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ADEEL MOHAMMADI

Sincerity, Religious Questions, and the Accommodation Claims of Muslim Prisoners

ABSTRACT. Two doctrines—the religious-question doctrine and the sincerity doctrine—control the evaluation of religious-accommodation claims. According to these doctrines, courts evaluating religious-accommodation claims must not consider the content of religious beliefs, but may consider the sincerity with which those beliefs are held. These two doctrines are well established in American constitutional history, dating back at least seventy-five years to *United States v. Ballard*. Yet, by using the example of Muslim prisoner accommodation claims, this Note shows that the doctrinal account is, in practice, a fiction. In the adjudication of Muslim prisoner claims, courts frequently rely on what Islam has to say, usually focusing on inconsistencies between prisoners' claims and Islamic doctrine as a method to summarily deny those claims. Thus, the line between sincerity and religious questions—one enthusiastically conserved by higher courts—remains relatively unpoliced by the district courts.

This Note articulates a new way of understanding the porousness of the boundary between sincerity and religious questions. By conceiving of the key inquiry as having less to do with a claimant's religious convictions and more to do with the plausibility of the claim, this Note provides a new doctrinal account that would justify the seemingly erroneous behavior of courts across the country.

AUTHOR. Yale Law School, J.D. 2019; Harvard Divinity School, M.T.S. 2016; University of Southern California, B.A. 2014. I am deeply grateful to Khaled A. Beydoun, Nathan S. Chapman, Amy Chua, Paul Gewirtz, Michael A. Helfand, and Jed Rubenfeld for their comments on earlier drafts of this Note. The editors at the *Yale Law Journal*, especially Zohaib Chida, Briana M. Clark, and Ela A. Leshem, provided meticulous and invaluable feedback. All shortcomings are my own. And God knows best.

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INTRODUCTION

In February 2019, the practice of Islam in American prisons made national headlines. A Muslim inmate in an Alabama prison, Domineque Hakim Marcelle Ray, was set to be executed on February 7.[1] Ten days before his scheduled execution, he filed suit to have his imam join him in the execution chamber, instead of the Christian chaplain who is usually present.[2] While the Eleventh Circuit granted a stay halting his execution,[3] the Supreme Court—in a rare move—vacated the stay and allowed the execution to move forward.[4] Ray was executed as originally scheduled, and his imam was excluded from joining him in the execution chamber. In a forceful two-page dissent, the four liberal Justices discussed how the policy ran afoul of the Establishment Clause.[5] "The clearest command of the Establishment Clause, this Court has held, is that one religious denomination cannot be officially preferred over another," wrote Justice Kagan, adding that Alabama's "policy does just that."[6]

Ray's case will be remembered for testing a new Court's attitude towards complicated issues like the death penalty and religion. At the highest Court, the case centered around Establishment Clause issues. But the case was litigated at the district court on an additional ground that was not addressed by the Supreme Court: the free exercise of religion. Alabama allows prisoners on death row to elect execution by nitrogen hypoxia instead of lethal injection if the request is made before a certain deadline.[7] Ray missed that deadline, claiming that, at the time, "his religious beliefs prohibited him from electing how he would die" because such an election would be analogous to suicide, but his views had since

1. Dunn v. Ray, 139 S. Ct. 661, 661 (2019).
2. Ray v. Dunn, No. 2:19-CV-88-WKW, 2019 WL 418105, at *1-3 (M.D. Ala. Feb. 1, 2019), *rev'd sub nom.* Ray v. Comm'r, Ala. Dep't of Corr., 915 F.3d 689 (11th Cir. 2019), *vacated sub nom.* Dunn v. Ray, 139 S. Ct. 661 (2019).
3. *Ray*, 915 F.3d at 703.
4. *Ray*, 139 S. Ct. at 661.
5. *Id.* at 661-62 (Kagan, J., dissenting).
6. *Id.* (citations omitted). Less than two months after Ray was executed, a similar case made its way to the Supreme Court, this time involving a Buddhist prisoner who wanted a Buddhist religious advisor to accompany him in the execution chamber. Texas policy allowed only state-employed Muslim or Christian religious advisors into the chamber. The Court granted a stay of execution over only two dissents, with Justice Kavanaugh writing a short concurring opinion, focusing on "equal treatment" and what he perceived as "denominational discrimination." Murphy v. Collier, 139 S. Ct. 1475, 1475 (2019) (Kavanaugh, J., concurring).
7. *Ray*, 2019 WL 418105, at *2.

changed.[8] As his execution approached, he consulted with an imam and subsequently sought execution by nitrogen hypoxia. Ray based his claim on a statutory right to freely exercise his religion in prison.[9] The district court found that Ray's change of heart was a matter of "personal preference" and that it was thus inappropriate to attribute his desire for an exemption from the deadline to his religion.[10] The court rejected the claim, and Ray was executed days later by lethal injection.[11]

The free-exercise claims of prisoners cover far more than methods of execution. Incarcerated individuals frequently file suit over food, grooming, clothing, worship services, access to devotional items, and much more, claiming that restrictive prison policies violate their ability to exercise religion freely.[12] Judges and lawmakers have decided, based on values enshrined in the First Amendment's Free Exercise Clause, that prisoners are entitled to heightened protections for their religious exercise and that prison officials should be made to answer for unjustifiably burdening prisoners' religious exercise.[13] Unless such a burden is legally justified, the prison must grant an accommodation allowing the prisoner to exercise her religion.

Free exercise of religion is a value that most agree is crucial to our American constitutional scheme. But we also worry about those who might abuse the law's religious accommodations. The vast majority of prisoners may be genuine in their claims to religious belief. But unscrupulous claimants can abuse the system by shrouding their claims in the language of religious exercise. In the prison context—where life is often made difficult as a form of punishment—a scheming prisoner may be tempted to use religion as a pretext to achieve better food, better clothes, better living arrangements, or fewer restrictions.[14]

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8. *Id.* at *6.

9. *Id.* at *3; *see* Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. §§ 1988, 2000bb-2, 2000bb-3, 2000cc (2018).

10. *Ray*, 2019 WL 418105, at *7.

11. *See* Lauren Gill, *Domineque Ray Is Executed in Alabama After Supreme Court Bid Fails*, PROPUBLICA (Feb. 8, 2019, 3:58 PM EST), http://www.propublica.org/article/domineque-ray-is-executed-in-alabama-after-supreme-court-bid-fails [https://perma.cc/8PNQ-AKMY].

12. *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, 557-68 (2005).

13. *See infra* notes 58-65 and accompanying text.

14. This should not be taken to cast aspersions on the practice of religion in American prisons. It would be a mistake to think that most, or even many, prisoners see religion as a con game. *See, e.g.*, Harry Dammer, *Religion in Prison*, *in* 2 ENCYCLOPEDIA OF PRISONS AND CORRECTIONAL FACILITIES 834, 838 (Mary Bosworth ed., 2005). The reasons why a prisoner might

The law has developed mechanisms to respond to this concern. Principal among them is the sincerity doctrine, according to which the state is only required to accommodate religious beliefs that are sincerely held.[15] The sincerity doctrine emerged as a functional tool to screen meritless claims in the wake of litigation surrounding conscientious objections to the military draft. By focusing on the sincerity of a claimant—draftee, prisoner, or otherwise—a court could deny claims for religious accommodation from the beginning, without having to engage in the more serious balancing tests that are common in free-exercise law. The sincerity doctrine is justifiable on first principles: "When a claimant is insincere, the law imposes no burden on religious exercise at all."[16] Today, sincerity is the touchstone and threshold inquiry in religious-exemption law, in areas ranging from immigration to employment discrimination.[17]

But while judges are allowed—and, in fact, required—to examine a claimant's sincerity, they are not allowed to make a determination about the truth behind a claimant's religious belief.[18] This is the so-called religious-question doctrine. The Establishment Clause prevents judges from making statements about what a religion does or does not say; the verity of religious claims lies in a nonjusticiable domain. Imagine a Muslim prisoner making the following religious-

choose to engage in religious belief or practice in prison are numerous and difficult to ascertain, but surely include attempts to sincerely engage with profound questions and a recognition of higher powers, while also seeking out the redemptive elements present in many religious traditions. *See generally* SpearIt, *Religion as Rehabilitation? Reflections on Islam in the Correctional Setting*, 34 WHITTIER L. REV. 29, 45-53 (2012) (describing various motivations for the practice of Islam in prison). The vast majority of prisoners who seek out religion may do so for the same reasons that nonincarcerated individuals do. And the lion's share of accommodation requests are innocuous and granted; according to one study, the majority of requests for religious accommodation pertaining to access to religious texts, meetings with spiritual leaders, special diets, and religious items and clothing are usually approved. Pew Forum on Religious & Pub. Life, *Religion in Prisons: A 50-State Survey of Prison Chaplains*, PEW RES. CTR. 24 (Mar. 22, 2012), https://www.pewresearch.org/wp-content/uploads/sites/7/2012/03/Religion-in-Prisons.pdf [https://perma.cc/M5MD-792D]. However, it is the marginal cases—those in which a prisoner makes a request that is ultimately denied by a prison—that become the subject of litigation, and thus the doctrine of prisoner religious accommodation has come to respond to these cases. In such instances, concerns about claimants using religious accommodation for self-serving purposes are real, and doctrinal considerations regarding accommodation law have come to respond to these concerns, unrepresentative as they may be.

15. *See, e.g.*, 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.").

16. Nathan S. Chapman, *Adjudicating Religious Sincerity*, 92 WASH. L. REV. 1185, 1188 (2017).

17. *See id*.

18. *See* United States v. Ballard, 322 U.S. 78, 86-87 (1944).

accommodation claim: "As a Muslim, I need a five-course dinner every night of the week." The religious-question doctrine prevents judges from asking whether Islamic teachings *actually* have such a gastronomic requirement. Instead, the court must rely on alternative means—usually the sincerity doctrine (in other words, the prisoner is not *sincere* in his belief that Islam requires a nightly five-course dinner)—to accept or deny the claim.

As I will show, this account of the relationship between the religious-question and sincerity doctrines is not entirely accurate. Though doctrinally prohibited, judges regularly inquire into the content of religious doctrines to help them adjudicate prisoner claims. These inquiries can take numerous forms, such as relying on religious experts to help weed out claims,[19] asking whether other members of the prisoner's religion also believe that the accommodation is needed,[20] and even examining the content of religious texts to seek corroboration for the claim.[21]

This Note takes a special interest in the religious-accommodation claims of Muslim prisoners and documents the ways in which judges blur the theoretically strict boundaries between the sincerity doctrine and the religious-question doctrine when evaluating Muslim prisoner claims. Muslim prisoner claims represent a particularly interesting case study because Islam is a religion that contains a highly developed doctrinal and legal tradition in its own right that judges can readily scrutinize when looking for Islamic "evidence" to evaluate an accommodation claim. Furthermore, Muslims are significantly overrepresented within the American prison population,[22] and claims from Muslim prisoners have historically driven much of the jurisprudence surrounding prisoners' religious-exercise rights.[23] Indeed, two of the Supreme Court's seminal cases on prisoners' religious rights were filed by Muslim prisoners.[24]

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19. *See infra* Section III.A.

20. *See infra* Section III.C.

21. *See infra* Section III.B.

22. A recent study has found that about nine percent of state prisoners and twelve percent of federal prisoners identify as Muslim, and that in most jurisdictions, the number of Muslim prisoners is increasing. The percentage of Muslims in a jurisdiction's prison population varies, with some states having a Muslim population of over twenty percent. MUSLIM ADVOCATES, FULFILLING THE PROMISE OF FREE EXERCISE FOR ALL: MUSLIM PRISONER ACCOMMODATION IN STATE PRISONS 15-16, 37-38 (July 2019), https://muslimadvocates.org/wp-content/uploads/2019/07/FULFILLING-THE-PROMISE-OF-FREE-EXERCISE-FOR-ALL-Muslim-Prisoner-Accommodation-In-State-Prisons-for-distribution-7_23-1.pdf [https://perma.cc/JS6R-ACNF].

23. *See* Clair A. Cripe, *Religious Freedom in Prisons*, 41 FED. PROB. 31, 32 (1977).

24. *See* Holt v. Hobbs, 135 S. Ct. 853, 859 (2015); O'Lone v. Estate of Shabazz, 482 U.S. 342, 344-45 (1987).

By examining dozens of Muslim prisoner cases in the federal courts, I find that judges are frequently interested in what Islam has to say about Muslim prisoners' claims. In many cases, judges inquire into Islam and Islamic law to see whether a Muslim prisoner's claim for accommodation should be granted. If the claim is corroborated by Islamic doctrine, it is more likely to be accommodated; however, if the prisoner makes a claim completely unsubstantiated by Islamic doctrine, the claim is more likely to fail.

This Note thus describes the ways in which judges blur the line between religious doctrine and religious sincerity. But instead of concluding that judges should be policing that line more stringently, I try to lend doctrinal consistency to these rulings. By observing the practical challenges in keeping questions of religious sincerity and religious veracity separate, I posit a novel theory of the sincerity doctrine as one of plausibility. Instead of asking whether the Muslim prisoner requesting five-course meals is sincere in his belief, the inquiry is better understood as one of plausibility—is it *plausible* that the Muslim prisoner could need such an accommodation? Under this vision of sincerity as plausibility, the inquiry is less about psychologically analyzing a prisoner's subjective belief than about examining how plausible it is that a claimant of the prisoner's religion would require such an accommodation. The plausibility inquiry provides a more doctrinally consistent way of framing existing judicial practice. At the same time, it also provides a more practically feasible way of weeding out otherwise meritless claims.

This Note proceeds in four Parts. Part I is a historical account of the development of religious free-exercise law in general and that of prisoners more specifically. In it, I describe the current dual statutory and constitutional regime that governs prisoner religious claims. In Part II, I turn to the sincerity doctrine and explain its historical roots and doctrinal justifications. I also explore the sincerity doctrine in relation to the religious-question doctrine. In Part III, I document the ways in which judges regularly flout the line between sincerity and religious questions when evaluating Muslim prisoner claims. Finally, in Part IV, I try to make sense of this doctrinal inconsistency by reframing sincerity as a doctrine of plausibility.

I. THE DEVELOPMENT OF THE LAW GOVERNING PRISONER ACCOMMODATION

Courts did not begin taking prisoners' free-exercise claims seriously until the 1960s. Before then, courts opted for a "hands off" approach that valued prison administration, along with federalism and separation of powers, over prisoners'

rights to exercise religion freely.[25] Since the 1960s, however, the law governing prisoner religious-accommodation claims has shifted. The complexity and instability of the law has largely resulted from institutional struggle between the judiciary and Congress over the scope of free-exercise protections. Currently, the law is governed under a dual constitutional and statutory framework, though—as with free-exercise law generally—the primary source of prisoner free-exercise rights today is statutory.[26]

A. Before Smith

In the decades preceding the Supreme Court's landmark decision in *Employment Division, Department of Human Resources v. Smith*,[27] the Court had articulated an expansive reading of Free Exercise Clause protections for those claiming religious exemptions. In a pair of cases, *Sherbert v. Verner*[28] and *Wisconsin v. Yoder*,[29] the Court established a "compelling state interest" test for evaluating general free-exercise claims.[30] Under this standard, only "[state] interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion."[31] To defeat a free-exercise claim, the state was

25. *See* Khaled A. Beydoun, *Islam Incarcerated: Religious Accommodation of Muslim Prisoners Before* Holt v. Hobbs, 84 U. CIN. L. REV. 99, 127-28 (2016); William Bennett Turner, *Establishing the Rule of Law in Prisons: A Manual for Prisoners' Rights Litigation*, 23 STAN. L. REV. 473, 473 (1971); Daniel J. Solove, Note, *Faith Profaned: The Religious Freedom Restoration Act and Religion in the Prisons*, 106 YALE L.J. 459, 464 (1996); *see also* Ruffin v. Commonwealth, 62 Va. (21 Gratt.) 790, 796 (1871) (describing a prisoner as "the slave of the State").

26. KENT GREENAWALT, EXEMPTIONS: NECESSARY, JUSTIFIED, OR MISGUIDED? 8 (2016). Eugene Volokh has identified "two primary models" for understanding religious exemptions: the "statutory exemption model" and the "constitutional exemption model" (also called the "'compelled exemption' model"). EUGENE VOLOKH, THE FIRST AMENDMENT AND RELATED STATUTES: PROBLEMS, CASES AND POLICY ARGUMENTS 981 (5th ed. 2014). However, though the statutory regime is clearly more protective of claimants, there is evidence that shows that empirically, many accommodation claims are still based on constitutional protections. *See, e.g.*, Gregory C. Sisk & Michael Heise, *Muslims and Religious Liberty in the Era of 9/11: Empirical Evidence from the Federal Courts*, 98 IOWA L. REV. 231, 238 (2012).

27. 494 U.S. 872 (1990).

28. 374 U.S. 398 (1963).

29. 406 U.S. 205 (1972).

30. *Sherbert*, 374 U.S. at 406.

31. *Yoder*, 406 U.S. at 215.

required to show that the limitation "is the least restrictive means of achieving [the] compelling state interest."[32]

Prisoners were excluded from the protections of *Sherbert* and *Yoder*. The Supreme Court did not accept its first prisoner religious-rights case until 1972. In a per curiam opinion, the Supreme Court found that the lower court had improperly dismissed a Buddhist prisoner's complaint that a prison refused to allow Buddhists to hold religious services.[33] The Court failed, however, to articulate a standard for prisoner free-exercise claims.

In the 1960s and 1970s, judicial interest in the free-exercise rights of prisoners—and in prisoner rights in general—was propelled by litigation brought by various Black Muslim sects, most notably the Nation of Islam (NOI).[34] In 1977, the then-general counsel of the Federal Bureau of Prisons acknowledged that when it came to religious-freedom litigation, it was "Black Muslim prisoners [who] got their foot in the judicial door, and then flung it wide open."[35] Even the question of whether the NOI should be considered a religion was heavily contested in the early 1960s.[36] Judges conceived of the NOI through political tropes, prominently identifying the NOI as "a gang," as "black militants," and as a "cult or sham religion."[37] When adjudicating these claims, the lower courts

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32. Thomas v. Review Bd. of Ind. Emp't Sec. Div., 450 U.S. 707, 718 (1981). The Supreme Court, despite this protective standard, ended up rejecting most requests for religious exemption that came before it. *See, e.g.*, Hernandez v. Comm'r, 490 U.S. 680, 698-700 (1989); Bowen v. Roy, 476 U.S. 693, 707-12 (1986); Bob Jones Univ. v. United States, 461 U.S. 574, 602-04 (1983); United States v. Lee, 455 U.S. 252, 258-61 (1982); Gillette v. United States, 401 U.S. 437, 461-62 (1971); *see also* VOLOKH, *supra* note 26, at 982 (stating that in the period between 1963 and 1990, the Court "rejected most exemption requests that came before it"). The strict scrutiny articulated by the Court in religious-accommodation law thus is of a separate and lower type than that which applies to, for example, racial classifications. *See* DANIEL O. CONKLE, CONSTITUTIONAL LAW: THE RELIGION CLAUSES 91 (2d ed. 2009); VOLOKH, *supra* note 26, at 985.

33. Cruz v. Beto, 405 U.S. 319 (1972).

34. *See* MARIE GOTTSCHALK, THE PRISON AND THE GALLOWS: THE POLITICS OF MASS INCARCERATION IN AMERICA 176 (2006) ("Once the Nation of Islam made the courts a central battleground for prison issues, the legal profession and other prison reform groups streamed in, thus ushering the civil rights movement through the gates of the prison.").

35. Cripe, *supra* note 23, at 32; *see also id.* at 31 ("[T]he 'correctional law revolution' can be traced to religious cases—specifically, to cases brought by Black Muslim prisoners in the early 1960's.").

36. *See, e.g.*, Pierce v. LaVallee, 319 F.2d 844 (2d Cir. 1963); Fulwood v. Clemmer, 206 F. Supp. 370 (D.D.C. 1962). The question whether Islam—NOI or otherwise—ought to be considered a religion for First Amendment purposes persists into the present day, with numerous commentators answering the question in the negative. *See* ASMA T. UDDIN, WHEN ISLAM IS NOT A RELIGION: INSIDE AMERICA'S FIGHT FOR RELIGIOUS FREEDOM 31-64 (2019).

37. Beydoun, *supra* note 25, at 134-40.

applied numerous tests with varying results.[38] However, this approach changed in the late 1980s with the announcement of a new standard in *O'Lone v. Estate of Shabazz*.[39]

Rather than relying on the general *Sherbert-Yoder* free-exercise doctrine, the *O'Lone* Court articulated a far more relaxed reasonableness standard for prison officials to meet. In *O'Lone*, the Court rejected Muslim prisoners' challenge of prison policies that required outdoor work on Friday afternoons and thus prevented their attendance at Friday prayers.[40] Five members of the Court articulated a reasonableness standard, whereby "prison regulations alleged to infringe constitutional rights," such as the right to free exercise, are "valid if [they are] reasonably related to legitimate penological interests."[41] Because prisons can almost always articulate a reasonable penological interest related to their restrictive policies, this standard is significantly less protective than what "ordinarily applie[s] to alleged infringements of fundamental constitutional rights."[42]

B. The Smith *Regime*

The Court's gradual disillusionment with the *Sherbert-Yoder* line of cases culminated in its landmark 1990 decision in *Smith*, which established that neutral, generally applicable laws that incidentally burden religious exercise do not violate the Free Exercise Clause.[43] *Smith* involved members of the Native American Church who were denied unemployment benefits because they consumed peyote, an illegal drug, for sacramental purposes. The Court upheld the denial.[44] The five Justices in the majority felt compelled by a deep-seated fear—dating back to at least a late nineteenth-century case rejecting Mormon requests for exemption from antipolygamy laws—that an expansive religious-exemption regime would "permit every citizen to become a law unto himself."[45] This, they concluded, would constitute a perverse type of "danger that increases in direct

38. *See Developments in the Law: The Law of Prisons*, 115 HARV. L. REV. 1838, 1893 n.11 (2002).

39. 482 U.S. 342 (1987).

40. *Id.* at 353.

41. *Id.* at 349 (quoting Turner v. Safley, 482 U.S. 78, 89 (1987) (dealing with the constitutional right of prisoners to marry)).

42. *Id.*; *see also id.* at 356 (Brennan, J., dissenting) (labeling the standard as "categorically deferential").

43. Emp't Div., Dep't of Human Res. v. Smith, 494 U.S. 872, 878-82 (1990).

44. *Id.* at 872-75.

45. *Id.* at 879 (quoting Reynolds v. United States, 98 U.S. 145, 167 (1879)).

proportion to [the United States'] diversity of religious beliefs."[46] *Smith* was, in many ways, the culmination of the trajectory of a Court that had become weary of free-exercise claims ever since *Sherbert*.

Yet as monumental as the *Smith* decision was for free-exercise doctrine, it had no impact on the adjudication of prisoner religious-accommodation claims. I could find no instance of a court applying the new regime to prisoner claims in the forty-three months between the *Smith* decision and the passage of the Religious Freedom Restoration Act of 1993 (RFRA), which effectively overturned *Smith*.[47] The only court that, to my knowledge, addressed the issue explained that "*Smith* does not alter the rights of prisoners; it simply brings the free exercise rights of private citizens closer to those of prisoners."[48]

C. The RFRA Regime

In response to the *Smith* decision, Congress passed RFRA "in order to provide greater protection for religious exercise than is available under the First Amendment."[49] If a state substantially burdens a person's exercise of religion, RFRA requires the state to demonstrate that the burden (a) furthers a compelling government interest and (b) is the least restrictive means of furthering that interest.[50] The Act's stated purpose was to "restore the compelling interest test as set forth in Sherbert v. Verner and Wisconsin v. Yoder,"[51] although, as the Supreme Court stated in a later decision, RFRA overshot and created "the most demanding test known to constitutional law."[52]

Considering *Smith*'s minimal impact on prisoner religious-rights claims, it is surprising that Congress—when seeking to override the decision—decided to include prisoners in RFRA's provisions. This inclusion was an overcorrection; before RFRA, prisoners' free-exercise rights had never been subject to the strict *Sherbert-Yoder* test but were governed by the deferential *O'Lone* reasonableness standard. In fact, Senator Harry Reid even introduced an amendment to exempt prisons from the Act. The amendment was also supported by the state prison

46. *Id.* at 888.

47. *See, e.g.*, Ward v. Walsh, 1 F.3d 873, 876-77 (9th Cir. 1993) (declining to apply *Smith*).

48. Salaam v. Lockhart, 905 F.2d 1168, 1171 n.7 (8th Cir. 1990).

49. Holt v. Hobbs, 135 S. Ct. 853, 859-60 (2015).

50. Religious Freedom Restoration Act of 1993 § 3(b), 42 U.S.C. § 2000bb-1(b) (2018) (citations omitted).

51. 42 U.S.C. § 2000bb(b)(1).

52. City of Boerne v. Flores, 521 U.S. 507, 534 (1997).

commissioners in each of the fifty states. But it was ultimately rejected.[53] There was a palpable sense among legislators that "if religion can help just a handful of prison inmates get back on track, then the inconvenience of accommodating their religious beliefs is a very small price to pay."[54]

Despite RFRA's promise, prisoners did not see substantive gains in the adjudication of their religious-accommodation claims. According to one study exhaustively examining all reported opinions before RFRA's invalidation, only nine cases (out of ninety-four) yielded relief for the prisoner.[55] Still, RFRA represented an important shift in the standard for the adjudication of prisoner claims and was an affirmative first step by Congress to take the power to define the standard for prisoner claims away from the Court.

D. The Current RLUIPA Regime

RFRA was short-lived. In *City of Boerne v. Flores*, the Supreme Court found that RFRA, at least as applied to "all . . . State law, and the implementation of that law,"[56] exceeded Congress's power under Section 5 of the Fourteenth Amendment.[57]

Not to be outdone, Congress responded by passing the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA) and invoking instead its authority under the Spending and Commerce Clauses.[58] RLUIPA creates two carveouts for congressional regulation of state activity in the arenas of land-use regulation and prisons. For prisoners whose free exercise of religion is substantially burdened by prison policy, the government must demonstrate that the policy furthers a compelling government interest and is the least restrictive means of doing so.[59]

RLUIPA establishes a notably different, more prisoner-friendly standard than RFRA. Both statutory regimes require prisons to show—even in enforcing

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53. 139 CONG. REC. 26,182-84 (1993).

54. *Id.* at 26,411 (1993) (statement of Sen. Dole).

55. Ira C. Lupu, *The Failure of RFRA*, 20 U. ARK. LITTLE ROCK L. REV. 591, 591 (1998). By contrast, nonprison claims were more than two-and-a-half times more likely to obtain relief. *Developments in the Law: The Law of Prisons*, *supra* note 38, at 1894 n.18.

56. 521 U.S. at 516 (quoting the Religious Freedom Restoration Act of 1993 § 6(a), 42 U.S.C. § 2000bb-3 (2018)).

57. *Id.* at 529-36.

58. Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. §§ 2000cc to 2000cc-5 (2018).

59. 42 U.S.C. § 2000cc-1(a).

rules of general applicability—that their policies further a compelling governmental interest using the least restrictive means test.[60] Both statutes also proscribe only *substantial* burdens.[61] However, the two statutes diverge in their definitions of religious practice. In its original form, RFRA defined "exercise of religion" to mean "the exercise of religion under the First Amendment."[62] This definition was "generally understood as limited to the 'central tenets' or 'mandated' practices of a belief system."[63] By contrast, RLUIPA's definition of religious exercise is broader: "The term 'religious exercise' includes *any* exercise of religion, whether or not compelled by, or central to, a system of religious belief."[64]

There is no doubt that RLUIPA creates a standard more favorable to prisoners compared to the previous *O'Lone* and RFRA tests. The substantive inquiry—whereby the prison bears the burden of demonstrating that the policy is the least restrictive means of achieving a compelling government interest—creates a test that poses, at least in theory, a significant challenge to prison officials.

While this substantive standard remains largely proplaintiff, judges can reject a claimant's case before even entering into that substantive inquiry. Not all prisoners can claim RLUIPA's liberal protections of religious free exercise because a claimant must first pass through three threshold inquiries: she must show that (1) her claim is based on *religious* grounds, (2) absent the accommodation there will be a *substantial burden* on her religious exercise, and (3) she is *sincere* in her belief.[65] The following Sections discuss each of these three threshold inquiries in turn. I then show that the boundaries between the thresholds are difficult to maintain and that, in some cases, the three inquiries collapse. I conclude that the "sincerity" threshold emerges as the key mechanism judges use to challenge prisoner free-exercise claims.

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60. 42 U.S.C. § 2000bb-1(a)-(b) (RFRA); *id.* § 2000cc-1(a) (RLUIPA).

61. *See id.* § 2000bb-1(a)-(b); *id.* § 2000cc-1(a).

62. Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, § 5(4), 107 Stat. 1488, 1489. RFRA has since been amended to define "exercise of religion" in the same way that RLUIPA does.

63. *Developments in the Law: The Law of Prisons*, *supra* note 38, at 1895 (first quoting Werner v. McCotter, 49 F.3d 1476, 1480 (10th Cir. 1995); and then quoting Bryant v. Gomez, 46 F.3d 948, 949 (9th Cir. 1995)).

64. 42 U.S.C. § 2000cc-5(7)(A) (emphasis added).

65. Because the claimant bears the burden of passing through these initial tests, the type of scrutiny articulated by RLUIPA—though mirroring the language of conventional strict-scrutiny analysis in other areas of constitutional law—is substantively different than the scrutiny that applies, for example, to discriminatory policies that have racial motivations.

1. Religion

To qualify for both statutory and constitutional protection, prisoners must establish that their claims are based on religion, as opposed to purely philosophical, ethical, or other nonreligious grounds. Such a requirement is textually derived from the language of the First Amendment and RLUIPA.[66] The line between religious and nonreligious claims is, of course, far from exact; the decision-maker who has to declare that a claimant's beliefs do not rise to the level of religion is faced with "a most delicate" task.[67] Hardly making things easier, the Supreme Court has never articulated a precise definition of "religion," making this threshold question an area ripe for contestation.[68]

As rough as the contours of "religion" may be, members of well-recognized traditions are seldom challenged on this ground. Indeed, the recognizability of a belief system plays a significant part in the analysis, such that this inquiry seems often less doctrinal and more sociological in nature.[69] In practice, this means that Muslim prisoners' claims based on religious exemption motivated by their Islamic beliefs, for example, are rarely dismissed on the grounds that their beliefs are not sufficiently religious in nature. To claim membership in a well-established religion—whether or not one's beliefs are mainstream in that religious tradition—largely insulates a claimant from this challenge. Yet it is not lost on the courts that well-established religions were, of course, at some point not-so-

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66. *See* U.S. CONST. amend. I (protecting *religious* exercise); 42 U.S.C. § 2000cc-1(a) (same); *see also* Thomas v. Review Bd. of Ind. Emp't Sec. Div., 450 U.S. 707, 713 (1981) ("Only beliefs rooted in religion are protected by the Free Exercise Clause, which, by its terms, gives special protection to the exercise of religion."); Cavanaugh v. Bartelt, 178 F. Supp. 3d 819, 829 (D. Neb. 2016), *aff'd*, No. 16-2105 (8th Cir. Sept. 7, 2016) (finding that "RLUIPA's scope is defined in terms of 'religious' belief, so the term must have meaning").

67. Wisconsin v. Yoder, 406 U.S. 205, 215 (1972).

68. *See* Chapman, *supra* note 16, at 1242; Jesse H. Choper, *Defining "Religion" in the First Amendment*, 1982 U. ILL. L. REV. 579, 587-604; Ben Clements, *Defining "Religion" in the First Amendment: A Functional Approach*, 74 CORNELL L. REV. 532, 532 (1989); Kent Greenawalt, *Religion as a Concept in Constitutional Law*, 72 CALIF. L. REV. 753, 756-62, 776-807 (1984); Jeffrey Omar Usman, *Defining Religion: The Struggle to Define Religion Under the First Amendment and the Contributions and Insights of Other Disciplines of Study Including Theology, Psychology, Sociology, the Arts, and Anthropology*, 83 N.D. L. REV. 123, 149-150 (2007).

69. In addressing the question of whether a belief system qualifies for First Amendment protections as a religion, the Court has asked whether it runs "parallel to that filled by the orthodox belief in God." United States v. Seeger, 380 U.S. 163, 166 (1965); *see also* Greenawalt, *supra* note 68, at 762 (advocating for a definition of religion whereby we first identify "what is indisputably religion" and then see if a particular system is sufficiently analogous).

established; almost universally, "[r]eligions now accepted were persecuted, unpopular and condemned at their inception."[70]

Still, prisoner claims are more likely to be disqualified under the religion inquiry when the prisoner claims to be part of a novel, less-established group, or one whose purpose is labeled as primarily something other than religious. For example, up until the 1960s, the Nation of Islam, in light of the controversial political stances its members and leadership had taken, was labeled as a political instead of a religious group, and thus NOI members' prisoner accommodation requests were summarily rejected.[71]

2. *Substantial Burden*

Second, prisoners under RLUIPA must show that the prison restriction not only burdens their religious exercise, but *substantially* does so.[72] In a widely cited opinion, the Tenth Circuit defined "substantial burden" in the prisoner-rights context as

> (1) requir[ing] participation in an activity prohibited by a sincerely held religious belief, or (2) prevent[ing] participation in conduct motivated by a sincerely held religious belief, or (3) plac[ing] substantial pressure on an adherent either not to engage in conduct motivated by a sincerely

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70. United States v. Kuch, 288 F. Supp. 439, 443 (D.D.C. 1968).

71. *See* Beydoun, *supra* note 25, at 141 (describing a 1962 decision as the first to "deem [the NOI] a legitimate religion"); Comment, *Black Muslims in Prison: Of Muslim Rites and Constitutional Rights*, 62 COLUM. L. REV. 1488, 1492 (1962) ("[T]he reaction of some prison officials has been not only to classify the Black Muslims as a threat to order, but also to declare that they are a sham religion, not entitled to any assistance in their efforts to practice their faith."); Ferdinand F. Fernandez, Comment, *Prisoners' Religious Freedom*, 35 S. CAL. L. REV. 162, 162 (1962) ("[T]he Department of Corrections of the State of California, through the Director of Corrections, determined that the Muslims should not be entitled to the privileges of a religious group or sect.").

Furthermore, plaintiffs who claim membership in movements that lack the traditional trappings of religion are also particularly susceptible. Claims from adherents of parodical religions, like the Church of the Flying Spaghetti Monster, have been rejected as not sufficiently religious in nature. *See Cavanaugh*, 178 F. Supp. 3d at 830; *see also Kuch*, 288 F. Supp. at 444 (rejecting as not religious a criminal defendant's First Amendment challenge to her conviction because her purported religion was "mocking established institutions"). As one commentator has explained, the "claimant may sincerely believe in the political or ethical objects of the parody, but that doesn't mean that the activity is a religion." Chapman, *supra* note 16, at 1243.

72. *See* 42 U.S.C. §§ 2000bb-1(a)-(b) (2018) (RFRA); 42 U.S.C. § 2000cc-1(a) (2018) (RLUIPA).

held religious belief or to engage in conduct contrary to a sincerely held religious belief.[73]

Conceptually, the substantiality of a burden can be subdivided into two parts. First, there are burdens to a claimant's religious sensibilities that she will feel if subjected to the burdensome policy. Second, there are costs that a claimant might suffer as legal sanction for disobeying that policy.[74] Scholars have argued that because the first category requires an evaluation of the contents of a claimant's religious beliefs, the second type of burden ought to be the operative one in judicial analysis of substantiality.[75] In the prison context, however, prisoners are not often given the choice between suffering a religious harm and suffering some penalty. Instead, prisoners are often filing suit to change a policy to allow some accommodation that is otherwise entirely unavailable to them. In that situation, engaging in the religious exercise is not an option, whatever the cost. Thus, in the prison context, the substantiality of a burden typically depends solely—or at least primarily—on its offensiveness to a believer's religious conscience, which in practice is often difficult to measure.[76]

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73. Abdulhaseeb v. Calbone, 600 F.3d 1301, 1315 (10th Cir. 2010).

74. *See* Frederick Mark Gedicks, "*Substantial" Burdens: How Courts May (and Why They Must) Judge Burdens on Religion Under RFRA*, 85 GEO. WASH. L. REV. 94, 96-97 (2017); *see also* Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 720 (2014) (discussing both the "demands that [claimants] engage in conduct that seriously violates their religious beliefs" and the "economic consequences" that would result if they failed to yield to the mandate).

75. *E.g.*, Michael A. Helfand, *Identifying Substantial Burdens*, 2016 U. ILL. L. REV. 1771, 1791 (arguing that because a court cannot measure the religious harm suffered by a RFRA claimant, the substantiality analysis should instead focus on what penalties a claimant who violates the law will suffer).

76. Michael Helfand has suggested that in such situations where a claimant simply does not have the option to engage in religious exercise, the burden is automatically substantial. *Id.* at 1804-05. The substantial-burden inquiry would thus be irrelevant in all but the rarest of prisoner cases. Courts do not, however, share the view that "every infringement on a religious exercise will constitute a substantial burden." *Abdulhaseeb*, 600 F.3d at 1316. Instead, they have asked how "important" a practice is to someone's religious belief and have clarified that to be substantial, the burden must be "more than an inconvenience on religious exercise." Smith v. Allen, 502 F.3d 1255, 1278 (11th Cir. 2007) (citation omitted). While inquiry into how *central* a practice is to a religious belief has been explicitly rejected by the text of RLUIPA, 42 U.S.C. § 2000cc-5(7)(A), some courts seem to be comfortable asking about the *importance* of the practice. *See* Sossamon v. Texas, 560 F.3d 316, 332 (5th Cir. 2009) ("The practice burdened need not be central to the adherent's belief system, but the adherent must have an honest belief that the practice is important to his free exercise of religion."); *see also* Levitan v. Ashcroft, 281 F.3d 1313, 1321 (D.C. Cir. 2002) (stating that, in the First Amendment context, "a rule that bans a practice that is not 'central' to an adherent's religious practice might nonetheless impose a substantial burden, if the practice is important and based on a sincere religious belief").

3. Sincerity

Third, prisoners must show that their religious beliefs are sincerely held. The dual constitutional and statutory regime governing free exercise—for prisoners and others—does not purport to protect *all* exercise stemming from religious belief; only *sincerely held* beliefs are accommodated. Though sincerity is not textually required in either the Constitution or governing statutes, judges have read it into both as a tool of judicial management, so as to limit the flow of accommodation claims.[77] Free-exercise claims arising under the First Amendment must demonstrate a required showing of sincerity.[78] Furthermore, the Supreme Court has clarified that RFRA's protections only apply to "sincere" beliefs and not to "pretextual assertions of a religious belief."[79] As for RLUIPA, the Supreme Court—in upholding the constitutionality of the statute soon after it was passed—reiterated the common understanding that "prison officials may appropriately question whether a prisoner's religiosity, asserted as the basis for a requested accommodation, is authentic" and that RLUIPA "does not preclude inquiry into the sincerity of a prisoner's professed religiosity."[80]

* * *

The three threshold inquiries into religious grounds, substantial burden, and sincerity are, in theory, analytically distinct. Take three examples. First, imagine a member of a purely secular movement who believes the consumption of meat is wrong; eating meat would thus be a *substantial burden* on her belief, and that belief might well be *sincere*, but the belief is not *religious*. Next, take a Muslim prisoner who is asked to vacate his cell for five minutes a day and thus cannot use that time to pray a supererogatory prayer, which he can pray any other time of the day. The belief he has is both *religious* and *sincere*, but his inability to pray for those five minutes might be a mere inconvenience and not a *substantial burden*. Finally, take someone completely uncommitted to the tenets of the Jewish faith; eating nonkosher foods might very well be a *substantial burden* to other members of the Jewish faith, and their beliefs are certainly *religious*, but the

77. *See infra* Section II.C.

78. Africa v. Pennsylvania., 662 F.2d 1025, 1030 (3d Cir. 1981).

79. *Hobby Lobby Stores, Inc.*, 573 U.S. at 717 n.28 (quoting United States v. Quaintance, 608 F.3d 717, 718-19 (10th Cir. 2010)).

80. Cutter v. Wilkinson, 544 U.S. 709, 725 n.13 (2005).

claimant would not be *sincere* in her belief that she cannot consume nonkosher food.[81]

Yet in practice, the three inquiries are frequently collapsed, and for good reason. The Tenth Circuit, for example, has explained that the sincerity prong is useful to disqualify "clearly nonreligious" beliefs.[82] In an oft-cited opinion, the Fifth Circuit criticized "so-called religions" whose members "are patently devoid of religious sincerity."[83] Laurence Tribe's foundational textbook on constitutional law, when discussing indicia of insincerity, points to adjudication on the basis of nonreligion.[84] The confusion surrounding the three inquiries exists because the boundaries between them stop making sense in all but the easiest of cases. Take, for example, an opportunistic marijuana user who claims to be the founder of a new church whose sacraments include the required ingestion of the drug. In such cases, courts have reasonably concluded that such a belief is insincere[85] but have also invalidated the claim on the grounds that it is not a bona fide religion.[86] In these and similar cases, the ultimate inquiry—whether the plaintiff's claim is of the type that the statutory and constitutional protections are designed to safeguard—is not so easily parsed into three distinct spheres.[87]

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81. There is a forceful argument to be made that in this case, because the claimant is not sincere, *his* beliefs are not religious, and therefore *his* exercise is not substantially burdened. Taking this approach, one would conclude that "[w]ithout sincerity, there is no 'religious exercise' and therefore no 'substantial burden' on it." Chapman, *supra* note 16, at 1217; *see also* Kevin L. Brady, Comment, *Religious Sincerity and Imperfection: Can Lapsing Prisoners Recover Under RFRA and RLUIPA?*, 78 U. CHI. L. REV. 1431, 1443 (2011) (arguing that burdens are only substantial if beliefs are sincere).

82. Kay v. Bemis, 500 F.3d 1214, 1219 (10th Cir. 2007).

83. Theriault v. Carlson, 495 F.2d 390, 395 (5th Cir. 1974).

84. *See* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 1246 & n.24 (2d ed. 1988).

85. *See* United States v. Quaintance, 608 F.3d 717, 720-21 (10th Cir. 2010) (holding, in a criminal case, that the defendants' beliefs were insincere, and declining to address whether their "church" was actually a religion).

86. *See* United States v. Meyers, 95 F.3d 1475, 1480-81 (10th Cir. 1996) (holding, in a criminal case, that while the defendant had sincerely held beliefs, his "church" was not actually a religion).

87. Nathan Chapman has argued that the three inquiries—religion, substantial burden, and sincerity—should be kept conceptually separated because a court's suspicion that a claimant fails one prong might improperly influence its analysis of the remaining prongs. The harm Chapman hopes to avoid is written opinions with muddled logic, creating issues for rule-of-law values and for future litigants who might be confused about legal standards. *See* Chapman, *supra* note 16, at 1215-16. However, the primary screening in these claims is ultimately not the type that can be neatly articulated into distinct doctrinal tests. Indeed, there are significant nonrational elements that enter into the screening of accommodation claims. *See infra* Part IV.

In the prison context, the sincerity inquiry has become the main "gatekeeping" inquiry, even while the borders between insincerity, nonreligiosity, and insubstantiality remain porous. When a judge encounters an outlandish claim, as an empirical matter, it is the sincerity doctrine that does the principal work of weeding out the claim.[88] The sincerity doctrine has come to encompass the basic inquiry into whether a judge believes that a claimant is trying to pull a fast one on the court by cloaking a claim in the language of religious exercise.[89] This is particularly true for the claims of prisoners from well-established religious traditions, like Islam. In those cases, it is rare to see judges challenge the religious nature of a claim because the claimant invokes a well-recognized and populous religious tradition. Similarly, substantiality is often unchallenged because inquiries into substantiality are the most invasive forms of (the forbidden) inquiry into the content of religious beliefs.[90] Thus, the sincerity doctrine is the touchstone inquiry invoked to challenge accommodation claims.

II. SINCERITY

This Part explores the sincerity doctrine, with a special focus on *United States v. Ballard*.[91] It describes the basic rule in free-exercise claims, first articulated in *Ballard*, which states that while the truth and content of a religious belief are outside the purview of a court, the sincerity with which that belief is held is squarely justiciable. The line between sincerity and the veracity of a religious belief has become a doctrinal truism in First Amendment law. This Part also describes the role that the sincerity doctrine has come to play in the adjudication of accommodation claims: screening claims by opportunists who invoke religion to claim exemptions.

88. *See* Gedicks, *supra* note 74, at 110 n.77 (identifying critiques of sincerity as a "reflexive[] skeptic[ism]" on the part of courts evaluating prisoner claims); William P. Marshall, *Solving the Free Exercise Dilemma: Free Exercise as Expression*, 67 MINN. L. REV. 545, 554 n.58 (1983) ("The sincerity test has been used most often in cases in which the free exercise clause could easily have been abused by fraudulent claims."); Anna Su, *Judging Religious Sincerity*, 5 OXFORD J.L. & RELIGION 28, 28 (2016) (calling sincerity the "primary factor" in the adjudication of religious-accommodation claims broadly).

89. *See infra* Section IV.A (proposing that a general inquiry into implausibility is the best way of understanding what judges are actually looking for in the sincerity doctrine).

90. *See supra* notes 74-76 and accompanying text.

91. 322 U.S. 78 (1944).

A. The Sincerity Doctrine

The history of the sincerity doctrine as applied to the First Amendment dates back at least three-quarters of a century. The Supreme Court's 1944 decision in *United States v. Ballard*, though never once mentioning the word "sincerity," is commonly understood to be the origin of the sincerity doctrine as applied to religious claims.[92] *Ballard* stands for the proposition that courts are permitted to inquire into the sincerity of religious beliefs. It does not, however, explain why *only* sincere religious beliefs are to be accommodated.

In *Ballard*, leaders of a new religious movement were prosecuted for mail fraud under the theory that the leaders, in order to solicit funds, made false representations about their ability to supernaturally heal their followers. The Supreme Court held that the First Amendment prevents questions of "the truth or verity of . . . religious doctrines or beliefs" from being submitted to juries.[93] Doing so would violate what would later be called the religious-question doctrine, which prohibits courts from reviewing religious claims.[94] Though the majority opinion never states that a conviction under the mail-fraud statute could be based on insincere claims, it implies it, and on remand the Ninth Circuit certainly seemed to agree.[95] From *Ballard*, most commentators understand the Court to have articulated an important First Amendment rule: while the accuracy of religious beliefs is outside the judicial scope (the religious-question doctrine), the sincerity of those beliefs is not.[96]

In a two-page opinion, Justice Jackson dissented in *Ballard*, arguing instead that juries should be barred from deciding both accuracy and sincerity. The dissent—though short—"remains the most thorough and nuanced critique of the government's authority to adjudicate religious sincerity."[97] It articulates three reasons why sincerity is an imprudent charge to assign to jurors and by extension to any fact finder. First, Justice Jackson identified as nearly impossible a juror's ability to separate the question of accuracy from the question of sincerity. Second, citing to William James—the late nineteenth-century philosopher of religion—Justice Jackson argued that nonbelievers "are likely not to understand and

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92. *Id.*; *see also* Emp't Div., Dep't of Human Res. v. Smith, 494 U.S. 872, 903 (1990) (O'Connor, J., concurring) (citing to *Ballard* as the key case establishing the sincerity doctrine).

93. *Ballard*, 322 U.S. at 86.

94. *See* Michael C. Grossman, *Is This Arbitration?: Religious Tribunals, Judicial Review, and Due Process*, 107 COLUM. L. REV. 169, 169 (2007).

95. Ballard v. United States, 152 F.2d 941, 943 (9th Cir. 1945), *rev'd*, 329 U.S. 187 (1946).

96. *See* Chapman, *supra* note 16, at 1203-04.

97. *Id.* at 1205.

are almost certain not to believe" a believer because belief involves experiences that "have existence for [some], but none at all for [others]."[98] Third, Justice Jackson articulated a concern that sincerity is understood as binary (that is, either sincere or insincere), whereas in practice religious individuals have varying levels of belief. "I do not know," Justice Jackson wrote, "what degree of skepticism or disbelief in a religious representation amounts to actionable fraud."[99]

Similar concerns with the sincerity doctrine have preoccupied jurists since the *Ballard* decision. In *Burwell v. Hobby Lobby Stores, Inc.*, the Supreme Court extended RFRA protections to closely held corporations after three such corporations argued that the Affordable Care Act's contraceptives mandate substantially burdened their free-exercise rights.[100] Justice Ginsburg dissented and, in an opinion joined by three other Justices, argued that "[t]here is an overriding interest . . . in keeping the courts out of the business of evaluating . . . the sincerity with which an asserted religious belief is held."[101]

In recent years, a number of commentators have rushed to defend the sincerity inquiry, especially in the wake of Justice Ginsburg's *Hobby Lobby* dissent.[102] Nathan Chapman has articulated various costs that would result if the sincerity inquiry were eliminated and insincere claims were accommodated. The accommodation of religious claims often shifts burdens onto third parties, so the elimination of this inquiry might encourage even insincere people to take advantage of accommodations.[103] Additionally, Chapman identifies the risk of "suspicion creep," a phenomenon whereby "a court's suspicion [of insincerity] improperly influences its analysis of other doctrinal components of the claim."[104] Thus, a court might improperly confuse a suspicion about a lack of sincerity with the separate inquiry of whether a claim actually involves religious exercise or not; this, Chapman argues, muddies judicial reasoning and encourages "judgment[s] based on secret reasons."[105] Finally, the accommodation of insincere claims could

98. *Ballard*, 322 U.S. at 93 (Jackson, J., dissenting).

99. *Id.*

100. 573 U.S. 682, 688-91 (2014).

101. *Id.* at 771 (Ginsburg, J., dissenting) (internal quotations omitted).

102. *See, e.g.*, Ben Adams & Cynthia Barmore, *Questioning Sincerity: The Role of the Courts After* Hobby Lobby, 67 STAN. L. REV. ONLINE 59 (2014); Chapman, *supra* note 16; Samuel J. Levine, *A Critique of* Hobby Lobby *and the Supreme Court's Hands-Off Approach to Religion*, 91 NOTRE DAME L. REV. ONLINE 26, 46 (2015); Kara Lowentheil & Elizabeth Reiner Platt, *In Defense of the Sincerity Test*, *in* RELIGIOUS EXEMPTIONS 247 (Kevin Vallier & Michael Weber eds., 2018).

103. *See* Chapman, *supra* note 16, at 1211-15.

104. *Id.* at 1215.

105. *Id.* at 1216.

undermine public support for religious liberty as a critical constitutional value.[106]

Still, the critique—that courts should get out of the business of evaluating sincerity—is pervasive.[107] Justice Sotomayor, in the *Hobby Lobby* oral arguments, suggested that sincerity is "the most dangerous piece" of an accommodation claim.[108] And scholars like Kent Greenawalt have advocated for avoiding sincerity inquiries whenever possible.[109] Judicial (in)competence to evaluate sincerity seems to be frequently motivating these critiques.

Yet the concern over judicial competence as the primary critique of the sincerity inquiry is misplaced. Courts are frequently tasked with the determination of mental states.[110] Furthermore, "a sincerity test will never be performed to examine the sincerity of an exclusively internal belief"—it is only that belief's relationship to some religious exercise that will be evaluated.[111] The judicial competence critiques, it seems, can only be sustained on the belief that "there is something inherently different about religious beliefs—as opposed to, say, intent or mental state—that makes it uniquely inappropriate for judicial review."[112] As a general matter, then, the critique of judicial incompetence to evaluate insincerity is unconvincing.

B. Sincerity and the Religious-Question Doctrine

The prisoner seeking a religious accommodation puts the court in an awkward position. Before even entering into the inquiry about penological reasons

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106. *Id.* at 1222.

107. *See* Lowentheil & Platt, *supra* note 102, at 265 (calling this "[p]ossibly the most prominent critique of sincerity tests").

108. Transcript of Oral Argument at 19, Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682 (2014) (Nos. 13-354, 13-356).

109. 1 KENT GREENAWALT, RELIGION AND THE CONSTITUTION 123 (2006) (stating that "[a]lternative approaches [to the sincerity inquiry] are preferable if they are feasible"); *see also* Chapman, *supra* note 16, at 1189 & n.17, 1205 (stating that Greenawalt "probably reflects the mainstream view among legal scholars" and listing others).

110. *See* Ira C. Lupu, *Where Rights Begin: The Problem of Burdens on the Free Exercise of Religion*, 102 HARV. L. REV 933, 954 (1989) ("Sincerity seems akin to good faith and other mental states that the law has for years made relevant to a wide variety of questions.").

111. Lowentheil & Platt, *supra* note 102, at 266. Similarly, in the context of criminal culpability, evaluating mental states in the absence of a nexus with some actus reus is outside the purview of judicial decision-making. *See generally* Gabriel S. Mendlow, *Why Is It Wrong to Punish Thought?*, 127 YALE L.J. 2342, 2346-59 (2018) (explaining various arguments as to why the punishment of thoughts dissociated from action is wrong).

112. Lowentheil & Platt, *supra* note 102, at 272-73.

for denying the accommodation, the court must answer threshold questions about the sincerity of a religiously held belief. There are some claims that are clearly outlandish, relying on alleged religious requirements that are "obviously shams and absurdities and whose members are patently devoid of religious sincerity."[113] But making this determination treads dangerously close to running afoul of the religious-question doctrine.

It is widely accepted that courts are "'forbid[den] from' interpreting 'particular church doctrines' and determining 'the importance of those doctrines to the religion.'"[114] The Court has been clear that there can be "no inquiry into religious doctrine."[115] This religious-question doctrine has become a truism of First Amendment law. Pervasive as it is, though, "the Supreme Court has never quite made it clear why courts cannot adjudicate such claims."[116] The Establishment Clause is probably the best constitutional basis for this "adjudicative disability"—the idea being that passing judgment on religious questions is a form of establishing religion.[117]

The religious-question doctrine was not always understood in these terms of absolute prohibition into religious questions. Before *Ballard*, "courts had long applied a limited common law principle of deference to ecclesiastical judgments, which barred courts from second-guessing the doctrinal decisions of church bodies."[118] Throughout the eighteenth and nineteenth centuries, the religious-question doctrine was thus originally understood to be an acknowledgment of institutional divisions of labor: courts deferred to ecclesiastical institutions to determine the answers to religious questions.[119] In 1872, for example, the Supreme Court held that a lower court was wrong in trying a dispute between rival church bodies and that church authorities were better suited to evaluate the

113. Theriault v. Carlson, 495 F.2d 390, 395 (5th Cir. 1974).

114. Ben-Levi v. Brown, 136 S. Ct. 930, 934 (2016) (Alito, J., dissenting from the denial of certiorari) (quoting Presbyterian Church in U.S. v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church, 393 U.S. 440, 450 (1969)).

115. Jones v. Wolf, 443 U.S. 595, 603 (1979) (quoting Md. & Va. Eldership v. Church of God, 396 U.S. 367, 368 (1970) (Brennan, J., concurring)).

116. Michael A. Helfand, *Litigating Religion*, 93 B.U. L. REV. 493, 494 (2013).

117. Ira C. Lupu & Robert W. Tuttle, *Courts, Clergy, and Congregations: Disputes Between Religious Institutions and Their Leaders*, 7 GEO. J.L. & PUB. POL'Y 119, 135 (2009); *see also Mary Elizabeth Blue Hull Mem'l Presbyterian Church*, 393 U.S. at 449 (discussing the problem of establishing religion in the resolution of a church property dispute).

118. Jared A. Goldstein, *Is There a "Religious Question" Doctrine? Judicial Authority to Examine Religious Practices and Beliefs*, 54 CATH. U. L. REV. 497, 502 (2005).

119. *See id.* at 504-05; Michael A. Helfand, *When Judges Are Theologians: Adjudicating Religious Questions*, *in* RESEARCH HANDBOOK ON LAW AND RELIGION 262, 277-79 (Rex Ahdar ed., 2018).

claim.[120] It was not until *Ballard* in 1944 that the Court expanded the religious-question doctrine into a rule prohibiting courts from delving into religious questions. In 1969 the Court further expanded that bar to prevent "the interpretation of particular [religious] doctrines and the importance of those doctrines to the religion."[121]

The religious-question doctrine as it exists in its broad form today significantly complicates the sincerity inquiry because of a "dangerous temptation to confuse sincerity with the underlying truth of a claim."[122] Put differently, "[h]uman nature being what it is . . . it is frequently difficult to separate [the sincerity] inquiry from a forbidden one involving the verity of the underlying belief."[123]

C. Why Require Sincerity?

The sincerity doctrine—that only *sincerely* held religious beliefs will be accommodated—is a peculiar rule. It is compelled by neither statutory nor constitutional text, and is instead a creature of judicial lawmaking. Where then does it come from? The *Ballard* decision is frequently understood as the progenitor of the contemporary sincerity doctrine.[124] However, this is not *Ballard*'s holding; the Court in *Ballard* simply found that it is within a court's *competency* to evaluate the sincerity (though not verity) of someone's religious beliefs.[125] This says nothing about why sincerity is *required* or about the sincerity doctrine's primary

120. Watson v. Jones, 80 U.S. (13 Wall.) 679, 734 (1872).

121. *Mary Elizabeth Blue Hull Mem'l Presbyterian Church*, 393 U.S. at 450; *see* Goldstein, *supra* note 118, at 509.

122. Adams & Barmore, *supra* note 102, at 64.

123. Int'l Soc'y for Krishna Consciousness, Inc. v. Barber, 650 F.2d 430, 441 (2d Cir. 1981); *see also* United States v. Ballard, 322 U.S. 78, 92 (1944) (Jackson, J., dissenting) (expressing doubt about a fact finder's ability to "separate an issue as to what is believed from considerations as to what is believable").

124. *See, e.g.*, Philbrook v. Ansonia Bd. of Educ., 757 F.2d 476, 481 (2d Cir. 1985), *aff'd and remanded*, 479 U.S. 60 (1986) (citing *Ballard* to show that it is "necessary . . . for a court to engage in analysis of the sincerity . . . of someone's religious beliefs"); Badoni v. Higginson, 638 F.2d 172, 176 (10th Cir. 1980) (citing *Ballard* to explain that to establish a free-exercise claim, the restriction "must be . . . sincerely held by the person asserting the infringement [on the claimant's religious practice]").

125. *Ballard*, 322 U.S. 78.

function: that of weeding out meritless claims.[126] Just because a court is competent to evaluate sincerity does not mean that free-exercise exemptions should be restricted only to sincerely held religious beliefs.

The sincerity doctrine has its historical roots in the thorny issue of conscientious objection to military service.[127] Conscientious objectors to deadly wars illustrate starkly the ultimate tension inherent in religious-exemption law: granting a religious exemption to one person often causes the shifting of costs to third parties.[128] One draftee's nonparticipation in the battlefield results in another servicemember's exposure. The sincerity doctrine thus emerged as a functional mechanism for claim management, and this understanding of the sincerity doctrine remains to this day, in the prisoner context and beyond.

Nothing in the text of the Universal Training and Service Act, governing conscientious objection for draftees, requires that beliefs be *sincerely* held.[129] Yet, in a seminal conscientious objector case from 1955, the Supreme Court highlighted that "the *ultimate* question in conscientious objector cases is the sincerity of the registrant . . . . In these cases, objective facts are relevant only insofar as they help in determining the sincerity of the registrant in his claimed belief, purely a subjective question."[130] Ten years later, in another conscientious objector case, the Supreme Court called sincerity the "threshold question . . . which must be resolved in every case."[131] Sincerity emerged as a functional doctrine created by the courts to serve as a tool of judicial management, to prevent "[a]

126. *See* Korte v. Sebelius, 735 F.3d 654, 683 (7th Cir. 2013) ("Checking for sincerity and religiosity is important to weed out sham claims.") (RFRA claim).

127. *See* Adams & Barmore, *supra* note 102, at 60 ("The sincere belief requirement has its roots in a long tradition of exempting conscientious objectors from conscripted military service.").

128. *See* Christopher C. Lund, *Religious Exemptions, Third-Party Harms, and the Establishment* Clause, 91 NOTRE DAME L. REV. 1375, 1383 (2016) (describing an "extraordinary" third-party burden if objectors are replaced by drafted substitutes). Not all agree, however, that conscientious objection to military draft is an obvious example of harm to third parties. *See, e.g.*, NELSON TEBBE, RELIGIOUS FREEDOM IN AN EGALITARIAN AGE 58 (2017) (arguing that draft exemptions do not impose significant burdens on third parties); *see also* Micah Schwartzman et al., *The Costs of Conscience*, 106 KY. L.J. 781, 804-06 (2017-18).

129. *See* Universal Military Training and Service Act, 50 U.S.C. § 456(j) (2018).

130. Witmer v. United States, 348 U.S. 375, 381 (1955) (emphasis added). While *Witmer* enshrined the sincerity inquiry in conscientious objection claims, militaries around the western world had been inquiring into the sincerity of a claimant's nonviolent convictions as a matter of administrative decision-making since at least the turn of the twentieth century. *See* Jeremy K. Kessler, *A War for Liberty: On the Law of Conscientious Objection*, *in* 3 THE CAMBRIDGE HISTORY OF THE SECOND WORLD WAR 447, 450-51 (Michael Geyer & Adam Tooze eds., 2015).

131. United States v. Seeger, 380 U.S. 163, 185 (1965).

[f]lood of [i]nsincere [c]laims,"[132] lest the protections of free exercise be reduced to "a limitless excuse for avoiding all unwanted legal obligations."[133]

In addition to the sincerity doctrine's functional role in "avoid[ing] making a mockery of both religion and government,"[134] the doctrine is also justifiable on first principles. Free-exercise protections are ultimately protections of individual conscience.[135] "[N]o serious injury is done to [one's] conscience," Donald Giannella pointed out fifty years ago, when one is not allowed to engage in conduct that one does not sincerely believe is motivated by one's religion.[136] An accommodation regime that seeks to protect exercise motivated by even insincere beliefs would protect too much.

D. Should Sincerity Be Eliminated?

In the three major cases that the Supreme Court has heard about prisoner religious claims, the prisoner's sincerity has never been contested.[137] In fact, more broadly, in most of the major cases defining modern free-exercise doctrine over the last five decades, sincerity has not been raised as an issue at the highest Court.[138] And while postural reasons might make issues of sincerity less central to appellate litigation, some lower courts have also elected to stay away from the

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132. Chapman, *supra* note 16, at 1220.

133. Africa v. Pennsylvania, 662 F.2d 1025, 1030 (3d Cir. 1981), *cert. denied*, 456 U.S. 908 (1982) (quoting LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 859 (1st ed. 1978)).

134. Donald A. Giannella, *Religious Liberty, Nonestablishment, and Doctrinal Development—Part I: The Religious Liberty Guarantee*, 80 HARV. L. REV. 1381, 1417 (1967).

135. *See* Wallace v. Jaffree, 472 U.S. 38, 50 (1985) (identifying "the individual's freedom of conscience as the central liberty that unifies the various Clauses in the First Amendment"); *see also* Patrick Weil, *Freedom of Conscience, But Which One? In Search of Coherence in the U.S. Supreme Court's Religion Jurisprudence*, 20 U. PA. J. CONST. L. 313, 317 (2017) (arguing that "the concept of 'freedom of conscience' has structured—implicitly or explicitly—the Court's religion-related jurisprudence").

136. Giannella, *supra* note 134, at 1417.

137. Holt v. Hobbs, 135 S. Ct. 853, 862 (2015); Cutter v. Wilkinson, 544 U.S. 709, 713 (2005); O'Lone v. Estate of Shabazz, 482 U.S. 342, 345 (1987); *see also* Ben-Levi v. Brown, 136 S. Ct. 930, 933 (2016) (Alito, J., dissenting from the denial of certiorari) (noting that the claimant's sincerity was not questioned).

138. *See* Stephen Pepper, *Taking the Free Exercise Clause Seriously*, 1986 BYU L. REV. 299, 325.

sincerity inquiry because it seems "exceedingly amorphous"[139] and an "impossible" task.[140] They seem concerned, as one scholar has pointed out, that inquiring into sincerity "cannot completely escape the distinctly bad aroma of an inquisition."[141]

Yet avoiding or eliminating the sincerity requirement for free-exercise protections is not the solution.[142] Disposing of the sincerity inquiry wholesale, as some have suggested, would largely eviscerate the constitutional conception of religion. The First Amendment ought to take religion seriously as a sociological and phenomenological reality in American society; taking religion seriously requires treating religion as not merely a set of empty, self-serving doctrines.[143] It means drawing lines, however troublesome they may be, to restrict access to constitutional protections to their intended beneficiaries, who actually subscribe to a comprehensive system of beliefs. A definition of sincerity so expansive that even the most outlandish of claimants is assumed to be sincere would collapse the category of religion into nothingness; "[s]incerity can only be assumed if nothing very important is at issue."[144]

Requiring sincerity, at least insofar as sincerity excludes those who abuse free-exercise exemptions for their own benefit, is thus a necessary, if imperfect, requirement for those seeking free-exercise protections. The defense of religious rights, if it is to treat religion as a serious and content-laden phenomenon, paradoxically requires the constriction of those rights. Religion cannot be reduced to a "cheap excuse for every conceivable form of self-indulgence."[145]

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139. Patrick v. LeFevre, 745 F.2d 153, 157 (2d Cir. 1984).

140. Smith v. Ozmint, No. 9:04-01819-PMD-BM, 2010 WL 1071388, at *12 (D.S.C. Jan. 25, 2010), *report and recommendation adopted*, No. 9:04-01819-PMD, 2010 WL 11636184 (D.S.C. Mar. 18, 2010), *aff'd*, 396 F. App'x 944 (4th Cir. 2010).

141. Lupu, *supra* note 110, at 954.

142. While I do not believe that the sincerity inquiry should be eliminated, this Note does not take a position on the important question of whether or not the three-prong test under RLUIPA (religion, substantial burden, and sincerity) should continue to be collapsed, as it often is in practice. At least one scholar has argued against this collapsing. *See* Chapman, *supra* note 16, at 1215-16; *supra* notes 104-105 and accompanying text.

143. On treating religion, and specifically the Free Exercise Clause, "seriously," see generally Pepper, *supra* note 138, which explains how and why one should take the Free Exercise Clause more seriously than in the past.

144. *Id.* at 327.

145. TRIBE, *supra* note 84, at 1249.

Furthermore, the accommodation of clearly insincere and meritless claims erodes confidence in the concept of religious liberty,[146] making a mockery of a constitutional value that for millions of Americans constitutes a—if not *the*—means by which they make sense of the world. Supporters of religious rights, therefore, should be at the forefront of advocacy for a robust understanding of sincerity, as a way to screen meritless claims.

Indeed, the sincerity doctrine's primary function should be understood—to borrow the Supreme Court's language from a different context—as an "important mechanism for weeding out meritless claims."[147] The perpetual fear is that a claimant will abuse the exemptions granted by virtue of free-exercise protections for ulterior motives. Sincerity is a doctrine deployed "when the government believes it is the dupe [because the] government does not want to be taken by fakers."[148]

Often, "[r]eligious accommodations in prison are desirable" for instrumental reasons.[149] As such, an overly broad accommodation regime encourages prisoners to "become religious in order to enjoy greater rights."[150] As then-Chief Judge Easterbrook explained in a case involving a Moorish Science Temple member requesting a special diet, "[a] prison is entitled to ensure that a given claim reflects a sincere religious belief, rather than a preference for the way a given diet tastes . . . or a prisoner's desire to make a pest of himself and cause trouble for his captors."[151] Or take the case of Harry Theriault, a prisoner who was the "self-proclaimed founder, organizer, bishop, prophet and spiritual leader" of a new faith. The Fifth Circuit wrote, in oft-quoted language, that there is "no hindrance to denials of First Amendment protection to so-called religions which tend to mock established institutions and are obviously shams and absurdities and whose members are patently devoid of religious sincerity."[152]

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146. *See* Chapman, *supra* note 16, at 1222 (discussing distrust of religious liberty in the absence of a sincerity test).

147. Fifth Third Bancorp v. Dudenhoeffer, 573 U.S. 409, 425 (2014) (discussing motions to dismiss for failure to state a claim under the Federal Rules of Civil Procedure).

148. John T. Noonan, Jr., *How Sincere Do You Have to Be to Be Religious?*, 1988 U. ILL. L. REV. 713, 723.

149. Noha Moustafa, Note, *The Right to Free Exercise of Religion in Prisons: How Courts Should Determine Sincerity of Religious Belief Under RLUIPA*, 20 MICH. J. RACE & L. 213, 224 (2014).

150. Cutter v. Wilkinson, 349 F.3d 257, 266 (6th Cir. 2003), *rev'd*, 544 U.S. 709 (2005). This was one basis on which the Sixth Circuit held RLUIPA was an unconstitutional violation of the Establishment Clause, *id.* at 260, 266-67, a holding the Supreme Court reversed, 544 U.S. at 713.

151. Vinning-El v. Evans, 657 F.3d 591, 592, 594 (7th Cir. 2011).

152. Theriault v. Carlson, 495 F.2d 390, 391, 395 (5th Cir. 1974).

E. How Courts Evaluate Sincerity

Sincerity, while an important element of the free-exercise analysis that should be preserved, does present a series of practical challenges in the way it is evaluated. The evaluation of sincerity is ultimately a factual question.[153] Evaluating sincerity relies heavily on a judgment of a claimant's credibility—an individual claimant is, after all, the most relevant narrator of her own religious beliefs. Still, courts find it particularly useful to evaluate "extrinsic evidence."[154] This Section discusses two relatively uncontroversial types of such evidence: incentives to be insincere and behavioral inconsistencies. Part III documents ways in which courts rely on a more controversial type of evidence that frequently arises in the Muslim prisoner context: religious doctrine regarding the accommodation sought.

First, courts can look to the existence of incentives to be insincere by assessing "evidence that the [claimant] materially gains by fraudulently hiding secular interests behind a veil of religious doctrine."[155] In prison, some—though not nearly all—religious accommodations are desirable because they provide prisoners "better food, more flexible sleeping schedules, extended time outside their cells, and more opportunities to congregate with fellow practitioners."[156] Such incentives are not, of course, dispositive of insincerity, but provide evidence of a motive to misrepresent one's religious beliefs.[157] By contrast, when prisoners ask for accommodations that might be understood as less desirable—a more restrictive diet, for example—courts take this as evidence in favor of sincerity.[158] Courts are also vigilant against prisoners who might be motivated to "adopt a

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153. *See, e.g.*, United States v. Seeger, 380 U.S. 163, 185 (1965) (noting, in a conscientious objector case, that sincerity "is, of course, a question of fact"); Mosier v. Maynard, 937 F.2d 1521, 1526 (10th Cir. 1991) (noting, in a prisoner accommodation case, that "[w]hether religious beliefs are sincerely held is a question of fact").

154. Int'l Soc'y for Krishna Consciousness, Inc. v. Barber, 650 F.2d 430, 442 (2d Cir. 1981) ("Extrinsic evidence demonstrates that the devotee's beliefs . . . are genuine to a sufficient degree."); *see also* Adams & Barmore, *supra* note 102, at 60 (arguing for the use of "objective criteria" in evaluating sincerity).

155. *Int'l Soc'y for Krishna Consciousness*, 650 F.2d at 441.

156. Moustafa, *supra* note 149, at 224.

157. *See, e.g.*, Perreault v. Mich. Dep't of Corr., No. 1:16-CV-1447, 2018 WL 3640356, at *3 (W.D. Mich. Aug. 1, 2018) (explaining that because only certain prison locations can accommodate religious diets, "there is a concern that prisoners may request a religious dietary accommodation simply for the purpose of obtaining a transfer to a more desirable location").

158. *See* Chapman, *supra* note 16, at 1233 & n.236.

religion merely to harass the prison staff with demands to accommodate [their] new faith."[159]

Next, courts also look to irregularities in the claimant's behavior in evaluating sincerity. One of the most often-cited examples of this type of evidence comes from the criminal context, in a case where the defendant objected on free-exercise grounds to criminal proceedings on the Sabbath. The court rejected this claim when the government offered evidence that the defendant would go "to his office and work[] on Saturdays."[160] In the prison context, evidence that a prisoner has been regularly abiding by religious restrictions is viewed as good evidence of sincerity. By contrast, evidence that a prisoner is not consistently observing the religious restrictions he has requested can be used to demonstrate insincerity.[161] Some courts have been cautious about this latter type of evidence, however, recognizing that "the fact that a person does not adhere steadfastly to every tenet of his faith does not mark him as insincere" and acknowledging that some inconsistency—particularly in demanding religious traditions—is to be expected.[162] One scholar has argued that this type of evidence should not be used to evaluate whether the claimant has "been a model of consistency," but rather whether the claimant's asserted beliefs "fit into . . . [his] religious biography."[163]

III. THE SINCERITY INQUIRY IN PRACTICE: EVIDENCE FROM MUSLIM PRISONER CLAIMS

The religious-question doctrine, at least in its most expansive form, precludes judges from inquiring into the doctrine behind a religious belief. Whether a prisoner's claim *actually* has a basis in the religion should be irrelevant to the inquiry; this question is, in fact, nonsensical to a legal system that claims not to recognize the ability of religious authorities to dictate the contours of adherents'

159. Reed v. Faulkner, 842 F.2d 960, 963 (7th Cir. 1988) (citing Azeez v. Fairman, 795 F.2d 1296, 1298 (7th Cir. 1986)); *see* Chapman, *supra* note 16, at 1233.

160. Dobkin v. District of Columbia, 194 A.2d 657, 659 (D.C. 1963); *see also* Webb v. LaManna, No. 19-CV-5164, 2019 WL 4752375, at *1 (E.D.N.Y. Sept. 30, 2019) (documenting a state trial court's refusal to delay a trial based on a Muslim defendant's objection that it interfered with his Friday prayer schedule because "[h]e's appeared on Fridays . . . [a] multitude of times").

161. *See, e.g.*, Daly v. Davis, No. 08-2046, 2009 WL 773880, at *1 (7th Cir. Mar. 25, 2009) (affirming dismissal of a prisoner's free-exercise claims when he was "observed purchasing and eating non-kosher food and trading his kosher tray for a regular non-kosher tray" on three occasions).

162. *Reed*, 842 F.2d at 963.

163. Chapman, *supra* note 16, at 1235.

beliefs. The judge is of course permitted to evaluate the sincerity of the claimant, but the actual religious belief itself should be taken at face value.

This Part documents several ways in which this account is a doctrinal fiction, focusing on the claims of Muslim prisoners. I focus on Muslim prisoners' claims because they provide some of the most challenging and common tests of the required distinction between the sincerity and religious-question doctrines. Islam represents a highly doctrinally developed religious tradition, with a particularly robust legal corpus that provides ample opportunity for those knowledgeable of the tradition to "verify" religious claims.[164] Judges evaluating Muslim prisoner claims are thus particularly susceptible to the temptation to look toward religious doctrine—either independently or through the use of experts—to evaluate the claims. Additionally, Islam remains a relatively unknown entity for most decision-makers in prison religious-accommodation claims, making the temptation to "verify" claims even more acute. Finally, Islam is significantly overrepresented in American prisons,[165] and individual Muslim prisoners such as Gregory Holt (*Holt v. Hobbs*) and Ahmad Uthman Shabazz (*O'Lone v. Estate of Shabazz*) have played an outsized role in the development of prisoner religious-accommodation law.[166]

This Part identifies courts' evaluative techniques that seem to violate the long-standing principle that courts are proscribed from intervening in religious questions and should instead focus on sincerity. These techniques include (1) relying on religious experts to make decisions about the merit of prisoner claims or alternatives; (2) inquiring into the views of other Muslims or seeking corroboration of the accommodation request within traditional sources; (3) expecting

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164. Islamic law has traditionally been recognized as the preeminent of the Islamic sciences. As one noted scholar of Islam stated in no uncertain terms, "Islam is, first and foremost, a nomocracy. The highest expression of its genius is to be found in its law; and its law is the source of legitimacy for other expressions of its genius." George Makdisi, *The Significance of the Sunni Schools of Law in Islamic Religious History*, 10 INT'L J. MIDDLE E. STUD. 1, 6 (1979). Other religious traditions where law occupies a privileged position, like Judaism, would perhaps have also made good case studies.

165. Estimates suggest that around nine percent of prisoners in the United States are Muslims. *See* MUSLIM ADVOCATES, *supra* note 22, at 15; *Religion in Prison: A 50-State Survey of Prison Chaplains*, PEW RES. CTR. 23 (Mar. 22, 2012), http://www.pewresearch.org/wp-content/uploads/sites/7/2012/03/Religion-in-Prisons.pdf [https://perma.cc/847D-WZT9]. In some states, Muslim prisoners make up as much as twenty percent of the overall prison population. MUSLIM ADVOCATES, *supra* note 22, at 37-38. By contrast, only about one percent of the total American population identifies as Muslim. Besheer Mohamed, *New Estimates Show U.S. Muslim Population Continues to Grow*, PEW RES. CTR. (Jan. 3, 2018), https://www.pewresearch.org/fact-tank/2018/01/03/new-estimates-show-u-s-muslim-population-continues-to-grow [https://perma.cc/PCM7-HTSK].

166. *See supra* note 24 and accompanying text.

a sincere Muslim prisoner asking for one accommodation to behave in a way consistent with Muslim practice generally; and (4) relying on past precedent involving other Muslim prisoners to evaluate the religious claims of a present claimant.

In the following cases, sincerity is not always explicitly identified as the grounds on which the claim is adjudicated. Yet, while the question of sincerity is not always specifically articulated, it is clear that judges' reliance on inquiries pertaining to Islamic religion and doctrine are aimed at preliminarily screening meritless claims by understanding the religious background of the accommodation sought.[167] Sincerity is, after all, the "threshold question . . . which must be resolved in every case."[168] If a claim passes through the preliminary inquiry, the judge can then turn to the various tests pertaining to balancing penological interests or looking at compelling governmental interests to adjudicate the claim on its merits. But the majority of the claims cited below do not make it this far—they are disposed of preliminarily, by judicial use of the preliminary screening inquiry.

A. What Do the Religious Experts Say?

Courts, including the Supreme Court, have historically relied upon religious experts in the adjudication of claims by Muslim prisoners.[169] Take *Holt v. Hobbs*, the Supreme Court's most recent prison religious-accommodation case.[170] A Muslim prisoner was challenging an Arkansas prison's refusal to accommodate his request to grow a half-inch beard "in accordance with his religious beliefs."[171]

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167. As noted below, this type of inquiry also presents itself as a question of the *substantiality* of the burden on the prisoner's religious beliefs. However, the cases below—with a few exceptions—do not rest upon whether the claim is *religious* in nature or not. As a general matter, courts that have opined on the ways in which these inquiries might be interrelated have found sincerity to be the definitive inquiry. For example, in *Luckette v. Lewis*, 15 F. App'x 451 (9th Cir. 2001), the Ninth Circuit held that even though a lower court found that the religion a prisoner claimed was a "sham," the determinative inquiry was whether the prisoner was sincere in his belief in the otherwise-sham religion. *See id.* at 452.

168. United States v. Seeger, 380 U.S. 163, 185 (1965).

169. This phenomenon is not, of course, limited to the claims of Muslim prisoners. *See, e.g.*, Friedman v. Arizona, 912 F.2d 328, 330 (9th Cir. 1990) (involving a rabbi testifying that "having a beard is a legitimate Jewish belief" in a case involving a Jewish prisoner's unsuccessful challenge to a prison policy prohibiting facial hair).

170. 135 S. Ct. 853 (2015).

171. *Id.* at 859.

Seventeen amicus briefs were filed in this case from various parties.[172] But a unanimous Court ultimately cited only one—a brief by Islamic law scholars—to support the finding that the Muslim prisoner's "belief is by no means idiosyncratic," though the Court did add the caveat that a prisoner need not have a "belief[] which [is] shared by all of the members of a religious sect."[173] The five Islamic law scholars noted that the Muslim prisoner "claimed support in a traditional Islamic set of sources, known as the hadith,"[174] and that "a perceived obligation to follow the hadith . . . is a common belief among Muslims and has a long established theological and historical warrant."[175] Additionally, the scholars found it useful to identify specifically some of the *ḥadīth* pertaining to beards and explain how Islamic law has come to understand these sources.[176] The brief recognizes that, according to the religious-question doctrine, "[e]ven if he were the only Muslim that felt [that he was required to grow a beard], it would not matter."[177] But there is a strange incongruity in this recognition: while acknowledging that what Islamic law scholars have to say is irrelevant to the merits of the petitioner's claim, the brief puts forward the views of precisely those scholars to demonstrate that the Muslim prisoner's beliefs are corroborated by mainstream understandings of the religious tradition. Implicit in the brief and in the Court's reliance on it is the assumption that the opinions of Islamic law scholars have some bearing on the case after all.

Holt is not exceptional in its reliance on religious experts. What is exceptional about *Holt* is that the religious experts were used to rule in *favor* of the claimant. Far more often, religious experts are used to support the denial of religious accommodations. Prison officials frequently offer their own religious experts to show that the accommodation the prisoner has requested is not justified as a matter of Islamic law. For example, one court put significant weight on the affidavit of a "Muslim scholar" that contradicted a prisoner's claim that his food should only be prepared by other Muslims, pointing to a reading of the "Qu'ran

172. *See Holt v. Hobbs*, SCOTUSBLOG, https://www.scotusblog.com/case-files/cases/holt-v-hobbs [https://perma.cc/N5EW-5MF8].

173. *Holt*, 135 S. Ct. at 862-63 (quoting Thomas v. Review Bd. of Ind. Emp't Sec. Div., 450 U.S. 707, 715-16 (1981)).

174. The *ḥadīth* are the statements of the Prophet Muhammad, peace be upon him, as reported by various narrators.

175. Brief for Islamic Law Scholars as Amici Curiae Supporting Petitioner at 2, *Holt*, 135 S. Ct. 853 (No. 13-6827).

176. *Id.*

177. *Id.* at 17 (citing Frazee v. Ill. Dep't of Emp't Sec., 489 U.S. 829, 834 (1989) ("[T]he Free Exercise Clause does not demand adherence to a tenet or dogma of an established religious sect.")).

[sic] [that] specifically permits Muslims to consume food prepared by non-Muslims."[178] On this basis, the court found that the right in question was not established explicitly enough to defeat a defense of qualified immunity.[179]

Another court relied on the affidavit of a professor of Islamic studies to sustain the finding that a meat-free diet was "acceptable under Islamic law," and that the prison's denial of the prisoner's claim was therefore not a substantial burden.[180] Similarly, in response to a claim demanding meat (instead of vegetarian) meals, another court relied on the testimony of the same professor to hold that "Islamic law does not require the eating of meat as a condition of being a Muslim."[181] Further, the court held that despite the prisoner's claims to the contrary, the meals that the prison provided "adequately accommodate[d] Plaintiff's religious dietary requirements."[182] In another case, a prisoner brought claims demanding the provision of medications before the start of the Ramadan fasts at dawn and access to a shower on Friday mornings (instead of Thursday) to prepare for Friday prayers.[183] The court rejected these claims, relying on a Muslim chaplain who stated that those taking necessary medications are excused from fasting and that showering on Thursday would be religiously acceptable.[184] The court was convinced by the chaplain, holding that "under Islamic law, Plaintiff may take his medication without breaking his fast" and that "under Islamic law," showering on Thursday was sufficient.[185] And yet another court was satisfied with a prison policy limiting the quantity of "prayer oil" that a prisoner could keep in part because an imam was consulted in the drafting of the rule.[186] These cases show that courts frequently use expert testimony in order to test the verity of Muslim claimants' religious beliefs.

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178. Hudson v. Maloney, 326 F. Supp. 2d 206, 211 n.3, 212 n.5 (D. Mass. 2004).

179. *Id.* at 212. But see Lindh v. Warden, No. 2:09-CV-00215-JMS-MJD, 2013 WL 139699, at *9 (S.D. Ind. Jan. 11, 2013), where, in response to a Muslim prisoner's request to be allowed to pray daily in congregation with other Muslim prisoners, the prison offered the testimony of a local imam who said that there is "no religious detriment to a prisoner's failure to engage in daily congregate prayer when the prison prohibits it." *Id.* Faithfully applying the religious-question doctrine, the court deemed the imam's testimony irrelevant. *Id.* at *6 n.1.

180. Turner-Bey v. Maynard, No. CIV.A. JFM-10-2816, 2012 WL 4327282, at *8 (D. Md. Sept. 18, 2012).

181. Phipps v. Morgan, No. CV-04-5108-MWL, 2006 WL 543896, at *1, *7-8 (E.D. Wash. Mar. 6, 2006).

182. *Id.* at *8.

183. Blackwell v. Green, No. CIV.A. RDB-13-372, 2013 WL 5883396, at *1-2 (D. Md. Oct. 29, 2013).

184. *Id.* at *2, *8.

185. *Id.* at *8.

186. Lewis v. Ollison, 571 F. Supp. 2d 1162, 1171 (C.D. Cal. 2008).

B. What Does Islam Say?

Relatedly, courts will look to whether a Muslim prisoner's understanding of Islam is consistent with broader Muslim views. For example, one court found a Muslim prisoner sincere in his request to pray in a congregation; the judge relied on the fact that the prisoner's "belief in the necessity of group prayer is consistent with the belief of many Muslims and he is a strict adherent to Islamic law."[187]

In a particularly illuminating example, a Muslim prisoner wished to start observing his Ramadan fasts several weeks before the standard Islamic calendar listed the start of Ramadan. According to the court, the prisoner's belief was troublesome because it contradicted "virtually every Muslim in the world."[188] A strict understanding of the religious-question doctrine would prevent a court from considering the prisoner's apparently aberrant schedule; deciding the start of a religious observance is, after all, a religious question. Still, the district court, clearly frustrated by the prisoner's claim, rested its denial on the fact that "he ha[d] not provided any evidence to support the assertion,"[189] even though he had arguably provided sufficient evidence of his subjective religious belief. In addition, the court drew upon Islamic law principles to hold that the prisoner was wrong in his belief that Ramadan started on the earlier date. Among its factual determinations, it found:

> Islam as a religion . . . does not hold a person guilty for lawful duties he could not perform because of certain serious circumstances. A Muslim inmate under certain security restriction may not be allowed to leave his/her cell to search for the new moon (crescent), and under these circumstances, would be exempted from physical sighting and should depend only on information about the starting and ending of Fasting through Islamic authority, such as the Fiqh Council.[190]

Thus, the court tried to explain in Islamic legal terms why the prisoner's claim was wrong. First, it cited the principle that one is excused for the nonperformance of legal duties because of extenuating circumstances.[191] Second, the

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187. Lindh v. Warden, No. 2:09-CV-00215-JMS-MJD, 2013 WL 139699, at *9 (S.D. Ind. Jan. 11, 2013).

188. Easterling v. Pollard, 528 F. App'x 653, 655 (7th Cir. 2013).

189. Easterling v. Pollard, No. 10-CV-779, 2012 WL 666797, at *7 (E.D. Wis. Feb. 29, 2012), *aff'd*, 528 F. App'x 653 (7th Cir. 2013).

190. *Id.* at *4.

191. *Id.*; *see also* WAEL B. HALLAQ, AN INTRODUCTION TO ISLAMIC LAW 172 (2009) (defining the concept of legal necessity, *ḍarūra*, in Islamic law).

court referenced the procedure for ascertaining the beginning of a lunar month—the sighting of the crescent—and argued that the prisoner, given his circumstances, should defer to authoritative sources on the matter.[192] This is a surprising analysis coming from a court that is—as a result of the religious-question doctrine—not supposed to enter into the question of what Islam *actually* says.

The previous case points to a common judicial tactic: seeking corroborative evidence from the Islamic doctrinal corpus to justify the accommodation sought. In effect, this creates—for a class of accommodation claims—a presumption of illegitimacy *unless* the prisoner is able to show that the accommodation is corroborated by the religious tradition.[193] Courts seem to deploy this method when they encounter claims they suspect are particularly meritless. In the aforementioned *Hudson* case, the court confronted a Muslim prisoner's request to have full-sized prayer rugs upon which to pray instead of the towels that the prison provided for that purpose.[194] The court threw out this claim because "it is unclear that any constitutional right is implicated by the [denial], as plaintiffs point to no tenet of the Muslim faith that requires that the prayer ritual be performed on a prayer rug as opposed to a prayer towel."[195] The burden of proof was on the prisoner to point to a "tenet of the Muslim faith" that justified the accommodation. His claim that his subjective religious belief required the accommodation was not by itself sufficient. Similarly, the Ninth Circuit rejected a prisoner's claim that certain scented oils "do not comply with Islamic law" by concluding that such a position was "unsupported by the record."[196] Another court denied a prisoner's claim that he needed two hot meals daily as part of his diet during Ramadan, noting that the prisoner "does not point to any Islamic teaching, law, or rule indicating the requirement of two hot meals per day."[197] And yet another court threw out a Muslim prisoner's claim that he should be allowed to wear an "Islamic medallion" because the prisoner was not able to provide "[]sufficient evidence to support a finding that these policies [prohibiting him from wearing the medallion] substantially burden his religious practice."[198]

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192. *Easterling*, 2012 WL 666797, at *6.

193. *Cf.* Ben-Levi v. Brown, 136 S. Ct. 930, 933 (2016) (Alito, J., dissenting from the denial of certiorari) (describing prison officials faulting a Jewish prisoner who requested accommodation of religious group study because he failed to "provide 'documentation from reliable sources or authorities on the Jewish faith'" to corroborate his request (citation omitted)).

194. Hudson v. Maloney, 326 F. Supp. 2d 206, 209 n.2 (D. Mass. 2004).

195. *Id.*

196. Nance v. Miser, 768 F. App'x 742, 743 (9th Cir. 2019).

197. Curry v. Bradt, No. 13-CV-355A, 2014 WL 7339039, at *7 (W.D.N.Y. Dec. 22, 2014).

198. Jihad v. Fabian, 680 F. Supp. 2d 1021, 1027 (D. Minn. 2010).

At other times, courts have tried to read and interpret religious texts as part of their adjudication of Muslim prisoner claims. For instance, in a case involving a Muslim prisoner unsatisfied with vegetarian meals and demanding *ḥalāl* meat, the court told the prisoner that his reading of Qur'anic verses was wrong: "Although Plaintiff has directed the Court to passages from the Quran, none of the quotations actually mandate the eating of meat."[199] The Supreme Court's warning that "[c]ourts are not arbiters of scriptural interpretation"[200] was of no consequence to this district court.

Courts will also adopt the vocabulary of Islamic law to explain why Muslim prisoners are not entitled to some requested accommodation. A court rejected a claim in which a Muslim prisoner asked to be provided with animal proteins as part of his *ḥalāl* meal, explaining that the prisoner has not "presented any evidence that he has no dietary option at [the prison] that does not contain haram food items."[201] The court referenced the Islamic legal category *ḥarām* ("impermissible") and reconstructed a longstanding principle from Islamic law dictating that, unless evidence demonstrates the impermissibility of something, its default status is *ḥalāl* ("permissible").[202] In essence, the court told the prisoner that his understanding of what is Islamically impermissible is incorrect and that for a diet to be Islamically impermissible, there must actually be something affirmatively *ḥarām* in it, not just the absence of a positive showing that the food is *ḥalāl*.

C. Are You a Consistent Muslim?

Decision-makers will also inquire into whether a Muslim prisoner is consistent—that is, whether the prisoner engages in other behavior that a practicing Muslim would engage in. This type of inquiry is predicated on the idea that a Muslim prisoner requesting some accommodation should demonstrate his commitment to the faith by showing that he engages in behavior consistent with that

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199. Phipps v. Morgan, No. CV-04-5108-MWL, 2006 WL 543896, at *1 (E.D. Wash. Mar. 6, 2006). For a more explicit example of a court functioning as interpreter of religious text, though not in the prison accommodation context, see Kathleen M. Moore, *Representation of Islam in the Language of Law: Some Recent U.S. Cases*, *in* MUSLIMS IN THE WEST: FROM SOJOURNERS TO CITIZENS 187, 187-88 (Yvonne Yazbeck Haddad, ed., 2002), which documents the invocation of various passages from the Qur'an by Judge Kevin Duffy at the sentencing of one of the 1993 World Trade Center bombing defendants.

200. Thomas v. Review Bd. of Ind. Emp't Sec. Div., 450 U.S. 707, 716 (1981).

201. Bey v. Tenn. Dep't of Corr., No. 2:15-CV-174-TWP-MCLC, 2018 WL 1542383, at *7 (E.D. Tenn. Mar. 29, 2018).

202. *See* KHALED ABOU EL FADL, REASONING WITH GOD: RECLAIMING SHARI'AH IN THE MODERN AGE xxxviii (2014) (discussing the principle of *al-barā'a al-aṣliyya*).

of "good" Muslims. In essence, a court engaging in such an inquiry imagines an archetype of what being a Muslim is and measures the individual against that standard.

For example, the Eighth Circuit encountered a Muslim prisoner who was fasting during Ramadan but, during a short stay in the prison infirmary, broke his fast for one day by eating a meal during the day.[203] The prison's policy was to only accommodate *practicing* Muslim prisoners with special Ramadan meals. Because the prisoner ate during the day, the prison denied his accommodation claim. Though the prisoner argued that his short break from fasting was religiously sanctioned (a claim that is corroborated in the Islamic legal tradition under the doctrine of medical necessity),[204] the Eighth Circuit rejected his claim: by breaking his fast for one day, the prisoner was no longer entitled to the accommodations for practicing Muslims.[205]

In another decision, a court upheld a prison policy of only giving prayer rugs to Muslim prisoners who also signed up for a pork-free diet.[206] In an opinion affirmed by the Fourth Circuit, the court determined that the policy "[e]nsures that genuine members of the Islamic Faith will be allowed to practice the mandates of their religion while frivolous and insincere requests for prayer rugs are eliminated."[207] In this case we see the linking of a religious accommodation to the execution of certain (usually burdensome) Islamic practices for the purpose of ensuring the sincerity of the claimant. This type of "linking" is not unique; another prison in Virginia facing a large number of requests for Ramadan accommodations, required prisoners to "provide some physical indicia of Islamic faith, such as a Quran, Kufi [prayer cap], prayer rug, or written religious material obtained from the prison Chaplain's office."[208]

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203. *See* Brown-El v. Harris, 26 F.3d 68, 69 (8th Cir. 1994).

204. *See* 1 AL-MAWṢILĪ, KITĀB AL-IKHTIYĀR LI-TAʿLĪL AL-MUKHTĀR 173-76 (Khālid b. ʿAbd al-Raḥmān al-ʿAkk ed., 2015).

205. *See Brown-El*, 26 F.3d at 69-70. *Contra* Lovelace v. Lee, 472 F.3d 174, 187-88 (4th Cir. 2006) (invalidating a similar scheme removing fasters who violated their fasts).

206. Vaughn v. Garrison, 534 F. Supp. 90, 92 (E.D.N.C. 1981), *aff'd*, 673 F.2d 1319 (4th Cir. 1982).

207. *Id.*

208. Wall v. Wade, 741 F.3d 492, 494 (4th Cir. 2014) (ultimately invalidating the prison policy). Additionally, according to one Tennessee prison chaplain interviewed in 2002, this type of policy is not uncommon as it prevents "structural proselytization" – the pressure to convert to the accommodated religion to obtain a privilege. Thus, the interviewed chaplain indicated that only those who fast for the whole month are allowed Ramadan accommodations. *See Developments in the Law: The Law of Prisons*, *supra* note 38, at 1899 n.43.

This type of inquiry purports to determine the sincerity of the prisoner by relying on extrinsic corroborative evidence of religious practices typical of Muslims.[209] However, the inquiry runs afoul of the religious-question doctrine because the court implicitly assumes that to be a Muslim means to engage in these multiple practices and that these practices *together* indicate a Muslim's sincerity. In essence, the court pronounces that to be a "good" Muslim involves a defined set of practices and that if a prisoner only engages in one or some of these, he does not qualify. As the Fourth Circuit explained in a decision invalidating the aforementioned Virginia prison's policy, such a policy allows a decision-maker to determine "what constitutes an appropriate gauge of faith."[210]

D. Relying on Precedent

Courts will also rely on precedent to dispose of Muslim prisoner claims at the threshold stage. This is incongruous with a strict understanding of the religious-question doctrine because a present Muslim prisoner's personal religious beliefs—namely the sincerity with which he holds them—should not have any relation to the way another Muslim prisoner's claim has been adjudicated.[211] The assumption by the court engaging in this type of reasoning is that because the prisoner making the claim is a Muslim, his religion is in the same category as that of other Muslim prisoners; the beliefs of other Muslims, therefore, are relevant to the adjudication of the present prisoner's claim.

To be clear, not every instance of reliance on precedent is problematic on religious-question doctrine grounds. For example, a court could rely on this type of precedent to help determine if the prison policy furthers a compelling governmental interest or is the least restrictive means of doing so, because the experience of other prisons and courts is relevant to these determinations.[212] It is instead the use of court precedent to establish that a prisoner's religious-accommodation claim is unmerited on one of the threshold questions—such as the sincerity of the prisoner—that presents problems for the religious-question doctrine.

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209. This is in contrast to a prisoner's purported beliefs and his behavior *in regards to the same practice*, which some have argued can be an effective tool in determining a prisoner's sincerity. *See* Adams & Barmore, *supra* note 102, at 63; Chapman, *supra* note 16, at 1234-37; *supra* notes 160-163 and accompanying text.

210. *Wall*, 741 F.3d at 499.

211. *See* Witmer v. United States, 348 U.S. 375, 381 (1955) (calling sincerity "purely a subjective question").

212. *See, e.g.*, Lewis v. Ollison, 571 F. Supp. 2d 1162, 1172 (C.D. Cal. 2008).

For example, a district court rejected a Muslim prisoner's claim demanding full-sized prayer rugs instead of prayer towels. It held that "this issue has been definitively and authoritatively addressed by" another court, which had determined that prayer towels comply with the Islamic purpose of the prayer rug: to protect the Muslim from impurities on the ground that would invalidate the prayer.[213] If the prayer towel accomplishes the religious objective for the other Muslim prisoner, the court reasoned, it should be good enough for this one too.

Challenges to prison meals—a primary arena of litigation for Muslim prisoners—tend to follow the same pattern: a Muslim prisoner is unsatisfied with the vegetarian options and demands to be provided with *ḥalāl* meat in his meals. One court lists a number of "case[s] . . . [that] consistently held that vegetarian . . . meals all meet the religious requirements for Muslims."[214] These precedents "support a conclusion that . . . vegetarian meals adequately accommodate Plaintiff's religious dietary requirements."[215]

It is true that nationwide, Muslim prisoner claims tend to be repetitive—they often focus on the same small set of accommodation requests (usually *ḥalāl* meals, prayer, and fasting accommodations).[216] The temptation to rely on other courts' experiences with Muslim prisoners is therefore understandable. But insofar as a court relies on these precedents to adduce that the religious nature of the present Muslim prisoner's claims is similar if not identical to another Muslim prisoner's claims, it runs afoul of the religious-question doctrine. Under such reliance, a court is essentially conceiving of Muslim prisoner claims as all belonging to a shared category (Islam) and therefore concluding that such a category has essential characteristics. If one court says that a Muslim prisoner is not sincere in some claim or is not burdened by some policy, the court is taking this holding to mean that Islam as a whole is not offended by the policy in question. The court therefore makes a pronouncement about what Islam does or does not have to say—precisely what the religious-question doctrine purports to prevent.

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213. Hudson v. Dennehy, 538 F. Supp. 2d 400, 411 (D. Mass. 2008) (citing Rasheed v. Comm'r of Corr., 446 Mass. 463, 473-74 (2006)), *aff'd sub nom.* Crawford v. Clarke, 578 F.3d 39 (1st Cir. 2009); *see also* Shepard v. Peryam, 657 F. Supp. 2d 1331, 1352 (S.D. Fla. 2009) (citing to other court cases on the prayer rug issue to question whether the policy "implicates a constitutional right").

214. Phipps v. Morgan, No. CV-04-5108-MWL, 2006 WL 543896, at *8 (E.D. Wash. Mar. 6, 2006).

215. *Id.*

216. One study found that over a fifteen-month period, thirty-nine percent of Muslim prisoner claims involved food and thirty-five percent involved the ability to pray. MUSLIM ADVOCATES, *supra* note 22, at 17-18.

The above examples show that the religious-question doctrine is far from strictly applied in the adjudication of prisoner religious-accommodation claims. When a prisoner invokes a well-established religious tradition (Islam, for example) in pursuit of some adjudication, the court will frequently look to that tradition for some guidance in the adjudication of the claim. Indeed, drawing upon a named, long-standing religious tradition is an expedient strategy for a prisoner looking to have her religious practice ultimately accommodated.

Even the Supreme Court, in adjudicating an early prison case, gave weight to a claimant's free-exercise claim because he was a member of the Buddhist religion, "established 600 B.C., long before the Christian era."[217] In *Wisconsin v. Yoder*, the Supreme Court was impressed by the Amish community's "almost 300 years of consistent practice," a feature that contributed to its decision in favor of the religious exemption sought.[218] Relying on *Yoder*, the Second Circuit has held that "[a] believer's sincerity is . . . evaluated in light of the religion's size and history."[219]

This judicial tendency, however, privileges longstanding religious traditions above religious claims coming from prisoners practicing lesser-known or unpopular religions.[220] This invariably creates a burden on the sincere followers of less-established religions.[221] It also burdens those who follow nonorthodox interpretations of well-established religions. In practice, courts seem to look to religious traditions because it helps them accomplish the ultimate goal of the sincerity inquiry: weeding out obviously meritless claims that judges determine to be implausible.[222]

IV. A NEW APPROACH TO SINCERITY

In the previous Part, I documented a number of ways in which courts fail to strictly police the boundary between sincerity and religious questions. This evidence challenges the oft-cited principle first articulated by the Supreme Court in *United States v. Ballard*, that while courts are banned from inquiring into the truth of a religious claim, they can ask whether the claimant is sincere in her

217. Cruz v. Beto, 405 U.S. 319, 322 (1972).

218. 406 U.S. 205, 219 (1972).

219. Int'l Soc'y for Krishna Consciousness, Inc. v. Barber, 650 F.2d 430, 441 (2d Cir. 1981).

220. *See* Chapman, *supra* note 16, at 1237-38; Moustafa, *supra* note 149, at 238.

221. *See* Lupu, *supra* note 110, at 933 (arguing that accommodation doctrine creates "intolerable risks of discrimination against non-mainstream religions").

222. *See, e.g.*, United States v. Meyers, 95 F.3d 1475, 1479 (10th Cir. 1996) (involving a defendant on drug charges claiming to be a member of the so-called "Church of Marijuana").

belief. In practice, as shown through evidence from Muslim prisoner accommodation claims, the line between these two inquiries is permeable, and courts often rely on the content of Islamic doctrine to evaluate Muslim prisoners' claims. In this Part, I try to make sense of this apparent inconsistency by articulating a novel understanding of what the sincerity inquiry is actually accomplishing in free-exercise law: the screening of implausible claims. While this reframing does not fully resolve the constitutional issues raised by the use of religious questions in the adjudication of prisoner claims, it does mitigate fears regarding the arbitrariness and impropriety of judicial approaches in the adjudication of accommodation claims.

A. Sincerity as Plausibility

The sincerity requirement—that if a claimant is insincere, her claim should be disposed of—plays an important function in the structure of religious-accommodation law by limiting the types of exercise that the government is required to accommodate. The sincerity doctrine mediates worries about claimants taking advantage of the protections the First Amendment enshrines for religious beliefs because the doctrine empowers judges to dispose of claims on the basis of insincerity. Especially in the wake of the *Hobby Lobby* decision—greatly expanding the rights of corporations to free exercise—several commentators have pointed to the sincerity doctrine as a way to restrict religious accommodation and to prevent abuses by opportunistic claimants.[223]

Yet, as shown above, we cannot conceive of the sincerity doctrine simply as a convenient way for courts to regulate accommodation claims without having to delve into the constitutionally murky territory of evaluating religious content. As an empirical matter, courts *do* evaluate religious content, and they do so with the same goal: to screen opportunistic claims by those who seek to abuse the expanding protections for religious exercise. Sincerity does not, therefore, accurately capture the way many judges evaluate which claims do and do not deserve accommodation.

Taking note of the prevalence of this phenomenon described in Part III, commentators might simply conclude that, in the face of this doctrinal inconsistency, judges ought to be chastised for failing to uphold the religious-question doctrine in their screening of claims. This is not, however, the conclusion of this Note;[224]

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223. *See generally* Adams & Barmore, *supra* note 102; Chapman, *supra* note 16.

224. The constitutional issues that might arise from such judicial inquiries into religious teachings are not addressed here; instead, this Part focuses on the functional role played by courts engaging in the practice.

instead, I am interested in trying to reorient the sincerity analysis to better capture the type of inquiry that judges are actually making when they delve into religious questions to screen accommodation claims. I propose a different understanding of the sincerity inquiry, that of *sincerity as plausibility*, which helps make sense of courts' apparent disregard for the religious-question doctrine.[225] This reorientation of the sincerity inquiry captures the current behavior of judges, describing in better terms than pure "sincerity" what judges are evaluating when they screen religious-accommodation claims.

How is the plausibility inquiry distinct from pure sincerity? Sincerity is interested in the most subjective state of a person's religious convictions. If sincerity truly captured what a court is screening for, then what Islamic or any other religious authorities had to say would be, strictly speaking, irrelevant. The plausibility inquiry is more expansive than a pure sincerity inquiry because it is not confined to the litigant's subjectivity. Ultimately, the plausibility inquiry is interested in whether or not the claim is absurd: is religion being used merely as a "fraudulent cloak" to gain undue privileges from the prison system?[226] In addition to an interest in the claimant's subjective state, plausibility also makes use of both objective criteria (including what religious teachings have to say about the merit of a claim) and the court's experiential sense about whether or not the claimant is a "faker."[227] Less controversial evidence of sincerity—like motives to misrepresent and consistent behavior—are still germane, but so is the concordance between a prisoner's claimed religious affiliation and the teachings of that religion.[228]

The sincerity and plausibility tests conceive of the claimant in different terms.[229] Sincerity, at least in theory, ascribes no denomination to the claimant.

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225. I take no position here on the normative question of the desirability of the plausibility inquiry; instead, my goal is more modest: I wish to articulate an analytical framework that makes sense of the empirical phenomenon observed in Part III.

226. TRIBE, *supra* note 84, at 1246.

227. *See* Noonan, *supra* note 148, at 723.

228. These less controversial types of evidence, discussed in Section II.E above, are often insufficient by themselves in weeding out implausible claims. For example, the "desirability" of a certain accommodation—that is, one's nonreligious incentive to request it—does not in and of itself indicate a meritless claim.

229. In practice, in the vast majority of cases, sincere claims will also qualify as plausible claims. However, the two categories are analytically distinct, and thus it is conceivable that a claimant might be sincere but that the claim will still be implausible. For example, take a Muslim prisoner who demands alcohol to be served with meals. Such a prisoner might be under some sort of delusion in thinking that Islam requires (rather than forbids) the consumption of alcohol; thus his claim might very well be sincere. But the claim is likely to fail on plausibility

It regards the claimant as just a prisoner making a claim. Yet this is almost never how courts report their written decisions and seem to think of claimants. Courts almost always conceive of and describe the claim of a *Muslim* prisoner or a *Jewish* prisoner. Once the denominational affiliation of the claimant begins to play a role in the court's reasoning, the inquiry shifts to one of plausibility.

As I use the term, the plausibility inquiry also differs from a general inquiry into reasonableness.[230] One interested in the latter would ask whether it is reasonable for a prisoner to have certain beliefs *in light of competing values* like efficiency or the mitigation of third-party harms.[231] How reasonable is it that a prisoner—any prisoner—would request such a claim? Plausibility, instead, focuses on the claimant's desired accommodation in light of her own pleading: how plausible is it that *this* prisoner is articulating a claim that the courts ought to seriously entertain? Thus, while it might be reasonable for a prisoner to request a small amount of wine during a religious ceremony,[232] in light of the Islamic prohibition on alcohol consumption,[233] it would almost certainly be implausible for a Muslim prisoner to do so.

Plausibility as a concept has become the subject of much hand-wringing after the Supreme Court adopted the plausibility standard for civil pleadings over a decade ago, while failing to define the exact contours of that standard.[234] Although the pleadings plausibility standard is not identical to the plausibility

grounds, because the judge will probably conclude that the prisoner is merely trying to exploit the accommodation regime.

230. *Cf.* Brandon L. Garrett, *Applause for the Plausible*, 162 U. PA. L. REV. ONLINE 221, 227-29 (2014) (arguing that the "plausible" legal standard for pleadings in civil procedure should be distinguished from a "reasonable" standard).

231. For an argument that this reasonableness standard should entirely replace sincerity in accommodation claims, see Rob Boston, *Sincerity Is Nice—But Reasonableness is Better*, HUMANIST (Apr. 19, 2016), https://thehumanist.com/magazine/may-june-2016/church-state/sincerity-nice-reasonableness-better [https://perma.cc/P35T-C6NJ].

232. *See generally* Levitan v. Ashcroft, 281 F.3d 1313 (D.C. Cir. 2002) (reversing a lower court decision rejecting Catholic prisoners' challenge of a federal prison policy banning the consumption of wine during Communion).

233. *See, e.g.*, AHMAD IBN NAQIB AL-MISRI, RELIANCE OF THE TRAVELLER 617 (Nu Ha Mim Keller, trans.) (describing a standard Islamic law position that consuming any amount of alcohol is unlawful for a Muslim). *But see* AL-QUDŪRĪ, MUKHTAṢAR 204 (Kāmil Muḥammad Muḥammad ʿUwayḍa, ed., 1997) (describing one school of Islamic law's position that small, nonintoxicating amounts of some alcoholic beverages are permissible).

234. Ashcroft v. Iqbal, 556 U.S. 662, 677-79 (2009); Bell Atl. Corp. v. Twombly, 550 U.S. 544, 557 (2007). Some have argued that the ambiguity behind the Court's plausibility standard is a benefit, which might also be said about the ambiguities underlying the sincerity-as-plausibility standard. *See* Garrett, *supra* note 230, at 222.

framework I am advancing here, plausibility in the general civil-procedure context is useful in understanding the role that plausibility plays in the religious-accommodation context.[235] In both contexts—pleadings and prisoner accommodations—the inquiry plays a functional role in gatekeeping.[236] The Court has clarified that in the pleadings context, plausibility is "more than a sheer possibility"[237] and cannot be "merely consistent" with the contours of a facially valid claim.[238] Pleadings plausibility does not, however, track the separate question of probability of success—in other words, a pleading could very well be improbable but still plausible.[239]

Similarly, in the accommodation context, the plausibility framework asks not merely whether it is possible (or probable) that a prisoner has a valid claim. It is not sufficient for the claimant to mechanically spell out the correct elements of a claim by merely alleging that her religious beliefs have been substantially burdened by some prison policy. The plausibility framework asks instead whether the judge thinks that the case should go forward, and whether, all things considered, this plaintiff has articulated a claim falling in the category of claims that the constitutional and statutory protections for free exercise were designed to protect. Justice Kennedy explained that a civil pleading, to be plausible, must be "more than an unadorned, the-defendant-unlawfully-harmed-me accusation."[240] Similarly, a plausible accommodation claim must strike the judge as more than merely a complaint about a prison policy cloaked in "religion." Religious doctrine, while not dispositive, is certainly relevant to this inquiry.

Understanding how the sincerity doctrine actually functions—as a basic inquiry into plausibility—helps explain the phenomenon observed in Part III, namely judicial inquiry into the content of religious teachings to help evaluate prisoner accommodation claims. While this might seem like an entirely impermissible violation of the religious-question doctrine, commentators have begun to observe that an expansive reading of the religious-question doctrine is neither

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235. Analogous as they may be, the plausibility standard in civil pleadings differs in at least one fundamental respect from the plausibility framework I am advancing here: the plausibility standard in civil pleadings is principally focused on the claimant's allegations of what *the defendant* has done, while the plausibility framework as I discuss it is concerned with *the claimant's* allegations of her own religious sensibilities.

236. *See* Adam N. Steinman, *The Pleading Problem*, 62 STAN. L. REV. 1293, 1294-95 (2010).

237. *Iqbal*, 556 U.S. at 678.

238. *Twombly*, 550 U.S. at 557.

239. *Iqbal*, 556 U.S. at 678 ("The plausibility standard is not akin to a 'probability requirement' . . . .").

240. *Id.*

required nor advisable.[241] Inquiry into the content of religious doctrine can provide useful evidence to a judge tasked with screening claims as a general totality-of-the-circumstances inquiry. Noha Moustafa has proposed a regime whereby a prisoner should be granted a rebuttable presumption of sincerity when he can provide—among other things—"doctrinal proof of the need of his religious accommodation."[242] Nathan Chapman also endorses the use of "community fit" evidence—"whether the claimant's alleged religious beliefs fit with the beliefs of the claimant's religious community"—in examining sincerity.[243]

Both Moustafa and Chapman generally see reliance on religious doctrine as helping—not hurting—a prisoner's claim. However, as demonstrated above, judges will more frequently rely on Islamic doctrine to *reject* a prisoner's claim.[244] And indeed, since the inquiry is principally functioning to screen implausible claims, it is only those outlandish claims that *should* be filtered at the earliest stages of adjudication. Implausibility is a low bar. The plausibility framework is best suited to these easy cases, where a prisoner advances a claim that strikes the judge as absurd; after all, it is only these easy cases that ought to be disposed of summarily. If a claim is plausible, then it should proceed to the substantive analysis under the appropriate constitutional or statutory framework.

Reframing the sincerity inquiry as one of plausibility also helps recognize and limit judicial overreach in the screening of prisoner accommodation claims. Plausibility is meant to be a low threshold to pass; only those claims that are "completely devoid of merit"[245] should be screened at the preliminary phase. A prisoner who makes a colorable showing that religious beliefs corroborate his request for accommodation should be allowed to pursue his claim. Judges act improperly when they screen requests even though prisoners make a plausible

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241. *See* Goldstein, *supra* note 118, at 533 (arguing that the religious-question doctrine should only prohibit the judicial inquiry into normative religious questions, while positive questions should be allowed); Michael A. Helfand, *Litigating Religion*, 93 B.U. L. REV. 493, 548 (2014) (arguing that courts should be allowed to "employ standard fact-finding techniques in order to resolve . . . dispute[s] regarding religious meaning" in private-law claims). *But see* Michael A. Helfand, *When Judges Are Theologians: Adjudicating Religious Questions*, *in* RESEARCH HANDBOOK ON LAW AND RELIGION 262, 284 (Rex Ahdar ed., 2018) (arguing that while concerns about the religious-question doctrine are lessened in the private-law sphere, "[t]here is good reason to worry" about the relaxing of the religious-question doctrine in the public-law context).

242. Moustafa, *supra* note 149, at 237.

243. Chapman, *supra* note 16, at 1237.

244. *See supra* Part III.

245. I borrow this language from *Oneida Indian Nation of N.Y. State v. Oneida Cty.*, 414 U.S. 661, 666 (1974), a case discussing federal jurisdiction.

showing by presenting religious evidence supporting their claims. Thus, for instance, under the plausibility framework the Eighth Circuit was wrong to have denied the previously discussed claim of the Muslim prisoner who properly pointed out that Islam has an "injury exception" to the daytime Ramadan fast when prison officials saw him eating during the day and refused to provide him subsequent Ramadan meals.[246] Establishing plausibility as a minimal inquiry allows for the recognition of judicial overreach, a possibility exacerbated by the threat that judges arbitrate religious issues wholesale in ways that might be motivated by prejudices against religion or against specific religious groups.

The plausibility framework does not propose that judges consider their task in screening meritless claims to also include the "dissect[ion] of religious beliefs"[247] so as to adjudicate which of the competing interpretations within a religious tradition is more authoritative. "[T]he judicial process is singularly ill equipped to resolve such differences"[248] and it would be judicial excess to determine which of the competing schools within a religious tradition were more deserving of accommodation. A prisoner's reliance on *some* religious authority should be enough to pass the low threshold of plausibility. The task of plausibility is to merely screen "asserted claim[s] so bizarre, so clearly nonreligious in motivation, as not to be entitled to protection."[249]

The plausibility approach has been at least partially endorsed by Judge Easterbrook, who was evaluating a Muslim (Moorish Science Temple) prisoner's request to be given vegan meals, even though on the organizational level, the Moorish Science Temple has no such religious mandate. Judge Easterbrook recognized that

> although sincerity rather than orthodoxy is the touchstone, a prison still is entitled to give *some* consideration to [a religious] organization's tenets. For the more a given person's professed beliefs differ from the orthodox beliefs of his faith, the less likely they are to be sincerely held. Very few people who identify themselves as Baptists sincerely believe that a halal or vegan diet is obligatory on religious grounds. Such a belief isn't impossible, but it is sufficiently rare that a prison's chaplain could be skeptical and conduct an inquiry to determine whether the claim was nonetheless sincere.[250]

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246. Brown-El v. Harris, 26 F.3d 68, 70 (8th Cir. 1994); *see supra* notes 203-205 and accompanying text.

247. Thomas v. Review Bd. of Ind. Emp't Sec. Div., 450 U.S. 707, 715 (1981).

248. *Id.*

249. *Id.*

250. Vinning-El v. Evans, 657 F.3d 591, 594 (7th Cir. 2011).

This approach still privileges sincerity as the key inquiry but recognizes that if a prisoner's purported religious affiliation and his request do not align, a decision-maker can be justifiably suspicious. In a strict sense, this is a violation of the religious-question doctrine—for to engage in this type of inquiry, the judge must first make an assessment about what it means to be a member of the Moorish Science Temple. But insofar as the sincerity inquiry is more interested in the plausibility of a claim, probing into the content of religious teachings can be an efficacious way of screening out insincere claims.

The sincerity-as-plausibility standard shifts the inquiry from whether or not a prisoner's subjective belief is held with sufficient conviction to whether or not the claim presented makes sense to someone generally familiar with the tenets of a given religion.[251] A decision-maker can ascertain useful context from religious doctrine, which can assist the decision-maker in determining how plausible the claim is and whether or not the prisoner is trying to take advantage of the religious-accommodation regimes. Ultimately, the concern in these types of cases is exactly that—to screen out opportunistic claimants.

Indeed, an overly indulgent approach to religious accommodation has the capacity to disrupt entire institutions, including prisons. This is the fundamental fear behind the religious-exemption debate—that individuals can abuse the system and cause harm to institutions and third parties under the guise of religious belief and practice. A devious prisoner, skeptics of religious accommodation will argue, can shroud any demand in the claim of religious exercise, thereby abusing the accommodations that the Constitution and the statutory regimes allow for sincere religious beliefs. Much of the doctrine surrounding religious-accommodation claims—including the sincerity doctrine—is ultimately about the screening of illegitimate claims.

The judicial experience in handling Muslim prisoner claims must be read in this light. When a judge asks if a prisoner's claim is corroborated by Islamic doctrine, she is making a threshold determination about whether the claim can go forward or if it is instead an abuse of the accommodation regime. This threshold inquiry is, of course, not determinative, since a claim passing this first step must be evaluated in the context of penological and compelling governmental interests, according to the constitutional and statutory regimes that govern the claims. But at the threshold, the sincerity doctrine exists to regulate those claims,[252] and the sincerity-as-plausibility reading is well suited to this gatekeeping purpose.

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251. The plausibility framework would, of course, have to take account of all of the complexities, differences of opinion, and sectarian disagreements within religious traditions.

252. *See* Adams & Barmore, *supra* note 102, at 64 (discussing sincerity in the context of placing "reasonable limits on RFRA claims").

B. Plausibility and the Role of the Nonrational

Justice Jackson's dissent in *United States v. Ballard* remains one of the most thoughtful and prescient arguments for why courts should take purported religious beliefs at face value. But even Justice Jackson—when encountering the Ballards, the founders of a lucrative movement where followers were asked to pay large sums to access the Ballards' alleged supernatural healing powers—recognized that the Ballards' religious claims were meritless, and that they were trying to take advantage of First Amendment protections. He wrote in dissent, "I should say the defendants have done just that for which they are indicted [that is, mail fraud]. If I might agree to their conviction without creating a precedent, I cheerfully would do so. I can see in their teachings nothing but humbug, untainted by any trace of truth."[253]

Ever the scrupulous jurist, Justice Jackson was worried about the ratiocination of what he otherwise knew: that this so-called religion was "humbug" and that its founders were charlatans. It was only because he was unable to come to a ratiocinative rule to justify his instinct that he turned the inquiry around and instead argued that questioning subjective "religious" beliefs—meritorious or meritless—was outside the competency of a court.

Should today's judges follow Justice Jackson and discard the insights they gain about claimants' sincerity if they are unable to articulate those insights in strictly doctrinal language? The Supreme Court, in a striking opinion cited as leading precedent for the religious-question doctrine and the inviolability of even idiosyncratic religious beliefs, recognizes that judges must be able to identify "claim[s] *so bizarre*, so clearly nonreligious in motivation, as not to be entitled to protection under the Free Exercise Clause."[254] How do we know that a purported religious claim is so bizarre, so meritless, so implausible, that it should fail on sincerity grounds? What exactly does a Justice mean when he says that a claim is "humbug"?

In a short but memorable one-paragraph concurrence in *Jacobellis v. Ohio*, Justice Stewart rejected the idea that a film shown in an Ohio theater was hardcore pornography.[255] "I know it when I see it," Justice Stewart wrote, "and the motion picture involved in this case is not that."[256] The opinion is problematic for those who think the job of judging should be "entirely rationalistic."[257] They

253. United States v. Ballard, 322 U.S. 78, 92 (1944) (Jackson, J., dissenting).

254. Thomas v. Review Bd. of Ind. Emp't Sec. Div., 450 U.S. 707, 715 (1981) (emphasis added).

255. 378 U.S. 184 (1964).

256. *Id.* at 197 (Stewart, J., concurring in judgment).

257. Owen M. Fiss, *Reason in All Its Splendor*, 56 BROOK. L. REV. 789, 789 (1990).

would argue, like Justice Jackson in *Ballard*, that unless a clear *ratio decidendi* can be articulated to evaluate a case, the judge should keep such nonarticulable insights out of the judicial process.

Paul Gewirtz, by contrast, has argued that this criticism of Justice Stewart's one-liner—and of the role of the nonrational in adjudicative processes in general—is unjustified.[258] While recognizing the importance of the rational in judging, he argues that the nonrational and emotional also play important roles. "Just as reason is often inseparable from emotion," Gewirtz writes, "judgments should not be deemed outside of reason and rationality just because they are automatic or hard to explain."[259] While of course certain nonrational emotions like prejudice and bias should be excluded from the judicial process, others can reveal profound truths and provide valuable insights in decision-making.[260] Generations ago, legal realists acknowledged that "much takes place in the course of adjudication which does not fit precisely into the doctrinal plan."[261]

The plausibility reading of the sincerity doctrine helps capture some of the nonrational elements involved in the judging of religious-accommodation claims. A court's experiential sense about whether or not someone is trying to cheat the system is surely relevant to the claim's merit. Some claims are so implausible that they deserve summary disposal; accommodating such claims would be an affront to the values that free-exercise law is meant to protect. How do we react when a prisoner claims to be a member of the Church of the Flying Spaghetti Monster (also known as "Pastafarianism") and demands religious accommodation on that basis?[262] Laypersons might roll their eyes, understand that this claim is "humbug," applaud the prisoner for his temerity, and move on. A judge, on the other hand, is placed in the unenviable position of having to use the language of the law to deny this claim. It is in situations like this that the plausibility framework captures what is really happening in a judge's mind: an assessment, surely at least somewhat informed by nonarticulable, nonrational reasons, that the claim should not receive the protections that free-exercise law grants.

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258. Paul Gewirtz, *On "I Know It When I See It,"* 105 YALE L.J. 1023, 1025 (1996).

259. *Id.* at 1030.

260. *See id.* at 1035.

261. Roscoe Pound, *The Call for a Realist Jurisprudence*, 44 HARV. L. REV. 697, 707 (1931).

262. *See* Cavanaugh v. Bartelt, 178 F. Supp. 3d 819, 823 (D. Neb. 2016) (determining whether a "Pastafarian" can receive a religious accommodation).

CONCLUSION

In the evaluation of religious-accommodation claims, the official doctrine is that while the content of religious belief is off-limits, the sincerity with which those beliefs are held is justiciable. Yet, through examples of Muslim prisoner accommodation claims, this Note has shown that this official account is not accurate. Courts frequently look to what Islam has to say in their adjudication of Muslim prisoner claims, usually as a way to summarily deny those claims without entering into the substantive inquiry set forth by relevant constitutional or statutory standards. As documented above, courts will rely on religious experts, ask whether other members of the prisoner's religion also believe that the accommodation is needed, and examine the substance of religious doctrine—even through the interpretation of religious texts—to seek corroboration for the claim. Thus, the line between sincerity and religious questions is not as airtight as the official doctrinal account would have us believe.

This Note presents a new method of understanding the porousness of the boundary between sincerity and religious questions. By reframing the key inquiry as less to do with a claimant's religious convictions and more to do with the plausibility of the claim, I have tried to provide a new doctrinal explanation for the seemingly erroneous behavior of courts across the country. Because courts' primary function in religious-accommodation cases is the screening of meritless claims, the use of religious content to refute an individual prisoner's invocation of a given religion serves an important function in that screening process. While the plausibility framework does not resolve the underlying constitutional issues regarding the blurring of religious questions and the sincerity inquiry, it does make sense of the otherwise inconsistent behavior of courts. Plausibility provides a useful recasting of the threshold inquiry judges are actually engaging in as they screen prisoner accommodation claims, while also limiting judicial overreach on religious questions in this low-threshold inquiry.