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Religious Freedom in Correctional Facilities (I)

-- Legal Standard

Issues of religious freedom for prisoners permeate contemporary correctional life, and arise in a wide variety of contexts. In the first of a series of articles in this area, we shall briefly examine what the general legal standard is which applies to actions and policies by correctional facilities which impose burdens on prisoners' exercise of their religions.

In future articles in this series, specific areas to be addressed will include religious freedom in the context of appearance and apparel, diet, drugs & alcohol, "establishment of religion," gangs or other security threat groups claiming to be religious, housing, medical care, prayer, religious literature and mail, religious objects and paraphernalia, religious names, Sabbath observance and religious holidays, and work assignments, as well as procedural and substantive rules which impact on what remedies are available to plaintiff prisoners.

Two major federal statutes govern the legal standard to be applied to prisoner claims that correctional officials or employees have imposed substantial burdens on their right to religious freedom. Under both of them, prison officials or employees must show that such actions or prison rules are justified by a "compelling" governmental interest, and also show that the "least restrictive" means available to further that interest were utilized.

Initial decisions under the first of these statutes, the Religious Freedom Restoration Act (RFRA), [42 U.S.C. Sec. 2000bb](#) included:

* Jewish prisoners are entitled to a kosher diet. [Friedman v. South](#), 92 F.3d 989 (9th Cir. 1996) and [Ashelman v. Wawrzaszek](#), 111 F.3d 674 (9th Cir. 1997).

* Rastafarians have the right to possess and use marijuana. [U.S. v. Bauer](#), 84 F.3d 1549, 1996 U.S. App. Lexis 11460 (9th Cir. 1996).

* Jehovah's Witnesses and Muslim prisoners must be allowed to meet on the same terms as other prisoners, including meetings without an outside religious leader.

Hyde v. Texas Dept. of Criminal Justice, 948 F.Supp. 625 (S.D. Tex. 1996).

* A Muslim prisoner had a clearly established right not to handle pork in prison kitchen; kitchen supervisors were not entitled to qualified immunity for disciplining him when he refused. Hayes v. Long, 72 F.3d 70 (8th Cir. 1995).

* A refusal to allow a Jewish or Muslim inmate to grow a beard violates the RFRA. Luckette v. Lewis, 883 F.Supp. 471 (D. Ariz. 1995); Lewis v. Scott, 910 F.Supp. 282 (E.D. Tex. 1995).

* Fundamentalist Christian inmates have the right to receive publications that are "deeply offensive" to Catholics. Weir v. Nix, 890 F.Supp. 769 (S.D.Iowa 1995).

* The denial of inmate's request to possess candles and incense and to perform Satanic rituals was a violation of his First Amendment right to religious freedom. Howard v. U.S., 864 F.Supp. 1019 (D. Colo. 1994).

The Religious Freedom Restoration Act, however, was struck down by the U.S. Supreme Court in Boerne v. Flores, 521 U.S. 507 (1997) as unconstitutional as applied to the states. The Court found that the statute was beyond the powers of Congress under Sec. 5 of the Fourteenth Amendment. The Fourteenth Amendment "incorporates" the rights contained in the First Amendment, and applies them to the states, and Sec. 5 of the Fourteenth Amendment gives Congress the power to enforce those rights against state and local government.

The Court's reasoning, however, was that the scope of religious rights under the First Amendment are properly to be determined by itself, and that, in analyzing First Amendment claims before, it has ruled that neutral laws that impose burdens on religion must only be justified by a rational relationship to legitimate governmental interests. Congress could not, therefore, through legislation, adopt a more stringent test for such constitutional claims.

Subsequent case law, however, indicates that the narrowness of the Supreme Court's ruling means that the Religious Freedom Restoration Act still applies to federal prisoners and correctional institutions, since Congress has more far-reaching powers over them.

In response to the Supreme Court's decision, Congress passed the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), 42 U.S.C. § 2000cc, which relied explicitly on the Commerce Clause and Spending Clause of the Constitution, and the ability of Congress to put "strings" on programs receiving financial assistance, which most state, county, and local correctional institutions and detention facilities do, in one way or another. Rather than applying to all areas

of state and federal law, as the RFRA did, the RLUIPA limits its scope to land-use regulation and religious exercise by institutionalized persons.

Under Sec. 3 of the RLUIPA statute, "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 2 of the Civil Rights of Institutionalized Persons Act (42 U.S.C. 1997), 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 interest."

Further, under Sec 4(b) of the statute "if a plaintiff produces prima facie evidence to support a claim alleging a violation of the Free Exercise Clause [...], the government shall bear the burden of persuasion on any element of the claim, except that the plaintiff shall bear the burden of persuasion on whether the law (including a regulation) or government practice that is challenged by the claim substantially burdens the plaintiff's exercise of religion."

Before the enactment of these two statutes, prison officials who wanted to justify a policy, regulation, or other action that imposed a burden on prisoner religious freedom rights only had to show a rational relationship to a legitimate penological interest, such as security, in order to prevail, a far easier burden to overcome.

The RLUIPA authorizes the award of attorneys' fees for its violation, and also states that it is not intended, in any way, to alter the application of the Prison Litigation Reform Act (PLRA), which, as shall be discussed in a later article in this series, has an impact both on what remedies are available in prisoner lawsuits concerning religious freedom, and procedural rules that prisoners must comply with to have their claims heard in the court.

Some correctional defendants sued under the RLUIPA challenged the new statute also, raising various arguments, including the theory that the statute constituted an impermissible "establishment of religion" in violation of the First Amendment, by giving preferential treatment to prisoner rights claims which were based on religious concerns, rather than on other concerns.

In a case filed by inmates belong to Satanist, Wicca (witchcraft), and white supremacist religions, a unanimous Supreme Court thoroughly rejected this

argument. The Court noted that prison safety and security are "compelling" interests, which can justify the imposition of substantial burdens on prisoner religious freedom, and expressed the expectation that courts applying the statute will give "due deference" to the experience and expertise of prison and jail administrators.

In the case, [Cutter v. Wilkinson](#), No. 03-9877, 544 U.S. 709 (2005), three Ohio prisoners who stated that they are members of "nonmainstream religions," named the Satanist, Wicca (witchcraft or pagan), and Asatru (Norse heathen or neo-pagan) religions, and the Church of Jesus Christ Christian (associated with the white supremacist views of the Aryan Nation) claimed that state correctional officials violated the RLUIPA by failing to accommodate their religious exercise in a variety of ways.

Specifically, they claimed that they were retaliated against and discriminated against for exercising their nontraditional religions, denied access to religious literature and denied the same opportunities for group worship that are granted to believers in other, mainstream, religions, as well as forbidding them to adhere to the dress and appearance mandates of their religions, and withholding religious ceremonial items that are substantially identical to those that the members of mainstream religions are allowed to possess. They also complained that they were not provided with a chaplain trained in their faith.

The Supreme Court overturned a prior lower federal appeals court decision, holding that the RLUIPA did not, on its face, exceed the limits of permissible government accommodation of religious practices.

The RLUIPA statute defines "religious exercise" fairly broadly to include "any exercise of religion, whether or not compelled by, or central to, a system of religious belief," removing a requirement, previously imposed by many courts, that plaintiff prisoners show that the restricted practice they complained about had to be one compulsory or "central," according to the established tenets of a religion.

The Court rejected the argument that the law improperly "advances" religion by providing greater protection to religious rights than to other constitutionally protected rights. It also pointed to the fact that the statute did not distinguish among bona fide religions, neither giving any particular religious sect "privileged status," nor singling out any religion for "disadvantageous treatment."

The Court's decision emphasized that it was addressing only the facial challenge that the defendants had presented to the constitutionality of the law, and not the application of the statute to the particular claims asserted by the prisoners, or whether the requested accommodations were outweighed by compelling

security and safety interests.

Additionally, for purposes of the appeal, both the sincerity of the prisoners' beliefs, and their religious nature, were assumed. In a footnote, the Court noted that any concerns that prison gangs use religious activity to conceal unlawful and violent conduct could be appropriately addressed by courts in specific cases by questioning whether a prisoner's "religiosity," asserted as the basis for a requested accommodation, is legitimate and sincere. While the "truth" of a religious belief is not open to question by the courts, the question of whether the prisoner's beliefs are sincerely held may be.

The Court also pointed to the fact that the U.S. [Bureau of Prisons](#), for more than ten years, has managed the largest correctional system in the country under the same "heightened scrutiny standard as RLUIPA without compromising prison security, public safety, or the constitutional rights of other prisoners," since the RFRA has widely been held to continue to apply to federal prisons. See, [Kikumura v. Hurley](#), #99-1284, 242 F.3d 950 (10th Cir. 2001). As a result, the Court rejected the argument that "abusive prisoner litigation" under the RLUIPA would "overburden" the operation of state and local correctional facilities.

A separate concurrence by Justice Thomas noted that the First Amendment only prohibited Congress from making laws "respecting an establishment of religion," i.e., an official governmental religion, and does not prohibit Congress from making laws which "respect" religion. While the Court's decision did not address the question of whether the RLUIPA exceeded the Spending clause powers of Congress, Thomas stated that the states' "voluntary acceptance" of the conditions imposed by Congress on the receipt of federal funds "undercuts Ohio's argument that Congress is encroaching on its turf."

In addition to the Supreme Court's rejection of the "establishment of religion" attack on the RLUIPA statute, federal appeals courts have rejected various other constitutional attacks on the statute, including ruling that Congress, in passing the statute, did not exceed its powers under the spending clause of the Constitution, or violate the establishment of religion clause, or violate the rights of the states under the Tenth Amendment, the immunity of the states under the Eleventh Amendment, or the doctrine of separation of powers. See, for instance, [Mayweathers v. Newland](#), #0-16505, 314 F.3d 1062 (9th Cir. 2002).

In that case, the court held that Congress did not exceed its power under the Spending Clause to further policy objectives by conditioning the receipt of federal funds on compliance with federal mandates, including, in this case, compliance with the designated legal standard for prisoners' religious rights. It noted that Congress has "great leeway" to determine which statutory aims "advance the

general welfare," and that "protecting religious worship in institutions from substantial and illegitimate burdens does promote the general welfare."

The court also found that the statute's conditions did "bear some relationship to the purpose of the federal spending," since "Congress has a strong interest in making certain that federal funds do not subsidize conduct that infringes individual liberties, such as the free practice of one's religion."

Rejecting the argument that the statute somehow "usurps" the regulation of a "core state function" in violation of the Tenth Amendment (reserving to the states or the people those powers not expressly delegated to the federal government), the court acknowledged that "the prosecution and punishment of crime remains a basic police power," but found that the RLUIPA "does not regulate the operation of prisons." Under the RLUIPA, the court stated, "prison officials remain free to run their prisons as they see fit," but are prohibited from "unduly burdening inmates' free exercise of religion in the process." While Congress may not have the authority to "commandeer the management of state prisons," it does have the power to fix the terms upon which its allotments of money will be disbursed.

"If states disagree with the requirements of RLUIPA," the court reasoned, "they remain free to forgo federal funding and opt out of its mandates." The court noted, in a footnote, that federal funding "comprises less than one percent of California's annual prison operating budget."

The appeals court rejected the argument that the plaintiff prisoners' lawsuit against California state prison officials under RLUIPA was barred by Eleventh Amendment immunity. The Eleventh Amendment, the court found, prohibits lawsuits against the state itself. "This case, by contrast, involves a suit by citizens of California against officials of the state of California for prospective injunctive relief," and therefore "falls squarely within the [Ex Parte Young](#) exception to sovereign immunity and does not violate the Eleventh Amendment."

Finally, the appeals court rejected the argument that the statute violates the principal of separation of powers. The correctional officials had argued that Congress, in passing the statute, was attempting to interfere with U.S. Supreme Court decisions interpreting the requirements of the First Amendment in the area of religion. The appeals court found that the RLUIPA "does not erroneously review or revise a specific ruling of the Supreme Court because the statute does not overturn the Court's constitutional interpretation," but rather "provides additional protection for religious worship," respecting that the Court's decisions "set only a constitutional floor--not a ceiling--for the protection of personal liberty." Indeed, the court found that the U.S. Supreme Court's decision in [Employment Division v. Smith](#), 494 U.S. 872 (1990), which held that laws of

general applicability that incidentally burden religious conduct do not offend the First Amendment, "explicitly left heightened legislative protection for religious worship to the political branches."

Other decisions upholding the RLUIPA against various constitutional attacks include: [Benning v. State of Georgia](#), No. 04-10979, 2004 U.S. App. Lexis 24842 (11th Cir. 2004), [Charles v. Verhagen](#), 348 F.3d 601 (7th Cir. 2003); [Mayweathers v. Newland](#), 314 F.3d 1062 (9th Cir. 2002), and [Madison v. Riter](#), 355 F.3d 310 (4th Cir. 2003).

In theory, the less stringent "rational relationship to a legitimate penological interest" test could still apply to a prisoner's religious freedom lawsuit if they fail to raise an explicit claim under either the RFRA (in the case of federal prisoners) or the RLUIPA (in the case of state prisoners). In such cases, prisoners might file a general First Amendment federal civil rights lawsuit under [42 U.S.C. Sec. 1983](#) or a direct constitutional claim under the First Amendment and [Bivens v. Six Unknown Federal Narcotics Agents](#), #301, 403 U.S. 388 (1971) against individual federal correctional officials, while failing to rely on either of the statutes.

At least one federal appeals court, however, has ruled that, in a pro se lawsuit filed by a prisoner over denial of access to a controversial religious text, the trial court should have, on its own, considered whether the prisoner had a claim under the RLUIPA, even though the prisoner did not refer to the statute in his complaint. The appeals court noted that complaints filed by prisoners who were acting as their own attorneys at the time are to be "liberally" construed, and that the courts should "apply the relevant law, regardless of whether the pro se litigant has identified it by name." [Smith v. Johnson](#), No. 03-2014, 2006 U.S. App. Lexis 27178 (3rd Cir.).

The court upheld summary judgment for the prison officials under the less stringent First Amendment legal standard, but ordered further proceedings on the possible statutory claim. The case involved a decision by the publication review committee of a Pennsylvania prison allegedly burdening a prisoner's ability to practice his religion of "Yoruba/Palero/Vodun" by denying him access to a religious text, two volumes of "El Libro," by Carlos Montenegro, a Palero priest. The committee disapproved receipt of the work as falling into a category of publications that "advocate, assist or are evidence of criminal activity or institution misconduct."

In most litigation concerning religious freedom rights of prisoners and detainees, therefore, correctional officials must be prepared to show that their actions or policies arguably imposing a substantial burden on a prisoner's ability to exercise their sincerely held religious beliefs are both justified by an identified

compelling governmental interest, and that the "least restrictive means" available is used to achieve that interest.

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