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Religious Freedom in Correctional Facilities (III): Protection for “Unconventional” Religions?

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Introduction

Prior articles in this multi-part series on religious freedom in correctional facilities have addressed the general legal standard to be applied in accommodating prisoners’ religious practices and religious issues that arise in the context of prisoner appearance and apparel. This article discusses the question of protection for “unconventional” religions, and how courts examine the sincerity of prisoner religious belief. At the conclusion of the article, there is a short list of useful resources, including prior articles in this series. This article does not address issues connected with atheist, agnostic, or “secular humanist” prisoners and “Establishment of Religion” issues, which will be covered in a future article.

Protection for “Unconventional” Religions?

Although persons seeking to determine whether to accommodate a particular religious practice, particularly based on a request from adherents of an unconventional, unorthodox, or relatively unknown religion may at times be inclined to ask whether an “unconventional” religion is “legitimate”, an examination of court decisions soon makes it apparent that this is perhaps a trick or wrong question altogether.

The U.S. Supreme Court, long ago, in [Reynolds v. U.S.](#), 98 U.S. 145 (1878) in first examining the scope of the constitutional protection given to the free exercise of religion by the First Amendment (and rejecting a “religious freedom” challenge to bigamy laws by polygamists), did not define religion itself, but stated that government was deprived of the power to deprive persons of religious freedom. “Congress was deprived of all legislative

power over mere opinion, but was left free to reach actions which were in violation of social duties or subversive of good order.”

In [U.S. v. Ballard](#), #421, 322 U.S. 78 (1944), the Court commented that an individual has the “right to worship as he pleases and to answer to no man for the verity of his religious views” since the Constitution does not prefer one religion over another. In [Thomas v. Review Board](#), #79-952, 450 U.S. 707 (1981), the Court commented that “religious beliefs need not be acceptable, logical, consistent, or comprehensible” for First Amendment protection to apply, although “one can, of course, imagine an asserted claim so bizarre, so clearly non-religious in motivation, as not to be entitled to protection under the Free Exercise Clause.”

The approach many courts have frequently taken, accordingly, is to presume, for purposes of litigation, the “legitimacy” of an asserted religion, while being willing to delve into the question of whether the litigant is sincere in their religious belief, as opposed to asserting it as a sham or subterfuge to escape the application of an otherwise generally applicable law or rule.

As a result, constitutional protection has often been extended to unusual and unorthodox religious groups and beliefs, such as Satanism, Odinism, Wicca, the Nation of Islam, etc.

In [Cutter v. Wilkinson](#), #03-9877, 544 U.S. 709 (2005), three Ohio prisoners who stated that they are members of "non-mainstream 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 their rights by failing to accommodate their religious exercise in a variety of ways. The particulars of the case were covered in the first article in this series, and will not be repeated here. What is of relevance here is that 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 noted that the fact that a belief is religious in nature, and sincerely held, would not deter courts from upholding the right of correctional officials to take action necessary to further prison security needs that are compelling, such as barring racist literature that would incite violence. This principle is illustrated by [Borzych v. Frank](#), #05-3907, 2006 U.S. App. Lexis 5278 (Unpub. 7th Cir.), in which the court held that Wisconsin prison properly barred an inmate from possessing books he claimed were

essential for the practice of his "Odinist" religion, when they were found to advocate white supremacist violence.

Despite this, however, courts have, in the absence of a case being made for the presence of overriding security concerns, afforded protection for unconventional and unpopular religions. In [Howard v. U.S.](#), #92-N-1515, 864 F. Supp. 1019 (D. Colo. 1994), a court held that the denial of an inmate's request for a place of worship to perform Satanic religious rituals and possession of candles, incense and other items necessary for Satanic rituals constituted a violation of his First Amendment religious freedom. While some other cases rejected accommodation for Satanist religious practices, they did so either on the basis of a question of the sincerity of the prisoner's beliefs or overriding issues of security involved in the particular request. See, [Childs v. Duckworth](#), #81-1496, 705 F.2d 915 (7th Cir. 1983). A good general discussion of how courts have addressed Satanism in the prison context is contained in Comment: The Devil You Know!: Should Prisoners Have the Right to Practice Satanism? by Patrick K.A. Elkins, 41 Hous. L. Rev. 613 (Summer 2004).

Similarly, in [Austin v. Crosby](#), #5D03-1834, 866 So. 2d 740 (Fla. App. 5th Dist. 2004), a prisoner whose requests to be allowed to participate in Wiccan religious rituals were denied failed to show that the Florida Department of Corrections security concerns about such rituals were not reasonably related to legitimate penological interests. The rituals involved would require the plaintiff and other inmates of the Wiccan faith to be taken outside when the moon is visible on the dates of the full moon for private "Esbat" celebratory rituals involving "Drawing Down of the Moon." The court upheld the correctional officials' concern that allowing Wiccans to conduct such private ceremonies outside of the prison housing facilities "presents security risks that are unacceptable." The court noted that the officials had accommodated the plaintiff's practice of her religion in other ways, including allowing her to purchase religious study materials, to purchase and wear religious medallions, to use tarot cards, and to participate in daily meditation.

In [Washington v. Klem](#), #05-2351, 497 F.3d 272 (3rd Cir. 2007), the Pennsylvania Department of Corrections' restriction on prisoners possessing more than ten books at a time in their cell was held to have substantially burdened a prisoner's exercise of his religion for purposes of the Religious Land Use and Institutionalized Persons Act (RLUIPA), 42 U.S.C. §§ 2000c. The defendant department was unable to show that the ten-book policy was the least restrictive means of furthering a compelling governmental interest in the safety and health of prisoners and prison employees, so that a federal appeals court overturned the dismissal of the prisoner's lawsuit. The prisoner belongs to the "Children of the Sun Church," which allegedly requires that the members of its religion read four Pan-African books per day, and the unconventional nature of this religious belief and practice did not give the court pause.

Prison officials were not entitled to judgment as a matter of law in a lawsuit claiming that a prisoner was denied the right to practice his Asatru faith (a pagan religion with Norse

origins) in terms of group worship. In response to the prisoner's equal protection claim, an official's affidavit failed to show how the prisoner's Asatru religion was different from the Nation of Islam or the Moorish American Science Temple, or other religions allowed group worship services. [Gordon v. Caruso](#), #1:06-CV-571, 2007 U.S. Dist. Lexis 65140 (W.D. Mich.).

While asserted limitations of space and staff and security concerns were valid penological reasons for not permitting Odinist prisoners to gather for services without an outside volunteer, an Odinist prisoner did present evidence that the policy was applied disparately to Odinists as opposed to prisoners of other religions. Barring Odinists from possessing "runestones," however, was justified by security concerns since they are similar to certain gambling-related objects, and no constitutional violation was found. The court found, however, that there were no penological interests that supported alleged limits on access to "rune literature" in the prison library, so that the trial court, on remand, had to examine whether that limitation violated the prisoner's constitutional rights. The court also held that, as to a claim under the Religious Land Use and Institutionalized Persons Act (RLUIPA), 42 U.S.C.S. §§ 2000cc-2000cc-5, concerning the restriction on possession of runestones, there should be further proceedings as to whether the overall runestones policy was "narrowly tailored" as required by the statute. [Mayfield v. Texas Dept. of Criminal Justice](#), #06-50490, 529 F.3d 599 (5th Cir. 2008).

What about generally "spiritual" practices not tied to a specific religion? In [Heleva v. Kramer](#), #06-1538, 2007 U.S. App. Lexis 1999 (Unpub. 3rd Cir.), the appeals court ruled that a trial court acted erroneously in ruling that prison officials did not violate inmate's rights to religious freedom by denying him access to certain allegedly religious books. The court found that the titles of the books indicated that they were "self-help" spiritual books. The appeals court ruled that the distinction between religion and spiritual "self-help" was not viable, and that the prisoner adequately alleged that his sincerely held religious beliefs were violated.

Prison officials who believe that there are compelling security or other penological interests that justify or necessitate restricting a particular religious practice will usually do better with the courts in making that argument directly than in attempting to challenge the legitimacy of the religion involved.

It is also worth noting that, while some earlier court decisions required, in the prison context, that a religious practice be "central" to a religion in order to be protected, Congress explicitly overturned this rule in enacting 42 U.S.C. Sec. 2000c-5(7)(a) of the Religious Land Use and Institutionalized Persons Act, which states that, for purposes of protection under that Act:

The term "religious exercise" includes any exercise of religion, whether or not compelled by, or central to, a system of religious belief.

The Test of Sincerity

As we have seen, a wide variety of religions are presumptively entitled to constitutional protection, and courts will not engage in attempting to gage the truth or merits of particular religious beliefs. A prisoner seeking accommodation of a particular religious practice, however, must be shown to be sincere in their belief. A finding that they are not, that the request is not religiously motivated, or that the religious reason given for the request is a sham will be grounds for rejecting the claim in a court of law.

That finding of sincerity, of course, is, standing alone, necessary, but not sufficient for a finding that the request should be accommodated, and is usually just the beginning of the inquiry. In [Kay v. Bemis](#), #07-4032, 500 F.3d 1214 (10th Cir. 2007), for instance, a Utah prisoner claimed that the refusal of prison officials to allow him possession of tarot cards, incense and religious books prevented him from practicing his Wiccan religion. A federal appeals court found that there was enough factual support to conclude that the plaintiff was a sincere devotee of the Wiccan faith. Further proceedings were therefore ordered to determine whether the prison's restrictions were justified by reasonable penological interests for purposes of a First Amendment claim, as well as the prisoner's claim under the Religious Land Use and Institutionalized Persons Act (RLUIPA), 42 U.S.C. Sec. 2000cc et seq., requiring that restrictions on prisoner religious freedom be justified by a "compelling" governmental interest and use the "least restrictive means" to further that interest.

Similar issues were confronted in [Singson v. Norris](#), #08-1570, 2009 U.S. App. Lexis 1971 (8th Cir.), finding that it did not violate the religious freedom rights of a Wiccan inmate to enforce a policy requiring inmates to check out tarot cards from a prison chaplain and forbidding the keeping of such cards in cells. The prisoner stated that he used the cards for religious purposes, and claimed that the policy violated his rights by preventing spontaneous tarot card readings. The policy was justified by security concerns, including preventing the use of the cards for gambling, preventing the exchange of card readings for goods or services, preventing the placement of gang symbols on the cards "which could be used to promote or defame gangs, leading to violence," and to prevent "psychological control, as some prisoners may believe that tarot card-holders have special powers."

In [Koger v. Bryan](#), #05-1904, 523 F.3d 789 (7th Cir. 2008), the court found that a prisoner's claim that he requested a non-meat diet for religious reasons was sincere. Prison officials had refused to provide a non-meat diet because they argued that such a diet was not required by the religious group, and the prisoner failed to submit to the prison chaplain a written verification of his membership in a religious group and its beliefs. The federal appeals court found that the defendant correctional officials failed to provide any evidence that their basis for denying the request served any compelling governmental interest, as required by the Religious Land Use and Institutionalized Persons Act (RLUIPA), 42

U.S.C.S. § 2000cc et seq., or that the rules used were the least restrictive means of advancing such an interest. Further proceedings were ordered on the prisoner's claims.

Courts have struck down a number of attempts to deny religious accommodation on the basis of prison officials' opinion that the prisoner could not be a member of a particular religion—the real question is the sincerity of the prisoner's individual religious belief. In [Morrison v. Garraghty](#), #00-6540, 239 F.3d 648 (4th Cir. 2001), the court found that the denial of prisoner's request for Native American religious items on the basis that he is Caucasian rather than Native American violated his right to equal protection of the law. Prison officials could not use race as the basis to deny a request for articles sincerely sought for reasons of religious belief and practice.

In [Jackson v. Mann](#), #97-2968, 196 F.3d 316 (2nd Cir. 1999), the court stated that a prisoner who declared that he was Jewish could not be properly denied kosher food on the basis that the prison Jewish chaplain did not recognize him as Jewish; the proper legal issue was whether his religious beliefs were sincerely held. Varying slightly in emphasis, but arriving at a similar result, the court in [Thomas v. Lord](#), #1963-96, 664 N.Y.S.2d 973 (Sup. 1997) found that the determination as to whether a prisoner was Jewish was a matter for the Jewish religious advisor at correctional facility, not for a court; but that the prisoner had a right, under state law, to participate in any religious observances she preferred, unless she was disruptive, or religious doctrine barred the participation of non-members of the faith.

Must all sincerely held religious beliefs be fully accommodated? Answering no, the court in [Ochs v. Thalacker](#), #95-2314, 90 F.3d 293 (8th Cir. 1996) found that prison officials could deny a "Neo-Nazi skinhead" white prisoner's request that he be housed only with prisoners of his own race even if such denial did substantially burden a sincerely held religious belief. The denial was justified on the basis of prison security and the public policy against racial segregation.

A Jewish prisoner's apparently sincerely held belief that it violated his religion to work in a non-kosher prison kitchen was not entitled to lesser consideration simply because it might not be a "central" tenet of his religion, but legitimate penological interests including budgetary concerns and the need for non-discriminatory prison staffing were sufficient, on limited review, to justify requiring him to accept the work assignment. [Searles v. Dechant](#), #03-3347, 393 F. 3d 1126 (10th Cir. 2004).

And, of course, a prisoner may sincerely want something, but fail to show that his motivation is religious. See [Weinberger v. Grimes](#), #07-6461, 2009 U.S. App. Lexis 2693 (Unpub. 6th Cir.), in which a prisoner failed to show that his use of a musical instrument, a practice the prison prohibited, was required by his religion.

See also, [Walker v. Iowa Dept. of Corrections](#), #06-1839, 2008 U.S. App. Lexis 18631 (Unpub. 8th Cir.) (Correctional officials were entitled to qualified immunity from liability

for damages in a lawsuit concerning alleged failure to accommodate a prisoner's religious beliefs when his "Hebrew Israelite" religion was not yet officially recognized, and the sincerity of his beliefs had been questioned in a prior lawsuit).

The prisoner's request must be based on their religion, rather than a personal preference. In Pasco v. Donald, #5:06-CV-141, 2007 U.S. Dist. Lexis 22809 (M.D. Ga.), a Muslim prisoner was not entitled to an injunction requiring that a prison serve fish as part of his diet. He did not show why fish was an absolute requirement of his religion, but merely asserted that it was important in his religion because it was among the foods Muhammad identified as "good" to eat. The vegan diet being provided, the court said, sufficiently satisfied his needs for a religious diet, and the legitimate interest of the prison in efficiently preparing meals outweighed his personal preferences as to what to eat.

See also, Walker v. Horn, #03-1896, 385 F.3d 321 (3rd Cir. 2004), ruling that prison officials did not violate an inmate's constitutional rights by force-feeding him after he refused to eat for nine days. The court upheld a jury's determination that the prisoner's fast was not for religious reasons.

Courts have, in a number of cases, upheld rules or procedures requiring a prisoner to declare or join a religion in order to participate in its organized activities. In Burks-Bey v. Stevenson, #3:04-CV-0096, 328 F. Supp. 2d 928 (N.D. Ind. 2004), despite prisoner's claim that his religion--the Moorish Science Temple of America--required him to "honor and study" the prophets of "all religions," prison officials did not violate his rights by refusing to allow him to attend group worship and study sessions of Buddhism, Confucianism, Islam, and Christianity, in addition to the meetings of his own religion. The court found that there were "obvious" legitimate security concerns and scheduling problems with allowing an inmate to attend the services of "all" religions.

See also, Spavone v. City of New York, #04 Civ. 8136, 420 F. Supp. 2d 236 (S.D.N.Y. 2005), finding that the New York city corrections department did not violate the rights of a Catholic inmate by prohibiting him from attending Protestant Bible study classes unless he changed his religious affiliation to Protestant, even though the jail failed to offer Catholic Bible study classes. There was no violation of equal protection, as a Catholic chaplain was available to meet with inmates individually. Allowing inmates to participate in only one religion, which they could choose, was the least restrictive available means of achieving a compelling interest in limiting the movement of prisoners to maintain order.

Resources

The following are a few useful resources on religion and prisoners.

- Monthly Law Journal Article: [Religious Freedom in Correctional Facilities \(I\) --Legal Standard](#), 2007 (3) AELE Mo. L. J. 301.

- Monthly Law Journal Article: [Religious Freedom in Correctional Facilities \(II\) --Appearance and Apparel](#), 2007 (4) AELE Mo. L. J. 301
- Monthly Law Journal Article: [Prisoner Diet Legal Issues](#), 2007 (7) AELE Mo. L.J. 301. [Contains a section on religious issues arising in the context of prisoner diet].
- [Religious Freedom Restoration Act](#) (RFRA), 42 U.S.C.), 42 U.S.C. § 2000bb et seq., a federal statute only applicable to federal government, not to state and local facilities.
- [Religious Land Use and Institutionalized Persons Act](#) (RLUIPA), 42 U.S.C. § 2000cc et seq., a federal statute with essentially the same legal test for accommodation of prisoner's religious practice as the RFRA, which applies to state and local facilities.
- U.S. Dept. of Justice, Federal Bureau of Prisons, [Technical Reference: Practical Guidelines for Administration of Inmate Religious Beliefs and Practices](#). (3/27/2002).
- U.S, Dept. of Justice, Federal Bureau of Prisons, [Program Statement No. P5360.09, Religious Beliefs and Practices](#). (12/31/2004).
- Comment: The Devil You Know!: Should Prisoners Have the Right to Practice Satanism? By Patrick K.A. Elkins, 41 Hous. L. Rev. 613 (Summer 2004).
- Prisoner Claims for Religious Freedom and State RFRAs, by Lee Boothby, 32 U.C. Davis L. Rev. 574 (1999).

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