The Heterodox Crux—Deriving Freedom Through Incarceration

I. INTRODUCTION

Today, the standard for suing prison officials who violate prison inmates' first amendment rights is split between an adherence to: (i) textualist interpretations of a "substantial burden" and (ii) free exercise jurisprudence definitions. The current circuit-split centers around precedential loyalists and common usage revolutionaries. This line of reasoning is in accordance with the Supreme Court's view exhibited in Holt v. Hobbs.[1] There, "the Holt Court wrote in dicta that a substantial burden forms when the government forces an adherent to 'engage in conduct that seriously violates [their] religious beliefs.'"

Textualists are commonly referred to as "plain-meaning" adherents, relying on dictionary definitions and "common meanings" in their interpretation. Jurisprudes, by contrast, are reliant on history and stare decisis.[2] The jurisprudes, as denoted by the Court's early analysis, have applied an internally looking, pressure-focused approach to finding a substantial burden. The textualists—an externally oriented, conduct-focused one. For purposes of review, this topic analysis takes the view that the textualist approach is preferable. Moreover, resolution of this circuit-split will result in significant change to the prison populous' freedoms and the relationships between the incarcerators and the incarcerated. The stakes of heterodox crucifixion are on the line.

II. ANALYSIS OF CURRENT LAW

The Supreme Court crafted the impetus for a "substantial burden" test in Sherbert v. Verner.[3] "'A regulation neutral on its face may, in its application, nonetheless offend the constitutional requirement for governmental neutrality if it unduly burdens the free exercise of religion,' the Court explained."[4] The Court propounded upon this strict scrutiny analysis in Turner v. Safley,[5] and O'Lone v. Estate of Shabazz[6] the Court reasoned that the question of whether a burden was substantial hinged on whether a regulation impinging on a religion bared a reasonable relation to penological interests. However, in Employment Division v. Smith,[7] the court rejected the Sherbert approach, asserting that "the Sherbert framework did not apply when the challenged law was 'neutral' and 'generally applicable,'"[8] taking issue with the premise that courts could differentiate between substantial and insubstantial burdens.[9] Thus, the Court moved away from a compelling interest test due to the dangers of making determinations considering the "centrality" of a particular practice or act of faith in respect to one's beliefs.[10] Accordingly, "since Smith the Supreme Court has treated a showing of the plaintiff's sincerity to be sufficient to establish a prima facie free

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[1] Holt v. Hobbs, 574 U.S. 352 (2015).
[2] Bret Matera, Divining a Definition: "Substantial Burden" in the Penal Context Under a Post-Holt RLUIPA, 119 Colum. L. Rev. 2239, 2255 (2019).
[3] Sherbert v. Verner, 374 U.S. 398 (U.S. 1963).
[4] Kravitz v. Purcell, 87 F.4th 111, 120 (2d Cir. 2023) (quoting Sherbert v. Verner, 374 U.S. 398, 403 (U.S. 1963)).
[5] Turner v. Safley, 482 U.S. 78, 89–91, 107 S. Ct. 2254, 2261–62, 96 L. Ed. 2d 64 (U.S. 1987).
[6] O'Lone v. Estate of Shabazz, 482 U.S. 342, 350 (U.S. 1987) (quoting Turner v. Safley, 482 U.S. 78, 89–91 (U.S. 1987)).
[7] Employment Div. v. Smith, 494 U.S. 872, 879–80, 110 S. Ct. 1595, 1600–01, 108 L. Ed. 2d 876 (U.S. 1990).
[8] Kravitz, 87 F.4th at 120 (quoting Smith, 494 U.S. at 879–80; see also Holt v. Hobbs, 574 U.S. 352, 357 (U.S. 2015)).
[9] Kravitz, 87 F.4th at 120–21 (citing Ford v. McGinnis, 352 F.3d 582, 592 (2d Cir. 2003), elucidating Smith, 494 U.S. 872, 886–87 (U.S. 1990)).
[10] Kravitz, 87 F.4th at 120–21.

exercise violation and has not referenced a substantial burden requirement."[11] In response, Congress enacted the Religious Freedom Restoration Act[12] ("RFRA") for purposes of reinstating a compelling interest test to measure substantial burdens on religion. The RFRA possessed "'universal' coverage pursuant to section 5 of the Fourteenth Amendment"[13] but was invalidated in City of Boerne v. Flores,[14] as it applied to the states because "the statute exceeded Congress' remedial powers under the Fourteenth Amendment."[15]

The Court in Cutter v. Wilkinson,[16] strayed away from the antiquated approach in pre-Smith analysis, putting forth a "due deference" standard.[17] This contextualized approach adheres to privileged immunity. Although Cutter failed to provide a working definition of a "substantial burden" it instructed lower courts on how to view perceived violations of prison inmates' rights to free exercise. The Court "explained that lower courts must grant 'due deference' to the 'experience and expertise' of defendant prison administrators on [the Religious Land Use and Institutionalized Persons Act's][18] compelling interest prong" (see infra).[19]

A. Legislative Oversight and Constitutional Authority

To bring a civil action for deprivation of rights[20] ("§ 1983") free exercise claim against the government, an individual need only demonstrate he possessed a sincerely held religious belief and there was conscious or intentional interference with their free exercise of such beliefs.[21] To bring a § 1983 claim for a perceived free exercise violation, there is no requisite to prove that a government burden placed on religious beliefs was "substantial."[22] Instead, "a plaintiff may carry the burden of proving a free exercise violation … by showing that a government entity has burdened his sincere religious practice pursuant to a policy that is not 'neutral' or 'generally applicable.'"[23]

The Religious Land Use and Institutionalized Persons Act ("RLUIPA") forbids the government from placing a "substantial burden" on prison inmates' religious exercise.[24] The legislative intent of the statute is not textualist, but advocates for court reliance on the Supreme Court's free exercise precedent in construing a definition. Moreover, RLUIPA's legislative history suggests that this statutory requirement is intended "to weed out false religious claims that are actually attempts to gain special privileges or to disrupt prison life."[25] RLUIPA uses a three-pronged analysis. In pertinent part, the Act states that a government action or rule of general applicability

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[11] Kravitz, 87 F.4th 111, 124 (2d Cir. 2023) (citing Kennedy *v.* Bremerton Sch. Dist., —— U.S. ——, 142 S. Ct. 2407, 2421–22, 213 L. Ed. 2d 755 (2022)).
[12] 42 U.S.C. § 2000cc–1(b)(1).
[13] Smith v. Allen, 502 F.3d 1255, 1266 (11th Cir. 2007) (citing Cutter v. Wilkinson, 544 U.S. 709, 714–15 (2005); City of Boerne v. Flores, 521 U.S. 507, 516–17 (1997)).
[14] City of Boerne v. Flores, 521 U.S. 507 (1997).
[15] Smith v. Allen, 502 F.3d 1255, 1266 (11th Cir. 2007) (clarifying City of Boerne v. Flores, 521 U.S. 507, 535–36 (1997)).
[16] Cutter v. Wilkinson, 544 U.S. 709 (2005).
[17] Matera, supra note 2, at 2254.
[18] 42 U.S.C. § 2000cc-1(a).
[19] Id. at 2254.
[20] 42 U.S.C. § 1983.
[21] Gallagher v. Shelton, 587 F.3d 1063, 1070 (10th Cir. 2009) (quoting Lovelace v. Lee, 472 F.3d 174, 201 (4th Cir. 2006)).
[22] Kravitz, 87 F.4th 111, 127 (2d Cir. 2023).
[23] Id. (quoting Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407, 2421–22 (2022), quoting Emp. Div. v. Smith, 494 U.S. 872, 880 (1990)).
[24] Matera, supra note 2, at abstract.
[25] Mbonyunkiza v. Beasley, 956 F.3d 1048, 1053 (8th Cir. 2020) (quoting Ochs v. Thalacker, 90 F.3d 293, 296 (8th Cir. 1996)).

may not (i) "substantially burden" an inmate's religious exercise unless the action (ii) furthers a "compelling governmental interest" (iii) in the "least restrictive means."[26] The second prong of the inquiry has been subject to much contest. Accordingly, Cutter grants due deference in applying the compelling interest and least restrictive means test to the penal context.

The free exercise clause, by contrast, asserts that regulations impinging on inmates' free exercise rights may be valid if they are reasonably related to legitimate penological interests. Such legitimate penological interests are often tied to prison resources and security. Furthermore, "to state a claim for violation of rights secured by the Free Exercise Clause, an inmate, as a threshold matter, must demonstrate that: (1) he holds a sincere religious belief; and (2) a prison practice or policy places a substantial burden on his ability to practice his religion."[27]

B. Sincere Religious Beliefs and Finding a Substantial Burden

The Supreme Court in Sherbert, Turner, and O'Lone, developed a framework separate from RFRA and RLUIPA claims. In its pre-Smith analysis, "[a] burden is unjustified if it is not reasonably related to a legitimate penological interest."[28] That is, "the government objective must be a legitimate and neutral one."[29] Turner set forth a four factor reasonableness inquiry for determining whether a prison policy that substantially burdens the exercise of religion is nevertheless lawful under the First Amendment: (i) whether the governmental objective justifying regulatory impingement of free exercise is legitimate and neutral, and whether the regulations are rationally related to that objective; (ii) "whether there remain alternative means of exercising the right that are open to prison inmates"; (iii) what "impact accommodation of the asserted constitutional right may have on guards and other inmates, and on the allocation of prison resources"; and (iv) whether there are ready alternatives to the prison regulation.[30]

An issue arises when interpreting Turner's second prong. There appears a clash between the alternative means inquiry in determining which practices are central to an inmates' religion and which acts are not (thus providing alternative means). The question presented is how much a religious practice can stray from its central tenets before it no longer may be considered a sincerely held belief. Although it may no longer be "kosher" for courts to make centrality determinations considering an adherent's belief system; it is permissible for courts to "consider whether the litigants' beliefs find any support in the religion to which they subscribe."[31] As such, courts may delineate between sincere and self-serving beliefs. Several courts have frayed from such determinations, however, reasoning "it is not within the judicial function and judicial competence to inquire whether the petitioner or [another member of his faith] more correctly perceived the commands of their common faith,"[32] since "[c]ourts are not arbiters of scriptural interpretation."[33] Alternatively, "a court may determine whether the litigants' views have any basis whatsoever in the creed or community on which they purport to rest their claim."[34]

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[26] Matera, supra note 16, at 2240,

[27] Wilcox v. Brown, 877 F.3d 161, 168 (4th Cir. 2017) (citing Thomas v. Review Bd. Of Ind. Emp't Sec. Div., 450 U.S. 707, 718 (1981)).

[28] Thompson v. Holm, 809 F.3d 376, 380 (7th Cir. 2016) (citing Turner v. Safley, 482 U.S. 78, 89–91.

[29] Butts v. Martin, *877 F.3d 571, 585 (5th Cir. 2017) (*citing Mayfield v. Tex. Dep't of Crim. Just.*, 529 F.3d 599, 607 (5th Cir. 2008),* quoting Turner v. Safley, *482 U.S. 78, 90 (1987)).*

[30] Firewalker-Fields v. Lee, 58 F.4th 104, 115 (4th Cir. 2023) (quoting Turner v. Safley, 482 U.S. 78, (1987)).

[31] Levitan v. Ashcroft, 281 F.3d 1313, 11321 (D.C. Cir. 2002).

[32] Jones v. Slade, 23 F.4th 1124, 1133 (9th Cir. 2022) (quoting Hernandez v. Comm'r, 490 U.S. 680, 699 (1989)).

[33] Levitan, 281 F.3d at 1321 (quoting Thomas, 450 U.S. at 716).

[34] Id.

Prison officials have discretion to determine whether a prison inmate has a sincere religious belief. However, an issue is presented in distinguishing between the centrality of a belief and the sincerity of a belief for purposes of finding a substantial burden. This is where the "orthodox" and the "unorthodox" clash in judicial decision making. "The distinction between questions of centrality and questions of sincerity and burden is admittedly fine, but it is one that is an established part of our free exercise doctrine and one that courts are capable of making."[35] Courts have been barred from appraising the place of a particular practice in a religion. Inquiries into the truth, validity, or reasonableness of a claimant's religious beliefs are considered off-limits.[36] Moreover, "[t]he Free Exercise Clause does not require plaintiffs to prove the centrality or consistency of their religious practice: 'It is not within the judicial ken to question the centrality of particular beliefs or practices to a faith.'"[37] Accordingly, the Supreme Court has expressed disapproval with a centrality test. Instead, in Malik v. Brown[38] and Callahan v. Woods,[39] the court applied a sincerity test to determine whether the Free Exercise Clause applies.[40]

Some courts have adopted a less stringent standard in finding a burden under the religious sincerity test. For example, the Third Circuit, in DeHart v. Horn,[41] considered the question of whether a prisoner's vegetarian diet was central to his Buddhist faith, and rejected the use of orthodox commandments, as exhibited in Johnson v. Horn[42] for purposes of finding a substantial burden. The District of Columbia Circuit, in Levitan v. Ashcroft,[43] quoting Ward v. Walsh,[44] characterized this distinction as that between a "religious practice which is a positive expression of belief and a religious commandment which the believer may not violate at peril of his soul."[45] In evaluating the sincerity of heterodox beliefs, the courts, as seen in Africa v. Pennsylvania,[46] have "look[ed] to the familiar religions as models in order to ascertain, by comparison, whether the new set of ideas or beliefs is confronting the same concerns, or serving the same purposes, as unquestioned and accepted 'religions.'"[47]

III. EVALUATION OF THE TOPIC AS THE BASIS FOR A COMMENT

A. Pressure-Focused and Conduct-Focused Approaches

There are two approaches to characterizing regulations that impinge on free exercise: (i) "pressure-focused" and (ii) "conduct-focused."[48] Pressure-focused analysis is internally driven, while conduct-focused analysis is externally identified. "Pressure-focused courts are analytically equipped to deal with claims in which the government pressures, but comes short of compelling, the plaintiff to violate their religious beliefs. Conduct-focused courts, by contrast, can conceive of claims only to

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[35] Kravitz, 87 F.4th at 127 (quoting Smith, 494 U.S. at 907 (O'Connor, J., concurring in the judgment)).
[36] Jones, 23 F.4th at 1145 (quoting Callahan, 658 F.2d at 685).
[37] Jones, 23 F.4th at 1145 (quoting Hernandez v. Comm'r, 490 U.S. 680, 699 (1989)).
[38] Malik v. Brown, 16 F.3d 330 (9th Cir. 1994).
[39] Callahan v. Woods, 658 F.2d 679 (9th Cir. 1981).
[40] Jones, 23 F.4th at 1145.
[41] DeHart v. Horn, 227 F.3d 47 (3d Cir. 2000 (en banc).
[42] Johnson v. Horn, 150 F.3d 276 (3d Cir. 1998).
[43] Levitan, 281 F.3d 1313 (D.C. Cir. 2002).
[44] Ward v. Walsh, 1 F. 3d 873 (9th Cir. 1993).
[45] Levitan, 281 F.3d at 1317 (quoting Walsh, 1 F.3d at 878).
[46] Africa v. Pennsylvania, 662 F.2d 1025 (3d Cir. 1981).
[47] DeHart, 277 F.3d at 53 n.3 (citing Africa, 662 F.2d at 1032 (quoting Malnak v. Yogi, 592 F.2d 197, 207 (3d Cir. 1979) (Adams, J., concurring)).
[48] Matera, supra note 16, at 2270.

the extent that the government has already forced the plaintiff into action" in contravention of their sincere religious beliefs.[49]

The Supreme Court's pre-Turner free exercise jurisprudence endorsed the pressure-focused approach. The Fourth Circuit, in Sherbert and Lovelace v. Lee,[50] afforded inmates greater protections to free exercise than the Constitution affords. In Lovelace, "[a] substantial burden either puts pressure on a person to change his religious beliefs or puts that person to a choice between abandoning his religion or following his beliefs and losing some government benefit."[51] Additionally, the Sherbert-Thomas framework also adopts a liberally construed view to the question of what constitutes a substantial burden: "[a] substantial burden on an inmate's religious exercise occurs when a state or local government, through act or omission, puts substantial pressure on an adherent to violate their beliefs."[52] This pressure-focused analysis has been exhibited in Seventh Circuit precedent. For example, the court in Thompson v. Holm,[53] found a substantial burden when the penal system "put[s] substantial pressure on an adherent to modify his behavior and to violate his beliefs." The exclusion of the phrase "modify his behavior" in Sherbert-Thomas, and its inclusion in Thompson, is a keen discernment to make. The phrase refers to an external modus operandi of proving a substantial burden, while its omittance, or rather its omission, points to a less stringent method.

Conduct-focused analysis, by contrast, focuses on how a government regulation may impact an inmate's purely external conduct, as opposed to coercing internal beliefs. The court in Holt considered whether the government, through their action, forced a respective inmate to engage in certain conduct that was violative or anathema to their religious beliefs. As a result, the conduct-oriented approach in Holt "requires the plaintiff to have actually engaged in conduct that violates their beliefs before they can show a substantial burden."[54] Conduct-focused analysis seems to offer a more objective approach in deciphering whether a burden has occurred, whereas pressure-focused analysis appears more subjective and arbitrary in its considerations.

B. Lowering the Bar: Innocent Until Proven Guilty

To combat the arbitrary summary denial of free exercise claims, courts should employ Holt in finding a de minimis, as opposed to a substantial burden. That is, courts should employ an external, textualist, and conduct-focused review of claims alleging an actual de minimis burden in relation to free exercise. In finding a de minimis burden, the court should justify it with the fulfillment of an important penological interest, not a compelling one. In doing so, courts will be able to by-pass the orthodox/unorthodox distinction and its corresponding centrality/sincerity tests. Thus, in incorporating peripheral or ancillary facets of belief, and lowering the bar for filing suit, the burden is placed in the hands of the government, and the presumption of innocence until proven guilty returns to the incarcerated.

Ergo, courts will no longer be tasked with grappling with the material fact enterprise seen in the "substantial burden test," which as explained, "requires courts to distinguish important from unimportant religious beliefs"[55] to decide whether a "belief or practice is so peripheral to the

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[49] Id. at 2241.
[50] Lovelace, 472 F.3d 174 (4th Cir. 2006).
[51] Firewalker-Fields, 58 F.4th at 114 (quoting Lovelace, 472 F.3d at 187).
[52] Matera, supra note 16, at 2270.
[53] Thompson, 809 F.3d 376 (7th Cir. 2016).
[54] Matera, supra note 16, at 2268.
[55] Kravitz, 87 F.4th at 119 (quoting Ford, 352 F. 582, 593 (2d Cir. 2003)).

plaintiff's religion that any burden can be aptly characterized as constitutionally de minimis."[56] Instead, courts should assess whether a de minimis burden is justified in relation to an important interest. As such, "I therefore would require prison officials to demonstrate that the restrictions they have imposed are necessary to further an important government interest, and that these restrictions are no greater than necessary to achieve prison objectives."[57] WHEREFORE, and in the sentiment of a man who once, too, was persecuted for his sincerely held beliefs… Now, heterodox am become orthodox—destroyer of unorthodox…

[56] Id.
[57] O'Lone, 482 U.S. 342 (1987) (Brennan, J., dissenting).