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Prisoners and the Law

By Ira P. Robbins

Enclosed is Release #75 for Prisoners and the Law.

Prisoners and the Law is the essential compendium on prisoners' rights and other prison-related topics. With Release #75, this seven-volume encyclopedia of articles, legal analysis, and statistics continues to provide a balanced and responsible overview of the entire area of prison law and litigation. Prisoners and the Law is compiled and edited by Ira P. Robbins, Distinguished Professor of Law and Barnard T. Welsh Scholar at American University Washington College of Law, and a leading expert in the field.

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Highlights

Highlights of this release include:

- **Habeas Corpus and Clearly Established Law**. Chapter 13C considers the extent to which **general principles** can constitute **"clearly established federal law"** under the **Antiterrorism and Effective Death Penalty Act, 28 U.S.C § 2254(d)**.

- **Federal Prisoner Statistics Under the First Step Act**. Appendix C contains information on federal prisoners required by the **First Step Act of 2018**, including selected characteristics such as **marital, veteran, citizenship, and English-speaking status; educational levels; medical conditions; and participation in treatment programs**. Also included are facility-level statistics, such as the **number of assaults on staff by prisoners**.

- **Sexual Victimization in Prisons and Local Jails.** Appendices C and D present findings from the **National Prison Rape Statistics Program**, which

collects **allegations of sexual victimization directly from victims**. It provides estimates of sexual victimization in prisons and jails, including **trend data from 2011-12 to 2023-24**. Appendix D also provides a list of jails according to the **prevalence of sexual victimization**.

- **Jails in Indian Country.** Appendix D provides data on the **demographic characteristics, such as age, sex, most serious offense, and conviction status** of persons held in Indian country jails. It also describes **facility characteristics, including capacity and staffing**.

- **Probation and Parole.** Appendix E reviews characteristics of the U.S. community supervision population such as **sex, race or ethnicity, and most serious offense**. It also provides statistics on **movements onto and off community supervision** and details **types of exits**, such as completing one's term of supervision, being incarcerated, absconding, or other unsatisfactory outcomes while in the community.

- **World Pre-trial/Remand Population.** Appendix G presents the most current data available on the **number of prisoners held in pre-trial detention and other forms of remand imprisonment in 218 independent countries and dependent territories.** Also included are the percentage of pre-trial/remand detainees within each country and their **pre-trial/remand population rate**.

This release also includes a comprehensive Index that covers material in all seven volumes of this treatise.

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Prisoners and the Law

Edited by Ira Robbins

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PRISONERS
AND THE LAW

(formerly *Prisoners' Rights Sourcebook* Series)

Compiled and Edited by
Ira P. Robbins

Volume 1

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Dedicated to
the memory of my parents,
Seena and Martin M. Robbins,
with love

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IRA P. ROBBINS is Distinguished Professor of Law and Barnard T. Welsh Scholar at American University Washington College of Law, where he teaches courses on criminal law, prisoners' rights, postconviction remedies, conflict of laws, and the judicial process. He holds an A.B. degree from the University of Pennsylvania and a J.D. degree from Harvard University, where he was an editor of the *Harvard Civil Rights-Civil Liberties Law Review*. He served as Pro Se Law Clerk for the United States Court of Appeals for the Second Circuit and as a faculty member at the University of Kansas School of Law, where he was also Director of the Kansas Defender Project—a clinical inmate-counseling program that services the legal problems of prisoners at several institutions, including the United States Penitentiary at Leavenworth and the Kansas State Penitentiary at Lansing.

Professor Robbins' publications include COMPARATIVE POSTCONVICTION REMEDIES (1980), PRISONERS' RIGHTS SOURCEBOOK: THEORY, LITIGATION, PRACTICE (1980), THE LAW AND PROCESSES OF POST-CONVICTION REMEDIES: CASES AND MATERIALS (1982), JUDICIAL SABBATICALS (1987), THE LEGAL DIMENSIONS OF PRIVATE INCARCERATION (1988), TOWARD A MORE JUST AND EFFECTIVE SYSTEM OF REVIEW IN STATE DEATH PENALTY CASES (1990), HABEAS CORPUS CHECKLISTS (2026), and numerous law review articles. He has spoken on the law of habeas corpus and prisoners' rights to federal and state judges and justices throughout the country (under the auspices of the Federal Judicial Center and the Appellate Judges' Conference of the American Bar Association), as well as at the First World Congress on Human Rights, held in Costa Rica, and at the Federal Bureau of Prisons Conference on The History of Federal Corrections.

From 1985 to 1986, Professor Robbins was a Supreme Court Fellow at the Federal Judicial Center, and for several months served as Acting Director of the Federal Judicial Center's Division of Continuing Education and Training. In 1998, he received the Chief Judge John R. Brown Award for Judicial Scholarship and Education.

Professor Robbins served as the Reporter for the American Bar Association's Study on Privatization of Corrections from 1986 to 1988, as the Reporter for the American Bar Association's Task Force on Death Penalty Habeas Corpus from 1988 to 1990, and as a member of the Board of Directors of D.C. Prisoners' Legal Ser-

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vices Project, Inc. He has also served as Special Consultant to the Habeas Corpus Subcommittee of the Judicial Conference Advisory Committee on Criminal Rules, and as a member of the American Bar Association's Task Force on Post-Conviction Remedies. In 2016, Professor Robbins was named a member of the Board of Directors of Abolish Private Prisons, Inc.

Professor Robbins is an elected life member of the American Law Institute and a consulting editor to *Federal Probation Quarterly, Journal of Criminal Law and Criminology, Judicature, Justice System Journal, Justice Quarterly, Correctional Law Reporter, State-Federal Judicial Observer, Federal Courts Law Review,* and American University Press. His biography is listed in *Who's Who in America, Who's Who in American Education, Who's Who Among America's Teachers and Educators, Who's Who in American Law, Who's Who of Emerging Leaders in America, Who's Who in the World, International Who's Who of Intellectuals, Dictionary of International Biography*, and *Directory of American Scholars*.

Foreword

NORVAL MORRIS*

When Judge Morris Lasker wrote the Foreword to the original edition of this work in 1985, he opened by noting that there were more than 670,000 persons in prison and jail in the United States. Now, less than a decade later, after a fifteen-year period of stable overall rates of serious crime, as measured by both the Uniform Crime Reports and the National Crime Surveys, that number has doubled. It is an extraordinary phenomenon. No other country has ever built the walls of imprisonment around such a proportion of its citizens—and with so little effect.

With more than a million and a quarter of our fellow citizens in prison and jail, the importance of the law relating to their incarceration, and the conditions of their incarceration, is of obvious social importance. *Prisoners and the Law* makes a magnificent contribution to our understanding of the many legal issues raised by the caging of humans.

The revolution in the law relating to prisoners' rights is a product of the past quarter century. The ''hands off'' doctrine, which led the courts to eschew examination of conditions in our prisons and jails, wilted in the face of the compelling proposition that prisoners remain subjects of the Constitution and are properly protected by the Bill of Rights. In the result, there has been a mushroom growth in this area of the law.

One hears comments critical of the law's role here: ''What are judges doing running prisons and jails? Who are judges to say how many prisoners can be held in a cell or institution?'' These are ill-informed censures which miss the reality of most of these cases. When one talks, out of hours, with the superintendents and wardens of prisons and jails who are the defendants in these cases, one finds that though these

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cases are demanding of their time and energy, the superintendents and wardens are appreciative that they are a powerful weapon against the politicians of their administration, and the politicians of their legislatures, who tend to deny corrections the resources necessary to fulfill its mission. Their public hostility to these cases often masks private acceptance of this whole area of the law.

Crime and punishment become increasingly important to the American experience. The levels of criminal violence throughout the country, and particularly in the destroyed inner-city areas, are increasingly recognized as unacceptable, and the roles that ineffective gun laws and criminogenic laws relating to drugs play in our too frequent scenarios of brutal crime also gain recognition. When racial discrimination and ethnic separateness blend into this volatile mixture, even the simpleminded amongst us come to appreciate that we are facing a problem of complexity, not likely to be responsive to the latest effusions from Congress, a problem which requires, among many other developments, that we should bring principle and understanding to the effective and fair punishment of criminals—a topic pervading this book. Prisoners are to be punished for having broken the law; we should sedulously adhere to the law, and to laws which are fair and just, in their punishment—demonstration far outranks preachment. Measured justice under law must banish both excessive and inadequate punishment—another topic pervading this book.

Prisoners and the Law is both detailed and comprehensive—the single inescapable text if one is to work in this field. I found this for myself a few years ago when I was appointed as a Special Master by a Federal District Court to assist the court in drafting a decree concerning prison conditions in the protective-custody sections of a maximum-security prison.[1] The briefs of counsel for the parties were helpful, of course, but it was in the multivolume *Prisoners and the Law* that I gained confidence that all of the relevant legal issues had been considered as we moved to the shaping of a decree, and, thereafter, to monitoring its enforcement and mediating the assessment of damages that ensued. The book is a fine reference for the classroom, but it is an *essential* tool of litigation.

Let me conclude with a point of constitutional law. The federal courts have not specified precisely what law books must make up a law library, accessible to those in prison and jail, to meet their constitutional right of access to the courts. If they ever did, this book should be required—high on the list. And as a matter of decency, if not of law, every prison and jail library should have *Prisoners and the Law* on its shelves, accessible both to the inmates and to those running the institution.

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[1] Williams v. Lane, 646 F. Supp. 1379 (N.D. Ill. 1986), *aff'd,* 851 F.2d 867 (7th Cir. 1988), *cert. denied,* 488 U.S. 1047 (1989).

Foreword to the Original Edition

MORRIS E. LASKER*

During the year 1985, there will be more than seven million admissions to the jails of the United States. On any given day there will be more than 450,000 inmates in prison and 220,000 in jail.[1]

It is a commonplace to observe that until short years ago American courts observed a hands-off attitude toward the conditions in which inmates were held, in spite of the natural proposition that courts should be concerned with the conditions of the institutions to which they sentence defendants. Those hands-off days have, of course, been decisively transcended, and, commencing with such a seminal case as *Holt v. Sarver,*[2] an evolution of court-declared prisoners' rights has occurred which, as the variety of subjects that are dealt with by this book witnesses, has come into full flower. It is impressive testimony to the value of the Third Branch in protecting nonmajoritarian groups that the articulation of prisoners' rights has occurred at the very time when "law and order" attitudes have been current on the public-political stage.

The courts have recognized—because of the helplessness of institutional inmates (not only prisoners, but also the mentally ill and children in institutional custody, for example); their physical isolation from the community at large; and the disinterest, or indeed the hostility or revulsion, of society toward them—that abuses in inmate treatment can be expected as a natural consequence, that prison conditions are justiciable, and that where abuses are found to exist they must be remedied.

There has accordingly developed a body of judicial decisions such that now, a score of years after *Holt,* the subject of prisoners' rights has become a specialized area

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[1] The jail figures are found in Bureau of Justice Statistics, U.S. Dep't of Justice, Bulletin NCJ-87161, Jail Inmates 1982, at 1, 2 (1983). Prison figures are from Bureau of Justice Statistics, U.S. Dep't of Justice, Bulletin NCJ-92949, Prisoners in 1983, at 1, 2 (1984). The figures in the text are slightly higher than those in the sources because populations in both prisons and jails have since increased.

[2] 309 F. Supp. 362 (E.D. Ark. 1970), *aff'd*, 442 F.2d 304 (8th Cir. 1971).

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of the law, with all of the complexity and sophistication that specialization implies. *Prisoners and the Law* is both a witness to the growth of the law on the subject and a particularly useful tool to the practitioner.

The book charts with precision and comprehensiveness the paths that have been taken to date: a record of accomplishment in which those who have worked in the field can generally take satisfaction. The book also speculates on the future of prison reform. A major question for that future is whether the assurance of prisoners' rights will be left only to the courts—and dedicated counsel who litigate the cases—or whether instead we can hope for greater governmental and political involvement.

Responsible commentators have questioned the appropriateness of judicial intervention in prison cases, arguing that courts are not functionally adapted to deal with the institutional administration and reform that these cases—and others, such as school desegregation suits—naturally entail. Yet, there appears to be at least a subliminal public recognition that without court action nothing would have happened (or will hereafter). Even the limiting decisions of the United States Supreme Court in *Bell v. Wolfish*[3] and *Rhodes v. Chapman*[4] do not suggest that courts should disengage themselves from the subject. To say that the courts should do their part, however, does not mean that there is no role for the other branches of government.

The determination of prisoners' rights is essentially a standard-setting process, and to a substantial extent involves the setting of physical standards—regarding, for example, space, diet, sanitation, exercise, light, and temperature control. Those standards are presently set against the requirements of the United States Constitution, if for no other reason than that almost all prisoners' rights litigation has dealt with state institutions and has been brought in federal courts, in which the sole source of jurisdiction for these cases derives from the Constitution through 42 U.S.C. § 1983. But the setting of standards is essentially a legislative, and to a lesser degree an executive, function, and it is time to consider the role that those branches of government ought to be playing in the process.

State and municipal legislatures have the legal and institutional capacity to:

(1) pose standards on state and local authorities;
(2) establish enforcement agencies with adequate powers of review and supervision;
(3) impose sanctions for the nonobservance of imposed standards, not only by classic methods, but also, for example, by imposing special taxes on local communities that fail to abide by the state-imposed standards, and by using the proceeds of such taxes for the state itself to remedy the deficiency; and
(4) impose state management of local facilities, where necessary.

It is appropriate to consider whether it would not be legally, administratively, and socially preferable for legislatures (or executives, where properly authorized) to assume the responsibility for standard setting, leaving to the courts—as is the norm in other areas of the law—the determination of the constitutionality of these standards and the assurance that the standards are observed. Legally and administratively,

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[3] 441 U.S. 520 (1979).

[4] 452 U.S. 337 (1981).

such a structure would be better defined than the necessarily more episodic creation of standards by common-law methods; socially, it might have the advantage of greater public acceptance.

The creation of this structure would, of course, involve the devotion of the same kind of energy and resources to the legislative process as has been devoted to the judicial process for the last twenty years, and results will take time. In the meantime, the courts will remain the agency that defines the rights of prisoners, and *Prisoners and the Law* and its predecessors in the *Prisoners' Rights Sourcebook* series will remain the Bible of those rights.

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Preface

The problems of America's prisons and jails continue to plague us. The last few years have witnessed many diverse, controversial developments. Some, like the voluntary accreditation of correctional facilities, are beginning to take root. Others, like the privatization of corrections, are in the incipient stage, and may turn out to be either major or momentary concepts. Still others, like a 1982 proposal in Congress to build an Arctic Penitentiary for serious offenders, are totally inconsequential. On the judicial front, while more than two-thirds of the states are under court order for housing inmates in conditions that violate the Cruel and Unusual Punishment Clause of the Eighth Amendment, the United States Supreme Court continues to circumscribe the constitutional rights of prisoners and detainees. There are many important questions, but there are still no satisfactory answers.

This should not be surprising, however, for prisoners' rights is a field that is barely two decades old. As a body of law matures, it searches for proper relationships within its own subdivisions, as well as with other areas, both within and without the law. Through this evolution, the law of prisoners' rights has entered a new generation—one that is attempting to be true both to guiding principles and to unfolding patterns in a changing society.

Yet we must simultaneously deal with some urgent, undeniable facts. Most prisoners do not merely sit in penitentiaries and do penitence. They do *time.* And during that time most of them are not rehabilitated. They typically come out worse off than when they went in. And most of them *do* come out—with their dignity impaired, and with bitterness and resentment toward the society that has made them pariahs. A particular focus has thus become whether there can and should be more to imprisonment than simply the incapacitation of criminals.

To be sure, these questions, like other important questions in the criminal justice system, may ultimately be unanswerable. But that is no excuse for failing to deal with them as comprehensively as we can, given the existing state of knowledge. The purpose of this volume is thus to facilitate the prisoners' rights debate by providing a forum for productive dialogue. The subjects in the book range from the extremely theoretical to the extremely practical, with emphasis on doctrinal developments and policy alternatives.

The reader will at once note that not all of the contributors to this volume are sympathetic to an expansion of prisoners' constitutional rights. To understand ideas

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and issues completely, however, it is necessary to have arguments that are balanced by fair presentations on all sides. Whatever direction the law of prisoners' rights may take, it is clear that we will need knowledgeable, responsible, and effective attorneys, legislators, and judges. We have many critical choices to make. How we make them will determine what we, as a nation, wish to stand for. Dostoevski said it well: "The degree of civilization in a society is revealed by entering its prisons." To this, we might add that the legitimacy of a society's future is determined by the reasoned elaboration with which it evaluates its options.

In the spirit of responsibility, we must summon the resolve to formulate our conclusions with preciseness; but in the spirit of liberty we must summon the courage to treat those conclusions as tentative. We will make the next generation of prisoners' rights significant only through informed debate and constant vigilance. In the process of attempting to understand why and how we incarcerate those who have offended society's norms, we may learn a great deal about ourselves as well.

* * *

Three aspects of the format and style of the book should be noted. First, there is a somewhat artificial delegation of articles to the several sections of the book. The sections themselves, however, cannot be considered totally distinct, for the procedural and substantive features of the litigation and enforcement of prisoners' rights necessarily merge on particular issues. Second, although I recognize that the feminine gender is equally appropriate for personal pronouns, I have used the masculine gender except in the few cases in which it was clearly inappropriate. This convention was adopted solely for the purposes of style and consistency. Last, this book—the third in the *Prisoners' Rights Sourcebook* series—is for the first time being published in a looseleaf binding. This change in title and format, designed to accommodate regular updating, will enable *Prisoners and the Law* to provide the most current data, to track the newest trends, and to be the leading and most useful source of information that is available.

I would like to express my profound appreciation to all of the contributors to this volume—for the quality of their contributions, for their support of the *Prisoners' Rights Sourcebook* series, and for their complete cooperation during the editing process. My work on this book was supported in part by a grant from The American University Law School Research Fund. For that, and for his confidence in my work in all respects, I am indebted to Thomas Buergenthal, formerly Dean of the Law School.

Finally, and most importantly, I thank Jo—who accepted my long absences with patience, understanding, friendship, and love—and Alex, Andrew, and Missy—for their cheerful smiles and always pleasant dispositions. My family makes everything that I do worthwhile.

IRA P. ROBBINS

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