Domestic Relations Problems of California Prisoners

I. INTRODUCTION

Family relationships are likely to exert an important impact on a prisoner's success or failure in readjusting to society after release from prison. Recent studies have consistently found a strong positive correlation between the maintenance of strong family ties and parole success.[1] A person whose marriage survives his imprisonment is a less likely recidivist than his counterpart who confronts the post-prison world alone.[2] The emotional and moral support provided by a prisoner's relatives contribute to his incentive to reintegrate into an otherwise hostile society. Their material aid provides a certain amount of security and permits some patience in exploring new opportunities. Their social contacts enhance employment prospects. The prisoner who has received positive support from his family is likely to emerge from prison less alienated and with more direction than the prisoner whose family ties have been severed. In light of these findings, it seems that any prison system that is committed to the eventual social reintegration of its inmates should be structured to give each prisoner at least the opportunity to preserve his family relationships when he wishes to do so. This article will summarize how the law of California affects the prisoner as spouse and parent, and will analyze the law in terms of this standard.

II. THE SOURCES OF THE LAW: STATUTORY AND CONSTITUTIONAL

A. STATUTORY SOURCES

Very few California statutes explicitly apply to the domestic relationships of persons convicted of crimes. There are three major reasons for the scarcity of specific statutory laws: (1) the civil law often makes no formal distinction between prisoners and others, as

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[1]HOLT and MILLER, EXPLORATIONS IN INMATE-FAMILY RELATIONSHIPS, Research Division, Department of Corrections, Calif. (1972), p. 61; GLASER, EFFECTIVENESS OF A PRISON AND PAROLE SYSTEM,(1964) p. 379; OHLIN, THE STABILITY AND VALIDITY OF PAROLE EXPERIENCE TABLES (1954).
[2]GLASER, *Id.*, p. 379.

in the grounds required for divorce;[3] (2) in the case of family relationships, as in other areas involving the legal rights of prisoners, the legislature has simply delegated quasi-legislative power to the California Adult Authority, whose regulations and resolutions accordingly become the source of a prisoner's (or parolee's) domestic rights and disabilities; and (3) the forces generated by the prison system itself may influence the inmate's personal relationships so thoroughly as to render formal legislation irrelevant or redundant.[4] One major exception to the general legislative reluctance to alter specific family rights of prisoners is Civil Code § 232(d), which provides for the termination of parental rights of persons convicted of certain felonies. This statute will be discussed in detail in Part IV, *infra.*

An analytical starting point for the study of prisoners' domestic rights is the sweeping "civil death" pronouncement of the California legislature.[5] This statute purports to suspend "all of the civil rights" of a person sentenced to prison. The only express exceptions involve the rights to inherit property, to correspond confidentially with State Bar members or office holders, to own self-produced written materials, and to receive certain reading materials.[6] The legislation vests in the Adult Authority the unrestricted discretionary power to restore to any prisoner "such civil rights as the authority may deem proper."[7] The Adult Authority has promulgated resolutions to restore certain civil rights to all prisoners on a blanket basis.[8] Among those rights fully restored, for example, is the right of a prisoner to consent to his minor child's adoption, marriage, or military enlistment.[9] But other rights, such as the right of a prisoner to initiate an action for divorce, are restored by the Authority only after special request and on a case-by-case basis. Thus, because they are sometimes deliberately undetermined, a prisoner's rights are obscure in some areas.

B. CONSTITUTIONAL PARAMETERS

Despite the drastic deprivations of civil rights purportedly imposed upon prisoners by the legislature, the courts have begun to recognize that imprisonment does not deprive a person of all his rights under the United States Constitution. Until recently, the judicial system maintained a "hands-off" policy of deference to state penal administrators in matters relating to the rights of prisoners.[10] The

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[3]CAL. CIV. CODE § 4506 (West 1970).
[4]This third factor will be discussed in Part V, *infra.*
[5]CAL. PEN. CODE § 2600 (West 1970).
[6]*Id.*
[7]*Id.*
[8]*See* RESOLUTION OF THE ADULT AUTHORITY NUMBER 199 (July 7, 1969).
[9]*Id.* I.G., p. 5.
[10]*See* Article, *The California Adult Authority—Administrative Sentencing and the*

general reasoning advanced in support of this policy was that "lawful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations underlying our penal system."[11] While this notion persists, its broad sweep has been modulated by the oft-quoted ideal that "[a] prisoner retains all the rights of an ordinary citizen except those expressly, or by necessary implication, taken from him by law." [12] The constitutional guide in the judicial transition from the first to the second of these two approaches has been the recognition that a prisoner is a "person" within the meaning of the Fourteenth Amendment.[13] It can now properly be said that "it is well established that prisoners do not lose all their constitutional rights and that the Due Process and Equal Protection Clauses of the Fourteenth Amendment follow them into prison . . . ."[14] Not yet well established, however, is the extent to which courts are willing to invoke the Constitution in protection of the rights of prisoners, at the expense of the previously unlimited prerogatives of the other branches of government.[15] Whether recent constitutional history should be applied to prisoners will be discussed *infra* in the context of marital and parental rights.

III. THE MARITAL RELATIONSHIP

A. THE RIGHT TO MARRY

The prisoner's ability to marry has been severely restricted in California. The legislature has categorically withdrawn the prisoner's legal right to enter into contracts,[16] but the Adult Authority retains the power to restore it at its discretion. The authors of one study have written: "Marriage is not a right of the prisoner. It is hedged

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Parole Decision as a Problem in Administrative Discretion, 5 U.C.D. L. REV. 360 (1972).

[11] Price v. Johnston, 334 U.S. 266, 285 (1948).

[12] Coffin v. Reichard, 143 F. 2d 443, 445 (6th Cir. 1944), *cert. denied*, 325 U.S. 887 (1945).

[13] *See* Justice Peters' opinion in the unanimous decision of the California Supreme Court in *In re* Jones, 57 Cal. 2d 860, 372 P.2d 310, 22 Cal. Rptr. 478 (1962), and Brenneman v. Madigan, 343 F. Supp. 128 (N.D. Cal. 1972).

[14] Washington v. Lee, 263 F. Supp. 327, 331 (M.D. Ala., N.D. 1966) *aff'd per curiam*, 390 U.S. 333 (1968). *See also* Johnson v. Avery, 393 U.S. 483, 486 (1969); Sostre v. Rockefeller, 312 F. Supp. 875 (S.D. N.Y. 1970); Carothers v. Follette, 314 F. Supp. 1014 (S.D. N.Y. 1970). Constitutional rights of prisoners are discussed in Barkin, *The Emergence of Correctional Law and the Awareness of the Rights of the Convicted*, 45 NEB. L. REV. 669 (1966); Turner, *Establishing the Rule of Law in Prisons: A Manual for Prisoners' Rights Litigation*, 23 STAN. L. REV. 473 (1971); Article, *Due Process in California Prison Disciplinary Hearings*, 5 U.C.D. L. REV. 384 (1972).

[15] *See* Tobriner, "Due Process Behind Prison Walls," 213 *The Nation* 367 (1971).

[16] "All persons are capable of contracting, except . . . persons deprived of civil rights." CAL. CIV. CODE § 1556 (West 1970).

about by investigation and formal approvals."[17] Although the authors were not referring specifically to California law, their statement has been fully applicable here. Prisoners must request special permission if they wish to marry; normally, permission is granted only where the object is to legalize a pre-existing "common law" conjugal relationship.[18] When approved, marriage ceremonies have been performed in prison chapel.[19] It is unclear whether California law would permit one alternative method, marriage outside of the prison by proxy.[20]

If a prisoner has been paroled and wants to marry, he must apply to the Adult Authority for permission to do so. Such applications have normally been approved.[21] Once released from parole, a convicted person is free to marry as he pleases, except that one California appellate court has held that concealment of one's criminal past from one's spouse may be such grievous fraud as to render the marriage void.[22]

Traditionally, there was normally only one reason why a prisoner would wish to marry. As the above-mentioned study stated, "a prison marriage rarely occurs to create a bond between a man and a woman; its usual purpose is a moral one to legitimize a child."[23] In California, a second specific incentive has recently been created. Since participation in conjugal visiting programs has been limited to legally married prisoners and their wives, some prisoners have sought to qualify by requesting permission to marry.[24] Thus, having taken a position restricting the right to marry, the administrators of the prison system have nevertheless enacted a regulation which inevitably has created stress on that position. Perhaps, instead of giving special recognition to prisoners having common law conjugal relationships solely for purposes of granting permission to marry, it would have been more consistent and straightforward simply to grant to those prisoners the privilege of conjugal visitation.[25]

A constitutional argument on behalf of a prisoner's *right* to marry

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[17]Zemans & Cavan, *Marital Relationships of Prisoners*, 49 J. CRIM. L.C. & P.S. 50, 54 (1959).
[18]Interview with Nelson Kempsky, Deputy Director of Dept. of Corrections, in Sacramento, Jan. 2, 1973 (hereinafter cited as Kempsky interview).
[19]*Id.* The first such ceremony at Folsom Prison occurred in December, 1972.
[20]It has not been determined whether CAL. CIV. CODE § 4206 (West 1970) would permit proxy marriages. *See* Comment, *Persons — Marriage — Validity of Proxy Marriages*, 25 S. CAL. L. REV. 181 (1951).
[21]*See* RESOLUTION OF THE ADULT AUTHORITY NUMBER 199 (July 7, 1969), III, 4.
[22]Douglass v. Douglass, 148 Cal. App. 2d 867, 307 P.2d 674 (1957).
[23]Zemans & Cavan, *supra* note 17, p. 54.
[24]Kempsky interview, *supra* note 18.
[25]In 1972 Assemblyman Karabian unsuccessfully introduced a bill to extend conjugal visiting privileges to persons other than spouses. A.B. 912.

should stand some chance of success. The courts have recognized that prisoners are protected by the Equal Protection Clause of the Fourteenth Amendment.[26] While its analysis has been expressed in various ways, the Supreme Court has tended to apply the Equal Protection Clause according to two distinct standards. The rigor of the standard has depended upon the nature of the interest limited by a state's classification. If a classification impinges on the "fundamental" rights held by a group of citizens, it is constitutionally invalid unless shown to be necessary to promote a "compelling" governmental interest.[27] If, on the other hand, the abridged right is not deemed fundamental, the state is permitted a much broader discretion, limited only by the requirement that the classification bear some rational relationship to the articulated state objective. [28] The Supreme Court has specifically declared that the freedom to marry is a fundamental right.[29] There appears to be no *compelling* interest of the State of California which could justify the denial of this right to prisoners.[30] As one federal court has said, "Basic constitutional rights cannot be sacrificed, even in the case of prisoners, in the interests of administrative efficiency."[31] It would follow that neither Civil Code §1556[32] nor Penal Code §2600[33] may be construed to remove from prisoners the right to marry, and that any Adult Authority regulations purporting to restrict the right to marry are invalid.

B. MARRIAGE DISSOLUTION

Marriage dissolution in California has generally been easily available since the Family Law Act of 1969 established "no-fault" divorce. Under the new grounds for divorce,[34] it is almost impossible

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[26] *See supra* note 14 and accompanying text.
[27] Shapiro v. Thompson, 394 U.S. 618 (1969).
[28] U.S. v. Kras, ___U.S.___, 93 S. Ct. 631 (1973).
[29] Loving v. Virginia, 388 U.S. 1 (1967).
[30] Very rarely has the United States Supreme Court found a state interest sufficiently compelling to support the abridgment of a fundamental right. But recently, in Roe v. Wade, ___U.S.___, 93 S. Ct. 705 (1973), the Court held that although a state law restricting the right to abortion would impinge upon a woman's fundamental right of privacy, such an abridgment would be justified by the state's "compelling" interest (after the first trimester) "in preserving and protecting the health of the pregnant woman," and (subsequent to viability) "in protecting the potentiality of human life." ___U.S. at ___, 93 S. Ct. at 731.
[31] Sostre v. Rockefeller, 312 F. Supp. 863, 873 (S.D. N.Y. 1970), *citing* United States *ex rel.* Marcial v. Fay, 247 F.2d 662, 669 (2d Cir. 1957), *cert. denied*, 355 U.S. 915 (1958); Burns v. Swenson, 288 F. Supp. 4 (W.D. Mo. 1968), *modified*, 300 F. Supp. 759 (W.D. Mo. 1969).
[32] *See supra* note 16 and accompanying text.
[33] *See supra* notes 5-7 and accompanying text.
[34] "Irreconcilable differences, which have caused the irremedial breakdown of the marriage." CAL. CIV. CODE §4506 (West 1970). The substitution of this gen-

to contest a dissolution petition successfully in court. As a result, the extrajudicial methods of opposing dissolution petitions have assumed increased relative importance. For example, the opportunity to speak to one's spouse personally through the process of the Conciliation Courts has proved to be a most effective means of resolving marital differences.[35] This alternative is denied the California prisoner. The courts have held that since a prisoner may be sued,[36] he has the right to defend[37] and to engage counsel for defense.[38] But these rights in the context of a marital dissolution proceeding may be useless to a prisoner who is denied personal physical access to the judicial or conciliation court process. Isolated from his spouse and from the forums of potential reconciliation, the prisoner is effectively denied the opportunity to preserve his marriage. Since the Corrections Department's own studies have concluded that recidivist tendencies are significantly curtailed by the survival of pre-existing marriages,[39] one might have expected it to permit prisoners to fully avail themselves of the legal channels of marital preservation. It has not done so. Personal access to the judicial and conciliation courts has been uniformly denied to California prisoners by the Adult Authority and the Department of Corrections, whose spokesmen have stressed the need for administrative efficiency[40] and the importance of the distinction between civil and criminal proceedings in the determination of a prisoner's procedural rights.[41] But how is administrative efficiency served by a policy which gives less than full protection to a prisoner's marriage? Compared with the enormous costs of coping with the problems of recidivism, it would appear to be in the interest of long-range administrative efficiency to make the relatively small expenditures necessary to allow a prisoner to attend appropriate court sessions.

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eral language for the list of specific grounds has saved the California courts tortuous problems of interpretation which have plagued courts in some other states. *See e.g.*, Brady v. Brady, 98 N.J. Super. 600, 238 A.2d 201 (Ch. 1968) (imprisonment as willful desertion), noted in 23 RUTGERS L. REV. 389 (1969).

[35] Lecture by Mayer Elkin at UCD School of Law, October 4, 1973. In reference to the Conciliation Courts, see CAL. CIV. CODE § 1740 (West 1970).

[36] *In re* McNally, 144 Cal. App. 531, 301 P.2d 385 (1956); People v. Lawrence, 140 Cal. App. 2d 133, 295 P.2d 4 (1956).

[37] *Id.*

[38] Although prisoners are generally unable to contract, prisoners have been restored this right for purposes of signing "a contract to pay attorney's fees in an amount not to exceed $500.00." RESOLUTION OF THE ADULT AUTHORITY NUMBER 199 (July 7, 1969), I.E. 2.

[39] *See* HOLT AND MILLER, *supra* note 1.

[40] Kempsky interview, *supra* note 18.

[41] *Id.*, and interview with Charles Hull, Asst. to the Director of the Dept. of Corrections, by telephone, in Sacramento, April 17, 1973 (hereinafter cited as Hull interview). On the validity of the civil-criminal distinction, *see infra* notes 80-86 and accompanying text.

The California prisoner has generally been denied the right to initiate a proceeding to dissolve his own marriage. The courts have held that the right to initiate any civil suit is among those rights suspended during the period a felon is imprisoned.[42] Accordingly, the Adult Authority has exercised its discretion to regulate the right to file for divorce. While it has restored this right "absolutely" to parolees,[43] it has closely regulated it (and generally denied it) in the case of prisoners. The articulated reason for the more restrictive treatment of prisoners is the state's interest in fostering certain kinds of marital relationships of prisoners.[44] General standards for deciding which divorces will be permitted have not been formally stated.

The Equal Protection Clause might be invoked as a bar to the denial of a prisoner's right of personal appearance in the divorce courts. Since the Supreme Court has held that the right to marry is fundamental, it seems that the right to legally and meaningfully protect one's marriage should also be entitled to strong constitutional protection. Administrative efficiency would be a constitutionally sufficient justification for the present policy only if the abridged right were not deemed fundamental. But since the administrative efficiency argument in this situation does not appear to be rationally based, the policy is probably vulnerable by either Equal Protection standard.

Recent constitutional history suggests the invalidity of the regulations restricting the prisoner's right to petition for divorce. In *Boddie v. Connecticut*[45] the Supreme Court held that because the state retains the exclusive power to define the marital relationship, its denial of court access to bona fide divorce petitioners would violate the Due Process Clause. Justice Harlan, for the majority, emphasized that the decision rested upon the Court's view of the fundamental nature of the marriage relationship.[46] If the right to file for divorce is fundamental, an Equal Protection argument would logically seem to follow. At present, California denies only prisoners the right to file for divorce. The state might arguably have a rational basis for preventing prisoners from dissolving their marriages, but one wonders whether its interest is sufficiently compelling to justify the infringement of this fundamental right.[47]

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[42] *In re* Robinson, 112 Cal. App. 2d 626, 246 P.2d 982 (1952).
[43] RESOLUTION OF THE ADULT AUTHORITY NUMBER 199 (July 7, 1969), II.A.
[44] Kempsky interview, *supra* note 18; Hull interview, *supra* note 41.
[45] 401 U.S. 371 (1971).
[46] This aspect of *Boddie* was recently emphasized in U.S. v. Kras, ___U.S.___, 93 S. Ct. 631 (1973).
[47] *See supra* note 30.

C. ANALYSIS OF MARITAL REGULATIONS

Current laws regulating the marital relationships of prisoners seem inconsistent. The right to marry is restricted solely to pre-existing common law marriages. The right to meaningfully contest a divorce petition does not exist. The right to file for divorce has also been withdrawn. These rules cannot be rationalized according to a policy of either promotion or derogation of the marriages of prisoners. There must be a more subtle rationalizing principle. It is suggested that there are two such principles. The first is society's implicit desire to punish a criminal for his wrongdoing by stripping him of one of the most basic trappings of human dignity: the ability to influence personal events intimately affecting one's life. The second reason, perhaps, is the notion that the most easily controlled prisoner is one who has been rendered docile by his own demonstrable impotence.

The regulatory structure that has emerged from these two closely related but distinct attitudes has, to a significant extent, deprived the prisoner of the power to control his marital relationship. Constitutional infirmaties aside, this structure should be discarded because it does not advance the primary appropriate goal of the state, the release from prison of persons capable of successfully reintegrating with their former communities. A prisoner is not socialized when he is prevented from accepting and exercising full responsibility for his personal actions and relationships. On the contrary, enforced personal and social impotence contributes to a psychology of frustration which perpetuates a pattern of crime that imprisonment was meant to deter. The only properly defensible policy is one which gives the prisoner a maximum of control over his personal relationships. For these reasons, the California legislature or administration should act to repeal all restrictions on the marital rights of prisoners, before the judiciary, in accordance with the exhortations of the federal constitution and principles of enlightened penology, acts for them.

IV. PARENTAL RIGHTS

A. INTRODUCTION

During a person's imprisonment, his children may be placed in the sole custody of his spouse[48] or the Juvenile Court.[49] In addition, the appropriate county Department of Social Welfare may initiate a Civil Code § 232 proceeding to terminate the prisoner's parental rights,[50] so that his children may be placed for adoption without his

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[48]CAL. CIV. CODE § 197 (West 1954).
[49]CAL. WELF. & INST. CODE § 600 (West 1970).
[50]CAL. CIV. CODE § 232 (West Supp. 1972).

consent.[51]

Civil Code § 232 permits a court to declare a child "free from the custody or control of either or both parents" if the parent or parents have abandoned the child,[52] or have been cruel, neglectful, habitually intemperate, morally depraved, or declared mentally deficient. In addition to these provisions subsection (d) embraces minors

> whose parent or parents are deprived of their civil rights due to the conviction of a felony, if the felony of which such parent or parents were convicted is of such nature as to prove the unfitness of such parent or parents to have the future custody and control of the child, or if any term of sentence of such parent or parents is of such length that the child will be deprived of a normal home for a period of years.

Many states have provided for the termination of the rights and responsibilities of neglectful parents,[53] but only California[54] and Michigan[55] make the parent's criminality an express ground for severing the parent-child relationship.[56] This California statutory provision appears to be this state's only specific statutory reference to the family relationships of convicted persons. Its substantive and procedural problems will be discussed in the following pages.

B. THE FIRST § 232(d) CRITERION: CONVICTION OF A FELONY

The first criterion of § 232(d) differs from the criteria listed in the other § 232 subsections not only because it specifically refers to convicted persons, but because it subtly tends to emphasize the past conduct of the parent rather than the present parent-child relationship. One indication of this quasi-penal emphasis is the absence of a provision for the lapse of time, a requirement for an action based on evidence of one of the other § 232 criteria. An abandonment is presumed only after six months without parental communication; termination of parental rights after proof of cruel treatment, neglect, habitual intemperance, or moral depravity may be declared only after the child has, for those reasons, been a dependent child of the

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[51] CAL. CIV. CODE § 224 (West Supp. 1972).

[52] Courts have defined abandonment to require the specific intention to permanently sever the parental relationship. Guardianship of Romine, 91 Cal. App. 2d 389, 205 P.2d 733 (1940); Guardianship of Kerns, 74 Cal. App. 2d 862, 159 P.2d 975 (1946). Thus imprisonment would not normally constitute abandonment.

[53] *See* Special Project, *The Collateral Consequences of a Criminal Conviction*, 23 VAND. L. REV. 929, 1074 (1970).

[54] CAL. CIV. CODE § 232(d) (West Supp. 1972).

[55] MICH. STAT. ANN. § 27.3178 (598.2) (Supp. 1970).

[56] One state, South Dakota, has deleted imprisonment as an express statutory ground for a finding of dependency or neglect. S.D. SESS. LAWS [1968] ch. 164, § 1, amending S.D. COMPILED LAWS ANN. 26-8-6 (1967) (codified at S.D. COMPILED LAWS ANN. 26-8-6 (Supp. 1969)).

juvenile court for at least one year. These minimum time provisions bespeak a policy which recognizes that parents should have an opportunity to show their present and future fitness, even after proof of past abuse of their parental responsibilities. Yet the first part of § 232(d) would permit the termination of parental rights immediately after the conviction, even if the parent was not sentenced to prison.[57] A parolee's parental rights might be terminated solely on the basis of the kind of felony he committed, without any resort to evidence of his present relationship with his children. The quasi-penal character of § 232(d) is further indicated by the fact that it cannot become operative until after a judgment of conviction. The other provisions of § 232 are based upon the quality of the parent-child relationship; subsection (d), on the other hand, is tied to the intricacies and formalities of the criminal judicial process.

The penal characteristics of § 232(d) complicate problems caused by the provision's inherent vagueness. Can conviction of a single crime "prove" a person's parental unfitness? If so, which crimes qualify? The legislature has delegated to the courts the task of defining the standard, but in the absence of a more substantial body of appellate case law, the statute remains ambiguous. This vagueness creates a potential obstacle to the fairness of the administration of criminal justice, especially at the plea-bargaining stage of the pre-trial proceedings. It is essential to fair plea-bargaining that the accused have "a full understanding of what the plea connotes and its consequences."[58] But a full understanding of the consequences is impossible when the § 232(d) impact of the conviction will be determined, if at all, only in a subsequent action. The dilemma inherent in this situation is suggested by the case of *In re Kapelis.*[59] Kapelis had been charged with five counts pertaining to "sexual perversion with a fifteen-year-old girl."[60] He accepted a deal and pleaded guilty to one count while the other counts were dismissed, and was thereupon sentenced to serve a prison term. In a subsequent proceeding to terminate his parental rights on the grounds of *abandonment*, the trial court granted the petition, despite Kapelis' contentions that he had "made every possible effort to communicate with and visit his children."[61] On appeal, the District Court of Appeals conceded that abandonment may not have been adequately proved, admitted the possibility of certain evidentiary errors, but nevertheless affirmed, relying solely on proof of the criminal conviction. Perhaps if Kapelis had known in advance the drastic and permanent consequences of his

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[57] The statute requires loss of civil rights, but not necessarily imprisonment.
[58] Boykin v. Alabama, 395 U.S. 238, 244 (1969).
[59] 147 Cal. App. 2d 801, 305 P.2d 968 (1957).
[60] In violation of CAL. PEN. CODE § 288a (West 1954).
[61] 147 Cal. App. at 802, 305 P.2d at 969.

plea of guilty, he would have been well advised to reject the District Attorney's "bargain." But such advance knowledge is difficult where the legislature and the courts have left unclear and unexplained the precise kinds of criminal convictions which may later serve as grounds for parental termination.

One prisoner-parent, years before the U.S. Supreme Court indicated guidelines controlling the plea-bargaining process, challenged the validity of the statute on the basis that it was too vague and uncertain to furnish a standard for guidance to courts administering it.[62] The District Court of Appeal rejected this argument, saying "in such a situation it is not possible to prescribe a rigidly specific formula .... [I] t probably is impossible, and certainly undesirable, to state or to try to state a fixed formula applicable to all cases." [63] Perhaps it is time for at least a limited reconsideration of the court's response. In light of the recent constitutional restraints on the plea-bargaining process, a parent who was not informed, prior to pleading guilty to a felony, that conviction could subject him to loss of parental rights, should not later have the conviction used against him for that purpose.

Regardless of the procedure determinative of the prior conviction, there is a more fundamental constitutional objection to § 232(d). The first criterion of this provision permits the state to terminate a parent's legal relationship with his child solely because of a conviction for a prior act. But a parent, even if a prisoner, should at least be allowed the opportunity to persuade the court that the *present* parent-child relationship has such strength that it should not be extinguished. A recent Supreme Court decision, a dependency case, suggests that parental rights may not be condemned on the basis of such presumptions as are inherent in § 232(d). *Stanley v. Illinois*[64] involved an Illinois statute which created a presumption that unmarried fathers are unsuitable parents, and denied them the right to raise their children without allowing them the opportunity to prove their fitness. The Court struck down the statute, saying, "as a matter of due process of law, Stanley was entitled to a hearing on his fitness as a parent before his children were taken from him . . . ."[65]

As in Illinois, California has created a statutory presumption that a group of parents is unfit. In effect, the California statute states that all persons convicted of and sentenced for certain crimes shall be *presumed* unfit parents, and their rights as parents may be terminated regardless of their prior or subsequent acts. It is possible, of

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[62] *In re* Melkonian, 152 Cal. App. 2d 250, 313 P.2d 52 (1957).
[63] 152 Cal. App. 2d at 251, 313 P.2d at 53.
[64] 405 U.S. 645 (1972).
[65] *Id.* at 649.

course, to attempt to distinguish the statute in *Stanley* from the California statute. In Illinois, a parent was presumed unfit because he was unmarried; in California a parent is presumed unfit because of his conviction of a crime. But in neither case is the parent given a hearing on the issue of whether he should be permitted to remain the legal parent of his children. Justice White's discussion of the Illinois statute is equally applicable to the California law:

> Procedure by presumption is always cheaper and easier than individualized determination. But when, as here, the procedure forecloses the determinative issues of competence and care, when it explicitly disdains present realities in deference to past formalities, it needlessly risks running roughshod over the important interests of both parent and child. It therefore cannot stand.[66]

The presumption created by the California legislature is probably unnecessary to accomplish the primary legislative purpose, the protection of the child. Very few single acts are so grave as to be "of such nature as to prove" a person's "unfitness" as a parent. Those crimes, such as incest or child molestation, which by themselves might prove parental unfitness would so inextricably involve the parent-child relationship that they would be capable of being subsumed by the criteria listed in the other paragraphs of § 232. If a judge is unable to find either abandonment, cruelty, neglect, moral depravity or habitual intemperance, how can he reasonably conclude that a parent is permanently unfit to have the custody and control of his children? Reference to the parental termination statutes of other states suggests that California could do better without any specific mention of prior crimes.[67]

C. THE SECOND CRITERION: "TERM OF SENTENCE . . . "

Other problems are presented by the second criterion of § 232(d), referring to a "term of sentence . . . of such length that the child will be deprived of a normal home for a period of years." It seems unrealistic to speak in terms of "normal homes" in such diverse society, but even more disturbing is the proposition that a judgment of abnormality, however reasonable, should be the basis for parental termination, rather than the stricter and more legitimate standard of approbrium, unfitness. A child's home is not necessarily rendered unfit by the temporary absence of one or both of his parents; other entirely satisfactory arrangements can be made during the parent's term of confinement, and some have been sanctioned by courts in

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[66] *Id.* at 656-57.

[67] *See, e.g.*, ORE. REV. STATS. 419-523, where the standard is more general, referring to "unfit[ness] by reason of conduct or condition seriously detrimental to the child . . . . "

other states.[68] Yet a plain reading of the California statute would permit parental termination even if the judge expressly finds, on the basis of the probation officer's report, that the parents have in the past properly exercised their parental responsibilities, and can be expected to do so again upon their release. Our society is neither characterized by nor dependent upon family tranquility to such an extent that temporary household disruptions, even if for a "period of years," should be the sole cause to require the permanent splitting of nuclear families. And insofar as family stability is a worthwhile goal of the state, the authorization of involuntary termination of the parental rights of fit parents is a questionable and probably counter-productive means to this end.

Not only is such an authorization unwise, but it is also, perhaps, constitutionally impermissible. Several Supreme Court decisions have emphasized the crucial importance of the parent-child relationship.[69] While the parent's right to raise his own children has not yet been specifically declared "fundamental," it is clear that for purposes of the Equal Protection Clause a "rational basis" for the state classification is insufficient to justify its abridgment.[70] The California statute, by applying the curious standard of "normality" to prisoners while requiring merely that all other parents not be unfit, deprives the prisoner of the Fourteenth Amendment's guarantee of equal protection under the laws.

But a standard of normality would probably be invalid, under the Due Process Clause, even if applied equally to all. "The private interest here, that of a man in the children he has sired and raised, undeniably warrants deference and, absent a powerful countervailing interest, protection."[71] But "[t]he state's interest in caring for Stanley's children is *de minimis* if Stanley is shown to be a fit father."[72] According to this reading of *Stanley*, the Due Process Clause prohibits California from terminating the rights of a fit parent

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[68] *See* Diernfield v. People, 137 Colo. 238, 323 P.2d 628 (1958), where a child was entrusted to the care of her grandmother while the mother served a sentence for her second forgery conviction.

[69] *E.g.*, Stanley v. Illinois, 405 U.S. 645 (1972), Meyer v. Nebraska, 262 U.S. 390 (1923), Skinner v. Oklahoma, 316 U.S. 535 (1942), Prince v. Massachusetts, 321 U.S. 158 (1944), May v. Anderson, 345 U.S. 528 (1953). *See* Article, *Plight of the Putative Father in California Child Custody Proceedings: A Problem of Equal Protection*, 6 U.C.D. L. REV. 1 (1973).

[70] Some of the recent cases in this area suggest that the Court may be searching for a more flexible approach to equal protection problems. *See, e.g.*, Stanley v. Illinois, 405 U.S. 645; Weber v. Aetna Casualty & Surety Co., 406 U.S. 164 (1972). In his dissent in *Weber*, Justice Rehnquist noted that the Court had apparently resolved the problem by use of a "hybrid standard," somewhere between the two extremes of the "fundamental- non-fundamental" approach. 406 U.S. at 181.

[71] Stanley v. Illinois, 405 U.S. at 651.

[72] *Id.* at 657-58.

solely because of his imprisonment for more than one year; the state should, in addition, at least be required to consider the quality of care provided for the child during the imprisoned parent's absence.

D. THE PRISONER-PARENT'S RIGHT OF PERSONAL APPEARANCE

In an ordinary child custody proceeding, the absence from the courtroom of one of the parents would subject that parent to a potentially decisive disadvantage. Where his adversary is the state, the absent parent's disadvantage is no less severe. In a hearing to determine a parent's right to the future custody and control of his children, the court is guided by very general standards, such as the "fitness" of the parent and the need "to serve and protect the interests and welfare of the child."[73] Accordingly, the parent's ability to personally impress the court with his parental qualifications may be an extraordinarily significant factor in the resolution of the case. Nevertheless, prisoners have been uniformly denied the right of personal appearance in hearings to terminate their parental rights.[74]

The Supreme Court has held that "the right of an individual to . . . establish a home and bring up children" is a "liberty" protected by the Due Process Clause of the Fourteenth Amendment.[75] "The fundamental requisite of due process of law is the opportunity to be heard."[76] In *Goldberg v. Kelly*,[77] the Court held that welfare benefits could not be terminated unless the recipient was given "an effective opportunity to defend by confronting any adverse witnesses and by presenting his own arguments and evidence orally." [78] *Stanley v. Illinois* suggests that the legal parent of one's children is entitled to equally strong procedural protection against mistakes of fact or judgment. As in *Goldberg*, the gravity of the individual interest at stake appears to outweigh considerably the normal administrative costs of providing for the presence of the interested party.

California courts have implicitly recognized that procedures for terminating the parental rights of a prisoner must comport with the requirements of due process.[79] But the courts,[80] the Department of

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[73] CAL. CIV. CODE § 238 (West Supp. 1972).
[74] Kempsky interview, *supra* note 18.
[75] Meyer v. Nebraska, 262 U.S. 390, 399 (1923).
[76] Grannis v. Ordean, 234 U.S. 385, 394 (1914).
[77] 397 U.S. 254 (1970).
[78] *Id.* at 268.
[79] Adoption of Hinman, 17 Cal. App. 3d 211, 94 Cal. Rptr. 487 (1971); *In re* Melkonian, 152 Cal. App. 250, 313 P.2d 52 (1957).
[80] People v. Lawrence, 140 Cal. App. 2d 133, 295 P.2d 4 (1956); *In re* Bagwell, 26 Cal. App. 2d 418, 79 P.2d 395 (1938).

Corrections,[81] and the Attorney General[82] have all relied on the legislative distinction between civil and criminal cases,[83] saying that due process guarantees the personal appearance of a prisoner only in the latter.[84] One case has held not only that a prisoner has no right to appear in civil cases, but that in such cases a court is without even the *discretion* to require his presence.[85] The premise underlying these holdings, that the fundamentals of procedural due process are limited or inapplicable in civil cases, has since been cast into considerable doubt by *Goldberg*, *Stanley*, and other developments,[86] and appears to be ripe for challenge.

Perhaps the ultimate source of the prisoner-parent's right to appear is the Confrontation Clause of the Sixth Amendment. In an important precedent, *In re Gault*,[87] the Supreme Court went beyond formalistic civil-criminal distinctions to apply the protections of the Fifth and Sixth Amendments to a "civil" Juvenile Court proceeding where a child's liberty was at stake, despite the express reference in those amendments to "criminal" cases. The Sixth Amendment provides: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ."[88] The Fourteenth Amendment makes this clause obligatory upon the states.[89] "One of the most basic of the rights guaranteed by the Confrontation Clause is the accused's right to be present in the courtroom at every stage of his trial."[90] *Gault* suggests that this guarantee could be extended to a proceeding to terminate parental rights on the basis of the resemblance of such an action to a criminal trial.

In California dependency cases, the applicability of constitutional rules of criminal procedure has been debated, with conflicting re-

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[81] Kempsky interview, *supra*, note 18.
[82] 14 OPS. ATTY. GEN. 59 (1949).
[83] CAL. PEN. CODE § 2620 (West 1970) permits the superior court to require the appearance of a prisoner who is a party to a criminal action. (*See also* 14 OPS. ATTY. GEN. 59, 62.) CAL. PEN. CODE § 2621 (West 1970) permits the court to require the production of a prisoner who is a material witness in a "criminal action." CAL. PEN. CODE § 2623 (West 1970) authorizes procedures for taking the deposition in prison of a material witness in a civil action.
[84] The legislature has made clear that the Department of Corrections has at least the discretion to "authorize the temporary removal from prison . . . of any inmate," *e.g.*, for the purpose of testifying in a civil action. CAL. PEN. CODE § 2690 (West Supp. 1972).
[85] Silver v. Dunbar, 264 F. Supp. 177, 179 (S.D. Cal. 1967).
[86] Bell v. Burson, 402 U.S. 535 (1971); Wisconsin v. Constantineau, 400 U.S. 433 (1971); Sniadach v. Family Finance Corp., 395 U.S. 337 (1969); Fuentes v. Shevin, 407 U.S. 67 (1972); Morrissey v. Brewer, 408 U.S. 471 (1972). *See* Article, *California and Federal Administrative Due Process: Development, Interrelation and Direction*, 5 U.C.D. L. REV. 1 (1972).
[87] 387 U.S. 1 (1967).
[88] U.S. CONST. AMEND. VI.
[89] Pointer v. Texas, 380 U.S. 400 (1965).
[90] Illinois v. Allen, 397 U.S. 337 (1970).

sults. The District Court of Appeals in *In re Robinson*[91] called a dependency proceeding "a true civil cause, comparable in essentials to a child custody controversy between parents, except that the controvery is not between parents but between a parent (or parents) and the state as *parens patriae.*"[92] The United States Supreme Court denied certiorari.[93] In a dissent to this denial, Justice Black urged that the Court recognize the quasi-criminal nature of the case:

> Here the state is employing the judicial mechanism it has created to enforce society's will upon an individual and take away her children. *The case by its very nature resembles a criminal prosecution.* The defendant is charged with conduct — failure to care properly for her children — which may be criminal and which in any event is viewed as reprehensible and morally wrong by a majority of society. And the cost of being unsuccessful is clearly high — loss of the companionship of one's children.[94]

The views expressed in other California decisions are closer to those of Black than *Robinson.* In one dependency case,[95] the court held that the nominally civil status of the proceedings "does not deprive a parent whose right to custody of his child is challenged, of the right to due process . . . .In other words, a parent is entitled to be apprised of the charges he must meet in order to prepare his case, and he must be given an opportunity to be heard and to cross-examine his accusers."[96] A recent decision, *In re David K.*,[97] indicates that even those courts that limit the scope of due process in dependency cases are willing to apply its full breadth in proceedings where the court could "sever forever the parental bond."[98] There, a court which had been unwilling to recognize a right to counsel in a dependency case[99] said that in a termination action, an indigent parent was entitled to court-appointed counsel at public expense. This decision suggests that the courts may now be willing to accept the principle that they may not hear arguments in favor of terminating a parent's rights unless they afford the parent the procedural rights that would apply to a criminal case, including the right to be present in the courtroom.[100]

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[91] 8 Cal. App. 3d 783, 87 Cal. Rptr. 678 (1970).
[92] 8 Cal. App. 3d at 786, 87 Cal. Rptr. at 680, and quoted with approval in *In re* Joseph T., 25 Cal. App. 3d 120, 126, 101 Cal. Rptr. 606, 611 (1972).
[93] *Sub nom.* Kaufman v. Carter, 402 U.S. 964 (1971).
[94] 402 U.S. at 959 (*emphasis added*).
[95] *In re* Neal D., 23 Cal. App. 3d 1045, 100 Cal. Rptr. 706 (1972).
[96] *Id.* at 1049, 100 Cal. Rptr. at 708 (*emphasis added*). *See also, in accord, In re* Creely, 70 Cal. App. 2d 186, 160 P.2d 870 (1945).
[97] 28 Cal. App. 3d 1061, 105 Cal. Rptr. 209 (1972).
[98] *Id.* at 1062, 105 Cal. Rptr. at 210.
[99] *In re* Jopseh T., 25 Cal. App. 3d 120, 101 Cal. Rptr. 606 (1972).
[100] The parent's right to counsel was discussed favorably in *dictum* in Adoption of Hinman, 17 Cal. App. 3d 211, 94 Cal. Rptr. 487 (1971), and in the Briefs for Appellant, *In re* Rodriguez, 5 Civil No. 1875 (5th Dist. Ct. of App. 1973).

The Equal Protection Clause appears to be an additional source of the prisoner-parent's right to appear. Under California statutory law as presently interpreted, all parents except prisoners are permitted, indeed normally *required*, to attend proceedings for the termination of their parental rights.[101] A parolee who is subject to a proceeding for the determination of his parental fitness would have the opportunity personally to defend his rights. A prisoner, convicted of a crime perhaps identical to the crime of which the parolee was convicted, must suffer the permanent loss of his children in silence. Although both have committed the same crime and are threatened with the same sanction, the parolee is required to attend the hearing, while the prisoner is forbidden. In *Stanley v. Illinois*, the Supreme Court declared that all parents must have an equal chance to defend their parental rights:

> We have concluded that all Illinois parents are constitutionally entitled to a hearing on their fitness before their children are removed from their custody. It follows that denying such a hearing to Stanley and those like him while granting it to other Illinois parents is inescapably contrary to the Equal Protection Clause.[102]

If the right to raise one's children is a fundamental right,[103] the right to meaningfully defend that right must also be fundamental. Thus a rational basis for discriminating against prisoners is constitutionally insufficient. Except for the unusual case where the state can demonstrate a compelling need for proceeding in his absence, the prisoner-parent's right of personal appearance appears to be guaranteed by the Equal Protection Clause.

V. CONCLUSION AND EPILOGUE

California prisoners have been denied the power to affect some of their most intimate legal relationships. Legislative acts and administrative regulations have denied or restricted the prisoner's right to marry,[104] or to file[105] or contest[106] a petition for divorce. One statute makes California one of only two states to make the conviction of a felony an express ground for the termination of parental rights.[107] The statute not only presumes the parental unfitness of some prisoners[108] but denies them the right of personal court appearance,

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[101] In a proceeding under CIV. CODE § 232, the parent's failure "without reasonable cause to appear . . . constitutes a contempt of court." CAL. CIV. CODE § 236 (West Supp. 1972).
[102] 405 U.S. at 658.
[103] *See supra* note 69.
[104] *See supra* notes 16-25 and accompanying text.
[105] *See supra* note 39 and accompanying text.
[106] *See supra* notes 52-56 and accompanying text.
[107] *See supra* notes 57-66 and accompanying text.
[108] *See supra* notes 72-85 and accompanying text.

perhaps the most effective means of rebutting the presumption.[109] For other prisoners, the state ignores the issue of parental fitness altogether.[110] It is suggested that these restrictions are not only unconstitutionally abusive of the rights of the individual prisoner, but, ultimately, against the best interests of society.[111] The public is the victim of a system which thwarts rather than encourages the prisoner's efforts to maintain his family ties, for these efforts represent one of the few available sources of his positive social reintegration. By completing the offender's social isolation, the state, in the interests of administrative efficiency, advances the likelihood of his eventual return to crime.

This article has considered the need for reform of the formal and explicit rules which directly restrict the legal relationships of prisoners and their families. But an evaluation of this group of laws would be incomplete without some reference to the policies which indirectly tend to dissolve a prisoner's family ties. A comprehensive reform should consider, in addition to the rules that have been discussed, the impact of these related issues.

The location of prisons in California creates a serious obstacle to the maintenance of family contact.[112] Because of social attitudes prevalent at the time many of the prisons were built, prisons tend to be located in rural areas away from the major population centers.[113] In addition, although two-thirds of their inmates are from Southern California, all maximum security prisons are located in the northern part of the state.[114] This situation exacerbates the already difficult task of maintaining contact between prisoners and their families, especially because prisoners' families tend to be poor[115] and therefore unable to afford the costs of transportation and accommodations that would necessarily be incurred in regular visitations.[116] In deciding where new prisons, if any, will be constructed, it would be

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[109] *See supra* note 68 and accompanying text.

[110] *See supra* note 1.

[111] Chief Justice Burger has said:

> We take on a burden when we put a man behind walls, and that burden is to give him a chance to change .... If we deny him that, we deny him his status as a human being, and to deny that is to diminish our humanity and plant the seeds of future anguish for ourselves.

Speech to the Association of the Bar of the City of New York, *quoted* in Tobriner, "Due Process Behind Prison Walls," 213 *The Nation* 367 (1971).

[112] *See* REPORT OF THE CENTER FOR THE ADMINISTRATION OF CRIMINAL JUSTICE, SCHOOL OF LAW, UNIVERSITY OF CALIFORNIA, DAVIS, PRISON VISITING CONDITIONS (1973).

[113] Kempsky interview, *supra* note 18.

[114] *Id.*

[115] This fact was recognized and commented upon by the court in Hillman v. Stults, 263 Cal. App. 2d 848, 873, 70 Cal. Rptr. 295, 309 (1968).

[116] PRISON VISITING CONDITIONS, *supra* note 112.

appropriate to reconsider whether it is desirable to physically isolate the prisoners from their home communities.

Even where visiting has been physically possible, it has, in many cases, been administratively restricted to a greater extent than might be desirable.[117] In view of the positive benefits of continued family relationships, restrictions on family visits, including conjugal visits,[118] should be reconsidered.

The system of indeterminate sentences has made it difficult for families to make positive plans for surviving their period of separation.[119] Modifications of this system which would make a prisoner's parole date known earlier would, for important psychological reasons, probably be a positive reform.[120]

Many prisoners work for only nominal compensation while in prison.[121] Meanwhile, because of their absence their families may become eligible for federal Aid to Families with Dependent Children, which would terminate upon their return.[122] Thus, although the prisoners work and their families are supported, the present system inevitably lessens the interdependence between prisoner and family, and may even decrease the incentives for eventual reunification. A more rational system would, in appropriate cases, pay the prisoner a minimum wage, to be set aside to maintain the family as a viable economic unit, without resort to the welfare rolls, during the wage-earner's period of incarceration.

Finally, it is suggested that a coherent policy toward prisoners and their families should be based on the recognition that the prisoner, the family, and society benefit when the prisoner is allowed this important prerequisite to human dignity and social accountability, the opportunity to be responsible for one's intimate family ties.

Steven N. Machtinger

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[117] *Id.*

[118] It has been argued that conjugal visiting is a constitutional right. *See* Hiestand and Halvonik, *Prisoners' Rights to Conjugal Visits*, 29 (THE NATIONAL LAWYERS) GUILD PRACTITIONER 91 (1972).

[119] Interviews with members of the Prisoners' Union, San Francisco, December 28, 1972.

[120] *See* Article, *The California Adult Authority — Administrative Sentencing and the Parole Decision as a Problem in Administrative Discretion*, 5 U.C.D. L.REV. 360 (1972).

[121] The legislature has set a wage scale for convicts of from $.02 to $.35 per hour. CAL. PEN. CODE § 2700 (West 1970).

[122] 42 U.S.C. § 601 *et seq.*