

## NOTE

### ISLAMIC SECTARIANISM IN UNITED STATES PRISONS: THE RELIGIOUS RIGHT OF SHI'A INMATES TO WORSHIP SEPARATELY FROM THEIR FELLOW SUNNI INMATES

*Prison walls do not form a barrier separating prison inmates from the protections of the Constitution.*<sup>1</sup>

—Justice Sandra Day O'Connor

#### I. INTRODUCTION

In the past four years, the world's attention has been focused on the American-led invasion of Iraq and the subsequent violence that has plagued that country. Reports of car bombings, suicide attacks, and casualties and deaths from improvised explosive devices ("IEDs") appear daily in newspapers and television broadcasts.<sup>2</sup>

Hostilities among Muslim groups are often cited as one of the main reasons for the bloodshed in Iraq.<sup>3</sup> The infighting between the Sunnis and Shi'a,<sup>4</sup> two of Islam's primary sects, did not stem solely from the fact that Saddam Hussein, a Sunni, brutally ruled over the Shi'a while in power.<sup>5</sup> The problems between the two groups first developed shortly after the founding of Islam.<sup>6</sup>

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

2. *See, e.g.*, Richard A. Oppel Jr. & Qais Mizher, *At Least 130 Die as Blast Levels Baghdad Market*, N.Y. TIMES, Feb. 4, 2007, at A1.

3. *See, e.g.*, Marc Santora, *One Year Later, Golden Mosque Is Still in Ruins*, N.Y. TIMES, Feb. 13, 2007, at A1 (marking one year since the destruction of the holy Shi'a site by Sunni insurgents, which subsequently led to an increase in sectarian violence).

4. For the purpose of this Note, the name of the sect will be referred to as "Shi'i" or "Shi'a." Different spellings might appear in news reports (Shi'ites), but academic literature tends to spell it Shi'a.

5. *See, e.g.*, MOOJAN MOMEN, AN INTRODUCTION TO SHI' I ISLAM: THE HISTORY AND DOCTRINES OF TWELVER SHI'ISM 262-64 (1985) (describing the Shi'a resistance to Saddam Hussein

Prior to the current war in Iraq and the ensuing sectarian violence, many Americans had perhaps never heard of the Sunni and Shi'a sects of Islam. Muslims in America, as a minority group, have tended to gloss over their differences in an effort to portray a unified front.<sup>7</sup> However, there is evidence that many Muslims living in the United States have retained their Sunni or Shi'a identities.<sup>8</sup> One example is the Shi'a community in Dearborn, Michigan. This community of immigrants arrived in Dearborn and managed to separate themselves from their Sunni neighbors by building Shi'a mosques.<sup>9</sup> Another example of Shi'a Muslims wanting to segregate themselves from Sunnis can be seen in American prisons,<sup>10</sup> especially in New York State which has a high Muslim population.<sup>11</sup>

The latest attempt of segregation was brought in 2005 by a Shi'a prisoner in Sullivan Correctional Facility in New York.<sup>12</sup> He sued the commissioner of prisons for the right to worship separately from the other Sunni Muslim prisoners. The state court judge followed what other New York courts had done and held that the Shi'a prisoner did not have the right to a separate worship service.<sup>13</sup> This was the latest in a recent trend of cases brought by a Muslim prisoner who wanted to worship separately from a member of the other sect.<sup>14</sup>

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which led to hundreds of Shi'a being executed and several thousand more expelled to the Iranian border).

6. See MEHRAN KAMRAVA, *THE MODERN MIDDLE EAST: A POLITICAL HISTORY SINCE THE FIRST WORLD WAR 17-19* (2005); see *infra* Part IV.A.

7. See Abdulaziz A. Sachedina, *A Minority Within a Minority: The Case of the Shi'a in North America*, in *MUSLIM COMMUNITIES IN NORTH AMERICA* 3, 3 (Yvonne Yazbeck Haddad & Jane Idleman Smith eds., 1994).

8. See *id.* at 3-4.

9. See Linda S. Walbridge, *The Shi'a Mosques and Their Congregations in Dearborn*, in *MUSLIM COMMUNITIES IN NORTH AMERICA* 337, 337-38, 340-42 (Yvonne Yazbeck Haddad & Jane Idleman Smith eds., 1994).

10. See *Orafan v. Goord*, 411 F. Supp. 2d 153, 156 (N.D.N.Y. 2006); *Pugh v. Goord*, No. 00Civ.7279, 2002 U.S. Dist. LEXIS 19382, at \*4 (S.D.N.Y. Oct. 3, 2002), *vacated*, 345 F.3d 121 (2d Cir. 2003); *Cancel v. Mazzuca*, 205 F. Supp. 2d 128, 133 (S.D.N.Y. 2002); *Matiyn v. Comm'r Dep't of Corr.*, 726 F. Supp. 42, 42-43 (W.D.N.Y. 1989); *Cancel v. Goord*, 717 N.Y.S.2d 610, 611 (App. Div. 2000); *Holman v. Goord*, No. 2500-05, 2006 WL 1789068, at \*1 (N.Y. Sup. Ct. June 29, 2006).

11. See, e.g., *Muslims in American Prisons Face Battles to Practice Religion: Courts Offer Insight for Peaceful Facilities*, CORRECTIONS PROFESSIONAL, June 24, 2005, at 1 [hereinafter *Muslims in American Prisons*] (citing statistics of the combined Muslim population in New York state and federal prisons).

12. *Holman*, 2006 WL 1789068, at \*1.

13. *Id.* at \*3-4.

14. See *id.* at \*1; see also *Orafan*, 411 F. Supp. 2d at 156; *Pugh*, 2002 U.S. Dist. LEXIS 19382, at \*4; *Cancel v. Mazzuca*, 205 F. Supp. 2d at 133; *Matiyn*, 726 F. Supp. at 42-43; *Cancel v. Goord*, 717 N.Y.S.2d at 611.

This Note addresses the right of Shi'a Muslim prisoners to attend prison worship services separate from Sunnis. In the past seventeen years, there have been six cases in New York involving a Sunni or Shi'a inmate who has sued for the right to worship apart from members of the other sect.<sup>15</sup> Starting in 2000, five cases have been decided against Shi'a plaintiffs, who all claimed that they were being discriminated against in a prison worship service by a Sunni chaplain.<sup>16</sup> The likelihood is great that a Muslim prison chaplain will be a Sunni because just as the Shi'a are a minority in the worldwide Muslim faith, they are also the minority Muslim group in the United States.<sup>17</sup> It is also not surprising that Sunni chaplains have been accused of discriminating against the Shi'a members of their prison communities. Even though the sectarian violence occurs half-way around the world in Iraq, the effect of that violence and the past history of violence<sup>18</sup> between the two sects has undoubtedly led to tensions here in the United States.<sup>19</sup>

This Note will begin by examining two congressional acts intended for the protection of religion in prisons, RLUIPA<sup>20</sup> and its predecessor RFRA,<sup>21</sup> as well as Supreme Court jurisprudence that forms the basis of prisoners' religious rights issues.<sup>22</sup> I will then move to an overview of the multitude of Muslim prisoner lawsuits in the United States, specifically those in which courts have applied RFRA or RLUIPA and other Supreme Court tests.<sup>23</sup> Because this Note examines Muslim separation cases in New York, an overview of New York Correction

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15. See *Orafan*, 411 F. Supp. 2d at 156; *Pugh*, 2002 U.S. Dist. LEXIS 19382, at \*4; *Cancel v. Mazzuca*, 205 F. Supp. 2d at 133; *Matiyn*, 726 F. Supp. at 42-43; *Cancel v. Goord*, 717 N.Y.S.2d at 611; *Holman*, 2006 WL 1789068, at \*1.

16. See *Orafan*, 411 F. Supp. 2d at 156; *Pugh*, 2002 U.S. Dist. LEXIS 19382, at \*4; *Cancel v. Mazzuca*, 205 F. Supp. 2d at 133; *Cancel v. Goord*, 717 N.Y.S.2d at 611; *Holman*, 2006 WL 1789068, at \*1.

17. See *Sachedina*, *supra* note 7, at 3-4.

18. See, e.g., *KAMRAVA*, *supra* note 6, at 28-29 (describing the violent conversion campaign in the 1500s in Iran to force Sunnis to adopt Shi'ism); *Walbridge*, *supra* note 9, at 338-40 (citing the Lebanese Civil War as a defining moment for the stark division between Sunni and Shi'a Muslims); see also DANIEL BROWN, *A NEW INTRODUCTION TO ISLAM* 191, 193 (2004) (the early 1500s bringing for the first time a "sharp divide" along geographical lines between Shi'a and Sunni Islam).

19. See *infra* Part IV.B.

20. Religious Land Use and Institutionalized Persons Act (RLUIPA) of 2000, 42 U.S.C. § 2000cc-1 (2000).

21. Religious Freedom Restoration Act (RFRA) of 1993, Pub. L. No. 103-141, 107 Stat. 1488, *invalidated by* *City of Boerne v. Flores*, 521 U.S. 507, 511, 527-36 (1997).

22. See *Employment Div. v. Smith*, 494 U.S. 872, 885-90 (1990); *Sherbert v. Verner*, 374 U.S. 398, 406 (1963).

23. See, e.g., *O'Lone v. Estate of Shabazz*, 482 U.S. 342, 351-53 (1987); *Turner v. Safley*, 482 U.S. 78, 81 (1987).

Statute section 610,<sup>24</sup> which deals with prisoners' rights in state prisons, will also be discussed.

The Note will then address the recent trend of lawsuits brought by Sunni and Shi'a prisoners to have separate worship services.<sup>25</sup> Briefly, I will explain the reason why these two groups split at the very inception of Islam, only sixty years after the death of the Prophet Muhammad.<sup>26</sup> I will also detail the current reasons why the two groups want to worship separately.

Finally, I will argue that Sunni and Shi'a Muslim inmates should be allowed separate religious services in prisons by applying Supreme Court and New York jurisprudence. I will also demonstrate that an unfamiliarity with Islam and Islamic issues has led courts to deny valid religious practices by Muslim inmates in favor of interests deemed "compelling" by prison officials.<sup>27</sup> American courts, at times, have utilized a double standard for Muslim inmates, and I will illustrate this by comparing Muslim inmates to Catholic and Protestant inmates who have separate worship services in prison despite falling under the umbrella of Christianity.<sup>28</sup>

## II. RELIGIOUS PROTECTIONS IN AMERICA'S PRISONS

### A. Background of RLUIPA

The Supreme Court's decision in *Sherbert v. Verner*<sup>29</sup> in 1963, marked the start of a series of Supreme Court holdings and congressional acts that would eventually lead to the passage of the Religious Land Use and Institutionalized Persons Act ("RLUIPA").<sup>30</sup> In *Sherbert*, the Court found that South Carolina violated the Constitution

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24. N.Y. CORRECT. LAW § 610 (McKinney 2003).

25. *Orafan v. Goord*, 411 F. Supp. 2d 153, 156 (N.D.N.Y. 2006); *Pugh v. Goord*, No. 00Civ.7279, 2002 U.S. Dist. LEXIS 19382, at \*4 (S.D.N.Y. Oct. 3, 2002), *vacated*, 345 F.3d 121 (2d Cir. 2003); *Cancel v. Mazzuca*, 205 F. Supp. 2d 128, 133 (S.D.N.Y. 2002); *Matiyn v. Comm'r Dep't of Corr.*, 726 F. Supp. 42, 42-43 (W.D.N.Y. 1989); *Cancel v. Goord*, 717 N.Y.S.2d 610, 611 (N.Y. App. Div. 2000); *Holman v. Goord*, No. 2500-05, 2006 WL 1789068, at \*1 (N.Y. Sup. Ct. June 29, 2006).

26. KAMRAVA, *supra* note 6, at 14-19.

27. *See infra* Part III.B.

28. Developments in the Law—The Law of Prisons, *In the Belly of the Whale: Religious Practice in Prison*, 115 HARV. L. REV. 1891, 1900-02 (2002) [hereinafter *Religious Practice in Prison*].

29. *Sherbert v. Verner*, 374 U.S. 398 (1963).

30. Religious Land Use and Institutionalized Persons Act (RLUIPA) of 2000, 42 U.S.C. § 2000cc-1 (2000).

when it denied unemployment benefits to a person who refused employment because it would cause her to work on Saturdays, in violation of her religious beliefs.<sup>31</sup>

That holding caused other courts to apply strict scrutiny to any law that infringed upon religiously-motivated activity.<sup>32</sup> Under strict scrutiny, government officials had to show both a compelling interest and least restrictive means.<sup>33</sup> As a result, there existed a high level of protection for religious conduct because government officials were rarely able to meet that demand.<sup>34</sup>

All that changed after the Supreme Court's 1990 decision in *Employment Division v. Smith*.<sup>35</sup> The Court ended *Sherbert's* widely-applied strict scrutiny analysis<sup>36</sup> in another case dealing with unemployment benefit eligibility. The claimants in *Smith* argued that Oregon courts incorrectly determined that their religious use of peyote qualified as misconduct that prevented them from receiving unemployment compensation benefits.<sup>37</sup> They were unsuccessful, and the Court held that Oregon had correctly applied its drug laws to the claimants' peyote use and found that application proper under the Free Exercise Clause.<sup>38</sup>

The Court then went a step further and abandoned the compelling interest test it had established in *Sherbert*.<sup>39</sup> Citing the "cosmopolitan" nature of the United States in terms of its diversity of religious beliefs, the Court held that "we cannot afford the luxury of deeming *presumptively invalid*, as applied to the religious objector, every regulation of conduct that does not protect an interest of the highest order."<sup>40</sup> The Court returned to its former standard where only the most overt discrimination by the government would trigger strict scrutiny review.<sup>41</sup>

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31. *Sherbert*, 374 U.S. at 410.

32. See John P. Forren, *Revisiting Four Popular Myths About the Peyote Case*, 8 U. PA. J. CONST. L. 209, 209 (2006).

33. *Id.*

34. See *id.*

35. *Employment Div. v. Smith*, 494 U.S. 872 (1990).

36. Forren, *supra* note 32, at 209.

37. *Smith*, 494 U.S. at 874-76.

38. *Id.* at 890.

39. See *id.* at 882-89.

40. *Id.* at 888.

41. See *id.* at 882 (referencing *Reynolds v. United States*, 98 U.S. 145, 166-67 (1878)).

Congress responded to *Smith* by enacting the Religious Freedom Restoration Act (“RFRA”),<sup>42</sup> in an attempt to return the standard of judicial review to that of *Sherbert*’s strict scrutiny.<sup>43</sup> Under that Act, a regulation would be upheld if the government could show that it represented a compelling interest and if it utilized the least restrictive means of furthering that interest.<sup>44</sup> Congress, in passing RFRA, especially geared it toward prisoners’ religious rights.<sup>45</sup> Senator Orrin Hatch, one of the original sponsors of RFRA, declared, “We want religion in the prisons. . . . Just because they are prisoners does not mean all of their rights should go down the drain . . . .”<sup>46</sup>

RFRA would prove short-lived. The Supreme Court in its 1997 decision, *City of Boerne v. Flores*, invalidated the statute and concluded that Congress had exceeded its power by passing a law that was too broad.<sup>47</sup> Specifically, the Court focused on how Congress improperly relied on its Fourteenth Amendment enforcement power in enacting a law that imposed requirements on the states.<sup>48</sup> “[RFRA’s] [s]weeping coverage ensures its intrusion at every level of government, displacing laws and prohibiting official actions of almost every description and regardless of subject matter.”<sup>49</sup> The Court found that when Congress enacted RFRA, it surpassed its enforcement role by creating a new constitutional violation.<sup>50</sup>

That decision led Congress to renew its efforts, this time with RLUIPA.<sup>51</sup> In its prisoner provision, Congress tried to draft an exemption statute that heeded the Court’s criticisms of RFRA.<sup>52</sup> This time, Congress narrowed the scope of the statute to apply only to cases that fell under Congress’s spending or commerce authority.<sup>53</sup> Specifically, the scope of RLUIPA applies only to “a program or activity

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42. Religious Freedom Restoration Act (RFRA) of 1993, Pub. L. No. 103-141, 107 Stat. 1488, *invalidated by* *City of Boerne v. Flores*, 521 U.S. 507, 536 (1997).

43. *See* Andrew C. Nichols, *The Constitutionality of the Religious Land Use and Institutionalized Persons Act Under the Establishment Clause*, 46 J. CHURCH & ST. 281, 284-85 (2004).

44. *Id.* at 284.

45. *See Religious Practice in Prison*, *supra* note 28, at 1893-94.

46. 139 CONG. REC. S14,367 (daily ed. Oct. 26, 1993) (statement of Sen. Hatch).

47. *City of Boerne*, 521 U.S. at 536.

48. *Id.* at 516.

49. *Id.* at 532.

50. *See id.* at 519.

51. Religious Land Use and Institutionalized Persons Act (RLUIPA) of 2000, 42 U.S.C. § 2000cc-1 (2000).

52. Nichols, *supra* note 43, at 286-88.

53. *Id.* at 287-88.

that receives Federal financial assistance” or “commerce with foreign nations, among the several States, or with Indian tribes.”<sup>54</sup> The Supreme Court in 2005 expressed its approval by reversing a Sixth Circuit Court of Appeals decision and affirming the constitutionality of RLUIPA.<sup>55</sup>

*B. Supreme Court Jurisprudence Relating to  
Prisoners’ Religious Rights*

Before Congress enacted RFRA and RLUIPA, the Supreme Court made several important determinations that continue to provide guidance to lower courts who hear cases involving prisoners’ religious rights. The Court in *O’Lone v. Estate of Shabazz* held that the generally accepted *Sherbert* analysis, in which laws that infringed upon religious conduct were subject to strict scrutiny,<sup>56</sup> would not automatically apply to prisons.<sup>57</sup> That meant less protection for prisoners’ religious activities than would be found elsewhere.<sup>58</sup>

The plaintiff-inmates in *O’Lone* had challenged their prison’s policies that prevented them from attending religious services on Fridays.<sup>59</sup> The inmates, who were Muslim, claimed that their rights were violated under the Free Exercise Clause of the First Amendment. Under a *Sherbert* analysis, courts could easily have found that the prison’s interest (requiring inmates to work outside on Fridays, in conformity with the prison schedule) was too restrictive and not compelling enough to infringe the Muslim inmate’s faith.<sup>60</sup> However, the Court’s holding in *O’Lone* abandoned *Sherbert*’s strict scrutiny in favor of giving deference to prison officials.<sup>61</sup>

The Court emphasized the need to balance the interests of the prisoners with those of the officials committed to securing the prison: “To ensure that courts afford appropriate deference to prison officials, we have determined that prison regulations alleged to infringe constitutional rights are judged under a ‘reasonableness’ test less restrictive than that ordinarily applied to alleged infringements of fundamental constitutional rights.”<sup>62</sup>

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54. 42 U.S.C. § 2000cc-1(b).

55. *Cutter v. Wilkinson*, 544 U.S. 709, 713 (2005).

56. *See Sherbert v. Verner*, 374 U.S. 398, 406, 410 (1963).

57. *O’Lone v. Estate of Shabazz*, 482 U.S. 342, 349 (1987).

58. *Id.*

59. *Id.* at 345-47.

60. *See O’Lone*, 482 U.S. at 345; *Sherbert*, 374 U.S. at 406.

61. *O’Lone*, 482 U.S. at 349, 353.

62. *Id.* at 349.

Along with the *O'Lone* "reasonableness" test, the Court in *Turner v. Safley* also developed a four-part test to determine whether an infringement upon an inmate's religious practices furthered a legitimate penological interest.<sup>63</sup> First, the Court looked to whether there was a rational relationship between the regulation and the legitimate government interests asserted. Second, whether the inmates had alternative means to exercise their rights. Third, the impact the accommodation of the right would have on the prison system. Fourth, whether ready alternatives existed which accommodated that right and also satisfied the government interest.<sup>64</sup>

The Court, in applying the *Turner* test to the Muslim inmates in *O'Lone*, found that the prison policies met the first standard of being rationally related to the prison's interests of safety.<sup>65</sup> The prison had cited concerns about overcrowding during daytime hours, and by ordering certain inmates to work outside, the tension inside the building was reduced.<sup>66</sup>

Interestingly, the Court acknowledged that the second factor could not be met—there were no alternate times for the Muslim inmates to attend the weekly Friday Jum'ah service.<sup>67</sup> Even though attending Jum'ah is one of the five pillars of Islam,<sup>68</sup> the Court held the second and third factors could be excused because the result would mean an extreme burden on prison officials to ensure that every Muslim prisoner attended the Friday service.<sup>69</sup> "While we in no way minimize the central importance of Jum[ah] to respondents, we are unwilling to hold that prison officials are required by the Constitution to sacrifice legitimate penological objectives to that end."<sup>70</sup>

Finally, even though inmates would be unable to attend Jum'ah, the Court found that the fourth factor of *Turner* was met because Muslim prisoners retained the right to congregate for prayer or discussion, and other arrangements were made during the month-long observances of Ramadan.<sup>71</sup> The Court held that "this ability on the part of respondents

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63. *Turner v. Safley*, 482 U.S. 78, 89-91 (1987).

64. *Id.*

65. *O'Lone*, 482 U.S. at 350-51.

66. *Id.*

67. *Id.* at 351-52.

68. KAMRAVA, *supra* note 6, at 17.

69. *O'Lone*, 482 U.S. at 351-53.

70. *Id.* at 351-52.

71. *Id.* at 352.

to participate in other religious observances of their faith supports the conclusion that the restrictions at issue here were reasonable.”<sup>72</sup>

The combination of *O’Lone’s* “reasonableness” test and the four *Turner* factors has led to varying results throughout the country in prisoner religious rights cases, many of them involving Muslim inmates. By examining those Muslim prisoner cases, one will see how a court’s familiarity and recognition of Islamic religious practices can often be the determining factor.<sup>73</sup> For example, in *O’Lone*, the Supreme Court claimed that it was not downplaying the importance of Jum’ah.<sup>74</sup> Yet, Jum’ah, a pillar of Islam, is comparable to the weekly religious services attended by Christians.<sup>75</sup> Had the prisoners in *Turner* been Catholics who were arguing for the right to attend Sunday Mass, the Court might have afforded more weight to that interest and less weight to the prison’s interest.<sup>76</sup> Knowledge about the importance of certain Islamic practices, therefore, could have an impact on the application of the Court’s balancing tests.

Working within this framework, this Note will focus now on the impact of the Supreme Court’s decisions upon cases in New York involving Muslim prisoners. Both federal and state courts in New York have had the opportunity to decide a multitude of Muslim prisoner rights cases because of the high Muslim populations in New York’s prisons.<sup>77</sup>

### III. TREATMENT OF MUSLIM PRISONERS’ RELIGIOUS RIGHTS BY NEW YORK COURTS

Islam has been present in American prisons for five decades; today, roughly fifteen percent of the United States prison population is Muslim.<sup>78</sup> Nearly six percent of the Muslim prisoners are incarcerated in federal prisons.<sup>79</sup> While there are no nationwide statistics of Muslim populations in state prisons, experts pinpoint New York as having the

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72. *Id.*

73. *See infra* Part III.B.

74. *O’Lone*, 482 U.S. at 351-52.

75. *See, e.g., KAMRAVA, supra* note 6, at 17 (noting that the Arabic translation for “Jum’ah” is “community” or “congregation”).

76. Justice Brennan’s dissent in *O’Lone* touched on this point: “If a Catholic prisoner were prevented from attending Mass on Sunday, few would regard that deprivation as anything but absolute, even if the prisoner were afforded other opportunities to pray, to discuss the Catholic faith with others, and even to avoid eating meat on Friday . . . .” *O’Lone*, 482 U.S. at 360 (Brennan, J., dissenting).

77. *Muslims in American Prisons, supra* note 11, at 1.

78. *Id.*

79. *Id.*

highest percentage of Muslim inmates—twenty-five percent in New York City’s state prisons and eighteen percent in state facilities throughout New York State.<sup>80</sup>

Before examining Muslim prisoner rights cases in New York, it is necessary to address the applicable New York laws. The state legislature has adopted section 610 of the Correction Law which applies to freedom of worship in state prisons.<sup>81</sup> The law recognizes the right of inmates to exercise their religious beliefs, which includes attending worship services and receiving spiritual advice from members of the clergy.<sup>82</sup> The inmates’ rights to free exercise of religion is then limited “in such manner and at such hours as will be in harmony . . . with the discipline and the rules and regulations of the institution.”<sup>83</sup>

The Second Circuit Court of Appeals’s interpretation of the Supreme Court’s *O’Lone* “reasonableness” test<sup>84</sup> must also be addressed because of the frequency in which it is cited in Muslim inmate religious rights cases. In *Farid v. Smith*, an inmate was denied a package he had received that contained two books on Tarot and a deck of Tarot cards.<sup>85</sup> The inmate filed a complaint and a grievance committee heard him, after which the committee recommended that a prison chaplain review the incident. However, the prison superintendent denied the recommendation and declared the Tarot materials contraband.<sup>86</sup> Farid then sued the superintendent claiming, among other things, that his rights had been violated.<sup>87</sup>

The Second Circuit, citing *O’Lone*, held that “a prison regulation that impinges on inmates’ constitutional rights may be valid if it is reasonably related to legitimate penological interests.”<sup>88</sup> The court found that the superintendent produced no evidence showing that the Tarot books and cards did not conform to prison regulations; therefore, without that evidence, the superintendent was unable to show that the materials violated the prison’s legitimate penological interest.<sup>89</sup>

As to Farid’s claim that the regulations violated his First Amendment right to freedom of religion, the Second Circuit introduced

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80. *Id.*

81. N.Y. CORRECT. LAW § 610(1) to (2) (McKinney 2003).

82. *Id.* § 610(3).

83. *Id.*

84. *Farid v. Smith*, 850 F.2d 917, 925 (2d Cir. 1988).

85. *Id.* at 920.

86. *Id.*

87. *Id.*

88. *Id.* at 925 (citing *O’Lone v. Estate of Shabazz*, 482 U.S. 342, 349 (1987)).

89. *Farid*, 850 F.2d at 925-26.

a three-factor test for assessing a free exercise claim.<sup>90</sup> It held that a court must first determine “whether the practice asserted is religious in the person’s scheme of beliefs, and whether the belief is sincerely held,” second, “whether the challenged practice of the prison officials infringes upon the religious belief,” and third, “whether the challenged practice of the prison officials furthers some legitimate penological objective.”<sup>91</sup> Even though the court had already found that the superintendent was unable to prove the furtherance of a legitimate penological objective, the Second Circuit also held that Farid was unable to prove that he was sincere in a religious belief that mandated the use of Tarot cards.<sup>92</sup> Farid’s failure to meet the first prong of the test led the court to affirm summary judgment against him on the free exercise claim.<sup>93</sup>

This Note will now examine a federal court case by Muslim inmates in New York who brought a religious rights claim under RFRA. Following the federal court case discussion, the Note will turn to New York state courts and their decisions which utilized the Supreme Court’s jurisprudence, the corresponding New York *Farid* test, and section 610 of the Correction Law.

#### A. Federal Court’s Treatment of a Muslim Inmate’s Religious Rights

The Muslim inmates in *Alameen v. Coughlin* brought a lawsuit alleging that the prison policy at Arthur Kill Correctional Facility in New York was both unconstitutional and in violation of RFRA.<sup>94</sup> The district court in that case used the language of RFRA to evaluate whether the inmates’ rights were indeed violated.<sup>95</sup>

The inmates’ complaint stemmed from a policy by the New York State Department of Correctional Services (“DOCS”) that prohibited the display of black dhikr beads.<sup>96</sup> Dhikr beads have been used by devout Sufi Muslims<sup>97</sup> since 623 A.D., when they came into general use,<sup>98</sup> to

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90. *Id.* at 926.

91. *Id.*

92. *Id.* at 925-26.

93. *Id.* at 926.

94. *Alameen v. Coughlin*, 892 F. Supp. 440, 441 (E.D.N.Y. 1995).

95. *Id.* at 446-51.

96. *Id.* at 441.

97. Sufi Muslims, separate from Shi’a and Sunni Muslims, are mystics who are preoccupied with “the spiritual journey of the soul on its return to the One.” BROWN, *supra* note 18, at 155. Sufis consider dhikr the very foundation of that journey’s path because “[n]o one reaches God save by continual remembrance of Him.” *Id.* at 156.

98. *Alameen*, 892 F. Supp. at 443.

help them pray and recite the ninety-nine names of Allah.<sup>99</sup> In his testimony, the plaintiff Imam Hamzah Alameen stated that Muslims use dhikr beads to help them “remain mindful of the presence of Allah in order to achieve spiritual purity and heal physical and mental illness.”<sup>100</sup>

The DOCS policy allowed inmates to possess only black beads for prayer and worship, but forbade inmates from displaying or wearing the beads.<sup>101</sup> The plaintiffs considered that policy to be burdensome because according to Alameen, “Muslims dhikr while doing all normal activities, like walking or at work performing their duties in their [prison] programs.”<sup>102</sup> Another inmate explained that devout Sufi Muslims dhikr wherever and whenever they found themselves stressed because the process was meant to calm the mind.<sup>103</sup> The display of the beads was thus incidental because as a practical matter, the beads must be held out in the open for a person to keep proper count.<sup>104</sup>

The inmates also objected to the DOCS policy that the only beads that Muslims could possess for private prayer and worship were black-colored beads.<sup>105</sup> The plaintiffs contended that Sufi Muslims used different colored dhikr beads according to their sect or when it was a particular holiday. However, a Muslim expert testified to the court that the color of the beads did not affect the actual practice of dhikr.<sup>106</sup>

DOCS, in defense of its restriction, stated that its prisons had a growing problem of prison gangs that used beads for identification and organizational purposes.<sup>107</sup> According to Deputy Commissioner Glenn S. Goord, the purpose of the restrictions was to prevent “gangs from obtaining colored beads ostensibly for religious purposes and then using them as a display of gang-related colors.”<sup>108</sup> In recent years, the prison system had experienced an increase in gang-related violence and disorder.<sup>109</sup> By banning the display of beads, and by limiting possession to only black beads, DOCS claimed it had a compelling interest in stopping gang violence in its prisons.<sup>110</sup>

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99. *Id.*

100. *Id.*

101. *Id.* at 442 n.1.

102. *Id.* at 444.

103. *Id.*

104. *Id.*

105. *Id.* at 441.

106. *Id.* at 444.

107. *Id.*

108. *Id.* at 445.

109. *Id.* at 444-45.

110. *Id.* at 449-50.

The district court addressed the plaintiffs' RFRA claims<sup>111</sup> and held that the DOCS regulations imposed a substantial burden on the inmates' First Amendment rights.<sup>112</sup> The court found that a ban on dhikr, a practice held to be a tenet of Islam by Sufi Muslims, would cause those plaintiffs to suffer irreparable harm.<sup>113</sup> "[P]rohibiting the plaintiffs from holding beads in their hands so that the beads might be seen and counted constitutes a substantial burden on their practice of religion."<sup>114</sup>

The court then looked to whether DOCS had shown that the restrictions furthered a compelling interest, and if it had, that those restrictions were also the least restrictive alternative. The court agreed with DOCS that curbing gang violence satisfied the compelling interest requirement.<sup>115</sup>

Since beads are used as a symbol of identity, unity, and authority by various gangs, prison officials have a compelling interest in restricting the use of the beads. The gangs pose a direct threat to prison authority as catalysts for violence and disorder, and prison officials are entitled to take measures to inhibit gang activity.<sup>116</sup>

While DOCS might have established a compelling interest, the court found that they had not shown the lack of an alternative, less restrictive method that would accomplish the same objective of keeping prisons safe from gang violence.<sup>117</sup> The only reason DOCS gave for a flat-out ban on displaying dhikr beads was that if practicing Muslims were allowed to use the beads in public, prison gang members would be able to steal the beads and then re-string them for gang identification purposes.<sup>118</sup> The court held that the argument failed because it "rest[ed] on an unproven assumption."<sup>119</sup>

The plaintiffs did not succeed on all their claims, though. The court found that the Muslim inmates could not establish that the DOCS ban on wearing or displaying the dhikr beads *while the beads were not being*

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111. The court's opinion acknowledged that the plaintiffs brought claims under both RFRA and under the Supreme Court's decisions that preceded the statute. However, the court held that it was unnecessary to evaluate the First Amendment claims under the *O'Lone* and *Turner* tests because plaintiffs would receive no additional relief under those standards. *Id.* at 446, 451.

112. *Id.* at 449.

113. *Id.* at 448.

114. *Id.* at 449.

115. *Id.* at 449-50.

116. *Id.* at 450 (footnote omitted).

117. *Id.*

118. *Id.*

119. *Id.*

used constituted a substantial burden on their religion.<sup>120</sup> Furthermore, the court held that only the use of black dhikr beads would receive religious protection.<sup>121</sup> DOCS had a legitimate compelling interest in banning different colored beads, and the plaintiffs failed to show that a requirement of black-only dhikr beads was a substantial burden because color was not integral to the practice of dhikr.<sup>122</sup>

The *Alameen* case proves useful because it illustrates how a federal court used the language of RFRA and its balancing test to decide a claim brought by Sufi Muslim inmates against a governmental restriction. However, the court, in addressing the insufficiency of DOCS's claim that prison officials would be unable to distinguish between the genuine practice of dhikr and the showing of gang colors via beads, reasoned that the fear was more the product of non-Muslims being unfamiliar with this religious practice.<sup>123</sup> "It is precisely because of Congress' fears that lack of contact with unfamiliar religious practices might lead to the suppression of such practices on insufficient grounds that RFRA cautions against the use of speculation to justify limitations of the free expression of one's religion."<sup>124</sup> In other words, the balancing test might be skewed by a misperception by courts of the importance of certain religious groups' practices.

The more familiar a court is with a religion—Protestantism or Catholicism, for example—the more likely the court is to afford greater weight to the protection of those religions' practices. Hence, one could follow from the *Alameen* court's reasoning that courts that have heard cases brought by Shi'a Muslim inmates incorrectly balanced the rights of Shi'a Muslims with the interests of the prison, simply because of their unfamiliarity with the Sunni-Shi'a divide.<sup>125</sup>

This Note will now review three cases from New York state courts that decided Muslim inmates' claims of religious rights violations by prison officials. The courts used a range of law, including the Supreme Court's *O'Lone* and *Turner* tests, as well as section 610 of the New York Correction Law. Interestingly, the various case outcomes show how courts throughout the years have become more familiar with Islam.

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120. *Id.* at 449 n.9. Muslim inmates would not be permitted to wear the beads as a necklace, for example. The only time the dhikr beads would be allowed to be displayed was when the Muslim was actually using the beads to recall the names of Allah.

121. *Id.* at 451.

122. *Id.* at 449 n.9.

123. *Id.* at 450.

124. *Id.* at 450-51.

125. *See id.*

This increased knowledge has directly affected the weight given to Muslim inmates' religious rights in the courts' balancing tests.

*B. New York State Courts' Treatment of Muslim Inmates'  
Religious Rights*

Muslim inmates in New York have had varying success in challenging prison policies that affected their religious rights and practices. Courts have heard claims challenging prison conditions, such as the way prison food is prepared,<sup>126</sup> but also about the right of Muslim inmates to even practice Islam in prison.<sup>127</sup> Several cases involved challenges to disciplinary proceedings brought against Muslim inmates for refusing to comply with prison regulations because of their religious beliefs.<sup>128</sup> The following synopsis of cases shows a gradual expansion of rights—as well as some set-backs—granted to Muslim inmates in New York.

In *Brown v. McGinnis*, decided in 1962, a Muslim inmate sued for the right to practice Islam in prison and lost.<sup>129</sup> Because of the lack of a Muslim chaplain or organized service, the inmate had to practice Islam in an informal setting in the prison yard.<sup>130</sup> Citing his religious needs, he requested that he be granted access to an off-site Islamic temple. The Commissioner refused that request because the leader of the Islamic temple had a past criminal record.<sup>131</sup>

The New York Court of Appeals interpreted section 610 of the Correction Law and held that while section 610 “confers upon prison inmates the right to religious services, spiritual advice and ministrations from some recognized clergyman, it also expressly authorizes the reasonable curtailment of such rights if such is necessary for the proper discipline and management of the institution.”<sup>132</sup> The court found the refusal reasonable and agreed with the Commissioner that allowing a religious leader with a criminal record to guide a current inmate in worship could jeopardize the safety of the prison.<sup>133</sup>

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126. *Malik v. Coughlin*, 551 N.Y.S.2d 418, 419 (App. Div. 1990).

127. *Brown v. McGinnis*, 180 N.E.2d 791, 791 (N.Y. 1962).

128. *See, e.g., Rivera v. Smith*, 462 N.Y.S.2d 352, 352 (Sup. Ct. 1983), *aff'd*, 472 N.Y.S.2d 210 (App. Div. 1984); *Abdullah v. Smith*, 453 N.Y.S.2d 541, 542 (Sup. Ct. 1982), *aff'd*, 465 N.Y.S.2d 81 (App. Div. 1983).

129. *Brown*, 180 N.E.2d at 793.

130. *Id.* at 791-92 (the prison provided chaplains for the three major faiths, Protestantism, Catholicism and Judaism).

131. *Id.*

132. *Id.* at 793 (internal citation omitted).

133. *See id.*

The Muslim population in New York prisons has increased greatly since *Brown* was decided.<sup>134</sup> Today, prisons accommodate the Islamic faith, and one might ask if *Brown* would have been decided differently had Islam been more widespread in the United States in 1962. If that had been the case, the New York Court of Appeals might have afforded more weight to the right of the Muslim inmate to worship Islam properly, especially because of the lack of Islamic services at the prison.

Since the *Brown* decision, New York courts often have found in favor of Muslim inmates bringing various religious rights claims, although the New York Court of Appeals interpretation of section 610 is still followed closely.<sup>135</sup> In *Abdullah v. Smith*, a group of Sunni Muslim inmates at Attica Correctional Facility in New York brought suit because they were disciplined for performing a ritual prayer in the prison yard.<sup>136</sup> According to DOCS prison regulations, any prayers that were done in groups or that included physical movements (“demonstrative prayer”) were restricted to authorized religious services or in the privacy of an inmate’s cell.<sup>137</sup> Besides the DOCS regulation, the Attica facility further banned any demonstrative prayer from taking place in prison yards.<sup>138</sup> Attica’s superintendent cited the need to uphold peace in the prison yards as a reason for the ban.<sup>139</sup>

The religious conduct that caused the Sunni inmates to be disciplined was part of their daily observance of Islam which consisted of praying five times a day. The prayers, which lasted five to twelve minutes, involved physical movements of kneeling and touching the head to the ground and motioning with hands and arms. Because Muslims must pray five times a day in that manner and at specified times based on the position of the sun, the inmates were sometimes in the prison yards when they needed to pray.<sup>140</sup> By forcing the inmates to return to their cells to pray, they frequently had to forfeit their recreation time; once the Muslim inmates left the yards for their cells, they were unable to return.<sup>141</sup>

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134. See, e.g., *Muslims in American Prisons*, *supra* note 11, at 1.

135. See, e.g., *Rivera v. Smith*, 462 N.Y.S.2d 352, 353-55 (Sup. Ct. 1983), *aff’d*, 472 N.Y.S.2d 210 (App. Div. 1984); *Abdullah v. Smith*, 453 N.Y.S.2d 541, 544 (Sup. Ct. 1982), *aff’d*, 465 N.Y.S.2d 81 (App. Div. 1983).

136. *Abdullah*, 453 N.Y.S.2d at 542.

137. *Id.* at 543.

138. *Id.*

139. *Id.*

140. *Id.*; see also *BROWN*, *supra* note 18, at 74 (explaining the origin of the prayers and how the sun dictates the timing of the five daily prayers practiced by Muslims).

141. *Abdullah*, 453 N.Y.S.2d at 543.

The court found that the DOCS policy could not be sustained under *Brown* because the demonstrative prayer in the prison yards was not disruptive<sup>142</sup> and would not interfere with—invoking the language of *Brown*—the “proper discipline and management of the institution.”<sup>143</sup> The court acknowledged the superintendent’s concern that allowing demonstrative prayer by some inmates in the yards would cause other religious groups to feel slighted, leading to a disruption of the prayers.<sup>144</sup> That concern, however, was not enough to sustain the DOCS policy. Instead, the court held that the policy unfairly infringed upon the Muslim inmates’ religious rights, and that it was unreasonable to force the inmates to choose between praying, which would cause them to stay in their cells, and recreation time.<sup>145</sup>

One year later, the same court decided another case brought by a Muslim inmate at Attica Correctional Facility that involved an alleged violation of religious rights under section 610.<sup>146</sup> In *Rivera v. Smith*, a Muslim inmate filed suit in protest of a disciplinary action he received for refusing to be frisked by a female guard at the facility.<sup>147</sup> He claimed that such close contact, outside marriage and by a member of the opposite sex, violated his religious beliefs.<sup>148</sup>

In filing suit, Rivera conceded that the prison had an obvious security interest in frisking inmates and asked that the DOCS policy be revised to state that “except in cases of emergency, where possible, an officer of the same sex as the inmate shall conduct a pat frisk.”<sup>149</sup> The respondent, however, maintained that the current policy of inmates submitting to a frisk, regardless of the guard’s sex, should remain. The respondent also raised concerns about security, as well as the rights of female corrections officers in obtaining job assignments.<sup>150</sup>

The court used *Brown*’s interpretation of section 610 and found that frisks of Muslim inmates by prison guards of the same sex served a “bona fide purpose” in protecting those inmates’ religious rights.<sup>151</sup> The court rejected the respondent’s claim that the revised policy would lead

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142. *Id.* at 544.

143. *Id.* (quoting *Brown v. McGinnis*, 180 N.E.2d 791, 793 (N.Y. 1962)).

144. *Id.*

145. *Id.*

146. *Rivera v. Smith*, 462 N.Y.S.2d 352, 352 (Sup. Ct. 1983), *aff’d*, 472 N.Y.S.2d 210 (App. Div. 1984).

147. *Id.*

148. *Id.* at 353.

149. *Id.* at 353-54.

150. *Id.* at 354.

151. *Id.*

to delays from replacing female guards for male guards whenever a male Muslim inmate needed to be frisked. It found that corrections officers typically worked in groups when transporting inmates, and male officers would be readily available for searching Muslim inmates.<sup>152</sup> The court also held that the interests of female corrections officers were outweighed by the religious interests of the inmates. Furthermore, the court determined that the female officers would not be greatly affected by the revised policy because they would still have a role in frisking non-Muslim inmates.<sup>153</sup> After finding that the inmates' religious interests outweighed the prison's concerns, the court ordered that Attica change its policy—excepting emergency situations, all Muslim inmates must now be frisked by officers of the same sex.<sup>154</sup>

*Abdullah*, decided in 1982, and *Rivera* in 1983, represented a shift in attitude by New York courts. In each case, the court afforded much more weight to the religious practices of the Muslim inmates in balancing them with the prisons' interests than was previously seen in *Brown*. Prisoners' rights do not always prevail, though. In *Malik v. Coughlin*, a 1990 case, the penological concerns prevailed over the inmate's religious rights.<sup>155</sup>

The Muslim inmate in *Malik* brought an action against DOCS, claiming that his religious rights were violated because he was not allowed a diet prepared in a way that conformed to his Islamic tenets.<sup>156</sup> The inmate argued that he was entitled to have his food prepared in pots and pans that would not be used for the general prison population's food. His request that the food be prepared by a Jewish or Muslim cook was refused by DOCS, along with his other dietary requests.<sup>157</sup>

The court found that the prison met the plaintiff's basic dietary restrictions in that he was given a substitute for pork whenever it was served.<sup>158</sup> The court then addressed the plaintiff's complaint about the lack of ritualistic food preparation that was required by his faith. Using the Supreme Court's tests, the court considered whether DOCS's refusal to comply with the plaintiff's religious dietary practice was "reasonably related to legitimate penological interests."<sup>159</sup>

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152. *Id.*

153. *Id.*

154. *Id.* at 355.

155. *Malik v. Coughlin*, 551 N.Y.S.2d 418, 419 (App. Div. 1990).

156. *Id.*

157. *Id.*

158. *Id.*

159. *Id.* (citing *Turner v. Safley*, 482 U.S. 78, 89 (1987), and *O'Lone v. Estate of Shabazz*, 482 U.S. 342, 349 (1987)).

Using the *O'Lone* and *Turner* tests, the court found that the prison facility's general dietary guidelines were based on legitimate penological concerns, mainly budgetary constraints and staff resources.<sup>160</sup> The impact on the prison of having special preparation procedures for certain inmates would be too great. Furthermore, the court held that the inmate was unable to offer any reasonable alternatives to address his concerns about food preparation.<sup>161</sup>

In balancing the interests of the prison and the inmate, the court held that the prison's interests outweighed the inmate's religious rights.<sup>162</sup> The fact that Muslim inmates at the prison were given pork-free food also bolstered the claim by DOCS that it was satisfying the "reasonableness" standard of *O'Lone*.<sup>163</sup>

Even though the Muslim inmate lost in *Malik*, New York courts have come a long way since 1962 in expanding the religious rights of Muslim prisoners. The question now is whether courts will begin to recognize the differences among the Islamic sects, just as they recognized the split within Christianity, accommodating both Protestant and Catholic prisoners.

#### IV. COURTS DENY SUNNI AND SHI'A MUSLIM INMATES THE LEGAL RIGHT TO WORSHIP SEPARATELY

New York courts, using federal law and section 610, have gradually expanded the rights of Muslim inmates in the state's prisons. The recurring theme in all the cases has been the balancing of the religious rights of prisoners against the security interests of the prisons. One right which Muslim inmates in New York have repeatedly failed to secure is the right of Sunni and Shi'a Muslim inmates to have separate worship services. Every time this issue has arisen, the courts have either deferred to DOCS to enact a compromise solution (which has proved ineffective),<sup>164</sup> or they have found that the prisons' interests greatly outweigh the prisoners' religious rights.<sup>165</sup>

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160. *Id.*

161. *Id.*

162. *Id.*

163. *Id.*; see *O'Lone*, 482 U.S. at 349.

164. See *Pugh v. Goord*, No. 00Civ.7279, 2002 U.S. Dist. LEXIS 19382, at \*7 n.6 (S.D.N.Y. Oct. 3, 2002), *vacated*, 345 F.3d 121 (2d Cir. 2003); *Cancel v. Goord*, 717 N.Y.S.2d 610, 612 (App. Div. 2000).

165. *Orafan v. Goord*, 411 F. Supp. 2d 153, 160 (N.D.N.Y. 2006); *Pugh*, 2002 U.S. Dist. LEXIS 19382, at \*6-7; *Cancel v. Mazzuca*, 205 F. Supp. 2d 128, 144-45 (S.D.N.Y. 2002); *Matiyn v. Comm'r Dep't of Corr.*, 726 F. Supp. 42, 44 (W.D.N.Y. 1989); *Holman v. Goord*, No. 2500-05, 2006 WL 1789068, at \*3 (N.Y. Sup. Ct. June 29, 2006).

A. *The Fundamental Differences Between Sunni and Shi'a Muslims*

The great split that divided Muslims into two main sects, Sunnism and Shi'ism, began in 632 A.D. with the death of the Prophet Muhammad, the founder of Islam.<sup>166</sup> Two years after his death, civil wars erupted among his followers over the question of who was to succeed Muhammad as the leader of Islam.<sup>167</sup> A minority group, the Shi'a, believed that the only rightful successor was one who had a direct blood tie to the Prophet. The Sunnis, who were the majority group, refused to focus on blood ties. Instead, they chose to follow a man who had declared himself the leader of Islam.<sup>168</sup>

The disagreement over succession was never resolved and was often the source of extreme violence between Sunnis and Shi'a Muslims.<sup>169</sup> A violent conversion campaign that began in Iran in 1500 and lasted nearly the entire century, attempted to force the majority Sunni population to convert to Shi'ism.<sup>170</sup>

Fast-forward several centuries to the 1970s and 1980s, when the two sects became especially divided during the Lebanese Civil War. Throughout much of the twentieth century, the Shi'a would align themselves with the Sunnis to fight for a common cause.<sup>171</sup> However, during the Lebanese Civil War, the Shi'a broke from the Sunni alliance and instead began to fight on their own.<sup>172</sup> The division continues today, where the greatest violence in Iraq is caused by fierce fighting between Sunni and Shi'a militant groups.<sup>173</sup>

B. *Divisions Between Sunni and Shi'a Muslims  
Also Exist in the United States*

The heightened tensions in Muslim-American communities, caused by the September 11th terrorist attacks and other attacks around the world by extremist groups, has led some Muslim groups to downplay divisions in favor of Islamic unity.<sup>174</sup> However, Sunnis and Shi'a

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166. See KAMRAVA, *supra* note 6, at 17.

167. *Id.* at 17-19.

168. *Id.* at 18-19.

169. See *id.* at 29.

170. *Id.* Today, Iran has a majority Shi'a population, with its Sunni minority populating the country's border regions. *Id.*

171. See Walbridge, *supra* note 9, at 338.

172. See *id.* at 338-39.

173. See, e.g., Santora, *supra* note 3.

174. See Sachedina, *supra* note 7, at 3.

increasingly worship separately in the United States, and evidence suggests that the divide is growing.<sup>175</sup>

The Muslim community in Dearborn, Michigan, provides such an example. Prior to the 1940s, the Shi'a population in Dearborn was in danger of being "subsumed by Sunnism, something that it ha[d] resisted in the rest of the world for centuries."<sup>176</sup> That began to change after the arrival of the Shi'a leader, Shaykh Chirri. He aided in the building of the Islamic Center of America in 1963, which was the first of the Shi'a mosques that would be constructed in Dearborn.<sup>177</sup> Today, the Shi'a make up the majority of the Muslim population in Dearborn, even though they remain a minority in the Muslim world.<sup>178</sup> Their strong religious centers, the Islamic Center of America and other Shi'a mosques that were later built, have led the Dearborn Shi'a to assert an identity that is separate from the Sunnis'.<sup>179</sup>

Separation among Muslims also exists in Brooklyn, New York, where separate calls to prayer for Sunni and Shi'a Muslims can be heard emanating from their respective mosques.<sup>180</sup> Whether or not religious tensions exist between the two groups depends on who is speaking. Because of the proliferation of Sunni mosques in New York City, many Shi'a sometimes pray at those mosques because of a lack of Shi'a mosques in the area.<sup>181</sup> While Sunnis say there is no religious friction in the neighborhood, some Shi'a have complained that the Sunnis have called them infidels while praying the "Shiite way" at the Sunni mosques.<sup>182</sup> One Shi'i told the *New York Times* that he keeps his gestures subtle while praying at the Sunni mosques, and that "[h]e also prepares himself psychologically to hear a lecture from Sunni worshipers who notice his Shiite gestures."<sup>183</sup>

Following the recent execution of Saddam Hussein, Shi'a Muslims living in the United States have even more motivations to worship separately from Sunnis. Hussein was a Sunni, and his hanging was

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175. See, e.g., Neil MacFarquhar, *Iraq's Shadow Widens Sunni-Shiite Split in U.S.*, N.Y. TIMES, Feb. 4, 2007, at A1 (noting that some United States Muslim communities now have large enough populations for Sunnis and Shi'ites to maintain their own mosques, schools, and social clubs).

176. Walbridge, *supra* note 9, at 340.

177. *Id.* at 342-43.

178. KAREN ISAKSEN LEONARD, MUSLIMS IN THE UNITED STATES: THE STATE OF RESEARCH 11 (2003).

179. See Walbridge, *supra* note 9, at 340-43.

180. Shomial Ahmad, *Sunnis and Shiites, A Street Apart*, N.Y. TIMES, Jan. 14, 2007, § 14, at 4.

181. *Id.*

182. *Id.*

183. *Id.*

controversial, in part, because it was carried out by a predominately Shi'a-led government in Iraq.<sup>184</sup> The backlash from the execution has spilled over to America's streets. Shortly after the former dictator's execution, three Shi'a Muslim mosques and a dozen Shi'a businesses in the Detroit-Dearborn area experienced vandalism; although no arrests were made, the Shi'a community suspected it was the work of Sunni Muslims.<sup>185</sup>

Friction between the two groups has also been growing at college campuses. Shi'a students who formerly worshipped with their Sunni classmates at various Muslim Student Associations are now breaking apart to form their own groups.<sup>186</sup> The reason is that the student associations are dominated by Sunnis, and Shi'a students claim they are no longer permitted to lead the groups in prayers.<sup>187</sup> At Rutgers University, where the Sunni-Shi'a divide has been especially pointed, a Sunni religious leader described the situation in New Jersey as a "microcosm of what is happening in Iraq . . . because people couldn't put aside their differences."<sup>188</sup>

The growing tensions in the United States between the two sects will likely lead to more Shi'a Muslims seeking their own worship services at Shi'a mosques, even if doing so would require additional cost and travel. That option is not available to Muslim inmates, however. Shi'a plaintiffs have continually lost in their lawsuits for the right to worship separately from Sunni inmates.<sup>189</sup> Currently, New York prisons offer only one worship service for all Muslim inmates, and Shi'a inmates strongly feel the effects of being the minority Muslim sect. As the cases reveal, these inmates often experience discrimination, criticism and attempts of conversion by the Sunni imams<sup>190</sup> who lead the prison worship services.

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184. See Jeff Zeleny & Helene Cooper, *Lawmakers Criticize Video of Hussein's Final Minutes*, N.Y. TIMES, Jan. 5, 2007, at A10 (the video revealed Hussein's executioners shouting pro-Shi'a statements at him before he was hanged).

185. MacFarquhar, *supra* note 175, at A1. "The Shiites were very happy that they killed Saddam, but the Sunnis were in tears," stated a Shi'a Muslim eating at one of the vandalized restaurants in Dearborn. "These people look at us like we sold our country to America." *Id.*

186. *Id.*

187. *Id.*

188. *Id.*

189. See *supra* note 165.

190. An imam is defined as "a prayer leader and, by extension, the leader of the Muslim community." BROWN, *supra* note 18, at 256.

### C. The Separation Cases

As stated earlier, the Shi'a are the minority group in the Muslim world, and this population breakdown also exists in United States prisons. Consequently, prison chaplains who have been hired to lead Muslim inmates in worship are often Sunnis. The recent wave of lawsuits brought by Shi'a inmates dealt with their right to worship separately from Sunnis for a variety of reasons. The various plaintiffs claimed that their religious beliefs dictated the need for a separate service,<sup>191</sup> and focused on the discrimination or conversion attempts they endured by the Sunni chaplains as the reason for needing a separate, Shi'a-led Jum'ah service.<sup>192</sup>

Five Shi'a plaintiff cases were decided by New York courts in the past six years—*Cancel v. Goord*<sup>193</sup> in 2000, *Pugh v. Goord*<sup>194</sup> and *Cancel v. Mazzuca*<sup>195</sup> in 2002, and the two most recent, *Orafan v. Goord*<sup>196</sup> and *Holman v. Goord*<sup>197</sup> in 2006. Another New York separation case, *Matiyn v. Commissioner Department of Corrections*, was decided in 1989 and was brought by a Sunni inmate.<sup>198</sup> This discussion will focus on the recently-brought Shi'a inmate cases, but it is interesting to note that the issue of separating Shi'a and Sunnis in prison worship services is not new.

The Shi'a inmates in *Orafan v. Goord*, who in 1995 started the chain of recent litigation, were from Auburn, Woodbourne, and Eastern correctional facilities in New York.<sup>199</sup> Their primary claim was that DOCS had violated their religious rights by not providing them with a separate worship service, apart from Sunnis.<sup>200</sup> The court determined that the Shi'a plaintiffs were not substantially burdened by the unified service because testimony showed that a separate Jum'ah service led by a Shi'a prayer leader was not part of the plaintiffs' personal beliefs.<sup>201</sup>

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191. See, e.g., *Orafan v. Goord*, 411 F. Supp. 2d 153, 156 (N.D.N.Y. 2006).

192. *Pugh v. Goord*, No. 00Civ.7279, 2002 U.S. Dist. LEXIS 19382, at \*6-7 (S.D.N.Y. Oct. 3, 2002), *vacated*, 345 F.3d 121 (2d Cir. 2003); *Cancel v. Mazzuca*, 205 F. Supp. 2d 128, 133 (S.D.N.Y. 2002); *Cancel v. Goord*, 717 N.Y.S.2d 610, 611 (App. Div. 2000); *Holman v. Goord*, No. 2500-05, 2006 WL 1789068, at \*1 (N.Y. Sup. Ct. June 29, 2006).

193. 717 N.Y.S.2d at 610.

194. 2002 U.S. Dist. LEXIS 19382, at \*1.

195. 205 F. Supp. 2d at 128.

196. 411 F. Supp. 2d at 153.

197. 2006 WL 1789068, at \*1.

198. *Matiyn v. Comm'r Dep't of Corr.*, 726 F. Supp. 42, 42-43 (W.D.N.Y. 1989).

199. *Orafan*, 411 F. Supp. 2d at 156.

200. *Id.*

201. *Id.* at 159; see also *Ford v. McGinnis*, 352 F.3d 582, 593-94 (2d Cir. 2003) (holding that substantial burden is determined by the sincerity of the individual's religious beliefs, not by

The plaintiffs had been attending the unified, Sunni-led service, which, according to the court, undermined the importance to the plaintiffs of a separate, Shi'a-led service.<sup>202</sup> The plaintiffs also described prayers that they could recite in their own cells as an alternative to attending Jum'ah.<sup>203</sup> The court held that these practices constituted acceptable alternatives to a separate Jum'ah service and that the Shi'a inmates were not substantially burdened by the current Muslim service.<sup>204</sup>

Besides the failed claim that a Sunni-led service was insufficient for their religious practices, the Shi'a inmates also claimed discrimination by the Sunni chaplains that led the prayer services.<sup>205</sup> The plaintiffs alleged that the chaplain "refused to facilitate Shiite requests because he did not share their religious beliefs and told Shiite inmates that their religious beliefs were wrong."<sup>206</sup> The Shi'a inmates also provided evidence that showed that another Sunni chaplain had "endorsed the distribution of anti-Shiite literature."<sup>207</sup>

The court refused to grant the Shi'a inmates a separate worship service for this reason, instead citing the numerous alternative means that the plaintiffs had to exercise their religious rights.<sup>208</sup> Besides avoiding the Jum'ah service altogether and praying in their own cells, the court suggested that the Shi'a inmates could meet with Shi'a religious advisors and participate in religious holidays and fasting.<sup>209</sup> What was missing from the court's decision was any broad guidance for DOCS as to how to solve the problem of Sunni chaplains discriminating against Shi'a inmates.<sup>210</sup> That proposed solution would come in the aftermath of *Cancel v. Goord*, with the DOCS introducing its Protocol.<sup>211</sup>

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religious mandate). The Shi'a inmates in *Orafan* tried unsuccessfully to present evidence that ecclesiastical authority dictated that Shi'a Muslims attend only Shi'a-led prayer services. *Orafan*, 411 F. Supp. 2d at 159.

202. *Orafan*, 411 F. Supp. 2d at 159.

203. *Id.*

204. *Id.*

205. *Id.* at 163.

206. *Id.*

207. *Id.*

208. *Id.* at 168.

209. *Id.*

210. The federal court dismissed the claims against those defendants who allegedly made derogatory remarks against the Shi'a inmates because of Eleventh Amendment concerns (the remarks were made within the scope of their employment as New York State prison chaplains). *Id.* at 168-69.

211. See *Cancel v. Goord*, 717 N.Y.S.2d 610, 612 (App. Div. 2000).

The next Shi'a inmate in the litigation chain was Frankie Cancel, and his lawsuit targeted his religious treatment at Fishkill Correctional Facility in New York.<sup>212</sup> Fishkill's guidelines for Islamic worship were established by DOCS and included a four-point program: 1) Friday noon services, or Jum'ah; 2) Islamic studies classes; 3) Islamic introduction services; and 4) consultation and religious planning.<sup>213</sup> This program was meant for all Muslim inmates, regardless of whether they were Sunni or Shi'a.<sup>214</sup>

Despite the "non-sectarian" program, Cancel alleged in his grievance to prison officials that the only Islamic services provided at the prison were those of the Sunni sect. The Sunni services were led by a Sunni chaplain, and Cancel claimed that they were "antagonistic [to] his Shi'a faith."<sup>215</sup> Specifically, he alleged that the Sunni chaplain did not permit the study of Shi'ism; the chaplain did not even recognize the differences between the two sects of Islam. Cancel also claimed that "the Sunni chaplain routinely included proselytizations in the services denigrating Shi'a believers as 'infidels,' 'hypocrites,' 'satanic worshippers,' and 'rejectors' to shame them into converting to the Sunni sect."<sup>216</sup>

Cancel requested in his grievance that the Shi'a inmates be allowed separate worship services, free from Sunni influence.<sup>217</sup> He also asked that DOCS permit Shi'a clergy or registered volunteers to enter the prison to lead Shi'a services and religious discussion groups. DOCS denied Cancel's grievance because it had been advised by the resident imam that "all Muslim religious groups fall under Islam, with the exception of [followers of the Nation of Islam]."<sup>218</sup>

The lower court found for Cancel in what would prove to be a short-lived victory for the rights of Shi'a inmates to worship separately from Sunni inmates.

The court . . . finds that the differences between the historical and doctrinal beliefs, as well as the religious practices, of the two groups

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212. *Cancel v. Goord*, 717 N.Y.S.2d at 611.

213. *Pugh v. Goord*, 184 F. Supp. 2d 326, 328 (S.D.N.Y. 2002), *motion denied*, 2002 U.S. Dist. LEXIS 19382 (S.D.N.Y. Oct. 3, 2002), *vacated*, 345 F.3d 121 (2d Cir. 2003).

214. The court included this disclaimer by DOCS following its description of the four-point program: "The DOCS program has been approved of by the Fiqh Council of North America, a nationally recognized board of Muslim scholars and educators, that is recognized as authoritative by all major Muslim organizations in the United States, in which all sects, including Shi'ites, are represented and play leadership roles." *Id.* at 329.

215. *Cancel v. Goord*, 717 N.Y.S.2d at 611.

216. *Id.*

217. *Id.*

218. *Id.* (alteration in original).

[Sunni and Shi'a] are significant. The nature of these differences mandates the conclusion that respondent's determination that the spiritual needs of the inmates of the Shi'a Muslim faith can be met in religious services led by chaplains of the Sunni Muslim faith is arbitrary and capricious.<sup>219</sup>

While the decision was upheld on appeal, the Appellate Division modified the judgment and held that the inmates' religious rights must be balanced against DOCS's security interests and "legitimate correctional goals."<sup>220</sup> Instead of enforcing the lower court's order, which would have directed DOCS to hold separate religious services for Sunni and Shi'a inmates, the matter would be remitted to DOCS to determine how best to accommodate Shi'a inmates.<sup>221</sup>

The Protocol, later challenged in both *Pugh* and *Holman*, was the result of DOCS's compliance from the *Cancel* decision to meet Shi'a inmates' concerns about their religious practices in prison.<sup>222</sup> In drafting the Protocol, DOCS consulted with several imams, a Shi'a chaplain, and other Muslim organizations and leaders to learn about the religious needs of Sunnis and Shi'a Muslims. DOCS claimed it considered those needs and balanced them against penological safety concerns.<sup>223</sup>

The Protocol, among other things, called for all employees, especially chaplains, to "refrain from making disparaging remarks about a religion or its followers."<sup>224</sup> It allowed Shi'a inmates to attend separate Shi'a Muslim religious education classes, with the aid of Shi'a Muslim inmate facilitators. The Protocol also "gave Shi'ite Muslim inmates a full and equal opportunity to participate in the weekly Friday Jum[']ah service, and Shi'ite Muslim chaplains the opportunity to officiate at the service."<sup>225</sup> It required that at least one member of the Muslim governing board of each prisons' Muslim communities be a Shi'a Muslim. Finally,

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219. *Cancel v. Goord*, 695 N.Y.S.2d 267, 269 (Sup. Ct. 1999), *aff'd*, 717 N.Y.S.2d 610 (App. Div. 2000).

220. *Cancel v. Goord*, 717 N.Y.S.2d at 612.

221. *Id.* This was not the end of Frankie Cancel's legal proceedings. He brought a related civil rights proceeding in federal court against thirty-one DOCS employees for violations of his religious rights. *Cancel v. Mazzuca*, 205 F. Supp. 2d 128, 133 (S.D.N.Y. 2002). The court dismissed all of the claims. *Id.* at 146.

222. *Holman v. Goord*, No. 2500-05, 2006 WL 1789068, at \*1 (N.Y. Sup. Ct. June 29, 2006) (citing *Cancel v. Goord*, 717 N.Y.S.2d at 612).

223. *Holman*, 2006 WL 1789068, at \*1.

224. *Id.* at \*2.

225. *Id.*

the Protocol included observances unique to Shi'a Muslims in DOCS's revised religious observance calendar.<sup>226</sup>

Following the implementation of the Protocol, a second Shi'a inmate from Fishkill Correctional Facility brought a lawsuit challenging the program as violative of the religious rights of Shi'a inmates.<sup>227</sup> Plaintiff Thomas Pugh asserted that the new religious program failed to meet Shi'a inmates' needs, and that DOCS must provide separate religious services, a separate prayer area, and a separate chaplain for Shi'a inmates.<sup>228</sup>

Furthermore, Pugh claimed similar discrimination from Imam Muhammad, the same chaplain that Cancel had identified as attempting to convert him to the Sunni beliefs. Pugh "allege[d] that Imam Muhammad [had] exhibited an overt hostility to the Shi'a faith, and that hostility has been evidenced not only in derogatory words, but also in Shi'ite inmates' being denied the right to celebrate *Eid Ghadir Khum*, apparently one of the biggest and most important Shi'a festivities."<sup>229</sup> While the Protocol did succeed in causing the prisons to recognize holidays specific to the Shi'a faith,<sup>230</sup> Pugh claimed that Sunni chaplains continued to make disparaging remarks against Shi'a inmates.<sup>231</sup>

Despite Pugh's claims, the district court denied the motion for a preliminary injunction and dismissed the complaint. Instead of focusing on the doctrinal reasons why Sunni and Shi'a Muslims did not want to worship together, the court addressed the reasonableness of DOCS's justifications for having the two groups worship in one service.<sup>232</sup> Using the *Turner* balancing test, the court determined that "the constitution does not require more than is provided by DOCS's Muslim program, as modified by the new Shi'a protocol."<sup>233</sup>

While both *Cancel* and *Pugh* involved claims brought by Shi'a inmates at Fishkill Correctional Facility, the problems were not isolated to that prison or to the particular chaplain in charge. The Shi'a inmates

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226. *Id.*

227. *Pugh v. Goord*, 184 F. Supp. 2d 326, 329-30 (S.D.N.Y. 2002), *motion denied*, 2002 U.S. Dist. LEXIS 19382 (S.D.N.Y. Oct. 3, 2002), *vacated*, 345 F.3d 121 (2d Cir. 2003).

228. *Pugh v. Goord*, No. 00Civ.7279, 2002 U.S. Dist. LEXIS 19382, at \*4 & n.5 (S.D.N.Y. Oct. 3, 2002), *vacated*, 345 F.3d 121 (2d Cir. 2003).

229. *Pugh*, 184 F. Supp. 2d at 330.

230. *See Holman*, 2006 WL 1789068, at \*2.

231. *Pugh*, 2002 U.S. Dist. LEXIS 19382, at \*7 n.6.

232. *Pugh*, 184 F. Supp. 2d at 335-37.

233. *Id.* at 335. Following judgment, Pugh sought vacatur of the dismissal of the complaint. That motion was denied. *Pugh*, 2002 U.S. Dist. LEXIS 19382, at \*10-11. An appeals court later vacated that judgment and remanded to a new court. *Pugh v. Goord*, 345 F.3d 121, 126 (2d Cir. 2003).

in *Orafan* complained of similar problems of mistreatment by the Sunni chaplain at Auburn Correctional Facility,<sup>234</sup> and the next case brought by an inmate from Sullivan Correctional Facility also cited discrimination from the resident Sunni chaplain.<sup>235</sup>

On March 4, 2005, the fourth Shi'a inmate in the chain filed a complaint about the Muslim religious accommodations at Sullivan Correctional Facility.<sup>236</sup> Petitioner David Holman, like Pugh, challenged the Protocol because it did not provide for separate Shi'a and Sunni religious services. Holman also asserted a now familiar claim that leaders of the Muslim worship services were "unduly discriminatory and harsh to Shi'ite Muslims."<sup>237</sup>

Instead, the court praised the Protocol, stating that DOCS's efforts produced "a sincere and adequate effort to provide for the needs of the Shi'ite inmate population."<sup>238</sup> Holman, however, claimed that the Protocol's allowance of a single Friday Jum'ah service was still discriminatory because the facility's service lacked the involvement of a Shi'a chaplain. Even worse, Holman alleged that the current Sunni chaplain continued to subject Shi'a inmates to disparaging remarks, even after the Protocol's enactment.<sup>239</sup> DOCS may have made great strides in drafting this Protocol, but the old problems remained in having Sunni chaplains lead Shi'a inmates in religious services.

In each of these cases, the courts have held that the legitimate penological concerns of the prisons greatly outweighed the interests of the Shi'a inmates in having a separate religious service from Sunnis. The Shi'a inmates have consistently lost this fight, returning instead to a Jum'ah service where they are mistreated by the resident Sunni chaplains. If courts were to rebalance their scales, applying more weight to the interests of Shi'a inmates—in light of current events and the history of Sunni-Shi'a relations<sup>240</sup>—they would find that Shi'a inmates should have the right to worship apart from Sunnis. In fact, the law demands such a result.<sup>241</sup>

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234. *Orafan v. Goord*, 411 F. Supp. 2d 153, 153, 163 (N.D.N.Y. 2006).

235. *Holman*, 2006 WL 1789068, at \*1.

236. *Id.* at \*1.

237. *Id.*

238. *Id.* at \*2.

239. *Id.*

240. *See supra* Part IV.A-B.

241. *See infra* Part V.

## V. REBALANCING SHI'A INMATE RIGHTS AND PRISON INTERESTS

The courts in the Shi'a separation cases all used the Supreme Court's balancing test, stated in *Turner v. Safley*,<sup>242</sup> to determine that the request by Shi'a inmates for a separate Jum'ah service was reasonably related to a legitimate penological concern. Furthermore, the courts used the *Turner* test to find that those penological concerns outweighed the religious rights of Shi'a inmates.<sup>243</sup>

The prison officials in *Orafan* convinced the court of the difficulties they would face in providing a separate Jum'ah service for Shi'a inmates. The officials cited the burden of paying for more guards to escort inmates to and from the services, as well as to monitor the services.<sup>244</sup> They also argued that their prison lacked the space to accommodate two Jum'ah services at once—one for Sunni inmates, the other for Shi'a inmates.<sup>245</sup>

In *Pugh*, the court cited security concerns as a main reason why Shi'a inmates should not have their own service. “[P]rison officials have documented that multiplying the number of sects or groupings entitled to separate services would have an adverse impact upon security at prison facilities by increasing opportunities for inmates to exchange contraband and carry on gang-related activity under the cloak of religion.”<sup>246</sup> The court gave similar reasons in *Holman*: “[T]he security concerns for inmates and correctional officers, fiscal and staffing considerations, and space restrictions are all rationally related to the policy of holding only general religious services.”<sup>247</sup>

The concerns cited by the prison officials are arguably valid, but it is interesting to note that prisons apply different standards to other religious groups. Many United States prisons allow separate services for Protestants and Catholics, even though both fall under the umbrella of Christianity.<sup>248</sup> The testimony in *Orafan* provides an even better example. The prison officials at Auburn Correctional Facility admit to

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242. *Turner v. Safley*, 482 U.S. 78, 89-90 (1987); see *supra* Part II.B for discussion about the *Turner* balancing test.

243. *Orafan v. Goord*, 411 F. Supp. 2d 153, 165-66 (N.D.N.Y. 2006); *Pugh v. Goord*, 184 F. Supp. 2d 326, 335-37 (S.D.N.Y. 2002), *motion denied*, 2002 U.S. Dist. LEXIS 19382 (S.D.N.Y. Oct. 3, 2002), *vacated*, 345 F.3d 121 (2d Cir. 2003); *Cancel v. Goord*, 717 N.Y.S.2d 610, 612 (App. Div. 2000) (citing *Muhammad v. City of N.Y. Dep't of Corr.*, 904 F. Supp. 161, 196-97 (S.D.N.Y. 1995), which used the *Turner* balancing test); *Holman*, 2006 WL 1789068, at \*3.

244. *Orafan*, 411 F. Supp. 2d at 160.

245. *Id.*

246. *Pugh*, 184 F. Supp. 2d at 336.

247. *Holman*, 2006 WL 1789068, at \*3.

248. *Religious Practice in Prison*, *supra* note 28, at 1902.

providing separate religious services to Seventh Day Adventists, Quakers, Jehovah's Witnesses, and members of the Greek Orthodox Church.<sup>249</sup> Officials claim that they have afforded these groups separate services because of greater availability of scheduling on weekends. Jum'ah, on the other hand, must take place at a specific time on Friday afternoons, when more prison activities are scheduled than on the weekends.<sup>250</sup>

A different reality could be taking place, however. American prison officials may be more familiar with groups such as Quakers and Jehovah's Witnesses. Until the Iraq War, many Americans were probably unaware of the divisions in Islam between Sunni and Shi'a Muslims. A lack of knowledge about a religion, however, should not affect a court's determination about how greatly to weigh an inmate's religious rights against penological concerns.<sup>251</sup>

During the past four decades, more and more courts have recognized the specific practices of Islam.<sup>252</sup> Earlier, this Note described how Muslim inmates suing for religious rights in New York have seen gradual success. A male Muslim inmate winning the right to be frisked by a guard of the same sex<sup>253</sup> plays in sharp contrast to a suit decades earlier in which another Muslim inmate could not even properly worship Islam in prison.<sup>254</sup> That is arguably due to Islam's increasing exposure and influence throughout the United States and especially in New York.

The continuing sectarian violence in Iraq is directly affecting relations between Sunni and Shi'a Muslims in the United States,<sup>255</sup> and it is inevitable that this strain will continue to carry over into the prisons. Therefore, a new assessment of the Supreme Court's balancing test must be made to determine whether Shi'a inmates should be given the right to worship apart from Sunni inmates.

First, in applying *Farid v. Smith*, a court must ask whether a separate Jum'ah service for Shi'a inmates is mandated by Shi'ism and whether the inmates sincerely hold that belief.<sup>256</sup> While Shi'a Muslims frequently worship with Sunnis, their firm belief in the succession of the Prophet Muhammad's bloodline mandates that they only acknowledge

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249. *Orafan*, 411 F. Supp. 2d at 167.

250. *Id.* at 167-68.

251. *See supra* note 76 and accompanying text.

252. *See supra* Part III.B.

253. *Rivera v. Smith*, 462 N.Y.S.2d 352, 355 (Sup. Ct. 1983), *aff'd*, 472 N.Y.S.2d 210 (App. Div. 1984).

254. *Brown v. McGinnis*, 180 N.E.2d 791, 793 (N.Y. 1962).

255. *See supra* Part IV.B.

256. *Farid v. Smith*, 850 F.2d 917, 926 (2d Cir. 1988).

the leadership of Shi'a scholars.<sup>257</sup> Past practices of worshipping in Sunni mosques might be ending, especially with the increased discomfort some Shi'a experience during Sunni-led worship services.<sup>258</sup>

Next, the court must ask whether the challenged practice of the prison officials infringes upon the Shi'a inmates' religious beliefs.<sup>259</sup> Forcing Shi'a Muslim inmates to worship with Sunni Muslims, and most often under the leadership of Sunni chaplains, constitutes an infringement. Shi'a Muslims in America have the choice of whether or not to worship at Sunni mosques. A prison inmate has no such choice; instead, the Shi'a inmate will have to choose between worshipping at a Sunni-led service or forgoing the worship service entirely.

The courts then ask whether the challenged practice of the prison officials furthers some legitimate penological objective, which is determined by the four-part *Turner* balancing test.<sup>260</sup> First, whether there is a rational relationship between the regulation and the legitimate government interest asserted.<sup>261</sup> That has already been answered in the affirmative by the *Holman* court.<sup>262</sup> Second, whether the Shi'a inmates have alternative means to exercise their rights.<sup>263</sup> The DOCS's Protocol offers as an alternative separate religious classes for Shi'a inmates.<sup>264</sup> However, separate religious classes alone are not a suitable alternative because Jum'ah, as one of the five pillars of Islam, is extremely important to the Muslim religion.<sup>265</sup>

Third, *Turner* asks what impact accommodating separate services for Shi'a inmates would have on the prison system.<sup>266</sup> The court in *Holman* responded that "providing every religious denomination with a separate service would be disastrous."<sup>267</sup> Yet, prison officials already accommodate non-mainstream groups with separate services.<sup>268</sup> Furthermore, the Muslim population in New York prisons is growing rapidly<sup>269</sup> and with that, the demand for separate Sunni and Shi'a religious services will also grow.

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257. See Sachedina, *supra* note 7, at 6.

258. See *supra* Part IV.B.

259. *Farid*, 850 F.2d at 926.

260. *Turner v. Safley*, 482 U.S. 78, 89-90 (1987).

261. *Id.* at 89.

262. See *supra* note 247 and accompanying text.

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

264. See *supra* notes 222-25 and accompanying text.

265. KAMRAVA, *supra* note 6, at 17.

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

267. *Holman v. Goord*, No. 2500-05, 2006 WL 1789068, at \*3 (N.Y. Sup. Ct. June 29, 2006).

268. See *supra* notes 248-49.

269. See *Muslims in American Prisons*, *supra* note 11, at 1.

Finally, the *Turner* test asks whether ready alternatives exist which accommodate the right and also satisfy the government interest.<sup>270</sup> After DOCS enacted its Protocol, the courts cited those provisions as providing a suitable alternative to the separate, Shi'a-led services.<sup>271</sup> However, evidence shows that the Protocol has failed in preventing Sunni chaplains from denigrating the Shi'a inmates' beliefs.<sup>272</sup> Courts must recognize that as the violence continues in Iraq, tensions between the two sects will only worsen in the United States. That will inevitably result in a greater hardship on Shi'a inmates who worship under Sunni chaplains at a unified Jum'ah service. Therefore, while the Protocol might satisfy the government interest, it does not protect the religious rights of incarcerated Shi'a Muslims.

## VI. CONCLUSION

When courts reapply the *Turner* balancing test to this issue—taking into account current events, the distinctness of Shi'a beliefs and the failure of prisons to prevent their Sunni chaplains from making disparaging remarks to Shi'a inmates—they will find that the scales have tipped in the Shi'a inmates' favor. Shi'a Muslim inmates should be allowed separate worship services in prison because a denial would mean an infringement upon their religious rights. The interests of DOCS are no longer compelling enough to outweigh those rights.

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

271. *See, e.g., Holman*, 2006 WL 1789068, at \*3.

272. *See supra* Part IV.C.

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