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

Kevin L. Brady[†]

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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The founders drafted the First Amendment to prevent government from interfering with religious exercise. But two decades ago, the Supreme Court weakened Free Exercise rights in *Employment Division v Smith*.[1] Congress responded to the Supreme Court by passing the Religious Freedom Restoration Act (RFRA)[2] and the Religious Land Use and Institutionalized Persons Act (RLUIPA).[3] 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."[4]

[†] BA 2007, MS 2008, Utah State University; JD Candidate 2012, The University of Chicago Law School.

[1] 494 US 872, 878–79 (1990).

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

[3] Pub L No 106-274, 114 State 803 (2000), codified primarily at 42 USC § 2000cc et seq.

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

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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" prisoner?[5] 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*,[6] the Seventh Circuit held that removing a violating prisoner from a kosher food program wasn't a substantial burden under RFRA.[7] On the other hand, in *Lovelace v Lee*,[8] the Fourth Circuit held that removing one-time violators from a fasting program was a substantial burden under the equivalent RLUIPA standard,[9] despite a lengthy dissent from Judge Harvie Wilkinson.

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 circuit split has broad implications: the reasoning in *Lovelace* and *Daly* extends to nondietary religious accommodations. It is therefore unclear if 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.

> 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.

42 USC § 2000bb-1(a)–(b). See also *A Jailhouse Lawyer's Manual* ch 27 (Colum Hum Rts L Rev 2009), online at http://www3.law.columbia.edu/hrlr/JLM/Chapter_27.pdf (visited Apr 26, 2011).

[5] A backsliding prisoner is one who "lapse[s] . . . 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").

[6] 2009 WL 773880 (7th Cir).

[7] Id at *2–3.

[8] 472 F3d 174 (4th Cir 2006).

[9] Id at 187.

[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, but the other side of the split hasn't addressed this question.

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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? To answer this question, courts must know if prisoners hold sincere religious beliefs. I therefore argue that sincerity is 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 *Smith* 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.

A. *Smith* and Laws of General Applicability

For decades, the Supreme Court analyzed Free Exercise claims under the *Sherbert* test.[12] Government could not substantially burden an individual's religious practice unless there was a "compelling state interest" in regulating that practice.[13] 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.[14] Smith and Black lost their jobs after using peyote 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.[15]

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

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[11] 348 US 375 (1955).
[12] See *Sherbert v Verner*, 374 US 398 (1961).
[13] See id at 406 (explaining that the gravity of the state interest must be much greater than merely "some colorable state interest").
[14] *Smith*, 494 US at 874.
[15] Id.

applicability are valid, even if they incidentally burden religion.[16] Under this standard, the Court determined that Oregon could withhold unemployment benefits from Smith and Black, since a policy barring claimants dismissed for drug-related reasons wasn't directed at a particular religion.[17] 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 religious adherents without judicial recourse in the face of laws that inadvertently restricted religious exercise.[18] Congress responded quickly and nearly unanimously by passing the Religious Freedom Restoration Act of 1993.[19] 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."[20] 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."[21] The stated goal of this statutory cause of action was to overrule *Smith* and to restore the *Sherbert* balancing test.[22]

As originally written, RFRA applied to state and federal government officials.[23] In *City of Boerne v Flores*,[24] however, the Supreme Court held

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[16] Id at 877–82 (noting, as an example, that an individual would not be exempt from paying a tax merely because his religion teaches that supporting organized government is sinful). See also *Church of the Lukumi Babalu Aye v Hialeah*, 508 US 520, 533–34, 542–43 (1993) (defining neutral laws of general applicability).
[17] *Smith*, 494 US at 889 (determining that the First Amendment's protections of religious liberty do not require the Court to hold to the contrary).
[18] See discussion in Robert S. Alley, *The Constitution and Religion: Leading Supreme Court Cases on Church and State* 483–501 (Prometheus 1999). See also 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").
[19] See 107 Stat 1488 (cited in note 2). See also 139 Cong Rec S 14470 (daily ed Oct 27, 1993) (tallying the roll call at 97-3, indicating that even some opponents of the RFRA ended up voting for it).
[20] 42 USC § 2000bb-1(a)
[21] 42 USC § 2000bb-1(b).
[22] See 42 USC § 2000bb (finding that in *Smith*, the Court essentially "eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion").
[23] See RFRA § 2000bb**,** 107 Stat at 1489 (cited in note 2) ("[T]he term 'government' includes a branch, department, agency, instrumentality, and official (or other person acting under color of law) of the United States, a State, or a subdivision of a State.").
[24] 521 US 507 (1997).

that RFRA was unconstitutional as applied to states because it exceeded Congress's limited powers to enforce the Fourteenth Amendment against state actors.[25] RFRA still applies to the federal government,[26] and federal prisoners who do not receive religious accommodations may bring claims under RFRA.[27]

2. The Religious Land Use and Institutionalized Persons Act.

In the wake of *Flores*, Congress again responded to the Supreme Court, this time passing the Religious Land Use and Institutionalized Person Act of 2000.[28] RLUIPA amended RFRA so that it no longer purported to apply to state actors.[29] More importantly, RLUIPA established two new causes of actions: one for landowners,[30] another for state prisoners.[31]

State prisoners can recover if prison officials substantially burden their religious exercise. The relevant language in RLUIPA is nearly 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."[32] 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."[33]

Congress relied on the Spending Clause[34] rather than the Fourteenth Amendment to implement RLUIPA.[35] State prisons must abide by RLUIPA

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[25] See id at 536 (reasoning that because Congress legislated beyond its authority, the Supreme Court's precedent, and not the RFRA, controls). See also US Const Amend XIV ("The Congress shall have power to enforce, by appropriate legislation, the provisions of this [Amendment].").
[26] See *Gonzales v O Centro Espirita Beneficente Uniao do Vegetal*, 546 US 418, 423 (2006) (explaining that the RFRA prohibits the *federal* government from substantially burdening an individual's free exercise of religion).
[27] See, for example, *Daly*, 2009 WL 773880, *2 (holding that the plaintiff prisoner could not prevail on his RFRA claim brought after he was suspended from the prison kosher food program, not because RFRA cannot be used by prisoners, but because the plaintiff could not prove that his exercise of religion had been substantially burdened).
[28] Pub L No 106 274, 114 Stat 803, at 42 USC § 2000cc (2000) (cited in note 3).
[29] 42 USC § 2000cc-3 (specifying that the Act does not preempt state law).
[30] 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).
[31] 42 USC § 2000cc-1.
[32] 42 USC § 2000cc-1(a).
[33] Id.
[34] US Const Art I, § 8, cl 1.
[35] See 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) (explaining that objectives that are traditionally not thought to be contained within US Const Art I's "enumerated legislative fields" may still be attained through the use of spending power and the conditional grant of federal funds).

only if they accept federal funds[36]—though nearly all state prisons receive at least some federal funds.[37] 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.[38]

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 *Flores* decision. Despite substantial similarities, one difference between the Acts is that "government" under RFRA includes only federal government, whereas "government" under RLUIPA includes only state government.[39] 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.[40] Courts rely on RFRA precedents when interpreting RLUIPA, and vice versa.[41] This is an important point 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."[42] Under either Act—as under the First Amendment—a claimant can recover only if her beliefs are "religious in nature" and "sincerely held."[43] I argue below that courts have not paid sufficient attention to the sincerity requirement in RFRA and RLUIPA cases.

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36 See, for example, *Sossamon v Lone Star State of Texas*, 560 F3d 316, 330 (5th Cir 2009) (explaining that it is clear that state prisons take on an obligation under RLUIPA by accepting federal funding).

37 See, for example, 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) (explaining that most state prisons, jails, and probation programs receive federal funding).

38 See *Cutter v Wilkinson*, 544 US 709, 720 (2005) (finding additionally that RLUIPA comports with Supreme Court precedent by ensuring courts applying the Act take into account the burdens of a requested accommodation and be satisfied that the Act is applied neutrally among different religions).

39 See text accompanying notes 26–34, 38.

40 See *Cutter*, 544 US at 725 (calling RFRA "the same heightened scrutiny standard as RLUIPIA"); *Fowler*, 534 F3d at 937–38 (calling a case decided under RFRA "markedly similar" to a case being decided under RLUIPA).

41 See, for example, *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); *Daly*, 2009 WL 773880, *2 (citing a RFRA case to decide a RLUIPA case).

42 See Part III.A.2.

43 *Africa v Pennsylvania*, 662 F2d 1025, 1030 (1981) (noting that the "religious in nature" and "sincerely held" elements are threshold requirements to making out such a claim). See also *A Jailhouse Lawyer's Manual* ch 27 at 12 & n 108 (cited in note 4)

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.[44] Lower courts have concluded that substantial burden has the same meaning under both Acts,[45] and that both Acts adopt the Supreme Court's definition of substantial burden from pre-*Smith* Free Exercise cases.[46] In these cases, a burden is substantial if it "pressure[s]" an adherent "to modify his behavior and to violate his beliefs."[47] 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.[48]

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 officials must show a compelling interest and the use of 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

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(discussing cases that articulate these two prongs); *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.").

[44] 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) (outlining what the author terms "different approaches" that circuit courts have taken to defining "substantial burden").

[45] See, for example, *Fowler*, 534 F3d at 937–38; *Daly*, 2009 WL 773880, *2–3. See also *A Jailhouse Lawyer's Manual* ch 27 at 1 (cited in note 4)(noting that both RFRA and RLUIPA use the same language to describe the protections provided to prisoners).

[46] See *Civil Liberties for Urban Believers v Chicago*, 342 F3d 752, 760–761 (7th Cir 2003), quoting Religious Land Use and Institutionalized Persons Act of 2000, S2869, 106th Cong, 2d Sess (July 27, 2000) 146 Cong Rec 7774-01, 7776 ("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.").

[47] *Lovelace*, 472 F3d at 187, quoting *Thomas v Review Board*, 450 US 707, 718 (1981) (explaining the Free Exercise substantial burden standard).

[48] 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, for example, *Midrash Sephardi, Inc v Surfside*, 366 F3d 1214, 1227 (11th Cir 2004) (stating that an individual's exercise of religion may be substantially burdened if a regulation completely prevents him from engaging in an activity mandated by his religion, or requires him to participate in an activity prohibited by his religion); *Adkins v Kaspar*, 393 F3d 559, 570 (5th Cir 2004) (explaining that a substantial burden on religious exercise may occur if a government action "truly pressures" the individual to "significantly modify" his behavior and "significantly violate his religious beliefs).

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 sincerity of the prisoner's beliefs.

II. WAYWARD PRISONERS: SUBSTANTIAL BURDEN?

RFRA and RLUIPA require federal and state prisons officials to make accommodations for prisoners' religious dietary needs.[49] For example, state prison officials may be liable under RLUIPA if they do not offer kosher food to Jewish prisoners.[50] Nevertheless, courts have disagreed about the implications of a prisoner who fails 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*,[51] the Eighth Circuit held that suspending the religious meals of a prisoner who had violated the Ramadan fast was proper.[52] 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.[53]

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 that

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[49] See 28 CRF § 548.20 (providing that prisons must give inmates requesting religious diets meals that reasonably and equitably allow them practice their religion).
[50] See discussion in *Colvin v Caruso*, 605 F3d 282, 289 (6th Cir 2010) (finding that the plaintiff prisoner could not prevail in his RLUIPA claims only because he requested relief in forms unavailable under the statute, or did not properly target his complaint, and not because of anything having to do with the validity of bringing this sort of claim under RLUIPA).
[51] 26 F3d 68 (8th Cir 1994).
[52] See id at 69–70 (explaining that the prison had not forced the plaintiff to violate his religious beliefs).
[53] See id (finding that Brown-El "placed himself outside the group of worshippers" granted special dietary accommodations by eating a daytime meal).

“[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.’”[54] 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.[55]

The Seventh Circuit recently analyzed a similar RFRA claim and reached the same conclusion.[56] 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 non-kosher food on three separate occasions. Daly was temporarily removed from the program each time.[57]

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.[58] 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.”[59] 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,”[60] as required under RFRA. But the court stated this argument “puts the cart before the horse.”[61] The compelling interest inquiry is relevant only after a prisoner shows that prison officials substantially burdened religious exercise.

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[54] Id at 70, citing *United States v Means*, 858 F2d 404, 407 (8th Cir 1988) (noting that the plaintiff was unable to establish that he himself had not voluntarily broken the fast).

[55] 26 F3d 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.

[56] See *Daly*, 2009 WL 773880, *2 (7th Cir) (noting that the plaintiff there himself admitted to having eaten non-Kosher food).

[57] Id at *1.

[58] See id at *2 (explaining that the prison’s rules did not substantially burden Daly’s free exercise of religion after he chose to eat non-Kosher food).

[59] Id.

[60] *Daly*, 2009 WL 773880, *2.

[61] 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' discussion of substantial burden.[62] 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.[63] 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.[64] Adding insult to injury, prison officials did not allow him to participate in worship services or group prayers.[65] 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."[66] 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.[67] But the court went further. It also stated that the prison's policy of removing violating inmates from accommodation programs was a substantial burden.[68] In other words, the prison policy was a substantial burden on Lovelace's exercise of religion, *regardless* 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."[69]

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."[70] Prison officials asserted that they had a "legitimate interest in removing inmates from religious dietary programs where the inmate flouts prison rules."[71] The court held that this interest was inadequate. It remanded the case to allow

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[62] *Lovelace*, 472 F3d at 187 (holding that the plaintiff's removal from the Ramadan observance list was a substantial burden on his religious freedom)."

[63] *Lovelace*, 472 F3d at 182–83.

[64] Id at 183–84.

[65] Id at 187 (noting that Lovelace was forbidden from participating in the group prayer services that were held immediately prior to or following the special Ramadan meals).

[66] Id at 187, quoting *Thomas*, 450 US at 718 (explaining the Supreme Court's definition of a "substantial burden").

[67] *Lovelace*, 472 F3d at 187 (noting that removing him from the dietary program also infringed on his ability to access the group prayers).

[68] Id at 188 (explaining that inmates may be religious in some aspects and not in others, so that an inmate may decide not to fast but still be religious about attending group prayer services).

[69] Id.

[70] 42 USC § 2000cc-1(a).

[71] *Lovelace*, 472 F3d at 190 (noting that the prison did not elaborate on why this interest is compelling).

prison officials to "provid[e] an explanation for the policy's restrictions that takes into account any institutional need to maintain good order, security, and discipline or to control costs."[72] The asserted interest would also need to be the least restrictive means of furthering the interest.[73]

The court's opinion elicited a strong dissent from Judge Wilkinson. He agreed with the Eighth Circuit that prisons officials need not continue accommodating backsliding prisoners.[74] Judge Wilkinson also argued that a prisoner's violation of dietary restrictions was presumptive evidence of religious insincerity.[75] Finally, he accused the majority of "[d]isregarding the deference historically accorded prison administrators," predicting "[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."[76]

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.[77]

The Sixth Circuit sided with the *Lovelace* majority in dicta. In *Colvin v Caruso*,[78] the court considered whether state prison officials had violated RLUIPA when they removed Kenneth Colvin from a kosher meal program after he had eaten non-kosher food on multiple occasions.[79] Although the court dismissed Colvin's RLUIPA claim as moot,[80] 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."[81] The District of New Hampshire similarly expressed skepticism about the validity of a policy that removed violating prisoners

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[72] Id at 190 (stating that the explanation would be accepted with "due deference").
[73] Id at 191 (explaining that the defendants here did not show how their actions constituted the least restrictive means of furthering their interest).
[74] See id at 207 (Wilkinson dissenting) (arguing that a "sincerity requirement" for prisoners to continue participating in the Ramadan program is not a substantial burden on their religious freedom).
[75] *Lovelace*, 472 F3d at 207 (Wilkinson dissenting) ("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.").
[76] Id at 204 (Wilkinson dissenting) (citations omitted) (insisting that the majority's decision offers no guidance to prison administrators or district courts grappling with similar issues).
[77] See Part I.C.
[78] 605 F3d 282 (6th Cir 2010).
[79] See id at 286–87 (explaining that the plaintiff had been placed on the kosher meal program after a court order stemming from a previous law suit).
[80] Id at 289 (finding his claim was moot because he requested monetary damages, unavailable under RLUIPA, and because he requested declaratory and injunctive relief but directed this request at the wrong policies and procedures).
[81] Id at 296 (pointing to the circuit split developing over this issue).

from religious dietary programs.[82] The court stated that "[w]hile the prison certainly has a valid interest in weeding out insincere requests for religious diets, there is some question whether that interest is truly compelling."[83]

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 religious diet.[84] 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."[85]

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.[86] 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.[87] 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.[88] The Sixth Circuit and the District of New Hampshire agreed with this conclusion in dicta.[89]

Part III argues that courts should shift the inquiry away from substantial burden and onto 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

[82] See *Kuperman v Warden*, 2009 WL 4042760, *6 (D NH) (granting summary judgment to the prison due to its changes in policy that the court determined resolved plaintiff's problems).
[83] Id (questioning whether the prison's interest in this situation was actually compelling).
[84] Id at *7 (noting that the court did not need to weigh in on the debate, since the plaintiff's claims were moot).
[85] *Thomas*, 450 US at 718 (explaining that even in the case of indirect compulsion, the effect on free religious exercise may be substantial).
[86] 2009 WL 773880, *2 (noting that Daly himself made the choice to veer from his kosher diet).
[87] See *Brown-El*, 26 F3d at 69 (disagreeing with the district court, which had held the prison policy violated Brown-El's religious freedoms).
[88] See *Lovelace*, 472 F3d at 187 (observing the substantial nature of the burden on Lovelace when he was denied the Ramadan meal plan).
[89] See *Colvin*, 605 F3d at 296 (adopting the reasoning in *Lovelace* to illustrate the substantial burden on the prisoner); *Kuperman*, 2009 WL 4042760, *6 (noting the split between the Fourth and Eight Circuits).

broken his fast.[90] 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 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. 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. Withholding religious accommodations from backsliding prisoners is a substantial burden *if* their 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 is a substantial burden. I thus accept the Fourth Circuit's conclusion in *Lovelace*, but my acceptance is qualified: removing prisoners is an illegal burden only if removal precludes conduct motivated by *sincere* beliefs. This suggests that the proper inquiry in backsliding cases is whether sincere beliefs motivate the prisoner's desire to continue participating.

*a. RFRA and RLUIPA codified the pre-*Smith *definition of substantial burden.* Congress passed RFRA in response to the Supreme Court's decision in *Smith*.[91] *Smith* held that religiously neutral laws of general applicability are valid under the Free Exercise Clause, even if they incidentally burden religion.[92] 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]."[93] 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."[94] The Act then declares its purposes:

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[90] See *Lovelace*, 472 F3d at 187.
[91] See notes 19–23 and accompanying text.
[92] *Smith*, 494 US at 874 (1990).
[93] 42 USC § 2000bb(a)(4).
[94] 42 USC § 2000bb(a)(5) (explaining that the balances struck are between religious liberty and competing prior governmental interest).

> to restore the compelling interest test as set forth in [*Sherbert]* and [*Wisconsin v Yoder*] and to guarantee its application in all 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.[95]

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,"[96] wording that the Supreme Court frequently used in pre-*Smith* case law. In *Thomas v Review Board*,[97] the Court stated, "[w]here 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*."[98] References to substantial burdens or infringements also appeared in *Sherbert* and *Wisconsin v Yoder*,[99] along with a number of Supreme Court decisions in the latter half of the twentieth century.[100] RFRA's textual incorporation of an oft-repeated phrase, along with the stated attempt to return to pre-*Smith* jurisprudence, indicates that the 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 splitting courts discussed in this Comment agreed that a substantial burden exists when the state places "pressure on an adherent . . . to violate his beliefs,"[101] thereby embracing the language from *Thomas*. The near unanimity among circuits, along with the arguments discussed above, provides strong evidence that RFRA adopted the Supreme Court's pre-*Smith* definition of substantial burden.[102]

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[95] 42 USC § 2000bb(b)(1)–(2) (emphasis added). See also *Sherbert*, 374 US 398; *Wisconsin v Yoder*, 406 US 205 (1972).

[96] 42 USC § 2000bb-1(a) (stating that government may not "substantially burden" religious liberty).

[97] 450 US 707 (1981).

[98] Id at 717–18 (emphasis added) (noting the coercive impact on Thomas because of the choice had to make between religious beliefs and his employment).

[99] 406 US 205 (1972).

[100] 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").

[101] *Lovelace*, 472 F3d at 187 (noting that this substantial burden forces the individual to make a choice between governmental benefits on the one hand, and his religious beliefs on the other); *Daly*, 2009 WL 773880, *2–3 (explaining that a substantial burden would force an individual to partake in conduct contrary to his religious beliefs). Both cases cited the standard in *Thomas*, 450 US at 717–18.

[102] *S*ee also Religious Land Use and Institutionalized Persons Act of 2000, S2869, 106th Cong, 2d Sess (July 27, 2000) 146 Cong Rec 7774-01, 7776 ("The term

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 contains nearly identical language. As a result, courts have recognized that RLUIPA also adopted the pre-*Smith* definition of substantial burden.[103]

*b. Removal a substantial burden under pre-*Smith *jurisprudence.* As noted, *Lovelace* and *Daly* agreed 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 simply asked whether officials pressured or compelled the prisoners to violate their beliefs.[104] 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.[105] 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 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."[106] The United States Supreme Court reversed, finding that denial of benefits placed a substantial burden on his religious exercise.

'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.").

[103] See *Lovelace*, 472 F3d at 187. See also *Fowler*, 534 F3d at 937–38 (holding that a RFRA case "dictate[d] the outcome" in the RLUIPA case before the court).

[104] 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, *2 ("[T]he program [does not] compel conduct contrary to religious beliefs.").

[105] See *Bowen v Roy*, 476 US 693, 708 (1986) (noting that the "good cause" standard created a mechanism for individualized exemptions, and if a state which has created the mechanism refuses to extend an exemption in an instance of religious hardship, its discriminatory intent is suggested).

[106] *Thomas v Review Board*, 391 NE2d 1127, 1133 (1979) (noting that there was no pressure placed on Thomas to quit his job).

"[Eddie Thomas] was put to a choice between fidelity to religious belief or cessation of work."[107] It did not matter that it "was reasonable to assume" he had previously worked on steel used in war.[108] 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.[109]

Thomas indicates that the substantial burden inquiry is temporally limited to the point in time when the claimant requests an accommodation. Other pre-*Smith* cases reflect 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*,[110] 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.[111] In *Yoder*, the Supreme Court held that requiring Old Order Amish parents to send their teenagers to secondary school, contrary to Amish religious teachings, "substantially interfer[ed]" with their religious exercise.[112] The Court did not inquire into whether they had ever sent their teenagers to secondary schools or whether they had ever violated tenets of their faith. The question was whether the parents currently believed that sending their teenagers to school violated their religious convictions.[113]

These pre-*Smith* 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.

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[107] *Thomas*, 450 US at 717 (noting that the coercive impact on Thomas was equivalent to that placed on the employee in *Sherbert*).
[108] Id at 711 n 3 (recounting Thomas's statement that he would have no difficulty doing the type of work he had previously done in the roll foundry).
[109] See id at 716–18 (analogizing this case to *Sherbert*, because in both, employees were terminated from an employment that had at one time been acceptable to them and their religious beliefs, but that changed conditions rendered the work unacceptable to them). 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.").
[110] 480 US 136 (1987).
[111] 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.").
[112] *Yoder*, 406 US at 218 (noting that forcing Amish parents to send their children to schools contravened the religious tenets of both the parents and the children).
[113] See id at 235–36 (finding that the plaintiffs also carried their burden of showing that their alternative schooling methods were adequate).

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."[114] 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*,[115] 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 interests."[116] 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. Religious sincerity is the determinative issue when analyzing backsliding prisoners' claims.

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.

*a. Religious exercise under pre-*Smith *jurisprudence.* As outlined above, RFRA and RLUIPA adopted the pre-*Smith* definition of substantial burden.[117] For similar reasons, these Acts also assumed the pre-*Smith* definition of religious exercise. In particular, they incorporated a specific phrase used both in the Constitution and in *Sherbert* jurisprudence.

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[114] 42 USC § 2000cc-3(g).
[115] 482 US 342 (1987).
[116] Id at 349 (noting that this approach avoids unnecessary intervention of judicial officers).
[117] See Part III.A.1.

Additionally, RFRA specifically states, "the term 'exercise of religion' means religious exercise, as defined in [RLUIPA]"[118]

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"?[119] Determining if beliefs are religious is "a most delicate question."[120] In general, courts have examined factors such as whether the alleged religion addresses fundamental life questions, is comprehensive, and has a formal organizational structure.[121]

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*,[122] "while 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."[123] 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 Dofre Ray King," had indeed been designated as a divine messenger.[124] Still, the court was free to ask whether the defendants, who collected $3 million from their followers based on these claims, sincerely held their beliefs.[125]

In sum, RFRA and RLUIPA adopted the First Amendment's definition of religious exercise, and the First Amendment requires sincere beliefs. As a result, RFRA and RLUIPA plaintiffs must have sincere beliefs.[126]

b. Courts generally recognize the issue as sincerity in analogous cases. My analysis so far suggests that the relevant question in prisoner accommodation cases is whether the prisoner's beliefs are sincere. A series

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[118] 42 USC § 2000bb-2(4).

[119] *Africa*, 662 F2d at 1030 (explaining that if either of the two factors is not met, the court applying the test need not go on to examine whether the state interest outweighs the First Amendment claim).

[120] *Yoder*, 406 US at 215 (stating that the concept of ordered liberty means that each person may not develop his own standard to answer this question).

[121] See, for example, *Africa*, 662 F2d at 1032 (explaining various factors the Supreme Court has considered in different cases); *US v Seeger*, 380 US 163, 176 (1965) (recognizing religions that are "based upon a power or being, or upon a faith, to which all else is subordinate or upon which all else is ultimately dependent"); *Welsh v US*, 398 US 333, 343 (1970), citing *Seeger*, 380 US at 186 (stating that "religious" beliefs must rise above the level of a "merely personal moral code").

[122] 380 US 163 (1965)

[123] Id at 185 (explaining that this is a question of fact, not of law).

[124] See *United States v Ballard*, 322 US 78, 79 (1944) (explaining the scheme at issue in the case: to defraud through the mails by making false representations to solicit membership to the "I Am" movement).

[125] See id at 84, 89–90 (holding that the jury had ample reason to determine that the defendants' beliefs were fraudulent).

[126] See *Cutter*, 544 US at725 n 13 ("Although RLUIPA bars inquiry into whether a particular belief or practice is 'central' to a prisoner's religion . . . the Act does not preclude inquiry into the sincerity of a prisoner's professed religiosity.").

of Free Exercise cases strengthen this conclusion. In these cases, courts have recognized that violations of beliefs—whether before or after the occurrence of alleged burdens—is an indication of insincerity, not a factor that influences the burden inquiry.

In *Reed v Faulkner*,[127] the Seventh Circuit examined a prisoner's Free Exercise claim. The prisoner had previously consumed meat and shaved his beard, contrary to his religious beliefs. The court held that the plaintiff's backsliding was relevant to the question of sincerity—though not conclusive.[128] In *Shaheed-Muhammad v Dipaolo*,[129] 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.[130] 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.[131]

In light of these cases, it is unfortunate that *Lovelace* and *Daly* framed the issue as one of burden, and not of sincerity—especially 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."[132] In fact, sincerity of beliefs is the "threshold inquiry of any religious accommodation claim."[133] And even under *O'Lone*'s penological interest test, the Supreme Court noted that prisoners must have sincere beliefs.[134] 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, "There is no dispute that Lovelace sincerely holds his religious beliefs."[135] The court may have assumed that any prisoner who claims to be religious is likely to be

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[127] 842 F2d 960 (7th Cir 1988).

[128] See id at 963 (noting that this evidence is especially relevant in a prison setting where inmates may adopt new religions merely to harass prison staff with his demands).

[129] 393 F Supp 2d 80 (D MA 2007).

[130] Id at 90–91 (suggesting the proof offered to show the plaintiff's insincerity instead demonstrated his evolving religious beliefs).

[131] See *Sepulveda v Borne Holding*, 2010 WL 5345127, *4–5 (NJ Super 2010) (reversing a summary judgment granted to the worker's employers by the lower court).

[132] *Cutter*, 544 US at 725 n 13 (2005) (explaining that prison officials can question whether a prisoner's religious beliefs are "authentic").

[133] *Lovelace*, 472 F3d at 207 (Wilkinson dissenting), 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.").

[134] See *O'Lone*, 482 US at 359 ("The Court in this case acknowledges that 'respondents' sincerely held religious beliefs compe[l] attendance at Jumu'ah.'").

[135] *Lovelace*, 472 F3d at 187 n 2 (explaining that, in considering the sincerity of a prisoner's religious beliefs, courts must not consider how central a particular practice is to his overall religiosity).

sincere, so past violations are irrelevant. Or perhaps the government's lawyer 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.[136]

The assumption that past violations are conclusive evidence of insincerity seemingly motivated Judge Wilkinson's *Lovelace* dissent.[137] 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."[138] He later stated, "The policy was designed to accommodate only sincere observers by the most reliable indicator possible: the would-be observers' own religious practice."[139]

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.[140] 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.

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[136] *Daly*, 2009 WL 773880, *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.").

[137] See *Lovelace*, 472 F3d at 207 (Wilkinson dissenting) ("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.").

[138] Id at 205 (arguing additionally that the prison's policy was not what caused Lovelace's alleged injury).

[139] Id at 208 (noting that the prison needed this indicator or else it would be forced to serve special Ramadan meals to any prisoner who demanded it, regardless of his religious beliefs).

[140] *Reed*, 842 F2d at 963 (stating that merely because a religious adherent does not comply with every tenet of the religion does not necessarily mean he is insincere in his beliefs).

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.

a. Sincerity testing generally. Sincerity testing became important after cases such as *Sherbert* allowed religious believers to receive exemptions from general laws.[141] Religion-based exemptions create incentives for people to feign religiosity. Courts typically deal with these incentives by reading sincerity requirements into federal statutes granting religious exemptions. For example, unlike most applicants for citizenship, religious applicants need not pledge a willingness to bear arms in defense of the United States, but their beliefs must be sincere.[142] Certain religious believers may opt out of Social Security taxes.[143] Members of Indian tribes may hunt bald eagles for "religious purposes."[144] Religious ministers are not subject to fines under the Equal Employment Opportunity Act.[145]

Despite widespread judicial approval, sincerity testing is difficult for several reasons. A factfinder'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

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[141] See *Sherbert*, 374 US at 409–10 (explaining why the plaintiff, a Seventh-Day Adventist who refused to take a job that required her to work on Saturdays (the Sabbath Day for her faith), qualified for unemployment benefits, despite the fact that the Employment Security Commission found her unable to receive unemployment benefits because she failed to accept available work without good cause [a pre-condition to receiving unemployment benefits]). See also William P. Marshall, *Solving the Free Exercise Dilemma: Free Exercise as Expression*, 67 Minn L Rev 545, 554 n 58 (1983) (noting that the sincerity test is often used in cases in which a free exercise claim could be abused by fraudulent claims).

[142] See *In re Weizman*, 426 F2d 439, 455 (8th Cir 1970) (considering the claim of a woman who refused to call herself "religious" because she did not adhere to any organized religion), citing 8 USC § 1448 (stipulating that those applying for American citizenship must take an oath pledging their support for the United States and the Constitution).

[143] See 26 USC § 1402(e)(1) (stating that for the benefit to be granted, evidence of the individual's religious beliefs must be established). See also 26 USC § 170 (describing tax credits for charitable contributions).

[144] See 16 USC § 668A (setting out the rare instances in which the Secretary of the Interior may permit bald eagle hunting).

[145] See 42 USC §§ 2000e-1 to -2 (explaining the inapplicability of EEOC fines for religious employers). See, for example, *Hernandez v Catholic Bishop Of Chicago*, 320 F3d 698, 703–04 (7th Cir 2003) (addressing the "ministerial exception," providing that courts do not involve themselves in employment disputes regarding hiring of ministers).

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."[146]

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."[147] 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 holding Mass.[148] The Supreme Court alleviated some of these concerns in *Thomas*. It held that Indiana had violated Eddie Thomas's Free Exercise rights, even though Thomas "was 'struggling' with his beliefs."[149] 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, factfinders must look to observable evidence that tends to support 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.[150] Most sincerity tests fail to grapple with the shortcomings outlined above. Also, courts generally do not have well-defined tests for religious sincerity.[151] 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.

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[146] *Ballard*, 322 US at 93 (Jackson dissenting) (discussing the difficulties juries face in separating real religious beliefs from untrue ones).
[147] John T. Noonan Jr, *How Sincere Do You Have to Be to Be Religious?*, 1988 U Ill L Rev 713, 718 (articulating the difference between a political belief, in which one can be scientifically certain of something, and a religious belief, in which one recognizes that he will always be in the darkness about God).
[148] See id at 719 (questioning whether scrutiny of the clergy and their beliefs should be open to the government). See also Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 Harv L Rev 1409, 1420 & n 26 (1990) (noting the objection that "determining the 'sincerity' of religious claimants is dangerously intrusive"), citing William P. Marshall, *The Case Against the Constitutionally Compelled Free Exercise Exemption*, 40 Case W Res L Rev 357 (1990).
[149] *Thomas*, 450 US at 715 (explaining why the Indiana Supreme Court had decided against Thomas).
[150] See *Ballard*, 322 US at 84 (discussing the screening done by the jury).
[151] See Bryan M. Likins, *Determining the Appropriate Definition of Religion and Obligation to Accommodate the Religious Employee Under Title VII: A Comparison of Religious Discrimination Protection in the United States and the United Kingdom*, 21 Ind Intl & Comp L Rev 111, 116 (2011) (noting that there is no "formal or informal test" to determine the sincerity of one's religious beliefs).

b. Section 6(j) conscientious objector status. Section 6(j) allows conscientious objectors to avoid induction into the armed forces. The statute exempts anyone "who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form."[152] 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*,[153] a local draft board determined that Philip Witmer's beliefs were insincere and denied § 6(j) exemption. 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."[154]

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."[155] 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 shifty or evasive or that his appearance was one of unreliability."[156] 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

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[152] 50 USC App § 456(j) (stipulating that "religious training and belief" does not include political, sociological, or philosophical views).
[153] 348 US 375.
[154] Id at 381, citing *Estep v United States*, 327 US 114, 122 (1946) (noting that courts should not substitute their judgment for that of the draft boards).
[155] Id at 381–82 (emphasis added) (noting that any fact is evidence that the registrant did not paint a true picture of his beliefs).
[156] Id at 382 (noting that another consideration should be whether the registrant stated his beliefs with apparent sincerity).

generally must allege other objective facts to uphold the denial of exemption on review.[157]

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 pre-induction 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.[158] 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.[159]

Delay in asserting conscientious objector status is a third factor emphasized in § 6(j) cases. In *United States v Messinger*,[160] the Second Circuit upheld a review board's denial of exemption status. 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.[161] Courts are quick to point out, however, that delay is not evidence of insincerity if the registrants' beliefs changed.[162]

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.[163] This factor is not decisive because religious exemptions do not require believers to be members of particular

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[157] 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.

[158] See *Hanna v Secretary of the Army*, 513 F3d 4, 6 (1st Cir 2008) (explaining that Hanna had agreed to serve in the army for four years and remain in the reserves an additional four years as a condition of the scholarship). 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.

[159] See *Hanna*, 513 F3d at 12–14 (noting that the amount of time that passed between Hanna accepting the scholarship and determining she did not want to join the army was more than enough for her beliefs to crystallize).

[160] 413 F2d 927 (2d Cir 1969).

[161] Id at 932 (pointing to other evidence that Messinger's opposition to the war was based more on political than religious sentiments).

[162] See *Hanna*, 513 F3d at 12–13 (explaining that a conscientious objector's beliefs may develop early or later on).

[163] See *Lovallo v Resor*, 443 F2d 1262, 1263–64 (2d Cir 1971) (discussing the consideration the Army's Conscientious Objection Review Board gave to the statement of a chaplain).

religions.[164] 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 § 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."[165] 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.[166]

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.[167] 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.[168] 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 disagreed about the level of evidence necessary to establish a prima facie case of sincerity. Courts would need to resolve this disagreement if they apply § 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.[169] 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

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[164] See, for example, *Seeger*, 380 US at 185 (instructing that the relevant consideration is whether religious beliefs are sincerely held, and not whether they are comprehensible to others). Compare *Frazee v Illinois Department of Employment Security*, 489 US 829, 832–33 (1989) (noting that previous Supreme Court cases finding for a plaintiff asserting religious beliefs did not turn on the plaintiff being a part of a specific religious group).

[165] 50 USC App § 456(j).

[166] *United States v Deere*, 428 F2d 1119, 1121 (2d Cir 1970) (citing as evidence the registrant's own statement of his beliefs, even though it was not stated strongly or particularly eloquently).

[167] 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.").

[168] 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.").

[169] See *Lovallo*, 443 F2d at 1264 (explaining that when a registrant had presented the signed statement, any finding against him must be predicated upon objective evidence).

applicant had never expressed religious beliefs before applying for conscientious objector status. The problem with this approach is that draft boards generally 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.[170] 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 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 disagreed whether statements of belief and testimony are prima facie evidence of sincerity in § 6(j) cases.[171] 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 inmate's 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 is unlikely that anyone other than sincerely religious Muslims want to participate in the Ramadan fast.

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[170] See *Salamy v United States*, 379 F2d 838, 842 (10th Cir 1967) (explaining this is because a registrant's earnestness may be called into question by the timing of his signed statement).
[171] See notes 169–170 and accompanying text.

The Supreme Court recognized this point in *Cutter v Wilkinson*[172]: "[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.'"[173] 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.[174] 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."[175]

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."[176] He further stated, "Non-Jews who inquires [sic] about converting to Judaism are subjected to harassment and intimidation, too."[177] A gang of Texas inmates killed a man who requested religious accommodations.[178]

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

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[172] 544 US 709 (2005).
[173] Id at 721 n 10 (refuting the point that RLUIPA goes beyond the permissible reduction of impediments to practicing religion).
[174] See Clair A. Cripe and Michael G. Pearlman, *Legal Aspects of Corrections Management* 140 (Jones ed 2003) (discussing the difficulties involved in setting up kosher kitchens in prisons).
[175] Protecting Religious Freedom After *Boerne v. Flores*, Part III, Hearing before the Subcommittee on the Constitution of the Committee on the Judiciary, 105th Cong 2d, Sess 78, 80 (1999) (statement of Isaac M. Jaroslawicz, Aleph Institute) (noting also that the state of Michigan established a rule refusing to recognize work proscription days such as the Sabbath).
[176] Id at 89 (explaining that this is especially so in areas in which certain racial or ethnic gangs are powerful in the prisons).
[177] Id (recounting the harassment faced by Jewish prisoners wearing yarmulkes while praying).
[178] Id (recounting that the man was killed within fifteen minutes of arriving at a maximum security prison, to which he was transferred after having resided at a minimum security prison).

determinations.[179] Still, prisoners occasionally invent religions specifically to receive accommodations. For example, members of the Church of the New Song informed prison officials that their religion required a regular diet of sherry and steak.[180] 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."[181] They also have "install[ed] electronic monitoring devices in chapels [and] increase[ed] training and scrutiny of religious volunteers and contractors."[182] A majority of state prisons similarly monitor religious services.[183] Prisons have generally increased efforts to monitor prisoners' religious practices since 9/11.[184]

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."[185]

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[179] See *Seeger*, 380 US at 185 (explaining that the determination of whether a religious belief is truly held is a question of fact for which review boards may require assistance).

[180] Cripe and Pearlman, *Legal Aspects* at 140 (cited in note 174) (discussing various religious dietary restrictions by which prisoners claim to be bound).

[181] United States 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) (explaining what has been done in prisons to limit the threats of radicalization among prisoners).

[182] Id.

[183] See id at 34 n 96 (noting that over half of the religious services that take place in prisons are monitored with electronic devices). See also Barbara Esposito and Lee Wood, *Prison Slavery* 157–58 (Joel 1982) (noting that Muslim prisoners in particular see their religious freedoms restricted).

[184] See United States Commission on Civil Rights, *Enforcing Religious Freedom in Prison* at 37 (cited in note 181) ("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.").

[185] State of Alaska Department of Corrections, Policies and Procedures: Religious Services, Religious Program 2 (Alaska Department of Corrections 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).

Moreover, prison chaplains are responsible for providing religious materials to inmates.[186] 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 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. Factfinders 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.[187]

A lack of previous expressions of belief and delay would also be strong evidence of insincerity. Factfinders should be skeptical of accommodation requests if there is no pre-request evidence of beliefs. Factfinders should similarly view delay in indicating beliefs as evidence that a prisoner merely want some accommodation and sees feigning religion as a way to receive it. Factfinders 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.

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[186] See United States Commission on Civil Rights, *Enforcing Religious Freedom in Prison* at 111 (cited in note 181) ("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).

[187] See *Reed*, 842 F2d at 963 (admonishing the district court judge for having attached conclusive weight to the prisoner's backsliding).

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 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 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 factfinders to weigh competing evidence and make conclusions. Some decisions will be easy: a devout Orthodox Jew unknowingly eats non-kosher ice cream. Other cases will be less so: a Christian converts to Judaism and eats non-kosher food on several occasions but otherwise appears devout. Factfinders 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."[188]

Importantly, my approach significantly reduces the number of difficult inquires by creating a rebuttable presumption—just as the Second Circuit did in the conscription context. A presumption would considerably decrease the number of cases where 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 detailed sincerity determinations. Some prisons may simply allow

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[188] *Lynch v Donnelly*, 465 US 668, 678 (1984) (noting that the Establishment Clause is not a "precise, detailed provision").

backsliding prisoners to continue participating, a result that may not be so bad.[189]

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.[190] And even if prison officials lose, most courts agree that prisoners are entitled only to injunctive relief.[191] 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. My approach advances RFRA's stated purpose of "restor[ing] the compelling interest test as set forth in [*Sherbert]* and [*Yoder*]."[192] *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 if the same analysis applies when, for example, an inmate misses a worship service but wants to attend another.[193] 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

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[189] 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.").

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

[191] 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).

[192] 42 USC § 2000bb(b)(1) (explaining the purpose of the statute).

[193] The Fourth Circuit addressed this issue, see *Lovelace*, 472 F3d at 187–88, but the other side of the split has not.

additional evidence—such as inconsistent religious expressions—to overcome the presumption. If the court concluded that an inmates' 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."[194] As Judge Richard Posner pointed out, "[s]ome religions place unrealistic demands on their adherents; others cater especially to the weak of will."[195]

Another problem with *Daly* is that it prevents erring adherents from overcoming past mistakes. A Jew who eats non-kosher food loses the opportunity to change. This makes repentance—a central teaching of many religions—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 non-kosher food three times. But the food was confusingly labeled on one occasion,[197] and he denied eating non-kosher 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 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

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[194] *Romans* 3:23 (King James version). See also Saint Augustine, *Sermon CLXX* ("This is the very perfection of a man, to find out his own imperfections.").
[195] *Reed*, 842 F2d at 963 (adding that it would be bizarre for prisons to attempt to impose strict religious orthodoxy on its religious prisoners).
[196] See *Daly v Davis*, 2008 WL 879048, *1 (SD Ill).
[197] Id (explaining why Daly objected to being removed from the kosher-food program after having eaten non-kosher ice cream).
[198] *Daly*, 2009 WL 773880, *2 (noting an issue of fact on whether the prison guards who testified that they had seen Daly eat non-kosher food had testified truthfully).
[199] Id at 204 (Wilkinson dissenting) ("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.").

have an interest in removing non-believers 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 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 Test

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 since 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 both prisoners indicated a desire to participate, but the program removes one-time violators. In effect, their claim 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 pre-participation 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

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[200] Marshall, 67 Minn L Rev at 554 n 58 (cited in note 141) (noting that the need for the sincerity test became pronounced after *Sherbert*).

the prisoners' claims into doubt—except nonconformance to a specific religion's teachings.

It is likely the factfinder would conclude that Ananias's beliefs are insincere. Prisons 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 factfinder 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 factfinder 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 factfinder would decide 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]

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 if 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.

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[201] 42 USC § 2000cc-1(a)(1)–(2).
[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.").

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.