Orthodox Jewish Prisoners and the Turner Effect

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Orthodox Jewish Prisoners and the *Turner* Effect

I. INTRODUCTION

Problems often arise when an inmate's desire to participate in a religious practice conflicts with prison regulations. The tension occurs between prison regulations restricting prisoners' rights and the Free Exercise Clause of the First Amendment of the United States Constitution protecting those rights. Orthodox Jewish prisoners have had various problems with prison regulations prohibiting or curtailing certain of their religious practices. These prisoners have desired specific areas for prayer in, constant wearing of a yarmulke, or even specific fabric necessary for their prison uniforms. Paramount among these practices are the keeping of the Jewish dietary laws and the growing of beards without cutting or trimming. Both practices have their roots in the Five Books of Moses, the Torah, and have been observed by many Jews, especially Orthodox Jews, for centuries. Prison officials have difficulty catering to prisoners who wish to keep the dietary or kosher laws because food choices in prison are limited and special, kosher food preparation methods are impracticable. Likewise, respecting the religious restriction against trimming beards is difficult because it allegedly hampers prison officials' quick and certain identification of prisoners.

This comment will explore the different claims raised by Orthodox Jewish prisoners in relation to these two religious practices. The analysis will focus on two periods on the jurisprudential timeline: Part II of the comment will concentrate on the cases decided before the seminal *Turner v. Safley* decision and Part III will examine those decisions after *Turner*. Contrasts will be drawn between the various standards for constitutionality used in these two different "periods," as well as the results produced by the different standards. Part IV of the comment will consider the constitutionality of the *Turner* standard, questioning the standard's effectiveness in evaluating Free Exercise claims, the Supreme Court's reasoning in granting almost complete deference to prison officials, and the standard's result in totally depriving Orthodox Jewish prisoners of their most essential religious practices. Part V will discuss the recent Religious Freedom Restoration Act and how it will affect the rights of these prisoners.

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1. U.S. Const. amend. I.: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."
4. Ward v. Walsh, 1 F.3d 873 (9th Cir. 1993).
5. See discussion in Section II.A.1. and B.1., *infra*.
II. PRE-TURNER STANDARDS AND OUTCOMES

Before analysis of the jurisprudence can begin, the origins and importance of kashrut and the prohibition against shaving must be considered. This Section explores the history of both practices and then delves into the jurisprudence affecting these issues. The case law will reveal favorable results to those inmates who challenged prison restrictions which curtailed their religious practices.

A. Kashrut

1. Biblical Origins

Like most other Jewish practices, the rules concerning kashrut, or keeping kosher, are found in the Five Books of Moses, or Torah. Three of the Five Books, Exodus, Leviticus, and Deuteronomy, include significant passages regarding kashrut.

Kashrut is first mentioned in the Torah in the Book of Exodus, which contains the story of the emancipation of the ancient Hebrews from Egyptian slavery by Moses. After pronouncing the Ten Commandments, God directed: “And ye shall be holy men unto Me; therefore ye shall not eat any flesh that is torn of beasts in the field; ye shall cast it to the dogs.” This passage, though somewhat cryptic, foreshadows the dietary rules to come in the later Books by condemning “any flesh that is torn of beasts,” or the eating of “unclean” animals, as an unholy practice.

Exodus also contains two identical references to the prohibition of consuming meat with milk: “Thou shall not seethe a kid in its mother’s milk.” There are three prohibitions that extend from this passage. Milk and meat are not to be cooked together, eaten together, or mixed together in any way. Separate utensils must be used for milk and meat products, and the utensils must also be cleaned and stored separately.

The Book of Leviticus is the true keeper of the kosher laws. Leviticus is the primary source of the Judaic law, or halacah. Leviticus provides the basic structure of halacah, discussing laws ranging from burnt offerings to the duty of

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8. Kashrut is the practice of keeping kosher, i.e., the Jewish dietary laws.
9. The Torah, also known as the Pentateuch, is regarded by most non-Jews as the “Old Testament,” describing the covenant between God and the Jewish people. The “New Testament,” in contrast, contains works describing the life of Jesus Christ, his teachings, and the works of his disciples.
the priests to medical treatment of plagues. Here, the laws of kashrut are clearly defined. *Leviticus* 11 decrees animals that are not cloven-footed, and that do not chew their cud, are "unclean," and not to be consumed. Thus, pork, hare and camel products are to be avoided because they do not possess the two above-mentioned attributes. Other restrictions involving animals forbidden for consumption follow. Sea animals that have neither fins nor scales cannot be eaten, thus excluding all shellfish and other aquatic life such as shark, catfish, and eel. Although bird such as chicken, duck, and turkey may be consumed, fowl such as eagle and hawk may not. "Swarming things that swarm upon the earth," such as rodents and lizards, are also deemed unclean. *Leviticus* even dictates rules for keeping vessels, ovens, and pottery clean after coming into contact with unclean animals.

The Book of Deuteronomy, known for containing the last words of Moses spoken to the ancient Hebrews, also provides some additions to kashrut. In particular, Deuteronomy prohibits eating the blood of animals:

Notwithstanding thou mayest kill and eat flesh within all thy gates, after all the desire of thy soul . . . Only ye shall not eat the blood; thou shalt poor it upon the earth as water . . . for the blood is the life, and thou shalt not eat the life with the flesh.

Deuteronomy explains the "life" of the animal, or the blood, is to be given to God in the burnt-offering ritual. Today, a special type of slaughtering method ensures compliance with this prohibition. A shokel, or special slaughterer, is trained to cut an animal's arteries and windpipe with one stroke, so that the blood drains quickly from the flesh.

At first glance, kashrut seems to be linked to old rituals dealing with health concerns. Some modern commentators disagree with this explanation:

The most common misconception regarding Kashrut is that it is an ancient health measure which may have had its place in antiquity, but, what with modern methods of slaughtering, regular government inspection and sanitary food preparation, is quite clearly an anachronism which should be discarded along with the horse and carriage and the high-button shoe.

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21. *Deuteronomy* 12:15-17, 23. This same prohibition is also found in *Genesis* 9:3-4 and *Leviticus* 17:10-11.
Dresner suggests that the main purpose behind these laws is not health but holiness. 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 the process of eating?”

Therefore, the kosher laws, through their restrictions and rules of cleanliness, make the act of eating a holy act, allowing the follower of kashrut to “know” God in his or her day to day activity. Other than perhaps daily prayer, the observance of kashrut provides Jews with a more continuous and structured way in which to worship God than any other practice in the religion.

Another purpose for kashrut lies in the spirituality of the body itself. Bleich suggests the food one consumes has “a profound effect upon his spiritual well-being.”

By regulating what enters one’s body, one concentrates not only on how food affects the body physically, but also how it affects the soul. “For a Jew the body is not simply a vessel serving as a container of a sacred soul, but is itself an instrument of spirituality.”

In Judaism, then, there is no strict dichotomy between the body and the soul. The two must exist as equal pillars of health, and the kosher laws maintain this balance by directing that only holy food be consumed by both the body and the spirit of the observer.

2. Standards, Burdens, and Results

Three federal cases prior to Turner deal specifically with the conflict between a prisoner’s Free Exercise right to practice kashrut and prison regulations: United States v. Huss, Kahane v. Carlson, and Prushinowski v. Hambrick. These cases have established a series of standards to determine whether a valid Free Exercise claim has been established and who carries the burden of proof therein. The analysis will show that the courts have favored the prisoners’ arguments.

a. United States v. Huss

United States v. Huss involved an Orthodox Jew detained at West Street Detention Center in New York. Defendant Smilow was to be transferred to another facility in Kentucky. He applied for an order to be given kosher food products during his internment in New York. Smilow explained that although

25. Id. at 18.
27. Id. at 59.
29. 527 F.2d 492 (2d Cir. 1975).
31. Actually the case involves two prisoners, Huss and Smilow, but Huss was found not to be a bona fide observer of the kosher laws. Huss, 394 F. Supp. at 754.
he was able to eat certain foods, such as fresh fruits, vegetables, and some dry
and canned goods, he could not eat any cooked food for fear that the cooking
utensils had touched unclean meats. He demanded frozen kosher meals which
were available from the local Board of Rabbis. The prison argued it should not
be compelled to provide frozen kosher meals to any of the prisoners because
there would be extreme difficulty in always using separate utensils and the price
of the kosher frozen meals was two to three times more than the non-kosher
frozen meals. The prison also argued this type of preferential treatment could
potentially cause unrest with the other inmates.

The court began its analysis by noting that although “[t]here appear[ed] to be
no reported judicial decision dealing with a request by an Orthodox Jew to
be provided with Kosher food in prison,” there were cases involving impris-
oned Black Muslims and their dietary problems. Those cases utilized a
“compelling government interest” standard under which the prison authorities had
the burden of proving a compelling interest in restricting the prisoners’ Free
Exercise rights. The court, however, ignored those decisions and opted for the
more prison-friendly standard enunciated in Pell v. Procunier. Pell held that
the courts should defer to prisons attempting to achieve “legitimate penological
objectives” and that prisoners retain only those rights not inconsistent with these
objectives.

The Huss court agreed that a prisoner’s First Amendment rights are
“severely curtailed” when in confinement, and explained

in order for a prisoner to successfully challenge prison procedures on
First Amendment grounds, he has the burden of showing that the
procedure or practice in question is clearly unreasonable; and in this
inquiry the expert judgment of the prison officials is accorded substan-
tial deference.

32. Id. at 759.
33. Id. at 757.
34. Apparently, the unrest was already happening. Six “militant Black Muslim” inmates
cornered the prison food administer in a “threatening manner,” requiring that they, too, be provided
with a diet that satisfied their religious practices. Id. at 758.
35. Id. at 760.
36. Barnett v. Rodgers, 410 F.2d 995 (1969); Russ v. Blackledge, 477 F.2d 616 (4th Cir. 1973);
1974).
California Department of Corrections regulation that forbade media interviews with individual
inmates. The prisoners argued the regulation unconstitutionally burdened their First Amendment right
of free speech. The Supreme Court held there was no violation of the constitutional right of free
speech because the prisoners were allowed “alternative means of communication.” Id. at 818, 94 S.
Ct. at 2802.
Applying this standard, the court determined the “defendants in the present action have failed to show that they are constitutionally entitled to be supplied with Kosher food during their imprisonment.”\textsuperscript{40} The court reasoned the prison’s reasons for denying Smilow’s requests, namely high prices and potential prisoner unrest, were sufficient to deny Smilow’s requests.

The court here may have been somewhat quick to support the prison system’s judgment. In a supplemental opinion,\textsuperscript{41} the court addressed a memorandum filed by the State of New York after the Huss decision, requesting a more inmate-friendly standard of proof. The state, in the memorandum, cited Procunier v. Martinez,\textsuperscript{42} which held that after a prisoner has “shown” that a prison policy has infringed on his Free Exercise rights, the burden is on the prison authorities to show

the policy or regulation furthers a substantial governmental interest connected with the legitimate goals of the correction system, unrelated to the suppression of religion, and must further show that the limitation on religious exercise is not greater than is necessary or essential to the protection of the particular government interest involved.\textsuperscript{43}

The court, however, disagreed. Explaining that Martinez dealt with censorship of prison mail, an issue also dealing with the rights of non-prisoners, the Huss court found the Pell decision, regarding press interviews with inmates, to be closer on point. Thereafter, the court simply reiterated its prior position, granting deference to the prison system. In the near future, however, the Martinez standard would arise again.

\textbf{b. Kahane v. Carlson}

Meir Kahane, an Orthodox Rabbi imprisoned in New York, filed an order with the United States District Court for the Eastern District of New York, demanding kosher meals. The court in this case took a different approach to Kahane’s request than did the court in Huss. The court proclaimed “[t]he dietary laws are an important, integral part of the covenant between the Jewish people and the God of Israel.”\textsuperscript{44} The court focused on the issue that a small number of Orthodox Jews are imprisoned. Considering that this preferential treatment

\begin{itemize}
  \item \textsuperscript{40} Id. at 762.
  \item \textsuperscript{41} Id. at 762. Huss was decided on May 5, 1975. The supplemental opinion was issued on May 14, 1975.
  \item \textsuperscript{42} 416 U.S. 396, 94 S. Ct. 1800 (1974). California inmates brought a class action challenging California Department of Corrections regulations that 1) censored prison mail and 2) banned prisoner access to law students and paralegals for attorney-client interviews. The Supreme Court held the regulation censoring prisoner mail violated the prisoner’s right to free speech, and the regulation banning the legal interviews unconstitutionally obstructed the prisoners’ access to the courts.
  \item \textsuperscript{43} Kahane v. Carlson, 527 F.2d 492, 495 (2d Cir. 1975).
\end{itemize}
might cause unrest among the other prisoners, the court found the difficulties of providing kosher food for these few inmates were "surmountable" by prison authorities.

The court began its legal analysis with *Martinez*, the case that the *Huss* court declined to consider. The court stated restrictions on prisoners are "not without limit," and continued by re-erecting the *Martinez* standard which had been dismissed by the *Huss* court:

Where [the prison restrictions] operate on fundamental rights such as the freedom of worship, the degree of restriction must be only that which can justified by an "important or substantial government interest" in the restriction by the penal institution.

Interestingly, although the court moved towards a more prisoner-friendly standard, it refused to decide whether restrictions on prisoners' First Amendment rights in general must be justified by the "compelling government interest," found in *Goodwin v. Oswald,* or by the less stringent "important or substantial interest" standard enunciated in *Martinez.* The court, however, reached the conclusion that even under the standard most favorable to the government, the denial of kosher food was not justified. The court found there were reasonable means of providing Kahane with a kosher diet and made several suggestions, such as providing frozen kosher dinners. Evoking the *Pell* reasoning, the court warned "each and every" method need not be followed, for "[p]rison authorities have reasonable discretion in selecting the means by which prisoners' rights are effectuated." The court held a diet sufficient to keep Kahane in good health without compromising kashrut should be provided.

c. Prushinowski v. Hambrick

Inmate Prushinowski sought a writ of habeas corpus under 28 U.S.C. Section 2241, alleging that he suffered health problems due to a poor diet resulting from the prison not providing kosher food. Prushinowski asked (1) that the kitchen be made kosher and that he be provided special kosher food, (2) that he be given his own cooking materials to prepare his own kosher meals, or (3) that he be transferred to another prison that could satisfy his kosher requests.

The court first considered the *Pell* "not inconsistent with legitimate penological objectives" standard and the *Cruz* "paramount state interest"

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45. *Id.* at 495.

46. *Id.* at 495.

47. *Id.* at 495 (quoting *Martinez*, 416 U.S. at 413, 94 S. Ct. at 1811).

48. 462 F.2d 1237, 1244 (2d Cir. 1972).

49. *Kahane*, 527 F.2d at 495 n.6.

50. *Id.* at 496.

Then the court proposed a third alternative standard requiring that
the restriction be "reasonably and substantially justified by considerations of
prison discipline and order" and must be the least restrictive alternative
available. Out of this legal morass, the court decided simply to "balance[e]
... Prushinowski's First Amendment freedoms and [the need for] prison
discipline and security."

The court cited Kahane and its progeny and declared that prison authorities
must accommodate prisoners' religious dietary requests. Prison officials must
show the food provided to the prisoners in their custody is adequate for both the
prisoners' health and religious beliefs. As for the prison's argument that
Prushinowski's requests for specific kosher foods were different than those
requested by other Orthodox Jewish prisoners, the court stressed that the First
Amendment protects an individual's beliefs whether or not that belief is held by the
majority of similar observers. The prison's second argument, that the special
food allowed in the prison may contain contraband, was also rebuffed by the court,
for lack of supporting evidence. The court, however, denied Prushinowski's
request that prison officials not touch kosher food entering the prison (thereby
making the food unclean) because the prison's need to inspect the food for
contraband was paramount. As in Huss, the prison officials argued kosher food
was too expensive to provide. Unlike Huss, however, the court in Prushinowski
allowed outside kosher foodstuffs to be donated to the prisoner, thus offsetting
potential economic problems.

d. The Trend

These cases show the law favoring prisoners in issues regarding the Free
Exercise protection of rights involving the kosher laws. The burden of proving
religious curtailment was shifted from the prisoner in Huss to the prison officials
in Kahane and Prushinowski. The standard for determining whether a prisoner's
religious liberties are being impaired by prison regulations has never reached the
strict "compelling interest" standard used in other prisoner cases. The "important
and substantial government interest" test in Kahane and the balancing test used in
Prushinowski, however, represent a quantum leap in favor of the prisoner from the
"clearly unreasonable" test enunciated in Huss. It appeared as long as their requests
were fairly reasonable, Jewish prisoners would be provided a kosher diet.

53. Prushinowski, 570 F. Supp. at 866 (citations omitted).
54. id. at 866.
55. The court was quoting Moskowitz v. Wilson, 432 F. Supp. 947 (D. Conn. 1977), to be
discussed at length infra.
56. See United States v. Huss, 394 F. Supp. 752, 762 (S.D.N.Y. 1975) ("I am also persuaded
that it 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 food. In addition, the security
problems referred to by the Bureau of Prisons cannot be overlooked."). Id.
B. Prohibition of the Cutting of Facial Hair

1. Biblical Origins

Two sections of the Torah discuss prohibitions against the cutting of facial hair. In the Book of Leviticus, God tells Moses to speak to the ancient Hebrews regarding a myriad of laws, and in Chapter 19 verse 27, Moses states “Ye shall not round the corners of your heads, neither shalt thou mar the corners of thy beard.” The purpose or meaning behind this command is not clear. One possible reason for the shaving prohibition was to differentiate ancient Hebrews from other peoples.

Some commentators have noted that the shaving of the head was a mourning practice of non-Hebrews in ancient times and that God was telling Moses to discard these pagan ways. A similar prohibition is found in Leviticus 21:5, where God commands Moses to warn the sons of Aaron, or the ancient Hebrew priests, about following the ancient pagan rituals. In fact, an ancient form of humiliation involved shaving only half a beard.

Today, the prohibition against “rounding the corners” of the head, or shaving of one’s beard, is taken very seriously by Orthodox Jews. There exist, however, some problems in perfecting this practice:

The Torah prohibited shaving the “corners” of beard with a razor. The beard has five “corners.” However, since there are differing opinions as to where they are, a pious person should not shave any part of the head with a razor, even the upper lip or under the chin.

Thus, Orthodox Jews do not shave any part of the beard, at any time, for any reason. Some Orthodox Jews even grow side curls, or put, in an attempt to strictly carry out these laws. Similar to kashrut, the observance of this ritual is viewed as a way of hallowing God on a daily basis.

2. Standards, Burdens, and Results

Two federal cases focus on the conflict between a prisoner’s Free Exercise right to keep his beard untrimmed and prison regulations requiring that beards be shaven, or trimmed: Moskowitz v. Wilkinson, and Fromer v.

57. 2 Encyclopaedia Judaica, supra note 13, at 356 (Beard and Shaving).
59. “They shall not make baldness upon their head, neither shall they shave off the corners of their beard, nor make any cuttings in their flesh.” See other references to baldness and mourning practices in Deuteronomy 14:1, Isaiah 22:12, Jeremiah 16:6, Amos 8:10, and Micah 1:16.
60. II Samuel 10:4. See also 2 Encyclopaedia Judaica, supra note 13, at 357.
62. Plaut, supra note 58, at 898.
This discussion concentrates on the same issues analyzed in the kosher cases: the standards set by each court to determine if a valid Free Exercise claim has been made, and who carries the burden of proof to bring or refute that claim. Again, the cases here will show a trend towards deference to the prisoner.

a. Moskowitz v. Wilson

Philip Moskowitz was an Orthodox Jewish prisoner at the Federal Correctional Institution in Danbury, Connecticut. While incarcerated, Moskowitz sought a writ of habeas corpus and motion requesting a temporary restraining order, to keep from having to shave off his beard, in accordance with Bureau of Prison policy. The court first declared that “prisoners do not lose their right to practice their religion when the prison gate closes behind them.” The court noted the Martinez “important or substantial government interest” test has been applied in several federal courts, including the Kahane case. The court noted as well that this standard places the burden of proof on the prison authorities. The court then enunciated its own standard:

These cases indicate that consideration must be given to both the First Amendment interest at issue, and the government interest asserted, and that a judgment must be made as to whether the governmental interest justifies impairment of the First Amendment interest. Justification in this context must mean more than rationally related to advancing a legitimate objective.

The court ignored standards used by the courts prior to Martinez which were less favorable to the prisoner. The court further explained that the restriction must be “generally necessary” to protect a legitimate government interest and that a mere “reasonable relation” will not suffice.

The government argued Moskowitz’s belief should not be protected because most other Jews do not observe this practice. The court found this claim lacked merit, stating that the belief in question is Moskowitz’s, not anyone else’s. It is irrelevant, the court explained, what other Jews do or do not practice.

The purported governmental interest was examined next. The prison authorities claimed the no-beard rule was necessary for “effective identification

64. 817 F.2d 227 (2d Cir. 1987).
65. Policy Statement 7300.64B (March 19, 1976): “There will be no limitations on hair style and length of hair but beards will be prohibited. . . . Mustaches, defined as hair growing on the upper lip, are permitted. Beards are not permitted, since they most readily compromise security because of the consequent rapid modification of appearance.” Moskowitz, 432 F. Supp. at 948 n.1 (emphasis added).
66. Id. at 948 (citing Cruz v. Beto, 405 U.S. 319, 92 S. Ct. 1079 (1972)).
67. Id. at 949.
68. Id. at 949.
of inmates to ensure prison security and to facilitate apprehension of inmate escapees. The government provided evidence showing that beards can easily change the appearance of inmates because they can be formed and shaped in a myriad of styles, making effective identification of inmates difficult. The court, however, found other evidence more compelling. For example, a survey conducted by the National Institute of Corrections indicated fifty percent of the state prison systems polled had no beard restrictions at all. Furthermore, the court pointed to the fact that the prison in question had no restrictions concerning hair style or length, raising further questions as to whether beards posed such a serious problem to prison identifications. The court concluded the problems with identification "are not shown to pose a sufficiently serious risk as to outweigh the inmate's religious interest in wearing a beard."

b. Fromer v. Scully (II)

Yevgen Fromer, an Orthodox Jew, was being detained at the New York Department of Corrections when he filed an action under 23 U.S.C. Section 1983 against the prison. Fromer had been punished several times for not submitting to a "Department Directive," requiring that all beards be trimmed to a length of no more than one inch.

The court began with a discussion of the Reynolds v. United States distinction between First Amendment protection of an individual's beliefs and his practices. The court resolved this issue by stating that according to recent Supreme Court rulings the degree of curtailment of religious practice depends on the relationship between that individual and the governmental entity imposing the

69. Id. at 950.
70. Id. at 951.
71. This discussion of Fromer centers around its second incarnation, following Fromer v. Scully, 649 F. Supp. 512 (S.D.N.Y.1986) ("Fromer (I)"). Fromer v. Scully, 874 F.2d 69 (2d Cir. 1989) ("Fromer (IV)"), will be discussed in Section IV infra.
72. Fromer was disciplined twice for failing to trim his beard while at the Great Meadow Correctional Facility, and was placed in solitary confinement for 30 days for again refusing to trim his beard upon transfer to the Wallkill Correctional Facility. Fromer v. Scully, 817 F.2d 227, 228, 229 (2d Cir. 1987) ("Fromer (II)").
73. Id. at 228.
74. 98 U.S. 145 (1878). In Reynolds, a member of the Church of Jesus Christ of Latter-Day Saints in Utah was prosecuted for the crime of bigamy, a practice accepted by the Church. The defendant argued that this practice was protected by the Free Exercise Clause, but the Supreme Court disagreed, holding that while the law could not control religious beliefs, it could curtail religious acts deemed criminal by society.
75. The court noted "[a]lthough the free exercise clause by its terms appears to impose an absolute proscription on the power of the government, only an individual's belief is beyond governmental intrusion. The right to engage in a practice concomitant with religious belief always has been balanced against the state's interest in applying neutral rules of conduct evenhandedly to all citizens." Fromer (II), 817 F.2d at 229.
The court discussed the question of prison restrictions and settled on a standard enunciated within its own walls only two years earlier in *Wall v. Coughlin*. This standard to determine whether the prisoner's Free Exercise rights were being violated applies

where "the activity in which the prisoners seek to engage is not presumptively dangerous, and where official action (or inaction) works to deprive rather than merely limit the means of exercising a protected right." . . . "In these limited circumstances, it is incumbent upon prison officials to show that a particular restriction is necessary to further an important governmental interest, and that the limitations on freedoms occasioned by the restriction are no greater than necessary to effectuate the governmental objective involved." 778

The court found none of the prison's arguments compelling. First, the prison argued the *Wall* decision was not factually similar to the instant case and, thus, should be distinguished. The court, however, believed the *Wall* standard was meant to evaluate inmates' constitutional claims of "any nature." 779 Second, the prison argued the *Goldman v. Weinburger* 80 case should be analogized to the present one. Though the court noted that deference was given to the government regulation in *Goldman*, it did not read *Goldman* to extend beyond the realm of the military. 81

Next, the prison asserted the court was using the wrong *Wall* standard to determine whether the plaintiff's rights had been infringed. 82 The court,

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76. The court specifically concentrated on *Hobbie v. Unemployment Appeals Commission*, 480 U.S. 136, 107 S. Ct. 1046 (1987). In *Hobbie* a discharged Florida worker who refused to work on Friday evenings and Saturday mornings was denied unemployment compensation for alleged misconduct connected with her firing. The Supreme Court held the refusal to award unemployment compensation violated the Free Exercise Clause of the First Amendment.

77. 754 F.2d 1015 (2d Cir. 1985). *Wall* involved an injunction brought by twenty-four inmates of various correctional facilities in New York state to enjoin the commissioner of the Department of Correctional Services from preventing copies of a legal services report dealing with problems between inmates and prison officials in the Attica prison from being circulated in New York prisons. The United States Court of Appeals for the Second Circuit affirmed the lower court's decision to grant the injunction, finding that the prison officials failed to carry their burden of demonstrating that the refusal to allow distribution of the report was necessary to further important penological interests. *Wall* actually contained three standards by which to determine whether a prisoner's Free Exercise rights are being violated, but the court in *Fromer (II)* chose standard three.

78. *Fromer (II)*, 817 F.2d at 230 (quoting *Wall*, 754 F.2d at 1033).

79. Id. at 231.

80. *Goldman v. Weinburger*, 475 U.S. 503, 106 S. Ct. 1310 (1986), involved an Orthodox Jewish U.S. Air Force pilot who was restricted from wearing a yarmulke while on duty. The Supreme Court held that great deference should be given the military in making restrictions, and Goldman's claim was denied.

81. *Fromer (II)*, 817 F.2d at 231.

82. See supra note 77. The other two *Wall* standards applied (1) "where the right asserted by the prisoner 'is found not to exist within the prison context, i.e., where it is held to be inherently
however, relied on the Moskowitz decision and the prison survey therein in support of the argument that a beard greater than one inch in length is not "presumptively dangerous," thus conforming with the standard the court chose. Continuing, the court found that requiring Fromer to cut his beard would not simply be a slight change in his religious practice, but rather would "work a total deprivation of his religious belief that the beard must not be disturbed."

The prison next defended the regulation by alleging several "compelling interests." The prison argued the regulation not only assisted in identification, but also protected against hidden contraband and promoted safety and hygiene. The court below disagreed, finding that contraband could just as easily be hidden on other parts of an inmate's body and that current inspection methods would succeed in finding contraband in a prisoner's beard.\textsuperscript{84} As far as hygiene risks, the district court could not see a difference between a risk presented by long hair and a risk presented by long beards.\textsuperscript{85} The Second Circuit agreed with this analysis, and confirmed that the beard length restriction was unconstitutional.

c. The Trend

As with the cases regarding the kosher claims, the cases dealing with the cutting of facial hair favor the prisoner. The question of deference to the prison authorities was barely mentioned; the burden of proof was placed on the prisons, and the standard applied in both cases required an "important or substantial governmental interest" in order to curtail the Free Exercise right of the prisoner. However, the deference towards the prisoner and the strictness of the standard were not to last very long.

III. THE \textit{Turner} STANDARD AND ITS EFFECT

\textbf{A. Turner v. Safley and its Progeny}

\textbf{1. Turner v. Safley}

\textit{Turner v. Safley,}\textsuperscript{86} was decided by the United States Supreme Court on June 1, 1987, only one month and six days after the \textit{Fromer} decision was handed down. \textit{Turner} reversed the law that governed prisoners for over a decade, and

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\begin{itemize}
  \item 83. \textit{Fromer (II)}, 817 F.2d at 232.
  \item 84. \textit{Fromer (I)}, 649 F. Supp. 512, 520 (S.D.N.Y. 1986).
  \item 85. \textit{Id.} at 521.
  \item 86. 482 U.S. 78, 107 S. Ct. 2254 (1987).
\end{itemize}
\end{flushright}
began a new trend in the jurisprudence that would adversely affect Orthodox Jewish prisoners.

Ironically, *Turner* did not even involve religion. A class action suit filed by prisoners alleged that two Missouri prison regulations were unconstitutional. The first regulation prohibited, with some exceptions, correspondence between inmates at different state prisons. The second regulation contained an almost complete ban on inmate marriages. The class action requested injunctive relief from these two prohibitions.

The Court's analysis, written by Justice O'Connor, thoroughly discussed the evolution of constitutional claims dealing with prison regulations. Justice O'Connor began with *Pell,* noting that that case stood for the proposition that prisoners do not leave their constitutional rights at the prison gates. The Court gave three examples of such rights: opportunity to petition the government for redress, protection against racial discrimination, and the protections afforded by due process. Justice O'Connor, however, stated that *Pell* also stood for a second principle: the courts are not the best administrators when it comes to determining the reasoning behind prison regulations. Justice O'Connor noted that *Pell* involved the rights of both prisoners and nonprisoners and that the standard established therein was not solely for the protection of prisoner's constitutional rights. However, she believed that in the jurisprudence that followed *Pell,* the Supreme Court had settled the question of how these competing interests are to be adjudged on a case-by-case basis:

If *Pell,* *Jones,* and *Bell* have not already resolved the 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.

The Court explained that a "strict scrutiny" standard would drastically restrain the prison from making certain decisions. Furthermore, a "strict scrutiny" standard would generate increased litigation against the prison system, further hampering its processes.

Justice O'Connor then enunciated a four-factor test to determine the reasonableness of a contested regulation:

First, there must be a "valid, rational connection" between the prison regulation and the legitimate governmental interest put forward to justify

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87. *Id.* at 81, 107 S. Ct. at 2258.
88. *Id.* at 82, 107 S. Ct. at 2258.
91. *Id.* at 84, 107 S. Ct. at 2259.
it.... A second factor... is whether there are alternative means of exercising the right that remain open to prison inmates.... 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.  

Justice O’Connor qualified the fourth factor, stating that the courts need not “set up and then shoot down” every possible accommodation, but that a prisoner should be able to provide evidence of unreasonableness by pointing to an alternative which imposes only a de minimis cost to the legal penological objective.

Under these factors, a five-to-four majority found that although the prohibition of inter-prison correspondence reasonably relates to a valid penological objective, the marriage restriction does not.

2. O’Lone v. Shabazz

Decided on the same day as Turner, O’Lone v. Estate of Shabazz applied the factors enunciated in Turner to questions arising specifically under the Free Exercise Clause. O’Lone involved Muslim prisoners imprisoned at the New Jersey State Prison. Problems arose when the state adopted a regulation that placed certain minimum-security workers on detail outside the main prison building, only allowing them inside the building for specified reasons. This regulation prevented Muslim prisoners from attending Jumu’ah, a religious service held in the main prison building. Two prisoners sued the prison under 42 U.S.C. Section 1983 for damages and injunctive relief.

The Court found the regulation was reasonably related to a valid penological interest, maintaining security. The Court determined that allowing this type of prison traffic to move within and without the complex would make keeping track of the prisoners more difficult. Furthermore, this type of “special treatment” was sure to create dissent among the ranks of the inmates. The Court also determined that when considering legitimate penological interests, the burden should not be placed on the prison officials to show the reasonableness of the regulation.

94. Id. at 89, 90, 107 S. Ct. at 2262 (citations omitted).
95. Id. at 90-91, 107 S. Ct. at 2262.
96. The opinion of Justice Stevens, concurring in part and dissenting in part, questioned the constitutionality of the “logical connection” standard. This opinion will be examined in more detail in Part III.
99. In his dissent, Justice Brennan voiced concern, like Justice Stevens in Turner, regarding the constitutionality of the “reasonableness” test. Justice Brennan’s dissent will be examined in greater detail in Part III of this Comment.
Thus, in these two companion cases, the law governing the Free Exercise claims of prisoners moved from favorable to the inmate to deferential to the jailor. The "compelling" and "important or substantial" governmental interest tests supposedly established by the Court in cases such as *Pell* suddenly gave way to the lenient "reasonable relation" test. The new four-factor test places the burden of proof on the prisoner, whereas in earlier cases the courts required the prison to explain why its regulation was constitutional.

**B. Turner and the Effect on Kosher Cases**

1. Cooper v. Rogers

The first test of the new *Turner* standard as applied to problems with Orthodox Jewish prisoners and kashrut came in the form of *Cooper v. Rogers*. Cooper involved an inmate, Richard Cooper, who brought a Section 1983 action, claiming that the Maryland Penitentiary failed to provide him with a kosher breakfast in violation of his Free Exercise rights. A kosher lunch and dinner were provided by the prison, but the prison officials had refused to comply with a request by a local rabbi to also provide a kosher breakfast. Cooper brought this action challenging the constitutionality of the prison official's refusal.

The court began its discussion with *Turner* and *O'Lone*, noting that lower courts have applied the lenient "legitimate penological interest" standard to cases concerning prisoner's diets. The court summarily concluded Cooper did not have a right to a specially prepared breakfast. Discussing Cooper's contention that *Kahane* and *Prushinowski* established the precedential standard in this case, the court stated a lesser, pre-*Turner* standard had been employed by the courts in those cases, and concluded that "... despite their factual relevance to this case, *Kahane* and *Prushinowski* can place no greater obligation on defendants than do *Turner* and *O'Lone*."

Despite expert testimony on behalf of Cooper, the court concluded Cooper had not satisfied his burden of proving why the food in the breakfast line was not sufficiently kosher. The court's analysis here indicates how switching standards from a "compelling state interest" to a "legitimate penological interest" made it difficult for Cooper to make out a case, even with expert witnesses. The court continued, noting that the availability of kosher food is only relevant in determining whether there are reasonable alternatives open to exercise religious rights, the second factor of the *Turner* test. Furthermore, the court noted it

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101. Rabbi Meyer Kurcfeld, the kosher food inspector for Baltimore County. *Id.* at 256.
102. *Id.* at 258 n.8.
103. The second factor of the *Turner* test is "whether there are alternative means of exercising the right that remain open to prison inmates." *Turner v. Safley*, 482 U.S. 78, 90, 107 S. Ct. 2254, 2262 (1987).
was reasonable for Cooper to buy his own kosher food at the commissary, for
neither Turner nor O'Lone stated "such an alternative must be state-subsidi-
dized."104

The court concluded its analysis (ignoring the other Turner factors) by
examining the price of the kosher breakfast because "[i]n the final analysis, the
question comes down to one of cost."105 The court found each kosher break-
fast cost between $2.50 and $5.00, much more than the $.50 average cost of a
non-kosher breakfast. Thus, the court concluded the costs could not be
considered de minimis, "particularly in light of the impact which providing
Cooper with special treatment might have upon the state's duty to provide similar
treatment for inmates of other religions."106 Hence, in the end, the court based
its holding on the unreasonable cost of providing the plaintiff with a kosher
breakfast as opposed to utilizing the tests set up by the Supreme Court in Turner.

2. Bass v. Coughlin107

Similar to Kahane, Bass involved a Jewish prisoner who requested kosher
meals. Bass brought a Section 1983 action against New York state prison
officials. The prison officials claimed the law regarding this subject was now
"beclouded by subsequent Supreme Court decisions,"108 alluding to Turner and
O'Lone.

Rejecting this notion, the United States Second Circuit Court of Appeals
recognized religiously-demanded prison diets had been protected since Kahane
in 1975. The court then asserted "Kahane has never been overruled and remains
the law."109 The court explained that because Turner and O'Lone dealt with
different issues such as marriage and attendance of religious ceremonies, the
holding in Kahane "was not placed in any reasonable doubt."110 Thus, the
court did not even attempt to employ the Turner standard. As a result, the
inmate's claim was successful.

3. Ward v. Walsh111

Ward involved the same problem found in Bass, but unlike the Second
Circuit, the Ninth Circuit turned to Turner. Ward, a Jewish prisoner, complained

104. Cooper, 788 F. Supp. at 259. This court, unlike the court in Prushinowski, did not discuss
the option of food being brought in to Cooper.
105. Id. at 260.
106. Id. at 260 (emphasis added).
107. 976 F.2d 98 (2d Cir. 1992).
108. Id. at 99.
109. Id. at 99.
110. Id. at 99.
111. 1 F.3d 873 (9th Cir. 1993).
several of his rights were being denied by the court, and brought suit under Section 1983. Ward was the only Orthodox Jewish prisoner at Ely State Prison. The prison warden argued Employment Division v. Smith was controlling. The court, however, chose to distinguish Smith and follow Turner instead.

Turning to the first Turner factor—"whether there is a logical connection between the policy and the legitimate governmental interest that justifies it"—the court found that the prison's interest in operating a simplified food line to lessen administrative burdens is a legitimate interest sufficient to justify the prohibition on special diets. As for the second Turner factor—"whether Ward has alternative means by which he can practice his religion"—the court, following O'Lone, stated the factor doesn't consider whether alternative means of practicing are available, but rather whether the prisoner has been "denied all means of religious expression." Comparing the instant case to O'Lone, the court found Ward, in fact, had been denied practically all means of religious expression. As the only Orthodox Jew in the facility, he had no access to an Orthodox rabbi or to religious services. Thus, the court found the second Turner factor operated in the defendant's favor.

Importantly, the court underscored the distinction between being denied a religious practice which is an expression of one's faith, and being denied a practice "which the believer may not violate at peril of his soul." The court stated this distinction must be considered when determining whether there exists an alternative means of religious expression. Because no factual findings were made by the district court on this issue, the Court of Appeals remanded the case.

The court also remanded the case on the basis of lack of findings for the third and fourth Turner factors. The court stated the administrative costs of providing the food, not to mention the cost of the meals themselves, were dispositive in determining the third Turner factor—the "impact accommodation ... will have on guards and other inmates, and on the allocation of prison resources generally." The court found the fourth Turner factor, regarding ready alternatives available to the prisoner at de minimis cost to the prison, was also insufficiently addressed.

112. Ward was also denied having candles in his cell, clothes of one fiber, and access to an Orthodox rabbi. Id. at 876.
113. 494 U.S. 872, 110 S. Ct. 1595 (1990). Smith involved two individuals who were denied unemployment compensation after being fired for ingesting peyote. The Supreme Court found for the state, determining that the Free Exercise Clause does not allow exemptions from a law that is neutral and of general applicability.
114. Ward, 1 F.3d at 877.
115. Id. at 877.
116. Id. at 877.
117. Id. at 878 (emphasis added).
118. Id. at 878 (quoting Washington v. Harper, 494 U.S. 210, 225, 110 S. Ct. 1028, 1038 (1990)).
C. Turner and the Effect on the Beard Restrictions

I. Ross v. Coughlin

Ross was the first post-Turner case dealing with Free Exercise claims brought by Orthodox Jewish prisoners. Ross challenged a regulation of New York State's Department of Correctional Services (DOCS) that stated "[a]ll inmates may grow a beard and/or mustache not to exceed one (1) inch in length." Turning to the Turner factors, the court stated "a regulation must have a logical connection to legitimate government interests invoked to justify it." With respect to the first Turner factor, the state argued that limiting beard length to identify prisoners and control contraband was a logical connection to a legitimate government interest. This court, however, like the court in Fromer (I), found these claims were without merit. In Fromer (II), the court disagreed with prison officials who claimed a beard longer than one inch created identification problems. The court pointed out that other ways of changing appearances, such as growing different hairstyles, were not regulated by the prison system. Therefore, there existed no logical relation between the beard length restriction and efficient identification. Furthermore, the Fromer (II) court found no evidence supporting the allegation that contraband may be hidden in a longer beard. The Ross court adopted these findings, and found the first factor in favor of Ross.

The second Turner factor—what "alternative means of exercising the right... remain open to prison inmates"—was a simple question for this court:

[i]t is of course no alternative means by which Ross can exercise his First Amendment right. If the State requires him to cut his facial hair it will work a total deprivation of his religious belief that the beard must not be disturbed.

Rejecting the state's argument that O'Lone is factually similar to the instant case and thus should be followed, the court continued with the third Turner factor—the impact of the accommodation on the other prisoners as well as administrative procedure. Again, this court deferred to Fromer (II), finding that the limited production of "confusion and resentment" was not enough to deny Ross his rights.

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120. DOCS directive #4914. Id. at 1239. Ross also complained that he did not receive kosher food and that religious articles were taken away from him in violation of his religious rights. The court's recitation of the facts revealed the blatant hostility and disrespect that Ross received once he was incarcerated. Id. at 1237-38.
121. Id. at 1239 (paraphrasing Turner v. Safley, 482 U.S. 78, 89, 107 S. Ct. 2254, 2262 (1987)).
122. Id. at 1240.
123. Id. at 1240 (quoting Turner, 482 U.S. at 90, 107 S. Ct. at 2262).
124. Id. at 1240 (emphasis added).
125. Id.
Although the court favored Ross on the issue of beard trimming, it came down in favor of the state on the issue of shaving for an initial identification photograph. Applying the Turner factors again, the court decided that mandatory shaving for this purpose was logically related to the legitimate penological interest of accurate identification.\textsuperscript{126} Further, although admitting again that Ross had no alternative means in this situation, the court believed the prison's security interests outweighed Ross' belief, noting that shaving with certain instruments "lessens" the burden on the religious practice.\textsuperscript{127} The court concluded the state had shown a "reasonable and legitimate penological objective" in curtailing the plaintiff's rights.\textsuperscript{128}

This case is notable for several reasons. First, the court did not even consider the fourth factor of the Turner analysis,\textsuperscript{129} similar to Cooper's\textsuperscript{130} "unfinished" discussion. Second, even though the court provided some protection to the prisoner regarding shaving, it nevertheless ultimately deferred to the prison by condoning an initial shave for an identification picture. The court was searching for a bright-line test, but it became more and more deferential to the state in the process, without fully considering the impact on the inmate.

2. Fromer v. Scully (IV)

Although Fromer had been released on parole since Fromer (II), the debate still raged on as to the constitutionality of Directive #4914 which requires all beards be trimmed to a length of no more than one inch.\textsuperscript{131} In Fromer (III), the district court, on remand from the Supreme Court, held there existed "no logical connection" between the beard limitation and the identification reasoning.\textsuperscript{132} In Fromer (IV), however, the Second Circuit announced "[w]e believe that Turner and O'Lone call for greater deference to the judgment of prison officials than was given by the district court."\textsuperscript{133}

Discussing the first Turner factor, the court pointed out that the burden of proving whether the regulation has a rational connection to a legitimate governmental interest does not fall on the prison (as the district court found), but on the prisoner.\textsuperscript{134} The court found the relationship between beard length and efficient

\textsuperscript{126} Id. at 1241.
\textsuperscript{127} Id. at 1241. The court noted this point was also made in Fromer (II), 649 F. Supp. at 514-15. \textit{Id.}
\textsuperscript{128} Id. at 1241.
\textsuperscript{129} "The absence of ready alternatives is evidence of the reasonableness of a prison regulation." \textit{Turner}, 482 U.S. at 90, 107 S. Ct. at 2262.
\textsuperscript{132} Fromer IV, 874 F.2d at 73 (quoting Fromer (III), 693 F. Supp. at 1540-41).
\textsuperscript{133} Id. at 73.
\textsuperscript{134} Id. at 74.
identification is "logical, if not obvious." The court also rejected the argument that, if the regulation allows some beards, it should allow all beards.

Concerning the prison's contention that the beard length restriction was necessary to prevent the concealment of contraband, the court stated that although "DOCS' expert witness could offer no examples of contraband discovered in inmates' beards," Turner allows, indeed, "obliges [this court] to ensure the ability of prison officials 'to anticipate security problems and to adopt innovative solutions.'"

As for the second Turner factor, the court compared the instant case to O'Lone and found the prison allowed Fromer to observe other religious practices. The court concluded:

We are unable to discern any distinguishing feature that would permit us to allow Orthodox Jews such as Fromer the unrestricted practice of their religion notwithstanding substantial conflicting governmental concerns when similar rights have also been validly denied to Moslems.

Turning to the third and fourth Turner factors the Second Circuit again repudiated the district court's placement of the burden of proof on the prison officials. The court explained the prisoner has the burden of showing that the accommodation of the religious practice will not adversely impact other inmates or prison resources. The court also dismissed the district court's finding that rephotographing inmates could be an acceptable alternative, allowing the accommodation of the prisoner's rights at a de minimis cost (Turner factor four). The court considered DOCS testimony that rephotographing inmates would not meet with the same concerns as the beard length restriction and that the "de minimis" costs of rephotographing inmates also include burdensome administrative costs. Concluding, the court found Fromer had not met his burden of showing that the prison officials "... exaggerated their response to... genuine security considerations."

3. Friedman v. Arizona

The Arizona Department of Corrections (ADOC) created a regulation prohibiting full or partial beards, but permitting moustaches, sideburns, and shoulder length hair. Friedman and another Orthodox Jewish inmate, Naftel, filed a Section 1983 complaint seeking injunctive relief from this regulation.

135. Id.
136. Id. at 75.
137. Id. (quoting Turner, 482 U.S. at 89, 107 S. Ct. at 2262 (emphasis added by the Second Circuit)).
138. Id. at 75.
139. Id. at 76 (quoting Bell v. Wolfish, 441 U.S. 520, 561-62, 99 S. Ct. 1861, 1885-86 (1979)).
140. 912 F.2d 328 (9th Cir. 1990).
The evidence adduced in the district court showed Friedman and Naftel had access to other means of expressing their religious beliefs, such as occasional kosher meals and visits from a rabbi. Conflicting testimony was offered by a rabbi who stated that while some Jews "view the beard as a matter of fundamental importance," others do not. The prison officials testified that the no-beard rule serves three prison objectives: rapid identification of inmates to control day-to-day affairs, control of prison disturbances, and apprehending escaped prisoners.

Applying the Turner factors, the court found the prison officials' reasons for the restriction were logically related to valid penological interests. The court emphasized that the "alternative means" test (Turner factor number two) does not require finding a replacement for the religious practice in question, but "[r]ather, our task under the alternative means analysis is to assess only the degree to which a regulation impinges upon a prisoner's asserted right." Thus, the court concluded the inmates have not been denied "all means of expression" because they have access to a rabbi, as well as being provided with at least one kosher dinner a day. The court failed to consider the degree of deprivation that the shaving of the beard would have on Friedman and Naftel.

Regarding the impact that the accommodation would have on the other inmates and prison resources, the court concluded that allowing the inmates to grow beards would strain prison resources. The court also refuted the prisoners' suggestion that accurate identification would be possible if two pictures, one with and one without the beard, were taken. According to expert testimony, this alternative would not be satisfactory because the beard could be cut in many forms, or even dyed, to change the appearance of the inmate.

The court here failed to realize that the whole impetus behind Friedman and Naftel's claim was that they did not want to cut the beard at all. The Jewish prohibition against cutting the beard is absolute, and doesn't even allow trimming. The court concluded, citing with approval the jurisprudence in the Fromer saga, and found for the prison officials.

The standards set up by Turner and O'Lone gave prison officials much greater deference in determining what inmate religious practices would be tolerated behind the prison walls. The federal courts following these decisions wielded these standards to the detriment of the prisoners, almost always finding the restrictions on the religious practices constitutional.
IV. PROBLEMS WITH THE TURNER STANDARD

As the above cases indicate, the plight of the Orthodox Jewish prisoner worsened dramatically after Turner. As one scholar noted: "an unfortunate trend [had] developed." 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.

This section of the comment will shed some light on the problems that the Turner standard has created. First, a lack of uniformity in application of the Turner factors has lead to erratic and unfair results. Second, the initial Turner factor of "rational relation to legitimate penological interests" promotes blind deference in favor of prison officials. Finally, and most importantly, the second factor, which considers "alternative means" of worship, actually leads to a total deprivation of prisoners' practices of kashrut and refraining from shaving their beards.

A. Lack of Uniformity Leads to Unfair Results

The first problem with the Turner standard lies in the structure of the test itself. Although in Turner Justice O'Connor attempted to clear up the confusion created by the Pell, Bell, and Jones cases, the courts have found the four factors to be cumbersome. Unfortunately for the Orthodox Jewish prisoners, this test has led to wide, varying reasoning by the federal courts, and negative results for the Jewish prisoners.

Fromer (IV) is a prime example of the courts' confusion with the Turner factors. The Second Circuit court diligently perused the history of prisoners' constitutional rights and then thoroughly discussed the first Turner standard in relation to the facts before it. When the court began its discussion of the second Turner standard regarding "alternative means" of religious practice, however, it failed to analyze the instant case at all. The court merely cited O'Lone and concluded:

We are unable to discern any distinguishing feature that would permit us to allow Orthodox Jews such as Fromer the unrestricted practice of their religion notwithstanding substantial conflicting governmental concerns when similar rights have been validly denied to Moslems.

The court never considered exactly what the other "alternative means" were, but rather held each group of rights up to one another and determined that the rights

148. Fromer (IV), 874 F.2d 69, 74-76 (2d Cir. 1989).
149. Fromer (IV), 874 F.2d 69, 75 (2d Cir. 1989).
remained equal in the eyes of the law. Neither did the court indicate the degree
to which the right was being deprived, leaving the Jewish prisoners with no
option at all.

Other evidence of the lack of uniformity in the application of the Turner
factors is found in Cooper and Ross. In Cooper the court confronted
the "legitimate penological interest" standard, but ignored the "alternative
means," the effect the accommodation might have on the prison, and the absence
of ready alternatives prongs of the Turner test. It is unclear what the court used
as the linchpin in these decision. Instead of employing the supposedly
"established" tests enunciated by Justice O'Connor in Turner, the Cooper court
simply found the kosher breakfast was not worth the money, harkening back to
the Huss decision. The Ross court was not quite as selective as the court in
Cooper; it merely declined to visit the fourth factor in the Turner analysis. In
Bass, the court simply declined to apply Turner at all.

What did these various workings of the Turner test lead to? In each case
that employed the Turner standard, the Jewish prisoner plaintiff lost. Even
commentators, who generally championed the Turner standard, foreshadowed the
confusion that is evident in these decisions. Arguably, these prisoners were
not going to succeed in their claims regardless of the application of the factors.
On the other hand, justice could be served more fairly and efficiently
by either

B. Deference to the Prisons and Unsubstantiated Claims

At first glance, Justice O'Connor's reasoning in Turner for granting
deference to prison officials appears sound:

Subjecting the day-to-day judgments of prison officials to an inflexible
strict scrutiny analysis would seriously hamper their 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.155

In its application, however, this reasoning has proven impracticable. "Defer-
ence," coupled with the lesser burden of proof on prison officials to justify their

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152. See discussion in Section II, supra.
154. See Peter Keenan, Constitutional Law: The Supreme Court's Recent Battle Against Judicial
regulations, has led to prison regulations being supported by nothing but conjecture and guesswork. This is evident in the cases discussed above. The Department of Corrections in Fromer (IV)\(^\text{156}\) propounded several reasons for the beard length restriction. One reason was preventing prisoners from hiding contraband in their long beards. The prison officials, however, never discussed exactly how this surreptitious act was to occur. Moreover, the Department of Corrections' expert witness had no proof that such activity ever occurred. The Second Circuit, nonetheless, was not swayed by this lack of evidence, explaining that because Turner empowers prison officials to anticipate problems, "[w]e cannot, therefore, second-guess reasonable efforts at such anticipation."\(^\text{157}\) This leads to the inevitable question: Who is second-guessing whom here?

Other examples of such "second-guessing" appeared in Cooper and Friedman. The court in Cooper\(^\text{158}\) concluded by finding the cost of the kosher breakfast alone was enough to deny Cooper's constitutional claim. In doing so, the court added the "special treatment" given to Cooper "might" have an adverse effect by prompting other claims of "special treatment."\(^\text{159}\) Once again, no evidence was offered by prison officials showing that any such result would arise from Cooper's accommodation. Likewise, the Friedman\(^\text{160}\) court found for the defendant without any real evidence or support. In Friedman the Arizona Department of Corrections expert testified in support of the no-beard policy, identifying potential security problems that would arise in the absence of such a restriction. However, no actual security problems were raised. Nonetheless, the court noted: "Although Kennedy's testimony largely justifies the regulation on the basis of anticipated security problems, we find Kennedy's testimony sufficient."\(^\text{161}\) The court then proceeded to dismiss the case, citing the applicable language from Turner.

Justice Stevens, dissenting in Turner, and Justice Brennan, dissenting in O'Lone, believe some inherent unfairness is created when any reason, even completely unsubstantiated, can support "legitimate penological interests." In his dissent in Turner, Justice Stevens questioned the standard enunciated by the majority regarding prisoners' rights, recognizing that "if 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."\(^\text{162}\) Stevens warned the warden's "imagination" could be the catalyst for a regulation just waiting to be linked by a trial court to any "logical connection."\(^\text{163}\) Stevens noted the Court of Appeals found the

\(^{156}\) Fromer (IV), 874 F.2d 69, 74-75 (2d Cir. 1989).
\(^{157}\) Fromer (IV), 879 F.2d at 75.
\(^{159}\) Id.
\(^{160}\) Friedman v. Arizona, 912 F.2d 328, 332-33 (9th Cir. 1990).
\(^{161}\) Friedman, 912 F.2d at 332.
\(^{163}\) Id. at 100-01, 107 S. Ct. at 2267-68.
evidence offered by the prison in support of its regulations as “simply too tenuous to justify denial of those constitutionally protected rights.”

Speculation was the theme of Stevens' dissent. He found the testimony, including that of Superintendent Turner himself, did not adequately substantiate the prison's concerns. Stevens found the prison regulation swept too broadly and was an "exaggerated response" to merely anticipated problems.

Justice Brennan articulated similar concerns in his dissent in *O'Lone*. Brennan clearly sympathized with the prisoners, but noted the importance of extending deference to prison officials in choosing how to best operate their prisons. However, this decision to defer should not blind the Court to the fact that "[t]he Constitution was not adopted as a means of enhancing the efficiency with which government officials conduct their affairs, nor as a blueprint for ensuring sufficient reliance on administrative expertise." Even though the *Turner* test employed several factors in an attempt to ensure the rights of prisoners were not needlessly trampled, Brennan believed that prison manipulation of the *Turner* factors was inevitable. He said that, "[v]arious 'factors' may be weighed differently in each situation, but the message to prison officials is clear: merely act 'reasonably' and your actions will be upheld. If a directive that officials act 'reasonably' were deemed sufficient to check all exercises of power, the Constitution would hardly be necessary.

Brennan preferred the *Wali* standard under which he feared the prison had failed to demonstrate the necessity of either the contested regulation or a less extreme alternative. Furthermore, Brennan declared that even under the majority's standard, "[h]e could not conclude on this record that prison officials have proved that it is reasonable to preclude respondents from attending Jumu'ah."

Justice Stevens and Justice Brennan agreed that the standard created by the Supreme Court in *Turner* could potentially lead to unsubstantiated claims. The courts in *Fromer (IV)*, *Cooper*, and *Friedman* in fact supported prison regulations on arguably unsubstantiated claims. None of the defendants in these cases showed with any force that regulations denying kosher meals and forcing prisoners to shave their beards had a reasonable relation to a legitimate penological interest. The *Turner* test allowed prison officials to curtail prisoners' rights on a whim.

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164. *Id.* at 104, 107 S. Ct. at 2269 (quoting 777 F.2d 1307, 1315-1316 (8th Cir. 1985) (emphasis added by Justice Stevens)).
165. *Id.* at 105, 107 S. Ct. at 2270.
167. *Id.* at 356, 107 S. Ct. at 2408.
168. See *supra* discussion in Section II.
169. 428 U.S. at 359, 107 S. Ct. at 2410 (emphasis added).
170. See *supra* discussion in Section III.
The "alternative means" factor in the Turner test has had the greatest impact on Orthodox Jewish prisoners. Regarding the consideration of "whether there are alternative means of exercising the rights that remain open to prison inmates," the Supreme Court in Turner referred to a singular "right," rather than prisoners' rights generally. Justice O'Connor reiterated this point, finding that greater deference should be given to the prison officials when there exist "other avenues" available for the exercise of the asserted right. In O'Lone, however, the Court did not see the second Turner factor as looking for alternatives to a particular right, but "whether under these regulations respondents retain the ability to participate in other . . . religious ceremonies." In O'Lone, the Court moved from concentrating on the asserted right to focusing on whether the prisoner had other means of religious expression. Justice O'Connor stated that in Turner, the critical question was whether the inmates were denied "all means of expression." The Court found in O'Lone there are no alternatives for the Muslim Jumu'ah ceremony, so it, in effect, bent the rule to ensure that the inmates had some means of religious expression. One commentator has remarked this reasoning amounts to an "improper expansion of Turner," finding that the Court in Turner was more sensitive to absolute deprivation of a prisoners' Free Exercise rights.

The "alternative means" test, indeed, leads to a total deprivation when applied to the specific Jewish practices of kashrut and abstaining from shaving the beard. There is simply no alternative to keeping one's beard untouched or observing kashrut. The Supreme Court, in an effort to provide an easy means for prison officials to control their environment, unfortunately overlooked a major problem in their "alternative means" test. The Court made no distinction between voluntary religious exercises and obligatory religious practices. One scholar has commented that under the Turner standard the lower courts have indicated "a disturbing unwillingness or inability to closely examine the religious practices involved." Another scholar has questioned the "broad standards" that do not allow for "distinguishing between claims and identifying situations in which infringements of prisoners' fundamental individual rights of free exercise of religion are significant." The practice of keeping kosher and abstaining from shaving the beard are two such necessary obligations for which

172. Id. at 90, 107 S. Ct. at 2262 (emphasis added).
173. O'Lone, 482 U.S. at 352, 107 S. Ct. at 2406.
174. Id. at 352, 107 S. Ct. at 2406 (quoting Turner, 482 U.S. at 92, 107 S. Ct. at 2263).
176. Abramovsky, supra note 147, at 257.
no alternatives exist. For Orthodox Jews, everyday observance of these beliefs is essential to their existence. By not allowing Fromer or Friedman to grow their beards, the courts forced them to defile the sacred word of God. By preventing Ward and Cooper from eating kosher meals all day, the courts have caused them to desecrate their diets, themselves, and their Lord.

These concerns have not been totally ignored by the courts. Justice Brennan, dissenting in *O'Lone*, called for the resurrection of the Second Circuit's *Walz* test because the test asked "whether the challenged restriction works a total deprivation (as opposed to a mere limitation) on the exercise of that right." Justice Brennan found the concept of a complete deprivation of a Free Exercise right central to one's faith, even in a prison system, to be abhorrent to the Constitution. He explained with reference to Jumu'ah that, "[t]he ability to engage in other religious activities cannot obscure the fact that the denial at issue in this case is absolute: respondents are completely foreclosed from participating in the core ceremony that reflects their membership in a particular religious community."

Justice Brennan insisted that if a total deprivation results from a prison regulation, then "more than [a] mere assertion" is necessary to deprive the prisoner of the right. In the cases discussed above, only the slightest of reasons was found by the courts to be adequate justifications for the challenge of prison regulations. In some cases mere speculation sufficed to find a rational relation to a "legitimate penological objective."

Other courts have also noticed the problem of total deprivation of an obligatory religious practice. In the pre-*Turner Fromer (II)* decision, the Second Circuit, employing the *Walz* test, stated that "requiring [appellee] to cut his facial hair would work a total deprivation of his religious belief that the beard must not be disturbed." In *Ward*, the Ninth Circuit realized that there is a difference "between a religious practice which is a positive expression of belief and a religious commandment which the believer may not violate at peril of his soul." The court remanded for findings regarding this distinction, stating that "[i]t is one thing to curtail various ways of expressing belief, for which alternative ways of expressing belief may be found. It is another thing to require a believer to defile himself, according to the believer's conscience, by doing something that is completely forbidden by the believer's religion."

Since the *Turner* decision, the Supreme Court and several lower federal courts have failed to protect the obligatory religious practices of Orthodox Jewish

178. Described in Section II, supra.
180. *Id.* at 360, 107 S. Ct. at 2410.
181. *Id.* at 361, 107 S. Ct. at 2411.
183. *Ward* v. Walsh, 1 F.3d 873, 878 (9th Cir. 1993).
184. *Id.* at 878.
prisoners. No “alternative means” exist to substitute for kashrut and abstention from shaving. The courts can provide sufficient power and control to the prisons, while at the same time upholding the constitutional rights of these prisoners. Although it may not be a simple task, a line could be drawn between regulations that completely deprive a prisoner of a central religious practice with no adequate, religiously-sanctioned alternative and regulations that prevent practices that are not essential to the religious observer. Perhaps, as one scholar suggests, a more careful analysis by the courts would distinguish between a religious practice with alternatives, such as the practice at issue in O'Lone, and a practice with no alternative, such as abstaining from shaving one's beard.8

While this alternative may lead to a “slippery slope” of other claims of “complete deprivation,” it is better to err on the side of protection of rights provided by the Constitution, than to deprive prisoners of simple requests that hold so much meaning in their lives for the sake of speculative benefits to prison officials.

V. RFRA AND BEYOND

Though the jurisprudence thus far appears to accept the Turner standard, a new law may disrupt the present pattern. In 1993 Congress passed the Religious Freedom Restoration Act (RFRA).186 RFRA originated with the United States Supreme Court decision Employment Division v. Smith.187 Essentially, the Supreme Court in Smith denied two workers unemployment compensation for digesting peyote, a hallucinogenic drug ritualized by the Native American Church. The plaintiffs argued, unsuccessfully, that this practice was protected by the Free Exercise Clause. To many lawyers and laymen, the Supreme Court in Smith discarded with the “compelling state interest” test utilized by the courts in so many cases prior to Smith. In an attempt to turn back the clock on the Supreme Court, Congress enacted RFRA.

RFRA states “[t]he Congress finds that . . . (4) in Employment Division v. Smith, 494 U.S. 872 (1990) the Supreme Court virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion.”188 RFRA then declares that its purpose is to “restore the compelling interest test as set forth in Sherbert v. Verner, 374 U.S. 398 (1963) and Wisconsin v. Yoder, 406 U.S. 205 (1972).”189 RFRA “applies to all Federal and State law.”190 RFRA, in effect, overrules Smith, and returns the “compelling interest” standard to the realm of Free Exercise decisions.

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185. Abramovsky, supra note 147, at 257.
190. Id.
Like Smith, RFRA has had its share of critics. Although RFRA has been applied with favorable results to Free Exercise claims, some scholars believe it is unconstitutional. The question that concerns this comment is the effect the RFRA will have on the Free Exercise claims of prisoners. By its clear wording, RFRA restores the “compelling state interest” test, instructing government entities that this standard must be satisfied to burden a constitutionally protected religious practice. Under RFRA, prisons must come up with strong reasons to deny a prisoners’ Free Exercise claim. This standard clearly makes prisoners’ claims more likely to succeed than the “reasonably related to legitimate penological interests” test espoused in Turner.

Some commentators even believe RFRA has overruled Turner and its progeny. Others have looked to RFRA’s legislative history to find its effect on prisoners’ rights. According to the House and Senate Reports, there was an amendment to exclude prisoners’ Free Exercise claims from RFRA, but it was defeated in the Senate. One scholar’s interpretation is that while O’Lone was not a satisfactory standard, Congress was not ready to totally abandon the prior policy of deference to the prison officials. Another scholar has found that the legislative history is “mired in ambiguity” and claims that only three facts can be gleaned from the reports: “(1) the question of RFRA in prisons was given explicit consideration; (2) the Congress rejected a prisons exception from RFRA; and (3) RFRA is designed to impose a standard stricter than that of O’Lone, but the ways in which it is to be stricter are not specified.” Whatever the effects RFRA will have on prisoners’ Free Exercise claims, it is

191. Cheema v. Thompson, 36 F.3d 1102, 1994 WL 477725 (9th Cir. 1994) (sikh schoolchildren allowed to wear ceremonial knife to class under certain school restrictions designed to promote safety).

192. Three main constitutional issues that arguably have been created by the RFRA include: 1) that Congress misread the jurisprudence prior to Smith, and thus allows more rights than are afforded by the Constitution itself; 2) that RFRA denies authority to the states to determine issues of religious freedom; and 3) that Congress is overreaching its authority by telling the Supreme Court to ignore their own opinion and interpret the Constitution through Congress’ statute. See Christopher L. Eisgruber and Lawrence G. Sager, Why the Religious Freedom Restoration Act is Unconstitutional, 69 N.Y.U. L. Rev. 437 (1994). Other scholars argue that because Smith has been effectively replaced with the RFRA, Smith can never be revisited, and therefore “Smith will survive in a placid constitutional limbo.” See Edward C. Lyons, Oregon v. Smith and the Religious Freedom Restoration Act: An Educational Perspective, 20 J.C. & U.C. 333, 335 (1994). Some postulate, however, that the RFRA fits neatly into the constitutional scheme by fulfilling the “ratchet theory” of Congress’ ability to require more, but not less, protection of a constitutional right than the Constitution itself. See Rex E. Lee, The Religious Freedom Restoration Act: Legislative Choice and Judicial Review, 1993 B.Y.U. L. Rev. 73 (1993).


certain that some change is inevitable. If the "compelling state interest" test is utilized by the courts, then more prison regulations will be found unconstitutional. Some commentators urge that RFRA be amended to exclude prisons from its scope in order to avert strains on administrative costs as well as on inmate tensions. Others go so far as to claim RFRA will actually curtail prisoners' religious freedom rights by forcing courts to more closely scrutinize prisoners' sincerity in their religious beliefs.

For Orthodox Jewish prisoners, the application of RFRA to their claims could only improve their present position. As shown above, when standards even resembling a "compelling state interest" were applied to the kosher diet or beard shaving claims, the claimant won. Prison systems, with a new burden to bear, may even change their policies altogether. Perhaps, the idea of a flood of claims will force correctional systems to adjust their regulations to accommodate more easily the special needs of their prisoners. It appears that Orthodox Jewish prisoners now have a strong ally in RFRA to combat the Turner effect.

VI. CONCLUSION

Before the Turner decision was handed down, most Orthodox Jewish prisoners felt secure in believing that their religious practices would be protected by the Constitution. The "compelling interest" standard that had developed in the prior jurisprudence made it very difficult for prison officials to burden the religious practices of kashrut and abstaining from shaving. The standard enunciated in Turner and developed in O'Lone, however, turned the tables on these prisoners. Now, the prison regulation was given a presumption of validity, and needed only a "rational relation to a legitimate penological interest" to burden prisoners' rights. This standard has not only been applied unevenly in the lower courts, but has also failed to consider the difference between a voluntary religious practice and an obligatory one. The result of this new standard has denied Jewish prisoners these simple religious requests in almost every instance. With the potential application of RFRA to these same issues, however, perhaps these prisoners will be given a better, more equitable chance to win their claims in court.

Eric J. Zogry

198. Cooper, supra note 195, at 344-46.