BEERHEIDE v SUTHERS: A CASE STUDY CONCERNING RELIGION IN PRISONS IN THE USA

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The penitentiary in the United States of America originated as a religious institution. Its roots lie in the belief that inmates could reform if they were given an opportunity to engage in reflection, prayer, Bible-reading and work, thus establishing a new personal foundation for functioning as productive members of the larger society. Not surprisingly, given Americans' predilection for maintaining a secular civil society, this original foundation for the prison eventually fell from favour, and American penological theories became more sociological or psychological in nature. The fact remains, however, that society in the United States is broadly religious, and prisons continue to address the religious beliefs of inmates and how to accommodate those beliefs in a penological setting. This comment provides a case study on this topic, based on litigation concerning the provision of kosher food to Orthodox inmates in the prisons in Colorado.

In *Beerheide v Zavaras,*[1] the United States District Court for the District of Colorado issued a preliminary injunction, directing that the Colorado Department of Corrections (CDOC) provide kosher food to three inmates: Charles Beerheide, Sheldon Perlman and Alan Fistell. Mr Perlman was an orthodox Jew, who had been raised in an orthodox household and who had, except for a short time, been observant for his entire life. Mr Fistell had not been raised in an orthodox home, but he had been increasingly observant during the time that he had been in prison, in part because of the influence of Mr Perlman and in part because of the influence of rabbis who visited the prison on a regular basis. Finally, Mr Beerheide had investigated a number of religions over the years and during his incarceration and had decided that he would become an observant Jew after discussing the matter with a visiting rabbi.[2] He had engaged in an unofficial conversion with the visiting rabbi,[3] and he was willing, upon his release from prison, to undergo a more orthodox conversion process. All three inmates had requested a kosher diet from CDOC, and all three had been refused.

[1] *Beerheide v Zavaras* 997 F Supp 1405 (D Colo, 1998).
[2] Although Mr Beerheide's father was Jewish, his mother was not, and he had not been raised as a Jew.
[3] Mr Beerheide's conversion in prison did not include a ritual bath, ritual circumcision or the approval of a Bet Din or rabbinical court, as the facilities for these formalities were not available. However, the visiting rabbi did conduct a prayer service, acknowledging that Mr Beerheide had become a Jew in a spiritual sense.

In 1993, the United States Congress had passed the Religious Freedom Restoration Act[4] (RFRA), which made it easier for inmates to gain accommodation from prisons for desired religious practices. Under RFRA, prisons (and all other governmental entities) were forbidden to 'substantially burden' religious practices unless the burden was 'in furtherance of a compelling state interest' and was 'the least restrictive means of furthering that compelling state interest'. That meant that once a practice qualified as 'religious' and the proposed or real governmental burden on the practice was 'substantial', the state was required to justify the burden as being necessary to accomplish an important purpose and as being the least burdensome way of accomplishing the purpose. RFRA was the United States Congress's first effort to address earlier decisions by the United States Supreme Court,[5] which had held that as long as a burden on religious practice was uniform and as long as it equally burdened religious and non-religious practice, the burden was not unconstitutional. In enacting RFRA, Congress expressed its belief that religion should be protected more carefully than the Supreme Court had been willing to do. The Supreme Court's approach emphasised fairness, with respect to the treatment of behaviours (whether religious or non-religious), while Congress's approach under RFRA recognised the inherent value and the unique character of religious practice.

In the prison context, the pre-RFRA standard for deciding whether the prison could burden a religious practice was based on a case involving the right of an inmate to participate in a weekly Muslim prayer service or Jumu'ah.[6] The United States Supreme Court held that the prison did not unconstitutionally infringe on the Muslim inmate's rights when it refused to let him attend the service. The inmate was in a transitional programme, which permitted him to work outside the highly secure living area of the prison, and escorting the prisoner to the living area for the service required all of the inmates in the programme to return, since they had only one guard. (The Supreme Court failed to mention that a different guard might have been sent from the living area for the inmate with a minimum of trouble.) In addition, the inmates had to move through a congested area, and the prison claimed that return to the living area increased the security risks, as well. The Supreme Court held that rather than being required to demonstrate that its refusal to return the prisoner to the living area for Jumu'ah was necessary in order to promote a compelling state interest, the prison was only required to show that its refusal was 'reasonably related' to 'a legitimate penological interest'. This latter standard is, under American law, much easier to meet, so that restrictions on religious liberty and

[4] 42 United States Code § 2000bb-1.
[5] See e.g, *Employment Div v Smith* 494 US 872, 110 S Ct 1595 (1990). These decisions were under the Free Exercise Clause of the First Amendment of the United States Constitution, which provides 'Congress shall make no law . . . prohibiting the free exercise [of religion]'. This constitutional restriction also applies, through other constitutional provisions, to laws passed by the States. *Cantwell v Conn.* 310 US 296, 60 S Ct 900 (1940).
[6] *O'Lone v Estate of Shabazz* 482 US 342, 107 S Ct 2400 (1987).

other infringements of religious interests will be more frequent and less susceptible to legal challenge.

The plaintiffs originally instituted *Beerheide* as a claim under RFRA, which is the more stringent standard that protects most religious practice. The prisoners claimed that they were entitled to a religious diet, which was mandated by their Jewish faith, and that the state could not demonstrate a compelling state interest to justify its refusal to provide them with one. An evidentiary hearing was held before a magistrate judge, who recommended to the district court judge in early 1997 that the prison be required to provide the inmates with kosher food.[7] However, on 15 October 1996 the United States Supreme Court agreed to hear a case that challenged the constitutionality of RFRA, and the district court judge withheld ruling on the preliminary injunction motion in *Beerheide* until the Supreme Court had decided *City of Boerne v Flores*.[8] The Supreme Court did so on 25 June 1997, holding that RFRA was, indeed, unconstitutional.[9] Thus, the district court judge in *Beerheide* was required to decide the case under the less stringent standard of *O'Lone*, which made it more difficult for the district judge to require CDOC to provide kosher food. Nevertheless, the court reviewed the factual record under the *O'Lone* standard and adopted the magistrate judge's recommendation to require the prison to provide a religious diet for the three plaintiffs.

The 'legitimate penological interests' that CDOC relied on before the district court for its refusal to provide kosher food included (1) cost considerations, (2) security concerns, and (3) the potential for proliferation of other lawsuits, for example the potential that Muslim inmates would seek *halal* food. The court considered each of these in turn. With regard to cost considerations, the court found that the prison system spent approximately $8.25 million annually to feed about 10,000 inmates. Compared to this overall budget, the district court found that kosher food costs for three inmates would be a miniscule amount. The court held that prepared kosher food was available in sealed packages, similar to those served on airlines, which would only need to be heated and served to inmates, thereby eliminating the need for and expense of constructing a full-blown kosher kitchen. The court found that CDOC had not presented evidence to support its position that the different meals would pose a security risk, although CDOC had claimed that any difference whatsoever in meals would lead to jealousy and the potential for violence. The district court ridiculed the argument concerning the potential proliferation of other lawsuits as 'specious', stating, 'The [CDOC's] logic would effectively preclude provision of any accommodations for religious practices in prison'. Its reasoning was that

[7] In the United States' federal courts, magistrate judges are permitted to perform certain duties delegated to them by district court judges; district judges are ordinarily responsible for more final determinations in these cases.
[8] *City of Boerne v Flores* 521 US 507, 117 S Ct 2157 (1997).
[9] The legal basis for this decision was that Congress had exceeded its power when it attempted to regulate state laws limiting freedom of religion, when the state law was a part of an overall statutory scheme that did not treat religious conduct differently from non-religious conduct.

any successful lawsuit that sought religious accommodation could result in more lawsuits seeking the same, or similar, accommodation. As a result of the judge's decision, on 16 March 1998 a preliminary injunction took effect, requiring the prison to provide the three plaintiffs with kosher food.

The prison system quickly developed another approach to discouraging these inmates (and others) from eating kosher food: a proposed co-pay. The proposal put forward by CDOC would have afforded all prisoners the ability to obtain a regular kosher diet, provided that prisoners paid 25 per cent of the excess cost of preparing and serving kosher food (over the cost of providing the standard prison fare), up to a maximum of $90.00 per month. This proposal was unacceptable to the inmates for two reasons. First, at the previous hearing, the food service director had testified that it would cost approximately $8,200 to construct a kosher kitchen for the prison and that it would cost approximately $1.4 million to feed the Jewish and Muslim inmates in the department of corrections. Thus, it was unlikely that any co-pay would ever be less than the $90.00 maximum. Moreover, the $90.00 maximum was not a court-mandated maximum, and CDOC reserved to itself the power to increase the maximum based on its own evaluation of the cost of providing the meals. It was entirely possible that CDOC would raise the cost until it eliminated all participation in its proposed programme. In addition to the amount of the maximum, the inmates also objected to the co-pay based on their own lack of resources to pay it. At this time the inmates only earned approximately $30.00 per month on average: one-third the amount of the proposed co-pay. According to the prison officials' proposal, if the inmates could not afford the extra cost of the kosher meals with their own funds or contributions from their families, then they would carry a deficit in their inmate accounts, so that at the end of their sentences, they would have a substantial debt to the state.

At the final district court hearing in the case, which took place over the course of two days in October 1999, the prison officials admitted that they could not accurately determine the excess cost of providing kosher food. They claimed that the extra cost of providing the meals was somewhere between $2.50 and $4.50 per meal in excess of the normal meal cost of approximately $0.90 per meal. However, the food service director admitted that her calculation of the excess cost of kosher food included equipment costs and labour costs which were incurred in preparation of the basic diet but which were not included in the $0.90 per meal cost attributed to that diet. The alleged 'cost' of the kosher diet was inflated. In addition, CDOC admitted that it bought large quantities of food for the kosher diet, which the three inmate plaintiffs were not able to consume and which either were allowed to spoil or which were fed to the general population of inmates without any credit being attributed to the kosher diet.

The district court found that the cost considerations were not sufficient to justify imposing the co-pay on the inmates, based on the pre-RFRA, *O'Lone* standard. Besides the failure of proof regarding the cost of the food, the judge expressed concern about the prospect of inmates building

up a substantial debt during their incarceration. Finally, the CDOC had argued that the co-pay was necessary in order to ensure that non-Jews did not choose to receive kosher food at state expense (for example, simply for dietary variety).[10] The district court held that the proposed CDOC policy permitted removing prisoners from the kosher diet if they were caught eating non-kosher food, which they either obtained in the cafeteria or purchased through the prison commissary system. This procedure, it held, was a preferable way of preventing people from participating in the kosher food programme without being sincere in their Jewish faith. The district court entered a permanent injunction, requiring CDOC to provide kosher food to the inmates and rejecting the proposal for a co-pay.

CDOC appealed to the United States Court of Appeals for the Tenth Circuit.[11] CDOC argued to the Court of Appeals both (1) that it was not required to provide a kosher diet under the applicable law, and (2) that even if it was required to provide such a diet, it could also impose a co-pay on the inmates participating in the diet. The Tenth Circuit rejected the arguments. Among other things, CDOC continued to argue that its provision of a pork-free diet should be satisfactory for the Jewish inmates. The Court of Appeals responded, 'Kosher laws govern not only the ingredients (both animal and vegetable), but the source, storage, and preparation of those ingredients, and the service of meals'. The Court of Appeals also held that the cost of providing kosher food was not prohibitive and that charging a co-pay, which resulted in a substantial deficit in the prisoner's trust account, could well be contrary to the legitimate penal objectives implicit in rehabilitating the prisoner for life outside the prison. Again, the CDOC failed to justify either its refusal to provide kosher food or its imposition of a co-pay, even under the relaxed, pre-RFRA standard of the *O'Lone* case.

The Courts of Appeal in the United States' federal system do not agree whether prison inmates are entitled to a kosher diet,[12] which constituted a basis for a further appeal to the United States Supreme Court. However, CDOC decided not to appeal, explaining that it believed that the decision in *Beerheide* was too 'factual' to be a candidate for that court's discretionary grant of leave to appeal. For that and other reasons, in the current legal environment in the United States the law governing religion in prison continues to be unsettled in a number of ways.

First, the rule of decision to be applied in these cases is uncertain. After the Supreme Court held that RFRA was unconstitutional, Congress passed a law carefully tailored to avoid the pitfalls that led to the Supreme Court's rejection of the earlier law. The new law is called the Religious Land Use

[10] In fact, after the kosher diet became available, a rumour did spread that the fresh fruit and vegetables prevented inmates from contracting hepatitis. This led to an increase in the number of inmates requesting kosher diets.
[11] *Beerheide v Suthers* 286 F 3d 1179 (10th Cir, 2002).
[12] Cf *Ashelman v Wawrzaszek* 111 F 3d 674 (9th Cir, 1997); *Kahane v Carlson* 527 F 2d 492 (2d Cir, 1975) (requiring kosher food) with *Cooper v Lanham*, No 97-7183 [1998 WL 230913] (4th Cir, 1998); *Holterman v Helling* No 94-3113 [1995 WL 702300] (8th Cir, 1995).

and Institutionalized Persons Act (RLUIPA).[13] The new statute is an effort to remedy the perceived defects in RFRA by relying on a different Congressional power to enact the new statute and by limiting the regulatory effect of the statute to federal prisons and state prisons that receive federal funds and to programmes or activities that either receive federal funding or that affect interstate commerce. Under RLUIPA federal prisons and state prisons that receive federal funds are held to the higher, 'compelling state interest' test before they can infringe on an inmate's religious practice or refuse to accommodate a religious practice. Immediately after the passage of RLUIPA, inmates began bringing religious claims under that statute; however its constitutionality is now in doubt.[14] On October 12, 2004 the United States Supreme Court agreed to review a case decided by the United States Court of Appeals for the Sixth Circuit which had held that RLUIPA is unconstitutional. The need for the Supreme Court to hear that case amounts to additional evidence that this entire area of the law is unclear.

Second, the determination whether an individual religious practice should be permitted, irrespective of the legal rule of decision, has become increasingly factual. *Beerheide* and other cases have evaluated the need to accommodate religious practice based on facts, such as cost, which must be based on evidentiary proof. Even more permissive rules of decision[15] than the *O'Lone* standard as applied in *Beerheide* would not be so dismissive of CDOC's security concerns, since it is at least imaginable that jealousy over differences in food offerings might lead to the potential for violence.[16] However, the courts have decided that in these cases they will decide whether the actual evidence is sufficient to justify the decision by the corrections officials whether to permit or accommodate a religious practice. If the evidence is lacking, then the state officials will be required to accommodate the practice. However, such reliance on evidence raises the potential that different trials in different states will lead to different practices, with one state being required to provide religious diets to its inmates and another state being authorised by the courts to refuse to provide identical religious diets.

Finally, because the legal presumption currently operates in favour of accommodating religion, the inherent value of a particular religious practice is never a part of the judicial equation when courts are deciding whether to require prisons to accommodate religious practice. The prison bears the burden of showing that it should not have to accommodate the practice; the prisoner does not have to show that he or she will benefit

[13] See 42 USC § 2000cc-1.
[14] See *Cutter v Wilkinson* 349 F 3d 257 (6th Cir, 2003) Cert. Granted October 12, 2004 [2004 WL 843727].
[15] An even more relaxed standard would require only proof of a rational relationship between a hypothetical reason that might lie behind the decision whether to accommodate religious practice and the decision, for example, not to offer the accommodation.
[16] For a more thorough development of this argument, see *Beerheide v Suthers* 286 F 3d at 1192 (Owens J concurring).

from the practice. The courts evaluate the burdens on the prison, such as the cost of the accommodation and whether the prison has offered a good enough reason to refuse to accommodate the practice. Courts' analyses even go so far as to examine, in a content-neutral fashion, the ability of the inmate to engage in other, equivalent or similar religious practices, other than the one directly before the court. This approach is consistent with United States' courts' reluctance to pass judgment on the substance of any religious belief.[17] However, the analysis frames the issue awkwardly, because it emphasises the cost to the institution, and fails to account for any benefit that the inmate will receive as a result of the accommodation. Of legal necessity in the United States, the decision must rest on an incomplete cost-benefit analysis. The incomplete character of this equation underscores the need to recognise the inherent value of religious practice and not to move to an approach that would assume that the costs and benefits to the prisoner and the institution have been, or could be, compared.

This case presents an interesting amalgamation of the different legal bases that govern disputes about religious rights in the United States. It also demonstrates that policy in the United States is not simply a product of institutional action, whether that institution is the United States Supreme Court, the lower courts or the state or federal legislature. Rather, human rights policy is a product of a complex interplay between these institutional actors (and the political, social and institutional interests that drive them), with one prevailing on one occasion and another managing to overcome on the next. Although these forces may ultimately arrive at a pragmatically correct outcome, that outcome (and the nature of what is 'pragmatically correct') is difficult to predict or to determine in the short run.

[17] *Thomas v Review Board of Indiana Employment Security Division* 450 US 707, 714, 101 S Ct 1425 (1981) ('religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection').