UNITED STATES PRISON LAW

SENTENCING TO PRISON, PRISON CONDITIONS, AND RELEASE—THE COURT DECISIONS

Selected and with Comments
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CONTENTS

CHAPTER 1

CONSTITUTIONALITY OF RESTRICTIONS

The basic right lost by commitment as a sentence is the obvious one of liberty. But even while imprisoned, the prisoner is not a slave, at least in law (see vol. II, chapter 4, discussion of *Ruffin v. Commonwealth*), and therefore not deprived of all other rights. All of the limits on state power over prisoners and the rights of prisoners are in active evolution, the basic challenge being around whether custody implies other losses of rights, or what the losses are (vol. III, chapter 1). As is evident in volumes 3 and 4, reflecting developments in decisional law, the extent of state control is being limited, and the rights of prisoners expanded, a balance that still leaves as an everyday issue the Eighth Amendment prohibition of cruel and unusual punishment.

But a person with a criminal record, even if not in prison, or on probation or parole, still suffers many restrictions in the exercise of civil rights. The great bulk of them are imposed by statute, a few by constitutions. Their huge extent, evident from the review in this volume, is a fairly modern development, although one or two, dealt with in this chapter, are of ancient vintage and on their way out. As for the modern restrictions and deprivations, although new ones are still being added, some are also being removed as unconstitutional by court decisions, and the application of the restrictions is increasingly being surrounded by due process requirements.

The rights affected by arrest, conviction, or imprisonment fall roughly into three classes: civil liberties, including the right to work and to obtain licenses (chapters 2, 3, and 5), property rights (chapter 4), and status (chapters 6 and 7).

Attainder, Civil Death

The modern statutes that deprive the convict of property rights had their origin in common law attainder, a status attached as a consequence of conviction for treason or felony. It resulted in the forfeiture of the convict's land and chattels, "corruption of blood" (preventing him from transmitting his land to his heirs, his blood being "corrupted" by his crime), and loss of civil rights. The United States Constitution forbids passage of bills of attainder and *ex post facto* laws (Constitution Art. I § 9, Art. III § 3). But the prohibition is not complete, particularly in that neither the United States nor state constitutions forbid the deprivation of civil rights. As we see in *Hawker v. New York,* set forth below, chapter 3, the Supreme Court of the United States rejected a challenge to a statute barring felons from medical practice, holding the law not to be a bill of attainder. For the historical background and citation of the early cases, see "The Collateral Consequences of a Criminal Conviction," 23 Vanderbilt Law Rev. 929, at 941-943, 1080, 1190-1195 (1970).

Although attainder is no longer part of our law, the equally ancient "outlawry" still exists, in three states (New York, for treason, North Carolina, and Pennsylvania); Bobby G. Deaver, "Outlawry, Another 'Gothic Column' in North Carolina," 41 North Carolina Law Rev. 634 (1963). The outlaw is a person who is in contempt on a criminal or civil process, whose goods are forfeited and who may be "knocked on the head" by anyone.

The other ancient means of depriving the convict of rights, civil death, still exists in a number of states. Civil death is the term applied to the wide forfeiture of rights—property, civil rights, and status—as a continuing result of attainder. Civil death statutes, still existing in about a dozen states, deprive the offender sentenced to life imprisonment, sometimes to less than life imprisonment, of numerous rights often more substantial than rights lost by other prisoners. Examples are provided in the chapters that follow. Although the number of civil death states is diminishing, and the effect of civil death is restrained by the courts, problems still arise for those to whom the statutes are applicable, of greater severity than from other deprivation statutes.

The civil death statutes are upheld as constitutional, although some applications are condemned, as we shall see, usually as a deprivation of due process of law.

Cruel and Unusual Punishment

The deprivation statutes have been subjected to constitutional challenges, all of which have been, in the main, rejected, although some partial invalidations have been pronounced.

An 1888 case decided by the Supreme Court of Michigan, *Robison v. Miner and Haug,* the first case set forth in this chapter, considers a liquor tax law whose provisions, in addition to other punishments, permitted depriving violators of bonding, hence outsting them from the business of selling liquor (other than for medicinal and some other purposes), for periods of time depending on the gravity of the violation. Several provisions of the law are held to violate substantive due process in the most basic sense. The court says:

"It would be anomalous to allow anyone to be disqualified from business and branded with disgrace, both of which are really heavy punishments, on the mere will of anybody." The court declares that *magna carta,* "the great charter," source of much of the Bill of Rights of the United States Constitution, makes it unlawful to impose a penalty that would deprive a person of the means of conducting a business. It says: "The disabilities and other peculiar consequences before referred to . . . may, and in some instances must, involve practical ruin to to the offender. A druggist, cut off for five years from his business, may suffer a loss of immense sums. . . . It is . . clear that any fine or penalty is excessive which seriously impairs the capacity of gaining a business livelihood. . . . It is safe to say that throughout the United States any fine or forfeiture is unusual which forfeits any civil rights. . . . Disability to transact business is almost or quite unheard of in this country."

The essence of this decision has not been followed, else much of the statutory deprivations would have been held to be invalid. Even in Michigan it appears that several statutory conditions affecting the licensing of ex-offenders still apply; James W. Hunt, James E. Bowers, and Neal Miller, *Laws, Licenses and the Offender's Right to Work* (American Bar Association 1973). Yet it is a benchmark against which to judge other cases. *Weems v. United States,* 217 U.S. 349, 30 S. Ct. 544, 54 L.Ed. 793 (1910), is the Supreme Court decision most often cited on the Eighth Amendment. Although it is concerned with physical punishments in that case, leading it to hold that the punishments are cruel and unusual in violation of the amendment, the Court also cites psychological penalties and deprivations of civil rights. The

statute involved included loss of parental authority, the right of guardianship, marital authority, as well as property rights. The Court does not say much about these penalties; but it does say, "there could be exercises of cruelty by laws other than those which inflicted bodily pain or mutilation." The two dissenting judges (Associate Justice White, and Holmes concurring with him) consider that the physical punishments are not, on the precedents, violations of the Eighth Amendment, whereupon "I am brought, then, to the conclusion that the accessory punishments are the basis of the ruling now made."

An Oklahoma Supreme Court case, next set forth, *Byers v. Sun Savings Bank,* another "old" case (1914), expresses views in the same spirit as *Robison.* The court holds that a prisoner's promissory note is enforceable against him, rejecting his defense that the statute providing that a sentence of imprisonment less than life suspends all civil rights during the term of imprisonment, rendered him incapable of contracting during the term. The court distinguishes between *natural* rights and *civil* rights. Citing the words in the Constitution, it declares that certain rights are innate, "which come from the very elementary laws of nature, such as life, liberty, the pursuit of happiness, and self-preservation" including, one would add, the right to work.

Citing a text statement on civil death and loss of rights, the Oklahoma court says, "The principles of law which this verbiage literally imports had its origin in the fogs and fictions of feudal jurisprudence and doubtless has been brought forward into modern statutes without fully realizing either the effect of its literal significance or the extent of its infringement upon the spirit of our system of government. At any rate, the full significance of such statutes has never been enforced by our courts, for the principal reason that they are out of harmony with the spirit of our fundamental laws and with other provisions of statutes." Citing other cases and authorities it says also—"All of which goes to show the tendency of our laws to not interfere with or abridge those natural rights, the exercise of which do no detriment to society nor harm to the liberal spirit of our positive laws."

One more expression of the same spirit is found in a case used in chapter 8 below, *Osborne v. County Court;* see the comments on the case. But these expressions came at a time when the laws were few (as noted in footnote 1 in *Hawker v. New York,* below chapter 3). Once the statutes proliferated, in recent times, the courts cited their wide use as an argument to uphold their constitutionality, and they were upheld, subject (as already noted) to due process restraints in recent cases.

A review of current constitutional challenges, particularly to employment disability statutes, has been published in a pamphlet by the National Clearinghouse On Offender Employment Restrictions; Robert Plotkin, "Constitutional Challenges to Employment Disability Statutes" (1974). It analyzes the weaknesses of conclusory presumptions of the unfitness of convicted persons, and the lack of objective criteria to determine an offender's capacity to perform the regulated functions, covering procedural safeguards and other approaches. Also Sol Rubin, "The Man With A Record: A Civil Rights Problem," Federal Probation, September 1971.

The right to work has often been recognized as a constitutionally protected right, although not an absolute one: *Traux v. Raich,* 239 U.S. 33, 41 (1915); *State v. Harris,* 216 N.C. 746, 6 S.E. 2d 854 (1940). In *United States v. Pastore,* cited in chapter 3 below, the court says: "There is a serious issue whether a federal district judge,

unguided by Congress except in the most general terms, can require a defendant to give up a lawful livelihood." In *Cummings v. Missouri,* 71 U.S. (4 Wall.) 277, 18 L. Ed. 356 (1966), the Supreme Court said, "The theory upon which our political institutions rests is, that all men have certain inalienable rights—that among these are life, liberty and the pursuit of happiness; and that in the pursuit of happiness all avocations, all honors, all positions, are alike open to everyone, and that in the protection of these rights all are equal before the law. Any deprivation or suspension of any of these rights for past conduct is punishment, and can be in no otherwise defined." And when the Supreme Court says, in *Schware v. Board of Bar Examiners of New Mexico* (in chapter 3, below), "The practice of law is not a matter of the state's grace," surely it means that the practice of any work, the right to work, is not a matter of the state's grace.

What Is a Conviction?

In the spirit of the cases discussed above, construing the statutes so as to minimize the deprivation of rights, many courts have found an avenue to support that spirit in narrow—sometimes strained—interpretations of the operative word "conviction" common in the statutes. Several cases dealing with this issue are set forth next. The first of these, *People v. Fabian,* a 1908 case in the New York Court of Appeals, avoids the application of the word "conviction" in constitution and statute by equating it with sentence, and holding that a suspended sentence is not a sentence, hence not a conviction. The next case, *People ex rel. Marcley v. Lawes,* a 1930 case, involves a defendant sentenced to a life term because he is a fourth offender. Because on two of the three previous convictions he received a suspended sentence, the court holds he is not subject to the fourth offender-life term statute. The court is clearly influenced by the severity of the sentence, saying, "If the sentence under review stands, the relator, who is twenty-five years of age, because he had previously stolen chickens, certain automobile parts and a motorcycle, must spend the remainder of his life in a state's prison."

If a suspended sentence may be an avenue of escape from mandatory sentences on conviction, would probation have the same effect? In the next case set forth, *People v. Andrae,* the court, citing cases holding both ways, holds that probation can come only after judgment is entered, hence a defendant is convicted although released on probation. In some jurisdictions the situation is different where probation has been completed, especially where the statute provides that successful completion of probation serves to set aside the conviction and releases the defendant from all disabilities and penalties resulting from conviction, as in *Truchon v. Toomey,* the next case set forth. The court cites holdings of broad and narrow interpretation, declaring that "as the imposition of a serious disability is being considered, the philosophy of the broad interpretation must necessarily be applied." Such a provision is a feature of youthful offender statutes, involved in the next two cases set forth, *Matter of Cuccio v. Civil Service Commission* (state statute), and *Morera v. United States Immigration and Naturalization Service* (federal statute), both holding that loss of rights (*Cuccio,* disqualification to be a patrolman; *Morera,* a deportation order based on conviction) upon conviction is not applicable where the defendant successfully complies with the requirements of the statute. (See also below, chapter 8, on the operation of these provisions.)

The situation of parolees is in as much confusion as that of defendants

receiving a suspended sentence or probation. On the one hand the parolee is said to be in "constructive custody," still serving a sentence, and on the other hand he is at liberty in much the same sense as one serving a term of probation, and presumably the exercise of civil rights is as appropriate to him. See below chapter 4, heading "Property Rights," and chapter 5, heading "Parolees."

State and Federal Standards

In this area of due process, as in others, federal constitutional requirements are a minimum, not a maximum, standard. The states may, sometimes do, require higher constitutional standards than those in the federal constitution. See, for example, discussion of this point in *Bush v. Reid,* in chapter 5 below. See William J. Brennan, Jr. "State Constitutions and the Protection of Individual Rights," 90 Harvard Law Rev. 489 (1977); and cases cited *Michigan v. Mosley,* 96 S. Ct. 321, at 334-35 (1975).

George F. Robison, Prosecuting Attorney of Wayne County, v. John Miner and Edmund Haug, Police Justices of the City of Detroit.

George F. Robison, prosecuting attorney (*Edwin F. Conely* and *C. A. Kent*, of counsel), for relator.

Isaac Marston and *F. A. Baker*, for respondents.

Campbell, J. The object of these two applications, one of which is made against each respondent, is to require them to entertain jurisdiction to hold preliminary examinations in criminal prosecutions under the revision of the liquor laws of 1887. They decline doing so upon the claim that the statute embodying that revision is invalid because, as they insist, it contains unconstitutional provisions, which are so connected with the prosecution clauses of the act that they must stand or fall together. If this defense is made out it will be fatal, and will defeat the application for our intervention. We are therefore required to consider it.

As none of the previous laws on the subject are repealed except by the general clause repealing all inconsistent statutes and parts of statutes, we are saved some discussion that might otherwise be required. The present statute covers the whole ground, and was meant to provide a full system of legislation to replace the old, and there are no important provisions in the old laws that are not more or less affected by the new one.

The act in question was approved June 28, 1887, subsequent to the act popularly known as the "Local Option Law," which must stand on its own merits as meant to apply by its terms whether the old or new law should be in force. That statute does not seem, therefore, to form any essential feature of this controversy, and we cannot properly consider it on this record.