Note

RESTRICTIONS ON PRISONERS' RELIGIOUS FREEDOM AS UNCONSTITUTIONAL CONDITIONS OF CONFINEMENT: AN EIGHTH AMENDMENT ARGUMENT

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INTRODUCTION

Not so long ago, the United States Supreme Court described one American prison as "a dark and evil world"[1] in which inmates were routinely raped, stabbed, shot, and tortured.[2] Many prisoners were knowingly exposed to communicable diseases[3] and were fed "fewer than 1,000 calories a day; their meals consisted primarily of four-inch squares of 'grue,' a substance created by mashing meat, potatoes, oleo, syrup, vegetables, eggs, and seasoning into a paste and baking the mixture in a pan."[4]

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1. Hutto v. Finney, 437 U.S. 678, 681 (1978) (internal quotation marks omitted) (quoting Holt v. Sarver, 309 F. Supp. 362, 381 (E.D. Ark. 1970)).

2. *See id.* at 681-82 nn.3-6.

3. *See id.* at 682-83 (discussing hepatitis and venereal diseases specifically). These conditions were imposed on prisoners in "punitive isolation." *Id.* at 682. Such inmates remained in isolation "indefinitely." *Id.* As many as 11 inmates were crowded into an 8 by 10 foot cell without windows or furniture. *See id.*

4. *Id.* at 683 (footnote omitted). *Hutto* was not an anomaly and is not an anachronism. The Supreme Court recently heard *Hudson v. McMillian*, 503 U.S. 1 (1992), which involved the following facts:

> [P]etitioner Keith Hudson was an inmate at the state penitentiary in Angola, Louisiana. Respondents Jack McMillian, Marvin Woods, and Arthur Mezo served as corrections security officers at the Angola facility. [One morning] McMillian . . . placed Hudson in handcuffs and shackles, took the prisoner out of his cell, and walked him toward the penitentiary's "administrative lockdown" area. Hudson testified that, on the way there, McMillian punched Hudson in the mouth, eyes, chest, and stomach while Woods held the inmate in place and kicked and punched him from behind. He further testified that Mezo, the supervisor on duty, watched the beating but merely told the officers "not to have too much fun."

Prison can be both dull and brutal. Inmates are stripped of freedom, social ties, and material possessions. They have time to pray and much to pray for, and may therefore cling fiercely to their spirituality.[5] Indeed, the importance of religion to some prisoners may be hard for those of us in the "free world" to grasp. In the words of one former prisoner: "The richest spiritual experiences I have known have not been in vaulted cathedrals surrounded by stained-glass windows but in the filthiest prison cells."[6]

Despite the central place religion occupies in many prisoners' lives, and despite the fact that the rehabilitative effects of religion may be significant,[7] inmates' religious freedoms are not well protected. The political branches have failed to guarantee such liberty, and the Supreme Court has held that the First Amendment applies only weakly in the prison setting.[8] Consequently, in this Note, I outline a new approach to the issue. I argue that the Eighth Amendment—which prohibits cruel and unusual punishment[9]—should be held to prohibit many currently accepted restrictions on religious exercise in prisons.

In Part I, I argue that protecting the religious freedom of prisoners is important, both to prisoners themselves and to society more broadly. Despite its importance, the religious freedom of prisoners is not currently well protected, as I detail in Part II. In Part III, the core of this Note, I argue that the Eighth Amendment should be held to prohibit some deprivations of religious freedom. This argument is based primarily on the Supreme Court's jurisprudence regarding "conditions of confinement," though other facets of Eighth Amendment doctrine also come into play. Then, in Part IV, I consider and reject two objections that might be made to the argument advanced in Part III. I discuss the theoretical and practical limitations of my proposal in the Conclusion.

Id. at 4; *see also* ACLU, *Alabama Prison "Hitching Posts" Ruled Unconstitutional* (last modified Feb. 10, 1997) <http://www.aclu.org/news/w021097c.html> (detailing repugnant disciplinary practices in Alabama prisons).

5. *See* HENRY G. COVERT, MINISTRY TO THE INCARCERATED 117 (1995) (noting that "[p]rison life leads inmates to look to the spiritual realm").

6. CHARLES W. COLSON, LIFE SENTENCE 151 (1979).

7. *See infra* notes 14-20 and accompanying text.

8. *See infra* notes 42-53 and accompanying text.

9. *See* U.S. CONST. amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.").

I. THE IMPORTANCE OF PROTECTING THE RELIGIOUS FREEDOM OF PRISONERS

The value of religious liberty is recognized by both philosophers[10] and politicians.[11] It is a notion that has been deeply and profoundly accepted by Americans.[12] In the words of our Supreme Court, "only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion."[13] It is, then, a tenet of American society that free exercise should be strongly protected, and the issue of prisoners' religious freedom should be examined through this lens.

Viewed through any lens, however, there are powerful reasons for protecting inmates' religious liberty. For example, religion may have significant rehabilitative effects. Early American prison officials certainly believed this,[14] and some contemporary data support the proposition.[15] Many religious prisoners—perhaps unsurprisingly—

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10. For example, John Rawls, easily the most influential contemporary political philosopher, avers: "The question of equal liberty of conscience [which he defines to include religious freedom] is settled. It is one of the fixed points of our considered judgments of justice." JOHN RAWLS, A THEORY OF JUSTICE 206 (1971).

11. *See infra* notes 100-14 and accompanying text (discussing the Religious Freedom Restoration Act (RFRA), which embodies Congress's devotion to the ideal of religious freedom). Religious freedom is also one of the rights identified in the United Nations Universal Declaration of Human Rights. *See Universal Declaration of Human Rights*, G.A. Res. 217, U.N. GAOR, 3d Sess., art. 18, at 71, 74, U.N. Doc. A/810 (1948).

12. *See, e.g.*, Michael W. McConnell, *Free Exercise Revisionism and the* Smith *Decision*, 57 U. CHI. L. REV. 1109, 1117-19 (1990) (discussing the early American history of protecting free exercise).

13. Wisconsin v. Yoder, 406 U.S. 205, 215 (1972); *see also* Cantwell v. Connecticut, 310 U.S. 296, 310 (1940) (terming religious freedom "essential" in a democratic system). *But cf.* Employment Div. v. Smith, 494 U.S. 872, 881-82 (1990) (purporting to harmonize with *Yoder* and its progeny but, in fact, severely limiting the rights of religious people to be exempted from laws which conflict with their religious beliefs).

14. *See, e.g.*, JOHN L. COWART, THE PRISON MINISTER'S HANDBOOK 33-34 (1996) (noting that most early American prisons provided chaplains and used religion as therapy for criminality).

15. *See generally* Joe Loconte, *Jailhouse Rock of Ages*, POL'Y REV., July-Aug. 1997, at 12, 12 (discussing domestic and international evidence that religion reduces recidivism); Andrew Skotnicki, *Religion and Rehabilitation*, 15 CRIM. JUST. ETHICS 34, 40-41 (1996) (citing theories that religious people commit fewer crimes); Center for Social Research, Religion and Prisons: Do Volunteer Religious Programs Reduce Recidivism? (1997) (unpublished study, on file with author) (stating that inmates who do not participate in prison religious programs are four times more likely to be re-arrested than otherwise similar inmates who participate extensively in such programs).

also adhere to this view.[16] To the extent that limitations on religious freedom reduce inmates' ability to practice their religions, such restrictions may carry increased recidivism as an attendant social cost.

The effect of religion on recidivism is essentially a specific application of a broader principle: religion can be a positive force in prisoners' lives. One inmate who found meaning and direction in religion said, "I don't look at prison as prison but as a monastery to do God's work."[17] Religious services can also provide inmates the opportunity to socialize with others in a constructive and cooperative way—an opportunity that is not common in prison.[18] Finally, religion can provide prisoners with the hope of personal change, and of a future in the free world.[19] It is neither in the interest of inmates nor in the interest of society as a whole to force prisoners to go without the humanizing benefits that religion can provide.[20]

A critic might contend that the issue is simple—the Eighth Amendment either does, or does not, protect inmates' free exercise; the question of whether such protection is "important" is politically interesting but constitutionally irrelevant. But the discussion presented in this Part connects in two ways with the constitutional argument that follows. First, I argue in Part III that some restrictions on inmates' religious freedoms are inconsistent with contemporary standards of decency, and are thus forbidden by the Eighth Amendment. That argument is made more complete by the foregoing sketch of the reasons that have led many people to conclude that such restrictions on free exercise are inappropriate.[21] Second, even if the argument I present in Part III is a sound one, it will make no difference unless lawyers are convinced that prisoners' freedoms are worth worrying about, and litigating. Judges must also be convinced that prisoners matter, and that their claims should be handled thoughtfully and seriously. Hopefully, the discussion in this Part will help foster such convictions.

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16. *See, e.g.*, HARRY R. DAMMER, PIETY IN PRISON 148 (1992) (noting that some inmates believe that religion "helps you change your life" and "gives you a straight path").

17. *Id.* at 149.

18. *See id.* at 161-64.

19. *See id.* at 148.

20. Of course, some prisoners may merely *pretend* to be religious, for a variety of reasons. *See id.* at 150-90, 240-41 (noting reasons such as group identity, social opportunity, and greater access to resources). The existence of these "fronters" should not be allowed to eviscerate the religious freedom of the authentically religious.

21. For example, most congressmen so concluded, as reflected in their passage of RFRA. *See infra* notes 111-14 and accompanying text.

II. THE RELIGIOUS FREEDOM OF PRISONERS IS POORLY PROTECTED

Unfortunately, prisoners' religious freedom is poorly protected. Neither the political branches nor the courts have provided a robust guarantee of this important liberty.

Federal prisons are managed directly by the executive branch.[22] The *Code of Federal Regulations* (C.F.R.) proclaims that prisoners shall have "reasonable and equitable opportunities to pursue religious beliefs and practices."[23] There is, however, a catch: religious exercise may be restrained out of concern for safety, security, or "good order,"[24] or because of scheduling problems, or a limited budget, or because a given inmate has not officially stated his religious preference, or because a chaplain has not approved an inmate for participation in a religious activity.[25] The exceptions eviscerate the rule. Indeed, the relevant portion of the C.F.R. has merited citation in only five federal cases.[26] In each of the five, the prisoner lost.[27]

Congress has also failed to provide a substantial guarantee of religious freedom to prisoners. It attempted to do so by passing the Religious Freedom Restoration Act of 1993 (RFRA),[28] which prohibited any limitation on inmates' religious freedom that could not pass strict scrutiny.[29] However, the Supreme Court held RFRA un-

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22. *See* 28 C.F.R. §§ 500-72 (1998) (laying out the regulations governing the Bureau of Prisons).

23. 28 C.F.R. § 548.10.

24. *Id.* Whether such concerns justify a restriction on free exercise is a discretionary decision to be made by the warden. *See id.*

25. *See* 28 C.F.R. § 548. Not all of these limitations apply to every type of religious exercise. For example, chaplains apparently must pre-approve inmates' written applications for religious diets, *see* 28 C.F.R. § 548.20, while other types of religious observance do not require such an application.

26. The five cases are: *O'Lone v. Estate of Shabazz*, 482 U.S. 342 (1987); *Johnson v. United States Bureau of Prisons*, No. 93-35198, 1993 WL 524120 (9th Cir. Dec. 15, 1993); *Davidson v. Chestnut*, No. 96 CIV. 1228 (LMM), 1998 WL 436527 (S.D.N.Y. July 28, 1998); *Sasnett v. Sullivan*, 908 F. Supp. 1429 (W.D. Wis. 1995); and *Grant v. Matthews*, No. 89-3194-R, 1992 WL 160926 (D. Kan. June 12, 1992).

27. *See O'Lone*, 482 U.S. at 353; *Johnson*, 1993 WL 524120, at *2; *Davidson*, 1998 WL 436527, at *7; *Sasnett*, 908 F. Supp. at 1450; *Grant*, 1992 WL 160926, at *4.

28. 42 U.S.C. § 2000bb (1994).

29. *See id.* § 2000bb-1 (forbidding substantial burdens on free exercise except those which are the "least restrictive means" of furthering a "compelling governmental interest"); *see also, e.g.*, Mack v. O'Leary, 80 F.3d 1175, 1178-81 (7th Cir. 1996) (applying RFRA's strict scrutiny to prisoners' religious freedom claims); *infra* notes 100-09 and accompanying text (discussing RFRA's applicability to prisoners). The practical effect of RFRA was to expand, significantly,

constitutional in *City of Boerne v. Flores*.[30] Perhaps chastened by *Boerne*, Congress has failed to pass any new legislation to protect the religious freedom of prisoners.[31]

To make matters worse, state governments have generally declined to guarantee greater liberty to their inmates than the federal government has provided to theirs.[32] Absent legislative action, state correctional employees—who are infamously indifferent to the needs of religious prisoners[33]—are unlikely to allow more than minimal religious exercise.[34] One state's secretary of corrections made his attitude plain, by threatening to eliminate *all* religious programs in the state's prisons, and by remarking that "a man can have a relationship with God alone in his cell."[35]

Thus, the federal and state governments' policy choices have left the task of protecting the religious liberty of prisoners to the courts.

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religious services in many penal institutions. *See* JAMES A. BECKFORD & SOPHIE GILLIAT, RELIGION IN PRISON 174-76 (1998).

RFRA was not *primarily* targeted at prisoners, of course; it was intended to legislatively reverse the Supreme Court's decision in *Employment Division v. Smith*, 494 U.S. 872 (1990). *See* 42 U.S.C. § 2000bb(b)(1). The literature on *Smith* and RFRA is vast; two pieces of note are Douglas Laycock, *Free Exercise and the Religious Freedom Restoration Act*, 62 FORDHAM L. REV. 883 (1994) and McConnell, *supra* note 12.

30. 117 S. Ct. 2157, 2172 (1997).

31. *But see infra* notes 115-19 and accompanying text (discussing pending legislation).

32. *See* Michael D. Goldhaber, *Religious Leaders Fear Implications of Recent Court Ruling*, DALLAS MORNING NEWS, July 19, 1997, at 1G (noting that only eight states provide robust protection for religious freedom); *see also, e.g.*, CAL. PENAL CODE §§ 4027, 5009 (West 1982 & Supp. 1998) (requiring only that inmates have "reasonable" opportunities to practice their religions). What the states do about religious exercise may ultimately be more important than what the federal government does, as the vast majority of prisoners are in state facilities. *See Department of Justice Press Release* (visited Aug. 27, 1998) <http://ojp.usdoj.gov/bjs/pub/press/pjim97.pr> (noting that 90% of America's prisoners are in state prisons). In the wake of *Boerne*, some states are considering, or have considered, passing their own statutory protections for religious freedom. Whether prisons ought to be covered by such legislation is often a contentious point. *See, e.g.*, Dan Bernstein, *Assembly Passes Religious Rights Bill*, FRESNO BEE, Aug. 22, 1998, at A14 (discussing California legislation); Steve Kloehn, *Edgar Amends Law on Religious Freedom*, CHI. TRIB., Aug. 15, 1998, at 6 (discussing Illinois legislation).

33. *See infra* notes 105-09 and accompanying text (discussing state prison directors' efforts to have prisoners excluded from the effects of RFRA).

34. Of course, the states must allow religious exercise that is constitutionally mandated under either the First or the Eighth Amendment. *See* Pell v. Procunier, 417 U.S. 817, 822 (1974) (applying the First Amendment to state prisoners); Francis v. Resweber, 329 U.S. 459, 463 (1947) (holding that the Eighth Amendment applies to the states through the Due Process Clause of the Fourteenth Amendment).

35. *Morning Edition: Effects of RFRA Nix* (National Public Radio broadcast, July 7, 1997) (quoting an unnamed secretary of corrections).

But the courts have not been receptive to prisoners' free exercise claims. The seminal Supreme Court decisions in this area are *Turner v. Safley*[36] and *O'Lone v. Estate of Shabazz*.[37]

Turner was a class action challenge to two prison regulations.[38] The first challenged regulation severely restricted inmates' right to correspond with other inmates, while the second barred inmates from marrying without the prison superintendent's permission.[39] The Court sustained the first regulation and struck down the second.[40] However, the real import of the case was not its narrow holding, but the standard that the Court applied to the inmates' constitutional claims. The Court held that "when a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests."[41]

O'Lone was decided eight days later. The *O'Lone* plaintiffs were Muslim inmates who, by the operation of prison work regulations, were prohibited from attending Jumu'ah, a Muslim worship service held on Friday afternoons.[42] They claimed that this state of affairs violated the Free Exercise Clause of the First Amendment.[43] The Court, reversing an en banc federal court of appeals decision, denied relief.[44] The Court quoted extensively from the *Turner* opinion, and applied the "rational relation to legitimate penological interests" test.[45]

Turner and *O'Lone* settled a lively debate over the appropriate level of scrutiny to be applied to inmates' First Amendment claims. While Justice O'Connor's majority opinion in *Turner* treated the issue as if the answer were clear from precedent,[46] both the district court that first heard the case and the Eighth Circuit, which reviewed

36. 482 U.S. 78 (1987).

37. 482 U.S. 342 (1987).

38. *See Turner*, 482 U.S. at 81.

39. *See id.* at 81-82.

40. *See id.* at 91.

41. *Id*. at 89.

42. *See O'Lone*, 482 U.S. at 344-45.

43. *See id.* at 347.

44. *See id.* at 345, 347-48.

45. *See id.* at 349-53.

46. *See Turner*, 482 U.S. at 84-89 (reviewing precedents and concluding that they require use of the "rational relation to legitimate penological interests" test).

it, applied strict scrutiny to the challenged regulations.[47] And in *O'Lone*, the Third Circuit had used a form of intermediate scrutiny.[48]

The highly deferential standard of review mandated by *Turner* and *O'Lone* has been used to "mechanically . . . uphold a variety of restrictions on prisoners' free exercise rights."[49] Among the claims that have been denied under the *Turner* test are Jewish inmates' requests for a kosher diet,[50] or at least one without pork;[51] Roman Catholics' requests to keep a rosary or scapular in their cells;[52] and Native American inmates' requests to be allowed to wear their hair long and to attend the sweat lodge purification ceremony that their religion requires.[53]

For religious inmates, then, the current picture is bleak. Neither the political branches nor the judiciary, at any level of government, currently offers a strong guarantee of religious liberty. The time may be ripe for a new approach.

III. THE EIGHTH AMENDMENT MAY PROTECT THE RELIGIOUS FREEDOM OF PRISONERS

An inmate who has been denied the opportunity to practice his religion is not likely to win a First Amendment suit, and is equally unlikely to find solace in the policies of the political branches of his federal and state governments. Perhaps, then, he should consider bringing an Eighth Amendment suit. Current Supreme Court juris-

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47. *See id.* at 83 (discussing the opinions of the lower courts); Safley v. Turner, 777 F.2d 1307, 1310-11 (8th Cir. 1985) (requiring strict scrutiny); Safley v. Turner, 586 F. Supp. 589, 595 (W.D. Mo. 1984) (requiring that the state show an important governmental interest and narrow tailoring, per *Procunier v. Martinez*, 416 U.S. 396 (1974)).

48. *See O'Lone*, 482 U.S. at 347-48 (discussing the opinions of the lower courts); Shabazz v. O'Lone, 782 F.2d 416, 420 (3d Cir. 1986) (requiring an inquiry into the tailoring of regulations and the viability of alternative, less restrictive measures). *But cf.* Shabazz v. O'Lone, 595 F. Supp. 928, 934 (D.N.J. 1984) (applying rational basis scrutiny).

49. Geoffrey S. Frankel, Note, *Untangling First Amendment Values: The Prisoners' Dilemma*, 59 GEO. WASH. L. REV. 1614, 1630 (1991). For a compilation of cases proving this point, see *id.* at 1630-34, 1641-42.

50. *See, e.g.*, Ben-Avraham v. Moses, No. 92-35604, 1993 WL 269611, at *3 (9th Cir. July 19, 1993). *But see* Ashelman v. Wawrzaszek, 111 F.3d 674, 678 (9th Cir. 1997) (granting such a request, but not expressly overruling *Ben-Avraham*).

51. *See, e.g.*, Burns v. Long, Nos. 92-7062, 92-7063, 1994 WL 709329, at *3 (D.C. Cir. Nov. 29, 1994) (per curiam).

52. *See, e.g.*, Friend v. Kolodzieczak, 923 F.2d 126, 128 (9th Cir. 1991).

53. *See, e.g.*, Hamilton v. Schriro, 74 F.3d 1545, 1551 (8th Cir. 1996). Many Native Americans see their hair as a gift of the Creator, and cut it only when a close friend or family member dies. *See id.* at 1547-48.

prudence regarding conditions of confinement would support an argument that some religious deprivations are cruel and unusual punishments.

A. Background

The original meaning of the Eighth Amendment's prohibition of cruel and unusual punishment has been the subject of substantial judicial[54] and academic[55] discussion. A rough consensus has emerged: most now agree that the Amendment was meant only to bar judges from imposing barbarous *types* of punishments (like drawing and quartering) as part of a defendant's sentence.[56]

But the Amendment has been read, in modern times, to prohibit much more. For example, it now prohibits the imposition of a punishment which is of an acceptable *type* but which—given the crime for which it is imposed—is excessive in *degree*.[57] And, more importantly for the purposes of this Note, it prohibits some nonjudicial behavior. Specifically, the Amendment has been held to prohibit prison administrators from confining prisoners in certain inhumane conditions.[58]

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54. *See, e.g.*, Helling v. McKinney, 509 U.S. 25, 38-40 (1993) (Thomas, J., dissenting) (analyzing the original meaning of the Amendment and arguing against its applicability to conditions of confinement cases); Hudson v. McMillian, 503 U.S. 1, 18-20 (1992) (Thomas, J., dissenting) (same); Gregg v. Georgia, 428 U.S. 153, 169-73 (1976) (plurality opinion) (surveying the Amendment's origins and its later judicial interpretations); Weems v. United States, 217 U.S. 349, 368-73 (1910) (discussing the history of the Amendment and its English antecedents). Interestingly, Justice Scalia joined Justice Thomas's dissents in *Hudson* and *Helling*, but was the author of the opinion of the Court in *Wilson v. Seiter*, 501 U.S. 294 (1991), where he applied the Eighth Amendment to a conditions of confinement case. *See id.* at 302.

55. Especially prominent is Anthony F. Granucci, *"Nor Cruel and Unusual Punishments Inflicted:" The Original Meaning*, 57 CAL. L. REV. 839 (1969). *See also, e.g.*, Jeffrey D. Bukowski, Comment, *The Eighth Amendment and Original Intent: Applying the Prohibition Against Cruel and Unusual Punishments to Prison Deprivation Cases Is Not Beyond the Bounds of History and Precedent*, 99 DICK. L. REV. 419 (1995) (arguing that although the Eighth Amendment was not originally understood to protect prisoners from conditions of confinement, the Supreme Court has properly concluded that confinement is itself a form of punishment subject to the Eighth Amendment).

56. *See* Granucci, *supra* note 55. At the Supreme Court level, the history of the Eighth Amendment has been most fully explored in the opinions of Justice Thomas, who is part of the consensus. *See supra* note 54; *see also* Furman v. Georgia, 408 U.S. 238, 242-45 (1972) (Douglas, J., concurring); *id.* at 258-64 (Brennan, J., concurring); *id.* at 316-22 (Marshall, J., concurring); *id.* at 376-79 (Burger, C.J., dissenting).

57. *See* Coker v. Georgia, 433 U.S. 584, 598 (1977) (holding that the death penalty "is an excessive penalty for the rapist who, as such, does not take human life").

58. *See, e.g.*, Estelle v. Gamble, 429 U.S. 97, 101-08 (1976) (applying, for the first time, the Eighth Amendment to a conditions of confinement case). Paradigmatic examples of forbidden

The history of the Court's "conditions of confinement" jurisprudence has been ably traced elsewhere,[59] but a brief recap may be useful here. The Court's first conditions case was *Estelle v. Gamble*.[60] In *Estelle*, a Texas prisoner argued that he had been subjected to cruel and unusual punishment because he had received deficient medical treatment from prison doctors after a work-related injury.[61] The Court concluded that because "infliction of . . . unnecessary suffering is inconsistent with contemporary standards of decency . . . [,] deliberate indifference to serious medical needs of prisoners constitutes the 'unnecessary and wanton infliction of pain' proscribed by the Eighth Amendment."[62] While acknowledging that the Framers would not likely have endorsed such an interpretation of the Amendment,[63] the Court supported its holding with reference both to precedent and to the commitment to "'dignity . . . and decency'"[64] embodied in the Amendment itself.[65]

Estelle was followed by a series of cases involving inmate complaints about, among other things, prison crowding,[66] shoddy facilities,[67] brutality by correctional officers,[68] and environmental tobacco

conditions are "deprivation[s] of . . . single, identifiable human need[s] such as food, warmth, or exercise." *Wilson*, 501 U.S. at 304.

59. *See, e.g.*, Bukowski, *supra* note 55, at 420-28.

60. 429 U.S. 97 (1976).

61. *See id.* at 99-101 (reciting the allegations made in the case). Gamble apparently was hit with a 600 pound bale of cotton, causing a painful back injury. *See id.* at 99 n.3. Despite the ineffectiveness of the medical treatments prescribed, Gamble was ordered back to work and was placed in solitary confinement when, on medical grounds, he refused. *See id.* at 100. Immediately prior to bringing suit, he had been suffering blackouts and chest pains, but was not allowed regular access to a doctor. *See id.* at 101.

62. *Id*. at 103-04 (quoting Gregg v. Georgia, 428 U.S. 153, 173 (1976) (plurality opinion)).

63. *See id.* at 102-03 (discussing the history of the Amendment).

64. *Id*. at 102 (quoting Jackson v. Bishop, 404 F.2d 571, 579 (8th Cir. 1968)).

65. Interestingly, the decision was virtually unanimous, with Justice Blackmun concurring only in the judgment, *see id.* at 108 (Blackmun, J., concurring), and only Justice Stevens filing a dissent—in which he expressed "no serious disagreement" with the majority. *See id.* (Stevens, J., dissenting).

66. *See* Rhodes v. Chapman, 452 U.S. 337 (1981).

67. *See* Wilson v. Seiter, 501 U.S. 294 (1991).

68. *See* Hudson v. McMillian, 503 U.S. 1 (1992).

smoke.[69] Of these cases, the most important was *Wilson v. Seiter*,[70] a case brought by Pearly Wilson, an Ohio prisoner who complained of "overcrowding, excessive noise, insufficient locker storage space, inadequate heating and cooling, improper ventilation, unclean and inadequate restrooms, unsanitary dining facilities and food preparation, and housing with mentally and physically ill inmates."[71] The Court held that prisoners suing over the conditions of their confinement can prevail only if they are able to satisfy a two-pronged test.[72] The *subjective* component of the *Wilson* test requires proof of a culpable mental state.[73] The prisoner must be able to show that a prison officer or employee was "deliberately indifferent," or worse, to the inmate's needs.[74] The *objective* component requires that the inmate be able to show that the deprivation conflicts with contemporary standards of decency.[75]

B. Applying the Wilson *Test to Religious Deprivations*

The conditions of confinement cases that the Court has heard so far have primarily involved threats to inmates' physical health.[76] But the body of doctrine to which these cases have given rise is not so limited. At least some deprivations of religious liberty appear to satisfy the *Wilson* test, and thus appear to be forbidden by the Eighth Amendment. The rest of this Part explores how Eighth Amendment religious freedom claims might fare under the *Wilson* line of cases.

1. *The Subjective Prong.* To satisfy the subjective prong of the *Wilson* test, an inmate must show that a member of the prison staff was deliberately indifferent, or worse, to the prisoner's needs.[77] For Eighth Amendment claims based on religious deprivations, the warden is likely to be the relevant staff member. Determining which re-

69. *See* Helling v. McKinney, 509 U.S. 25 (1993).

70. 501 U.S. 294 (1991).

71. *Id.* at 296.

72. *See id.* at 298 (mentioning both the subjective and objective prongs); *see also Helling*, 509 U.S. at 35-37 (evaluating an inmate's claim under each of the two prongs).

73. *See Wilson*, 501 U.S. at 298-304.

74. *Id.*

75. *Wilson* itself focused on the subjective prong, merely noting in passing the existence of the objective prong. *See id.* at 298-303. A good exposition of the requirements of the objective prong can be found in *Rhodes v. Chapman*, 452 U.S. 337, 345-47 (1981). *See also infra* Part III.B.2 (providing a detailed discussion of the objective component of the *Wilson* test).

76. *See supra* notes 59-75 and accompanying text.

77. *See supra* notes 73-74 and accompanying text.

ligious activities are permissible is one of his responsibilities.[78] Absent dereliction of duty, then, his decision to allow a particular level of religious freedom must certainly be a deliberate one. To the extent that the warden decides not to permit a certain type of religious exercise, he is manifesting indifference to the plight of those inmates who wish to engage in the forbidden type of worship.[79] To put this point another way: Prison is an institution of total control.[80] When a particular type of religious exercise is prohibited, it is because a prison official has expressly decided to prohibit it—and therein has manifested deliberate indifference to the needs of inmates seeking that type of exercise.

2. *The Objective Prong.* The objective prong of the *Wilson* test presents a difficult issue: how serious must a harm be before it rises to a constitutional level? According to the Court, a prisoner must show that he has been deprived of the "minimal civilized measure of life's necessities."[81] But this is not a constant standard, because "[n]o static 'test' can exist by which courts determine whether conditions of confinement are cruel and unusual . . . the Eighth Amendment 'must draw its meaning from the evolving standards of decency that mark

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78. See *supra* note 24 and accompanying text (discussing federal prison wardens' power to limit religious activities).

79. Of course, the warden might have mixed feelings or regrets about his decision, and thus might be, in some literal sense, *not* indifferent. But such an exploration of the warden's mental state is probably unnecessary. For example, several courts have found Eighth Amendment violations despite wardens' claims that they were not, in fact, indifferent to prisoners' needs but rather were constrained by inadequate funding. *See, e.g.*, Jones v. Johnson, 781 F.2d 769, 771 (9th Cir. 1986) (holding that poor conditions cannot be excused because of inadequate funding); Smith v. Sullivan, 611 F.2d 1039, 1043-44 (5th Cir. 1980) (same). *But see Wilson*, 501 U.S. at 301-02 (suggesting in dicta that literal deliberate indifference may always be required).

80. In the words of one eloquent federal judge:

> [P]rison is a complex of physical arrangements and of measures, all wholly governmental, all wholly performed by agents of government, which determine the total existence of certain human beings (except perhaps in the realm of the spirit, and inevitably there as well) from sundown to sundown, sleeping, waking, speaking, silent, working, playing, viewing, eating, voiding, reading, alone, with others. . . . State governments have not undertaken to require members of the general adult population to rise at a certain hour, retire at a certain hour, eat at certain hours, live for periods with no companionship whatever, wear certain clothing, or submit to oral and anal searches after visiting hours, nor have state governments undertaken to prohibit members of the general adult population from speaking to one another, wearing beards, embracing their spouses, or corresponding with their lovers.

Morales v. Schmidt, 340 F. Supp. 544, 550 (W.D. Wis. 1972).

81. Rhodes v. Chapman, 452 U.S. 337, 347 (1981); *accord* Jihad v. Wright, 929 F. Supp. 325, 331 (N.D. Ind. 1996).

the progress of a maturing society.'"[82] Ultimately, the Court has held, this focus on contemporary societal standards of decency requires an inquiry into "the public attitude toward a given sanction."[83]

The Court has identified several means of determining public opinion: history,[84] expert opinion,[85] and legislative action.[86] As will shortly become clear, the first two are of little use in evaluating the

82. *Rhodes*, 452 U.S. at 346 (quoting Trop v. Dulles, 356 U.S. 86, 101 (1958) (plurality opinion)). Even if a punishment satisfies contemporary standards of decency, it may still be unconstitutional if it does not comport with human dignity. *See, e.g.*, Gregg v. Georgia, 428 U.S. 153, 173 (1976) (plurality opinion) ("[P]ublic perceptions of standards of decency with respect to criminal sanctions are not conclusive [because penalties] also must accord with the dignity of man." (internal quotation marks omitted)). Because I conclude that religious deprivations fail to live up to modern standards of decency, and because the jurisprudence surrounding the "dignity of man" requirement is both sparse and unclear, I do not discuss the dignity requirement of the Eighth Amendment further.

83. *Gregg*, 428 U.S. at 173. The great benefit of grounding Eighth Amendment jurisprudence in public opinion is that it avoids having the subjective views of judges determine the scope of the Amendment. *See* Rummel v. Estelle, 445 U.S. 263, 275 (1980) (stating that "Eighth Amendment judgments should neither be nor appear to be merely the subjective views of individual Justices"). Still, the focus on the public's view of a given sanction makes for questionable doctrine for several reasons. First, allowing constitutional decisions to turn so directly on the public whim means unstable and unpredictable jurisprudence: must the Court reverse itself each time sentiment shifts? Second, to the extent that one conceives of the role of the Court as a countermajoritarian one, it is simply absurd to have the constitutionality of a practice turn on its popularity. The best piece of evidence in Eighth Amendment cases would then be a current Gallup Poll. *See, e.g.*, Furman v. Georgia, 408 U.S. 238, 361 (1972) (Marshall, J., concurring) (discussing the relevance of polls); *id.* at 385-86 & n.9 (Burger, C.J., dissenting) (actually citing a poll). Perhaps the liberals on the Court emphasized the role of public sentiment as a means of striking down the death penalty. The subsequent retrenchment in criminal law revealed the vulnerability of an Eighth Amendment edifice constructed on the sandy foundations of public opinion.

84. A fine example of this type of analysis is provided by Justice White, writing for the plurality, in *Coker v. Georgia*, 433 U.S. 584, 593-96 (1977) (discussing the criminal laws of the several states as they relate to the death penalty for rape and as "guidance in history").

85. *See, e.g.*, *Rhodes*, 452 U.S. at 348 n.13. (noting that expert opinions "'do not establish the constitutional minima[, but] rather . . . establish goals recommended by the organization in question'" (quoting Bell v. Wolfish, 441 U.S. 520, 543-44 n. 27 (1979))).

86. *See, e.g.*, *id.* at 346-47 ("[W]hen the question was whether capital punishment for certain crimes violated contemporary values, the Court looked for 'objective indicia' derived [in part] from . . . the action of state legislatures . . . ."); *Gregg*, 428 U.S. at 174 n.19 ("[L]egislative measures adopted by the people's chosen representatives provide one important means of ascertaining contemporary values . . . ."). The use of legislative action is somewhat paradoxical, since the Eighth Amendment must have been meant to express a limit to legislative activity. *See Furman*, 408 U.S. at 258 (Brennan, J., concurring) ("[T]he Clause imposes upon this Court the duty . . . to determine the constitutional validity of a challenged punishment, whatever that punishment may be."). Nonetheless, it is clear that this is the single most important factor in most Eighth Amendment judgments. *See infra* notes 96-99 and accompanying text.

cognizability of religious freedom claims under the Eighth Amendment, while the third clearly weighs in favor of allowing such claims.[87]

The Court's concern with whether a certain punishment (or practice) has been *historically* imposed (or followed) is somewhat puzzling in light of its focus on *evolving* and *contemporary* standards of decency. But even if it is a relevant factor in some situations, it should be discounted in this one. America's religious landscape is simply changing too rapidly for historical inquiry to carry much weight. Religious diversity is increasing, especially in prisons, where ethnic and religious minorities are overrepresented.[88] And Americans' religious tolerance is growing as well.[89] In any case, the historical record is equivocal. At one time, religion and religious instruction were pillars of prison life,[90] whereas in more recent years, prison administrators have been less friendly towards religion.[91]

If history is of little use in determining whether religious deprivations can satisfy the objective prong of the *Wilson* test, what about expert opinion? It, too, is problematic. First, because expert opinion does not generally depend on public opinion, its logical relevance is slim. This may explain why the Court has found little occasion to turn to expert opinion in an effort to determine the contours of the Eighth Amendment.[92] Lower courts have also generally downplayed the im-

87. One additional factor which a court might consider, but which is omitted from the list here, is whether or not juries frequently impose a given punishment when given the opportunity. *See Gregg*, 428 U.S. at 181-82. Although that makes sense as a measure of public opinion in the sentencing context, it does not in the context of prison conditions. The jury does not control the conditions of the prison to which they send the defendant.

88. *See, e.g.*, *Characteristics of the Federal Prison Population, 1998* (visited Feb. 19, 1999) <http://www.dev.infoplease.com/ipa/A0193950.html> (noting that 40.3% of federal prisoners are black, and that 28.3% are hispanic); Mack v. O'Leary, 80 F.3d 1175, 1177 (7th Cir. 1996) (noting that there are "more than 300 religious denominations" at one Illinois prison alone); *cf.* BECKFORD & GILLIAT, *supra* note 29, at 2, 25-55 (noting that in English prisons, "a growing number of prisoners . . . are declaring themselves to be, for example, Buddhists, Hindus, Muslims, or Sikhs").

89. *See Review: America's Middle Class: Moral but Not Moralising*, ECONOMIST, April 18, 1998, at 8, 8 (noting signs of increased tolerance, such as the fact that "evangelical Protestants have ceased to call adherents of other faiths 'infidels,'" and concluding that "Americans have managed a rare thing: they are both religious and tolerant").

90. *See supra* note 14 and accompanying text.

91. *See supra* notes 33-35 and accompanying text.

92. *See* Rhodes v. Chapman, 452 U.S. 337, 348 n.13 (1981) (noting that expert opinion is of slight import in making Eighth Amendment determinations).

portance of expert opinion.[93] Moreover, expert opinion on inmates' free exercise is mixed. Correctional professionals tend to be suspicious of religious activity,[94] while most religious leaders and many policymakers support broader protection for prisoners' religious liberty.[95]

Unlike the inquiries into history and expert opinion, the inquiry into legislative action does shed light on the cognizability of religious freedom claims under the Eighth Amendment. This alone would justify a detailed examination of recent legislative events. But there is another reason to conduct such a review—legislative action is the most important factor in Eighth Amendment jurisprudence. In the words of Justice Powell, "the first indicator of the public's attitude [and thus of contemporary standards of decency] must always be found in the legislative judgments of the people's chosen representatives."[96]

In the most common type of Eighth Amendment case, a court examines a condition or punishment that has been approved by the legislature. In such a situation, the Supreme Court recommends restraint. After all, judges are not democratically elected and so may be less likely than legislators to serve as a "'good reflex of a democratic society.'"[97] Consequently, a heavy burden normally rests on a plaintiff who brings an Eighth Amendment challenge.[98]

Ultimately, this makes sense, partly "because the constitutional test is intertwined with an assessment of contemporary standards and the legislative judgment weighs heavily in ascertaining such stan-

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93. *See, e.g.*, Hoptowit v. Ray, 682 F.2d 1237, 1246 (9th Cir. 1982) ("[Expert] opinions will not ordinarily establish constitutional minima. . . . [T]hey weigh less heavily . . . than what the general public would consider decent.").

94. *See supra* notes 33-35 and accompanying text.

95. *See, e.g.*, *infra* notes 105-09, 113-14 (discussing the Senate's rejection of an amendment which would have exempted prisons from RFRA).

96. Furman v. Georgia, 408 U.S. 238, 436 (1972) (Powell, J., dissenting). In the *Gregg* opinion, analysis of the legislatures' positions is given pride of place in the Eighth Amendment analysis. *See* Gregg v. Georgia, 428 U.S. 153, 162-68, 174-76, 179-81, 232 (1976) (opinions of various Justices). It also takes up the greatest amount of space in that opinion, in *Furman*, and in other important Eighth Amendment cases. *See id.*; Furman v. Georgia, 408 U.S. 238, 296-300, 336-42, 383-86, 412-13, 417-18, 431-33, 464-65 (1972) (opinions of various Justices); Estelle v. Gamble, 429 U.S. 97, 103 (1976) ("The infliction of such unnecessary suffering is inconsistent with contemporary standards of decency *as manifested in modern legislation*." (emphasis added)).

97. *Gregg*, 428 U.S. at 175 (quoting Dennis v. United States, 341 U.S. 494, 525 (1951) (Frankfurter, J., concurring)).

98. *See id.*

dards. 'In a democratic society legislatures, not courts, are constituted to respond to the will and consequently the moral values of the people.'"[99]

Eighth Amendment challenges to deprivations of religious freedom are, however, anomalous in this respect. Although the religious freedoms of inmates are poorly protected,[100] this state of affairs exists *despite*, rather than *because of*, the actions of the national legislature.[101] Congress attempted to fortify religious exercise in the prisons through RFRA[102] but was rebuffed by the Court.[103]

Indeed, both the Senate and House reports on RFRA explicitly criticized *O'Lone*, the case in which the Court first applied the "rational relation to legitimate penological interests" test in the context of religious freedom.[104] During RFRA's pendency, all fifty state prison directors signed a letter asking Congress not to require strict scrutiny in the prison context.[105] This letter led to the proposal of an amendment, the Reid Amendment,[106] to exempt prisons from RFRA's purview.[107] After substantial debate,[108] the Amendment was

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99. *Id.* (quoting *Furman*, 408 U.S. at 383 (Burger, C.J., dissenting)).

100. *See supra* Part II.

101. Although the Court has most often discussed the role of state legislatures, this is only because most criminal sanctions are determined at the state level. It is clear that the actions of the national legislature are also relevant. *See Gregg*, 428 U.S. at 180 (discussing Congress's actions). For present purposes, the actions of the national legislature are more illuminating than those of the state legislatures, because Congress has spoken with a clear voice on the issue of religious freedom in prisons, *see infra* notes 111-14 and accompanying text, while the states are still struggling with the issue, *see supra* note 32.

102. *See* Daniel J. Solove, Note, *Faith Profaned: The Religious Freedom Restoration Act and Religion in the Prisons*, 106 YALE L.J. 459, 470-73 (1996) (providing an excellent discussion of RFRA's legislative history).

103. *See* City of Boerne v. Flores, 117 S. Ct 2157, 2172 (1997) (finding RFRA unconstitutional).

104. *See* S. REP. NO. 103-111, at 9-11 (1993), *reprinted in* 1993 U.S.C.C.A.N. 1892, 1898-1901; H.R. REP. NO. 103-88, at 7-8 (1993); *see generally supra* notes 42-45 and accompanying text (discussing *O'Lone*).

105. *See* 139 CONG. REC. S14,355 (daily ed. Oct. 26, 1993) (reprinting the letter). The fear appeared to be twofold: first, that a higher level of protection for religion would cause more prisoner free exercise suits, and second, that more such suits would succeed, requiring expensive accommodations. *See id.*

106. The Amendment was named after a primary sponsor, Senator Harry Reid.

107. On January 28, 1997, Senator Reid introduced a bill which again sought to exempt prisoners from the protections of RFRA. *See* S. 206, 105th Cong. (1997). Since RFRA was struck down by the Court just months later, the Senate never voted on the bill.

108. The debate over the Reid Amendment was slated to last two-and-one-half hours, significantly longer than the debate over RFRA itself. *See* 139 CONG. REC. S12,463 (daily ed. Sept. 23, 1993) (statement of Sen. Wellstone) (setting the duration of the debate). The bulk of

rejected,[109] and RFRA was passed—and signed into law—fully applicable to the nation's prisons.

There is a conceptual asymmetry here. A sanction that has been conscientiously considered and embraced by a legislature will almost always be held to be *consistent* with the Eighth Amendment.[110] Legislative *disapproval* of a given sanction, on the other hand, does not necessarily imply that the punishment is *inconsistent* with the Eighth Amendment's requirements. Why? Because the legislature may merely be opining that a given punishment is bad policy, not that it fails to live up to contemporary standards of decency. For example, if a state legislature were to decide that supervised release was too risky to impose, that could hardly count as evidence that supervised release is inconsistent with contemporary standards of decency.

But RFRA was not a mere administrative judgment.[111] The legislative history of RFRA indicates that Congress felt that religious

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the debate actually occurred on October 26, 1993. *See* 139 CONG. REC. S14,350–68 (daily ed. Oct. 26, 1993).

One of the issues discussed at length in the debate was whether or not religious prisoners should be given food that comports with their religious dietary requirements. Senator Reid himself appeared to believe that religious prisoners were routinely granted dietary accommodations by prison wardens. *See* 139 CONG. REC. S14,354 (daily ed. Oct. 26, 1993). However, even in the most progressive jurisdictions, accommodation is hit-or-miss, *see, e.g.*, Ben-Avraham v. Moses, No. 92-35604, 1993 WL 269611, at *1-3 (9th Cir. July 19, 1993) (rejecting a Jewish inmate's request for a kosher diet), and even then may be due to judicial intervention, *see generally* Ashelman v. Wawrzaszek, 111 F.3d 674 (9th Cir. 1997) (granting a Jewish inmate's request for a kosher diet on First Amendment grounds). Ironically, a co-sponsor of the Amendment, Wyoming's Alan Simpson, thought that RFRA would, unhappily, bring about just such accommodations as Senator Reid already believed to exist: "Prisoners could demand things such as specially prepared food; the right to pray three times a day . . . ." 139 CONG. REC. S14,358 (daily ed. Oct. 26, 1993).

109. The vote was 58 to 41 (with one abstention). *See* 139 CONG. REC. S14,468 (daily ed. Oct. 27, 1993).

110. The death penalty cases are evidence of this. The Court held the death penalty unconstitutional in *Furman v. Georgia*, 408 U.S. 238 (1972). But when 35 states immediately passed new capital punishment statutes in an effort to save the death penalty, the Court was forced to reverse its position. *See* Gregg v. Georgia, 428 U.S. 153, 179-81 (1976) (plurality opinion).

111. Another implausible argument would run as follows: Suppose that RFRA was *not* Congress's way of expressing its opinion about the decency of religious deprivations in prisons. Suppose, rather, that it was merely expressing its collective *academic* opinion about the correct interpretation of the First Amendment. In such a case, no Eighth Amendment consequences would follow from RFRA's passage.

There is some support for this argument. A few of RFRA's sponsors used the language of constitutional law in arguing for the bill. Senator Hatch, for example, claimed that "[t]he *Smith* case was wrongly decided," and bemoaned the passing of "the compelling interest standard." 139 CONG. REC. S14,353 (daily ed. Oct. 26, 1993). On the connection between *Smith* and RFRA, see *supra* note 29.

freedom was more a matter of principle than of policy.[112] For example, conservative Senator Orrin Hatch of Utah proclaimed that rejecting the Reid Amendment was simply "the right thing to do,"[113] independent of the rehabilitative benefits of religion.[114]

While RFRA did not survive Supreme Court review, its passage was not meaningless. It still stands as evidence of legislative concern for religious prisoners, and consequently strongly supports the cognizability of Eighth Amendment religious freedom claims.

A recent development reinforces this point. The Religious Liberty Protection Act of 1998 (RLPA) has just been introduced in both houses of Congress.[115] The bill, clearly meant to reach as far as the Supreme Court will allow, provides exactly the same level of protection to religion as RFRA did—strict scrutiny for all actions which substantially burden free exercise.[116] The difference between RFRA and RLPA is that RLPA is grounded in the Commerce Clause, rather than in the Fourteenth Amendment, and so only affects religious exercise that has some link to interstate commerce.[117]

But statements like this were the exception, not the rule. Most Senators appeared clear on the distinction between the statutory right they were creating and the constitutional rights defined by the Court. *See, e.g.*, 139 CONG. REC. S14,350–51 (daily ed. Oct. 26, 1993) (statement of Sen. Kennedy) (delineating the difference between the two). The decision to pass RFRA was not a matter of constitutional law. This was even more true of the Reid Amendment. In debates about the Amendment, there was no talk of the intricacies of constitutional interpretation; rather, several legislators noted that the tide of public opinion flowed strongly against the Amendment. *See, e.g.*, 139 CONG. REC. S14,362 (daily ed. Oct. 26, 1993) (statement of Sen. Hatch) (discussing opposition to the Amendment). This assessment of public opinion directly supports the idea that religious deprivations contravene modern standards of decency.

112. *See, e.g.*, 139 CONG. REC. S14,462 (daily ed. Oct. 27, 1993) (statement of Sen. Lieberman) (arguing that it is "dramatic" and improper to permit prisoners' free exercise to be restricted more easily than that of other citizens). Of course, it was *also* clearly a policy matter. As Senator Kennedy proclaimed: "We would encourage prisoners to be religious. There is every reason to believe that doing so will increase the likelihood that a prisoner will be rehabilitat[ed]." 139 CONG. REC. S14,351 (daily ed. Oct. 26, 1993).

113. 139 CONG. REC. S14,362 (daily ed. Oct. 26, 1993).

114. With which he was impressed. *See id.*; *cf. supra* notes 15-20 and accompanying text (discussing religion and rehabilitation).

115. *See* H.R. 4019, 105th Cong. (1998); S. 2148, 105th Cong. (1998).

116. *See* H.R. 4019 § 2(a)-(b); S. 2148 § 2(a)-(b).

117. *See* H.R. 4019 § 2(a); S. 2148 § 2(a). This provision is controversial and may not survive, throwing the entire future of RLPA into question. *See House Subcommittee Upholds Principles of Federalism* (visited Aug. 29, 1998) <http://www.hslda.org/media/releases/docs/08-07-98.html> (media release) (noting that the reference to the Commerce Clause has been cut from the House version of RLPA, but that it may be reinstated).

Prisons are not exempted from RLPA;[118] in light of the history of RFRA, including the defeat of the Reid Amendment, this surely indicates Congress's continuing desire to protect prisoners' free exercise. But because both the future and the scope of RLPA are uncertain, it would be unwise to rely upon it to protect prisoners' religious rights.[119]

A final factor the Court has identified as relevant in assessing conditions of confinement claims is that prison is an environment of total control.[120] Unlike the inquiries into history and legislative action, recognizing that prisons are institutions of total control does not reveal public opinion and is not probative of contemporary standards of decency. Nonetheless, the Court has found it important that inmates are utterly dependent on guards and administrators for a number of essential items, services, and activities; because prisoners have no access to these things other than through their keepers, prison administrators should not casually close off inmates' access. For example, as the Court observed, "[a]n inmate must rely on prison authorities to treat his medical needs; if the authorities fail to do so, those needs will not be met."[121]

Religious exercise is one of the essential activities that prison authorities may cut off. The *Code of Federal Regulations* permits "the Warden [to] limit attendance at or discontinue a religious activity"[122] on a variety of grounds.[123] This situation is not unique to federal prisons; states also typically empower prison wardens to restrict inmates' religious freedom.[124]

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118. The only mention of prisons or inmates is in section 4(c) of the bill, which notes merely that prisoner suits are subject to the Prison Litigation Reform Act. *See* H.R. 4019 § 4(c); S. 2148 § 4(c). Advocates of increased religious freedom in prisons are behind the bill. *See, e.g.*, *Religious Liberty Protection Act: Hearing on H.R. 4019 Before the Subcomm. on the Constitution of the House Comm. on the Judiciary*, 105th Cong. (1998) (statement of Pat Nolan, President, Justice Fellowship), *available in* 1998 WL 12762197.

119. *See supra* note 117 (discussing RLPA's possible emasculation by amendment).

120. *See, e.g.*, Helling v. McKinney, 509 U.S. 25, 31-32 (1993) (stating that "'when the State by the affirmative exercise of its power so restrains an individual's liberty that it renders him unable to care for himself'" it must provide for his basic human needs (quoting DeShaney v. Winnebago County Dep't of Soc. Servs., 489 U.S. 189, 199-200 (1989))).

121. Estelle v. Gamble, 429 U.S. 97, 103 (1976).

122. 28 C.F.R. § 548.10(b) (1997).

123. *See supra* notes 24-25 and accompanying text (discussing the many grounds on which religious exercise of federal prisoners may be limited).

124. *See, e.g.*, N.Y. CORRECT. LAW § 610 (McKinney 1997) (stating that prisoners' free exercise of religion must be "consistent with the proper discipline and management of the institution"); *supra* note 32 (discussing California's system).

Some might argue that restricting religious *programs* does not equate with limiting religious *freedom*. But merely being able to pray at night in one's cell is not adequate religious exercise. Group worship is an essential part of most religions,[125] while others require worship at particular times[126] or places,[127] or involve other commands or prohibitions with which prisoners cannot conform absent some action by the prison administrators.[128] The situation is analogous to the provision of medical care; adequate medical care and adequate spiritual care both depend on the sponsorship of prison officials. Thus, the fact that prison is an institution of total control weighs in favor of allowing Eighth Amendment religious freedom claims.

In short, extant Eighth Amendment doctrine strongly suggests that some limitations on inmates' religious freedom would violate the Amendment. RFRA and RLPA are legislative actions which embody America's evolving standards of decency. They show that it is no longer thought acceptable to deprive inmates of important avenues of spiritual exercise—at least without a demanding inquiry into the reasons for such restrictions. The validity of this argument is bolstered by a recognition that prison is an environment of total control, in which inmates are wholly dependent on prison staff for meaningful religious exercise.

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125. *See* Walker v. Mintzes, 771 F.2d 920, 930 (6th Cir. 1985) ("Most religious faiths give a central role to congregate religious services. It is an important aspect of religious socialization, and it imparts a sense of religious fellowship which deepens religious conviction."). For example, Rastafarians engage in Issembly, or religious conversation, as an essential part of their religious practice. *See* Benjamin v. Coughlin, 905 F.2d 571, 573 (2d Cir. 1990). Catholics, of course, attend Mass, the very name of which suggests a group activity. Ethnologically, a major reason for religious participation is a desire to connect with others—a desire that is especially strong in the isolating world of prison. *See* DAMMER, *supra* note 16, at 159-65.

126. For example, Muslims pray facing east five times per day; all the major religions have some special holy days. *See* JOHN L. ESPOSITO, ISLAM: THE STRAIGHT PATH 90 (1988).

127. Native Americans' religious ceremonies often take place in sweat lodges, for example. *See* Hamilton v. Schriro, 74 F.3d 1545, 1548 (8th Cir. 1996) (discussing the content of sweat lodge ceremonies and relating testimony respecting the religious importance of such ceremonies).

128. For example, many religions (including, among others, Islam, Judaism, Rastafarianism, some sects of Buddhism, and Jainism) require adherents to adopt certain dietary practices. *See, e.g.*, Ashelman v. Wawrzaszek, 111 F.3d 674, 675 n.2 (9th Cir. 1997) (discussing Jewish dietary strictures); Abdul-Malik v. Goord, No. 96 CIV. 1021 (DLC), 1997 U.S. Dist. LEXIS 2047, at *4-5 (S.D.N.Y. Feb. 26, 1997) (discussing Muslim dietary laws). Absent the cooperation of prison officials, it would be virtually impossible for strict adherents to these diets to receive adequate nutrition. Consequently, this form of religious exercise is utterly dependent on the whims of the wardens.

IV. OBJECTIONS AND REPLIES

A. Religious Freedom and (Physical?) Pain

One objection that could be advanced against the preceding argument can be summarized as follows: An Eighth Amendment violation requires a showing of pain. Religious deprivations are not really 'painful,' and so cannot be actionable.

A related argument would be that the Prisoner Litigation Reform Act (PLRA)[129] forbids inmates from bringing suits in which only psychological injuries are alleged. These two connected positions will be considered in turn.

1. *Pain and the Eighth Amendment.* While at least one court has rejected an Eighth Amendment religious freedom claim because the inmate plaintiffs failed to show an infliction of pain,[130] this view is deficient for several reasons. First, a deprivation of religious freedom can be said to be *psychologically* painful,[131] and psychological harms are almost certainly actionable under the Eighth Amendment. Justice Blackmun wrote:

> It is not hard to imagine inflictions of psychological harm . . . that might prove to be cruel and unusual punishment . . . . "Pain" in its ordinary meaning surely includes a notion of psychological harm. I am unaware of any precedent of this Court to the effect that psychological pain is not cognizable for constitutional purposes. If anything, our precedent is to the contrary.[132]

Various lower courts have come to the same conclusion. For example, in *Frazier v. Ward*,[133] a case involving visual rectal inspections of New York prisoners, the court found that when highly invasive

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129. Pub. L. No. 104-134, 110 Stat. 1321 (1996) (codified as amended at 18 U.S.C. § 3626, 28 U.S.C. § 1915, 28 U.S.C. § 1346, 42 U.S.C. § 1997, and other scattered sections (1998)).

130. *See* Lucero v. Hensley, 920 F. Supp. 1067, 1074 (C.D. Cal. 1996) (holding that because Native Americans deprived of religious artifacts and denied a chaplain "do not allege any infliction of pain" they could not state a claim).

131. *See supra* Introduction, Part I (describing the psychological importance of religion to some prisoners).

132. Hudson v. McMillian, 503 U.S. 1, 16 (1992) (Blackmun, J., concurring); *see also* Julie M. Riewe, Note, *The Least Among Us: Unconstitutional Changes in Prisoner Litigation Under the Prison Litigation Reform Act of 1995*, 47 DUKE L.J. 117, 152-54 (1997) (discussing psychological pain and the Eighth Amendment).

133. 426 F. Supp. 1354 (N.D.N.Y. 1977).

searches were not grounded in *any* appropriate security concern, they were "dehumanizing"[134] and violative of the Eighth Amendment.[135]

Even if psychological harm were not actionable under the Eighth Amendment, however, some prisoners deprived of religious liberty would still be able to state causes of action. In some cases, a denial of religious freedom leads, directly if not immediately, to a physically painful result. This class of "derived" Eighth Amendment claims is well illustrated by *Jolly v. Coughlin*.[136] The case centered around the New York prison system's requirement that all inmates be tested annually for latent tuberculosis.[137] The TB test involved the injection of a purified protein derivative under the skin.[138] Plaintiff Jolly, a Rastafarian, refused to take the test on the grounds that his religion prohibited accepting artificial substances into the body.[139] As a consequence, Jolly was placed in "medical keeplock," a form of administrative confinement that allowed the inmate to leave his cell for only ten minutes each week (for a shower).[140] Despite its name, medical keeplock had no medical significance; it did not involve respiratory isolation.[141] Indeed, had Jolly tested positive for latent tuberculosis, he would *still* not have been respiratorily isolated from the rest of the prison (unlike those with active TB).[142] As a consequence of his three-and-a-half years in keeplock, Jolly alleged that he suf-

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134. *Id.* at 1366. This conclusion certainly appeared warranted by the evidence. One inmate who had been subjected to the searches described them as follows:

> [J]ust about every time I came out [of the cell block where he was housed (the inmate was naked at this point)] it was always anywhere from six to eight, and there has been occasions where there was approximately 12 officers . . And one particular officer directs you to lift your arms to examine your arm pits. He asks you to open your mouth, wag your tongue, run your fingers through your hair, lift your testicles, skin back your penis, then you are directed to turn around, lift your feet, left and right foot, and bend over, and that's the most humiliating part of the whole procedure in the sense there would be a lot of oohs and aahs and good show . . . .

Id. at 1363 (ellipses in original).

135. *See id.* at 1366; *see also* Show v. Patterson, 955 F. Supp. 182, 191 (S.D.N.Y. 1997) (concluding that psychological pain may constitute an Eighth Amendment violation under certain circumstances); Jones v. Banks, 892 F. Supp. 988, 990 (N.D. Ill. 1995) (stating that a "brutal and demeaning attack" on an inmate's psyche would be actionable).

136. 76 F.3d 468 (2d Cir. 1996).

137. *See id.* at 471-72.

138. *See id.* at 471.

139. *See id.* at 472.

140. *See id.*

141. *See id.*

142. *See id.*

fered from "headaches, hair loss, rashes, and an inability to stand or walk without difficulty."[143]

Jolly's inability to get any meaningful exercise, and the health harms he suffered as a result, were the basis for the Second Circuit's determination that the Eighth Amendment was probably violated.[144] The crucial point for present purposes is that Jolly's religious liberties had not been curtailed directly, because he had not been forced to undergo the test. The court concluded, however, that the Eighth Amendment was implicated because he had been placed "in the position of choosing to follow his religious beliefs or to improve his conditions of confinement."[145] This sort of case,[146] where a prisoner can comply with the tenets of his religion only by undergoing significant physical deprivation,[147] shows that attempts to curtail religious liberty may result in physical harms.[148]

Jordan v. Gardner[149] is another case involving a physical harm resulting from a psychological one. There, the Ninth Circuit ruled that male guards could not perform extensive clothed body searches on female inmates.[150] The court wrote that "[o]ne [inmate], who had a

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143. *Id.*

144. *See id.* at 480-81. The court was evaluating a preliminary injunction issued by a district court, and so was attempting to decide if the plaintiff had shown "a substantial likelihood of success on the merits" of his claim. *Id.* at 480.

145. *Id.* at 481.

146. For other examples of this kind of claim, see *Beyah v. Coughlin*, 789 F.2d 986 (2d Cir. 1986) (involving the hygiene problems of religious prisoners who alleged that they were not afforded pork-free soap) and *Jihad v. Wright*, 929 F. Supp. 325, 330-31 (N.D. Ind. 1996) (following *Jolly* on similar facts).

147. A choice the Second Circuit termed "not meaningful, much less constitutional." *Jolly*, 76 F.3d at 481.

148. One of the most interesting subtypes of derived Eighth Amendment claim involves adherents to religions that require specific dietary practices. It is at least imaginable that a prisoner could refuse food because it was unacceptable to her on religious grounds, and sue for relief on the theory that she was, effectively, being starved by the prison. *Cf.* Burns v. Long, Nos. 92-7602, 92-7063, 1994 WL 709329, at *3 (D.C. Cir. Nov. 29, 1994) (rejecting a malnourishment claim on factual grounds, but implicitly accepting the legal claim that it would be actionable if proven); Chapman v. Pickett, 491 F. Supp. 967, 972 (C.D. Ill. 1980) (finding a First Amendment violation where a prison did not accommodate a Muslim inmate's request not to handle pork).

149. 986 F.2d 1521 (9th Cir. 1993)

150. *See id.* at 1530-31. These searches were described by the court as follows:

> During the cross-gender clothed body search, the male guard stands next to the female inmate and thoroughly runs his hands over her clothed body starting with her neck and working down to her feet. According to the prison training material, a guard is to "[u]se a flat hand and pushing motion across the [inmate's] crotch area." The guard must "[p]ush inward and upward when searching the crotch and upper thighs of the inmate." All seams in the leg and the crotch area are to be "squeez[ed]

long history of sexual abuse by men, unwillingly submitted to a cross-gender clothed body search and suffered severe distress: she had to have her fingers pried loose from bars she had grabbed during the search, and she vomited after returning to her cell block."[151]

While not every inmate who suffers a psychological harm will be able to point to a physical manifestation of the injury, *Jolly* and *Jordan* make clear that for some inmates, even a restrictive interpretation of the word "pain" will not preclude Eighth Amendment claims.

2. *The Prison Litigation Reform Act.* Even if psychological and emotional injuries are cognizable under the Eighth Amendment, it might be argued that the Prison Litigation Reform Act (PLRA) prohibits inmates from bringing claims based only on such injuries. The PLRA provides, in part, that "[n]o Federal civil action may be brought by a prisoner confined in a jail, prison, or other correctional facility, for mental or emotional injury suffered while in custody without a prior showing of physical injury."[152] Because religious deprivations often will not produce physical injuries,[153] it might be thought that the PLRA prevents litigation to protect religious freedom.

This provision of the PLRA may not be constitutional, because it may impermissibly limit the courts' ability to fashion remedies for constitutional violations,[154] and may violate the Equal Protection Clause by singling out prisoners as the only group whose access to the courts is to be limited.[155] Fortunately, for present purposes it is not necessary to resolve the complex constitutional debate, because the physical injury provision of the PLRA has been largely eviscerated

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> and knead[ed]." Using the back of the hand, the guard also is to search the breast area in a sweeping motion, so that the breasts will be "flattened."

Id. at 1523 (alterations in original) (citations omitted).

151. *Id.*

152. 42 U.S.C.A. § 1997e(e) (West 1998 Supp.).

153. There may, of course, be physical manifestations of emotional injuries, such as headaches, weight loss, and so forth. *See* Riewe, *supra* note 132, at 154; *supra* notes 136-51 and accompanying text. But not every psychologically damaged person will necessarily suffer attendant physical problems. And at least one court seems to have rejected the use of such maladies as qualifying physical injuries. *See* Cain v. Virginia, 982 F. Supp. 1132, 1135 (E.D. Va. 1997) (holding, apparently, that allegations of severe headaches and stomach cramps were not serious enough to satisfy the PLRA).

154. *See* Riewe, *supra* note 132, at 153-54.

155. *See* Dorn v. DeTella, No. 96 C 3830, 1997 WL 85145, at *4-6 (N.D. Ill. Feb. 24, 1997) (suggesting strongly that the PLRA is unconstitutional on Equal Protection grounds). *But see* Zehner v. Trigg, 133 F.3d 459, 461-64 (7th Cir. 1997) (upholding the constitutionality of the physical injury requirement against various challenges).

by the courts. Some judges have flatly and openly ignored the provision,[156] while others have exempted constitutional claims.[157] Still others have stated that the provision bars only suits for damages, not requests for injunctive relief.[158] And, of course, the PLRA applies only to suits in federal courts. Inmates are free to pursue their religious freedom claims in state courts, unfettered by the Act.[159] The conclusion that the PLRA does not bar effective litigation of religious freedom issues is ineluctable.

B. Isn't the First Amendment the Right Way to Protect Free Exercise?

A second argument against extending Eighth Amendment protection to religious freedom is best expressed as a question: given that the First Amendment provides explicit constitutional protection to freedom of religion, how can the Eighth Amendment, which doesn't even mention religion, provide *more extensive* protection?[160] Several courts have rejected Eighth Amendment free exercise claims on this basis.[161]

But consider the Equal Protection Clause of the Fourteenth Amendment. It forbids some limitations of First Amendment values that would be permitted by the First Amendment itself.[162] For example, while the First Amendment permits regulation of obscene

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156. *See, e.g.*, Warburton v. Underwood, 2 F. Supp. 2d 306, 315 (W.D.N.Y. 1998) (ignoring the provision in a religious freedom case).

157. *See, e.g.*, Canell v. Lightner, 143 F.3d 1210, 1213 (9th Cir. 1998) (stating, in a First Amendment case, that "[t]he deprivation of First Amendment rights entitles a plaintiff to judicial relief wholly aside from any physical injury he can show, or any mental or emotional injury he may have incurred" and holding that "[t]herefore, § 1997e(e) does not apply to First Amendment Claims regardless of the form of relief sought"); Barnes v. Ramos, No. 94 C 7541, 1996 WL 599637, at *2 (N.D. Ill. Oct. 11, 1996) (advancing a similar argument as to constitutional violations in general).

158. *See Zehner*, 133 F.3d at 462-63.

159. State courts must adjudicate claims brought before them under 42 U.S.C. § 1983. *See* Maine v. Thiboutot, 448 U.S. 1, 2-4 (1980).

160. The argument implied by this question is a variant on the canon of statutory construction which holds that a more specific provision governs a more general one, from the maxim that "[*g*]*eneralis clausula ad ea qua antea specialiter sunt comprehensa*." *See* BLACK'S LAW DICTIONARY 684 (6th ed. 1990) (defining this maxim as "[a] general clause does not extend to those things which are previously provided for specially").

161. *See, e.g.*, Caldwell v. Miller, 790 F.2d 589, 601 n.16 (7th Cir. 1986). The same error appears to have been made in *Smith v. Coughlin*, 748 F.2d 783, 787-89 (2d Cir. 1984) (rejecting an inmate's Eighth Amendment claim without mentioning limitations on the inmate's religious freedom, but analyzing those limitations explicitly under the rubric of the First Amendment).

162. The First Amendment overlaps with many other constitutional provisions. *See* Employment Div. v. Smith, 494 U.S. 872, 881-82 (1990) (listing cases involving such an overlap).

speech, a regulation which prohibited women, but not men, from uttering obscenities would likely be held unconstitutional on Equal Protection grounds.[163] This result follows from the *purpose* of the Equal Protection Clause. It is intended to prevent discrimination, which may, of course, occur in areas also regulated by other constitutional provisions.

Similarly, the Eighth Amendment targets a particular evil—inhumane punishment—which crosscuts many constitutional values. Both the primary opinion and the concurrence in *Jordan*—the Ninth Circuit's recent decision about cross-gender clothed body searches—discussed at length whether the Eighth or the Fourth Amendment provided the proper basis for the decision.[164] The authors of the primary opinion were confident that the Eighth Amendment was violated, but unsure if the Fourth Amendment extended so far,[165] while the concurring judge concluded that both Amendments were violated.[166] If the Eight Amendment can overlap with, and extend beyond, the Fourth Amendment, it may surely interact in the same way with the First.[167]

CONCLUSION

In determining the contours of the Eighth Amendment, the Supreme Court pays close attention to legislative behavior. Therefore, the passage of RFRA and the pendency of RLPA strongly suggest that the Eighth Amendment should be held to prohibit certain restrictions on inmates' religious exercise. This does not imply, of

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163. *Cf.* Cruz v. Beto, 405 U.S. 319, 322 (1972) (holding that a Buddhist inmate who alleged that "he was denied a reasonable opportunity of pursuing his faith comparable to the opportunity afforded fellow prisoners who adhere to conventional religious precepts" had stated a viable equal protection claim).

164. *See* Jordan v. Gardner, 986 F.2d 1521, 1524-25 (9th Cir. 1993); *see id.* at 1532, 1540-43 (Reinhardt, J., concurring). This conclusion may only apply to searches of women by male guards. *See id.* at 1526 (discussing Grummett v. Rushen, 779 F.2d 491 (9th Cir. 1985), which upheld pat searches of male inmates by female guards).

165. *See id*. at 1524-25 (stating the conclusions of the primary opinion).

166. *See id*. at 1532 (Reinhardt, J., concurring) ("I believe that the conduct challenged here violates the fourth amendment as well as the eighth . . . ."); *id.* at 1540-43 (Reinhardt, J., concurring).

167. The overlap between the First and Eighth Amendments may have a special constitutional significance. In *Smith*, Justice Scalia noted that in cases where the plaintiffs were asserting multiple constitutional claims, exceptions to generally applicable, neutral laws might be appropriate. *See Smith*, 494 U.S. at 881. No cases explore this idea in the prison setting, where *Turner* and *O'Lone*, not *Smith*, are the relevant First Amendment precedents. *See supra* notes 36-53 and accompanying text (discussing *Turner* and *O'Lone*).

course, that prisoners' religious freedoms should be limitless. At its outer bound, the argument outlined in this Note only implies that contemporary standards of decency—as embodied in recent legislative actions—require the invalidation of *those prison regulations that cannot survive strict scrutiny*. After all, strict scrutiny is what the legislature sought to impose. Some regulations, solidly grounded in security or other concerns, should survive, as they did during the window of time when RFRA was in effect.[168]

As a practical matter, *all* current prison regulations may survive, because the argument I have proposed may not meet with success in the courts. It is difficult to estimate the argument's likelihood of success, in part because it has likely never been properly presented to any court. While religious prisoners do occasionally bring Eighth Amendment claims against prison officials who limit religious exercise, these prisoners are virtually always proceeding *pro se*,[169] and may not completely conceptualize, or successfully present, the argument outlined above. Further, these inmates invariably, and understandably, make First Amendment arguments as well. As a result, courts have frequently fallen into the errors discussed in Part IV and held that Eighth Amendment claims must include allegations of physical pain, or that free exercise claims must be brought under the First Amendment.

The simple fact that so many cases have rejected ill-conceived or ill-executed Eighth Amendment challenges to religious restrictions is itself a problem for future litigants who would use the Eighth Amendment to protect the religious freedom of the incarcerated. The *appearance* of thoughtful precedent may obscure the sandy foundations of most of the current cases in this area.

Of course, there are a few courts that have concluded that the Eighth Amendment does offer some protection to religious inmates.[170] But even these courts have never found the Eighth Amendment to protect a religious freedom that the First Amendment does

168. *See, e.g.*, Winburn v. Bologna, 979 F. Supp. 531, 535 (W.D. Mich. 1997) (rejecting RFRA challenge to prison regulation forbidding the receipt of racist literature); Jenkins v. Angelone, 948 F. Supp. 543, 548 (E.D. Va. 1996) (rejecting a RFRA challenge to a prison policy of not providing an extremely strict vegetarian diet).

169. A few examples of such *pro se* suits and the resulting opinions are: Show v. Patterson, 955 F. Supp. 182 (S.D.N.Y. 1997); Lucero v. Hensely, 920 F. Supp. 1067 (C.D. Cal. 1996); Jihad v. Wright, 929 F. Supp. 325 (N.D. Ind. 1996).

170. *See, e.g.*, Jolly v. Coughlin, 76 F.3d 468, 480-83 (2d Cir. 1996); *Jihad*, 929 F. Supp. at 331-32.

not. Until this hurdle is passed, the Eighth Amendment will not be doing the work that this Note suggests it should.

Arguing that the Eighth Amendment should be held to protect the religious liberties of prisoners is an uphill battle.[171] The lower court cases in this area are mostly unfavorable, and convicts, even devout ones, do not make sympathetic litigants. Nonetheless, it is a battle worth fighting. The words of President Lincoln, spoken in another context, are apposite:

> In giving freedom to the slave, we assure freedom to the free—honorable alike in what we give and what we preserve.[172]

171. If the issue were aggressively litigated, it is at least imaginable that the Supreme Court would want to speak to it, given the doctrinal confusion in this small area. Justices Thomas and Scalia, who believe that the Eighth Amendment should not apply in conditions of confinement cases at all, would surely vote against interpreting the Eighth Amendment in this way. *See supra* note 54 (noting the views of those Justices). No one else's vote is certain. Even the relatively conservative Chief Justice has parted ways with Justices Thomas and Scalia in recent Eighth Amendment cases. *Compare* Helling v. McKinney, 509 U.S. 25, 26 (1993) (majority opinion in which Rehnquist, C.J., joined), *and* Hudson v. McMillian, 503 U.S. 1, 3 (1992) (majority opinion in which Rehnquist, C.J., joined), *with Helling*, 509 U.S. at 37 (Thomas, J., joined by Scalia, J., dissenting), *and Hudson*, 503 U.S. at 17 (Thomas, J., joined by Scalia, J., dissenting). The rest of the current Court has similarly been prone to read the Amendment expansively with respect to conditions of confinement. *See supra* notes 58-75 and accompanying text (discussing modern Eighth Amendment doctrine). Perhaps the most perspicacious view is that "in a given case, any result is possible." Interview with H. Jefferson Powell, Professor of Law, Duke University, Durham, N.C. (Oct. 2, 1997).

172. Abraham Lincoln, Annual Message to Congress (Dec. 1, 1862), *in* LINCOLN: HIS WORDS AND HIS WORLD 57 (Country Beautiful Found. Inc. ed., 1965).