strict scrutiny to these cases, the courts continue to reject most claims. One reason is that many courts are applying a diluted form of the legal standard. Indeed, the "war on terror" has justified increasing deference to prison administration to the detriment of incarcerated Muslims and religious freedom.

Keywords Islamophobia · Muslims · Prisoners' rights · Religious freedom · Religious discrimination · Religious Land Use and Incarcerated Persons Act

Introduction

Muslims constitute nearly a tenth of the American federal prison population and their numbers are rapidly rising.[1] The post 9/11 surge in Muslim prison population has stirred deep-seated fears and resentments, including the specter that the American prison system will become a breeding system for "radicalized Islam."[2] With these fears have come restraints on Muslim religious expression, with prison officials citing a need to maintain orderly prison administration and ensure homeland security.[3]

Treatment of Muslim prisoners frequently conflicts with recent legislation enacted to protect prisoners from religious discrimination. Nine years ago, Congress passed the Religious Land Use and Institutionalized Persons Act of

Lillie and Nathan Ackerman Chair in Equality and Justice in America, Baruch College School of Public Affairs, The City University of New York; Director, Initiative on Anti-Semitism and Anti-Israelism, Institute for Jewish & Community Research; and former Staff Director, U.S. Commission on Civil Rights (2004–2008). This article arose in part from the author's experience overseeing the Civil Rights Commission's 2007–2008 research project on religious discrimination in American prisons. The article benefits from the author's discussions with former Commission colleagues, including Gail Heriot, Robert Lerner, David Blackwood, and Kim Tolhurst, as well as research provided by law clerks John Barone, Nagmeh Shariatmadar, and Lianne Labossiere. At Baruch College, Amita Dahiya has provided able research assistance.

K. L. Marcus (✉)
Bernard M. Baruch College School of Public Affairs,
The City University of New York, 43328 Crystal Lake Street,
Leesburg, VA 20176, USA
e-mail: klmarcus@aol.com

[1] U.S. Commission on Civil Rights, *Enforcing Religious Freedom in Prison* (2008), p. 13 (indicating that Muslims constitute approximately 9.3 percent of the U.S. federal prison population but only 0.6 percent of the general adult population); see also Al-Amin 2008, p. 2 (discussing the surge in Muslim prison conversions). Muslims have become an even larger portion of some European prison populations, which has also fueled fear and resentment in Europe. See Bawer 2006 at 56–57.

[2] See, e.g., Colson 2002, available at http://opinionjournal.com/editorial/feature.html?id=110001885; Marks 2006, available at http://www.csmonitor.com/2006/0920/p03s02-ussc.html ("The radicalization and recruitment of terrorists present a threat of 'unknown magnitude,' according to national security experts.").

[3] See, e.g., Atkins 2008, p. 2 ("Prison radicalization primarily occurs through anti-U.S. sermons provided by contract, volunteer, or staff imams…").

2000 (RLUIPA)[4] in part to protect prisoners from religious discrimination. Four years ago, in the case of *Cutter v. Wilkinson*,[5] the United States Supreme Court unanimously upheld RLUIPA against constitutional challenge.

Despite this legislation, Muslim prisoners continue to document countless examples of discrimination in facilities around the country.[6] Recent anti-Muslim allegations have included, for example, refusal to honor *halel* dietary restrictions, to allow prisoners to wear religious garb (such as the *keffiyeh* or *hijab*), or to obtain access to chapels or religious services; denial of Korans and other religious materials; interference with observance of holidays such as *Ramadan*, *Eid-al-Ghadeer*, *Muharram*, and *Ashura*; and forced participation in Christian religious services. Such cases have increased sharply over the last few years.

Ironically, while Congress directed the courts to apply the most stringent form of judicial scrutiny to these cases, the courts continue to reject most claims. One reason is that, despite RLUIPA and *Cutter v. Wilkinson*, many courts are applying a diluted form of the applicable legal standard.

Anti-Muslim Discrimination in the United States Prison System

Institutional Intolerance of Religion

Some experts argue that religious activity is "often barely tolerated and in some institutions even discouraged" in American prisons today.[7] Members of virtually all religions, including mainstream Christian denominations, have testified that they have been denied basic religious freedoms while under incarceration, including access to Bibles and religious services and programs.[8]

Prison staff, fellow inmates, chaplains, and faith-based service providers have all been involved in perpetrating religious discrimination in prison. Prison chaplains report that religious services are often delayed, interrupted, or cancelled for no apparent reason; and custodial staffs are perceived as dismissive or contemptuous of those who participate in religious self-improvement programs.[9] Correctional staff often distrusts prison chaplains and volunteers ministering to prison populations, questioning the motives of those who minister to those who have not conformed to social conventions.[10] Worse, some staff may believe that it is appropriate to punish prisoners, on an ad hoc basis, by denying them access to religious worship.[11] Additionally, religious minority inmates may face persecution by other inmates; after all, prisons do house neo-Nazis, "Christian Identity" supremacists, and others convicted of religiously motivated hate crimes.[12] Moreover, some chaplains exacerbate these problems by denigrating religious minority prisoners, notably Muslims, in a manner that provokes physical conflict.[13] Finally, faith-based service providers, servicing contracts with federal and state prisons, have provided various special material benefits to inmates of their faith that are denied to others,[14] and have disparaged prisoners of other faiths.[15] In some cases, discrimination may arise from an unconscious presumption in favor of mainstream Protestant religious practice[16] (which Chaplain Patrick M. McCollum calls the "Dominant Religion Lens Factor")[17] or an explicit bias in favor of fundamentalist or evangelical programming (see footnote 16).

Unsurprisingly, non-mainstream religions of all kinds report higher levels of religious animus.[18] This particularly includes Muslim inmates but also extends to institutionalized persons of other faiths (see footnote 9). Wiccan inmates, for example, have been denied access to appropriate clergy while dying and have been refused chemotherapy except on the condition that they remove an approved Wiccan pentacle medallion.[19]

Discrimination Specifically Directed Against Muslims

While other minority religious prisoners face considerable discrimination, the situation facing Muslim prisoners is both larger and more complex. This is due to their substantial percentage of the prison population, concerns about Islamic radicalization in prison, and particular animosities held toward members of the Muslim faith.[20] During the

[4] 42 U.S. C. §§ 2000 cc *et seq.*

[5] 544 U.S. 709 (2005).

[6] See, e.g., Al-Amin (2008).

[7] Nolan 2008 at 2, 3–5.

[8] *Id.* at 2.

[9] Al-Amin 2008 at 7.

[10] Atkins 2008 at 1.

[11] Friedman 2008 at 1.

[12] *Id.*

[13] *Id.* at 4.

[14] Americans United for Separation of Church & State v. Prison Fellowship Ministries, 432 F. Supp. 862, ____ (S.D. Iowa 2006), *aff'd in part and rev'd in part on other grounds,* 509 F.3d 406, 413–16, 424 (8th Cir. 2007); Luchenitser 2008 at 1, 4–6.

[15] Luchenitser 2008 at 3–4; Americans United, 432 F. Supp.2d at 899, 900, 909–910; Americans United, 509 F.3d at 425.

[16] Friedman 2008 at 2.

[17] McCollum 2008 at 3.

[18] *Id.* at 1–2 ("While practices differ from state to state, I have found discrimination against non-traditional religions everywhere.").

[19] *Id.* at 1.

[20] For a general discussion of contemporary anti-Muslim attitudes, see Gottschalk and Greenberg 2008.

2001–2006 period, Muslims brought the greatest number of religious discrimination claims under RLUIPA. During that period, Muslims brought 62 out of the 229 cases analyzed.[21] This represents 27 percent of the cases, or nearly three times Muslims' share of the prison population.

Muslim prisoners and their advocates report being denied access to religiously required (*Halal*) meats[22] or other compliant foods,[23] even when institutions have been presented with opportunities to acquire *Halal* meats at lower costs than the non-compliant meats currently provided.[24] Under RLUIPA, courts have generally but not always been receptive to inmates' claims regarding religiously motivated dietary restrictions.[25]

Prison officials have reportedly prohibited facial hair longer than one quarter inch beards,[26] or prohibited the wearing of any beards at all[27]; banned *Kufi* prayer caps,[28] *Thawbs* (prayer robes),[29] or the use of prayer beads around necks and under shirts,[30] on the ground that inmates are required to wear prison uniforms.

Muslim prisoners have reported being prevented from performing the "*Khutba*" sermon during the Friday weekly prayer,[31] participating in *Jumu'ah* services,[32] or reciting Islamic texts in Arabic.[33] In other cases, they have reportedly been required to choose between access to Muslim services or access to a law library,[34] been denied access to a Muslim chaplain,[35] or been penalized for participation in Muslim religious services.[36] In some facilities, Sunni Muslims are required to pray jointly with Shi'ite Muslims[37] or with members of the Nation of Islam.[38] Some Shi'ite prisoners have alleged refusal to allow separate Shi'ite *Jumah* services as part of prison practices systematically discriminating against Shi'ite practices.[39] Similarly, they have reportedly been barred from attending holiday services eating holiday meals in cell while kept in disciplinary keeplock (see footnote 34).

Prisoners have reported being denied access to free Qura'ans[40]; restricted in their access to the religious literature of various Muslim sects, such as the Five Percent Nation[41] (a spin-off of the Nation of Islam); denied the possession or use of prayer oils[42] or other religious items, such as incense, leather socks, compass, and *halal* toothpaste.[43] They have been barred from possessing prayer rugs

[21] U.S. Commission on Civil Rights, *Religious Freedom of Incarcerated Persons* (Forthcoming 2008).

[22] *Spruel v. Clarke*, Case No. C06-5021 RJB, W.D. Washington, 2007 U.S. Dist. LEXIS 39772, *7–8, May 31, 2007; *Bilal v. Lehman,* C04-2507 JLR, 2006 U.S. Dist. LEXIS 93152, 2006 U.S. Dist. LEXIS 89430 (W.D. WA); *Phipps v. Morgan,* CV-04-5108, 2006 U.S. Dist. LEXIS 12199 (E.D. WA. 2006); *Pratt v. Corr. Corp. of America,* 124 Fed. Appx. 465 (8th Cir. 2005); *Al Ghashiyah v. Wis. Dept. of Corr*., 250 F.Supp.2d 2016 (E.D. WI. 2006).

[23] See, e.g., *Allah v. Jordan Duster* et al*.,* 04–1083, 2007 U.S. Dist. LEXIS 56631, *4 (W.D. Ill.), August 3, 2007; *Mayweathers v. Hickman*, Civil No. 05-CV-713 WGH (CAB), 2006 U.S. Dist. LEXIS 95882 (S.D. Cal. 2006); *Holiday v. Giusto,* 2004 U.S. Dist. LEXIS 16348 (D.OR 2004).

[24] Al-Amin 2008 at 10.

[25] See, generally, Dilg 2008 , p. 3.

[26] *Barnes v. Molett,* V-05-014, 2006 U.S. Dist. LEXIS 69303 (S.D. TX. 2006); *Nicholas v. Oxmint,* 8:05-3472-RBH, 2006 U.S. Dist. LEXIS 67592 (D.S·C. 2006); *Daker v. Wetherington,* 2005 U.S. Dist. LEXIS 44485, 469 F.Supp.2d 1231 (N.D. GA.); *Taylor v. Groom, Cockrell,* 02–21316, 74 Fed. Appx. 369 (5th Cir. 2003).

[27] *Williams v. Ferguson,* S-04-0998, 2006 U.S. LEXIS 61586 (E.D. CA. 2006).

[28] *Aziyz v. Tremble,* Civil Action No. 5:03-cv-412 (HL) (M.D. Ga.), 2008 U.S. Dist. LEXIS 7079, January 31, 2008.

[29] See *Abdullah v. Frank*, 2007 U.S. Dist. LEXIS 13215, *4 (Case No. 04C1181), 2007 U.S. Dist. LEXIS 13215 (E.D. Wisc. February 26, 2007).

[30] *Charles v. Frank*, 101 Fed. Appx. 634 (7th Cir. 2004).

[31] *Shabazz v. Ark. Dept. of Corrections*, 157 Fed. Appx. 944 (8th Cir. 2005).

[32] *Eley v. Herman*, 1:04-cv-416, 2007 U.S. LEXIS 42197 (N.D. IN. 2007); *McCree v. Pocock*, CIVIL ACTION FILE NO. 1:06-CV-1279-TWT, (N.D. GA.), 2007 U.S. Dist. LEXIS 44594, June 18, 2007; *Larry v. Goetz,* 06-C-197, 2006 U.S. Dist. LEXIS 32164 (W.D. Wis. 2006); *Earl v. Gould*, 192 Fed. Appx. 226 (4th Cir. 2006); *Thomas v. Saafir*, C 06-0184, 2006 U.S. Dist. LEXIS 32187 (N.D. CA. 2006); *Muhammed v. Page,* 02-298, 2006 U.S. Dist. LEXIS 16630 (S.D. Ill. 2006); *Walmuller v. Bennett,* 2005 U.S. Dist. LEXIS 35066 (D.ID. 2005).

[33] *Stephens v. Federal Bureau of Prisons*, 06-CV-319-JBC, 2006 US. Dist. LEXIS 72955, 2006 U.S. Dist. LEXIS 79389 (E.D. KY.).

[34] See *Salahuddin v. Goord*, 467 F.3d 263 (2d Cir. 2006).

[35] *Id*.

[36] *Mayweathers v. Terhune, Newland* et al*.,* 328 F.Supp.2d 1086 (E.D. CA. 2004); Al-Amin 2008, p. 9.

[37] *Pugh v. Goord,* 345 F.3d 121 (2nd Cir. 2003); *El Isquierdo v. Crawford*, Case No. 1:05CV192 CDP, E.D. Mo., 2007 U.S. Dist. LEXIS 71608 * 1 (September 26, 2007). See *Salahuddin v. Goord*, 467 F.3d 263 (2d Cir. 2006).

[38] *Abdullah, Perez.* Et al. *v. Wis. Dept. of Corrections,* 2005 U.S. Dist. LEXIS 27999 (E.D. Wis. 2005).

[39] *Orfan v. Goord,* 411 F.Supp. 2d 153 (N.D. N.Y. 2006).

[40] See, e.g., *Eley v. Herman,* 1:04-cv-416, 2007 U.S. LEXIS 42197 (N.D. IN. 2007); *Salahuddin v. Goord*, 467 F.3d 263 (2d Cir. 2006); *Grant v. Sutton,* 04-326-JPG, 2006 U.S. Dist. LEXIS 70076 (S.D. Il. 2006); *Larry v. Goetz,* 06-C-197, 2006 U.S. Dist. LEXIS 32164 (W.D. Wis. 2006); *Larry v. Goetz,* 06-C-197, 2007 U.S. Dist. LEXIS (W.D. WI. 2007).

[41] *Fraise v. Terhune,* 283 F.3d 506 (3d Cir. 2002); *Marria v. Broaddus,* 200 F.Supp.2d 280 (S.D. N.Y., 2004).

[42] See, e.g., *Hammons v. Saffle,* No. 02–5009, 348 F.3d 1250 (10th Cir. 2003); *Charles v. Verhagen, Grank, Litscher*, 348 F.3d 601 (7th Cir. 2003); *Shidler v. Moore* et al., Case No. 3:05-CV-804 RM, N.D. IN, 008 U.S. Dist. LEXIS 8872, February 4, 2008; *Salgado v. Grams,* 06-C-598-C, 2006 US. Dist. LEXIS 7564, 2007 US. Dist. LEXIS 26213 (W.D. WI).

[43] *Vega v. Lantz,* 3:04CV1215, US. Dist. LEXIS 69120 (D. Conn.).

or from placing linens or towels on the floor as a prayer surface.[44]

The Bureau of Prisons attempted to address the problem of prisoner radicalization, discussed *supra*, through its now-abandoned Standardized Chapel Library Project.[45] This program was developed to purge all prison chapel libraries of all items except for a handful of items on an approved religious reading list.[46]

Muslim inmates also must cope with prison officials' mistreatment of loss of religious objects. When this mistreatment is negligent (or when, at any rate, the inmate cannot prove that the mistreatment is intentional), the responsible officials are shielded from federal liability. In 2008, the Supreme Court denied recovery to a Muslim inmate based on the Bureau of Prison's allegedly negligent loss of his Qur'an, prayer rug, and various religious magazines, holding in a divided opinion that the Federal Tort Claims Act exempts this form of negligence from its waiver of federal sovereign immunity.[47]

Muslim prisoners have reported that they have been barred from celebrating *Ramadan*,[48] *Eid ul Fitr*,[49] or other holidays; that they have been unable to participate in *Ramadan* worship for breaking the fast[50]; and that prison authorities have refused to acknowledge Shi'ite holidays, such as *Eid-al-Ghadeer*, *Muharram*, or *Ashura*.[51]

The Homeland Security Justification

In many cases, prison authorities have justified restrictions on Muslim prisoners as a necessary means of ensuring not only prison safety but also homeland security. Their argument is that Muslim religious services may be used as a means of fostering Islamic radicalization. Prison radicalization is a phenomenon that has been defined as "the process by which inmates … adopt extreme views, including beliefs that violent measures need to be taken for political or religious purposes."[52] It is a global phenomenon, encountered to a greater extent in Europe, the Middle East and Latin America than in the United States.[53] However, it is a particular source of concern the United States, with the world's largest prison population and highest incarceration rates, and an enormous challenge in the prospect that radicalized prisoners could become terrorists as a result of their experiences under incarceration.[54]

This concern has developed in response to numerous examples of terrorist incidents that were advanced in some measure by the radicalization of certain prison inmates.[55] As Abu Musab al-Zarqawi has said, "prison makes our fight stronger."[56]

This phenomenon takes many forms, but observers have expressed concern with two particular variations: the so-called "Jailhouse Islam," which incorporate violent prison culture into religious practice using a "cut-and-paste" version of the Qur'an and "Prislam," in which prisoners join Islamic gangs for protection and convert out of necessity (see footnote 54). Prisons are fertile environments for radicalization, since inmates exhibit high-risk characteristics of youth, unemployment, and alienation, as well as psychological factors such as high levels of personal distress, cultural disillusionment, lack of intrinsic beliefs or values, dysfunctional families, and dependent personality tendencies,[57] exacerbated by overcrowding and prisoners' need for protection,[58] in an inherently violent environment.[59]

Ironically, anti-Muslim discrimination in American prisons may exacerbate the problem of prison radicalization. For example, the inadequate number of legitimate Muslim religious providers may create an opportunity for extremists to fill the role of religious service providers.[60] As Frank Cilluffo has observed, increasing the availability of legitimate Muslim religious services may decrease the opportunities for prison radicalization.[61] Similarly, religious faith and practice can help to ameliorate the problem.[62]

[44] *Mohammad v. Kelchner*, 2005 U.S. Dist. LEXIS 40762 (M.D. PA. 2005).

[45] Cilluffo 2008, p. 6.

[46] *Id.*

[47] Ali v. Federal Bureau of Prisons (No. 06–9130), 204 Fed. Appx. 778 (2008).

[48] *Earl v. Gould,* 192 Fed. Appx. 226 (4th Cir. 2006); *Mallory v. Winchester*4:06-CV-136 AS, 2006 U.S. Dist LEXIS 90581 (N.D. IN. 2006).

[49] *Couch v. Jabe,* 2006 U.S. Dist. LEXIS 68216 (W.D. VA.).

[50] Lovelace v. Lee, 472 F.3d 174 (4th Cir. 2006).

[51] See, e.g., *Rahman v. Goord*, 04-CV-6368 CJS, W.D.N.Y., 2007 U.S. Dist. LEXIS 32680, *2, May 3, 2007.

[52] The George Washington University Homeland Security Policy Institute (2006), p. 3 (quoting Department of Justice, Office of Inspector General Review, 2004).

[53] Cilluffo 2008 at 3, 5.

[54] *Id*. at 2.

[55] See, e.g., The George Washington University Homeland Security Policy Institute (2006), p. 2; Cilluffo 2008 at 3.

[56] *Id*. at 1.

[57] *Id*. at 1, 4.

[58] Cilluffo 2008 at 1.

[59] The George Washington University Homeland Security Policy Institute 2006 at 4.

[60] Cilluffo 2008 at 4; The George Washington University Homeland Security Policy Institute (2006) at 6.

[61] Cilluffo 2008 at 4.

[62] *Id*. at 6.

Legal Background

American prisoners were granted little religious freedom during the early years of the United States. Interestingly, the term "penitentiary" was first used in eighteenth-century Pennsylvania to describe institutions established to induce convicts to reflect and repent.[63] This ideal, which developed out of William Penn's history of incarceration, did not survive through the nineteenth century. Some early cases hinted at an inchoate free exercise right for incarcerated persons, but courts usually considered an inmate to be, in an oft-quoted formulation, "a slave of the State."[64] Some Protestants had limited ability to worship, but persons of other faiths were not much tolerated.[65]

During the 1960s and 1970s, however, federal courts became increasingly responsive to prisoners' religious claims. This change was largely instigated by demands from Black Muslim prisoners.[66] At the time, the Court was highly protective of religious free exercise generally, announcing in *Sherbert v. Verner* that "[t]he door of the Free Exercise Clause stands tightly closed against any governmental regulation of religious beliefs as such."[67] In *Sherbert*, the Court held that strict scrutiny is required when generally applicable, facially neutral government action places a "substantial burden" on the exercise of religion, such as when an individual must choose between adhering to religious conviction or enjoying governmental benefits.[68] As the Supreme Court explained in another case during this period, "[p]risoners do not forfeit all constitutional protections by reason of their conviction and confinement in prison."[69]

This period of relative tolerance for prisoner religious exercise ended when the Supreme Court handed down its decision in *O'Lone v. Estate of Shabazz*.[70] In that case, the Court announced that it would not apply heightened scrutiny for prisoner free exercise claims. Instead, it would ask only whether the prisons actions were "reasonably related to legitimate penological interests."

In the years between *Sherbert* and *O'Lone*, the Court professed to apply strict scrutiny to cases in which a substantial burden on religious activity was alleged. In fact, in all but a handful of cases, the Court's application of this standard of review was quite lax, leading prominent scholars to assert that the standard was "strict in theory, feeble in fact."[71] In 1990, the Court pulled back more broadly (i.e., outside the prison context) from the liberality it had shown in *Sherbert*, announcing in *Employment Div., Dept. of Human Resources of Ore. v. Smith*,[72] that the Free Exercise Clause of the U.S. Constitution does not inhibit enforcement of otherwise valid, neutral laws of general applicability that incidentally burden religious conduct.[73] The Court continued to recognize an exception, however, when government actions manifestly target religious practice.[74]

The Supreme Court's opinion in *Smith* has been roundly criticized by both academic commentators and public officials. Congress and the President responded to the decision by passing two important statutes. In 1993, Congress passed the Religious Freedom Restoration Act (RFRA).[75] A Senate report notes that "as applied in the prison and jail context, the intent of [RFRA] is to restore the traditional protection afforded by prisoners to observe their religious rights which was weakened by the decision in *O'Lone v. Estate of Shabazz*."[76] RFRA provides that "Government may substantially burden a person's exercise of religion *only* if it demonstrates that application of the burden to the person—(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest."[77] This statute (which the Supreme Court later found unconstitutional as applied to the states and its subdivisions in *City of Flores v. Boerne*[78]) continues to govern federal actions, including the conduct of the federal Bureau of Prisons.[79]

State prisoners did not fare well under RFRA. During the four years between RFRA's passage and its partial invalidation, lower courts ruled against prisoners in over 90% of cases,[80] effectively gutting its enforcement.[81] As

[63] Note, Harvard Law Review Editors 2002 at 1892 (quoting Richard G. Singer & William P. Statsky, Rights of the Imprisoned: Cases, Materials and Directions 4 (1974)).

[64] Note, Harvard Law Review Editors 2002.

[65] Mushlin 1993 at 5–6.

[66] *Id.*; Smith 1993; see, generally, King 1969, pp. 300–304.

[67] 374 U.S. 398 (1963).

[68] *Id.* at 406.

[69] *Bell v. Wolfish*, 441 U.S. 520, 545 (1970).

[70] *O'Lone v. Estate of Shabazz*, 482 U.S. 342, 348 (1987).

[71] Christopher L. Eisgruber and Lawrence G. Sager, *The Vulnerability of Conscience*, 61 U. Chi. L. Rev. 1245 (1994). See, generally, Winkler (2006).

[72] 494 U.S. 872 (1990).

[73] *Id.* at 879.

[74] Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520 (1993).

[75] 42 U.S. C. §§ 2000cc *et seq.*

[76] Fischer (2001), pp. 243–244 (quoting S. Rep. No. 103–111, at 8 (1993), reprinted in 1993 U.S. C.C.A.N. 1892, 1899.

[77] *Id.* at 2000bb-1(b).

[78] City of Flores v. Boerne, 521 U.S. 507 (1997).

[79] See, e.g., *O'Bryan v. Bureau of Prisons*, 349 F.3d 399 (7th Cir. 2003).

[80] Lupu (1998) pp. 575, 607–617.

[81] Daubatz, "RLUIPA at Four," 28 Harv. J.L. & Pub. Pol'y at 504.

Ira C. Lupu has shown, the principal way in which courts weakened RFRA during its 4 years of general applicability was to disregard the "least restrictive means" test and forgive government regulations that were supported by practical or budgetary considerations.[82] Since this result could not be easily squared with the text of the legal standard, courts typically relied instead on a Senate committee report on RFRA,[83] which stated that, "the committee expects that the courts will continue the tradition of giving 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."[84]

Against this backdrop, RLUIPA appeared to represent a remarkable change (see footnote 81). In 2000, responding to RFRA's partial invalidation, Congress held a number of hearings, over a 3-year period, to gather facts about the extent of religious discrimination across the country.[85] For example, Congress heard that in one Ohio prison officials refused to provide Muslims with *Halal* food, although they provided Kosher food to Jewish inmates and that Qu'urans and other prayer books were frequently confiscated, damaged, or discarded.[86] In a joint statement, the bill's sponsors, Senators Edward Kennedy and Orrin Hatch, concluded that "[w]hether from indifference, ignorance, bigotry, or lack of resources, some institutions restrict religious liberty in egregious and unnecessary ways."[87]

Congress passed the RLUIPA to ensure that state and local prison inmates would receive the same stringent standard of review applied to federal prisoners under RFRA. Strikingly, both the Senate and the House of Representatives were unanimous in its passage.[88] RLUIPA prohibits federal and state agencies from undertaking actions that impose a "substantial burden" on the religious exercise of an incarcerated person, even if the burden results from a rule of general applicability, unless the government can demonstrate that imposition of the burden furthers a "compelling governmental interest" and is the "least restrictive means" of furthering that interest.[89] While RLUIPA does not define such terms as "compelling government interest" or "least restrictive means," the legislation clearly intends to reinstate the strict scrutiny test that prevailed, at least in theory, between *Sherbert* and *O'Lone/Smith.*

The Supreme Court unanimously affirmed RLUIPA against an Establishment Clause challenge in *Cutter v. Wilkinson.*[90] In *Cutter*, Ohio prison inmates sued the state's department of corrections for failing to accommodate their religious exercise of non-mainstream religions (e.g., Satanist, Wicca, and Asatru religions, and the Church of Jesus Christ Christian).[91] Specifically, they alleged that prison officials retaliated and discriminated against them by denying them access to religious literature, denying them the same opportunities for group worship afforded to adherents of mainstream religions, forbidding them to adhere to religiously required codes of dress and conduct, withholding religious ceremonial objects, and failing to provide them with a chaplain trained in their faith.[92] In response, the prison officials contended that RLUIPA's institutionalized persons provision improperly advances religion in violation of the Establishment Clause.[93]

Justice Ruth Bader Ginsburg wrote the unanimous opinion for the Court, affirming RLUIPA against this challenge, but doing so in a way that may undermine the statute's effectiveness. The decision was initially received as a significant victory for religious freedom,[94] but a closer look suggests that the victory was far from complete.

While Justice Ginsburg reasoned that the statute alleviates "exceptional government-created burdens" on religious exercise,[95] she also emphasized, that the statute does not improperly elevate accommodation of religion over penal officers' interest in maintaining order and safety.[96] In particular, Ginsburg indicated that lawmakers

[82] Lupu (1998) pp. 575, 596.

[83] Gaubatz, "RLUIPA at Four," 28 *Harv. J.L. & Pub. Pol'y* 501, 550–552 and cases cited at 552 n.226.

[84] Senate Report 103–111 at 10 (1993); 146 *Cong. Rec.* S7775 (daily ed. July 27, 2000).

[85] *Cutter*, 544 U.S. 709, 716 n.5 (2005); see, generally, Daubatz, "RLUIPA at Four," 28 Harv. J.L. & Pub. Pol'y at 510.

[86] *Cutter*, 544 U.S. at 716 n.5.

[87] *Id.* at 716 (*quoting* 146 Cong. Rec. S7774, S7775) (joint statement of Sen. Hatch and Sen. Kennedy on RLUIPA).

[88] See S.2869, Bill Summary and Status for 106th Congress (2000), available at http://thomas.loc.gov/cgi-bin/bdquery/z?d106:SN02869:222L&summ2:m& Daubatz, "RLUIPA at Four," 28 Harv. J.L. & Pub. Pol'y at 504–505.

[89] 42 U.S. C. at § 2000cc-1(a).

[90] *Id.* at §§ 2000cc et seq.

[91] *Id.* at § 2000cc-1(a) at 712.

[92] *Id.* at § 2000cc-1(a) at 712–13.

[93] *Id.* at § 2000cc-1(a) at 713.

[94] Goldberg at 1404 (arguing that "[u]nder *Cutter*, religion has achieved a special status it has not enjoyed in years, and this result can only be explained by the Free Exercise Clause…religion has not only regained parity with free speech, it now receives greater protection in the prison setting.").

[95] *Cutter*, 544 U.S. at 720.

[96] *Id.* at 722.

were mindful of the urgency of prison security, and that they anticipated that courts would apply RLUIPA with "due deference" to the "experience and expertise" of prison administrators in establishing rules to maintain order, security, and discipline, consistent with budgetary considerations.[97] For this reason, Ginsburg stated that while "prison security is a compelling state interest," nevertheless "deference is due to institutional officials' expertise in this area."[98]

There is an unavoidable tension between Justice Ginsburg's affirmance of RLUIPA's strict scrutiny test—which is by definition the opposite of deferential—and her insistence that the courts should nevertheless apply it in a deferential manner. By having it both ways, as it were, Ginsburg may appear to strike a moderate compromise, but the result is an incoherent legal doctrine. Courts are directed to apply the strict scrutiny but to do so in a manner, which is inconsistent with the requirements of that standard. Ironically, Ginsburg explicitly relies on an earlier opinion, which has been criticized on particularly that basis. Citing the Supreme Court's earlier decision in the University of Michigan affirmative action litigation, Ginsburg explains that "context matters" in the application of strict scrutiny, by which she means that different degrees of deference are required depending on the circumstances.[99] In that case, Justice Sandra Day O'Connor's opinion, applying the same test in a deferential manner to the use of race-preferential affirmative action in university admission, was strongly criticized for undermining the standard of review (see footnote 84).

Moreover, in relying upon the deferential language of Senators Kennedy and Hatch, Justice Ginsburg tacitly incorporated the very language that had created problems for prison inmates under RFRA: "the courts will continue the tradition of giving 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" (see footnote 84). Unfortunately, it is precisely this same language that RLUIPA's co-sponsors repeated in their joint statement and which Justice Ginsburg approvingly quoted. Worse, Ginsburg failed to cite the following sentence in both the RFRA Senate Committee Report and the RLUIPA joint statement: "At the same time, however, inadequately formulated prison regulations and policies grounded on mere speculation, exaggerated fears, or post-hoc rationalizations will not suffice to meet the act's requirements."[100]

At least one court has acknowledged this problem with surprising candor:

> Some courts, in examining prison regulations under RFRA and RLUIPA, have softened the compelling interest test to allow speculative administrative judgments concerning security and cost to suffice to allow the regulation to survive strict scrutiny …It is also an approach that is dangerous for the protection of the constitutional rights of individuals outside of prison. Watering down strict scrutiny in a result-oriented manner in the prison context could subvert its rigor in other fields where it is applied.[101]

Unfortunately, this has indeed been a consequence of the manner in which the Ginsburg opinion selectively incorporated the legislative record.

The lower courts' ineffective, inconsistent use of RLUIPA's strict scrutiny standard can be seen, for example, in its disparate treatment of grooming issues. Grooming issues, such as the permissibility of facial hair, are of great importance to many Muslim prisoners and are frequently litigated in the courts. The recent split between the Ninth and Sixth Circuit Courts of Appeals over RLUIPA grooming standards shows the difficulty that the courts are having with this issue.

In two recent cases, the Sixth and Ninth Circuits reached opposite conclusions in cases in which prisoners refused to cut their hair for religious reasons. In *Warsoldier v. Woodford,* the Ninth Circuit rejected the California prison system's argument that its hair grooming policy was the least restrictive means of promoting security, enabling quick identification of inmates, preventing inmates from hiding contraband in their hair, and preserving health and safety.[102] The Ninth Circuit emphasized that the policy is too sweeping; that it applies to all male inmates but to no female inmates regardless of security threat; that it does not distinguish between maximum and minimum security levels; and that it provides not accommodation for religious belief.[103]

The Sixth Circuit, by contrast, affirmed the Ohio prison system's similar policy in *Hoevenaar v. Lazaroff*, giving "due deference to the judgment of prison officials, given

[97] *Id*. at 723 (quoting Joint Statement 775, in turn quoting S. Rep. No. 103–111 at 10).

[98] *Id*. at 725 n. 13.

[99] *Id*. at 725 n. 13 at 723 (*quoting Grutter v. Bollinger*, 539 U.S. 306 (2003)).

[100] Senate Report 103–111 at 10 (1993); 146 *Cong. Rec.* S7775 (daily ed. July 27, 2000).

[101] *Madison v. Riter*, 240 F. Supp. 2d 566, 578 n.10 (W.D. Va. 2003), *overruled on other grounds* 355 F.3d 310 (4th Cir. 2003).

[102] 418 F.3d 989, 997 (9th Cir. 2005).

[103] *Id*. at 997 (9th Cir. 2005) at 102.

their expertise and the significant security concerns implicated by prison regulations."[104] Indeed, the Sixth Circuit reversed a lower court decision striking down Ohio's policy, admonishing that the court had "improperly substituted its judgment for that of prison officials."[105] The court relied heavily on "expert testimony" provided by Ohio prison officials, who provided conclusory justifications for their refusal to provide religious accommodations (see footnote 103). Disturbingly, the Sixth Circuit was most impressed with the warden's testimony that "individualized exemptions are problematic because they cause resentment among the other inmates, a copycat effect, and problems with enforcement of the regulation due to staff members' difficulties in determining who is exempted and who is not."[106] All of these arguments prove too much, in the sense that they can be applied to any request for any religious context in any context, whether prison-related or not. Moreover, the "resentment" argument, also known as the "heckler's veto" is the classic example of an argument, which cannot be considered "compelling," because it is inconsistent with all forms of accommodation and with virtually any system of individual rights.

In short, the *Cutter* court's strong reliance on legislative "deference" comments has undercut RLUIPA's facial insistence upon strict scrutiny, leading to weak, inconsistent opinions by the lower courts. Unfortunately, as long as the courts continue to apply diluted versions of the compelling interest standard, they will countenance improper, discriminatory conduct by prison officials. The degree of deference provided by some lower courts, with apparent congressional and Supreme Court approval, is inconsistent not only with the concept of strict scrutiny, but also with everything that we know about the conduct of prison officials in matters of religious free exercise.

Conclusion: The Need for Change

Eight years after Congress unanimously passed RLUIPA, incarcerated persons still face the same challenge that motivated the bill's sponsor's to initiate the legislation. As Senators Orin Hatch and Ted Kennedy had jointly announced at the time: "[i]nstitutional residents' rights to practice their faith is at the mercy of those running the institutions."[107]

The condition of Muslim prisoners is important, not only for obvious humanitarian reasons, but also because prisoners now represent more than one percent of the American population.[108] Moreover, when freedoms are denied incarcerated persons, they may soon be denied to others as well.

The best way to effectively prevent anti-Muslim discrimination in American prisons is for courts to apply RLUIPA's liability standard as written, rather than by giving undue deference to prison officials in a manner that is inconsistent with the rigors of judicial strict scrutiny; for the Justice Department to aggressively enforce these cases; and for Congress to establish a process for administrative complaint resolution. Currently, processes exist for prisoners to raise complaints within their own prison systems and, if necessary, to seek Justice Department intervention. Given the rarity of Justice Department involvement, and the weakness of internal administrative reviews, Congress should provide for federal administrative review of prisoner complaints at federally assisted state and private prisons, just as such review is provided in the educational, health, employment, and housing sectors.

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[104] 422 F.3d 366 (6th Cir. 2005), *cert. denied*, 127 S. Ct. 187 (2006).

[105] *Id.*

[106] *Id.*

[107] Joint Statement of Senators Hatch & Kennedy, 146 Cong. Rec. at S7775.

[108] The Pew Center on the States 2008, available at http://www.pewcenteronthestates.org/uploadedFiles/One520in520100.pdf.

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