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NOTE

JEWISH PRISONERS AND THEIR FIRST AMENDMENT RIGHT TO A KOSHER MEAL: AN EXAMINATION OF THE RELATIONSHIP BETWEEN PRISON DIETARY POLICY AND CORRECTIONAL GOALS

"You can imprison their bodies, but you shouldn't imprison their souls."¹

INTRODUCTION

In all areas of life, observant Jews are "bound by Biblical principles that have been passed down from generation to generation,"² and these mandates of Judaism do not disappear once inside the prison gate. There are approximately 6,000 to 8,000 Jewish men and women confined in federal, state, and local prisons.³ Although it may appear to be a blessing to members of the Jewish faith that Jewish prisoners comprise such a small percentage of a total prison population of more than 1.5 million,⁴ observant Jewish prisoners have faced endless difficulties with prison regulations prohibiting many of their religious practices. For example, prison regulations have restricted Jewish prisoners' right to wear a beard,⁵ right to

¹ *NY Prisons Offering Hot Kosher Meals; Advocate Says Plan Frees Inmates' Souls*, ARIZ. REPUBLIC, Mar. 12, 1994, at A11 [hereinafter *Hot Kosher Meals*] (quoting Bennett Epstein, attorney and advocate for system-wide availability of kosher food).

² Yehuda M. Braunstein, Note, *Will Jewish Prisoners Be Boerne Again? Legislative Responses to City of Boerne v. Flores*, 66 FORDHAM L. REV. 2333, 2333 (1998) (discussing history of Religious Freedom Restoration Act and arguing for more free exercise protection to religious groups).

³ *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).

⁴ *Id.* at 2.

⁵ See *Friedman v. Lewis*, 912 F.2d 328 (9th Cir. 1990) (holding that prison

wear a yarmulke,⁶ and right to use candles to observe religious rituals.⁷ But perhaps the most important religious practice commonly prohibited or curtailed by prison regulations is the right to keep kosher.⁸

In trying to comply with the laws of kashruth,⁹ Jewish prisoners have made a wide-range of dietary requests based on First Amendment free exercise principles,¹⁰ including, *inter alia*, requests for a catered kosher breakfast,¹¹ a hot plate and access to a room to prepare meals for Passover,¹² food certified by the Central Rabbinical Congress,¹³ and hot kosher meals provided at the state's expense.¹⁴ Although Jewish pris-

regulation prohibiting facial hair not a violation of Jewish inmate's First Amendment right because regulation was reasonably related to legitimate penological interests); see also Abraham Abramovsky, *First Amendment Rights of Jewish Prisoners: Kosher Food, Skullcaps, and Beards*, 21 AM. J. CRIM. L. 241, 250-59 (1994) (analyzing Jewish inmates' First Amendment right to wear a beard).

⁶ See *Young v. Lane*, 922 F.2d 370 (7th Cir. 1991) (holding that policy of permitting Jewish inmates to wear yarmulkes only inside prison cell and during religious services not a First Amendment violation); see also Abramovsky, *supra* note 5, at 259-65 (analyzing Jewish inmates' right to wear a yarmulke).

⁷ See *Ward v. Walsh*, 1 F.3d 873, 879 (9th Cir. 1992) (holding that regulation prohibiting Jewish inmates from possessing and using candles to observe religious rituals reasonably related to safety and security concerns).

⁸ See Abramovsky, *supra* note 5, at 265-71 (analyzing Jewish inmates' First Amendment right to kosher diets); Braunstein, *supra* note 2, at 2335-37 (noting that observant Jewish inmates are obligated to follow laws of kashruth); Eric J. Zogry, Comment, *Orthodox Jewish Prisoners and the Turner Effect*, 56 LA. L. REV. 905, 906-12 (1996) (discussing *Turner/O'Lone* standard and its effect on Jewish inmates' attempts to procure kosher diets).

⁹ The laws of kashruth are the Jewish laws and customs relating to the types of food permitted for consumption and the preparation of such food. See Gerald F. Masoudi, *Kosher Food Regulation and the Religion Clauses of the First Amendment*, 60 U. CHI. L. REV. 667, 668 (1993).

¹⁰ The First Amendment to the United States Constitution provides, in pertinent part, that "Congress shall make no law respecting an establishment or religion, or prohibiting the free exercise thereof." U.S. CONST. amend. I.

¹¹ See *Cooper v. Rogers*, 788 F. Supp. 255, 258 (D. Md. 1991) (denying Jewish inmate's request for catered kosher breakfast on grounds that catered breakfast was too costly and kosher items were available on regular prison menu).

¹² See *Schlesinger v. Carlson*, 489 F. Supp. 612 (M.D. Pa. 1980) (granting Hassidic Jewish inmate access to hot plate and room to prepare Passover meals).

¹³ See *Prushinowski v. Hambrick*, 570 F. Supp. 863, 864-67 (E.D.N.C. 1983) (holding that food certified by Central Rabbinical Congress should be provided to Jewish inmate). The Central Rabbinical Congress certifies the types of food which can be eaten by Orthodox Jews in the Hasidic community. See *id.* at 865 n.2.

¹⁴ See *Johnson v. Horn*, 150 F.3d 276 (3d Cir. 1998) (denying Jewish inmates' request for hot kosher meals on grounds that legitimate penological interests would be compromised).

oners have occasionally been successful in obtaining kosher food under their First Amendment free exercise rights,¹⁵ prison officials have frequently referred to important penological objectives to prohibit or curtail Jewish prisoners' right to a kosher meal. The most common penological interests asserted for prohibiting or limiting Jewish prisoners' right to a kosher diet include: running a simplified prison food service,¹⁶ cost considerations,¹⁷ institutional security,¹⁸ and proliferation of other religious dietary demands.¹⁹

While this Note is mindful of the fact that "[f]ederal courts give great deference to prison officials' decisions with respect to the running of prisons,"²⁰ it seeks to focus on the tenuous nex-

¹⁵ See, e.g., *Beerheide v. Zavaras*, 997 F. Supp. 1405 (D. Colo. 1998) (granting Orthodox Jewish prisoners injunction compelling prison to provide them with kosher meals); *Ashelman v. Wawrzaszek*, 111 F.3d 674 (9th Cir. 1997) ("[P]rison must provide a diet sufficient to sustain [Orthodox Jewish prisoner] in good health without violating the laws of Kashrut."); *United States v. Kahane*, 396 F. Supp. 687 (E.D.N.Y. 1975) (holding that Orthodox Jewish prisoner is constitutionally entitled to meals that conform to his religious dietary requirements); see also *Abramovsky*, *supra* note 5, at 265-71.

¹⁶ See, e.g., *Ward v. Walsh*, 1 F.3d 873, 877 (9th Cir. 1993) (recognizing that prison officials have legitimate interest in running simplified dining service, but remanding case for determination of whether denial of kosher diet was reasonably related to that interest); see also *Kahey v. Jones*, 836 F.2d 948, 950 (5th Cir. 1988) (holding that prison has a legitimate interest in running a simplified food service "rather than a full-scale restaurant").

¹⁷ See, e.g., *Beerheide*, 997 F. Supp. at 1412 (noting that Colorado Department of Corrections cited cost concerns as justification for policy of not providing kosher diets); *Cooper v. Rogers*, 788 F. Supp. 255, 260 (D. Md. 1991) (denying Jewish inmate's request for particularized kosher diet, holding that costs associated with kosher meals "cannot be dismissed as de minimis"); see also JOHN W. PALMER, CONSTITUTIONAL RIGHTS OF PRISONERS § 5.2.3, at 62 (1973) (noting that economic considerations are often cited by prison administrators as a justification for limiting inmates' free exercise of religion).

¹⁸ See, e.g., *Beerheide*, 997 F. Supp. at 1412 (Department of Corrections refusing to provide Jewish inmates kosher diets, arguing, *inter alia*, that providing kosher meals would adversely impact security); *United States v. Huss*, 394 F. Supp. 752, 762 (S.D.N.Y. 1975), *vacated on other grounds*, 520 F.2d 598 (2d Cir. 1975) (same); see also PALMER, *supra* note 17, § 5.2.1, at 59 ("The duty of prison officials to maintain security within an institution is the most frequently cited justification for limiting an inmate's religious freedom.").

¹⁹ See, e.g., *Cooper v. Lanham*, 145 F.3d 1323, No. 97-7183, 1998 WL 230913, at *2 (4th Cir. May, 7, 1998) (unpublished disposition) (discussing prison officials' concerns that if one dietary request is granted similar demands will proliferate); *Ben-Avraham v. Moses*, 1 F.3d 1246, No. 92-35604, 1993 WL 269611, at *2 (9th Cir. July 13, 1993) (unpublished disposition) (same); *Kahey*, 836 F.2d at 950 (same); *Beerheide*, 997 F. Supp. at 1410-12 (same).

²⁰ *Madison v. Horn*, No. Civ. A. 97-3143, 1998 WL 531830, at *11 (E.D. Pa.

us between prison dietary policy and correctional goals. Part I of this Note explains the laws of kashruth and the significant role it plays in Jewish prisoners' lives. Part II of this Note traces the historical development of Jewish prisoners' First Amendment rights to a kosher diet. This Part will: (1) analyze the various standards the courts have applied in cases regarding prisoners' First Amendment rights; and (2) discuss the effect these standards have had on observant Jewish prisoners' attempts to procure kosher diets. Finally, Part III of this Note takes a closer look at the various penological interests commonly asserted for prohibiting or curtailing Jewish prisoners' First Amendment rights to a kosher diet and submits that, regardless of the standard of review applied, these interests are invalid justifications for refusing to provide kosher diets. This Part then: (1) analyzes the Federal Bureau of Prisons Common Fare Religious Diet program, which accommodates the kosher dietary needs of observant Jewish inmates; and (2) submits that the existence of such a program casts doubt on the necessity of kosher dietary regulations.²¹

I. THE LAWS OF KASHRUTH

A. *Its Meaning*

The Hebrew term "kashruth" is "the collective term for the Jewish laws and customs pertaining to the types of food permitted for consumption and their preparation."²² Although the rules of kashruth, or keeping kosher, are based on the Five Books of Moses,²³ Jewish dietary law "has developed continuously since [the Biblical period] through interpretation, legislation, and custom . . ."²⁴ Because the laws of kashruth are

Aug. 21, 1998) (holding that Pennsylvania Department of Corrections policies and regulations do not unduly burden Orthodox Muslim inmates' First Amendment rights).

²¹ See *Procunier v. Martinez*, 416 U.S. 396, 414 n.14 (1974), *overruled by* *Thornburgh v. Abbott*, 490 U.S. 401 (1989) ("While not necessarily controlling, the policies followed at other well-run institutions would be relevant to a determination of the need for a particular type of restriction.").

²² Masoudi, *supra* note 9, at 668 (citation omitted) (analyzing limitations imposed by First Amendment on kosher food laws).

²³ See *Zogry*, *supra* note 8, at 906-07 (discussing several passages in the Five Books of Moses regarding kashruth).

²⁴ Mark A. Berman, *Kosher Fraud Statutes and the Establishment Clause: Are*

classified as "divine statutes . . . lacking any explicit explanation,"²⁵ rationales underlying Jewish dietary law are often misinterpreted. For example, a common misconception about kashruth is that it "involve[s] cleanliness or alimentary needs in [a] hygienic or nutritional sense."²⁶ Kosher food is neither healthier nor cleaner than non-kosher food,²⁷ however, and scholars suggest that the main purpose behind these laws is not hygiene, but holiness.²⁸ "[W]hat is involved is the issue of godliness. Each person observing kashruth is treated as if he were in a direct relationship with God, observing what in other religions might be considered a priestly function at the table in the sequence of preparation and service of food and of prayers."²⁹

Observing the rules of kashruth is not a "frivolous notion We are talking about a critical need of the Jew[s] to relate with [their] God in a series of instructions that have been [their] mark of distinction from the days that [they] left Egypt . . . thousands of years ago."³⁰ Therefore, an observant

They Kosher?, 26 COLUM. J.L. & SOC. PROBS. 1, 3 (1992) (alteration in original) (quoting ELIOT N. DORFF & ATHUR ROSETT, *A LIVING TREE* 13-14 (1988)).

²⁵ *Id.*

²⁶ *United States v. Kahane*, 396 F. Supp. 687, 692 (E.D.N.Y. 1975) (recognizing Jewish inmate's constitutional right to diet that conforms to laws of kashruth).

²⁷ See Berman, *supra* note 24, at 4 & n.12. The author noted the following:

A kosher specialist from the [USDA] blew a hole in the perception that kosher foods are healthier than their secular competitors [M]any cuts of meat meeting kosher standards are actually fatter than USDA-approved meats . . . which may be why consumers prefer the taste of kosher meats USDA inspection procedures have improved to the point that occasionally animals approved for kosher slaughter fail to meet USDA standards, rather than vice versa

Id. at 4 n.12 (citation omitted). Further, the author cited a study which indicated that kosher turkeys had higher salmonella levels than non-kosher turkeys. See *id.*

²⁸ See *id.* at 5 ("Today there is general agreement among Orthodox and Conservative authorities that the rationale for the dietary laws has nothing to do with health In the Torah, the laws of kashrut are closely associated with the idea of 'holiness.'"); Masoudi, *supra* note 9, at 668 (same); Zogry, *supra* note 8, at 908 (same).

²⁹ *Kahane*, 396 F. Supp. at 692; see also Zogry, *supra* note 8, at 908 ("Through the Torah, Judaism teaches its followers to know God and to serve God in all ways. All deeds should be made holy, both the extraordinary and the ordinary, '(a)nd what is more common, more ordinary, more seemingly trivial and inconsequential that [sic] the process of eating?' (first alteration in original) (citation omitted)).

³⁰ *Kahane*, 396 F. Supp. at 691 (quoting testimony of Rabbi Moishe D. Tendler).

Jew must maintain a strict kosher diet at all times, even when imprisoned,³¹ and the kosher dietary laws can be interrupted only when life is in danger. "If all [an orthodox Jew] had was non-kosher food to eat, he would have to wait until his physiological state—his vital signs would be so determined by competent medical authorities that he is in danger of dying—then and only then could he partake of food"³²

B. *The Basic Laws*

One of the primary concerns of the Jewish dietary laws involves the types of food an observant Jew may consume and how such food must be prepared. For example, while all fruits and vegetables are kosher,³³ the Torah prohibits the eating of certain meat,³⁴ poultry,³⁵ and fish.³⁶ In addition to prescribing the types of food that may be eaten, the laws of kashruth also dictate the proper preparation of such food:

Only a trained kosher slaughterer (shochet) whose piety and expertise have been attested to by rabbinic authorities is qualified to slaughter an animal. The trachea and esophagus [sic] of the animal are severed with a special razor-sharp, perfectly smooth blade causing instantaneous death with no pain to the animal After the animal has been properly slaughtered, a trained inspector (hodek) inspects the internal organs for any physiological abnormalities that may render the animal non-kosher (treif). The lungs in particular, must be examined to determine that there are no adhesions (sirchot)

³¹ See *id.* at 690-91 (summarizing testimony of Rabbi Moishe D. Tendler).

³² *Id.* (alteration in original) (quoting testimony of Rabbi Moishe D. Tendler).

³³ See Berman, *supra* note 24, at 6.

³⁴ See *Leviticus* 11:3 (prohibiting the eating of animals that do not chew their cud and are not cloven-hoofed); see also *How Do I Know It's Kosher? An OU Kosher Primer* (visited Nov. 6, 1998) <<http://www.ou.org/kosher/primer.html>> [hereinafter *Kosher Primer*].

³⁵ See *Leviticus* 11:13-19 (permitting the eating of chicken, turkey, and duck, but prohibiting the consumption of fowl such as hawk and eagle); see also *Kosher Primer*, *supra* note 34.

³⁶ See *Leviticus* 11:9 (permitting the consumption of fish that have "fins and scales in the waters, in the seas, and in the rivers"). "Among those that are clean are carp, trout and salmon. Among those generally considered unclean are the shark, the catfish and the eel." Masoudi, *supra* note 9, at 669. In addition, all shellfish are prohibited. See *Leviticus* 11:9-12; see also *Kosher Primer*, *supra* note 34.

which may be indicative of a puncture in the lungs. If an adhesion is found, the bodek must examine it carefully to determine its kashruth status.³⁷

After inspection, the meat must be put through the process of "koshering."³⁸

The dramatic growth of the American kosher food industry in the past ten years,³⁹ however, has made the preparation of kosher meals easier. Observant Jews no longer have to prepare kosher meals from scratch; instead, they can buy pre-packaged and pre-prepared kosher items.⁴⁰ Although these meals must still be approved by kashruth-approval authorities,⁴¹ they make compliance with the laws of kashruth a bit less burdensome.

Another vital facet of the Jewish dietary laws is that meat and dairy products may not be eaten together. The Torah's directive, "[t]hou shalt not seethe a kid in its mother's milk,"⁴² prohibits "cooking meat and milk together; eating such mixture; and deriving any benefit from such a mixture."⁴³ To

³⁷ *Kosher Primer*, *supra* note 34.

³⁸ "Koshering" involves extracting the blood from meat by either salting or broiling the meat. See *Kosher Primer*, *supra* note 34. If the meat is not koshered within 72 hours after slaughter, the meat must be koshered through the broiling process. See Berman, *supra* note 24, at 6-7.

³⁹ See Marilyn Henry, *Kosher, Tasty and Profitable*, JERUSALEM POST, February 21, 1996, at 6. The author notes that the American kosher food industry has "gone far beyond its traditional product range. The 'kosher aisle' is gone. Instead, kosher foods are interspersed throughout the stores and may account for as much as 40 percent of the non-meat products in supermarkets in the Northeast." *Id.*

⁴⁰ See *Kosher Primer*, *supra* note 34 (noting that traveling observant Jews can take frozen T.V. dinners with them); see also Joseph Hanania, *Kosher Gains New Following; Health-Food Fans, Christians Add to Growing Market*, CLEV. PLAIN DEALER, January 3, 1996, at 1E ("[Kosher foods] range from See's Candies to Dole Pineapples, from Ronzoni macaroni to Bazooka bubble gum, from Sunkist orange juice to Knudsen's dairy products. Kosher foods also include King's Hawaiian Bakery and Country Hearth corn bread; A & W Root Beer and Seven-Up; Pillsbury Dough and Campbell's Soups—as well as the drinks and snacks on American, Delta and Northwest airlines.").

When pre-packaged/pre-prepared kosher meals are heated in a non-kosher oven, however, the foods must be heated exactly the way they are received, totally wrapped in two layers of foil with the manufacturer's seal and the Rabbinic certification seal intact. See *Kosher Primer*, *supra* note 34.

⁴¹ An example of such an authority is the Orthodox Union, the largest kosher certification organization. See *About the Orthodox Union* (visited Nov. 8, 1998) <<http://www.ou.org/>> [hereinafter *Orthodox Union*].

⁴² *Exodus* 23:19.

⁴³ Masoudi, *supra* note 9, at 669 (footnote omitted).

comply with this directive, an observant Jew must use a separate set of utensils for meat and milk products, and these utensils must not be commonly washed or stored.⁴⁴

C. *The Importance of Kashruth Inside Prison Gates*

Spiritual development and religious study are perhaps "the most valuable tools for rehabilitation and to prevent recidivism."⁴⁵ As one commentator noted:

Religion in prison can help an inmate 'prepare for a socially useful life.' In fact, it has been suggested that free exercise violations can be even more harmful to prisoners than to free persons because prisoners' 'means of spiritual recovery are limited by the prison environment.' . . . [R]eligion plays a crucial role in managing a prison and the 'positive effect that religion can have on an inmate is immeasurable.'⁴⁶

Indeed, prison officials recognize the importance of religious involvement in prison. As an assistant state commissioner of corrections commented, "In a state of incarceration, especially when you're doing heavy time, you don't have many hope pegs to hang your being on. Religion is one of those hope pegs."⁴⁷ Even the courts have recognized that "[s]tripping a prisoner of the opportunity to maintain and strengthen his religious and ethical values would be so counterproductive of good sentencing principles as to require reconsideration of incarceration."⁴⁸

⁴⁴ See Berman, *supra* note 24, at 7; Masoudi, *supra* note 9, at 669. To avoid the burdens of the storage and use requirements of utensils and containers, observant Jews can use disposable utensils and containers. See Ashelman v. Wawrzaszek, 111 F.3d 674, 678 (9th Cir. 1997) (noting that observant Jewish inmate could eat kosher meal with disposable utensils); United States v. Kahane, 396 F. Supp. 687, 702 (E.D.N.Y. 1975) (noting that prisons could purchase pre-packaged, frozen kosher meals accompanied by disposable utensils).

⁴⁵ *Hearings on The Need for Federal Protection of Religious Freedom After Boerne v. Flores Before the Comm. on the Judiciary*, 105th Cong. 5 (1998) (statement of Isaac M. Jaroslawicz, Director of Legal Affairs for the Aleph Institute); see also Braunstein, *supra* note 2, at 2384-86 (discussing studies showing that religion has proven to be a useful form of rehabilitation for prisoners).

⁴⁶ Braunstein, *supra* note 2, at 2385 (citations omitted).

⁴⁷ Ari L. Goldman, *Sing Sing Inmates Hail Plan to Offer Kosher Meals*, N.Y. TIMES, Sept. 6, 1993, at 20 (quoting Rev. Earl B. Moore, a Baptist minister and assistant state commissioner of correction).

⁴⁸ *Kahane*, 396 F. Supp. at 695.

Specifically, the religious practice of adhering to kosher dietary laws has beneficial effects on Jewish prisoners' spiritual development. Jewish dietary laws "were given not for the good of the body but that of the soul . . . [A]nimals which are permitted to be eaten are of a higher spiritual nature, resulting in a higher spiritual health and a more saintly character for humans who consume them."⁴⁹ Eating kosher food is also "one of the best possible insurance policies to help keep the . . . body pure."⁵⁰ As Rabbi I. Harold Sharfman, leader of the Kosher Overseers Association of America, stated:

"Judaism is a system of laws and life inspired by divine teachings. The Torah does not give direct reasons for kosher laws other than they are holy. But eating kosher separates people. Those who observe kosher laws are more likely to observe other biblical injunctions and lead a healthier, moral life."⁵¹

In addition, Jewish prisoners gain a sense of identity by adhering to the kosher dietary laws:

Kashruth for the contemporary Jew has become a rallying point for Jewish identity. So much so that even non-observant Soviet prisoners of Zion refused to consume non-kosher food in their prison cells in order to affirm their identification with the Jewish people past, present and future. Some Soviet Jewish heroes and heroines have subsisted on diets of tea and crackers for years rather than let a non-kosher morsel pass through their mouths.⁵²

Moreover, the religious practice of adhering to the laws of kashruth certainly has positive effects on Jewish prisoners' attitudes and behaviors. Perhaps the most convincing evidence comes directly from observant Jewish prisoners themselves. As one Jewish inmate stated, "Knowing that [the food is] kosher makes me feel better. For me, it has both spiritual and physical benefits."⁵³ Similarly, other observant Jewish prisoners look forward to receiving kosher meals. As an observant Jewish inmate housed in New York's Sing Sing prison remarked, "I was never very observant or knowledgeable before I came

⁴⁹ Ephraim Buchwald, *Kashruth: An Interpretation for the 20th Century* (visited Nov. 8, 1998) <<http://www.njop.org/koshint.htm>>.

⁵⁰ Hanania, *supra* note 40, at 1E.

⁵¹ Hanania, *supra* note 40, at 1E (quoting Rabbi I. Harold Sharfman).

⁵² Buchwald, *supra* note 49, at 5.

⁵³ Goldman, *supra* note 47, at 20 (quoting Joel Kalish, a 38-year-old observant Jewish inmate convicted of drug possession).

[to the prison]. Everything I know, I learned here. I have discovered great knowledge and inspiration. I finally found myself. I was lost in the world. It's a mitzvah that we all have to observe [the Jewish dietary laws] if we want to be good believers."⁵⁴

Evidently, "Kashruth in the 20th century is far more than a religious ritual, it is a bond which unites Jew to 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."⁵⁵ This notion has no less force inside the prison gates.

II. HISTORICAL DEVELOPMENT OF JEWISH PRISONERS' FIRST AMENDMENT RIGHT TO KOSHER DIETS

A. *Heightened Scrutiny of Prison Dietary Regulations: Federal Court Decisions Between 1974 and 1987 and the General Success of Jewish Prisoners*

The United States Supreme Court has never directly spoken to the issue of whether Jewish prisoners have a First Amendment right to observe the laws of kashruth. Between 1974 and 1987, however, the Court, in several important cases, considered the proper standard of review for prisoners' challenges to prison regulations and practices infringing on their First Amendment rights.⁵⁶ The first standard of review for cases dealing with First Amendment rights in the prison context was delineated by the Court 25 years ago in *Procunier v. Martinez*.⁵⁷ In *Martinez*, California state prisoners brought a class action challenging inmate mail censorship regula-

⁵⁴ *Id.* (quoting Iznaga Ricardo, a 50-year-old Jewish inmate from Cuba who was three years into a 10-year sentence).

⁵⁵ Buchwald, *supra* note 49, at 5.

⁵⁶ See, e.g., *Bell v. Wolfish*, 441 U.S. 520 (1979) (applying rational basis standard of review and upholding Federal Bureau of Prisons regulation that restricted receipt of hardback books); *Jones v. North Carolina Prisoners' Labor Union, Inc.*, 433 U.S. 119 (1977) (applying a deferential, rational basis standard of review and upheld prison regulations that prohibited, *inter alia*, meetings of a prisoners' labor union); *Pell v. Procunier*, 417 U.S. 817 (1974) (deferring to judgment of prison officials and upholding prison regulation that banned press and media interviews); *Procunier v. Martinez*, 416 U.S. 396 (1974), *overruled by Thornburgh v. Abbott*, 490 U.S. 401 (1989) (applying "important or substantial interest" test and holding restrictions on inmate mail unconstitutional).

⁵⁷ 416 U.S. 396 (1974), *overruled by Thornburgh v. Abbott*, 490 U.S. 401 (1989).

tions that prohibited prisoner correspondence that "unduly complain(ed),' 'magnif(ied) grievances,' 'express(ed) inflammatory pollitical [sic], racial, religious or other views or beliefs,' or contained matter deemed 'defamatory' or 'otherwise inappropriate.'"⁵⁸

The Court noted that the federal courts adopted inconsistent standards for prison regulations restricting First Amendment interests⁵⁹ and recognized the need to formulate a consistent standard of review.⁶⁰ The *Martinez* Court held that a regulation of inmate mail is justified only if the following criteria are satisfied:

First, the regulation or practice in question must further an important or substantial governmental interest unrelated to the suppression of expression. Prison officials may not censor inmate correspondence simply to eliminate unflattering or unwelcome opinions or factually inaccurate statements. Rather, they must show that a regulation . . . furthers one or more of the substantial governmental interests of security, order, and rehabilitation. Second, the limitation of First Amendment freedoms must be no greater than is necessary or essential to the protection of the particular governmental interest

⁵⁸ *Id.* at 396 (alterations in original).

⁵⁹ Specifically, the Court noted:

Some [federal courts] have maintained a hands-off posture in the face of constitutional challenges to censorship of prisoner mail. Another [federal court] has required only that censorship of personal correspondence not lack support 'in any rational and constitutionally acceptable concept of a prison system.' At the other extreme some courts have been willing to require demonstration of a 'compelling state interest' to justify censorship of prisoner mail And there are various intermediate positions, most notably the view that a 'regulation . . . must be related both reasonably and necessarily to the advancement of some justifiable purpose.'

Id. at 406-07 (citations omitted).

⁶⁰ See *id.* at 407. Before announcing a new standard of review, however, the Court noted that because inmate correspondence also involved parties outside of prison, it was unnecessary to decide the extent to which prisoners, exclusively, were able to claim First Amendment rights:

[T]he arguments of the parties reflect the assumption that the resolution of this case requires an assessment of the extent to which prisoners may claim First Amendment freedoms. In our view this inquiry is unnecessary. In determining the proper standard of review for prison restrictions on inmate correspondence, we have no occasion to consider the extent to which an individual's right to free speech survives incarceration, for a narrower basis of decision is at hand.

Id. at 408. However, two months later, in *Pell v. Procunier*, 417 U.S. 817 (1974), the Court enunciated a general standard to be used in cases of restrictions on prisoners' First Amendment rights. See *Pell*, 417 U.S. at 827.

involved. Thus a restriction . . . that furthers an important or substantial interest of penal administration will nevertheless be invalid if its sweep is unnecessarily broad.⁶¹

Applying this heightened scrutiny standard,⁶² the Court found that the restrictions on prisoner mail were in no way necessary to the furtherance of legitimate government interests because the California Department of Corrections failed to show how statements in letters could possibly lead to flash riots.⁶³ Additionally, the Department of Corrections failed to specify what contribution the suppression of complaints in letters made to the rehabilitation of criminals.⁶⁴ "[T]he Department's regulations authorized censorship of prisoner mail far broader than any legitimate interest of penal administration demands"⁶⁵

Approximately two months later, in *Pell v. Procunier*,⁶⁶ the Court again faced the issue of the extent of First Amendment rights in the prison context. *Pell* involved a First Amendment challenge to a California Department of Corrections regulation that prohibited face-to-face "press and other media interviews with specific individual inmates."⁶⁷ In rejecting the inmates' First Amendment challenge to the ban on press and media interviews and holding that the prison regulation did not violate the constitutional rights of the prisoners⁶⁸ because

⁶¹ *Martinez*, 416 U.S. at 413-14.

⁶² See Abromovsky, *supra* note 5, at 245 (describing the *Martinez* test as a "two-pronged, intermediate scrutiny standard"); Andrea Bernstein, *Free Exercise of Religion in Prisons—The Right to Observe Dietary Laws*, 45 *FORDHAM L. REV.* 92, 108 (1976) (describing the *Martinez* test as an "important or substantial interest test"); cf. Lorie Jean Golichowski Dei, Note, *The New Standard of Review for Prisoners' Rights: A 'Turner' For the Worse?*, 33 *VILL. L. REV.* 393, 414 (1988) (describing the *Martinez* standard as one of "strict scrutiny").

⁶³ See *Martinez*, 416 U.S. at 416.

⁶⁴ See *id.*

⁶⁵ *Id.*

⁶⁶ 417 U.S. 817 (1974).

⁶⁷ *Id.* at 819.

⁶⁸ See *id.* at 835.

alternative means of communication were available,⁶⁹ the Court stated:

Such considerations [of institutional security, administrative efficiency, and inmate rehabilitation] are peculiarly within the province and professional expertise of corrections officials, and in the absence of substantial evidence in the record to indicate that the officials have exaggerated their response to these considerations, courts should ordinarily defer to their expert judgment in such matters.⁷⁰

Notwithstanding the Court's adoption of what appeared to be a reasonableness test,⁷¹ giving greater deference to prison officials, at least one lower court appeared hesitant to give greater deference to prison officials in the context of Jewish dietary regulations. Less than one year after *Pell*, a New York district court, in *United States v. Kahane*,⁷² considered for the first time whether a Jewish prisoner was entitled to a kosher diet,⁷³ and in holding for the Jewish inmate, appeared to adopt the *Martinez* heightened scrutiny standard.⁷⁴

⁶⁹ Although the Court recognized that face-to-face meetings had inherent qualities, the Court "regard[ed] the available 'alternative means of (communication as) a relevant factor' in a case such as this where 'we (are) called upon to balance First Amendment rights against (legitimate) governmental interests.'" *Id.* at 824 (citation omitted) (first alteration added). The Court noted that the alternative channels of communication that were available to the prisoners included mail communication and "limited visits from members of their families, the clergy, their attorneys, and friends of prior acquaintance." *Id.* at 824-25.

⁷⁰ *Pell*, 417 U.S. at 827. The Court did, however, caution that "[c]ourts cannot, of course, abdicate their constitutional responsibility to delineate and protect fundamental liberties." *Id.*

⁷¹ See Bernstein, *supra* note 62, at 101 ("[T]he reasonableness test received new vitality in . . . *Pell v. Procunier*"); see also Dei, *supra* note 62, at 408 (noting that "*Pell* differs from *Martinez* in that it does not discuss the least restrictive alternative means requirement of *Martinez*").

⁷² 396 F. Supp. 687 (E.D.N.Y. 1975).

⁷³ See *id.* at 700 ("[W]e have found no cases deciding whether prison officials are compelled to provide kosher food to Jewish prisoners.").

⁷⁴ Although not specifically stating that it was applying the *Martinez* test, the court appeared to place the burden on prison officials. See *id.* at 703 (holding that prison officials failed to show how providing a kosher diet would adversely affect penological interests). Additionally, the court relied heavily on an examination of the Muslim food cases, stating that those cases "require the least denigration of the human spirit and mind consistent with the needs of a structured correctional society. This balance is in general accord with the Supreme Court's recent discussion of the appropriate standard for First Amendment rights in the context of prisons in *Procunier v. Martinez*." *Id.*

Meir Kahane, an orthodox Jewish rabbi, was convicted of violating probation and sentenced to one year in prison.⁷⁵ Although the trial court ordered that Kahane "be placed in an institution, and in a setting so that he can obtain . . . kosher foods and (comply with) other religious requirements that he may reasonably have,"⁷⁶ the government denied him kosher food, arguing, *inter alia*, that "it would be burdensome to meet the religious dietary needs of its diverse prison population."⁷⁷ Thus, Kahane brought an action in the United States District Court for the Eastern District of New York, seeking a kosher diet.⁷⁸

Relying on its examination of cases regarding Muslim dietary requirements,⁷⁹ the court held that "[Kahane] is constitutionally entitled to an order . . . that allows him to conform to Jewish dietary laws."⁸⁰ In reaching its decision, the court reasoned that "[t]he government has shown no seri-

⁷⁵ See *id.* at 689.

⁷⁶ *Kahane*, 396 F. Supp. at 689 (alteration in original).

⁷⁷ *Id.* at 690. The government argued that denying Jewish prisoners access to a kosher diet was consistent with the Federal Bureau of Prisons policy that kosher food

'is not to be made available to the inmates on a routine basis. It has been the Bureau's decision that administrative, financial, disciplinary, and security problems which would be created by the offering of such food so far outweigh the incidental burdens upon the practice of the inmates' various religions as to preclude attempting to accommodate the dietary needs of the diverse groups within the prison population.'

Id. at 692.

⁷⁸ See *id.*

⁷⁹ The court quoted *Barnett v. Rogers*, 410 F.2d 995 (D.C. Cir. 1969), a leading case protecting the religious dietary requirements of Muslim prisoners:

"To say that religious freedom may undergo modification in a prison environment is not to say that it can be suppressed or ignored without adequate reason. And although 'within the prison society as well as without, the practice of religious beliefs is subject to reasonable regulations, necessary for the protection and welfare of the community involved,' the mere fact that government, as a practical matter, stands a better chance of justifying a curtailment of fundamental liberties where prisoners are involved does not eliminate the need for reasons imperatively justifying the particular retraction of rights challenged at bar. Nor does it lessen governmental responsibility to reduce the resulting impact upon those rights to the fullest extent consistent with the justified objective."

Kahane, 396 F. Supp. at 700-01.

In addition to examining cases regarding the religious dietary requirements of Muslim inmates, the court also relied on its interpretation of the importance of Jewish dietary law. See *id.* at 690-94 (discussing importance of kosher food).

⁸⁰ *Id.* at 704.

ous, much less compelling, reasons why provision of a kosher diet for this [Jewish inmate] would affect prison security or discipline."⁸¹

In affirming the lower court's decision as modified,⁸² the Second Circuit subjected the prison dietary policy to a heightened scrutiny standard⁸³ 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."⁸⁴

Despite the Second Circuit's move in *Kahane* towards a more prisoner-friendly standard, the Supreme Court continued its trend of according greater deference to prison officials and taking a restrictive view of prisoners' retained constitutional rights. In *Jones v. North Carolina Prisoners' Labor Union, Inc.*,⁸⁵ the Court examined prison regulations that prohibited meetings of a prisoners' labor union, "inmate solicitation of other inmates, meetings between members of the Union, and bulk mailings concerning the Union from outside sources."⁸⁶ In upholding the prison regulations, the Court appeared to apply a rational basis standard of review.⁸⁷ The Court noted:

⁸¹ *Id.* at 703. *But see* *United States v. Huss*, 394 F. Supp. 752, 761 (S.D.N.Y. 1975), *vacated*, 520 F.2d 598 (2d Cir. 1975) (giving substantial deference to prison officials and holding that Jewish prisoners had no constitutional right to be provided kosher food).

⁸² *See Kahane v. Carlson*, 527 F.2d 492, 496 (2d Cir. 1975) (modifying lower court's order to ensure that specific items of kosher diet are left to discretion of prison officials).

⁸³ Although the court refused to decide whether constraints on inmates' First Amendment rights must be justified by the *Martinez* "important or substantial interest" standard, *see id.* at 495 ("[W]e need not decide whether restrictions on prisoners' First Amendment rights need be justified by an 'important or substantial government interest' or by . . . a 'compelling government interest.'"), it is evident that some form of a heightened scrutiny standard was adopted, "keep[ing] the burden of justification upon the government." Bernstein, *supra* note 62, at 107.

⁸⁴ *Kahane*, 527 F.2d at 495.

⁸⁵ 433 U.S. 119 (1977).

⁸⁶ *Id.* at 122.

⁸⁷ *See id.* at 130 ("An examination of the potential restrictions on speech or association that have been imposed by the regulations . . . demonstrates that the restrictions imposed are reasonable, and are consistent with the inmates' status as prisoners and with the legitimate operational considerations of the institution."); *see also* Dei, *supra* note 62, at 409 ("The *Jones* Court's analysis appeared to minimally balance interests by applying a rational basis standard of review which emphasized deference to prison officials and the incompatibility of the exercise of certain rights and incarceration.").

The District Court . . . got off on the wrong foot . . . by not giving appropriate deference to the decisions of prison administrators and appropriate recognition to the peculiar and restrictive circumstances of penal confinement. While litigation by prison inmates concerning conditions of confinement . . . is of recent vintage, this Court has long recognized that "(l)awful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations underlying our penal system. The fact of confinement and the needs of the penal institution impose limitations on constitutional rights, including those derived from the First Amendment"⁸⁸

The Court further emphasized that the burden was not on the prison officials "to show affirmatively that the Union would be 'detrimental to proper penological objectives' or would constitute a 'present danger to security and order.'"⁸⁹ Absent a showing that the prison officials' beliefs regarding increased danger and chaos were unreasonable,⁹⁰ the prisoners' constitutional challenges had to be rejected.⁹¹

Several years later, in *Bell v. Wolfish*,⁹² the Court again applied a rational basis standard of review to a Federal Bureau of Prisons rule that prohibited inmates' "receipt of hardback books unless mailed directly from publishers, book clubs, or bookstores."⁹³ In upholding the regulation, the Court noted that the prison officials did not "exaggerate[] their response" to security problems; rather, the restriction was a "rational response . . . to an obvious security problem."⁹⁴ Absent an overly broad regulation, therefore, the Court determined that it should "defer to [corrections officials'] expert judgment."⁹⁵

⁸⁸ *Jones*, 433 U.S. at 125 (citations omitted) (alteration in original).

⁸⁹ *Id.* at 128.

⁹⁰ *See id.* at 127-28.

⁹¹ *See id.* at 136.

⁹² 441 U.S. 520 (1979).

⁹³ *Id.* at 550.

⁹⁴ *Id.* The Court noted that "[i]t hardly needs to be emphasized that hardback books are especially serviceable for smuggling contraband into an institution; money, drugs, and weapons easily may be secreted in the bindings. They are also difficult to search effectively." *Id.*

⁹⁵ *Id.* at 548. The Court noted that considerations of internal order and discipline and the maintenance of institutional security are "'peculiarly within the province and professional expertise of corrections officials.'" *Bell*, 441 U.S. at 547-48 (quoting *Pell v. Procunier*, 417 U.S. 817, 827 (1974)).

An examination of the lower courts' treatment of religious dietary regulations reveals, nevertheless, that *Jones's* and *Bell's* bark was worse than their bite for Jewish prisoners trying to obtain kosher diets. Despite the Supreme Court's statement that the standards of review in *Jones* and *Bell* were not heightened scrutiny standards,⁹⁶ it appears that, during this time period, the lower courts, in construing the foregoing Supreme Court decisions, have generally applied some form of an intermediate level scrutiny standard of review to prison regulations,⁹⁷ specifically those restricting Jewish prisoners' access to kosher food. Interestingly, the trend in the lower courts, even after *Jones* and *Bell*, was that Jewish prisoners were generally able to procure kosher diets.⁹⁸

For example, in *Prushinowski v. Hambrick*,⁹⁹ an Orthodox Jewish inmate at a federal correctional institute in North Carolina petitioned for a writ of habeas corpus pursuant to 28 U.S.C. § 2241, arguing that prison officials "failed to provide him with facilities and foods in order that he may observe the Jewish dietary laws."¹⁰⁰ Before determining whether prison

⁹⁶ See *Turner v. Safley*, 482 U.S. 78, 87 (1987) ("In none of these . . . 'prisoners' rights' cases did the Court apply a standard of heightened scrutiny, but instead inquired whether a prison regulation that burdens fundamental rights is 'reasonably related' to legitimate penological objectives, or whether it represents an 'exaggerated response' to those concerns.").

⁹⁷ See *Abramovsky*, *supra* note 5, at 246 ("Since none of these cases [referring to *Jones*, *Bell*, and *Block v. Rutherford*, 468 U.S. 576 (1984)] expressly overruled *Martinez*, federal courts . . . continued to apply the intermediate scrutiny test for restrictions on the First Amendment rights of inmates . . ."); *Zogry*, *supra* note 8, at 912 ("The burden of proving religious curtailment was shifted from the prisoner . . . to the prison officials . . .").

⁹⁸ See, e.g., *Theodore v. Coughlin*, No. 83 Civ. 6668, 1986 WL 11456 (S.D.N.Y. Oct. 7, 1986) (deprivation of kosher diet for first three weeks of incarceration violated inmate's First Amendment rights); *Prushinowski v. Hambrick*, 570 F. Supp. 863 (E.D.N.C. 1983) (holding that Jewish inmate has First Amendment right to kosher diet); *Schlesinger v. Carlson*, 489 F. Supp. 612 (M.D. Pa. 1980) (Orthodox Jewish inmate who followed laws of kashruth entitled to hot plate and access to separate area of prison to prepare his meals during Passover holiday); see also *Abramovsky*, *supra* note 5, at 265 ("In contrast to difficulties they have had in securing the right to observe certain other religious practices, Jewish prisoners have been largely successful in obtaining kosher food."); *Zogry*, *supra* note 8, at 912 ("[C]ases show the law favoring prisoners in issues regarding the Free Exercise protection of rights involving the kosher laws.").

⁹⁹ 570 F. Supp. 863 (E.D.N.C. 1983).

¹⁰⁰ *Id.* at 863. The inmate alleged that the prison officials' failure to provide a kosher diet caused him to become ill. See *id.*

officials were required to provide a kosher diet, 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 In addition, the prison regulation "must be 'reasonably and substantially justified by considerations of prison discipline and order' and must be the least restrictive alternative available."¹⁰² Essentially, the court determined that it was required to balance the Jewish inmate's First Amendment rights with prison security and discipline.¹⁰³

Relying on *Kahane*, the court stated that "the burden falls on the prison officials to prove that the food available to a religious inmate is consistent with his dietary laws and provides adequate nourishment."¹⁰⁴ The prison officials, however, failed to satisfy that burden.¹⁰⁵ Therefore, the court held that the Jewish inmate should be provided with the requested kosher diet "so that he will not be required to sacrifice his religious beliefs in order to maintain his health. The First Amendment requires as much."¹⁰⁶

Notwithstanding the Supreme Court decisions since *Martinez*,¹⁰⁷ Jewish prisoners, between 1974 and 1987, have had general success in procuring kosher diets. This result was due

¹⁰¹ *Id.* at 866 (citing *Cruz v. Beto*, 405 U.S. 319 (1972)).

¹⁰² *Id.* (citation omitted). Although the court made no mention of *Martinez*, it appeared to adopt *Martinez's* "least restrictive alternative means" requirement. See *Procunier v. Martinez*, 416 U.S. 396, 413-14 (1974), *overruled by* *Thornburgh v. Abbott*, 490 U.S. 401 (1989) ("[T]he limitation of First Amendment freedoms must be no greater than is necessary or essential to the protection of the particular governmental interest involved.").

¹⁰³ See *Prushinowski*, 570 F. Supp. at 866.

¹⁰⁴ *Id.*

¹⁰⁵ The prison presented various reasons as to why they should not have been required to provide *Prushinowski* with the kosher food he requested. First, the officials argued that the First Amendment required that they only provide kosher food that is acceptable to other Jewish inmates and that *Prushinowski's* requests were peculiar. See *id.* at 867. Second, the prison officials argued that providing the requested kosher food would create security problems. See *id.* at 868. Finally, the officials contended that it would be too costly to provide *Prushinowski* with his requested kosher food. See *id.* The court determined, however, that none of these arguments were effective. See *Prushinowski*, 570 F. Supp. at 867.

¹⁰⁶ *Id.* at 867.

¹⁰⁷ For a discussion of *Pell v. Procunier*, 417 U.S. 817 (1974), *Jones v. North Carolina Prisoners' Labor Union, Inc.*, 433 U.S. 119 (1977), and *Bell v. Wolfish*, 441 U.S. 520 (1979), see *supra* Part II.A.

to the lower courts' application of some form of a heightened scrutiny standard of review, placing the burden of proving religious curtailment on prison officials. As a result of the Supreme Court decisions of *Turner v. Safley*¹⁰⁸ and *O'Lone v. Estate of Shabazz*,¹⁰⁹ however, this trend soon changed.¹¹⁰

B. *A New Trend in Jurisprudence: Turner v. Safley/O'Lone v. Estate of Shabazz and Their Adverse Effect on Jewish Prisoners' Attempts to Procure Kosher Diets*

In *Turner v. Safley*,¹¹¹ inmates brought a class action challenging the constitutionality of two prison regulations enacted by the Missouri Division of Corrections.¹¹² In determining whether the prison restrictions were constitutional, the United States Supreme Court began its analysis by stating that the lower courts incorrectly decided that *Martinez* and subsequent Court decisions "require the application of a strict scrutiny standard of review for resolving [inmates'] constitutional complaints."¹¹³ The Court, in deciding what standard of

¹⁰⁸ 482 U.S. 78 (1987).

¹⁰⁹ 482 U.S. 342 (1987).

¹¹⁰ See Zogry, *supra* note 8, at 917-18 ("Turner reversed the law that governed prisoners for over a decade, and began a new trend in the jurisprudence that would adversely affect Orthodox Jewish prisoners.").

¹¹¹ 482 U.S. 78 (1987).

¹¹² See *id.* at 78. Specifically, the first regulation "permit[ted] correspondence between immediate family members who [were] inmates at different institutions within the Division's jurisdiction, and between inmates 'concerning legal matters,' but allow[ed] other inmate correspondence only if each inmate's classification/treatment team deem[ed] it in the best interest of the parties." *Id.* The second prison regulation "permit[ted] an inmate to marry only with the prison superintendent's permission, which [could] be given only when there [were] 'compelling reasons' to do so." *Id.*

¹¹³ *Id.* Pursuant to *Martinez*, the Court of Appeals for the Eighth Circuit decided that the prison regulations could be justified "only if [they] further[] an important or substantial governmental interest unrelated to the suppression of expression, and the limitation is no greater than necessary or essential to protect that interest." *Turner*, 482 U.S. at 83 (quoting *Safley v. Turner*, 777 F.2d 1307, 1310 (8th Cir. 1985)). Although the Eighth Circuit recognized that "*Martinez* had expressly reserved the question of the appropriate standard of review based on inmates' constitutional claims," it nevertheless believed that application of the *Martinez* standard was proper. *Id.* at 87. Based on the *Martinez* standard, the court of appeals held that the regulations were not the least restrictive means of achieving the rehabilitation and security goals of the prison. See *Turner*, 777 F.2d at 1315-16.

review was proper, summarized its decisions dealing with prison regulations subsequent to *Martinez*; specifically, *Pell*, *Jones*, and *Bell*.¹¹⁴ "If Pell, Jones, and Bell have not already resolved the question posed in *Martinez*, we resolve it now: when a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests."¹¹⁵

The Court enunciated a four-factor test to determine whether a prison regulation is reasonable:

First, there must be a "valid, rational connection" between the prison regulation and the legitimate governmental interest put forward to justify it A second factor . . . is whether there are alternative means of exercising the right that remain open to prison inmates. Where "other avenues" remain available for the exercise of the asserted right, courts should be particularly conscious of the "measure of judicial deference owed to corrections officials . . . in gauging the validity of the regulation. A third consideration is the impact accommodation of the asserted constitutional right will have on guards and other inmates, and on the allocation of prison resources generally Finally, the absence of ready alternatives is evidence of the reasonableness of a prison regulation. By the same token, the existence of obvious, easy alternatives may be evidence that the regulation is not reasonable, but is an "exaggerated response" to prison concerns.¹¹⁶

Applying this new four-part test, the Court upheld the inmate correspondence regulation, deciding that it was reasonably related to the goals of institutional safety and security.¹¹⁷ The marriage regulation, however, was not reasonably

¹¹⁴ See *Turner*, 482 U.S. at 86-87.

¹¹⁵ *Id.* at 89. The Court believed that a "reasonable relation" standard was required if "prison administrators . . . , and not the courts, [are] to make the difficult judgments concerning institutional operations." *Id.* (citation omitted). Subjecting prison regulations to a rigid strict scrutiny standard, however, would have detrimental effects on prison administration. Such a standard

would seriously hamper [prison officials'] ability to anticipate security problems and to adopt innovative solutions to the intractable problems of prison administration. The rule would also distort the decisionmaking process, for every administrative judgment would be subject to the possibility that some court somewhere would conclude that it had a less restrictive way of solving the problem at hand. Courts inevitably would become the primary arbiters of what constitutes the best solution to every administrative problem

Id.

¹¹⁶ *Id.* at 89-90 (citations omitted).

¹¹⁷ See *Turner*, 482 U.S. at 93.

related to rehabilitation and security concerns, and thus, was unconstitutional.¹¹⁸

On the same day as the *Turner* decision, the Court was required, in *O'Lone v. Estate of Shabazz*,¹¹⁹ to apply its new four-part standard to claims specifically involving the free exercise of religion. In *O'Lone*, Muslim prisoners brought suit pursuant to 42 U.S.C. § 1983, challenging a New Jersey prison regulation which prevented them from attending Jumu'ah, a weekly religious service.¹²⁰

The Court, applying the *Turner* factors, held that the prison regulation was reasonably related to the penological objectives of institutional security and order,¹²¹ and thus, did not violate the Muslim inmates' First Amendment rights.¹²² Further, the Court determined that the prisoners had alternative means of expressing their religion.¹²³

Thus, in *Turner* and *O'Lone*, the Court made it quite clear that prison regulations curtailing constitutional rights were not to be reviewed under any type of heightened scrutiny standard. Whereas in prior cases prison officials were required to explain the constitutionality of their regulations, the *Turner/O'Lone* four-part test shifted the burden of proof to the prisoner.¹²⁴

Applying the *Turner/O'Lone* test, lower courts seemed more willing than ever to deny Jewish prisoners' requests for

¹¹⁸ See *id.* at 97-98.

¹¹⁹ 482 U.S. 342 (1987).

¹²⁰ See *id.* at 345.

¹²¹ See *id.* at 350.

¹²² See *id.* at 345.

¹²³ See *id.* at 351-52. The Court recognized that there existed no alternative means of attending Jumu'ah. See *O'Lone*, 482 U.S. at 351. The Court stated, however:

While we in no way minimize the central importance of Jumu'ah to [the inmates], we are unwilling to hold that prison officials are required by the Constitution to sacrifice legitimate penological objectives to that end. In *Turner*, we did not look to see whether prisoners had other means of communicating with fellow inmates, but instead examined whether the inmates were deprived of "all means of expression." Here, similarly, we think it appropriate to see whether under these regulations [the inmates] retain the ability to participate in other Muslim religious ceremonies.

Id. at 351-52. The Court then noted that Muslim prisoners were served pork-alternative meals and that "special arrangements" were made during Ramadan, a month-long period of prayer and fasting. *Id.* at 352.

¹²⁴ See Zogry, *supra* note 8, at 920.

kosher diets.¹²⁵ In *Cooper v. Rogers*,¹²⁶ for example, an Orthodox Jewish inmate unsuccessfully brought an action pursuant to 42 U.S.C. § 1983, arguing that the Maryland Penitentiary refused to provide him with a kosher breakfast in violation of his First Amendment rights.¹²⁷ In determining whether the prison regulation was valid, 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."¹²⁸ Applying the *Turner* standard, the court upheld the prison regulation, finding that the regulation was rationally related to the prison officials' budgetary concerns.¹²⁹ Furthermore, the court noted that there existed reasonable alternatives for the inmate to practice his religion.¹³⁰

¹²⁵ See, e.g., *Holterman v. Helling*, 70 F.3d 1276 (8th Cir. 1995) (prison policy of refusing to provide kosher food to observant Jewish inmate rationally related to prison's economic and administrative concerns); *Ben-Avraham v. Moses*, 1 F.3d 1246 (9th Cir. 1993) (same); *Cooper v. Rogers*, 788 F. Supp. 255 (D. Md. 1991) (same).

Jewish prisoners did achieve some success in procuring kosher diets, but this success was due to the fact that at least one court continued to rely on *Kahane*, and was unwilling to apply the *Turner/O'Lone* standard. See *Bass v. Coughlin*, 976 F.2d 98, 99 (2d Cir. 1992) (per curiam) ("At least as early as 1975, it was established that prison officials must provide a prisoner a diet that is consistent with his religious scruples. *Kahane* has never been overruled and remains the law. The principle it established was not placed in any reasonable doubt by intervening Supreme Court rulings in *O'Lone* and *Turner* . . .").

¹²⁶ 788 F. Supp. 255 (D. Md. 1991).

¹²⁷ See *id.* at 256.

¹²⁸ *Id.* at 258 (applying *Turner* and *O'Lone* standard). The inmate urged the court to use a constitutional standard more deferential to prisoners, specifically the *Kahane* or *Prushinowski* standard. See *id.* at 258 n.8. The court stated, however, that "despite their factual relevance to this case, *Kahane* and *Prushinowski* can place no greater obligation on [the prison officials] than do *Turner* and *O'Lone*." *Id.*

¹²⁹ See *Cooper*, 788 F. Supp. at 260. The court noted that:

A specially ordered breakfast for [the inmate] would cost between \$2.50 and \$5.00, compared with approximately \$.50 if [the inmate] ate . . . items already available at breakfast. Additionally, a pre-packaged kosher breakfast unlike lunch and dinner, can only be ordered from a caterer in New York. These costs cannot be dismissed as de minimis, particularly in light of the impact which providing [the inmate] with special treatment might have upon the state's duty to provide similar treatment for inmates of other religions.

Id. (citing *Turner v. Safley*, 482 U.S. 78, 90 (1987)).

¹³⁰ See *id.* at 259 ("[E]ven if the kosher breakfast is not available, [the inmate] can . . . purchas[e] from the commissary breakfast foods which meet his kosher

Another case illustrating the courts' seemingly eager willingness under *Turner/O'Lone* to deny Jewish inmates' requests for kosher diets is *Ben-Avraham v. Moses*.¹³¹ In *Ben-Avraham*, a Hasidic Jewish prisoner brought suit against an Alaska state prison, contending that the prison officials' refusal to provide his requested kosher diet violated his First Amendment rights.¹³² The *Ben-Avraham* court began its analysis with the recognition that "[i]nmates . . . have the right to be provided with food sufficient to sustain them in good health that satisfies the dietary laws of their religion."¹³³ Applying the *Turner/O'Lone* test, however, the court stated that the prison officials' decision not to provide the inmate with his requested kosher diet was reasonably related to legitimate penological concerns, and thus, upheld the regulation.¹³⁴ In determining the reasonableness of the regulation, the court noted that the cost of the inmate's requested kosher meals was nearly three times as much as the cost of regular prison meals¹³⁵ and that the requested kosher meals were difficult to prepare, detrimentally affecting the prison staff's "duty to oversee the rest of the prison population."¹³⁶ Further, the court stated that providing the inmate with his requested diet

standards. While *Turner* and *O'Lone* specify alternative means of observance as an indication of reasonableness, neither opinion states that such an alternative must be state-subsidized.").

¹³¹ 1 F.3d 1246, No. 92-35604, 1993 WL 269611 (9th Cir. July 19, 1993) (unpublished disposition).

¹³² See *id.* at *1. Because of the prison's failure to provide his requested kosher diet, the inmate went on hunger strikes, lost a significant amount of weight and, for a time period, was placed in medical segregation. See *id.*

¹³³ *Id.* (citing *McElyea v. Babbitt*, 833 F.2d 196, 198 (9th Cir. 1987) (per curiam)).

¹³⁴ See *id.* at *3.

¹³⁵ See *Ben-Avraham*, 1993 WL 269611, at *2.

¹³⁶ *Id.* Specifically, the inmate insisted that his food be stored, cooked and served separately from all other food and that special kosher pots, dishes, and utensils be used. He insisted that his food be opened in his presence because he didn't trust the kitchen staff not to contaminate his food. Finally, different pans, dishes, and utensils had to be used for different foods.

Id. at *3 n.3.

"could lead to a proliferation of special diet requests, and to resentment by other prisoners and disruption of the administration of prison food service or prison discipline."¹³⁷ Moreover, the inmate had alternative ways to practice his religion.¹³⁸

Evidently, the Supreme Court decisions in *Turner* and *O'Lone* represented a turn for the worse for Jewish prisoners attempting to obtain kosher diets.¹³⁹ "With the heavy burden on the prisoner to show that his rights had been greatly circumscribed, the courts were reluctant to find constitutional violations. The new 'rational relation to legitimate penological interests' test effectively validated any prison regulation."¹⁴⁰ This trend came to a screeching halt, however, when Congress, in 1993, enacted the Religious Freedom Restoration Act ("RFRA").¹⁴¹

C. *The Religious Freedom Restoration Act: A "Strong Ally"*¹⁴²
For Jewish Prisoners in Their Fight Against Turner/O'Lone

The Religious Freedom Restoration Act explicitly created a "compelling state interest" standard to be applied in all free exercise cases,¹⁴³ including those cases brought by prison-

¹³⁷ *Id.* at *2.

¹³⁸ For example, the Jewish prisoner "had a prayer shawl, had access to a rabbi, was provided special food at Passover, and was allowed to wear a yarmulke in his living module." *Id.*

¹³⁹ See generally Zogry, *supra* note 8, at 917-33 (discussing *Turner* and its dramatic effect on Jewish prisoners).

¹⁴⁰ Zogry, *supra* note 8, at 927.

¹⁴¹ 42 U.S.C. § 2000bb (1994), *invalidated by City of Boerne v. Flores*, 521 U.S. 507 (1997).

¹⁴² Zogry, *supra* note 8, at 935.

¹⁴³ RFRA provides:

(a) In general. Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b) of this section.

(b) Exception. Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person—

(1) is in furtherance of a compelling governmental interest; and

(2) is the least restrictive means of furthering that compelling governmental interest.

(c) Judicial relief. A person whose religious exercise has been burdened in violation of this section may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief against a government. Standing to assert a claim or defense under this section shall be

ers.¹⁴⁴ Although it was "unclear . . . what effect the RFRA had on the O'Lone [and Turner] standard,"¹⁴⁵ one thing was certain: during the three years that RFRA was the law,¹⁴⁶ courts strictly scrutinized prison regulations that curtailed Jewish prisoners' First Amendment rights to a kosher diet.¹⁴⁷

In *Ward v. Walsh*,¹⁴⁸ for example, an Orthodox Jewish prisoner in a Nevada state prison brought suit against prison officials, arguing that their refusal to provide him with a kosher diet violated his First Amendment free exercise rights.¹⁴⁹ The court determined that, under the *Turner/O'Lone* standard, the prison dietary policy was rationally related to legitimate governmental interests,¹⁵⁰ but neverthe-

governed by the general rules of standing under article III of the Constitution.

42 U.S.C. § 2000bb-1; see also Braunstein, *supra* note 2, at 2355-64 (general discussion of RFRA); Zogry, *supra* note 8, at 933-35 (same).

¹⁴⁴ See Braunstein, *supra* note 2, at 2358-60 (discussing the debate surrounding the applicability of RFRA to prisoners); see also Bryant v. Gomez, 46 F.3d 948, 949 (9th Cir. 1995) ("The purpose of the RFRA is 'to restore the compelling interest test . . . in all cases where free exercise of religion is substantially burdened.' Given this broad purpose, it is clear that the RFRA applies to prisoners' claims.").

¹⁴⁵ Braunstein, *supra* note 2, at 2360. Although RFRA's effect on the *Turner/O'Lone* "rational relation" test is unclear, House and Senate Reports pertaining to RFRA suggest that the *Turner/O'Lone* standard was weakened, or perhaps even overturned. "As applied in the prison and jail context, the intent of the act is to restore the traditional protection afforded to prisoners to observe their religions which was weakened by the decision in *O'Lone v. Estate of Shabazz*." S.R. No. 111, 103d Cong., 1st Sess. 9-11 (1993), reprinted in 1993 U.S.C.A.N. 1892, 1898-1901; see also H.R. Rep. No. 88, 103d Cong., 1st Sess. 8 (1993).

¹⁴⁶ Approximately three years after the passage of RFRA, the Supreme Court decided, in *City of Boerne v. Flores*, 521 U.S. 507 (1997), that the Act was unconstitutional. See *Flores*, 521 U.S. at 512.

¹⁴⁷ See Braunstein, *supra* note 2, at 2362 ("As a result [of RFRA], courts evaluating Jewish prisoners' free exercise claims found that the claims should be evaluated by a much stricter standard than had been used during the *Turner* era."). Not every court during the RFRA era, however, held that prison dietary regulations infringed upon Jewish prisoners' First Amendment rights. See, e.g., Best v. Kelly, 879 F. Supp. 305, 308-09 (W.D.N.Y. 1995) (noting that Jewish prisoner did not request kosher diet primarily for religious purposes and, applying the RFRA standard, held that "refusing to provide [plaintiff] with an alternative diet for a short time period [did not] substantially burden[] plaintiff's exercise of his religion"); *Holterman v. Helling*, No. 94-3113, 1995 WL 702300 (8th Cir. Nov. 30, 1995) (unpublished disposition) (declining to consider Jewish prisoner's free exercise claim under RFRA standard because prisoner failed to amend complaint to allege RFRA violation, and holding that, under pre-RFRA standards, Jewish prisoner not entitled to kosher diet).

¹⁴⁸ 1 F.3d 873 (9th Cir. 1993).

¹⁴⁹ See *id.* at 876.

¹⁵⁰ See *id.* at 877 (legitimate interest in running simplified food service logically

less, remanded the case because the district court failed to consider the other *Turner/O'Lone* factors.¹⁵¹ After the case was remanded, but prior to the district court's evidentiary hearing regarding the other *Turner/O'Lone* factors, RFRA was enacted.¹⁵² The district court, nevertheless, pursuant to the Ninth Circuit's instructions, applied the *Turner/O'Lone* test and upheld the prison regulations.¹⁵³ The Jewish inmate appealed, and considering the case for a second time, the Ninth Circuit reversed the district court's decision.¹⁵⁴

Jewish prisoners were successful in procuring kosher diets during the RFRA era even when courts did not explicitly apply the strict RFRA standard. In *Ashelman v. Wawrzaszek*,¹⁵⁵ for example, an Orthodox Jewish prisoner in an Arizona state prison brought suit against prison officials, challenging the prison's policy of furnishing Jewish prisoners with one frozen TV-style kosher meal supplemented with nonkosher pork-free or vegetarian meals.¹⁵⁶ The Jewish inmate contended that his First Amendment claim should be analyzed under the strict RFRA standard.¹⁵⁷ The prison officials, on the other hand, argued, *inter alia*, that RFRA was unconstitutional.¹⁵⁸

The court declined to consider whether RFRA was controlling, but nevertheless, concluded that "the magistrate judge failed to take alternatives into consideration that are disposi-

related to dietary regulation).

¹⁵¹ See *id.* at 879 (remanding the case "so that the district court can make specific factual findings and can engage in a careful balancing of all the *Turner* factors").

¹⁵² See *Ward v. Walsh*, 76 F.3d 390, 390 (9th Cir. 1996) (noting passage of RFRA prior to district court's evidentiary hearing).

¹⁵³ See *id.* (noting that district court entered supplemental findings of fact and conclusions of law upholding prison dietary regulations).

¹⁵⁴ See *id.* (holding that since RFRA "altered the standard for analyzing prisoners' free exercise of religion claims," case must be reversed and remanded so that district court could apply RFRA).

¹⁵⁵ 111 F.3d 674 (9th Cir. 1997).

¹⁵⁶ See *id.* at 675.

¹⁵⁷ See *id.* at 676.

¹⁵⁸ See *id.* at 677. At the time of *Ashelman*, the issue of the constitutionality of RFRA was heavily debated. See, e.g., *Mockaitis v. Harclerod*, 104 F.3d 1522 (9th Cir. 1997); *Sasnett v. Sullivan*, 91 F.3d 1018 (7th Cir. 1996); *EEOC v. Catholic University*, 83 F.3d 455 (D.C. Cir. 1996); *Flores v. City of Boerne*, 73 F.3d 1352 (5th Cir. 1996), *cert. granted*, 117 S. Ct. 293 (1996). The Supreme Court, in *City of Boerne v. Flores*, 521 U.S. 507 (1997), ultimately decided that RFRA was unconstitutional. See *Flores*, 521 U.S. at 512.

tive in shifting the balance in [the inmate's] favor even under the more lenient test of O'Lone and Turner."¹⁵⁹ The court noted that the existence of alternatives "shows that the policy is unreasonable"¹⁶⁰ and held that "the prison must provide a diet sufficient to sustain [the Jewish inmate] in good health without violating the laws of kashruth."¹⁶¹

D. *Post-RFRA: Uncertain Results For Jewish Prisoners*

The protection RFRA afforded Jewish prisoners vanished when the Supreme Court, in *City of Boerne v. Flores*,¹⁶² held that the Act was unconstitutional on the grounds that Congress had exceeded its constitutional authority.¹⁶³ As a result of the *Boerne* decision, courts once again turned to the *Turner/O'Lone* standard when evaluating Jewish prisoners' free exercise claims.¹⁶⁴

¹⁵⁹ See *Ashelman*, 111 F.3d at 677. The trial court based its decision on the pre-RFRA standards of *Turner/O'Lone* and held that the prison dietary policy was constitutional "in light of the prison's legitimate penological concerns about cost and favoritism." *Id.* at 676.

¹⁶⁰ *Id.* at 678. The court stated:

[T]he record in this case does permit us to determine that reasonable alternatives to the prison's policy of providing one frozen kosher TV-dinner, supplemented with vegetarian or nonpork meals, do exist. The warden virtually concedes that [the inmate's] kosher TV-dinner could be supplemented with whole fruits, vegetables, nuts, and cereals that are not tough to come by The evidence shows that disposable utensils are also available, at modest cost And the warden himself proposed a program that would have substantially satisfied [the inmate's] dietary requirements, but which for some reason wasn't pursued. The evidence also shows that the prison accommodates the dietary requirements of other religious groups . . . without disruption.

Id.

¹⁶¹ *Id.*

¹⁶² 521 U.S. 507 (1997).

¹⁶³ See *id.* at 536. In deciding that RFRA was unconstitutional, the Court stated:

It is for Congress in the first instance to "determine whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment," and its conclusions are entitled to much deference. Congress' discretion is not unlimited, however, and the courts retain the power, as they have since *Marbury v. Madison*, to determine if Congress has exceeded its authority under the Constitution. Broad as the power of Congress is under the Enforcement Clause of the Fourteenth Amendment, RFRA contradicts vital principles necessary to maintain separation of powers and the federal balance.

Id. (citation omitted).

¹⁶⁴ See, e.g., *Johnson v. Horn*, 150 F.3d 276, 282 (3d Cir. 1998) (holding in a

Several courts applying the *Turner/O'Lone* standard in the post-RFRA era seem willing to grant extreme deference to prison officials and their dietary regulations.¹⁶⁵ In *Cooper v. Lanham*,¹⁶⁶ for example, the court, applying the *Turner/O'Lone* test, held that the Maryland Department of Correction's ("MDOC") refusal to provide an Orthodox Jewish inmate a kosher diet was reasonably related to promoting legitimate penological interests, and thus, did not violate the inmate's First Amendment rights.¹⁶⁷ The court noted, *inter alia*, that: (1) MDOC had a legitimate interest in running a simplified food system,¹⁶⁸ (2) providing Jewish inmates kosher meals would have a significant impact on other inmates, prison officials, and prison resources,¹⁶⁹ and (3) there were no ready alternatives to the dietary regulations that would fully accommodate the Jewish inmate's rights at a de minimis cost.¹⁷⁰

post-*Boerne* case that the appropriate standard to evaluate the validity of prison regulations that curtail First Amendment rights is the *Turner* standard); *Beerheide v. Zavaras*, 997 F. Supp. 1405, 1411 (D. Colo. 1998) ("To determine the likelihood of plaintiffs prevailing on the merits of their First Amendment claim [to a kosher diet], [the court will] apply the pre-RFRA standards set forth in *Turner v. Safley*"); see also Braunstein, *supra* note 2, at 2367 ("[T]he *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 three years that the RFRA was the law.").

¹⁶⁵ This deference to prison administration is no different than that given by the courts when *Turner* and *O'Lone* were first decided. See *supra* Part II.B.

¹⁶⁶ 145 F.3d 1323, No. 97-7183, 1998 WL 230913 (4th Cir. May 7, 1998) (unpublished disposition).

¹⁶⁷ See *id.* at *3.

¹⁶⁸ See *id.* at *1 ("MDOC's food services program is designed to allow mass production of food and . . . it is economically and administratively unable to accommodate the special dietary requests of the over forty religious groups represented in the inmate population.").

¹⁶⁹ See *id.* at *2. Specifically, the court stated:

The cost of providing kosher meals to Jewish . . . inmates is significant. In addition, . . . providing [the inmate] with a kosher diet will prompt other inmates of different religious denominations to make similar requests. MDOC cannot afford to honor these requests, and providing special diets to some inmates and not to others would violate the prison's religious directives which is to treat all religions equitably.

Id. at *2 (citations omitted).

¹⁷⁰ See *Cooper*, 1998 WL 230913, at *2. Although the record indicated that a Jewish organization was willing to provide pre-packaged frozen kosher meals or, in the alternative, provide volunteers to prepare kosher meals in the prison kitchen, the court gave great deference to the prison officials' arguments that "the already strained kitchen facilities at MDOC are not equipped to handle the preparation

Similarly, in *Johnson v. Horn*,¹⁷¹ the court, applying the *Turner/O'Lone* standard to an Orthodox Jewish prisoner's claim that he had a constitutional right to hot kosher meals, held that "the cold kosher diet currently being provided passes constitutional muster because it is sufficient to keep the inmates in good health."¹⁷² Balancing the *Turner/O'Lone* factors, the court noted, *inter alia*, that: (1) the Pennsylvania prison had a legitimate interest in running a simplified food system; and (2) the inmates' request for hot kosher meals "created legitimate security concerns, including bringing additional foods from new sources into the Prison and the possible belief by other inmates that [the Jewish inmates] are receiving special treatment."¹⁷³

Application of the *Turner/O'Lone* test in the post-RFRA era does not, however, always lead to an automatic victory for prison officials. In *Beerheide v. Zavaras*,¹⁷⁴ for example, three Orthodox Jewish inmates brought suit against a Colorado state prison, seeking a preliminary injunction forcing the prison to provide them with a kosher diet.¹⁷⁵ The Colorado Department of Corrections offered three legitimate penological goals to

and storage of special meals, there are hidden costs associated with [the Jewish inmate's] suggestions, and that [the inmate's] suggestions do not address MDOC's broader concern of treating all inmates in a uniform manner." *Id.*

¹⁷¹ 150 F.3d 276 (3d Cir. 1998).

¹⁷² *Id.* at 283. Although the prison was not required to provide a hot kosher diet, the court did hold, however, that Jewish inmates were entitled to a "diet sufficient to sustain them in good health without violating the kosher laws." *Id.*

¹⁷³ *Id.* at 282. Interestingly, the court also noted that although the prison officials asserted cost as a legitimate justification for denying the Jewish inmates' request for hot kosher food, providing hot kosher meals would cost less than the prisoners' current cold kosher diet. *See id.* at 283. The court further stated, however:

The cost factor, which might suggest a certain arbitrariness on the part of prison officials could be given some weight were we free to apply the state regulation requiring "reasonable accommodations for dietary restrictions." However, it is not our function to look to such sources in circumstances like those presented here. As *Turner* makes clear, we are to avoid "unnecessarily perpetuating the involvement of the federal courts in the affairs of prison administration."

Johnson, 150 F.3d at 283 (citations omitted).

¹⁷⁴ 997 F. Supp. 1405 (D. Colo. 1998).

¹⁷⁵ *See id.* at 1408.

justify its policy of refusing to provide kosher diets: (1) financial concerns; (2) security considerations; and (3) the proliferation of other lawsuits.¹⁷⁶

In determining whether the prison's dietary regulation was constitutional, the court stated that although "[e]ach concern is legitimate in the abstract[,] . . . the nexus between the prison dietary policy and the correctional goals is too tenuous to withstand scrutiny."¹⁷⁷ Thus, the prison officials were required to provide the Jewish inmates with a kosher diet.¹⁷⁸

III. ANALYSIS

Although the standards used by the courts during the past 25 years vary in their degree of scrutiny, some offering more protection to Jewish prisoners than others,¹⁷⁹ the standards

¹⁷⁶ See *id.* at 1412.

¹⁷⁷ *Id.* The court scrutinized each proffered correctional goal: First, the court stated that the prison officials' cost concerns were without merit because "mathematically speaking, the actual annual cost of providing these three inmates with kosher meals . . . must be regarded as a minuscule portion of the Food Services' annual budget." *Id.* Thus, the prison officials did not explain "why providing plaintiffs with kosher TV dinners would not accommodate plaintiffs' request at a de minimis cost." *Beerheide*, 997 F. Supp. at 1413. Second, the prison officials presented no evidence to support their position that giving Jewish inmates kosher meals would present security problems. See *id.* at 1412. Third,

[t]he concern of proliferation of lawsuits seeking various accommodations is speculative at best. Moreover, to deny these plaintiffs their right to observe a central tenet of their religion on the ground that it might lead to other lawsuits is specious. The DOC's logic would effectively preclude provision of any accommodations for religious practices in prison To deny plaintiffs their right to free exercise of their sincerely held religious beliefs because it might lead to other inmates filing lawsuits is unreasonable.

Id.

¹⁷⁸ See *id.* at 1413. Although not specifically mentioned, the *Beerheide* court, interestingly enough, appeared to place the burden of proving the validity of the dietary regulation on the prison officials. This is contrary to other court decisions applying the *Turner/O'Lone* standard. See *supra* Part II.B and accompanying notes. In addition, *Beerheide* appears to be the first case in the post-RFRA era to question the relationship between penological interests and prison dietary regulations, requiring prison officials to offer actual evidence, not mere speculation, that providing kosher diets will compromise penological interests. Thus, *Beerheide* may prove to be an extremely significant case for Jewish inmates attempting to obtain kosher diets in the future.

¹⁷⁹ Compare, e.g., *United States v. Kahane*, 396 F. Supp. 687, 704 (E.D.N.Y.) (applying heightened scrutiny test to prison dietary regulations and holding that Jewish inmate constitutionally entitled to diet that conforms to laws of kashruth),

neither adequately nor consistently protect Jewish prisoners' First Amendment rights to a kosher diet.¹⁸⁰ Each standard, in one way or another, attempts to weigh Jewish prisoners' rights against the penological interests of prison administration. Notwithstanding the fact that a number of courts have held that prison officials must "accommodate the right of [Jewish] prisoners to receive diets consistent with their religious scruples,"¹⁸¹ other courts have upheld prison kosher dietary

with *Cooper v. Rogers*, 788 F. Supp. 255, 259-60 (D. Md. 1991) (applying deferential *Turner/O'Lone* test and upholding kosher dietary regulations), and *Ward v. Walsh*, 76 F.3d 390, 390 (9th Cir. 1996) (noting that RFRA "altered the standard for analyzing prisoners' free exercise of religion claims," and holding in favor of Jewish inmate).

¹⁸⁰ Arguably, even an inmate-friendly standard does not afford adequate protection. See Comment, *The Religious Rights of the Incarcerated*, 125 U. PA. L. REV. 812, 842-45, 866-67 (1977) [hereinafter *Religious Rights*] (discussing and critiquing inmate-friendly *Martinez* test); see also *Cooper v. Rogers*, 788 F. Supp. 255 (D. Md. 1991). In *Cooper*, the Jewish inmate urged the court to apply a constitutional standard more favorable to prisoners, as opposed to the deferential *Turner/O'Lone* standard. See *id.* at 258 n.8. Specifically, the inmate urged the court to apply the *Kahane* or *Prushinowski* standard. See *id.* The court stated, however, that "despite their factual relevance to this case, *Kahane* and *Prushinowski* can place no greater obligation on [the prison officials] than do *Turner* and *O'Lone*." *Id.*

The standards do not consistently protect Jewish inmates' rights to a kosher diet either. Compare, e.g., *Beerheide v. Zavaras*, 997 F. Supp. 1405 (D. Colo. 1998) (applying *Turner/O'Lone* test and holding in favor of Jewish inmate), with *Ben-Avraham v. Moses*, 1 F.3d 1246, No. 92-35604, 1993 WL 269611 (9th Cir. July 19, 1993) (unpublished disposition) (applying *Turner/O'Lone* test and upholding prison dietary regulations). See generally *Bernstein*, *supra* note 62 (discussing standards by which freedoms in prison are evaluated and noting inconsistencies in federal courts with regard to inmates' right to religious diets).

Although the standards neither adequately nor consistently protect Jewish inmates' free exercise right to a kosher diet, one must keep in mind that the purpose of this Note is neither to reject the standards of review applied in kosher diet cases nor to argue for the adoption of a new standard of review. The standards of review have been discussed and criticized too fully elsewhere to warrant extended treatment here, see generally *Dei*, *supra* note 62 (analyzing *Turner/O'Lone* test); *Religious Rights*, *supra* (discussing and evaluating seven tests applied in prisoners' rights cases); *Zogry*, *supra* note 8 (analyzing and evaluating *Turner/O'Lone* test and RFRA), and many commentators have already argued for the adoption of a new standard of review. See, e.g., *Dei*, *supra* note 62, at 432-36 (arguing for adoption of standard such as that outlined by Second Circuit in *Abdul Wali v. Coughlin*, 754 F.2d 1015 (2d Cir. 1985)); *Religious Rights*, *supra*, at 857-74 (proposing variation of compelling interest test). Rather, the goal of this Note is to suggest that, regardless of the standard used, the "nexus between . . . prison dietary policy and . . . correctional goals is too tenuous to withstand scrutiny." *Beerheide v. Zavaras*, 997 F. Supp. 1405, 1412 (D. Colo. 1998).

¹⁸¹ *Kahane v. Carlson*, 527 F.2d 492, 495 (2d Cir. 1975); see also *Ashelman v. Wawrzaszek*, 111 F.3d 674, 678 (9th Cir. 1997) (holding that "prison must provide

regulations on the grounds that they safeguard legitimate penological interests.¹⁸² Part III of this Note examines the various penological interests most commonly asserted for prohibiting or curtailing Jewish prisoners' First Amendment rights to a kosher diet, and argues that, while the interests are "legitimate in the abstract,"¹⁸³ they are invalid justifications for refusing to furnish kosher meals.¹⁸⁴ This Part then discusses the Federal Bureau of Prisons Common Fare Religious

a diet sufficient to sustain [inmate] in good health without violating the laws of kashruth"); *Beerheide*, 997 F. Supp. at 1413 (same); *Luckette v. Lewis*, 883 F. Supp. 471, 483 (same); *Prushinowski v. Hambrick*, 570 F. Supp. 863, 869 (E.D.N.C. 1983) (same).

¹⁸² See, e.g., *Johnson v. Horn*, 150 F.3d 276, 282 (3d Cir. 1998) (prison officials' refusal to provide hot kosher diet reasonably related to penological interests); *Cooper v. Lanham*, 145 F.3d 1323, 1998 WL 230913, at *3 (4th Cir. May 7, 1998) (unpublished disposition) (same); *Ben-Avraham v. Moses*, 1 F.3d 1246, No. 92-35604, 1993 WL 269611, at *3 (9th Cir. July 19, 1993) (unpublished disposition) (same); *Cooper v. Rogers*, 788 F. Supp. 255, 260 (D. Md. 1991) (same).

¹⁸³ *Beerheide v. Zavaras*, 997 F. Supp. 1405, 1412 (D. Colo. 1998) (holding that although concerns about cost, security and proliferation of lawsuits are "legitimate in the abstract[,] . . . the nexus between the prison dietary policy and the correctional goals is too tenuous to withstand scrutiny").

¹⁸⁴ Justice Stevens, dissenting in *Turner*, recognized the inherent unfairness created when any plausible penological interest could be used to justify prison regulations. Justice Stevens, criticizing the deferential *Turner* standard, stated:

[I]f the standard can be satisfied by nothing more than a "logical connection" between the regulation and any legitimate penological concern perceived by a cautious warden, it is virtually meaningless. Application of the standard would seem to permit disregard for inmates' constitutional rights whenever the imagination of the warden produces a plausible security concern and a deferential trial court is able to discern a logical connection between that concern and the challenged regulation. Indeed, there is a logical connection between prison discipline and the use of bullwhips on prisoners

Turner v. Safley, 482 U.S. 78, 100-01 (1987).

In cases regarding Jewish prisoners' First Amendment rights to a kosher diet, many courts have recognized, fortunately, that the prison officials' proffered penological interests do not adequately substantiate the prison dietary policy. See, e.g., *Ashelman v. Wawrzaszek*, 111 F.3d 674, 678 (9th Cir. 1997) (holding that difficulties envisioned by prison officials in providing kosher diets not insurmountable); *Beerheide*, 997 F. Supp. at 1412 (holding that although the DOC's governmental concerns about cost, security, and the proliferation of other lawsuits are "legitimate in the abstract[,] . . . the nexus between the prison dietary policy and the correctional goals is too tenuous to withstand scrutiny"); *Prushinowski v. Hambrick*, 570 F. Supp. 863, 868 (E.D.N.C. 1983) (holding that kosher food could be provided from "controlled sources wherein security measures can reasonably be maintained"); *United States v. Kahane*, 396 F. Supp. 687, 703 (E.D.N.Y. 1975) (holding that kosher dinners could be provided "with virtually no administrative inconvenience").

Diet program currently in effect and submits that this program is solid evidence that all prisons can accommodate observant Jewish prisoners' requests for kosher diets with relatively little or no administrative inconvenience.

A. *Penological Interests Arguably Justifying Prison Dietary Regulations and Why These Interests Are Invalid Justifications for Refusing to Furnish Kosher Diets*

Judicial opinions have made clear that the courts lack the qualifications to deal with the practical needs of prison administration.¹⁸⁵ Similarly, several commentators have noted:

The problems of routine jail and prison administration in conflict with the asserted rights of prisoners rarely have simple answers. Accordingly, the need for administrative on-the-spot decisional flexibility, and the emergence of professionalism and credentialing among corrections personnel have reinforced the much older attitude of judges that corrections administrators . . . of various skills *must be accorded generous discretion* in their choice and implementation of policies and practices necessary in their judgment to maintain institutional safety, order, discipline, security, and the punitive and rehabilitative objectives of incarceration.¹⁸⁶

Against that background, prison officials, in response to Jewish prisoners' demands for kosher diets, have provided a number of explanations for the restrictions they have placed upon the inmates' First Amendment rights. Among the most common are: institutional security,¹⁸⁷ running a simplified

¹⁸⁵ See, e.g., *Turner v. Safley*, 482 U.S. 78, 84-85 (1987) ("Running a prison is an inordinately difficult undertaking that requires expertise, planning, and the commitment of resources, all of which are peculiarly within the province of the legislative and executive branches of government."); *Madison v. Horn*, No. Civ. A. 97-3143, 1998 WL 531830, at *11 (E.D. Pa. Aug. 21, 1998) (stating that "[f]ederal courts give great deference to prison officials' decisions with respect to the running of prisons").

¹⁸⁶ BARBARA B. KNIGHT & STEPHEN T. EARLY, JR., *PRISONERS' RIGHTS IN AMERICA* 3 (1986) (emphasis added). The authors further state that judges are inadequate substitutes for the expertise of prison officials because, presumably, corrections officials possess a better understanding of the complexities inherent in prison administration. See *id.*

¹⁸⁷ See *Beerheide v. Zavaras*, 997 F. Supp. 1405, 1412 (D. Colo. 1998) (Department of Corrections refusing to provide Jewish inmates kosher diets, arguing, *inter alia*, that providing kosher meals would adversely impact security); *United States v. Huss*, 394 F. Supp. 752, 762 (S.D.N.Y. 1975), *vacated on other grounds*, 520 F.2d 598 (2d. Cir. 1975) (same).

prison food service,¹⁸⁸ cost considerations,¹⁸⁹ and proliferation of other religious dietary demands.¹⁹⁰

1. Institutional Security

Perhaps the most important goal of prison officials is that of institutional security,¹⁹¹ and prison administrators frequently argue that providing kosher diets to Jewish inmates would present security problems.¹⁹² Prison officials, in denying Jewish inmates' requests for kosher diets, appear to be motivated by the fact that Jewish inmates might obtain kosher food from unknown sources and contraband could be easily smuggled to inmates for whom the kosher food is designat-

¹⁸⁸ See, e.g., *Ward v. Walsh*, 1 F.3d 873, 877 (9th Cir. 1993) (recognizing that prison officials have legitimate interest in running simplified dining service, but remanding case for determination of whether denial of kosher diet was reasonably related to that interest); see also *Kahey v. Jones*, 836 F.2d 948, 950 (5th Cir. 1988) (holding that prison has a legitimate interest in running a simplified food service "rather than a full-scale restaurant").

¹⁸⁹ See, e.g., *Beerheide*, 997 F. Supp. at 1412 (noting that Colorado Department of Corrections cited cost concerns as justification for policy of not providing kosher diets); *Cooper v. Rogers*, 788 F. Supp. 255, 260 (D. Md. 1991) (denying Jewish inmate's request for particularized kosher diet, holding that costs associated with kosher meals "cannot be dismissed as de minimis").

¹⁹⁰ See *Cooper v. Lanham*, 145 F.3d 1323, No. 97-7183, 1998 WL 230913, at *2 (4th Cir. May 7, 1998) (unpublished disposition) (discussing prison officials' concerns that if one dietary request is granted similar demands will proliferate); *Ben-Avraham v. Moses*, 1 F.3d 1246, No. 92-35604, 1993 WL 269611, at *2 (9th Cir. July 13, 1993) (unpublished disposition) (same); *Kahey*, 836 F.2d at 950 (same); *Beerheide*, 997 F. Supp. at 1410-12 (same).

¹⁹¹ See KNIGHT & EARLY, *supra* note 186, at 2-3. The authors assert:

Central to the administration of detention facilities is the institutional and societal consideration of internal security. Prison officials must be left that minimum freedom which permits them to take appropriate action to ensure the safety of both correctional personnel and inmates and to prevent escape, on the one hand, and the unlawful entry of persons or contraband into the institution, on the other. Even when challenged administrative practices or regulations are alleged to transgress fundamental interests of inmates, the conflict of values must be adjusted in light of institutional security.

Id.

¹⁹² See, e.g., *Beerheide*, 997 F. Supp. at 1412 (Department of Corrections refusing to provide Jewish inmates kosher diets, arguing, *inter alia*, that providing kosher meals would adversely impact security); *United States v. Huss*, 394 F. Supp. 752, 762 (S.D.N.Y. 1975), *vacated on other grounds*, 520 F.2d 598 (2d Cir. 1975) (same); see also PALMER, *supra* note 17, § 5.2.1, at 59 ("The duty of prison officials to maintain security within an institution is the most frequently cited justification for limiting an inmate's religious freedom.").

ed.¹⁹³ Additionally, prison officials argue that many available kosher food items are contained in packaging that is potentially dangerous.¹⁹⁴ Further, providing Jewish inmates kosher diets would adversely impact prison discipline and order because other inmates would be led to believe that the Jewish inmates are receiving special treatment.¹⁹⁵

Although the prison officials' security concerns are legitimate, they are purely speculative; thus, they should not constitute a sufficient justification for refusing to provide kosher diets.¹⁹⁶ Despite the fact that prison officials continually ex-

¹⁹³ See *Johnson v. Horn*, 150 F.3d 276, 282 (3d Cir. 1998) (noting that Jewish inmates' requests for hot kosher meals "creates legitimate security concerns [for the Pennsylvania Department of Corrections], including bringing additional foods from new sources into the Prison"); *Huss*, 394 F. Supp. at 762 (noting that security problems referred to by Bureau of Prisons, such as the relative ease with which contraband could be smuggled in to the prison, could not be overlooked).

¹⁹⁴ See *Response to Defendants' Proposed Dietary Plan* at 11, *Ashelman v. Wawrzaszek*, 111 F.3d 674 (9th Cir. 1997) (No. Civ. 83-1072) (noting that the Arizona Department of Corrections asserted that providing Jewish inmate certain readily available kosher food items, such as canned food with pull tops, implicates security concerns).

¹⁹⁵ See *Johnson*, 150 F.3d at 282 (stating that providing Jewish prisoners kosher food creates security concerns because of the other inmates' possible beliefs that the Jewish inmates were getting special treatment); *Ward v. Walsh*, 1 F.3d 873, 878 (9th Cir. 1992) (noting warden's contention that if other inmates are not similarly treated, they might perceive the Jewish inmate as being favored); *Huss*, 394 F. Supp. at 762 ("[I]t would be contrary to good order and discipline to permit one group of prisoners, or organizations supporting them, to pay for their more expensive, special [kosher] food.").

¹⁹⁶ The United States Supreme Court has held that speculative concerns do not constitute compelling government interests. See, e.g., *Wisconsin v. Yoder*, 406 U.S. 205, 223-25 (1972). In that case, the state of Wisconsin sought to compel Amish parents to require their children, who graduated from eighth grade, to attend formal high school. The state argued that if Amish children left their church they would not be able to survive in society without the education available in the years of formal high school. See *id.* at 224. The Court held, however, that the state's interest was "highly speculative" because there was no specific evidence that Amish children would burden society because of their lack of a formal high school education. *Id.* (emphasis added).

Additionally, Justice Stevens, dissenting in *Turner*, expressed concern about prison officials' speculation. See *Turner v. Safley*, 482 U.S. 78, 100-16 (1987) (Stevens, J., dissenting). Justice Stevens argued that applying a deferential standard to prison regulations

would seem to permit disregard for inmates' constitutional rights whenever the imagination of the warden produces a plausible security concern and a deferential trial court is able to discern a logical connection between that concern and the challenged regulation. Indeed, there is a logical connection between prison discipline and the use of bullwhips on

press concern that contraband could be smuggled into the prison, these prison officials consistently fail to provide any evidence whatsoever that security problems result from allowing Jewish prisoners to receive kosher diets.¹⁹⁷ Further, notwithstanding the prison officials' fear that Jewish prisoners might obtain food from unknown sources, courts have recognized that kosher food can be provided for Jewish inmates from "controlled sources wherein security measures can reasonably be maintained."¹⁹⁸ In fact, pre-prepared kosher meals are readily available from a number of well-known manufacturers throughout the country.¹⁹⁹ The vice-president of marketing for Dannon Company, a popular yogurt maker, stated, "Virtually every major food company in the US utilizes kosher certification, and many spend significant advertising dollars behind marketing this fact."²⁰⁰ Thus, prison officials' security

prisoners

Id. at 100-01. Justice Stevens continued in a footnote: "The Court's rather open-ended 'reasonableness' standard makes it much too easy to uphold restrictions on prisoners' First Amendment rights on the basis of administrative concerns and speculation about possible security risks rather than on the basis of evidence that the restrictions are needed to further an important governmental interest." *Id.* at 101 n.1 (emphasis added).

¹⁹⁷ See, e.g., *Beerheide v. Zavaras*, 997 F. Supp. 1405, 1412 (D. Colo. 1998) (holding that prison officials presented no evidence to support their position that providing Jewish inmates kosher meals would adversely impact security); *Prushinowski v. Hambrick*, 570 F. Supp. 863, 868 (E.D.N.C. 1983) (holding that although prison officials argued that contraband could be hidden in food and smuggled into prison, prison officials presented no evidence that attempts had been made to smuggle contraband into the prison in the kosher food).

¹⁹⁸ *Prushinowski*, 570 F. Supp. at 868.

¹⁹⁹ Indeed, at least one court recognized this fact nearly 25 years ago. See *United States v. Kahane*, 396 F. Supp. 687, 702-03 (E.D.N.Y. 1975) ("[P]risoners could purchase, under their normal food requisitioning procedures, pre-prepared, frozen, foil-wrapped kosher meals accompanied by disposable eating utensils; they are readily available from a number of manufacturers with numerous distributorships around the country.").

²⁰⁰ Henry, *supra* note 39, at 6 (quoting Yossi Heber, vice-president of marketing for Dannon Company); see also Hanania, *supra* note 40, at 1E ("[Kosher foods] range from See's Candies to Dole pineapples, from Ronzoni macaroni to Bazooka bubble gum, from Sunkist orange juice to Knudsen's dairy products. Kosher foods also include King's Hawaiian Bakery and Country Hearth corn bread; A & W Root Beer and Seven-Up; Pillsbury Dough and Campbell's Soups . . ."). While it is possible that Jewish inmates may receive kosher items from unknown Jewish community groups, see *Kahane*, 396 F. Supp. at 702, prison officials can conveniently inspect the incoming food for contraband as part of customary prison regulations. See, e.g., *Prushinowski*, 570 F. Supp. at 868 (holding that although Jewish inmate is entitled to kosher food certified by the Central Rabbinical Congress,

concerns that Jewish inmates might obtain food from unknown sources are unwarranted. Moreover, notwithstanding prison officials' concerns that various readily available kosher food items are stored in dangerous packaging, such as canned food with pull tops, regular food in similar "dangerous" packaging is frequently available to all inmates in prison stores and is sold to inmates without adversely impacting security.²⁰¹

Furthermore, despite prison officials' fears that other inmates may perceive Jewish prisoners as being favored, and thus adversely impact prison morale, courts have never weighed these concerns heavily in their evaluations of prison dietary policy.²⁰² "This effect . . . is present in every case that requires special accommodations for adherents to particular religious practices."²⁰³ Additionally, prison systems already provide diets to other religious groups, including Sikhs, Muslims, and Seventh-Day Adventists, without disruption,²⁰⁴ and where prison officials refuse to grant religious requests that do not significantly impact prison resources any more than other religious accommodations, courts have held that prison officials are acting irrationally.²⁰⁵ Lastly, despite prison officials' ex-

prison officials could personally inspect incoming food items for contraband consistent with prison procedure). One court has even suggested that Jewish inmates could inspect the food themselves in the presence of prison officials. *See id.*

²⁰¹ *See* Response to Defendants' Proposed Dietary Plan at 11, *Ashelman v. Wawrzaszek*, 111 F.3d 674 (9th Cir. 1997) (No. Civ. 83-1072) (citations omitted) ("The State asserts that providing some of the [readily available kosher food] items, such as canned food with pull tops, causes security concerns. However, food with pull top lids are sold by the State to inmates in the prison store. Further, canned tuna, which the State also makes an objection, is provided in the inmate store, as are can openers. The purchase of these food items has been authorized by the State and these items are sold to inmates, presumably without any breach of security or disruption to the prison. Thus, these objections are nothing more than another excuse why certain [kosher] foods cannot be provided.").

²⁰² *See, e.g., Ward v. Walsh*, 1 F.3d 873, 878 (9th Cir. 1993) (noting warden's contention that other inmates might perceive Jewish inmate as being favored, but holding that this effect is not dispositive); *see also Ashelman*, 111 F.3d at 677 (same).

²⁰³ *Ward*, 1 F.3d at 878.

²⁰⁴ *See Ashelman*, 111 F.3d at 678 (noting that because the prison accommodates the dietary requirements of other religious groups, "it does not appear that the difficulties envisioned by the prison are insurmountable").

²⁰⁵ *See Howard v. United States*, 864 F. Supp. 1019, 1027 (D. Colo. 1994) (holding that where satanist was asking for same privileges granted to every other religious group but was denied requests, security concerns discussed by prison officials were pretextual).

pressed security concerns, courts have explicitly stated that security interests would not be undermined in any way by providing kosher diets.²⁰⁶

2. Running a Simplified Food System

Another common penological interest asserted for prohibiting or limiting Jewish prisoners' right to a kosher diet is that of running a simplified prison food system,²⁰⁷ and because of the strict rules regarding preparation and storage of kosher food,²⁰⁸ prison officials fear that providing kosher meals would disrupt the convenient operation of the food service. In *Ward v. Walsh*,²⁰⁹ for example, a Jewish inmate requested a kosher diet that required the prison not merely to provide kosher food, but to prepare and to store the kosher food in a particular manner.²¹⁰ Further, the Jewish prisoner asked that the "food be served in an 'eating area [that is] kept kosher for all Jewish inmates.'"²¹¹ Prison officials refused to provide this particularized diet, citing their interest in running a simplified food service.²¹²

Additionally, a case occasionally arises where an observant Jewish inmate cannot eat the type of kosher food that is acceptable to most observant Jews.²¹³ Prison officials argue, therefore, that accommodating this wide range of requests would turn the prison dining service into a full-scale restau-

²⁰⁶ See, e.g., *Luckette v. Lewis*, 883 F. Supp. 471, 481 (D. Ariz. 1995) ("Clearly, provision of a Kosher diet would not implicate any safety concerns.").

²⁰⁷ See, e.g., *Ward v. Walsh*, 1 F.3d 873, 877 (9th Cir. 1993) (recognizing that prison officials have legitimate interest in running simplified dining service, but remanding case for determination of whether denial of kosher diet was reasonably related to that interest); see also *Kahey v. Jones*, 836 F.2d 948, 950 (5th Cir. 1988) (holding that prison has a legitimate interest in running a simplified food service "rather than a full-scale restaurant").

²⁰⁸ See *supra* Part I.B.

²⁰⁹ 1 F.3d 873 (9th Cir. 1993).

²¹⁰ See *id.* at 877.

²¹¹ See *id.* (alteration in original).

²¹² See *id.*

²¹³ See, e.g., *Prushinowski v. Hambrick*, 570 F. Supp. 863, 865 n.2 (E.D.N.C. 1983). In that case, the Jewish inmate, since his arrival at the prison, refused to eat the kosher food made available to other observant Jewish inmates on the grounds that the kosher food provided was not certified by the Central Rabbinical Congress. See *id.* The Central Rabbinical Congress certifies the food which may be eaten by Orthodox Jews of the Hasidic community. See *id.*

rant.²¹⁴ Arguably, requests such as these are administratively unfeasible and hinder the simplified operation of the prison food service.

Although maintenance and monitoring of a kosher kitchen and eating area may cause *some* disruption to the simplified operation of the prison food service,²¹⁵ prisons do *not* need to maintain kosher kitchens and eating areas in order to provide kosher meals;²¹⁶ thus, kosher meals can be provided without significant disruption. In *Ashelman v. Wawrzaszek*,²¹⁷ for example, the Ninth Circuit held that providing a kosher diet is not unduly burdensome on the Arizona Department of Corrections.²¹⁸ In reaching its decision, the court stated that a variety of kosher foods, many of which required no cooking, would satisfy the Jewish inmate's request.²¹⁹ Further, notwithstand-

²¹⁴ For a good illustration of this concern, see *Kahey v. Jones*, 836 F.2d 948, 949-50 (5th Cir. 1988). In *Kahey*, a Muslim inmate requested the prison to provide meals "consisting of eggs, fruit and vegetables served with shells or peels, on paper plates." *Id.* at 950. The court denied the inmate's request, *see id.* at 951, and stated that the prison "has a legitimate governmental interest in running a simplified prison food service rather than a full-scale restaurant." *Id.* at 950.

²¹⁵ Rabbis, themselves, admit that maintenance and monitoring of a kosher kitchen would be problematic. *See, e.g.*, Supplemental Answering Brief of Defendants/Appellees/Cross-Appellants at 13, *Ashelman v. Wawrzaszek*, 111 F.3d 674 (9th Cir. 1997) (No. 95-15071) (noting that plaintiff inmate's expert, Rabbi Levertov, admitted that running kosher kitchen would present problems). Some prisons, nevertheless, do maintain kosher kitchens. *See, e.g.*, *Garza v. Carlson*, 877 F.2d 14, 16 (8th Cir. 1989) (Jewish inmate provided with food prepared in kosher kitchen in federal correctional facility).

²¹⁶ *See United States v. Kahane*, 396 F. Supp. 687, 702-03 (E.D.N.Y. 1975) ("[P]risons could purchase, under their normal food requisitioning procedures, pre-prepared, frozen, foil-wrapped kosher meals accompanied by disposable eating utensils. Such frozen meals . . . are now widely available on airplanes, trains, buses, in hospitals, and at hotels and motels. These dinners could be prepared with virtually no administrative inconvenience by heating in regular prison kitchens."). Although preparation of kosher food requires that everything be kept separate (the food must be prepared and served in separate containers, the utensils and containers used for cooking must be sanitized in separate sinks and dishwashers, and separate ovens must be used for kosher items), *see supra* Part I.B. and accompanying notes, providing a pre-prepared kosher meal, as well as disposable utensils and containers, could avoid these strict preparation requirements. *See supra* Part I.B. Additionally, pre-packaged kosher meals can be heated in a non-kosher oven as long as the products are heated (and served) with the manufacturer's double-seal wrapping intact. *See supra* Part I.B.

²¹⁷ 111 F.3d 674 (9th Cir. 1997).

²¹⁸ *See id.* at 678.

²¹⁹ *See id.* at 677-78. The court noted that the prison officials "could provide whole fruits, vegetables, nuts, tinned fish, dairy products, and kosher cereals that

ing prison officials' concerns that some observant Jews cannot eat the type of kosher food that is acceptable to other observant Jews, thus turning the prison food service into a full-scale restaurant, courts have held that this concern is an invalid reason for refusing to provide requested kosher diets.²²⁰

would satisfy the laws of kashruth, and serve them on disposable plates with disposable utensils—which also would satisfy kashruth. Most of these things are 'off-the-shelf and nothing . . . suggests that the cost would be appreciable." *Id.* at 677. In fact, the Jewish inmate's counsel provided a list of food items that are certified by the Orthodox Union (the largest kosher certification organization). See Response to Defendant's Proposed Dietary Plan at 9-10, *Ashelman v. Wawrzaszek*, 111 F.3d 674 (9th Cir. 1997) (No. Civ. 83-1072). The list is as follows:

From Exhibit G:

Nabisco Mix 'N Eat Variety Pack-D cereals, Quaker Oats cereal products, including Life, Oat Bran, and Puffed Rice, Ralston Regular Instant Oatmeal, Roman Meal cereals, Wheatabix cereals, Nescafe Instant coffees, Lipton teas, Heinz mustard and relish, Nabisco Oreo cookies, Sun Giant raisins, Bumble Bee salmon and tuna, Starkist and Chicken of the Sea tuna, Heinz pureed beets, carrots, green beans, peaches, pears, and spinach, Sunkist orange juice, Reese's, Laura Scudder's, and Smucker's peanut butters, and Fisher nuts.

From Exhibit H:

Pepperidge Farms bagels, breads and muffins; Sara Lee bagels and muffins; Ralston crackers and fruit bars; Keebler crackers and cookies; Nabisco crackers, cookies and snack bars; Dannon yogurt; Kraft cheeses and sour cream; Dole dried fruits and nuts; Green Giant canned corn, beans and peas; Heinz beans; Libby's spears, beans, beets, red cabbage, carrots, green beans, peas, and potatoes; Seneca apple sauce, asparagus and mushrooms; Nabisco/Fleischman's Blue Bonnet margarine; Skippy, Planters and Jif peanut butters; Planters nuts; Frito-Lay's, Ruffles and Pringles potato chips; Rold Gold Pretzels; Heinz soups; and Heinz ketchup.

Id. (citations omitted).

²²⁰ See *Prushinowski v. Hambrick*, 570 F. Supp. 863, 867 (E.D.N.C. 1983). Prison officials argued that they did not have to accommodate a Jewish inmate's request for a kosher diet because the food requested was different than the food acceptable to other observant Jewish inmates. See *id.* The court held, however, that the inmate's "prerogative to exercise his beliefs under the First Amendment is in no way diminished by the fact that his faith requires that he not eat certain food that is acceptable to most Orthodox Jews." *Id.*

For a further illustration of this point, see *Moskowitz v. Wilkinson*, 432 F. Supp. 947 (D. Conn. 1977). In *Moskowitz*, an Orthodox Jewish inmate argued that the First Amendment forbade prison officials from requiring him to cut or shave his facial hair. See *id.* at 948. Prison officials rejected the inmate's claim, arguing that other sects within the Jewish religion permitted the removal of facial hair. See *id.* at 949. The court rejected the prison officials' argument, stating: "[T]he fact that some Jews do not object to shaving, or that others accept the distinction between shaving and cutting, does not defeat the [inmate's] claim. It is his own religious belief that is asserted, not anyone else's." *Id.*

Understandably, prison officials may occasionally receive particular demands for kosher meals that are administratively burdensome to satisfy.²²¹ When faced with these demands, however, prison officials should not automatically refuse to provide *any* kosher diet.²²² Rather, prison officials could explore the many alternative options in existence that would satisfy, if only at least partially, the Jewish inmates' request.²²³ While prison officials may be administratively inconvenienced by constructing kosher kitchens and providing kosher eating areas, prison officials can easily provide a wide assortment of pre-packaged kosher items and serve these items in a non-kosher eating area.²²⁴

²²¹ See, e.g., *Ward v. Walsh*, 1 F.3d 873 (9th Cir. 1992) (Jewish inmate requested kosher diet that required the prison not merely to provide kosher food, but to prepare and to store the kosher food in a particular manner).

²²² See *id.* (prison officials refusing to provide particularized kosher diet on grounds that they have legitimate interest in running simplified food system).

²²³ In *Ward v. Walsh*, 1 F.3d 873 (9th Cir. 1992), the court held that although the prison has a legitimate interest in running a simplified food service, there were insufficient findings regarding whether the prison officials had even explored the possibility of the existence of other options that would accommodate the Jewish inmate. See *id.* at 878. "Although we must give deference to the prison official's own assessment of the burden on prison operations, we cannot simply accept the warden's assertion . . . that the disruption would be significant." *Id.*

Prison officials could explore various options, including, *inter alia*: (1) serving a cold alternative kosher diet, consisting of fresh fruits and vegetables, milk, eggs, kosher pastries, cheese, bread, fruit juices, teas, and coffee, see, e.g., *Bass v. Coughlin*, 800 F. Supp. 1066, 1068 n.1 (N.D.N.Y. 1991), *aff'd*, 976 F.2d 98 (2d Cir. 1992); and (2) allowing the self-preparation of certain fruits and vegetables, providing tinned fish, boiled eggs and cheeses from regular institution supplies, and acceptable breads, supplemented by hot pre-packaged/pre-prepared frozen kosher meals. See, e.g., *Kahane v. Carlson*, 527 F.2d 492, 496, 496 n.1 (2d Cir. 1975). In addition, prison officials could consult with the Orthodox Union and the Aleph Institute regarding the requirements of kashruth and the many possibilities of convenient and feasible kosher diets. See Response to Defendants' Proposed Dietary Plan at 10-11, *Ashelman v. Wawrzaszek*, 111 F.3d 674 (9th Cir. 1997) (No. Civ. 83-1072) (noting that the Federal Bureau of Prisons, which provides a kosher diet to Jewish inmates, has routinely consulted with the Orthodox Union and Aleph Institute); see also *Orthodox Union*, *supra* note 41; *The Aleph Institute* (visited Nov. 9, 1998) <<http://www.nauticom.net/users/moishe/aleph.html>> [hereinafter *Aleph Institute*].

²²⁴ See *Ward*, 1 F.3d at 879 (noting that it may be possible to provide Jewish inmates with "non-defiled foodstuffs, even if the dining area is not kept kosher").

3. Cost Considerations

Cost considerations are another factor often cited by prison officials as a justification for denying Jewish inmates' requests for kosher food.²²⁵ Prison officials generally argue that they cannot afford to buy special kosher food items within the limits of the existing prison budget. In *Beerheide v. Zavaras*,²²⁶ for example, the Colorado Department of Corrections refused to provide kosher meals to three Orthodox prisoners on the grounds that the kosher meals would adversely affect the prison's dietary budget.²²⁷ The Department of Corrections Food Services department had an annual budget of approximately \$8.25 million, and the prison officials testified that providing kosher meals to all the Orthodox Jewish inmates would cost nearly \$1.4 million each year, a substantial portion of the prison's annual food budget.²²⁸

Similarly, in *Cooper v. Rogers*,²²⁹ a Jewish inmate housed at the Maryland Penitentiary was denied his requested kosher diet because of budgetary concerns. In agreeing with the prison officials and upholding the dietary restrictions, the court stated:

In the final analysis, the question comes down to one of cost. The two kosher meals which [the inmate] currently receives costs the state approximately \$7.50 each day. The average amount budgeted for an inmates daily food allowance is much less, approximately \$1.79. A specially ordered breakfast for [the inmate] would cost between \$2.50 and \$5.00, compared with approximately \$.50 if [the inmate] ate the allegedly kosher items already available at break-

²²⁵ See, e.g., *Beerheide v. Zavaras*, 997 F. Supp. 1405, 1412 (D. Colo. 1998) (noting that Colorado Department of Corrections cited cost concerns as justification for policy of not providing kosher diets); *Cooper v. Rogers*, 788 F. Supp. 255, 260 (D. Md. 1991) (denying Jewish inmate's request for particularized kosher diet, holding that costs associated with kosher meals "cannot be dismissed as de minimis"); see also PALMER, *supra* note 17, § 5.2.3, at 62 (noting that economic considerations are often cited by prison administrators as a justification for limiting inmates' free exercise of religion).

²²⁶ 997 F. Supp. 1405 (D. Colo. 1998).

²²⁷ See *id.* at 1410.

²²⁸ See *id.* at 1412. The court ultimately held, however, that "mathematically speaking, the actual annual cost of providing these three inmates with kosher meals, by force of reason, must be regarded as a minuscule portion of the Food Services' annual budget. Thus, [the prison officials'] concerns . . . is [sic] without merit." *Id.*

²²⁹ 788 F. Supp. 255 (D. Md. 1991).

fast. Additionally, a pre-packaged kosher breakfast unlike lunch and dinner, can only be ordered from a caterer in New York. These costs cannot be dismissed as *de minimis*²³⁰

In addition to the actual cost of kosher food, prison officials frequently express concern that they would be required to prepare kosher kitchens within the prisons and that the construction costs would be too burdensome on the prisons' budget.²³¹ Prison administrators contend that even one centralized kosher kitchen system within each prison would be too burdensome on the budget.²³² Centralized kosher kitchens, apart from the regular dining facilities, would require that the kosher food be transported; thus, compelling the purchase of food carts to keep the food either cold or hot.²³³

Notwithstanding the prison officials' budgetary concerns, at least one court has held that cost concerns alone cannot justify prison officials' refusal to provide kosher diets.²³⁴ Further, prison officials can provide kosher diets by simply purchasing readily available food products at minimal cost.²³⁵ The Ninth Circuit noted that prison officials can provide kosher meals consisting of "off-the-shelf [products] and nothing . . . suggests that the cost would be appreciable."²³⁶ Even assuming, *arguendo*, that some kosher food is more expensive

²³⁰ *Id.* at 260; see also *Ben-Avraham v. Moses*, 1 F.3d 1246, No. 92-35604, 1993 WL 269611, at *2 (9th Cir. July 19, 1993) (refusing to provide Jewish inmate requested kosher diet on grounds that cost of providing kosher meals that met inmate's demands was nearly three times as great as the cost of providing regular prison meals).

²³¹ See Supplemental Answering Brief of Defendants/Appellees/Cross Appellants at 13, *Ashelman v. Wawrzaszek*, 111 F.3d 674 (9th Cir. 1997) (No. 95-15071) (arguing that, because of construction costs, Arizona Department of Corrections "could not place a kosher kitchen within each non-kosher inmate ADOC kitchen"); see also *Beerheide v. Zavaras*, 997 F. Supp. 1405, 1412 (D. Colo. 1998) (noting that cost of equipping each Department of Corrections facility would be approximately \$8,200 per facility, excluding cold storage costs).

²³² See Supplemental Answering Brief of Defendants/Appellees/Cross Appellants at 13, *Ashelman v. Wawrzaszek*, 111 F. 3d 674 (9th Cir. 1997) (No. 95-15071) (discussing the problems of a centralized kosher kitchen system).

²³³ See *id.*

²³⁴ See *Prushinowski v. Hambrick*, 570 F. Supp. 863, 868-69 (E.D.N.C. 1983) (holding that "budgetary considerations alone cannot excuse the prison from according [the Jewish inmate] his First Amendment rights").

²³⁵ For a list of readily available kosher food items, see *supra* note 219 and accompanying text. For other possibilities of convenient and feasible diets, see *supra* note 223 and accompanying text.

²³⁶ *Ashelman v. Wawrzaszek*, 111 F.3d 674, 677 (9th Cir. 1997).

than regular food, courts have recognized that only a small fraction of prisoners are required to adhere to the laws of kashruth; thus, the cost of providing kosher meals to these relatively few prisoners is minimal.²³⁷ Additionally, despite concerns about the construction costs of kosher kitchens within each prison system, prison officials do not have to incur these costs. Because pre-packaged and pre-prepared kosher food can be provided,²³⁸ construction of kosher kitchens is unnecessary.²³⁹

Moreover, prison officials can easily consult with local or national Jewish community groups to discuss how kosher diets can be provided at minimal cost. The Federal Bureau of Prisons, which provides kosher diets to Jewish inmates,²⁴⁰ routinely consults with the Orthodox Union²⁴¹ regarding kosher

²³⁷ See *Luckette v. Lewis*, 883 F. Supp. 471, 480 (D. Ariz. 1995) ("Although, the cost [of kosher food] may be greater, this additional expense is not a compelling governmental interest. Only a few prisoners have legitimate religious beliefs which require they maintain a Kosher diet, and the expense of providing Kosher meals to these few prisoners is minimal."); see also *Beerheide v. Zavaras*, 997 F. Supp. 1405, 1412 (D. Colo. 1998) ("[M]athematically speaking, the actual annual cost of providing these three [Jewish] inmates with kosher meals . . . must be regarded as a minuscule portion of the Food Services' annual budget. Thus, [the prison officials'] concerns about the effect . . . on their costs is without merit.").

Prison officials express a concern that if a kosher diet is furnished to some inmates, prisons will be bombarded with applications for it. See *United States v. Kahane*, 396 F. Supp. 687, 703 (E.D.N.Y. 1975). One court has noted, however, that "the repetitive and spartan nature of such a diet under prison conditions would undoubtedly discourage those who are not sincere." *Id.* at 703. The New York State prison system is a good illustration of this point. As of September 1993, there were 907 Jewish inmates housed in New York State correctional facilities. See Goldman, *supra* note 47, at 20. When the New York State Department of Correctional Services began its kosher food program, however, fewer than 100 Jewish inmates were expected to participate. See *id.*

²³⁸ See *supra* Part I.B.; see also *Kahane*, 396 F. Supp. at 702-03 ("[P]risons could purchase, under their normal food requisitioning procedures, pre-prepared, frozen, foil-wrapped kosher meals accompanied by disposal eating utensils. Such frozen meals . . . are now widely available on airplanes, trains, buses, in hospitals, and at hotels and motels."). In fact, some pre-prepared and pre-packaged kosher diets cost less than other kosher diets. See *Johnson v. Horn*, 150 F.3d 276, 281 (3d Cir. 1998) (noting that daily cost of purchasing frozen, pre-packaged kosher meals is approximately \$4.00 per inmate, whereas daily cost of cold kosher diet is \$7.24 per inmate).

²³⁹ Some correctional facilities, however, maintain a kosher kitchen. See, e.g., *Garza v. Carlson*, 877 F.2d 14, 16 (8th Cir. 1989) (Jewish inmate provided with food prepared in kosher kitchen in federal prison).

²⁴⁰ See *infra* Part III.B.

²⁴¹ See *Orthodox Union*, *supra* note 41.

issues.²⁴² Similarly, the Aleph Institute routinely offers advice to prison officials regarding their concerns about kosher diets.²⁴³ In fact, the Aleph Institute, as well as other Jewish groups, often helps fund the furnishing of kosher meals in prison by donating kosher products.²⁴⁴ Thus, because "it may be possible to comply with the laws [of kashruth] in substantial part at de minimis cost,"²⁴⁵ budgetary concerns are an invalid justification for refusing to provide kosher diets.

4. Proliferation of Other Religious Dietary Demands

A final justification often asserted for prohibiting or limiting Jewish inmates' First Amendment rights to a kosher diet is the proliferation of other religious dietary demands.²⁴⁶ The

²⁴² See Response to Defendants' Proposed Dietary Plan at 10, *Ashelman v. Wawrzaszek*, 111 F.3d 674 (9th Cir. 1997) (No. Civ. 83-1072). The attorneys for the Jewish inmate noted that Rabbi Buchbinder, on behalf of the Orthodox Union, stated that he would make himself available to answer any questions from food services administrators within the Arizona Department of Corrections. See *id.* at 10-11.

²⁴³ See *Aleph Institute*, *supra* note 223.

²⁴⁴ See *id.*; see also *Hearings on The Need for Federal Protection of Religious Freedom After Boerne v. Flores Before the Comm. on the Judiciary*, 105th Cong. 4 (1998) (statement of Isaac M. Jaroslawicz, Director of Legal Affairs for the Aleph Institute) ("Illinois has just announced a unique partnership with Aleph's affiliated Rabbi in that state . . . that will insure that Jewish inmates at more than 20 prisons in that state will receive sufficient kosher-for-Passover foods to observe the upcoming holiday Other states, and many hundreds of chaplains of good faith employed in their prison systems, have contacted Aleph for donations of tens of thousands of pounds of matzo, grape juice, and other . . . supplies."). Other Jewish community groups have attempted to establish relationships with prisons, offering to provide kosher food to the prisons' Jewish inmates. See *Cooper v. Smith*, 145 F.3d 1323, No. 97-7183, 1998 WL 230913, at *2 (4th Cir. Mar. 17, 1998) (unpublished disposition) (noting that the Jewish Big Brother League is willing to pay for and deliver pre-packaged frozen kosher meals to Maryland prison, or, in the alternative, provide volunteers to prepare kosher meals in prison kitchen, or pay Maryland Department of Corrections costs associated with having prison personnel prepare kosher diets); see also Ann M. Norton, *Synagogue-State Program Now Serves Jewish Inmates*, ARIZ. DAILY STAR, Sept. 29, 1984, available in (visited Nov. 14, 1998) <<http://www.rickross.com/reference/Jewpris3.html>> (discussing the "Adopt a Penal Institution" program, in which Arizona synagogues offer food and services to Arizona prisons).

²⁴⁵ *Ward v. Walsh*, 1 F.3d 873, 879 (9th Cir. 1992).

²⁴⁶ See *Cooper v. Lanham*, 145 F.3d 1323, No. 97-7183, 1998 WL 230913, at *2 (4th Cir. May 7, 1998) (unpublished disposition) (discussing prison officials' concerns that if one dietary request is granted similar demands will proliferate); *Ben-Avraham v. Moses*, 1 F.3d 1246, No. 92-35604, 1993 WL 269611, at *2 (9th Cir.

following exchange between the Chaplaincy Administrator for the Bureau of Prisons and a Texas district court best illustrates the problem prison officials fear they would encounter if they were compelled to furnish religious diets:

THE COURT: . . . Now, do you have any opinion, knowing what you know about this case, whether providing [a religious diet for the inmate] would place an undue burden on the prison system, and whether or not there is any good reason not to provide him with the food that he says would make him comply with his religious diet?

THE WITNESS: Only in as much as if we do it for [this inmate], we have an obligation to do it for all others who would make individual requests and that would be an undue burden for the prison system.

THE COURT: In what way?

THE WITNESS: The proliferation of those requests, the individualization. We have a number of self-initiating, self-authenticating religions which we could name, requiring specifics for their own established dietary and sacramental needs Based on the requests that we've had and denied in the past, I would say that it would be a very strong likelihood that others seeing that an individual could request specifically what they wanted, they also would. It's a phenomenon within the prison setting.

THE COURT: You are saying that if this were granted, that would go up, using the old phrase, go up the grapevine to the areas throughout the United States?

THE WITNESS: My experience is that that has happened and would happen.²⁴⁷

Prison officials fear that such a proliferation effect would disrupt and unduly burden the prison system.²⁴⁸

In *Cooper v. Lanham*,²⁴⁹ for example, the Maryland Department of Corrections refused to provide an Orthodox Jewish inmate a kosher diet because the prison officials expected that providing kosher meals would prompt other inmates of different religions to make similar requests for religious diets.²⁵⁰

July 13, 1993) (unpublished disposition) (same); *Kahey v. Jones*, 836 F.2d 948, 950 (5th Cir. 1988) (same); *Beerheide v. Zavaras*, 997 F. Supp. 1405, 1410-12 (D. Colo. 1998) (same).

²⁴⁷ *Udey v. Kastner*, 644 F. Supp. 1441, 1447 (E.D. Tex. 1986) (citations omitted).

²⁴⁸ See *Ben-Avraham*, 1993 WL 269611, at *2 (holding that accommodating Jewish inmate's kosher dietary demands could lead to a proliferation of special diet requests, thus adversely impacting prison resources).

²⁴⁹ 145 F.3d 1323, No. 97-7183, 1998 WL 230913 (4th Cir. May 7, 1998) (unpublished disposition).

²⁵⁰ See *id.* at *2.

The prison officials asserted that the Department of Corrections did not have the resources to honor the additional requests, and thus, "providing special diets to some inmates and not to others would violate the prison's religious directives which is to treat all religions equitably."²⁵¹

Notwithstanding prison officials' arguments, the fear that furnishing kosher diets to Jewish inmates will result in a plethora of religious dietary demands is "speculative at best."²⁵² Justice Brennan, dissenting in *O'Lone*, recognized that, although prison officials have a "difficult and often thankless job,"²⁵³ courts should be skeptical about their speculative justifications for prison regulations: "Mere assertions of exigency have a way of providing a colorable defense for governmental deprivation, and we should be especially wary of expansive delegations of power to those who wield it on the margins of society."²⁵⁴

²⁵¹ *Id.* The court noted that there were over 40 religious groups represented in the inmate population, and that it was administratively and economically unfeasible for the Maryland Department of Corrections to accommodate all special dietary requests. *See id.* at *1.

²⁵² *Beerheide v. Zavaras*, 997 F. Supp. 1405, 1412 (D. Colo. 1998) (holding that concern about proliferation of lawsuits does not justify prison officials' refusal to provide kosher diets).

²⁵³ *O'Lone v. Estate of Shabazz*, 482 U.S. 342, 355 (1987) (Brennan, J., dissenting).

²⁵⁴ *Id.* at 358. Arguably, the Ninth Circuit, in *Ward v. Walsh*, 1 F.3d 873, 878-79 (9th Cir. 1992), heeded Justice Brennan's advice. The *Ward* court, applying the *Turner/O'Lone* factors, recognized that providing a kosher diet would impact the prison system, not only from the cost of the Jewish inmate's diet, but also from the cost of accommodating other inmates with similar claims of entitlement to religious meals. *See id.* Because no specific factual findings were made, however, the court chose not to speculate about the magnitude of the impact provision of kosher diet would have. *See id.* at 879. Rather, the court remanded the inmate's claim so that specific factual findings could be made, and stated:

Abrogation of this important right [to a kosher diet] cannot be justified by the rote recitation of the *O'Lone* standard. The failure to provide a kosher diet may require [the Jewish inmate] to defile himself in a manner not contemplated by *O'Lone*. Moreover, . . . [the Jewish inmate's] religious practice in general has been significantly curtailed by the fact of incarceration in the remote prison. In such circumstances, it is necessary to *evaluate carefully* the justifications proffered by the prison before determining whether the Constitution allows the intrusion into the free exercise right of the inmate.

Id. (emphasis added).

Further, prison officials' slippery slope argument does not pass muster even under the deferential *Turner/O'Lone* standard.²⁵⁵ As the *Beerheide* court held:

[T]o deny these [Jewish inmates] their right to observe a central tenet of their religion on the ground that it might lead to other lawsuits is specious. The DOC's logic would effectively preclude provision of any accommodations for religious practices in prison To deny [the Jewish inmates] their right to free exercise of their sincerely held religious beliefs because it might lead to other inmates filing lawsuits is unreasonable.²⁵⁶

Thus, the concern about the proliferation of other religious dietary demands is an invalid justification for refusing to furnish kosher meals to observant Jewish inmates.

B. *The Federal Bureau of Prisons Common Fare Religious Diet Program: Evidence that Kosher Diets are Compatible with Demands of Prison Administration*

The Federal Bureau of Prisons, under the leadership of Director Kathleen Hawk and through the guidance of Chief Chaplain Susan Van Baalen, has created a Common Fare Religious Diet program to accommodate the religious dietary needs of observant Jewish inmates housed in federal correctional facilities.²⁵⁷ The Bureau's Program Statement provides:

²⁵⁵ See *Beerheide*, 997 F. Supp. at 1412 (applying the *Turner/O'Lone* factors and holding that concern about proliferation of lawsuits is *unreasonable*).

²⁵⁶ *Id.*

²⁵⁷ See 28 C.F.R. § 548.20 (1997). The Bureau's regulation provides:

(a) The Bureau provides inmates requesting a religious diet reasonable and equitable opportunity to observe their religious dietary practice within the constraints of budget limitations and the security and orderly running of the institution and the Bureau through a common fare menu. The inmate will provide a written statement articulating the religious motivation for participation in the common fare program.

(b) An inmate who has been approved for a common fare menu must notify the chaplain in writing if the inmate wishes to withdraw from the religious diet. Approval for an inmate's religious diet may be withdrawn . . . if the inmate is documented as being in violation of the terms of the religious diet program to which the inmate has agreed in writing. In order to preserve the integrity and orderly operation of the religious diet program and to prevent fraud, inmates who withdraw (or are removed) may not be immediately reestablished back into the program. The process of reapproving a religious diet for an inmate . . . may extend up to thirty days. Repeated withdrawals . . . , however, may

The increased number of religious groups requesting diets requires a religious diet program that provides equity to all. Common Fare is intended to accommodate inmates whose religious dietary needs cannot be met on the main line. The common fare menu is based upon a 14-day cycle with special menus for the ten recognized Federal Holidays. The menus have been nutritionally analyzed and certified as exceeding minimum daily nutritional requirements.²⁵⁸

In order to participate in the Common Fare program, an observant Jewish inmate must submit an application to the particular institution's Chaplain for approval, and, ordinarily, the inmate can begin eating from the common fare menu within two days after the prison food service receives written authorization from the Chaplain that the inmate has been approved.²⁵⁹ Participation in the Common Fare program is not affected by placement in a Special Housing Unit or temporary placement on a medically prescribed diet, and "[n]o staff may disparage an inmate's religion or religious views or attempt to dissuade an inmate from participating in the program."²⁶⁰

The existence of the Common Fare Religious Diet program is evidence that kosher dietary regulations are an exaggerated response to prison concerns. Indeed, the United States Supreme Court has stated that the policies and practices of other well-run penal institutions are relevant to a determination of the necessity of a particular type of prison regulation, and the fact that the Federal Bureau of Prisons provides kosher meals

result in inmates being subjected to a waiting period of up to one year.

(c) The chaplain may arrange for inmate religious groups to have one appropriate ceremonial . . . meal each year for their members as identified by the religious preference reflected in the inmate's file. An inmate may attend one religious ceremonial meal in a calendar year.

Id. Similarly, the New York State prison system consistently accommodates the dietary needs of Jewish prisoners. See N.Y. COMP. CODES R. & REGS. tit. 9, § 7024.6 (1988) ("Prisoners are entitled to observe reasonable dietary laws established by their religion. Each facility shall provide prisoners with food items sufficient to meet such reasonable religious dietary laws."); see also Goldman, *supra* note 47, at 20 (noting that kosher diets would be available in each of New York's 69 state prisons by April 1994); *Hot Kosher Meals*, *supra* note 1, at A11 (noting that in March 1994, New York became the first state to offer hot kosher meals to Jewish inmates).

²⁵⁸ Federal Bureau of Prisons [hereinafter BOP], Food Services Manual, P.S. 4700.04, ch. 7, at 1 (Oct. 7, 1996).

²⁵⁹ See *id.* at 2.

²⁶⁰ *Id.* If inmates miss six consecutive Common Fare meals, however, the food services recommends that they be removed from the program. See *id.*

casts doubt on the validity of prison officials' justifications for refusing to furnish kosher diets.²⁶¹ The ability of Jewish inmates to observe the kosher dietary laws throughout the entire federal prison system suggests that the practice is compatible with the interests of prison administration.²⁶²

Indeed, the Federal Bureau of Prisons is able to provide kosher diets to Jewish inmates without compromising penological interests. For example, the Bureau facilitates the preparation of kosher food by purchasing all food (except fresh fruits and vegetables) "fully prepared, ready to use, and certified by a recognized Orthodox Standard."²⁶³ Additionally, hot kosher meals are available, which "shall be offered three times a week and shall be purchased *precooked*, heated in their *sealed* containers, and served *hot*."²⁶⁴ Further, kosher meals are generally served with disposable plates and utensils.²⁶⁵ Moreover, to ease the preparation of ceremonial kosher meals, such as Passover meals, the Chaplain consults with the food service administrators "well in advanced [sic] of the scheduled

²⁶¹ See *Turner v. Safley*, 482 U.S. 78 (1987). The *Turner* Court found that the practices of the Federal Bureau of Prisons were relevant to a determination of the existence of reasonable alternatives to the policy under challenge. See *id.* at 93. In upholding a regulation on inmate-to-inmate mail, the *Turner* Court observed that the Federal Bureau had adopted "substantially similar restrictions on inmate correspondence." *Id.* (citing 28 C.F.R. § 540.17 (1986)). In holding that there were reasonable alternatives to a strict marriage regulation, the Court noted that marriages by prisoners in federal correctional facilities were generally permitted absent a threat to public safety or security. See *id.* at 97 (citing 28 C.F.R. § 551.10 (1986)). The Supreme Court, in other instances, has held that the policies at other correctional facilities are relevant to a determination of the necessity of a restriction. See *Procunier v. Martinez*, 416 U.S. 396, 414 n.14 (1974), *overruled by Thornburgh v. Abbott*, 490 U.S. 401 (1989) ("While not necessarily controlling, the policies followed at other well-run institutions would be relevant to a determination of the need for a particular type of restriction.").

²⁶² See *O'Lone v. Estate of Shabazz*, 482 U.S. 342, 362 (1987) (Brennan, J., dissenting) ("That Muslim inmates are able to participate in Jumu'ah throughout the entire federal prison system suggests that the practice is, under normal circumstances, compatible with the demands of prison administration.").

²⁶³ *Id.* at 1. Under the common fare program, no pork or pork derivatives may be used, and all margarine and bread must be labeled *Parve* for use on the Common Fare tray. See *id.*

²⁶⁴ *Id.* As submitted in Part III.A., *supra*, construction of kosher kitchens is unnecessary; most kosher foods can be purchased pre-cooked and pre-prepared.

²⁶⁵ See BOP, Food Services Manual, P.S. 4700.04, ch. 7, at 2 (Oct. 7, 1996). If reusable utensils and plates are used, they are identified for Common Fare use only, and are washed and sanitized in a separate dish pan if a separate three-compartment sink is unavailable. See *id.*

date of the observance (six to eight weeks prior).²⁶⁶ Thus, the Bureau furnishes kosher diets without compromising the simplified operation of the dining service.

In addition, institutional security is not adversely impacted under the Common Fare program. The Bureau does not have to worry about Jewish inmates receiving kosher food from unknown sources and the potential contraband that could be smuggled into the prisons,²⁶⁷ because the Bureau's Food Service Department is "the only source of procurement for all food items."²⁶⁸ Furthermore, the Bureau need not concern itself with the perception that Jewish inmates are being favored by receiving kosher meals,²⁶⁹ because all religious inmates have an "equitable opportunity to observe their religious dietary practice."²⁷⁰

The Common Fare Religious Diet program demonstrates the Federal Bureau of Prisons' commitment to accommodate legitimate religious practices, and this good faith policy of furnishing religious diets is consistent with the needs of prison administration. In light of standard federal prison practice, there exists solid support for the argument that prison officials throughout the country can invariably furnish diets consistent with the central tenets of Jewish inmates' religion.²⁷¹

CONCLUSION

While many Jewish inmates are fortunate enough to be housed in one of the few prison systems that consistently provide kosher diets, others are routinely deprived of this central tenet of their religion. Prison officials frequently base such a

²⁶⁶ *Id.* at 3.

²⁶⁷ See *supra* Part III.A.1. (discussing security concerns).

²⁶⁸ BOP, Food Services Manual, P.S. 4700.04, ch. 7, at 3 (Oct. 7, 1996).

²⁶⁹ See *supra* Part III.A.1. (discussing security concerns).

²⁷⁰ 28 C.F.R. § 548.20 (1997) (emphasis added). The Bureau's Program Statement indicates, for example, that Christian inmates observing Lent and Muslim inmates observing Ramadhan can be accommodated under the common fare program. See BOP, Food Services Manual, P.S. 4700.04, ch. 7, at 3-4 (Oct. 7, 1996).

²⁷¹ Further support for this assertion is the fact that at least one state prison system also consistently accommodates kosher dietary requests. See Goldman, *supra* note 47, at 20 (noting that kosher diets would be available in each of New York's 69 state prisons by April 1994); *Hot Kosher Meals*, *supra* note 1, at A11 (noting that in March 1994, New York became the first state to offer hot kosher meals to Jewish inmates).

denial on mere assertions that penological interests will be compromised. "To deny the opportunity to affirm membership in a spiritual community, however, may extinguish an inmate's last source of hope for dignity and redemption."²⁷² It is hoped that in the future, courts, as well as prison officials, will recognize that the proffered penological interests are invalid justifications for refusing to furnish kosher diets, and that the relationship between prison dietary policy and correctional goals is tenuous. It is submitted that a colorable claim can be made that such restrictive religious dietary policies are unnecessary, in light of the ability of the federal prison system, and at least one state prison system, to accommodate Jewish inmates' kosher dietary requests.

Completely foreclosing Jewish inmates from observing a central tenet of their religion is unwarranted. Ready and feasible alternatives to current prison dietary policy exist that satisfy both the laws of kashruth and penological interests. It is hoped that prison officials will recognize these administratively feasible alternatives and affirm a commitment to accommodating the dietary needs of observant Jewish inmates. Prison officials throughout the country, with advice from the Federal Bureau of Prisons and well-established Jewish organizations, can establish kosher diet plans compatible with the needs of prison administration.

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²⁷² *O'Lone v. Estate of Shabazz*, 482 U.S. 342, 368 (1987) (Brennan, J., dissenting).