"THREE HOTS AND A COT AND A LOT OF TALK":[1] DISCUSSING FEDERAL RIGHTS-BASED AVENUES FOR PRISONER ACCESS TO VEGAN MEALS

By
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Vegan prisoners face obstacles in accessing meals congruent with their beliefs, but it may be possible to assert the right to vegan meals while incarcerated via a number of constitutional and statutory provisions. Focusing specifically on the federal legal landscape, this Article acts as a road map to those options. First, this Article discusses the scope of relevant religious free exercise jurisprudence—and its utility for prisoners who are vegan for religious reasons. Second, this Article explores the extent to which an equal protection approach may provide vegan prisoners with a viable route to securing appropriate meals. Third, this Article discusses possible application of the Eighth Amendment's "cruel and unusual punishment" provision to vegan prisoners who are denied the appropriate diet. Fourth, it gives an overview of the Prison Litigation Reform Act's impact on litigating these issues.

The objectives are threefold: to summarize the relevant jurisprudence, to highlight new legal developments, and to suggest creative legal theories addressing the needs of vegan prisoners. In doing so, the Article seeks to support lawyers confronting these issues and benefit vegan prisoners.

[1] SOCIAL DISTORTION, *Prison Bound*, *on* PRISON BOUND (Restless Records 1988).

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I. INTRODUCTION

Throughout the United States' penal system, prisoners have attempted—with varying degrees of success—to obtain access to vegan meals during their terms of incarceration.[2] While individual prisoner reasons for seeking a vegan diet vary, those reasons often include re-

[2] I recognize that 'vegan diet' is an imprecise term, if only because diets are the product of individual choices, and as such tend to be defined at an individual level. Some individuals who identify as maintaining a vegan diet see the practice as simply calling for the exclusion of flesh, eggs, and dairy products; others hold that a vegan diet must additionally exclude insect products, such as honey; still others understand vegan diets as also excluding refined sugar, because the refining process typically involves use of charred bone as a filtering agent. Recognizing that providing a monolithic definition of 'vegan diet' is, therefore, a futile exercise, for the purposes of this Article I largely use 'vegan' as referring to a diet that excludes flesh, eggs, and dairy products, which encompasses the minimum dietary choices of most vegans. This Article's analysis should, however, be useful regardless of whether an individual prisoner is seeking to adhere to a more exacting form of veganism, or less restrictive vegetarianism. Analysis of vegan prison life beyond diet, such as clothing, is beyond the present scope of this Article. Similarly, because the purpose of this Article is to address potential avenues for relief which could be invoked by prisoners attempting to secure access to a vegan diet, my focus is on those prisoners' veganism and need for a vegan diet as such, rather than specific approaches to veganism underlying those beliefs and needs. For a comprehensive argument that animal liberationist prisoners, specifically, could claim religious status due to their animal liberationist beliefs—with or without forming a 'Church of Animal Liberation,' see Bruce Friedrich, *The Church of Animal Liberation: Animal Rights as 'Religion' Under the Free Exercise* Clause, 21 ANIMAL L. 65, 65–119 (2014). Such analysis is beyond the scope of this Article, though Friedrich's piece is quite useful

ligious beliefs, ethical obligations, and health concerns.[3] In response, prison administrators typically deny prisoners access to vegan meals on the basis of security, efficiency, or financial concerns.[4] Additionally, prison administrators who do recognize certain exceptions to the standard prison diet may not believe a given prisoner's desire for vegan meals reaches an applicable exception's threshold.[5]

Though prisoners are far from having a blanket right to maintain a vegan diet, prisoners do have certain rights relevant to dietary choice and access. Prisoners have a right to a nutritionally sufficient and healthful diet.[6] Moreover, the religious practice of prisoners—potentially extending to diet—are afforded both constitutional and statutory protection.[7]

Recognizing that prisoners who desire to maintain vegan diets often have difficulty securing access to vegan meals, this Article seeks to outline the main avenues through which courts are likely to analyze whether a prisoner has a legal right to be provided with vegan meals. First, this Article will review the First Amendment analysis relevant to prisoners seeking vegan diets: examining factors which come into play when a prisoner seeks a vegan diet as part of their religious or spiritual practice. I then analyze the history of free exercise protections relevant to prisoners, both those of constitutional First Amendment jurisprudence, and statutory jurisprudence surrounding the Religious Freedom Restoration Act (RFRA) and the Religious Land Use and Institutionalized Persons Act (RLUIPA). In the next Section, I consider how the Fourteenth Amendment might assist prisoners denied access to vegan meals in mounting an equal protection challenge. Turning to Eighth Amendment jurisprudence, I examine—and ultimately dismiss as unlikely to succeed—arguments that denying a prisoner access to vegan meals rises to the level of cruel and unusual punishment. Having determined that the Eighth Amendment alone is unlikely to be successfully invoked by prisoners seeking vegan diets, I consider arguments that use the Eighth Amendment and Free Exercise Clauses to buttress and inform each other, concluding that such an approach might offer recourse to prisoners in certain situations. I

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in exploring issues at the intersection of veganism, animal liberation, and free exercise jurisprudence generally.

[3] F. PHILLIPS, VEGETARIAN NUTRITION 133 (2005) ("[M]otives for being vegetarian [or vegan] include, amongst others, ethical . . . issues, health concerns, . . . and philosophical teachings.").

[4] *See, e.g.*, Jones v. Hobbs, 864 F. Supp. 2d 808, 813 (E.D. Ark. 2012) ("The defendants contend that [honoring plaintiff's request for a vegan diet would] . . . [f]irst, not [prove] financially feasible . . . [and s]econd, . . . could implicate jail security.").

[5] For example, even if a prison administrator makes a practice of accommodating the dietary needs of prisoners who maintain kosher or halal diets, that administrator may not understand a vegan prisoner's needs as existing on a similar continuum.

[6] *See* Smith v. Sullivan, 553 F.2d 373, 380 (5th Cir. 1977) ("A well-balanced meal, containing sufficient nutritional value to preserve health, is all that is required.").

[7] Friedrich, *supra* note 2, at 70–88 (analyzing the Establishment Clause of the First Amendment and the judicial definition of the term 'religion').

close with a discussion of how the Prison Litigation Reform Act constrains the ability of prisoners to pursue claims under any of these approaches.

II. RELIGIOUS FREE EXERCISE ANALYSIS

While some prisoners seek access to vegan diets out of purely pragmatic concerns, such as personal health, many others ground their need for vegan meals in ethics, morality, or spirituality.[8] For some prisoners, their need to maintain a vegan diet is grounded in their religious beliefs—whether those beliefs are part of their religion's dogma or not.[9] Others situate their moral imperative to consume only vegan foods as a spiritual matter of conscience.[10] While these later vegan paradigms are distinct from each other, they share a common spiritual foundation that becomes apparent when they are contrasted with purely pragmatic reasons—such as political or personal health concerns—which might prompt other prisoners to seek access to vegan meals. Acknowledging that these three sorts of morally grounded veganism—religiously dogmatic, religiously idiosyncratic, and personally spiritual—will be analyzed differently by courts, any one of the three is likely to benefit from understanding how courts will approach these issues in general.[11] I begin by examining how courts are likely to address these morally based requests for vegan meals under the First Amendment.

A. Scope of the First Amendment

The First Amendment guards against the government taking action to either prescribe or proscribe religion: simultaneously barring religious establishment and shielding religious exercise.[12] These First

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[8] PHILLIPS, *supra* note 3, at 133 ("[M]otives for being vegetarian [or vegan] include, amongst others, ethical . . . issues, health concerns, . . . and philosophical teachings.").

[9] *See* Friedrich, *supra* note 2, at 89 ("Although there are many faith-based animal liberationists, the philosophy is not an essential element of any mainstream religion as interpreted by most of its practitioners . . . .").

[10] *See id.* at 90 ("The best-known argument for animal liberation goes like this: Other animals are made of flesh, blood, and bone, just like human beings are. They have the same . . . senses as humans and feel pain in the same way and to the same degree. For the same reason most human beings would not eat, wear, or experiment on other humans—because they are individuals with moral worth in their own right—so too with animals.").

[11] In the interest of clarity, I refer to those who hold any of these three morally grounded types of veganism as 'religious vegans,' and other vegans as 'non-religious vegans.' In doing so, I recognize that many of the former may not consider themselves or their veganism explicitly *religious*, while many of the latter may have deep religious convictions entirely apart from their veganism. My goal in using those terms in this context is simply to easily differentiate between vegans who will not be able to achieve protection for their veganism under the Free Exercise Clause, and the three categories of vegans who may be able to do so.

[12] *See* U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ."). Those protections have

Amendment religious safeguards are, by definition, implicated by the presence of a religious matter. Thus, the first task involved in applying the First Amendment to claims regarding vegan meals, is determining whether the petitioner's need for a vegan diet is honestly religious in nature.[13] If a petitioner's desire to adhere to a vegan diet does not originate from a sincere sentiment, which could arguably be situated within First Amendment jurisprudence's use of 'religious,' then further First Amendment analysis will be irrelevant to that claim.[14]

1. A Belief, Sincerely Held

In order to receive First Amendment protection, a petitioner must sincerely hold the religious belief they are seeking to shield from government interference.[15] In framing this issue as a question of fact, the court is largely concerned with guarding against pretextual or fraudulent claims.[16] In examining this issue of fact, courts do not question a belief's spiritual truth or normativity, but rather simply whether the petitioner actually holds that belief.[17] In evaluating a petitioner's

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been subsequently incorporated to apply to state and local governments. *See* Cantwell v. State of Conn., 310 U.S. 296, 303 (1940) ("The First Amendment declares that Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof. The Fourteenth Amendment has rendered the legislatures of the states as incompetent as Congress to enact such laws."); Everson v. Bd. of Educ. of Ewing Tp., 330 U.S. 1, 15–16 (1947) (applying the Establishment Clause to state governments).

[13] *See* Kay v. Bemis, 550 F.3d 1214, 1218 (10th Cir. 2007) ("[T]he first question in any free exercise claim [is] whether the plaintiff's beliefs are religious in nature . . . .").

[14] DeHart v. Horn, 227 F.3d 47, 52 (3d Cir. 2000) ("[I]f a prisoner's request for a particular diet is not the result of sincerely held religious beliefs, the First Amendment imposes no obligation on the prison to honor that request . . . . It is in this way that prisons are protected from random requests for special diets by inmates whose alleged dietary restrictions are not the result of their religious convictions but rather their secular predilections.").

[15] *See, e.g.*, *Bemis*, 550 F.3d at 1218 (explaining that in addition to the requirement that plaintiff's beliefs are religious in nature, those religious beliefs must also be sincerely held).

[16] Courts have also observed that pointing to a plaintiff's ability to insincerely profess some other religious affiliation in order to enjoy an associated benefit is an insufficient—and, indeed, insulting—remedy as compared with resolving whether the plaintiff's *actual* beliefs are sincerely held, religious, and ought to confer the sought benefit. *See, e.g.*, Ctr. for Inquiry, Inc. v. Marion Cir. Ct. Clerk, 758 F.3d 869, 875 (7th Cir. 2014) ("It is irrational to allow humanists to solemnize marriages if, and only if, they falsely declare that they are a 'religion . . . .' A marriage solemnized by a self-declared hypocrite would leave a sour taste in the couple's mouths; like many others, humanists want a ceremony that celebrates *their* values, not the 'values' of people who will say or do whatever it takes to jump through some statutory hoop.").

[17] *See* United States v. Seeger, 380 U.S. 163, 184–85 (1965) ("But we hasten to emphasize that while the 'truth' of a belief is not open to question, there remains the significant question whether it is 'truly held.' This is the threshold question of sincerity which must be resolved in every case. It is, of course, a question of fact . . . ."). Note, while some Justices have argued that even this inquiry into sincerity is constitutionally forbidden, their arguments have not carried the day. *See, e.g.*, United States v. Ballard, 322 U.S. 78, 92–95 (1944) (Jackson, J. dissenting) ("I find it difficult to reconcile this conclusion with our traditional religious freedoms . . . . I do not see how we can separate an issue as

sincerity, courts look to extrinsic evidence which might demonstrate sincerity, such as whether the petitioner has a history of behavior consistent with their professed belief, or evidence that secular self-interest—rather than spiritual concern—motivates the petitioner's belief.[18]

Evidence indicative of behavior consistent with professed religious beliefs includes a history of participating in rituals, learning about one's religion via study or mentorship,[19] and observing the religion's prescribed and proscribed conduct.[20] Conversely, failure to behave in a manner consistent with claimed beliefs cuts against the court finding a petitioner's belief is sincere.[21] Courts may be particularly attentive to evidence of nonobservance in the prison context, out of concern that "inmate[s] may adopt a religion merely to harass the prison staff with demands to accommodate his new faith."[22] Despite this heightened concern that the prison environment encourages pretextual beliefs, courts caution against treating nonobservance as dispositive. Religious demands come in varying degrees of severity, and religious followers in varying degrees of tenacity; that a particular religion's demands are more or less "unrealistic," or a particular adherent more or less "weak

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to what is believed from considerations as to what is believable . . . . Religious symbolism is even used by some with the same mental reservations one has in teaching of Santa Claus or Uncle Sam or Easter bunnies or dispassionate judges. It is hard in matters so mystical to say how literally one is bound to believe the doctrine he teaches . . . . [E]ven the most regular of [religious teachers] are sometimes accused of taking their orthodoxy with a grain of salt."); Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2805 (2014) (Ginsburg, J. dissenting) ("There is an overriding interest, I believe, in keeping the courts 'out of the business of evaluating the relative merits of differing religious claims,' or the sincerity with which an asserted religious belief is held. Indeed, approving some religious claims while deeming others unworthy of accommodation could be 'perceived as favoring one religion over another,' the very 'risk the Establishment Clause was designed to preclude.' The Court, I fear, has ventured into a minefield . . . .").

[18] *See* Int'l Soc. for Krishna Consciousness, Inc. v. Barber, 650 F.2d 430, 441 (2d Cir. 1981) ("Sincerity analysis . . . is most useful where extrinsic evidence is evaluated. For example, an adherent's belief would not be 'sincere' if he acts in a manner inconsistent with that belief, . . . or by fraudulently hiding secular interests behind religious doctrine . . . ."). Evaluating extrinsic evidence helps courts guard against dismissing "particularly fanciful or incredible belief[s]"—or, by the same analysis, non-majoritarian beliefs—out of hand. *Id.*

[19] *See, e.g.*, Howard v. United States, 864 F. Supp. 1019, 1021 (D. Colo. 1994) (accepting a prisoner's attendance at Satanic lectures, history of reading Satanic literature, personal adoption of the Nine Satanic Statements, and period of being mentored by a practicing Satanist as evidence supporting the prisoner's sincerity in his Satanic religious beliefs).

[20] *Cf.* Reed v. Faulkner, 842 F.2d 960, 963 (7th Cir. 1988) ("Evidence of nonobservance is relevant on the question of sincerity . . . .").

[21] *Id.* Note, however, that while failure to observe one's own religious obligations may implicate insincerity, study of other religions does not bear the same implication: "Attending other religious services does not prove the insincerity of a professed belief." *Howard*, 864 F. Supp. at 1024.

[22] *Reed*, 842 F.2d at 963; *see also* Cutter v. Wilkinson, 544 U.S. 709, 725 n.13 (2005) ("[P]rison officials may appropriately question whether a prisoner's religiosity, asserted as the basis for a requested accommodation, is authentic.").

of will" does not render the belief held by that adherent for that religion inherently any less sincere.[23] "While conduct inconsistent with an expressed religious belief may call into question the sincerity with which that belief is held, the gap between the ideal and the real is a universal feature of human experience."[24]

Courts may also look to evidence indicating whether or not the underlying purpose of a claimed belief is to procure some secular benefit.[25] Under this area of analysis, hasty induction into a religion just in time to acquire a hoped-for benefit may incline against a finding of sincerity,[26] as can forgoing affirmative opportunities to assert religious belief until it becomes apparent that doing so might achieve secular benefit.[27] Similarly, courts may find the timing of an asserted religious belief connected to a benefit suspect when it follows an earlier secular request for the same benefit.[28] Conversely, evidence of petitioners undergoing hardship in the name of religious belief bolsters a factual finding of sincerity: when a religious belief not only offers no secular benefit, but actually puts its holder to some degree of inconvenience, it becomes "difficult to make . . . an argument [that the belief is not sincere]."[29] Similarly, courts see evidence of sincerity when petitioners maintain their professed belief despite being able to secure a benefit by disclaiming their religious belief in favor of another that already enjoys the sought benefit.[30]

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[23] *See Reed*, 842 F.2d at 963 ("But the fact that a person does not adhere steadfastly to every tenet of his faith does not mark him as insincere. Some religions place unrealistic demands on their adherents; others cater especially to the weak of will."). In *Reed*, Judge Posner further notes that adopting a rule that treated nonobservance as dispositive would result in the "bizarre" outcome of having "prisons . . . undertake in effect to promote strict orthodoxy, by forfeiting the religious rights of any inmate observed backsliding, thus placing guards and fellow inmates in the role of religious police." *Id.*

[24] *See* Weir v. Nix, 890 F. Supp. 769, 776 (S.D. Iowa 1995) (finding that "periodic receipt of pornographic literature" did not invalidate the sincerity of a prisoner's professed fundamentalist Christian belief).

[25] *See*, *e.g.*, United States v. Quaintance, 608 F.3d 717, 723 (10th Cir. 2010) (finding defendant's professed beliefs were not sincerely held but rather to procure a secular benefit).

[26] *Id.* at 722–23 (rejecting the sincerity of a courier's beliefs as a member of the Church of Cognizance—which holds marijuana to be "deity and sacrament"—because he had been perfunctorily inducted the evening before a scheduled marijuana delivery).

[27] United States v. Messinger, 413 F.2d 927, 928–30, 932 (2d Cir. 1969) (rejecting sincerity of religious conscientious objector status, in part on the basis of plaintiff failing to indicate a conscientious objection on over two years' worth of Selective Service questionnaires).

[28] *See, e.g.*, *id.* at 928–29, 932 (noting plaintiff only sought conscientious objector status after he was unable to secure a second student draft deferral).

[29] Jolly v. Coughlin, 894 F. Supp. 734, 743 (S.D.N.Y. 1995) (noting that a Rastafarian prisoner being willing to remain in "medical keeplock for over three and a half years" rather than take a purified protein derivative tuberculous test was indicative of how sincerely he felt the test would violate his religious beliefs).

[30] *See, e.g.*, Koger v. Bryan, 523 F.3d 789, 797 (7th Cir. 2008) ("If Koger's [Ordo Templi Orientis] beliefs were not sincere, and if he wanted a non-meat diet for reasons other than his religious beliefs, he could have attempted to have his affiliation changed to one of the denominations whose members regularly received non-meat diets. The fact

In the context of religious veganism in prisons, the question courts will ask is not whether forgoing animal products is the correct thing to do (religiously or spiritually), but simply whether the prisoner seeking vegan meals honestly believes it to be so. In evaluating that sincerity, courts are likely to look to how long the prisoner has professed their religious beliefs vis-à-vis veganism, how consistently the prisoner has abstained from consuming animal products, whether the prisoner has engaged in any religious study or discussion regarding veganism, what personal benefit or difficulty the prisoner's veganism entails, and so forth. Given that a prisoner attempting to secure access to vegan meals likely is not already receiving vegan meals, arguments that sincerely held beliefs are not required to be perfectly actualized may be particularly appropriate.[31]

B. The Nature of Belief: Religious vs. Secular

In order to receive First Amendment protection under the Free Exercise Clause, a belief must not only be sincerely held, but also religious. As this plays out practically for vegans, there are three broad ways in which their commitment to not consuming animal products could be religiously-grounded: as the normative belief of an established religion or sect, as a non-mainstream belief that the vegan nonetheless connects to an established religion, or as a personal belief unconnected to an established religion.

1. Dogmatically Religious Vegan Beliefs

The scenarios which lend themselves most straightforwardly to a court finding a request for vegan meals is based in a sincerely held religious belief are those where the petitioner has historically adhered to an established religious community[32] whose standard dogma re-

that he did not, settling instead on a religion with which the prison officials were unfamiliar, indicates that Koger's beliefs, in addition to being religious in nature, were sincerely held.").

[31] *See, e.g.*, *Reed*, 842 F.2d at 963 (Judge Posner noting that—even in the potentially pretext-ridden context of incarceration—a prisoner "backsliding" and consuming meat in contravention of their religious belief cannot be treated as conclusive evidence of that religious belief being insincere).

[32] Whether an entire religion proper, a sect within a larger religion, or a smaller recognized sub-group.

quires—or at least prefers[33]—veganism.[34] The Supreme Court has long held the First Amendment bars the government from "prefer[ring] one religion over another,"[35] and the Supreme Court has explicitly extended that First Amendment understanding of religion to include not only the monotheistic religions well-represented in America, but other established religions, whether monotheistic, polytheistic, or non-theistic.[36]

Much as the scope of the First Amendment's treatment of 'religion' has grown to encompass non-monotheistic religions, so too has it included religious beliefs at odds with normative secular mores. An early attempt by the Court to reconcile First Amendment protection with generally applicable criminal prohibitions resolved the matter by es-

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[33] That a practice is religiously preferred rather than strictly mandatory does not place it beyond the protections of the free exercise clause; the First Amendment does not predicate religious protection on the relative spiritual seriousness of failing to live up to a particular religious duty. *See* Grayson v. Schuler, 666 F.3d 450, 454 (7th Cir. 2012) ("[O]ptional as distinct from mandatory religious observances aren't excluded [from free exercise clause protection]. . . . [A] religious believer who does more than he is strictly required to do is nevertheless exercising his religion. A Catholic who vows to obey the Rule of St. Benedict and therefore avoid 'the meat of four-footed animals' is performing a religious observance even though not a mandatory one.").

[34] For example, Members of the Minim Order are obligated to maintain a vegan diet as one of their religious vows. *See* CHARLES WARREN CURRIER, HISTORY OF RELIGIOUS ORDERS 270 (1898) ("The distinctive feature of the Order of the Minims is the fourth vow . . . [which] obliges them not only to abstain from meat, but also from eggs, butter, cheese, and everything prepared therewith . . . ."). Similarly, veganism is one of the Quan Yin Method's five precepts; non-vegans may not be initiated into the group and are advised to curtail their meditation until they become vegan. *See Spiritual Discovery—Quan Yin Method*, SUPREME MASTER CHING HAI INT'L ASSOC., http://www.godsdirectcontact.org/eng/quanyin.html [https://perma.cc/5DJB-FJV9] (accessed Apr. 9, 2017) (describing initiation as offering the ability to "come to know God" and noting the first of the five associated precepts—not "taking the life of sentient beings"—requires "strict adherence to a vegan diet"). While the Quan Yin Method's dietary requirements are described inconsistently as either vegetarian or vegan, in practice they seem to call for abstention from flesh, dairy, and eggs. *See id*. (describing the requirement as both "a lifetime commitment to the vegetarian diet," "strict adherence to a vegan diet," and "[n]o meat, fish, poultry, or eggs" in the same document); *Supreme Master Ching Hai International Association*, VEGEFESTUKLONDON, http://london.vegfest.co.uk/2013/supreme-master-ching-hai-international-association (accessed Apr. 9, 2017) ("[A] lifetime commitment to the vegan lifestyle is a necessary prerequisite for receiving initiation. . . . This guideline requires strict adherence to a vegan diet. No meat, dairy, fish, poultry or eggs (fertilized or unfertilized)."); Stephen Lemons, *Critics Claim Supreme Master Ching Hai's Followers' Restaurants Featuring Tasty Vegan Fare Front for an Exploitive Movement*, PHX. NEW TIMES (June 2, 2011), http://www.phoenixnewtimes.com/news/critics-claim-supreme-master-ching-hais-followers-restaurants-featuring-tasty-vegan-fare-front-for-an-exploitive-movement-6449095 [https://perma.cc/ERX4-84VC] (accessed Apr. 9, 2017) (describing the required diet as "no dairy, as well as no eggs, meat, poultry, or fish."). These mixed messages may be due in part to veganism being a relatively new mission of the method's founder: "After embracing veganism in 2008 . . . Ching Hai announced her new mission worldwide . . . . Today, interested parties must maintain a vegan diet for a minimum of two months before formally applying to be accepted to SMCHIA." Abigail Young, *Supreme Mystery*, VEGNEWS, Sept.–Oct. 2010 at 45–46.

[35] Everson v. Bd. of Educ. of Ewing Tp., 330 U.S. 1, 15 (1947).

[36] Torcaso v. Watkins, 367 U.S. 488, 495 n.11 (1961).

sentially declaring that beliefs "inimical to the peace, good order, and morals of society" were not *religious* at all, thus sidestepping (or, less generously, ignoring) the First Amendment problem entirely.[37] Modern First Amendment constitutional jurisprudence, however, embraces a more complex analysis, accepting that even potentially "abhorrent," illogical, inconsistent, unacceptable, or incomprehensible beliefs can be religious for First Amendment purposes,[38] and addressing the balance between those beliefs and contradictory laws by considering whether the law is religiously neutral and generally applicable, and applying the appropriate level of scrutiny.[39] Thus, petitioners who adhere to established religious groups whose dogma requires veganism should be well-positioned to convince the courts that their request for vegan meals is religious in nature. As long as the petitioner's adherence is sincere, rather than pretextual, this should be so—regardless of how rare the religious group in question may be, or how far from secular norms the religion's preference for veganism may be.

2. Idiosyncratically Religious Vegan Beliefs

Slightly more complex are those cases where a prisoner adheres to an established religion, and personally believes that particular religion requires a vegan diet, even though the religion's dogma does not generally require its members to be vegan. While reference to a religion's dogma presents an easy method of separating the religious from the irreligious, the First Amendment demands that courts undertake a more difficult and accurate inquiry into what constitutes religious belief.[40] The First Amendment does not limit its protections to the universally held beliefs of any particular religion: "[T]he guarantee of free exercise is not limited to beliefs which are shared by all of the members of a religious sect."[41] Indeed, *defining* religion to exclude idiosyn-

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[37] Davis v. Beason, 133 U.S. 333, 342 (1890) ("The term 'religion' has reference to one's views of his relations to his Creator, and to the obligations they impose of reverence for his being and character, and of obedience to his will. It is often confounded with the *cultus* or form of worship of a particular sect, but is distinguishable from the latter."). The religious beliefs being considered in *Davis v. Beason* were bigamy and polygamy, as practiced by the Church of Jesus Christ of Latter Day Saints during the late nineteenth century. *Id.* at 341.

[38] Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 531 (1993) ("The city does not argue that Santeria is not a 'religion' within the meaning of the First Amendment. Nor could it. Although the practice of animal sacrifice may seem abhorrent to some, 'religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection.'").

[39] *Id.* at 531–532 (citation omitted) ("[A] law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice. . . . A law failing to satisfy these requirements must be justified by a compelling governmental interest and must be narrowly tailored to advance that interest.").

[40] Shakur v. Schriro, 514 F.3d 878, 885 (9th Cir. 2008).

[41] Thomas v. Rev. Bd. of Ind. Emp't Sec. Div., 450 U.S. 1425, 1431 (1981). This precept largely renders irrelevant earlier judicial approaches which looked to how central a religious belief or practice was to its holder's religion. The issue is not how central a

cratic interpretations may be constitutionally problematic;[42] the very act of delineating one religious understanding as valid and another as invalid implies the establishment of religion.[43] The court's refusal to limit First Amendment protections to religious dogma indicates that a petitioner can legitimately believe they have a religious imperative to maintain a vegan diet, even if their religion does not generally require—or even prefer—veganism.[44] Under this analysis, for example, that none of the three Religions of The Book—Judaism, Christianity, and Islam—advocate veganism as a matter of dogma, would not prevent an individual Jew, Christian, or Muslim from holding a religious belief that they should be vegan, which in turn would be cognizable as religious in First Amendment terms.[45] As with prisoners adhering to

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belief is to a *religion*'s dogma, but rather how sincerely the individual *person* holding that belief understands it to be religiously relevant. "'[I]t is not within the judicial ken to question the centrality of particular beliefs or practices to a faith, or the validity of particular litigants' interpretations of those creeds.' '[I]t is no more appropriate for judges to determine the "centrality" of religious beliefs before applying a "compelling interest" test in the free exercise field, than it would be for them to determine the "importance" of ideas before applying the "compelling interest" test in the free speech field.' . . . Given the Supreme Court's disapproval of the centrality test, we are satisfied that the sincerity test . . . determines whether the Free Exercise Clause applies." *Shakur*, 514 F.3d at 884–85 (citations omitted) (declining to continue use of the centrality test, in light of Hernandez v. C.I.R., 490 U.S. 680 (1989), and Emp't Div., Dep't of Hum. Res. of Or. v. Smith, 494 U.S. 872 (1990)).

42 "The word 'religion' is not defined in the Constitution." Reynolds v. United States, 98 U.S. 145, 162 (1878). In *Reynolds*, the Court considered an appeal from a member of the Church of Jesus Christ of Latter Day Saints, who argued that his polygamy conviction should be overturned because "he believed it to be his religious duty." *Id.* at 153. Note, while the *Reynolds* court declined to overturn the defendant's conviction, it did accept as religious in nature the defendant's belief that he had a duty to practice polygamy. *Id.* at 161–62. Rather than rejecting Reynolds's argument for want of religious belief, the court upheld his conviction on grounds analogous to the modern court's holding that the First Amendment "does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).'" *Smith*, 494 U.S. at 878. *Cf. Reynolds*, 98 U.S. at 166–67 ("[The ban on polygamy] is constitutional and valid as prescribing a rule of action for all those residing in the Territories, and in places over which the United States have exclusive control. . . . Can a man excuse his practices to the contrary because of his religious belief? To permit this would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself. Government could exist only in name under such circumstances.").

43 "An analysis of the First Amendment to the Constitution of the United States indicates that it is logically impossible to define 'religion' . . . . An attempt to define religion, even for purposes of statutory construction, violates the 'establishment' clause since it necessarily delineates and, therefore, limits what can and cannot be a religion. The judicial system has struggled with this philosophic problem throughout the years in a variety of contexts." I.R.S. Gen. Couns. Mem. 36,993 (Feb. 3, 1977). *See also Grayson*, 666 F.3d at 453 ("Heretics have religious rights.").

44 *Grayson*, 666 F.3d at 453.

45 A Jewish prisoner might, for example, believe that all creatures in the Garden of Eden were vegan, deriving a religious obligation to maintain a vegan diet so as to more closely emulate a desirable Edenic state of being. *See Genesis* 1:29–31 ("Behold, I have given [humans] every herb yielding seed . . . [and] fruit of a tree yielding seed—to you it

religions that require veganism as a matter of dogma, prisoners in this situation—those who understand their religion as including an imperative to be vegan, despite that not being part of the religion's dogma—would need to satisfy the court that their belief was sincere.[46]

3. Religious Vegan Beliefs Beyond Traditional Religions

Beyond cases where a petitioner's religious denomination dogmatically calls for veganism, or where a petitioner adheres to an established religion which they idiosyncratically understand as calling for veganism, lie cases where a petitioner subscribes to a belief system which calls for veganism, but is not itself a commonly recognized religion. Here, the question of when a belief is—for First Amendment purposes—*religious* becomes particularly pointed. While the Supreme Court has not specifically addressed this issue vis-à-vis vegan beliefs, it has evaluated the line between religious and non-religious ethical beliefs in other contexts, and those cases—particularly *United States v. Seeger*, *Welsh v. United States*, and their progeny—provide useful

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shall be for food . . . and to every thing . . . wherein there is a living soul, every green herb [shall be] for food."); *see also Isaiah* 11:6–8 (describing the messianic age as including predators eating plants and mingling peacefully with prey: "a cow and a bear shall graze together . . . and a lion, like cattle, shall eat straw."). A Christian prisoner might understand Jesus's imperative to care for "the least" as inclusive of animals—believing that using them as foodstuff is ungodly. *See* JENNIFER HORSMAN & JAMIE FLOWERS, PLEASE DON'T EAT THE ANIMALS 92 (2007) (quoting Rev. Andrew Linzey) ("Animals are God's creatures, not human property, nor utilities, nor resources, nor commodities, but precious beings in God's sight. . . . The Cross of Christ is God's absolute identification with the weak, the powerless, and the vulnerable, but most of all with unprotected, undefended, innocent suffering."); *see generally Matthew* 25:31–46 (the parable of the sheep and the goats, in which Jesus divides humanity between "the righteous" and the rest—the righteous being those who have cared for the impoverished, needy, alienated, and oppressed, "the least"). A Muslim prisoner could have the religious belief that, "[g]iven the current status of the planet and practices in the animal agriculture industry, and the numerous relevant verses in the Quran and available Hadiths, the Sunnah [is] to give up all animal products and go vegan." Mohamed Ghilan, *The Halal Bubble and the Sunnah Imperative to Go Vegan*, AL-MADINA INST. (May 16, 2016), http://almadinainstitute.org/blog/vegan-sunnah/ [https://perma.cc/6GPN-ARE4] (accessed Apr. 9, 2017). All this, despite each of the three Religions of The Book having precepts which clearly allow for—or even sanctify—non-vegan activity. *See, e.g.*, *Genesis* 9:3 (divine leave to consume animals following the flood); *Leviticus* 11 and *Deuteronomy* 14 (setting forth kashrut law as including meat and animal products among permissible foods); *Luke* 24:42–43 (describing Jesus eating fish); *An-Nahl* 16:115 (describing halal food as including appropriate meats and animal products). *See generally*, Friedrich *supra* note 2, at 94–95 (providing a range of sources delving into the various religions' positions on veganism).

[46] This analysis holds, whether the prisoner's belief stems from an idiosyncratic understanding rooted in religious study—as outlined in the examples above—or from an apparent ignorance of religious orthodoxy. *See, e.g.*, Colvin v. Caruso, 605 F.3d 282, 297–98 (6th Cir. 2010) (rejecting state's position that prisoner's request for kosher meals was deniable due to the prisoner exhibiting insufficient knowledge of "'Judaism and its dietary requirements.' . . . [T]he touchstone for determining whether a religious belief is entitled to free-exercise protection is an assessment of 'whether the beliefs professed . . . are sincerely held.'").

guidance as we consider similar questions of when an ethical belief in veganism may qualify as religious.[47]

In *Seeger*, the Court determined that conscientious objectors could qualify for the Selective Service Act's religious belief exemption, despite the conscientious objectors in question describing their beliefs as being grounded, variously, in the philosophy of "Plato, Aristotle, and Spinoza,"[48] the "sum and essence of . . . attitudes to the fundamental problems of human existence,"[49] or a "moral code . . . superior to his obligation to the state" that would be violated by taking "human life."[50] The unifying factor which seems to frame each of these conscientious objections as religious in nature is that their holder allowed that those beliefs had some spiritual dimension: "Godness;"[51] "the consciousness of some power manifest in nature which helps man in the ordering of his life in harmony with its demand;"[52] belief in the divine only in the "remotest sense."[53] Ruling in favor of the conscientious objectors, the *Seeger* Court acknowledged "the beliefs of different individuals who will articulate them in a multitude of ways," describing the key issue as "whether the beliefs professed by a registrant are sincerely held and whether they are, in his own scheme of things, relig-

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[47] *See generally Seeger*, 380 U.S. at 853–54; Welsh v. United States, 398 U.S. 333 (1970). Though both *Seeger* and *Welsh* ostensibly focus on statutory interpretation of the Selective Service Act, in practice they have been applied as part of First Amendment constitutional jurisprudence. *See* Malnak v. Yogi, 592 F.2d 197, 204–205 (3d Cir. 1979) ("Although *Seeger* and *Welsh* turned on statutory interpretation, and despite some indication that the Court has, to some degree, drawn back from the broadest possible reading of these cases, they remain constitutionally significant. . . . The Court's willingness to depart so drastically from the plain language of [the Selective Service] statute in order to produce an expansive definition almost certainly unintended by Congress, implies, as Justice Harlan observed in *Welsh*, a 'distortion to avert an inevitable constitutional collision.' Most importantly, the constitutional values prompting such a statutory construction can only be taken to suggest a broad definition of religion.").

[48] Daniel Andrew Seeger himself described his conscientious objection to military service as being part and parcel of his "ethical belief in intellectual and moral integrity," "[citing] such personages as Plato, Aristotle, and Spinoza [in] support" of the proposition. *Seeger*, 380 U.S. at 166.

[49] *Id.* at 168 (Arno Sascha Jakobson, whose case was also decided in *Seeger*, describing "defined religion as the 'sum and essence of one's basic attitudes to the fundamental problems of human existence.'").

[50] *Id.* (Forest Britt Peter, the third conscientious objector considered in *Seeger*, attributing "the source of his conviction . . . to reading and meditation 'in our democratic American culture, with its values derived from the western religious and philosophical tradition.'").

[51] *Id.* (describing Godness as "the Ultimate Cause for the fact of the Being of the Universe," Jackobson accepted that people could develop relationships with Godness "vertically, towards Godness directly" or "horizontally, towards Godness through Mankind and the World," preferring in his case to develop his relationship with Godness in the later fashion).

[52] *Id.* at 169 (noting that Peter borrowed this language from Reverend John Haynes Holmes, allowing that "you could call that a belief in the Supreme Being or God. Those just do not happen to be the words I use.").

[53] *Id.* at 166 (quoting Seeger's description of his ethical beliefs as "without belief in God, except in the remotest sense.").

ious."[54] The *Seeger* test then, focuses courts on two questions: first whether a belief is "sincere and meaningful,"[55] and second whether the belief "occupies in the life of its possessor a place parallel to that fitted by the God of" more clearly qualifying religions.[56] Five years later, in *Welsh*, the Supreme Court elaborated on the *Seeger* test's second element, noting: "[T]he central consideration in determining whether the registrant's beliefs are religious is whether these beliefs play the role of a religion and function as a religion in the registrant's life. . . . [T]hese sincere and meaningful beliefs . . . need not be confined in either source or content to traditional or parochial concepts of religion."[57] Significantly, in *Welsh* a plurality held that a person can disclaim not just specific religions, but "conventional" religion in general, and still be 'religious' for First Amendment purposes.[58] In the *Welsh* plurality's treatment, a belief system can be religious even if it lacks a belief in divinity, as long as that system of belief occupies "in the life of that individual" the position of "a Supreme Being or a Supreme Reality—a God," and is "held with the strength of traditional religious convictions."[59]

Seeger and *Welsh*, however, should not be read as allowing *all* sincerely held philosophical or ethical paradigms to qualify for First Amendment religious protection.[60] The scope of First Amendment religiosity is not unbounded. As the Court noted in 1972's *Yoder*, First Amendment religiousness does not extend to "a way of life . . . if it is based in purely secular considerations."[61] Rather, "to have the protection of the Religion Clauses, the claims must be rooted in religious belief."[62] While these statements at first glance seem tautological—if religious belief, then religious protection, else secular—they actually refine jurisprudence surrounding the First Amendment definition of

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[54] *Id.* at 184–85.

[55] *Id.* at 176. See Section II.A.i for a discussion of how courts interrogate religious sincerity.

[56] *Id*.

[57] *Welsh*, 398 U.S. at 339 (1970).

[58] *Id.* at 341–42. Elliot Ashton Welsh II had edited his conscientious objector form, crossing out "my religious training and" causing the form to read: "'I am, by reason of my religious training and belief, conscientiously opposed to participation in war in any form.'" *Id.* at 336–37. The plurality in *Welsh* declined to invalidate the religiosity of his views, despite them being "undeniably based in part on his perception of world politics." *Id.* at 342.

[59] *Id.* at 340. Read against *Seeger*, this holding suggests that First Amendment religiosity requires more than a one-off belief: religion in this sense entails a certain degree of pervasiveness in the life of its holder, in order to "occup[y] in the life of its possessor a place parallel to that fitted by the God of" traditional religions. *Seeger*, 380 U.S. at 176.

[60] *See* Wisconsin v. Yoder, 406 U.S. 205, 215 (1972) ("A way of life, however virtuous and admirable, may not be interposed as a barrier to reasonable state regulation of education if it is based on purely secular considerations . . . .").

[61] *Id.*

[62] *Id.* The *Yoder* Court immediately pointed to *Welsh*, by way of elaborating that determining what constituted "religious" belief was itself "a most delicate question." *Id.*

religion. The key lies in the *Yoder* Court's observation that in order to receive protection under the First Amendment's Religious Clauses, a belief cannot be "based in purely secular considerations."[63] Rather, harkening back to the plaintiffs in *Seeger* and *Welsh*, a qualifying belief must be rooted, at least in part, in the spiritual—however unorthodox.[64] Thus, a non-religious vegan petitioner seeking a vegan diet for purely pragmatic (e.g., 'I feel more energetic and healthy when I eat vegan'), political (e.g., 'I object to subsidies received by animal agriculture'), or secularly ethical reasons (e.g., 'eating animals causes more pain than it prevents') will not be well positioned to bring a First Amendment claim in support of their sought diet.

4. Lower Court Applications of Seeger *and* Welsh

As the controlling Supreme Court decisions regarding what constitutes First Amendment religiosity, *Seeger* and *Welsh* have been applied in various ways by lower courts. Some federal circuits hew closely to *Seeger*/*Welsh*, accepting that the religious nature of a belief can be subjective—existing in the believer's "own scheme of things"—and focusing simply on whether that belief is sincerely held and sufficiently pervasive in the believer's life.[65] Others have adopted tests which inject into their inquiry a greater degree of comparison with belief systems external to the believer.[66]

The Second and Fourth Circuits' rulings fall solidly within the bounds set by *Seeger*/*Welsh*. The Second Circuit has defined 'religion' as including "the feelings, acts, and experiences of individual men in their solitude, so far as they apprehend themselves to stand in relation to whatever they may consider divine."[67] The Second Circuit rejects judicial inquiry into the religious validity of idiosyncratic beliefs held by prisoners, pointing to *Seeger* for the proposition that "the proper inquiry [is] always whether [the prisoner]'s belief [is] sincerely held and '*in his own scheme of things*, religious.'"[68] For its part, the Fourth Circuit follows a similar classic *Seeger*/*Welsh*/*Yoder* line of reasoning, asking whether beliefs are sincerely held and religious in nature, as opposed to being a secular way of life.[69] In doing so, the Fourth Circuit

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[63] *Yoder*, 406 U.S. at 215.

[64] *See Ballard*, 322 U.S. at 86–87 ("'The law knows no heresy, and is committed to the support of no dogma, the establishment of no sect' . . . . *Men may believe what they cannot prove*. They may not be put to the proof of their religious doctrines or beliefs. Religious experiences which are as real as life to some may be incomprehensible to others. Yet the fact that they may be beyond the ken of mortals does not mean that they can be made suspect before the law.") (emphasis added).The *Ballard* Court's reasoning implies that one of the characteristics of religious beliefs is involvement of a spiritual element which is separate from the physically provable realm.

[65] *Seeger*, 380 U.S. at 184–85.

[66] Friedman v. S. Cal. Permanente Med. Grp., 102 Cal. App. 4th 39, 47–48 (2002).

[67] United States v. Sun Myung Moon, 718 F.2d 1210, 1227 (2d Cir. 1983).

[68] Ford v. McGinnis, 352 F.3d 582, 589 (2d Cir. 2003) (emphasis in original). The *Ford* decision was written by then-Judge (now Justice) Sotomayor.

[69] Moore-King v. Cty. of Chesterfield, Va., 708 F.3d 560, 571 (4th Cir. 2013).

explicitly does not require beliefs to be theistic, logical, or externally comprehendible, but simply requires they reach the threshold set forth in *Seeger/Welsh/Yoder*: that they "occupy a place in . . . life 'parallel to that filled by the orthodox belief in God.'"[70] Similarly, while the Eighth Circuit is careful to note that "First Amendment religious protection is not extended to 'so-called religions which tend to mock established institutions and are obviously shams and absurdities and whose members are patently devoid of religious sincerity,'"[71] it clearly rejects the notion that religion need be "acceptable, logical, consistent, or comprehensible to others," or that religious and secular beliefs cannot comingle.[72]

Following the subjective-belief track of *Seeger/Welsh*, the Eleventh Circuit "question[s] whether a plaintiff could ever plead or proffer 'objective' facts that his sincerely held belief is religious in nature."[73] In doing so, the Eleventh Circuit reiterates the Supreme Court's exhortation in *Thomas v. Review Board of the Indiana Employment Security Division* that "resolution of whether a particular belief is religious in nature 'is not to turn upon a judicial perception of the particular belief or practice in question; religious beliefs need not be acceptable, logical, consistent, or comprehensible to others to merit First Amendment Protection.'"[74] From the *Thomas* precedent, the Eleventh Circuit determines, "it is difficult to gauge the objective reasonableness of a belief that need not be acceptable, logical, consistent, or comprehensible to others."[75]

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[70] *Id.* (citing *Seeger*, 380 U.S. at 166).

[71] Wiggins v. Sargent, 753 F.2d 663, 666 (8th Cir. 1985).

[72] *Id.* While the Eighth Circuit has *acknowledged* the *Malnak/Africa* factors, it characterizes *Africa* as concerning a prisoner who "simply believed that everything he did had religious significance," and has rejected application of *Malnak/Africa* as "a rigid 'test' for defining a religion." *Id.* at 666 n.4; Love v. Reed, 216 F.3d 682, 687 (8th Cir. 2000) (noting that an inmate who had developed an idiosyncratic set of beliefs rooted in his personal "evolving" understanding of the Christian Old Testament was engaged in the practice of religion "*even* applying the *Africa* standards as a 'test'") (emphasis added).

[73] Watts v. Fla. Int'l. Univ., 495 F.3d 1289, 1296 (11th Cir. 2007).

[74] *Id.*

[75] *Id.* In *Watts*, the Eleventh Circuit entirely rejects *any* objective weighing of religious belief, suggesting that the key question is not whether plaintiffs sincerely hold religious beliefs, but rather that plaintiffs sincerely hold beliefs which they *also* sincerely believe to be religious. *Watts*, 495 F.3d at 1297–98 ("The honest (sincere) conviction that counts is that of the plaintiff, not that of the court. . . . [Watts] need not plead now, or present later, 'objective' evidence that his belief is of the type that a judge would generally consider to be religious in nature. Watts is not on the hook for our inability to understand his religious system. . . . Simply put, judges and juries must not inquire into the validity of a religious doctrine, and the task of courts is to examine whether a plaintiff's beliefs are, 'in his own scheme of things, religious.' The question is not whether the plaintiff's beliefs are religious in the objective, reasonable person's view, but whether they are religious in the subjective, personal view of the plaintiff."). Note, however, the Eleventh Circuit does not seem averse to arguments and evidence regarding a plaintiff's subjective sincerity that a belief is religious (similar to those regularly used by courts in resolving whether a belief is sincerely held)—the court simply relegates those argu-

The Seventh Circuit has followed *Seeger/Welsh* to the extent of holding that atheism can count as religious for First Amendment purposes. In *Kaufman v. McCaughtry*, the Seventh Circuit considered a challenge brought by a prisoner attempting to form an atheist study group, parallel to existing religious prisoner study groups.[76] Honing in on the prisoner's atheism, the Seventh Circuit acknowledged that the outer limit of First Amendment religiosity stops short of purely secular ways of life, but found that atheism *could* be religious when it dealt with "issues of 'ultimate concern' . . . [occupying] a 'place parallel to that filled by . . . God in traditionally religious persons."[77] Thus, following the line of reasoning in *Seeger* and especially the *Welsh* plurality, the Seventh Circuit arrives at a place where beliefs that ultimately reject any possibility of the divine—and indeed, beliefs that themselves reject religious labeling[78]—can themselves be protected as religious for First Amendment purposes. The Fifth Circuit inclines in a similar direction, having overturned and remanded lower court use of a test which would have made belief in the divine a prerequisite for religious status.[79]

A distinguishable line of cases holds sway in other circuits, whose decisions have—to varying degrees—adopted a "'definition by analogy' approach."[80] Initially framed by Judge Arlin Adams's concurrence to the Third Circuit's 1979 *Malnak v. Yogi* opinion,[81] and adopted by the Third Circuit two years later in *Africa v. Pennsylvania*,[82] this line of jurisprudence uses three factors to determine whether a given set of beliefs is religious by asking whether those beliefs are sufficiently analogous to the "models" of "familiar religions."[83] The first factor considered by *Malnak/Africa* is to what extent the belief set in question "addresses fundamental and ultimate questions having to do with deep

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ments to the appropriate phase of litigation. *See id.* at 1299 (rejecting the need for such arguments at the pleading stage); *see also supra* notes 18–29 and accompanying text (discussing methods for evaluating whether a belief is sincerely held).

[76] Kaufman v. McCaughtry, 419 F.3d 678, 681 (7th Cir. 2005).

[77] *Id.* The Seventh Circuit seems to have reached this conclusion in part as a reflection of Establishment Clause jurisprudence, which "understands the [First Amendment's] reference to religion to include . . . 'nonreligion.'" *Id.* at 682.

[78] *See Ctr. for Inquiry, Inc.*, 758 F.3d at 873–75 (holding that secular humanism is entitled to First Amendment protection, despite the secular humanist "plaintiffs' own view [that] humanism is not a religion").

[79] Theriault v. Silber, 547 F.2d 1279, 1281 (5th Cir. 1977). The lower court had imported a test from *United States v. Kuch*, heard about a decade prior in the District Court for the District of Columbia. *See* United States v. Kuch, 288 F. Supp. 439, 444 (D.D.C 1968) ("What is lacking in the proofs received as to the Neo-American Church is any solid evidence of a belief in a supreme being, a religious discipline, a ritual, or tenets to guide one's daily existence.").

[80] Africa v. Com. of Pa., 662 F.2d 1025, 1032 (3d Cir. 1981). The *Africa* decision frames this jurisprudence as "at once a refinement and an extension of the 'parallel'?belief course first charged by the Supreme Court in *Seeger*." *Id.*

[81] Malnak v. Yogi, 592 F.2d 197, 200 (3d Cir. 1979).

[82] *Africa*, 662 F.2d at 1031.

[83] *Malnak*, 592 F.2d at 207.

and imponderable matters," such as "life and death, right and wrong, and good and evil[—] . . . 'underlying theories of man's nature or his place in the Universe'."[84] Second, *Malnak/Africa* jurisprudence examines whether the beliefs are "comprehensive in nature . . . [consisting] of a belief-system as opposed to an isolated teaching."[85] The final *Malnak/Africa* factor looks to "the presence of certain formal and external signs" by which "a religion can often be recognized."[86] While none of the *Malnak/Africa* factors are individually dispositive,[87] taken as a whole they raise the bar for First Amendment religiosity. Under *Malnak/Africa* the question is not simply whether a set of beliefs occupies religious ground in its holder's 'own scheme of things'; rather, *Malnak/Africa* encourages inquiry into how much the beliefs strike the court as looking like 'familiar religions.'[88]

In finding that a statue of Quetzalcoatl erected by the city of San Jose did not have the effect of advancing religion,[89] the Ninth Circuit explicitly applied *Malnak/Africa*'s three factors, finding that 'New Age' was not cognizable as a religion in First Amendment terms.[90] Specifically, the Ninth Circuit found that the version of New Age belief offered by the case's plaintiffs lacked specific religious texts and rituals, had no particular object of worship, did not have an organization corresponding to its belief, and did not even suggest that "anyone give up the religious beliefs he or she already holds. In other words, anyone's in and 'anything goes.'"[91] Similarly, in rejecting a claim from the "founder and Reverend of the Church of Marijuana" that federal drug

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[84] *Africa*, 662 F.2d at 1032–33.

[85] *Id.* at 1032. In *Africa*, Frank Africa—an incarcerated member of the anarcho-primitivist MOVE organization—argued that MOVE's teaching that members must consume only raw foods constituted a protected religious belief. *Id.* at 1025. In finding that MOVE's "philosophical naturalism" was not sufficiently comprehensive to be religious, the *Africa* Court specifically compared MOVE to vegetarianism, which it argued "would [also] not qualify as [a religion] under the first amendment." *Id.* at 1035.

[86] *Id.* at 1032.

[87] "Not every tenet of an established theology need focus upon such elemental matters [as fundamental or ultimate questions], of course . . . ." *Id.* at 1033; "When . . . theories are combined into a comprehensive belief system, however, the result may well become such a 'ruling science' . . . ." *Malnak*, 592 F.2d at 209; "Of course, a religion may exist without any of these [external] signs, so they are not determinative, at least by their absence . . . ." *Id.* at 209.

[88] *Africa*, 662 F.2d at 1031.

[89] Alvarado v. City of San Jose, 94 F.3d 1223, 1225, 1232 (9th Cir. 1996).

[90] *Id.* at 1230.

[91] *Id.* The plaintiffs in *Alvarado* were not themselves members of a New Age faith, but rather entered several "New Age and Mormon writings [into evidence] to support their contention that belief in the symbol is current and active . . . ." *Id.* at 1227. The opinion, therefore, is more useful as a demonstration of the Ninth Circuit's use of *Malnak/Africa*, than an actual holding that New Age beliefs *cannot* be religious. Certainly at least some proponents of New Age spiritual practices can point to texts, organizations, worship objects, and sharply—sometimes bitterly argued—exclusive beliefs, of the sort the *Alvarado* Court sought. *The New Age Movement*, MELTON'S ENCYCLOPEDIA OF AMERICAN RELIGIONS 754 (8th ed. 2009) (noting that, while the New Age movement itself is generally loosely structured, there are some "highly structured and even au-

laws impermissibly burdened his religion,[92] the Tenth Circuit upheld the lower court's use of a five-factor test "for establishing the religious nature of his beliefs."[93] These non-dispositive factors—explicitly influenced by *Malnak/Africa*[94]—are:

(1) "Ultimate Ideas," a rephrasing of *Africa*'s "fundamental and ultimate questions";[95]
(2) "Metaphysical Beliefs," concerning "a reality which transcends the physical and immediately apparent world";[96]
(3) "[A] Moral or Ethical System," prescribing proper behavior and proscribing improper behavior;[97]
(4) "Comprehensiveness of Beliefs," functioning as *Malnak/Africa*'s similarly-named factor;[98]
(5) "Accoutrements of Religion," which essentially builds on *Malnak/Africa*'s search for "formal and external signs" by specifying ten categories of "external signs" which "may indicate that a particular set of beliefs is 'religious.'"[99]

Whether in a circuit that adheres closely to *Seeger/Welsh* or one that adopts a test along the lines of *Malnak/Africa*,[100] religiously vegan prisoners seeking to engage in religious expression by having

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thoritarian groups" that stress the importance of certain practices or beliefs over others).

92 United States v. Meyers, 95 F.3d 1475, 1479 (10th Cir. 1996). David Meyers framed possession, growth, and distribution of marijuana as a religious duty within the Church of Marijuana. *Id.*

93 *Id.* at 1482–83.

94 *Id.* at 1482 n.2.

95 *Id.* at 1483 (citing *Africa*, 662 F.2d at 1032).

96 *Id.* Note, I read this factor as also implicated by *Seeger/Welsh/Yoder* jurisprudence. *See supra* notes 59–64 and accompanying text (arguing that scope of First Amendment religiosity requires the presence of some non-secular considerations).

97 *Id.*

98 *Id.* (citing *Africa*, 662 F.2d at 1035).

99 *Id.*; *Africa*, 662 F.2d at 1036. The ten categories of external signs the *Meyers* court looks to are: (1) having a specific founder or key influential figure; (2) embracing important texts—whether those are kept in writing or transmitted orally; (3) designating places for believers to gather; (4) elevating members of the religion who act as "keepers of knowledge"; (5) requiring ceremony and ritual; (6) maintaining a hierarchical structure; (7) marking holidays; (8) imposing dietary requirements and restrictions; (9) requiring believers to adhere to certain appearance standards; and (10) seeking to convert non-believers or otherwise spread the religion. *Meyers*, 95 F.3d at 1483–84.

100 Whether a Circuit hews towards the *Seeger/Welsh* 'place parallel' treatment of religion or the *Malnak/Africa* definition-by-analogy approach is not always clear. Beliefs that qualify as religious under *Malnak/Africa* are almost certain to pass the *Seeger/Welsh* threshold as well; beliefs that fail to qualify as religious under *Seeger/Welsh* are all but certain to fail under *Malnak/Africa*. As a result, courts are often able to dispose of the matter simply by noting that a given belief is protected (or unprotected) under either approach. For example, the District of Columbia Circuit points to *Africa* in noting the "dogma, services and ceremonies of the Black Hebrews . . . are, in form at least, characteristic of many well-established religions." United States v. Lemon, 723 F.2d 922, 938 n.48 (D.C. Cir. 1983). In doing so, the court implies that *Malnak/Africa*'s third factor can be sufficient to show religiosity, but stops short of suggesting those external and formal signifiers are necessary.

access to vegan meals will need to establish the religious nature of their belief. Clearing this bar will likely be least difficult for prisoners whose veganism is dogmatically or idiosyncratically religious. With their beliefs clearly connected to the sorts of established religions *Malnak* might term 'familiar,' these prisoners' beliefs already more than meet the parallel-to or analogous-with standards of *Seeger/Welsh* and *Malnak/Africa*, respectively.[101] As a practical matter, prisoners holding personally spiritual vegan beliefs are likely to have more difficulty establishing the religiosity of their beliefs. Depending on the particulars of these prisoners' faith, pure *Seeger/Welsh* jurisdictions may be more welcoming: rejecting the divine or religion as a label should not preclude being religiously protected in these jurisdictions, so long as the faith held by those prisoners which gives rise to their veganism has a spiritual component, subjectively parallel to that of more traditional religions.[102] Conversely, achieving religious status may be more difficult in jurisdictions which apply the *Malnak/Africa* test (or similar): such prisoners might need to show that their vegan beliefs are situated in a larger system of spiritual beliefs, explain how their belief system addresses fundamental moral or existential questions, or point to various external trappings connected to their belief system.[103]

C. First Amendment Considerations Particular to Prisoners

As it developed prior to 1990, First Amendment jurisprudence had come—at least in theory—to apply strict scrutiny when government action substantially burdened free exercise of religion: such government action was legitimate only when it served a compelling state interest and was narrowly tailored—that is, when its ends could not be met by a less restrictive government means.[104] Even so, the religious rights of prisoners were additionally constrained.[105]

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101 *Malnak*, 592 F.2d at 207, 209–10; *Seeger*, 380 U.S. at 165–66; *Welsh*, 398 U.S. at 339; *Africa*, 662 F.2d at 1032.

102 *Seeger*, 380 U.S. at 167; *Welsh*, 398 U.S. at 333.

103 *Malnak*, 592 F.2d at 212.

104 "This Court over the years painstakingly has developed a consistent and exacting standard to test the constitutionality of a state statute that burdens the free exercise of religion. Such a statute may stand only if the law in general, and the State's refusal to allow a religious exemption in particular, are justified by a compelling interest that cannot be served by less restrictive means." *Smith*, 494 U.S. at 907 (Blackmun, Brennan, and Marshall, JJ., dissenting). Though it developed over the course of multiple cases, this standard is generally known as the *Sherbert* test (or *Sherbert* rule), in reference to 1963's *Sherbert v. Verner*, which required the state to point to a compelling interest in denying unemployment benefits to a Seventh-Day Adventist whose sincerely held religious beliefs prevented her from working on Saturdays. Sherbert v. Verner, 374 U.S. 398, 400–03; *see also* Jesse H. Choper, *In Favor of Restoring the Sherbert Rule—With Qualifications*, 44 TEX. TECH L. REV. 221, 221 (2011) (describing the *Sherbert* rule, though noting that while *Sherbert* and its progeny stood for the proposition of strict scrutiny for interference with Free Exercise, in practice it "provide[d] a very diluted version of the traditional strict scrutiny criterion").

105 O'Lone v. Estate of Shabazz, 482 U.S. 342, 368 (1987).

1. Limitations on First Amendment Rights in Prison

While prisoners do not give up their First Amendment rights by virtue of entering the prison system,[106] incarceration carries with it an implied limitation on a prisoner's constitutional rights.[107] Modern jurisprudence vis-à-vis free exercise in prison is rooted in 1987's *Turner v. Safley*. While *Turner* itself did not deal with free exercise claims—rather concerning restrictions on prisoner marriage and inmate-to-inmate mail—it resulted in the court declining to apply strict scrutiny to restrictions on the constitutional rights of prisoners.[108] Rather, the Court outlined four factors to evaluate when considering the validity of such restrictions:

(1) the degree of "valid, rational connection" between the restriction and "the legitimate [and neutral] government interest put forward to justify it";[109]
(2) the impact allowing the prisoner to exercise the right in question "will have on guards and other inmates, and on the allocation of prison resources generally";[110]
(3) the ability of *the prisoner* to exercise the right in question by "alternative means";[111]
(4) the ability of *the prison* to use an alternative measure which would accommodate prisoner rights without harming the prison's interests.[112]

Ultimately, *Turner* focuses on the reasonableness of prison regulations which restrict prisoner rights.[113] Courts are more likely to find regulations reasonable if they are neutrally applied and rationally support

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106 *Id.* at 347–48.

107 Pell v. Procunier, 417 U.S. 817, 822–23 (1974); *see also* Rhodes v. Chapman, 452 U.S. 337, 369 (1981) (Blackmun, J., concurring) ("[I]ncarceration necessarily, and constitutionally, entails restrictions, discomforts, and a loss of privileges that complete freedom affords.").

108 Turner v. Safley, 482 U.S. 78, 89 (1987).

109 *Id.* at 89–90 ("Moreover, the government objective must be a legitimate and neutral one."). In the context of prison food services, such interests include "simplified food service, security, and budget constraints." Williams v. Morton, 343 F.3d 212, 217 (3d Cir. 2003) (applying the *Turner* test to an unsuccessful claim brought by Muslim prisoners arguing that while a prison-provided vegetarian diet allowed them to avoid haram foods, it did not permit access to sufficient halal foods).

110 *Turner*, 482 U.S. at 90.

111 *Id.* at 90. That a prisoner has such alternative means inclines towards the restriction's validity: under such circumstances, "courts should be particularly conscious of the 'measure of judicial deference owed to corrections officials . . . in gauging the validity of the regulation.'" *Id.* (quoting Pell v. Procunier, 417 U.S. 817, 827 (1974)).

112 *Id.* at 90–91 ("This is not a 'least restrictive alternative' test: prison officials do not have to set up and then shoot down every conceivable alternative method of accommodating the claimant's constitutional complaint. But if an inmate claimant can point to an alternative that fully accommodates the prisoner's rights at *de minimis* cost to valid penological interests, a court may consider that as evidence that the regulation does not satisfy the reasonable relationship standard.") (citations omitted).

113 *Id.* at 78–79.

the connected government interests,[114] will not cause a significant 'ripple effect' on fellow inmates or on prison staff,[115] allow prisoners to exercise the relevant rights in some other fashion,[116] and if there are no "ready alternatives" which the prison could use to be more accommodating to prisoner rights.[117]

One week after *Turner*, the Court applied these four factors to a challenge brought by prisoners claiming prison regulations impermissibly interfered with their free exercise of religion in *O'Lone v. Estate of Shabazz*.[118] Of critical importance to prisoners seeking access to a vegan diet for religious reasons, the *O'Lone* Court refined the *Turner* factor concerning the ability of prisoners to exercise their rights through alternative means.[119] The *O'Lone* Court held that for religious freedom purposes, this factor should be evaluated for reasonableness not in terms of the prisoner having an alternative method of undertaking the specific practice in question, but rather in terms of prisoners having alternative means of practicing their religion as a whole.[120] While *O'Lone* does not tell us exactly at what point depriving a religiously vegan prisoner of the ability to maintain a vegan diet would be unreasonable,[121] by raising the possibility that such a prisoner could

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[114] *Id.* at 89 ("[W]hen a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests.").

[115] *Id.* at 90.

[116] *Id.*

[117] *Id.* at 90–91. Notably, in suggesting that the presence of "ready alternatives" inclined against the reasonableness of prisoner regulations, the *Turner* Court explicitly does not call for application of a "'least restrictive alternative' test." *Turner* does not require prisons to use the least burdensome policy, though "the existence of obvious, easy alternatives may be evidence that the regulation is not reasonable." *Id. Turner* is thus relevant to prisoners seeking vegan diets for religious reasons. Under *Turner*, prisons do not have to provide vegan diets simply because they conceivably have the ability to do so. Conversely, prisons may need to explain how allowing religiously vegan prisoners access to existing specialized diets is not an "obvious, easy" solution—particularly if they are providing prisoners with specialized diets under other circumstances.

[118] *O'Lone*, 482 U.S. at 350.

[119] *Id.* at 367.

[120] *Id.* at 351–52. The specific religious practice the prisoners in *O'Lone* sought to participate in was Jumu'ah—a weekly Muslim congregational service. *Id.* at 345. The alternative methods of religious practice the Court identified the *O'Lone* prisons as having access to included the ability to "congregate for prayer or discussion" at many other times, a "state-provided imam," "special [meal] arrangements . . . during the month-long observance of Ramadan," and "different meals whenever pork [was] served in the prison cafeteria." *Id.* at 352.

[121] *O'Lone* does not provide clear guidance regarding at what point deprivation of the opportunity to engage in religious practice becomes unreasonable. The decision implies that blocking "all forms of religious exercise" would be unreasonable, but that restrictions that leave prisoners able to "freely observe a number of their religious obligations" are reasonable. *O'Lone*, 482 U.S. at 351–52. The *O'Lone* Court did not draw a brighter line between preventing prisoners from fulfilling all their religious obligations and enabling them to fulfill "a number" of those obligations. *Id.* Similarly, the Court did not clearly indicate how the relative theological importance of a particular religious practice should be weighed. The *O'Lone* Court is careful to "in no way minimize the central importance of Jumu'ah [the weekly Muslim congregational service, which the prisoners in

meet their overall religious needs through fulfilling other religious obligations, the decision strengthens the ability of prisons to restrict the prisoner's diet.[122]

D. The More Things Stay The Same . . . : Smith *and Statutory Free Exercise Protections*

1. Smith *Ends Strict Scrutiny for Neutral Restrictions on Free Exercise*

The Supreme Court's 1990 decision in *Employment Division, Department of Human Resources of Oregon v. Smith* represented a sea change in free exercise constitutional jurisprudence.[123] In *Smith*, the Court considered a First Amendment claim raised by Alfred Smith and Galen Black, who were fired after consuming "peyote for sacramental purposes at a ceremony of the Native American Church, of which both [were] members," after which both Smith and Black were denied state unemployment benefits on the grounds that "they had been discharged for work-related 'misconduct.'"[124] The *Smith* majority distinguished between laws "specifically directed at . . . religious practice," laws that "involved . . . the Free Exercise Clause in conjunction with other constitutional protections, such as freedom of speech and of the press," and "neutral law[s] of general applicability."[125] While the *Smith* majority accepted that laws specifically directed at religion or "hybrid" laws which implicated both free exercise and some other constitutional right could continue to be held to strict scrutiny,[126] it held that the third category, generally applicable, neutral laws—such as Oregon's

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O'Lone were being prevented from attending] to respondents," but nonetheless held prisons are not constitutionally required to accommodate that practice. *Id.* This leaves open the question of whether there are some religious obligations so fundamental to a religion that blocking them could not be compensated for by enabling various lesser obligations.

[122] *See* Spies v. Voinovich, 173 F.3d 398, 402, 407 (6th Cir. 1999) ("Spies filed a grievance with prison officials alleging that, because he was a [Zen] Buddhist, the prison was required to provide him with a vegan diet," rather than the vegetarian diet he was given. The Sixth Circuit was careful to note that despite "Spies *admit[ing]* that adherence to a vegan diet is not required under Zen Buddhist practice," his veganism could still be "a sincerely-held religious belief." Nonetheless, the court held that because his Zen beliefs "only required . . . a vegetarian (and not vegan) diet," that the prison provided a vegetarian diet gave him a sufficient "alternative means of exercising his religion under . . . the *Turner* test.") (emphasis in original). *But see* Haight v. Thompson, 763 F.3d 554, 564–65 (6th Cir. 2014) (barring access to foods necessary for a Native American Church religious ritual necessarily involves substantially burdening that religious exercise, despite prisoners being "allowed to have [other] traditional foods" at the ceremony).

[123] The *Smith* concurrence regarded the majority opinion as "dramatically depart[ing] from well-settled First Amendment jurisprudence," while the dissent described this paradigm shift as "perfunctorily dismiss[ing] . . . a settled and inviolate principle of this Court's First Amendment jurisprudence." *Smith*, 494 U.S. at 891, 908.

[124] *Id.* at 874.

[125] *Id.* at 879, 881.

[126] *Id.* at 881–82.

drug laws—were not subject to such heightened scrutiny.[127] As a result, such laws are subject to a rational basis test, and are thus constitutionally compliant if they simply serve a legitimate state interest using means rationally connected to that interest.[128]

While the holdings in *Turner* and *O'Lone* meant that limits on prisoner rights were already subject to a less than strict level of scrutiny, *Smith* implies even more latitude for those limits.[129] The holding in *Smith* calls for a bright-line rule for evaluating non-targeted (or non-hybrid) laws restricting religious exercise: if such a law is not rationally connected to a legitimate government interest, then the law is unconstitutional—otherwise, it is constitutionally permitted.[130] By doing so, *Smith* seems to reject even the deferential balancing of the *Turner* test.[131] If a restriction on the ability of prisoners to engage in religious exercise is valid when it is rationally related to a legitimate government interest, courts hardly need to balance the impact on prisoners and guards, the ability of prisoners to enjoy religious exercise through alternate means, or the ability of prisons to use alternative measures which are less harmful to the ability of prisoners to engage in religious exercise. In essence then, *Smith* implies that the *Turner* test has been pared back to its first prong: the "valid, rational connection" between the restriction and "the legitimate[, neutral] governmental interest put forward to justify it"[132]—rational basis by any other name.[133]

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127 *Id.* at 882 ("We have never held that, and decline to do so now.").

128 Three years later, Congress would use harsher terms to describe *Smith*'s result: "[T]he Supreme Court virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion." Religious Freedom Restoration Act of 1993, 42 U.S.C. § 2000bb(a)(4) (2016).

129 *Smith*, 494 U.S. at 908.

130 *Id.* at 890.

131 *Turner*, 482 U.S. at 89–91.

132 *Id.*

133 Subsequent passage of the Religious Freedom Restoration Act (RFRA) and the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA) indicates Congress saw *Smith* as reducing religious protections available to a range of individuals, including prisoners—who presumably were therefore receiving less religious protection post-*Smith* than under *Turner/O'Lone*. *See infra* Section D.ii (congressional reaction to *Smith*); Joseph Thomas Wilson, *The Big Man in the Big House: Prisoner Free Exercise in Light of* Employment Division v. Smith, 73 LA. L. REV. 219, 245–46 (discussing Congress's particular interest in using RLUIPA to address "severe burdens prison administrators . . . had placed on religious inmates"); *see also* Sasnett v. Litscher, 197 F.3d 290 (7th Cir. 1999), 292–93 ("If the Wisconsin prison system forbade inmates to have any jewelry, it would be difficult under *Smith* for inmates to claim that the Constitution entitled them to an exemption for religious jewelry, whereas under the regime of *Turner-O'Lone* we would have to uphold the claim."). This is not, however, the only reading of *Smith*'s interaction with *Turner/O'Lone*. *See* Levitan v. Ashcroft, 281 F.3d 1313, 1318–19 (D.C. Cir. 2002) ("Many courts have grappled with the question of how the Court's decision in *Smith* interacts with the prisoner-specific test set forth in *Turner* and *O'Lone*. One possibility is that *Smith* supplanted the *Turner* analysis, because *Smith* can be read to say that religious inmates should never be entitled to exemptions from generally applicable, religion-neutral prison regulations. Another possibility is

2. *Congress Reacts: Strict Scrutiny Reiterated*

Congress did not cause its face to smile upon the new jurisprudence created in *Smith*. Finding that "laws 'neutral' toward religion may burden religious exercise as surely as laws intended to interfere with religious exercise,"[134] and that allowing those neutral laws to be evaluated at a lesser standard ran counter to both the constitutional framing of free religious exercise as an unalienable right[135] and Congress's own finding that "governments should not substantially burden religious exercise without compelling justification,"[136] Congress passed the Religious Freedom Restoration Act (RFRA) in 1993.[137] Explicitly framed with the purpose of restoring Free Exercise standards to their pre-*Smith* state,[138] RFRA provides that when "the Government substantially burdens a person's exercise of religion,[139] under the Act that person is entitled to an exemption from the rule unless the Government 'demonstrates that application of the burden to the person—(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.'"[140] As RFRA's rule applies "even [when a] burden results from a rule of general applicability,"[141] it effectively resurrected strict scrutiny as the applicable standard which government infringement on free exercise must meet—though on a statutory, rather than constitutional basis.[142]

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that *Smith* simply has no application in the unique and highly regulated prison context, so *Turner* and *O'Lone* continue to govern. A third possibility is that both *Smith* and *O'Lone*/*Turner* are applicable, but at different stages of analysis. Under this view, *Smith* is relevant in determining the scope of a person's free exercise right in the first instance, while *Turner* and *O'Lone* are employed in determining how that right may be circumscribed in the specialized prison context. Thus, a prisoner asserting a right to smoke marijuana for religious purposes in prison would never reach the *Turner* analysis, because he would lack a First Amendment right under *Smith* to smoke marijuana in the first instance, whether in prison or elsewhere.").

134 42 U.S.C. § 2000bb(a)(2) (2016).

135 *Id.* (a)(1).

136 *Id.* (a)(3).

137 Religious Freedom Restoration Act of 1993, 103 Pub. L. No. 141, 107 Stat. 1488.

138 42 U.S.C. § 2000bb(b) (2016). ("The purposes of this chapter are—(1) to restore the compelling interest test as set forth in Sherbert v. Verner, 374 U.S. 398 (1963) and Wisconsin v. Yoder, 406 U.S. 205 (1972) and to guarantee its application in all cases where free exercise of religion is substantially burdened.").

139 *Shakur*, 514 F.3d at 888 (quoting RLUIPA and Warsoldier v. Woodford, 418 F.3d 989, 995 (9th Cir. 2005)). ("RLUIPA defines 'religious exercise' as 'any exercise of religion, whether or not compelled by, or central to, a system of religious belief.' § 2000cc–5(7)(A). . . . [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.'").

140 *Hobby Lobby*, 134 S. Ct. at 2761 (2014) (quoting RFRA, 42 U.S.C. § 2000bb-1(b)).

141 42 U.S.C. § 2000bb-1(a).

142 *Id.*

In its original 1993 form, RFRA applied to both state and federal governments.[143] Application of RFRA to federal action is straightforward: RFRA is a federal law, duly passed by Congress and signed into law by the President.[144] RFRA's attempts to control state action proved more complicated. RFRA itself located its ability to control state action in the Fourteenth Amendment, specifically section five, which gives "Congress . . . power to . . . by appropriate legislation" prevent states from denying people equal protection under the law, or from depriving people of life, liberty, or property without due process of law.[145] In *City of Boerne v. Flore*, a 1997 challenge to RFRA, however, the Supreme Court held that Congress's Fourteenth Amendment enforcement authority extended to "[enforcing] . . . constitutional right[s] . . . [but not] changing what the right[s are]."[146] In other words, the Fourteenth Amendment might allow Congress to hold states to the *constitutional* standard established in *Smith*, but not to the *statutory* standard Congress themselves had created in RFRA.[147]

Congress responded to this judicial narrowing of RFRA by passing the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA).[148] RLUIPA operates by statutorily applying strict scrutiny to government land use regulations impacting religious exercise,[149] as well as "the religious exercise of a person residing in or confined to an institution."[150] Unlike the now federal-only RFRA, RLUIPA is able to impact a narrow range of state action by relying upon the Constitution's Spending and Commerce Clauses.[151] In the context of prisoners

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143 City of Boerne v. Flores, 521 U.S. 507, 516 (1997).

144 RFRA passed the House unanimously, passed the Senate 97 to 3, and was signed into law by President Bill Clinton on November 16, 1993. Peter Steinfels, *Clinton Signs Law Protecting Religious Practices*, N.Y. TIMES, Nov. 17, 1993, at A18.

145 U.S. CONST. amend. XIV, §§ 1, 5.

146 *City of Boerne*, 521 U.S. at 519.

147 *See id.* at 534–36 ("Laws valid under *Smith* would fall under RFRA without regard to whether they had the object of stifling or punishing free exercise. We make these observations not to reargue the position of the majority in *Smith* but to illustrate the substantive alteration of its holding attempted by RFRA. . . . This is a considerable congressional intrusion into the States' traditional prerogatives and general authority. . . . [A]s the provisions of the federal statute here invoked are beyond congressional authority, it is this Court's precedent, not RFRA, which must control.").

148 42 U.S.C. § 2000cc.

149 Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. § 2000cc(a) (2016). This formulation of strict scrutiny mirrors RFRA's: imposing a substantial burden on religious exercise is barred unless the burden serves a compelling government interest and is the least restrictive means of furthering that interest. Of particular relevance in the prison context, the Court has held that "order . . . safety . . . and security concerns" are able to rise to the level of compelling interests such that "religious observances . . . [do] not override." Cutter v. Wilkinson, 544 U.S. 709, 710 (2005).

150 42 U.S.C. § 2000cc(a)-1.

151 *Cutter*, 544 U.S. at 715.

seeking access to vegan meals,[152] RLUIPA is particularly notable as it applies strict scrutiny to actions which interfere with religious exercise in both federal prisons (also covered by RFRA) and state prisons (not covered by RFRA since 1997).[153] While state prisons may in theory escape RLUIPA's reach by forgoing federal funding,[154] in practice states uniformly accept federal prison funding. Indeed, depending on the facts involved, temporary holding facilities—such as courthouse holding cells—can also fall under RLUIPA's remit.[155] Prisoners denied vegan meals in contravention of their religious beliefs should, therefore, be able to bring claims under either RLUIPA (if confined in a state facility) or both RLUIPA and RFRA (if confined in a federal facility).[156] Moreover, in the wake of *City of Boerne* many states passed their own Religious Freedom Restoration Acts (whether under that name or others), which provide prisoners an additional avenue by which to bring claims against state facilities.[157]

3. . . . The More Things Change: Imposition of a (Yet Higher?) Scrutiny Standard

RLUIPA is also relevant to prisoners seeking to contest restrictions on their religious exercise because it changed the way RFRA defines and treats "exercise of religion."[158] While *City of Boerne* suggests that—despite Congress's expressed statement of purpose[159]—RFRA actually holds government action which burdened religious exercise to

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[152] The land-use provisions of RLUIPA have been the subject of much more extensive—and much less clear—litigation than the prison provisions. RLUIPA's land-use provisions are beyond the scope of this Article.

[153] 42 U.S.C. § 2000cc-5(4).

[154] *Cutter*, 544 U.S. at 732 (Thomas, J. concurring).

[155] *See* Khatib v. Cty. of Orange, 639 F.3d 898, 906 (9th Cir. 2011) ("RLUIPA plainly covers the Santa Ana Courthouse holding facility.").

[156] *Cutter*, 544 U.S. at 714–15.

[157] *See, e.g.*, ARIZ. REV. STAT. ANN. §§ 41-1493-02 (1999); CONN. GEN. STAT. ANN. §§ 52-571b (1993); FLA. STAT. §§ 761.01–.05 (1998); IDAHO CODE §§ 73-401 to -404 (2000); 775 ILL. COMP. STAT. 35/1-99 (1998); H.B. 279, 2013 Reg. Sess. (Ky. 2013); LA. REV. STAT. §§ 13:5231-5242 (2010); MO. REV. STAT. §§ 1.302–.307 (2003); N.M. STAT. ANN. §§ 28-22-1 to -5 (2000); OKLA. STAT. tit. 51, §§ 251–258 (2000); 71 PA. CONST. STAT. §§ 2401–2407 (2002); 42 R.I. GEN. LAWS §§ 42-80.1-1 to -4 (1998); S.C. CODE ANN. §§ 1-32-10 to -60 (1999); TENN. CODE ANN. § 4-1-407 (2009); TEX. CIV. PRAC. & REM. CODE. ANN. §§ 110.001-0.12 (West 1999); UTAH CODE ANN. §§ 63L-5-101 to -403 (LexisNexis 2008); VA. CODE ANN. §§ 57-1 to -2.02 (2007). Some states choose to enshrine provisions of this type at a constitutional, rather than statutory, level. *See, e.g.*, ALA. CONST. art. I, § 3.01 (This portion of the Alabama Constitution, the Alabama Religious Freedom Amendment, explicitly frames itself as a reaction to *Employment Division v. Smith* and *City of Boerne*, citing both cases in the amendment's text.). A deeper analysis of the impact of those state-level religious freedom restoration acts on prisoners is beyond the scope of this Article.

[158] *Hobby Lobby*, 134 S. Ct. at 2761.

[159] 42 U.S.C. § 2000bb(b) ("The purposes of this chapter are—(1) to restore the compelling interest test as set forth in Sherbert v. Verner, 374 U.S. 398 (1963) and Wisconsin v. Yoder, 406 U.S. 205 (1972) and to guarantee its application in all cases where free exercise of religion is substantially burdened.").

a more stringent standard than did pre-*Smith* jurisprudence (such as the *Sherbert* test), this observation occupies a single line in the majority opinion,[160] and seems to have gone largely unremarked until,[161] bolstered by RLUIPA's definitional changes, it surged into the fore of the argument between the majority and dissent in *Hobby Lobby*.[162]

RFRA originally defined "exercise of religion" simply as "exercise of religion under the First Amendment."[163] RLUIPA's passage amended RFRA so that the two Acts would share the same definition: "'religious exercise' includes any exercise of religion, whether or not compelled by, or central to, a system of religious belief,"[164] which in turn is to be construed "in favor of a broad protection of religious exercise, to the maximum extent permitted by [RLUIPA] . . . and the Constitution."[165] In the *Hobby Lobby* opinion, Justice Alito argues that this change renders the statutory landscape of RFRA/RLUIPA different than the constitutional landscape had ever been, either before or immediately after *Smith*.[166] When applying RFRA or RLUIPA, therefore, Alito's *Hobby Lobby* majority suggests courts should go "far beyond what . . . has [been] held [to be] constitutionally required."[167] As such, *neither* the free exercise jurisprudence of *Smith* nor the cases that came before it control: RLUIPA and RFRA (as amended by RLUIPA) establish a statutory standard more deferential to protection of religious exercise than any of the prior constitutional standards.[168] The relevance for prisoners seeking vegan meals in accordance with their religious beliefs is this: if the statutorily mandated standard exceeds not only *Smith*'s rational basis, but also the sort of weakly strict scrutiny applied under *Sherbert*,[169] then balancing tests—such as *Tur-*

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160 *City of Boerne*, 521 U.S. at 535 ("In addition, the Act imposes in every case a least restrictive means requirement—a requirement that was not used in the pre-*Smith* jurisprudence RFRA purported to codify—which also indicates that the legislation is broader than is appropriate if the goal is to prevent and remedy constitutional violations.").

161 Though not entirely unremarked. *See, e.g.*, *Shakur*, 514 F.3d at 887 ("RLUIPA . . . mandates a stricter standard of review for prison regulations that burden the free exercise of religion than the reasonableness standard under *Turner*.").

162 *Hobby Lobby*, 134 S. Ct. at 2761.

163 *Id.*

164 42 U.S.C. § 2000cc-5(7)(A).

165 *Id.* 3(g).

166 *Hobby Lobby*, 134 S. Ct. at 2760–61 n.3–4, 2767 n.18; *see also Haight*, 763 F.3d at 566 (observing—in the context of re-affirming the impropriety of courts passing judgment on what constitutes proper religious practice—that RLUIPA "extend[ed] the free-exercise protections of the First Amendment beyond those recognized in *Smith* and other cases").

167 *Hobby Lobby*, 134 S. Ct. at 2767.

168 *Id.* at 2772.

169 Justice Ginsburg's *Hobby Lobby* dissent argues against this understanding. Looking to RFRA's congressional findings and declaration of purpose, and surrounding legislative history, Ginsburg argues that the purpose of RFRA as passed was to reinstate "the law as it was prior to *Smith*." *Id.* at 2791. Ginsburg's response to Alito's analysis of RLUIPA amending RFRA is that the amendment "in no way suggests" expansion of the "class of entities" able to bring free exercise claims, or "relieve[s] courts of the obligation

ner/O'Lone—built around those standards are inapplicable under RFRA/RLUIPA, because they are balancing prisoner rights around a lesser point, not the "maximum" protection promised by RFRA and RLUIPA.[170] Nor should the incarcerated status of prisoners incline against them being able to argue that they are entitled to full protection under RFRA or RLUIPA: Congress directed RLUIPA—and its RFRA amendment—in part at prisoners, and the scope of the Acts demonstrates congressional confidence in the ability of courts to deal with prisoner claims at the level of sincerity.[171]

E. Holt v. Hobbs*: A Post-*Hobby Lobby *Case Study in Prisoner Free Exercise*

Gregory Holt—who, as he notes, goes by Abdul Maalik Muhammad—began serving a life sentence within the Arkansas state corrections system on June 10, 2010.[172] Shortly thereafter, Holt asked for an exception from the prison's general prohibition on prisoners growing beards,[173] explaining that he believed he had a religious obligation as a Muslim male to allow his beard to grow uncut, though he would be willing to "'compromise' . . . [and] grow only a ½-inch beard."[174] On July 21, 2001, the prison warden declined to issue Holt an exception, informing him that if he chose to grow a beard anyway he would "'suffer the consequences.'"[175] Holt filed a RLUIPA claim, challenging the

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to inquire whether a government action substantially burdens a religious exercise." *Id.* Notably for our purposes, Ginsburg's analysis of the RLUIPA amendment of RFRA is focused more on *who* gets religious protection—as is appropriate, where one of *Hobby Lobby*'s central questions was whether a corporation was entitled to religious protection—rather than whether the amendment sets a higher scrutiny bar for laws interfering with religious exercise, as would be relevant to religiously vegan prisoners. Ginsburg's scrutiny analysis deals with RFRA as passed, not as amended. *Id.* at 2792–93.

170 42 U.S.C. § 2000cc-3(g); *see also Shakur*, 514 F.3d at 887 ("RLUIPA, passed after the Supreme Court's decisions in *Employment Division v. Smith* and *City of Boerne v. Flores*, mandates a stricter standard of review for prison regulations that burden the free exercise of religion than the reasonableness standard under *Turner*.").

171 *Hobby Lobby*, 134 S. Ct. at 2774.

172 *ADC Inmate Search—Inmate Details*, ARK. DEP'T CORRECTIONS, http://adc.arkansas.gov/inmate_info/search.php?dcnum=129616&lastname=holt&firstname=gregory&sex=b&agetype=1&sp2007=2956006572.20480.0000&__utma=93856461.1315756141.1393882203.1393882203.1393882203.1&__utmb=93856461.1.10.1393882203&__utmc=93856461&__utmz=93856461.1393882203.1.1.utmcsr%3Dbing%7Cutmccn%3D(organic)%7Cutmcmd%3Dorganic%7Cutmctr%3Darkansas+dept+of+corrections [https://perma.cc/ZKN6-Y9LX] (accessed Apr. 9, 2017); Gregory Holt, *Motion for Leave to Proceed in Forma Pauperis* (Sept. 27, 2013), http://sblog.s3.amazonaws.com/wp-content/uploads/2014/02/Muhammad-Cert-Petition.pdf [https://perma.cc/9GYT-DVKG] (accessed Apr. 7, 2015); Holt v. Hobbs, 135 S. Ct. 853 (2015). In light of the name associated with litigation, I refer to Abdul Maalik Muhammad as Gregory Holt throughout, while acknowledging his chosen appellation.

173 The prison allowed prisoners to grow quarter-inch beards by medical prescription only—offering no exemption for religious need. *Holt*, 135 S. Ct. at 859–60.

174 *Id.* at 861.

175 *Id.*

prison's decision, and—after being initially granted a temporary injunction to grow a half-inch beard—met defeat before a magistrate judge, the district court, and the Eighth Circuit Court of Appeals.[176] On September 27, 2013, fifteen pages worth of hand-written *in forma pauperis* petition from Holt reached the Supreme Court, who granted certiorari on March 3, 2014.[177] While the resulting opinion does not involve prisoners seeking access to vegan meals, it is directly relevant: religiously vegan prisoners face the same legal landscape as did Gregory Holt in bringing claims under either RLUIPA or RFRA.[178]

The *Holt* opinion reiterates that the initial burden under RLUIPA or RFRA lies with the prisoner, who must establish three things:

(1) that the prison's policy "implicates [the prisoner's] religious exercise";[179]
(2) that "the relevant exercise of religion is grounded in a sincerely held religious belief";[180] and
(3) that the prison's policy "substantially burdened that exercise of religion."[181]

For Gregory Holt, those burdens were "easily satisfied."[182] The prison's policy implicated Gregory Holt's religious exercise, insofar as it conflicted with "growing a beard, which [Holt] believes is a dictate of his religious faith."[183] The prison did not dispute that Gregory Holt's belief was sincere, rather than pretextual.[184] By forcing him to choose between "engag[ing] in conduct that seriously violates [his] religious beliefs" and punishment, the prison substantially burdened Gregory Holt's religious exercise.[185] A religiously vegan prisoner would need to meet the same burden, and could do so in a similar fashion.[186] If prison policy denies the prisoner vegan meals, then it implicates the prisoner's religious exercise by conflicting with a duty—not consuming animal products—the prisoner holds as a religious belief. If the prisoner faces a choice between eating animal products—in *Hobby Lobby* and *Holt*'s terms, engaging in conduct that seriously violates the prisoner's religious beliefs—on the one hand, and being punished or denied meals on the other hand, then the prisoner's religious exercise is

176 *Id.*
177 Petition for Writ of Certiorari, Holt v. Hobbs, 135 S. Ct. 853 (2015) (No. 13-6827).
178 While Gregory Holt, as a prisoner in a state facility, brought his claim under RLUIPA, the issues litigated in *Holt v. Hobbs* are equivalent for prisoners bringing claims under RFRA. *Holt*, 135 S. Ct. at 863.
179 *Id.* at 862.
180 *Id.*
181 *Id.*
182 *Id.* at 853, 857, 862.
183 *Id.* at 862.
184 *Id.*
185 *Id.* at 857 (quoting *Hobby Lobby*, 134 S. Ct. at 2775).
186 *See* Donna D. Page, *Veganism and Sincerely Held "Religious" Beliefs in the Workplace: No Protection Without Definition*, 7 U. PA. J. LAB. & EMP. L. 363, 404 (2005) (arguing that the moral and ethical values of veganism should be included under statutory definition of "religion").

being substantially burdened.[187] While *Holt* does not speak directly to testing the sincerity of a prisoner's religious beliefs,[188] it does point towards established jurisprudence regarding sincerity-testing of religious beliefs.[189] As such, a religiously vegan prisoner able to produce the sort of extrinsic evidence indicative of sincerity discussed earlier in this Article should be well-positioned to meet this burden.[190] Similarly, while the prison never disputed the religious nature of Gregory Holt's belief, the *Holt* opinion—specifically its response to the district court's analysis of Gregory Holt's belief—is instructive. The district court had downplayed the importance of Gregory Holt's religious need to grow a beard, because he had testified that not all Muslims shared that belief.[191] In response, the *Holt* opinion reiterates that religious protection extends not only to beliefs that comport with religious dogma, but also idiosyncratic beliefs: "the protection of RLUIPA [or RFRA], no less than the guarantee of the Free Exercise Clause, is 'not limited to beliefs what are shared by all of the members of a religious sect.'"[192] The lesson for religiously vegan prisoners is that outlined earlier in this Article: prisoners whose veganism is grounded in religious dogma or religious idiosyncrasy are likely to face less practical hurdles to establishing the religious character of their belief than prisoners whose vegan practice is grounded in a more personal religious understanding—but if the latter can meet the threshold established by *Seeger/Welsh* or *Malnak/Africa*, they too should have met this burden.[193]

After determining that Gregory Holt had met his burden of establishing that the prison's no-beard policy substantially burdened exercise of his sincerely held religious belief, the *Holt* court explains that the burden "[shifts] to the [prison] to show that its refusal to allow petitioner to grow a ½-inch beard '(1) [was] in furtherance of a compelling governmental interest; and (2) [was] the least restrictive means of furthering that compelling governmental interest.'"[194] Critically, the *Holt* Court does not frame this inquiry in terms of the *Turner/O'Lone*

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[187] *See id.* at 407 ("If a person ties vegan beliefs to [a traditional religion], . . . courts will very likely provide a cause of action for discrimination because of those beliefs.").

[188] Because, as noted, the sincerity of Gregory Holt's belief was never in question.

[189] *E.g.*, *Holt*, 135 S. Ct. at 862 (quoting *Hobby Lobby*, 134 S. Ct. at 2774 n.28) ("[A] prisoner's request for an accommodation must be sincerely based on a religious belief and not some other motivation.").

[190] *See* Page, *supra* note 186, at 405 (arguing that veganism can be a sincerely held religious belief, that such "internally-derived" sincerely held beliefs are protected against discrimination, and that courts may be open to finding veganism as a sincerely held religious belief).

[191] *Holt*, 135 S. Ct. at 857.

[192] *Id.* (citing *Thomas*, 450 U.S. at 715–16). The *Holt* Court also noted that Gregory Holt's religious belief regarding facial hair was not actually idiosyncratic, but rather exists widely across different schools of Islamic practice. *Id.*

[193] *See generally* Page, *supra* note 186 (arguing that vegan beliefs can be protected similarly to religious beliefs).

[194] *Holt*, 135 S. Ct. at 863 (quoting 42 U.S.C. § 2000cc–1(a)).

factors.[195] Rather, the Court points towards *Hobby Lobby*: not only is the relevant test the compelling interest/narrowly tailored standard associated with strict scrutiny, but the "Government [must] . . . demonstrate that the compelling interest test is satisfied through application of the challenged law 'to the person'—the particular claimant whose sincere exercise of religion is being substantially burdened."[196] Here, even a generically compelling government interest in secure and safe prisons is insufficient to alone meet the prison's burden—RLUIPA, like RFRA, directs courts to more deeply "'scrutiniz[e] the asserted harm of granting specific exemptions to particular religious claimants' and 'to look to the marginal interest in enforcing' the challenged government action in that particular context."[197] While the Alito-penned *Holt* opinion does not explicitly revisit the claim in his *Hobby Lobby* majority that RLUIPA/RFRA have created a new era of Free Exercise statutory jurisprudence, distinct from the pre-*Smith* constitutional landscape,[198] it strongly hints that this is indeed the case. *Holt* chides the magistrate judge and district court's decisions to "import[ ] a strand of reasoning" from *Turner* and *O'Lone*, as having "misunderstood the analysis that RLUIPA demands"—"RLUIPA *provides greater protection*."[199] Alito's *Holt* analysis specifically indicates that the *Turner/O'Lone* inquiry into whether prisoners can engage in religious exercise via 'alternative means' is "improper" under RLUIPA (and thus, also under RFRA).[200] This logic, as outlined earlier in this Article, applies equally to the remainder of the *Turner/O'Lone* factors.[201] If RFRA/RLUIPA simply re-encode the pre-*Smith* order in statutory form, then the alternative means analysis rejected by *Holt* would not in fact be improper; that RFRA/RLUIPA exceed pre-*Smith* jurispru-

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195 *See id.* at 862 (holding that the district court improperly used the *Turner/O'Lone* factors).

196 *Id.* at 863 (first quoting *Hobby Lobby*, 134 S. Ct. at 2779; then quoting Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418, 430–31 (2006); and then quoting 42 U.S.C. § 2000bb-1(b)). Notably, both *Hobby Lobby* and *O Centro* conduct this analysis in reference to RFRA, paralleling *Holt*'s identical RLUIPA analysis. *Id.*

197 *Id.* (internal quotation marks omitted) (first quoting *Hobby Lobby*, 134 S. Ct. at 2779; then quoting *O Centro*, 546 U.S. at 1220). Again, *Holt* deals with RLUIPA, while *Hobby Lobby* and *O Centro* deal identically with RFRA. *Id.*

198 *See supra* notes 178–84 and accompanying text (summarizing the argument between Alito's *Hobby Lobby* majority and Ginsburg's dissent regarding whether RFRA and RLUIPA restore pre-*Smith* jurisprudence or create a jurisprudential standard which exceeds both *Smith* and its predecessors). Ginsburg wrote a two-sentence concurrence for *Holt*, noting that she joined Alito's opinion on the understanding that—unlike *Hobby Lobby*—"accommodating petitioner's religious beliefs in this case would not detrimentally affect others who do not share petitioner's belief." *Holt*, 135 S. Ct. at 867 (Ginsburg, J., concurring).

199 *Holt*, 135 S. Ct. at 862 (emphasis added).

200 *Id.* Both the magistrate judge and district court had found that "the grooming policy allowed petitioner to exercise his religion in other ways, such as by praying on a prayer rug, maintaining the diet required by his faith, and observing religious holidays." *Id.* at 861.

201 *See, e.g.*, *id.* at 860, 866 (discussing two of the *Turner* factors).

dence in their "expansive protection for religious liberty" indicates that those earlier balancing tests are no longer applicable when evaluating statutory claims.[202] Religiously vegan prisoners bringing claims under RFRA or RLUIPA should, therefore, argue that the proper way for courts to examine the legitimacy of prison restrictions which substantially burden their religious exercise is by applying strict scrutiny, not the weaker balancing test set forth in *Turner* and *O'Lone*.[203]

In *Holt*, the Court accepted that the prison had compelling interests in "staunching the flow of contraband into and within its facilities" and "the quick and reliable identification of prisoners," but found that forbidding Gregory Holt to grow a half-inch beard was not the least restrictive means of achieving either interest—in other words, the state's *ends* cleared the strict scrutiny threshold, but by not being narrowly tailored, the state's *means* failed to meet strict scrutiny.[204] In reaching this conclusion, the Court noted that RLUIPA (and, thus by analogy, RFRA) did not permit the narrowly tailored question to be resolved through "unquestioning deference" to prison officials.[205] While courts "should respect [the] expertise" prison officials have in running prisons and predicting the likely impact of changing prison regulations, it is ultimately the court's responsibility to determine that the challenged prison policy both furthers the identified compelling government interest and is the least restrictive way to do so.[206] In terms of the prison regulations at question in *Holt*, the Court noted that the prison already searched prisoner hair and clothing, as well as the quarter-inch beards of prisoners allowed to grow those for medical reasons.[207] Given those existing methods, the Court found the sugges-

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[202] *Id.* at 860. Beyond its direct attack on *Turner*'s 'alternative means' factor, *Holt*'s analysis specifically inclines against *Turner*'s willingness to weigh the impact on prison resources: "Congress stated that RLUIPA 'may require a government to incur expenses in its own operations to avoid imposing a substantial burden on religious exercise.'" *Id.* (citing 42 U.S.C. § 2000cc-3(c)). While *Holt* acknowledges that "cost control or program administration" can rise to the level of compelling interests, they—and administrative convenience in general—do not automatically meet the threshold of strict scrutiny. *Id.* at 866. The second of *Turner*'s four factors is, therefore, significantly narrowed under RFRA/RLUIPA per *Holt*: whether the impact of a particular prisoner exercising their rights implicates a compelling interest vis-à-vis guards or other inmates remains a viable line of inquiry. *Id. Turner*'s first factor—a rational connection between the prison restriction and a legitimate government interest—is rational basis by any other name, and so is difficult to reconcile with RFRA/RLUPIA. The fourth *Turner* factor—the ability of the prison to accommodate the prisoner via alternative means—may survive to the degree that those alternative means are narrowly tailored, as benefits strict scrutiny.

[203] *See, e.g.*, Accoolla v. Angelone, No. 7:01-CV-01008, 2006 WL 938731, at *12–13 (W.D. Va. Apr. 10, 2006) (denying a motion for summary judgment against plaintiff's claim that Virginia Department of Corrections failed to provide a vegan diet, under both the *Turner* test and RLUIPA).

[204] *Holt*, 135 S. Ct. at 863–64. The prison argued that beards facilitated smuggling contraband and interfered with ease of prisoner identification. *Id.*

[205] *Id.* at 864.

[206] *Id.*

[207] *Id.*

tion that contraband interdiction would be undermined if Gregory Holt were allowed to grow a beard which was quarter-inch longer than the permitted medical beards "hard to take seriously."[208] Indeed, the Court noted that even if the prison could make such a showing, its policy would still fail to meet a least restrictive means threshold: simply "run[ning] a comb through [Gregory Holt's] beard" or otherwise searching his facial hair would be less restrictive to his religious exercise than preventing him from growing a beard.[209] Similarly, the Court found that forbidding Gregory Holt from growing a beard in contravention of his religious faith was not the least restrictive way to achieve the prison's interest in prisoner identification.[210] The prison in *Holt* already had a policy in place to take identification photos of prisoners at intake and at any subsequent change in appearance; moreover, the prison "failed to establish why the risk that a prisoner will shave a ½-inch beard to disguise himself is so great" that such beards must be banned, but mustaches, head hair, and shorter medical beards were all allowed.[211] In conducting this inquiry into whether the prison's beard ban was narrowly tailored, the Court looked to the medical exception for quarter-inch beards and allowance of longer head hair as demonstrating that the prison's ban was under-inclusive: only one was banned, though all posed similar risks—indicating the policy was a poor fit for the associated compelling government interest.[212] In the context of the Free Exercise Clause, that "'proffered objectives are not pursued with respect to analogous nonreligious conduct' . . . suggests that 'those interests could be achieved by narrower ordinances that burdened religion to a far lesser degree.'"[213] Similarly, while the Court took care not to flag the ability of other prisons to deal with contraband and identification without forbidding beards as dispositive, it noted that "when so many prisons offer an accommodation, a prison must, at a minimum, offer persuasive reasons why it believes that it must take a different course."[214]

Religiously vegan prisoners should face little difficulty making analogous arguments under RFRA/RLUIPA.[215] While there are a host of compelling government interests connected to prison food—includ-

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[208] *Id.* at 863.

[209] *Id.* at 864–65.

[210] *Id.* at 864.

[211] *Id.* at 865.

[212] *Id.* at 865–66.

[213] *Id*. at 866 (citing *Lukumi Babalu Aye*, 508 U.S. at 2234).

[214] *Id.* Justice Sotomayor's *Holt* concurrence reminds us that under strict scrutiny, "the government need not 'do the impossible—refuse each and every conceivable alternative regulation scheme,' but need only 'refute the alternative schemes offered by the challenger.'" *Id.* at 868 (Sotomayor, J., concurring).

[215] *Know Your Rights: Freedom of Religion in Prison*, ACLU, https://www.aclu.org/know-your-rights/freedom-religion-prison [https://perma.cc/U9J6-CYUP] (accessed Apr. 9, 2017).

ing prisoner health and the risk of prohibitive cost[216]—prisons will need to establish how barring the specific religiously vegan prisoner in question from having access to vegan meals is the least restrictive means of serving those interests.[217] In doing so, prisons are likely to face the same under-inclusiveness problem as did the Arkansas prison in *Holt*: If those prisons already provide special diets to meet other prisoner's religious or medical needs, it will be difficult for courts to find that specifically denying special diets to religiously vegan prisoners poses any unique threat to compelling government interests at hand.[218] Similarly, that other prisons successfully provide vegan meals to prisoners[219] without corroding the government's compelling interests—while not dispositive—indicates refusing to provide those meals is not narrowly tailored. When RLUIPA (and RFRA) prevent prisons from forbidding religious beards—despite concededly implicated issues of prison security—it is difficult to foresee a religious request for vegan meals failing in similarly situated circumstances.

Gregory Holt's RLUIPA claim ultimately found success before the Supreme Court.[220] Using his litigation as a model, analogously situated religiously vegan prisoners will hopefully be able to gain the full religious protections they are entitled to under RFRA or RLUIPA (or both) at a less extreme level. Particularly under the *Hobby Lobby*/*Holt* framing of RFRA/RLUIPA as forging a new era of statutory free exercise protection, the key hurdles religiously vegan prisoners are likely to face are establishing that their veganism is rooted in a religious belief, and that they sincerely hold that religious belief.[221] By way of example, were Frank Africa—the prisoner who unsuccessfully sought

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216 *See, e.g.*, Hudson v. Maloney, 326 F. Supp. 2d 206, 213–14 (D. Mass. 2004) (noting that while the "'prohibitive' cost" of providing halal food to Muslim prisoners would be relevant, evidence establishing such a fact was "conspicuously absent from the pleadings"). Note, however, that incurring some additional cost in order to avoid substantially burdening religious exercise is explicitly contemplated by RFRA and RLUIPA. *Hobby Lobby*, 134 S. Ct. at 2781 ("[C]ost may be an important factor in the least-restrictive-means analysis, but both RFRA and its sister statute, RLUIPA, may in some circumstances require the Government to expend additional funds to accommodate citizens' religious beliefs.").

217 *Hudson*, 326 F. Supp. 2d at 210.

218 *Holt*, 135 S. Ct. at 865.

219 Daniel Stone, *Vegetarian Convictions*, NEWSWEEK (Dec. 8, 2007), http://www.newsweek.com/vegetarian-convictions-94869 [https://perma.cc/TP5H-XHTJ] (accessed Apr. 9, 2017); *Top 10 Vegetarian-Friendly Prisons!*, PETA (Dec. 10, 2007), http://www.peta.org/blog/top-10-vegetarianfriendly-prisons/ [https://perma.cc/WP3F-BVTT] (accessed Apr. 9, 2017).

220 *Holt*, 135 S. Ct. at 856.

221 *Holt* specifies three checks within RLUIPA/RFRA analysis which "afford[ ] prison officials ample ability to maintain security." *Holt*, 135 S. Ct. at 867. The first of these is simply that courts should bear in mind that in these situations they are analyzing the RFRA/RLUIPA statutory standing in the prison context—as the Court did in *Holt*, and presumably as would courts evaluating the claims of religiously vegan prisoners. Second, the *Holt* Court specifically points to the ability of prisons to challenge—and courts to evaluate—the sincerity of a prisoner's religious belief. *Id.* Finally, the Court cautions that prisoners who abuse a granted religious exemption "in a manner that undermines

access to a diet compliant with his beliefs as a member of MOVE in *Africa v. Commonwealth of Pennsylvania*—able to establish that his beliefs were religious in the context of a RLUIPA claim, he would have almost certainly prevailed under the standard laid out in *Holt*.[222] The *Africa* court accepted that Frank Africa's beliefs were sincere,[223] and—while denying him relief under the First Amendment—suggested that accommodating his request could be "prudent state penological policy": "Especially in light of the apparent willingness of [prison] officials to accede to the dietary requirements of other prisoners, both for religious and for medical reasons, it is not clear from the record why special accommodations cannot be made in this instance . . . ."[224] Under *Hobby Lobby* and *Holt*'s interpretation of RFRA/RLUIPA, denying Frank Africa access to his MOVE-mandated raw food diet would be unlikely to satisfy the narrowly tailored threshold of strict scrutiny—particularly because Pennsylvania was contemporaneously providing the very raw food diet Frank Africa sought to MOVE-affiliated prisoners at other prisons in the state.[225] Religiously vegan prisoners will still need to provide extrinsic evidence indicative that their belief is sincere, and will need to satisfy the court that their belief is religious—a more difficult prospect in those circuits that apply *Malnak/Africa*.[226] Once, however, religiously vegan prisoners overcome those hurdles, they will face less difficulty than their pre-*Hobby Lobby*/*Holt* predecessors if the jurisprudence suggested by *Hobby Lobby* and *Holt* holds: under that line of reasoning, the controlling judicial standard for statutory protection under RFRA/RLUIPA would be true strict scrutiny, which would apply before either *Smith*'s constitutional rational basis or the weakly strict *Turner*/*O'Lone* constitutional balancing test.

F. A Note on Evolving Free Exercise Jurisprudence

While the law is continually evolving, jurisprudence surrounding the key issue at hand here—First Amendment protection for religious exercise—has recently seen particularly rapid development in *Hobby Lobby* and *Holt*, the impacts and implications of which are as yet not fully resolved. Indeed, given the recent vintage of *Hobby Lobby* and particularly *Holt*'s model for prisoner free exercise under RFRA/RLUIPA, we have not had the opportunity to observe how these juris-

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the prison's compelling interests" may have their exemption withdrawn—even if the prisoners in question are religiously sincere. *Id.* at 867.

[222] *Africa*, 662 F.2d at 1025.

[223] *Id.* at 1036–37.

[224] *Id.* at 1037.

[225] *Id.* at 1037 n.24 ("We also note that the Commonwealth apparently is willing to provide a special raw food diet to female MOVE members incarcerated in the State Correctional Institution at Muncy, Pennsylvania.").

[226] *See, e.g.*, Friedman v. S. Cal. Permanente Med. Grp., 102 Cal. App. 4th 39, 69–70 (2002) (applying the *Malnak/Africa* line of reasoning to reject plaintiff's attempt to position his vegan beliefs and practices as a religious creed). *See also id.* at 44 (describing plaintiff's "strict vegan[ism]" and related "personal religious tenets").

prudential developments will be applied in lower courts. As such, while I have presented an argument based on where my analysis of those cases indicates jurisprudence regarding statutory free exercise in prisons is headed, prisoners pursuing claims under the Free Exercise clause should consider the utility of making both a statutory free exercise argument and a constitutional free exercise argument. This would provide the court with two non-mutually exclusive avenues for free exercise analysis—either one of which could vindicate a religiously vegan prisoner's access to vegan meals.[227] The statutory argument—based on RLUIPA (for state prisoners) or RFRA and RLUIPA (for federal prisoners)—could be built in a manner analogous to *Holt*, as outlined above. The constitutional argument's structure should be tailored to fit the target court's understanding of how *Smith*—which remains the controlling constitutional decision—interacts with *Turner/O'Lone*. Given the lack of an explicit Supreme Court ruling on constitutional free exercise rights in prisons post-*Smith*, courts generally have considered one of three approaches to integrating *Turner/O'Lone* with *Smith*.[228] The interpretation that most directly applies *Smith*'s holding is that outlined earlier in this Article:[229] *Smith* calls for the application of rational basis review to any generally-applicable, neutral law, and as such prisoners challenging such laws are only entitled to rational basis review, supplanting the *Turner/O'Lone* balancing test.[230] A more nuanced option is to use *Smith* to determine whether a prisoner has a First Amendment right to undertake an exercise, and

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[227] This is essentially the approach used by Amin Rahman Shakur, an inmate whose requests for a kosher diet—which Shakur believed would also satisfy his Muslim dietary requirements—were denied by the Arizona Department of Corrections. The Ninth Circuit Court of Appeals applied the *Turner* test to Shakur's constitutional free exercise claim and strict scrutiny to his RLUIPA claim—finding the lower court had erred in both areas by ordering summary judgment for the prison without sufficient evidence. *Shakur*, 514 F.3d at 882–91. *Shakur* was decided years prior to *Hobby Lobby/Holt*; the differentiation drawn in the latter cases between both the pre- or post-*Smith* constitutional standards, and the RLUIPA/RFRA statutory standard should only ease the process of separating those two areas of analysis when presenting arguments to the court.

[228] *Levitan*, 281 F.3d at 1318.

[229] *Supra* note 99 and accompanying text. Reading *Turner/O'Lone* as unimpacted by *Smith* tends to make it more difficult for the state to restrict religious exercise inside prisons than outside—counterintuitive, given the understanding that prison entails limitations on rights, not enlargement. *See Wilson*, *supra* note 133, at 220, 228 (arguing for application of *Smith* rather than *Turner/O'Lone* in the prison context). *But see Grayson*, 666 F.3d at 453 (making the case that courts ought to continue to apply *Turner/O'Lone* as a matter of stare decisis: "[*O'Lone* and *Turner* are] not expressively overruled by *Smith* or *Cutter*. . . . [I]t's hard to believe that prisoners have more rights than nonprisoners. But we're not supposed to declare a decision by the Supreme Court overruled unless the Court makes clear that the case has been overruled, even if we're confident that the Court would overrule it if the occasion presented itself.").

[230] *Levitan*, 281 F.3d at 1318; *see, e.g.*, Borzych v. Frank, 439 F.3d 388, 390 (7th Cir. 2006) (citing both *Smith* and *O'Lone* and disposing of a prisoner's constitutional claims by noting, "The first amendment, [unlike RLUIPA], does not require the accommodation of religious practice: states may enforce neutral rules.").

then apply *Turner/O'Lone* if such a right does exist.[231] The most popular option seems to be simply continuing to use *Turner/O'Lone*—justified either by the state failing to argue for *Smith*'s application,[232] by finding no inherent conflict between the two standards,[233] or by noting that *Smith* did not relate specifically to the prison context, and that as a result while it might control elsewhere, the older pre-*Smith* jurisprudence continues inside prisons.[234] Courts who preserve use of *Turner/O'Lone* to any degree will provide better ground for vegan prisoners seeking access to vegan meals through a constitutional free exercise claim: as much latitude as the *Turner* test gives the government, it is still more protective of religious freedom than *Smith*'s pure rational basis review.[235]

III. EQUAL PROTECTION

The Fourteenth Amendment's Equal Protection Clause forbids the government from denying "any person . . . equal protection of the laws."[236] This constitutional directive means, "essentially[,] . . . that all persons similarly situated should be treated alike."[237] In practice, the validity of a government action which treats people differently is often dependent upon what sort of classification the government is using to draw distinctions between otherwise similarly situated people.[238] By default, the government classification must simply meet rational basis review: if the classification's goal is a legitimate government interest, and the classification is rationally connected to that interest, then the classification is legitimate.[239] Distinctions drawn based on a quasi-suspect classification—currently, largely limited to sex-based distinctions—are subject to an intermediate level of scrutiny: the discriminatory classification must serve an important government interest, and be substantially related to that interest.[240] Finally, government action

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231 *Levitan*, 281 F.3d at 1319.

232 *E.g.*, *id.* at 1318–19; Salahuddin v. Groord, 467 F.3d 263, 274 n.3 (2d Cir. 2006); *Bemis*, 550 F.3d at 1219 n.3.

233 *E.g.*, Salaam v. Lockhart, 905 F.2d 1168, 1171 (8th Cir. 1990) ("We do not believe that the Supreme Court's recent decision in *Employment Div., Dep't of Human Resources v. Smith* affects our analysis. *Smith* does not alter the rights of prisoners; it simply brings the free exercise rights of private citizens closer to those of prisoners.").

234 *Levitan*, 281 F.3d at 1318–19; *see, e.g.*, Ward v. Walsh, 1 F.3d 873, 877 (9th Cir. 1993).

235 *Levitan*, 281 F.3d at 1318–19.

236 U.S. CONST. amend. XIV, §1. While the Equal Protection Clause's textual language specifically restricts the actions of state governments, the Court has effectively applied the Equal Protection Clause to the federal government, by way of the Fifth Amendment's due process guarantee. Bolling v. Sharpe, 347 U.S. 497, 499 (1954).

237 City of Cleburne, Tex. v. Cleburne Living Ctr., 473 U.S. 432, 439 (1985).

238 *Id.* at 439–40.

239 *Id.* at 440.

240 Miss. U. for Women v. Hogan, 458 U.S. 718, 724 (1982).

which classifies based on a suspect class—race,[241] national origin,[242] alienage, or religion[243]—is subject to strict scrutiny: the classification is valid only if it serves a compelling government interest in a manner which is narrowly tailored to that interest.[244] Regardless of the level of scrutiny involved, the Equal Protection Clause's functional goal remains the same: a guarantee that the government will not unwarrantedly discriminate against individuals.[245]

A. Equal Protection in the Prison Context

As with other constitutional rights, prisoners do not surrender their equal protection rights upon incarceration.[246] Prisoners may, however, see those equal protection rights constrained in the face of deference to legitimate penological purposes.[247] Much as when courts balance prisoner religious exercise rights against penological concerns,[248] the *Turner* test has historically been deployed to analyze prisoner equal protection rights.[249] Though the Supreme Court has clearly rejected *Turner* in favor of strict scrutiny when prison regulations differentiate between inmates based on racial classification,[250] subsequent cases have not yet revealed whether this applies similarly to prison classifications based on other suspect classes.

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241 *E.g.*, Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227 (1995).

242 *E.g.*, Graham v. Richardson, 403 U.S. 365, 372 (1971).

243 *E.g.*, Corp. of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos, 483 U.S. 327, 339 (1987).

244 Wygant v. Jackson Bd. of Educ., 476 U.S 267, 274 (1986).

245 Benjamin Pi-wei Liu, *A Prisoner's Right to Religious Diet Beyond the Free Exercise Clause*, 51 UCLA L. REV. 1151, 1179 (2004).

246 *See Turner*, 482 U.S. at 84–85 (identifying equal protection as a constitutional protection applying to prisoners).

247 *See id.* (noting that prisons involve a special context vis-à-vis constitutional rights).

248 *See supra* notes 108–117 and accompanying text (outlining the *Turner* test and its four factors).

249 *E.g.*, *Shakur*, 514 F.3d at 891–92; *DeHart*, 227 F.3d at 61; Clark v. Groose, 36 F.3d 770, 773 (8th Cir. 1994); *see also* Shaw v. Murphy, 532 U.S. 223, 229 (2001) ("[I]n *Turner*, we adopted a unitary deferential standard for reviewing prisoners' constitutional claims . . . ."); Washington v. Harper, 494 U.S. 210, 224 (1990) ("We made quite clear that the standard of review we adopted in *Turner* applies to all circumstances in which the needs of prison administration implicate constitutional rights.").

250 Johnson v. California, 543 U.S. 499, 509 (2005). The *Johnson* Court took pains to focus their holding on racial classifications in the prison context: "We have never applied *Turner* to racial classifications. *Turner* itself did not involve any racial classification, and it cast no doubt on *Lee*. We think this unsurprising, as we have applied *Turner*'s reasonable-relationship test *only* to rights that are 'inconsistent with proper incarceration.'. . . The right not to be discriminated against based on one's race is not susceptible to the logic of *Turner*. It is not a right that need necessarily be compromised for the sake of proper prison administration. On the contrary, compliance with the *Fourteenth Amendment's* ban on racial discrimination is not only consistent with proper prison administration, but also bolsters the legitimacy of the entire criminal justice system." *Id.* at 510–11.

B. Applying the Fourteenth Amendment to Non-Religious Vegan Prisoners

When the state declines to provide non-religious vegan prisoners with access to vegan meals, the implicated state action does not classify people by race, alienage, national origin, religion, or sex, and thus does not invoke distinction based on suspect class. Therefore, the prison's action will not be subject to heightened scrutiny by a court. Applying the rational basis test, a court considering this issue would determine whether a prison action that infringes on constitutional rights reasonably relates to legitimate penological objectives.[251] Given the range of legitimate penological purposes connected to prison food service, and the low threshold required to meet rational basis review, such a claim under the Equal Protection Clause brought by a non-religious vegan prisoner would likely fail.[252]

C. Applying the Fourteenth Amendment to Religiously Vegan Prisoners

In contrast, if a prisoner can establish that their veganism is rooted in a sincerely held religious belief,[253] the key question becomes whether similarly situated people—that is, other religious prisoners—are being treated alike. If a prison makes religiously compliant meals—such as kosher or halal meals—available to some religious prisoners, but does not make compliant—i.e. vegan—meals available to religiously vegan prisoners, then the religiously vegan prisoners can argue that they are being subject to discrimination based on their religious status. Such discrimination is constitutionally impermissible unless it can survive *Turner* balancing.[254]

Such a religiously vegan prisoner could also raise constitutional and statutory free exercise claims, because the discrimination in question—denial of access to religiously compliant meals—necessarily involves a substantial burden upon their ability to engage in religious exercise.[255] While the equal protection claim may involve similar arguments—certainly where the *Turner* test would be applied to a constitutional free exercise claim—its resolution is sufficiently distinct to offer some potential strategic advantages.[256] A religiously vegan prisoner's free exercise claim will focus on a particular policy regarding food ser-

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[251] *Turner*, 482 U.S. at 87.

[252] *Id.*

[253] *See supra* Sections II.A.i, B (discussing the thresholds for finding that a belief is sincerely held, and religious, respectively).

[254] *Shakur*, 514 F.3d at 891; *DeHart*, 227 F.3d at 61. *Cf.* Cruz v. Beto, 405 U.S. 319, 322 (1972) ("If Cruz was a Buddhist and if he was denied a reasonable opportunity of pursuing his faith comparable to the opportunity afforded fellow prisoners who adhere to conventional religious precepts, then there was palpable discrimination by the State against the Buddhist religion.").

[255] Liu, *supra* note 245, at 1185.

[256] *Id.* at 1178, 1181.

vice, while the same prisoner's equal protection claim will focus on discrimination between different, similarly situated prisoners.[257] By focusing on the difference in how prisoners are treated, rather than individual treatment itself, an equal protection argument shifts which penological interests are weighed against the prisoner's rights.[258]

The situation considered by the Third Circuit in 2000's *DeHart v. Horn* is instructive. Robert P. DeHart had become a self-taught Buddhist while serving a life sentence in the Pennsylvania state correctional system, and interpreted Buddhist texts as a mandate to adopt a vegetarian diet.[259] DeHart requested that the prison provide him with vegetarian meals by simply removing meat from his meal, while doubling his normal portion of "vegetables and grains and adding an eight-ounce cup of" soy milk, at a cost of "$1.71 per day."[260] When the prison denied his request, DeHart sued, arguing, among other things, that the prison's provision of kosher meals to Jewish prisoners—at a "substantially [higher] cost than the" soy milk he requested—indicated that he was suffering religiously-based discrimination, in violation of his equal protection rights.[261] While a *Turner* free exercise analysis might consider the cost of purchasing soy milk in and of itself as a valid penological interest,[262] it would be difficult[263] to argue that the cost of soy milk was a legitimate justification for treating Buddhist and Jewish prisoners differently, when the prison had already committed to provide more expensive meals to Jewish prisoners.[264] Similarly, a religiously vegan prisoner denied access to vegan meals in a prison system that provides other religious prisoners with food appropriate to their religious beliefs can expand their argument's analytical ground

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257 *Id.* at 1176.

258 *Id.*

259 *DeHart*, 227 F.3d at 49.

260 *Id.*

261 *Id.* at 58.

262 Liu, *supra* note 245, at 1176.

263 Though not impossible: in Robert DeHart's third round of litigation before the Third Circuit, his religiously-grounded dietary request required "*portions individually prepared to his dietary specifications*[, or] . . . extra daily servings of the alternative protein sources available at the Prison, but specially prepared without pungent vegetables and outside of their rotation on the master menu." DeHart v. Horn, 390 F.3d 262, 270 (3d Cir. 2004) (emphasis in original). The Third Circuit concluded that, based on the greater cost in terms of money and time required to meet that version of DeHart's proposed diet, he could not be said to be situated similarly to Jewish or Muslim prisoners for Equal Protection purposes. *Id.* at 272.

264 Liu, *supra* note 245, at 1176; *see also DeHart*, 227 F.3d at 61 ("[D]efendants explain that they provide kosher diets to Orthodox Jewish inmates because such diets 'are a commandment of the [O]rthodox Jewish faith' and that they have denied DeHart the diet that his personal religious faith mandates because such a diet 'is not a commandment of Buddhism.' Neither the defendants nor the District Court has explained, however, how this distinction is reasonably grounded in legitimate penological concerns, and any nexus between the two is not self-evident. In the absence of such a nexus, the distinction drawn between orthodox and non-orthodox believers cannot justify the refusal of DeHart's request. Accordingly, we will remand this issue as well for further development and factual findings.").

so it not only focuses on the prison interfering with their religious exercise, but also the prison's unequal treatment of them vis-à-vis other prisoners.

IV. EIGHTH AMENDMENT ANALYSIS

The Eighth Amendment prohibits the government from imposing cruel and unusual punishments.[265] While refusing to provide a prisoner with food consistent with their moral beliefs—forcing the prisoner to choose between their health and their conscience—might seem to intuitively be cruel and unusual, the Eighth Amendment is not a fruitful avenue for prisoners seeking to secure access to vegan meals. Eighth Amendment jurisprudence outlines "four principles by which we may determine whether a particular punishment is 'cruel and unusual.'"[266]

(1) the punishment is so severe as to degrade human dignity;
(2) the punishment is severe and "obviously inflicted in a wholly arbitrary fashion";
(3) the punishment is severe and "totally rejected throughout society"; and
(4) the punishment is severe and "patently unnecessary."[267]

These Eighth Amendment limits encompass "the treatment a prisoner receives in prison and the conditions under which [the prisoner] is confined,"[268] creating a positive duty on the part of prison officials to "provide humane conditions of confinement . . . [including] adequate food."[269]

A. Neither Tasty Nor Pleasing: The Low Threshold for an Eighth Amendment Diet[270]

This humane requirement, however, focuses on the nutritional adequacy of food available for ingestion, not the humane character of food

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265 "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII. This limits both federal and—since 1962—state punishment options. Robinson v. California, 370 U.S. 660, 667 (1962).

266 Furman v. Georgia, 408 U.S. 238, 281 (1972).

267 *Id.*

268 Helling v. McKinney, 509 U.S. 25, 31 (1993).

269 Farmer v. Brennan, 511 U.S. 825, 832 (1994); *see also* Rhodes v. Chapman, 452 U.S. 337, 347 (1981) (noting that when prisoners rely on prisons for provision of their basic needs, conditions that result in serious deprivation of those "basic human needs" constitute cruel and unusual punishment). The *Rhodes* concurrence endorses a holistic analysis of prison conditions vis-à-vis provision of basic needs: "[Evaluating whether the] cumulative impact of the conditions of incarceration threatens the physical, mental, and emotional health and well-being of the inmates and/or creates a probability of recidivism and future incarceration." *Id.* at 364.

270 *See* LeMaire v. Maass, 12 F.3d 1444, 1456 (9th Cir. 1993) ("The Eighth Amendment requires only that prisoners receive food that is adequate to maintain health; it need not be tasty or aesthetically pleasing.").

ingredients.[271] Providing prisoners with access to adequate nutrition is an Eighth Amendment requirement.[272] This obligation, however, is independent of a prisoner's choice regarding what constitutes adequate or acceptable food.[273] In a line of cases involving restricting prisoner diets as a punishment mechanism, courts have distinguished acceptable diets from those that invoke Eighth Amendment problems based on whether food provided meets nutritional and caloric requirements, regardless of how displeasing the food might be.[274] Addressing the Arkansas prison system's practice of feeding prisoners in punitive isolation meals consisting of "4-inch squares of 'grue', a substance created by mashing meat, potatoes, oleo, syrup, vegetables, eggs, and seasoning" into a pan-baked paste,[275] the district court initially ruled that though "grue" was "not appetizing and is not served attractively, it is a wholesome and sufficient diet for men in close confinement day after day."[276] Five years later, the Eighth Circuit considered the issue, finding that while the "tasteless, unappetizing paste-like food" may have theoretically constituted a "nutritionally sufficient diet," the way in which it was delivered to inmates—who received "one full meal every three days and six consecutive full meals every 14 days," interspersed with medical checkups—made concluding that prisoners were actually having their nutritional needs met "dubious."[277] Subsequently, the

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[271] *Id.*

[272] Shrader v. White, 761 F.2d 975, 986 (4th Cir. 1985) ("It is well-established that inmates must be provided nutritionally adequate food, 'prepared and served under conditions which do not present an immediate danger to the health and well being of the inmates who consume it.'"); Wishon v. Gammon, 978 F.2d 446, 449 (8th Cir. 1992) ("[P]risoners have a right to nutritionally adequate food . . . ."). This affirmative Eighth Amendment obligation focuses on prisoner health, not prisoner desire. *Africa*, 662 F.2d at 1036 n.23. As such, a prisoner who has a medical condition requiring a vegan (or otherwise restricted) diet potentially *does* have a cognizable claim under the Cruel and Unusual Punishment clause. *Id.* Certainly, if the necessity of a prisoner receiving vegan food rose to the level of "serious medical need[ ]," then for a prison to remain "deliberate[ly] indifferen[t]"—whether by failing to provide appropriate medical care or intentionally interfering with the prisoner's access to vegan food—would constitute "the 'unnecessary and wanton infliction of pain' proscribed by the Eighth Amendment." Estelle v. Gamble, 429 U.S. 97, 104 (1976). The deliberate indifference standard invoked in *Estelle* is more stringent than the *Turner* test, which does not apply to Eighth Amendment claims. *Johnson*, 543 U.S. at 511 ("[W]e have not used *Turner* to evaluate Eighth Amendment claims of cruel and unusual punishment in prison. We judge violations of that Amendment under the 'deliberate indifference' standard, rather than [*Turner*] . . . . This is because the integrity of the criminal justice system depends on full compliance with the Eighth Amendment.").

[273] *LeMaire*, 12 F.3d at 1456; *see also Wishon*, 978 F.2d at 449 (finding that a prisoner's personal assessment of available food was not sufficient evidence to survive summary judgment on Eighth Amendment claims—prisoner needed "evidence that the food he was served was nutritionally inadequate or prepared in a manner presenting an immediate danger to his health, or that his health suffered as a result of the food").

[274] *See LeMaire*, 12 F.3d at 1455–56 (listing the decisions and their holdings that distinguish acceptable diets from Eighth Amendment violations).

[275] Hutto v. Finney, 437 U.S. 678, 683 (1978).

[276] Holt v. Sarver, 300 F. Supp. 825, 832 (E.D. Ark. 1969).

[277] Finney v. Ark. Bd. of Corr., 505 F.2d 194, 207 (8th Cir. 1974).

Federal District Court for the Eastern District of Arkansas ruled that using "grue" for prisoner meals was unconstitutional.[278] While "grue" went unaddressed as such by the subsequent circuit court ruling,[279] the Supreme Court accepted the district court's finding, implicitly tying the impermissibility of feeding prisoners "grue" to the fact that "practically all inmates were losing weight on it."[280] Lest the "grue" cases be taken as indication that courts are willing to entertain prisoner food choice in the face of minimal nutritional adequacy, courts have generally ruled that feeding prisoners the similar 'meal loaf' does not trigger Eighth Amendment issues.[281] The Ninth Circuit has consistently held that feeding prisoners meal loaf—a blended and baked puree of ingredients "mixed according to nutritionally balanced recipes"[282]—does not rise to the level of cruel and unusual punishment, because the "Eighth Amendment requires only that prisoners receive food that is adequate to maintain health; [the food] need not be tasty or aesthetically pleasing."[283] In doing so, the Ninth Circuit distinguished meal loaf from "grue," because while Arkansas's implementation of the "grue" diet "provided only 1000 calories a day [and thus] might be unconstitutional if served for long periods . . . [meal loaf] provides an excess of nutritional requirements."[284] State courts have reached similar conclusions. In 2001, the Illinois Appellate Court found that, due to its nutritional adequacy, a "meal loaf diet does not violate the Eighth Amendment protection against cruel and unusual punishment,"[285] despite the refusal of the prisoners involved to eat the loaf.[286] In 2009, the Vermont Supreme Court considered a meal loaf case and carefully noted the "case does *not* present the question of whether the imposition of such a diet is cruel and unusual punishment."[287]

By similar reasoning, because Eighth Amendment jurisprudence vis-à-vis prisoner meals focuses on physiological adequacy—inquiring simply whether offered meals meet the base nutritional and caloric needs of a prisoner's body—failing to provide a vegan diet has not been

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278 Finney v. Hutto, 410 F. Supp. 251, 251, 277 (E.D. Ark. 1976). The most helpful language here vis-à-vis Eighth Amendment claims based on provision of meals that *prisoners* consider inedible is found in footnote twelve: "While the evidence is to the effect that 'grue,' a tasteless and unappetizing substance, will not only sustain life but is adequate nutritionally for an inmate who is not leading an active life, the evidence also discloses that some inmates simply will not eat the 'grue' or will not eat much of it, and that practically all inmates lose weight while in punitive isolation." *Id.* at 276 n.12.

279 Finney v. Hutto, 548 F.2d 740 (8th Cir. 1977) (focusing on prisoner isolation and declining to address "grue").

280 *Hutto*, 437 U.S. at 684.

281 Arnett v. Synder, 769 N.E.2d 943, 950 (2001).

282 *LeMaire*, 12 F.3d at 1455.

283 *Id.* at 1456; Gordon v. Barnett, 338 F. App'x. 640, 641 (9th Cir. 2009).

284 *LeMaire*, 12 F.3d at 1456 (holding that "Nutraloaf and grue, however, are not comparable").

285 *Arnett*, 769 N.E.2d at 950.

286 Indeed, that the prisoners refused to eat meal loaf prompted the court to find "any weight loss cannot be attributed to a nutritional deficiency of the meal loaf." *Id.*

287 Borden v. Hofmann, 974 A.2d 1249, 1250 (Vt. 2009).

held to rise to the level of cruel and unusual punishment.[288] In *LaFevers v. Saffle*, the Tenth Circuit held that denying a prisoner's request for vegetarian meals does not constitute cruel and unusual punishment.[289] In doing so, the *LaFevers* court noted that while the prisoner did not have his first choice of meals, the prison did offer him "three [nutritionally adequate] meals a day" and therefore had met its obligation.[290] In short, barring a fundamental shift in how courts evaluate dietary claims under the Eighth Amendment, relying upon the Eighth Amendment alone is a poor avenue for prisoners seeking access to vegan meals.

B. Using the Free Exercise Clause to Buttress Eighth Amendment Claims[291]

While the Eighth Amendment's prohibition on cruel and unusual punishment is not in and of itself a useful avenue for prisoners seeking vegan meals, it can be used in conjunction with free exercise claims—at least in certain scenarios where prisoners ultimately refuse to eat the non-vegan portions of their meals, or where the prison simply removes non-vegan items from prisoner meals without substituting a vegan alternative.[292] If, despite forgoing whatever calories and nutrients were contained in the non-vegan items, a religiously vegan prisoner's physical needs are still being met, then the Eighth Amendment provides no additional support to the prisoner's free exercise claim.[293] If, however, the religiously vegan prisoner is not receiving the calories or nutrients necessary to maintain health, then they will eventually begin to suffer "physical deprivation deserving of attention."[294] At that point, the prison has two options: either ignore the prisoner's physical deterioration or force-feed the prisoner.[295]

Ignoring the problem may constitute the sort of deliberate indifference which does actually implicate a violation of the Eighth Amendment's ban on cruel and unusual punishment. While it remains true that the Eighth Amendment does not guard more than the physiological adequacy of inmate meals,[296] a prison which is affirmatively providing what appear to be inadequate meals—for example, by serving vegan meals which are either too small or not nutritionally balanced, perhaps because they were created by removing non-vegan content without adding vegan alternatives—may give rise to an issue of fact as to whether their conduct rises to the level of cruel and unusual punish-

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288 *LeMaire*, 12 F.3d at 1456.

289 LaFevers v. Saffle, 936 F.2d 1117, 1120 (10th Cir. 1991).

290 *Id.*

291 This Section draws heavily on arguments made by Benjamin Pi-wei Liu. Liu, *supra* note 245, at 1170–73.

292 *Id.* at 1170.

293 *Id.*

294 *Id.*

295 *Id.*

296 *Supra* Part IV.

ment.[297] In situations where the prison fails to provide sufficient vegan food, a religiously vegan prisoner refuses to eat non-vegan food, and the prison is aware that this refusal stems from the prisoner's sincerely held religious beliefs, that the prisoner had the theoretical choice between violating their religious beliefs and eating may well be unavailing.[298] Under this line of reasoning, putting a prisoner "in the position of choosing to follow his religious beliefs or to improve his conditions of confinement" offers a "choice [which] is not meaningful, much less constitutional"—forcing prisoners to choose between constitutional violation of their religious beliefs and conditions of confinement severe enough to constitute cruel and unusual punishment does not excuse the implied Eighth Amendment violation.[299]

If the prison chooses to force-feed their religiously vegan inmate, the result may be to clarify the second *Turner* test factor: the impact providing vegan meals to the prisoner will have on guards, other inmates, and prison resources.[300] By illustrating that the alternative to the cost and trouble of providing vegan meals may be the cost and trouble of regularly engaging in a medical force-feeding procedure, the prison's duty to see that the prisoner receives food sufficient to sustain physiological health can provide courts with a clear "real cost of non-accommodation" to weigh against the cost of accommodation.[301]

V. THE PRISON LITIGATION REFORM ACT

Congress enacted the Prison Litigation Reform Act (PLRA) in 1996, with the explicit purpose of modulating the quantity of prisoner suits being litigated in federal court.[302] Though the PLRA restricts and discourages litigation by prisoners in various fashions, it largely attempts to throttle prisoner civil litigation in two general ways: by regulating *how* prisoners may litigate claims, and by limiting injunctions resulting *from* successful litigation.[303]

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297 *See, e.g.*, Caldwell v. Caesar, 150 F. Supp. 2d 50, 50, 64–65 (D.D.C. 2001) (stating that Lawrence Caldwell maintained a vegetarian diet as encouraged by the tenants of the Liberal Catholic Church, of which he was a member. Caldwell alleged that the food service provider contracted by the District of Columbia Department of Corrections to provide him with vegetarian meals often served him meals from which non-vegetarian items had simply been removed, with no alternatives substituted).

298 *Id.*

299 Jolly v. Coughlin, 76 F.3d 468, 480–81 (2d Cir. 1996) (dismissing the prison's argument that holding a Rastafarian prisoner in indefinite medical keep lock for years while he refused to take a tuberculosis test which he felt would violate his religious beliefs did not implicate the Eighth Amendment, because the prisoner could have decided to submit to the tuberculosis test).

300 Liu, *supra* note 245, at 1171–72.

301 *Id.* at 1170.

302 Woodford v. Ngo, 548 U.S. 81, 83 (2006) (describing the PLRA as "designed to bring this litigation [prisoner litigation in federal courts] under control").

303 The PLRA's regulations on how prisoners may litigate are often referred to as 'the prisoner litigation provisions,' while its limits on injunctive relief are referred to as 'the prospective relief provisions.' *See generally* JOHN BOSTON, PRISON LITIGATION REFORM

While the PLRA's limitations on how prisoners may litigate claims are varied—encompassing attorney's fees,[304] filing fees,[305] and limitations on recovery[306]—one is particularly relevant to suits regarding access to vegan food: the administrative exhaustion requirement.[307] Before bringing an action "with respect to prison conditions," a prisoner must exhaust any applicable administrative remedies available to them[308] by attempting to resolve their complaint through the prison's internal grievance procedure.[309] In short, a prisoner seeking vegan

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ACT 1 (2004), http://www.wnylc.net/pb/docs/plra2cir04.pdf [https://perma.cc/3NCJ-58U6] (accessed Apr. 9, 2017).

304 42 U.S.C. § 1997e(d) (2012) (including a 'three strikes' provision, such that if a prisoner has brought three civil actions (or appealed a judgment in three civil actions), which were dismissed for frivolousness, maliciousness, or failure to state a claim upon which relief can be granted, then the prisoner is barred from bringing future civil claims *in forma pauperis*); 28 U.S.C. § 1915(g) (2012) (exempting cases where the prisoner is "under imminent danger of serious physical injury").

305 28 U.S.C. § 1915(b)(1)–(2) (2012) (requiring prisoners to pay filing fees in installments according to a complex statutory formula).

306 42 U.S.C. § 1997e(e) (2012) (requiring prisoners raising mental or emotional damage claims to establish that they were physically injured or sexually assaulted while in custody). Note, courts have held that this section only applies to actions for damages, and not actions for injunctive or declaratory relief. *See Thompson*, 284 F.3d 411, 418 (2d Cir. 2002) (citing Herman v. Holiday, 238 F.3d 660, 665 (5th Cir. 2001); Harris v. Garner, 190 F.3d 1279, 1288 (11th Cir.1999); Harper v. Showers, 174 F.3d 716, 719 (5th Cir. 1999); Perkins v. Kan. Dep't of Corr., 165 F.3d 803, 808 (10th Cir.1999); Davis v. Dist. of Columbia, 158 F.3d 1342, 1346 (D.C. Cir. 1998); Zehner v. Trigg, 133 F.3d 459, 462–63 (7th Cir.1997)). A majority of courts have held that this provision only applies to compensatory damages, and not nominal or punitive damages. *See* Thompson v. Carter, 284 F.3d at 418 (citing Searles v. Van Bebber, 251 F.3d 869, 878–80 (10th Cir. 2001); Allah v. Al-Hafeez, 226 F.3d 247, 252 (3d Cir. 2000); Cassidy v. Ind. Dep't of Corr., 199 F.3d 374, 376–77 (7th Cir. 2000)). The courts are not in agreement as to how this provision relates to constitutional rights. Many courts have held that First Amendment violations are separate from mental or emotional injuries. *See* Rowe v. Shake, 196 F.3d 778, 781–82 (7th Cir. 1999) ("A prisoner is entitled to judicial relief for a violation of his First Amendment rights aside from any physical, mental, or emotional injury he may have sustained."); Ford v. McGinnis, 198 F. Supp. 2d 363, 366 (S.D.N.Y. 2001) ("[T]he PLRA does not bar a separate award of damages to compensate the plaintiff for the First Amendment violation in and of itself."); Lipton v. Cty. of Orange, N.Y., 315 F. Supp. 2d 434, 457 (S.D.N.Y. 2004) (quoting *Ford*, 198 F. Supp. 2d at 366); Cancel v. Mazzuca, 205 F. Supp. 2d 128, 138 (S.D.N.Y. 2002) (stating that § 1997(e) does not present an obstacle for an action for alleged violations of First Amendment rights). But another court has stated, "Plaintiff cannot recover damages for mental or emotional injury for a constitutional violation in the absence of a showing of actual physical injury." *Thompson*, 284 F.3d at 417. Most courts have adopted the view that the injury must be more than de minimus, but not necessarily significant. *See* Siglar v. Hightower, 112 F.3d 191, 193 (5th Cir. 1997) (using the Eighth Amendment's prohibition on cruel and unusual punishment as a guide); Liner v. Goord, 196 F.3d 132, 135 (2d Cir. 1999) (holding sexual assaults were more than a de minimis injury); Oliver v. Keller, 289 F.3d 623, 627–28 (9th Cir. 2002) (stating that injuries must be more than de minimis).

307 42 U.S.C. § 1997e(a).

308 *Id.*

309 *Id.*

meals must pursue to conclusion whatever process the prison offers to potentially get those meals, before asking a court to intervene.[310]

The PLRA's limits on what injunctive relief prisoners may achieve following a successful claim are relevant to the core goal of prisoners suing in an attempt to secure access to vegan meals: actually changing the food they eat.[311] The injunctive relief limits established by the PLRA certainly apply to court orders addressing meals served to prisoners; the limits apply to "[p]rospective relief" arising from "any civil proceeding arising under Federal law with respect to the conditions of confinement or the actions by government officials on the lives of persons confined [excluding habeas corpus petitions]."[312] The PLRA requires that such relief be "narrowly drawn, . . . [extending] no further than necessary to correct the violation of the Federal right, and [being] the least intrusive means necessary to correct the violation of Federal right."[313] In narrowly drawing such relief, the PLRA directs courts to heavily weigh "any adverse impact on public safety or . . . [operating the] criminal justice system."[314] Thus, a prisoner asking a court to order a prison to provide vegan meals must first identify and prevail upon an applicable rights-based argument, and second should take care to describe the relief sought with narrow care.[315]

VI. CONCLUSION

While this Article frames its analysis in terms of generically vegan meals, I anticipate that it will be useful in other contexts—whether prisoners seeking to maintain a differently exacting sort of vegan or vegetarian diet, or prisoners who are interested in exploring their access to vegan or animal-friendly options in non-food areas, such as personal hygiene products or clothing.

In analyzing legal issues surrounding these sorts of vegan prison issues, the aim of this Article has been three fold:

(1) to summarize the established jurisprudence vis-à-vis the needs of vegan prisoners;
(2) to highlight relevant new legal developments, and provide an argument regarding how this developments may impact previously established jurisprudence; and
(3) to suggest creative legal theories to address the needs of vegan prisoners.

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310 *Id.*

311 *Id.*

312 18 U.S.C. § 3626(a)(1), (g)(2) (2012).

313 18 U.S.C. § 3626(a)(1)(A) (2012).

314 *Id.*

315 For example, prisoners seeking vegan meals may find utility in modeling their requested relief on an existing program implemented at their prison, much as Gregory Holt did by agreeing to a beard length similar to that authorized for prisoners with medical beard needs. *Holt*, 135 S. Ct. at 856–57.

In doing so, I do not advocate for any one approach to ensure that vegan prisoners receive accommodation while incarcerated. Indeed, I anticipate that each combination of prisoner and prison will raise its own fact-specific challenges and needs. Taken as a whole, therefore, I look to these goals as a way to support lawyers in analyzing the legal landscape they and their clients face, allowing them to construct arguments that will better help vegan prisoners maintain that commitment throughout the terms of their incarceration, whatever the particulars of those prisoners or their confinement.