IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

GEORGE GOFF, WILLIAM BARBEE, JIM DORSEY, TOM YARGES, JEFF RAGLAND, JAMES HALL, MICHAEL GUNN, JON JON KING, ADAM TANNER, SAM ARCHER, MICHAEL O'DONNELL, PAT CUPPLES, JEFF WINTERS, and ART POYNER,	)	Civil No. 4-97-cv-90341
Plaintiffs,	)	
v.	)	
LEONARD GRAVES, JAMES HELLING, and BERNARD EAVES,	)	REPORT AND RECOMMENDATION
Defendants.	)	

Plaintiffs, as named in the caption above[1], are or were inmates at the Iowa State Penitentiary (ISP) and professed members of Church of the New Song (CONS). They brought this action against defendants[2] on May 14, 1997, asserting claims for relief under 42 U.S.C. § 1983 for violation of their rights under the Free Exercise Clause of the First Amendment and contempt of the court's decree in Remmers v. Brewer, 361 F. Supp. 537, 544 (S.D. Iowa 1973), aff'd, 494 F.2d 1277 (8th Cir.), cert. denied, 419 U.S. 1012 (1974), as

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[1] Initially there were thirty-five (35) inmate plaintiffs. Four failed to pay the filing fee and were dismissed; seventeen dismissed their claims prior to trial. The remaining fourteen plaintiffs are as named in the caption.

[2] The original defendants included former Warden Maschner. His successor, Leonard Graves, has been substituted as a party pursuant to Fed. R. Civ. P. 25(d)(1).

supplemented in Loney v. Scurr, 474 F. Supp. 1186, 1197 (S.D. Ia. 1979).[3] Specifically, plaintiffs complain that defendants have not let them have their Celebration of Life festival on plaintiffs' chosen date and have not allowed CONS inmates in lock-up to receive the Celebration meal. Plaintiffs seek injunctive relief in their § 1983 action. On the contempt issue they seek a finding of contempt and an order that defendants accede to their requests, but do not ask the Court to sanction defendants for contempt.

Jurisdiction is predicated on 28 U.S.C. §§ 1331, 1343(a)(3),(4). The case has been referred to the undersigned for a Report and Recommendation pursuant to 28 U.S.C. § 636(b)(1)(B).

Trial occurred over two sessions, on October 27, 28 and 29, 1998 and June 1, 1999, followed by briefing. After the first session, essentially in mid-trial, defendants sought leave to amend their answer to assert a counterclaim for declaratory relief. The

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[3] The Court views plaintiffs' claims as alleging a violation of their Free Exercise rights and contempt of Remmers decree that CONS members at ISP have the right to exercise their religion equally with members of other religions. 361 F. Supp. at 544. (See Trial Tr. 10/98 at 10). The Court has not treated the complaint, as tried, as presenting a stand alone Equal Protection claim. The result of any such claim would not, in any event, differ from the Court's conclusions with respect to the contempt claim.

In their trial brief plaintiffs now suggest the Court need go no further than address the contempt claim (June 25, 1999 Brief at 2), but they have not dismissed the § 1983 action and the Court is reluctant to infer an intent to do so. Therefore, not withstanding plaintiffs' suggestion, the Court will address both the First Amendment Free Exercise and contempt claims.

counterclaim sought three alternative declaratory rulings: (1) that plaintiffs are insincere in their professed religious beliefs; (2) that plaintiffs' activities associated with CONS are non-religious and therefore not entitled to First Amendment protection; or (3) that legitimate penological interests outweigh any constitutional right of defendants to practice "Eclatarianism" as the CONS belief system is described. The Court granted the motion for leave to amend with respect to the first two alternative claims, but denied it as to the third. (Trial Tr. 6/1/99 at 6-8). The first two claims were sufficiently connected to the issues described in the final pretrial order that they did not unduly broaden the scope of the case. The Court viewed the third alternative claim as significantly changing and expanding the issues in the action because it sought court-sanctioned suppression of all CONS activities in the prison. Having rethought the matter, the third claim is factually related to the first two so that it is appropriate to grant leave to amend to consider that claim as well. The motion for leave to amend is now granted as to the counterclaim in its entirety. The original ruling granting the motion in part reserved for later determination the question of whether declaratory judgment would be an appropriate exercise of discretion. (Id.) That subject is discussed below.

The record in this case is unusual and lengthy. Pleading threat to institutional security and the safety of those who would give evidence against CONS, defendants sought leave to present certain confidential exhibits and testimony by ex parte proceedings outside the presence of plaintiffs and their counsel. When prison officials express extraordinary concern for safety and security, they are entitled to respectful consideration by the Court. At the same time, this is a lawsuit in which plaintiffs claim violations of their fundamental constitutional right to practice their religion and the orders of this court. Due Process principles, the qualified right of public access to court proceedings and records, and the integrity of the factfinding process severely limit the occasions when what defendants proposed, if ever, would be appropriate. The Court granted defendants' request to the extent of permitting defendants to offer the exhibits and testimony in question outside of plaintiffs' presence (but with plaintiffs' counsel present) and under a protective order preventing disclosure to them. Ultimately, under this procedure the Court received, subject to plaintiffs' objections, the deposition testimony of several inmate witnesses and a number of exhibits consisting generally of prison investigative reports, disciplinary records, inmate communications, and two affidavits tendered as offers of

proof (hereinafter "the sealed record").[4] Defendants were also given wide latitude in developing the open record.

The Court has carefully reviewed the lengthy record, paying particular attention to the citations to the record in defendants' proposed findings.[5] Review and consideration of the record in this case has taken more than the usual length of time.

I.

FINDINGS OF FACT

Plaintiffs are inmates in the custody of the Iowa Department of Corrections, now incarcerated at various institutions throughout the state of Iowa. They are members of the prison-based religion known as Church of the New Song (CONS), which practices a belief known as Eclatarianism, "the pantheistic belief in an all-pervading, harmonizing spirit" known as "Eclat." Loney, 474 F. Supp. at 1188; see Remmers, 361 F. Supp. at 540. The settled law of this district, affirmed by the Eighth Circuit, is that CONS "is a religion within the ambit of the First Amendment." Remmers, 494 F.2d at 1278; see Remmers, 361 F. Supp. at 542. The history of the religion and its belief system are discussed at length in Remmers

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[4] The sealed exhibits are Exhibits A, B, C, D-1, E, G-1 and G-2.

[5] At the conclusion of the June 1, 1999 hearing the Court had asked defense counsel to specifically identify the significant parts of the record relied on and defendants have done so in their proposed findings.

and the Court will not belabor these points. It was founded by federal prison inmate Harry Theriault, the self-styled "Bishop of Tellus." Its principal doctrinal source is "The Paratestament in the New Language of the Church" written by Theriault. (Ex. S, S-1). See Remmers, 361 F. Supp. at 540-41.

The Remmers court recognized the possibility that CONS was a sham and observed that if that proved to be the case, it could be dealt with by the prison administration and the court. 361 F. Supp. at 543. In Loney prison officials took up the invitation to revisit what CONS was really about. They filed a "Motion to Reopen and Vacate Judgment and Dismiss Plaintiffs' Complaint" in the original Remmers action which had been recaptioned Loney v. Scurr. 474 F. Supp. at 1188. The motion was made under Fed. R. Civ. P. 60(b)(5), (6) and was based in part on defendants' contention that CONS members had abused their First Amendment privileges since the original Remmers ruling had been handed down. Id. at 1191. Following a lengthy series of hearings, the court found that the evidence was insufficient to disturb the Remmers judgment. The court repeated Remmers core holding that "[t]he Church of the New Song is simply and only to be accorded the same treatment accorded other recognized religions, with respect to both privileges and restrictions." Id. at 1197.

Participation in the church died down after the initial years of interest. (See Ex. X). In 1985 George Goff, one of the plaintiffs here, acted to revitalize interest in CONS at ISP. A number of inmates including plaintiffs currently profess to be members of CONS.

One of the asserted holidays of CONS, indeed the only one expressly identified in the record, is the Celebration of Life, an event which plaintiffs testified should be held in April to commemorate the day on which CONS "broke into history" through the "opening" of the church by Theriault. (Ex. S, Paratestament 2:29 at 5; S-1). Over the years the Celebration has been held at various times.[6] Its focal point is a banquet for general population CONS inmates. Food is catered in from outside the penitentiary and paid for by the inmates from the church's prison account. In the past food trays were delivered to church members in lock-up status.

In 1993 the Celebration of Life was held in December, with meal trays to lock-up inmates. (Ex. L/N at 829). In 1994 and 1995 the Celebration was held in August, with meal trays going to

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[6] In 1973, 1974 and 1975 the banquet was held in April and November. (Ex. L/N at 1407-1409, 1411). In 1977 and 1979 the banquet was held in November. (Id. at 1404-05). In 1981 it was held in April. (Id. at 1402). The next record in evidence which reflects any scheduling of the Celebration of Life banquet shows a specific request it be held in September 1993. (Id. at 865). It appears, however, the banquet was actually held in December 1993. (Id. at 829).

lock-up inmates. (Id. at 621, 760). Although an inmate request was made to schedule the banquet in April 1996, (id. at 487), it was held in August of that year and at that time ISP prison authorities declined to allow trays to go to lock-up inmates. (Id. at 417).

In January 1997, Pat Cupples, one of the plaintiffs, wrote a memo to the attention of Bernard Eaves, ISP's treatment director, requesting that the banquet be held in April, and that lock-up members be allowed to receive trays. He also requested that the event be held in the chapel instead of the visiting room. (Id. at 325). Prison officials denied the requests that the ceremony be moved to April and that lock-up inmates receive trays. The warden at the time, Warden Maschner, was new and not familiar with CONS. When the request was made for the April date, he asked when the Celebration had been held the year before, and on learning it had been in the Fall, decided that it would be held at the same time in 1997. (Trial Tr. 10/98 at 458).

This lawsuit followed on May 8, 1997. It appears that ISP officials approved CONS members holding the banquet in August 1997 and 1998. (Ex. L/N at 93, 250).

II.

DISCUSSION INCLUDING ADDITIONAL FACTUAL FINDINGS

A. Plaintiffs' Claims.

(i) Constitutional and Contempt Principles Generally

Free Exercise. In general, an "'inmate retains those First Amendment rights that are not inconsistent with his status as a prisoner or with the legitimate penological objectives of the corrections system.'" Cornell v. Woods, 69 F.3d 1383, 1388 (8th Cir. 1995) (quoting Pell v. Procunier, 417 U.S. 817, 822 (1974)); see also O'Lone v. Estate of Shabazz, 482 U.S. 342, 349 (1987); Turner v. Safley, 482 U.S. 78, 84 (1987); Hudson v. Palmer, 468 U.S. 517, 523 (1984); Giano v. Senkowski, 54 F.3d 1050, 1053 (2d Cir. 1995); Nichols v. Nix, 810 F. Supp. 1448, 1455 (S.D. Iowa 1993), aff'd, 16 F.3d 1228 (1993) (Table).

One who claims a challenged government action violates his or her constitutionally protected free exercise of religion must first establish that the belief in question is religious in nature, is sincerely held, and that the government action actually infringes upon the free exercise of the individual's belief. Sherbert v. Verner, 374 U.S. 398, 403-04 (1963); Brown-El v. Harris, 26 F.3d 68, 69 (8th Cir. 1994); Iron Eyes v. Henry, 907 F.2d 810, 813 (8th Cir. 1990); Hill v. Blackwell, 774 F.2d 338, 342 (8th Cir. 1985). "[A]ctual infringement," is shown if the

government action substantially burdens an individual's ability to freely exercise his religion. Love v. Reed, 216 F.3d 682, 689 (8th Cir. 2000).

> In order to be considered a "substantial" burden, the governmental action must 'significantly inhibit or constrain conduct or expression that manifests some central tenet of a [person's] individual [religious] beliefs; must meaningfully curtail a [person's] ability to express adherence to his or her faith; or must deny a [person] reasonable opportunities to engage in those activities that are fundamental to a [person's] religion.'

Weir v. Nix, 114 F.3d 817, 820 (8th Cir. 1997)[7] (quoting In Re Young, 82 F.3d 1407, 1418 (8th Cir. 1996), cert. granted, judgment vacated, 521 U.S. 1114 (1997), in turn quoting Werner v. McCotter, 49 F.3d 1476, 1480 (10th Cir.), cert. denied, 515 U.S. 1166 (1995)). In the prison context if a substantial burden is shown, the Court then examines whether prison officials have "shown a reasonable relationship between the [restriction] and some legitimate penological interest." Love, 216 F.3d at 690 (citing Turner, 482 U.S. at 89).

Contempt. To demonstrate civil contempt, plaintiffs must establish violation of a decree by clear and convincing evidence.

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[7] The substantial burden test is similar to that formerly required by the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb-1(b), held unconstitutional by the United States Supreme Court in City of Boerne v. Flores, 521 U.S. 507, 1997.

Chicago Truck Drivers v. Brotherhood Labor Leasing, 207 F.3d 500, 505 (8th Cir. 2000); Wycoff v. Hedgepeth, 34 F.3d 614, 616 (8th Cir. 1996). The decree must be "sufficiently specific to be enforceable." Hazen v. Reagen, 16 F.3d 921, 924 (8th Cir. 1994); see Imageware, Inc. v. U.S. West Communications, 219 F.3d 793, 797 (8th Cir. (2000) ("No one should be held in contempt for violating an ambiguous order. . ."). The Court must keep in mind the purpose of the decree and "substantial, good faith compliance is a defense to an action for civil contempt." Id. Because the contempt power is a substantial one, it should be used sparingly and not be lightly invoked." Hartman v. Lyng, 884 F.2d 1103, 1106 (8th Cir. 1989)(citing United States v. United Mine Workers of America, 330 U.S. 258, 303-04 (1947) and In Re Attorney General of the United Sates, 596 F.2d 58, 65 (8th Cir. 1979)); see Independent Fed'n of Flight Attendants v. Cooper, 141 F.3d 900, 920 (8th Cir. 1998)(contempt is a "most potent weapon, and therefore it must be carefully and precisely employed").

(ii) Timing of the Celebration of Life.

Plaintiffs have not established that the inability to hold the Celebration of Life in April substantially burdens the exercise of their CONS beliefs or that defendants are in contempt of Remmers in this regard. April 1970 is apparently when the church was founded by Theriault. It is of primarily historical

significance. During the life of CONS at ISP the Celebration has been held at various times during the year, April, August, November and December. Until February 1996, (Ex. L/N at 487), no member of CONS protested or complained about the timing of the Celebration of Life on religious grounds, at least not on the record before the Court. In a deposition given in 1981 the present de facto leader of CONS at ISP, Goff, was not sure when the Celebration of Life was celebrated, but thought it was in June. (Trial Tr. 10/98 at 232, 235-37).

Plaintiffs have not identified any doctrinal source for the April date. Most of the plaintiffs cited to a specific portion of the Paratestament dealing with the "Sacred Unity Feast."

> . . .each year on the same date the Seminary of the Fountainhead in all purlieus will hold the Annual Sacred Unity Feast for the fellowship of all Maverites and Sporades and for the purpose of having new Revelation ministers consecrated (R.M.C.) into the faith to carry on the works of Eclat through the Church of the New Song all over the Earth, of every nation, and kindred, and people, and tongue. (Book of Revelation 7:9).

(Ex. S, Paratestament 7:149 at 62). It is not very clear that the Sacred Unity Feast is the same thing as the Celebration of Life. The Eclatarian Glossary describes the Fountainhead Seminary as a "Ministerial school of Eclatarianity" composed of "rectorates" (CONS clergy). (Ex. S-1). "Maverites" are human beings and

"Sporades" are women. (Id.) The Sacred Unity Feast is apparently intended as some type of ceremony to consecrate new ministers. Plaintiffs do not direct the Court's attention to anything in the Paratestament which indicates the Sacred Unity Feast is to occur on any given date or, more generally, that the date on which CONS was founded is a religious holiday. This result is not surprising because as the court noted in Remmers, CONS is not a dogmatic church. Members are free to accept or reject Eclatarian teachings as they choose. "[T]he only absolute requirement . . . [is] a firm belief in Eclat." Remmers, 361 F. Supp. at 541.

The Court finds plaintiffs' insistence on the April date for the Celebration of Life is neither religiously motivated nor religiously compelled. See In re Young, 82 F.3d 1407, 1418 (8th Cir. 1996)(citing Sasnett v. Sullivan, 908 F. Supp. 1429, 1440-45 (W.D. Wis. 1995). It follows that there is no substantial evidence in the record which ties the Celebration of Life to some central tenet of CONS beliefs. Holding the Celebration at some time other than April does not meaningfully curtail members' ability to express adherence to CONS or deny a reasonable opportunity to engage in fundamental religious activity. Weir, 114 F.3d at 820.

On the contempt issue, neither Remmers nor Loney decree any specific time when CONS events must be scheduled, only that CONS be treated equally with other religions. Neither is

"sufficiently specific to be enforceable," by contempt proceedings with respect to the date of the Celebration. Hazen, 16 F.3d at 924.

As noted, Remmers and Loney mandate no more than an equal opportunity for CONS adherents to exercise their religion. The times designated for the observance of the religious holidays of other religions to which CONS members compare themselves (principally the Muslim religion) are firmly rooted in religious doctrine and tradition and ripe with religious significance. For example, the holy month of Ramadan with its routine of fasting, prayer and Qur'anic readings is observed by Muslims around the world. CONS has no counterpart. Prison officials did not treat CONS unequally just because they did not permit its members to have the Celebration of Life on the date they demanded.

(iii) Trays to Lock-Up Inmates.

For the Celebration of Life banquet CONS members vote on a menu which is ordered from outside the penitentiary. The menu has no religious significance. CONS has no dietary laws. The banquet is more akin to a church supper than a ritual meal or ceremony. In the past meal trays from the banquet were prepared for lock-up inmates and delivered to them in their cells so they could share in the Celebration of Life.

In January 1997 ISP officials decided lock-up inmates could not have trays in connection with the Celebration of Life,

which was actually held in August that year. Colonel John Emmett, Security Director at ISP, testified that staff cannot totally control what goes on the lock-up trays as they cannot tear the food apart or watch every tray being made. (Trial Tr. 10/98 at 397).

The Muslims are the only religious group allowed to take food brought in from outside the prison to inmates in lock-up. (Id. at 432). ISP accommodates the fasting requirements of Ramadan by providing a hot meal after sundown together with a sack breakfast for the morning. (Id. at 251). The end of Ramadan is celebrated with the Eid al-Fitr celebratory meal at which the fast is broken. See Hicks v. Acevedo, No. 4-96-cv-70072, Findings of Fact, Conclusions of Law, and Order at 2 (S.D. Iowa December 17, 1996).[8] Halal meat (prepared similar to Kosher meat) is traditionally eaten at the Eid al-Fitr. ISP allows the Muslims to eat halal meat and order catered food for the Eid al-Fitr. (Trial Tr. 10/98 at 250). Muslim inmates in the general population are allowed to take trays of food to inmates in lock-up.

Plaintiffs have not demonstrated a substantial burden on the free exercise of their religious beliefs arising from inability to receive meal trays of banquet food while in a lock-up or a

[8] A similar festival, Eid al-Adha, is celebrated at the end of the annual Hajj. Hicks, supra at 2.

similar status.[9] The fact the food is catered in and, if not better, represents a change of pace from prison fare has no religious significance. See Spies v. Voinovich, 173 F.3d 398, 407 (6th Cir. 1999)(refusal to provide vegan meal to Zen Buddhist did not violate First Amendment as adherence to vegan diet was not requirement of religion). Plaintiffs did not testify, and the Paratestament does not indicate, that what CONS members eat in connection with the Celebration of Life observances is religiously motivated or compelled. Eating the banquet food would provide a lock-up inmate with a connection to the larger celebration, but this inability to symbolically participate in what is primarily a social event does not deny lock-up inmates an opportunity to engage in a fundamental religious activity. Lock-up inmates can pray, have access to an inmate minister and through these means express their belief in Eclat.

It is not clear from the record that the "equal treatment" rule of Remmers was violated by not allowing CONS inmates in lock-up to share in the food catered in for the Celebration banquet. Plaintiffs again point to their Muslim counterparts. If prison officials have allowed Muslim lock-up inmates to receive catered food from outside the prison for the Eid

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[9] Many of the plaintiffs have poor disciplinary records and have been, and probably will be, in lock-up or some similar status from time to time.

al-Fitr solely to accommodate Muslim dietary practices, for example, the halal meat, there is no unequal treatment because CONS members do not have dietary restrictions or traditions which need to be accommodated. If, on the other hand, the food for the Eid al-Fitr is not catered in to comply with religious dietary laws or traditions, but, like the Celebration of Life, is simply food for a banquet, then CONS members in lock-up are entitled to share the catered food for the Celebration banquet the same as Muslim lock-up inmates are for the Eid al-Fitr. The Court cannot tell from the record whether, apart from the halal meat, catered food not required by Muslim religious beliefs is provided to Muslim lock-up inmates during Eid al-Fitr.[10] The record is thus insufficient to find a violation of Remmers.

B. Counterclaims.

The significant question presented by the counterclaim is whether the Court should exercise its discretionary jurisdiction.

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[10] The security concerns expressed by Security Director Emmett would not justify treating CONS inmates differently with respect to access to catered food for religious festivals. The Celebration of Life is once a year and inspection of the food trays is not likely to be burdensome. There is no evidence in the case of the Muslims or, when they were allowed to partake, CONS inmates, that providing special food has in the past resulted in a breach of security. The impact of accommodating the CONS lock-up inmates would be minimal and inspection of the meals an obvious, reasonable alternative. Turner, 482 U.S. at 90. Of course, absent a First Amendment violation or violation of Remmers, prison officials do not have to justify their refusal to let lock-up inmates have catered food.

The Declaratory Judgment Act provides that district courts "may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought." 28 U.S.C. § 2201(a). Textually, the power to grant declaratory judgments is discretionary, and the United States Supreme Court has consistently taken that position. Wilton v. Seven Falls Co., 515 U.S. 277, 287 (1995); Public Affairs Assoc., Inc. v. Rickover, 369 U.S. 111, 112 (1962); Public Serv. Comm'n of Utah v. Wycoff Co., 344 U.S. 237, 241 (1952); see Alsager v. Dist. Court of Polk County, Iowa (Juvenile Div.), 518 F.2d 1160, 1163 (8th Cir. 1975). "'[T]here is . . . nothing automatic or obligatory about the assumption of 'jurisdiction' by a federal court' to hear a declaratory judgment action." Wilton, 515 U.S. at 288 (quoting Borchard, Declaratory Judgments, at 313). The Eighth Circuit, like the Supreme Court, has looked to Professor Borchard's guidelines for determining the propriety of declaratory relief.

> The two principal criteria guiding the policy in favor of rendering declaratory judgments are (1) when the judgment will serve a useful purpose in clarifying and settling the legal relations in issue, and (2) when it will terminate and afford relief from the uncertainty, insecurity and controversy giving rise to the proceedings. It follows that when neither of these results can be accomplished, the court should decline to render the declaration prayed.

Alsager, 518 F.2d at 1163-64 (quoting Borchard, Declaratory Judgments, at 299). See C. Wright, A. Miller and M. Kane, Federal Practice and Procedure § 2759, at 543 ("One of the most important considerations that may induce a court to deny declaratory relief is that the judgment sought would not settle the controversy between the parties.").

For the reasons that follow, the Court concludes it should decline to exercise its declaratory judgment jurisdiction to grant the declaratory relief prayed for.

First, declaratory judgment in any particular would not bring an end to the controversy surrounding CONS, in fact just the opposite is foreseeable. Except perhaps for the sought-after adjudication of the sincerity of the individual plaintiffs (which has its own finality problems as discussed below), defendants appear to assume that a decree in their favor would permit them to suffocate CONS at ISP. That would not be the result of a declaratory judgment in their favor. The holding and decree in Remmers would be left undisturbed, CONS would still be a religion entitled to First Amendment protection, and prison officials would still be under a mandate to allow CONS members "to exercise their religion equally with other religions." 361 F. Supp. at 544. CONS members who are not plaintiffs could claim the right to continue to exercise their beliefs, a new generation of CONS inmates will

eventually come along as the present crop have, and these plaintiffs will be back. Any declaratory judgment in defendants' favor, if not legally so, would appear to be inconsistent with Remmers and neither inmates nor prison officials would be left with a very clear idea where they stood. The declaratory judgment defendants ask for would breed uncertainty and future controversy.

Second, defendants rely heavily on the sealed record, the fairness and reliability of which are, frankly, troublesome. It is a questionable foundation on which to base extensive declaratory relief. In view of its confidential nature, the Court is not able to discuss the contents of the sealed record in detail. Most of the plaintiffs are violent, hardened criminals serving long prison sentences. All have disciplinary histories, some more extensive and serious than others. There is evidence that some of the plaintiffs and other CONS members over the years have engaged in such activities as extortion, drug trafficking, assaults, gambling, attempted escapes, and weapons manufacturing and possession. (See Trial Tr. 10/98 at 381-82). While the Paratestament does not have racial overtones and CONS beliefs are peaceful, some past and present CONS members are open racists which has led to a perception by some in the institution that it is a white racist group.

The sealed record must, however, be approached with considerable caution. The evident motives and bias of the inmates

who have given deposition testimony adversely affects their credibility. While not all of counsel's many hearsay objections are meritorious, the sealed record contains a great deal of hearsay as well as hearsay upon hearsay. Much of the information is not based on personal knowledge, but is of the "prison grapevine" variety, very general and replete with speculation. The fact that plaintiffs' counsel has been unable to share the information in the sealed record with his clients further weakens its overall probative value. Plaintiffs have not had a full opportunity to respond to the charges leveled against them.

Finally, there are reasons specific to the forms of declaratory relief sought which cause the Court to stay its hand. Defendants first argue the Court should enter a declaratory judgment that plaintiffs are not sincere in their professed belief in Eclatarianism. Some of the plaintiffs are sincere, some are not. Those who are not sincere lack knowledge of the rudiments of their professed religion, and CONS is a rudimentary religion. The Court does not believe, however, it is useful to declare the religious sincerity, or insincerity, of each plaintiff. It is one thing to require plaintiffs in a Free Exercise action under § 1983 to demonstrate the sincerity of their religious beliefs as a prerequisite to obtaining damages or equitable relief, but it is another to, at the request of state officials, undertake to

determine a person's religious sincerity so that the state may deny him or her the opportunity to participate in future religious observances. Such a finding is, moreover, only a snapshot at the time of hearing. This Court has held that a finding a person is not a sincere believer is incapable of being given issue preclusive effect because "a person's religious sincerity at a given point in time does not preclude the possibility that the person has become sincere by a later date." Walker v. Maschner, Civil No. 4-98-cv-10159, Report and Recommendation at 12 (S. D. Ia. May 31, 2000), adopted August 10, 2000. A declaratory judgment in defendants' favor on this point would not permanently isolate any plaintiff from CONS observances at ISP.

Defendants alternatively seek a decree that plaintiffs' "activities associated with the Church of the New Song [are] non-religious in nature and not entitled to First Amendment protection." Counterclaim at 5. As the Court understands it there are two parts to defendants' argument here: CONS as a group is engaged in definitely unreligious criminal and other misconduct and CONS observances at ISP are not sufficiently religious.

As to the first part, in addition to the problems with the sealed record, the Court should not be too quick to attribute the misbehavior of members of a prison religious group to the group. Plaintiffs are at ISP because they have been convicted of

serious crimes and need the close supervision of a maximum security prison. No religious group would survive at the prison if disciplinary problems of its members was readily taken as a "practice" or "activity" of the religious group. See Loney, 474 F. Supp. at 1195. In this case, the problem conduct of certain plaintiffs and others CONS members described both in the open and sealed record is connected with CONS only by the fact of church membership or attendance at church functions.[11] (Trial Tr. 10/98 at 407). Despite close attention, defendants have not identified significant criminal conduct or prison rule violations associated with CONS observances; the Celebration banquets, weekly services and study groups. (Id.) To the extent individual CONS members, alone or together with others, engage in criminal acts and prison rule violations, defendants do not need a decree from this Court to adequately respond.

Courts are in very uncertain territory when asked to determine if a purported religious observance is religious enough to merit First Amendment protection, the second part of defendants' argument here. The Free Exercise Clause does not have a litmus test for religious content and structure. As described in the

[11] The Iowa Department of Corrections lists CONS as a "security threat group." (Trial Tr. 10/98 at 335). Prison officials regard CONS as a prison gang. Colonel Emmett explained this perception resulted from "the conduct of people who go to those meetings, not the title itself." (Id. at 376).

Paratestament, CONS services are "Free Exercise Seminars" containing three parts: (1) "[t]he act of embracing the limits of life"; (2) "the act of proclaiming the possibilities of life"; and (3) "the act of Eclatarian concern." (Exhibit S, Paratestament 10:181-84 at 123). In practical terms this translates into talking about what "is bugging you," "what do you propose to do about it," and a summing up or evaluation of the problems by the "Revelation minister." (Id. 10:187, 213, 218 at 124, 126-27). By nature this process is unstructured and freewheeling. As practiced by the CONS group at ISP, services consist of an occasional reading from the Paratestament, followed by music, playing cards or other games, and talking. CONS observances would not appear to be very religious to most people. However, the Eighth Circuit has again recently cautioned that beliefs can be both secular and religious and the First Amendment protects the area where the two overlap. Love, 216 F.3d at 689. CONS beliefs are "highly focused in the emotional support it gives its members" and on promoting a sense of self-worth and sense of community. Loney, 474 F. Supp. at 1193-94. Given these beliefs and the purpose served by a CONS service, it is very difficult to say what formalities and content are required to qualify as the exercise of a religious belief.

Finally, defendants contend legitimate penological interests outweigh the interest of plaintiffs in the exercise of

CONS beliefs in any manner, including services, study group, lay ministry and banquets. Such a plenary decree would have difficulty surviving the Turner analysis. There is an arguable relationship between the suppression of CONS and prison security, but not a close connection. The troublemakers in CONS would likely continue to associate and from time to time cause security problems like those defendants have identified. Plaintiffs, and if applied broadly, other CONS believers, would be deprived of any opportunity for congregate religious observance, a fundamental aspect of free exercise. Weir, 114 F.3d at 820. CONS observances in the past have not been a source of disciplinary problems and have been accommodated, as far as the record indicates, with no more burden to prison resources than that required to accommodate other religious groups. The ready alternative to the complete suppression of CONS activities is continuance of the supervision of those activities as in the past. 482 U.S. at 89-91.

III.

CONCLUSIONS OF LAW

(1) Plaintiffs have not established that defendants have violated their right to the free exercise of their CONS religion with respect to the date of the Celebration of Life observance or the restriction against taking a tray of food from the Celebration banquet to CONS inmates in lock-up.

(2) Plaintiffs have not established that any defendant is in contempt of the Remmers decree with respect to the date of the Celebration of Life observance or the restriction against taking a tray of food from the Celebration banquet to CONS inmates in lock-up.

(3) The Court should exercise its discretion to decline to grant the declaratory relief prayed for in the counterclaim.

(4) The Complaint and Counterclaim should be dismissed.

IV.

RECOMMENDATION AND ORDER

IT IS RESPECTFULLY RECOMMENDED that plaintiffs' Complaint and defendants' Counterclaim be dismissed.

IT IS ORDERED that the parties have to and including **December 8, 2000** to file written objections, pursuant to 28 U. S. C. § 636(b)(1), unless an extension of time for good cause is obtained. Thompson v. Nix, 897 F.2d 356 (8th Cir. 1990). Such extensions will be freely granted. Any objections filed must identify the specific portions of the Report and Recommendation to which the objections are made, and set forth the basis for such objections. See Fed. R. Civ. P. 72; Nix, 897 F.2d at 357. Failure to timely file objections may constitute a waiver of a party's right to appeal questions of fact. Thomas v. Arn, 474 U.S. 140, 155 (1985); Nix, 897 F.2d at 357.

IT IS SO ORDERED.

DATED this 20th day of November, 2000.

ROSS A. WALTERS
CHIEF UNITED STATES MAGISTRATE JUDGE