ANALYZING THE RELIGIOUS FREE EXERCISE RIGHTS OF INMATES: THE SIGNIFICANCE OF *PELL, JONES,* AND *WOLFISH*

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I

INTRODUCTION

Many correctional institutions in the United States were originally intended to help educate criminals in Christian ways of life.[1] Today, while this overt religious indoctrination has been abandoned,[2] inmates seeking to practice non-Christian religions often face difficult struggles with unsympathetic prison administrators. Confronted with the refusal of administrators to accommodate their religious needs, Muslims, Jews, and other minority religious groups have resorted to the courts for protection of their religious rights.[3] The extent to which the reluctance of administrators to accommodate the religious needs of non-Christian inmates stems from cultural prejudices is not for this Article to determine. The possibility that prejudice may be readily and unconsciously disguised as a concern for security, however, indicates that courts should carefully scrutinize regulations that infringe upon inmate rights of religious free exercise.[4]

The Supreme Court of the United States has provided little guidance in establishing a uniform standard by which to assess the religious free exercise claims of inmates. In the last nine years, the Court delineated inmate rights of speech and association in *Procunier v. Martinez,*[5] *Pell v. Procunier,*[6]

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1. *See* D. ROTHMAN, THE DISCOVERY OF THE ASYLUM 84-86 (1971); PENAL AND REFORMATORY INSTITUTIONS 39 (C. Henderson ed. 1910).

2. Modern interpretation of the establishment clause bars religious indoctrination by the state. *See* Everson v. Board of Educ., 330 U.S. 1, 15-16 (1946).

3. *See, e.g.,* Monroe v. Bombard, 422 F. Supp. 211 (S.D.N.Y. 1976) (enjoining enforcement of "no beard" policy as applied to Sunni Muslims in state correctional facility); United States v. Kahane, 396 F. Supp. 687 (E.D.N.Y), *aff'd sub nom.* Kahane v. Carlson, 527 F.2d 492 (2d Cir. 1975) (requiring provision of kosher food to Orthodox Jewish inmate); Teterud v. Gillman, 385 F. Supp. 153 (S.D. Iowa 1974), *aff'd sub nom.* Teterud v. Burns, 522 F.2d 357 (8th Cir. 1975) (permitting Native Americans to wear long hair in accordance with religious beliefs). Suits for the protection of religious rights of Christians are virtually nonexistent. *But see* Sweet v. South Carolina Dept. of Corrections, 529 F.2d 854 (4th Cir. 1975).

4. The first amendment provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ." U.S. CONST., amend. I.

5. 416 U.S. 396 (1974).

6. 417 U.S. 817 (1974).

Jones v. North Carolina Prisoners' Labor Union, Inc.,[7] and *Bell v. Wolfish*.[8]

Federal courts have differed sharply over the relevance of these decisions to religious free exercise claims brought by inmates. In two cases arising in the Third and Eighth Circuits, for example, district courts subjected the religious free exercise claims of inmates to a "least restrictive means" test. Each case was reversed on appeal based on determinations that the *Wolfish* line of cases required application of a "reasonableness" standard.[9] This Article will argue that the least restrictive means test, rather than the reasonableness test, should apply to infringements on inmate rights of religious free exercise.

The two standards differ significantly in the allocation of burdens placed on plaintiff and defendant. Under the reasonableness test, the inmate-plaintiff must first prove that a prison regulation infringes upon a right protected by the free exercise clause. The burden then shifts to the state to establish that the regulation serves a substantial state interest such as maintenance of institutional security and order or rehabilitation. Unless the plaintiff can then show that the regulation is irrational, or an "exaggerated response" to the interest asserted by the state, the regulation will be held constitutional.[10] In contrast, the least restrictive means test requires the state to establish not only that the challenged regulation serves a substantial state interest, but also that it is the least restrictive means of furthering that interest.[11]

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7. 433 U.S. 119 (1977).

8. 441 U.S. 520 (1979).

9. Rogers v. Scurr, 676 F.2d 1211, 1215 (8th Cir. 1982); St. Claire v. Cuyler, 481 F. Supp. 732, 737-38 (E.D. Pa. 1979), *rev'd*, 634 F.2d 109 (3d Cir. 1980). These cases are discussed *infra*, Section II.

The applicability of the Supreme Court decisions in *Jones* and *Wolfish* to inmate rights of religious free exercise was the issue at the root of the dispute between the district and appellate courts in *Rogers* and *St. Claire*. *See infra* notes 44-49 and accompanying text. The controversy over whether the least restrictive means or the reasonableness test applies to religious free exercise rights of inmates predates *Jones* and *Wolfish*. *See, e.g., Teterud*, 522 F.2d 357 (least restrictive means); Brown v. Wainwright, 419 F.2d 1376 (5th Cir. 1970) (reasonableness); Wright v. Raines, 457 F. Supp. 1082 (D. Kan. 1978) (least restrictive means); Bryant v. Carlson, 363 F. Supp. 928 (E.D. Ill. 1973) (reasonableness). *See also*, Note, *The Religious Rights of the Incarcerated*, 125 U. PA. L. REV. 812 (1977), for discussion of entire array of tests applied to inmate religious free exercise challenges by federal courts.

10. *See, e.g., Rogers*, 676 F.2d at 1215; *St. Claire*, 634 F.2d at 114-15; *cf.* Alim v. Byrne, 521 F. Supp. 1039, 1044-45 (D.N.J. 1980). *See also Wolfish* 441 U.S. at 545-58, 550-51; *Jones*, 433 U.S. at 128-29; and *Pell*, 417 U.S. at 827, in which the test is applied to inmate rights of speech.

11. *See Rogers*, 676 F.2d at 1215 (discussion of the district court decision); *Teterud*, 522 F.2d at 359; *St. Claire*, 481 F. Supp. at 737-38; *Wright*, 457 F. Supp. at 1085.

In a nonprison context, the least restrictive means test appears frequently when religious free exercise rights are at stake. *See, e.g.*, Thomas v. Review Bd. of the Indiana Employment Sec. Div., 450 U.S. 707, 718 (1981); Sherbert v. Verner, 374 U.S. 398, 407 (1963); Callahan v. Woods, 658 F.2d 679, 686-87 (9th Cir. 1981); Walsh v. Louisiana High School Athletic

Only the least restrictive means standard is consistent with Supreme Court pronouncements on the first amendment rights of inmates, and with the singular characteristics of the right of religious free exercise. An analysis of *Pell, Jones,* and *Wolfish* shows that the constitutional standards protecting rights of speech and association remain substantially the same whether or not the infringement affects rights of inmates. When an inmate rather than a non-inmate asserts a first amendment right, however, great weight is given the state interest against which the right is balanced. The same principle should apply to inmate religious free exercise rights. The least restrictive means test, which is commonly used to assess the constitutionality of infringements on religious free exercise rights of non-inmates,[12] should also be used to assess infringements on the religious rights of inmates.

While the Supreme Court has used the reasonableness test to assess the constitutionality of restrictions on rights of speech,[13] courts seeking to transfer this test to religious free exercise challenges have neglected to observe that the Court applied the test only to what it regarded as time, place, and manner restrictions.[14] A time, place, or manner regulation may restrict, but may not totally prohibit the exercise of first amendment rights.[15] In general, such a regulation will be found constitutional if the state can show a reasonable relation between the regulation and an important state objective.[16] When the regulation totally prohibits the exercise of a first amendment right, however, the state must meet a higher burden because the regulation no longer affects merely the time, place, or manner in which the right is exercised. When rights of speech are at issue, this burden generally requires the state to show that the challenged regulation serves an important state interest, and that the scope of the regulation is "no greater than necessary or essential to the protection of the governmental interest involved."[17]

The difference between the least restrictive means and this "necessity" test is largely rhetorical. The burden on the state in showing that a regulation sweeps no more broadly than necessary, and in showing that it is the

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Ass'n, 616 F.2d 152, 158-59 (5th Cir.), *cert. denied,* 449 U.S. 1124 (1981); Espinosa v. Rusk, 634 F.2d 477, 482 (10th Cir. 1980), *aff'd.*, 102 S.Ct. 2025 (1982); Brandon v. Board of Educ., 635 F.2d 971, 976 (2d Cir. 1980), *cert. denied,* 454 U.S. 1123 (1981).

12. *See supra* note 11.

13. *See supra* note 10.

14. *See infra* Section III.

15. *See* Schad v. Borough of Mt. Ephraim, 452 U.S. 61, 75-76 (1981); Linmark Assoc., Inc. v. Township of Willingboro, 431 U.S. 85, 93-94 (1977); Virginia State Bd. of Pharmacy v. Virginia Citizens' Consumer Council, 425 U.S. 748, 771 (1976); Ad World, Inc. v. Township of Doylestown, 672 F.2d 1136, 1142 (3d Cir.), *cert. denied,* 102 S. Ct. 2240 (1982).

16. *See, e.g.,* Cox v. New Hampshire, 312 U.S. 569, 574-76 (1941); Feeley v. Sampson, 570 F.2d 364, 378-79 (1st Cir. 1978) (Coffin, C.J., dissenting).

17. *Martinez,* 416 U.S. at 413; *see also,* Central Hudson Gas & Elec. Corp. v. Public Service Comm'n, 447 U.S. 557, 566 (1980); United States v. O'Brien, 391 U.S. 367, 377 (1968).

least restrictive regulation possible, is for all practical purposes the same. The purpose of comparing the two tests is to show that outside of the prison context, religious free exercise rights receive the same kind and degree of protection as rights of speech or assembly that are subjected to prohibitive regulation. One essential difference, however, exists between rights of religious free exercise and those of speech and assembly. Religious free exercise rights cannot be subjected to time, place, or manner analysis.

In order to find a time, place, or manner regulation constitutional, a court must determine that the regulation permits exercise of the restricted first amendment right at some time or place or in some manner that will adequately serve the communicative purposes of those asserting that right.[18] Courts are constitutionally incompetent to make such an assessment when religious free exercise rights are infringed upon by state regulations. Whether Sunday prayer meetings "adequately" fulfill the religious needs of Muslim inmates, for example, is a question which the courts cannot adjudicate.[19] Given the inability of courts to resolve such issues, infringements on fundamental religious rights must be treated as prohibitions of the exercise of those rights, and not simply as time, place, or manner regulations. The relatively heavy burden placed on the state by the least restrictive means test thus becomes necessary to protect inmate religious rights.

Several courts have refused to apply the least restrictive means test to infringements on inmate religious rights, however, because they find this standard to be inconsistent with the policy of deference to the opinions of prison officials set forth in *Pell, Jones,* and *Wolfish.*[20] This policy establishes a presumption that regulations designed by prison officials to further the security or rehabilitative goals of prison institutions are reasonable if a rational relation exists between the rule and the goal.[21] This presumption prevents judges from intruding on the domain of the executive branch and from substituting their judgments as to how a prison ought to be managed for those of "experts" in the field of penology.[22] Thus, a judge is precluded from disputing the reasonableness of the opinions of prison officials in the area of security or rehabilitation unless this presumption of reasonableness is rebutted. The presumption may be rebutted by showing either that no rational relation exists between the regulation and the asserted security or rehabilitative objective, or that the regulation is an "exaggerated response" to the alleged objective.[23]

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18. "To be reasonable, time, place and manner restrictions not only must serve significant state interests but also must leave open adequate alternative channels of communication." *Schad,* 452 U.S. at 75-76. *See also supra* note 17.

19. *See infra* text accompanying notes 140-55.

20. *See infra* Section III.

21. *See Wolfish,* 441 U.S. at 546-48; *Jones,* 433 U.S. at 125-30; *Pell,* 417 U.S. at 823; *see also infra* Section II.

22. *See Wolfish,* 441 U.S. at 547-48; *Pell,* 417 U.S. at 827.

23. *See Jones,* 433 U.S. at 128; *Pell,* 417 U.S. at 827.

Courts applying a reasonableness test to infringements on the religious rights of inmates have confused this presumption of reasonableness regarding evidence submitted by prison officials with the constitutional standard under which a particular infringement must be tested. Such courts presume, in essence, that a regulation that serves a security or rehabilitative purpose is not merely reasonable, but constitutional. This analysis is acceptable only when the constitutional standard applicable to the infringement under challenge happens to be a reasonableness standard. For example, the test for infringements on the fourth amendment rights of inmates is reasonableness.[24] When an infringement amounts to censorship of speech rights, however, prison administrators must show that the infringement is "no greater than is necessary or essential" to the protection of important government interests.[25] Thus, a finding that a prison censorship regulation bears a reasonable relation to a legitimate penal objective establishes only that officials' opinions regarding the need for such a regulation are entitled to deference, not that the regulation is constitutional.

Under *Pell, Jones,* and *Wolfish,* a technically correct analysis of a challenge to a prison regulation that is alleged to serve security or rehabilitative goals of the institution must proceed through several stages. Plaintiffs must first establish that the challenged regulation infringes upon a constitutional right.[26] Without such a showing they will have failed to state a cause of action. Assuming that an infringement on a first amendment right is shown, the defendant prison officials may bring the regulation within the presumption of reasonableness by establishing that the regulation serves a security or rehabilitative objective. The burden then shifts back to the plaintiffs to show that the regulation is either irrational or an exaggerated response to these objectives. If they fail to meet this burden, the court must consider the regulation to be a sensible and appropriate method of dealing with a legitimate penological concern.[27] For example, although a court may doubt the basis of an official's belief that a particular regulation is necessary to prevent a riot, the court may not use that doubt as a basis for ordering constitutional relief unless the plaintiffs succeed in showing that the belief is irrational.[28]

In cases involving time, place, or manner regulations, if the plaintiffs fail to rebut the presumption of reasonableness, the inquiry will end because the regulation is per se constitutional. Such regulations need only be found reasonable under the constitutional standard normally applied to regulations of this nature.[29] In cases involving rights of religious free exercise,

24. *Wolfish,* 441 U.S. at 558-59.
25. *Martinez,* 416 U.S. at 413.
26. *See, e.g., Jones,* 433 U.S. at 130-32 (finding rights "barely" infringed upon).
27. *See Wolfish,* 441 U.S. at 547-48; *Pell,* 417 U.S. at 827.
28. *See Jones,* 433 U.S. at 127-28.
29. *See supra* note 17.

however, the suit does not end upon failure to rebut the presumption of reasonableness.

Religious free exercise rights are normally tested under a least restrictive means standard.[30] Thus, a finding that a regulation is merely reasonable does not resolve the issue of whether the regulation is constitutional. The court must find that no less restrictive alternative regulation would adequately fulfill the security or rehabilitative purposes of the challenged regulation. Notably, in making this determination, the court's hands are still bound by the policy of deference. If the court is inclined to enforce a proposed alternative and less restrictive regulation, it may not take such action if prison officials assert that the regulation would be inadequate to serve the security or rehabilitative purposes of the challenged regulation. Under the policy of deference, the court must accept this assertion by officials unless plaintiffs can show that it is irrational.

It is thus extremely difficult to prove, under either the least restrictive means test or the reasonableness test, that a prison regulation is unconstitutional. *Pell, Jones,* and *Wolfish*, however, maintain the distinctions between the tests. While preservation of these distinctions may have a minimal impact on the outcome of inmate suits, preservation of the differences between the tests is important. Creative litigators may prove able to take advantage of these differences so as to ensure substantial protection of religious rights.[31] A lessening of judicial deference to prison authorities may result from changes in the composition of the Supreme Court, or from a revival of public concern regarding prison conditions. Such modifications might enhance the now muted differences between the least restrictive means and the reasonableness test as applied under the current policy of deference.

Section II of this Article describes three recent cases illustrating the use by federal courts of *Pell, Jones,* and *Wolfish* to support application of the reasonableness test to inmate religious free exercise claims. The analysis of *Pell, Jones,* and *Wolfish* in Section III reveals that these precedents support application of the least restrictive means rather than the reasonableness test to infringements on the exercise of religious rights. Section IV argues that the least restrictive means test is appropriate and necessary for judicial review of such infringements in spite of the current policy of deference to the opinions of prison officials mandated by the Supreme Court. The section concludes with suggestions of how plaintiffs' attorneys might minimize the effects of the deference standard and take advantage of the arguments made available by the least restrictive means test.

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30. *See supra* note 11.
31. *See infra* notes 169-72 and accompanying text.

II

THE REASONABLENESS TEST MISUSED

Federal courts have long disagreed over the proper standard by which to assess the constitutionality of infringements on inmate free exercise rights.[32] Although the Supreme Court has recently delineated inmate rights of speech and association in *Pell, Jones,* and *Wolfish,*[33] these decisions appear only to have muddied the waters surrounding the religion debate. As the federal court decisions discussed below demonstrate, the arguments used to support application of the reasonableness test are weak at best. The Supreme Court cases cited by courts which favor the reasonableness test actually strengthen the argument for application of a least restrictive means test. This section outlines the approach taken by three federal courts of appeals that use *Pell, Jones,* and *Wolfish* to justify application of the reasonableness test to infringements on inmate religious rights.

A. St. Claire v. Cuyler

The trial and appellate decisions in *St. Claire*[34] exemplify the conflicting approaches taken by federal courts in evaluating the rights of inmates to the free exercise of their religion. The inmate-plaintiff in this case, St. Claire, charged that prison regulations infringed unconstitutionally upon religious practices required by his Islamic faith. Two of these infringements arose from the refusal of prison officials to allow St. Claire to wear a religious head-covering either in the dining room of the prison or in the area where parole board hearings were held. Another regulation challenged by St. Claire forbade his attendance at group religious services while he was confined in administrative segregation.[35]

The district court, after establishing that prison regulations in fact infringed upon the bona fide and sincerely held religious beliefs of St. Claire,[36] held the regulations unconstitutional. All of the challenged regulations were found to infringe unnecessarily on the religious rights of St. Claire in light of available less restrictive methods of effectuating the substantial state interests at stake.[37] The court also found that the state had

32. *See supra* notes 9-11 and accompanying text.

33. *See infra* Section III.

34. St. Claire v. Cuyler, 481 F. Supp. 732 (E.D. Pa. 1979), *rev'd,* 634 F.2d 109 (3d Cir. 1980).

35. *St. Claire,* 481 F. Supp. at 734-35.

36. *Id.* at 736. Before a court can reach the question of whether a regulation unconstitutionally infringes upon a religious right, it must first determine whether the regulation infringes at all on a constitutionally cognizable religious belief or practice. This threshold determination is commonly broken down into two questions: whether the belief asserted derives from a formal body of religious doctrine, and whether the person asserting the religious claim is a sincere adherent of this and other beliefs arising out of the doctrine. *See, e.g.,* Loney v. Scurr, 474 F. Supp. 1186, 1192-96 (S.D. Iowa 1979); *Wright,* 457 F. Supp. at 1085. The Supreme Court takes a less structured approach in Wisconsin v. Yoder, 406 U.S. 205, 215-19 (1972).

37. *St. Claire,* 481 F. Supp. at 739, 741.

failed to establish a substantial state interest in maintaining the no-hat regulations under challenge.[38] Although recognizing that the security concerns asserted by the prison officials in support of the regulations were per se important state interests, the court observed that "the mere assertion of a security interest can never be sufficient proof of its existence."[39] The court dismissed as speculative the dangers to security cited by officials in support of the prohibition on hats in the dining area and in the area where parole board hearings were held.[40] Officials were told to design regulations that would safely permit religious headcovering to be worn in these areas.[41]

The court recognized the legitimacy of the security interests underlying the ban on chapel attendance for those in administrative segregation. The ban, however, was deemed broader than necessary to effect these security concerns.[42] The court instructed the officials to devise a system whereby peaceable inmates in segregation could be escorted to chapel on a rotating schedule in a manner consistent with security and administrative needs.[43]

The court of appeals determined that the district court had applied an incorrect constitutional standard, and reversed.[44] The lower court had failed adequately to take into account decisions of the Supreme Court in *Pell, Jones,* and *Wolfish.*[45] These decisions, according to the circuit court, mandated a higher degree of deference to the opinions of prison officials than the lower court had exhibited. Such deference precluded the court from requiring the administrators to show that their regulations were the least restrictive means of effecting security or rehabilitative interests.[46] "First amendment freedoms may be curtailed whenever the officials, in the exer-

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38. *Id.* at 739. The court had determined that *Martinez* and Third Circuit precedents indicated that the circuit "at a minimum adheres to the *Procunier v. Martinez* test requiring a substantial or important governmental interest and the least restrictive means to effectuate it." *Id.* at 737-38. The reasonableness test used by the Supreme Court in *Wolfish* was found to be readily distinguishable by the court. *St. Claire,* 481 F. Supp. at 739 n.13. This test placed the burden on the inmate plaintiffs to show by substantial evidence that prison regulations infringing on their constitutional rights constituted an "exaggerated response" to the security and administrative interests that the regulations were alleged to serve. *Wolfish,* 441 U.S. at 550-51. The district court observed that this rule had been applied to pretrial detainees, not convicts, and that no religious free exercise issues were raised. Even if *Wolfish* were to apply, however, the court noted that the challenged rules were an exaggerated response to the security risks attendant on the wearing of religious head-covering. *St. Claire,* 481 F. Supp. at 739 n.13.

39. *Id.* at 739.

40. *Id.* at 738-39. The purpose of the dining room "no-hat" rule was simply to preserve decorum, according to the court. The assertions of prison officials that the rule served various important security purposes were belied by the fact that hats were otherwise allowed virtually throughout the prison. *Id.*

41. *Id.* at 739, 741.

42. *Id.* at 740-41.

43. *Id.* at 741. The defendants later moved to stay the injunctive orders of the court pending appeal, but the court denied the motion. St. Claire v. Cuyler, 482 F. Supp. 257 (E.D. Pa. 1979).

44. *St. Claire,* 634 F.2d at 109.

45. *Id.* at 114.

46. *Id.*

cise of their informed discretion, reasonably conclude that the first amendment exercise possesses 'the likelihood of disruption to prison order or stability, or otherwise interfere[s] with the legitimate penological objectives of the prison environment.' "[47] Even though the asserted state interest appeared speculative, the district court was required to defer to the expertise of prison administrators regarding the importance and method of protecting that interest.[48] Thus, according to the circuit court, the correct standard required shifting the burden of proof back to the plaintiff once the state had shown that a challenged regulation was reasonably related to a legitimate security interest. The plaintiff had to establish "by 'substantial evidence . . . that the officials have exaggerated their response' to security considerations . . . or that their beliefs are unreasonable."[49]

Applying this test to the record, the court found that the plaintiff had failed to meet his burden of proof. The testimony of prison officials had established that each of the challenged rules served a security interest.[50] Because these beliefs appeared "sincerely held" and were "arguably correct," the burden of proof had shifted back to the plaintiff.[51] No evidence that the beliefs of the officials were unreasonable or exaggerated appeared in the record.[52] The decisions of the district court as to each of the three religious free exercise claims were therefore reversed.[53]

B. Rogers v. Scurr

The Eighth Circuit Court of Appeals has adopted the reasoning of the Third Circuit in *St. Claire,* and held that religious free exercise rights must be subjected to a reasonableness test.[54] The inmate-plaintiffs in *Rogers* asserted that they were constitutionally entitled to wear prayer caps and robes outside their prayer services and to have personal visits with Muslim religious leaders during emergency "lockdowns."[55] The district court applied a least restrictive means analysis to the claims of the Muslims and held that regulations prohibiting these activities were unconstitutional.[56] The

47. *Id.* (quoting *Jones*, 433 U.S. at 132).
48. *See id.* at 114-15.
49. *Id.* at 115 (quoting *Pell*, 417 U.S. at 827) (citations omitted).
50. *Id.* at 115-16. The officials testified that hats could conceal contraband, and could cause friction between inmates in the potentially volatile dining area. The turban could facilitate escapes since the parole board met where civilian employees, commonly in civilian attire, could mistakenly release an unusually dressed inmate. Allowing chapel attendance would require deployment of guard-escorts, thereby draining limited manpower from stations where they were needed to ensure the security of the institution. *Id.*
51. *Id.* at 116.
52. *Id.*
53. *Id.* at 117.
54. Rogers v. Scurr, 676 F.2d 1211 (8th Cir. 1982).
55. *See id.* at 1213.
56. *Id.* at 1215.

court ordered that Muslim inmates be allowed to wear religious attire outside of services subject to the right of prison officials to search persons wearing such clothing at any reasonable time.[57] The court also ordered that religious leaders be permitted to visit with inmates after the first five days of a lockdown.[58]

The court of appeals reversed these orders holding that the existing regulations were "eminently reasonable," and therefore constitutional.[59] The court noted that "[w]hile in general we agree with the district court that limitations on these rights should be no greater than necessary to protect the governmental interest involved, . . . we believe that, especially when the maintenance of institutional security is at issue, prison officials ordinarily must have wide latitude within which to make appropriate limitations."[60] The injunctions of the district court effectively substituted the judgment of the court for that of the prison officials. According to the appeals court, this action violated the policy of deference set forth in *Bell v. Wolfish,* and could not be sustained.[61]

C. Aziz v. LeFevre

The Second Circuit Court of Appeals has yet to take a binding position on the effect of *Jones* and *Wolfish* on the standard to be applied to infringements on the religious rights of inmates. The concurring opinion in *Aziz,* however, suggests that the court would regard these decisions as mandating application of a reasonableness test.[62]

In *Aziz,* Muslim inmates contested the right of prison officials to prohibit group prayer in an outdoor recreational area. They alleged that this prohibition infringed upon their first amendment rights by forcing them during certain months of the year to forgo either their recreation privileges or the exercise of their religious beliefs.[63] The district court found that "there is no complete prohibition of the opportunity to exercise [religious rights] in this instance."[64] Furthermore, according to the court, the defendant-officials had established a rational relation between the security needs of

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57. *Id.* at 1213.

58. *Id.* In response to other complaints brought by plaintiffs in this suit, the district court issued injunctions against regulations relating to Muslim worship and diet. These orders were vacated by the appellate court. *Id.* at 1213-15.

59. *Id.* at 1215-16.

60. *Id.* at 1215 (citations omitted).

61. *Id.* at 1216.

62. Aziz v. LeFevre, 642 F.2d 1109, 1112 (2d Cir. 1981) (Meskill, J., concurring). Prior to *Jones,* the Second Circuit Court of Appeals had applied a necessity standard to regulations infringing on religious liberties based on *Martinez. See* Mawkinney v. Henderson, 542 F.2d 1, 3 (2d Cir. 1976) (religious service attendance); Kahane v. Carlson, 527 F.2d 492, 495 (2d Cir. 1975) (kosher food).

63. 500 F. Supp. 725, 726 (N.D.N.Y. 1980), *rev'd,* 642 F.2d 1109, 1111 (2d Cir. 1981).

64. *Id.* at 727.

the institution and the ban on prayer in the yard.[65] Given the repeated admonishments of the Supreme Court discouraging federal court involvement in the management of prisons, the court declined to consider the feasibility of less restrictive alternate regulations.[66] The court held the regulation constitutional, and granted summary judgment for the defendants.[67]

The court of appeals reversed and remanded, calling for further fact development by the district court.[68] While the majority opinion indicated some dismay over the intransigence of the prison officials in this case, it did not suggest that the district court had applied an improper constitutional standard in evaluating the claim of the plaintiff.[69]

The concurring opinion sought to make explicit the majority's implicit approval of application of the reasonableness test to these facts. Quoting the language of *Jones* and *Wolfish,* the concurring opinion explained that on remand plaintiffs would have the burden of showing that the challenged regulation was "unreasonable" or an "exaggerated response" to a security problem.[70]

Each of the circuit court opinions discussed in this section purports to rely on decisions of the Supreme Court that address first amendment rights of inmates. Each of the opinions, however, bases its result on a superficial interpretation of the analysis developed by the Supreme Court. The remaining sections of this Article will demonstrate that *Pell, Jones,* and *Wolfish* require that infringements on religious liberties must be tested under a least restrictive means standard.

III

ADDING UP *Pell, Jones* AND *Wolfish*

The approach of the Supreme Court to first amendment claims brought by inmates has been fairly consistent since 1974. *Pell, Jones,* and *Wolfish* hold that when a prison rule places a time, place, or manner restriction on the exercise of a first amendment right, the constitutionality of the restriction will be judged under a reasonableness test.[71] Lower courts have generally overlooked the corollary to this rule, however, which holds that restrictions prohibiting the exercise of first amendment rights must be subjected to the least restrictive means test.[72] This corollary is admittedly well concealed

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65. *Id.* at 728.
66. *Id.*
67. *Id.* at 729.
68. 642 F.2d at 1112.
69. *Id.*
70. *Id.*
71. *See infra* text accompanying notes 81-85, 105-11, 128-37.
72. *See supra,* Section II. *But see* Monroe v. Bombard, 422 F. Supp. 211, 217 (S.D.N.Y. 1976). The argument for this corollary, not elaborated in *Monroe,* would be that the application of a reasonableness test in *Pell* to a time, place, or manner regulation indicates

by the confusing analysis set forth in *Jones* and *Wolfish*. Nevertheless, a careful examination of these cases reveals that behind the confusion lies a coherent and legally sophisticated approach to infringements on the first amendment rights of inmates.[73]

A. Pell v. Procunier

Pell was the first Supreme Court decision to hold that inmates *qua* inmates were entitled to invoke the first amendment to protect their rights of speech.[74] In *Pell,* the Court was asked to determine the constitutionality of a prohibition on face-to-face interviews between inmates and news-media representatives.[75] Rather than base its decision on the constitutional right of noninmates to communicate with prisoners, the Court declared that "a prison inmate retains those First Amendment rights that are not inconsistent with his status as a prisoner or with the legitimate penological objectives of the corrections system."[76]

To determine the extent to which inmates retained first amendment rights, the Court examined the competing interests at stake. Of central importance to the corrections system, the Court reasoned, was the maintenance of institutional security.[77] On the other hand, the prohibition on interviews with newspersons clearly restricted inmates in the exercise of their first amendment rights.[78] This restriction, however, precluded only one manner of communication. Inmates were still free to communicate directly with newspersons by mail, or indirectly through personal visits with family

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that greater judicial scrutiny is appropriate in cases concerning regulatory infringements on the exercise of first amendment rights if the regulation fails to afford some alternate means of exercising those rights. *See infra* text accompanying notes 77-85. *Martinez,* although cited in *Monroe* in support of this proposition, *Monroe,* 422 F. Supp. at 217, actually adjudicates only the rights of noninmates to communicate with prisoners. *Martinez,* 416 U.S. at 408. *See infra* text accompanying notes 116-20. Judge Carter, author of the *Monroe* opinion, appears to have recently overruled *Monroe.* In Hurley v. Ward, 549 F. Supp. 174, 184-86 (S.D.N.Y. 1982), he held that *Wolfish* requires that inmates whose religious beliefs are infringed upon by strip searches are entitled only to the protection afforded by the reasonableness standard.

73. The following analysis of *Pell, Jones,* and *Wolfish* is similar in some respects to that put forth in Calhoun, *The First Amendment Rights of Prisoners,* in 2 PRISONERS' RIGHTS SOURCEBOOK 43 (1980).

74. In *Procunier v. Martinez,* decided only a few months before *Pell,* the Supreme Court noted that it had never ruled on the question of whether inmates could claim first amendment freedoms, but declined to address the question. 416 U.S. at 406-08. The Court chose instead to examine the constitutionality of prison censorship regulations in light of the first amendment rights of noninmates rather than of prisoners. *Id.* at 408. *See infra* text accompanying notes 126-34.

75. 417 U.S. at 821-22.

76. *Id.* at 822.

77. *Id.* at 823. The Court also numbered deterrence, isolation, and rehabilitation among the "legitimate policies and goals of the corrections system." *Id.* at 822-23.

78. *Id.* at 823.

or friends.[79] The Court concluded that "[s]o long as reasonable and effective means of communication remain open and no discrimination in terms of content is involved . . . 'prison officials must be accorded latitude.' "[80]

The appropriate degree of latitude was measured by reference to the constitutional standard applied to time, place, or manner regulations of speech beyond prison walls.[81] This standard permitted such regulations if they were reasonable in light of the normal functions and patterns of use of the regulated area.[82] The Court held that paramount security interests, combined with the deference owed to prison officials, dictated placement of a stringent burden of proof on the inmate-plaintiffs:[83] "in the absence of substantial evidence in the record to indicate that the officials have exaggerated their response to [rehabilitative and security] considerations, courts should ordinarily defer to [the] expert judgment [of prison officials] in such matters."[84] Reiterating that the interview prohibition permitted alternative means of communication, and that the rule operated in a neutral fashion with respect to content, the Court held the regulation constitutional.[85]

Pell, though ostensibly determining only the constitutional standard by which to test time, place, and manner regulations, has received much broader application in subsequent Supreme Court cases. Both *Jones* and *Wolfish* follow the approach of *Pell* in determining the constitutionality of time, place, and manner regulations in prisons.[86] They also use the exaggerated response test of *Pell,* however, to define the presumption that attaches to the opinions of prison officials with respect to the special functions of correctional institutions.[87] Courts are required under this presumption to defer to the opinions of prison administrators concerning security, order, and rehabilitation unless these opinions are shown to be unreasonable, irrational or an exaggerated response to these concerns.[88] Some courts, most notably the court of appeals in *St. Claire,* have mistakenly equated this presumption with the constitutional standard under which challenged regulations are to be tested.[89] While this approach may produce the constitutionally correct result in some cases, *Jones* and *Wolfish* indicate that this approach is overly simplistic.

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79. *Id.* at 823-25.
80. *Id.* at 826 (citing Cruz v. Beto, 405 U.S. 319, 321 (1972) (per curiam)).
81. 417 U.S. at 826-27); *see supra* notes 17-20 and accompanying text.
82. 417 U.S. at 827.
83. *Id.* In this case, officials cited the need to limit visitation privileges so as to promote internal security by keeping visits to a manageable level while promoting rehabilitation by allowing contact with family, friends, legal counsel, and clergy. *Id.*
84. *Id.*
85. *Id.* at 827-28.
86. *Wolfish,* 441 U.S. at 551; *Jones,* 433 U.S. at 130-32.
87. *Wolfish,* 441 U.S. at 546-48; *Jones,* 433 U.S. at 128-29.
88. *Wolfish,* 441 U.S. at 547-48.
89. *See St. Claire,* 643 F.2d at 104.

B. Jones v. North Carolina Prisoners' Union

Three years after *Pell,* the Supreme Court once again decided a case involving the first amendment rights of inmates. The inmate-plaintiffs alleged that prison regulations had blocked their attempts to organize an inmate union, and thereby had violated their rights of speech, association, and equal protection.[90] The challenged regulations forbade inmates to attend union meetings, to receive packets of union publications mailed in bulk for redistribution inside the prison, and to solicit other inmates to join the union.[91] The prison administration neither prohibited the existence of the union per se, nor prevented inmates from "joining" the union. Officials reasoned that since inmates could join the union simply by considering themselves members, the existence of and membership in the union was beyond the reach of regulation.[92]

A three-judge federal district court found that the prison officials had failed to adequately explain why forbidding solicitation of membership in an unforbidden union was necessary or essential to interests of security and order.[93] The meeting and bulk mailing rules were found by the court to violate rights of equal protection in light of prison policies permitting such forms of communication by other inmate organizations.[94]

The Supreme Court reversed the district court on all three issues, explaining that the lower court had failed to give due deference to the opinions of prison officials and to appreciate the "peculiar and restrictive" nature of penal institutions.[95] The Court particularly criticized the insensitivity of the district court to the problems that officials anticipated if a union was permitted to form within the prison.[96] State officials had testified that the creation of a union would exacerbate relations between inmates and prison personnel, and between members and nonunion inmates. Work stoppages and mutinies would "inevitably" lead to riots, according to the officials.[97] The district court had dismissed these concerns as speculative, while acknowledging that they were "sincerely held" and "arguably correct."[98] The Supreme Court ruled that the district court should have re-

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90. *Jones,* 433 U.S. at 122.
91. *Id.* at 121.
92. *Id.* at 128-29.
93. North Carolina Prisoners' Labor Union, Inc. v. Jones, 409 F. Supp. 937, 943-44 (E.D.N.C. 1976).
94. *Id.* at 944-45.
95. *Jones,* 433 U.S. at 125, 136. The Court rejected the equal protection analysis of the lower court, finding that prisons could not be treated as public fora, and that the reasons given by prior administrators for distinguishing between a prisoners' union and other inmate organizations were reasonable. *Id.* at 134-35.
96. *Id.* at 127-28.
97. *Id.* at 127.
98. *Id.*

garded itself as bound by this testimony absent a showing that the beliefs of the officials were unreasonble or irrational.[99]

While the wisdom of this high standard of deference may be questioned,[100] the confusion in interpreting this case arises primarily out of the Court's treatment of the specific constitutional issues raised by the plaintiffs. The Court appears to have applied both the reasonableness and the least restrictive means tests to the regulations limiting rights of solicitation and association. Regardless of how the case is interpreted with respect to these issues, however, *Jones* is consistent with the proposition that time, place, and manner regulations are subject to the reasonableness test, while absolute prohibitions of first amendment rights are subject to the least restrictive means test.

The discussion of the specific regulations challenged by the plaintiffs opened with a statement suggesting that the Court had applied the reasonableness test to each of the regulations. "An examination of the potential restrictions on speech or association that have been imposed by the regulations under challenge, demonstrates that the restrictions imposed are reasonable, and are consistent with the inmates' status as prisoners and with the legitimate operational considerations of the institution."[101] This statement misleads because the Court later held that the ban on bulk mailing was reasonable,[102] that the ban on solicitation was both reasonable and necessary,[103] and that the ban on association was reasonable and drafted no more broadly than necessary.[104]

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99. *Id.* at 128-29 ("The burden was not on [the officials] to show affirmatively that the Union would be 'detrimental to proper penological objectives' or would constitute a 'present danger to security and order.' ").

100. Justice Marshall, author of the dissenting opinion in which Justice Brennan concurred, argued that there was no precedent for such a standard. *Id.* at 141. Marshall asserted that it is particularly dangerous to defer to the "rational" judgments of prison officials because they, unlike other public officials, are removed from public scrutiny. Prison officials have a substantial incentive to keep themselves out of the public eye by ensuring that no disturbances arise within the institution. "Consequently," Marshall opined, "prison officials inevitably will err on the side of too little freedom." *Id.* at 142. That this excessively conservative attitude exists among prison officials is borne out by a report of the American Bar Association Joint Committee on the Legal Status of Prisoners:

> All organizations including correctional organizations overreact to suggested changes, whether sweeping or merely incremental . . . [M]any of the fears voiced by prison officials in the 1960s to the growing tide of court determinations invalidating prison regulations have simply not come to pass; indeed, in several instances . . . those groups feared by the prisons in the 1960s have become stabilizing influences in the 1970s.

ABA Joint Committee on the Legal Status of Prisoners, *The Legal Status of Prisoners,* (Tent. Draft 1977) in 14 AM. CRIM. L. REV. 377, 419 (1977), *quoted in Jones,* 433 U.S. at 142 (Marshall, J., dissenting).

101. 433 U.S. at 130.

102. *Id.* at 131.

103. *Id.* at 132.

104. *Id.* at 133.

The approach of the Court to the ban on bulk mailing roughly follows that taken in *Pell*. The Court began by noting that speech rights were barely implicated by the bulk mailing prohibition.[105] An alternative channel of communication between outside union organizers and inmates remained available in the form of direct, individual correspondence. The fact that this form of communication was more expensive than bulk mailing did not fundamentally implicate speech values, according to the Court. The Court concluded that the regulation was reasonable because adequate alternative means of communication remained available to the inmates.[106]

This analysis follows that of *Pell* in that the Court emphasized the availability of alternate means of communication and subjected the regulation to a reasonableness test.[107] Use of "reasonableness" language in *Jones* rather than the "exaggerated response" language of *Pell* did not substantially alter the burden of proof on inmates. There is little difference between showing that the response of officials to an institutional problem is exaggerated and showing that the officials have acted unreasonably.[108]

The ban on solicitation, like the ban on bulk mailing, was found by the Court to have a limited impact on inmate rights of speech. The Court observed that "the State has not hampered the ability of prison inmates to communicate their grievances to correction officials. In banning union solicitation or organization, appellants have merely affected one of several ways in which inmates may voice their complaints to, and seek relief from, prison officials."[109] This construction of the facts is incomplete in that it ignores the direct infringement of the solicitation ban on the right of inmates to communicate invitations to join the union among themselves. The Court nevertheless deemed adequate the alternate, nonunion means of communicating grievances, and held that the prohibition was "not only reasonable, but necessary."[110]

This finding of necessity arguably reveals that the Court recognized that it was dealing with an absolute, content-based prohibition and therefore applied a necessity test. If so, then use of the necessity test was appropriate. It is more likely, however, that the necessity language was superfluous. The Court may simply have been noting the fact that if union

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105. *Id.* at 130.

106. *Id.* at 131.

107. *Id.* "Since other avenues of outside informational flow by the Union remain available, the prohibition on bulk mailing, reasonable in the absence of First Amendment considerations, remains reasonable. *Cf. Pell v. Procunier* . . . ." *Id.* (footnote omitted).

108. The Court also uses these terms interchangeably in *Wolfish*. The Court, discussing a ban on a receipt of hardcover books sent to prisoners from certain sources, held that the "restriction is a rational response by prison officials to an obvious security problem. . . . There is simply no evidence in the record to indicate that [prison] officials have exaggerated their response to this security problem . . . ." 441 U.S. at 550-51.

109. *Jones,* 433 U.S. at 130 n.6.

110. *Id.* at 132.

activity is legitimately forbidden, prison officials would be remiss if they failed also to prohibit solicitation encouraging participation in such activity. Given that the Court chose to regard the ban on solicitation as affecting only the method by which inmates communicate with officials, it is unlikely that it intended to subject the regulation to the necessity test. This interpretation is supported by the fact that the Court cited no authority for the necessity test.[111] Furthermore, this reference to necessity appears casual in comparison to the clear language and appropriate reference to authority for the necessity test that appears in the Court's subsequent discussion of association rights.

Early on in the *Jones* opinion, the Court singled out associational rights as being particularly subject to limitation because of the nature of incarceration. The Court observed that incarceration necessarily requires restrictions on the right of inmates to associate with outsiders. Restrictions on associational rights among inmates are similarly necessitated by "the operational realities of a prison" and by the inmates' status as prisoners.[112] Consequently, associational rights "may be curtailed whenever the institution's officials, in the exercise of their informed discretion, reasonably conclude that such associations, whether through group meetings or otherwise, possess the likelihood of disruption to prison order or stability, or otherwise interfere with the legitimate penological objectives of the prison environment."[113] This reasonableness standard is set forth in the context of describing the rights of association at issue. After describing with great appreciation the dangers which prison officials attempted to forestall by banning union activities,[114] however, the Court held that "[i]f the [officials'] views as to the possible detrimental effects of the organizational activities of the Union are reasonable, as we conclude they are, then the regulations are drafted no more broadly than they need be to meet the perceived threat . . . ."[115] Herein, the Court applied both a reasonableness and a necessity test.

In ruling that the associational restrictions were necessary, the Court cited its decision in *Procunier v. Martinez*.[116] *Martinez* applied a necessity test to censorship regulations concerning inmate mail.[117] Censorship rules

111. The Court cites only to *Pell*, in which a reasonableness test was applied. *Id; see supra* text accompanying notes 74-85. The *Jones* Court refers to a specific page of the *Pell* decision, apparently to bolster the proposition that legitimate proscription of an activity necessarily requires proscription of solicitation encouraging such activity. *See Pell*, 417 U.S. at 822.

112. *Jones*, 433 U.S. at 126.

113. *Id.* at 132.

114. The Court noted that relations between prison staff and inmates "contain the everpresent potential for violent confrontation and conflagration . . . ." *Id.* at 132.

115. *Id.* at 133.

116. *Id.*

117. 416 U.S. at 412-16. The regulations empowered prison officials to censor mail in which inmates "unduly complain" or "magnify grievances" and prohibited receipt of certain types of vaguely defined "inflammatory" correspondence or literature. *Id.* at 399.

are content-based by definition, and thus cannot be classified as time, place, or manner regulations.[118] *Martinez* thus appears to fit together well with *Pell* in that it provides for greater judicial scrutiny when the right of inmates to exercise certain first amendment freedoms is abolished than when the right is merely subjected to time, place, or manner restrictions. The major difficulty with this interpretation, however, is that the *Martinez* ruling was based solely on the first amendment right of outsiders to communicate with inmates.[119] *Martinez* avoided the issue of whether inmates retained any first amendment privileges,[120] leaving that determination to *Pell.*

The citation to *Martinez* in *Jones*, however, appears to confirm that inmates are entitled in their own right to the protection of the necessity test. The fact that the *Jones* Court has effectively merged the necessity and reasonableness tests as applied to associational rights does not weaken this conclusion. Associational freedoms were found inconsistent with the purpose of incarceration.[121] Groups of inmates have the potential to create a significantly greater threat to the security of an institution than do individuals.[122] Accordingly, "[r]esponsible prison officials must be permitted steps to forestall such a threat, and they must be permitted to act before the time when they can compile a dossier on the eve of a riot."[123] Given the ever-present danger of serious disturbances arising from inmate organizations antagonistic to the administration, forbidding exercise of associational rights becomes necessary whenever officials reasonably fear such an organization threatens security.[124] There is, in the view of the Court, no less restrictive manner of protecting this important state interest.[125]

The ambiguities in the language of the *Jones* opinion preclude an unambiguous analysis of the rules of law established by the decision. Nonetheless, rejection of the argument that *Jones* employed a necessity standard does not permit use of the decision as blanket authority for application of the reasonableness test to all infringements on first amendment rights.[126] The Supreme Court has never indicated that the inherent necessity of re-

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118. *See* Cox v. Louisiana, 379 U.S. 536, 557-58 (1965).
119. 416 U.S. at 408.
120. *Id.*
121. *See supra* text accompanying notes 112-13.
122. *See Jones,* 433 U.S. at 127-28.
123. *Id.* at 132-33.
124. *Id.* at 133.
125. *See id.*
126. The use of reasonableness language in the Court's discussion of associational rights has been interpreted as authority for application of a pure reasonableness standard to a wide range of prohibitions of the exercise of inmate associational rights. *See, e.g.,* Garland v. Polley, 594 F.2d 1220 (8th Cir. 1979) (business association); Pittman v. Hutto, 594 F.2d 407 (4th Cir. 1979) (prison newspapers); Bono v. Saxbe, 450 F. Supp. 934, 947 (E.D. Ill. 1978) (visitation), *aff'd in part, remanded in part,* 620 F.2d 609 (7th Cir. 1980); Holland v. Hutto, 450 F. Supp. 194 (W.D. Va. 1978) (marriage), *aff'd in part, vacated in part,* 601 F.2d 580 (4th Cir. 1979).

stricting associational rights extends to the exercise of religious rights. It would be difficult, in fact, to draw parallels between rights of association and rights of religious free exercise. One of the primary functions of modern prisons is to prevent free association both among inmates and with outsiders. Religious piety and practice on the other hand have been historically encouraged in prison.[127] It is anything but the function of prisons to inhibit the exercise of religious rights.

C. Bell v. Wolfish

Bell v. Wolfish further reinforces the argument that the reasonableness test applies to speech rights only when regulations infringing on those rights can be classified as time, place, or manner restrictions. Unlike *Pell* and *Jones*, the *Wolfish* decision addressed an array of constitutional complaints brought by inmates. The *Wolfish* case concerned a class action brought by detainees at the New York Metropolitan Correctional Center.[128] The plaintiffs asserted due process challenges to a variety of regulations under the fifth amendment. These claims were supplemented by allegations of specific first and fourth amendment violations.[129]

The Court rejected the least restrictive means standard used by the lower courts in *Wolfish* as a basis for holding certain regulations and conditions at the Center unconstitutional.[130] The Court noted that the due process clause "provides no basis for application of a compelling-necessity standard to conditions of pretrial confinement that are not alleged to infringe any other, more specific guarantee of the Constitution."[131] This statement suggests that a compelling-necessity standard might be appropriate to test the constitutionality of the specific first and fourth amendment claims asserted by the inmates. The inmate claims in *Wolfish* did not test this statement, however, because they raised only issues to which the reasonableness test traditionally applies.

The first amendment issue concerned a "publisher-only" rule authorizing inmates to receive hardcover books only if mailed directly from a publisher, book club, or bookstore.[132] Prison officials defended this regulation as necessary to prevent the smuggling of contraband into the prison concealed in the bindings or leaves of the books. The inspection necessary if books were admitted regardless of their source would be difficult, according to the testimony, and would consume an inordinate amount of time.[133] The

127. *See supra* note 1.
128. 441 U.S. at 523.
129. Issues addressed by the Court included overcrowding, strip and cell searches, restrictions on the transfers of personal goods and books, lack of recreational, education and employment facilities, and excess periods of pretrial confinement. *Id.* at 527.
130. *Id.* at 532.
131. *Id.* at 533.
132. *Id.* at 548-49.
133. *Id.* at 549.

Court found that the regulation was a rational response to "an obvious security problem."[134] The Court upheld the rule because the plaintiffs had failed to show that the officials had exaggerated their response to the legitimate security and administrative concerns raised by the problem of admitting hardcover books.[135]

The Court's application of the reasonableness test was by no means automatic, however. The Court pointed out that several other factors influenced its holding: the neutral operation of the rule, the existence of "alternative means of obtaining reading material that have not been shown to be burdensome or insufficient," and the sixty-day limitation of the rule's impact on pretrial detainees.[136] The Court concluded that the publisher-only rule was a reasonable time, place, and manner regulation necessary to further significant government interests.[137]

Similarly, the Court held that regulations affecting rights of privacy need only meet a reasonableness test because "[t]he Fourth Amendment prohibits only unreasonable searches."[138] Thus the body cavity and cell search policies of the institution were found to be reasonable given the diminished expectation of privacy inherent in imprisonment[139] and the special security needs of the institution.[140]

The opinions of the Supreme Court in *Pell, Jones,* and *Wolfish* thus indicate that it would be inappropriate for courts to presume that "reasonable" restrictions on first amendment rights are also constitutional where no alternate means of exercising those rights are available. In the context of free exercise challenges, the concern of the Supreme Court with the availability of alternate means becomes critical. The following section will explore further the considerations that should compel courts to apply a least restrictive means rather than a reasonableness test to free excercise challenges.

IV

Religious Rights and the Least Restrictive Means Standard

The appellate courts in *St. Claire, Rogers,* and *Aziz* made two fundamental errors in concluding that free exercise claims should be subjected to the reasonableness test. They ignored the inapplicability of time, place, and manner analysis to free exercise challenges. They also confused the policy of deference to the opinions of prison administrators with the legal standard to

134. *Id.* at 550.
135. *Id.* at 551.
136. *Id.* at 551-52.
137. *Id.* at 552.
138. *Id.* at 558.
139. *Id.* at 556-67.
140. *Id.* at 559-60.

be applied to the adjudicated facts. In all three cases, the least restrictive means test ought to have been applied.

The religious free exercise rights of inmates cannot be subjected to time, place, and manner analysis if such considerations constitute an integral part of the religious claim. Whereas courts may rely on common sense and experience to assess the adequacy of alternate methods of exercising rights of speech, they are forbidden by the establishment clause to determine whether one religious practice may be substituted for another or altered without infringing on religious beliefs.

Attempts by courts to assess the adequacy of alternate means of exercising religious beliefs would destroy the "wall of separation" between church and state created by the first amendment.[141] Although the establishment clause is most frequently invoked to challenge the constitutionality of actions by the legislative or executive branches of government,[142] it also limits the scope of permissible judicial actions. Just as the legislative or executive branches cannot, under the Constitution, impose their religious views on citizens by mandating prayer in public schools,[143] the judiciary must not be allowed to "establish" a religion by making legal rights contingent upon a court's interpretation of religious doctrine.

In *Serbian Eastern Orthodox Diocese v. Milivojevich*,[144] for example, the Supreme Court carefully distinguished secular interests within the civil jurisdiction of the courts from religious concerns that were beyond its reach. The issue was whether a civil court could order the Holy Synod and Holy Assembly of the Serbian Orthodox Church to reinstate an American bishop whom they had defrocked. This defrockment, repudiated by the bishop and his supporters, in turn raised the issue of who controlled church property under his jurisdiction.[145] The Illinois Supreme Court had ordered reinstatement because the actions of the mother church were "arbitrary" within the terms of the constitution and penal law of the church itself.[146] The Supreme Court determined that the attempt by the Illinois Supreme Court to interpret the constitutional and penal provisions of the Serbian Orthodox Church entangled the court to an unconstitutional extent in the resolution of questions of religious belief. The Court observed:

> First Amendment values are plainly jeopardized when church property litigation is made to turn on the resolution by civil courts of

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141. *See* Everson v. Board of Educ., 330 U.S. 1, 16 (1946).

142. *See, e.g.*, Larson v. Valente, 456 U.S. 228 (1982) (religious solicitation); Widmar v. Vincent, 457 U.S. 263 (1981) (access of student religious groups to state university facilities); Gilfillan v. City of Philadelphia, 637 F.2d 924 (3d Cir. 1980), *cert. denied*, 451 U.S. 987 (1981) (use of tax revenue for papal visit).

143. *See* Engel v. Vitale, 370 U.S. 421 (1962).

144. 426 U.S. 696 (1976).

145. *Id.* at 703-05.

146. *Id.* at 708.

> controversies over religious doctrine and practice. If civil courts undertake to resolve such controversies in order to adjudicate the property dispute, the hazards are ever present of inhibiting the free development of religious doctrine and of implicating secular interests in matters of purely ecclesiastical concern . . . . [T]he [First] Amendment therefore commands civil courts to decide church property disputes without resolving underlying controversies over religious doctrine.[147]

Disputes over church policy or administration were similarly beyond the scope of court scrutiny.[148] Consequently, the Court held that the Supreme Court of Illinois was bound to accept the decision of the ecclesiastical tribunal of the Serbian Orthodox Church to defrock the bishop and take control of the church property he had supervised.[149]

The role of courts in church property and administrative disputes set forth in *Serbian Eastern Orthodox Diocese* applies with equal force to suits raising free exercise challenges to state laws or regulations. In *Thomas v. Review Board of the Indiana Employment Security Division,*[150] the Supreme Court refused to become entangled in the interpretation of beliefs held by Jehovah's Witnesses. The case raised the issue of whether a Witness, who was fired for his refusal to work directly on the production of military hardware, was entitled to unemployment benefits.[151] His refusal to undertake such work was based on his assertion that his religious beliefs forbade such a direct role in the production of armaments.[152] Another Witness working at the plant, however, had advised Thomas that such work was "scripturally" acceptable. The Indiana Supreme Court had regarded this difference of opinion between the two Witnesses as evidence that the root of Thomas's belief was philosophical rather than religious, and therefore not entitled to the protection of the free exercise clause.[153]

The Supreme Court, however, refuted this attempt by the Indiana court to determine which form of belief regarding armament production was more true to scripture.

> [T]he guarantee of free exercise is not limited to beliefs which are shared by all of the members of a religious sect. Particularly in this sensitive area, it is not within the judicial function and judicial competence to inquire whether the petitioner or his fellow worker

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147. *Id.* at 709-10 (quoting Presbyterian Church v. Hull Church, 393 U.S. 440, 449 (1969)).
148. *Serbian Eastern Orthodox Diocese,* 426 U.S. at 710.
149. *Id.* at 724.
150. 450 U.S. 707 (1981).
151. *Id.* at 709.
152. *Id.* at 710.
153. *Id.* at 711, 714-15.

> more correctly perceived the commands of their common faith. Courts are not arbiters of scriptural interpretation.[154]

The Court concluded that Thomas had terminated his work for religious reasons, and that he was entitled to unemployment benefits.[155]

The proper scope of a court's inquiry is thus limited to a determination that a particular religious belief has a bona fide basis in religious doctrine, and that the belief is sincerely held. It then decides whether the challenged law or regulation infringes upon that belief.[156] If anything, *Pell, Jones,* and *Wolfish* indicate that the reasonableness test would be inapplicable to such an infringement because the condition precedent to application of the test, the existence of an adequate alternate means of exercising the belief, is beyond the competence of a court to determine.[157] Any restriction on constitutionally protected free exercise rights must therefore be subjected to greater scrutiny than the reasonableness test allows.

The Third and Eighth Circuit Courts of Appeals have taken the position, however, that such scrutiny would encroach upon the policy of deference to the opinions of prison officials mandated by the Supreme Court. The court of appeals in *St. Claire* asserted that "[t]he deferential review required by the Supreme Court's decisions leaves no room for a requirement that prison officials choose the least restrictive regulation consistent with prison discipline."[158] This statement is supported by neither Supreme Court opinions nor logic. Suppose a regulation totally prohibited exercise of a first amendment right such that no alternate means were available by which to exercise the right. The Supreme Court opinions suggest that such a regula-

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154. *Id.* at 715-16.

155. *Id.* at 720.

156. *Id.* at 714-16; *Yoder*, 406 U.S. at 215-19.

157. *See supra* text accompanying notes 81-85, 126-27, 136-37. In Heffron v. International Society for Krishna Consciousness (ISKCON), 452 U.S. 640 (1981), the Supreme Court appeared to indicate that religious free exercise rights could be subjected to time, place, or manner analysis. The Court held that a state fair regulation prohibiting solicitation and distribution of literature outside of fair booths was a constitutional time, place, or manner restriction as applied to members of ISKCON. *Id.* at 655. "None of our cases suggest that the inclusion of peripatetic solicitation as part of a church ritual entitles church members to solicitation rights in a public forum superior to those of members of other religious groups that raise money but do not purport to ritualize the process." *Id.* at 652. Significantly, however, ISKCON had argued only that its activities were protected under the free speech provisions of the first amendment, not the free exercise clause. *Id.* at 652 n.15, 659 n.3. Justice Brennan, concurring in part and dissenting in part, interpreted the dictum of the majority as consistent with precedents that accorded special protection to religious free exercise rights. The majority, according to Brennan, held merely that "even if Sankirtan is 'conduct protected by the Free Exercise Clause,' it is entitled to no greater protection than other forms of expression protected by the First Amendment that are burdened to the same extent [by the regulation under challenge]." *Id.* at 659 n.3.

158. 634 F.2d at 114. The Eighth Circuit has adopted this view. *See* Otey v. Best, 680 F.2d 1231, 1233 (8th Cir. 1982) (denying right of Muslim in administrative segregation to participate in group worship); *Rogers,* 676 F.2d at 1215.

tion must be found not only reasonable, but necessary. If a prison official asserted in good faith that any less restrictive alternative would threaten security or rehabilitative objectives to an unacceptable degree, then the court would be bound by that assertion absent substantial evidence that the judgment was irrational or unreasonable. If the officials made no reasonable assertion that an alternate plan would be infeasible, there appears to be no reason why a court could not compel implementation of the less restrictive alternative. No principle of deference to the expertise of prison officials would be violated thereby because the action of the court would be consistent with the expert judgment of the official.

A brief review of the facts of *St. Claire* serves to illustrate how this formula might work in practice. In *St. Claire,* one of the challenged regulations forbade the wearing of hats in the dining area.[159] The district court established that St. Claire was a sincere adherent of a bona fide religion, and that he sincerely believed that he should wear a kufi whenever possible as a symbol of his faith.[160] The no-hat rule infringed upon this religious belief by preventing St. Claire from wearing his kufi in accordance with his religious beliefs.[161] The state in *St. Claire* responded with evidence that the dining area was highly volatile and posed unique risks to the security of the institution. Testimony of prison officials suggested that the no-hat policy served to prevent weapons from entering the dining area and helped to prevent the use of headgear as clique identifiers.[162]

Under the reasonableness standard used by the circuit court in *St. Claire,* the state had at this point met its burden of proving the prima facie constitutionality of the infringement. The regulation had been shown to serve a legitimate and important state interest, namely that of preserving security. The burden then shifted back to the plaintiffs to show that the regulation was irrational or an exaggerated response to the purported security need. Under the test outlined by this Article, however, the state must establish one more point before the burden shifts back to the plaintiffs. Because this regulation infringed upon the right of religious free exercise, and because there could be no alternate means of exercising this right, the state would have to show that the regulation was also the least restrictive means of effectuating these security interests.

This additional burden is less difficult to meet than might be supposed. The policy of deference requires that the court accept as true any evidence presented by prison officials that a security need exists and that a particular regulation serves that need. The court may reject such evidence only if it

159. 481 F. Supp. at 734.
160. *Id.* at 734, 736.
161. *See id.* at 738; 634 F.2d at 111.
162. *St. Claire,* 634 F.2d at 115. Group identification was considered a security problem because certain groups might exhibit hostility towards nonmembers. *Id.*

finds the allegations of prison officials to be irrational or exaggerated. Thus, the court was bound in *St. Claire* to find that the dining area was especially dangerous to security and that the no-hat rule enhanced safety in the area. Under the least restrictive means test, however, officials would also have to allege that they knew of no less restrictive means of preserving security in the area that would serve security functions as well as the no-hat rule. It is at this point that the burden of going forward would shift back to the plaintiffs.

Plaintiffs might then proceed along one of two avenues. They could attack the legitimacy of the security interests alleged, or the rationality of the connection between the regulation and those interests. Alternatively, they could suggest that there are less restrictive but equally or more effective means of accommodating these needs. The approach of plaintiffs in following the first avenue would remain the same whether the least restrictive means or the reasonableness test applied. Following the second avenue, however, would force the court and the state to consider whether it is really necessary that the plaintiffs' religious rights be proscribed in the manner at issue.

Given the apparent contrast between the attitude of the district and circuit courts in *St. Claire* towards the testimony given by prison officials, the additional level of scrutiny afforded by an attack along this second avenue would seem unlikely to change the outcome of the case. The district court suggested that searches outside the dining area would be an adequate alternative means of preserving security in the dining hall.[163] The circuit court rejected this alternative as beyond the scope of judicial authority under the reasonableness test.[164] Under the suggested least restrictive means test, however, the state would be required to show that this alternative proposal would inadequately serve the security needs of the institution. In *St. Claire,* the state could probably justify rejection of the alternative on the basis of its failure to address the security problems posed by the use of hats as clique identifiers. The court would be bound to accept this basis for rejection under the policy of deference unless the plaintiffs could show that the position taken by the officials was irrational or an exaggerated response. The district court in *St Claire* would appear to be inclined to make just such a finding and to require substitution of a search policy for the no-hat rule.[165] The circuit court, on the other hand, appears to advocate greater deference, and would probably reject the proposed less restrictive alternative based on assertions of inadequacy by prison officials.

Another reason the least restrictive means test should be applied to religious free exercise claims arising in prisons is because it is the test applied

163. 481 F. Supp. at 739.
164. 634 F.2d at 114-15.
165. 481 F. Supp. at 739, 739 n.13.

to such claims outside of prison.[166] The reasonableness test is applied to time, place, and manner regulations of speech rights both inside and outside of prison.[167] What changes when the context shifts from the free world to the prison is not the constitutional test applied to such infringements, but the standard used to assess the opinions of state officials. There is no reason to treat religious rights any differently. The Supreme Court has employed both the least restrictive means and necessity tests to religious free exercise rights arising outside of prison.[168] Following the precedent established in *Pell,* these tests should be applied in prison, as tempered by the policy of deference established by the Court in prison speech cases.

A high standard of deference does not doom all first amendment litigation tested under the least restrictive means standard. In *Boudin v. Thomas*, a district court found that the decision of prison administrators to hold the plaintiff in segregated confinement because of her alleged association with terrorists constituted an exaggerated response to security concerns.[169] The court ordered her placed with the general prison population.[170] The Seventh Circuit Court of Appeals held in *Kincaid v. Rusk* that prison officials failed to establish any rational relation between rules prohibiting inmates from receiving certain types of reading materials and a valid security interest.[171]

Creative litigators may be able to use the slightly higher constitutional standard embodied in the least restrictive means test to force courts to scrutinize carefully infringements on religious free exercise rights. As described above, it may be argued that if a proposed less restrictive alternative regulation serves institutional security needs better than the challenged regulation, the court ought to order implementation of the proposed alternative.[172]

The deference standard may also be interpreted to leave the court greater latitude to evaluate the soundness of assertions made by prison administrators. One district court, after debating whether prisoners retained any rights at all under the standard of deference described in *Wolfish*, concluded that "the Court stated a general rule of judicial deference, but not of judicial abdication."[173] The court stressed that *Wolfish* mandated

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166. *See supra* note 11. Note, *Religious Rights, supra* note 9, at 852-56, takes this position, but approaches the issue as an argument of policy. The Note suggests that the values of the free exercise clause are as important inside as outside prison, and therefore ought to be subject to the same constitutional standard. *Id.*

167. *See supra* text accompanying notes 81-85.

168. *See supra* note 11.

169. 533 F. Supp. 786, 790-91 (S.D.N.Y. 1982).

170. *Id.* at 793.

171. 670 F.2d 737, 744-45 (7th Cir. 1982).

172. *See supra* text accompanying note 163. Post Trial Memorandum For The Plaintiff-Intervenor Subclass at 121-22, Hurley v. Ward, 549 F. Supp. 174 (S.D.N.Y. 1982).

173. Beckett v. Powers, 494 F. Supp. 364, 367 (W.D. Wis. 1980).

deference to the informed judgment of prison administrators.[174] "[I]t would be an abuse of discretion for [prison officials] to act in a manner that infringes a constitutional protection without first acquiring and weighing information regarding the necessity for the action and its intrusiveness vis-a-vis the inmates."[175] Cross-examination of prison officials would thus stress the degree to which the officials had investigated the likelihood that the regulation under challenge would actually serve purported security or rehabilitative functions. A showing that officials had informed themselves poorly would weaken the presumption of reasonableness and help to establish the irrationality of a regulation.

At the very least, the least restrictive means test forces courts and administrators to seriously consider the unmitigated impact that everyday rules and regulations can have on deeply held religious beliefs. The test focuses attention on what is often the total inability of inmates to alter their religious doctrines to accommodate prison regulations. Unlike more maleable rights of speech, religious doctrine generally cannot be readily modified to accommodate regulations drawn up by those who are often utterly ignorant of how religious beliefs might be affected by the rule. The degree to which administrators and courts will be bothered by the impact of regulations on inmate religious beliefs will of course depend upon their predisposition to view complaints about infringements with sympathy. It is hoped that the higher standard of constitutional scrutiny embodied in the least restrictive means test would encourage such sympathy.

V.

CONCLUSION

The *Pell, Jones,* and *Wolfish* decisions of the Supreme Court have clearly tended to limit the exercise of first amendment rights by prison inmates. This Article has shown that the source of this limitation is primarily the policy of deference to the opinions of prison officials mandated by the Court, rather than any substantial change in the constitutional standards applicable to specific infringements on the first amendment rights of inmates.

The separation of the policy of deference from the constitutional test applied to inmate religious rights reveals that these rights should be subject to the least restrictive means, not the reasonableness, test. *Pell, Jones,* and *Wolfish* support this analysis by distinguishing between time, place, and manner regulations and those regulations which infringe upon first amendment values directly. This distinction has been ignored by circuit courts that cite these cases in support of blanket application of the reasonableness test

174. *Id.*
175. *Id.* at 368.

to inmate first amendment challenges. Because restrictions on religious rights cannot be classified as time, place, or manner restrictions, the approach of the circuit courts in *St. Claire, Rogers,* and *Aziz* to the regulations under challenge in these cases is incorrect. A least restrictive means test should have been applied. Only application of this test to infringements on religious liberties will maintain the consistency of first amendment law in the area of prisoners' rights, and preserve the dignity and respect accorded to religious beliefs by the Constitution.