

1992

## Due Process

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### Recommended Citation

(1992) "Due Process," *Touro Law Review*. Vol. 8: No. 3, Article 13.

Available at: <https://digitalcommons.tourolaw.edu/lawreview/vol8/iss3/13>

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## SUPREME COURT, APPELLATE DIVISION

## THIRD DEPARTMENT

Victory v. Coughlin<sup>131</sup>  
 (decided April 4, 1991)

The petitioners, Albert Victory, a state prisoner, and his wife, Susan Block, brought an article 78 proceeding seeking a declaration that the prison authorities' decision denying Victory's visiting privileges with Block violated his constitutional right to due process under the state constitution.<sup>132</sup> The court held that convicted felons do not have a fundamental right to visitation protected by the state constitution.<sup>133</sup>

Victory had previously escaped prison, with the help of his wife, while serving a twenty-five year to life sentence for the felony murder of a policeman. A child was born to them while they were fugitives. That child was permitted to visit, but his wife was not because the facility determined that she was a security risk.<sup>134</sup>

Victory and Block relied on the New York Court of Appeals' decision *Cooper v. Morin*,<sup>135</sup> which held that pretrial detainees are entitled to contact visitation, unless there is a strong showing of necessity.<sup>136</sup> The *Victory* court noted that there is a clear distinction between pretrial detainees, who are presumed innocent, and convicted felons.<sup>137</sup> The holding in *Cooper* was

131. 165 A.D.2d 402, 568 N.Y.S.2d 186 (3d Dep't 1991).

132. *Id.* at 404, 568 N.Y.S.2d at 187; see N.Y. CONST. art. I, § 6. The defendant had originally brought a claim under the United States Constitution as well, but that claim had apparently been abandoned. *Victory*, 165 A.D.2d at 404 n.1, 568 N.Y.S.2d at 187 n.1.

133. *Victory*, 165 A.D.2d at 404, 568 N.Y.S.2d at 187.

134. *Id.* at 403, 568 N.Y.S.2d at 187.

135. 49 N.Y.2d 69, 399 N.E.2d 1188, 424 N.Y.S.2d 168 (1979), *cert. denied*, 446 U.S. 984 (1980).

136. *Id.* at 81, 399 N.E.2d at 1195, 424 N.Y.S.2d at 176.

137. *Victory*, 165 A.D.2d at 404, 568 N.Y.S.2d at 187.

“explicitly limited to pretrial detainees . . . .”<sup>138</sup> The court also found that “visitation privileges which are generally permitted within the State’s correctional facilities [do not] give rise to a ‘legitimate expectation’ which in turn attains to the level of a ‘protected interest’ under the State Constitution.”<sup>139</sup> The court explained that “[w]hen access to a program is based upon objective criteria and enjoyment of participation is contingent upon subjective factors, a ‘legitimate expectation’ is not warranted and no constitutional right arises.”<sup>140</sup>

The court found that the determination was rational based on the supreme court’s finding of the defendants’ “continual disregard of societal norms and an unwillingness to abide by the terms of . . . confinement.”<sup>141</sup> The court also rejected the prisoner’s “contention[] that the denial of visitation constitute[d] cruel and unusual punishment.”<sup>142</sup>

The United States Supreme Court, in *Kentucky Department of Corrections v. Thompson*,<sup>143</sup> held that in order to establish a liberty interest that is entitled to the protection of the Due Process Clause, the state regulations must use “explicit mandatory language” in connection with the establishment of “specific . . . substantive predicates” to limit discretion.<sup>144</sup> The Supreme Court, citing *Hewitt v. Helms*,<sup>145</sup> explained that the denial of a particular visitor “is well within the terms of confinement ordinarily contemplated by a prison sentence”<sup>146</sup> and is thus not protected by the Due Process Clause of the United States Constitution.<sup>147</sup> However, the court then explained that the state

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138. *Id.*

139. *Id.*

140. *Id.* at 404-05, 568 N.Y.S.2d at 187 (citing *Doe v. Coughlin*, 71 N.Y.2d 48, 55, 518 N.E.2d 536, 541, 523 N.Y.S.2d 782, 787 (1987), *cert. denied*, 488 U.S. 879 (1988)).

141. *Id.* at 405, 568 N.Y.S.2d at 188.

142. *Id.*

143. 490 U.S. 454 (1989).

144. *Id.* at 463.

145. 459 U.S. 460 (1983).

146. *Kentucky*, 490 U.S. at 461.

147. *Id.*

may create enforceable liberty interests in the prison setting.<sup>148</sup>

The New York Court of Appeals, in *Doe v. Coughlin*,<sup>149</sup> found that if regulations exist that promise certain benefits, so long as participation in the program is not contingent upon subjective factors, a protected interest may arise.<sup>150</sup> Therefore, the state and federal courts appear to be consistent in their application of due process to this right potentially arising in the prison context.

*Children's Village v. Holbrook*<sup>151</sup>  
(decided November 21, 1991)

Children's Village, a not-for-profit child care agency, brought an article 78 proceeding appealing the denial of its application for a special permit to operate a group home in a single-family residential district.<sup>152</sup> The court held the zoning ordinance to be facially invalid under the due process clause of the New York State Constitution<sup>153</sup> insofar as it restricted the size of a "functionally equivalent" family while not similarly restricting the size of a traditional family.<sup>154</sup>

Children's Village proposed to operate a group home for up to ten abused or neglected adolescent boys in an R-22 zoning district in the Town of Clarkstown. Under the Town Zoning Ordinance, single-family detached residences are permitted as of right in an R-22 district.<sup>155</sup> "Family" is defined as "[a]ny number of individuals related by blood, marriage or adoption [or not more

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148. *Id.*

149. 71 N.Y.2d 48, 518 N.E.2d 536, 523 N.Y.S.2d 782 (1987), *cert. denied*, 488 U.S. 879 (1988).

150. *Id.* at 55, 518 N.E.2d at 540-41, 523 N.Y.S.2d at 786-87 (when a state adopts programs where there is an expectation of early release from prison or a family reunion, an expectation of certain rights arises, however, if there is a regulatory scheme attached to that program, no legitimate expectation exists).

151. 171 A.D.2d 298, 576 N.Y.S.2d 405 (3d Dep't 1991).

152. *Id.* at 299-300, 576 N.Y.S.2d at 406.

153. N.Y. CONST. art. I, § 6.

154. *Children's Village*, 171 A.D.2d at 300-01, 576 N.Y.S.2d at 406-07.

155. *Id.* at 299, 576 N.Y.S.2d at 406.