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The Right to Cheesecake: Prisoners' Rights Jurisprudence Through a Jewish Lens

Arielle L. Yacker

Introduction

Since the founding era, religion has served as an important guide for running prisons. This is noted in early observations from French visitors, Alexis de Tocqueville and Gustave de Beaumont, who praised America's religious prison experiment: "In America… the progress of the reform of prisons has been of a character essentially religious… It is [religion's] influence alone which produces complete reformation."[1] Quakers developed the Pennsylvania system of incarceration which was modeled on the idea "that incarceration could bring about a spiritual conversion among criminals that would restore them to an honest, crime-free lifestyle… interaction with clergy could encourage inmates to repent for their sins or become penitent."[2] Reflection and repentance were the hallmarks of this common system used in prison administration, which allowed prisoners to have access to religious leaders and supplies for their rehabilitation.

Into the twentieth century, however, a more progressive ideology emerged: "social science replaced religion as the official guiding approach to the treatment of prisoners."[3] This ideology sought to rehabilitate prisoners through reason. Prisons were still considered to be rehabilitative spaces, including punishment and treatment programs, and chaplains were still widely available, but the idea of religion being the rehabilitator of prisoners fell to the wayside.

Increasingly since the 1960s, questions of religious exercise in prison have been prevalent among Muslims and individuals of all faiths, including observant Jews. However rare it may seem, observant Jewish prisoners have carved a space in the realm of prison law. In fact,

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[1] GUSTAVE DE BEAUMONT & ALEXIS DE TOCQUEVILLE, ON THE PENITENTIARY SYSTEM IN THE UNITED STATES AND ITS APPLICATION IN FRANCE, AT 121 (SOUTHERN ILLINOIS UNIVERSITY PRESS 1964) (1833).

[2] BENJAMIN MEADE, MORAL COMMUNITIES AND JAILHOUSE RELIGION: RELIGIOSITY AND PRISON MISCONDUCT, AT 65 (2014).

[3] *Id.* at 67.

Congress estimates that 1 in 1,000 inmates in the United States prison system is Jewish.[4] Therefore, it is clear that prison populations mirror the populations of people in the United States. This paper seeks to provide the trajectory of how Jews have practiced their religion in prisons over the last fifty years. Prison law has proliferated in recent decades and so have lawsuits brought by Jewish prisoners. None of these, however, have been met by the Supreme Court.

Part I of this paper will summarize statistics regarding incarcerated Jews. Part II will detail the most common Jewish laws that come into play in the prison context and their religious significance. Part III will go through the various eras of prisoner's rights jurisprudence. Over the past fifty years, the judiciary has interacted with prison religion in a multitude of ways, with standards of review jumping back and forth every ten years or so. Part IV will detail how each of these eras of prisoners' rights have affected Jewish prisoners. Scholarship in the area of Jewish practice in prison is fairly slim, especially since 2000. Predictably, this may be because the number of observant Jews in prison is low and because other religions, such as Islam, are more prone to legal argument in the prison context. Part V will seek to look at this latest phase of prison religion in light of the Supreme Court's landmark ruling in favor of a Muslim prisoner's right to grow a beard in *Holt v. Hobbs*.[5]

I. Incarcerated Jews

A. What Do We Know About Incarcerated Jews?

In short, it is very difficult to gauge the number of practicing Jewish prisoners. Part of this is due to the fact that Congress forbade the Census Bureau from asking about people's

[4] PATRICIA WAGNER, *JUDAISM IN PRISONS*, THE ENCYCLOPEDIA OF CORRECTIONS (Kent R. Kerly, ed., 2017).

[5] Holt v. Hobbs, 574 U.S. 352 (2015).

religious belief or membership on the U.S. Census in 1976.[6] Even before that, prominent Jewish groups publicly opposed the Census Bureau's possible inclusion of the question "what is your religion?" in 1960.[7] This makes it almost impossible to know not only how many Jewish prisoners there are, but how many Jews there are in the United States.

In 2020, the Pew Research Center conducted a large scale study of Jewish Americans.[8] Although this study did not go into detail regarding prison religion, it provides useful information about Jewish identity and the spectrum thereof. The study estimates that 2.4% of United States adults are Jewish.[9] Approximately 27% of those people, however, do not identify with the Jewish religion.[10] Rather, they might see Judaism as an ethnic background or a culture, but do not participate in Jewish religious practices; instead, they describe their current religion as atheist, agnostic, or nothing.[11]

Within the 73% of Jewish Americans who do identify with the Jewish religion, there is a great deal of variety, also.[12] 22% of those people keep kosher in their homes, 56% participated in the ritual fast during *Yom Kippur* and 74% attended a Passover Seder in the year preceding the study.[13] This variety is extremely important in the prison context because it means that the

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[6] *See* Kevin M. Schultz, *Religion as Identity in Postwar America: The Last Serious Attempt to Put a Question on Religion in the United States Census*, 93 THE JOURNAL OF AMERICAN HISTORY 359 (2006).

[7] *Jews Oppose Inclusion of Question on Religion in 1960 U.S. Census,* JEWISH TELEGRAPHIC AGENCY: DAILY NEWS BULLETIN 4 (September 30, 1957).

[8] Pew Research Center, *Jewish Americans in 2020*, https://www.pewresearch.org/religion/2021/05/11/jewish-americans-in-2020/.

[9] *Id.*

[10] *Id.*

[11] *Id.*

[12] *Id.*

[13] *Id.*

variety of services that Jews may need will be different. For example, a Jew who keeps kosher in prison may need to pray three times per day in accordance with their practice. There are also many Jews who keep kosher, but do not pray three times per day. This lack of uniformity among Jewish Americans translates to the prison context and presents *ad hoc* issues for Jewish prisoners' legal cases.

B. History of Incarcerated Jews

Archival evidence indicates that access to kosher food in prison dates as far back as the 1850s.[14] In 1931, the American Jewish Committee conducted a study on Jewish inmates in state prisons throughout the 1920s.[15] This study found that 6,846, or 1.74%, of felons received by the courts between 1920 and 1929 were Jews.[16] By 1983, Rabbi Rudolph J. Adler estimated that Jews still constituted approximately 2% of the state prison population, and perhaps even less for federal prisons.[17]

Before Passover in 1929, Jewish inmates in the Atlanta Federal Penitentiary were provided with ten pounds of matzo each[18] for the eight-day holiday of *Pesach* and Jewish inmates in Elmira, New York were provided with five pounds of matzo, donated by a local

[14] Chaplain Gary Friedman OBM, *Rewriting Leviticus*, AMERICAN JAILS 17, 18 (July, Aug. 2012).

[15] H.S. Linfield, *Jewish Inmates of the State Prisons of the United States 1920-1929*, 33 THE AMERICAN JEWISH YEAR BOOK 203 (1931-1932). Interestingly, this study was conducted during the 1920s, the Prohibition Era. The Prohibition Era led to the rise of Arnold Rothstein and other prominent figures of the American Jewish mafia (which fell to the wayside during the 1940s), including Meyer Lansky and Bugsy Siegel who were incarcerated during these years. *See* RICH COHEN, TOUGH JEWS: FATHERS, SONS, AND GANGSTER DREAMS (1988) (providing a critical history of the phenomenon of Jewish gangsters who were most prominent in the 1920s and 1930s).

[16] *Id.*

[17] Rabbi Rudolph J. Adler, *The Problems of Adjustment for the Jewish Prisoner,* 11(2) INDIAN JOURNAL OF CRIMINOLOGY 91, 91–92 (July 1983).

[18] *Provide Matzoth for Jewish Inmates at Atlanta,* JEWISH TELEGRAPHIC AGENCY: DAILY NEWS BULLETIN, 2 (March 20, 1929).

temple and chapter of the National Council of Jewish Women.[19] In 1934, inmates in Lewisberg penitentiary threatened a hunger strike unless kosher-for-Passover food was provided to Jewish prisoners.[20] Although only 175 Jewish inmates at that prison protested, 825 non-Jewish prisoners joined the Jewish inmates in a hunger strike and many participated in Shabbat services.[21]

Between the 1930s and the 1990s, the level of protection for prisoners' religious rights was constantly changing. It was during this time that organizations proliferated which were designed to protect the religious rights of Jewish prisoners. Most prominent in the Jewish community is The Aleph Institute. The Aleph Institute is a national non-profit organization that was founded in 1981 by Rabbi Sholom Ber Lipsker under the direction of the Chabad-Lubavitcher Rebbe, Menachem Mendel Schneerson.[22] The Aleph Institute's mission is targeted to assisting the wellbeing of populations which may be isolated from their communities; they are committed to addressing the religious and spiritual needs of Jewish prisoners by providing faith-based programs in prisons around the United States.[23] The Seattle-based Jewish Prisoner Services International also provides services to incarcerated Jews.[24] More recently, *Matir*

[19] Adam Soclof, *Timeline: Kosher Food Fights for Jewish Prisoners*, JEWISH TELEGRAPHIC AGENCY (June 3, 2011).

[20] *Id.*

[21] *Thousand Threaten Revolt in Pen Ban on Jewish Food*, DAILY NEWS 206 (April 2, 1934). This article also notes that Waxey Gordon, a well-known figure in organized crime was incarcerated at the prison during this time.

[22] Rebbe Menachem Mendel Schneerson is seen as a divine figure in the Chabad-Lubavitch movement. Under his leadership, Chabad-Lubavitch became an extremely influential international organization targeted at Jewish outreach. *See Rabbi Menachem Mendel Schneerson*, JEWISH VIRTUAL LIBRARY (providing an encyclopedia entry and brief biography).

[23] Mission Statement, THE ALEPH INSTITUTE, https://aleph-institute.org/about/ (last visited April 30, 2024).

[24] About – JEWISH PRISONER SERVICES INTERNATIONAL, https://www.jpsi.org/about (last visited April 30, 2024).

Asurim[25]: Jewish Care Network for Incarcerated People was founded as a more liberal alternative to JPSI and Aleph, which are both run by more Orthodox sects of Judaism.[26]

These organizations have assisted in assessing the number of incarcerated individuals in the United States who seek spiritual Jewish services. At a Congressional hearing in 1998, the Director of Legal Affairs for the Aleph Institute estimated that there are approximately 6,000 to 8,000 Jewish inmates incarcerated in federal, state, and local facilities.[27] According to a 2012 report from the American Jewish media organization, The Forward, there are approximately 4,000 Jewish inmates in the United States who abide by the more strict regimens of Jewish law (considered *halakhic* Jews) and keep kosher.[28] In 2023, The Aleph Institute estimated that their volunteers visited over 750 incarcerated individuals per month and provided over 100,000 religious, educational, and holiday items to prisons.[29]

II. Jewish Practice

The Jewish legal tradition, or *halakhah*, encompasses the Hebrew Bible (*Tanakh*), *Mishna*, *Midrash Halakhah*, *Tosefta*, and *Talmud*. These sources include not only the more general terms of the *Tanakh*, but also systems of legal interpretation and application.[30] During

[25] "*Matir Asurim*" is a phrase from a prayer which translates to "Blessed is The One Who Frees Captives." *SEE Psalms* 146:7. Psalm 146 is meant to be recited during the initial section of the daily morning prayer service, *psukei dezimra*.

[26] MATIR ASURIM – JEWISH CARE NETWORK FOR INCARCERATED PEOPLE, https://matirasurim.org/about-us/ (last visited April 30, 2024).

[27] Hearings on The Need for Federal Protection of Religious Freedom After *Boerne v. Flores* Before the Comm. on the Judiciary, 105th Cong. 1–2 (1998) (statement of Isaac M. Jaroslawicz, Director of Legal Affairs for the Aleph Institute).

[28] Naomi Zeveloff, *Not Just Jews Eat Kosher Food in Prison*, THE FORWARD (Apr. 30, 2012).

[29] Aleph Annual Report 2023, ALEPH INSTITUTE, at 7–8.

[30] *Introduction to Halacha, the Jewish Legal Tradition*, MY JEWISH LEARNING, https://www.myjewishlearning.com/article/halakhic-texts-101/ (last visited April 30, 2024).

the 12th Century, Maimonides published the first true *halakhic* code, the *Mishneh Torah*. The *Mishneh Torah* was the first attempt to combine religious law with secular law and philosophy in order to allow all Jews to understand the legal doctrines that cover them.[31] Today, the legal standard for Jewish law is the *Shulchan Arukh*, a legal code compiled by Rabbi Joseph Caro in the mid-1500s. This code is divided into four volumes: (1) laws of prayer and of holidays, or *Orekh Hayyim*; (2) diverse laws (including Jewish dietary law and charity), or *Yoreh Deah*; (3) laws concerning marriage and divorce, or *Even haEzer*; and (4) Jewish civil law, or *Khoshen Mishpat*.[32]

Partly because all aspects "of a religiously observant Jew's life is guided by principles which have been practiced for over five thousand years," the "demands of [Jewish law] do not evaporate" when an observant Jew is behind bars.[33] Also due to its longstanding history, Professor Abraham Abramovsky suggests "that the religious problems encountered by Jewish prisoners stem at least in part from the inability or unwillingness of a number of courts to carefully consider the religious and historical bases for Jewish religious practices."[34]

Further, not every Jew follows these laws, making it much more difficult for courts to look at Jewish prisoners as a cohesive group. Therefore, the prisoners in these cases represent a very particular type of Jew: one who is probably Orthodox and abides by strict Jewish law. This requires distilling Jewish practice to a few common themes that tend to show up most in the prison religion context even though the majority of the Jews in prison may not even abide by

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[31] *Mishne Torah*, ENCYCLOPAEDIA BRITANNICA (Aug. 12, 2013).

[32] *Jewish Holy Scriptures: The Shulkhan Arukh*, JEWISH VIRTUAL LIBRARY.

[33] Yehuda M. Braunstein, *Will Jewish Prisoners Be Boerne Again? Legislative Responses to City of Boerne v. Flores*, 66 FORDHAM L. REV. 2333, 2335 (May 1998).

[34] Abraham Abramovsky, *First Amendment Rights of Jewish Prisoners: Kosher Food, Skullcaps, and Beards*, 21 AM. J. CRIM. L. 241, 243 (1994).

these laws. This paper will be concerned with Jewish dietary laws, celebrating Jewish holidays, and the donning of certain religious garb or physical appearances.

A. Kashrut

At its most basic level, *kashrut* is the Jewish law governing food. *Kashrut* may dictate what items of food are allowed or prohibited, what foods may be eaten together, how animals are slaughtered, and how food should be prepared.[35]

These laws are primarily spiritual.[36] They are based in biblical text, mostly found in the Book of Leviticus, which defines a great deal of *halakhah*.[37] Jewish scholars agree that *kashrut* is made up of laws that Jews follow without the necessity of explanation.[38] In his philosophical magnum opus, The Guide of the Perplexed, Maimonides even labels the laws of *kashrut* as *hukkim*, religious laws that have no explanation in terms of human reason.[39]

This makes it immensely difficult not only for all Jews to understand *halakhah*, but also prison officials. Jewish law may dictate that *kashrut* is required, but if an inmate is asked why they want to keep kosher, the only answer is because that's what *halakhah* says. *Kashrut* is not just laws that Jews follow for religious reason; in addition, "'it is a bond which unites Jew to

[35] *See generally* 6 ENYCLOPAEDIA JUDAICA 26 (Dietary Laws) (Keter Publishing, 1971).

[36] Gerald F. Masoudi, *Kosher Food Regulation and the Religion Clauses of the First Amendment*, 60 U. CHI. L. REV. 667, 667 (1993).

[37] *Leviticus* 11.

[38] *See* Jamie Aron Forman, *Jewish Prisoners and Their First Amendment Right to a Kosher Meal: An Examination of the Relationship Between Prison Dietary Policy and Correctional Goals*, 65 BROOKLYN L. REV. 477, 480–81 (Summer 1999).

[39] MOSES MAIMONIDES, THE GUIDE OF THE PERPLEXED Vol. 2 Trans. Shlomo Pines 507.

Jew, it is a tether which secures an individual to a nation, it is the energy which connects a people, and a nation, to its very roots.' This notion has no less force inside the prison gates."[40]

At the prison gates, however, there are penological interests which prisons have asserted for limiting Jewish prisoners' right to a kosher diet. Most commonly, prison officials have used rationales of running a simplified prison food service, cost considerations, institutional security, and worries about further dietary demands.[41] The evolving standards as will be described will shed light on the importance of these penological interests as applied to the cases of Jewish prisoners.

B. Holidays

Jewish holidays, or *chaggim*, have also created issues for prisons in attaining penological interests while also attempting to abide by Free Exercise principles. Holiday observance is a large aspect of Jewish practice, not just applying to the more observant sects of Judaism. It is quite common for Jews, regardless of sect to fast for twenty-five hours on *Yom Kippur*. *Pesach* presents more specific challenges to prison administration of Jews during this eight-day holiday around the Spring. *Pesach* is a widely observed Jewish holiday that has many critical aspects. One aspect is having a *seder*, a special meal with family to recount the *Pesach* story and freedom from Egyptian slavery.[42] Another is the fact that observing the laws of *kashrut* encompasses different laws during *Pesach*, including a prohibition on leavened bread for the entirety of eight

[40] Forman, *supra* note 38 at 486 (quoting Ephraim Z. Buchwald, *Kashruth: An Interpretation for the 20th Century*). Today, the Buchwald article can be found on the Internet as Rabbi Ephraim Z. Buchwald, *Kashruth: An Interpretation for the 21st Century*, https://njop.org/wp-content/uploads/2020/06/kashruth-an-interpretation-in-book-format-3-25-2014.pdf (slightly altered from the 20th Century version) (last visited April 30, 2024).

[41] Forman, *supra* note 38 at 480–81.

[42] *See generally* Aviva Orenstein, *Once We Were Slaves, Now We Are Free: Legal, Administrative, and Social Issues Raised by Passover Celebrations in Prison*, 41 PEPP. L. REV. 57 (2013).

days. Therefore, there are not only the concerns of a communal festive meal for Jewish prisoners, but also that *kashrut* observance is even more demanding in its requirements during this holiday.

There are many questions as to the number of Jewish holidays which may be observed and the strict confines within prison administration as to how prisoners may observe them.[43] Prison administrators have to weigh the importance of the customs of each holiday against prison security in order to make these decisions.

C. Religious Garb and Appearance

Another common issue among religious practice in prison is specific clothing, items, or appearances that some religious observers may deem integral to the practice of their religion. One issue that the Supreme Court ruled on for Muslim prisoners is the right for a prisoner to grow a beard for religious reasons.[44] Judaism has a similar prohibition stemming from the Book of Leviticus where God commands "Ye shall not round the corners of your heads, neither shalt thou mar the corners of thy beard."[45] Similarly to the laws of *kashrut*, "the purpose or meaning behind this command is not clear."[46] One variation of this commandment for some Orthodox Jews requires men to grow *peyos*, or side curls, as a showing of a strict attempt to carry out the law.[47]

Phylacteries, or *tefillin*, have presented another issue for some courts. During weekday morning prayer, *halakhah* demands that Jewish men wear *tefillin* on their head and upper arm in fulfillment of a commandment to "bind them as a sign upon your hand, and they shall be for a

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[43] *See generally* Sid Z. Leiman, *Jewish Religious Year*, ENCYCLOPAEDIA BRITANNICA (Last Updated Feb. 9, 2024).

[44] *Holt*, 574 U.S. at 352.

[45] *Leviticus* 19:27.

[46] Eric J. Zogry, *Orthodox Jewish Prisoners and the Turner Effect*, 56 LA. L. REV. 905, 913 (1996).

[47] *See* THE TORAH: A MODERN COMMENTARY 898 (W. Gunther Plaut ed., 1981).

reminder between your eyes."[48] *Tefillin* presents issues of prison security just in its physical attributes. Generally, *tefillin* consists "of two black leather boxes and straps to hold them on. One is worn on the biceps, and its strap… is wound by the wearer seven times around the forearm and hand."[49] These straps are meant to be wound tightly around the arm, presenting possible security dangers that an inmate may use them to strangle themselves or someone near them. Another issue they present is that it is plausible for contraband to be put into the boxes, and may present a danger similar to hardcover books.

Probably the most common piece of apparel in Jewish practice is the skullcap, or *yarmulke*. This requirement comes from a two thousand year-old tradition of men covering their heads as a sign of that God is always above one's head and that a Jew should aways be reminded of God's presence.[50] Some laws concerning *yarmulkes* forbid an observant Jewish male to make a blessing or pray with his head uncovered and forbid an observant Jewish male from traveling a small distance (even six feet) without wearing a *yarmulke*.[51] This demonstrates "the enormous importance to an observant Jew of wearing a *yarmulke* at all times, even if he is incarcerated."[52]

III. **Evolving Standards**

A. Pre-*Turner*

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[48] *Deuteronomy* 6:8.

[49] *Tefillin (Phylacteries)*, MY JEWISH LEARNING, https://www.myjewishlearning.com/article/tefillin-phylacteries/ (last visited April 30, 2024).

[50] Babylonian Talmud, *Kiddushin* 31a (holding that a Jewish male should not walk even a short distance without a *yarmulke* because the holiness of God permeates above); *Maharshah*, *Shabbat* 156b (the purpose of a *yarmulke* is to remind a Jew of God's presence).

[51] *See* Yosef Karo, *Shulchan Aruch*, *Orach Chayyim* 206:3; Babylonian Talmud *Kiddushin* 31:1.

[52] Braunstein, *supra* note 33 at 2338.

Before the 1960s, courts exercised a "hands off" policy when it came to adjudicating prisoners' Free Exercise claims.[53] The purpose of this was to ensure "that judicial involvement would [not] impede prison administration[s] from implementing penological objectives."[54] Not only did courts feel as though their involvement could impede penological objectives, but judges were not the people running the prisons; courts did not feel it was their place to impinge on decisions already made by prison administrators.[55]

However, the advent of the Civil Rights presented a new era for prisoners' rights. *Cooper v. Pate* presented the Supreme Court with its first opportunity to decide whether prisoners retain their right to religious freedom during incarceration.[56] This case established, for the first time, a cause of action subject to judicial review for denial of Free Exercise behind bars.[57] Just eight years later, the Supreme Court held that "reasonable opportunities must be afforded to all prisoners to exercise the religious freedom guaranteed by the First and Fourteenth Amendments without fear of penalty."[58] Problematically however, the Court did not establish a precise standard to govern prisoners' Free Exercise claims.[59]

Throughout the 1970s and 80s, the Supreme Court realized that issues pertaining to prisoners' First Amendment rights needed to be addressed through the judicial system. As the Court came to this realization, they attempted to develop a few different standards for prisoners'

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[53] *See* William L. Selke, PRISONS IN CRISIS 28–29 (1993).

[54] Braunstein, *supra* note 33 at 2339.

[55] *Id.* at 2339–40.

[56] 378 U.S. 546 (1964) (per curiam).

[57] *Id.*

[58] Cruz v. Beto, 405 U.S. 319, 322 n.2 (1972).

[59] Braunstein, *supra* note 33 at 2342.

First Amendment claims. In *Procunier v. Martinez*, the Court developed an intermediate level of scrutiny for mail censorship: the mail censorship regulation was justified if the regulation furthered an important or substantial government interest and the infringement was no greater than necessary to protect that interest.[60] Just two months later, the Supreme Court did not apply the prong of *Martinez* which requires that a regulation limiting First Amendment freedoms be no greater than necessary to protect government interests.[61] Because of the Supreme Court's inconsistencies in establishing a standard for First Amendment claims, lower courts ruled on Free Exercise claims without guidance from the Supreme Court, developing contradictory formulations of First Amendment jurisprudence for prisoners.[62]

B. Turner

In *Turner v. Safley*, the Supreme Court entered a new era of prisoners' rights jurisprudence and established a well-delineated test for determining the reasonableness of regulations impinging on prisoners' First Amendment rights. Although *Turner* did not have anything to do with Free Exercise, it established a reasonableness test for any First Amendment claims coming from behind bars: "when a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests."[63] Based on this standard, the Court enunciated four factors that should be determined on a case-by-case basis in determining whether a constitutionally-infringing regulation is reasonable: (1) whether there is a valid, rational connection between the regulation and the governmental interest; (2) whether there are alternative means available to the inmate which would permit him

[60] *See* 416 U.S. 396, 413 (1974).

[61] *See* Braunstein, *supra* note 33 at 2345 (citing Pell v. Procunier, 417 U.S. 817 (1974)).

[62] *See id.* at 2346.

[63] Turner v. Safley, 482 U.S. 78, 89 (1987).

to exercise his religious beliefs; (3) the impact that an accommodation to the prisoner would have on the institution; and (4) whether there is an absence of ready alternatives to the constitutional infringement.[64]

Shortly after *Turner*, the Court applied its new test to Free Exercise claims in *O'Lone v. Estate of Shabazz*.[65] In this case, Muslim inmates challenged prison regulations that prevented them from attending *Jumu'ah*, a weekly service.[66] Using the *Turner* test, the Court found that the regulation was reasonably related to valid penological interests in maintaining security and that the prisoners could express their religious beliefs using alternative means.[67] Because *Turner* established a reasonableness standard for Free Exercise claims, it was clear that extreme deference should be given to prison administrations when faced with such claims. This "test places the burden of proof on the prisoner, whereas in earlier cases the courts required the prison to explain why its regulation was constitutional."[68] The *Turner* test gave courts permission to deem restrictions on religious practice constitutional.[69]

C. RFRA

Turner produced a lot of lower court caselaw. Its reasonableness test created a highly deferential standard for prison administrators. In 1993, however, Congress passed the Religious Freedom Restoration Act (RFRA), which "disrupt[ed] the present pattern" of applying low-level

[64] *Id.*

[65] *O'Lone v. Estate of Shabazz*, 482 U.S. 342 (1987).

[66] *Id.* at 345.

[67] *Id*. at 350–53.

[68] Zogry, *supra* note 46 at 920.

[69] *See* Braunstein, *supra* note 33 at 2352.

scrutiny.[70] RFRA explicitly created a "compelling state interest" standard for Free Exercise cases.[71]

Because it was unclear whether RFRA applied to prisoners' claims, advocates in Congress proposed an exemption to RFRA for prisoners: The Reid Amendment.[72] The idea of the Reid Amendment, which was introduced before RFRA was passed in hopes that it would be added to the legislation, would have exempt prison regulations from having to meet the compelling interest standard.[73] The Senate rejected the Reid Amendment by a slim margin (58 to 41) and RFRA was passed, without an exemption for prisoners. [74]

This allowed "every court [to apply] the RFRA to prisoners' free exercise claims."[75] During the time that RFRA was law, it "generally produced positive results for all prisoners. The majority of courts applied the compelling interest mandated by the RFRA which, in many instances, proved too difficult a standard for prison administration to overcome."[76]

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[70] Zogry, *supra* note 46 at 933.

[71] *See* 42 U.S.C. § 2000bb.

[72] *See* 139 Cong. Rec. S14,353 (daily ed. Oct. 26, 1993) (statement of Sen. Reid).

[73] The Reid Amendment provided:

> Notwithstanding any other provision of this Act, nothing in this Act or any amendment made by this Act, shall be construed to affect, interpret, or in any way address that portion of the First Amendment regarding laws prohibiting the free exercise of religion, with respect to any individual who is incarcerated in a Federal, State, or local correctional, detention, or penal facility- including any correctional, detention, or penal facility that is operated by a private entity under a contract with the government.

139 Cong. Rec. S14,366 (daily ed. Oct. 26, 1993) (statement of Sen. Simpson).

[74] 139 Cong. Rec. S14,468 (daily ed. Oct. 27, 1993).

[75] Braunstein, *supra* note 33 at 2362.

[76] *Id.* at 2361–62.

This era, which tended to benefit prisoners' claims, halted four years later when the Supreme Court decided *City of Boerne v. Flores*.[77] In *Boerne*, the Supreme Court held that RFRA was unconstitutional as applied to states on the grounds that Congress had exceeded its enforcement powers and that it contradicted principles of separation of powers.[78] As a result of RFRA being ruled as unconstitutional as applied to the states, prisoners' rights jurisprudence went back in time and "the *Boerne* decision led many courts to resort to the low-level standard of *Turner* that grants deference to prison administration, which had been largely unused during the years that RFRA was the law.[79]

D. RLUIPA

Three years after *Boerne*, Congress unanimously passed the Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA").[80] In pertinent part, RLUIPA provides that

> [n]o government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution… even if the burden results from a rule of general applicability, unless the government demonstrates that its imposition of the burden on that person
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> (1) is in furtherance of a compelling governmental interest; and
> (2) is the least restrictive means of furthering that compelling governmental interest.[81]

[77] 521 U.S. 507 (1997).

[78] *Id.* at 536.

[79] Braunstein, *supra* note 33 at 2367.

[80] 42 U.S.C. §§ 2000cc – 2000cc-5.

[81] 42 U.S.C. § 2000cc-1(a).

RLUIPA defines "religious exercise" as including "any exercise of religion, whether or not compelled by, or central to, a system of religious belief."[82] This concept "shall be construed in favor of a broad protection of religious exercise, to the maximum extent permitted by the terms of this chapter and the Constitution."[83] This allows courts to take a broad stance as to what constitutes a religious exercise. An adherent need not prove that the religious exercise is a pillar of the entire religion's exercise. Indeed, RLUIPA prohibits "inquiry into whether a particular belief or practice is 'central' to a prisoner's religion."[84] Additionally, a substantial burden exists where either " [1] a follower is forced to choose between following the precepts of his religion and forfeiting benefits otherwise generally available to other inmates versus abandoning one of the precepts of his religion in order to receive a benefit; OR [2] the government puts a substantial pressure on an adherent to substantially modify his behavior and to violate his beliefs."[85] As a result, RLUIPA allows prisoners "to seek religious accommodations pursuant to the same strict scrutiny standard set forth in RFRA."[86]

When the Supreme Court held that RLUIPA was not facially unconstitutional in *Cutter v. Wilkinson*, the Court held that although RLUIPA is generally friendly to prisoners' Free Exercise claims, it is not unlimited. RLUIPA does not "elevate accommodation of religious observances over an institution's need to maintain order and safety… Should inmate requests… become

[82] 42 U.S.C. § 2000cc-5(7)(A).

[83] 42 U.S.C. § 2000cc-3(g).

[84] Cutter v. Wilkinson, 544 U.S. 709, 725 n.13 (2005).

[85] Washington v. Klem, 497 F.3d 272, 280 (3d Cir. 2011).

[86] Gonzales v. O Centro Espírita Uninõ do Vegetal, 546 U.S. 418, 436 (2006).

excessive, impose unjustified burdens… or jeopardize the effective functioning of an institution, the facility would be free to resist the imposition."[87]

RLUIPA is an expansive interpretation of Free Exercise. It "provides significantly more protection for prisoners' religious exercise than does the First Amendment."[88] Some scholars even argue that RLUIPA provides prisoners with more religious protections than the average American citizen.[89] Further, RLUIPA even "may require a government to incur expenses in its own operations to avoid imposing a substantial burden on religious exercise."[90]

IV. Application of the Standards to Jews

So far, this writing has described both Jewish practices that may be common in prisons as well as the evolving standards by which religious exercise has been accommodated. The above section focused almost wholly on Supreme Court cases which provide a general overview of the law in each of those eras. Now, this paper will look at how the standards and Jewish law have worked together over the past fifty years and their application to observant Jewish prisoners.

A. Pre-*Turner*

The first time the issue of whether Jewish prisoners have the legal right to kosher food came in 1975, when Rabbi Meir Kahane, founder of the Jewish Defense League (a militant group) sued the Allenwood federal penitentiary and demanded that he be provided with kosher food during his incarceration.[91] Although Rabbi Kahane was ordered to be placed in an

[87] *Cutter*, 544 U.S. at 722, 726.

[88] Orenstein, *supra* note 42 at 73.

[89] *See* Spencer T. Proffitt, *Gods Behind Bars: How Religious Liberty Has Been Sent Directly to Jail, and How to Get Out of Jail Free*, 40 ARIZ. ST. L.J. 1401, 1401, 1427 (2008).

[90] 42 U.S.C. § 2000CC-3(C).

[91] JONATHAN D. SARNA & DAVID G. DALIN, RELIGION AND STATE IN THE AMERICAN JEWISH EXPERIENCE 277 (1997).

institution where he could obtain kosher food and access religious requirements, the government denied him kosher food, arguing that "it would be burdensome to meet the religious dietary needs of its diverse prison population."[92] The trial court held that Kahane was constitutionally entitled "to conform to Jewish dietary laws."[93] Further, the court found that the government's contentions that it would be too burdensome to adhere to religious dietary needs did not amount to a "serious, much less compelling, reasons why provision of a kosher diet for this [Jewish inmate] would affect prison security or discipline."[94] In affirming the Eastern District of New York's decision, the Second Circuit used a standard of heightened scrutiny and held that "prison authorities are proscribed by the constitutional status of religious freedom from managing the institution in a manner which unnecessarily prevents Kahane's observance of his dietary obligations."[95] Importantly, the Second Circuit proclaimed that "dietary laws are an important, integral part of the covenant between the Jewish people and the God of Israel."[96]

The Second Circuit did find in favor of Rabbi Kahane, but Rabbi Kahane's hopes that his case would establish legal precedent for constitutionally entitling a Jewish prisoner to kosher food did not succeed across the board. Rabbi Kahane vowed, "This fight will continue until a court ruling is handed down establishing *the constitutional right of every Jew*, who so wishes to have kosher food regardless of cost or problems for the prison."[97] This fight has continued and has experienced the ebbs and flows of constitutional jurisprudence regarding what religious

[92] United States v. Kahane, 396 F. Supp. 687, 690 (E.D.N.Y. 1975).

[93] *Id.* at 704.

[94] *Id.* at 703.

[95] Kahane v. Carlson, 527 F.2d 492, 495 (2d Cir. 1975).

[96] *Id.*

[97] Sarna *supra* note 91 at 277.

practice someone is entitled to when they have lost other constitutional rights in the prison context.

Regardless of the Second Circuit's decision, the Supreme Court still accorded greater deference to prison officials and took a restrictive view of prisoners' religious rights."[98] Interestingly enough, when it came down to the lower courts, "Jewish prisoners were generally able to procure kosher diets."[99] For example, an Orthodox Jewish inmate in North Carolina successfully petitioned the Eastern District of Carolina to be provided with kosher meals.[100] As an initial matter, the court stated that a "prisoner's predilection to practice his religion may be restricted only upon convincing showing that paramount state interests so require."[101] Because many lower courts during this era applied some sort of heightened scrutiny, "the burden of proving religious curtailment [was] on prison officials."[102]

B. Turner

Unfortunately, the Supreme Court in *Turner* "made it quite clear that prison regulations curtailing constitutional rights were not to be reviewed under any type of heightened scrutiny standard."[103] As lower courts applied the new *Turner* test, it became clear that "lower courts

[98] Forman, *supra* note 38 at 491–493 (citing Jones v. North Carolina Prisoners' Labor Union, Inc., 433 U.S. 119 (1977) and Bell v. Wolfish, 441 U.S. 520 (1979)).

[99] *Id. See* Theodore v. Coughlin, No. 83 Civ. 6668, 1986 WL 11456 (S.D.N.Y. Oct. 7, 1986); Prushinowski v. Hambrick, 570 F. Supp. 863 (E.D.N.C. 1983); Schlesinger v. Carlson, 489 F. Supp. 612 (M.D. Pa. 1980). Outside of kosher food the Eastern District of New York established that because communal worship is a hallmark of Judaism, Jewish prisoners had a right to pray with a group. *See* Wilson v. Beame, 280 F. Supp. 1232, 1239 (E.D.N.Y. 1974).

[100] *Prushinowski*, 570 F. Supp. at 863.

[101] *Prushinowski*, 570 F. Supp. at 866.

[102] Forman, *supra* note 38 at 495.

[103] *Id.* at 497.

seemed more willing than ever to deny Jewish prisoners' requests for kosher diets."[104] The first test of *Turner/O'Lone* applied to Jewish prisoners and a kosher diet was in *Cooper v. Rogers*.[105] In *Cooper*, an Orthodox Jewish inmate brought a 42 U.S.C. § 1983 action against the prison he was incarcerated in, arguing that its refusal to provide him with a kosher breakfast violated his First Amendment rights.[106] Using *Turner*, the court stated that the inmate "has no right to a specially prepared kosher breakfast as long as [the prison officials'] denial of such a breakfast bears a reasonable relationship to their legitimate penological goals," a standard which was satisfied here.[107]

Similarly, the Ninth Circuit held in an unpublished opinion that prison officials decision not to provide a Hasidic Jewish prisoner with a kosher diet was reasonably related to legitimate penological concerns.[108] Specifically, the court noted the cost of kosher meals was nearly three times as much as the cost of regular prison meals, that the kosher meals were difficult to prepare (which could result in prison staff not being able to fully oversee the prison population), and that the kosher diet "could lead to a proliferation of special diet requests, and to resentment by other prisoners and disruption of the administration of prison food service of prison discipline."[109]

Outside of kosher food provisions, lower courts reached different conclusions in cases involving communal prayer.[110] In the Sixth Circuit, a prison regulation eliminating intercomplex

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[104] *Id.* at 497–98.

[105] 788 F. Supp. 255 (D. Md. 1991).

[106] *Id.* at 256.

[107] Cooper v. Rogers, 788 F. Supp. 255, 258 (D. Md. 1991).

[108] Ben-Avraham v. Moses, 1 F.3d 1246, No. 92-35604, 1993 WL 269611 (9th Cir. July 19, 1993) (unpublished disposition).

[109] *Ben-Avraham,* 1 F.3d at *2.

travel, unconstitutionally infringed on Jewish inmates' right to go to weekly Shabbat services.[111] Contrastingly, the Eighth Circuit decided in favor of the prison where a Jewish inmate was prohibited from praying in a *minyan*; importantly, this applied to the inmate while he was in administrative segregation.[112] The added layer of the inmate being in administrative segregation permitted the court to find that institutional security concerns trumped religious rights.

Critically, on all fronts of Jewish religious exercise, there was great "confusion" among the lower courts "which existed after the *Turner* decision."[113] This trend of validating every prison regulation "came to a screeching halt" when Congress enacted the Religious Freedom Restoration Act.[114]

C. RFRA

Although it was not completely clear how the enactment of RFRA would apply to prisoners, "[i]n many cases involving Jewish prisoners' free exercise claims, courts applied a compelling interest analysis, as dictated by the RFRA, and found for the prisoner."[115] In fact, every court applied RFRA to prisoners' free exercise claims after its enactment.[116] Thus, courts were able, under RFRA, to evaluate Jewish prisoners' claims under a much stricter standard than that used during the *Turner* era.[117] However, it also appears that "Jewish prisoners were

[110] Braunstein, *supra* note 33 at 2353.

[111] Whitney v. Brown, 882 F.2d 1068, 1078 (6th Cir. 1989).

[112] Garza v. Carlson, 877 F.2d 14, 15 (8th Cir. 1989).

[113] Braunstein, *supra* note 33 at 2355.

[114] Forman, *supra* note 38 at 500.

[115] Braunstein, *supra* note 33 at 2362.

[116] *Id.*

[117] *Id.*

successful in procuring kosher diets during the RFRA era even when courts did not explicitly apply the RFRA standard."[118] In addition, courts sided with prisoners in cases of haircuts and granted a preliminary injunction to prohibit a prison administration from cutting an Orthodox Jewish prisoner's *peyos*.[119] Further, during the time that RFRA was law, courts found that prisons could not justify impinging on the religious rights of Jewish prisoners even under the *Turner* standard.[120] For example, the Southern District of New York established that even under *Turner*, all prisoners "should be afforded a reasonable opportunity to attend religious services."[121] When RFRA was deemed unconstitutional as applied to states in 1997, however, "courts once again turned to the *Turner*/*O'Lone* standard when evaluating Jewish prisoners' free exercise claims."[122]

D. RLUIPA

With RLUIPA, federal prisoners regained a strict scrutiny standard for substantially burdened religious practice. In *Spratt v. Rhode Island Department of Corrections*, the First Circuit articulated the elements of an RLUIPA claim as follows:

> On the first two elements, (1) that an institutionalized person's religious exercise has been burdened and (2) that the burden is substantial, the plaintiff bears the burden of proof… [then] the onus shifts to the government to show (3) that the burden furthers a compelling governmental interest and (4) that the burden is the least restrictive means of achieving that compelling interest.[123]

[118] Forman, *supra* note 38 at 502.

[119] Estep v. Dent, 914 F. Supp. 1462 (W.D. Ky. 1996).

[120] Braunstein, *supra* note 33 at 2364.

[121] Bass v. Grottoli, No. 94 Civ. 3220, 1995 WL 565979 (S.D.N.Y. Sept. 25, 1995).

[122] Forman, *supra* note 38 at 503.

[123] 482 F.3d 33, 38 (1st Cir. 2007).

Since RLUIPA's enactment, these four elements have taken on various meanings and been given different levels of importance in establishing whether a Jewish prisoner can actually make an RLUIPA claim in any given case. Generally, Jewish prisoners have been able to establish that there is a substantial burden on religious exercise. However, courts have not always been on the same page in deciding when and how the government meets its burden to show that the burden furthers a compelling governmental interest and is the least restrictive means of achieving that compelling interest.

It was thought that RLUIPA would be much friendlier to Jewish inmates than the *Turner* era. Indeed, most federal courts require prisons to, at the very least, provide kosher food to Jews who request it.[124] However, many courts have also denied kosher foods on grounds that either the inmate did not prove lack of access to kosher food was a substantial burden or that it placed too much of a burden on the government's compelling interests in saving money and prioritizing security.

An earlier example came out of *Baranowski v. Hart*, where a Jewish inmate challenged prison policies which affected his ability to participate in certain religious activities.[125] The plaintiff in *Baranowski* alleged that the Texas Department of Criminal Justice had denied Jewish prisoners access to Shabbat services, High Holy Day observance, and failed to provide proper kosher diets.[126] At this time, "only 900 [inmates were] self described as Jewish. Of those, only 70 to 75 are "recognized" as actually practicing their faith, with 90 in the conversion process," and the prison held a total population of 145,000 inmates.[127] The Department had determined that

[124] Orenstein, *supra* note 42 at 85.

[125] 486 F.3d 112 (5th Cir. 2007).

[126] Baranowski v. Hart, 486 F.3d 112, 116–17 (5th Cir. 2007).

[127] *Id.* at 117.

providing kosher meals cost the prison twelve to fifteen dollars per day, but that the average inmate's non-kosher meal cost $2.46.[128] The Fifth Circuit plainly held that "the activities alleged to be burdened in this case – Jewish Sabbath and holy day services and keeping kosher – qualify as 'religious exercises' for the practice of Judaism under RLUIPA's generous definition."[129] The Fifth Circuit also did not deny that failure to provide kosher meals to a Jewish inmate may substantantially burden religious exercise.[130] Nonetheless, the Fifth Circuit held that Texas's policy of not providing kosher food was "related to maintaining good order and controlling costs and, as such, involves compelling governmental interests."[131] This was based on the fact that Texas did not have an adequate budget and that providing kosher meals could "breed resentment among other inmates."[132]

After *Baranowski*, the Department established a Basic Designated Jewish Unit in four of their prisons, where kosher meals could be purchased in the prison commissary.[133] There was also one Enhanced Designated Jewish Unit, which provided kosher meals free of charge to all observant Jewish prisoners.[134] Through this type of program, it is up to the prison to decide who is genuinely eligible to have kosher food.[135] This brings up its own issues of constitutionality,

[128] *Baranowski*, 486 F.3d at 118.

[129] *Id*. at 124.

[130] *Id*. at 125.

[131] *Id*.

[132] *Id*.

[133] Moussazadeh v. Texas Dept. of Criminal Justice, 703 F.3d 781, 786 (5th Cir. 2012).

[134] *Id*. at 787.

[135] Orenstein, *supra* note 42 at 87.

putting prison administrators "in the business of investigating those [religious] beliefs."[136] It is true that even under RLUIPA, a belief must be "sincerely held" in order to be substantially burdened.[137] In *Moussazadeh v. Texas Dept. of Criminal Justice*, the lower court held because the inmate had purchased food that was not certified as kosher, such as coffee, his beliefs could not have been "sincerely held." Important to the appeal, the items he purchased at the prison commissary were not *per se* non-kosher, but rather, did not have a certification on them.[138] At the Fifth Circuit again, the Court assessed what "sincerely held" may look like to an individual prisoner. The court noted that a "finding of sincerity does not require perfect adherence to beliefs expressed by the inmate, and even the most sincere practitioner may stray from time to time."[139] In this case, the Court vehemently rejected the notion that though the plaintiff "may have erred in his food purchases and strayed from the path of perfect adherence, that alone does not eviscerate his claim of sincerity."[140]

In an *amicus* brief written by the American Jewish Committee, a nonprofit which seeks to safeguard the civil and religious rights of Jews, the organization looked to Jewish law as forgiving when it comes to the adherence of *kashrut*.[141] In *halakhah*, "even believers striving to mend their ways will backslide… Judaism does not believe this condemns them as insincere in

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[136] Orenstein, *supra* note 42 at 88.

[137] *Moussazadeh*, 703 F.3d at 787. *See United States v. Seeger*, 380 U.S. 163, 185 (1965) ("[W]hile the 'truth' of a belief is not open to question, there remains the significant question of whether it is 'truly held.'")

[138] *Id.* at 787, 791 (*see* Brief for *Amicus Curaie* American Jewish Committee in Support of Appellant and Reversal at 16–22, *Moussazadeh v. Texas Dept. of Criminal Justice*, 703 F.3d 781 (5th Cir. 2012)).

[139] *Id.* at 791. *See Grayson v. Schuler*, 666 F.3d 450, 454 (7th Cir. 2012) ("[A] sincere religious believer doesn't forfeit his religious rights merely because he is not scrupulous in his observance; for where would religion be without its backsliders, penitents, and prodigal sons?").

[140] *Moussazadeh*, 703 F.3d at 792.

[141] Brief for *Amicus Curiae* American Jewish Committee in Support of Appellant and Reversal, *Moussazadeh v. Texas Dept. of Criminal Justice*, 703 F.3d 781 (5th Cir. 2012).

their quest to… avoid transgression… and if Judaism takes this view, it seems anomalous for courts to insist on greater orthodoxy."[142] The idea that the trial court decided the sincerity of the Plaintiff's belief in this case without understanding what *halakhah* would say about a slight transgression goes against valuing religious belief. In a similar case at the Sixth Circuit, the Court held that a prison's "policy of removing a prisoner from the kosher-meal program for mere possession of a nonkosher food item may be overly restrictive of inmates' religious rights."[143] Given the fact that courts and prison officials have to label what is and is not sincere, they "necessarily become entangled in religion."[144] This is concerning as it could allow prison administrations and courts to be intrusive regarding individual prisoners' spiritual beliefs and impose their own definitions of what is "Jewish enough."[145]

Money is often seen as the biggest threat to the prison administrations during this era. In some cases, it was found not to be compelling, but other cases demonstrate that the increased cost of kosher food does not present a danger to the administration of prisons. For example, in *Beerheide v. Suthers*, the Tenth Circuit held that excluding a $13,000 expenditure from a budget of over $8 million was not a compelling interest.[146] In *Moussazadeh*, the court found that Texas could not make the argument that they had a compelling interest in lowering costs by denying kosher food when, in fact, they had offered kosher food in the past.[147] This, too, occurred in the

[142] *Id.* at 3.

[143] Colvin v. Caruso, 605 F.3d 282, 296 (6th Cir. 2010).

[144] Orenstein, *supra* note 42 at 100.

[145] *Id.*

[146] 286 F.3d 1179, 1191 (10th Cir. 2002).

[147] *Moussazadeh*, 703 F.3d at 794–95.

Eleventh Circuit, where the court found that Defendants could not carry their burden to show that Florida's policy at the time of not providing kosher meals served the compelling interests of safety and cost management, especially given the fact that Florida provided kosher meals in the past.[148]

With regard to other forms of practice, courts have varied in their approaches. The Sixth Circuit has held that a prisoner's First Amendment right to freedom of religion is not violated where a prison lacks Jewish services and literature.[149] In 2001, an Orthodox Jewish prisoner was told "that prison regulations prohibited him from leaving the facility wearing his *yarmulke* and *tallit katan*" when he had to leave the prison grounds for surgery at an offsite hospital.[150] While assessing the importance of the religious garments in question, the Court found that the Warden's actions were not justified by security concerns or any other valid penological objectives. Therefore, the inmate upheld his end of the legal bargain by making the requisite showing that his sincerely held beliefs were substantially burdened, but the Warden presented no evidence of penological objectives served by his actions.[151] Even in doing so, the court cites to an older case where a prison administration was even successful in restricting *yarmulkes* out of concern that they could be used to smuggle contraband.[152] This all goes to show that it is possible for prison administrators to cross the heavy burden of proof that RLUIPA presents, but it is definitely a bit more difficult than it was during the times of *Turner*.

V. Incarcerated Jews After *Holt v. Hobbs*

[148] Rich v. Fla. Dep't of Corr., 716 F.3d 525 (11th Cir. 2013).

[149] *Colvin*, 605 F.3d at 282.

[150] Boles v. Neet, 486 F.3d 1177, 1179 (10th Cir. 2007).

[151] *Boles*, 486 F.3d at 1182–83.

[152] *Young v. Lane*, 922 F.2d 370, 376 (7th Cir. 1991).

Holt v. Hobbs did not change the law regarding prisoners' religious rights. RLUIPA is still the guiding statute. However, *Holt v. Hobbs* presented a new back drop for prisoners' religious jurisprudence. Generally, the Supreme Court has wanted to stay away from adjudicating prisoners' civil rights claims. This is because judges do not necessarily want to insert their ideologies into the prison context. Historically, great deference has been given to prison administrators when prison policies are challenged on First Amendment grounds. By 2015, however, the Supreme Court unanimously recognized that prison administrations do not receive "such unquestioning deference" under RLUIPA.[153] Just because "prison officials are experts in running prisons and evaluating the likely effects of altering prison rules… that respect does not justify the abdication of the responsibility, conferred by Congress, to apply RLUIPA's rigorous standard."[154]

Holt v. Hobbs revolved around the rights accorded to a Muslim prisoner and his right to grow a 1/2-inch beard. The fact that this prisoner was Muslim does not preclude application of this case to Jewish prisoners' Free Exercise rights. Rather, for Orthodox Jews, this case was of immense importance, as can be seen in the *amicus* brief written "on behalf of adherents to the Jewish faith who are religiously observant."[155] Establishing their view on the subject deeply rooted in Jewish law, the National Jewish Commission on Law and Public Affairs ("COLPA") not only backed the Petitioner in *Holt v. Hobbs*, but called for a broad holding: "Merely sustaining petitioner's claim that he may grow a one-half-inch beard in Arkansas' prisons will not… prevent future violations of the First Amendment. The history of lawsuits brought by

[153] *Holt*, 574 U.S. at 364.

[154] *Id.*

[155] Brief *Amicus Curiae* of the National Jewish Commission on Law and Public Affairs ("COLPA"), *et al.*, in Support of Petitioner, at 2, *Holt v. Hobbs*, 574 U.S. 352 (2015).

Orthodox Jews… demonstrates that this subject calls for a broad ruling."[156] Although it can be assumed that COLPA was generally happy with the ruling in favor of the Muslim inmate in this case, Jewish organizations wanted more expansive rulings that would not only be favorable to a given inmate in a certain case, but to all Jewish inmates seeking religious rights.

Since *Holt v. Hobbs*, there have been quite a few lower court decisions ruling on Jewish inmates' Free Exercise claims. Because the Supreme Court ruled in favor of the petitioner in that case, the cases arriving at lower courts since the Supreme Court handed down *Holt v. Hobbs* have been unique in their recognition of Jewish prisoners' rights. Particularly, the rest of this section will highlight a few cases that came to Courts of Appeals in recent years which decided cases regarding Jewish prisoners.

Florida's policy of not providing kosher meals came up yet again when the federal government brought action against the Florida Department of Corrections in *United States v. Secretary, Florida Department of Corrections*.[157] At the stage of this case, litigation between the federal government and Florida had been ongoing since 2011, when Department of Justice Civil Rights Division opened an investigation into the Florida Department of Corrections' denial of kosher food.[158] By the time the Eleventh Circuit issued its ruling, the Secretary only appealed a permanent injunction in favor of the federal government requiring the provision of kosher food.[159] Similarly to *Holt*, the Eleventh Circuit found that because "the Secretary fails to explain why the Department cannot offer kosher meals when it offers vegan, medical, and therapeutic

[156] *Id.* at 9–10.

[157] 828 F.3d 1341 (11th Cir. 2016).

[158] *Id.* at 1344.

[159] *Id.* at 1346.

diets and similar marginal costs" the Secretary did not meet the burden of proving that denial of kosher meals was the least restrictive means of furthering compelling governmental interests.[160]

It does appear that, contrary to what COLPA had hoped for, *Holt v. Hobbs* was influential in putting forth individualized cases and narrow holdings rather than holdings that may favor groups as a whole. In a nonprecedential opinion, the Third Circuit denied a Jewish inmate's "request to possess *tefillin*, an item used by some Jewish men for weekday prayers."[161] Citing the particularized circumstances of this case, "which demonstrates the unique components of tefillin, [Appellant's] behavioral and mental health issues, and the challenges in securing the prison unit in which he is housed," the Third Circuit put forth a detailed ruling as to why RLUIPA still precludes this specific inmate from accessing *tefillin*.[162]

The Third Circuit took to very specific explanations of both Jewish law and prison administration at the James T. Vaughn Correctional Center ("VCC") in Delaware. The Appellant was a maximum-security inmate in a segregated unit for inmates with severe mental illness.[163] When the inmate first requested *tefillin*, the prison administration "educated itself about *tefillin*, discussed the security issues it posed (namely, that it could be used for violence, self-harm, or escape)" and denied the Appellant's request.[164]

When the case arrived at the Third Circuit, the court found that "no reasonable juror could conclude that the prison could feasibly achieve its goal of safety and security while

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[160] *Id.* at 1349.

[161] Watson v. Christo, 837 Fed. App'x. 877, 878 (3d Cir. 2020).

[162] *Id.*

[163] The inmate also had a history of escape, suicide attempts, suicidal threats, possession of sharp metal objects, and threats to corrections officers. *Id.* at 879.

[164] *Id.*

allowing Watson access, supervised or otherwise, to *tefillin* each weekday morning."[165] While still recognizing the importance of the religious practice and not even disputing the substantial burden that not having *tefillin* may impose on the Appellant, the court considered facts specific to the inmate's history and the history of the specific unit in which he was housed. Based on the Appellant's history, which have demonstrated violent and suicidal tendencies, the court held that "allowing Watson access to *tefillin* poses substantial risks because… its long leather straps could be used to strangle or restrain others or injure oneself."[166] Furthermore, because of the specific prison environment in which the Appellant resided, which tends to be one that houses inmates with serious behavioral and mental health issues, "[d]iverting resources to monitor the activities of one inmate each weekday places the entire unit at risk."[167] Therefore, the particular circumstances of this case, which probably is the reason for its nonprecedential value, determined that RLUIPA was not violated when the prison refused to give the Appellant *tefillin* in this particular circumstance.

In another recent interesting case arising out of the Sixth Circuit, the Sixth Circuit has essentially determined that Jewish inmates have a right to certain foods coinciding with particular religious holidays.[168] In *Ackerman v. Washington*, Jewish prisoners challenged the Michigan Department of Corrections' policy of providing a universal vegan diet to all prisoners with religious dietary needs.[169] Admittedly, this does solve some of the issues pertaining to *kashrut*; inmates do not need to worry about mixing dairy and meat, nor do they need to worry

[165] *Id.* at 881.

[166] *Id.*

[167] *Id*. at 883.

[168] Ackerman v. Washington, 16 F.4th 170 (6th Cir. 2021).

[169] *Ackerman*, 16 F.4th at 176.

that the foods they are given may contain shellfish products or other foods deemed nonkosher. However, the inmates here challenged the vegan diet on the following grounds: "Their religious beliefs require them to eat a meal with kosher meat and a meal with dairy on the Jewish Sabbath and four Jewish holidays. They also believe that they must eat cheesecake on the holiday of *Shavuot* to celebrate the holiday properly."[170]

Now, these beliefs are not followed by all Jews, let alone observant Jews. There are plenty of religious Jews who prefer to eat a vegetarian or vegan diet while still also following the laws of *kashrut*. However, "RLUIPA's sweep is not limited to reasonable or even orthodox beliefs—the reasonable and the unreasonable, the orthodox and the idiosyncratic all enjoy protection."[171] One of the hallmarks of RLUIPA's sincerity prong is that sincerity does not need to be demonstrated by all adherents. It is simply "a 'credibility assessment' that asks if a prisoner's religious belief is honest."[172] Further, under *Holt*, "whether the RLUIPA claimant is able to engage in other forms of religious exercise" is irrelevant.

Based on factual determinations which took into account inmate testimony, chaplain testimony, prison administrator testimony, and religious texts, the court found that traditional celebratory foods support the inmates' belief that meat and dairy are required foods for Jewish practice.[173] Because the prison here completely barred the practice of eating meat and dairy, they imposed a substantial burden on what the prisoners sincerely believed was their religious exercise.[174] This included the religious exercise of eating cheesecake on *Shavuot*. Prior to trial,

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[170] *Id*.

[171] *Id*. at 181.

[172] *Id*. (quoting Kay v. Bemis, 500 F.3d 1214, 1219 (10th Cir. 2007).

[173] *Id*. at 181–82.

[174] *Id*. at 185.

cheesecake on *Shavuot* was not considered and the inmates recognized that "religious texts don't say cheesecake is mandatory—the Code of Jewish Law just notes that '[s]ome have a custom to just eat some dairy *mezonot*, cake, and beverage.'"[175] Regardless of the inmates' admissions that cheesecake is probably not required on *Shavuot*, the Sixth Circuit held that the evidence in this case suggested "that these prisoners do in fact sincerely believe that cheesecake is required on *Shavuot*."[176] This is what the trial court held. According to the Sixth Circuit, they may not have found that cheesecake was required under RLUIPA standard if they were trial court judges. However, clear-error review applies and the Sixth Circuit could not disturb the trial court's sincerity finding on that standard: "The district court reached the defensible conclusion that it should credit the prisoners' testimony that they believe cheesecake is mandatory on *Shavuot*. That's all that is required. Even if we may have come out differently on this issue if we were sitting as district judges, we affirm."[177] Therefore, because the district court found that the inmates sincerely believed that eating cheesecake is mandatory on *Shavuot*, they met their burden and "[t]he interest in simply avoiding an annual $10,000 outlay [needed to provide the requested foods] here is not compelling."[178]

VI. Conclusion

In *United States v. Secretary, Florida Department of Corrections*, *Watson v. Christo*, and *Ackerman v. Washington*, the appellate courts interpreted RLUIPA and *Holt* on both individualized and communal bases. Due to *Holt*, it is essentially unreasonable for courts to deny Jewish prisoners' kosher food when the Bureau of Prisons and many other prisons around the

[175] *Id*. at 183.

[176] *Id*.

[177] *Id*.

[178] *Id*. at 188.

country do so without infringing on compelling governmental interests. It is now clear that individualized belief governs whether an inmate has met their burden of showing a substantial burden on their religious exercise. However, b the individualized circumstances of the inmate and the environment they are in will contribute to balancing what compelling governmental interests are at stake for the prison administration. Although *Holt* did not present a new standard, it allows for lower courts to see a model of protecting religious rights of prisoners in the twenty-first century. Given the fact that the Supreme Court tries to stay away from adjudicating prisoners' First Amendment rights it appears that their doing so in *Holt* paves a new path of prisoners' religious jurisprudence. The law is the same, but because of *Holt*, lower courts are able to follow a rubric for a prisoner's RLUIPA claim, what constitutes a sincere belief for RLUIPA purposes, and when a prison cannot meet its burden of establishing a compelling governmental interest.