

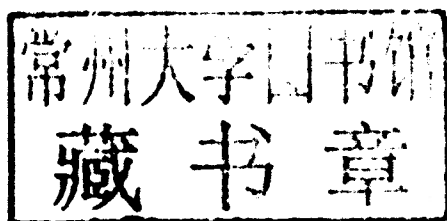
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THE LEGAL RIGHTS OF THE CONVICTED

The Legal Rights of the Convicted

Barbara Belbot and Craig Hemmens



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CHAPTER 1:

Introduction

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State correctional departments are very large bureaucracies. In some states, the prison, probation and parole systems are operated by separate agencies, each with their own missions, leadership structures, and budgets. In other states, both institutional and community-based corrections are under a single umbrella agency led by an executive director with deputy directors in charge of managing the prison, probation, and parole components. Whatever the organizational structure, however, within each correctional agency you will find legal counsel, generally reporting to the highest level of administration. Depending on the size of the agency and state law, that office may house one attorney or dozens.

A quick visit to the Internet homepages of three state correctional agencies provides insight into the important role of legal counsel in corrections today. The Ohio Department of Rehabilitation and Correction has a Legal Services Division that, among other things, manages in-house legal issues for the department and develops litigation strategy with the Office of the Ohio Attorney General to help administrators avoid litigation. The Legal Division also drafts and reviews administrative rules and policies. The Texas Department of Criminal Justice has an Office of the General Counsel. Different sections within the Office have specific responsibilities. The Legal Affairs section provides advice to officials on corrections law, employment law, government law, transactions and the open records act. The Litigation Support section evaluates every lawsuit filed against the agency or its employees to determine liability and assists the Texas Attorney General in cases that go to trial. The Preventive Law section keeps up with emerging legal issues, identifies legal risks, and monitors events and trends in the prison units. The Governmental Affairs section liaisons with the legislature.

The Legal Affairs Division in the California Department of Corrections has a Correctional Law Unit that provides legal advice and training to management and staff. The Employment Law Unit represents the department in administrative proceedings and civil lawsuits filed by employees and former employees. The Governmental Law Unit counsels on legal issues related to the department's business operations, construction contracts, and disputes with vendors. The Liability Response Unit reviews all civil lawsuits filed against the department and its employees, assesses liability, and acts as a liaison with counsel. The Major Litigation Unit monitors, supervises, and assures that the department complies with court orders that result from class action lawsuits. Agency legal counsel try to prevent lawsuits by providing sound legal advice, participating in personnel training, helping to write policies and procedures that follow the requirements of the law, and monitoring the enforcement of those policies. Once a lawsuit is filed, in most states attorneys from the state Attorney General's Office who specialize in litigation defend the agency and its employees.

Clearly, much of the business of corrections involves law, making it essential that correctional administrators and legal counsel communicate regularly and effectively. While many legal issues that concern correctional officials are shared by all governmental agencies and even private enterprise, other issues are totally unique to the field of corrections. Issues about disciplining inmates who break prison rules or the right to search the homes of probationers without a warrant raise matters outside the scope of what most attorneys deal with on a regular basis. Corrections law has developed into its own area of expertise and requires an understanding of the special context in which the legal issues develop. It is also clear that the legal side of the corrections business has a high price tag, including salaries for staff - attorneys,

legal assistants, legal secretaries, and administrative staff, the cost of furnishing and equipping office space, and building and maintaining law libraries and access to electronic legal databases. Not only do agency legal counsel incur these expenses, so do the litigating attorneys in the Offices of the State Attorney Generals who defend the lawsuits in court.

This book concentrates on the area of corrections law that specifically concerns the legal rights of convicted offenders, whether they are incarcerated in prisons or jails or serving time in a community corrections program on probation or parole. It does not address many other areas of law that also affect correctional officials, such as employment or business law. Chapter 1 presents important background material that introduces students to the source of law and the role that courts play in legal proceedings filed by prisoners. Chapter 2 discusses sentencing issues. Chapter 3 examines the First Amendment rights of access to the courts and outside world. Chapter 4 examines the First Amendment rights of freedom of religion and association. Students read about prisoners' Fourth Amendment protections in Chapter 5 and how the law governs the use of force in correctional settings in Chapter 6. Chapter 7 looks at prison disciplinary systems, followed by Chapter 8, which introduces the Eighth Amendment's cruel and unusual punishment clause and its impact on living conditions in correctional institutions. Chapter 9 moves the focus of the book away from offenders incarcerated in prison to jail detainees. Chapter 10 focuses on the rights of convicted offenders who are not incarcerated and have been released to the community on probation and parole. In Chapter 11, students learn more about the legal "mechanics" of a prisoner civil rights lawsuit and how defendants defend such a suit.

For students who are or aspiring to become criminal justice professionals, the study of prisoners' rights is especially interesting because it extends your understanding of legal issues beyond what happens up to the point of a criminal conviction. Most criminal justice courses that deal with legal issues spend little time examining the rights of convicted offenders during sentencing and even less time examining their rights while incarcerated or on community supervision. It is as if the story ends with conviction. In reality, for millions of offenders, the story is just beginning. What happens after conviction often includes a significant amount of time under correctional supervision, and for some that supervision is highly intrusive and controlling. It is important to understand the extent to which correctional supervision is governed by the laws and constitutions of both the state and federal governments. Correctional officials have an enormous amount of authority. Just as law enforcement officers and prosecutors must be held accountable for their exercise of authority and use of discretion during the investigation, arrest, and prosecution of a crime, so must correctional officials account for how they incarcerate or otherwise supervise an offender after conviction.

Abuse of authority can occur as easily, perhaps even more easily, in a correctional setting than anywhere else in the criminal justice system – and, arguably with even greater negative consequences for the offender and the system as a whole. Not only is the potential for abuse always present (24 hours a day in a jail or prison), it can occur in the dark shadows of a prison cellblock – far away from “outside” scrutiny. In Chapter 10 students will read about the poor prison conditions in this country as recently as the 1960s and 1970s, before officials were subject to more stringent oversight. Other factors contribute to the problem of abuse. Since offenders have not volunteered to live under government control and do not always willingly comply with even the most reasonable rules, their behavior can help create an environment that makes it difficult to respect their rights. Security and order concerns take precedence and inmate rights are relegated to the back seat. Prison administrators frequently have to perform a problematic balancing act between the two. Prisoners are not a popular cause for the average American who abides by the rules and sacrifices to maintain a home and care for a family. There is little public outcry calling for protecting the rights of prisoners. Prisons administration is a demanding job; and it is especially challenging to afford incarcerated offenders their constitutional and statutory rights in light of all the factors that complicate the challenge.

HISTORY OF THE PRISONERS’ CIVIL RIGHTS MOVEMENT

For many years courts were extremely reluctant to consider cases filed by prisoners complaining about their living conditions or the conduct of prison officials. Unofficially labeled the “hands-off” doctrine, courts routinely dismissed prisoners’ rights cases on several grounds: 1) judges are not experts in penology and are not equipped to evaluate prison policies and practices; 2) the separation of powers doctrine prohibited the judiciary from interfering in the executive branch’s responsibility to build and operate prisons; and 3) concerns that judicial involvement would undermine the stability of correctional institutions. Federal judges who reviewed lawsuits filed by state prison inmates were particularly wary of intruding on the business of state governments. A Virginia Court of Appeals opinion dating back to 1871, *Ruffin v. Commonwealth of Virginia*, set the stage for the hands-off doctrine. In that case, the court described prisoners, “For the time being, during his term of service in the penitentiary, he is in a state of penal servitude to the State. He has, as a consequence of his crime, not only forfeited his liberty, but all his personal rights except those which the law in its humanity accords to him. He is for the time being the slave of the State...”

The dramatic shift in the judiciary’s approach to prisoners’ rights evolved over time, climaxing in 1964 in the U.S. Supreme Court’s decision in *Cooper v. Pate*. To fully appreciate this evolution, it is important to understand that in a series of landmark opinions during the first half of the Twentieth Century, the

Supreme Court incorporated much of the federal Constitution's Bill of Rights to the Fourteenth Amendment's due process clause. (Incorporation will be discussed in detail later in this chapter; for now, suffice to say it means the Supreme Court has interpreted "due process" to include many of the individual rights contained in the Bill of Rights). As this happened, state and local officials became obligated to observe the incorporated rights; in the same way that federal officials had always been obligated.

The Eighth Amendment's prohibition against cruel and unusual punishment was incorporated by the Supreme Court's decision in *Robinson v. California* (1962). As a consequence of incorporation, state and local laws, regulations, and official policies and practices could no longer violate the prohibition, and prisoners could now argue that prison and jail regulations and practices must not violate the Eighth Amendment. The Supreme Court's incorporation of the Eighth Amendment occurred during the Warren Court era (1953-1969), a sixteen-year period, during which the High Court incorporated several important constitutional amendments that significantly expanded the rights of persons suspected of committing crimes and those charged with crimes. It was during the Warren Court that the composition of the federal court dockets began to change. Until the 1950s and 1960s, issues involving business and commerce dominated the work conducted in federal courts. The Warren Court thrust the federal judiciary into deciding issues surrounding the constitutional rights of individuals, including the rights of criminals.

Events outside the nation's prisons also contributed to the shift in the judiciary's approach to prisoners' rights. The civil rights movement forced Americans to reevaluate their perspective on matters of individual rights and heightened the consciousness of African-Americans to racial oppression. It was not long before the movement influenced the attitudes of African-American prisoners. The influence came at a time when the composition of some of the larger state prison systems was in flux. America's prisons, 70% white in the 1950s, were almost 70% African-American and Latino by 2000. Until the 1970s, correctional officers and higher-ranking prison officials were almost all white males. Many state prisons segregated prisoners by race, if not by policy then by practice. Inmates of different races were housed separately. It was not unusual to restrict desirable prison work assignments to white inmates.

The changing prison population demographics and the prisoners' growing political consciousness translated into demands for prisoners' rights. The Nation of Islam played a particularly important role in developing a political consciousness among African-American inmates in the 1950s and 1960s. Muslim prisoners openly challenged prisons as racist and discriminatory. Muslims were organized, disciplined, and articulate. Officials were threatened by their rhetoric and labeled them as dangerous. They were not permitted to meet and worship together. They were not permitted to receive printed religious

materials from the outside. Prison staff kept files on inmates belonging to the Nation, detailing their backgrounds and activities.

The first prisoner rights lawsuits to break through the “hands-off” doctrine were filed by members of the Nation of Islam demanding their right to worship under the First Amendment. Initially these lawsuits were dismissed on the basis of the “hands-off” doctrine. In 1962, Thomas Cooper filed a lawsuit alleging he had been confined to administrative segregation in Illinois’s Stateville Prison as retribution for his religious beliefs. He claimed he was denied access to the Koran, Muslim literature, and Muslim clergy. While he initiated his suit *pro se*, the Nation of Islam eventually hired attorneys to assist him. In 1964, in flagrant disregard for the “hands-off” doctrine, the Supreme Court ruled that Cooper had the right to file a lawsuit that alleged prison officials had violated his constitutional rights under the First Amendment and to seek an injunction. The importance of the *Cooper* decision cannot be overstated and the Court’s opinion is discussed further in Chapter 11. Argued over a specific set of facts involving an inmate who claimed his First Amendment rights had been violated, the case’s significance lies in the legal precedent it established: prisoners are entitled to file lawsuits alleging violations of their federal constitutional or statutory rights.

Not to be underestimated is the role that lawyers played in opening up the federal courts to prisoners’ rights cases. Lawyers dedicated to the civil rights movement sharpened their skills in tough courtroom battles and created new and challenging interpretations of the Constitution and federal law. The lawyers soon recognized that the same legal arguments they fashioned for issues involving African-Americans were also applicable to other oppressed groups who were in the process of developing a political consciousness. Some of these attorneys gravitated to representing inmates. Organizations like the American Civil Liberties Union (ACLU), the NAACP Legal Defense Fund (LDF), and the National Lawyers’ Guild took on prisoners’ rights issues. Although the majority of inmates still file their lawsuits *pro se* (meaning without the assistance of legal counsel) attorneys have represented inmates in some of the more high profile cases with important issues at stake.

The hands-off doctrine eroded as the Supreme Court and the entire federal judiciary became more sensitive to the rights of individuals, including the rights of alleged criminals. Add to that a politically savvy and assertive population of prisoners who were in tune with the civil rights movement and were eager to litigate. Include in that mix a group of attorneys who had gained experience in the civil rights movement and were willing to apply their expertise to help redefine the status of convicted offenders incarcerated in America’s jails and prisons. Events coalesced, resulting in the *Cooper v. Pate* decision. The doors of the federal courthouses opened wide to a flood of prisoner civil rights litigation.

The National Prison Project

The American Civil Liberties Union (ACLU) founded the National Prison Project (NPP) in 1972. It is the only national litigation program on behalf of prisoners. The organization claims it has represented over 100,000 confined men, women, and children since 1972. The Project is primarily involved in class-action lawsuits. Those lawsuits have addressed a broad range of issues, such as improved care for inmates with tuberculosis, cancer, HIV/AIDS, and mental illness. Other lawsuits have attacked overcrowding and the failure to provide prisoners with a safe and secure living environment.

Examples of Recent Litigation Where the NPP Has Played a Role:

- The NPP filed a lawsuit in 2002 against Extraditions International, Inc., a private prisoner transportation company and several of its employees, alleging that a driver/correctional officer for the company sexually harassed, assaulted, and threatened a prisoner in his custody, and the company was deliberately indifferent to inmate safety concerns.
- In *Hart v. Arpaio*, filed in federal court in Arizona, the NPP entered the case at the request of local counsel when Sheriff Joe Arpaio filed a motion to terminate an existing consent decree that protects pretrial detainees in the Maricopa County Jail in Phoenix.
- The NPP represents the plaintiffs in a lawsuit against the El Paso County Jail in Colorado Springs, CO on the grounds that the jail provides inadequate mental health care to the inmates.
- The NPP reentered a lawsuit in the District of Columbia that challenged the conditions in juvenile facilities. In 1986, the District entered into a consent decree and agreed to make changes, but a hearing in 2000 revealed that the District was violating some of the provisions of the decree regarding population limits, diagnostic services, programming, and aftercare.
- In addition to providing attorneys for prisoners' lawsuits, the Project also advocates for prison reform and tries to educate the public about the ramifications of America's current incarceration policy. The NPP publishes a biannual newsletter that features articles, reports, legal analysis, and legislative news about prisoners' rights. It also publishes a number of other reports and bibliographies dealing with inmates' constitutional rights.

Before we proceed to an examination of the legal rights of prisoners, it is important that we provide some background on the history and development of the law in general and individual rights in particular. The next section provides an overview of the common law, sources of law, and the manner in which the U.S. Supreme Court interprets state actions that affect individual rights.

THE COMMON LAW

Understanding what is meant by "common law" is essential for understanding how law evolves, even today, in the United States. Our legal heritage comes from England where the common law was judge-made law. That is, it was law

created by judges as they heard cases and settled disputes. Judges wrote down their decisions, and in doing so attempted to justify their decision by reference to custom, tradition, history, and prior judicial decisions. As judges in England began to rely on previous judgments, they developed the concepts of *stare decisis* (Latin for “let the decision stand”) and precedent. Of course, for there to be precedent, there must be prior decisions. At first, judges made decisions without referring to other cases or courts. They simply heard the case and decided the appropriate outcome, based on their understanding of the law as they had learned it through the reading of legal treatises and encyclopedias. But as time went by, judges came to rely on prior decisions as a means of justifying their decision in a particular case. From this came the reliance on precedent and the concept of *stare decisis*. By the reign of the English King Henry II (1154–1189), a body of law had been developed, and was applied not just in local courts, but nationally. Decisions began to be written down, circulated, and summarized. The result was a more unified body of law, which came to be known as the common law, because it was in force throughout the country; it was literally the law in common throughout the country. The common law system was well developed in England by the thirteenth century.

PRECEDENT AND STARE DECISIS

Under the common law system, every final decision by a court creates a precedent. This precedent governs the court issuing the decision as well as any lower, or inferior, courts in the same jurisdiction. The common law system, developed in England, was brought to America by the early colonists. Many of the principles of the common law, including precedent and belief in *stare decisis*, remain in force today in American courts. Thus, all courts in a state are bound to follow the decisions of the highest court in the state, usually known as the state supreme court. All courts in the federal court system are bound to follow the decisions of the U.S. Supreme Court. This is the notion of precedent.

Precedent is binding only on those courts within the jurisdiction of the court issuing the opinion. Thus a decision of the Idaho Supreme Court is not binding on any court in Texas. Texas courts are not subject to the jurisdiction or control of Idaho courts, and thus are free to interpret the law differently from Idaho courts, if they see fit to do so. Decisions from courts in other jurisdictions, while not binding, may be persuasive, however. This simply means that another court may give consideration and weight to the opinion of other courts. Thus a Texas court may, if it chooses, consider the judgment of an Idaho court. Courts may do this when faced with an issue which they have not dealt with before, but which other courts have examined.

Under the principle of *stare decisis*, if there is a prior decision on a legal issue which applies to a current case, the court will be guided by that prior decision and apply the same legal principles in the current case. *Stare decisis*,

then, is a means of establishing the value of prior decisions, or precedent. In other words, if an issue has been decided one way, it will continue to be decided that way in future cases. Through a reliance on precedent and the principle of *stare decisis*, common law courts were able to provide litigants with some degree of predictability regarding the courts' decisions.

Precedent is not necessarily unchangeable. Judge-made law may be set aside, or overruled, by an act of the legislature, if the constitution permits the legislature to do so. Additionally, the court that issued the precedent may overrule it, or a higher court may reverse the decision of a lower court. If an intermediate level appeals court decides an issue one way and the losing party appeals to a higher appeals court (such as the state supreme court), that higher court may reverse the decision of the lower court. Higher level appeals courts are not bound by the judgments of lower courts. They are bound only by the decisions of courts above them in the court structure. *Stare decisis*, then, involves a respect for and belief in the validity of precedent. Precedent is simply the influence of prior cases on current cases.

Courts are understandably reluctant to reverse decisions they made previously, as this is a tacit admission of error. Courts do so, however, when presented with a compelling justification for doing so. Thus, *stare decisis* is not an inflexible doctrine, but one that is merely the general rule—there are always exceptions, as with most areas of the law!

Alternatively, rather than expressly overrule a prior decision; a court may instead seek to distinguish the prior case from the present case, on the ground that the facts are slightly different. By doing so the court can avoid overruling a prior decisions while coming to what it considers the proper result in the present case. Until a decision is expressly overruled, it stands as an accurate statement of legal principles, or “good law.”

SOURCES OF LAW

The law that students will study in this textbook about prisoners' rights, like all law, is grounded in several sources, including the U.S. Constitution, state constitutions, federal and state statutes, administrative regulations, and case law. Each of these is discussed, in turn, below.

The U.S. Constitution

The U.S. Constitution establishes the powers and limits of the government. It defines the relationship between the three branches of the federal government: the legislative branch, responsible for enacting laws, the executive branch, responsible for enforcing the law, and the judicial branch, responsible for interpreting the laws and applying them in formal legal proceedings. It establishes the basic structure of the three branches and outlines their power and authority within the national government. According to the Constitution's sepa-

ration of powers doctrine, each branch of government is limited to performing its own functions, leaving each branch independent. The Constitution also provides a procedure for amendment. It is a difficult process because the framers of the Constitution believed it should be amended only for the most important reasons. The government cannot change the Constitution, only the people can amend it through their elected representatives. An amendment can be initiated by a two-thirds vote of both houses of Congress or by two-thirds majority of the state legislatures. It must then be approved by the state legislatures in three-fourths of the states or by constitutional conventions in three-fourths of the states.

In 1791, the first ten amendments to the U.S. Constitution, known as the Bill of Rights, were ratified. The Bill of Rights details the fundamental rights of individuals, such as freedom of religion and speech and freedom from unreasonable searches and seizures by the government. The Bill of Rights is of primary importance in the study of the rights of convicted offenders because courts have decided that several of the first ten amendments, specifically the First, Fourth, Fifth, Sixth, Eighth also provide constitutional protection for convicted offenders. This text's focus is on the court decisions that have interpreted those amendments, including the Fourteenth Amendment, ratified after the Civil War in 1868, as they apply to incarcerated offenders and offenders on probation and parole.

The First Amendment's protections for free speech, the right of association, and freedom of religious expression have been hotly contested in many court cases involving incarcerated offenders. Courts have addressed to what extent prisoners, probationers, and parolees are protected against unreasonable searches under the Fourth Amendment. Pursuant to the Eighth Amendment, courts have had to decide what constitutes cruel and unusual punishment. Students, however, may be a bit confused about how the Fifth and Fourteenth Amendments play a role in prisoners' rights. Section One of the Fourteenth Amendment is important for several reasons. First, based on the Fourteenth Amendment's due process clause the Supreme Court reasoned that most of the Bill of Rights, including the Eighth Amendment's cruel and unusual punishment clause, should be incorporated, applying constitutional protections not only to federal officials but to state and local government officials as well.

Second, that same due process clause is significant in cases where inmates argue that correctional officials must abide by specific regulations before they can take certain actions, such as changing a prisoner's security classification or housing assignment, and that failing to follow the regulations is a denial of due process. It is this second application that also makes the Fifth Amendment's due process clause important to the study of prisoner's rights. By its very language, the Fourteenth Amendment's due process clause only applies to actions taken by state and local governments. The Fifth Amendment's due process clause applies