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LEGAL RIGHTS OF PRISONERS

Geoffrey P. Alpert
Editor



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LEGAL RIGHTS OF PRISONERS

GEOFFREY P. ALPERT
Editor



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*To BRENTWOOD COLLEGE—its past, present, and future students.
And to the memory of Fay Stender, Co-Founder, National Prison Project.*

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CONTENTS

<i>Acknowledgments</i>	6
<i>Foreword</i>	
JAMES F. SHORT, Jr.	7
Prisoners and Their Rights: An Introduction	
GEOFFREY P. ALPERT	11
1. Prisoners' Rights: A History	
ALVIN J. BRONSTEIN	19
2. The Discovery of Prisoners' Rights: A Sociological Analysis	
C. RONALD HUFF	47
3. The <i>Wolfish</i> Case: Has the <i>Bell</i> Tolled for Prisoner Litigation in the Federal Courts?	
RICHARD SINGER	67
4. The Negotiated Settlement: Prisoners' Rights in Action	
WILLIAM D. LEEKE	113
5. Prisoners' Right of Access to the Courts: A Comparative Analysis of Human Rights Jurisprudence in Europe and the United States	
ALESSANDRA LUINI DEL RUSSO	129
6. Women Prisoners: Challenge of the Future	
SHARON L. FABIAN	171
7. Women, the Forgotten Prisoners: <i>Glover v. Johnson</i>	
RUTH DIANE LOWN and CHARLENE SNOW	195
8. Inmate Labor Practices and Laws: A Preliminary Analysis	
NEAL MILLER and WALTER JENSEN, Jr.	217
9. The Impotence of Correctional Law	
CHARLES W. THOMAS	243
10. Legal Rights of Prisoners: A View from the Trial Bench	
TERRY L. BULLOCK	261
<i>About the Authors</i>	277

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FOREWORD

Geoffrey Alpert here continues his work on the legal rights of prisoners—joined by others from both the scholarly and “real” worlds. The book is timely and important, not only for prisoners, their families, and friends, but for a broad spectrum of people interested in law, prisons, criminal justice, and especially racial and ethnic relations.

Jacobs (forthcoming) notes: “Since the mid-1960s prisoners have literally besieged the federal courts with civil rights suits challenging every aspect of penal operations and practices.” The number of prisoner petitions increased from 218 in 1966 to more than 11,000 in the year ending June 30, 1979. The Chief Justice of the United States noted that, “by 1974 three-quarters of all convicted persons in the nation’s prisons were appealing their cases” (Moore et al., 1978: 132).

The importance of prisoners’ rights goes far beyond the sheer volume of legal actions, impressive though those numbers may be. The problems of prisoners are “similar to the problems of other minorities in America,” as the editor notes in his introductory chapter. In fact, they are a major aspect of minority life in this country; in some respects they are prototypical, although, as Jacobs (1979: 24) also notes, there is considerable irony in the fact that prisons may be the one type of institution in American society which blacks “control.” In many prisons that control is contested by other minorities, especially the Latin Americans. Moore et al. (1978) described important continuities as well as discontinuities of barrio and prison life for Los Angeles *pintos* (Chicano convicts or ex-convicts), observations similar to those Valentine (1978) made concerning her black community of residence and study.

Importantly, in the context of prisoners’ rights, Moore et al. (1978) suggested that “many convicts begin to think clearly about their legal cases, and the quality of their legal representation” only after they have

been incarcerated. They have a great deal to think about, as the volume of legal activity by jailhouse lawyers (or writ-writers) in prison and, more recently, by lawyers employed in a variety of legal services to prisoners' projects attests. Writ-writers enjoy high prestige in prison, and this type of legal activity serves positive functions for prisoners: for example, it counters alienation, upgrades education, and encourages self-help, especially among minority prisoners. The importance of these functions, to the larger society as well as to prisoners, should be obvious; for the most important continuity of all is the fact that virtually all prisoners return to society, for better or for worse. The hope for betterment remains elusive after 200 years of changing penal philosophies and policies and repeated efforts at prison reform. Recognition of prisoners *as citizens* and appreciation of the continuities of prison and community life for the variety of racial and ethnic groups which populate our prisons may yet prove to be the best hope for "rehabilitation" of prisons, prisoners, and the communities to which they return.

Moore et al. (1978), Valentine (1978), and Ianni (1974), among others, demonstrate in a variety of ways the tripartite nature of the economy of many (most?) minority communities, involving illegal and welfare components in addition to the primary (legal) labor market. The prisoner in our society relates in important ways to each of these components, for they shape the lives not only of prisoners and their families but of countless others in the bureaucracies of business and government and in the struggle for existence in communities across the nation. The importance of legal understanding and resources for this struggle can hardly be overestimated. At stake is not only the welfare of prisoners and their families, but the viability of a pluralistic society and the social fabric upon which we are all dependent.

James F. Short, Jr.

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PRISONERS AND THEIR RIGHTS: AN INTRODUCTION

GEOFFREY P. ALPERT

Prisons are one of the most criticized social institutions in America. Over the years, they have been attacked for being cruel, criticized for being liberal, and analyzed as being ineffective. Penologists are aware of the contradictory beliefs about prisons and the various means which have been employed to analyze them and their interrelationships with society. One could pick almost any theory and find data to reinforce it. There are too many theories and too few facts.

Academic disciplines generate their own relationships with prisons: political science, sociology, economics, psychology, and law, among others. Each gathers and interprets its own "facts." Several issues span the breadth of these disciplines; politics and law seem to be of interest to all. Before we begin the journey into the legal rights of prisoners, it is important to look at the question of function versus intent. Changes in penal reform can produce political and/or economic benefits for one group or another. Prisoners, guards, the construction industries, and psychologists are among the various groups which can benefit from changes in prison policy and beliefs about the prison. The most intriguing question revolves around the *effects* of change in prisons; the extent to which they are unforeseen consequences of humanitarian decisions, or products of decisions made deliberately with political gains in mind. An excellent example of these questions comes from the former Chief Judge of the

District Court, District of Columbia. In a speech to correctional psychologists, Judge David Bazelon asked:

Why should we even consider fundamental social changes or massive income redistribution if the entire population can be solved by having scientists teach the criminal class—like a group of laboratory rats—to march successfully through the maze of our society? In short, before you respond with enthusiasm to our pleas for help, you must ask yourselves whether your help is really needed, or whether you are merely engaged as magicians to perform an intriguing side-show so that the spectators will not notice the crisis in the center ring. In considering our motives for offering you a role, I think you would do well to consider how much less expensive it is to hire a thousand psychologists than to make even a minuscule change in the social and economic structure [1972: 6].

The same questions must be asked about prisoners' legal rights. Can the legal profession really help prisoners, and by this means help societies in their efforts to cope with crime? Or is the law performing a side-show to obfuscate the real problem in the center ring? Many of these questions will be addressed in the following chapters after a brief introduction to prisoners and their rights and legal assistance to prisoners.

PERSPECTIVES ON PRISONERS' RIGHTS

The nature and extent of prisoners' rights have been debated in the courts and professional literature for years. In many ways, the problem of prisoners' rights is similar to problems of other minorities in America; they all mirror social, political, and economic forces and especially the changes in society. There are many approaches to the study of prisoners' rights: One is to examine prisoners' rights in historical perspective, while another suggests examining the social reactions to crime which influence the legal status of prisoners. Each of these perspectives would provide insight into prisoners' rights but would reveal only a partial view. Such has been the pattern of investigations in the past, as each study presents only a fragmented view of the total research on prisoners' rights. This collection of essays written by attorneys and social scientists represents an effort to provide a more complete picture of prisoners' rights from a multidisciplinary perspective.

PRISONS AND CRIMINAL JUSTICE

Police agencies and prosecutors' offices maintain that crime deterrence must include incarceration and incapacitation. As long as prisons are administered safely and effectively, these law-enforcement agencies usually remain detached from prison politics. Typically, it is the philosophy of law-enforcement officials to support the autonomy of prison administrators. Factors such as liberal public opinion, reductions in police power, "leniency" and inconsistency on the part of the courts, and lower rates of incarceration of offenders challenge this philosophy. To counter these "attacks" on the traditional criminal justice system, some segments of society are demanding tougher justice and longer prison sentences for guilty defendants. Police continue to complain about the revolving justice syndrome and the "easy" time spent in prison. They are continually trying to bolster their forces, sharpen their investigatory skills, and improve case management. Prosecutors see prison sentences which they recommend cut in half or suspended. They persevere in verbal battle with defense attorneys and attempt to convince judges and juries of the need to incarcerate criminals for more lengthy periods of time. The Law Enforcement Assistance Administration has funded 24 Integrated Police-Prosecutor Career Criminal Programs which have proved successful in the apprehension and conviction of repeat offenders. These types of programs have been a "shot in the arm" to law-enforcement.

APPARENT CONTRADICTIONS

While some programs aim at swift and sure prosecution and incarceration of criminals, others attempt to divert criminal defendants from incarceration. This apparent contradiction in philosophy and practice leaves many with a confused view of justice. In the same light, some prison rules and regulations impair prisoners' constitutional rights while others help enforce them. Recently, prisons have been described as unlikely to rehabilitate, but certain to punish. This situation inspires both severe criticism and approval. One side effect has been a rising concern for the protection of prisoners' rights and their ability to secure at least minimal rights within a punishment-oriented institution.

LEGAL AID TO PRISONERS

Providing prisoners with legal assistance is a relatively new practice which is described by Judge Bullock in Chapter 10. Unfortunately, not

much has been written on the delivery of prisoners' legal services or the numerous problems related to administering the programs. At issue is the type(s) of legal services which should be provided to prisoners. The choices include general civil legal assistance and help with prisoners' rights cases including § 1983 actions. The federal government has recently passed the Civil Rights of Institutionalized Persons Act (public law 96-247) which can help states determine their priorities. This act provides for a certification process of prison grievance mechanisms, and includes a method for courts to continue § 1983 actions in jurisdictions which have approved grievance mechanisms. It is hoped that most complaints will be settled by administrative remedies rather than by court decrees.

Regardless of which types of legal services prisoners receive or how the programs are structured empirical evaluations reveal a positive impact on prisoners. Specifically, studies in Massachusetts, Washington, and Texas demonstrate that receiving legal assistance is likely to improve prisoners' attitudes toward the criminal justice system as well as their institutional-behavior (Alpert, 1978). These longitudinal investigations show how important legal service delivery is to prisoners.

The original study in Massachusetts was directed by Professor Finkelstein at Boston University, who investigated the effects of legal assistance on prisoners' attitudes toward law and justice over a six-month period (Finkelstein, 1971). Although this study was not well publicized, it established the viability of prisoners' legal services and suggested that other investigators examine these effects further. My colleagues and I based our research on Finkelstein's methodology. Our first study, conducted in Washington State prisons in 1974 and 1975, used the Finkelstein study to identify dependent and independent variables and ways to measure them. The Washington study was multifaceted and included analyses of prisoners' legal problems (Alpert, 1976), the antecedents of seeking legal aid, and the results of such assistance (Alpert et al., 1978). In addition, we reviewed the various methods of delivering legal services to prisoners (Alpert and Miller, 1978). The results of the Washington study were similar to those reported in Massachusetts, strongly supporting the efficacy of providing legal services to prisoners. Because the prison systems in Washington and Massachusetts have relatively similar characteristics, we wanted to study another, more diverse population. This led to replication in Texas, with the cooperation of the Texas Department of Corrections (Alpert, 1978). We could not have found a prison system whose characteristics contrasted more markedly to the systems in Massachusetts and Washington. We concluded that

participation in the legal aid project is a significant factor in producing positive changes in prisonization and in prisoners' attitudes

toward police, lawyers, law and the judicial system. . . . A second significant finding which moves beyond attitudinal changes concerns the number of institutional infractions committed by members of our cohorts. The finding that users of legal aid experience fewer convictions of institutional infractions is significant in that it uses a behavioral measure as an independent variable. Providing legal services to prisoners is one step to reduce tension and anxiety, and reduce hostility among inmates [Alpert, 1978:44, 46-47].

In Texas we also found that providing women prisoners with legal assistance yields the same positive results as it does for men (Noblit and Alpert, 1979). A recent evaluation of a legal services project sponsored by the American Bar Association at Jackson Prison in Michigan also concluded that legal services have a positive impact on the prison population (Conner and Huff, 1979). The cumulative effect of these findings convinces us that legal assistance to prisoners is workable and functional.

We have come a long way since the days when prisoners were slaves of the state. There have been many developments in prison rules and regulations, as well as constructive programs and philosophies. The overall impact of these changes on the inmate structure and daily operation of the prison remains a topic for debate. Charles Thomas discusses these issues in Chapter 9.

THE BOTTOM LINE

All of the new rights and changes in prison programs and philosophies leave us with a new set of questions. How far do prisoners' rights extend, and to what end do they lead? The bottom line remains the same: What difference does it make? The following chapters do not provide definitive answers to these questions, but they do present current information and expert opinion. Their analyses are at least focused on the multiple crises in the center ring!

A COMPILATION OF EXPERT OPINIONS

In the opening chapter, Alvin Bronstein traces the history and status of prisoners' rights. Bronstein, Executive Director of the American Civil Liberties Union's National Prison Project, analyzes the role of the judiciary in providing and ensuring prisoners' rights. He concludes that although certain rights are guaranteed by the courts, these rights are often illusory for prisoners.

Ronald Huff extends Bronstein's legal analysis and develops prisoners' rights from a sociological perspective. He argues that the extension of legal

rights to prisoners may be viewed as a manifestation of social differentiation and the evolution of jurisprudence in a complex society, the expansion of civil rights to minorities, and the changing social structure of the prison. Huff uses the issue of prisoners' labor unions to advance his arguments, and concludes that the prisoners' rights movement has reached a critical impasse.

In the third chapter, Richard Singer provides an excellent analysis of *Bell v. Wolfish*, in which the Supreme Court ruled that the need to maintain order and security in detention facilities housing pretrial detainees justifies the imposition of various conditions and restrictions. Singer goes beyond a traditional legal analysis and incorporates various standards and guidelines to evaluate *Bell v. Wolfish*. He contends that the court's decision was wrong, and he presents evidence that the basic rationale of the court would return us to the days when the sheriff was king of his castle. In an extremely well-written and well-argued chapter, the *Bell* decision is portrayed as an enemy of correctional change. Singer suggests that the *Bell* decision should be attacked directly and that the lower courts should be prudent in their application of *Bell* rather than applying the Supreme Court's sweeping dicta.

The South Carolina Department of Corrections has applied the negotiated settlement to remedy prisoners' grievances. In the fourth chapter, William Leeke describes how South Carolina deals with many of its prisoners' complaints. Because of the high court costs and high attorney's fees, this method of dispute resolution is one way to serve both the rights of the prisoners and the obligations of the state.

Prisoners' rights are not limited to American prisoners; Alessandra Luini del Russo's chapter introduces prisoners' rights from an international perspective. The major focus is on the progress made by the North American and European countries as compared with other cultural areas of the world. Del Russo examines the various procedures followed and results gained by providing prisoners their basic human rights.

Sharon Fabian examines the history and changes of the status of female prisoners in Chapter 6. She analyzes the differential treatment of women in prison and suggests needed changes. Her ultimate conclusion is that women prisoners should not try to reach parity with men prisoners but should aim at deinstitutionalization.

The differential treatment of male and female prisoners is also explored by Ruth Diane Lown and Charlene Snow. Chapter 7 focuses upon *Glover v. Johnson*, a recent case which held unconstitutional the prison programs available to women prisoners in Michigan. Lown and Snow examine several