THEY CAN TAKE YOUR BODY BUT NOT YOUR SOUL--OR SO YOU THOUGHT--THE THIRD CIRCUIT'S APPLICATION OF THE *TURNER* STANDARD IN PRISONERS' FREE EXERCISE CASES

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I. Introduction

¶1. Courts and Congress alike have been struggling to define the scope of prisoners' religious rights.[2] An inmate should consider the four walls of his cell not only a prison for his body but also his soul;[3] in addition to physical confinement, prisoners in the United States corrections system may also be subject to religious constrictions.[4] In certain cases they may not be able to observe their religious mandates because of prison regulations created to sustain security and order.[5] Prisoners are often not afforded the same rights as civilians, and those diminished rights have been held to include restrictions on their religious freedoms.[6]

¶2. The First Amendment of the Constitution guarantees individuals the right of free exercise of their religious beliefs (*herein* free exercise rights).[7] The application of the First Amendment to inmates in the correctional system presents a contradiction with the right to free exercise.[8] Courts have long disregarded prisoners' rights and considered prisoners "slave[s] of the State."[9] The Supreme Court eventually diverted from this hands-off principle, recognizing that "[p]rison walls do not form a barrier separating prison inmates from the protections of the Constitution."[10]

¶3. In *Turner v. Safley*, the Supreme Court established a test to determine the constitutionality of prison regulations that burden religious rights.[11] The Court expressly rejected a heightened scrutiny standard in favor of rational basis review.[12] Additionally, the Court emphasized the need to afford deference to the judgment of prison authorities.[13] Although the Court made efforts to create a precedent for others, the lower courts have applied the *Turner* test inconsistently and have arrived at different conclusions in similar cases.[14] These inconsistencies result in the arbitrary violation of prisoners' constitutional rights and is hardly better than the hands-off doctrine.[15]

¶4. This article seeks to reveal the weakness of the *Turner* test as a standard for gauging religious freedom. It focuses on application by the Third Circuit as the court from which many cases interpreting *Turner* originate. Part II outlines the development of prisoners' First Amendment rights, starting with the hands-off doctrine and ending with a detailed explanation of the *Turner* analysis. Part III discusses the Third Circuit's struggle in determining the scope of prisoners' free exercise rights in three recent cases, *Sutton v. Rasheed*,[16] *Williams v. Morton*,[17] and *DeHart v. Horn*.[18] Part IV provides advice to practitioners and presents *Brown v. Johnson*[19] as an example of an unsuccessful case, challenging a prison regulation. Part V concludes with the impact of *Turner* on prisoners' First Amendment rights.

II. **The Development of Prisoners' First Amendment Rights**

A. The Hands-Off Doctrine

¶5. Before the 1960s, courts traditionally refrained from addressing prisoners' rights issues, a practice known as the hands-off doctrine.[20] In dismissing prisoners' complaints, courts refused to interfere in the penal system and deferred to the judgment of prison officials.[21] Courts set forth several reasons for their non-involvement, citing policies including separation of powers, federalism and judicial incompetence.[22] This policy of judicial passivity was also based on courts' belief that meddling in prison decisions hindered the objectives of the penal system.[23]

¶6. The decision in *Cooper v. Pate*[24] marked the decline of the Hands-off doctrine.[25] The inmate in *Cooper* alleged that the prison violated his First Amendment rights by denying him permission to purchase religious publications solely because of his religious beliefs.[26] For the first time, rather than perpetuating the hands-off doctrine, the Supreme Court recognized a cause of action in a prisoners' complaint.[27] This case resulted in more inmate cases reaching the federal courts but without a specific constitutional standard for prisoners' rights cases.[28]

B. Developing a Standard of Review: Before *Turner v. Safley*

¶7. After the hands-off era the Supreme Court recognized that inmates were entitled to constitutional rights even behind prison walls.[29] Courts, however, continued to assume a policy of deference to prison officials in resolving inmates' free exercise

claims.[30] The Court first addressed the need for an appropriate standard of review in *Procunier v. Martinez*.[31] The Court set forth two criteria to determine whether the regulation was justified: (1) the prison policy must support an important governmental interest, and (2) it must not burden prisoners beyond what is necessary to promote that interest.[32] Effectually, the Court applied a heightened level of scrutiny, but failed to establish a standard of review for all prisoners' free exercise cases.[33]

¶8. For the next few years, the Court continued to provide consistent principles in its attempt to refine the scope of prisoners' First Amendment rights.[34] In *Pell v. Procunier* the Court created a balancing test under which the burden on inmates' rights must be balanced against the state's legitimate interest in confining prisoners.[35]

¶9. Additionally, the Court considered the availability of alternative ways for inmates to exercise their rights.[36] In redefining the balancing test, the Supreme Court in *Jones v. North Carolina Prisoners' Union*, formed a rational basis standard that addressed the question of whether the prison restriction was rationally related to the reasonable goals of the prison system.[37] The Court again adopted a narrow view of prisoners' rights, deferring to prison administrators.[38] The Court found most relevant the fact that there were other available alternatives, concluding that such a restriction on one manner of communication was not unconstitutional.[39]

¶10. In *Bell v. Wolfish*, the Court, applying a rational relationship test, considered issues presented in earlier cases such as prison objectives and alternatives to inmates.[40] These past cases established the foundation of the current standard of review found in *Turner v. Safely*.[41]

C. *Turner v. Safley*: The Standard

¶11. In *Turner*, the Supreme Court set forth the current standard of review for ascertaining the extent of prisoners' constitutional rights.[42] The plaintiff inmates challenged two regulations adopted by the Missouri Division of Corrections.[43] The first regulation at issue limited correspondence between inmates at different institutions.[44] The second forbade inmates from marrying unless the superintendent found a compelling reason, namely pregnancy or birth of an illegitimate child.[45] The Court explicitly rejected the use of a strict scrutiny standard derived from *Martinez*, because previous cases called for a lesser standard.[46] Instead, the Supreme Court attempted to set forth an intermediate level of scrutiny for prisoners' rights cases as a whole.[47] In deciding this particular case, the majority found that the essential question was whether prison rules that infringe on inmates' constitutional rights are reasonably related to legitimate penological interests.[48] Moreover, inmates bear the burden of disproving the validity of the prison regulation at issue.[49]

¶12. The determination of the reasonableness of a prison regulation requires the balancing of four factors set forth in *Turner*.[50] The balancing test does not require that all four factors be met.[51] The first factor requires a rational relationship between the prison regulation and the legitimate governmental interest.[52] The second factor is whether alternative means of exercising the right are available to prisoners.[53] The third factor is whether accommodation of the prisoner's right would have a negative impact on guards or other prisoners.[54] The last factor is whether alternative regulations exist.[55]

¶13. In its application of the balancing test, the *Turner* Court concluded that the restrictions on inmate correspondence were not a violation of the prisoners' constitutional rights because they were reasonably related to valid security concerns.[56] The Court found that growing problems with prison gangs were legitimate governmental concerns and that restricting correspondence between members would help reduce the problem.[57] The rule on inmate marriage, however, did not pass scrutiny because it constituted an "exaggerated response" to similar concerns.[58] The Court found no rational relationship between the rule and the asserted governmental concerns about security and rehabilitation.[59] The Court found the regulation too broad and considered another less restrictive alternative regulation.[60] In his dissent, Justice Stevens found the majority holdings contradictory and accurately predicted inconsistent application of the Turner test.[61]

1. The First *Turner* Factor: The Logical Connection

¶14. The first factor in determining the reasonableness of the challenged prison regulation is whether a valid, rational connection exists between the regulation and legitimate governmental interests asserted by prison officials.[62] A defendant can generally prevail under this factor unless the regulation's relationship with the asserted objective was "so remote as to render the policy arbitrary and irrational."[63] In addition to having a rational relationship with governmental objectives, the prison regulation that infringes on the prisoners' constitutional right must be legitimate and neutral.[64] Courts consider prison security the most compelling state interest; thus, they often find the

requisite logical connection when the basis for a correctional policy is to promote security.[65]

2. The Second *Turner* Factor: Alternative Means of Expression

¶15. Under the second factor, courts determine whether alternative means of practicing their religion were available to prisoners.[66] The Court affords prison administrators deference in their establishment of correctional policy and practice.[67] The material question is whether prisoners have opportunities to observe their faith generally, and the fact that the prison sets forth specific prohibitions is not relevant.[68] Under this factor, the corrections facility is not obligated to allow inmates their preferred means of religious expression so long as they have alternative ways to practice their faith.[69]

¶16. The pertinent question is whether the prison denies inmates all means to observe their faith.[70] In addressing this issue, courts pay more attention to the fact that the prison policy infringes on only one aspect of inmates' religious practice. In such cases, inmates are afforded opportunities to exercise other aspects of their faith, deciding this factor in favor of the prison.[71] Some courts do not allow prison policies that infringe on a religious practice that forms part of the core of a religion, making the infringement far more serious than a single means of religious expression.[72] In such a case, the second *Turner* factor would remain unsatisfied and designate the corrections policy less reasonable.[73]

3. The Third *Turner* Factor: "The Ripple Effect"

¶17. The reasonableness of the challenged prison policy also depends on whether the prisoners' free exercise rights significantly affect other inmates or prison guards.[74] In such cases where a prisoners' asserted rights limit others' liberty, courts should defer to the authority of prisoner administrators.[75] The *Turner* Court recognized that all prison modifications would likely have an effect on others' rights and use of prison resources.[76] Therefore, if the negative effects are substantial, courts will defer to the authority of prison administrators.[77]

¶18. Limited resources in prisons, for example, may result in legitimate restrictions on prisoners' free exercise rights in some circumstances because prisons may be unable to accommodate every religious group.[78] If the prison affords one group of prisoners free exercise as opposed to another group, it would cause the diminution of prison morale and discipline, which some courts consider valid penological concerns.[79] Other courts, however, disagree with this line of reasoning because any special treatment could likely arrive at this outcome.[80]

4. The Fourth *Turner* Factor: The Easy Alternative Prison Regulation

¶19. The last relevant factor is whether alternatives to the challenged prison policy exist.[81] A court may deem a prison regulation unreasonable if inmate claimants can identify another procedure that fulfills their religious rights at de minimis costs to legitimate governmental interest.[82] Hence, the burden is on the claimant inmate to

demonstrate a better way to satisfy both parties.[83] The plaintiff must illustrate obvious and easy alternatives, presenting a difficult test.[84]

D. Extension of the *Turner* Test: The *DeHart* Threshold Question

¶20. Recently in *DeHart v. Horn*, the Third Circuit extended the scope of the *Turner* test to consider whether a prisoner's constitutional right is being threatened.[85] It addressed this question first because the rest of the *Turner* analysis would only applies on the assumption that there is a right at issue.[86] In resolving this, the court held that only beliefs that are both "sincerely held" and "religious in nature" are allowed constitutional protection.[87] The religious practice or belief does not have to be mandatory or even common among its members in order to constitute a fundamentally protected interest.[88] In this extension of the Turner test, the court was motivated to reduce cases of deception and fraud.[89] If this requirement is not satisfied, courts need not reach the *Turner* analysis.[90] Many courts have adopted this test as the threshold question.[91]

E. Recent Developments in the Standard

¶21. In *Turner*, the Supreme Court expressly rejected heightened scrutiny in favor of rational basis review.[92] Congress, however, has attempted to increase the level of scrutiny applied by courts in order to broaden the scope of prisoners' religious rights.[93] In 2000, Congress created the Religious Land Use and Institutionalized

Persons Act (RLUIPA), and critics anticipated that the Supreme Court would find it unconstitutional and an abuse of congressional power.[94] In June of 2005, the Supreme Court in *Cutter v. Wilkinson*[95] upheld RLUIPA under the Establishment Clause but did not address whether Congress surpassed its spending power.[96] Therefore, the *Turner* test is still relevant especially if RLUIPA is found unconstitutional or if Congress decides to repeal the statute.[97] It remains the default test because it is the basic test to determine whether prisoners' First Amendment rights have been violated.[98]

III. The Third Circuit's Recent Application of the *Turner* Analysis

A. Sutton v. Rasheed

¶22. In *Sutton v. Rasheed*, the defendant prison established a program for its high risks prisoners and provided five phases to help these inmates curb their behavior.[99] To prepare prisoners for return to the general prison population, the prison encouraged progression through the five phases through rewards of additional privileges.[100] The program included a one-box policy, allowing inmates only legal documents contained in one records center box and a personal Bible, a Holy Koran or the like.[101] The prison officials denied the plaintiff inmate his requested Muslim books because they believed the books were not religious.[102] The plaintiff argued that the ban on the texts did not promote rehabilitation and security, the asserted penological interests, because it was effective at all phases regardless of prisoners' behavior.[103] The court found that the denial was improper and did not further a legitimate governmental interest.[104]

¶23. Considering that the latest prisoners' rights cases held in favor of the prison officials, *Sutton* seemed long overdue.[105] Inmates claimed that depriving them of the Muslim literature was a violation of their religious rights.[106] The prison administrators argued that such restrictions would improve inmate behavior and provide security.[107] The court ultimately disagreed and found no rational relationship between the policy and the asserted governmental objectives.[108]

¶24. The court began its discussion with application of the *Turner* test.[109] In its assessment of the first prong, the court emphasized the need to give deference to the informed discretion of corrections officials.[110] Nevertheless, without addressing the defendants' arguments, the court noted difficulty in finding legitimate penological interests in upholding the prison regulation.[111] In finding the second prong in favor of the plaintiffs, the court determined that the policy barred the prisoners from practicing their religion generally as opposed to a particular practice.[112] With little explanation, the Third Circuit found the third and fourth factors supportive of the plaintiffs' claim because their requests would result in de minimis costs and minimum impact.[113] The *Sutton* court chose not to defer to prison officials' judgment and instead found the policy unreasonable.[114]

B. Williams v. Morton

¶25. In *Williams v. Morton*, the Third Circuit addressed a prisoners' free exercise claim challenging the validity of a restriction on their religious diet.[115] The Muslim inmates

requested a Halal diet, which consists of fruits, vegetables, seafood and meat from properly slaughtered herbivorous animals.[116] However, the prison did not comply and supplied vegetarian meals instead.[117] The inmates asserted that the prison violated their rights by refusing to provide the plaintiffs with Halal meat in accordance with their Muslim beliefs.[118]

¶26. The court deferred to the reasoning of the District Court, which held that the prison's diet restriction was rationally related to the asserted penological concerns.[119] The prison officials argued that they denied the plaintiffs Halal meat because of concerns regarding simplified food service, security and budget constraints.[120] The court held that these concerns were legitimate and supported the prison's actions.[121]

¶27. The court upheld summary judgment for the defendant because it did not find a genuine issue of material fact under any of the factors.[122] Under the first factor, the court dismissed plaintiffs' argument as being immaterial.[123] Further, the second factor weighed in favor of the prison because the plaintiffs received a choice of a vegetarian meal.[124] As to the third factor, the court applied the deference standard without much explanation.[125] Finally, it rejected the plaintiffs' suggested alternatives to the prison policy, finding that full accommodations would result in more than de minimis cost.[126]

¶28. The Third Circuit placed the burden on the plaintiff to refute the validity of the challenged prison policy.[127] Moreover, the court gave substantial deference to prison administrators, implying that it was generally their responsibility to achieve penological objectives.[128] From the outset, the court presented a difficult case for the plaintiffs to win.[129]

C. DeHart v. Horn

¶29. In *DeHart v. Horn*, the Third Circuit applied the *Turner* reasonableness test for the third time and once again deferred to the discretion of the corrections officials.[130] DeHart, the plaintiff inmate, was a Mahayana Buddhist who educated himself on the teachings of his religion, including the requisite diet.[131] He alleged that prison administrators violated his religious free exercise rights when they denied his requests for a special diet that satisfied his beliefs.[132] In his third appeal, the court addressed only the third and fourth factors and relied on the District Court's findings under the first two factors, which favored the defendant.[133] The plaintiff prescribed a meal plan that he believed would accommodate his religious mandates; however, the court dismissed every suggestion as more burdensome on the prison staff and resources than other special diets served at the prison.[134] Thus, the third and fourth factors weighed in favor of the prison because of the substantial impact of providing the Buddhist diet and the lack of easy alternative regulations.[135] The court concluded that the prison's denial of Buddhist meals was reasonably related to penological objectives of food service efficiency.[136]

IV. **The Implications of *Turner***

¶30. When the Supreme Court eliminated the hands-off doctrine in the 1970s, it intended to break down the walls formed to separate prisoners from their constitutional

rights.[137] Nevertheless, courts, including the Third Circuit, have applied the *Turner* test without focusing on the issue at hand--the protection of prisoners' free exercise rights.[138] As illustrated in Part III above, the Third Circuit is especially mindful not to disregard the informed authority of corrections officials and less mindful of the rights of the prisoners themselves.[139] The deferential characteristic of the standard also diminishes the level of scrutiny to the bare minimum, substantially reducing the protection given to prisoners' free exercise rights.[140]

¶31. The following critical analysis discusses the effects of *Turner* on prisoners' First Amendment rights. Section A describes how prisoners' free exercise rights begin and end with the hands-off doctrine. The section goes on to illustrate the discretionary and inconsistent nature of the *Turner* test. Section B focuses on the attorney's mistakes made in the plaintiff's claim in *Brown v. Johnson*. Section C leaves practitioners with advice on how to outline their prisoners' First Amendment cases.

A. The Hands-Off Principle in Disguise

¶32. The modern day application of the *Turner* test is a restoration of the hands-off doctrine.[141] During the hands-off era, courts dismissed all prisoners' complaints, refusing to interfere in the penal system.[142] Similar to the hands-off principle, the underlying and ongoing theme of the *Turner* test is deference.[143] Courts consider prison administrators most qualified to solve the complicated problems that arise in the prison system.[144] In light of this view, the majority in *O'Lone v. Estate of*

Shabazz[145] reiterated the purpose of *Turner* - to ensure the deferential treatment of the discretion of prison authorities.[146] The nature of a reasonableness standard lends itself to deferential application, and pursuant to *Turner*, defendant prison administrators would meet the test as long as they act reasonably.[147]

¶33. In the *O'Lone* dissent, Justice Brennan criticized the majority for distorting the Constitution and using the *Turner* standard as a vehicle to uphold the authority of prison officials.[148] He claimed that the important constitutional issue was whether the prison regulation was unjustifiably infringing on prisoners' free exercise rights[149] and that an appropriate standard would not leave the decision to the defendants.[150]

¶34. This deferential standard also leads to discretionary decisions made by courts.[151] *Turner* provides little guidance on how to perform the balancing test and what types of evidence plaintiffs need to meet each factor.[152] The challenged regulation could be justified under the standard whenever an imaginative prison official presents a valid penological concern and a deferential court finds some logical connection.[153] The standard allows courts to disregard inmates' protected rights at its unfettered discretion.[154]

¶35. Both the *Turner* standard and the hands-off doctrine place all prisoners' constitutional cases in the same category, though all are not created alike.[155] The level of scrutiny set forth in *Turner* is appropriate to evaluate restrictions on rights that are "presumptively dangerous."[156] In contrast, when the exercise of rights is not "presumptively dangerous" and is also completely deprived, courts should not rely on the discretion of the prison administrators.[157] In such cases, reasonableness would not be

sufficient to justify the prison regulation.[158] Justice Brennan, dissenting in *O'Lone*, asserted that a better standard would depend on "the nature of the right being asserted by prisoners, the type of activity in which they seek to engage, and whether the challenged restriction works a total deprivation (as opposed to the mere limitation) on the exercise of the right."[159]

¶36. The only difference between *Turner* and the hands-off standard is that the hands-off standard resulted in consistent treatment of prisoners' First Amendment cases.[160] With the hands-off standard courts dismissed all cases and deferred to the discretion of the corrections officials. In contrast, *Turner* has led courts to apply the test differently to similar cases.[161] The *Turner* case itself is an example of the standard's inconsistency.[162] There, the Court took different approaches to the same concerns under the challenged prison policies.[163] In its review of the correspondence regulation, the Court gave almost total deference to speculative security concerns regarding gang problems.[164] The Court, however, rejected the prison officials' reasoning that inmate marriages would threaten internal safety.[165] Moreover, the Court established that the marriage restriction, and not the mail prohibition, "swept too broadly" even though the latter was more restrictive than regulations of other states.[166] This conflicting application has guided circuit courts in the same direction, resulting in different approaches in cases with similar facts.[167]

B. *Brown v. Johnson*: The Most Recent of Lawyer Blunders

¶37. In *Brown v. Johnson*, the Third Circuit addressed the prisoner's First Amendment rights claim without determining whether the prison policy at issue was rationally related to valid penological interests.[168] The inmate was a Rastafarian who alleged that the correctional grooming policy violated his religious rights.[169] The challenged regulation required that prisoners keep their hair short, which directly conflicted with the plaintiff's religious beliefs.[170] In determining whether the policy violated the inmate's free exercise rights, the Third Circuit did not address the District Court's findings regarding the *Turner* factors because the plaintiff failed to challenge them on appeal.[171] Instead, the plaintiff claimed in the appeal that the District Court erred in first performing the *Turner* analysis before establishing that his beliefs were sincerely held and religious in nature.[172]

¶38. Although the Third Circuit found the plaintiff's assertions correct, it considered them irrelevant because the defendants had already assumed that the plaintiff's beliefs had met the *DeHart* requirement.[173] Accordingly, the court held that the District Court did not err when it addressed the *Turner* test before performing the *DeHart* analysis.[174] Because the plaintiff failed to address the *Turner* analysis, the court relied on the District Court's findings that all factors weighed in favor of the prison officials, thereby affirming the grant of summary judgment.[175]

¶39. *Brown* is a prime example of lawyers' lack of knowledge in prisoners' rights cases.[176] Because courts give deference to the prison officials for their expertise and knowledge, a lawyer must present his arguments strategically. If the plaintiff fails to meet his burden in district court, he should expect a heavier burden on appeal because the

Third Circuit often defers to the decision of the district court.[177] Therefore, unlike in *Brown*, lawyers must be especially careful in detailing all challenges to the lower court's findings.[178]

C. Advice to Practitioners

¶40. Practitioners should understand the deferential nature of the *Turner* reasonableness test. In its application of *Turner*, the Third Circuit generally grants corrections officials deference in judgment.[179] This is an important consideration in assessing the possibility of success of a case and in outlining affirmations in the complaint.[180]

¶41. Practitioners should also acknowledge the obstacles they must face in prisoners' free exercise claims.[181] The entire burden is on the plaintiff to present evidence to negate all assumptions of the prison regulations' validity.[182] The corrections administrators merely have to provide a legitimate penological interest such as security or budget concerns.[183]

¶42. Under the *Turner* analysis, practitioners must apply the factors to prove that the challenged prison policy is not reasonably related to legitimate penological interests.[184] Also, if the defendants challenge the sincerity of the plaintiff's beliefs, practitioners must demonstrate that the prisoners' beliefs are sincerely held and religious in nature before addressing the *Turner* analysis.[185] The *DeHart* threshold question is not a heavy burden for plaintiff inmates because their religious practice need not be

mandatory or even common among members of the same religion.[186] After the threshold question is satisfied, practitioners need to provide sufficient evidence for each *Turner* factor; although the Third Circuit does not require the placing of each factor in neat columns, prison administrators are nevertheless at an advantage.[187]

¶43. The first *Turner* prong establishes an easy test for the defendant; however, it would weigh in favor of the plaintiff if the plaintiff presents evidence that no legitimate penological interests exist to justify the prison regulation.[188] To do this, the plaintiff attorney must repudiate every asserted governmental concern to demonstrate that the regulation is arbitrary or irrational.[189]

¶44. To meet the second *Turner* prong, practitioners must illustrate how the challenged policy deprives the prisoner of all means of religious observation.[190] Practitioners, however, must keep in mind that the Third Circuit does not distinguish between religious commandments and positive expressions.[191]

¶45. Pursuant to the third prong, practitioners must present a method that would accommodate the prisoner's request and cause minimum effects on prison staff and resources.[192]

¶46. The greatest hurdle in prisoners' free exercise cases is the fourth *Turner* prong.[193] Even though all prison actions give rise to some cost to the prison, the plaintiff must nevertheless produce an easy, obvious alternative that results in de minimis costs.[194] Thus, practitioners must be aware of the potential ramifications of the *Turner* standard and present sufficient evidence for each factor.[195]

V. **Conclusion**

¶47. Though prisoners are out of sight, courts should not push them out of mind. The slow progression of prisoners' First Amendment rights indicates that this ideology continues to govern this area of law. Since the late 1980s, courts have applied the *Turner* analysis, assuming a policy of deference. Such a standard has allowed courts to arbitrarily infringe on prisoners' free exercise rights. As a result of the heavy burden set forth in *Turner*, prisoners' outrage cannot be heard over the prison walls.

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[2] *See* Turner v. Safley, 482 U.S. 78, 84-85 (1987); Religious Freedom Restoration Act of 1993, 42 U.S.C. § 2000bb-1(a) (2005) [RFRA] (prohibiting government from burdening prisoners' religious rights generally); Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. § 2000cc-1(a) (2005) [RLUIPA]; *see also* Kevin M. Powers, *The Sword and the Shield: RLUIPA and the New Battle Grounds of Religious Freedom*, 22 BUFF. PUB. INTEREST L.J. 145, 149-50.

[3] *See* O'Lone v. Estate of Shabazz, 482 U.S. 342, 348-49 (1987); *see also Kosher Meals Are Getting Hot in New York State Prisons*, GOVERNING MAGAZINE, February, 1994, Vol. 7, No. 5, p. 16.

[4] Jamie Aron Forman, *Jewish Prisoners and Their First Amendment Right to a Kosher Meal: An Examination of the Relationship Between Prison Dietary Policy and Correctional Goals*, 65 BROOKLYN L. REV. 477, 477 (1999).

[5] *See, e.g.,* O'Lone, 482 U.S. at 345-47.

[6] *Id.* at 354-55 (Brennan, J., dissenting) (discussing status of inmates).

[7] *See* U.S. CONST. amend. I.

[8] *See* JOHN W. PALMER & STEPHEN E. PALMER, CONSTITUTIONAL RIGHTS OF PRISONERS 91 (7th ed. 2004). In certain situations, if prison authorities adhered to the Establishment Clause and chose not to interfere, they would be violating inmates' free exercise rights. *Id.* In contrast, if prison authorities proactively create policies to conform to inmates' religious beliefs, they would be violating the Establishment Clause of the First Amendment. *Id.* (quoting Gittlemacker v. Prasse, 428 F.2d 1, 7 (3d Cir. 1970)) ("The requirement that a state interpose no unreasonable barriers to the free exercise of an inmate's religion cannot be equated with the suggestion that the state has an affirmative duty to provide, furnish, or supply every inmate with a clergyman or religious services of his choice.").

[9] Ruffin v. Commonwealth, 62 Va. 790, 796 (1871). For the time being, during his term of service in the penitentiary, [a prisoner] is in a state of penal servitude to the State. He has, as a consequence of his crime, not only forfeited his liberty, but all his personal rights except those which the law in its humanity accords to him. *Id.*

[10] Turner v. Safley, 482 U.S. 78, 84 (1987) (providing current standard of review); Cooper v. Pate, 378 U.S. 546, 546 (1964); *see also* Geoffrey S. Frankel, *Untangling First Amendment Values: The Prisoners' Dilemma*, 59 GEO. WASH. L. REV. 1614, 1618-20 (1991).

[11] 482 U.S. 78, 89-91 (1987) (listing four factors to determine reasonableness of prison regulation).

[12] *Id.* at 78 (discussing whether prison regulation is reasonably related to legitimate penological interests).

[13] *Id.* at 89-91.

[14] *Id.* at 112-15 (Stevens, J., dissenting) (discussing Supreme Court's different views of similar aspects in prison regulations at issue); Benjamin Pi-wei Liu, *A Prisoner's Right to Religious Diet Beyond the Free Exercise Clause*, 51 UCLA L. REV. 1151, 1161-63 (2004) (describing courts' different approaches to issues of prisoners' religious diets).

[15] *See* Turner, 482 U.S. at 100-01 (Stevens, J., dissenting) (noting that the *Turner* standard allows courts to disregard prisoners' rights); Rarric, *supra* note 16 at 318-19 (comparing *Turner* to hands-off doctrine).

[16] 323 F.3d 236 (3d Cir. 2003).

[17] 343 F.3d 212 (3d Cir. 2003).

[18] 390 F.3d 262 (3d Cir. 2004).

[19] No. 03-4766, 2004 WL 2616428, at 1 (3d Cir. Nov. 18, 2004).

[20] Palmer, *supra* note 7 at 271 (describing hands-off doctrine); Colin Miller, *Film & TV: A Wolf in Sheep's Clothing: Wolf v. Ashcroft and the Constitutionality of Using the MPAA Ratings to Censor Films in Prison*, 6 VAND. J. ENT. L. & PRAC. 265, 266 (2004) (discussing courts' refusal to hear suits brought by inmates against prison administrators); Owen Rarric, *Kirsch v. Wisconsin Department of Corrections: Will the Supreme Court say "Hands-Off" Again?*, 35 AKRON L. REV. 305, 306 (2002).

[21] *See* Matthew P. Blischak, *O'Lone v. Estate of Shabazz: The State of Prisoners' Religious Free Exercise Rights*, 37 AM. U. L. REV. 453, 458 (1988) (noting courts' hesitation in meddling with prison disciplinary schemes); Frankel, *supra* note 8 at 1619 (discussing result of hands-off doctrine).

[22] *See* Palmer, *supra* note 7 at 272 (noting courts' rationale for hands-off doctrine); *see also* Miller, *supra* note 21 at 266 (listing reasons why courts apply hands-off doctrine). Courts are also concerned with and want to avoid flooding the judiciary system, especially the federal courts, with inmate suits. *Id.* "Federal judges should not be dealing with prisoner complaints which, although important to a prisoner, are so minor that any well-run institution should be able to resolve them fairly without resorting to federal judges." Palmer, *supra* note 7 at 272.

[23] Blischak, *supra* note 22 at 458.

[24] 378 U.S. 546, 546 (1964).

[25] *See* Palmer, *supra* note 6 at 272 (discussing *Cooper*); Blischak, *supra* note 22 at 459 (noting abandonment of hands-off doctrine); Jennifer Ellis, *DeHart v. Horn: Extending First Amendment Free Exercise Protections to Prisoners' Individually Held Religious Beliefs*, 11 GEO. MASON U. CIV. RTS. L.J. 357, 359-60 (2001) (discussing free exercise of religion in prison).

[26] *See* Cooper, 378 U.S. at 546.

[27] *See id.*

[28] *See* Frankel, *supra* note 8 at 1619; *see also* Blischak, *supra* note 22 at 461 (discussing *Cruz*); *see, e.g.*, Cruz v. Beto, 405 U.S. 319, 321–22 (1972). The Court addressed the issue of prisoner's religious right for the second time in *Cruz*. *See id.* There, Cruz claimed that the prison denied his religious right to practice his Buddhist faith. *See id.* at 319. The prison did not permit him to use the prison chapel while allowing inmates of other faiths the privilege. *See id.* In its review of this claim, the Supreme Court held that the state could not deny a prisoner a reasonable opportunity to pursue his religious faith if other prisoners received opportunities to do so. *See id.* at 322.

[29] *See* Jones v. North Carolina Prisoners Union, 433 U.S. 119, 128 (1977) (noting that inmates had constitutional rights although they were limited); Pell v. Procunier, 417 U.S. 817, 822 (1974).

[30] *See, e.g.,* Block v. Rutherford, 468 U.S. 576, 582 (1985); Bell v. Wolfish, 441 U.S. 520, 540-41 (1979) (relying on prison administrators to decide reasonableness); *Jones*, 433 U.S. at 128 (deferring decision-making to prison administrators); *Pell*, 417 U.S. at 827 (discussing courts' lack of expertise); Procunier v. Martinez, 416 U.S. 396, 405-06 (1974); *Cruz*, 405 U.S. at 321 (providing prison administrators with discretion); *see* Blischak, *supra* note 22 at 466 (noting courts' reasoning before Turner).

[31] 416 U.S. at 417-21. "This Court has not previously addressed this question, and the tension between the traditional policy of judicial restraint regarding prisoner complaints and the need to protect constitutional rights has led the federal courts to adopt a variety of widely inconsistent approaches to the problem." *Id.* at 406. The plaintiff inmate also challenged the prison rule that censored his mail when it did not conform to certain standards. *See id.* at 398-99 (describing regulation at issue).

[32] *See id.* at 413 (listing criteria to consider in prisoners' claims).

[33] *See id.* at 408 (finding no reason to determine scope of prisoners' rights); Lorijean Golichowski Dei, *The New Standard of Review for Prisoners' Rights: A "Turner" for the Worse*, 33 VILL. L. REV. 393, 404-05 (1988) (discussing how *Martinez* Court sidestepped preliminary question regarding standard of review). *But see* Turner v. Safley, 482 U.S. 78, 84-89(1987) (rejecting strict scrutiny standard articulated in *Martinez*).

[34] Turner, 482 U.S. at 89-90; Block, 468 U.S at 584 (applying principles denoted in *Bell*); Dei, *supra* note 34 at 413-414 .

[35] 417 U.S. at 822. The Court once again emphasized that the prison regulation at issue must further a legitimate governmental interest such crime deterrence, rehabilitation and prison security. *See id.* at 822-24.

[36] *Id.* at 827 (holding no constitutional violation because prison provided inmates alternative ways of communicating with press).

[37] *See* 433 U.S. 119, 129-30 (1977) . The Court upheld the prison rule that banned solicitation by the North Carolina Prisoners' Union. *Id.* at 121 (finding against plaintiff inmate). The Court stated that the restrictions were reasonable and were consistent with inmates' status and with legitimate governmental interest. *Id.* at 132-33.

[38] *Id.* at 128 . "The necessary and correct result of our deference to the informed discretion of prison administrators permits them, and not the courts, to make the difficult judgments concerning institutional operations in situations such as this." *Id.*; *see also* Dei, *supra* note 34 at 409-12 (describing standard established in *Jones*).

[39] *See id.* at 823-28 (declining to find prison regulation unconstitutional in light of alternatives).

[40] 441 U.S. 520, 550-52 (1979). The prison set forth a "publisher-only" rule, which limited inmates' receipt of hardback books to those mailed directly from publishers. *Id.* at 549. The Court found that such a restriction did not violate inmates' rights because it was a rational response to security risks. *Id.* at 550-51 (noting that prison rules were not exaggerated in relation to objective). Hardback books create an obvious security problem because they can conceal money, drugs and weapons and are not easily searchable. *Id.* at 551.

[41] *See* Turner v. Safley, 482 U.S. 78, 89-91 (1987) (analyzing *Pell*, *Bell* and *Jones* to ascertain standard of review).

[42] *Id.* at 81.

[43] *Id.* (presenting cause of action).

[44] *Id.*

[45] *Id.* The prison authorities aimed to limit prisoner-to-prisoner correspondence for security reasons. *Id.* at 91-92. Also, they believed that it would help prevent inmates from planning escapes or violent attacks. *Id.* at 91. Furthermore, prison officials testified that the prison regulation governing inmate marriages promotes security and rehabilitation. *Id.* at 97. As for the security concern, love triangles, for example, may cause violent behavior between inmates. *Id.* (naming example of dangers of inmate marriages). The prison officials also testified to that rehabilitation concern that female prisoners are susceptible to abuse at home, which may encourage their criminal behavior. *Id.* (describing possible rehabilitation problems in relation to inmate marriages).

[46] *Id.* at 84-89..

[47] *See generally id.* at 89-90; *see also* Dei, *supra* note 34 at 420 n.135.

[48] *See* Turner, 482 U.S. at 89 (providing test for prisoners' free exercise cases); *see, e.g.*, DeHart v. Horn, 390 F.3d 262, 268-69 (3d Cir. 2004); Searles v. DeChant, 393 F.3d 1126, 1131-32 (10th Cir. 2004) (finding reasonable connection between prisoners' work policy and penological concerns regarding budget and staffing); McEachin v. McGuinnis, 357 F.3d 197, 205 n.8 (2d Cir. 2004) (noting standard of review). The Ninth Circuit broke the *Turner* test into two parts: (1) whether the asserted penological interests were valid and (2) whether the correctional policy was reasonably related to such interests. Henderson v. Terhune, 379 F.3d 709, 713 (9th Cir. 2004). Before the court addressed the reasonable relationship issue, it analyzed each penological interest presented by the defendant corrections facility. *Id.* at 712-13 (finding that inmates' hair length caused justifiable concerns).

[49] Overton v. Bazetta, 539 U.S. 126, 132 (2003) ("The burden . . . is not on the State to prove the validity of prison regulations but on the prisoner to disprove it."); O'Lone v.

Estate of Shabazz, 482 U.S. 342, 350 (1987) (refusing to place burden on prison officials).

[50] Turner, 482 U.S. at 89-91.

[51] *Id.* (explaining standard of review).

[52] *Id.* at 89-90.

[53] *Id.* at 90.

[54] *Id*.

[55] *Id.* at 90-91.

[56] *Id.* at 91. The Court also found a logical connection between the correspondence regulation and valid security concerns of possible criminal behavior. *Id.* at 91-92. Next, the Court found alternative means of expression were available to the prisoners. *Id.* at 92. Weighing the third prong in favor of defendant prison officials, Court accepted their argument that informal organizations created through inmate correspondence could jeopardize internal security. *Id.* (describing "ripple effect"). Under the last factor, Court rejected plaintiffs' suggestions, finding no easy alternative regulation. *Id.* at 93 (disagreeing with plaintiff that monitoring correspondence would impose de minimis costs).

[57] *Id.* at 91.

[58] *Id.* at 97. The Court found no rational relationship under the first prong, rejecting the defendant's argument regarding security and rehabilitation concerns. *Id.* at 97-99. The third factor also weighed in favor of the plaintiff inmates because the ripple effect was not substantial enough to justify the restriction. *Id.* Under the fourth factor, the Court found possible easy alternative regulations such as a prohibition only on marriages that present specific security risks. *Id.* at 98 (finding that defendants presented no evidence to demonstrate such alternatives would not accommodate their safety objectives).

[59] *Id.* at 97-99.

[60] *Id.* at 98.

[61] *Id.* at 100 (Stevens, J., dissenting) (illustrating how courts can disregard rights of prisoners); *see also* DeHart v. Horn, 227 F.3d 47, 59 n.8 (3d Cir. 2000) [herein DeHart II] ("The Court of Appeals cases dealing with inmate requests for religious diets do not reach a uniform result."), *aff'd*, 390 F.3d 262 (3d Cir. 2004); Liu, *supra* note 13 at 1160-61 (providing example of court's different views in regard to denial of kosher diets); *compare.* Sutton v. Rasheed, 323 F.3d 236, 258 (3d Cir. 2003) (holding that denial of

important religious material is unlawful), *with* Tarpley v. Allen County, 312 F.3d 895, 898-99 (7th Cir. 2002) (holding that denial of complete religious material is lawful).

[62] *See* Turner, 482 U.S. at 89-90.

[63] *See id.* at 89-90; O'Lone v. Estate of Shabazz, 482 U.S. 342, 353 (1987) (requiring deference in first prong). For example, in *Henderson*, the Ninth Circuit found the restriction on hair length had a clear relationship with penological concerns about prisoner identification, concealment of contraband, poor hygiene, prison gangs and safety. 379 F.3d at 713-14 (analyzing asserted governmental interests). Additionally, the Fifth Circuit found a logical connection between prison's practice of creating broad religious sub-groups and penological concerns regarding staff and space limitations and financial burdens. Adkins v. Kaspar, 393 F.3d 559, 564 (5th Cir. 2004).

[64] Turner, 482 U.S. at 89-90 (requiring initial determination of validity of prison practice).

[65] *See, e.g.*, O'Lone, 482 U.S. at 350-51 (finding security reasons persuasive grounds for work restriction); Murphy v. Mo. Dep't of Corr., 372 F.3d 979, 983 (8th Cir. 2004) (finding that decision not to segregate inmates was rationally related to concerns of prison security).

[66] Turner, 482 U.S. at 90.

[67] *See id.*

[68] Adkins, 393 F.3d at 564 (quoting *Freeman*); Freeman, 369 F.3d at 861-62.

[69] O'Lone, 482 U.S. at 352; *see, e.g.*, Murphy, 372 F.3d at 983 (explaining *Turner* analysis).

[70] *Id.* at 352.

[71] Henderson, 379 F.3d at 714.

[72] *Id.*

[73] *See id.*

[74] Turner, 482 U.S. at 90.

[75] *See id.* (noting implication of "ripple effect"); Jones v. North Carolina Prisoners Union, 433 U.S. 119, 132-33 (1977).

[76] Turner, 482 U.S. at 90.

[77] *Id.*

[78] *See, e.g.*, Adkins v. Kaspar, 393 F.3d 559, 565 (5th Cir. 2004).

[79] *See id.* at 565 (finding that inmates' asserted rights would negatively affect staff, inmates and resources).

[80] *See, e.g.*, Henderson, 379 F.3d at 714 (rejecting argument against preferential accommodations).

[81] Turner, 482 U.S. at 90.

[82] *Id.* at 91.

[83] *See id.* at 91-92.

[84] *See id.* at 93.

[85] *See* DeHart II, 227 F.3d 47, 51-52 (3d Cir. 2000).

[86] *Id.* at 51.

[87] *See id.* (quoting *Africa*, 662 F.2d at 1029-30).

[88] *Id.* at 54.

[89] *See* Ford v. McGinnis, 352 F.3d 582, 588 (2d Cir. 2003) (describing scrutiny of plaintiff's sincerity as essential to prisoners' free exercise cases).

[90] *See* DeHart II, 227 F.3d at 51 (applying *Turner*).

[91] *See, e.g.*, Brown, 2004 WL 2616428 at 4 (discussing claimant inmate's First Amendment Claim)..

[92] *See id.* at 78 (discussing whether prison regulation is reasonably related to legitimate penological interests).

[93] *See* RFRA, 42 U.S.C. § 2000bb-1(a) (2005); RLUIPA, 42 U.S.C. § 2000cc-1(a) (2005).

> No government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution . . . even if the burden results from a rule of general applicability, unless the government demonstrates that imposition of the burden on that person--(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.

Id. The Supreme Court held that RFRA was unconstitutional because Congress exceeded its power. *See* City of Boerne v. Flores, 521 U.S. 507, 536 (1997) (repealing RFRA). Then Congress created RLUIPA. *See* RLUIPA, 42 U.S.C. § 2000cc-1(a) (2005). Instead of rational basis review established in *Turner*, both statutes suggest courts apply a strict scrutiny test. *See id.* (presenting general rule that imposing on prisoners' religious rights is violation); *see also id.* § 2000bb-1(a). Some courts, however, have found reasons not to adhere to RLUIPA and continue to resort to the *Turner* analysis.

[94] *See* Marci Hamilton, *California's Defeat of a State RLUIPA Bill: The Growing Backlash against Religious Land Use and Institutionalized Persons Act*, WRIT, January 29, 2004, http://writ.news.findlaw.com/hamilton/20040129.html (discussing backlash against RLUIPA).

[95] 125 S. Ct. 2113 (2005).

[96] *See id.* at 2121 (finding RLUIPA compatible with Establishment Clause). *But see* Cutter v. Wilkinson, 423 F.3d 579, 584 (6th Cir. 2005).

[97] *See* Liu, *supra* note 2 at 1197-98.

[98] *See id.*

[99] Sutton v. Rasheed, 323 F.3d 236, 241 (3d Cir. 2003).

[100] *Id.*

[101] *Id.*

[102] *See id.* 242-44 (explaining how plaintiff was repeatedly denied religious books).

[103] *See id.* at 254.

[104] *See id.* at 258.

[105] *Cf. id.* (finding prison practice violated prisoners' free exercise rights) *with* Carter v. McGrady, 292 F.3d 152, 158 (3d Cir. 2002) (holding that prison penalties were rationally related to penological interests) and Terhune, 283 F.3d 506, 521 (3d Cir. 2002) (finding that policy of separating gangs did not violate free exercise rights).

[106] Sutton, 323 F.3d at 240-44.

[107] *Id.* at 241.

[108] *See id.* at 258.

[109] *Id.* at 252-58.

[110] *Id.* at 253.

[111] *Id.* at 253-54. The court explicitly stated that the first factor was not a threshold requirement that rendered all other factors irrelevant if no logical connection was found. *Id.*

[112] *See* Sutton, 323 F.3d at 254-57. The court also explicitly rejected the distinction between religious commandments and positive religious expressions. *Id.* at 255-57 (describing texts as "a necessary element of exercising the right in question").

[113] *Id.* at 257-58. The court found that an easy and obvious alternative to the prison policy would be to provide the requested books instead.

[114] *Id.* at 258. Moreover, the court did not defer to the decision of the lower court.

[115] Williams v. Morton, 343 F.3d 212, 216 (3d Cir. 2003).

[116] *Id.* at 215.

[117] *Id.* at 215-16.

[118] *Id.* at 215.

[119] *Id.* at 218 (deferring to District Court's decision).

[120] *Id.* at 217.

[121] *Id.* at 221.

[122] *Id.* at 217-21.

[123] *Id.* at 218 ("It is not enough to show there are different views as to the relevant issues and underlying facts."). The court found a valid, rational connection between the legitimate penological interests and the challenged prison policy. *Id.* at 218 (finding first prong in favor of defendant). On appeal, plaintiff inmates presented the testimony of the prison's food service supervisor who stated that serving a Halal meal would not substantially hinder the prison's food service. *Id.* at 217-18 (presenting arguments against defendants' concerns of simplified food service and security). Also, plaintiffs' evidence demonstrated that a Halal meal with meat would cost about $280 more a year per person. *Id.* at 218 (disputing defendant's claim of budget constraints). The amount is insignificant compared to the $3,650 spent per year for each of the prison's four Jewish prisoners. *Id.*

[124] *Id.* at 219.

[125] *Id.* at 219-20.

[126] Williams, 343 F.3d at 221.

[127] *Id.* at 217 (explaining *Turner* test).

[128] Williams, 343 F.3d at 218 (discussing ongoing concept of deference).

[129] *See generally id.* at 216-17.

[130] *See* DeHart v. Horn, 390 F.3d 262, 268 (3d Cir. 2004). Additionally, in evaluating overall reasonableness, the court weighs these legitimate concerns against the prisoner's constitutionally protected activity. *Id.*

[131] *Id.* at 265.

[132] *Id.* at 264. According to the plaintiff, his religious beliefs do not allow him to consume any meat and dairy. *Id.* at 265. The controversy mostly involved plaintiff's refusal to eat any food containing what he called "pungent vegetables" such as onions, garlic and chives. *Id.* at 269-72.

[133] *Id.* at 268. The court did not address the second prong because plaintiff failed to challenge the finding on appeal. *See id.* at 268 n. 7.

[134] *Id.* at 270-72 (comparing plaintiff's diet plan to cold kosher meals and Muslim diet accommodations).

[135] *Id.* at 272.

[136] DeHart, 390 F.3d at 272.

[137] *See* Turner v. Safley, 482 U.S. 78, 84 (1987) (providing examples of when prisoners retain their constitutional rights); Jones v. North Carolina Prisoners Union, 433 U.S. 119, 128 (1977); Pell v. Procunier, 417 U.S. 817, 822 (1974).

[138] *See, e.g.*, DeHart, 390 F.3d at 264 (noting vegan Buddhist prisoner's right to religious diet).

[139] *Id.* at 268 (noting that standard of review requires deference to prison).

[140] Dei, *supra* note 34 at 429-32 (stating that standard "essentially validates officials' action on the basis of assertions regarding possible administrative and security problems rather than on the basis of any proof that the regulations are necessary to further governmental interests").

[141] *Id.* at 429 (discussing problem of providing deference to judgment of prison administrators); Cheryl Dunn Giles, *Turner v. Safley and its Progeny: A Gradual Retreat to the "Hands-Off" Doctrine?*, 35 ARIZ. L. REV. 219, 229-30 (1993) (illustrating three

basic problems with *Turner* test); Rarric, *supra* note 21 at 318-19 (comparing *Turner* to hands-off doctrine).

[142] Palmer, *supra* note 7 at 271; Blischak, *supra* note 23 at 458.

[143] *See* Turner, 482 U.S. at 84-85 (1987) (noting important principle of deference to prison officials); Rarric, *supra* note 21 at 325 (emphasizing need to divert from deferential standard); Dei, *supra* note 34 at 427-34 (comparing standard with hands-off approach).

[144] *See, e.g.*, Turner, 482 U.S. at 84-85 (describing courts as "ill equipped" to make decisions regarding prison activity); Sutton v. Rasheed, 323 F.3d 236, 253 (3d Cir. 2003) (outlining deference as important element of *Turner* analysis); Williams, 343 F.3d at 218 (providing substantial deference for prison officials to define penological goals and achieve them).

[145] 482 U.S. 342 (1987).

[146] *Id.* at 349 (applying less restrictive standard to give prisons room to regulate). *But see id.* at 356 (Stevens, J., dissenting) (criticizing majority for applying deference). The Court emphasized that the *Turner* approach allowed prison authorities to maintain safety measures and solve administrative problems without intrusion by courts. *Id.* at 349-50.

[147] *Id.* at 356-57 (Brennan, J., dissenting).

[148] *Id.* at 356 (Brennan, J., dissenting) (observing constitutional purpose to prevent unjustified infringement of rights).

[149] *Id.* at 356 (Brennan, J., dissenting); Rarric, *supra* note 21 at 319-20 (explaining how fourth factor present obstacle, undermining protections of Constitution).

[150] O'Lone, 482 U.S. at 356-58 (Brennan, J., dissenting); Dei, *supra* note 3 at 429-30 (noting instances where courts must use professional judgment).

[151] *See* Turner v. Safley, 482 U.S. at 100-05 (1987) (Stevens, J., dissenting).

[152] *Id.* at 105; Giles, *supra* note 123 at 230-31; Rarric, *supra* note 21 at 320.

[153] Turner, 482 U.S. at 100-01 (Stevens, J., dissenting); O'Lone, 482 U.S. at 357 (Brennan, J., dissenting) (noting that prison's claim of necessity would be sufficient justification).

[154] Turner, 482 U.S. at 100-01 (Stevens, J., dissenting).

[155] O'Lone, 482 U.S. at 356 (Brennan, J., dissenting).

[156] O'Lone, 482 U.S. at 358 (Brennan, J., dissenting) (quoting Abdul Wali v. Coughlin, 754 F.2d 1015, 1033 (2d Cir. 1985)) (suggesting better approach).

[157] *Id.* (Brennan, J., dissenting) (recognizing instances where deference is inappropriate); Dei, *supra* note 34 at 429-30 (noting when courts must observe constitutional requirements).

[158] *Id.* at 358-59 (Brennan, J., dissenting) (demanding higher level of scrutiny). An instance that would require intermediate scrutiny is when the regulation limits rights "by merely restricting the means, time, place or manner of the exercise of a right." *Id.* at 358 (Brennan, J., dissenting).

[159] *Id.* (Brennan, J., dissenting) (quoting Abdul Wali v. Coughlin, 754 F.2d 1015, 1033 (2d Cir. 1985)).

[160] *See* Liu, *supra* note 13 at 1160-61 (stating that *Turner* test is problematic for its inconsistency and excessive deference); *see* Giles, *supra* note 123 at 220-21 (noting that hands-off principle requires almost absolute bar on review of prisoners' rights cases).

[161] See Liu, *supra* note 13 at 1161-63 (providing examples of discrepancy in courts' application of *Turner* test).

[162] *See generally* Turner, 482 U.S. at 112-13 (Stevens, J., dissenting).

[163] *Id.,* 482 U.S. at 113 (Stevens, J., dissenting).

[164] *Id.* (Stevens, J., dissenting) (comparing different approaches to security concerns).

[165] *Id.* (Stevens, J., dissenting).

[166] *Id.* (Stevens, J., dissenting) (criticizing majority for finding more value in marriage rights than freedom of correspondence).

[167] *See* Liu, *supra* note 13 at 1160-63, which provides examples of when courts apply *Turner* test differently. For example, some courts found the denial of kosher diet reasonably related to penological objectives, but others have not. *Id.* at 1161-62. In view of the fourth *Turner* factor, courts also evaluate de minis costs in different ways. *Id.* at 1163; *see, e.g.*, Williams, 343 F.3d at 218 (3d Cir. 2003) (evaluating costs of accommodations); Dehart, 227 F.3d at 57 (3d Cir. 2000).

[168] *See* Brown v. Johnson, No. 03-4766, 2004 WL 2616428, at 5-6 (3d Cir. Nov. 18, 2004) (addressing only plaintiff's affirmations).

[169] *Id.* at 2-3. Plaintiff asserted that his religion does not allow him to cut his hair and that he should be exempt from the grooming requirement. Id. at 2. The prison denied

him exemption from the hair length requirement because the facility chaplain did not believe that his religious reasons were legitimate. *Id.*

[170] *Id.* at 3.

[171] *Id.* at 5-6.

[172] *Id.* (noting *DeHart* requirement).

[173] *Id.* (noting that defendant must challenge sincerity of religious beliefs for it to be issue).

[174] *Id.* at 7 (concluding that District Court did not err by failing to consider sincerity of plaintiff's beliefs).

[175] *Id.* at 5. The District Court held that all *Turner* factors weighed in favor of the prison.

[176] *See generally id.* at 5-6.

[177] *Id.* at 5-6; Ash-Bey v. Fauntleroy, No. 01-1865, 2002 WL 125583 (3d Cir. 2002).

[178] *See, e.g.*, Brown, 2004 WL 2616428 at 5-6.

[179] *See, e.g.*, DeHart v. Horn, 390 F.3d 262, 268 (3d Cir. 2004) (refusing to interfere with prison administration); *Williams*, 343 F.3d at 218. *But see* Sutton v. Rasheed, 323 F.3d 236, 255 (3d Cir. 2003).

[180] Brown, 2004 WL 2616428 at 5-6.

[181] *See* Turner, 482 U.S. at 89-90 (establishing fourth factors to determine reasonableness).

[182] *Id.* at 89-90 (explaining four factors); Williams, 323 F.3d at 218 (noting that plaintiff must disprove validity of the prison policy); Dei, *supra* note 34 at 434-36 (describing burden of proof as problematic).

[183] *See* Turner, 482 U.S. at 100-101 (Stevens, J., dissenting) (describing how standard is satisfied when warden produces legitimate penological concern); *see, e.g.*, Williams, 343 F.3d at 217; Dehart, 227 F.3d at 52.

[184] Turner, 482 U.S. at 89 (providing test for prisoners' free exercise cases).

[185] *See* Brown, 2004 WL 2616428 at 6 (explaining *DeHart* analysis).

[186] *See* Dehart II, 227 F.3d at 51-52.

[187] *Id.* at 57.

[188] Sutton, 323 F.3d at 253-54 (3d Cir. 2003).

[189] Turner, 482 U.S. at 89-90; DeHart II, 390 F.3d at 51.

[190] Turner, 482 U.S. at 89-90 (describing second factor); Sutton, 323 F.3d at 254-57 (determining that prisoners were not able to practice their religion generally).

[191] DeHart, 390 F.3d at 266 (3d Cir. 2004).

[192] Turner, 482 U.S. at 89-90; DeHart, 390 F.3d at 269-70; Sutton, 323 F.3d at 257-58.

[193] *See* Dei, *supra* note 34 at 431 ("Placing the burden on the inmates . . . virtually ensures their failure, especially since almost any change in the established method of operating to accommodate the right will be at some cost to governmental interests."); Rarric, *supra* note 21 at 319 (describing fourth prong as "all-but-insurmountable obstacle").

[194] Turner, 482 U.S. at 89-90; Sutton, 323 F.3d at 257-58.

[195] Turner, 482 U.S. at 89-90.