ON THE LEGAL STANDARD FOR EVALUATING FREE EXERCISE CLAIMS IN THE CONTEXT OF SEX OFFENDER CIVIL COMMITMENT

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INTRODUCTION

Generally, courts have a variety of readily available legal standards at their disposal to analyze constitutional claims relating to the free exercise of religion. However, the recent surge of free exercise litigation brought by those who have been statutorily classified as sexually violent predators (SVPs) and who are held in indefinite civil confinement appears to manifest a significant lacuna in this regard; while analogous to other contexts for which a free exercise legal framework is well established, the context of SVP civil commitment is unique, and none of the existing legal standards clearly apply. As a result, courts are divided in their determination of the applicable legal standard for the evaluation of free exercise claims brought by civilly committed SVPs, with some courts applying an already existing standard developed for an analogous context, others modifying an existing standard, and others adopting a new approach entirely.

The First Amendment of the United States Constitution provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ."[1] The latter of these two proscriptions, the Free Exercise Clause, means primarily that an individual has "the right to believe and profess whatever religious doctrine one desires."[2] Nevertheless, the exercise of religion often includes the performance of physical acts; and actions, unlike purely spiritual beliefs, are properly within the scope of government regulation.[3]

The extent to which religiously motivated conduct is protected from government interference or restriction depends on the applicable legal standard. The determination of the applicable legal standard, in turn, depends on the source of law under which a particular claim is brought.

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1. U.S. CONST. amend. I.
2. Emp't Div. v. Smith, 494 U.S. 872, 877 (1990).
3. *Id.* at 877–79.

Different legal standards are used, for example, for constitutional free exercise claims brought under the First Amendment, and statutory free exercise claims brought under more permissive federal or state laws.

The determination of the applicable legal standard further depends on the factual context in which a religious practice occurs. For example, the Supreme Court has established one legal standard for "ordinary" free exercise claims brought by free citizens, and another standard for similar claims brought by convicted prisoners in the specialized context of incarceration.

But the context of sex offender civil commitment is unique. Committed sex offenders are confined in a restrictive environment similar to a prison. However, whereas the involuntary commitment of prisoners is a form of criminal punishment, the commitment of SVPs is nonpunitive in nature, and is justified solely on civil grounds.[4] Further, the established constitutional analysis for the evaluation of free exercise claims in the context of prison presupposes the existence of a *penological* government interest in the restriction of religious conduct.[5] No such interest or rationale is present in the context of civil confinement. In addition, the Supreme Court has not established any comparable analytical framework for the evaluation of free exercise claims in the unique context of sex offender civil commitment.

Accordingly, there is a lack of uniformity among lower courts in their analytical approach to such claims. Courts diverge in their selection of an applicable legal standard, and, even where they use the same standard, they often interpret and apply that standard differently. These dual points of divergence—the standard applied and the manner of its application—are intertwined. In some cases, for example, a differing judicial interpretation of a single standard may, for practical purposes, be a little different from a distinct legal approach altogether. Whether a differing approach is merely a shift in the manner of application of a common standard, or whether it constitutes an independent standard that is different in kind, is an issue of classification that is outside the scope of this Note, which focuses primarily on a practical assessment of the state of the law and the possible course of its future development. Consequently, for the sake of clarity, this Note simply refers to differing legal trends as "approaches" or "standards."

Beneath the apparent dissonance of legal approaches employed to address the novel issue of free exercise in the context of sex offender civil commitment, a survey of case law on the issue reveals certain common underlying themes in legal analysis. The abstraction of these unifying

4. *See, e.g.*, Kansas v. Hendricks, 521 U.S. 346, 369 (1997) (holding that involuntary confinement pursuant to Kansas's SVP statute is not punitive).

5. Turner v. Safley, 482 U.S. 78, 89 (1987).

themes or characteristics, which are sometimes little more than distinct emphases in a court's reasoning, is useful in classifying the current spectrum of legal approaches, and in identifying general trends that may be predictive of the future direction of the law.

The purpose of this Note is to identify, explain, and evaluate the differing legal approaches used by courts in their analysis of free exercise claims brought by civilly committed SVPs. These different approaches towards free exercise claims in the context of SVP civil confinement have not evolved in a vacuum; they draw their terminology, rationales, and logic from the entire body of free exercise law. Therefore, Part I of this Note will provide an overview of free exercise law in general. Part II deals with the application of free exercise law in the context of prison, the setting to which SVP civil commitment is most often analogized for purposes of free exercise. Part III surveys and evaluates the various legal approaches that courts use to analyze free exercise claims in the unique context of sex offender civil commitment. Part IV concludes by reaffirming the inadequacy of existing legal standards for free exercise claims in the context of SVP civil commitment, and highlights the need for the adoption of a new context-specific standard that adequately balances the government's interest in confining dangerous sex offenders with the interest of committed SVPs in the free exercise of religion.

I. OVERVIEW OF FREE EXERCISE IN GENERAL

The current legal standard for ordinary claims brought under the Free Exercise Clause was established by the Supreme Court in *Employment Division v. Smith*.[6] In *Smith*, two employees were terminated from their jobs because they had ingested peyote in violation of Oregon law, as part of a religious ceremony of the Native American Church.[7] The Employment Division denied the employees unemployment compensation on the grounds that the termination was justified for work-related misconduct.[8] The employees claimed that the denial of benefits violated their right to free exercise under the First Amendment.[9] The Oregon Supreme Court ruled in their favor, and the United States Supreme Court reversed.[10]

In an opinion written by Justice Scalia, the Court held that "the right of free exercise does not relieve an individual of the obligation to comply with a

6. 494 U.S. at 872.
7. *Id.* at 874.
8. *Id.*
9. *Id.*
10. *Id.* at 875–76, 890.

valid and neutral law of general applicability . . . ."[11] The Court reasoned that while government has no authority to interfere with religious beliefs, it does have the authority to regulate actions, even where such regulation might interfere incidentally with a particular religious practice.[12] To hold otherwise would enable "every citizen to become a law unto himself."[13] Thus, under *Smith*, a law cannot violate the Free Exercise Clause under the First Amendment unless it targets or singles out a certain religion for unfavorable treatment; such targeting would be present, for example, if a law prohibited an action only when the action is "engaged in for religious reasons, or only because of the religious belief that [it] display[s]."[14]

The *Smith* Court expressly rejected a standard under which the government would have to justify a neutral law that incidentally burdens certain religious conduct by showing that the law furthered a "compelling government interest."[15] However, if a law is not neutral or of general applicability, then it must (and may) be justified by a compelling governmental interest, and it must be "narrowly tailored to advance that interest."[16]

In sum, when addressing an "ordinary" free exercise claim brought under the First Amendment, a court must first determine whether a law or government regulation interferes with the claimant's right to free exercise.[17] Interference is present where the government action compels the claimant to act in a way that violates his sincerely held religious beliefs.[18] The next step is to determine whether the law is a neutral law of general applicability. If it is, then the claimant is entitled to no relief; but if it is not, then the claimant is entitled to relief only if the law is not narrowly tailored to advance a compelling state interest.

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11. *Id.* at 879 (citation omitted) (internal quotation marks omitted).

12. *Id.* at 878.

13. *Id.* at 879 (citation omitted).

14. *Id.* at 877.

15. *Id.* at 885.

16. Church of the Lukumi Babulu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 531–32 (1993).

17. *See* United States v. Lee, 455 U.S. 252, 256–57 (1982) (characterizing the necessary determination of whether a government regulation interferes with the free exercise of religion as "[t]he preliminary inquiry in determining the existence of a constitutionally required exemption").

18. For the requirement that a religious belief be sincerely held, see United States v. Seeger, 380 U.S. 163, 185 (1965) ("[W]hile the truth of a belief is not open to question, there remains the significant question whether it is truly held. This is the threshold question of sincerity[,] which must be resolved in every case. It is, of course, a question of fact . . . ." (internal quotation marks omitted)). And for the requirement that the government action in some way compel the claimant to act against that belief, see *Lee*, 455 U.S. at 257 ("Because the payment of the taxes or receipt of benefits violates Amish religious beliefs, *compulsory* participation in the social security system interferes with their free exercise rights.") (emphasis added).

II. FREE EXERCISE IN SPECIAL CONTEXTS: PRISON AND INSTITUTIONAL SETTINGS

A. *Prisoner Claims Under the First Amendment: The* Turner *Test*

Prisoners do not enjoy the same degree of constitutional protections as free persons, and the considerations underlying the penal system necessarily entail the "withdrawal or limitation of many privileges and rights . . . ."[19] Nevertheless, while prisoners' rights are diminished by the exigencies of the prison setting, the "[p]rison walls do not form a barrier separating prison inmates from the protections of the Constitution,"[20] and prisoners retain certain fundamental constitutional guarantees, including the right to free exercise of religion.[21]

The current legal standard for evaluating constitutional claims brought by prisoners, including free exercise claims under the First Amendment, was established by the Supreme Court in *Turner v. Safley*.[22] Cognizant of the rights of prisoners and the pressing need for deference to the "professional expertise of corrections officials,"[23] the Court sought to develop a standard that "is responsive both to the policy of judicial restraint regarding prisoner complaints and [to] the need to protect constitutional rights."[24] Under the standard established by the Court—the *Turner* test—a prison regulation that impinges on inmates' constitutional rights "is valid if it is reasonably related to legitimate penological interests."[25]

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19. Price v. Johnston, 334 U.S. 266, 285 (1948).

20. Turner v. Safley, 482 U.S. 78, 84 (1987).

21. *See* Wolff v. McDonnel, 418 U.S. 539, 555 (1974) (noting that "[a] prisoner is not wholly stripped of constitutional protections when he is imprisoned for a crime," and that prisoners "enjoy substantial religious freedom under the First and Fourteenth Amendments." (citations omitted)). Other constitutional rights retained by prisoners include the right to be free from racial discrimination, Lee v. Washington, 390 U.S. 333 (1968); the right to be free from cruel and unusual punishment, Rhodes v. Chapman, 452 U.S. 337, 345 (1981); the right of access to the courts to petition for redress of grievances, White v. Ragen, 324 U.S. 760 (1945); and the right to due process of law, Haines v. Kerner, 404 U.S. 519 (1972).

22. In *Turner*, the Court considered the constitutionality of two challenged regulations within the Missouri Division of Corrections. The first regulation, which was upheld by the Court, limited prisoners' rights to correspond with other inmates; the second regulation, which restricted the right of prisoners to marry while incarcerated, was struck down as unconstitutional. 482 U.S. at 81–82.

23. *Id.* at 86.

24. *Id*. at 85 (quoting Procunier v. Martinez, 416 U.S. 396, 406 (1974)) (internal quotation marks omitted).

25. *Id.* at 89. The Supreme Court described the *Turner* test as a "reasonableness standard," which is similar to a rational basis review, under which a law is constitutional so long as it is rationally related to the advancement of a legitimate government interest. *Id.* at 88, 93.

The *Turner* Court listed several relevant factors in determining the reasonableness of a prison regulation. The first factor is whether there is a "valid, rational connection between the prison regulation and the legitimate governmental interest put forward to justify it."[26] Under this factor, regulations restricting prisoners' First Amendment rights should be carried out in a "neutral fashion, without regard to the content of the expression," and the governmental interest must also be "legitimate and neutral."[27] The second factor is "whether there are alternative means of exercising the right that remain open to prison inmates."[28] The Court explained that greater deference is owed to corrections officials where "other avenues remain available for the exercise of the asserted right."[29]

The third factor is whether allowing an accommodation of the asserted right would have an adverse impact "on guards and other inmates, and on the allocation of prison resources generally."[30] The Court noted that particular deference is due to the prison administrators where an accommodation would have a "significant 'ripple effect' on fellow inmates or on prison staff."[31] The fourth factor is whether there are alternatives to the restrictive prison regulation.[32] Less deference is given to the prison where there are ready alternatives that would fully accommodate the prisoners' rights at "*de minimis* cost to valid penological interests."[33] However, the Court emphasized that prison officials are not required to use the least restrictive alternative means to achieve a legitimate penological interest.[34]

B. *RFRA and RLUIPA*

Both the *Smith* and *Turner* standards were developed in response to claims brought under the First Amendment in order to determine whether government action is so restrictive as to fall below the constitutional

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26. *Id.* at 89 (quoting Block v. Rutherford, 468 U.S. 576, 586 (1984)) (internal quotation marks omitted).

27. *Id.* at 90.

28. *Id.*

29. *Id.* (internal quotation marks omitted).

30. *Id.*

31. *Id.*

32. *Id.* at 90.

33. *Id.* at 91.

34. *Id.* at 90–91, 93. The *Turner* test is "not a 'least restrictive alternative' test: prison officials do not have to set up and then shoot down every conceivable alternative method of accommodating the claimant's constitutional complaint." *Id.* at 90–91. So long as the prison restriction is "reasonably related to valid corrections goals," and "is not an exaggerated response to those objectives," the restriction does not unconstitutionally abridge the prisoners' rights. *Id.* at 93.

minimum. Of course, nothing in the Constitution prohibits Congress from enacting laws with protections exceeding minimal constitutional guarantees.

Thus, in response to *Smith*, Congress enacted the Religious Freedom Restoration Act (RFRA).[35] Under RFRA, whenever state action results in a substantial burden on the free exercise of religion, the state must show that its action is in furtherance of a compelling interest, and that it used the least restrictive means of furthering that interest, even where the substantial burden resulted from a neutral law of general applicability.[36]

Shortly after the enactment of RFRA, the Supreme Court, in *City of Boerne v. Flores*, held that RFRA was unconstitutional as applied to the states because it exceeded the scope of Congress's authority under the Enforcement Clause of the Fourteenth Amendment.[37] Ultimately, the Supreme Court found that RFRA was an invalid attempt by Congress to effect a "substantive change in constitutional protections."[38] However, while RFRA does not apply to the states as Congress initially intended, it does apply to the federal government, including federal prisons.[39]

Congress reacted to *City of Boerne* by passing into law the Religious Land Use and Institutionalized Persons Act (RLUIPA).[40] After numerous evidentiary hearings, Congress had determined that the "record of religious discrimination and discretionary burden was the strongest" with regard to institutionalized persons and religious land use.[41] Regarding institutionalized

35. 42 U.S.C. §§ 2000bb–2000bb-4 (2000). The *Smith* Court had already recognized as constitutionally permissible legislative action to effect religious exemptions, but noted that such accommodations, since they are not required by the Constitution, must be left to the political process. Emp't Div. v. Smith, 494 U.S. at 890 ("[T]o say that a nondiscriminatory religious-practice exemption is permitted . . . is not to say that it is constitutionally required . . . .").

36. 42 U.S.C. §§ 2000bb-1(a)–(b).

37. 521 U.S. 507, 533 (1997). Congress's power under the Enforcement Clause is preventative and remedial, not substantive; thus, RFRA would have been valid if it was a measured remedy against unconstitutional laws that targeted religious conduct for unfavorable treatment. However, the standard established in RFRA was "so out of proportion to a supposed remedial or preventive object that it [could not] be understood as responsive to . . . unconstitutional behavior." *Id.* at 532. Instead of enforcing the constitutional protections of the Free Exercise Clause as defined in *Smith*, RFRA attempted to supplant *Smith* with a new standard derived from Congress's competing interpretation of the Free Exercise Clause. *Id.*

38. *Id.* at 532.

39. *See* Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418, 426 (2006).

40. 42 U.S.C. §§ 2000cc–2000cc-5.

41. Roman P. Storzer & Anthony R. Picarello, Jr., *The Religious Land Use and Institutionalized Persons Act of 2000: A Constitutional Response to Unconstitutional Zoning Practices*, 9 GEO. MASON L. REV. 929, 944 (2001). *See also* 146 CONG. REC. 16698, 16699 (2000) (joint statement of Sen. Hatch and Sen. Kennedy on need for RLUIPA protection for institutionalized persons) ("[S]ome institutions restrict religious liberty in egregious and unnecessary ways.").

persons,[42] RLUIPA was enacted to expand the free exercise rights of prisoners and other persons residing in government-run facilities by creating a legal standard that affords less deference to institutional administrators than the *Turner* standard.

Additionally, Congress took careful measures to ensure that RLUIPA would not undergo a fate similar to that of RFRA. First, RLUIPA is narrower than RFRA; whereas RFRA applied to all free exercise claims, RLUIPA encompasses only those that are brought in the context of religious land use and state institutions.[43] Second, while RFRA invoked Congress's authority under the Fourteenth Amendment's Enforcement Clause, RLUIPA relies on Congress's Commerce and Spending Clause powers.[44] Finally, RLUIPA probably gave less cause for concern about excessive litigation than did RFRA because institutionalized persons may only bring a claim under RLUIPA if they first exhaust all available administrative remedies.[45]

In the years immediately following the enactment of RLUIPA, lower courts were divided on the statute's constitutionality.[46] Specifically, some Courts of Appeals held that RLUIPA violated the Establishment Clause because it "impermissibly advanc[ed] religion by giving greater protection to religious rights than to other constitutionally protected rights."[47] However, Congress's measures to ensure the constitutionality of RLUIPA were effective, and the Supreme Court in *Cutter v. Wilkinson* upheld RLUIPA in 2005.[48] Acknowledging that "[a]t some point, accommodation may devolve into an unlawful fostering of religion,"[49] the *Cutter* Court ultimately held that Section 3 of RLUIPA, which deals with institutionalized persons, "does not,

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42. RLUIPA borrows its definition of "institution" from the Civil Rights of Institutionalized Persons Act (CRIPA), 42 U.S.C. § 2000cc-1 (2000). Under CRIPA, an institution is any facility that is owned, operated, or managed by the State, and in which persons reside for a State purpose. 42 U.S.C. § 1997 (2012). Examples of institutions include prisons, *id.* at § 1997(1)(B)(ii), facilities for the mentally or chronically ill, *id.* at § 1997(1)(B)(i), and pre-trial detention facilities, *id.* at § 1997(1)(B)(iii), including juvenile detention centers, *id.* at § 1997(1)(B)(iv).

43. *See* Cutter v. Wilkinson, 544 U.S. 709, 715 (2005) (distinguishing RLUIPA from RFRA on the grounds that the former is "[l]ess sweeping than RFRA").

44. The applicability or "jurisdiction" of RLUIPA requires either that "the substantial burden is imposed in a program or activity that receives Federal financial assistance; or the substantial burden affects . . . commerce with foreign nations, among the several States, or with Indian tribes." 42 U.S.C. § 2000cc-1(b).

45. *See* 42 U.S.C. § 2000cc-2(e) (RLUIPA does not "amend or repeal the Prison Litigation Reform Act of 1995"); *id.* at § 1997e(a) (requiring exhaustion of administrative remedies).

46. *Cutter*, 544 U.S. at 718.

47. Cutter v. Wilkinson, 349 F.3d 257, 264 (6th Cir. 2003), *rev'd*, 544 U.S. 709 (2005).

48. *Cutter*, 544 U.S. at 720.

49. *Id.* at 714 (quoting Corp. of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327, 334–35 (1987) (internal quotation marks omitted)).

on its face, exceed the limits of permissible government accommodations of religious practices."[50]

Under RLUIPA, the government is prohibited from imposing a substantial burden on the religious exercise of institutionalized persons unless it demonstrates that the imposition of the burden is in furtherance of a compelling state interest,[51] and is the least restrictive means of furthering that compelling interest.[52] Significantly, RLUIPA applies even where the burden on free exercise results from a neutral rule of general applicability.[53]

Procedurally, once a claimant makes an initial prima facie showing of a substantial burden on his free exercise of religion, the burden of proof shifts to the state; unless the government demonstrates that there are less restrictive means of advancing its objective, and that the objective itself is compelling, then the court will order an appropriate remedy.[54] This stands in sharp contrast to the *Turner* test, under which the dual burden of production and persuasion falls entirely on the claimant.[55]

RLUIPA provides enhanced protection for the religious exercise of institutionalized persons in two ways. First, procedurally, it places a heavy burden on officials who wish to justify a regulation that constrains an individual's exercise of religion; second, substantively, RLUIPA's terms are defined broadly so as to expand the scope of religious liberty.[56] For example, a "religious exercise" need not be "compelled by, or central to, a system of religious belief";[57] a religious exercise is *any* exercise of one's religious beliefs.[58]

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50. *Id.*

51. A compelling state interest is an "overriding governmental interest," United States v. Lee, 455 U.S. 252, 257 (1982); a "paramount interest," and an "interest[] of the highest order," Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 546 (1993) (citation omitted) (internal quotation marks omitted). Some examples of compelling state interests recognized by the Supreme Court in the context of free exercise include the operation of national defense, Johnson v. Robinson, 415 U.S. 361, 385 (1974), and the social security system, *Lee*, 455 U.S. at 259–60.

52. A law that has the effect of restricting free exercise is the least restrictive means of achieving a compelling state interest if the restriction "is no greater than is essential" to effect that interest. *See* United States v. O'Brien, 391 U.S. 367, 377 (1968) ("[A] government regulation is sufficiently justified . . . if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that [governmental] interest.").

53. 42 U.S.C. § 2000cc(a)(2)(A) (2000).

54. Under RLUIPA, "[t]he term 'demonstrates' means meets the burdens of going forward with the evidence and of persuasion." 42 U.S.C. § 2000cc-5.

55. *See* O'Lone v. Estate of Shabazz, 482 U.S. 342, 350 (1987).

56. RLUIPA itself provides a default rule of interpretation in favor of more expansive protection, indicating that the Act "shall be construed in favor of a broad protection of religious exercise, to the maximum extent permitted by the terms of this chapter and the Constitution." 42 U.S.C. § 2000cc-3(g).

57. 42 U.S.C. § 2000cc-5(7)(A). This is also consistent with Supreme Court precedent regarding free exercise under the First Amendment. *See* Frazee v. Ill. Dep't of Emp't Sec., 489 U.S. 829,

RLUIPA did not define "substantial burden" because this term already had a well-established meaning when RLUIPA was enacted. Essentially, a substantial burden exists whenever a policy puts "substantial pressure on an adherent to modify his behavior and to violate his beliefs."[59] It follows *a fortiori* that a substantial burden is present when a regulation actually prohibits a person outright from practicing a particular religious act.

At the outset, RLUIPA appears to establish a standard of strict scrutiny. Strict scrutiny "refers to a test under which statutes will be pronounced unconstitutional unless they are 'necessary' or 'narrowly tailored' to serve a 'compelling government interest.'"[60] Strict scrutiny is the most stringent standard of judicial review,[61] and generally applies where legislation infringes on a fundamental constitutional right, such as free exercise of religion, or has an adverse disparate impact based on a suspect classification.[62]

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834 (1989) ("[W]e reject the notion that to claim the protection of the Free Exercise Clause, one must be responding to the commands of a particular religious organization."). A requirement of religious compulsion, moreover, might raise equal protection claims, as it would exclude classes of religious adherents whose religions are entirely non-compulsory. *See, e.g.*, Steven C. Seeger, *Restoring Rights to Rites: The Religious Motivation Test and the Religious Freedom Restoration Act*, 95 MICH. L. REV. 1472, 1503 (1997) ("Theravada Buddhism, for example, is a non-duty-based religion, which emphasizes inward spiritual maturity rather than obedience to religious mandates."). Additionally, RLUIPA's refusal to consider the centrality of a religious belief is based on the same policy concerns that preclude courts from considering whether a religious practice is compelled; a determination as to either religious centrality or compulsion would put courts in the awkward situation of theological and scriptural exegesis, a task that is outside the realm of judicial competence. *See* Presbyterian Church v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church, 393 U.S. 440, 450 (1969); *see also* Emp't Div. v. Smith, 494 U.S. at 886–87 ("It is no more appropriate for judges to determine the 'centrality' of religious beliefs before applying a 'compelling interest' test in the free exercise field, than it would be for them to determine the 'importance' of ideas before applying a 'compelling interest' test in the free speech field.").

58. A "religious belief" has been defined as a *sincerely held* belief "based upon a power or being, or upon a faith, to which all else is subordinate or upon which all else is ultimately dependent." United States v. Seeger, 380 U.S. 163, 176 (1965). *See also* Cutter v. Wilkinson, 544 U.S. at 726 n.13 ("[P]rison officials may appropriately question whether a prisoner's religiosity, asserted as the basis for a requested accommodation, is authentic.").

59. Hobbie v. Unemp't Appeals Comm'n of Fla., 481 U.S. 136, 142 (1987). *See also* Sherbert v. Verner, 374 U.S. 398, 404 (1963) (explaining that a substantial burden exists where the plaintiff must "choose between following the precepts of [his] religion and forfeiting benefits, on the one hand, and abandoning the precepts of [his] religion . . . on the other hand.").

60. Richard H. Fallon, Jr., *Strict Judicial Scrutiny*, 54 UCLA L. REV. 1267, 1273 (2006).

61. *See* Clark v. Jeter, 486 U.S. 456, 461 (1988) (stating that strict scrutiny review is the "most exacting scrutiny"). *See also* City of Boerne v. Flores, 521 U.S. 507, 534 (1997) ("Requiring a State to demonstrate a compelling interest and show that it has adopted the least restrictive means of achieving that interest is the most demanding test known to constitutional law.").

62. *See* Plyler v. Doe, 457 U.S. 202, 216–17 (1982); *see also* JEFFREY M. SHAMAN, EQUALITY AND LIBERTY IN THE GOLDEN AGE OF STATE CONSTITUTIONAL LAW 12 (2008). Clearly defined suspect classifications include national origin, Korematsu v. United States, 323 U.S. 214, 216 (1944); race, Loving v. Virginia, 388 U.S. 1, 11 (1967); and alien status, Graham v. Richardson, 403 U.S. 365, 371–72 (1971).

Government action that is subject to strict scrutiny is "presumptively unconstitutional."[63] As a result, once a claimant makes a prima facie showing, the government has the difficult burden of showing that its law or policy is intended to advance a compelling state interest, and that the law or policy is necessary to advance that interest, meaning that less restrictive means are not feasible.[64]

Theoretically, then, government-run institutions should have a difficult time defending against a claim brought under RLUIPA; likewise, one would expect institutional policies that restrict religious exercise to be as summarily defeated as statutes that would deny basic rights to a class of citizens solely on the basis of race. However, the opposite is true: laws that impinge on the free exercise of religion actually *survive* strict scrutiny review in a majority of cases.[65]

One explanation for this anomaly is that Congress itself created a kind of double standard by making an allowance under RLUIPA for deference to institutional officials. Specifically, in enacting RLUIPA, Congress "anticipated that courts would apply the Act's standard with due deference to the experience and expertise of prison and jail administrators in establishing necessary regulations and procedures to maintain good order, security, and discipline, consistent with consideration of costs and limited resources."[66]

In fact, the Supreme Court in *Cutter* specifically noted that "[l]awmakers supporting RLUIPA were mindful of the urgency of discipline, order, safety, and security in penal institutions."[67] Congress might have incorporated the

63. Bush v. Vera, 517 U.S. 952, 976 (1996) (citation ommitted) (internal quotation marks omitted).

64. To say that a law must be more narrowly tailored to pass constitutional muster under a strict scrutiny standard is, effectively, to say that the government failed to use the least restrictive means to achieve its interest. *See, e.g.*, Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 546 (1993) (finding that the state's ordinances were invalid because less restrictive means were available, as the state's interests "could be achieved by narrower ordinances that burdened religion to a far lesser degree."). *See also* Nasir v. Morgan, 350 F.3d 366, 370 n.4 (3d Cir. 2003) (describing the least-restrictive means test as "the hallmark of strict scrutiny analysis"); United States v. Hardman, 297 F.3d 1116, 1130 (10th Cir. 2002) ("[l]east restrictive means is a severe form of the more common narrowly tailored test." (internal quotation marks omitted)).

65. *See* Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND. L. REV. 793, 861–62 (2006) (explaining that in a comparative statistical study in 2006, the religious liberty category had the highest survival rate of any area of law in which strict scrutiny applies; laws that burden religious liberty survived strict scrutiny review in nearly sixty percent of cases).

66. Cutter v. Wilkinson, 544 U.S. 709, 723 (2005) (internal quotation marks omitted).

67. *Id. But see* Derek L. Gaubatz, *RLUIPA at Four: Evaluating the Success and Constitutionality of RLUIPA's Prisoner Provisions*, 28 HARV. J.L. & PUB. POL'Y 501, 553 (2005) (maintaining that RLUIPA is to be interpreted as imposing strict scrutiny in the traditional sense, implicitly holding that the *Cutter* Court misconstrued the Act by reading into it the references to due deference in the Congressional record).

anomalous concept of due deference into its otherwise "strict" scrutiny standard, as a mitigating factor, in order to ensure that RLUIPA would not be struck down like its broader predecessor, RFRA. Further, in upholding RLUIPA, the *Cutter* Court emphasized that the integration of due deference into RLUIPA reduced the risk that that Act would be applied in an inappropriately balanced way, without "particular sensitivity to security concerns."[68]

RLUIPA's standard is, therefore, a kind of paradox; at the same time that it finds a regulation presumptively unconstitutional, it affords deference to that regulation, which would tend to produce a contrary presumption in favor of the government. Such a standard can hardly be called strict scrutiny in the traditional sense. Nevertheless, the primary thrust of Section 3 of RLUIPA was to expand the right to free exercise. Therefore, an interpretation of the Act that would make the deference due the state greater than or equal to the presumptive unconstitutionality of a law that substantially burdens free exercise seems implausible.

Under such an interpretation, the joint requirements of deference and strict scrutiny would effectively negate one another, and RLUIPA would be a nullity. Clearly, this was not the intent of Congress. Still, the degree to which courts should give deference to a government agency that imposes a substantial burden on free exercise remains unclear. Perhaps the most that can be said is that in no case should courts afford an amount of deference that would obviate the need for the government to carry its dual burden of production and persuasion.

III. FREE EXERCISE OF RELIGION AND SEX OFFENDER CIVIL COMMITMENT

A. *Civil Commitment in General*

The indefinite civil detention of sex offenders under modern sexually violent predator (SVP) statutes poses unique problems in the area of free exercise of religion. While there are established legal standards for the evaluation of free exercise claims in a variety of contexts, free exercise claims in the context of sex offender civil commitment appear to fall into a significant analytical gap, where the proper legal standard and the proper means of its application remain unclear. Before exploring this difficulty and evaluating the differing approaches used by lower courts, it is first necessary to explain the basic characteristics of civil commitment in general, and civil commitment of sexually dangerous persons, in particular.

68. *Cutter*, 544 U.S. at 723.

Civil commitment in America has its roots in the early colonial period, when local ordinances required communities to care for dependents, such as the mentally ill, widows, and orphans, who could not care for themselves.[69] As the population grew during the Industrial Revolution, the need for more formal institutional care became apparent, and local communities began building almshouses to provide for the increasing number of dependents.[70]

By the twentieth century, the emergence of state asylums for the mentally ill became commonplace.[71] Because commitment to these asylums was largely involuntary, there was a danger of wrongful confinement; state legislatures responded to this danger by increasing government oversight of mental institutions and requiring procedural safeguards as a prerequisite to commitment.[72]

In the midst of growing civil rights concerns regarding involuntary commitment throughout the latter half of the twentieth century,[73] the Supreme Court, in *Jones v. United States*, eventually held that states could no longer confine persons to an asylum on the basis of mental illness alone; rather, consistent with due process, the state must demonstrate in a civil commitment proceeding that an individual is dangerous, as well as mentally ill.[74] Later, in *Foucha v. Louisiana*, the Court held that the continued confinement of an individual against his will must be supported by constitutionally adequate procedures establishing the basis of the confinement.[75]

Presently, all fifty states have laws providing for the involuntary civil confinement of mentally ill and dangerous persons.[76]

B. *Civil Commitment of Sex Offenders*

1. *The Rise and Fall of Sexual Psychopath Laws*

Modern statutes that call specifically for the civil detention of sexually dangerous persons have developed out of a long history of sex offender civil

69. Adam J. Falk, *Sex Offenders, Mental Illness and Criminal Responsibility: The Constitutional Boundaries of Civil Commitment after* Kansas v. Hendricks, 25 AM. J.L. & MED. 117, 121 (1999).

70. *See id.*

71. *Id.* at 122.

72. *See id.* at 123.

73. *Id.* at 124.

74. 463 U.S. 354, 361–62 (1983).

75. 504 U.S. 71, 79 (1992).

76. W. Lawrence Fitch, *Sexual Offender Commitment in the United States: Legislative and Policy Concerns*, 989 ANNALS N.Y. ACAD. SCI. 489, 489 (2003).

commitment in the United States.[77] Prior to the twentieth century, sex offenders were treated no differently than other criminals.[78] However, by 1911, state legislation recognized a special category of criminals convicted of violent sexual crimes by classifying them as "defective delinquents" and "criminal psychopaths."[79]

In the 1930s, states began to develop laws for the involuntary civil commitment of sex offenders. These statutes, commonly known as "sexual psychopath" laws,[80] probably came in response to popular contemporary opinions within the medical community that rehabilitation and treatment of sex offenders was more appropriate than punishment.[81]

By the 1960s, a majority of states had enacted sexual psychopath laws.[82] During the 1970s, however, the efficacy of sexual psychopath laws was called into doubt by both the American Bar Association's (ABA's) Criminal Justice Mental Health Standards, and the Group for the Advancement of Psychiatry (GAP).[83] Recent research seemed to indicate that sex offenders were not mentally ill, and that treatment did not result in a reduced likelihood of recidivism.[84] As a result, many sexual psychopath laws were abolished.[85]

2. *The Rise of Sexually Violent Predator Statutes*

Beginning in the 1990s, many states began adopting laws for the civil commitment of Sexually Violent Predators, a trend that has been aptly

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77. Jeslyn A. Miller, *Sex Offender Civil Commitment: The Treatment Paradox*, 98 CALIF. L. REV. 2093, 2096 (2010).

78. *See* Jason A. Cantone, *Rational Enough to Punish, But Too Irrational to Release: The Integrity of Sex Offender Civil Commitment*, 57 DRAKE L. REV. 693, 695 (2008).

79. Samuel Jan Brakel & James L. Cavanaugh, Jr., *Of Psychopaths and Pendulums: Legal and Psychiatric Treatment of Sex Offenders in the United States*, 30 N.M. L. REV. 69, 70 (2000).

80. NATHAN JAMES, KENNETH R. THOMAS & CASSANDRA FOLEY, CONG. RESEARCH SERV., RL34068, CIVIL COMMITMENT OF SEXUALLY DANGEROUS PERSONS 2 (2007) [hereinafter CRS].

81. *See id.* at 2–3 (discussing the four presumptions on which the "sexual psychopath" laws were based: "(1) sexual psychopaths are distinguishable from generic sex offenders, (2) individuals commit sex offenses because of mental disease, (3) mental diseases are treatable and curable, and (4) mental health professionals can successfully predict who will commit sex crimes in the future."). *See also* Brakel & Cavanaugh, *supra* note 79, at 71.

82. *See* Aman Ahluwalia, *Civil Commitment of Sexually Violent Predators: The Search for a Limiting Principle*, 4 CARDOZO PUB. L. POL'Y & ETHICS J. 489, 489 (2006); Raquel Blacher, *Historical Perspective of the 'Sex Psychopath' Statute: From the Revolutionary Era to the Present Federal Crime Bill*, 46 MERCER L. REV. 889, 903 (1995); Jill S. Levenson, *Policy Interventions Designed to Combat Sexual Violence: Community Notification and Civil Commitment*, 12 J. CHILD SEXUAL ABUSE 17, 31 (2003).

83. CRS, *supra* note 80, at 3.

84. *See id.*; Blacher, *supra* note 82, at 906.

85. *See* Eric S. Janus, *Sexual Predator and Commitment Laws: Lessons for Law and Behavioral Sciences*, 18 BEHAV. SCI. & L. 7 (2000).

termed the "'second wave' of sex offender commitment laws."[86] Presently, twenty states[87] and the federal government[88] have SVP statutes providing for the involuntary commitment of dangerous sex offenders.

There are several reasons for the birth—or rebirth—of modern SVP statutes. In the first place, these laws may be seen as a timely response by legislatures to the growing national problem of sexual predation,[89] and the corresponding loss of society's confidence in the criminal justice system's ability to deal effectively with violent sex offenders.[90] Indeed, many states enacted SVP laws as an immediate response to public outcry over horrific sexual crimes,[91] often committed by repeat offenders with previous convictions.[92] Also, the shift from indeterminate to determinate sentencing during the 1970s and 1980s resulted in lighter sentences for sex offenders.[93]

Further, many legislatures determined that the existing general civil commitment statutes, which usually required demonstration of a severe

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86. ERIC S. JANUS, FAILURE TO PROTECT: AMERICA'S SEXUAL VIOLENT PREDATOR LAWS AND THE RISE OF THE PREVENTATIVE STATE 23 (2006). *See also* Brakel & Cavanaugh, *supra* note 79, at 70 (describing the resurrection of civil commitment statutes for sex offenders as "déjà vü all over again").

87. *See* Miller, *supra* note 77, at 2098; OFFICE OF THE LEGISLATIVE AUDITOR FOR THE STATE OF MINNESOTA, EVALUATION REPORT: CIVIL COMMITMENT OF SEX OFFENDERS 1 (Mar. 2011) [hereinafter CIVIL COMMITMENT OF SEX OFFENDERS].

88. 18 U.S.C. § 4248 (2006). *See also* United States v. Comstock, 130 S. Ct. 1949, 1965 (2010) (upholding same, which is part of the Adam Walsh Child Protection and Safety Act of 2006 and includes provision for civil commitment).

89. *See Is Child Sexual Abuse Really Such a Big Problem?*, STOP IT NOW, http://www.stopitnow.org/faq_child_sex_abuse_problem (last visited Feb. 18, 2013) ("As many as one in three girls and one in seven boys will be sexually abused at some point in their childhood. . . . Surveys of U.S. adults consistently show that more than one in five adults were sexually abused during childhood.").

90. *See* Mari M. "Miki" Presley, *Jimmy Ryce Involuntary Civil Commitment for Sexually Violent Predators' Treatment and Care Act: Replacing Criminal Justice with Civil Commitment*, 26 FLA. ST. U. L. REV. 487, 496 (1999); Falk, *supra* note 69, at 128; Miller, *supra* note 77, at 2097 (claiming that modern SVP laws are "[i]nspired by high-profile crimes and public outrage").

91. CRS, *supra* note 80, at 4.

92. *See, e.g.*, Julia C. Walker, *Freedom Is to Confinement as Twilight Is to Dusk: The Unfortunate Logic of Sexual Predator Statutes*, 67 MO. L. REV. 993, 1004–05 (2002) ("Prior to his incarceration . . . Hendricks [, the first to be civilly committed under Kansas's SVP statute,] had been confined on five occasions for five separate sex crimes against children, and admitted to engaging in more criminal sex acts than the acts for which he was confined.") (footnote omitted); Monica Davey & Abbey Goodnough, *Doubts Rise As States Hold Sex Offenders After Prison*, N.Y. TIMES, Mar. 4, 2007, *available at* http://www.nytimes.com/2007/03/04/us/04civil.html?pagewanted=all ("Washington State adopted the first civil commitment law in 1990 after men with predatory histories killed a young woman in Seattle and sexually mutilated a boy in Tacoma.").

93. CRS, *supra* note 80, at 4; Howard Zonana, *The Civil Commitment of Sex Offenders*, 278 Science, 278 SCI. 1248, 1248 (1997). *See also* Presley, *supra* note 90, at 495–96 (explaining that before the enactment of Florida's SVP statute, the Jimmy Ryce Act, seventy-five percent of 577 convicted sex offenders statewide received shorter sentences than called for in the state guidelines, and, in one county, all registered sex offenders "bypassed prison and went directly to probation, [even though] all were charged with sex crimes against children").

mental disorder and recent dangerous cnduct, were not well-suited to the commitment of the small but "extremely dangerous group of sexually violent predators,"[94] who are often free of serious mental disease, and whose detention in prison prior to a civil commitment hearing makes it difficult for the state to show recent dangerous behavior.[95]

The SVP laws of virtually every state have two distinct but related purposes: the protection of society and the treatment of sex offenders.[96] The former goal, which is achieved by the incapacitation of the sex offender through confinement, is justified by the state's police power, while the latter is justified by the state's power of *parens patriae*.[97]

Overall, the SVP laws of most states bear a high degree of similarity in their basic form and content. Typically, in order to subject an offender to civil confinement as an SVP, the state must show, either beyond a reasonable doubt or by clear and convincing evidence[98]: (1) past commission of a sexually violent crime;[99] (2) a present mental abnormality; and (3) an increased risk of sexually violent crimes in the future as a result of that abnormality.[100]

Procedurally, the determination to confine an individual as an SVP is made either by a judge or a jury at an adversarial hearing. The sex offender retains many of the rights afforded to defendants in criminal proceedings, such as the right to counsel, the right to proffer evidence and witnesses, and the right to cross-examine witnesses.[101]

In 1997, the Supreme Court upheld the constitutionality of civil commitment for sexually violent criminals.[102] Leroy Hendricks, the first person that Kansas sought to confine under its newly enacted SVP statute, claimed that the statute violated the Federal Constitution's Due Process, Double Jeopardy, and Ex Post Facto Clauses. The Supreme Court began its analysis by noting that freedom from physical restraint, while "at the core of

94. *See* KAN. STAT. ANN. § 59-29a01 (2012).

95. CRS, *supra* note 80, at 4.

96. *See* Miller, *supra* note 77, at 2101; Rayna G. Edwards, *Profiling the Sexually Violent Predator: An Examination of the Current Literature Regarding Candidacy for Surgical Castration*, 4 MIND MATTERS: WESLEYAN J. PSYCHOL. 17, 19 (2009). Currently, every state SVP program offers treatment to committed sex offenders. Miller, *supra* note 77, at 2100.

97. *See* Miller, *supra* note 77, at 2101; Presley, *supra* note 90, at 502–03.

98. *See* CRS, *supra* note 80, at 36–49 app. A.

99. *See id.* (explaining that most states require some judicial evidence of previous sexually violent behavior, such as conviction or adjudication by reason of insanity).

100. *See* Edwards, *supra* note 96, at 18; CRS, *supra* note 80, at 10 ("The civil commitment of [SVPs] hinges on the belief that sex offenders are more likely to recidivate."). In 2005, the Department of Justice estimated that sex offenders are at least four times more likely to be re-arrested (for another sexual offense) than other criminals. Cantone, *supra* note 78, at 709.

101. *See, e.g.*, KAN. STAT. ANN. § 59-29a05 (2012); FLA. STAT. § 394.916 (2012).

102. Kansas v. Hendricks, 521 U.S. 346 (1997).

the liberty protected by the Due Process Clause," is not an absolute right.[103] Rather, states may, "in certain narrow circumstances," consistent with due process, forcibly detain "people who are unable to control their behavior and who thereby pose a danger to the public."[104] Thus, Kansas's statute, which required a showing of volitional impairment along with a prediction of future dangerousness, sufficed for due process purposes.[105]

Additionally, the statute could not possibly violate the Constitution's Double Jeopardy and Ex Post Facto Clauses because those Clauses only apply to criminal proceedings, and the SVP statute was strictly civil in nature.[106] In making this determination, the Court observed that the Kansas legislature manifestly intended the statute to establish civil, not criminal, proceedings, and that it is the ordinary role of the Court to defer to the legislature's stated intent.

Further, the Court held that the affirmative restraint of mentally unstable and dangerous persons, is "a legitimate nonpunitive governmental objective,"[107] and neither the potentially indefinite duration of confinement under the statute, nor the use of common criminal procedural safeguards were sufficient to render the statute "so punitive either in purpose or effect as to negate [the State's] intention to deem it civil."[108] The nonpunitive nature of the statute thus removed an "essential prerequisite for both Hendricks' double jeopardy and *ex post facto* claims."[109]

Significantly, the Court stressed that SVP civil commitment programs must provide treatment to confined sex offenders.[110] However, treatment need not be the primary goal of the legislation; nothing in the Constitution prohibits a state from making the segregation and incapacitation of sex

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103. *Id.* at 356 (citation omitted) (internal quotation marks omitted).

104. *Id.* at 357.

105. *Id.* at 356. Previously, only individuals with "mental illness" had been subjected to civil commitment. By allowing for commitment on the basis of a "mental abnormality" amounting to a volitional impairment, the Supreme Court expanded the class of persons who might be civilly committed. *See* Falk, *supra* note 69, at 142. In Kansas v. Crane, 534 U.S. 407, 413 (2002), the Supreme Court elaborated that volitional impairment requires only a "serious difficulty," and not complete incapacity, in controlling one's conduct.

106. *Hendricks*, 521 U.S. at 369. In general, criminal laws are retroactive because they aim to punish for past acts; civil laws that call for confinement, conversely, are prospective because they seek primarily to prevent future harm. *See* Miller, *supra* note 77, at 2105.

107. *Hendricks*, 521 U.S. at 363 (citation omitted) (internal quotation marks omitted).

108. *Id.* at 361.

109. *Id.*

110. *See id.* at 367 (citing Allen v. Illinois, 478 U.S. 364, 369 (1986) ("[T]he State has a statutory obligation to provide care and treatment for [persons adjudged sexually dangerous] designed to effect recovery.") (internal quotation marks omitted)). However, the civil commitment of those whose condition is untreatable is not, for that reason, rendered punitive. *See id.* at 366.

offenders the primary goal behind a civil commitment scheme, so long as treatment is an ancillary goal, at least where treatment is possible.[111]

After the Supreme Court's favorable ruling in *Hendricks*, many states quickly responded by enacting similar SVP legislation.[112] Nevertheless, in spite of its approval by the Supreme Court, and its growing popularity among the states, SVP civil commitment remains a highly controversial issue. SVP statutes are criticized on both constitutional and practical grounds. On constitutional grounds, some scholars, contrary to the holding in *Hendricks*, claim that SVP laws violate the Due Process Clause because they are punitive, not civil, in nature, notwithstanding their stated legislative intent.[113] These commentators view SVP commitment programs as "simply after-the-fact attempts to impose additional punishment."[114]

On practical grounds, critics maintain that the costs of SVP civil commitment programs outweigh any corresponding benefits. Indisputably, the costs are high. Civil commitment typically costs taxpayers four times more than criminal incarceration,[115] averaging about $100,000 per offender per year.[116] The increased cost is largely associated with the provision of

111. *See id.* at 365.

112. Grant H. Morris, *The Evil that Men Do: Perverting Justice to Punish Perverts*, 2000 U. ILL. L. REV. 1199, 1204 (2000).

113. Marc W. Pearce, *Civilly Committing Criminals: An Analysis of the Expressive Function of Nebraska's 'Dangerous Sex Offender' Commitment Procedure*, 85 NEB. L. REV. 575, 579 (2007). Those who criticize SVP statutes on constitutional grounds agree with Justice Breyer's dissent in *Hendricks* that a law which delays treatment until an offender is at the end of his jail term, thereby necessitating further confinement, begins to look punitive. *Hendricks*, 521 U.S. at 381 (Breyer, J., dissenting).

114. Douglas G. Smith, *The Constitutionality of Civil Commitment and the Requirement of Adequate Treatment*, 49 B.C. L. REV. 1383, 1426 (2008). *See also* Davey & Goodnough, *supra* note 92 ("Some civil libertarians and prisoner advocates, who still object to the laws, have not given up on finding a challenge that the Supreme Court might view favorably. Despite the court rulings, these groups insist civil commitment amounts to a second sentence for a crime.").

115. *See* Davey & Goodnough, *supra* note 92.

> The cost of the programs is virtually unchecked and growing, with states spending nearly $450 million on them [in 2007]. The annual price of housing a committed sex offender averages more than $100,000, compared with about $26,000 a year for keeping someone in prison, because of the higher costs for programs, treatment and supervised freedoms.

Id.

116. CRS, *supra* note 80, at 33. *See also* CIVIL COMMITMENT OF SEX OFFENDERS, *supra* note 87 (noting that the $120,000 annual cost per offender in Minnesota is "close to the average for other secure treatment facilities for civilly committed sex offenders"); Martiga Lohn, *Sexual Predator Treatment Squeezes State Budgets*, BOSTON.COM (June 21, 2010), http://www.boston.com/news/education/higher/articles/2010/06/21/sexual_predator_treatment_squeezes_ state_budgets/ ("The annual costs per offender topped out at $175,000 in New York and $173,000 in California.") (last visited Jan. 29, 2013).

treatment, which typically requires a team of psychiatrists, psychologists, behavioral therapists, and social workers.[117]

Moreover, it appears likely that the expense of civil commitment will continue to increase in the future. Because of the extremely low release rate of SVPs, the amount of confined offenders will continue to expand, requiring the construction of additional facilities.[118] For the same reason, an increasingly large percentage of committed SVPs are now elderly, and require increased medical care.[119] As rising expenses make it more difficult for states to maintain adequate conditions and treatment, increased costly litigation from committed SVPs is also likely.[120] Thus far, attempts to reduce cost while maintaining secure commitment of SVPs have been largely ineffective.[121]

Furthermore, critics maintain that, despite its cost, the efficacy of sex offender treatment remains dubious.[122] In any case, many offenders choose not to participate.[123] Treatment records are fully discoverable during

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117. *See* Lohn, *supra* note 116 (noting that Minnesota has a five to six-member treatment team for every twenty to fifty offenders).

118. Typically, SVPs remain in confinement until they cease to pose a danger to the community, as determined by an annual evaluation. *See* Miller, *supra* note 77, at 2110; CRS, *supra* note 80, at 36–49 app. A. The number of SVPs who are ultimately released from confinement is below one percent. Jeremiah W. White, *Is Iowa's Sexual Predator Statute 'Civil'? The Civil Commitment of Sexually Violent Predators After* Kansas v. Crane, 89 IOWA L. REV. 739, 747 (2004). *See also* Jenny Roberts, *The Mythical Divide Between Collateral and Direct Consequences of Criminal Convictions: Involuntary Commitment of 'Sexually Violent Predators'*, 93 MINN. L. REV. 670, 707 (2008) (noting that civil commitment in these circumstances is practically a "life sentence"); *Minnesota's Failed Civil Commitment Program for Sex Offenders*, FINDLAW (Apr. 25, 2011), http://knowledgebase.findlaw.com/kb/2011/Apr/294201.html (stating that death is the "unwritten standard of release" from civil commitment, and quoting a former employee of Minnesota's SVP program who revealed that, upon the death of a committed offender, the employees would say "[a]nother one completed treatment") (last visited Jan. 29, 2013).

119. *See* CRS, *supra* note 80, at 33–34; *see also* Davey & Goodnough, *supra* note 92 ("The backlogs have led to an aging population. Inside many facilities, wheelchairs, walkers, high blood pressure and senility are increasingly expensive concerns.").

120. *See* CRS, *supra* note 80, at 34. This would compound an already significant source of costs for civil commitment programs. In Washington, for example, litigation costs are $35,000 per offender per year. *Id.*

121. *See, e.g.*, Lohn, *supra* note 116. Minnesota saved costs by selectively referring eligible sex offenders (less than thirty per year) for civil commitment. *Id.* However, after a sex offender released from prison in 2003 quickly recidivated with another act of rape and murder, the state began referring *all* sex offenders who might be eligible for commitment, thereby increasing the number of referrals six-fold. *Id.*

122. *See* CRS, *supra* note 80, at 21 ("[C]urrently, it cannot be proven that treatment is effective."); Miller, *supra* note 77, at 2118 (explaining that it is disputed whether treatment is effective at reducing recidivism by sexually violent criminals); Davey & Goodnough, *supra* note 92 ("The treatment regimens are expensive and largely unproven.").

123. *See* Miller, *supra* note 77, at 2118 ("Empirically, many offenders . . . have refused treatment. For example, only 25 to 30 percent of sexually violent predators consent to participate in the active phases of California's sex offender treatment program.").

evaluations to determine eligibility for release, and a crucial part of treatment is the disclosure of past offenses, along with the disturbing fantasies and impulses that prompted them.[124] Once divulged, the incriminatory data is used to demonstrate the need for continued commitment,[125] or even subsequent prosecution. Ironically, then, the very treatment of sex offenders, which is upheld as one of the primary goals of SVP civil commitment, provides a "strong incentive to refuse treatment."[126] As a result, many SVPs—and their attorneys—conclude "that the safest bet is to avoid treatment altogether."[127] Moreover, release is unlikely even after successful completion of the treatment program,[128] partly because the civil confinement setting itself precludes the possibility of subsequent offenses in the community, making a determination of future risk upon release highly uncertain.[129]

Finally, critics maintain that SVP statutes are ineffective because the methods used to predict future dangerousness are unreliable, and may result in the commitment of those who pose little risk of future harm, as well as the release, or non-commitment, of the most dangerous predators.[130] The future dangerousness of a particular sex offender is determined either by clinical judgment or the use of actuarial instruments.[131] Clinical judgments of future sex offender dangerousness may be accurate as little as ten percent of the time.[132] Actuarial predictions also pose an inherent risk of error, since they

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124. *See id.* at 2108–09, 2115–16. *See also* Davey & Goodnough, *supra* note 92 ("[T]reatment often requires [SVPs] to recount crimes, even those not known to law enforcement.").

125. Miller, *supra* note 77, at 2108 ("[P]rosecutors use treatment records to create the proof necessary for continued confinement.").

126. *Id.* at 2114.

127. Eric S. Janus, *Minnesota's Sex Offender Commitment Program: Would an Empirically-Based Prevention Policy Be More Effective?*, 29 WM. MITCHELL L. REV. 1083, 1123 (2003). *See also* Davey & Goodnough, *supra* note 92 ("[T]here is no way to compel patients to participate. Many simply do not show up for sessions on their lawyers' advice"); DEIDRE M. D'ORAZIO ET AL., THE CALIFORNIA COALITION ON SEXUAL OFFENDING, THE CALIFORNIA SEXUALLY VIOLENT PREDATOR STATUTE: HISTORY, DESCRIPTION & AREAS FOR IMPROVEMENT 27 (2009), *available at* http://ccoso.org/papers/CCOSO%20SVP%20Paper.pdf (stating that SVPs refusing treatment often indicate that their "attorney advises them not to").

128. Miller, *supra* note 77, at 2117–18 ("Because states are not releasing [SVPs], including those who complete the entire institutional treatment program, patients perceive no benefit in participating in sex offender treatment."). *See* Davey & Goodnough, *supra* note 92 ("Successful treatment is often not a factor in determining the relatively few offenders who are released; in Iowa, of the nine men let go unconditionally, none had completed treatment or earned the center's recommendation for release.").

129. *See* CRS, *supra* note 80, at 30 ("Offenders do not face the same stimulations and opportunities in an institutional setting that they will face in the community, hence it is difficult to tell whether they can apply what they have learned in treatment.").

130. *See* Davey & Goodnough, *supra* note 92 ("Sex offenders selected for commitment are not always the most violent; some exhibitionists are chosen, for example, while rapists are passed over.").

131. CRS, *supra* note 80, at 27–29; Cantone, *supra* note 78, at 711–12.

132. CRS, *supra* note 80, at 28.

fail to take into account the unique characteristics of an individual offender, instead relying on the recidivism rates for a group of which a particular offender is a member.[133]

C. *The Inadequacy of Existing Standards to Evaluate SVP Free Exercise Claims*

Sex offender civil commitment has been described as a "murky area of the law."[134] The same can be said about the determination of the applicable legal standard for evaluating free exercise claims brought by SVPs held in civil confinement. The source of uncertainty in this "developing area of the law"[135] appears to stem from the unique criminal/civil hybrid nature of sex offender civil commitment.[136] The Supreme Court has established well-developed legal standards for the free exercise of religion pertaining to free citizens, in general, and to prisoners, in particular; but committed SVPs do not fit neatly into either of these categories.

The applicability of the general *Smith* standard presupposes the existence of either a neutral law of general applicability, or else a law that targets a particular religious exercise for unfavorable treatment. It is unclear whether such a dichotomy, while effective with regard to public laws, is also

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133. *See id.* at 29 (citation omitted) ("Actuarial instruments can only identify a range of risk for a *group* of sex offenders; they cannot identify the specific risk for any individual within the group. A given individual in the group might have a risk of re-offending that is either higher or lower than the group's risk." (internal footnote omitted)).

134. Davey & Goodnough, *supra* note 92.

135. *See, e.g.*, *Eastern District of California Swamped by Prisoner Lawsuits*, THE THIRD BRANCH (July 2010), http://www.uscourts.gov/news/TheThirdBranch/10-07-01/Eastern_District_of_California_Swamped_by_Prisoner_Lawsuits.aspx (last visited Jan. 29, 2013) (noting that civil rights litigation pertaining to civilly committed SVPs in California is a "developing area of the law, and, as such, presents special challenges to the courts handling those cases").

136. *See* Lisa Kavanaugh, *Massachusetts's Sexually Dangerous Persons Legislation: Can Juries Make a Bad Law Better?*, 35 HARV. C.R.-C.L. L. REV. 509, 561 n.271 (2000) (referring to the "hybrid civil/criminal nature" of sex offender commitment proceedings); Stephen J. Morse, *Blame and Danger: An Essay on Preventive Detention*, 76 B.U. L. REV. 113, 120 (1996); Ahluwalia, *supra* note 82, at 491 (referring to the "hybrid nature" of sex offender civil commitment); Andrew Hammel, Comment, *The Importance of Being Insane: Sexual Predator Civil Commitment Laws and the Idea of Sex Crimes as Insane Acts*, 32 HOUS. L. REV. 775, 791 (1995) (noting the "curious hybrid of civil and criminal law"); John P. Zanini, *Considering* Hendricks v. Kansas *for Massachusetts: Can the Commonwealth Constitutionally Detain Dangerous Persons Who Are Not Mentally Ill?*, 23 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 427, 431 n.9 (1997); Grant H. Morris, *Escaping the Asylum: When Freedom Is a Crime*, 40 SAN DIEGO L. REV. 481, 542 (2003) (characterizing SVPs as a "special hybrid class of patient with 'criminal' as well as 'civil' features"); John M. Fabian, Kansas v. Hendricks, *Crane and Beyond: 'Mental Abnormality,' and 'Sexual Dangerousness': Volitional vs. Emotional Abnormality and the Debate Between Community Safety and Civil Liberties*, 29 WM. MITCHELL L. REV. 1367, 1443 n.9 (2003) (describing committed SVPs, themselves, as a "hybrid").

applicable in the civil commitment setting, where the actions taken by institutional officials are neither generally applicable laws, in the ordinary sense of the term, nor (necessarily) attempts to single out a particular religious practice.

Further, while *Smith* does not expressly limit its holding to claims arising under laws that govern the free public in general, it is significant that the Supreme Court has never applied *Smith* to a constitutional claim made by an institutionalized person—suggesting that *Smith* is not an appropriate standard for free exercise claims arising in institutional settings where persons are subjected to involuntary confinement.

On the other hand, the applicability of the *Turner* 'reasonableness standard' in the prison setting hinges on the determination of a policy's relation to 'legitimate penological interests.' In the context of civil commitment, however, where penological interests have no place,[137] such a determination cannot be made. Further, the Supreme Court has held that convicted prisoners enjoy rights only to the extent that those rights are not fundamentally inconsistent with the incarceration itself or incompatible with the objectives of the incarceration.[138] Civilly confined SVPs are not incarcerated, but committed. Therefore, the scope of their rights, including the right to free exercise of religion, may be broader than for those confined to prison. Indeed, the Supreme Court has determined that civilly committed persons "are entitled to more considerate treatment and conditions of confinement than criminals whose conditions of confinement are designed to punish."[139]

The manner in which RLUIPA claims brought by SVPs are to be evaluated is similarly unclear. Under RLUIPA, a policy that substantially burdens the free exercise of institutionalized persons must be justified by a compelling state interest; but compelling interests that have been recognized in other institutionalized settings are not necessarily compelling in the context of sex offender civil commitment.

Unlike compelling interests in the prison setting, for example, any interests in the civil commitment context must be entirely nonpunitive. Likewise, compelling interests recognized in other civil contexts, such as traditional mental health institutions, may not apply in the unique context of

137. Civil commitment is entirely nonpunitive. Kansas v. Hendricks, 521 U.S. 346, 361 (1997). On the other hand, penological interests are, by definition, punitive. *See* BLACK'S LAW DICTIONARY 1246, 1248 (9th ed. 2009) ("*penology-penological*: The study of penal institutions, crime prevention, and the *punishment* and rehabilitation of criminals . . . ." "*penal*: Of, relating to, or being a penalty or *punishment*, esp. for a crime.") (emphases added).

138. Hudson v. Palmer, 468 U.S. 517, 523 (1984).

139. Youngberg v. Romeo, 457 U.S. 307, 321–22 (1982).

SVP civil commitment institutions, whose population is typically comprised of dangerous convicted criminals not necessarily suffering from any diagnosable mental illness, and who differ in many respects from typical mental health patients.[140]

Moreover, even where a broad interest, such as institutional security, would be compelling in any institutional setting, the magnitude of such an interest, and the extent to which it may permissibly result in the abatement of the right to free exercise, depends on the singular interests that differentiate one type of institution from another, and the countering scope of rights afforded to the class of persons residing there. A nursing care facility, for example, and a maximum security prison,[141] would both seem to have a compelling government interest in security, but the contours of that interest are clearly different in each setting, as are the restrictive measures that may lawfully be justified in its furtherance.[142]

Additionally, the extent to which RLUIPA's requirement of due deference applies to officials of civil commitment institutions is unclear; within the legislative history of RLUIPA, the expectation of deference to state actors is mentioned only with regard to prison and jail administrators. Likewise, the Supreme Court in *Cutter* interpreted RLUIPA as affording deference specifically to *prison* officials, on the basis of the recognized need for discipline in *penal* institutions.

Assuming, *arguendo*, that the requirement of due deference applies to *all* institutional officials, the predominant and consistent association of that requirement with *prison* officials at least renders uncertain the degree of deference that is due to officials of other kinds of institutions governed by manifestly different interests.

D. *A Survey and Evaluation of Various Approaches*

Because there is not a clearly established legal standard for evaluating free exercise claims in the context of SVP civil commitment, lower courts have adopted a variety of approaches. These approaches may be broadly categorized according to their adoption of certain common themes or

140. The differences between SVPs and persons civilly committed to traditional mental health institutions have proven sufficiently decisive as to render the former unsusceptible to confinement under traditional involuntary commitment statutes for the mentally ill.

141. Either may be considered an institution under RLUIPA if it receives federal grants.

142. Some courts treat the security interest in the diverse contexts of prison and civil commitment as if it were univocal, and fail to distinguish among different *kinds* or *degrees* of security interests. *See, e.g.*, Strutton v. Hooker, No. 4:05CV02022 ERW, 2008 U.S. Dist. LEXIS 75226, at *76–77 (E.D. Mo. Sept. 29, 2008) (citation omitted) (internal quotations marks omitted) (explaining that plaintiff SVP's "confinement is subject to the same safety and security concerns as that of a prisoner").

dynamics. While the process of classification is partly subjective, as differing classifications could be made based on different sets of commonalities among the same cases, some type of systematic organization is necessary in order to bring clarity to this foggy area of the law, and to distill the presence of various legal trends that may show the direction in which the law is evolving.

1. *The* Turner *Test*

Many courts have used the *Turner* test to evaluate free exercise claims in the context of SVP civil commitment.[143] This is problematic, of course, as the *Turner* test was designed specifically to evaluate the constitutionality of *prison* regulations, to be determined by their relation to *penological* interests.[144] The Supreme Court has not expanded the holding or the rationale in *Turner* to constitutional claims in any other context besides that of prison.

For this reason, some courts that have adopted the *Turner* test in the civil commitment setting recognize that *Turner* does not clearly control the novel issue of constitutional claims by civilly committed sex offenders. These courts have typically justified their use of *Turner* by analogizing sex offender civil commitment to imprisonment.[145] Rather than likening the legal status of a committed SVP "to that of a mental health patient who is hospitalized,"[146] these courts choose to emphasize the ways in which "[a] person who is civilly

143. *See, e.g.*, Chavez v. Ahlin, No. 1:09-cv-00202-SMS (PC), 2009 U.S. Dist. LEXIS 35063, at *10–11 (E.D. Calif. Apr. 8, 2009); DeSimone v. Bartrow, No. 08-C-638, 2008 U.S. Dist. LEXIS 64419, at *11 (E.D. Wis. Aug. 12, 2008); Thompson v. Vilsack, 328 F. Supp. 2d 974 (S.D. Iowa 2004); *Strutton*, 2008 U.S. Dist. LEXIS 75226, at *64–65; Newberg v. Geo Group, Inc., No. 2:09-cv-625-FtM-36DNF, 2011 U.S. Dist. LEXIS 68955, at *25 (M.D. Fla. June 27, 2011); Marsh v. Liberty Behavioral Healthcare, Inc., No. 2:06-cv-125-FtM-34SPC, 2008 U.S. Dist. LEXIS 24347, at *18–19 (M.D. Fla. Mar. 27, 2008). For a modified version of the *Turner* test, see Young v. Bass, No. 01 C 7944, 2004 U.S. Dist. LEXIS 6023, at *13 (N.D. Ill. Apr. 6, 2004).

144. *See* Turner v. Safley, 482 U.S. 78, 89 (1987) ("[W]hen a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests.").

145. *See, e.g.*, *Marsh*, 2008 U.S. Dist. LEXIS 24347, at *25 (applying *Turner* to a free exercise claim by a civilly committed SVP, and prefacing the adoption of *Turner* by indicating that the Eleventh Circuit likened civilly committed SVPs to prisoners, and applied *Turner* to evaluate a resident's First Amendment rights); *id.* at *20 ("While the Eleventh Circuit has not addressed this issue, other federal courts have applied the *Turner* test to analyze constitutional claims raised by individuals who . . . are involuntarily civilly committed."); Kollyns v. Hughes, No. 3:05-0090-JFA-JRM (D.S.C. Aug. 18, 2006), at *4 ("Although the Fourth Circuit has not addressed the issue, other courts have applied *Turner* in analyzing constitutional claims by civilly committed SVPs.").

146. *Newberg*, 2011 U.S. Dist. LEXIS 68955, at *25.

committed is in a position analogous to a criminally confined prisoner."[147] Other courts simply apply *Turner* without providing any justification.[148]

At least one court has addressed the issue by analogizing civilly committed sex offenders to pretrial detainees, employing a *Turner*-like reasonableness standard under which the constitutionality of regulations that restrict free exercise is determined by their reasonable relation to "the effective management of the confinement facility."[149]

As *Turner* called for deference to prison administrators, courts using the *Turner* test typically uphold the policies of the civil commitment center when those policies are alleged to infringe upon a committed offender's free exercise rights. However, one court has employed a modified version of the *Turner* test that is more favorable to SVPs by dispensing with *Turner's* required preliminary showing that a regulation has actually infringed upon a sincerely held religious belief, and instead beginning the analysis with the factors set forth in *Turner* to determine the reasonableness of a regulation in relation to penological interests.[150] Under such an approach, it might be that the alleged violation of an SVP's right to free exercise is presumed, while the burden lies with the facility to rebut this presumption.

2. *The* Smith *Standard*

One reported case has adopted the *Smith* standard to address free exercise claims in the context of sex offender civil confinement. In In re

147. *Marsh*, 2008 U.S. Dist. LEXIS 24347, at *17 ("[R]esidents at the [Florida Civil Commitment Center] are considered 'totally confined,' and subject to certain internal regulations much like those established by the Florida Department of Corrections."). That SVPs are more analogous to prisoners than to mental health patients is not obvious. Civilly committed SVPs, like civilly committed mental health patients, are apparently entitled to more considerate treatment and conditions of confinement than prisoners. Youngberg v. Romeo, 457 U.S. 307, 321–22 (1982). Further, unlike prisoners, SVPs may not be subjected to restrictive conditions that amount to punishment. Bell v. Wolfish, 441 U.S. 520, 536–37 (1979).

148. *See, e.g.*, *Chavez*, 2009 U.S. Dist. LEXIS 35063, at *9–10; *DeSimone*, 2008 U.S. Dist. LEXIS 64419, at *10–11; *Strutton*, 2008 U.S. Dist. LEXIS 75226, at *63–65; *Thompson*, 328 F. Supp. 2d at 977–78. The logical leap taken by some courts in expanding *Turner* to the context of civil commitment is often obvious. *See, e.g.*, *Chavez*, 2009 U.S. Dist. LEXIS 35063, at *10 (applying *Turner*, and quoting from *O'Lone* by substituting the word "detainment" in place of "incarceration" in the original); *Thompson*, 328 F. Supp. 2d at 978 (citing *Turner* to substantiate the broad proposition that "[t]he first step in scrutinizing a regulation . . . that affects the constitutional rights of *those in the custody of the state* is to determine whether there is a rational connection *between the regulation* and the state interest"); whereas the passage cited in *Turner* refers only to a "rational connection between the *prison regulation* and the . . . governmental interest put forward to justify it." *Turner*, 482 U.S. at 89 (emphases added).

149. Young v. Bass, No. 01 C 7944, 2004 U.S. Dist. LEXIS 6023, at *13 (N.D. Ill. Apr. 6, 2004).

150. *See Thompson*, at 977–79 (presuming that a facility's failure to fully subsidize kosher food to a civilly committed SVP "deprive[d] [him] of a constitutional right," and beginning the analysis by examining whether the facility's failure to subsidize meets the first of the four *Turner* factors).

Boone v. Missouri, a convicted sex offender complained that Missouri's Sexual Offender Program burdened his right to free exercise of religion because the program was based on secular humanism.[151] After setting out the *Smith* standard as described in *Church of the Lukumi Babalu Aye, Inc.*, the court disposed of the complaint by reasoning that the treatment program furthered the compelling government interest of protecting the public from future crime, and was narrowly tailored to advance that interest.[152] Accordingly, any infringement on religious exercise was constitutionally permissible, and there was no need to "determine whether the law [was] neutral and generally applicable."[153]

3. *The Compelling Interest Test*

In *Newberg v. Geo Group, Inc.*, a United States District Court in Florida evaluated a committed SVP's free exercise claims under both the *Turner* test and, in the alternative, a "compelling interest test."[154] Under this latter "more rigorous standard," the court considered whether there was a "substantial burden" on the claimant's religious exercise, and whether the commitment facility had a compelling governmental interest in imposing that burden.[155] However, the court required no showing that the facility's regulation was the least restrictive means of furthering its interest. The court relied on an analogy to a factually similar case that dealt with an SVP claim brought under RLUIPA, and drew heavily from RLUIPA to establish its analytical framework.[156] Thus, the court appeared to be using a modified version of RLUIPA to evaluate free exercise claims brought under the First Amendment in the civil commitment setting.[157]

4. *Broadening the Scope of Religious Exercise*

Some courts, in determining the threshold issue of actual infringement upon the right to free exercise, broadly define the scope of the religious right asserted by a plaintiff SVP, such that the plaintiff's right to a particular act of religious exercise is subsumed into the right to free exercise in general.

151. *In re Boone v. Missouri*, 147 S.W.3d 801, 804–05 (Mo. Ct. App. 2004).

152. *Id.* at 806.

153. *Id.*

154. No. 2:09-cv-625-FtM-36DNF, 2011 U.S. Dist. LEXIS, at *29 (M.D. Fla. June 27, 2011).

155. *Id.* at *29–32.

156. *See id.* at *29, 32–35.

157. *See id.* at *36 ("[D]efendant . . . is entitled to summary judgment on Plaintiff's *First Amendment* free exercise claim under the compelling interest test.").

Under this approach, so long as the plaintiff is not entirely barred from practicing his religion, no impingement of the right to free exercise will be found; the availability of alternative means of religious observance effectively precludes a finding that the plaintiff's free exercise rights are burdened, even though the right to a specific religious exercise may be completely denied by an institutional regulation. It is as though the court construes a complaint asserting the right to engage in ritual X as if it asserted only the right to *some* form of free exercise in general. Provided that *this* latter right, (the broadly construed right to have some means to exercise one's religion), has not been violated, then there is no infringement.

In the same way, some courts may subsume the plaintiff's asserted right into a broader religious right of the same general category, but not so broad as the right to any form of religious exercise in general. Thus, a plaintiff who is denied the right to fast as a means of performing penance, for example, might be found to have sustained no infringement of his right to free exercise, provided that he is permitted to engage, not merely in religious practice in general, but in other religious exercises which serve a penitential purpose similar to that of fasting.

Several cases illustrate this broadening approach. In *Newberg v. Geo Group, Inc.*, for example, a civilly committed Native American SVP was denied the use of a sweat lodge, which he asserted was required by his religion for periodic cleansing and purification.[158] The court found that the facility's prohibition against the sweat lodge was insufficient to establish a substantial burden on the plaintiff's religious exercise since he was permitted to practice his religion by participating in other religious rituals, including the Sacred Pipe Ceremony and Smudging, both of which were deemed to afford "the ability to pray and to cleanse pursuant to his religious tenets."[159] The court subsumed the specific asserted right to the use of a sweat lodge into the broader religious right to participate in cleansing rituals; because this broader right was afforded in other ways, the plaintiff's claim failed as a matter of law.[160]

Similarly, in *Young v. Thompson*, a committed SVP alleged that the commitment facility "violated his constitutional rights by [its] refusal or

158. U.S. Dist. LEXIS 68955, at *9.

159. *Id.* at *31. *See also id.* at *28 ("Plaintiff is not otherwise prohibited from practicing any other component of his faith, or engaging in other Native American religious rituals and rites."). "Smudging" is a ceremonial act of "purification and cleansing with smoke from smoldering sage, sweet grass, cedar, or kinnik-kinnik." *Id.* at *11.

160. *Id.* at *32. The court did note that, even if the plaintiff could demonstrate that the prohibition of a sweat lodge was a substantial burden, his claim would nevertheless fail as a matter of law because the prohibition was in furtherance of a compelling governmental interest. *Id.* at *32–36.

failure to provide [Mormon] religious services."[161] The court found that even if the plaintiff was denied the provision of such services, his constitutional rights were not violated, since the facility had "met its burden in providing [him] with an opportunity to *practice his religion*."[162] Evidently, because this broadly construed right—the right simply to "practice religion"—was satisfied, presumably in some other way, it was irrelevant that the plaintiff was not provided with the specifically requested opportunity to attend religious services in accordance with his faith.

Also, in *Marsh v. Liberty Behavioral Healthcare, Inc.*, the plaintiff alleged that a civil commitment facility's policy prohibiting the practice of martial arts infringed upon the free exercise of his Zen Buddhist faith, in which various martial arts are performed as a means to spiritual enlightenment.[163] Although the facility permitted the plaintiff to practice martial arts exercises in his cell, the size of the plaintiff's cell was prohibitively small, and it was apparently of religious significance that the plaintiff's exercises be performed outdoors "in various . . . weather conditions."[164]

The court granted summary judgment to the facility, reasoning in part that the plaintiff was "not otherwise prohibited from practicing any other component of his faith," and was "not prohibited from performing the exercises in his 'cell.'"[165] In so doing, the court broadly defined the scope of the plaintiff's asserted right to free exercise in a way that precluded any infringement of that right. Of course, had the court defined the right asserted by the plaintiff more narrowly as the right to exercise his religion *by practicing a particular form of martial arts* that must be done outdoors, and that could not properly be practiced in the confines of the plaintiff's cell, then it might easily have reached a different conclusion, since *that* right was clearly restricted.

The problem with the "broadening" approach is that it tends to vitiate the right to free exercise. The right to the exercise of religion is not the right to a mere abstraction, such as free exercise in general; nor is it merely the right to make interior religious acts of intellect and will; nor still is it the right to practice any *other* component of one's faith except the one that happens to be prohibited, and regarding which the plaintiff brings suit. The right to free exercise can only have meaning to the extent that it protects particular and concrete religious acts and rituals, and the use of particular sacred objects.

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161. No. 92-35405, 1993 U.S. App. LEXIS 10263, at *8 (9th Cir. Apr. 29, 1993) (citation omitted) (internal quotation marks omitted).

162. *Id.* at *9 (emphasis added).

163. No. 2:06-cv-125-FtM-34SPC, 2008 U.S. Dist. LEXIS 24347, at *8–9 (M.D. Fla. Mar. 27, 2008).

164. *Id.* at *8.

165. *Id.* at *23.

Free exercise would be devoid of content if a state ban on the attendance of synagogue, for example, were legally insufficient to rise to the level of a violation of free exercise, so long as practitioners of Judaism were permitted to engage in other more general forms of religious exercise like prayer and fasting. Indeed, such an approach would tend to enervate any right to which it is applied. With respect to free speech, for example, what protection would the First Amendment afford if the state could, with impunity, prohibit persons from criticizing members of government, provided only that other forms of speech remained permissible?

While problematic, the trend of conceptually broadening the scope of what constitutes a religious exercise does appear, to an extent, in Supreme Court precedent. In *O'Lone v. Estate of Shabazz*, for example, the Court found that Muslim inmates had alternative means of exercising their right to practice their religion by participating in Muslim *religious ceremonies*, even though the inmates were not simply asserting their right to attend religious "ceremonies," but their right to attend a *particular* religious ceremony, Jumu'ah, at a particular time.[166] The Court did implicitly acknowledge that if the right asserted was defined more narrowly, as the attendance of Jumu'ah and not of religious ceremonies in general, no alternative means were available for the prisoners.[167] As the dissent noted, "[t]he respondents in this case have been absolutely foreclosed from participating in the central religious ceremony of their Muslim faith."[168]

5. *Narrowing the Scope of Religious Exercise*

Other courts address the issue of SVP free exercise claims by imposing special requirements on the showing necessary to establish that a religiously motivated activity constitutes a religious exercise. Under this approach, a court may determine that a religious practice motivated by sincere religious belief is nevertheless not a religious exercise for purposes of the First Amendment or RLUIPA. Absent a religious exercise, there can be no infringement of the right to that exercise, and the plaintiff's claim must fail accordingly.

Under a slightly different variation, the failure of a prohibited religious practice to meet some restrictive elements imposed by a court is used to show *directly* that there is no infringement of the right to free exercise, without any preliminary inquiry as to whether the absence of these elements affects the

166. 482 U.S. 342, 351–52 (1987).

167. *Id.* at 351 ("There are, of course, no alternative means of attending Jumu'ah; respondents' religious beliefs insist that it occur at a particular time.").

168. *Id.* at 367 (Brennan, J., dissenting).

legal classification of the practice as a religious exercise. The only difference in this perspective is that it involves one less step of demonstrated reasoning.[169]

This narrowing approach is exemplified in the case of *Strutton v. Hooker*, where the plaintiff, a committed SVP and a practicing Wiccan, claimed that officials at his civil commitment facility had denied him the use of certain religious ceremonial items for the exercise of his Wiccan faith.[170] The court held that the plaintiff's claims could not survive summary judgment because there was no evidence that the ceremonial items were "*necessary* to his practice of the Wiccan religion."[171] The court reasoned that such evidence was "necessary to show which tenet or belief is burdened, so that the Court may determine if the restriction infringes upon that tenet or belief."[172] It is noteworthy that the court required a showing of religious compulsion to establish the possibility of a free exercise violation under RLUIPA as well as the First Amendment.[173]

The court limited the legal determination of religious exercise exclusively to those religious practices that were "*required* [by the plaintiff] to practice his religion."[174] Accordingly, the plaintiff's claim failed because the prohibited religious items, which were to be used for religious ceremonial practices, did not meet the judicially imposed element of religious compulsion.

Also, in *Smith v. Haley*, the plaintiff, a practitioner of Odinism, was prohibited from using a small quartz crystal, which he claimed was "fundamental to his practice of Odinism."[175] While the court decided the case on other grounds, it adopted a restrictive definition of religious exercise, noting that the institutional officials would have been justified in their actions, under RLUIPA, if the crystal were not "essential" to the practice of

169. Under the indirect variation, if a religious practice lacks required element X, then the practice is not a religious exercise, and therefore there is no infringement of the right to free exercise; under the direct approach, if the same religious practice lacks the necessary element, then it means simply that there is no infringement of the right to free exercise.

170. No. 4:05CV02022 ERW, 2008 U.S. Dist. LEXIS 75226, at *3–4, *61, *65 (E.D. Mo. Sept. 29, 2008). Among the ceremonial items denied were stones, seed, sticks, pea gravel, thread, glasses and bowls, yarn, quartz, amethyst, sandalwood chips, jasmine flowers, white willow bark, and "a mortar." *Id.* at *29–34.

171. *Id.* at *66 (emphasis added).

172. *Id.*

173. *Id.* at *74–75 ("The requirement that the Plaintiff show that a substantial burden exists [under RLUIPA] is the *same* burden that Plaintiff had to satisfy with regard to his claims under the *Free Exercise Clause* . . . .") (emphasis added).

174. *Id.* at *64. While the plaintiff in *Smith* was a prison inmate, not a civilly committed SVP, an evaluation of the approach towards the plaintiff's free exercise claim is no less illustrative than examples of the same approach in the context of civil commitment. *Id.*

175. 401 F. Supp. 2d 1240, 1242–43, 1248 (M.D. Ala. 2005). The plaintiff further explained that "without [a crystal], meditation and prayer are rendered impossible, much like a telephone without a receiver." *Id.* at 1248 (internal quotation marks omitted).

the plaintiff's religion, since, in that case, "denying him possession of [a crystal] would not substantially burden his exercise of Odinism . . . ."[176]

Finally, in *Carter v. Engelhart*, a civilly committed SVP alleged that his civil rights were violated when he was forcibly administered a psychotropic medication in spite of his objection that involuntary medication was against his Catholic religious beliefs.[177] The court bypassed the issue of whether the plaintiff's right to freedom of religious exercise included the right to be free from forcible mind-altering medication, and instead dismissed the claim because there was no evidence that the forcible administration of the medicine violated the Catholic religion, "nor was there any evidence that [the] [p]laintiff ha[d] been confirmed in the Catholic church."[178]

In doing so, the court appears to have circumscribed the plaintiff's right by narrowing down the scope of religious exercise to those acts or omissions that objectively *violate the ethical mandates of a plaintiff's religion*, as determined by the court, rather than those that *violate the plaintiff's right to exercise his religion*. In this way, there can be no violation of the right to free exercise unless the restriction of the asserted religious right is also a violation of compulsory religious moral doctrine.

Moreover, the court's reliance on the plaintiff's failure to demonstrate that he had been confirmed in the Catholic faith, if it is to have any meaning at all, can only mean that the court implicitly adopted a kind of certified-membership-test, whereby the absence of some kind of formal membership cuts against the finding of a legitimate religious exercise. By imposing the additional requirement of evidence of official membership, this line of reasoning further narrows the scope of what constitutes religious exercise.

This approach appears problematic, as it seems to be in direct conflict with existing free exercise law under both the First Amendment and RLUIPA. Under the First Amendment, courts may not "question the centrality of particular beliefs or practices to a faith, or the validity of particular litigants' interpretations of those creeds."[179] Moreover, the Supreme Court has expressly repudiated "the notion that to claim the protection of the Free Exercise Clause, one must be responding to the commands of a particular religious organization."[180]

176. *Id.* at 1249 n.24. The court ultimately decided the case on grounds of qualified immunity, holding that the plaintiff's asserted right was not clearly established under RLUIPA at the time of the alleged violation. *Id.* at 1250.

177. No. 4:05CV1211 HEA, 2007 U.S Dist. LEXIS 89053, at *11–14 (E.D. Mo. Feb. 5, 2007).

178. *Id.* at *19.

179. Hernandez v. Comm'r, 490 U.S. 680, 699 (1989).

180. Frazee v. Ill. Dep't of Emp't Sec., 489 U.S. 829, 834 (1989).

The Supreme Court demonstrated its policy of refraining from matters of religious interpretation in *Frazee v. Illinois Dept. of Employment Security*, where the Court placed no additional requirements or preconditions on the showing necessary to establish a religious exercise other than the plaintiff's own bare assertion that his refusal to work on Sundays was "based on a personal professed religious belief."[181] Whether the plaintiff's religion compelled his observance was irrelevant, as was any inquiry into religious membership. Indeed, the Court explicitly rejected the State's contention that the plaintiff's religious observance was "inadequate" as a religious exercise because he was not a "member" of a particular religious sect.[182] In sum, the Court based its determination that the plaintiff's actions constituted a legitimate religious exercise on nothing other than the plaintiff's own allegation that he was motivated by a private and sincerely held religious belief.[183] Accordingly, nothing more was necessary to guarantee that exercise of the First Amendment's protections.[184]

In contrast, courts that make a finding of an infringement of religious exercise contingent upon a judicial determination of religious compulsion, or of what constitutes membership or adherence to a particular religion, or upon the judicial interpretation of whether a certain restriction violates that religion, appear to entangle themselves in precisely the kind of theological exegesis that is outside the realm of judicial competence, and that Supreme Court precedent appears to prohibit on First Amendment grounds.[185]

Further, the restrictive definition of religious exercise under the "narrowing" approach is even more perplexing for claims brought under RLUIPA, which expressly provides that a "religious exercise" need not be compelled by, or central to, a system of religious belief, and that any ambiguities are to be resolved in favor of a *broad* protection of religious exercise.[186]

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181. *Id.* at 833 (internal quotation marks omitted).

182. *Id.* at 834–35 ("[The plaintiff's] conviction was recognized as religious but found to be inadequate because it was not claimed to represent a tenet of a religious organization of which he was a member. That ground for decision was clearly erroneous.").

183. *Id.*

184. *Id.*

185. *See* Presbyterian Church v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church, 393 U.S. 440, 450 (1969) ("[T]he departure-from-doctrine element of the Georgia implied trust theory requires the civil court to determine matters at the very core of a religion—the interpretation of particular church doctrines and the importance of those doctrines to the religion. Plainly, the First Amendment forbids civil courts from playing such a role."); Serbian E. Orthodox Diocese v. Milivojevich, 426 U.S. 696, 709–10 (1976) ("If civil courts undertake to resolve such controversies [over religious doctrine and practice] . . . hazards are ever present of inhibiting the free development of religious doctrine and of implicating secular interests in matters of purely ecclesiastical concern.").

186. 42 U.S.C. § 2000cc-5 (2012).

6. *The De Minimis Approach*

Finally, there is a noticeable analytical trend to downplay the significance of alleged free exercise violations in the context of sex offender civil commitment. Under this "de minimis" approach, courts are prone to discredit SVP free exercise claims by considering alleged infringements of the plaintiff's religious exercise as nominal, or at least of insufficient magnitude to be afforded constitutional protection.

For example, in *Young v. Bass*, the court found that the free exercise rights of a civilly committed Muslim[187] SVP were not violated when officials prevented him from fasting during Ramadan,[188] and from wearing a head covering in a common area.[189] Because the plaintiff was prevented from fasting on "only" two days, and from wearing his hat on only one day, any burden on his free exercise of religion was "*de minimis*."[190] Accordingly, as the plaintiff's injury "fail[ed] to rise to a constitutional dimension," neither of his claims survived summary judgment.[191]

Also, in *Marsh v. Liberty Behavioral Health Care, Inc.*, the court found no infringement of the right to free exercise where a committed SVP of the Zen Buddhist faith alleged that officials had taken actions to prohibit him from engaging in Buddhist meditation.[192] The court summarily concluded that the plaintiff's allegations, if true, failed to demonstrate a substantial burden on his ability to practice his religion.[193] In doing so, the court seemed effectively to treat the plaintiff's loss as de minimis.[194]

187. Specifically, the plaintiff "affiliated himself with the Moorish Science Temple of America." Young v. Bass, No. 01 C 7944, 2004 U.S. Dist. LEXIS 6023, at *4 (N.D. Ill. Apr. 6, 2004).

188. *Id.* at *7, *12–13, *15.

189. *Id.* at *11, *13, *21. The plaintiff professed that his religion "required [him] to keep his head covered at all times." *Id.* at *10–11.

190. *Id.* at *16, *21.

191. *Id.* at *16. *See also id.* at *21 (explaining that restriction on religious exercise did "not rise to a constitutional burden").

192. No. 2:06-cv-125-FtM-34SPC, 2008 U.S. Dist. LEXIS 24347, at *24. (M.D. Fla. Mar. 27, 2008). Specifically, the plaintiff alleged that officials had cancelled a session of group meditation, and confiscated from him certain religious possessions used for meditation, including a Zufu, or a pillow for sitting meditation, and a Zagu, a type of Buddhist garment. *Id.*

193. The court *did* analyze, under the *Turner* test, another of the plaintiff's free exercise claims regarding the facility's prohibition on martial arts; presumably, the court considered the loss of the plaintiff's right to practice martial arts for purposes of "enlightenment" as more significant than the loss of his right to meditate, even though the purpose of such meditation appears to have been the same: to achieve Buddhist enlightenment. *Id.*

194. In reaching this conclusion, the court also used another approach—that of conceptually broadening the scope of the plaintiff's asserted right to meditate. The court treated that right as if it were the same as the right to practice religion in general by determining that the plaintiff failed to show how the

Finally, some courts seem to employ an alternative form of the "de minimis" approach when addressing free exercise claims brought by committed SVPs in the particular context of sex offender treatment. SVPs often allege that treatment programs are compulsory because active participation in treatment serves as a precondition for the conferral of benefits and privileges, including eventual release. It is further argued that such coercive treatment is a violation of the First Amendment rights of free speech and free exercise because participation requires vocal interaction and active cooperation in matters that are at odds with some participants' religious beliefs.[195]

Courts commonly dismiss these types of claims, reasoning that the deprivations attendant upon failure to participate are not so severe as to render the treatment compulsory; consequently, the voluntary subjection of participants to a rehabilitative program that conflicts with their religious convictions precludes any infringement of the right to free exercise. Essentially, it seems that the trend is to minimize the significance of the burden on the plaintiff's right to free exercise, by minimizing the value of the privileges lost for refusal to participate in treatment.[196]

For example, in *Strutton v. Hooker*, the plaintiff alleged that his civil commitment facility had violated his free exercise rights by "requiring that he express beliefs or participate in treatment contrary to his beliefs."[197] Notwithstanding the plaintiff's subjection to "penalties for failing to participate," the court found that participation in treatment was not compulsory.[198] Since the treatment was voluntary, any burdens upon the plaintiff's religious convictions resulting from that treatment were of the plaintiff's own making, rather than an imposition by officials.

Nevertheless, the court found that those *same* penalties for failure to participate in treatment had "a coercive effect" with regard to the plaintiff's Establishment Clause claim, based on the use of Christian prayer during

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restrictions on his meditation "placed a substantial burden on his ability to *otherwise practice his chosen faith*." *Id.* (emphasis added).

195. The two rights—free speech and free exercise—are closely related in the treatment context. *See* W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 645 (1943) (Murphy, J., concurring) ("The right of freedom of thought and of religion as guaranteed by the Constitution against State action includes both the right to speak freely and the right to refrain from speaking at all . . . .").

196. *But see* Hydrick v. Hunter, 466 F. 3d 676, 693–94 (9th Cir. 2006) (explaining that while committed SVPs are "not actually forced" to forego their First Amendment rights, "the stakes for refusing to [participate] are so high that Plaintiffs' participation in treatment is almost compulsory"). Additionally, the court explained that "it is not yet clear the extent to which the State can condition privileges or advancement on participation in . . . treatment." *Id*. at 694.

197. No. 4:05CV02022ERW, 2008 U.S. Dist. LEXIS 75226, at *61 (E.D. Mo. Sept. 29, 2008).

198. *Id.* at *81.

treatment.[199] Thus, the court's rejection of the plaintiff's free exercise claim could not have been based simply on a conclusion that the deprivations entailing refusal to participate in treatment were not significant enough to render the treatment coercive, for the court concluded just the opposite. Rather, a more plausible explanation is that, underlying the court's finding that the identical treatment program was coercive for purposes of the Establishment Clause, but not coercive for purposes of the Free Exercise Clause, was the supposition that the violation of the plaintiff's right to religious exercise is a less serious violation than a corresponding violation of the Establishment Clause.[200] In other words, the court seems effectively to have found that any curtailment of the plaintiff's rights occasioned by the imposition of *otherwise coercive* treatment was, for purposes of free exercise, de minimis.

CONCLUSION

The protection to be afforded to the free exercise rights of civilly committed SVPs depends on the applicable legal standard that is used to evaluate their legal claims of infringement of those rights. While established legal standards exist for the evaluation of free exercise claims arising in other contexts, the context of SVP civil commitment is unique, and none of the existing legal standards clearly apply; or, where they do apply, the proper manner of their application is uncertain. The lack of guidance from a controlling legal standard is illustrated in the variety of conflicting approaches adopted by lower courts addressing the issue. Thus far, all of these approaches seem to fail adequately to address the issue. Further, there is significant litigation in this context (though few published cases), and it appears likely that this litigation will only increase in the future.[201] Thus, the need for a coherent, workable, and doctrinally sound approach to this novel issue is apparent.

One possible solution might be a modified strict scrutiny standard, under which an institutional regulation that restricts a civilly committed SVP's right to the free exercise of religion would be unconstitutional unless the government can show that the restriction is the least restrictive means of advancing a substantial state interest. This standard would show a measure of deference to the professional expertise of civil commitment officials, as

199. *Id.*

200. It is difficult to see how the coercion of Christianity in violation of the Establishment Clause in this context would not also be a coercion, for those of a different faith, to behave or profess in a manner contrary to their religious beliefs in violation of the Free Exercise Clause.

201. *See supra* note 120 and accompanying text.

they would have significant discretion to adopt measures in furtherance of numerous (substantial) institutional interests, not limited to the compelling interests of the order and safety of the facility. At the same time, such a standard might afford substantial protection to committed SVPs by requiring any regulations that incidentally restrict their exercise of religion to be achieved by the least restrictive means; such restrictions could not be justified merely on the grounds that they are rationally connected to the achievement of the state's interest.

Whatever legal standard is offered to fill in the analytical gap for the evaluation of free exercise claims brought by SVPs, any proposed standard should probably afford SVPs greater protection than convicted prisoners—the restriction of whose rights is in no small part justified on punitive grounds. Ideally, courts will develop a context-specific standard to address this novel situation, one that will adequately balance the government's interest in confining and treating dangerous sex offenders, with the interest of committed SVPs in their free exercise of religion.