

Briefing Paper for the United States Commission on Civil Rights
“The Accommodation of Religious Practice in a Correctional Environment”

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The purpose of this paper is to outline the challenge of accommodating the practice of religion in a correctional environment. To achieve this purpose I will give a brief history of the presence of religion in prisons, describe current laws impacting religious practice, and discourse about how the Federal Bureau of Prisons accommodates the religious rights of inmates in its custody.

Religion in the American Justice system has its roots in the Colonial Period of the late 1600's and early 1700's. During this time Colonists adhered to correctional techniques inherited from England and based in a Puritan philosophy. Crime was viewed as a sin against God and the criminal was seen as a person cursed by the devil.

Until the 1770's imprisonment was for those waiting to learn their punishment, or for the poor who could not afford their fines or debts. During this time period, the Quakers introduced the practice of incarceration as a punishment for crime. William Penn, the first governor of Pennsylvania and a Quaker himself, had experienced the harshness and brutality of jail, having been imprisoned for his religious beliefs. As a result, he developed what was known as the “Great Code”. Under this code capital punishment was only for murderers, the government paid for the food and housing of prisoners, and inmates were required to do useful work. Many of today’s correctional practices can be traced to the “Great Code”.

A component of this new and radical correctional method required prisoners to attend Sunday services and encouraged them to read scriptures. The goal was to reform the individual through helping them see the error of their ways, thereby preparing them for a successful re-entry into society. Interestingly, the national focus on re-entry programs is still flourishing today and has been infused with new energy over the past decade. The right to practice one’s religion during incarceration is pivotal to this effort.

In 1787, the Philadelphia Society for Alleviating the Miseries of Public Prisons, advocated to raise the humane conditions of prisons. The organization sought better sanitation standards, quality health care, the separation of inmates by the severity of their offence, and a prisoners right to community religious leaders.

While over the decades correctional systems have evolved in many ways, religion has always played a role in the treatment and rehabilitation of prisoners. Recent laws such as the Religious Land Use and Institutionalized Persons Act (RLUIPA), and the Religious Freedom Restoration Act (RFRA), have brought to the forefront the natural tension between a person’s free exercise of religion and the need of a correctional institution to operate in a secure and orderly fashion.

In 1987 the United States Supreme Court decided the Turner v. Safley case. In this case two inmates in Missouri prisons wanted to write to each other and to get married. Both of these requests were in opposition to prison regulations. The court decided that the inmates did have

the right to get married, but that writing to each other was a legitimate correctional concern. More importantly, as a result of this case, the Supreme Court established a “Balancing Test” to be applied to future cases involving inmates and their constitutional rights. The “Balancing Test” involves four questions:

1. Is there a valid connection between the regulation and a legitimate correctional interest?
2. Are inmates allowed other ways of exercising their right?
3. How much will allowing the inmates to exercise this right affect others in the facility?
4. Are there available alternatives that accommodate both interests?

In the same year the Supreme Court heard the case of O’Lone v. Shabazz, in which a group of Islamic inmates were suing for the right to leave their work site in the middle of the day every Friday for Jumah prayer. The “Balancing Test” was applied and the Court ruled that the inmates rights were not being violated since they had other ample opportunities to practice their religion.

What the Court acknowledged with these cases is the natural and daily tension that exists between the accommodation of a person’s religious rights and the legitimate correctional interests of an institution. Outside of the courts these decisions are made by Chaplains and other prison officials multiple times every day. On any given day, in any correctional institution, the religious rights of inmates are accommodated without the attention of the courts or the general public. Inmates are given the opportunity to worship and pray, observe religious holy days, participate in ceremonial meals, and adhere to a religious diet. Many times Chaplains adjust their schedules, work an extra night, or coordinate scheduling with other faith groups, to accommodate the religious practice of groups and individuals. Prison officials grapple with the challenge of accommodating the ever growing numbers of faith groups and individual practitioners who want to practice their religious tenants. Sufficient staff to supervise programs, availability of space, escorting of volunteers and contractors, and contraband issues all play an important part in the effort to provide fair and equitable opportunities for religious expression.

In 1993, the Religious Freedom Restoration Act (RFRA) was enacted by Congress due in part to the belief by some that the “Balancing Test” gave the government too much opportunity to restrict the free exercise of a person’s religion. The result of RFRA was a new standard in evaluating the government’s ability to restrict religious practice. RFRA set forth two very important criteria.

1. The restriction must show a “compelling government interest”.
2. The restriction must be the “least restrictive means of furthering that interest”.

While RFRA was struck down by the Supreme Court in the 1997 case of City of Boerne v. Flores, it is still applied to the Federal Government by Executive Order.

In 2000, Congress passed the Religious Land Use and Institutionalized Persons Act (RLUIPA) to

ensure that the protections offered under RFRA once again would apply to the states. While the protections are basically the same, RLUIPA goes a step further than RFRA by specifically ensuring religious protections for prisoners. A portion of the Act states:

SEC. 3. PROTECTION OF RELIGIOUS EXERCISE OF INSTITUTIONALIZED PERSONS. (a) **GENERAL RULE-** No government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution, as defined in section 2 of the Civil Rights of Institutionalized Persons Act (42 U.S.C. 1997), even if the burden results from a rule of general applicability, unless the government demonstrates that imposition of the burden on that person-- (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.

Both RFRA and RLUIPA have been put to the test in court cases around the country. Cases against various state correctional systems filed using RLUIPA as a basis and still in various stages of litigation include:

- A Muslim inmate who is suing because he was punished for refusing to handle pork in his job as a cook in the prison kitchen.
- An inmate who sued after his request for a Kosher diet was denied.
- A Jewish inmate who was removed from his Kosher diet because he was caught purchasing non-kosher food from the prison commissary. The inmate prevailed in this case. During the time his religious diet was suspended, the Chaplain arranged for him to be on a vegetarian diet so he would not have to eat non-kosher meat. He also arranged Kosher food for his religious observances.
- An inmate sued after he was denied his request to purchase a Thor's Hammer religious pendant. A U.S. Magistrate ruled that prison officials had not followed their established procedures in processing the inmate's request.

Cases involving the Federal Bureau of Prisons and filed using RFRA as a basis include:

- An inmate wanting Halal instead of Kosher food. This case was settled by permitting the inmate to use the special purpose order system to use personal funds to purchase Halal foods. Since most Kosher foods are considered Halal, this settlement satisfied the inmates request.
- An inmate sued over the portion of Bureau of Prisons policy that prohibited "curses and spells". The inmate claimed that this implied that all spells had a negative connotation. The case was settled by rewording the language in the Bureau's policy.

One of the biggest challenges facing correctional professionals as a result of RFRA and RLUIPA is in the area of "sincerely held religious beliefs". Often times inmates will make requests for religious accommodation that are outside the normal practice of the religion they claim as a preference. When determining appropriate accommodation, institution staff have to weigh security concerns, staff supervision, space availability, and even the impact providing one person's request will have on others who adhere to

the same religion. These are often complex and difficult issues that stand the chance of being decided through the courts.

The Bureau of Prisons has, over the years, developed policy to ensure the religious rights of inmates in a correctional environment. Program Statement 5360.09, Religious Beliefs and Practices, takes rules language from the Code of Federal Regulation and applies it to religious accommodation through the development of implementation language. Chaplains are trained thoroughly on this policy and use it as a guide throughout their careers as they seek to accommodate the broad variety of religious expressions in a reasonable and equitable way. This program statement covers issues such as religious accommodation through programs, religious use of wine, unauthorized religious practices, supervision of inmates, religious preferences, visits to special housing units, telephone calls, women and special needs offenders, community involvement of volunteers and contractors, religious property, religious head wear, and clothing. The Bureau also accommodates a religious diet, fasts, religious holy day observances, ceremonial meals, and pastoral visits.

Every Bureau of Prisons facility is responsible for developing an Institution Supplement to the Religious Beliefs and Practices Program Statement. This supplement takes policy and applies it to the unique mission of each institution. In other words, the operation of a minimum security camp is vastly different from a high security penitentiary or a prison with a medical mission.

The Bureau has also developed a Technical Reference Manual which serves as a detailed guide for Chaplains as they seek to accommodate the religious beliefs and practices of inmates. This manual has been shared with many state correctional systems who now make use of it in their institutions.

In addition to policy, the Bureau also has Religious Issues Committees at the Institution, Regional Office, and Central Office levels. The purpose of these committees is to review inmate requests for new and unfamiliar religious components. The committee seeks to determine if the request is religious in nature. If it is, the committee recommends the most appropriate accommodation (i.e., least restrictive) based on issues of institution safety, security, and good order. The institution Warden receives the recommendation and makes a decision on the accommodation of the religious practice.

If an inmate believes their religious rights are being unfairly denied, they can choose to state their case through the administrative remedy process. This process may be pursued all the way through to the Central Office level if the inmate's request is not granted by the Institution or Regional Office.

In addition to these policy protections, the Bureau enjoys the services of over 7000 volunteers from fourteen different faith traditions and 209 contractors representing ten faith traditions. This un-precedented gathering of diverse community resources signals the Bureau's commitment to the involvement of faith based and community organizations in the spiritual welfare of the inmates in its custody.

The Bureau of Prisons currently employs 251 Chaplains representing Protestant, Catholic, Islamic, Jewish, Buddhist, and Orthodox faith traditions. This committed group of ministers are motivated by a calling to bring the presence of the divine to people at their darkest and most desperate moments.

In 2007 approximately 59,000 inmates participated in weekly religious observances. Institution Chaplaincy teams conducted an average of 37 counseling sessions each week, and delivered an average of 7 emergency notifications each week.

The Federal Bureau of Prisons adhere to a mission statement which states:

“The mission of the Chaplaincy Services Department is to accommodate the free exercise of religion by providing pastoral care to all Federal inmates and facilitating opportunities to pursue individual religious beliefs and practices in accordance with the law, Federal regulations and Bureau of Prisons policy. The chaplain shall provide religious worship, education, counseling, spiritual direction, support and crisis intervention to accommodate the diverse religious needs of inmates. When appropriate, pastoral care and subject matter expertise may be extended to staff.”

It is from this mission statement that Chaplains in the Bureau of Prisons define their existence. The Federal Bureau of Prisons is committed to the accommodation of the legitimate religious practices of inmates in their custody.