

Civil Death - A New Look at an Ancient Doctrine

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CIVIL DEATH—A NEW LOOK AT AN ANCIENT DOCTRINE

The incongruous and often unexplainable effects that arise from application of the doctrine of civil death have plagued the law for centuries. It has survived a long history to become a statutory incident of a sentence to life imprisonment.

With living men regarded as dead, dead men returning to life, and the same man considered alive for one purpose but dead for another, the realm of legal fiction acquires a touch of the supernatural under the paradoxical doctrine of civil death.¹

Such has been the effect in fourteen jurisdictions which have retained this statutory consequence of a life sentence. The application and consequences of this doctrine vary among the states. Since several detailed articles are available concerning civil death in the various states,² the approach of this discussion is to give a broad overview of the doctrine as it is generally construed. This article will present a brief history of the fiction of civil death, some of the effects on rights of those sentenced to life imprisonment, and finally an analysis of the doctrine in regard to modern parole and rehabilitative penology. Having as its overall purpose to show the problems that can and do result from the application of an outmoded common law doctrine, and further, with the objective of promoting the repeal of these statutes as soon as possible, this article will critically view the ancient doctrine of civil death. In a time when the civil rights of all persons, including life convicts, are more carefully protected than ever before, a doctrine which divests the life convict of his estate while living and removes forever the capacity to sue and contract deserves current, serious consideration.

EARLY ENGLISH COMMON LAW

A state of civil death, or *civilliter mortuus* as it was known at early English common law, resulted under certain circumstances in which a person though living, was considered dead. This status, very similar to

1. Note, *Civil Death Statutes—Medieval Fiction in a Modern World*, 50 HARV. L. REV. 968 (1937).

2. Comment, *The Rights of Prisoners While Incarcerated*, 15 BUFFALO L. REV. 397 (1965); Comment, *Civil Death in California*, 26 S. CAL. L. REV. 425 (1953); Note, *The Legal Status of Convicts During and after Incarceration*, 37 VA. L. REV. 105 (1951); Annot., 139 A.L.R. 1308 (1942).

natural death in that all civil rights were extinguished, resulted in three situations: (1) abjuration, (2) profession, and (3) banishment. Abjuration was a means of escaping criminal punishment by leaving the realm forever. When one did so he was considered to be civilly dead. Likewise civil death was a consequence of profession, whereby a man entered a religious order to become a monk. Banishment occurred when a man was attainted by act of Parliament and cast from the realm forever.³ The civil death that resulted from these sources is unknown in the United States.⁴ A further source of common law civil death of which civil death was an integral element was attainder which resulted from conviction of a felony or treason. Attainder also had as a consequence corruption of blood and forfeiture of estate.⁵ These ancient remnants of attainder, corruption of blood and forfeiture of estate, found in the English common law have generally disappeared.⁶ They were never recognized in the United States or were forbidden by state constitutions and statutes.⁷

Since civil death more commonly resulted from attainder (conviction for felonies) than from the other sources, all the principal incidents of attainder should be considered. First, corruption of blood meant that the one attainted could no longer devise his holdings to his heirs nor receive property by devise or descent from his ancestors (under this principle land escheated to the sovereign). Second, forfeiture provided that all land of the convicted felon was forfeited to the sovereign upon sentence. Civil death, the third and most important incident of attainder, resulted in the loss of the convict's civil rights and he was thereby disqualified from being a witness, prohibited from bringing an action or performing any legal function, and he was in effect regarded as dead by the law.⁸

Since conviction of a felony at early common law resulted in the death penalty,⁹ the effect of civil death was normally unnecessary. Al-

3. See W. BLACKSTONE, COMMENTARIES *132.

4. Several American Jurisdictions passed bills of attainder in the latter part of the eighteenth century. *Jackson v. Catlin*, 2 Johns. 248 (N.Y. 1807).

5. 2 W. BLACKSTONE, COMMENTARIES *251-57; 4 W. BLACKSTONE, COMMENTARIES 381-82; 1 J. CHITTY, CRIMINAL LAW *725 (1847).

6. *Howard v. State*, 28 Ariz. 433, 237 P. 203 (1925); *State v. Duket*, 90 Wis. 272, 63 N.W. 83 (1895).

7. E.g., ILL. CONST. art. II, § 11; KAN. STAT. ANN. § 21-120 (1964).

8. *Avery v. Everett*, 110 N.Y. 317, 324, 18 N.E. 148, 150 (1888).

9. *Shapiro v. Equitable Life Assur. Soc'y*, 182 Misc. 678, 45 N.Y.S.2d 717 (1943); *Jones v. Jones*, 249 App. Div. 470, 471, 292 N.Y.S. 705, 706, *aff'd* 274 N.Y. 574, 10 N.E.2d 558 (1937).

though the convicted felon was considered dead by the law, it mattered little which rights were lost and which were retained, for his natural state was soon to coincide with that of his legal state by means of execution. Thus, civil death was a practical way of settling the earthly affairs of a convicted felon soon to be executed.

CIVIL DEATH IN THE UNITED STATES

Civil death and the other incidents of attainder were never a part of the common law recognized in the United States, and in the absence of statute, courts have refused to recognize them as an incident of conviction.¹⁰ Nevertheless, civil death has been revived by statute and is currently in effect, in various forms, in fourteen states.¹¹ When civil death statutes were enacted, the legislatures of many states failed to provide a proper definition. Such enactments presupposed that civil death would have the same effect as it had at English common law. Conditions had changed, however, and the death penalty, once imposed on most felons, was rarely used and was generally replaced by the life sentence. Imposed as an incident of life conviction, civil death derived substantive effects where it originally was intended to merely settle the estate of an executed or banished felon. As a result, courts, in their interpretation of these statutes, have been confused on the question of whether or not to render a strict construction as at common law or to

10. *Thomas v. Mills*, 117 Ohio St. 114, 157 N.E. 488 (1927); *Davis v. Laning*, 85 Tex. 39, 19 S.W. 846 (1892). *Contra, In re Lindewall's Will*, 287 N.Y. 347, 39 N.E.2d 907, 910 (1942), which says that the common law consequences of conviction including civil death continue until abrogated by constitution or statute.

11. ARIZ. REV. STAT. ANN. § 13-1653 (1956); CAL. PENAL CODE § 2600 (West 1956) *as amended*, (Supp. 1968); IDAHO CODE ANN. § 18-311 (1948); KAN. STAT. ANN. § 21-118 (1964); MO. STAT. ANN. § 222.010 (1959); MONT. REV. CODES ANN. § 94-4721 (1947); N.Y. CIV. RIGHTS LAW § 79 (McKinney Supp. 1969); N.D. CODE ANN. § 12-06-27 (1960); OKLA. STAT. ANN. tit. 21, § 66 (1951); R.I. GEN. LAWS ANN. § 13-6-1 (1956); UTAH CODE ANN. tit. 76, § 1-37 (1953).

Although the following states do not have civil death statutes *per se*, they do have statutes with similar results. ALASKA STAT. § 11.05.080 (1962); HAWAII REV. LAWS § 353-38 (1968); ME. REV. STAT. ANN. tit. 19, § 631 (1964) *as amended* (Supp. 1970).

Three states have recently repealed their civil death statutes, ALA. CODE ANN. tit. 61, § 3 (1960) repealed by § 1, [1965] Act, 1st Ex. Sess. 381; MINN. STAT. ANN. § 610.34 repealed by ch. 753, art II, § 17 [1963] Laws; VT. STAT. ANN. tit. 13, § 7005 (1959) repealed by No. 83, [1963]. Typical of the civil death statutes is Oklahoma's: "A person sentenced to imprisonment in the state prison for life, is thereby deemed civilly dead." Such a statute does nothing to define what is actually meant by civil death. The Utah civil death act is interesting, yet rather incongruous in that the initial section employs the typical language setting forth civil death for the life convict while the "exceptions" section of the statute restores most, if not all, of his civil rights.

modify it to meet changing conditions.¹² These civil death statutes were never held to be declaratory of the common law, and civil death consequent to abjuration, banishment, and profession never became a part of American jurisprudence.¹³ The statutory form that did evolve created considerable confusion since the exact incapacities intended to accompany civil death were not enumerated. It is apparent that civil death emerged in a state of conflict, a condition from which it has never been able to extricate itself. Court interpretations have varied widely. An early Maine decision construed its civil death statute to mean that

one who is sentenced to life in prison is civilly dead and he loses all his civil rights—considered in law, dead. His capacities among his fellow members of society are extinct and he can no longer perform any legal function.¹⁴

The court in *Ruffin v. Commonwealth* likewise adopted a strict view when it said:

He [the convicted felon] has as a consequence of his crime, not only forfeited his liberty but all his personal rights except those which the law in its humanity affords him. He is for the time being a slave of the state.¹⁵

A Kentucky court in *Dept. of Welfare v. Brock* relaxed the common law view of civil death and allowed felons to sue and to inherit and convey property.¹⁶

In all cases civil death statutes have been considered penal and have been strictly construed.¹⁷ Strict construction narrows the application of civil death statutes to only two groups of persons, those sentenced to life imprisonment and those facing the death sentence.¹⁸ Further limitations restrict the doctrine to those convictions which result in incarceration.

12. *Byers v. Sun Savings Bank*, 41 Okla. 728, 731-32, 139 P. 948, 949 (1914); *Avery v. Everett*, 110 N.Y. 317, 18 N.E. 148 (1888).

13. Various state statutes expressly provide civil death consequences for a life conviction. See note 11, *supra*.

14. *Sullivan v. Prudential Ins. Co.*, 131 Me. 228, 160 A. 777, 778 (1932).

15. 62 Va. (21 Gratt.) 790, 796 (1871).

16. 306 Ky. 243, 206 S.W.2d 915 (1947). This relaxed view of civil death was more recently expressed in *Grasso v. McDonough Power Equip., Inc.*, 264 Cal. App. 2d 597, 70 Cal. Rptr. 458 (1968).

17. *Hayashi v. Lorenz*, 42 Cal. App. 2d 848, 271 P.2d 18 (1954).

18. *Jones v. Jones*, 249 App. Div. 470, 292 N.Y.S. 705, *aff'd* 274 N.Y. 574, 10 N.E.2d 558 (1937).

tion in state prisons.¹⁹ Other interpretations construe civil death as occurring at the time of incarceration;²⁰ furthermore, it has been held that the doctrine has no extraterritorial effect.²¹

Right to Sue and be Sued

A life convict's right to appear before a court for any reason was generally foreclosed at common law. The same result holds true in states which regard a life convict as losing his civil rights.²² Utah is the sole exception allowing a life convict free access to the courts.²³ This access can be subdivided by viewing the convict as a plaintiff and as a defendant in both civil and criminal actions.²⁴ At common law, access to the courts to institute civil proceedings was generally denied as a proper restriction of a convict's rights.²⁵ With few exceptions, however, courts have found that a civilly dead convict may nevertheless be subject to civil suit as a defendant,²⁶ especially when sued for claims

19. *Hill v. Gentry*, 280 F.2d 88 (8th Cir. 1960), *cert. denied*, 364 U.S. 875 (1960); *Hayashi v. Lorenz*, 42 Cal. App.2d 848, 271 P.2d 18 (1954).

20. *Harmon v. Bower*, 78 Kan. 135, 96 P. 51 (1908).

21. *Panko v. Endicott Johnson Corp.*, 24 F. Supp. 678 (N.D.N.Y. 1938). This case expresses the rule that a sentence or conviction in one state can have no effect by way of penalty or disability beyond the limits of the state in which the judgment is rendered, in absence of an express statute in another state giving effect to such sentence. *Logan v. United States*, 144 U.S. 262 (1892); *People v. Gutterson*, 244 N.Y. 243, 155 N.E. 113 (1926); *Burdine v. Kennon*, 186 Tenn. 200, 209 S.W.2d 9 (1948). *Contra Urbano v. News Syndicate Co.*, 232 F. Supp. 237 (S.D.N.Y. 1964); *Natasi v. State*, 186 Misc. 1051, 61 N.Y.S.2d 438 (1946); *Pallas v. Misericordia Hospital*, App. Div. 1, 34 N.Y.S.2d 881, *aff'd*, 291 N.Y. 692, 52 N.E.2d 590 (1943).

22. *De Cloux v. Johnston*, 70 F. Supp. 718 (N.D. Cal. 1947); *Quick v. Western Ry.*, 207 Ala. 376, 92 So. 608 (1922); *Sullivan v. Prudential Ins. Co.*, 131 Me. 228, 160 A. 777 (1932); *In re Cirello's Estate*, 50 Misc.2d 1007, 271 N.Y.S.2d 841 (Sur. Ct. 1966); *Grant v. State*, 192 Misc. 45, 77 N.Y.S.2d 756 (Ct. Cl. 1948); *Natasi v. State*, 186 Misc. 1051, 61 N.Y.S.2d 438 (Ct. Cl. 1946).

23. UTAH CODE ANN. § 76-1-38 (1953). "The provisions of the two next preceding sections [civil death statute] must not be construed to render the persons herein mentioned [life convicts] . . . incapable . . . of maintaining a civil action. . . ." *Id.*

24. Comment, *Civil Death in California*, 26 S. CAL. L. REV. 425, 429 (1953).

25. *Ex parte Maro*, 133 Cal. App. 411, 248 P.2d 135 (1952); *Harel v. State*, 17 Misc. 2d 950, 188 N.Y.S.2d 683 (Ct. Cl. 1959) (New York is the exception which, by enabling acts, allows convicts to sue for tort injuries sustained while in prison). *Tomaselli v. State*, 168 Misc. 674, 6 N.Y.S.2d 435 (Ct. Cl. 1938); N.Y. CIV. RIGHTS LAW § 79 n. 10 (McKinney Supp. 1969). For a discussion of a convict's access to the courts see *Vogelman, Prison Restrictions—Prisoner Rights*, 59 J. CRIM. L.C. & P.S. 386, 393 (1968); *Annot.*, 139 A.L.R. 1309, 1314 (1942).

26. *Jones v. Allen*, 8 Cal. Rptr. 316, 185 Cal. App. 2d 278 (1960); *Application of McNally*, 144 Cal. App. 2d 531, 301 P.2d 385 (1956) (the court held that though the

by his creditors,²⁷ and accordingly in such cases is given the right to defend.²⁸ Though his right to sue and defend as an individual is often prohibited,²⁹ the power to assert such rights through an administrator or guardian is more fully accorded in several states.³⁰ While access to the courts in regard to civil matters is generally restricted, a convict, however, has unrestrained access to the courts to assert, by means of habeas corpus, that his confinement is unlawful.³¹ Protection of this right is fundamental and "access to the courts [to seek release] is one of the rights a prisoner clearly retains."³² Denial or undue restrictions on the reasonable access to the courts is a denial of due process.³³

It is difficult to see how society may be served by preventing convicts from legally protecting their property and prosecuting their claims. One limited, yet possible, explanation of the policy is that "retention of disability is apparently based on the necessity of maintaining prison discipline and morale in the face of endless law suits which might be brought by prisoners with nothing else to do."³⁴ Whether the purpose intended here outweighs the importance of the convict's freedom to assert his legal rights is questionable; one view which incorporates both is provided for by statute in California.³⁵ Under this statute the Adult

convict could be sued, he had no right to be present at the proceedings); *Fidelity & Deposit Co. v. Boundy*, 236 Mo.App. 656, 158 S.W.2d 243 (1942).

27. *Coffee v. Haynes*, 125 Cal. 561, 57 P. 482 (1899) where a debtor was convicted of a felony and sentenced to life imprisonment. It would be unfair for a criminal to escape payment of his debts by committing crime. See *New v. Smith*, 73 Kan. 174, 178, 84 P. 1030, 1031 (1906).

28. *Application of McNally*, 144 Cal.App. 2d 531, 301 P.2d 385 (1956); *People v. Lawrence*, 140 Cal.App.2d 133, 295 P.2d 4 (1956); *In re Brown's Trust*, 19 App.Div.2d 24, 240 N.Y.S.2d 387 (1963); North Dakota provides such a right by statute, N.D. CODE ANN. § 12-06-27 (1960).

29. *Quinn v. Johnson*, 273 App. Div. 961, 78 N.Y.S.2d 499 (1947).

30. Hawaii, Missouri and New York allow a trustee or guardian to sue and be sued instead of the convict. *Application of Fein*, 51 Misc. 2d 1022, 274 N.Y.S. 2d 547 (1966); *State ex rel. Bricker v. Nolte*, 350 Mo. App. 842, 169 S.W.2d 50 (1943); HAWAII REV. LAWS § 353-35 (1968).

31. *Miller v. Turner*, 64 N.D. 463, 253 N.W. 437 (1934).

32. *Coleman v. Peyton*, 362 F.2d 905, 907 (4th Cir. 1966); *accord, Ex parte Hull*, 312 U.S. 546 (1941); *Kirby v. Thomas* 336 F.2d 462 (6th Cir. 1964); *Warfield v. Raymond*, 195 Md. 711, 71 A.2d 870 (1950).

33. *Hatfield v. Bailleaux*, 290 F.2d 632, 636 (9th Cir.), *cert. denied* 368 U.S. 862 (1961).

34. *Cf. Weller v. Dickson*, 314 F.2d 598, 601-04 (9th Cir.) (Dunway, J., concurring), *cert. denied*, 375 U.S. 845 (1963). See Comment, *The Rights of Prisoners While Incarcerated*, 15 BUFFALO L. REV. 397 (1965).

35. CAL. PENAL CODE § 2600 (West Supp. 1968):

A sentence of imprisonment in the state prison for any term suspends all

Authority has the power to grant and withhold the legal capacities of the convicts on a case by case basis so as to do substantial justice while maintaining discipline and facilitating penal administration.³⁶ Whether a convict needs access to the courts depends on which rights are granted to him or which rights he retains. It will be more apparent later in this discussion that certain property rights retained by convicts require access to the courts for their protection; to restrict access to the judiciary renders incomplete the convict's right to property.

Right to Contract

An early New York decision stated that a life convict could make no contract which he could enforce.³⁷ This result would no longer be reached in New York which, with six other states, has provided by statute for the convict's capacity to contract, at least to a limited extent.³⁸ These statutes typically provide that a convict's civil death will not prevent him from making or acknowledging a sale or conveyance of property.³⁹ They have been narrowly interpreted, however, limiting these property contracts to real estate transactions,⁴⁰ under the theory that the legislatures intended to deny convicts all rights not specifically granted.⁴¹

Based on the inherent right of a convict to have access to the courts in order to seek parole or habeas corpus, it can be inferred that even a civilly dead convict has the right to contract for legal services in his behalf. This was established by the Oklahoma court in *Byers v. Sun Savings Bank*.⁴² In this case a prisoner executed a note and mortgage to an attorney for legal services performed in order to obtain his parole. In an action by the attorney to enforce the obligation, the convict as-

the civil rights of the person so sentenced . . . But the Adult Authority may restore to said person during his imprisonment such civil rights as the authority may deem proper. . . .

36. *Grazzo v. McDonough Power Equip. Inc.*, 264 Cal. App.2d 723, 70 Cal. Rptr. 458 (1968).

37. *Avery v. Everett*, 110 N.Y. 317, 18 N.E. 148 (1888).

38. See note 11, *supra*.

39. ARIZ. REV. STAT. ANN. § 13-1653 c (1956). "Persons sentenced to imprisonment in the state prison for any term shall not thereby be rendered . . . incapable of making or acknowledging a sale or conveyance of property."

40. *Rosman v. Cuevas*, 176 Cal. App.2d 867, 1 Cal.Rptr. 485 (1959) which held that a woman in prison on a felony conviction was incapable of contracting for the sale of an automobile.

41. See *Miller v. Turner*, 64 N.D. 463, 467, 253 N.W. 437, 439 (1934); cf. *In re Donnelly's Estate*, 125 Cal. 417, 419, 58 P. 61 (1899).

42. 41 Okla. 728, 139 P. 948 (1914).

serted that civil death brought about his incapacity to contract. The court rejected this and held that he not only retained the right to contract, but that he also retained its corresponding duties. Only two states, one by statute⁴³ and the other by judicial decision,⁴⁴ forbid a convict the right to contract even in these limited instances. Considering the inconsistencies surrounding the capacity to sue and contract, civil death through interpretation has endowed the life convict with an anomalous situation in which he has the right to make contracts which he can not enforce, to enforce contracts which he had no right to make, and generally creating a Pandora's box in this area of the law.

Property Rights

From a survey of the various statutes, it is apparent that a life convict is readily given more freedom to convey or sell his property than he is given to exercise most of his other rights. This particular right is retained by the convict or his personal representative in eight states.⁴⁵ The rights, applicable to the sale of personalty, are demonstrated in *Davis v. Superior Court in and for County of Marin*.⁴⁶ There the defendant was charged with conspiracy to remove from prison a manuscript of a book, *The Face of Justice*, written by Caryl Chessman while serving a life sentence. The court, in dismissing the charge and the state's claim to the manuscript said, "an odor of totalitarianism infects the concept that any product of the prisoner's mind automatically becomes the property of the state."⁴⁷ It was held that the manuscript was the property of Chessman and could be made the object of a sales contract executed by him even though he was suffering under a civil death disability. In most states, the same would hold true to a conveyance of real property.⁴⁸

Closely related to the right to convey is the right to receive and transmit property by inheritance and devise. There is a diversity of opinion throughout the civil death states as to the status of this right.

43. R.I. GEN. LAWS ANN. tit. 13, § 6-1 (1956).

Every person imprisoned in the adult correctional institutions for life shall thereupon, with respect to all rights of property, to the bond of matrimony and to all civil rights and relations of any nature whatsoever, be deemed to be dead in all respects, as if his or her natural death had taken place at the time of such conviction. . . .

44. *Williams v. Shackleford*, 97 Mo. App. 322, 11 S.W. 222 (1889).

45. See note 11, *supra*.

46. 175 Cal. App. 2d 8, 345 P.2d 513 (1959).

47. *Id.* at 520

48. *In re Olson's Estate*, 202 Misc. 2d 1113, 118 N.Y.S.2d 81 (1959).

Four states provide for this right either by statute⁴⁹ or by judicial decision,⁵⁰ while it is expressly forbidden in two states.⁵¹ The remaining eight jurisdictions make no express mention of the right to receive and transmit property by inheritance and devise. Involved in the issue of the right of inheritance is whether the loss of such right would constitute a forfeiture by divesting the convict's estate in favor of his heirs before his natural death.⁵² The statutes and constitutions of many states prohibit the forfeiture of a convict's property upon conviction "except in cases where a forfeiture is expressly imposed by law."⁵³ Even when civil death statutes provide for the estate of the convict "to be administered as though he were actually dead," courts have held that the property does not pass to the heirs until the convict's natural death and thus, is not a forfeiture.⁵⁴

The two states which forbid the convict the right to devise his property provide for the estate of a life convict to pass to his heirs upon his sentencing.⁵⁵ Interpreted literally, this presents an unreasonable situation where the convict is subsequently pardoned or paroled in a penniless condition.⁵⁶

Marriage Rights

There are two prevailing views as to the effect of civil death on the marriage relationship. The New York Court of Appeals presented one

49. California, CAL. PENAL CODE § 2600 (West 1956), provides for a convict's right to inherit, see *In re Dickinson's Estate*, 125 P.2d 542, 51 Cal. App.2d 638 (1942); UTAH CODE ANN. tit. 76, § 1-38 (1953) (expressly allowing convicts to devise and by implication to inherit).

50. New York: Application of Fein, 51 Misc. 2d 1012, 274 N.Y.S.2d 547 (1966); Oklahoma: Hine v. Simon, 95 Okla. 86, 218 P. 1072 (1923).

51. Rhode Island: R.I. GEN. LAWS ANN. § 13-6-1 (1956) (a life convict has no power to make a will); *id.* at § 13-6-7 (upon imprisonment for life the estate of a life prisoner passes automatically to his heirs).

Hawaii: HAWAII REV. STAT. § 353-38 (1968). "All property given or in any manner whatsoever accruing to a convict . . . sentenced for life, shall vest in his heirs." This statute can be construed to mean that the convict may neither receive by inheritance nor devise by will since in either case the property is out of the hands of the convict and vested automatically in his heirs. Cf. *Hunter v. Hunter*, 361 Mo. App. 799, 237 S.W.2d 100 (1951).

52. See, *Wall v. Pfanschmidt*, 265 Ill. 180, 106 N.E. 785 (1914); *State v. Duket*, 90 Wis. 272, 63 N.W. 83 (1895); *Kenyon v. Saunders*, 18 R.I. 590, 30 A. 470 (1894).

53. *In re Donnelly*, 125 Cal. 417, 58 P. 61 (1899).

54. *Smith v. Becker*, 62 Kan. 541, 64 P. 70 (1901).

55. See note 51, *supra*.

56. A very good discussion of the civil death effect upon the estate of a life convict is found in Annot., 139 A.L.R. 1308, 1316-1322.

view in the case of *In re Lindewall*.⁵⁷ The court in that case held that the marriage and its consequent rights were ipso facto dissolved upon the civil death of the imprisoned spouse without any election or judicial decree of divorce being required. The court considered at length as to what would be a proper election if such were required and, unable to settle on a standard, found an ipso facto termination stating:

We think there are many reasons why it is more logical to hold that it is a sentence of life imprisonment, with consequent civil death, which ipso facto acts upon and affects the marital relation at least to the extent of liberating the husband or wife of the one sentenced⁵⁸

This view is far from satisfactory since it fails to consider the desires of the wife who may look at her husband's conviction as the "for better or for worse" aspect of the marriage relationship and may not want it terminated. If one of the supposed purposes of a civil death statute is to protect the feelings of the innocent spouse and children, such protection is not provided for if the marriage relation is terminated without considering whether or not the innocent spouse desires to maintain the marriage relationship.

A better view is expressed by a Rhode Island statute which provides:

. . . . that the bond of matrimony shall not thereby be dissolved, nor shall the rights to property or other rights of the husband or wife of the person so imprisoned be thereby terminated or impaired except on the entry of a decree for divorce lawfully obtained.⁵⁹

Under such a statute a spouse has grounds for divorce if it is desired, and if not, the marriage can be maintained. Further, there is no question, under this method, as to when the marriage relationship is terminated.⁶⁰

In addition to the basic rights already discussed, other rights have been affected by civil death. Early American decisions construing civil death as it had been in English common law held that a convicted felon was

57. 287 N.Y. 347, 39 N.E.2d 907 (1942).

58. *In re Lindewall's Will*, 287 N.Y. 347, 39 N.E.2d 907, 912 (1942); see Annot., 139 A.L.R. 1308, 1323.

59. R.I. GEN. LAWS. ANN. § 13-6-1 (1956).

60. A good discussion of domestic relations and civil death is found in Note, *supra* note 1, at 974-77.

incompetent to serve as a witness because of his total loss of both civil rights and reputation and therefore, no credence could be given to his testimony.⁶¹ Today, however, in New York, a statute allows a convict to be a witness in any case,⁶² and his prior conviction will only affect his credibility and not his capacity. Other rights of which the life convict is more commonly deprived are the right to vote and to hold office.⁶³

CIVIL DEATH IN MODERN SOCIETY

Statutes which treat a convict as if he were naturally dead in some instances and alive in others have often led courts to inconsistent and curious results. The practice of maintaining such an outdated legal doctrine in a modern society is both confusing and conflicting. The entire doctrine must be analyzed in light of contemporaneous thought regarding rehabilitation to determine if it is a benefit to society and to the individual sentenced to life imprisonment. Such an analysis reveals that the doctrine's shortcomings have been recognized for some time.

The continued existence of civil death, outworn as a mode of punishment and ineffective as a deterrent to crime, leads to increasing confusion and uncertainty in its effects on the personal and property relationships of life convicts.⁶⁴

A civil death statute which removes some or all of a life convict's civil rights nevertheless leaves him, unlike one actually deceased, with the burden of certain liabilities such as the claims of his creditors (who may reach his unprotected property),⁶⁵ criminal prosecutions,⁶⁶ and even involuntary bankruptcy.⁶⁷

Another problem arises in Hawaii and Rhode Island which provide

61. "The stain of his iniquity . . . is still left upon him. . . . The judgment of the law upon that fact is that the credit of his oath is so absolutely and effectively destroyed that it is not to be hoped that he will speak the truth, but must be conclusively assumed that he will not." *People v. Bowen*, 43 Cal. 439, 443, 13 Am. Rep. 148, 151 (1872).

62. N.Y. CPLR § 4513 (McKinney 1963).

63. The mere fact of incarceration makes the convict unable to perform these acts though this is generally established by statute or judicial decision; see Comment, *The Rights of Prisoners While Incarcerated*, 15 BUFFALO L. REV. 397, 409 (right to vote), 407 (right to hold office) (1965).

64. Note, *supra* note 1, at 977.

65. *Coffee v. Haynes*, 124 Cal. 561, 57 P. 482 (1899).

66. *People v. Majors*, 65 Cal. 138, 3 P. 597 (1884); *People v. Hong Ah Duck*, 61 Cal. 387 (1882); see *People v. Hayes*, 9 Cal. App. 2d 157, 49 P.2d 288 (1935).

67. *In re Gainfort*, 14 F. Supp. 788 (N.D. Cal. 1936).

for the estate of the life convict to pass to his heirs upon sentencing. Without an estate the convict has nothing with which to retain counsel for seeking parole nor any means of support in the case of a pardon. He is left helpless; neither he nor society benefits in such an instance. Even if the life convict retains full property rights, in some states he is still unable to protect his estate since he is unable to sue in ejectment, waste, or trespass and cannot enforce his contracts because access to the courts is unavailable.⁶⁸ Such conflicting results are a clear indication that no matter what logic is applied to civil death its inconsistencies prevail. It is apparent that the legislatures of some states realize the harsh consequences resulting from civil death and have attempted to avoid the problem by providing for an administrator to exercise civil rights on behalf of the convicted felon.⁶⁹ If this is the practice, why have civil death at all? This adherence by the legislature to an outdated fiction while at the same time being aware of the doctrine's harshness is difficult to rationalize.

In keeping with a rehabilitative theory of criminal administration, several practices have evolved in modern penology which seem to be at least a *de facto* repudiation of the old retributive theory upon which civil death is based. One modern practice followed in many states is to permit convicts to write and publish manuscripts. Considered from a rehabilitation standpoint, this right of expression provides an outlet for inner frustrations and keeps inmates occupied and mentally alert in the routine of prison life. After considering the works of incarcerated authors, few would doubt that such a practice is worthwhile. It seems incongruous that a society allows life convicts expanded freedoms to write and publish their manuscripts and yet still abides by civil death with its consequent loss of civil rights.⁷⁰

CIVIL DEATH—PARDON AND PAROLE

The most serious inconsistencies resulting from civil death appear when considering pardon and parole of the life convict. Since pardons and paroles are continually shortening the prison terms of the life con-

68. *Avery v. Everett*, 110 N.Y. 317, 334-35, 18 N.E. 148, 155-56 (1888) (Earl, J., dissenting).

69. Such is provided for in HAWAII REV. LAWS § 353-35 (1968); see *Application of Fein*, 51 Misc. 2d 1012, 274 N.Y.S.2d 547 (1966).

70. Note, *The Right of Expression in Prison*, 40 S. CAL. L. REV. 407, 420 (1967); see *Davis v. Superior Court*, 175 Cal. App. 2d 8, 345 P.2d 513 (1959).

vict,⁷¹ he is much more likely to find himself placed back into society and it is in this situation that the inequities of civil death become most apparent. Therefore, a new and more cautious look must be taken at civil death.

Considering pardon first, it has generally been held by judicial decision or by statutory mandate that a pardon restores the civil rights to the convict.⁷² Problems arise when, although some rights are restored by the pardon, restoration to the convict of interests already vested in others as a consequence of the sentence is impossible. For example, when pardoned, the convict, whose estate was divested when he was sentenced, finds himself thrust into society with no means of support. Similarly, although he is pardoned there is no way to restore him to his former marriage relationship which was ipso facto terminated, perhaps years earlier and possibly against the will of both parties.

Similar inequities result in regard to paroles. A life prisoner who is released on parole, unlike in the case of a pardon, is not restored to his civil rights since they are regarded as subsisting for the maximum term.⁷³ Yet he, like the pardoned convict, is cast back into society with civil death working the same inequities. To hold a man in the confines of prison without civil rights is questionable, but to place this man into society divested of those rights, by the action of civil death, is indeed unconscionable. No man should be placed in society with his person and property unprotected, without the right to sue and contract. Even with a pardon restoring his civil rights, his estate and marriage rights have long since vested in others and for that reason could not now be restored to him. This harsh and extreme result is another example of

71. T. SELLIN, *THE DEATH PENALTY*, 72-79 (1959) (also in *MODEL PENAL CODE* (Tent. Draft No. 9)) shows some interesting statistics on the actual average time a life convict spends in prison. Likewise, figures show that only about 25 per cent of life convicts actually serve a life term. Seventy-five per cent are released by various means such as parole and pardon. The median actual sentence served by life convicts was 11 years and 10 months in 1939, but dropped to 10 years 7 months in 1946. ROYAL COMMISSION ON CAPITAL PUNISHMENT 1949-1953, REPORT App. 16 at 495 (1953); see Note, *supra* note 1, at 970.

72. Mo. STAT. ANN. § 222.030 (1959). Some rights are restored by pardon. *White v. State*, 260 App. Div. 412, 23 N.Y.S.2d 526 (1940); *State v. Election Board*, 169 Okla. 363, 36 P.2d 20 (1934) (right to hold office); N.Y. EXEC. LAW § 242 (McKinney 1951) (right to vote); MONT. REV. CODE ANN. § 94-9817 (1947). Iowa is peculiar in that pardoned convicts are not restored to their citizenship until a Certificate of Restoration of the Rights of Citizenship is issued by the governor. Note, *Civil Consequences of Conviction for a Felony*, 12 DRAKE L. REV. 141, 143 (1963).

73. *Vedin v. McConnell*, 22 F.2d 753 (9th Cir. 1927); *Gargan v. Sculley*, 82 Misc. 667, 670, 144 N.Y.S. 205, 207 (1913).

unnecessary and unproductive adherence to an outmoded legal fiction. Modern conditions concerning parole and pardon have brought the life convict back into society within a relatively short period of time thereby creating a drastic need to have his basic rights clearly defined and his status unquestionably specified. Functioning under an archaic theory like civil death, this is impossible to achieve.

To further emphasize, there has been a gradually occurring phenomenon in the law of penology and criminal justice which will have a tremendous impact on society as well as create a critical need for untangling the maze of inconsistencies and confusions resulting from the application of civil death. This phenomenon is the de facto abolition of the death penalty in all states. Statistics analyzing the number of prisoners executed for crime on a state-by-state basis reveals the numbers have been decreasing annually.⁷⁴ This trend took an even sharper drop in the 1960's and in 1967 only three state prisoners were executed. Since

74. The following table from the *Statistical Abstract of the United States* at 158 (1968) shows the decreasing trend in the number of executions in the United States since 1940:

NO. 240. PRISONERS EXECUTED UNDER CIVIL AUTHORITY—STATES: 1940 TO 1968

[Death penalty illegal in States not listed (Alaska, Hawaii, Maine, Michigan, Minnesota, North Dakota, Rhode Island and Wisconsin) and as noted, with certain exceptions in New Hampshire, New York, North Dakota, Rhode Island, and Vermont under the provisions of which no executions have taken place. Method of execution: E—electrocution, G—lethal gas, H—hanging, and S—shooting or hanging.]

STATE AND METHOD OF EXECUTION	1940-1949	1950-1959	1960-1966	1967	1968	STATE AND METHOD OF EXECUTION	1940-1949	1950-1959	1960-1966	1967	1968
Total ¹ (X).....	1,284	717	189	2	-	Mont. (H).....	1	-	-	-	-
Ala. (E).....	50	20	5	-	-	Nebr. (E).....	2	2	-	-	-
Ariz. (G).....	9	8	4	-	-	Nev. (G).....	10	9	2	-	-
Ark. (E).....	38	18	9	-	-	N. J. (E).....	14	17	3	-	-
Calif. (G).....	80	74	29	1	-	N. Mex. (G).....	2	3	1	-	-
Colo. (G).....	13	3	5	1	-	N. Y. (E).....	114	52	10	(?)	(?)
Conn. (E).....	10	5	1	-	-	N. C. (G).....	112	19	1	-	-
Del. (H).....	4	(?)	(?)	-	-	Ohio (E).....	51	32	7	-	-
D. C. (E).....	16	4	-	-	-	Okla. (E).....	13	7	6	-	-
Fla. (E).....	65	49	12	-	-	Oreg. (G).....	12	4	1	(?)	(?)
Ga. (E).....	130	85	14	-	-	Pa. (E).....	36	31	3	-	-
Idaho (H).....	-	3	-	-	-	S. C. (E).....	61	26	8	-	-
Ill. (E).....	18	9	2	-	-	S. Dak. (E).....	1	-	-	-	-
Ind. (E).....	7	2	1	-	-	Tenn. (E).....	37	8	1	-	-
Iowa (H).....	7	1	2	(?)	(?)	Tex. (E).....	74	74	29	-	-
Kans. (H).....	5	5	5	-	-	Utah (S).....	4	6	1	-	-
Ky. (E).....	34	16	1	-	-	Vt. (E).....	1	2	-	(?)	(?)
La. (E).....	47	27	1	-	-	Va. (E).....	35	23	6	-	-
Md. (G).....	45	6	1	-	-	Wash. (H).....	16	6	2	-	-
Mass. (E).....	9	-	-	-	-	W. Va. (E).....	11	9	-	(?)	(?)
Miss. (G).....	60	36	10	-	-	Wyo. (G).....	2	-	1	-	-
Mo. (G).....	15	7	4	-	-						

- Represents zero. X Not applicable.

¹ Includes 23 Federal executions not shown by State (1940-1949, 13; 1950-1959, 9; and 1960-1966, 1).

² Death penalty illegal from Apr. 2, 1958, to Dec. 18, 1961. ³ Death penalty abolished.

⁴ Capital punishment abolished after a referendum in November 1964.

Source of tables 239 and 240: Dept. of Justice, Bureau of Prisons; *National Prisoner Statistics*, bulletin No. 45.

that time there have been none. The reasons for this drop are speculative and an entire topic in itself, but the result has not been because the death penalty has been repealed as a means of punishment.⁷⁵ Perhaps since the legislatures have not acted to repeal the death penalty, the executives have taken the initiative and have refused to impose it. Nevertheless, the longer this trend of "no executions" lasts, the more certain will become this de facto abolition. Certainly no state wants to push forward during such a lull and be the first to renew enforcement of the unpopular death penalty. State legislatures will not only have to repeal the death sentence but they will also have to review the life sentence with all its various failures including civil death, since it will very likely be more frequently imposed, becoming the most severe means of punishment. All jurisdictions especially those with civil death statutes will need to re-evaluate the life sentence not only in its practical application but also from a constitutional standpoint.⁷⁶ For a doctrine with so many inconsistencies to treat a particular class of persons with such inequality would certainly lend itself to criticism for lack of equal protection under the law.

CONCLUSION

To keep a convicted criminal away from the polls and out of public office serves the public; to keep him from asserting frivolous court suits maintains prison discipline; but, to keep him from suing on his contracts and to dissolve his marriage serves the interests of no one. Because it no longer serves any real purpose and likewise lacks legislative direction as to how it is to be administered, a lack of uniformity has resulted in applying the fiction of civil death. Being aware of this, plus an increase in the number of paroles and with the life sentence taking on a more important role as the maximum sentence, the legislatures of the various states should finally meet the problem directly and repeal their civil death statutes. Whether or not these statutes are currently enforced, they present serious inequities which can only be eliminated by their repeal.

A much better plan for administering the civil rights of the life convict would be to abolish civil death and follow the California statutory scheme of allowing the life convict to retain his rights with direction

75. Alaska, Hawaii, Maine, Minnesota, North Dakota, Rhode Island and Wisconsin are states which have repealed the death penalty. *Id.*

76. Note, *Prison Life and Prisoner's Rights*, 53 IOWA L. REV., 671, 672-73 (1967).

over their use by an Adult Authority. This plan would enable the convict to assert his rights when needed, but would prevent him from abusing those rights, thereby maintaining prison discipline. This type of plan is flexible, just, and effective. Such a repeal would eliminate the common law effects of civil death and put an end to its resulting inconsistencies, thereby allowing the civil rights of convicts to be administered in a manner more equitable to them and more productive to society. Finally, then, civil death would be put to rest—a status it so justly deserves.

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