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NOTES

REDUCING CIVIL DISABILITIES FOR CONVICTED FELONS IN NORTH DAKOTA: A STEP IN THE RIGHT DIRECTION*

I. INTRODUCTION[1]

In North Dakota, the civil rights of a convict are suspended during his term of imprisonment[2] and can be restored only by application to the North Dakota Board of Pardons.[3] In some cases it is questionable if the inmates' civil rights are ever restored.[4] This state law is called a civil death statute. Thirteen other states have civil death statutes similar to that of North Dakota.[5] Although the remaining states have repealed their civil death statutes or have never had such legislation, specific civil disabilities still affect the convicts. These disabilities include loss of the right to vote, loss of the right to hold public office, loss of the right to act as a juror, and loss or denial of professional and occupational licenses.[6]

North Dakota's statute is clear on certain points. Upon "imprisonment in the penitentiary" a citizen will forfeit his basic civil rights. But unlike other civil death jurisdictions, North Dakota has

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1. The scope of a major portion of this paper will include a discussion of the prevailing North Dakota civil disability statute, and how this statute in relationship with the entire North Dakota Century Code and body of North Dakota case law affects the rights of imprisoned individuals during their incarceration and after their parole or discharge. It should be noted at the outset that the 1973 North Dakota Legislature passed a new statute which effectively repeals the present civil disability statute. The new legislation will not become effective until the Act of July 1, 1975, ch. 116, [1973] N.D. Laws, 43rd Sess.

2. N.D. CENT. CODE § 12-06-27 (1960), which states:

> A sentence of imprisonment in the penitentiary for any term less than for life suspends all the civil rights of the person sentenced and forfeits all public offices and all private trusts, authority, or power during the term of such imprisonment. A person sentenced to imprisonment for life is deemed civilly dead. Any person serving a term in the penitentiary shall be capable of making and acknowledging a sale or conveyance of property and can maintain any action based on natural rights. He may be sued and in such case may defend.

3. *See* notes 300-19, *infra*.

4. *See* notes 297-819, *infra* and accompanying text.

5. Comment, *Collateral Consequences of a Criminal Conviction*, 23 VAND. L. REV. 929. 950 (1970).

6. *See, e.g.*, ILL. ANN. STAT. ch. 38, § 1005-5-5 (1973).

included vague wording in its statute that states "an imprisoned individual can maintain any action based on 'natural rights'."

The original North Dakota civil disability statute was codified in 1895. It stated: "A sentence of imprisonment in the penitentiary for any term less than life, suspends all civil rights of the person so sentenced, and forfeits all public and private trusts, authority or power, during the term of imprisonment."[7] In 1943 the statute was re-written to combine sections 7707 and 7708 into an amended section numbered 12-0627. A reviser's note stated that the sections were joined because they contained similar subject matter. The "natural rights" concept was added following the decision handed down by the Supreme Court of North Dakota in *Miller v. Turner*.[8] Since the introduction of the concept of "natural rights" no attempt has been made by either the legislature or the courts to clarify its meaning.

Historically the term "natural rights" has been difficult to define. "Natural rights" were considered a basis for law during the Roman Era, and there was a strong sentiment among early American legal scholars that "natural rights" were incorporated into the early laws of the United States. Very few sources could be found that attempted to specifically categorize the "natural rights" of man. An example of this vagueness can be found in one early American legal work that stated: "In spite of these interesting observations, it is manifestly difficult to point to any conspicuous modern representation of a clearly defined doctrine of natural law."[9] Despite the failure of other jurisdictions to clarify this term, North Dakota enumerated certain "natural rights" within its original constitution.[10]

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7. R.C. §§ 7706-08 (1895).

8. Miller v. Turner, 64 N.D. 463, 253 N.W. 437 (1934); N.D. CENT. CODE § 12-06-27 (1960). The deviser's note stated:

> Sections joined to connect similar subject matter. The last portion of this section "and can maintain any action . . ." has been added following the decision handed down by the Supreme Court in the case of Miller v. Turner, 64 N.D. 463, 253 N.W. 437, in which the court held that while a convict cannot make contracts generally under this section he can make such contracts as are necessary for the disposition of his property only. He has no authority to make any other kind of a contract and cannot maintain any action except those which concern his personal liberty and are based on natural rights as distinguished from legal rights. He may be sued and in such case he can defend.

9. Spencer, *The Revival of Natural Law*, 80 CENT. L.J. 346 (1915).

10. *See* N.D. CONST. art. III, § (1) (1889).

> (1). *Natural Rights.*
>
> Section 1. All men are born equally free and independent, and have certain inherent, inalienable and indefeasible rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing protecting property and reputation, and of pursuing their own happiness.
>
> Section 2. All men have a natural and indefeasible right to worship Almighty God according to the dictates of their own consciences, and no person shall be denied any civil or political right, privilege or capacity on account of his religious opinions. No man can of right be compelled to attend, erect or support any place of worship or to maintain any minister of religion against his consent. No preference shall ever be given by law to any religious establishment or mode of worship; but the liberty of conscience hereby secured shall not be construed to dispense with oaths or affirmations, excuse acts of licentiousness

Although the subheading "natural rights" has been dropped from the text of the constitution and the contents of this subheading have been realigned, each section is retained in the Declaration of Rights. If a convict can protect his "natural rights" and if we assume that every man's "natural rights" can categorically be found in the original text of the North Dakota Constitution, this concept could be used to extend prisoners' rights and to challenge the constitutionality of the statute.

II. CIVIL DISABILITIES—ARE THEY CONSTITUTIONAL?

Although there have been a few cases which have ruled that the application of a certain civil disability law is unconstitutional, no court has ruled that the concept of civil disabilities is unconstitutional *per se*.[11]

A. CIVIL DISABILITY LAWS AS A VIOLATION OF DUE PROCESS

Due Process of law is not susceptible to a definition that is applicable to all situations.[12] Its meaning will vary with the general rules of fair play that govern society.[13] Due process has been defined as the fundamental principles of liberty and justice which are the basis of our civil and political institutions.[14] As applied to substantive rights, due process requires that the government cannot deprive a person of life, liberty or property by an act which does not have a reasonable relation to a valid governmental purpose.[15]

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or justify practices inconsistent with the peace or safety of the state.

Section 3. No title of nobility or hereditary distinction, privilege, honor or emolument shall ever be granted or conferred in this state.

Section 4. Emigration from the state shall not be prohibited.

Section 5. Aliens who are *bona fide* residents of this state shall have the rights of citizens with regard to the acquisition, possession, transfer and descent of property.

Section 6. Every man shall have the right freely to write, speak and publish his opinions on all subjects, being responsible for the abuse of that privilege. In all civil and criminal trials for libel, the truth may be given in evidence, and shall be a sufficient defense when the matter is published with good motives and for justifiable ends; and the jury shall have the same power of giving a general verdict as in other cases.

Section 7. All political power is inherent in the people, and they have the right to alter, reform or abolish their form of government whenever the public good may require it.

11. In Stephens v. Yeomans, 327 F. Supp. 1182 (D.N.J. 1970), the District Court for the District of New Jersey held unconstitutional as a violation of equal protection a disenfranchisement statute which excluded from the franchise ex-criminals who had committed certain crimes. The court overturned the statute because of the haphazard treatment it afforded to different criminals. "Most defrauders, including persons convicted of income tax fraud, remain eligible to vote . . . but those convicted of larceny are ineligible." *Id.* at 1188. *But see* Fincher v. Scott, 352 F. Supp. 117 (M.D.N.C. 1972).

12. Hannah v. Larche, 363 U.S. 240, 442 (1960). *See* 16A C.J.S. *Constitutional Law* § 567 (1956).

13. Bolling v. Sharpe, 347 U.S. 497, 500 (1954).

14. *See* Rochin v. People of Cal., 342 U.S. 165 (1952).

15. Zemel v. Rusk, 381 U.S. 1, 14-15 (1964). *See* 16A C.J.S. *Constitutional Law* § 567 (1956). Procedural due process requires that a person be given an opportunity to be heard in order to protect his rights. *See, e.g.*, Goldberg v. Kelly, 397 U.S. 254 (1970).

Civil disability laws create a conclusive presumption that a felon is unfit to perform certain activities. This conclusive presumption of unfitness is generally not questioned by the Courts.[16] In *Hawker v. New York*,[17] the plaintiff challenged the constitutionality of a New York statute which forbade convicted felons from practicing medicine. Mr. Hawker had been convicted of performing an abortion before the statute was passed. The court held that the state may use the prior conviction as conclusive evidence of an absence of the good character required of a physician,[18] stating that a convicted felon conclusively lacks good moral character because of a prior conviction deprives the ex-felon of an opportunity to provide evidence of his good moral character. In *Heiner v. Donnan*,[19] the plaintiff challenged the constitutionality of a statute which said that any transfer of property made within two years of the decedent's death was a transfer in contemplation of death. The Supreme Court of the United States held that the statute violated due process because this statute created a conclusive presumption which did not allow the heirs to prove the transfer was not made in contemplation of death.[20] The ruling in *Heiner* could arguably be applied to civil disability laws since civil disability laws create a conclusive presumption of unfitness which cannot be refuted by the ex-felon.

Civil disability laws have been challenged as violating due process because of the lack of a rational connection between the deprivation suffered the ex-felon and the government's purpose underlying the disability statutes.[21] The rationale is that the inclusion of all ex-felons in civil disability statutes is overbroad in regard to the interests which the state is trying to protect.[22]

In *Schware v. Board of Bar Examiners*,[23] the Supreme Court of the United States ruled that the Board of Bar Examiners of New Mexico violated the Due Process Clause of the Fourteenth Amendment by denying the plaintiff a license to practice law in the state of New Mexico. After graduating from the University of New Mexico Law School in 1953, the plaintiff applied to take the bar examination. The plaintiff's application was denied because of information given to the Board of Bar Examiners by the plaintiff that he had used aliases, been connected with the Communist Party, and had been arrested several times prior to 1940. The Board said that the

16. Comment, *supra* note 5, at 1199.
17. Hawker v. New York, 170 U.S. 189 (1889).
18. *Id.* at 191.
19. Heiner v. Donnan, 285 U.S. 312 (1932).
20. *Id.* at 328.
21. *See, e.g.*, Devau v. Braistad, 363 U.S. 144 (1960).
22. Comment, *supra* note 5, at 1207. *See* Comment, *Employment of Former Criminals*, 55 CORNELL L. REV. 306 (1970). The state's interest is to protect the public from corruption in certain areas.
23. Schware v. Board of Bar Examiners, 353 U.S. 232 (1957). *See* Comment, *Civil Disabilities of Felons*, 53 VA. L. REV. 403, 416 (1967).

plaintiff lacked the requisite moral character for admission to the bar of New Mexico. In reversing the decision of the Supreme Court of New Mexico, the Supreme Court of the United States held that a state cannot exclude a person from the practice of law or any other occupation in a manner or for reasons which contravene the Due Process or Equal Protection Clauses of the Fourteenth Amendment.[24] A state can require high standards such as good moral character before admission to the bar, but the qualifications must bear a rational connection to the applicant's fitness to practice law.[52] The Court reasoned that since none of the alleged violations of good moral character occurred within the last fifteen years, the denial of the plaintiff's application for admission to the bar was a violation of due process in light of the evidence he introduced at the hearing.

A similar result occurred in *Hallinan v. Committee of Bar Examiners*.[26] The Supreme Court of California ruled that plaintiff's misdemeanor convictions in connection with peaceful civil rights demonstrations and his belief that he had a duty to disobey unconstitutional laws did not warrant his exclusion from the bar of California. The court in *Hallinan* quoted *Schware saying*:

> A state can require high standards of qualification, such as good moral character or proficiency in its law, before it admits an applicant to the bar, but *any qualification must have a rational connection with the applicants' fitness or capacity to practice law*.[27] Obviously an applicant would not be excluded merely because he was a Republican or a Negro or a member of a particular church. Even in applying permissible standards, officers of a state cannot exclude an applicant when there is no basis for their finding that he fails to meet these standards, or when their action is indiviously discriminating.[28]

Despite the standards which emerged from *Schware* and *Hallinan* courts have almost unanimously upheld civil disability statutes as rational regulations enacted to protect legitimate public interests.[29]

In *Deveau v. Braistad*,[30] the Supreme Court of the United States upheld a disability law which forbade the collection of dues by a labor organization if any officer or agent of the labor organization had ever been convicted of a felony, unless the officer or agent had been pardoned. In 1920, appellant, who was secretary-treasurer of

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24. Schware v. Board of Bar Examiners, 353 U.S. 232, 238, 239 (1957).
25. *Id.* at 239.
26. Hallinan v. Committee of Bar Examiners, 65 Cal. 2d 447, 421 P.2d 76, 55 Cal. Rptr. 228 (1966).
27. Emphasis added.
28. Hallinan v. Committee of Bar Examiners, 65 Cal. 2d 447, 457, 421 P.2d 76, 86, 55 Cal. Rptr. 228, 238 (1966).
29. Comment, *supra* note 5, at 1203. *See, e.g.*, Upshaw v. McNamara, 435 F.2d 1188 (1st Cir. 1970).
30. Deveau v. Braistad, 363 U.S. 144 (1960).

Local 1346, International Longshoremen's Association, plead guilty to a charge of grand larceny and received a suspended sentence.[31] In denying appellant's claim that enforcement of the Act denied due process, the Court looked to the legislative history behind the Act and determined that barring convicted felons from waterfront union offices was a reasonable means for achieving a legitimate state aim, namely to rid the waterfront from corruption. This Act was reasonable in light of state[32] and Congressional studies which indicated that ex-convicts on the waterfront were a principal cause of corruption.[33] The Court said that even though it was cognizant of the promising record of rehabilitation of ex-felons, it would not substitute its judgment for that of the states and the United States Congress.[34]

Although the *Schware* and *Hallinan* decisions seem to limit the right of states to deny admission to the bar because of arbitrary decisions on what constitutes good moral character, it must be remembered that neither Schware nor Hallinan was convicted of a felony. Thus the *Schware* and *Hallinan* decisions cannot be used as precedents to overturn civil disability statutes which disqualify felons from certain professions.[35]

B. CIVIL DISABILITY LAWS AS A VIOLATION OF EQUAL PROTECTION

The Equal Protection Clause of the Fourteenth Amendment prohibits any state from denying equal protection of its laws to any citizen. The standard used to determine whether equal protection has been violated varies according to the interest which is affected by the particular classification. Traditionally equal protection is violated "only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective."[36] This requirement of a rational basis between the classification and the achievement of the state's objective is supplanted by a more stringent test if the classification is "suspect"[37] or if the classification affects a fundamental interest.[38] In such cases the state is required to show a "compelling" state interest before the classification will survive an equal protection challenge.[39]

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31. *Id.* at 145-46.
32. The New York Waterfront Commission Act was created by the states of New York and New Jersey to try to solve some of the evils which existed on their joint waterfront in the Port of New York. *Id.* at 147.
33. *Id.* at 157, 158.
34. *Id.* at 158.
35. *But see* Muhammad Ali v. Division of State Athletic Comm'n., N.Y., 316 F. Supp. 1246 (S.D.N.Y. 1970).
36. McGowan v. Maryland, 366 U.S. 420, 425 (1961).
37. Comment, *Equal Protection,* 82 HARV. L. REV. 1065, 1088 (1969). Classifications which are "suspect" include those based on race, lineage and alienage.
38. *Id.* at 1127-28. Fundamental interests include voting, procreation, rights with respect to criminal procedure, and to a lesser degree education.
39. *See, e.g.,* Shapiro v. Thompson, 394 U.S. 618, 634 (1968).

If courts use a traditional standard of review, an ex-felon will have to show that his exclusion from certain occupations and professions is not reasonable in light of the interest the state is trying to protect. This will place an extremely heavy burden on the ex-felon in light of the reluctance of courts to overturn occupational disabilities for ex-felons.[40] In *Mones v. Austin*,[41] the plaintiff presented an equal protection challenge to a statute that excluded him from the race tracks of Florida because of a prior bookmaking conviction. Although not all ex-felons were excluded from the race tracks of Florida, the court held that the exclusion was neither arbitrary not unreasonable in light of the connection between bookmaking and illegal gambling.[42] A similar result occurred in *Upshaw v. McNamara*,[43] where an ex-felon sought to receive a police appointment. The ex-felon, who had received a full pardon, challenged the police commissioner's automatic refusal to appoint a pardoned felon to the police force as a denial of equal protection.[44] After deciding that a classification based on a criminal record is not a "suspect" classification,[45] the court went on to find a rational basis for the policy of not hiring ex-felons even if they had been pardoned.[46] The rational basis for the exclusion was that "a person who has committed a felony may be thought to lack the qualities of self-control or honesty that this sensitive job requires."[47]

In *Green v. Board of Elections of the City of New York*,[48] an ex-felon's challenge to disenfranchisement on equal protection grounds was denied. The plaintiff challenged the constitutionality of a New York statute which provided that no person convicted of a felony shall register or vote unless he has been pardoned or restored to the rights of citizenship by the President of the United States. In denying plaintiff's equal protection challenge, the court said that previous landmark voting rights cases did not preclude the states from disenfranchising "persons convicted of all or certain types of felonies."[49] By saying that "it can scarcely be deemed unreasonable for a state to decide that perpetrators of serious crimes shall not take part in electing the legislators who make the laws, the execu-

40. *See* Deveau v. Braistad, 363 U.S. 144 (1960).
41. Mones v. Austin, 318 F. Supp. 653, 654 (S.D. Fla. 1970).
42. *Id.* at 657.
43. Upshaw v. McNamara, 435 F.2d 1188, 1189 (1st Cir. 1970).
44. *Id.* at 1190.
45. *Id.*
46. *Id.*
47. *Id.*
48. Green v. Board of Elections of the City of New York, 380 F.2d 445 (2d Cir. 1967). In *Green*, the plaintiff had been convicted of two felonies (conspiracy to violate the Smith Act and criminal contempt for failure to surrender after his conviction. *See* Fincher v. Scott, 352 F. Supp. 117 (M.D.N.C. 1972). *But see*, Stephens v. Yeomans, 327 F. Supp. 1182 (D.N.J. 1970). *See also* DuFresne, *The Case for Allowing "Convicted Mafiosi to Vote for Judges": Beyond Green v. Board of Elections of New York City*, 19 DEPAUL L. REV. 112 (1969).
49. *Id.* at 451.

tors who enforce them, the prosecutors who must try them for further violations, or the judges who are to consider their cases,"[50] the court justified the exclusion of ex-felons from the franchise by using a rational basis test. Since voting is a fundamental right, the court should have applied the more rigid standard of a "compelling" state interest.

In *Otsuka v. Hite*,[51] the Supreme Court of California held that a conscientious objector should be placed on the voting role since his crime was not "infamous." The California Constitution prohibits persons convicted of "infamous" crimes from exercising the franchise. By excluding the plaintiff's crime from "infamous" crimes the court upheld the statute denying the franchise to those persons convicted of "infamous" crimes. Although *Otsuka* limited the meaning of "infamous" crimes, it did not overturn a disenfranchisement statute on equal protection grounds.

Equal protection challenges to civil disability laws which deny licenses to convicted felons may be successful if the individual can prove that licenses have been issued to other offenders with criminal convictions. In *Muhammad Ali v. Division of State Athletic Com'n, N. Y.*,[52] the plaintiff challenged the denial of a license to box in the state of New York.[53] The court ruled that the denial of the license to the plaintiff was an arbitrary denial of equal protection since other felons in similar circumstances had been granted licenses to box.[54] This ruling indicates that if the ex-felon can establish that he has been denied a license while other ex-felons in similar situations have been granted licenses, he may be able to challenge the denial as a violation of equal protection.

C. CIVIL DISABILITIES AS CRUEL AND UNUSUAL PUNISHMENT

Claims that civil disability laws violate the Eighth Amendment have been routinely dismissed by the courts. In *Green v. Board of Elections of the City of New York*,[55] the court found two rationales for holding that the disenfranchisement of convicted felons is not cruel and unusual punishment. First, the court stated that the deprivation of the franchise is not a punishment but rather a "nonpenal exercise of the power to regulate the franchise."[56] Second, if the deprivation of the franchise is a punishment then the framers of

50. *Id.*
51. Otsuka v. Hite, 64 Cal. 2d 596, 414 P.2d 412, 51 Cal. Rptr. 284 (1966).
52. Muhammed Ali v. Division of State Athletic Comm'n., N.Y., 316 F. Supp. 1246 (S.D.N.Y. 1970).
53. *Id.* at 1248.
54. *Id.* at 1253.
55. Green v. Board of Elections of the City of New York, 380 F.2d 445 (2d Cir. 1967).
56. *Id.* at 450. rop v. Dulles, 356 U.S. 86, 97 (1958). *See Gough, The Expungements of Adjudication. Records of Juvenile and Adult Offendeds: A Problem of Status*, 1966 WASH. U.L.Q. 147 (1966).

the Bill of Rights would not consider this deprivation to be cruel and unusual.[57]

Arguably, civil disability laws are cruel and unusual punishment because they punish an ex-felon for his status. In *Robinson v. California*,[58] the Supreme Court of the United States ruled that a statute that punished an individual for being a narcotics addict was unconstitutional as a violation of the Fourteenth Amendment.[59] The statute punished an individual for being an addict even though he never touched a narcotic drug in the state or was guilty of any irregular behavior.[60] This punishment based on status could be analogous to an ex-felon who is subject to civil disabilities because of his status as an ex-felon.

D. Civil Disability Laws as Bills of Attainder

In *State v. O'Brien*,[61] the Supreme Court of the United States defined a bill of attainder and identified the requisite elements that must be proven if a statute is to be classified as a bill of attainder. The Court defined a bill of attainder "as a legislative Act which inflicts punishment on normal individuals or members of an easily ascertainable group without a judicial trial."[62]

In *Deveau v. Braistad*,[63] the plaintiff attacked as a bill of attainder a statute that prevented the collection of dues by any labor organization if an officer or agent was an ex-felon.[64] The Supreme Court of the United States dismissed the argument saying that the distinguishing feature of a bill of attainder is the substitution of a legislative finding of guilt instead of a judicial determination.[65] The court felt that the only implications of the defendant's guilt were those contained in the 1920 trial.[66] Also, the Court determined that the restrictions on ex-felons in the statute were not a punishment for past activity but were needed to regulate the present situation. Such restrictions were held to be justifiable in light of the legitimate legislative purpose of the statute.[67]

E. Comment

Constitutional challenges to civil disability laws have been denied by almost all courts. As stated in the previous sections, most of the successful constitutional challenges to civil disability laws have oc-

57. Green v. Board of Elections of the City of New York, 380 F.2d 445, 450 (2d Cir. 1967).
58. Robinson v. California, 370 U.S. 660 (1962).
59. *Id.* at 667.
60. *Id.*
61. State v. O'Brien, 391 U.S. 367 (1968).
62. *Id.* at 383 n.30.
63. Deveau v. Braisted, 363 U.S. 144 (1960).
64. *Id.* at 145.
65. *Id.* at 160.
66. *Id.*
67. *Id.*

curred when the court has found that the individual does not come within a particular classification; that the civil disability laws have been applied arbitrarily and capriciously; or that the legislative purpose in excluding ex-felons is unreasonable in light of a legitimate state interest.

III. ACCESS TO THE COURTS FOR PRISONERS

Although, in theory, there are various ways for a prisoner to seek redress of his grievances through the courts, the courts' adherence to the "hands-off doctrine" has prevented any meaningful redress.[68] The "hands-off doctrine" is typified by *Banning v. Looney*[69] in which the court dismissed a complaint from a federal prisoner who claimed his constitutional rights were being violated. The court ruled that "[C]ourts are without power to supervise prison administration or to interfere with the ordinary prison rules or regulations."[70]

The first group of cases to overturn the "hands-off doctrine" were cases which concerned the right of access to the courts.[71] The principle of access to federal courts was set out in *Ex Parte* Hull,[72] when the Supreme Court of the United States held that "the state and its officers may not abridge or impair petitioner's right to apply to a federal court for a writ of habeas corpus."[73] Access to state courts by state prisoners was subsequently recognized in *White v. Ragan*.[74]

When prisoners have attacked their convictions, cases have held that the Due Process and Equal Protection Clauses of the Fourteenth Amendment forbid prison administrators from enforcing even reasonable regulations which prevent a prisoner from filing a timely appeal.[75] The importance of access to the courts for prisoners cannot be overemphasized; without access, a prisoner is left with rights which are unenforceable.

In *Stiltner v. Rhay*,[76] The Supreme Court of the United States affirmed the principle that access to the courts is basic to all other rights protected by the Civil Rights Act, for it is essential to their

68. *See* Comment, *Beyond the Ken of the Courts: Critique of Judicial Refusal to Review The Complaints of Convicts*, 72 YALE L. REV. 506 (1963).
69. Banning v. Looney, 213 F.2d 771 (10th Cir. 1054), *cert. denied*, 348 U.S. 859 (1954).
70. *Id.*
71. *See* Goldfarb & Singer, *Redressing Prisoners' Grievances*, 39 GEO. WASH. L. REV. 175, 183 (1970).
72. *Exp arte* Hull, 312 U.S. 546 (1941).
73. *Id.* at 549.
74. White v. Ragen, 324 U.S. 760, 762 n.1 (1944).
75. Goldfarb & Singer, *supra* note 71, at 231. In Dowd v. United States *ex rel* Cook, 340 U.S. 206 (1951) the Supreme Court of the United States held that a discriminatory denial of a statutory right to appeal is a denial of the Equal Protection Clause of the Fourteenth Amendment.
76. Stiltner v. Rhay, 322 F.2d 314 (9th Cir. 1963).

enforcement."[77] Thus, courts have reaffirmed the necessity of reasonable access when prisoners are challenging their original conviction or claiming mistreatment by prison officials.[78]

Courts have not been as concerned about the refusal by prison officials to provide access to the courts for a civil suit if the civil suit is not related to the prisoner's liberty.[79] In *Tabor v. Hardwick*,[80] the Court of Appeals for the Fifth Circuit acknowledged the wisdom of the rule in *Hull* and *White* which gives prisoners the "right to inquire into the validity of their restraint of personal liberty and freedom."[81] However, the court in *Tabor* stated that the right to access principle was not "intended to give them [inmates] an absolute and unrestricted right to file any civil action they might desire."[82] Courts which permit the filing of civil actions by prisoners often toll the statute of limitations for the prisoner and then postpone the action until the prisoner is released from prison.[83] If a state has a civil death statute, the statute of limitations is usually tolled during incarceration.[84] By postponing the prisoner's civil action until he is released, the court denies the prisoner the possibility of injunctive relief.[85] If civil rights are suspended under a civil death statute the right to sue is denied although the prisoner still has a right to defend himself.[86] This right to defend does not mean that the prisoner has a right to be present at the civil suit. By forcing a prisoner to wait until after his incarceration to prosecute a civil suit, the prisoner is at a distinct disadvantage because witnesses may no longer be around or the evidence may have gone stale.[87]

A prisoner confined to a state penitentiary has six basic remedies which he can use to challenge either his unlawful detention or his treatment. The six remedies are: 1) habeas corpus; 2) the Federal Civil Rights Act; 3) civil suits against federal, state, and local governments and their administrative officials; 4) criminal actions against prison officials; 5) class actions; and 6) post conviction relief.

A. HABEAS CORPUS[88]

Prisoners have traditionally used habeas corpus as a means to

77. *Id.* at 316.
78. Goldfarb & Singer, *supra* note 71, at 232.
79. *Id.*
80. Tabor v. Hardwick, 224 F.2d 526 (5th Cir. 1955).
81. *Id.* at 529.
82. *Id.*
83. Seybold v. Milwaukee County Sheriff, 276 F. Supp. 484, 487 (E.D. Wis. 1967).
84. RUBIN, THE LAW OF CRIMINAL CORRECTION 615 (1963).
85. Goldfarb & Singer, *supra* note 71, at 232.
86. RUBIN, *supra* note 84, at 615.
87. Goldfarb & Singer, *supra* note 71, at 232.
88. Habeas corpus is defined by Black's Law Dictionary as

Lat. (You have the body.) The name given to a variety of writs, . . . having for their object to bring a party before a court or judge. In common usage, and

challenge the legality of their confinement.[89] There are three traditional limitations on the prisoner's use of the writ of habeas corpus that have reduced its effectiveness. The three limitations are: 1) "the exhaustion of remedies rule; 2) the proposition that the only relief which can be granted under the writ is total release; and 3) the restriction that the writ is only available to contest the legitimacy of one's confinement and is not available to test the legitimacy of the mode or manner of confinement."[90]

Before 1944, federal and state courts would only hear habeas corpus petitions if the prisoner challenged the legality of his original conviction. In such cases the granting of the writ would lead to a new trial or release.[91] In 1944, the Court of Appeals for the Sixth Circuit expanded the previous limitations which had been placed on habeas corpus. In *Coffin v. Reichard*,[92] the court stated:

> Any unlawful restraint of personal liberty may be inquired into on habeas corpus. . . . A prisoner is entitled to the writ of habeas corpus when, though lawfully in custody, he is deprived of some right to which he is lawfully entitled even in his confinement. . . .[93]

The writ of habeas corpus was further expanded in *Peyton v. Rowe*.[94] In this case the Supreme Court of the United States held that a prisoner serving consecutive sentences could prosecute a writ of habeas corpus that claimed that the future sentence was invalid because of a deprivation of rights guaranteed by the Constitution. In *Johnson v. Avery*,[95] the petitioner was placed in disciplinary confinement because he continued to help other inmates prepare legal papers. The Supreme Court of the United States granted petitioner's writ of habeas corpus which freed the petitioner from disciplinary confinement. The Supreme Court of the United States stated that Tennessee could not enforce its regulation which prevented inmates from helping other inmates prepare legal papers until the state of Tennessee provided a reasonable alternative to the "jail house lawyer." By refusing to allow inmates to help other inmates prepare legal papers the state of Tennessee was denying illiterate prisoners reasonable access to the courts.

The exhaustion of remedies limitation on habeas corpus requires

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whenever these words are used alone, they are understood to mean the habeas corpus ad subjicindum,—A writ directed to the person detaining another, and commanding him to produce the body of the prisoner.

89. Goldfarb & Singer, *supra* note 71, at 267. *See* Reitz, *Federal Habeas Corpus and State Prisoners*, 32 F.R.D. 88 (1963).
90. Comment, *supra* note 68, at 510.
91. Goldfarb & Singer, *supra* note 71, at 267-68.
92. Coffin v. Reichard, 143 F.2d 443 (6th Cir. 1944).
93. *Id.* at 445.
94. Peyton v. Rowe, 391 U.S. 54 (1968), *overruling* McNally v. Hill, 293 U.S. 131 (1934).
95. Johnson v. Avery, 393 U.S. 483 (1969), *aff'g* 252 F. Supp. 783 (M.D. Tenn. 1966).

a federal prisoner to exhaust the remedies of the Bureau of Prisons before he is eligible for the writ.[96] The exhaustion of remedies limitation forces a state prisoner to exhaust his administrative and state court remedies before he can apply to a federal court for a writ of habeas corpus.[97] In *Fay v. Noia*,[98] the Supreme Court of the United States ruled that "the jurisdiction of federal courts on habeas corpus is not affected by procedural defaults incurred by the applicant during the state court proceedings."[99] This relaxation of the exhaustion of remedies requirement for state prisoners was limited somewhat by the Courts grant to federal judges of limited discretion to deny relief when the petitioner has deliberately by-passed state remedies.

The relaxation of the exhaustion of state remedies requirement in *Fay* does not set a precedent to allow the use of habeas corpus by state prisoners to attack prison restrictions and regulations without first exhausting state remedies.[100] If a state does not have a procedure for the consideration of violations of alleged federal constitutional rights, the state prisoner is not required to go through the motions of filing with the state court.[101] Furthermore, when a state prisoner faces obstacles that make state remedies ineffective, he is not required to exhaust these state remedies before he applies for federal habeas corpus relief.[102] This rule was set out in *Young v. Ragen*.[103] The Supreme Court of the United States ruled that if the state does not have an adequate state remedy, the petitioner may file a habeas corpus petition without exhausting state remedies. In *Johnson v. Avery*[104] the Supreme Court of the United States held that since the state of Tennessee did not provide adequate help to prisoners in preparing legal documents, the state could not prevent inmates from helping other inmates prepare petitions for the writ of habeas corpus. In the *per curiam* opinion of *Houghton v. Shafer*,[105] the Supreme Court of the United States ruled that the petitioner did not have to exhaust state remedies if the attempt at exhaustion would be futile. This opinion intimates that if prison officials develop adequate administrative procedures for handling prisoners' grievances, the prisoner will be required to exhaust the administrative

96. Comment, *supra* note 68, at 510.
97. *Id.*
98. Fay v. Noia, 372 U.S. 391 (1963).
99. *Id.* at 438.
100. Goldfarb & Singer, *supra* note 71, at 273.
101. *Id.* at 274.
102. Amsterdam, *Criminal Prosecutions Affecting Federally Guaranteed Civil Rights: Federal Removal and Habeas Corpus Jurisdiction to Abort State Court Trial*, 113 U. PA. L. REV. 793, 894 (1965).
103. Young v. Ragen, 337 U.S. 235, 238-39 (1949).
104. Johnson v. Avery, 393 U.S. 438 (1969).
105. Houghton v. Shafer, 392 U.S. 639 (1968).

procedures before he will be allowed to proceed in federal court under habeas corpus.

B. FEDERAL CIVIL RIGHTS ACT

If state officers or employees are involved, a prisoner can seek a redress of his grievances through the Federal Civil Rights Act of 1871:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution or laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.[106]

Because of the "hands-off" doctrine, courts were hesitant to get involved in what the courts deemed to be administrative problems.[107] The adherence to the "hands-off" doctrine prevented prisoners from effectively invoking the Civil Rights Act.[108] New life was breathed into the Civil Rights Act by the decision in *Monroe v. Pape*.[109] In *Monroe*, the petitioners, a husband and wife and their children, alleged that conduct of the officers of the city of Chicago who searched their home without a warrant, and arrested and detained the husband without a warrant, or arraignment, constituted a deprivation of their "rights, privileges, or immunities secured by the Constitution within the meaning of 42 U.S.C. 1983." Justice Douglas, speaking for the Court, said:

> It is no answer that the State has a law which if enforced would give relief. The federal remedy is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked. Hence the fact that Illinois by its constitution and laws outlaws searches and seizures is not barrier to the present suit in the federal court.[110]

Thus, if a prisoner can show a cause of action by virtue of a violation of the Civil Rights Act, he need not exhaust state remedies before he pursues his action in a federal court. In *Cooper v. Pate*,[111] the principle enunciated in *Monroe* was held applicable to prison-

106. 42 U.S.C. § 1983 (1970). Since the Civil Rights Act is limited to violations carried out "under color of state law" the Act is not available to federal prisoners for use against federal officials.
107. Goldfarb & Singer, *supra* note 71, at 253.
108. *Id.*
109. Monroe v. Pape, 365 U.S. 167 (1961).
110. *Id.* at 183.
111. Cooper v. Pate, 378 U.S. 546 (1964).

ers. In many federal courts, the *Monroe* decision ended the "hands-off" doctrine in reference to state prisoner actions under the Civil Rights Act.[112]

To state a claim under the Civil Rights Act, the prisoner must allege that the state: 1) "deprived him of a federal statutory right; or 2) a constitutional right guaranteed by the Fourteenth Amendment."[113] Besides the requirement that the action must have resulted in a deprivation of a federal statutory right or a constitutional right guaranteed by the Fourteenth Amendment, the petitioner must show that the deprivation was "under color of state law." "Under color of state law" is described as follows:

> Misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with authority of state law, is action taken "under color of" state law.[114]

The definition of "under color of state law" was extended to private persons acting jointly with state officials.[115] Thus anyone given authority in a correctional institution or working with persons who have authority is within the ambit of the "under color of state law" provision. Such individuals will be subject to suit pursuant to the Civil Rights Act for any deprivation of a prisoner's federal statutory right or a constitutional right guaranteed by the Fourteenth Amendment.[116]

Although the Civil Rights Act provides for both legal and equitable remedies, it is uncommon to see an award of damages for a violation of the Act. In *Sostre v. McGinnis,*[117] the Court of Appeals for the Second Circuit allowed an award of compensatory damages to stand against a warden who placed Sostre in punitive segregation which deprived the prisoner of access to the courts. The appellate court reversed the awarding of punitive damages and dismissed the damages against the commissioner of corrections. The liability imposed under a Civil Rights Act violation is entirely personal; it must be satisfied by the individual. The doctrine of sovereign immunity prevents any part of the award from being paid out of the state treasury without the state's consent.[118]

After the revival of the Civil Rights Act in *Monroe,* federal

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112. Goldfarb & Singer, *supra* note 71, at 254; *see* Jackson v. Bishop, 404 F.2d 571 (8th Cir. 1968).
113. Goldfarb & Singer, *supra* note 71, at 254 (Deprivation of a Federal Statutory Right). *See* Smart v. Avery, 370 F.2d 788 (6th Cir. 1967). (Deprivation of a constitutional right guaranteed by the Fourteenth Amendment.) *See* Benton v. Maryland, 394 U.S. 784 (1969).
114. United States v. Classic, 313 U.S. 299, 326 (1941).
115. United States v. Price, 383 U.S. 787 (1966).
116. Goldfarb & Singer, *supra* note 71, at 256.
117. Sostre v. McGinnis, 442 F.2d 178 (2d Cir. 1971), *cert. denied,* Oswald v. Sostre, 405 U.S. 978 (1972).
118. *Id.* at 205.

courts have made equitable relief available for violations of prisoners' rights when the states have failed to develop adequate administrative or judicial procedures.[119] Although *Monroe* explicitly stated that exhaustion of state remedies is not required before a federal action is brought under the Civil Rights Act, a question has been raised concerning whether state remedies must be exhausted in both legal and equitable actions for relief.[120] This confusion results somewhat from the decision in *Houghton v. Shafer*,[121] where a state prisoner sought injunctive relief under the Civil Rights Act for the return of his law materials.[122] The Supreme Court of the United States in a *per curiam* decision reiterated the ruling in *Monroe* that exhaustion of state remedies is not necessary under the Civil Rights Act but added that in this case the exhaustion of state remedies would be futile.[123] By indicating that exhaustion of state remedies would be futile, the court seems to be saying that exhaustion of state remedies may be required when equitable relief is sought and the attempt at exhaustion would not be futile.

The question of whether exhaustion of state remedies is required for injunctive relief is further compounded by the maxim that federal courts will not entertain a suit in equity when there is adequate relief at law.[124] In *Miller v. Purtell*,[125] the court quoted *Monroe* saying that exhaustion of state remedies is not necessary for a cause of action under the Civil Rights Act. However, the court denied the prisoner's motion for injunctive relief because the prisoner failed to show that there was no adequate remedy at law.[126] Since the prisoner had not shown the court that he had made an effort to exhaust state remedies his motion for leave to file a complaint in forma pauperis was denied.[127]

Under the Civil Rights Act a state prisoner can also seek declaratory relief under the Declaratory Judgment Act.[128] Declaratory judgments define the rights and obligations of each party in a particular case.[129] In *Holt v. Sarver*,[130] the Federal District Court for the Eastern District of Arkansas granted declaratory relief under the Civil Rights Act to inmates of the Arkansas penitentiary system because their constitutional rights had been violated. The court granted declaratory relief stating that confinement in the Arkansas penitentiary system constituted cruel and unusual punish-

119. Goldfarb & Singer, *supra* note 71, at 258.
120. *Id.* at 260.
121. Houghton v. Shafer, 392 U.S. 639 (1968).
122. *Id.*
123. *Id.* at 640.
124. Wright v. McMann, 387 F.2d 519, 524 (2d Cir. 1967).
125. Miller v. Purtell, 289 F. Supp. 733, 734 (E.D.Wis. 1968).
126. *Id.*
127. *Id.*
128. 28 U.S.C. § 2201 (1964).
129. Goldfarb & Singer, *supra* note 71, at 262-63.

ment. The court also declared that racial discrimination in the prison violated the Equal Protection Clause of the Fourteenth Amendment.[131] Usually declaratory relief is granted under the Civil Rights Act only when a state fails to respond to a mandate by the court to improve various conditions and practices in a prison.[132]

C. Civil Suits Against Federal, State and Local Governments and Their Administrative Officials

A tort suit for damages is the most widely accepted method of recovering for injuries due to the negligence of prison employees.[133] Many cases deal with a failure on the part of prison officials to provide minimal necessities such as food, clothing, shelter, and medical care.[134]

The biggest limitation on civil suits by prisoners is the current requirement, in North Dakota[135] and many other states, that the suit must be postponed until the prisoner is released from prison. The suspension of the prisoner's civil rights during imprisonment prevents him from suing a civil action although he has the right to defend if he is sued.[136] Although most states toll the statute of limitations during the time of imprisonment, the practical problems of producing evidence and getting witnesses to testify many years after the alleged incident when the petitioner is released make the viability of civil suits questionable when the inmate's right to sue is suspended.

Because of the doctrine of sovereign immunity, federal and state governments are not liable for injuries caused by employees who are working within the scope of their employment.[137] The only way to get around sovereign immunity is for the state to waive its immunity either by statute or judicial decision. The Federal Government, the District of Columbia, and over one-third of the states have waived sovereign immunity in limited situations.[138] North Dakota is not among the states which have waived sovereign immunity. Under present North Dakota law a civil suit based on tortious conduct of a prison employee could only be instituted by the prisoner after his release. Since North Dakota still recognizes sovereign immunity, the suit would be against the persons involved, not against the state.

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130. *See generally* Holt v. Sarver, 309 F. Supp. 362 (E.D.Ark. 1970).
131. *Id.* at 382.
132. *See* Holt v. Sarver, 309 F. Supp. 362 (E.D.Ark. 1970).
133. Goldfarb & Singer, *supra* note 71, at 244.
134. *Id.*
135. N.D. Cent. Code § 28-01-25 (1960).
136. *See* notes 168-71 *infra* and accompanying text.
137. Goldfarb & Singer, *supra* note 71, at 246.
138. *Id.* at 246-47.

D. CRIMINAL ACTIONS AGAINST OFFICIALS

Although, in theory, it is always possible to prosecute prison officials under criminal statutes, the statutes usually are not enforced against prison officials.[139] In *State v. Bruton*,[140] the Supreme Court of Arkansas dismissed criminal complaints against employees of the Arkansas penitentiary who had been charged with inflicting excessive punishment. The court declared that the employees were not charged under a valid Arkansas statute because the statute, which authorized the State Penitentiary Board to prescribe the mode and extent of punishment for prisoners, was an unconstitutional delegation of legislative power.[141] After the dismissal of the charges by the state court in Arkansas, federal indictments under the criminal provisions of the Civil Rights Act[142] were returned against fifteen employees charging them with inflicting cruel and unusual punishment.[143]

E. CLASS ACTIONS

The class action suit, which evolved from equity, is an attempt to remedy the practical problem of joining a large number of parties in the same action.[144] The class action suit allows suit to be brought by or against a representative of the class.[145] A decree in favor or against a representative of a class binds every member of the class.[146]

The use of class actions by prisoners would benefit prisoners, prison administrators, and the courts. Since prisoners are often uneducated and unaware of their rights, a class action may be the only means by which prisoners can protect their rights and the rights of fellow inmates.[147] The class action benefits prisoners because it allows one prisoner to sue on behlf of all the other prisoners who are similarly situated. It is a benefit to prison administrators because it frees them from the burden of defending against numerous suits attacking a common problem. The single suit also frees the courts from hearing repetitious suits.

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139. *Id.* at 275.
140. State v. Bruton, 246 Ark. 288, 437 S.W.2d 795 (1969).
141. *Id.* at 796-97.
142. 18 U.S.C. § 242 (1968) provides:
> Whoever, under color of any law, statute, ordinance, regulation or custom, wilfully subjects any inhabitant of any state, territory, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States, or to different punishments, pains, or penalties, on account of such inhabitant being an alien, or by reason of his color, or race, than are prescribed for the punishment of citizens, shall be fined not more than $1,000 or imprisoned not more than one year, or both; and if death results shall be subject to imprisonment for any term of years or for life.
143. Goldfarb & Singer, *supra* note 71, at 276-77.
144. *James*, CIVIL PROCEDURE § 510.18, at 494 (1965).
145. *Id.*
146. *Id.*
147. Goldfarb & Singer, *supra* note 71, at 282.

In *Wilson v. Kelly*,[148] prisoners confined in state prisons and jails in Georgia sought by means of a class action: 1) to abolish racial segregation in the jails and prisons of Georgia; 2) to prevent discrimination in the hiring of Negroes by penal institutions and sheriffs; and 3) to abolish all county work camps.[149] The defendant prison administrators and sheriffs contended that the suit by the prisoners was not a proper class action under Rule 23 of the Federal Rules of Civil Procedure.[150] The court held that the complaint concerning segregated jails was a proper class action on both sides[151] because any question as to whether the prisoners constituted a class or the propriety of the defendants being representatives of a class were settled in *Washington v. Lee*.[152]

The court in *Wilson* dismissed the second and third causes of action because the requirements for a class action had not been met. As to the claim that penal institutions discriminated against the hiring of Negroes, the court held that since none of the prisoners or witnesses had ever applied for a job with the Georgia system, they were not a proper class to allege racial discrimination.[153] The complaint to abolish all county work camps was dismissed primarily because the court felt that the type and location of institutions was an administrative matter.[154]

The main disadvantage to class actions by prisoners is that judges are reluctant to make broad changes that might affect the entire prison system of a state.[155] In *Ford v. Board of Managers*,[156] the appellant prisoner sought to bring a class action under 42 U.S.C. §§ 1981 & 1983 alleging that the defendant prison administrators were subjecting him and other state prisoners to cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments.[157] In dismissing the class action, the Court of Appeals for the Third Circuit ruled that a class action was not the proper procedure to

148. Wilson v. Kelley, 294 F. Supp. 1005 (N.D.Ga. 1968), *aff'd per curiam*, 393 U.S. 266 (1969).
149. *Id.* at 1008.
150. *Id.* at 1009.
151. *Id.* In Wren v. Smith, 410 F.2d 390 (5th Cir. 1969), Georgia prison inmates sought an injunction to block the integration ordered in *Wilson*. Injunctive relief was denied because appellants were members of the class designated as plaintiffs in *Wilson*, thus they were bound by the decision in *Wilson*.
152. Washington v. Lee, 263 F. Supp. 327 (M.D.Ala. 1966). *Washington* involved a challenge to the segregation of Alabama prisoners according to race along the same lines as the challenge in *Wilson*. The defendants in *Washington* maintained that the action was not a proper class action because they were not representative defendants of the other wardens and jailers of the state of Alabama. In denying the defendants' claim of nonrepresentation the court in *Washington* said "[S]ince the rule [23] requires only that there be questions of law and fact common to these defendants and the members of the class which they represent . . . then it becomes immaterial whether certain of these class defendants are not otherwise identically situated." *Id.* at 330.
153. Wilson v. Kelley, 294 F. Supp. 1005, 1110 (N.D.Ga. 1968), *aff'd per curiam*, 393 U.S. 266 (1969).
154. *Id.* at 1012.
155. Goldfarb & Singer, *supra* note 71, at 283.
156. Ford v. Board of Managers, 407 F.2d 937 (3rd Cir. 1969).
157. *Id.* at 938.

challenge disciplinary procedures because the circumstances which surround punishment differ from case to case.[158]

Although the Supreme Court of the United States held in *Harris v. Nelson*[159] that in appropriate circumstances a district court confronted with a writ of habeas corpus may authorize the use of discovery procedures pursuant to the Federal Rules of Criminal Procedure, the Court has not taken a position on the use of class actions for habeas corpus relief.[160] The Court's reluctance to allow class actions for habeas corpus relief is an outgrowth of the supposed individuality of the writ of habeas corpus.

To date, the most far reaching decision involving class action is *Holt v. Sarver*.[161] In that case, the District Court for the Eastern District of Arkansas ruled that the Arkansas prison system was unconstitutional. The court consolidated eight class actions and allowed the prisoners to sue on their own behalf, on behalf of other prisoners, and on behalf of others who may be confined in the system at a future date.[162] This sweeping class action decision is an exception rather than the norm because courts continue to be reluctant to fashion relief in broad terms applicable to all prisoners of a particular prison system.

F. POST CONVICTION RELIEF

Since post conviction relief is dependent on the statutory law of the forum, post conviction relief will be discussed in reference to the Uniform - Post - Conviction Procedure Act which was passed by the North Dakota legislature in 1971.[163]

G. COMMENT

Although the writ of habeas corpus can be used to seek release from unconstitutional confinement, that does not seek the total release of the prisoner, the Civil Rights Act is becoming the most prevalent means for a state prisoner to protest the conditions of his confinement or treatment. The Civil Rights Act is used by state prisoners mainly because the exhaustion of state remedies requirement of habeas corpus does not apply. The use of civil suits by prisoners will increase because of the growing trend among states to allow a prisoner to sue during his incarceration.[164] The use of

158. *Id.* at 940.
159. Harris v. Nelson, 394 U.S. 286 (1969).
160. *Id.* at 295 n.5. "We intimate no view on whether the Federal Rules may be applicable with respect to the aspects of a habeas corpus proceeding."
161. Holt v. Sarver, 309 F. Supp. 362 (E.D.Ark. 1970).
162. *Id.* at 364.
163. *See* notes 172-89 *infra* and accompanying text.
164. *See* N.D. Sess. Laws, ch. 112, § 1 (1973); This law is based on the Uniform Act on Status of Convicted Persons NCCUSL at 295 (1964). As of 1971, the latest date indexed by the NCCUSL, two states (New Hampshire and Hawaii) have passed the Uniform Act on Status of Convicted Persons.

class actions by prisoners should be encouraged, but the judicial reluctance to grant broad relief will probably limit their use to actions such as in *Holt*, in which extreme abuse was evidenced.

H. ACCESS TO NORTH DAKOTA COURTS

1. *Capacity of Prisoner to Sue*

In North Dakota an individual whose civil rights have been suspended by imprisonment "can maintain no action except those which concern his personal liberty and are based upon natural rights." However, if he is named as a defendant in a civil suit, he "may defend."[165] This point has been emphasized by the North Dakota Supreme Court in *Miller v. Turner* in which the court stated that an imprisoned felon could not maintain any action except "those based upon personal liberty or natural rights as distinguished from legal rights."[166] In recognition of this disability, the North Dakota legislature has established a statute designed to toll the statute of limitations on any civil action which arises while the inmate is imprisoned.[167]

2. *Capacity of Prisoner To Be Sued*

Although the right to defend against a civil action is definitively stated in the North Dakota Century Code, it is not clear whether the inmate must be personally present at the hearing(s). In *Hager v. Homath*,[168] the North Dakota Supreme Court held that the North Dakota courts are "not without power to procure the attendance of a convicted prisoner, either as a witness or as a defendant. . . ."[169] This language appears to permit the North Dakota courts to compel attendance whenever they feel that it would be convenient or necessary. This is definitely a minority view.[170]

The prisoner may have an atttorney to represent him in defense of any court action, but personal counsel is not always available for the inmate. If the charge is criminal, defense may be provided by the Public Defender.[171] If the action is civil in nature, the ability to obtain counsel may be difficult. A community Legal Aid office may offer legal assistance to prison inmates, but the legal aid program in North Dakota is limited at this time. It follows that the

165. *See* note 1 *supra.*
166. Miller v. Turner, 64 N.D. 463, 467; 253 N.W. 437, 439 (1934).
167. N.D. CENT. CODE § 28-01-25 (1960); "The period within which the action must be brought cannot be extended more than five years by any such disability except infancy, nor can it be extended in any case longer than one year after the disability cases."
168. Hager v. Homuth, 68 N.D. 84, 276 N.W. 668 (1937).
169. *Id.* at 91.
170. *See, e.g.*, Application of McNally, 144 Cal. App. 2d 531, 301 P.2d 385 (1956); In re Baywell, 26 Cal. App. 2d 418, 420, 79 P.2d 395 (1938).
171. *See* Note, *Meeting the Challenge of Argersinger: The Public Defender System in North Dakota*, 49 N.D. L. REV. 699 (1973).

inmate who is unable to secure representation is likely to have a default judgment entered against him. It is not unusual for a divorce action, creditor action, or some other form of civil action to be filed against the inmate. Despite the statutory authority to defend, if legal counsel is not made simple and inexpensive, it is questionable whether the right to defend does, in fact, exist.

3. *Remedies available under the North Dakota Post-Conviction Procedure Act.*

In 1971, the North Dakota legislature enacted a Uniform Post-Conviction Procedure Act.[172] Seven other states have enacted similar legislation.[173] The Act is not intended to be a means of appealing a judgment of conviction.[174] It is, instead, a method of reviewing a court ruling whereby the "conviction or sentence was in violation of the laws, Treaties or Constitution of the United States or North Dakota, if the court was without jurisdiction, or if the sentence exceeded the maximum authorized by law."[175] The Act itself is exclusively procedural in effect and does not create new grounds for the granting of post-conviction relief.[176]

A petitioner may file for relief at any time.[177] Relief is initiated by filing a petition with the Clerk of Court in the county where the conviction was received.[178] The burden of establishing a basis for relief rests upon the petitioning defendant.[179] A bare unsupported allegation will not be considered.[180] Furthermore, the Act will not provide relief for reconsideration of matters which have been previously litigated or waived.[181]

To avoid frivolous reviews, the District Court in which the petition is filed will make a summary study of the petition. The court then gives the State thirty days to respond to the petition's allegations.[182] After reviewing the petition, the State's response, and the pertinent court records from the original proceeding, the court will summarily deny the right to a review or set up a hearing.

172. N.D. CENT. CODE ch. 29-32 (Supp. 1973).
173. IDAHO CODE § 19-4901 (Supp. 1973); IOWA CODE § 663 A.1 (Supp. 1970); MD. ANN. CODE art. 27, § 645A (1971); NEV. REV. STAT. 177.315 (1967); OR. REV. STAT. 138.50 (1971); S.C. CODE ANN. § 17-601 (Supp. 1971); S.D. COMP. LAWS ANN. 23-52-1 (Supp. 1973).
174. Bulluck v. Warden of Md. Penitentiary, 220 Md. 658, 152 A.2d 184 (1959).
175. N.D. CENT. CODE § 29-32-01 (Supp. 1973).
176. Woods v. Steiner, 207 F. Supp. 945, 953 (D.Md. 1962).
177. N.D. CENT. CODE § 29-32-03 (Supp. 1973).
178. *Id.*
179. Stale v. Rudolph, 193 N.W.2d 237, 243 (N.D. 1971).
180. Smith v. Warden of Md. Penitentiary, 238 Md. 27, 207 A.2d 484 (1965); *See also* Fanning v. State, 85 S.D. 246, 180 N.W.2d 853 (1970); Walker v. State, 92 Idaho 517, 446 P.2d 886 (1968); State v. Riley, 193 N.W.2d 455 (N.D. 1971). In *Riley* an unsupported assertion of the defendant that he pleaded guilty because he would receive a suspended sentence was insufficient grounds to attack conviction under the Uniform Post-Conviction Procedure Act.
181. Jordan v. Steiner, 184 F. Supp. 432 (D.Md. 1960).
182. N.D. CENT. CODE § 24-32-06(1) (Supp. 1973).

If the court summarily denies the petition, the applicant is given an opportunity to respond.[183] If the petition merits a review, a hearing date will be set. It is not clear if the petitioner will be allowed to leave the penitentiary for the hearing.[184] The proceedings are evidentiary in nature and both parties may introduce evidence. The court makes its findings based on the evidence produced at the hearing.[185] The decision may be appealed by the petitioner or the State to the North Dakota Supreme Court.[186]

The basis of the Uniform Post-Conviction Procedure Act has been summarized by the Maryland Supreme Court in *Brady v. State* in which the court said: "The aim of this section is to bring together and consolidate into one statute all the remedies, beyond those that are incidental to the usual procedures of trial and review, which are available for challenging the validity of the sentence."[187]

By consolidation, it is conceivable that the number of repeated collateral attacks on a criminal conviction can be reduced to a single hearing, thus economizing the courts time. At the same time the act provides, within clearly defined limits, the right of appellate review for the individual who feels he is illegally incarcerated. The Act does not replace the writ of habeas corpus or other procedures for review. Rather, it is an expansion of the prisoner's remedies.[188] In the event that the individual feels he has been denied a fair review, he has a right to appeal to the North Dakota Supreme Court.[189]

IV. PRISONER'S CIVIL RIGHTS IN NORTH DAKOTA

A. RIGHT TO VOTE

Section 127 of the North Dakota Constitution states that "no person who is under guardianship . . . shall be qualified to vote at any election; nor shall any person convicted of treason or felony unless restored to civil rights. . . ."[190] The North Dakota Supreme Court in *State ex. rel. Olson v. Langer*, defined felony as "a crime which is or may be punishable with death or imprisonment in the penitentiary."[191] A felony conviction in some other jurisdiction, even though a misdemeanor in North Dakota, forfeits the civil right to vote in a North Dakota election.[192]

183. N.D. CENT. CODE § 29-32-06(2) (Supp. 1973).
184. *See* notes 68-189 *supra*, and accompanying text.
185. State v. Decker, 181 N.W.2d 746, 754 (N.D. 1970).
186. N.D. CENT. CODE § 29-32-09 (Supp. 1973).
187. Brady v. State, 222 Md. 442, 160 A.2d 912, 915 (1960); *see also* Dionne v. State, 93 Idaho 235, 459 P.2d 1017, 1019 (1969): where the court stated, "the proper use of the act is to avoid repetitious and successive applications, eliminate confusion, and yet protect the applicant's constitutional rights."
188. Dionne v. State, 93 Idaho 235, 459 P.2d 1017, 1019 (1969).
189. N.D. CENT. CODE § 29-32-09 (Supp. 1973).
190. N.D. CONST. § 127; N.D. CENT. CODE § 16-01-04 (1971).
191. State *ex. rel.* Olson v .Langer, 65 N.D. 68, 85, 256 N.W. 377, 384 (1934).
192. Salisbury v. Vogel, 65 N.D. 137, 256 N.W. 404 (1934).

It is interesting to note the North Dakota Supreme Court's interpretation of section 127.[193] The court has indicated that it is the characteristic displayed by committing the felony, not the felony, that leads to disqualification. The purpose of the disability is "the protection of the state by denying the privilege of the franchise to those whose unfitness is evidenced by conviction of felony. The disqualification is not a penaly. It is merely a consequence attendant on, and incident to, the doing of the felonious Act."[194] The felon will be denied the right to vote until his civil rights are restored. Until that time, the North Dakota Century Code makes it a misdemeanor for him if he offers or attempts to vote.[195]

Voting rights are not directly denied by statute to pre-conviction prisoners, but there is an indirect disability in a county that does not provide voting facilities at the jail or prison, a means of transportation to get to the polls, or an absentee ballot.

Illinois' absentee ballot statute is similar to that of North Dakota.[196] Under this statute, it was constitutional to deny issuance of absentee ballots to two inmates in the Cook County jail even though no alternative means of voting was provided.[197] An absentee ballot here was denied because the inmates were incarcerated in Cook County, their residence. Since an absentee ballot cannot be issued unless the applicant is absent from the county of his residence, the court concluded that the Illinois statute was uniform with other jurisdictions and was reasonable. But in dictum, the court stated that upon a showing that an alternative means of voting was not available, the right to vote would have been denied.[198]

Although the Supreme Court of the United States has recognized the right to vote as a fundamental right enjoyed by citizens in a democratic society[199] and has demanded that infringement of voting rights be "carefully and meticulously scrutinized,"[200] the Court has been unwilling to declare state disenfranchisement statutes unconstitutional. The reasoning of the Supreme Court of the United

193. *See* note 190 *supra*.
194. State *ex. rel.* Olson v. Langer, 65 N.D. 68, 90, 256 N.W. 377, 387 (1934).
195. N.D. CENT. CODE § 12-11-04 (1960).
196. ILL. REV. STAT. ch. 46, § 19-1 (Supp. 1973): Under the Illinois statute absentee ballots are made available to four classes of persons: (1) Those who are absent from the county of residence for any reason whatsoever; (2) Those who are "physically incapacitated" so long as they present an affidavit to that effect from licensed physician; (3) Those whose observance of a religious holiday precludes attendance at the polls; and (4) Those who are serving as poll watchers in precincts.
197. McDonald v. Board of Election Comm'rs. of Chicago, 394 U.S. 802 (1969).
198. The ramifications of this policy in North Dakota should be clear. For example, if a prisoner who is a resident of Grand Forks County is incarcerated before conviction in the Grand Forks County jail he does not qualify for an absentee ballot. If he awaits trial in any other county or the state penitentiary he does qualify for an absentee ballot. The question remains whether or not provisions are made available by our voting officials, where the absentee ballot is not made available.
199. Wesberry v. Sanders, 376 U.S. 1, 17 (1964).
200. Reynolds v. Sims, 377 U.S. 533, 562 (1964).

States is similar to that found in a North Dakota decision, *State ex. rel Olson v. Langer,* where the North Dakota court stated, "the manifest purpose of such restrictions upon the right to vote is to preserve the purity of the election. The presumption is that one rendered infamous by conviction of a felony, . . . is unfit to exercise the privilege of suffrage."[201]

B. Right to Hold Public Office

In North Dakota an individual seeking public office must qualify as an elector. As previously discussed, any individual sentenced to imprisonment at the penitentiary loses his right of suffrage.[202] It follows that imprisonment disables this individual from holding public office.[203] If a citizen is elected to public office prior to conviction, his office shall be vacated upon conviction "of any felony or any offense involving moral turptitude or violation of his official oath."[204] In *State v. Vogel* the North Dakota Supreme Court clarified one aspect of this statute by stating, "the conviction of a felony *ipso facto* causes a vacancy in public office."[205] Upon restoration of civil rights, the felon again possesses the capacity to run for public office.[206]

C. Right of a Prisoner to Contract

The North Dakota Code does not specifically exclude convicts from contracting. The only contractual disabilities in the North Dakota statutes apply to "minors and persons of unsound mind."[207] The civil death statute acknowledges that an inmate can contract to sell and convey his property. The North Dakota Supreme Court has interpreted this statute narrowly. The court stated, "the provisions of the last two sections (combined in 1943 to form the present civil death statute) must not be construed to render the person therein mentioned incapable of making and acknowledging a sale or conveyance of property. While a convict cannot make contracts generally

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201. State *ex. rel.* Olson v. Langer, 65 N.D. 68, 86, 256 N.W. 377, 385 (1934).
202. For a discussion by the Supreme Court of the United States on civil death statutes *see* Price v. Johnson, 334 U.S. 266 (1948). N.D. Const. § 127; N.D. Cent. Code § 44-01-01 (1960); *See generally* notes 190-201 *supra* and accompanying text.
203. A public office in its broadest sense has been outlined by the court in Pope v. Commissioner, 138 F.2d 1006, 1009 (6th Cir. 1943). The basic criteria for a public office was: (1) It must be created by the Constitution or the legislature, or by a municipality or other body within authority conferred by the Legislature; (2) There must be a delegation of a portion of the sovereign powers of government to be exercised for the benefit of the public; (3) The powers conferred and the duties to be discharged must be defined either directly or indirectly by the Legislature or through legislative authority; (4) The duties must be performed independently and without control of a superior power other than the law; and (5) The office must have some permanency and continuity and the officers must take an official oath.
204. N.D. Cent. Code § 44-02-01(8) (1960).
205. State v. Vogel, 65 N.D. 137, 143, 256 N.W. 404, 407 (1934).
206. *See* notes 294-96 *infra* and accompanying text.
207. N.D. Cent. Code § 9-02-01 (1959).

under this last section, he can make contracts as are necessary for disposition of his property only. He has no authority to make any other kind of a contract. . . ." under this section.[208] The above comment does not prohibit the making of general contracts. It simply does not authorize them under the statute. It is concluded, in the absence of any state statute specifically prohibiting the right to contract, that the inmate is free to make contracts. However, enforcing the contract would be difficult because the inmate is prohibited from bringing a judicial action.[209] Therefore, the inmate is permitted to contract by the prison officials, but is denied access to the courts to enforce his contractual rights while he is incarcerated.

D. RIGHT TO MAKE A WILL

The laws of North Dakota provide that "any person eighteen years of age or older may make a will disposing of all or any part of his estate."[210] Any part not disposed of will pass through intestacy.[211] The North Dakota Supreme Court has clarified this provision. In *Storman v. Weiss* the court stated that there is "no statutory requirement for capacity to make a will other than that the testator must be a person eighteen years of age or older."[212] This indicates that a prisoner is free to make a legally enforceable will during his incarceration.

E. RIGHT TO ACT AS A WITNESS

At common law, a conviction for treason or felony, or a misdemeanor involving dishonesty or obstruction of justice, rendered the convicted person incompetent as a witness.[213] North Dakota has retained a fragment of the common law disability. If a person is convicted of perjury or subordination of perjury, he cannot testify on his own behalf or for any other parties in any action.[214]

Incarceration does not prevent the inmate from appearing as a witness.[215] The testimony may be given by the inmate in open court, but absent special circumstances the testimony will be taken by deposition in the prison. The inmate or ex-inmate carries a great disability when he testifies because his credibility may be impeached by establishing his crminal record. The question of impeachment was considered by the territorial courts of North Dakota. In *Territory v. O'Hare*, the court stated that, "the right to cross-examine as

208. Miller v. Turner, 64 N.D. 463, 467, 253 N.W. 437, 439 (1934).
209. *See* note 2 *supra; see also* notes 165-89 *supra* and accompanying text.
210. N.D. CENT. CODE § 56-02-01 (1972).
211. N.D. CENT. CODE § 56-01-03 (1972).
212. Storman v. Weiss, 65 N.W.2d 475, 505 (N.D. 1954).
213. *See* C. MCCORMICK, EVIDENCE § 43, at 84 (2d ed. 1972).
214. N.D. CENT. CODE § 31-01-08 (1960).
215. N.D. CENT. CODE § 31-03-16 (1960).

to outside matters of fact, which affect the general character of the witness, and tend to degrade him, and affect his credibility, is within the limits of sound juidcial discretion, a salutary rule."[216] For impeachment purposes the questioner is limited to questions concerning the name of the crime, the time and place of conviction, and the punishment.[217] He may not be asked on cross-examination if he has been arrested for committing any particular act, because an arrest is not proof of guilt.[218] Although the weight of a witness' testimony and the credibility of a witness are matters to be determined by the jury,[219] the fact that the ex-inmates testimony is questioned despite any relationship between the previous crime and the present testimony is a serious civil disability for the ex-inmate. Furthermore, in North Dakota, the witness will not be allowed to explain the matter or circumstances surrounding the previous conviction. "To permit an explanation would be to permit an inquiry into a collateral matter that had been (previously) disposed of."[220]

F. Right to Serve as a Juror

The North Dakota code prohibits any citizen who has lost the right to vote because of imprisonment in the penitentiary from serving as a juror.[221] Once civil rights are restored, the citizen will be entitled to serve on a jury,[222] and will be subject to jury duty call.

G. Right to Serve as an Executor, Administrator, Guardian, or Trustee

The North Dakota code prohibits any person who has been convicted of a felony from serving as an administrator, executor or guardian.[223] An ex-felon could serve as a trustee since he is empowered to hold and disperse property. While incarcerated, an inmate named as a trustee would be unable to fulfill the duties of his appointment because of his immobility. Upon failing to perform his duties he could be discharged by the District Court.[224] In other words the law does not preclude him from acting as a trustee, but his imprisonment prevents him from effectively exercising his duties.

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216. Territory v. O'Hare, 1 N.D. 30, 44, 44 N.W. 1003, 1008 (1890); *see also* State v. Fury, 53 N.D. 333, 205 N.W. 877 (1925).
217. State v. Moe, 151 N.W.2d 310 (N.D. 1967); *see also* State v. Kent, 5 N.D. 516, 67 N.W. 1052 (1896); State v. Rozum, 8 N.D. 548, 80 N.W. 477 (1899).
218. State v. McCray, 99 N.W.2d 321, 325 (N.D. 1959).
219. State v. Holte, 87 N.W.2d 47, 48 (N.D. 1957).
220. State v. Keillor, 50 N.D. 728, 734, 197 N.W. 859, 861 (1924).
221. N.D. Cent. Code § 27-09.1-08 (1) (Supp. 1973).
222. Until 1971 when the former disqualification statute was repealed, the right to serve as a juror was not restored. (Law of March 9, 1921, ch. 81, § 1 [1921] N.D. Cent. Code 27-09-02 (repealed 1971)).
223. N.D. Cent. Code § 30-11-01(3) (1960).
224. N.D. Cent. Code § 59-02-20(6) (1960).

H. RIGHTS IN DOMESTIC RELATIONS

1. *Grounds for Divorce*

Conviction of a felony under North Dakota Law is grounds for divorce by the inmate's spouse.[225] Although an inmate's spouse can start a divorce proceeding against the inmate, it is doubtful if an inmate could maintain an action for divorce while he is in prison, since he cannot bring a civil action.[226]

If children are involved in the divorce proceedings, the court will consider the specific facts involved and determine which alternative is in the child's best interest.[227] The non-incarcerated spouse usually receives custody because the incarcerated spouse is in no position to care for the children. A difficult situation arises where neither parent possesses the necessary qualities to properly care for the children. In such a case the court can transfer the children to a foster home or adoption agency. When the imprisoned spouse is released, he can petition the court to vacate or modify the divorce decree and grant him custody of the children.[228]

When an incarcerated spouse determines that his spouse is no longer capable of caring for the children, he cannot seek custody through a divorce because he has lost his civil right to bring a civil action. It would appear that his only recourse is to ask a community welfare agency to file a petition for termination of parental rights.[229] Relinquishment of parental rights is, however, a double edged sword. The wife could conceivably use the same tool to terminate his parental rights. Under such a termination, even the natural parent's right to consent to adoption is lost.

I. RIGHT OF STATE FARM AND PENETENTIARY PRISONERS TO RECEIVE THE SAME BENEFITS AS COUNTY PRISONERS

There is an inconsistency in North Dakota law between payments received by county prisoners and payments received by prisoners sentenced either to the State Farm or the Penitentiary. The North Dakota Century Code[230] provides that convicts sentenced to a county jail or workhouse will receive credit for labor to be applied against any judgment for fine and costs. The prisoner receives five dollars credit for each day of labor performed. Prisoners sentenced to the State Farm or the Penitentiary do not receive a five dollar credit for labor to be applied against any judgment for fine and costs.

225. N.D. CENT. CODE § 14-05-03(6) (1971).
226. *See* notes 165-171 *supra.*
227. N.D. CENT. CODE § 14-05-22 (1971); *See also* Kucera v. Kucera, 117 N.W.2d 810 (N.D. 1962).
228. N.D. CENT. CODE § 14-05-22 (1971).
229. N.D. CENT. CODE § 14-15-19(5) (1971) & § 27-20-44 (Supp. 1973).
230. N.D. CENT. CODE § 12-44-33 (Supp. 1973).

Arguably, the denial of the five dollar credit to State Farm and Penitentiary prisoners is a denial of equal protection of the laws guaranteed by Sections 11 and 20[231] of the North Dakota Constitution and Section 1[232] of the Fourteenth Amendment to the United States Constitution.

The Equal Protection Clause of the Fourteenth Amendment is a command directed to the states that persons similarly situated be given equal protection of the laws of the state. The Equal Protection Clause recognizes that a state may classify its citizens and treat them differently, but any such classification should include all the persons who are in a similar situation.[233] To determine whether the Equal Protection Clause of the Fourteenth Amendment has been violated, a court looks first to ascertain if the classification is reasonable.[234] The reasonableness of a classification, is weighed in terms of the purpose for which the statute in question was enacted. If reasonable, the court looks to the statute and determines the purpose from the statutory language. If the purpose of the statute can be determined from the language itself, it is not necessary for the court to look at legislative history or ancillary materials.[235]

In *State v. Gamble Skogmo, Inc.*[236], the North Dakota Supreme Court has declared that the constitutional safeguard of equal protection is violated only if the classification is founded on grounds that are "wholly irrelevant to the achievement of the State's objective."[237] The court in *Gamble Skogmo, Inc.* continued by saying that state legislatures are presumed to act within their constitutional power and a statute which discriminates will not be set aside if any state of facts will reasonably justify the statute.[238] Arguably, since *Gamble* was decided the Supreme Court of the United States has begun to abandon the old equal protection by which the judiciary deferred to the legislature and upheld classifications if any reason for

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231. *See* N.D. CONST. §§ 11, 20.

Sec. 11.
All laws of a general nature shall have a uniform operation.

Sec. 20.
No special privileges or immunities shall ever be granted which may not be altered, revoked or repealed by the legislative assembly; nor shall any citizen or class of citizens be granted privileges or immunities which upon the same terms shall not be granted to all citizens.

232. U.S. CONST. amend. XIV, § 1.
All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person or life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

233. Comment, *supra* note 37, at 1076.
234. *Id.* at 1077.
235. *Id.*
236. State v. Gamble Skogmo, Inc., 144 N.W.2d 749, 758 (N.D. 1966).
237. *Id.*
238. *Id.*

the classification could be found. Professor Gunther in his *Forward* concerning the 1971 Supreme Court term said, "Judicial deference to a broad range of conceivable legislative purposes and to imaginable facts that might justify classifications is strikingly diminished."[239]

The purpose of section 12-44-33 of the North Dakota Century Code (Supp. 1973) is to provide convicted prisoners with a means of paying any judgment for fine and costs. By giving a convicted county prisoner a five dollar credit per day in return for labor performed, the legislature has sought to lighten the already heavy burden of the convicted prisoner. The purpose of the statute is constitutional, but section 12-44-33 seems to violate the Equal Protection Clause of the Fourteenth Amendment because the classification which includes only county prisoners is not reasonable in light of the purpose of the statute.[240] Section 12-44-33 appears to be underinclusive. Underinclusion occurs when a state benefits or burdens persons in a way which is within a legitimate state purpose but the state does not give the same benefit or burden to persons who are in a similar position.[241] Underinclusion, if arbitrary, is a denial of the Equal Protection Clause of the Fourteenth Amendment.[242]

Courts often hold that underinclusion does not violate equal protection because the legislatures are free to recognize degrees of evil and remedy wrongs that they think are most acute.[243] This is an abandonment of the theory that the classification must include all who are in the same position.[244] One could not say that the legislature was looking to degrees of evil and sought only to help county prisoners because section 12-44-33 was not enacted to remedy evils. It was enacted to benefit convicted prisoners who already bear a heavy burden.[245] This benefit should be conferred on State Farm and Penitentiary prisoners as well as county prisoners.

There are two other rationales for tolerating underinclusion.[246] First, administrative necessity often limits what a state can accomplish. This exception to the underinclusion prohibition is tolerated to allow a state to embark upon change which would have to be delayed if everyone in the class had to be included.[247] Secondly, un-

239. Gunther, *Foreward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 20 (1972).
240. Comment, *supra* note 37, at 1082.
241. *Id.* at 1084.
242. *Id. See also* Rinaldi v. Yeager, 384 U.S. 305 (1966).
243. Comment, *supra* note 37, at 1084.
244. *Id.*
245. Although there are no exact figures as to how many State Farm and Penitentiary inmates have judgment and costs expenses unpaid, the authors feel that the cost to the state for including State Farm and Penitentiary inmates would not be excessive.
246. Comment, *supra* note 37, at 1085.
247. *Id.* One of the major reasons states make only limited changes is that they often lack the monetary resources necessary to make changes which would effect all that are similarly situated.

derinclusion is often tolerated if the state is not convinced the statute enacted is wise or the legislature may not be able to get the majority of its members to extend the coverage of the statute.[248] Neither of the above two reasons for allowing underinclusion would seem applicable to N.D.C.C. 12-44-33. There would be no great financial burden on the state if State Farm and Penitentiary prisoners were allowed the five dollar per day credit that county prisoners are allowed. Also, it seems doubtful that N.D.C.C. 12-44-33 was enacted only for county prisoners because it was thought by the legislature that the statute was of doubtful merit or that the legislature was not able to get a majority to include State Farm and Penitentiary prisoners along with county prisoners.

N.D.C.C. 12-44-33 is a denial of the Equal Protection Clause of the Fourteenth Amendment because of its underinclusiveness. It should be amended to include State Farm and Penitentiary prisoners. All prisoners, whether they are at the State Farm, Penitentiary, county jail or workhouse, should be allowed to receive the five dollar per day credit in return for labor performed.

J. Right to Full Benefits of Funds Earned While in Prison

Sections 12-48-16,[249] 12-48-17,[250] 12-48-18[251] and 12-48-19[252] of the North Dakota Century Code require that a percentage of the money earned by a prisoner at the Penitentiary be deposited to the credit of the prisoners' general benefit fund.

The prisoners' general benefit fund is used to provide entertainment and amusement for the benefit of all prisoners.[253] Five per cent of the gross earnings of a prisoner is deposited in the prisoners' general benefit fund if he has less than fifty dollars in his temporary aid account.[254] When a prisoner with dependent relatives has more than fifty dollars in his temporary aid account, ten per cent is deposited in the prisoners' general benefit fund.[255] Twenty-five per cent of gross earnings is deposited in the prisoner's general benefit fund if the prisoner has more than fifty dollars in his temporary aid account and he has no dependent relatives.[256]

Since an inmate can make a maximum of one dollar a day, this forced contribution to the prisoners' general benefit fund creates a hardship on many inmates.[257] The prisoners' general benefit fund

248. *Id.*
249. N.D. Cent. Code § 12-48-16 (1960).
250. N.D. Cent. Code § 12-48-17 (1960).
251. N.D. Cent. Code § 12-48-18 (1960).
252. N.D. Cent. Code § 12-48-19 (1960).
253. N.D. Cent. Code § 12-48-15 (1960).
254. N.D. Cent. Code §§ 12-48-16(2) to -18(2) (1960).
255. N.D. Cent. Code § 12-48-17(2) (1960).
256. N.D. Cent. Code § 12-48-19(2) (1960).
257. N.D. Cent. Code § 12-48-14 (1973).

was created years ago at the request of the inmates to provide a fund for the purchase of various recreation equipment at a time when there was no money available for this purpose.[258] This forced contribution deprives an inmate of spending his meager earnings according to his own desires.[259] The prisoners' general benefit fund should be funded by the state as a part of its general appropriation to the prison.

K. RIGHT TO RECEIVE INTEREST

North Dakota law does not provide for the payment of interest on money held by a prisoner in any of his prison accounts. Recently Warden Robert Landon initiated a program to allow "long timers" with a substantial balance in their accounts to deposit their money in interest bearing accounts or notes in Bismarck.[260] The opportunity for an inmate to deposit his savings in an interest bearing account should be authorized by statute so that this benefit is not left to the discretion of each individual warden.[261]

L. RIGHT TO RECEIVE COMPENSATION FOR INJURIES

Federal prisoners who are injured while incarcerated are denied workmen's compensation, but they may receive benefits from the Prison Industries Fund.[262] Benefits from the fund can be received only upon the release of the inmate. All benefits are withdrawn if an inmate recovers or dies from his injury during imprisonment. The amount of compensation is determined by the Attorney General and is limited to the amounts recoverable under the Federal Employees' Compensation Act.[263] The awards do not cover pain and suffering. Furthermore, a subsequent criminal conviction disqualifies the inmate from all benefits.[264] If the injury received by the inmate is the result of negligence of a federal employee, an inmate not within the protection of the Prison Industries Fund may seek compen-

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Section 1.

COMPENSATION OF INMATES. Prisoners engaged in carrying on the work of the penitentiary and its industries, the work of other state institutions and their industries, or upon the public highways, shall receive not less than ten cents nor more than one dollar per day for the work actually performed, ...

258. Conversation with Warden Robert Landon at the North Dakota Penitentiary on July 11, 1973.

259. Some inmates do not partake in any of the programs offered by the fund. Many inmates would prefer to spend their money on reading material or other endeavors.

260. *Id.* Warden Robert Landon considers "long timers" to be those prisoners who have more than a one year sentence. A substantial balance according to Warden Landon would be over fifty dollars in a prisoner's account. Warden Landon believes that limiting the availability of interest bearing accounts to "long timers" who have a substantial balance is necessary because the administrative burdens of carrying out this program would be too great if men with short sentences and small balances were included.

261. Statutory law in California allows an inmate the option of investing his money in interest bearing accounts or certain limited securities. CAL. PEN. CODE § 5008 (West 1970).

262. *Id.*

263. 5 U.S.C. §§ 8102-50 (1964).

264. Comment, *supra* note 5, at 1139.

sation under the Federal Tort Claims Act.[265] When both the Prison Industries Fund and the Federal Tort Claims Act are applicable, federal courts have ruled that an inmate must seek relief from the Prison Industries Fund.[266]

Most states do not provide compensation to prisoners for injuries received while working at a prison.[267] At least five states have statutes barring prisoners from receiving workmen's compensation benefits.[268] In the absence of a specific statute, the courts and attorney general's opinions in fourteen states have disallowed such benefits.[269] The decisions denying workmen's compensation in states that do not specifically bar such benefits generally base the denial on the definition of "employee" or "contract for hire" incorporated in the workmen's compensation laws.[270] The courts have held that an inmate who is required to do labor by law cannot enter into a "contract for hire."[271] A prisoner cannot be an employee of the state even though he receives compensation for his services.[272]

Some states have allowed prisoners to recover under workmen's compensation or by civil suit for injuries received while working in a prison[273] and at least five states allow prisoners to recover under their respective workmen's compensation laws.[274] Other states have waived their governmental immunity and allow persons to institute civil suits for negligence against the state.[275] Three cases which allowed prisoners to receive workmen's compensation for injuries, absent a statute, involved prisoners who were working on a road crew,[276] or were loaned to another governmental agency or private group.[277]

Since the North Dakota Penitentiary makes a profit on its prison industries,[278] North Dakota should follow the federal example and set up a fund from the prison industries which would compensate an inmate who is injured while working in the prison.

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265. *Id.*

266. United States v. Demko, 385 U.S. 149 (1966).

267. Comment, *supra* note 5, at 1140.

268. *Id.*

269. *Id.* at 1141.

270. *Id.*

271. *Id.*

272. *See* Watson v. Industrial Comm'n, 100 Ariz. 327, 414 P.2d 144 (1966).

273. Comment, *supra* note 5, at 1141.

274. *Id.*

275. *Id.*

276. *See* California Highway Comm'n v. Industrial Accident Comm'n, 200 Cal. 44, 251 P. 808 (1926). The case was decided before California adopted its current statute which prohibits prisoners from receiving workmen's compensation. *See* CAL. PEN. CODE § 2700 (West 1970).

277. Johnson v. Industrial Comm'n, 88 Ariz. 354, 356 P.2d 1021 (1960).

278. Because of the complex accounting methods used by the state, it is hard to determine what profit the prison industries make but the prison industries do make a profit. Conversation with Charles Simonson, Business Manager of the North Dakota Penitentiary on Friday, July 13, 1973.

M. RIGHT TO HOLD, RECEIVE AND TRANSFER PROPERTY

1. *Divestment*

There is no disability under the North Dakota civil disability statute to prevent an inmate from transferring his property.[279]

2. *Inheritance*

The North Dakota Code does not prevent an inmate from inheriting[280] unless he murdered the person from whom he is inheriting.[281] Also, the inmate can inherit through intestacy if he falls into the appropriate classification.[282]

3. *Transfer of property when abandoned or imprisoned*

Although the prisoner has the right to control the conveyance of his property, this right may be pre-empted by the North Dakota Code Section 14-07-12.[283] In this section, abandonment of one spouse by the other spouse for a period of over one year, where the absent spouse is imprisoned in a jail or the penitentiary, is grounds for a court order allowing the abandoned spouse to "manage, control or encumber the incarcerated spouse's property for support and family maintenance and for the purpose of paying debts contracted before prison."

4. *Right to Appoint a Representative to Protect the Prisoner's Property.*[284]

The North Dakota Century Code does not provide for the appointment of a representative to act as a fiduciary for the inmate while he is in prison. Several states have provisions allowing an inmate to appoint a fiduciary.[285] Furthermore, there seems to be a general trend to allow such appointments.

In the absence of such a statute, the inmate must create a bailment or power of attorney to protect his property.[286] A bailment is

279. N.D. CENT. CODE § 12-06-27 (1960).
The statute states "any person shall be capable of making and acknowledging a sale or conveyance of his property. . . ."
280. N.D. CENT. CODE § 56-02-01 (1972).
281. N.D. CENT. CODE § 56-04-23 (1972).
282. N.D. CENT. CODE § 56-01-04 (1972).
283. N.D. CENT. CODE § 14-07-12 (1971).
284. Although N.D. CENT. CODE § 47-07-12 (1971) does provide a court appointed fiduciary to administer the inmates real and personal property and is considered by some states to be an adequate provision to oversee the inmates property, this statute is very negative by its wording and is only exercised after a years abandonment. Furthermore, it is usually exercised to pay the debts incurred by the family or incurred by the inmate. It is the opinion of the authors that a more positive statute should be adopted in the form of an administrator to oversee the property, upon the inmates request, from the date of incarceration. The basic purpose of the aforementioned statute could still be met, while at the same time the property would possibly be enhanced. *See, e.g.*, HAWAII § 355-34 (1955); MAINE tit. 18, § 3601 (1959); NEW YORK ch. 14, § 350 (1929).
285. *Id.*
286. Another possibility would be the establishment of a revocable private trust but the civil death statute provides for the forfeiture of all private trusts. The assumption is therefore made that a private trust cannot be created by an inmate under civil disabilities.

established when one person gives his possessions to another to be kept for the benefit of the party giving up possession.[287] Likewise, the inmate can exercise a general power of attorney[288] Both methods are risky because the inmate has no access to the courts. First, the inmate does not have recourse if the bailee or other agent wastes the property.[289] Second, the bailee or other agent is encumbered by the same disabilities that encumber the principal.[290] Therefore, such bailee or agent cannot go to court to protect the property.

N. RIGHT TO RECEIVE A PENSION

Private pension funds are generally unaffected by criminal conviction unless they are not vested at the time of conviction or there is a special divestment provision in the company's pension policy. Public pension funds are affected by criminal conviction. Conviction of a felony in North Dakota can result in the loss of pension rights for city employees,[291] police officers[292] and employees of the park districts.[293] There is no consideration of the relationship between the crime committed and the loss of the pension fund. It is of interest to note that while a policeman will lose his pension, a judge or fireman will not lose his pension. This inconsistency is without any apparent justification.

O. RESTORATION OF CIVIL RIGHTS AND PRIVILEGES

In North Dakota the Board of Pardons has the authority to restore an inmate's Civil Rights at any time.[294] The Board members are the Governor, the Attorney General, the Chief Justice of the Supreme Court, and two qualified electors appointed by the Governor.[295] The power of restoration appears to be discretionary. Upon application by the inmate, the Board can restore civil rights at any time.[296]

1. *Areas Where Civil Disabilities Are Not Restored*

Even though the Board of Pardons purports to restore an inmate's civil rights, certain disabilities remain. The most apparent area is that of employment. In the private sector, a criminal record may lead to summary rejection when alternative non-criminal per-

287. N.D. CENT. CODE § 60-01-02 (1960).
288. For general discussion on the principal-agent relationship, *see* I. A. SCOTT, TRUSTS § 8 (3d ed. 1967).
289. *See* notes 165-71 *supra* and accompanying text.
290. *See* note 229 *supra*.
291. N.D. CENT. CODE § 40-46-16 (2960).
292. N.D. CENT. CODE § 40-45-15 (1968).
293. N.D. CENT. CODE § 40-49-21 (1968).
294. N.D. CENT. CODE § 12-55-24 (1960): The board of pardons may restore to civil rights any person convicted of any offense committed against the state, upon cause being shown, after the execution or expiration of sentence or any other time.
295. N.D. CENT. CODE § 12-55-01 (Supp. 1973).
296. N.D. CENT. CODE § 12-55-24 (1960).

sonnel are available.[297] The ex-inmate may be prevented from employment because he lacks the skill or educational requirements for the job[298] or inability to secure the necessary bond for employment from a fidelity insurance company.[299]

Many other ex-inmates are denied employment opportunities because they are unable to obtain the necessary license through the state licensing agency. The refusal may be exercised by a statute that directly states that a license will not be granted to an individual who has been convicted of a felony or some other violation, or refusal may be exercised indirectly by requiring that an applicant be of "good moral character." North Dakota's Code contains a long list of disabilities. A license will be directly refused or revoked from an abstractor,[300] an accountant,[301] a barber,[302] an MD,[303] a plumber,[304] a massage parlor,[305] a dentist,[306] an insurance agent,[307] or an individual seeking a liquor license[308] for the "conviction of a felony." A license will be directly refused or revoked from a chiropodist,[309] a child placing agency,[310] and a children's home[311] for conviction of a crime involving moral turpitude,[312] an architect upon conviction of "fraud,"[313] and a real estate agent upon "conviction of embezzlement, forgery, obtaining money by false pretenses, extortion, conspiracy to defraud or other like offense."[314] Conviction of a felony will also result in disbarrment of a lawyer from the legal profession.[315]

The state licensing agencies may indirectly deny licenses in several fields upon a showing that the applicant is not of "good moral character." Several of the professions already mentioned also require good moral character.[316] Other fields requiring good moral character include embalming[317] and pharmacy.[318] A license could be

297. Comment, *supra* note 5, at 1001.
298. *Id.*
299. Lykke, *Attitude of Bonding Companies Toward Probationers and Parolees*, 21 FED. PROB. 36 (1951).
300. N.D. CENT. CODE § 43-01-06(1) (1960).
301. N.D. CENT. CODE § 43-02-12(1) (1960).
302. N.D. CENT. CODE § 43-04-40(1) (1960).
303. N.D. CENT. CODE § 43-17-31(3) (1960).
304. N.D. CENT. CODE § 43-18-18(1) (1960).
305. N.D. CENT. CODE § 43-25-10(2) (1960).
306. N.D. CENT. CODE § 43-28-18(3) (1960).
307. N.D. CENT. CODE § 26-17-01.12 (1970).
308. N.D. CENT. CODE § 5-05-03(2) (1959).
309. N.D. CENT. CODE § 43-05-16(5) (1960).
310. N.D. CENT. CODE § 50-12-10(4) (1960).
311. N.D. CENT. CODE § 50-11-07(4) (1960).
312. N.D. CENT. CODE § 43-26-11(3) (1960).
313. N.D. CENT. CODE § 43-03-20(1) (1960).
314. N.D. CENT. CODE § 43-23-11(f) (1960).
315. N.D. CENT. CODE § 27-14-02 (1960).
316. *See, e.g.*, N.D. CENT. CODE § 43-02-10 (1960) (accountant); § 43-04-23 (1960) (barber); § 43-05-11(2) (1960) (chiropodist).
317. N.D. CENT. CODE § 43-10-11(1) (1960).
318. N.D. CENT. CODE § 43-15-15(2) (1960).

denied a chiropractor upon showing of "dishonorable, unprofessional or immoral conduct."[319]

The area of employment is an example of how a states laws affecting felons are overbroad and inconsistent. The statute creates disabilities in areas where they are not necessary for the public health and safety. For example, why should an ex-felon be deprived of a license to operate as a barber, plumber, or dentist? There seems to be no rational connection between the licensing standard and the crime committed. This deprivation appears to be nothing more than post-conviction punishment which keeps the ex-felon out of the labor market and seriously affects the progress of his readjustment. The area of employment exemplifies how inconsistent a state's laws can be. Why should a man in one field be prevented from receiving his license because of his record when a man in another field is not similarly affected?

V. NEW CIVIL RIGHTS LEGISLATION

The 1973 North Dakota Legislature passed a bill which repeals section 12-06-27 and replaces it with a progressive bill guaranteeing an inmate "all of his rights, political, personal, civil, and otherwise."[320] The bill will become operative on July 1, 1975. To what degree does the new act guarantee a convicted individual his civil rights?

The new law is divided into two sections, "rights lost"[321] and "rights retained."[322] The first section, "rights lost," concerns the right to vote and hold public office. Under the present civil death statute, both of these rights are lost. Under this law, the imprisoned individual has to ask for a restoration of these rights from the Board of Pardons. The restoration can be granted "after the expiration or execution of the sentence or at any other time."[323] The new law provides for automatic restoration upon receipt of parole which emphasizes a changed attitude toward the concept of civil disabilities. The present law takes civil rights from the individual indefinitely and restores them at the discretion of the Board of Pardons. The whole process emphasizes the punitive nature of corrections. Under the new law the civil rights will remain vested in the imprisoned individual subject to temporary divestment. At the time of parole, the civil rights will be automatically restored.

By specifically stating that a person convicted of a crime "retains all his rights, political, personal, civil and other." The legislature has clearly placed the North Dakota Civil death statute to

319. N.D. CENT. CODE § 43-06-15(1) (1960).
320. Act of July 1, 1975, ch. 116, § 12.1-33-02, [1973] N.D. Laws, 43rd Sess.
321. Act of July 1, 1975, ch. 116, § 12.1-33-01, [1973] N.D. Laws, 43rd Sess.
322. Ch. 116, § 12.1-33-02, [1973] N.D. Laws, 43rd Sess.
323. N.D. CENT. CODE § 12-55-24 (1960).

rest.[324] But the extent to which the new statute will enhance the individual's rights is not clear. Specifically, the statute has included the right to hold public office or employment, to vote, to hold, receive and transfer property, to enter into contracts, to sue and be sued, and to hold offices of private trust in accordance with law as areas to be affected by the change. But several of the above mentioned areas were not disabled before the new act or are still civil disabilities under the new act. In these areas the new law has not made any changes. For example, the right to vote[326] and the right to hold public office[326] are disabilities under the present statute and will continue to be disabilities under the new law. The right to hold, receive, and transfer property has never been affected by the civil death laws of North Dakota.[327] Furthermore, "although the imprisoned individual under 12-06-27 has never had an affirmative statute to guarantee his right to contract, it has not been a disability.[328] The inmates have been able to contract for books, magazines and other items while in prison. Finally, N.D.C.C. 12-06-27 specifically entitles the imprisoned inmate to defend a lawsuit.[329] Thus, despite the new statutory language it appears that the new statute has caused a change in only two areas, the right to sue[330] and the right to hold offices of private trust in accordance with the law.

Further considerations must be made before the scope of the new law can be fully considered. The first consideration deals with the inmate while he is still in prison. The warden of the penitentiary is given general power to make rules and regulations affecting the prisoners.[331] Specifically, he may regulate the conduct of the prisoners within the penitentiary. Such regulation and prison management may constitutionally lead to the deterioration of some of a prisoner's political, personal, or civil rights.[332] The rights of the prisoners must be considered along with the authority of the prison officials before the scope of the prisoners rights can adequately be determined. After parole or discharge, the convicted individual may still have a difficult time determining the scope of his rights. Despite the new legislation his rights will be affected in many ways that do not affect the normal citizen. This is true because the stat-

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324. N.D. CENT. CODE § 12-06-27 (1960).
325. N.D. CONST. § 127.
326. *See* notes 202-06 *supra* and accompanying text.
327. N.D. CENT. CODE § 12-06-27 (1960).
328. *See* notes 207-09 *supra* and accompanying text.
329. N.D. CENT. CODE § 12-06-27 (1960).
The North Dakota Civil Death statute specifically states, "He may be sued and in such case he may defend."
330. The right to sue is one of the single most important rights examined by this study. *See* notes 68-187 *supra* and accompanying text.
331. N.D. CENT. CODE § 12-47-12(8) (1960).
332. Price v. Johnson, 334 U.S. 266, 285 (1948); The Court stated in dictum that "Lawful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, retraction jjustified by the considerations underlying our penal system."

ute directly exposes itself to the vulnerability of other statutes by stating "except as otherwise provided by law." This means that despite the new statute, the ex-felon cannot serve as an administrator, executor or guardian,[333] that he cannot seek employment in a great number of licensed professions,[334] that he cannot depend on his public pension when he retires,[335] and that his testimony will be impeached because of his criminal record when he tries to testify on his own behalf or for or against someone else.[336] These areas do not exhaust the potentially disabling statutes. However, they must certainly raise the question of whether the new legislation, dealing with the civil disabilities of the convicted individual, accomplish the establishment of political, personal, and civil rights which the legislature intended.

VI. CONCLUSION

After extensively researching the civil rights of prisoners, the authors of this paper generally concur with the contents of section 12.1-33-01 and 12.1-33-02. This study, however, has recognized that many other statutes in the North Dakota Century Code present potential frustration to the rights of any person convicted of a felony. To prevent such a frustration, the legislature should update the entire body of statutory law to assure that the intention of the new legislation is not thwarted. Employment is an area of potential frustration. The new legislation guarantees the right to employment, but present state licensing requirements prevent licensing of past felons. The difference between these two laws will lead to conflict and frustration.

While incarcerated the inmate has real and personal property which should be administered while he is incarcerated. To facilitate this need the legislature should consider establishing a law whereby a fiduciary or representative could be appointed by order of the Court at the request of the prisoner, his spouse, or creditors to administer the real and personal property of the inmate.

The matter of prisoner's wages while in prison should be reconsidered. First, the practice of placing a percentage of each inmate's wages into the prisoner's general benefit fund should be discontinued, and the benefit fund should be funded by the legislature as part of its general appropriation to the prison. Second, interest payments should be made on prisoner's savings accounts held by prison authorities. Third, a fund should be established from the prison industry's to pay for work related accidents to inmates.

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333. N.D. CENT. CODE § 30-11-01(3) (1960).
334. *See* notes 300-19 *supra*.
335. *See* notes 291-93 *supra*.
336. *See* notes 213-20 *supra*.

This study discovered that a five dollar credit paid to county prisoners is not available to State Farm and Penitentiary prisoners. To correct this discrepancy, State Farm and Penitentiary prisoners should be allowed a five dollar credit for labor to be used against any judgments and fines in the same manner that the credit is allowed for county prisoners under North Dakota Century Code 12-44-33.

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