EASTERN DISTRICT OF WISCONSIN BAR ASSOCIATION
***Pro Bono* Continuing Legal Education Program**
Prisoner Litigation

An Overview of Prisoners' First Amendment Rights

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Larry Dupuis, ACLU of Wisconsin Foundation

Important Note: This is an overview only. It is not and does not substitute for individual legal advice. This overview was current as of March 29, 2007. The law is always evolving. If you have access to a law library, it is a good idea to confirm that the cases and statutes cited in this outline are still good law.

Judicial Scrutiny of Prisoner Regulations

"Inmates clearly retain protections afforded by the First Amendment." *O'Lone v. Estate of Shabazz*, 482 U.S. 342, 348 (1987). Outside of the prison setting, courts rigorously review government actions and policies that curtail constitutional rights, including the rights guaranteed by the First Amendment. However, restrictions on prisoners' rights are generally scrutinized under the less demanding standard articulated in *Turner v. Safley*, 482 U.S. 78 (1987). Under *Turner*, a prison regulation is valid "if it is reasonably related to legitimate penological interests." *Id.* at 89.

While the *Turner* standard is deferential, it is "not toothless." *Thornburgh v. Abbott*, 490 U.S. 401, 414 (1989). For example, prison officials may not "pil[e] conjecture upon conjecture" to justify their regulations. *Reed v. Faulkner*, 842 F.2d 960, 963-64 (7th Cir. 1988); *cf. Miller-El v. Cockrell*, 537 U.S. 322, 340 (2003) ("deference does not imply abandonment or abdication of judicial review").

In applying the *Turner* test, courts consider the following factors: "whether the regulation is rationally related to a legitimate and neutral governmental objective; whether there are alternative means of exercising the right that remain open to the inmate; what impact an accommodation of the asserted right will have on guards and other inmates; and whether there are obvious alternatives to the regulation that show that it is an exaggerated response to prison concerns." *Lindell v. Frank*, 377 F.3d 655, 657 (7th Cir. 2004) (*citing Turner*, 482 U.S. at 89-91).

The *Turner* standard applies to *First Amendment* claims challenging prison *regulations*, but *Turner* does not apply to *all* prisoner claims of violations of religious freedom or freedom of speech. In *statutory* religious liberty challenges to state prison regulations brought pursuant to the Religious Land Use and Institutionalized Persons Act (RLUIPA), 42 U.S.C. ' 2000cc, *et seq.*, and to federal prison regulations pursuant to the Religious Freedom Restoration Act (RFRA), 42 U.S.C. ' 2000bb, *et seq.*, courts apply a more stringent test, as discussed below. Although the Supreme Court has referred to the *Turner* standard as a "unitary, deferential

standard for reviewing prisoners' constitutional claims," *Shaw v. Murphy*, 532 U.S. 223, 229 (2001), there are at least some circumstances in which a higher level of scrutiny still applies to First Amendment challenges to prison regulations. *See, e.g.*, *Koutnik v. Brown*, 456 F.3d 777, 784 (7th Cir. 2006) (restrictions on *outgoing* mail must be "no greater than necessary or essential" to further "substantial or important" government interest). In addition, in some First Amendment cases that challenge *actions* of prison officials, rather than prison regulations (*e.g.*, retaliation claims), the *Turner* standard may not apply at all. Moreover, the application of the *Turner* principles and sometimes even the verbal formulation of the test vary depending on the rights at issue.

Free Speech

"When a prison regulation restricts a prisoner's First Amendment right to free speech, it is valid only if it is reasonably related to legitimate penological interests." *Lindell v. Frank*, 377 F.3d 655, 657 (7th Cir. 2004).

Right to Send & Receive Correspondence

The First Amendment protects prisoners' rights to send and receive personal correspondence.

• *Incoming v. Outgoing Correspondence*: Restrictions on *incoming* correspondence are governed by the *Turner* reasonableness test. *Thornburgh v. Abbott*, 490 U.S. at 412-14. Incoming correspondence creates greater institutional risks than outgoing correspondence, because incoming correspondence can circulate within the prison and provoke disturbances that outgoing mail would not. *Id.* Restrictions on *outgoing* mail are subjected to the more rigorous review established by *Procunier v. Martinez*, 416 U.S. 396 (1974). *Koutnik v. Brown*, 456 F.3d 777, 784 (7th Cir. 2006). Under *Procunier*, a regulation of outgoing mail "must be no greater than is necessary or essential" to "further an important or substantial governmental interest unrelated to the suppression of expression." 416 U.S. at 413-14.

• *Right to Send and Receive Correspondence in Foreign Language*: In *Kikimura v. Turner*, 28 F.3d 592 (7th Cir. 1994), the plaintiff successfully challenged a general ban on any mail in Japanese. The *Kikimura* court focused primarily on the receipt of publications, rather than personal correspondence. However, the court's inquiry into whether the prisoner could read English suggests that if a prisoner cannot read English, prison authorities will be required to allow some correspondence in the prisoner's native language, because otherwise the prisoner will have no "alternative means of exercising the right in question." *Id.* at 598-99. In *Thongvanh v. Thalacker*, 17 F. 3d 256, 259 (8th Cir. 1994), the 8th Circuit upheld a verdict against a prison for violating the First Amendment rights of a prisoner from Laos by barring any correspondence in Lao, partly because there was a "ready alternative" of routing the correspondence through a refugee center to screen for security purposes. The validity of a restriction on sending and receiving mail is likely to turn on the prisoner's (and possibly the prisoner's correspondent's) ability to communicate in English. If a prisoner simply cannot communicate in English, it seems

likely that the 7th Circuit would require the prison to accommodate correspondence in the prisoner's native language.

• *Screening Correspondence*: Prison officials may inspect and even read general prisoner correspondence and may do so out of the presence of the prisoner. *Martin v. Brewer*, 830 F.2d 76 (7th Cir. 1987). However, prison officials may open and inspect "legal" or "privileged" correspondence only in the presence of the inmate and may not read such correspondence. *Wolff v. McDonnell*, 418 U.S. 539, 577 (1974); *Kaufman v. McCaughtry*, 419 F.3d 678, 685-86 (7th Cir. 2005). In the 7th Circuit, to prevail in a claim for reading or opening privileged mail outside the prisoner's presence, the prisoner must show that the mail was marked as legal mail. 419 F.3d at 686. In the 7th Circuit, it is unclear what, if any, correspondence other than legal correspondence qualifies as "privileged." Unmarked mail to and from a court is unlikely to be considered privileged, because court filings are generally public records. *Martin*, 830 F.2d at 78-79. However, a prisoner may state a claim if the prison opens mail from a court that is marked as legal mail to be opened in the prisoner's presence. *Castillo v. Cook Co. Mail Room Dep't*, 990 F.2d 304, 305-07 (7th Cir. 1993). Mail from other public officials may also be privileged, at least if it is so marked. *See Martin*, 830 F.2d at 78 (discussing letters from senators and foreign consulates).

• *Refusing to Deliver/Delays in Correspondence*: Systematic or repeated refusals to deliver prisoner mail or substantial delays in such delivery violate the prisoners' First Amendment rights. *Sizemore v. Williford*, 829 F.2d 608, 610 (7th Cir. 1999). However, "relatively short term and sporadic delays" that are not the result of "a content-based prison regulation or practice" are not actionable. *Rowe v. Shake*, 196 F.3d 778, 782 (7th Cir. 1999).

• *Content-based Censorship of Correspondence*: See *Content-based Restrictions on Publications*, below.

Right to Receive Publications

Prisoners' "[f]reedom of speech is not merely freedom to speak; it is also freedom to read. . . . Forbid a person to read and you shut him out of the marketplace of ideas and opinions that it is the purpose of the free speech clause to protect." *King v. Fed. Bureau of Prisons*, 415 F.3d 634, 638 (7th Cir. 2005).

• *Content-based Censorship of Publications*: Although subject to the *Turner* reasonableness test for restrictions on incoming mail, courts remain suspicious of censorship based on content or regulations that leave unbridled discretion to censor disfavored materials in the hands of prison officials. In *Thornburgh*, for example, the Court noted that it was "important to inquire whether prison regulations restricting inmates' First Amendment rights operated in a neutral fashion, without regard to the content of the expression." 490 U.S. at 415 (quoting *Turner*, 482 U.S. at 90). When the prison rejects a publication solely because the content could reasonably be deemed a threat to security, the regulation may be deemed "neutral," even though the rejection can be described as "content-based." *See Thornburgh*, 490 U.S. at 415-16; *see also*

Koutnik, 456 F.3d at 782-83 (rejecting facial overbreadth and vagueness challenges to prohibition on possessing gang symbols). However, while prison officials can justify prohibitions on "books detailing famous prison escapes" or facilitating criminal activity, courts will not allow prison officials to stretch security justifications to prohibit content that does not pose a meaningful threat. *See King*, 415 F.3d at 638-39 (holding refusal to permit prisoner to receive book on computer programming violated First Amendment, absent showing of credible threat prisoner could use book to disrupt prison computer system). Courts are also unlikely to condone censorship of publications merely because they express political or social views that are unpopular or even "inflammatory." *See Thornburgh*, 490 U.S. at 416 n.14 (noting that regulations barring writings that "express 'inflammatory political, racial, religious or other views'" were not sufficiently "neutral" or "unrelated to the suppression of expression"); *see also Lindell v. Frank*, 377 F.3d 655, 658 (7th Cir. 2004) ("prison officials violate the First Amendment when for reasons unrelated to legitimate penological interests they engage in 'censorship of . . . expression of "inflammatory political, racial, religious or other views"'") (citing *Procunier v. Martinez*, 416 U.S. at 415). Similarly, although censorship of sexually explicit visual materials may be justified by security concerns, a regulation that would prohibit materials that clearly have scientific, literary, or artistic merit, even though such materials may depict nudity or describe sexual activity (such as reproductions of the Sistine Chapel, the poetry of Walt Whitman or the Song of Solomon in the Bible) will not survive judicial scrutiny. *Aiello v. Litscher*, 104 F.Supp.2d 1068, 1079-80 (W.D. Wis. 2000).

• *Blanket Bans on Receipt of Publications*: A permanent ban on all newspapers and magazines would be impermissible under *Turner*, because such a ban would not leave meaningful alternative channels for the prisoner to obtain information about the world outside the prison. *See Sizemore v. Williford*, 829 F.2d 608, 610 (7th Cir. 1987) (allegation that copies of newspaper permanently withheld states claim under First Amendment); *Maddox v. Berge*, __ F.Supp.2d __, 2007 WL 420193 *9-10 (W.D. Wis. Feb. 8, 2007) (allegation that prisoner was "denied all access to magazines and newspapers" states claim). However, a *temporary* ban on all such publications as a disciplinary measure can be justified on the ground that restoration of such publications can be used as an "incentive" to induce better behavior among particularly incorrigible prisoners. *Beard v. Banks*, 126 S.Ct. 2572, 2579-80 (2006).

• *Foreign-Language Publications*: "Summary exclusion of foreign language materials is unconstitutional." *Kikimura v. Turner*, 28 F.3d 592, 598 (7th Cir. 1994). In adopting a blanket ban on materials written in Japanese, the prison did not make individualized assessments to determine whether materials written in Japanese posed a risk to the orderly operation of the prison. *Id.* The court noted that "a restriction is likely to be constitutionally permissible where the alternatives to the restriction are costly and not immediately apparent. The obvious implication, then, is that a prison may not restrict a prisoner's rights without even looking to see how the rights might be accommodated and estimating the expense entailed by doing so." *Id.* at 599.

• *Right to Receive Clippings and Information from the Internet*: A general prohibition on the receipt of clippings from non-commercial sources violates the First Amendment. *Lindell v. Frank*, 377 F.3d at 658-60. Although the Seventh Circuit has not ruled on whether prisoners may

receive information downloaded and printed from the internet, its ruling in *Lindell* strongly suggests it would follow the 9th Circuit in striking down a ban on mail that contains internet material. *Clement v. California Dep't of Correct.*, 364 F.3d 1148 (9th Cir. 2004); *see also West v. Frank*, 2005 WL 701703, *5 (W.D. Wis. March 25, 2005).

• *Publisher Only Rules*: Prisons may require that prisoners receive hardcover books only from the publisher, because books from acquaintances (or accomplices) outside the prison may be used to smuggle contraband. *Bell v. Wolfish*, 441 U.S. 520, 555 (1979). However, because there must be alternative means of exercising the right to read (*King*, 415 F.3d at 638), "security and discipline do not justify the wholesale prohibition of . . . hardbound books." *Kincaid v. Rusk*, 670 F.2d 737, 744 (7th Cir. 1982). Although the 7th Circuit does not appear to have squarely addressed the question, it would likely uphold "publisher only" rules applied to soft-cover books and possibly magazines, so long as prisoners have a means of obtaining such items from the publisher. *Lindell v. Frank*, 377 F.3d 655, 658-59 (7th Cir. 2004). However, prisons cannot ban *clippings* from such publications from sources other than the publisher, if the cost of obtaining full copies of a book or a subscription would be prohibitive for prisoners. *Id.*

Media Access to Prisoners

Prison officials can restrict face-to-face media access to prisoners, so long as there are alternative means by which the prisoner may communicate with the media. *Pell v. Procunier*, 417 U.S. 817, 823-25 (1974) (upholding ban on face-to-face communication with media on grounds prisoner can communicate with media by mail and through other visitors). Restrictions on prisoner's access to the media generally must be applied in a content-neutral manner, although even content-based restrictions may be upheld if they are reasonably related to security. *Abu-Jamal v. Price*, 154 F.3d 128, 133-34 (3d Cir. 1998); *Hammer v. Ashcroft*, 2006 WL 456177 *3 (S.D. Ind. Feb. 23, 2006).

Grooming and Attire (Non-Religious)

Prison officials have wide latitude to impose grooming and attire restrictions. In general, they will only need to make exceptions that are necessary for medical reasons or required by the prisoner's religion (see below).

Associational Rights

Right to Visitors

The Supreme Court has stopped short of holding that prisoners have no right to associate with non-prisoners through visitation, *Overton v. Bazzetta*, 539 U.S. 126, 131-32 (2003), but has upheld severe limits on visitors who are not in the prisoner's immediate family and even complete bans on visits (other than visits by attorneys or clergy) to prisoners who have two substance abuse infractions while incarcerated. *Id.* at 133-136. In *Overton*, the Court noted that "[t]he very object of imprisonment is confinement . . . . [F]reedom of association is among the

rights least compatible with incarceration." *Id.* at 131.

Prisoners retain the right to visits from close family members. *See Overton*, 539 U.S. at 131 (acknowledging that Constitution protects "highly personal relationships" including "association among members of an immediate family and association between grandchildren and grandparents" and declining to hold that such rights are extinguished in prison); *cf. Williams v. Frank*, 2006 WL 3409636 *4 (E.D. Wis. Nov. 27, 2006) (alleged deprivation of "right to communicate with his son and future wife" sufficient to state claim, although defendants would have opportunity to demonstrate reasonable relationship to penological purpose); *King v. Frank*, 328 F.Supp.2d 940, 945 (W.D. Wis. 2004). However, as *Overton* itself illustrates, almost any temporary restriction on visitation is likely to be upheld if it has some rational justification. Moreover, prison actions that are not intended to affect visitation, but practically impede it, are unlikely to be actionable. For example, the Supreme Court has upheld transfers of prisoners to facilities that are so far from their families as to be a practical bar on family visits. *Olim v. Wakinekona*, 461 U.S. 238 (1983).

While visitation restrictions are generally analyzed as First Amendment association claims, severe social isolation in itself may violate of the 8th Amendment's prohibition on cruel and unusual punishment, especially if the isolated prisoner is mentally ill. *See Jones'El v. Berge*, 164 F.Supp.2d 1096, 1117-18 (W.D. Wis. 2001).

Right to Interact with Other Prisoners

Although prisoners retain some minimal right to association with other prisoners, an "inmate's 'status as a prisoner' and the operational realities of a prison dictate restrictions on the associational rights among inmates." *Jones v. North Carolina Prisoners' Labor Union, Inc.*, 433 U.S. 119, 126 (1977). Alleged violations of a right to associate or communicate with other prisoners are analyzed under the *Turner* standard. *Turner*, 482 U.S. at 89. Restrictions on communication between a "jailhouse lawyer" and other inmates are also subject to the same standard, even though such communication is arguably of greater value because it facilitates access to the courts. *Shaw v. Murphy*, 532 U.S. 223, 228-230 (2001). Prisoners have no "right to associate" with gang members. *Westefer v. Snyder*, 422 F.3d 570, 574-75 (7th Cir. 2005).

Note: In a case alleging placement in segregation without adequate procedural due process, the 7th Circuit seemed to suggest that prisoners have no right whatsoever to associate with one another: "Subject only to such restraints as the cruel and unusual punishments clause of the Eighth Amendment may place upon the severity of punishment, a state can confine a prisoner as closely as it wants, in solitary confinement if it wants; a prisoner has no natural liberty to mingle with the general prison population." *Smith v. Shettle*, 946 F.2d 1250, 1252 (7th Cir. 1991). This sweeping statement appears inconsistent with both *Turner* and *Murphy*, which suggest that association and communication among prisoners enjoys at least some protection. And it seems irreconcilable with *Wilkinson v. Austin*, 545 U.S. 209 (2005), which held that prisoners had a liberty interest protected by the due process clause in not being subjected to the extreme deprivations experienced at a "supermax" facility, including prohibition on "almost all

human contact . . . even to the point that conversation is not permitted cell to cell . . . ." *Id.* at 223-24.

Right to Petition/Access to Courts

"Like others, prisoners have the constitutional right to petition the Government for redress of their grievances, which includes a reasonable right of access to the courts." *Hudson v. Palmer*, 468 U.S. 517, 523 (1984) (citing *Johnson v. Avery*, 393 U.S. 483 (1969)). The right of access to the courts derives not only from the petition clause, but also from the Due Process clause of the 14th Amendment. *Lewis v. Casey*, 518 U.S. 343, 351 (1996); *Bounds v. Smith*, 430 U.S. 817, 824 (1977); *see also Snyder v. Nolen*, 380 F.3d 279, 290-91 (7th Cir. 2004) (explaining that due process "requires prison authorities to provide prisoners with the tools necessary 'to attack their sentences, directly or collaterally, and in order to challenge the conditions of their confinement,'" while petition clause "includes the right to file other civil actions in court that have a reasonable basis in law or fact.").

Retaliation for Prisoner Grievances

Actions taken by a prison official in retaliation for a prisoner's exercise of his or her right to file an administrative grievance or a lawsuit violate the First Amendment, even if the action taken by the official would not otherwise violate the prisoner's rights. *Hoskins v. Lenear*, 395 F.3d 372, 375 (7th Cir. 2005) ("Conduct that does not independently violate the Constitution can form the basis for a retaliation claim, if that conduct is done with an improper, retaliatory motive."). Accordingly, the issuance of baseless disciplinary tickets, limitations on access to the library, or a transfer to another facility, which would not be independent violations of a prisoner's rights, would be actionable if done with a retaliatory motive. *See, e.g., Black v. Lane*, 22 F.3d 1395, 1402-03 (7th Cir. 1994) (disciplinary tickets); *Zimmerman v. Tribble*, 226 F.3d 568, 573 (7th Cir. 2000) (access to library); *Higgason v. Farley*, 83 F.3d 807, 810 (7th Cir. 1996) ("If a prisoner is transferred for exercising his own right of access to the courts, or for assisting others in exercising their right of access, he has a claim under § 1983."); *Babcock v. White*, 102 F.3d 267, 275 (7th Cir. 1996) (delay in transfer out of facility in which plaintiff was threatened by gang members).

In order to state a claim for retaliation, the prisoner must allege (1) a retaliatory action; (2) taken by a prison official; (3) caused by the prisoner's constitutionally protected activity. *Id.* A complaint satisfies the causation element if it "sets forth 'a chronology of events from which retaliation may be plausibly inferred.'" *Zimmerman v. Tribble*, 226 F.3d 568, 573 (7th Cir. 2000). In general, then, a plaintiff can state a claim for retaliation by alleging that she filed a grievance or lawsuit and that a prison official who knew or had reason to know of the grievance or lawsuit thereafter took action detrimental to the plaintiff.

Right to Attorney Visits

Prisoners have a right to legal visits from attorneys (or from paralegals under the direction

of attorneys). *Procunier v. Martinez*, 416 U.S. 396, 419 (1974), *overruled on other grounds by Thornburgh v. Abbott*, 490 U.S. 401 (1989). Although the prison may impose reasonable time, place and manner restrictions on such visits, there must be adequate opportunity to consult with an attorney in a private, confidential setting. "[C]ontact with an attorney and the opportunity to communicate privately is a vital ingredient to the effective assistance of counsel and access to the courts." *Bach v. Illinois*, 504 F.2d 1100, 1102 (7th Cir. 1974); *see also Dreher v. Sielaff*, 636 F.2d 1141 (7th Cir. 1980) (denying summary judgment in case alleging prison eavesdropping on attorney visits and lack of rooms for private consultation). Limitations on the number of visits and the days on which visits can take place, as well as requirements of advance notice of visits, are all constitutionally permissible, so long as they do not amount to a practical denial of attorney visits. *See, e.g.*, *Campbell v. Miller*, 787 F.2d 217, 226-27 (7th Cir. 1986) (upholding 24-hour notice, limitation of visits to Thursdays through Sundays).

Access to Law Library

Due process requires that prisons provide prisoners with "the capability of bringing contemplated challenges to sentences or conditions of confinement before the courts." *Lewis v. Casey*, 518 U.S. at 356. Prisons may discharge this obligation by providing adequate law libraries, adequate legal assistance services, or by any other mechanism that ensures a "reasonably adequate opportunity to present claimed violations of fundamental rights to the courts." *Id.* at 351 (quoting *Bounds*, 430 U.S. at 825).

While a prisoner's *due process* right of access to the courts is limited to those actions essential to a prisoner (*i.e.*, criminal appeals, *habeas* petitions, and challenges to conditions of confinement), the *petition clause* confers a broader right to bring other civil actions, such as divorce actions and petitions for restraining orders. *See Snyder v. Nolen*, 380 F.3d 279, 290-91 (7th Cir. 2004). It is not clear that prison officials have the same obligation to affirmatively facilitate such non-criminal, non-constitutional claims. *Id.* ("'states are required to provide affirmative assistance in the preparation of legal papers in cases involving constitutional rights and other civil rights actions related to their incarceration,' but 'in all other types of civil actions, states may not erect barriers that impede the right of access of incarcerated persons.'") (quoting *John L. v. Adams*, 969 F.2d 228, 235 (6th Cir. 1992)).

Generally, a library that provides access to basic federal materials and state materials relevant to the prisoner's criminal case will be adequate. *Lewis*, 518 U.S. at 351 (prisoner must show that he "was so stymied by inadequacies of the law library that he was unable even to file a complaint"); *Lehn v. Holmes*, 364 F.3d 862, 868 (7th Cir. 2004) (constitution "does not require any specific resources such as a law library or a laptop with a CD-ROM drive or a particular type of assistance"). If necessary to contest a criminal proceeding in a state other than the state of confinement, the prison may be required to provide access to that other state's materials, if the criminal proceeding affects the conditions or duration of the prisoner's current incarceration. *See Lehn*, 364 F.3d at 866-67.

As with limitations on access to attorney visits, time, place and manner restrictions on

library access that are reasonably related to a prison's security or administrative needs will generally be upheld. *See, e.g.*, *Lewis*, 518 U.S. at 361-62 (16-day delay in receiving requested materials does not violate right of access to courts); *Campbell v. Miller*, 787 F.2d at 227-29 (delays of up to 8 days, body cavity searches before and after entering library, requirement to provide exact page citation to request cases did not violate right to access courts). However, when access to the library is essentially "non-existent," and there are no alternative means of preparing pleadings, the prisoner is entitled to relief. *Marshall v. Knight*, 445 F.3d 965, 969 (7th Cir. 2006). Similarly, if the prison imposes impossible conditions on a prisoner's access to relevant materials, those conditions violate the prisoner's rights. *See Corgain v. Miller*, 708 F.2d 1241, 1250 (7th Cir. 1983) (requirement to provide exact citation to obtain case invalid when reference materials necessary to find citation are not available).

Religious Freedom

First Amendment Free Exercise Standard

The Free Exercise Clause prohibits the government from discriminating against religious beliefs or targeting religious practice for special restrictions or penalties. *See Church of Lukumi Babalu Aye v. Hialeah*, 508 U.S. 520, 533 (1993). Outside the prison setting, the Supreme Court has held that "if prohibiting the exercise of religion . . . is not the object of the [regulation] but merely the incidental effect of a generally applicable and otherwise valid provision, the First Amendment has not been offended." *Employment Div. v. Smith*, 494 U.S. 872, 878 (1990). Under *Smith*, then, government is not obliged to "accommodate" religious exercise. In the prison setting, however, regulations that substantially burden religious practices, even incidentally, will be upheld only if they satisfy the *Turner* standard of being "reasonably related to legitimate penological interests." *O'Lone v. Estate of Shabazz*, 482 U.S. 342, 349 (1987). The 7th Circuit has held that the *O'Lone* and *Turner* standard, not the *Smith* standard, applies to the Free Exercise claims of prisoners. *Sasnett v. Litscher*, 197 F.3d 290, 292 (7th Cir. 1999).

RLUIPA & RFRA Standard

After the decision in *Employment Div. v. Smith*, Congress sought to increase the judicial scrutiny applied to burdens on religious exercise by passing the Religious Freedom Restoration Act, 42 U.S.C. ' 2000bb *et seq*. In *City of Boerne v. Flores*, 521 U.S. 507 (1997), the Supreme Court held that RFRA exceeded Congress' powers under the Enforcement Clause of the Fourteenth Amendment, and thus could not constitutionally be applied to the states. RFRA still applies, however, to the claims of federal prisoners. *O'Bryan v. Bureau of Prisons*, 349 F.3d 399, 401 (7th Cir. 2003).

After RFRA was struck down, Congress enacted the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), 42 U.S.C. ' 2000cc *et seq*., which applies the same "compelling state interest/least restrictive means" test used in RFRA, but only to the claims of "institutionalized persons," including prisoners in state prison systems that receive federal

funds,[1] and zoning decisions against churches and other religious institutions. In *Cutter v. Wilkinson*, 544 U.S. 709 (2005), the Supreme Court upheld the Religious Land Use & Institutionalized Persons Act against Establishment Clause challenge. The court held that RLUIPA was a permissible accommodation of religion because "it alleviates exceptional government-created burdens on private religious exercise." *Id.* at 720; *see also Charles* v. *Verhagen*, 348 F.3d 601 (7th Cir. 2003) (rejecting Spending Clause, Establishment Clause, and Tenth Amendment challenges, but declining to reach Commerce Clause challenge).

RLUIPA provides:

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

42 U.S.C. § 2000cc-1(a).[2]

RLUIPA defines "religious exercise" as "any exercise of religion, whether or not compelled by, or central to, a system of religious belief." 42 U.S.C. § 2000cc-5(7)(A). "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." *Cutter*, 125 S. Ct. at 2124 n. 13. Maintaining institutional order and security is a compelling governmental interest. *See, e.g., Cutter*, 125 S. Ct. at 2124 n. 13 ("prison security is a compelling state interest"). Mere cost savings are not a compelling governmental interest. 42 U.S.C. § 2000cc-3(c) ("this Act may require a government to incur expenses in its own operations to avoid imposing a substantial burden on religious exercise").

The 7th Circuit held in a RLUIPA challenge to a *zoning* decision that a regulation that imposes a "substantial burden" on religion is defined as "one that necessarily bears direct, primary, and fundamental responsibility for rendering religious exercise . . . effectively impracticable." *Civil Liberties for Urban Believers v. City of Chicago*, 342 F.3d 752, 761 (7th Cir. 2003). District courts in Wisconsin appear to have adopted this definition for prisoner cases as well. *See, e.g.*, *Skenandore v. Endicott*, 2006 WL 2587545 *12 (E.D. Wis. Sept. 6, 2006); *Kaufman v. Schneiter*, __ F.Supp.2d __, 2007 WL 521218 *9 (W.D. Wis. Feb. 15, 2007); *compare Adkins v. Kaspar*, 393 F.3d 559, 570 (5th Cir. 2004) ("[A] government action or regulation creates a 'substantial burden' on a religious exercise if it truly pressures the adherent

[1] *Lindell v. McCallum*, 352 F.3d 1107, 1110 (7th Cir. 2003) (noting that "the Wisconsin prison system receives federal funding").

[2] Under RFRA, the federal government "shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability," unless the government demonstrates that the government policy or action "is in furtherance of a compelling governmental interest" and "is the least restrictive means of furthering" that interest. 42 U.S.C. § 2000bb-1.

to significantly modify his religious behavior and significantly violate his religious beliefs. And, in line with the foregoing teachings of the Supreme Court, the effect of a government action or regulation is significant when it either (1) influences the adherent to act in a way that violates his religious beliefs, or (2) forces the adherent to choose between, on the one hand, enjoying some generally available, non-trivial benefit, and, on the other hand, following his religious beliefs."); *Warsoldier v. Woodford*, 418 F.3d 989, 996 (9th Cir. 2005) ("Because the grooming policy intentionally puts significant pressure on inmates such as Warsoldier to abandon their religious beliefs by cutting their hair, CDC's grooming policy imposes a substantial burden on Warsoldier's religious practice.").

State Constitutional "Free Conscience" Standard

Art. I, § 18 of the Wisconsin Constitution provides, in relevant part: "The right of every person to worship almighty God according to the dictates of conscience shall never be infringed; . . . nor shall any control of, or interference with, the rights of conscience be permitted . . . ." This "free conscience" clause provides greater protections than its federal counterpart. *See State v. Miller*, 202 Wis.2d 56, 549 N.W.2d 235 (1996); *Peace Lutheran Church & Acad. v. Sussex*, 2001 WI App 139, ¶14, 246 Wis.2d 502, 631 N.W.2d 229 ("[O]ur state constitution offers more expansive protections for freedom of conscience than those offered by the Free Exercise Clause of the First Amendment to the United States Constitution.").

In *State v. Miller*, *supra*, the Court rejected the contention that Art. I, § 18 should be construed in the same manner as the federal free exercise clause, 202 Wis.2d at 63, and held that the "compelling state interest/least restrictive alternative test" should be used in evaluating challenges to facially neutral laws that burden religious practices. *Id.* at 66-69. In applying this test, the plaintiff challenging a statute or regulation "carries the burden to prove: (1) that he or she has a sincerely held religious belief, (2) that is burdened by application of the state law at issue. Upon such proof, the burden shifts to the State to prove: (3) that the law is based on a compelling state interest, (4) which cannot be served by a less restrictive alternative." *Id.* at 66. There is some support for the proposition that the burden on the person's religious exercise must be "substantial" before a court will apply the strict "compelling interest/least restrictive alternative" test. *See Peace Lutheran*, 2001 WI App 139 at ¶¶ 19-21.

Which Claims to Raise

In general, RLUIPA (or, in the case of federal prisoners, RFRA) and the Wisconsin Free Conscience clause will provide greater protections to prisoners' religious rights than will the federal Free Exercise clause. Although the Wisconsin prison system will be subject to RLUIPA, because it receives federal funding, some county jails may not be covered, if they do not receive federal funds. Ideally, county prisoners should file state Free Conscience clause claims to ensure that the jail's practices are subjected to stricter scrutiny.

Prisoners should be aware of the various time limits for filing each of these claims. For all state-law damages actions and injunctive actions (including state constitutional actions)

against municipalities or municipal employees, a notice of the circumstances giving rise to the claim must be served upon the appropriate official within 120 days of the incident giving rise to the claim. Wis. Stat. § 893.80; *D.N.R. v. City of Waukesha*, 184 Wis.2d 178, 515 N.W.2d 888 (1994). For state-law damages claims against state employees, notice of claim must be served within 120 days. Wis. Stat. § 893.82. The notice of claim statute does not apply to state-law claims for injunctive or declaratory relief against *state* employees. *Lewis v. Sullivan*, 188 Wis.2d 157, 524 N.W.2d 630 (1994). It is unclear what limitations period does apply to injunctive and declaratory claims against state officials. Claims under RLUIPA are governed by the four-year statute of limitations set forth in 28 U.S.C. § 1658(a). The limitations period for a Free Exercise claim brought under section 1983 in Wisconsin is 6 years, derived from the residual tort statute of limitations. *Hemberger v. Bitzer*, 216 Wis.2d 509, 574 N.W.2d 656 (1998).

When more than 4 but fewer than 6 years have elapsed from the violation of a prisoner's religious rights, the only viable claim may be a Free Exercise claim.

Applications of Free Exercise & RFRA/RLUIPA & "Free Conscience" Standards

• *Religious Rituals, Services and Ceremonies*: In a case alleging that refusal to permit a prisoner to attend Native American congregate services violated the Free Exercise clause and RLUIPA, a court noted that "[i]t is difficult to imagine a burden more substantial than banning an individual from engaging in a specific religious practice. Depriving plaintiff of the opportunity to participate in the only group worship services offered during a three month period is no *de minimis* deprivation." *Meyer v. Teslik*, 411 F.Supp.2d 983, 989-90 (W.D. Wis. 2006).

Rituals, services or ceremonies that involve objective safety or security risks are subject to considerable regulation by prison officials. *See Skenandore v. Endicott*, 2006 WL 2587545 *12-14 (E.D. Wis. Sept. 6, 2006) (restrictions on Native American smoking rituals upheld under RLUIPA); *Goodman v. Carter*, 2001 WL 755137 *10 (N.D. Ill. July 2, 2001) (ban on burning incense in cells upheld against Free Exercise challenge).

However, rituals that some may find offensive or unusual may not be prohibited, absent a showing of genuine risk. Under RFRA, for example, the 7th Circuit has held that a prohibition on "casting of spells" may substantially burden Wiccan religious practice, which involves herbal magic and benign witchcraft. *O'Bryan v. Bureau of Prisons*, 349 F.3d 399, 400-01 (7th Cir. 2003). In order to impose such a rule, the government must "*demonstrate*, and not just assert, that the rule at issue is the least restrictive means of achieving a compelling governmental interest." *Id.* at 401.

Time limits on ceremonies and limited access to rituals have been upheld on grounds of security and limited resources. *See, e.g., Skenandore v. Endicott*, 2006 WL 2587545 *14-18 (E.D. Wis. Sept. 6, 2006) (upholding limit on duration on sweat lodge ceremony because of scheduled head counts and limitation of drumming and smoking ceremonies to less than once per week because volunteer religious leader was not available more frequently).

A prisoner must generally be able to show that the ritual or service is a part of the religion's practice. For example, although atheism qualifies as a "religion" under the First Amendment, the plaintiff's Free Exercise challenge to a prison's refusal to permit him to form an atheist "study group" was rejected, because he could not show that the refusal burdened a "central religious belief or practice" of atheists. *Kaufman v. McCaughtry*, 419 F.3d 678, 682-83 (7th Cir. 2004).

• *Holiday Observance*: Prisoners have generally been successful in demanding accommodations for observance of religious holidays, including adjustments of work schedules for Sabbath observances. *See, e.g.*, *Conyers v. Abitz*, 416 F.3d 580, 584-85 (7th Cir. 2005) (refusal to allow Muslim prisoner participate in Ramadan meal schedule (bagged meals delivered after sundown) because he missed deadline to request participation violates Free Exercise clause, absent showing that strict enforcement of deadline was reasonably related to legitimate purpose); *Mayweathers v. Newland*, 258 F.3d 930, 938 (9th Cir. 2001) (upholding injunction against disciplining Muslim prisoners for missing work to attend Friday services); *Murphy v. Carroll*, 202 F.Supp.2d 421 (D.Md. 2002) (prison officials' designation of Saturday as cell-cleaning day violated Free Exercise rights of Orthodox Jewish prisoner).

• *Religious Literature*: Prisons may not prevent a prisoner from purchasing religious texts or treat the religious texts of different faiths differently, absent a showing that the texts in question threaten institutional security or some other important governmental interest. For example, refusal to provide copies of the *Tao te Ching* and the *I Ching*, when the prison provided the sacred texts of other religions, violated the Free Exercise clause (and the Establishment clause). *Henderson v Brush*, 2006 WL 561236, *15-17 (W.D. Wis. March 6, 2006). Similarly, a refusal to permit a prisoner to order books about atheism, while permitting prisoners to order other religious books, violates RLUIPA. *Kaufman v. Schneiter*, __ F.Supp.2d __, 2007 WL 521218 (W.D. Wis. Feb. 15, 2007). Prisons may not ban religious texts simply because they are unfamiliar or involve "divination" or attempts to influence future events, since many religious traditions involve prophesy and petitioning for divine intervention. *See Goodman v. Carter*, 2001 WL 755137 *10-12 (N.D. Ill. July 2, 2001) (rejecting prison's argument that denial of Tarot cards to Wiccan was justified because they could be used to divine the future or "influence" or "manipulate" other prisoners; other religious systems engage in divination and attempt to use religious texts to proselytize or otherwise influence others); *see also O'Bryan v. Bureau of Prisons*, 349 F.3d 399, 401 (7th Cir. 2003) (rejecting argument that "casting of spells" might cause disruption as a "heckler's veto").

However, under RLUIPA, banning allegedly religious texts that advocate violence has been held to be the least restrictive means of advancing the compelling interest in prison security. *Borzych v. Frank*, 439 F.3d 388, 390-91 (7th Cir. 2006) (questioning whether particular Odinist texts were actually sacred (as opposed to religious fiction), but concluding that even if they were, their advocacy of violence made banning them permissible).

• *Religious Objects and Accessories*: Prisons may not prevent prisoners from purchasing and possessing devotional objects, or treat the devotional objects of different religions

differently, absent a showing that the objects in question threaten institutional security or another legitimate penological interest. For example, a refusal to allow Protestant prisoners to possess crosses, while allowing Roman Catholic prisoners to possess rosaries with crucifixes, violates the Free Exercise clause. *Sasnett v. Litscher*, 197 f.3d 290, 293 (7th Cir. 1999). However, a neutral security policy against affixing objects or papers to cell walls may be applied to prevent prisoners from attaching devotional objects to the walls, where the prison allows the prisoner to possess such objects and use them in other ways. *Mark v. Gustafson*, 2006 WL 2540772 *5-6 (W.D. Wis. Aug. 30, 2006) (upholding prohibition on Wiccan prisoner attaching "magic seals" to walls and door of cell, where prisoner could possess seals and prop them on floor against wall temporarily).

• *Religious Diet*: So long as the dietary needs are not so unusual as to require preparation of unique meals, courts have generally been protective of prisoners' rights to observe religious dietary rules. For example, in *Hunafa v. Murphy*, 907 F.2d 46, 47-48 (7th Cir. 1990), the 7th Circuit denied summary judgment for prison officials who refused to deliver meal trays without pork to a Muslim prisoner in segregation. Because the non-pork items in the tray could be contaminated by the pork while the tray was in transit, the prisoner's desire to have no pork on the tray was reasonable. The court noted that the prison might be able to defend the policy under the *Turner* standard if they could show (not just speculate) that trays without pork might be used by Muslim kitchen workers to communicate or convey contraband to Muslims in segregation.

• *Grooming & Attire*: Neutral regulations of grooming (*e.g.*, hair length limits, prohibitions on facial hair) and attire (bans on headwear) will generally be upheld against Free Exercise challenge, because they are rationally related to the prison's interest in order and security. *See, e.g.*, *Young v. Lane*, 922 F.2d 370, 375-76 (7th Cir. 1991) (upholding ban on headwear other than prison-issued baseball caps; rejecting Jewish prisoners' to regulation permitting wearing of yarmulkes only in cell or during worship services). However, application of such rules differently to different religions will violate the Free Exercise clause. *See, e.g.*, *Reed v. Faulkner*, 842 F.2d 960, 964 (7th Cir. 1988) (enforcing hair length policy against Rastafarians, but not against Native Americans, violates Free Exercise).

<u>First Amendment Establishment Clause Claims</u>

"A government policy or practice violates the Establishment Clause if (1) it has no secular purpose; (2) its primary effect advances or inhibits religion, or (3) it fosters an excessive entanglement with religion." *Kaufman v. McCaughtry*, 419 F.3d 678, 683 (7th Cir. 2005) (citing *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971). "The Establishment Clause also prohibits the government from favoring one religion over another without a legitimate secular reason." *Id.* Thus, a refusal to allow formation of an atheist study group, while allowing other religious study groups, violates the Establishment Clause. *Id.* at 684.

The Establishment Clause also forbids prison officials from subjecting prisoners to involuntary religious indoctrination or coercing them into participating in religion-based programs. *See, e.g.*, *Kerr v. Farrey*, 95 F.3d 472, 479-80 (7th Cir. 1996) (requiring prisoner to

participate in religious Narcotics Anonymous program, on penalty of elevated security classification and possible negative consequences for parole eligibility, violates the Establishment Clause).