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PRISON INMATE MARRIAGES: A SURVEY AND A PROPOSAL

I. INTRODUCTION*

During the last century, the individual convicted for a crime lost not only his freedom but also most of his civil rights:

> The bill of rights is a declaration of general principles to govern a society of freemen, and not of convicted felons and men civilly dead. Such men have some rights it is true, such as the law in its benignity accords to them, but not the rights of freemen. They are the slaves of the State . . . .[1]

This nineteenth century philosophy has to a large degree carried over to the twentieth century,[2] but there is a movement under way to restore the prisoner to the status of full citizenship: "Prisoners retain all the rights of free citizens except those on which restriction is necessary to assure their orderly confinement or to provide reasonable protection for the rights and physical safety of all members of the prison community."[3]

This comment explores one facet of the issue of inmate civil rights: the right to marry. An analysis will be made of the current situation nationwide with particular emphasis on Virginia, including proposed guidelines for Virginia's Department of Corrections that reflect the current national trend with regard to inmate marriages.

II. THE INMATE'S "RIGHT" TO MARRY

Incarceration, by its very nature, brings about the curtailment or abolition of many rights that the free citizen enjoys.[4] To determine the effect imprisonment has on the right to marry, it is necessary to first explore the current status of inmate rights in general and consider a survey of the civilian's and the inmate's right to marry.

An inmate does not lose all his rights when convicted and incarcerated. Generally, "[a] prisoner retains all the rights of an ordinary citizen except

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

2. *See* Note, *The Collateral Consequences of a Criminal Conviction*, 23 VAND. L. REV. 929 (1970) [hereinafter cited as *Collateral Consequences*].

3. A.B.A. Joint Comm. on the Legal Status of Prisoners, *The Legal Status of Prisoners* (Tent. Draft 1977), in 14 AM. CRIM. L. REV. 377, 387 (1977) [hereinafter cited as *The Legal Status of Prisoners*].

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

those expressly, or by necessary implication, taken from him by law."[5] In actuality, by "implication" or through civil death or disability statutes,[6] most jurisdictions have severely curtailed inmate rights, except those protected by the courts.

In determining which rights to protect, the courts are practical and realize that the very nature of incarceration is going to restrict many rights fundamental to and exercisable in civilian life. Accordingly, in fundamental areas such as certain first amendment rights of speech and association, the Court has allowed state regulation as long as it is reasonable, consistent with the inmate's status as a prisoner, and within the legitimate operational considerations of the prison.[7]

There are areas, however, in which the courts recognize that the rights involved are so fundamental or the classification is of such a suspect nature that state regulation must be held to a higher degree of judicial scrutiny. Accordingly, when the right of reasonable access to the courts,[8] or racial discrimination,[9] or certain other rights to speech and association[10] are the issue: "Only a compelling state interest centering about prison security, or a clear and present danger of a breach of prison discipline, or some

5. Coffin v. Reichard, 143 F.2d 443, 445 (6th Cir. 1944).

6. For a discussion of civil disability statutes see *Collateral Consequences, supra* note 2.

7. *See, e.g.*, Wolff v. McDonnell, 418 U.S. 539 (1974); Pell v. Procunier, 417 U.S. 817 (1974).

Jones v. North Carolina Prisoners' Union, 97 S.Ct. 2532 (1977), recently decided by the United States Supreme Court, is the latest in this line of decisions. In *North Carolina Prisoners' Union*, the North Carolina Department of Corrections prohibited inmates from soliciting other inmates to join the union, barred all meetings of the union, and refused to deliver packets of union publications that had been mailed in bulk to several inmates for redistribution among the prisoners. The union sought declaratory judgment and injunctive relief alleging that its rights, and those of its members, to engage in protected free speech, association and assembly activities were being infringed by the no-solicitation and no-meeting rules. The State argued that the union activity would increase tensions between the inmates and prison personnel and might result in work stoppages, riots, and chaos. A three-judge federal district court granted the union substantial relief but the Supreme Court reversed, holding that: "An examination of the potential restrictions on speech or association that have been imposed by the regulations under challenge, demonstrate that the restrictions imposed are reasonable, and are consistent with the inmates' status as prisoners and with the legitimate operational considerations of the institution." 97 S.Ct. at 2540.

North Carolina Prisoners' Union should have no detrimental effect on the issue of inmate marriages. Whether or not an inmate has a right to marry was not an issue in the case. Furthermore, it is questionable if the right to marry can be denied by a penal institution using the test cited above, *i.e.*, that the denial is reasonable and consistent with the inmate's status as a prisoner and with legitimate operational considerations of the institution.

8. *See, e.g.*, Goodwin v. Oswald, 462 F.2d 1237, 1241 (2d Cir. 1972); Paka v. Manson, 387 F. Supp. 111, 127 (D. Conn. 1974).

9. *See, e.g.*, Jackson v. Godwin, 400 F.2d 529 (5th Cir. 1968).

10. *See, e.g.*, Fortune Soc'y v. McGinnis, 319 F. Supp. 901 (S.D.N.Y. 1970).

substantial interference with orderly institutional administration can justify curtailment of a prisoner's constitutional rights."[11]

The United States Supreme Court has made it clear that marriage, although not mentioned in the United States Constitution, underlies the purposes of the Constitution and is, therefore, a *basic liberty* afforded constitutional protection.[12] Whether a civilian has a constitutionally guaranteed *right* to marry, however, has not been addressed by the Supreme Court in the absence of other constitutional issues. The weight of authority in the lower federal courts, though, is that, for the civilian, marriage is a fundamental right.[13]

The fact that marriage is a fundamental right, or at least a basic liberty, for a civilian does not, however, preclude governmental intervention. It is recognized that the power to regulate marriage is a sovereign function retained by the States.[14] Accordingly, it has been determined that the state has the power to regulate marital inception, status, duration, and termination,[15] as long as it does so within constitutional bounds.

The Court determines the limits of governmental intervention through the use of the "strict scrutiny" test, invoked whenever a "fundamental" right is curtailed by regulations or a "suspect" classification results in detriment to members of a particular class.[16] This test is two-pronged and places the burden on the state to prove that the regulation is necessary due to a compelling state interest and that the infringement is the least objectionable alternative available.[17]

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11. *Id.* at 904.

12. *See* Roe v. Wade, 410 U.S. 113 (1973) (concerning abortions); Boddie v. Connecticut, 401 U.S. 371 (1971) (invalidating filing fees in order to bring an action for divorce); Loving v. Virginia, 388 U.S. 1 (1967) (striking down anti-miscegenation statute); Griswold v. Connecticut, 381 U.S. 479 (1965) (concerning right to marital privacy); Skinner v. Oklahoma, 316 U.S. 535 (1942) (striking down statute providing for sterilization of habitual criminals).

13. *See, e.g.,* Johnson v. United States, 422 F. Supp. 958, 969-71 (N.D. Ind. 1976); Redhail v. Zablocki, 418 F. Supp. 1061, 1069 (E.D. Wisc. 1976); Holt v. Shelton, 341 F. Supp. 821, 822-23 (M.D. Tenn. 1972). *Contra,* Davis v. Meek, 344 F. Supp. 298, 299-300 (N.D. Ohio 1972).

14. *See, e.g.,* Loving v. Virginia, 388 U.S. 1, 7 (1967); Maynard v. Hill, 125 U.S. 190, 205 (1888).

15. *See, e.g.,* Haddock v. Haddock, 201 U.S. 562 (1906); Maynard v. Hill, 125 U.S. 190 (1888); Henderson v. Henderson, 199 Md. 449, 87 A.2d 403 (1952); Toler v. Oakwood Smokeless Coal Corp., 173 Va. 425, 4 S.E.2d 364 (1939).

16. *See, e.g.,* Graham v. Richardson, 403 U.S. 365 (1971) (alienage); Williams v. Rhodes, 393 U.S. 23 (1968) (right to vote and freedom of association); McLaughlin v. Florida, 379 U.S. 184 (1964) (race).

17. *See, e.g.,* Alevy v. Downstate Medical Center, 39 N.Y.2d 326, 384 N.E.2d 537, 543 (1976).

In light of the fundamental right involved and the burden of proof on the state under the strict scrutiny test, the decision in *O'Neill v. Dent*[18] is not surprising. Dennis O'Neill was expelled from the United States Merchant Marine Academy when it was discovered that he had married in violation of Academy and federal regulations forbidding a midshipman to marry while enrolled in the Academy.[19] O'Neill sought declaratory and injunctive relief alleging that the regulations were a denial of due process and equal protection and an interference with his fundamental right to marry.[20] The federal district court decided that, in view of the fundamental nature of the right involved, the strict scrutiny test should be applied. The court then ruled that, under this test, the Government had failed to demonstrate the compelling necessity for interfering with the midshipman's right to marry.[21]

The courts have not been persuaded to apply the strict scrutiny test seen in *O'Neill* when an inmate is one of the parties who is denied permission to marry. *Johnson v. Rockefeller*[22] involved a conflict between a civil death statute[23] and a life-term inmate's desire to marry. The inmate sought injunctive and declaratory relief alleging that the ban on marriage was violative of his constitutional rights.[24] A three-judge federal court held two to one that the basic essentials of marriage—cohabitation, sexual intercourse, and the begetting of children—are already effectively denied to prisoners serving life terms by virtue of their incarceration.[25] Thus, the court concluded that a statute merely imposing denial of the right to a formal marriage ceremony and not denying the basic essentials of marriage did not violate the equal protection or due process provisions of the Constitution.[26] The court also held that under the eighth amendment[27] the states

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18. 364 F. Supp. 565 (E.D.N.Y. 1973).

19. *Id.* at 567, n.2, citing U.S. Merchant Marine Academy Reg. 02120 (1971), amending Midshipman Reg. 900.45 (1967): "A midshipman who shall marry shall immediately submit his resignation. A midshipman found to be married and to have willfully concealed the fact will be dismissed." *Id.* n.3, citing 46 C.F.R. § 310.53 (1972): "(c) *Marriage.* A candidate must be unmarried and have never been married. Any cadet who shall marry, or who shall be found to be married, or to have been married before his final graduation shall be required to resign. Refusal to resign will result in dismissal."

20. 364 F. Supp. at 567-68.

21. *Id.* at 579.

22. 365 F. Supp. 377 (S.D.N.Y. 1973), *aff'd sub nom.* Butler v. Wilson, 415 U.S. 953 (1974).

23. N.Y. CIVIL RIGHTS LAW § 79, 79-a (McKinney Supp. 1972).

24. Statute challenged as being violative of the fifth, eighth, ninth, and fourteenth amendments as well as 42 U.S.C. § 1983. 365 F. Supp. at 380.

25. *Id.* at 380.

26. *Id.*

27. "Excessive bail shall not be required, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII.

have considerable freedom "in determining what form the punishment for crime shall take."[28] Thus, the court concluded that the deprivation of the right to marry is within the state's power to punish crime.

The federal judge dissenting in *Johnson,* however, was more in line with the reasoning of the court in *O'Neill.* He felt that the statute deprived the inmate of the "critical emotional support to be found in the formalized and symbolic relation [marriage] itself."[29] Furthermore, he postulated that the "formalized emotional commitment"[30] between husband and wife had been prohibited "without any compelling necessity and without benefiting the state"[31] and in this sense the punishment could be considered excessive under the eighth amendment.[32]

In re Goalen[33] is even more indicative of the plight of the inmate's right to marry. Ann Goalen was denied permission to marry an inmate of the Utah prison system by the prison warden acting under the authority of a civil death statute.[34] Her petition for mandate to order the warden to permit her to marry the prisoner was denied and appealed to the Supreme Court of Utah. Goalen based her appeal on the concept that marriage is a fundamental right, denial of which is unconstitutional.[35] The Utah Supreme Court ruled that this contention was an *ipse dixit,*[36] that the right to marry is not a fundamental right, and that the state had the authority to deny inmate marriages under its police power.[37]

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28. 365 F. Supp. at 380.

29. *Id.* at 382.

30. *Id.* at 383.

31. *Id.*

32. *Id.* (But "excessiveness" alone would not trigger the application of the eight amendment).

33. 30 Utah 2d 27, 512 P.2d 1028 (1973).

34. *Id.* at 1028. UTAH CODE ANN. § 76-1-36 (1953) provided: "A sentence of imprisonment in the state prison for any term less than for life suspends all civil rights of the person so sentenced during imprisonment, and forfeits all private trusts and public offices, authority of power."

Upon this statute, the Utah State Board of Corrections issued Policy No. 36: "It shall be the policy of the Board of Corrections that the Warden may, upon recommendation of the treatment team, authorize inmates nearing their release dates to marry." In re Goalen, 414 U.S. 1148, 1149 (1974).

35. 512 P.2d at 1028.

36. "He himself said it; a bare assertion resting on the authority of an individual." BLACK'S LAW DICTIONARY 961 (4th ed. 1968).

37. 512 P.2d at 1028-30. The attitude of the court toward this case can be ascertained from the following quotation:

> [O]ne of the principals [Ann Goalen] has her civil rights, perhaps, but the other [the inmate] has lost his because the state, under its legitimate police power, has a perfect right, in our opinion, to protect the community against the repeated incursions into

Appeal was made from the decision in this case to the United States Supreme Court but certiorari was denied[38] for want of a substantial federal question (perhaps because Utah repealed its civil death statute[39] and mooted the issue). However, Mr. Justice Stewart, joined by Justices Douglas and Brennan, dissented and noted, "[t]he extent to which this right [to marry] may be diluted for one in prison is something the Court has never decided."[40] Mr. Justice Stewart further alluded to the determination that the Court would have made had certiorari been granted:

> In this case the State asserts no security or discipline problems that would arise by permitting the marriage. The State's only interest appears to be to utilize the wholesale denial and subsequent "gradual return" of prisoners' civil rights as an incentive to encourage their cooperation in corrective programs . . . . I think there is a serious question whether this state policy is sufficient to overcome the appellant's constitutional claim.[41]

The decisions in *Johnson* and *In re Goalen* have not settled the issue of the inmate's right to marry. It should be noted that *Johnson* and *In re Goalen* both involved civil death statutes. In those states where the legislature has not spoken on the issue, it remains to be seen if administrative officials and courts can deny inmate marriages without legislative authority to do so.

Respected legal organizations, cognizant of the fact that denial of fundamental rights such as marriage and voting do not enhance prison security, discipline, or rehabilitative programs, are drafting proposals calling for the restoration of many lost rights. The Joint Committee on the Legal Status of Prisoners, a committee of the American Bar Association, has prepared an unannotated tentative draft[42] proposing sweeping changes which: "[F]or the most part . . . define the essentials of human liberty and dignity as it should exist—not only for part but for all of society. The standards [tenative draft] seek to operationalize concepts of justice, of fairness, and of human rights."[43] Accordingly, the tenative draft begins with the general principle: "Prisoners retain all the rights of free citizens

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> the privacy of decent people by a proven sex deviate, who, for aught we know, by marriage while in prison, might have an opportunity to procreate and sire one who might be like father like son . . . .

Id. at 1029.

38. 414 U.S. 1148 (1974).

39. *Id.* at 1150.

40. *Id.*

41. *Id.*

42. *The Legal Status of Prisoners, supra* note 3.

43. *Id.* at 378.

except those on which restriction is necessary to assure their orderly confinement or to provide reasonable protection for the rights and physical safety of all members of the prison community."[44] Typifying this statement, the draft proposed that inmates not be deprived of the right to contract or dissolve marriage.[45]

Likewise, the second tenative draft of the Uniform Corrections Act prepared by the National Conference of Commissioners on Uniform State Laws calls for a change from the current position on many prisoner rights. The tenative draft proposes that the inmate retain, "all rights political, personal, civil, and otherwise, including the right to . . . (8) marry, separate, divorce . . . ."[46]

Granting the right to marry to inmates naturally raises questions of the effect the ensuing marriages would have on such collateral areas as conjugal visits, divorce and charges of discrimination by homosexuals.

Conjugal visits would not have to be afforded in order to consummate the marriage. It is uniformly held that consummation through sexual intercourse or cohabitation is not a requirement of a valid marriage ceremony.[47] Once the ceremony is concluded the parties have entered into the legal relationship of husband and wife. Furthermore, the courts have held that denial of conjugal rights to convicted detainees is within the state's power and does not violate the constitutional rights of the inmate or the spouse.[48]

Affording the inmate the right to marry would not affect the existing divorce laws. In many states the conviction and incarceration for a crime after the marriage is grounds for divorce.[49] However, if the spouse was convicted of a crime before the marriage and the other spouse knew of the conviction prior to the marriage ceremony, the conviction is not grounds for divorce.[50]

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44. *Id.* at 387.

45. *Id.* at 415.

46. Uniform Corrections Act § 4-600 (2d Tent. Draft 1977).

47. *See, e.g.,* Robertson v. Robertson, 262 Ala. 114, 77 So.2d 373, 374 (1955); Mitchell v. Mitchell, 136 Me. 406, 11 A.2d 898, 906 (1940); In re Zanfino's Estate, 375 Pa. 501, 100 A.2d 60, 61 (1953).

48. *See, e.g.,* McCray v. Sullivan, 509 F.2d 1332, 1334 (5th Cir. 1975) (prisoner); Tarlton v. Clark, 441 F.2d 384, 385 (5th Cir.), *cert. denied,* 403 U.S. 934 (1971) (prisoner); Polakoff v. Henderson, 370 F. Supp. 690, 694 (N.D. Ga. 1973); *aff'd,* 488 F.2d 977 (5th Cir. 1974) (prisoner or spouse); In re Flowers, 292 F. Supp. 390 (E.D. Wisc. 1968) (prisoner).

49. *See, e.g.,* VA. CODE ANN. § 20-91(3) (Repl. Vol. 1975). *See also* Plotkin, *Recent Developments in the Law of Prisoners' Rights,* 11 CRIM. L. BULL. 405, 431 (1975).

50. Caswell v. Caswell, 64 Vt. 557, 24 A. 988 (1892); *cf.* Williamson v. Williamson, 212 Ark. 12, 204 S.W.2d 785 (1947); Clough v. Clough, 248 Iowa 1090, 84 N.W.2d 16 (1957).

Granting the right to enter into heterosexual marriages would not open the door for homosexual marriages. By definition and statute marriage can be entered into only by persons of the opposite sex.[51] Accordingly, courts have relied on the very definition of marriage to defeat challenges that bans on like sex marriages were unconstitutional.[52] Of course, should a state allow civilian homosexual marriages, then a charge of discrimination may be valid if heterosexual inmate marriages were allowed and homosexual inmate marriages denied.[53]

Thus, recognition of an inmate's right to marry would not affect the current status of any of these collateral areas.

III. Jurisdictions Considering The Issue Of Inmate Marriages

Not only has case law been unable to resolve the issue of a prisoner's right to marry, there exists no uniform position among the various jurisdictions on this issue.[54] (See table below.) In fact, some states have conflicting positions within their own corrections systems,[55] and at least one jurisdic-

51. Ballentine's Law Dictionary 778 (3d ed. 1969); Black's Law Dictionary 1123 (4th ed. 1968); Webster's Third New International Dictionary 1384 (1971). *See, e.g.,* Va. Code Ann. § 20-45.2 (Repl. Vol. 1975).

52. Jones v. Hallahan, 501 S.W.2d 588 (Ky. Ct. App. 1973); Baker v. Nelson, 291 Minn. 310, 191 N.W.2d 185 (1971), *appeal dismissed,* 409 U.S. 810 (1972); Singer v. Hara, 11 Wash. App. 247, 522 P.2d 1187 (1974).

53. *See generally* Time, September 8, 1975, at 35 pertaining to six legally sanctioned homosexual civilian marriages. *See also* M.T. v. J.T., 140 N.J. Super. 77, 355 A.2d 204, *cert. denied,* 71 N.J. 345, 364 A.2d 1076 (1976) (dealing with sex changes).

54. In December 1976, the Board of Corrections, as rule and policy making body for the Department of Corrections of the Commonwealth of Virginia created the Chaplaincy Study Commission. This Commission sought input from the other forty-nine states, the District of Columbia, and the United States Department of Justice regarding several issues including their positions on marriage rights of penal inmates. With the permission and assistance of Hullihen W. Moore, LL.B., Christian, Barton, Epps, Brent and Chappell, Richmond, Va., Doris R. DeHart, Chairman, Virginia Board of Corrections and Rev. George F. Ricketts, Executive Director, Chaplain Service of the Churches of Virginia, a comparative analysis has been compiled of the various responding jurisdictions' policies on this issue. This research was supplemented with the state code provisions, if any, of the seventeen states that did not respond to the Commission's request and interviews with the authorities from several of the responding states. Any conflicts and duplications in categorizing the jurisdictions are caused by a difference between the formal position and the actual application of that position. The non-responding states are Ala., Ark., Colo., Idaho, Ind., Ky., Minn., Miss., Mo., Nev., N.H., N.J., Ore., R.I., S.C., S.D., and W.Va. The corresponding chart summarizes the various jurisdicitions as to their positions, purported and actual, with regard to this issue.

55. For example, an inmate's chance of an approved marriage request in Maryland and Iowa may depend on whether his or her religious preference is Catholicism: "The Catholic Chaplain at the Maryland Penitentiary . . . discourages marriages . . . [while] the Protestant Chaplain does allow or seeks permission for them in special circumstances and according

tion questions whether this issue is important enough to merit concern.[56]

At least twenty-six jurisdictions[57] have a formal written policy on inmate marriages, while eleven states[58] have none. Six states[59] are governed by a specific state code or statutory provision. Less than one-third of the United States jurisdictions generally allow inmate marriages, and of these, only three—California, Pennsylvania, and Tennessee—view inmate marriages as a right.[60]

The second tenative draft of the Uniform Corrections Act would allow inmates to retain the right to marry.[61] California and four other states[62] allow inmate marriages without the necessity of an official issuing approval. Illinois allows "marriages under all circumstances if they meet the legal requirements of the State . . . ."[63] Michigan feels that inmates should "be permitted to marry if they comply with the law. . . ."[64] New York is in accord except for a statute which prohibits marriage to those sentenced to life terms,[65] while an Oregon statute provides for no loss of civil rights

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to the inmate's religious convictions as well as civil laws." Letter from Frederick E. Terrinoni, Dir. of Classification, Md. Dep't of Pub. Safety and Correctional Serv. to Chaplaincy Study Comm'n (June 3, 1977); "My practice at present is to simply say 'no' . . . The Rules of the Catholic Church would not permit me to have a marriage in prison at any rate . . . ." Memo from Iowa Catholic Chaplain Fr. Hoenig to Chaplain Ray, HOW I HANDLE REQUEST FOR MARRIAGE HERE IN PRISON (May 19, 1977).

56. In an interview on Sept. 16, 1977, Comm'r C. Murray Henderson, Tenn. Dep't. of Corrections, summed up his philosophy by stating:

> What's the big deal? What's the difference? We only have one or two marriage requests per month out of six thousand inmates, and I don't have the right to deny a person the right to marry. If there's some compelling interest we may try to talk them out of it, but if we can't do it, well, so what?

57. Cal., Conn., Del., D.C., Fla., Ga., Idaho, Ill., Iowa, Kan., La., Md., Mass., Mich., Neb., N.Y., N.C., Pa., R.I., Tenn., Tex., Utah, U.S., Va., Wash., Wis.

58. Alas., Ariz., Hawaii, Me., Mont., N.M., N.D., Ohio, Okla., Vt., Wyo.

59. Cal., Idaho, Mo., Ore., R.I., Tex.

60. "[E]ach such person shall have the following civil rights . . . (f) To marry." CAL. PENAL CODE § 2601(f) (Deering 1975); "By law all inmates shall be granted all fundamental constitutional rights enjoyed by the general population . . . ." Pa. Bureau of Correction, Directive, INMATE MARRIAGES (Nov. 7, 1974); "Thus, marriage seems to be a right which isn't removed upon conviction of a felony." Letter from C. Murray Henderson, Comm'r, Tenn. Dep't of Corrections to Chaplaincy Study Comm'n (Apr. 25, 1977).

61. Uniform Corrections Act (2d Tent. Draft), Nat'l. Conf. of Comm'rs. on Uniform State Laws (1977).

62. Ill., Mich., N.Y., Ore.

63. Letter from Charles J. Rowe, Acting Dir., Ill. Dep't of Corrections to Chaplaincy Study Comm'n (May 11, 1977).

64. Mich. Dep't of Corrections, Policy Directive DWA-64.03, RIGHTS OF CLIENTS TO RESPONSIBLE SELF-DETERMINATION (1977).

65. N.Y. Dep't of Correctional Serv., Directive No. 4201, MARRIAGES DURING CONFINEMENT (Jan. 15, 1975)

due to imprisonment.[66] Texas law allows proxy marriages,[67] and inmates who choose this route cannot be barred or hampered by prison officials;[68] otherwise, it is difficult for a Texas penal inmate to marry.[69]

Closely aligned with the states that allow inmate marriages are eight jurisdictions[70] that seem to generally approve requests by inmates to marry. Louisiana's formal position places it in this category,[71] but its actual policy is to "allow inmates to be married, but only in very special circumstances."[72] The District of Columbia's official policy statement intones that, "when all legal and procedural criteria have been met, it is the Department's policy to permit its residents to marry."[73] But a closer look at the District's policy seems to limit authorization to situations involving children or where incarceration thwarted a previous agreement to marry.[74] Although the Tennessee and Pennsylvania philosophies are most favorable to inmate marriages, they refuse to give carte blanche approval to all marriage requests.[75] Oklahoma grants inmates the privilege of marriage,[76]

Any inmate may marry providing: a. there are no legal impedements to such marriage, b. satisfactory arrangements can be made . . . . Section 79-a of the New York State Civil Rights Law prohibits an offender sentenced to life imprisonment from entering into marriage until such time as he is paroled.

66. ORE. REV. STAT. § 137.275 (1975). Available information does not disclose how close Oregon policy follows this statute.

67. TEX. FAM. CODE ANN. tit. 1, § 1.05 (Vernon 1975); *See also* OP. ATT'Y. GEN. TEX. No. M-1287 (Dec. 28, 1972): "We therefore conclude that a proxy marriage may be performed in Texas."

68. "We have nothing to say about who are married by proxy . . . . We will simply be notified when the proxy marriage has been consummated [?] and we change our records." Letter from Clyde M. Johnston, Dir. of Chaplains, Tex. Dep't of Corrections to Chaplaincy Study Comm'n (May 25, 1977).

69. *Id.* "We do not encourage inmate marriages."

70. Conn., D.C., La., Okla., Pa., Tenn., U.S., Wis.

71. "Absent unusual circumstances, the warden should approve the marriage request." La. Dep't of Corrections, Dep't Reg. No. 30-23, INMATE MARRIAGE REQUESTS (Apr. 21, 1976).

72. Letter from C. Paul Phelps, Sec. of Corrections, La. Dep't of Corrections to Chaplaincy Study Comm'n (Apr. 19, 1977).

73. D. C. Dep't of Corrections, Dep't Order No. 4160.5, MARRIAGE BY RESIDENTS OF THE D. C. DEPARTMENT OF CORRECTIONS (Dec. 30, 1976).

74. *Id.* "6. Purpose of Marriage While Incarcerated: Authorization will be considered for the following purposes: a) Pregnancy; b) Previously arranged marriage prevented by arrest and incarceration; c) To legalize a sound relationship of significant duration, particularly when children are involved."

75. "The warden does, however, retain the option of denying or delaying a request, and this action has been used in two requests [since the Dep't's policy was liberalized on April 30, 1976]." Letter from C. Murray Henderson (*supra* note 60); Pa. Bureau of Corrections, Directive, INMATE MARRIAGES, (Nov. 7, 1974) "Permission will not be granted if the inmate's mental or emotional stability will be seriously impaired by the marriage."

76. "[W]e take an active interest in the desire of an inmate to become married . . . . This

while Connecticut and Wisconsin pose no unnecessary restraints so long as statutory[77] and procedural[78] requirements are met.

There has been a growing progressive attitude towards prisoners' rights since the days of Andersonville.[79] Recognizing the trend, the United States Department of Justice expresses its tolerance of inmate marriages as follows: "Formerly an inmate had to convince the staff of the institution where confined that the marriage was necessary and/or helpful. Now the responsibility is on the staff to give sufficient evidence why the marriage may *not* be consummated [emphasis added]."[80]

Most jurisdictions[81] favoring inmate marriages claim a neutral or open policy on the issue either in written correspondence[82] or in their formal rules and regulations. This contention can be somewhat deceptive as evidenced by Delaware's allegedly open policy[83] and Virginia's claim of neutrality.[84] Actually, Virginia makes it very difficult for an inmate to marry,[85] while the anomaly of Delaware's claim of an open policy is brought out in an inter-departmental memorandum: "It [the present procedure] was developed some years ago by a former chaplain (now deceased) who, with the institutional officials, was apparently in basic opposition to marriages of inmates but felt that one might be permitted under very exceptional circumstances. The present feeling is the same."[86]

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privilege is not spoken by statute." Letter from Frederick L. Keith, Dir. Programs and Serv. Unit Okla. Dep't of Corrections to Chaplaincy Study Comm'n (May 3, 1977).

77. "The Department of Correction is neutral in the marriage area so long as the statutory requirements (blood tests, parental consent, etc.) are met." Letter from Dorin J. Povani, Dep. Comm'r for Evaluation and Inspection, Conn. Dep't of Correction to Chaplaincy Study Comm'n (Apr. 18, 1977); *Accord*, Wis. Admin. Policies, Div. of Corrections, Sect. No. 3.006, RESIDENT MARRIAGE (May 15, 1977).

78. Conn. Admin. Directive, Dep't of Correction, Ch. No. 1.3, INMATE MARRIAGES (Dec. 1, 1976); Wis. Admin. Policies, Div. of Corrections Sect. No. 3.006. RESIDENT MARRIAGES (May 15, 1977).

79. Andersonville, Ga., was the site of a notorious prison for Union soldiers during the Civil War. C. Funk, NEW COLLEGE STANDARD DICTIONARY 45 (1947).

80. Letter from Norman A. Carlson, Dir., U.S. Dep't of Justice, Bureau of Prisons to Chaplaincy Study Comm'n (May 2, 1977). *See also* Note, *A Review of Prisoners' Rights Litigation Under 42 U.S.C. § 1983*, 11 U. RICH. L. REV. 803, 851-52 (1977).

81. Cal., Conn., Mich., N.Y., Pa., Tenn., U.S.

82. Letters to Chaplaincy Study Comm'n (1977), *supra* note 54.

83. Letter from Rev. Don Chapman, Chaplain, Del. Correctional Center to Chaplaincy Study Comm'n (April 25, 1977).

84. Div. of Adult Serv. Guideline, Va. Dep't of Corrections, No. 891, MARRIAGE CEREMONIES FOR INMATES (May 19, 1976).

85. Interview with George F. Ricketts, Exec. Dir., Chaplain Serv. of the Churches of Va. (Sept. 19, 1977).

86. Memo from E. H. Dunlavey to Comm'r Vaughan, MARRIAGE BY INMATES, (Apr. 22, 1977). *See also,* Letter from Rev. Don Chapman, *supra* note 83. "While meeting with each

Nebraska's seemingly neutral official position[87] is contrasted in practice with a negative stance which discourages and seldom allows inmates to marry.[88] A Nebraska inmate seeking permission to marry because of a pregnant consort is first told that "the possibility of marriage is rather remote,"[89] and then is introduced to "forms . . . called 'Paternity Affidavits' . . . for the birth record . . . having the inmate's name as father of the child."[90]

Over half the states take a moderate to strong stand in opposition to prisoner marriages. In at least seven states they are simply not allowed.[91] By statute, Idaho, Missouri, and Rhode Island declare that a prisoner loses his civil rights upon incarceration,[92] and is civilly dead if sentenced to life imprisonment.[93] Arizona has retreated from allowing inmate marriages "on a very rare occasion" to a present interim policy . . . "which does not allow an individual on inmate status authorization to get married . . . [pending] result of litigation in the United States District Court."[94] Georgia has but one narrow exception to its prohibition of inmate marriages; they are "only allowed if an unwed mother conceived prior to an inmate's incarceration."[95] Iowa, by allowing only a single marriage in the last twelve years,[96] in effect, has a negative policy. The unwritten policy of the Ohio[97]

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inmate, I have explained the institution's procedure. Usually this has discouraged the inmate from further pursuing an institutional marriage. My personal feeling is not to encourage such a marriage as well."

87. Neb. Div. of Corrections, Official Memo. No. 839.001, OFFENDER MARRIAGES (Mar. 22, 1976).

88. "[H]e [the warden] and I agreed that inmate marriages should not be allowed." Letter from Winfred C. Ollenburg, Chaplain, Neb. Dep't of Corrections to Chaplaincy Study Comm'n (Apr. 20, 1977).

89. *Id.*

90. *Id.* No information is available as to whether any of these confession-obligation forms have ever been executed by an inmate.

91. Ariz., Ga., Idaho, Iowa, N.D., Ohio, R.I.

92. IDAHO CODE § 18-310 (Cum. Supp. 1976); MO. ANN. STAT. § 222.010 (Vernon 1959); R. I. GEN. LAWS § 13-6-1 (1969).

93. IDAHO CODE § 18-311 (Cum. Supp. 1976); MO. ANN. STAT. § 222.010 (Vernon 1959); R.I. GEN. LAWS § 13-6-2 (1969).

94. Letter from Thomas W. Korff, Ass't to the Dir., Ariz. Dep't of Corrections to Chaplaincy Study Comm'n (May 10, 1977). This pending litigation involves a prospective spouse claiming a violation of her civil rights because she was not allowed to marry an inmate. Interview with Thomas W. Korff, Ass't to the Dir., Ariz. Dep't of Corrections (Sept. 6, 1977). *See* note 33 *supra* and accompanying text for Utah case on point.

95. Ga. Dep't of Offender Rehab., Dep'tal Rules and Regs. Ch. 125-2-2-.14 MARRIAGE, AMENDED (Feb. 16, 1975).

96. Letter from Sherburne L. Ray, Religious Coordinator, Iowa State Pen. to Chaplaincy Study Comm'n (May 27, 1977).

97. "The general policy of our Department is not to permit marriages." Letter from Freder-

and North Dakota[98] prison administrators is not to permit inmates to marry.

Seven states[99] claim to strongly discourage requests by prisoners to marry. While Montana's "general policy discourages marriage of inmates in prison,"[100] most of these discouragements come directly from the chaplains. The Delaware chaplain claims his meeting with inmates requesting to be married "usually . . . has discouraged the inmate from further pursuing an institutional marriage."[101] Florida's chaplains are "the most frequent marriage counselors and they are urged to lead inmates to *responsibility* in the matter. Sometimes, *responsibility* leads to inmates deciding that marriage is not the best decision [emphasis added]."[102] While the Iowa and Maine chaplains flatly claim to "discourage marriage" during imprisonment,[103] the Nebraska chaplain takes a more subtle approach. He writes a letter to every prospective civilian spouse which includes a sentence which states something to the effect that if we allow or ever recommend this marriage, we would possibly be guilty of contributing to what has already been an irresponsible life pattern."[104] At least one of these chaplains feels "[t]here is no legal prohibition to marriage while in jail. [And concedes] I suppose that an inmate could insist and his request would have to be granted."[105] This policy of strong discouragement appears to be serving its purpose since "so far, these decisions have been accepted without any recourse for some kind of an appeal."[106]

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ick R. Silber, Chaplain, Adm'r., Religious Serv., Ohio Dep't of Rehab. and Correction to Chaplaincy Study Comm'n (May 4, 1977); Answering an informal inquiry, an Ohio "Federal Judge indicated marriage was not a Constitutional right, and, therefore, the denial of marriage was not a violation of the rights of the individual. Further, he intimated should a case be brought before him, he would uphold the practice of the Department." *Id. Contra,* note 60.

98. North Dakota's "present administration's policy [is] not to allow any marriages while an inmate is serving a sentence in the Penitentiary." Letter from Charles F. Enders, Dir. of Programs, N.D. State Pen. to Chaplaincy Study Comm'n (Apr. 25, 1977). To make sure there was no misunderstanding, Mr. Enders closed this letter with "We do not allow inmate marriages." *Id.*

99. Del., Fla., Iowa, Me., Md., Mont., Neb.

100. Letter from Alvin O. Skibsrud, Chaplain, Mont. State Prison to Chaplaincy Study Comm'n (May 6, 1977).

101. Letter from Rev. Don Chapman, *supra* note 83.

102. Letter from Hugh D. Perry, Fla. Chaplaincy Serv. Coordinator to Chaplaincy Study Comm'n (Apr. 20, 1977).

103. Letter from Sherburne L. Ray, *supra* note 96; Letter from T. Lawrence Gilbert, Jr., D. Min., Dir. of Pastoral Care, Me. Correctional Center to Chaplaincy Study Comm'n (May 3, 1977).

104. Letter from Winfred C. Ollenburg, *supra* note 88.

105. Letter from T. Lawrence Gilbert, Jr., *supra* note 103.

106. Letter from Winfred C. Ollenburg, *supra* note 88.

Virginia and at least twelve other states[107] seem to either generally disapprove or give only limited approval to requests by prisoners to marry. New Mexico will only allow such marriages by proxy,[108] but contrary to Texas, these proxy marriages are discretionary and not absolute privileges afforded by statute.[109] In 1974, Washington "vacillated from not permitting marriages under any circumstances to a more liberal policy [which still requires] a strong presentation for granting permission to marry . . . ."[110] Three states—Florida,[111] Kansas,[112] and North Carolina[113]—along with the more neutral state of Maryland,[114] give special consideration to inmates who are soon to be released, or who have earned special privileges by participation in an outside rehabilitating activity such as a work or study release program. Eleven jurisdictions[115] also give extra consideration to those cases where pregnancy is involved or where a previously born child will be legitimized by the requested marriage. There appears to be no rule of thumb permitting one to predict whether a marriage request will be approved in six states.[116] Virginia typifies this ad hoc, discretionary approach with a policy of judging each case "on its individual merits, taking into account the parties, their relationship prior to incarceration, their financial assets, the public interest, and all other pertinent considerations."[117]

From the available information, over seventy-five percent of the jurisdictions require an official decision to be made on each inmate's request to marry. The warden or penal institution head makes the final determination in fifteen jurisdictions;[118] the head of the department of corrections in

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107. Del., Fla., Kan., La., Me., Mont., Neb., N.M., N.C., Tex., Wash., Wyo.

108. Letter from Edwin T. Mahr, Sec'y of Corrections, N.M. Dep't of Corrections to Chaplaincy Study Comm'n (Apr. 25, 1977).

109. *Id.*

110. Letter from Roger Maxwell, Ass't Dir., Wash. Adult Corrections Div. to Chaplaincy Study Comm'n (Apr. 22, 1977).

111. Fla. Dep't of Offender Rehab., Program Directive No. 9, MARRIAGE OF AN INMATE WHILE INCARCERATED (n.d.).

112. Kan. Dep't of Corrections, Pol'y and Procedure Manual, II Inmate Mgmt., Sec. No. 212, MARRIAGE POLICY FOR INMATES (Feb. 1, 1977).

113. N.C. Dep't of Corrections, Tab No. 5NCAC2F, INMATE MARRIAGE REQUESTS (Feb. 1, 1976).

114. "An inmate housed in a minimum security institution, in a community corrections center, or in the Work Release Program would be in a much better position for a favorable response to a request . . . ." Letter from Frederick E. Terrinoni, *supra* note 55.

115. D.C., Fla., Ga., Kan., Mass., Mont., Neb., N.M., N.C., Tex., Wyo.

116. Hawaii, Md., Mass., Utah, Vt., Va.

117. Guideline No. 891, *supra* note 84.

118. Cal., Conn., D.C., Iowa, Kan., La., Mont., Neb., N.M., N.C., Okla., Tenn., U.S., Wash., Wis.

seven jurisdictions;[119] the chaplain in two jurisdictions;[120] and a committee in two jurisdictions.[121] Maryland's penal classification director indicates that "the Warden . . . makes the final decision,"[122] while Maryland's formal written policy provision is that the "Commissioner of Correction makes the final decision with the warden's report."[123] If the final decision is in favor of marriage, only seven jurisdictions[124] seem to give consideration to a furlough to allow the ceremony outside the penal setting.

The majority of prison chaplains seem to feel approval of marriage under the basically abnormal environment of prison conditions "does a disservice to the individual inmate by limitation of choice [of partners] and by virtue of making a decision for reasons that suit the confinement situation rather than promote a stable marriage situation."[125] Based on both personal and religious beliefs, the general opinion seems to be that "the time of incarceration is just no occasion to get married."[126] In respecting the religious convictions of their chaplains, three states[127] recognize the position taken by the United States Department of Justice, Bureau of Prisons, that "a Chaplain is not forced to perform a marriage against his conscience."[128]

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119. Fla., Ga., Hawaii, Mass., Pa., Tex., Vt., Va.

120. Me., Ohio.

121. Del., Utah.

122. Letter from Frederick E. Terrinoni, *supra* note 55.

123. Md. Div. of Correction Reg. No. 265-1, REQUEST TO MARRY (Mar. 22, 1974).

124. Conn., Ill., Kan., Neb., N.Y., U.S., Wash.

125. Memo from Walter L. Kautzky, N.C. Dep. Dir. of the Div. of Prisons, RIGHTS OF INMATES TO MARRY (May 21, 1974). The position of the Chaplain Service of the Churches of Virginia, Inc., favoring inmate marriages is in direct conflict with the majority of other prison chaplains.

> I know of no reason why an inmate should be denied the opportunity to marry if he or she meets the requirements of the state to obtain a marriage license. It would appear to me that the public interest in the marriage of an inmate is no different than the public interest in other marriages.

Letter from George F. Ricketts, Exec. Dir., Chaplain Service of the Churches of Virginia, Inc., to Bishop John Baden (May 3, 1976).

126. Interview with Frederick R. Silber, Chaplain, Adm'r, Religious Serv., Ohio Dep't of Rehab. and Correction (Sept. 6, 1977).

127. "A prison chaplain lawfully may refuse to solemnize an inmate marriage . . . when to do so would violate his religious beliefs." Op. Att'y Gen. Cal. No. CV 76/58 I.L. (Jan. 3, 1977); "The Department position is that our paid chaplains do not have to perform marriages . . . ." Mich. Dep't of Corrections, Pol'y Directive DWN-64.03, RIGHT OF CLIENTS TO RESPONSIBLE SELF-DETERMINATION, (n.d.). "Under no circumstances will any chaplain be required to perform a marriage he feels is not in the best interest of both parties." Tenn. Dep't of Corrections, Policy Memo, No. 56, MARRIAGE OF INMATES (Apr. 30, 1976).

128. Letter from Norman A. Carlson, Dir., U.S. Dep't of Justice, Bur. of Prisons to Chaplaincy Study Comm'n (May 2, 1977).

An examination of the jurisdictions reveals a general lack of consistency and a menagerie of divergent, often contradictory positions.

IV. A Closer Inspection of One State Jurisdiction: An Inmate's Right to Marriage in Virginia

A close look at Virginia's formal policy reveals that considerable effort and thought have gone into this area. Despite its procedural thoroughness, however, Virginia's policy is constructed so that the ultimate determination of an inmate's marriage request usually depends upon the personal philosophy of the current Director of the Department of Corrections. The Directors' past exercise of discretion has not favored inmate marriages.[129]

There are no Virginia statutes relating to the area of prisoners' marriages. The Commonwealth is guided by the Department of Correction's most recent policy statement.[130]

The present guideline establishes the specific procedures to be followed by an inmate in gaining approval for his proposed marriage, as well as the post approval measures necessary to enable the ceremony to take place. The Department takes a cautious view of inmate marriages.[131] The policy statement contends that although there are many aspects of such marriages that are helpful in preparing the inmate for release, there are harmful aspects that also must be considered.[132] The statement further establishes that each request is to be considered on its individual merits in relation to certain enumerated considerations.[133] It also points out that the approval of a marriage request will not necessarily benefit the inmate with regard to his opportunity for parole, furlough, transfer, or other such considerations.[134] Under the Commonwealth's present policy, the burden is on the inmate to demonstrate his need to be married while incarcerated as opposed to waiting for discharge or parole.[135]

The present guideline outlines the procedure to be followed in submitting and determining the inmate's marital request. The initial step consists of the inmate's submitting a written request to the superintendent of

129. Interview with Rev. George F. Ricketts, *supra* note 85.

130. Guideline No. 891, *supra* note 84. The present policy superseded Guideline Number 803 which had been in effect since Mar. 5, 1974.

131. "Extremely careful consideration must be given all requests for the marriage of an inmate." *Id.* at 1.

132. *Id.* at 1. However, specific harmful responsibilities of such marriages are not cited.

133. *Id.* These considerations include "the welfare of the inmate and the proposed spouse, their respective families, and the interest of the public at large."

134. *Id.*

135. *Id.*

his institution, who then assigns a staff member to assist the inmate in reducing all necessary information to writing.[136] With the inmate's written approval, the staff member then meets with the proposed spouse and thoroughly reviews the inmate's record file.[137] After this review has taken place, the complete written request is submitted to the superintendent of the inmate's institution.[138]

The superintendent consults the chaplain assigned to the inmate's institution[139] regarding the advisability of permitting the inmate to marry.[140] The superintendent, taking into account the chaplain's recommendation, then makes his own written recommendation and forwards it along with the inmate's request, to the Director, Division of Adult Services,[141] who considers the request and recommendation(s), and if he deems it beneficial, institutes further investigation.[142] On the basis of this information, if he feels that a favorable recommendation can be given to the proposed marriage, the recommendation is forwarded along with the recommendations of the superintendent and chaplain, the inmate's request, and all data gathered from an investigation to the Director of the Department of Corrections.[143]

The Director of the Department of Corrections has final authority to

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136. *Id.* at 1-2. According to the guideline, the staff member, presumably a counselor, is to remain neutral in regard to the request.

Besides aiding the inmate with background information, the staff member also helps the inmate prepare a statement which persuasively presents the inmate's reasoning as to why he should be married while incarcerated.

137. *Id.* at 2. Apparently, the Commonwealth assumes that there is a substantial possibility that the inmate has not divulged his entire criminal history and all other salient details (such as possibility of parole) to his intended spouse. It is interesting to note that the inmate does not have access to this file himself. Interview with Rev. George F. Ricketts, *supra* note 85.

138. Guideline No. 891, *supra* note 84.

139. The chaplains who serve the Commonwealth's penal institutions are supplied by the Chaplain Service of the Churches of Virginia. The Chaplain Service is a private, non-profit religious organization which operates autonomously from the Department of Corrections. The Department has utilized the service since 1920, and over the years the Chaplain Service has become the coordinator of religious activities for Virginia's inmates. The service presently has nine full-time and approximately seven part-time chaplains assigned to the Commonwealth's penal facilities. These persons are *not* on the state payroll. Interview with Rev. George F. Ricketts, *supra* note 85.

140. Guideline No. 891, *supra* note 84.

141. *Id.* at 2. The chaplain, if he feels it necessary and appropriate, may submit his separate recommendation to the Director, Division of Adult Services, under separate cover.

142. The investigation is to concern "the backgrounds of the parties, the request and effect a marriage would have on the parties and on the public interest." *Id.*

143. *Id.*

approve or disapprove all requests submitted to him.[144] Under the present policy when the request is disapproved, it is possible to resubmit the request after passage of one year provided some fact or circumstance has changed which would indicate that the request could be approved.[145] There is also a provision which allows any request not recommended by the Director, Division of Adult Services, to be appealed directly to the Director of the Department of Corrections.[146]

Further provisions provide that, should the marriage be approved, the inmate must submit a copy of the marriage license[147] and the blood test results[148] to the superintendent before a ceremony can take place.[149] The inmate must also agree to counseling sessions "to such a degree as may be appropriate"[150] by the institutional chaplain while incarcerated and upon release.[151] It is further required that the ceremony be held at the inmate's institution,[152] unless arrangements are made for the ceremony to take place during an approved furlough.[153] The inmate is fully responsible for all expenses incurred.[154]

While Virginia's present policy appears to be neutral on its face, as a practical matter very few inmate marriages are approved.[155] In fact, there

144. *Id.* According to the guidelines, the Director of the Department of Corrections is to consider each case individually taking into account "the parties, their relationship prior to incarceration, their financial assets, the public interest, and all other pertinent considerations." *Id.* at 2-3. These considerations are not elaborated on in any detail. The consideration of the inmate's financial assets seems dubious at best, and there are some persons who feel that the purpose of such is the Commonwealth's interest in minimizing welfare benefits paid out. Interview with Rev. George F. Ricketts, *supra* note 85.

145. Guideline No. 891, *supra* note 84. No specific examples are cited.

146. *Id.* at 3.

147. In Virginia, only one party to the proposed marriage need appear before the county clerk, provided there is a notarized affidavit from the absent party indicating his background and intent to marry. Interview with Rev. George F. Ricketts, *supra* note 85.

148. The blood test can be performed by the institution's health office. *Id.*

149. Guideline No. 891, *supra* note 84.

150. No explanation of this vague phrase is given.

151. *Id.* at 3. No indication is given concerning whether these sessions are prerequisites to having the actual ceremony take place. The required session upon release is especially troublesome, *i.e.*, if the inmate refuses such counseling is his marriage invalidated and possibly his parole cancelled?

152. All arrangements for the ceremony are made by the staff member originally assigned to the inmate provided they meet with the superintendent's approval. *Id.*

153. *Id.* In the absence of a furlough, no opportunity is provided for the marriage to be consummated. Virginia is not among the jurisdictions that allow conjugal visits. Interview with Rev. George F. Ricketts, *supra* note 85.

154. Guideline No. 891, *supra* note 84.

155. Interview with Rev. George F. Ricketts, *supra* note 85. However, no exact figures are available.

has been a considerable decline in approvals since the present policy has been in effect.[156] Among the reasons given for the decline are increased red tape, an increased burden on the inmate to show legitimate reasons to be married, and a general prohibitive attitude on the part of the department's administrators.[157] New regulations should be considered in an effort to introduce equity into the area of inmate marriages.

V. A Proposed Regulation For Virginia on Inmate Marriages

I. PURPOSE

The purpose of this regulation is to establish guidelines for the marriages of inmates. The Commonwealth recognizes the right to marry as fundamental and that inmates are granted all fundamental constitutional rights enjoyed by the general population that are not inconsistent with imprisonment itself. The Commonwealth is not only charged with protecting the rights and welfare of the inmate and his intended spouse, but also has a responsibility for insuring the general welfare and safety of the institutional community, as well as society at large. Thus, all of these interests are of vital importance in considering an inmate's request to marry. It is recognized that a major objective of the Department of Corrections is to foster ties to the community that will help create stability in the inmate's personal life, and that in many cases, the marriage relationship can be beneficial in preparing the inmate for his release and reassimilation into the community.

II. GENERAL GUIDELINES

A. Every inmate (except as limited by Guidelines C, D, and E below) has the right to seek approval for a proposed marriage through the proper procedures outlined herein.

B. Each request shall be considered individually on its own merits by the Marital Evaluation Committee (described below). This Committee has final authority with regard to the request's ultimate disposition.

C. If parole or pre-release status is imminent (within six months), an inmate who has attained such status cannot be denied the right to marry while incarcerated. However, the inmate should be counseled as to the

156. As a practical matter, under the previous policy, Guideline No. 803, the superintendent's recommendation was routinely the only requirement in having the request approved. The other officials in the process generally deferred to his judgment. This is no longer true under the present policy. *Id.*

157. *Id.*

advisability of deferring the marriage until such status is attained. Since in these cases the right to marry is automatic, the procedure outlined below is not applicable.

D. No marriage shall be denied, regardless of the inmate's status, where the purpose of such marriage is the legitimation and support of children born or about to be born. The procedure outlined below is not applicable in such cases.

E. An offender sentenced to life imprisonment shall be prohibited from entering into marriage until such time as he has attained parole status. Guideline D creates an exception whereby this prohibition shall be waived.

F. Approval will not be granted if the marriage would be void under the laws of the Commonwealth; *e.g.*, bigamy, incest, non-age marriage, marriages lacking requisite parental consent, marriages between persons of the same sex, or marriages of emotionally and mentally imcompetent persons.

G. All statutory requirements, such as the medical tests and licensing procedures, must be met before the ceremony is performed.

H. The marriages involving an inmate shall take place within the institution where the inmate is incarcerated or in a place approved by the institutional superintendent and shall be solemnized by either the institutional chaplain, an outside recognized clergyperson chosen by the applicants, or by a judge or justice of the peace. This does not apply to inmates who have achieved a status, such as furlough, whereby they can be freely married outside the institution.

I. The inmate himself is responsible for all financial obligations incurred. State funds shall not be appropriated for such use.

J. It should be emphasized to the inmate that the fact of a marriage of this type will not be of any benefit for purposes of parole, furlough, transfer, or other considerations.

III. PROCEDURE FOR THE INMATE'S MARITAL REQUEST

A. Notice of Intent to Marry

1. A written request for marriage must be filed notifying the superintendent of the inmate's institution of the parties' intent to marry. Such request must be signed by both the inmate and the intended spouse to insure mutual agreement.

2. Upon receipt, the superintendent shall assign an appropriate staff member (*e.g.*, an institutional counselor) to process the request. The latter shall assist the inmate in reducing to writing all necessary informa-

tion, including background data of both the inmate and the intended spouse. The staff member's position throughout the procedure should be neutral. It is not his job to encourage or discourage the proposed marriage. However, he does have a vote with regard to the request's final determination as a member of the Marital Evaluation Committee. (See Guideline D.2. below).

B. Interviews with the Proposed Marriage Partners

1. The staff member shall have an interview with the inmate submitting the request, and shall fully explain the mechanics and details of the entire marriage approval procedure. It should be pointed out to the inmate that while the Department will assist in areas where capable, the responsibility for actual execution of the procedures rests with the inmate and intended spouse.

2. The staff member shall also have an interview with the intended spouse. Full disclosure of the inmate's record, including a summary of the inmate's salient criminal history is required. The inmate must personally approve, in writing, the divulgence of this information. If such approval is not forthcoming, the marriage request will be tabled at this point. Such details as parole eligibility, conditional discharge, and the maximum expiration date of the inmate's sentence must be provided the intended spouse. It should also be explained that no special consideration for temporary release or parole will be accorded the inmate by benefit of the marriage.

3. If both the inmate and intended spouse desire counseling, the institutional chaplain of their faith shall be available. Such a consultation should be strongly urged.

C. Recommendations

1. Separate, written recommendations regarding the advisability of the requested marriage shall be submitted to the Marital Evaluation Committee by the superintendent of the inmate's institution, the chaplain assigned to that institution, and the assigned staff member.

D. The Marital Evaluation Committee

1. The purpose of such Committee shall be to give individual consideration to each request. The Committee is required to make a final determination on the inmate's request within 60 days after it's submission to the inmate's superintendent.

2. The Committee shall consist of seven members; four shall hold permanent positions, and three shall vary depending on the inmate's institution. The permanent members shall include the Director, Division of Adult Services, who shall serve as chairperson, and three citizens ap-

pointed by the Governor. The members serving on a variable basis shall be the superintendent and chaplain of the inmate's institution, as well as the staff member who aided the inmate and intended spouse in preparation of the request. After a discussion where all recommendations, background data, and relevant interests (those of the inmate, the intended spouse, the Commonwealth, and the community) are considered, a vote shall be taken. Each member casts a single vote, and a simple majority is required for approval.

3. The burden is on the Committee to establish why the inmate should *not* be allowed to marry. If there are insufficient grounds on which to support a denial, then the marriage should be approved. There is a presumption that the marriage should be allowed; it is up to the Committee to establish otherwise.

4. Should the request be denied, a full, documented report explaining the Committee's reasoning must be made available to the inmate and the intended spouse. An explanation from the chairperson advising the inmate of the procedure's appeal provisions should be attached.

5. A denied marriage request may be resubmitted after a period of one year has elapsed provided there has been a significant change in circumstances (*e.g.*, a change in the inmate's custody classification from maximum to minimum security).

E. Upon Committee Approval: Meeting the Statutory Requirements

1. The assigned staff member is charged with assisting the parties in arranging both the requisite blood test and the acquisition of a marriage license. The former should be arranged with the institution's assigned health official. The staff member should arrange for the inmate to submit a notarized affidavit, whereby the intended spouse can obtain the marriage license.

F. Upon Committee Approval: The Ceremony

1. Arrangements for the ceremony are the responsibility of the inmate and intended spouse. The staff member is available to assist however possible. This may include reserving the institution's chapel, or making the necessary arrangements for the clergyperson or officer of the couple's choice.

2. Those permitted to attend the ceremony shall be limited to the two participating partners, the solemnizer, and four guests of the couple's choosing. There shall be a one-hour time limit on the chapel's use. Necessary security precautions shall be undertaken. No reception facilities shall be provided.

3. No special privileges, such as a marriage furlough or conjugal visit, are to be granted solely as a result of the approval to marry, and the nature of such surrounding activities are contingent upon the custody classification of the inmate.

VI. Conclusion

There are several features in the proposed regulation that clearly distinguish it from the present guideline. The proposal is much more detailed than the present guideline. It establishes policy and procedure in areas formerly left to discretion. By decreasing the amount of individual discretion, the proposed regulation seeks to reduce the personal arbitrariness and discrimination presently involved. The proposed procedure also reduces the red tape involved in the ultimate determination of the request. Under the proposed regulation, the request would not have to be approved at every level of the Department of Corrections' bureaucratic structure. In addition, there are inherent benefits involved in a committee determination as opposed to final authority vested in one decisionmaker. Personal prejudices are diluted within a committee framework so that individual bias and discretion are minimized or eliminated. Finally, and most importantly, the burden is shifted to the government for presenting legitimate reasons for prohibiting the marriage. The comment does not propose that the right to marry is fundamental for all inmates "across the board." However, it does propose that marriage is a fundamental right that cannot be denied unless the government establishes significant, documented substantiation that the marriage would be materially detrimental to the interests of the parties, the Commonwealth, or the community at large.

Although judicial decisions have established no clear precedents, the courts concede that the states have within their police power the right to deny inmate freedoms that would otherwise be available to unincarcerated civilians. However, the trend appears to be towards weakening the distinction between an inmate's rights and those of a civilian. Although the present policies of other jurisdictions are muddled, there may be a discernible trend favoring increased inmate freedoms. It appears the time has come for Virginia's Department of Corrections to take a more humanistic, realistic view of the sacred institution of marriage.

TABLE — MARRIAGE OF PENAL INMATES*

Jurisdictions	Purported Policy	Actual Policy
1. Alabama	_____**	_____
2. Alaska	Neutral. No Written Policy.	Neutral.
3. Arizona	Not Allowed. No Written Policy.	Not Allowed.
4. Arkansas	_____	_____
5. California	Allowed by Statute.	Allowed.
6. Colorado	_____	_____
7. Connecticut	Neutral. Written Policy.	Generally Approved.
8. Delaware	Neutral. Open, Written Policy.	Discouraged Strongly.
9. District of Columbia	Allowed for Specific Purposes. Written Policy.	Allowed for Specific Purposes.
10. Florida	Neutral. Written Policy.	Discouraged.
11. Georgia	Not Allowed. Written Policy.	Not Allowed.
12. Hawaii	Neutral. No Written Policy.	Discretionary Decisions on Case-by-Case Basis.
13. Idaho	Not Allowed by Statute.	Not Allowed.
14. Illinois	Allowed. Written Policy.	Allowed.
15. Indiana	_____	_____
16. Iowa	Discouraged. Written Policy.	Not Allowed.
17. Kansas	Generally Not Allowed. Written Policy.	Generally Not Allowed.
18. Kentucky	_____	_____
19. Louisiana	Approved by Written Policy.	Generally Not Allowed.
20. Maine	Discouraged. No Written Policy.	Generally Not Allowed.
21. Maryland	Neutral. Written Policy.	Discouraged by Catholic Chaplain; Neutral by Protestant Chaplain.
22. Massachusetts	Neutral. Written Policy.	Discretionary Decisions on Case-by-Case Basis.
23. Michigan	Allowed. Written Policy.	Allowed.
24. Minnesota	_____	_____

Jurisdictions	Purported Policy	Actual Policy
25. Mississippi	———	———
26. Missouri	Not Allowed by Statute.	Not Allowed.
27. Montana	Discouraged. No Written Policy.	Generally Not Allowed.
28. Nebraska	Neutral. Written Policy.	Generally Not Allowed.
29. Nevada	———	———
30. New Hampshire	———	———
31. New Jersey	———	———
32. New Mexico	Generally Not Allowed. No Written Policy.	Generally Not Allowed.
33. New York	Allowed by Statute, except for "lifers."	Allowed except for "lifers."
34. North Carolina	Generally Allowed in Limited Situations. Written Policy.	Allowed for Specific Circumstances. Not Allowed Otherwise.
35. North Dakota	Not Allowed. No Written Policy.	Not Allowed.
36. Ohio	Not Allowed. No Written Policy.	Not Allowed.
37. Oklahoma	Generally Allowed. No Written Policy.	Generally Allowed.
38. Oregon	Allowed by Statute.	———
39. Pennsylvania	Generally Allowed. Written Policy.	Generally Allowed.
40. Rhode Island	Not Allowed by Statute.	Not Allowed.
41. South Carolina	———	———
42. South Dakota	———	———
43. Tennessee	Generally Allowed. Written Policy.	Generally Allowed.
44. Texas	Allowed by Proxy Only. Statute.	Generally Not Allowed, except for Proxy Marriages.
45. U.S. Dept. of Justice	Neutral. Written Policy.	Generally Allowed.
46. Utah	Neutral. Written Policy.	Discretionary Decision on Case-by-Case Basis.
47. Vermont	Neutral. No Written Policy.	Discretionary Decisions on Case-by-Case Basis.
48. Virginia	Neutral. Written Policy.	Generally Not Allowed.

Jurisdictions	Purported Policy	Actual Policy
49. Washington	Generally Not Allowed. Written Policy.	Generally Not Allowed.
50. West Virginia	———	———
51. Wisconsin	Generally Allowed. Written Policy.	Generally Allowed.
52. Wyoming	Generally Not Allowed. No Written Policy.	Generally Not Allowed.

* This chart was compiled from information received by the Chaplaincy Study Commission in answer to its request to the other forty-nine states, the District of Columbia, and the United States Department of Justice regarding their positions on marriage rights of penal inmates. This research was supplemented with the state code provisions of the non-responding states and by interviews with the authorities from several of the responding jurisdictions.

** No response was received by the Chaplaincy Study Commission to its request for information from this state regarding its position on marriage rights of penal inmates; therefore, this jurisdiction's position is unknown.