DO BORDERS MAKE A DIFFERENCE BEHIND BARS? THE SCOPE OF PRISONERS' FREE EXERCISE OF RELIGION PROTECTION IN CANADA AND THE UNITED STATES

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I. INTRODUCTION

The United States and Canada have very different federal corrections structures and realities. The United States and Canada have comparable crime rates,[1] but the United States incarceration rate is more than four times the rate in Canada.[2] The two countries also diverge in the level of religious free exercise protection offered to adult inmates serving sentences in correctional facilities.[3]

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[1] William T. Pizzi, *American Exceptionalism: The Effects of the 'Vanishing Trial' on Our Incarceration Rate*, 48 FED. SENT. R. 330, (2016) ("Canada has crime rates that track those in the United States.").

[2] Michelle Ye Hee Lee, *Yes, U.S. Locks People Up at A Higher Rate Than Any Other Country*, THE WASHINGTON POST, July 7, 2015, https://www.washingtonpost.com/news/fact-checker/wp/2015/07/07/yes-u-s-locks-people-up-at-a-higher-rate-than-any-other-country; Adam Liptak, *Inmate Count in U.S. Dwarfs Other Nations',* N.Y. TIMES, April 23, 2008, http://www.nytimes.com/2008/04/23/us/23prison.html?_r=1&fta=y.

[3] The scope of this note's discussion is limited to adult inmates incarcerated in corrections facilities in each country. In the United States, the discussion includes adult prisoners incarcerated in the local jails and in the confinement facilities operated "by a state or the federal government, which typically holds felons and offenders with sentences of more than 1 year." DANIELLE KAEBLE & LAUREN GLAZE, U.S. DEP'T. OF JUSTICE, BUREAU OF JUSTICE STATISTICS, NCJ 250374, CORRECTIONAL POPULATIONS IN THE UNITED STATES, 2015, at 2 (2016), https://www.bjs.gov/content/pub/pdf/cpus15.pdf. In Canada, this discussion will include both the offenders under the federal jurisdiction of the Correctional Service of Canada ("CSC") and the offenders in the responsibility of the provinces. Both the federal

Freedom Restoration Act of 1993 (RFRA)[4] and the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA).[5] Canada's primary federal legislation is the Corrections and Conditional Release Act that has been interpreted to require Canadian prisons to provide reasonable religious accommodations to inmates.[6] The courts of both countries are tasked with interpreting these fundamental rights,[7] but the courts have been

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and provincial offenders are discussed because the only difference in legal protection is that the offenders under provincial control are not subject to CSC's internal policies protecting religious freedom. *Our Role*, CORRECTIONAL SERVICE CANADA, (Oct. 31, 2016), http://www.csc-scc.gc.ca/about-us/006-0001-eng.shtml. Further, both federal and provincial offenders are protected by the federal constitutional and statutory scheme discussed in Part II, *infra*. *Canadian Bill of Rights*, *1960,* CORRECTIONAL SERVICE CANADA, http://www.csc-scc.gc.ca/text/pblct/rht-drt/03-eng.shtml (March 5, 2015) ("[T]he *Canadian Charter of Rights and Freedoms* . . . applies to both federal and provincial acts of government.").

[4] Religious Freedom Restoration Act of 1993, Pub. L. No. 103-131, 107 Stat. 1488 (codified as amended at 42 U.S.C. §§ 2000bb-2000bb-4 (1993)).

[5] Religious Land Use and Institutionalized Persons Act of 2000, Pub. L. No. 106-274, 114 Stat. 803 (codified as amended at 42 U.S.C. §§ 2000cc-2000cc-5 (2000)).

[6] Corrections and Conditional Release Act, S.C. 1992, c 20, s 75 (Can.) ("An inmate is entitled to reasonable opportunities to freely and openly participate in, and express, religion or spirituality, subject to such reasonable limits as are prescribed for protecting the security of the penitentiary or the safety of persons.").

[7] *See, e.g.*, Sherbert v. Verner, 374 U.S. 398, 402 (1963) ("The door of the Free Exercise Clause stands tightly closed against any governmental regulation of religious beliefs." (citing Cantwell v. Connecticut, 310 U.S. 296, 303 (1940))). *See also* R. v. Big M Drug Mart Ltd., [1985] 1 S.C.R. 295, 347 (Can.) ("[W]hatever else freedom of conscience and religion may mean, it must at the very least mean this: government may not coerce individuals to affirm a specific religious belief or to manifest a specific religious practice for a sectarian purpose.").

criticized for failing to vigorously and consistently protect prisoners' religious free exercise rights.[8]

This note will discuss the religious protections of both countries' prisoners in different contexts and ultimately conclude that there are different levels of religious protection for prisoners in the United States and Canada because of the Canadian's broader guarantee of freedom of conscience. Part II describes the legal history and current protections provided to prisoners on the federal level in the United States. First, this section includes an overview of the Supreme Court jurisprudence establishing the First Amendment Free Exercise Clause guarantees and the federal legislative response of RFRA and RLUIPA. Second, this section outlines the few cases where the Supreme Court has applied the heightened protections in RFRA and RLUIPA.

Part III describes the Canadian corrections system and the religious free exercise protections afforded to prisoners at the federal levels. First, this outlines the protections afforded by the Canadian Corrections System (CSC) internal policies and guidelines. Second, a brief overview is included of the Canadian cases where prisoners challenged prison policies as violating their freedom of religion or conscience under the Canadian Charter of Rights and Freedoms and the decisions issued by the Canadian Human Rights Act. Lastly, this section concludes with the protections and legal remedies provided by the Corrections and Conditional Release Act.

Part IV compares the level of religious rights guaranteed to prisoners in each country and concludes the United States legal framework should adopt principles from the broader Canadian protection. First, this section includes a discussion of each country's required religious accommodations for inmates in the correctional institutions, such as requests for food substitutes in

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[8] *See* James D. Nelson, *Incarceration, Accommodation, and Strict Scrutiny*, 95 VA. L. REV. 2053, 2054 (2009) (arguing that federal courts have failed to uniformly and coherently resolve religious exemption claims brought by inmates and observing that federal courts have not resolved a consistent way to apply strict scrutiny under RLUIPA); *See also* Ira C. Lupu, *The Failure of RFRA*, 20 U. ARK. LITTLE ROCK L. REV. 575, 585 (1998) (finding that the increased standard imposed in RFRA have failed in the federal courts to "produce any substantial improvement in the legal atmosphere surrounding religious liberty by the United States.").

their diets, for provision of religious services, and for exemptions for clothing and hygiene policies.

Lastly, this note concludes that although both countries have strongly-worded and well-intentioned policies and legal protections, both legal systems demonstrate inconsistencies when applied to prisoners' religious free exercise challenges. In the United States, the courts are mandated by federal legislation to apply the most stringent standard of review to these claims and balance the prisoner's religious interests against the prison's governmental interest for the action.[9] In practice, however, the strongly-worded legal standards for inmates' religious free exercise rights are largely illusory.

First, the courts and Congress have expressly rejected the argument that increasing prisoners' religious freedom will overburden the corrections system and will result in endless frivolous claims.[10] In application, however, many courts degrade inmates' religious freedom by placing too much importance on the prison's interests and the administrative costs associated with religious accommodations. Second, courts afford too much deference to the prison's alleged governmental interest or policy decision alleged by the prison without evaluating the logical soundness or merit of the prison's judgment.[11] At the expense of

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[9] Both the Religious Freedom and Restoration Act (RFRA) and the Religious Land Use and Institutionalized Persons Act (RLUIPA) require courts to apply "strict" scrutiny review. *See* Part II-B, *infra*.

[10] Cutter v. Wilkinson, 544 U.S. 709, 725-26 (2005) (discussing the legislative history for RLUIPA and agreeing with a Department of Justice statement that RLUIPA would likely not have an "unreasonable impact on prison operations" because the system had been complying with RFRA's requirements for six years).

[11] One of the most striking examples illustrating the judicial tendency to unduly defer to the prison's stated policy judgment is Holt v. Hobbs, 135 S. Ct. 853 (2015). In *Holt*, a prison prohibited a Muslim inmate from growing a one-half-inch beard. *Holt*, 135 S. Ct. at 863. The prison argued that denying the request was the least restrictive means to further its compelling governmental interests in prison safety and security because inmates could use their beards to hide "prohibited items, including razors, needles, [and] drugs." *Id.* The Supreme Court rejected the prison's argument and sharply criticized the three lower courts for deferring to the prison's claim that allowing

inmates' religious freedoms, the result is a lopsided balancing test that allows courts to blindly accept proffered justifications for prison policies with "unquestioning deference."[12]

In Canada, the legal system has a complex web of constitutional and statutory provisions that are designed to strongly protect the freedom of conscience and the right of religious free exercise. However, much of the inmates' religious protections can be credited to the internal policies established and enforced by the Correctional Service of Canada ("CSC"). Aggrieved inmates need not often resort to filing claims under the *Charter of Rights and Freedoms* or the Corrections and Conditional Release Act.

This note will conclude that the United States is less protective of inmates' religious freedoms than the Canadian system in many ways. However, the United States lesser protection is not necessarily a pitfall of American legislation, but is likely largely a result of the very different corrections realities in the two countries. Any substantial expansion of inmates' religious protection that requires prisons to grant more accommodation requests would likely increase the costs of operating the corrections system. The United States has a larger number of total prisoners and proportion of the population incarcerated than Canada.[13] Therefore, any increase in inmates' religious freedom in

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short beards would harm its interest in prohibiting contraband. *Id*., at 863-64. *See* Part IV-B, *infra*.

[12] *Holt*, 135 S. Ct. at 864 (criticizing the decisions of the lower courts for invalidly affording the prison "a degree of deference that is tantamount to unquestioning acceptance" that amounts to an "abdication of the responsibility . . . to apply RLUIPA's rigorous standard.").

[13] *Compare* E. ANN CARSON & ELIZABETH ANDERSON, BUREAU OF JUSTICE STATISTICS, NCJ 250229, PRISONERS IN 2015, at 1, 8 (2016), https://www.bjs.gov/content/pub/pdf/p15.pdf (reporting that there were 1,476,847 total state and federal prisoners who were sentenced to more than 1 year with 1,298,200 of those held in state prisons, and the imprisonment rate for U.S. residents age 18 or older for 2015 was "593 prisoners sentenced to more than 1 year in state or federal prison per 100,000 U.S. adult residents") *and* KAEBLE & GLAZE, *supra* 3, at 2, 5 ("At yearend 2015, an estimated 2,173,800 persons were either under the jurisdiction of state or federal prisons or in the custody of local jails in the United States…[which] represents

the American corrections system would likely be far costlier than a similar increase in Canada's less populated system.

II. THE UNITED STATES LEGAL FRAMEWORK

A. Constitutional Protection of Prisoners' Religious Rights: The Free Exercise Clause of the First Amendment Supreme Court Jurisprudence

In the United States, the First Amendment protects the right to free exercise of religion, which consists of two related guarantees.[14] The freedom to believe in a religion, to subscribe to a set of faith-based beliefs, or to not believe in anything at all is an absolute right and therefore the government is prohibited from regulating it.[15] In contrast, the right to free religious *exercise* can be constitutionally regulated so long as the government does not impermissibly burden the protected right.[16] In short, the First

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BJS's official measure of the prison population and includes prisoners held in prisons, penitentiaries, correctional facilities, halfway houses, boot camps, farms, training or treatment centers, and hospitals.") *with* THE PUBLIC SAFETY CANADA PORTFOLIO CORRECTIONS STATISTICS COMMITTEE, 2015 CORRECTIONS AND CONDITIONAL RELEASE STATISTICAL OVERVIEW, Table C2 at 36, https://www.publicsafety.gc.ca/cnt/rsrcs/pblctns/ccrso-2015/ccrso-2015-en.pdf (reporting for 2013-2014 that the total number of offenders in custody was 37,031, which consisted of 15,327 federal offenders in the custody of a CSC facility and 21,704 offenders in provincial/territorial custody).

[14] U.S. CONST. amend. I. ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof").

[15] Cantwell v. Connecticut, 310 U.S. 296, 303 (1940) ("The constitutional inhibition of legislation on the subject of religion has a double aspect. On the one hand, it forestalls compulsion by law of the acceptance of any creed or the practice of any form of worship."). *See also* Torcaso v. Watkins, 367 U.S. 488, 495 (1961) ("[N]either a State nor the Federal Government can constitutionally force a person 'to profess a belief or disbelief in any religion.'") (quoting Everson v. Board of Ed., 330 U.S. 1, 15, 16 (1947)).

[16] *See Cantwell*, 310 U.S. at 304 ("The freedom to act must have appropriate definition to preserve the enforcement of that protection. In every case the power to regulate must be so exercised as

Amendment protects both the "freedom to believe and [the] freedom to act."[17]

The degree of religious freedom will vary depending on how views, values, or standards may be deemed to constitute a "religious belief" and how expansively "religion" is defined more generally. The Supreme Court has not explicitly defined "religion" but has provided piecemeal guidance in various contexts as to what qualifies for Constitutional protection.[18] Adherence to the more mainstream and traditional organized religions has been accepted as protected, regardless of whether those religions include the belief in God.[19] The Court has consistently indicated a

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not, in attaining a permissible end, unduly to infringe the protected freedom.").

[17] *Id*. at 303.

[18] For example, the Court has discussed the issue of defining "religious beliefs" in the context of deciding whether individuals who have a fundamental belief against fighting an ongoing war could qualify under the Universal Military Training and Service Act as conscientious objectors and be granted exemptions to military service because of their "religious training or belief." 50 U.S.C.S. App. §456(j), transferred to 50 U.S.C.S. § 3806(j) (2016). *See, e.g*. United States v. Seeger, 380 U.S. 163, 173-74 (1965) (discussing whether the statutory phrase "Supreme Being" refers to the "broader concept of a power or being, or a faith" and therefore includes parties' stated belief in theism or "'superhuman powers or spiritual agencies in one or many gods'" as a "religious belief" under the statute). *See also* Welsh v. United States, 398 U.S. 333, 339-40 (1970) ("[T]he central consideration in determining whether the registrant's beliefs are religious is whether these beliefs play the role of a religion and function as a religion in the registrant's life. . . [T]his opposition to war [must] stem from the registrant's moral, ethical, or religious beliefs about what is right and wrong and that these beliefs be held with the strength of traditional religious convictions.") (citing *Seeger*, 380 U.S. at 176).

[19] Torcaso v. Watkins, 367 U.S. 488, 495 (1961) ("[N]either a State nor the Federal Government can . . . constitutionally pass laws or impose requirements which aid all religions as against non-believers, and neither can aid those religions based on a belief in the existence of God as against those religions founded on different beliefs.") *See also* Welsh v. United States, 398 U.S. 333, 357, n. 8 (1970) (White, J., dissenting) ("This Court has

tendency to reject a particular way of life or "philosophical and personal [belief] rather than religious" and instead are more likely to protect "not merely a matter of personal preference, but one of deep religious conviction, shared by an organized group, and intimately related to daily living." [20] The Court has also stated that "[o]nly beliefs rooted in religion are protected"[21]

The United States Supreme Court applied strong First Amendment protection in *Wisconsin v. Yoder*[22] and *Sherbert v. Verner*[23] using a balancing approach[24] that resembled strict scrutiny review.[25] The Court stated that it would uphold "a

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taken notice of the fact that recognized 'religions' exist that 'do not teach what would generally be considered a belief in the existence of God,' e. g., 'Buddhism, Taoism, Ethical Culture, Secular Humanism and others.'") (quoting *Torcaso*, 367 U.S. 488, 495 n. 11).

[20] Wisconsin v. Yoder, 406 U.S. 205, 216-17 (1972) (discussing whether the Amish traditional way of life should be considered a "religious" belief or practice).

[21] *Id*. at 215.

[22] *Id*. at 214.

[23] *Sherbert*, 374 U.S. at 403 (1965). In *Sherbert*, the Court applied strict scrutiny to free exercise of religion claim challenging a denial of unemployment benefits after declining a job with work on Saturday because it was contrary to her religious views as a Seventh-Day Adventist.

[24] *Yoder*, 406 U.S. at 214 (1972).

[25] The "strict scrutiny" standard of review is consistently considered to afford the highest level of judicial protection applied by courts to First Amendment claims because it is so difficult for the government to overcome the high burden. *See,* Roy G. Spece, Jr. & David Yokum, *Scrutinizing Strict Scrutin*y, 40 CT. L. REV. 285, 295 (2015) ("The Court's most common articulations of strict scrutiny are that the state must show its action is necessary to further a compelling state interest or that its action is narrowly tailored to further a compelling state interest."); Peter J. Rubin, *Reconnecting Doctrine and Purpose: A Comprehensive Approach to Strict Scrutiny After* Adarand *and* Shaw, 149 U. PA. L. REV. 1, 4 (2000) ("[M]ost have concluded that a judicial determination to apply "strict scrutiny" is little more than a way to describe the conclusion that a particular governmental action is invalid."). *But see* Matthew D. Bunker, Clay Calvert & William C. Nevin, *Strict in Theory, but Feeble in Fact? First Amendment Strict Scrutiny and the Protection of Speech*, 16

challenged government action that substantially burdened the exercise of religion [if it] was necessary to further a compelling state interest."[26] However, this strong language was ignored in the context of protecting prisoners' religious exercise.

The First Amendment also applies to protect prisoners from unconstitutional government actions that imposes an unreasonable burden on that right.[27] In *Turner v. Safley*[28] and

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COMM. L. & POL'Y 349, 351 (2011) ("Although strict scrutiny is unquestionably still a highly speech-protective standard, cracks in its structure are evident."); Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND. L. REV. 793, 814 (2006) (concluding that strict scrutiny is not applied evenly to all constitutional rights and finding that religious liberty "has a particularly weak version of strict scrutiny under which the majority of challenged laws are upheld.").

[26] Holt v. Hobbs, 135 S. Ct. 853, 859 (2015) (citing *Yoder*, 406 U.S.at 214, 219 (1972); *Sherbert*, 374 U.S.at 403, 406 (1965)).

[27] Cruz v. Beto, 405 U.S. 319, 321-22 (1972) ("Federal courts sit not to supervise prisons but to enforce the constitutional rights of all 'persons,' including prisoners…The First Amendment, applicable to the States by reason of the Fourteenth Amendment…prohibits government from making a law 'prohibiting the free exercise' of religion."); *See also Cruz,* at 32, n. 2 ("We do not suggest, of course, that every religious sect or group within a prison -- however few in number -- must have identical facilities or personnel. A special chapel or place of worship need not be provided for every faith regardless of size; nor must a chaplain, priest, or minister be provided without regard to the extent of the demand. But reasonable opportunities must be afforded to all prisoners to exercise the religious freedom guaranteed by the First and Fourteenth Amendments without fear of penalty"); Turner v. Safley, 482 U.S. 78, 95 (1987) ("It is settled that a prison inmate retains those [constitutional] rights that are not inconsistent with his status as a prisoner or with the legitimate penological objectives of the corrections system" (citing Pell v. Procunier, 417 U.S. 817, 822, (1974))); O'Lone v. Estate of Shabazz, 482 U.S. 342, 348 (1987) ("Inmates clearly retain protections afforded by the First Amendment . . . including its directive that no law shall prohibit the free exercise of religion." (citing Cruz v. Beto, 405 U.S. 319 (1972) (per curiam))).

[28] Turner v. Safley, 482 U.S. 78, 89 (1987).

O'Lone v. Estate of Shabazz,[29] the Supreme Court adopted a deferential "reasonableness" approach and explicitly rejected strict scrutiny as the appropriate standard of review to evaluate the validity of prison policies or regulations that infringe on inmates' constitutional rights.[30] Instead, a policy would be upheld "if it is reasonably related to legitimate penological interests."[31]

Four factors are considered in assessing a policy's "reasonableness." First, a court must find there is a "valid, rational connection between the prison regulation and the legitimate governmental interest put forth to justify it."[32] In other words, the prison policy will be invalidated where the relationship between the policy and the prison's asserted objective is "so remote as to render the policy arbitrary or irrational."[33] Further, the asserted state interest must be legitimate and content-neutral.[34]

Second, the court must consider whether a policy completely bars all means of expression or if the inmates still have available alternatives to exercise their constitutional right.[35] Third, a court should consider any effects caused by the prison accommodating a claimant's religious right, including the "impact…on guards and other inmates, and on the allocation of prison resources generally."[36] Courts are required to afford special deference to the prison officials' decisions where an accommodation will have a "significant 'ripple effect' on fellow inmates or on prison staff."[37] Fourth, a court must consider the availability of alternative methods to accommodate a claimant's

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29 O'Lone v. Estate of Shabazz, 482 U.S. 342 (1987).

30 Turner, 482 U.S. at 89 ("Subjecting the day-to-day judgments of prison officials to an inflexible strict scrutiny analysis would seriously hamper their ability to anticipate security problems and to adopt innovative solutions to the intractable problems of prison administration.").

31 *Id*., at 89.

32 *Id*. at 89 (citing Block v. Rutherford, 468 U.S. 576, 586 (1984)).

33 *Id*. at 89-90.

34 *Id*. at 90 (holding that the state interest must be "legitimate and neutral so that if a policy limits prisoners' expression, it cannot be content-specific).

35 *Turner,* 482 U.S. at 90.

36 *Id*.

37 *Id*.

religious right where "the existence of obvious, easy alternatives may be evidence that the regulation is not reasonable, but is an 'exaggerated response' to prison concerns."[38]

The newly-minted reasonableness standard from *Turner* was first applied in *O'Lone v. Shabazz*.[39] The Supreme Court found no violation of the inmate's free exercise rights when the prison rejected accommodation requests to create a few work details of only Muslim inmates or weekend work hours because officials properly concluded this would compromise security.[40] The Court gave deference to the prison officials' concern that this would pose a threat to security by "allowing 'affinity groups' . . . to flourish" because they will "invariably challenge the institutional authority."[41] However, as Justice Brennan points out in dissent, the government presented no evidence of these challenges during the five years in which the prison offered an alternative work schedule for Friday.[42]

Further, the Court accepted the prison's claim that the accommodation would have adverse effects on the institution because it would require additional supervision, which is a "drain on scarce human resources."[43] The Court concluded the imagined difficulties asserted by the prison officials "make clear that there are no 'obvious, easy alternatives to the policy.'"[44]

The application of the Turner balancing approach in *Safley* demonstrates a substantial departure from the strong free exercise protections afforded by strict scrutiny in *Sherbert*.[45] This

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38 *Id*. at 90-91.

39 O'Lone v. Shabazz, 482 U.S. 342 (1987).

40 *Id*., at 350.

41 *Id*. at 353.

42 *Id*. at 366 (Brennan, J, dissenting).

43 *Id*., at 353.

44 *O'Lone*, 482 U.S. at 353 (quoting *Turner*, 482 U.S. at 93).

45 Some have criticized and questioned the level of free exercise protection afforded by the First Amendment even under the *Sherbert* standard, especially for prisioners. *See* Christopher L. Eisgruber & Lawrence G. Sager, *Mediating Institutions: Beyond the Public/Private Distinction: The Vulnerability of Conscience: The Constitutional Basis for Protecting Religious Conduct*, 61 U. CHI. L. REV. 1245, 1247, n. 11 (1994) ("[T]he Court has rejected Free Exercise claims on the ground that the challenged practice imposed no

downward trend was later extended beyond the prison context in *Employment Division v. Smith*.[46] The Supreme Court recast the heightened review of First Amendment religious claims used in cases like *Sherbert* and *Yoder* as only applicable to challenged government action that regulates "the religious beliefs, the communication of religious beliefs, or the raising of one's children in those beliefs."[47] Instead, a generally applicable regulation that

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actual burden upon the religious convictions of the claimants.") (citing Lyng v. N.w. Indian Cemetery Prot. Ass'n, 485 U.S. 439, 448-49 (1988) (building road over sacred areas did not burden religious belief); Bowen v. Roy, 476 U.S. 693, 700 (1986) (requiring disclosure of a social security number for welfare benefits did not burden religious beliefs); Alamo Found. v. Sec.' of Labor, 471 U.S. 290, 304-05 (1985) (imposing a minimum wage requirement does not burden religious believers who refuse, for religious reasons, to accept wages)). *See also* Ira C. Lupu, *The Trouble with Accommodation*, 60 GEO. WASH. L. REV. 743, 756-57 (1992) (arguing that Smith's holding just represented an explicit continuation of a lower standard in First Amendment accommodation cases) ("Relying on a series of decisional maneuvers and a standard of review that was strict in theory, but ever-so-gentle in fact, the Court in the 1980s already had signaled the impending demise of mandatory accommodations."). *See also* Geoffrey S. Frankel, *Untangling First Amendment Values: The Prisoners' Dilemma*, 59 GEO. WASH. L. REV. 1614, 1616-17 (1991) (discussing prisons as one of the "special contexts" in which the Supreme Court has refused to apply strict scrutiny and concluding that the Court "has adopted a particularly deferential standard of review in the prison context.").

[46] Emp't Div., Dep't of Human Res. of Or. v. Smith, 494 U.S. 872 (1990).

[47] *Id*. at 882, 886-88. The Court further limited the significance of *Sherbert* to the realm of unemployment compensation exemptions. *Id.*, at 883 ("Applying that test we have, on three occasions, invalidated state unemployment compensation rules that conditioned the availability of benefits upon an applicant's willingness to work under conditions forbidden by his religion.") (*citing* Sherbert v. Verner, 374 U.S. 398 (1963); Thomas v. Review Bd. of Ind. Emp' Sec. Div., 450 U.S. 707 (1981); Hobbie v. Unemployment Appeals Comm'n of Fa., 480 U.S. 136 (1987)). The Supreme Court recast this line of precedent to "stand for the proposition that where the State has in place a system of individual exemptions, it may not refuse to extend

incidentally burdens an individual's religious beliefs will be upheld if it satisfies a mere rational basis for furthering a legitimate government interest and will be upheld if it is neutral and otherwise constitutional.[48] This prompted Congress to enact legislation providing for stronger First Amendment free exercise protection.

B. The United States federal legislation

1. The Religious Freedom Restoration Act

The Religious Freedom Restoration Act ("RFRA")[49] was enacted in 1993 as a congressional response to *Smith*'s departure from the strong protections in *Sherbert* and *Yoder*.[50] RFRA requires courts to apply strict scrutiny[51] and prohibits government action that substantially burdens an individual's exercise of

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that system to cases of "religious hardship" without compelling reason." *Id*. at 884.

[48] *Id*., at 879 ("[T]he right of free exercise does not relieve an individual of the obligation to comply with a "valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes.") (*citing* United States v. Lee, 455 U.S. 252, 263, n. 3 (1982) (Stevens, J., concurring)).

[49] Religious Freedom Restoration Act of 1993, Pub. L. No. 103-131, 107 Stat. 1488 (1993) (codified at 42 U.S.C. §§ 2000bb-2000bb-4).

[50] 42 U.S.C. § 2000bb(a)(4) ("The Congress finds that…in Employment Division v. Smith…the Supreme Court virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion."); 42 U.S.C § 2000bb(b) "The purposes of this Act are to (1) restore the compelling interest test as set forth in Sherbert v. Verner, 374 U.S. 398 (1963) and Wisconsin v. Yoder, 406 U.S. 205 (1972) and to guarantee its application in all cases where free exercise of religion is substantially burdened; and (2) to provide a claim or defense to persons whose religious exercise is substantially burdened by government.").

[51] 42 U.S.C. § 2000bb-1(b) ("Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person-- (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.").

religion "even if the burden results from a rule of general applicability."[52]

However, not all legislators agreed that RFRA's broad religious guarantees should apply in the prison context. The specific issue of whether to extend RFRA's strict scrutiny protection to prisoners has been referred to as "one of the most hotly debated aspects of RFRA."[53] Lawmakers proposed an amendment that would have exempted prisoners from RFRA's protections mostly due to concerns that the federal courts would be flooded with frivolous claims by inmates. [54]

The scope of RFRA's protection was gutted in *City of Boerne v. Flores*,[55] where the Supreme Court invalidated RFRA as it applies to state and local government actions[56] on the grounds that Congress had surpassed its constitutional enforcement authority under Section 5 of the Fourteenth Amendment.[57] RFRA's protections are still applicable to federal government actions and therefore still protect District of Columbia prisoners and inmates in other federal prisons as well.[58] As a result, Congress enacted

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[52] 42 U.S.C. § 2000bb-1(a).

[53] Daniel J. Solove, *Faith Profaned: The Religious Freedom Restoration Act and Religion in the Prisons*, 106 YALE L.J. 459, 471 (1996).

[54] Senator Reid introduced the amendment with the following stated purpose "to prohibit the application of this Act, or any amendment made by this Act, to an individual who is incarcerated in a Federal, State, or local correctional, detention, or penal facility.") *See* 139 Cong. Rec. S 14350 (daily ed. Oct. 26, 1993) (statement by Sen. Reid) ("Putting prisons under the compelling State interest test would permit the courts to second guess prison officials on virtually every decision of prison administration-virtually every decision. The prisoners brag about how many lawsuits they file.").

[55] City of Boerne v. Flores, 521 U.S. 507 (1997).

[56] *Id*. at 536 ("Broad as the power of Congress is under the Enforcement Clause of the Fourteenth Amendment, RFRA contradicts vital principles necessary to maintain separation of powers and the federal balance.").

[57] U.S. CONST. AMEND, XIV § 5 ("The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.").

[58] Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418, 424 (2006) (applying RFRA in a post-*Boerne*

additional legislation to fill the gap opened by RFRA's partial invalidation in *Boerne*.[59]

2. The Religious Land Use and Institutionalized Persons Act

After *Boerne*, Congress again responded with more expansive free exercise protection by enacting the Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA").[60] RLUIPA essentially mirrors RFRA's protections, but was crafted in an attempt to correct the deficiencies of RFRA which led to its invalidation in *Boerne*.[61] RLUIPA applies only to land use

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challenge to the federal Controlled Substances Act) ("Under RFRA, the Federal Government may not, as a statutory matter, substantially burden a person's exercise of religion, 'even if the burden results from a rule of general applicability.'") (*quoting* 42 U.S.C. § 2000bb-1(a)). *See also* Gartrell v. Ashcroft, 191 F. Supp. 2d 23 (D.D.C. 2002) (deciding a religious claim by prisoners from the District of Columbia).

[59] There is some evidence that RFRA's strong language did not translate into greater religious protection for prisoners because courts diluted or misapplied the standard. *See* Derek L. Gaubataz, *RLUIPA At Four: Evaluating the Successes and Constitutionality of RLUIPA's Prisoner Provisions*, 28 HARV. J.L. & PUB. POL'Y 501, 504 (2005) (Lower courts also gutted the protections afforded to prisoners' religious exercise under the Religious Freedom Restoration Act (RFRA) in the four years it applied to the states (before being held unconstitutional), ruling against prisoners in over 90% of the cases.") (citing Ira C. Lupu, *The Failure of RFRA*, 20 U. ARK. LITTLE ROCK L.J. 575, 607-17 (1998)). *See also* SOLOVE, *supra* 56, at 474-75 ("RFRA's failure to provide an effective, uniform, heightened standard of review for prisoners' free exercise stems from two problematic trends in the way courts have balanced, and continue to balance, religion with penological interests: (1) insensitive approaches toward weighing prisoners' religious rights; and (2) nonskeptical approaches toward weighing penological interests.").

[60] *Supra* note 8.

[61] *See* 146 Cong. Rec. S7774 (daily ed. July 27, 2000) (joint statement of Sens. Hatch & Kennedy) (discussing the narrower scope of RLUIPA protections and Congress relying on its Spending and Commerce power to enact RLUIPA) ("Within those two target areas, the bill applies only to the extent that Congress has power to

regulations or decisions[62] and to claims by institutionalized persons,[63] which predominantly protect inmates.[64] RLUIPA re-establishes strict scrutiny review in both categories[65] where it is alleged that the government substantially burdened religious free exercise rights[66] and (1) the challenged program or activity

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regulate under the Commerce Clause, the Spending Clause, or Section 5 of the Fourteenth Amendment.").

[62] *See* 42 U.S.C. § 2000cc(a)(2)(C) ("This subsection applies in any case in which – the substantial burden is imposed in the implementation of a land use regulation or system of land use regulations, under which a government makes, or has in place formal or informal procedures or practices that permit the government to make, individualized assessments of the proposed uses for the property involved.").

[63] *See* 42 U.S.C. § 2000cc-1(a) ("No government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution . . .").

[64] Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2774 (2014) (discussing RLUIPA in the context of claims brought under RFRA and stating that "RLUIPA applies to 'institutionalized persons,' a category that consists primarily of prisoners . . . [and] Congress enacted RLUIPA to preserve the right of prisoners to raise religious liberty cl aims.").

[65] The land-use provisions of RLUIPA in Section 2 largely mirror the guarantees for institutionalized persons in Section 3, but the sole focus of this note will be on the protections in Section 3. For thoughtful discussions on RLUIPA in the land-use context, *see* Ryan M. Lore, *When Religion and Land Use Regulations Collide: Interpreting the Application of RLUIPA's Equal Terms Provision*, 46 U.C. DAVIS L. REV. 1339 (2013) (analyzing in-depth the circuit split over the proper interpretation of RLUIPA's land-use provision); and Jason Z. Pesick, *RLUIPA: What's the Use?*, 17 MICH. J. RACE & L. 359 (2012) (discussing how courts have applied RLUIPA's land-use section and evaluating the level of religious protection afforded by courts interpreting RLUIPA's definition of "religious exercise").

[66] *See* 42 U.S.C. § 2000cc-1(a) ("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, unless the government demonstrates that imposition of the burden on that person-- (1) is in

receives federal funding, or (2) the burden affects United States' commerce.[67]

While RLUIPA claims have been inconsistently successful, they are more successful than RFRA claims.[68] A recent case decided by the Supreme Court, *Holt*,[69] is illustrative of the type of RLUIPA analysis conducted by courts.

In *Holt*, the Supreme Court invalidated a prison policy challenged under RLUIPA that prohibited prisoners from growing beards with a sole exemption for diagnosed dermatological conditions.[70] The petitioner claimed his Muslim faith prohibits him from cutting his beard, but requested a religious exemption to grow an only one-half inch beard as a "compromise."[71] The Court held that the prison officials substantially burdened the Muslim claimant's religious exercise when he was denied an exemption to grow a one-half inch beard as required by his religious beliefs.[72]

In evaluating the lower court's analysis, the Court held that the district court misapplied RLUIPA's "substantial burden" analysis by imputing principles from the lesser First Amendment protection established in *Turner* and *O'Lone*.[73] The district court

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furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.").

[67] *See* 42 U.S.C. § 2000cc-1(b)(1)-(2) ("This section applies in any case in which – (1) the substantial burden is imposed in a program or activity that receives Federal financial assistance; or (2) the substantial burden affects, or removal of that substantial burden would affect, commerce with foreign nations, among the several States, or with Indian tribes.").

[68] GAUBATAZ, *supra* 62, at 569-71 (analyzing forty-six RLUIPA claims by prisoners and concluding that "prisoners are generally having more success than they did under RFRA in establishing a substantial burden on religious exercise.").

[69] Holt, 135 S. Ct. at 867 (refusing to uphold a prison policy that barred prisoners from growing beards challenged by a Muslim inmate who wished to grow a one-half inch beard).

[70] *Id*. at 860.

[71] *Id*. at 861.

[72] *Id*. at 859.

[73] *Id*. ("[T]he District Court improperly imported a strand of reasoning from cases involving prisoners' First Amendment

found that the grooming policy did not substantially burden petitioners' free exercise by improperly considering (1) whether the prison allowed petitioner to "engage in other forms of religious exercise" and (2) whether the particular exercise is required or "compelled" by the religious belief.[74]

Further, the district court erroneously relied on "testimony that not all Muslims believe that men must grow beards" in finding that the grooming policy did not cause a substantial burden.[75] The Court reaffirmed the principle that the religious freedom protected by RLUIPA and the First Amendment are "not limited to beliefs which are shared by all of the members of a religious sect."[76]

By holding that a claimant must not show a religious exercise is required by all believers of that religion, the Supreme Court strengthened the protection for inmates' religious freedoms and proscribed a standard similar to the constitutional protection granted by the Canadian *Charter of Rights and Freedoms*.

III. THE CANADIAN LEGAL FRAMEWORK

A. Constitutional Protection of Prisoners' Religious Rights: The Canadian Charter of Rights and Freedoms

Central to the web of legal authority protecting Canadian prisoners' religious freedom while incarcerated is section 2(a) of the *Charter of Rights and Freedoms*, which guarantees "the freedom of conscience and religion."[77] Although conscience and religion are separately listed, the Canadian courts interpret the term to encompass only one "freedom."[78] The freedom of religion is

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rights.") (citing O'Lone, 482 U.S. at 351-352; Turner, 482 U.S. at 78, 90).

[74] *Id*. at 861.

[75] *Holt*,. 135 S. Ct. at 862-63.

[76] *Id*. at 862-63 (2015) (quoting Thomas v. Review Bd. of Ind. Empl'. Sec. Div., 450 U.S. 707, 715-16 (1981)).

[77] *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution* Act, 1982, being Schedule B to the *Canada Act,* 1982, (U.K.), 1982, c. 11. ("Everyone has the following fundamental freedoms: (a) freedom of conscience and religion … ").

[78] *See* R. v. Big M Drug Mart Ltd., [1985] 1 S.C.R. 295, para. 121, 124 ("[T]he concepts of freedom of religion and freedom of conscience became associated, to form, as they do in s. 2(a) of our Charter, the single integrated concept of "freedom of conscience and

the predominant claim under section 2(a) of the *Charter*, whereas the freedom of conscience is rarely litigated separately.[79] However, this protection granted in section 2(a) is not absolute.[80] The rights in the *Charter* are protected only to the extent that individuals exercising their freedoms do not infringe on the rights of others.[81]

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religion" . . . Religious belief and practice are historically prototypical and, in many ways, paradigmatic of conscientiously held beliefs and manifestations and are therefore protected by the Charter."). *See also* Victor M. Muñiz-Fraticelli & Lawrence David, *Religious Institutionalism in a Canadian Context*, 52 OSGOODE HALL L.J. 1049, 1061 (2015) ("The dominant opinion in both the academy and the courts has tended to equate religious freedom with freedom of conscience, or at least to read the concept of religion expansively to cover beliefs and practices beyond those commonly associated with the historical conception of religion.").

[79] *See* Debra Parkes, *A Prisoners' Charter?: Reflections on Prisoner Litigation Under the Canadian Charter of Rights And Freedoms*, 40 U.B.C. L. REV. 629, at 654 n. 103 (2007) ("[The freedom of conscience] . . . has received little attention from courts or commentators."). *See also* KISLOWICZ, *supra* 134, at 703 ("Almost from the Charter's beginnings in 1982, a constant theme in s. 2(a) jurisprudence has been a relative lack of consideration given to the word "conscience" as a fundamental freedom.")

[80] *See* Syndicat v. Amselem, [2004] 2 S.C.R. 551, 585 (Can.) ("No right, including freedom of religion, is absolute.") (citing R. v. Big M Drug Mart Ltd., [1985] 1 S.C.R. 295, 346; P. (D.) v. S. (C.), [1993] 4 S.C.R. 141, at p. 182; B. (R.) v. Children's Aid Society of Metro. Toronto, [1995] 1 S.C.R. 315, at para. 226; Trinity W. Univ. v. B.C. Coll. of Teachers, [2001] 1 S.C.R. 772, 2001 SCC 31, at para. 29). *See also* Trinity W. Univ., [2001] 1 S.C.R. at 811 ("[A]lthough the freedom of belief may be broad, the freedom to act upon those beliefs is considerably narrower . . . ") (quoting B. (R.) v. Children's Aid Society of Metro. Toronto, [1995] 1 S.C.R. 315, at para. 226)).

[81] *See* Trinity W. Univ., [2001] 1 S.C.R. at 810 ("[F]reedom of religion, like any freedom, is not absolute. It is inherently limited by the rights and freedoms of others." (quoting P. (D.) v. S. (C), [1993] 4 S.C.R. 141, 182)) (discussing that the freedom of religion is not absolute in deciding a case also claiming discrimination on the basis of sexual orientation). *See also* Trinity W. Univ., [2001] 1 S.C.R. at 811 ("[S]o are there limits to the scope of s.

Further, provisions of the *Charter* specifically permit the restriction of fundamental freedoms granted under section 2(a). For example, section 1 of the *Charter* subjects the rights and freedoms guaranteed "only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."[82] In addition, section 33 of the *Charter* allows the Canadian legislatures to enact valid statutory schemes for five-year temporary periods which may violate the freedoms guaranteed in section 2(a).[83] While the restrictions under section 33 must be in the form of a legislative enactment, section 1 also allows the courts to limit the rights guaranteed by the *Charter*.[84]

As a threshold matter, courts must first decide whether the challenged action satisfies the section 1 requirement that any limitation on a right guaranteed by the *Charter* is reasonable "as can be demonstrably justified in a free and democratic society."[85] Courts are required to follow a two-step legal test to decide whether the government's action is valid. First, the government objective must be "of sufficient importance to warrant overriding a constitutionally protected right or freedom."[86] Second, the court

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2(a), especially so when this provision is called upon to protect activity that threatens the physical or psychological well-being of others.") (quoting B. (R.) v. Children's Aid Society of Metro. Toronto, [1995] 1 S.C.R. 315, at para. 226).

[82] *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution* Act, 1982, being Schedule B to the *Canada Act,* 1982, (U.K.), 1982, c. 11. ("The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.").

[83] *See* H.R.S. Ryan, *The Impact of the Canadian Charter of Rights and Freedoms on the Canadian Correctional System*, CANADIAN HUMAN RIGHTS YEARBOOK 99, 116 (1983) ("Parliament or provincial or territorial legislature to declare expressly by statute that a statutory provision shall apply for renewable periods of five years notwithstanding a provision of section 2…of the Charter.").

[84] RYAN, *supra* 86, at 116.

[85] *Canadian Charter of Rights and Freedoms*, s 1, Part I of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c 11 (U.K.).

[86] *See* R. v. Oakes, [1986] 1 S.C.R. 103,138 (Can.) (citing R. v. Big M Drug Mart Ltd, at 352).

will conduct a proportionality test by balancing "the interests of society with those of individuals and groups."[87] The means to serve that governmental objective will be "reasonable and demonstrably justified" when finding three essential elements are met: (1) the action's measures "must be rationally connected to the objective" in that they are "carefully designed to achieve that objective . . . [and] not arbitrary, unfair or based on irrational considerations," (2) the means "impair 'as little as possible' the right or freedom in question," and (3) the action must have a "proportionality between the effects of the [challenged] measures…and the objective which has been identified as of 'sufficient importance.'"[88]

Finally, a court must evaluate the "severity of the deleterious effects" on the right or freedom guaranteed under the *Charter* by considering (1) "the nature of the right or freedom violated," (2) "the extent of the violation," and (3) "the degree to which the measures which impose the limit trench upon the integral principles of a free and democratic society."[89] The court may decide that even though a measure has satisfied the first two elements of the third prong, the "measure will not be justified by the purposes it is intended to serve" because of "the severity of the deleterious effects of a measure on individuals or groups."[90] Once the claimant has surpassed this section 1 hurdle, the courts will analyze whether the specific right has been violated given its level of constitutional protection.[91]

The Supreme Court of Canada has held that under section 2(a) of the *Charter*, "only beliefs, convictions and practices rooted in religion, as opposed to those that are secular, socially based or conscientiously held, are protected by the guarantee of freedom of religion."[92] The Court defined "religion" broadly, holding that it

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[87] *See* Oakes, 1 S.C.R. at 139.

[88] *Id*. (quoting R. v. Big M Drug Mart Ltd., at 352).

[89] *Id*. at 139-140 ("The inquiry into effects must, however, go further . . . . Some limits on rights and freedoms protected by the Charter will be more serious than others.").

[90] *See Id*. at 140 ("The more severe the deleterious effects of a measure, the more important the objective must be if the measure is to be reasonable and demonstrably justified in a free and democratic society.").

[91] *Id*.

[92] Syndicat Northcrest v. Amselem, [2004] 2 S.C.R. 551, 576 (Can.).

"typically involves a particular and comprehensive system of faith and worship. Religion also tends to involve the belief in a divine, superhuman or controlling power. "In essence, religion is about freely and deeply held personal convictions or beliefs connected to an individual's spiritual faith and integrally linked to one's self-definition and spiritual fulfillment, the practices of which allow individuals to foster a connection with the divine or with the subject or object of that spiritual faith."[93]

The Supreme Court's definition of religion focuses primarily on the subjective belief of claimants and does not require it be a belief shared by every person in that religious group.[94] Specifically, the Court aimed to clarify that previous opinions "should not be construed to imply that freedom of religion protects only those aspects of religious belief or conduct that are objectively recognized by religious experts as being obligatory tenets or precepts of a particular religion."[95] The *Charter*'s guarantee to the freedom of religion and conscience includes both the objective and the subjective "personal notions of religious belief, 'obligation', precept, 'commandment', custom or ritual."[96] Therefore, courts must focus only on the "religious or spiritual essence of an action" and not on whether the practice is mandatory because section 2(a) of the *Charter* protects "both obligatory as well as voluntary expressions of faith."[97]

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93 *Syndicat*, 2 S.C.R. at 576.

94 *Id*. at 577 (holding that the Charter protects a "personal or subjective conception of freedom of religion, one that is integrally linked with an individual's self-definition and fulfillment and is a function of personal autonomy and choice, elements which undergird the right").

95 *Id*. at 578 ("Claimants . . . should not need to prove the objective validity of their beliefs in that their beliefs are objectively recognized as valid by other members of the same religion, nor is such an inquiry appropriate for courts to make.").

96 *Id*. at 579-80 ("[F]reedom of religion consists of the freedom to undertake practices and harbour beliefs, having a nexus with religion, in which an individual demonstrates he or she sincerely believes or is sincerely undertaking in order to connect with the divine or as a function of his or her spiritual faith, irrespective of whether a particular practice or belief is required by official religious dogma or is in conformity with the position of religious officials.").

97 *Syndicat*, 2 S.C.R. at 580.

In evaluating religious claims under the *Charter*, a court must analyze the context of each case to determine whether there has been sufficient infringement on the exercise of a claimant's freedom of religion under section 2(a).[98] Although the court has previously stated that "[a]ll coercive burdens on the exercise of religious beliefs are potentially within the ambit of s. 2(a),"[99] a claimant must demonstrate the state conduct "interferes with his or her ability to act in accordance with his or her religious beliefs *in a manner that is more than trivial or insubstantial*."[100]

Claimants challenging a state action as violating their religious freedom guaranteed by section 2(a) of *The Charter* must show the court that "(1) he or she has a practice or belief, having a nexus with religion, which calls for a particular line of conduct, either by being objectively or subjectively obligatory or customary, or by, in general, subjectively engendering a personal connection with the divine or with the subject or object of an individual's spiritual faith, irrespective of whether a particular practice or belief is required by official religious dogma or is in conformity with the position of religious officials; and (2) he or she is sincere in his or her belief."[101]

The court must analyze the sincerity of a claimant's belief when it is at issue, which requires an inquiry into the honesty of that belief.[102] Analyzing the sincerity of a claimant's belief is a question of fact that considers (1) the alleged belief is or is not consistent with the claimant's other current religious practices, (2) "the credibility of a claimant's testimony," and (3) the expert evidence, if any, which demonstrates that claimant's belief is "consistent with the practices and beliefs of other adherents of the

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98 *Id*. at 584-85.

99 R. v. Videoflicks Ltd., [1986] 2 S.C.R. 713, 759 (Can.), *sub nom*. R. v. Edwards Books & Art Ltd., [1986] 2 S.C.R. 713.

100 *Syndicat*, 2 S.C.R. at 584-85 (emphasis in original).

101 *Id*. at 583, 589 ("[I]ndividual demonstrates that he or she sincerely believes that a certain practice or belief is experientially religious in nature in that it is either objectively required by the religion, *or* that he or she subjectively believes that it is required by the religion, *or* that he or she sincerely believes that the practice engenders a personal, subjective connection to the divine or to the subject or object of his or her spiritual faith, and as long as that practice has a nexus with religion") (emphasis in original).

102 *Id*. \at 581.

faith."[103] However, courts must not inquire into whether the claimant has a "sincere subjective belief that an obligation exists and that the practice is *required*."[104] Rather, "the court's role in assessing sincerity is intended only to ensure that a presently asserted religious belief is in good faith, neither fictitious nor capricious, and that it is not an artifice."[105]

After a claimant has demonstrated the first two requirements and triggered the religious protection under section 2(a), a court then will determine "whether there has been enough of an interference with the exercise of the implicated right so as to constitute an infringement of freedom of religion under the . . . *Charter*."[106] Further, courts may also deny a religious freedom action under section 2(a) of the Charter where claimants do not demonstrate that the exercise of their religion does not interfere with or cause harm to the rights of others.[107] Therefore, claimants must also demonstrate to the court "how the exercise of their right impacts upon the right of others in the context of the competing rights of private individuals . . . . [because] [c]onduct which would potentially cause harm to or interference with the rights of others would not automatically be protected."[108]

Compared to the frequently-litigated religious freedom challenges brought by American inmates, there are far fewer reported cases brought by Canadian inmates challenging prison

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103 *Id*. at 582.

104 *Id*. at 588. (holding that claimants do not need to "prove the objective validity of their beliefs in that their beliefs are objectively recognized as valid by other members of the same religion, nor is such an inquiry appropriate for courts to make."); *See also id*. at 578.

105 *Id*. at 582.

106 *See* Syndicat v. Amselem, [2004] 2 S.C.R. 551, 583-84 (Can.).

107 *See id.* at 577 (discussing that the purpose of freedom of religion is that "*every individual be free to hold and to manifest whatever beliefs and opinions his or her conscience dictates*, provided *inter alia only that such manifestations do not injure his or her neighbours or their parallel rights to hold and manifest beliefs and opinions in their own*.") (quoting R. v. Big M Drug Mart Ltd., [1985] 1 S.C.R. 295, 347 (Can.) at 346) (emphasis in original).

108 *Id*. at 585-86.

policies or decisions under the *Charter of Rights and Freedoms*.[109] Further, of the rare cases which are pursued on section 2(a) grounds, there are very few which discuss the freedom of conscience specifically.[110] Instead, many religious freedom claims brought by inmates are based on Canadian statutes and regulations which grant certain religious rights to federal prisoners.

B. Statutory Protection of Prisoners' Religious Rights: The Corrections and Conditional Release Act (CCRA) and its Regulations

The Corrections and Conditional Release Act ("CCRA")[111] and its accompanying regulations[112] protect specific religious

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109 *See* PARKES, *supra* 82, at 654-55 ("The only reported freedom of religion cases relate to limited religious services provided to remand prisoners and a claim that a prison smoking ban infringed the rights of Aboriginal prisoners to practice their religion (tobacco being an important part of the religious practice of many Aboriginal groups.").

110 *See* PARKES, *supra* 82, at 655 (discussing the freedom of conscience granted by Section 2(a) of the *Charter of Rights and Freedom*s, (stating, "This freedom has received little attention from courts or commentators. An exception is the consideration given to freedom of conscience by Justice Wilson in her minority opinion in R. v. Morgentaler (1988), 37 C.C.C. (3d) 449, [1988] 1 S.C.R. 30 at para. 249-54.").

111 *Corrections and Conditional Release Act*, S.C. 1992, c. 20, s. 75, 4(d) (Can.) ("[O]ffenders retain the rights of all members of society except those that are, as a consequence of the sentence, lawfully and necessarily removed or restricted.").

112 *See Corrections and Conditional Release Act Regulations*, SOR/92-620, s. 100(1)-(2), s. 101. (providing that all inmates are entitled to "express [their] religion or spirituality . . . to the extent that the expression . . . does not (a) jeopardize the security of the penitentiary or the safety of any person; or (b) involve contraband," including "any assembly of inmates held for the purpose of expressing a religion or spirituality"; The [CSC] shall ensure that, where practicable, the necessities that are not contraband and that are reasonably required by an inmate for the inmate's religion or spirituality are made available to the inmate, including (a) interfaith chaplaincy services; (b) facilities for the expression of the religion or

rights to federal inmates under the CSC's care. The CCRA guarantees inmates "reasonable opportunities to freely and openly participate in, and express, religion or spirituality."[113] However, this right is not absolute and is "subject to such reasonable limits as are prescribed for protecting the security of the penitentiary or the safety of persons."[114] All inmates are entitled to file complaints alleging that their guarantee of religious expression has been infringed on by the prison,[115] but are deterred from filing frequent meritless claims with the statutory caveat that inmates may lose their right to file future complaints.[116]

Most of the prisoners' protections are afforded by the internal policies enacted by the Correctional Service of Canada (CSC), which are responsible for offenders serving sentences more than two years in the federal correctional institutions or prisons.[117] There are far fewer correctional facilities in Canada than in the United States,[118] but CSC has dedicated a lot of effort to providing expansive religious protections to inmates in their care.[119] One

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spirituality; (c) a special diet as required by the inmate's religious or spiritual tenets; and (d) the necessities related to special religious or spiritual rites of the inmate.").

[113] *Corrections and Conditional Release Act*, S.C. 1992, c. 20, s. 75 (Can.).

[114] *Id*.

[115] *Id*. at s. 91 ("Every offender shall have complete access to the offender grievance procedure without negative consequences.").

[116] *Id*. s. 91.1(1) ("If the Commissioner is satisfied that an offender has persistently submitted complaints or grievances that are frivolous, vexatious or not made in good faith, the Commissioner may . . . prohibit an offender from submitting any further complaint or grievance.").

[117] *See* CORRECTIONAL SERVICE OF CANADA, *Facilities and Security*, (May 6, 2016), http://www.csc-scc.gc.ca/facilities-and-security/index-eng.shtml.

[118] *See* CORRECTIONAL SERVICE OF CANADA, *supra* 3 ("CSC is responsible for the management of 43 institutions [and] . . . 15 community correctional centres.").

[119] CORRECTIONAL SERVICE CANADA, *Memorandum of Understanding Between the Correctional Service of Canada (CSC) and the Interfaith Committee on Chaplaincy (IFC)*, (Dec. 2, 2013), http://www.csc-scc.gc.ca/chaplaincy/092/mou_e.pdf. (CSC has

reason prisoner complaints on religious freedom grounds may not get widely litigated or reported is that inmates use the internal complaint mechanism offered by the CSC.[120] The office of the Correctional Investigator ("OCI") is the federal agency that investigates complaints brought by federal offenders regarding issues specific to that individual and issues widespread throughout the corrections system.[121]

Offenders dissatisfied with the result at the initial complaint level have available to them two more appeal-like steps in the grievance process.[122] After exhausting the third step of the

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implemented several policies to improve the religious freedom of inmates under its custody and has commissioned reports evaluating the success of programs to maintain the level of religious protection. For example, the Interfaith Committee on Chaplaincy (IFC)) is a committee of religious and faith-group representatives that serves as an advisory board to the CSC and that partners with the CSC to help reach their goal of "ensuring the delivery and ongoing improvement of effective spiritual care and religious services to offenders.")

120 *See* COMMISSIONER OF THE CORRECTIONAL SERVICE OF CANADA DIRECTIVE NO. 081, *Offender Complaints and Grievances*, http://www.csc-scc.gc.ca/acts-and-regulations/081-cd-eng.shtml (last modified Jan. 13, 2014) ("Where an offender is dissatisfied with an action or a decision by a staff member, the offender may submit a written complaint").

121 *See* OFFICE OF THE CORRECTIONAL INVESTIGATOR, *Making a Complaint to the Office of the Correctional Investigator*, http://www.oci-bec.gc.ca/cnt/complaint-plainte-eng.aspx (last modified Jan. 11, 2016) ("The Office investigates federal offender concerns related to the CSC's decisions, recommendations, acts or omissions that affect federal offenders, either as individuals or as a group…[and] also conducts investigations into systemic issue of offender concern.").

122 *See* COMMISSIONER OF THE CORRECTIONAL SERVICE OF CANADA DIRECTIVE NO. 081, *supra* 123 ("The offender complaint and grievance process is comprised of three levels: (a) written complaint – submitted by the offender at the institution/district parole office and responded to by the supervisor of the staff member whose actions or decisions are being grieved (b) initial grievance (institution/district level) – submitted to the Institutional Head/District Director (c) final grievance (national level) – submitted to the Commissioner.").

grievance process and receiving the final judgment for the complaint, offenders may seek federal court review.[123]

A shared problem faced by both the Canadian and American corrections systems is the religious freedoms of each country's native populations. In Canada, there are three constitutionally recognized Aboriginal groups.[124] The Canadian government has established special facilities for these populations which provide "a holistic and community-based approach to healing by creating a plan outlining what each offender needs to help with rehabilitation."[125] Further, aboriginal offenders receive special mention in the *Corrections and Conditional Release Act* guaranteeing they receive the same religious protection as all other inmates.[126]

IV. THE AMERICAN AND CANADIAN LEGAL PROTECTIONS OF INMATES' RELIGIOUS FREEDOMS COMPARED: THE GOOD, THE BAD, AND THE NEED FOR IMPROVEMENT

Prisoners in both the United States and Canada have benefitted from the constitutional and statutory scheme protecting inmates' religious rights. Both the United States and Canada have strongly-designed legal guarantees to religious freedom, but courts interpreting the legislation and applying the legal standards have degraded the protection of inmates' freedom of conscience and free-exercise of religion.

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123 *See* COMMISSIONER OF THE CORRECTIONAL SERVICE OF CANADA DIRECTIVE NO. 081, *supra* 123 ("If not satisfied with a decision rendered at the final level, grievors may seek judicial review of the decision at the Federal Court.").

124 *See* INDIGENOUS AND NORTHERN AFFAIRS CANADA, INDIGENOUS PEOPLES AND COMMUNITIES, *Terminology*, http://www.aadnc-aandc.gc.ca/eng/1100100014642/1100100014643 ("The Canadian *Constitution* recognizes three groups of Aboriginal people — Indians, Métis and Inuit.").

125 CORRECTIONAL SERVICE CANADA, *Correctional Service Canada Healing Lodges*, http://www.csc-scc.gc.ca/aboriginal/002003-2000-eng.shtml (last modified Dec. 1, 2016).

126 *Corrections and Conditional Release Act*, S.C. 1992, c. 20, s. 83(1) ("For greater certainty, aboriginal spirituality and aboriginal spiritual leaders and elders have the same status as other religious and other religious leaders.").

First, both countries lower the religious freedoms of inmates from what is constitutionally and statutorily promised because the courts are required to inquire into the sincerity of the claimant's beliefs, which lower the religious freedoms of inmates. Second, the shared issue of providing religious accommodations to native populations in each country has demonstrated mixed results, but the Canadian system offers a higher level of protection for its aboriginal groups than the United States has done for its Native American populations. Third, both countries impose special challenges to prisoners' claims which burden inmates' access to judicial relief for claimed religious infringements.

However, a likely explanation for the much lower religious protection offered by the American system is the difference in the sheer number of inmates each country must serve in its correctional population.

A. The American and Canadian Legal Framework: The Weaknesses and Strengths in Guaranteeing Inmates' Religious Freedom

The legal protections of both the United States and Canada require courts to evaluate whether inmates hold a "sincerely-held" religious belief.[127] Especially with claims under section 2(a) of the Canadian *Charter of Rights and Freedoms*, requiring the sincerely held belief analysis can be detrimental to the inmate's claim.[128]

For American prisoners to bring claims under RLUIPA, they are not required to demonstrate that the denied religious practice is a mandatory activity under their religion.[129] The courts in both countries engage in a balancing test under the American statutory and constitutional protections[130] and under the

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[127] Noha Moustafa, *The Right to Free Exercise of Religion in Prisons: How Courts Should Determine Sincerity of Religious Belief Under RLUIPA*, 20 MICH. J. RACE & L. 213 (2014) (arguing that the difficulty in applying the RLUIPA legal standard to determine the sincerity of a claimant's belief has led American correctional facilities to violate the constitutional free exercise rights granted to prisoners.).

[128] Syndicat Northeast v. Amselem, [2004] 2 S.C.R. 551, 583 (Can.).

[129] 42 U.S.C. § 2000cc-5(7)(A) (2012) ("The term "religious exercise" includes any exercise of religion, whether or not compelled by, or central to, a system of religious belief.").

[130] Aaron K. Block, *When Money is Tight, is Strict Scrutiny Loose?: Cost Sensitivity as a Compelling Governmental*

Canadian section 1 of the *Charter*,[131] which has been criticized as inadequate on several fronts. In the United States, courts deciding prisoners' free exercise claims under any of the legal sources have placed too much weight on the prison's asserted compelling governmental interest in conducting its balancing test.[132] Many of the similar problems occur in Canada because courts have placed too much deference to the judgment of prison officials.[133]

In addition, the legal protections guaranteed by both the American and Canadian systems to its native populations have differed widely. At its most basic level, both countries prohibit legislatures from enacting religious-focused statutory schemes that favor certain religions over others.[134] This part concludes that

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Interest Under the Religious Land Use and Institutionalized Persons Act of 2000, 14 TEX. J. ON C.L. & C.R. 237, 257 (2009) ("[T]he cases can turn on considerations which the political branches - by codifying strict scrutiny for prisoners' free exercise rights - have found sufficient to merit the protection of important rights. It is then political actors, not judges, who have done the balancing of prison administrative concerns and important rights.").

[131] Howard Kislowicz, Richard Haigh, & Adrienne NG, *Calculations of Conscience: The Costs and Benefits of Religious and Conscientious Freedom*, 48 ALBERTA L. REV. 679, 693 (2011) ("[A] cost-benefit analysis leads to the conclusion that the legal outcome should depend upon the strength of the government interest; the rule that imposes additional costs upon religious adherents can only be allowed to stand if it is justified by a sufficiently compelling reason.").

[132] BLOCK, *supra* 133, at 239 ("[T]he courts are holding that, under RLUIPA, a government's cost sensitivity is a compelling governmental interest, leaving governments free to violate the First Amendment if that is the cheaper option.").

[133] PARKES, *supra* 82, at 631-32 ("[T]he impact of the Charter has been diminished at the prison walls, such as through a lack of full and meaningful access by prisoners to courts or other means of independent review of prison decisions and conditions, as well as by the persistence, at least in a significant number of cases, of the pre-Charter tendency toward paying deference to prison officials and policies in claims that do make it to court.").

[134] KISLOWICZ, *supra* 134, at 693 ("Though the Canadian and American freedom of religion jurisprudence differ significantly, they share in common the principle that governments may not legislate for religious purposes, and that, in principle, all are free to observe

the American system could greatly improve its religious protections to the Native American incarcerated populations by mimicking some of the accommodations provided to the aboriginal groups in Canada.[135]

In Canada, Aboriginal offenders are disproportionately represented in the federal criminal justice system, representing 17% of federally-sentenced offenders but only constitute 2.7% of the population.[136] The Correctional Service of Canada ("CSC") has demonstrated a continuing commitment to protecting the religious rights of its Aboriginal offenders both through its general service[137] and by creating specialized programs to serve this group's unique religious needs.[138]

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their religious practices provided that they do not cause injury to others.") (citations omitted).

[135] James A. Beckford, *Religious Diversity in Prisons: Chaplaincy and Contention*, 42 STUD. RELIGION 190, 194 (2013) ("[T]he study of religious diversity in prisons needs to take proper account of variations…in what prisoners are permitted to do in the way of religion and in the types of prison establishments and the frameworks of relevant laws and regulations.").

[136] CORRECTIONAL SERVICE CANADA, *Aboriginal Corrections*, http://www.csc-scc.gc.ca/aboriginal/index-eng.shtml (last modified Aug. 15, 2013).

[137] CORRECTIONAL SERVICE CANADA, STRATEGIC PLAN FOR ABORIGINAL CORRECTIONS, SENIOR DEPUTY COMMISSIONER'S MESSAGE, *Innovation Learning & Adjustments 2006-07 to 2010-11*, http://www.csc-scc.gc.ca/aboriginal/002003-1001-eng.shtml (last modified Aug. 15, 2013) ("This strategic plan articulates a vision for Aboriginal corrections that will take us beyond development and implementation of correctional interventions, to enhancing capacities to provide interventions for Aboriginal offenders within a continuum of care model that respects the diversity of First Nations, Métis and Inuit offenders and their communities. It calls for greater integration of Aboriginal initiatives and considerations throughout our organization, with other levels of government and with Aboriginal peoples.").

[138] *See* COMMISSIONER OF THE CORRECTIONAL SERVICE OF CANADA DIRECTIVE NO. 702, *Aboriginal Offenders*, http://www.csc-scc.gc.ca/acts-and-regulations/702-cd-eng.shtml (last modified Nov. 12, 2013) (establishing the aboriginal corrections continuum of care, improving the elder/spiritual advisor reviews of inmates on their

One example is the Canadian Healing Lodges, which serve as correctional institutions using "Aboriginal values, traditions and beliefs to design services and programs for offenders [and] include Aboriginal concepts of justice and reconciliation."[139] The Corrections and Conditional Release Act ("CCRA") has required the relationship between the CSC and Aboriginal communities to become stronger,[140] leading to the result that "Aboriginal communities now help develop and deliver services and programs to Aboriginal offenders."[141] The purpose of this relationship is to create and foster an "environment that is inclusive of Aboriginal spirituality and culture."[142]

The lodges offer programs that use Aboriginal programming and spirituality through a therapeutic approach that is "community-based and [follows a] holistic healing philosophy."[143] Some facilities offer both single and family residential units to

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healing journey, and defining the limits of inmates' rights to receive traditional foods for cultural/spiritual purposes).

[139] *See* CORRECTIONAL SERVICE CANADA, ABORIGINAL CORRECTIONS, *Correctional Service Canada Healing Lodges* (last modified Dec. 1, 2016) http://www.csc-scc.gc.ca/aboriginal/002003-2000-eng.shtml.

[140] CORRECTIONS AND CONDITIONAL RELEASE ACT, S.C. 1992, c. 20., s. 80 ("Without limiting the generality of section 76, the Service shall provide programs designed particularly to address the needs of aboriginal offenders."). *See also* Corrections and Conditional Release Act, S.C. 1992, c. 20., s. 81 (providing that the CSC can enter into agreements with the aboriginal community for the provision of correctional services to aboriginal offenders that allow for non-aboriginal offenders to participate and allows the CSC to "transfer an offender to the care and custody of an aboriginal community, with the consent of the offender and of the aboriginal community").

[141] *Supra* 143.

[142] *Id*.

[143] *Id*. ("Programs at Pê Sâkâstêw are based on the belief that Aboriginal spirituality is central to the healing process for Aboriginal offenders. Elders and staff from surrounding Aboriginal communities teach offenders traditional values and spiritual practices. At the same time they offer training and counseling, and serve as role models.").

allow offenders' children to stay with them, but females and males are separated to different lodges.[144]

The United States also disproportionately incarcerates Native American groups at a higher rate than any other American ethnic populations.[145] In contrast to the Canadian protections,[146] the American system has been strongly criticized as "one of unparalleled suppression of religious freedom…in the state and federal prisons."[147] Although American prisons offer religious

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144 *Supra* note 142 (discussing the several healing lodges operated and monitored by CSC that are separated by sex).

145 Elizabeth Grant, *Designing Carceral Environments for Indigenous Prisoners: A Comparison of Approaches in Australia, Canada, Aotearoa New Zealand, the US and Greenland*, 1 ADVANCING CORRECTIONS J. 26, 28 (2016) ("The 2012 census recorded a population of 2.5 million Native Americans4 and it is estimated that more First Nations people are incarcerated relative to population size than any other ethnic group in the United States.").

146 Although Canada's protections of Aboriginal inmates' religious rights is generally stronger, the programs have been persuasively criticized by various scholars. *See* Stephanie Beran, *Native Americans in Prison: The Struggle for Religious Freedom*, 1 NEBRASKA ANTHROPOLOGIST 46, 52 (2005) ("Unfortunately, the Canadian spirituality program is not without its problems. Prison officials do not understand that the practice of Native spirituality is unlike that of Christian inmates who are often able to fulfill their religious needs and obligations in a weekly service. Some facility staff members also view Native religious practice unfavorably and believe it to be frivolous, "absurd", or a means of garnering special treatment and avoiding other prison programs. In addition, Waldram has noted that Elders are often harassed and their legitimacy questioned by prison staff.") (citations omitted).; *But see* James B. Waldram, *Aboriginal Spirituality: Symbolic Healing in Canadian Prisons*, 17 CULTURE, MEDICINE & PSYCHIATRY 345, 358-59 (1993) ("Most Aboriginal offenders found great value in the spirituality programs they received in prison…More importantly, the spirituality programs provide a new meaning to shattered lives, and a way to cope with incarceration. They have given a "religion" of sorts to some offenders.").

147 Lee Irwin, *Walking the Line: Pipe and Sweat Ceremonies in Prison*, 9 NOVA RELIGION: J. OF ALT. & EMERGING RELIGIONS 39, 40 (2006).

services to its inmates in the form of chaplains, priests, or other religious leaders, these services are often limited to the traditional Judeo-Christian religions, but not Native American.[148] Even when inmates are incarcerated in prisons that do provide "opportunities for religious practice and activities…[Native American] prisoners often experience discrimination and religious ethnocentrism."[149] In contrast, the Canadian corrections system offers separate healing lodges for Aboriginal offenders, most Native Americans are sentenced to prisons with the general inmate population which are designed mainly on the principles of "unit management."[150] This operating style was implemented in response to serious overcrowding in American prisons, and cannot easily include new cultural-specific programs that allow Native Americans to participate in their religious ceremonies.[151]

The Canadian system has been able to adjust to prison overcrowding more easily at least partly because of its lower

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148 *Id*. at 40 ("All such prisons employ chaplains or priests or rabbis who perform services in prison chapels, with appropriate religious texts and ritual accouterments. While all inmates are given access to these services, the traditions represented and privileged are primarily Judeo-Christian and, more recently, Islam and Buddhism. But not Native American.").; *See also* BERAN, *supra* 149, at 50 ("In the view of many Native Americans, religious satisfaction in legal terms has yet to be achieved. Despite the long list of congressional acts and resolutions, Native religious rights and freedoms continue to be ignored, overlooked, denied, and violated in several contexts, including the prison system.")

149 BERAN, *supra* 146, at 50 (discussing violations of Native American inmates' religious rights due to their "distinctive cultural needs").

150 GRANT, *supra* 148, at 30 ("Most Native American prisoners are imprisoned in mainstream prisons which make few concessions for their varying cultural, environmental or socio-spatial needs and there has been little evidence based research into these.").

151 *Id*. ("[O]ften Native American prisoners are incarcerated hundreds, if not thousands of miles from their homes and families. Overcrowding is a serious issue in the United States and has a major impact on living conditions for all prisoners in all States. Modern US prisons are typically designed under the principles of unit management, most commonly with separate housing units each with a dayroom and adjoining cells or dormitories.").

incarcerated population compared to the United States. One example is the creation of the healing lodges,[152] but the CSC has built new general correctional facilities with campus residential designs with several living units.[153]

In sum, the general efforts and programs specific to the American native populations provide a much weaker level of religious protection than the Canadian system. This is, at least in part, due to the different correctional realities facing each country, such as overcrowding and federal funding.[154]

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[152] *See* CORRECTIONAL SERVICE CANADA, STRATEGIC PLAN FOR ABORIGINAL CORRECTIONS, SENIOR DEPUTY COMMISSIONER'S MESSAGE *supra* 142 (discussing the various Aboriginal Healing Lodges established for the native populations which offer a "holistic and spiritual" approach to corrections with "guidance and support from Elders and Aboriginal communities").

[153] GRANT, *supra* 148, at 34 ("Since 1960, most provincial and municipal prisons and jails (the majority of them predating the First World War) have been replaced by new institutions. Canadian prisons designed with Auburn-styled rows of inside cells have been abandoned for campus layouts with separate housing units.").

[154] *Supra* 135-138 and accompanying text. *See also*, BECKFORD, *supra* 138, at 194 ("Another important variable that affects the response to religious diversity in prisons is the framework of law, regulations and customs governing the place and the practice of religion in prison establishments….The United States offers a third model in which the separation of religions from the state is not regarded as an obstacle to the provision and public funding of prison chaplaincies.") (citations omitted).