



Advocacy for Prisoners' Rights: Civil Litigation in the Criminal Justice World

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The long trek from arrest to release from confinement or supervision poses some interesting challenges for the civil and criminal legal organizations that



represent indigent persons. More and more individuals are caught up in the ever expanding criminal justice system,² especially people of color.³ Currently there are almost seven million persons or 2.9% of the American population under correctional supervision,

including 2.5 million people in prisons.⁴ In a nation that houses 25% of the world's prison population while comprising only 5% of the world's population, the need for legal assistance is enormous.⁵ This rapid expansion of the prison population, ongoing since 1980, is unprecedented in our nation's history. Curiously, the expansion occurred at the same time as and at a similar rate to the expansion in our country's income gap.⁶

Providing a holistic legal response to this development requires teamwork, communication and commitment from the defenders, legal aid and other legal nonprofits that serve this population. This is especially true in an era of limited and often diminishing funding for legal aid programs. Despite the many obstacles, there are currently several excellent examples of collaboration between such groups that provide a framework for expanding and improving the response to the largely unmet legal needs of people in the criminal justice system. These partnerships include training, advocacy, litigation and programming coalitions. They are essential in protecting this extremely vulnerable population. They should include community and client input, legal analysis and expertise. Knowledge of the issues and legal options are essential ingredients.

A Brief Review of the Evolution of Prisoners Rights

The need to provide a quality legal services delivery system to prisoners and others in the criminal justice system cannot be divorced from a larger ongoing debate in our society about what rights, if any, persons behind bars are entitled to. This debate impacts the ability to provide legal services in several ways. At one time many years ago, prisoners were considered slaves or wards of the state and had no rights. During the civil rights era, the Supreme Court, headed by Chief Justice Earl Warren, was shocked by the deplorable conditions in many southern jails⁷ and became actively involved in what is known today as prisoner's rights. Individual rights for prisoners were recognized so as to end the denial of medical care, excessive force, sexual abuse and other actions that shocked the conscious of a civilized society. "Prisoners are a voteless socially threatening minority with no currency in the political arena," opined Justice Brennan in his concurrence in *Rhodes v. Chapman*, 452 U.S. 337 (1981). "[t]here is no iron curtain drawn between the Constitution and the prisons of this country." *Wolff v. McDonnell*, 418 U.S. 539, 555-556, 94 S. Ct. 2963, 41 L. Ed. 2d 935 (1974).

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However, as the number of persons behind bars grew and the composition of the Supreme Court changed, so did the legal limitations on prisoner rights. The current United States Supreme Court has curtailed many of the substantive rights previously recognized. The U.S. Supreme Court today is split on how to interpret earlier Court mandates. The majority of the Court continues to interpret but limit the Bill of Rights as extending a few long standing constitutional principles deeply rooted in our jurisprudential history to persons behind bars. Justices Scalia and Thomas hold a much different view, stating that such individuals deserve little or no protection from the Court.

Congress has also taken steps to enact legislation which greatly restricts prisoner's rights. The Prisoner Litigation Reform Act of 1995 (PLRA) is a major procedural impediment to prisoner's rights litigation. It was passed under the premise that prisoners were filing frivolous lawsuits and tying up the federal court system. Hidden beneath the provisions to stop nuisance suits were procedural barriers to major class action conditions litigation, which up to that time had subjected some of the worst prison and jails to years of court intervention.⁸ The PLRA termination provisions ended much of this litigation.

The problems of the PLRA were compounded by the restrictions on legal work imposed by Congress on the Legal Services Corporation (LSC) that prohibit LSC-funded organizations from representing incarcerated persons.⁹ However, despite those restrictions, most of the larger states still have non-LSC-funded prison projects, including my own in Pennsylvania.¹⁰ These programs provide civil legal assistance to varying degrees. Some are encumbered with restrictions on their legal activities, but most are not. Most of them engage in impact and class action litigation, often concerning the conditions of confinement in prisons and jails. Many of these programs are funded in part by IOLTA programs, which have seen a dramatic reduction in funding with the fall of interest rates. Underfunding of public defender organizations further hamstring the ability to provide legal assistance to those in the criminal justice system beyond the minimum required defense work. Problems of excessive case loads and low salaries still plague many state public defender offices. These problems hinder their ability to interact with legal aid or other legal providers as they are often just trying to get through the day. To

avoid these problems, the American Bar Association and the National Legal Aid and Defender Association enacted guidelines for indigent criminal defense representation.¹¹ These barriers must be considered and avoided in molding an effective legal services delivery system.

Collaborative Efforts

A few years ago, I received a call from Brian Roberts, the coordinator for Institutional Services for the Public Defender Service of the District of Columbia. He later stopped by our Philadelphia office when returning from visiting his clients who had been transferred to the United States Penitentiary at Lewisburg, Pennsylvania, when the federal government federalized the D.C. prison system. We shared our mutual interest and concern for the well being of his and our clients at Lewisburg. Lewisburg had recently been reclassified as a super max facility, imposing the harshest regimentation currently allowed under our Constitution. It housed the "worst of the worst" in the Bureau of Prisons federal system. Brian and I kept in touch as the transformation progressed, and others joined in the conversation. Eventually a consensus developed that something had to be done to address the dramatic rise in violence at the facility. Several other groups joined in the conversation including the D.C. Prisoners Project, Washington Lawyers Committee for Civil Rights, Dechert LLP, the Lewisburg Prison Project and my organization, the Pennsylvania Institutional Law Project.

The issue that was most troubling was the forced double cell assignments in very small cells. Despite the fact that cell assignments are very difficult in the super max environment, double celling is commonplace due to overcrowding. It was our understanding that those who refused assignments were placed in restraints for as long as weeks at a time in an effort to force them to capitulate. Those that accepted assignments despite their protest and reservations were often subject to violent encounters with their cell mates. This led to the filing of two pending civil rights class actions for each category. *Richardson v. Kane*, M.D. Pa. 3-11-2206 and *Shelton v. Kane*, M.D. Pa. 3:11:1618. Free flowing conversation and information sharing between the defenders, legal aid, private firms and other concerned non-profits made this litigation partnership possible.

A tradition of collaboration among Philadelphia's thirty plus nonprofit legal organizations has been important to our efforts. The directors of these organizations meet monthly under the auspices of the

Delivery of Legal Services Committee of the Philadelphia Bar Association, with members of the private bar pro bono community and law school clinics present. These meetings give us a regular opportunity to share issues, concerns, build coalitions and advance legal projects. Several of the nonprofit executive directors sit on the Board of Directors of other legal and advocacy non-profits, affording us other opportunities to share information, discuss pressing legal issues and build coalitions.

The Bronx Public Defender holistic approach is another example of thinking outside the box and coming up with a creative and meaningful program that assists ex-offenders. For more on this program, see Robin Steinberg's excellent article in this *Journal*.

Other examples of interagency cooperation in our area revolve around local issues we have faced. The Defender Association of Philadelphia has been a vital member of a coalition that filed a class action lawsuit against the City of Philadelphia for triple celling in the city jails, *Williams v. City of Philadelphia*, E.D. Pa. 2:08-1979. The Defender Association helped organize a successful coalition forcing the city jails to provide educational opportunities to inmates under eighteen years old who had not completed high school. After much discussion, the prison system and the school district provided the necessary services. The Defender Association also formed a coalition regarding sex offender legislation. While not successful in stopping the Sex Offender Registration and Notification Act, it did delay and improve the legislation. The City of Philadelphia's effort to collect outstanding fines and costs has been another effective coalition builder. Community Legal Services has led a collaborative group in demanding proof of indebtedness and allowing for waivers, payment plans and other due process guarantees to this beleaguered client population. The immigration consequences of a criminal conviction requires more cooperation between criminal defense attorneys, immigration attorneys and advocates in the field — seemingly harmless plea agreements can result in deportation proceedings against the uninformed.

There are no magic bullets in this area. All concerned must remain vigilant in knowing the law, communicating with their sister agencies, being open to coalition building and problem-solving. Like minded, well-intentioned persons with a sense of purpose can solve some of the most difficult challenges for this vulnerable population and assist society by reducing recidivism, improving public safety and

reducing the high cost of corrections. Given the scarcity of funds, challenges such as this are greatly encouraged and admired.

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- 2 The United States is the leader in incarceration rates which have been rapidly expanding since 1980, "U.S. Prison Population Dwarfs that of other Nations," *New York Times*, April 23, 2008.
- 3 *Uneven Justice: State Rates of Incarceration By Race and Ethnicity*, Marc Mauer and Ryan S. King, The Sentencing Project, July 2007.
- 4 "Correctional Populations in the United States, 2011," United States Bureau of Justice Statistics.
- 5 Talvi, Silja J.A., *Women Behind Bars: The Crisis of Women in the U.S. Prison System*, California: Seal Press (2007), pp. xv.
- 6 "America's Growing Income Gap, by the Numbers," by Braden Goyette, *ProPublica*, Nov. 3, 2011.
- 7 *Holt v. Sarnver*, 309 F. Supp. 362 (E.D. Ark. 1970).
- 8 Prisoners Litigation Reform Act of 1996; 18 USC 3626 and 42 USC 1997; The Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214.
- 9 45 CFR part 1637.3.
- 10 Pennsylvania Institutional Law Project, Prisoners' Legal Services of New York, Massachusetts Prisoners' Legal Services, Prison Law Office, CA, D.C. Prisoners' Legal Services, North Carolina Prisoner Legal Services, Florida Institutional Legal Services, Legal Assistance to Minnesota Prisoners, Prison Reform Advocacy Center, OH, Prisoners' Rights Office, VT, Institutions Project of Columbia, WA, Wisconsin Correctional Services.
- 11 <http://www.nlada.org>.