THE RELIGIOUS RIGHTS OF THE INCARCERATED

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I. INTRODUCTION

In the 1879 case of *Ho Ah Kow v. Nunan*,[1] Justice Field, sitting as Circuit Justice, heard a constitutional challenge to a San Francisco ordinance requiring all male prisoners, upon incarceration in the county jail, to cut their hair to a "uniform length of one inch from the scalp."[2] Plaintiff Ho Ah Kow, a Chinese citi-

[1] 12 F. Cas. 252 (C.C.D. Cal. 1879) (No. 6,546).
[2] *Id.* at 253.

zen jailed for five days,[3] was shorn of his queue[4] by the county sheriff. Deprivation of the queue was at that time regarded by certain Chinese as a mark of disgrace, attended, according to their religious beliefs, by misfortune and suffering after death.[5] Although the ordinance was invalidated on equal protection grounds, Justice Field recognized the free exercise of religion[6] dimension of the case and analogized the hair length requirement to a regulation that would force Orthodox Jewish prisoners to eat pork. Such a regulation, he noted, would be "an offense against their religion" and "notwithstanding its general terms, would be regarded as a special law in its purpose and operation."[7] In a commentary on the case, Judge Cooley wrote that constitutional protection for the incarcerated requires that "[c]onvicts have all the rights of other citizens, except as these are limited by the sentence of the law and proceedings for its proper execution."[8] The hair length ordinance, Cooley wrote, was "not important to the preservation of discipline in the prison, or to the due enforcement of the sentence" and was therefore an unconstitutional abridgment of a Chinese prisoner's rights.[9]

Today, nearly one hundred years after *Ho Ah Kow*, the courts are still faced with the question when "the sentence of the law and proceedings for its proper execution"[10] constitutionally justify denying prisoners' religious claims to wear their hair and regulate their diets in the manner dictated by their beliefs. Confronted with the ageless tension between the commands of conscience and the demands of society—a tension articulated in the

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[3] Ho Ah Kow was jailed for violating an ordinance that prohibited "any person [from] sleeping or lodging in a room or an apartment containing less than five hundred cubic feet of space in the clear for each person occupying it." *Id.*

[4] A queue is a long braid made of the hair remaining after the front portion of the head is shaved. *Id.*

[5] *Id.*

[6] The first amendment prohibits Congress from enacting any law "respecting an establishment of religion, or prohibiting the free exercise thereof." U.S. CONST. amend. I.

[7] 12 F. Cas. at 255. The problem of Jewish prisoners in America being denied provisions that will enable them to eat in accordance with kosher dietary laws antedates the establishment of the United States. Reuben Etting, a Revolutionary War soldier captured by the British, died of starvation rather than eat pork, the main staple provided him in captivity. Levin, *The Solis-Cohens: Philadelphia's Grandees*, The Philadelphia Inquirer, Sept. 12, 1976 (Magazine), at 21.

[8] 18 AM. L. REG. 676, 686 (1879); *accord*, Coffin v. Reichard, 143 F.2d 443, 445 (6th Cir. 1944), *cert. denied*, 325 U.S. 887 (1945) (per curiam) ("A prisoner retains all the rights of an ordinary citizen except those expressly, or by necessary implication, taken from him by law.").

[9] 18 AM. L. REG. 676, 686 (1879).

[10] *Id.*

biblical injunction to "[r]ender therefore unto Caesar the things that are Caesar's; and unto God the things that are God's"[11]—the courts must reconcile these interests. The task is especially difficult in the context of contemporary prisons, where Caesar is a demanding presence whose just domain is not easily identified. Recently, the Court of Appeals for the Second Circuit suggested that the personal appearance of a prisoner is a concern of the state. Presented with allegations that prison officials were interfering with several Sunni (orthodox) Muslims' free exercise of religion by compelling them to shave their facial hair,[12] the court stated: "It may well be that the state's interest in hygiene and identification of inmates outweighs the prisoner's interest in growing a beard as required by his religion . . . ."[13] A year earlier, however, the Court of Appeals for the Eighth Circuit affirmed a decision that evaluated the competing institutional and inmate interests in control of hair length and concluded that the free exercise of religion claim must prevail. The case, *Teterud v. Gillman*,[14] involved an American Indian whose faith required the wearing of long, braided hair; like Ho Ah Kow, he successfully challenged a requirement that all prisoners have uniform, short haircuts.

Contrary results were also reached on essentially identical facts in two recent cases presenting the hypothetical posed by Justice Field—the right of Orthodox Jewish inmates to kosher diets. In *Kahane v. Carlson*,[15] the district court, in a decision affirmed by the Court of Appeals for the Second Circuit,[16] upheld

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[11] *Matthew* 22: 21.

[12] Black Muslims believe that "it is against the nature of the creation of Allah, that one should shave the hair off his face and thus resemble women, defacing the nature of man." M. Sayed Adly, About the Beard of Muslims 1 (sermon) (1976) (delivered in New York Muslim shrines). This injunction against shaving is believed to be "fard (obligatory)." *Id.*

[13] Burgin v. Henderson, 536 F.2d 501, 504 (2d Cir. 1976). The district court viewed the prison regulation as plainly justified and dismissed the complaint without requiring defendants to respond. Subsequently, the Second Circuit reversed and remanded for development of the record in a factual hearing on the beard claim and also on allegations that prison officials prohibited wearing prayer caps and extensive praying, both prescribed by the Muslim religion.

[14] 385 F. Supp. 153 (S.D. Iowa 1974), *aff'd sub nom.* Teterud v. Burns, 522 F.2d 357 (8th Cir. 1975). *See also* Maguire v. Wilkinson, 405 F. Supp. 637, 640 (D. Conn. 1975) (prison regulation allowing prisoners to wear beards based on religious conviction only if they had beards when first incarcerated impermissibly presumed that asserted religious beliefs of all prisoners claiming to have acquired a belief after incarceration are spurious).

[15] 527 F.2d 492 (2d Cir.), *aff'g* United States v. Kahane, 396 F. Supp. 687 (E.D.N.Y. 1975).

[16] *Id. See also* Jihaad v. Carlson, 410 F. Supp. 1132, 1135 (E.D. Mich. 1976) (hearing

Jewish Defense League leader Meir Kahane's claim that a denial by prison authorities of his request for kosher food violated the first amendment. Another district court in the Second Circuit, however, rejected a claim by imprisoned Jewish Defense League members for provision of a kosher diet.[17]

These inconsistencies in judicial behavior are largely attributable to the peculiar position that these cases occupy. The free exercise of religion in prison marks the intersection of two strong and antagonistic lines of constitutional law: the preferred rights of religious practitioners and the diminished rights of the imprisoned. The first amendment right to the free exercise of religion has enjoyed a position of special prominence in the realm of constitutional values.[18] Long considered one of the "preferred" freedoms,[19] free exercise has recently received such respect from courts and legislatures that some commentators have referred to the "supremacy" of that clause.[20] Significantly, this development, pioneered by the Warren Court, has continued under the Burger Court.[21]

A more restrictive approach, however, characterizes the Burger Court's decisions on the constitutional rights of prisoners.[22] Although no religious liberty cases have yet reached the Court,[23] its disposition of other prisoners' rights issues sug-

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on the merits ordered on Muslim inmate's complaint that he was placed in segregation for refusing to shave his beard and then fed only pork sandwiches—the consumption of which his religion proscribes—and oranges).

[17] United States v. Huss, 394 F. Supp. 752 (S.D.N.Y.), *vacated for lack of jurisdiction*, 520 F.2d 598 (2d Cir. 1975); *cf.* Cochran v. Sielaff, 405 F. Supp. 1126 (S.D. Ill. 1976) (upholding prison officials' refusal to allow food in cell of Muslim during Fast of Ramadan, which requires partaking of food before sunrise).

[18] *See generally, e.g.*, Wisconsin v. Yoder, 406 U.S. 205, 214-15 (1972); Sherbert v. Verner, 374 U.S. 398, 406 (1963).

[19] *See, e.g.*, West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 639 (1943); Cantwell v. Connecticut, 310 U.S. 296, 303 (1940).

[20] Pfeffer, *The Supremacy of Free Exercise*, 61 GEO. L.J. 1115, 1140 (1973); Saladin, *Relative Ranking of the Preferred Freedoms: Religion and Speech*, 1964 RELIGION & PUB. ORD. 149, 171.

[21] *Compare* Wisconsin v. Yoder, 406 U.S. 205 (1972), *with* Sherbert v. Verner, 374 U.S. 398 (1963).

[22] *Compare, e.g.*, Goss v. Lopez, 419 U.S. 565 (1975) (due process requires hearing prior to suspension of public high school student), *and* Schneider v. State, 308 U.S. 147, 163 (1939) (existence of alternative channels of communications does not justify suppression of free speech), *with* Meachum v. Fano, 96 S. Ct. 2532 (1976) (due process does not require hearing prior to transfer of prisoner), *and* Pell v. Procunier, 417 U.S. 817, 823-28 (1974) (existence of alternative channels of communication justifies abridgment of prisoners' free speech).

[23] Cruz v. Beto, 405 U.S. 319 (1972) (per curiam), was a § 1983 action brought by a Buddhist inmate who alleged that Texas prison officials were punishing him for attempting to proselytize his faith. The Court held that the district court improperly

gests that an inmate's free exercise claim would not be given as much weight as the typical nonprisoner's free exercise claim. Prisoners' procedural due process rights, for example, broadened in the landmark case of *Wolff v. McDonnell*,[24] have recently been restricted.[25] More relevant to the free exercise question is the Court's treatment of prisoners' free speech claims. In this area, the Court has either strained to avoid determining to what extent incarceration justifies an infringement of preferred first amendment rights,[26] or confronted this issue by applying a test that for decades has been inapplicable to general free speech litigation.[27] In addition, the Court has displayed extreme deference toward the defenses urged by prison officials, resulting in uncritical acceptance of asserted institutional needs.[28] The tendency of the Court to treat cases involving prisoners' first amendment rights differently than cases involving other citizens' nondiminished rights clearly identifies the distance separating religious rights and prisoners' rights on the Court's constitutional map.[29]

Thus, the recent grooming and diet cases, involving the collision of these two lines of constitutional doctrine, are characterized by uncertainty. Not only have opposite results been reached on essentially identical facts, but different tests have been applied.[30] The interests of neither the inmates nor the institution are well-served when the law is so unclear that it contains no identifiable standard for determining infractions.[31] Yet this is the present situation with respect to the religious rights of prisoners. At least seven distinct tests have been applied in the

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dismissed the complaint, and remanded for a factual hearing. Justice Rehnquist filed a dissenting opinion. *Id.* at 323.

[24] 418 U.S. 539 (1974).

[25] *See* Montanye v. Haymes, 96 S. Ct. 2543 (1976); Meachum v. Fano, 96 S. Ct. 2532 (1976); Baxter v. Palmigiano, 425 U.S. 308 (1976).

[26] *See* Procunier v. Martinez, 416 U.S. 396, 407-09 (1974).

[27] *See* Pell v. Procunier, 417 U.S. 817, 823-28 (1974); note 22 *supra*.

[28] *See, e.g.*, Pell v. Procunier, 417 U.S. 817, 829-35 (1974). The Court here upheld against first amendment attack a California prison regulation prohibiting media interviews with particular inmates. California defended the rule on the theory that such interviews would turn inmates into "big wheels" whose notoriety would impair prison discipline. Despite petitioners' vigorous challenge to this "big wheel" theory, the Court deferred to the judgment of corrections officials that the danger was real and required a total ban.

[29] *See* Meachum v. Fano, 96 S. Ct. 2532, 2542 (1976) (Stevens, J., dissenting); Pell v. Procunier, 417 U.S. 817, 825-26 (1974).

[30] *See* notes 168-278 *infra* & accompanying text.

[31] *See* Procunier v. Martinez, 416 U.S. 396, 404-05 (1974); notes 198-216 *infra* & accompanying text.

past decade to free exercise claims of prisoners;[32] often, two or more tests have been applied by the same court to different claims.[33] Although this area has been extensively litigated,[34] it is as unsettled as it was ten years ago and can provide a crucible for forging a coherent approach to the scope of prisoners' rights as well as to the range of religious liberty generally.[35]

This Comment will first survey the existing law concerning the free exercise of religion in prison and then identify and evaluate the numerous tests that have been applied in this area. It will reject, for a variety of reasons, all of those tests except the "compelling interest" standard traditionally applied to free exercise claims, which requires that any infringement be justified by a compelling state interest and be achieved through the least drastic means available to further that compelling end.[36] This test will be accepted on the theory that because the values underlying the free exercise clause are largely the same inside and outside prison, the test for an infringement of the free exercise clause should also be the same. The compelling interest approach will then be analyzed, so that latent ambiguities in the definitions of "compelling interests" and "least drastic means" may be resolved. The refined compelling interest test will at that point be modified specifically to serve the free exercise in prison issue, by categorizing the possible justifications for abridging the religious rights of prisoners into two levels of importance. Interests that fall into the lower level will rarely pass the refined test, while those in the higher level will usually pass the compelling interest prong of the test, but must then satisfy a modified "least drastic means" requirement. Finally, this test will be applied to the grooming and diet cases, reaching the same result as *Teterud*[37] and *Kahane*,[38] but with greater doctrinal precision. Although much of the discussion in this Comment is relevant to

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[32] *See* notes 168-278 *infra* & accompanying text.

[33] Hodges v. Klein, 421 F. Supp. 1224, 1238 (D.N.J. 1976) (compelling interest and clear and present danger tests); Lipp v. Procunier, 395 F. Supp. 871, 877 (N.D. Cal. 1975) (compelling interest, clear and present danger, and reasonableness tests). *See also* Goodwin v. Oswald, 462 F.2d 1237, 1243-44 (2d Cir. 1972).

[34] *See* Hollen, *Emerging Prisoners' Rights*, 33 OHIO ST. L.J. 1 (1972).

[35] For a discussion of the prison environment as a microcosm of the problem of free exercise of religion in society generally, see Frankino, *The Manacles and the Messenger: A Short Study in Religious Freedom in the Prison Community*, 14 CATH. U. L. REV. 30, 43-44 (1965).

[36] *See* Sherbert v. Verner, 374 U.S. 398, 406-09 (1963). This test will be analyzed in detail in notes 279-342 *infra* & accompanying text.

[37] 522 F.2d 357 (8th Cir. 1975).

[38] 527 F.2d 492 (2d Cir. 1975).

prisoners' rights generally, the test and conclusions are confined to free exercise claims.[39] The first amendment embodies a considered decision that religious pursuits are to be specially protected,[40] and the wisdom of that judgment is beyond reevalu-

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[39] *See* note 352 *infra*.

[40] This Comment will not treat the threshold issue in all free exercise cases—that is, whether the interest asserted is a *religious* one. No peculiar problems are presented simply because the person raising the free exercise claim is a prisoner. Unlike the question whether an infringement is justified, which is complicated by the needs of the correctional system, the determination of what is religious for the purposes of the first amendment is not altered by either the fact or the theory of confinement. Although specific practices that are protected when engaged in by nonprisoners may be held regulable when pursued by inmates, the preliminary question whether those practices are *religious* is identical in both cases. For a discussion of this definitional inquiry, see Gillette v. United States, 401 U.S. 437, 455-60 (1971); Welsh v. United States, 398 U.S. 333, 336-43 (1970); United States v. Seeger, 380 U.S. 163, 173-85 (1965); Torcaso v. Watkins, 367 U.S. 488, 495 & nn. 10 & 11 (1961); Boyan, *Defining Religion in Operational and Institutional Terms*, 116 U. PA. L. REV. 479 (1968); Freund, *Public Aid to Parochial Schools*, 82 HARV. L. REV. 1680, 1686 n.14 (1969) ("It may be suggested that a conventional definition of religion or religious practice is controlling in applying the non-establishment clause, while a heterodox version is entitled to protection under the free-exercise clause, which safeguards the nonconformist conscience."); Comment, *Defining Religion: Of God, the Constitution and the D.A.R.*, 32 U. CHI. L. REV. 533, 550-51 (1965) ("parallel importance" test: "[a]n individual or group belief is religious if it occupies the same place in the lives of its adherents that orthodox beliefs occupy in the lives of their adherents"). The Supreme Court has authorized not only an inquiry into whether an allegedly protected practice is religious but also an inquiry into whether it is *sincerely* pursued by the claimant. United States v. Seeger, 380 U.S. 163, 185 (1965) ("the threshold question of sincerity . . . must be resolved in every case"); *see* Gillette v. United States, 401 U.S. 437, 457 (1971); note 306 *infra*.

A recent line of cases that deals with the question of what is a bona fide religion coincidentally happens to involve prisoners. Harry William Theriault, a federal prisoner in Atlanta, founded in the early 1970's an organization known as the Church of the New Song (CONS). Styling himself as the Bishop of Tellus and working through the Fountainhead Seminary, whose facilities consisted largely of his cell, Theriault spread the Gospel of his Eclatarian Faith through the Atlanta prison. Corrections officials, doubting CONS' legitimacy and fearing the consequences of an organized group of inmates, attempted to suppress the incipient church. Theriault brought a free exercise suit against the prison, and the district court ruled, in an often-cited decision, that until such time as CONS demonstrated otherwise, it was to be considered a bona fide religion for first amendment purposes, and was not to be suppressed. Theriault v. Carlson, 339 F. Supp. 375, 382-85 (N.D. Ga. 1972), *vacated and remanded*, 495 F.2d 390 (5th Cir.), *cert. denied*, 419 U.S. 1003 (1974). Shortly after this victory a sect within the church nearly provided evidence that the district court in *Carlson* had suggested would suffice to remove CONS from the protective scope of the religion clause. This episode involved a formal request to the Federal Bureau of Prisons for 700 porterhouse steaks and 98 bottles of Harvey's Bristol Cream Sherry with which to celebrate the sect's rituals. Theriault immediately proclaimed the request "unsanctioned" and disavowed any doctrinal affiliation with those members responsible for the incident. N.Y. Times, Sept. 24, 1972, at 57, col. 1.

Encouraged by the judicial recognition of CONS, Theriault began an aggressive proselytizing campaign that led to the organization of Eclatarian churches in penitentiaries in Illinois, Iowa, and Texas, among others. The belief persists among prison officials that the movement is a calculated hoax, and the chapters have often been

ation here.[41]

II. The Current State of the Law

A. *A Short History of Religion in Prison*

A certain irony pervades the history of the free exercise of religion in prison. Although contemporary American correctional institutions are characterized by the debilitating demands of the state—demands that often impede religious practice—our prisons were originally isolated asylums in which offenders were to render unto God the reverence and obedience that they had wrongfully denied Him by committing crimes.[42] This approach, pioneered by William Penn and the Quakers and implemented in 1789 at the Walnut Street Gaol in Philadelphia,[43] was a humanitarian alternative to the common law penalty of death for all felonies. Instead of being executed, the convict was provided with a place

> in which he could cogitate about his salvation, become reacquainted with his God, and do penance. Hence, the name of the institution—"penitentiary." When such a reassessment of self had occurred, the offender could, theoretically, return to the community, literally a "new man." This religious foundation of the institution led to conditions much like those endured by others who sought God. Like seminarians, prisoners were subjected to physical pain, sparse food, and isolation from the community.[44]

The religious impulse that animated the "Pennsylvania" system of imprisonment evoked awe around the world and became a guiding influence in the European corrections community.[45]

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forced to litigate to secure their asserted free exercise rights. Although some of these suits have been successful, *see, e.g.*, Remmers v. Brewer, 361 F. Supp. 537 (S.D. Iowa 1973), *aff'd per curiam*, 494 F.2d 1277 (8th Cir.), *cert. denied*, 419 U.S. 1012 (1974), not all federal courts have accepted the legitimacy of CONS. *See, e.g.*, Theriault v. Silber, 391 F. Supp. 578 (W.D. Tex. 1975); Theriault v. Establishment of Religion on Taxpayers' Money, No. CV 70-186D (E.D. Ill. Apr. 4, 1975); Hundley v. Sielaff, 407 F. Supp. 543 (N.D. Ill. 1975).

[41] *See generally* P. Kauper, Religion and the Constitution 15-30 (1964).

[42] *See* D. Rothman, The Discovery of the Asylum 85-86 (1971).

[43] *See* R. Singer & W. Statsky, Rights of the Imprisoned: Cases, Materials and Directions 4 (1974) [hereinafter cited as Singer & Statsky].

[44] *Id. See also* T. Wicker, A Time to Die 60 (1975).

[45] *See* Singer & Statsky, *supra* note 43, at 4-5. De Tocqueville's visit was motivated in part by a desire to see this new institution developed by Americans. *See* G. Beaumont

As Europe was emulating the Pennsylvania approach, however, American prisons were being reshaped according to a system developed by a sadistic, entrepreneurial warden at the Auburn Prison in New York.[46] The Auburn system required prisoners to work together in complete silence during the day and return to isolated cells at night.[47] The status of inmates sank so low that by the late nineteenth century one court referred to the prisoner as "for the time being the slave of the State."[48] Eventually, the Auburn system collapsed from the pressure of anti-prison-industry legislation sponsored by unions fearing competition from inmate labor. Prison administrators, searching for new roles for their institutions, turned to the writings of late nineteenth-century reformers such as Zebulon Brockway and Dorothea Dix, who argued that criminals suffer from a social "disease" that can be "cured" with proper treatment;[49] America almost immediately began to explore the possibilities of a therapeutic approach to criminal justice. Although this "medical" model of corrections has yet to be adopted fully or enthusiastically,[50] no significant vestiges of the original Quaker impulse remain in contemporary discussions of penal reform. When more than a century ago religion lost its centrality to the purpose of confinement, the inmate could no longer assume that the institution would respect his freedom to pursue his religious beliefs.

Nor, until recently, could the prisoner expect the courts to recognize, let alone protect, his free exercise rights. For decades, the federal courts consistently refused to hear prisoners' complaints concerning administrative policies.[51] This "hands-off" doctrine,[52] grounded in the policies of judicial restraint and

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& A. DE TOCQUEVILLE, ON THE PENITENTIARY SYSTEM IN THE UNITED STATES AND ITS APPLICATION IN FRANCE 36 (S. Ill. Press ed. 1964) (1st ed. Philadelphia 1833).

[46] *See* SINGER & STATSKY, *supra* note 43, at 5. The warden, Elam Lynds, used cheap prison labor to bestow favors upon his friends and associates.

[47] *Id.*

[48] Ruffin v. Commonwealth, 62 Va. (21 Gratt.) 790, 796 (1871).

[49] *See* SINGER & STATSKY, *supra* note 43, at 5.

[50] *Id.* 5-6.

[51] *See, e.g.*, Lee v. Tahash, 352 F.2d 970, 971 (8th Cir. 1965) ("It is settled doctrine that except in extreme cases the courts may not interfere with the conduct of a prison, with its regulations and their enforcement, or with its discipline."); Sostre v. McGinnis, 334 F.2d 906, 908 (2d Cir.), *cert. denied*, 379 U.S. 892 (1964); United States *ex rel.* Morris v. Radio Station WENR, 209 F.2d 105, 107 (7th Cir. 1953), *overruled on other grounds*, Wartman v. Branch 7, Civil Div., County Court, 510 F.2d 130, 134 (7th Cir. 1975).

[52] For a comprehensive treatment of the hands-off doctrine, see Note, *Decency and Fairness: An Emerging Judicial Role in Prison Reform*, 57 VA. L. REV. 841 (1971); Com-

deference to administrative expertise,[53] effectively precluded supervision by judges of the prisons to which they regularly consigned convicted offenders. This judicial insensitivity is typified by a frequently cited passage from a 1964 opinion denying a Black Muslim inmate access to controversial religious literature: "No romantic or sentimental view of constitutional rights or of religion should induce a court to interfere with the necessary disciplinary regime established by the prison officials."[54] This overly deferential perspective was assumed, under the hands-off approach, not only in cases presenting frivolous claims but also in cases involving constitutional rights that the courts had previously acknowledged were retained by prisoners.[55]

Among the earliest cases to erode the hands-off doctrine were hybrid free exercise-equal protection claims brought by religious minority inmates.[56] Addressing the issue for the first time, in *Cooper v. Pate*,[57] the Supreme Court held that claims by Black Muslims of religious suppression and discrimination stated a federal cause of action. Similarly, in *Cruz v. Beto*,[58] the Court ruled that discriminatory disciplinary action against a Buddhist inmate would violate both the first amendment guarantee of free exercise of religion and the fourteenth amendment guarantee of

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ment, *Beyond the Ken of the Courts: A Critique of Judicial Refusal to Review the Complaints of Convicts*, 72 YALE L. J. 506 (1963).

[53] Separation of powers and federalism seem to underly the hands-off argument. Courts are said to be ill equipped for the factfinding necessary to supervise prison administration, a task requiring investigative resources and expertise. Consequently, courts defer to the decisions of those with expertise, *i.e.*, prison administrators. When dealing with state prisons, consideration of federalism principles further restrains federal courts.

Comment, *Backwash Benefits for Second Class Citizens: Prisoners' First Amendment and Procedural Due Process Rights*, 46 U. COLO. L. REV. 377, 379 n.6 (1975).

[54] Sostre v. McGinnis, 334 F.2d 906, 908 (2d Cir.), *cert. denied*, 379 U.S. 892 (1964).

[55] When fundamental rights were at stake, the courts created an exception to the general policy of deference, and these occasional interventions led to the sketching of an area of retained rights. *See, e.g.*, Johnson v. Avery, 393 U.S. 483 (1969) (access to the courts); Cooper v. Pate, 378 U.S. 546 (1964) (per curiam) (equal protection and free exercise of religion). A classic statement of the retained rights theory can be found in Coffin v. Reichard, 143 F.2d 443 (6th Cir. 1944), *cert. denied*, 325 U.S. 887 (1945): "A prisoner retains all the rights of an ordinary citizen except those expressly, or by necessary implication, taken from him by law." *Id.* at 445. This principle was recently reaffirmed. Pell v. Procunier, 417 U.S. 817, 822 (1974); Mukmuk v. Commissioner of Dep't of Correctional Servs., 529 F.2d 272, 275 (2d Cir.), *cert. denied*, 426 U.S. 94 (1976).

[56] *See generally* Note, *Constitutional Rights of Prisoners: The Developing Law*, 110 U. PA. L. REV. 985, 997-1001 (1962).

[57] 378 U.S. 546 (1964) (per curiam).

[58] 405 U.S. 319 (1972) (per curiam). *See generally* State v. Cubbage, 210 A.2d 555, 566-68 (Del. Super. Ct. 1965) (discussing equal protection aspect of free exercise of Muslim religion in prison).

equal protection of the laws. In an oblique reference to the hands-off doctrine, the Court stated:

> Federal courts sit not to supervise prisons but to enforce the constitutional rights of all "persons," including prisoners. We are not unmindful that prison officials must be accorded latitude in the administration of prison affairs, and that prisoners necessarily are subject to appropriate rules and regulations. But persons in prison, like other individuals, have the right to petition the Government for redress of grievances which, of course, includes "access of prisoners to the courts for the purpose of presenting their complaints."[59]

This language suggests a long-overdue recognition of prisoners' rights.[60] *Cruz v. Beto* clearly establishes that the free exercise of religion is among those rights retained by the incarcerated; no positive scope, however, is delineated for that right.[61] Lower courts, both before and after *Cruz*, have divided over the proper resolution of the clash between the free exercise clause and the demands of American penology, as the next several sections will document.[62] Yet a more active approach, suggested by the following language from a recent Fourth Circuit decision, is becoming common:

> While the judgments of prison officials are entitled to considerable weight because they are based upon first-hand observance of the events of prison life and upon a certain expertise in the functioning of a penal institu-

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[59] 405 U.S. at 321 (citations omitted).

[60] "[T]he view once held that an inmate is a mere slave is now totally rejected. The restraints and the punishment which a criminal conviction entails do not place the citizen beyond the ethical tradition that accords respect to the dignity and intrinsic worth of every individual." Meachum v. Fano, 96 S. Ct. 2532, 2542 (1976) (Stevens, J., dissenting) (footnote omitted) (quoting United States *ex rel.* Miller v. Twomey, 479 F.2d 701, 712 (7th Cir. 1973), *cert. denied*, 414 U.S. 1146 (1974)). For an overview of this development, see SINGER & STATSKY, *supra* note 43, at 511-608. On the procedural dimension of this issue, see Note, *Prisoners' Rights Under Section 1983*, 57 GEO. L.J. 1270 (1969). *See also* Note, *Enforcing Prisoners' Rights*, 73 W. VA. L. REV. 38 (1971). For a discussion of the internal procedures for hearing prisoner complaints see Gallington, *Prison Disciplinary Decisions*, 60 J. CRIM. L.C. & P.S. 152 (1969); Lesnick, *Grievance Procedures in Federal Prisons: Practices and Proposals*, 123 U. PA. L. REV. 1 (1974). *See generally* Hirshkop, *The Rights of Prisoners*, in THE RIGHTS OF AMERICANS 451 (N. Dorsen ed. 1971); Zellick, *Prisoners' Rights in England*, 24 U. TORONTO L.J. 331 (1974).

[61] One commentator has suggested that "under *Cruz v. Beto* freedom of religion extends only as far as the umbrella of the equal protection clause can shelter it." Comment, *supra* note 53, at 382 (footnote omitted).

[62] *See* notes 64-142 *infra* & accompanying text.

> tion, prison officials are not judges. They are not charged by law and constitutional mandate with the responsibility for interpreting and applying constitutional provisions, and they are not always disinterested persons in the resolution of prison problems. We do not denigrate their views but we cannot be absolutely bound by them.[63]

B. *A Survey of Major Issues*

1. Diet

The Black Muslim religion, like Orthodox Judaism, prohibits the consumption of pork or the essence of swine; according to one Muslim minister, even "if our lives depend on it . . . we can't eat pork."[64] Additionally, Black Muslims celebrate in December the Fast of Ramadan, which entails the consumption, after sunset and before sunrise, of ritually significant foods such as Akbar coffee and pastries.[65] The dietary requirements of Muslim prisoners have led to friction between inmates and corrections officials. Because of their low cost, pork and pork by-products frequently appear on prison menus, sometimes to the extent that an adequate nonpork diet is not available for the abstaining inmate. Furthermore, the widespread use of pork as a seasoning makes it difficult to isolate pork-free dishes.[66] Institutional meals are served in a dining facility according to a strict schedule that generally calls for dinner to be served before sunset; special arrangements for the proper celebration of the Fast of Ramadan are rarely made.[67] In addition, regulations prohibiting food in prisoners' cells prevent Muslims from independently observing Ramadan.[68] Prison administrators defend these

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[63] Peyton v. Brown, 437 F.2d 1228, 1232 (4th Cir. 1971).

[64] Barnett v. Rodgers, 410 F.2d 995, 998 (D.C. Cir. 1969). Although the Jewish dietary laws of Kashruth are more restrictive than those of the Black Muslim faith, in that they prescribe a particular mode of food preparation in addition to requiring the nonconsumption of pork, a kosher Jew may, unlike a devout Muslim, violate the dietary laws at a point just short of death. *See* United States v. Kahane, 396 F. Supp. 687, 690-94 (E.D.N.Y.), *aff'd sub nom.* Kahane v. Carlson, 527 F.2d 492 (2d Cir. 1975).

[65] *See, e.g.*, Walker v. Blackwell, 411 F.2d 23, 25-26 (5th Cir. 1969); Cochran v. Sielaff, 405 F. Supp. 1126, 1128 (S.D. Ill. 1976).

[66] On the use of pork in prison diets, see Battle v. Anderson, 376 F. Supp. 402, 419 (E.D. Okla. 1974).

[67] *See, e.g.*, Walker v. Blackwell, 411 F.2d 23, 25-26 (5th Cir. 1969); Cochran v. Sielaff, 405 F. Supp. 1126, 1128 (S.D. Ill. 1976).

[68] *See, e.g.*, Cochran v. Sielaff, 405 F. Supp. 1126, 1128 (S.D. Ill. 1976).

policies on the grounds of cost, convenience, and security.[69]

The judicial response to suits alleging unconstitutional interference with free exercise has been inconsistent. In the Ramadan cases, the courts have deferred to administrative restrictions disallowing, on security[70] or expense grounds,[71] requests for special ritual foods and for changes in dining hours. Many of these decisions have applied a compelling interest analysis.[72] Muslim requests for pork-free diets have been rejected because courts have concluded that such requests seek "special privileges,"[73] because prison officials need only refrain from prohibiting religious practices and need not "provide the means for carrying them out,"[74] and because the existing prison diet supplies adequate nourishment for Muslims abstaining from pork consumption.[75] The Court of Appeals for the District of Columbia Circuit, in *Barnett v. Rodgers*,[76] was more sympathetic to Muslim requests for "one full-course pork-free diet once a day and coffee three times daily":

> Appellants do not seek, either for themselves or other Muslims, a full menu tailored specially to their religious beliefs. Their request . . . is essentially a plea for a modest degree of official deference to their religious obligations. Certainly if this concession is feasible from the standpoint of prison management, it represents the bare minimum that jail authorities . . . are constitutionally required to do, not only for Muslims,

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[69] *See generally* Walker v. Blackwell, 411 F.2d 23, 25-26 (5th Cir. 1969); Barnett v. Rogers, 410 F.2d 995, 1001-02 (D.C. Cir. 1969).

[70] *See, e.g.*, Walker v. Blackwell, 411 F.2d 23, 26 (5th Cir. 1969); Cochran v. Sielaff, 405 F. Supp. 1126, 1128 (S.D. Ill. 1976).

[71] *See, e.g.*, Elam v. Henderson, 472 F.2d 582 (5th Cir.) (per curiam) (*semble*), *cert. denied*, 414 U.S. 868 (1973); Cochran v. Sielaff, 405 F. Supp. 1126, 1128 (S.D. Ill. 1976). *See also* Clark v. Wolff, 347 F. Supp. 887, 890 (D. Neb.), *aff'd per curiam sub nom.* Anderson v. Wolff, 468 F.2d 252 (8th Cir. 1972).

[72] The compelling interest test will be carefully examined below, text accompanying notes 279-357 *infra*, and expense will be rejected as a justification for abridgment of free exercise rights, notes 324-25 *infra* & accompanying text.

[73] Childs v. Pegelow, 321 F.2d 487, 490 (4th Cir. 1963), *cert. denied*, 376 U.S. 932 (1964).

[74] Clark v. Wolff, 347 F. Supp. 887, 890 (D. Neb.), *aff'd per curiam sub nom.* Anderson v. Wolff, 468 F.2d 252 (8th Cir. 1972).

[75] Elam v. Henderson, 472 F.2d 582, 582 (5th Cir.) (per curiam), *cert. denied*, 414 U.S. 868 (1973); Abernathy v. Cunningham, 393 F.2d 775, 778 (4th Cir. 1968); Bryant v. Carlson, 363 F. Supp. 928, 930-31 (E.D. Ill. 1973); Northern v. Nelson, 315 F. Supp. 687, 688 (N.D. Cal. 1970), *aff'd*, 448 F.2d 1266 (9th Cir. 1971).

[76] 410 F.2d 995 (D.C. Cir. 1969); *accord*, SaMarion v. McGinnis, 35 App. Div. 2d 684, 314 N.Y.S.2d 715 (1970).

> but indeed for any group of inmates with religious restrictions on diet.[77]

The case was remanded for a factual hearing to determine if "compelling justifications" supported the infringement of free exercise.[78] In one of the few decisions to reach the issue of affirmative relief, a federal district court recently held that there was no possible justification for failing to identify for Muslim inmates those foods prepared with pork, and ordered the immediate implementation of such a procedure.[79]

The right of an incarcerated Orthodox Jew to a kosher diet was upheld under a compelling interest analysis by the district court in *United States v. Kahane*[80] and under the *Procunier v. Martinez*[81] standard by the Second Circuit on appeal.[82] On similar facts, however, the district court in *United States v. Huss*[83] denied this asserted right. Applying a mere "reasonableness" standard,[84] with the burden of proof on the inmate, the court upheld the denial of kosher food, reasoning that "the expert judgment of prison officials is accorded substantial deference [especially] . . . in regard to the basic matters involved in prison administration such as the feeding, housing and disciplining of prisoners."[85]

2. Grooming

Black Muslims are enjoined by their faith from shaving their facial hair and thereby "resembling" women. This practice is

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[77] 410 F.2d at 1001.

[78] *Id.* at 1003.

[79] Battle v. Anderson, 376 F. Supp. 402, 427, 436 (E.D. Okla. 1974).

[80] 396 F. Supp. 687 (E.D.N.Y.), *aff'd sub nom.* Kahane v. Carlson, 527 F.2d 492 (2d Cir. 1975).

[81] 416 U.S. 396 (1974). The Court announced the following test:

> First, the regulation or practice in question must further an important or substantial governmental interest unrelated to the suppression of expression. Prison officials . . . must show that a regulation . . . furthers one or more of the substantial governmental interests of security, order, and rehabilitation. Second, the limitation of First Amendment freedoms must be no greater than is necessary or essential to the protection of the particular governmental interest involved.

Id. at 413. The *Martinez* test is discussed and rejected at notes 198-216 *infra* & accompanying text.

[82] Kahane v. Carlson, 527 F.2d 492 (2d Cir. 1975).

[83] 394 F. Supp. 752 (S.D.N.Y.), *vacated for lack of jurisdiction*, 520 F.2d 598 (2d Cir. 1975).

[84] The reasonableness test is considered and rejected at notes 217-33 *infra* & accompanying text.

[85] 394 F. Supp. 752, 762 (S.D.N.Y.), *vacated for lack of jurisdiction*, 520 F.2d 598 (2d Cir. 1975).

based on the teaching of Allah, and conformity with it is obligatory.[86] A parallel tenet of Orthodox Judaism requires practitioners to wear beards, consistent with the Old Testament law that "[y]e shall not round the corners of your heads, neither shalt thou mar the corners of thy beard."[87] Similarly, many American Indian religious sects have traditionally required that hair be worn long and braided.[88] Although this practice is derived from the general naturalism that has historically characterized American Indian life, and is cultural as much as it is religious, it has been held to be protected under the first amendment.[89] The American prison community also includes individuals who purport to attach a private religious significance to their hair length.[90]

Nearly all correctional institutions have regulations governing inmate appearance.[91] When these have been challenged on free exercise grounds, prison officials have responded with three justifications:[92] a) long hair and beards present security problems because they may be used to conceal weapons or contraband, b) long hair and beards hinder identification because a prisoner's appearance could rapidly be altered, and c) long hair and beards present hygiene problems because they are difficult to keep clean. Most courts have upheld appearance regulations on one or more of these grounds.[93] The approach to inmate free exercise challenges to hair requirements is typified by the statement of the Fifth Circuit in *Brooks v. Wainwright*:[94] "[W]here the

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[86] M. Sayed Adly, About the Beard of Muslims 1 (sermon) (1976).

[87] *Leviticus* 19:27. *See also Numbers* 6:5.

[88] *See* 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).

[89] *Id.* at 156.

[90] *See, e.g.*, Brooks v. Wainwright, 428 F.2d 652 (5th Cir. 1970) (divine revelation commanded plaintiff inmate not to shave); Brown v. Wainwright, 419 F.2d 1376 (5th Cir. 1970) (prisoner alleged that he was "an offspring of a God and a Mortal," and that mustache was gift from Creator).

[91] *See, e.g.*, Teterud v. Gillman, 385 F. Supp. 153, 154 (S.D. Iowa 1974), *aff'd sub nom.* Teterud v. Burns, 522 F.2d 357 (8th Cir. 1975) ("*Hair length* may grow to the shirt collar, and bottom on [*sic*] the ears. May grow over the ears if desired.").

[92] *See generally* Burgin v. Henderson, 536 F.2d 501 (2d Cir. 1976); Maguire v. Wilkinson, 405 F. Supp. 637 (D. Conn. 1975).

[93] *See, e.g.*, Brooks v. Wainwright, 428 F.2d 652 (5th Cir. 1970); Brown v. Wainwright, 419 F.2d 1376 (5th Cir. 1970); United States *ex rel.* Goings v. Aaron, 350 F. Supp. 1 (D. Minn. 1972). Many of these cases also involve assertions of a penumbral free speech or privacy right to wear long hair or a beard; these claims have usually been rejected on the security, identification, and hygiene rationales. *See, e.g.*, Rhinehart v. Brewer, 360 F. Supp. 105 (S.D. Iowa 1973), *aff'd per curiam*, 491 F.2d 705 (8th Cir. 1974). Circuit Judge Lay's dissenting opinion in *Rhinehart* is a convincing critique of this line of authority. 491 F.2d at 706-07 (dissenting opinion).

[94] 428 F.2d 652 (5th Cir. 1970).

state regulation is neither unreasonable nor arbitrary, the courts will not interfere with the administrative functions of state prisons."[95] Finding the appearance regulation to be promotive of "cleanliness and . . . personal identification,"[96] the *Brooks* court rejected the plaintiff's claim. Only the Eighth Circuit, in *Teterud v. Burns*,[97] has explicitly invalidated a prison's appearance regulation on free exercise grounds, applying a least drastic means test:[98]

> The proof at trial established that the legitimate institutional needs of the penitentiary can be served by viable, less restrictive means which will not unduly burden the administrator's task. The challenged regulation, thus, impermissibly infringed on Teterud's right under the First Amendment to the free exercise of his religion.[99]

Other courts have upheld prisoners' free exercise claims, but the cases rest on equal protection principles rather than on the first amendment.[100]

3. Segregation

Prison administrators often place inmates in segregation units for punitive purposes, and infrequently do so for protective purposes. Prisoners in segregation generally receive little or no religious visitation and are excluded from participation in group worship.[101] Because group worship is practiced by certain faiths, these policies may deprive an inmate of "refreshment to the soul."[102] The courts have frequently upheld, on the grounds of security and convenience, regulations denying segregated in-

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[95] *Id.* at 653.

[96] *Id.* (quoting Brown v. Wainwright, 419 F.2d 1370, 1372 (5th Cir. 1970)).

[97] 522 F.2d 357 (8th Cir. 1975).

[98] The least drastic means test is evaluated at notes 331-42 *infra* & accompanying text.

[99] 522 F.2d at 362-63. *See generally* Maguire v. Wilkinson, 405 F. Supp. 637 (D. Conn. 1975).

[100] *See, e.g.*, Maguire v. Wilkinson, 405 F. Supp. 637 (D. Conn. 1975) (regulation permitting prisoners to wear beards based on religious conviction, only if they wore beards when incarcerated, impermissibly presumed that religious beliefs assertedly acquired after incarceration are spurious); People *ex rel.* Rockey v. Krueger, 62 Misc. 2d 135, 306 N.Y.S.2d 359 (Sup. Ct. 1969) (Muslims cannot be punished for refusal to shave while Orthodox Jews are permitted to wear beards).

[101] *See* Collins v. Vitek, 375 F. Supp. 856, 862 (D.N.H. 1974); SINGER & STATSKY, *supra* note 43, at 666.

[102] Wilson v. Beame, 380 F. Supp. 1232, 1242 (E.D.N.Y. 1974).

mates the rights to receive ministerial visits,[103] to conduct group worship services within the segregation area,[104] and to attend group worship services with the general prison population.[105] In *Sharp v. Sigler*,[106] the leading case in this area, four prisoners in segregation brought free exercise and equal protection challenges to the denial of their requests to attend prison chapel services. The Eighth Circuit, speaking through Judge Blackmun, addressed the free exercise claim and rejected petitioners' least drastic means argument, holding that

> the measure and comparison of security risks as between alternative procedures are matters appropriate for resolution by the prison authorities . . . .
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> The standard is one of reasonableness. This record demonstrates for us that under all the circumstances the defendant warden's actions were not unreasonable. . . . We see nothing arbitrary, in the constitutional sense . . . .[107]

The equal protection argument—that more dangerous inmates had in the past been permitted to leave segregation units for weekly group worship—also was rejected,[108] although a similar equal protection claim had previously been upheld by the Eighth Circuit in *Konigsberg v. Ciccone*.[109]

One recent case, *Wilson v. Beame*,[110] reached a different result on the free exercise issue. Employing a compelling interest analysis, the court found the prison interest in security to be compelling, but held that less drastic means than a total prohibi-

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[103] *See* Mims v. Shapp, 399 F. Supp. 818 (W.D. Pa. 1975) (*semble*), *vacated and remanded on other grounds*, 541 F.2d 415 (3d Cir. 1976).

[104] *See id.*

[105] *See, e.g.*, LaReau v. MacDougall, 473 F.2d 974 (2d Cir. 1972), *cert. denied*, 414 U.S. 878 (1973); Mims v. Shapp, 399 F. Supp. 818 (W.D. Pa. 1975), *vacated and remanded on other grounds*, 541 F.2d 415 (3d Cir. 1976); Giampetruzzi v. Malcolm, 406 F. Supp. 836 (S.D.N.Y. 1975) (pretrial detainees); United States *ex rel.* Cleggett v. Pate, 229 F. Supp. 818 (N.D. Ill. 1964); McBride v. McCorkle, 44 N.J. Super. 468, 130 A.2d 881 (App. Div. 1957). *See also* Hodges v. Klein, 421 F. Supp. 1224 (D.N.J. 1976).

[106] 408 F.2d 966 (8th Cir. 1969).

[107] *Id.* at 971.

[108] *Id.* at 972.

[109] 285 F. Supp. 585 (W.D. Mo. 1968), *aff'd on other grounds*, 417 F.2d 161 (8th Cir. 1969), *cert. denied*, 397 U.S. 963 (1970) (where Catholics and Protestants in segregation were provided with escorts enabling them to worship with the general population, members of other faiths must be provided the same opportunity).

[110] 380 F. Supp. 1232 (E.D.N.Y. 1974) (Weinstein, J.); *cf.* United States *ex rel.* Jones v. Rundle, 453 F.2d 147 (3d Cir. 1971) (compelling justification required for forbidding an untried detainee confined to solitary from attending group services). *See also* Mitchell v. Untreiner, 421 F. Supp. 886, 895 (N.D. Fla. 1976).

tion of group worship by segregated pretrial detainees were available. The court ordered the provision of additional guards in order to allow the petitioner to worship with the general prison community. Another district court rejected the *Wilson v. Beame* remedy, but ordered that segregated inmates be allowed to hold group worship services in the prison's dayroom.[111]

4. Ministers

The right of prisoners to receive counseling visits from, and to correspond with, outside ministers of their faith has been widely recognized by the courts,[112] even in cases involving Muslim ministers who, as former inmates, would otherwise be ineligible to visit under the regulations of some prison systems. One court has upheld a prison ban on an inmate minister's distribution of religious literature within the institution.[113] The question of under what circumstances prison officials must *provide* facilities and clergy is essentially one of equal protection.[114] In *Cruz v. Beto*,[115] the Supreme Court noted that "[a] special chapel or place of worship need not be provided for every faith regardless of size; nor must a chaplain, priest or minister be provided without regard to the extent of the demand."[116] One court held that on the facts before it equal protection did not require that Jewish inmates be provided with a rabbi;[117] another has found the facts to call for providing a Muslim minister.[118]

5. Other Religious Issues

Imprisoned practitioners of most religious groups are

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[111] *See* Giampetruzzi v. Malcolm, 406 F. Supp. 836 (S.D.N.Y. 1975) (pretrial detainees).

[112] Walker v. Blackwell, 411 F.2d 23 (5th Cir. 1969); Cooper v. Pate, 382 F.2d 518 (7th Cir. 1967); Theriault v. Carlson, 339 F. Supp. 375 (N.D. Ga. 1972), *vacated and remanded on other grounds*, 495 F.2d 390 (5th Cir.), *cert. denied*, 419 U.S. 1003 (1974); Knuckles v. Prasse, 302 F. Supp. 1036 (E.D. Pa. 1969), *aff'd on other grounds*, 435 F.2d 1255 (3d Cir. 1970), *cert. denied*, 403 U.S. 936 (1971). *But see* Fallis v. United States, 476 F.2d 619, 620-21 (5th Cir. 1973) (upholding refusal of prison authorities to permit counseling visits by a Mormon elder and his family); Coleman v. District of Columbia Comm'rs, 234 F. Supp. 408 (E.D. Va. 1964).

The issue of visits to prisoners in segregation is discussed in cases cited note 103 *supra* & accompanying text.

[113] McLaughlin v. Cunningham, 344 F. Supp. 816 (W.D. Va. 1972).

[114] *See, e.g.*, Fulwood v. Clemmer, 206 F. Supp. 370 (D.D.C. 1962) (government required to make religious facilities available in nondiscriminatory manner).

[115] 405 U.S. 319 (1972).

[116] *Id.* at 322 n.2.

[117] Gittlemacker v. Prasse, 428 F.2d 1 (3d Cir. 1970).

[118] Northern v. Nelson, 315 F. Supp. 687 (N.D. Cal. 1970) (*semble*), *aff'd on other grounds*, 448 F.2d 1266 (9th Cir. 1971).

routinely allowed to hold group worship ceremonies. Members of certain controversial faiths, however, have on occasion been denied the right to group worship, usually for security reasons. When challenged under the free exercise guarantee, such denials frequently have been invalidated. In a widely cited opinion, the court in *Knuckles v. Prasse*[119] reluctantly applied the clear and present danger test[120] to a total ban on Muslim group worship. The court found no such danger and ordered that Muslims be allowed to hold collective services, warning, however, that "[i]f . . . the Muslim gatherings in prison proceed along non-religious lines—if defiance of prison or civil authority becomes the message and substance of such gatherings—the prison authorities may cancel the collective worship."[121] Another district court recently ordered prison officials to permit Muslim group worship, holding that there was no justification at all for the denial to do so.[122] One of the few cases rejecting a free exercise challenge of this kind is *Kennedy v. Meacham*,[123] in which the court, applying the reasonableness test, held that prison officials could prohibit practitioners of the "Satanic religion" from congregating for worship ceremonies involving bells, candles, pointing sticks, gongs, incense, black robes, and the "baphomet," a symbol of Satan. The Court of Appeals for the Tenth Circuit vacated and remanded this decision for an evidentiary hearing to determine whether the restrictions on free exercise rights were justified by a compelling state interest.

Prohibitions on wearing religious medallions have been upheld on the grounds that such medals might serve as weapons.[124] Any regulation, of course, must comport with equal protection standards; thus, permitting Catholic crosses but not Muslim crescents has been held unjustified.[125]

Several problems peculiar to Muslims have arisen. The Law of Islam compels Sunni Muslims to perform their prayers five times a day at fixed hours, standing, bowing, and prostrating; "without any one of these forms the prayers (Salat) would be

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[119] 302 F. Supp. 1036 (E.D. Pa. 1969), *aff'd*, 435 F.2d 1255 (3d Cir. 1970), *cert. denied*, 403 U.S. 936 (1971).

[120] For an evaluation of this test, see notes 174-90 *infra* & accompanying text.

[121] 302 F. Supp. at 1058.

[122] Battle v. Anderson, 376 F. Supp. 402, 427 (E.D. Okla. 1974).

[123] 382 F. Supp. 996 (D. Wyo. 1974), *vacated and remanded*, 540 F.2d 1057 (10th Cir. 1976).

[124] *See, e.g.*, Rowland v. Jones, 452 F.2d 1005 (8th Cir. 1971).

[125] State *ex rel.* Tate v. Cubbage, 210 A.2d 555 (Del. Super. Ct. 1965).

incomplete."[126] The tightly scheduled prison routine sometimes interferes with Muslim praying, and a few free exercise cases have been brought on the basis of such interference. In the only case reaching the merits, the court found no deprivation of religious liberty, because the prison routine, although rigidly scheduled, allowed ample opportunity for prayer.[127] The Muslim religion also requires that the head be kept covered with a prayer hat. "These hats 'not only serve as . . . a garment for prayer' but also are 'an intricate part' of the Muslim Faith."[128] In the unreported free exercise case of *Abdullah v. Manson*,[129] the court struck down under compelling interest analysis a prison regulation restricting head coverings for security purposes. The prison policy of asking each inmate upon arrival to designate a religious preference presents another almost uniquely Muslim problem. This preference often severely restricts the prisoner's ability to attend other religious ceremonies. Because many Muslims undergo their conversion to this faith while in prison, and because prisoners often are not allowed to change their preferential designation,[130] the courts in some cases have ordered that prisoners be permitted to attend meetings of religions other than the one listed on the entrance card.[131]

6. Literature

The study of religious literature is important to most faiths. Access to such literature has sometimes been withheld from prisoners, particularly Black Muslims, through passive refusal by corrections officials to furnish copies of particular works for the prison library[132] as well as through active suppression of allegedly "inflammatory" materials that prisoners sought to procure on their own.[133] In the cases involving active suppression of

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[126] Brief for Appellants at 2, Burgin v. Henderson, 536 F.2d 501 (2d Cir. 1976) (quoting Appendix at 6).

[127] Bethea v. Daggett, 329 F. Supp. 796 (N.D. Ga. 1970), *aff'd per curiam*, 444 F.2d 112 (5th Cir. 1971).

[128] Brief for Appellants at 3, Burgin v. Henderson, 536 F.2d 501 (2d Cir. 1976) (quoting Appendix at 6) (citation omitted).

[129] No. 15,606 (D. Conn. Mar. 13, 1973).

[130] *See, e.g.*, Long v. Katzenbach, 258 F. Supp. 89 (M.D. Pa. 1966). *See also* Maguire v. Wilkinson, 405 F. Supp. 637 (D. Conn. 1975).

[131] *See, e.g.*, SaMarion v. McGinnis, 55 Misc. 2d 59, 284 N.Y.S.2d 504 (Sup. Ct. 1967). *But see* Cochran v. Sielaff, 405 F. Supp. 1126 (S.D. Ill. 1976).

[132] *See, e.g.*, Northern v. Nelson, 315 F. Supp. 687 (N.D. Cal. 1970), *aff'd on other grounds*, 448 F.2d 1266 (9th Cir. 1971).

[133] *See, e.g.*, Walker v. Blackwell, 411 F.2d 23 (5th Cir. 1969); Long v. Parker, 390 F.2d 816 (3d Cir. 1968).

the Muslim newspaper, *Muhammad Speaks*, and other writings of Elijah Muhammad, most courts have required prison authorities to show a high degree of justification to support the rule.[134] While some courts have applied a variant of the compelling interest test—the leading case of *Brown v. Peyton*[135] articulated the necessity of "a convincing showing that paramount state interests . . . require" the restriction of an inmate's free exercise—other courts have employed a "substantial interference" test[136] or a test requiring that the suppressed material be "inflammatory."[137] Perhaps the most widely used test is that of "clear and present danger," under which suppression is rarely permitted:

> Mere antipathy caused by statements derogatory of, and offensive to the white race is not sufficient to justify the suppression of religious literature even in a prison. Nor does the mere speculation that such statements may ignite racial or religious riots in a penal institution warrant their proscription. To justify the prohibition of religious literature, the prison officials must prove that the literature creates a clear and present danger of a breach of prison security or discipline or some other substantial interference with the orderly functioning of the institution.[138]

Suppression is almost never allowed under these standards.

One of the very few cases in this area in which a court held that the state met its heavy burden is *Knuckles v. Prasse*.[139] After finding that the works of Elijah Muhammad "could be interpreted as an endorsement of a concept that whites generally and prison authorities should be defied by Muslim prisoners,"[140] the court ruled that prison authorities need not make the materials available.

Analysis of the religious literature cases is complicated by the overlap between the first amendment's free speech and free

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[134] *See, e.g.*, Hoggro v. Pontesso, 456 F.2d 917 (10th Cir. 1972); Rowland v. Sigler, 327 F. Supp. 821 (D. Neb.), *aff'd*, 452 F.2d 1005 (8th Cir. 1971). *See also* Pitts v. Knowles, 339 F. Supp. 1183 (W.D. Wis. 1972), *aff'd*, 478 F.2d 1405 (7th Cir. 1973).

[135] 437 F.2d 1228, 1231 (4th Cir. 1971).

[136] *See, e.g.*, Northern v. Nelson, 315 F. Supp. 687 (N.D. Cal. 1970), *aff'd on other grounds*, 448 F.2d 1266 (9th Cir. 1971). For a critique of the substantial interference test, see notes 191-97 *infra* & accompanying text.

[137] *See, e.g.*, Walker v. Blackwell, 411 F.2d 23 (5th Cir. 1969).

[138] Long v. Parker, 390 F.2d 816, 822 (3d Cir. 1968).

[139] 302 F. Supp. 1036 (E.D. Pa. 1969), *aff'd*, 435 F.2d 1255 (3d Cir. 1970), *cert. denied*, 403 U.S. 936 (1971).

[140] *Id.* at 1040.

exercise guarantees. Most nonprison cases involving this overlap have been treated as free speech cases.[141] The prison cases have not displayed the same consistent approach, however; indeed, the question does not seem to have been addressed directly at all.[142]

C. *The Major Nonprison Free Exercise Cases*

Until 1963, the Supreme Court had not squarely resolved a major free exercise case in favor of the individual.[143] Plaintiffs asserting religious rights prevailed before the Court only when their claims implicated the first amendment guarantee of free speech as well as that of free exercise;[144] cases brought under the religion clause alone were unsuccessful.[145] *Braunfeld v. Brown*,[146] a 1961 Sunday closing law case that involved the prosecution of Orthodox Jews under a Pennsylvania statute prohibiting retail sales on Sundays, was the most recent major free exercise case

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[141] *See, e.g.*, West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943) (refusal by Jehovah's Witness school children to salute flag held unpunishable expression); Cantwell v. Connecticut, 310 U.S. 296 (1940) (anti-Catholic public speech of Jehovah's Witness held protected). Although these cases "could properly have been adjudicated under the free exercise clause because of the religious motivation of the individuals involved, they were decided on free speech grounds, as the courts and commentators have fairly uniformly noted." Marcus, *The Forum of Conscience: Applying Standards Under the Free Exercise Clause*, 1973 DUKE L.J. 1217, 1265 (footnote omitted). Most of the mixed speech-religion cases reached the result that appears mandated by free exercise analysis. *Cf.* Fowler v. Rhode Island, 345 U.S. 67 (1953) (equal access to public parks ordered for Jehovah's Witnesses); Niemotko v. Maryland, 340 U.S. 268 (1951) (same). *But see* Prince v. Massachusetts, 321 U.S. 158 (1944) (affirming conviction of Witness for allowing nine-year-old niece to sell pamphlets in public, despite assertion that distribution of literature was required religious practice).

[142] *See, e.g.*, Long v. Parker, 390 F.2d 816 (3d Cir. 1968) (indiscriminate use of free speech and free exercise standards in evaluating suppression of *Muhammad Speaks*). In cases involving only the free speech guarantee, the courts have almost uniformly prevented prison officials from withholding publications that an inmate has purchased or otherwise obtained; incoming materials may be inspected, however, for contraband, obscenity, or "clear and present danger." *See, e.g.*, Frazier v. Donelon, 381 F. Supp. 911 (E.D. La. 1974), *aff'd*, 520 F.2d 941 (5th Cir. 1975) (prison ban on *Playboy Magazine* upheld on grounds of internal order); Goldsby v. Carnes, 365 F. Supp. 395 (W.D. Mo. 1973); Laaman v. Hancock, 351 F. Supp. 1265 (D.N.H. 1972); Fortune Society v. McGinnis, 319 F. Supp. 901 (S.D.N.Y. 1970). *See also* 1 N. DORSEN, P. BENDER & B. NEUBORNE, EMERSON, HABER AND DORSEN'S POLITICAL AND CIVIL RIGHTS IN THE UNITED STATES 1338-39 (4th ed. 1976) [hereinafter cited as DORSEN, BENDER & NEUBORNE]. For a discussion of what is the proper analysis of a mixed speech and religion case, see notes 184-88 *infra* & accompanying text.

[143] For a discussion of free exercise litigation generally, see DORSEN, BENDER & NEUBORNE, *supra* note 142, at 1166-1279; L. PFEFFER, GOD, CAESAR AND THE CONSTITUTION 31-36 (1975).

[144] *See* note 141 *supra*.

[145] *See, e.g.*, Reynolds v. United States, 98 U.S. 145 (1878) (prohibition of polygamy applied to Mormons).

[146] 366 U.S. 599 (1961).

resolved in favor of the state. As a Sabbatarian, Braunfeld was unable to conduct business on Saturday. Sunday closing, he argued, would "result in impairing [his] ability . . . to earn a livelihood and render [him] unable to continue in his business."[147] Putting him to a choice between "his religious faith and his economic survival,"[148] Braunfeld maintained, amounted to unconstitutional interference with his free exercise rights.

The Supreme Court rejected this argument. Chief Justice Warren, writing for a plurality,[149] characterized the burden on petitioner as "indirect" because the state law did not *prohibit* the religious practice, and held that the closing law would be invalid only if "the State may accomplish its purpose by means which do not impose such a burden."[150] No alternative means of furthering the state's goal—"one day of the week apart from the others as a day of rest, repose, recreation, and tranquility"[151]—was found. A suggested alternative, exempting Sabbatarians from the statute, was rejected because it "might well undermine the State's goal of providing a day that, as best possible, eliminates the atmosphere of commercial noise and activity."[152] Chief Justice Warren found other difficulties with an exemption, including the delicate inquiry into a Sabbatarian's religious sincerity that it would entail, and the Court affirmed Braunfeld's conviction.

Justice Brennan wrote the principal free exercise dissent, asking "[w]hat overbalancing need is so weighty in the constitutional scale that it justifies this substantial, though indirect, limitation of appellants' freedom?" Justice Brennan answered his own question:

> It is the mere convenience of having everyone rest on the same day. It is to defend this interest that the Court holds that a State need not follow the alternative route of granting an exemption for those who in good faith observe a day of rest other than Sunday.[153]

Arguing that the state should be required to grant an exemption to religious individuals like Braunfeld, as twenty-one of the

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[147] *Id.* at 601.
[148] *Id.* at 616 (Stewart, J., dissenting).
[149] Justices Frankfurter and Harlan concurred in the result only. *Id.* at 610.
[150] *Id.* at 607.
[151] *Id.*
[152] *Id.* at 608.
[153] *Id.* at 614.

thirty-four states that had Sunday closing laws had done, Justice Brennan thought the objection that such an exemption "would make Sundays a little noisier, and the task of police and prosecutor a little more difficult"[154] to be less than compelling. The other problems discussed by the Chief Justice were "more fanciful than real" to Justice Brennan,[155] who pointed out that inquiries into religious sincerity had been expressly upheld by the Court in *United States v. Ballard*.[156]

The *Braunfeld* reasoning, though not technically overruled, was not followed two years later in Justice Brennan's opinion for the Court in *Sherbert v. Verner*.[157] Adell Sherbert, a Seventh Day Adventist, was fired because she would not work on Saturday, the Sabbath of her church. Unable to find other employment that did not require Saturday work, she filed for state unemployment compensation benefits. Her claim was refused on the ground that by adhering to her Sabbatarianism she had made herself unavailable for work. Justice Brennan began his opinion by stating that although the burden on free exercise imposed in *Sherbert* was, like that in *Braunfeld*, "indirect," "[i]t is basic that no showing merely of a rational relationship to some colorable state interest would suffice; in this highly sensitive constitutional area, '[o]nly the gravest abuses, endangering paramount interests, give occasion for permissible limitation.' "[158] No such abuse had been advanced here; the only state interest raised in defense of Ms. Sherbert's exclusion was the possibility that "the filing of fraudulent claims by unscrupulous claimants feigning religious objections to Saturday work might not only dilute the unemployment compensation fund but also hinder the scheduling by employers of necessary Saturday work."[159] Justice Brennan dismissed this contention, both because the argument had not been presented to the lower court and because the contention did not appear supportable on the record. Given the holding that no compelling state interest had been shown, Justice Brennan did not have to reach the less drastic means question, but he nevertheless stressed that if the Court had found a paramount interest endangered, the state would then have had to demonstrate that "no alternative forms of regulation would combat

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[154] *Id.*

[155] *Id.* at 615.

[156] 322 U.S. 78 (1944). For a discussion considering the significance of the *Ballard* decision, see note 306 *infra*.

[157] 374 U.S. 398 (1963).

[158] *Id.* at 406 (quoting in part Thomas v. Collins, 323 U.S. 516, 530 (1945)).

[159] *Id.* at 407.

such abuses without infringing First Amendment rights."[160] Justice Stewart, concurring in the result, and Justices Harlan and White dissenting, thought that the majority's holding was inconsistent with *Braunfeld*. As Justice Harlan observed, "any differences between this case and *Braunfeld* cut against the present appellant."[161] The *Sherbert* majority, however, discussed *Braunfeld* as if it were still good law.

In the most recent free exercise case, *Wisconsin v. Yoder*,[162] the Court addressed a first amendment challenge by Old Order Amish parents to Wisconsin's compulsory education law, and reaffirmed the protective attitude it displayed in *Sherbert*, prompting one commentator to suggest that free exercise has become, in the short time since *Braunfeld*, the most cherished constitutional liberty.[163] The Yoders were members of an extremely conservative Mennonite group who earn their livelihood exclusively by farming or related activities, wear seventeenth-century-style clothing and untrimmed beards, abstain from using electricity and other technological developments, and believe that salvation requires a life apart from worldly influences. The Amish accept formal education through the eighth grade, but reject further schooling as promotive of values—such as competitiveness, success, and social life—that are antithetical to traditional Amish values.

Wisconsin asserted two general interests in requiring that all children attend school up to the age of sixteen. The first was the Jeffersonian argument that compulsory public education prepares citizens to discharge their political responsibilities in a democratic society and support themselves economically without becoming a burden on the community. The second was the development of individuals able to support themselves in society—the protection, especially, of children who might some day wish to enter the secular world but would be unprepared to do so if they had been sequestered by their parents. The Court, in an opinion by Chief Justice Burger, rejected both state interests and overturned Yoder's conviction as unconstitutional. Chief Justice Burger apparently applied the compelling interest test, because Wisconsin was required to demonstrate a state goal of "the highest order."[164] Furthermore, generalized assertions of

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[160] *Id.* (footnote omitted).
[161] *Id.* at 421 (Harlan & White, JJ., dissenting) (footnote omitted).
[162] 406 U.S. 205 (1972).
[163] *See* Pfeffer, *supra* note 20, at 1140.
[164] 406 U.S. at 215; *see* note 166 *infra*.

a paramount need for an educated populace would not suffice: "Where fundamental claims of religious freedom are at stake . . . we cannot accept such a sweeping claim; despite its admitted validity in the generality of cases, we must searchingly examine the interests that the State seeks to promote by its requirement for compulsory education . . . ."[165] The Chief Justice concluded that neither of Wisconsin's interests was "of sufficient magnitude to override the interests claiming protection under the Free Exercise Clause."[166] There were no dissents from this conclusion.[167]

III. An Evaluation of the Principal Tests

The law of free exercise of religion in prison is marked not only by the inconsistent results previously discussed,[168] but also by the application of inconsistent standards in arriving at those results. Different courts apply different tests to essentially similar facts, and occasionally one court applies several different tests to the facts of a single case.[169] Thus, in *Goodwin v. Oswald*,[170] the Second Circuit held that a prison regulation abridging first amendment rights is constitutional if it is justified by "a *compelling state interest* centering about prison security, or a *clear and present danger* of a breach of prison security . . . or some *substantial interference* with orderly institutional administration."[171]

Seven distinct tests can be identified in the cases and the law review literature: 1) the clear and present danger test; 2) the

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[165] 406 U.S. at 221.

[166] *Id.* at 214. Although Chief Justice Burger appeared to require a compelling interest, the Court's opinion may also be read as applying an ad hoc balancing test. For a discussion and resolution of this ambiguity, see notes 293-342 *infra* & accompanying text.

[167] Justice Douglas strongly hinted that there may be a constitutional interest of the Amish children sufficient to overcome the parents' free exercise claim. 406 U.S. at 241 (Douglas, J., dissenting in part). The *Yoder* litigation is considered in Marcus, *supra* note 141, at 1225-30; Pfeffer, *supra* note 20, at 1139-42; Comment, *The Amish and Compulsory School Attendance: Recent Developments*, 1971 Wis. L. Rev. 832; 56 Minn. L. Rev. 111 (1971); 24 Vand. L. Rev. 808 (1971).

[168] *See* text accompanying notes 64-142 *supra*.

[169] *See, e.g.*, Hodges v. Klein, 421 F. Supp. 1224, 1238 (D.N.J. 1976) (compelling interest and clear and present danger tests); Lipp v. Procunier, 395 F. Supp. 871, 877 (N.D. Cal. 1975) (compelling interest, clear and present danger, and reasonableness tests).

The same confusion may be found in the commentaries. *E.g.*, Hollen, *supra* note 34, at 18-19 (clear and present danger and balancing tests advocated); Comment, *Prisoners' Rights: Restrictions on Religious Practices*, 42 U. Colo. L. Rev. 387 (1970) (clear and present danger and substantial interference tests advocated).

[170] 462 F.2d 1237 (2d Cir. 1972).

[171] *Id.* at 1244 (emphasis supplied) (quoting Fortune Soc'y v. McGinnis, 319 F. Supp. 901, 904 (S.D.N.Y. 1970) (Weinfeld, J.)).

substantial interference test; 3) the *Procunier v. Martinez*[172] test; 4) the reasonableness test; 5) the ad hoc balancing test; 6) the *Braunfeld v. Brown*[173] test; and 7) the compelling interest test. Three of these were originally articulated in nonprison free speech cases: the clear and present danger test, the substantial interference test, and the *Procunier v. Martinez* test. Two are not widely accepted in the nonprison context in either the free speech or the free exercise cases: the reasonableness test and the ad hoc balancing test. Finally, two are "general" free exercise tests that have been applied in the nonprison context as well: the compelling interest test and the *Braunfeld v. Brown* test. This section of the Comment will analyze and evaluate each of the seven tests and conclude that the compelling interest test is the most appropriate standard for resolving prisoners' free exercise claims.

A. *The Clear and Present Danger Test*

The clear and present danger test is frequently applied in prison free exercise cases.[174] As articulated in *Banks v. Havener*,[175] one of the earliest decisions to adopt this approach, the test requires that "[t]o justify the prohibition of the practice of an established religion . . . the prison officials must prove by satisfactory evidence that the teachings and practice of the sect create a clear and present danger to the orderly functioning of the institution."[176] The use of this test in the free exercise context is generally supported by a citation to *Cantwell v. Connecticut*,[177] in which the Supreme Court overturned the conviction of a Jehovah's Witness for distributing anti-Catholic literature in a heavily Catholic neighborhood. Many of the prison free exercise cases, like *Cantwell*, that have applied this test involved efforts to prevent the distribution of religious literature.[178] Nothing in the opinions, however, suggests that the courts intended to confine the test to free exercise cases that also implicate the free speech guarantee of the first amendment, and several courts have applied the clear and present danger standard to nonspeech free exercise issues such as a prohibition on group wor-

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[172] 416 U.S. 396 (1974).

[173] 366 U.S. 599 (1961) (plurality opinion).

[174] *E.g.*, cases cited note 179 *infra*.

[175] 234 F. Supp. 27 (E.D. Va. 1964).

[176] *Id.* at 30.

[177] 310 U.S. 296 (1940).

[178] *See, e.g.*, Walker v. Blackwell, 411 F.2d 23 (5th Cir. 1969); Long v. Parker, 390 F.2d 816 (3d Cir. 1968); Cooper v. Pate, 382 F.2d 518 (7th Cir. 1967).

ship.[179]

This approach has been endorsed by several commentators. At least two have concluded that this test should be widely applied in prison free exercise cases, because the fundamental issue in all such cases is institutional security and the clear and present danger test is directly responsive to this issue.[180] Other commentators, however, have suggested that the test should be limited to cases in which the prison authorities' immediate interest is discipline or prison security.[181]

Two considerations, however, counsel against adopting this test. First, the clear and present danger test was developed in the free speech context as a response to the attempted suppression of opinions "fraught with death."[182] To transfer the test to the free exercise context, as some courts have done, is to strain it severely, for many free exercise issues simply will not admit of proper clear and present danger analysis. In the kosher food cases considered earlier,[183] for example, a court applying this test would presumably inquire whether the provision of kosher food to Orthodox Jewish inmates would constitute a clear and present danger to convenient and economical administration of the prison. A court would be obliged to decide free exercise cases based on whether the values of convenience or economy are endangered, an approach that would entail giving great weight to the number of prisoners in the institution asserting a particular claim or type of claim (with its attendant cost and inconvenience). Yet for the state's burden of justification to be reduced as the number of persons affected by a given restriction increases is surely irrational. Moreover, the determination of when economical and convenient administration is endangered would be standardless and could lead to an unjustified degree of deference to prison officials. Nor is the test appropriate in cases in which the state asserts a security interest in, for example, a prohibition on beards. The essence of the prison officials' po-

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[179] Hodges v. Klein, 421 F. Supp. 1224, 1238 (D.N.J. 1976); Lipp v. Procunier, 395 F. Supp. 871, 877 (N.D. Cal. 1975) (*semble*); Knuckles v. Prasse, 302 F. Supp. 1036, 1056 (E.D. Pa. 1969), *aff'd*, 435 F.2d 1255 (3d Cir. 1970), *cert. denied*, 403 U.S. 936 (1971) ("[i]t is irrelevant whether the danger to prison operations is caused by religious literature or by the practice of religion").

[180] Comment, *Black Muslims in Prison: Of Muslim Rites and Constitutional Rights*, 62 COLUM. L. REV. 1488, 1503-04 (1962).

[181] Hollen, *supra* note 34, at 18-19 (balancing test for nonsecurity cases); Comment, *supra* note 169, at 395 (substantial interference test for nonsecurity cases).

[182] Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting). *See* G. GUNTHER, CASES AND MATERIALS ON CONSTITUTIONAL LAW 1054-68 (9th ed. 1975).

[183] Text accompanying notes 64-85 *supra*.

sition is that because contraband can be hidden in a beard and remain undetected, the beard carries a *potential* for danger to prison security. Only the broadest reading of "present" could, under this test, justify a requirement that beards be kept trimmed. In short, in the free exercise context, the clear and present danger test appears to be insufficiently restrictive when the challenged regulation is based on security and inevitably arbitrary when the regulation is based on economy or convenience.

Cases that present overlapping free speech and free exercise issues, however, require a different analysis. When a prison free exercise claim is directed against the content-based suppression of speech, the clear and present danger test is appropriate.[184] In some of the earliest cases involving Black Muslims, for example, prison officials, fearful that the sect would teach defiance of civil authority, denied Muslim inmates all forms of group worship and cut off access to religious literature and ministerial visits.[185] Suppression based on the *ideas* communicated by a religious group is properly evaluated under the clear and present danger test as interpreted in *Brandenburg v. Ohio*,[186] for the religious advocacy of defiance in prison is entitled to no less constitutional protection than that accorded to the violent "revengeance"[187] communicated in *Brandenburg*. The state's greater interest in maintaining order in the prison context argues for allowing suppression on a lesser showing of "imminent lawless action"[188]

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[184] *See generally* Dennis v. United States, 341 U.S. 494 (1951); Schenck v. United States, 249 U.S. 47 (1919). Although Professor Ely has rejected the traditional distinction between content suppression and time, place, and manner regulation as "shopworn" and "as irrelevant as it is unintelligible," Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 HARV. L. REV. 1482, 1497-98 (1975), the distinction still appears in Supreme Court analysis, *see, e.g.*, Young v. American Mini Theatres, Inc., 96 S. Ct. 2440, 2449-50, 2453 & n.35 (1976); *id.* at 2459-61 (Stewart, J., dissenting), and retains its conceptual significance. *See* S. KRANTZ, R. BELL, J. BRANT & M. MAGRUDER, MODEL RULES AND REGULATIONS ON PRISONERS' RIGHTS AND RESPONSIBILITIES rule IA-1c (1973) (advocating clear and present danger test for content-based regulation).

The content-manner distinction should not be confused with the belief-practice distinction of Reynolds v. United States, 98 U.S. 145 (1878), the Mormon polygamy case. For an isolated recent endorsement of the latter distinction, see Comment, *Religious Freedom in Prison—Free Exercise vs. The Need for Prison Security*, 36 ALB. L. REV. 416 (1972).

[185] *E.g.*, Sostre v. McGinnis, 334 F.2d 906 (2d Cir.), *cert. denied*, 379 U.S. 892 (1964); Knuckles v. Prasse, 302 F. Supp. 1036 (E.D. Pa. 1969), *aff'd*, 435 F.2d 1255 (3d Cir. 1970), *cert. denied*, 403 U.S. 936 (1971).

[186] 395 U.S. 444 (1969) (per curiam). *See generally* Fox, *The First Amendment Rights of Prisoners*, 63 J. CRIM. L.C. & P.S. 162, 176-78 (1972).

[187] 395 U.S. at 446.

[188] *Id.* at 447.

than was required in *Brandenburg*, but not for applying a different test.

The second consideration that weighs against applying the clear and present danger test in most prison free exercise cases is that, with the possible exception of *Cantwell v. Connecticut*,[189] this test has not been applied in the nonprison free exercise context.[190] For reasons that will be developed in part III-G, whichever test is applied in the nonprison cases should be applied in the prison cases as well. Therefore, any other test, including the clear and present danger test, would be inappropriate.

B. *The Substantial Interference Test*

The substantial interference test originated in a line of cases involving the first amendment rights of public school students. In *Tinker v. Des Moines Independent Community School District*,[191] the leading case in this area, the Supreme Court held that students could not be forbidden to wear black armbands in class absent a showing that such conduct would "materially and substantially interfere with the requirements of appropriate discipline in the operation of the school."[192] All nine Justices viewed *Tinker* as a free speech case; none of the five opinions filed in *Tinker* mentioned the free exercise guarantee.[193] Several courts, however, have applied the substantial interference test to free exercise claims raised by prisoners,[194] and at least one commentator has endorsed this approach.[195]

Assuming that this is the appropriate test for public school free speech cases, it nevertheless should not be transferred to the

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[189] 310 U.S. 296, 308, 310 (1940).

[190] *But see* Baxley v. United States, 134 F.2d 937, 938 (4th Cir. 1943) (*semble*); Sheldon v. Fannin, 221 F. Supp. 766, 773-74 (D. Ariz. 1963) (dictum); State *ex rel.* Swann v. Pack, 527 S.W.2d 99 (Tenn. 1975) (*semble*), *cert. denied*, 424 U.S. 954 (1976).

[191] 393 U.S. 503 (1969).

[192] *Id.* at 509 (quoting Burnside v. Bayars, 363 F.2d 744, 749 (5th Cir. 1966)). *See also* Healy v. James, 408 U.S. 169, 189 (1972) (dictum).

[193] 393 U.S. at 504 (majority opinion); *id.* at 514 (Stewart, J., concurring); *id.* at 515 (White, J., concurring); *id.* at 515 (Black, J., dissenting); *id.* at 526 (Harlan, J., dissenting).

[194] *E.g.*, Long v. Parker, 390 F.2d 816, 822 (3d Cir. 1968) (*semble*); Northern v. Nelson, 315 F. Supp. 687, 688 (N.D. Cal. 1970), *aff'd on other grounds*, 448 F.2d 1266 (9th Cir. 1971).

[195] "It is proposed that the proper standard for testing restrictions in this area is 'substantial interference,' and that courts should not permit any restrictions unless the prison can clearly demonstrate that a religious practice left unrestricted would effectively nullify an essential prison interest." Comment, *supra* note 169, at 399 (footnotes omitted).

prison free exercise context. First, this test has never been applied in a nonprison free exercise case, and there is no justification for treating prisoners' claims under a standard different from the general free exercise standard.[196] Second, the infrequent application of the substantial interference test to free exercise cases,[197] together with the ambiguity inherent in the term "substantial," makes it difficult to predict the extent to which this test would protect prisoners' religious liberty. These considerations illustrate the problems that arise when free speech doctrines are transferred to the free exercise context.

C. *The* Procunier v. Martinez *Test*

The plaintiff inmates in *Procunier v. Martinez*[198] challenged, on free speech and other grounds, prison regulations that authorized opening and reading inmate mail to detect violations of an elaborate set of rules, under which prisoners were forbidden to "agitate, unduly complain, magnify grievances, or behave in any way which might lead to violence."[199] A three-judge district court held that the mail censorship program was unconstitutional,[200] and the Supreme Court affirmed without dissent.[201] Justice Powell, writing for the Court, rested the decision on the free speech rights of the prisoners' correspondents rather than on the rights of the prisoners themselves.[202] In an effort to accommodate both the prison officials' concerns and the correspondents' rights, Justice Powell relied heavily on *United States v. O'Brien*[203] and fashioned a two-part test:

> First, the regulation or practice in question must further an important or substantial governmental interest unrelated to the suppression of expression. Prison officials . . . must show that a regulation . . . furthers one

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[196] *See* text accompanying notes 251-71 *infra*.

[197] The test has been widely used in public school free speech cases. DORSEN, BENDER & NEUBORNE, *supra* note 142, at 882-83. In the few public school free exercise cases, however, the courts have used other tests. *E.g.*, Spence v. Bailey, 465 F.2d 797 (6th Cir. 1972) (compelling interest test); Davis v. Page, 385 F. Supp. 395 (D.N.H. 1974) (same) (*semble*); Sheldon v. Fannin, 221 F. Supp. 766 (D. Ariz. 1963) (clear and present danger test) (*semble*). The only application of the substantial interference test to free exercise issues has occurred in the prison cases.

[198] 416 U.S. 396 (1974).

[199] *Id.* at 399 n.2.

[200] Martinez v. Procunier, 354 F. Supp. 1092 (N.D. Cal. 1973) (per curiam), *aff'd*, 416 U.S. 396 (1974).

[201] Procunier v. Martinez, 416 U.S. 396 (1974).

[202] *Id.* at 408-09. The Court's opinion characterized the issue of correspondents' rights as a "narrower" ground of decision. *Id.* at 408.

[203] 391 U.S. 367 (1968).

> or more of the substantial governmental interests of security, order, and rehabilitation. Second, the limitation of First Amendment freedoms must be no greater than is necessary or essential to the protection of the particular governmental interest involved. Thus a restriction . . . that furthers an important or substantial interest of penal administration will nevertheless be invalid if its sweep is unnecessarily broad.[204]

Under this test, the Court held the mail censorship program to be unconstitutional. Several lower courts have applied this test in cases involving the free speech rights of prisoners themselves[205] and, more importantly, in cases involving prisoners' free exercise claims.[206]

The *Martinez* standard is not free from difficulty. It derives largely from *United States v. O'Brien*,[207] in which the Supreme Court affirmed the conviction of an antiwar protestor who publicly burned his draft card. The *O'Brien* test, also known as the incidental restrictions test,[208] is based on the assumption that certain laws are directed primarily at an unprotected activity and only incidentally restrict the asserted constitutional right. In *O'Brien*, the Court recognized two distinct elements in the card burning: a nonspeech element that was the target of the statute and a speech element upon which there was an incidental effect. This distinction has generally been viewed as being without substance, and the *O'Brien* decision has been criticized for this reason;[209] thus, the source of the *Martinez* test is itself unsound. Nor is it clear why *O'Brien* should determine the outcome in *Martinez*. The distinction between speech and nonspeech, al-

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[204] 416 U.S. at 413-14. The *O'Brien* four-part test was strikingly similar:

> [W]e think it clear that a government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

391 U.S. at 377.

[205] Shakur v. Malcolm, 525 F.2d 1144, 1148 n.3 (2d Cir. 1975) (dictum); Battle v. Anderson, 376 F. Supp. 402, 425-26 (E.D. Okla. 1974).

[206] United States v. Kahane, 527 F.2d 492 (2d Cir. 1975); 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).

[207] 391 U.S. 367 (1968); *see* note 204 *supra* & accompanying text.

[208] For an explication of the test, see note 204 *supra*.

[209] *See, e.g.*, Alfange, *Free Speech and Symbolic Conduct: The Draft-Card Burning Case*, 1968 SUP. CT. REV. 1, 14-27; Ely, *supra* note 184, at 1494-95; Henkin, *The Supreme Court, 1967 Term—Foreword: On Drawing Lines*, 82 HARV. L. REV. 63, 76-80 (1968).

though it did not fit the facts of *O'Brien*, was an explicit premise on which the *O'Brien* test rested.[210] No such distinction can be drawn in *Martinez*, in which the controversial regulations authorized mail censorship, because there is simply no nonspeech element in correspondence with prisoners. Justice Powell, writing for the Court in *Martinez*, acknowledged that *O'Brien*, for this reason, was not "directly" controlling.[211] *O'Brien*, however, may have been completely irrelevant because the situation that triggered the incidental restrictions test in *O'Brien* and other "symbolic speech" cases[212]—the mixture of speech and nonspeech in a course of conduct that the state seeks to restrict—was not present in *Martinez*. Yet the *Martinez* test is virtually indistinguishable from the *O'Brien* test,[213] and the *Martinez* opinion neither cites authority nor gives reasons for extending the incidental restrictions test beyond the "symbolic speech" cases.[214]

Assuming that the *Martinez* test is nevertheless sound in the free speech context, several difficulties arise in transferring it to the prison free exercise context. First, to the extent that *O'Brien* is still controlling, there is a practical problem. It is frequently impossible to resolve a restricted religious practice, such as group worship, into a religious element and a nonreligious element along the lines of the *O'Brien* distinction between speech and nonspeech; if, despite *Martinez*, the incidental restrictions test may be triggered only by a nonreligious element, the test would be inapplicable in these cases. Second, the requirement that the government interest be "substantial" appears to be of little significance. In *O'Brien*, for example, the Court found that a Selective Service Law amendment prohibiting registrants from destroying their draft cards substantially increased the efficiency of the Selective Service System, which had previously required only that registrants have the cards in their possession. Because *O'Brien* is the leading case applying the substantial interest requirement, and because nothing in the opinion "suggests

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[210] 391 U.S. at 376.

[211] 416 U.S. at 411.

[212] *E.g.*, Healy v. James, 408 U.S. 169 (1972); Tinker v. Des Moines Independent Community School Dist., 393 U.S. 503 (1969).

[213] *Compare* text accompanying note 204 *supra*, *with* note 204 *supra*. The *O'Brien* test is expressly limited to incidental restrictions, unlike the *Martinez* test, but the opinion in *Martinez* makes it relatively clear that the test is to be similarly limited. *See* 416 U.S. at 409, 412-13.

[214] It should be noticed that this doctrinal aberration cannot be explained by any theory of the diminished constitutional rights retained by prisoners, for *Martinez* expressly passed on the free speech rights of *nonincarcerated* citizens who correspond with prisoners. 416 U.S. at 408-09.

that the requirement will not always be satisfiable,"[215] the requirement will offer little protection for free exercise rights.[216] Third, and more generally, the *Martinez-O'Brien* approach has never been applied in the nonprison free exercise context. For reasons that will be developed in part III-G, the same test should apply to free exercise cases brought by prisoners and to those brought by nonprisoners.

D. *The Reasonableness Test*

The standard most often applied in prison free exercise cases is the reasonableness test:[217] "[I]n order for a prisoner to successfully challenge prison procedures on First Amendment grounds, he has the burden of showing that the procedure or practice in question is clearly unreasonable; and in this inquiry the expert judgment of the prison officials is accorded substantial deference."[218] In 1974, the Supreme Court apparently applied this standard in *Pell v. Procunier*,[219] a prison free speech case, and several lower courts have since relied on *Pell* as authority for applying the reasonableness test in prison free exercise cases.[220]

Pell upheld the constitutionality of a California prison regulation that banned "press and other media interviews with specific individual inmates."[221] Prison officials contended that in the past such interviews made "big wheels" of the inmate subjects and that these individuals frequently became violent and disrupted the institutional order. Justice Stewart, writing for the Court, was persuaded by this argument.

The opinion in *Pell*, unlike the opinion in *Procunier v. Martinez*,[222] focused on the first amendment rights of the prisoners themselves. "[A] prison inmate," wrote Justice Stewart, "retains those First Amendment rights that are not inconsistent with his status as a prisoner or with the legitimate penological objec-

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[215] Ely, *supra* note 184, at 1486 n.17.

[216] *But cf.* Pell v. Procunier, 417 U.S. 817, 826 (1974) (statement that the Court was unable to find any "legitimate" state interest in *Procunier v. Martinez*).

[217] *E.g.*, Brooks v. Wainwright, 428 F.2d 652 (5th Cir. 1970) (per curiam); Sharp v. Sigler, 408 F.2d 966 (8th Cir. 1969) (Blackmun, J.); Hodges v. Klein, 421 F. Supp. 1224 (D.N.J. 1976) (*semble*); United States *ex rel.* Goings v. Aaron, 350 F. Supp. 1 (D. Minn. 1972).

[218] United States v. Huss, 394 F. Supp. 752, 762 (S.D.N.Y.), *vacated for lack of jurisdiction*, 520 F.2d 598 (2d Cir. 1975).

[219] 417 U.S. 817 (1974).

[220] *E.g.*, United States v. Huss, 394 F. Supp. 752, 762 (S.D.N.Y.), *vacated for lack of jurisdiction*, 520 F.2d 598 (2d Cir. 1975).

[221] 417 U.S. at 819.

[222] 416 U.S. 396 (1974); *see* notes 198-216 *supra* & accompanying text.

tives of the corrections system."[223] Assessing the prisoners' challenge to the regulation in light of the legitimate objectives of deterrence, rehabilitation, and security, the Court found dispositive the existence of what it viewed as equally effective alternative modes of communication—unrestricted by prison regulations—with persons outside the prison.[224] This analysis of alternatives was held controlling despite the Court's acknowledgment that it "would find the availability of such alternatives unimpressive if they were submitted as justification for governmental restriction of personal communication among members of the general public."[225] Because the case involved the "intimate" relationship[226] between the state and an inmate, however, "the measure of judicial deference owed to corrections officials" supported the use of an otherwise unacceptable standard.[227] This is a questionable justification for defining the scope of prisoners' free speech rights under an entirely different standard than that applied in the nonprison free speech context.[228]

Assuming that the *Pell* test is nevertheless sound in the area of free speech, no comparable analysis of alternatives could be undertaken in the area of free exercise. Religious practices are rarely fungible in the way that *Pell* viewed modes of communication with nonincarcerated persons. For a court to consider whether there is an effective alternative means of observing the kosher dietary laws would be highly inappropriate. Nor is the reasonableness standard that underlies *Pell* a sound test for the prison free exercise cases. First, it has never been applied in a major nonprison free exercise case,[229] and no persuasive justification has been articulated for applying a different test in the prison context than that used in nonprison cases.[230] More fun-

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[223] 417 U.S. at 822.

[224] *Id.* at 823-25.

[225] *Id.* at 825. *See also* Kleindienst v. Mandel, 408 U.S. 753 (1972); Schneider v. State, 308 U.S. 147 (1939).

[226] 417 U.S. at 825 (quoting Preiser v. Rodriguez, 411 U.S. 475, 492 (1973)).

[227] *Id.* at 832.

[228] *See, e.g.*, Comment, *First Amendment Rights of Prisoners to Have Access to the News Media in Relation to Administrative Policy Bans upon Such Access*, 1 PEPPERDINE L. REV. 382 (1974); Comment, *Bans on Interviews of Prisoners: Prisoner and Press Rights After Pell and Saxbe*, 9 U.S.F. L. REV. 718 (1975). *See generally* Plotkin, *Recent Developments in the Law of Prisoners' Rights*, 11 CRIM. L. BULL. 405, 414-16 (1975).

[229] *But cf.* New Rider v. Board of Educ., 480 F.2d 693 (10th Cir.), *cert. denied*, 414 U.S. 1097 (1973) (public school grooming regulation upheld under rational relationship test); Cupit v. Baton Rouge Police Dep't, 277 So. 2d 454 (La. Ct. App.), *cert. denied*, 281 So. 2d 745 (La. Sup. Ct. 1973) (police department grooming regulation upheld under rational relationship test).

[230] *See* text accompanying notes 251-71 *infra*.

damentally, the resonableness test is unsuited to first amendment analysis. In the area of economic legislation, in which it is most often applied, the reasonableness test provides a deferential standard that respects the boundary between the legislative and the judicial functions.[231] This degree of deference is inappropriate in the area of individual rights.[232] If the courts are to carry out their duty "not to supervise prisons but to enforce the constitutional rights of all 'persons,' including prisoners,"[233] then prisoners' rights should not be consigned to the personal discretion of prison custodians.

E. *The Ad Hoc Balancing Test*

In several cases, the ad hoc balancing test has been applied to prison free exercise claims.[234] Under this approach, "when the claim is that a prison regulation infringes upon a constitutional right 'a court must balance the asserted need for the regulation in furthering prison security or orderly administration against the claimed constitutional right and the degree to which it has been impaired.' "[235]

This approach presents several difficulties. First, results reached under a balancing test are necessarily tied to the facts of individual cases and are therefore of slight precedential value. Second, in actual application, the weighing process in each case is often pro forma to the extent that interests asserted by prison authorities are viewed uncritically.[236] The danger that unjustified deference to prison officials will distort the balancing process militates against using this test.[237]

Third, and most fundamental, the balancing approach is theoretically unsound. As one writer has recognized, specifically in the free exercise context, "this approach . . . tends to substitute subjective judgment for objective standards."[238] Other

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[231] *E.g.*, Ferguson v. Skrupa, 372 U.S. 726 (1963); Day-Brite Lighting, Inc. v. Missouri, 342 U.S. 421 (1952).

[232] *See generally* G. GUNTHER, CASES AND MATERIALS ON CONSTITUTIONAL LAW 637-38 (9th ed. 1975).

[233] Cruz v. Beto, 405 U.S. 319, 321 (1972) (per curiam).

[234] *E.g.*, Moore v. Ciccone, 459 F.2d 574 (8th Cir. 1972) (en banc). Several courts apparently have applied an ad hoc balancing approach while announcing that a different standard was being applied. *E.g.*, Walker v. Blackwell, 411 F.2d 23 (5th Cir. 1969) (announcing a "compelling interest" test but using an ad hoc balancing approach).

[235] Moore v. Ciccone, 459 F.2d 574, 576 (8th Cir. 1972) (en banc) (quoting Smith v. Robbins, 328 F. Supp. 162, 164 (D. Me. 1971), *aff'd*, 454 F.2d 696 (1st Cir. 1972)).

[236] *See* Comment, *supra* note 169, at 389-91.

[237] *See also* Mims v. Shapp, 399 F. Supp. 818 (W.D. Pa. 1975).

[238] Giannella, *Religious Liberty, Nonestablishment, and Doctrinal Development* (pt. 1), 80 HARV. L. REV. 1381, 1384 (1967).

commentators have criticized ad hoc balancing because no aspect of first amendment freedom is protected if a court finds that the state's interest outweighs the infringed individual liberty.[239] Mr. Frantz is emphatic in this regard:

> If the arguments employed to justify balancing are carried to their logical conclusion, then the Constitution does not contain—and is not even capable of containing—anything whatever which is unconditionally obligatory. Defendants in criminal cases can be tried in secret, or held incommunicado without trial, can be denied knowledge of the accusation against them, and the right to counsel, and the right to call witnesses in their own defense, and the right to trial by jury. . . . Anything which the Constitution says *cannot* be done *can* be done, if Congress thinks and the Court agrees . . . that the interests thereby served outweighed those which were sacrificed. Thus the whole idea of a government of limited powers, and of a written constitution as a device for attaining that end, is at least potentially at stake.[240]

Although the Supreme Court has never completely shared this view of the balancing test, Chief Justice Warren, writing for the majority, articulated similar concerns in a footnote in *United States v. Robel*:[241]

> It has been suggested that this case should be decided by "balancing" the governmental interest . . . against the First Amendment rights asserted by the appellee. This we decline to do. We recognize that both interests are substantial, but we deem it inappropriate for this Court to label one as being more important or more substantial than the other.[242]

This inherent standardlessness is the most serious problem presented by the ad hoc balancing test.

A related difficulty with the ad hoc balancing test is peculiar

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[239] *See, e.g.*, Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877 (1963); Nimmer, *The Right to Speak from* Times *to* Time*: First Amendment Theory Applied to Libel and Misapplied to Privacy*, 56 CALIF. L. REV. 935 (1968). These critics of ad hoc balancing advocate a definitional balancing approach that this Comment endorses. Text accompanying notes 293-330 *infra*.

[240] Frantz, *The First Amendment in the Balance*, 71 YALE L.J. 1424, 1445 (1962) (emphasis in original).

[241] 389 U.S. 258 (1967).

[242] *Id.* at 268 n.20.

to the free exercise context. The use of this test in a religious liberty case would entail an inquiry into the importance of a particular religious practice to the individual and, perhaps, into its centrality to the faith of which the individual is a member, for these are the major "variables" on the individual's side of the balance. These are delicate matters not readily susceptible to evidentiary proof and judicial factfinding,[243] and a test that in every case requires an assessment of both ought to be rejected for this reason alone.

F. *The* Braunfeld v. Brown *Test*

In *Braunfeld v. Brown*,[244] Chief Justice Warren articulated a distinction between direct and indirect burdens on the free exercise of religion. A direct burden is a prohibition of the religious practice itself, such as a statute banning polygamy. An indirect burden, by contrast, is any requirement or restriction that makes it more difficult or more expensive for the practitioner to adhere to his faith. The Court treated the Sunday closing law in *Braunfeld* as an indirect burden because, although it effectively prevented the petitioner, a Sabbatarian, from conducting business six days a week as his competitors did, it did not require him to violate his faith and remain open on Saturdays. Chief Justice Warren intimated that the state's burden of justification was lighter in regard to an indirect restriction such as this, and upheld the law.[245] Although the *Braunfeld* test has not been applied in the prison free exercise context, at least one commentator has argued that the test is significant in that area.[246]

The *Braunfeld* approach to free exercise cases presents several difficulties. First, the labels "direct" and "indirect" do not always forecast the result in a particular case. In *Sherbert v. Verner*,[247] the Court struck down an unemployment compensation law that imposed an indirect burden, while in *Prince v.*

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[243] *See* text accompanying notes 298-306 *infra*.

A critical distinction exists between an *importance* inquiry and a *sincerity* inquiry. The former is rejected because it would tend to be awkward, difficult, and standardless; the latter is approved. *See* note 306 *infra*.

[244] 366 U.S. 599 (1961) (plurality opinion). For a discussion of the case, see text accompanying notes 145-56 *supra*.

[245] 366 U.S. at 605-07.

[246] Note, *A* Braunfeld v. Brown *Test for Indirect Burdens on the Free Exercise of Religion*, 48 MINN. L. REV. 1165 (1964). *But cf.* Comment, *Religious Accommodation Under* Sherbert v. Verner*: The Common Sense of the Matter*, 10 VILL. L. REV. 337, 345 (1965) (direct-indirect distinction termed unreal).

[247] 374 U.S. 398 (1963). For a discussion of the case, see text accompanying notes 157-61 *supra*.

Massachusetts,[248] the Court affirmed a conviction under the state's child labor law even though it placed a direct burden on the petitioner's religious liberty. Moreover, the Court has not specified to what extent the state's burden of justification is lessened when an indirect burden is at issue; indeed, the Court has not relied on the *Braunfeld* distinction since enunciating it in 1963.[249] Nor is it clear that the distinction should have constitutional significance: "[T]he rights of conscience are, in their nature, of peculiar delicacy, and will little bear the gentlest touch of governmental hand . . . ."[250]

Finally, even if the distinction is sound for most purposes, it provides little help in distinguishing among and deciding prison free exercise cases. Virtually all such cases are brought because a prison regulation effectively *prohibits* a given religious practice, rather than making it more costly or inconvenient. When prison officials grant the religious inmate an exemption from the regulation, the prisoner has, in a sense, prevailed; although the fact of incarceration may make observance of his faith more costly or inconvenient than it would be outside of prison, this indirect burden does not result from the regulation. When the prisoner is not exempted from the regulation, on the other hand, it almost invariably amounts to a direct burden. The *Braunfeld* test, centered around the direct-indirect distinction, thus does not assist in analyzing the wide range of factual patterns that the cases present.

G. *The Compelling Interest Test*

Of the various approaches to free exercise in prison discussed in this Comment, the compelling interest test provides the greatest protection for inmates' rights.[251] This test is frequently applied,[252] often in reliance on the Court's statement in *Sherbert v. Verner* that the determinative issue in a free exercise case is

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[248] 321 U.S. 158 (1944).

[249] *Cf.*, *e.g.*, Wisconsin v. Yoder, 406 U.S. 205, 218 (1972) ("the Wisconsin law affirmatively compels [petitioners], under threat of criminal sanction, to perform acts undeniably at odds with fundamental tenets of their religious beliefs").

[250] 1 ANNALS OF CONGRESS 730 (J. Gales ed. 1789) (remarks of Rep. Daniel Carroll of Maryland).

[251] *Cf.*, *e.g.*, L. PFEFFER, GOD, CAESAR AND THE CONSTITUTION 36 (1975) ("[The compelling interest test] appears to afford a degree of freedom for the exercise of religion but little short of an impossible holding that the freedom is absolute and subject to no government regulation or restriction."). *But see* Linscott v. Millers Falls Co., 440 F.2d 14 (1st Cir. 1971); CIBA-Geigy Corp. v. Local 2548, United Textile Workers, 391 F. Supp. 287 (D.R.I. 1975).

[252] *See*, *e.g.*, Kennedy v. Meacham, 540 F.2d 1057 (10th Cir. 1976); Neal v. Georgia, 469 F.2d 446 (5th Cir. 1972); United States *ex rel.* Jones v. Rundle, 453 F.2d 147 (3d

> whether some compelling state interest . . . justifies the substantial infringement of appellant's First Amendment right. It is basic that no showing merely of a rational relationship to some colorable state interest would suffice; in this highly sensitive constitutional area, "[o]nly the gravest abuses, endangering paramount interests, give occasion for permissible limitation," *Thomas v. Collins*, 323 U.S. 516, 530.[253]

In addition, the compelling interest test for prison free exercise cases has been advocated by the National Advisory Commission on Criminal Justice Standards and Goals[254] and by other commentators on the correctional system.[255]

This Comment endorses the compelling interest approach because it is the standard applied by the Supreme Court in non-prison free exercise cases. As one lower court has stated, the analytical tools needed to define the scope of religious liberty

> do not change merely because the context of enforcement is a prison. Upholding of a subjugation of preferred First Amendment rights by deferring to the discretion of the prison warden . . . falls short of the duty of a federal court. This does not mean that the circumstances peculiar to prison confinement are irrelevant . . . . It does mean that the strict tests should not be abandoned . . . .[256]

This argument for an identity of approach is persuasive because the values protected by the free exercise clause exist in the prison community to the same extent that they exist in the society outside of prison. Constitutional standards are fashioned

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Cir. 1971); Brown v. Peyton, 437 F.2d 1228 (4th Cir. 1971); Cochran v. Sielaff, 405 F. Supp. 1126 (S.D. Ill. 1976); 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); *cf.* Bethea v. Daggett, 329 F. Supp. 796, 797 (N.D. Ga. 1970) ("substantial and controlling interest") (dictum), *aff'd per curiam*, 444 F.2d 112 (5th Cir. 1971).

[253] 374 U.S. 398, 406 (1963). *See* L. PFEFFER, GOD, CAESAR, AND THE CONSTITUTION 35 (1975) ("It is the compelling-interest rule to which the present Court appears committed."). *See also* CIBA-Geigy Corp. v. Local 2548, United Textile Workers, 391 F. Supp. 287 (D.R.I. 1975).

[254] NATIONAL ADVISORY COMMISSION ON CRIMINAL JUSTICE STANDARDS AND GOALS: CORRECTIONS, standards 2:15, 2:16 (1973).

[255] S. KRANTZ, R. BELL, J. BRANT & M. MAGRUDER, MODEL RULES AND REGULATIONS ON PRISONERS' RIGHTS AND RESPONSIBILITIES, rules IB-3 to IB-12 (1973). *See also* FOX, *supra* note 186, at 166.

[256] Rowland v. Sigler, 327 F. Supp. 821, 827 (D. Neb.), *aff'd sub nom.* Rowland v. Jones, 452 F.2d 1005 (8th Cir. 1971); *accord*, Note, *The Prisoner and the First Amendment: Freedom Behind Bars?*, 4 LOY. CHI. L.J. 109, 135-36 (1973).

essentially to protect particular values. In a range of factual settings, the state's interest in overriding those values will sometimes be great and sometimes be small; these variations are taken into account in the application of the test, rather than through the creation of a new test for each fact pattern that emerges. This point is illustrated by the consistent application of the clear and present danger standard to content-based suppression of speech, regardless of the nature or degree of the state interest asserted as justification for the suppression.[257] If the state interests are the major determinants of the applicable constitutional standard, the very different interests in regulating speech that have surfaced in the cases would have generated different tests, each to be triggered by the assertion of a particular state interest. This has not, however, been the history of content-based suppression of speech. Given, then, that the constitutional values underlying a particular guarantee of individual rights are the primary determinants of the standard by which infringements must be measured, free exercise cases should be approached identically when core free exercise values are present. This is not to say that similar religious claims of prisoners and nonincarcerated citizens will necessarily be finally resolved in the same way. An unconfined Muslim may travel to Chicago to visit Elijah Muhammad, whereas an imprisoned Muslim may not.[258] The standard, however, should be the same in both cases, if the core free exercise values are the same.[259]

That the free exercise values identifiable outside of prison exist with equal intensity in prison can be demonstrated. First, some of the values inherent in the religious liberty guarantee resemble those underlying the free speech guarantee. Among these shared values may be found what Professor Emerson described as the individual's "power to realize his potentiality as a

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[257] *Compare* Pennekamp v. Florida, 328 U.S. 331 (1946) (state interest in citing newspaper for contempt asserted to be protection of its courts from intimidation and coercion; clear and present danger test applied), *with* Dennis v. United States, 341 U.S. 494 (1951) (plurality opinion) (state interest in suppressing advocacy of communist revolution asserted to be self-preservation; clear and present danger test applied).

[258] The test proposed in part IV of this Comment proceeds on the assumption that until a prisoner has completed his sentence, the state may, without violating the free exercise clause, deny him the right to leave prison in order to practice his religion. *See* text accompanying notes 279-92 *infra*.

[259] The present Supreme Court does not accept this approach, as is clear from the free speech cases discussed in parts III-C and III-D. *See* text accompanying notes 198-233 *supra*. Prisoners have instead been accorded diminished first amendment rights on what may be termed a theory of stratified citizenship. *See also* DORSEN, BENDER & NEUBORNE, *supra* note 142, at 1320-1433.

human being."[260] This self-fulfillment value is not only present but is augmented in the prison environment, which offers diminished outlets for expression and generally lacks identity-promotive opportunities. Another value common to free exercise and free speech is their contribution to the advancement of knowledge and understanding. The free and vigorous exchange of ideas and opinions allows an individual to weigh alternatives before deciding how to guide his behavior. This need for information exists in prison, notwithstanding the regimentation of institutional life. If prisoners' decisions about their immediate and future conduct are to be well considered, the exposure to religious beliefs that unimpeded free exercise yields is important.

The religious liberty guarantee secures other values unshielded by the free speech guarantee.[261] The free exercise clause embodies an acceptance of the Apostle Peter's injunction: "We ought to obey God rather than men."[262] This acceptance came about through the convergence in revolutionary America of two distinct lines of church-state theory. From the Protestant dissenters came the principle of uncoerced religious faith, and from the secular humanists came the axiom of uncoerced religious dissent.[263] These two principles fused into the fundamental free exercise value, which Professor Giannella identified as "respect for the inviolability of conscience."[264] The violation of a man's conscience often works an exceptional harm that, unless compellingly justified, amounts to "a moral wrong in and of itself."[265] "Personal alienation from one's Maker, frustration of one's ultimate mission in life, and violation of the religious person's integrity are all at stake when the right to worship is threatened."[266] These considerations also reveal a primary concern for the individual conscience rather than for the group of religious believers.[267]

All this suggests that the essential free exercise values may be found in the prison community. An inmate's conscience is no

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[260] Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877, 879 (1963).

[261] *See generally* G. GUNTHER, CASES AND MATERIALS ON CONSTITUTIONAL LAW 1505-09 (9th ed. 1975).

[262] *Acts* 5:29.

[263] *See generally* P. KAUPER, RELIGION AND THE CONSTITUTION 22-29 (1964).

[264] Giannella, *supra* note 238, at 1386.

[265] Clark, *Guidelines for the Free Exercise Clause*, 83 HARV. L. REV. 327, 337 (1969).

[266] Giannella, *supra* note 238, at 1427.

[267] Pfeffer, *The Right to Religious Liberty*, in THE RIGHTS OF AMERICANS 328 (N. Dorsen ed. 1972).

less inviolable than that of an unconfined citizen, and a violation could well work an even greater harm upon the inmate, whose means of spiritual recovery are limited by the prison environment. Finally, although an inmate's spiritual deprivation may not threaten the religious liberty of unconfined members of his faith, the individualistic focus of the free exercise guarantee opposes justifying the single deprivation on this basis.

An additional free exercise value, rehabilitation, is peculiar to the prison context. Religious expression can significantly aid a prisoner in reevaluating himself and preparing for a return to society.[268] In the lonely, stifling prison environment, an inmate can sometimes find great strength and self-respect in religious practice.[269] The Court of Appeals for the District of Columbia Circuit echoed this sentiment in an opinion requiring prison officials to offer compelling reasons for denying pork-free diets to Muslims:

> Treatment that degrades the inmate, invades his privacy, and frustrates the ability to choose pursuits through which he can manifest himself and gain self-respect erodes the very foundations upon which he can prepare for a socially useful life. Religion in prison subserves the rehabilitative function by providing an area within which the inmate may reclaim his dignity and reassert his individuality.[270]

Although some commentators have expressed skepticism about the rehabilitative function of religion,[271] the possibility of such an effect makes rehabilitation at least a potential value of free exercise in prison. The values of self-fulfillment, the advancement of knowledge, and the inviolability of conscience are equally present inside and outside prison. For this reason, the test by which infringements on free exercise are measured should also be the same.

At the heart of the compelling interest test is the require-

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[268] H. BARNES & N. TEETERS, NEW HORIZONS IN CRIMINOLOGY 492-95 (3d ed. 1959).

[269] *See, e.g.*, THE AUTOBIOGRAPHY OF MALCOLM X, 152-291 (A. Haley ed. 1965).

[270] Barnett v. Rodgers, 410 F.2d 995, 1002 (D.C. Cir. 1969) (footnotes omitted).

[271] *See, e.g.*, R. NEESE, PRISON EXPOSURES (1959):

> Contrary to popular belief—or perhaps wishful thinking—religion plays a very small part in a prison's rehabilitation program. Going to church does not change men from criminals to noncriminals . . . . The automotive mechanic training school is 23 times as successful in keeping men out as both chapels together, and a radio repair school is more than 40 times as successful.

Id. 69.

ment that the state's interest in abridging free exercise be compelling. One commentator has written that this high standard "appears to afford a degree of freedom for the exercise of religion but little short of an impossible holding that the freedom is absolute and subject to no government regulation or restriction."[272] Although religious freedom in prison will be significantly limited even under the compelling interest approach,[273] this standard is nevertheless preferable in order to assure the greatest possible vindication of free exercise rights. The consequences of relaxing the "compelling" standard are illustrated by a reexamination of the *Procunier v. Martinez* test.[274] Like the compelling interest test, the *Martinez* test contains two elements: a requirement that the state interest be of a certain weight, and a requirement that the means used to further this interest be the least drastic means possible. A significant distinction exists, however, in the degree of importance required of the state interest.[275] In contrast to the "compelling" requirement, the "substantial or important interest" requirement of *Martinez* is satisfied by a considerably lesser showing. The leading case finding a "substantial" state interest is *United States v. O'Brien*,[276] the

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[272] L. PFEFFER, GOD, CAESAR, AND THE CONSTITUTION 36 (1975). *But see* Linscott v. Millers Falls Co., 440 F.2d 14 (1st Cir. 1971) (federal labor policy viewed as compelling interest justifying infringement on free exercise); CIBA-Geigy Corp. v. Local 2548, United Textile Workers, 391 F. Supp. 287 (D.R.I. 1975) (state labor policy viewed as compelling interest justifying infringement on free exercise).

[273] *See* text accompanying notes 343-57 *infra*.

[274] *See* text accompanying notes 198-216 *supra*.

[275] The least drastic means elements of the tests are, however, virtually identical. *See* Procunier v. Martinez, 416 U.S. 396, 413-14 (1974); Sherbert v. Verner, 374 U.S. 398, 407 (1963). Thus, both tests contain the latent ambiguity discussed at notes 331-42 *infra* & accompanying text.

[276] 391 U.S. 367 (1968). *See* text accompanying notes 203-16 *supra*. *Martinez* appears at first glance to settle for prison cases the question of the substantiality of asserted state interests: "[Prison officials] must show that a regulation . . . furthers one or more of the substantial governmental interests of *security*, *order*, and *rehabilitation*." 416 U.S. 396, 413 (1974) (emphasis supplied). Yet this listing of substantial state interests, unaccompanied by any discussion, cannot be taken as the Court's considered and exhaustive cataloguing of interests important enough to justify an infringement on first amendment freedoms. *See* text accompanying notes 326-30 *infra*. The *Martinez* list amounts to little more than a statement that any good faith restriction on first amendment rights will satisfy the substantial interest element of the test. This is so because, in a very broad sense, all the abridgments of free exercise discussed in part II-B, text accompanying notes 64-167 *supra*, further the "substantial governmental interest of . . . order . . . ." Without considerable elaboration upon the "order" interest, something the Court fails to provide, no distinction is possible between those characteristics of prison order that are substantial, such as safety, and those that are trivial, such as convenience. Thus, the order interest as presently stated is uninstructive as a guide to substantiality, and the lower courts will have to evaluate asserted governmental interests on a case-by-case basis —unless the *Martinez* Court intended that *all* invocations of the order interest be held

very case that announced the standard. The Court there found a sufficient state interest in the incremental efficiency gained by imposing on draft-eligible males the requirement that they not mutilate or destroy their draft cards, in addition to the existing requirement that they always possess their cards. This interest, held to be "substantial," is not of a "compelling" magnitude. The difference between the two tests was explicitly noted by the Second Circuit in *Kahane v. Carlson*,[277] in which the court queried whether "restrictions on prisoners' First Amendment rights need be justified by an 'important or substantial government interest' or by *the more stringent demands* of a 'compelling government interest.' "[278] Because the compelling interest test is used in non-prison free exercise cases, that approach should also be applied to inmate religious liberty claims.

IV. THE COMPELLING INTEREST TEST: A PROPOSAL

A. *The Scope of the Test*

The compelling interest test developed in the remaining sections of this Comment is intended to govern all prison free exercise cases except those in which a prisoner seeks to be released from prison, even for a brief period of time. When an asserted free exercise claim requires that the prisoner be released, whether to worship at a particular church or religious meeting-place, to proselytize in the community,[279] or to embark on a

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substantial, in which case the test is unacceptable because it fails to exclude from "substantial" status such interests as cost and convenience. *See* text accompanying notes 324-25 *infra*.

[277] 527 F.2d 492 (2d Cir. 1975).

[278] *Id.* at 495 n.6 (emphasis supplied).

[279] State v. Richardson, 130 N.J. Super. 63, 324 A.2d 914 (1974), is apparently the only reported case in which such a claim was asserted. Richardson converted to the Jehovah's Witnesses sect shortly after he was imprisoned, and subsequently filed a motion for reconsideration of his sentence. The court described this motion as follows:

> Instead of a reduction of sentence defendant requests that this court grant him a release from the State Prison one weekend a month "to participate most actively with the rest of the Jehovah's Witnesses out there." His activities in the community would include attendance at religious services at the Kingdom Hall, going from door to door, bringing the good news and "(e)verything the Witnesses do in the field." Most important to defendant is that he be given the opportunity to attend ministry schools and services in the community so that he "could become more enlightened" and "could enlighten the brothers that have been converted here in the prison as to the organization out there." Defendant testified he would restrict his activities to the Trenton, Hopewell or Princeton communities and abide by any restrictions which the court seeks to place on his mobility. He would plan to live with his parents during the weekend releases.

Id. at 66-67, 324 A.2d at 916.

religious pilgrimage, the claim should be regarded as a challenge to the state's right to incarcerate the individual and, for several reasons, should be rejected. Although prison officials may, in their discretion, grant an abbreviated release on religious grounds, this Comment argues that they are not required to do so.[280]

Sharp disagreement exists over how to define the scope of prisoners' constitutional rights. One approach treats prisoners as a group whose rights are effectively forfeited whenever they conflict with the prison regimen. Following that approach, the Court of Appeals for the Second Circuit stated in a 1964 opinion that "[a] prisoner has only such rights as can be exercised without impairing the requirements of prison discipline."[281] The other approach asserts that prisoners retain their constitutional rights, but that those rights must be modified somewhat because of incarceration. This dispute is important and far-reaching;[282] but even the broadest statement of the rights retained by prisoners implicitly excludes the asserted free exercise right to be released for a brief period. In a 1944 opinion, the Court of Appeals for the Sixth Circuit stated: "A prisoner retains all the rights of an ordinary citizen except those expressly, or by necessary implication, taken from him by law."[283] In a case in which release is sought, the asserted free exercise right includes the right—for brief periods—not to be incarcerated, in order that the prisoner may pursue his religion. This subsidiary right, however, is *expressly* taken from each prisoner by law when he is sentenced to a particular institution for a stated period of time. The sentence need not enumerate the activities that the prisoner will be unable to pursue outside the prison during his confinement; it nevertheless expressly negates any right to leave prison

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[280] If prison officials elect to grant a release to one inmate, however, all other inmates must be considered on a nondiscriminatory basis for similar privileges. *See also* Cruz v. Beto, 405 U.S. 319 (1972) (per curiam). In State v. Richardson, 130 N.J. Super. 63, 324 A.2d 914 (1974), a prisoner alleged that other inmates were frequently released for periods of several hours in order to attend religious services outside the institution, and that the equal protection clause of the fourteenth amendment required that he be released for one weekend each month. The court, finding that releases were available only on an occasional basis, and only to those who, unlike Richardson, were classified as "minimum security" prisoners, rejected the equal protection argument. Richardson's challenge to his own classification as a "maximum security" prisoner was dismissed for failure to raise the claim in the proper forum.

[281] Sostre v. McGinnis, 334 F.2d 906, 908 (2d Cir.), *cert. denied*, 379 U.S. 892 (1964); *accord*, Mims v. Shapp, 399 F. Supp. 818, 822 (W.D. Pa. 1975).

[282] *See generally* Hollen, *supra* note 34.

[283] Coffin v. Reichard, 143 F.2d 443, 445 (6th Cir. 1944) (per curiam), *cert. denied*, 325 U.S. 887 (1945).

in order to pursue any such activity. Nor can any distinctions be drawn based on the duration of the requested release. The criminal sentence denies the right to spend Easter Sunday in church[284] as well as the right to make an extended pilgrimage to Mecca. In short, the denial of an asserted free exercise right to be released is entirely consistent with even the broadest reading of prisoners' free exercise rights and of prisoners' retained rights generally.

Expanding the idea that the right to a brief release is analytically indistinguishable from the right not to be incarcerated at all, one could view an asserted right to be released as a demand for exemption from the operation of the particular criminal law violated by the prisoner. The courts have at times passed on such demands in cases in which a defendant asserted religiously motivated objections to the substantive content of a particular law. In nearly every case, the free exercise defense has been rejected.[285] Thus, religious beliefs have not relieved citizens of the obligation to pay federal income taxes,[286] nor exempted them from prohibitions on polygamy,[287] nonregistration with the Selective Service System,[288] counseling draft evasion,[289] manufacturing marijuana,[290] or handling poisonous snakes.[291] It would seem wholly inconsistent with this rejection of religious opposition to the content of particular laws for the courts to recognize and

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[284] *See* Cruz v. Beto, 405 U.S. 319, 324 (Rehnquist, J., dissenting).

[285] *See, e.g.*, Baxley v. United States, 134 F.2d 937, 938 (4th Cir. 1943), *quoted with approval in* Holdridge v. United States, 282 F.2d 302, 311 (8th Cir. 1960). *But see* People v. Woody, 61 Cal. 2d 716, 394 P.2d 813, 40 Cal. Rptr. 69 (1964) (reversing convictions of Navajo Indians who used peyote as part of a religious ceremony), *noted in* 17 STAN. L. REV. 494 (1965).

[286] *E.g.*, Autenrieth v. Cullen, 418 F.2d 586 (9th Cir. 1969), *cert. denied*, 397 U.S. 1036 (1970); United States v. Haworth, 386 F. Supp. 1099 (S.D.N.Y. 1974). *See generally* U.S. CONST. art. I, § 8, cl. 1 ("The Congress shall have Power To lay and collect Taxes . . . ."); *id.* amend. XVI.

[287] Reynolds v. United States, 98 U.S. 145 (1878); *cf.* Davis v. Beason, 133 U.S. 333 (1890) (upholding requirement that voters take an oath disavowing membership in any group that practices bigamy).

[288] *E.g.*, United States v. Bertram, 477 F.2d 1329 (10th Cir. 1973); United States v. Craft, 423 F.2d 829, 833 (9th Cir. 1970) (collecting cases). *See also* United States v. Macintosh, 283 U.S. 605, 623-24 (1931); Selective Draft Law Cases, 245 U.S. 366 (1918).

[289] Baxley v. United States, 134 F.2d 937 (4th Cir. 1943), *quoted with approval in* Holdridge v. United States, 282 F.2d 302, 311 (8th Cir. 1960).

[290] Gaskin v. State, 490 S.W.2d 521 (Tenn.), *appeal dismissed*, 414 U.S. 886 (1973). *But cf.* People v. Woody, 61 Cal. 2d 716, 394 P.2d 813, 40 Cal. Rptr. 69 (1964) (en banc) (reversing convictions of Navajo Indians who used peyote in religious rituals).

[291] Harden v. State, 188 Tenn. 17, 216 S.W.2d 708 (1948); *cf.* State *ex rel.* Swann v. Pack, 527 S.W.2d 99 (Tenn. 1975) (handling of poisonous snakes is subject to abatement as a common law nuisance), *cert. denied*, 424 U.S. 954 (1976).

uphold religious opposition to incarceration, the consequence of violating a criminal law. Unless a free exercise defense to specific substantive offenses is recognized, no prisoner should prevail on the claim that his confinement per se impermissibly infringes his right to the free exercise of his religion.[292]

B. *The Test Defined*

Although the compelling interest test has been endorsed as the preferred standard for prison free exercise claims, this test as typically applied is not without problems in either the prison or the nonprison context. This Comment proposes a refinement that will resolve much of the ambiguity and will make the compelling interest test a more cogent approach to constitutional evaluation.

1. The Compelling Interest Requirement

A subtle ambiguity lies beneath the use that has been made of the compelling interest test in free exercise cases. Relying on *Sherbert* and *Yoder*[293] for guidance, some courts have applied the compelling interest test in such a way as to make the evaluation little more than an ad hoc balancing of the competing interests.[294] This formulation, which usually identifies as relevant considerations the importance of the religious practice to the individual and the impact of that practice on society, requires that the state interest be compelling *relative to* that of the practitioner. This "relatively" compelling approach is not fundamentally distinguishable from an ad hoc weighing of interests, and therefore is subject to the same criticisms directed at the simple balancing test. As discussed earlier,[295] ad hoc balancing is essentially formless: "[B]y hypothesis [it] means that there is no rule to be applied, but only interests to be weighed."[296] Moreover, such an approach is especially inappropriate in prisoners' rights cases, in which the courts tend to be overly deferential to administrative decisions; "it is more than mere coincidence," Professor Nimmer

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[292] This result was reached in what is apparently the only reported case raising the issue. *See* State v. Richardson, 130 N.J. Super. 63, 68, 324 A.2d 914, 916-17 (1974); note 279 *supra*.

[293] *See* text accompanying notes 157-67 *supra*.

[294] *See, e.g.*, Walker v. Blackwell, 411 F.2d 23 (5th Cir. 1969); Marshall v. District of Columbia, 392 F. Supp. 1012, 1013-14 (D.D.C. 1975); Davis v. Page, 385 F. Supp. 395, 399 (D.N.H. 1974).

[295] *See* text accompanying notes 234-43 *supra*.

[296] Nimmer, *supra* note 239, at 939.

has noted, that the state usually prevails when a balancing test is applied.[297]

Another benefit resulting from a rejection of the "relatively" compelling approach is the elimination of the need for inquiry into the religious importance of a particular practice. Even though the courts have traditionally engaged in such an inquiry in free exercise cases, often with great sensitivity,[298] this evaluation should be left to theologians. The constitutional necessity of such an inquiry is doubtful. "The protection the Constitution extends to the exercise of religion does not turn on the theological importance of the disputed activity. Rather constitutional protection is triggered by the fact that it is religious."[299] In addition, the evaluation is of dubious constitutional validity, for any inquiry into the importance of a religious practice necessarily involves the assessment of imponderables, an enterprise falling outside the scope of judicial competence.[300] Religious practices, "like some tones and colors, have existence for one, but none at all for another. They cannot be verified to the minds of those whose field of consciousness does not include religious insight."[301] For a court to enter this area and pronounce certain activities more significant than others is to create an enormous potential for intolerable results. An importance inquiry could lead a court examining Orthodox Judaism to decide in the face of a Talmudic declaration that the laws of God are not hierarchical,[302] that keeping kosher is not as important as lighting the sabbath candles, and that therefore prison officials may restrict the former, but not the latter; or that keeping kosher is

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[297] *Id.* 939-40.

[298] *See, e.g.*, United States v. Kahane, 396 F. Supp. 687 (E.D.N.Y. 1975), *aff'd sub nom.* Kahane v. Carlson, 527 F.2d 492 (2d Cir. 1975) (kosher dietary laws centrally important to Orthodox Judaism); People v. Woody, 61 Cal. 2d 716, 394 P.2d 813, 40 Cal. Rptr. 69 (1964) (use of peyote centrally important to members of Native American Church); State *ex rel.* Swann v. Pack, 527 S.W.2d 99, 105-06 (Tenn. 1975); Davis, *Plural Marriage and Religious Freedom: The Impact of Reynolds v. United States*, 15 ARIZ. L. REV. 287 (1973); 17 STAN. L. REV. 494 (1965) (approval of importance inquiry in *People v. Woody*).

[299] Unitarian Church W. v. McConnell, 337 F. Supp. 1252, 1257 (E.D. Wis. 1972), *vacated and remanded on other grounds*, 416 U.S. 932 (1974).

[300] *Cf.* Serbian E. Orthodox Diocese v. Milivojevich, 96 S. Ct. 2372 (1976) (state court ruling setting aside as arbitrary the defrocking of bishop because violative of Church Penal Code constitutes improper judicial interference in religious controversy); Presbyterian Church v. Mary Elizabeth Blue Hull Memorial Presbyterian Church, 393 U.S. 440 (1969) (reversing settlement of church property dispute in which jury was asked to determine if church had deviated from its original tenets).

[301] United States v. Ballard, 322 U.S. 78, 93 (1944) (Jackson, J., dissenting).

[302] *See* Brief for Appellee at 50 app., Kahane v. Carlson, 527 F.2d 492 (2d Cir. 1975).

not as important to Orthodox Jews as wearing beards is to Muslims, and that therefore prison officials may restrict the practice of the Orthodox Jews, but not that of the Muslims.

Such results are not inconceivable. In *Walker v. Blackwell*,[303] the Fifth Circuit rejected Muslim requests for special meals during the Fast of Ramadan, terming the denials "minor restrictions on the practice of the faith of Islam." No expert testimony was taken on the importance of this practice to the Muslim religion.[304] Although the court attempted to render a reasoned decision, its conclusion that the special meals were of minor importance illustrates the possibility for harm resulting from an importance evaluation. Judicial assessment of religious practices contravenes Mr. Justice Jackson's eloquent statement in the second flag-salute case: "[i]f there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in . . . religion . . . ."[305] To avoid the importance inquiry, and the general lack of standards referred to earlier, the "relatively" compelling interest test should be rejected.[306]

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[303] 411 F.2d 23, 26 (5th Cir. 1969).

[304] *See id.* at 25.

[305] West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943).

[306] This rejection of an importance inquiry does not entail the rejection of an inquiry into the sincerity of a professed religious belief. Because protection of individual conscience lies at the core of the free exercise guarantee, that clause is not violated when a practice interfered with by the state is an insincere one, the deprivation of which cannot work serious injury to the conscience. *See* Giannella, *supra* note 238, at 1417.

The Supreme Court considered this issue in United States v. Ballard, 322 U.S. 78 (1944), a criminal prosecution for fraud in which defendants allegedly used the mails to solicit funds, representing themselves as divine messengers with supernatural powers. The Court held that to evaluate the truth or falsity of these representations would violate the first amendment. Chief Justice Stone, dissenting, saw no constitutional obstacle to examining the defendants' state of mind, "a fact as capable of fraudulent misrepresentation as is one's physical condition or the state of his bodily health." *Id.* at 90 (Stone, C.J., dissenting). Although a sincerity inquiry is not free from difficulty, as Justice Jackson detailed in his dissent, *id.* at 92-95 (Jackson, J., dissenting), such an approach is tenable and has been approved. *See, e.g.*, United States v. Seeger, 380 U.S. 163, 185 (1965); Maguire v. Wilkinson, 405 F. Supp. 637, 640 (D. Conn. 1975); Marcus, *supra* note 141, at 1243-44. *But see* Sherbert v. Verner, 374 U.S. 398, 407 (1963) (dictum); Sheldon v. Fannin, 221 F. Supp. 766, 775 (D. Ariz. 1963).

A sincerity inquiry is especially important in prison free exercise cases because the bleakness of institutional life may create an incentive falsely to allege religious motivation for acts, such as growing a beard, that will be tolerated only if done in pursuit of a religious belief held in good faith. This hypothetically greater incentive to fabricate religious beliefs supports a more exacting scrutiny of prisoner sincerity than that applied in a nonprison case, in which less incentive to be insincere may exist. The scrutiny to which a prisoner's sincerity is exposed, however, must not be so extreme as to require an impossible showing. Because no precise limitation can be placed on the degree of severity permissible in scrutinizing a claim, a procedural device is perhaps appro-

The alternative to the "relative" standard is an "absolutely" compelling interest test fashioned according to the "definitional balancing" approach to the first amendment.[307] Professor DuVal has distinguished the definitional balancing approach from the ad hoc balancing approach:

> [D]efinitional balancing seeks to formulate rules for differentiating between protected and unprotected [religious practices]. In formulating this distinction, the interests in freedom of [religious practices] must be weighed against competing governmental interests in much the same manner as under the ad hoc balancing test. The outcome of the process, however, is a rule which governs not only the case before the court, but future cases as well . . . . Moreover, the adoption of a rule will make it easier for the courts to resist popular pressures for suppression in particular cases.[308]

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priate. A comparison of two cases in which the sincerity of American Indian inmates claiming a religious right to wear long hair was tested suggests that placing the burden of proof on the prison officials is a desirable prophylactic. In United States *ex rel.* Goings v. Aaron, 350 F. Supp. 1 (D. Minn. 1972), the district court, apparently placing the burden of proof on the plaintiff inmate, held that his free exercise claim was not sincere despite his choice, only 55 days before his release, to undergo punitive isolation rather than cut his hair. Citing evidence introduced by prison officials, such as the fact that "[n]o other Indians at the Institution are motivated by religious customs the way he [plaintiff] claims to be," the judge doubted that, in the eight months since plaintiff made a vow at his father's grave to pursue the Indian faith, "the petitioner has become so devoutly religious . . . that he cannot forego growing his hair to the desired length for another brief period." *Id.* at 4-5. This unfortunate conclusion, attributable to the court's undisguised suspicion of the plaintiff's motives, would have been more easily reversible as "clearly erroneous" had the burden of proof been on the prison officials, who evidently submitted no substantial evidence of insincerity. In 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), however, after considering extensive evidence concerning plaintiff's past religious activities (raised in a Catholic orphanage) and present spiritual practices (follower of Native American Church), Chief Judge Hanson concluded that "[a]t best, the evidence on the issue of plaintiff's sincerity is somewhat contradictory. . . . The Court can never know with assurance whether Teterud is sincere or insincere. The defendants, however, have not presented sufficient evidence to show that Teterud's beliefs are not made in good faith." *Id.* at 157. Placing the burden of proof on the prison officials, the court thus found plaintiff's free exercise claim to be sincere. Because no Supreme Court authority exists on the allocation of the burden of proof in a sincerity hearing—the Court did not address this issue in *Ballard*—the question is unresolved, and this Comment endorses the *Teterud* approach.

[307] The definitional balancing-versus-ad hoc balancing controversy has been discussed too fully elsewhere to warrant extended treatment here. *See, e.g.*, T. EMERSON, TOWARD A GENERAL THEORY OF THE FIRST AMENDMENT (1966); Ely, *supra* note 184; Frantz, *The First Amendment in the Balance*, 71 YALE L.J. 1424 (1962); Nimmer, *supra* note 239.

[308] DuVal, *Free Communication of Ideas and the Quest for Truth: Toward a Teleological*

Proponents of definitional balancing cite the Supreme Court's decisions in *New York Times v. Sullivan*[309] and *Brandenburg v. Ohio*,[310] as models of this approach.[311] In those cases the Court defined two categories of expression—in *New York Times*, speech that is knowingly or recklessly false and defamatory, and in *Brandenburg*, speech that is "directed to" imminent lawlessness—and held those categories to be unprotected by the first amendment. The most prominent advantage of this approach is a reduction of the need to balance on a case-by-case basis. The necessity of evaluating each case on its facts is not obviated: the determination whether a given instance of expression is within the protected category is, and should be, guided by the particular circumstances of the case. Additionally, the definition of the categories in the first instance involves a general balancing of interests.[312] This approach is nevertheless superior to the ad hoc approach.

In the free exercise area, the Supreme Court has apparently combined the two approaches. The test emerging from *Sherbert* and *Yoder*[313] has been stated as follows:

> [I]f the individual demonstrates that his actions are sincerely religious and have been interfered with as a result of a state regulation, the state must demonstrate that it has a compelling interest in the regulation, an interest which could not be promoted by any less restrictive means. If the state makes that demonstration, it prevails in the case; if not, it loses.[314]

This test has an ad hoc balancing dimension in that the court must determine in each case whether a given state interest is compelling. The Court has not, however, rested on an entirely situational determination, because it has defined certain state interests—such as administrative convenience and the detection of fraudulent claims—as not compelling in any case.[315] This

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Approach to First Amendment Adjudication, 41 GEO. WASH. L. REV. 161, 179 (1972) (footnotes omitted).

[309] 376 U.S. 254 (1964).

[310] 395 U.S. 444 (1969) (per curiam).

[311] *See, e.g.*, Ely, *supra* note 184; Nimmer, *supra* note 239.

[312] *See* DuVal, *supra* note 308, at 179.

[313] *See* text accompanying notes 157-67 *supra*.

[314] Marcus, *supra* note 141, at 1242.

[315] Sherbert v. Verner, 374 U.S. 398 (1963); *see* cases cited note 324 *infra*. In the religion cases, unlike the expression cases, the Court has classified the state's interest, rather than the individual's activity. This shift in focus is inconsequential in terms of first amendment definitional balancing, for its purposes are equally furthered by either emphasis.

Comment proposes that this classification process be completed and particularized in the prison context in order to formulate a definitional balancing test in which certain state interests generally are compelling, and others generally are not.[316] Such a classification system is more protective of first amendment interests than the previously suggested alternatives.[317]

The proposed categorization of state interests should be guided by the principle that a prisoner retains all rights except those that are "expressly, or by necessary implication, taken . . . by law."[318] Criminal laws expressly provide only for confinement. Keeping the inmate confined, then, is the fundamental state interest that must be classified as compelling[319] because of its centrality to the social purposes attributed to incarceration. Other prison interests can be similarly classified. State interests commonly advanced to justify restrictions on religious practice can be placed in one of two categories: 1) those interests flowing from the purposes of incarceration itself; and 2) those interests flowing from the need to administer the prison in an orderly manner.[320]

The first category of interests is comprised of restraint, deterrence, and rehabilitation—generally considered to be the contemporary purposes of the American penal system.[321] Restraint

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[316] Even if a restriction on inmate free exercise is justified by a compelling state interest, the restriction must be the least drastic means possible to satisfy the state's interest. *See* text accompanying notes 331-42 *infra*.

[317] One commentator has suggested a definitional balancing approach to free exercise adjudication that resurrects the belief-action categories of Reynolds v. United States, 98 U.S. 145 (1878). Note, *The Amish Exception: A Constitutionally Compelled Exemption?*, 34 U. PITT. L. REV. 274 (1972). This distinction, which would categorize belief as absolutely protected and practice as reasonably regulable, is both gratuitous—because belief is of necessity unregulable—and weak—because reasonableness is too ambiguous a standard of review. *See* text accompanying notes 217-33 *supra*.

[318] Coffin v. Reichard, 143 F.2d 443, 445 (6th Cir. 1944), *cert. denied*, 325 U.S. 887 (1945).

[319] State v. Cubbage, 210 A.2d 555, 565 (Del. Super. Ct. 1965):

> The question is—what rights should be restricted or even taken away entirely? Our statutes restrict those rights demanding of their very nature free movement of the body. Thus it would seem that the primary punishment of a prison is movement. A natural consequence would seem to be that the prisoner is entitled to those same rights as any other citizen which are not in conflict with the order of the court restricting the free movement of the body.

[320] For an analogous breakdown of prison justifications for restricting first amendment freedoms, see Note, *The Right of Expression in Prison*, 40 S. CAL. L. REV. 407, 410-11 (1967).

[321] *See* E. SUTHERLAND & D. CRESSEY, CRIMINOLOGY 496-521 (9th ed. 1974). For a survey of the development of modern penal theory, see H. BARNES & N. TEETERS, NEW HORIZONS IN CRIMINOLOGY 285-601 (3d ed. 1959). *See also* S. RUBIN, THE LAW OF CRIMINAL CORRECTION 735-64 (2d ed. 1973). This Comment accepts prevention as the animating principle of American penology. *See generally* Dershowitz, *The Origins of Pre-*

is the isolation of the inmate from society for its protection; the state interest in prison security adequate to prevent escapes is correlative to the restraint interest. A necessary corrollary to the restraint interest is the concern for safety. Protecting institutional personnel and inmates from violent prisoners constitutes an interest of the same magnitude as restraint. Deterrence is the discouragement of criminal activity through exposure to the undesirable life of the confined. Rehabilitation is ideally a resocialization of the inmate. Given the existence of a prison system, all three are compelling state interests. Each is a central purpose of incarceration, and each arises by necessary implication from the criminal law's sentence of confinement.

When a prison contains detainees awaiting trial as well as convicted offenders, the state's interests in regard to each group must be determined independently. Rehabilitation and deterrence are not legitimate interests if a prisoner has not been convicted.[322] It has been held that "[t]he First Amendment rights of a detainee may be limited only to the extent necessary to ensure his appearance at trial and to assure the security of the institution."[323] Thus, although the proposed test is fully applicable to free exercise claims raised by pretrial detainees, a considerably narrower range of asserted state interests will justify restrictions on detainees' free exercise rights than will justify identical restrictions on the rights of convicted offenders.

The second category of state interests centers upon the administrative needs of the prison community. These interests relate less directly to the sentence of confinement than do the interests of restraint, deterrence, and rehabilitation. Far from being central to the purpose of incarceration, the administrative interests—considerations such as economy and convenience—arise incidentally and are largely indifferent to the purposes of the prison system. They exist whenever a substantial group of people are collected in one place, and not because the collection

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ventive Confinement in Anglo-American Law (pts. 1-2), 43 U. CIN. L. REV. 1, 781 (1974). Retribution is not considered here as a modern purpose of incarceration. *But see* Gregg v. Georgia, 96 S. Ct. 2909, 2930 (1976); H.L.A. HART, PUNISHMENT AND RESPONSIBILITY 230-37 (1968); I. KANT, THE METAPHYSICAL ELEMENTS OF JUSTICE 101, 131-33 (J. Ladd trans. 1965).

[322] *E.g.*, Wilson v. Beame, 380 F. Supp. 1232, 1237 (E.D.N.Y. 1974) (collecting cases).

[323] Giampetruzzi v. Malcolm, 406 F. Supp. 836, 843 (S.D.N.Y. 1975); *accord*, Jones v. Wittenberg, 323 F. Supp. 93, 99-100 (N.D. Ohio), *after hearing on the issue of relief*, 330 F. Supp. 707 (N.D. Ohio 1971), *aff'd sub nom.* Jones v. Metzger, 456 F.2d 854 (6th Cir. 1972); *see* Rhem v. Malcolm, 507 F.2d 333, 336 (2d Cir. 1974), *on remand*, 389 F. Supp. 964 (S.D.N.Y.), *aff'd*, 527 F.2d 1041 (2d Cir. 1975).

has been undertaken for certain social purposes. Economy and convenience have generally been denied compelling status by the Supreme Court in nonprison cases,[324] and therefore they should not be classified as compelling in prisoner free exercise cases.[325] To summarize, if a state interest assertedly justifying a restriction on religious practices relates directly to one of the central purposes of incarceration, that interest is compelling; if, on the other hand, the interest is merely administrative, it is not compelling.

The refined compelling interest prong differs not only from the "relative" compelling interest test—in that the refined model rejects ad hoc balancing in favor of a definitional balancing approach—but also from the substantial interest element of the *Martinez* test, which at first glance also appears to adopt a definitional balancing approach in the statement that "[p]rison officials . . . must show that a regulation . . . furthers one or more of the substantial governmental interests of security, order, and rehabilitation."[326] Despite this list of substantial interests, the suspicion persists that the *Martinez* Court was not experimenting with definitional balancing theory. To the extent that the designation of security, order, and rehabilitation as "substantial" interests means that they are substantial *relative to* the first amendment claim to uncensored prisoner correspondence at issue in *Martinez*, a reading suggested by the Court's treatment of *Martinez* in *Pell v. Procunier*,[327] the opinion is not meaningful definitional balancing and is at least in part vulnerable to the numerous criticisms of an ad hoc approach.

Furthermore, even if the *Martinez* Court was engaging in definitional balancing, the refined compelling interest element differs from the *Martinez* test in regard to which state interests it identifies as constitutionally sufficient. The proposed test classifies as compelling three primary interests: restraint, and its

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[324] *See, e.g.*, Memorial Hosp. v. Maricopa County, 415 U.S. 250 (1974); Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632 (1974); Frontiero v. Richardson, 411 U.S. 677 (1973); Stanley v. Illinois, 405 U.S. 645 (1972); Shapiro v. Thompson, 394 U.S. 618 (1969). *But cf.* Dandridge v. Williams, 397 U.S. 471 (1970) (saving money a legitimate and rational state interest in the context of a welfare program).

[325] *See* Fox, *supra* note 186, at 170. *But see* Walker v. Blackwell, 411 F.2d 23 (5th Cir. 1969); Cochran v. Sielaff, 405 F. Supp. 1126 (S.D. Ill. 1976) (economy a compelling interest in prison diet case).

[326] 416 U.S. 396, 413 (1974); *see* text accompanying notes 198-216 *supra*.

[327] 417 U.S. 817 (1974). *Pell v. Procunier* was the first prisoners' rights case decided by the Supreme Court on first amendment grounds. The *Pell* Court did not rely heavily on *Martinez*, and the use it did make of that opinion is not at all suggestive of definitional balancing. *See also* text accompanying notes 219-33 *supra*.

corollaries of security and safety, deterrence, and rehabilitation. It classifies as noncompelling such administrative interests as economy and convenience. *Martinez*, on the other hand, may be read as categorizing the interests of security, order, and rehabilitation as substantial. The principal deficiency of this list is the possibility that the state interests of economy or convenient administration—interests generally rejected under the proposed test—will be viewed as substantial under the rubric of promotion of prison order. Nearly all good faith measures of prison administrators are taken to promote institutional order. For example, a regulation prohibiting the rescheduling of dining hours for special groups or a rule banning the consumption of food in cells would further the "substantial governmental interest of . . . order" and thereby satisfy the first element of the *Martinez* test despite the impossibility of celebrating the Muslim Fast of Ramadan under such a regime;[328] this regulation would fail the first prong of the proposed test. Thus, even if *Martinez* is read as employing a definitional balancing test, the proposed compelling interest test is more demanding.[329]

The Court's failure to elaborate on the three interests raises an additional problem with the *Martinez* test. Absent some discussion of the security, order, and rehabilitation interests, the attempted definitional balance is deprived of much of the legitimacy that comes from a reasoned argument that only these interests are categorically acceptable. The refined compelling interest test, on the other hand, attempts to avoid these difficulties by discussing the nature and scope of its categories and testing their adequacy by application.[330]

2. The Least Drastic Means Requirement

Even if a prison restriction on the free exercise of religion survives the compelling interest element, it still must be subjected to least drastic means analysis. This component of the compelling interest test has long been recognized when constitutional liberties are at stake;[331] the Court stated in *Sherbert* that if the state were to establish grave abuses, endangering compelling

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[328] *See* text accompanying notes 64-85 *supra*. Such a regulation would probably also meet the second prong of the *Martinez* test. *See* note 336 *infra*.

[329] *Cf.* Kahane v. Carlson, 527 F.2d 492, 495 n.6 (2d Cir. 1975) (compelling interest test characterized as imposing "more stringent demands" than *Martinez* substantial interest approach).

[330] *See* text accompanying notes 343-57 *infra*.

[331] *See, e.g.*, Kusper v. Pontikes, 414 U.S. 51, 58-59 (1973); Shelton v. Tucker, 364 U.S. 479, 488 (1960).

interests, still "it would plainly be incumbent upon [the state] to demonstrate that no alternative forms of regulation would combat such abuses without infringing First Amendment rights."[332] Several prisoners have prevailed in religious liberty cases on the ground that the challenged regulation was unnecessarily restrictive of free exercise rights.[333] Despite its frequent and successful use, the least drastic means test has always displayed what Professor Ely calls "a latent ambiguity in the analysis,"[334] an ambiguity nowhere discussed in the case law. The least drastic means requirement can be read two ways. Narrowly construed, the requirement merely insists that there be no less restrictive alternative capable of furthering the state's interest as much as it is furthered by the challenged means—the "efficiency" approach. More broadly construed, the requirement permits no less restrictive alternatives capable of serving the state's interest sufficiently—the "sufficiency" approach. The "efficiency" approach, although endorsed in commentary and apparently used in cases,[335] should be rejected as too weak, for it would permit the use of any means yielding maximum efficiency: by definition, all other means would fail the requirement that they be as efficient as the challenged means. Thus, no matter how drastic, the most efficient means would be allowable, and only those means that exceed the point of maximum efficiency and gratuitously restrict free exercise would be unconstitutional. Because regulations that in this way outrun the interests they are designed to serve are rarely formulated,[336] the "efficiency" ap-

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[332] Sherbert v. Verner, 374 U.S. 398, 407 (1963).

[333] *See* Teterud v. Burns, 522 F.2d 357 (8th Cir. 1975); Wilson v. Beame, 380 F. Supp. 1232 (E.D.N.Y. 1974).

[334] Ely, *supra* note 184, at 1484.

[335] *See, e.g.*, United States v. O'Brien, 391 U.S. 367 (1968); Struve, *The Less-Restrictive-Alternative Principle and Economic Due Process*, 80 HARV. L. REV. 1463 (1967).

[336] *But see* Procunier v. Martinez, 416 U.S. 396 (1974), discussed at text accompanying notes 198-216 *supra*. That the *Martinez* test, like those applications of the unrefined compelling interest test discussed above, apparently uses the "efficiency" approach is worth noting because the proposed "sufficiency" approach to the least drastic means requirement in this way differs not only from the conventional compelling interest test but also from the *Martinez* standard. Two reasons support the conclusion that *Martinez* involves an "efficiency" interpretation of the least drastic means requirement. First, *Martinez* explicitly derives its test from *O'Brien*, a case that rather clearly envisions an efficiency approach. *See* Ely, *supra* note 184, at 1484-86; text accompanying notes 198-216 *supra*. Second, because of the broad censorship scheme involved in *Martinez*, it is one of the rare cases in which an "efficiency" approach could invalidate a regulation on the ground that it exceeds maximum "efficiency." *See* text accompanying notes 198-216 *supra*. If, as seems likely, the least drastic means element of *Martinez* is an "efficiency" test, then its success in the peculiar circumstances of that case is not good cause for preferring that approach to the proposed "sufficiency" test. *Compare*

proach is of little help.

On the other hand, different problems inhere in the "sufficiency" approach to the less drastic means test. This approach, apparently applied by the Supreme Court in the old handbill cases,[337] has been challenged by at least one commentator as being beyond the capabilities of the judiciary and inconsistent with the separation of powers doctrine: "Since the Court lacks the competency to measure the relative efficiency, cost, and repressive effect of alternative measures, consideration of less drastic means cannot provide any form or structure to [first amendment analysis]."[338] In addition, the "sufficiency" approach involves the courts in balancing "at the margin," comparing the incremental furtherance of the asserted state interest with the incremental restriction on free exercise. Such an evaluation is at least in part plagued by the same infirmities present in all ad hoc weighing of interests.[339]

To minimize these difficulties with the "sufficiency" approach, this Comment proposes the erection of a rebuttable presumption that prison officials, even after establishing a compelling justification for a restriction on free exercise, can afford to exempt religious objectors from that regulation and instead subject them to less drastic, albeit less efficient, regulation. Only when the state can convince the court that a regulation incorporating such an exemption will not sufficiently further the compelling interest at stake will the presumption be successfully rebutted. The precise point at which rebuttal occurs cannot, of course, be identified a priori; and thus a measure of situational evaluation inheres in this approach. Nevertheless, the presumption serves to mitigate the formlessness of a "sufficiency" approach to the least drastic means test. Furthermore, this approach has been advocated in commentary[340] and sensibly applied in at least one major case. *In re Jenison*,[341] which first

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Schneider v. State, 308 U.S. 147 (1939), *with* United States v. O'Brien, 391 U.S. 367 (1968).

[337] *E.g.*, Schneider v. State, 308 U.S. 147, 162 (1939) (first amendment requires toleration of some litter); Hague v. Committee for Indus. Organization, 307 U.S. 496 (1939).

[338] 78 YALE L.J. 464, 474 (1969). *But see* West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 640 (1943) ("[W]e act in these matters not by authority of our competence but by force of our commissions.").

[339] For a discussion of ad hoc balancing, see text accompanying notes 234-43 *supra*.

[340] *See, e.g.*, Clark, *Guidelines for the Free Exercise Clause*, 83 HARV. L. REV. 327 (1969); Giannella, *supra* note 238, at 1389-90.

[341] 265 Minn. 96, 120 N.W.2d 515, *vacated and remanded*, 375 U.S. 14 (remanded for consideration in light of Sherbert v. Verner, 374 U.S. 398 (1963)), *on remand*, 267 Minn. 136, 125 N.W.2d 588 (1963) (per curiam).

reached the Minnesota Supreme Court prior to the 1963 decision in *Sherbert*, involved a Jehovah's Witness who took literally the Biblical command "Judge not lest ye be judged" and refused to serve as a juror. Her conviction for contempt of court was initially affirmed by the Minnesota Supreme Court. After that decision was vacated and remanded for reconsideration in light of *Sherbert*, the Minnesota court ruled that the state had the burden of demonstrating that it could not afford a religious exemption from jury duty for religious objectors. The state's burden was not met, and the conviction was reversed. Although not directly supportive, *Jenison* suggests the viability of the proposed religious exemption approach to the least drastic means requirement.[342]

C. *The Test Applied*

The proposed compelling interest test can be applied with relative ease in the diet and grooming cases.[343] The prison in-

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[342] The presumption of an affordable religious exemption is less stringent than an unmodified "sufficiency" approach to the least drastic means test, for the presumption, if unrebutted, will result only in an exemption for religious objectors whereas an ad hoc sufficiency approach could result in the invalidation of the entire regulatory scheme. Even this milder version of the least drastic means test might be criticized because it creates a special privilege for religious practitioners in violation of notions of equality of treatment. *See* Fernandez, *The Free Exercise of Religion*, 36 S. CAL. L. REV. 546, 564-66 (1963). *But see* text accompanying notes 40-41 *supra*.

The use in *Jenison* of a religious exemption analogous to the rebuttable presumption scheme proposed by this Comment suggests that the entire compelling interest test as outlined here can and should be adapted to nonprison free exercise claims. Such an adaptation is required by the identity of religious liberty values inside and outside prison, *see* text accompanying notes 60-71 *supra*, and should (1) apply the presumption of an affordable religious exemption discussed above, because this approach to the least drastic means requirement is equally suited to prison and nonprison cases; and (2) evolve a classification scheme that would categorize each nonprison state interest as either generally compelling or generally noncompelling. Because the nonprison cases arise in contexts more variable than the prison environment, classification of all the state interests that might be advanced is considerably more difficult, if possible at all, than categorization of the limited number of interests that arise in a prison context. Among the legitimate state interests often asserted as justifying abridgments of free exercise, administrative convenience should be considered noncompelling. *See* cases cited note 324 *supra*. By contrast, the state's interest in raising an army in time of war should be considered categorically "compelling," as the Supreme Court implicitly held in Gillette v. United States, 401 U.S. 437, 461 (1971), a conscientious objector case. Classifying the state interest in raising an army in time of war as categorically compelling would not, however, resolve a free exercise attack on conscription; the state would still have to rebut the presumption of an affordable religious exemption in order to impose constitutionally a selective service system that does not exempt conscientious objectors to war. *But see* Selective Draft Law Cases, 245 U.S. 366 (1918). Further classification should begin with the two poles here identified and definitionally balance from those points to the other commonly asserted state interests.

[343] The refined test is here applied only to the grooming and diet cases because (1)

terests offered as justifications for denying kosher diets to Orthodox Jewish inmates and pork-free diets to Muslim prisoners are budgetary contraints and administrative convenience.[344] Neither of these interests is considered compelling under the proposed test.[345] Therefore, without further inquiry, these restrictions on religious dietary practices are unconstitutional abridgments of the free exercise guarantee. Similarly, the refusal of prison administrators to accommodate the special needs of Muslims observing the December Fast of Ramadan is unjustifiable because it furthers only the prison interest in economical and convenient administration of the dining program. Whether such accommodation is arranged by providing Muslims with meals in their cells, or by scheduling all prisoners' evening meals after sunset during December, when sunset occurs rather early, is a matter of official discretion. Accommodation, however, is a matter of constitutional imperative.

As is clear from its application in the Ramadan cases, the proposed test differs from both the "relatively" compelling interest test and the *Martinez* approach. Under the *Martinez* analysis, the asserted prison interest in administrative convenience would probably be considered "substantial" because it furthers the state interest in order.[346] And vindication of the free exercise claim under the least drastic means element of *Martinez* would be problematic given the "efficiency" approach apparently contemplated in the second stage of the *Martinez* test.[347] The "relatively" compelling interest test similarly cannot be relied on to insure that Muslim prisoners will have the opportunity to observe Ramadan properly. Under the "relatively" compelling interest test, which is essentially an ad hoc balancing approach,[348] one court found that the state interests in economy and convenience are compelling *relative to* the "minor" free exercise abridgment produced by regulations making the celebration of Ramadan impossible.[349] Once such regulations are found to be justified by a compelling state interest, they then need only

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the grooming and diet cases implicate nearly the entire range of commonly asserted state interests, thereby suitably challenging and demonstrating the proposed test; and (2) the grooming and diet issues have been most recently and most inconsistently litigated. *See* text accompanying notes 1-35 *supra*.

[344] *See* text accompanying notes 64-85 *supra*.

[345] *See* text accompanying notes 318-25 *supra*.

[346] *See* text accompanying notes 326-30 *supra*.

[347] *See* note 336 *supra*.

[348] *See* text accompanying notes 298-306 *supra*.

[349] *See* Walker v. Blackwell, 411 F.2d 23, 25-26 (5th Cir. 1969); text accompanying notes 303-04 *supra*.

pass the weak "efficiency" reading of the least drastic means test to be upheld under the "relatively" compelling interest test. The proposed approach, in contrast to the *Martinez* and "relatively" compelling interest tests, would clearly invalidate these blanket restrictions on the observance of Ramadan.

The grooming cases require a slightly more involved analysis. The prison interests commonly offered in support of regulations governing personal appearance are security, identification, and hygiene: long hair and beards threaten security by facilitating the concealment of contraband and weapons, thwart identification efforts by enabling inmates to change their appearance, and jeopardize hygiene because prisoners cannot keep long hair and beards clean. The hygiene interest may be dismissed as administrative and therefore not compelling, absent conditions so unhealthy as to threaten other prisoners. If the wearing of long hair and beards by religiously motivated inmates results in a diminution of cleanliness in the institution—a proposition that is dubious given, for example, the injunction of the Muslim religion that its practitioners wash five times daily[350]—then a little less cleanliness is the sacrifice required by the first amendment.

The security interest is classified as compelling,[351] thereby triggering the least drastic means element of the proposed test. The state must then rebut the presumption that its interest in the detection of contraband and weapons cannot be served by exempting religious objectors from the appearance regulations and imposing on them instead an alternative burden not restrictive of free exercise. Along with the periodic body searches to which prisoners are subjected because contraband is most easily concealed on the body or in clothing, a simple hair or beard search of religious objectors could be conducted simultaneously.[352] The state should thus not be allowed to rebut successfully the presumption of an affordable religious exemption.

Partial rebuttal remains a theoretical possibility. The state conceivably could persuade the court that a beard search will not

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[350] *See* Brief for Appellants at 3, Burgin v. Henderson, 536 F.2d 501 (2d Cir. 1976).

[351] *See* text accompanying notes 318-23 *supra*.

[352] This reasoning could also be urged in calling for a complete abandonment of appearance regulations. Such an attack could be brought by nonreligious prisoners on a right-to-privacy theory and could succeed for the reasons stated above. A court might hold, however, that the free exercise claim is weightier than the privacy claim, and that although the former succeeds, the latter must fail. An evaluation of this result is beyond the scope of this Comment. *See* text accompanying notes 40-41 *supra*.

be sufficiently prophylactic unless the beards are kept reasonably short. If such a showing were made,[353] the presumption of an affordable religious exemption would be rebutted to an extent, and the regulation of beards would have to be modified but not discontinued. A degree of ad hoc balancing inheres in the notion of a partial rebuttal; as discussed above,[354] the presumption in favor of a religious exemption is not altogether free of situational evaluation. The presumption approach to the least drastic means test nonetheless would invalidate a total ban on wearing long hair and beards insofar as it rested on the state's interest in security. In this way, the proposed standard differs from the "relatively" compelling interest test and the *Martinez* test, both of which apparently include the "efficiency" reading of the least drastic means requirement.[355] Under the "efficiency" approach a court might be persuaded that beard and hair searches do not further the prison interest in security as efficiently as a total ban on long hair and beards, because of the remote chance that contraband or a weapon will go undetected—a chance that is eliminated under a regime of no beards or long hair. Consequently, no means less drastic than total prohibition exist when this approach is applied. Under the presumption approach, which is essentially a "sufficiency" reading of the least drastic means element,[356] the court should find that beard and hair searches, although perhaps not as effective as a total ban, further the state's interest in security enough to constitute a viable and less restrictive means. The state accordingly would fail to rebut completely the presumption of an affordable religious exemption from the prohibition of long hair and beards because an alternative scheme exists for sufficient vindication of the security interest.

Similarly, the identification interest cannot support a total prohibition against wearing long hair or beards. Although primarily an administrative concern, prisoner identification coincides sufficiently with the security interest to be classified as

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[353] The suggestion that long beards could not practically be searched is presented *arguendo*. The rationality of the position that weapons and contraband are more easily concealed in longer beards is doubtful because the size of items that are concealable at all is so small that they would likely be equally concealable in either long or short beards. A regulation allowing beards provided they are kept short would infringe upon the religious practices of Orthodox Jews, who do not shave at all, but not those of Muslims, who simply do not shave entirely. This distinction might result in an equal protection problem.

[354] *See* text accompanying notes 331-42 *supra*.

[355] *See id.*

[356] *Id.*

compelling. The identification interest, however, like the security interest, probably fails the least drastic means requirement of the proposed test. Religious objectors could be exempted from appearance regulation and rephotographed regularly for identification purposes as their appearances change. This rephotographing scheme should prove an effective means of monitoring appearance, because prisoners, deprived of razors and other such implements, usually cannot secretly and quickly alter their appearances by cutting an identifying beard or braid.[357] The major opposition to such a policy would be that the plan is costly and inconvenient; this opposition, of course, is not compelling and therefore could not rebut the presumption of a free exercise exception. Because the three asserted justifications fail the proposed test, prohibitions on wearing beards or long hair should be held violative of the free exercise clause as applied to religious prisoners.

V. CONCLUSION

Prison free exercise cases stand at the junction of two antagonistic lines of Supreme Court authority. In nonprison free exercise cases, the Court has displayed a special solicitude for those who obey the commands of their faith. In most prisoners' rights cases, the Court has shown considerably less solicitude for those who must daily obey the commands of prison authorities. This Comment, after surveying existing results and evaluating current approaches, has proposed that the same test be applied in all free exercise cases because the values protected by the religious liberty guarantee exist with equal intensity on both sides of prison walls. This test, the compelling interest standard, has been refined to comprise a definitional balancing approach with a least drastic means element. This classification scheme, and the accompanying presumption in favor of a religious exemption from regulations enacted in furtherance of a compelling interest, should promote simplicity of application, clarity and consistency of reasoning, and, most importantly, fairness of result. Perhaps if such careful attention is more often given to the free exercise claims of prisoners, the words of Justice Field in *Ho Ah Kow* will ring true:

[357] If prison officials can convince a court that, despite security precautions, inmates so often possess the means to alter their appearance quickly and drastically if allowed to wear a beard or a long braid, the presumption in favor of a religious exemption may be somewhat rebutted. A total prohibition, however, would not be justified even on this showing, because short beards or braids would still pose a significantly smaller problem.

> It is certainly something in which a citizen of the United States may feel a generous pride that the government of his country extends protection to all persons within its jurisdiction; and that every blow aimed at any of them, however humble, come from what quarter it may, is "caught upon the broad shield of our blessed constitution and our equal laws."[358]

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[358] 12 F. Cas. 252, 256 (C.C.D. Cal. 1879) (footnote omitted).