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COMMENT

THE RIGHTS OF PRISONERS WHILE INCARCERATED

INTRODUCTION

A defendant has been convicted, sentenced, and the conviction has been confirmed on appeal by the highest court of the state. Does an attorney's duty to his client end here? If the purpose of confinement in a prison is truly rehabilitation and return to a beneficial role in society, those rights *remaining* to a prisoner should be jealously safeguarded. A working knowledge of the legal status of an inmate in a state institution is indispensable to the attorney in whose hands the life and fortune of his client have been placed. Therefore, if possible, explanation of a client's rights to him at the time of incarceration would be most salutary. Imprisonment will breed further contempt for the system unless the inmate understands that he is still *human* and as such, still has enforceable rights and can successfully overcome abuses of over-zealous or over-cautious prison officials.

In a legal system which has in the past few years come to recognize the importance of the rights of individuals,¹ where it is felt better to let the guilty go free rather than to imprison one innocent man, it would be gross hypocrisy to allow this shield of individual rights to be cast aside simply because a man has become an inmate in a penal institution. It is in the prison situation, where abuse can so easily be concealed from the public eye, that the attorney must be ever vigilant, protecting the civil and human rights of his client. Utilization of a lawyer's skills in pointing out deficiencies to prison administrators will not only improve the inmate's lot, but also make the administrator aware of injustices which may have escaped his attention.

The purpose of this treatment is to familiarize attorneys and prison administrators with some of the current problems in an area which has received little attention but is nevertheless critically important to those affected. Hopefully, this discussion will furnish a starting point for those concerned with the rights of the imprisoned and provide a basis for more extensive analysis. Emphasis will be given to an examination of the civil death provisions of the New York Penal Law and their effect on a prisoner's right to sue, contract, convey realty, inherit, execute a will, hold public office, vote, and continue his marital status. His rights as an inmate are also explored: mail privileges; access to courts, attorneys, and legal materials; and his freedom of speech and religion. These topics are examined with an eye to the presentation of each problem area rather than an exhaustive study of any one particular area.

1. *E.g.*, *Gideon v. Wainwright*, 372 U.S. 335 (1963).

THE EFFECT OF CIVIL DEATH OR SUSPENSION OF CIVIL RIGHTS

A. *Generally*²

It has been said that "[a] prisoner retains all the rights of an ordinary citizen except those expressly, or by necessary implication, taken from him by law."³ The doctrine of civil death (known at common law as *civilliter mortuus*) denies a person convicted of certain degrees of crime the civil rights which all citizens enjoy. Sections 510 and 511 of the New York Penal Law are the current embodiment of this penal sanction. Whether expressed in terms of "shall be deemed civilly dead"⁴ or "all civil rights shall be suspended,"⁵ the effect is the same: the person upon whom these words are pronounced is less than a full citizen. The only distinction between a person civilly dead and one whose civil rights have been suspended is the length of the term to which he has been sentenced.

New York's civil death statute passed by the legislature in 1799 was the first such enactment in the United States.⁶ It was said to have been declaratory of the common law,⁷ but "the strict civil death seems to have been confined to the cases of persons professed (entering religious orders), or abjured, or banished the realm . . ."⁸ Though the common law of civil death was so clarified in the case of *Platner v. Sherwood*,⁹ later judicial interpretation expanded the doctrine far beyond its original concept.

In the application of the present civil death statutes,¹⁰ the courts have

2. See 37 Va. L. Rev. 105 (1951) for a good discussion of New York law before 1948. See also 34 Va. L. Rev. 463 (1948). See generally 21 Am. Jur. 2d *Criminal Law* §§ 616-29 (1965); 16 Am. Jur. *Death* §§ 2-11 (1938).

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

4. N.Y. Pen. Law § 511 (*semble*).

5. N.Y. Pen. Law § 510 (*semble*).

6. N.Y. Sess. Laws 1799, Ch. 57.

7. *Troup v. Wood*, 4 Johns Ch. R. 228 (N.Y. 1820).

8. *Platner v. Sherwood*, 6 Johns Ch. R. 118, 128, 2 N.Y. Chan. Rep. 73 (1822).

9. *Ibid.*

10. N.Y. Pen. Law §§ 510-11:

§ 510. Forfeiture of office and suspension of civil rights.—A sentence of imprisonment in a state prison for any term less than for life or a sentence of imprisonment in a state prison for an indeterminate term, having a minimum of one day and a maximum of natural life, forfeits all the public offices, and suspends, during the term of the sentence, all the civil rights, and all private trusts, authority, or powers of, or held by, the person sentenced; but nothing herein contained shall be deemed to suspend the right or capacity of any of the following persons to institute an action or proceeding in a court or before a body or officer exercising judicial, quasi-judicial or administrative functions, with respect to matters other than those arising out of his arrest or detention:

a. A person sentenced to state prison for any term less than for life or a person sentenced to imprisonment in a state prison for an indeterminate term, having a minimum of one day and a maximum of his natural life, on whom sentence was imposed and the execution of the judgment suspended, while the execution of the judgment remains suspended:

b. A person sentenced to state prison for any term less than for life or a person sentenced to imprisonment in a state prison for an indeterminate term, having a minimum of one day and a maximum of his natural life, while he is released on parole, or after he has been discharged from parole.

§ 511. Consequences of sentence to imprisonment for life—A person sentenced to

been burdened with prior judicial interpretations. They founder while attempting to breathe life into this anachronistic doctrine. "Civil Death seems today a somewhat impractical and doubtful penalty. It is hard to apply and often inflicts a greater injury upon the innocent family or relatives of the felon or even upon the state itself . . . than it does upon the convict."¹¹ It has been said that the prime concern of the New York civil death statute is for the spouse and children of the convict;¹² but in actuality, its effect is to hinder more than aid these objects of its bounty.

A curious inconsistency noted by this writer is the apparent neglect by the authors of modern civil death statutes to cover the very situation which the common law had in mind when the doctrine of civil death was originated, namely, the status of a person sentenced to death. Since a person sentenced to life or less is not civilly dead unless there are statutory provisions providing so,¹³ it is not inconceivable that this rationale should also apply to one sentenced to death. Therefore, it is at least arguable that a person sentenced to death may enjoy all his civil rights unfettered since there is no express statutory provision to the contrary. Specific references below, concerning the rights of prisoners, will further point out the inconsistencies and confusions possible when a common law doctrine outlives its usefulness.

B. *Civil Death and the Felon's Right to Court Process*

1. *As a Plaintiff*

Can a felon bring civil suit while in prison? The New York Civil Rights Law¹⁴ implies that court process is a civil right and as such is unavailable to a convicted felon sentenced to a state institution.¹⁵ It has been held that a

imprisonment for life is thereafter deemed civilly dead; provided, that such a person may marry while on parole, or after he has been discharged from parole, if otherwise capable of contracting a valid marriage. Such capability shall be deemed to exist where the marriage of a person sentenced to imprisonment for life has been terminated by divorce, annulment, or subsequent remarriage of a former spouse. A marriage contracted pursuant to this section by a person while he is on parole, without the prior written approval of the board of parole, shall be a ground for revocation of the parole.

2. This section shall not apply to a person sentenced to imprisonment for an indeterminate term, having a minimum of one day and a maximum of his natural life.

3. Nothing in this section shall be deemed to suspend the right or capacity of a person sentenced to imprisonment for life, while he is released on parole, or after he has been discharged from parole, to institute an action or proceeding in a court or before a body or officer exercising judicial, quasi-judicial or administrative functions, with respect to matters other than those arising out of his arrest and detention.

4. Nothing in this section shall be deemed to preclude the issuance of a certificate of good conduct by the board of parole pursuant to the executive law to a person who previously had been sentenced to imprisonment for life.

11. 5 Calif. L. Rev. 81, 83 (1916). See generally Annot., 139 A.L.R. 1308 (1942).

12. *Garner v. Shulte Co.*, 23 A.D.2d 127, 259 N.Y.S.2d 161 (3d Dep't 1965).

13. Note, 17 L.R.A. (N.S.) 502 (1909).

14. N.Y. Civ. Rights Law § 10.

15. N.Y. Pen. Law §§ 510-11.

statutory exception to the right to sue must be distinctly expressed.¹⁶ New York's statute has passed this test and has been found to be constitutional, not violative of either article 1, section 1 of the United States Constitution or the fourteenth amendment.¹⁷ Thus the right of a state to suspend the right to sue during the term of sentence has been fully acknowledged.¹⁸ In contrast, since no federal statute has adopted the doctrine of civil death, federal courts have implied that inmates in federal prisons may file either federal suits or suits in state jurisdictions where statutes of limitation may run because of their confinement.¹⁹

New York, prior to the 1946 and 1952 revisions of the Penal Law sections relating to civil death, subscribed to the majority American rule that, generally, convicts enjoy no right to sue.²⁰ However, to alleviate much suffering by the families of convicts, New York employed a device which conferred jurisdiction on the courts by passing special enabling acts,²¹ in the form of private bills. Claims were thus reduced to resultant money awards which were turned over to the families of convicts. But the majority of prisoners' families enjoyed no special consideration by the legislature and this stop-gap remedy was far from sufficient.²²

The requirement that a claimant against the state file a notice of claim within a specified period after the claim accrues also played havoc with incarcerated prisoners. It had been held that the fact that one is under disability due to the civil death statutes did not obviate the necessity for filing a notice of claim.²³ This claim must be filed in every action under the Court of Claims Act, section ten. A distinction is drawn between the *filing* of a claim, which right is suspended during confinement (under Court of Claims Act, section ten, subdivision five, the prisoner has two years to pursue the claim after disability is removed), and the *notice of intention to file* a claim, not a civil right, therefore, mandatory upon penalty of dismissal. This distinction, based upon capacity due to suspension or loss of civil rights is a most dubious one.

16. *Saxe v. Peck*, 139 App. Div. 419, 124 N.Y. Supp. 14 (3d Dep't 1910).

17. *Harrell v. State*, 17 Misc. 2d 950, 188 N.Y.S.2d 683 (Ct. Cl. 1959).

18. *E.g.*, *Burns v. City of New York*, 21 A.D.2d 767, 250 N.Y.S.2d 680 (1st Dep't 1964).

19. *Tabor v. Hardwick*, 224 F.2d 526, 529 (5th Cir.), *appeal dismissed*, 350 U.S. 890 (1955). (Dismissal of prisoner's civil suit was proper where both the state in which the prisoner desired to bring suit and the state where he was incarcerated both provided for tolling of the statute of limitations.)

20. See 18 C.J.S. *Convicts* § 7 (1939).

21. See, *e.g.*, N.Y. Sess. Laws 1933, ch. 382, conferring jurisdiction for trial of *Tomaselli v. State*, 168 Misc. 674, 6 N.Y.S.2d 435 (Ct. Cl. 1938); N.Y. Sess. Laws 1933, ch. 547, conferring jurisdiction for trial of *Cullen v. State*, 247 App. Div. 921, 287 N.Y. Supp. 677 (3d Dep't 1936), *aff'd mem.*, 277 N.Y. 541, 13 N.E.2d 465 (1938); N.Y. Sess. Laws 1935, ch. 961, conferring jurisdiction for trial of *Bhullar v. State*, 248 App. Div. 802, 289 N.Y. Supp. 41 (3d Dep't 1936).

22. See *Green v. State*, 278 N.Y. 15, 14 N.E.2d 833 (1938) (no capacity to sue without jurisdiction being granted by statute while under disability of suspension or loss of civil rights).

23. *Pascucci v. County of Nassau*, 8 Misc. 2d 229, 165 N.Y.S.2d 797 (Sup. Ct. 1957); *Federman v. State*, 173 Misc. 830, 19 N.Y.S.2d 325 (Ct. Cl. 1940); *Baroness v. State*, 153 Misc. 212, 274 N.Y. Supp. 522 (Ct. Cl. 1934).

Why should a party be any less capable of filing a claim than a notice of claim? But even under pre-1946 New York law, a vested claim, *i.e.*, a claim upon which liability has attached prior to incarceration, was held immune from dismissal where the claimant was subsequently imprisoned.²⁴ The courts felt that to dismiss such a claim would cause the fact of the sentence to operate as a forfeiture, a result contrary to public policy as pronounced in statute.²⁵ However, where a life prisoner petitioned to have outstanding indictments brought to trial or dismissed for failure to prosecute, the court held that the statute declaring his civil death meant that he could perform *no* legal function and consequently had no standing to compel the prosecution of the indictments.²⁶ But where an assignment of property, while under disability, was made for the benefit of the victims of the inmate's crime (a sort of restitution), the court reasoned that since the felon retained no beneficial interest in the assigned property, and the fact that the purpose of the assignment was to give their own property back to the victims, in an action brought by the assignee to recover such property, the assignee was held to be able to recover the property.²⁷ Here the dictates of logic and the theory of civil death were sacrificed in the interest of justice. Civil death, it must be remembered, was at common law applied only to prisoners convicted of felony punishable by death.²⁸

Palpable anomaly inevitably results from attempting to attribute civil death, not only to persons about to be executed, but, also, to persons who may remain physically alive for many years and also may be paroled or pardoned. Still greater anomaly results from attempting to transplant the fiction of civil death to a land which has neither attainder, forfeiture, nor corruption of blood.²⁹

An ostensible saving grace for the doctrine of civil death in New York is the fact that the statute of limitations is tolled during the period of disability.³⁰ The force of this assertion is severely limited when the fact is realized that release from imprisonment may never occur.³¹ Also the statute of limitations requires that the action be brought within the ten year maximum

24. *Nastasi v. State*, 186 Misc. 1051, 61 N.Y.S.2d 438 (Ct. Cl. 1946).

25. See N.Y. Pen. Law § 512.

26. *Quinn v. Johnson*, 78 N.Y.S.2d 499 (Sup. Ct. 1947).

27. *Bamman v. Erickson*, 259 App. Div. 1040, 21 N.Y.S.2d 40 (2d Dep't 1940) (Memorandum decision).

28. *Shapiro v. Equitable Life Assur. Soc. of the United States*, 182 Misc. 678, 45 N.Y.S.2d 717 (Sup. Ct. 1943), *aff'd mem.*, 268 App. Div. 854, 50 N.Y.S.2d 846 (1st Dep't 1944), *aff'd mem.*, 294 N.Y. 743, 61 N.E.2d 745 (1945).

29. *Id.* at 681, 45 N.Y.S.2d at 719.

30. *Benson v. State*, 183 Misc. 972, 52 N.Y.S.2d 36 (Ct. Cl. 1944).

31. *Lipschultz v. State*, 192 Misc. 70, 78 N.Y.S.2d 731 (Ct. Cl. 1948). In this case, brought in 1948, the prisoner had a claim against the state for injuries sustained in Clinton prison. His minimum term was due to expire in the year 1993. He was a man in his fifties. The court noted: "The order of dismissal herein is granted without prejudice, however, to the proper prosecution by claimant of his claim against the State after his present sentence has been duly terminated." 192 Misc. at 71, 78 N.Y.S.2d at 733. One feels the only termination in this case would be that of claimant's life.

time allowed.³² But under the Correction Law,³³ a committee can be appointed to administer the inmate's affairs, presumably including the prosecution of such claims. And if the committee can sue in the prisoner's stead, of what necessity, and of what force is the doctrine of civil death? It seems to be a dead letter in this connection.

Prior to the revisions of 1946 and 1952, prisoners on parole had no capacity to sue.³⁴ In 1946, persons sentenced for periods less than life were granted the right to sue while on parole or during periods when their sentence was in suspension.³⁵ In 1952, this privilege was extended to prisoners sentenced to life, while on parole.³⁶

The statutes require that in order to be deprived of civil rights, the inmate must be serving his sentence in a "state prison." County Penitentiaries³⁷ and the Elmira Reception Center³⁸ are not "state prisons" within the statutory meaning. New York citizens found guilty of federal crimes which would be felonies in New York do not lose their right to sue because the statutes relate only to imprisonment in a "state prison."³⁹ But New York has also held that a citizen of New York is civilly dead where imprisoned for life in a foreign state.⁴⁰ A foreign citizen imprisoned for life in a foreign state which has no civil death disabilities is nevertheless under disability from suing in New York.⁴¹ Thus New York's interpretation of the doctrine of civil death has extraterritorial effect.

In a recent case, a parolee instituted a civil suit against the state, and was later adjudged a parole violator. He was then committed to serve out his original sentence. He desired to hold an examination before the trial of this civil suit but it was held that since he was now a felon serving a sentence in a state prison, his civil rights were again suspended, and he had no right to use court process to compel the examination.⁴² Of course, this suit would

32. See N.Y.CPLR § 208.

33. N.Y. Correction Law, §§ 320-25, 350-61.

34. See, e.g., *Hayes v. State*, 50 N.Y.S.2d 492 (Ct. Cl. 1944); *accord*, *Lehrman v. State*, 176 Misc. 1022, 29 N.Y.S.2d 635 (Ct. Cl. 1941).

35. N.Y. Sess. Laws 1946, ch. 260. For general background see Law Revision Comm., 1946 Report, Recommendations & Studies 159 (1946 Leg. Doc. No. 65 (F)).

36. N.Y. Sess. Laws 1952, ch. 167. For general background see Law Revision Comm., 1952 Report, Recommendations & Studies 533 (1952 Leg. Doc. No. 65 (Q)). See also Law Revision Comm., 1953 Report, Recommendations & Studies 495 (1953 Leg. Doc. No. 65 (M)).

37. 1930 Ops. Att'y Gen., 1933 Report of Att'y Gen. 571. (By implication.)

38. *Foster v. State*, 205 Misc. 736, 129 N.Y.S.2d 413 (Ct. Cl. 1954).

39. *Accord*, *Hill v. Gentry*, 280 F.2d 88 (8th Cir. 1960) (per curiam), *cert. denied*, 364 U.S. 875 (1960) (applying Missouri law). *Jones v. Jones*, 188 Mo. App. 220, 175 S.W. 227 (1915).

40. *Pallas v. Misericordia Hosp.*, 264 App. Div. 1, 34 N.Y.S.2d 881 (3d Dep't 1942), *aff'd mem.*, 291 N.Y. 692, 52 N.E.2d 590 (1943).

41. *Urbano v. News Syndicate Co.*, 232 F. Supp. 237 (S.D.N.Y. 1964) (applying *Erie* doctrine). *But see* *Panko v. Endicott Johnson Corp.*, 24 F. Supp. 678 (N.D.N.Y. 1938). See also *Vedin v. McConnell*, 22 F.2d 753 (9th Cir. 1927) (cannot declare out of state resident civilly dead in his own state).

42. *Glena v. State*, 207 Misc. 776, 138 N.Y.S.2d 857 (Ct. Cl. 1955).

43. N.Y.CPLR § 208 provides for the tolling of the statute of limitations for a

be placed in abeyance,⁴³ but again the problem of staleness of evidence is present. Prior to the revisions of 1946 and 1952, a parolee was held to be in legal custody even while at large. The fact of his release from imprisonment did not restore his suspended civil rights.⁴⁴ The rationale of such holdings was that the parolee was still under sentence and as such was required to finish that sentence before his civil rights could be restored. Conversely, where a prisoner's sentence was *commuted*, his sentence was at an end; therefore, his civil rights were restored.⁴⁵ It was also held that the statutes of limitation, where a prisoner is one whose sentence has been commuted, run from the date of his release and is not tolled because of any subsequent imprisonment.⁴⁶ This distinction obtains today. Also by legislative amendment,⁴⁷ a parolee now enjoys the right to sue whether on parole or after being discharged from parole.⁴⁸

The statutory language ". . . with respect to matters other than those arising out of his arrest or detention . . .,"⁴⁹ at first blush, presents a problem where an inmate seeks to recover for an injury received while an inmate of a state institution. But it was held that this language ". . . should not be construed to apply to all causes which may arise *during* detention."⁵⁰ It was felt that this limitation would apply only to cases of false arrest, false imprisonment or malicious prosecution.⁵¹ Under this rationale, courts have found it easy to afford relief to inmates who suffered injuries while in prison and who are presently on parole. In a recent case, a life convict who had been receiving workmen's compensation benefits prior to incarceration was held not able to continue receiving these benefits; but the court read section fifteen of the Workmen's Compensation Law and section 511 of the Penal Law together and held that the prisoner's dependents would receive such payments

period of up to ten years after the cause of action accrues where a prisoner is serving a term less than life imprisonment. Under Fed. R. Civ. Proc. 17(b), the capacity for suit of a prisoner is determined by the law of the state where the federal district court is sitting.

44. *White v. State*, 166 Misc. 481, 2 N.Y.S.2d 582 (Ct. Cl. 1938), *aff'd*, 260 App. Div. 413, 23 N.Y.S.2d 526 (3d Dep't 1940), *aff'd mem.*, 285 N.Y. 728, 34 N.E.2d 896 (1941).

45. *Gershinsky v. State*, 6 A.D.2d 964, 176 N.Y.S.2d 667 (3d Dep't 1958), *aff'd mem.*, 6 N.Y.2d 798, 159 N.E.2d 681, 188 N.Y.S.2d 190 (1959). *Accord*, *White v. State*, 166 Misc. 481, 2 N.Y.S.2d 582 (Ct. Cl. 1938), *aff'd*, 260 App. Div. 413, 23 N.Y.S.2d 526 (3d Dep't 1940), *aff'd mem.*, 285 N.Y. 728, 34 N.E.2d 896 (1941).

46. *Gershinsky v. State*, *supra* note 45.

47. N.Y. Pen. Law §§ 510-11.

48. See *Hight v. State*, 35 Misc. 2d 926, 231 N.Y.S.2d 361 (Ct. Cl. 1962). *Accord*, *Melton v. State*, 198 Misc. 654, 99 N.Y.S.2d 737 (Ct. Cl. 1950), *appeal dismissed*, 108 N.Y.S.2d 967 (1951); *Duffy v. State*, 197 Misc. 569, 94 N.Y.S.2d 757 (Ct. Cl. 1950). See also *Morris v. State*, 6 A.D.2d 984, 176 N.Y.S.2d 674 (3d Dep't 1958), where an inmate had been injured while in prison in the year 1936. He was released on parole in 1940, consulted an attorney who advised him that under the then current state of the law he must wait until his sentence was completed before he could present his claim. Subsequently, he made a timely application for relief after his sentence was completed but the 1946 amendment, conferring upon him the right to sue while on parole had taken effect, and it was held that his application was therefore not timely since under the amendment it should have been brought while on parole. His claim was denied. The attorney's advice was correct at the time but the 1946 amendment to § 510, in effect, cut short this prisoner's right to sue.

49. N.Y. Pen. Law § 510.

50. *Grant v. State*, 192 Misc. 45, 47, 77 N.Y.S.2d 756, 758 (Ct. Cl. 1948).

51. *Ibid.*

as if he were actually dead.⁵² The court reiterated the policy of the civil death statute, saying that its purpose is to protect the innocent spouse and family of the felon. This case is representative of the current trend of the courts in dealing with the civil death statutes and severely undercuts its original theory and the practice under which it previously operated. To say that a felon imprisoned has no right to sue and yet allow a claim to be prosecuted, in effect, in his name by his dependents, is to destroy any force which the statute might have. In this way, mere substitution of parties would have the effect of lifting the disability imposed by the statute. It would be better to rid the law of such an anomaly and confer the right to sue upon all prisoners whether serving sentences, on parole, with sentences commuted, suspended or otherwise. The spirit of the ancient common law idea of *civilitur mortuus* would best be confined to the relatively unimportant area of the law which defines the consequences of a judgment of outlawry.⁵³

2. As a Defendant or Necessary Party

Concomitant with the right to sue is the duty to respond as a defendant in an action, and ". . . the liability to be sued, of necessity implies the right to defend. . . ."⁵⁴ It has been held that even though a prisoner's civil rights have been suspended, he must be allowed to employ an attorney when sued or the right to defend would be illusory,⁵⁵ the rationale of these holdings being that liability can attach only where a party is able to defend.⁵⁶ Also, ". . . convicts should not be allowed to employ their crimes as a shield against the just demands of creditors"⁵⁷ It has even been intimated that a convict may be subject to involuntary bankruptcy.⁵⁸ Thus, in a case where a felon was a creditor of an estate, in an accounting proceeding held by the executor, the claim of this creditor-felon which had been rejected by the executor, was held to be enforceable.⁵⁹ The court felt that ". . . unless the convict can be heard now, he can never be heard. . . ."⁶⁰ The creditor-felon, whose civil rights had been suspended, was not required to proceed by a trustee. It has also been held that since a felon is subject to the claims of his creditors, he must be afforded the right to defend such claims.⁶¹ In addition, civil death has not

52. *Garner v. Shulte Co.*, 23 A.D.2d 127, 259 N.Y.S.2d 161 (3d Dep't 1965).

53. See N.Y. Code of Crim. Proc. §§ 814-26. A judgment of outlawry is rendered where a person has escaped custody after a plea or verdict of guilty has been entered on an indictment for treason. Its effect is civil death in the real sense: forfeiture of realty and personalty to the people of the State.

54. *Werckman v. Werckman*, 4 N.Y. Civ. Proc. R. 146, 147 (Oneida County Ct. 1883).

55. *Matter of McNally*, 144 Cal. App. 2d 531, 301 P.2d 385 (Dist. Ct. App. 1956).

56. *Bonnell v. Rome, W. & O. R.R.*, 12 Hun. 218, 219 (N.Y.App. Div., 4th Dep't 1877).

57. *Matter of Gainfort*, 14 F. Supp. 788, 790 (N.D. Cal. 1936).

58. *Ibid.*

59. *Matter of Weber*, 165 Misc. 815, 1 N.Y.S.2d 809 (Surr. Ct. 1938), 26 Geo. L.J. 1051 (1938).

60. *Matter of Weber*, *supra* at 817, 1 N.Y.S.2d at 811.

61. *Davis v. Duffie*, 21 N.Y. Super. Ct. 617, 8 Rosw. 617 (1861), *aff'd*, 4 Abb. Pr. (N.S.) 478, 3 Keyes 606 (N.Y. 1867).

been held a reason to dismiss a garnishment brought against property of the felon.⁶²

In another case where an action had begun and issue joined prior to the plaintiff's conviction of a felony, a motion by the defendant to dismiss for lack of prosecution was denied. The court realized that a decision allowing dismissal, as it would have been on the merits, would work a forfeiture of the plaintiff's rights and felt this result would be contrary to the legislative purpose of the civil death statute.⁶³ Plaintiff was allowed to notice the action for trial.

In *Bowles v. Haberman* where a plaintiff in a civil action had been awarded damages and was subsequently convicted of a felony and sentenced to prison and the defendant in this action appealed the judgment in favor of the plaintiff-felon, it was held that the plaintiff must be allowed to defend the appeal,⁶⁴ on the same rationale that obtains where the felon is a defendant in an action. In a recent case relying on this decision, a remainderman of an express trust was held to be under no disability in an accounting proceeding brought by the trustee.⁶⁵ Thus it seems that the disabilities of civil death or suspension of civil rights are somewhat relaxed where the plaintiff-felon can be characterized as a defendant in an action whether it be an actual defendant, an appellee or a necessary party. It would seem that if the legislature were truly interested in the care of the felon's spouse and family it would allow the same degree of access to the courts to a felon when he is plaintiff as well as defendant. Surely one always liable as defendant is no better off than one only allowed limited court process as plaintiff.

C. *The Right to Contract, Convey, Devise, Inherit, and the Competency of a Prisoner as a Witness*

It cannot be denied that a felon whose civil rights have been suspended or revoked is able to contract for legal assistance in trying to effect his release, yet an early New York case implied that such a felon could not enforce this contract.⁶⁶ There are no recent cases decided upon such facts but it is presumed that an attorney-creditor could take advantage of the provisions of the Correction Law⁶⁷ which allow the creditor of a prisoner to apply for the appointment of a committee to administer the prisoner's affairs. He would, of course, then present his claim to that committee.⁶⁸ A leading case in the right to contract

62. *Wise v. Hull*, 32 Mo. 209 (1862).

63. *Finkelstein v. Badman*, 95 N.Y.L.J. 1614 (1936) (N.Y. City Ct.).

64. *Bowles v. Habermann*, 95 N.Y. 246 (1884). This case is cited throughout the literature for this proposition but it seems that the actual basis for the decision was that the felon was not imprisoned in a "state prison" as set out in the statute, but was an inmate of Kings County Penitentiary. Nevertheless, this dictum has been widely quoted as the holding of the case.

65. *Matter of Brown*, 19 A.D.2d 24, 240 N.Y.S.2d 381 (1st Dep't 1963).

66. *Stephani v. Lent*, 30 Misc. 346, 349, 63 N.Y. Supp. 471, 473 (Sup. Ct. 1900).

67. N.Y. Correction Law §§ 320-25, 350-61.

68. An interesting case appeared recently in California where it was held that a parolee under disability could not be held for the purchase price of an automobile which she had contracted to buy after her release from prison. It was held that she had no capacity to

area held that where a prisoner gave a note and mortgage to an attorney as payment for efforts to secure his parole and then sought to use his disability as a defense to an action brought to enforce the obligations, the disability would not apply.⁶⁹ This Oklahoma court, in dealing with their civil death statute which is in effect the same as New York's, explained that the common law situations where civil death came into play are gone since attainder is expressly forbidden in the federal constitution, whether by federal⁷⁰ or state⁷¹ law, and forfeitures to the state are abolished. The primary import of the doctrine was embodied by this court in the following pronouncement:

. . . the principles of law which this verbiage [*civiliter mortuus*] literally imports had its origin in the fogs and fictions of feudal jurisprudence and doubtlessly has been brought forward into modern statutes without fully realizing either the effect of its literal significance or the extent of its infringement upon the spirit of our system of government.⁷²

In sum, it would seem that, similar to an infant, a prisoner has a right to contract for necessities. Especially where employment can be a condition for parole, a prisoner should be able to validly contract for such employment which will qualify him for release.

At common law a conveyance by an attainted felon bound all except the king and any party holding under the king.⁷³ So too, a felon's will was valid except as to the crown.⁷⁴ New York's early finding, still valid, was that a prisoner for life under disability could transfer by will or deed and could also receive a devise.⁷⁵ This holding, by implication, extends these rights to one sentenced to a period less than life. "[T]he law would not be consistent with itself if it held the party alive for the purpose of being sued and charged in execution, and yet dead for the purpose of transmitting his estate to his heirs."⁷⁶

contract, therefore there was no contract upon which to base the action. Not only was this person incapacitated because of the suspension of her civil rights, but she was also a minor, the court finding that this was not a case involving necessities. *Rosman v. Cuevas*, 176 Cal. App. 2d 867, 1 Cal. Rptr. 485 (1959).

69. *Byers v. Sun Sav. Bank*, 41 Okla. 728, 139 Pac. 948, 52 L.R.A. (N.S.) 320, Ann. Cas. 1916D 222 (1914).

70. U.S. Const. art. 1, § 9.

71. U.S. Const. art. 1, § 10.

72. *Byers v. Sun Sav. Bank*, 41 Okla. at 731, 139 Pac. at 949, 52 L.R.A. (N.S.) at 323.

73. 16 Am. Jur. *Deeds* § 86 (1938).

74. 57 Am. Jur. *Wills* § 57 (1948).

75. *LaChapelle v. Burpee*, 69 Hun. 436, 23 N.Y. Supp. 453 (Sup. Ct., 3d Dep't 1893).

76. *Avery v. Everett*, 110 N.Y. 317, 18 N.E. 148, 1 L.R.A. 264, 6 Am. St. Rep. 368 (1888), citing Chancellor Kent in *Platner v. Sherwood*, 6 Johns. Ch. 118 (1922). At common law, one of the effects of profession as a monk or nun was to cause the person's will to become effective as if they had died. Law Revision Comm., 1946 Report, Recommendations & Studies 168 (1946 Leg. Doc. No. 65 (F) at 10). An early New York case decided that this aspect of civil death would not obtain where it was held that letters of administration could not be granted upon the revocation of rights by the attachment of the penalty of civil death. Natural death was deemed to be necessary before such result could occur. *Matter of Zeph*, 50 Hun. 523, 3 N.Y. Supp. 460 (Sup. Ct. 1888), citing *Avery v. Everett*, *supra*.

It is also well settled that convicts under disability may inherit.⁷⁷ These holdings further illustrate the fallacy of regarding civil death as an end to one's rights.

The common law holdings were to the effect that a felon convicted and deprived of his civil rights was incompetent as a witness. This was based on the idea that since his civil rights had been suspended and reputation forfeit, no credence could be given his statements. Under present law, a person who has been convicted of a crime is competent to give testimony in any case.⁷⁸ The fact of his imprisonment or loss of civil rights goes only to the weight to be assigned his evidence. This is more in keeping with the present day attitudes on testimonial capacity.

D. *The Right to Hold Public Offices and Private Trusts*

The statute⁷⁹ specifically declares that all public offices and private trusts are suspended during the term of an inmate's imprisonment.⁸⁰ The Surrogate's Court Act⁸¹ provides that a felon cannot serve as a guardian, executor, administrator, or testamentary trustee; but it was held in a case where, through some mischance, the husband-administrator of his wife's estate was a felon on parole, that the appointment could not be attacked collaterally.⁸² In another case, where a person was convicted in a foreign state of a misdemeanor which would be a felony if committed in New York, the court refused to allow him to receive letters testamentary.⁸³ These rulings are certainly practical since a felon imprisoned is virtually denied access to the courts and an appointment as administrator, for example, would of necessity require free and complete access.⁸⁴

In the case of public offices, it was held in a suit brought to compel the nominating petitions of a person convicted of a federal crime, sentenced to

77. *Hill v. Guaranty Trust Co.*, 163 App. Div. 374, 13 Mills 231, 148 N.Y. Supp. 601 (1st Dep't 1914); *Matter of Shaffer*, 184 Misc. 855, 56 N.Y.S.2d 568 (Surr. Ct. 1945).

78. N.Y.CPLR § 4513; N.Y. Pen. Law § 2444.

79. N.Y. Pen. Law § 510.

80. It is to be noted that the categories mentioned, public offices and private trusts, are enumerated specifically, not included in the term "civil rights." See also the following statutes for the penalties involved where the holder of a license is convicted of a crime:

- Education Law § 6502 (Medicine)
- 6613 (Dentistry)
- 6702 (Veterinary)
- 7011 (Podiatry)
- 6803-04 (Pharmacy)
- 7205, 7210 (Engineering)
- 7304, 7308 (Architecture)
- 7404, 7406 (Accounting)
- 6905, 6911 (Nursing)
- 7105, 7108 (Optometry)

Gen. Bus. Law § 74 (Private Detectives)

Alcoholic Beverage Control Law § 126 (Traffic in Alcoholic Beverages).

81. Surrogate's Ct. Act § 94(4).

82. *Levay v. Mate*, 194 Misc. 179, 88 N.Y.S.2d 481 (N.Y. City Ct. 1949).

83. *Matter of Johnson*, 202 Misc. 751, 112 N.Y.S.2d 866 (Surr. Ct. 1952).

84. Query as to misdemeanants as trustees? As a practical matter, how could this class of persons administer an estate while imprisoned any more than a felon?

imprisonment for four years but on bail pending appeal of the conviction, that the New York statute relating to sentence of imprisonment in a "state prison" was not applicable since this prisoner would have been serving his sentence in a federal prison. Therefore, this candidate for office was, in effect, held to be eligible for office.⁸⁵ The force of this decision, it seems, is severely limited by other decisions holding that a sentence in a federal prison is at least as effective a suspension of rights as is a sentence in a state prison. Why the court did not base its decision upon the fact that the candidate was, on bail pending appeal is remarkable, since it has been held that the *execution* of a judgment of conviction, *i.e.*, actual confinement, is the moment when the suspension of civil rights begins.⁸⁶ In another case where the felons nominated for office were actually serving sentences in a state prison and a suit was brought to require their names to be printed on the ballot, it was held that they had no such right.⁸⁷ The Court said: ". . . it surely cannot be contemplated that a prison convict can be a nominee when he cannot hold the office if elected."⁸⁸ It would seem that this is a correct result, yet the possibility of pardon or commutation of sentence would seem to limit its force, especially where a miscarriage of justice has occurred.

Holders of professional and other licenses are subject to disciplinary action and revocation of their license where convicted of crimes. For example, in the case of attorneys convicted of a felony, the legislature has seen fit to enact specific provisions. The Judiciary Law provides for disbarment upon *conviction* of a felony.⁸⁹ But upon reversal on appeal, or pardon by the President or the Governor, the Appellate Division may vacate such order of disbarment.⁹⁰ These provisions have been held to require disbarment as a matter of course immediately following a *judgment of conviction*,⁹¹ notwithstanding pendency of appeal.⁹² Even where the conviction has been reversed on appeal, the attorney must still be reinstated by the Appellate Division.⁹³ It should be noted, however, that the conviction of an attorney for a misdemeanor does not mandate disbarment as does conviction of a felony.⁹⁴ Also, it has been held where a crime was a felony under federal law, but a misdemeanor under New York law, that the striking of the attorney's name upon presentation of the judg-

85. *O'Connor v. Cohen*, 173 Misc. 419, 17 N.Y.S.2d 758 (Sup. Ct. 1940).

86. *Harmon v. Bower*, 78 Kan. 135, 96 Pac. 51, 17 L.R.A. (N.S.) 502, 16 Ann. Cas. 121 (1908).

87. *Matter of Lindgren*, 232 N.Y. 59, 133 N.E. 353 (1921).

88. *Id.* at 65, 133 N.E. at 355.

89. N.Y. Judiciary Law § 90(4).

90. N.Y. Judiciary Law § 90(5).

91. *E.g.*, *Matter of Steinberg*, 12 A.D.2d 331, 211 N.Y.S.2d 527 (1st Dep't 1961).

92. *E.g.*, *Matter of Rosenfield*, 11 A.D.2d 324, 205 N.Y.S.2d 189 (1st Dep't 1960) (per curiam); *Matter of Scotti*, 266 App. Div. 279, 42 N.Y.S.2d 234 (1st Dep't 1943).

93. *Matter of Ginsberg*, 1 N.Y.2d 144, 134 N.E.2d 193, 151 N.Y.S.2d 361 (1956). Judge Van Voorhis in his dissent pointed out that "he should not be disbarred . . . merely for the reason that he has been accused." *Id.* at 14, 151 N.Y.S.2d at 366.

94. *Matter of Glassman*, 19 A.D.2d 146, 241 N.Y.S.2d 468 (1st Dep't 1963) (dictum); *Matter of Hughes*, 188 App. Div. 520, 177 N.Y. Supp. 234 (1st Dep't 1919) (dictum).

ment of conviction was error.⁹⁵ In such a case an attorney is not subject to summary disbarment.⁹⁶ In a case where an attorney had been convicted of a federal felony which would not have been a felony under state law, and no appeal had been taken for the Appellate Division order of disbarment, rendered upon proof of the judgment of conviction, the Court of Appeals of New York held that even though no appeal had been taken, the judgment of conviction was not conclusive on the issue of guilt.⁹⁷ Judge Cardozo, cognizant of the fact that the attorney involved had been granted two commutations followed by a full pardon by the President of the United States, pointed out: "[a] pardon may in some conditions be a warning as significant as a judgment of reversal that the looms of the law have woven a fabric of injustice."⁹⁸ Therefore it seems that even though disbarment follows a judgment of conviction as a matter of course, this judgment can be attacked collaterally in the disbarment proceeding. Certainly the wisdom of the judicial interpretations requiring disbarment as a matter of course is correct as far as it goes; but, in situations similar to the one confronting Judge Cardozo, it appears that the ends of justice will not be served by such automatic disbarment, the opportunity to present facts reducing the gravity of the judgment of conviction must be preserved.

E. Voting Rights

The United States Constitution recognizes the right of a state to deny its citizens the franchise.⁹⁹ New York's Constitution provides that no citizen of the state can be disenfranchised except by the law of the land.¹⁰⁰ In consonance with this provision, the New York Constitution also provides that ". . . [t]he Legislature enact laws excluding from the right of suffrage persons convicted of bribery or of any infamous crime."¹⁰¹ Pursuant to this constitutional mandate, the legislature has provided that persons convicted of felonies in New York, or in federal or other state courts (where conviction of a crime would be a felony if committed in New York), will be denied the right to vote.¹⁰² This prohibition applies unless the person convicted has been pardoned or restored to the rights of citizenship by the governor, or has received a certificate of good conduct by the Board of Parole pursuant to the Executive Law,¹⁰³ or where convicted of a federal felony or a federal crime which would be a felony if committed in New York unless he is pardoned or restored to the rights of citizenship by the President; or where convicted of a crime in another state which would be a felony in New York unless pardoned or restored to the

95. *Matter of Donegan*, 282 N.Y. 285, 26 N.E.2d 260 (1940).

96. *Matter of Lindheim*, 195 App. Div. 827, 187 N.Y. Supp. 211 (1st Dep't 1921), *rev'd sub nom. Matter of Kaufman*, 245 N.Y. 423, 157 N.E. 730 (1927) (by implication).

97. *Matter of Kaufmann*, 245 N.Y. 423, 157 N.E. 730 (1927).

98. *Id.* at 429, 157 N.E. at 732.

99. U.S. Const. amend. XIV, § 2.

100. N.Y. Const. art. 1, § 1.

101. N.Y. Const. art. 2, § 3.

102. N.Y. Election Law § 152. See generally, 18 N.Y. Jur. *Elections* § 83 (1961).

103. N.Y. Executive Law § 242.

rights of citizenship by that state. It is to be noted that this curtailment of the right to vote does not apply to persons convicted of *any* crime, where sentenced or committed to a house of refuge or reformatory.¹⁰⁴ Thus a person convicted of a felony may yet be able to vote where he is committed to any of the last mentioned institutions. Since a misdemeanor is not specifically denied the right to vote, he still enjoys that right.¹⁰⁵ In a case where a judgment of conviction of felony was suspended and a fine assessed in lieu of imprisonment, it was felt that the collection of the fine was the *execution* of the judgment of conviction and consequently the right to vote was lost.¹⁰⁶ Compliance with the rules concerning the requirement of a pardon or certificate of good conduct¹⁰⁷ was compelled in this case before the right to vote could be restored. In another case, where a judgment of conviction had not been entered upon a verdict of guilty, and sentence had been suspended, it was held that the right to vote was not lost.¹⁰⁸ The reason given normally for the revocation or suspension of the right to vote is that to allow the franchise in such cases is not in keeping with the general feeling that the purity of elections must be preserved.¹⁰⁹ The manner in which this legislative policy has been carried out in New York leaves much to be desired. An arbitrary line separating misdemeanor voters from felony non-voters does not accurately achieve this purpose. Surely there are some misdemeanors which import a greater degree of moral turpitude than the felonies so arbitrarily categorized by the statutes.¹¹⁰ If the "purity of elections" is to be preserved, a more reasonable classification of persons subject to suspension of the right to vote should be formulated.

F. Family Law¹¹¹

1. Marriage

The effect of civil death on marital rights has been far from clear in New York State. The basic question is: Does the marriage end upon the execution of the judgment of conviction (imprisonment), or must there be some further court action declaring the marriage at an end?

Where a husband had killed his wife's father and was sentenced for a period of twenty years to life and the wife brought suit to compel issuance of a

104. N.Y. Pen. Law § 510-a. *But see* 1933 Ops. Att'y Gen., 1933 Report of Att'y Gen. 571, where Pen. Law § 644 (now § 510-a) was construed not to include the New York County Penitentiary.

105. 1945 Ops. Att'y Gen., 1945 Report of Att'y Gen. 90.

106. 1950 Ops. Att'y Gen., 1950 Report of Att'y Gen. 115.

107. See Executive Law § 242.

108. *People v. Fabian*, 192 N.Y. 443, 85 N.E. 672 (1908). See Note, *The Meaning of Conviction*, 30 Colum. L. Rev. 1045, 1048 (1930). See also Annot., *What Constitutes "Conviction" Within Constitutional or Statutory Provision Disfranchising One Convicted of Crime*, 36 A.L.R.2d 1238 (1954).

109. 18 Am. Jur. *Elections* § 80 (1938).

110. For example, contrast Pen. Law § 483(b) (carnal abuse of a child of certain age), a misdemeanor, with the felony of grand larceny in the joy-ride theft of an automobile.

111. See generally 15 N.Y. Jur. *Domestic Relations* § 12 (1962).

marriage license in order to remarry another, the court held that the sentence *ipso facto* destroyed the marriage and therefore there was no necessity to compel issuance of the license.¹¹² This particular problem has plagued the courts down to the present day. In a later case, a wife whose husband had been imprisoned for life sought a declaratory judgment that she was free to remarry; but the court, relying on statutory authority,¹¹³ held that there was no necessity to grant such a remedy. In *Wilder v. Wilder*,¹¹⁴ a similar case, the court noted in dismissing the action, “. . . the declaration can add nothing to the actual legal status of the plaintiff.”¹¹⁵ But in a very recent case, when faced with the same factual situation, a court granted a declaratory judgment.¹¹⁶ Whether or not the wife in asking for declaratory relief made an *election* to terminate the marriage was not relevant to this court. The court granted the declaratory judgment merely to resolve the problem, whether or not there was in actuality a justiciable issue. New York has also held that a sentence to life imprisonment in a foreign state is not grounds for annulment of a second marriage contracted by the “surviving” spouse,¹¹⁷ where it was argued that the second marriage was void since the first husband was living at the time the second marriage was contracted.¹¹⁸ In another case where the husband of the first marriage had been sentenced to life with the consequence of civil death and the wife had remarried, the second husband tried to defend a separation action brought by the wife on the grounds of no marriage, relying on a previous Massachusetts decree which had declared the second marriage void. The New York court, noting that Massachusetts should have given effect to New York law since the husband and wife of the second marriage were both New York citizens, held the defense inapplicable.¹¹⁹ In *Matter of Lindewall* it was held that insofar as the civilly dead felon was concerned, a sentence for life automatically destroyed the marriage relation.¹²⁰ Consequently, all property rights established by the marriage were extinguished, since “. . . one civilly dead has no rights in the estate of the innocent spouse.”¹²¹

The right to remarry granted to those sentenced for less than life¹²² and those sentenced to life¹²³ while on parole greatly improved the status of such prisoners as was pointed out in the Law Revision Commission Report of

112. *Gargan v. Scully*, 82 Misc. 667, 144 N.Y. Supp. 205 (Sup. Ct. 1913).

113. Dom. Rel. Law § 6, now § 58, providing that a pardon will not restore a person to the rights of a previous marriage.

114. 181 Misc. 1059, 43 N.Y.S.2d 287 (Sup. Ct. 1943).

115. *Id.* at 1061, 43 N.Y.S.2d at 289.

116. *Zizzo v. Zizzo*, 41 Misc. 2d 928, 247 N.Y.S.2d 38 (Sup. Ct. 1964).

117. *Jones v. Jones*, 249 App. Div. 470, 292 N.Y. Supp. 705 (3d Dep't), *aff'd mem.*, 274 N.Y. 574, 10 N.E.2d 558 (1937).

118. See Dom. Rel. Law § 6 (2).

119. *Bond v. Bond*, 162 Misc. 449, 295 N.Y. Supp. 24 (Sup. Ct. 1937).

120. 287 N.Y. 347, 39 N.E.2d 907, 139 A.L.R. 1301 (1942).

121. Law Revision Comm., 1952 Report, Recommendations & Studies (1952 Leg. Doc. No. 65 (Q) at 19).

122. N.Y. Sess. Laws 1946, ch. 260.

123. N.Y. Sess. Laws 1950, ch. 144.

1953, in that “. . . married parolees, as a class, are unquestionably more law abiding than single ones.”¹²⁴ But, “. . . it is questionable whether the creation of exceptions to the doctrine of civil death has met the real problem.”¹²⁵ It would seem that the better rule would be to make imprisonment for life a grounds for divorce. In so doing, the election of the “injured” spouse to end her marriage would be made a matter of record which could be relied upon by all concerned.¹²⁶ The grounds for divorce would not be the conviction of the crime but rather the imprisonment which can be likened to the existing grounds for divorce in many states, namely, abandonment.¹²⁷

2. *Custody*¹²⁸

The Domestic Relations Law of New York¹²⁹ provides that the consent of a parent whose civil rights have been suspended or revoked is not necessary when his or her child is about to be adopted. In keeping with this rationale in a case where the father had been sentenced for a period less than life but had been released on parole, and the maternal grandparents were about to adopt the child, the court held that since parole did not terminate the sentence, the parent was still under disability. Consequently no consent was necessary. Thus, under the present statute,¹³⁰ a parolee may sue, may validly contract a marriage, but is barred from contesting the adoption of his own child. This result is hardly in keeping with the trend towards liberalization of the effect of civil death. Can it be said that the right to institute suit is any greater a civil right, or human right, than that of having custody of one's own child? The harshness caused by the misapplication of this “medieval fiction”¹³¹ is again made apparent. Inconsistent in result, but equally absurd, was a case holding that a father's consent to the adoption of his children by a maternal uncle *was* necessary, even though the father had been convicted of manslaughter in the homicide of his wife.¹³²

124. Law Revision Comm., 1953 Report, Recommendations & Studies 511 (1953 Leg. Doc. No. 65 (M)).

125. 25 St. John's L. Rev. 132, 137 (1950).

126. See Note, 50 Harv. L. Rev. 968, 977 (1937).

127. See Rubin, *The Law of Criminal Correction* 622 (1963).

128. See generally Foster & Freed, *Child Custody*, 39 N.Y.U.L. Rev. 423, 434-35 (1964).

129. N.Y. Dom. Rel. Law § 111. *Accord*, *Matter of Miller*, 179 N.Y. Supp. 181 (Kings County Ct. 1919). See also *Matter of Anonymous*, 12 Misc. 2d 1073, 175 N.Y.S.2d 282 (Surr. Ct. 1958), *modified*, 17 Misc. 2d 691, 187 N.Y.S.2d 870 (Surr. Ct. 1959) (*held*, sentence to federal prison for crime which would be a felony in New York suspends civil rights, therefore, no consent to adoption of children necessary).

130. *Matter of O'Daniel*, 128 N.Y.S.2d 351 (Surr. Ct. 1953).

131. See Note, *Civil Death Statutes—Medieval Fiction in a Modern World*, 50 Harv. L. Rev. 968 (1937) for a good discussion of pre-1946 New York law. See also Note, *Civil Death in California*, 26 S. Calif. L. Rev. 425 (1953).

132. *Matter of Riggs*, 10 Misc. 2d 617, 175 N.Y.S.2d 388 (Surr. Ct. 1958). This decision is severely undercut, however, due to the fact that the father was not imprisoned in a “state prison,” but was incarcerated at the Elmira Reformatory, thus taking his case out of the literal application of the statute suspending civil rights.

COMMENT

CONSTITUTIONAL AND OTHER INHERENT RIGHTS OF PRISONERS¹³³

A. General Regulation of the Mail Privilege

Censorship of prisoner's mail is a long established procedure. "Control of the mail to and from inmates is an essential adjunct of prison administration and the maintenance of order within the prison."¹³⁴ Although there is no specific federal statutory provision concerning censorship in a prison situation,¹³⁵ the constitutionality of censorship regulations has never been seriously challenged.¹³⁶

There is no absolute federal right to use the mails.¹³⁷ The courts have held that censorship of mail is a matter of administrative discretion and on these grounds have declined to interfere.¹³⁸ In accordance with this rationale, the petition of an avowed anti-Semite seeking access to the mails for the purpose of carrying on propagandizing endeavors was properly dismissed.¹³⁹ Where a prisoner was refused by prison authorities the right to correspond with a female acquaintance, it was held that there was no power in a federal court to provide relief by injunction in such a case.¹⁴⁰ Where prison authorities have denied correspondence with sources of technical and legal assistance, it has been held that this regulation was reasonable.¹⁴¹ Although the promotion of inmates' education is a primary concern of prison authorities under today's "modern penology," where an inmate had begun an extension course in English composition and had indicated that the reason why he wanted to take the course was so he could prepare himself to write a book exposing the brutality of prison authorities, it was held that he had abused the mail privilege and was not in any position to complain of its curtailment.¹⁴² Denials of permission to use the mails for

133. See generally Note, *Constitutional Rights of Prisoners: The Developing Law*, 110 U. Pa. L. Rev. 985 (1962).

134. *McCloskey v. Maryland*, 337 F.2d 72, 74 (4th Cir. 1964). See generally 72 C.J.S. *Prisons* § 18 (c) (1951).

135. See 39 U.S.C.A. § 4057 which allows the opening of mail only in limited situations: holders of search warrants or employees of the Dead Letter Office. See, e.g., *United States v. Fulcher*, 229 F. Supp. 456 (D. Md. 1964) (search warrant necessary to open mail). See also 39 C.F.R. § 3.1 (1962) (mail is to be treated with confidence). In practice, a warden normally requires an inmate upon entrance to sign a paper authorizing the opening of mail by prison authorities. If the inmate fails to so authorize, any letters addressed to him are held for him in his file to be turned over to him upon release, furthermore, he is unable to send out any mail. Thus, he must sign or he has no mail privilege whatsoever.

136. Coercive though it be, no challenge has been made of which this writer is aware. See e.g., *Adams v. Ellis*, 197 F.2d 483, 484 (5th Cir. 1952); *Gerrish v. State*, 89 F. Supp. 244 (S.D. Maine 1950); *United States ex rel. Mitchell v. Thompson*, 56 F. Supp. 683 (S.D.N.Y. 1944).

137. *United States ex rel. Thompson v. Fay*, 197 F. Supp. 855 (S.D.N.Y. 1961).

138. *United States v. Knies*, 251 F.2d 669 (7th Cir. 1958) (per curiam); *Reilly v. Hiatt*, 63 F. Supp. 477 (M.D. Pa. 1945).

139. *McCloskey v. Maryland*, 337 F.2d 72, 74 (4th Cir. 1964).

140. *Dayton v. Hunter*, 176 F.2d 108 (10th Cir.), cert. denied, 338 U.S. 888 (1949), rehearing denied, 338 U.S. 945, second petition for rehearing denied, 339 U.S. 972 (1950). See also *Dayton v. McGranery*, 201 F.2d 711 (D.C. Cir. 1953) where a prisoner was held properly denied permission to correspond with the daughter of a prison official of another institution.

141. *Miller v. Wilkins*, 31 Misc. 2d 700, 220 N.Y.S.2d 671 (Sup. Ct. 1961).

142. *Numer v. Miller*, 165 F.2d 986 (9th Cir. 1948).

the purpose of registering inventions with the Patent Office,¹⁴³ carrying on business interests,¹⁴⁴ and corresponding with the press to present an inmate's case to the public,¹⁴⁵ have all been upheld by the courts. In an action instituted under the Federal Civil Rights Act,¹⁴⁶ where an inmate complained of a warden's refusal to deliver a registered letter containing material necessary to the preparation of papers in a court action, it was held that the petitioner failed to state a cause of action.¹⁴⁷ As has been said: "Lawful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations underlying our penal system."¹⁴⁸ In the light of this pronouncement, it is evident that some form of regulation of mails is necessary. Security is foremost in the minds of prison administrators and so it should be. The constitutional problem lies in the extent and rational connection mail regulations have with prison security.

B. Access to the Courts and the Censorship of Mail

Generally it has been held that there can be no limit on the right of a prisoner to enjoy free access to the courts.¹⁴⁹ Thus where prison officials refused to notarize and mail papers to the United States Supreme Court it was held that such regulation was invalid.¹⁵⁰ Some prison authorities have contended that the contents of petitions for relief addressed to the courts must be *true* and in instances where prisoners had complained of improper treatment, which the authorities had denied, such petitions have been confiscated. In other instances prison authorities had failed to forward petitions because they felt that their content was insufficient to present a court with facts upon which it could afford relief. The United States Supreme Court took a dim view of such practices, stating: "Whether a petition for [relief] addressed to a federal court is properly drawn and what allegations it must contain are questions for that court alone to determine."¹⁵¹ This right of access to the courts has

143. *United States ex rel. Wagner v. Ragen*, 213 F.2d 294 (7th Cir.), *cert. denied*, 348 U.S. 846, *petition for rehearing denied*, 348 U.S. 884 (1954).

144. *Stroud v. Swope*, 187 F.2d 850 (9th Cir.), *cert. denied*, 342 U.S. 829 (1951).

145. *Petition of Smigelski*, 185 F. Supp. 283 (D.N.J. 1960).

146. 42 U.S.C.A. § 1983.

147. *Ortega v. Ragen*, 216 F.2d 561 (7th Cir. 1954), *cert. denied*, 349 U.S. 940 (1955).

148. *Price v. Johnston*, 334 U.S. 266, 285 (1948).

149. *Ex Parte Hull*, 312 U.S. 546 (1941). *Accord*, *Kirby v. Thomas*, 336 F.2d 462 (6th Cir. 1964); *Bolden v. Pegelow*, 329 F.2d 95 (4th Cir. 1964); *Bailleaux v. Holmes*, 177 F. Supp. 361 (1959), *rev'd on other grounds sub nom. Hatfield v. Bailleaux*, 290 F.2d 632 (9th Cir.), *cert. denied*, 368 U.S. 862 (1961), noted in 58 Mich. L. Rev. 1233 (1960) and 39 Texas L. Rev. 228 (1960); *Haines v. Castle*, 226 F.2d 591, 594 (7th Cir. 1955), *cert. denied*, 350 U.S. 1014 (1956) (dictum); *People v. Superior Court*, 273 P.2d 936 (Cal. Dist. Ct. App. 1954); *Warfield v. Raymond*, 195 Md. 711, 71 A.2d 870 (1950); *State ex rel. Jacobs v. Warden of Maryland Penitentiary*, 190 Md. 755, 59 A.2d 753 (1948).

150. *Ex Parte Hull*, 312 U.S. 546 (1941).

151. *Id.* at 549. *Accord*, *Hymes v. Dickson*, 232 F. Supp. 796, 797 (N.D. Cal. 1964): "Inmates should not have to answer for their allegations to the very people against whom their allegations are directed. To permit such a procedure would be to make a mockery of the inmates' right to petition to this court." See also *People v. Superior Court*, 273 P.2d 936 (Cal. Dist. Ct. App. 1954) where the court held that no matter how false a petition reads, the prison authorities must send it to the court.

been characterized as a question of due process,¹⁵² and, as such, courts should be wary of any abuse. The interception and delay of communications to the courts which have affected the timeliness of appeal have been dealt with by allowing the appeal even though the time had run.¹⁵³ A recent case pointed out that in order to escape such results, federal prison authorities when now presented with documents by prisoners addressed to courts must inscribe them with the time of receipt.¹⁵⁴ This procedure is designed to forestall inmates making any claim of inordinate delay by prison authorities.

This immunity from confiscation or delay of documents has been held to extend to matters addressed to the United States Attorney General and heads of departments of his office.¹⁵⁵ In such cases, it is reasoned that such communications are in the nature of matters addressed to the courts themselves.¹⁵⁶ This right of access to courts, however, does not extend to the right to correspond with a specific judge of a court.¹⁵⁷ There can be little doubt that these holdings are just, and in keeping with the constitutional guarantees of due process.

C. *Right of Access to Materials for the Preparation of Petitions*

In a case where a prisoner had elected to represent himself it was held that he had no absolute right to engage in legal research.¹⁵⁸ This holding is supported by others which have denied prisoners the right to obtain full sets of state statutes,¹⁵⁹ and even one certain law book.¹⁶⁰ The total denial of the use of law books by prisoners would seem to be a violation of due process,¹⁶¹ but the competing interest, it must be remembered, is the orderly administration of prison affairs. Denial of the right to possess an extensive law library in a prisoner's cell is proper;¹⁶² but, such regulations must be administered judiciously. Complete denial of the right to prepare papers in a prisoner's cell, the penalty for clandestine activity being confiscation, would probably be denoted as arbitrary.¹⁶³ Therefore, administrators should take care to insure access to legal materials by prisoners in their charge; but prisoners must not expect special privileges—jail-house lawyers will be frowned upon.

152. *Hymes v. Dickson*, 232 F. Supp. 796, 797 (N.D. Cal. 1964) (dictum).

153. *Dowd v. United States ex rel. Cook*, 340 U.S. 206 (1951). *Accord*, *Dodge v. Bennett*, 335 F.2d 657 (1st Cir. 1964); *People v. Howard*, 166 Cal. App. 2d 638, 334 P.2d 105 (Dist. Ct. App. 1958); *People v. Hairston*, 10 N.Y.2d 92, 176 N.E.2d 90, 217 N.Y.S.2d 77 (1961).

154. *Fallen v. United States*, 378 U.S. 139 (1964).

155. *Matter of Brabson v. Wilkins*, 45 Misc. 2d 286, 256 N.Y.S.2d 693 (Sup. Ct. 1965).

156. *Id.* at 291, 256 N.Y.S.2d at 698.

157. *Spires v. Dowd*, 271 F.2d 659 (7th Cir. 1959).

158. *Matter of Chessman v. Superior Court*, 44 Cal. 2d 1, 279 P.2d 24 (1955). *But see* dissenting opinion of Judge Carter where he stated: "If he may transmit 'facts' to the courts in an attempt to obtain relief he should also be entitled to transmit legal propositions." *Id.* at 15, 279 P.2d at 32.

159. *Piccoli v. Board of Trustees & Warden of State Prison*, 87 F. Supp. 672 (D.N.H. 1949).

160. *Grove v. Smyth*, 169 F. Supp. 852 (E.D. Va. 1958).

161. *Hymes v. Dickson*, 232 F. Supp. 796 (N.D. Calif. 1964) (by implication).

162. *See Bolden v. Pegelow*, 329 F.2d 95 (4th Cir. 1964).

163. *See Bailleaux v. Holmes*, *supra* note 149.

D. Access to Counsel & Privacy of Communications

The privacy of communications between counsel and client suffers somewhat when the client is a prisoner. Since the security of the prison is foremost in the minds of prison administrators, a warden may compel a guard to be present during interviews between attorney and client.¹⁶⁴ The right to private consultation with a client during trial¹⁶⁵ will not extend to such conversations while the prisoner is incarcerated.¹⁶⁶ Concerning inspection of written correspondence between prisoners and their attorneys, it has been held that the practice violates no constitutional right,¹⁶⁷ thus inspection, and even censorship of mail is permissible,¹⁶⁸ whereas interception of lawyer-client verbal communications have been held to be improper.¹⁶⁹ As to derogatory statements concerning prison life, there is a split of authority.¹⁷⁰ The better rule seems to be that it is an abuse of discretion to deny the right to communicate with attorneys, even prospective attorneys, even though the content of the prisoner's writing concerning imagined abuses may be totally false or critical of prison authorities. If this were not the rule, a prisoner who had been truly illegally punished or denied rights by arbitrary prison authority would be denied any relief whatsoever. This safeguard of allowing free access to counsel is important and must be preserved.

E. Other Censorship Requirements

The security of a prison must be safeguarded not only by censorship of the mails, but in many other ways. Thus, where newspapers have been withheld¹⁷¹ or censored by clipping out specific articles,¹⁷² such action has been held reasonable in the absence of a clear abuse of discretion. The monitoring of conversations between prisoners and visitors has also been approved.¹⁷³ The authority of a warden to select "proper" visitors for prisoners in his charge is also unquestioned. In a case where both husband and wife had been committed on

164. *Gambadoro v. La Vallee*, 20 Misc. 2d 554, 199 N.Y.S.2d 264 (Sup. Ct. 1960), *aff'd sub nom. Kahn v. La Vallee*, 12 A.D.2d 832, 209 N.Y.S.2d 591 (3d Dep't 1961) (by implication).

165. *E.g.*, *Coplon v. United States*, 191 F.2d 749 (D.C. Cir. 1951), *cert. denied*, 342 U.S. 926 (1952).

166. *But see* *People v. Del Rio*, 25 Misc. 2d 444, 207 N.Y.S.2d 186 (N.Y. County Ct. 1960) where it was held that a prisoner must be allowed a reasonable place within which to consult with his attorney outside of the hearing of others.

167. *Green v. Maine*, 113 F. Supp. 253, 256 (S.D. Maine 1953).

168. *United States ex rel. Vraniak v. Randolph*, 161 F. Supp. 553 (D. Ill. 1958). (dictum).

169. *Matter of Reuter*, 4 A.D.2d 252, 164 N.Y.S.2d 534 (1st Dep't 1957).

170. *Compare* *Matter of Ferguson*, 55 Cal.2d 663, 361 P.2d 417, 12 Cal. Rptr. 753, *cert. denied sub nom. Ferguson v. Heinze*, 368 U.S. 864 (1961), *with* *Matter of Gregg*, 143 Mont. 523, 392 P.2d 87 (1964) (*held*, not an abuse of discretion to withhold a letter by a prisoner to his attorney which was characterized as "grisly" and containing fabrications. It is interesting to note that the court did not cite a single precedent in support of its decision).

171. *Bloeth v. Cyrta*, 39 Misc. 2d 1039, 242 N.Y.S.2d 307 (Sup. Ct. 1963).

172. *Morris v. Igoe*, 209 F.2d 108 (7th Cir. 1953).

173. *People v. Morgan*, 197 Cal. App. 2d 90, 16 Cal. Rptr. 838 (1961), *cert. denied*, 370 U.S. 965 (1962).

identical charges and the wife had been released on bail, it was held reasonable to prevent the wife from consequently visiting her husband who had remained in custody.¹⁷⁴ Also, the necessity for lists of approved visitors, excluding known unsavory persons or recent inmates, is self-explanatory and reflects the concern for the security of penal institutions.

F. *The Right to Competent Medical Care*

"Prison physicians owe no less duty to prisoners who must accept their care, than do private physicians to their patients who are free to choose."¹⁷⁵ A claim by a prisoner that he was refused medical care has thus been held to state a cause of action¹⁷⁶ under the Federal Civil Rights Act.¹⁷⁷ "The obligation of a State to treat its convicts with decency and humanity is an absolute one and a federal court will not overlook a breach of that duty."¹⁷⁸ In cases where a prisoner requests the attendance of a private physician and he can afford to pay the fee, prison authorities allow this private attention.

G. *The Right to be Free from Racial or Other Segregation*

The law concerning racial segregation is presently in a state of flux. Previous decisions have held that there is no federally protected right to participate in the transcription of radio programs, prepared for future broadcast, where Negroes are systematically denied participation,¹⁷⁹ nor will a prisoner be heard to complain of exclusively Negro cell blocks, formations or dining facilities.¹⁸⁰ But one federal court recently invoked the spirit of *Brown v. Board of Education* when it granted an injunction to petitioners who had complained of indignities suffered by being required to receive haircuts in racially segregated barber shops.¹⁸¹ It has also been held that where aliens were held pending deportation proceedings and had complained of close confinement, recreational facilities different from the rest of the prisoners, unhealthy and cramped dining facilities, and discrimination as to other privileges, that such claims were not proper subjects of relief.¹⁸²

It must be recognized that segregation of prisoners, when based upon actual probabilities of violence or breach of prison discipline, are valid and

174. *Akamine v. Murphy*, 108 Cal. App. 2d 294, 238 P.2d 606 (1951).

175. *Pisacano v. State*, 8 A.D.2d 335, 340, 188 N.Y.S.2d 35, 40 (4th Dep't 1959).

176. *McCullum v. Mayfield*, 130 F. Supp. 112 (N.D. Cal. 1955).

177. 42 U.S.C.A. § 1983. *But see* *Snow v. Roche*, 143 F.2d 718 (9th Cir.), *cert. denied*, 323 U.S. 788 (1944) (*held*, allegations of failure to provide medical and dental care were insufficient to sustain a petition for a writ of habeas corpus where no allegation of illegal detention was made).

178. *Johnson v. Dye*, 175 F.2d 250, 256 (3d Cir.), *rev'd on other grounds sub nom. Dye v. Johnson*, 338 U.S. 864, *rehearing denied*, 338 U.S. 896 (1949).

179. *United States ex rel. Morris v. Radio Station WENR*, 209 F.2d 105 (7th Cir. 1953).

180. *Nichols v. McGee*, 169 F. Supp. 721 (N.D. Cal.), *appeal dismissed*, 361 U.S. 6 (1959).

181. *Bolden v. Pegelow*, 329 F.2d 95 (4th Cir. 1964).

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

necessary. But segregation for its own sake is suspect, and reasons for such treatment should be required of prison officials.

H. *Right to be Free from Cruel and Unusual Punishments*¹⁸³

The United States Constitution¹⁸⁴ and the New York Constitution¹⁸⁵ both contain provisions prohibiting cruel and unusual punishments. In a recent New York case it was held that habeas corpus could be utilized to inquire into ". . . further restraint in excess of that permitted by the judgment or constitutional guarantees. . . ."¹⁸⁶ Where a prisoner was placed in solitary confinement, now euphemistically termed "segregation," for ninety-two days on bread and water,¹⁸⁷ it was held that allegations of such treatment stated a cause of action under the Federal Civil Rights Act.¹⁸⁸ But where a prisoner complained of a "conspiracy" against his welfare it was held that federal courts could not superintend the internal workings of state prisons.¹⁸⁹ It seems that allegations of actual *physical* mistreatment are the key to these cases.

It has also been held that there is no right *not* to work while one's case is pending appeal.¹⁹⁰ These decisions and interpretations are based upon rules of common sense and as long as institutional forces continue to use standards of reasonable treatment, this area will continue to be of little practical importance.

I. *The Right to Religious Belief and Activity*¹⁹¹

Of all the problems affecting both prison populations and prison administrators, the problem concerning religious exercise has enjoyed the most litigation, publicity and growth and expansion as a legal concept in recent years. This writer's treatment of the subject is by no means exhaustive, and is presented only to spotlight the major issues.

New York's Constitution of 1777 provided:

The free exercise and enjoyment of religious profession and worship, without discrimination or preference, shall forever hereafter be allowed, within this State, to all mankind: *Provided*, That the liberty of conscience, hereby granted, shall not be so construed as to excuse acts of licentiousness, or justify practices inconsistent with the peace or safety of this State.¹⁹²

183. See generally Note, 59 Yale L.J. 800 (1950).

184. U.S. Const. amend. VIII.

185. N.Y. Const. art. 1, § 5.

186. *People ex rel. Brown v. Johnson*, 9 N.Y.2d 482, 485, 174 N.E.2d 725, 726, 215 N.Y.S.2d 44, 45 (1961) (testing validity of transfer from state penitentiary to state hospital for the insane).

187. One hot meal per week was provided during this period.

188. *Gordon v. Gannon*, 77 F. Supp. 477 (E.D. Ill. 1948).

189. *Curtis v. Jacques*, 130 F. Supp. 920 (W.D. Mich. 1954).

190. *Draper v. Rhay*, 315 F.2d 193 (9th Cir.), cert. denied, 375 U.S. 915 (1963), petition for rehearing denied, 375 U.S. 982 (1964).

191. Comment, *Prisoners' Religious Freedom*, 35 So. Cal. L. Rev. 162, 173 (1962). See also Comment, *Black Muslims in Prison: Muslim Rights and Constitutional Rights*, 62 Colum. L. Rev. 1488 (1962).

192. *Davis v. Beason*, 133 U.S. 333, n.348 (1890), citing N.Y. Const. art. 38 (1777).

As early as 1777, it was realized that a distinction must be drawn between the right to religious belief and the right to act in pursuance of that religious belief. This distinction remains valid even today. Conduct remains subject to regulation for the protection of society.¹⁹³ It has been said that the First Amendment freedoms enjoy a preferred status;¹⁹⁴ but in a prison situation where the free exercise of religious beliefs could be a threat to discipline, it is recognized that curbs are both necessary and constitutionally proper.¹⁹⁵ New York prison authorities are required by law to provide a Bible in each cell.¹⁹⁶ The law also provides that divine services are to be held, if possible, every Sunday, the needs of prison security being kept in mind. The New York Correction Law¹⁹⁷ also provides that all persons committed to state prisons are entitled to the free exercise and enjoyment of religious profession and worship without discrimination or preference. This provision does not extend to a prisoner the right to possession of an Arabic grammar book for use in studying a language which would help him in the pursuit of his religious belief.¹⁹⁸

The general practice in all state and federal prisons is to hire chaplains, paying them with governmental funds to minister to the religious needs of its inmates. These chaplains are normally required to have achieved a certain level of professional competence before they are considered able to cope with men in the prison situation.¹⁹⁹ In this way the government fulfils its obligation to the spiritual needs of its prisoners. Where Catholic prisoners in solitary confinement were denied the right to attend Mass but the prison chaplain administered the sacraments to these prisoners individually on Sundays and Holy days, it was held that there was no denial of the exercise of religion.²⁰⁰

With the growth of the Black Muslim sect, special problems have presented themselves to both state and federal penal authorities. In an attempt to insure the security of their prisons, wardens and commissioners of correction have somewhat sacrificed the religious rights of the followers of Elijah Muhammed, as the Muslims have been regarded as a major threat to prison discipline due to their adherence to inflammatory doctrines, in particular, the doctrine of Black Supremacy. The courts have been caught in the middle of this dilemma, balancing on one side the Muslim's constitutional right to freedom of religious belief, and on the other, the administrator's concern for prison security. The judiciary has recognized that prison affairs are normally best left to prison authorities, and except in extreme cases, courts should not interfere with prison rules, regu-

193. See, e.g., *Cantwell v. Connecticut*, 310 U.S. 296 (1940).

194. E.g., *Thomas v. Collins*, 323 U.S. 516, 529-30 (1945) (speech & assembly).

195. *Matter of Ferguson*, 55 Cal. 2d 663, 361 P.2d 417, 12 Cal. Rptr. 753, cert. denied, 368 U.S. 864 (1961). *Accord*, *Cooke v. Tramburg*, 43 N.J. 514, 205 A.2d 889 (1964). See also 75 Harv. L. Rev. 837 (1962).

196. N.Y. Corr. Law § 500-e. Note there is no stipulation as to *which* Bible.

197. N.Y. Corr. Law § 610.

198. *Wright v. Wilkins*, 26 Misc. 2d 1090, 210 N.Y.S.2d 309 (Ct. 1961).

199. See, e.g., 7 N.Y. Codes, Rules & Regulations §§ 59.1-59.9 (1962).

200. *McBride v. McCorkle*, 44 N.J. Super. 468, 130 A.2d 881 (App. Div. 1957).

lations or discipline.²⁰¹ A fuller comprehension of this problem can be had by tracing the experience of the federal courts during the past few years.

In *Pierce v. La Vallee*,²⁰² although the question was actually moot, it was said that the denial by the state of possession of the Muslim's holy book, the *Koran* (denoted *Quer'an* by Black Muslims), would be a direct violation of the Civil Rights Act.²⁰³ In another case brought under the Civil Rights Act where prisoners complained that they had been deprived of the right to communicate with religious advisors, had been forbidden the wearing of religious medals, and letters of complaint had been suppressed, a hearing of these charges was required.²⁰⁴ The hearing was held as directed but there was no consequent redress of their grievances. The same parties sued again. On appeal of this second suit, the prison authorities finally acceded to petitioners' demands. The appeal was dismissed on stipulation-by the parties when it was assured the prisoners that the *Koran* (*Quer'an*) and other prayer books would be made available to them; correspondence with ministers of their faith would be allowed, within reasonable limitations; local ministers would be allowed to address them; the wearing of religious medals would be authorized; and groupings of inmates for purposes of prayer, discussion and study would be allowed.²⁰⁵ The court, mindful of the fact that assurances made are not always kept, dismissed the action, without prejudice to the right of the parties to reinstitute the proceedings in the event the prison authorities failed to keep their word.²⁰⁶ Thus the Black Muslims of Lorton Reformatory ostensibly won the day.

A prisoner, exercising his privilege as granted in the stipulation disposing of the previous case discussed, had been transferred from Lorton and placed in solitary confinement for a period of two years, as the authorities regarded his speech as inflammatory. It was held that such punishment was improper and that he must be returned to the general prison population.²⁰⁷ This case has been noted as a landmark in the expansion of the law in the area of cruel and unusual punishment,²⁰⁸ but it would seem that its First Amendment overtones are more important. A later case holding that agitation was a proper cause for discipline appears to cast some doubt on the force of this argument.²⁰⁹ But, agitation when clothed in religious garb is no less agitation, especially where men of violence abound, as they do in a prison population. Free speech and

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

202. 293 F.2d 233 (2d Cir. 1961).

203. 28 U.S.C. § 1343; 42 U.S.C. § 1983. See also *Cooper v. Pate*, 378 U.S. 546 (1964) (*per curiam*) (denial of right to purchase religious publications state a cause of action under Civil Rights Act.)

204. *Sewell v. Pegelow*, 291 F.2d 196 (4th Cir. 1961).

205. *Sewell v. Pegelow*, 304 F.2d 670 (4th Cir. 1962). See also *Roberts v. Pegelow*, 313 F.2d 548 (4th Cir. 1963).

206. *Sewell v. Pegelow*, *supra* note 205.

207. *Fulwood v. Clemmer*, 206 F. Supp. 370 (D.D.C. 1962).

208. Note, 8 Vill. L. Rev. 379, 384 (1963).

209. *Pierce v. La Vallee*, 212 F. Supp. 865 (N.D.N.Y. 1962), *aff'd mem.*, 319 F.2d 844 (2d Cir. 1963), *cert. denied*, 376 U.S. 918 (1964).

religious *acts* as opposed to religious *belief* must be curbed where there is such a danger of violence.

The right to possess a prayer book and religious medals, and the right to visits by ministers having been won, the Black Muslims then sought to compel prison authorities to recognize dietary restrictions, knowing that the dietary restrictions of Catholics and Jews were fully acknowledged.

Fasting is required during daylight hours during the Moslem month of Ramadan. Daylight hours are ascertained in a most unusual way. A Moslem may eat during this month only when upon inspection of a white and a black thread held in front of him he can tell no difference in color. Only then have the hours of darkness commenced. In attempting to defer to the wishes of the Black Muslim inmates, officials relied on Naval Observatory time rather than upon the traditional test as outlined above. The court, when petitioned to compel implementation of the traditional test held that there was no justiciable issue; that the prisoners were seeking a special privilege. Judge Sobeloff, in a vigorous dissent, observed:

To those who are not versed in their ritualistic requirements the distinction [between the traditional test and the time as delineated by the Naval Observatory] may appear foolish; but the same may be said of the fasts and feasts and the many other religious practices of more traditional denominations.²¹⁰

The time difference may be critical to Moslems and should not be lightly dismissed, any more than Catholics should be served nothing but meat every Friday.

The right to purchase inflammatory religious newspapers is not federally protected,²¹¹ nor should it be where insubordination and breaches of discipline are the result. The federal courts have found that the periodicals, *Muhammed Speaks* and *Salaam*, are proscribed for that reason.²¹²

A recent federal case utilized the test of clear and present danger where the competing interests were religious freedom and prison discipline. In this case,²¹³ the director of a penal institution had curtailed Black Muslim activities because he felt that riots would ensue. The court held that inmates must be allowed the right to practice where there was no clear and present danger of disturbance. The court warned, however:

Lest there be no misunderstanding, the practice of this right (religious freedom) in a penal institution is not absolute—it is sub-

210. *Childs v. Pegelow*, 321 F.2d 487, 492 (4th Cir. 1963), *cert. denied*, 376 U.S. 932 (1964).

211. *Desmond v. Blackwell*, 235 F. Supp. 246 (M.D. Pa. 1964).

212. See *Desmond v. Blackwell*, *supra* note 211. *But see* *Coleman v. District of Columbia Commissioners*, 234 F. Supp. 408 (E.D. Va. 1964) (by implication) (had sued to require officials to allow purchase of *Muhammed Speaks* but question was moot since prisoner was allowed them after suit instituted). See also *Blazic v. Fay*, 21 A.D.2d 817, 251 N.Y.S.2d 494 (2d Dep't 1964) (Memorandum decision) (religious material must be in violation of reasonable rules and regulations concerning prison discipline in order to be subject to confiscation).

213. *Banks v. Havener*, 234 F. Supp. 27 (E.D. Va. 1964).

ject to rules and regulations necessary to the safety of the prisoners and the orderly functioning of the institution.²¹⁴

In New York, subsequent to the Court of Appeals decision *Brown v. McGinnis*²¹⁵ (prisoner was held to have a right to a hearing to determine the scope of his right to religious practice while in prison), and pursuant to the Court's mandate, the Department of Correction promulgated rules and regulations concerning religious services and ministrations in state institutions.²¹⁶ These rules were geared primarily to the "established" religions, namely Christianity and Judaism. Qualifications for chaplaincy of "approved denominations" were set forth, the Commissioner of Correction declaring that Islam consists of three specified sects, of which the followers of Elijah Muhammed, the Black Muslims, are not a part.²¹⁷ This failure to recognize the Black Muslims as a valid religious sect was later held to be a forbidden prior restraint of religious exercise.²¹⁸ The opportunity afforded the state to propose workable rules and regulations in this sensitive area²¹⁹ was to no avail. Although other courts had at least recognized the authenticity of Black Muslimism as a religious sect,²²⁰ the Commissioner had declined to so find. Thus his regulations were found to be inadequate. The court noted:

It is apparent that the effect of the regulations adopted . . . is to prevent members of the Muslim religion from obtaining spiritual advice and ministration from ministers of their own faith and choosing and conducting the other religious exercises described in their petitions.²²¹

The court directed that the Commissioner revise his rules, keeping in mind the spirit of the Federal and State Constitutions and section 610 of the Penal Law which preserves the religious freedom of prisoners. In granting the petitioners' request for equal treatment with other religious sects, the court recognized the need for safeguarding against breaches of prison discipline in the guise of religious exercise. The reputed philosophy of Black Muslimism, Black Supremacy, could be a source of disruption to prison life. The federal courts had recognized this problem. A balance between these two elements must be kept stable.

The particular characteristics of the Muslims obviously require that whatever rights may be granted because of the religious content of their practices must be carefully circumscribed by rules and regulations which will permit the authorities to maintain discipline in the prison.²²²

214. *Id.* at 31.

215. 10 N.Y.2d 531, 180 N.E.2d 791, 225 N.Y.S.2d 497 (1962).

216. 7 N.Y. Codes, Rules and Regulations §§ 59.1-59.9 (1962).

217. 7 N.Y. Codes, Rules and Regulations § 59.9 (1962).

218. *Bryant v. Wilkins*, 45 Misc. 2d 923, 258 N.Y.S.2d 455 (Sup. Ct. 1965).

219. *Cf. Sostre v. McGinnis*, 334 F.2d 906 (2d Cir.), *cert. denied*, 379 U.S. 892 (1964).

220. *E.g.*, *Sostre v. McGinnis*, *supra* note 219.

221. *Bryant v. Wilkins*, 45 Misc. 2d 923, 929, 258 N.Y.S.2d 455, 461 (Sup. Ct. 1965).

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

The recognition of the Black Muslims as a valid religious sect is only a preliminary question. Now that the findings have been made conclusive that they are as such, the next issue will be the permissible extent of the exercise of their beliefs in the prison situation. Possession of their Bible, the particular translation of the *Koran* which they require, and the authority to purchase other religious objects would seem to be totally permissible.²²³ Under the decision in *Bryant v. Wilkins*²²⁴ it would seem that the right to correspond, receive instruction, visitations and to attend congregational services held by a minister of their faith are also within the protection of the law. Where feasible, observance of dietary laws of Near Eastern and other religions should also be allowed.²²⁵ When the Commissioner's new regulations are ready for publication, it is hoped that all these areas will be satisfactorily covered.

CONCLUSION

With the total revision and re-codification of New York's Penal Law, it might have been expected that the doctrine of civil death would have been scrapped. But it seems that this sadly misused doctrine will stay with us. It will appear as before, verbatim, in the Civil Rights Law.²²⁶ Disability, the penalty of civil death, is no deterrent,²²⁷ and at best its application is unpredictable, therefore its continuance seems to serve no useful purpose. It has never helped the family of an inmate, but has created still more problems for them. The Model Penal Code solution is simple: no disability attaches upon imprisonment except for those rights necessarily incident to execution, specifically denied by constitution or statute, or order of court.²²⁸ In this way, the difficulties inherent in the application of the sweeping common law doctrine are avoided.

A prisoner should be allowed to pursue any suit, in person, by attorney or committee. Causes of action should not be allowed to expire for the mere reason that the party is under disability. The franchise of prisoners institu-

223. See *Cooper v. Pate*, 378 U.S. 546 (1964) (per curiam).

224. *Bryant v. Wilkins*, 45 Misc. 2d 923, 258 N.Y.S.2d 455 (Sup. Ct. 1965).

225. It is to be noted that the Commissioners allow Roman Catholic and Orthodox Jewish inmates the observance of their dietary restrictions. Why should it be any different for Muslims, if it is conceded that this sect is a religion?

226. See N.Y. Civ. Rights Law § 79, effective September 1, 1967.

227. See Rubin, *The Law of Criminal Correction* 620 (1963).

228. Model Penal Code § 306.1 (Proposed Official Draft, 1962):

(1) No person shall suffer any legal disqualification or disability because of his conviction of a crime or his sentence on such conviction, unless the disqualification or disability involves the deprivation of a right or privilege which is:

(a) necessarily incident to execution of the sentence of the Court; or
 (b) provided by the Constitution or the Code; or
 (c) provided by a statute other than the Code, when the conviction is of a crime defined by such statute; or
 (d) provided by the judgment, order or regulation of a court, agency or official exercising a jurisdiction conferred by law, or by the statute defining such jurisdiction, when the commission of the crime or the conviction or the sentence is reasonably related to the competency of the individual to exercise the right or privilege of which he is deprived.

tionalized should depend on a more rational ground than either the classification of their crime as felony or misdemeanor, or their incarceration in state rather than county prison. A better standard would exclude from the franchise *all* persons convicted of a crime rather than the incongruous results under the present state of the law. Life imprisonment should be made a grounds for divorce. This would seem a more workable solution to the problem where a spouse desires to remarry and is uncertain of his or her status.

Censorship, where necessary, should continue; but never at the expense of a prisoner's right of access to his attorney or the courts. The first amendment freedoms extended to those under state control by the fourteenth amendment must also be protected. Prison officials cannot be allowed to employ "requirements of prison discipline and security" to abridge these preferred rights where there is no showing of clear and present danger.

It appears, that if the prisoner is to be rehabilitated, he must be allowed to maintain his dignity. The denial of civil rights or abridgment of constitutional guarantees can only serve to defeat honest attempts at rehabilitation made by prison administrators.

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