

COMMENTS

RELIGIOUS SINCERITY AND IMPERFECTION: CAN LAPSING PRISONERS RECOVER UNDER RFRA AND RLUIPA?

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INTRODUCTION

Saul and Ananias accidentally killed a man in a bar fight. Both were sent to the same prison. Saul began reading the Bible and joined a Protestant denomination. He consistently attended worship services. Ananias too joined the denomination, but unlike Saul, he did not develop sincere beliefs. He merely enjoyed Saul's company and his relationships with other religious prisoners. Ananias attended only one service and didn't own a Bible.

Members of Saul and Ananias's church held an annual month-long fast, avoiding meat, eggs, and dairy. The prison accommodated inmates by providing a special diet, as long as inmates made a written statement affirming their beliefs and agreed to eat only religious food. Saul and Ananias provided the necessary statement. Saul explained his beliefs in detail, while Ananias provided a short, generic statement.

During the fast, Saul traded his religious meal for a plate of prime rib. Saul immediately regretted his transgression and consulted with his religious leader, who instructed him that he could receive forgiveness by faithfully observing the remainder of the fast. Meanwhile, Ananias ignored the fast by continuing to consume meat. Prison officials learned of the indiscretions and removed both prisoners from the diet program. The officials also put them on a one-month probation, barring them from attending worship services. Did prison officials substantially burden either Saul's or Ananias's exercise of religion?

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In the past two decades, Congress has passed the Religious Freedom Restoration Act¹ (RFRA) and the Religious Land Use and Institutionalized Persons Act² (RLUIPA). These acts prevent federal and state officials from imposing a “substantial burden” on prisoners’ religious exercise, unless the burden advances “a compelling governmental interest...and is the least restrictive means of furthering that...interest.”³ In accordance with these Acts, prison officials often allow inmates to read scriptures, attend services, eat religious foods, and participate in fasts. But what happens if officials provide accommodations and inmates fail to take advantage of them? Must prison officials continue accommodating these so-called “backsliding” prisoners?⁴ Circuits are split over this question.

Specifically, courts have recently disagreed whether it is a “substantial burden” for prisons to withhold religious diets after prisoners fail to keep them. In *Daly v Davis*,⁵ the Seventh Circuit held that removing a violating prisoner from a kosher food program wasn’t a substantial burden under RFRA.⁶ On the other hand, in *Lovelace v Lee*,⁷ the Fourth Circuit held that removing one-time violators from a fasting program was a substantial burden under the equivalent RLUIPA standard,⁸ despite a lengthy dissent from Judge J. Harvie Wilkinson.⁹

This issue requires clarification. Prison officials need to know the legality of disciplinary measures, and inmates need to know the consequences of violating religious accommodations. Moreover, the

¹ Pub L No 103-141, 107 Stat 1488 (1993), codified at 42 USC § 2000bb et seq.

² Pub L No 106-274, 114 Stat 803 (2000), codified at 42 USC § 2000cc et seq.

³ RLUIPA § 2(a)(1), 42 USC § 2000cc-1(a). RFRA applies outside the prison context:

Government shall not substantially burden a person’s exercise of religion even if the burden results from a rule of general applicability, [unless] ... it demonstrates that [the burden] ... is in furtherance of a compelling governmental interest, [and] is the least restrictive means of furthering that compelling governmental interest.

RFRA § 3(a), 42 USC § 2000bb-1(a)–(b). See also *A Jailhouse Lawyer’s Manual* 727–57 (Columbia Human Rights Law Review 9th ed 2011), online at <http://www3.law.columbia.edu/hrlr/JLM/Chapter-27.pdf> (visited Apr 26, 2011).

⁴ Backsliding is defined as “laps[ing]...in the practice of religion.” Merriam-Webster, <http://www.merriam-webster.com/dictionary/backsliding> (visited Apr 27, 2011). See also *Reed v Faulkner*, 842 F2d 960, 963 (7th Cir 1988) (calling a religious prisoner’s decision to eat meat “backsliding”).

⁵ 2009 WL 773880 (7th Cir).

⁶ *Id.* at *2–3.

⁷ 472 F3d 174 (4th Cir 2006).

⁸ *Id.* at 187.

⁹ *Id.* at 204 (Wilkinson concurring in part and dissenting in part).

circuit split has broad implications: the reasoning in *Lovelace* and *Daly* extends to nondietary religious accommodations. It is therefore unclear whether prison officials must continue holding religious services for prisoners who occasionally fail to attend.¹⁰

This Comment analyzes the current debate and suggests a novel solution—one that addresses these questions and overcomes the weaknesses of the current approaches. Part I summarizes the First Amendment jurisprudence that led to RFRA and RLUIPA and briefly explains how courts have interpreted these Acts. Part II describes courts' attempts to determine if removing violating prisoners from dietary accommodation programs is a substantial burden.

Part III argues that courts are focusing on the wrong issue. Both sides rush to determine whether removing backsliding prisoners is a substantial burden, but both overlook the critical prior question: Is there even a burden on religious exercise? The text and history of RFRA and RLUIPA indicate that courts first must answer this question. They also indicate that to answer this question, courts must know if prisoners hold sincere religious beliefs. I therefore argue that sincerity should be the determinative inquiry when analyzing the claims of backsliding prisoners. Unfortunately, courts have not developed a formal sincerity test in RFRA and RLUIPA cases. Courts should remedy this problem by applying a modified version of the sincerity test developed for conscientious objectors to military service in *Witmer v United States*.¹¹ My approach allows sincere but imperfect prisoners to exercise their beliefs but doesn't force prison officials to accommodate mendacity.

I. LEGAL BACKGROUND

This Part provides historical context for RFRA and RLUIPA. Part I.A describes how the Supreme Court's holding in *Employment Division v Smith*¹² made it more difficult for individuals to recover under the Free Exercise Clause of the First Amendment. Part I.B explains how Congress responded to *Smith* by passing RFRA and, eventually, RLUIPA. Part I.C summarizes how courts have generally interpreted these statutes.

¹⁰ Similarly, must prison officials continue allowing prisoners to attend religious services after they fail to abide by their religious diets? The Fourth Circuit held that barring attendance is a substantial burden. See *Lovelace*, 472 F3d at 187–88.

¹¹ 348 US 375 (1955).

¹² 494 US 872 (1990).

A. *Smith* and Laws of General Applicability

For decades, the Supreme Court analyzed free exercise claims under the test announced in *Sherbert v Verner*.¹³ Governments could not substantially burden an individual's religious practice unless there was a "compelling state interest" in regulating that practice.¹⁴ The Supreme Court significantly changed free exercise jurisprudence in *Smith*.

Alfred Smith and Galen Black were employees at a private drug rehabilitation clinic in Oregon.¹⁵ Smith and Black lost their jobs after using peyote¹⁶ as part of a religious ceremony in the Native American Church. They filed for government unemployment benefits but were denied because they had been fired for work-related misconduct. Smith and Black sued, claiming that the state's denial of unemployment benefits for religiously motivated conduct violated the Free Exercise Clause.¹⁷

The Court held that Oregon did not violate the First Amendment. Rather than invoking *Sherbert*, however, the Court created a new standard for analyzing free exercise claims. It stated that neutral laws of general applicability are valid even if they incidentally burden religion.¹⁸ Under this standard, the Court determined that Oregon could withhold unemployment benefits from Smith and Black, since the policy barring claimants dismissed for drug-related reasons wasn't directed at a particular religion.¹⁹ By rejecting *Sherbert's* compelling-interest test, the Supreme Court set the stage for RFRA and RLUIPA.

B. Congressional Responses to *Smith*

1. The Religious Freedom Restoration Act.

The Supreme Court's holding in *Smith* created apprehension among scholars and believers. Many worried that *Smith* would leave

¹³ 374 US 398 (1963).

¹⁴ See *id.* at 406.

¹⁵ *Smith*, 494 US at 874.

¹⁶ The US Drug Enforcement Administration defines peyote as "a small, spineless cactus . . . whose principal active ingredient is the hallucinogen mescaline" and notes that "[f]rom earliest recorded time, peyote has been used by natives in northern Mexico and the southwestern United States as a part of their religious rites." See US Drug Enforcement Administration, *Peyote and Mescaline*, online at <http://www.justice.gov/dea/concern/peyote.html> (visited Apr 26, 2011).

¹⁷ *Smith*, 494 US at 874.

¹⁸ *Id.* at 877–82. See also *Church of the Lukumi Babalu Aye v Hialeah*, 508 US 520, 533–34, 542–43 (1993) (defining neutral laws of general applicability by, for instance, noting that neutrality determinations are made based on the purpose of the law).

¹⁹ *Smith*, 494 US at 889.

religious adherents without judicial recourse in the face of laws that inadvertently restricted religious exercise.²⁰ Congress responded quickly and nearly unanimously by passing RFRA.²¹ RFRA established a new statutory cause of action for infringements on religious freedom.

The Act states, “Government shall not substantially burden a person’s exercise of religion even if the burden results from a rule of general applicability.”²² Government actors can escape liability if they show that any burden they impose “(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.”²³ The stated goal of this statutory cause of action was to overrule *Smith* and to restore the *Sherbert* balancing test.²⁴

As originally written, RFRA applied to state and federal government officials.²⁵ In *City of Boerne v Flores*,²⁶ however, the Supreme Court held that RFRA was unconstitutional as applied to states because it exceeded Congress’s limited powers to enforce the Fourteenth Amendment against state actors.²⁷ Despite *City of Boerne*, RFRA still applies to the federal government,²⁸ so federal prisoners who do not receive religious accommodations may bring claims under RFRA.²⁹

2. The Religious Land Use and Institutionalized Persons Act.

In the wake of *City of Boerne*, Congress again responded to the Supreme Court, this time passing RLUIPA. RLUIPA amended RFRA so that it no longer purported to apply to state actors.³⁰ More importantly, RLUIPA established two new causes of action: one for landowners³¹ and another for state prisoners.³²

State prisoners can recover if prison officials substantially burden their exercise of religion. The relevant language in RLUIPA is nearly

²⁰ See Douglas Laycock, *Formal, Substantive, and Disaggregated Neutrality toward Religion*, 39 DePaul L Rev 993, 1000 (1990) (calling *Smith* a “stunning opinion” that allowed the government to “regulate the Mass for good reasons, bad reasons, or no reasons at all”).

²¹ See 139 Cong Rec S 14468, 14471 (daily ed Oct 27, 1993).

²² RFRA § 3(a), 42 USC § 2000bb-1(a).

²³ RFRA § 3(b), 42 USC § 2000bb-1(b).

²⁴ See RFRA § 2, 42 USC § 2000bb.

²⁵ See RFRA § 5(1), 42 USC § 2000bb-2(1).

²⁶ 521 US 507 (1997).

²⁷ See *id* at 536.

²⁸ See *Gonzales v O Centro Espirita Beneficente Uniao do Vegetal*, 546 US 418, 423 (2006).

²⁹ See, for example, *Daly*, 2009 WL 773880 at *2.

³⁰ RLUIPA § 5(h), 42 USC § 2000cc-3(h) (specifying that the Act does not preempt state law).

³¹ RLUIPA § 2, 42 USC § 2000cc (stipulating that, normally, the government may not implement a land-use regulation that would impose a substantial burden on an individual’s religious exercise).

³² RLUIPA § 3, 42 USC § 2000cc-1.

identical to the language in RFRA: “No government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution . . . even if the burden results from a rule of general applicability.”³³ As under RFRA, government actors are not liable if they show that the burden “(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.”³⁴

Congress relied on the Spending Clause³⁵ rather than the Fourteenth Amendment to implement RLUIPA.³⁶ State prisons must abide by RLUIPA only if they accept federal funds³⁷—though nearly all state prisons accept such funds.³⁸ In the only Supreme Court case interpreting RLUIPA, the Court held that the Act does not violate the Establishment Clause because it simply restores prisoners’ rights that were removed upon incarceration.³⁹

C. The Relationship between RFRA and RLUIPA

Courts generally interpret the relevant standards in RFRA and RLUIPA uniformly. The substantial-burden language in RFRA and RLUIPA is practically identical. Also, RLUIPA’s history indicates that both Acts prohibit the same conduct; Congress passed RLUIPA explicitly to patch a hole in RFRA protection after the Court’s *City of Boerne* decision. Despite substantial similarities, one difference between the Acts is that “government” under RFRA means only the federal government, whereas “government” under RLUIPA means only state governments.⁴⁰ Nevertheless, courts have interpreted the phrases “substantial burden on the religious exercise of a person” and “substantially burden a person’s exercise of religion” equivalently under both statutes.⁴¹ Courts rely on RFRA precedents when interpreting RLUIPA, and vice versa.⁴² This is an important point

³³ RFRA § 3, 42 USC § 2000cc-1(a).

³⁴ RFRA § 3, 42 USC § 2000cc-1(a).

³⁵ US Const Art I, § 8, cl 1.

³⁶ See RLUIPA § 3, 42 USC § 2000cc-1(b). RLUIPA is therefore immune to the constitutional challenges that limited RFRA. See *South Dakota v Dole*, 483 US 203, 207 (1987).

³⁷ See *Benning v Georgia*, 391 F3d 1299, 1305–06 (11th Cir 2004). But see *Sossamon v Lone Star State of Texas*, 560 F3d 316, 330 (5th Cir 2009).

³⁸ See Sarah Kerr, *Litigation and Legislation Efforts to Improve Mental Health Treatment for Prisoners in New York State Prisons*, 224 Prison L 153, 160 n 25 (2010).

³⁹ See *Cutter v Wilkinson*, 544 US 709, 720 (2005).

⁴⁰ See text accompanying notes 28–35, 39.

⁴¹ See *Cutter*, 544 US at 725 (calling RFRA “the same heightened scrutiny standard as RLUIPA”); *Fowler v Crawford*, 534 F3d 931, 937–38 (8th Cir 2008).

⁴² See, for example, *Fowler*, 534 F3d at 937–38 (holding that a RFRA case “dictate[d] the outcome” in the RLUIPA case before the court); *Daly*, 2009 WL 773880 at *2 (citing a RFRA case to decide a RLUIPA case).

because some of the cases discussed in Part II rely on RFRA, while others rely on RLUIPA.

Both Acts incorporate the First Amendment's definition of "religious exercise."⁴³ Under either Act—as under the First Amendment—a claimant can recover only if her beliefs are "religious in nature" and "sincerely held."⁴⁴ I argue below that courts have not paid sufficient attention to the sincerity requirement in RFRA and RLUIPA cases.

Neither Act defines "substantial burden." The Supreme Court has not interpreted the phrase in the context of RFRA or RLUIPA, but its definition is generally constant across circuits.⁴⁵ Lower courts have concluded that substantial burden has the same meaning under both Acts⁴⁶ and that both Acts adopt the Supreme Court's definition of substantial burden from pre-*Smith* free exercise cases.⁴⁷ In these cases, a burden is substantial if it "pressure[s]" an adherent "to modify his behavior and to violate his beliefs."⁴⁸ This pressure can result either from government officials conditioning a benefit on the adherent violating her beliefs or from penalizing an adherent for practicing her beliefs.⁴⁹

In sum, a prisoner who brings a RFRA or RLUIPA claim must show that prison officials burdened her exercise of religion and that the burden is substantial. If a prisoner proves both elements, prison

⁴³ See Part III.A.2.

⁴⁴ *Africa v Pennsylvania*, 662 F2d 1025, 1030 (3d Cir 1981). See also *A Jailhouse Lawyer's Manual* at 734–35, 738 n 109 (cited in note 3); *Lovelace*, 472 F3d at 187 n 2 ("RLUIPA bars inquiry into whether [the] belief or practice is central to a prisoner's religion. RLUIPA does not, however, preclude inquiry into the sincerity of a prisoner's professed religiosity.") (quotation marks and citations omitted).

⁴⁵ See *Lovelace*, 472 F3d at 187 ("[C]ircuits have articulated generally consistent definitions of 'substantial burden' under RLUIPA."). But see Scott Budzenski, Comment, *Tug of War: The Supreme Court, Congress, and the Circuits—The Fifth Circuit's Input on the Struggle to Define a Prisoner's Right to Religious Freedom in Adkins v. Kaspar*, 80 St John's L Rev 1335, 1346–50 (2006).

⁴⁶ See, for example, *Fowler*, 534 F3d at 937–38; *Daly*, 2009 WL 773880 at *2–3. See also *A Jailhouse Lawyer's Manual* at 727 (cited in note 3).

⁴⁷ See *Civil Liberties for Urban Believers v Chicago*, 342 F3d 752, 760–61 (7th Cir 2003), quoting 146 Cong Rec S 16700 (July 27, 2000) (Joint Statement of Sen Hatch and Sen Kennedy) ("The term 'substantial burden' as used in [RLUIPA] is not intended to be given any broader interpretation than the Supreme Court's articulation of the concept of substantial burden of religious exercise."); *Lovelace*, 472 F3d at 187 ("We likewise follow the Supreme Court's guidance in the Free Exercise Clause context.")

⁴⁸ *Lovelace*, 472 F3d at 187, quoting *Thomas v Review Board*, 450 US 707, 718 (1981) (explaining the free exercise substantial-burden standard).

⁴⁹ See *Lovelace*, 472 F3d at 187 ("[A substantial burden] forces a person to 'choose between following the precepts of her religion and forfeiting [governmental] benefits, on the one hand, and abandoning one of the precepts of her religion . . . on the other hand.'"), quoting *Sherbert*, 374 US at 404. See also *Midrash Sephardi, Inc v Surfside*, 366 F3d 1214, 1227 (11th Cir 2004); *Adkins v Kaspar*, 393 F3d 559, 570 (5th Cir 2004).

officials must show a compelling interest and the use of the least restrictive means. Part II demonstrates that courts currently analyze the claims of backsliding prisoners by focusing on the second element—whether a burden is substantial. Part III argues that the emphasis is misplaced. Courts should focus on the first element—whether there is a burden on religious exercise. The first element is particularly relevant when dealing with backsliding prisoners, since backsliding raises doubts about the sincerity of the prisoner’s beliefs.

II. WAYWARD PRISONERS: SUBSTANTIAL BURDEN?

Federal and state prison officials are required to make accommodations for prisoners’ religious dietary needs.⁵⁰ For example, state prison officials may be liable under RLUIPA if they do not offer kosher food to Jewish prisoners.⁵¹ Nevertheless, courts have disagreed about the implications of a prisoner’s failing to take advantage of accommodations. Specifically, courts have disagreed whether removing backsliding prisoners from accommodation programs is a substantial burden under RFRA and RLUIPA. Part II.A discusses cases in the Seventh and Eighth Circuits, which conclude that removal isn’t a substantial burden. Part II.B discusses cases in the Fourth and Sixth Circuits, which conclude otherwise. Part II.C summarizes the debate.

A. Removing Backsliding Prisoners Is Not a Substantial Burden

In *Brown-El v Harris*,⁵² the Eighth Circuit held that suspending the religious meals of a prisoner who had violated the Ramadan fast was permissible.⁵³ Keith Brown-El was a Muslim prisoner at a Missouri state prison. He participated in a program that allowed him to eat specially prepared meals after dark so he could observe the Ramadan fast. The program’s written policy stated that officials would remove prisoners who ate meals during daytime. Brown-El fought a prison guard and was placed in the infirmary, where he voluntarily ate a daytime meal. The prison then removed Brown-El from the fasting program. Brown-El first claimed that his religion made an exception for adherents who were injured but didn’t offer any evidence of this tenet.⁵⁴

Brown-El’s second claim was that even if he broke his religious fast by eating daytime food, removal for a single infraction violated his First Amendment rights. The Eighth Circuit rejected this claim, holding

⁵⁰ See 28 CFR § 548.20.

⁵¹ See, for example, *Colvin v Caruso*, 605 F3d 282, 289 (6th Cir 2010).

⁵² 26 F3d 68 (8th Cir 1994).

⁵³ See *id.* at 69–70.

⁵⁴ See *id.*

that “[t]he policy did not coerce worshippers ‘into violating their religious beliefs; nor [did it compel] them, by threat of sanctions, to refrain from religiously motivated conduct.’”⁵⁵ In other words, removing accommodations when a prisoner fails to take advantage of them does not substantially burden the exercise of religion because there is no pressure. In such cases, the prisoner chooses to remove herself by rejecting an accommodation. The court analyzed this claim under the First Amendment, but the court stated that Brown-El’s claim would similarly fail under RFRA’s substantial-burden requirement.⁵⁶

The Seventh Circuit recently analyzed a similar RFRA claim and reached the same conclusion.⁵⁷ James Daly, a Jewish inmate in a federal penitentiary, participated in a program that allowed prisoners to receive kosher food. Prison guards saw Daly eating nonkosher food on three separate occasions. Daly was temporarily removed from the program each time.⁵⁸

As a federal prisoner, Daly brought his claim under RFRA. The Seventh Circuit held that the federal prison was justified in removing Daly from the dietary accommodation program.⁵⁹ The court stated that removal was not a substantial burden because it did not “compel conduct contrary to religious beliefs: Daly was forced to eat the non-kosher meals only because he turned down the kosher ones.”⁶⁰ Much like the Eighth Circuit, the Seventh Circuit held that removing a straying prisoner from an accommodation program was not a substantial burden because the prisoner voluntarily opted out of the program by choosing to violate personal religious beliefs.

Daly also claimed that prison officials failed to “establish that his suspension was the least restrictive means of furthering a compelling governmental interest,”⁶¹ as required under RFRA. But the court stated this argument “puts the cart before the horse.”⁶² The compelling-interest inquiry is relevant only after a prisoner shows that prison officials substantially burdened religious exercise.

⁵⁵ Id at 70, citing *United States v Means*, 858 F2d 404, 407 (8th Cir 1988).

⁵⁶ *Brown-El*, 26 F3d at 69. Even though Brown-El was in a state prison, the court analyzed his claim under RFRA because, at the time, courts still assumed the Act was valid against state actors.

⁵⁷ See *Daly*, 2009 WL 773880 at *2.

⁵⁸ Id at *1.

⁵⁹ See id at *2.

⁶⁰ Id.

⁶¹ *Daly*, 2009 WL 773880 at *2.

⁶² Id, quoting *Navajo Nation v United States Forest Service*, 535 F3d 1058, 1076 (9th Cir 2008).

B. Removing Backsliding Prisoners Is a Substantial Burden

In *Lovelace*, the Fourth Circuit disagreed with the Seventh and Eighth Circuits' discussions of substantial burden.⁶³ Like the prison in *Brown-El*, a Virginia state prison accommodated Muslim prisoners during Ramadan by allowing them to eat before sunrise and after sunset.⁶⁴ Prisoners who violated the fast were unable to continue participating. A prison guard accused Leroy Lovelace of eating a daytime meal after Lovelace had complained of rotten milk. Although the guard later admitted he had been confused, Lovelace was removed from the program.⁶⁵ Adding insult to injury, prison officials did not allow him to participate in worship services or group prayers.⁶⁶ Lovelace sued under RLUIPA.

The Fourth Circuit held that the Virginia prison placed a substantial burden on Lovelace's exercise of religion because he was under "pressure . . . to modify his behavior and to violate his beliefs."⁶⁷ The court stated that removing Lovelace from the fasting program substantially burdened his religious exercise if he *had not* violated the fast by eating during the day.⁶⁸ But the court went further. It also stated that the prison's policy of removing violating inmates from accommodation programs was a substantial burden.⁶⁹ In other words, the prison policy was a substantial burden on Lovelace's exercise of religion, *regardless* of whether Lovelace had broken his fast. The court noted it was irrelevant "that the burden on Lovelace's religious exercise resulted from discipline . . . rather than from the prison's failure to accommodate."⁷⁰

Because Lovelace had shown that the prison's policy substantially burdened his exercise of religion, the burden shifted to the prison to show that the burden furthered "a compelling governmental interest; and [was] the least restrictive means of furthering that . . . interest."⁷¹ Prison officials asserted that they had a "legitimate interest in removing inmates from religious dietary programs where the inmate flouts prison rules."⁷² The court held that this interest was inadequate. It remanded the case to allow prison officials to "provid[e] an

⁶³ *Lovelace*, 472 F3d at 208 (Wilkinson concurring in part and dissenting in part) (noting that the majority's holding puts the court at tension with the Eighth Circuit).

⁶⁴ *Id.* at 182–83 (majority).

⁶⁵ *Id.* at 183–84.

⁶⁶ *Id.* at 187.

⁶⁷ *Lovelace*, 472 F3d at 187, quoting *Thomas*, 450 US at 718.

⁶⁸ *Lovelace*, 472 F3d at 187.

⁶⁹ *Id.* at 188.

⁷⁰ *Id.*

⁷¹ RLUIPA § 3, 42 USC § 2000cc-1(a).

⁷² *Lovelace*, 472 F3d at 190.

explanation for the policy's restrictions that takes into account any institutional need to maintain good order, security, and discipline or to control costs."⁷³ The policy would also need to be the least restrictive means of furthering the interest.⁷⁴

The court's opinion elicited a strong dissent from Judge Wilkinson. He agreed with the Eighth Circuit that prison officials need not continue accommodating backsliding prisoners.⁷⁵ Judge Wilkinson also argued that a prisoner's violation of dietary restrictions was presumptive evidence of religious insincerity.⁷⁶ Finally, he accused the majority of "[d]isregarding the deference historically accorded prison administrators," predicting that "[t]he only certainty that the majority guarantees is litigation over matters large and small, with federal courts thrust into a role they have sought assiduously to avoid—that of micromanaging state prisons."⁷⁷

Although Lovelace sued under RLUIPA and Daly sued under RFRA, the resulting disagreement between the Fourth and Seventh Circuits is not simply a result of courts applying two different statutes. After all, RFRA and RLUIPA use equivalent language and courts have consistently held that "substantial burden" has the same meaning under both Acts.⁷⁸

The Sixth Circuit sided with the *Lovelace* majority in dicta. In *Colvin v Caruso*,⁷⁹ the court considered whether state prison officials had violated RLUIPA when they removed Kenneth Colvin from a kosher meal program after he had eaten nonkosher food on multiple occasions.⁸⁰ Although the court dismissed Colvin's RLUIPA claim as moot,⁸¹ it noted that the prison's "policy of removing a prisoner from the kosher-meal program for mere possession of a non-kosher food item may be overly restrictive of inmates' religious rights."⁸² The District of New Hampshire similarly expressed skepticism about the validity of a policy that removed violating prisoners from religious dietary programs.⁸³ The court stated that "[w]hile the prison certainly has a valid

⁷³ Id.

⁷⁴ Id at 191.

⁷⁵ See id at 207 (Wilkinson concurring in part and dissenting in part).

⁷⁶ *Lovelace*, 472 F3d at 207 (Wilkinson concurring in part and dissenting in part) ("The Keen Mountain policy accommodates Ramadan observance only for those inmates who actually observe the Ramadan fast. Such a sincerity requirement is in no way a substantial burden on religious exercise.").

⁷⁷ Id at 204 (citations omitted).

⁷⁸ See Part I.C.

⁷⁹ 605 F3d 282 (6th Cir 2010).

⁸⁰ See id at 286–87.

⁸¹ Id at 289.

⁸² Id at 296.

⁸³ See *Kuperman v Warden*, 2009 WL 4042760, *6 (D NH).

interest in weeding out insincere requests for religious diets, there is some question whether that interest is truly compelling.”⁸⁴

C. Summarizing the Debate

It is “open to question” whether prison officials violate RLUIPA or RFRA when they remove prisoners from religious dietary programs after prisoners break their religious commitment.⁸⁵ Both sides agree that substantial burden is the critical issue. They merely disagree whether removal “put[s] substantial pressure on an adherent . . . to violate his beliefs.”⁸⁶

In *Daly*, the Seventh Circuit held that removing wayward adherents is not a substantial burden under RFRA, since they “choose” to remove themselves when they choose to violate their beliefs.⁸⁷ Under this view, prisoners are not under pressure to violate their beliefs because they can remain in the program simply by not violating their religion’s dietary restrictions. The Eighth Circuit agreed with this conclusion in dicta.⁸⁸ In *Lovelace*, the Fourth Circuit reached the opposite result under RLUIPA. In the court’s view, it didn’t matter if expulsion from the program was the result of a voluntary choice. It mattered only that the prisoner was unable to practice his religion after removal.⁸⁹ The Sixth Circuit and the District of New Hampshire agreed with this conclusion in dicta.⁹⁰

Part III argues that courts should shift the inquiry away from substantial burden and on to religious sincerity. My solution also addresses the broader implications of this circuit split. In particular, the disagreement centers on the narrow issue of dietary accommodations, but the courts’ reasoning seems to extend to other instances of religious accommodations. The Fourth Circuit held that preventing *Lovelace* from attending worship services was a substantial burden even though he had broken his fast.⁹¹ But courts on the other side of the split have not stated their views on this issue.

III. TESTING THE SINCERITY OF RFRA AND RLUIPA CLAIMANTS

This Part resolves the circuit split by developing a new framework for analyzing prisoners’ RFRA and RLUIPA claims. I

⁸⁴ *Id.*

⁸⁵ *Id.* at *7.

⁸⁶ *Thomas*, 450 US at 718.

⁸⁷ 2009 WL 773880 at *2.

⁸⁸ See *Brown-El*, 26 F3d at 69.

⁸⁹ See *Lovelace*, 472 F3d at 187.

⁹⁰ See *Colvin*, 605 F3d at 296; *Kuperman*, 2009 WL 4042760 at *6.

⁹¹ See *Lovelace*, 472 F3d at 187.

argue that the inquiry in both *Daly* and *Lovelace* is misguided: the relevant question is not whether removing prisoners from accommodation programs is a substantial burden but whether prisoners have sincere beliefs. If courts know that a prisoner's beliefs are sincere, it becomes apparent that removal is a substantial burden under the Acts. Part III.A derives this framework from the Acts themselves. Part III.B discusses the advantages of a sincerity-centered approach. Part III.C applies the approach to Saul and Ananias, the hypothetical prisoners from the Introduction.

A. Religious Sincerity as the Determinative Inquiry

1. RFRA and RLUIPA codified pre-*Smith* jurisprudence, indicating burdens are substantial only if beliefs are sincere.

This Section argues that RFRA and RLUIPA codified the pre-*Smith* definition of “substantial burden,” which developed in a line of free exercise cases starting with *Sherbert*. I show that under pre-*Smith* jurisprudence, removing violating prisoners from accommodation programs generally is a substantial burden—but only if prisoners have sincere beliefs. This suggests that the proper inquiry in RFRA and RLUIPA cases is whether the prisoner's desire to continue receiving accommodations is motivated by sincere beliefs.

Congress passed RFRA in response to the Supreme Court's decision in *Smith*.⁹² *Smith* held that neutral laws of general applicability are valid under the Free Exercise Clause, even if they incidentally burden religion.⁹³ There are at least three reasons courts should interpret “substantial burden” under RFRA the same way courts used the term before *Smith*.

First, RFRA's stated purpose is to return to pre-*Smith* free exercise jurisprudence. The Act states that *Smith* “virtually eliminated the requirement that the government justify burdens on religious exercise imposed by [neutral laws].”⁹⁴ The Act further states that “the compelling interest test as set forth in prior Federal court rulings is a workable test for striking sensible balances.”⁹⁵ The Act then declares its purposes:

[T]o restore the compelling interest test as set forth in [*Sherbert*] and [*Wisconsin v Yoder*] and to guarantee its application in all

⁹² See notes 20–24 and accompanying text.

⁹³ 494 US at 885.

⁹⁴ RFRA § 2(a)(4), 42 USC § 2000bb(a)(4).

⁹⁵ RFRA § 2(a)(5), 42 USC § 2000bb(a)(5) (explaining that the balances struck are between religious liberty and competing prior governmental interest).

cases where free exercise of religion is *substantially burdened*; and to provide a claim or defense to persons whose religious exercise is substantially burdened by government.⁹⁶

This express attempt to codify pre-*Smith* free exercise jurisprudence indicates that courts should interpret the statute according to pre-*Smith* case law.

Second, RFRA incorporates the phrase “substantially burden,”⁹⁷ wording that the Supreme Court frequently used in pre-*Smith* case law. In *Thomas v Review Board*,⁹⁸ the Court stated, “Where the state . . . [puts] *substantial* pressure on an adherent to modify his behavior and to violate his beliefs, a burden upon religion exists. While the compulsion may be indirect, the infringement upon free exercise is nonetheless *substantial*.”⁹⁹ References to substantial burdens or infringements also appeared in *Sherbert* and *Wisconsin v Yoder*,¹⁰⁰ along with a number of Supreme Court decisions in the latter half of the twentieth century.¹⁰¹ RFRA’s textual incorporation of an oft-repeated phrase, along with the stated attempt to return to pre-*Smith* jurisprudence, indicates that RFRA adopted the Supreme Court’s definition.

Third, circuit courts have agreed that RFRA and RLUIPA adopted the meaning of substantial burden from pre-*Smith* cases. Notably, the split courts discussed in this Comment agree that a substantial burden exists when the state places “pressure on an adherent . . . to violate his beliefs,”¹⁰² thereby embracing the language from *Thomas*. The near unanimity among the circuits, along with the arguments discussed above, provides strong evidence that RFRA adopted the Supreme Court’s pre-*Smith* definition of substantial burden.¹⁰³

Related factors suggest that RLUIPA incorporated the same definition of substantial burden. Congress passed RLUIPA after the Court held that RFRA did not apply to state actors, and the statute

⁹⁶ RFRA § 2(b)(1)–(2), 42 USC § 2000bb(b)(1)–(2) (emphasis added). See also *Sherbert*, 374 US at 403–04; *Wisconsin v Yoder*, 406 US 205, 218 (1972).

⁹⁷ RFRA § 3(a), 42 USC § 2000bb-1(a).

⁹⁸ 450 US 707 (1981).

⁹⁹ *Id.* at 717–18 (emphasis added).

¹⁰⁰ 406 US 205 (1972).

¹⁰¹ See *Sherbert*, 374 US at 406 (“substantial infringement”); *Yoder*, 406 US at 218 (“substantially interfering”); *Hobbie v Unemployment Appeals Commission*, 480 US 136, 141 (1987), citing *Thomas*, 450 US at 717 (“substantial pressure”); *Hernandez v Commissioner of Internal Revenue*, 490 US 680, 699 (1989) (“substantial burden”).

¹⁰² *Lovelace*, 472 F3d at 187; *Daly*, 2009 WL 773880 at *2–3. Both cases cited the standard in *Thomas*, 450 US at 717–18.

¹⁰³ See also 146 Cong Rec at S 16700 (cited in note 47).

contains nearly identical language. As a result, courts have recognized that RLUIPA also adopted the pre-*Smith* definition of substantial burden.¹⁰⁴

As noted above, *Lovelace* and *Daly* agreed with this analysis. Both cases assumed that RFRA and RLUIPA adopted the pre-*Smith* definition of substantial burden. In light of this agreement, it is surprising that neither took the next step. Neither court asked if removing accommodations from a violating prisoner is a substantial burden under pre-*Smith* law. Instead of examining precedent, both courts asked simply whether officials pressured or compelled the prisoners to violate their beliefs.¹⁰⁵ The courts' laconic explanations make it difficult to understand why they reached opposing conclusions. Fortunately, a principle revealed in pre-*Smith* Supreme Court cases answers the substantial-burden question.

To determine if eliminating accommodations would have been a substantial burden pre-*Smith*, it may be helpful to start with an analogy. Assume that workers can receive state unemployment benefits after voluntarily quitting jobs, but only if they quit for good cause. In most cases, workers have good cause if they quit because a job forced them to violate their religious beliefs.¹⁰⁶ Tom quit because he was transferred to a factory manufacturing tank parts, and creating weapons violates his religious beliefs. Before his transfer to the tank factory, Tom worked in a steel factory. It is reasonable to assume that the steel was ultimately used in weapons. Pre-*Smith*, could the government withhold otherwise required accommodations—unemployment benefits—because Tom either had violated his beliefs or was at least inconsistent?

This was the story in *Thomas*. The Indiana Supreme Court held that denying Eddie Thomas unemployment benefits didn't violate his free exercise rights because it was "unclear what his belief was, and what the religious basis of his belief was."¹⁰⁷ The US Supreme Court reversed, finding that the denial of benefits placed a substantial burden on his religious exercise. Thomas "was put to a choice between fidelity to religious belief or cessation of work."¹⁰⁸ It did not matter that it "was reasonable to assume" he had previously worked on steel

¹⁰⁴ See *Lovelace*, 472 F3d at 187. See also *Fowler v Crawford*, 534 F3d 931, 937–38 (8th Cir 2008) (holding that a RFRA case "dictate[d] the outcome" in the RLUIPA case before the court).

¹⁰⁵ Compare *Lovelace*, 472 F3d at 187 ("[A] 'substantial burden' is one that 'put[s] substantial pressure on an adherent to modify his behavior and to violate his beliefs.'"), with *Daly*, 2009 WL 773880 at *2 ("[T]he program [does not] compel conduct contrary to religious beliefs.").

¹⁰⁶ See *Bowen v Roy*, 476 US 693, 708 (1986).

¹⁰⁷ *Thomas v Review Board*, 391 NE2d 1127, 1133 (Ind 1979).

¹⁰⁸ *Thomas*, 450 US at 717.

used in war.¹⁰⁹ It only mattered that Thomas sincerely believed his religion barred him from working on tank parts at the time he quit his job and requested the religious accommodation.¹¹⁰

Thomas indicates that the substantial-burden inquiry is temporally limited to the point in time when the claimant requests an accommodation. Another pre-*Smith* case reflects this principle. After working at a jewelry store for over two years, Paula Hobbie became a Seventh-Day Adventist. She refused to work on Saturdays and lost her job. Florida then denied her request for unemployment benefits. In *Hobbie v Unemployment Appeals Commission*,¹¹¹ the Court held that Florida had behaved improperly. The Court reached this conclusion by determining that a sincere religious belief motivated Hobbie at the time she stopped working on Saturdays—her past behavior was irrelevant.¹¹²

These cases resolve the substantial-burden question in the prison context. Courts should ignore past conduct—including past violations—and simply ask if removal prevents the prisoner from exercising sincerely held religious beliefs. If so, the burden is substantial. Because removing prisoners from dietary programs makes it impossible for them to maintain religious diets, removal is a substantial burden on prisoners motivated by sincere religious beliefs.

The rules of construction accompanying RLUIPA strengthen the conclusion that removing sincere prisoners from accommodation programs for past violations is a substantial burden: “This chapter shall be construed in favor of a broad protection of religious exercise, to the maximum extent permitted by the terms of this chapter and the Constitution.”¹¹³ The “broad protection” and “maximum extent” language indicates that courts should err on the side of finding substantial burdens.

One possible objection is that the substantial-burden inquiry doesn’t apply to prisoners. As demonstrated in *O’Lone v Shabazz*,¹¹⁴ courts did not apply *Sherbert*’s substantial-burden framework to prisoners before *Smith*. Instead, courts applied a standard of review that was more deferential to officials’ “legitimate penological

¹⁰⁹ *Id.* at 711 n.3.

¹¹⁰ See *id.* at 716–18. See also *id.* at 715 (“We see, therefore, that Thomas drew a line, and it is not for us to say that the line he drew was an unreasonable one.”).

¹¹¹ 480 US 136 (1987).

¹¹² See *id.* at 144 (“The timing of Hobbie’s conversion is immaterial to our determination that her free exercise rights have been burdened; the salient inquiry under the Free Exercise Clause is the burden involved.”).

¹¹³ RLUIPA § 5(g), 42 USC § 2000cc-3(g).

¹¹⁴ 482 US 342 (1987).

interests.”¹¹⁵ But RFRA implicitly rejected *O’Lone* by not preserving *O’Lone*’s prison exception. Moreover, RLUIPA explicitly rejected *O’Lone* by overtly extending the substantial-burden inquiry to prisoners. Thus, neither RFRA nor RLUIPA maintains the penological interests exception.

The Fourth Circuit was therefore correct in holding that Lovelace’s removal from the fasting program was a substantial burden. But my acceptance of *Lovelace* comes with a caveat: rules prohibiting behavior should be considered substantial burdens *if and only if* the behavior is religiously motivated. The relevant question in accommodation cases is whether prisoners have sincere beliefs. While past violations are not relevant to the substantial-burden question, they are to the sincerity question.

2. The pre-*Smith* definition of “religious exercise” indicates that sincerity is the determinative issue in backsliding cases.

This Section notes that RFRA and RLUIPA also codified the pre-*Smith* definition of religious exercise. I discuss religious exercise under pre-*Smith* jurisprudence and demonstrate that sincerity is an important element. I also show that courts generally recognize sincerity as the determinative question in analogous backsliding cases under the Free Exercise Clause. These propositions strengthen my conclusion above: the key issue in analyzing backsliding prisoners’ RFRA and RLUIPA claims is sincerity of beliefs.

Various factors suggest that RFRA and RLUIPA assumed the pre-*Smith* definition of religious exercise. For example, they incorporated a specific phrase used both in the Constitution and in *Sherbert* jurisprudence. More importantly, an amended section of RFRA states “the term ‘exercise of religion’ means religious exercise, as defined in [RLUIPA].”¹¹⁶

Under pre-*Smith* case law, courts first determined whether a belief or act qualified as religious exercise before asking if an alleged burden was substantial. Courts asked two questions: Are the beliefs “religious in nature,” and are they “sincerely held”?¹¹⁷ Determining if beliefs are religious is “a most delicate question.”¹¹⁸ In general, courts have examined factors such as whether the alleged religion addresses

¹¹⁵ *Id.* at 349.

¹¹⁶ RFRA § 5(1), 42 USC § 2000bb-2(4).

¹¹⁷ *Africa v Pennsylvania*, 662 F.2d 1025, 1030 (3d Cir. 1981).

¹¹⁸ *Yoder*, 406 US at 215.

fundamental life questions, is comprehensive, and has a formal organizational structure.¹¹⁹

Even if a court finds that beliefs are religious, the court may still ask whether a claimant sincerely holds the beliefs. As the Supreme Court stated in *United States v Seeger*,¹²⁰ “[W]hile the ‘truth’ of a belief is not open to question, there remains the significant question whether it is ‘truly held.’ This is the threshold question of sincerity which must be resolved in every case.”¹²¹ In accordance with these principles, the Supreme Court held that it would be improper for a jury to determine whether Guy Ballard, “alias Saint Germain, Jesus, George Washington, and Godfre Ray King,” had indeed been designated as a divine messenger.¹²² Still, the jury was free to determine whether the defendants—who collected \$3 million from their followers based on these claims—sincerely held their beliefs.¹²³

A series of free exercise cases strengthen the conclusion that the relevant question is whether prisoners’ beliefs are sincere. In these cases, courts have recognized that violations of beliefs—whether before or after the occurrence of alleged burdens—are an indication of insincerity, not a factor that influences the burden inquiry.

In *Reed v Faulkner*,¹²⁴ the Seventh Circuit examined a prisoner’s free exercise claim. The prisoner had previously consumed meat and shaved his beard. Both actions were contrary to his stated religious beliefs. The court held that the plaintiff’s backsliding was relevant to the question of sincerity—though not conclusive.¹²⁵ In *Shaheed-Muhammad v Dipaolo*,¹²⁶ the prisoner ate meat before requesting a vegetarian diet. The federal district court concluded that past violations were relevant to the question of sincerity, not the question of burden.¹²⁷ Similarly, the Superior Court of New Jersey held that a worker’s previous Sunday labors, along with his willingness to work on Sunday after he was fired, influenced the sincerity analysis.¹²⁸

In light of such cases, it is unfortunate that *Lovelace* and *Daly* framed the issue as one of burden, and not of sincerity—especially

¹¹⁹ See, for example, *Africa*, 662 F2d at 1032 (explaining various factors the Supreme Court has considered in different cases). See also *Welsh v United States*, 398 US 333, 343 (1970), citing *United States v Seeger*, 380 US 163, 186 (1965); *Seeger*, 380 US at 176.

¹²⁰ 380 US 163 (1965).

¹²¹ *Id.* at 185.

¹²² See *United States v Ballard*, 322 US 78, 79 (1944).

¹²³ See *id.* at 84, 89–90.

¹²⁴ 842 F2d 960 (7th Cir 1988).

¹²⁵ See *id.* at 963.

¹²⁶ 393 F Supp 2d 80 (D Mass 2005).

¹²⁷ *Id.* at 90–91.

¹²⁸ See *Sepulveda v Borne Holding Co.*, 2010 WL 5345127, *4–5 (NJ Super 2010).

since pre-*Smith* law seemingly resolves the issue of burden. The Supreme Court itself has stated that “[RLUIPA] does not preclude inquiry into the sincerity of a prisoner’s professed religiosity.”¹²⁹ In fact, sincerity of beliefs is the “threshold inquiry of any religious accommodation claim.”¹³⁰ And even under *O’Lone*’s penological interest test, the Supreme Court noted that prisoners must have sincere beliefs.¹³¹ Why, then, have courts seemingly skipped over this threshold question when analyzing backsliding prisoners’ RFRA and RLUIPA claims?

One possible explanation is that courts are relying on unexpressed tests for sincerity. The *Lovelace* court mentioned in a footnote that “[t]here is no dispute that Lovelace sincerely holds his religious beliefs.”¹³² The court may have assumed that any prisoner who claims to be religious is likely to be sincere, so past violations are irrelevant. Or perhaps the government simply failed to recognize that backsliding can be evidence of insincerity. On the other hand, *Daly* and *Brown-El* may have assumed that prior religious violations are conclusive evidence of insincerity. Neither court expressly found insincerity, but at least the Seventh Circuit seemed skeptical that *Daly*’s beliefs were sincere.¹³³

The assumption that past violations are conclusive evidence of insincerity seemingly motivated Judge Wilkinson’s *Lovelace* dissent.¹³⁴ He claimed that the policy of removing one-time violators was valid “because it is keyed to what the Supreme Court has told us a policy may rightly be keyed to: the sincerity of a religious belief, rather than its truth.”¹³⁵ He later stated that “[t]he policy was designed to accommodate only sincere observers by the most reliable indicator possible: the would-be observers’ own religious practice.”¹³⁶

¹²⁹ *Cutter*, 544 US at 725 n 13.

¹³⁰ *Lovelace*, 472 F3d at 207 (Wilkinson concurring in part and dissenting in part), citing *Seeger*, 380 US at 185 (“[W]hile the ‘truth’ of a belief is not open to question, there remains the significant question whether it is ‘truly held.’ This is the *threshold* question of sincerity which must be resolved in every case.”).

¹³¹ See *O’Lone*, 482 US at 359 (“The Court in this case acknowledges that ‘respondents’ sincerely held religious beliefs compe[.] attendance at Jumu’ah.”).

¹³² *Lovelace*, 472 F3d at 187 n 2.

¹³³ *Daly*, 2009 WL 773880 at *1 (noting that “Daly was suspended three times from the program because he was observed purchasing and eating non-kosher food and trading his kosher tray for a regular non-kosher tray.”).

¹³⁴ See *Lovelace*, 472 F3d at 207 (Wilkinson concurring in part and dissenting in part) (“The Keen Mountain policy accommodates Ramadan observance only for those inmates who actually observe the Ramadan fast. Such a sincerity requirement is in no way a substantial burden on religious exercise.”).

¹³⁵ *Id* at 205.

¹³⁶ *Id* at 208.

It is troubling that courts might be relying on unexpressed sincerity tests. Both possible approaches are problematic because neither backsliding nor statements of belief are perfect proxies for sincerity. The Seventh Circuit recognized this when holding that past violations are evidence of insincerity, though not conclusive.¹³⁷ But there is a deeper problem with these possible unstated assumptions: they hide the courts' true standards. If sincerity is the determinative issue in RFRA and RLUIPA cases, courts should address the issue openly—not through implicit and imperfect proxies.

Another possible explanation for the misguided focus on burden is that no standardized sincerity test has emerged in RFRA and RLUIPA cases. Courts may therefore be more comfortable trying to fit the question of accommodation into the burden framework. As noted above, this oblique attempt is improper under the stated purpose and text of RFRA and RLUIPA.

3. Courts have developed a practical test for determining the sincerity of conscientious objectors.

This Section discusses the advantages and disadvantages of testing religious beliefs for sincerity. I identify various provisions of the US Code that require sincerity testing. Only one provision has been significantly litigated: the statute exempting conscientious objectors from military service. I discuss factors that courts and military review boards have examined when determining sincerity.

Sincerity testing became important after cases such as *Sherbert* allowed religious believers to receive exemptions from general laws.¹³⁸ Religion-based exemptions create incentives for people to feign religiosity.¹³⁹ Courts typically deal with these incentives by reading sincerity requirements into federal statutes granting religious exemptions. For example, unlike most applicants for citizenship, some religious applicants need not pledge a willingness to bear arms in defense of the United States, but their beliefs must be sincere.¹⁴⁰ Certain religious believers may opt out of Social Security taxes.¹⁴¹ Members of Indian tribes

¹³⁷ *Reed*, 842 F2d at 963.

¹³⁸ See *Sherbert*, 374 US at 409–10. See also William P. Marshall, *Solving the Free Exercise Dilemma: Free Exercise as Expression*, 67 Minn L Rev 545, 554 n 58 (1983).

¹³⁹ See James D. Nelson, *Incarceration, Accommodation, and Strict Scrutiny*, 95 Va L Rev 2053, 2055 (2009).

¹⁴⁰ See *In re Weizman*, 426 F2d 439, 455 (8th Cir 1970).

¹⁴¹ See 26 USC § 1402(e)(1). See also 26 USC § 170.

may hunt bald eagles for “religious purposes.”¹⁴² Religious ministers are not subject to fines for discriminatory hiring.¹⁴³

Despite widespread judicial approval, sincerity testing is difficult for several reasons. A fact finder’s personal religious beliefs may affect her perceptions of sincerity. For example, Christians may doubt the sincerity of Muslims’ belief in Ramadan. Justice Robert Jackson voiced this concern soon after courts began sincerity testing: “[Religious] experiences, like some tones and colors, have existence for one, but none at all for another. They cannot be verified to the minds of those whose field of consciousness does not include religious insight.”¹⁴⁴

Another difficulty is that the relationship between sincerity and belief is conceptually unclear. As Judge John Noonan pointed out, “Faith is faith because it cannot be demonstrated. A degree of doubt is therefore always possible.”¹⁴⁵ How certain in convictions must one be to pass a sincerity test? Judge Noonan expressed concern that a priest who had lost his faith could be guilty of fraud for saying Mass.¹⁴⁶ The Supreme Court alleviated some of these concerns in *Thomas*. It held that Indiana had violated Thomas’s free exercise rights, even though Thomas “was ‘struggling’ with his beliefs.”¹⁴⁷ Sincerity does not require certainty.

Finally, religious sincerity is difficult to prove. Prisoners may know if their beliefs are sincere, but prison officials and courts cannot. In cases of unverifiable, asymmetric information, fact finders must look to observable evidence that tends to confirm the information. Courts generally examine objective evidence—such as behavior or statements—to prove or disprove the existence of subjective beliefs.

Despite the potential drawbacks of sincerity testing, certain government programs give benefits only to religious adherents. As the Supreme Court has recognized, screening is necessary in these situations—otherwise, the risk of fraud may be high.¹⁴⁸ Most sincerity tests fail to grapple with the shortcomings outlined above. Also, courts generally do not have well-defined tests for religious sincerity.¹⁴⁹

¹⁴² See 16 USC § 668A; *Gibson v Babbitt*, 223 F3d 1256, 1258 (11th Cir 2000).

¹⁴³ See 42 USC §§ 2000e-1–2000e-2. See, for example, *Hernandez v Catholic Bishop of Chicago*, 320 F3d 698, 703–04 (7th Cir 2003).

¹⁴⁴ *Ballard*, 322 US at 93 (Jackson dissenting).

¹⁴⁵ John T. Noonan Jr, *How Sincere Do You Have to Be to Be Religious?*, 1988 U Ill L Rev 713, 718.

¹⁴⁶ See *id.* at 719. See also Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 Harv L Rev 1409, 1417 n 26, 1420 (1990) (noting the objection that “determining the ‘sincerity’ of religious claimants is dangerously intrusive”).

¹⁴⁷ *Thomas*, 450 US at 715.

¹⁴⁸ See *Ballard*, 322 US at 84 (discussing the screening done by the jury).

¹⁴⁹ See Bryan M. Likins, Note, *Determining the Appropriate Definition of Religion and Obligation to Accommodate the Religious Employee under Title VII: A Comparison of Religious*

Courts are often unclear about which party bears the burden of proof and what evidence is permissible. One notable exception is § 6(j) of the Universal Military Training and Service Act.¹⁵⁰

Section 6(j) allows conscientious objectors to avoid induction into the United States Armed Forces. The statute exempts anyone “who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form.”¹⁵¹ An objector seeking exemption must make a short statement of religious beliefs and cite relevant evidence. If the local draft board determines the objector’s beliefs are sincere, the draftee is exempted from conscription.

In *Witmer*, a local draft board determined that Philip Witmer’s beliefs were insincere and denied the § 6(j) exemption.¹⁵² The board based its decision on Witmer’s “inconsistent” claims: he initially sought exemption as a farmer, then as an ordained minister, and finally as a conscientious objector. The Supreme Court reaffirmed the standard for reviewing board decisions established in an earlier case. Courts should overturn a board’s determination of sincerity only if it has “no basis in fact.”¹⁵³

In addition to affirming the “no basis in fact” standard, the Supreme Court clarified which facts are relevant in making and reviewing sincerity determinations. “In these cases, objective facts are relevant only insofar as they help in determining the sincerity of the registrant in his claimed belief, purely a subjective question. In conscientious objector cases, therefore, *any fact* which casts doubt on the veracity of the registrant is relevant.”¹⁵⁴ Applying this standard to *Witmer*, the Court affirmed the board’s determination. It based its decision on Witmer’s supposedly inconsistent claims and his failure to produce prior evidence of religious convictions.

Lower courts have interpreted *Witmer* capaciously, examining a wide range of evidence when reviewing military boards’ sincerity determinations. Many of these decisions are highly fact specific, so it is often unclear how the holding in one case applies to others. Still, in the many cases since *Witmer*, courts have repeatedly emphasized a few specific factors. One important factor is the objector’s testimony before the review board. In *Witmer* itself, the Court stated that review boards should consider whether the registrant’s “demeanor appeared

Discrimination Protection in the United States and United Kingdom, 21 Ind Intl & Comp L Rev 111, 116 (2011).

¹⁵⁰ Pub L No 82-51, 65 Stat 75 (1951), codified as amended at 50 USC App § 451 et seq.

¹⁵¹ Universal Military Training and Service Act § 1(q), 50 USC App § 456(j).

¹⁵² *Witmer*, 348 US at 396–97.

¹⁵³ Id at 381, citing *Estep v United States*, 327 US 114, 122 (1946).

¹⁵⁴ *Witmer*, 348 US at 381–82 (emphasis added).

shifty or evasive or that his appearance was one of unreliability.”¹⁵⁵ If the review board concludes that the registrant’s testimony is untrustworthy, it can deny an exemption. Nevertheless, under the “no basis in fact” review standard, the government generally must allege other objective facts to uphold the denial of exemption on review.¹⁵⁶

Courts have emphasized at least five other factors when determining sincerity. Many of these factors are also relevant to prisoners. The first two are from *Witmer*. The *Witmer* Court based its conclusion on inconsistent claims and a lack of preinduction evidence of beliefs. Lower courts continue to rely on these factors. For example, the First Circuit recently considered the claim of a student who attended medical school on an army scholarship, then requested exemption shortly before she was scheduled to report for active duty.¹⁵⁷ The court upheld her exemption. It focused on inconsistency—in particular, whether it was inconsistent for her to claim that she was driven but also religiously uncertain when she first signed up for the scholarship. The court concluded it wasn’t.¹⁵⁸

Delay in asserting conscientious objector status is a third factor emphasized in § 6(j) cases. In *United States v Messinger*,¹⁵⁹ the Second Circuit upheld a review board’s denial of exemption status. Irwin Messinger claimed conscientious objector status two years after registering with the Selective Service System and only after various attempts to be exempted as a student failed. The court held that delay in asserting beliefs was evidence of insincerity.¹⁶⁰ Courts are quick to point out, however, that delay is not evidence of insincerity if the registrants’ beliefs have changed.¹⁶¹

The fourth and fifth factors—religious leader testimony and strength of statement—are relevant only in some cases. Review boards often hear testimony from religious leaders.¹⁶² This factor is not decisive because religious exemptions do not require believers to be

¹⁵⁵ *Id.* at 382.

¹⁵⁶ See, for example, *United States v Abbott*, 425 F2d 910, 913 (8th Cir 1970):

A local board may find that an applicant lacks sincerity in his beliefs because his demeanor demonstrates a shiftiness or evasive attitude. . . . However, this cannot serve as a basis-in-fact for an appeal board to reject a conscientious objector claim unless there exists some disclosure of this finding of unreliability by the local board on the applicant’s selective service record.

¹⁵⁷ See *Hanna v Secretary of the Army*, 513 F3d 4, 6 (1st Cir 2008). Mary Hanna’s conscientious objector status claim was analyzed under former 32 CFR § 75.5 (2007), but the standard for determining conscientious objector status is the same.

¹⁵⁸ See *Hanna*, 513 F3d at 12–14.

¹⁵⁹ 413 F2d 927 (2d Cir 1969).

¹⁶⁰ *Id.* at 932.

¹⁶¹ See *Hanna*, 513 F3d at 12–13.

¹⁶² See *Lovullo v Resor*, 443 F2d 1262, 1263–64 (2d Cir 1971).

members of particular religions.¹⁶³ But courts look favorably on religious leaders who are personally acquainted with a registrant. The final factor is the strength of the registrant's statement. When requesting a § 6(j) exemption, a registrant must agree to the declaration: "[B]y reason of religious training and belief, [I am] conscientiously opposed to participation in war in any form."¹⁶⁴ In addition, a registrant must make a written statement that explains the nature of her objections and the history of her beliefs. A thorough and convincing statement can be evidence of sincerity.¹⁶⁵

There is one major exception to the broad *Witmer* principle. The government cannot prove insincerity by showing that an applicant's conduct fails to conform to the teachings of a professed religion.¹⁶⁶ The government cannot prove that a Mormon's belief in the Bible is insincere by demonstrating that she drinks alcohol. There are two reasons for this. Courts are not comfortable deciding what a religion requires and whether a person falls short of that required conduct.¹⁶⁷ Also, courts often recognize that people may have sincere beliefs in some principles, even though their behavior doesn't conform to all teachings of a particular sect.

Despite generally agreeing on relevant factors, circuits disagree about the level of evidence necessary to establish a prima facie case of sincerity. Courts would need to resolve this disagreement if they apply the § 6(j) test to religious prisoners. On the one hand, the Second Circuit held that a registrant's signed statement of belief and testimony before the review board are prima facie evidence of sincerity.¹⁶⁸ The military draft board can overcome this presumption by adducing evidence to refute the applicant's statement. The board might attempt to prove, for example, that the applicant had never expressed religious beliefs before applying for conscientious objector status. The problem with this approach is that draft boards generally

¹⁶³ See, for example, *Seeger*, 380 US at 185. See also *Frazee v Illinois Department of Employment Security*, 489 US 829, 832–33 (1989).

¹⁶⁴ 50 USC App § 456(j).

¹⁶⁵ See *United States v Deere*, 428 F2d 1119, 1121 (2d Cir 1970).

¹⁶⁶ See *United States v Rutherford*, 437 F2d 182, 187 (8th Cir 1972):

Just as a registrant does not establish the sincerity of his claim merely by demonstrating that he is a baptized member of an organized religion which dogmatically opposes participation by its members in the military service, a registrant's decision not to conform chapter and verse to the modes of his chosen religion is not per se indicative of insincerity.

¹⁶⁷ See *Serbian Eastern Orthodox Diocese v Milivojevich*, 426 US 696, 721–22 (1976) (“[R]eligious freedom encompasses the power (of religious bodies) to decide for themselves, free from state interference, matters . . . of faith and doctrine.”). See also *Africa*, 662 F2d at 1032 (“Judges are not oracles of theological verity, and the Founders did not intend for them to be declarants of religious orthodoxy.”).

¹⁶⁸ See *Lovullo*, 443 F2d at 1264.

do not have access to sufficient evidence to prove insincerity. On the other hand, the Tenth Circuit held that an applicant's statement and testimony is not prima facie evidence of sincerity.¹⁶⁹ An applicant must provide additional evidence.

4. Courts should adapt the conscientious objector test to prisoners.

This Section argues that courts should adapt the well-developed § 6(j) sincerity test to prisoners in RFRA and RLUIPA cases. Courts should adopt a rebuttable presumption in favor of sincerity if prisoners claim to have sincere beliefs. I show that my approach would have a minimal but important effect on prison administration.

a) *Presumption of sincerity.* The Supreme Court's *Witmer* approach is a practical method for excluding disingenuous applicants while accommodating sincere believers. As argued above, the text and history of RFRA and RLUIPA require a similar test. Rather than creating a new test from whole cloth, courts should rely on the capacious sincerity test developed in *Witmer*. Trial-level courts should act as the military review board, evaluating the truthfulness of a prisoner's testimony and analyzing objective evidence. Appellate courts should review a trial court's finding under the "no basis in fact" standard.

If courts apply *Witmer* to RFRA and RLUIPA cases, they would need to adapt the test to the idiosyncrasies of prison. In particular, courts would need to resolve two issues: whether statements and testimony are prima facie evidence of sincerity and which objective factors identified in § 6(j) cases are relevant.

As noted above, the Second and Tenth Circuits disagree whether statements of belief and testimony are prima facie evidence of sincerity in § 6(j) cases.¹⁷⁰ Courts would need to resolve a similar issue in RFRA and RLUIPA cases. Prisons generally require inmates to make written statements before joining religious accommodation programs, and inmates bringing claims generally testify about their beliefs in court. Should inmates' statements and in-court testimony create a rebuttable presumption of sincerity?

There are two reasons a presumption of sincerity is appropriate in the prison context: one reason deals with incentives, the other with ease of monitoring. Relative to military draftees, prisoners have a weaker incentive to make false assertions of sincerity. Religious accommodations often provide benefits solely to sincere adherents. It

¹⁶⁹ See *Salamy v United States*, 379 F2d 838, 842 (10th Cir 1967).

¹⁷⁰ See notes 168–69 and accompanying text.

is unlikely that anyone other than sincerely religious Muslims want to participate in the Ramadan fast.

The Supreme Court recognized this point in *Cutter v Wilkinson*:¹⁷¹ “[W]e doubt that all accommodations would be perceived as ‘benefits.’ For example, congressional hearings on RLUIPA revealed that one state corrections system served as its kosher diet ‘a fruit, a vegetable, a granola bar, and a liquid nutritional supplement—each and every meal.’”¹⁷² Kosher food must be prepared in special kitchens that prisons often do not have access to, so inmates desiring kosher meals often must eat frozen or dried meals.¹⁷³ Inmates may request transfers to facilities that prepare hot kosher meals, but this option is not always available or convenient. In Michigan, for example, “institutions [that prepare hot kosher food] are only located in cold, isolated parts of the state, making it practically impossible for family members or clergy to regularly travel 800 miles or more to provide any visitation.”¹⁷⁴

There are other reasons prisoners may refrain from making false religious assertions. A congressional committee hearing revealed that at least some Jewish prisoners “are afraid to even announce their religion, for fear of the anti-Semitic attitude of wardens, guards and other inmates.”¹⁷⁵ He further stated, “Non-Jews who inquire about converting to Judaism are subjected to harassment and intimidation, too.”¹⁷⁶ A gang of Texas inmates killed a man who requested religious accommodations.¹⁷⁷

Such behavior is clearly intolerable, but the point is important: inmates have a weaker incentive than military draftees to feign sincerity. In most cases, the downside of unwanted accommodations and possible discrimination will outweigh any psychic benefit a prisoner may receive from causing administrative headaches. Congress implicitly recognized military draftees’ strong incentives to make false assertions by appointing the FBI to assist military review boards in making sincerity determinations.¹⁷⁸ Still, prisoners occasionally invent religions specifically to receive accommodations.

¹⁷¹ 544 US 709 (2005).

¹⁷² *Id.* at 721 n 10.

¹⁷³ See Clair A. Cripe, *Legal Aspects of Correction Management* 182 (Jones & Bartlett 2003).

¹⁷⁴ Protecting Religious Freedom after *Boerne v. Flores* (Part III), Hearing before the Subcommittee on the Constitution of the House Committee on the Judiciary, 105th Cong, 2d Sess 78, 80 (1999) (statement of Isaac M. Jaroslawicz, Aleph Institute), online at http://commdocs.house.gov/committees/judiciary/hju57227.000/hju57227_of.htm (visited June 18, 2011).

¹⁷⁵ *Id.* at 89.

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

¹⁷⁸ See *Seeger*, 380 US at 185.

For example, members of the Church of the New Song informed prison officials that their religion required a regular diet of sherry and steak.¹⁷⁹ But courts are generally quick to recognize sham religions.

There is a second reason courts should adopt the Second Circuit's presumption of sincerity in RFRA and RLUIPA cases. Prison officials are in a much better position than military draft boards to refute false assertions. Prisons monitor inmates' day-to-day activities. Prison guards can observe whether allegedly devout Muslims pray, read the Koran, and abstain from pork.

For instance, prison guards usually are present at religious services, and officials electronically monitor inmates who attend. According to a federal prison official, federal prisons have "increase[ed] supervision within the federal system so that no inmate-led religious groups meet without 100 percent staff supervision."¹⁸⁰ They also have "install[ed] electronic monitoring devices in chapels [and] increase[d] training and scrutiny of religious volunteers and contractors."¹⁸¹ A majority of state prisons similarly monitor religious services.¹⁸² Prisons have generally increased efforts to monitor prisoners' religious practices since 9/11.¹⁸³

Prisons also monitor visitors; they know whether a supposedly religious inmate has consulted with a religious leader. Alaskan prison guidelines state that while "[p]risoners may privately consult with a religious volunteer or faith representative in the visitation area or any other appropriate location," correctional officers "may view the meeting."¹⁸⁴

Moreover, prison chaplains are responsible for providing religious materials to inmates.¹⁸⁵ They know which prisoners have requested Bibles or other religious items. Prison officials can refute false assertions of sincerity by demonstrating that an allegedly devout inmate

¹⁷⁹ Cripe, *Legal Aspects* at 182 (cited in note 173).

¹⁸⁰ US Commission on Civil Rights, *Enforcing Religious Freedom in Prison* *35 (2008), online at <http://www.law.umaryland.edu/marshall/usccr/documents/cr12r274.pdf> (visited Apr 26, 2011).

¹⁸¹ *Id.*

¹⁸² See *id.* at *34 n 96. See also Barbara Esposito and Lee Wood, *Prison Slavery* 157–58 (Joel 1982).

¹⁸³ See US Commission on Civil Rights, *Enforcing Religious Freedom in Prison* at *37 (cited in note 180) ("At the local level, the L.A. County Jails notes that since 9/11, it has maintained a close relationship with the Joint Terrorism Task Force Radicalization Work Group.").

¹⁸⁴ State of Alaska Department of Corrections, Policies and Procedures: Religious Services, Religious Program *2 (Sept 1990), online at <http://www.correct.state.ak.us/corrections/pnp/pdf/816.01.pdf> (visited Apr 26, 2011) (stating that correctional officers may view religious interviews, but they may not record the conversations).

¹⁸⁵ See United States Commission on Civil Rights, *Enforcing Religious Freedom in Prison* at *111 (cited in note 180) ("Two federal prisons acknowledged continuing or expanding their checks on incoming religious materials, in particular those available in religious libraries."); James A. Beckford and Sophie Gilliat, *Religion in Prison: Equal Rites in a Multi-faith Society* 184–87 (Cambridge 1998).

doesn't attend religious services or use religious items. Prison officials can more easily access relevant evidence than military review boards.

b) Rebutting the presumption. I have so far argued that courts should apply the *Witmer* approach coupled with the Second Circuit's presumption of sincerity. In a typical RFRA or RLUIPA case, a backsliding prisoner would need to show that removal prevented her from practicing her beliefs. The court would presume that her beliefs are sincere based on the inmate's initial written statement to participate in the program and in-court testimony.

In many cases, prison officials would not challenge the presumption of sincerity. The court would then turn to the compelling-interest inquiry. If prison officials challenge the presumption, however, they would need to adduce relevant "objective facts." They would bear the burden of proving that the prisoner's beliefs are insincere. At this point, the prisoner also could provide additional evidence to strengthen her case. Three facts identified in § 6(j) cases would be particularly relevant to officials attempting to rebut the presumption: inconsistent claims, no prior evidence of beliefs, and delay.

Inconsistent claims would be strong evidence of insincerity. Fact finders should be skeptical of a prisoner's sincere desire to eat kosher food if he eats kosher food one month, participates in Ramadan the next, then switches back to kosher food. This prisoner would almost certainly lose. Prior violations of accommodations would be weak evidence of inconsistency, since even sincere believers are imperfectly religious. As the Seventh Circuit noted, therefore, backsliding should be considered evidence of insincerity, but not conclusive evidence.¹⁸⁶

Delay or a lack of previous expressions of belief would also be strong evidence of insincerity. Fact finders should be skeptical of accommodation requests if there is no pre-request evidence of beliefs. Fact finders should similarly view delay in indicating beliefs as evidence that a prisoner merely wants some accommodation and sees feigning religion as a way to receive it. Fact finders should be especially skeptical if an inmate doesn't express belief in Judaism or eating kosher food until after kosher food is made available to other prisoners.

If prison officials decide to challenge the presumption of sincerity, inmates also would introduce additional evidence. Inmates would try to strengthen their case by showing prior instances of religious expression and other relevant objective facts, thereby hoping to prove that their beliefs in the accommodated practices are sincere. As in § 6(j) cases, inmates could call religious leaders as witnesses. Religious leader testimony would be especially helpful if the leader personally worked

¹⁸⁶ See *Reed*, 842 F2d at 963.

with the inmate. But courts should not infer insincerity from a lack of expert testimony. This inference would create the impermissible requirement that a prisoner be a member of a particular religious group. Inmates would also be able to rely on the strength of their statements in proving sincerity.

In sum, prison officials bear the burden of proving insincerity if they challenge the presumption of sincerity. This approach requires fact finders to weigh competing evidence and make conclusions. Some decisions will be easy: a devout Orthodox Jew unknowingly eats nonkosher ice cream. Other cases will be less so: a Christian converts to Judaism and eats nonkosher food on several occasions but otherwise appears devout. Fact finders may occasionally face difficult inquiries, but Congress mandated this analysis by adopting the First Amendment's definition of religious exercise. As the Supreme Court has stated in related First Amendment jurisprudence, "In each case, the inquiry calls for line drawing; no fixed *per se* rule can be framed."¹⁸⁷

Importantly, my approach significantly reduces the number of difficult inquiries by creating a rebuttable presumption—just as the Second Circuit did in the conscription context. A presumption would considerably decrease the number of cases in which courts must weigh competing objective evidence.

c) Effect on prison management. How would prison officials implement this approach? In general, prison officials would continue managing religious accommodation programs as they have in the past. Officials would still require inmates to make written statements affirming religious beliefs before receiving accommodations. The primary difference is how prison officials would respond to backsliding prisoners.

My approach requires prison officials to focus on the sincerity of the prisoners' beliefs. In response to backsliding, officials would perhaps require prisoners to make additional statements reaffirming their beliefs. If prisoners were unwilling, officials could safely conclude that their beliefs are insincere. Prison officials may also require violating prisoners to meet with the prison chaplain, who may be in a better position to determine if a prisoner's beliefs are sincere. Or officials may comprehensively evaluate past evidence—such as surveillance data and written statements—to make a detailed sincerity determination. Some prisons may simply allow backsliding prisoners to continue participating, a result that may not be so bad.¹⁸⁸

¹⁸⁷ *Lynch v Donnelly*, 465 US 668, 678 (1984).

¹⁸⁸ See *Africa*, 662 F2d at 1037 ("[I]t is not clear from the record why special accommodations cannot be made in this instance for a prisoner who obviously cares deeply about what food he eats.").

Prison officials who remove prisoners from accommodation programs might fear that a court will disagree with their conclusions. But such fears would be exaggerated. If the court finds a substantial burden on religious exercise under RFRA or RLUIPA, prison officials can still avoid liability by showing a compelling interest. For example, the district court ultimately denied Lovelace's RLUIPA claim on remand because it concluded that the policy of removing one-time violators served a compelling interest, even though the policy itself was a substantial burden.¹⁸⁹ And even if prison officials lose, most courts agree that prisoners are entitled only to injunctive relief.¹⁹⁰ Prison officials would simply need to return the prisoner to the accommodation program. This approach would therefore require prison officials to make minor but meaningful changes.

B. Benefits of a Sincerity-Centered Approach

There are a number of advantages to the sincerity approach. Foremost, my approach is faithful to the text and express purpose of RFRA and RLUIPA. It advances RFRA's stated purpose of "restor[ing] the compelling interest test as set forth in [*Sherbert*] and [*Yoder*]." ¹⁹¹ *Daly* and *Lovelace* pay lip service to this purpose—by adopting the pre-*Smith* definition of substantial burden—but they surprisingly fail to consider whether eliminating accommodations is a substantial burden under pre-*Smith* jurisprudence. The current approaches seem to recognize that a prisoner's beliefs must be sincere, but they fail to address the relationship between backsliding and sincerity.

Moreover, my solution addresses the broader issues raised by the split between the Seventh and Fourth Circuits. At least under the Seventh Circuit's approach, it is unclear whether the same analysis applies when, for example, an inmate misses a worship service but wants to attend another.¹⁹² Under a sincerity-based approach, the important question is not whether there is a burden but whether there is a burden on *religious exercise*. This requires the inmate to have sincere beliefs. Backsliding would be evidence of insincerity, but prison officials would need to adduce additional evidence—such as

¹⁸⁹ See *Lovelace v Lee*, 2007 WL 2461750, *15 (WD Va) (discussing the number of prisoners that may attempt to participate in the Ramadan program if stringent rules were not applied to it).

¹⁹⁰ See, for example, *Colvin*, 605 F3d at 289 (“[T]his court has recently held that monetary damages are not available under RLUIPA.”). There is a dispute whether damages are allowed under RLUIPA. See generally Jennifer D. Larson, Comment, *RLUIPA, Distress, and Damages*, 74 U Chi L Rev 1443 (2007).

¹⁹¹ RFRA § 2(b)(1), 42 USC § 2000bb(b)(1).

¹⁹² The Fourth Circuit addressed this issue, see *Lovelace*, 472 F3d at 188, but the other side of the split has not.

inconsistent religious expressions—to overcome the presumption. If the court concluded that an inmate’s beliefs are sincere, and thus that there is a burden on religious exercise, the court would turn to the question of substantial burden. Under this inquiry, the outcome would be the same whether prison officials prevented an inmate from attending a worship service after missing a service or after violating a dietary accommodation. The burden would be substantial because the inmate would be deprived of the opportunity to exercise deeply held religious convictions.

My approach also overcomes the specific weaknesses of the two current approaches. The *Daly* approach assumes that backsliding prisoners are not pressured to violate their beliefs when officials remove accommodations. Prisoners choose to violate in the first place. Such an approach fails to recognize that religious laws are often difficult to obey. Major religions recognize that people will fail to achieve religious perfection. Paul wrote, “For all have sinned, and come short of the glory of God.”¹⁹³ As Judge Richard Posner pointed out, “Some religions place unrealistic demands on their adherents; others cater especially to the weak of will.”¹⁹⁴

Another problem with *Daly* is that it prevents erring adherents from overcoming past mistakes. A Jew who eats nonkosher food loses the opportunity to change. This makes repentance—a central teaching of many religions¹⁹⁵—impossible. Removing accommodations from sinners may be as much of a burden on religious exercise as failing to accommodate in the first place. For example, *Daly* was a practicing Jew for over eight years.¹⁹⁶ Prison officials removed *Daly* from a kosher food program after he ate nonkosher food three times. But the food was confusingly labeled on one occasion,¹⁹⁷ and he denied eating nonkosher food on the other two occasions.¹⁹⁸ My approach would have required officials to evaluate the sincerity of *Daly*’s beliefs, rather than suspending him and forcing him to violate his stated beliefs. Under a sincerity-based approach, the Seventh Circuit likely

¹⁹³ *Romans* 3:23 (King James Version).

¹⁹⁴ *Reed*, 842 F2d at 963.

¹⁹⁵ See, for example, *Psalms* 51:10 (King James Version) (“Create in me a pure heart, O God, and renew a steadfast spirit within me.”); *Ezekial* 33:10–20 (“As I live—declares the Lord God—I do not desire the death of the wicked, but that the wicked turn from his way and live; turn back, turn back from your evil ways, for why should you die, O House of Israel?”); *Surah al-Baqara* 2:222 (“Surely Allah loves those who turn unto him in repentance and loves those who purify themselves.”).

¹⁹⁶ See *Daly v Davis*, 2008 WL 879048, *1 (SD Ill).

¹⁹⁷ *Id.*

¹⁹⁸ *Daly*, 2009 WL 773880 at *2 (noting an issue of fact on whether the prison guards who testified that they had seen *Daly* eat nonkosher food had testified truthfully).

would have found prison officials liable; other than the three alleged infractions, there was no evidence of insincerity in eight years.

A sincerity-based approach also addresses the concerns that Judge Wilkinson expressed in his *Lovelace* dissent. Judge Wilkinson worried that the majority ignored the realities of operating a prison.¹⁹⁹ Prison officials have an interest in removing nonbelievers from accommodation programs, since many religious accommodations require extra resources. Prison officials must increase the number of nighttime guards and cooks to facilitate the Ramadan fast. Also, the *Lovelace* majority's deferential approach makes it more difficult to discipline deceitful and unruly prisoners.

As Professor William Marshall noted, "The sincerity test has been used most often in cases in which the free exercise clause could easily have been abused by fraudulent claims."²⁰⁰ There is a risk that insincere prisoners will attempt to receive accommodations, although the risk is lower here than in the military draft context. My approach recognizes prison officials' managerial interest in removing false claimants—and thus responds to Judge Wilkinson's challenge—by allowing officials to screen out false claimants. And it does so while remaining faithful to the text and stated purpose of RFRA and RLUIPA.

C. Applying the Presumption-of-Sincerity Approach

I now return to the story of Saul and Ananias from the Introduction. Both Saul and Ananias joined a Protestant denomination while in a state prison. Saul ate meat once during an annual fast. He regretted his transgression and consulted with his religious leader. Ananias attended one religious service after joining, but he didn't otherwise change his behavior. He didn't observe the fast. Both Saul and Ananias were removed from the fasting program and could not attend worship services for one month. Do either of them have claims under RLUIPA?

Under the *Daly* approach, neither has a valid claim. Both Saul and Ananias removed themselves from the religious accommodation programs by violating the fast. Their failure to observe the fast means removal is not a substantial burden. Under the *Lovelace* approach, both prisoners likely have RLUIPA claims. The fasting program imposes a substantial burden because, though both prisoners indicated a desire to participate, they were removed for one-time violations. In

¹⁹⁹ *Lovelace*, 472 F3d at 204 (Wilkinson concurring in part and dissenting in part) ("The only certainty that the majority guarantees is litigation over matters large and small, with federal courts thrust into a role they have sought assiduously to avoid—that of micromanaging state prisons.")

²⁰⁰ Marshall, 67 Minn L Rev at 554 n 58 (cited in note 138).

effect, their claims that they are religious would be conclusive evidence that the policy imposes a substantial burden. The ultimate success of their RLUIPA claims would depend on whether the court found that the government had a compelling interest.

My solution would produce a more sensible outcome. Instead of jumping to the substantial-burden inquiry, the court would first ask whether the removal policy burdens the prisoners' religious exercise. The critical inquiry would be whether Saul's and Ananias's beliefs are sincere. Under the modified *Witmer* approach, the court would find that Saul's and Ananias's preparticipation statements and in-court testimony are prima facie evidence of sincerity. Prison officials could then attempt to rebut the presumption of sincerity by proving *any* relevant objective facts that cast the prisoners' claims into doubt—except nonconformance to a specific religion's teachings.

It is likely the fact finder would conclude that Ananias's beliefs are insincere. Prison officials would overcome the presumption of sincerity by demonstrating that, other than recently joining the denomination, Ananias had not expressed religious convictions. Prison officials would know that Ananias didn't own a Bible and that he had not attended worship services regularly—enabling the fact finder to conclude that Ananias's beliefs in attending worship services are insincere. Ananias's statement of belief wasn't convincing, and he probably would not be able to call a familiar religious leader as a witness to confirm his belief in fasting.

On the other hand, it is likely the fact finder would conclude that Saul's beliefs are sincere. He read the Bible daily and regularly attended worship services. Also, he was nearly perfect in his observance of the fast. He expressed remorse to a religious leader when he failed to keep the fast. Prison officials would likely point to his recent conversion and his one-time decision to eat prime rib as evidence of insincerity, but it is unlikely the fact finder would decide that this is sufficient evidence to overturn the presumption of sincerity.

After concluding that removal was a burden on Saul's religious exercise, the court would ask whether the burden is substantial. Pre-*Smith* case law indicates that the burden is substantial because removal prevented Ananias from engaging in religiously motivated conduct. The burden would then shift entirely to the prison officials to show that removal served a "compelling governmental interest; and [was] the least restrictive means of furthering that . . . interest."²⁰¹

²⁰¹ RFRA § 2, 42 USC § 2000cc-1(a)(1)–(2).

CONCLUSION

Prisoners forfeit many freedoms, but they “do not lose their right to practice their religion when the prison gate closes behind them.”²⁰² Do they lose the right to practice their religion when they violate religious accommodations? Courts have answered this question two different ways, both sides debating whether removing accommodations from backsliding prisoners is a substantial burden.

In rushing to determine whether the burden is substantial, both approaches have missed the critical prior question: Is there even a burden on religious exercise? Answering this question requires courts to know whether prisoners hold sincere beliefs. Once the court knows that a backsliding prisoner’s beliefs are sincere, it becomes clear that removal is a substantial burden.

One possible explanation for this misguided focus on burden is that no standardized sincerity test has emerged in RFRA and RLUIPA cases. Courts may therefore be more comfortable trying to fit the accommodation question into the burden framework, but the fit is awkward. I attempt to remedy this problem by adapting the conscientious objector sincerity test to the prison context. My proposal leads to a sensible outcome that allows sincere prisoners to practice their religion but does not force prison officials to accommodate disingenuous prisoners.

²⁰² *Moskowitz v Wilkinson*, 432 F Supp 947, 948 (D Conn 1977), citing *Cruz v Beto*, 405 US 319, 322 (1972) (“[R]easonable opportunities must be afforded to all prisoners to exercise the religious freedom guaranteed by the First and Fourteenth Amendments without fear of penalty.”).