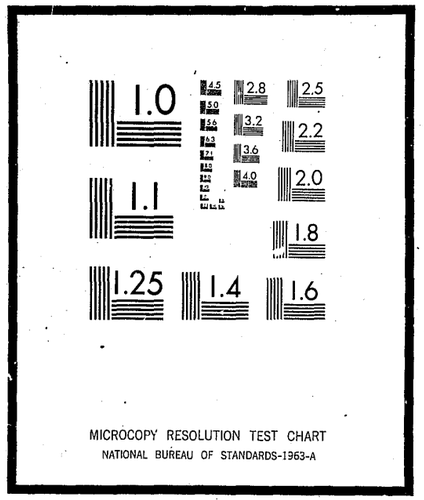

PRISONERS CIVIL RIGHTS IN NORTH DAKOTA

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PREFACE

In April, 1973, the Institute for the Study of Crime and Delinquency asked Professor Bruce E. Bohlman of the University of North Dakota Law School to conduct an evaluation into the area of prisoners civil rights and related matters in the North Dakota Prison system. This report is the result of the research and writing done by John M. Parr and H. Jeffrey Peterson.

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I. INTRODUCTION[1]

Under statutory law in North Dakota, the civil rights of a convict are suspended by imprisonment.[2] Thirteen other states have civil death statutes similar to that of North Dakota.[3] Although the remaining states have repealed their civil death statutes or never had civil death legislation, specific civil disabilities still affect the convicts. These disabilities range from the loss of the franchise, loss of the right to hold public office, loss of the right to act as a juror, to the loss or denial of professional and occupational licenses.[4]

North Dakota's civil death statute is similar to the statutes of other civil death jurisdictions. The body of the statute is clear. Upon "imprisonment in the penitentiary" a citizen will forfeit his basic civil rights. But unlike other civil death jurisdictions, North Dakota has included a vague and indecisive fragment in the statute that states [an imprisoned individual] "can maintain any action based on natural rights." Could a consideration of the natural rights concept broaden the inmate's civil rights beyond conveying property and defending against law suits?

The original civil disability statute was written into the North Dakota code 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."[5] In 1943 the statute was re-written to combine what had been 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.[6] Since the introduction of the concept of "natural rights" there has been no attempt 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 is 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 the natural rights of man."[7] Despite a vagueness in other jurisdictions, North Dakota's original constitution dealt specifically with "natural rights" in Article III, DECLARATION OF RIGHTS--NATURAL RIGHTS.[8] 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 still in the Declaration of Rights. If a convict can protect his 'natural rights' we assume that every man's 'natural rights' can categorically be found in the original text of the North Dakota Constitution, this concept could lay the basis for an extension of the prisoners' rights, if not a basis for the unconstitutionality of the statute itself.

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.[9]

A. Civil Disability Laws as a Violation of Due Process

Due process of law is not susceptible to a definition which is applicable to all situations,[10] its meaning will vary depending on the general rules which govern society and are considered fair play.[11] Due process has been defined as the fundamental principles of liberty and justice which are the basis of our civil and political institutions.[12] Due process applied to substantive rights 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.[13] Procedural due process requires that a person be given an opportunity to be heard in order to protect his rights.[14]

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.[15]

In Hawker v. New York,[16] the plaintiff challenged the constitutionality of a New York statute which forbade convicted felons from practicing medicine. Mr. Hawker had been convicted before the statute was passed of performing an abortion. The court held that the state may use the evidence of a prior conviction as conclusive evidence of absence of the requisite good character required of a physician.[17] Saying that a convicted felon conclusively lacks good moral character because of his prior conviction deprives the ex-felon of an opportunity to be heard when proving his good moral character. In Heiner v. Donnan,[18] 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 ruled that the statute violated due process because this statute had the effect of creating a conclusive presumption which did not allow the heirs to prove the transfer was not made in contemplation of death. The ruling in Heiner could 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 of life, liberty and property of the ex-felon and the government's purpose behind the disability statutes. The inclusion of all ex-felons in civil disability statutesis overbroad in regard to the interests which the state is trying to protect.

In Schware v. Board of Bar Examiners,[20] 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 in 1953, the plaintiff made application to take the bar

examination which is required for admission to the bar in New Mexico. The plaintiff's application was denied based on information given to the Board of Bar Examiners by the plaintiff which stated that the plaintiff had used alias, been connected with the Communist Party, and had been arrested several times prior to 1940. The Board said that the plaintiff lacked the requisite moral character for admission to the bar of New Mexico. In reversing the denial of admission to the bar which had been upheld by 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 Clause of the Fourteenth Amendment.[21] A state can require high standards such as good moral character before admission to the bar but the qualification must bear a rational connection to the applicant's fitness to practice law.[22] Since the plaintiff possessed all of the qualifications needed for admission to the bar except the requisite good moral character, the Court determined 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 of his present good moral character.

A similar result to Schware occurred in Hallinan v. Committee of Bar Examiners.[23] 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 do not warrant his exclusion from the bar of California. The court in Hallinan quoted Schware saying that:

> 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.[24] [Citations] 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 invidiously discriminating.[25] [Citation]

Despite the standards which emerged from Schware and Hallinan, courts have almost unaimously upheld civil disability statutes as rational regulations, enacted to protect legitimate public interests.[26]

In Deveau v. Braistad,[27] the Supreme Court of the United States upheld a disability law which forbade the collection of dues for any labor organization if any officer or agent of the labor organization had been convicted of a felony unless the officer or agent had been pardoned. In 1920, appellant who was secretary-treasurer of Local 1346, International Longshoremen's Association, had plead guilty to a charge of grand larceny and received a suspended sentence.[28] In denying appellant's claim that the enforcement of the Act denied due process, the Court looked to the legislative history behind the Act and determined that the legislature's basis for barring convicted felons from the 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 (New York and New Jersey) and Congressional studies which showed that ex-convicts on the waterfront were a principal influence on corruption which was widespread when the Act was enacted.[29] The Court said that even though it is cognizant of the promising record of rehabilitation of ex-felons, the Court will not substitute its judgment of the situation for that of the states (New York and New Jersey) and Congress "regarding the social surgery required by a situation as gangrenous as exposure of the New York waterfront has revealed."[30]

Although the Schware and Hallinan decisions seem to limit the states right to deny admission to the bar because of arbitrary decisions on what is 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. The ruling in Deveau which upheld the barring of a convicted felon from being an officer in a labor organization is the controlling precedent which has not been questioned in recent decisions.[31]

B. Civil Disability Laws as a Violation of Equal Protection

The Equal Protection Clause of the Fourteenth Amendment prohibits any state from denying the equal protection of its laws to any citizen. The standard used to determine if 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."[32] 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." Classifications which are "suspect" include those based on race, lineage and alienage.[33] Classifications which affect fundamental interests,[34] (voting, procreation, rights with respect to criminal procedure, and to a lesser degree education) and "suspect" classification require the state to show a "compelling" state interest before the classification will survive an equal protection challenge.[35] Thus any challenge to civil disability laws based on a denial of equal protection will depend on the classification and the burden required of the state to prove that the classification was a legitimate state interest.

If the traditional standard of review is used, 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.[36] In Mones v. Austin,[37] the plaintiff challenged a statute on equal protection grounds which excluded him from the race tracks of Florida because of a prior bookmaking conviction. In assessing plaintiff's equal protection challenge, the court denied the challenge stating that the exclusion was reasonable in light of the state's interest in controlling gambling. Although not all ex-felons were excluded from the race tracks of Florida, the Court held that the exclusion of plaintiff because of his bookmaking conviction was neither arbitrary nor unreasonable in light of the connection between bookmaking and illegal gambling. A similar result to Mones occurred in Upshaw v. McNamara,[38] 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. After deciding that a classification based on a criminal record is not a "suspect" classification,[39] the court went on to find a rational basis for the policy of not hiring ex-felons even if they had been pardoned. 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."[40]

Although voting is considered a fundamental right subject to rigid scrutiny by the Equal Protection Clause if the franchise is denied, a challenge to disenfranchisement on equal protection grounds by an ex-felon was denied in Green v. Board of Elections of the City of New York.[41] The plaintiff had been convicted of two felonies (conspiracy to violate the Smith Act and criminal contempt for failure to surrender after his conviction). 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 intimate that states could not continue the disenfranchisement "of persons convicted of all or certain types of felonies."[42] 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 executors who enforce them, the prosecutors who must try them for further violations, or the judges who are to consider their cases,"[43] 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 order to uphold the disenfranchisement of ex-felons. The Court conceded that there may be crimes which do not come within a particular state law on the exclusion of the franchise such as the court in Otsuka v. Hite[44] found. The court in Green did not agree with the court in Otsuka that the Federal Constitution forbade denial of the franchise to violators of the Selective Service Act.[45]

In Otsuka, the Supreme Court of California held that a conscientious objector should be placed on the roles of voters since his crime was not "infamous." The California Constitution prohibited persons convicted of "infamous" crimes from exercising the franchise. By excluding 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.

Successful equal protection challenges to civil disability laws may be had if the offender 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.,[46] the plaintiff challenged on equal protection grounds the denial by the commission of a license for the plaintiff to box in the state of New York. 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. This ruling shows 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 should be able to challenge the denial based on a violation of equal protection.

C. Civil Disabilities as Cruel and Unusual Punishment

Claims that civil disability laws violate the Eighth Amendment, which prohibits cruel and unusual punishment, have been routinely dismissed by the courts. In Green v. Board of Elections,[47] the court held that the disenfranchisement of convicted felons is not cruel and unusual punishment for two reasons. First, the court quoted Trop v. Dulles,[48] and said that the deprivation of the franchise is not a punishment but rather a "nonpenal exercise of the power to regulate the franchise." Second, if the deprivation of the franchise is a punishment then the framers of the Bill of Rights would not consider this deprivation to be cruel and unusual.

Civil disability laws may be cruel and unusual punishment because they punish an ex-felon for his status. In Robinson v. California,[49] the Supreme Court of the United States ruled that a statute which punished an individual for being a narcotics addict was unconstitutional as a violation of the Eighth Amendment which prohibits cruel and unusual punishment. The statute in question, 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. This punishment because of an addicts status could be analoguous 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,[50] the Supreme Court of the United States defined a bill of attainder and the requisite elements which 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."[51]

In Deveau v. Braistad,[52] the plaintiff sought to attack as a bill of attainder a statute, which prevented the collection of dues by any labor organization if an officer or agent was an ex-felon. 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. The court felt that the only implications of the defendant's guilt were those contained in the 1920 trial. Also, the court determined that the restrictions on ex-felons in the statute was not to punish an individual for past activity but to regulate the present situation which was justifiable in light of the legitimate legislative purpose of the statute.[53]

E. Conclusion

Constitutional challenges to civil disability laws have been denied by almost all of the courts. As stated in the previous sections, the only successful constitutional challenges to civil disability laws have occurred when the court has found that the individual does not come within a particular classification; when the civil disability laws have been applied arbitrarily and capriciously; or when courts have not found the legislative purpose in excluding ex-felons to be reasonable in light of a legitimate state interest.

III. ACCESS TO THE COURTS FOR PRISONERS

Although there are theoretically 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.[54] The "hands-off doctrine" is typified by Banning v. Looney[55] 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."[56]

The first group of cases to overturn the "hands-off doctrine" were cases which concerned the right of access to the courts.[57] Access to federal courts was clearly set out in Ex Parte Hull,[58] 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."[59] Access to state courts by state prisoners was recognized in White v. Ragen.[60]

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.[61]

The importance of access to the courts for prisoners cannot be overemphasized because without access a prisoner is left with rights which are unenforceable.

In Stiltner v. Rhay,[62] the Supreme Court of the United States affirmed the principle that access to the courts is basic to all other rights protected by the Act, for it is essential to their enforcement."[63] Thus, courts have reaffirmed the necessity of reasonable access when prisoners are challenging their original conviction or claiming mistreatment by prison officials.[64]

Courts have not been as concerned about prison officials who refuse access to the courts to an inmate for a civil suit if the civil suit is not related to the prisoner's liberty.[65] In Tabor v. Hardwick,[66] 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[67] but the court in Tabor thought that the right to access principle "should not be intended to give them [inmates] an absolute and unrestricted right to file any civil action they might desire."[68] 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.[69] If a state has a civil death statute, the statute of limitations is usually tolled during incarceration.[70] By postponing the prisoners' civil action until he is released, the court denies the prisoner the possibility of injunctive relief.[71] If civil rights are suspended under a civil death statute the right to sue is denied although the prisoner has a right to defend himself.[72] The 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.[73]

A prisoner confined to a state penitentiary has basically four types of remedies which he can use to challenge either his unlawful detention or his treatment on behalf of the prison officials. The four types of remedies are:

1. Habeas Corpus;
2. Federal Civil Rights Act;
3. Civil suits against federal, state and local governments and the officials responsible for administering the respective government; and
4. Criminal actions against prison officials.

A. Habeas Corpus[74]

Habeas corpus has traditionally been the means by which prisoners have challenged the legality of their confinement.[75] There are three traditional limitations on the writ of habeas corpus which has limited the effectiveness of the writ for prisoners. 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."[76]

Before 1944, federal and state courts would only hear habeas corpus petitions if the prisoner challenged the legality of his original conviction and the granting of the writ would lead to a new trial or release.[77]

In 1944, in Coffin v. Richard,[78] the Court of Appeals for the Sixth Circuit expanded the previous limitations which had been placed on habeas corpus. In Coffin, the court stated that:

> 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....[79]

The writ of habeas corpus was further expanded in Peyton v. Rowe[80] when the Supreme Court of the United States held that a prisoner incarcerated under consecutive sentences could prosecute a writ of habeas corpus that claimed the future sentence was invalid because of a deprivation of rights guaranteed by the Constitution. In Johnson v. Avery,[81] the petitioner was placed in disciplinary confinement because he refused to stop helping other inmates prepare legal papers. The Supreme Court of the United States granted petitioner's writ of habeas corpus which freed petitioner from disciplinary confinement and 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

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 a federal prisoner to exhaust the remedies of the Bureau of Prisons before he is eligible for the writ.[82] 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.[83] In Fay v. Noia,[84] 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."[85] This relaxation of the exhaustion of remedies requirement for state prisoners was limited somewhat by giving federal judges 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.[86] 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.[87]

When a state prisoner has obstacles which make state remedies ineffective, the state prisoner is not required to exhaust these state remedies before he applies for federal habeas corpus relief.[88] This rule was set out in Young v. Ragen[89] when 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[90] 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,[91] 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 procedures for handling prisoners' grievances, 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, subject or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any right, 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.[92]

Because of the "hands-off" doctrine, courts were hesitant to get involved in what the courts deemed to be administrative problems.[93] The adherence to the "hands-off" doctrine prevented prisoners from effectively invoking the Civil Rights Act.[94] New life was breathed into the Civil Rights Act by the decision of Monroe v. Pape,[95] a case which did not concern prisoners. 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, arrested and detained the husband without a warrant, and without arraignment, constituted a deprivation of their "rights, privileges, or immunities secured by the Constitution within the meaning of 42 U.S.C. 1983." The Supreme Court reversed the judgment of the Court of Appeals which stated no cause of action had been alleged. The Supreme Court allowed the dismissal against the city of Chicago to stand saying that a municipal corporation was not within the ambit of the statute, 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 no barrier to the present suit in the federal court.[96]

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. The principles advocated in Monroe were held to apply to prisoners in Cooper v. Pate.[97] The Monroe decision ended in many federal courts the "hands-off" doctrine that most federal courts had followed concerning state prisoner actions under the Civil Rights Act.[98]

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."[99]

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" means that:

> Misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law, is action taken "under color of" state law.[100]

The definition of "under color of state law" was extended to private persons if they act jointly with state officials.[101] 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 and will be subject to suit under the Civil Rights Act for any deprivation of a federal statutory right or a constitutional right guaranteed by the Fourteenth Amendment.[102]

Although the Civil Rights Act provides for both legal and equitable remedies it is uncommon to see an award of damages for a deprivation under the Act. In Sostre v. McGinnis[103] 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 which must be satisfied by the individual. The doctrine of sovereign immunity prevents any part of the award being paid out of the state treasury without the state's consent.[104]

Since the revival of the Civil Rights Act in Monroe, federal courts have made equitable relief available for violations of prisoners' rights when the states have failed to develop adequate administrative or judicial procedures.[105]

Although Monroe explicitly stated that exhaustion of state remedies is not required before a federal action is brought under the Civil Rights Act, there has been some question as to whether the non-exhaustion of state remedies applies to both legal and equitable relief.[106] This confusion results somewhat from the decision in Houghton v. Shafer,[107] where a state prisoner sought injunctive relief under the Civil Rights Act for the return of his law materials. The Supreme Court in a per curiam decision reiterated the ruling in Monroe that exhaustion of state remedies is not necessary under the Civil Rights Act but at the same time they looked at the case and determined that exhaustion of state remedies would be futile. By claiming 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.[108] In Miller v. Purtell,[109] the court quoted Monroe saying that exhaustion of state remedies is not necessary for a cause of action under the Civil Rights Act but the prisoner's motion for injunctive relief was denied because the court held that injunctive relief could only be granted when there is no adequate remedy at law. Since the prisoner had not shown the court that he had made any effort to exhaust state remedies his motion for an injunction was dismissed.

Under the Civil Rights Act a state prisoner can also seek declaratory relief under the Declaratory Judgment Act.[110] Declaratory judgments define the rights and obligations of each party to a particular case.[111] In Holt v. Sarver,[112] the federal court for the eastern district of Arkansas granted declaratory relief under the Civil Rights Act to inmates of the Arkansas penitentiary system because of violations of constitutional rights. The court granted declaratory relief which declaratory relief which declared that confinement in the Arkansas penitentiary system constituted cruel and unusual punishment because of the existing conditions. The court also declared that racial discrimination in the prison which included racial segregation violated the Equal Protection Clause of the Fourteenth Amendment.[113]

Usually declaratory relief granted under the Civil Rights Act is granted only when a state fails to respond to a mandate by the court to improve various conditions and practices in a prison.[114]

Since the Civil Rights Act is limited to violations carried out "under color of state law" federal prisoners have not been able to use the Civil Rights Act against federal officials.[115]

C. Civil Suits Against Federal, State and Local Governments and the Officials Responsible for Administering the Respective Government.

A tort suit for damages is the most widely accepted method of recovering damages for injuries due to the negligence of prison employees.[116] The cases deal with a failure on the part of prison officials to provide minimal necessities such as food, clothing, shelter, and medical care.[117]

The biggest limitation on civil suits by prisoners is the current requirement in North Dakota[118] and many other states that the suit must be postponed until the prisoner is released from prison. The suspension of the prisoners' civil rights during imprisonment prevents him from suing a civil action although he has the right to defend if he is sued.[119] 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 under the doctrine of respondent superior for injuries caused by employees who are working within the scope of their employment.[120] 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.[121] 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 respects sovereign immunity, the suit would be against the persons involved, not against the state.

D. Criminal Actions Against Officials.

Although in theory it is always possible to prosecute prison officials under criminal statutes for assault and battery or even murder, the statutes usually are not enforced against prison officials.[122] In State v. Bruton,[123] 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. After the dismissal of the charges by the state court in Arkansas, federal indictments under the criminal provisions of the Civil Rights Act[124] were returned against fifteen employees for inflicting cruel and unusual punishment.[125]

E. Conclusion

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 to a legal action under the Civil Rights Act. The use of criminal actions against prison officials will probably remain relatively few mainly because district attorneys are reluctant to prosecute state prison employees for criminal violations. 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.[126]

F. Access to the 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." But if sued he "may defend."[127] This point has been clearly emphasized by the North Dakota Supreme Court in Miller v. Turner where 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."[128]

In recognition of this disability the North Dakota legislature has established a statute of limitations designed to toll the statute on any civil action which arises while the inmate is imprisoned.[129]

(2) Capacity Of Prisoner To Be Sued

The North Dakota Century Code provides that a prisoner whose civil rights have been suspended can still be sued.[130] If sued the inmate can defend the action.

Although the right to defend is definite, it is not clear if this means the inmate must be personally present at the hearing(s). In Hager v. Homath, 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...."[131] However, this provision appears to be at the convenience and/or necessity of the court and it is doubtful if it would be exercised to compel attendance in the average court action. A majority of the states have held that while a prisoner has the right to defend when sued, he is not entitled to be personally present at any part of the proceeding.[132]

The prisoner may have an attorney to represent him in defense of any court action. But personal counsel is not always available for the inmate because of financial or other reasons. If the charge is criminal, defense may be provided by the Public Defender.[133] If the action is civil in nature, the ability to obtain counsel may be difficult in North Dakota. A community Legal Aid office may offer legal assistance to prison inmates. But the legal aid program in North Dakota is very limited at this time. It follows that the inmate who is unable to secure proper representation is

subjected to having a judgment on default 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. But despite the statutory authority to defend, if legal counsel is not made simple and inexpensive, it must be questioned if the right to defend does, in fact, exist.

It has been held that a prisoner may be forced into involuntary bankruptcy. In reading the provisions of the Bankruptcy Act, the court found no distinction between a convict and ordinary citizen when applying the bankruptcy laws. Therefore, "the convict should not be able to employ their crimes as a shield against the just demands of their creditors."[134] The court did hold, however, that the convict could avail himself of any defenses under the Bankruptcy Act.

(3) Remedies Available Under The North Dakota Uniform Post-Conviction Procedure Act.

Under Chapter 29-32 of the North Dakota Century Code any person who has been "convicted of, or sentenced for, a crime" may find review of his conviction if he falls within the scope of the chapter.[135]

The Post-Conviction remedies are generally available if 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 exceeds the maximum authorized by law." The action may be maintained in the "District Court in which...original jurisdiction in habeas corpus is vested, may entertain in accordance with its rules of proceeding under this chapter in the exercise of its original jurisdiction."

IV. PRISONER'S 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...."[136] The North Dakota Supreme Court in State v. Langer, defined felony as "a crime which is or may be punishable with death or imprisonment in the penitentiary."[137] Conviction of a felony in some other jurisdiction (state or federal) even though a misdemeanor in North Dakota forfeits the civil right to vote in a North Dakota election.[138]

It is significant to look at the North Dakota Supreme Court's interpretation of section 127.[139] It is the characteristic displayed by committing the felony, not the felony that leads to disqualification. The court stated that 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 a felony. The disqualification is not the felony nor is it the penalty. It is simply a consequence of the feloneous act."[140] Finally, it is a misdemeanor for a convicted felon to offer to vote.[141]

The above makes it clear that a convicted felon cannot exercise his right of franchise. But does the same statute deny voting rights during confinement in jail or prison when the offense is nonbailable or the prisoner is unable to post bail?

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

Illinois' absentee ballot statute is similar to that of North Dakota.[142] Under this statute it was constitutional to deny issuance of absentee ballots to two inmates in the Cook County jail despite the fact that no alternative means of voting was provided.[143] An absentee ballot 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 residence, the court concluded that the Illinois statute was uniform with other jurisdictions and that the statute was reasonable. But in dictum, the court stated that upon showing that an alternative means of voting was not available, the right to vote would have been denied.[144]

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[145] and has demanded that infringement of voting rights be "carefully and meticulously scrutinized,"[146] the Court has been unwilling to declare state disenfranchisement statutes unconstitutional. The Supreme Court's basic reasoning can be found in a North Dakota decision, State v. Langer, where the 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."[147]

B. Right to Hold Public Office

In North Dakota an individual seeking public office must qualify as an elector. As previously discussed a person sentenced to imprisonment at the penitentiary looses his right of suffrage.[148] It follows that imprisonment disables an individual from holding public office.[149] 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 turpitude or violation of his official oath."[150] In State v. Vogel the North Dakota Supreme Court emphasized this statute by stating, "the conviction of a felony ipso facto causes a vacancy in public office."[151] Upon restoration of Civil Rights, the felon again possesses the capacity to run for public office.[152]

C. Right of a Prisoner to Contract

The North Dakota Code does not specifically exclude convicts from contracting. The only disabilities in the North Dakota statutes apply to "minors and persons of unsound mind."[153] The civil death statute acknowledges that a contract can be made by the inmate 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 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 contracts..." under this section.[154] 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. The difficulty will come, however, when the contract must be enforced, because the inmate is prohibited from bringing a judicial action.[155] Therefore, the inmate is granted the right to contract, but is denied access to the courts to enforce that right.

D. Right to Make a Will

The laws of North Dakota provides that "any person eighteen years of age or older may make a will disposing of all or any part of his estate."[156] Any part not disposed of will pass through intestacy.[157] The North Dakota Supreme Court has affirmed this provision. In Storman v. Weis the court stated that there is "no statutory requirement to make a will other than that the testator must be a person eighteen years of age or older."[158]

E. Right to Act as a Witness

At common law the conviction of treason or a felony, or of a misdemeanor involving dishonesty or obstruction of justice, rendered the convicted person incompetent as a witness.[159] 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.[160] Even while incarcerated a prisoner may appear as a witness.[161]

The inmate or ex-inmate carries a great disability when he testifies. His credibility may be impeached by establishing his criminal 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 to 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 judicial discretion, a salutary rule."[162] For impeachment purposes the questioner is limited to questions concerning the name of the crime, the time and place of conviction, and the punishment.[163] He may not be asked on cross-examination if he has been arrested for commiting any particular act, because the fact of arrest is not proof of guilt.[164] Although the weight of a witness' testimony and the credibility of a witness are a matter to be determined by the jury,[165] the basic fact that the ex-inmates testimony is questioned despite any relationship between the previous crime and the present testimony would seem to be an insurmountable civil disability for the ex-inmate. Furthermore, the witness will not be allowed in a North Dakota court 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."[166]

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.[167] Once civil rights are restored, the citizen will be subject to and entitled to serve on jury duty.[168]

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.[169] 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. Upon failing to perform his duties because of incarceration or other neglect, he could be discharged by the District Court.[170] In other words the law does not preclude him from acting as a trustee, but his imprisonment prevents him from effectively exercising his duties.

H. Rights in Domestic Relations

(1) Ground for Divorce

Conviction of a felony under North Dakota Law is grounds for divorce by the inmate's spouse.[171] It is doubtful if an inmate can maintain an action for divorce while he is in prison since he cannot bring a civil action.[172]

If children are involved in the divorce proceedings, custody of the children will be awarded by the court as provided by law.[173] The court will consider the specific facts involved and determine which alternative is in the child's best interest.[174] 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 remove 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 if he feels he is the proper parent to have custody.[175]

When an incarcerated spouse discovers 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.[176] 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 parents 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 a basic inconsistency in North Dakota law insofar as payments received by county prisoners and payments received by prisoners sentenced either to the State Farm or the Penitentiary. N.D.C.C. 12-44-33[177] provides that convicts sentenced to a county jail or workhouse will receive credit for labor to be applied against any judgment for a fine and costs. The prisoner receives five dollars credit for each day of labor performed.

Prisoners sentenced to either the State Farm or the Penitentiary do not receive a five dollar credit for labor to be applied against any judgment for a fine and costs. 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[178] of the North Dakota Constitution and Section 1[179] 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 will classify its citizens and treat them differently for various reasons but the classifications should include all the persons who are in the same situation.[180]

To determine if there is a violation of the Equal Protection Clause of the Fourteenth Amendment, one looks first to determine if the classification is reasonable.[181] To determine the reasonableness of a classification, the court will try to determine the purpose for which the statute in question was enacted. In construction of a statute the court looks to the statute itself and determines the purpose from the language itself. 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.[182]

The North Dakota Supreme Court has declared that the constitutional safeguard of equal protection is violated only if the classification is founded on grounds which are "wholly irrelevant to the achievement of the state's objective."[183] The court 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.[184] The purpose of N.D.C.C. 12-44-33 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 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 N.D.C.C. 12-44-33 violates the Equal Protection Clause of the Fourteenth Amendment because the classification of only including county prisoners is not reasonable in light of the purpose of the statute.[185] N.D.C.C. 12-44-33 is under inclusive. 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 the same situation.[186] Underinclusion, if arbitrary, is a denial of the Equal Protection Clause of the Fourteenth Amendment.[187]

Courts often hold that underinclusion does not violate equal protection on the theory that legislatures are free to recognize degrees of evil and remedy wrongs that they think are most acute.[188] This is an abandonment of the theory that the classification must include all who are in the same situation.[189] One could not say that the legislature was looking to degrees of evil and sought only to help county prisoners because N.D.C.C. 12-44-33 was not enacted to remedy evils. It was enacted to benefit convicted prisoners who already bear a heavy burden.[190] This benefit should be conferred on State Farm and Penitentiary prisoners as well as county prisoners.

There are two other reasons often given when under-inclusion is tolerated.[191] 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 is underinclusive in order to permit a state to make changes which would be delayed if resources were not adequate to include everyone.[192] Secondly, underinclusion 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 to extend the coverage of the statute.[193] Neither of the two above 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 credit applicable to a judgment and costs that county prisoners are allowed. Also, it seems improbable 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 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 credit per day applicable for a judgment and costs in return for labor performed.

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

Sections 12-48-16,[194] 12-48-17,[195] 12-48-18,[196] and 12-48-19[197] 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. Five percent 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. N.D.C.C. 12-48-16; N.D.C.C. 12-48-18. When a prisoner with dependent relatives has more than fifty dollars in his temporary aid account, ten percent is deposited in the prisoners' general benefit fund, N.D.C.C. 12-48-17. Twenty-five percent 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. N.D.C.C. 12-48-19.

The prisoners' general benefit fund is used to provide entertainment and amusement for the benefit of all prisoners. N.D.C.C. 12-48-15.

Since an inmate can make only one dollar a day at the maximum, this forced contribution to the prisoners' general benefit fund creates a hardship on many inmates.[198] The prisoners' general benefit fund 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.[199] The purpose for which the fund was created is no longer applicable to today's inmate. This forced contribution deprives an inmate from spending his meager earnings the way he wants to. 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. An inmate should not be forced to pay into a fund of which he does not partake. 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 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.[200] The opportunity for an inmate to deposit his savings in an interest bearing account should be authorized by statute so that the right of an inmate to deposit his money in interest bearing accounts will not be left to the discretion of each individual warden.[201]

L. Right to Receive Compensation for Injuries

A majority of states deny workmen's compensation for injuries sustained by an inmate while working in a prison.[202]

Federal prisoners who are injured while incarcerated are denied workmen's compensation but they may receive benefits from the Prison Industries Fund.[203] 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.[204] The awards do not cover pain and suffering and a subsequent criminal conviction disqualifies the inmate from all benefits.[205] 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 compensation under the Federal Tort Claims Act.[206] 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.[207]

Most states do not provide compensation to prisoners for injuries received while working at a prison.[208] At least five states bar prisoners by statute from receiving workmen's compensation benefits.[209] In the absence of a specific statute barring workmen's compensation benefits to prisoners, the courts and attorney general's opinions in fourteen states have not allowed workmen's compensation benefits to prisoners.[210] Although North Dakota has no statute specifically barring workmen's compensation to inmates, North Dakota would probably follow the other fourteen states and hold that workmen's compensation benefits are not applicable to inmates. The decisions denying workmen's compensation in states which do not specifically bar an inmate from receiving workmen's compensation generally deny benefits based on the definition of "employee" or "contract for hire" incorporated in the workmen's compensation laws.[211] The courts have held that an inmate who is required to do labor by law cannot enter into a "contract for hire."[212] Thus he cannot be an employee of the state even if he receives compensation for his services.[213]

Some states have allowed prisoners to recover under workmen's compensation or by civil suit for injuries received while working in a prison.[214] At least five states allow prisoners to recover under their respective workmen's compensation laws.[215]

Other states have waived their governmental immunity and allow persons to institute civil suits for negligence against the state.[216]

Three cases which allowed prisoners to receive workmen's compensation for injuries in the absence of statute involved prisoners who were either working on a road crew,[217] or loaned to another governmental agency or private group.[218]

Since the North Dakota Penitentiary makes a profit on its industries,[219] 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.

M. Right to Hold, Receive and Transfer Property

(1) Divestment

There is no disability under the North Dakota civil disability statute to prevent transfer of his property by an inmate.[220]

(2) Inheritance

The North Dakota Code does not prevent an inmate or ex-inmate from inheriting[221] unless he murdered the person from whom he is inheriting.[222]

The inmate can inherit through intestacy if he falls into the appropriate classification.[223]

(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.[224] 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 an order by the court 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[225]

The North Dakota Code does not provide a statute authorizing the appointment of a representative to act as a fiduciary for the inmate while he is in prison. At least thirteen (13) other states have provisions allowing an inmate to appoint a fiduciary and there is a general trend to allow such appointments.[226]

In the absence of such a statute the inmate must look toward creating a bailment or power of attorney to protect his property.[227]

A bailment can be exercised by any person who gives his possessions to another to be kept for the benefit of the party giving up possession.[228] Likewise, the inmate can exercise a general power of attorney to oversee and guard his property.[229] 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.[230] Second, the bailee or other agent are encumbered by the same disabilities that encumber the Principle.[231] Therefore, they cannot go to court to protect the property.

N. Right to Receive Pensions

Private pension funds are generally not affected 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 effect the loss of pension rights for city employees,[232] police officers[233] and employees of the park districts.[234] There is no apparent 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 reason.

O. Restoration of Civil Rights and Privileges

In North Dakota the Board of Pardons has the authority to restore an inmate's Civil Rights.[235] The Board members are the Governor, the Attorney General, the Chief Justice of the Supreme Court, and two qualified electors appointed by the Governor.[236] The power of restoration appears to be completely discretionary. Upon application by the inmate the Board can restore civil rights at any time.[237]

(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 profound area is that of employment. In the private sector a criminal record may lead to summary

rejection when alternative non-criminal personnel are available.[238] The ex-inmate may be prevented from employment because he lacks the skill or educational requirements for the job[239] or inability to secure the necessary bond for employment from a fidelity insurance company.[240]

Many 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,[241] an accountant,[242] a barber,[243] an MD,[244] a plumber,[245] a massage parlor,[246] a dentist,[247] an insurance agent,[248] or an individual seeking a liquor license[249] for "conviction of a felony."

A license will be directly refused or revoked from a chiropodist,[250] a child placing agency,[251] and a children's home[252] for conviction of a crime involving moral turpitude. A physical therapist is denied a license for conviction of a felony or a crime involving moral turpitude,[253] an architect upon conviction of "fraud",[254] and a real estate agent upon "conviction of embezzlement, forgery, obtaining money by false pretenses, extortion, conspiracy to defraud or other like offense."[255] Conviction of a felony will result in disbarrment from the legal profession.[256]

The state licensing agencies may deny licenses in several fields indirectly upon a showing that the applicant is not of "good moral character." Several of the professions already mentioned also require good moral character, e.g., an accountant,[257] barber,[258] and chiropodist.[259] Other fields requiring good moral character include embalming[260] and pharmacy.[261] A license could be denied a chiropractor upon showing of "dishonorable, unprofessional or immoral conduct."[262]

The area of employment of convicted felons is an example of how the civil death statutes are over broad and inconsistent. The statute creates disabilities in areas where such disabilities 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 because of his record, without drawing a rational connection between the licensing standard and the crime committed? Without any further explanation 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. At the same time, the area of employment exemplifies how inconsistent the civil death laws can be. Why, for example, should a man in one field be prevented from receiving his license because of his record when a man in another field is not 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, reasonable bill guaranteeing an inmate "all of his rights, political, personal, civil, and otherwise."[263] 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"[264] and "rights retained".[265] The first section, rights lost, considers the right to vote and hold public office. Under the civil death concept that is presently in effect, both of these rights are also lost. But 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."[266] Under the new law the restoration will be automatic upon receipt of parole. Although the overall effect of the new law has created little change in the two areas affected, the emphasis has changed. Under the old law the civil right is taken from the individual indefinitely and is restored at the discretion of the Board of Pardons. It requires the individual to ask for return of his rights. 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. Upon parole the civil rights will be automatically restored.

By specifically denoting that a person convicted of a crime "retains all his rights, political, personal, civil and other, "the legislature has clearly put the North Dakota Civil death statute to rest.[267] 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[268] and the right to hold public office[269] were disabilities before and 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.[270] 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.[271] The inmates have been able to contract for books, magazines and other items while in prison. Finally, 12-06-27 specifically entitles the imprisoned inmate to defend a lawsuit.[272] The above has reduced the specific rights included within the body of the new statute to two, the right to sue and the right to hold offices of private trust in accordance with the law. The right to sue is one of the single most important rights that has been discovered by this study and such a decision has support of the North Dakota Constitution.[273] The extent of the right to hold offices of private trust does little to enhance the individuals' civil rights.

There are further considerations which 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.[274] Specifically, he may regulate the conduct of the prisoners within the penitentiary and such regulation and prison management may constitutionally lead to the deterioration of some of a prisoner's political, personal or civil rights.[275] 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 non-felon. This is so because the statute 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,[276] that he cannot seek employment in a great number of licensed professions,[277] that he cannot depend on his public pension when he retires,[278] 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.[279] These areas do not exhaust the potentially frustrating statutes. But they must certainly raise the following question. Without any further considerations will the new legislation dealing with the civil disabilities of the convicted individual accomplish the establishment of political, personal and civil rights that the legislature intended?

VI. RECOMMENDATIONS

With the contents of this paper as a reference we submit the following recommendations:

1. After extensive study into the civil rights of prisoners this study concurs with the contents of sections 12.1-33-01 and 12.1-33-02. But this study 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. It is therefore recommended that the entire body of statutory law be updated to assure that the intention of the new legislation is not thwarted.[280]

2. Legislation should be considered to provide the establishment of a fiduciary or representative at the request of the prisoner, his spouse or creditors by order of the court to administer the real and personal property of the inmate while he is incarcerated.

3. The prisoners' general benefit fund should be funded by the state as a part of its general appropriation to the prison.

4. Interest payments should be made on the prisoner's savings accounts held by the prison authorities.

5. A fund should be established from the prison industry's profits to pay for work related accidents.

6. State Farm and Penitentiary prisoners should be allowed to receive a five dollar credit for labor to be used against any judgment and fine. This would bring state correctional prisoners into line with county prisoners who currently receive five dollars credit under N.D.C.C. 12-44-33.

VII. FOOTNOTES

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. But the new legislation will not become effective until July 1, 1975.

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 mai ,tain any action based on natural rights. He may be sued and in such case may defend."

3. Comment, Collateral Consequences of a Criminal Conviction, 23 Vand. L.Rev. 929, 950 (1970).

4. See, e.g., Illinois 38 § 1005-5-5 (1973).

5. R.C. §§ 7706-7708 (1895).

6. N.D. Cent. Code § 12-0627: The reviser'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."

7. Spencer, The Revival of Natural Law, 80 Cent.L.J. 346 (1915).

8. 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 and protecting property and reputation, and of pursuing their own happiness.

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

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

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

Sec. 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.

Sec. 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.

Sec. 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.

9. 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).

10. Hannah v. Larche, 363 U.S. 420 (1960). See, 16A C.J.S. Constitutional Law § 567 (1956).

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

12. Rochin v. People of California, 342 U.S. 165 (1952).

13. Zemel v. Rusk, 381 U.S. 1 (1964). See 16A C.J.S. Constitutional Law § 567 (1956).

14. Goldberg v. Kelly, 397 U.S. 254 (1970).

15. Comment, supra note 3 at 1199.

16. Hawker v. New York, 170 U.S. 189 (1889).

17. Id. at 191.

18. Heiner v. Donnan, 285 U.S. 312 (1932).

19. Comment, supra note 3 at 1207. See Comment, Employment of Former Criminals, 55 Cornell L.Rev. 306 (1970).

20. Schware v. Board of Bar Examiners, 353 U.S. 232 (1957). See, Comment, Civil Disabilities of Felons, 53 Va.L.Rev. 403, 416 (1967).

21. Id. at 238,239.

22. Id. at 239.

23. Hallinan v. Committee of Bar Examiners, 65 Cal.2d 447, 421 P.2d 76, 55 Cal. Rptr. 228 (1966).

24. Emphasis added.

25. Hallinan v. Committee of Bar Examiners, 65 Cal.2d 447, 421 P.2d 76, 55 Cal.Rptr. 228 (1966) at 86.

26. Comment, supra note 3 at 1203.

27. Deveau v. Braistad, 263 U.S. 144 (1960).

28. Id. at 145,146.

29. Id. at 157,158.

30. Id. at 158.

31. See, e.g., Upshaw v. McNamara, 435 F.2d 1188 (1st Cir. 1970); Muhammad Ali v. Division of State Athletic Com'n., N.Y., 316 F.Supp. 1246 (S.D. N.Y. 1970).

32. McGowan v. Maryland, 366 U.S. 420, 425 (1961).

33. Comment, Equal Protection, 82 Harv. L.Rev. 1065, 1088 (1969).

34. Id. at 1127,1128.

35. See, e.g., Shapiro v. Thompson, 344 U.S. 618 (1968).

36. See, Deveau v. Braistad, 263 U.S. 144 (1960).

37. Mones v. Austin, 318 F.Supp. 653 (S.D.Fla. 1970).

38. Upshaw v. McNamara, 435 F.2d 1188 (1st Cir. 1970).

39. Id. at 1190.

40. Id.

41. Green v. Board of Elections of the City of New York, 380 F.2d 445 (2nd Cir. 1967). 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, E. & W. DuFresne, The Case for Allowing "Convicted Majiosi to Vote for Judges":Beyond Green v. Board of Elections of New York City, 19 DePaul L.Rev. 112 (1969).

42. Id. at 451.

43. Id.

44. Otsaka v. Hite, 64 Cal.2d 596, 51 Cal.Rptr. 284, 414 P.2d 412 (1966).

45. Green v. Board of Elections of the City of New York, 380 F.2d 445,452 N.8 (2nd Cir. 1967).

46. Muhammad Ali v. Division of State Athletic Com'n. N.Y., 316 F.Supp. 1246 (S.D.N.Y. 1970).

47. See, Green v. Board of Elections of the City of New York, 380 F.2d 445 (2d. Cir. 1967).

48. Trop v. Dulles, 356 U.S. 86,97 (1958). See, Gough, The Expingements of Adjudication Records of Juvenile and Adult Offenders:A Problem of Status, 1966 Wash. U.L.Q. 147 (1966).

49. Robinson v. California, 370 U.S. 660 (1962).

50. State v. O'Brien, 391 U.S. 367 (1968).

51. Id. at 384 N.30.

52. Deveau v. Braistod, 263 U.S. 144 (1960).

53. Id. at 160.

54. See Comment, Beyond the Ken of the Courts:Critique of Judicial Refusal To Review The Complaints of Convicts, 72 Yale L.Rev. 506 (1963).

55. Banning v. Looney, 213 F.2d 771 (10th Cir. 1954) cert.denied, 348 U.S. 859 (1954).

56. Id.

57. See Goldfarb & Singer, Redressing Prisoners' Grievances, 39 Geo.Wash.L. Rev. 175,183 (1970).

58. Ex parte Hull, 312 U.S. 546 (1941).

59. Id. at 549.

60. White v. Ragen, 324 U.S. 760,762 N.1 (1944).

61. Goldfarb & Singer, supra note 57 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.

62. Stiltner v. Rhay, 322 F.2d 314 (9th Cir. 1963).

63. Id. at 316.

64. Goldfarb & Singer, supra note 57 at 232.

65. Id.

66. Tabor v. Hardwick, 224 F.2d 526 (5th Cir. 1955).

67. Id. at 529.

68. Id.

69. Seybold v. Milwaukee County Sheriff, 276 F.Supp. 484 (E.D.Wis. 1967).

70. Rubin, The Law of Criminal Correction 615 (1963).

71. Goldfarb & Singer, supra note 4 at 232.

72. Rubin, supra note 70 at 615.

73. Goldfarb & Singer, supra note 57 at 232.

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

75. Goldfarb & Singer, supra note 57 at 267. See Reitz, Federal Habeas Corpus and State Prisoners, 32 F.R.D. 88 (1963).

76. Comment, supra note 54 at 510.

77. Goldfarb & Singer, supra note 57 at 268.

78. Coffin v. Richard, 143 F.2d 443 (6th Cir. 1944).

79. Id. at 445.

80. Peyton v. Rowe, 391 U.S. 54 (1968); overruling McNally v.Hill, 293 U.S. 131 (1934).

81. Johnson v. Avery, 393 U.S. 483 (1969) aff'g. 252 F.Supp. 783 (M.D. Tenn. 1966).

82. Comment, supra note 54 at 510.

83. Id.

84. Fay v. Noia, 372 U.S. 391 (1943).

85. Id. at 438.

86. Goldfarb & Singer, supra note 57 at 273.

87. Id. at 274.

88. 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).

89. Young v. Ragen, 337 U.S. 235,238-9 (1949).

90. Johnson v. Avery, 393 U.S. 438 (1969).

91. Houghton v. Shafer, 392 U.S. 639 (1968).

92. 42 U.S.C. § 1983 (1964).

93. Goldfarb & Singer, supra note 57 at 253.

94. Id.

95. Monroe v. Pape, 365 U.S. 167 (1961).

96. Id. at 183.

97. Cooper v. Pate, 378 U.S. 546 (1964).

98. Goldfarb & Singer, supra note 57 at 254; see, Jackson v. Bishop 404 F.2d 571 (8th Cir. 1968).

99. Goldfarb & Singer, supra note 57 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).

100. United States v. Classic, 313 U.S. 299, 326 (1941).

101. United States v. Price, 383 U.S. 787 (1966).

102. Goldfarb & Singer, supra note 57 at 256.

103. Sostre v. McGinnis, 442 F.2d 178 (2d Cir. 1971), cert. denied sub non. Oswald v. Sostre, 405 U.S. 978 (1972).

104. Id. at 205.

105. Goldfarb & Singer, supra note 57 at 258.

106. Id. at 260.

107. Houghton v. Shafer, 392 U.S. 639 (1968).

108. Wright v. McMann, 387 F.2d 519 (2nd Cir. 1967).

109. Miller v. Purtell, 289 F.Supp. 733 (E.D.Wis. 1968).

110. 28 U.S.C. § 2201 (1964).

111. Goldfarb & Singer, supra note 57 at 262-3.

112. Holt v. Saruer, 309 F.Supp. 362 (E.D.Ark. 1970).

113. Id. at 382.

114. See, Holt v. Saruer, 309 F.Supp. 362 (E.D.Ark. 1970).

115. Goldfarb & Singer, supra note 57 at 264.

116. Id. at 244.

117. Id.

118. Supra note 129.

119. Supra note 130-135 and accompanying text.

120. Goldfarb & Singer, supra note 57 at 246.

121. Id. at 246,247.

122. Id. at 275.

123. State v. Burton, 246 Ark. 288, 437 S.W.2d 795 (1969).

124. 18 U.S.C. § 242 (1968) provides that:

> 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.

125. Goldfarb & Singer, supra note 57 at 276-7.

126. 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, 716-3 which is the latest date indexed by the NCCUSL two states (New Hampshire and Hawaii) have passed the Uniform Act on Status of Convicted

126. Continued

Persons. The two states are New Hampshire and Hawaii.

127. Supra note 1.

128. Miller v. Turner, 64 N.D. 463,467; 253 N.W. 437,439 (1934).

129. 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 ceases.

130. Supra note 2.

131. Hager v. Homath, 68 N.D. 84, 91,; 276 N.W. 668, 672 (1937).

132. See, e.g., Application of McNally, 144 Cal.Ap.2d 531, 301 P.2d 385 (1 (1956). In Re Baywell, 26 Cal.Ap.2d 418,420, 79 P.2d 395 (1938).

133. See, note, Meeting the Challenge of Argersinger:The Public Defender System in North Dakota, 49 N.D.Law Rev. 699 (Spr. 1973).

134. In re Gainfort, 14 F.Supp. 788 (1936).

135. N.D.Cent.Code ch. 29-32 (Supp. 1971).

136. N.D.Const. § 127; N.D.Cent.Code 16-01-04 (1971).

137. State ex. rel. Olson v. Langer, 65 N.D. 68, 256 N.W. 377 (1934).

138. Salisbury v. Vogel, 65 N.D. 137, 256 N.W. 404 (1934).

139. Supra note 136.

140. State ex.rel. Olson v. Langer, 65 N.D. 68, 256 N.W. 377 (1934).

141. N.D.Cent.Code 12-11-04 (1960).

142. Ill.Rev.Stat. C.46, §§ 19-1 (1961): 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 whatever; (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.

143. McDonald v. Board of Election Commissioners of Chicago, 394 U.S. 802 (1969).

144. 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.

144. Continued

The question remains whether or not provisions are made available by our voting officials, where the absentee ballot is not made available.

145. Wesberry v. Sanders, 376 U.S. 1,17 (1964).

146. Reynolds v. Sims, 377 U.S. 533, 562 (1964).

147. State ex.rel. Olson v. Langer, 65 N.D. 68, 256 N.W. 377 (1934).

148. N.D. Const. § 127; N.D. Cent. Code 44-01-01 (1960); See generally supra notes 136-147 and accompanying text.

149. A public office in its broadest sense has been outlined by the court in Pope v. Commissioner of Internal Revenue, 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.

150. N.D. Cent. Code 44-02-01 (1960).

151. State v. Vogel, 65 N.D. 137,143, 256 N.W. 404,407 (1934).

152. Infra, notes 235-237 and accompanying text.

153. N.D. Cent. Code § 9-02-01 (1959).

154. Miller v. Turner, 64 N.D. 463, 467, 253 N.W. 437, 439 (1934).

155. Supra, note 2; See generally, supra notes 127-131 and accompanying text.

156. N.D. Cent. Code 56-02-01 (1960).

157. N.D. Cent. Code 56-01-03 (1960).

158. Storman v. Weiss, 65 N.W.2d 475, 505 (N.D. 1954).

159. See, C. McCormick, Evidence § 43 at 84 (2d Ed. 1972).

160. N.D. Cent. Code 31-01-08 (1960).

161. N.D. Cent. Code 31-03-16 (1960): Although this statute provides

161. Continued

for actual court appearances, the testimony is taken at the prison and presented in the form of a deposition to the court except in special circumstances.

162. 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).

163. State v. Moe, 151 N.W.2d 310 (N.D. 1967); See also State v. Kent, 5 N.D. 516, 67 N.W. 1052, State v. Rozum, 8 N.D. 548, 80 N.W. 477 (1899).

164. State v. McCray, 99 N.W.2d 321, 325 (N.D. 1959).

165. State v. Holte, 87 N.W.2d 47 (N.D. 1957).

166. State v. Keillor, 50 N.D. 728,734, 197 N.W. 859, 861 (1924).

167. N.D. Cent. Code 27-09.1-08 (Supp. 1971).

168. Until 1971 when the former disqualification statute was repealed, the right to serve as a juror was not restored. (27-09-02 repealed 1971).

169. N.D. Cent. Code 30-11-01(3) (1960).

170. N.D. Cent. Code 59-02-20 (5) (1960).

171. N.D. Cent. Code 14-05-03(6) (1971).

172. See supra, note 155.

173. N.D. Cent. Code 14-05-22 (1971).

174. Kucera v. Kucera, 117 N.W.2d 810 (N.D. 1962).

175. See supra note 173.

176. N.D. Cent. Code 14-15-19 (1971) and 27-20-44 (1960).

177. N.D. Cent. Code § 12-44-33 (1971).

178. See, N.D. Const. § 11,20.

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

179. U.S. Const. amend. XIV § 1.

All persons born or naturalized in the United States, and

179. Continued

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 of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

180. Comment, supra note 33 at 1076.

181 Id. at 1077.

182. Id.

183. State v. Gamble Skogmo, Inc., 144 N.W.2d 749,758 (1966).

184. Id.

185. Comment, supra note 33 at 1082.

186. Id. at 1084.

187. Id. See Rinaldi v. Yeager, 384 U.S. 305 (1966).

188. Comment, supra note 33 at 1084.

189. Id.

190. 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.

191. Comment, supra note 33 at 1085.

192. Id.

193. Id.

194. N.D. Cent. Code § 12-48-16 (1960).

Disposition of earnings of inmate with dependents.
The gross earning of a prisoner having dependent relatives shall be distributed monthly as follows:
1. Fifty per cent thereof shall be mailed to his dependent relatives upon request;
2. Five per cent thereof shall be deposited to the credit of the prisoners' general benefit fund;
3. Five per cent thereof shall be placed to the credit of the prisoner's personal account; and
4. Forty per cent thereof shall be deposited to the credit of the prisoner's temporary aid account until he has accumulated the sum of fifty dollars to his credit, or

194. Continued

4. Continued
such portion thereof as he has earned at the expiration of his sentence, which sum shall be paid to him in full upon his final discharge.

195. N.D. Cent. Code § 12-48-17 (1960).

Disposition of earnings of inmate with dependents when more than fifty dollars in temporary aid account.
The gross earnings of a prisoner having a relative dependent upon him for support, after he has accumulated the sum of fifty dollars to his credit in the temporary aid account, shall be distributed monthly as follows:
1. Seventy-five per cent thereof shall be mailed to his dependent relatives upon request;
2. Ten per cent thereof shall be deposited to the credit of the prisoner's general benefit fund; and
3. Fifteen per cent thereof shall be placed to the credit of the prisoner's personal account.

196. N.D. Cent. Code § 12-48-18 (1960).

Disposition of earnings of inmate who has no dependent relatives.
The gross earnings of a prisoner not having relatives dependent upon him for support shall be distributed as follows:
1. Five per cent thereof shall be placed to the credit of the prisoner's personal account;
2. Five per cent thereof shall be placed to the credit of the prisoners' general benefit fund; and
3. Ninety per cent thereof shall be placed to the credit of the prisoner's temporary aid account until he has accumulated the sum of fifty dollars to his credit, or such portion thereof as he shall have earned at the expiration of his sentence, and such sum shall be paid to him in full upon his final discharge.

197. N.D. Cent. Code § 12-48-19 (1960).

Disposition of earnings of inmate who has no dependent relatives when more than fifty dollars in temporary aid account.
The gross earnings of a prisoner having no relatives dependent upon him for support, after fifty dollars has been accumulated to his credit in the temporary aid account, shall be distributed as follows:
1. Seventy-five per cent thereof shall be placed to the credit of the prisoner's personal account.
2. Twenty-five per cent thereof shall be placed to the credit of the prisoners' general benefit fund.

198. N.D. Cent. Code § 12-48-14 (1973).

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, ...

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

200. 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.

201. Statutory law in California allows an inmate the option of investing his money in interest bearing accounts or certain limited securities.

202. Comment, supra note 3 at 1139.

203. Id.

204. 5 U.S.C. §§ 751-803 (1964).

205. Comment, supra note 3 at 1139.

206. Id.

207. United States v. Demke, 385 U.S. 149 (1966).

208. Comment, supra note 3 at 1140.

209. Id.

210. Id.

211. Id. at 1141.

212. Id.

213. See, Watson v. Industrial Com'n., 100 Ariz. 327, 414 P.2d 144 (1966).

214. Comment, supra note 3 at 1141.

215. Id.

216. Id.

217. See, California Highway Com'n. v. Industrial Accident Com'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).

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

219. 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.

220. Supra note 2 (12-06-27): The statute states "any person shall be capable of making and acknowledging a sale or conveyance of his property..."

221. N.D. Cent. Code 56-02-01 (1960).

222. N.D. Cent. Code 56-04-23 (1960).

223. N.D. Cent. Code 56-01-04 (1960).

224. N.D. Cent. Code 14-07-12 (1971).

225. Although North Dakota Century Code 47-07-12 mentioned above 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 over see 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 writer 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 could possibly be enhanced. See e.g., Hawaii para 355-34; (1955) Maine tit 18, para 3601 (1959); New York ch 14 para 350 (1929).

226. Id.

227. 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.

228. N.D. Cent. Code § 60-01-02 (1960).

229. For general discussion on the Principal-agent relationship, see I.A. Scott, Trusts § 8 (3d ed. 1967).

230. Supra note 155.

231. Supra note 229.

232. N.D. Cent. Code § 40-46-16 (1960).

233. N.D. Cent. Code § 40-45-15 (1960).

234. N.D. Cent. Code § 40-49-21 (1960).

235. N.D. Cent. Code § 12-55-24 (1960).

236. N.D. Cent. Code § 12-55-01 (1960).

237. Supra note 235.

238. Supra note 3 at 1001.

239. Id.

240. Lykke, Attitude of Bonding Companies Toward Probationers and Parolees 21 Fed. Prob. 36 (1951).

241. N.D. Cent Code § 43-01-16(1) (1960).

242. N.D. Cent. Code § 43-02-12(1) (1960).

243. N.D. Cent. Code 43-04-40(1) (1960).

244. N.D. Cent. Code § 43-17-31(3) (1960).

245. N.D. Cent. Code § 43-18-18(1) (1960).

246. N.D. Cent. Code § 43-25-10(2) (1960).

247. N.D. Cent. Code § 43-28-18(3) (1960).

248. N.D. Cent. Code § 26-17-01.12 (1970).

249. N.D. Cent. Code § 5-05-03(2) (1959).

250. N.D. Cent. Code § 43-05-16(5) (1960).

251. N.D. Cent. Code § 50-12-10(4) (1960).

252. N.D. Cent. Code § 50-11-07(4) (1960).

253. N.D. Cent. Code § 43-26-11(3) (1960).

254. N.D. Cent. Code § 43-03-20(1) (1960).

255. N.D. Cent. Code § 43-23-11(f)(1960).

256. N.D. Cent. Code § 27-14-02 (1943).

257. N.D. Cent. Code § 43-02-10 (1960).

258. N.D. Cent. Code § 43-04-23 (1960).

259. N.D. Cent. Code § 43-05-11(2) (1960).

260. N.D. Cent. Code § 43-10-11(1) (1960).

261. N.D. Cent. Code § 43-15-15(2) (1960).

262. N.D. Cent. Code § 43-06-15(1) (1960).

263. N.D. Cent. Code § 12.1-33-02 (1973).

264. N.D. Cent. Code § 12.1-33-01 (1973).

265. Supra note 263.

266. Supra note 235.

267. Supra note 2.

268. Supra note 148.

269 Supra notes 148-152 and accompanying text.

270. Supra note 2.

271. Supra notes 153-155 and accompanying text.

272. Supra note 2; North Dakota Civil Death statute specifically states, "He may be sued and in such case he may defend."

273. See, Supra notes 54-126 and accompanying text.

274. N.D. Cent. Code § 12-47-12(3) (1960).

275. 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 justified by the considerations underlying our penal system."

276. Supra note 169.

277. Supra notes 238-262.

278. Supra notes 232-234.

279. Supra notes 159-166.

280. The applicable statutes usually deal with such keywords as "convicted of felony," "imprisoned individual," "criminal record."

END