

12-15-2013

## Once We Were Slaves, Now We Are Free: Legal, Administrative, and Social Issues Raised by Passover Celebrations in Prison

Aviva Orenstein

Follow this and additional works at: <https://digitalcommons.pepperdine.edu/plr>



Part of the [Constitutional Law Commons](#), [First Amendment Commons](#), and the [Religion Law Commons](#)

---

### Recommended Citation

Aviva Orenstein *Once We Were Slaves, Now We Are Free: Legal, Administrative, and Social Issues Raised by Passover Celebrations in Prison*, 41 Pepp. L. Rev. Iss. 1 (2013)

Available at: <https://digitalcommons.pepperdine.edu/plr/vol41/iss1/2>

This Article is brought to you for free and open access by the School of Law at Pepperdine Digital Commons. It has been accepted for inclusion in Pepperdine Law Review by an authorized editor of Pepperdine Digital Commons. For more information, please contact [Katrina.Gallardo@pepperdine.edu](mailto:Katrina.Gallardo@pepperdine.edu), [anna.speth@pepperdine.edu](mailto:anna.speth@pepperdine.edu).

# Once We Were Slaves, Now We Are Free: Legal, Administrative, and Social Issues Raised by Passover Celebrations in Prison

Aviva Orenstein\*

## *Abstract*

*“Once we were slaves, now we are free” is a central line from the Jewish Passover Seder, a ritual meal in which participants retell the story of liberation from Pharaoh’s oppression. In prison, many Jewish inmates request access to a Seder and to kosher-for-Passover food for the eight-day holiday. Prisoners’ requests to celebrate Passover provide a rich example for exploring the Religious Land Use and Institutional Persons Act (RLUIPA) and raise a host of tough questions regarding cost, safety, equal treatment of prisoners, and establishment of religion. Because kosher-for-Passover meals are more expensive and generally of higher quality than regular prison fare, the prison must decide who is genuinely eligible and who is merely seeking better food. In deciding which prisoners are sincere, administrators tend to adopt rigid standards for what constitutes appropriate religious observance and sometimes fail to credit prisoners’ individual beliefs. Beyond the formal legal issues of prisoners’ rights and administrative protocol lies the deeply personal and symbolic meaning that the Passover Seder has for those who are incarcerated. The irony of their*

---

\* The author wishes to thank Florida State University College of Law and the Center for Law, Society, and Culture at Indiana University for inviting me to present workshops on this paper and providing me with invaluable comments. Thanks also go to Professors Daniel Conkle, Steven Friedell, Steve Johnson, Leandra Lederman, Seth Lahn, and Deborah Widiss, who read earlier drafts of the Article. The author appreciates the excellent research assistance of Christina Zook and Megan Shipley, the eagle editorial eye of David Szonyi, and the assistance of Caroline Wong whose brilliance is only outshined by her patience. Finally, the author wishes to thank her mother, Sylvia Orenstein, an appellate public defender, who made valuable comments on early drafts of the Article and whose flourless chocolate roll is the culinary hit of our family Seder every year.

*situation—celebrating a ritual of freedom inside prison—is not lost on inmates who seek spiritual freedom even—and especially—in prison.*

I.	INTRODUCTION .....	62
II.	WHAT IS THIS? .....	64
	A. <i>The Holiday of Passover</i> .....	64
	B. <i>The Seder</i> .....	66
	C. <i>Special Dietary Restrictions</i> .....	67
	D. <i>Religious Needs of Prisoners on Passover</i> .....	69
III.	RELIGIOUS EXERCISE IN PRISON GENERALLY .....	69
	A. <i>Struggle Between Congress and the Courts</i> .....	70
	1. The Religious Land Use and Institutionalized Persons Act of 2000 (“RLUIPA”) .....	70
	2. <i>Cutter v. Wilkinson</i> .....	75
	3. Suits Under the First Amendment .....	76
	B. <i>Concerns by Prison Administrators—Legitimate and         Questionable</i> .....	80
	1. Reasonable Concerns of Jailers .....	81
	2. Illegitimate Behavior and Motivation by Jailers .....	83
	3. Prisoners Behaving Badly .....	86
IV.	RELIGIOUS EXERCISE QUESTIONS RAISED BY PASSOVER OBSERVANCE IN PRISON .....	87
	A. <i>Kosher-for-Passover Food</i> .....	89
	1. Kosher Food Generally .....	89
	2. Special Challenges of Kosher-for-Passover Food .....	97
	B. <i>Seders in Prison</i> .....	99
V.	THE SPIRITUAL SIGNIFICANCE OF PASSOVER OBSERVANCE IN PRISON .....	100
VI.	HOW IS THIS PRISONER PROBLEM DIFFERENT FROM ALL OTHER PRISONER PROBLEMS? .....	104
VII.	CONCLUSION & SUGGESTIONS FOR FURTHER INQUIRY .....	114

## I. INTRODUCTION

Using Passover observance in prison as a case study, this Article examines the law regarding the religious rights of prisoners as well as the spiritual and emotional significance of religious exercise for those who are

incarcerated. It analyzes the interesting and complex issues posed by the Religious Land Use and Institutionalized Persons Act (“RLUIPA”), which is far more protective of prisoners’ rights than is the First Amendment. RLUIPA provides that: “No government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution” absent “a compelling governmental interest” that is advanced by “the least restrictive means” available.<sup>1</sup> The Act has been analyzed for its land use aspect,<sup>2</sup> but has not received the attention it deserves in the prison context.<sup>3</sup>

This Article examines the delicate balance of accommodating religion in prison against the issues of cost, safety, and equal treatment of prisoners. It also addresses issues of entanglement that arise when prison administrators must decide who is genuinely eligible for special diets and other forms of religious accommodation. It identifies several problems with the current system, including the tendency of prison officials to adopt rigid religious orthodoxies and disregard prisoners’ sincere individual beliefs.

Part II describes the Jewish holiday of Passover, and it explains the ritual and significance of the Seder as well as the special dietary restrictions of Passover. Part III discusses RLUIPA, presents the legal issues surrounding religious exercise in prison generally, and analyzes the arguments made by prison administrators who oppose expansive religious

---

1. Religious Land Use and Institutionalized Persons Act of 2000 § 3, 42 U.S.C. § 2000cc-1(a) (2012).

2. See, e.g., Daniel P. Dalton, *The Religious Land Use and Institutionalized Person’s Act: Recent Developments in RLUIPA’s Land Use Jurisprudence*, 44 URB. LAW. 647 (2012); Jeffrey H. Goldfien, *Thou Shalt Love Thy Neighbor: RLUIPA and the Mediation of Religious Land Use Disputes*, 2006 J. DISP. RESOL. 435 (2006); Marci A. Hamilton, *Federalism and the Public Good: The True Story Behind the Religious Land Use and Institutionalized Persons Act*, 78 IND. L.J. 311, 345–46 (2003); Note, *Religious Land Use in The Federal Courts Under RLUIPA*, 120 HARV. L. REV. 2178 (2007); Ashira Perlman Ostrow, *Judicial Review of Local Land Use Decisions: Lessons from RLUIPA*, 31 HARV. J.L. & PUB. POL’Y 717, 719–20 (2008); Christopher Serkin & Nelson Tebbe, *Condemning Religion: RLUIPA and the Politics of Eminent Domain*, 85 NOTRE DAME L. REV. 1, 34 (2009); Roman P. Storz & Anthony R. Picarello, Jr., *The Religious Land Use and Institutionalized Persons Act of 2000: A Constitutional Response to Unconstitutional Zoning Practices*, 9 GEO. MASON L. REV. 929 (2001).

3. Most of the discussion of prisoners’ rights under RLUIPA concerns individual cases, see, for example, Harvard Law Review, *First Amendment—Free Exercise in Prisons—Fifth Circuit Holds That Prison’s Prohibition on All Objects over Twenty-Five Dollars Did Not Violate Prisoner’s First Amendment Rights or Substantially Burden His Religion Under RLUIPA—Mcfaul v. Valenzuela*, 684 F.3d 564 (5th Cir. 2012), 126 HARV. L. REV. 1154 (2013), or issues of grooming, see, for example, Dawinder S. Sidhu, *Religious Freedom And Inmate Grooming Standards*, 66 U. MIAMI L. REV. 923, 964 (2012). But see Derek L. Gaubatz, *RLUIPA at Four: Evaluating the Success and Constitutionality of RLUIPA’s Prisoner Provisions*, 28 HARV. J.L. & PUB. POL’Y 501 (2005).

rights for prisoners. Part IV examines the question of Passover observance in prison, looking first at kosher food generally and then at the more rarified and complex question of kosher-for-Passover food. Using the rich example of Passover as a case study, it demonstrates the difficulty of balancing religious accommodation with safe and orderly administration. Part V examines Passover's deep personal and symbolic meaning for those who are incarcerated. Finally, Part VI uses the example of Passover observance in prison to argue that cost alone should rarely, if ever, constitute a compelling governmental interest strong enough to overcome a prisoner's sincere religious need. It also discusses prison officials' entanglement with religion and the dangers of providing one discrete minority with special privileges. The Article concludes by tying together the legal and spiritual needs of prisoners and suggesting further study of RLUIPA, particularly regarding access to Halal food and anti-Muslim bias.

## II. WHAT IS THIS?<sup>4</sup>

### A. The Holiday of Passover

Passover celebrates the escape of the Jewish slaves from the land of Egypt, commemorating the events portrayed in the biblical book of Exodus.<sup>5</sup>

---

4. "What is this?" is the question asked by the simple son, one of four archetypal sons portrayed in the Haggadah (the traditional text of the Passover Seder)—the others are the wise son, the wicked son, and the one who doesn't know how to ask. Solomon Zeitlin, *The Liturgy of the First Night of Passover*, 38 JEWISH Q. REV. 431 (1948). The simple son is answered with the explanation: "By strength of the hand the Lord brought us out from Egypt out of the house of bondage." *Id.* at 453–54 (internal quotations omitted). See *infra* notes 229–236 and accompanying text (discussing the wicked son).

5. It is one of the triad of pilgrimage holidays to Jerusalem. See Daniel Kohn, *Pilgrimage Festivals*, MY JEWISH LEARNING, [http://www.myjewishlearning.com/holidays/About\\_Holidays/Types\\_of\\_Holidays/Pilgrimage\\_Festivals.shtml](http://www.myjewishlearning.com/holidays/About_Holidays/Types_of_Holidays/Pilgrimage_Festivals.shtml) (last visited Oct. 8, 2013).

A major category of Jewish holidays is the pilgrimage festivals. Described in the Hebrew Bible as celebrating both agricultural festivals and historical events in the history of the Jewish people, these three holidays were set aside in biblical times for people to travel to the ancient Temple in Jerusalem . . . . These three holidays are Passover, Shavuot, and Sukkot.

*Id.* Passover is seven days long in Israel, see *Exodus* 12:14–15:

And this day shall be unto you for a memorial, and ye shall keep it a feast to the LORD; throughout your generations ye shall keep it a feast by an ordinance for ever. Seven days shall ye eat unleavened bread; howbeit the first day ye shall put away leaven out of your houses; for whosoever eateth leavened bread from the first day until the seventh day, that soul shall be cut off from Israel.

Although many modern historians and archeologists dispute the existence of a large Jewish slave revolt and subsequent exodus from Egypt,<sup>6</sup> the story of liberation from bondage has crucial cultural importance. It has become a foundational myth of the Jews, explaining not only Jewish presence in the land of Israel, but Jewish ethics as well. Ancient Jews needed to shed a slave mentality to become free. Collective memory of slave experience creates and justifies the core of Jewish dedication to social justice. For instance, the commandment to be kind to the stranger, widow, and orphan is grounded in the slave experience: Jews must have empathy for the downtrodden, for they were once slaves in the land of Egypt.<sup>7</sup> The Jewish exodus from Egypt has become a western symbol for the transition from slavery to freedom and, as such, has inspired many oppressed people—most notably African slaves in the American South.<sup>8</sup>

---

Passover is an eight-day holiday in the diaspora to accommodate uncertainties in the ancient lunar calendar. See Airela Pelaia, *Passover Observance in Israel and the Diaspora: Seven Days or Eight?*, ABOUT, <http://judaism.about.com/od/holidays/a/passoverdays.htm> (last visited Oct. 8, 2013).

6. Although one could argue that the early Jews incorporated an exiled tribe from Egypt and that Moses might have been a real historical figure, the overwhelming evidence from archaeology, history, textual analysis, and hieroglyphics indicates that the original Jewish tribes formed in the Canaanite area and grew by conquering the surrounding tribes. See Carol A. Redmount, *Bitter Lives: Israel in and out of Egypt*, in *THE OXFORD HISTORY OF THE BIBLICAL WORLD* 58, 62–64 (Michael Coogan ed., 2001) (“[S]cholars of all critical schools agree that the Exodus account as it stands today is a composite, a literary construct, carefully composed and edited to achieve historical and theological coherence. . . . In the end, the Exodus saga is neither pure history nor pure literature, but an inseparable amalgam of both, closest in form to what we would call a docudrama.”). Rather than an historical account, the exodus story can be understood as part of the ideology of specialness and divine promise that bolstered the Canaan conquests. The anti-Egyptian flavor of the exodus narrative can be explained by the fact that when the book of Exodus was written (centuries after the alleged events occurred) Egypt was the main rival and enemy of the Persian Empire (where the Jews lived). See ROBERT WRIGHT, *THE EVOLUTION OF GOD* (2009).

7. See *Deuteronomy* 24:17–18 (“You shall not subvert the rights of the stranger or the fatherless; you shall not take a widow’s garment in pawn. Remember that you were a slave in Egypt and that the Lord your God redeemed you from there; therefore do I enjoin you to observe this commandment.”); Aurora Mendelsohn, *From the Civil War to Our Seders, a Song of Redemption*, *JEWISH DAILY FORWARD*, Apr. 15, 2011, at 11 (discussing the establishment of the Freedom Seder in 1969, which ritually connected the “Passover story to American slavery, the struggle for civil rights and our present-day obligations to end oppression”); see also Kelly Adams, *A Prayerful Passover; Congregation Kol Ami Recalls Freeing of Jews, Suffering in Darfur*, *COLUMBIAN*, Apr. 14, 2006, at A1 (discussing a Seder in which participants “prayed for the end of the genocide in Darfur in the African nation of Sudan,” and noting that “it is also traditional to remember those less fortunate during Passover”).

8. See ARTHUR O. WASKOW & PHYLLIS O. BERMAN, *FREEDOM JOURNEYS: THE TALE OF EXODUS AND WILDERNESS ACROSS MILLENNIA* (2011) (describing how the Passover story has been adapted and used by African-American, Christian, and Muslim communities to provide insight and

*B. The Seder*

The central ritual of Passover is the Seder, in which participants—including small children—sit around the dining table with extended family and guests to retell the story of the escape from bondage.<sup>9</sup> The Seder, which literally means “order,”<sup>10</sup> is organized and directed by the Haggadah—the traditional textual guide to the Seder.<sup>11</sup> As they read from the Haggadah, which literally means “the telling,”<sup>12</sup> participants recount the story of the freedom from the Pharaoh’s oppression, sing songs praising God, drink four cups of wine, and enjoy a feast.<sup>13</sup> The Haggadah, which developed over centuries, has a standardized text drawn from Biblical and later rabbinical sources, but the commentary and illustrations vary among versions.<sup>14</sup> Central to the opulent table is the Seder plate, a special platter of symbolic

---

inspiration).

9. Traditionally, “the eating of the paschal lamb was to be participated in by a number of people—there was to be a family feast.” Zeitlin, *supra* note 4, at 432.

10. See *Love v. N.J. Dep’t of Corr.*, No. 10–1714, 2011 WL 345964, at \*4 n.10 (D.N.J. Jan. 31, 2011) (“A Seder (meaning, in Hebrew, an ‘order’ or ‘arrangement’) is a Jewish religious ritual marking the Jewish holiday of Passover. The Seder ritual includes, *inter alia*, the consumption of a specific meal.”) (quoting <http://www.beingJewish.com/yomtov/passover/schedule1.html>). In modern Hebrew, “b’seder” means “okay,” as in “everything is in order.” See *Cool Hebrew Phrases*, JEWISH CMTY. FED’N, <http://www.jewishrichmond.org/page.aspx?id=137886> (last visited Oct. 8, 2013).

11. The Haggadah starts with a table of contents, which is often the first song of the Seder. See MENACHEM M. SCHNEERSON, *THE PASSOVER HAGGADAH 4* (Yosef Marcus ed., J. Immanuel Schochet trans., 1999). It directs the various activities around the table, only one of which is the actual meal. *Id.* The central part of the Haggadah is *magid*, literally “the teller,” in which the exodus story is retold. See *id.* at 7–21. The *magid* has set pieces—the classic four questions sung by the youngest child who is able to do so, and an account of the four sons (wise, wicked, simple, and he who is unable to ask), including how the ritual is explained to each one. *Id.* at 9. The text makes clear that the sources provided in the Haggadah are intended as a starting point of discussion, not a rote run-through. *Id.* at vii. “All who elaborate upon the telling of the tale of the exodus from Egypt, are to be praised.” See David Arnov, *Creating Lively Passover Seders*, JEWISH THEOLOGICAL SEMINARY 1 (2004), available at <http://www.jtsa.edu/Documents/pagedocs/Communications/Passover/2009BetAm.pdf>.

12. The term Haggadah comes from the Biblical verse, “V’Higadita l’vanecha” (“and you shall tell your children”). *Exodus* 13:8; see Zalman Schachter-Shalomi, *Haggadah: Telling and Empowering*, REB ZALMAN LEGACY PROJECT, <http://www.jewishrenewalhasidus.org/wordpress/?p=63> (last visited Oct. 8, 2013).

13. See SCHNEERSON, *supra* note 11, at 7–21.

14. Amazon.com boasts over 1,000 different Haggadahs, including those designed especially for children, Christians, feminists, scholars, followers of the Kabbalah, and oddly enough, Americans. See AMAZON, [http://www.amazon.com/s/ref=nb\\_sb\\_ss\\_i\\_0\\_10?url=search-alias%3Daps&field-keywords=passover+haggadah&sprefix=Passover+H%2Caps%2C163](http://www.amazon.com/s/ref=nb_sb_ss_i_0_10?url=search-alias%3Daps&field-keywords=passover+haggadah&sprefix=Passover+H%2Caps%2C163) (last visited Oct. 8, 2013).

foods.<sup>15</sup> These foods include bitter herbs that serve as a reminder of slavery and greens representing renewal and hope, dipped in salt-water to represent the slaves' tears.<sup>16</sup> The learning around the table is not just visual and auditory, but also kinesthetic and experiential—one might even say gastronomic.

The Seder raises and portrays issues of liminality, posing questions about the borders between free/imprisoned, Jew/non-Jew, and spiritual/physical. Even outside of prisons, the Seder ritual encompasses the tension of order/chaos,<sup>17</sup> tradition/innovation, and collectivity/individuality. This last tension arises because the Seder is a time for family and for collective celebration and affiliation with co-religionists, but it also focuses on individual experience. As the Haggadah instructs, "In every generation a person is obligated to regard himself as if he had come out of Egypt."<sup>18</sup>

### C. Special Dietary Restrictions

The one food not found at the Seder (or throughout Passover for that matter) is bread, which is forbidden during the weeklong holiday.<sup>19</sup> Numerous rules control observant Jews' diets throughout the week of

15. The Seder plate includes: a roasted egg as a symbol of spring, fertility, and eternity; a roast lamb shank reminiscent of the sacrificial paschal lamb and God's "strong hand and outstretched arm," *Exodus* 5:12, with which God freed the slaves; bitter herbs; greens; *charoset*, a mixture of fruit, nuts, and wine ground into a paste designed to resemble the mortar used by the slaves in their labor; and in some traditions, an orange—meant to prompt questions and in response to the anti-feminist assertion that "women belong on the bimah—the stage at a synagogue—as much as an orange belongs on the seder plate." Laurel Ramseyer, *An Orange on the Seder Plate*, PAM'S HOUSE BLEND (Apr. 19, 2011), <http://pamshouseblend.firedoglake.com/2011/04/19/an-orange-on-the-seder-plate/>.

16. See *supra* note 15.

17. The four cups of wine may contribute to the chaos.

18. See SCHNEERSON, *supra* note 11, at 20.

19. Bread and all leavened products are forbidden. See *Passover 101: What You Need to Know*, NBC NEWS (Apr. 18, 2008, 8:01 AM), [http://www.today.com/id/23884119/ns/today-today\\_food/t/passover-what-you-need-to-know/#.UjCpssakqNg](http://www.today.com/id/23884119/ns/today-today_food/t/passover-what-you-need-to-know/#.UjCpssakqNg) (explaining the dietary restrictions that take effect during Passover). The dietary rules are extraordinarily complicated and rigidly enforced. See *infra* note 144. Unlike normal rules of keeping kosher, during Passover there is no *de minimis* test for tolerating adulteration. *Id.* Any amount of leavening renders the food unkosher for Passover. *Id.* In this respect, civil law, which recognizes the notion of substantial compliance and thus allows for some flexibility in complying with contract provisions and court orders, does not comport with Jewish practice. See *Miles v. Aramark Corr. Serv.*, 236 F. App'x 746 (3d Cir. 2007) (finding substantial compliance with court decree ordering Passover food for prisoner even though some bread and some iced tea made with corn syrup appeared on his tray).



Passover, requiring elimination of all leavened products (not just bread).<sup>20</sup> Sephardic Jews<sup>21</sup> have fewer restrictions, but Ashkenazi Jews do not eat rice, barley, corn, beans, or soybeans.<sup>22</sup> The ban on *chametz*, leavened products, literally “soured” products, extends to perfume and other non-edible items; it applies to anything that gives pleasure.<sup>23</sup> The restrictions generate a buying frenzy of goods in an inelastic market of specialty items marked with a “P” for Passover.<sup>24</sup> Leavened products cannot be consumed, enjoyed, or even owned—Jews must sell them or give them away before Passover.<sup>25</sup> The weeks before Passover thus entails major spring-cleaning.<sup>26</sup> The day before Passover, the last remnants of *chametz* are burned.<sup>27</sup> Many see the burning of *chametz* as symbolic of new beginnings and an end to sourness.<sup>28</sup>

The central food of the holiday is matzah, the unleavened bread that was the food of the slaves.<sup>29</sup> As the Jewish tradition explains, the slaves were so eager to leave that they did not wait for the bread to rise before they escaped the Pharaoh.<sup>30</sup> Matzah, the bread of affliction, was thus transformed into a

20. See sources cited *supra* note 19.

21. Sephardic Jews trace their heritage from Spain; Portugal; and Middle Eastern, North African, and Arab countries. See AVIVA BEN-UR, SEPHARDIC JEWS IN AMERICA: A DIASPORIC HISTORY 6 (2009) (defining Sephardic Jews as those who descended from Spanish- and Portuguese-speaking Jews of Western Europe and Ladino-speaking Jews of the Ottoman Empire, and discussing Mizrahi Jews (those coming from Arab lands) as descendants of the Sephardic Jews).

22. These foods are designated as *kitniyot* based on the concerns that the harvest time is similar, all are ground into flours that are hard to distinguish one from another, and some small amount of wheat or other grain might have mixed in. See *What is Kitniyot?*, OUKOSHER, <http://oukosher.org/passover/articles/what-is-kitniyot/> (last visited Oct. 8, 2013).

23. See *On Chametz and Matza*, VIRTUAL BEIT MIDRASH, <http://www.vbm-torah.org/pesach/chametz.htm> (explaining the significance of chametz).

24. See Jason Perlow, *Kosher for Passover Coke: It's the Real Thing Baby*, OFF THE BROILER (Mar. 25, 2006), <http://offthebroiler.wordpress.com/2009/03/27/kosher-for-passover-coke-its-the-real-thing-baby/>. In some major United States cities with large Jewish populations, it is possible to get kosher-for-Passover Coca-Cola, which is made with sugar instead of high-fructose corn syrup and prepared in a specially cleaned bottling plant. *Id.*

25. See *supra* note 19.

26. See, e.g., *Hints for Pesach Cleaning*, OUKOSHER.ORG, [http://oukosher.org/index.php/passover/article/hints\\_for\\_pesach\\_cleaning/](http://oukosher.org/index.php/passover/article/hints_for_pesach_cleaning/) (last visited Oct. 8, 2013) (reminding cleaners: “Don’t forget to clean brooms, vacuum cleaners, clothing pockets, car and garage.”).

27. See *Chametz's Final Moments: The Burning of the Chametz, Chabad*, [http://www.chabad.org/holidays/passover/pesach\\_cdo/aid/117223/jewish/Chametz-Final-Moments.htm](http://www.chabad.org/holidays/passover/pesach_cdo/aid/117223/jewish/Chametz-Final-Moments.htm) (last visited Oct. 8, 2013).

28. *Id.*

29. See sources cited *supra* note 19.

30. See sources cited *supra* note 19.

symbol of freedom.<sup>31</sup>

#### D. Religious Needs of Prisoners on Passover

Because of its ties to food, family, and tradition, Passover is the most observed Jewish holiday—even more than Judaism’s holiest day, Yom Kippur, the Day of Atonement.<sup>32</sup> Jewish prisoners celebrating Passover may desire different levels of services and religious observance. At the very least, Jewish prisoners desire a Seder replete with a Haggadah, Seder plate, and matzah.<sup>33</sup> More traditionally observant Jews would insist on the prescribed stringent dietary restrictions throughout the weeklong holiday.

### III. RELIGIOUS EXERCISE IN PRISON GENERALLY

The First Amendment to the United States Constitution protects citizens from governmental interference in their exercise of religion.<sup>34</sup> The reach of the constitutional Free Exercise Clause is tempered by the Establishment Clause in the same Amendment, which prohibits the making of any “law respecting an establishment of religion.”<sup>35</sup> The line between government’s appropriate fostering of free exercise of religion and its impermissible establishment is a complicated one. Administrative and security concerns further muddy the doctrine and policy of free exercise in prisons. Although prisoners still possess civil rights, those rights are substantially limited by their institutionalization.<sup>36</sup>

---

31. See sources cited *supra* note 18.

32. See Nancy Ammerman, *Religious Identities in Contemporary American Life: Lessons from the NJPS*, 67 SOC. OF RELIGION 359, 363 (2006) (besides Hanukkah, which comes during the Christmas season, the other religious holiday that unaffiliated Jews are most likely to celebrate is Passover). As one rabbi who is a chaplain in prisons explained, “A lot of Jews aren’t observant, but when it comes to Passover, everyone shows up.” Lindsay Melvin, *Passover in Prison: Holiday a Busy Time for Rabbi Levi Klein Who Ministers to the Incarcerated*, COMMERCIAL APPEAL (Apr. 16, 2011), <http://www.commercialappeal.com/news/2011/apr/16/passover-in-prison/>.

33. See generally *Miles v. Aramark Corr. Serv.*, 236 F. App’x 746 (3d Cir. 2007) (providing an example of how prisoners may wish to celebrate Passover).

34. U.S. CONST. amend. I.

35. *Id.*

36. See *Ward v. Rabideau*, 732 F. Supp. 2d 162, 167 (W.D.N.Y. 2010). The court held that when prison regulation impinges on prisoners’ constitutional rights, such regulations are valid if they reasonably are related to legitimate penological interests: “[S]uch a standard is necessary ‘if prison administrators, and not the courts, are to make the difficult judgments concerning institutional operations.’” *Id.* (quoting *Jones v. N.C. Prisoners’ Union*, 433 U.S. 119, 128 (1977)).

A. *Struggle Between Congress and the Courts*

The modern history of religious free exercise began with the 1990 case *Employment Division v. Smith*, in which the Supreme Court rejected a First Amendment challenge to an Oregon statute.<sup>37</sup> *Smith* ultimately turned on the validity of a criminal law as applied to sacramental peyote use by Native Americans.<sup>38</sup> The Court held that, although the petitioners possessed a sincere religious interest in peyote use during their religious ceremony, the State of Oregon's legitimate and neutrally applied drug ban did not run afoul of the Free Exercise Clause.<sup>39</sup> *Smith* held that the First Amendment does not prohibit the government from burdening religious practices through neutral, generally applicable laws.<sup>40</sup>

In 1993, Congress passed the Religious Freedom Restoration Act ("RFRA"), which applied to prisons among many other diverse venues and greatly expanded the religious exercise rights of prisoners.<sup>41</sup> In a responsive volley four years later, the Supreme Court decided *City of Boerne v. Flores*, which held RFRA unconstitutional as applied to the states.<sup>42</sup> The RFRA protections for prisoners' religious rights in federal (as opposed to state) prisons, however, remained undisturbed.<sup>43</sup>

## 1. The Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA")

In 2000, Congress tried again to enact protections for religious practice that would apply to the states and not run afoul of the Constitution. It passed by unanimous consent the Religious Land Use and Institutionalized Persons

37. *Emp't Div. v. Smith*, 494 U.S. 872 (1990), *superseded by statute*, Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. § 2000cc-1(a) (2012), *as recognized in* *Sossamon v. Texas*, 131 S. Ct. 1651 (2011).

38. *Smith*, 494 U.S. at 882–83, 890.

39. *Id.* at 877–82.

40. *Id.* at 890. *Smith* rejected the interpretation of the Free Exercise Clause announced in *Sherbert v. Verner*, 374 U.S. 398 (1963), and held that the Constitution does not require judges to engage in a case-by-case assessment of the religious burdens imposed by facially constitutional laws. *Smith*, 494 U.S. at 883–90.

41. Religious Freedom Restoration Act of 1993, 42 U.S.C. § 2000bb (2012), *invalidated by* *City of Boerne v. Flores*, 521 U.S. 507 (1997).

42. *City of Boerne*, 521 U.S. at 536 (holding that RFRA unconstitutionally exceeded Congress's power under section 5 of the Fourteenth Amendment).

43. *See id.* at 509.

Act (“RLUIPA”), an odd hybrid that addresses two unrelated issues: land use and prisoners’ rights.<sup>44</sup> As the Supreme Court has explained, “RLUIPA borrows important elements from RFRA—which continues to apply to the federal government—but RLUIPA is less sweeping in scope.”<sup>45</sup> RLUIPA’s heightened protection stemmed from Congress’s recognition that the right of inmates (and other institutionalized persons) to practice their faith is “at the mercy of those running the institution.”<sup>46</sup>

RLUIPA applies a form of strict scrutiny to restrictions on the use of land by religious institutions and protects the religious rights of prisoners and other people confined by the government to institutions. In relevant part RLUIPA provides that: “No government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution” absent “a compelling governmental interest” that is advanced by “the least restrictive means” available.<sup>47</sup>

The Ninth Circuit held that “a burden is substantial under RLUIPA when the state denies an important benefit because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs.”<sup>48</sup> The Third Circuit explained that

a substantial burden exists where: 1) a follower is forced to choose between following the precepts of his religion and forfeiting benefits otherwise generally available to other inmates versus abandoning one of the precepts of his religion in order to receive a benefit; OR 2) the government puts substantial pressure on an adherent to substantially modify his behavior and to violate his

---

44. Gaubatz, *supra* note 3, at n.6 (2005). RLUIPA relies on the Spending and Commerce Clauses for its Constitutional authority. One author has noted that RLUIPA raises significant issues of federalism, but it so far has survived—or avoided—constitutional challenges addressing these concerns. DANIEL O. CONKLE, CONSTITUTIONAL LAW: THE RELIGION CLAUSES 111–12 (2d ed., 2009) (citing *Cutter v. Wilkinson*, 544 U.S. 709, 718 n.7 (2005), which noted but did not reach the argument that RLUIPA exceeds congressional constitutional authority).

45. *Sossamon v. Texas*, 131 S. Ct. 1651, 1656 (2011).

46. 146 CONG. REC. S7775 (July 27, 2000) (joint statement of Sen. Hatch and Sen. Kennedy—two sponsors of RLUIPA).

47. Religious Land Use and Institutionalized Persons Act of 2000 § 3, 42 U.S.C. § 2000cc-1(a) (2012).

48. *Shakur v. Schriro*, 514 F.3d 878, 888 (9th Cir. 2008) (citations omitted) (internal quotation marks omitted).

beliefs.<sup>49</sup>

Not every limitation will present a substantial burden. For instance, a California prison's restriction on third-party purchases of prayer oil was held not to substantially burden the prisoner's ability to practice his religion.<sup>50</sup> RLUIPA is aimed at government obstructions of religious practice; it does not require the state to provide devotional accessories.<sup>51</sup>

RLUIPA defines "religious exercise" as including "any exercise of religion, whether or not compelled by, or central to, a system of religious belief."<sup>52</sup> "The practice burdened need not be central to the adherent's belief system, but the adherent must have an honest belief that the practice is important to his free exercise of religion."<sup>53</sup> The broad definition of religious exercise was intended to counter the narrow interpretation of the circuit courts in the four years that RFRA applied to the states.<sup>54</sup> Although RLUIPA prohibits "inquiry into whether a particular belief or practice is 'central' to a prisoner's religion," it "does not preclude inquiry into the sincerity of a prisoner's professed religiosity."<sup>55</sup>

RLUIPA provides an express private cause of action for "appropriate relief against a government,"<sup>56</sup> including against states, their instrumentalities and officers, and persons "acting under color of State law."<sup>57</sup> Until recently, an interesting, unresolved question split the circuits concerning whether prisoners suing under RLUIPA could receive money

---

49. *Washington v. Klem*, 497 F.3d 272, 280 (3d Cir. 2007). *See also* *Abdulhaseeb v. Calbone*, 600 F.3d 1301, 1315 (10th Cir. 2010) (providing an in-depth analysis of the definition of substantial burden: "(1) requires participation in an activity prohibited by a sincerely held religious belief, or (2) prevents participation in conduct motivated by a sincerely held religious belief, or (3) places substantial pressure on an adherent either not to engage in conduct motivated by a sincerely held religious belief or to engage in conduct contrary to a sincerely held religious belief").

50. *Smith v. Marshall*, 453 F. App'x 714 (9th Cir. 2011).

51. *Cutter v. Wilkinson*, 544 U.S. 709, 720 n.8 (2005).

52. 42 U.S.C. § 2000cc-5(7)(A).

53. *Sossamon v. Texas*, 560 F.3d 316, 332 (5th Cir. 2009) [hereinafter *Sossamon 2009*]; *cf.* *Vinning-El v. Evans*, 657 F.3d 591, 594 (7th Cir. 2011) ("A prison is entitled to ensure that a given claim reflects a sincere religious belief, rather than a preference for the way a given diet tastes, a belief that the preferred diet is less painful for animals, or a prisoner's desire to make a pest of himself and cause trouble for his captors.").

54. *Gaubatz*, *supra* note 3, at 505.

55. *Cutter*, 544 U.S. at 725 n. 13.

56. 42 U.S.C. § 2000cc-2(a).

57. 42 U.S.C. § 2000cc-5(4)(A).

damages from the state.<sup>58</sup> The Supreme Court, in *Sossamon v. Texas*,<sup>59</sup> resolved the split—holding that in accepting federal funding, states do not automatically consent to a waiver of sovereign immunity, and thus RLUIPA does not provide for private monetary damages.<sup>60</sup> Furthermore, at least three circuits have held that RLUIPA does not authorize any monetary relief against public officials in their personal capacities.<sup>61</sup> Others have not reached the question whether RLUIPA authorizes individual-capacity claims for damages, but have offered qualified immunity to prison officials.<sup>62</sup> If a prisoner is already out of jail, or is currently receiving the religious accommodation he was denied, his case for equitable relief under RLUIPA will be dismissed as moot.<sup>63</sup> Inmates must exhaust administrative remedies as required by the Prison Litigation Reform Act (“PLRA”)<sup>64</sup> before suing

---

58. See *Florer v. Bales-Johnson*, 752 F. Supp. 2d 1185, 1205-06 (W.D. Wash. 2010) (discussing split in the circuits).

59. 131 S. Ct. 1651, 1654 (2011). *Sossamon* did not address Congress’ authority to enact RLUIPA under the Spending Clause. *Id.* at 1656 n.1.

60. *Id.* at 1660. Suits against state employees in their official capacity are treated as suits against the states themselves. *Will v. Mich. Dep’t of State Police*, 491 U.S. 58, 59 (1989).

61. See, e.g., *Nelson v. Miller*, 570 F.3d 868, 889 (7th Cir. 2009) (“Construing RLUIPA to provide for damages actions against officials in their individual capacities would raise serious questions regarding whether Congress had exceeded its authority under the Spending Clause.”); *Sossamon v. Texas*, 560 F.3d 316, 329 (5th Cir. 2009) (holding that congressional enactments pursuant to the Spending Clause do not impose direct liability on an individual who is not a party to the contract between the state and federal government), *aff’d*, 131 S.Ct. 1651 (2011); *Rendelman v. Rouse*, 569 F.3d 182, 189 (4th Cir. 2009) (“[I]t would be a novel use of the spending clause to condition the receipt of federal funds on the creation of an *individual capacity* damages action.”); *Smith v. Allen*, 502 F.3d 1255, 1275 (11th Cir. 2007) (“[S]ection 3 of RLUIPA—a provision that derives from Congress’ Spending Power—cannot be construed as creating a private action against individual defendants for monetary damages.”), *abrogated on other grounds in Sossamon*, 131 S.Ct. 1651 (2011). Various district courts have so held. See *Wakefield v. Indermill*, No. 1:09-cv-00274-LJO-BAM PC, 2011 WL 5876246, at \*10 (E.D. Cal. Nov. 22, 2011); *Pugh v. Goord*, 571 F. Supp. 2d 477, 507 (S.D.N.Y. 2008); *Sisney v. Reisch*, 533 F. Supp. 2d 952, 967 (D.S.D. 2008); *Garrison v. Dutcher*, No. 1:07-cv-642, 2008 WL 938159, at \*1-2 (W.D. Mich. Sept. 30, 2008); *Horacek v. Burnett*, No. 07-11865, 2008 WL 4427825, at \*2 (E.D. Mich. Sept. 30, 2008). However, other courts permit individual capacity claims to proceed under RLUIPA. See *Shakur v. Schriro*, 514 F.3d 878 (9th Cir. 2008); *Williams v. Bitner*, 455 F.3d 186, 194 (3d Cir. 2006); *Farnsworth v. Baxter*, No. 03-2950-B/V, 2007 WL 2793364, at \*4 (W.D. Tenn. Sept. 26, 2007).

62. See, e.g., *Hall v. Ekpe*, 428 Fed. Appx. 93, 94 (2d Cir. 2011).

63. See, e.g., *Cardinal v. Metrish*, 564 F.3d 794, 798-99 (6th Cir. 2009) (holding that RLUIPA injunctive relief claim based on prison’s policy of not offering kosher meals rendered moot when prisoner transferred to another facility that provided kosher meals); *Whitfield v. Ill. Dep’t of Corr.*, No. 06-cv-00968, 2011 WL 5282639, at \*4 (S.D. Ill. Nov. 2, 2011).

64. Prison Litigation Reform Act § 7, 42 U.S.C. § 1997e(a) (2012). The PLRA requires exhaustion of “all inmate suits about prison life, whether they involve general circumstances or

under RLUIPA.<sup>65</sup> This has the effect of dismissing many otherwise viable claims.<sup>66</sup>

To make a claim under RLUIPA, the institutionalized person must produce prima facie evidence to support a claim, showing that the government practice substantially burdens the person's exercise of religion.<sup>67</sup> If the prisoner makes that initial showing, the government then bears the burden of persuasion in providing a compelling interest and demonstrating that its action is narrowly tailored to that compelling purpose.<sup>68</sup> For

particular episodes, and whether they allege excessive force or some other wrong." Porter v. Nussle, 534 U.S. 516, 517 (2002). The PLRA also limits federal civil action for mental or emotional injury to cases with physical injury under 42 U.S.C. § 1997(e)(e), places a limit on attorneys' fees to 150% of the Criminal Justice Act Rate under 42 U.S.C. § 1997(e)(d), and requires filing fees—even under the *in forma pauperis* provision, with special limitations for those who have already filed three prior claims that were deemed frivolous. See JOHN BOSTON, *The Prison Litigation Reform Act: Considerations in Individual Litigation*, in PRISON LAW 2010 283, 316–17 (2010). However, some Courts have questioned whether the limitation of damages to cases of physical injury can fairly apply to First Amendment claims. See Horacek, 2008 WL 4427825, at \*10 ("[S]ince First Amendment violations rarely, if ever, result in physical injuries, construction of the PLRA against recovery of damages would defeat congressional intent and render constitutional protections meaningless.") (quoting Siggers-El v. Barlow, 433 F. Supp. 2d 811, 816 (E.D. Mich. 2006)).

65. RLUIPA provides that "[n]othing in this chapter shall be construed to amend or repeal the Prison Litigation Reform Act of 1995." 42 U.S.C. § 2000cc–2(e) (2012).

66. See, e.g., Parnell v. Tucker, 458 Fed. App'x 581 (9th Cir. 2011) (rejecting prisoner's claim under RLUIPA for being prohibited from congregating with other Muslims for prayer because prisoner failed to exhaust his administrative remedies); Scott v. Kelly, No. 1:11cv25 (AJT/TCB), 2011 WL 6046400 (E.D. Va. Dec. 2, 2011) (denying prisoner's challenge to rule that prisoners had to have ninety consecutive days without a disciplinary charge to attend religious services); Williams v. Cate, No. 1:09–cv–00468 OWW JLT (PC), 2011 WL 1121965 (E.D. Cal. Mar. 24, 2011) (denying request for kosher-for-Passover food because prisoner had not exhausted his administrative remedies). There is ample evidence in RLUIPA cases of administrators failing to respond or otherwise sitting on grievances to stymie compliance with PLRA. See, e.g., Mootry v. Flores, No. 1:09–cv–01252-LJO-BAM PC, 2011 WL 5593170, at \*1 (E.D. Cal. Nov. 16, 2011) (recounting the administration's screening out grievances claiming they were merely requests for information and hence not appealable).

67. Willis v. Commissioner, 753 F. Supp. 2d 768, 776 (S.D. Ind. 2010) (citing § 2000cc–2(b)).

68. *Id.* (citations omitted). See also Adkins v. Kaspar, 393 F.3d 559, 567 (5th Cir. 2004) (restating that an inmate must prove (i) the burdened activity is a "religious exercise," (ii) the burden is "substantial," and (iii) the belief is sincerely held; then the burden shifts to the government to prove (i) that the burden is supported by a compelling interest, and (ii) that the burden is the least restrictive means of carrying out that interest); Pittman-Bey v. Clay, No. V–10–086, 2011 WL 6749027, at \*6 (S.D. Tex. Dec. 22, 2011) ("In order to make a RLUIPA claim, a prisoner must initially show that the prison's regulations imposed a substantial burden on his exercise of religious activity. . . . If a plaintiff meets his burden of proof, the burden shifts to the government to demonstrate that its action was supported by a compelling interest and that the regulation is the least restrictive means of carrying out that interest.") (citations omitted).



example, even though an avowed Satanist held sincere religious beliefs that were burdened by the prison's decision not to allow him to conduct fellowship services, the practices and principles of Satanism created a risk to the safety and security of the prison that met the compelling interest standard.<sup>69</sup> The plaintiff retains "the burden of persuasion on whether the law (including a regulation) or government practice that is challenged by the claim substantially burdens the plaintiff's exercise of religion."<sup>70</sup> In *Spratt v. Rhode Island Department of Corrections*, the First Circuit summarized the elements of such a claim and articulated the shifting burden.<sup>71</sup>

[A] claim under RLUIPA includes four elements. On the first two elements, (1) that an institutionalized person's religious exercise has been burdened and (2) that the burden is substantial, the plaintiff bears the burden of proof . . . . Once a plaintiff has established that his religious exercise has been substantially burdened, the onus shifts to the government to show (3) that the burden furthers a compelling governmental interest and (4) that the burden is the least restrictive means of achieving that compelling interest.<sup>72</sup>

## 2. *Cutter v. Wilkinson*

In response to a challenge in 2003, the Supreme Court, in *Cutter v. Wilkinson*, held that RLUIPA is facially constitutional.<sup>73</sup> In *Cutter*, Satanists, Wiccans, members of Asatru (a German neopagan religion), and

69. *Cookson v. Me. Dep't of Corr.*, No. 1:10-cv-00256-JAW, 2012 WL 32378 (D. Me. Jan. 4, 2012). The court quoted "The Eleven Satanic Rules of the Earth," which dictate among other things that "[i]f a guest in your lair annoys you, treat him cruelly and without mercy" and "[i]f someone bothers you, ask him to stop. If he does not stop, destroy him." *Id.* at \*3 (internal quotation marks omitted).

70. RLUIPA Section 2, 42 U.S.C. § 2000cc-2(b) (2012).

71. 482 F.3d 33 (1st Cir. 2007).

72. *Id.* at 38 (citing RLUIPA). Compelling really means compelling, not just reasonable or convincing. For instance, in *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418 (2006) (a RFRA case), the Court held that the government failed to show a compelling interest in prohibiting a religious sect from consuming hoasca, a hallucinogenic substance. As many courts have observed, the standard for adjudicating a governmental interest compelling is the same under RFRA and RLUIPA. *See, e.g., Turner-Bey v. Maynard*, No. Civ.A. JFM-10-2816, 2012 WL 4327282 (D. Md. Sept. 18, 2012); *Ali v. Quaterman*, No. 9:09CV52, 2010 WL 3790829 (E.D. Tex. July 20, 2010) ("[A]lthough RFRA had been struck down, the compelling governmental interest/least restrictive means test was carried over from RFRA to RLUIPA.").

73. 544 U.S. 709, 725 (2005).



members of the Church of Jesus Christ Christian (the religious arm of the Aryan Nations) challenged an Ohio prison's restrictions on their religious practices.<sup>74</sup> For purposes of litigation at the early stage in which the issues arose,<sup>75</sup> prison officials stipulated that inmates were members of bona fide religions and were sincere in their religious beliefs.<sup>76</sup> The State of Ohio argued that RLUIPA is facially unconstitutional because it advances religion in violation of the Establishment Clause,<sup>77</sup> and maintained that accommodation of the prisoners' requests would encourage religiosity among other inmates to secure the requested benefits, thereby devolving into a fostering of religion.<sup>78</sup>

*Cutter* held that RLUIPA was not facially unconstitutional but affirmatively acknowledged that RLUIPA would be subject to as-applied challenges in prison management.<sup>79</sup> The opinion added in dicta that RLUIPA does not "elevate accommodation of religious observances over an institution's need to maintain order and safety."<sup>80</sup> In "applying RLUIPA, courts must take adequate account of the burdens a requested accommodation may impose on nonbeneficiaries . . . and they must be satisfied that the Act's prescriptions are and will be administered neutrally among different faiths . . ." <sup>81</sup> Finally, "[s]hould inmate requests for religious accommodations become excessive, impose unjustified burdens on other institutionalized persons, or jeopardize the effective functioning of an institution, the facility would be free to resist the imposition."<sup>82</sup>

### 3. Suits Under the First Amendment

It is still possible for a prisoner to sue under the First Amendment.<sup>83</sup> As

---

74. *Id.* at 712.

75. The case arrived in the Supreme Court based on the circuit court's determination that the case should have ended under Federal Rules of Civil Procedure Rule 12(b)(6) by a motion to dismiss for failure to state a claim upon which relief could be granted. *Cutter*, 544 U.S. at 713.

76. *Id.*

77. *Id.* Another objection to RLUIPA, based on a federalism issue, was not addressed in *Cutter*. See *id.* at 718 n.7.

78. *Id.* at 721 n.10.

79. *Id.* at 721, 725.

80. *Id.* at 722.

81. *Id.* at 720 (citations omitted).

82. *Id.* at 726.

83. In state courts, challengers may bring an action based on the First Amendment under 42

the Supreme Court explained, prisoners do not lose their right to free exercise of their religion because of their incarceration.<sup>84</sup> “However, the circumstances of prison life may require some restrictions on prisoners’ exercise of their religious beliefs.”<sup>85</sup> In judging free exercise claims based on the First Amendment, courts have tended to be highly deferential to prison authorities. The standard under the First Amendment requires only that there be a “valid, rational connection” between the prison regulation and the underlying legitimate government interest.<sup>86</sup> The government’s objective must be legitimate and neutral.<sup>87</sup> For instance, in *O’Lone v. Estate of Shabazz*, Muslim inmates challenged a prison policy that prevented some Muslim inmates assigned to outside work detail from attending a weekly Friday prayer service.<sup>88</sup> The Court found a valid, logical connection<sup>89</sup> between the policy of requiring inmates to remain with their work details and the goal of simulating work conditions and responsibilities in society.<sup>90</sup> The Court also found that accommodating the inmates’ desire to return for Friday prayers would have unduly affected other inmates, prison personnel, and the allocation of prison resources.<sup>91</sup> The Court rejected a strict or

---

U.S.C. § 1983, and in federal court as a *Bivens* action. (See generally *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971) (creating the federal equivalent of a § 1983 claim)). It is possible to sue both under the statute—RFRA in federal court and RLUIPA in state court—as well as under the First Amendment. See, e.g., *Jihad v. Fabian*, No. 09–1604 (SRN/LIB), 2011 WL 1641885 (D. Minn. Feb. 17, 2011).

84. See *Turner v. Safley*, 482 U.S. 78, 84 (1987); *Bell v. Wolfish*, 441 U.S. 520, 545 (1979) (“[C]onvicted prisoners do not forfeit all constitutional protections by reason of their conviction and confinement in prison.”).

85. *Walker v. Mintzes*, 771 F.2d 920, 929 (6th Cir. 1985).

86. *Block v. Rutherford*, 468 U.S. 576, 586 (1984); see also *Turner*, 482 U.S. at 89 (holding that prison regulations must be reasonably related to legitimate penological interests to withstand a constitutional challenge).

87. *Bell*, 441 U.S. at 551.

88. 482 U.S. 342, 346 (1987).

89. *Florer v. Bales-Johnson*, 752 F. Supp. 2d 1185, 1202 (W.D. Wash. 2010) (“RLUIPA provides greater protection than the First Amendment by protecting activities that an offender sincerely believes are central to his religion, rather than just those activities which are central to his religion as determined by the tenets of that religion.”).

90. *O’Lone*, 482 U.S. at 350–51.

91. *Id.* at 352–53. Work details were supervised by a single guard, which meant an entire crew would have to be brought back to the prison to satisfy a single inmate’s desire to attend the service, thereby disrupting work schedules and increasing the security risks near the gate. *Id.* at 351. The Court noted that the prison provides multiple accommodations to Muslim inmates, including opportunities for alternative religious services, a state-provided imam who had free access to the prison, different meals whenever pork was served in the cafeteria, and special meal arrangements

heightened standard,<sup>92</sup> explaining: “To ensure that courts afford appropriate deference to prison officials, we have determined that prison regulations alleged to infringe constitutional rights are judged under a ‘reasonableness’ test less restrictive than that ordinarily applied to alleged infringements of fundamental constitutional rights.”<sup>93</sup> *O’Lone* made clear that great deference would be shown to prison administrators’ judgment.<sup>94</sup> Courts will often construe a pro se claim for a religious diet as a RLUIPA claim, but not always, and where the prisoner asserts only a free exercise claim, he will lose.<sup>95</sup>

Though a statute, RLUIPA provides significantly more protection for prisoners’ religious exercise than does the First Amendment.<sup>96</sup> Before the enactment of RLUIPA, courts recognized the right to a kosher diet under the First Amendment,<sup>97</sup> but the standard under RLUIPA is much more protective of prisoners. Indeed, RLUIPA provides prisoners more religious free exercise protection than average citizens receive.<sup>98</sup>

---

during the month-long observance of Ramadan, including a pre-sunrise breakfast and a post-sunset dinner. *Id.* at 352.

92. See Gaubatz, *supra* note 3 at 507–08.

93. *O’Lone*, 482 U.S. at 349.

94. *Id.* (“In considering the appropriate balance of these factors, we have often said that evaluation of penological objectives is committed to the considered judgment of prison administrators, ‘who are actually charged with and trained in the running of the particular institution under examination.’” (citations omitted)); see *Murphy v. Mo. Dep’t of Corr.*, 372 F.3d 979, 984 (8th Cir. 2004) (First Amendment not violated by prison’s refusal to allow meetings of religious group believing in segregation and Caucasian supremacy, because policy was reasonably related to legitimate interest in security; however, RLUIPA may still be violated if prisoner’s rights were substantially violated and there are less restrictive means available).

95. See, e.g., *Jordan v. Fuller*, 507 Fed. App’x 752 (10th Cir. 2013).

96. See *Gardner v. Riska*, 444 Fed. App’x 353, 354 (11th Cir. 2011) (“More expansive than prisoners’ rights under the First Amendment, RLUIPA ‘affords to prison inmates a heightened protection.’”) (citation omitted); *Van Wyhe v. Reisch*, 581 F.3d 639, 651 (8th Cir. 2009) (finding that even if allowed under the Free Exercise Clause, a prison’s actions may not be allowed under RLUIPA); *Pittman-Bey v. Clay*, No. V–10–086, 2011 WL 6749027, at \*6 (S.D. Tex. Dec. 22, 2011) (“RLUIPA imposes a higher burden than does the First Amendment in that the statute requires prison regulators to put forth a stronger justification for regulations that impinge on the religious practices of inmates.”) (quoting *Mayfield v. Tex. Dep’t of Criminal Justice*, 529 F.3d 599, 612 (5th Cir. 2008)).

97. See, e.g., *Ford v. McGinnis*, 352 F.3d 582, 597 (2d Cir. 2003) (holding that prisoners have a “clearly established” right “to a diet consistent with [their] religious scruples”); *Bass v. Coughlin*, 976 F.2d 98, 99 (2d Cir. 1992) (per curiam) (reaffirming *Kahane v. Carlson*, 527 F.2d 492, 495 (2d Cir. 1975) (finding that Orthodox Jewish inmate had right to provision of kosher meals)).

98. Spencer T. Proffitt, *Gods Behind Bars: How Religious Liberty Has Been Sent Directly to Jail, and How to Get Out of Jail Free*, 40 ARIZ. ST. L.J. 1401, 1401, 1427 (“[T]he nation has come

A good illustration of the application of the various remedies is presented in *Williams v. Secretary Pennsylvania Department of Corrections*, where the prisoner was disciplined for conducting afternoon prayer in a corner of the prison kitchen.<sup>99</sup> The Third Circuit held that the prison did not violate Williams's First Amendment rights because the prison possessed legitimate interests "in maintaining institutional order and security . . . and that those interests were rationally connected to the institutional policy that inmates must obey orders and may not be present in an unauthorized area."<sup>100</sup> The same action by the prison administration failed RLUIPA because it "heightens the protection from burdens on religious exercise."<sup>101</sup> Williams's religious exercise was substantially burdened—he was "forced to choose between offering prayers in the manner consistent with his religious belief and being disciplined for being in an unauthorized area or for refusing to obey an order."<sup>102</sup> Furthermore, the prison did not seek out the least restrictive means of furthering its compelling government interest because it did not investigate other potential nearby venues for Williams to pray.<sup>103</sup> Prisoners may still wish to sue under the First Amendment as well, however, because it offers a chance to secure monetary damages in addition to the injunctive relief available under RLUIPA.<sup>104</sup>

---

to a topsy-turvy situation where convicted criminals actually have more protection for their religious liberty than free citizens do . . . . The decisions of *Smith II*, *Flores*, and *Cutter* combine to create the Prisoner's Paradox—where such claims made by convicted criminals are analyzed under the more protective strict scrutiny, while those made by law-abiding citizens are instead determined using the more government-deferential rational basis scrutiny.").

99. 450 F. App'x 191 (3d Cir. 2011).

100. *Id.* at 195.

101. *Id.* (citations omitted).

102. *Id.* at 196.

103. *Id.*; see also *Hayes v. Tennessee*, 424 Fed. App'x 546, 548 (6th Cir. 2011) (finding that confiscation of religious literature containing messages of white supremacy and racial purity, such as "the Bible is the genesis of, the history of, and the prophecy for, the WHITE RACE only and the Jews are the mongrelized descendants of Satan through Cain" did not violate the First Amendment but that a genuine issue of material fact existed under RLUIPA as to whether prison used the least restrictive means) (internal quotation marks omitted).

104. Getting such damages is difficult. See, e.g., *Sanchez v. United States*, No. 10–21435–CIV–HUCK, 2010 WL 3199878, at \*3 (S.D. Fla. Aug. 6, 2010) (finding against compensation for emotional distress of prisoner after finding out he was served food that was not kosher-for-Passover as he had been assured the food was).

*B. Concerns by Prison Administrators—Legitimate and Questionable*

As a practical matter, it is interesting to speculate why prison administrators would want to discourage or subvert religious observance by inmates. Aside from constitutional scruples concerning the establishment of religion, why would prison administrators object to prisoners' free exercise? If one's image of religious exercise in prison conjures up born-again Christians seeking to make amends using the model of Prison Fellowship, a Christian ministry dedicated to bring a message of contrition to prisoners,<sup>105</sup> then the prison administrators' opposition is indeed puzzling. A religion of contrition that squarely places blame on the inmate for his crimes might appeal to administrators (who undoubtedly would find contrite prisoners easier to handle).<sup>106</sup> Contrast that, however, with other religions whose tenets may not similarly foster acceptance of prison hierarchy. For instance, the Nation of Islam—a famously unpopular religion with wardens—is confrontational with prison administration, blaming society and the prison system—not the individual prisoners—for the prisoners' crimes.<sup>107</sup> The Nation of Islam organizes prison inmates to be disciplined in resistance to prison authority.<sup>108</sup> Historically, Jehovah's Witnesses, who do not recognize secular authority, also subvert prison administrators.<sup>109</sup> There is no reason to suppose that religiously motivated action will inure necessarily to the benefit of the rulers and jailers—consider Jesus of Nazareth's defiance of Roman

---

105. The late Chuck Colson, one of Nixon's "Watergate seven," founded Prison Fellowship. See *Career Opportunities*, PRISON FELLOWSHIP, <http://www.prisonfellowship.org/about/careers> (last visited Oct. 8, 2013). The mission of Prison Fellowship is "to seek the transformation of prisoners and their reconciliation to God, family, and community through the power and truth of Jesus Christ." See *id.* According to the Statement of Faith of Prison Fellowship Ministries, "We believe that all people are lost sinners and cannot see the Kingdom of God except through the new birth." See *Statement of Faith*, PRISON FELLOWSHIP, <http://www.prisonfellowship.org/about/statement-of-faith/> (last visited Oct. 8, 2013).

106. See *Religious Services*, STATE OF DEL., <http://doc.delaware.gov/religiousServices.shtml> (last visited Oct. 1, 2013) ("Religious services and programs promote high morals, encourage positive lifestyle changes and can play a critical role in an inmate's rehabilitation.").

107. See SARAH BARRINGER GORDON, *Faith as Liberation: The Nation of Islam and Religion in Prison, 1940–1975*, in *THE SPIRIT OF THE LAW: RELIGIOUS VOICES AND THE CONSTITUTION IN MODERN AMERICA* 97 (2010) ("[T]he Nation offered prisoners meaning and direction through faith. It also offered a path to resistance and self-expression that could not be matched by other beliefs.").

108. Malcolm X, who converted to the Nation of Islam, discussed the role of prison in the Nation of Islam faith—explaining that the black prisoner symbolized the white society's oppression of black men. *Id.* at 110.

109. *Id.* at 97.

authority.

Given that religious devotion among prisoners may indeed be a mixed bag for their jailers, the next sections examine the justifications that prison administrators offer for limiting prisoners' religious exercise. The discussion is divided between concerns that seem reasonable and those that seem petty or pretextual.

### 1. Reasonable Concerns of Jailers

*Cutter*, which considered the facial constitutionality of RLUIPA, illustrates legitimate concerns that unfettered free exercise by some religious groups could create tension and danger in the prison.<sup>110</sup> One of the plaintiffs in *Cutter* was a member of the Church of Jesus Christ Christian, which supports tenets of white supremacy and is devoted to preserving and promoting the white race.<sup>111</sup> It is easy to see why the gathering of members of this white supremacist group for regular prayer meetings might alarm prison officials and frighten non-white or non-Christian inmates.

Even if prison administrators have no objections to the tenets or activities of a religious group per se, and the religious practice will cause no outrage or strife, other legitimate concerns arise. Prison officials might raise concerns about the logistics of accommodating religious observance in prison. Participating in sweat lodges<sup>112</sup> or lighting incense<sup>113</sup> can raise safety

---

110. *Cutter v. Wilkinson*, 544 U.S. 709 (2005).

111. See Brief for Respondents at 5–6, *Cutter v. Wilkerson*, 544 U.S. 709 (2005) (No. 03–9877). The Aryan Nation's Church of Jesus Christ Christian believes "in the preservation of our Race, individually and collectively, as a people as demanded and directed by God." Richard G. Butler, *Who, What, Why, When, Where: Aryan Nations*, ARYAN NATION, <http://www.aryan-nation.org/RGB/WhoWhatWhyWhenWhereAryanNations.html> (last visited Oct. 8, 2013). Their "racial nation has a right and is under obligation to preserve itself and its members." *Id.* Another tenet is that "Adam-man of Genesis was the placing of the White Race upon this earth. All races did not descend from Adam. Adam is the father of the White Race only." *Id.* The Church is virulently anti-Semitic, calling for "six million more" and claiming that Jews engage in human sacrifice. ARYAN NATION, <http://www.aryan-nation.org/zog/index.htm> (last visited Oct. 8, 2013).

112. See *Fowler v. Crawford*, 534 F.3d 931 (8th Cir. 2008) (holding that sincere religious desire for Native American sweat lodge was substantially burdened, but nevertheless finding compelling the prison's administrative, security, and financial reasons for refusing to provide one); *Cryer v. Clarke*, No. 09–10238–PBS, 2012 WL 6800791, \*10 (D. Mass. Sept. 7, 2012) ("Court concludes that defendants have established that prohibiting monthly access to a sweat lodge serves the compelling interest of maintaining security and safety, and that they have further established that an outright ban on access to sweat lodge ceremonies is the least restrictive means of achieving that interest."); *Kempvance v. Skolnik*, No. 3:10–CV–00535–ECR–vVPC, 2012 WL 893901 (D. Nev.

concerns. The most tangible and concrete objection brought by prison administrators to accommodating religious belief and practice is cost. As the State of Ohio explained in *Cutter*, “the upsurge in religious demands” would strain resources and “make[] . . . employees unavailable for other pressing tasks.”<sup>114</sup> It remains unsettled whether cost alone constitutes a compelling governmental interest sufficient to satisfy RLUIPA.<sup>115</sup>

Prison officials are also concerned about providing equal treatment and avoiding the appearance of favoritism towards one group of prisoners. As the State of Ohio explained in *Cutter*, “differences in treatment that outside of prison would be understood as making a religious adherent whole, are likely in prison to be perceived as favoritism and thus engender resentment.”<sup>116</sup>

Additionally, prison officials worry about fakers. In *Cutter*, prison officials argued that “[a]ffording religious prisoners rights superior to those of nonreligious prisoners . . . might encourage prisoners to become religious in order to enjoy greater rights.”<sup>117</sup> If religious observance translates into different and better food, less restricted environments for group worship, or designated days of rest, then others may declare themselves members of the religion solely to receive the perks.

Beyond the unfairness of gaining religious amenities without true devotion, a secondary problem arises if the prison is put in the position of determining whose beliefs are sincere. Prison officials have a credible argument that such assessments risk violating the Establishment Clause by entangling the government officials in the prisoners’ religion.

---

Mar. 14, 2012); *but see* *Sousa v. Wegman*, No. 1:11-CV-01754-MJS (PC), 2012 WL 2521115 (E.D. Cal. June 28, 2012) (referring to a sweat lodge in a California prison).

113. *Orso v. Shumate*, No. 3:10-cv-1069, 2010 WL 5698528, \*6 (W.D. La. Oct. 13 2010) (“[T]here exists a legitimate governmental interest in denying inmates access to burning incense.”).

114. Brief for Respondents at 18–19, *Cutter*, 544 U.S. 709 (No. 03-9877) (citations omitted).

115. *See* *Curry v. Cal. Dep’t of Corr.*, No. C-09-3408 EMC (pr), 2013 WL 75769, \*9 (N.D. Cal. Jan. 4, 2013) (“While there may be some question whether avoidance of a negligible cost increase is a compelling state interest, the \$50,000+ extra expense to provide the Kemetic diet for one inmate is not a negligible cost increase.”).

116. Brief for Respondents at 15, *Cutter*, 544 U.S. 709 (No. 03-9877) (citations omitted) (internal quotation marks omitted); *cf.* *Hearn v. Kennell*, 433 Fed. App’x 483 (7th Cir. 2011) (rejecting a claim by a Muslim prisoner—based on fact that Jewish prisoners received kosher meat but Muslims had to eat vegetarian—because the prisoner offered no evidence of intentional discrimination).

117. 544 U.S. at 718 (citations omitted) (internal quotation marks omitted).

## 2. Illegitimate Behavior and Motivation by Jailers

Although prison officials might have legitimate reasons to limit inmates' religious exercise, there are some undoubtedly less admirable reasons they might be inclined to do so. The power dynamics between jailers and the jailed are an essential element of prison life. Prison administrators believe that by wielding their authority they can provide a safe and orderly prison environment. Showing keen awareness of such dynamics, the State of Ohio, in *Cutter*, argued that any deference to prisoners' religious needs would alter the balance of power between jailers and inmates, and that religious inmates would acquire "a powerful weapon to gain exemption from whatever prison regulations they wish."<sup>118</sup> One judge in dissent complained that "akin to the adage about 'inmates running the asylum,'" the majority in reversing summary judgment and allowing the prisoner pursue his claim under RLUIPA permitted the "inmate to run the penitentiary."<sup>119</sup>

In addition to establishing authority, the vast power of the warden can spark cruel and authoritarian behavior. One recurring theme in the case law of prisoners' religious complaints is casual cruelty toward prisoners. These cases demonstrate disrespect for inmates' rights as human beings.

Why do the jailers behave so? Are they by nature sadistic people attracted to the job of subjugating others? Perhaps certain personality types are attracted to this type of work.<sup>120</sup> Perhaps the work itself changes people.<sup>121</sup> Regarding religious exercise, perhaps the jailers do not want to grant religious freedoms because to acknowledge religious rights is to

---

118. Brief for Respondents at 13, *Cutter*, 544 U.S. 709 (No. 03-9877).

119. *Moussazadeh v. Tex. Dep't Crim. J.*, 703 F.3d 781, 798 (5th Cir. 2012) (Barksdale, J., dissenting in part).

120. There is a substantial literature indicating that corrections officers, particular the guards who interact with prisoners, suffer from high stress. See Sunny Schwartz & Leslie Levitas, *A New Vision for Correctional Officers*, 27 *TIKKUN* 37 (2012).

121. In 1973, Philip G. Zimbardo, a social psychologist, designed an experiment in which he randomly assigned twenty-four mentally healthy male college students to be either prisoners or guards. Philip G. Zimbardo et al., *Reflections on the Stanford Prison Experiment: Genesis, Transformations, Consequences*, in *OBEDIENCE TO AUTHORITY: CURRENT PERSPECTIVES ON THE MILGRAM PARADIGM* 193–237 (T. Blass ed., 2000), available at <http://www.prisonexp.org/pdf/blass.pdf> (last visited Oct. 8, 2013). In a short time the prisoners became pathologically passive, depressed and stressed, and the guards aggressive and sadistic. *Id.* The experiment, designed to last two weeks, was terminated after six days because "because too many normal young men were behaving pathologically as powerless prisoners or as sadistic, all-powerful guards." *Id.*; see also TED CONOVER, *NEWJACK: GUARDING SING SING* (2000) (recounting an undercover journalist's yearlong work at Sing Sing and portraying the hardships and moral ambiguities of the job).



acknowledge the prisoners' basic humanity and equality. It is emotionally easier for prison workers to deal harshly and dismissively with prisoners if one conceives of them as caged animals rather than fully equal human beings.<sup>122</sup> Conversely, respect for prisoners' religions and their status as people of faith humanizes the incarcerated. For some, relating to prisoners as fellow worshippers, equal in the eyes of their mutual creator, seems to subvert the strict prison hierarchy.

Not surprisingly, many of the most troubling cases concerning religious practices in prison involve mistreatment of Muslims. In *Williams v. Bitner*, a Muslim prisoner was fired from his job as a jail kitchen worker for refusing to handle pork.<sup>123</sup> Based on his refusal, which was grounded in sincere religious belief, he was cited for misconduct and served twenty-seven days in cell restriction punishment for insubordination.<sup>124</sup> Consequently, he missed religious observances, including the annual Islamic festival of Eid-al-Fitr at the end of Ramadan.<sup>125</sup> At the conclusion of his cell restriction, Williams was reassigned to serve as a janitor in the kitchen, a position that—at nineteen cents per hour—provided half the compensation of his previous job as a cook.<sup>126</sup> The prison staff also placed the misconduct citation in Williams's institutional disciplinary record and raised his security classification from "low" to "medium."<sup>127</sup>

In *Lovelace v. Lee*, an inmate, who complained about being served expired milk, was taken off the Ramadan list because a guard claimed that he saw the prisoner eating during Ramadan—a holy month during which observant Muslims fast during daylight hours.<sup>128</sup> The facts as described by the appellate court make it seem likely that the guard's assertion was dishonest and retributory, but by the time the case came to trial the prisoner had long-since faced the choice of either breaking Ramadan by eating the

---

122. Here it is worth quoting Justice Brennan's dissent in *O'Lone v. Estate of Shabazz*: "It is thus easy to think of prisoners as members of a separate netherworld, driven by its own demands, ordered by its own customs, ruled by those whose claim to power rests on raw necessity." 482 U.S. 342, 355 (1987).

123. *Williams v. Bitner*, 455 F.3d 186, 188 (3d Cir. 2006).

124. *Id.* at 188–89.

125. *Id.* at 189. He also missed his Arabic Studies classes, which prevented him from obtaining his certification in that subject. *Id.*

126. *Id.*

127. *Id.*

128. 472 F.3d 174, 184–85 (4th Cir. 2006).

regular meals during the day or starving.<sup>129</sup>

In a case that similarly seems to involve indifference or cruelty, Jewish inmates were not provided with sack dinners after fasting for Yom Kippur.<sup>130</sup> The prison administrators thereby extended a twenty-five hour fast to a thirty-six hour fast, wherein the Jewish prisoners received no food until the morning.<sup>131</sup>

Other cases bespeak ignorance and adherence to religious orthodoxy. In *Pittman-Bey v. Clay*, the plaintiff was forbidden from receiving his post-sunset meal during Ramadan because he failed to attend Friday prayers.<sup>132</sup> As he attempted to explain to the prison authorities with no success, members of the Hanafi school of Sunni Islam, such as Pittman-Bey, are forbidden from attending Friday prayers while in jail.<sup>133</sup> The court allowed the case to go forward on RLUIPA and under the First Amendment.<sup>134</sup> The court described the Ramadan meal as “an essential part of the Ramadan experience.”<sup>135</sup> It is unclear, however, whether the court understood that by forgoing this experience the prisoner would starve.

Some cases involving Jewish inmates’ requests for religious accommodation also include significant evidence of discriminatory treatment, retaliation, and anti-Semitism. For instance, Jewish prisoners receiving special kosher diets in the Groveland Correctional Facility in New York alleged that the prison administration segregated them at meal times by compelling them to sit at a table designated as “Jewish Inmates Only,” and that prison officials threatened disciplinary sanctions if they refused to sit there.<sup>136</sup> Another court rejected summary judgment, finding that the prison had created a genuine issue of material fact as to whether taking the prisoner off the kosher-diet list because the prisoner took a protein powder supplement was motivated by an attempt to retaliate against the prisoner for

---

129. *Id.* at 195–96. The guard refused to sign an affidavit and no one at the prison would review the video of the cafeteria, which would have proven without question whether the prisoner had taken lunch as the guard asserted. *Id.* at 184, 195.

130. *Brown v. Vail*, No. CV-08-5091-JPH, 2009 WL 2253334, at \*3–5 (E.D. Wash. July 28, 2009).

131. *Id.*

132. *Pittman-Bey v. Clay*, No. V-10-086, 2011 WL 6749027, at \*1 (S.D. Tex. Dec. 22, 2011).

133. *Id.* at \*1–2; see Mohammad Akhtar Raza Kahn Qadiri Azhari, *Jumah in Prison*, AZHARUL FATAWA, [http://www.aaajushshariah.com/Fatawa/jumma\\_prison.html](http://www.aaajushshariah.com/Fatawa/jumma_prison.html) (last visited Oct. 8, 2013).

134. *Pittman-Bey*, 2011 WL 6749027, at \*1.

135. *Id.* at \*6.

136. *Ward v. Rabideau*, 732 F. Supp. 2d 162, 165 (W.D.N.Y. 2010).

filing too many grievances.<sup>137</sup>

### 3. Prisoners Behaving Badly

If some aspects of religious exercise in prison reveal the casual cruelty of jailers, then another theme involves prisoners who are clearly gaming the system or complaining over insubstantial or unreasonable matters. For instance, a Texas prisoner, who illegitimately refused to go to another unit for his requested eye exam did not raise a valid RLUIPA claim when he challenged the disciplinary action preventing him from attending outside events (including a celebration of the end of Ramadan) for breaking the appointment.<sup>138</sup> In *Miller v. Wilkinson*, a prisoner complained under RLUIPA of the prison's failure to acknowledge his common-law name change.<sup>139</sup> The prisoner, who prefers the name Alfar Kynwolf, argued that his religious exercise was burdened because he was "forced to 'use names imposed on my ancestors by Christians by force in the 9th and 10th centuries' and that the use of his Asatru name [would] allow[] him to form a religious connection with his ancestors and his sacred animal, the wolf."<sup>140</sup> The court was skeptical whether a substantial burden existed upon his religion (particularly because his old name would have been retained in the

---

137. *Colvin v. Caruso*, 605 F.2d 282 (6th Cir. 2010). Another aspect of the dehumanization of prisoners stems from their portrayal as whiners with trivial problems, too much free time on their hands, and easy access to courts. Fred Cohen, *The Limits of the Judicial Reform of Prisons: What Works; What Does Not*, 40 CRIM. L. BULL. 421, 447 (2004). One good example is a list from the National Association of Attorneys General enumerating their top-ten frivolous lawsuits. *Id.* at 449. Some items on the list were truly frivolous—such as a nudist inmate claiming his free exercise right to have his girlfriend visit in see-through clothing. *Id.* Most items on the top-ten list, patterned after the comic presentations of David Letterman, however, sadly mock untreated mental illness. *Id.* For example, one item on the list derides a prisoner who claimed that the prison minister was "reading his letters to God and incorporating the material in his sermons." *Id.* Another item in what ostensibly is a litany of frivolous suits seemed reasonable. *Id.* It concerned a prisoner suing because the prison's new telephone system made it expensive for family and friends to receive collect calls. *Id.* Prisoners are required to call collect; the prices are much higher than normal collect calls and the prisons split the profits with the phone carriers. See *Families of Prisoners Paying High Price for Collect Calls*, NPR, (Dec. 21, 2004, 12:00 AM), available at <http://www.npr.org/templates/story/story.php?storyId=4238743>. Some prisoners are thus effectively prevented from maintaining outside contact with their loved ones.

138. *Mitchell v. Tex. Dep't of Criminal Justice*, No. 1:11-CV-045-BLECF, 2011 WL 6029884, at \*3 (N.D. Tex. Dec. 5, 2011) (holding that this claim and all the prisoner's other claims "should be **DISMISSED WITH PREJUDICE AS FRIVOLOUS**") (emphasis in original).

139. No. 2:98-cv-275, 2010 WL 3909119, at \*2-3 (S.D. Ohio Sept. 30, 2010).

140. *Id.* at \*10.

prison records even if his new name were formally added as an “aka”).<sup>141</sup> The court also credited the important administrative concerns of having the same name follow a prisoner.<sup>142</sup> As a final example, a prisoner, with a history of violence against correction officers, could not make a successful RLUIPA claim based on the prison’s refusal to have the chaplain provide individual foot washing, because under the tenets of the Seventh-Day Adventist Church, the prisoner could perform this ritual himself.<sup>143</sup>

#### IV. RELIGIOUS EXERCISE QUESTIONS RAISED BY PASSOVER OBSERVANCE IN PRISON

All prisons have specific rules about food, and many have detailed rules about kosher food and even kosher-for-Passover food.<sup>144</sup> Prison regulations can be applied woodenly, and inmates who reject food as insufficiently

141. *Id.* at \*11.

142. *Id.* at \*12. *But cf.* *Hakim v. Hicks*, 223 F.3d 1244, 1249 (11th Cir. 2000) (applying the First Amendment, not RLUIPA, court held that the prison policy, which refused to use a dual-name policy, violated the free exercise rights of inmate, who had legally changed his name).

143. *See Wakefield v. Indermill*, No. 1:09-cv-00274-LJO-BAM PC, 2011 WL 5876246, at \*10 (E.D. Cal. Nov. 22, 2011).

144. For instance, in addition to specifying a staggering number of medical diets for, among other things, hypertension, diabetes, dental soft diet, pregnancy, and gluten intolerance, the State of Arizona makes special provision for religious diets, including a lacto vegetarian diet and a kosher diet. ARIZONA DEPARTMENT OF CORRECTIONS, DIET REFERENCE MANUAL (2008), available at [http://www.azcorrections.gov/hlthsvc\\_rfp/diet\\_ref\\_manual\\_may2008.pdf](http://www.azcorrections.gov/hlthsvc_rfp/diet_ref_manual_may2008.pdf). The regulations specify that “[k]osher Passover meals will be provided for all inmates on the kosher diet during Passover.” *Id.* at 13; *See also* CAL. CODE REGS. tit. 15, § 3054.2 (2010) (“requiring kosher for Passover foods to be provided during the eight days of observance”); 103 MASS. CODE REGS. 471.09(5)(b) (2013) (“Where religious holidays specify particular dietary requirements (e.g., Passover, month of Ramadan), special arrangements should be made so that inmates shall be able to adhere to their religious beliefs.”); MICH. DEP’T OF CORR., POLICY DIRECTIVE, No. 05.03.150, at 7 (effective Mar. 20, 2007), available at [http://www.michigan.gov/documents/corrections/05\\_03\\_150\\_330459\\_7.pdf](http://www.michigan.gov/documents/corrections/05_03_150_330459_7.pdf) (“Pursuant to court order, an annual Passover Seder shall be conducted . . . . Only prisoners who designated Judaism as their religious affiliation shall be permitted to attend the Seder.”); OHIO DEP’T REHAB. & CORR., JEWISH RELIGIOUS SERVICES, No. 72-REG-07, at 2 (effective Jan. 25, 2009), available at [http://www.drc.ohio.gov/web/drc\\_policies/documents/72-REG-07.pdf](http://www.drc.ohio.gov/web/drc_policies/documents/72-REG-07.pdf) (“Passover—An eight-day observance commemorating the exodus from Egypt. Leavened materials are removed and ‘Kosher for Passover’ requirements are added to the diet. Kosher for Passover meals differ from regular kosher meals.”); VA. DEP’T OF CORR., MASTER RELIGIOUS CALENDAR, OPERATING PROCEDURE 841.3, at 1 (effective Mar. 1, 2012), available at [http://www.vadoc.state.va.us/about/procedures/documents/800/841-3\\_A2.pdf](http://www.vadoc.state.va.us/about/procedures/documents/800/841-3_A2.pdf) (providing matzo in place of bread and a ceremonial Passover Seder plate, and noting that “The Passover Seder meal is itself a worship time. At least two hours should be allowed (for saying prayers, reading scriptures, singing hymns, etc.). Service should begin 30 minutes after sundown.”).

compliant with the kosher rules risk being barred from access to kosher meals entirely.<sup>145</sup>

Seders and kosher-for-Passover food in prison raise First Amendment issues about religious exercise and serve as a vehicle for exploring how such rights are tempered by concerns about equal treatment of all prisoners, as well as jailers' administrative needs and safety concerns. The request for a Seder or for matzah and other kosher-for-Passover items raises interesting legal questions that display the complexity—and sometimes the harshness and arbitrariness—of prison regulations. They also illustrate disagreement regarding the degree to which the warden-as-Pharaoh must accommodate Jewish religious practices, and how those accommodations must be balanced against prison safety and orderly administration. The approximately sixty cases that deal with Passover celebration in prison also expose the thorny issues of who qualifies as a Jew. Because kosher-for-Passover meals are generally higher quality than regular prison fare, the prison must decide who is genuinely eligible and who is claiming the religious diets under false pretenses.<sup>146</sup>

In *Whitney v. Brown*, a pre-RLUIPA case analyzing the question of prisoners having a Seder, Jewish prisoners at the State Prison of Southern Michigan brought a § 1983 suit challenging a prison policy that prohibited them from congregating in weekly Sabbath services and an annual Passover Seder.<sup>147</sup> The court was critical of the prison's justifications for rejecting the Passover Seder, noting that this annual event had caused no security

---

145. *Willis v. Commissioner*, 753 F. Supp. 2d 768, 770 (S.D. Ind. 2010) (recounting prisoner's contention that he was "deprived [of] his religious meal card after failing to eat at least 75 percent of his [kosher] meals").

146. Those readers who have actually tasted kosher-for-Passover food might marvel that someone would try to manipulate the prison system to get it. But as Rabbi Levi Klein, a chaplain in various Southern prisons, explains, even the kosher-for-Passover dinners are appetizing to prisoners who have the same daily prison diet. Melvin, *supra* note 32. According to Klein, the meals are tempting enough to foster conversion. *Id.* During the Passover season, the number of inmates wanting to affiliate with Judaism skyrockets and Klein must discern real Jews from "Gastro Jews." *Id.* When Klein asked why certain prisoners wanted to learn more about Judaism, the less spiritually motivated inmates would answer, "My friend told me you get grape juice." *Id.*

147. *Whitney v. Brown*, 882 F.2d 1068, 1069, 1074 (6th Cir. 1989). See generally 42 U.S.C. § 1983 (2012) (civil action for deprivation of rights). Below, the district court had permitted the annual Seder, but not the weekly Sabbath services, and both sides appealed. *Whitney*, 882 F.2d at 1069. Although technically a Seder does not require a prayer quorum, "because the Passover Seder is a celebration of the exodus of the Jewish people out of Egypt, an individual's solo Seder, or one conducted with only a very few worshippers, was characterized below as 'a very miserable seder.'" *Id.* at 1070.

problems and that the prisoners had been flexible in moving the location and providing their own catered meals.<sup>148</sup> It discredited the prison's argument that "any time the normal routine of an institution is altered, the good order and security of that facility are potentially compromised," and held that the additional cost of moving prisoners within the facility was *de minimis*.<sup>149</sup>

### A. Kosher-for-Passover Food

#### 1. Kosher Food Generally

The designation "kosher" affects not only which foods an observant Jew can eat,<sup>150</sup> but also permissible food combinations,<sup>151</sup> how the animals are slaughtered,<sup>152</sup> how the utensils are used in preparation and eating,<sup>153</sup> and

148. *Whitney*, 882 F.2d at 1075.

149. *Id.* at 1074 (internal quotation marks omitted).

150. For instance, the biblical rules of keeping kosher enjoin eating "abominable things," including pork, shellfish, snakes, rabbits, and camels, to name a few. See *Leviticus* 11; see also *Deuteronomy* 14:2–21.

151. Part of keeping kosher requires maintaining a separation of milk and meat, which includes chicken but not fish. The prohibition derives from the Biblical injunction against boiling a calf in its mother's milk. See *Exodus* 23:19, 34:26; see also *Deuteronomy* 12:21. This has been extrapolated to ban a turkey and cheese sandwich. See *Kashrut: Jewish Dietary Laws*, MECHON MAMRE, <http://www.mechon-mamre.org/jewfaq/kashrut.htm> (last visited Oct. 8, 2013). There is also an intermediate category called "pareve," which is neither dairy nor meat (such as fish, grains, eggs, vegetables, and fruit) and can be consumed with either dairy or meat. *Id.*

152. See JOSEPH TELUSHKIN, *JEWISH LITERACY: THE MOST IMPORTANT THINGS TO KNOW ABOUT THE JEWISH RELIGION, ITS PEOPLE, AND ITS HISTORY* 712 (rev. ed. 2008).

153. See *Kashrut: Jewish Dietary Laws*, *supra* note 151 ("Utensils (pots, pans, plates, flatware, etc., etc.) must also be kosher. A utensil picks up the kosher 'status' (meat, dairy, pareve, or treyf [non-kosher]) of the food that is cooked in it or eaten off of it, and transmits that status back to the next food that is cooked in it or eaten off of it."). As one court recently explained:

The laws of kosher address a comprehensive dietary system—including not only the types of foods that may be eaten, but also the preparation requirements, which ensure kosher ingredients are not "contaminated" by non-kosher ingredients. . . . According to the laws of kosher, dairy and meat, both of which must be kosher in their core ingredients, must be totally separated during preparation and consumption; they may neither be served at the same meal nor mixed with plates/utensils that have touched the other category of food. . . . Although the laws of kosher are traditionally complicated, one fundamental tenet is non-contamination of kosher food products with non-kosher products during and after preparation—as such, kosher food must be carefully supervised through the phases of production.

*Willis v. Commissioner*, 753 F. Supp. 2d 768, 771 (S.D. Ind. 2010) (citations omitted).

even which sponges are used for the cleanup.<sup>154</sup> Because of all these strictures, kosher food—and particularly kosher meat—is expensive. One prison administrator explained the costs involved:

Providing kosher meals requires extra effort and extra expense. Separate Kosher kitchens are maintained at selected prison sites. It is expensive to build and equip a Koher [sic] kitchen. . . . [I]n addition to the logistical requirements of keeping a kosher kitchen, Kosher meals cost two to three times as much as meals from the main food line.<sup>155</sup>

Any deviation from the general menu plan is bound to add costs. As another prison administrator explained, “special diets require additional accountability and planning, more preparation manpower, and at times, more expensive ingredient costs.”<sup>156</sup> Kosher food is particularly expensive. Interestingly, one cause of the increased cost of kosher meals in some prisons is the request by devout Muslims for kosher foods, which satisfy the Muslim requirements of halal.<sup>157</sup>

---

154. *Willis v. Commissioner*, 753 F. Supp. 2d at 773; *see also* *Moussazadeh v. Tex. Dep’t of Criminal Justice*, 703 F.3d 781, 786 (5th Cir. 2012) (“Jewish dietary laws, ‘kashrut,’ are fundamental to the practice of Judaism as embodied in the Torah and Rabbinic laws. Food that satisfies the biblical and rabbinic requirements is deemed ‘kosher.’ Those laws demand that food be stored, prepared, and served in a certain manner, and they exclude certain types of food. For example, pork is *per se* nonkosher. Food that would otherwise be kosher becomes nonkosher if mixed with nonkosher food or brought into contact with utensils that have been used in the preparation of nonkosher food. For that reason, certain types of food must not be served, and a separate set of cookware, utensils, and flatware must generally be used.”).

155. *DuJardine v. Mich. Dep’t of Corr.*, No. 1:07-cv-701, 2008 WL 4146021, at \*2 (W.D. Mich. Aug. 4, 2008) (quoting Affidavit of Michigan Department of Corrections Special Activities Coordinator Dave J. Burnett); *see also* *Andreola v. Wisconsin*, 211 F. App’x 495, 496 (7th Cir. 2006) (noting that certified kosher meals cost “nearly four times the cost of non-kosher meals”). In *Curry v. California Department of Corrections*, No. C-09-3408 EMC (pr), 2013 WL 75769 (N.D. Cal. Jan. 4, 2013), the court rejected a prisoner’s request based on his Neterian religion for a Kemetec (vegan, non-wheat, non-GMO) diet. It noted the various medical and religious diets already available in the California system: “\$2.82 for the standard diet; \$3.20 for the vegetarian diet; \$3.50 for the religious-meat-alternate diet; \$9.28 for the Jewish-kosher diet; and approximately \$26.03 for the Kemetec diet requested.” *Id.* at \*3 (citations omitted).

156. *Isbell v. Ryan*, No. CV 11-0391-PHX-JAT (JFM), 2011 WL 6050337, at \*3 (D. Ariz. Dec. 6, 2011) (citations omitted).

157. “‘Halal . . . literally means ‘lawful or permitted.’ For meat to be halal, it cannot be of certain types or parts of animals and must be butchered in a certain manner [with a blessing] . . . . The Quran specifically allows . . . [beef], camels, sheep, goat, seafood, and ‘that which you have taught birds and beasts of prey to catch, training them as God has



Jews comprise a small percent of those incarcerated and archival evidence indicates that provision of kosher food to Jewish inmates dates as far back as the 1850s.<sup>158</sup> Twenty-six out of thirty-four states responding to a survey indicated that they provide kosher food to prisoners.<sup>159</sup> Those that do not offer vegan or vegetarian meals instead.<sup>160</sup> Most federal circuit courts require prisons to provide kosher food to Jews who request it;<sup>161</sup> others do

---

taught you.”

Rain Levy Minns, *Food Fights: Redefining the Current Boundaries of the Government's Positive Obligation to Provide Halal*, 17 J.L. & POL. 713, 717–18 (2001); *Willis*, 753 F. Supp. 2d at 772 (observing that “in the past few years, the number of kosher meals increased, in large part due to Muslim inmates who did not have access to Halal meals but found sufficient substitutes in kosher meals” (citations omitted)). Not all Muslims are entitled to kosher meals. *See Sims v. Wegman*, No. 1:11cv0931 DLB PC, 2011 WL 6367750, at \*2 (E.D. Cal. Dec. 19, 2011) (denying Muslim prisoner’s request for kosher meals, which comport with halal requirements and would allow prisoners to eat meat, because the prison regulations provide that “Jewish Kosher Diet Program is only available to Jewish inmates and plaintiff” had no affirmative religious interest in eating meat); *Williams v. Dart*, No. 10 C 2499, 2011 WL 4808167, at \*2 (N.D. Ill. Oct. 11, 2011) (“Williams also requested a Kosher diet, which like an Islamic diet is pork-free, but that request was denied because Williams is not Jewish.”). Similarly, in New Jersey one can only receive vegetarian meals. Unpublished Statement of Sylvia Orenstein, public defender of Marco Bey (on file with the author). To get kosher meals in New Jersey, a person has to list his religion as Jewish, and then cannot attend Muslim services. *Id.*

158. *See* Gary Friedman, *Rewriting Leviticus*, AMERICAN JAILS 17, 18 (July, Aug. 2012), available at <http://jpsi.org/wp-content/uploads/2012/08/americanjails-julyaugust.pdf>.

159. *See* Brandon Sample, *Maryland Prisoners Receive Kosher Food*, PRISON LEGAL NEWS, <https://www.prisonlegalnews.org/displayArticle.aspx?articleid=21655&AspxAutoDetectCookieSupport=1> (last visited Oct. 8, 2013). As of this writing, Florida recently reinstated its kosher food program in response to a suit by the United State Department of Justice. *See* Steve Bousquet, *Justice Department Sues Florida over Lack of Kosher Meals for Prison Inmates*, TAMPA BAY TIMES, (Aug. 16, 2012), <http://www.tampabay.com/news/politics/legislature/justice-department-sues-florida-over-lack-of-kosher-meals-for-prison/1246207>. Nevada has hired a kosher consultant as part of settlement of a class action lawsuit by an Orthodox Jewish prisoner who found the common fare unsuitable for his level of kosher observance because of shellfish and mixture of milk and meat. *See* Cy Ryan, *Nevada Moving to Settle Lawsuit over Kosher Prison Meals*, LAS VEGAS SUN, Sept. 17, 2012, <http://www.lasvegassun.com/news/2012/sep/17/nevada-moving-settle-lawsuit-over-kosher-prison-meal/>; *see also* JTA, *Nevada Moves to Provide Kosher Food for Inmates*, JEWISH DAILY FORWARD, Sept. 19, 2012, <http://forward.com/articles/163038/nevada-moves-to-provide-kosher-food-for-inmates/>.

160. JTA, *Nevada Moves to Provide Kosher Food for Inmates*, JEWISH DAILY FORWARD, Sept. 19, 2012, <http://forward.com/articles/163038/nevada-moves-to-provide-kosher-food-for-inmates/>.

161. The Sixth Circuit required the provision of kosher meals to those who hold sincere religious beliefs. *See* *Bonnell v. Burnett*, No. 07–CV–15444, 2011 WL 4533830, at \*2 (E.D. Mich. Sept. 29, 2011) (“[T]here is no compelling state interest to deny a kosher meal to a prisoner whose religious beliefs regarding the meal are sincerely held.” (citations omitted)); *see also* *Kretchmar v. Beard*, 241 F. App’x 863, 865 (3d Cir. 2007) (holding that inmate’s religious exercise was not substantially burdened by his regularly receiving cold, not hot kosher meals that were nutritionally



not.<sup>162</sup> According to one estimate only a sixth of the 24,000 inmates, who receive kosher food in prison, are traditionally considered Jewish.<sup>163</sup> In *Baranowski v. Hart*, however, the Fifth Circuit found that although failure to provide kosher meals to a Jewish inmate might substantially burden his religious exercise, the State of Texas had a compelling governmental interest in maintaining good order and controlling costs.<sup>164</sup> There were approximately 165 practicing Jewish inmates in the prison, which had a total population of 145,000.<sup>165</sup> Providing kosher meals cost the prison twelve to fifteen dollars per day, while non-kosher meals cost an average of only \$2.46 per day.<sup>166</sup> Since then, the Texas Department of Criminal Justice has created a single kosher unit meant to accommodate all but the most violent offenders housed near a large Jewish community.<sup>167</sup> Excluding start-up expenses, the cost of feeding a prisoner at the kosher kitchen was \$6.82 per day, as opposed to \$3.82 for a normal prison diet.<sup>168</sup> Kosher food is available for purchase at other Texas prisons, but the Fifth Circuit has indicated that making an inmate pay for his kosher food places a substantial

---

adequate).

162. See *Berryman v. Granholm*, No. 06-CV-11010-DT, 2007 WL 2259334, \*3 (E.D. Mich. Aug. 3, 2007) (holding that “temporary suspension of the kosher meal program did [not] constitute a substantial burden” and prison officials “ha[d] a compelling financial interest in ensuring that kosher food is served only to those inmates who sincerely need it for religious reasons”). *But see* *Madison v. Riter*, 240 F. Supp. 2d 566, 569 n.2 (W.D. Va. 2003) (finding that inmate met “the substantial burden threshold under RLUIPA” when he was denied a kosher meal request).

163. Naomi Zeveloff, *Not Just Jews Eat Kosher Food in Prison: Millions Spent on Special Meals for Non-Jewish Inmates*, JEWISH DAILY FORWARD, Apr. 30, 2012, <http://forward.com/articles/155363/not-just-jews-eat-kosher-food-in-prison/?p=all#ixzz2lim5TRHh>; see David Z. Bernstein, *Why Prisoners Love Kosher Food*, TIMES OF ISRAEL (Jan. 2, 2013, 5:20 PM), <http://blogs.timesofisrael.com/why-prisoners-love-kosher-food> (“[T]he majority of inmates who receive kosher food in the United States are not religious Jews. There are the Messianic Jews, secular Jews, Black Hebrew Israelites and in most cases non-Jews, who also receive this privilege. In fact Jews make up only one sixth of inmates who eat kosher food in American jails.”); see also Friedman, *supra* note 158 at 18 (discussing the “kosher diet craze that is rapidly escalating among inmates”).

164. 486 F.3d 112, 125 (5th Cir. 2007), *cert. denied*, 552 U.S. 1062 (2007).

165. *Id.* at 117.

166. *Id.* at 118.

167. *Moussazadeh v. Tex. Dep’t Criminal Justice*, 703 F.3d 781, 787 (5th Cir. 2012). See Ronald G. Turner, *The Religious Land Use and Institutionalized Persons Act of 2000*, 45 TENN. B.J. 25 (2009).

168. *Id.*; see also *Yaacov v. Collins*, 649 F. Supp2d. 679 (N.D. Ohio 2009) (noting that “[p]re-packaged Kosher meals at the prison cost \$7.00 per meal as opposed to \$0.80 per main-line meal”).

burden on his religious exercise.<sup>169</sup>

The State of Florida had eliminated kosher food in its prisons in August 2007, citing cost and equal treatment concerns.<sup>170</sup> Additionally, gang members, in order to stay together in the same facility, all requested kosher food (which led them to the prison with the kosher kitchen).<sup>171</sup> This presented safety concerns when corrections officers wished to split up gang members among various facilities.<sup>172</sup> In 2012, the Justice Department brought suit against Florida while several cases were pending in the Eleventh Circuit.<sup>173</sup>

Even if the cost of kosher food qualifies as a compelling governmental interest, that interest must, according to RLUIPA, be narrowly tailored. In one case, the administration informed the prisoner that he could keep kosher, but would have to be transferred to a maximum-security facility where there were other Jews, who kept kosher, and where there could be economy of scale.<sup>174</sup> The court held that the prison failed to find the least restrictive means to grant the prisoner his religious exercise.<sup>175</sup>

Because kosher meals are generally of higher quality than regular prison fare, prison officials worry about culinary conversions.<sup>176</sup> The prison must decide who is genuinely eligible and who is requesting it just to eat tastier food. As one prison administrator explained, “extra effort and expense should be reserved only for those for whom the meals are a religious requirement, and who demonstrate that they have enough knowledge to enable them to abide by the requirements of their faith.”<sup>177</sup>

---

169. *Id.* at 793–94.

170. News Serv. of Fla., *Feds Sue Florida Prisons Over Kosher Meals*, (Aug. 17, 2012), <http://www.northescambia.com/2012/08/feds-sue-florida-prisons-over-kosher-meals>.

171. Robert, *Feds Sue Florida Prisons Over Kosher Meals*, (Aug. 19, 2012, 7:46 AM), <http://www.northescambia.com/2012/08/feds-sue-florida-prisons-over-kosher-meals>.

172. *Id.* (“[G]ang members were changing their religions to Jewish, so they would be transferred [to] one of the few prisons that has a kosher kitchen. They would then be housed with their gang partners.”).

173. News Serv. of Fla., *Feds Sue Florida Prisons Over Kosher Meals*, (Aug. 17, 2012), <http://www.northescambia.com/2012/08/feds-sue-florida-prisons-over-kosher-meals>.

174. *Shilling v. Crawford*, 536 F. Supp. 2d 1227, 1231 (D. Nev. 2008).

175. *Id.* at 1234.

176. Among the reasons that non-Jews request kosher food include test, safety, and the fact that kosher food often comes prepackaged, which makes it easier to trade or sell. *See Zeveloff, supra* note 163.

177. *DuJardine v. Mich. Dep’t of Corr.*, No. 1:07-cv-701, 2008 WL 4146021, at \*2 (W.D. Mich. 2008) (quoting Affidavit of Michigan Department of Corrections Special Activities Coordinator

This requires prison administrators to determine who is sincere in their religious belief<sup>178</sup> and sometimes raises painful and difficult questions about who qualifies as a Jew. One group, Messianic Jews (also known as Jews for Jesus), often demands Jewish services but is rejected by the other Jews in prison as inauthentic.<sup>179</sup> In Ohio, a group of Messianic Jewish inmates filed suit after being denied kosher meals by prison officials who classified them as Protestants.<sup>180</sup> The inmates were provided with kosher meals on Jewish holidays but received cheaper, non-kosher meals otherwise.<sup>181</sup>

Even when a prisoner is unquestionably Jewish, the issue of sincerity arises.<sup>182</sup> RLUIPA does not apply to mere food preferences, but to religiously mandated ones that arise from the prisoner's sincere religious beliefs.<sup>183</sup> Therefore, the prisons are in the business of investigating those beliefs and the prison chaplain "can review the request in light of the inmate's inconsistent history and behavior, which may include an investigation into such factors as past religious declarations, disciplinary history, and discretionary food purchases that are inconsistent with the requested diet."<sup>184</sup> Where the prisoner obtains non-kosher food from the

---

Dave J. Burnett) (internal quotation marks omitted).

178. *Moussazadeh v. Tex. Dep't of Criminal Justice*, 703 F.3d 781, 791 (5th Cir. 2012) ("Sincerity of a belief is an essential initial matter in a RLUIPA claim."); *Sossamon v. Texas*, 560 F.3d 316, 332 (5th Cir. 2009) (The inmate must possess "an honest belief that the practice is important to his free exercise of religion.").

179. See, e.g., *Prisoner Services*, ALEPH INST., <http://www.aleph-institute.org/prisoner-services.html> (last visited Oct. 8, 2013) (listing one of its missions as: "[l]obby to prevent Messianic 'rabbis' conducting Jewish services"). Meredith Heagney, *Messianic Jewish Inmates Claim Discrimination; Ohio Prisons Label Them Protestants, Deny Them More-Costly Kosher Meals*, COLUMBUS DISPATCH, July 18, 2008, at 03B; see also Glenn Harris, *Passover in Prison*, JEWS FOR JESUS 4 (Mar. 31, 1996), <http://jewsforjesus.org/pdf/newsletter/newsletter-1996-04.pdf> (describing a Passover Celebration led by a Jews for Jesus chaplain). Other religious groups may specifically require kosher food. See, e.g., *Fegans v. Norris*, 537 F.3d 897, 900 (8th Cir. 2008) (The prison denied kosher food by a practitioner of "the Assemblies of Yahweh, a Christian sect which requires its members to follow Old Testament law."); *Madison v. Virginia*, 474 F.3d 118, 127 (4th Cir. 2006) (involving a request for kosher food by "a Hebrew Israelite and member of the Church of God and Saints of Christ").

180. Heagney, *supra* note 179, at 03B.

181. *Id.*

182. *Supra* note 178.

183. *Moussazadeh*, *supra* note 178.

184. *Isbell v. Ryan*, No. CV 11-0391-PHX-JAT (JFM), 2011 WL 6050337, at \*3 (D. Ariz. Dec. 6, 2011) (citations omitted) (finding a genuine question of material fact whether prisoner's request for a lacto-vegetarian diet to follow Asatru, an ancient northern European religion, where he sincerely felt he could not eat meat unless he knew how it was slaughtered).

commissary, he has waived the right to ask for kosher food.<sup>185</sup> This sometimes takes the form of “the cheeseburger test.”<sup>186</sup> For instance, one case describes a prisoner’s mandatory “religious diet interview” with the prison chaplain.<sup>187</sup> The prisoner’s response when asked to explain the major teaching of Judaism was “following God’s laws,” noting there were “hundreds of them.”<sup>188</sup> The prisoner could only identify one Jewish holiday.<sup>189</sup> This, and his other inadequate replies, prohibited him from getting kosher food, even though he was serious about his faith.<sup>190</sup> Ross Lawson was denied kosher food because the court found that although Lawson claimed to be an Orthodox Jew (thereby requiring him to keep Kosher as well as refrain from working on the Sabbath), he “never attends morning Jewish prayer services, has declined a proffered work release, and eats non-Kosher foods.”<sup>191</sup> Some opinions list the non-kosher items prisoner

185. See, e.g., MICH. DEP’T OF CORR., POLICY DIRECTIVE, No. 05.03.150, at 7 (effective Mar. 20, 2007), available at [http://www.michigan.gov/documents/corrections/05\\_03\\_150\\_330459\\_7.pdf](http://www.michigan.gov/documents/corrections/05_03_150_330459_7.pdf) (“A prisoner approved to eat from a religious menu shall have that approval rescinded if s/he eats, or has in his/her possession, any food item that violates a tenet of his/her designated religion.”).

186. See, e.g., Horacek v. Burnett, No. 07-11885, 2008 WL 4427825, at \*6 (E.D. Mich. Aug. 19, 2008). All cheeseburgers are nonkosher because they mingle dairy with beef, a combination prohibited by the kosher laws. Tracey R. Rich, *Judaism 101: Kashrut: Jewish Dietary Laws*, <http://www.jewfaq.org/kashrut.htm> (last visited Oct. 8, 2013). In addition, a cheeseburger from the commissary would be nonkosher because it has nonkosher meat.

187. See DuJardine v. Mich. Dep’t of Corr., No. 1:07-cv-701, 2008 WL 4146021, at \*2 (W.D. Mich. 2008) (“[P]laintiff underwent a religious diet interview” “pursuant to Policy Directive 05.03.150 and Operating Procedure 05.03.150A”); see also Schuh v. Mich. Dep’t of Corr., No. 1:09-CV-982, 2011 WL 4529641, at \*1 (W.D. Mich. Sept. 30, 2011) (noting that chaplain found prisoner “lacked a genuine understanding” of Judaism and holding that plaintiff’s current receipt of kosher food rendered the year-long denial moot); Allison v. Martin, No. 08-15093-BC, 2011 WL 6217425, at \*1 (E.D. Mich. Dec. 14, 2011). In Allison, a new convert to Judaism was denied kosher food because he failed the “Kosher diet test” by providing “brief, incomplete and sometimes inaccurate explanations to the questions asked” and being “unable to explain the major teachings of Judaism or what a kosher diet does and does not consist of.” Allison, 2011 WL 6217425, at \*1. The lack of knowledge and an attempt to cheat on the test suggested a lack of sincerity on the part of the prisoner. Schuh, 2011 WL 4529641, at \*1.

188. See Schuh, 2011 WL 4529641, at \*1 (internal citations omitted).

189. See *id.* (The plaintiff noted Passover in this case.).

190. *Id.*

191. Lawson v. Aleph Inst., No. 4:04-cv-00105, 2009 WL 4404720, at \*1 (N.D. Fla. Dec. 2, 2009) (“Sworn testimony that Plaintiff has purchased and eaten non-Kosher foods such as cheeseburgers undermines his claim of sincere Jewish Orthodoxy.”), *rev’d on other grounds*, Lawson v. Fla. Dep’t of Corr., 454 Fed. App’x 706 (11th Cir. 2011). In another context a court portrayed it as “the Plaintiff was accused of having been in possession of a cheeseburger.” Horacek v. Burnett, No. 07-11885, 2008 WL 4427825, at \*6 (E.D. Mich. Aug. 19, 2008).

have purchased at the prison commissary.<sup>192</sup> Such inquiries into practice and knowledge are conducted for all religious diets.<sup>193</sup>

In *Horacek v. Burnett*, the test seemed grossly unfair.<sup>194</sup> The court refused to grant summary judgment against a prisoner who was denied kosher food, despite having passed the “Kosher Meal Program participation test.”<sup>195</sup> The prison administration denied his request, because as a reoffending parole violator, “his continuing criminal behavior reflected a lack of sincerity about practicing Judaism, which does not advocate crime.”<sup>196</sup> In response, the court observed: “What religion *does* advocate crime? And what prison inmate has *not* been convicted of one or several crimes? The *reductio ad absurdum* of Defendant’s reasoning would be the denial of all religious practices to all inmates, or at least to all recidivist inmates.”<sup>197</sup>

In addition to reasons of cost and concerns about establishment of religion, questions arise about safety. Where only a few people get special meals, issues of safety and worries about food tampering arise.<sup>198</sup> More importantly, prison administrators are concerned about equal protection and the appearance of unequal treatment.<sup>199</sup> If Jews are accommodated, then Muslims requesting halal meat and Buddhists requesting vegan diets must also receive special meals.<sup>200</sup> One administrative response to Muslim

192. See, e.g., *Lute v. Johnson*, 2012 WL 913749 \*6 (D. Idaho) (“Plaintiff has consistently purchased nonkosher food from the prison commissary, including rice noodles, nacho chips, salsa, corn tortillas, chili, beef stew, barbeque beef, roast beef and gravy, chili ramen noodles, beef ramen noodles, enchilada party mix, instant milk, and hot summer sausage.”); *Mahone v. Pierce County*, 2011 WL 2360354 \*2 (W.D. Wash.) (listing “jalapeno cheese, sharp cheddar cheese, Ramen–Texas beef, Ramen Hot and Spicy Vegetable, and Ramen Chili”).

193. See *Moussazadeh v. Tex. Dep’t of Criminal Justice*, 703 F.3d 781, 791 (5th Cir. 2012).

194. No. 07-11885, 2008 WL 4427825, at \*1.

195. *Id.* (citations omitted) (internal quotation marks omitted).

196. *Id.* at \*2 (citations omitted) (internal quotation marks omitted).

197. *Id.* at \*6.

198. See *El-Tabech v. Clarke*, 616 F.3d 834 (8th Cir. 2010). “El-Tabech discovered feces wrapped in plastic in a vegan entree prepared and delivered by TSCI staff.” *Id.* at 843.

199. See, e.g., *Turner-Bey v. Maynard*, No. Civ.A. JFM–10–2816, 2012 WL 4327282, at \*3 (D. Md. Sept. 18, 2012) (“Prison officials must craft such diets in order to eliminate perceptions of favoritism which could pose legitimate security concerns.”).

200. See *DeHart v. Horn*, 390 F.3d 262 (3d Cir. 2004). The Buddhist prisoner, for religious reasons, ate “only fruit, certain cereals, salads when served without dressing, and vegetables served with margarine.” *Id.* at 265. He “supplement[ed] his meals with items purchased from the commissary, including peanut butter, peanuts, pretzels, potato chips, caramel popcorn, and trail mix,” and “request[ed] that the Prison provide him with a diet free of meat, dairy products and

concerns about the availability of kosher food, but not halal, was to provide a pork-free diet with a lacto-ovo-vegetarian option.<sup>201</sup>

## 2. Special Challenges of Kosher-for-Passover Food

One important issue surrounding kosher-for-Passover food in prison is the cost and difficulty of preparing the special diet.<sup>202</sup> Benson Li, the sheriff's department manager for food service units in the Los Angeles jail, stated that the "kosher for Passover food costs \$24.30 per inmate per day. 'That's almost nine times more than the regular meals,' [he] said, referring to [the] nonkosher food that most of the 15,000 other inmates eat daily."<sup>203</sup> In Cook County, Illinois (as in many jails) the kosher food is donated by outside sources.<sup>204</sup> The donations undermine the governmental objections as to cost, but some prisons prohibit food being brought in from the outside for security and fairness reasons.<sup>205</sup>

In *Sokolsky v. Voss*, despite timely and repeated requests, the prisoner received kosher—but not kosher-for-Passover—food.<sup>206</sup> In what can only be

pungent vegetables." *Id.*

201. *Turner-Bey*, 2012 WL 4327282, at \*3 n.19.

202. "Rabbi Lon Moskowitz, who has served as the Jewish chaplain at the California Men's Colony in San Luis Obispo for the past fifteen years," stated of Passover: "I think it's the most intensive Jewish holy day inside the prison system, just because it is so logistically complicated." Jonah Lowenfeld, *Passover in Prison*, JEWISH JOURNAL (Apr. 12, 2011), [http://www.jewishjournal.com/passover/article/this\\_matzah\\_is\\_kept\\_under\\_lock\\_and\\_key\\_so\\_are\\_the\\_people\\_who\\_will\\_eat\\_it/](http://www.jewishjournal.com/passover/article/this_matzah_is_kept_under_lock_and_key_so_are_the_people_who_will_eat_it/).

203. *Id.*

204. Dawn Rhodes, *Passover Celebrations Parallel Story Behind Holiday*, CHI. TRIB. (Apr. 17, 2011), available at [http://articles.chicagotribune.com/2011-04-17/news/ct-met-passover-prison-20110417\\_1\\_kosher-meals-jewish-inmates-passover-prayers](http://articles.chicagotribune.com/2011-04-17/news/ct-met-passover-prison-20110417_1_kosher-meals-jewish-inmates-passover-prayers) ("Because of strict guidelines on how to prepare food for Passover, none of it can be prepared in the jail's vast kitchen facilities, which churn out about 30,000 meals daily, officials said. Instead, Rabbi Binyomin Scheiman delivered an eight-day supply of kosher fare and instructed jail authorities on what to serve when."). The Aleph Institute, an arm of Chabad that ministers to Jews in prison and in the military, provides the following for the Seder: "Matzah, *shmura* (handmade [and specially watched to make sure no leavening agent is introduced]) matzah, grape juice, horseradish, gefilte fish, matzoh ball soup, cans of macaroons, haggadahs, shelf stable meals, 'Seder-in-a-Box'—Seder plates with all ritual items except for romaine lettuce and hard boiled egg, and kosher for Passover snacks for institution use and resale in the canteen/commissary." *Holiday Programs and Services*, ALEPH INST., <http://www.aleph-institute.org/programs/holiday-programs-a-services.html> (last visited Oct. 8, 2013) (emphasis added).

205. Lowenfeld, *supra* note 202.

206. No. 1:07 CV-00594 SMM, 2009 WL 2230871, at \*3–4 (E.D. Cal. July 24, 2009) (Plaintiff was an inmate at Coalinga State Hospital.).

considered a gross understatement, the court explained: “Kosher[-]for-Passover meals have stricter dietary requirements than both non-Kosher and regular Kosher meals.”<sup>207</sup> The court noted, “Plaintiff alleges that Defendants’ restriction on his ability to keep Kosher-for-Passover was absolute, and that this restriction put Plaintiff to a Hobson’s choice in which he was forced to either violate his sincerely-held religious beliefs or starve.”<sup>208</sup> The prisoner also alleged that, “in addition to not receiving the Kosher-for-Passover meals he requested, he was subjected to discipline due to his complaints.”<sup>209</sup> Sokolosky requested compensatory damages of \$1 million for violating RLUIPA and punitive damages of \$4 million “for massive intentional disrespect for Judaism and unjustifiable and intentional anti-Semitism.”<sup>210</sup>

In *Greenberg v. Hill*, the prisoner received a ceremonial Seder plate as his meal.<sup>211</sup> The prison argued that the failure to receive a real meal was an “unintentional oversight resulting from inadvertent miscommunication,” while the prisoner believed that prison officials purposely deprived Jewish inmates of the Passover meal on the two Seder nights.<sup>212</sup> The court, in finding that the deprivation did not amount to a substantial burden, noted that the prisoner had received all his kosher-for-Passover meals in previous years.<sup>213</sup> The court did not seem to comprehend that the festive meal—as opposed to a plate of symbolic and generally inedible food<sup>214</sup>—was itself part of the celebration.<sup>215</sup> Similarly, it is hard to know whether—in another case—the service of bagels on Passover represents incompetence,

---

207. *Id.* at \*1. For instance, Passover requires completely different sets of milk and meat dishes, pots, and utensils.

208. *Id.* at \*3.

209. *Id.* at \*2.

210. *Id.* at \*4.

211. No. 2:07-CV-1076, 2009 WL 890521, at \*2 (S.D. Ohio Mar. 31, 2009).

212. *Id.* (internal quotation marks omitted).

213. *Id.*

214. *Id.* at \*1 (listing the Seder plate ingredients as “1. Matzah 2. Kosher grape juice 3. Parsley (or celery) 4. One hard boiled or roasted egg 5. Salt water 6. Horseradish 7. Charosat (mixture of kosher grape juice, scraped apple & nuts) 8. Roasted shank bone (a chicken neck may be substituted)”).

215. *Id.* at \*7. In the Seder, *Shulchan Aruch*, literally, “a set table”—the portion of the Seder in which everyone eats—is a crucial component. See generally Eli Touger, *At Our Rebbes’ Seder Table: Glossary*, SICHOS IN ENGLISH, available at <http://www.sichosinenglish.org/books/at-our-rebbes-seder-table/28.htm> (last visited Oct. 8, 2013).

indifference, unfortunate stereotyping, or actual hostility.<sup>216</sup>

Passover observance also brings to light prisoner misbehavior. For instance, in *Edwards v. Bruno*, a prisoner was denied matzah because he was found to be hoarding it and selling matzahs in the prison yard.<sup>217</sup>

Finally, and not insignificantly, questions of equal treatment arise. In her prison memoir entitled *ORANGE IS THE NEW BLACK: MY YEAR IN A WOMEN'S PRISON*, Piper Kerman recounts a conversation she had when a Jewish prisoner had been given boxes of matzah for Passover:

This excited the interest of the other prisoners. “How come they get them big crackers?” a neighbor from B Dorm asked me, probing the mysteries of faith. “Them crackers would be good with jelly.”

Nina, with her bangs in rollers, tilted her head as she reminisced about Passovers past. “One year I was in Rikers. Matzoh was the only edible thing they gave us,” she mused, rolling her cigarette thoughtfully between her fingers. “It’s a delicious with buttah.”<sup>218</sup>

### *B. Seders in Prison*

The prisoners’ celebration of the Seder is obviously not the same as what it would be outside of prison. Grape juice substitutes for wine.<sup>219</sup> Prayers may be interrupted for a headcount.<sup>220</sup> At the end of the evening, everyone must return to his cell.<sup>221</sup> Sometimes the meals sound delicious.<sup>222</sup> At other times, the food is inadequate,<sup>223</sup> or worse—entirely unavailable.<sup>224</sup>

---

216. *Green v. Werholtz*, Nos. 08-3260–JAR, 08-3261–JAR, 06-3198, 2010 WL 3878772, at \*2 (D. Kan. Sept. 28, 2010).

217. No. CV085005022S, 2009 WL 5322227, at \*6 (Conn. Super. Ct. Nov. 2, 2009).

218. PIPER KERMAN, *ORANGE IS THE NEW BLACK: MY YEAR IN A WOMAN'S PRISON* 106 (2010).

219. Melvin, *supra* note 32.

220. *Id.*

221. *Id.*

222. In Los Angeles County Jail on Passover 2011, prisoners received a meal of roast chicken, potato kugel and carrot tzimmes [carrots cooked in honey]. Included in each prisoner’s box are four boxes of grape juice, an Artsroll paperback [H]aggadah and a plastic seder plate with all the fixings, all of them freezer-safe. (The green vegetable on the plate is celery, which freezes better than the alternatives.).

Lowenfeld, *supra* note 202.

223. See *Love v. N.J. Dep’t of Corr.*, No. 10–1714 (GEB), 2011 WL 345964, at \*6 (D.N.J. Jan.



## V. THE SPIRITUAL SIGNIFICANCE OF PASSOVER OBSERVANCE IN PRISON

Beyond formal legal issues of prisoners' rights and administrative protocol is the deep personal and symbolic meaning that the Seder and Passover holiday have for those who are incarcerated.

Passover can be a difficult time of year for Jewish inmates. First of all, the prisoners may particularly miss their families during the time of this family holiday celebration.<sup>225</sup> Furthermore, the irony of the prisoners' situation—celebrating a ritual of liberation inside prison—is not lost on them.<sup>226</sup> Sid Kleiner, longtime director of Beth Tikvah Jewish Prisoner Outreach,<sup>227</sup> explains:

Along with separation from family, there is a painful theme to the holiday—redemption, freedom from bondage and captivity. Jewish inmates gather around the Seder table and declare that, “this year we are free.” It isn't easy to make this declaration with barbed wire, high walls, and correctional officers in view.<sup>228</sup>

In some ways, Jews in prison might be associated with the wicked son,<sup>229</sup> who in various editions of the Haggadah is presented as a soldier, a

31, 2011) (arguing that plaintiff failed to state a claim that his civil rights were violated when he received for his Seder meal “a regular kosher for Passover vegetarian 12 oz prepackaged tray” that “failed to meet plaintiff's definition of ‘festiveness’”).

224. Jonathan Pollard, who was convicted in the United States of spying for Israel, wrote of his incarceration: “Every Passover there is not enough food and hunger is my constant companion. This year will be worse: the Kosher-for-Passover foods for sale in the prison commissary were stolen by other inmates. What will be now, I have no idea.” Jonathan Pollard, *My 21st Passover in Prison*, JUSTICE FOR JONATHAN POLLARD (Apr. 13, 2006), available at <http://www.jonathanpollard.org/2006/041306a.htm>.

225. Rhodes, *supra* note 204.

226. Rabbi Binyomin Schneiman, who serves the Cook County Jail, observed: “Each one of them is fighting for freedom[.] They're actually in an Egypt, in a sense. They are incarcerated. They are in bondage.” *Id.*

227. “Beth Tikvah literally means ‘house of hope.’” Trudy Kleiner & Sid Kleiner, *Jewish Prisoner Outreach*, BETH TIKVAH JEWISH PRISONER OUTREACH, [http://bt.isrv.org/?page\\_id=2](http://bt.isrv.org/?page_id=2) (last visited Oct. 8, 2013).

228. Mark Mietkiewicz, *Pesach & Prison*, DOING JEWISH IN TORONTO (March 8, 2007), [http://www.jewishtorontoonline.net/home.do?ch=highway\\_articles&jt\\_style=detail&cid=4743](http://www.jewishtorontoonline.net/home.do?ch=highway_articles&jt_style=detail&cid=4743).

229. The wicked son is one of the archetypal four sons who play a prominent role in the Seder. Each son appears in the Haggadah, asks a different question, and gets a personal answer regarding the significance of the Passover holiday. The simple son asks a simple question: “What is this?” See Zeitlin, *supra* note 4.

boxer, a robber baron, a scowling child, or a punk rocker.<sup>230</sup> The wicked son asks: “What is this service to you?”<sup>231</sup> The Haggadah explains that the wicked son’s sin is to refer “to you” and to exclude himself.<sup>232</sup> It teaches that because the wicked son “separated himself from the community, he rejects that which is essential.”<sup>233</sup> The Haggadah further instructs:

And you will blunt his teeth and say to him “Because of this [i.e., in return for my offering the Pesach sacrifice] G-d acted for me . . . in my leaving Egypt.” For you and not for him [the wicked son]; had he been there, he would not have been redeemed.<sup>234</sup>

Prisoners have been convicted of doing something wicked and they are indeed separated from the community, but they have not committed the sin of the wicked son. By requesting a Seder and matzah, the inmates affirmatively express their affiliation with the Jewish people and their identity as Jews. Although they are not redeemed and still in bondage, modern Jewish prisoners seek connection with the rest of world Jewry by celebrating the festival of freedom. Therefore, according to the reasoning of the Haggadah, unlike the wicked son, those celebrating Passover in prison would have been redeemed in the Exodus. They are, however, like the wicked son in one interesting respect. The prisoners’ questions about the

230. Eliyahu Fink, *Who Is the Wicked Son?*, FINKORSWIM (Apr. 27, 2011), <http://finkorswim.com/2011/04/27/who-is-the-wicked-son> (discussing and demonstrating various illustrations of the wicked son).

231. Ari Kahn, *The Wicked Son in the Passover Haggadah*, EXPLORATIONS: TORAH COMMENTARY BY RABBI ARI KAHN (Apr. 3, 2009), <http://arikahn.blogspot.com/2009/04/wicked-son-in-passover-haggadah.html> (citations omitted). The original Hebrew “*lachem*” is in the plural. A better translation might be: “What’s this service to you people?” Cf. Shaul Robinson, *The Wicked Child and Boycotts*, THE VOICES OF LINCOLN SQUARE SYNAGOGUE (April 10, 2012), <http://voicesoflss.wordpress.com/2012/04/10/the-wicked-child-and-boycotts/>.

232. Kahn, *supra* note 231.

233. *Id.* (He denied Judaism.).

234. *Id.* One can question the parenting style involved in answering the wicked son’s question and the very different treatment of the sons. Readers of the Haggadah have to do interpretive somersaults to distinguish the wicked son’s question from the wise son’s. See *id.* (noting the similar language used by both sons). The wise son asks, “What are the testimonies, statutes and laws that the Lord our God commanded you?” Rav Amnon Bazak, *The Four Sons*, ISRAEL KOSCHITZKY VIRTUAL BEIT MIDRASH (David Silverberg trans.), available at <http://www.vbm-torah.org/pesach/pes68-ab.htm> (last visited Oct. 8, 2013). The wise son also seems to ask about “you.” *Id.* His wisdom allegedly comes from the legalistic inquiry and the mention of God. *Id.*

Seder are not lawyer-like as the wise son's are,<sup>235</sup> but instead relate to feelings and emotion. The wicked son's question is thus arguably more emotional and psychologically astute. "What is this business to you?" leads inevitably to the more introspective questions concerning the personal significance of the holiday to the questioner.

Passover provides the inmates with a chance to consider the true nature of freedom. Even though they remain captives, they can be spiritually free. Their spiritual freedom signifies their humanity and resistance to those who might quash their spirit. Kleiner tells the inmates: "'We seize this opportunity to remind our blue-garbed brethren that, in soul and spirit, the essence of freedom remains intact. One need not surrender one's soul and spirit to institutionalization.'"<sup>236</sup>

The power of the Seder arises in part from the tension between the celebration of freedom and the prisoners' current condition. Charles Johnson, who is currently serving a life sentence with no parole in a maximum-security prison, explores this dichotomy between physical and spiritual freedom.<sup>237</sup> Johnson appears in documentary footage, previously entitled *American Prison: The Forgotten Jews*,<sup>238</sup> and poignantly and insightfully examines the significance of the Passover Seder. In an evocative reframing of the language of the Haggadah he says, "Now we are here in Tomoka;<sup>239</sup> next year may we be in the land of Israel. Now we are slaves; next year may we be free."<sup>240</sup> Johnson explains: "I'm in bondage, but I don't let them buy their way inside and keep me down inside. They can have the body. They can't have the mind."<sup>241</sup> Johnson considers the spiritual significance of his incarceration:

---

235. See *supra* note 234 and accompanying text.

236. See Mietkiewicz, *supra* note 228.

237. AMERICAN PRISON: THE FORGOTTEN JEWS (Shining Light Productions 2009), available at <http://www.youtube.com/watch?v=3IP0IAGmD8o&feature=related> (transcript available from the director Rhonda Moskowitz via <http://teshuvafilm.wordpress.com/>). Rabbi Charles Rudansky also raised the issue of "Passover under chains." Rhonda Moskowitz, *Passover Behind Bars*, TESHUVAFILM'S BLOG (Apr. 18, 2011), <http://teshuvafilm.wordpress.com/>. He asked the Sing Sing inmates about a sense of freedom and liberation when one is incarcerated and does not have one's physical freedom. *Id.*

238. AMERICAN PRISON: THE FORGOTTEN JEWS, *supra* note 237.

239. *Id.* (referring to Tomoka Correctional Institution in Daytona Beach, Florida).

240. *Id.*

241. *Id.*

Maybe coming here was the way that Hashem [literally, “the name,” a respectful name for God] slowed us down to get our attention. By no means, this is not a wonderful place and we all want to be home with our families. I know I want to be home. Just try to remember that. And no one can enslave you within. They might be able to take this [*points to himself*], keep this locked away but they can’t enslave who you are inside.<sup>242</sup>

In a similar fashion, Rabbi Levi Klein, who serves incarcerated Jews in Tennessee, Arkansas, and Mississippi, ponders how to celebrate freedom with people who are in jail.<sup>243</sup> He concludes, “They’re really celebrating the freedom of the soul.”<sup>244</sup>

Prisoners reflect on the theme that their incarceration has personal spiritual meaning and probe what or who constitutes the Pharaoh in their lives.<sup>245</sup> They seek the oppressors in their lives—naming bad choices, addictions, or deep-seated anger. For instance, the women who gathered for a Seder at the California Institution for Women focused on their personal liberation.<sup>246</sup> Joni Cyran-Kaempfer, who has been in prison since 2002, announced, tapping her chest above her heart, “I feel completely free . . . Truly, truly, it’s right here.”<sup>247</sup> Shari Stevens, a thirty-five-year-old who had two months left on a fraud sentence, kicked her addiction to methamphetamine, which she called “my personal Egypt.”<sup>248</sup> “Even

242. *Id.*; see also Mietkiewicz, *supra* note 228.

243. Melvin, *supra* note 32.

244. Melvin, *supra* note 32.

245. Obviously, not all prisoners are truly devoted or introspective. I have my doubts about former Liberian President Charles Taylor, who gave permission for his trial to proceed in his absence while he remained in his cell to celebrate Passover. Alpha Sesay, *Charles Taylor Did Not Send Traditional Herbalists to Prevent RUF Rebels from Bullets, Defense Witness Says*, THE TRIAL OF CHARLES TAYLOR (March 30, 2010), <http://www.charlestaylortrial.org/2010/03/30/charles-taylor-did-not-send-traditional-herbalists-to-prevent-ruf-rebels-from-bullets-defense-witness-says/>. Taylor “converted to Judaism after his relocation to The Hague to face” the United Nations-backed Special Court for Sierra Leone for his “role in supporting RUF rebels in Sierra Leone who committed” genocide. *Id.*

246. Doug Irving, *Passover in Women’s Prison Celebrates Freedom*, ORANGE COUNTY REGISTER, (Apr. 10, 2011), <http://www.ocregister.com/articles/prison-295781-passover-sunday.html>.

247. *Id.*

248. *Id.* This sentiment was echoed by Lucien Izraylov, who celebrated Passover in the Cook County Jail because of “his fourth DUI arrest for heroin.” Rhodes, *supra* note 204. He stated of his time incarcerated, “I’m trying to free myself from slavery—of addiction.” *Id.*

though I'm in here, I feel free, I feel liberated,' she said. 'That's what it is for me. My liberation.'"<sup>249</sup>

Rather than posing an existential crisis, Passover in prison prompts reflection about the true nature of freedom, free choice, and destiny. Johnson ponders, "Maybe, just maybe, freedom could have been our Egypt."<sup>250</sup> As Johnson explained to his fellow inmates attending the Seder:

I know we might think of this place as an Egypt. And—and maybe it is Egypt. Maybe there's more to it. Maybe there's more to our being here than just this being Egypt. Maybe Hashem [God] has a reason for each of us to be here, just maybe. Maybe he wants us to shine and be a light in this—as we know—dark place.<sup>251</sup>

#### VI. HOW IS THIS PRISONER PROBLEM DIFFERENT FROM ALL OTHER PRISONER PROBLEMS?<sup>252</sup>

Prisoner requests for Seders and special diets on Passover are in some respects unique and in other ways illustrative of many recurrent religious exercise issues in prison—providing a good example of the difficult and delicate balance between religious rights and the needs of prison administrators. Passover observance in prison raises important First

249. *Irving*, *supra* note 246.

250. AMERICAN PRISON: THE FORGOTTEN JEWS, *supra* note 237. Johnson expanded on his comments, explaining the concept of a personal Egypt:

Egypt represents something that oppresses, enslaves or controls. Something that keeps a person imprisoned! Not always a physical imprisonment.

...

Once I came to *this!* wonderful place . . . I realized that all that stuff, the money, nice things, etc. was not what was important, and I saw how those things had trapped my mind, enslaved my thinking process, and I came to call that freedom my Egypt, that I had to come out of "it," for my eyes to open. To see the way I allowed it to enslave me.

What is freedom? Is it being able to walk down a street to places you wish to go?! Yes!

But also freedom has another avenue. Freedom within. Which to me is more important than any amount of money!

So, the physical freedom that I was enslaved by, was my Egypt! [A]nd coming here, (even though I wish to be free,) was a type of exodus for me, an exodus from the distractions, that I was constantly bombarded by.

Letter from Charles Johnson to Aviva Orenstein (July 25, 2011) (on file with the author).

251. AMERICAN PRISON: THE FORGOTTEN JEWS, *supra* note 238.

252. This is a riff on a famous question (usually asked by the youngest person at the Seder), "[W]hat makes this night different from all other nights?" See SCHNEERSON, *supra* note 11, at 7.

Amendment issues of assessing prisoners' sincerity, determining the extent of accommodation required, avoiding the establishment of religion, and addressing legitimate concerns about unequal treatment of prisoners. To echo the Passover liturgy, "[e]ven if all of us were wise, all of us understanding [of the plight of prisoners], all of us knowing the . . . [Constitution], we would still be obligated to" puzzle out a fair balance between all the competing interests and to wonder whether prison administrators should be saddled (or trusted?) with such important determinations.<sup>253</sup> Everyone, who discusses these questions (or at least is engaged by them), is praiseworthy.<sup>254</sup>

In the context of Passover, we can elide at least some tough constitutional and policy questions that arise with other types of religious observance covered by RLUIPA. Certainly, there are cases where the existence of a substantial burden is debatable,<sup>255</sup> but Passover is not one of them. Because Passover is such an established and important holiday, and the traditional rules are exacting and non-negotiable, few questions arise about the substantial burden on a sincere prisoner's religious practice. Failure to provide kosher-for-Passover food or a Seder is per se a substantial burden.<sup>256</sup> In contrast with Muslim prisoners' requests for halal diets,<sup>257</sup>

253. See SCHNEERSON, *supra* note 11, at 8.

254. *Id.* The Haggadah provides: "Even if all of us were wise, all of us understanding, all of us knowing the Torah, we would still be obligated to discuss the exodus from Egypt; and everyone who discusses the exodus from Egypt at length is praiseworthy." *Id.*

255. *Accord* Shakur v. Schriro, 514 F.3d 878, 888–89 (9th Cir. 2007).

256. Obviously, complaints regarding the quality, taste, or amount of kosher food may not rise to the level of a substantial burden. See, e.g., Kretchmar v. Beard, 241 F. App'x 863, 865 (3d Cir. 2007) (holding that inmate's religious exercise was not substantially burdened by his regularly receiving cold, not hot, kosher meals that were nutritionally adequate); Strobe v. Cummings, No. 05–3385–SAC, 2009 WL 3045463, at \*2 (D. Kan. Sept. 22, 2009) (holding that prisoner who received a kosher diet from a special supervised kosher kitchen had no RLUIPA claims based on the facts that "(1) he was served 'warm/wilted salads'; (2) he was 'rarely served seasonal fruits'; (3) he was never served food items such as macaroni salad, potato salad, watermelon, or baked potatoes; [and] (4) the Kosher menu was not rotated"), *aff'd*, 381 F. App'x 878 (10th Cir. 2010).

257. Courts are split on whether providing a halal diet is a requirement of RLUIPA. Some hold that denial of a halal diet is not a substantial burden. See Patel v. U.S. Bureau of Prisons, 515 F.3d 807, 811 (8th Cir. 2008) (finding that failure to provide a halal dining option did not substantially burden inmate's religious exercise, because prison did provide vegetarian kosher options and inmate could purchase halal meals at commissary); Watkins v. Shabazz, 180 F. App'x 773, 775 (9th Cir. 2006) (holding that failure to provide inmate with halal meals did not substantially burden religious exercise, because the prison provided him with vegetarian options and the ability to contract with outside sources to provide his halal meals). *But see* Gonzalez v. Corr. Corp. of Am., 334 F. App'x 984 (5th Cir. 2009) (holding that denial of meals that comport with halal stated a claim under

which courts often find are satisfied by providing vegetarian options or common fare,<sup>258</sup> requests for kosher food—especially on Passover—require much more accommodation, which courts tend to acknowledge as a substantial burden on prisoners’ religious practice when they are denied.<sup>259</sup>

Passover observance and access to kosher food in general, however, do highlight three other significant problems with RLUIPA’s application. First, even if the prison’s actions substantially burden a sincere religious practice, there remains the question of what qualifies as a compelling governmental interest that justifies refusal to accommodate the prisoner. On a very practical level, Passover’s exacting food regulations and the complicated logistics of the Seder meal demand the prison’s administrative attention, money, and guard time.<sup>260</sup> These are consequential issues, especially when resources are scarce.<sup>261</sup> In extreme cases where safety is a concern and cost is exorbitant, courts have found a compelling governmental interest that outweighs a substantial burden on prisoners’ religious practice.<sup>262</sup> Given the

RLUIPA); *Shakur v. Schriro*, 514 F.3d 878, 888–90 (9th Cir. 2008) (holding that the denial of halal or kosher meats to a Muslim prisoner could constitute a substantial burden under RLUIPA). Other courts reject requests for halal because of the cost, which they find a compelling governmental interest. *See Via v. Wilhelm*, No. 7:11cv00050, 2011 WL 5419709, at \*6, n.6 (W.D. Va. Nov. 9, 2011) (rejecting RLUIPA claim by Muslim inmate, who wanted halal meat (at a cost of \$6.00 per day) rather than soy protein substitute (at a cost of \$2.85 per day) and finding management of costs a compelling interest supporting decision to offer a substitute protein that is inoffensive to a broad range of religions); *Muhammad v. Crosby*, No. 4:05cv193–WS, 2009 WL 2913412, at \*10 (N.D. Fla. Sept. 3, 2009) (finding lack of halal food options did not violate RLUIPA because of compelling state interests of minimizing costs and security), *aff’d sub nom.*, *Muhammad v. Sapp*, 388 F. App’x 892 (11th Cir. 2010).

258. *See Madison v. Virginia*, 474 F.3d 118, 123 (4th Cir. 2006) (discussing common fare diet as one designed to meet the needs of a wide variety of religious groups); Jerry C. Chow, *Resnick v. Adams: The Lawful Denial of a Jewish Prisoner’s Right to Keep Kosher?*, 37 LOY. L.A. L. REV. 45, 46–47 (2003) (describing common fare diet). *But see Abdhaseeb v. Calbone*, 600 F.3d 1301, 1319–20 (10th Cir. 2010) (holding that there was a genuine issue of material fact as to whether failure to provide a halal diet substantially burdened a Muslim inmate’s religious exercise where he sincerely believed that the Qur’an required him to eat halal meat and not just a vegetarian diet).

259. *See, e.g., Washington v. Klem*, 497 F.3d 272, 280 (3d Cir. 2007).

260. *See Andreola v. Wisconsin*, 211 F. App’x 495, 497 (7th Cir. 2006) (noting that kosher meals cost “nearly four times the cost of non-kosher meals”); *Isbell v. Ryan*, No. CV 11–0391–PHX–JAT (JFM), 2011 WL 6050337, at \*3 (D. Ariz. Dec. 6, 2011) (arguing that special meals increase necessary planning and staff accommodations).

261. *See Michael Jacobson, The High Cost of Prisons: Using Scarce Resources Wisely*, CRIME REPORT (Feb. 12, 2012, 8:20 PM), <http://www.thecrimereport.org/news/inside-criminal-justice/2012-02-the-high-cost-of-prisons-using-scarce-resources-wise> (highlighting substantial “prison costs that fall outside the state corrections budgets”).

262. *See, e.g., Curry v. Cal. Dep’t of Corr.*, No. C–09–3408 EMC (pr), 2013 WL 75769, at \*10



clear mandate of RLUIPA and the deep significance of Passover observance, cost alone should rarely—if ever—constitute a compelling governmental interest. Teasing out the problem of cost is complicated; it requires addressing the more difficult question of who qualifies for a special religious diet. Currently, given the number of prisoners who demand kosher food, the cost is minimal in light of the entire prison budget.<sup>263</sup> If, however, more and more prisoners request kosher food, the persuasiveness of cost as creating a compelling governmental interest will become more plausible.

Second, prison officials necessarily become entangled in religion when they must decide who is sincere—and hence who deserves the special (and often more expensive) religious dietary accommodations. This leads to two related problems: intrusiveness regarding prisoners' spiritual beliefs and the general imposition of various religious orthodoxies. Prison officials are rightfully skeptical of the "Church of Red Wine and Steak" and any other less blatant conversion of a food preference into a religious requirement.<sup>264</sup>

---

(N.D. Cal. Jan. 4, 2013) (discussing cases where cost of non-GMO, totally organic diet overrode a prisoner's sincere religious dietary request); *see also*, Taylor G. Stout, *The Costs of Religious Accommodation in Prisons*, 96 VA. L. REV. 1201 (2010) (arguing that RLUIPA imposed more onerous financial burdens on prisons than Congress intended and that several circuits have determined that the cost of RLUIPA accommodations outweigh the religious interests of prisoners).

263. *Moussazadeh v. Tex. Dep't of Criminal Justice*, 703 F.3d 781, 795 (5th Cir. 2012) ("Although cost reduction, as a general matter, is unquestionably a compelling interest of TDCJ, we are skeptical that saving less than .05% of the food budget constitutes a compelling interest."). Chaplain Gary Friedman, who works in the Washington State Department of Corrections and serves as executive director of Jewish Prisoner Services International, estimates that the additional cost for kosher food in prison to be forty million dollars. *See* T. Cohn, *Nation's Prisons Face Soaring Demand for Kosher Food; Estimate at \$40 Million*, KOSHER TODAY, <http://www.koshertoday.com/Nations-Prisons-Face-Soaring-Demand-for-Kosher-Food.aspx> (last visited Oct. 8, 2013). Obviously, costs rise considerably if the prison provides a special kosher kitchen. New York has a long running hot kosher kitchen at the Green Haven Correctional Facility, where kosher food is prepared on site and provided for approximately 3,000 prisoners throughout the New York penal system. *See* Gil Shefler, *Even Behind Bars, Jewish Life Flourishes*, JTA, (Sept. 14, 2009, 11:05 PM), <http://www.jta.org/news/article/2009/09/14/1007849/even-behind-bars-jewish-life-flourishes>. Texas opened a kosher kitchen in Stringfellow Prison near Houston in 2007. *See* Brandon Sample, *Maryland Prisoners Receive Kosher Food*, PRISON LEGAL NEWS, <https://www.prisonlegalnews.org/displayArticle.aspx?articleid=21655&AspxAutoDetectCookieSupport=1> (last visited Oct. 8, 2013).

264. Apparently, in the late 1970s, some federal prisoners came up with the "Church of the New Song," which—among other attempts to "cause or encourage disruption of established prison discipline for the sake of disruption"—requested "a paschal type feast . . . of steak and wine." *Therault v. Silber*, 453 F. Supp. 254, 260 (W.D. Tex. 1978); *see also* *Kalka v. Hawk*, 215 F.3d 90, 99 (D.C. Cir. 2000) (holding no constitutional violation when inmate was prohibited from forming groups within prison chapels to promote humanism, because humanist beliefs were found to be



Yet, overly close scrutiny of practices can lead to the tacit establishment of an official version of accepted religious practice, which may injure sincere personal religious beliefs that vary from religious tradition. One good example of this is the tendency of prison officials to administer religious tests to the prisoners to examine their sincerity—what I have dubbed in the context of kosher food as the “cheeseburger test.”<sup>265</sup>

Quizzing prisoners about their current level of knowledge of ritual observance fails to account for inmates who wish to develop more connection to their religion—something that the hardship and emptiness of prison life might inspire.<sup>266</sup> Furthermore, just because a religious person slips and violates the tenets of his faith does not mean he should be cut off from his religious practice entirely. As one court aptly observed, “A sincere religious believer doesn’t forfeit his religious rights merely because he is not scrupulous in his observance; for where would religion be without its backsliders, penitents, and prodigal sons?”<sup>267</sup> A Muslim who breaks the Ramadan fast to eat during the day or a Jew who buys a cheeseburger at the commissary should not automatically be presumed to be insincere in his religious beliefs, just weak in his ability to execute its demands. Additionally, given the diversity of Jewish practice,<sup>268</sup> a prisoner may sincerely wish to avoid bread on Passover but nevertheless eat cheeseburgers throughout the year.

---

rooted in philosophy, not religion); *United States v. Meyers*, 95 F.3d 1475, 1484 (10th Cir. 1996) (holding that the Church of Marijuana is a philosophy, not a religion).

265. See *supra* note 186 and accompanying text.

266. See *Shefler*, *supra* note 263 (observing that some Jewish inmates “embrace a religion they long had neglected”).

267. *Moussazadeh v. Tex. Dep’t Criminal Justice*, 703 F.3d 781, 791–92 (5th Cir. 2012) (quoting *Grayson v. Schuler*, 666 F.3d 450, 454 (7th Cir. 2012)); see also *Reed v. Faulkner*, 842 F.2d 960, 962–63 (7th Cir. 1988) (holding that Rastafarianism is a religious belief, and that some backsliding or failure to adhere to every religious tenet does not mean that an inmate is not a sincere believer in the faith). But see *Lute v. Jonson*, No. 1:08–cv–00234–EJL, 2012 WL 913749, at \*7 (D. Idaho Mar. 16, 2012) (“Although ‘backsliding’ or nonobservance of a religious practice is not dispositive, it is evidence of a prisoner’s religious insincerity . . . Purchasing nonkosher foods—both before and after his kosher diet request—is completely inconsistent with Plaintiff’s professed religious belief.”). See generally, Kevin L. Brady, *Religious Sincerity and Imperfection: Can Lapsing Prisoners Recover Under RFRA and RLUIPA?*, 78 U. CHI. L. REV. 1431 (2011) (discussing prisoner backsliding and RLUIPA); Shannon A. Burns, *Perfect Piety?: Transgression and Redemption Within the Legal Structures Affording Prisoners the Right to a Religious Diet*, 50 U. LOUISVILLE L. REV. 153 (2011) (examining the denial of prisoners’ access to religious dietary programs after violating the program rules).

268. See WASKOW & BERMAN, *supra* note 8.

Prison officials' arbitration of religious authenticity reinforces certain religious orthodoxies and thereby entangles these government officials in religious issues. For instance, Judaism encompasses many different traditions, and what qualifies as kosher is a matter of some debate among Jewish denominations.<sup>269</sup> Yet, the dominant (and often very compassionate) voice for Jewish religious practice in prison comes mainly from Orthodox institutions whose practitioners may hold more rigid beliefs than some Jewish prisoners who do not accept all such beliefs or practices but are nevertheless sincere.<sup>270</sup>

A more serious problem with entanglement arises when prison officials decide who "counts" as Jewish. Problems arise not merely with religious fakers, who wish to con prison administrators,<sup>271</sup> but also with those who sincerely consider themselves Jewish, though others do not accept them as such.<sup>272</sup> Those advocating for Jews in prison often reflect an Orthodox worldview and have no patience for Messianic Jews or others they do not believe are Jewish or entitled to kosher-for-Passover food and a Seder.<sup>273</sup> Representatives of such organizations welcome all Jews who choose to be more traditional but affirmatively attempt to exclude those whom they

269. The Orthodox Union ("OU") has its own certification process, and the Conservative Movement in Judaism recognizes as kosher some items, such as gelatin, that the OU does not. *Cf.* EDWARD K. KAPLAN, *SPIRITUAL RADICAL: ABRAHAM JOSHUA HESCHEL IN AMERICA, 1940–1972* 132 (2007) (recounting the story that as his rabbinical students at the Jewish Theological Seminary of America—the rabbinical school for the Conservative movement—debated whether gelatin was kosher, Rabbi Heschel, who marched in Selma with Martin Luther King, interrupted to ask, "Gentleman, can you tell me if the atomic bomb is kosher?"). In *Wright v. Bennett*, No. 5:08–CT–3129–BO, 2010 WL 3075519, at \*1–2 (E.D.N.C. 2010), *aff'd*, 415 Fed. App'x 476 (4th Cir. 2011), the prisoner insisted upon and received pre-packaged kosher meals certificated by the OU and prepared them in a prison microwave dedicated for that purpose. Not all Jews who keep kosher would insist on such stringencies. Even within the orthodox community there is debate about certain foods. Some ultra-Orthodox Jews require "Chalav Yisrael," dairy products that derive from cows milked under rabbinic supervision, reflecting the medieval concern that milk from non-kosher animals would be combined with cow's milk. *See* Howard Jachter, *Chalav Yisrael—Part I: Rav Soloveitchik's View*, RABBI JACHTER'S HALACHA FILES (Oct. 25, 2003), available at <http://koltorah.org/ravj/13-7%20Chalav%20Yisrael%20-%20Part%201.htm> ("[A] question that is often debated in the Orthodox community is whether or not one may drink packaged milk that is not under Rabbinic supervision.").

270. *See generally*, HARVARD LAW REVIEW, *supra* note 3 (arguing that the evidentiary burden is high under RLUIPA for prisoners espousing unique religious beliefs).

271. *See* *Cutter v. Wilkinson*, 544 U.S. 709, 709 (2005) ("[A]ffording religious prisoners superior rights might encourage prisoners to become religious.").

272. *See supra* notes 185–91 and accompanying text.

273. *See supra* note 191 and accompanying text.

consider non-Jews.<sup>274</sup>

Menachem Katz, director of prison and military outreach of the Aleph Institute (the major charitable organization that advocates for and provides benefits to Jewish prisoners),<sup>275</sup> explained that he wanted prison officials to “be very careful about who they give kosher food to.”<sup>276</sup> He said: “We don’t want them to give kosher food to every Tom, Dick and Harry if they say they are Jewish.”<sup>277</sup> Similarly, a chaplain in Washington State lamented: “If only those prisoners who were actually Jewish claimed Judaism as their religion and requested kosher food, there would be no problem with any particular prisoner receiving kosher meals.”<sup>278</sup>

Although modern Judaism is fractured over whether someone may be considered Jewish if he has a Jewish father but not a Jewish mother,<sup>279</sup> the Orthodox definition requiring matrilineal descent is sometimes tacitly enforced by prisons.<sup>280</sup> For instance, in one case, prison officials inquired as to why the Aleph Institute (an Orthodox organization) was assisting a prisoner who was not born of a Jewish mother.<sup>281</sup> This inquiry caused the Institute to stop sending the prisoner religious materials because it did not deem him Jewish.<sup>282</sup> A Rabbi, who was a Jewish prison chaplain in New York, repeatedly asked inmates their names and posed questions about their parents to, in the words of a prisoner, “confirm whether or not I’m really

274. See Zeveloff, *supra* note 163.

275. The Aleph Institute is an Orthodox non-profit organization that serves, among other constituencies, Jewish inmates and their families. *The Aleph Institute: An Overview of Unique Services to the Community*, ALEPH INST., <http://aleph-institute.org/about-us.html> (last visited Oct. 8, 2013).

276. Zeveloff, *supra* note 163 (internal quotation marks omitted).

277. *Id.* (internal quotation marks omitted).

278. Cohn, *supra* note 263 (internal quotation marks omitted).

279. Reform Judaism accepts patrilineal descent; Orthodox and Conservative Judaism do not. See, e.g., Jason Miller, *Patrilineal ‘Dissent’: Solving the Jewish Status Problem*, HUFFINGTON POST (JULY 19, 2012, 7:24 AM), [http://www.huffingtonpost.com/rabbi-jason-miller/patrilineal-dissent-solving-the-jewish-status-problem\\_b\\_1659620.html](http://www.huffingtonpost.com/rabbi-jason-miller/patrilineal-dissent-solving-the-jewish-status-problem_b_1659620.html).

280. See, e.g., *Van Wyhe v. Reisch*, 581 F.3d 639, 646 (8th Cir. 2009).

281. *Id.*

282. *Id.* There is no consensus on how Jewish identity is established. The Central Conference of American Rabbis, an organization of Reform Judaism, specifically declared in 1983 that “the child of one Jewish parent is under the presumption of Jewish descent. This presumption of the Jewish status of the offspring of any mixed marriage is to be established through appropriate and timely public and formal acts of identification with the Jewish faith and people.” *Reform Movement’s Resolution on Patrilineal Descent*, JEWISH VIRTUAL LIBRARY, <http://www.jewishvirtuallibrary.org/jsource/Judaism/patrilineal1.html> (last visited Oct. 8, 2013).

Jewish, or I'm just there saying that I am to get all the perks."<sup>283</sup> By contrast, in Virginia, prison regulations specifically mention Messianic Jews, and Yahwists, as deserving matzah, a Seder plate, and kosher-for-Passover food, though the regulations specify that each group has its own separate Seder.<sup>284</sup>

RLUIPA is clear that it is sincerity of belief, and not ancestry, membership in a recognized religion, or adherence to traditional tenets, that establishes a right to religious exercise in prison.<sup>285</sup> But it is understandable (particularly because of the problem of pretenders, some of whom present security risks) that prison officials rely on outsiders and defer to traditional definitions of who is a Jew. This entangles prison officials in religion in ways that raise serious Establishment Clause and equal treatment concerns. Even if some testing for sincerity is necessary, the imposition of "cheeseburger tests" and other orthodoxies crosses the line into unnecessary entanglement.<sup>286</sup>

Third, a real problem with equal treatment exists in supplying kosher food and holiday accommodation to Jewish prisoners, but denying the same or equivalent benefits to other prisoners. Issues of fairness and safety arise when one group seems to receive a special benefit.<sup>287</sup> Although no question

283. N.J. Burkett, *EXCLUSIVE: Rabbi Answers Accusations*, WABC (June 17, 2009), available at <http://abclocal.go.com/wabc/story?section=news/local&id=6870439> (internal quotation marks omitted).

284. VA. DEP'T OF CORR., MASTER RELIGIOUS CALENDAR, OPERATING PROCEDURE 841.3, at 1 (effective Mar. 1, 2012), available at [http://www.vadoc.state.va.us/about/procedures/documents/800/841-3\\_A2.pdf](http://www.vadoc.state.va.us/about/procedures/documents/800/841-3_A2.pdf) ("Matzo provided in place of bread to all Jews, Messianic Jews, and Yahwists during the entire Passover season. Ceremonial Passover Seder plate provided to Jews, Messianic Jews, and Yahwists (separately)—one plate for each group (after sundown) . . . Jews, Messianic Jews, and Yahwists must have their Passover Seder meal and service separately.").

285. See *Nelson v. Miller*, 570 F.3d 868, 875, 876 n4 (7th Cir. 2009) (holding where prisoner adhered to the Rule of St. Benedict, which he believed forbade him from "eating the flesh of four-legged animals," the prison's response that the requested diet "is not required by the Roman Catholic faith" violated RLUIPA, because prison officials may not require textual or tenet justification of the diet; the prisoner's sincere belief should be enough).

286. Cf. *Thomas v. Review Bd. of the Ind. Emp't Sec. Div.*, 450 U.S. 707, 714 (1981) (stating "religious beliefs need not be . . . logical [or] consistent" to receive First Amendment protection but must be honest); *United States v. Ballard*, 322 U.S. 78, 85–86 (1944) (holding that the government could dispute "the truth of the representations concerning" a religious belief and could evaluate the sincerity of the person asserting his religious exercise rights). See generally, CONKLE, *supra* note 44, at 69–72 (discussing the sincerity of religious beliefs).

287. See, e.g., Reuven Blau, *Perv Rabbi Gets Special Jail Meals*, NEW YORK POST, Aug. 15, 2010, available at [http://www.nypost.com/p/news/local/brooklyn/kosher\\_jail\\_perks\\_for\\_pervert\\_hRE6OJU8IIGdEv4gIvq6VK](http://www.nypost.com/p/news/local/brooklyn/kosher_jail_perks_for_pervert_hRE6OJU8IIGdEv4gIvq6VK) (decrying the fact that "a Rikers jail captain was ordered to pick up

arises concerning a constitutional equal protection violation, which requires intentional discrimination,<sup>288</sup> perceptions of unequal treatment can stir resentment and unrest within the prison. This is bad both for the group that feels deprived and for the group that may be singled out by fellow prisoners as privileged.

The stark difference between the way halal and kosher requirements are treated provides an example of understandable perceptions of unequal treatment. Many jurisdictions do not provide halal meat to Muslim prisoners, and instead provide only a meat-free diet on the grounds that vegetarianism comports with Islam's dietary demands.<sup>289</sup> Because the kosher rules prohibit any contact with many different species (for example, rabbit, shellfish, venison) in addition to pork, and because the diet must account for various food combinations and the way the food is prepared and served, a mere vegetarian diet will not satisfy the most strictly observant Jews.<sup>290</sup> This principled distinction, however, may not address prison management issues where there is a perception of unequal treatment. Indeed, certain anti-Jewish animus<sup>291</sup> and anti-Semitic stereotypes<sup>292</sup> may be

---

\$60 worth of glatt kosher canned meals for the sicko, including Salisbury steak, stuffed shells, cheese ravioli and barbecued chicken wings"); Burkett, *supra* note 283 (noting that an Orthodox Rabbi and prison chaplain, Leib Glanz, was criticized for "creat[ing] an enclave of privilege exclusively for Jewish inmates"); William K. Rashbaum & Paul Von Zielbauer, *Rabbi for Jails Said to Ease Stays of Jewish Inmates*, N.Y. TIMES, June 12, 2009, available at [http://www.nytimes.com/2009/06/13/nyregion/13jail.html?\\_r=0](http://www.nytimes.com/2009/06/13/nyregion/13jail.html?_r=0).

288. Courts routinely reject equal protection claims by prisoners. See *Hearn v. Kennell*, 433 Fed. App'x 483, 484 (7th Cir. 2011) (rejecting Muslim prisoner's equal protection claim—finding no intent to discriminate because Jews received kosher meat while he only received vegetarian fare instead of halal); *DeHart v. Horn*, 227 F.3d 47, 61 (3d Cir. 2000) (holding that an inmate "cannot obtain relief if the difference between the defendants' treatment of him and their treatment of [inmates of another religion] is 'reasonably related to legitimate penological interests.'"); *Holmes v. Conway*, No. 1:12-CV-4105-TWT-RGV, 2012 WL 6923588, \*4 (N.D. Ga. Dec. 21, 2012) (holding that a Muslim prisoner failed to state equal protection claim where Muslims did not receive halal meat but Jews received kosher food, because he failed to allege facts to show that Jewish inmates were not similarly situated regarding their ability to meet religious dietary requirements). *But cf. Turkman v. Ashcroft*, 915 F. Supp. 2d 314, 346 (E.D.N.Y. 2013) (holding that Muslim inmates, who alleged verbal abuse, prohibition on having Korans in their cells, and frequent interruptions of their prayers, raised plausible equal protections concerns).

289. See *supra* note 258 and accompanying text.

290. See, e.g., Eliezer Posner, *Are vegan restaurants automatically kosher?*, CHABAD, [http://www.chabad.org/library/article\\_cdo/aid/547235/jewish/Are-vegan-restaurants-kosher.htm](http://www.chabad.org/library/article_cdo/aid/547235/jewish/Are-vegan-restaurants-kosher.htm) (last visited Oct. 8, 2013) (discussing kosher restaurant certification requirements).

291. See, e.g., *Robinson v. U.S. Gov't*, No. 08-CV-0902 (NGG), 2008 WL 4283649, \*1 (E.D.N.Y. Sept. 16, 2008) (Jewish prisoner reported anti-Semitic verbal abuse during an assault by a prison guard breaking up Jewish services early.); *Bass v. Grottoli*, No. 94 Civ. 3220 (MGC), 1998

triggered by perceived special treatment for Jewish prisoners. One notorious New York case, where a Rabbi managed to organize a lavish six-hour bar mitzvah for a prisoner's son in a New York City jail gymnasium, created an uproar and raised questions about special privileges for Jews in prison.<sup>293</sup> But even less extreme examples of special treatment—the receipt of fresh chicken and grape juice for Friday night dinner—can be perceived as unfair and foster resentment.<sup>294</sup>

In light of the potential intrusion and entanglement as well as the concern regarding equal protection, we might question why prisons do not choose just to offer kosher food to anyone who requests it. Issues of cost and safety make this solution impossible. Offering kosher food to whoever asked for it would generate many requests from people who perceive it as more pure and of better quality but who possess no sincere religious

---

WL 677580, \*2–6 (S.D.N.Y. Sept. 29, 1998) (New York prison inmates alleged numerous anti-Semitic acts by guards.); Abraham Abramovsky & Jonathan I. Edelstein, *The Post-Sheinbein Israeli Extradition Law: Has It Solved the Extradition Problems Between Israel and the United States or Has It Merely Shifted the Battleground?*, 35 VAND. J. TRANSNAT'L L. 1, 36 (2002) (“Jews form a very small minority in most Western prison populations and are often at risk from anti-Semitic inmate gangs.”); Douglas Belkin, *Advocates: Jewish Community Shuns Its Inmates*, PALM BEACH POST, Aug. 2, 1998, at 1B (“‘Jail isn’t a good place for a Jew.’ . . . ‘On one side, you have 500 neo-Nazis; on the other side, you’ve got 500 Black Muslims; and in the middle, you’ve got three Jews scared to death.’”) (quoting the executive director of the Aleph Institute); Rodger Kamenetz, *Jews in Jail*, BELIEFNET, <http://www.beliefnet.com/Faiths/Judaism/2000/08/Jews-In-Jail.aspx?p=1> (last visited Oct. 8, 2013) (quoting Isaac M. Jaroslawicz, director of legal affairs for the Aleph Institute, testifying at a “Congressional committee in 1998, ‘Many Jews in state prisons are afraid to even announce their religion, for fear of the anti-Semitic attitude of wardens, guards, and other inmates. Jewish inmates in Arizona have been knifed and beaten, then placed in isolated segregation “for their own benefit” while the perpetrators roam free.’”); Mason Lerner, *Jews in Jail: The Story of Zev Isgur and One of the Strangest Jewish Communities You’ll Ever Read About*, JEWISH STUDENT PRESS SERV., <http://www.shmoozenet.com/jsps/stories/0998Mason.shtml> (last visited Oct. 8, 2013) (describing how Jews stuck together in prison and watched out for each other: “‘Ain’t much love for Jew boys in jail, I can promise you that.’”); Phillip Martin, *Jewish Inmate Seeks Segregation from Anti-Semitic Gangs*, NPR (Nov. 6, 2005, 12:00 AM), available at <http://www.npr.org/templates/story/story.php?storyId=4991738> (discussing white supremacy in prison). *But see* Shefler, *supra* note 263 (“None of the Jewish inmates interviewed at Green Haven say they have encountered anti-Semitism, and state prison authorities say hate groups are not tolerated.”).

292. Foster Kamer, *Pervy Rabbi Tricks Traif with Kosher Prison Meals*, VILLAGE VOICE BLOGS (Aug. 16, 2010, 10:15 AM), [http://blogs.villagevoice.com/runninscared/2010/08/pervy\\_rabbi\\_tri.php](http://blogs.villagevoice.com/runninscared/2010/08/pervy_rabbi_tri.php) (“[A] Rabbi housed on Rikers Island stopped eating not because he wasn’t being served Kosher meals, but because the meals weren’t certified by a Rabbi of his choice . . . thus reinforcing the stereotype of kvetching New York Jews.”).

293. *See* Rashbaum & Zielbauer, *supra* note 287.

294. *See, e.g., supra* note 287.

requirement.<sup>295</sup> Additionally, some prison administrators have experienced serious safety concerns with providing kosher diets.<sup>296</sup> In Florida, certain gang members learned to request kosher food to assure being sent to the same facility.<sup>297</sup> In Washington, a group of neo-Nazis declared themselves Jews to assure that they would be housed in the same place.<sup>298</sup>

Another potential solution—to provide kosher-for-Passover food and a Seder to anyone who could demonstrate that he observed the holiday before he was incarcerated—would be too limiting. The issue is sincere religious desire, not past practice.<sup>299</sup> If indeed prison is a penitentiary—a place to be penitent and learn from regret for past sin and offenses—then prison must be a place that allows, if not fosters, spiritual growth. A prisoner, who discovers meaning in his Jewish faith, should not be prohibited from expressing that faith for the first time in prison. Certainly RLUIPA will not allow past behavior to be the sole factor determining prisoner sincerity.<sup>300</sup>

Therefore, prison administrators are left in the uncomfortable and frankly impossible position of having to distinguish among prisoners, and risk intrusion into the prisoners' beliefs as well as imposing religious orthodoxy. The importance of this endeavor is increased by the intense meaning that religious observance—particularly observance of Passover, the holiday of freedom—represents to sincere prisoners.

## VII. CONCLUSION & SUGGESTIONS FOR FURTHER INQUIRY

Passover is a holiday replete with symbols of freedom. It enjoins celebrants to resist slavery, appreciate liberty, and foster a sense of empathy for the oppressed. If for no other reason than its message of freedom, the celebration of Passover is important to inmates and somewhat challenging for prison officials. In addition to the poignancy of prisoners' holiday celebration, many practical and legal questions arise. An examination of Passover celebration in prison reveals the surprisingly extensive religious rights of Jewish prisoners as well as the social and spiritual importance of the religious observance. Passover celebration allows prisoners to affirm

---

295. See, e.g., Cohn, *supra* note 263.

296. See, e.g., *supra* note 172 and accompanying text.

297. See *supra* note 172 and accompanying text.

298. See Cohn, *supra* note 263.

299. See *supra* notes 266–67 and accompanying text.

300. See *supra* text accompanying note 184.

their individual commitment to Judaism and their collective affiliation with all who are not free. Perhaps most importantly, it raises questions about the nature of freedom, and who or what constitutes the Pharaoh in the prisoners' lives. Poignantly and insightfully, the inmates look within their personal histories to find what has served as their oppressors—including bad choices, addictions, and deep-seated anger. Celebration of Passover also raises tough doctrinal issues of equal treatment and government entanglement in religion. What unites both the legal and the social inquiries is a respect for the prisoners' humanity and dignity.

Different religious traditions present their own unique challenges to the interpretation of RLUIPA, and the balancing of prisoners' and jailers' needs. The role of Halal food, and the observance of fasting on Ramadan and feasting at its conclusion appear with frequency in the case law applying RLUIPA. Evidence of anti-Muslim bias, issues of cost, and impositions of religious orthodoxy permeate these cases. An inquiry into the spiritual meaning for Muslim prisoners as well as the applicability of RLUIPA would add to this study. Ultimately both inquiries—the legal and the societal—must address how much religious freedom is desirable or attainable for those physically imprisoned.



[Vol. 41: 61, 2013]

*Once We Were Slaves, Now We Are Free*  
PEPPERDINE LAW REVIEW

\*\*\*