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# Saving Their Own Souls: How RLUIPA Failed to Deliver On Its Promises

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Sarah Gerwig-Moore*

## INTRODUCTION

In the summer of 2001, as a graduate student in law and theology, I began work on a master's thesis that examined the predicament of men of faith on San Quentin's Condemned Row. I was working in the California Appellate Project—mostly assisting with direct appeals and state habeas petitions on behalf of men under a death sentence—when a colleague guided me into theological conversations with some of our clients.[1] On Condemned Row, they waited—up to five years to be assigned a court-appointed appellate attorney, on judges' rulings, and to find whether the legal system would ultimately exact the penalty it had prescribed. Some struggled with guilt or loss, and all endured the boredom of days spent in solitary cells.

If anyone needed the solace of faith, it was these men. I began the project, frankly, with a fair amount of skepticism that the men had become faithful opportunistically. (I recalled once having read about a prisoner who filed a lawsuit for not being offered a so-called religiously-mandated diet of lobster and champagne, which pretty well summed up my thoughts on prisoner religious practice.) I was also personally dissatisfied by supernatural answers to life's questions and approached the prisoners' religious beliefs with a mixture of agnostic temerity and hyper-educated condescension. But after the year spent corresponding and meeting with these men and their attorneys or spiritual advisors, I was impressed by the modesty of their requests and the persistence of the prison's denials of their religious requests.

In 2001, nearly every aspect of each man's religious practice was subject to (and limited by) the policies of the wardens of San Quentin. Prisoners were entirely at the mercy of the prison with regard to the diet prepared, the religious services offered, and the counseling or spiritual advice available. And frequently, what was offered or forbidden forced a prisoner to break a requirement of his faith.

Until the passage of the short-lived Religious Freedom and Restoration Act[2] (RFRA) in 1993, prisoners' legal claims related to their free exercise of religion were evaluated under a test that required them both to justify the importance of a particular practice and to prove that a prison's concerns about safety and budgeting (or any other concerns a

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*Assoc. Professor of Law, Mercer University Walter F. George School of Law. BA, Mercer University, *summa cum laude*; MTS, Candler School of Theology; JD, Emory Law School. I would like to thank Karin Tilly, Michael Umberger, Brooke Walker, Sabrina Atkins, and Ashley Short for their very able (and amiable) research assistance on this project. I would also like to thank Dean Gary Simson for offering his guidance and insight.

[1] The topics of religion and capital punishment frequently overlap, even outside the context of religious practice on death row. *See* Gary J. Simson & Stephen P. Garvey, *Knockin' on Heavens Door: Rethinking the Role of Religion in Death Penalty Cases*, 86 CORNELL L. REV. 1090 (2001).

[2] 42 U.S.C. § 2000bb (1993).

Warden might offer) were not justified under the circumstances.[3] Such litigation also put prisoners in the position of defending the sincerity of their faith and the action which that faith required.

But the 1990s had been an active decade for proponents of free exercise and offered promise of new legal standards and, perhaps, new prison policies. The RFRA required the government to provide evidence of a "compelling interest" in cases of freedom of religion.[4] It, however, was struck down as applied to state law by the United States Supreme Court in 1997[5] as overreaching Congressional authority. Only a year before I began my work in California, a defiant U.S. Congress passed the Religious Land Use and Institutionalized Persons Act[6] (RLUIPA). That Act was far more generous than the *Turner* test, but it was too soon to tell whether the men would ever enjoy RLUIPA's promised benefits.

First, RLUIPA, like RFRA, seemed vulnerable to an Establishment Clause challenge and was clearly destined to be the subject of litigation about its constitutionality.[7] Second, men who had litigated under *Turner* had become almost accustomed to denials of religious claims and felt powerless to prompt change. But unexpected challenges lay within a piece of legislation passed after RFRA and before RLUIPA: the Prison Litigation Reform Act[8] (PLRA). The PLRA was intended to weed out prisoners' meritless, successive, or inartfully-crafted civil legal claims,[9] but because it was passed after RFRA, it had not been an impediment to litigation under that statute.

The project changed me and how I thought of prison lawsuits related to religious practice. I came to understand these lawsuits as overwhelmingly reasonable, modest, and related to the core of lives of faith. And so I became particularly interested in whether our courts offered a means by which to vindicate otherwise-frustrated needs to act in belief as a follower sees fit.

I fully appreciate that some—perhaps even many—prisoner religious claims are self-serving, meritless, or abusive. Some suits are merely the outgrowth of boredom, frustration with prison authority, or are cynical expressions of a prisoner with far more interest in filing serial

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[3] *See infra* page 128-30 for a more comprehensive description of this test that was established by the Supreme Court in *Turner v. Safley*.

[4] 42 U.S.C. § 2000bb (2)(b) of RFRA states that the government may interfere only if it demonstrates that the law is "the least restrictive means of furthering that compelling government interest."

[5] City of Boerne v. Flores, 117 U.S. 507 (1997).

[6] 42 U.S.C. §§ 2000cc-1 *et seq*. (2006).

[7] Although an Establishment Clause issue was not the basis for the majority of the Supreme Court's declaring RFRA unconstitutional, the Establishment issue was noted by Justice Stevens in his concurrence. *City of Boerne*, 521 U.S. at 536-37 (Stevens, J., concurring).

[8] 42 U.S.C. § 1997 (1996).

[9] 145 Cong. Rec. H5598 (1999) (daily ed. July 15, 1999) (statement of Rep. Nadler noting that "this bill limits the right of prison inmates to raise otherwise valid claims under the bill by specifically referencing the Prison Litigation Reform Act").

lawsuits than to practice a religion of any stripe.[10] However, I believe the law of free exercise (particularly free exercise in prison) employs legal tests that are sufficient to ferret out the "nonbeliever" or the abusive litigant. Years later, this article follows on, examining how RLUIPA has borne up under constitutional scrutiny, and whether it has had its intended impact upon the men of faith who live in American prisons. If, for example, the purpose of RLUIPA was to remove encumbrances upon religious practice in prison, has it succeeded? Or has RLUIPA been another disappointment, given the deference traditionally given to prison officials?

The intersection of these two laws is sufficiently beneath most scholars' attention that those writing on RLUIPA have had little—if anything—to say on the matter; this Article is the first to fully examine the impact of the PLRA upon prisoners' RLUIPA claims. What I found after a national survey of lower court cases and reported appellate opinions, however, was deeply disappointing, if not surprising. For all the heavy rhetoric and bipartisan support behind RLUIPA's passage, the ultimate outcomes of prisoners' lawsuits related to their free exercise reveals that it has had only a modest impact. There may or may not exist the political will to modify either law such that prisoners' claims have more likelihood of success, but given the practical and legal restrictions upon litigation of this sort, the radical change promised in RFRA and RLUIPA still eludes most prisoners litigating free exercise claims.

## I. Perspectives And Context

*It was not man who implanted in himself the taste for what is infinite and the love of what is immortal; these instincts are not the offspring of his capricious will; their steadfast foundation is fixed in human nature, and they exist in spite of his efforts.*
—de Tocqueville, Democracy in America[11]

Why does all of this matter? What difference does it make whether RLUIPA's new legal test has been effective or has fostered a change for prisoners? I will begin with a broad inquiry into the fundamental need of many to belong to a religious group and the importance of religious practice in the United States. More specifically, this chapter will focus upon the significance of faith among incarcerated persons generally and the needs and motivations of prisoners, prison chaplains, and prison administrators.

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[10] Tony Barboza, *Inmate Claims Fictitious 'Festivus' Religious Holiday to Score Better Food*, L.A. Now, Dec. 14, 2010, http://latimesblogs.latimes.com/lanow/2010/12/oc-inmate-claims-religious-ties-to-festivus-to-score-better-food.html ("An Orange County jail inmate caused a stir this year by successfully claiming the fictitious holiday Festivus, made famous on the television show 'Seinfeld,' as part of his religious beliefs to score better meals.").

[11] Alexis De Tocqueville, Democracy In America, Volume 2 (1840).

For the faithful, religion forms identity, nourishes the soul, and orients the believer within world. According to a relatively recent poll, "an overwhelming majority (96%) of Americans endorse a belief in God or a universal spirit."[12] Though religious orientation and belief may vary, as explained by Karen van der Merwe, "people want to understand themselves and the world in which they live. This quest for understanding and meaning is ultimately a spiritual endeavor as it entails searching for meaning beyond the self, thus transcending the self."[13]

For many—and more specifically, in our American context—belief in a higher authority or power is fundamental to being human.[14] Or, as Douglas Laycock describes, religious beliefs are "important enough to die for, to suffer for, to rebel for, to emigrate for, to fight to control the government for." [15]

It is true that our nation values the separation of Church and State, but, of course that too may be motivated by our collective understanding of the importance of our freedom to practice (within notable limitations) as dictated by our conscience. "Within the liberty guaranteed by the Religion Clauses," writes Laycock, "the free human beings who make up the sovereign People may experience a Great Awakening of Christianity, a mass conversion to Islam or New Age mysticism or any other faith, or an overwhelming swing to atheism."[16] Not surprisingly, then, in a 2007 poll conducted by the First Amendment Center, 74% of respondents stated that "the right to practice the religion of your choice" is essential and 57% found the "right to practice no religion" to be essential.[17]

Just as the people demand the freedom of conscience and room for plurality, space for religious ritual is important for several reasons. It connects the believer to her inward soul, her outward community, and to the God she seeks. Symbolic or not, religious ritual means something: it transports those who take part to a world of higher and better things—to clearer insight, to deeper conviction, or stronger connection to God. Ritual is also a sign of membership in a group, which is of no small importance. Dietary laws, the Christian sacraments, the pillars of

[12] Heather S. Lonczak et al., *Religious Coping and Psychological Functioning in a Correctional Population*, 9 Mental Health, Religion & Culture 171 (2006).

[13] Karen van der Merwe, *A Psychological Perspective on the Source and Function of Religion*, 66 HTS Theological Studies 2010 1, 4 available at http://www/hts.org.za ("Religion provides the framework or meaning, as the quintessence of meaningfulness is connectedness with God, self and others.").

[14] *See also* Gary J. Simson, *Endangering Religious Liberty*, 84 Cal. L. Rev. 441 (1996).

[15] Douglas Laycock, *Religious Liberty as Liberty*, 7 J. Contemp. Legal Issues 313, 317 (1996).

[16] *Id.* at 313.

[17] First Amendment Center, State of the First Amendment 2007, 2 (2007), http://www.firstamendmentcenter.org/PDF/SOFA2007results.pdf; *see also* Patricia E. Salkin & Amy Lavine, *The Genesis of RLUIPA and Federalism: Evaluating the Creation of a Federal Statutory Right and Its Impact on Local Government*, 40 Urb. Law. 195, 196 (2008) ("The religion clauses of the First Amendment, which simultaneously forbid the government from establishing religion and from prohibiting its free exercise, are looked upon with great respect and admiration by many.").

Islam, ritual grasses, and the like, not only link the pious to the deity but also link the believer to others who recognize that deity. Robert Bellah, discussing Durkheim's notions of ritual and community, writes, " [in] ritual interaction the members of the group, through their shared experience, feel a sense of membership, however fleeting, with a sense of boundary between those sharing the experience and those outside it; they feel some sense of moral obligation to each other. . . "[18] That is, religion, through ritual and belonging, sets up standards of obligation to members of that community and informs that group's understanding of belonging, morality, and roles within the community.

### A. The Conflicting Constituencies

One of the problems with accommodating religious practice in prison is that there are several different interested parties involved, each with varied motivations and each with legitimate concerns.

First, take the prisoners' priorities. As populations diversify, so do religious beliefs.[19] At the same time, connectedness to community (sometimes a new one, sometimes one of importance from a time before a prisoner's incarceration) becomes especially important. As acknowledged by Justice Brennan, dissenting in *O'Lone v. Shabazz*, "[i] ncarceration by its nature denies a prisoner participation in the larger human community. To deny the opportunity to affirm membership in a spiritual community, however, may extinguish an inmate's last source of hope for dignity and redemption." [20]

Religion, as it offers prisoners hope and purpose generally, also encourages learning and self-improvement. The tale of a prisoner—formerly lawless, apathetic and angry—undergoing a process of renewal or rebirth is not a new one. Certainly one of the most well-known stories of a conversion in prison is the one that Malcolm X tells in his autobiography. [21] But Malcolm X is not the only person who has been transformed as a result of religious conversion in prison; many

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[18] Robert Bellah, *Durkheim and Ritual*, *in* Cambridge Companion to Durkheim, 185-86 (Jeffrey C. Alexander & Philip Smith, eds. 2005).

[19] *See also* Laycock, *supra* note 15 at 317 ("… the affirmative goal is to create a regime in which people of fundamentally different views about religion can live together in a peaceful and self-governing society."); Daniel O. Conkle, *Religious Truth, Pluralism, and Secularization: The Shaking Foundation of American Religious Liberty*, 32 Cardozo L. Rev. 1755, 1767-68 (2011) ("Religion in America has become radically diverse, and it is likely to become even more so in the decades that lie ahead. As Professor Stephen J. Stein has explained, the history of American religion has been a story of ever-increasing religious diversity.").

[20] O'Lone v. Shabazz, 482 U.S. 342, 368 (1987) (Brennan, J., dissenting).

[21] Malcolm X (As told to Alex Haley), The Autobiography of Malcolm X, 153 (1964) ("To understand that of any person, his whole life, from birth, must be reviewed. . . . I am spending many hours [in the preparation of this book] because the full story is the best way that I know to have it seen, and understood, that I had sunk to the very bottom of the American white man's society when—soon now, in prison – I found Allah and the religion of Islam and it completely transformed my life.").

men become motivated to seek personal enlightenment only after a criminal conviction.

Belief and faithful commitment may also lead prisoners to help others—whether in a "faith-sharing" sense or in a more practical sense. It also offers belonging and acceptance: acceptance often by a deity, but also from the welcoming embrace of like-minded people in a similar situation. A primary purpose of religious practice "in prison is not only to reduce anti-social behavior/criminal behavior or relapse into criminal activity but also to counteract the tendency of prisons to dehumanize people and help prisoners prevent a further decline in their humanity."[22] In a society continually at risk of violence, religion may "prevent the further deterioration of inmates by helping them to cope with being a social outcast in a prison situation that is fraught with loss, deprivation, and survival challenges." [23]

Anyone who has reviewed prisoners' free exercise lawsuits is familiar with administrators' reasons for denying or curtailing certain practices. Safety, order, and budget are all, of course, valid concerns for a prison administrator. Prison is a dangerous place in which to work or live. State and federal budget cuts have real impact upon prison rehabilitation and security programs. And wardens shoulder a heavy burden of responsibility not only to their staff and their charges but to the larger community. Richard Symes, a longtime prison minister, observes that while prison rules may seem draconian to the outsider, "almost all rules are made to help implement the prison's intention to create a safe place for everyone." [24]

On the other hand, Symes explains, "It is also true that the prison staff will on occasion ignore, twist, and unfairly administer the rules to either favor or punish a specific prisoner." [25] Likewise, the Congressional record surrounding RLUIPA itself includes an acknowledgment of inappropriate limitations on prisoners' religious practice: "It is well known that prisoners often file frivolous claims; it is less well known that prison officials sometimes impose frivolous or arbitrary rules. Whether from indifference, ignorance, bigotry, or lack of resources, some institutions restrict religious liberty in egregious and unnecessary ways."[26]

Although religious accommodation makes prison administration more complicated and many prisons are unwilling to offer more than legally required, a prisoner's faith does offer some ancillary benefits for

[22] Melvina Sumter, *Faith-Based Prison Programs*, 5 Crim. & Pub. Pol'y 523, 525 (2006) (citing Todd R. Clear et al., *The Value of Religion in Prison: An Inmate Perspective*, 16 J. of Contemp. Crim. Just. 53–74 (2000)).

[23] *Id.*

[24] Richard A. Symes, *As Though you were in Prison with Them*, 53 Presbyterian Criminal Justice Program, Kentucky 2000.

[25] *Id*.

[26] 146 Cong. Rec. S7775 (daily ed. July 27, 2000) (joint statement of Sens. Hatch and Kennedy).

prison officials.[27] As discussed above, prisoners with hope and purpose are, pragmatically speaking, easier to control. Prisoners have more to lose and more at stake when connected to a faith group, and many men, through religious study, learn anew the importance of respect for authority.[28]

There are, of course, notable exceptions to this general rule, and attendant concerns and fears about these deviations may result in discrimination against minority religious groups. While some groups advocate harmony and peace, other groups are suspected to advocate political agitation and overthrow of oppression.[29]

Against this backdrop of varied interests, priorities, perspectives, needs, limitations, and guidelines RLUIPA and free exercise claims are brought, defended against, and decided. No one can reasonably argue with a prison warden's desire for order and safety; she has her staff and inmates' safety to protect, as well as the public's general confidence in the prison system.[30] On the other hand, with religious practice and free exercise as closely-held American values—with attending practical applications in the prison context—there are powerful countervailing reasons to question restrictions burdening religious practice.

## II. The Undulating Landscape of Free Exercise Tests

A prisoner does not altogether forfeit his or her First Amendment right to free exercise of religion—even though it may be limited by incarceration.[31] The Ninth Circuit Court of Appeals has so eloquently

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[27] *Id*. In the three years leading up to RLUIPA's passage, Congress heard testimony and found that some officials in institutions impose arbitrary restrictions on the religious practices of prisoners. Many of these restrictions did not further an institution's policy on discipline, order, or safety. Not surprisingly then, there is a congressional record supporting action to make it easier for prisoners to practice their religions and to more easily challenge restrictions upon their exercise. *Id*.

[28] Aaron K. Block, *When Money is Tight, is Strict Scrutiny Loose?: Cost Sensitivity as a Compelling Governmental Interest Under the Religious Land Use and Institutionalized Persons Act of 2000*, 14 Tex. J. on C.L. & C.R. 237, 247 (2009). "*Cutter* declared that courts reviewing RLUIPA claims should recognize that "context matters" in the application of the Act's strict scrutiny test. Referencing the Act's legislative history, the Court noted that 'lawmakers supporting RLUIPA were mindful of the urgency of discipline, order, safety, and security in penal institutions.'").

[29] John W. Popeo, *Combating Radical Islam in Prisons within the Legal Dictates of the Free Exercise Clause*, 32 New Eng. J. on Crim. & Civ. Confinement 135, 140-41 (2006) However, government officials, even under RLUIPA, still look at ways to regulate religion within prisons. For example, "based on the fear of Islamic radicals exploiting prisons chaplaincies and institutional programs provided for inmates, government officials have proposed a number of more stringent requirements [on Islamic radicals]." *Id.*

[30] *See Religious Liberties Act 'Compromise' Compromises Local Authority*, Nation's Cities Weekly, July 24, 2000 ("Oversight of jails and corrections facilities involves weighing public safety, the security of staff and the safety and individual rights of inmates, as well as many other factors that affect budgetary and management decisions. This bill would restrict the ability of local governments to set appropriate corrections policies.").

[31] Turner v. Safely, 482 U.S. 76, 84 (1987). In *Turner v. Safely*, the Supreme Court recognized that "prison walls do not form a barrier separating prison inmates from the protections of the Constitution." *Id.*

articulated, "[t]he right to the free exercise of religion is to be jealously guarded. It is the right of a human being to respond to what that person's conscience says is the dictate of God… A human being does not cease to be a human being because the human being is a prisoner of the state." [32]

Although the First Amendment to the United States Constitution provides, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof,"[33] the United States Supreme Court has long distinguished the freedom to believe from the freedom to act – or be exempted from reasonable and generally-applicable laws.[34] Protection of religious organizations from the interference of the state has waxed and waned, undergoing several incarnations from *Sherbert* through *Smith* to RFRA and RLUIPA.

Prisoners' free exercise claims have never been appellate court darlings, but the likelihood of success in those cases has risen and fallen as the legal tests around general free exercise claims have undulated. Long before any statutes related to court review of free exercise claims (much less prisoner free exercise claims), the U.S. Supreme Court and lower appellate courts have struggled with appropriate tests and ranges of acceptable state limits on Americans' right to practice as their consciences dictate.

### A. Supreme Court Jurisprudence Prior To *Employment Division v. Smith*

Until *Employment Division v. Smith,*[35] the Supreme Court's early decisions interpreting Free Exercise claims held that generally-applicable state and local laws were constitutional as long as the laws served a rational government purpose. This test operated regardless of whether the laws inhibited a religious person from *practicing* a certain tenet of his faith. [36]

In 1963, the Court's decision in *Sherbert v. Verner*[37] moved in a new direction: an otherwise neutral law with a discriminatory impact upon a religious practice would be subject to strict scrutiny.[38] If, then, a

[32] Ward v. Walsh, 1 F.3d 873, 876 (1993). In *Walsh*, an Orthodox Jewish prisoner in a Nevada state prison brought suit under Section 1983 alleging that by denying him a kosher diet, clothes made of a single fabric, and access to an Orthodox rabbi; by refusing to allow him to have candles in his cell; and by disregarding his request to promise to not be transported on the Sabbath prison officials had violated his First Amendment right to free exercise.

[33] U.S. Const. amend. I.

[34] *See* Cantwell v. Connecticut, 310 U.S. 296, 303-04 (1940).

[35] 494 U.S. 872 (1990).

[36] *See* Reynolds v. United States, 98 U.S. 145, 166 (1978) (holding that a territory's law criminalizing bigamy was constitutional, making the distinction between laws that interfere with religious practices versus those that interfere with religious belief or opinion); *see also* Cantwell v. Connecticut, 310 U.S. 296, 303-04 (1940) (explicitly incorporating the Free Exercise Amendment, but making a distinction between freedom to believe and freedom to act).

[37] 374 U.S. 398 (1963).

[38] *Id.*

plaintiff could prove a "substantial burden" on his religious practice, the government was required to demonstrate that the "compelling governmental interest" motivating the law could not have been satisfied through less restrictive means.[39] Nearly a decade later, in *Wisconsin v. Yoder*,[40] the Court struck down a Wisconsin law requiring public school attendance of children under the age of sixteen.[41] Finding that the children of the Amish plaintiffs were adequately educated within their own community, it held that the law unreasonably burdened the free exercise rights of those challenging the law.[42]

By the 1980's, however, after the *Sherbert*/*Yoder* decisions, the Supreme Court purported to apply strict scrutiny analysis when reviewing facially-neutral decisions but failed to apply the test as rigidly as it had in those earlier opinions. For example, in *Lyng v. Northwest Indian Cemetery Protective Association*,[43] the Supreme Court rejected a challenge to a forest service road that ran directly through a sacred Native American site.[44] The Court reasoned that the road only "incidentally" burdened the exercise of religion and did not "coerce" anyone to violate religious beliefs.[45] Further, in *United States v. Lee*,[46] the Court refused to hold social security and unemployment insurance taxes unconstitutional as applied to Amish employers because, even though the taxes did burden Amish beliefs, the government had a compelling interest in preserving the social security system.[47]

### B. Prisoners' Free Exercise Cases And Precedent

At the same time as the high Court was narrowing and revising its tests related to generally-applicable laws concerning free exercise, it began to look at prisoners' cases. In the late 1980s, the *Turner v. Safley* test became the applicable standard governing prisoners' claims under section 1983—including free exercise claims. Under that analysis, the State was simply required to show that its action was "reasonably related" to a "legitimate penological interest."[48] *Turner* was an attempt to "balance" the protection of prisoners' constitutional rights with

[39] *Id.*
[40] 406 U.S. 205 (1972).
[41] *Id.*
[42] *Id.*
[43] 485 U.S. 439 (1988).
[44] *Id.*
[45] *Id.*
[46] 455 U.S. 252 (1982).
[47] *Id.*
[48] *Turner*, 482 U.S. at 89; *see also* Derek L. Gaubatz, *RLUIPA at Four: Evaluating the Success and Constitutionality of RLUIPA's Prisoner Provisions*, 28 HARV. J.L. & PUB. POL'Y 501, 507-08 (2005) ("The renaissance of prisoner free exercise claims ended with the Supreme Court's 1987 decision in *O'Lone v. Estate of Shabazz*. Citing its earlier precedent of *Turner v. Safley*, which narrowly construed the due process rights of prisoners, the Court rejected both strict and heightened scrutiny for prisoner free exercise claims.").

legitimate correctional priorities by considering a number of factors, such as the extent to which alternate avenues for religious practice remained open to inmates and the impact that accommodation would have on prison operations.[49] Not surprisingly, very few prisoners' lawsuits prevailed under the *Turner* analysis.

As the four *Turner* dissenters—Stevens, Brennan, Marshall, and Blackmun—presciently identified, "[t]he Court's rather open-ended 'reasonableness' standard makes it much too easy to uphold restrictions on prisoners' First Amendment rights on the basis of administrative concerns and speculation about possible security risks rather than on the basis of evidence that the restrictions are needed to further an important governmental interest."[50]

For example, *O'Lone*, decided one week after *Turner* and using the test prescribed therein, confirmed that prisons are, with some guidelines, allowed to limit fundamental rights by alleging that they have a reasonable justification for doing so. [51] From the beginning of its opinion in *O'Lone*, the Court recognized it had recently determined a "proper standard" to apply when an inmate is challenging a prison regulation and asserting it restricts inmates' constitutional rights.[52] It reiterated the notion that the *Turner* approach '"ensures the ability of corrections officials 'to anticipate security problems and to adopt innovative solutions to the intractable problems of prison administration.'"[53]

The lower court in *O'Lone* had required prison officials to show that no reasonable policy would allow the prisoners to attend Jumu'ah[54] without creating security concerns. The Supreme Court, however, declined to adopt that test; instead, it looked generally to whether the prisoners had alternative means to observe their faith—without regard to any particular religious practice.[55] After determining that prisoners could participate in other Muslim practices, such as observing Ramadan[56] and dietary requirements, the Court decided that there

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[49] *Id.* The complete list of *Turner* factors require that courts consider (1) whether there existed a "valid, rational connection" between the prison regulation and the legitimate (and neutral) governmental interest justifying it; (2) whether alternative means of exercising the right remained open to prison inmates; (3) the sort of impact accommodation of the asserted constitutional right might have on guards and other prisoners, and on the allocation of prison resources generally; and (4) whether there exists a reasonable alternative to the prison regulation. *Id.*

[50] *Turner*, 482 U.S. at 101 (Stevens, J., dissenting).

[51] O'Lone v. Shabazz, 482 U.S. 342 (1987). In *O'Lone*, the prisoners were of Islamic faith and contended that two prison regulations prevented them attending a Muslim service that was offered on Friday afternoons. *Id.* at 344-45.

[52] *Id*. at 349 (citing *Turner*, 482 U.S. at 89).

[53] *Id.*

[54] *Id.* at 344. Jumu'ah, meaning "Friday prayer," is a congregational prayer held by Muslims every Friday, just after noon.

[55] *Id.* at 350-52.

[56] *Id*. at 352. Ramadan is the Islamic month of fasting, in which participating Muslims refrain from eating, drinking, smoking and sex during daylight hours. It is intended to teach Muslims about patience, spirituality, humility and submissiveness to Allah.

was no obligation that the prison accommodate their desire to attend Jumu'ah.[57]

Cases decided under the *Turner/O'Lone* tests rarely moved beyond the Summary Judgment stage –frequently because of prisons' defense on the basis of safety or budgetary concerns. Under those four factors, courts did not focus upon legitimacy of a prisoner's religion or the strength of his or her faith and more on the prison policy or action itself.[58]

### C. *EMPLOYMENT DIVISION V. SMITH* AND LEGISLATIVE RESPONSES THERETO

The 1990s saw a power struggle between the Court's evolving standards related to free exercise and Congressional interest in protecting religious freedom. In *Employment Division v. Smith,* the Supreme Court departed from its earlier precedent in *Yoder* and *Sherbert*.[59] Justice Scalia wrote for a 5-4 majority and announced that criminalizing peyote use only incidentally burdened two members of a Native Americans' religious beliefs.[60] The Court reasoned that there was no need to apply strict scrutiny analysis because the standard is too stringent for general, neutral laws that are not overtly intended to restrict religious beliefs.[61] This changed the landscape somewhat – and many were dismayed. Professor Douglas Laycock spoke for many when he complained, "This Court has said to Americans of all faiths that they have a constitutional right to believe their religion but no constitutional right to practice it."[62]

The Court distinguished *Sherbert* and *Yoder* analysis, limiting *Sherbert* to its factual context as an unemployment benefits case involving a system of individualized exemptions.[63] It further reasoned that *Yoder* was a "hybrid" case because it affected more than one fundamental right (free exercise of religion and the right for parents to direct education of their children). No particular standard of review

[57] *Id*. "By placing the burden on prison officials to disprove the availability of alternatives," the Court explained, "the approach articulated by the Court of Appeals fails to reflect the respect and deference that the United States Constitution allows for the judgment of prison administrators." *Id.* Even further, the Court found that a gathering for Jumu'ah among prisoners could threaten prison security and anger other inmates, who would not get to participate in the gathering. *Id*. at 352.

[58] For example, the Supreme Court acknowledged that "there is no question that respondent's sincerely held religious beliefs which compelled attendance at Jumu'ah." *Id.* at 345.

[59] 494 U.S. 872.

[60] *Id*. Smith and Black were fired from their jobs for using peyote, a sacrament in the Native American church in which they were members. *Id.* at 872. They were subsequently denied unemployment benefits by the state of Oregon because they had been dismissed for work-related misconduct. *Id.* The State's position was that the dismissals were based on criminal drug statutes and that the statutes were neutral and generally applicable. *Id.*

[61] *Id.* at 881-82.

[62] DOUGLAS LAYCOCK, RELIGIOUS LIBERTY, VOLUME 2: THE FREE EXERCISE CLAUSE 58 (2011).

[63] *Smith*, 494 U.S. 872. Here, there was misconduct and plaintiffs were not subject to individualized exceptions because they violated Oregon's controlled substance laws. *Id.*

was discussed, but it was clear that scrutiny less than strict scrutiny was applied to general, neutrally-applicable laws.[64] However, laws not generally-applicable or neutral remained subject to the *Sherbert/Yoder* strict scrutiny analysis if it substantially burdened a religion practice.[65]

### D. Free Exercise Power Struggles: *Smith*, RFRA and RLUIPA

In response to constituents' outcries, Congress legislatively overturned the Supreme Court's decision in *Employment Division v. Smith* through enactment of RFRA.[66] The purpose behind RFRA was to return to the pre-*Smith* analysis of free exercise claims—including, presumably (though not explicitly) claims brought by prisoners. More specifically, Congress intended to restore the *Sherbert/Yoder* test by subjecting all laws that "substantially burden a person's exercise of religion" to strict scrutiny, even if the state or local laws were generally applicable and neutral.[67] In order for the State to survive a free exercise challenge brought by a prisoner under RFRA and its more stringent test, it had to show not only a compelling interest justifying its substantial burden upon free exercise but also that it had employed the "least restrictive means of furthering that compelling interest."[68] Senator Oren Hatch—a co-sponsor of the legislation—described RFRA as one of the most significant pieces of legislation to ever come before the Congress."[69]

RFRA was controversial, especially as related to prisoners' religious practices. Some argued that it created another series of rights to hardened criminals or would flood the court system with frivolous claims. There are pages of discussion in the corresponding Congressional Record in the Senate regarding the harms RFRA could do to prisons, court systems, prisoners, and prison wardens.[70] However, some legislators clearly thought RFRA could repair the damage the *Smith* decision had exacted upon on religious free exercise.[71]

The Supreme Court quickly responded to RFRA in *Boerne v. Flores*,[72] and the power struggle continued.[73] It declared RFRA unconstitutional, because—although section 5 of the Fourteenth Amendment gave Congress the power to enforce certain rights—it did not give Congress

[64] *Id.* at 881-82.

[65] *See* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 113 S. Ct. 2217 (1993) (applying strict scrutiny analysis to a non-neutral law that substantially burdened Santerian's religious exercise of sacrificing animals).

[66] Religious Freedom Restoration Act, 42 U.S. §2000bb (1993).

[67] *See* 42 U.S.C. § 2000bb-2000bb-4.

[68] *See supra* note 13 at 443.

[69] 139 Cong. Rec. S 2610 (1993).

[70] 139 Cong. Rec. 26181-90 (1993). For further discussion of the Congressional Record surrounding RFRA, see *infra* Part VI.

[71] 139 Cong. Rec. 4922 (daily ed. March 11, 1993) (statements of Sen. Kennedy).

[72] Boerne v. Flores, 521 U.S. 507 (1997).

[73] Gaubatz, *supra* note 48 at 509.

the power to change the substance of what those rights entailed or to create new rights.[74] Thereafter, RFRA still applied to federal laws, but state or local laws were again subject to the *Smith* analysis.[75] For prisoners, the effect of the *Boerne* decision was to restore the less restrictive reasonableness standard articulated in *Turner* and followed in *O'Lone*.[76]

### E. The Religious Land Use And Institutionalized Persons Act

Undaunted, Congress initiated RLUIPA legislation less than a month after the Court's decision in *Boerne v. Flores*.[77] Immediately following the decision, legislators held a first series of meetings to consider what alternative sources of legislation were available to Congress in order to protect against religious discrimination and substantial burdens on religious practice.[78] One representative noted, "Because the freedom to practice one's religion is a fundamental right, we are meeting this morning . . . to consider what sources of authority Congress may utilize to protect this most precious freedom from government infringement."[79] At some point, the discussion turned to burdens upon religious free exercise in land use regulations and denial of religious exercise in state-run institutions.[80]

Though prisoners' free exercise claims met with little success in the federal courts even as late as 2001, RLUIPA's passage at the turn of the century offered promise and hope. Like its predecessor, it "restored" a compelling interest test for laws impacting religious practices and discarded the previous rational basis test.[81] Enacted under congressional Spending Clause powers—rather than the powers invoked for RFRA under Section 5 of the Fourteenth Amendment[82]—the relevant portion of RLUIPA reads,

> No government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution. . . 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

[74] *Id.* at 530, 532.

[75] *See id.*

[76] Bolin v. Rice, 2000 WL 342676 (N.D. Cal. 2000).

[77] 42 U.S.C. § 2000cc to -5 (2006).

[78] *See Protecting Religious Freedom after* Boerne v. Flores: *Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 105th Cong. (1997) (statement of Rep. Canady).

[79] *Id.*

[80] *Id.*

[81] 42 U.S.C. § 2000-cc (2001).

[82] The Religious Freedom Restoration Act of 1993 (RFRA), 42 U.S.C. § 2000bb, under which many prisoners' free exercise claims were brought, was found an unconstitutional exercise of Congress' powers, and does not apply to the States. *Boerne*, 521 U.S. 507 (1997).

> interest; and (2) is the least restrictive means of furthering that compelling governmental interest.[83]

RLUIPA applies to any "program or activity that receives Federal financial assistance" or when "the substantial burden affects, or removal of that burden would affect [] commerce . . . among the several states."[84] Thus, RLUIPA applies to prisoners because prisons receive federal funding. And at least theoretically, the language of that test offered hope for success to prisoners filing religious practice claims. Under RLUIPA, if a prisoner is able to demonstrate that a substantial burden has been imposed on his or her religious practice, the burden of proof then shifts to the State to demonstrate both the existence of a compelling governmental interest and that the method complained of is the "least restrictive means of furthering" that compelling interest.[85] The test is markedly more favorable to the prisoner than the *Turner v. Safley* test, under which the prisoner carried the factual burden and through which a prison might prevail by showing merely that its policies were "'reasonably related' to legitimate penological interests."[86]

### F. RLUIPA's Constitutionality

The question of RLUIPA's constitutionality was always present because of the fate of its predecessor.[87] In its clearest statement about religious practice in prison since its decision in *Turner v. Safley*, the United States Supreme Court in *Cutter v. Wilkinson*[88] not only found RLUIPA to be constitutional but also offered guidance related to its application to prisoners' free exercise cases.[89] First, the Court "found RLUIPA's institutionalized-persons provision compatible with the Establishment Clause because it alleviate[d] exceptional government-created burdens on private religious exercise."[90] RLUIPA, it continued,

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[83] 42 U.S.C. §§ 2000cc-1(b)(1)- (2) (2006).

[84] *Id.*

[85] *Id.*

[86] Turner v. Safley, 482 U.S. 78, 93 (1987).

[87] The *amicus curiae* briefs submitted to the Supreme Court in *Cutter v. Wilkinson* supporting RLUIPA's constitutionality and the prisoners' rights to conform to their religious beliefs demonstrate the diversity of RLUIPA's support. Individuals and organizations filing amicus curiae briefs included: the Rutherford Institute, the Americans United for Separation of Church and State, the American Civil Liberties Union, the Coalition for the Free Exercise of Religion, Senators Orrin G. Hatch and Edward M. Kennedy, the American Correctional Chaplains Association, Former state corrections officials, state prisoners, prison fellowship, the Jewish Prisoner Services International, the American Catholic Correctional Chaplains Association, the Prison Dharma Network, the Nation Association of Evangelicals, the Union of Orthodox Jewish Congregation, the states of New York and Washington, and others. *Cutter*, 544 U.S. 709 (2005).

[88] 544 U.S. 709 (2005).

[89] James D. Nelson, *Incarceration, Accommodation, and Strict Scrutiny*, 95 Va. L. Rev. 2053, 2059-60 (2009) ("The Cutter Court affirmed the constitutionality of RLUIPA, holding that the heightened standard of review did not impermissibly favor religion.").

[90] *Cutter*, 544 U.S. 709, 720.

"thus protects institutionalized persons who are unable freely to attend to their religious needs" and who are also "therefore dependent on the government's permission and accommodation for exercise of their religion."[91] *Cutter* also reaffirmed that the state must not, in its accommodation, confer any "privileged status on any particular religious sect" nor should the state "single[] out [any] bona fide faith for disadvantageous treatment."[92] And while courts may not enter into an inquiry regarding the sincerity of a prisoner's beliefs or whether "the belief or practice in question is 'compelled by, or central to, a system of religious belief,'[93] RLUIPA does permit inquiry regarding 'whether the objector's beliefs are 'truly held.'"[94]

Whether advocating or criticizing, scholars noted that RLUIPA has increased prisoner litigants' opportunities to challenge administrative policies that hinder religious practices. Some feared that the RLUIPA would result in a flood of prisoner litigants' claims, predicting that "the Supreme Court's decision in Cutter will most likely result in an increase in litigation and thereby burden penological interests."[95]

What is generally agreed upon, however, is that RLUIPA was an unprecedented legal statement in support of religious practice in prison. Never before—whether under a legislative effort or court opinion—had prisoners enjoyed such public statements in support of their free exercise. After *Cutter* was decided, Brian Fahling, senior trial attorney for the American Family Association Center for Law and Policy, quipped ruefully: "It is a sign of the times, I suppose, that it took a witch and a Satanist to secure the rights of inmates to worship."[96] But whether Protestant or wiccan, RLUIPA was supposed to stand for the proposition that all prisoners of faith should be able to practice according to the dictates of their conscience and would have recourse to the federal courts if that was impeded by their custodians.

## III. The Prison Litigation Reform Act

In the years that intervened the passage of RFRA and RLUIPA, Congress passed another federal law related to civil lawsuits—whether or not related to religious practice. Though it has received almost no attention in the examination of the success and impact of RLUIPA, this little law has had a tremendous influence on whether RLUIPA has

[91] *Id*. at 721.

[92] *Id*. at 724.

[93] *Cutter*, 544 U.S. at 725, n.13 (quoting 42 U.S.C. § 2000cc-5(7)(a)); *see also* Navajo Nation v. U.S. Forest Serv., 479 F.3d 1024, 1032 (9th Cir. 2007).

[94] *Ibid.* (internal citations omitted).

[95] Morgan F. Johnson, *Heaven Help Us: The Religious Land Use and Institutionalized Persons Act's Prisoners Provisions in the Aftermath of the Supreme Court's Decision in* Cutter v. Wilkinson, 14 Am. U. J. Gender Soc. Pol'y & L. 585, 599 (2006).

[96] B.A. Robinson, *Religious Freedom Restoration Acts Additional Attempts at Federal Legislation: RLPA and RLUIPA*, http://www.religioustolerance.org/rfra3.htm (accessed July 19, 2011).

proven an effective tool for prisoners litigating about religious free exercise. The PLRA was signed into law in April of 1996 as a rider within an omnibus appropriations bill[97] after Congress was unable to pass eight out of thirteen annual federal appropriations bills (which led to a brief government shutdown during November and December of 1995 and January of 1996).[98] Whatever the cause of the bill's quick movement into law[99], there were at least some lawmakers who were unhappy with the inclusion of the PLRA rider with such sparse debate.[100] While criticism of appropriations riders in general is beyond the scope of this article, two real problems have emerged from the passage of the PLRA: (1) a vast *decrease* in a prisoner's ability to litigate even claims with merit and (2) an increase in litigation over the statutory construction of the PLRA.[101]

### A. PLRA And Constitutionality[102]

The PLRA, which applies to all prisoners' federal civil rights cases (even RLUIPA and other religious free exercise claims), was enacted to better screen prisoner claims and therefore includes a number of strict litigation requirements. Its general constitutionality has never been considered by the Supreme Court.[103] Instead, the Court has analyzed cases involving small aspects of the Act and either refined the challenged rule or expanded it. [104]

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[97] Omnibus Consolidated Rescissions and Appropriations Bill of 1996, Pub. L. No. 104-134, 110 Stat. 1321-66 (1996).

[98] Sandra Beth Zellmer, *Sacrificing Legislative Integrity at the Alter of Appropriations Riders: A Constitutional Crisis*, 21 Harv. Envtl. L. Rev. 457, 507-09 (1997).

[99] Giovanna Shay and Johanna Kalb, *More Stories of Jurisdiction-Stripping and Executive Power: Interpreting the Prison Litigation Reform Act (PLRA)*, 29 Cardozo L. Rev. 291, 300 (2007) ("Passed hastily and with scant legislative history, the PLRA represented a moment when state attorneys general were able to take advantage of anti-prisoner and anti-activist court sentiment--as well as a Republican-controlled Congress--to curtail access to courts.").

[100] 142 Cong. Rec. S2296 (1996) (statement of Sen. Kennedy that "[a]lthough a version of the PLRA was introduced as a free-standing bill and referred to the Judiciary Committee, it was never the subject of a committee mark-up, and there is no Judiciary Committee report explaining the proposal. The PLRA was the subject of a single in the Judiciary Committee, hardly the type of thorough review that a measure of this scope deserves.").

[101] *See generally*, Lynn S. Branham, *The Prison Litigation Reform Act's Enigmatic Exhaustion Requirement: What it means and what Congress, the Courts and Correctional Officials Can Learn from it*, 86 Corn. L. Rev. 483 (2001).

[102] *See* 42 U.S.C. § 1997.

[103] "The United States Supreme Court has granted certiorari in only a few of the many cases in which federal courts have interpreted the provisions of the PLRA, and in several of these the Court discussed general principles of the Act such as the purpose of the Act (§ 4), its movement away from a discretionary standard (§ 5), its limitations on injunctive relief (§ 6), and whether some provisions of the Act would be applied retroactively (§ 7)." Philip White, Jr., *Construction and Application of Prison Litigations Reform Act – Supreme Court Cases*, 51 A.L.R. Fed.2d 143 (originally published in 2010).

[104] This can be seen in Woodford v. NGO, 548 U.S. 81 (2006) and Jones v. Bock, 549 U.S. 199 (2007). In these cases, the prisoner-petitioners challenged the exhaustion requirement of PLRA.

The Act's "exhaustion" requirement is perhaps the prisoners' most difficult hurdle and is the topic of the most litigation. The PLRA provides that "no action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted."[105] The law's mandatory exhaustion provision replaced the weaker requirement in the Civil Rights of Institutionalized Person Act, which left discretion with the district courts to determine whether the prisoner had exhausted the administrative remedies.[106] The changes within the PLRA, however, restricts courts' discretion to find that a prisoner has brought all necessary administrative challenges.[107] In addition to deterring even meritorious prisoner lawsuits, the PLRA has generated its own vast litigation about when exhaustion requirements apply and what they demand of prisoners.[108]

A decade after the PLRA's enactment, in *Woodford v. NGO*, the United State Supreme Court settled a growing circuit split over the meaning of the term "exhaustion."[109] Although the text of the statute does not explicitly call for it, *Woodford* interpreted the PLRA's administrative exhaustion requirement as requiring "proper" exhaustion.[110] In the

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[105] 42 U.S.C. § 1997e (a). Exhaustion of administrative remedies, pursuant to Prison Litigation Reform Act (PLRA), is required for all prisoner suits seeking redress for prison circumstances or occurrences, regardless of whether they involve general circumstances of incarceration or particular episodes. Porter v. Nussle, 122 S. Ct. 983 (2002).

[106] Woodford v. NGO, 548 U.S. 81, 84 (2006).

[107] Not surprisingly, this requirement has made quite an impact upon civil litigation around prison conditions. *See e.g.*, Johnson v. Jones, 340 F.3d 624 (8th Cir. 2003) (holding that prisoner must exhaust administrative remedies before filing suit in federal court); McKinney v. Carey, 311 F.3d 1198, 1200 (9th Cir. 2002) (affirming dismissal of inmate's complaint who was in the process of exhausting his administrative remedies); Medina-Claudio v. Rodriguez-Mateo, 292 F.3d 31, 36 (1st Cir. 2002) (affirming dismissal when inmate failed to exhaust the administrative remedies in place); Jackson v. Dist. of Columbia, 254 F.3d 262, 269 (D.C. Cir. 2001) (affirming dismissal of inmates' complaint because they had begun, but not yet exhausted, the prison grievance procedure); Freeman v. Francis, 196 F.3d 641, 645 (6th Cir. 1999) (dismissing inmate's complaint brought under RFRA because he filed his federal complaint before allowing the administrative process to be completed); Perez v. Wisconsin Dep't of Corrections, 182 F.3d 532, 538 (7th Cir. 1999) (remanding for dismissal and reversing the district court's refusal to dismiss when, at the time the district court was ruling on the motion to dismiss, the inmate had fully exhausted his administrative remedies but had not done so at the time of filing).

[108] *Id.*

[109] *Woodford*, 548 U.S. at 87. In *Woodford*, the prisoner had filed a grievance with the prison officials. The California Department of Corrections and Rehabilitation rejected the grievance as being untimely filed since the prisoner filed the complaint six months after the restriction had initially been imposed upon the plaintiff, exceeding California's 15-working day rule. After an unsuccessful appeal to the California Department of Corrections, the prisoner filed suit against prison officials. The Ninth Circuit and the Sixth Circuit had interpreted a prisoner to have satisfied the PLRA's 'exhaustion' requirement once all administrative remedies were no longer available. *Id.*

[110] *Id.* at 87. According to the *Woodford* Majority, the text of the PLRA "strongly suggests" the term "exhausted" requires 'proper' exhaustion. But the dissent cautions that the Majority's interpretation "essentially ignores the PLRA's text."

wake of that decision, it is not enough that the prisoner has confronted prison administrators with his complaint; rather, he must have followed the proper procedure in filing grievances and alleging interference with religious practice.[111] According to one commentator, "the [*Woodford*] decision effectively leaves the ability to define the hurdles a prisoner must clear (in the form of prison grievance procedures) in the hands of prison officials, making them gate-keepers to both federal and, in some jurisdictions, state courts."[112] These gate keepers may review technical issues or whether a prisoner used the correct form or named the proper official.

Prior to 2001, the federal circuit courts were also divided on the question of whether a prisoner who was seeking only monetary damages which could not be obtained through a prison's grievance process must still exhaust all "available" remedies. This Circuit split was resolved by *Booth v. Churner,* in which the Supreme Court held that a prisoner who is only seeking monetary damages must still exhaust all prison remedies as long as the prison's grievance committee has the authority to take some remedial action. [113] Thus, this issue was essentially decided in favor of the prisons, a fact that has militated against prisoner claims regardless of their merit.[114]

Also controversial is the "physical harm" requirement, particularly in the context of First Amendment and RLUIPA claims. [115] As with many other civil claims, the injury involved in the denial of the right to free exercise of religion is usually not physical; rather, it is emotional or spiritual. Applied strictly, this restriction would prevent most prisoners from asserting that they have been denied reasonable opportunities to practice their religious beliefs.[116] Immediately after PLRA's passage, it was used as a defense to a New York prisoner's free exercise claim.[117]

Circuits are split on the issue of physical harm and how to interpret it. Some courts have held that it does not apply to some claims. For example, in *Saheed-Muhammad v. Dipaelo*, that district court explained that "regardless of actual physical or emotional injury," if the prisoner's constitutional claim involves "the violation of intangible rights," the

[111] For one example, California Department of Corrections and Rehabilitation ("CDCR") has an administrative grievance system for prisoner complaints. Regs., tit.15 SECTION 3084.1 (2007). Before filing suit prisoners must submit a CDC Form 602. There are four separate levels of appeals the first of which must be initiated within fifteen working days of the event being appealed. California prisoners must follow this process—including the filing of the initial grievance and timely appeals to each of the four levels of appeals—in order to satisfy the exhaustion requirement of § 1997e(a).

[112] Shay and Kalb, *supra* note 99 at 293.

[113] 532 U.S. 731 (2001).

[114] *Id.*

[115] 42 U.S.C. § 1997e(e); Siggers-El v. Barlow, 433 F. Supp. 2d 811 (E.D. Mich. 2006).

[116] *See* Stacy Heather O'Brien, *Closing the Courthouse Door: The Impact of the Prison Litigation Reform Act's Physical Injury Requirement on the Constitutional Rights of Prisoners*, 83 Va. L. Rev. 1189 (1997).

[117] Harris v. Lord, 957 F. Supp. 471, 473 (S.D.N.Y. 1997) (at issue here, however, was a question of retroactivity and the prisoner's suit was allowed to continue).

physical harm subsection simply does "not govern." [118] The Ninth, Sixth, and Seventh Circuits and a number of other district courts have likewise made distinctions between constitutional— particularly First Amendment— claims and other civil claims made by prisoners.[119] This subsection has never been considered by the Supreme Court, however, and remains a puzzle largely left to lower courts to interpret, accept, or reject entirely.

Beyond the PLRA's general constitutionality and aside from questions of exhaustion or application, other provisions of the PLRA raise constitutional concerns. For example, one federal district court has held that the "three strikes" provision (28 U.S.C.A. § 1915(g)) violates the Equal Protection Clause.[120] The requirements related to filing fees, however, consistently withstand constitutional challenges.[121]

Still, all of these technical factors have a significant impact upon whether a prisoner receives a hearing on the merits, and while some have praised the PLRA, others condemn its restrictions. Professor Schlanger, who analyzed federal court filings for her scholarship on inmate litigation, explains, "The statute has been highly successful in reducing litigation, triggering a forty-three percent decline over five years, notwithstanding the simultaneous twenty-three percent increase in the incarcerated population." [122] The question of whether this effectiveness is appropriate and its unintended impact upon RLUIPA litigation is at the heart of the inquiry here.

## IV. How Have RLUIPA Claims Really Fared In The Courts (And Has PLRA Made An Impact)?

RLUIPA brought with it a good deal of discussion—hype, even—and raised the hopes of a number of religious practice advocates and prisoners themselves. Scholars, both supporters and detractors, have discussed various reasons why RLUIPA has been a useful new tool for some prisoner litigants.

[118] Saheed-Muhammad v. Dipaelo, 138 F.Supp. 2d 99, 107 (2001) (citing Memphis Community School District v. Stachura, 477 U.S. 299, 308 n. 11 (1986)) (stating that courts should vindicate deprivations of certain "absolute" rights that are not shown to have caused actual injury because of their fundamental importance in organized society).

[119] Canell v. Lightner, 143 F.3d 1210, 1213 (9th Cir.1998) ("[t]he deprivation of First Amendment rights entitles a plaintiff judicial relief wholly aside from any physical injury he can show, or any mental or emotional injury he may have incurred."); *see also* Rowe v. Shake, 196 F.3d 778, 781 (7th Cir.1999) (deprivation of First Amendment rights is a cognizable injury unencumbered by requirements of physical, mental or emotional injury); Williams v. Ollis, 230 F.3d 1361 (6th Cir. 2000) (the PLRA does not cover First Amendment retaliation claim); Mason v. Schriro, 45 F.Supp.2d 709, 720 (W.D.Mo.1999) (Equal Protection Claims under the Fourteenth Amendment could be brought without allegation of physical harm); Warburton v. Underwood, 2 F.Supp.2d 306, 315 (W.D.N.Y.1998) (declined to dismiss the plaintiff's Establishment Clause claim for want of proof of physical injury because "such claims nevertheless deserve to be heard").

[120] Ayers v. Norris, 43 F. Supp. 2d 1039 (E.D. Ark. 1999).

[121] Nicholas v. Tucker, 114 F.3d 17 (2d Cir. 1997); Roller v. Gunn, 107 F.3d 227 (4th Cir. 1997); Hampton v. Hobbs, 106 F.3d 1281, 1997 F. App. 0059P (6th Cir. 1997).

[122] Margo Schlanger, *Inmate Litigation*, 116 HARV. L. REV. 1555, 1694 (2003).

Now, ten years after RLUIPA's passage and with the benefit of time to examine district and circuit cases addressing prisoner lawsuits, the result is disappointing. Though, to be fair, RLUIPA has allowed some significant victories, under this—the most accommodating test under which prisoner free exercises have ever been considered—the overall range of outcomes is less than remarkable.

### A. A Number Of RLUIPA Cases Have Won On The Merits Or Survived Summary Judgment

Over the past decade, a number of RLUIPA cases have been successful on the merits with resulting relief for prisoners. Despite the disappointments noted and described further in this Article, it would be disingenuous not to recognize these cases in which prisoners' lawsuits prevailed because the plaintiffs had been prohibited from worshiping as their consciences dictate.

For one example, the Ninth Circuit's has acknowledged that prisons may still curtail prisoners' religious freedoms in some instances, but cautioned that "in light of RLUIPA, no longer can prison officials justify restrictions on religious exercise by simply citing to the need to maintain order and security in a prison." [123] Undoubtedly, this represents a leap in jurisprudence on prisoners' religious practice claims from *Turner* and *O'Lone*.

Some categories of cases have been consistently successful, with others yielding mixed results. RLUIPA free exercise claims have been most successful when a prisoner's claim has had no reasonable security impact, a minimal financial burden upon the prison administration, and has involved a core tenet of a prisoner's religious beliefs.

For example, possession of religious articles and books have frequently been the subject of religious practice lawsuits —under the First Amendment *Turner* test, RFRA, and under RLUIPA. These have no perceptible financial impact (since these cases deal with possession—not provision—of religious articles) and a limited realistic security interest. Under RLUIPA, some federal circuits have granted relief, though they failed under other tests. For instance, the victory of a Muslim inmate who sued prison officials for prohibiting him from possessing prayer oil won relief at both the district and circuit levels was unprecedented at the time.[124]

Hair and beard length have been other new areas of success for

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[123] Greene v. Solano County Jail, 513 F.3d 982, 985 (2008) (where the Ninth circuit found that a prison policy outright banning a particular religious practice—regardless of available alternatives—constitutes a "substantial [ ] burden" on one's free exercise).

[124] Charles v. Verhagen, 348 F.3d 601 (7th Cir. 2003) (denying relief, however, on an additional claim related to the prison's rules restricting the number of religious feasts an inmate may observe per year); *cf*. Borzych v. Frank, 439 F.3d 388 (7th Cir. 2006) (holding that prison's ban on white supremacist books did not violate RLUIPA).

many of the same reasons,[125] though somewhat surprisingly not in all federal circuits.[126] It is clear that a few successes would not have been possible if not for RLUIPA's new legal test. For example, California prisoners who brought a claim about the right to wear beards won relief in the Ninth Circuit. That court was receptive to the prisoners' arguments, determining that the prison had no compelling interest in regulating religiously-mandated beards. [127]

Similarly, addressing the issue of the Jumu'ah services, the court noted that while the prison's interest in having a workforce of prisoners and a system that encourages participation in that work detail was a compelling interest, the policy of punishing Muslim prisoners who missed one hour of work detail a week to attend Jumu'ah services was not the least restrictive means of achieving that interest.[128] The simple alternative of simply creating an exemption for Muslims that missed work detail while attending Jumu'ah services was clearly more appropriate .[129]

Lawsuits related to religiously-mandated diets are perennial ones presenting a difficult balancing of interests: of course diet is fundamental to the belief of many prisoners, but while it poses no threat to security, providing alternative meals can be expensive. For this reason, many of these cases have not been successful in the federal courts no matter the legal test—Turner, RFRA, or RLUIPA—under which the issue is considered. One very recent Circuit court case, though, proved successful for a Muslim inmate who alleged a violation of RLUIPA for failure to provide a halal diet. [130] Likewise, once a prison provides a religious diet to prisoners, they may not be denied that accommodation without reasonable justification. When, for instance, a prisoner was removed from the prison's list of Ramadan participants after a guard filed a report that he had broken the fast, his RLUIPA claim against the prison won relief.[131]

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[125] Warsoldier v. Woodford, 418 F.3d 989 (9th Cir. 2005) (granting Native American inmate granted relief in the Ninth Circuit over the prison's grooming and hair length policies because of the substantial burden on his religious practice and limited financial and security impact inmates' long hair).

[126] Thunderhorse v. Pierce, 364 F. App'x 141 (5th Cir. 2010) (reasoning that the hair length policy substantially burdened plaintiff's religious exercise but was the lease restrictive means of a compelling governmental interest in prison security).

[127] Mayweathers v. Terhune, 328 F. Supp. 2d. 1086, 1088 (E.D. Cal. 2004) (reasoning that a half-inch beard made a prisoner no more difficult to identify, and therefore the risk of a bearded prisoner being able to escape unnoticed was exaggerated and the regulation was an overreaction).

[128] *Id.*

[129] *Id.*

[130] Abdulhaseeb v. Calbone, 600 F.3d 1301 (10th Cir. 2010) ("DOC" substantially burdened the inmates religious exercise by refusing to offer the prisoner a halal diet); *see also* Willis v. Comm'r, Indiana Dept. of Corr., 2010 WL 4457432 (S.D. Ind. Nov. 1, 2010) (stating that denial of kosher diets substantially burdened inmate's religious exercise and increased costs of providing kosher meals to inmates is not a "compelling interest").

[131] Lovelace v. Lee, 472 F.3d 174,188 (4th Cir. 2006) **(**"An inmate…could decide not to be religious about fasting and still be religious about other practices, such as congregational services or group prayer. Such an inmate's right to religious exercise is substantially burdened by a policy, like the one here, that automatically assumes that lack of sincerity with respect to one practice means lack of sincerity with respect to others.").

Not all prisoners' RLIUPA claims have been caught in the net of summary judgment. But this does not necessarily foreshadow ultimate success; many of those cases surviving summary judgment do so because of incomplete or insufficient factual records precluding summary judgment for either party.[132] A number of prisoners' cases have moved forward because of their ability to exhaust administrative remedies.[133] Still, in more factually complex circumstances there is perhaps an indication that the courts are exhibiting a diminishing deference to prison officials' judgment.[134]

### B. Despite RLUIPA's Promise, Prisoners Remain Disappointed

While the passage of RLUIPA foreshadowed an increase in successful prisoners' claims, a consistent trend of that sort has yet to emerge in the courts. The success described above notwithstanding, RLUIPA has not been the "magic bullet" of free exercise in prison. In "RLUIPA at Four," an early article (and arguably the most important) on the topic, the author described that at the time of publication only seven out of forty RLUIPA cases had been dismissed. [135] And in a piece critical of RLUIPA's application to prisoners, the author asserts that "an assessment of actual RLUIPA actions reveals that the majority of prisoners' claims are successful, even when important penological interest are at stake."[136] Both claims are drastically overstated and oversimplified. Instead of considering the outcomes not favorable to a prisoners' claim—such as a loss at summary judgment—both speedily leaps to the conclusion that all thirty three cases involving RLUIPA and prisoners were granted relief of some sort. This was not the case then and is not the case to date.

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[132] Jova v. Smith, 582 F.3d 410 (2d Cir. 2009) (holding that the grant of summary judgment for the defendants was improper because the District Court did not consider whether the institution's practices in restricting the inmates' diets and group worship satisfied the least restrictive means standard); Sample v. Lappin, 424 F.Supp.2d 187 (D.D.C. 2006) (refusing to grant summary judgment, as genuine issues of material fact existed as to whether the outright ban on Sample's consumption of wine was the least restrictive means of furthering the government's compelling interest in controlling intoxicants).

[133] Smith v. Ozmint, 578 F.3d 246 (4th Cir. 2009) (showing that a prisoner who fully exhausted his administrative remedies and did not encounter problems under the PLRA, having the defendants' motion for summary judgment vacated on the RLUIPA claim); Orafan v. Goord, 411 F.Supp.2d 153 (N.D.N.Y. 2006) (finding that although the defendants, in seeking summary judgment, alleged that the plaintiffs had not properly exhausted their administrative remedies, the district court found that these remedies were properly exhausted, allowing the court to reach the plaintiffs' RLUIPA claims); Pugh v. Goord, 571 F.Supp.2d 477 (S.D.N.Y. 2008) (finding that the plaintiffs had fully and properly exhausted their administrative relief thus denying the defendant's motion for summary judgment and the PLRA proved no obstacle to the plaintiffs' RLUIPA claim proceeding).

[134] Shakur v. Schriro, 514 F. 3d 878 (9th Cir. 2008) (where, for example, the Ninth Circuit Court of Appeals held that summary judgment was improper after finding that the practice of Halal was a religious exercise that was substantially burdened by prison policies).

[135] Gaubatz, *supra* note 48, at 515.

[136] Johnson, *supra* note 95, at 599-600.

The PLRA has had a consistent and consistently-overlooked negative impact upon prisoners' success in religious practice litigation. The text of RLUIPA promises a better and more accommodating legal test, but the PLRA has had the effect of stopping many claims before they could be considered under the RLUIPA test. And no wonder: "[t]he PLRA," writes Margo Schlanger, "emboldens prison and jail officials to make objectionable arguments that must be litigated, forcing expenditure of resources and prolonging litigation, as well as further dehumanizing prisoners and promoting a culture of callousness."[137]

Disappointingly, a large number of cases have failed to move beyond the PLRA screening process or failed at the summary judgment stage. Consider the Ninth Circuit's jurisprudence on the topic. As arguably the most diverse and progressive federal circuit, the Ninth Circuit has seen an abundance of RLUIPA litigation and generated most of the hallmark opinions on the topic. However, of the twenty-two prisoner RLUIPA cases that the Ninth Circuit saw between 2009 and 2010, ***none*** of them won ultimate relief. Eleven were defeated by summary judgment, four were dismissed, and three were eventually defeated on appeal.[138] Only four remaining cases have a chance of relief, but these are still awaiting final judgment.[139] Also, of the 97 RLUIPA claims considered by the Ninth Circuit between 2007 and 2008, ***every single one*** was dismissed or denied, extinguishing the prisoner-litigants' chances of relief from the judicial system.[140]

Look, too, within the jurisprudence of the First Circuit Court of Appeals. From 2009 to 2010, that circuit saw sixteen RLUIPA prisoner claims; among them, five were defeated by summary judgment, two were denied relief, two were dismissed.[141] Only one received ultimate relief, and six still wait in hope that they might see positive results.[142]

### 1. "Legal" Victories Without Policy Changes

True relief—the freedom to practice as a prisoner's conscience dictates—requires more than mere appellate court success. Even when a prisoner's RLUIPA claim is successful on the merits, the implementation

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[137] Margo Schlanger, *Preserving the Rule of Law in American's Jails and Prisons: The Case for Amending the Prison Litigation Reform Act*, 11 U. PA. J. CONST. L. 139, 145 (2008).

[138] Search query used: advanced: RLUIPA & DA (aft 12-31-2008 & bef 01-01-2011) and narrowing results to the 9th Circuit and prisoner claims.

[139] Search query used: advanced: RLUIPA & DA (aft 12-31-2008 & bef 01-01-2011) and narrowing results to the 9th Circuit and prisoner claims.

[140] Search query used: advanced: RLUIPA & DA (aft 12-31-2006 & bef 01-01-2009) and narrowing results to the 9th Circuit and prisoner claims.

[141] Search query used: advanced: RLUIPA & DA (aft 12-31-2008 & bef 01-01-2011) and narrowing results to the 1st Circuit and prisoner claims.

[142] *Id.*

of new regulations (or inadequacy of new policies intended to address the problems complained of) has also sparked new RLUIPA claims. Because RLUIPA does not require every prison within a system to implement the changes required by one prisoner's successful lawsuit, progress has not been uniformly applied. Also, even when the prisoner has successfully won a RLUIPA claim on the merits, seeing the fruits of that success can raise issues as well. In *Washington v. Klem*, for example, after entering into a settlement agreement, the plaintiff was unable to enforce it and his motions to the court had no perceptible impact.[143] *Charles v. Verhagen* is another example of a case that won on the merits but in which the prisoner ultimately got no relief; because the type of prayer oil allowed by the prison after his successful lawsuit was not the variety he required, the prisoner initiated follow-on litigation that was ultimately unsuccessful.[144]

### 2. Losses At Summary Judgment On Substantive Issues

Many RLUIPA claims fail because the prison policies are either deemed not a substantial burden on the prisoners' religious practice[145] or the policy is justified by a compelling government interest—typically still prison security and budgetary concerns.[146] While a prisoner may argue that his religious practices are being substantially burdened by a regulation upon personal possessions, diet and group worship,[147] many courts are not sympathetic when there exists an unrestricted alternative means to a specific religious practice.[148] In many instances, a prison's implementation of a policy banning a practice or a prison's refusal to accommodate an inmate's beliefs have been found lawful even under RLUIPA's test (when, for example, failure to accommodate a group worship service was found to be due to a lack of volunteer resources rather than an overt policy banning the assembly.) [149] Security concerns—however important and legitimate—may still be used as prison wardens' legal trump cards on issues whose impact on security is distant at best. Where, for example, an inmate has professed a desire to have access to certain religious objects or materials, some courts have still been reluctant to

[143] 388 F. App'x 85, 85-85 (2010) (after entering into a settlement agreement, plaintiff filed a pro se motion to enforce the agreement and to be appointed council. The Court of Appeals affirmed the District Court's denial of the motions because the plaintiff failed to file the supporting documents expounding his reasons for seeking enforcement of the settlement).

[144] 348 F.3d 601 (2003).

[145] Watkins v. Shabazz, 180 F.App'x 773 (C.A. 9th 2006).

[146] Keen v. Noble, 2007 WL 1080849 (E.D. Cal. 2007).

[147] Hall v. Ekpe, 2011 WL 2600514 (2d Cir. 2011) (affirming the District Court's summary judgment in favor of the defendants after the Supreme Court held states do not waive their sovereign immunity merely because they accepted federal funds).

[148] Stavenjord v. Corr. Corp. of Am., 2007 WL 215816, at *5 (D. Ariz. 2007).

[149] Smith v. Kyler, 295 F. App'x 479 (3d Cir. 2008).

meet the prisoner's requests, finding instead that the prison's need for security was a compelling interest.[150]

As foreshadowed earlier, many prisoners' claims dealing with religious dietary requirements fail to move beyond the summary judgment stage because of the existence of alternative diet programs provided by prisons.[151] A number of these cases upheld prisons' refusals to provide inmates with Halal[152] or Kosher food because of the availability of foods that the prisons and courts deemed satisfactory substitutes.[153] For example, though a prisoner may prefer a hot Kosher meal, repetitive (identical) cold Kosher meals were found to satisfy a prisoner's religiously-mandated diet.[154] Prisoner claims revolving around religious dietary requirements have also failed to move beyond the summary judgment stage for other reasons such as a court's determination that the prison's failure to provide a Kosher meal to a non-Jewish inmate does not violate RLUIPA[155] and the court's deference to a magistrate judge's determination that an inmate had not exhausted his remedies with respect to allegations involving halal meat.[156]

As was the case under the *Turner* and *O'Lone's*—but now with the added hurdles of PLRA—when a claim moves beyond the initial screening stages, prison officials still to seek summary judgment or defend cases on the merits by simply offering better and better-justified explanations for policies based on security or budgetary concerns.[157]

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[150] *Keen*, 2007 WL 10808 (E.D. Cal 2007) (holding that the compelling interest in security of the prison outweighed the prisoner's interest in building a "hof"); *see also* Jones v. Schriro, 2006 WL 2772641 (D. Ariz. 2006) (deciding that even if the prison regulation was a substantial burden upon the prisoner's religious practice, the prison's compelling interest in security outweighed); Brunskill v. Boyd, 141 F. App'x 771 (11th Cir. 2005) (holding that the prison's hair length policy and limitation on possession of religious articles were the least restrictive means of furthering the institute's compelling interests in security, health, and safety of its staff).

[151] *See* supra at Section V. A.

[152] Defined as sanctioned by Islamic law; selling or serving food ritually fit according to Islamic law. Webster's Dictionary, *available at* http://www.merriam-webster.com/dictionary/halal.

[153] Watkins v. Shabazz, 180 F. App'x 773 (9th Cir. 2006) (finding that the existence of both a vegetarian diet program and an option to purchase Halal meat at a de minimus cost to the prison with no cost to the prisoner precluded the prisoner from claiming that his religious practice was substantially burdened by the prison's failure to provide Halal meat); *see also* Sefeldeen v. Alameida, 238 F. App'x 204 (9th Cir. 2007) (finding that the district court properly granted summary judgment because the prison had provided two alternatives to eating Halal meat—a vegetarian equivalent or the choice of finding a religious organization outside the prison willing to provide Halal meat); Muhammed v. Sapp, 388 F. App'x 892 (11th Cir. 2010) (affirming summary judgment for the prison when "alternative" or vegan meals—but not requested meals— were offered to Muslim inmates). *Id.*

[154] Kretchmar v. Beard, 241 F. App'x 863 (3d Cir. 2007).

[155] Linehan v. Crosby, 346 F. App'x 471 (11th Cir. 2009) (granting summary judgment for the prison because failure to provide a Kosher meal to a non-Jewish inmate does not violate RLUIPA.)

[156] Jihad v. Fabian, 680 F.Supp.2d 1021 (D. Minn. 2010) (determing that a prisoner must adhere to the agency's grievance process to exhaust administrative remedies).

[157] *See e.g.*, Rouser v. White, 2010 WL 2541268 (C.A. 9 2010) (the defendants claimed he had not exhausted all of the administrative remedies and that the plaintiff's claims were improperly joined).

### 3. Prisoners' Losses On Technical PLRA Issues

The exhaustion and screening requirements of the PLRA make it extremely difficult for a prisoner to file suit, much less prevail upon the merits of a case.[158] Before even reaching the PLRA's statutorily mandated screening process, it is not uncommon for a prisoner's claim to be dismissed for failure to exhaust administrative remedies—especially given the judicially-engrafted procedural default rule.[159] The PLRA's exhaustion requirement provides an affirmative defense where the defendant has the burden of raising and proving the absence of exhaustion.[160] Consider the "Woodford Rule"—a confusing rule if ever there was one—allowing, as one commentator explained, "a prisoner's mistakes in the prison grievance system to scuttle potential federal constitutional claims."[161] Obviously, a dismissal on technical grounds frequently precludes federal courts from ever reaching the merits of cases involving the arguable violation of a constitutional right that has been—at least outside the prison context—historically and vigilantly guarded.

In many prisoners' RLUIPA cases, reviewing courts (both at the trial and appellate levels) have held that a failure to exhaust administrative remedies warranted summary judgment in the prisons' favor.[162] In these cases, prisoner-litigants' errors left no room for amendment and re-filing; the PLRA requirements were absolute. A sampling of California cases reveals that, in the first half of 2010 alone, a significant number of prisoner complaints were dismissed for failure to exhaust administrative remedies.[163] Additionally, a non-exhaustive survey of the PLRA's exhaustion requirement upon RLUIPA claims reveals a broad swath of dismissals or denials.[164] Even in the cases in which the

[158] Kimbrough v. California, 609 F.3d 1027 (9th Cir. 2010) (under the PLRA, prisoner-plaintiffs could not be awarded attorneys' fees in RLUIPA claim).

[159] *See, e.g.*, Mathis v. Knowles, 81 F. App'x 906 (9th Cir. 2003).

[160] Mello v. Martinez, 2010 WL 118394, at * 2 (E.D. Cal. 2010).

[161] Shay and Kalb, *supra* note 99, at 293.

[162] *See e.g.*, Lindell v. Casperson, 360 F.Supp.2d 932 (W.D. Wis. 2005) (Wiccan inmate's claims failed at summary judgment after he failed to exhaust administrative remedies under PLRA); Couch v. Jabe, 479 F.Supp.2d 569 (W.D. Va. 2006) (Muslim prisoner's claim was dismissed for failure to exhaust administrative remedies); Rogers v. U.S., 696 F.Supp.2d 472 (W.D. Pa. 2010) (Muslim inmates sued prison officials for selling scented oils used in Muslim services at too high a cost, but defendants were granted summary judgment because of the Plaintiffs' failure to exhaust administrative remedies).

[163] *See, e.g.*, *Mello,* 2010 WL 118394 (holding that the prisoner failed to state a cognizable claim); *see also*, Comundoiwilla v. Evans, No. 1:04-cv-06721-LJO-YNP PC, 2010 WL 669097 (E.D. Cal. Feb. 23, 2010) (ordering plaintiff to file an amended complaint or face dismissal of the non-cognizable claims); Phillips v. Ayers, No. CV 07-2897-DDP (SH), 2010 WL 1947015 (C.D. Cal. 2010) (denying defendant's motion to dismiss prisoner's RLUIPA claim).

[164] *See* Maddox v. Love, 2011 U.S. App. LEXIS 17680 (dismissal affirmed because of the plaintiff's failure to exhaust administrative grievance by naming on his grievance form who was alleged to have violated his rights); Nifas v. Beard, 374 F. App'x 241 (3d Cir. 2010) (RLUIPA claim dismissed for failure to exhaust administrative grievance procedure); Seneca v. Arizona, 345 F. App'x 226, (9th Cir. 2009) (administrative grievance filed was too general and did not exhaust state remedies); Thomas v. Parker, 318 F. App'x 626 (10th Cir. 2009).

prisoner won ultimate relief, it was hard-fought and delayed through extended litigation over technical PLRA requirements. Several cases were unsuccessful in the lower courts because of a purported failure to exhaust administrative remedies, and only after favorable review in a circuit court of appeals were then permitted to litigate on the merits. [165]

The PLRA's screening requirement that a prisoner must state a cognizable claim creates another barrier for pro se litigants seeking access to the courts.[166] In order to avoid dismissal as "frivolous," the plaintiff must craft a complaint with "an arguable legal and factual basis."[167] Similarly, in order to avoid dismissal for failure to state claim, the plaintiff must craft a complaint that, on one hand, contains more than "a formulaic recitation of the elements of a cause of action"[168] but, on the other hand, satisfies the Federal Rules of Civil Procedure Rule 8 pleading requirement of a "short and plain statement showing that the pleader is entitled to relief."[169] Specifically, for a claim for relief under RLUIPA to be cognizable, the "plaintiff must link any RLUIPA claim together with specific defendants and specific conduct."[170] Crafting an intelligible complaint that ties critical facts to the relevant theory, and is simply, concisely and directly stated, is a difficult task for even the most sophisticated advocate. For a prisoner with limited literacy skills, education, access to legal research materials, and meager financial resources, these litigation demands are especially burdensome.[171] For these reasons it is not surprising that prisoners proceeding pro se would have difficulty stating cognizable claims under RLUIPA.

Further, on the very face of the subsection describing the restriction, the PLRA's physical injury or physical harm requirement seems to exempt

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[165] *See, e.g.,* Nelson v. Miller, 570 F.3d 868 (7th Cir. 2009); McEachin v. McGuinnis, 357 F.3d 197 (2d Cir. 2004); DeHart v. Horn, 390 F.3d 262 (3d Cir. 2004).

[166] Shay and Kalb, *supra* note 99, at 293.

[167] *See* Neitzke v. Williams, 490 U.S. 319, 325 (1989) (applying to in forma pauperis complaints the framework used for evaluating legal frivolousness in appeals); *cf.* Franklin v. Murphy, 745 F.2d 1221,1227-28 (9th Cir. 1984) (adopting a frivolousness standard requiring in forma pauperis complaints to have "arguable substance in law and fact).

[168] *See* Bell Atlantic Corp. v. Twombley, 550 U.S. 544, 555 (2007) (holding that although detailed factual allegations are unnecessary, the complaint must state enough facts to establish the basis for relief beyond the speculative level).

[169] F.R.C.P. 8(a)(2); Mayfield v. Tex. Dep't of Crim. Justice, 529 F.3d 599 (5th Cir. 2008) (summary judgment for the prison affirmed because the remedy sought was held to be barred by the PLRA).

[170] *See* Rider v. Felker, No. CIV S-09-0637 DAD P, 2010 WL 458915, at *5 (E.D. Cal. Feb. 5, 2010) (dismissing plaintiff's RLUIPA claim because it contained only general allegations that defendants had interfered with his religious exercise).

[171] Paula Hannaford-Agor and Nicole Mott, *Research of Self-Represented Litigation: Preliminary Results and Methodological Considerations*, 24 THE JUSTICE SYSTEM JOURNAL, VOL. 2 (2003) ("The many aspects that make up a civil, or even criminal, trial tend to increase the already heavy burden pro se litigants face when even choosing to file a civil claim. For example, after filing a suit, the litigant must arrange for service of process, conduct discovery, schedule hearings, file motions, and eventually present evidence at trial. These are all aspects of a trial that laypeople "rarely have access or the opportunity to develop.").

all RLUIPA claims from even remaining in court.[172] Though in practice not all courts have interpreted the PLRA to apply to religious free exercise claims, it has still proved an impediment in a number of federal circuits. [173]

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These are realities consistently overlooked in literature on the topic of RLUIPA litigation. Despite its exhaustive discussion of many other features of the law and its impact, *RLUIPA at Four* fails to truly address the implication that the Prison Litigation Reform Act has on prisoners bringing civil lawsuits through RLUIPA. That Article, for example, devotes a mere three sentences addressing the fact that the PLRA is applicable to RLUIPA claims, and merely states that prisoners should properly pleaded claims within the complaints.[174]

But it is no wonder that the impact of the PLRA has been little-studied: only the cases moving beyond the administrative and lower court stages result in reported opinions. These only scratch the surface of RLUIPA claims in general; others—especially cases dismissed on technical grounds—would hardly arouse the interest of anyone who not looking to lower court case or outcomes. Further, because the PLRA includes punitive measures for successive petitions (for example, the loss of "good time" credits), it may inhibit prisoners from ever filing suit in the first place. Rousing the courage to file a legal claim against one's custodian may be sufficiently intimidating to prevent prisoners with legitimate claims to initiate them in the first place. It is nearly impossible, therefore, to calculate the number of claims that have been ensnared by district and lower states courts because of the PLRA or other substantial issues or that are never even filed because of the daunting nature of the litigation process. The language of RLUIPA indisputably offers a legal test more friendly to prisoners' claims and there has indeed been some progress from that perspective. Change, if it has come at all, has come slowly, at great price, and in relatively limited areas of the law.

## V. What's The Problem? What's The Solution?

### A. Comparing Public Rhetoric With Private Intent (Did Congress Understand PLRA's Limitation On RLUIPA Litigation?)

On its face, RLUIPA is the second legislative attempt of a Congress

[172] 42 U.S.C. § 1997e(e); see Section IV.A infra.

[173] Mayfield v. Tex. Dep't of Crim. Justice, 529 F.3d 599 (5th Cir. 2008); *see also* Jennifer D. Larson, *RLUIPA, Distress, and Damages,* 74 Chi. L. Rev. 1443, 1458 (2007) ("A prisoner who suffered some physical harm would be allowed to recover damages for accompanying mental and emotional distress, but a prisoner who suffered serious violations of his constitutional or statutory rights without any physical harm would be unable to collect any damages. When the right violated is RLUIPA's statutory right of free exercise of religion, such a result is deeply problematic.").

[174] Gaubatz, *supra* note 48, at 539.

seemingly determined to Americans' free exercise rights—even those of prisoners.[175] The Department of Justice's Statement on the Institutionalized Persons Provisions of RLUIPA declared its concern about Congressional findings that prisoners and others residing in prisons, jails, or mental institutions are subjected to discriminatory or arbitrary denial of the ability to practice their faiths. [176]

Looking back a few years, however, history tells a slightly more nuanced story. Although there was widespread support for restoring the compelling interest test as a way to safeguard the First Amendment right to free exercise,[177] RFRA's legislative history reveals sharp divisions among lawmakers when it came to extending heightened protection to prisoners' free exercise claims. Vigorous debate surrounded who was to be included and who was to be excluded from RFRA. Senator Reid introduced an amendment that would have *fully excluded* the prison population from claiming heightened scrutiny for religious claims under RFRA.[178] Growing concern over the increase in prisoner litigation in the federal court,[179] fear that the Act would strip away the long-recognized deference granted to prison officials and interfere with prison administration,[180] and skepticism about prisoner's claims are the primary reasons why the Reid Amendment received strong support from some many members of Congress.[181] As Senator Jesse Helms put it, RFRA's unamended passage would mean that "inmates will be provided much greater latitude to assault legitimate prison authority, by masking disobedience under the guise of special privileges for religious observation." [182] While the issue of its application to prisoners nearly cost RFRA its passage, proponents

[175] *See* 146 CONG. REC. S7774, S7775, July 27, 2000, (joint statement of Sens Hatch and Kennedy).

[176] DEPT. OF JUSTICE, STATEMENT OF THE DEPARTMENT OF JUSTICE ON THE INSTITUTIONALIZED PERSONS PROVISIONS OF THE RELIGIOUS LAND USE AND INSTITUTIONALIZED PERSONS ACT (RLUIPA) (2010) *available at* http://www.justice.gov/crt/about/spl/documents/RLUIPA10thAnnivSPLQAs.pdf.

[177] 139 CONG. REC. S26408 (1993) (statement of Senator Simpson stating "there is not a single thing that has come up in this debate that should lead anyone to believe that anything other than that we all believe in religious freedom for everybody.").

[178] 139 CONG. REC. 26194 (1993) ("Nothwithstanding any other provision of this act, nothing in this Act or any amendment made by this Act shall be construed to affect, interpret, or in any way address that portion of the First Amendment regarding laws prohibiting the free exercise of religion, with respect to any individual who is incarcerated in a federal, state, or local correctional, detention, or penal facility (including any correctional, detention, or penal facility that is operated by a private entity under a contract with a government).").

[179] *See* 139 CONG. REC. S26181 (1993) (pointing out that more federal civil cases were brought by prisoners in 1992 than federal criminal cases were initiated by the government).

[180] *See* 139 CONG. REC. S26409 (1993) (expressing concern that the "least restrictive meants" standard for accommodation as determined by the courts could in practice lead to higher costs and disruptions in security).

[181] 139 CONG. REC. S26408 (1993). The legislative history for the floor debates discussing the proposed amendment are rife with comments made by proponents of the Amendment like this of Senator Simpson, "This Amendment would exempt prisons and prisoners to avoid the extraordinary creativity of people who spend their time figuring out how to concoct a new religion. . . ." *Id*.

[182] 139 CONG. REC. S14515 (1993).

of the amendment failed to persuade their colleagues that without the Reid Amendment, RFRA would "open the floodgates for prisoner's religion-based claims."[183]

Why, then, of all areas of religious freedom to salvage from the much-broader (but unconstitutional) RFRA, did Congress focus upon land use and institutionalized persons? Why does RLUIPA's legislative history involve so little controversy (as had existed before RFRA's passage) over its application to prisoners? The Congressional record reveals precious little to answer these questions, but it seems mightily significant that the PLRA had been passed in the interval.[184]

The serious and increasing concern over increased prisoner litigation, after all, had not died with the proposed Reid amendment to RFRA. A few years later, Senator Oren Hatch spoke as one of the PLRA's sponsors and explained, "[Some] prison lawsuits may seem far-fetched, almost funny, but unfortunately . . . frivolous lawsuits by prisoners tie up the courts, waste valuable resources, and . . . [the PLRA] prohibits prisoners from suing for mental or emotional abuse, absent a prior showing of physical injury."[185]

It follows, then, that because of the passage of the PLRA, Congress seemed far less concerned about RLUIPA's possible "floodgate of litigation." Although at least one critic feared that RLUIPA would result in "excessive litigation and unacceptable threats to important penological interests," that was not the view shared by many voting members of Congress.[186]

In addition to the explicit reference in the bill's text, some supporters of RLUIPA specifically referred the Prison Litigation Reform Act during debates: "[t]his provision does not require prison officials to grant religious requests that would undermine prison discipline, order, and security. . . . Thus, the courts will continue to be able to reject frivolous lawsuits with ease."[187] As Congressman Nadler observed, presciently, "This bill limits the rights of prison inmates to raise otherwise valid claims under the bill by specifically referencing the Prison Litigation Reform Act."[188] The existence of the PLRA likely explains the absence of acrimonious debate about the litigious nature of prisoners and the dangerous effect RLUIPA would have on prison administration.[189]

[183] 139 Cong. Rec. S26407 (1993).

[184] 146 Cong. Rec. S7779 (2000) (statement of Senator Reid voicing his ongoing concern about extending heightened scrutiny to prisoners' free exercise claims, "[w]hile I continue to believe that we should not extend the privilege of a strict scrutiny standard to restrictions on the free exercise of religion behind the bars of our nation's prisons, I also recognize certain other realities.").

[185] 154 Cong. Rec. S14626 (1995).

[186] Johnson, *supra* note 95, at 587.

[187] 146 Cong. Rec. S7777 (2000) (statement of Melissa Rogers, General Counsel for Baptist Joint Committee on Public Affairs).

[188] 145 Cong. Rec. H5598 (1999) (statement of Rep. Nadler).

[189] 146 Cong. Rec. S7779 (2000) (statement of Sen. Reid conceding that he still harbors concerns about extending strict scrutiny to prisons).

In fact, the PLRA effectively created a "carve-out" for prisoners' claims, leading to an outcome not unlike what was advocated for and envisioned under the proposed Reid Amendment to RFRA.[190]

Some members of Congress foresaw the PLRA's limitations on RLUIPA's application to prisoners as a negative point, but this was a minority view. Congressman Nadler, for one, said publicly that he would urge his colleagues to vote against the RLUIPA bill if the PLRA were specifically referenced or if the PLRA's application were not in some way limited to certain claims.[191]Others, previously critical of RFRA, threw their support behind RLUIPA. [192]

Across the board—from floor debates to the Supreme Court's consideration of its constitutionality—RLUIPA was far less controversial than its predecessor RFRA. However, that the PLRA was specifically referenced and acknowledged makes it questionable that Congress ever intended a flood of prisoners' religious practice claims, much less a flood of successful ones. Beyond the practical realities of being pro se litigants, RLUIPA's protection of prisoners' religious practice has been severely hindered by the PLRA requirements. One Congressman noted that "[t]his bill limits the right of prison inmates to raise otherwise valid claims under the bill by specifically referencing the Prison Litigation Reform Act." [193] This same Congressman warned he would urge his colleagues to vote against the RLUIPA bill if the PLRA was specifically referenced, or the PLRA's application was not in some way limited to certain claims.[194] However, as one scholar convincingly notes, Congress made no attempt to reconcile the apparent PLRA and RLUIPA conflicts before RLUIPA's enactment.[195]

What then, did Congress actually intend with its passage of RLUIPA? Did members of Congress fully understand that prisoners' claims would be caught in the PLRA's nets of administrative remedies, potential punitive measures for "successive" petitions, and other detailed and complicated limitations on civil rights lawsuits? Whether or not Congress understood the impact on the ground and in the courts, it clearly intended the PLRA to apply. Even it had not specifically been referenced in the text of the law itself and in the floor debates, courts would have presumed Congress to intend the PLRA's application to RLUIPA.[196]

Congress, in considering RLUIPA, clearly responded to (bipartisan)

[190] 145 CONG. REC. H5598 (1999) (statement of Rep. Nadler admitting that the PLRA is a carve-out for prisoners' free exercise claims).

[191] *Id.*

[192] *See* 146 CONG. REC. S7775 (2000) (statement of Sen. Hatch encouraging passage of RLUIPA).

[193] 145 CONG. REC. H5598 (1999) (daily ed. July 15, 1999) (statement of Rep. Nadler).

[194] *Id*.

[195] *See* Jennifer D. Larson, *RLUIPA, Distress, and Damages*, 74 U. CHI. L. REV. 1443, 1453-59 (2007) (discussing the numerous inherent conflicts between a statute designed to preserve rights and one aimed at limiting remedies).

[196] Andrus v. Glover Constr. Co., 446 U.S. 608 (1980) ("The courts are not at liberty to pick and choose among Congressional enactments, and when two statutes are capable of coexistence, it is

constituencies supporting the bill. Although its primary backing came from the "usual suspects" of prisoners' rights groups and ACLU lobbyists, other smaller groups endorsed it as well.[197] One of the main lobbyist groups supporting RLUIPA was Friends Committee on National Legislation (FCNL), a Quaker lobbyist group.[198] But did these constituencies fully understand the likely impact the PLRA would have upon the substance of the prisoners' claims? Probably not. Gaubatz's discussion of RLUIPA describes the statute as a "remarkable departure" from the legislatures and courts' previous attempts to restrict prisoners' legal rights.[199] Still, decisions on the merits are rare, with actual relief for the prisoner even more so.

Legal impediments—such as the PLRA and the typical absence of counsel—greatly limit many prisoners' ability to challenge, through litigation, prison policies and regulations that curtail their ability to practice as their consciences dictate. RLUIPA's alleged intended effect of helping pro se prisoners bring their free exercise claims—is obviously diminished by these hurdles. Surviving summary judgment is a cold comfort and says little about changing policies, programs, or legal standards. For all the helpful language and bipartisan political rhetoric, unless a policy challenged or an impediment complained of is actually removed, RLUIPA has not been nearly as successful as prisoners once hoped. Whether a case survives a motion for summary judgment is an interesting academic question. A review of which cases actually grant the prisoners resolution and relief, however, is the truer test of the law. And those successes have been hard-fought and rare indeed.

Whether Congressional passage of RLUIPA was a legitimate effort to more fully accommodate the imprisoned faithful or a safely-cynical passage of a popular law never intended to have much of an impact, RLUIPA has been a disappointment. Ten years later, there have of course been inroads made and progress pushed, but most of this development falls short of RLUIPA's shining promise.

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the duty of the court, absent a clearly expressed Congressional intention to the contrary, to regard each as effective.").

[197] *See, e.g.*, Pat Nolan, *Victory for Religion Behind Bars,* Christianity Today (June 2, 2005), http://www.christianitytoday.com/ct/2005/juneweb-only/42.0.html (accessed July 19, 2011) (noting that *Cutter v. Wilkinson* was a "tremendous victory for those who work to transform the lives of inmates through faith" and also noted that faith is usually not encouraged in prisons due to the "extra work").

[198] Friends Committee on National Legislation, *Congress Moves to Protect the Free Exercise of Religion,* http://fcnl.org/resources/newsletter/oct00/congress_moves_to_protect_the_free_exercise_of_religion/ (accessed July 19, 2011). This group praises Congress for protecting the religious liberty of individuals.

[199] *See* Gaubatz, *supra* note 48 at 504 (contrasting RLUIPA's creation of rights to the previous trend among courts and legislatures to restrict those rights).

### B. RECOMMENDATIONS & PROPOSED AMENDMENTS TO PLRA

The strong bipartisan support initially rallied for RLUIPA's passage must now be focused towards remedying RLUIPA's relatively unknown "PLRA problem." Courts cannot change how the PLRA restricts RLUIPA, since the actual text makes PLRA restrictions explicitly applicable. The political process may be the only real remedy for this problem—but only once the groups that supported its passage understand what has happened in the courts since the bill was signed into law.

If Congress truly intended to protect prisoners from institutional restrictions of their religious liberties, then two primarily remedies present themselves. Beyond repealing the entire PLRA (which seems unlikely given the strength of concern over frivolous prison litigation),[200] Congress could specifically exempt RLUIPA claims from PLRA restrictions or it could amend the PLRA to ensure that more claims can be fully litigated in court.

Whatever future legislative efforts may entail, any attempts to soften the impacts of the PLRA generally or specifically in relation to RLUIPA should address the PLRA's burden. Each of these is an impediment on its own, but taken together are daunting and frequently fatal to even substantial RLUIPA litigation. Some of the hurdles that prisons must jump through include filing fees and screening processes and the physical injury requirement that PLRA places on them. These recommendations include a number of amendments.

Because a full repeal of the PLRA is improbable, the next best solution is to restructure the PLRA to be more fair to prisoner litigants. Though the Prison Abuse Remedies Act of 2007 died in committee, its text and supporters offered thoughtful suggestions from bipartisan supporters. This Article's review of the PLRA's impact upon RLUIPA litigation concludes that changes in the following areas would allow more prisoners' religious claims to reach decisions on their merits.

#### 1. PRIOR (UNSUCCESSFUL) EFFORTS TO AMEND THE PLRA

Strange partners—as with the original passage of RLUIPA—have worked at various points toward changes or amendments to the PLRA, which is widely acknowledged to have prevented substantial change otherwise possible under RLUIPA. Although never passed, the Prison Abuse Remedies Act of 2007, which was introduced in the House Judiciary Committee, offered a good deal of hope about how RLUIPA may have eventually become more effective.[201]

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[200] Courts considering prisoners' civil suits have legal tests at their disposal that are more than sufficient to address issues of successive or abusive litigation. If the entire Act were be repealed (even if it was later re-written), legitimate prisoner claims could be heard on the merits—without excessive delays and costs. This remedy, however, is admittedly unlikely.

[201] *See generally* H.R. 4109 110th Cong. (2007).

"There are two kinds of walls in American prisons," wrote ACLU Legislative Counsel Jesselyn McCurdy, "one that keeps prisoners from escaping, and another that keeps the abuse that happens inside from ever reaching the light of day. The Prison Litigation Reform Act creates prisons within prisons, except with paperwork instead of locks and administrative hurdles instead of bars."[202] The proposed amendment, among other things, would have exempted juveniles from PLRA's restrictions, removed the "physical injury" requirement (particularly from free exercise and other constitutional violation claims), and softened exhaustion requirements for all prisoners' civil lawsuits. The bill failed to progress out of the committee, but its diverse support may lead to the passage of a similar bill in a future legislative session.

That particular proposed bill garnered support from Jeanne Woodford, the former Warden of San Quentin State Prison; Stephen Bright, the President of the Southern Center for Human Rights; various Attorney Generals; and religious leaders from a variety of faith groups. Woodford, perhaps surprisingly, strongly supported and still supports the reform as one frustrated by the PLRA's harsh restrictions: "For those prison officials who fear the courts, the PLRA provides an incentive to make their grievance procedures more complicated than necessary. As a result, prisoners and prison officials are more likely to get tied up in a game of 'gotcha' rather than spending that time resolving a prisoner's complaint."[203]

And in addition to the "usual suspects" of civil rights and criminal defense litigators, conservative religious leaders also support more generous amendments to the PLRA. As one religious leader testified, "Few prisoners file grievance for the simple reason that they know it is useless to do so and, just as importantly, because they know they are likely to face retaliatory punishment if they do."[204] That understanding of the realities faced by prisoners mirrors their own concerns and frustrations and helps explain why RLUIPA has not been a more effective tool in free exercise litigation.

Congress should reevaluate the failed Prisoner Abuse Remedies Act—or craft a document similar to that bill — and include the initial proposals in the PLRA to ensure that the RLUIPA becomes more effective. Without such action, the rhetoric in support of free exercise, the floor comments, the public statements—ring hollow.

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[202] *See* Jesselyn McCurdy, *Prison Litigation Reform Act Must be Fixed, Law denies justice to victims* (Apr. 22, 2008) http://www.aclu.org/prison/gen/34970prs20080422.html (last visited July 25, 2008).

[203] *Prison Abuse Remedies Act of 2007: Hearing before the Subcomm. On Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary*, 110th Cong. 83 (2008) (statement of Jeanne S. Woodford).

[204] *Private Prison Information Act of 2007, and Review of the Prison Litigation Reform Act: A Decade of Reform or an Increase in Prison and Abuses?: Hearing before the Subcomm. On Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary*, 110th Cong. 31 (2007) (statement of David Keene, Chairman of the American Conservative Union).

### 2. Physical Injury Requirement

The PLRA's physical injury requirement continues to confound courts, though some federal courts have declined to apply it to religious practice claims. Repealing this subsection—particularly as it relates to RLUIPA issues—makes good sense and allows claims of this sort a greater chance of a hearing on the merits. After all "[PLRA]'s purpose to insulate from review all claims in which legitimate constitutional issues predominate without accompanying physical harm." [205] "Plainly," the court continues, constitutional claims are "qualitatively different from lawsuits seeking damages for 'insufficient storage locker space, a defective haircut by a prison barber, the failure of prison officials to invite a prisoner to a pizza party for a departing prison employee, and yes, being served chunky peanut butter instead of the creamy variety.'"[206]

Congress should repeal the requirement that prisoners suffer a physical injury in order to recover for mental or emotional injuries caused by the failure of a prison to accommodate religious practice needs.[207] First, as many federal courts interpreting this requirement have explained, the subsection of this statute makes little sense in light of the emotional or spiritual nature of RLUIPA claims.[208] Repealing the physical injury requirement would have made a difference in multiple cases and at different stages in those cases, and because of the confusion caused by its text, lower federal courts are applying independent logic to cases' individual facts.

For example, in *Mayfield v. Texas Department of Criminal Justice,*[209] the defendant who won his claim was not able to receive compensatory damages due to the PLRA's physical injury requirement.[210]

### 3. Exhaustion Requirement

Amending or repealing the PLRA exhaustion requirement could be the most important area requiring Congressional action to enhance the likelihood that prisoners may be heard. Requiring that a prisoner who has not exhausted administrative remedies at the time a lawsuit is filed be permitted to pursue the claim through an administrative- remedy process still serves the ultimate purpose of the PLRA—allowing problems to be fixed at the local level—without deferring entirely to prison officials with an interest in the outcome of RLUIPA litigation. This requirement, of course, can prevent prisoners from even having

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[205] *Dipaelo,* 138 F.Supp.2d at 109.
[206] *Id.*
[207] Prison Abuse Remedies Act of 2007, H.R. 4109 §2(a), 110th Cong. (2007).
[208] *See supra* at Section IV (a).
[209] 529 F.3d 599 (5th Cir. 2009).
[210] *Id.*

their claims heard—as described *supra* in Section V. B. 3—or entangle prisoner-litigants in extended litigation about technical matters rather than the merits of their religious practice claims. [211]

### 4. Filing Fee Provisions

Congress should modify or repeal the filing fee provisions that apply only to prisoners.[212] Prisoners are some of the poorest citizens of our society, and it stands to reason that a prisoner cannot expect to prevail upon a claim if he cannot first afford to file it in court. Under the PLRA, before filing a lawsuit, even prisoners must first pay a filing fee.[213] Those who cannot pay the initial filing fee may still file[214] but will usually be required to make payments on the balance of the filing fee on a monthly basis thereafter.[215] Though the impact of this upon RLUIPA claims is difficult to measure (since by definition, court opinions only describe the outcomes of cases filed), filing fee provisions serve as yet another impediment to prisoners' free exercise lawsuits and undermines Congress's stated support of religious practice among prisoners.

### 5. PLRA Screening Requirements

Even if a prisoner has succeeded in satisfying the stringent administrative exhaustion requirement by patiently and timely navigating the prison administrative grievance process, he must still comply with the PLRA's screening requirements. It requires federal courts to conduct a preliminary screening of all prisoner complaints against prison officials and dismiss—*sua sponte*—any action or claim that in the court's view is "frivolous or malicious," "fails to state a claim on which relief may be granted," or "seeks monetary relief against a defendant who is immune from such relief.

### 6. The Three-Strike Rule

Furthermore, under the PLRA's "three-strike" rule, prisoners are essentially afforded only three chances to get it right.[216] A dismissal of the prisoner's claim for any of the aforementioned reasons counts as a strike. Prisoners who have had civil actions or appeals dismissed three times before because they were either frivolous or malicious, or

[211] Rogers v. U.S., 696 F.Supp.2d 472 (where the petitioner was prevented from filing his RLUIPA lawsuit because he had not exhausted the grievance procedure in the prison where he was incarcerated).

[212] Though unsuccessful, the Prison Abuse Remedies Act of 2007, HR 4109 §8(a), proposed removing PLRA's filing fee provision when a prisoner files an appeal in forma pauperis.

[213] *See* 28 U.S.C. § 1915(b)(1) (2006).

[214] *Id.* § 1915(b)(4).

[215] *Id.* § 1915(b)(2).

[216] *Id.* § 1915 (g).

failed to state a claim, will not be allowed to file *in forma pauperis* unless the prisoner can prove an "imminent" threat of "serious physical injury."[217]

As described above in Section V.B.3., this provision in particular communicates a message of power and danger, even in relation to prisoners' lawsuits about religious matters. Despite obvious Congressional concern over frivolous lawsuits, penalties such as the ones described in the PLRA are inappropriate if its goal was ever to help ensure that prisoners are protected from improper restrictions upon their religious practice.

### 7. The PLRA And Attorneys' Fees

Finally, Congress should either repeal or amend the PLRA to allow prisoners who prevail on civil rights claims to recover attorney's fees on the same basis as the general public in civil rights cases.[218] Another factor related to prisoners' success on these issues relates to their ability to retain counsel or locate an organization willing to bring a case on their behalf.

Recovery of attorney's fees is necessary to fund the legal organizations—frequently not-for-profit—who accept RLUIPA cases. It is these organizations which are penalized by the Act's restrictions, and this doubtless serves as an additional roadblock to litigation through limitation of available legal resources. If a lawsuit is meritorious, why should a prisoner's attorney not be awarded fees just as any other meritorious litigant would be under the circumstances? Finally, under the PLRA, federal courts may revoke "good time credits" from prisoners who have filed "frivolous lawsuits." This provision alone deters many prisoners from filing lawsuits challenging their free exercise accommodation.

Any of the requirements of this process, when coupled with the three strikes rule, may forever close the courthouse doors to aggrieved and deserving plaintiffs.

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Although prior legislative attempts to amend the PLRA have failed, perhaps the missing piece was full education and information about the failure of RLUIPA claims because of technical requirements and hurdles. Although members of varied communities have supported the simplification of prisoners' civil claims, the legislative history of the Prison Abuse Remedies Act fails to fully discuss the PLRA's impact upon religious free exercise. Including the communities initially supportive of RLUIPA—and of free exercise generally—may be the key to ensuring that RLUIPA can finally have the impact that at least some supporters hoped it would.

[217] *Id.*

[218] Though unsuccessful, the Prison Abuse Remedies Act of 2007, HR 4109 §7, also proposed restoring attorney fees for PLRA claims.

## Concluding Thoughts: On Their Own (Again)

With the benefit of ten years of hindsight, it would be foolish to claim that RLUIPA has had no impact prisoners of faith. It clearly has; prisoner free exercise claims have never enjoyed particular success – under any reviewing test—but some claims are indeed winning. On the other hand, the cases that actually do see relief are fewer than many expected, and it is not particularly clear that the cases winning relief could not have prevailed under the *Turner/ O'Lone* tests.

There may be a number of factors that contribute to this relatively disappointing impact of a law that garnered such support and galvanized such hope.[219] It not only gathered bipartisan excitement at the time of its passage and signing—it was actually drafted by those who usually find themselves on opposing sides of such issues.[220]

However, assuming that Congress intended RLUIPA to revolutionize legal examination of prisoner free exercise claims, it has fallen short of the mark. In order for the legal test of RLUIPA to have the broad impact its text implies, Congress must make fundamental changes to (or abandon entirely) the Prison Litigation Reform Act.

Nearly a decade after RLUIPA's passage, American's imprisoned men and women still face significant related to fundamental requirements of their faith, and there is little to give hope that the litigation process will ever become less complicated, less expensive, or ultimately more successful. On legal questions so fact-driven, a claim that faces so many procedural hurdles will never be an easy one to win. The difficulty is of course compounded by the fact that most of the claims are brought *pro se* and by litigants with limited access to investigation or legal research tools. With a federal law threatening loss of "good time" credit and other retribution for filing a religious free exercise claim that others might view as "frivolous," the law hardly encourages the imprisoned faithful to boldly claim a right to practice as their consciences dictate. Who among us would take such risks in order merely to get to court to litigate a religious practice issue?

When the courts show few signs of drastically re-interpreting PLRA, then any changes are dependent upon a political process. Either members of Congress who supported RLUIPA initially should reexamine the application of PLRA to those legal claims (or the PLRA

[219] Rare indeed are the issues on which the American Civil Liberties Union, The Christian Legal Society, The Family Research Council, The National Association of Evangelicals, and The United States Catholic Conference join forces. "The bill was supported by a most unusual coalition of religious and civil liberties groups, including the *American Civil Liberties Association, Christian Coalition, Family Research Council,* and *People for the American Way.* These are organizations that almost always find themselves on opposite sides in religious disputes." B.A Robinson, *Religious Freedom Restoration Acts Additional Attempts at Federal Legislation: RLPRA and RLUIPA*, http://www.religioustolerance.org/rfra3.htm (accessed July 19, 2011).

[220] Timothy J. Houseal, *RLUIPA: Protecting Houses of Worship and Religious Liberty*, Delaware Lawyer, Fall, 2002.

itself), or the constituents who urged RLUIPA's passage should explain concern to their lawmakers. The problem, though, is that so few perceive the discord in Congress (at least publicly) showing full support for religious practice in prison while fully supporting a law that makes it so difficult to challenge restrictions of that free exercise.

First steps, though, are discussion and education around this issue. The warden and the prisoners' rights advocate must continue to explain the actual consequences—unintended or otherwise—of the PLRA. The litigants themselves must carry on as they have been, facing the hurdles of administrative remedies, filing fees, and potential retribution for the lawsuits they file. And those others who can recognize the benefits of religious practice in prison and the solace it can afford must continue to explore creative alternatives to singing RLUIPA's praises while the law falls far short of its promises.