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Free Exercise of Religion in Prisons—The Right To Observe Dietary Laws

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FREE EXERCISE OF RELIGION IN PRISONS— THE RIGHT TO OBSERVE DIETARY LAWS

I. INTRODUCTION

The extent to which the government must accommodate a prisoner whose religious beliefs require him to observe special dietary laws[1] has been the subject of much litigation. Contrary to the opinion of some commentators,[2] the parameters of religious freedom in prisons remain unsettled. Various standards have emerged in an effort to define these parameters. This Note will examine the nature of the free exercise of religion and how it relates to the prison setting. It will also consider tests which have been used and evaluate these in light of recent developments.

The establishment and free exercise clauses of the first amendment[3] are the guardians of our religious freedoms. During the past century efforts have been made to define the degree of protection afforded by these clauses.[4]

The Supreme Court first attempted to define the scope of the free exercise clause in 1878. In *Reynolds v. United States*,[5] the Court upheld the bigamy conviction of a male member of the Church of Jesus Christ of Latter-Day Saints (commonly known as the Mormon Church) despite Reynolds' defense based upon the free exercise of religion.[6] Relying on the historical writings of Madison and Jefferson,[7] the Court conceived of a dichotomy in the religious protection afforded by the first amendment—to the extent that "mere opinion" was involved Congress had been deprived of all legislative power to control; however, where "actions" were involved Congress was free to legislate regulations.[8] Therefore, where religious beliefs are manifested through actions

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1. These dietary laws require abstinence from certain foods. Both the Black Muslim and Jewish religions prohibit the eating of pork. Barnett v. Rodgers, 410 F.2d 995 (D.C. Cir. 1969); cf. 75 Harv. L. Rev. 837, 838 (1962) (Black Muslim prohibition); B. Isaacson & D. Wigoder, The International Jewish Encyclopedia 83-85 (1973) (Jewish prohibition). The Jewish dietary requirements (kosher) go beyond those of the Black Muslims, requiring abstinence from all "unclean" foods and accepted foods prepared in a forbidden manner. Exodus 23:19 and 34:26; Deut. 14:21 (meat and milk may not be cooked or consumed together).

2. M. Hermann & M. Haft, Prisoners' Rights Sourcebook 71 (1973). "It is now well settled that prisoners are entitled to . . . have a special diet prepared as required by their religion." Id.

3. "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ." U.S. Const. amend. I.

4. See R. Morgan, The Supreme Court and Religion (1972) [hereinafter cited as Morgan]; G. Spicer, The Supreme Court and Fundamental Freedoms 110-51 (1967) [hereinafter cited as Spicer].

5. 98 U.S. 145 (1878).

6. "[I]t was an accepted doctrine of [the Mormon Church] 'that it was the duty of male members . . . , circumstances permitting, to practice polygamy; that the failing or refusing to practice polygamy . . . would be punished, and that the penalty for such failure and refusal would be damnation in the life to come.' " Id. at 161, quoting from trial record.

7. 98 U.S. at 163-64.

8. Id. at 164; cf. Greenawalt, Book Review, 70 Colum. L. Rev. 1133 (1970).

which contravene public laws, those actions may properly be curtailed.[9]

The *Reynolds* "belief-action" dichotomy was qualified in *Cantwell v. Connecticut*,[10] where the Court espoused a test for permissible regulation.

> When clear and present danger of riot, disorder, interference with traffic upon the public streets, or other immediate threat to public safety, peace, or order, appears, the power of the State to prevent or punish is obvious. Equally obvious is it that a State may not unduly suppress free communication of views, religious or other, under the guise of conserving desirable conditions.[11]

Thus, while the free exercise of religion could not be prohibited,[12] it was subject to some regulation when a clear and present danger to governmental interests existed.[13]

The most recent development in the Supreme Court's analysis of free exercise protections was the enunciation of a compelling interest standard. In *Sherbert v. Verner*,[14] Ms. Sherbert, a member of the Seventh-Day Adventist Church, was denied state unemployment benefits because she was unable to obtain employment which would permit her to observe her religion's prohibition against Saturday work. The Court held this refusal of benefits to be an impermissible burden upon appellant's right to the free exercise of religion.

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9. 98 U.S. 145 (1878); State v. Bullard, 267 N.C. 599, 148 S.E.2d 565 (1966), cert. denied, 386 U.S. 917 (1967). Contra, People v. Woody, 61 Cal. 2d 716, 394 P.2d 813, 40 Cal. Rptr. 69 (1964) (in bank) (State restrictions against unauthorized use of peyote not applicable to members of Native American Church); Montana Stat. ch. 314, § 3(k) (1969); New Mexico Stat. ch. 84, § 6 (D) (1972).

10. 310 U.S. 296 (1940). "[T]he Amendment embraces two concepts,—freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be." Id. at 303-04. Cantwell v. Connecticut was the first instance where the Supreme Court invalidated a state statute as a violation of the free exercise clause. The ultimate effect was to hold the free exercise clause applicable to the states.

11. 310 U.S. at 308. This test is strikingly similar to that of the early freedom of speech cases. Schenck v. United States, 249 U.S. 47, 52 (1919).

One commentator has suggested that but for the speech issue, the Court might have reached the opposite result. See Pfeffer, The Supremacy of Free Exercise, 61 Geo. L.J. 1115, 1124-26 (1973) [hereinafter cited as Pfeffer].

12. 310 U.S. at 307.

13. Id. Although the clear and present danger test is not widely relied upon, it can be viewed as a foundation upon which the present "preferred status" test relies. "The right of a State to regulate, . . . may well include, so far as the due process test is concerned, power to impose all of the restrictions which a legislature may have a 'rational basis' for adopting. But [freedom] of . . . worship may not be infringed on such slender grounds. [It is] susceptible of restriction only to prevent grave and immediate danger to interests which the State may lawfully protect." West Virginia Bd. of Educ. v. Barnette, 319 U.S. 624, 639 (1943); Spicer, supra note 4, at 27-28.

14. 374 U.S. 398 (1963). Two years prior to Sherbert the Supreme Court upheld the validity of Sunday closing laws against a claimed free exercise violation. Braunfeld v. Brown, 366 U.S. 599 (1961). The Court enunciated a "direct-indirect burden" test and found the indirect nature of the burden upon petitioner's free exercise not sufficient to override the State's interest in a uniform day of rest. 366 U.S. at 606. This direct-indirect test was severely limited by the Court in Sherbert. See note 17 infra and accompanying text.

Relying upon *American Communications Association v. Douds*,[15] the majority stated:

"Under some circumstances, indirect 'discouragements' undoubtedly have the same coercive effect upon the exercise of First Amendment rights as imprisonment, fines, injunctions or taxes."[16]

Here, the state was placing a burden upon the free exercise of religion, albeit indirectly, which "threatened to 'produce a result which the State could not command directly.' "[17] The Court recognized that the state was forcing a choice upon the Sabbatarian which was impermissible.

[T]o condition the availability of benefits upon this appellant's willingness to violate a cardinal principle of her religious faith effectively penalizes the free exercise of her constitutional liberties.[18]

The majority recognized that free exercise could be regulated;[19] but held, for the first time, that only a compelling state interest would be sufficient to justify a substantial infringement of the first amendment right to the free exercise of religion.[20]

In evaluating the development of the free exercise clause it is clear that the "belief-action" dichotomy first raised in *Reynolds*[21] has been maintained. The law is well-settled that the freedom to believe is "absolute."[22] Therefore, the significant development of the free exercise clause has centered upon the freedom to act and circumstances under which this freedom may be regulated or restricted. A test based upon balancing conflicting interests of the state and the individual has evolved.[23] Now, only a showing of paramount or compel-

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15. 339 U.S. 382 (1950) (freedom of speech and assembly).

16. 374 U.S. at 404 n.5, quoting American Communications Ass'n v. Douds, 339 U.S. at 402. Although drawing a parallel to other first amendment rights, Sherbert was decided solely on the strength of the free exercise clause. Pfeffer, supra note 11 at 1139.

17. 374 U.S. at 405, quoting Speiser v. Randall, 357 U.S. 513, 526 (1958). Although Justice Brennan took great pains to distinguish and not overrule Braunfeld, the distinctions drawn are more form than substance, as the Court strictly narrowed the "direct-indirect" test of Braunfeld. The view that Braunfeld was overruled sub silentio is subscribed to by Justice Stewart in his concurring opinion, 374 U.S. at 417, and Justice Harlan in his dissent, 374 U.S. at 418.

18. 374 U.S. at 406. The question remains whether a prison setting is sufficiently distinguishable to justify a limitation of this principle. See notes 65-66 and 81-83 infra and accompanying text.

19. "The conduct or actions so regulated have invariably posed some substantial threat to public safety, peace or order." 374 U.S. at 403.

20. Id. at 406-09. The Court has continued to employ the compelling interest standard where religious free exercise claims are involved. See, e.g., Wisconsin v. Yoder, 406 U.S. 205 (1972) (Amish parents not required to send their children to school past the eighth grade in accordance with their religious beliefs).

21. See notes 8 & 9 supra and accompanying text.

22. Cantwell v. Connecticut, 310 U.S. 296, 303 (1940).

23. In Sherbert the Court linked the compelling or paramount state interest test with the "less drastic means" principle by which the state would be required to employ means to achieve a

ling interest is sufficient to tip the scales in favor of governmental regulation. It thus appears that the development of the free exercise clause has culminated in its present position of parity with other fundamental freedoms. Indeed, there are indications that in the future free exercise of religion may assume a singular significance in the development of personal freedoms safeguarded by the Constitution.[24]

II. Religious Freedom in Prisons

This trend toward a more stringent standard for regulation represents an innovation for the mainstream of American society. It is, however, merely a reflection of the importance of the free exercise clause to one particular segment of our society—prisoners—who for decades have relied on the protections of the free exercise clause to safeguard their religious freedoms while incarcerated.

Historically, prisoners were considered to have lost all of their rights upon incarceration.[25] A century ago, the Supreme Court of Virginia wrote:

> A convicted felon, whom the law in its humanity punishes by confinement in the penitentiary instead of with death, is subject while undergoing that punishment, to all the laws which the Legislature in its wisdom may enact for the government of that institution and the control of its inmates. For the time being, during his term of service in the penitentiary, he is in a state of penal servitude to the State. He has, as a consequence of his crime, not only forfeited his liberty, but all his personal rights except those which the law in its humanity accords to him. He is for the time being the slave of the State. He is *civiliter mortuus* . . . .[26]

A gradual erosion of this attitude has occurred in the past fifty years. In contrast to the 19th century view that prisoners were void of all rights except those granted by the state,[27] the modern-day prisoner is considered to retain all rights except those taken away by the state.[28] This theoretical change in

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paramount state objective in a manner least restrictive of the individual rights in question. 374 U.S. at 407; see Note, 78 Yale L.J. 464 (1969). "Most first amendment cases, however, rest on a balancing of the conflicting values and interests, whatever the Supreme Court calls the process." Id. at 466.

24. Cf. Wisconsin v. Yoder, 406 U.S. 205, 216 (1972).

25. See Goldfarb & Singer, Redressing Prisoners' Grievances, 39 Geo. Wash. L. Rev. 175 (1970) [hereinafter cited as Goldfarb].

26. Ruffin v. Commonwealth, 62 Va. (21 Gratt.) 790, 795-96 (1871). "The bill of rights is a declaration of general principles to govern a society of free men, and not of convicted felons . . . ." Id. at 796.

27. See notes 25 & 26 supra and accompanying text.

28. "[A] prison inmate retains those First Amendment rights that are not inconsistent with his status as a prisoner or with the legitimate penological objectives of the corrections system." Pell v. Procunier, 417 U.S. 817, 822 (1974); Price v. Johnston, 334 U.S. 266 (1948). "Lawful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations underlying our penal system." Id. at 285. Price v.

outlook is significant. It, however, has not provided total relief to prisoners because the 19th century view still exerts an influence upon penal administration.[29]

Few existing state or federal statutes provide minimum prison standards. Those that do, afford little guidance to prison administrators and few safeguards for the prisoners' themselves.[30] As a result, prisoners have turned to the courts in an effort to prevent unjustified encroachment upon their civil rights.[31]

Initial attempts to procure relief in the courts were denied on the basis of an artificial barrier to jurisdiction known as the "hands-off doctrine".[32] By virtue of this doctrine, courts have avoided judicial involvement in situations concerning the internal affairs of prisons.[33] The rationale behind this doctrine is three-fold:[34] 1) separation of powers;[35] 2) deference to administrative

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Johnston concerned the right to oral argument on appeal, not a constitutionally guaranteed right. Its application, however, has not been limited but has been continually endorsed by the Supreme Court, and followed by lower federal courts. Goldfarb, supra note 25 at 183.

29. Goldfarb, supra note 25 at 179.

30. Id. at 180. An attempt to remedy this situation is presently before the House of Representatives Judiciary Committee in the form of the Omnibus Penal Reform Act, H.R. 2803, 94th Cong., 1st Sess. (1975) [hereinafter cited as Penal Reform Act]. "Title I. Minimum Standards. Sec. 101. The Congress finds the absence of minimum standards for the treatment of prisoners, and the inadequacy of procedures for the review of prisoner complaints, are conducive to disorder and violence in the Nation's correctional institutions. A uniform system of such minimum standards in the framework of a national enforcement mechanism is necessary to assure the maintenance of correctional principles and practices consistent with the constitutional prohibition of cruel and unusual punishments, and to eliminate pretexts for dangerous and sometimes fatal confrontations between prisoners and authorities. . . . It is the judgment of Congress that in no other manner can a proper balance be struck between individual prisoner rights and the need for the unhampered administration of prison discipline." Id. at 1-2. The framers of this act recognize the need for some regulation of prisoner behavior in the interest of security and discipline, but seek to balance this against the possible infringement of prisoners' rights. This same balancing test is used by courts in determining the constitutionality of state regulation of a non-prisoner's civil rights. See, e.g., Wisconsin v. Yoder, 406 U.S. 205, 214 (1972).

31. Procunier v. Martinez, 416 U.S. 396 (1974) (inmates challenged mail censorship and ban against use of paralegals and law students in conducting attorney-client interviews); Price v. Johnston, 334 U.S. 266 (1948) (inmate sought a writ of habeas corpus so that he might appear before the court to argue his own appeal); Brown v. Peyton, 437 F.2d 1228 (4th Cir. 1971) (injunction sought to remove ban on Black Muslim literature); Jackson v. Godwin, 400 F.2d 529 (5th Cir. 1968) (injunction sought to remove ban on Negro literature); See generally Note, Beyond the Ken of the Courts: A Critique of Judicial Refusal to Review the Complaints of Convicts, 72 Yale L.J. 506 (1963) [hereinafter cited as Beyond the Ken]; Goldfarb, supra note 25.

32. The origin of this phrase is credited to Fritch, Civil Rights of Federal Prison Inmates 31 (1961).

33 Sutton v. Settle, 302 F.2d 286, 288 (8th Cir. 1962) (per curiam), cert. denied, 372 U.S. 930 (1963).

34. Goldfarb, supra note 25 at 181.

35. "The prison system is under the administration of the Attorney General . . . and not of the district courts." Id. at n.25, quoting Powell v. Hunter, 172 F.2d 330, 331 (10th Cir. 1949).

expertise;[36] and 3) prison discipline.[37] One, two, or a combination of all three reasons have been relied upon[38] by courts.

The hands-off doctrine broke down under criticism from both legal commentators[39] and judicial activists.[40] The first breakthrough occurred in the area of access to the courts. In *Johnson v. Avery*,[41] the Supreme Court, recognizing "that discipline and administration of state detention facilities are state functions," went on to state that "in instances where state regulations applicable to inmates of prison facilities conflict with [paramount federal constitutional or statutory] rights, the regulations may be invalidated."[42] The Court encouraged judicial examination of prisoners' claims where constitutional rights were at issue.[43] Although the hands-off doctrine has generally been abandoned,[44] its elements are still used by the courts as factors in determining the availability of judicial review.[45]

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36. "[T]he rule of deference to administrative discretion . . . has been overwhelmingly accepted in the courts of appeals." Cruz v. Beto, 405 U.S. 319, 325 (1972) (Rehnquist, J., dissenting) (footnote omitted); cf. Brown v. Peyton, 437 F.2d 1228 (4th Cir. 1971); Long v. Parker, 390 F.2d 816, 820 (3d Cir. 1968).

37. "Because prison officials must be responsible for the security of the prison and the safety of its population, they must have a wide discretion in promulgating rules to govern the prison population and in imposing disciplinary sanctions for their violation." McCloskey v. Maryland, 337 F.2d 72, 74 (4th Cir. 1964) (censorship of anti-semitic statements upheld).

38. Sewell v. Pegelow, 291 F.2d 196 (4th Cir. 1961). "It is a rule grounded in necessity and common sense, as well as authority, that the maintenance of discipline in a prison is an executive function with which the judicial branch ordinarily will not interfere." Id. at 197.

39. Goldfarb, supra note 25, at 181-85; Hirsckop & Millemann, The Unconstitutionality of Prison Life, 55 Va. L. Rev. 795, 812-13 (1969); Comment, The Inadequacy of Prisoners' Rights to Provide Sufficient Protection for Those Confined in Penal Institutions, 48 N.C.L. Rev. 847, 849-50 (1970) [hereinafter cited as Comment]; Note, Religious Freedom in Prisons, 36 Albany L. Rev. 416-17 (1972); Note, Black Muslim Prisoners and Religious Discrimination: The Developing Criteria for Judicial Review, 32 Geo. Wash. L. Rev. 1124 (1964) [hereinafter cited as Developing Criteria]; Beyond the Ken, supra note 31.

40. E.g., Braxton v. Carlson, 483 F.2d 933, 942 n.10 (3d Cir. 1973).

41. 393 U.S. 483 (1969); see Comment, supra note 39; Note, The Evolving Right of Due Process at Prison Disciplinary Hearings, 42 Fordham L. Rev. 878 (1974).

42 393 U.S. at 486 (prison can not ban inmate assistance in preparation of habeas corpus writs without providing alternate means of assistance).

43. Id. at 485.

44 Pell v. Procunier, 417 U.S. 817, 827 (1974); Procunier v. Martinez, 416 U.S. 396, 405-06 (1974); Braxton v. Carlson, 483 F.2d 933, 942 (3d Cir. 1973). Moore v. Ciccone, 459 F.2d 574, 576 (8th Cir. 1972) (en banc); Brown v. Peyton, 437 F.2d 1228, 1232 (4th Cir. 1971); Jackson v. Godwin, 400 F.2d 529, 537 (5th Cir. 1968).

45. "While the judgments of prison officials are entitled to considerable weight because they are based upon first-hand observance of the events of prison life and upon a certain expertise in the functioning of a penal institution, prison officials are not judges. They are not charged by law and constitutional mandate with the responsibility for interpreting and applying constitutional provisions, and they are not always disinterested persons in the resolution of prison problems. We do not denigrate their views but we cannot be absolutely bound by them." Brown v. Peyton, 437 F.2d 1228, 1232 (4th Cir. 1971); Cooper v. Pate, 382 F.2d 518, 521 (7th Cir. 1967); cf. Pell v. Procunier, 417 U.S. 817, 827 (1974).

It is clear that prisoners retain rights upon incarceration.[46] These rights are subject to regulation, the fairness of which can only be determined on a case-by-case basis. This has resulted in varying degrees of protection.

The right to practice a religion in prisons is an area where the judiciary has shown a determined willingness[47] to protect religious freedom. This is a logical extension of the historical relationship between prisons and religion. The American penitentiary system was founded by the Quakers in the hope of reforming felons instead of punishing them by death.[48] Religion was seen as a way to rehabilitate the prisoner.[49] Prison is a demeaning and dehumanizing environment,[50] which tends to strip away the inmate's personal identity and sense of worth.[51] Religion in prison is thought to help the inmate "reclaim his dignity and reassert his individuality."[52]

There is little argument that first amendment freedoms in a non-prison setting have long been recognized as "preferred."[53] It is noteworthy that religious freedom, although limited in the prison environment, is not only preferred,[54] but may enjoy a more preferred position than other first amend-

46. See notes 28, 41-45 supra and accompanying text. "[I]t is not doubtful now that the Constitution, and notably the First Amendment reaches inside prison walls. [These] freedoms . . . are cramped and diluted for the inmate. But they exist to the fullest extent consistent with prison discipline, security and 'the punitive regimen of a prison . . . .' " Sobel v. Reed, 327 F. Supp. 1294, 1303 (S.D.N.Y. 1971), quoting Brown v. Peyton, 437 F.2d 1228, 1231 (4th Cir. 1971).

47. The hands-off doctrine was attacked in the area of prisoners' freedom of religion only after it was abandoned in the area of access to the courts. Goldfarb, supra note 25 at 216.

48. The American penal system is based upon the Quakers' idea that "criminals could be redeemed if only they were placed in solitude where they could pray, meditate their sins, and reconstruct their lives through patient religious guidance." Alexander, Corrections in Transition, 45 Neb. L. Rev. 10 (1966); King, Religious Freedom in the Correctional Institution, 60 J. Crim. L.C. & P.S. 299, 300 (1969).

49. The four most often identified goals of our penal system are protection of society, deterrence, rehabilitation and prison security. Pell v. Procunier, 417 U.S. 817, 822-23 (1974); cf. Procunier v. Martinez, 416 U.S. 396, 412 (1974).

50. Procunier v. Martinez, 416 U.S. 396, 428 (1974) (Marshall, J., concurring).

51. Cf. Emerson, Toward a General Theory of the First Amendment, 72 Yale L.J. 877, 879 (1963).

52. Goldfarb, supra note 25 at 217, quoting Barnett v. Rodgers, 410 F.2d 995, 1002 (D.C. Cir. 1969). Black Muslim leaders claim that through their religion they have rehabilitated previously disruptive Black prisoners by instilling a sense of value and pride in them. See C. Lincoln, The Black Muslims in America (1962). As one court put it, "The rationale of the first amendment is, at least in part, that, particular doctrine aside, devotion to one's religious beliefs is considered to make one a more ethical, intelligent, useful member of society . . . . One of the principal purposes of incarceration is rehabilitation. . . . Criminals and prison communities may [as a result] be benefited by the free exercise of religion." Brown v. Peyton, 437 F.2d 1228, 1230 (4th Cir. 1971); Teterud v. Burns, 522 F.2d 357 (8th Cir. 1975).

53. Thomas v. Collins, 323 U.S. 516, 530 (1945).

54. Pierce v. La Vallee, 293 F.2d 233 (2d Cir. 1961). "Whatever may be the view with regard to ordinary problems of prison discipline, however, we think that a charge of religious persecution falls in quite a different category. As the Supreme Court has . . . pointed out, freedom of

ment rights in the prison context.[55]

The major judicial focus in the area of free exercise of religion in prisons[56] has involved the Black Muslim movement. Initial litigation concerned characterization of the movement as a religion. Penal administrators denied recognition of religious status to the Black Muslim movement on the grounds of prison security, and the political and racist nature of the movement.[57] It was not until *Fulwood v. Clemmer*,[58] that the movement was held by a court to be a religion.[59] The court noted that Muslim prisoners were denied permission to hold religious services "primarily upon [the Director's] belief that the Muslims teach racial hatred, that such teaching is inflammatory and likely to create a disturbance or disorder, and hence would not promote the welfare of the prison population."[60] While admitting some factual basis for this belief, the court commented that it was not a judicial function to consider the "merits or fallacies"[61] of a religion. It was sufficient that the Black Muslims met one definition of religion in that they believed in a supreme being, Allah.[62] As a

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religion and of conscience is one of the fundamental 'preferred' freedoms guaranteed by the Constitution." Id. at 235 (citations omitted); J. Palmer, Constitutional Rights of Prisoners 57-76 (1973) [hereinafter cited as Palmer]; Fox, The First Amendment Rights of Prisoners, 63 J. Crim. L.C. & P.S. 162, 170 (1972); Developing Criteria, supra note 39, at 1137; see Cooper v. Pate, 382 F.2d 518, 522 (7th Cir. 1967).

55. S. Krantz, R. Bell, J. Brant, M. Magruder, Model Rules and Regulations on Prisoners' Rights and Responsibilities 33 (1973). For a discussion of the rising importance of freedom of religion in a non-prison setting see note 23 supra and accompanying text. "First Amendment rights must always be applied 'in light of the special characteristics of the . . . environment' in the particular case." Healy v. James, 408 U.S. 169, 180 (1972), citing Tinker v. Des Moines Indep. School Dist., 393 U.S. 503, 506 (1969).

56. No distinction will be made between prisoners in state and federal institutions as the rights involved are equally applicable to both groups. The first amendment restrictions upon federal activity have been held applicable to the states. Everson v. Bd. of Educ., 330 U.S. 1 (1947) (Establishment Clause); Cantwell v. Connecticut, 310 U.S. 296 (1940) (Free Exercise Clause). The fourteenth amendment's equal protection provision has been held applicable to the federal government through the due process provision of the fifth amendment. Shapiro v. Thompson, 394 U.S. 618 (1969); Bolling v. Sharpe, 347 U.S. 497 (1954).

57. 75 Harv. L. Rev. 837, 838-39 (1962); Sostre v. McGinnis, 334 F.2d 906 (2d Cir.), cert. denied, 379 U.S. 892 (1964); Fulwood v. Clemmer, 206 F. Supp. 370 (D.D.C. 1962).

58. 206 F. Supp. 370 (D.D.C. 1962).

59. Id. at 373. See Clay v. United States, 403 U.S. 698, 702-03 (1971) (per curiam) (Black Muslim movement recognized as a religion within the meaning of the Selective Service Act).

60. 206 F. Supp. at 373.

61. Id.

62. See also United States v. Ballard, 322 U.S. 78 (1944). "The Fathers of the Constitution were not unaware of the varied and extreme views of religious sects, of the violence of disagreement among them, and of the lack of any one religious creed on which all men would agree. They fashioned a charter of government which envisaged the widest possible toleration of conflicting views. Man's relation to his God was made no concern of the state. He was granted the right to worship as he pleased and to answer to no man for the verity of his religious views. . . . The First Amendment does not select any one group or any one type of religion for preferred treatment. It puts them all in that position." Id. at 87.

result of this, Black Muslims have been able to achieve judicial examination of constitutionally protected activities.[63]

The precise standards employed in *Fulwood* were not clearly delineated, since the court relied on both equal protection and first amendment grounds.[64] An examination of other free exercise cases, however, reveals two

63. 206 F. Supp. at 373. The determination of which practices and beliefs are "religious" (and therefore subject to protection) is delicate and difficult, but one which must at times be made in the interest of our concept of "ordered liberty." Wisconsin v. Yoder, 406 U.S. 205, 215-16 (1972). While no precise standard exists, Theriault v. Carlson, 495 F.2d 390 (5th Cir.), cert. denied, 419 U.S. 1003 (1974), the courts have developed certain guidelines to aid in this determination. The initial criterion was developed in United States v. Ballard, 322 U.S. 78 (1944), wherein the conviction for fraud of a promotor for the "I Am" movement was upheld. The court held that the jury had received proper instruction as to the sincerity and not the veracity of the belief in question. Courts have consistently applied this "sincerity test." Theriault v. Carlson, 495 F.2d 390, 394-95 (5th Cir.), cert. denied, 419 U.S. 1003 (1974); Remmers v. Brewer, 361 F. Supp. 537, 542 (S.D. Iowa 1973), aff'd, 494 F.2d 1277 (8th Cir.) (per curiam), cert. denied, 419 U.S. 1012 (1974); and rejected the "truthfulness test" as being beyond the proper consideration of the court. Teterud v. Burns, 522 F.2d 357, 359-60 (8th Cir. 1975). A second guideline was presented by the Court for religious exemptions under the Selective Service Act. United States v. Seeger, 380 U.S. 163 (1965). Exemption status was allowed for "[a] sincere and meaningful belief which occupies in the life of its possessor a place parallel to that filled by the God of those admittedly qualifying for the exemption. . . ." Id. at 176. This liberalized view may have been limited by the Court in Wisconsin v. Yoder, where it was implied that philosophical and personal beliefs are not religious. 406 U.S. 205, 216 (1972). However, at least one circuit has relied upon a combination of the Ballard (sincerity) and Seeger criteria stating that it is up to the court to determine if the beliefs are " 'sincerely held and whether they are, in [their] own scheme of things, religious.' " Theriault v. Carlson, 495 F.2d 390, 394 (5th Cir.), cert. denied, 419 U.S. 1003 (1974), quoting United States v. Seeger, 380 U.S. 163, 185 (1965). The durability of "religious" doctrines has also been considered by the courts. Wisconsin v. Yoder, 406 U.S. 205, 225 (1972).

64. "By allowing some religious groups to hold religious services . . . and by conducting such services at public expense, while denying that right to . . . Muslims, [prison officials] have discriminated . . . against petitioner. . . ." Fulwood v. Clemmer, 206 F. Supp. 370, 374 (D.D.C. 1962). Courts have consistently held that opportunities to exercise religious freedom must be equally afforded to all prisoners within the institution. Cruz v. Beto, 405 U.S. 319, 321-22 (1972) (per curiam); cf. Remmers v. Brewer, 361 F. Supp. 537, 542 (S.D. Iowa 1973), aff'd, 494 F.2d 1277 (8th Cir.), cert. denied, 419 U.S. 1012 (1974); Long v. Parker, 390 F.2d 816, 820 (3d Cir. 1968); Cooper v. Pate, 382 F.2d 518, 521 (7th Cir. 1967); Palmer, supra note 54, at 76.

The Fulwood decision emphasized the inherent tension between the free exercise and establishment clauses of the first amendment. While the state may be required to provide religious services and meals under the free exercise clause, this very same action may violate the constitutional prohibition against the establishment of religion. However, under circumstances where the state has deprived an individual of his opportunity to practice his faith in the manner of his choice, the establishment clause prohibitions have been subordinated to the free exercise protections. Palmer, supra note 54, at 57-76. It was suggested by Mr. Justice Brennan that "[t]he State must be steadfastly neutral in all matters of faith, and neither favor nor inhibit religion. . . . [H]ostility, not neutrality, would characterize the refusal to provide chaplains and places of worship for prisoners . . . cut off by the State from all civilian opportunities for public communion . . . ." School Dist. of Abington Township v. Schempp, 374 U.S. 203, 299 (1963) (concurring); Everson v. Board of Educ., 330 U.S. 1, 15 (1947); King, Religious Freedom in the Correctional Institution, 60 J. Crim. L.C. & P.S. 299, 300 (1969); Developing Criteria, supra note

distinct approaches taken by courts in trying to determine the extent to which the free exercise clause protects the religious activities of prison inmates. In this regard, courts have employed either a compelling interest standard[65] or, as a function of special prison circumstances,[66] a reasonableness standard.

III. THE TWO STANDARDS

The reasonableness standard requires that a "reasonable basis" exist for curtailing prisoner activities.[67] The judicial balancing process centers on considerations of prison discipline, management, order and security[68]—areas primarily viewed as administrative, with which the courts are reluctant to interfere. However, courts do rely on administrative discretion to determine which regulations are reasonable[69] and place the burden on the prisoner to overcome this assumption. While this may sound reminiscent of the now abandoned hands-off policy,[70] the reasonableness test received new vitality in the recent Supreme Court decision of *Pell v. Procunier*.[71] Despite a claimed violation of the first and fourteenth amendments, the Court upheld a California Department of Corrections regulation prohibiting face-to-face interviews with individual prisoners on the basis that alternative channels of communications were available.[72] The Court stated that:

39, at 1132; cf. Gittlemacker v. Prasse, 428 F.2d 1, 4 (3d Cir. 1970) (free exercise clause requires opportunity, but does not mandate affirmative duty to provide religious services to inmates).

65. A third test requires that a clear and present danger to the prison exist before religious practices may be curtailed. Long v. Parker, 390 F.2d 816, 822 (3d Cir. 1968); Cooper v. Pate, 382 F.2d 518, 522 (7th Cir. 1967); Banks v. Havener, 234 F. Supp. 27, 30 (E.D. Va. 1964). This test, endorsed in Cantwell v. Connecticut, 310 U.S. 296 (1940), has been abandoned by the Court. See notes 14-20 supra and accompanying text. The applicability of this test to the prison setting has been criticized. "[It] may require prison authorities to engage in brinkmanship . . . ." Knuckles v. Prasse, 302 F. Supp. 1036, 1057 (E.D. Pa. 1969), aff'd, 435 F.2d 1255 (3d Cir. 1970), cert. denied, 403 U.S. 936 (1971).

66. See generally Palmer, supra note 54.

67. Long v. Parker, 390 F.2d 816, 820 (3d. Cir. 1968); Vogelman, Prison Restrictions—Prisoner Rights, 59 J. Crim. L.C. & P.S. 386, 392 (1968) [hereinafter cited as Prison Restrictions].

68. "The particular characteristics of the Muslims obviously require that whatever rights may be granted because of the religious content of their practices must be carefully circumscribed by rules and regulations which will permit the authorities to maintain discipline in the prison." Sostre v. McGinnis, 334 F.2d 906, 911 (2d Cir.), cert. denied, 379 U.S. 892 (1964); see, e.g., Brown v. Peyton, 437 F.2d 1228, 1233 (4th Cir. 1971) (dissenting opinion); Abernathy v. Cunningham, 393 F.2d 775, 779 (4th Cir. 1968) (reasonableness of ban on Muslim literature upheld); Cooper v. Pate, 382 F.2d 518, 523 (7th Cir. 1967) (no abuse of discretion in denying prisoner access to specified religious literature); Brown v. McGinnis, 10 N.Y. 2d 531, 535-36, 180 N.E.2d 791, 793, 225 N.Y.S.2d 497, 500 (1962); Palmer, supra note 54, at 76; Prison Restrictions, supra note 67, at 392.

69. Courts defer to administrative discretion on the grounds that "prison authorities . . . should not be subjected to court interference with the routine management of the institution." Childs v. Pegelow, 321 F.2d 487, 491 (4th Cir. 1963), cert. denied, 376 U.S. 932 (1964). This policy is supported by Justice Rehnquist in his dissent in Cruz v. Beto, 405 U.S. 319, 325 (1972).

70. See notes 32-45 supra and accompanying text.

71. 417 U.S. 817 (1974).

72. Id. at 823-24.

[s]uch considerations [of rehabilitation, internal security and administrative efficiency] 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.[73]

It would, therefore, appear that only an "exaggerated response" by prison officials to the legitimate policies and goals of correctional institutions would be invalidated. However, this test may not have as widespread an application as appears at first glance. *Pell* concerned the abridgment of the right to freedom of speech and not the prohibition of that right.[74] As a result, its application of the reasonableness test may be limited to those regulations which merely restrict a right, while at the same time allowing for alternate means of realizing the right so regulated.[75] The scope of a regulation may not reach the destruction of a right. Additionally, the standard may be inapposite where free exercise of religion claims are involved, because of the importance placed upon religion in the prison environment.[76]

The second and more progressive test recognizes that while some degree of regulation is inherent in a prison setting,[77] a compelling or paramount state interest[78] should be shown before a retraction of religious rights will be upheld.[79]

The District of Columbia Circuit Court of Appeals in *Barnett v. Rodgers*[80] held that Black Muslim petitioners could be denied their request to receive religiously acceptable food[81] only upon a showing by the prison that the

73. Id. at 827. This fairly amorphous standard was severely criticized by the three dissenting Justices. " 'Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms.' " Id. at 838 (Douglas, Brennan & Marshall, dissenting), quoting NAACP v. Button, 371 U.S. 415, 438 (1962).

74. 417 U.S. at 823.

75. Id.; cf. United States ex rel. Jones v. Rundle, 453 F.2d 147, 149-50 (3d Cir. 1971); Cooper v. Pate, 382 F.2d 518, 522 (7th Cir. 1967) (regulation rather than prohibition permissible).

76. See notes 48-56 supra and accompanying text.

77. See Brown v. Peyton, 437 F.2d 1228, 1231 (4th Cir. 1971); Jackson v. Godwin, 400 F.2d 529, 532 (5th Cir. 1968).

78. Courts frequently enunciate this standard in a variety of ways. Theriault v. Carlson, 495 F.2d 390, 394 (5th Cir.), cert. denied, 419 U.S. 1003 (1974) ("sufficiently important governmental interest"); Ross v. Blackledge, 477 F.2d 616, 618 (4th Cir. 1973) (" 'paramount state interests' "); Walker v. Blackwell, 411 F.2d 23, 25 (5th Cir. 1969) ("compelling and substantial public interest"); Barnett v. Rodgers, 410 F.2d 995, 1003 (D.C. Cir. 1969) ("compelling justifications"); Jackson v. Godwin, 400 F.2d 529, 542 (5th Cir. 1968) ("important or substantial governmental interest").

79. "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." Barnett v. Rodgers, 410 F.2d 995, 1000 (D.C. Cir. 1969); accord, Brown v. Peyton, 437 F.2d 1228 (4th Cir. 1971); Rowland v. Sigler, 327 F. Supp. 821 (D. Neb.), aff'd sub nom. Rowland v. Jones, 452 F.2d 1005 (8th Cir. 1971).

80. 410 F.2d 995 (D.C. Cir. 1969).

81. Muslims are to abstain from the consumption of swine. See note 1 supra. Petitioners here requested one pork-free meal per day. 410 F.2d at 997.

refusal to provide such food was justified by a compelling interest, and that this governmental interest could not be attained in a manner which less " 'broadly stifle[d] fundamental personal liberties.' "[82]

It has been suggested that in prison cases, courts which in practice ostensibly apply the compelling interest standard actually require a less rigorous showing of governmental interest than would be required in a non-prison setting.[83] Courts have found this compelling justification in the burden and expense of prison administration,[84] and in the government's interest in maintaining prison security, order[85] and discipline.[86] These are the very same considerations upon which courts using the reasonableness test rely.[87]

Courts employing these tests do not indicate why a particular test is used, and frequently do not uniformly apply the same test to each issue presented. Often the test applied is a function of the extent of the governmental activity in question. Where regulation is involved the court may use a reasonableness test, whereas the same court may apply a compelling interest test if prohibition is sought.[88]

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82. 410 F.2d at 1003, quoting Shelton v. Tucker, 364 U.S. 479, 488 (1960) (footnotes omitted). Other courts have relied upon the "less drastic means" test of Shelton v. Tucker. See, e.g., Teterud v. Burns, 522 F.2d 357, 362 (8th Cir. 1975); Jackson v. Godwin, 400 F.2d 529, 541 (5th Cir. 1968); Cooper v. Pate, 382 F.2d 518, 522 (7th Cir. 1967); Palmigiano v. Travisono, 317 F. Supp. 776, 786 (D. R.I. 1970). As the record did not address the government's rationale behind denying petitioners' request for religiously acceptable food the court remanded, commenting that petitioners' request "is essentially a plea for a modest degree of official deference to their religious obligations. Certainly if this concession is feasible from the standpoint of prison management, it represents the bare minimum that jail authorities, with or without specific request, are constitutionally required to do, not only for Muslims but indeed for any group of inmates with religious restrictions on diet." 410 F.2d at 1001.

The court suggested at least two methods of lessening the burden upon petitioners' exercise of religion which would be administratively feasible: a) seasoning fewer vegetables with pork or providing alternative vegetables and b) posting prison menus in advance, designating pork and pork flavored food to be served. Id. at 1002.

83. United States v. Kahane, 396 F. Supp. 687, 702 (E.D.N.Y.), aff'd as modified sub nom. Kahane v. Carlson, 527 F.2d 492 (2d Cir. 1975). This is, perhaps, a result of the particular relationship existing between the controlled prison environment and the prisoner. Barkin, The Emergence of Correctional Law & the Awareness of the Rights of the Convicted, 45 Neb. L. Rev. 669, 682-84 (1966).

84. See, e.g., Brown v. Peyton, 437 F.2d 1228, 1231 (4th Cir. 1971); Walker v. Blackwell, 411 F.2d 23, 25 (5th Cir. 1969).

85. Brown v. Peyton, 437 F.2d 1228, 1231 (4th Cir. 1971); Walker v. Blackwell, 411 F.2d 23, 25 (5th Cir. 1969); Theriault v. Carlson, 339 F. Supp. 375, 387 (N.D. Ga. 1972), vacated and remanded on other grounds, 495 F.2d 390 (5th Cir.), cert. denied, 419 U.S. 1003 (1974).

86. See, e.g., Brown v. Peyton, 437 F.2d 1228, 1231 (4th Cir. 1971); Walker v. Blackwell, 411 F.2d 23, 25 (5th Cir. 1969); Jackson v. Godwin, 400 F.2d 529, 532 (5th Cir. 1968) (non-religious first amendment claims).

87. See notes 67-70 supra and accompanying text. The difference remains, however, in the allocation of the burden of proof. See text accompanying notes 69 & 82 supra.

88. See, e.g., Brown v. Peyton, 437 F.2d 1228 (4th Cir. 1971); Walker v. Blackwell, 411 F.2d 23 (5th Cir. 1969); see note 75 supra.

IV. KOSHER FOOD IN PRISONS

The Second Circuit has applied yet another test in its consideration of the necessity of accommodating the religious dietary requirements of prisoners in the recent case of *Kahane v. Carlson*.[89]

Kahane, an orthodox Jewish Rabbi, was charged with violating parole and sentenced to one year in prison.[90] The trial court ordered that he

> 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.[91]

The government refused to provide Kahane with kosher food, claiming, *inter alia*, that "it would be burdensome to meet the religious dietary needs of its diverse prison population."[92] This position was based upon the Federal Bureau of Prisons' determination

> "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."[93]

Kahane moved for an order directing the government to permit him to obtain food meeting orthodox Jewish dietary requirements comparable in nutritional value to food served to the general prison population. The requested relief was granted by the district court and subsequently modified by the court of appeals.

The district court held that "[Kahane] is constitutionally entitled to an order . . . that allows him to conform to Jewish dietary laws."[94] The court based its holdings on its interpretation of the significance of Jewish dietary laws. These laws were considered to be central to the orthodox Jew's religious observance and "deeply symbolic . . . of the basic relationship between God and man."[95] They were not merely empty rituals, but rather were believed to be an expression of the covenantal relationship existing between God and the Jewish people. "As the rabbinic literature makes clear, the dietary laws are to be strictly observed, as part of the Biblical command to 'In all thy ways acknowledge Him.' Proverbs 3:6."[96] Strict observance is an obligation which must continually be met, and which can only be suspended when one is in danger of dying.[97] Incarceration does not relieve this religious obligation. It seems that the court based its findings upon its own interpretation of the

89. 527 F.2d 492 (2d Cir. 1975).

90. Id. at 493.

91. United States v. Kahane, 396 F. Supp. 687, 689 (E.D.N.Y.), aff'd as modified sub nom. Kahane v. Carlson, 527 F.2d 492 (2d Cir. 1975).

92. 396 F. Supp. at 690.

93. Id. at 692, quoting the government's brief submitted in United States v. Huss, 394 F. Supp. 752 (S.D.N.Y.), vacated without prejudice on other grounds, 520 F.2d 598 (2d Cir. 1975).

94. Id. at 704.

95. Id. at 693.

96. Id. at 694.

97. Id. at 691.

"merits" of the religious activity in question. This line of inquiry would appear to be proscribed by previous Supreme Court decisions.[98] The danger of basing the availability of religious activities upon a court's own interpretation of the significance of that activity to the particular religion is exemplified by the court in *United States v. Huss*[99] where a different interpretation of the relative importance of the kosher laws to the Orthodox Jewish faith resulted in the denial of a special kosher diet.[100]

In evaluating Kahane's claim, the court acknowledged the government's right to make some inquiry into the sincerity of his religious beliefs,[101] but found the defendant to be a strictly observant Jew.[102] The court noted that with regard to freedom of religion, prisons occupy a singular position in our society. "[I]n the prison setting the establishment clause has been interpreted in the light of the affirmative demands of the free exercise clause."[103] As a result of this unique posture, prisons have been required to hire clergy at their own expense, despite the possible clash with the establishment clause.[104] Additionally, prison authorities have been precluded "from indirectly and unreasonably disfavoring practices of some religions by preventing its adherents from observing their religious requirements."[105] Prisons, therefore, must provide the opportunity for religious observance even where only a small number of prisoners are involved and a prison clergyman is not feasible.[106] Reiterating this free exercise[107] emphasis and relying heavily upon cases involving Black Muslim requests for food consonant with their religious beliefs,[108] the trial court determined that only a compelling interest, in terms

98. See note 63 supra.

99. 394 F. Supp. 752 (S.D.N.Y.), vacated without prejudice on other grounds, 520 F.2d 598 (2d Cir. 1975).

100. See text accompanying note 93 supra.

101. 396 F. Supp. at 698. The court considered this to be relevant especially where duties and rights would result from a finding of sincerity, but cautioned that any inquiry should proceed slowly to avoid placing the state "in the position of deciding which religious claims are meritorious." Id. See note 63 supra.

102. If defendant's religious claims were held not to be bona fide, the government would not be required to provide the relief requested. See United States v. Huss, 394 F. Supp. 752, 754 (S.D.N.Y.), vacated without prejudice on other grounds, 520 F.2d 598 (2d Cir. 1975).

103. 396 F. Supp. at 698. See note 64 supra.

104. See note 64 supra.

105. 396 F. Supp. at 699.

106. See Cruz v. Beto, 405 U.S. 319, 322 n.2 (1972) (per curiam); Northern v. Nelson, 315 F Supp. 687 (N.D. Cal. 1970), aff'd, 448 F.2d 1266 (9th Cir. 1971).

107. 396 F. Supp. at 698-99.

108. See notes 56-82 supra and accompanying text. The court appeared to resolve the various Black Muslim cases in terms of three considerations: a) did the religious practice in question present a threat to prison security or administration; b) was an adequate nutritionally balanced diet available to the prisoner abstaining from offending foods; and c) if not, was there sufficient measure of governmental interest against providing the complaining prisoners with acceptable foods. While relying upon the similarity of Black Muslim precedents, the court did recognize distinctions between the Black Muslim and kosher cases. The Black Muslim religion requires abstinence from pork and pork flavored products. Compliance with its restrictions is, therefore,

of a "seriously disruptive administrative burden,"[109] would justify the failure to make kosher food available to an observant Jew. The court concluded that relatively simple procedures were available which would enable prisons to provide a nutritionally sound kosher diet. The government, showing only a higher average cost for kosher meals[110] and claiming threats to prison security if kosher meals were provided,[111] had given "no serious, much less compelling, reasons why provision of a kosher diet for this defendant would affect prison security or discipline."[112] As

> no irresolvable conflict exists between the rights of the defendant and the practical needs of the correctional institutions. . . . Defendant is constitutionally entitled to an order . . . that allows him to conform to Jewish dietary laws.[113]

The trial court enumerated several methods to achieve this. In addition to providing the prisoner with acceptable foods already available ("certain fruits, acceptable breads, cheeses, tinned fish, boiled eggs and vegetables . . . ."[114]) the court suggested the purchase of frozen kosher meals financed by the prison or by local or national Jewish groups. The court minimized the difficulties raised by these methods, and merely stated, "[t]he minor practical problems presented can be easily met if the government tries in good faith to do so."[115]

The court of appeals modified the lower court's order to ensure that details of compliance would be left to the prison administration.[116] The court affirmed the decision as modified, holding 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.[117]

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easier than compliance with the more stringent kosher requirements. However, the greater efforts required by the kosher laws are balanced by the small number of observant Jews in the prison systems, especially when compared to the large number of Black Muslim prisoners. 396 F. Supp. at 702. It has been estimated "that only six to twelve inmates in the entire federal prison system would seek kosher food if it were available . . . ." Id. at 692.

109. Id. at 700. It would appear this test requires more than a mere showing of greater expense and administrative burden—two elements of the present requirement of providing clergy in prisons. A situation also involving a threat to the security of the prison might be sufficient to warrant government restriction of prisoner rights. See text accompanying note 65 infra.

110. 396 F. Supp. at 692.

111. Id. The court took judicial notice of proceedings in United States v. Huss, 394 F. Supp. 752 (S.D.N.Y.), vacated without prejudice, 520 F.2d 598 (2d Cir. 1975). In Huss the government claimed the security and order of the prison would be threatened if special kosher meals were provided. 394 F. Supp. at 758-59.

112. 396 F. Supp. at 703.

113. Id. at 704.

114. Id. at 702.

115. Id. at 704.

116. The court of appeals, fearing these suggestions would be seen as requirements and not mere suggestions, modified the district court order to ensure clarity. Kahane v. Carlson, 527 F.2d 492, 496 (2d Cir. 1975).

117. 527 F.2d at 495.

The appellate court considered the relatively small number of practising orthodox Jews in federal prisons,[118] that state and city prisons provide kosher food, and that federal prisons provide kosher food for high holidays and special medical diets,[119] concluding that no "important or substantial government interest"[120] was offered to justify the restriction in question.

A strong point of the *Kahane* opinion lies in its recognition of the availability of alternate methods of accommodating religious dietary needs.[121] Rather than mandating one particular method, the court opted for flexibility, and left the means of compliance to the particular institution.[122] In so doing, the court appears to have lessened the burden to be borne by the prisons. If religiously acceptable foods are available in the prison,[123] it may provide such foods from existing stock rather than purchase special kosher foods.[124] It is only when non-offending foods are unavailable, or not nutritionally balanced, that the prison will be required to purchase or obtain such foods. If a nutritionally balanced, non-offending diet is achieved, the prison is free to consider its particular security, discipline and administrative requirements.[125]

While reaching the same conclusion as the district court, the court of appeals relied upon a different standard in evaluating the propriety of governmental restriction. The Second Circuit relied upon a new, apparently less rigorous test, stating that "the degree of restriction must be only that which can be justified by an 'important or substantial government interest' in the restriction by the penal institution."[126]

The court, however, failed to elucidate the distinctions, if any, between the important or substantial interest test and the reasonableness and compelling interest tests. While this new test falls somewhere between those two standards, no explicit definition was offered as to its boundaries. It seems that the important or substantial interest test is similar to the compelling interest test, in that it keeps the burden of justification upon the government. On the other hand, it is different from the compelling interest test in that it requires the government to sustain a "lesser burden" of justification.[127] Though it is

118. Id. at 495. See note 108 supra.

119. 527 F.2d at 496; Ross v. Blackledge, 477 F.2d 616, 619 (4th Cir. 1973) (medically required special diets).

120. 527 F.2d at 495, relying upon Procunier v. Martinez, 416 U.S. 396, 413 (1974).

121. 527 F.2d at 496. See notes 114-115 supra and accompanying text.

122. 527 F.2d at 496.

123. See note 114 supra and accompanying text.

124. 527 F.2d at 496.

125. As a result, the prison would only be required to purchase special kosher food if the diet lacked nutritional parity with the regular prison menu. Thus, a kosher diet consisting of raw vegetables, eggs and tinned foods with few hot items would be acceptable even though it did not contain the same foods served to the other prisoners.

126. 527 F.2d at 495, quoting Procunier v. Martinez, 416 U.S. 396, 413 (1974). In a footnote to its opinion the Second Circuit noted that although it had previously adopted the compelling interest test in prison cases, Goodwin v. Oswald, 462 F.2d 1237, 1244 (2d Cir. 1972), subsequent Supreme Court decisions use the important or substantial test. 527 F.2d at 495 n.6.

127. 527 F.2d at 495 n.6.

merely conjecture at this time, this important or substantial interest test may in fact permit the government to show only a reasonable or rational basis for the restriction in question. This represents an elementary weakness in the Second Circuit's decision in *Kahane*.[128]

Moreover, the reliance on an important or substantial interest test may be misplaced. The *Kahane* court adopted the test from the Supreme Court decision in *Procunier v. Martinez*.[129] *Martinez* concerned the constitutionality of state censorship of prisoner mail. It was not decided on the basis of prisoner rights, but rather on the first amendment rights to freedom of speech and expression of the non-prisoner party to the communications.[130] It specifically did not deal with the issue of prisoners' fundamental rights.[131]

It is submitted that the use of the important or substantial interest test may not be necessary in the prison setting. The state's need to regulate is greater in a prison setting than in society in general. Therefore, while it may be difficult, if not impossible to show a compelling interest in a case involving non-prisoners,[132] such a showing is quite plausible in the controlled prison environment. Rather than complicating an already confused issue, the court would have performed a great service if it had chosen to define the parameters of this newly endorsed standard.

The ultimate resolution of the *Kahane* case raises an additional problem. Upon its finding that the government did not offer proof sufficient to meet the necessary justification, the court ordered that Kahane be provided with food consistent with his religious beliefs.[133] It is obvious that different prisons have different degrees of security, discipline and administrative problems. Should a case similar to *Kahane* arise in another prison, it might be possible for the government to sufficiently justify the refusal of a prisoner's religious dietary needs. This raises the question of potential equal protection problems which this Note does not purport to analyze fully. Where equally religious individuals are in one instance granted special diets and in another denied such diets, solely because of the particular prison to which they are committed, some inequity results. If, to prevent this inequity, a prisoner is moved to a facility

128. This interpretation differs from the accepted rational basis test, which places the burden of showing an absence of reasonableness on the individual whose rights are being restricted. Reed v. Reed, 404 U.S. 71 (1971). Interpreting the important or substantial interest test to allow the government to show reasonableness would be identical to the standard used by the Supreme Court in Weinberger v. Wiesenfeld, 420 U.S. 636 (1975). Weinberger, however, involved classification by sex, a classification which the Court has refused to recognize as suspect. In Kahane, a fundamental interest was involved, to wit, freedom of religion. As no explicit parameters of this test were forthcoming from the Kahane case, this interpretation is plausible, but would be logically inconsistent with the special protections consistently given to fundamental freedoms in the past. Such an inconsistency could only be reconciled if it were concluded that the protections given to preferred freedoms are to be eased in the prison setting.

129. 416 U.S. 396, 413 (1974).

130. Id. at 408-09.

131. Id.

132. Cf. Procunier v. Martinez, 416 U.S. 396 (1974).

133. See notes 113 & 117 supra and accompanying text.

where religious dietary observance is possible, religiously segregated prisons would result. It appears, however, that such inequities are a price to be paid for the application of a subjective balancing test.

V. CONCLUSION

Kahane is yet another illustration of the problematic state of free exercise of religion in prisons. The *Kahane* opinion has been constructive in its immediate effect, and may have provided the impetus for a new Federal Bureau of Prisons policy[134] to provide full kosher meals to observant prisoners. However, it may have an even greater, and unfortunately less favorable impact in another area—the development of constitutional standards by which fundamental freedoms in prison are evaluated. The freedom to observe the dietary laws of a chosen religion has been extended to encompass daily, and not merely occasional prison meals. This freedom is, of necessity, subject to limitations,[135] as all activities in a prison setting must be. Confusion, however, arises when courts attempt to determine when and to what degree limitation is permissible. By employing a standard different in some undefined degree from both the reasonableness and compelling interest tests, the Second Circuit further complicated an already confused area without constructively contributing thereto. Admittedly, no hard and fast rules are available and some degree of flexibility is required if courts are to perform their proper function. But, rather than add to the rhetoric, the court would have performed a valuable service had it chosen to delineate or clarify the actual bases of its decision. Instead, it chose to join the other circuits in failing to provide meaningful guidelines for the determination of the circumstances under which limitation will be constitutionally permissible. There is now even more uncertainty as to what circumstances and conditions will be sufficient to permit the limitation of religious freedom in prisons. The inconsistencies presently existing in the circuits show no sign of resolution. Unless and until the Supreme Court speaks to this issue, the confusion and conflict in the courts will continue.

Andrea Bernstein

134. The Federal Bureau of Prisons has agreed to provide full kosher meals, including meat and poultry, to Jewish prisoners who observe the dietary restrictions. Federal Bureau of Prisons, Policy Statement, No. 22001.2A (June 11, 1976).

135. Cf. Procunier v. Martinez, 416 U.S. 396, 412-13 (1974).