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Constitutional Law -- Prisons -- Confinement to Maximum Security as an Abridgment of First Amendment Rights

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Constitutional Law—Prisons—Confinement to Maximum Security as an Abridgment of First Amendment Rights

Throughout history courts have viewed the prisoner as one who by his crime forfeits all his individual rights.[1] This attitude, coupled with public and judicial endorsement of strict prison discipline, has led the judiciary to decline numerous invitations to pass upon the

to find utility remaining in the old test. *Terminiello's* aptness here lies in its assertion of the first amendment's design to invite, rather than squelch, dispute; *Wood* contained this statement: "The role that elected officials play in our society makes it all the more imperative that they be allowed freely to express themselves on matters of current public importance." 370 U.S. at 395.

In rejecting Georgia's contention that it could apply stricter standards to legislators than to other citizens, the Court used a test more familiar to recent free speech litigants, the balancing of interests. While the state has a recognized interest in the legislators' sworn allegiance to the Constitution, "surely the oath gives it no interest in limiting its legislators' capacity to discuss their views of local or national policy." 35 U.S.L. WEEK at 4043. The countervailing interest of the public in having its representatives take positions on controversial issues is high. Therefore, reasoned the Court, the case may be decided by the "rationale" of New York Times v. Sullivan, 376 U.S. 254 (1964). That case had decided that a critic of official conduct should be protected by the first amendment from the imposition of an effectively punitive, though technically "civil," libel suit. Its statement of the "central meaning" of the first amendment has made it a touchstone for subsequent delineation of protected speech, *e.g.*, United States v. Johnson, 383 U.S. 169, 182 (1966), Lamont v. Postmaster General, 381 U.S. 301 (1965). *New York Times* had found the "lesson" of the first amendment in the attack on the Sedition Act of 1798, which had "carried the day in the court of history." 376 U.S. at 273, 276. Clearly, the Court in *Bond v. Floyd* found the action of the Georgia legislature a condemnable reminder of that infamous act.

Whether qualifications enumerated in a state or federal constitution should be regarded as exclusive, to prevent disqualifications on other grounds than speech, was not decided. The Court observed in a footnote that "Madison and Hamilton anticipated the oppressive effect on freedom of expression which would result if the legislature could utilize its power of judging qualifications to pass judgment on a legislator's political views." 35 U.S.L. WEEK at 4043. But the Court did not draw, from the quotes selected, the conclusion urged above. Whether a legislator disqualified on grounds other than speech would have constitutional standing to challenge his exclusion in the federal courts, and whether, if presented with such a claim, the Court would follow the "rule" urged above, are questions which must await answer another day. That day could conceivably come early in 1967, if Representative Lionel Van Deerlin is successful in his attempt to deny Representative Adam Clayton Powell a seat in the Ninetieth Congress. See N. Y. Times, Dec. 1, 1966, p. 1, col. 1.

[1] "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."
Ruffin v. Commonwealth, 62 Va. (21 Gratt.) 790, 796 (1871).

constitutional propriety of internal regulations imposed by prison administrators.[2] This reluctance has been especially prominent in the case of federal courts and state prisons.[3] Further, the courts have often expressed their conviction that the management and control of prisons is properly vested in executive agencies, and that they have no power to intervene in administrative matters.[4] However, a growing conviction on the part of the federal judiciary that a prisoner retains certain individual rights has led some courts to abandon this "hands off" doctrine.[5] Recent decisions have granted prisoners privileges to exercise such rights as prompt and timely access by mail to the courts,[6] communication with the outside world unimpaired by arbitrary prohibitions,[7] and subscription to a non-subversive Negro newspaper by a Negro inmate.[8]

The single individual right to freedom of religion has been the foundation for the overwhelming majority of inmate petitions, however, and the fight for protection of that freedom has been carried on almost exclusively by Black Muslim prisoners.[9] The Muslim

[2] For general discussion of judicial involvement in internal prison affairs and the rights of prisoners, see Note, *Constitutional Rights of Prisoners: The Developing Law*, 110 U. PA. L. REV. 985 (1962); Note, *Beyond the Ken of the Courts: A Critique of Judicial Refusal to Review the Complaints of Convicts*, 72 YALE L.J. 506 (1963).

[3] *E.g.*, Sostre v. McGinnis, 334 F.2d 906 (2d Cir.), *cert. denied*, 379 U.S. 892 (1964); Hatfield v. Bailleaux, 290 F.2d 632 (9th Cir.), *cert. denied*, 368 U.S. 862 (1961); Oregon *ex rel.* Sherwood v. Gladden, 240 F.2d 910 (9th Cir. 1957); United States *ex rel.* Atterbury v. Ragen, 237 F.2d 953 (7th Cir. 1956); Ortega v. Ragen, 216 F.2d 561 (7th Cir. 1954), *cert. denied*, 349 U.S. 940 (1955); United States *ex rel.* Wagner v. Ragen, 213 F.2d 294 (7th Cir. 1954); Siegel v. Ragen, 180 F.2d 785 (7th Cir. 1950).

[4] *E.g.*, United States v. Marchese, 341 F.2d 782 (9th Cir.), *cert. denied*, 382 U.S. 817 (1965); Childs v. Pegelow, 321 F.2d 487 (4th Cir. 1963), *cert. denied*, 376 U.S. 932 (1964); Roberts v. Pegelow, 313 F.2d 548 (4th Cir. 1963); Sutton v. Settle, 302 F.2d 286 (8th Cir. 1962), *cert. denied*, 372 U.S. 930 (1963); Tabor v. Hardwick, 224 F.2d 526 (5th Cir. 1955), *cert. denied*, 350 U.S. 971 (1956); Dayton v. McGranery, 201 F.2d 711 (D.C. Cir. 1953); Strowd v. Swope, 187 F.2d 850 (9th Cir.), *cert. denied*, 342 U.S. 829 (1951); Dayton v. Hunter, 176 F.2d 108 (10th Cir.), *cert. denied*, 338 U.S. 888 (1949).

[5] See Price v. Johnston, 334 U.S. 266 (1948).

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

[7] Dayton v. McGranery, 201 F.2d 711 (D.C. Cir. 1953).

[8] Rivers v. Royster, 360 F.2d 592 (4th Cir. 1966).

[9] The list of cases involving Black Muslims attempting to assert their rights while incarcerated has grown rapidly in recent years. See Williford v. California, 352 F.2d 474 (9th Cir. 1965); Richey v. Wilkins, 335 F.2d 1 (2d Cir. 1964); Sostre v. McGinnis, 334 F.2d 906 (2d Cir.), *cert. denied*, 379 U.S. 892 (1964); Childs v. Pegelow, 321 F.2d 487 (4th Cir. 1963), *cert. denied*, 376 U. S. 932 (1964); Fulwood v. Clemmer, 295 F.2d 171

movement, which is familiar to most Americans because of its separatist social and economic policies and its promotion of militant Negro racial pride, has profoundly affected internal discipline in penal institutions by means of zealous efforts to protect its incarcerated members.[10] The movement should not be dismissed, however, as that of a group of militant racists adhering to unorthodox beliefs and practices. The Black Muslim faith has all the normal aspects of a religion—including a bible, ministers, temples and parochial schools.[11] As far as can be determined there has been no case in which a court has refused to recognize the movement as a legitimate religion; at least three courts have held expressly that Black Muslims do constitute a religious group.[12] The numerous petitions by Muslim prisoners have produced a significant body of decisions in which the courts have shown themselves willing to inquire into the possibility of granting relief for inmate grievances under the constitutional protection of freedom of religion. The basic proposition facing the judiciary in such cases is the delineation of boundaries between the exercise of individual religion and the pragmatic imposition of penal authority.

(D.C. Cir. 1961); Pierce v. LaVallee, 293 F.2d 233 (2d Cir. 1961); Jones v. Willingham, 248 F. Supp. 791 (D. Kan. 1965); Banks v. Havener, 234 F. Supp. 27 (E.D. Va. 1964); Coleman v. District of Columbia Comm'rs, 234 F. Supp. 408 (E.D. Va. 1964); Sewell v. Kennedy, 222 F. Supp. 15 (E.D. Va. 1963); Dixon v. Duncan, 218 F. Supp. 157 (E.D. Va. 1963); Bolden v. Pegelow, 218 F. Supp. 152 (E.D. Va. 1963); *In re* Jones, 22 Cal. Rptr. 478, 372 P.2d 310 (1962); *In re* Ferguson, 12 Cal. Rptr. 753, 361 P.2d 417, *cert. denied*, 368 U.S. 864 (1961); Bryant v. Wilkins, 265 N.Y.S.2d 995 (App. Div. 1965), *cert. denied*, 383 U.S. 972 (1966); Blazic v. Fay, 251 N.Y.S.2d 494 (App. Div. 1964); Brown v. McGinnis, 10 N.Y.2d 531, 180 N.E.2d 791, 225 N.Y.S.2d 497 (1962). For commentary on Black Muslim cases see Comment, *Black Muslims in Prison: Of Muslim Rites and Constitutional Rights*, 62 COLUM. L. REV. 1488 (1962); Comment, 32 GEO. WASH. L. REV. 1124 (1964).

[10] Prisoners believing in Islam have installed "kangaroo courts" within prison walls, Sostre v. McGinnis, 334 F.2d 906 (2d Cir. 1964), demanded special dietary considerations during "Ramadan" (the month of fasting), Childs v. Pegelow, 321 F.2d 487 (4th Cir. 1963), and kept special scrapbooks of Muslim materials, *In re* Ferguson, 12 Cal. Rptr. 753, 361 P.2d 417 (1961). Muslim prisoners at Leavenworth congregated in the recreation yard for instruction in judo and karate while other inmates were kept away by "sentries," Jones v. Willingham, 248 F. Supp. 791 (D. Kan. 1965).

[11] LINCOLN, THE BLACK MUSLIMS IN AMERICA 125-28, 132 (1961). Muslims are also required to adopt a strict moral code (including puritanical sexual mores, dietary restrictions, and total abstinence from tobacco and alcohol) which is often beneficial to prison discipline. *Id.* at 80-83.

[12] Banks v. Havener, 234 F. Supp. 408 (E.D. Va. 1964); Fulwood v. Clemmer, 206 F. Supp. 370 (D.D.C. 1962); Bryant v. Wilkins, 265 N.Y.S.2d 995 (App. Div. 1965).

In *Howard v. Smyth*[13] a Black Muslim inmate of the Virginia State Penitentiary sought release from the maximum security unit where he had been confined for approximately four years. During July and August of 1962 he had met with the prison chaplain and an assistant superintendent to ask for worship services for inmates who embraced the Muslim faith. Following these discussions he was called before the prison superintendent who heard his request and demanded the names of the prisoners for whom he spoke. Howard refused to give the names. He later explained that he feared disciplinary action against the Muslim inmates. The prison superintendent then summarily ordered him confined to the maximum security unit. Although hearings were customary in such cases, none was given Howard. The Fourth Circuit, reversing denial of Howard's petition by the District Court, held that while

> prison officials may and should be alert to exercise their legitimate authority to prevent breaches of discipline, even this acknowledged broad authority may not be exercised to discipline a prisoner who merely expresses for himself and others a desire to worship according to their religious dictates.[14]

Expressing its belief that petitioner was guilty of no misconduct, the court refused to countenance "the arbitrary imposition of such serious disciplinary action where the assertedly offensive conduct bears so close a relationship to First Amendment freedoms."[15]

The prison officials contested Howard's right to relief by means of a dual argument: (1) his confinement in maximum security was not "punishment," but merely "segregation"; and (2) he was not placed in security because of his religious beliefs. Acceptance of the first contention would have placed the administrators' decision within their acknowledged regulatory authority, thereby destroying the court's authority to interfere. The court hurdled this obstacle and reached the broader constitutional issue by looking beyond mere definitions and holding that the deprivations to which Howard was subjected by his change in status "cannot be treated as insubstantial."[16]

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[13] 365 F.2d 428 (4th Cir. 1966).
[14] *Id.* at 430.
[15] *Id.* at 431.
[16] *Id.* at 430. The court found that prisoners in the maximum security unit to which Howard was confined were not permitted to work and earn money; they were allowed only two meals a day, and were deprived of radio, television, and movie privileges. They did not have access to the library

The second half of the officials' argument was not dealt with so directly. By contending that Howard was placed in maximum security *only* because he refused to divulge the names of the other prisoners who desired Muslim services, the administrators presented the court with the task of constructing a proper foundation for First Amendment relief. The officials argued that the nature of the group represented by Howard was immaterial, because the existence of *any* cohesive groups of prisoners within the institution posed a threat to discipline.[17] In his testimony, the prison superintendent stated that he would have placed in maximum security *any* inmate who came before him requesting privileges for a group if that inmate refused to divulge the group's membership. He further said that this policy would apply equally to Protestant, Catholic or Jewish prisoners.[18] On the basis of this argument, the District Court had refused to find a violation of Howard's religious freedom. The Fourth Circuit thus faced the dilemma of accepting this argument, or bringing within the purview of the First Amendment Howard's refusal to divulge the names. The court followed neither course; rather, it slipped between the horns of the dilemma. The opinion acknowledges that the sole reason for Howard's confinement was his refusal to divulge the names, but continues:

> If a Protestant or Catholic or Jewish inmate had expressed a desire to worship with others of his faith, there can be little doubt that the prison officials would have been disposed to honor the request; and if for any reason this was thought impracticable, it can hardly be supposed that the mere making of the request or even the refusal to reveal the identity of other prisoners sharing in this concern would have led to punishment by years of confinement in the maximum security ward.[19]

This conclusion makes no attempt to equate Howard's actions with his religious beliefs, and it deals only peripherally with the

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and were not permitted to attend educational classes. Baths were restricted to once a week, as opposed to daily baths allowed other prisoners. In addition, the Parole Board declined to hear applications for parole from any prisoners confined to maximum security. *Id.* at 429-30.

[17] At least one court has associated this general fear of intra-institutional groups with the Black Muslims specifically. "Black Muslim inmates . . . tend to form themselves into cohesive, disciplined groups, taught to come to the defense of other Black Muslims and to demand equal punishment with a brother Muslim who might be disciplined." Jones v. Willingham, 248 F. Supp. 791, 793 (D. Kan. 1965).

[18] Record, pp. 24-25, 27.

[19] 365 F.2d at 428.

superintendent's arguments concerning the relationship between the refusal to give names and general prison discipline. The court simply bypasses these problems and concludes that the inviolability of a prisoner's religious attitudes demands that they be protected when the facts allow the conclusion that prison officials are in fact attempting to suppress them, even though they act under the guise of fair play. This interpretation is substantiated by the court's statement that petitioner "had been guilty of no misconduct," and by its final holding that "the only reasonable conclusion is that he is being arbitrarily punished."[20]

It was not absolutely necessary for this court to avoid an assessment of Howard's refusal to divulge the names of his fellow Muslims in order to grant the relief sought. In *Fulwood v. Clemmer*[21] a district court applied the protection of the eighth amendment to achieve a similar result. In that case, a Muslim prisoner had engaged in "racial preaching" which the court found 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."[22] Prison officials placed him in solitary confinement for two years. Relief was granted under the test formulated by Mr. Justice Douglas in *Robinson v. California*:[23] the imposition of a deprivation bearing no reasonable relation to the offense constitutes both a denial of due process and a cruel and unusual punishment within the ambit of the eighth amendment. Once the court in Howard had found that petitioner's special confinement constituted "punishment," the Douglas test could have been applied to grant relief even if the refusal to divulge names was construed as an offense against prison discipline. A holding based on this test, however, would have been decidedly less flexible than a decision grounded in the first amendment, because the eighth amendment lacks the scope necessary to encompass wide varieties of circumstances. But by its willingness to reach past secondary arguments and protect Howard's religious attitudes from infringements which it considered both substantial and arbitrary, the court in this case has demonstrated an unequivocal commitment to the emerging view that the most private of all consti-

[20] *Id.* at 428.
[21] 206 F. Supp. 370 (D.D.C. 1962).
[22] *Id.* at 378.
[23] 370 U.S. 660 (1962).

tutional rights must not be shut off even by the imposing barriers of prison walls.

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Constitutional Law—The Right to a Bifurcated Trial

Congress, when passing the Federal Rules of Civil Procedure, recognized the likelihood that prejudice would result when certain issues were tried together and authorized the federal courts, in a civil suit, to order the separate trial of any issue to avoid that problem.[1] It would seem that the need to avoid prejudice in a criminal proceeding, where the life or liberty of the defendant is at stake, is even greater, but the Federal Rules of Criminal Procedure contain no comparable provision.[2]

The likelihood of this type of prejudice was so great in *Holmes v. United States*[3] that the defense counsel refused as a matter of trial tactics to raise the issue of the appellant's insanity at the time the crime was committed. The appellant, after being convicted, filed a motion under section 2255 of the Judicial Code[4] in the Federal District Court for the District of Columbia to have his sentence vacated alleging that his counsel rendered ineffective assistance because of his failure to assert the insanity defense.[5] Counsel testified that his experience led him to believe that such a defense would be a most "impractical approach or request to make of a jury," that a defense of insanity coupled with a defense on the merits would jeopardize both defenses, and that there would be great difficulty "without first admitting to the jury that the defendant Holmes was guilty of all counts before interjecting a defense of insanity."[6]

The appellate court found the "trial counsel's appraisal of the prejudicial effect of the insanity defense on the defense of not guilty was entirely reasonable," but that this did not mean that the insanity defense had to be abandoned. The court pointed out that the de-

[1] FED. R. CIV. P. 42(b).

[2] Such procedure would not be inconsistent with the Federal Rules of Criminal Procedure which authorize courts, "If no procedure is specifically prescribed by rule . . . [to] proceed in any lawful manner not inconsistent with these rules or any specific statute." FED. R. CRIM. P. 57(b).

[3] 363 F.2d 281 (D.C. Cir. 1966).

[4] 28 U.S.C. § 2255 (1965) (Statutory equivalent of habeas corpus).

[5] 363 F.2d at 281.

[6] *Id.* at 282.