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> [I]t seems apparent that very considerable gains had been made in terms of human decency, that men had come to be animated by an increasing sensitivity to human pain and suffering. This significant and obscure development . . . contributed most immediately and notably to the rise of religious toleration. It might be suggested, indeed, that the history of culture can in one sense be interpreted in terms of the rising and falling curve of man's sensitivity to cruelty and of his reaction to needless suffering. There was in religious persecution a very considerable and very ugly psychological and moral element which must be described as sadism. Innate barbarism relieved and justified itself by the infliction of suffering for what was conceived as a moral end. . . . The mass of men in England came to make a very sharp and important distinction between punishment imposed for the judicially demonstrable fact of crime and the infliction of punishment for the retention of opinion. This must be regarded as one of the most significant cultural gains in human history. These gains of the human race are painfully and slowly attained and they may be lost before the mass of men realize that they are threatened. Brutality and sadism are deeply rooted in man's nature. They are restrained by no surer sanction than a decent attitude toward the fact of difference, which man's biological nature apparently teaches him to abhor but which his history has taught him he must respect in the interest of sheer survival.[1]

[1] 4 JORDAN, THE DEVELOPMENT OF RELIGIOUS TOLERATION IN ENGLAND 476-77 (1940), as quoted in KURLAND, RELIGION AND THE LAW 16-17 (1962).

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THE POET PERCY BYSSHE SHELLEY in his elegy on the death of John Keats devoted many stanzas to the problem of the One and the Many.[2] To him unity and plurality were so fascinating that he could not resist speculating on it even as he mourned his friend. Like Shelley, our society has been preoccupied with the political, legal and social aspects of the One and the Many.[3] But unlike Adonais, in society the One remains and so does the Many. The problem is to reconcile them.

We describe ourselves as a "pluralistic society"—a shorthand expression for our continuing struggle to accommodate national unity with the rights of the plurality of our constituent parts, be they individuals, states, religious groups or political dissenters. The problem partakes conceptually of Shelley's soaring meters and expresses itself in such pragmatic situations as the power of a municipality to enter a private dwelling as a health measure to control the accumulation of filth and vermin.[4] From pests to poetry the pluralistic accommodation cuts across all aspects of our national life.

Nowhere is this accommodation more poignant than in the constitutional struggle over the religious settlement. Thomas Jefferson constructed the metaphorical "wall of separation"[5] and at the same time laid the foundation for a School of Divinity at the University of Virginia.[6] The Mormons found that they could believe in polygamy but couldn't practice it.[7] Mrs. Madalyn Murray of Baltimore recently insured that her son William would not have to pray in public schools,[8] and a Maryland notary has convinced the United States Supreme Court that there is freedom from religion.[9]

Many chapters have already been written in this constitutional saga, but, what has been a footnote in the struggle, is now emerging as a fascinating arena for the refinement of our conceptions of religious liberty versus society's interests. The arena is the prison. The contestants are members of the Black Muslim sect. The relevant society is the prison community. Our analogies to the open society, where our principles of religious liberty have been

[2] Shelley, *Adonais,* in THE MENTOR BOOK OF MAJOR POETS 187 (Williams ed. 1963):

> "The One remains, the many change and pass;
> Heaven's light forever shines, Earth's shadows fly;
> Life, like a dome of many-coloured glass,
> Stains the white radiance of Eternity,
> Until Death tramples it to fragments. . . ."

[3] See BROOKS, THE ONE AND THE MANY, THE INDIVIDUAL IN THE MODERN WORLD (1962); MURRAY, WE HOLD THESE TRUTHS (1960); KAUPER, CIVIL LIBERTIES AND THE CONSTITUTION (1962); REGAN, AMERICAN PLURALISM AND THE CATHOLIC CONSCIENCE (1963).

[4] Frank v. Maryland, 359 U.S. 360 (1959).

[5] 8 WRITINGS OF THOMAS JEFFERSON 113 (Washington ed. 1854).

[6] BRUCE, HISTORY OF THE UNIVERSITY OF VIRGINIA, Vol. I (1920-21).

[7] Reynolds v. United States, 98 U.S. 145 (1878).

[8] Murray v. Curlett and companion case School District of Abington Township v. Schempp, 374 U.S. 203 (1963), both reported *sub nom.* School District of Abington Township v. Schempp.

[9] Torcaso v. Watkins, 367 U.S. 488 (1961).

worked out, limp at best when applied to a closed society in which restrictions and regulations are of necessity immediate and pervasive.

A statement of the problem is relatively easy. The Black Muslims teach hatred of the white man, supremacy of the Negro race, separation of the races, and disavow loyalty to the United States government or respect for its officials.[10] Prison officials have found that their teachings cause antipathy among other inmates and prison staffs, they have a disruptive effect on rehabilitation programs, and, generally, present a "clear and present danger" to the peaceful ordering of the prison society.[11] As a result, various measures from restrictions to suppression of the practice of their religion have been imposed on Muslims. In California,[12] New York,[13] the District of Columbia,[14] and Virginia,[15] members of the sect have brought actions against the prison officials claiming violation of their rights as guaranteed by the first and fourteenth amendments.

The questions presented represent a potpourri of the problems of religious liberty. Is the Muslim sect a religion to which the guarantees of the first amendment attach. Does the prison inmate have a right to free exercise of his religion. When does religious exercise represent a "clear and present danger" to the prison community so that limitations may be placed on the right to act as distinct from the right to believe. What restrictions, if any, may be imposed on the right to act. Must prison officials extend to Muslim prisoners the same facilities and privileges extended to the major Judaeo-Christian faiths. The courts which have been presented with cases concerning Black Muslims in District of Columbia penal institutions at Lorton, Virginia, have dealt with each of these questions. Their decisions will be the basis of this examination of the problem.

The Followers of the Messenger: The Black Muslims

The Muslims are a militant religious sect[16] numbering in excess of 100,000

[10] Banks v. Havener, Civil No. 3026-M, E.D. Va., Oct. 2, 1964, page 6 of opinion; *In Re* Ferguson, 55 Cal. 2d 667, 361 P.2d 417, 419, *cert. denied*, 368 U.S. 864 (1961), 9 U.C.L.A.L. Rev. 501 (1962), 75 Harv. L. Rev. 837 (1962), Comment, 35 So. Cal. L. Rev. 162 (1962).

[11] Banks v. Havener, *supra* note 10, at 5.

[12] *In Re* Ferguson, *supra* note 10; Williford v. People of California, 217 F. Supp. 245 (N.D. Cal. 1963).

[13] Wright v. Wilkins, 26 Misc. 2d 1090, 210 N.Y.S.2d 309 (Sup. Ct. 1961); Brown v. McGinnis, 10 N.Y.2d 531, 180 N.E.2d 791, 225 N.Y.S.2d 497 (1962); Pierce v. La Vallee, 293 F.2d 233 (2d Cir. 1961).

[14] Fulwood v. Clemmer, 206 F.Supp. 370 (D.D.C. 1962).

[15] Sewell v. Pegelow, 291 F.2d 196 (4th Cir. 1961); Childs v. Pegelow, 321 F.2d 487 (4th Cir. 1963); Banks v. Havener, *supra* note 10.

[16] The discription of the Black Muslim sect is mainly taken from Lincoln, The Black Muslims In America (1961): Krosney, *America's Black Supremacists*, 192 Nation 390 (1961); Hentoff, *Our Negro Segregationists*, Reporter, April 27, 1961, p. 52; Worthy, *The Angriest Negroes*, Esquire, Feb. 1961, p. 102; Muhammad, The Supreme Wisdom: Solution To The So-Called Negroes' Problem (1957).

members,[17] founded in 1930, who claim to be an offshoot of the Islamic religion of the Moslems. The Muslims believe in Allah as their God and they regard their religion as Islam which teaches submission to the will of Allah. They must pray at least five times per day and must believe in the scriptures, including a holy book which purports to be the Koran.[18] They must believe in the resurrection and the hereafter. The sect can be differentiated from Eastern Islamism in their belief in Black Supremacy, and it is this difference which primarily gives rise to problems in the prison environment.[19] Islamic groups in America have refused to recognize them.[20]

The Muslims believe that America's Negroes ("Black Men" as the Muslims prefer to call themselves) are the "lost Nation of Islam in North America."[21] They have now been found by Allah, and a Messenger, Elijah Muhammad of Chicago, has been sent to prepare them for their day of destiny. "The judgment of the world has arrived and the gathering together of the people is now going on."[22]

Fundamental to the Black Muslim movement is the "orginality" of the Black Nation and the creation of the white race by one Yakub.[23] The Original Man is the Black Man and he is the creator of the universe and the primogenitor of all other races. The white race has white skin because it was grafted from the original black nation. This phenomenon, as explained by Muhammad, is:

> The Black Man has two germs (two people) in him. One is black and the other is brown. The brown germ is weaker than the black germ. The brown germ can be grafted into its last stage, and the last stage is white. A scientist by the name of Yakub discovered this knowledge . . . 6,645 years ago, and was successful in doing this job of grafting after 600 years of following a strict and rigid birth control law.[24]

[17] LINCOLN, *op. cit. supra* note 16, at 4. As of December, 1960 the Muslims had 69 establishments (temples or missions) in 27 states. *Ibid.*

[18] The Muslims refer to their holy book as the Qur-an which seems to be a selectively edited version of the Moslem orthodox Koran. Muhammad Speaks, Nov. 20, 1964, p. 24, col. 2. A summary of Muslim beliefs are set out in LINCOLN, *op. cit. supra* note 16. The basic doctrines may be found in a book by their leader Elijah Muhammad. MUHAMMAD, *op. cit. supra* note 16. At least one court has intimated that the prison authorities must purchase the edition of the Koran requested by Muslim prisoners (an edition published in Pakistan in 1951). Pierce v. La Vallee, *supra* note 13, at 236.

[19] *E.g.*, Fulwood v. Clemmer, *supra* note 14, at 377-78.

[20] The Muslims have not been recognized by the Official Islamic Association of the United States and Canada, nor been allowed to affiliate with the association. LINCOLN, *op. cit. supra* note 16, at 219. In view of Muslim belief in black supremacy, it is ironic that orthodox Islamic belief has recently been characterized thusly: "Essential to Islam in its purity is freedom from any racial prejudice and the sense that Moslems are, both in a mystical and real sense, all brothers." BROOKS, *op. cit. supra* note 3, at 147.

[21] MUHAMMAD, *op. cit. supra* note 16, at 21.

[22] *Id.* at 17.

[23] Muhammad, *Mr. Muhammad Speaks*, Pittsburgh Courier, July 4, 1959.

[24] *Ibid.* See also, LINCOLN, *op. cit. supra* note 16, at 21, 24.

This experiment "had an unfortunate side effect" in that it peopled the world with "blue-eyed devils," who were of comparatively low physical and moral stamina—a reflection of their distance from the "divine blacks".[25]

Four hundred years ago, the white Christians stole the Black Muslims away from their homes and brought them to North America where the whites were already in the process of systematic genocide against the Indians. The whites enslaved the Blacks and insured their bondage by robbing them of their names (identity), language (cultural continuity) and religion (protection of their God). By taking from them their name the whites both shamed them and effectively "hid" them from their own kind. By making Black Men accept European names, the Whites branded them as property. By requiring them to speak English rather than their native Arabic, the whites cut their slaves off from their cultural heritage and the knowledge of self which is essential to dignity and freedom.

The Christian religion was and is the master stratagem for keeping the negro enslaved. The whites gave him the "poisoned book" (the Bible) and required him to join the "slave religion" (Christianity), which teaches him to love his oppressor and to pray for them who persecute him. Thus the Black Men are Muslims by nature while Christianity is a white man's religion. There is not even a possibility of an awakened Black Man accepting Christianity, nor can the white man accept Islam as taught by Muhammad, for the white man is a devil by nature.[26]

The core of this dogma, then, is hatred of the white man and the supremacy of the Black Man. One expert witness has testified:

> I don't know any other religion that teaches racial hatred as an essential part of the faith of the religion. There are many religions which have practiced racial hatred at various times, but this movement is the only movement that I know of which makes it a tenet of the faith that all white people should be hated.[27]

Elijah Muhammad portrays the white race as a race of total evil—a race of devils, murderers, thieves, robbers, scientist at tricks, world snoopers, meddlers, and liars.[28] For this reason he teaches that to survive, Negroes and

[25] The Muslims hold that this is proved by the fact that white athletes are poor competitors against black athletes. They take great pride in the accomplishments of Negro athletes, especially Muslims. The current example is Muhammad Ali (nee Cassius Clay) sometime heavyweight champion. *Universal Salute to Champ Ali,* Muhammad Speaks, Nov. 20, 1964, p. 5, col. 2.

[26] Muhammad, *Mr. Muhammad Speaks,* Pittsburgh Courier, December 13, 1958: These "devils" were given 6,000 years to rule. During their reign the devils have "deceived the black nations of the earth, trapped and murdered them by the hundreds of thousands, divided and put black against black, corrupted and committed fornication before your very eyes with your women . . . (and then made) you confess that you love them. . . ."

[27] Fulwood v. Clemmer, *supra* note 14, at 373. (testimony of Father Chas. M. Whelan).

[28] *Ibid.*

whites must be separated, a vague political aspiration for the establishment of separate black states.[29]

In their everyday lives the Black Muslims are governed by a stringent code of private and social morality.[30] Besides the required prayers, they are forbidden to eat certain foods such as pork and cornbread, and many other foods common to the diet of negroes, particularly in the South, since they constitute a "slave diet."[31] They are forbidden whiskey, tobacco and narcotics, and sexual morality is ultra-puritanical. For these reasons, it has been claimed that the Muslim faith has a rehabilitating effect on prisoners, creating "model prisoners."[32]

Prison authorities have found that the individual Muslim is very devoted to his faith, generally, and that it "is in some way related to increasing his status as a negro. . . ."[33] In the case of one prisoner it was noted that the "main attraction of the Muslim faith is that it gave him something to associate himself with, something to uplift him from the degradation to which he had fallen."[34]

Whether the Muslim is a model prisoner or not, the Muslims in prison have been subjected to many deprivations of their practice of religion. It has been suggested that the basis of this proscription is threefold:

> First, the Black Muslim movement—strange, separatist, arrogant, anti-Christian, and Negro—is an extremely attractive target for prejudice. Second, the very success of the Muslim proselytizing in prisons results in a high percentage of their new preachers being ex-convicts, some of whom have extensive previous criminal records. . . . Third, and probably most important, despite the success of Muslim teaching in reforming the personal habits of new converts, available evidence indicates its frequent failure to make Muslim convicts into the "model prisoners" Malcolm X describes. Riots, prompted by disputes over religiously unacceptable prison food, proselytizing in the exercise yard,

[29] LINCOLN, *op. cit. supra* note 16, at 94, 95.

[30] Krosney, *op. cit. supra* note 16.

[31] MUHAMMAD, *op. cit. supra* note 16, at 21, 42: Eating these foods means a "slow death" to those who eat them. Lamb, chicken, fish and beef are approved but all foods must be strictly fresh. The hog is considered filthy—"a poisoned food, hated by Allah"—and was never intended to be eaten except by the white race.

[32] See address by Malcolm X, Boston University Human Relations Center, Feb. 15, 1960, in LINCOLN, *op. cit. supra* note 16, at 82-83.

"He (Elijah Muhammad) has taken men who were thieves, who broke the law—men who were in prison—and reformed them so that no more do they steal, no more do they commit crimes against the government. . . . the Black Man who is a hardened criminal hears the teachings of Mr. Muhammad, immediately he makes an about face. Where the warden couldn't straighten him out through solitary confinement, as soon as he became a Muslim, he begins to become a model prisoner right in that institution, far more than whites or so-called Negroes who confess Christianity." C. Eric Lincoln in his definitive work on the Black Muslims accepts these assertions. *Id.* at 82.

[33] Fulwood v. Clemmer, *supra* note 14, at 372.

[34] *Id.* at 373. The prisoner Fulwood was a convert to the Muslim sect while in prison.

and refusals by individual Muslims to obey white guards have occurred in a number of prisons.[35]

The Anguish at Lorton

Perhaps nothing can be more exciting than to witness public functionaries working out solutions to seemingly insoluble problems. The nature of the prison community from our traditional viewpoint recommends absolute control of management by those charged with management. The nature of religious freedom demands tolerance and non-interference. The nature of pluralism requires parity of treatment as well as acceptance of difference. The imperatives of these three areas collided when the courts opened the door to a consideration of the right of Muslims within the closed prison society. Viewed in this way the challenge to the courts in the Lorton penal institution cases takes on dimensions suitable to a major constitutional crisis. It should not be forgotten that, in a larger sense, the nature of the prison community was on trial in these cases.

The four Lorton cases with which this discussion will be concerned are: *Sewell v. Pegelow*,[36] *Fulwood v. Clemmer*,[37] *Childs v. Pegelow*,[38] and *Banks v. Havender*.[39] Each case involves the rights of Muslims in prisons maintained by the District of Columbia.

A. *Sewell v. Pegelow*

In 1961 Theodore X. A. Sewell and Joseph X. Watson were prisoners in the United States Reformatory at Lorton, Virginia. They were members of the Black Muslims, as were thirty-six other Lorton residents. All of the Black Muslims had been put in isolation for 90 days where they had "one teaspoon of food for eating [and] a slice of bread at each meal three times per day."[40] The cells contained no furniture and the floors were concrete. The inmates were provided with a blanket and mattress between 10:00 p.m. and 5:30 a.m. They were forbidden to wear medals symbolic of their faith, the opportunity to write to religious advisors, recite prayers publicly or receive religious publications.[41] Sewell and Watson maintained that this treatment was meted out solely because of their religious convictions and not for any breach of disciplinary rules or regulations of the Reformatory. They attempted to complain to and seek redress from the Board of Commissioners of the District of Columbia but the superintendent of Lorton, Paul F. Pegelow, and other prison officials refused to transmit their complaints.

[35] Comment, *Black Muslims in Prison*, 62 Colum. L. Rev. 1488, 1491-92 (1962).
[36] *Supra* note 15.
[37] *Supra* note 14.
[38] *Supra* note 15.
[39] *Supra* note 10.
[40] Sewell v. Pegelow, *supra* note 15, at 197.

Actions were begun in the United States District Court for the Eastern District of Virginia, which had jurisdiction over Lorton.[42] They sought an order to restrain the officials of the reformatory from continuing to harass them and from denying their constitutional rights to free exercise of their religion. The District Court, without requiring the officials to show cause or answer, and without holding a hearing, dismissed on the grounds that the matters alleged related to the discipline and conduct of the internal affairs of the reformatory, which are exclusively within the authority of the executive.[43] The Court of Appeals reversed, holding that the complaints stated enough to require a hearing.[44]

Chief Judge Sobeloff, while recognizing that the maintenance of discipline in a prison is an executive function and that courts ordinarily will not interfere, found that Sewell and Watson were not complaining of deprivations and hardships because of infractions of disciplinary rules but rather ones imposed "solely because of what the appellants describe as their religion."[45] While certain rights are withdrawn from a person on entering prison, a prisoner is not "entirely bereft of all of his civil rights" and does not "forfeit every protection of the law."[46] Prisoners may invoke the provisions of the Federal Civil Rights Act "since that Act applies to any person within the jurisdiction of the United States."[47] The traditional difficulty of non-justicibility in prison cases was overcome by grounding the cause of action on the Civil Rights Act, thus avoiding the pitfalls of extraordinary writs such as habeas corpus and mandamus.[48]

The problems of Sewell and Watson were not finally settled until May 23rd, 1962, when the District Commissioners issued a policy order[49] regarding nondiscrimination in the Lorton Reformatory. The order provides that Muslims will have available to them copies of the Koran and other prayer books, be allowed to correspond with Muslim leaders, meet for prayer, study and discussion, carry non-dangerous religious medals, and hold religious meetings

[41] *Ibid.*

[42] *Id.* at 196.

[43] *Id.* at 197.

[44] *Id.* at 198.

[45] *Id.* at 197.

[46] *Id.* at 198. REV. STAT. §§ 1977-91 (1875), 42 U.S.C. §§ 1981-95 (1958); see 2 J. PUB. L. 181, 185 (1953); Siegel v. Ragen, 88 F. Supp. 996, 998 (N.D.Ill. 1949), *aff'd*,180 F.2d 785 (7th Cir. 1950), *cert. denied*, 339 U.S. 990, *rehearing denied*, 340 U.S. 847 (1950).

[47] *Ibid.*

[48] This paper will not concern itself with procedural obstacles to prisoner's presentation of claims. For a discussion of the developing law in this field see generally Note, 110 U. PA. L. REV. 985 (1962).

[49] Order of the Commissioners of the District of Columbia No. 6514-B, Nov. 25, 1953, known as Policy Order of the District of Columbia Government Regarding Nondiscrimination of Nov. 25, 1953, as amended on March 4, 1954; April 7, 1955; and May 23, 1962. A copy of the order is in a letter of assurances filed in *Sewell v. Pegelow*, 304 F.2d 670 (4th Cir. 1962). See discussion of the Policy Order *infra*.

conducted by a minister of the Muslim sect.[50]

Rather than settling the issues, however, *Sewell v. Pegelow* was only the initial skirmish in a four year struggle with the District of Columbia Department of Corrections.

B. *Fulwood v. Clemmer*[51]

William T. X. Fulwood was serving a term in the Lorton Reformatory for robbery. He was a recent convert to the Muslim faith, although he had first learned of the Islamic faith of the Moslems while serving with the Army in Korea. In September, 1959, Fulwood and several other Muslims requested permission from Donald Clemmer, Director of the District of Columbia Department of Corrections, to hold religious services. Clemmer denied their request on the ground that the teachings of the Muslims were inflammatory and would be likely to create disorders and disturbances.[52]

Since the Muslims had been refused permission to hold religious services, they met informally in the stands of the recreation field.[53] Their meetings were peaceful, and the prison regulations specifically allowed the inmates to meet on the field and to talk. On May 25, 1960, about fifteen Muslims met in the stands while a ball game was in progress. Fulwood preached for twenty minutes in a loud voice on the writings of Elijah Muhammed,[54] making references to the white race as murderers, thieves and liars. There were six prison guards on the field while he was speaking, and six or seven hundred inmates.

Fulwood was punished for the May 25th incident because the prison officials felt that his preaching was of such a character as to tend to breach the peace.[55] Fulwood was placed in a control cell[56] and kept there for 13 days. He was then transferred to the D.C. jail and placed in a Special Treatment

[50] *Ibid.*

[51] *Supra* note 14.

[52] *Id.* at 373. In Lorton there were 1,725 inmates, 1,500 colored and 225 white; of the 1,500 colored inmates, only 50 or less are Muslims. The prison population is overwhelmingly Protestant. *Id.* at 374.

[53] *Id.* at 377.

[54] *Id.* at 377. On cross examination he admitted that he "made references to the white race as liars, thieves, and murderers, that he said the white man can not be trusted, that it was the tough luck of the black men that they 'fought for the white man in the war' and more of the like." *Ibid.*

[55] *Id.* at 378.

[56] A control cell is a cell in a special building. It is approximately eight feet by twelve feet, with a stone floor and stone walls on three sides. There is no window, so that no natural light enters the cell, and the single artificial light is controlled from outside the cell. There is no bed; a mattress is placed on the floor at ten o'clock at night and taken out at six o'clock in the morning. The toilet has no top and in most cases is not flushable from inside the cell. An inmate in a control cell is allowed no reading matter, no exercise, no visitors, no mail unless of an emergency nature, and only occasionally a shave and shower. Regardless of the time of year, an inmate in the control cell is allowed to wear only coveralls and shoes without laces. A restricted diet of 2,000 calories daily is given. For breakfast he usually receives some dry cereal and water, and for lunch and dinner some potatoes and a

Unit,[57] was later placed in a control cell and afterwards returned to a STU cell. He was then placed in a transient section of the jail.[58]

During a two year period, Fulwood was never allowed to return to the general inmate population of either Lorton or the D.C. jail. Other than his religious activities, Fulwood never had any other disciplinary report except one. Evidence also showed that he had a heart murmur and suffered from bronchitis.[59]

In addition to the incident on the recreation field, several other clashes occurred between Fulwood and the prison officials. He was, for example, denied permission to wear a religious medal,[60] although prisoners of the Catholic and Protestant faiths were allowed to wear them, and in fact, such medals were issued to the prisoners and paid for with public funds. Fulwood was also refused permission to correspond with Elijah Muhammed, and his subscription to the Los Angeles Herald Dispatch, which carries a column by Muhammed, was confiscated.[61] Further, when Fulwood came up for parole, his letter to his counsel had not been forwarded by the Superintendent's office of the prison, so that when his parole hearing came up, his counsel had not heard of the hearing.[62] The parole was refused. On several occasions, Fulwood attempted to notify the District Commissioners of his grievances, but his complaints were never forwarded by Clemmer.

Fulwood brought a proceeding in the District Court of the District of Columbia for a writ of mandamus and an alternative writ of habeas corpus. On the basis of the foregoing history, Judge Matthews made the following conclusions of law: 1) that the Muslim faith is a religion;[63] 2) that prison officials discriminated against the Muslims in not making facilities available without regard to race or religion;[64] 3) that Fulwood had been denied his right to counsel in connection with the parole hearing;[65] 4) that denial of the religious medal was discrimination; 5) that the two year punitive detention was not reasonably related to the infraction on the ball field and was in fact

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vegetable or two with bread and water. Regulations forbid placing a man in a control cell for a stay longer than 15 days. Fulwood v. Clemmer, *supra* note 14, at 378.

[57] *Id.* at 379. A Special Treatment Unit (STU) is a special cell in which a number of restrictions are imposed on the inmate. For example, an STU inmate is fed in his cell, so that his food is usually cold, he is not permitted to work except on the range, and he is not allowed movies, television, rehabilitation program, Saturday visits, etc. *Ibid.*

[58] The transient section of the jail involves restrictions such as: no money allowance, no movies or television, no free letter privileges, less exercise, no holiday plays, fewer canteen privileges, no rehabilitation program, no Saturday visits, etc. Fulwood v. Clemmer, *supra* note 14, at 379.

[59] *Id.* at 379.

[60] *Id.* at 374.

[61] *Id.* at 375.

[62] *Id.* at 376.

[63] *Id.* at 379

[64] *Id.* at 374.

[65] *Id.* at 376.

unreasonable;[66] 6) refusal to forward letters to the Commissioners and punishment for what was written in the complaints was a violation of his right to seek redress of grievances.[67] Judge Matthews also found that refusal to correspond with Elijah Muhammed and to receive the Los Angeles Dispatch were not violations of Fulwood's legal rights,[68] and that the incident of the playing field was a violation of prison regulations tending to menace order, and that Fulwood could be punished for this infraction, although not unreasonably.[69]

C. *Childs v. Pegelow*[70]

The month of December, 1962, corresponded with the Islamic month of fasting from sunup to sunset, the holy month of Ramadan. In November, 1962, the superintendent of the Lorton Reformatory, Pegelow, told the Muslims that they would be allowed to fast during the month of Ramadan, and implemented his decision by changing the time of the evening meal from 4:15 to 5:00. He also ordered that all Muslims be fed a pork-free diet.[71] The change in meal time corresponded with the time set for sunset by official government computation.[72] However, the Muslim "sunset" was computed according to the time when it is impossible to distinguish a white thread from a black thread when held side by side.[73]

On December 8, 1962, James H. Childs filed a petition for a temporary injunction to require the reformatory officials to feed all Muslims at Lorton a full-course pork-free meal after "sundown" during the month of December.[74]

The District Court dismissed the suit as moot because relief prayed for would have been effective only during the month of December, 1962, the suit having been heard on January 3rd, 1963. On appeal, the Fourth Circuit affirmed.[75]

Judge Boreman, writing for the court, held that there was no justiciable

[66] *Id.* at 375.
[67] *Id.* at 377.
[68] *Id.* at 375.
[69] *Id.* at 379.
[70] 321 F.2d 487 (4th Cir. 1963).
[71] *Id.* at 489.
[72] *Id.* at 488. During the month of December sunrise in the District of Columbia and Northern Virginia is no earlier than 7:07 a.m. and sunset is no later than 4:56 p.m. This information was based on a table prepared by the National Almanac Office, United States Naval Observatory. It was on the basis of this official prediction that the prison authorities calculated dinner hours, however, there is still light at this time. The Muslims could not, technically, eat even at the changed time. See note 73 *infra*.
[73] As a result of the fact that sunset calculated by official standards and as calculated by Muslim standards conflicted the Muslim inmates alleged that their religious freedom was violated. The dietary laws of Ramadan are strictly observed by orthodox Muslims.
[74] *Id.* at 489. Twenty additional petitions were filed and the District Court for the Eastern District of Virginia granted permission to proceed *in forma pauperis*. A hearing was held on December 21. James 15 X and another prisoner were allowed to examine witnesses, but the Court refused to appoint counsel because the hearing would run into the Christmas recess, while relief could only be granted during December.
[75] *Id.* at 491.

issue presented because the time of meals is a matter of internal prison management. He found that the demands of the Muslims, if met, would disrupt the prison dining routine.[76]

Chief Judge Sobeloff dissented on the grounds that the petitioners were entitled to counsel at the hearing, that the allegations contained serious questions concerning religious freedom, and that as Ramadan would occur each year the question could not be considered moot. He noted that all of the facts concerning the dietary restrictions of the plaintiffs' religion and the facts concerning management of the prison should be ascertained so that the court could "undertake to what extent there may be a balancing of the plaintiff's religious rights against administrative necessity or convenience."[77]

D. *Banks v. Havener*

Following the *Sewell, Fulwood* and *Childs* cases the treatment of the Muslims' religious problem at Lorton Reformatory and the District of Columbia jail has remained substantially within the directives of the District Commissioners' Nondiscrimination Order. The issue was settled, therefore, with regard to two of the three major penal institutions of the District of Columbia. The third institution is also at Lorton, Virginia, and is known as the District of Columbia Youth Center. The inmates at the Youth Center are confined pursuant to sentence under the Federal Youth Corrections Act.[79] The problems of the Black Muslims in the prison environment were presented in more extreme circumstances at this institution.

Pursuant to the letter of assurances filed with the Court of Appeals in the *Sewell* case, the Director of the District of Columbia Department of Corrections permitted the free exercise of Muslim rituals at the Youth Center.[80]

Riots broke out at the prison. The Youth Center suffered extensive damage, and prison employees were injured. Less than a month later, another disturbance took place while some of the riot participants were being transferred to the D.C. jail.[81] Prison Director Clemmer concluded that the Muslims

[76] *Ibid.* Judge Boreman stated:
The establishment of dining hours for December prior to the earliest sunrise and after the latest sunset indicates a good faith effort to carry out the arrangement as defendants obviously understood it. It would appear that the prison authorities are entitled to plaintiffs' commendation for their efforts to cooperate but should not be subjected to court interference with the routine management of the institution. Certainly, each plaintiff should understand that he was shown much more consideration than a prisoner is legally entitled to ask and receive. The obvious way in which the plaintiffs may assure their right to the free and unfettered practice of their religion in its every detailed teaching and custom is to earn the right to live outside the federal prison. *Id.* at 491.

[77] *Id.* at 491, 492.

[78] Civil No. 3026-M, E.D. Va. Oct. 2, 1964.

[79] 18 U.S.C. § 5010.

[80] See *supra* note 49.

[81] *Id.* at 4.

were the "motivating influence" of the disturbances. Since that time all formal Muslim activity at the Youth Center has been forbidden.[82]

The restriction on Muslim activity was justified by the Director because of the experience of the July riot, and because the teachings and dogma of the Muslims are disruptive of the rehabilitative concept at the Youth Center, which calls for an atmosphere of harmony, free of tension. He concluded, therefore, that the practice of the Muslim faith at the Youth Center should be prohibited.[83]

Fifteen Black Muslims at the Youth Center filed suits under the Federal Civil Rights Act alleging discrimination on the basis of their religion in that they were denied "the rights and privileges accorded other religious faiths."[84]

Judge Oren Lewis found that the Directors' conclusion that the Muslims were "the motivating influence" in the riot was not without some support in the record, but concluded that "the evidence is not conclusive that the 1962 riots were instigated or led by members of the Black Muslims. (Other inmates equally participated in the riots)."[85] He also concluded that the probability of future Muslim-inspired riots was speculative at best, that antipathy of other inmates and staff would not be sufficient to justify suppression of religious freedom, and that the alleged disruptive effect on the rehabilitation program was equally insufficient.

On the question of discrimination, the court found that adherents of other religions had participated in the riots and yet their religious practices were neither suppressed nor curtailed. It was noted that Muslim religious practices were permitted at the D.C. jail and Lorton, and that this discrimination, coupled with the discrimination within the Youth Center, violated the orders of the District Commissioners and the constitutional rights of the plaintiffs.[86]

An order enforcing this opinion was entered on October 27th, 1964, bringing up to date this survey of the judicial struggle between the Department of Corrections and the Black Muslims.

While this history will be the basis of an analysis of religious freedom in prisons, there have been other significant cases, especially in New York[87] and California,[88] which have concerned the Black Muslims and other religions in the same or similar contexts.

The panorama of questions presented to the courts and answered directly

[82] *Id.* at 5.
[83] *Id.* at 6.
[84] *Id.* at 2.
[85] *Id.* at 8.
[86] *Id.* at 11.
[87] Wright v. Wilkins, 26 Misc. 2d 1090, 210 N.Y.S. 309 (Sup. Ct. 1961); Brown v. McGinnis, 10 N.Y.2d 531, 180 N.E. 2d 791, 225 N.Y.S. 2d 497 (1962); Pierce v. La Vallee, 293 F.2d 233 (2d Cir. 1961).
[88] *In Re* Ferguson, 55 Cal. 2d 667, 361 P.2d 417, *cert. denied*, 368 U.S. 864 (1961); Williford v. People of California, 217 F. Supp. 245 (N.D. Cal. 1963).

or collaterally in the four cases concerning the Lorton penal institutions represents a fair selection of the questions basic to any consideration of religious freedom in the prison community. An analysis of the issues presented should elucidate at least a tentative answer to the fundamental constitutional question. That question, as stated by Chief Judge Sobeloff in the *Childs* case, is "the abstract legal issue as to whether, and if so how far, the enjoyment of religious freedom, which is guaranteed by the First Amendment, may be circumscribed for prison inmates."[89] Yet the question need not be, and, indeed, is not limited to the prison. It is but a species of the larger question, *i.e.*, whether, and if so how far, religious freedom may be circumscribed.

The Closed Society: Rights of the Inmate

The greatest barrier to the recognition of any rights in prisoners has been the nature of the prison and the derivative judgment that the prison is exclusively under the control of the executive. The inmate has been viewed as a "slave" for the duration of his incarceration.[90] The fundamental premise was that the criminal not only lost his liberty but all his rights. The courts might speak of privileges which the law "in its humanity accords," but the result was more of law and little of humanity. Abysmal conditions were viewed as the prisoners' lot and approved as a less than subtle means of deterrence. The excesses which jar the senses in *Les Miserable* and the folksongs of the chain gangs were too often the rule rather than the exception. In 1939 the Attorney General's Survey of Release Procedures pointed up the fact that there had been no significant change in prison conditions in many states in over one hundred and fifty years.[91] The walled-off prison community was by concession tyrannical. All that the inmate could expect was whatever was dispensed by grace of his wardens. But tyranny in structure and philosophy often leads to tyrannical abuses. The prison reform movement was a popular and humanitarian reaction to this fact. As society became more sophisticated in dealing with psychological and social problems it became apparent to many that vindictive punishment in prisons warped the prisoner and created personalities incapable of rehabilitation or a coming to terms with society after release.

While public order and the protection of society demands the deprivation of some rights it need not mean the loss of all rights. Many states have enacted what are known as "civil death" statutes.[92] Generally, these

[89] Childs v. Pegelow, *supra* note 70, at 492.

[90] Ruffin v. Commonwealth, 62 Va. (21 Gratt.) 790, 796 (1871): "He 'the convicted felon' has, as a consequence of his crime, not only forfeited his liberty, but all his personal rights except those which the law in its humanity accords to him. He is for the time being the slave of the State." *Ibid.* As quoted in Note, 110 U. Pa. L. Rev. 985 (1962).

[91] 5 U.S. Att'y Gen., Survey Of Release Procedures 29 (1939).

[92] See, *e.g.*, N.Y. Pen. Law § 510-a (voting rights); Ind. Ann. Stat. § 29-4804 (1949); Cal. Const. art. 11, § 1; Cal. Penal Code §§ 2600-01; Wash. Rev. Code §§ 29.01.080, 29.07.070.

deprive the inmate of the right to vote, to hold public office, state citizenship, and certain contractual rights. A new theory of penology has gradually emerged, however, based on the premise that prison regulations and regimentation are for the maintenance of the order in the prison community and not for the infliction of additional punishment for the crime for which the prisoner was sentenced. This so-called "New Penology" has been the basis for the American Law Institute's Model Penal Code.[93] The same philosophy has also emerged in judicial decisions. In *Price v. Johnson*[94] the Supreme Court underlined this change by recognizing that "a prisoner retains all the rights of an ordinary citizen except those expressly, or by necessary implication, taken from him by law."[95] Any additional punishment in excess of that permitted by the judgment or constitutional guarantees "should be subject to inquiry, for a prisoner once validly convicted . . . is not to be divested of all rights and unalterably abandoned and forgotten by the remainder of society."[96] Indeed, the state's "right to detain a person is entitled to no greater application than its correlative duty to protect him from unlawful and onerous treatment. . . ."[97]

The courts have come full circle in the past eighty years from the position that the criminal *forfeited* all his rights "except those which the law in its humanity accords him" to the premise that the criminal *retains* all rights "except those expressly, or by necessary implication, taken from him by law." The crux of the problem today, then, is what rights may be taken from him. Any answer to this question would of necessity depend on the nature of the relevant society within which the restrictions and the rights operate, *i.e.*, the prison.

It is axiomatic that the prison community is not an open and free society; it is better described as a "walled-off subsociety."[98] One of the basic rights of men living in an open society is freedom of movement; and the basic punishment exacted in the prison is restriction of that freedom. The goal of the prison community is to maintain an ordered society which confines and houses those who have an abhorrence of confinement. Obviously, the basis for the reluctance of courts to interfere with prison management is the necessity of wide discretion in prison officials in containing and disciplining this

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(1951); COLO. REV. STAT. ANN. § 39-10-17 (1953) (public office and employment); MONT. REV. CODES ANN. § 94-4720 (Supp. 1959); R. I. GEN. LAWS ANN. § 13-6-1 (1956). See generally 37 VA. L. REV. 105 (1951); 34 VA. L. REV. 463 (1948); Comment, 26 SO. CAL. L. REV. 425 (1953).

[93] MODEL PENAL CODE Parts III and IV (1962). See Wechsler, *et al., Symposium on the Model Penal Code*, 63 COLUM. L. REV. 590-686, 617-18 (1963).

[94] 334 U.S. 266 (1948).

[95] *Id.* at 285.

[96] People *ex rel.* Brown v. Johnston, 9 N.Y.2d 482, 485, 174 N.E.2d 725, 726, 215 N.Y.S.2d 44, 45-46 (1961).

[97] *Ibid.*

[98] Comment, *supra* note 35, at 1488.

peculiar society.[99] Only obedience to prison rules will maintain control over large numbers of prisoners "many of whom are hardened, desperate, incorrigible criminals. Lax control . . . will inevitably lead to . . . mutiny . . . so as to endanger the lives of prison officers and the maintenance of our prison system."[100]

Empowering statutes usually state the purpose of the correctional institution. The District of Columbia Department of Corrections and the Federal Prison system, of which it is a part, are directed by statute[101] to provide suitable quarters, safekeeping, care, discipline, instruction, protection, subsistence, rehabilitation, and reformation. The statutes also grant the prison authorities the power to promulgate rules and regulations for the government of the institutions. These restrictions, under the influence of the theories of "New Penology"[102] insure the well-being and order of the prison as a whole and are not intended to be punitive as such to any individual.

The nature of the prison community and the necessity, arising out of its nature, to give wide discretionary scope to prison officials has given rise to a general rule that courts will not interfere with the conduct of a prison, with the enforcement of its rules and regulations, or its discipline.[103] This rule is,

[99] Fussa v. Taylor, 168 F. Supp. 302 (M.D. Pa. 1958); Commonwealth *ex rel.* Smith v. Banmiller, 194 Pa. Super. 566, 168 A.2d 793 (1961); Peretz v. Humphrey, 86 F. Supp. 706 (M.D. Pa. 1949); Powell v. Hunter, 172 F.2d 330 (10th Cir. 1949); Wright v. Wilkins, 26 Misc. 2d 1090, 210 N.Y.S.2d 309 (Sup. Ct. 1961); Hatfield v. Bailleaux, 290 F.2d 632 (9th Cir. 1961), *cert. denied*, 368 U.S. 862 (1961); Ortega v. Ragen, 216 F.2d 561 (7th Cir. 1954), *cert. denied*, 349 U.S. 940 (1955); Oregon *ex rel.* Sherwood v. Gladden, 240 F.2d 910 (9th Cir. 1957).

[100] O'Brien v. Olson, 42 Cal. App. 2d 449, 459, 109 P. 2d 8, 15 (Dist. Ct. App. 1941).

[101] 18 U.S.C. § 4042: "The Bureau of Prisons, under the direction of the Attorney General, shall——

(1) have charge of the management and regulation of all Federal penal and correctional institutions;

(2) provide suitable quarters and provide for the safekeeping, care, and subsistence of all persons charged with or convicted of offenses against the United States, or held as witnessess or otherwise;

(3) provide for the protection, instruction, and discipline of all persons charged with or convicted of offenses against the United States."

D.C. CODE ANN. § 24-442: "The Department of Corrections is established to provide for the custody, care, discipline, and instruction of all persons committed to the Workhouse, Lorton Reformatory, Women's Reformatory, and the D.C. Jail in such a manner as to achieve their maximum rehabilitation and reformation. . . . Said Department of Corrections under the general direction and supervision of the Commissioners of the District of Columbia shall have charge of the management and regulation of the Workhouse at Occaquan in the State of Virginia, the Reformatory at Lorton in the State of Virginia, and the Washington Asylum and Jail, and be responsible for the safekeeping, care, protection, instruction, and discipline of all persons committed to such institutions. The Department of Corrections with the approval of the Commissioners shall have power to promulgate rules and regulations for the government of such institutions and to establish and conduct industries, farms, and other activities, to classify the inmates, and to provide for their proper treatment, care, rehabilitation, and reformation.

[102] *Supra* note 91 and 93.

[103] See Roberts v. Pegelow, 313 F.2d 548 (4th Cir. 1963); White v. Clemmer, 111 U.S. App. D.C. 145, 295 F.2d 132 (1961), *cert. denied*, 368 U.S. 992 (1962); Haskins v. United States, 292 F.2d 265 (4th Cir. 1961); Tabor v. Hardwick, 224 F.2d 526 (5th Cir. 1955), *cert. denied*,

however, in conflict with the concept of the prisoner's possession of all rights except those necessary for maintenance of the institution. It is clear that these rights are hollow if the courts will not take judicial cognizance of them.[104]

The District Court in *Sewell v. Pegelow* dismissed the complaint on the basis that it was without jurisdiction because the matters alleged related to the discipline and conduct of the internal affairs of Lorton Reformatory, which are exclusively within the authority of the Executive Department.[105] The allegations by Sewell and Watson stated that they were denied prison privileges and suffered hardships solely because of their religious beliefs, and that they had not breached any rule or regulation of the prison. Chief Judge Sobeloff distinguished judicial interference in such a case on the basis that the allegations were not "an attack upon disciplinary measures taken by authorities"[106] nor bare conclusory allegation of a denial of constitutional rights. "There is," he wrote, "an extensive detailed specification of deprivations and hardships inflicted for no infraction of any rule, and solely because of what appellants describe as their religion."[107] He then noted that allegations were also made of suppression of efforts to obtain administrative relief. "In these circumstances the case is manifestly unlike those in which courts have declined to interfere because particular disciplinary measures were taken within the normal management of the institution."[108]

On the contrary, the majority in *Childs v. Pegelow* rested its decision on the general rule of non-interference.[109] The court, speaking through Judge Boreman, found that the setting of the time for meals during Ramadan was not within the exceptions to the rule.[110]

Chief Judge Sobeloff dissented on the basis *inter alia,* that the court read the complaint too strictly and should have looked behind the allegations where it would have found a question of religious freedom.[111] It should be

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350 U.S. 971 (1956); Dayton v. McGranery, 92 U.S. App. D.C. 24, 201 F.2d 711 (1953); Henson v. Welch, 199 F.2d 367 (4th Cir. 1952); Adams v. Ellis, 197 F.2d 483 (5th Cir. 1952); Williams v. Steele, 194 F.2d 32 (8th Cir. 1952), *aff'd on rehearing,* 194 F2d 917, *cert. denied,* 344 U.S. 822 (1952); Stroud v. Swope, 187 F.2d 850 (9th Cir. 1951), *cert. denied,* 342 U.S. 829 (1951); Strum v. McGrath, 177 F.2d 472 (10th Cir. 1949); Dayton v. Hunter, 176 F.2d 108 (10th Cir. 1949), *cert. denied,* 338 U.S. 888 (1949); Powell v. Hunter, 172 F.2d 330 (10th Cir. 1949); Numer v. Miller, 165 F.2d 986 (9th Cir. 1948).

[104] United States ex rel. Yaris v. Shaughnessy, 112 F.Supp. 143 (S.D.N.Y. 1953).

[105] Sewell v. Pegelow, 291 F.2d 196, 197 (4th Cir. 1961).

[106] *Ibid.*

[107] *Ibid.*

[108] *Ibid.*

[109] Childs v. Pegelow, *supra* note 93.

[110] *Id.* at 490. Judge Boreman put it this way:

There is no charge here of discrimination against the plaintiffs by way of interference with the practice of their religious beliefs as in Sewell v. Pegelow. Nothing could be more routine in prison administration than determining dining hours and practices. The plaintiffs are, in fact, seeking privileges because of their religious beliefs, privileges not extended to the other inmates.

[111] *Id.* at 491-2.

noted that both Judge Boreman and Chief Judge Sobeloff used the same criterion as to non-interference. If there is a constitutional issue then the courts will interfere. Illegal acts or omissions of prison authorities give rise to justiciable issues as do complaints "alleging deprivations of constitutionally and legally protected rights."[112]

The question as to non-interference would seem settled. It is interesting to note that neither the *Fulwood* nor the *Banks* courts felt it necessary to discuss the issue. In light of *Sewell* they assumed that the court would interfere. This solution in the Lorton cases is sound in that it is grounded on an enlightened attitude toward the prison community and recognizes that that attitude is meaningless if the courts do not vindicate prisoners' rights. Given the authoritarian nature of the prison, strict non-interference would be an invitation to revert to slave penology, especially when an unpopular dissident group is involved. Under these circumstances, to say that rights are non-justiciable is to say there are no rights.

Constitutional Rights in the Closed Society

Granted that it is settled that rights of prisoners are to be given judicial cognizance, the question is what rights will be recognized. In recent years there has been an increasing recognition on the part of courts, especially Federal courts, that prisoners must have access to judicial tribunals.[113] This has been the case in regard to challenges to the validity of conviction,[114] the right of appeal,[115] and the right to retain counsel.[116] The prisoners' right to mail legal documents to the clerk of the proper court has also been recognized,[117] as has the right to communicate with counsel.

The question of the right to counsel was presented to the District Court for the District of Columbia in the *Fulwood* case.[118] The officials at Lorton had delayed transmitting a letter to Fulwood's counsel concerning his parole hearing. Counsel had not received notice until after the hearing. Judge Matthews held that Fulwood "was clearly entitled to send to and receive

[112] *Id.* at 490.

[113] See *e.g.*, Bailleaux v. Holmes, 177 F. Supp. 361 (D. Ore. 1959), *rev'd sub nom.* Hatfield v. Bailleaux, 290 F.2d 632 (9th Cir.), *cert. denied*, 368 U.S. 862 (1961); *ex parte* Robinson, 112 Cal. App. 2d 626, 246 P.2d 982 (Dist. Ct. App. 1952); *In re* Ferguson, 55 Cal. 2d 663, 361 P.2d 417, 12 Cal. Rptr. 753, *cert. denied*, 368 U.S. 864 (1961); United States *ex rel.* Foley v. Ragen, 52 F. Supp. 265 (N.D. Ill. 1943), *rev'd*, 143 F.2d 774 (7th Cir. 1944); Sweet v. State, 233 Ind. 160, 117 N.E.2d 745 (1954).

[114] *Ex parte* Hull, 312 U.S. 546 (1941).

[115] Dowd v. United States *ex rel.* Cook, 340 U.S. 206 (1951); Ortega v. Ragen, 216 F.2d 561 (7th Cir. 1954), *cert. denied*, 349 U.S. 940 (1955); Griffin v. Illinois, 351 U.S. 12 (1956); People v. Howard, 166 Cal. App. 2d 638, 334 P.2d 105 (Dist. Ct. App. 1958).

[116] United States *ex rel.* Foley v. Ragen, *supra* note 117; White v. Ragen, 324 U.S. 760 (1945).

[117] Spires v. Dowd, 271 F.2d 659 (7th Cir. 1959).

[118] Fulwood v. Clemmer, *supra* note 73, at 376.

from his counsel communications as to his parole and alleged violations of his rights as a prisoner."[119] The court also found that under the nondiscrimination order of the District Commissioners Fulwood could not be denied the right, either by delay, or because of alleged repetitiousness, to have complaints transmitted.[120] The District Court found, therefore, that one of the rights retained by prisoners is the right to seek redress in the proper instance and the right to communicate with those who can prosecute his petition. Concomitant with the right to communicate is the right to prepare legal petitions, including access to the necessary materials.[121] This has been applied to legal materials, writing materials, and even to the study of law.[122] The cases are based on the idea that the right to prepare legal materials is necessary to the effective utilization of the right to communicate with the courts. "Unless the vindication of prisoner's rights is to be left to the discretion of the prison officials —which is tantamount to denying that such *rights* exist—the right on which all other rights for prisoners will turn is that of access to the courts."[123]

Is freedom of religion one of the rights retained by the prisoner when he enters the penal institution? As a point of departure two aspects of religious liberty, as it has been judicially evolved, should be noted. In *Reynolds v. United States,*[124] which rejected the contention of a Mormon that, because of his religious belief, he could not be prosecuted under a criminal statute prohibiting polygamy, the Supreme Court drew the famous belief-practice dichotomy. "Laws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices."[125] The second consideration is that first amendment freedoms have a "preferred" status. It is against the tenets of these two concepts that the practice of any religious activities must be tested. When the tests are applied they must be applied in terms of the subsociety of the prison. The first amendment alone, however, does not exhaust the constitutional guarantees in regard to religious practice. The guarantee of equal protection in the fourteenth amendment also has relevance.

There are several avenues of approach whenever religious liberty is involved. The right can be viewed as "absolute" and subject to no substantive regulation.[126] The right can be "preferred" as having a higher dignity than

[119] *Ibid.*
[120] *Ibid.*
[121] See Note, 110 U. PA. L. REV. 985, at 992-95 (1962).
[122] Bailleux v. Holmes, *supra* note 117; 58 MICH. L. REV. 1233 (1960);39 TEXAS L. REV. 228 (1960).
[123] See Note, *supra* note 125, at 987.
[124] 98 U.S. 145 (1878).
[125] *Id.* at 166.
[126] Black, *The Bill of Rights,* 35 N.Y.U.L. REV. 865 (1960). Mr. Justice Black has stated: "It is my belief that there *are* "absolutes" in our Bill of Rights, and that they were put there on purpose by men who knew what words meant and meant their prohibitions to be "absolutes." See Meiklejohn, *The First Amendment is an Absolute,* 1961 SUP. CT. REV. 245:

other rights.[127] Another approach is to describe religious freedom in terms of all the surrounding circumstances and then balance it with the interests of society viewed generally.[128] Religious liberty would then be viewed as subject to "reasonable" regulation and proscription. A last approach would be to view the state and its functionaries as necessarily "neutral," neither inhibiting or promoting, the right to religious liberty.[129] The courts which have dealt with the first amendment in terms of the open society have utilized either one or more of these theoretical positions in justifying their decisions.

The question remains: what theoretical basis, if any, is instructive in working out an accommodation between religious liberty, on the one hand, and the necessary regulation of the prison community, on the other.

In *Fulwood v. Clemmer*, Judge Matthews accepted the belief-act dichotomy of *Reynolds*. The initial proposition against which the opinion was written was that under freedom of religion "a person has an absolute right to embrace the religious belief of his choice."[130] The remainder of the opinion carefully details the practice of the Muslim faith by Fulwood and the bases upon which it was proscribed. Judge Matthews did not, however, deal with the abstract question of how far practice could be limited, but based her determinations on the concept of equality of treatment. The essential test, therefore, was not a free exercise one, but the Nondiscrimination Order issued by the District Commissioners.[131] This, of course, leaves open whether the activities involved are privileges or rights. Whether the prison officials discriminate between religious groups in extending the privileges of practicing their religion, says nothing as to whether these so-called privileges are in reality protected constitutional rights.

The Nondiscrimination Order grew out of *Sewell v. Pegelow*.[132] No substantive test of what are and what are not constitutionally protected rights were presented there, for the court was dealing solely with the question of whether a hearing should be granted. The issue was solely one of justiciability. In the last analysis, then, *Sewell* simply held that the court must hear the complaint to determine whether the allegations gave rise to constitutional questions, not that such questions were in fact presented.[133] From this viewpoint, then, Judge Matthew's decision is hardly more instructive.

Mendelson, *On the Meaning of the First Amendment: Absolutes in the Balance*, 50 CALIF. L. REV. 821 (1962); LEVY, LEGACY OF SUPPRESSION (1960). For a recent criticism of the "absolute" theory see Griswold, *Absolute is in the Dark*, 8 UTAH. L. REV. 167 (1963).

[127] See *e.g.*, Murdock v. Pennsylvania, 319 U.S. 105 (1943).

[128] Jones v. Opelika, 316 U.S. 584 (1942); Fried, *Two Concepts of Interests: Some Reflections on the Supreme Court's Balancing Test*, 76 HARV. L. REV. 755 (1963),

[129] See KURLAND, RELIGION AND THE LAW (1962).

[130] *Supra* note 73, at 373.

[131] *Id.* at 374-376.

[132] 304 F.2d 670 (4th Cir. 1962).

[133] Sewell v. Pegelow, 291 F.2d 196 (4th Cir. 1961).

In *Banks v. Havener*,[134] on the other hand, the issue was squarely presented and decided. The prison officials had suspended the application of the Nondiscrimination Order in light of the July riot. The basic right to practice was therefore the issue. The officials had presented their conclusions from the study of Muslim practices, and from the riot experiences, that practice of the Muslim faith presented a clear and present danger. Judge Lewis, after noting that members of other religious faiths had participated in the riots, discounted the basis upon which that judgment was made.[135] He found that the probability of subsequent riots, disruptive effect on the rehabilitive program, and antipathy of other inmates and members of the staff did not constitute a valid reason for the suspension of religious practices. "To justify the prohibition of the practice of an established religion at the Youth Center the prison officials must prove by satisfactory evidence that the teachings and practice of the sect creates a clear and present danger to the orderly functioning of the institution."[136] This, Judge Lewis concluded, they had not done.

Thus the religious issue as a constitutional right was joined. The Nondiscrimination Order was, therefore, issued in pursuance of religious guarantees and not based on privileges granted by grace of executive officials. It is clear that if the officials of the prison chose to curtail all religious practices such action would be unconstitutional even though it is nondiscriminatory.[137] The court was unwilling to permit denials of freedom of religion even when placed on the ground of administrative control of prison discipline which has generally been held to justify denial of "lesser" rights.

The recognition of religious freedom as one of those rights reserved to the prisoner on entering prison was not new with the *Banks* decision.[138] In *Brown v. McGinnis*[139] the New York Court of Appeals spoke in clear and strong language on this issue. Clarence Brown, an inmate of Green Haven Prison, and his fellow Muslims held religious services in the prison yard because the warden did not provide a meeting place. He alleged that he had been denied the right to the ministrations of Muslim religious leaders. The Commissioner of Correction claimed that the refusal to communicate with the local head of the Muslim sect, Malcolm X Little, was based on the fact that Malcolm X

[134] *Supra* note 78.

[135] *Id.* at 8-9.

[136] *Id.* at 9.

[137] Sewell v. Pegelow, *supra* note 78. *Contra, In Re* Ferguson, 55 Cal. 2d 667, 361 P.2d 417, *cert. denied,* 368 U.S. 864 (1961); Williford v. People of California, 217 F. Supp. 245 (N.D. Cal. 1963). The California state and federal courts in *Ferguson* and *Williford* held that the Muslim religion could be supressed even though other sects were allowed the practice of their beliefs. These decisions would seem to be wrong. See Comment, 35 So. CAL. L. REV. 162 (1962); Note, 9 U.C.L.A.L. REV. 501 (1962); Note, HARV. L. REV. 837 (1962).

[138] McBride v. McCorkle, 44 N.J. Super. 468, 130 A.2d 881 (App. Div. 1957); Brown v. McGinnis, 10 N.Y.2d 531, 180 N.E.2d 791, 225 N.Y.S.2d 497 (1962); Pierce v. La Valle, 293 F.2d 233 (2 Cir. 1961).

[139] *Supra* note 138.

had a criminal record.[140] It was further maintained that the exercise and enjoyment of religious worship by an inmate of a penal institution was subject to "reasonable rules and regulations" and that the Commissioner had not abused his discretion in denying Brown the spiritual ministration requested. The court, in the course of holding that Brown could force the prison authorities to permit him free exercise of his religion, stated:

> In support of the position which respondent has taken with respect to petitioner's exercise of his religious belief, the Attorney-General has annexed to his brief excerpts from various magazine and newspaper articles which describe the "Muslim" cult to which the temple of Islam belongs. Respondent maintains that the potential dangers inherent in permitting the dissemination of their beliefs among the prison population warrant the restrictions imposed. While such potential dangers, if realized, may justify the curtailment or withdrawal of petitioner's qualified rights, mere speculation, based upon matters dehors the record, is insufficient to sustain respondent's action.[141]

On the other hand, in all the cases which have dealt with religious freedom in prison, the courts have rejected the proposition that the right to practice is absolute. Judge Lewis in *Banks* stated:

> Lest there be no misunderstanding, the practice of this right (religious freedom) in a penal institution is not absolute—it is subject to rules and regulations necessary to the safety of the prisoners and the orderly functioning of the institution. Adherents of the Muslim faith, or of any other religious sect, found guilty of violating established prison rules will not be heard to plead religious persecution, absent unusual circumstances.[142]

How, then, can this interrelation of religious liberty and prison regulation be tested? Judge Lewis, as was noted above, favors the application of the clear and present danger test. He relied particularly on the following language of *Cantwell v. Connecticut:*

> Freedom of conscience and freedom to adhere to such religious organization or form of worship as the individual may choose cannot be restricted by law. On the other hand, it safeguards the free exercise of the chosen form of religion. Thus the Amendment [First] embraces two concepts,—freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be. Conduct remains subject to regulation for the protection of society. The freedom to act must have appropriate definition to preserve the enforcement of that protection. In every case the power to regulate must be so exer-

[140] *Id.* at 531. Malcolm X. had been arrested in 1944 for larceny of a fur coat and in 1946 for breaking and entering and larceny for which he received four consecutive sentences of eight to ten years each.

[141] *Id.* at 535.

[142] *Supra* note 78, at 11.

> cised as not, in attaining a permissible end, unduly to infringe the protected freedom. No one would contest the proposition that a State may not, by statute, wholly deny the right to preach or to disseminate religious views. Plainly such a previous and absolute restraint would violate the terms of the guarantee.[143]

Although *Cantwell* did not deal specifically with religious freedom in penal institutions, Judge Lewis found it "quite analogous and very persuasive." Only the protection of the prison society could be a basis for limitation of this freedom.

The clear and present danger test has been applied in a carefully reasoned case involving a Catholic prisoner in New Jersey.[144] James McBride had refused to obey prison orders and repeatedly used foul and obscene language to prison officials. For these offences he was placed in the prison's segregation wing. A part of the punishment was that he could not attend Mass with the rest of the Roman Catholic prisoners on Sundays and holy days of obligation. Although the inmates in segregation were not permitted to accompany the general prison population to the chapel, chaplains of each religious faith were permitted to visit them in their cells. The Catholic chaplain, however, refused to say Mass in the segregation wing which had no chapel. The New Jersey Supreme Court held that the freedom of a person to practice his religion, whether in or out of prison, must be considered in the light of the general welfare, that the Federal Constitution stands as a barrier against unjust deprivation of civil liberties. However, religious freedoms could be denied if the court found that the restrictions were reasonably necessary to protect some paramount societal interest.[145] The social interest involved in segregating the plaintiff was preservation of order and discipline in the prison. His claim of religious freedom did not warrant desegregation for the purpose of attending services. The prisoner brought this treatment on himself and it was his position within the prison rather than of his faith which led to the deprivation, and, therefore, it was not discriminatory. The prisoner was allowed to receive religious consultation and the Sacraments through visits of the Catholic chaplains. It was permissible for the prison authorities to determine that attendance at Mass with the general prison population would impair the disciplinary effect of the segration wing. The court held, therefore, that the regulations did not constitute an unwarranted restriction upon the prisoners' freedom of religion.[146]

The court in *Brown v. McGinnis*[147] based its decision on the principle that freedom of exercise of religious worship is a preferred right. It cannot, therefore, interfere with the laws which the State enacts for its preservation, safety

[143] 310 U.S. 296 (1940), at 303-04.
[144] McBride v. McCorkle, *supra* note 138.
[145] *Id.* at 479, 130 A.2d at 886-87.
[146] *Id.* at 480, 130 A.2d at 887.
[147] *Supra* note 138.

or welfare.[148] This is consistent with the tests applied in both *Banks* and *McBride*. As an operative proposition against which courts may test an allegation of unconstitutional restriction, then, the following factors seem crucial. 1) The rule or regulation must not be based solely on the religious beliefs or practices of the prisoners. 2) Any rule must be demonstrably based on the vital interest of the prison society not merely on discretion or judgments not founded on factually present prison conditions. 3) The religious activities must present a clear and present danger and not just a speculative or anticipated danger to the prison society. 4) Any regulations of religious activities must be reasonable when viewed in the context of other regulations of the prison.

Clear and Present Danger

Accepting this test, then, as a working basis, attention should now be turned to the meaning of the clear and present danger test. This test has a venerable tradition and has been a hallmark of decision in many of the cases concerning civil liberties. Its initial statement was in *Schenck v. U.S.*,[149] a case involving free speech. Mr. Justice Holmes formulated the test in these words:

> . . . We admit that in many places and in ordinary times the defendants in saying all that was said in the circular would have been within their constitutional rights. But the character of every act depends upon the circumstances in which it is done. . . . The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree.[150]

This test has been applied in a variety of contexts, *e.g.*, cases involving freedom of assembly,[151] group libel legislation,[152] legislative investigations,[153] loyalty programs,[154] sedition,[155] subversion,[156] comment on judicial proceedings,[157] and obscenity. It would not be useful here to trace the evolution of

[148] *Id.* at 535.
[149] 249 U.S. 47 (1919).
[150] *Id.* at 52.
[151] Chaplinsky v. New Hampshire, 315 U.S. 568, 571-72 (1942); Feiner v. New York, 340 U.S. 315 (1951).
[152] Beauharnais v. Illinois, 343 U.S. 250 (1952).
[153] Barsky *et. al* v. U.S., 167 F.2d 241 (D.C. Cir. 1948), *cert. denied,* 334 U.S. 843 (1948), *rehearing denied,* 339 U.S. 971 (1950).
[154] Bailey v. Richardson, 182 F.2d 46 (D.C. Cir. 1950), *aff'd,* 341 U.S. 918 (1951).
[155] Schenck v. U.S., *supra* note 149; Debs v. U.S. 249 U.S. 211 (1919); Abrams v. U.S., 250 U.S. 616 (1919); Gitlow v. New York, 268 U.S. 652 (1925); Whitney v. California, 274 U.S. 357 (1927); see Chafee, Free Speech In The United States (1941).
[156] American Communications Association v. Douds, 339 U.S. 382 (1950).
[157] Craig v. Harney, 331 U.S. 367 (1947); Pennekamp v. Florida, 328 U.S. 331 (1946); Bridges v. California, 314 U.S. 252 (1941).

the test in all its configurations. There have been occasions, however, in which the test was applied in cases with religious content. The most instructive is the case relied on by Judge Lewis in *Banks—Cantwell v. Connecticut.*[158]

The Jehovah's Witnesses were primarily responsible for the working out of the posture of the free exercise clause when it is admixed with freedom of the press and free speech. *Cantwell* arose out of the arrest of a father and his two minor sons for engaging in the distribution of the literature of the Jehovah's Witnesses and playing phonograph records setting out its doctrines. They went from door to door selling and distributing pamphlets as well as playing the records and proselytizing. The material was patently hostile to the Catholic faith and was distributed, and the records played, in a neighborhood which was 90% Catholic. The defendants were convicted under a Connecticut statute prohibiting solicitation without a licence[159] and for breach of the peace, a common law crime in Connecticut. The state court stated the breach of peace issue in these terms: "The doing of acts or the use of language which, under circumstances of which the person is or should be aware, are calculated or likely to provoke another person or other persons to acts of immediate violence may constitute a breach of the peace. . . . It is not necessary, as claimed, to show that other persons were actually provoked to the point of violence or disturbance of the peace."[160] In dealing with this aspect of the case the Supreme Court, speaking through Justice Rutledge, stated:

> Although the contents of the record not unnaturally aroused animosity, we think that, in the absence of a statute narrowly drawn to define and punish specific conduct as constituting a clear and present danger to a substantial interest of the State, the petitioner's communication, considered in the light of the constitutional guarantees, raised no such clear and present menace to public peace and order as to render him liable to conviction of the common law offense in question.[161]

Animosity, then, is not enough; suspicion of trouble is certainly not enough; imminent danger of violence would seem to be required. The immediate question is how instructive this view of the clear and present danger test can be in the context of the prison community.

Judge Matthews in *Fulwood* faced the most immediate application of this test in the Muslim cases. Unfortunately, she rested her analysis on freedom of speech and the racial contents of Fulwood's remarks, rather than facing the free exercise issue. Fulwood had been punished for the incident on the recreation field in which he addressed other Muslims in the stands during a ball

[158] *Supra* note 143.

[159] CONN. GEN. STATS. § 6294 (1930), as amended by § 860(d) of Connecticut Public Act of 1937.

[160] State v. Cantwell, 126 Conn. 1, 8 A.2d 533, 537 (1939).

[161] 312 U.S. 569 (1941).

game. Fulwood spoke of the beliefs and practices of the Muslims and the writings of Elijah Muhammad. He also used abusive language in characterizing whites as liars, etc.[162] This incident would seem a clear case of religious proselytizing, and an apt opportunity for a discussion of the limitations on religious practice. While admitting the religious content in the "speech,"[163] Judge Matthews, however, dismissed that element and characterized the problem as arising out of the racial content of the words.[164] The conclusion was stated that what Fulwood "said on racial matters caused tension and resentment among inmates of both races and was of a character tending to breach the peace."[165] In drawing the conclusion that the prisoner could be punished for this incident the judge relied on a relevant prison regulation, and the decisions of the Supreme Court in *Chaplinsky v. New Hampshire*[166] and *Feiner v. New York*.[167]

Chaplinsky was concerned with a state statute which incorporated the common-law doctrine of "fighting words": "No person shall address any offensive, derisive or annoying word to any other person who is lawfully in any street or other public place, nor call him by any offensive or derisive name. . . ."[168] The New Hampshire courts had interpreted the statute as applicable only to the use in a public place of words directly tending to cause a breach of the peace by the persons to whom the remark was addressed. The conviction of a street speaker who called a policeman a "damned racketeer" and a "damned fascist"[169] was upheld by the Supreme Court.

In the course of the opinion in *Chaplinsky*, Mr. Justice Murphy put any religious issue to one side:

> We cannot conceive that cursing a public officer is the exercise of religion in any sense of the term. But even if the activities of the appellant which preceded the incident could be viewed as religious in character, and therefore entitled to the protection of the Fourteenth Amendment, they would not cloak him with immunity from the legal consequences for concomitant acts committed in violation of a valid criminal statute.[170]

The Court did not give any credence to the religious issue. It treated the appellant as it would treat any appellant speaking on a street corner.

It is interesting to note that Judge Matthews followed the same line in *Ful-*

[162] Fulwood v. Clemmer, 206 F.Supp. 370, 377-79 (1962).
[163] *Id.* at 377.
[164] *Id.* at 378.
[165] *Ibid.*
[166] *Supra* note 151.
[167] *Ibid.*
[168] Chapter 378, § 2, Public Laws of New Hampshire.
[169] *Id.* at 569.
[170] *Id.* at 571.

wood in spite of the claimed religious character of the utterances.[171] In doing so she selected the following language from Justice Murphy's opinion:

> There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which has never been thought to raise any Constitutional problem. These include . . . the insulting or 'fighting' words—those which by their very utterance inflict injury or *tend* to incite an immediate breach of the peace.[172]

The issue was freedom of speech, not freedom of religion. "Petitioner's racial preaching within the hearing of white and negro inmates was such as to be offensive, insulting, and disturbing to white inmates and to non-Muslim negroes and to engender those feelings which tend to menace order."[173] At this point *Feiner*[174] was cited by the Judge. That case involved addressing an open-air meeting on a Syracuse, N.Y., street corner. The speech involved contained derogatory remarks concerning President Truman, the American Legion, the Mayor of Syracuse and other local political officials. There was no religious content in the speech. The court placed its emphasis on the reaction to the speech and not the content. As the reaction in the hearers was such as would show a clear danger of disorder, Feiner was arrested. His conviction was upheld by the Supreme Court.

It is disappointing that Judge Matthews chose this free speech characterization. It would have been more instructive from the viewpoint of religious liberty in prison, with which she had dealt in all other questions in *Fulwood,* if she had tested the effect of the religious element in the speech. If she had, the applicability of Supreme Court decisions which dealt with the religious content question in relation to free speech and permissible regulation would have been tested.[175]

The *Fulwood* decision is important, however, because it sets out the clear and present danger test in relation to the prison. The presentation is instructive in delimiting the operation of the test in this setting.

It would seem clear that a prison regulation such as the one involved in *Fulwood* is not only a proper, but necessary one. The rule reads in part: "It is against the law to engage in a demonstration, disturbance, strike, or act of resistance, either alone or in combination with others, which will *tend to breach the peace* or which constitute disorderly conduct."[176] This represents a workable test in regard to the application of the clear and present danger

[171] Fulwood v. Clemmer, *supra* note 162, at 378.
[172] Chaplinsky v. New Hampshire, *supra* note 151, at 571-72.
[173] Fulwood v. Clemmer, *supra* note 162, at 378.
[174] Feiner v. New York, *supra* note 151.
[175] *E.g.,* Cantwell v. Connecticut, *supra* note 143; Saia v. New York, 334 U.S. 558 (1948); Kuntz v. New York, 340 U.S. 290 (1951).
[176] Fulwood v. Clemmer, *supra* note 162 at 378. (Emphasis supplied).

standard to the prison community. Words or action which would tend to incite an immediate breach of the peace are clearly within the scope of proper regulation. While there is some authority for a stricter test when religious freedom is involved, this should not serve to attenuate the effectiveness of the rule as an operative standard. At the same time, the test cannot operate on a basis of mere speculation—whether the educated or experiential "guess" of prison authorities or mere conclusory determinations not based on ascertainable facts.

Reasonableness should always be the keystone of the permissible scope of prison discretion. At one extreme, if fertility rights which included orgiastic melees in the prison compound were a part of a primitive religion, it is clear that such rites could be prohibited. It would also seem clear that a religious Navajo's Indian hogan which included eating cactus containing peyote would be prohibited, even though constitutionally protected in the open society.[176a] On the other hand, inmates meeting to discuss religion or to pray without obstructing normal routine would not constitute a danger. The freedom of exercise which is asserted by inmates must not bring them into collision with the rights asserted by others. Behavior must be peaceable and orderly. The test cannot be set down with definitive scope. No question should be raised concerning the power of prison officials to regulate activities, to inspect, to supervise, to discipline, etc. Defining the official's permissible sphere is as useless as trying to determine what religious freedom is in the abstract.

Muslims' beliefs are unpopular and resented. White inmates will resent being called liars, devils, slavers, etc. Negro inmates might well find militant black supremacy obnoxious, especially as they try to work out a *modus vivendi* with their white counterparts. In this context should the prison officials deny the Muslims their religious practices? The courts of California have answered in the affirmative.[177] The courts dealing with Lorton, however, have found that a complete proscription is unwarranted.

In the balance it would seem that if Muslim religious practices are treated on the same basis with other religions the immediate danger would not be present. Allowing them to meet together for services separate from other inmates, private religious reading, non-ostantatious wearing of religious medals, and hearing instructions from their ministers would not seem *in se* provocative of others. Annoyance, antagonism, and dislike on the part of other prisoners should not be cumulated into an immediate danger. The prison authorities, if put to the balance, should discipline and control the others before they deny religious freedom. This is not meant to suggest that violent speeches, inciting, and provocations by Muslims should be permitted;

[176a] People v. Woody, 40 Cal. Rptr. 69, 394 P.2d 813 (1964). See Casenote, *infra*.
[177] See note 137 *supra*.

rather, that normal religious practices should not be prohibited on the tenuous basis of potential or suspected future dangers. Certainly, Judge Matthews' decision as to each of the practices and incidents in the *Fulwood* case represents such a balance.

Perhaps the closer question is presented in *Banks*.[178] There the Muslims were permitted religious exercises until the July 31st riots broke out. The court found "some support in the record" that the Muslims were the "motivating influence of the riot." The Director of the Department of Corrections based his prohibition of practice of the Muslim faith within the guidelines of the Nondiscrimination Order, on the judgment that the practice constituted a clear and present danger.[179] It would seem at first blush this would be a justifiable position. However, there was evidence that the Muslims were subsequently allowed to hold informal meetings in the yard during recreation periods.[180] This would seem to contradict the clarity and immediacy of any danger. Where better would resentment be shown and tension accumulated than in meetings held at recreation with other inmates present—even if separated. Judge Lewis did not foreclose the possibility of restriction on the basis of danger; he did require, and properly so, that the danger be immediate and demonstrated from the facts. It is clear that the prison officials must be able to act with dispatch when they see the tendency toward danger, but their acts are subject to subsequent judicial justification. The mere presence of Muslims is not a sufficient basis.

From this analysis, it is submitted that the clear and present danger test as applied in the *Fulwood* and *Banks* cases is the best standard for testing the limitations which can be placed on religious practices in prisons. The test leaves to the prison officials the necessary flexibility and scope for action and at the same time protects the prisoners from arbitrary religious classifications and proscriptions. The preferred position corollary would also be required when it is kept in mind that the courts, while recognizing rights in prisoners, do so in a judicial process of selection as to which rights are attenuated and which are to be recognized. The "absolute" position would not be workable in the prison community, to say nothing of the dubiousness of its application in the free community. The neutral principle would seem to be too vague and difficult of application in the prison community, where state action is the all encompassing operative factor, even if it were appropriate in the context of society generally.

[178] Banks v. Havener, Civil No. 3026-M, E.D. Va., Oct. 2, 1964.
[179] *Id.* at 9.
[180] *Id.* at 5.

EQUAL PROTECTION AND THE ESTABLISHMENT CLAUSE

Not only is the free exercise clause of the first amendment involved once the constitutional rights of prisoners to religious liberty is recognized, but also the equal protection clause of the fourteenth amendment. Concomitant with the equal protection clause is the application of what might be styled the "establishment clause backlash"—to use a popular contemporary figure. The idea is a relatively simple one. If one religious group is allowed certain practices then all religious groups must be allowed the same practices. If a religious sect is prohibited from religious exercises on an equal basis with what is allowed others, the effect is to establish the non-prohibited sects by making them preferred religions.[181]

This principle rests on two decisions of the Supreme Court in Jehovah's Witnesses cases. The first dealt with the equal protection clause, the second with the preferred religion problem. In *Niemotko v. Maryland*[182] the defendant Witnesses were refused permission by the city officials of Havre de Grace, Maryland, to use a public park for religious speeches while the same privileges had been given to other groups. Mr. Chief Justice Vinson, in overturning the arrests of the defendants, stated that ". . . rarely has any case been before this Court which shows so clearly an unwarranted discrimination. . . . The conclusion is inescapable that the use of the park was denied because of the City Council's dislike for or disagreement with the Witnesses or their views."[183] The convictions were invalid, therefore, because of the equal protection clause. In the second case, *Fowler v. Rhode Island*,[184] Witnesses had been arrested for violation of an ordinance that forbade speeches in public parks. Mr. Justice Douglas, writing for the Court, stated:

> Catholics could hold mass in Slater Park and Protestants could conduct their church services there without violating the ordinance. Church services normally entail not only singing, prayer, and other devotionals but preaching as well. Even so, those services would not be barred by the ordinance. That broad concession, made in oral argument, is fatal to Rhode Island's case. For it plainly shows that a religious service of Jehovah's Witnesses is treated differently than a religious service of other sects. That amounts to the state preferring some religious groups over this one.[185]

Mr. Justice Frankfurter, who concurred, was unwilling to base his decision

[181] It should be noted that this is also very close to Professor Kurland's thesis. KURLAND, *op. cit. supra* note 129.
[182] 340 U.S. 268 (1951).
[183] *Id.* at 272.
[184] 345 U.S. 67 (1953).
[185] *Id.* at 69.

on the first amendment, but would have relied solely on the equal protection clause.

The first hint of this line of argument in the Lorton cases was outlined in the petition in *Sewell v. Pegelow.*[186] The basis of the complaint was that the Muslim petitioners "are forbidden to wear medals symbolic of their faith while 'that privilege is accorded to Catholics, Baptists, etc.'; that unlike prisoners of other faiths, they are denied all opportunity to communicate with their religious advisers, recite their prayers or receive desired publications without fear of being persecuted."[187] In the Nondiscrimination Order there is a continual refrain that the privileges will be made available "in the same manner and to the same extent as (to) inmates of Christian or other persuasions."[188] Again, the same principle of nondiscrimination was the crux of Judge Matthews' opinion in *Fulwood v. Clemmer.*

In the *Banks* case an even wider application of the principle of nondiscrimination was utilized. The petitioners claimed that the Director of Correction discriminated between treatment of Muslims in Lorton Reformatory and the D.C. Jail, where religious practices were allowed, and Lorton Youth Center, where they were proscribed.[189] They also claimed discrimination on the basis of the religious practices allowed other inmates within the Youth Center. Judge Lewis concluded his opinion: "Therefore, an appropriate order will be entered herein permitting all inmates at the Youth Center who are adherents of the Muslim faith to practice their religion at the Youth Center on a non-discriminatory basis so long as it does not present a clear and present danger to the orderly functioning of the institution."[190]

While nondiscrimination is a crucial consideration in working out what rights are preserved to prisoners it is well to keep in mind Justice Douglas' caveat in *Murdock v. Pennsylvania:*

> The fact that the ordinance (against distribution of literature without a licence) is "nondiscriminatory" is immaterial. The protection afforded by the First Amendment is not so restricted. . . . Freedom of press, freedom of speech, freedom of religion are in a preferred position.[191]

Two tests emerge from the opinions in the Lorton cases: preferred position subject to the limitations of the clear and present danger test, and non-discrimination. The latter principle seems more nearly applicable to those aspects of religious practice in prison which may be described as privileges. In extending privileges to members of the subsociety, the state must extend

[186] Sewell v. Pegelow, 291 F.2d 196 (4th Cir. 1961).
[187] *Id.* at 197.
[188] *Ibid.*
[189] Banks v. Havener, *supra* note 178, at 8.
[190] *Id.* at 11.
[191] 319 U.S. at 115 (1943).

them to all on an equal basis, without any classification in terms of religion. This does not weaken the application of the first principle which applies to preferred rights. While privileges might be taken away if there is no discrimination, rights cannot be excised unless there is full justification in terms of a basic societal interest. While nondiscrimination might be viewed and applied mechanically, the clear and present danger test will always be weighted in terms of the configuration of the fact situation presented.

The application of these tests to specific rights might best be seen in terms of the specific rights for which the Muslims fought. All of them have been incorporated into the Order on Nondiscrimination issued by the District Commissioners.

THE NONDISCRIMINATION ORDER[192] AND THE RIGHTS INVOLVED

A. *Remedy*

> Any person who has been aggrieved because the policy of this section has not been adhered to may, within ten days, file with the Secretary of the Board of Commissioners a written statement of the alleged violation setting forth specifically and in detail the facts of the matter. The Commissioners will thereafter cause an investigation to be made and, in the event that the complaint is justified, will take appropriate action.[193]

The initial section of the District Commissioners' Order secures the right of access to administrative remedies. In the *Fulwood* case the prisoner had been placed in a control cell because of the complaints he attempted to communicate under this section. Of several letters, only one had been transmitted by the Director to the Commissioners, and that was one day late.[194] Judge Matthews found this conduct violative of the Order in that it was "the petitioner's right to set forth the factual allegations relied upon by him, even though they were derogatory or critical of prison authorities."[195] The punishment of the petitioner was, therefore, a violation of his right to seek redress of alleged grievances. This right is a close parallel to the constitutional right, discussed above, concerning access to the courts. It is clear, however, that remedies under the Nondiscrimination Order must be exhausted before the courts will hear the prisoner's complaint.

B. *Recognition of the Muslims as a Religion*

The order specifically guarantees the prisoner the right to be recognized as

[192] *Supra* note 49.
[193] Sewell v. Pegelow, *supra* note 133, at 670.
[194] Fulwood v. Clemmer, *supra* note 162, at 376.
[195] *Ibid.*

a member of the Muslim sect and to practice his religion on the same basis as other religious groups.[196]

C. *Private Study of Religion*

Questions concerning the private study of religious material have been presented in all the cases involving Black Muslims. Censorship in the dissemination of ideas has long been a concern of the Supreme Court, and censorship of religious ideas has been particularly guarded.[197] In *Pierce v. LaVallee*,[198] the right of Muslim prisoners in New York prisons to have access to copies of the Koran was upheld. The court even went so far as to imply that the correct edition was necessary to avoid unwarranted interference with religious freedom. This same right was specifically recognized in both *Fulwood* and *Banks*. In recognition of this right, the Commissioners ordered that copies of the Koran be made available to the Muslims on the same basis as copies of the Bible are made available to Catholics and Protestants. The Commissioners also specify that the copies shall be translations "previously indicated by them as acceptable to their sect."[199]

The receipt of newspapers and periodicals, on the other hand, has not been recognized as a constitutional right.[200] It is a matter of prison regulation. This is consistent with religious freedom since such reading material, unlike basic religious texts, is not a necessary part of the practice of religion. While the order does not mention the newspaper Muhammad Speaks, it specifically witholds permission to subscribe to the Los Angeles Dispatch.[201] Judge Matthews was presented with this question in *Fulwood*. She noted that the prison officials had confiscated the Dispatch because "both white and negro inmates were agitated by Mr. Muhammad's inflammatory articles in the mentioned newspaper."[202] In spite of the fact that over three hundred newspapers were received by inmates, and that the Daily Worker was the only other newspaper confiscated, Judge Matthews concluded that receipt of newspapers was a matter of discretion by prison officials and no abuse of discretion was shown here.

D. *Religious Meetings*

The Commissioners ordered that the Muslims be permitted periodic meetings for the purpose of prayer, study and discussion of their faith at reasonable times and places.[203] This would seem to be the basic practice which should

[196] Sewell v. Pegelow, *supra* note 133, at 671.
[197] See *e.g.*, Jamison v. Texas, 318 U.S. 413 (1943); Largent v. Texas, 318 U.S. 418 (1943).
[198] *Supra* note 138.
[199] Sewell v. Pegelow, *supra* note 133, at 671.
[200] See *e.g.*, White v. Clemmer, 295 F.2d 132 (1961).
[201] Sewell v. Pegelow, *supra* note 133, at 671.
[202] Fulwood v. Clemmer, *supra* note 162, at 375.
[203] Sewell v. Pegelow, *supra* note 133, at 671.

be protected, subject, of course, to the clear and present danger rule. When religious meetings threaten the end of the prison society in providing safekeeping, care, protection, etc., they can be limited. Also, an individual's right to participate in such a meeting may be circumscribed as was recognized by the court in *McBride v. McCorkle.*[204] At the very least Muslims must be afforded the same opportunity for public worship as other prisoners. This right, however, would seem subject to greater vigilance than the right to possess religious materials. The latter touches more closely the absolute right to believe, while the former is a preferred right involving free exercise. Implicit in the reasoning of both the *McBride* court and the *Fulwood* court is a recognition of this difference.

The right to have ministers conduct the meetings is another matter. Obviously a Catholic mass cannot be conducted without a priest, and many Protestant services require the presence of ministers. The same right, on an equal basis, is granted the Muslims under the Nondiscrimination Order.[205] This right, however, is not without limitations. As in the case of *Brown v. McGinnis,*[206] a minister may be excluded on the basis of a former criminal record. This is a particularly difficult problem in relation to Muslims because many of their ministers were converted in prison. This regulation meets the test of reasonableness, although it is doubtful if ministers can be excluded altogether. This is certainly true if to do so would violate equal protection.

E. *Correspondence with Religious Leaders*

Ordinarily the regulation of the mail of prisoners is a matter within the administrative discretion of prison officials. This is subject to exception, however, when the mails are necessary to secure a fundamental right. Such is the case when correspondence is necessary to obtain access to the courts.[207] Communication with ministers of religion is not fundamental to the practice of religion, although greater consideration should be given to this type of correspondence than merely social letters. This preference was not accorded in *Fulwood,* however. Prison authorities had declined to allow Fulwood to correspond with Elijah Muhammad and the petitioner sought to compel the director to allow him that privilege. Judge Matthews' discussion of mail privileges is illustrative of the twilight area which always exists when prison regulations are weighted against prisoners' desires.

> Mail lists are established for inmates so that they may maintain legitimate familial, legal, welfare and employment contacts. Usually the mail lists include relatives. If inmates have no relatives or none that can be reached, then the mail lists include friends, and occasionally ministers. A minister is customarily put

[204] *Supra* note 138.
[205] Sewell v. Pegelow, *supra* note 133, at 671.
[206] *Supra* note 138.
[207] See notes 113-117 *supra.*

> on the mailing list where the inmate prior to entering prison knew the minister. When it has seemed desirable for the good of the inmate, permission has been given for correspondence with a minister the inmate did not know when he entered prison. There is no rigid rule governing mail lists. Petitioner has relatives and apparently has never met Mr. Muhammad.[208]

She concluded, therefore, that mail lists were matters of prison regulation and that Fulwood had not made a showing sufficient to establish a violation of a legal right.

The Nondiscrimination Order allows the Muslims to correspond with Elijah Muhammad or Lucius X. Brown, the Washington minister. This privilege is to be carried out in conformity "with normal prison procedures, including usual and generally applicable censorship."[209]

F. *Religious Insignia*

A religious insignia can be of such proportions and of such material as to be a dangerous weapon. Possession and wearing of such medals must come under prison control. However, if other prisoners are allowed harmless insignia, it would be discrimination to deny the same right to Muslims. This was the position taken in *Fulwood v. Clemmer* where it was pointed out that Catholic and Protestant medals were considered regular prison issue.[210] The wearing of such medals is considered of great importance to Muslims, the medal being worn outside of the shirt. The Commissioners' Order delimits this question very specifically, and, by any test, reasonably.

> Muslim inmates may carry on their persons non-dangerous medals showing the Islamic star and crescent. Such medals may be displayed in the same manner and to the same extent as Christian and other religious medals are permitted to be displayed. Inmate welfare funds will be made available to furnish medals to Muslims on the same basis as medals are furnished to inmates of other religions.[211]

G. *The Right to Proselytize*

It has already been pointed out that the landmark decisions on free exercise have concerned the rights of Jehovah's Witnesses to proselytize. The clear and present danger test was formulated, in relation to religion, in a series of cases which balanced municipal licensing with freedom of religion. The right to preach is a part of the right to proselytize, and free speech involved with religious content has been accorded preferred treatment by the courts. This is one area, however, where the possibilities for trouble with regard to the Muslims in prison can be acute. The playing field incident in the *Fulwood* case is a pertinent example.

[208] Fulwood v. Clemmer, *supra* note 162, at 375.
[209] Sewell v. Pegelow, *supra* note 133, at 671.
[210] Fulwood v. Clemmer, *supra* note 162, at 374.
[211] Sewell v. Pegelow, *supra* note 133, at 671.

This is the area where freedom of religion blends into freedom of speech. The social difficulty presented by the Muslims is analogous to the Jehovah's Witnesses. As Professor Kurland has written: "It is not infrequent that those most intolerant of the rights of others are the most vigorous in seeking the protection of their own."[212] The cases involving the Witnesses have resulted in a confusion of doctrine between freedom of religion and free speech but have also resulted in the "expansion of the right of militant minority sects to the protection of the state in their virulent attacks on the views of others."[213]

This was clearly the case with Fulwood's virulent preaching in the prison yard. Judge Matthews had little difficulty, however, in finding that the situation presented the requisite clear and present danger to punish the prisoner. This points up the fact that constitutional doctrine cannot, and should not, be applied automatically from the open society to the prison subsociety. Our analogies, of necessity, limp. It is evident that preaching, especially preaching black supremacy, must be curtailed. The peace and order of the prison community requires it. This should not create any problems in the application of the tests outlined above, however, for the cornerstone of the balance of interests test is the societal interests of the prison.

Private proselytizing, however, is another matter. If it is carried on in private conversations and does not tend to incite the hearer, then it should be protected. The Commissioners have followed this distinction, though they have camouflaged it in equal protection language. The regulation reads:

> A Muslim inmate may discuss his religion with other inmates only in the same manner and to the same extent as inmates of Christian or other persuasions *are permitted* to discuss their religions with other inmates. (Emphasis added).[214]

The discretion and control of the prison authorities is completely preserved in this ruling. However, that discretion must be subject to the rule of "reasonableness" contained in the balance of interests principle. Prohibition of all religious discussion would be suspect and should give rise to administrative or judicial review of the factors leading to such a decision. It has been suggested, however, that total silence in a prison, the so-called Auburn system, would not be unconstitutional on its face.[215] This conclusion would seem dubious in relation to the premises of New Penology. It can be concluded that while proselytizing presents a more closely drawn line, the line of protection nevertheless exists.

[212] KURLAND, *op. cit supra* note 129, at 50.
[213] *Ibid.*
[214] Sewell v. Pegelow, *supra* note 133, at 671.
[215] Comment, *Black Muslims in Prison*, 62 COLUM. L. REV. 1488, at 1501. *But cf. Ibid.* note 62 and cases cited therein.

Conclusion

There are very few times when man's inhumanity to man knows such excess as when man justifies his inhumanity by deifying it. This deification can come in the guise of religious zeal, religious intolerance, or active secularism raised to the ironic pitch of a "holy" war. It was the realization of this which led reasonable men to determine that intellectual freedom was essential to the peaceful ordering of society. Whenever an attempt is made to determine what course should be taken when this rational ideal conflicts with social interests, the scene is set for one of the most important and necessary accommodations man must make. This is the problem and challenge of the first amendment. The theories for the accomplishment of this accommodation are many, the practical areas of conflict inexhaustible.

Religious freedom versus the interests of the prison subsociety is only one manifestation of this accommodation—a most provocative manifestation. Pluralism and prison seem logical contradictories, but the ingenuity and humanity of man has never balked at the possibility of successfully living with contradictions. By avoiding dogma and expediency, a middle ground can be found which will best serve that magnificent compromise we choose to call pluralism. With this thought in mind the anguish of Lorton can be instructive rather than descriptive.