Prisoner Claims for Religious Freedom and State RFRAs

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INTRODUCTION

On September 28, 1998, California Governor Pete Wilson vetoed his state's Religious Freedom Restoration Act ("RFRA") legislation, justifying his decision in part on the basis that prisoners were included in the new legislation's protections. He complained that the legislation would effectively overturn the United States Supreme Court decisions in *Turner v. Safley*[1] and *O'Lone v. Estate of Shabazz*,[2] both of which permitted only minimal free exercise protection to prisoners. One of RFRA's major critics, he argues that there should not be an across-the-board standard. He maintains that RFRA is "an ill-conceived measure to cure an unidentified problem."[3] This Article attempts to demonstrate otherwise on prisoner issues.

A major issue regarding the adoption of state RFRAs is whether such legislation should provide broad and universal protection or whether full religious free exercise protection should be granted and withheld on a selective basis. Prisoners are prime candidates for exclusion from such protection. But if religious freedom means anything, it cannot be parceled out to those favored while denied to those unpopular. Since RFRA represents a legislative approach to free exercise, rather than protection guaranteed by constitutional mandate, future legislatures can easily use a prisoner exemption as a precedent to withhold protection from other groups that from time to time become political whipping posts.

This Article examines the law and the facts in relation to the substance and volume of prisoner religious freedom protection. It argues that prisoners are legitimate and important candidates for state RFRA protection, and shows that claims that state RFRA protection of prisoners is either unnecessary or unduly burdensome are without merit. Part I gives an overview of the evolution of the legal standard applied to prisoner claims for religious freedom. Part II argues that the "least restrictive means" prong of the compelling state interest test should be applied to prisoners. Part III examines the question of the sincerity of prisoner religious claims. Finally, Part IV refutes the claim that extending state RFRA protec-

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[1] 482 U.S. 78 (1987).

[2] 482 U.S. 342 (1987).

[3] Marci A. Hamilton, *The Constitution's Pragmatic Balance of Power Between Church and State*, 2 NEXUS 33, 41 (Fall 1997).

tion to prisoners would result in a flood of prisoner religious freedom claims.

I. DEBATE OVER PRISONER FREE EXERCISE CLAIMS

Lack of concern for prisoners' religious rights finds expression in political debates, legislative halls, and even in courts. Ongoing arguments abound as to the appropriate standard to apply and how to balance the conflicting interests.

A. Background to Prisoner Civil Rights Claims

Barnette v. Rogers,[4] a case involving a prisoners' appeal filed by members of the Black Muslim faith illustrates the conflict within the courts. The Muslim faith proscribes consumption of swine. In *Barnette* the basic issue was whether the District of Columbia jail authorities were constitutionally compelled to accommodate Muslim prisoners' dietary laws. The prisoners alleged that jail authorities denied their request to "be fed, at least, one full-course pork-free diet once a day."[5] The district court dismissed the complaint saying the inmates were fed a "well balanced and wholesome diet," and that "by refraining from eating those things that they considered objectionable,"[6] the Muslim prisoners could still practice their religion.

Reversing the trial court, the court of appeals applied the Supreme Court's decision in *Sherbert*. *Sherbert*, later overturned, permitted government to abridge religious freedom only if it established a compelling interest and that the method implemented was the least restrictive alternative.[7] The *Barnette* court criticized the lack of lower court findings on what particular government interest was at stake when the state denied plaintiffs their religious diet, and it noted that the state had not attempted to find a less restrictive way of dealing with the governmental concern. The court also pointed out that:

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[4] 410 F.2d 995 (D.C. Cir. 1969).

[5] *Id.* at 997.

[6] *Id.* at 999.

[7] *See id.* at 1000 (noting one must demonstrate state interest and that no other alternative is adequate).

> Appellants do not seek, either for themselves or other Muslims, a full menu tailored especially to their religious beliefs. Their request . . . is essentially a plea for a modest degree of official deference to their religious obligations. Certainly if this concession is feasible from the standpoint of prison management, it represents the bare minimum that jail authorities, without specific requests, are constitutionally required to do, not only for Muslims but indeed for any group of inmates with religious restrictions on diet.[8]

But one on the panel found nothing wrong with the trial court's lack of scrutiny, stating that to agree to the plaintiffs' demands would be to discriminate against other, nonreligious prisoners. He stated that:

> The record before us establishes that on a budget of ninety cents a day per prisoner the jail authorities attempt to serve a balanced diet to all prisoners without any preferential treatment of any group on religious or other grounds. . . . I fear that my learned brethren of the majority are in this case pursuing an abstract constitutional issue for its own sake and are creating an opus monstrous of ends without means. If the ultimate outcome of these proceedings is to be judicial supervision of penal institutions in such minute detail as to encompass even the selection and makeup of daily menus and direction of the service of coffee three times a day (as appellants demand) all bottomed upon the theory that there is a religious freedom involved, the court having opened the Pandora's Box must not hereafter complain about hornets.[9]

We doubt those forced to compromise their religious beliefs or go without an "adequate" ninety cent per day food ration would agree that the constitutional issue was abstract. The concurring judge found no problem with the substantial reduction of the minimal prison fare for individuals holding strong religious beliefs concerning diet because the prison diet policy was neutral and of general applicability.[10] After all, he reasoned, the prisoners were all

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[8] *Id.* at 1001.

[9] *Id.* at 1003-04 (Tamm, J., concurring only in the result).

[10] *See id.* at 1004 (requiring that prison authorities provide balanced diet to all religious prisoners without any preferential treatment).

treated equally and to accommodate the dietary needs of certain prisoners must be seen as a preference. This analysis is identical to that of *Employment Division v. Smith*,[11] which abandoned *Sherbert*'s compelling interest standard.

While *Barnette* represented free exercise progress, cases earlier this century displayed a judiciary that generally turned a blind eye to prisoners' constitutional lawsuits. As stated in *Adams v. Ellis*,[12] "it is not the function of the Courts to superintend the treatment and discipline of prisoners in penitentiaries, but only to deliver from imprisonment those who are illegally confined."[13] Another example of judicial lack of concern for prisoners' constitutional claims is *Kelly v. Dowd*.[14] There the Seventh Circuit said that because the prisoner was incarcerated in a state prison, the reasonableness of the warden's refusal to provide religious materials may be determined only by state courts.[15]

In 1968, the Supreme Court provided a somewhat more enlightened view of prisoners' constitutional complaints. In *Lee v. Washington*,[16] the Court addressed the practice of prisoner racial segregation which the state of Alabama justified as necessary to maintain good order and discipline. But the Supreme Court found the practice to be constitutionally prohibited.[17]

The following year in *Johnson v. Avery*,[18] a state prisoner filed a "motion for law books and a typewriter," which the Court treated as an application for a writ of habeas corpus.[19] The district court granted the writ and the state appealed, but the court of appeals reversed.[20] At issue in *Johnson* was a state prison regulation barring inmates from assisting other prisoners in preparation of petitions for postconviction relief. The Supreme Court held that this prison regulation was invalid because it was in conflict with the federal right of habeas corpus.[21] The state argued that the contested regu-

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[11] 494 U.S. 872 (1990).

[12] 197 F.2d 483 (5th Cir. 1952).

[13] *Id.* at 485.

[14] 140 F.2d 81 (7th Cir. 1944).

[15] *See id.* at 83.

[16] 390 U.S. 333 (1968) (per curiam).

[17] *See id.* at 333-34 (affirming unconstitutionality of Alabama statute requiring segregation of prisons).

[18] 393 U.S. 483 (1969).

[19] *See id.* at 487 (explaining that Tennessee regulation governing habeus petitions unconstitutionally prevented illiterate or poorly educated prisoners from filing).

[20] *See* Johnson v. Avery, 382 F.2d 353 (6th Cir. 1967), *rev'd*, 393 U.S. 483 (1969).

[21] *See Johnson*, 393 U.S. at 486-87 (explaining that state may not abridge or impair pris-

lation was justified as part of the state's disciplinary administration of the prisoners.[22] The Supreme Court noted that discipline and administration of state detention facilities are state functions, but concluded "where state regulations applicable to inmates of prison facilities conflict with . . . [federal constitutional or statutory] rights, the regulations may be invalidated."[23]

B. The Modern Era of Prisoner Religious Freedom Claims

Again, the conflict within the judiciary as to whether prisoners' religious rights should be given more than token recognition surfaced in the Supreme Court's 1972 decision in *Cruz v. Beto*.[24] That case involved a Buddhist incarcerated in a Texas state prison. Cruz alleged that prisoners who were members of other religions were allowed to use the prison chapel, but he was not. He further complained that when he shared his Buddhist religious material with other prisoners, the prison authorities retaliated and placed him in solitary confinement with a diet of bread and water. He also said prison officials prohibited him from corresponding with his religious advisor.

The *Cruz* complaint alleged that Texas encouraged inmates to participate in religious programs and provided, at state expense, chaplains of the Catholic, Jewish, and Protestant faiths. The state also provided weekly Sunday school classes and religious services. Cruz further claimed that copies of Jewish and Christian books were provided at state expense.

The defendant denied the allegations, then moved to dismiss. The federal district court denied relief without a hearing or any findings, saying the complaint was in an area that should be left "to the sound discretion of prison administrators."[25] It went on to say that "valid disciplinarian security reasons not known to this court may prevent the 'equality' of exercise of religious practices in prison."[26] The court of appeals affirmed.[27]

In a per curiam opinion, the Supreme Court vacated and re-

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oner's right to petition for writ of habeus corpus).

[22] *See id.* at 486.

[23] *Id.*

[24] 405 U.S. 319 (1972).

[25] *Id.* at 321.

[26] *Id.*

[27] *See* Cruz v. Beto, 445 F.2d 801 (5th Cir.), *vacated*, 405 U.S. 319 (1971) (per curiam).

manded, stating:

> Federal courts sit not to supervise prisons but to enforce the constitutional rights of all "persons," including prisoners. We are not unmindful that prison officials must be accorded latitude in the administration of prison affairs, and that prisoners necessarily are subject to appropriate rules and regulations. But persons in prison, like other individuals, have the right to petition the Government for redress of grievances, which, of course, includes "access of prisoners to the courts for the purpose of presenting their complaints."[28]

The Court concluded:

> If Cruz was a Buddhist and if he was denied a reasonable opportunity of pursuing his faith comparable to the opportunity afforded fellow prisoners who adhered to conventional religious precepts, then there was palpable discrimination by the State against the Buddhist religion, established 600 B.C., long before the Christian era. The First Amendment, applicable to the states by reason of the Fourteenth Amendment, prohibits government from making a law "prohibiting the free exercise [of religion]." If the allegations of this complaint are assumed to be true, as they must be on the motion to dismiss, Texas has violated the First and Fourteenth Amendments.[29]

This may have been the high watermark for the protection of prisoner religious liberty. Even so, when the Supreme Court reversed the case, then Justice Rehnquist dissented, saying he was not persuaded petitioner's complaint stated a claim under the First Amendment.[30] In a somewhat revealing commentary, he rated prisoner religious freedom rights within the hierarchy of protected rights, stating:

> [T]his Court has recognized that the "equal protection of the laws" guaranteed by the Fourteenth Amendment is not to be applied in a precisely equivalent away in the multitudinous fact

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[28] *Cruz*, 405 U.S. at 321 (per curiam).
[29] *Id.* at 322 (citation omitted).
[30] *See id.* at 323.

> situations that may confront the courts. On the one hand, we have held that racial classifications are "invidious" and "suspect." I think it quite consistent with the intent of the framers of the Fourteenth Amendment, ***many of whom would doubtless be surprised to know that convicts come within its ambit, to treat prisoner claims*** at the other end of the spectrum from claims of racial discrimination. Absent a complaint alleging facts showing that the difference in treatment between petitioner and his fellow Buddhists and practitioners of other denominations with more numerous adherents could not reasonably be justified under any rational hypothesis, I would leave the matter in the hands of the prison officials.[31]

Two years later, in *Procunier v. Martinez*,[32] the Court followed the majority's lead in *Cruz*, holding that "[w]hen a prison regulation or practice offends a fundamental constitutional guarantee, federal courts will discharge their duty to protect constitutional rights."[33] However, at the same time, the Court recognized that "courts are ill equipped to deal with increasingly urgent problems of prison administration and reform."[34]

With *Cruz* as a starting point, courts exhibited progressively greater sensitivity to religious rights of prisoners during the 1970s. In *Kahane v. Carlson*,[35] the Second Circuit dealt with a prisoner's claim brought by an Orthodox Jewish rabbi who contended his free exercise rights were infringed because the prison failed to provide Kosher food.[36] Unlike *Barnette*, the court held that prison officials must provide a prisoner a diet that is consistent with his religious scruples.[37] The court, in an insightful opinion, stated:

> [P]rison authorities are proscribed by the constitutional status of religious freedom from managing the institution in a manner which unnecessarily prevents Kahane's observance of his dietary obligations. The difficulties for the prisons inherent in this rule would seem surmountable in view of the small number of practising [sic] orthodox Jews in federal prisons (which the evidence

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[31] *Id.* at 325-26 (emphasis added).
[32] 416 U.S. 396 (1974).
[33] *Id.* at 405-06.
[34] *Id.* at 405.
[35] 527 F.2d 492 (2d Cir. 1975).
[36] *See id.* at 493.
[37] *See id.* at 496.

> indicated would not exceed approximately twelve), and in view of the fact that the state and city prisons provide kosher food, that federal institutions do so on high holiday and that medical diets are not unknown in the federal system.[38]

This progress, however, abruptly reversed course following two Supreme Court decisions. In 1990, the Supreme Court in *Smith* overruled its earlier *Sherbert* decision, abandoning the compelling state interest/least restrictive alternative test. And in 1997s *City of Boerne v. Flores*,[39] the Supreme Court invalidated the Federal RFRA, which Congress enacted to legislatively restore *Sherbert*'s religious protection standard. Consequently, we find ourselves back where we were in the 1960s. In Governor Wilson's veto message, citing *City of Boerne*,[40] Wilson embraced the dubious claim that the Federal RFRA requirement that laws be the "least restrictive means" of furthering a compelling interest adds "a requirement that was not used in the pre-*Employment Divisions v. Smith* jurisprudence that RFRA purports to codify."[41]

Since the California State RFRA bill tracked the language of the federal law, Governor Wilson argued that "this bill goes beyond the constitutional protection for religion that its supporters believe they are restoring."[42] Wilson then argued against adopting into state law the least restrictive means requirement, stating:

> By invalidating any facially neutral law or regulation which substantially burdens a person's exercise of religion unless the government demonstrates that the law or regulation is the least restrictive means of furthering a compelling governmental interest, correction officials can and will be sued over a variety of facially neutral laws and regulations by prisoners who claim that alcohol, a specific diet, sacred knives, conjugal visits, and satanic bibles are all part of their free exercise of religion.[43]

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[38] *Id.* at 495-96.

[39] 521 U.S. 507 (1997).

[40] *See* Governor's Veto Message for Assembly Bill No. 1617 (Sept. 28, 1998), 1997-98 Reg. Sess., 8 ASSEMBLY J. 9647, 9649 (Cal. 1998) (also available at <http://www.leginfo.ca.gov/pub/97-98/bill/asm/ab_16011650/ab_1617_vt_19980928.html>) [hereinafter *Governor's Veto Message*] (citing *City of Boerne*, 521 U.S. at 535).

[41] *Id.*

[42] *Id.*

[43] *Id.*

Governor Wilson's veto message, of course, encapsulates the basic argument of those attempting to excise prisoners' religious rights from any state RFRA legislation. This argument, upon close analysis, is specious in many respects. It is true, *City of Boerne* does say: "In addition, the Act imposes in every case a least restrictive means requirement — a requirement that was not used in the pre-*Smith* jurisprudence RFRA purported to codify — which also indicates that the legislation is broader than is appropriate if the goal is to prevent and remedy constitutional violations."[44]

But, this is simply not true. The Court essentially articulated the least restrictive means analysis[45] in *Braunfeld v. Brown*,[46] when it stated:

> [T]o hold unassailable all legislation regulating conduct which imposes solely an indirect burden on the observance of religion would be a gross oversimplification. If the purpose or effect of a law is to impede the observance of one or all religions or is to discriminate invidiously between religions, the law is constitutionally invalid even though the burden may be characterized as being only indirect. But if the State regulates conduct by enacting a general law within its power, the purpose and effect of which is to advance the State's secular goals, the statute is valid despite its indirect burden on religious observance *unless the State may accomplish its purpose by means which do not impose such a burden.*[47]

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[44] *City of Boerne*, 521 U.S. at 535.

[45] Earlier in the seminal case of *West Virginia Board of Education v. Barnette*, 319 U.S. 624 (1943), Justice Black in his concurrence suggested the embryonic free exercise/compelling state interest part of what was later to be employed as the free exercise test as set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963). Justice Black stated:

> No well-ordered society can leave to individuals an absolute right to make final decisions, unassailable by the State, as to everything they will or will not do. The First Amendment does not go so far. Religious faiths, honestly held, do not free individuals from responsibilities to conduct themselves obediently to laws which are either *imperatively necessary to protect society as a whole from grave and pressing imminent dangers* or which, without any general prohibition, merely regulate time, place or manner of religious activity. *Decisions as to the constitutionality of particular laws which strike at the substance of religious tenets and practices must be made by this Court.*

Barnette, 319 U.S. at 643-44 (Black, J., concurring) (emphasis added).

[46] 366 U.S. 599 (1961). *Braunfeld* is a pre-*Sherbert* case. *See id.*

[47] *Id.* at 607 (emphasis added).

Then, in *Sherbert v. Verner*,[48] the Court stated that the State must "demonstrate that no alternative forms of regulation would [accomplish the State's interests] without infringing First Amendment rights."[49] Likewise, in *Thomas v. Review Board*,[50] the Court stated:

> The mere fact that the petitioner's religious practice is burdened by a governmental program does not mean that an exemption accommodating his practice must be granted. The state may justify an inroad on religious liberty by ***showing that it is the least restrictive means of achieving some compelling state interest.*** However, it is still true that "[t]he essence of all that has been said and written on the subject is that only those interests of the highest order . . . can overbalance legitimate claims to the free exercise of religion."[51]

II. PRISON AUTHORITIES SHOULD BE REQUIRED TO DEMONSTRATE THE ABSENCE OF ANY LESS BURDENSOME MEANS OF SERVING COMPELLING PENOLOGICAL INTERESTS

A. The Current Standard

Governor Wilson, like other anti-RFRA voices, argues that "the 'least restrictive means' requirement would open the door for constitutional challenges by prisoners to laws and regulations, which challenges are currently denied under the Supreme Court's decision in *Turner v. Safley*."[52] In *Turner*, the Supreme Court addressed the constitutionality of Missouri prison regulations concerning prisoner to prisoner correspondence and inmate marriage.[53] The Court, in refusing to apply a strict scrutiny standard of review, articulated the appropriate test: "[W]hen a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests."[54] One factor to consider is the availability of plausible alternatives. In so considering, the *Turner* Court maintains that the absence of ready alternatives is evidence of a prison regulation's reasonableness,

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[48] 374 U.S. 398 (1963).

[49] *Id.* at 407.

[50] 450 U.S. 707 (1981).

[51] *Id.* at 718 (alteration in original) (emphasis added) (citing *Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972)).

[52] *Governor's Veto Message*, *supra* note 40, at 9649 (citation omitted).

[53] *See* Turner v. Safley, 482 U.S. 78 (1987).

[54] *Id.* at 89.

while the existence of an obvious easy alternative is evidence the regulation is not reasonable. The Court then declares, however, that "this is not a 'least restrictive alternative' test: prison officials do not have to set up and then shoot down every conceivable alternative method of accommodating the claimant's constitutional complaint."[55]

Thus, as indicated above, while the *Sherbert* test required the government to show a compelling state interest when a law, regulation, or governmental act burdened an individual's beliefs or practices, the 1987 decision in *Turner* eliminated the government's responsibility of demonstrating that prison regulations burdening a prisoner's religious beliefs were the least restrictive means of serving its legitimate penological interests.

However, the critical question is whether any statutory mandate that requires government authorities to actively seek the least restrictive means for meeting the state's legitimate penological concerns should exclude those prisoners claiming an abridgment of their religious free exercise rights. To be sure, the unique requirements of prisons may certainly reduce the available possibilities of less burdensome means of satisfying legitimate regulatory requirements. Thus, prison authorities clearly may find it easier to demonstrate a compelling justification for its burdensome regulation.

But in the adoption of state RFRA legislation, the question must be whether the compelling state interest/least restrictive alternative test would not still provide the proper balance between legitimate prison concerns and free exercise protections for prison inmates. *Turner* contends there are legitimate reasons why prison authorities should be held to a lesser standard while other governmental agencies are required to bear the twin burdens of demonstrating both a compelling governmental interest and the absence of any less restrictive means of satisfying important governmental concerns.

Turner certainly is, and will no doubt remain, the law unless state legislatures enact RFRAs that employ a compelling state interest/least restrictive alternative test. The fact is, though, that a bare majority of the Supreme Court reached the legal standard for prisoners' constitutional rights embraced in *Turner*. Four justices would not have lowered the standard of free exercise protection as

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[55] *Id.* at 90-91.

to prison regulations that burden fundamental rights of religious freedom.[56] These four justices rejected the idea that all a prison warden need demonstrate is that his or her regulations are reasonably related to a legitimate penological objective.

B. Why Prisoners Deserve Protection from Government Abridgment of Religious Free Exercise

Religious free exercise protections may be more important for prisoners than for any other segment of society, except for possibly those serving in the armed forces. Government imposed burdens on religion will occur more often and in greater degree for those subject to twenty-four hour control by prison authorities than in any other segment of our society. In penal institutions, the state controls dress, diet, grooming, work schedule, communication, available print material, and similar day to day conduct. Most others in society escape such all-demanding controls.

An opinion more sensitive to these realities and providing a reasonable response to free exercise concerns is found in an en banc decision, *Shabazz v. O'Lone*,[57] by the Third Circuit preceding *Turner*. That decision was prompted by an earlier Third Circuit decision, *St. Claire v. Cuyler*.[58] In *St. Claire*, the court dealt with an action brought by a man belonging to the Nation of Islam. Because a nontraditional religion was involved, of course, there was less inducement to accommodate. Part of St. Claire's suit involved his religion's mandate requiring attendance as often as possible, but at least once a month, at a Friday congregational prayer service known as Jumu'ah.

Deciding whether it was appropriate to employ the least restrictive alternative requirement in balancing the state's and prisoner's legitimate interests, the Third Circuit responded negatively, stating:

> The deferential review required by the Supreme Court's decision leaves no room for a requirement that prison officials choose the least restrictive regulation consistent with prison discipline. . . .
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[56] *See id.* at 100.

[57] 782 F.2d 416 (3d Cir. 1986) (en banc).

[58] 634 F.2d 109 (3d Cir. 1980).

> . . . We therefore conclude that the state needs only to produce evidence that to permit the exercise of first amendment rights would create a potential danger to institutional security.[59]

No burden was imposed by the court on the prison officials to demonstrate there were no less restrictive means to provide for the appropriate security.

Subsequently, in *Shabazz v. O'Lone*, the Third Circuit (en banc) rejected the *St. Claire* standard. Like *St. Claire*, *O'Lone* involved Jumu'ah services. The district court and the Third Circuit panel in *O'Lone* embraced the language and holding of *St. Claire* that a mere declaration by prison officials that certain religious practices raise potential security concerns is sufficient to override a prisoner's First Amendment right to attend the central religious service of his or her faith. Judge Adams, writing for the full bench and rejecting the district court's analysis, stated:

> The flaw in the *St. Claire* standard is well illustrated by the facts presented in this case. The prison officials here do not claim that attendance at Jumu'ah is an inherently dangerous practice. . . . Rather, defendants merely assert that security problems caused by overcrowding and understaffing necessitated the policy changes that outlawed attendance at Jumu'ah for nearly all but the maximum security prisoners. Yet, under *St. Claire*, the state was under no burden to establish that such security concerns were genuine and were based upon more than speculation.
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> . . . We conclude . . . that the *St. Claire* standard, which did not require any inquiry into the feasibility of accommodating prisoners' religious practices, provides inadequate protection for their free exercise rights and therefore must be modified. Accordingly, we hold that upon remand, the state must show that the challenged regulations were intended to serve, and do serve, the important penological goal of security, and that no reasonable methods existed by which appellants' religious rights can be accommodated without creating bona fide security problems.[60]

The warden filed a petition for writ of certiorari to the U.S. Su-

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[59] *Id.* at 114.

[60] *O'Lone*, 782 F.2d at 419-20.

preme Court, which decided *O'Lone* a few days after *Turner v. Safley*. The majority in *O'Lone v. Estate of Shabazz*[61] applied the *Turner* analysis to this free exercise-based case with the same five-to-four split. The Court held: "We think the court of appeals decision in this case was wrong when it established a separate burden on prison officials to prove 'that no reasonable method exists by which [prisoners'] religious rights can be accommodated without creating bona fide security problems.'"[62]

A dissenting Justice Brennan, joined by Justices Marshall, Blackmun, and Stevens, declared that the religious ceremony that the plaintiff's sought to attend was not presumptively dangerous, and the prison had completely foreclosed respondents' participation in it. They would have "require[d] prison officials to demonstrate that the restrictions they imposed were necessary to further an important governmental interest, and that these restrictions are no greater than necessary to achieve prison objectives."[63]

In a notably articulate and impassioned defense of prisoner rights, Justice Brennan rejected the politically popular practice of dismissing the idea of providing rights to prisoners. He wrote:

> Prisoners are persons who most of us would rather not think about. Banished from everyday sight, they exist in a shadow world that only dimly enters our awareness. They are members of a "total institution" that controls their daily existence in a way that few of us can imagine:
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> > "[P]rison is a complex of physical arrangements and of measures, all wholly governmental, all wholly performed by agents of government, which determine the total existence of certain human beings (except perhaps in the realm of the spirit, and inevitably there as well) from sundown to sundown, sleeping, waking, speaking, silent, working, playing, viewing, eating, voiding, reading, alone with others. It is not so with members of the general adult population. . . ."[64]

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[61] 482 U.S. 342 (1987).

[62] *Id.* at 350.

[63] *Id.* at 354 (Brennan, J., dissenting).

[64] *Id.* at 354-55 (Brennan, J., dissenting) (quoting *Morales v. Schmidt*, 340 F. Supp. 544, 550 (W.D. Wis. 1972)) (alteration in original).

> It is thus easy to think of prisoners as members of a separate netherworld, driven by its own demands, ordered by its own customs, ruled by those whose claim to power rests on raw necessity. Nothing can change the fact, however, that the society that these prisoners inhabit is our own. Prisons may exist on the margins of that society, but no act of will can sever them from the body politic. When prisoners emerge from the shadows to press a constitutional claim, they invoke no alien set of principles drawn from a distant culture. Rather, they speak the language of the charter upon which all of us rely to hold official power accountable. They ask us to acknowledge that power exercised in the shadows must be restrained at least as diligently as power that acts in the sunlight.[65]

Zeroing in on the specific religious practice which the prison denied, the dissent pointed out the disregard that is peculiarly experienced by minority religions in prison. It said:

> Jumu'ah therefore cannot be regarded as one of several essentially fungible religious practices. The ability to engage in other religious activities cannot obscure the fact that the denial at issue in this case is absolute: respondents are completely foreclosed from participating in the core ceremony that reflects their membership in a particular religious community. If a Catholic prisoner were prevented from attending Mass on Sunday, few would regard that deprivation as anything but absolute, even if the prisoner were afforded other opportunities to pray, to discuss the Catholic faith with others, and even to avoid eating meat on Friday if that were a preference.[66]

The *O'Lone* dissent noted that the "Federal Bureau of Prisons regulations require the adjustment of work assignments to permit inmate participation in various ceremonies absent a threat to 'security, safety and good order.'"[67] Also, the chaplain director of the Bureau specifically noted the Bureau policy of providing for the observance of Jumu'ah by all inmates in the general population who wish to observe their faith.[68] The dissent then stated:

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[65] *Id.* (Brennan, J., dissenting).
[66] *Id.* at 360 (Brennan, J., dissenting).
[67] *Id.* at 361 (Brennan, J., dissenting) (quoting 28 C.F.R. § 548.17 (1998)).
[68] *See id.* at 362 (Brennan, J. dissenting).

> That Muslim inmates are able to participate in Jumu'ah throughout the entire federal prison system suggests that the practice is, under normal circumstances, compatible with the demands of prison administration. Indeed, the Leesburg State Prison permitted participation in this ceremony for five years, and experienced no threats to security or safety as a result. In light of both standard federal prison practice and Leesburg's own past practice, a reasonableness test in this case demands at least minimal substantiation by prison officials that alternatives that would permit participation in Jumu'ah are infeasible. [69]

We believe in actual practice that it would not be particularly burdensome to require the prison system to demonstrate that no less restrictive alternatives are available. Types of accommodations required in a prison setting are similar to those set forth in Governor Wilson's veto message. They include: accommodating those whose religious beliefs include religiously imposed diet, religious requirements as to the cutting or shaving of one's beard, the wearing of religious symbols, the attendance at religious services, and the study of religious material. Consideration should be given to how other penal institutions deal with these same problems. Since the practices tend to repeat themselves in prisons, a single careful study may well provide a reservoir of responses to repeated claims for such accommodation needs.

It may be helpful to note that the majority of employers, both private and governmental, are required by Title VII of the Civil Rights Act of 1964, as amended, to accommodate the religious beliefs and practices of their employees. Under 42 U.S.C. § 2000e(j), an employer must accommodate the religious needs of its employees unless the employer can demonstrate that all reasonable existing alternatives would result in undue hardship.

In the same way private employers' accommodation of employees and prospective employees is given due deference by the courts, so should the reasonable alternative requirements of RFRA be given due deference in light of the unique penological concerns of prison. But just because a prison system has unique interests and concerns for the protection of society does not excuse the state from providing the maximum degree of religious freedom for inmates consistent with the legitimate penological concerns of the

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[69] *Id.* at 362-63 (Brennan, J. dissenting).

prison.

We suggest that as the interest of the state served by a state regulation becomes more compelling, the quantity of effort in finding a less restrictive alternative decreases accordingly. This is akin to the position taken by some courts in Title VII religious accommodation cases which hold that "[a]s the degree of business hardship increases, the quantity of conduct which will satisfy the reasonable accommodation decreases."[70]

In prison cases under a state RFRA, the prison authorities should be required to prove the magnitude, as well as the fact, of a legitimate penological concern. In Title VII religious accommodation law, "[t]he magnitude as well as the fact of hardship must be determined by the examination of the facts of each case."[71]

Governor Wilson's veto message complains that prisoners can and will sue correctional officials over facially neutral laws and regulations concerning various items such as diet.[72] But prison officials have been sued in the past, and should be sued in the future, if such officials deny prisoners any reasonable accommodation for their religious beliefs, such as their dietary needs.

Many state and federal prison authorities have implemented dietary programs to accommodate the religious beliefs and practices of their inmates. For example, in March of 1988, the Federal Bureau of Prisons implemented a dietary program to accommodate the religious beliefs and practices of committed offenders. This program is generally referred to as the "common fare menu" program. The federal program requires that all of the food served on the common fare menu be kosher. The menu is made available to both Jews and Muslims and any other prisoner that elects it for religious reasons.

But even with the Bureau of Prisons policy in force, almost all of the federal prisons have flagrantly violated the federal common fare requirement. As noted by Rabbi Menachemm Katz, prison visitation coordinator for the Aleph Institute, "there is no facility in which common-fare is 100% Kosher besides Otisville, New York."[73] According to Rabbi Katz:

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[70] Claybaugh v. Pacific N.W. Bell Tel. Co., 355 F. Supp. 1, 6 (D. Or. 1973).

[71] Tooley v. Martin-Marietta Corp., 648 F.2d 1239, 1243 (9th Cir.), *cert. denied*, 454 U.S. 1098 (1981).

[72] *See Governor's Veto Message*, *supra* note 40, at 9649.

[73] *Memo Re: Common Program B.O.P.*, (Rosh Chodesh Iyar 57 5757) (on file with author).

> Many facilities will refuse to give an inmate common-fare and threaten to move the inmate if he complains. The ones that reluctantly provide common-fare never follow the national guidelines. They are commonly running out of foods needed for common-fare. They begin to substitute peanut butter for protein, etc. The frozen meals which are supposed to be provided three times a week are frequently spoiled.[74]

Rabbi Katz pointed out that whereas those prisoners eating from the mainline are given a balanced diet, those electing to eat from the common-fare menu are relegated to eating "tomato, cottage cheese and bread."[75] But according to Rabbi Katz:

> The worst thing is that the [Bureau of Prisons] has an unwritten rule to discourage as many people as possible from being on common-fare. Many food service administrators have told Jewish inmates that they will make it so hard that they will beg to get off common-fare. Unfortunately, they have been very successful and most Jews in federal prison today choose to eat non-Kosher rather than starve and be fed like an animal.[76]

This intolerant attitude toward a prisoner's religiously imposed diet cannot and should not escape judicial action. As a matter of fact, even after the Supreme Court's decision in *Smith*, the Second Circuit in *Bass v. Coughlin*,[77] pointed out that even after *O'Lone* and *Turner* the federal courts still can and should require prisons to provide certain religious accommodations. In that case, the court stated:

> At least as early as 1975, it was established that prison officials must provide a prisoner a diet that is consistent with his religious scruples. *Kahane* has never been overruled and remains the law. The principle it established was not placed in any reasonable doubt by intervening Supreme Court rulings in *O'Lone v. Estate of Shabazz* and *Turner v. Safley*, that prison officials need meet less exacting standards when a prisoner's interest in marrying, or attending religious ceremonies, or maintaining the length of his

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[74] *Id.*
[75] *Id.*
[76] *Id.*
[77] 976 F.2d 98 (2d Cir. 1992) (per curiam), *aff'g* 800 F. Supp. 1066 (N.D.N.Y. 1991).

> hair is to be balanced against interests of rehabilitation and prison security.[78]

Even though the Second Circuit, after *Smith*, stated that neither *O'Lone* nor *Turner* excused "prison officials . . . [from] meet[ing] less exacting standards when a prisoner's interest in . . . maintaining the length of his hair is to be balanced against interests of rehabilitation and prison security,"[79] the New York State Department of Correctional Services ("DOCS") nevertheless reimposed its "no-beard" policy on the strength of *Turner*. This is revealed in an exchange of correspondence between David Zwiebel of Agudath Israel of America and the governor's office.

On July 13, 1998, Mr. Zwiebel wrote to the secretary to the governor noting that in New York a RFRA-type bill, although having quickly passed through the Assembly, died in the Senate.[80] He observed that while the Federal RFRA legislation was in place, the state established a policy allowing an exemption to accommodate the religious requirements of inmates having religious convictions prohibiting them from shaving their beards.[81] However, after RFRA was declared unconstitutional, the state reverted to its former policy of not allowing a religious exemption from its general no-beard rule.

In the letter from the governor's office, the governor noted that:

> Other prison systems have varying policies with regard to inmate grooming standards — ranging from no standards at all to total prohibitions on facial hair. I've requested DOCS to continue to analyze those other systems to determine whether any changes could or should be made to our current policy based on experiences and other systems.[82]

Clearly this is an example where a prison system should accommodate the religious needs of its prisoners if a less burdensome alternative can be employed in a manner that would not pose a

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[78] *Bass*, 976 F.2d at 99 (citations omitted).

[79] *Id.*

[80] *See* Letter from David Zwiebel, Agudath Israel of America, to Pete Wilson, Governor of California 1 (July 13, 1998) (on file with author).

[81] *See id.*

[82] Letter from Pete Wilson, Governor of California, to David Zwiebel, Agudath Israel of America 1 (Sept. 24, 1998) (on file with author).

genuine security risk in the prison setting.[83] However, if, or when, those in prison management fail even to explore in good faith a means to accommodate these legitimate and serious religious concerns, only the judiciary can bring balance. The proposed state RFRA legislation provides a means that would require the courts to take into consideration the unique problems and concerns of prisons.[84] To require the prison system to explore alternative means of providing religious accommodations (such as investigating how other prison systems have provided religious accommodation) would not impose an undue burden on the state.

III. SINCERITY AND LEGITIMACY OF PRISONER RELIGIOUS FREE EXERCISE CLAIMS

The Wilson veto message also expresses concern about bizarre or sham claims by a criminal defendant such as those that would "seek to justify domestic violence based upon a purported religious belief that wives should be submissive to their husbands."[85] Clearly, the compelling state interest/least restrictive alternative requirements of proposed state RFRA legislation would provide no defense for such an offender.

Of course, whether or not state RFRA legislation is enacted, there will always be lawsuits filed by prisoners whether the standard to be employed by the court is the compelling state interest/least

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[83] We do not necessarily advocate the following proposition. But when dealing with prisoner claims, the courts could apply a state RFRA's compelling state interest/least restrictive alternative requirement by interpreting that provision of RFRA which requires finding a "substantial burden" to "a person's exercise of religion" to require the court to find whether or not the prison regulation presents a "substantial and realistic threat" to the individual's religious convictions. As Professor Kent Greenawalt noted, Justice Brennan in *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439 (1988) (Brennan, J., dissenting), stated that when adherents challenge a proposed use of federal land, they should be required to show "that the . . . decision poses a substantial and realistic threat of undermining or frustrating their religious practices." Kent Greenawalt, *Judicial Resolution of Issues About Religious Conviction*, 81 MARQ. L. REV. 461, 469 (1998).

[84] In adopting a state RFRA, the legislative history might contain language similar to that used by the Senate Committee on the Judiciary when the Religious Freedom Restoration Act was enacted so as to assuage concerns expressed by some senators concerning how the law would impact on the prison system. *See* 139 CONG. REC. 14,468 (1993). The committee included language indicating the law was not designed to place undue burdens on prison authorities. *See* S. REP. NO. 103-111, at 9 (1993). Further, it stated that although a prison regulation could not be bound upon speculation, exaggerated fears or post-hoc rationalization, courts must continue to give due deference to the experience and expertise of correctional officers in establishing regulation designed to maintain security and discipline, consistent with a consideration for the limited resources available. *See id.* at 8.

[85] *Governor's Veto Message*, *supra* note 40, at 9649.

restrictive alternative test or the "reasonably related to legitimate penological" test set forth in *Turner* and *O'Lone*.

Arguments have been made that prisoners using religion as a sham will clog the courts and overburden the prison system.[86] Of course, however, "only beliefs rooted in religions are protected by the Free Exercise Clause."[87] As *United States v. Seeger*[88] makes abundantly clear, "while the 'truth' of a belief is not open to question, there remains the significant question . . . of sincerity which must be resolved in every case."[89] Further, as the Court noted in *Thomas v. Review Board*, the courts have recognized that "an asserted claim [may be] so bizarre, so clearly nonreligious in motivation, as not to be entitled to protection under the Free Exercise Clause."[90]

IV. VOLUME OF PRISONER RELIGIOUS FREEDOM CLAIMS[91]

One concern is the potential increase in prisoner religious freedom claims, and the attendant burden on state correctional and legal resources, that a state RFRA may generate.[92] Speculation is not necessary on this question, as the experience and data from the period during which the Federal Religious Freedom Restoration Act was operational is available for review. State RFRAs would generally create no further opportunities for prisoner suits beyond those found under the Federal RFRA during its period of operation. A review of the statistics during that period indicates that while there may be some marginal increase of prisoner litigation under a state RFRA, the increase will be very small in real numbers. Further, what increase there may be will have minimal impact against the larger background of shifts in prisoner litigation

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[86] *See* 139 CONG. REC. 14,468 (noting concerns of some judicial and prison officials that RFRA will result in increased litigation).

[87] Thomas v. Review Bd., 450 U.S. 707, 713 (1981).

[88] 380 U.S. 163 (1964).

[89] *Id.* at 185.

[90] *Thomas*, 450 U.S. at 715.

[91] Special thanks for assistance in gathering some of the data for this Part goes to Justice Fellowship and its able staff members Kevin W. Sanner and Dimitri Kesari.

[92] Florida Assistant Attorney General Cecilia Bradley, in a letter of May 20, 1997, complained that "since RFRA, the number of claimed religions have risen greatly. . . . This increase has placed a tremendous burden on both the chaplains and the security staff." *But cf.* Letter from Wallace H. Cheney, Assistant Director of the Federal Bureau of Prisons, on behalf of the U.S. Justice Department, to Rev. Oliver Thomas, Esq. (Nov. 6, 1998) (on file with author) (stating that "although compliance with the additional requirements of RFRA certainly places limited additional administrative requirements on Bureau of Prisons staff, these burdens have been manageable. . . . The Bureau of Prisons will continue to support the mandates of the Religious Freedom Restoration Act.").

generally.

To examine the effect of the Federal RFRA on prisoner litigation, statistics from the period beginning in 1989 and ending in 1998 were examined. The crucial dates during this time are November 16, 1993, when the Federal RFRA was passed, and June 28, 1997, when it was struck down. The time period for the analysis was set prior to 1993 to help set a baseline and take into account any larger trends in prisoner litigation. The statistics were taken from a number of sources, including the Lexis legal database, data gathered by the Administrative Office of the United States Courts, and a nationwide survey of state attorney general offices.

First, we examine the number of prisoner cases involving claims of religious freedom in which a written opinion was issued for each year of the 1989 to 1998 period. Then we compare the changes in these numbers to the changes in prisoner civil rights litigation volume generally during this same period. Finally, we review statistics relative to prisoner religious freedom litigation self-reported by a number of state attorney general offices.

A. Reported Prisoner Religious Freedom Cases

Using the Lexis legal service, we examined the number of cases involving prisoners and religious freedom with reported opinions over the period from 1989 to 1998.[93] There was a general increase in reported prisoner religious freedom cases during this period, with a more pronounced increase during the years that RFRA was law. The real number increase, however, was quite modest, and at the peak of the increase, came to an average of two cases per state. The numbers, with the percentage increase from year to year, are as follows:

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[93] Search of LEXIS, Mega Library (using "(prison! or correction! or inmate or jail) w/45 (relig! w/3 free! or liberty) and date is (19xx)"). The Mega Library includes all federal and state courts. While the numbers obtained are not accurate in absolute terms, primarily because of the existence of unreported cases, we do think that the search will show an accurate trend over a period of time. Further, most prisoner cases with no reported opinions have been disposed of summarily, likely in response to a perfunctory motion to dismiss that did not require a written opinion. It was the authors' experience that these types of cases consumed relatively little lawyer time, as "canned" briefs are often sufficient to deal with frivolous claims. With the passage of the Prison Litigation Reform Act, discussed below, many of these cases would be screened by the court clerk as frivolous and would not be formally filed and would not require any response from the government.

TABLE 1 — REPORTED PRISONER RELIGIOUS FREEDOM CASES

Year	Reported Cases	% Change
1989	45	N/A
1990	63	28.5%
1991	60	- 4.7%
1992	65	8.3%
1993	76	17.0%
1994	86	13.0%
1995	120	39.5%
1996	148	23.0%
1997	140	- 5.0%
1998	89	- 36.0%

It is worth noting that from 1989 to 1993,[94] the four-year period prior to the passage of RFRA, the number of prisoner religion cases increased by an average of more than twelve percent per year. This is about equal to the increase in prisoner religious freedom cases during the first full year of RFRA in 1994.

While in 1995 there was a nearly forty percent increase in cases reported, in real numbers this represented an increase of less than fifty cases, less than one case per state, over 1993, the last year prior to the passage of RFRA. In 1996, the increase dropped back to twenty-three percent, bringing that year's total to 148 reported cases. This was the greatest number of cases for any year under the RFRA regime, but while this was nearly double the seventy-six from 1993, in real terms it was only an increase of seventy-two cases, or less than 1.5 cases per state on average.

Finally, the slight drop in 1997, and the more dramatic drop in 1998, probably had as much to do with the passage of the Prison Litigation Reform Act of 1995 ("PLRA")[95] as it did with the demise of RFRA. The PLRA, which came into effect in 1996, was aimed at reducing frivolous prisoner lawsuits.[96] It instituted certain restric-

[94] While Congress passed the Religious Freedom Restoration Act on November 16, 1993, it seems that the statistics from 1993 were not measurably affected by the month and a half that RFRA was in operation. It generally takes a few months before the practical benefits of a new statute are understood and acted upon in the isolated world of the prison system. This is borne out by the fact that even in 1994, prisoner religious claims did not increase beyond the rate of increase of the previous four years.

[95] Pub. L. No. 104-134, Title I, § 101(a), Title VIII, §§ 801-810, 110 Stat. 1321-66 to -77 (1996).

[96] *See id.*

tive filing requirements on prisoners, such as payment of filing fees out of an institutional account, the need to pass a court clerk's review and a "three strikes and you're out" provision on frequent frivolous filers.[97]

As the following section will show, the passage of the PLRA actually caused a much greater decline in prisoner civil rights cases generally than it did to prisoner religious freedom claims. This would suggest that proportionately fewer religious freedom claims were deemed frivolous under the PLRA, when compared to prisoner civil rights cases generally. One conclusion that we draw from this is that prisoners brought a higher percentage of valid claims under RFRA than they brought under other civil rights rubrics.

B. Increase in Prisoner Civil Rights Generally

The meaning of the numbers of reported prisoner religious freedom cases is better understood when seen in the context of the numbers of all civil rights suits brought by prisoners during the 1990s. The increase in religious freedom claims discussed above is overshadowed by the general prison litigation explosion occurring during the 1990s. It was this bigger picture that prompted the PLRA, and it is only in this larger backdrop that the increase in religious freedom claims can be understood. The increase in all prisoner civil rights suits over the period 1989 to 1997 was as follows:[98]

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[97] *See* 28 U.S.C. § 1915(a),(b),(e),(g) (1994).

[98] *See Federal District-Court Civil Cases* (visited Jan. 11, 1999) <http://teddy.law.cornell.edu:8090/questcv2.htm> (on file with author). The figures in Table 2 are taken from the Administrative Office of the United States Courts and Federal Judicial Center figures as made accessible by the Cornell Law School. *See id.* The figures for 1998 are not yet, as of this writing, available for an on-line analysis. *See id.*

TABLE 2 — ALL PRISONER CIVIL RIGHTS CASES

Year	Reported Cases	% Change
1989	25,048	N/A
1990	24,478	- 2.2%
1991	24,678	0.8%
1992	27,794	11.2%
1993	31,654	12.2%
1994	36,098	12.3%
1995	41,201	12.4%
1996	42,522	3.1%
1997	30,689	- 28.0%

The above numbers show that in the years immediately prior to and after the passage of RFRA, the general prisoner civil rights numbers were increasing by about twelve percent per year. This matches what was happening to religious freedom cases generally prior to and during the first year of RFRA, as shown in Table 1. It also indicates that the large percentage increases in religious freedom litigation in 1994 and 1995 were overstated by about twelve percent in regards to the effect of RFRA. This is because general prisoner civil rights claims were growing by about twelve percent per year, thus the increase of religious freedom cases cannot be attributed solely to RFRA. Rather, RFRA merely marginally added to the existing upward trend in prisoner civil rights cases.

When the "non-RFRA" growth is accounted for by subtracting the percentage growth in general prisoner civil rights cases from the total growth of religious freedom cases, the numbers for the critical RFRA years look like this (compare with Table 1):

TABLE 3 — PRISONER RELIGIOUS FREEDOM CASES DUE TO RFRA (ADJUSTED FOR GENERAL INCREASE IN ALL PRISONER CIVIL RIGHTS LITIGATION)

Year	Reported Cases	% Change due to RFRA
1993	76	N/A
1994	86	1.0%
1995	120	27.9%
1996	148	20.0%

Further, when accounting for the general civil rights prisoner litigation increase, not only does the total percentage increase due to RFRA fall, but also the real number of cases attributable to RFRA also decline. Religious freedom cases could have been expected, given the general increase in civil rights litigation, to increase by twenty-eight percent during the period from 1993 to 1996 even in the absence of RFRA. Thus, without RFRA, it is reasonable to calculate that there would have been ninety-seven religious freedom cases in 1996. That amounts to twenty-eight more than the seventy-six for 1993. With RFRA, there was a total of 148, just fifty-one more than could have been expected otherwise. Thus, in real terms, RFRA added on average just about one reported case for each state of the union. One would think that this hardly meets the threshold of "unduly burdensome," or even that of "minimally burdensome," for the average state attorney general's office.

C. States Attorney Generals' Self-Reported Data

The statistics supplied by a number of state attorneys general supports the conclusion that prison RFRA cases had a minimal impact on state government legal resources. The occasion of this reporting was a survey on prisoner RFRA cases the Florida Attorney General's office conducted during the last half of 1996. Twenty-nine states, the District of Columbia, and one territory (Guam) responded to the survey.

The survey asked: "How many cases filed by or on behalf of inmates raising religious claims did your state have pending as of November 16, 1993 (the date RFRA was enacted)?"[99] It then asked, "How many cases filed by or on behalf of inmates raising religious claims have been filed since November 16, 1993?"[100] The responses were illuminating in that only fifteen of the respondents, less than half, reported an increase in prisoner religious freedom cases between 1993 and 1996.[101] Seven respondents reported either a de-

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[99] FLORIDA ATT'Y GEN., 1996 SURVEY OF STATES ON PENDING RFRA CASES REGARDING PRISONERS 1 (1996).

[100] *Id.*

[101] *See* FLORIDA ATT'Y GEN., RESULTS OF 1996 SURVEY OF STATES ON PENDING RFRA CASES REGARDING PRISONERS 1-2 (1997) [hereinafter 1996 SURVEY RESULTS]. The 15 states that reported increases were Arizona (37 to 81), Connecticut (5 to 25), Idaho (2 to 4), Kentucky (10 to 25), Michigan (35 to 95), Minnesota (1 to 19), North Carolina (3 to 10), Nebraska (1 to 6), New Jersey (4 to 15), New Mexico (0 to 1), Nevada (3 to 23), Oregon (4 to 8), Ver-

crease in filings or no change at all, and at least four offices reported they had no prisoner claims either before or after the passage of RFRA.[102]

But even the "increases" reported by certain states are misleading if taken at face value. The first question on the survey asked about prisoner religious freedom cases "pending" at one point in time, November 16, 1993. These would have included primarily only cases filed during the previous one to two years. The second question asked about all cases filed after November 16, 1993, which would have included nearly a three year period, as the survey was conducted in the latter part of 1996. Even if there had been no increase in filing, the second reported number would have been expected to be 1.5 to two times that of the first number. If this factor is accounted for, only eleven states reported actual increases, as four states had an increase less than this rate.[103]

Of those states that reported an increase, the average increase for each state was 16.5 cases over the three year period since the passage of RFRA.[104] This works out to an average of 5.5 cases per state per year. If RFRA had not become law, religious freedom cases would have been expected to increase by about five over that three year period due to the underlying increase of prisoner civil rights actions generally, as shown in Table 2.[105] Thus, when this background increase is factored in, the increase brought about by RFRA is closer to eleven for the three year period, or a little more

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mont (1 to 2), Washington (5 to 26), and West Virginia (4 to 23).

[102] *See id.* These seven are Florida (91 to 90), Georgia (20 to 20), Guam (0 to 0), Maine (0 to 0), North Dakota (0 to 0), Rhode Island (0 to 0), and Virginia (16 to 14). *See id.* A number of reporting jurisdictions did not have statistics that allowed a before RFRA and after RFRA comparison. *See id.* These were Arkansas, Colorado, The District of Columbia, Missouri, New York, Ohio, Oklahoma, and Pennsylvania. *See id.* While arguments from silence can be dubious standing alone, this lack of data, and the lack of response by the 20 states that did not respond to the survey, is further supporting evidence that RFRA cases were of minimal impact, as they did not apparently draw enough attention to be viewed as a concern and tracked by many states. *See id.*

[103] *See id.* These states were Idaho, New Mexico, Oregon, and Vermont. *See id.*

[104] *See id.*

[105] *See Federal District-Court Civil Cases* (visited Jan. 11, 1999) <http://teddy.law.cornell.edu:8090/questcv2.htm> (on file with author). The figure of an expected average five-case increase between 1993 and 1996 is arrived at by looking at the total increase in civil rights litigation during that three-year period from Table 2. *See id.* That increase was about 12.5% for 1994 and 1995 and about 3% for 1996. *See id.* According to the Florida Attorney General's survey, responding states had an average of about 12 prisoner religious freedom cases pending in 1993. *See* 1996 SURVEY RESULTS, *supra* note 101, at 1-2. Given the average rate of increase for civil rights cases generally, the number of cases would have been expected to be nearly 17 by 1997, a total increase of about five cases per state. *See id.*

than 3.5 cases per year for each state.

Further, two states had negligible increases: New Mexico went from zero cases to one case and Vermont went from one case to two cases. The most cases reported by any state for the three-year period of RFRA activity was ninety-five by Michigan followed closely by Florida at ninety. These higher numbers are put in perspective by the fact that Michigan started in 1993 with thirty-five pending cases. Thus, Michigan had a pre-existing filing rate for prisoner religious freedom cases of somewhere between twenty to thirty per year,[106] and RFRA did not alter this by much. Florida actually experienced a decrease under RFRA, as that state began in 1993 with ninety-one pending prisoner religious freedom cases and dropped to ninety during the period of RFRA.

While a number of states did increase substantially in percentage of religious freedom cases filed, when these numbers are converted to real terms the results are underwhelming. While Idaho and Oregon doubled their caseloads, the addition of two and four cases respectively over three years is a small fraction of the hundreds of civil rights cases no doubt processed by these states during the same period. Connecticut's prisoner religious freedom caseload increased fivefold, from five to twenty-five. However, once again, twenty additional cases over a three year period for a major state legal office is not substantial. These real number increases are dwarfed by the real number increases in prisoner litigation generally, which shot up by an average of 300 cases per state or territory during the same three-year period.[107] This compares with the average per state increase of eleven RFRA-generated cases during this same time period, at a rate of 3.67 per year. Thus, RFRA-generated cases represented only about 2.5% of the increase in all prisoner litigation between 1993 and 1996 and about 0.5% of all prisoner

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[106] *See* 1996 SURVEY RESULTS, *supra* note 101, at 1. This assumes a prisoner case life of between one to two years. *See id.* While prisoner civil cases can go on longer than this, it was the author's experience that most were resolved in less than a year and certainly in less than two. Prisoners and their attorneys generally did not have the resources to engage in protracted discovery or extensive motions practice, and it was the rare case that actually went to trial.

[107] *See Federal District-Court Civil Cases* (visited Jan. 11, 1999) <http://teddy.law.cornell.edu:8090/questcv2.htm> (on file with author). According to the Administrative Office of the United States Courts' figures, in 1993 there were 50,102 civil prisoner claims of all types filed, or nearly 900 for each state or territory. *See id.* In 1996, there were 66,884 such claims filed, a net increase of 16,782. *See id.* This works out to an increase of 300 more prisoner cases per year for each state or territory. *See id.*

cases filed during the same period.[108]

The data reported by the Florida Attorney General's report confirms the numbers of reported cases discussed in the first part of this section. The reported prisoner religious freedom cases increased at an average of 1.5 cases per year and, thus, the Florida Attorney General's survey rate of a 3.67 increase in actual prisoner religious freedom cases filed (a larger group than those actually reported) seems reasonable.

The numbers from all sources show that the impact of prisoner claims generated by the Federal RFRA was de minimus, given the overall backdrop of prisoner claims generally. Any attempt to defeat a state RFRA, or to seek a prisoner exemption from a state RFRA, cannot be supported by the statistical reality of prisoner lawsuits under the Federal RFRA. The very modest increase in prisoner case numbers is a small price to pay for the complete restoration of our foundational freedom.

CONCLUSION

The same standard of religious freedom can be applied to prisoners as to the rest of society without jeopardizing legitimate security or administrative interests of penal institutions. The flexibility inherent in the compelling interest/least restrictive means balancing test allows for sensitivity to issues of prison safety and security. And the empirical caseload information under the Federal RFRA demonstrates that prisoner religious freedom lawsuits will not significantly, or even moderately, increase under state RFRAs.

The debate over prisoner free exercise claims reveals as much about our view of religious freedom as it does about our attitude toward prisoners. One measure of a civilization is the way those in power treat those on the margins of power. This yardstick will show if our society values fairness, justice, and humanity, leading it to treat men and women as ends and not means. Or it will show whether our society places its highest value on power, prestige, and material goods, leading it to view people as means and not ends.

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[108] *See id.* The Administrative Office figures showed a total of 232,687 prisoner filings between 1993 and 1996, for an average of 4155 filings for each U.S. state and territory. *See id.* The Florida Attorney General's survey showed an average of 23 religious freedom cases filed by prisoners between 1993 and 1996. *See* 1996 SURVEY RESULTS, *supra* note 101, at 1. The figure of 23 prisoner religious freedom cases is less than 0.5% of the total 4155 civil rights cases filed by prisoners on average in each state. *See id.*

In the latter calculus, those that have failed to attain society's standard of power or prestige or wealth will be treated as less than fully human.

Prisoners are the classic outgroup. Certainly, their own poor choices justify a society that deprives them of certain physical freedoms. But even in prison, they are still human, possessed of consciences before God. If the state does not choose to recognize a prisoner's continuing duty to conscience and God, it sends a profound message to the rest of society about religious freedom. That message is this: religious freedom is not a fundamental human right, but rather a state created policy that it can extend to and withdraw from people as it wishes. In the end, the quality of religious freedom we extend to prisoners will define the substance of our own freedom.