

Seton Hall University

eRepository @ Seton Hall

Law School Student Scholarship

Seton Hall Law

2020

My God Told Me to Hate You: Racism, Religious Liberty and the Law

Liam McManus

Follow this and additional works at: https://scholarship.shu.edu/student_scholarship



Part of the Law Commons

Contents

INTRODUCTION	3
THE HISTORY OF RACE AND RELIGION IN AMERICA.	4
RACIST RELIGIONS AND THE WORKPLACE	9
RACISM IN PRISON, RELIGIOUS PRACTICE OR SECURITY THREAT?.....	15
MODERN MOVEMENT TOWARDS WIDER DEFINITIONS OF RELIGION AND GREATER SUPPORT FOR RELIGIOUS FREEDOM COULD OPEN DOORS FOR WHITE SUPREMACISTS TO GAIN RELIGIOUS RECOGNITION FOR THEIR PRACTICES.	24
CONCLUSION.....	28

My God Told Me to Hate You: Racism, Religious Liberty and the Law.

Question Presented: When faced with backlash from mainstream society over racist beliefs, some white supremacists are claiming to be professing their religious beliefs. But can religious freedom be used to protect bigotry and hatred?

INTRODUCTION

In the early days of the Trump Administration, President Trump issued the “Presidential Executive Order Promoting Free Speech and Religious Liberty.”¹ According to the text, the order was intended to direct the executive branch to, “vigorously enforce Federal law’s robust protections for religious freedom.”² The order was seen by many commentators as a direct response to policies of prior administrations believed to be anti-religion. The order mentions the so-called “Johnson Amendment” prohibiting outward support for political candidates by churches,³ and the religious based exemptions to preventative care mandates in the Patient Protection and Affordable Care Act (Obamacare).⁴ The order itself, and President Trump’s remarks in signing the order, have been seen as a concession to the right-wing religious groups that overwhelmingly supported the President in the 2016 election.⁵

¹ Exec. Order No. 13,798, 92 Fed. Reg. 21,674 (May 4, 2017).

² *Id.* § 1.

³ *Id.* § 2.

⁴ *Id.* § 3.

⁵ Pew Research estimates that more than 80% of those identifying as White, born-again/evangelical Christian voted for Trump. Jessica Martínez and Gregory A. Smith, *How the faithful voted: A preliminary 2016 analysis*, PEW

Opponents have claimed that the goal behind the order is to allow fundamentalist Christians and fundamentalist groups the ability to legally discriminate against homosexual and transgender individuals.⁶ LGBT advocacy groups were especially concerned with the president's comments in signing the order, calling for government support for giving faith-based organizations, "equal right to exercise their deeply held beliefs."⁷ However, when the Trump Administration opened this door to allow for an expanded definition of religious free exercise for fundamentalist Christians, have they left an opening for other "religions" to find legal support for discrimination?

THE HISTORY OF RACE AND RELIGION IN AMERICA.

Since the early days of America, religiously affiliated groups have supported racial discrimination, segregation, and worse, based on their own interpretations of their religious doctrines. In the years leading up to The American Civil War, the battle over the future of slavery was heavily religious. Many prominent voices in the Abolition movements belonged to religious leaders, and many abolition groups were explicitly aligned with a religious order. However, pro-slavery factions also found justification for their positions in the bible. The bible makes numerous references to slavery in both the Old and New Testaments.⁸ Pro-slavery

RESEARCH CENTER (Nov. 9, 2016), <https://www.pewresearch.org/fact-tank/2016/11/09/how-the-faithful-voted-a-preliminary-2016-analysis/>.

⁶ Samantha Allen, *LGBT Alarm as President Trump Signs 'Religious Liberty' Executive Order*, THE DAILY BEAST May 04, 2018, <https://www.thedailybeast.com/lgbt-alarm-as-trump-signs-religious-liberty-exec-order>.

⁷ *Id.*

⁸ From the Old Testament:

Your male and female slaves are to come from the nations around you; from them you may buy slaves. You may also buy some of the temporary residents living among you and members of their clans born in your country, and they will become your property. You can bequeath them to your children as inherited property and can make them slaves for life, but you must not rule over your fellow Israelites ruthlessly.

Leviticus 25:44-46 (New International Version).

advocates cited these references to justify the institution and reinforce their belief in the superiority of their own race. Thornton Stringfellow, a Virginia Baptist minister, published an extensive report on his opinion on the biblical justification for slavery.

You ask me for my opinion about the emancipation movement in the State of Kentucky. I hold that the emancipation of hereditary slaves by a State is not commanded, or in any way required by the Bible. The Old Testament and the New, sanction slavery, but under no circumstances enjoin its abolition, even among saints. Now, if religion, or the duty we owe our Creator, was inconsistent with slavery, then this could not be so. If pure religion, therefore, did not require its abolition under the law of Moses, nor in the church of Christ--we may safely infer, that our political, moral, and social relations do not require it in a State; unless a State requires higher moral, social, and religious qualities in its subjects, than a Gospel church.⁹

These polar opposite views, unsurprisingly, divided religions and even individual congregations.¹⁰

The use of the bible to support racial discrimination didn't end with the abolition of slavery. Religious leaders continued to find biblical justification for discriminatory and segregationist policies even as the civil rights movement began to chip away at some racial barriers. Fundamentalist preacher Bob Jones Sr., found justification for segregation in the Acts of the Apostles.¹¹

From the New Testament:

Slaves, obey your earthly masters with respect and fear, and with sincerity of heart, just as you would obey Christ. Obey them not only to win their favor when their eye is on you, but as slaves of Christ, doing the will of God from your heart. Serve wholeheartedly, as if you were serving the Lord, not people, because you know that the Lord will reward each one for whatever good they do, whether they are slave or free.

Ephesians 6:5-8 (New International Version).

⁹ Thornton Stringfellow, D. D., *SCRIPTURAL AND STATISTICAL VIEWS IN FAVOR OF SLAVERY* 149 (4th ed., with additions 1856).

¹⁰ See eg., *Gartin v. Penick*, 68 Ky. 110 (1868) A Kentucky parish, split into pro and anti-slavery factions went to court over the use of the church building and the division of property.

¹¹ "From one man he made all the nations, that they should inhabit the whole earth; and he marked out their appointed times in history and the boundaries of their lands." Acts 17:26 (New International Version)

There is no trouble between a colored Christian and a white Christian. They operate as individuals and deal with each other as Christians who have their citizenship in heaven. Up in heaven there will be no boundaries. We will be one forever with Christ. But we are not one down here, as far as race is concerned and as far as nations are concerned. God said so, and Paul made it clear when he preached in Athens in the midst of Athenian culture. He said that God ‘...hath made of one blood all nations of men...’ But god has also done something else. He has fixed the bounds of their habitations¹²

It was this dedication to segregation that would eventually cost The Bob Jones University its tax-exempt status.¹³

In the years following the passage of the Civil Rights Act of 1964, individual white supremacists have also tried to cite their religious practices as a way to avoid integration and allow them to discriminate. In *Newman v. Piggie Park Industries Inc.*,¹⁴ a South Carolina restaurant refused to allow African American patrons to eat on the premises. The owner cited, among other reasons, that his religious beliefs precluded him from having to serve anyone other than white patrons. The court dismissed this section of his argument. Accepting his right to have white supremacist beliefs, the court recognized that there is a difference between having the belief and acting on it. “Undoubtedly defendant Bessinger has a constitutional right to espouse the religious beliefs of his own choosing, however, he does not have the absolute right to exercise and practice such beliefs in utter disregard of the clear constitutional rights of other citizens.”¹⁵

¹² Is Segregation Spiritual? Address given over radio station WMUU (Apr. 17, 1960) in the archives of Camille K. Lewis, Ph.D., <https://www.drslewis.org/camille/2013/03/15/is-segregation-scriptural-by-bob-jones-sr-1960/>.

¹³ *Bob Jones Univ. v. United States*, 461 U.S. 574, 103 S. Ct. 2017 (1983) The Supreme Court upheld an IRS decision stripping the university of its tax exempt status based on its refusal to allow interracial dating or admit students in an interracial marriage.

¹⁴ *Newman v. Piggie Park Enters., Inc.*, 390 U.S. 400 (1968) (modified on other grounds).

¹⁵ *Id* at 945.

When looking at groups that professed white supremacy, the most prominent example is the Ku Klux Klan. In the years following the Civil War, the rise of the Ku Klux Klan blurred the line between racism and religion. The group, in its various incarnations from Reconstruction to today, has relied heavily on Christian symbolism. Though the organization itself does not claim to be a religion, individual members have made claims that Klan activities deserve First Amendment protection. When it comes to the right of free speech, courts agree.

In the famous case *Brandenburg v. Ohio* the Supreme Court sided with a KKK leader's right to free speech despite the fact that he was advocating lawlessness and violence, in violation of an Ohio law then on the books.¹⁶ More recently, in *Virginia v. Black*,¹⁷ the Court invalidated a jury instruction making the burning of a cross *per se* illegal. Instead, the Court found laws banning cross burning can be constitutional, when the intent is to intimidate, but when the cross burning was purely expressive, the right to free speech prevailed. "[J]ust as a State may regulate only that obscenity which is the most obscene due to its prurient content, so too may a State choose to prohibit only those forms of intimidation that are most likely to inspire fear of bodily harm. A ban on cross burning carried out with the intent to intimidate is fully consistent with our holding in *R. A. V.* and is proscribable under the First Amendment."¹⁸

Courts have been less receptive to protecting KKK activity on religious grounds. In several cases, explored more fully below, Courts have held that the KKK is not a religion in

¹⁶ *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

¹⁷ *Virginia v. Black*, 538 U.S. 343 (2003).

¹⁸ *Id.* at 363. In *R. A. V. v. St. Paul*, 505 U.S. 377 (1992), the Supreme Court held that a ban on fighting words was permissible, but banning those that advocated a certain point of view was not.

itself, rather a political and social organization, and thus not entitled to protection on free exercise grounds.

This refusal to recognize the KKK as a religion and their activities as religious has extended to cross burning as well. In one particular case out of Pennsylvania,¹⁹ a local Klan leader capped a day-long rally on his property with a cross burning. He was cited for violating a local ordinance that forbid fires of any kind after dark. The defendant tried to find protection under the First Amendment, claiming the display was religious in nature. “It is the belief of the Klan that the cross as a burning fire be lifted upon a hill where all people can see it as a light unto the world pursuant to the religious traditions of the Klan as a Christian organization.”²⁰ The court was unpersuaded and determined that the KKK did not meet the criteria of a religion. Interestingly, in doing so, that Pennsylvania court seemed to embrace a very narrow definition of what qualifies as a religion. “Were we to conclude, on this record, that the KKK is a religion under the First Amendment, we would have to so qualify every group who came into court with a Bible, a lighted match and a claim to be a Christian.”²¹

However, in the 30 years since that decision, the altered social, political, and legal landscape may be changing in the direction of providing religious protections to groups whose beliefs are centered around white supremacy. In addition to the support from the religious right, the Trump Administration has found widespread and vocal support from other right-wing

¹⁹ Commonwealth v. Lower, 2 Pa. D. & C.4th 107 (C.P. 1989).

²⁰ *Id.* at 108-09.

²¹ *Id.* at 114.

groups, some of whom self-identify as religious. Will the policies of the Trump Administration allow hate-based groups to find legal protections for their discriminatory actions?

In August 2017 thousands of demonstrators and protestors descended on Charlottesville, Virginia for what was dubbed the “Unite the Right Rally.” The resulting event became a violent clash between protestors and white supremacist groups. The scene was a highly publicized demonstration that hate groups were still alive in the United States, and that they have become more willing to shed their anonymity and openly profess their hatred. However, this new-found boldness has resulted in backlash in the community at large. Media portrayals and social media postings have allowed communities to identify members of white supremacist groups and publicly expose their views. For now, legal safeguards have kept the idea of religious protections for white supremacists at bay.

RACIST RELIGIONS AND THE WORKPLACE

Courts have already established that racism and white supremacy can be protected by the Free Speech Clause of the First Amendment.²² However, the free speech protection does not encompass all areas of life, and white supremacists have faced backlash at work and in their communities. White supremacists and others that have found themselves out of work because of racist activities or social media posts have not been protected by a right to free speech.²³

²² U.S. Const. Amend. 1., *See eg. R. A. V. v. St. Paul*, 505 U.S. 377, 2538 (1992).

²³ One famous example, actress/comedian Rosanne Barr was fired from her ABC sitcom over a Twitter post perceived as racist. Her claims of free speech protection did not get her job back.

Title VII of the Civil Rights Act of 1964 prevents employers from discriminating based on race, color, religion, sex, and national origin.²⁴ Since the earliest days of Title VII, employees have sought protections for a variety of religious beliefs from religious dress²⁵ to exemptions from working on the holy days of their particular faith.²⁶ Petitioners have sought protections for more non-traditional beliefs as well. Notably, members of the Ku Klux Klan, and its various incarnations, have sought free speech protections as well as recognition of the group as a religion and Title VII protection for members who met with adverse employment action because of their membership in the organization.

In *McMullen v. Carson*,²⁷ a clerical worker at a Florida Sheriff's office was fired after appearing on a news interview as a recruiter for the local chapter of the Ku Klux Klan. He filed suit arguing that his termination over his membership in the Klan was a violation of his right to free speech. The court agreed that he had the right to associate with the Klan and express his beliefs. However, they recognized the damage that could be done by a law enforcement agency having prominent Klan members on their payroll. "We hold only that a law enforcement agency does not violate the First Amendment by discharging an employee whose active participation in an organization with a history of violent activity, which is antithetical to enforcement of the laws by state officers, has become known to the public and created an understandably adverse public

²⁴ 42 U.S.C.S. § 2000e.

²⁵ See e.g., *EEOC v. Abercrombie & Fitch Stores, Inc.*, 135 S. Ct. 2028 (2015). (An applicant was refused employment because her religious headscarf would violate the company dress code.)

²⁶ See e.g., *Ansonia Bd. of Educ. v. Philbrook*, 479 U.S. 60, (1986) (A school teacher sought accommodation for six annual religious holidays when the employer only allowed for three. The Supreme Court agreed with the Second Circuit that the teacher's proposal to use personal leave for the three additional days was a "reasonable accommodation" under Title VII and the school board was obliged to accept unless they could show undue hardship).

²⁷ *McMullen v. Carson*, 754 F.2d 936 (11th Cir. 1985).

reaction that seriously and dangerously threatens to cripple the ability of the law enforcement agency to perform effectively its public duties.”²⁸

With free speech defenses off the table, some white supremacists are trying to hide behind another part of the First Amendment. By claiming to be members of religious groups that profess racist or white supremacist beliefs, some white supremacists are trying to claim that they are being discriminated against on religious grounds, in violation of their right to free exercise.

When evaluating any religious claim, the first issue for a court is determine just what is a religion, and what makes a belief religious. The Supreme Court attempted to answer that in the 1965 case *United States v. Seeger*.²⁹ In that case the Court had to determine if the beliefs held by the Defendants constituted religious beliefs in order to qualify for conscientious objector status. The Court was interpreting the Universal Military Training and Service Act,³⁰ rather than the Free Exercise Clause, but the analysis the Court used is analogous to that used in free exercise claims.

The court established a two-part test which has become the benchmark for determining if beliefs qualify as religion. In order to be considered religious, the belief must be (1) sincerely held, and (2) Occupy the same place in life as a traditional deity in mainstream religion. In evaluating the validity of a religious claim, the Court noted that it is only the sincerity of the belief that is to be evaluated, not the validity of the belief itself. “The validity of what he believes cannot be questioned. Some theologians, and indeed some examiners, might be tempted to

²⁸ *Id* at 940.

²⁹ *United States v. Seeger*, 380 U.S. 163, (1965).

³⁰ 50 U. S. C. App. § 456 (j) (1958 ed.)

question the existence of the registrant's 'Supreme Being' or the truth of his concepts. But these are inquiries foreclosed to Government."³¹

In *Seeger* the court put the beliefs of the potential conscientious objectors to their two-part test, and in each case, found that the beliefs of each of the objectors met the threshold they established.

Some members of the Ku Klux Klan have tried to have the organization itself recognized as a religion, affording themselves and other members the protections that come with the designation. However, the Equal Opportunity Employment Commission has ruled otherwise,³² thus far, Klan members have not had any success convincing the courts to overrule that decision. In *Bellamy v. Mason's Stores, Inc.*³³ the plaintiff was fired from his job for the sole reason that he was a member of United Klans of America, considered a sub-group of the Ku Klux Klan. In finding for the employer, the District court for the Eastern District of Virginia ruled that the KKK did not fit the statutory definition of religion under Title VII.³⁴ "[T]he proclaimed racist and anti-Semitic ideology of the organization to which Bellamy belongs takes on, as that organization, a narrow, temporal and political character inconsistent with the meaning of

³¹ *Id.* at 184.

³² "Social, political, or economic philosophies, as well as mere personal preferences, are not "religious" beliefs protected by Title VII." *EEOC Compliance Manual* § 12 -I(A)(1) n28 available at <http://www.eeoc.gov/policy/docs/religion.html>.

³³ *Bellamy v. Mason's Stores, Inc.*, 368 F. Supp. 1025 (E.D. Va. 1973).

³⁴ "The term 'religion' includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business." 42 U.S.A.C.S. 2000e. On appeal, the 4th Circuit Court of Appeals did not rule on the legitimacy of the religious claim. The Plaintiff referred to the KKK as a "patriotic" organization in his complaint. The 4th Circuit held him to the definition. *Bellamy v. Mason's Stores, Inc. (Richmond)*, 508 F.2d 504 (4th Cir. 1974)

‘religion as used in [Title VII].’³⁵ In *Slater v. King Soopers, Inc.*³⁶, the Colorado District Court agreed. In a similar set of facts, Plaintiff Slater was fired for his association with the Ku Klux Klan. He filed a Title VII based on his belief that the KKK was his religion, and he was entitled to protection. The court rejected that claim, finding the KKK to be, “political and social in nature,”³⁷ and upheld the Eastern District of Virginia and the EEOC’s decision that the KKK did not qualify as a religion for Title VII purposes.

While courts have refused to recognize the KKK as a religion, at least one white supremacist has convinced a court that his racist beliefs could be considered religious. However, once again, it was the difference between a belief and the expression of that belief that made a difference to the court. Wisconsin man Christopher Peterson was extensively quoted in a March 2000 newspaper article about his membership in the World Church of the Creator (also known as “Creativity”). The group self-identifies as a religion, the central tenant of their beliefs is the superiority of the white race. Peterson had been a long-time member of the organization and had held the title of “reverend” for the previous three years. The day after the article appeared, Peterson was suspended from his job as a supervisor at a telemarketing firm. On his return from suspension, Peterson was given a letter from the president of the company. The letter specifically mentioned the newspaper article and expressed concern over Peterson’s ability to carry out his supervisory roles, as three of his eight direct reports identified as non-white. Peterson was reinstated in a non-supervisory role, at a lower pay rate.

³⁵ *Bellamy v. Mason's Stores, Inc.*, 368 F. Supp. 1025, 1026 (E.D. Va. 1973).

³⁶ *Slater v. King Soopers*, 809 F. Supp. 809 (D. Colo. 1992).

³⁷ *Id.* at 810.

Peterson filed a Title VII suit against the company, claiming his demotion was the direct result of his religious beliefs. Both sides filed for summary judgement. In his opinion in *Peterson v. Wilmur Communs., Inc.*,³⁸ Justice Lynn Adelman in the Eastern District of Wisconsin applied Peterson's beliefs in the World Church of the Creator to the two-part test set forth in *United States v. Seeger*. "To satisfy this test, the plaintiff must show that the belief at issue is 'sincerely held' and 'religious' in [his or her] own scheme of things."³⁹ In his analysis, Judge Adelman saw sincerity in Peterson's claim that his devotion to The World Church of the Creator represented religious belief. "These beliefs occupy for plaintiff a place in his life parallel to that held by a belief in God for believers in more mainstream theistic religions. Thus, Creativity 'functions as' religion for plaintiff. Plaintiff has met his initial burden of showing that his beliefs constitute a 'religion' for purposes of Title VII."⁴⁰

Judge Adelman was unconvinced by the Defense claim that similar rulings (specifically *Bellamy* and *Slater*) that held the KKK was not a religion should apply to Peterson's claim as well. The Judge dismissed this argument, citing the subjective elements of the *Seeger* test, as the reason this claim must be looked at independently.

There were claims brought by the company, on behalf of fellow employees that Peterson treated African-American and white workers unequally, but the judge dismissed them as inadmissible hearsay and too vague to show that Peterson acted upon his white supremacist beliefs in the workplace. This distinction is important to Judge Adelman's ruling. "[T]he record

³⁸ *Peterson v. Wilmur Communs., Inc.*, 205 F. Supp. 2d 1014 (E.D. Wis. 2002).

³⁹ *Id.* at 1018 (citing *Redmond v. GAF Corp.*, 574 F.2d 897, 901 n.12 (7th Cir. 1978)) (quoting *Seeger*, 380 U.S. at 185).

⁴⁰ *Id.* at 1022.

must contain evidence from which a reasonable jury could find that plaintiff engaged or sought to engage in a religiously-motivated act and was demoted because of it.”⁴¹ In the end, Peterson’s motion for Summary Judgment on liability was granted, the judge finding that, a reasonable jury would be compelled to find that Peterson’s demotion was based solely on his religious beliefs as opposed to any action taken in furtherance of those beliefs.

The decision in the *Peterson* case outraged anti-hate groups. The Southern Poverty Law Center called the decision “bizarre” and figured the case would be an anomaly in legal reasoning that other courts would be unlikely to follow.⁴² It seems as if the Southern Poverty Law center was correct. Since the *Peterson* ruling, other Creativity litigants have tried to rely on the precedent, only to find other courts are not as persuaded as Judge Adelman in Wisconsin. To date, no other court has made a similar ruling.

RACISM IN PRISON, RELIGIOUS PRACTICE OR SECURITY THREAT?

Attempts have also been made by prisoners to use religious protections as a cover for racist activities. The Religious Land Use and Institutionalized Persons Act (RLUIPA),⁴³ passed in 2000, prohibits prisons from imposing burdens on prisoner’s ability to participate in religious worship. The law was approved by an overwhelming majority in Congress, based, in part, on the

⁴¹ *Id.* at 1024-25.

⁴² *Race as Religion*, INTELLIGENCE REPORT, 2002 Winter Issue, Dec. 18, 2002, <https://www.splcenter.org/fighting-hate/intelligence-report/2002/race-religion>.

⁴³ 42 U.S.C. §§ 2000cc, et seq.

concept of redemption through religion, the prospect that convicts could be reformed by finding moral guidance through religion. Prisoners have used RLUIPA to secure access to religious materials,⁴⁴ win allowances for religious dress and grooming,⁴⁵ and win the right to a religious diet.⁴⁶ Furthermore, like Title VII, RLUIPA contains a broad definition of religion. The act defines “religious exercise” as, “any exercise of religion, whether or not compelled by, or central to, a system of religious belief.”⁴⁷ Congress included language in the statute to make it clear that they desired RLUIPA to include broad protections for religion. Congress declared that RLUIPA, “shall be construed in favor of a broad protection of religious exercise, to the maximum extent permitted by the terms of this Act and the Constitution.”⁴⁸ The Court has further clarified that the beliefs need to be “sincerely based on a religious belief and not some other motivation.”⁴⁹

After RLUIPA passed, there was concern in the prison system that the new law could compromise the carefully controlled prison setting. In *Cutter v. Wilkinson*,⁵⁰ the law survived a constitutional challenge from prison officials. However, in upholding the law, the Supreme Court also gave prisons a powerful tool to ensure they remained in control. “We do not read RLUIPA to elevate accommodation of religious observances over an institution's need to maintain order and safety. Our decisions indicate that an accommodation must be measured so that it does not override other significant interests.”⁵¹ The Supreme Court recognized that

⁴⁴ See, e.g., *Charles v. Verhagen*, 348 F.3d 601 (7th Cir. 2003). (A Muslim prisoner is granted summary judgement on an RLUIPA claim after prison officials denied him access to prayer oil).

⁴⁵ See, e.g., *Holt v. Hobbs*, 574 U.S. 352 (2015). (Supreme Court upheld Muslim prisoner’s request to maintain a one-half inch beard, in accordance with his religious beliefs).

⁴⁶ See, e.g., *Willis v. Comm’r, Ind. Dep’t of Corr.*, 753 F. Supp. 2d 768 (S.D. Ind. 2010). (The prison substantially burdened the religious practice of orthodox Jewish prisoners when they failed to provide a kosher meal).

⁴⁷ 42 U.S.C.S. § 2000cc-5 (7)(A).

⁴⁸ 42 U.S. Code § 2000cc-3.

⁴⁹ *Holt v. Hobbs*, *supra* at 360-61.

⁵⁰ *Cutter v. Wilkinson*, 544 U.S. 709, 125 S. Ct. 2113 (2005).

⁵¹ *Id.* at 722.

Congress never intended RLUIPA to be used as a tool to compromise, among other things, safety. Congress expects the courts to evaluate claims with, “due deference to the experience and expertise of prison and jail administrators in establishing necessary regulations and procedures to maintain good order, security and discipline, consistent with consideration of costs and limited resources.”⁵²

This has given prisons the ability to fight back against petty, frivolous, and in some cases downright ridiculous requests from prisoners. It also gives them the ability to provide some control over religious expression when, in their opinion, that expression puts prisoners, staff, or the public at large at risk.

When addressing white supremacy in prison, officials have been especially concerned with the rise of the Aryan Brotherhood gang. The formation of the gang has been traced to the California’s San Quentin Prison in the 1960’s.⁵³ In the years since, associated branches of the gang have spread throughout the country. According to prison gang experts, in order to join the gang, a potential member must “make bones,” in other words, commit a murder, at the direction of the gang leadership. Additionally, the Aryan Brotherhood expects complete loyalty from its members. Behavior considered disloyal, including attempts to disassociate from the gang, is punishable by death at the hands of other gang members. This attitude of violence has been noted by prison officials, gang experts, and by courts, and has led to the Aryan Brotherhood’s recognition as “the most violent gang in the federal prison system.”⁵⁴

⁵² *Id.* at 723, ((quoting Joint Statement 16699)(quoting S. Rep. No. 103-111, at 10)).

⁵³ SOUTHERN POVERTY LAW CENTER: ARYAN BROTHERHOOD, <https://www.splcenter.org/fighting-hate/extremist-files/group/aryan-brotherhood>.

⁵⁴ *Griffin v. Gomez*, 741 F.3d 10 (9th Cir. 2014).

The court system has, for the most part, deferred to prison officials, and given them a wide latitude to restrict the activities of Aryan Brotherhood members, even when officials are alleged to have violated prisoner's constitutional rights. In *Silverstien v. Fed. Bureau of Prisons* the 10th Circuit rejected an Aryan Brotherhood member's allegation that his thirty years in solitary confinement constituted "cruel and unusual punishment."⁵⁵ "We must accord substantial deference to the BOP determination to separate such gang members from each other and keep influential members of gangs, like Mr. Silverstein, from interacting in the open prison population for the purpose of inmate safety, preserving internal order and discipline, and maintaining institutional security."⁵⁶

Segregating gang members so they cannot hold meetings is not cruel and unusual punishment. With the Eighth Amendment challenge defeated, white supremacists are now trying to classify their gang meetings as religious services and hoping to gain protection under RLUIPA. Thus far, prison officials haven't given in, and the courts have supported them. A 2017 case out of Illinois, *Strickland v. Godinez*,⁵⁸ provides an excellent example of how religious services can be a cover for gang activity.

Plaintiff Eric Strickland is an inmate in the Illinois prison system. He is a professed follower of the Asatru religion. Asatru, also sometimes called Odinism or Paganism, is a religion based on

⁵⁵ *Silverstein v. Fed. Bureau of Prisons*, 559 F. App'x 739 (10th Cir. 2014). Petitioner Silverstien was a so-called "commissioner" in the Aryan Brotherhood, one member of the three-person leadership of the gang. Originally convicted of bank robbery, and sentenced to 15 years in prison, Silverstien was convicted of three murders including the murder of a prison guard and the murder of the leader of a rival African American gang.

⁵⁶ *Id.* at 761.

⁵⁷ See also, *Griffin v. Gomez*, 741 F.3d 10 (9th Cir. 2014) The 9th Circuit found the California prison system was compliant with the 8th Amendment with keeping another Aryan Brotherhood commissioner in a "security housing unit" a form of solitary confinement for more than 35 years.

⁵⁸ *Strickland v. Godinez*, No. 3:14-CV-962-NJR-DGW, 2017 U.S. Dist. LEXIS 39707 (S.D. Ill. Mar. 20, 2017)

the worship of ancient Norse gods. Asatru appeals to many believers that feel the Northern European origins make Asatru a “white” religion, as opposed to the Middle Eastern roots of the Judeo-Christians faiths. The religion is spreading through social media and other outlets and is becoming the religion of choice for many white supremacists.⁵⁹

Strickland was transferred to the Lawrence Correctional Center after being suspected of trying to start a white supremacist gang at another prison. Once at Lawrence, he made requests for religious accommodations including religious artifacts in his cell and in the chapel,⁶⁰ and for the authority to conduct group Asatru services. The prison agreed to many of his requests, including allowing for regular group services in the prison chapel. The services were required to follow the Illinois Administrative Code which required, among other things, for a guard to be present and monitor the services. According to the undisputed facts, when that monitor was an intelligence officer, the services followed the regulations. However, when an intelligence officer was not available, the staff observer noted that Strickland spent the service time in private discussion with two other inmates. The services were held regularly for almost two years before prison officials ordered them stopped because they suspected Strickland was using them to recruit new gang members, and plan gang activity. This reversal from prison staff formed a major part of Strickland’s RLUIPA suit.

⁵⁹ Daryl Johnson, *Hate In God’s Name*, SOUTHERN POVERTY LAW CENTER, Sep. 25, 2017, <https://www.splcenter.org/20170925/hate-god%E2%80%99s-name>.

⁶⁰ Among the things Strickland asked for were a drinking horn and a ceremonial wooden bowl. The prison provided plastic alternatives. These alternatives formed part of Strickland’s RLUIPA claim, arguing that his religion required “natural” articles. The judge dismissed this part of the claim, citing sincerity of beliefs since Strickland could not provide a sound reason why plastic substitutes could not serve. “Strickland cites only to his belief that because his religion is ‘a nature religion,’ the use of unnatural substances like plastic or Styrofoam cups and bowls in religious ceremonies ‘is just, you know, almost sacrilegious, you know.’” *Strickland v. Godinez*, *supra* note 58 at 18.

Strickland claimed that the refusal to allow him to participate in group worship services was a substantial burden on his religious practice. In response, the prison claimed to have a compelling interest in preventing gang-related activity. In evaluating the claim, Justice Nancy Jo Rosenstengel of the Southern District of Illinois focused heavily on Strickland's individual behavior, both as an inmate in Lawrence Correctional Center, and in other prisons. As the court put it, "the conclusion cannot be made in a vacuum and without reference to his specific conduct."⁶¹ The court cited Strickland's behavior at the approved meetings, specifically, his conversations with other inmates outside the normal worship program. The court also looked at Strickland's record of attempting to start a white supremacist gang in another prison (the reason for his transfer to Lawrence in the first place), also his numerous white supremacist and Nazi tattoos, and his request for background checks on proposed members of the worship group.⁶²

Interestingly, Justice Rosenstengel issued a very narrow holding concerning Asatru worship in this case. In her ruling, based on facts specific to Strickland's claim, Justice Rosenstengel held that Strickland's conduct at these services raised legitimate prison safety concerns, and upheld summary judgment in favor of the prison. However, in dicta, Justice Rosenstengel said that a similar claim, brought by a different Asatru prisoner, could possibly succeed. The judge noted that an intelligence officer closely monitoring all services could be a less restrictive means of ensuring security while allowing Asatru/Odinist worship to continue. "Thus, for a typical

⁶¹ *Id.* at 21.

⁶² According to the court, the background checks are intended to determine if potential members are sex-offenders. Sex-offenders are not, apparently, welcome as members of white supremacist prison gangs.

adherent of Odinism, an outright ban on group worship may violate RLUIPA and lead to injunctive relief.”⁶³

This hypothetical would seem to be an RLUIPA parallel to the Title VII *Peterson* case. Strickland’s removal from group worship was not based on his beliefs, but rather on how he chose to act on those beliefs. Justice Rosenstengel’s “typical adherent of Odinism” might prevail if it was determined that the prison was restricting worship based solely on the white supremacist nature of the religion.

Even in RLUIPA suits when prisoners have only asked for access to Asatru or Odinist literature, prison staff has argued, and courts have agreed, that the literature promotes racial violence, and the prison’s compelling interest in safety and security outweigh the prisoner’s religious need.

Inmate Garry Borzych, a self-identified Odinist, filed an RLUIPA suit against Wisconsin prison officials⁶⁴ after he was denied access to three books he claimed were religious texts.⁶⁵ The Seventh Circuit was not convinced that any violation of RLUIPA had occurred.

First, the court ruled that denying Borzych the texts he requested was in no way a substantial burden on his ability to practice Odinism. The claim that the texts were Odinist, or even religious in nature was based only on the say-so of Borzych and other inmates. In their own

⁶³ *Id.*

⁶⁴ *Borzych v. Frank*, 439 F.3d 388 (7th Cir. 2006).

⁶⁵ The first two books, *Creed of Iron* and *Temple of Wotan* both written by Ron McVan are published by 14 Word Press, a publishing company started by prominent white supremacist David Lane. Lane was sentenced to 190 years in prison for his part in the 1984 murder of prominent Jewish radio personality Alan Berg. Lane died in prison in 2007. The name of the company itself is a reference to the popular white supremacist saying, “14 words.” The saying, credited to Lane, is a reference to a popular white supremacist creed, “We must secure the existence of our people and a future for white children.” The third book, *The NPKA Book of Blotar* (NPKA stands for National Prison Kindred Alliance) is a guide to prisoners on Odinist rituals and celebrations.

evaluation the court found that two of the three texts⁶⁶ did not relate to Odinism at all, and the third⁶⁷ was described by its own author as not authoritative and the rituals described within are fictitious. “A book about fictitious rituals, rather than actual ones, is not vital to any religious practice.”⁶⁸

The court did find that all three books contain white supremacist themes, including advocating violence to promote racist beliefs. It is on this basis that the prison claims to have banned the books. Borzych suggested that instead of an outright ban, the prison could simply redact the sections advocating violence. The court did not consider this reasonable since the violent themes were so prevalent in the books. Instead, they found that the ban was the least restrictive means of furthering the compelling interest in safety. “[Prison Officials’] principal argument is that the books promote violence to exalt the status of whites and demean other races; it is the means rather than the underlying racist view that the defendants contend (and we hold) may be forbidden in prisoners' reading matter.”⁶⁹

*Barletta v. Quiros*⁷⁰ was another attempt by a Connecticut prisoner to recover for alleged civil rights violations based on alleged mistreatment due to his adherence to a suspected white supremacist religion, this time on First Amendment grounds.⁷¹ Plaintiff John Barletta, another professed member of the World Church of the Creator, was dubbed a gang member upon his

⁶⁶ McVan, *Creed of Iron and Temple of Wotan*, *supra* note 65

⁶⁷ *The NPKA Book of Blotar*

⁶⁸ *Id.* at 390

⁶⁹ *Id.* at 391.

⁷⁰ *Barletta v. Quiros*, No. 3:10-cv-939 (AVC), 2013 U.S. Dist. LEXIS 201157 (D. Conn. Feb. 15, 2013).

⁷¹ By the time the case went to trial, Barletta was no longer in the Connecticut prison system. Therefore, no injunctive relief was possible or necessary. The judge dismissed his RLUIPA claim since RLUIPA only provides injunctive relief and no monetary awards are allowed under the statute. The judge considered the First Amendment claim since monetary damages were possible in that situation. *Id.* at 8-9.

arrival at a Connecticut prison. As a prisoner marked as a gang member, Barletta was subject to additional security measures and restrictions on his privileges. Barletta's claim was that he was not a gang member, but instead a member of a religion. His suit claimed the restrictions placed on him, including the confiscation of his "religious" texts were a violation of his First Amendment right to the free exercise of his religion.

The Connecticut District Court, however, disagreed. While the court did not rule definitively on Barletta's claim that Creativity should be given religious status, it did discuss in dicta. The court correctly pointed out that no authority binding on the Connecticut court had ruled on the status of Creativity, and no court that had considered a First Amendment claim based on membership in the Church of the Creator had found it to be a religion. The court did acknowledge the *Peterson* decision in a footnote, but distinguished it from Barletta's claim. *Peterson* concerned Creativity as a religion in a Title VII claim, which the court noted is, "...broader than the standard applied in First Amendment Cases." The claim was dismissed on the grounds that the defendants, as state actors, had qualified immunity and in the court's view, "no reasonable correctional official would understand that his actions violated the plaintiff's constitutional rights."⁷²

White supremacist individuals and groups are prevalent in America's prisons. Prison officials are doing everything within their power to control the potentially violent behavior of these inmates. Even when prisoners are claiming religious protection for their white supremacist

⁷² *Id.* at 14.

activities and materials, the strong protection of RLUIPA cannot overcome the even stronger interest in safety and security.

**MODERN MOVEMENT TOWARDS WIDER DEFINITIONS OF
RELIGION AND GREATER SUPPORT FOR RELIGIOUS FREEDOM
COULD OPEN DOORS FOR WHITE SUPREMACISTS TO GAIN
RELIGIOUS RECOGNITION FOR THEIR PRACTICES.**

In *Burwell v. Hobby Lobby Stores, Inc.*,⁷³ three closely held corporations filed a suit under the Religious Freedom Restoration Act (RFRA)⁷⁴ to challenge the Obamacare mandate that they provide insurance coverage for certain forms of contraceptives. According to the suit, covering these particular contraceptives was against the firmly held religious beliefs of the company's owners, and placed a substantial burden on their religious exercise. The Supreme Court agreed.

The case was not about asking for permission to discriminate based on religious belief, but there are some who saw the decision as a move in that direction. Justice Ginsburg, in her dissent, warned that the majority decision risked sending religious freedom jurisprudence down a slippery slope. Specifically mentioning *Piggie Park*, Justice Ginsburg questioned the wisdom of the court opening this door even a little bit. Theorizing that the court's interpretation of the Religious Freedom Restoration Act could be used to overturn cases like *Piggie Park*. "Would

⁷³ *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014).

⁷⁴ 42 U.S.C.S. § 2000bb.

RFRA require exemptions in cases of this ilk?” she asks. “And if not, how does the Court divine which religious beliefs are worthy of accommodation, and which are not?”⁷⁵

The majority opinion discounts that suggestion with little discussion. Only stating that, “Our decision today provides no such shield.”⁷⁶ However, the language of the decision could do just that: “...in these cases, the Hahns and Greens and their companies sincerely believe that providing the insurance coverage demanded by the HHS regulations lies on the forbidden side of the line, and it is not for us to say that their religious beliefs are mistaken or insubstantial. Instead, our ‘narrow function . . . in this context is to determine’ whether the line drawn reflects ‘an honest conviction,’ and there is no dispute that it does.”⁷⁷ Would ‘an honest conviction’ about racial superiority or segregation lead to a similar result?

In 2018, the Supreme Court may have moved even closer to protecting white supremacy as a religious belief. *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*,⁷⁸ considered the question of whether religious beliefs could be used to refuse to provide services for a same sex wedding by a public accommodation. In this case, a Colorado baker, Jack Phillips, refused to provide a wedding cake for a same-sex wedding. Citing his deep Christian beliefs, the baker considered providing the cake to be condoning something that is against his religious beliefs. This ran afoul of Colorado’s public accommodation law and the suit followed.⁷⁹ Though the court remanded the case on due process, several justices offered opinions which might suggest they are willing to test out Justice Ginsburg’s slippery slope. In his concurrence, Justice Gorsuch,

⁷⁵ *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 770 (2014)(Ginsburg, J., *dissenting*).

⁷⁶ *Burwell* 573 U.S. at 733.

⁷⁷ *Id.* at 725 (internal citations omitted).

⁷⁸ *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719 (2018).

⁷⁹ Colo. Rev. Stat. § 24-34-401.

joined by Justice Alito (who wrote the majority opinion in *Hobby Lobby*) seems to offer broad support to accommodating fringe religious beliefs, no matter how far outside the mainstream they may seem. “Just as it is the ‘proudest boast of our free speech jurisprudence’ that we protect speech that we hate, it must be the proudest boast of our free exercise jurisprudence that we protect religious beliefs that we find offensive.”⁸⁰

Justice Thomas expresses similar views in his concurrence. Celebrating the victory for religious liberty and adding additional free speech support to Phillips’s claim, he accuses supporters of same-sex marriage of trying to stamp out all dissent. He compares Phillips’s refusal to provide a same-sex wedding cake to other issues of homophobia and racism that have been brought before the Supreme Court. “Moreover, it is also hard to see how Phillips’s statement is worse than the racist, demeaning, and even threatening speech toward blacks that this Court has tolerated in previous decisions.”⁸¹ Justice Thomas celebrated the decision in *Masterpiece Cakeshop* as a victory for religious freedom proclaiming, “it seems that religious liberty has lived to fight another day.”⁸²

But when that day comes, what will the fight look like? It seems that at least three justices feel that religious convictions should allow some business owners to violate public accommodations laws when the request of a prospective patron conflicts with those convictions. Like the Trump Administration’s order “Promoting Free Speech and Religious Liberty,” it is likely that these Justices’ position only relates to the conservative Christian position that homosexuality is a sin. However, it is not difficult to see how these opinions could be used to

⁸⁰ *Id.* at 1737 (Gorsuch, J., *concurring*).

⁸¹ *Id.* at 1747 (Thomas, J., *concurring*).

⁸² *Id.* at 1748.

defend white supremacist religious views in the same way they were used to trump up anti-homosexual religious views.

If, under similar facts as *Masterpiece Cakeshop*, a store owner refused to provide services to an interracial wedding, would the analysis remain the same? In his concurrence, Justice Gorsuch, like the majority opinion, made extensive note of the commission's attitude towards Phillips' professed beliefs. The opinion specifically mentioned the commission calling Phillips's beliefs despicable and referring to them as rhetorical. However, it is not unbelievable, in fact it is highly likely, that a commission facing complaint about a business refusing to serve minority customers would react in the same way. Justice Gorsuch's words seem to apply equally to that situation.

Many may agree with the Commission and consider Mr. Phillips's religious beliefs irrational or offensive. Some may believe he misinterprets the teachings of his faith. And, to be sure, this Court has held same-sex marriage a matter of constitutional right⁸³ and various States have enacted laws that preclude discrimination on the basis of sexual orientation. But it is also true that no bureaucratic judgment condemning a sincerely held religious belief as "irrational" or "offensive" will ever survive strict scrutiny under the First Amendment.⁸⁴

The Supreme Court may be painting itself into a corner. It stands to reason that if discrimination against homosexuals is permitted based on sincere religious beliefs, that there is a logical argument that discrimination based on other classifications including race, sex, or national origin should be protected too. If and when the Supreme Court is faced with this question, it may be forced to decide definitively one way or the other. If it hopes to preserve the ability for conservative Christians to exclude homosexuals on religious grounds, it may be forced

⁸³ The court also held interracial marriage to be a constitutional right, despite state and local laws to the contrary. *See, Loving v. Virginia*, 388 U.S. 1 (1967).

⁸⁴ *Id.* at 1737.

to accept the exclusion of other classes by followers of other religions. On the other hand, if the Court wishes to preserve the compelling government interest of maintaining equality in hiring and public accommodation, it may be forced to reevaluate the protections it has given other religious groups to discriminate based on sexual orientation.

CONCLUSION

For decades in the post-Civil Rights era, American courts have kept white supremacists from finding protection for their views a religious practice. However, in recent years, the changing political landscape has emboldened racist groups to openly express their views in the public forum. At the same time, cracks have begun to form in the solid wall that had been built between religious protection and bigotry.

Courts have been careful to distinguish between religious belief and the expression of that belief. The courts have ruled that Americans have a right to whatever beliefs they choose, no matter how offensive to the general morality, or how far outside the mainstream those beliefs are. It is, however, the action associated with those beliefs that have led to trouble for some believers. Once those beliefs cross that line and become actions, religious freedom has no longer worked as a defense.

Now, under the guise of restoring religious liberties that some say have been threatened or lost altogether, courts have allowed mainstream religious groups to use their beliefs to exclude sexual practices that they claim violate tenants of their religions. In doing so, they appear to have crossed the line between protecting belief and protecting expression. It is not difficult to see how

fringe religions might attempt to build off these rulings to gain the same protection for white supremacist views.