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The Enforcement of Prisoners’ Rights in the United States: An Access to the Courts Issue

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This edition of the journal continues to expand the international dimension that has been introduced recently and which is only proper for a law group in a School where the focus is on international matters, in academic content, students and links with other institutions. There are articles wholly or partly considering law in Tanzania, the United States of America and France as well as one considering the Israeli/Palestinian conflict in the context of international law. Many of the other pieces have European Law aspects to them.

The article by Professor Roberta Harding is based on a talk which she gave at Coventry when she visited from the University of Kentucky. The law schools at Coventry and Kentucky are linked and there have been visits from academics from both campuses. These will continue and, hopefully, blossom into other collaborations. A formal link has been established with Intercollege in Cyprus and there are other, ongoing discussions in other countries. In due course we hope to be able to publish pieces written by colleagues from these institutions.

The article by Nick Squires has its basis in a paper he presented at an International Law Workshop which he organised at the University. He was able to attract some distinguished academics and the day was a success.

Finally, as far as the contents are concerned, we should mention the contribution from Emma Pickworth, who has been a research student here for the last two years. Emma has secured a post elsewhere and we wish her every success.

The usual, but nonetheless heartfelt, thanks are due to Julie Davis for physically producing the contents and to Paul Hartley for his support in every way. Also, and not before time, we should acknowledge the contribution of the print room, who undertake the final, physical production in an efficient, unflustered and prompt manner, even when we do not give them quite the notice they are entitled to.

Steve Foster
Roger Kay
Barry Mitchell
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PRISONERS’ RIGHTS

The enforcement of prisoners’ rights in the United States: an access to the courts issue

“The mood and temper of the public in regard to the treatment of crime and criminals is one of the most unfailing tests of the civilization of any country” (Winston Churchill)

Introduction

This article examines how the development and status of the rights of incarcerated people is significantly affected by their ability to access the judiciary, specifically the federal judicial system. The relatively recent explosion in the American prison population provided the impetus for researching this topic. The objective was to examine whether this tremendous rise in the number of people incarcerated in U.S. penal facilities had impacted the posture of the rights afforded to these individuals. One conclusion reached was that the rise in the prison population had harshly eroded the right of access to the courts. The exploration of the issue will be conducted by examining the key phases in the development of prisoners’ rights in the United States. A more detailed examination of the present stage and specifically, how it represents a regression in prisoners’ rights due to the detrimental impact it has on an inmate’s ability to access the courts is also addressed.

The Historical Development of Prisoners’ Rights

From approximately the late nineteenth century until the mid-twentieth century the plight of the incarcerated was dismal in terms of the rights afforded to them. This was because the “slave of the state” doctrine governed the treatment of inmates. Under this scheme, an incarcerated individual was deemed the property of the state. Needless to say, this led to gross abuses such as the institution of exploitative contract prison labor systems. In addition, since their status as state property resulted in the relinquishment of their rights, the issue of accessibility to the courts was irrelevant. Eventually, conditions during this era became so horrendous that the judiciary was forced to acknowledge that prisoners did not automatically forfeit all of their rights upon incarceration by the state.

This recognition ushered in the next phase in the development of prisoners’ rights, the “hands-off” stage. Under this scheme, courts became increasingly willing to concede the existence of prisoners’ rights, but were extremely hesitant to intervene. This refusal was based upon perceived federalism concerns and the preference to defer to the prison officials’ “expertise.” Consequently, a minimal amount of substantive change occurred during this stage. Nonetheless, this phase is significant because it represents the judiciary’s increased awareness of and concern for the plight of those confined to penal facilities. It also played a critical role in facilitating the installation of the next phase: the “rights enforcement” stage. Arguably, another stage existed prior to the establishment of the “rights
enforcement" era. This stage is the "rule/exception" phase. Pursuant to this methodology, "hands-off" was the rule and what would ultimately become the "rights enforcement" era was the exception. Conceptually, under this scheme, if a court was presented with a case involving particularly egregious circumstances, then it would state the general applicability of the "hands-off" rule, and then note that due to the previous recognition that prisoners retain certain rights, and the presence of the unique factual circumstances in the case at hand, an exception was created that authorized the court to proceed and, if warranted, grant an appropriate remedy. Ultimately, the "exceptions" consumed the "rule" which led to the emergence of the "rights enforcement" stage.

The "rights enforcement" phase was established during the 1960's and 1970's. Several major events cemented the institution of this era. First, in 1962 the United States Supreme Court held in Robinson v California that the Eighth Amendment's prohibition against the infliction of cruel and unusual punishments applied to the states. Secondly, two years later the Court held that prisoners were entitled to use 28 United States Codes section 1983 to commence federal civil rights actions against state prison officials. These two rulings represented a favorable advance for prisoners because they constituted tools that assisted them in accessing the courts when there were allegations that state prison officials engaged in activities violative of their rights. The right of access to the courts was further reinforced by the Supreme Court's decision in Bounds v Smith. This case held that prisons are obligated to provide some form of prison legal assistance plan to their detainees. Between the institution of the era and its peak, which occurred between the late 1970's and the early to mid-1980's, there was extensive judicial activity directed at ensuring that the improvement in the courts' accessibility resulted in the redress of violations in appropriate situations.

Eventually this stage waned and the present phase, the "modified hands-off" phase" emerged. This transition commenced in the early to mid-1980's. The bomb that destroyed the remnants of the "rights enforcement" doctrine was dropped by the Supreme Court during its 1996 term. In Lewis v Casey, the Court strenuously disagreed with a federal district court's ruling on an access to the courts case and Justice Scalia, writing for the majority, instituted a modified version of the "hands-off" approach. The Court's admonition that it is for the political branches of the State and Federal Governments to manage prisons in such fashion that official interference with the presentation of claims will not occur. Of course the two roles briefly and partially coincide when a court ... order[s] the alteration of an institutional organization or procedure that causes the harm reinstituted a "deferential standard" that has culminated in the establishment of the present "modified hands-off" era. The entrenchment of this phase was bolstered by the enactment of the Prison Litigation Reform Act (PLRA) of 1996 by Congress. The PLRA is comprehensive legislation that substantially and detrimentally affects the status of prisoners' rights. It has a notable, and intended, adverse impact on the accessibility of the federal courts. In addition, equitable remedies, such as injunctions, which are the typical form of relief sought in prisoners'
rights cases, were adversely affected by the legislation through the institution of a presumptive three year time limit.\textsuperscript{28}

The combination of the Court's decision in \textit{Lewis} and the federal legislative enactment of the PLRA represent a regression in the development of prisoners' rights in the United States. Given how they hinder the ability to gain access to the judiciary, those incarcerated in penal facilities in the U.S. can expect to experience a deterioration in their conditions of confinement\textsuperscript{29} and possibly an increase in the violation of their rights. Hopefully, future developments in this area will revert to the wisdom imparted by Sir Winston Churchill in 1910.

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This article is based on my article “In the Belly of the Beast: A Comparison of the Evolution and Status of Prisoners’ Rights in the United States and Europe” that will be published by the University of Georgia Journal of International and Comparative Law and presentations of the article given at the University of Oxford on March 11, 1998 and at Coventry University on March 18, 1998.

2. 19 Parl. Deb., H.C. (5th ser.) 1354 (1910)

3. Unfortunately, the source of this right has never been unambiguously established. Some Justices of the United States Supreme Court contend that the right is derived from the First Amendment’s right to petition the government for redress - U.S. Const., Amend.I (1791). Others, however, rely upon the Fourteenth Amendment’s due process clause - U.S.Const., Amend. XIV (1868). In any event, it is accepted that incarcerated individuals have a constitutional right of access to the courts. See generally Lewis v Casey, 518 U.S. (1996) 345 U.S. (1996) 2174 (1996) (containing a discussion of the possible sources of the right).

4. The United States has two judicial systems: the federal and the state systems. Each of the fifty states has a judicial system that is independent from the federal judicial system. The “Founding Fathers” adopted this scheme in order to facilitate the maintenance of a political scheme based on federalism.


6. Again, this article is derived from a longer article that compares the development and status of prisoners’ rights in the United States and Europe, including Great Britain. See supra note 1.

7. The time frame is limited to the late-nineteenth century and the twentieth century. For a description of prisoners’ rights prior to this time period see Blake Mckelvey, American Prisons: A History of Good Intentions (Patterson Smith 1977); Norval Morris and David J. Rothman ed., The Oxford History of the Prison: The Practice of Punishment in Western Society (Oxford University Press 1995).

(providing a detailed and disturbing description of how the “slave of the state” era existed in Mississippi).

9. See Oshinsky, supra note 8, at 31-100; McKelvey, supra note 7, at 197-216; Lewis Lawes, 20,000 Years In Sing Sing (The New Home Library 1942), at 89.

10. See e.g., Procunier v Martinez, 416 U.S. 396,404 (1974) (“[t]raditionally, federal courts have adopted a broad hands-off attitude towards problems of prison administration” (emphasis added)).

11. Gates v Collier, 501 F.2d 1291, 1302 (5th Cir. 1974) (noting that for years courts “close[d] their judicial eyes to prison conditions which present[ed] a grave and immediate threat to [the prisoners’] health or physical well being”).

12. 416 U.S. at 404-5 (noting that “where state penal institutions are involved, federal courts have a further reason for deference to the appropriate prison authorities”).

13. Jackson v Bishop, 404 F.2d 571, 577 (8th Cir. 1968) (“[t]he federal courts, including this one, entertain a natural reluctance to interfere with a prison’s internal discipline”); see also Sheldon Krantz and Lynn S. Brantham, The Law of Sentencing, Corrections & Prisoners’ Rights (4th ed. 1991), at 264-66 (discussing the “hands-off” stage).

14. McKelvey, supra note 7, at 360-61 (discussing the relaxation of the “hands-off” approach); Prison Conditions in the United States: A Human Rights Watch Report (Human Rights Watch 1991), at 102; Berkman, supra note 8 at 41 (noting that during the 1960’s “[c]ourts became more willing to intervene and rule on issues dealing specifically with the conditions of confinement” in state prisons). Furthermore, in 1974 the Supreme Court proclaimed that:

   a policy of judicial restraint cannot encompass any failure to take cognizance of valid constitutional claims whether arising in a federal or a state institution. When a prison regulation or practice is unlawful, federal courts will discharge their duty to protect constitutional rights. Procunier v Martinez 416 U.S. 396, 405-6 (1974)(emphasis added).

In this same year the Court made its oft-quoted pronouncement that “there is no iron curtain drawn between the Constitution and the prisons of this country”. Wolff v McDonnell, 418 U.S. 539, 55-56 (1974) (emphasis added).

15. Robinson v California, 370 U.S. 660, 666 (1962). The Eighth Amendment is included in the Bill of Rights, the first ten Amendments to the United States Constitution. For the Eighth Amendment’s prohibition against the infliction of cruel and unusual punishment to apply to the states, the Court had to incorporate it through the Fourteenth Amendment’s due process clause.


18. The express issue in *Bounds* focused on whether the prison at issue was obliged to provide an adequate law library. The Court's holding has been interpreted to mean that in order to afford prisoners their right of access to the courts, prisons have a duty to provide some means for the satisfaction of this right. The establishment of a prison law library simply being one of several acceptable methods.


21. A sample of prisoner cases that illustrate this shift include: *Estelle v Gamble*, 429 U.S. 97, 105 (1976) (imposing the "deliberate indifference" standard to cases involving Eighth Amendment challenges to the medical care an inmate receives); *Bell v Wolfish*, 441 U.S. 520(197) (holding that various prison practices did not violate the Constitution); *Rhodes v Chapman*, 452 U.S. 337, 347 (1981) (affirming the decision against the prisoners and noting that "[t]o the extent that such conditions are restrictive and even harsh, they are part of the penalty that criminal offenders pay for their offences") (emphasis added)); *Turner v Safely*, 482 U.S. 78, 89 (1987) (declaring that allegations that prison regulations unconstitutionally infringe or impair a prisoner's rights are to be assessed in accordance with the less stringent "rational basis" test).


23. Id., at 2179 (emphasis added).

24. Id., at 2185.


26. A major catalyst for the formulation and enactment of the PLRA was the public's misperception regarding the amount of litigation generated by prisoners and the substance of their legal claims. See "Critics of prisoner litigation cite a 'flood' of cases. What did they expect? There is a flood of prisoners," The National Prison Project Journal (Winter 1996), at 2. The media played an integral role in conveying the perception that prisoners constantly engage in "frivolous" litigation. This is not to say that this activity does not occur. However, it is greatly overstated. Unfortunately, the media neglected
to advise the public that the prevailing "get tough on crime" scheme resulted in a burgeoning prison population, see supra note 5, and a subsequent deterioration in the conditions of confinement. Such circumstances would in all likelihood lead to an increase in the number of cases filed by prisoners. See also California Lawyer, May 1995, at 33 (discussing how California's "Three Strikes and You're Out" legislation will increase an already increasing prison population and result in an increase in the number of grievances lodged with the courts). However, interestingly, while the number of cases filed has increased, the cases generated by prisoners, when measured as a percentage of the prison population, has actually decreased.

27. For example, one significant change is in the *in forma pauperis* rules which now generally require an inmate to pay a filing fee in order to access the court. See 28 United States Code section 1915. Prior to the PLRA it was much easier for a confined person to be declared indigent in order to obtain a waiver of the payment of filing fees.

28. See 18 United States Code section 3626.

29. This should be compared to the situation confronted by those detained by countries that are members of the Council of Europe where the following instruments appear to assure, at the minimum, the maintenance of relatively adequate conditions of confinement and an improvement in the ability to seek judicial redress: European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), Council of Europe, 5 European Treaty Series, entry into force, September 3, 1953; European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (ECPT), Council of Europe, 126 European Treaty Series, entry into force, February 1, 1989; European Standard Minimum Rules for the Treatment of Prisoners (European Prison Rules)(non-mandatory), Recommendation of Ministers No. R(87) 3, February 12, 1987 (revised).