Judges are not wardens, but we must act as wardens to the limited extent that unconstitutional prison conditions force us to intervene when those responsible for the conditions have failed to act.

— U.S. Seventh Circuit Court of Appeals, Harris v. Flemming (1988)

INTRODUCTION

The convicted felon in confinement exists in a legal world much different from that of free people outside prison. Prisoners give up many rights on conviction, and the rights they retain are constrained by the nature of confinement. The loss of citizenship rights is not limited to felons serving prison terms. Anyone convicted of a felony, including those persons who never go to prison, may lose any number of citizenship rights and face other restrictions because of the criminal conviction. After reading the material in this chapter, you should be familiar with:

1. The historical legal status of the convicted felon.
2. Recent developments in prison litigation.
3. Leading cases in prisoners’ rights, including those involving legal access, discipline, medical care, and personal rights.
4. Effects of litigation on jail and prison administration.
5. Alternatives to litigation.
6. Postrelease consequences of a criminal conviction.
7. Civil rights commonly denied felons.
8. Registration and civil commitment of ex-offenders.
9. Methods of erasing criminal records and restoring offenders’ rights.

THE CONVICTED FELON IN HISTORY

Nine California prisoners file a class-action lawsuit accusing the state prison system of providing poor medical care to over 160,000 prisoners. Federal prison inmates sue for the return of Playboy and Penthouse magazines, banned for their sexually explicit pictures by a new act of Congress. Two Wisconsin inmates file
suit over restrictive conditions in the state’s supermax prison. A state prisoner
sues to be allowed to send his semen to his wife outside, maintaining that im-
prisonment without conjugal visiting denies his right to procreation. Attorneys
for a psychotic death row inmate sue to stop his forced medication, arguing
that the state only wishes to keep him stable enough to be executed on sched-
ule. A Chicago jail inmate complains in his lawsuit that his personal privacy
and “Christian modesty” are violated because women guards watch him
shower and use the bathroom. An HIV-positive inmate sues a gossipy prison
guard for damages, claiming that his heart was broken when his fiancée broke
off their relationship after the guard revealed the prisoner’s HIV status to mu-
tual friends.

What two important common features do these recent (and real) lawsuits
share? They are all part of the category of prisoners’ rights litigation, and if
they had occurred fifty years ago, none of them would ever have seen the light
of day, much less the focus of media and court attention. Fifty or a hundred
years ago, if you had posed the question, “What are the rights of the convicted
felon,” the simple answer would have been, “None,” and this chapter would be
over. This was the legacy of the convicted felon—a person to whom the rights
of ordinary citizens did not apply.

For hundreds of years under common law, a felon had no commonly ac-
cepted legal status. When the final guilty verdict was pronounced, the con-
victed offender became a dead man in the eyes of the law, or he at least entered
the realm of legal purgatory. The concept was called civil death, meaning that
the felon no longer had the civil rights of other persons. Whatever happened
to him after conviction, including death, was legally fitting. The convicted
felon became an outlaw, no longer a member of society. He lost the rights of
citizenship, becoming the equivalent of what the later Soviet system would
call a nonperson.

This legal status (or lack of legal status) attached to the convicted felon
continued from the early days of common law into the modern era—well into
the days of the penitentiary. The case most often cited as representative of the
status of the convict in the penitentiary is the 1871 Virginia appellate court de-
cision Ruffin v. Commonwealth, which declared, in part,

A convicted felon, whom the law in its humanity punishes by confinement in the
penitentiary instead of with death, is subject while undergoing that punishment,
to all the laws which the Legislature in its wisdom may enact for the govern-
ment of that institution and the control of its inmates. 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 per-
sonal rights except those which the law in its humanity accords to him. He is for
the time being the slave of the State. . . .

The bill of rights is a declaration of general principles to govern a society of
freemen, and not of convicted felons and men civilly dead. Such men have some
rights it is true, such as the law in its benignity accords to them, but not the rights
of free men. They are the slaves of the State undergoing punishment for heinous
crimes committed against the laws of the land.

This case, in describing the condition of penal servitude and defining the
prisoner as the slave of the state, seems authoritative in restating the “convict-
as-social-outcast” principle that had endured for centuries. Donald Wallace has
taken a different perspective. He has pointed out that the Virginia appeals court judges were overstating their opinions on a case that was not really about hard labor or prison management. Woody Ruffin had killed a private guard attempting to escape from a work detail. After he was condemned to hang, he argued that his trial should have been held where the crime was committed rather than in Richmond, where the prison was located. The appellate court, after appearing to say that he had no rights, in fact reviewed his claim and said that holding the trial in Richmond was allowed, as this was Ruffin’s “vicinage,” his lawful residence. If Ruffin had no legal rights, the court would not have been required to review the merits of his case.1

Wallace goes on to cite other cases from this era that illustrate his theme that not all courts viewed prisoners as civilly dead or without legal standing. He argues that “the slave of the state view was not generally held, if it was ever held by any court.”2 A Georgia Supreme Court case from 1909, Westbrook v. State, found that the prisoner was owed some affirmative obligation from the state:

The convict occupies a different attitude from the slave toward society. He is not mere property, without any civil rights, but has all the rights of an ordinary citizen which are not expressly or by necessary implication taken from him by law. While the law does take his liberty, and imposes a duty of servitude and observance of discipline for the regulation of convicts, it does not deny his right to personal security against unlawful invasion.3

Wallace reviews other cases from the late 1800s and early 1900s relating to the physical conditions in jails and prisons and the administration of discipline in these institutions, particularly the use of physical punishments that were then common practice. Although in this era state and county institutions were considered legally immune from damages in prisoner lawsuits, municipalities and individual jail and prison officers were occasionally held liable for injuries to inmates. The Kansas Supreme Court, holding custodians liable for damages in Topeka v. Boutwell (1894), wrote of the duty of custodians to treat prisoners “humanely”:

... keepers of city prisoners have no warrant authority in law to be harsh and brutal in the management of those in their custody. ... the constitution of the state forbids cruel or unusual punishments, and the courts have ample power to prevent such punishments from being inflicted. In making arrests and in the treatment of prisoners, in or out of city prisons, no police or other officer is justified in using unnecessary harshness or excessive violence.4

If you accept Wallace’s view, which runs contrary to much of the general commentary on the prisoner’s legal status during this era, the convicted felon, if not exactly a dead man, was surely on a legal frontier—a remote place where the rules that applied to everyone else did not generally apply to him. Perhaps he might find an attentive court to listen to his arguments, but more likely not. No general doctrines defined his legal standing. And the fact that he was in the physical custody of a warden with complete control over his body tended to limit his access to the courts free people would have access to (though we know that poor people, even when free, have never found it easy to get the courts to pay attention to their legal problems).

Convicts were lost in the penitentiary’s dark womb. If anything happened to them, if they fell sick and died from neglect, if they were harmed by another
inmate, or if they were killed by a guard, no explanation was necessary. The state was not liable for any misadventure that befell a felon in prison, nor was it required to meet standards of decent care. Bad management or deliberate abuse of prisoners had no legal consequences.

By the 1940s and 1950s, the widespread legal philosophy was that the courts left prison operations alone. Court officials acknowledged that they lacked the expertise to tell prison officials how to run their institutions. This concept, called the **hands-off doctrine**, allowed prison wardens to run their institutions with legal impunity. Prison officials were not accountable in either state or federal courts for their actions or for conditions within their institutions. Donald Wallace calls this a step back, or retrenchment, from an earlier time when courts might have been more inclined to step into matters relating to the administration of jails and prisons; other scholars view the hands-off era as the logical position of the courts in avoiding intervention on behalf of unpopular complainants.

Whatever explanation one accepts, the result was that in general state and federal courts did not intervene in prison and jail operations, and prisoners were not entitled to damages resulting from injuries sustained while in custody. One often-cited case from 1944, *Coffin v. Reichard*, appears to run counter to this doctrine. In *Coffin*, the U.S. Sixth Circuit Court of Appeals held that “a prisoner retains all the rights of an ordinary citizen except those expressly, or by necessary implication, taken from him by law.” Four years later, in reviewing a petition by an Alcatraz inmate to appear in person to argue his appeal, the U.S. Supreme Court ruled in *Price v. Johnston* (1948), “Lawful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations underlying our penal system.”

This typically was interpreted to mean that constitutional rights invariably had to give way to expressed (but rarely documented) corrections concerns about the administering of prison systems—problems and needs relating to custody, security, rehabilitation, discipline, punishment, and resource limitations. Not until the 1960s, when social and legal changes shook up the existing order of American society, would the hands-off doctrine be abandoned and prisoners begin to find courts more concerned about their rights as citizens in confinement.

**LEGAL ACTIONS OPEN TO PRISONERS**

While we probably should not say that courts in the penitentiary era completely ignored prisoners as human beings, it is fair to say that prevailing doctrines worked against prisoners getting their issues into court and getting a fair review once there. Here and there exceptions occurred, but the rule was that prisoners could expect little consideration from both state and federal courts. From the 1960s on, prisoners would experience two important changes in their previously diminished standing as litigants:

1. A wide variety of legal avenues leading into the courts would open to prisoners.
2. State and federal courts would extend to prisoners constitutional rights not previously acknowledged.

We are going to concentrate on two of the most important legal channels that were opened to prisoners between the 1960s and the end of the twentieth century—the
“cruel and unusual punishment” clause of the Eighth Amendment and the
civil rights provisions of Section 1983 of Title 42 of the U.S. Code—but we
ought to review other legal routes as well.

Christopher Smith has provided an overview of legal actions that may be
filed in state and federal courts:6

1. **Appeals.** Anyone convicted at trial (a small percentage of all convictions
in comparison to guilty pleas in which appeals are less readily available) has
the right to appeal the conviction into higher state and federal courts. The
great majority of appeals result in decisions against the convicted criminal.

2. **Torts.** Based on negligence or intentional actions, a tort suit is simply a law-
suit for damages filed in the state or federal court that would have jurisdic-
tion over the place of confinement. If the roof of a prison dorm collapsed
during a rainstorm, injured prisoners could sue for damages just as college
students could if a dorm roof fell in on them.

3. **Criminal charges.** Inmates or prison staff who commit crimes against pris-
oners could have criminal charges filed against them if the prisoner can con-
vince a local district attorney or U.S. district attorney with jurisdiction over the
prison to accept charges. This was rarely done in the past but is more common
today, particularly in cases related to sexual assault and victimization.

4. **Writ of mandamus.** Mandamus is another old common law legal action.
A person asks a court to order a public official to perform his or her lawful
duty. If, for instance, prison policies provided that inmates were to receive
three hot meals per day and prison officials because of budget cutbacks went
to one hot meal and two cold meals, a prisoner could file a writ of mandamus
to require officials to comply with their own policies.

5. **Administrative appeals.** Applying mostly to internal actions within the
prison such as disciplinary hearings, classification, and transfers, these ap-
peals would be carried forth into a court when they could not be resolved
within the internal workings of the prison or corrections bureaucracy. These
appeals grow out of the administrative remedies set up after the litigation of
the 1970s required some structure to process prisoner grievances.

6. **Other legal actions.** This category would include a broad range of other civil
and administrative actions that a prisoner might be involved in because of
events *outside* prison. This would include such legal matters as divorce, child
custody, inheritance, real estate transactions, Social Security, veterans bene-
fits and other financial matters. The prisoner retains the citizenship rights of
ordinary persons in these actions.

State and local prisoners, who make up over 90 percent of all prisoners in
custody, have two common means available to litigate their confinement in
the federal courts:

1. **Habeas corpus petitions**
2. **Civil rights lawsuits**

*Habeas corpus* is an old English legal remedy. As it was used in English and
American courts for a long time, it allowed a court to review the legality of a
prisoner’s confinement. After the appeal was over, prisoners could file *habeas
corpus* petitions in a state court or a federal court asking the judge to review
constitutional issues related to the legal process and conduct of the trial. They typically sought an order granting a new trial, a sentence reduction, or discharge from custody. Such an order was itself subject to appeal. Because it typically took a long time, habeas corpus was associated more with long-term sentences, such as life sentences and death sentences, when appeals of these sentences became common after World War II. Indigents who would have the legal right to appointed counsel for the appeal (at least through state court appeals) have no such right in filing habeas corpus petitions; they must file the actions themselves or find paid or unpaid legal assistance.

Habeas corpus, its use defined in Section 2254 of Title 28 of the U.S. Code, was initially available only to challenge the basis or duration of imprisonment, but in time the courts allowed these petitions to challenge the nature as well as the fact of confinement. In Coffin v. Reichard (1944), the U.S. Sixth Circuit Court of Appeals ruled,

A prisoner is entitled to the writ of habeas corpus when, though lawfully in custody, he is deprived of some right to which he is lawfully entitled even in his confinement, the deprivation of which serves to make his imprisonment more burdensome than the law allows or curtails his liberty to a greater degree than the law permits.

A state prisoner who files a habeas corpus petition is likely to be asking the federal courts to review his conviction, but he could be asking for a review of the conditions under which he is serving his prison term.

Over the past forty years, most of the litigation attacking prison conditions or treatment has arisen in the federal courts under the Federal Civil Rights Act (Section 1983 of Title 42 of the U.S. Code). Several reasons exist for prisoners’ preference for pursuing civil rights litigation:

1. It was a comparatively simple form of action to use.
2. It potentially covered a multitude of prison conditions and procedures.
3. It offered a wide range of possible remedies (including monetary damages) for violations of prisoners’ rights.
4. Many states did not have legal remedies available to challenge prison conditions.
5. In civil rights cases, state remedies did not have to be exhausted first before a federal claim could be made.
6. Prisoners found federal courts more objective and receptive to their claims, primarily because the judges were not part of the state political system that the prisoners blamed for their legal problems.

THE EIGHTH AMENDMENT: CRUEL AND UNUSUAL PUNISHMENT

The Eighth Amendment to the Bill of Rights of the U.S. Constitution contains these provisions: “Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments imposed.” For almost two centuries, the cruel and unusual punishments clause had no application to prisoners. The Bill of Rights, adopted to limit the power of the federal government and its officials, had no application to state prisoners—only federal prisoners—as originally applied. The Supreme Court looked at very few cases relating to
the issue of cruel and unusual punishment prior to the 1970s. The phrase “cruel and unusual punishment” had originally appeared in the English Bill of Rights in 1689, apparently directed against punishments not authorized by law or beyond the jurisdiction of the sentencing court. In including it in the Bill of Rights, the draftsmen of the American Constitution were more concerned with torture and other physically excessive means of punishment.

In this era, the death penalty was an accepted punishment. In *Wilkinson v. Utah* (1879), the Supreme Court unanimously held that execution by shooting was not a prohibited form of execution. The Court said that “it is safe to affirm that the punishments of torture . . . and all others in the same line of unnecessary cruelty, are forbidden by that amendment to the Constitution.” When the Court was asked to rule on New York’s new electric chair in *In re Kemmler* (1890), it held the Eighth Amendment inapplicable to the states and added the following comment: “Punishments are cruel when they involve torture or a lingering death; but the punishment of death is not cruel within the meaning of that word as used in the Constitution. It implies there something inhuman and barbarous, something more than the mere extinguishment of life.”

In 1910, the Court ruled in *Weems v. United States* that a sentence could be cruel and unusual when it was disproportionate to the crime committed—in this case, twelve to twenty years at hard labor in chains and perpetual loss of civil rights for the crime of accessory in falsifying public documents. However, in the well-known death penalty case of *Louisiana ex re. Francis v. Resweber* (1947), the Court ruled it permissible to “reexecute” Willie Francis after a malfunction short-circuited the first attempt to electrocute him: a second electrocution was not cruel and unusual punishment.

Smith and Dow have commented on the next important case in this chronology:

The seminal case that shaped the meaning of the Eighth Amendment was *Trop v. Dulles* (1958), which concerned an unusual circumstance regarding an American soldier who was convicted of desertion during World War II. He received a dishonorable discharge and served a sentence in a military prison. Years later, he learned that he had also lost his citizenship under the requirements of the congressional statute governing wartime desertion. The Supreme Court examined the case and declared that the forfeiture of citizenship in these circumstances, which render a native-born American “stateless” and without rights and protections from any nation in the world, constituted cruel and unusual punishment in violation of the Eighth Amendment.

The most important aspect of the decision was the test announced by Chief Justice Earl Warren for defining the Eighth Amendment—a test that continues to govern the Cruel and Unusual Punishments Clause more than 40 years later. According to Warren, “The words of the amendment are not precise . . . and their scope is not static. The amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.” As indicated by this test, the Eighth Amendment has no fixed meaning. Instead, the meaning of “cruel and unusual punishments” will change as society changes and as judges assess whether specific “punishments” are consistent with evolving society values. In sum, individual judicial officers must make their own judgments about whether the Eighth Amendment has been violated.

None of this yet meant anything to state prisoners, whose state constitutions, not the U.S. Constitution, defined their rights, but this would soon change abruptly. In the 1960s, the Supreme Court, through the more frequent
application of a legal doctrine known as incorporation, began to apply the
provisions of the Bill of Rights to the states, including local jurisdictions within
the states. The mechanism for incorporation was the Fourteenth Amend-
ment to the Constitution, adopted in 1868 after the Civil War. Section I pro-
vides, in part, “No State shall make or enforce any law which shall abridge the
privileges or immunities of citizens of the United States; nor shall any State de-
prive any person of life, liberty, or property, without due process of law; nor
deny to any person within its jurisdiction the equal protection of the law.”

The due process and equal protection provisions of the Fourteenth
Amendment made citizens subject to state laws—such as criminal defendants
and convicted criminals—also subject to federal constitutional standards. The
Bill of Rights applied as much to state cases as it did to federal cases. In land-
mark cases such as Mapp v. Ohio (1961), Gideon v. Wainwright (1963), Miranda
v. Arizona (1966), In re Gault (1967), Brady v. Maryland (1968), and dozens of
other cases in this decade and the early part of the next, the Court moved to
set consistent national standards where only widely varying state standards
had existed previously. Most of the early decisions dealt with criminal suspects
pretrial and at trial, not in confinement after conviction. However, as the
Warren Court undertook what is called the due process revolution at the
national level, federal district judges began to accept lawsuits filed by state
prisoners alleging unconstitutional prison conditions in state prisons.

The most important Eighth Amendment lawsuits complaining of bad liv-
ing conditions were filed or adjudicated during the 1970s. Some of these were
individual suits in which one prisoner claimed that he or she had been mis-
treated or made to suffer because of a prison’s bad living environment. The
most influential of these cases were class-action lawsuits filed by a small
group of inmates but on behalf of a much larger group—such as all inmates in
a treatment unit, all inmates in a jail or prison, or sometimes all inmates in all
the jails of a particular county or the prisons of a particular state.

During the 1970s, virtually every state prison system and most urban jails
would be hit by inmate lawsuits arguing that confinement in these institutions
constituted “cruel and unusual punishment” under Eighth Amendment stan-
dards. The South was hardest hit. In state after state across the South, federal dis-
trict judges heard Eighth Amendment and Fourteenth Amendment suits charging
that prisons were overcrowded, dilapidated, violent, and failing to provide needed
care, particularly in regard to medical care and mental health services.

Federal judges responding to inmate lawsuits would hold fact-finding
hearings and conduct inquiries into the allegations made. The suits often be-
came totality of conditions actions in which several different lawsuits with
different complaints would be rolled into one megacase examining the whole
prison or, in several states, the entire prison system. Then the federal judge
would issue a court order for prison reform in the name of the lead case. In
Arkansas, it was Holt v. Sarver (1970); in Alabama, it was Newman v. Alabama
(1972); in Mississippi, it was Gates v. Collier (1972); in Louisiana, it was Williams
v. McKeithen (1975); and in Texas, it was Ruiz v. Estelle (1980).

Holt v. Sarver was the first state-level totality-of-conditions Eighth Amend-
ment case. The federal court found in Holt that the Arkansas prison system was
in violation of the cruel and unusual punishments clause in several key aspects:

1. The prison was run largely by inmate trusty guards who bred hatred
   and mistrust.
2. The open barracks within the prison invited widespread physical and sexual assaults.
3. The isolation cells were overcrowded, filthy, and unsanitary.
4. There was a total absence of any program of rehabilitation and training.9

The court commented,

It is one thing for the State to send a man to the Penitentiary as a punishment for crime, it is another thing for the State to delegate the governance of him to other convicts, and to do nothing meaningful for his safety, well being, and possible rehabilitation. . . . However constitutionally tolerable the Arkansas system may have been in former years, it simply will not do today.10

When prison officials acknowledged their problems but argued they could make no improvements until the state legislature appropriated the funds to make improvements, the court was unsympathetic:

Let there be no mistake in the matter; the obligation of prison officials to eliminate existing unconstitutionalities does not depend upon what the Legislature may do, or upon what the Governor may do, or indeed upon what prison officials may actually be able to accomplish. If Arkansas is going to operate a Penitentiary System, it is going to have to be a system that is countenanced by the Constitution of the United States.11

In Louisiana, four inmates filed a class-action lawsuit about conditions at the Angola penitentiary in 1971. After a federal magistrate investigated the allegations and found most of them to be substantially true, efforts were made to settle the case without judicial intervention. These efforts failed, and on June 10, 1975, Federal District Judge Gordon West issued a twenty-page “Judgment and Order.” In signing the order, Judge West observed that conditions at Angola “not only shock the conscience” but also flagrantly violated basic constitutional requirements. Among the more important provisions of Judge West’s order were these:

1. The prison was to hire 400 more correctional officers to bring the staff up to a minimum of 950.
2. Two guards were to be placed in each living unit twenty-four hours per day to maintain a safe living environment.
3. Overt and aggressive homosexuals were to be removed from the general population.
4. Violent inmates were to be separated from the general population.
5. Temporary housing must be used to deal with overcrowding.
6. Medical care must be dramatically improved.
7. Incoming inmates must get physical exams.
8. The psychiatric unit (also known as “PU” and called a “hellhole”) must begin providing real therapy to mentally ill inmates.12

When Louisiana officials dragged their feet responding to the order for over a year and appealed to a higher court—losing the appeal—Judge West tightened the screws. He put a population limit on Angola of 2,640 inmates—its official capacity—though it then held 4,000 inmates in custody. This forced the
system to make immediate changes and to begin storing state prisoners in parish jails, leading to the state’s split system of today. Judge West and his successor, Judge Frank Polozola, kept the court order in *Williams v. McKeithen* in effect for twenty-one years, until April 1996, eventually expanding it to include all adult prisons, all parish jails, and all juvenile training schools in the state. Even after the court removed the general order in 1996, it retained provisions relating to prison medical care, which had still not been brought up to adequate standards, and to the juvenile institutions, which had been plagued by internal violence and disorder.

**SECTION 1983: CIVIL RIGHTS LITIGATION**

Although the Eighth Amendment and Fourteenth Amendment litigation had the more profound impact in accomplishing broad institutional reform during the 1970s and 1980s, the most common form of prisoners’ rights litigation during this era (and continuing today) is through what is commonly called a **Section 1983 lawsuit**. Section 1983 of Title 42 of the U.S. Code provides,

> Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory, subjects or causes to be subjected, any citizen of the United States of any other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit at equity, or other proper proceeding for redress.

This statute was enacted in 1871 during Reconstruction after the Civil War. For almost a century, it lay dormant in its application to local or state criminal justice officials until 1961, when it was first applied to police officers. Section 1983 actions proliferated by the early 1970s. From about 200 filings in 1966, the number of Section 1983 suits jumped up to 5,000 in 1972, and the numbers increased steadily for the next twenty-five years, roughly paralleling the increase in state prisoner population, to more than 40,000 in 1996. The premise of these actions is that a state or local government official acting **under color of state law** has deprived a prisoner of a constitutional right. These actions normally name a specific person or persons as defendants. Supreme Court decisions have established that while neither states nor state agencies (such as the department of corrections) can be sued as entities, municipalities and counties can be if the alleged violation in part of local government policy.

Hanson and Daly, in their review of the issues in Section 1983 prison lawsuits filed in 1992, provided this summary of the principal cause of action cited:

1. Physical security (prisoner attacked by other prisoners or by corrections officers) 21 percent
2. Medical treatment 17 percent
3. Due process (internal transfers or disciplinary action without following proper procedures) 13 percent
4. Challenges to conviction (prisoners mistakenly raising *habeas corpus* issues in a Section 1983 action) 12 percent
5. Physical conditions in prison 9 percent
6. Access to courts, lawyers, and communication with others 7 percent
7. Living conditions (denied access to recreation or programs) 4 percent
8. Religious expression 4 percent
9. Assault by arresting officer 3 percent
10. Other 11 percent

Of the approximately 25,000 Section 1983 lawsuits filed in 1992, 74 percent were dismissed by the court based on the prisoner’s complaint. Another 20 percent were dismissed after the individual and government unit being sued responded to the complaint. This left about 6 percent of the total filings, or 1,500 cases, still alive. Four percent were dismissed with the prisoner’s agreement, sometimes because of a settlement. Two percent went to trial; prisoners won less than half the cases that went to trial. Thus, out of 25,000 lawsuits filed, prisoners won outright less than 1 percent and settled to their advantage another small percentage, totaling perhaps fewer than 1,000 out of 25,000 filed. Hanson and Daly divide outcomes into three categories: win nothing, win little, and win big. For prisoners, win nothing was by far the most common; win big was like winning the lottery, and even there the winnings were usually small, no more than a few thousand dollars.14 Hanson and Daly identified the principal reasons for dismissal of these suits:

1. Prisoner failed to follow court rules in filing case 38 percent
2. No evidence exists of constitutional rights violation 19 percent
3. Issue is frivolous (no basis for claim in fact or law) 19 percent
4. Issue presented is not covered by Section 1983 (mistakenly raises habeas corpus issues about the basis of the conviction) 7 percent
5. Defendant is a judge or prosecutor and therefore is protected by law against lawsuits 4 percent
6. Defendant does not work for the government 3 percent
7. Other 9 percent

Each of these cases would have been under review in the federal courts for an average of five to nine months prior to its dismissal, some with complex issues more than twice this long. In the decade of the 1990s, Section 1983 lawsuits made up more than 10 percent of all civil cases filed in the federal courts. In some districts with lots of prisoners, the suits were the most common filings in the district courts.

FEDERAL COURT INTERVENTION

In less than ten years, “hands off” had been transformed into a very definite “hands on,” and so it went in many other states and hundreds of county and city jails across America during the 1970s and into the early 1980s. New York City’s old jail, the Tombs, was shut down by federal court order on November 15, 1974,
the only major institution actually closed as a result of judicial intervention, but hundreds of other state and local facilities were under court order, some for years at a time, during this era.

The intervention process typically followed steps similar to those described previously for Louisiana. The federal district court with jurisdiction over the institution would get a Section 1983 lawsuit or a *habeas corpus* petition filed by inmates proceeding pro se (without counsel) or with counsel, often pro bono (unpaid) or legal aid attorneys interested in prisoners’ rights litigation. The court would appoint attorneys to represent the inmates’ legal interests if it found merit to their initial claim. If the litigation could not be resolved through negotiation, over a period of months or years, the court would hold a formal hearing and announce its judgment. This ordinarily involved the imposition of a *court order* giving the court controlling authority over some aspect of the institution’s operations and requiring that certain steps be taken to eliminate unconstitutional conditions. Sometimes the court granted an *injunction*, a legal order to stop an action or a practice that was ruled improper.

If the intervention was broad based and would go on for an extended period, the court would appoint an official usually termed a *court master* or *monitor* to oversee the institution’s response to the order. The master, someone outside the system but experienced in corrections, did the legwork for the judge. Thus, while the correctional institution was working within its own governmental bureaucracy to effect change, it was also being monitored by a representative of the federal court to ensure that progress was being made. If population limits were set, for instance, and the master found that the institution had exceeded these limits, this would be reported to the court, and the judge would schedule a hearing to determine why this violation of the order occurred.

The court’s authority ultimately resided in its *contempt power*, its ability to impose a jail term or a monetary fine on officials who violated its order. Because the orders came from a federal district court, where some judges might be considered too “liberal” or *activist*, meaning that they were siding with the prisoners against the administration, it was common for prison officials to appeal unfavorable rulings to the federal appeals courts and eventually to the Supreme Court. These legal battles were often protracted struggles that went on for decades. Improvements were being made, new prisons being built to relieve overcrowding, and prisoners getting better care than they had previously, but the details were hashed out in court—the federal court imposing its authority to umpire the adversarial relationship between the prisoners and prison administrators. The goal of the court order was to achieve a formal agreement, called a *consent decree*, in which both sides agreed (through their attorneys) on the actions to be taken to resolve the litigation. When the court determined that the institution had met the requirements of the court, as written down in the consent decree, the court order was terminated. The institution could operate on its own again without federal court supervision.

Some individual institutions worked their way through this process fairly quickly, while statewide systems confronting totality-of-conditions rulings often worked much more slowly, particularly if state officials contested the details of intervention. Prison systems were compared to a longtime alcoholic: you could cooperate, take your treatment immediately, and try to reform, or you could fight treatment, try it on your own, fail, try again, fail again, and
eventually accept what you had rejected when it was first offered. The long-running Texas case of *Ruiz v. Estelle*, which brought sweeping reforms to the Texas prison system and created chaos when it broke down the old control model of Texas prisons in the process, began in the courts in 1972 and was not finally resolved until 1986.

Let us now take a closer look at several key areas of federal court intervention, most of these the subject of Section 1983 lawsuits but some initiated through habeas corpus petitions. The topics we will focus on include the following:

1. Access to courts
2. Discipline and due process
3. Medical care
4. Personal rights

**PRISONERS’ RIGHTS: ACCESS TO COURTS**

In the “good old days” of the penitentiary, prison officials had complete control over the prisoner’s contact with the outside world. If the warden did not want a letter or legal document complaining of prison conditions to get out, he simply destroyed it and locked the prisoner in “the hole” for daring to criticize the prison. All the prisoner’s other rights thus depend on this first right of **access to courts**—to bring a complaint to the attention of authorities who will require prison officials to follow the law.

In one of the earliest prisoners’ rights cases decided by the Supreme Court, *Ex parte Hull* (1941), the Court examined a Michigan prison regulation that required “all legal documents, briefs, petitions, motions, habeas corpus proceedings, and appeals . . . to be submitted to the institutional welfare office and . . . the legal investigator to the Parole Board.” Parole board investigators forwarded the documents to the court if they believed they were properly written, but they sent them back to prisoners if they believed the documents did not comply with court regulations. In effect, state officials had the power to determine which communications from prisoners would actually be sent to the courthouse. The Supreme Court rejected the Michigan regulation, ruling that a prisoner’s right to petition a federal court for a writ of *habeas corpus* could not be abridged or impaired.

Prisoners would argue later that the right of access was meaningless if they did not have legal assistance and access to legal resources in preparing writs and briefs and submitting materials to the courts. Two cases defined these rights to legal assistance and legal materials. The Supreme Court, in *Johnson v. Avery* (1969), was asked to consider the case of a Tennessee prison inmate who was transferred for acting as a *jailhouse lawyer*, assisting other inmates with legal matters. Since prisoners were not entitled to professional attorneys, the district court ruled, “for all practical purposes, if such prisoners cannot have the assistance of a ‘jail-house lawyer,’ their possibly valid constitutional claims will never be heard in any court.” The Supreme Court ruled that the state could not enforce a regulation barring inmates from furnishing assistance to other prisoners.
A few years later, the issue of research materials was addressed in the North Carolina case of *Bounds v. Smith* (1977), often called the law library case. The Supreme Court held that “the fundamental constitutional right of access to the courts requires prison authorities to assist inmates in the preparation and filing of meaningful legal papers by providing prisoners with adequate law libraries or adequate legal assistance from persons trained in the law.” Some states provided attorneys—either paid or pro bono—or law students to provide legal assistance; most relied on prison law libraries staffed by inmate paralegals (the more dignified term for jailhouse lawyer). A later ruling in this same case (*Smith v. Bounds* [1987]) defined an “adequate” prison library as consisting of the following:

1. Photocopy materials without charge
2. Inmates trained as paralegals
3. The availability of prison law libraries for all inmates

After the original *Bounds* decision, law professor Barry Nakell and others established North Carolina Prisoner Legal Services (NCPLS) as a nonprofit organization to provide legal assistance to prison and jail inmates. NCPLS has refined its operation several times since its founding in 1978, but it has continued to assist prisoners in basic rights cases and grievance resolution, including filing lawsuits when necessary. In 2003, as it celebrated its twenty-fifth anniversary, NCPLS had a staff of thirty-four, including fourteen lawyers and ten paralegals, to assist prisoners in both civil (including Section 1983) and postconviction (*habeas corpus*) legal matters. It operates through a contract with the North Carolina Department of Corrections. Many other states do not provide this level of assistance to inmates, providing inmate-staffed law libraries as the basic alternative.

The requirement of access to legal materials by all inmates has often been a problem for prisoners held in special housing units, such as segregation or mental health. It has also been an issue for inmates whose first language is not English. In a later case reviewing the intervention of an Arizona district court into these issues—*Lewis v. Casey* (1996)—the conservative Supreme Court of the 1990s overturned the detailed requirements the lower court had established for prison library operations to serve specific targeted populations. It said that without showing that these inmates were actually being harmed by inadequate legal resources, the court should defer to the judgment of prison authorities. In basketball terms, “no harm, no foul.”

Justice Clarence Thomas, in a concurring opinion in *Lewis*, wrote,

I agree that the Constitution affords prisoners what can be termed a right of access to the courts. That right, rooted in the Due Process Clause and the principle articulated in *Ex parte Hull*, is a right not to be arbitrarily prevented from lodging a claimed violation of a constitutional right in the federal court. The State, however, is not constitutionally required to finance or otherwise assist the prisoner’s efforts, either through law libraries or other legal assistance. Whether to expend state resources to facilitate prisoner lawsuits is a question of policy and one that the Constitution leaves to the discretion of the States.16

This case is an important recent example of the deference doctrine (akin to hands off) that we will discuss later.
PRISONERS’ RIGHTS: DISCIPLINE AND DUE PROCESS

As prison officials once had complete control over prisoners’ contacts with the courts, so they once had complete authority in internal disciplinary and punishment matters. The key Supreme Court case to address procedures in imposing punishments for violating prison rules was Wolff v. McDonnell (1974). Prior to this decision, jails and prisons typically relied on informal internal procedures in dealing with inmates who violated the rules. Inmates might be locked down, transferred, given extra duty, have privileges taken away, or have good-time credits canceled by the order of prison officials—all of these done verbally without a formal hearing or creation of a record for the action.

It was only six years before Wolff, in Jackson v. Bishop (1968), that the U.S. Eighth Circuit Court of Appeals had finally struck down corporal punishment of prisoners in Arkansas. Three years before, the federal district court had allowed Arkansas to continue its old practice of beating prisoners with a leather strap, as had been done in numerous other states into at least the 1950s. The earlier decision in Tally v. Stephens (1965) provided that whipping could continue to be used so long as safeguards were followed to prevent abuse:

It must not be excessive; it must be inflicted as dispassionately as possible and by responsible people; and it must be applied in reference to recognizable standards whereby a convict may know what conduct on his part will cause him to be whipped and how much punishment given conduct may produce.

Jackson said essentially, “This is not working, so it is time to quit.” Justice Harry Blackmun, who wrote the Jackson opinion for the court of appeals before he was appointed to the Supreme Court, said that the use of the strap violated the Eighth Amendment (the cruel and unusual punishment doctrine). The ruling said no rule or regulation could prevent abuse. Sounding like the Enlightenment philosophers who had advocated the abolition of whipping two centuries before, the court wrote,

Corporal punishment generates hate toward the keepers who punish and toward the system which permits it. It is degrading to the punisher and the punished alike. It frustrates correctional and rehabilitative goals. This record cries out with testimony to this effect from the expert penologists, from the inmates, and from their keepers. . . . In any event, the testimony of the two expert penologists clearly demonstrates that the use of the strap in this day is unusual and we encounter no difficulty in holding that its use is cruel.

In Wolff v. McDonnell, Nebraska prison inmates sued over the informality of prison misconduct proceedings that could result in the loss of good-time credits. The Supreme Court ruled that prisoners were protected by the Fourteenth Amendment’s due process clause even though the prison environment is far different from the free-world environment, as Justice Byron White noted in the opinion:

Prison disciplinary proceedings . . . take place in a close, tightly controlled environment peopled by those who have chosen to violate the criminal law and who have been lawfully incarcerated for doing so. Some are first offenders, but many
are recidivists who have repeatedly employed illegal and often very violent
means to attain their ends. They may have very little regard for the safety of oth-
ers or their property or for the rules designed to provide an orderly and reason-
ably safe prison life . . . Guards and inmates co-exist in direct and intimate
contact. Tension between them is unremitting. Frustration, resentment, and de-
spair are commonplace. Relationships among the inmates are varied and complex
and perhaps subject to the unwritten code that exhorts inmates not to inform on
a fellow prisoner.

The Court then ruled that the prison must extend basic elements of due
process to prisoners in these proceedings (specifically if they involve a possi-
ble liberty interest, such as loss of good time or punitive segregation). The
required safeguards included the following:

1. Advance written notice of the charges must be given to the inmate no less
than twenty-four hours prior to his or her appearance before the committee.
2. There must be a written statement by the factfinders as to the evidence re-
lied on and reasons for the disciplinary action.
3. The inmate should be allowed to call witnesses and present documentary ev-
dence in his or her defense if permitting him or her to do so will not jeop-
ardize institutional safety or correctional goals.
4. Counsel substitute (either a fellow inmate or a staff member) will be per-
mitted when the inmate is illiterate or when the complexity of the issues
make it unlikely that the inmate will be able to collect and present the evi-
dence for an adequate comprehension of the case.
5. The prison disciplinary board must be impartial. 17

Some prisoners’ rights advocates thought this decision did not go far
enough. They wanted such additional safeguards as the right to confront and
cross-examine witnesses and right to counsel, which would have turned these
proceedings into “minitrials” similar to outside courtrooms. The Court was not
willing to go this far, and, while it has never really gone further than this deci-
sion in defining rights in disciplinary cases, Wolff had a great impact on prison
and jail operations. Imagine—say, as a parent—what the effect on discipline
would be if, each time you wanted to punish a child for misconduct, you had
to schedule a hearing, notify participants, and assemble a board to hear the case.

Just the mechanics of following the rules work to reduce arbitrariness and
personal abuses—and likely reduce as well the number of such violations that
might be written up and forwarded to the disciplinary board. The DB Court
(for disciplinary board), meeting on a regular schedule, has become a standard
part of the internal disciplinary system of all secure custodial and community
residential facilities since Wolff.

PRISONERS’ RIGHTS: MEDICAL CARE

As we discussed in chapter 8, access to medical care and the quality of care pro-
vided are important issues to prisoners who suffer from a broad range of health
problems related primarily to poverty and substance abuse. Prison health care
before the reform era was inconsistent and often “shockingly substandard,” in
the words of law professor Sheldon Krantz. Several of the whole-prison or whole-system lawsuits of the 1970s included descriptions of deficient medical care. In Newman v. State of Alabama (1972), for instance, the federal district court had found the general quality of medical care within the Alabama prison system to be “barbarous” and “shocking to the conscience” and therefore in violation of the Eighth Amendment.

Not until the Texas case of Estelle v. Gamble (1976) did the Supreme Court address medical care by itself as an Eighth Amendment issue. J. W. Gamble was a prisoner who was injured when a bale of cotton fell on him while he was unloading a truck. He was provided with medical treatment but maintained that he was still in too much pain to return to work. When he was subjected to disciplinary action based on refusal to work, he filed a Section 1983 lawsuit.

The Supreme Court reviewed the history of Gamble’s medical treatment and determined that his case did not rise to the level of deliberate indifference to the serious medical needs of inmates: “the unnecessary and wanton infliction of pain.” The Court went on to say that not all claims of inadequate medical treatment would be covered by the Eighth Amendment’s cruel and unusual punishment provisions. An inadvertent failure to provide adequate medical care would not qualify, nor would an accident, simple negligence, or disagreement as to treatment options. The Court denied Gamble’s claim, suggesting that if he had a claim at all, it was a medical malpractice claim that should be filed in state court as a tort suit for damages.

Gamble lost, but the Court established the deliberate indifference rule that became the foundation of later Section 1983 litigation of all types, not just medical care. Deliberate indifference, which is comparable to gross negligence or recklessness, focuses on the motives or thoughts of prison officials responsible for the injury, which in medical cases results from the bad care provided. Justice John Paul Stevens, who dissented in Estelle v. Gamble, objected to the decision’s focus on the “subjective motivation” of prison officials, which meant that a prisoner had to show bad intentions or shameful neglect to fix responsibility. Justice Stevens argued that “whether the constitutional standard has been violated should turn on the character of the punishment rather than the motivation of the individual who inflicted it.” (A similar example would be hate crimes, in which the penalty is increased because of the motivation rather than the harm done.)

Justice Stevens used the example of the Confederate Civil War prison at Andersonville, where thousands of Union troops died of disease and starvation as prisoners of war. The prison’s commandant, Captain Henry Wirz, was the only southerner hanged by federal authority after the war ended. Wirz claimed he was not responsible for the conditions and had tried to fix them but lacked the resources. According to Gamble, Wirz’s situation would be comparable to a doctor who completely misdiagnosed an inmate’s case of cancer and refused to refer him to a specialist for treatment, saying, “Here, take two aspirin three times a day and come see me if you don’t get better.” If the inmate sued because his cancer became terminal, the doctor would respond, “I tried to do what I could. I just made a mistake,” and the inmate would lose his Section 1983 lawsuit because no constitutional violation occurred.

Several years later, the Supreme Court reiterated this point in Whitley v. Albers (1986), a use-of-force case:
After incarceration, only the unnecessary and wanton infliction of pain . . . constitutes cruel and unusual punishment forbidden by the Eighth Amendment. To be cruel and unusual punishment, conduct that does not purport to be punishment at all must involve more than ordinary lack of due care for the prisoner's interests or safety . . . It is obduracy and wantonness, not inadvertence or error in good faith, that characterize the conduct prohibited by the Cruel and Unusual Punishments Clause, whether that conduct occurs in connection with establishing conditions of confinement, supplying medical needs, or restoring official control over a tumultuous cellblock.

*Estelle v. Gamble* is said to have established a general right to “adequate” medical care in prisons, meaning that the medical needs of prisoners cannot be completely ignored or botched. Prisoners do have a right to treatment, even if it is not constitutionally protected at the same level as the right of private citizens. But what of the opposite right, the right to refuse treatment? Terry Castleberry, a death row inmate at the Louisiana State Penitentiary, suffered from several ailments, including progressive kidney failure. He could undergo dialysis, if he wished, at state expense in the prison hospital, but he would continue to be housed on death row. Castleberry expressed his wish to refuse treatment, which would result in his death. Should he be allowed to decline treatment that would keep him alive?

Treatment of prisoners against their will often ventures into the subject area of mental incompetence. If a patient—free or in prison—is mentally competent, he or she has the right to refuse treatment. This is a right to privacy decision called the informed consent doctrine. People have the right to decide what will and will not be done to their bodies. That includes the right to decide whether to take medication or permit surgery.20

Like many rights, this right is not absolute. The state may have an interest in requiring treatment for someone who is suicidal, for instance, or who has a contagious disease. In prison, this issue of compelling treatment comes up most often with prisoners who are mentally incompetent either because of mental illness or serious medical conditions such as dementia or Alzheimer’s. The leading Supreme Court case in this area is *Washington v. Harper* (1990). Harper was an inmate in a Washington prison who was suffering from a manic-depressive disorder. He took his medication voluntarily and then stopped. His physician wanted to continue the medication and took the issue to a special committee described in a prison policy. Harper was found to be a danger to others, and the committee allowed his involuntary treatment with antipsychotic drugs. When he was transferred out to another prison, he briefly stopped taking the drugs, then started again—involuntarily—on his return. He sued under Section 1983.

This case considered two questions:

1. Can a prisoner be treated with antipsychotic drugs against his will?
2. Can the review by an internal committee take the place of a judicial hearing?

To both questions, the Court answered yes. The medication was necessary, given Harper’s history of violent behavior when he was off his medication, to reduce the danger he posed to other persons. The committee review satisfied the liberty interest of the inmate, in the Court’s language, “perhaps better . . . by allowing the decision to medicate to be made by the medical professionals
rather than a judge.” The Court was satisfied that the State of Washington had provided due process to the inmate.\(^\text{21}\)

This issue has come up again recently in connection with inmates on death row. The 1986 decision in *Ford v. Wainwright* had ruled that to be executed, inmates must be mentally competent—at least to understand their crime and the punishment. Can inmates be medicated against their will to remain functional enough to be processed along toward their execution date? Does the state have the authority to medicate to execute? Some states do not allow this, but thus far no Supreme Court ruling prohibits the practice. Some borderline types, such as Scott Panetti—a schizophrenic who was hospitalized fourteen times prior to his conviction for the murder of his wife’s parents in 1992—have faced execution while on medication on death row; Panetti’s scheduled 2004 execution was delayed indefinitely while the courts consider whether he is mentally competent to die. As for Terry Castleberry, his decision to opt out of waiting for execution in Louisiana was allowed. He died in the prison hospital of kidney failure in April 2002.

**PRISONERS’ RIGHTS: PERSONAL RIGHTS**

A Buddhist prisoner is placed in solitary confinement on a bread-and-water diet for sharing religious materials with other inmates. Journalists and inmates are prohibited from conducting face-to-face interviews. Prisoners object to the institution’s seizure of magazines on a “forbidden” list, including *High Times* (about drug use) and *Guns and Ammo* (about firearms). Jail inmates are denied contact visits with their families. Prisoners want to form a labor union to promote better working conditions for inmates.

These are real cases related to the personal rights of prisoners, rights commonly placed under the First Amendment of the Bill of Rights. It reads, “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for redress of grievances.”

Religion is very important to many prisoners, the center of their prison life. Some of the most important early prisoners’ rights cases in the 1960s dealt with the right of inmates to practice an established religion, in these cases the Black Muslim faith in Illinois and California prisons. One of the leading cases—the first Section 1983 case decided in a prisoner’s favor—was *Cooper v. Pate* (1964), a lawsuit filed by Thomas X. Cooper, a former Catholic turned Black Muslim in Illinois’s Stateville Prison. While the prisons saw the Muslims as an adversarial political group, the courts ruled that prisoners had to be allowed to practice their faith and not be punished for doing so.

*Cruz v. Beto* (1972) dealt with a Buddhist prisoner in the Texas prison system. Cruz was not allowed to use the prison chapel, nor to correspond with his religious advisor in the Buddhist sect. He was also placed in solitary on a restricted diet for allowing other inmates to read his religious materials. When he filed suit under Section 1983, the Supreme Court agreed that the Texas Department of Corrections had discriminated against Cruz by denying him reasonable opportunity to practice his Buddhist faith, comparable to opportunities offered to other inmates of conventional religious beliefs.\(^\text{22}\)
This case has been used since by numerous individuals and groups as a "foot in the door" to new religions and religious practices in prisons. Later cases have generally been less tolerant of new, "prison-founded" religions and religious practices that conflict with "legitimate penological interests," a term defined in the case of Turner v. Safley (1987), discussed later in this chapter. A New Jersey case, O'Lone v. Estate of Shabazz (1987), involved Muslim inmates who said they were denied participation in religious services because of work assignments. The court sided with prison officials, basically saying that security was more important than the prisoners' religious rights.

The free exercise of religion is an important issue in American society. Congress passed a new law, the Religious Freedom Restoration Act of 1993, which was intended to force the government to provide compelling justifications for insisting that any law or policy was more important than people's religious practices. This law was not about prisoners' religious rights, but Congress did allow prisoners to be included within its protective provisions. This law was declared unconstitutional by the Supreme Court in 1997 on the basis that Congress lacked the authority to enact such legislation. Several states have adopted or considered the adoption of similar laws since. State corrections departments generally oppose including prisoners among the groups granted religious freedom in legislation, arguing that this tends to promote frivolous lawsuits by odd-balls and splinter groups who want to practice new religions they have made up. Let's say that the inmates who wanted to form a chapter of the new prison religion, the Church of the New Song, were not allowed to do so by prison authorities and that a journalist from a major religious magazine wanted to interview them in prison. Do journalists have the right to interview particular inmates in prison? This was the issue in Pell v. Procunier (1974) and Houchins v. KQED, Inc. (1978). These two California cases established two important standards:

1. A state prison regulation prohibiting media interviews with specific inmates does not violate the constitutional rights of the media or the inmates as long as alternative means of communication are available.
2. The media have no right of access to inmates and prisons beyond that given to the general public.

In Pell, prison officials argued that interviews make inmates "famous" (or notorious) and give them influence over their fellow inmates that can be a threat to security. As long as alternative forms of communication such as correspondence and visitation remained available, prisoners had no rights to direct media access except as might be permitted by prison officials. A popular 2003 film, The Life of David Gale, about a former professor awaiting execution in Texas, was premised on a series of last-minute interviews of inmate Gale by outside journalists—lengthy, individual, face-to-face paid interviews that the prison system would very likely not have allowed in the first place (but that's showbiz).

In Houchins, a television station that wanted to tour the county jail was prohibited from doing so by the sheriff except within limits specified in a departmental policy. The TV station wanted more access than the sheriff was willing to give. The Supreme Court sided with the sheriff. It cited other alternatives that, though not as convenient as going on location to shoot live footage, were also available to get the story. The secure operation of the jail took precedence over the media's right to gather information to present to the public.
If prisoners do not have the right to meet directly with journalists, what general rights do they have to communicate with or visit with other persons, including family and friends? One of the defining qualities of imprisonment is separation from the outside world. Prisoners are not simply convicted criminals. They are also husbands and wives, fathers and mothers, sons and daughters, sisters and brothers, and friends to people in the outside world. As a result, they are eager to maintain contact with outsiders.

Prisoners who want to maintain family and friendship ties face severe limits on the frequency, duration, and type of contact allowed in visiting. Many prisons (and even more jails) still enforce rules on noncontact visits, and in many institutions the display of any kind of personal affection is a write-up. Sex is absolutely forbidden except in the six states that allow conjugal visits for at least a portion of the inmate population, usually trusties or medium-security inmates who are married and have good conduct records. As Christopher Smith has pointed out,

Communication with the outside world . . . can cause problems. Visitors and mail are primary methods for bringing illegal items, especially drugs, into a prison. In addition, prisoners may use letters and telephones to plan escapes, harass people outside the prison, and even carry out significant criminal activities, such as fraud schemes. Thus, prison officials have good reason to monitor and regulate some aspects of inmates’ communications.

Until a generation or so ago, prison authorities routinely censored prison mail—outgoing and incoming. Mail censors marked out objectionable parts or simply threw offensive correspondence away. Today, mail can be opened and inspected but is generally not censored. Publications must be on an approved list (or not be on the disapproved list, such as porn magazines). Books and periodicals must be sent directly from the publisher or a bookstore and not from a private person.

The two leading cases regarding correspondence and publications received by inmates are *Turner v. Safley* (1987) and *Thornburgh v. Abbott* (1989). *Turner* dealt with a Missouri prison regulation that allowed prisoners within its system to communicate with other family members in prison and other inmates about legal matters but prohibited general correspondence between inmates in different prisons. The Court asked whether the prison regulation was related to legitimate penological interests of the prison. Several factors were to be considered in determining the reasonableness of a regulation:

1. Whether there is a valid, rational connection between the regulation and the legitimate government interest put forward to justify it
2. Whether there are alternative means of exercising the right that remain open to prisoners
3. The impact that accommodation of the asserted right will have on guards and other inmates and on the allocation of prison resources generally
4. The existence of ready alternatives to the regulation

Because mail could be used to plan escapes, arrange violent acts, or expand gang activity, the regulation was valid. Prisoners could communicate with lots of other people but not other prisoners.
The focus in *Thornburgh* was a Federal Bureau of Prisons regulation on the books or periodicals inmates could receive. Publications determined to be “detrimental to the security, good order, or discipline of the institution” or that might “facilitate criminal activity” were targeted, but amplification of those standards was provided in the following language:

Publications which may be rejected by the Warden include but are not limited to publications which meet one of the following criteria:

1. It depicts or describes procedures for the construction or use of weapons, ammunition, bombs, or incendiary devices.
2. It depicts, encourages, or describes methods of escape from correctional facilities, or contains blueprints, drawings, or similar descriptions of Bureau of Prisons institutions.
3. It depicts or describes procedures for the brewing of alcoholic beverages, or the manufacture of drugs.
4. It is written in code.
5. It depicts, describes, or encourages activities which may lead to the use of physical violence or group disruption.
6. It encourages or instructs in the commission of criminal activities.
7. It is sexually explicit material which by its nature or content poses a threat to the security, good order, or discipline of the institution, or facilitates criminal activity.

The Court, applying the four-part test developed in *Turner*, determined that this regulation was constitutional. It provides general guidance to state and local officials, who often use it to restrict inmate access to certain publications, including magazines such as *Playboy* or *Penthouse*, that correctional officers might find objectionable—if, for instance, a prisoner papered his cell wall with nude photos and then made suggestive remarks to women officers. The institution could react by punishing the individual inmate for a disciplinary violation, or it could establish a blanket rule that would prevent all inmates from gaining access to such materials in the first place. Some prison administrators find it easier to think in general terms—“Ban all magazines with sexual content”—than individual cases—“Punish inmates who abuse their privileges.” Although court decisions generally allow jails and prisons broad authority to censor incoming publications, some institutions do so to a much greater degree than others. Practices within states vary considerably.

With regard to visitation, the courts have long allowed prison officials to define visitation as a privilege rather than a right. This gives officials the authority to restrict visitation to certain places and times; to monitor visitation; to prohibit physical contact, even between married couples or parents and minor children; to bar visitors with criminal records or histories of violating visitation rules, as in smuggling contraband; to require strip searches of inmates after visits (even in some instances where the visits were through glass where no contact was possible); and to move inmates far away from home, making it nearly impossible for would-be visitors to get to them. Under the restrictions sometimes imposed, visiting can become more of an obstacle (a “pain in the ass,” one inmate described it in explaining why he would not allow people to visit him) than a delight.

The two leading visitation cases are *Block v. Rutherford* (1979), which held that Los Angeles jail inmates could be denied contact visits with spouses, children,
relatives, and friends on security grounds, and *Bell v. Wolfish* (1979), which defined jail inmate search standards before and after receiving a visit (and is also viewed as the source of the deference doctrine discussed later). Inmates have also sued for conjugal visits for reproductive purposes (denied) and for homosexual as well as heterosexual conjugal visits (also denied). It is instructive to note that the *Block* decision also dealt with shakedown searches of cells in the absence of their inmate occupants; courts have consistently ruled that the Fourth Amendment’s search and seizure provisions do not apply to prisoners in custody (and are limited in their application to probationers and parolees as well). Institutional security again prevails over individual rights.

The last example given at the opening of this section involved the formation of a prisoners’ labor union. Though the very idea of such an organization would probably cause Captain Elam Lynds to rise up from his grave and begin cracking his whip, it is in fact based on *Jones v. North Carolina Prisoners’ Labor Union Inc.* (1977). About 2,000 North Carolina prisoners had joined this union by 1975. Its principal purposes were to represent prisoners’ interests in work-related issues and assist in resolving inmates’ grievances. Prison regulations allowed membership in the union but made it impossible for union members to meet or conduct business. It was obviously more political than recreational in its purpose. The Court agreed with prison officials that the union would be detrimental to “prison order and security” in that it would encourage “adversary relations” within the prison system. The Court also rejected the inmates’ arguments under the equal protection clause of the Fourteenth Amendment—basically that the union had as much right to exist as other organizations that the prison did allow to function for other purposes.

**PRISONERS’ RIGHTS: WOMEN IN PRISON**

Equal protection is not used nearly as often in prisoners’ rights cases as are cruel and unusual punishment and due process. When it has been used successfully, it has been applied to race (as in segregation of prison housing, job assignments, or programs) and indigency (as when poor inmates would get lower-quality services, such as medical care or mental health treatment, than other inmates or sometimes free people would get from other state-supported service providers).

Equal protection has sometimes been an issue in regard to a third class of prisoners: women. Men prisoners have been much more numerous than women prisoners in the past. This remains true today, when 93 percent of state and federal prisoners and 88 percent of jail inmates are male. This has led women prisoners and their advocates to make two general claims about the management of women in prison:

1. Women generally have fewer programs and treatment options open to them than men do.
2. The programs and options that do exist are not gender specific; they are designed for men rather than for women.

The basic argument is that the focus of prison management is so much on men that women are incidental, not deserving of equal attention. This deals with the concept of *gender equity*.
Several courts have found **differential treatment** of male and female prisoners in the recent past. The landmark case here is *Glover v. Johnson* (1979 and 1987). In this Michigan case, a U.S. district court found that female inmates were offered educational and vocational programs that were markedly poorer than those offered to male prisoners. The court found that women were educationally disadvantaged by having fewer courses made available to them and that these were offered on a more limited schedule so that it was more difficult to complete them while in custody. While men had access to twenty different vocational programs, women had access to five, and “the male versions of those programs . . . were often more extensive and more useful to the inmates.” The court said, “The women inmates have a right to a range and quality of programming substantially equivalent to that offered the men, and the programs currently offered do not meet this standard. . . . Institutional size is frankly not a justification but an excuse for the kind of treatment afforded women prisoners.”

An earlier case from New Mexico, *Barefield v. Leach* (1974), had used this language in its decision: “What the equal protection clause requires in a prison setting is parity of treatment . . . between male and female inmates with respect to the conditions of their confinement and access to rehabilitative programs.” If **disparate treatment** had marked the imprisonment of women to this time, **parity of treatment** became the subsequent goal.

Many of the scholars who write about the imprisonment of women are not certain that the **parity model** is a good idea in practice. The women’s prison system for a long time no doubt did treat women not only as being different from men but also as being inferior or less important, likely because of both numbers and status. The parity model that evolved from 1970s litigation treated women prisoners *as if they were men* (to use Barbara Bloom and Meda Chesney-Lind’s emphasis), applying a male standard to women at sentencing and in prison. From differential treatment, which often disadvantages women prisoners through neglect, the prison system has moved to **vengeful equity**, in which women are treated exactly as men are.

The official line would go something like this. You want to come to prison pregnant? Okay, you can go outside to have the baby, but you come back to prison the next day without the baby, and someone else gets to raise your infant. You want to go through a short-term program? We have the boot camp, in which your head will be shaved and you will be run ragged and yelled at, just as if you were in the military (or an abusive relationship, which a lot of the women were). Oh, and since we have men on chain gangs, to show there’s no discrimination, we have to put women there, too. So guess what you will be doing in your striped suit tomorrow?

The argument about policy goals in managing the imprisonment of women today is often said to come down to a contrast between the **equal treatment** model and the **special needs** model: “Equality is defined as rights equal to those of males, and differential needs are defined as needs different from those of males.”

A few cases have supported the special needs model, particularly with regard to medical care and visitation with their children, but in general the equity model is more prevalent. The huge increase in the numbers of women in jail and prison over the past thirty years—from about 15,000 to approaching 200,000—has also provided an impetus to treat female prisoners as a clientele more deserving of equitable attention.
Before the due process revolution, incarceration was a closed, internal world. When federal courts, in the Warren Court era, began to look into this world, they saw conditions—in individual cases and often with entire institutions—that did not meet standards of how civilized prisons ought to operate. Using the Constitution as the framework to define their intervention, the courts opened up jails and prisons to outside review. Prisoners, accustomed to being ignored by guards and officials, found they had access to officials who would at least listen to their complaints and occasionally order corrective action.

As James B. Jacobs wrote about the origins of federal court intervention in prisons,

The Supreme Court’s first modern prisoners’ rights case, *Cooper v. Pate* (1964), was an appeal from a lower court ruling upholding the discretion of prison officials to refuse Muslim prisoners their Korans and all opportunities for worship. The Supreme Court’s decision was narrow: the Muslim prisoners had standing to challenge religious discrimination under Section 193 of the resurrected Civil Rights Act of 1871. But for the prisoners’ movement it was not the breadth of the decision that mattered but the Supreme Court’s determination that prisoners have constitutional rights; prison officials were not free to do with prisoners as they pleased. And the federal courts were permitted, indeed obligated, to provide a forum where prisoners could challenge and confront prison officials. Whatever the outcome of such confrontations, they spelled the end of the authoritarian regime in American penology.33

Forty years later, how do we assess the impact of the prisoners’ rights movement on corrections? Jacobs, writing in 1980, when this movement was at (or already past) its peak, offered several hypotheses about the effects of legal changes on prisons:

1. The prisoners’ rights movement has contributed to the bureaucratization of the prison. Prisons are governed much more by policies, procedures, and regulations than they were previously.
2. The prisoners’ rights movement has produced a new generation of administrators. The new generation of wardens is much better able to deal with external influences, including the courts, and to operate the prison as a bureaucracy.
3. The prisoners’ rights movement expanded the procedural protections available to prisoners. Prisoners not only have greater access to state and federal courts but also benefit from grievance procedures to provide dispute resolution within the prison.
4. The prisoners’ rights movement has heightened public awareness of prison conditions. Media attention to prison litigation made the public and public officials more responsive to correctional needs.
5. The prisoners’ rights movement has politicized prisoners and heightened their expectations. Prisoners developed an attitude, expecting the courts to intervene on their behalf.
6. The prisoners’ rights movement has demoralized prison staff. As prisoners gained legal standing, correctional officers and administrators likely felt they...
were losing authority and status. This would be particularly true for institutions under court order—in effect supervised by the courts for past failures.

7. The prisoners' rights movement had made it more difficult to maintain control over prisoners. Past use of informal, physical punishments was replaced by a rulebook approach. Prisoners are also better able to sue for damages when physical force is used.

8. The prisoners' rights movement has contributed to a professional movement within corrections to establish national standards. One way of avoiding criticism is to make your operation better. Accreditation as promoted by the American Correctional Association is a prime example of this approach.34

Court intervention and its corollary—the need to avoid intervention—did all of these and more. It resulted in huge budget increases for correctional institutions, particularly in those states where corrections had been cheapest. Malcolm Feeley and Roger Hanson have discussed the costs of correctional intervention in the South, in such states as Arkansas, where the correctional budget increased sixfold after Holt v. Sarver and was credited with breaking loose money for prison improvements.35 In Louisiana, the operating budget for the state penitentiary at Angola increased from less than $10 million in 1975—the year of Williams v. McKeithen—to nearly $100 million in 2000.

Most of the initial budget increases in prisons and jails went to hire new staff, especially in those institutions that had relied heavily on inmate trusties as workers and guards. Free people were more costly than unpaid prisoners. Capital expenditures were also necessary to renovate old facilities and build new housing to alleviate overcrowding, a frequent circumstance in the totality-of-conditions cases. Rehabilitation programs, medical care, and mental health treatment were costly new additions in many states. Then, as prison and jail populations really exploded after 1980, correctional systems were obliged to build new institutions to house the new inmates instead of just cramming them into existing facilities as they would have done in the past.

Corrections became a higher priority because it was the subject of expensive and often embarrassing litigation. No state official wants to have his prison system described as “brutal and inhumane”; private citizens would hardly take pride in having a local jail described as “one of the worst in the country.” You can almost hear people in decision-making positions saying, “Well, we have to do something about corrections, even if we would rather not.” In Louisiana, this recognition did not come about until more than a year after Judge West’s court order to reform Angola. While the state appealed the order, the legislature appropriated money that could have been used to start reforms to instead begin construction of a new upper deck on the Louisiana State University football stadium. It was then that the judge closed the prison to new admissions, forcing corrections officials to place prisoners elsewhere and the governor to call a special session of the legislature to consider prison reforms. Real change started at this point.

Court intervention also had a major impact in defining correctional standards, as Jacobs mentioned previously. Each state’s prison system is different from the others, and local jails vary even more widely. How do we determine what standards these institutions should meet in their operation? Litigation forced comparison. What does this state have? What does this jail do that this one does not? The process of gaining compliance with court orders forced officials to meet with the court masters and monitors appointed by the court to
oversee implementation of the orders. The objective was to realize a consent decree that would result in the termination of the court order. But this would be done only when correctional officials, outside experts, and the court were satisfied with the new standards that had been set.

Jails and prisons were obliged to find new ways to deal with prisoner complaints so that every minor issue did not end up the subject of a federal court lawsuit. Discipline and complaint procedures were formalized. Prisoners were given rule books explaining their rights in custody, classifying disciplinary infractions as major and minor, and providing channels for complaints. Institutions established grievance procedures for inmates to follow. Several prison systems established the position of ombudsman, based on a long-established position in Scandinavian countries, to receive, investigate, and act on complaints—sometimes from staff as well as inmates. This puts the institution in the posture of being self-critical, which is a major step in actually trying to learn from your mistakes rather than just cover them over.

Most correctional administrators who were active in the period of the most intensive court intervention, from about 1970 through the mid-1980s, would agree that this was a difficult time for them. They were often caught between opposing forces—prisoners seeking their “rights,” politicians who for the most part could not have cared less, and federal courts trying to define constitutional conditions. How do they view the effects of intervention long after the fact? Although they may find fault with the details of some of the consent decrees, most agree that the prisoners’ rights movement speeded up the process of change and brought positive results, making correctional management if not easier, then more professional.

Ross Maggio, nicknamed “Boss Ross” by the inmates in his two stints as warden of Angola prison in the 1970s and 1980s, said in a February 2000 interview that the prison was “underfunded, overcrowded, dirty, run-down, and dangerous for inmates and employees alike” when he arrived to work there in the late 1960s. Sexual predators preyed on weaker inmates, most prisoners carried knives for protection, killings were commonplace, and inmate cliques and guards ran Angola.36

Twenty-five years later, “the basic system in our state adult prisons is a good one because of the 1975 court order,” Maggio said. “The court order gave us the resources for physical plant construction and hiring new staff. At the same time, we developed a philosophy that didn’t exist before: that the administration was going to run the prison and not share power with inmate cliques and strong-armers.”37 Noting trends to reduce the authority of federal judges to intervene in prison matters, he said that criticisms of federal court intervention overlooked two basic facts: the urgent need for reforms in the 1970s and the positive effects of those reforms that had lasted through the end of the century. Many correctional administrators at the local and state levels would agree with his opinions.

PROBATION AND PAROLE

When we think of “prisoners’ rights” as applicable to persons confined in jails and prisons, we should remember that the term also applies to persons on probation and parole. A sentence to probation, in lieu of imprisonment, or release...
on parole, after serving a portion of a sentence in confinement, both require supervision, both impose conditions on the convicted person, and both involve a reduced-rights status in comparison to the rights enjoyed by law-abiding citizens. Although probationers and parolees are free in the community, their freedom is conditional, and the people who supervise them have considerable authority over them.

In *Griffin v. Wisconsin* (1987), the Supreme Court ruled that the search of a probationer’s home without a warrant was legal. Usually, the search of a home would require probable cause and a warrant, but in the case of Griffin, who was on probation, the Court allowed the warrantless search of his home by a probation officer, acting on information from police that Griffin had a gun, to stand. One of the conditions of probation is that the probationer not be in possession of a firearm. Griffin had a gun, he was caught with it, and he picked up a new sentence of two years in prison as a result. In another search and seizure case involving an offender on parole, *Pennsylvania Board of Probation and Parole v. Scott* (1998), the Supreme Court ruled that the exclusionary rule, which bars improperly obtained evidence in criminal proceedings, does not apply to parole revocation hearings. Parole officers used weapons found in a warrantless search of Keith Scott’s home as part of the basis for revoking his parole. The weapons were not used to bring new criminal charges. Scott argued the search was illegal and that the weapons could not be used to revoke his parole. The Court rejected his argument: “We therefore hold that the federal exclusionary rule does not bar the introduction at parole revocation hearings of evidence seized in violation of parolees’ Fourth Amendment rights.”

The parolee’s basic rights in revocation hearings were established in the landmark case of *Morrissey v. Brewer* (1972). The Supreme Court ruled that parole revocation represents a “grievous loss” of liberty to the parolee to which the parolee is entitled to due process. The Court discussed a two-stage parole revocation process: a preliminary hearing to establish the probable cause of the violation and the revocation hearing itself. In these hearings, the parolee is entitled to the following due process rights:

1. Written notice of the claimed violations of parole
2. Disclosure to the parolee of the evidence against him
3. Opportunity to be heard in person and to present witnesses and documentary evidence
4. The right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation)
5. A “neutral and detached” hearing body, such as a traditional parole board, members of which need not be judicial officers or lawyers
6. A written statement by the fact finders as to the evidence relied on and reasons for revoking parole

The following year, the Supreme Court applied these same six due process rights to probationers in *Gagnon v. Scarpelli* (1973). Probationers were entitled to a hearing, the Court ruled, but not to have an attorney represent them. Both Morrissey and Scarpelli clarified what had previously been highly variable revocation and often informal proceedings leading to the revocation of parole and probation. But the courts have not done much to go beyond these
basic rulings since. Parolees have tried, in particular, to get more rights in re-
gard to parole release hearings, but the Supreme Court has consistently held
that parole is a privilege, not a right; that parole is an option up to the state to
define in practice (including abolishing parole altogether); and that parole re-
lease hearings do not have to meet due process requirements—the difference
being that release relates to a liberty that one desires, not a liberty one has.39

THE POLITICS OF “MODIFIED HANDS OFF”: AEDPA AND PRLA

Although both prisoners and jail and prison officials would agree that prisoner-
ers’ rights litigation resulted in positive changes in corrections in the last
decades of the twentieth century, you would find sharp differences of opinion
about the need for that litigation to continue at high levels into the indefinite
future. Many jail and prison inmates would prefer to see more litigation for
several reasons:

1. It is their way of challenging the system that put them behind bars. Because
most prisoners hold state or local authorities responsible for their confine-
ment, they turn to the federal system for relief—in effect using one legal
system to get back at the other.
2. Legal actions, large and small, give them something to do while serving time.
Some judge, somewhere, some day, may find merit in a habeas corpus peti-
tion or a Section 1983 suit. Maybe you will get some money, a little relief, or
at least a couple of trips to court out of it to break the monotony. Jay D.
Jamieson has called this the “blind pig” theory of litigation, based on the
premise that even a blind pig finds an acorn sometime.
3. They may see no other effective way to resolve valid problems. Grievance pro-
cedures, ombudsmen, and other remedies are all part of the corrections sys-
tem. Prisoners want someone outside the system looking at their complaints.

Correctional officials would like to see less litigation for contrasting reasons:

1. Improvements have been made to bring prison and jail conditions up to
reasonable levels. Prisons are nice enough places to live. Further litigation
over basic conditions is pointless.
2. Frivolous lawsuits, defined as those lacking in factual merit or of such a
trivial nature they are not worth the court’s time—by jailhouse lawyers or
inmate “writ writers” take up a lot of time on the part of corrections officials
and officers of the court, including the attorneys who must defend such cases
and the judges and magistrates who must review legal briefs and hear the
cases. Prisoners may have a lot of dead time to fill with doing legal research
and writing out their lawsuits, but the public officials have other work they
could be doing if they were not tied up dealing with litigation.
3. A high percentage of inmate-filed litigation (an estimated 95 percent plus)
are simply badly prepared gripes, grievances, and crank letters that waste the
court’s time. Much of it is filed by chronic complainers who have no other
purpose in mind than messing with the system.
The public and political perceptions that inmates have won enough rights, that much litigation is frivolous, and that federal judges have been too intrusive into state affairs have led to important legislative changes in recent years. In 1996, the U.S. Congress passed two major pieces of legislation, the Anti-Terrorism and Effective Death Penalty Act (AEDPA) and the Prison Litigation Reform Act (PLRA), both aimed at prisoners’ rights litigation in the federal courts.

The AEDPA had several features intended to limit the number of habeas corpus petitions filed in U.S. district courts:

1. Placing a time limit of one year from the date their conviction becomes final (after the appeal is over) to file a habeas corpus petition in federal court
2. Restrictions on second or successive habeas corpus petitions (already ruled on by the Supreme Court in the death penalty case of McCleskey v. Zant [1991])
3. Requirements that state remedies be exhausted before the federal petition is filed
4. A presumption of correctness for state court findings that limits the intervention authority of federal judges

By imposing time limits and other restrictions, the political intent of the AEDPA was to speed up the processing of habeas corpus petitions, specifically reducing the time spent processing death penalty cases. Some had predicted that the average length of time spent between sentencing and execution could be reduced from ten to twelve years, in ordinary cases, to perhaps five or six years. This has not yet happened.

The PLRA was much more significant to prisoners’ rights issues in general because of the much higher volume of Section 1983 lawsuits, almost three times as many (42,000 to 15,000) as habeas corpus petitions in 1995. Christopher Smith has written about the PLRA:

The Prison Litigation Reform Act represents a political reaction to judges’ involvement in prison administration. Stated another way, prison litigation reform has produced a political backlash that has imposed limitations on both judges and prisoners. Some of the statute’s most significant provisions include the following:

1. The establishment of specific requirements for findings that judges must make before relief can be granted or consent decrees can be imposed.
2. A reduction in judges’ authority to order the release of prisoners in response to overcrowding.
3. Short time limits on the effective period for judges’ remedial orders.
4. A new requirement that prisoners must exhaust administrative remedies before filing civil rights lawsuits.
5. Increased influence by corrections officials over the appointment of special masters to supervise the implementation of remedies.
6. The definition and limitation of special masters’ powers.
7. The imposition of the special master’s costs upon the court rather than on the state whose officials were sued in the case.
8. Stricter procedures for filing fees by requiring partial payment of fees by prisoners with very limited resources instead of the waiver of fees, as usually occurred in the past.40
The PLRA was intended to limit prisoners’ opportunities to file civil rights lawsuits and to restrict the large-scale intervention of federal judges who might be so inclined. The number of civil rights suits filed by prisoners has fallen off sharply since the law took effect, so it appears to be having the desired result.

**PRISON LITIGATION TODAY**

In a 1995 article titled “The Supreme Court and Prisoners’ Rights,” Jack Call divided the history of prisoners’ rights into three periods:

1. The hands-off era (before 1964)
2. The rights era (1964–1978)
3. The deference era (1979 to present)

In the hands-off era, prisoners had minimal legal standing. The courts took the abstention approach, saying that it was up to the executive and legislative branches of government to provide for the care of prisoners. The federal courts viewed prisoners as the domain of the states and rarely intervened in these cases.

The rights era reflected a dramatic reversal of the hands-off approach. The Warren Court’s due process revolution applied the Fourteenth Amendment and the Civil Rights Statute (Section 1983) to create national standards applicable to all prisoners. Call suggests that several forces were at work during the 1960s and 1970s:

First, prisoners, perhaps reflecting society as a whole at the time, became more militant and aggressive in asserting their rights. Second, the legal profession developed a cadre of “public interest lawyers” who were willing to take on these cases, either pro bono or with financial support from government and private foundation grants. Third, the judiciary as a whole seemed to become more responsive to the legal arguments advanced by politically disadvantaged groups. Fourth, judges were often presented with cases that involved such horrible conditions of confinement that they cried out for some sort of remedial order.

In little more than a decade—most of the important Supreme Court decisions were made in the 1970s, after the intervention precedent was established in the 1960s—prisoners became citizens of America with constitutional rights guaranteed by the federal courts. The prisoners might have thought that this trend would continue in their favor until the rights of prisoners and correctional administrators achieved some kind of balance. But the time of expanding rights had quickly run its course.

The official origin of the deference era is traced to *Bell v. Wolfish* (1979), a lawsuit filed over conditions in the new federal Metropolitan Correctional Center in New York City. Inmates submitted a laundry list of complaints, including double bunking in one-man cells, overcrowding, improper searches, inadequate staffing, and lack of recreational and rehabilitative activities. Justice William Rehnquist wrote the majority opinion rejecting the inmates’ legal claims:

There was a time not too long ago when the federal judiciary took a completely “hands-off” approach to the problem of prison administration. In recent years,
however, these courts largely have discarded this “hands-off” attitude and have waded into this complex arena. The deplorable conditions and Draconian restriction of some of our Nation’s prisons are too well known to require recounting here, and the federal courts rightly have condemned these sordid aspects of our prison systems. But many of these same courts have, in the name of the Constitution, become increasing enmeshed in the minutiae of prison operations. Judges, after all, are human. They, no less than others in our society, have a natural tendency to believe that their individual solutions to often intractable problems are better or more workable than those of the persons who are actually charged with and trained in the running of the particular institution under examination. But under the Constitution, the first question to be answered is not whose plan is best, but in what branch of the Government is lodged the authority to initially devise the plan. This does not mean that constitutional rights are not to be scrupulously observed. It does mean, however, that the inquiry of federal courts into prison management must be limited to the issue of whether a particular system violates any prohibition of the Constitution or, in the case of a federal prison, a statute. The wide range of “judgment calls” that meet constitutional and statutory requirements are confined to officials outside of the Judicial Branch of Government.

Or in other words; “back off.” Rehnquist’s call for judicial deference to corrections and legislative officials was made in 1979. Twenty-five years later, Chief Justice Rehnquist presides over a Supreme Court that has grown more conservative in the exercise of federal authority in state matters, including jail and prison operations. Long before Congress enacted the AEDPA and the PLRA to restrict prisoners’ access to the federal courts, Supreme Court decisions had made it clear that prisoners’ rights went only so far—that in a federal system, the states retain primary authority for the confinement of prisoners. The core of cases defining judicial deference would include the following:

*Gregg v. Georgia* (1976). State death penalty statutes that contain sufficient safeguards against arbitrary and capricious imposition are constitutional.


*Hudson v. Palmer* (1984). A prison cell may be searched without a warrant or probable cause because a prison cell is not protected by the Fourth Amendment.

*Turner v. Safley* (1987). A prison regulation that impinges on inmates’ constitutional rights is valid if it is reasonably related to legitimate penological interests.


*Farmer v. Brennan* (1994). A prison official is not liable under the Eighth Amendment for injury inflicted on an inmate by other inmates “unless the official knows of and disregards an excessive risk of harm to an inmate.” It is not enough for liability that “the risk was so obvious that a reasonable person should have noticed it.”

*Lewis v. Casey* (1996). The constitutional right of court access is violated only if a prisoner’s attempt to pursue a legal claim is hindered by prison officials.
Inadequacies in state’s delivery of legal services to inmates is insufficient as a basis for such claim.43

If *Bell v. Wolfish* announced the message in 1979, *Turner v. Safley* provided the philosophical doctrine in 1987. Its creation of the “legitimate penological interests” rule allows judges to defer to corrections officials provided that officials can explain the reasons for their actions and policies. When prison policies and prisoner rights are in conflict, *Turner* applies the reasonable relationship test. All prison authorities have to do is prove that a prison regulation is reasonably related to a legitimate penological interest in order for that regulation to be valid even if a constitutional right is infringed.44 It is conceivable (and in fact has happened) that two states could have policies completely contradictory to each other and that both policies could be allowed to stand as legitimate when officials provide a reasonable explanation for them. Serving as the basis for a new conservative perspective on confinement, *Turner* limits constitutional rights and expands state power.45

Does this mean that prisoners have given up or that we are about to reenter the hands-off era? Neither, actually. Prisoners continue to file federal *habeas corpus* petitions and Section 1983 lawsuits as well as other legal actions in both state and federal courts. While the number of *habeas corpus* petitions had remained fairly constant, in the range of about 2,000 to 2,500 new filings per month through 2000, the numbers of Section 1983 filings had declined to about the same range, 2,000 to 2,500 new filings per month, three years after the PLRA took effect. Recent research suggests that the filing of *habeas corpus* petitions continues to roughly parallel the numbers of state prisoners, while Section 1983 filings have dropped by almost half.46

A *Corrections Compendium* survey completed in June 2003 indicated that the great majority of the states reported sharp declines (averaging 69 percent) in federal lawsuits between 1996 and 2003; in about half the reporting states, the numbers of state court lawsuits had increased over the same period. The forty-two states in the survey estimated approximately 20,000 federal lawsuits pending in 2002. Eleven of these states reported paying no damages to prisoners in lawsuits concluded in 2002. California lost the only suit—for bad medical care—in which an inmate received more than $1 million. Texas, which used to routinely have more than a thousand lawsuits pending at any given time, reported about 400 in 2002. It paid damages in a total of fifteen suits:

- Six for use of force, averaging $8,350
- Five for failure to protect inmates, averaging $6,464
- Three for personal injury, averaging $108,226
- One for cruel and unusual punishment, settled for $247

This survey also indicated that as the number of lawsuits has declined, the number of inmate grievances has increased sharply. The thirty-six states that maintain grievance statistics reported 769,000 grievances filed in 2002, or about one per inmate. Texas alone reported 212,000 grievances in 2002, indicating that prisoners, although less litigious, still find aspects of imprisonment worthy of formal complaint.48
The PLRA dealt not only with inmates, remember, but also with the intervention authority of federal judges. The intent was to free jails and prisons from federal court supervision. This has apparently happened as well, as the number of states with at least one prison under federal court order had declined from thirty-six in 1987 to fewer than half that number in 2002. The survey noted that twenty-one state systems had successfully sought termination of previous court orders or consent decrees affecting their prisons between 1996 and 2002, while new orders or decrees were issued in eight states. The issues covered in the new legal orders include overcrowding, medical and mental health care, grooming standards for religious purposes, equitable relief in earned good-time credits, visitation rules, inmate classification in high-security facilities, reading materials that may be considered threatening to security, and the use of canines to search visitors. In responding to a question about the reasons for the decline in litigation, the state systems listed the number one reason as the requirement that inmates exhaust all available administrative remedies before filing lawsuits; other reasons given were speedier access to trial calendars, requirements that inmates pay filing fees, and the reduction in the percentage of fees awarded to attorneys representing inmates in litigation.

We should note that the outcome of grievance procedures is critically important to litigation long term. If the grievance procedures work and the inmates are satisfied, the numbers of lawsuits will stay down. If the inmates are not satisfied with the outcomes, once these administrative remedies are completed, then the number of lawsuits will almost surely increase again.

For now, it is more difficult for prisoners to get their cases into federal courts and keep them there. Prisons and jails have more discretion in managing prisoners, and many state corrections departments have established mechanisms—grievance procedures, mediators, and ombudsmen—for resolving complaints about prison conditions short of litigation. Although corrections officials have become accustomed to fighting out prisoners’ rights issues in court, they recognize that it is cheaper and easier to resolve complaints internally than to take them into the courtroom.

Prisoners’ rights is not a completely dead issue, and no one (except perhaps an extremely conservative Supreme Court justice or two) is suggesting that we return to the hands-off era, but no one outside prison really seems highly interested in expanding inmates’ rights as a legal priority for now. We have reached a kind of status quo in this regard.

Some prisoners either have not noticed or do not care. They remain committed to challenging the corrections system through the courts. Some have turned more often to state courts, thinking that state judges may be more sympathetic (more “liberal”) than federal judges in the current political environment. Some await political changes at the national level that will result in a different perspective among the federal judges making decisions in prisoners’ rights cases (though these political swings can take a very long time and no one really anticipates the activist Warren Court being re-created anytime soon). Some search for new themes and new wrinkles on old themes—anything to keep litigation alive.

Prisoners are captives of their own adversarial mentality. They do not see that their own excesses from the prisoners’ rights era, which led them to file not only important suits but also too many trivial suits as recreational litigation, when combined with the more conservative turn of the federal courts, have
undermined support for any further extension of prisoners’ rights. Even the litigation experts who have supported reform have suggested that prisoners need to be more “judicious” in attacking the legal system. Otherwise, they run the risk of further alienating the public, the political officials, and, most important, the judges whose support is essential if they wish to get a fair hearing in court.

COLLATERAL CONSEQUENCES OF A CRIMINAL CONVICTION

One of the traditions left over from civil death is the felon’s loss of civil rights, even after discharge from prison or supervision and carrying over beyond the end of his sentence. Diminished civil standing continues even when the criminal punishment is completed. These civil rights, such as voting, holding public office, marital and parental rights, serving on a jury, and possessing firearms, are often lost to the convicted felon until he goes through the formal procedure to get them restored. The ex-offender, often labeled an ex-con if he or she has been imprisoned, must also comply with administrative and legal restrictions, such as registration or notification of authorities, and employment licensing; he must also deal with the social stigma of being a felon.

These are the collateral consequences of a felony conviction. The criminal does his time and comes to the end of his term, as Robert M. A. Johnson, president of the National District Attorneys Association, wrote recently, only to discover that this is not the end:

Today’s offenders learn that they have only begun to suffer the consequences of their convictions after they have satisfied their sentences. State legislators and members of Congress, often motivated by public response to highly publicized cases, have opened the dam on a stream of laws that impose subsequent consequences on those convicted of particular crimes. These collateral consequences are in addition to the sentencing consequences enforced in the courtroom, and unlike the judicial sentence, they do not consider the circumstances of an individual offender or offense and often they are lifetime consequences. The consequences vary from state to state, but they generally relate to voting, occupational licensing, vehicle licensing, firearms restrictions, offender registration, civil forfeitures, and welfare benefits. Federal collateral consequences are much the same as those imposed by state law with the addition of deportation.50

Jeremy Travis, former director of the National Institute of Justice, called these consequences invisible punishments in that they pose legal barriers harmful to the economic, political, and social well-being of their communities, black communities in particular. National policies, many of them coming out of Congress, significantly affect the life prospects of the 600,000 prisoners of all races released back to the community each year as well as social and economic conditions in the low-income neighborhoods to which most criminals return.51

The civil rights lost vary greatly from one state to another. Some states are very restrictive, others much less so. In Mississippi, persons convicted of most felonies (though not drug crimes) lose the right to vote or serve on a jury. All felons post-1992 are disqualified from holding public office. Felons are either barred or subject to discretionary review by licensing authorities for a long list of professional and occupational licenses, including those for architect, nurse, bail agent, insurance agent, physician, social worker, attorney, and schoolteacher.
Persons with drug- or sex-related convicts are barred from working or volunteering with any counseling program in which they would provide services directly to children. Sex offenders are required to register (as indeed they are in every state now). The rights to hold public office and vote are restored by the governor’s pardon, as is the right to possess firearms. The court in which the felon was convicted can also grant a “certificate of rehabilitation” restoring firearms privileges if it finds that the criminal has been rehabilitated. Thus, apparently the Mississippi courts have known all along what others find so difficult to determine—when the criminal has been rehabilitated.

In Vermont, felons are permitted to vote by absentee ballot even in prison. A felon who has actually served prison time cannot serve on a jury. A felony conviction can also be grounds for denial of some business or professional licenses. Vermont law does not prohibit felons from possessing firearms, though persons on probation may be ordered by the court not to possess firearms. Persons who engage in sexual abuse of children, whether convicted or not, have to register as sex offenders.

Since the specific provisions cited were taken from Civil Disabilities of Convicted Felons: A State-by-State Survey, last updated by the Office of the Pardon Attorney in the U.S. Justice Department in October 1996, it is quite possible that changes have occurred recently with regard to the rights of felons in Mississippi, Vermont, and the other forty-eight states. However, we should not assume that the direction of change in general is toward the restoration of lost rights, which some foresaw as a trend in the 1960s and 1970s. When we began to “get tough on crime” in the 1980s and 1990s, however, we also got tough on criminals. Many states reversed directions and imposed collateral consequences on convicted felons (and some misdemeanants) once again. Attention tends to be focused on whatever “crime du jour” happens to hold the political spotlight at the moment—drugs, sex crimes, child abuse, domestic violence, and, most recently, terrorism. All these have been singled out for particular attention at the federal level and in specific states, along with the ordinary murders, rapes, robberies, burglaries, and thefts that make up the bulk of felony crimes.

The list of civil disabilities is a long one. Most of us would not quarrel too loudly with the restrictions on firearms possession by convicted felons, the single right that is most likely to be taken away and least likely to be given back. Keeping guns from felons is not such a bad public policy. But voting is almost as widely prohibited. Forty-eight states prohibit voting during imprisonment, thirty-three during parole, and twenty-nine during probation. Seven states permanently bar felons from voting (unless pardoned by the governor or meeting other specific authorizations), while seven others have crime-specific bars or waiting periods. Marc Mauer pointed out that nearly 5 million Americans have currently or permanently lost their voting rights as a result of a felony conviction. This includes 13 percent of black men. The state of Florida, the swing state in the 2000 presidential election, had an estimated 600,000 ex-felons who were unable to vote in that election. If even one-quarter had voted, would this have made a difference?

Other disabilities are less well known, unless you happen to be a felon that runs into the barrier. When Congress passed the welfare reform package in 1996, one of the laws adopted was a lifetime ban on the receipt of welfare and food stamp benefits for anyone convicted of a felony drug offense; states can opt out, but twenty states enforce it in full. Federal laws allow public housing agencies to ban anyone who had engaged in “any drug-related” activity; registered sex offenders are ineligible for housing also. Students with drug convic-
tions face ineligibility periods when they are disqualified from receiving student loans and federal grants for technical and higher education. It is interesting to consider that an armed robber or an arsonist could get governmental assistance, but a single mother convicted of a drug crime could not.

Realistically, many ex-felons probably could not care less about some of the common civil rights they have lost—holding public office, serving on juries, or even voting. But housing, job training, temporary assistance (particularly if they have children), and employment—these are critical to avoiding returning to criminal activities. What they must have, first and foremost, is a job. Ex-felons face employment restrictions, including occupational disability statutes that bar them from licenses in certain trades and professions. When they go in to apply for many jobs, the standard line on the employment application throws them into a quandary: “Have you ever been convicted of a felony?” In some states, the application may ask the broader question about arrests, not just convictions. If ex-offenders answer yes truthfully, their employer may turn them down as criminals (although the official reason would be that they were not right for the job). If they say no, they run the risk of being fired later for falsifying the employment application. Which option would you choose?

The consequences to ex-felons are also consequences to their dependents. More than 10 million American children have a parent who has been in prison. Every Door Closed: Barriers Facing Parents with Criminal Records, the 2002 joint report of the Center for Law and Social Policy and Community Legal Services of Philadelphia, explores in detail the impact of criminal records on families. The report looks at six specific aspects of life on which criminal records impose ineligibility or other sanctions:

1. Employment
2. Welfare benefits
3. Subsidized housing
4. Loss of child custody
5. Student loans
6. Immigration

The report’s executive summary suggests that these barriers, singly and in combination, tear families apart, create unemployment and homelessness, and guarantee failure, thereby harming parents and children, families, and communities. These barriers (to stable employment needed to earn a living most of all) are intended to reduce crime and enhance community security, yet their effect is just the opposite: they make it more difficult for ex-offenders to take care of their children and avoid criminal activity. In addition, what will happen to the children of the parents to whom “every door is closed”?

CRIMINAL REGISTRATION

The offender’s criminal record does not go away by itself at the expiration of the sentence; generally, the offender must pursue legal action at his own initiative to clear his record. The most sweeping—and least available—method of
wiping out a record is through what is called annulment. The National Council on Crime and Delinquency, in its Model Act for Annulment of Conviction of Crime, states that the effect of an annulment is to restore all lost civil rights and to cancel the record of conviction and disposition. The responsibility for annulment would lie with the court that convicted the offender. The judge would issue the annulment order to assist in rehabilitation when it was consistent with the public welfare.

Little support exists for the practice of annulment at present; the trend seems to be in the other direction, toward maintaining better records on convicted criminals and using the records to impose greater control over ex-offenders. Harry Allen and Clifford Simonsen have described the old local courts’ practice of maintaining “vest-pocket” records of criminal offenses, particularly minor offenses, meaning that the records were maintained locally for the information of the local courts but not sent forward into the central repository at the state level. With the computer networks of today, it has become much more difficult to keep records out of the system.

Centralized data banks are often used as sources of information in those states that require registration of criminals. Registration of certain classes of criminals, particularly sex offenders, is becoming more common in the United States today. In Europe, where citizens were often required to carry identity papers, former prisoners were once given a yellow card—like Jean Valjean in Les Misérables—showing that they had been in custody previously. When asked for their identification, they had to show their yellow card to the police, which probably did not do a lot for their credibility as law-abiding citizens. They carried the yellow card for life unless they were pardoned for the crime. The cards were a replacement for branding, which was practiced in early modern Europe as both a form of punishment and criminal identification. Nothing like carrying your criminal history as a permanent mark on your skin.

Although we do not use yellow cards in the United States today, we are marking sex offenders for life by requiring them to register or face criminal penalties for failing to do so. Sex offender registries have existed since California started one in 1947, but they really took off nationally in the 1990s. First, the forcible abduction of Jacob Wetterling, an eleven-year-old Minnesota boy in 1989, prompted Congress to pass the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act (the Jacob Wetterling Act) in 1994. Criminals who commit sex crimes against children or any violent sex offense against adults must register for a period of ten years from the date of their release from custody or supervision. All fifty states now have sex offender registration laws.

The Jacob Wetterling Act gave states the option of releasing information about registered sex offenders to the public but did not require it. This changed in 1996 when Congress amended the act to require states to disclose information about sex offenders for public safety purposes. This legislation was known as Megan’s Law, after seven-year-old Megan Kanka, who had been abducted and murdered by a convicted sex offender in New Jersey. States were required to notify citizens of sex offenders in their communities through a variety of methods:

1. Internet postings, including photos (used in thirty-four states by 2003)
2. Media releases or announcements
3. Flyers distributed by offenders or public officials through the mail
4. Door-to-door flyers
5. Public meetings®

Virtually all states have adopted some form of community notification laws based on some combination of these methods.

The Pam Lychner Sexual Offender Tracking and Identification Act of 1996 amended the Jacob Wetterling Act by establishing a national sex offender database maintained by the FBI. This national tracking system gives law enforcement authorities access to sex offender registration data from all participating states. It contained information on about 400,000 registered sex offenders in 2003.

Several objections to the broad scope of sex offender registration have been made:

1. It is permanent, lasting a lifetime, no matter how long it has been since the person last committed a sex crime.
2. Although the intent of the statutes is to protect children and others from sexual predators, all sex offenders who commit listed crimes are required to register. This would include many nonviolent offenders, family offenders, and adults who have had sex with minors.
3. Registration is not based on risk. It feeds a kind of “witch hunt” mentality about sex offenders that is not supported by research. Most sex offenses, especially against children, do not involve strangers, and recidivism rates for sex offenders are no higher (and, in recent detailed Justice Department statistics, are much lower) than for other categories of criminals.
4. Registration further stigmatizes criminals as an additional civil disability added to the other collateral consequences. Convicted sex offenders end up the “lowest of the low” among the criminal caste in American society.

Among the public, political officials, and the legal system, no one seems to find much merit in these objections at present. In March 2003, the Supreme Court announced two major decisions upholding sex offender registries. Offenders in Connecticut and Alaska had claimed that registration violated due process (posting without a hearing to determine dangerousness) and represented an “extra” punishment beyond the criminal sentence. The Supreme Court rejected both arguments. It said registration was based on past acts, not future threats. It also said registration is not a punishment but a regulatory effort to account for the location of sex offenders to ensure public safety, not to humiliate the offender. These decisions clear the way for even more rigorous requirements to register offenders, including tracking down and prosecuting as fugitives the approximately 100,000 offenders who cannot be located in the FBI’s database.

CIVIL COMMITMENT

For some sex offenders, the end of the criminal sentence holds an even greater peril than registration—civil commitment for treatment as a sexually violent predator (SVP). Howard Zonana described the history of civil commitment in a 1997 article:
U.S. society has struggled with the question of what to do with sex offenders. Between 1930 and 1960, a number of states passed “sexual psychopath laws” that offered indefinite hospitalization and treatment in lieu of incarceration for offenders who committed repetitive sexual crimes. When treatment was not sufficiently effective, and when retribution became a more primary goal than rehabilitation, these statutes were repealed or fell into disuse. Sex offenders were then given very long sentences with the opportunity for earlier release if they were deemed safe by parole boards. This era of so-called “indeterminate sentencing” was replaced in the 1980s by the present era of “determinate sentencing.” The mandatory sentence now is based on the average time offenders used to spend in prison for a given offense under the old indeterminate sentencing system.

One consequence of this policy change in criminal justice has been that offenders had to be released at the end of relatively brief fixed sentence, and a number of them inevitably repeated some particularly heinous crimes. The legislature of the state of Washington reacted to this by passing the first of the “sexual predator” statutes in 1990. Over the next three years, several states passed similar legislation or revived their old sexual psychopath statutes. These new statutes permitted state officials, under civil law, to commit offenders who were considered dangerous if, at the end of their sentence, they met the criteria of a “sexual predator.” In order to do so, offenders had to have a “mental abnormality” that would lead to the commission of further crimes. The definition of “mental abnormality” that is sufficient to meet the legal standard included many disorders that had not been used as a basis for civil commitment for many years. This abnormality can be defined so broadly as to include antisocial personality traits, such as lack of empathy for others or absence of conscience, that could make the offenders likely to repeat their past crimes. If these criteria are met, the person could be confined indefinitely as a “patient” in a psychiatric hospital until it is “safe” to permit that person’s return to the community.62

Although the practice of civil commitment of the mentally ill had gone out of fashion in America in the 1960s and 1970s, in its focus on SVPs in the 1990s it was welcomed back with enthusiasm. Several states, including Kansas, passed laws modeled on Washington’s. Kansas’s Sexual Predator Act empowered the state’s attorney general to bring civil commitment actions against individuals who are within ninety days of release from criminal confinement and who are deemed, through a review process, to be at high risk to reoffend. Through a civil commitment process, these individuals can be committed to a sexual predator treatment program (SPTP) for treatment until it is determined by treatment staff and the court that they no longer represent a high risk to reoffend. The law cast a broad net, and most sexual behaviors that were illegal could serve as criteria for commitment.63

Leroy Hendricks was the first Kansas resident committed to SPTP. When he appealed his commitment, the Kansas Supreme Court ruled the law unconstitutional and threw out his commitment. The attorney general appealed to the U.S. Supreme Court, which in a landmark 1997 decision, Kansas v. Hendricks, upheld the law by a five-to-four vote. The majority opinion, written by Justice Clarence Thomas, indicated that constitutional protections apply primarily to criminal, not civil, law. The Court said the Kansas law was not about retribution or deterrence, reasoning that “the confinement’s duration is instead linked to the state purposes of the commitment, namely to hold the person until his mental abnormality no longer causes him to be a threat to others.” Justice Anthony Kennedy, in his concurring opinion, underlined the importance of treatment and the ability of people to move through the program as central to the
position of the court. This ruling seemed to make clear that SVP programs could legitimately hold people in restraint of their freedom only if the programs were willing and able to offer treatment aimed at reducing sex offenders’ risk for reoffense and so afford them an opportunity to return to the community.64

In a 2002 split decision, the Florida Supreme Court upheld that state’s Ryce Act (named after Jimmy Ryce, a nine-year-old boy who was raped and murdered). In the Florida case, *Westerheide v. State of Florida*, the court said the Ryce Act did not violate due process because the state carries the burden, during the civil commitment hearing, of proving by clear and convincing evidence that the person’s mental condition requires confinement. In addition, it noted, defendants receive assistance of counsel, trial by jury, appeal, and yearly mental evaluation to determine whether they still require treatment.65

Alexander Cockburn, looking at California’s SVP law in practice, called the view of sexually violent predators preying on minors of the same sex a “quadruple axel of evil,” meaning that such persons are put in a special category apart from other offenders. “There’s no quarreling between prosecutor and judge, jury and governor, Supreme Court and shrinks. Lock ‘em up and throw away the key.”66

When the California sex offenders identified as SVPs approach parole, a jury hearing is held to commit them to Atascadero state hospital, the SVP treatment facility. They go to Atascadero for two years, get a hearing to determine suitability for release, and go back for another two years if disapproved.

Marita Mayer, a public defender who represents such men in their hearings, says, “Many of them refuse treatment. They refuse to sign a piece of paper saying they have a mental disease”—which, of course, creates a catch-22 condition: if you will not admit you are sick, then you must be sick, and you cannot be released until you agree to the treatment to cure you of your sickness.

Attorney Mayer concludes,

> It’s using psychiatry, like religion, to put people away. Why not hire an astrologer or a goat-entrails reader to predict what the person might do? Why not the same for robbers as rapists? What’s happening is double jeopardy. People don’t care about rapists, but the Constitution is about protections. How do I feel about these guys? When I talk to my clients I don’t presume to think what they’ll do in the future. I believe in redemption. I don’t look at them as sexually violent predators, I see them as sad sacks. They have to register; they could be hounded from county to county; even for a tiny crime they’ll be put away. Their lives are in ruin. I pity them.68

Criminal defense attorneys are not the only ones who feel this way. Medical professionals have expressed several important concerns:

1. The decision broadly redefines sexual criminal behavior as a mental illness for the purpose of allowing continued preventive detention—an unacceptable *medicalization of deviance*.
2. The legislature’s main purpose is preventive detention and not treatment.
3. The criminal conviction assumes voluntary behavior, but the mental disorder assumes that the offender cannot control his behavior, warranting commitment and long-term treatment.
4. If 10 percent of sex offenders are identified as sexual predators, mental health treatment costs—averaging $60,000 to $130,000 per “patient” in maximum-security mental health facilities—will divert funds from other severely mentally ill patients.
5. This is a matter to be addressed by criminal sentencing and not the use or misuse of psychiatry.⁶⁹

RESTORING RIGHTS

The traditional and most available way for an offender to get lost civil rights restored is through the executive clemency process under the authority of the governor or president. What the offender needs is a pardon. In some states, certain classes of offenders whose terms have expired may be entitled to so-called automatic pardons, where no discretionary board action is needed. In other states, offenders must petition the state pardon board and appear in person to ask for a pardon—either full or conditional—to get those rights restored. The governor remains in charge of clemency, though in some states the pardon board has the authority to make decisions without his approval being necessary. Pardons may be either full, with the restoration of all rights, or conditional, with only certain rights, often excluding firearms.

Even if a pardon is granted to the ex-offender, restoring the lost civil rights, under most state laws the offender still has a criminal record. To get rid of the record, the ex-offender must get an expungement order signed by the court in which the offender was sentenced. This order would result in the destruction of the criminal history record related to the instant case. Both manual and computer files at all levels—local, state, and federal—should be purged of all information related to the defendant’s involvement in the case. A similar process, called erasure of record, is used for juvenile court records, which by law are supposed to be sealed and not mixed with or carried over to the offender’s adult criminal records. If the ex-offender follows both tracks—pardon and expungement—legally available in his state, he can get his lost rights back and his record wiped clean. The only limitations may be that he must wait some period of time past the expiration of his sentence to apply for either action, that each disposition on his record must be attacked separately, and that repeat offenders may not be eligible to apply. In truth, many ex-offenders, who are not known for their attention to bureaucratic detail, view these processes as so much mumbo jumbo. They never bother to apply. Ex-offenders are no longer civilly dead, but it still is not easy to make a fresh start.

The public image of the felon released from prison has been shaped not only by legal tradition but also by the media, in particular the crime movies of an earlier era. We think of the tough-talking, amoral ex-con, dedicated to a life of crime, pursuing the company of others living like himself in the criminal underworld, and anxious to resume the criminal activities interrupted by a prison term. In the real world, it is not so simple. Many offenders released from prison want to “go straight” and avoid further run-ins with the law. Half of them may end up back in prison, but this statistic also means that half don’t. Ex-offenders have families and friends; they need a place to live, a job, and productive ways to spend their time. It is not easy to leave prison, particularly if you have been away several years, and jump right back into mainstream society—not as an “ex-con.”
KEY TERMS

civil death
outlaw
nonperson
Ruffin v. Commonwealth
penal servitude
slave of the state
hands-off doctrine
appeals
torts
criminal charges
writ of mandamus
administration of appeals
habeas corpus petitions
civil rights lawsuits
Eighth Amendment
Bill of Rights
rude and unusual
punishments
incorporation
Fourteenth Amendment
due process
equal protection
Warren Court
due process revolution
class-action lawsuits
totality of conditions
Holt v. Sarver
Section 1983 lawsuit
under color of state law
court order
injunction
court master
monitor
contempt power
activist
consent decree
access to courts
jailhouse lawyer
law library
Wolff v. McDonnell
liberty interest
DB Court
Estelle v. Gamble
deliberate indifference
right to refuse treatment
informed consent
medicate to execute
personal rights
First Amendment
Black Muslim
Cooper v. Pate
Religious Freedom
Restoration Act of 1993
legitimate penological
interests
gender equity
differential treatment
disparate treatment
parity of treatment
parity model
vengeful equity
equal treatment
special needs
grievance procedures
ombudsman
exclusionary rule
Morrissey v. Brewer
frivolous lawsuits
Anti-Terrorism and
Effective Death
Penalty Act
Prison Litigation Reform
Act
rights era
dereference era
Bell v. Wolfish
judicial deference
Gregg v. Georgia
Rhodes v. Chapman
Turner v. Safley
Wilson v. Seiter
Lewis v. Casey
reasonable relationship
recreational litigation
ex-offender
ex-con
collateral consequences
invisible punishments
civil disabilities
annulment
registration of criminals
yellow card
Megan’s Law
community notification
laws
national sex offender
database
civil commitment
sexually violent predator
Kansas v. Hendricks
medicalization of deviance
executive clemency
pardon
expungement
erasure of record

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64. Ibid., p. 119.


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FURTHER READING


WEB AND VIDEO RESOURCES

The Prison Legal News Website is www.prisonlegalnews.org. This comprehensive site provides links to state and federal prison Websites and to many local jails.

The American Civil Liberties Union maintains a “Prisoner Rights” page at www.aclu.org/Prison/PrisonsMain.cfm.

COMMENTARY

Disenfranchising Felons Hurts Entire Communities

by Marc Mauer

Lumumba Bandele is a teacher and guidance counselor in the Brooklyn neighborhood of Bedford Stuyvesant in New York City. As the father of two, he and his wife struggle to provide a safe and secure environment for their children in a neighborhood with overcrowded public schools, failing small businesses and little affordable housing. Bandele sees political change as the means of improving these conditions,
but he’s frustrated by declining voter turnout in his community.

Electoral participation is lacking across the country, but in places like Bedford Stuyvesant it takes on a particularly curious slant. With so many of his neighbors unable to vote because they are in prison or on parole, Bandele feels that he, too, has lost political influence. To change that, he is now a plaintiff in a lawsuit challenging New York State’s felon disenfranchisement laws, in part because they dilute the vote in communities of color, like his own neighborhood.

“The issue of disenfranchisement is really about power,” Bandele says. “As the ‘prison industrial complex’ grows, one of the results is an increase in the number of people of color who are not allowed to participate in the electoral process. Our communities have been and will continue to struggle for power. The big battle now is to empower our family members who have returned and who are returning home from prison.”

The New York litigation is but one aspect of a growing recognition that the vast expansion of the prison apparatus over the last two decades is now hurting not only those incarcerated and their families, but their communities as well. Increasingly, the ability of these communities to gain political representation and influence—and therefore access to public resources—is being thwarted by the American race to incarcerate. The structural racism in the system, an entrenched and often unconscious bias in law enforcement, has weakened Black political power. This affects everything, from elections for township supervisors to the president and all the policies that result.

As we celebrate the 50th anniversary of the historic Brown v. Board of Education Supreme Court decision, we can measure the contours of the expansion in incarceration against the background of the intervening five decades. While much attention is being focused on assessing progress in educational opportunity, the contrast with developments in the criminal justice system is quite profound. The figures themselves are shocking even after countless news stories and government reports. On the day of the Brown decision in 1954, about 98,000 African Americans were incarcerated. Today, there are nine times that number, an estimated 884,000, which is nearly half of today’s total incarcerated population. If current trends continue, one of every three Black males born today will be sentenced to prison at some point in his lifetime. And in recent decades, the combined impact of poverty and the war on drugs has resulted in rapidly escalating figures for Black women as well.

The ripple effects of large-scale incarceration now extend well beyond the time individuals are locked up. We can see this most directly in the way low-income communities have lost political influence as a result of felony disenfranchisement laws. Depending on the state, a felony conviction can result in the loss of the right to vote while serving a sentence or even after completion of sentence. At present, prisoners can vote only in Maine and Vermont. In the other 48 states and the District of Columbia, persons in prison are not permitted to vote; in 33 of these states, persons on probation and/or parole cannot vote either; and in 13 states a felony conviction can result in the loss of voting rights for life. As a combined result of the growth in incarceration and disenfranchisement practices, more than four million Americans will be unable to vote in this year’s presidential election. Among African American men, an estimated 13 percent are disenfranchised as a result of a current or previous conviction. And in the states with the most restrictive laws, 30 percent to 40 percent of the next generation of Black males will lose their right to vote if current trends continue.

These dynamics are not just the unfortunate consequences of higher rates of involvement in crime among African Americans. There is documented evidence of racial disparity in criminal justice processing and in the legacy of disenfranchisement being used as a means of restricting Black voting. In the years after Reconstruction in the South, state legislators tailored their disenfranchisement laws with the intent of reducing participation among the new Black electorate. The means by which they accomplished this was to expand disenfranchisement for crimes believed to be committed by Blacks but not for those offenses presumed to be committed by Whites. This led to the bizarre situation in Alabama whereby a man convicted of beating his wife would lose his right to vote but a man convicted of killing his wife would not.

Disenfranchisement laws directly affect the 1.4 million African American men and 245,000 women who cannot vote, but the impact goes well beyond them. The effect on families can be particularly hard when women are incarcerated. “Almost half of all Black families are headed by women. When Black women are disengaged from the political process, the whole family is disfranchised,” says Monifa Bandele, field coordinator for the Right to Vote Campaign and wife of Lumumba Bandele.

Communities with high rates of people with felony convictions have fewer votes to cast. All residents of these neighborhoods, not just those with a felony conviction, become less influential than residents of more affluent neighborhoods. Emerging research also suggests that disenfranchisement laws may affect voter turnout in neighborhoods of high incarceration even among people who are legally eligible to vote. Since voting is essentially a communal

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experience—we talk about elections with our families and often go to the polls together—limitations on some members of the community translate into lower overall participation.

While disenfranchisement policies raise serious questions about democratic inclusion, their practical effect is now of such a magnitude that it may be determining electoral outcomes. On the day of the historic Florida election fiasco in 2000—when 537 votes in the state effectively decided the presidential election—an estimated 600,000 persons who had completed their felony sentences were unable to vote due to the state’s restrictive laws. Had these persons been eligible to vote, even a modest rate of participation could easily have altered the national outcome.

Political influence and access to resources are further hindered by the growing tendency to build prisons in rural areas. Prison officials have always sought rural land for prison construction, primarily due to low real estate costs, and these trends have accelerated in recent years. Communities hard hit by the loss of manufacturing jobs and the decline of family farms have come to view prisons—often incorrectly, it turns out—as a recession-proof means of providing jobs. In New York State, for example, all 38 of the prisons built since 1982 have been located in upstate areas, most in rural communities.

Rural prison expansion affects urban communities of color through the mechanism of the census count. The Census Bureau’s general rule is to count people in their “usual residence”; for prisoners, this has been interpreted to mean that they should be counted at the prison where they are housed, not in their home communities. The effect of this policy is that sparsely populated rural communities are artificially enlarged through their inmate population consisting mostly of people of color from urban neighborhoods. In Florence, Arizona, for example, two-thirds of the town’s 16,000 inhabitants are prisoners, and for every dollar raised by local taxes, the town receives an additional $1.76 from state and federal allocations based on its prison population.

The increased political clout in many areas is now quite significant. In one prison district near Albany, New York, every 93 residents enjoy the political representation that would require 100 residents in other areas of the state, according to Soros Justice Fellow Peter Wagner. Fiscal dynamics created by the census play out in similar ways. Former Soros Senior Justice Fellow Eric Lotke (currently with the Justice Policy Institute) estimates that nationwide each prisoner brings in between $50-$250 a year to the local government in which he or she is housed. Thus, a new 500-bed prison may yield about $50,000 annually in new revenue. If such facilities were located in the urban areas many inmates call home, at least their communities would reap any financial and political benefits. Finally, urban areas suffer from the vicious cycle set in motion by the dramatically high rates of arrest and imprisonment of members of their communities. Eric Cadora of the Open Society Institute, who tracked this geographic concentration in a publication for the Urban Institute, found that New York City taxpayers spend $1 million to incarcerate inmates from some city blocks in Brooklyn. Suppose that this rate of incarceration could be reduced by just 10 percent; that would free up $100,000 in savings that could be invested to provide education, health care, and job training to this distressed area.

In recent years, considerable momentum for change in disenfranchisement laws has developed nationally. Nine states have adopted reforms of their policies since 1996, resulting in a half million persons becoming eligible to vote. The changes represent a growing realization in the states and in Washington that restricting voting rights does not serve a crime control agenda—the goal of racial inclusion or democracy itself. At the federal level, Congressman John Conyers (D-MI) introduced legislation last year that would permit any non-incarcerated person to vote in federal elections, even if prohibited from voting in state elections. He argues that there should be uniformity in electing national leaders. “If we want former felons to become good citizens,” he said, “we must give them rights as well as responsibilities, and there is no greater responsibility than voting.”
Most Americans were shocked by the sadistic treatment of Iraqi detainees at the Abu Ghraib prison. But we shouldn’t have been. Not only are inmates at prisons in the U.S. frequently subjected to similarly grotesque treatment, but Congress passed a law in 1996 to ensure that in most cases they were barred from receiving any financial compensation for the abuse. We routinely treat prisoners in the United States like animals. We brutalize and degrade them, both men and women. And we have a lousy record when it comes to protecting well-behaved, weak and mentally ill prisoners from the predators surrounding them.

Very few Americans have raised their voices in opposition to our shameful prison policies. And I’m convinced that’s primarily because the inmates are viewed as less than human. Stephen Bright, director of the Southern Center for Human Rights, represented several prisoners in Georgia who sought compensation in the late-1990s for treatment that was remarkably similar to the abuses at Abu Ghraib. An undertaker named Wayne Garner was in charge of the prison system at the time, having been appointed in 1995 by the governor, Zell Miller, who is now a U.S. senator. Mr. Garner considered himself a tough guy. In a federal lawsuit brought on behalf of the prisoners by the center, he was quoted as saying that while there were some inmates who “truly want to do better . . . there’s another 30 to 35 per cent that ain’t fit to kill. And I’m going to be there to accommodate them.”

On October 23, 1996, officers from the Tactical Squad of the Georgia Department of Corrections raided the inmates’ living quarters at Dooly State Prison, a medium-security facility in Unadilla. This was part of a series of brutal shakedowns at prisons around the state that were designed to show the prisoners that a new and tougher regime was in charge. What followed, according to the lawsuit, was simply sick. Officers opened cell doors and ordered the inmates, all males, to run outside and strip. With female prison staff members looking on, and at times laughing, several inmates were subjected to extensive and wholly unnecessary body cavity searches. The inmates were ordered to lift their genitals, to squat, to bend over and display themselves, and so on.

One inmate who was suspected of being gay was told that if he ever said anything about the way he was being treated, he would be locked up and beaten until he wouldn’t “want to be gay any more.” An officer who was staring at another naked inmate said, “I bet you can tap dance.” The inmate was forced to dance, and then had his body cavities searched. An inmate in a dormitory identified as J-2 was slapped in the face and ordered to bend over and show himself to his cellmate. The raiding party apparently found that to be hilarious.

According to the lawsuit, Mr. Garner himself, the commissioner of the Department of Corrections, was present at the Dooly Prison raid. None of the prisoners named in the lawsuit were accused of any improper behavior during the course of the raid. The suit charged that the inmates’ constitutional rights had been violated and sought compensation for the pain, suffering, humiliation and degradation they had been subjected to.

Fat chance. The Prison Litigation Reform Act, designed in part to limit “frivolous” lawsuits by inmates, was passed by Congress and signed into law by Bill Clinton in 1996. It specifically prohibits the awarding of financial compensation to prisoners “for mental or emotional injury while in custody without a prior showing of physical injury.” Without any evidence that they had been seriously physically harmed, the inmates in the Georgia case were out of luck. The courts ruled against them.

This is the policy of the United States of America. Said Mr. Bright: “Today we are talking about compensating prisoners in Iraq for degrading treatment, as of course we should. But we do not allow compensation for prisoners in the United States who suffer the same kind of degradation and humiliation.”

The message with regard to the treatment of prisoners in the U.S. has been clear for years: Treat them any way you’d like. They’re just animals. The treatment of the detainees in Iraq was far from an aberration. They, too, were treated like animals, which was simply a logical extension of the way we treat prisoners here at home.