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The free exercise of religion often presents a complex reality in prison. Over the years, the standard of scrutiny for free exercise claims has not only been easily alterable but also unclear and inconsistent in its application. Recent legislation, such as RLUIPA and RFRA, has significantly improved the state of religious freedom in prisons. However, two U.S. Supreme Court decisions on RLUIPA – Cutter v. Wilkinson *and* Holt v. Hobbs – *have led to some confusion among lower courts regarding the level of deference that should be afforded to prison officials. Although Holt demonstrated a hard look approach to strict scrutiny, it did nothing to strike down or clarify Cutter's deferential language. This is problematic because there is an inherent contradiction in applying strict scrutiny with deference. Although many courts follow a true strict scrutiny approach, in practice, remnants of a deferential approach remain among lower courts.*

This Note argues that courts must adhere to strict scrutiny, not only in theory, but also in practice. In doing so, it first gives a brief, general overview of the history of religious freedom in the prison system, with particular focus on the efforts and struggles of religious minorities. Then it addresses the inconsistency between Cutter and Holt while comparing the due deference and hard look approaches. Finally, to provide some concrete examples of why this inconsistency matters, it examines two issues more in-depth: First Amendment retaliation claims and equal treatment claims. It looks at several recent cases to further support the conclusion that strict scrutiny is not only necessary to protect religious minorities' rights, but it is also both practical and feasible, even in the prison context.

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INTRODUCTION

"Prisoners are persons whom most of us would rather not think about[,]" Justice William J. Brennan states at the beginning of his dissenting opinion in *O'Lone v. Estate of Shabazz*.[1] He continues: "Incarceration 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."[2]

Justice Brennan's opinion reflects a thorough understanding of religion's centrality in American society and its ability to provide hope and meaning to one's life. His response also reveals a deep concern for the incarcerated—who often cannot enjoy the full exercise of their religion while in prison. At the heart of his statement is the idea that prisoners—even those perceived as society's "worst offenders"—still retain human dignity. They are still individuals who, although they may be denied full participation in society, desire full participation in their chosen spiritual community. They are still individuals who "hope for

1. O'Lone v. Estate of Shabazz, 482 U.S. 342, 354 (1987) (Brennan, J., dissenting).
2. *Id.* at 368.

dignity and redemption[,]"[3] and as such are deserving of the fullest measure of religious freedom that can be offered to them.

However, the free exercise of religion often presents a complex reality in prisons. Courts have long rejected the view that prisoners are "slaves of the State"[4] to whom the Bill of Rights does not apply,[5] but it is well-settled that "[l]awful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations underlying our penal system."[6] Yet courts have consistently held that religious freedom is "one of the fundamental 'preferred' freedoms guaranteed by the Constitution[,]" and therefore religious freedom claims "fall[] in quite a different category" than other claims.[7]

Even so, there are compelling penological objectives—such as security, safety, deterrence of crime, rehabilitation, and orderly administration—that often come into direct conflict with an inmate's right to free exercise of religion. Thus, the ability and willingness of prison administrators to accommodate religion in prisons has fluctuated over the years. Although the ideal of religious freedom was written into America's earliest documents, "[t]he struggle to make religious freedom real in America has been long and tempestuous[,]"[8] and the story is no different in America's prisons.

Examining this history reveals two important points: first, religious minority groups have played a central role in the progression of religious freedom in prison; and second, over the years, the standard of scrutiny for free exercise claims has not only

3. *Id.*

4. Ruffin v. Commonwealth, 62 Va. (1 Gratt.) 790, 796 (1871).

5. *See, e.g.*, Palmigiano v. Travisono, 317 F. Supp. 776, 785 (D.R.I. 1970) ("Our enlightened concern for individual human rights as it has penetrated prison compounds has taken us a long way from the judicial attitudes of the past . . . ."); Wolff v. McDonnell, 418 U.S. 539, 555–56 (1974) ("There is no iron curtain drawn between the Constitution and the prisons of this country."); Cruz v. Beto, 405 U.S. 319, 321 (1972) ("Federal courts sit not to supervise prisons but to enforce the constitutional rights of all 'persons,' including prisoners.").

6. Price v. Johnston, 334 U.S. 266, 285 (1948).

7. Pierce v. La Vallee, 293 F.2d 233, 235 (2d Cir. 1961). *See also* Murdock v. Pennsylvania, 319 U.S. 105, 115 (1943) ("Freedom of press, freedom of speech, freedom of religion are in a preferred position."); Marsh v. Alabama, 326 U.S. 501, 509 (1946) ("When we balance the Constitutional rights of owners of property against those of the people to enjoy freedom of press and religion . . . we remain mindful of the fact that the latter occupy a preferred position.").

8. STEVEN WALDMAN, SACRED LIBERTY: AMERICA'S LONG, BLOODY, AND ONGOING STRUGGLE FOR RELIGIOUS FREEDOM 5 (2020).

been easily alterable but also unclear and inconsistent in its application. A glance back to the not-so-distant past confirms that "[t]he difficulties of prison administration create the potential for prisons to succumb to neglect, racism, and religious intolerance and for prison officials to curtail inmates' rights not only when necessary, but also when merely convenient."[9]

Recent legislation, such as the Religious Freedom Restoration Act (RFRA) and the Religious Land Use and Institutionalized Persons Act (RLUIPA), has significantly improved the state of religious freedom in prisons by not only offering more protection to religious minorities through a return to strict scrutiny, but also providing a more permanent and effective standard to guide courts in their efforts to balance the competing interests of state and individual. Even so, the unique nature of the prison context, the variety of free exercise issues that can arise there, and an extensive history of overlapping and conflicting legal standards has led to confusion, even today, among courts as to how exactly those standards should be applied in practice.

This inconsistency is due in large part to two U.S. Supreme Court decisions. The first, *Cutter v. Wilkinson*, upheld RLUIPA as constitutional, but also put forth a "due deference" approach in dicta.[10] The second, *Holt v. Hobbs*, decided ten years later, took a more scrutinizing approach but did nothing to strike down or clarify *Cutter*'s deferential language.[11] In the aftermath of *Holt*, most lower courts have followed its hard look approach; however, given that *Cutter* has not been overruled or discounted by subsequent decisions, due deference remains an avenue for courts to use when they so choose. Thus, although the *theory* of strict scrutiny was well-established through RLUIPA, in *practice*, some remnants of a deferential approach remain among lower courts.

This Note argues that courts must adhere to strict scrutiny, not only in theory, but also in practice. In doing so, it will first give a brief, general overview of the history of religious freedom in the prison system, with particular focus on the efforts and struggles of religious minorities. Then it will address the inconsistency between *Cutter* and *Holt* while comparing the due deference and

9. Daniel J. Solove, *Faith Profaned: The Religious Freedom Restoration Act and Religion in the Prisons*, 106 YALE L.J. 459, 463 (1996).

10. Cutter v. Wilkinson, 544 U.S. 709, 725 n.13 (2005).

11. Holt v. Hobbs, 574 U.S. 352 (2015).

hard look approaches. Finally, to provide some concrete examples of why this matters, this Note will examine two issues more in-depth: First Amendment retaliation claims and equal treatment claims. It will look at several recent cases to further support the conclusion that strict scrutiny is not only necessary to protect religious minorities' rights, but it is also both practical and feasible, even in the prison context.

I. EARLY AMERICAN PRISONS

In 1785, James Madison penned an eloquent and well-reasoned defense of religious freedom, titled *Memorial and Remonstrance Against Religious Assessments*.[12] Among the arguments set forth, Madison asserted that a society built on one particular religion or belief system would only lead to oppression and conflict, while a society built on principles of religious freedom would flourish.[13] However, the reality of this flourishing society would prove to be more elusive in prison life; it seemed that the more religious diversity increased in prisons, the more security threats and administrative problems arose for prison officials.

Like many other aspects of society, early American prisons were highly influenced by Christianity. Andrew Skotnicki has stated that "[r]eligion was not an external force outside the [prison] walls, simply reacting to events, but an integral part of the internal logic by which the prisons were governed."[14] For example, many early prison reformers endeavored to bring about the "moral and religious improvement" of inmates[15] by implementing religious services, encouraging Bible studies, and allowing visits from church ministers.[16] The New York Prison Association, formed in

12. James Madison, *Memorial and Remonstrance Against Religious Assessments*, FOUNDERS ONLINE, NAT'L ARCHIVES (1785), https://founders.archives.gov/documents/Madison/01-08-02-0163.

13. *Id.* ("Because experience witnesseth that ecclesiastical establishments, instead of maintaining the purity and efficacy of Religion, have had a contrary operation. During almost fifteen centuries has the legal establishment of Christianity been on trial. What have been its fruits? More or less in all places, pride and indolence in the Clergy, ignorance and servility in the laity, in both, superstition, bigotry and persecution.").

14. ANDREW SKOTNICKI, RELIGION AND THE DEVELOPMENT OF THE AMERICAN PENAL SYSTEM 3 (2000).

15. *Id.* at 38.

16. In 1787, Benjamin Franklin, along with a group of Quaker men, formed the Philadelphia Society for Alleviating the Miseries of Public Prisons and subsequently

1844, issued several official reports that demonstrated the importance of religion and its role in reforming inmates.[17] One report from 1867 had forty pages devoted to "Moral and Religious Agencies," with the opening paragraph stating:

> The importance of suitable and adequate provisions for the moral and religious instruction of prisoners, whether regard be had to public worship, Sunday school lessons, daily prayer and reading of the scriptures, or private visitation, can scarcely be exaggerated. If the design be to reform and restore them to virtue, religion is needed above everything . . . . *We have a profound conviction of the inefficacy of all measures for reformation, except such as are based on religion* . . . .[18]

However, most references to "religion" in these early documents really only referred to *Christian* religions.

This partly explains why religious freedom claims were not very common until the mid-twentieth century;[19] because Christianity was well-protected and incorporated into prison life, as well as in society at large, most inmates belonging to mainstream Christian sects were able to freely exercise their religion with little opposition from prison officials. An 1845 report on the Maryland State Prison illustrates this point: "Every opportunity is allowed to the convicts to receive religious instruction, and they are left

undertook efforts to reform Philadelphia's Walnut Street Jail by implementing religious services there. *Id.* at 32. The society was highly motivated by religion, as evident from its constitution, which declared that "the obligations of benevolence . . . are founded on the precepts and example of the author of Christianity." ROBERTS VAUX, NOTICES OF THE ORIGINAL, AND SUCCESSIVE EFFORTS, TO IMPROVE THE DISCIPLINE OF THE PRISON AT PHILADELPHIA AND TO REFORM THE CRIMINAL CODE OF PENNSYLVANIA WITH A FEW OBSERVATIONS ON THE PENITENTIARY SYSTEM 10–11 (1826). Inspired by the reforms made in Philadelphia, Quaker reformer Thomas Eddy pushed for similar prison reforms in New York in the late 18th century. JENNIFER GRABER, THE FURNACE OF AFFLICTION: PRISONS & RELIGION IN ANTEBELLUM AMERICA 26 (2014). Eddy believed that by incorporating religion into New York's prison, crime would also be reduced. *Id.* at 27, 30.

17. The NYPA was itself very influenced by religion, as evidenced by its motto: "Sin No More." MARY BOSWORTH, 1 ENCYCLOPEDIA OF PRISONS AND CORRECTIONAL FACILITIES 420 (2005).

18. ENOCH COBB WINES & THEODORE WILLIAM DWIGHT, REPORT ON THE PRISONS AND REFORMATORIES OF THE UNITED STATES AND CANADA 184 (1867) (emphasis added).

19. For an analysis of how mass incarceration and evolving social norms have influenced prisoners' rights in general, see Robert T. Chase, *We Are Not Slaves: Rethinking the Rise of the Carceral States through the Lens of the Prisoners' Rights Movement*, 102 J. AM. HIST. 73 (2015) (arguing that multiple prisoners' rights movements between 1965 and 1995 attempted to challenge the construction of the carcel state by using legal, political, and social strategies).

entirely at liberty to select for the purpose the minister of any religious denomination whom they may prefer, and who is willing to attend on them."[20] With the introduction of more non-Christian inmates in the twentieth century, however, this accommodating view was challenged.

II. THE GROWTH OF RELIGIOUS MINORITIES

As the nineteenth century came to a close, many of its pivotal events were still causing ripple effects throughout the nation. The end of the Civil War, the Great Migration, influxes in immigration, increasing urbanization, countless social movements, and a changing political landscape all contributed to an increase in racial and ethnic tensions, deteriorating urban conditions, overcrowding, and increasing crime rates. This in turn led to a strain on prisons themselves.[21] As officials struggled to keep peace and order as well as find space for the increasing number of prisoners, an influx of diverse racial, ethnic, and religious groups added to that strain. However, by the 1950s, one group in particular stood out to prison officials as posing the greatest threat: the Nation of Islam.

The Nation of Islam (NOI) was founded in 1930 by Wallace D. Fard Mohammed.[22] In its early days, it was characterized by the press as a "jungle cult," with "sinister influences of voodooism."[23] However, when some of its more troubling racial rhetoric became more widely known,[24] many began to denounce the NOI much more fervently. The press began to characterize it as "a subversive political group in the guise of religion."[25] One Harvard professor

20. PRISON ASSOCIATION OF NEW YORK, FIRST REPORT OF THE PRISON ASSOCIATION OF NEW YORK 289 (1845) (accessed through https://books.google.com/books?id=y7YXAAAAYAAJ&printsec=frontcover&source=gbs_ge_summary_r&cad=0#v=onepage&q&f=false).

21. GRABER, *supra* note 16, at 158–59; DAVID J. ROTHMAN, THE DISCOVERY OF THE ASYLUM: SOCIAL ORDER AND DISORDER IN THE NEW REPUBLIC 237 (1971).

22. See MARTHA F. LEE, THE NATION OF ISLAM: AN AMERICAN MILLENARIAN MOVEMENT (1996).

23. Garrett Felber, *The Making of the "Black Muslims," in* THOSE WHO KNOW DON'T SAY: THE NATION OF ISLAM, THE BLACK FREEDOM MOVEMENT, AND THE CARCERAL STATE 16, 20 (2020).

24. Fundamental to NOI beliefs is the concept that Black Americans are a chosen people, superior to the white race. See LEE, *supra* note 22. Additionally, during World War II, many NOI followers were arrested for draft evasion, professing pro-Japanese sentiment and other troubling statements about how World War II was a "white man's war." *See* Felber, *supra* note 23, at 16–22.

25. Felber, *supra* note 23, at 19.

opined that "white supremacists and the Black Muslims are two sides of the same coin"; a former prison warden claimed it was the "Black Ku-Klux-Klan."[26] Yet, as Malcom X remarked during his own time in prison, "All of the opposition was, after all, helpful toward the spread of Islam there, because the opposition made Islam heard of by many who otherwise wouldn't have paid it the second thought."[27]

And so, by the end of the 1950s, the Nation of Islam was flourishing in America's prisons.[28] The NOI's radical views caused concern for many prison officials, and they went to great lengths to prevent these prisoners from gathering together, obtaining NOI literature, and practicing or even conversing about their religion with others.[29] Eldridge Cleaver, who later went on to become a leader of the Black Panthers, wrote an essay detailing the extent of the discrimination and retaliation that Black Muslims faced in prison. He stated:

> In those days if you walked into any prison in the State of California and visited the unit set aside for solitary confinement, there was absolutely no doubt that you'd find ten or fifteen Black Muslims who were being "disciplined" for staunchly confronting prison officials with implacable demands that Muslims be allowed to practice their religion with the same freedom and privileges as the Catholics, Jews, and Protestants.[30]

Beginning in the 1960s, many Muslim inmates took to the courts to fight for their religious freedom. Many of these early claims alleged not only that their free exercise rights were violated, but also that they faced retaliation because of their religious beliefs.[31]

26. *Id.* at 36.

27. *Id.* at 29.

28. Zoe Colley, *"All America Is a Prison": The Nation of Islam and the Politicization of African American Prisoners, 1955–1965*, 48 J. AM. STUD. 393, 398 (2014).

29. For additional sources that address the topic of Anti-Muslim discrimination in prisons, see Kenneth L. Marcus, *Jailhouse Islamophobia: Anti-Muslim Discrimination in American Prisons*, 1 RACE AND SOC. PROBLEMS (2009); Dulcey A. Brown, *Black Muslim Prisoners and Religious Discrimination: The Developing Criteria for Judicial Review*, 32 GEO. WASH. L. REV. 1124 (1963); SpearIt, *9/11 Impacts on Muslims in Prison*, 27 MICH. J. RACE & L. 233 (2021); Colley, *supra* note 28; SpearIt, *Muslim Radicalization in Prison: Responding with Sound Penal Policy or the Sound of Alarm*, 49 GONZ. L. REV. 37 (2013).

30. THE EDITORS OF RAMPARTS MAGAZINE & FRANK BROWNING, PRISON LIFE: A STUDY OF THE EXPLOSIVE CONDITIONS IN AMERICA'S PRISONS 100 (1972).

31. *See, e.g.*, Pierce v. La Vallee, 293 F.2d 233 (2d Cir. 1961); Sewell v. Pegelow, 291 F.2d 196 (4th Cir. 1961); Sostre v. McGinnis, 334 F.2d 906 (2d Cir. 1964).

Examining a few court cases from this time period sheds light not only on the conditions and limitations that religious minorities faced in prison, but also traces the first application of judicial scrutiny to religious freedom cases.[32]

III. EARLY EFFORTS

In 1961, Jesse L. Ferguson and nine other inmates at Folsom State Prison petitioned the Supreme Court of California for a writ of habeas corpus. They sought to call attention to the discrimination they faced as Muslims, claiming that they were not allowed to worship or meet together, obtain the Quran or other religious texts, or receive visits from their religious leaders—all practices that Christian and Jewish inmates could do.[33] The court denied their petition, reasoning that the prisoners were not protected by the California Constitution, nor could they seek relief under the federal Constitution.[34] The court clarified that inmates of state prisons could not assert those rights except "in cases of extreme mistreatment by prison officials," and refusing to allow the Muslim inmates to practice their religion did not fall under that category.[35]

More significantly, however, the court candidly admitted that Muslims *were* targeted and denied rights based on their religion. This discrimination was justified because Muslims "were not entitled to be accorded the privileges of a religious group or sect."[36] The Department of Corrections' policy at the time was that "[o]ther religious groups are allowed to pursue religious activities, but the Muslims are not allowed to engage in their claimed religious practices."[37] The court indicated that because Muslim beliefs and actions posed "potentially serious dangers to the established prison

32. Some scholars have tied the prisoners' rights movement to various other social movements of that time period, making the argument that the movement inside the prisons cannot be understood without understanding the movements outside the prisons. *See* James B. Jacobs, *The Prisoners' Rights Movement and Its Impacts, 1960–1980*, 2 CRIME AND JUSTICE 429, 432 (1980); Garrett Felber, *"Shades of Mississippi": The Nation of Islam's Prison Organizing, the Carceral State, and the Black Freedom Struggle*, 105 J. AM. HIST. 71, 71–72 (2018).

33. In re Ferguson, 361 P.2d 417, 420 (1961).

34. *Id.* at 420–21.

35. *Id.* at 421.

36. *Id.* at 418.

37. *Id.*

society[,]" the prison's policy was reasonable and not an abuse of discretion.[38]

Such views were not uncommon at the time. A few years later, the U.S. Court of Appeals for the Second Circuit addressed similar complaints from Muslim inmates of Attica State Prison, affirming, as the Supreme Court of California did, that courts must defer to prison administrators' judgment on such issues, even when important rights were involved.[39] The court stated: "No romantic or sentimental view of constitutional rights or of religion should induce a court to interfere with the necessary disciplinary regime established by the prison officials."[40]

Gradually, however, courts' views regarding prisoners' rights changed, even if attitudes toward Muslims themselves did not change so easily. In *Pierce v. La Vallee*, three inmates of Clinton State Prison in New York alleged that they were being denied the opportunity to buy the Quran and receive visits or even contact a spiritual advisor.[41] They also brought a claim under 42 U.S.C. § 1983, alleging that they were being punished with solitary confinement because of their religious beliefs.[42]

The district court had previously refused to even hear their claims, but the Second Circuit held that "this is not a case where federal courts should abstain from decision because the issue is within state cognizance."[43] The appellate court pointed out that this was not a claim that involved "ordinary problems of prison discipline," but rather involved a charge of religious persecution, which "falls in quite a different category."[44] Citing several Supreme Court cases from the 1940s,[45] the court clarified that religious freedom is "one of the fundamental 'preferred' freedoms guaranteed by the Constitution[,]" and therefore is deserving of greater protection, even for prisoners.[46] Although on remand, the district

38. *Id.* at 422.

39. Sostre v. McGinnis, 334 F.2d 906 (2d Cir. 1964).

40. *Id.* at 908.

41. Pierce v. La Vallee, 293 F.2d 233, 234 (2d Cir. 1961).

42. *Id.*

43. *Id.* at 236.

44. *Id.* at 235.

45. Murdock v. Pennsylvania, 319 U.S. 105 (1943); Follett v. Town of McCormick, 321 U.S. 573 (1944); Marsh v. Alabama, 326 U.S. 501 (1946).

46. Pierce, 293 F.2d at 235.

court ruled in favor of the prison,[47] *Pierce v. La Vallee* still had a great impact in moving forward other religious freedom cases.

Several years later, the Supreme Court solidified *Pierce*'s ruling and extended federal jurisdiction over state prisons in *Cooper v. Pate*,[48] definitively requiring federal courts to hear prisoners' constitutional claims.[49] On remand, the U.S. Court of Appeals for the Seventh Circuit addressed the inmate's claims, which included a statutory retaliation claim, as well as allegations that the prison prohibited him from obtaining the Quran, attending religious services, and meeting with spiritual advisors.[50] The court noted that "although the deference to administrative discretion is not as complete in a case like the present, weight is still given to the judgment of the administrators in determining the practices which are necessary and appropriate in the conduct of a prison."[51]

Therefore, although the Supreme Court's decision in *Cooper* was a significant victory for prisoners' rights in allowing inmates' claims to be heard, the reality was that courts still afforded significant deference to prison officials, who were more aware of the security and safety measures necessary for their institution, as well as the economic and practical concerns of accommodating inmates' religious exercise.

Additionally, *Cooper* did little to clarify how courts should analyze such prisoner claims. In the years following *Cooper*, the U.S. Court of Appeals for the Third Circuit noted that "the test of what actions are unreasonable restraints on the exercise of religion has of necessity proceeded on an ad hoc basis."[52] In other words, there was no uniform standard being applied; courts were merely balancing the competing interests at hand on a case-by-case basis. In practice, this meant that prisons often "succumb[ed] to neglect, racism, and religious intolerance" and that many "curtail[ed] inmates' rights not only when necessary, but also when merely convenient."[53] But in 1972, the Supreme Court gave some clearer

47. Pierce v. La Vallee, 212 F. Supp. 865 (N.D.N.Y. 1962).

48. Cooper v. Pate, 378 U.S. 546 (1964).

49. Christopher E. Smith, *Black Muslims and the Development of Prisoners' Rights*, 24 J. BLACK STUD. 131, 141 (1993).

50. Cooper v. Pate, 382 F.2d 518, 520 (7th Cir. 1967).

51. *Id.* at 521.

52. Gittlemacker v. Prasse, 428 F.2d 1, 4 (3d Cir. 1970).

53. Solove, *supra* note 9, at 463.

guidance on how lower courts should proceed in *Cruz v. Beto*, a case that marks the beginning of the high point of religious freedom in America's prisons.[54]

IV. THE RISE AND FALL OF RELIGIOUS FREEDOM IN PRISON

Fred Cruz was a Buddhist inmate in the Texas Department of Corrections. Among other injustices,[55] Cruz was prohibited from contacting a Buddhist religious advisor and was denied access to the prison chapel, while inmates of other faiths were allowed access.[56] When deciding on Cruz's claim, the Supreme Court acknowledged that courts should not be heavily involved in prison affairs, since prison officials know the rules and regulations necessary to ensure order and safety in their institutions.[57] However, the Court held that "persons in prison, like other individuals, have the right to petition the Government for redress of grievances[,]"[58] and therefore "reasonable opportunities must be afforded to all prisoners to exercise the religious freedom guaranteed by the First and Fourteenth Amendments without fear or penalty."[59] The Supreme Court remanded Cruz's case, stating that "[i]f Cruz was a Buddhist and if he was denied a reasonable opportunity of pursuing his faith comparable to the opportunity afforded fellow prisoners who adhere to conventional religious precepts, then there was palpable discrimination by the State against the Buddhist religion[.]"[60]

Cruz v. Beto was significant for two reasons: first, it further solidified prisoners' right to bring constitutional claims to court; and second, it established a somewhat clearer standard for courts

54. Cruz v. Beto, 405 U.S. 319 (1972).

55. Cruz also brought a retaliation claim, alleging that he was placed in solitary confinement for two weeks because he had shared religious materials with other inmates. Further, the prison had a reward system in place whereby inmates were given points for attending "orthodox religious services"; these points in turn "enhanc[ed] a prisoner's eligibility for desirable job assignments and early parole consideration." *Id.* at 320. Thus, not only was Cruz denied the ability to practice his religion, but this injustice was compounded by the fact that inmates were *encouraged* by prison officials to practice their religion and received rewards for doing so—but only those who belonged to a more mainstream religion.

56. *Id.* at 319.

57. *Id.* at 321.

58. *Id.*

59. *Id.* at 322 n.2.

60. *Id.* at 322.

to analyze prisoners' religious freedom claims. Prisoners must be afforded "reasonable opportunities" to pursue their faith,[61] especially if such opportunities are available to other prisoners. If one sect is denied those opportunities, absent reasonable efforts or reasonable justification from the prison,[62] then that constitutes religious discrimination. In 1974, the Supreme Court clarified that the reasonable justification requirement "must be analyzed in terms of the legitimate policies and goals of the corrections system[.]"[63] It was not enough to give a reason for the restriction on a prisoner's religious exercise; prison administrators needed to give a reasonable and substantial justification for the restrictions, which was a much higher burden to meet.[64]

Although the Court had established a clearer standard for religious claims in *Cruz*, lower courts remained divided as to the exact level of scrutiny required by *Cruz*.[65] Some courts only required minimal scrutiny of prison policies, requiring that the infringement on free exercise be "reasonably related" to a penological interest.[66] However, others were more skeptical of prison administrators' policies and reasoning, and they required officials to show not only that the rules and regulations prohibiting a prisoner's free exercise were legitimate, reasonable,

61. *Id.* at 322 n.2.

62. *See, e.g.*, O'Malley v. Brierley, 477 F.2d 785, 795 (3d Cir. 1973) ("[W]here a state does afford prison inmates the opportunity of practicing a religion, it may not, without reasonable justification, curtail the practice of religion by one sect.").

63. Pell v. Procunier, 417 U.S. 817, 822 (1974).

64. Gallahan v. Hollyfield, 670 F.2d 1345, 1346 (4th Cir. 1982) (quoting Sweet v. S.C. Dep't of Corr., 529 F.2d 854, 863 (4th Cir. 1975)).

65. Solove, *supra* note 9, at 468.

66. *See, e.g.*, Brown v. Johnson, 743 F.2d 408, 412 (6th Cir. 1984) (upholding a prison regulation banning congregate worship services by plaintiffs because plaintiffs ministered to the spiritual needs of homosexuals and prison officials presented testimony indicating there was a strong correlation between homosexuality and violence); Madyun v. Franzen, 704 F.2d 954 (7th Cir. 1983) (holding that a prison regulation allowing for female guards to "frisk search" male inmates was reasonably adapted to achieve a compelling state objective and was therefore sufficient to overcome a Muslim inmate's First Amendment claim); Rogers v. Scurr, 676 F.2d 1211, 1215 (8th Cir. 1982) (upholding a prison regulation that prohibited Muslim inmates from wearing prayer caps and robes outside religious services; the court noted that courts "should not substitute [their] judgment for that of the officials who run penal institutions."); St. Claire v. Cuyler, 634 F.2d 109, 115 (3d Cir. 1980) (noting that "courts must defer to the expert judgment of the prison officials unless the prisoner proves by substantial evidence . . . that the officials have exaggerated their response to security considerations, or that their beliefs are unreasonable.") (internal quotations and citations omitted).

and important in upholding the prison's function, but also that no less restrictive alternatives existed.[67]

This strict scrutiny approach did not go unchallenged. In 1987, two Supreme Court cases delivered a significant blow to prisoners' free exercise claims, marking the decline of the higher degree of protection that religious freedom had enjoyed since *Cruz*. The first case, *Turner v. Safley*, dealt not with religious claims, but with two other constitutional claims—the right of inmates to marry and the right of inmate correspondence.[68]

Turner rejected a strict scrutiny approach in the prison context, and instead clarified that "when a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests."[69] The Court established a four-pronged test to determine reasonableness: (1) "there must be a 'valid, rational connection' between the prison regulation and the legitimate governmental interest put forward to justify it"; (2) courts must weigh "whether there are alternative means of exercising the right that remain open to prison inmates"; (3) courts must consider "the impact accommodation of the asserted constitutional right will have on guards and other inmates, and on the allocation of prison resources generally"; and (4) there must be an "absence of ready alternatives[.]"[70]A few days later, the Supreme Court applied this four-part test to an inmate's free exercise claim.[71]

In *O'Lone v. Estate of Shabazz*, the question before the Court was whether a Leesburg State Prison policy infringed upon two Muslim inmates' right to attend Jumu'ah, a Muslim worship service held

67. *See, e.g.*, Shabazz v. Barnauskas, 790 F.2d 1536, 1539 (11th Cir. 1986) (finding that under a "less restrictive means test[,]" the prison's no beard policy was constitutional); Gallahan, 670 F.2d at 1346 (finding that a prison regulation prohibiting beards unconstitutionally restricted an inmate's right to free exercise because less restrictive means of achieving the prison's compelling interests were available); Teterud v. Burns, 522 F.2d 357, 362 (8th Cir. 1975) (finding that "the legitimate institutional needs of the penitentiary can be served by viable, less restrictive means which will not unduly burden the administrator's task"); Barnett v. Rodgers, 410 F.2d 995, 1000 (D.C. Cir. 1969) (quoting Shelton v. Tucker, 364 U.S. 479, 488 (1960)) ("For 'even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved.'").

68. Turner v. Safley, 482 U.S. 78 (1987).

69. *Id.* at 89.

70. *Id.* at 89–90 (quoting Block v. Rutherford, 468 U.S. 576, 586 (1984)).

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

on Fridays.[72] The district court initially held that there was no First Amendment violation, but on appeal, the Third Circuit, following the strict scrutiny standard established in previous cases, ruled that the prison needed to show that the policies "were intended to serve, and do serve, the important penological goal of security," and there was no less restrictive alternative available.[73]

However, after applying *Turner*'s four-part reasonableness test, the Supreme Court reversed. The Court noted that it was wrong to put the burden on prison officials to prove that no other alternatives existed or that the chosen policy was the least restrictive means available.[74] Additionally, the Court stated its refusal to "'substitute [its own] judgment on . . . difficult and sensitive matters of institutional administration,' for the determinations of those charged with the formidable task of running a prison."[75] In other words, the Court determined that strict scrutiny did not belong in prisons, even when free exercise claims are involved.

O'Lone therefore significantly weakened the religious freedom protections afforded to prisoners. In applying the four-part *Turner* test to free exercise claims, the Court essentially reverted to the deferential approach taken by courts decades earlier, ruling that it was not prison officials' job to search for every available less restrictive alternative to accommodate every inmate's religious beliefs, nor was it the Court's job to interfere in the way prisons are run.

This decision preceded the landmark religious freedom case, *Employment Division v. Smith*, which dismantled strict scrutiny even for individuals outside of prison.[76] One scholar, in examining the two cases together, noted "[t]he Court's judicial restraint in *Smith* and *O'Lone* had all but eviscerated the judiciary's role in balancing religious liberty against governmental and penological interests: *Smith* delegated the task of balancing to the legislature while *O'Lone* surrendered it to prison officials."[77] However, in the years following these two decisions, Congress proposed a different solution—one that attempted to bring the protections of religious freedom back to citizens and prisoners alike.

72. *Id.* at 344–45.
73. *Id.* at 347 (quoting Shabazz v. O'Lone, 782 F.2d 416, 420 (3d Cir. 1986)).
74. *Id.* at 350.
75. *Id.* at 353 (quoting Block v. Rutherford, 468 U.S. 576, 588 (1984)).
76. Emp. Div. v. Smith, 494 U.S. 872 (1990).
77. Solove, *supra* note 9, at 470.

V. THE EFFECT OF RECENT LEGISLATION

In 1993, Congress passed the Religious Freedom Restoration Act (RFRA) in order "to provide a claim or defense to persons whose religious exercise is substantially burdened by government."[78] The Act served to restore the strict scrutiny standard and "to guarantee its application in all cases where free exercise of religion is substantially burdened[.]"[79] RFRA's influence extended to prisoners' rights as well, and the bill's passage revealed that many people believed that prisoners' religious freedom deserved protection.[80]

However, in 1997, the Supreme Court struck down RFRA as an unconstitutional exercise of Congress's power in *City of Boerne v. Flores*.[81] The Court noted that although Congress has power to enforce the Free Exercise Clause under Section 5 of the Fourteenth Amendment, Congress exceeded its powers in enacting RFRA for the following reason: "Legislation which alters the meaning of the Free Exercise Clause cannot be said to be enforcing the Clause. Congress does not enforce a constitutional right by changing what the right is. It has been given the power 'to enforce,' not the power to determine what constitutes a constitutional violation."[82]

In the face of RFRA's defeat,[83] some states quickly passed their own legislation to ensure the continued protection of religious

78. 42 U.S.C. § 2000bb (1994).

79. *Id.*

80. There has been extensive debate, however, about RFRA and its effects. *See, e.g.*, Marci A. Hamilton, *The Case for Evidence-Based Free Exercise Accommodation: Why the Religious Freedom Restoration Act Is Bad Public Policy*, 9 HARV. L. & POL'Y REV. 129 (2015); Scott C. Idleman, *The Religious Freedom Restoration Act: Pushing the Limits of Legislative Power*, 73 TEX. L. REV. 247 (1994); Bryan A. Hum, *My Religion, My Rules: Examining the Impact of RFRA Laws on Individual Rights*, 79 ALB. L. REV. 621 (2015); Abbott Cooper, *Dam the RFRA at the Prison Gate: The Religious Freedom Restoration Act's Impact on Correctional Litigation*, 56 MONT. L. REV. 325 (1995).

81. City of Boerne v. Flores, 521 U.S. 507 (1997).

82. *Id.* at 519.

83. Although the Supreme Court found RFRA was unconstitutional as applied to states, it remains constitutional on the federal level. Therefore, in the prison context, RFRA only applies to federal prisons, not state or local jails.

freedom under strict scrutiny,[84] but Congress soon found a more lasting solution.[85]

On September 22, 2000, President Clinton signed the Religious Land Use and Institutionalized Persons Act (RLUIPA) into law.[86] Along with protecting religious institutions from burdensome or discriminatory land use and zoning regulations, Section 3 outlines the protections afforded to institutionalized persons. This section states:

> 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 interest; and (2) is the least restrictive means of furthering that compelling governmental interest.[87]

Therefore, RLUIPA essentially restored the strict scrutiny standard for prisoner religious freedom claims: government actors must clearly demonstrate both a compelling government interest and that there is no less restrictive way to satisfy that interest. However, it is important to note that "RLUIPA's enactment did not change the level of *constitutional* scrutiny to be used for inmate free exercise claims, [but rather] it created a statutory right that functionally abrogates *O'Lone v. Estate of Shabazz*."[88]

The joint statement of the bill's authors, Senators Orrin Hatch and Edward Kennedy, clarifies the logic behind RLUIPA and why they believe that strict scrutiny is necessary for prisoners' free exercise claims in particular:

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84. For some perspectives on the impact of state RFRAs, see W. Cole Durham, Jr., *State RFRAs and the Scope of Free Exercise Protection*, 32 U.C. DAVIS L. REV. 665 (1998); Mark Strasser, *Old Wine, Old Bottles, and Not Very New Corks: On State RFRAs and Free Exercise Jurisprudence*, 34 ST. LOUIS U. PUB. L. REV. 335 (2014); Christopher C. Lund, *Religious Liberty After* Gonzales*: A Look at State RFRAs*, 55 S.D. L. REV. 466 (2010); Robert M. O'Neil, *Religious Freedom and Nondiscrimination: State RFRA Laws Versus Civil Rights*, 32 U.C. DAVIS L. REV. 785 (1998).

85. *See* James D. Nelson, *Incarceration, Accommodation, and Strict Scrutiny*, 95 VA. L. REV. 2053, 2059 (2013).

86. 42 U.S.C. §§ 2000cc–2000cc-5.

87. *Id.* § 2000cc-1(a).

88. Michael Keegan, *The Supreme Court's "Prisoner Dilemma:" How* Johnson*, RLUIPA, and* Cutter *Re-Defined Inmate Constitutional Claims*, 86 NEB. L. REV. 279, 323–24 (2007).

> Far more than any other Americans, persons residing in institutions are subject to the authority of one or a few local officials. Institutional residents' right to practice their faith is at the mercy of those running the institution, and their experience is very mixed . . . . Whether from indifference, ignorance, bigotry, or lack of resources, some institutions restrict religious liberty in egregious and unnecessary ways.[89]

Additionally, the legislative history compiled by Congress demonstrated that "prison officials sometimes impose frivolous or arbitrary rules."[90] In the light of these challenges, "[t]he compelling interest test is a standard that responds to facts and context" to ensure that prisoners' rights are not egregiously or unnecessarily infringed.[91]

VI. RLUIPA APPLIED: THE IMPACT OF *CUTTER* AND *HOLT*

As with RFRA, RLUIPA's constitutionality was subsequently challenged.[92] In *Cutter*, several inmates from "nontraditional" religions, including Satanists, Wiccans, Asatruar, and Church of Jesus Christ Christians, brought a complaint alleging that Ohio prison officials violated RLUIPA by failing to accommodate their religious exercise in various ways.[93] In response, the prison officials argued that RLUIPA itself was unconstitutional because it

89. 146 CONG. REC. 16698, 16699 (2000) (joint statement of Senators Hatch and Kennedy).

90. *Id.* Congress cited several examples "such as Jewish prisoners denied matzo bread at Passover, prisoners denied the ability to wear small religious symbols such as crosses that posed no security risk, and a Catholic prisoner whose private confession to a priest was recorded by prison officials." U.S. DEP'T OF JUST., REPORT ON THE TWENTIETH ANNIVERSARY OF THE RELIGIOUS LAND USE AND INSTITUTIONALIZED PERSONS ACT 5, (2020) (citing H.R. Rep. 106-219, 9–10 (1999)).

91. 146 CONG. REC. at 16699.

92. RLUIPA had faced unsuccessful Establishment Clause challenges in the Fourth, Seventh, and Ninth Circuits previously, but only in the Sixth Circuit was the Act found to violate the Establishment Clause. *See* 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, 591–92 (2006).

93. Cutter v. Wilkinson, 544 U.S. 709, 712 (2005). The inmates alleged that prison officials had retaliated and discriminated against them by "denying them access to religious literature, denying them the same opportunities for group worship that are granted to adherents of mainstream religions, forbidding them to adhere to the dress and appearance mandates of their religions, withholding religious ceremonial items that are substantially identical to those that the adherents of mainstream religions are permitted, and failing to provide a chaplain trained in their faith." *Id.* at 713.

"improperly advance[d] religion in violation of the . . . Establishment Clause."[94] When the case came before the Supreme Court in 2005, the Supreme Court upheld RLUIPA, finding that it did not violate the Establishment Clause by impermissibly favoring religion.[95]

In a unanimous decision, Justice Ginsburg reasoned that RLUIPA is "compatible with the Establishment Clause because it alleviates exceptional government-created burdens on private religious exercise."[96] However, she also noted that while RLUIPA is meant to "protect[] institutionalized persons who are unable freely to attend to their religious needs,"[97] it should not be read "to elevate accommodation of religious observances over an institution's need to maintain order and safety."[98] The Court clarified that RLUIPA established a strict scrutiny standard, but one that should be applied with "due deference to the experience and expertise of prison and jail administrators."[99]

After *Cutter*, lower courts were split on exactly how much deference to afford prison officials.[100] It was not uncommon for different courts to come to different conclusions regarding the same prison regulation. For example, in *Warsoldier v. Woodford*, the U.S. Court of Appeals for the Ninth Circuit ruled in favor of a Native American inmate who challenged a prison regulation prohibiting hair longer than three inches.[101] The court acknowledged that security was a compelling interest in maintaining a hair grooming policy, but the prison had failed to demonstrate that the current policy was the least restrictive means of achieving that compelling interest.[102] The court clarified that this requires a demonstration

94. *Id.* at 713.

95. *Id.* at 720.

96. *Id.*

97. *Id.* at 721.

98. *Id.* at 722.

99. *Id.* at 717 (quoting 146 CONG. REC. 16698–99 (2000)) ("Congress carried over from RFRA the 'compelling governmental interest'/'least restrictive means' standard. Lawmakers anticipated, however, that courts entertaining complaints under § 3 would accord 'due deference to the experience and expertise of prison and jail administrators.'").

100. Some scholars criticized the Supreme Court's decision, arguing that it would result in "excessive litigation and unacceptable threats to important penological interests." *See* Johnson, *supra* note 92, at 587.

101. Warsoldier v. Woodford, 418 F.3d 989, 991 (9th Cir. 2005).

102. *Id.* at 998–1001.

that the prison "has actually considered and rejected the efficacy of less restrictive measures before adopting the challenged practice[,]" and furthermore, prison officials must do more than "present[] only conclusory statements."[103] The Ninth Circuit carefully scrutinized the prison officials' arguments and found that they had failed to explain why a religious exemption would not be feasible or why female inmates did not have the same grooming restrictions.[104]

Yet the U.S. Court of Appeals for the Sixth Circuit came to the opposite conclusion in a case regarding the same hair grooming regulation.[105] The district court granted a Native American inmate a temporary injunction that allowed him to maintain a "kouplock" (a two-inch-by-two-inch square section of hair at the base of his head that can be grown longer). But the Sixth Circuit reversed, holding that "[w]hile the district court is not required to blindly accept any policy justification offered by the state officials, the district court's analysis does not reflect the requisite deference to the expertise and experience of prison officials."[106] The district court had scrutinized the testimony of prison officials, noting that the warden did not produce any evidence demonstrating that previous regulations, which had allowed individualized exceptions in the past, had led to increased security threats.[107] The Sixth Circuit, however, citing *Cutter*'s due deference instruction, did not scrutinize the prison's policy, stating that "the testimony from [the prison officials] was sufficient to demonstrate that individualized exceptions did not sufficiently protect the state's interest in security and safety, particularly in light of the deference accorded to the judgment of prison officials."[108]

In 2015, the Supreme Court revisited RLUIPA in the seminal case *Holt v. Hobbs*.[109] Holt, a Muslim inmate, challenged an Arkansas Department of Correction grooming regulation that prohibited him from growing a half-inch beard according to his

103. *Id.* at 998–99.

104. *Id.* at 999–1000.

105. Hoevenaar v. Lazaroff, 422 F.3d 366, 367 (6th Cir. 2005) (Ohio's regulation also required hair to be no longer than three inches).

106. *Id.* at 371.

107. *Id.*

108. *Id.* at 371–72.

109. Holt v. Hobbs, 574 U.S. 352 (2015).

religious beliefs.[110] The state argued that the policy furthered prison security and safety for two reasons: it prevented prisoners from hiding contraband,[111] and it prevented them from disguising their identity.[112] The Court, however, concluded that the policy violated RLUIPA because the state's policy was not the least restrictive means of accomplishing those compelling interests.[113] First, regarding the contraband issue, the court indicated that the argument that a half-inch beard could hide any contraband was "hard to take seriously";[114] further, the state had not explained why they could not satisfy these security concerns through searches, as they did with hair and clothing.[115] Regarding the identification issue, the Court deemed it a valid concern but found that the problem could be easily solved by taking both a clean-shaven and a bearded photo of inmates.[116]

The Supreme Court's approach in *Holt* indicated that courts must take a hard look at the justifications set forth by prison administrators when a policy places a substantial burden on an inmate's free exercise of religion. Although applying strict scrutiny seemed to definitively answer the question regarding how much deference to afford prison officials, *Holt* did not explicitly overrule *Cutter*, neither did it clarify *Cutter*'s deferential language or attempt to reconcile the two seemingly contradictory approaches. The only clear instruction regarding deference was that RLUIPA "does not permit . . . unquestioning deference."[117]

Justice Sotomayor alone addressed the two cases in her concurrence, maintaining that "[n]othing in the Court's opinion calls into question our prior holding in *Cutter v. Wilkinson*."[118]

110. *Id.* at 355–56.

111. *Id.* at 363.

112. *Id.* at 365.

113. *Id.* at 363–67.

114. *Id.* at 363.

115. *Id.* at 365.

116. *Id.* at 367 ("We are unpersuaded by these arguments for at least two reasons. First, the Department failed to show, in the face of petitioner's evidence that its prison system is so different from the many institutions that allow facial hair that the dual-photo method cannot be employed at its institutions. Second, the Department failed to establish why the risk that a prisoner will shave a ½-inch beard to disguise himself is so great that ½-inch beards cannot be allowed, even though prisoners are allowed to grow mustaches, head hair, or ¼-inch beards for medical reasons.").

117. *Id.* at 364.

118. *Id.* at 370 (Sotomayor, J., concurring).

However, some scholars have argued that the heart of *Cutter*'s analysis focused on the constitutionality of RLUIPA, and therefore "its language regarding heightened deference towards prison officials was never intended to bind lower courts."[119] Others have reasoned that "[s]ince strict scrutiny and deference to the government are in a sense opposites, there [is] incoherence in the very notion of strict scrutiny with deference[,]" and therefore the deferential language in *Cutter* must be "sent to the dustbin of history."[120] Yet the Third, Fourth, Sixth, Ninth, and Eleventh Circuits have all cited *Cutter*'s due deference language in cases as recent as 2022.[121] Therefore, the fact remains that *Cutter*—although perhaps not as widely cited as it was before *Holt*—is still very much alive.

With both a historical background on religious freedom and minorities in prison and an understanding of current legislation and the problems posed by *Cutter* and *Holt*, the next Part will explore some current issues in prisoner free exercise claims—retaliation and equal treatment—in depth.

VII. FIRST AMENDMENT RETALIATION IN PRISON

The statutory basis of retaliation claims comes from the Civil Rights Act of 1871, which is codified as 42 U.S.C. § 1983. This Act was passed in the aftermath of the Civil War to provide an avenue for individuals to obtain federal relief for constitutional violations caused by state actors.[122] Although retaliation "is not expressly

119. Clinton Oxford, *Failing Native American Prisoners: RLUIPA & the Dilution of Strict Scrutiny*, 9 GEO. J. L. & MOD. CRITICAL RACE PERSP. 203, 211 (2017). *See also* David M. Shapiro, *Lenient in Theory, Dumb in Fact: Prison, Speech, and Scrutiny*, 84 Geo. Wash. L. Rev 972, 1024–25 (2016) ("*Holt* strongly suggests that courts should apply RLUIPA with far less deference than the dictum in *Cutter* had implied.").

120. David M. Shapiro, *To Seek a Newer World: Prisoners' Rights at the Frontier*, 114 MICH. L. REV. FIRST IMPRESSIONS 124, 126–27 (2016).

121. *See, e.g.*, Watson v. Christo, 837 F. App'x 877, 882 (3d Cir. 2020); Greenhill v. Clarke, 944 F.3d 243, 250 (4th Cir. 2019); Faver v. Clarke, 24 F.4th 954, 960 (4th Cir. 2022); Ackerman v. Washington, 16 F.4th 170, 179–80 (6th Cir. 2021); Jones v. Slade, 23 F.4th 1124, 1141 (9th Cir. 2022); Smith v. Owens, 13 F.4th 1319, 1329 (11th Cir. 2021).

122. The Civil Rights Act of 1871 was passed in response to "the failure of certain States to enforce the laws with an equal hand[,]" and is also sometimes referred to as the Ku Klux Klan Act. Monroe v. Pape, 365 U.S. 167, 174 (1961). The statutory text reads: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the

referred to in the Constitution, [it] is nonetheless actionable because retaliatory actions may tend to chill individuals' exercise of constitutional rights."[123] Courts have clarified that even "government actions, which standing alone do not violate the Constitution, may nonetheless be constitutional torts if motivated in substantial part by a desire to punish an individual for exercise of a constitutional right."[124]

Retaliation claims outside of the prison context require a fairly straightforward analysis. The individual bringing the claim must demonstrate three elements: (1) she "engaged in protected conduct" and (2) the defendant took some "adverse action" against her (3) because of that "protected conduct."[125] Several issues arise with this test in the prison context. First, courts are more skeptical of prisoner retaliation claims in general because, as the U.S. Court of Appeals for the Fourth Circuit has noted:

> Every act of discipline by prison officials is by definition "retaliatory" in the sense that it responds directly to prisoner misconduct. The prospect of endless claims of retaliation on the part of inmates would disrupt prison officials in the discharge of their most basic duties. Claims of retaliation must therefore be regarded with skepticism, lest federal courts embroil themselves in every disciplinary act that occurs in state penal institutions.[126]

United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress," 42 U.S.C. § 1983. § 1983 claims most commonly include allegations of First Amendment, *see, e.g.*, Garcetti v. Ceballos, 547 U.S. 410 (2006) (employee alleged retaliation in violation of right to free speech), Fourth Amendment, *see, e.g.*, Rivas-Villegas v. Cortesluna, 142 S. Ct. 4 (2021) (plaintiff alleged that a police officer used excessive force while arresting him, in violation of the Fourth Amendment), Eighth Amendment, *see, e.g.*, Colwell v. Bannister, 763 F.3d 1060 (9th Cir. 2014) (inmate brought a claim alleging inadequate medical care in violation of the Eighth Amendment), or Fourteenth Amendment violations, *see, e.g.*, Fitzgerald v. Barnstable Sch. Comm., 555 U.S. 246 (2009) (a student and her parents brought a claim against a school committee alleging inadequate response to sexual harassment in violation of the Equal Protection Clause).

123. Am. C.L. Union of Md., Inc. v. Wicomico Cnty., 999 F.2d 780, 785 (4th Cir. 1993) (citing Perry v. Sinderman, 408 U.S. 593, 597 (1972)).

124. Thaddeus-X v. Blatter, 175 F.3d 378, 386 (6th Cir. 1999).

125. *Id.* at 394.

126. Adams v. Rice, 40 F.3d 72, 74 (4th Cir. 1994); *see also* Woods v. Smith, 60 F.3d 1161, 1166 (5th Cir. 1995) ("To assure that prisoners do not inappropriately insulate themselves from disciplinary actions by drawing the shield of retaliation around them, trial courts must carefully scrutinize these claims.").

Therefore, what may be seen as "retaliation" to an inmate may be merely adherence to or enforcement of a legitimate regulation or standard prison practice.

Additionally, what would normally be considered protected conduct for a non-incarcerated plaintiff may not be considered protected conduct for an incarcerated plaintiff, given the necessary limitations on prisoners' constitutional rights while incarcerated.[127] As noted above, the need for disciplinary rules and regulations in prisons makes it harder to determine what constitutes an adverse action[128] and whether that action was motivated by the prisoner's exercise of a protected right or whether it was a justified response to the violation of some other prison regulation.[129]

Thus, the inherent nature of incarceration necessitates a different analysis for prisoner retaliation claims. In general, a prisoner bringing a § 1983 claim must still prove the same three elements required in a standard retaliation claim: (1) protected conduct, (2) adverse action, and (3) causation.[130] However, for prisoners, the analysis does not end there. Although the specific test varies by jurisdiction, most courts will also either require the plaintiff to show that the adverse action did not reasonably advance a legitimate penological goal,[131] or require prison officials to demonstrate that they "would have made the same decision absent the protected conduct for reasons reasonably related to a legitimate penological interest."[132]

127. Heard v. Strange, No. 2:21-cv-10237, 2022 WL 1164919, at *5 (E.D. Mich. Mar. 22, 2022) ("Generally, the freedoms to discuss religion with members of one's faith, pursue litigation, and even proselytize, are protected by the First Amendment. But prisoners do not enjoy the same protections as nonincarcerated individuals[,]" and therefore prison officials are granted a great degree of deference to impose restrictions on such religious practices when necessary to meet legitimate penological interests.).

128. *See, e.g.*, Washington v. Barnhart, Civil Action No. 3:17-cv-00070, 2021 U.S. Dist. LEXIS 93015, at *48–49 (W.D. Pa. May 14, 2021) (holding that being deprived of prison employment as a sports official and being assigned to other menial tasks did not constitute an adverse action).

129. *See, e.g.*, Runningbird v. Weber, 198 F. App'x 576 (8th Cir. 2006) (holding that there was no retaliation because the inmate was disciplined for possessing tobacco, a restricted item, in his cell, and not because of his religious conduct).

130. Watson v. Rozum, 834 F.3d 417, 422 (3d Cir. 2016) (citing Rauser v. Horn, 241 F.3d 330, 333–34 (3d Cir. 2001)).

131. Rhodes v. Robinson, 408 F.3d 559, 567–68 (9th Cir. 2005).

132. Watson, 834 F.3d at 422 (quoting Rauser, 241 F.3d at 334).

First Amendment retaliation claims brought by inmates, however, raise additional questions. These types of claims can entail allegations of retaliation because an inmate filed an internal prison grievance or a lawsuit,[133] or they could also deal with allegations of retaliation because of the inmate's religious beliefs or practices themselves.[134] It is well established that filing both internal prison grievances and filing lawsuits are protected conduct,[135] although there is some disagreement among lower courts as to whether threatening to initiate a lawsuit is also considered protected conduct under the First Amendment.[136]

When the claim involves allegations of retaliation because of an inmate's religious beliefs or practices, determining protected conduct becomes somewhat more difficult. Just as with other constitutional rights, an inmate's First Amendment rights may be limited in prison. Therefore, what would normally constitute protected conduct for a non-incarcerated individual may not

133. *See, e.g.*, Barnett v. Gipson, No. CV 20-409-PSG (KS) (C.D. Cal. July 28, 2021) (concerning inmate's allegation of retaliation after filing grievances related to a prison's new religious diet policy); Hageman v. Morrison Cnty., No. 19-cv-3019 (JRT/HB) (D. Minn. Feb. 1, 2022), *report and recommendation adopted*, No. CV 19-3019 (JRT/HB) (D. Minn. Mar. 28, 2022) (concerning inmate's claim of retaliation and mistreatment by prison officials because of a prior lawsuit he had filed).

134. *See, e.g.*, Heard v. Strange, No. 2:21-cv-10237 (E.D. Mich. Mar. 22, 2022) (inmate claimed that he was transferred from a privileged housing unit to a more dangerous unit because of his Islamic faith and in order to discourage his ongoing lawsuit), *report and recommendation adopted*, No. 21-10237 (E.D. Mich. Apr. 19, 2022), *and objections overruled*, No. 21-10237 (E.D. Mich. Apr. 29, 2022); Mease v. Washington, No. 2:20-cv-176 (W.D. Mich. May 13, 2021) (Muslim inmate alleged that he faced retaliation for refusing to break his Ramadan fast to take scabies medicine).

135. *See, e.g.*, Anderson v. Davila, 125 F.3d 148, 161 (3d Cir. 1997) (holding that filing a lawsuit is protected conduct); Herron v. Harrison, 203 F.3d 410, 415 (6th Cir. 2000) (holding that filing grievances against prison officials is protected conduct); Entler v. Gregoire, 872 F.3d 1031, 1039 (9th Cir. 2017) ("The most fundamental of the constitutional protections that prisoners retain are the First Amendment rights to file prison grievances and to pursue civil rights litigation in the courts . . . .").

136. For instances in which a threat to file a grievance or lawsuit has been found to be protected conduct, see *Entler*, 872 F.3d at 1041–43 ("[I]t is illogical to conclude that prison officials may punish a prisoner for *threatening* to sue when it would be unconstitutional to punish a prisoner for *actually* suing."); White v. McKay, Case No. 18-1473, 2019 WL 5420092 (6th Cir. June 27, 2019). *But see* Bridges v. Gilbert, 557 F.3d 541, 555 (7th Cir. 2009) ("[I]t seems implausible that a *threat* to file a grievance would itself constitute a First Amendment-protected grievance."); Ingram v. SCI Camp Hill, Civil No. 3:08-CV-0023, 2010 WL 4973302, at *15 (M.D. Pa. Dec. 1, 2010) ("Stating an intention to file a grievance is not a constitutionally protected activity."), *aff'd sub nom.* Ingram v. S.C.I. Camp Hill, 448 F. App'x 275 (3d Cir. 2011).

necessarily be protected conduct for an incarcerated individual.[137] Given that inmates' free exercise is limited in prison, courts must determine if a prison regulation exists that limits what would normally be protected conduct. In the absence of such a regulation, if the conduct would be considered protected under the First Amendment outside of the prison context, then it is assumed that the prisoner's conduct is protected as well.

However, one question that arises is whether the prison regulation itself—the one that limits an inmate's ability to engage in what would otherwise be considered protected conduct—must also undergo a constitutional evaluation. This step in the analysis essentially turns retaliation claims on their head. Normally, "First Amendment challenges [require] the Court [to] ask[] whether a 'policy' or 'action' is constitutional," whereas retaliation claims ask "whether the individual's conduct is protected."[138] In analyzing the prison policy in this way, the retaliation claim essentially becomes a typical First Amendment claim. While there is nothing inherently wrong with this, it does raise a question about the appropriate test or standard of scrutiny that should be used to determine protected conduct. Is this prison regulation to be analyzed under the *Turner/O'Lone* standard of reasonableness or under RLUIPA's strict scrutiny standard?

Consider the following hypothetical:[139] As part of his work assignment, a Muslim inmate is assigned to the prison kitchens where he is ordered to cook and handle pork. The inmate informs prison officials that handling pork is against his religious beliefs. Instead of accommodating the inmate, officials file a negative performance report, which impacts his ability to earn good points and other program benefits. Suppose that the prison has a policy that any inmate who refuses to comply with his or her work assignment will be given a negative performance report. Normally, an individual outside of prison would be free to decide to comply

137. *See Heard*, No. 2:21-cv-10237, slip op. at *14–15 ("The Court cannot conclude, in a vacuum, that a prisoner has a right under the First Amendment—while a right may be protected in one context, the same right may also be infringed upon in a different context.").

138. *Id.* at *14.

139. This hypothetical draws from some of the facts of a case that came before the Ninth Circuit in 2015. *See* Jones v. Williams, 791 F.3d 1023 (9th Cir. 2015). The Muslim inmate was assigned to work in the kitchen and handle pork, although in that case, the inmate alleged retaliation because he threatened to sue the prison officials, which was considered protected conduct by the court. *Id.* at 1028–29.

with her religious beliefs and there would be no issue of whether this decision was protected conduct or not. However, given the prison context, a court hearing this claim would have to analyze whether the prison regulation was constitutional or whether it unduly burdened free exercise.

Under RLUIPA, the court would consider whether the prison had a compelling interest and whether there was a less restrictive way to satisfy that interest. It is likely that whatever compelling interest the prison has in ensuring that prisoners comply with their work assignments, providing no exception or accommodation for individuals whose religious beliefs come into conflict with that work assignment is not the least restrictive way to satisfy that compelling interest.

The *Turner/O'Lone* standard, however, is much more deferential to prison officials. If prison officials can demonstrate that the regulation is reasonably related to a legitimate penological interest, the regulation will be upheld. If courts determine that the prison's policy of filing a negative performance report when inmates refuse to comply with work assignments is reasonably related to the prison's legitimate goal of maintaining order and security in the prison, then the prisoner's retaliation claim will fail. It is interesting, however, that a Free Exercise claim brought under RLUIPA regarding the very same set of circumstances would likely succeed.

This inconsistency has not been addressed by many courts, although a district court in Michigan recently addressed the difficulty in determining protected conduct in prison in *Heard v. Strange*.[140] In 2016, Lamont Heard, who was in the midst of litigation against a group of prison officials with two other inmates, was separated from his co-plaintiffs and transferred to a different prison unit.[141] Heard claimed that this transfer was "motivated by animus towards Heard's Islamic faith and a desire to quell Heard's litigation."[142] But the prison officials argued that the transfer was not motivated by any religious animus nor in retaliation for Heard's lawsuit.[143] Instead, prison officials decided to transfer him because they observed Heard talking to younger inmates about the

140. *Heard*, No. 2:21-cv-10237.

141. *Id.* at *2–3.

142. *Id.*at *1.

143. *Id.*

Nation of Islam and "were concerned that this might give Heard excessive influence over other prisoners, threatening prison safety and order."[144]

In evaluating these two competing narratives, the court addressed how to determine the protected conduct of prisoners. The court noted that "to determine whether a First Amendment activity is protected, the Court must weigh the prisoner's interest in an activity against some government action."[145] However, interestingly, the court explained that while that government action may be a pre-existing prison regulation, "a prisoner's First Amendment activity is not 'protected' simply because prison officials have not yet tried to restrict it through some formal policy."[146] But this statement goes against the established principle that "[t]here is no iron curtain . . . between the Constitution and the prisons of this country."[147] Both *O'Lone* and *Turner* reiterated that "[i]nmates clearly retain protections afforded by the First Amendment,"[148] and therefore in the absence of a valid prison regulation that limits those rights, prisoners enjoy the same First Amendment rights as citizens outside of prison.[149]

The district court ultimately utilized the *Turner* test to evaluate Heard's actions (both the defendants' claims that he was proselytizing and Heard's claims that he was practicing his religion and engaging in litigation) and found that even when viewing the facts in the light most favorable to the defendant, proselytizing was a protected conduct in prison because the prison did not demonstrate that it threatened prison security.[150]

Both the earlier hypothetical and this recent case illustrate that there are still many questions surrounding First Amendment retaliation claims and the applicable standard of scrutiny.

144. *Id.* at *1–2.

145. *Id.* at *15.

146. *Id.* at *16.

147. Wolff v. McDonnell, 418 U.S. 539, 555–56 (1974).

148. O'Lone v. Estate of Shabazz, 482 U.S. 342, 348 (1987).

149. *See* Pell v. Procunier, 417 U.S. 817, 822 (1974) ("[A] prison inmate retains those First Amendment rights that are not inconsistent with his status as a prisoner or with the legitimate penological objectives of the corrections system.").

150. *Heard*, No. 2:21-cv-10237 at *6–11 (denying Heard's motion for summary judgment, not on the grounds of a lack of protected conduct, but rather because there was a genuine dispute of fact regarding the second element required in retaliation claims: adverse action).

Although most inmates bringing First Amendment retaliation claims also bring claims under RLUIPA, the potential disconnect between the two claims should be explored further.

Although there are valid reasons to be skeptical of prisoner retaliation claims in general, there is no compelling state interest in retaliation itself. The history of retaliation against religious minorities in America's prisons suggests that the standard to evaluate retaliation claims must be stricter when dealing with allegations of religious retaliation.[151] Such an approach does more to protect religious minorities while still respecting the valid penological concerns of prison administrators. As the U.S. Court of Appeals for the District of Columbia Circuit has noted:

> To say that religious freedom may undergo modification in a prison environment is not to say that it can be suppressed or ignored without adequate reason. And although 'within the prison society as well as without, the practice of religious beliefs is subject to reasonable regulations, necessary for the protection and welfare of the community involved,' the mere fact that government, as a practical matter, stands a better chance of justifying a curtailment of fundamental liberties where prisoners are involved does not eliminate the need for reasons imperatively justifying the particular retraction of rights challenged at bar. Nor does it lessen governmental responsibility to reduce the resulting impact upon those rights to the fullest extent consistent with the justified objective.[152]

In conjunction with this issue, and to further support this argument, the following Part will analyze several recent cases dealing with the equal treatment of religious minorities. In doing so it will demonstrate both the necessity of strict scrutiny and the feasibility of such an approach in prisons.

151. Professor James Robertson makes the argument that allegations of retaliation as a result of filing a prison grievance should be treated differently because inmate grievants share many similarities with whistleblowers. He argues that any adverse changes to the inmate's condition of confinement that occurs within sixty days of filing the grievance should create a rebuttable presumption of retaliation. *See* James E. Robertson, "*One of the Dirty Secrets of American Corrections": Retaliation, Surplus Power, and Whistleblowing Inmates*, 42 U. MICH. J. L. REFORM 611 (2009).

152. Barnett v. Rodgers, 410 F.2d 995, 1000–01 (D.C. Cir. 1969) (first quoting Long v. Parker, 390 F.2d 816, 820 (3d Cir. 1968), then citing Price v. Johnston 334 U.S. 266, 285–86 (1948)).

VIII. EQUAL TREATMENT ISSUES IN PRISON

As briefly touched on above, many early prisoner free exercise cases dealt not just with inmates who faced a substantial burden on their religion, but also with equal treatment issues, where inmates belonging to a religious minority were denied the opportunity to practice their religion while inmates of other religious faiths were allowed to do so.[153] Prison officials have long been used to accommodating Christian inmates, but such accommodations have not always been offered to inmates of other faiths—for various reasons, including limited resources, budget concerns, or simply the practical challenges of prison administration.

Although the state of religious freedom in prison has largely improved since those early cases, equal protection issues still frequently arise in the prison context. Common issues include failure to provide inmates with the opportunity or the space to hold worship services,[154] prohibitions on religious materials,[155] denying access to clergy,[156] failure to provide food consistent with religious diets,[157] and discriminatory dress and grooming regulations,[158] among other issues. The reality is that "[w]hile language explicitly denying religious accommodation to one group such as Muslims and accommodating others such as Christians has arguably been

153. *See, e.g.*, Cruz v. Beto, 405 U.S. 319 (1972) (per curiam); *In re* Ferguson, 361 P.2d 417, 420 (Cal. 1961).

154. *See, e.g.*, Williams v. Conway, No. 19-cv-03988, 2020 WL 5593233, *1–2 (N.D. Cal. 2020) (alleging that the prison had refused to give a Muslim inmate adequate space to conduct prayer services, while other religions were allowed to use the chapel every week).

155. *See, e.g.*, McFaul v. Valenzuela, 684 F.3d 564, 568–69 (5th Cir. 2012) (alleging free exercise, equal protection, and RLUIPA violations because prison officials would not let an inmate buy religious medallions needed for his Celtic Druid ceremonies, although inmates in other prison units were allowed to purchase such religious medallions).

156. *See, e.g.*, Hartmann v. Cal. Dep't of Corr. and Rehab., 707 F.3d 1114, 1119 (9th Cir. 2013) (alleging discrimination because the prison hired chaplains of five other denominations but refused to hire a Wiccan chaplain).

157. *See, e.g.*, Patel v. U.S. Bureau of Prisons, 515 F.3d 807, 810–12 (8th Cir. 2008) (alleging that the prison had violated a Muslim inmate's equal protection and free exercise rights for failing to provide halal meals while kosher meals were provided to Jewish inmates); Ephraim v. Angelone, 313 F. Supp. 2d 569, 571 (E.D. Va. 2003), *aff'd without opinion*, 68 F. App'x 460 (4th Cir. 2003) (alleging First Amendment and equal protection violations when an inmate belonging to the Charismatic Christian religion requested a vegetarian diet).

158. *See, e.g.*, United States *ex rel.* Goings v. Aaron, 350 F. Supp. 1, 5 (D. Minn. 1972) (claiming that a prison grooming regulation was discriminatory because the regulations permitted Afro hairstyles and mustaches but gave no specific religious exception for Native Americans).

eliminated from prison policies, the elimination of all prejudice and enforcement of equal protection for minority religious groups continues to be a problem."[159]

It is foreseeable that regarding any of these issues, an inmate would bring a First Amendment or RLUIPA claim, just on the basis that their free exercise has been unconstitutionally burdened. However, in some cases, equal protection issues arise as well as free exercise issues. Consider the following case that came before the Third Circuit in 2004.

DeHart was a Buddhist inmate at a state correctional facility in Pennsylvania who brought a claim under § 1983 alleging Free Exercise and Equal Protection rights violations, as well as an RLUIPA claim.[160] DeHart alleged that prison administrators refused to provide him with a vegetarian diet that was consistent with his Buddhist beliefs, but provided a kosher diet to Jewish inmates.[161] The Third Circuit noted that for Equal Protection claims, as with Free Exercise claims, the *Turner* test applies.[162] Because DeHart's dietary request imposed a significantly higher burden on the prison than the Jewish dietary requests, there was no Equal Protection Clause violation.[163]

This case demonstrates there is a slight difference in the question asked when applying *Turner* to each of these respective claims. For Free Exercise claims, courts use the *Turner/O'Lone* test to ask whether the prison regulation that limits an inmate's free exercise is reasonably related to a legitimate penological goal. With Equal Protection claims, however, courts will look at whether the prison regulation that discriminates against a certain religious group or in some way leads to a difference in treatment between

159. Sarah E. Vallely, Comment, *Criminals Are All the Same: Why Courts Need to Hold Prison Officials Accountable for Religious Discrimination Under the Religious Land Use and Institutionalized Persons Act*, 30 HAMLINE L. REV. 191, 196 (2007).

160. DeHart v. Horn, 390 F.3d 262, 264 (3d Cir. 2004).

161. *Id.* at 265.

162. *Id.* at 272.

163. *Id.* at 270 ("DeHart's diet would require individualized preparation of his meals, which is made more burdensome by the fact that the Prison's kitchen was set up only for bulk food preparation. Additionally, it would require special ordering soy milk, whole grain bread and extra servings of the few alternative protein sources DeHart would eat, all at extra cost to the Prison. . . . In contrast, the District Court found that the religious diets provided to Jewish and Muslim inmates did not require special ordering of items not already available at the Prison or through the Prison's current vendors, nor did they require individualized preparation of meals." (citation omitted)).

religious groups is reasonably related to a legitimate penological goal. "Thus the focus of an equal protection *Turner* claim is not the treatment per se, but the difference in treatment."[164]

Recently, the Supreme Court has addressed the difference in treatment of inmates on death row who requested the presence of a spiritual advisor in the execution room. In 2019, the Supreme Court ruled on two cases that came before it on the Court's emergency, or "shadow," docket. Both cases concerned death row inmates—one Muslim and one Buddhist—who were denied their requests to have their respective spiritual advisors' presence in the execution chamber. Although the two cases dealt with very similar prison policies, each had a different outcome.

The first case, *Dunn v. Ray*, concerned Ray—a Muslim inmate on Alabama's death row.[165] Alabama's prison had a policy that did not allow any clergy inside the execution chamber other than the prison's chaplain, who was Christian.[166] Shortly before his scheduled execution date, Ray met with the prison warden, who explained the prison's policy regarding chaplains. A few days later, Ray brought a claim alleging violations of his rights under RLUIPA and the Establishment Clause of the First Amendment.[167] The Eleventh Circuit issued a stay of execution, holding that there was likely an Establishment Clause violation since "Alabama's policy facially furthers a denominational preference."[168] However, on appeal, the Supreme Court vacated the stay, given the "last-minute nature" of the claim.[169]

The second case, *Murphy v. Collier*, was decided a little over a month later.[170] In a very similar set of facts, Murphy, a Buddhist inmate at a Texas correctional facility, requested a Buddhist spiritual advisor to be present in the execution chamber during his upcoming execution. The prison's policy allowed Christian and Muslim inmates to have a state-employed chaplain in the execution

164. Benjamin Pi-wei Liu, Comment, *A Prisoner's Right to Religious Diet Beyond the Free Exercise Clause*, 51 UCLA L. REV. 1151, 1176 (2004).

165. Dunn v. Ray, 139 S. Ct. 661 (2019) (mem.).

166. *Id.* at 661; *see also* Ray v. Comm'r, Ala. Dep't of Corr., 915 F.3d 689, 692–93 (11th Cir. 2019).

167. *Ray*, 915 F.3d at 693.

168. *Id.* at 697.

169. *Dunn*, 139 S. Ct. at 661 (quoting Gomez v. U.S. Dist. Ct. for N. Dist. of Cal., 503 U.S. 653, 654 (1992) ("A court may consider the last-minute nature of an application to stay an execution in deciding whether to grant equitable relief.").

170. Murphy v. Collier, 139 S. Ct. 1475 (2019).

chamber but did not allow Buddhist inmates (or those belonging to other religious denominations) to have a religious advisor in the execution chamber.[171]

The Supreme Court ultimately granted Murphy's application for a stay of execution, and, in his concurring opinion, Justice Kavanaugh clarified some of the Court's reasoning.[172] He explained that Texas's policy violated the Constitutional prohibition on "denominational discrimination," and the State would have to remedy the equal treatment issue by either allowing inmates of all denominations to have a religious advisor of their choice in the execution room, or have a standard policy that only allow religious advisors in the waiting room, regardless of the inmate's religion.[173] He emphasized that "[w]hat the State may not do . . . is allow Christian or Muslim inmates but not Buddhist inmates to have a religious adviser of their religion in the execution room."[174]

Justice Kavanaugh also responded to the dissent's comparison of this case to *Dunn v. Ray*. In his view, the distinguishing factor between the two cases was the nature of the claim being brought.[175] Ray did not bring an equal treatment claim, he only brought claims under RLUIPA and the Establishment Clause, and therefore, the U.S. Court of Appeals for the Eleventh Circuit was wrong to grant the stay of execution on an Equal Protection Clause basis.[176] Kavanaugh also explained that the timing of the request also influenced the difference in outcome.

Interestingly, Kavanaugh noted that "States . . . have a strong interest in tightly controlled access to an execution room in order to ensure that the execution occurs without any complications, distractions, or disruptions."[177] He opined that for this reason, "an inmate likely cannot prevail on a RLUIPA or free exercise claim to have a religious minister in the execution room."[178] However, a year later, the Court granted a stay of execution for an Alabama

171. *Id.* at 1475 (Kavanaugh, J., concurring).
172. *Id.*
173. *Id.*
174. *Id.* at 1476.
175. *Id.* at 1476–77
176. *Id.*
177. *Id.*
178. *Id.*

death row inmate who brought a claim under RLUIPA after he was denied access to clergy in the execution chamber.[179]

To provide some context for this decision, after *Ray* and *Murphy* were decided, both Alabama and Texas changed their prison policies to prohibit clergy from being present in the execution room altogether. In *Dunn v. Smith*, after an inmate subsequently challenged Alabama's new policy, the Supreme Court held that "Alabama's policy substantially burden[ed] Smith's exercise of religion" because the prison had not met the "exceptionally demanding" burden of showing that the policy was "necessary to ensure prison security."[180]

In the aftermath of *Dunn*, Texas again changed its policy to allow clergy to be present in the execution room; however, one correctional facility instituted a new policy that prohibited them from speaking aloud or touching the inmate.[181] That policy was soon challenged by an inmate facing execution who wanted his Christian pastor to lay hands on him and pray audibly over him in the execution chamber.[182] The Supreme Court granted certiorari to consider whether Ramirez, who sought a preliminary injunction ordering Texas to permit his religious exercise,[183] was likely to succeed on his RLUIPA claim. After determining that Ramirez had exhausted all available remedies,[184] and that his requests were based on a sincere religious belief,[185] the Court addressed the prison's compelling interest arguments, as required by RLUIPA.[186]

179. Dunn v. Smith, 141 S. Ct. 725 (2021) (mem.). *See also* Gutierrez v. Saenz, 141 S. Ct. 127 (2020) (mem.).

180. *Dunn*, 141 S. Ct. at 725–26 ("Prison security is, of course, a compelling state interest. But past practice, in Alabama and elsewhere, shows that a prison may ensure security without barring all clergy members from the execution chamber. Until two years ago, Alabama required the presence of a prison chaplain at an inmate's side. . . . Nowhere, as far as I can tell, has the presence of a clergy member (whether state-appointed or independent) disturbed an execution.").

181. Ramirez v. Collier, 142 S. Ct. 1264, 1274 (2022).

182. *Id.*

183. *Id.* at 1272.

184. Exhaustion of all available remedies is required under the Prison Litigation Reform Act of 1995 (PLRA). 42 U.S.C. § 1997e(a).

185. *Ramirez,* 142 S. Ct. at 1277 (Having a pastor lay hands on and pray over someone "are traditional forms of religious exercise. . . . Ramirez's grievance states, 'it is part of my faith to have my spiritual advisor lay hands on me anytime I am sick or dying.'" Further, Ramirez's pastor "agrees that prayer accompanied by touch is 'a significant part of [their] faith tradition as Baptists.'").

186. *Id.* at 1278.

Regarding the ban on audible prayer, prison officials cited the following compelling penological interests: first, absolute silence is necessary in the execution chamber so that prison officials can monitor the inmate's condition through a microphone suspended in the room; and second, prison officials must prevent disruptions and maintain solemnity and decorum in the execution chamber—something that might be jeopardized if the pastor chooses to make a statement to the witnesses or officials present.[187] Regarding the ban on religious touch, prison officials cited the following reasons: "[maintaining] security in the execution chamber,[188] preventing unnecessary suffering,[189] and avoiding further emotional trauma to the victim's family members."[190]

Although the Court recognized all of the prison's proffered reasons as compelling and important state interests, the Court ultimately held that Ramirez was likely to prevail on the merits of his RLUIPA claim.[191] The Court's reasoning in *Ramirez*, as with *Holt*, demonstrated a hard look approach to strict scrutiny. Primarily because Texas had previously allowed audible prayer and touch in the execution room,[192] the Court stated that the prison officials had not given sufficient reasons explaining why departure from that precedent was now necessary to further compelling state interests. Neither had they demonstrated that a categorical ban was the least restrictive means to handle their interest in preventing disruptions, maintaining safety and security during the procedure, or monitoring the inmate's condition. In fact, the Court proposed

187. *Id.* at 1279–80.

188. *Id.* at 1280 ("[Prison officials] say that allowing a spiritual advisor to touch an inmate would place the advisor in harm's way because the inmate might escape his restraints, smuggle in a weapon, or become violent. They also contend that if a spiritual advisor were close enough to touch an inmate, he might tamper with the prisoner's restraints or yank out an IV line." (citation omitted)).

189. *Id.* at 1281 ("The theory is that [a pastor] might accidentally jostle, pinch, or otherwise interfere with an IV line, and that this in turn might affect the administration of the execution drugs in a way that results in greater pain or suffering.").

190. *Id.* ("[A]llowing certain forms of religious touch might further traumatize a victim's family members who are present as witnesses, reminding them that their loved one received no such solace.").

191. *Id.* at 1284.

192. The Court noted that not only had Texas "long allowed prison chaplains to pray with inmates in the execution chamber[,]" but "there is [also] a rich [national] history of clerical prayer at the time of a prisoner's execution, dating back well before the founding of our Nation." *Id.* at 1278–79.

several other measures that could be implemented that would adequately address the prison's concerns while still allowing the inmate to exercise his religion.[193] The Court noted that prison officials were offering only conclusory statements and "ask[ing] that we simply defer to their determination," but "[t]hat is not enough under RLUIPA."[194]

Ramirez demonstrates that a hard look approach to strict scrutiny can protect the religious freedom of inmates without compromising compelling penological interests such as security, safety, or order. Even in a highly sensitive and unpredictable environment like the execution chamber, where prison officials have an extremely compelling interest in maintaining order, safety, and security, careful scrutiny is feasible. Such an approach holds prison officials to a higher degree of accountability, ensuring that when a prison policy or regulation exists that burdens an inmate's religious freedom, it truly is a necessary and unavoidable intrusion on their rights. This ultimately benefits individuals of all religious denominations, but especially religious minorities, who have experienced a history of religious discrimination and unequal treatment in prison, and who still face significant and disproportionate burdens on their free exercise today.[195]

Although a strict scrutiny approach may seem at odds with the interests of prison officials, this is not entirely true. Often, the rationales behind many of the regulations that limit inmates'

193. For example, regarding the prison's interest in having complete silence and maintaining security in the execution chamber, the Court noted that "there appear to be less restrictive ways to handle any concerns. Prison officials could impose reasonable restrictions on audible prayer in the execution chamber—such as limiting the volume of any prayer so that medical officials can monitor an inmate's condition, requiring silence during critical points in the execution process (including when an execution warrant is read or officials must communicate with one another), allowing a spiritual advisor to speak only with the inmate, and subjecting advisors to immediate removal for failure to comply with any rule. Prison officials could also require spiritual advisors to sign penalty-backed pledges agreeing to abide by all such limitations." *Id.* at 1280.

194. *Id.* at 1279.

195. One scholar notes, however, that the Supreme Court's reliance on history in *Ramirez* may have a negative effect for religious minorities. *See, Leading Cases*, *Religious Land Use and Institutionalized Persons Act – Religious Liberty – Death Penalty* – Ramirez v. Collier, 136 HARV. L. REV. 470, 470 ("[T]he Court's use of history in its strict scrutiny analysis incorporated an atextual inquiry that both diverges from RLUIPA jurisprudence and threatens to skew RLUIPA toward mainstream religions, undermining its neutrality. While the outcome expands religious exercise for condemned persons, the Court's overreliance on history could result in asymmetric outcomes for litigants.").

religious freedom are the prison administrator's interest in maintaining security, safety, and order in prisons. But another consideration for prison administrators is the effect that providing equal treatment can have on those compelling penological interests. One scholar noted: "Creating conditions of fair treatment and equal opportunities is paramount in prisons, not just to bring [prison officials] in line with equality legislation, but also as a safeguarding priority for the offenders themselves. . . . [P]erceptions of fairness have demonstrable effects on order and well-being."[196] Further, by providing religious accommodations and ensuring equal treatment of minorities, prison officials will be more likely to avoid time-consuming and costly litigation. The Court acknowledged some of these considerations in *Ramirez*. Justice Kavanaugh noted in his concurring opinion that states wishing "to avoid persistent future litigation and the accompanying delays" should "try to accommodate an inmate's timely and reasonable requests [for religious accommodation]."[197]

It seems, then, if equal treatment and opportunities are provided to inmates, this can contribute to greater order, better inmate well-being, less litigation, and increased safety and security in general. This does not mean that every request for religious accommodation must be granted, but it does mean that prison officials should carefully scrutinize their policies, considering both the effect they may have on religious exercise and the feasibility of granting religious accommodations when conflicts between compelling penological interests and an inmate's religious practices arise. Both prison officials *and* courts must support the legislature's efforts "to reconcile, in an honest and public way, the competing interests of the individual and the community," when dealing with religious freedom issues that arise in the prison context.[198]

196. Katie Hunt, *Non-Religious Prisoners' Unequal Access to Pastoral Care*, 18 INT'L J. L. IN CONTEXT, 116, 117 (2022).

197. *Ramirez*, 142 S. Ct. 1264, 1289 (2022) (Kavanaugh, J., concurring).

198. Solove, *supra* note 9, at 490.

CONCLUSION

When trying to pass RFRA, Senator Orrin Hatch stated: "We want religion in the prisons."[199] Although a laudable statement, it is arguably misleading. Religion has always existed in prisons. Even the briefest glance at this country's history reveals that Christianity had a strong and well-protected presence in early-American prisons. Religious freedom, on the other hand, has not always existed in America's prisons. What many do not understand is that religion and religious freedom are not interchangeable terms. Just because religion exists in prison life does not mean that religious freedom does. Therefore, a more fitting statement would be: "We want *religious freedom* in the prisons."

Although many individuals are afforded the freedom to exercise their religion in prison, many others are not. While some may be complacent with the fact that most mainstream religions are afforded free exercise in prisons, those with a more thorough understanding of religious freedom know that merely providing protection for the majority is not enough. James Madison recognized this when considering the dangers posed by granting government favor to one religious sect. He said, "Who does not see that the same authority which can establish Christianity, in exclusion of all other Religions, may establish with the same ease any particular sect of Christians, in exclusion of all other Sects?"[200] Therefore a threat to one religious denomination can easily be transferred to another denomination or to all religions in general if protections are not in place for religious freedom. Religious freedom ultimately protects everyone—believers and nonbelievers alike—when it protects the rights of the minority.

Although the realities of prison life raise complex issues regarding the free exercise of religion, key court decisions and legislation like RFRA and RLUIPA have established that religious freedom should not be suppressed or infringed without compelling and reasonable justification from prison officials. The history of religious freedom in America's prisons, however, demonstrates that the level of judicial scrutiny applied to free exercise cases has been quite variable. Even with RLUIPA's strict scrutiny mandate, courts remain confused regarding the amount of deference that

199. *Id.* at 459 (quoting 139 CONG. REC. S14,367 (daily ed. Oct. 26, 1993)).

200. Madison, *supra* note 12, at 6.

should be afforded to prison officials, and in practice, remnants of a deferential approach remain among lower courts. This is troubling because such practices weaken the protections provided by RLUIPA's strict scrutiny standard.

Additionally, because the status of religious freedom in prisons has fluctuated over the years, there are still many unsettled questions that must be addressed in the future, both regarding the level of deference in RLUIPA claims, but also regarding other issues such as retaliation and equal treatment. Reflecting on the history of religious freedom in prisons and current issues that still arise for religious minorities, it is clear that a true hard look approach to strict scrutiny can resolve some of those issues while still addressing important penological concerns. *Holt* and *Ramirez* have demonstrated that a hard look strict scrutiny standard is feasible. Even in the most intense and precarious of situations—such as the execution of a death row inmate, where security, safety, and order are of utmost importance—strict scrutiny has proven to be a workable standard.

Such an approach acknowledges the central role that religious freedom plays in protecting human dignity. Professor Eiichiro Takahata has stated that "every person has a right to behave as a human, be treated as a human, and think as a human."[201] Part of what makes us human is our ability to seek out religious meaning and purpose in our lives. Although prisoners are by necessity denied many basic constitutional rights, to also deny them of religious expression and community is to deny them an important part of their human dignity. In his concurring opinion in *Procunier v. Martinez*, Justice Marshall stated:

> When the prison gates slam behind an inmate, he does not lose his human quality; his mind does not become closed to ideas; his intellect does not cease to feed on a free and open interchange of opinions; his yearning for self-respect does not end; nor is his quest for self-realization concluded. . . . It is the role of the First Amendment and this Court to protect those precious personal rights by which we satisfy such basic yearnings of the human spirit.[202]

201. BRETT G. SCHARFFS, JÁN FIGEL & JANE H. WISE, POINTS OF LIGHT: THE PUNTA DEL ESTE DECLARATION ON HUMAN DIGNITY FOR EVERYONE EVERYWHERE 107 (2021).

202. Procunier v. Martinez, 416 U.S. 396, 428 (1974) (Marshall, J., concurring).

Understanding this core principle of human dignity as well as the importance of safeguarding religious freedom for all individuals—whether mainstream or marginalized—must therefore be the guiding light behind any discussions surrounding religious freedom in prisons. Only with this perspective can courts, prison administrators, and scholars resolve the complexities of free exercise litigation.

While deference to prison officials may be the easier choice in many situations, a hard look analysis does more to balance the competing interests at play—both respecting the human dignity of the inmate and protecting the prison's compelling interest in security and safety. Although deference has a time and place, its place is not with strict scrutiny. RLUIPA requires courts to uphold strict scrutiny not only in theory, but also in practice.