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## THE EXISTENCE OF CIVIL RIGHTS AT COMMON LAW

Much is said and heard on the subject of civil rights and their infringement and deprivation. The subject has presented the courts with many intricate problems, but thus far no rules have been formulated which make results certain in individual cases. Although much has been said on the subject, certain questions and problems still exist. What are civil rights as compared to other rights? Do civil rights exist or are they created? The purpose of this note is to discuss these and related topics.

"Civil rights," which are said to be absolute rights,<sup>1</sup> are, in the broader sense of the term, those rights which are the outgrowth of civilization. They arise from the needs of civilized, highly-organized communities as distinguished from barbaric ones. They are given, defined, and circumscribed by positive laws enacted by communities as may be or are considered necessary to maintain organized government and still grant certain elements of individual freedom. They comprehend all rights which civilized communities undertake to protect.<sup>2</sup>

"Civil rights" have been defined as those which have no relation to the establishment, support, or management of government.<sup>3</sup> They are also said to be those rights which are accorded to every member of a distinct community or nation<sup>4</sup> which the municipal law will enforce at the instance of private individuals for the purpose of securing to them the enjoyment of their means of happiness.<sup>5</sup> They have been further defined as the rights of a citizen, the rights of an individual as an individual, the duties due from one citizen to another,<sup>6</sup> and a privilege accorded to an individual by such duties due from one to another which, if trespassed upon, may be redressed by a civil action.<sup>7</sup>

1. *People v. Washington*, 36 Cal. 658, 662 (1869).

2. *Byers v. Sun Savings Bank*, 41 Okla. 728, 139 P. 948, 52 L. R. A. (N. S.) 320 (1914); *Grooms v. Thomas*, 93 Okla. 87, 219 P. 700, 701 (1923).

3. *People v. Barrett*, 203 Ill. 99, 67 N. E. 742, 96 Am. St. Rep. 296 (1903); *Litzelman v. Town of Fox*, 285 Ill. App. 7, 1 N. E. 2d 915, 917 (1935); *People v. Washington*, *supra*.

4. *Winnett v. Adams*, 71 Neb. 817, 99 N. W. 681 (1904); *Blackman v. Stone*, 17 F. Supp. 102, 105 (S. D. Ill. 1936); *Litzelman v. Town of Fox*, *supra*.

5. *Wilson v. Gonzales*, 44 N. M. 599, 106 P. 2d 1093, 1095 (1940); *State v. Powers*, 51 N. J. L. 432, 17 A. 969 (1889).

6. *State of Iowa v. Chicago, B., and Q. Railway*, 37 F. 497, 3 L. R. A. 554 (S. D. Iowa 1889); *Commonwealth v. Shimpeno*, 160 Pa. Super. 104, 50 A. 2d 39, 43 (1946).

7. *United States v. 24 Live Silver Black Foxes*, 1 F. 2d 934 (D. C. Wash. 1924).

In discussing rights, one should note the distinction between a civil right and a political right and between a civil right and a natural or inherent right; these are closely connected and somewhat interrelated; consequently some confusion has existed in attempting to differentiate them. The general distinction between a civil and a political right is that a civil right is one accorded to every individual of a distinct community or nation, having no relation to the establishment, support, or management of the government,<sup>8</sup> while a political right consists in the power to participate directly or indirectly in the establishment or administration of the government.<sup>9</sup> This participation in the government is said to have its extent and limits fixed by constitutions;<sup>10</sup> it generally includes the right to participate in the administration of justice,<sup>11</sup> the right to vote for public officers,<sup>12</sup> the right to be a candidate for public office, the right to hold public office,<sup>13</sup> and the right to citizenship.<sup>14</sup> Each individual in a given locality is a beneficiary to all civil rights existing there and he continues to enjoy such rights unless "civil death" takes them from him;<sup>15</sup> this is not true of political rights, since political rights extend to citizens only. Therefore an alien would be entitled to all the civil rights which exist in a community but would have no political rights therein.<sup>16</sup>

While civil rights refer to the enjoyment of such non-political guaranties as are contained in the constitutions or statutes, natural or inherent rights are considered to exist regardless of municipal or other laws on which civil rights always depend for enforcement.<sup>17</sup> Natural rights are considered to be rights due any person from a government based generally on the idea of a God-given law. Even though natural rights would exist if there were no municipal law, some natural

8. *Joughin v. Parks*, 107 Fla. 833, 147 So. 273 (1933).

9. *Friendly v. Olcott*, 61 Ore. 580, 123 P. 53 (1912); *State ex rel. McGovren v. Gillkison*, .....Ind. ...., 196 N. E. 231 (1935).

10. *Winnett v. Adams*, 71 Neb. 817, 99 N. W. 681 (1904); *Blackman v. Stone*, 17 F. Supp. 102 (S. D. Ill. 1936); *Caven v. Clark*, 78 F. Supp. 295 (W. D. Ark. 1948).

11. *State v. Powers*, note 5 *supra*.

12. *State v. Collins*, 69 Wash. 268, 124 P. 903 (1912); *Garrett v. Cunningham*, 211 Ala. 430, 100 So. 845 (1924); *Pirtle v. Brown*, 118 F. 2d 218 (6th Cir. 1941). However, one decision, *State ex rel. Parker v. Corcoran*, 155 Kan. 714, 128 P. 2d 999 (1942), held that the term "civil rights," as used in statute creating a housing project and providing that persons acquiring realty for that project shall not impair the civil rights of inhabitants under the state or local laws, was broad enough to include political rights such as the right to vote.

13. *Herken v. Glynn*, 151 Kan. 885, 101 P. 2d 946 (1940).

14. *Friendly v. Olcott*, note 9 *supra*.

15. See note 37 *infra*.

16. 1 Blackstone's Commentaries 124-139.

17. *Sult v. Gilbert*, 148 Fla. 31, 3 So. 2d 729, 731 (1941).

rights are said to be abrogated by the municipal law, others are outside of its scope, and still others are enforceable under it as "civil rights."<sup>18</sup> The integration of these various rights makes the distinctions among them at times difficult to maintain, but, using as a test the basis of their existence, the difference among them is clear.

Civil rights, varying because of the laws of the community in which one lives and of which one is a member,<sup>19</sup> have been held to include the liberty of the person and of his conscience<sup>20</sup> and the right to acquire, possess, and enjoy property;<sup>21</sup> however, the "opportunity" to acquire interest in real property has been held not to be a civil right.<sup>22</sup> The right of exercising the paternal and marital powers and similar familial relations are generally considered civil rights.<sup>23</sup> It is also recognized that the statutory right to sue the state for tortious acts of its officers and employees is a civil right.<sup>24</sup> The permission to operate a motor vehicle upon the highways of a state, however, is not a civil right and the license to do so is thereby subject to conditions prescribed by the state.<sup>25</sup>

Because of the many apparent failures to support what have been considered property rights, there is a question whether property rights are civil rights. While having their origin in the common law, certain property rights are considered protected by the Fifth and Fourteenth Amendments. Variation in interpretation of what encompasses these constitutionally protected property rights has caused much doubt as to which are now civil rights. Certain courts have, however, used the terms synonymously, and clearly indicated that a property right is also a civil right.<sup>26</sup> This has been particularly the case where equity jurisdiction has been sought.<sup>27</sup> Property rights include many varying rights which are an interest in, or incident to,

18. *Wilson v. Gonzales*, 44 N. M. 599, 106 P. 2d 1093, 1095 (1940); *State v. Powers*, 51 N. J. L. 432, 17 A. 969 (1889).

19. *Bowles v. Haberman*, 95 N. Y. 246, 247 (1884).

20. *Wilson v. Gonzales*, note 18 *supra*.

21. *People v. Washington*, note 1 *supra*; *Wilson v. Gonzales*, note 18 *supra*.

22. *Dorsey v. Stuyvesant Town Corporation*, 299 N. Y. 512, 87 N. E. 2d 541, 14 A. L. R. 2d 133, *cert. denied* 339 U. S. 981 (1949).

23. *Litzelman v. Town of Fox*, note 3 *supra*; *Caven v. Clark*, 78 F. Supp. 295, 298 (W. D. Ark. 1948).

24. *Application of White*, 2 N. Y. S. 2d 582, 166 Misc. 481 (1938).

25. *Commonwealth v. Funk*, 323 Pa. 390, 186 A. 65, 67 (1936).

26. *Anthony v. Burrow*, 129 F. 783, 789 (C. C. Kan. 1903), quoting from *Ex parte Sawyer*, 124 U. S. 200, 31 L. Ed. 402 (1888).

27. *W. Walley, Incorporated v. Saks and Company*, 41 N. Y. S. 2d 739, 744, 266 App. Div. 193 (1943), and *International News Service v. Associated Press*, 248 U. S. 215, 63 L. Ed. 211, 39 S. Ct. 68, 2 A. L. R. 293 (1918), stated that "the rule that a court of equity concerns itself only in the protection of property rights treats any civil rights of a pecuniary nature as a property right."

ownership of property,<sup>28</sup> including the right to conduct a business<sup>29</sup> and the right to make a contract.<sup>30</sup> The right to contract is also considered a civil right and will be enforced as such,<sup>31</sup> indicating that some property rights are clearly civil rights.

Civil rights have also been considered to include the right of every citizen to seek redress of wrongs and enforcement of rights in the courts. As an incident to these is included the right of a person to testify in his own behalf in a criminal case.<sup>32</sup> Even though the exact derivation of the right to trial by jury is uncertain, that principle has been stated as a "fundamental principle of civil rights."<sup>33</sup> The use of court process<sup>34</sup> and the right to sue another are said by some courts to be civil rights.<sup>35</sup> Though bringing a suit is a civil right, the basis being the injury of a legal right to the complainant, the filing of notice of intention to file suit has been held not to be an exercise of one's civil rights, since it is only a condition precedent to the suit. Therefore one who has no civil rights may file such notice even though he cannot bring the suit.<sup>36</sup>

Where a person has a civil right, it will be lost by conviction of a felony, which imposes a "civil death"<sup>37</sup> on the person. "Civil death" is the deprivation of all rights whose existence or enjoyment depend on some provision of positive law and, therefore, it includes the extinction of civil rights.<sup>38</sup> This "civil death" is imposed by statute in several states;<sup>39</sup> it is also said to exist at common law and only af-

28. For the various rights considered as property rights, see 34 Words and Phrases, Property Rights, 553 *et. seq.*

29. *Lauf v. E. G. Shinner & Co.*, 82 F. 2d 68, 72 (7th Cir. 1936); *Freeman v. Board of Adjustment of City of Great Falls*, 97 Mont. 342, 34 P. 2d 534, 538 (1934).

30. *Chicago Title and Trust Company v. Robin*, 361 Ill. 261, 198 N. E. 4 (1935); *State v. Whitaker*, ..... N. C. ...., 45 S. E. 2d 860, 874 (1947). In *Coleman v. Whisnant*, 225 N. C. 494, 35 S. E. 2d 647 (1945), the right to contract was said to be a liberty as well as a property right.

31. *Sult v. Gilbert*, 148 Fla. 31, 3 So. 2d 729 (1941).

32. *State v. Powers*, note 5 *supra*.

33. *People ex rel. Barrett v. Fritz*, 316 Ill. App. 217, 45 N. E. 2d 48, 55 (1942).

34. *Nastasi v. State*, 61 N. Y. S. 2d 438, 441, 186 Misc. 1051 (1946).

35. *Lipzchultz v. State*, 78 N. Y. S. 2d 731 (1948).

36. *Federman v. State*, 19 N. Y. S. 2d 325, 173 Misc. 830 (1940).

37. *Sullivan v. Prudential Insurance Company*, 131 Me. 228, 160 A. 777 (1932). The court in this case appropriately defined "civil death" in stating it to be "the state of one who, although possessing natural life, is, on account of the commission of crime for which he has been convicted, incarcerated in execution of sentence for so long as he shall live, and thereby loses all civil rights; he is considered in law, dead."

38. *In re Donnelly's Estate*, 125 Cal. 417, 58 P. 61, 73 Am. St. Rep. 62 (1899); *Holmes v. King*, 216 Ala. 412, 113 So. 274 (1927).

39. *In re Donnelly's Estate*, *supra*; *Holmes v. King*, *supra*.

firmed or modified by the statutes.<sup>40</sup> This death of one's rights as a general rule is strictly enforced and followed in the courts. A statute waiving the state's immunity from liability for the torts of its officers and employees is held not to relieve a convicted felon from the statutory suspension of his civil rights so as to allow him to bring such a suit during the term of his sentence.<sup>41</sup> It appears, however, that a person in such a case may get statutory relief; a statute providing that sentence forfeits all civil rights has been held not to preclude a recovery by a convict for injuries sustained during a previous imprisonment where the legislature had enacted an enabling act granting him the right to sue.<sup>42</sup> The court which allowed the convict to recover based its holding on the theory that the right granted was not a civil right; nevertheless the effect was to allow a person's civil rights to be revived by legislative action when the person is "civilly dead" and has no rights. But unless there is some specific enabling act involved, there is no relief. Thus where a mortgagor was imprisoned and foreclosure was had by reason of default during his imprisonment, and the sheriff delivered a deed, the mortgagor was not entitled to the right to give notice and redeem it upon leaving prison after the period for redemption has run out, since the right of redemption is a civil right.<sup>43</sup> The sentence of imprisonment was a suspension of all civil rights of the person imprisoned for the duration of the term.<sup>44</sup> A civil right cannot be exercised after the period for its exercise has passed, even though the person's rights were suspended during the time when that same right was in existence.

In determining whether civil rights exist at common law or only in statutory form, one can find some aid by observing the construction given to civil rights statutes by federal and state courts, and to their statements and decisions. Emphasis, of course, is on the decisions of state courts since they are the primary interpreters of the common law and thus of any civil rights which might exist under such law. The civil rights which the federal courts will enforce in favor of the individual and protect against violation by states or other individuals are those which are secured by the Constitution and the amendments thereto. All enabling acts Congress has passed to pro-

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40. *Breed v. Atlanta, Birmingham, and Coast Railroad Company*, 241 Ala. 640, 4 So. 2d 315 (1941).

41. *Green v. State*, 295 N. Y. Supp. 672, 251 App. Div. 108 (1937).

42. *Tomaselli v. State*, 6 N. Y. S. 2d 435, 168 Misc. 674 (1938).

43. *Grasser v. Jones*, 102 Ore. 214, 201 P. 1069, 1090 (1921).

44. *Wilson v. Gonzales*, 44 N. M. 599, 106 P. 2d 1093 (1940); *Tomaselli v. State*, note 42 *supra*.

tect or enforce such rights are based on the Constitution.<sup>45</sup> This is the limitation of federal government's authority in this field. As stated by the Supreme Court, the federal government, although supreme and beyond the state in the scope of its power, can neither grant nor secure to its citizens rights or privileges which are not expressly or by implication placed under its jurisdiction.<sup>46</sup>

The language of various decisions of the United States Supreme Court indicates that the civil rights derived from the Constitution are the only ones enforceable as federal rights. That Court has stated that federal statutes protecting civil rights must not go beyond the authority given to the federal government by the Constitution; other rights are left exclusively to the protection of the states.<sup>47</sup> Certain provisions of the Civil Rights Act of 1875<sup>48</sup> were held unconstitutional as attempting to regulate action other than that of the various arms of-the-state governments.<sup>49</sup> An act which attempted to punish a conspiracy to deprive a person of the equal protection of the laws was held to be unconstitutional on the grounds that it was not limited to protect those rights secured by the Constitution.<sup>50</sup>

The Supreme Court has put another limitation upon what rights will be federally protected against state action. Only the fundamental rights of the first ten Amendments are secured against state action by the Fourteenth Amendment, *i. e.*, only those rights which are of the "very essence of a scheme or ordered liberty."<sup>51</sup> Here again, the Court has used words without a definite meaning, leaving the question of determining just what is meant by a "fundamental right" or a right which is of "the very essence of a scheme or ordered liberty" to be decided on the facts as each case comes before it, or before lower federal and state courts.

Even though the federal courts have strictly construed the civil rights acts, these acts do give protection to a person's enjoyment of various rights or privileges secured to him by the Constitution, and

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45. *United States v. Reese*, 92 U. S. 214, 23 L. Ed. 563 (1875); *United States v. Cruikshank*, 92 U. S. 542, 23 L. Ed. 588 (1875). In *Lawless v. Duval County*, 6 F. Supp. 303 (D. C. Fla. 1934), the court stated that suits to redress the deprivation of civil rights refers to action brought to protect those civil rights "primarily, if not exclusively, secured by the Fourteenth Amendment."

46. *Ibid.*

47. *United States v. Cruikshank*, note 45 *supra*; *Simpson v. Geary*, 204 F. 507, 511 (D. C. Ariz. 1913).

48. Act March 1, 1875, c. 114, 18 Stat. 335, U. S. Comp. Stat. 1901 p. 1259, 1 Fed. Stat. Ann. 805.

49. *Civil Rights Cases*, 109 U. S. 3, 27 L. Ed. 835 (1883).

50. *United States v. Harris*, 106 U. S. 290, 27 L. Ed. 290 (1882).

51. *Palko v. Connecticut*, 302 U. S. 319, 82 L. Ed. 288 (1937).

those provisions have been upheld as constitutional.<sup>52</sup> It is considered that these statutes substantially re-enact and make effective the constitutional amendment from which such rights are secured in favor of individuals.<sup>53</sup>

State civil rights statutes providing for equal protection and accommodations in public places have been strictly construed by the state courts.<sup>54</sup> The statutes are similar to the federal acts usually. The reasons given for such construction are that the statutes are penal in character<sup>55</sup> and that they are in "derogation to the common law."<sup>56</sup>

The Iowa Supreme Court, in an action based on a civil rights statute which provided that "all persons shall be entitled to full and equal enjoyment of the accommodations in inns, restaurants . . . and all other places where refreshments are served," held that such statute did not apply to a purely private place where a merchant gave away refreshments for advertising purposes.<sup>57</sup> In reaching its decision, the court stated that "the question is purely one of statutory construction, and it is not for the courts to extend the remedy or to give the language used in the act an interpretation which it will not reasonably bear. There is no such offense known to the common law, and the liability and remedy are both creatures of the statute."<sup>58</sup> The New York Court of Appeals, in construing a similar civil rights statute, providing that there must be "equal accommodation to all persons in inns, restaurants, hotels . . . and all other places of public accommodation," held that such statute has no application to a bootblacking stand. The court strictly construed the words "and all other places of public accommodation" to not include bootblacking stands, since other places were statutorily enumerated and "the legislature seems to have had no difficulty in naming a variety of places and callings that have never been regarded as places of public accommodation under the common law."<sup>59</sup>

Another reason for the strict construction given to civil rights

52. *Ex parte Yarbrough*, 110 U. S. 651, 28 L. Ed. 274 (1883); *United States v. Mosely*, 238 U. S. 383, 59 L. Ed. 1355 (1915).

53. *Strauder v. West Virginia*, 100 U. S. 303, 25 L. Ed. 664 (1879).

54. *People v. Barlett*, 169 Ill. App. 304 (1912); *Grace v. Mosely*, 112 Ill. App. 100 (1904); *Brown v. J. H. Bell Company*, 146 Iowa 89, 123 N. W. 231, 27 L. R. A. (N. S.) 407 (1909).

55. *Brown v. Meyer Sanitary Milk Company*, 150 Kan. 931, 96 P. 2d 651 (1939).

56. *Grace v. Moseley*, note 54 *supra*. *Brown v. J. H. Bell Company*, *supra*, also stated that such statutes create "an offense unknown to the common law."

57. *Brown v. J. H. Bell Company*, note 54 *supra*.

58. 123 N. W. at 233.

59. *Burks v. Bosso*, 180 N. Y. 341, 73 N. E. 58, 105 Am. St. Rep. 762 (1905).



statutes is that very often one person's common law right would be restricted in the enforcement of the civil rights a person claims under a statute. This was pointed out in a New York decision which held that except as restricted by the civil rights act, the rights of proprietors managing their theaters were those existing at common law.<sup>60</sup> At common law a business proprietor can discriminate as to those who desire accommodation, choosing with whom he will do business. The reasoning is that a person has an absolute right to operate his business in any manner he wishes; therefore those coming into his establishment must recognize these rights. Where a person was refused entrance to a theater, another New York decision stated that, in order for him to sustain a judgment recovered under the civil rights law, he "must show that the common law rule has been abrogated, either by constitutional provision or a legislative enactment not violative of the Constitution."<sup>61</sup> As to restriction by civil rights laws of the common law right of a proprietor to manage his business, it appears clear that "a mere common law regulation of trade or business may be changed by statute."<sup>62</sup>

As pointed out earlier, the courts have stated, in defining the term "civil rights," that such rights are those of positive law,<sup>63</sup> thereby indicating the non-existence of them at common law. In pointing out the distinction between civil rights and natural rights, it was said civil rights were those which refer to the enjoyment of guaranties existing in the Constitution and statutes.<sup>64</sup> Thus it is apparent from these and other statements that the courts consider civil rights do not

60. *Woolcott v. Shubert*, 217 N. Y. 212, 111 N. E. 829, 830, L. R. A. 1916 E, 248, Ann. Cas., 1916 B, 726 (1916). The court further stated that "under the common law, the rights of the plaintiff were not violated by the acts of the defendants" where the plaintiff was refused admittance to the defendant's theater. The statute here prohibited exclusion on grounds of race, creed, or color; the court held this could not be construed as to prohibit the exclusion for any other reason, as in this case where the plaintiff was excluded because of the animosity of the owner of the theater, engendered by adverse criticism.

61. *Christie v. 46th Street Theatre Corporation*, 39 N. Y. S. 2d 454, 265 App. Div. 255 (1942), *aff'd.*, 292 N. Y. 520, 54 N. E. 2d 206 (1944), *cert. denied*, 323 U. S. 710, 89 L. Ed. 571 (1944).

62. *Munn v. State of Illinois*, 94 U. S. 113, 25 L. Ed. 77 (1878). Here the court made the further statement that "a person has no property, nor vested, interest in any rule of the common law . . . Rights of property which have been created by the common law cannot be taken away without due process; but the law itself, as a rule of conduct, may be changed by the will, or even the whim, of the legislature, unless prevented by constitutional limitations."

63. *Byers v. Sun Savings Bank*, note 2 *supra*; *Groom v. Thomas*, note 2 *supra*.

64. *Sult v. Gilbert*, note 31 *supra*; *Wilson v. Gonzales*, note 44 *supra*; *State v. Powers*, note 5, *supra*; also *In re Donnelly's Estate*, 125 Cal. 417, 58 P. 61, 73 Am. St. Rep. 62 (1899), where the court stated, "Civil death imports a deprivation of all rights whose exercise or enjoyment depends upon some provision of positive law. It is the extinction of civil rights."

exist at common law but only in constitutional and statutory form. This conclusion would be further substantiated by taking note of the construction given the various civil rights statutes, especially those enacted by state legislatures. The federal courts have strictly construed the federal civil rights statutes, but this is primarily because the national government is one of enumerated powers and, consequently all rights enforced under its power must be derived from the Constitution. The state courts are not bound by any such limitation within their jurisdiction, and their decisions provide better guidance in answering these questions.

In the state decisions, it is indicated strongly that one who seeks to enforce a civil right must show that the right exists in statutory form, although the courts have not stated this as a definite rule of law. The general proposition has been that, to deprive a person of a common law right, such as the right to conduct a business or use one's property as one pleases, the person claiming discrimination must point to a statute expressly covering the situation. By this and other reasoning of the courts as indicated, it is clear that the courts treat civil rights as having no existence in the common law but as owing their existence to the pertinent constitutions or to statutes enacted by the various legislative bodies under constitutional authority.

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