CHAPTER

3

The Law and Corrections

"The basic concept underlying the Eighth Amendment is nothing less than the dignity of man. While the State has the power to punish, the Amendment stands to assure that this power be exercised within the limits of civilized standards."[1]

OBJECTIVES

- Understand how prisoners gain access to the courts and the purpose of habeas corpus.
- Identify statutes and case law pertaining to civil rights and mandamus petitions brought by prisoners.
- Specify the First Amendment rights of prisoners regarding religion, free speech and mail, and free association visitation.
- Apply the Fourth Amendment to inmate privacy rights.
- Recognize the due process considerations and case law expressed in the Fifth and Fourteenth Amendments.
- Describe the Eighth Amendment and the case law relevant to capital punishment, conditions of confinement, and habitual offender statutes.

CASE STUDY

There is no statute of limitation when the case involves murder. Charles E. Moore and Henry Hezekiah died in May 1964. Both men had been part of an effort to register Black voters in Mississippi during the civil rights movement. Police reports indicated both young men had been kidnapped, beaten, whipped, tied to old jeep parts, and dumped alive and still breathing into the Mississippi River. Confessions from Klan informants identified James Ford Seale as the man who stopped to pick up the two men as they were hitchhiking in the town of Meadville. FBI reports from the time of the crime indicate that Seale and another man beat Moore and Hezekiah nearly to death as they questioned them about rumors Blacks were importing firearms into the county. Forty-three years later, former sheriff's deputy and reputed Ku Klux Klansman Seale was charged with the crime of kidnapping.

Years later, Seale was located by Thomas Moore, Charles Moore's brother, when he returned to Roxie, Mississippi, to film a documentary about his brother's death. Thomas learned from a local resident that James Seale was still living in the area and that although there had been reports of his death, the reports were false; the reports had been verified by family members and published in several newspapers, including the Los Angeles *Times*.

1. Why wasn't Seale charged and prosecuted years ago?
2. What made this a federal case?
3. Were there others involved in this case?
4. Is physical evidence tying the defendant to a crime always necessary for a conviction?
5. Are there other cases stemming from the civil rights movement similar to this one?

"No longer can a jury wantonly and freakishly impose the death sentence; it is always circumscribed by the legislative guidelines."[2]

The rule book of the criminal justice system is the United States Constitution, which contains the procedures or rules by which criminal justice agents must comply while performing their duties. For criminal justice to be lawful, it must be in compliance with the U.S. Constitution, the supreme law of the land and the set of laws that supersedes all other laws in the country. No law or any jurisdiction can conflict with the expressed or understood doctrines of the U.S. Constitution. More precisely, the guidelines that the police, courts, and corrections must abide by are the first 10 amendments to the U.S. Constitution, also known as the **Bill of Rights**, which was ratified in 1791. (The Fourteenth Amendment also figures prominently in criminal justice because it pertains to the equal applicability and protection of the law). These amendments and the rights inherent to them are:

Amendment I: 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 a redress of grievances.

Amendment II: A well-regulated militia, being necessary to the security of a free state, the right of the people to keep and bear arms, shall not be infringed.

Amendment III: No soldier shall, in time of peace be quartered in any house, without the consent of the owner, nor in time of war, but in a manner to be prescribed by law.

Amendment IV: The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Amendment V: No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself,

nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment VI: In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

Amendment VII: In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any court of the United States, than according to the rules of the common law.

Amendment VIII: Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Amendment IX: The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

Amendment X: The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.

Amendment XIV: Section 1: All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. 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 deprive 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 laws.[7]

"Impairment of any other litigating capacity is simply one of the incidental and perfectly constitutional consequences of conviction and incarceration."[3]

CORRECTIONS IN THE NEWS

Sex Traffickers

Prior to 2000, no comprehensive federal law existed to prevent individuals or groups from human trafficking. No law, no federal prosecution! It was just that simple. How things have changed! Today the Trafficking Victims Protection Act of 2000 (TVPA) provides federal penalties for persons convicted of trafficking humans. Traffickers risk life in prison for a trafficking crime that results in death or if the commission of the crime involves kidnapping, attempted kidnapping, aggravated sexual assault, attempted aggravated assault, or an attempt to murder the victim. If the trafficker exploits a child under the age of 14 through force, fraud, or coercion for the purposes of sex trafficking, the trafficker again risks life in prison. The act or acts of coercion include psychological coercion, trickery, and the seizure of documents.

There are an estimated 18,000 to 20,000 human trafficking victims trafficked into the United States each year. From 2001 to 2005, U.S. Attorney's offices across the country were involved in 555 investigations involving acts outlawed by the TVPA. More than 58 percent of these cases involved forced labor (24 percent), sex trafficking of children (23 percent), trafficking slaves (9 percent), and unlawful conduct or a violation of other provisions (2 percent). The highest concentration of cases occurred in just four states: California (17 percent), Florida (14 percent), Texas (9 percent), and New York (8 percent).

From 2001 to 2005, 146 suspects were prosecuted under TVPA statutes. The largest number of cases prosecuted involved suspects charged with the sex trafficking of children. In 85 percent of the cases where the defendant was convicted, prison sentences were the penalty. In only 7 percent of the cases was probation the sentence. In 8 percent of the cases the defendant was ordered by the court to pay a fine and included in this percentage were those defendants who received suspended sentences. U.S. Attorneys declined to prosecute 222 cases during this period. Their main reasons included lack of evidence, weak or insufficient admissible evidence, and prosecution by other authorities.

Sources: Trafficking Victims Protection Act of 2000 fact sheet. Retrieved May 9, 2007, from http://www.acf.hhs.gov/trafficking/about/TVPA_2000.pdf; Motivans, M., & Kyckelhahn, T. (2006). *Federal prosecution of human trafficking, 2001–2005.* Washington, DC: U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics.

"From the correctional point of view, conviction of crime does not render anyone hopelessly unfit."[4, p. 35]

Clearly, some of the amendments have more to do with criminal justice than others. For instance, the Fourth Amendment is commonly known as the police amendment because it addresses search and seizure, probable cause, and warrants. The Fifth and Sixth Amendments apply broadly to the courts and contain hallowed due process concepts, such as the protection against double jeopardy, the use of grand jury indictment, fair and speedy trial, right to counsel, and others. The **Eighth Amendment** can be understood as the corrections amendment because it addresses both pretrial detention via the proscription of excessive bail and punishment via the proscription against cruel and unusual punishment. As indicated in Chapter 2, the American criminal justice system and legal system was influenced by several progressive ideas, including a more humane, less bloody means of criminal punishment.

Because corrections is the end of the line of the criminal justice process since defendants had been adjudicated and are serving some sentence, casual observers think that the law has little relevance to corrections beyond the obvious concern about cruel and unusual punishment. In practice, offenders, especially those serving jail or prison sentences, continuously challenge their conviction and utilize the criminal courts to revisit their case. As a county attorney once indicated to the current authors, most of his time was spent keeping inmates in prison as opposed to prosecuting new offenders. This chapter explores the law and corrections as well as the many ways that the criminal courts serve as a check on the correctional system. The legal doctrines that empower criminal defendants to even gain access to the criminal courts is examined next.

Why are nominations to the United States Supreme Court so controversial and often bitterly contested? What is at stake when the president seeks to appoint justices? On which issues do conservatives and liberals most disagree?

Access to Courts

There are three general scenarios by which inmates access the federal courts: (1) they can challenge the constitutionality of their imprisonment (writ of habeas corpus); (2) they can seek redress of civil rights violations by government officials (42 U.S.C. § 1983, also known as Section 1983 lawsuits); and (3) they can compel a government official to perform a duty (writ of mandamus). For general trends in prisoner petitions between 1980 and 2000, see TABLE 3–1 and FIGURE 3–1.

Habeas Corpus

The legal doctrine that grants correctional clients access to the courts to challenge the legality of their sentence is **habeas corpus**, Latin for "to have the body." Habeas corpus is mentioned in Article I, Section 9 of the U.S. Constitution, "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion and public Safety may require it." Also known as the *great writ of liberty*, habeas corpus is an order for correctional authorities, known as the respondent, to bring the defendant who requested filing the paper or writ, known as the petitioner, to court. There are three main purposes of habeas corpus: (1) to provide release from illegal confinement (habeas corpus ad subjiciendum), (2) to order the prisoner to the court for prosecution (habeas corpus *ad prosequendum*), and (3) to order the prisoner before the court to give evidence (habeas corpus *ad testificandum*).[8]

Inmates pursue habeas filings for several reasons. The most common reason that inmates cite for the illegality of their sentence stems from ineffective defense counsel. In other words, prisoners believe that because their defense attorney was bad, their sentence is illegal. Other commonly cited reasons include errors by the trial court, due process concerns, and self-incrimination (**Fifth Amendment** violations), which resulted in the perceived illegal sentence. According to the most recent data from the Bureau of Justice Statistics, nearly 60,000 prisoner petitions are filed each year, 80 percent of which are from state prisoners and 20 percent from BOP inmates. More than 54 percent are habeas corpus filings.[9]

TABLE 3–1 **Prisoner Petitions in Federal District Court, 1980–2000**

	Jurisdiction and Type of Petition									
	Federal						State			
Year	Total	Total	Vacate Sentence	Habeas Corpus	Mandamus	Civil Rights	Total	Habeas Corpus	Mandamus	Civil Rights
1980	23,230	3,661	1,322	1,413	323	603	19,569	7,029	145	12,395
1981	27,655	4,053	1,248	1,629	342	834	23,602	7,786	177	12,639
1982	29,275	4,328	1,186	1,927	381	834	24,947	8,036	172	16,739
1983	30,765	4,354	1,311	1,914	339	790	26,411	8,523	202	17,686
1984	31,093	4,526	1,427	1,905	372	822	26,567	8,335	198	18,034
1985	33,452	6,262	1,527	3,405	373	957	27,190	8,520	180	18,490
1986	33,758	4,432	1,556	1,679	427	770	29,326	9,040	215	20,071
1987	37,279	4,507	1,664	1,808	313	722	32,772	9,524	276	22,972
1988	38,825	5,130	2,071	1,867	330	862	33,695	9,867	270	23,558
1989	41,472	5,577	2,526	1,818	315	918	35,895	10,545	311	25,039
1990	42,623	6,611	2,970	1,967	525	1,149	36,012	10,817	352	24,843
1991	42,452	6,817	3,328	2,112	378	999	35,635	10,325	267	25,043
1992	48,417	6,997	3,983	1,507	597	910	41,420	11,296	479	29,645
1993	53,436	8,456	5,379	1,467	695	915	44,980	11,574	388	33,018
1994	57,928	7,700	4,628	1,441	491	1,140	50,228	11,908	395	37,925
1995	63,634	8,951	5,988	1,343	510	1,110	54,593	13,627	397	40,569
1996	68,235	13,069	9,729	1,703	418	1,219	55,166	14,726	444	39,996
1997	62,966	14,952	11,675	1,902	401	974	48,011	19,956	397	27,658
1998	54,715	9,937	6,287	2,321	346	983	44,777	18,838	461	25,478
1999	56,603	10,859	5,752	3,590	555	962	45,738	20,493	513	24,732
2000	58,257	11,880	6,341	3,870	628	1,041	46,371	23,345	563	24,463

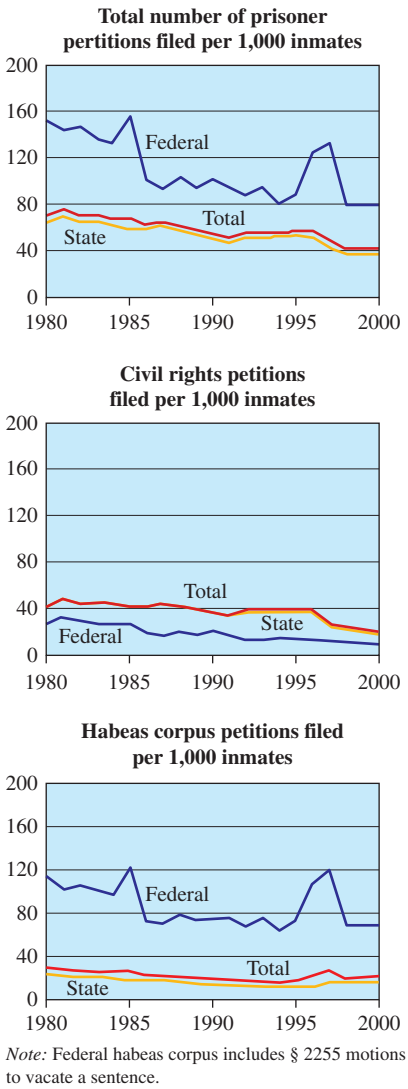
Note: Detail does not add to total, which includes jurisdiction cases from outlying territories. Data source: Administrative Office of the U.S. Courts, Report of the Proceedings of the Judicial Conference of the United States, annual (Table C–2).

Source: Scalia, J. (2002). *Prisoner petitions filed in U.S. district courts, 2000, with trends 1980–2000.* Washington, DC: U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics.

"The Fourth Amendment proscription against unreasonable searches does not apply within the confines of the prison cell."[5]

Habeas corpus is also the legal doctrine used by condemned offenders to challenge the propriety of their death sentence. Over the years, the ability or ease with which offenders can invoke the habeas corpus doctrine has evolved. For instance, Andrew Hammel suggests that during the tenure of Chief Justice Earl Warren, federal courts actively monitored state courts to ensure the liberal use of habeas. During the more conservative tenure of Chief Justice Warren Burger, federal courts permitted states to restrict inmate access to the courts via habeas requests.[10] Since 1996, Congress attempted to curtail the ability of prisoners to file petitions in federal court with the passage of the Antiterrorism and Effective Death Penalty Act, which contains amendments to habeas corpus requirements. For example, Section 2254 provides that federal habeas corpus relief is only available to a state prisoner if the petitioner has exhausted the remedies that are available at the state level. Section 2255 contains a 1-year period of limitation for a federal prisoner to file a motion attacking the illegality of his or her sentence.[11–12] Although the Antiterrorism and Effective Death Penalty Act was expected to reduce prisoner petitions, it actually increased the filing rate and the number of habeas corpus petitions originating from state

"Simply because an execution method may result in pain, either by accident or as an inescapable consequence of death, does not establish the sort of 'objectively intolerable risk of harm' that qualifies as cruel and unusual."[6, p. 11]



Note: Federal habeas corpus includes § 2255 motions to vacate a sentence.

FIGURE 3–1 Petitioner Filings per 1,000 Inmates, 1980–2000. *Source*: Scalia, J. (2002). *Prisoner petitions filed in U.S. district courts, 2000, with trends 1980–2000*. Washington, DC: U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics.

prisoners. Between 1996 and 2000, state prison inmates filed 50 percent more habeas petitions (see **FIGURE 3–2**).[13]

Civil Rights and Mandamus

The purpose of habeas corpus is narrow; it only allows inmates to challenge the legality of their confinement/sentence. However, inmates have many complaints about their involvement in the correctional system, such as allegations of violations of their constitutional and civil rights. These allegations and petitions for money damages or injunctive relief from their sentence are covered by **Section 1983** of the United States Code. The foundation for these petitions originates in the Fourteenth Amendment, which prohibits violations of due process. The Civil Rights Act of 1871 provided the mechanism for correctional clients to seek relief from constitutional deprivations at the state level.[14] This was applied to include federal violations in *Bivens v. Six Unknown Agents of the Federal Bureau of Narcotics* in 1971.[15]

CORRECTIONS HISTORY

Death by Lethal Injection

Courts have been sentencing defendants convicted of their crimes to death for centuries. Is there a method that is completely painless? The answer to this question is probably not. Is death by lethal injection less painful than the other methods used by departments of correction in this country? You decide . . . .

Let's begin this discussion at the point where the inmate who is sentenced to death has been strapped to the gurney. Trained prison personnel are tasked with establishing an intravenous line that will be used to administer each of three different drugs that will ultimately end the life of the inmate. The first drug used is an anesthetic, commonly sodium thiopental. The next drug that is administered is a paralytic agent such as pancuronium bromide. The last drug in this series is usually potassium chloride, which causes the heart to stop beating. According to claims made by condemned offenders and their attorneys, this is not a painless procedure and there is ongoing public debate whether it is more humane than electrocution, lethal gas, hanging, or firing squad.

The sequence of drugs used in an execution by lethal injection was developed in 1977 by an Oklahoma medical examiner. It sounds reasonable and sure, but the medical examiner had little training in pharmacology, basing the development of this protocol on personal experience having been subjected to anesthesia himself. Nonetheless, the procedure was soon adopted by Oklahoma and eventually by Texas and other states with the death penalty. In 1982, Texas was the first state to execute a prisoner using lethal injection. Within 10 years, Texas had executed 53 prisoners by means of lethal injection.

It is interesting to note that each of the drugs, and the massive quantities dictated by protocol, are themselves lethal. Pancuronium bromide is a neuromuscular blocking agent capable of causing death by asphyxiation—but this drug does not affect consciousness or block the sensation of pain. It does keep the prisoner from moving or thrashing about during the procedure. Consequently, if the prisoner is not anesthetized sufficiently prior to the administering of pancuronium bromide, the inmate will experience the pain of suffocating. Because of this, 30 states have banned the use of neuromuscular blocking agents due to the potential risk of suffering. Sodium thiopental alone, at the dose prescribed by the state, some 5 to 20 times the dose used during surgery, will cause the inmate to go limp, stop breathing, and lose consciousness within a minute of the drug being administered.

So far, and after approximately 40 cases, heard both by state and federal courts, none of the courts have ruled lethal injection to be unconstitutional. Times are changing; courts are beginning to express some concern over the procedures used in an execution by lethal injection. However, on April 16, 2008, in *Baze v. Rees*, the United States Supreme Court upheld lethal injection as a constitutional form of capital punishment. In the words of Chief Justice John Roberts, "Simply because an execution method may result in pain, either by accident or as an inescapable consequence of death, does not establish the sort of 'objectively intolerable risk of harm' that qualifies as cruel and unusual."

Sources: Human Rights Watch (2006). *So long as they die: Lethal injections in the United States*. Retrieved May 24, 2007, from http://hrw.org/reports/2006/us0406/; Human Rights Watch. (2006). *U.S.: States negligent in use of lethal injections*, Retrieved May 24, 2007, from http://hrw.org/english/docs/2006/04/24/usdom13241.htm; *Baze v. Rees* (553 U.S. XXXX) (2008).

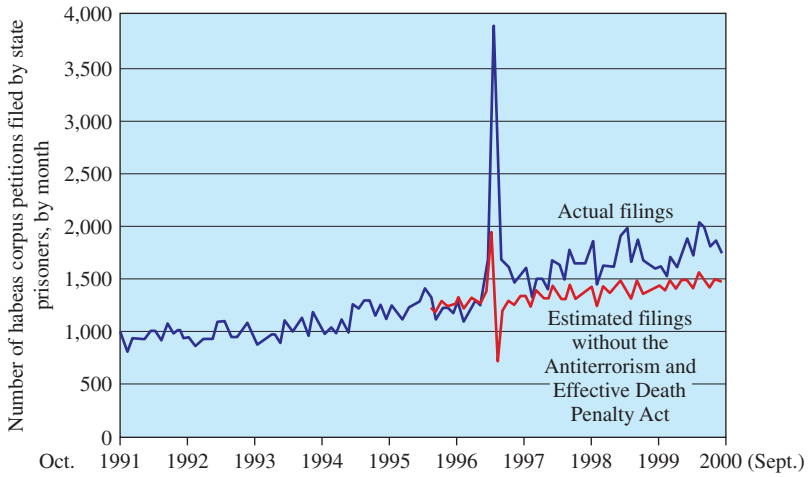


FIGURE 3–2 Habeas Petitions and the Antiterrorism and Effective Death Penalty Act. *Source*: Scalia, J. (2002). *Prisoner petitions filed in U.S. district courts, 2000, with trends 1980–2000*. Washington, DC: U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics.

An unseen part of the correctional experience is the attempts by prisoners to challenge the legality of their sentence in the courts. It is commonly recognized that the courts serve as a check and balance on the police power, but do the courts similarly check the correctional system?

A variety of legislative initiatives have been advanced to limit frivolous and malicious prisoner litigation against correctional systems. For instance, the Civil Rights of Institutionalized Persons Act of 1980 was enacted to reduce the number of civil rights petitions filed in the federal courts. According to the legislation, state prisoners were required to exhaust state-level administrative remedies before filing their petitions in federal court. In this way, Congress attempted to reserve federal courts for more serious civil rights violations or other significant constitutional issues.[16] The Prison Litigation Reform Act of 1996 attempted to reduce the number of petitions filed by inmates who claimed civil rights violations in three ways:

1. Inmates were required to exhaust all administrative remedies before filing in federal courts.
2. Inmates who filed as indigent persons (in forma pauperis) nevertheless required the payment of filing fees and court costs.
3. Inmates are prohibited from filing as indigent if they had prior petitions dismissed as frivolous or malicious.[17]

Civil rights petitions declined 40 percent as a result of the Prison Litigation Reform Act of 1996 (see FIGURE 3–3).

Finally, a **writ of mandamus** is an extraordinary remedy used when the plaintiff has no other way to access the courts for relief and he or she seeks to compel a governmental duty. Writs of mandamus are rare, with slightly over 1,000 filed in the most recent year where data are available.[18] The relevant case law that speaks to the ability of correctional clients to access the courts is explored next.

Case Law

Among the most important and the earliest Supreme Court decisions regarding inmate access to courts is ***Ex parte Hull***. In 1941, the Court held that states could not impair a petitioner's right to apply to a federal court for a writ of habeas corpus. The case arose in Michigan where correctional officials required inmates to submit their legal mailings for review prior to being sent to the courts. Only papers that met the guidelines of correctional staff were forwarded, suggesting that prison officials and prison administrative

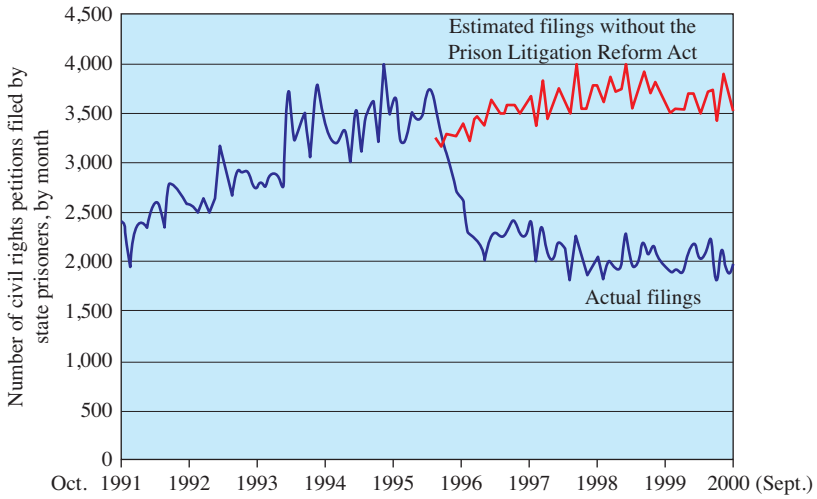


FIGURE 3–3 Civil Rights Petitions and the Prison Litigation Reform Act. *Source*: Scalia, J. (2002). *Prisoner petitions filed in U.S. district courts, 2000, with trends 1980–2000*. Washington, DC: U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics.

guidelines effectively abridged habeas rights.[19] *Ex parte Hull* is important on two fronts. First, is established **precedent**, a decision by the appellate court (usually the Supreme Court) that serves to guide all future legal decisions that encompass a similar topic, for inmates to apply for habeas corpus. Second, it loosened the hands-off doctrine that characterized American corrections, especially prisons, for most of the first half of the 20th century.

The spirit of *Hull* can be seen in several cases from the 1960s. In *Smith v. Bennett* (1961), the Court held that states cannot limit writ applications only to prisoners who can pay a filing fee.[20] On the issue of indigent inmates, the Court held in *Long v. District Court* (1966) that states must also furnish a transcript of court proceedings when the inmate cannot afford it if the court transcript is needed to pursue subsequent legal action.[21] In 1969, a landmark case, ***Johnson v. Avery***, affirmed the *Hull* decision, furthered the decline of the hands-off approach to corrections, and addressed the First Amendment protection of free speech and association. The issue at hand centered on the rightfulness of inmates to provide legal assistance or serve as a jailhouse lawyer to their peers. Johnson, a Tennessee inmate, had been cited for helping another inmate prepare to submit a writ of habeas corpus—an action that was in direct violation of prison policy. Upon review, the Supreme Court held that the policy was invalid and that inmates *are* able to provide legal assistance to other inmates if no other legal assistance is available. Like the *Hull* decision 28 years prior, *Johnson v. Avery* established that access to the courts for prisoners to present their legal complaints cannot be denied or obstructed.[22]

Like all legal doctrines, access to the courts evolves and is subject to the criminal justice mood of the country and, more specifically, the Supreme Court. During the 1960s, many legal decisions reflected a liberalization of inmate rights, greater access to the courts, and the decline of the hands-off approach to corrections. For instance, access to the courts was bolstered in 1977 with the *Bounds v. Smith* decision. In *Bounds*, the Court held that prisoners must have access to an adequate law library if no adequate form of legal assistance was provided for them.[23] Approximately 20 years later, the Supreme Court did an about-face on the *Bounds* decision. In ***Lewis v. Casey*** (1996), the Court held that prisoners who claim that they have been denied access to the courts and that the prisons failed to comply with *Bounds v. Smith* must show that their rights were prejudiced as a

CORRECTIONS FOCUS

Battered Woman's Syndrome: Self-Defense or Diminished Capacity to Form Mental Intent

It's simple, you kill someone—you go to prison. And in many cases that's exactly what happens. A significant number of women in prison for murder are incarcerated because they murdered their abusive partners. The immediate cause of the crime is in many situations case specific. What these women have in common, however, is a relationship that can be characterized by years of abuse, threats, and violence. Was the abuse they experienced the impetus for the ultimate act of revenge? Could their behavior in any way be deemed as reasonable force or self-defense? Is it possible these convicted female homicide offenders suffered from a battered woman's syndrome (BWS) prior to the commission of the crime?

In the 1970s, legal advocates suggested to the courts that a woman who, without immediate and life-threatening provocation, made a conscious choice to end the life of an intimate partner was in fact suffering from traumatic life experiences that, void of illegitimate pathways to safety, offered her a way out of a physically violent relationship and a life free from abuse. For a short time and in a limited number of court rooms, the BWS defense answered the question everyone was asking—why did she kill him? Was it enough for an acquittal? Only in a limited number of cases did this defense convince the jury that the alleged female homicide offender deserved to be set free.

Typically, the use of the BWS claim varied with the facts of each case in which it was employed. In some criminal cases, the BWS claim was used to convince the jury that the defendant truly believed her life was in danger and that she acted in self-defense using reasonable force to save her life and/or the lives of her children. In other cases, the BWS defense was used to persuade the jury of the woman's incapacity to form the intent to commit the murder. Unfortunately, to date, no empirical evidence has been found to support this defense. This does not mean that BWS is not a true syndrome. It only means that no empirical evidence supports the BWS contention, and until there is such evidence, other pathways to a life free from abuse need to be made available.

Source: Dixon, J. W. (2002). *Battered woman syndrome.* Retrieved May 16, 2007, from http://www.expertlaw.com/library/domestic_violence/battered_women.html; DeHart, D. D. (2005). *Pathways to prison: Impact of victimization in the lives of incarcerated women.* Washington, DC: U.S. Department of Justice, Office of Justice Programs, National Institute of Justice.

result of the denial of these rights in order to recover in a Section 1983 suit. In an opinion led by Justice Antonin Scalia, arguably the court's most ardent conservative, the *Lewis* decision blasted earlier precedents for their overly liberal interpretation of the access to courts doctrine:

> Several statements in *Bounds* went beyond the right of access recognized in the earlier cases on which it relied. . . . To demand the conferral of such sophisticated legal capabilities upon a mostly uneducated and indeed largely illiterate prison population is effectively to demand permanent provision of counsel, which we do not believe the Constitution requires.[24]

Similarly, the expectation that inmates are entitled to associate with other inmates for habeas or other legal reasons also has been curtailed. *Turner v. Safley* (1987) held that the test of reasonable relationship to legitimate penal objectives, not strict scrutiny, is used to determine if prison rules that affect only inmates are constitutional. A rule prohibiting inmate-to-inmate correspondence was upheld because it was neutral and logically advanced the goals of institutional security and safety.[25] In other words, inmates do not have a right to free association for legal discourse because inmate free association can lead to violence or rioting. A similar decision was reached in 1989 in *Thornburgh v Abbot*, where the Court held that the Federal Bureau of Prisons can reject incoming publications that potentially threaten institutional safety because it is a reasonable and legitimate penological concern.[26] In *Shaw v. Murphy* (2001), the Court held that inmates do not have a First Amendment right to provide legal assistance to other inmates.

In sum, inmates have a constitutional right to access the courts to directly appeal their sentence, file civil rights lawsuits under Section 1983, request a writ of mandamus, and request a writ of habeas corpus. In fact, habeas corpus is a fundamental right of American jurisprudence and is the primary reason that correctional clients are not finished contesting their legal case simply because they have been convicted and sentenced. The access to courts doctrine is a hallmark of American justice because it permits a check and balance to ensure that every sentence of confinement is legal.

First Amendment

Constitutionally speaking, correctional clients appear to be in a gray area as to their legal rights. An essential part of any criminal punishment is the deprivation of liberty or freedom. There are many examples of this. Defendants on house arrest cannot leave their own home except as specified by the courts. Probationers must report to their probation officer at certain dates and times, abstain from using alcohol, refrain from contacting specific individuals, and the like. Parolees can be barred from living less than 2,000 feet from a school, must attend counseling and treatment regardless of their interest in doing so, and avoid fraternizing with felons, gang members, and other undesirable characters.

Because of this, it is common for correctional clients to perceive that their sentence is infringing on their constitutional rights and prisoners tend to gravitate to the "to petition the government for a redress of grievances" clause of the First Amendment. Many types of complaints are cited as infringements on constitutional rights, and the First Amendment is often viewed as the most important amendment, and the one containing the most sacred rights, such as freedom of speech, religion, press, and assembly. Legally speaking, prisoners retain their **First Amendment** rights while incarcerated unless those rights are (1) inconsistent with their status as prisoner or (2) inconsistent with the legitimate penological goals of the institution. This balance of rights is known as the **balancing test** decision reached in ***Pell v. Procunier*** in 1974.[27]

Religion

In April 2007, a jail chaplain in Rockland County, New York, was suspended after she distributed religious booklets that condemned Islam, depicted the prophet Muhammad as a religious dictator, and generally contained offensive depictions of Muslims.[28] Although this incident is controversial because of its depiction of Islam, it also pertains to perhaps the most hallowed right within the First Amendment: religion. The seminal case for the right to religious freedom for prisoners is ***Cooper v. Pate*** (1964). In Cooper, the Court held that inmates were permitted to practice their religion provided that three basic conditions were met: (1) the religion must be an established religion (not contrived by the inmate); (2) the inmate's religious practices must conform to the tenets of the religion; and (3) the religious practices cannot pose a security risk or disrupt prison operations.[29]

Two important federal laws that address religious rights of correctional clients are the Religious Freedom Restoration Act of 1993 (RFRA) and the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA). The RFRA established that governmental agencies may substantially burden a person's exercise of religion only if it demonstrates that the burden is (1) in furtherance of a compelling governmental interest and (2) is the least restrictive means of furthering that compelling governmental interest.[30]

However, in 1997 in *City of Boerne v. Flores*, the Supreme Court held that Congress exceeded its powers by enacting the RFRA and infringed on a judicial act, thus the Religious Freedom Restoration Act was voided. Just 3 years later, however, Congress enacted the RLUIPA, which addressed the protection of religious practices by institutionalized persons (prisoners) with basically the same language from the RFRA.[31] As of 2008, the

Supreme Court has not evaluated the constitutionality of the Religious Land Use and Institutionalized Persons Act of 2000.

What constitutes an established religion is sometimes a point of contention between correctional clients and correctional administrators, and occasionally the Supreme Court is needed to resolve the matter. For instance, in *Cruz v. Beto* (1972), a Texas inmate (Cruz) filed a Section 1983 suit because correctional authorities were not allowing him to use the prison chapel, correspond with a Buddhist religious advisor, and share his Buddhist materials with other prisoners. In fact, Cruz was placed in solitary confinement after attempting to disperse Buddhist materials (correctional staff doubted the authenticity of Cruz's claim to be Buddhist). At the same time, religious services were provided to inmates of Jewish and Christian faiths. Upon appeal, the Supreme Court held that by denying Cruz a reasonable opportunity to pursue his faith when others were afforded opportunities to pursue theirs, correctional authorities were effectively discriminating against the Buddhist religion.[32]

Perhaps the outcome in *Cruz* should have been obvious since Buddhism is an official religion. In the 1970s, some inmates at the U.S. Penitentiary in Atlanta organized a "religion" called the Church of the New Song (CONS). Despite the claims made by CONS that it should receive the same amenities and services as other religions, the federal courts did not agree because CONS was not a genuine religion (for instance, its membership was restricted to those inmates).[33] Similarly, in *McCorkle v. Johnson* (1989), the federal courts upheld an Alabama correctional policy that banned Satanic materials and Satanic worship despite the protests of inmates who claimed to be Satanists because the materials and practices were inherently violent and posed security and safety risks for inmates.[34]

Essentially, correctional officials must accommodate religious practices that are based on the tenets of a genuine religion provided that the practices are not dangerous or in conflict with the reasonable operations of the facility. For example, the Court held in *O'Lone v. Shabazz* (1987) that a prison regulation that prohibited inmates on outside work details from returning to the main prison building during the day, and thereby preventing them from attending Muslim services that the Koran dictated be held during the early afternoon on Fridays, *did not* violate their First Amendment rights. Prison officials only need to show that the regulation was reasonably related to the security interest of the prison.[35] In other circumstances, federal courts have ruled in favor of inmates and their religious requests. Federal courts have decided that correctional officials provide sweat lodges for Native American inmates (*Hamilton v. Schriro*, 1996), provide special meals for Ramadan for Islamic inmates (*Walker v. Blackwell*, 1969), and offer kosher food as part of the prison menu for Jewish inmates (*Kahane v. Carlson,* 1975, and *Jackson v. Mann*, 1999).[36–39]

Free Speech and Mail

Perhaps more important than the First Amendment rights to religious expression is the right of free speech. Free speech is a hallmark of American freedom and liberty; however, the right to free speech is not absolute. There are many forms of speech that can bring censure, rebuke, or in the case of harassing language, criminal charges. Because prisoners are incapacitated from society, their speech takes the form of telephone calls, e-mail, and mail. The landmark case that established inmate rights to speech via the mail is ***Procunier v. Martinez*** (1974). In *Procunier,* the Court held that mail correspondence between inmates and outside parties was speech protected by the First Amendment. However, there were limits to that speech. Correctional officials could restrict inmate mail (and thus restrict their free speech) to further the interests of legitimate governmental interests. More specifically, inmate mail can be restricted for three reasons:

1. To preserve order and discipline
2. To maintain institutional security
3. To rehabilitate the prisoner[40]

The courts have affirmed First Amendment religious rights among prisoners. Which types of inmate religious practices have pushed the boundaries of constitutionally permissible forms of worship?

In 2006, an interesting case occurred involving a Wisconsin prisoner serving time for murder, armed robbery, and weapons possession. The inmate filed a lawsuit against correctional officials who were refusing to provide to the inmate his e-mail printouts from a personal ad he owns on the Inmate Connections service. The 7th U.S. Circuit Court of Appeals ruled in favor of the inmate and the lawsuit is going forward.[41] In addition to correctional policies limiting access to e-mail output, there are other limits on inmate speech. To guard against security breaches, inmates are prohibited from writing to inmates in other institutions except in narrow, extenuating circumstances (*Turner v. Safley*, 1987).[42] Federal courts have limited inmate access to nude photographs that are sent through the mail. The same is applied to magazines, newspapers, and other periodicals. In *Thornburgh v. Abbot* (1989), the Court held that prison regulations that permit the Federal Bureau of Prisons to reject incoming publications found to be detrimental to institutional security are valid if they are reasonably related to a legitimate penological interest.[43] Thornburgh built upon the "publisher only rule" established in *Bell v. Wolfish* (1979) in which inmates were permitted to receive periodicals exclusively from the publisher since friends and family were more likely to hide **contraband**, or materials prohibited in correctional facilities, such as drugs and weapons, in the mail.[44]

Contraband is a serious risk to institutional safety. Cases such as *Bell v. Wolfish* limited opportunities for visitors to smuggle contraband within periodicals.

Free Association and Visitation

> The fact of confinement and the needs of the penal institution impose limitations on constitutional rights, including those derived from the First Amendment, which are implicit in incarceration. Perhaps the most obvious of the First Amendment rights that are necessarily curtailed by confinement are those associational rights that the First Amendment protects outside of prison walls.[45]

This passage comes from the landmark case in inmate right to association, *Jones v. North Carolina Prisoners' Labor Union, Inc.* (1977). In *Jones*, the Court held that prison rules prohibiting the solicitation of members for the prisoners' union, barring meetings of the union, and refusing to deliver packets of union publications that were sent to the prison in bulk mailings did not violate First Amendment freedom of speech or association or equal protection rights specified in the Fourteenth Amendment (discussed later in this chapter). The Court also decided that prison officials reserved the right to permit some organizations, such as Alcoholics Anonymous, to organize and meet in prison while depriving others. Another group that does not have a right to access or association with inmates is the news media. In *Pell v. Procunier* (1974), the Court held that prison regulations prohibiting face-to-face press interviews did not violate the First Amendment because others avenues were available to the media.[46]

Association rights extend beyond labor unions and the media. The Supreme Court has ruled on whether prisoners have a constitutional right to have contact visits, in which they can physically touch visitors. They do not. In *Block v. Rutherford* (1984), the Court held that the Los Angeles County Jail's policy of total prohibition on contact visits by pretrial detainees is a reasonable response to legitimate security concerns.[47] In *Overton v. Bazzetta* (2003), the Court held that jails can place limits on who can visit inmates, including their own children, if the limitations serve legitimate penological interests.[48] Correctional officials can also revoke visitation privileges of specific visitors who pose a threat to institutional security or the orderly operation of the visitation area, a decision reached in *Kentucky Department of Corrections, v. Thompson* (1989).[49]

Finally, perhaps the most controversial association issue pertaining to prisoners is conjugal visits, which are overnight visits between inmates and their spouses in which sexual activity is permitted. Because of security and contraband risks, most states do not allow conjugal visits for prisoners. In fact, only six states, California, Connecticut, Mississippi, New Mexico, New York, and Washington, permit conjugal visits. In 2007, California became the first state to allow gay and lesbian partners of prison inmates to participate

CORRECTIONS FOCUS

The Hands-Off Doctrine

In the early to mid-1900s, the courts were reluctant to support claims by convicted prisoners of constitutional guarantees. Public opinion, mirrored by court decisions, limited the rights of prisoners and the courts felt the power to define and enforce the constitutional rights of prisoners was not within the mandate of their authority. The general consensus was that in so doing, the court's decision would undermine state and federal correctional policy that must also consider security and the appropriate and necessary discipline of inmates.

By the 1960s, the reluctance by certain courts to apply the hands-off doctrine was increasing. In essence, the mood of the court was changing. It was not until the 1960s and 1970s that courts generally accepted the idea that prisoners have rights and that the courts are bound to protect those rights. The Supreme Court decided, in a series of opinions, that rights guaranteed by the U.S. Constitution must also be afforded prison inmates.

Sources: *Cruz v. Beto,* 405 U.S. 319 (1972) [freedom of religion]; *Wolf v. McDonnell*, 418 U.S. 539 (1974) [procedural due process]; *Pell v. Procunier*, 417 U.S. 817 (1974) [freedom of speech].

in conjugal visits.[50] Although the Supreme Court has yet to rule on the constitutionality of conjugal visits, lower courts have addressed the issue. In *Lyons v. Gilligan*, a federal court determined that there is no constitutional right to conjugal visits and correctional policies can lawfully proscribe them.[51] In *Mary of Oak Knoll v. Coughlin*, a New York state court upheld a policy which limited conjugal visits to inmates who could provide a valid marriage certificate to verify the authenticity of their marriage. Inmates without a valid certificate were prevented from conjugal visits.[52]

Fourth Amendment

The **Fourth Amendment** is commonly known as the police amendment, since it focuses on search and seizure, warrants, and probable cause. It would seem that the Fourth Amendment has little applicability to correctional clients; after all, there are no police officers patrolling jails and prisons. However, in correctional facilities, officers and other staff perform quasi-law enforcement functions and, as officers of the state, are bound by the Fourth Amendment. This section explores the important case law about the Fourth Amendment rights of inmates, including how closely bound to the Fourth Amendment correctional officers are and whether inmates receive the same Fourth Amendment protections as members of conventional society.

The landmark case in the application of the Fourth Amendment to inmates is ***Hudson v. Palmer*** (1984). In *Hudson*, the Court held that an inmate did not have a reasonable expectation of privacy in his cell that entitled him to Fourth Amendment protections against unreasonable searches and seizures. The Court also refused to find a due process violation where the inmate had been deprived of his property by a state employee (that had been damaged during a cell search) because state law provided for a meaningful postdeprivation remedy for the loss. Indeed, the Court was clear that the sheer differences between free society and prison make for a more narrow application of the Fourth Amendment.

> A right to privacy in the traditional Fourth Amendment terms is fundamentally incompatible with the close and continual surveillance of inmates and their cells required to ensure institutional security and internal order. We are satisfied that society would insist that the prisoner's expectation of privacy always yield to what must be considered the paramount interest in institutional security.[53]

Overall, inmates have limited privacy rights while they are in custody and the Supreme Court has ruled on this in a variety of cases. In *Bell v. Wolfish* (1979), the Court held that authorities can search an inmate's cell with him being present.[54] Also in the *Bell* decision, the Court held that body cavity and strip searches were permitted and thus not a violation of constitutional protections against illegal search and seizure.

In correctional facilities, there is also no constitutional right to privacy during visitation with family and friends. In fact, not only is there no entitlement to privacy, but also the authorities can record conversations between inmates and their visitors. This was the decision in *Lanza v. New York* (1962).[55] Moreover, authorities can turn over recorded conversations between inmates and visitors to law enforcement and prosecutors to pursue criminal charges against the inmate, a decision reached in *United States v. Hearst* (1978).[56]

These procedures are permitted as part of the regular course of maintaining a safe prison environment, but how often do correctional facilities actually monitor inmate visits, seize their communication, and limit their privacy? Heath Hoffman, George Dickinson, and Chelsea Dunn studied trends in prison communication policies between 1971 and 2005. Overall, Hoffman and his colleagues found that prisons have become more restrictive in their policies toward inmate visits and communication. For instance, they found:

- Between 1971 and 2005, the proportion of facilities that had 365-day visitation declined from 48 percent to 19 percent.
- Almost all prison facilities routinely monitor inmate mail to check for incoming contraband.
- Inmates are afforded liberal access to telephones and 84 percent of prisons routinely monitor inmate phone calls.
- Almost 70 percent of facilities always monitor inmate phone calls.
- Inmate access to the Internet and e-mail is severely restricted.[57]

Inmates have limited Fourth Amendment rights because of their status as prisoners. This suggests that within correctional facilities there is a greater emphasis on institutional safety than individual rights to privacy.

Fifth and Fourteenth Amendments

Due process is so important to American law that it is mentioned twice in the Bill of Rights, in the Fifth and Fourteenth Amendments. Generally, **due process** means that laws and criminal procedures are reasonable and applied in a fair and equal manner. Due process guarantees that people have a right to be fairly heard before they can be deprived of life, liberty, and property. Due process is a sacred legal concept derived from Article 29 of the Magna Carta, which was published in 1215.[58] Given the importance of due process to criminal justice, the case law supporting it is extensive. This section reviews landmark decisions and other case law that pertains to a variety of procedures used to supervise correctional clients.

The landmark case in due process rights of prisoners is ***Wolff v. McDonnell*** (1974), which specified the due process guidelines for major prison disciplinary proceedings. In *Wolff*, the Court held that:

- Written notice of the charges must be given to the inmate.
- The fact finder must make written statements of the evidence relied upon and reasons for the disciplinary action.
- The inmate must be allowed to call witnesses and present documentary evidence except when doing so would be unduly hazardous to institutional safety or correctional goals.
- Due process *does not* require confrontation and cross-examination of adverse witnesses or the right to counsel.
- Guards may open incoming mail from an attorney if done in the presence of the inmate.[59]

CORRECTIONS HISTORY

Reasons for Striking the Hands-Off Doctrine

1. More vocal prisoners
2. Civil rights demonstrations
3. Vietnam War protests
4. Ghetto riots
5. Prison riots
6. Attorneys' concerns about prison conditions
7. Development of a civil-liberties bar
8. More effective counsel for the defendants
9. North American Civil Liberties Union's National Prison Project
10. Expert witnesses hired to represent prisoners

Source: Branham, L. S., & Hamden, M. S. (2005). *Cases and materials on the law and policy of sentencing and corrections* (7th ed.). Belmont, CA: Thomson/West.

Two years later, in *Baxter v. Palmigiano* (1976), the Court added more conditions for disciplinary hearings. The Court held that:

1. Inmates have no due process right to retained or appointed counsel regardless of the charges.
2. The Fifth Amendment does not prohibit the drawing of adverse inferences from the inmate's failure to testify at the hearing.
3. Inmates do not have a right to confront and cross-examine the witnesses against them.
4. Authorities do not have to state reasons for denying these rights to inmates.[60]

In other words, although inmates have due process rights during disciplinary hearings, they are considerably limited especially compared to the due process rights of citizens in the noncorrectional settings.

In addition to *Wolff*, the Supreme Court has ruled on a variety of due process claims made by inmates, parolees, and probationers that pertain to their Fifth and **Fourteenth Amendment** rights. In most, but not all, cases, the Court held to restrict due process rights or to deny that a due process claim exists in the first place. For instance:

- *Morrissey v. Brewer* (1972): The Court held that due process establishes the right of a parolee to a preliminary and final hearing before parole can be revoked.[61]
- *Gagnon v. Scarpelli* (1973): The Court held that probationers are entitled to a preliminary and final revocation hearing and in special circumstances may be required to assign counsel at the hearing.[62]
- *Estelle v. Dorrough* (1975): The Court held that automatic dismissal of pending appeals if an inmate escapes from prison for more than 10 days while the appeal was pending did not violate equal protection rights.[63]
- *Meachum v. Fano* (1976): The Court held there was no due process requirement for a formal hearing prior to transferring an inmate from a medium- to maximum-security facility.[64]
- *Craig v. Boren* (1976): The Court held that disparity in treatment between male and female inmates must be justified by important government objectives and must be substantially related to advancing those objectives.[65]

- *Montanye v. Haymes* (1976): The Court held there was no due process right to a hearing prior to the transfer of an inmate from one prison to another absent state law which claims otherwise.[66]
- *Greenholtz v. Inmates of the Nebraska Penal and Correctional Complex* (1979): The Court upheld Nebraska's procedures for parole hearings, including a preliminary hearing and final hearing where the inmate can call witnesses, present evidence, and be represented by private counsel.[67]
- *Viteck v. Jones* (1980): The Court held that an involuntary transfer of a prisoner to a mental hospital required a hearing that included written notice of the transfer, an adversary hearing before an independent decision maker, written findings, and effective and timely notice of these rights. In their reasoning, the Court asserted that the stigmatizing effects of transfer to a mental hospital required a due process hearing.[68]
- *Jago v. Van Curen* (1981): The Court held that revocation of a parole date prior to the release of the inmate on parole did not require a hearing.[69]
- *Hewitt v. Helms* (1983): The Court held that an informal, nonadversary evidentiary review was sufficient for the transfer of an inmate to administrative segregation (isolation) pending a complete investigation of the alleged misconduct.[70]
- *Olim v. Wakinekona* (1983): The Court held that a Hawaiian inmate was not denied due process by a transfer to an out-of-state prison without a hearing.[71]
- *United States v. Gouveia* (1984): The Court held that inmates were not constitutionally entitled to appointment of counsel while the inmates were in administrative segregation prior to initiation of adversary judicial proceedings against them.[72]
- *Superintendent v. Hill* (1985): The Court held that due process is satisfied if the record relied on by a prison disciplinary board to revoke good time credits contains some evidence that supports the decision.[73]
- *Daniels v. Williams* (1986): The Court held that negligent acts of correctional officers that lead to unintended property loss or injury do not violate the inmates' due process rights.[74]
- *Davidson v. Cannon* (1986): The Court held procedural and substantive due process rights are not violated by a lack of due care or simple negligence on the part of prison officials.[75]

Broadly speaking, inmates and other correctional clients of course retain their constitutional rights to due process, which are expressed in the Fifth and Fourteenth Amendments. But, as the list of these cases suggests, due process rights are streamlined for correctional clients and as long as correctional officials are operating in good faith according to legitimate and sensible correctional goals, there is no rights violation.

Eighth Amendment

To be a correctional client is not fun. In addition to the curtailment on one's liberty, being on probation, parole, or incarcerated carries with it several inconveniences and privations. This is particularly true for prisoners who face the frightening reality of living with some of the most violent, disturbed, and antisocial people in society. In addition, jails and prisons are very crowded, noisy, monotonous, and generally unclean. However, they cannot be such a negative environment that it violates the Eighth Amendment prohibition against cruel and unusual punishment. The standard that is used to evaluate the overall quality of a prison environment is the **totality-of-conditions test** established in ***Pugh v. Locke*** (1976). In *Pugh*, Alabama prisons were found to be so appalling and debilitating

CORRECTIONS IN THE NEWS

Are Wrongful Convictions Isolated Cases?

In 1986, a crime of rape was committed. The victim, a 13-year-old female, was sexually assaulted at knifepoint. The young victim could not identify her assailant so the defendant's chances of impeaching her testimony were very slim. There was physical evidence, but although DNA evidence was available, the court's willingness to accept and recognize this type of evidence in criminal cases was still years away. The case against the defendant was based on a confession by one of the two other men involved in the crime who implicated the defendant as his accomplice. The defendant was arrested for the crime. The only problem was—he didn't do it.

More than 220 convicted felons have been exonerated through the proper use of DNA evidence in the United States. Fifteen of these felons had been sentenced to death. The average length of time served by these former inmates was 12 years. The actual perpetrator has been identified in only 74 of the cases. Of these exonerated felons, 120 were African American, 56 were Caucasians, 19 were Latinos, and 1 was Asian American.

Problems with witnesses' testimony, problems with the investigation, and problems with the system all explain a portion of the variance in this model. There is overlap as well. Eyewitness testimony is by far the leading cause of wrongful convictions. In 77 percent of the cases, eyewitness testimony was one of the factors used to convince the jury the defendant was guilty of the crime. Sixty-five percent of the wrongful convictions can also be attributed to errors in crime lab procedures. In the worst of these cases, crime lab analysts presented false testimony regarding the results of DNA tests. But that's not all; 25 percent of these cases also involved false confessions, which ultimately led to a wrongful conviction—35 percent of this percentage involved a confession from a suspect under the age of 18 or one who was developmentally disabled. Furthermore, information obtained from jailhouse informants aided in 15 percent of the wrongful convictions.

In the event that the courts recognize the wrongful conviction and release the inmate, 21 have a compensation statute; 29 states do not. In Iowa, for example, the first consideration is whether the defendant pleaded guilty to the crime. If so, the defendant is not entitled to file a claim for compensation against the state. If the defendant pleaded not guilty, but was found guilty in a court of law the defendant is eligible for up to $50 per day of the length the time spent in prison plus any lost wages, not to exceed $25,000 per year. The defendant is also entitled to have his attorney's fees paid if the claim is made within 2 years of his release.

Sources: *The Innocence Project*. Retrieved August 29, 2008, from http://www.innocenceproject.org; Iowa Code 633A.1 (1997).

that they worked to deteriorate the health and spirit of inmates and thus reduce the likelihood of successful rehabilitation. The totality-of-conditions test is the aggregate characteristics of the facility that are used to show an Eighth Amendment violation.[76] One example of appalling prison conditions relates to health care. In ***Estelle v. Gamble*** (1976), the Court held that deliberate indifference to a prisoner's serious medical needs constituted cruel and unusual punishment. According to the Court:

> Deliberate indifference to serious medical needs of prisoners constitutes the unnecessary and wanton infliction of pain proscribed by the Eighth Amendment. This is true whether the indifference is manifested by prison doctors in their response to the prisoner's needs or by prison guards in intentionally denying or delaying access to medical care or intentionally interfering with the treatment once prescribed.[77]

The concept of deliberate indifference was modified in 1991 in the case *Wilson v. Seiter*, with the establishment of the **deliberate indifference** standard, which states that the conditions at a prison are not unconstitutional unless it can be shown that prison administrators show deliberate indifference to the quality of life in prisons and inmates' most basic needs.[78] In 1994, the deliberate indifference doctrine was broadened in the

case of *Farmer v. Brennan*. In *Farmer*, the Court held that a prison official may be liable under the Eighth Amendment for denying humane conditions of confinement only if he knows that inmates face a substantial risk of serious harm, for example, because of gang animosity, and disregards that risk by failing to take reasonable measures to abate it.[79]

A careful reading of the Eighth Amendment, which states that "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted" describes three distinct correctional domains in which correctional clients can file grievances for purportedly unconstitutional treatment. These are (1) the pretrial period while on bail, (2) the postadjudication phase resulting in any sentence where fines were imposed, and (3) the penalty phase, especially confinement and capital punishment. Overwhelmingly, case law pertaining to the Eighth Amendment has centered on capital punishment. The remaining part of the chapter reviews the case law related to the Eighth Amendment and the various doctrines that evolved from it.

Capital Punishment

Without question, capital punishment, commonly known as the death penalty, has received the most attention from appellate courts regarding the proscription of cruel and unusual punishment. Evaluations of capital punishment have followed the "evolving standards of decency that mark the progress of a maturing society," an idea established in ***Trop v. Dulles*** in 1958. In *Trop*, the Court held that the penalty of loss of nationality for the crime of desertion was overly severe and thus violated the cruel and unusual punishment clause of the Eighth Amendment.[80]

During the 1960s, there was growing sentiment in the United States that capital punishment itself was cruel and unusual. As such, executions plummeted from earlier decades when states routinely executed more than 150 inmates annually. For instance, only three persons were executed in 1966 and 1967, and from 1968 to 1976 there was a de facto moratorium on the death penalty. From 1972 to 1976, the death penalty was officially held to be unconstitutional. In three cases (*Furman v. Georgia*, *Jackson v. Georgia*, and *Branch v. Texas*), collectively known as the *Furman* decision, the Supreme Court, in a 5–4 decision, held that the manner in which the death penalty was imposed and carried out under the laws of Georgia and Texas (famously described as arbitrary and capricious) was cruel and unusual and overall in violation of the Eighth and Fourteenth Amendments.[81–83] The ruling in ***Furman v. Georgia*** (1972) voided death penalty statutes nationwide and commuted the sentences of more than 600 death row inmates.

No sooner was capital punishment declared unconstitutional than legislatures enacted new death penalty statutes that addressed the Court's concern about the arbitrary and capricious application of the sanction. New death penalty statutes essentially describe the conditions under which a homicide is escalated into a capital crime. Two types of circumstances are considered: aggravating and mitigating circumstances. **Aggravating circumstances**, such as murder of more than one person or murder in conjunction with serious felonies like kidnapping and rape, are characteristics that make the crime seem worse in totality and thus deserving of death as the only appropriate punishment. **Mitigating circumstances**, such as youth, mental retardation, or the defendant's prior abuse and victimization history, seem to render a crime less serious and provide context that appears to reduce the overall viciousness of the behavior.

Aggravating and mitigating circumstances resuscitated the death penalty after its ban from 1972 to 1976 because they allowed states to use discretion by providing sentencing guidelines for the judge and jury when deciding whether to impose death. These guided discretion statutes were approved by the Supreme Court in five cases (***Gregg v. Georgia***, *Jurek v. Texas*, *Roberts v. Louisiana, Woodson v. North Carolina*, and *Proffitt v. Florida*) collectively referred to as the *Gregg* decision. This landmark decision held that the new

death penalty statutes in Florida, Georgia, and Texas were constitutional, and that the death penalty itself was constitutional under the Eighth Amendment.

The *Gregg* decision resulted in the following three procedural reforms:

1. **Bifurcated trials**, in which there are separate deliberations for the guilt and penalty phases of the trial. Only after the jury has determined that the defendant is guilty of capital murder does it decide in a second trial whether the defendant should be sentenced to death or given a lesser sentence of prison time.
2. **Automatic appellate review** of convictions and sentence.
3. **Proportionality review,** which helps the state to identify and eliminate sentencing disparities by comparing the sentence in the case with other cases within the state.[84–88]

Since the landmark *Furman* and *Gregg* decisions, there have been several other important rulings on the death penalty, including three categorical exemptions, for the insane, mentally retarded, and juveniles. In ***Ford v. Wainwright*** (1986), the Court held that the Eighth Amendment prohibits a state from carrying out a sentence of death upon a prisoner who is insane.[89] In ***Atkins v. Virginia*** (2002), the Court held that the execution of the mentally retarded was cruel and unusual punishment according to the evolving standards of decency developed in *Trop*.[90] In *Atkins*, the Court drew heavily on international perspectives from the European Union to inform its decision, a rationale that drew sharp dissents from the conservative members of the court. Interestingly, the *Atkins* decision overturned the Court's decision in *Penry v. Lynaugh* (1989), which had upheld the execution of mentally retarded persons because of the absence of a national consensus or evolving standard against it.[91]

In 2005, the Court held in ***Roper v. Simmons*** that it is unconstitutional to impose the death penalty on offenders younger than 18 at the time of their capital crimes. The case centered on Christopher Simmons, who at 17 plotted and executed the crimes of burglary, abduction, and murder.[92] The Roper decision represented the culmination of a legal struggle about the appropriate minimum age for capital punishment eligibility. For example, in *Thompson v. Oklahoma* (1988), the Court held that the execution of persons under the age of 16 at the time of their crimes was cruel and unusual.[93] Just 1 year later in *Stanford v. Kentucky*, the Court held that for 16- and 17-year-olds, there is no national consensus suggesting that their execution would be cruel and unusual.[94]

The Supreme Court's rationale used in the *Atkins* and *Roper* decisions is controversial. Wayne Myers suggests that both decisions dealt with the issue of cognitive ability, intellectual development and decision making, and maturity. It is believed that mentally retarded and adolescent defendants are lacking or are so diminished in these skills that their ability to appreciate the wrongfulness of their conduct is compromised. Furthermore, in both cases, the Court used the evolving standards of decency logic to categorically bar entire groups from capital punishment. Myers argues this is a mistake because the Court is imposing a worldview or set of beliefs about when the death penalty is appropriate or lawful. This task, according to Myers, should be left to individual state courts.[95]

Conditions of Confinement

There have been assorted claims that various aspects of the correctional system are themselves examples of cruel and unusual punishment. For instance, Faith Lutze and David Brody suggested that the verbal abuse and harsh discipline used in boot camps could be characterized as cruel and unusual and could give rise to prisoner lawsuits.[96] Dwight Aarons examined whether the inordinate delays that condemned offenders serve on death row, in other words, the waiting, is itself cruel and unusual punishment.[97] Mostly, however, concerns about cruel and unusual punishment pertain to the conditions that exist in the nation's jails and prisons. One of the first cases that addressed the conditions

of correctional facilities is *Wright v. McMann* (1967), which brought the appalling, inhumane, and barbaric nature of some correctional environments to the courts' attention and determined that debasing, uncivilized, and inhumane conditions violated the cruel and unusual punishment clause of the Eighth Amendment.[98]

In 1979, the Supreme Court visited the conditions of confinement, specifically crowding, in the case of *Bell v. Wolfish*. In *Bell*, the Court held that double bunking (placing two inmates in a single occupancy cell) of pretrial inmates did not violate their rights because their confinement was not technically punishment (since they were pretrial) but instead the incidental consequences of their legal status. Also, the Court also held that cell searches and visual body cavity searches after visits and without probable cause was allowed.[99]

The constitutionality of double bunking (and from the inmate's perspective, the constitutionality of crowding) was affirmed in ***Rhodes v. Chapman*** (1981). In *Rhodes*, the Court held that double celling at a prison does not constitute cruel and unusual punishment where there is no evidence that the conditions in question inflict unnecessary or wanton pain, or are disproportionate to the severity of crimes warranting imprisonment.[100] The *Rhodes* decision established a general good faith doctrine whereby correctional officials were authorized to enforce policies that nevertheless seemed cruel and unusual from the inmates' viewpoint as long as they were not gratuitously violating common sense standards of decency. This good faith doctrine can apply to cases where correctional officers assault and *even shoot* inmates. In *Whitley v. Albers* (1986), the Court held that where a prison security measure that indisputably poses significant risks to the safety of inmates (in this case, an inmate was shot during a disturbance), the inquiry must focus on whether the actions were taken in a good faith effort to maintain or restore discipline or maliciously and sadistically for the purpose of causing harm.[101] The same standard applies to the use of physical force against inmates; staff cannot maliciously assault inmates but can use physical force to maintain discipline (*Hudson v. McMillian* [1992]).[102]

Habitual Offender Statutes

Another important Eighth Amendment issue focuses on laws designed to control habitual or career criminals. Alternating and at times inconsistent decisions have been established about the constitutionality of punishing chronic criminal offenders with habitual offender laws that require increased sentencing, often life imprisonment. The spirit of these laws is to inflict a lifetime achievement penalty for criminals who simply refuse to desist from crime. The letter of the law is more problematic because they result in severe sentences that often exceed the legal seriousness of the instant offense, or the most recent crime for which the offender was arrested and convicted. Jurists have declared that life sentences constitute cruel and unusual punishment if the instant offense was relatively benign regardless of the severity of the defendant's prior criminal history.

The landmark case that addressed the constitutionality of habitual offender laws was ***Weems v. United States*** (1910). In *Weems*, the Court decided that criminal punishments must be graduated, proportionate, or commensurate to the seriousness of the underlying crime. The defendant in that case, William Weems, was sentenced to 15 years of hard labor and an assortment of other penalties for falsifying public documents—hardly a grievous offense.[103] Just 2 years later, the United States Supreme Court reviewed its first habitual offender law in *Graham v. West Virginia* (1912). The Court decided that a life sentence for a repeat property offender (e.g., burglary and grand theft) neither violated double jeopardy provisions in the Fifth Amendment nor constituted cruel and unusual punishment in violation of the Eighth Amendment.[104]

Habitual offender statutes did not appear on the state-level radar screen until the 1960s. The proportionality issue for habitual offender statues was applied to the states

in *Robinson v. California* in 1962.[105] In the decades since, the judiciary has been unable to reach consensus on the legality of statutes that seek to severely punish recidivists. At issue was the fairness of administering a life sentence for minor felonies regardless of the defendant's record of recurrent convictions and incarceration. For instance, in *Rummel v. Estelle* (1980), the Court affirmed the constitutionality of a Texas law that imposed life imprisonment for defendants with three prior felony convictions. The defendant in the case had been convicted of three forgery/fraud cases that yielded meager financial gains between $25 and $125. Nevertheless, the life sentence was imposed.[106]

In *Hutto v. Davis* (1982), the Court explored additional issues in the aggravated sentencing of criminal offenders. First, they held that two consecutive 20-year prison terms and two fines of $10,000 upon conviction for the distribution of 9 ounces of marijuana did not violate the cruel and unusual punishment clause. Moreover, the Court refused to note sentencing disparities for like crimes in the same state and other states.[107] This changed a year later in *Solem v. Helm* (1983), when, in a 5–4 decision, the Supreme Court held that a life imprisonment without parole sentence given under a habitual offender law for a person convicted of check fraud for less than $100 was unconstitutional. The defendant who had seven previous nonviolent felony convictions was, in the view of the justices, treated more harshly than his in-state criminal peers who had committed more serious offenses. Also, the Court ruled that this sentence was harsher than other sentences imposed for similar crimes in other states.[108] In *Harmelin v. Michigan* (1991) the Court ruled, again in a narrow 5–4 opinion, that the Eighth Amendment *was not* violated in a noncapital case that result in a life in prison without parole sentence. The defendant was convicted of possessing 672 grams or 24 ounces of cocaine in Michigan, where possession of more than 650 grams warranted life in prison without parole.[109] In 2003, the Supreme Court reviewed two cases originating in California (*Ewing v. California* and *Lockyer v. Andrade*), where 25-years-to-life sentences were administered to chronic offenders whose instant offenses were nominal thefts. The Court affirmed the constitutionality of the sentences acknowledging that although the sentences were long, so were the criminal records of these recidivists.[110–111]

WRAP UP

CASE STUDY CONCLUSION

Federal law enforcement referred all evidence collected to local authorities and the evidence was brought to the court's attention; however, the local prosecutor had little interest in pursuing the case and a justice of the peace moved to dismiss the case without the evidence ever making it to a grand jury. As a result, other than James Seale, those involved in this incident were never tried for their crimes. The other Klansmen have since died. Had they been charged, prosecuted, and acquitted previously, Seale could not have been tried and convicted some 43 years later.

Federal law enforcement has jurisdictional restrictions and limitations. However, in this case, those limitations were removed when, after allegedly abducting the two young men, the accused drove across state lines and ultimately committed the crime in a national forest. According to FBI records from 1964, after beating the men and extracting information about the location of a stockpile of firearms, other Klansmen disposed of the two nearly dead men, dumping them in the Ole River near Tallulah, Louisiana.

Sometimes prosecutors make deals. In this case, prosecutors used the testimony of Charles Marcus Edwards, a former Klansman, to convict Seale. Edwards agreed to testify, but his agreement was based on a promise of immunity. According to Edwards, both young men were placed in the trunk of Seale's Volkswagen and transported to a nearby farm. Eventually, both men were driven across the Mississippi state line into Louisiana. Edwards also informed the court that Seale had told him the bodies had been tied to heavy weights and thrown into the river. Edwards claims that both men were alive when he left them.

Sources: PR Newswire. (n.d.). *Former Klansman, James Ford Seale found guilty for role in 1964 kidnapping and murder of two African-American men.* Retrieved June 17, 2007, from http://www.prnewswire.com/cgi-bin/stories.pl?ACCT=104&STORY=/www/story/06-14-2007/0004608813&EDATE; Associated Press. (2007). *Reputed Klansman convicted in 1964 deaths.* Retrieved June 14, 2007, from http://www.msnbc.msn.com/id/19234202/print/1/displaymode.1098/.

Chapter Summary

- Access to the courts is guaranteed in the United States Constitution and habeas corpus is a hallmark of American law.
- Although inmates are protected by the First Amendment, their speech and association rights are limited.
- Inmates have no constitutional right to privacy while incarcerated and correctional authorities may search their cells, inspect their mail, and record their visitation conversations.
- The due process doctrine in the Fifth and Fourteenth Amendments applies to correctional procedures such as parole board hearing and disciplinary proceedings.
- Capital punishment was unconstitutional between 1972 and 1976 but is constitutionally permitted today because of the use of aggravating and mitigating circumstances.
- The conditions of jails and prisons and habitual offender statutes have been cited as potential violations of prohibition of cruel and unusual punishment.

Key Terms

aggravating circumstances Characteristics that make the crime seem worse in totality and thus deserving of death as only appropriate punishment.

Atkins v. Virginia Supreme case that held that executing mentally retarded persons *did* constitute cruel and unusual punishment and was a violation of the Eighth Amendment, consistent with the evolving standards of decency.

automatic appellate review Automatic review of death sentences established by *Gregg v. Georgia*.

balancing test Prisoners retain their First Amendment rights while incarcerated unless those rights are inconsistent with their status as prisoner or inconsistent with the legitimate penological goals of the institution.

bifurcated trials Trials in which there are separate deliberations for the guilt and penalty phases of the trial.

Bill of Rights The first 10 amendments to the United States Constitution.

contraband Materials prohibited in correctional facilities, such as drugs and weapons.

Cooper v. Pate Case that resulted in a ruling that inmates were permitted to practice their religion provided that the following three basic conditions were met: (1) the religion must be an established religion (not contrived by the inmate); (2) the inmate's religious practices must conform to the tenets of the religion; and (3) the religious practices cannot pose a security risk or disrupt prison operations.

deliberate indifference Standard that affirms that the conditions at a prison are not unconstitutional unless it can be shown that prison administrators show deliberate indifference to the quality of life in prisons and inmates' most basic needs.

due process Laws and criminal procedures that are reasonable and applied in a fair and equal manner.

Eighth Amendment Amendment to the Bill of Rights of the United States Constitution that states that "excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

Estelle v. Gamble Case in which the Court held that deliberate indifference to a prisoner's serious medical needs constituted cruel and unusual punishment.

Ex parte Hull Case that loosened the hands-off doctrine that characterized American corrections.

Fifth Amendment Constitutional amendment that states that no person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

First Amendment Constitutional amendment that states that 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 a redress of grievances.

Ford v. Wainwright Case that ruled that the Eighth Amendment prohibits a state from carrying out a sentence of death upon a prisoner who is insane.

Fourteenth Amendment Constitutional amendment that states in Section 1: All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. 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 deprive 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 laws.

Fourth Amendment Constitutional amendment that states that the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Furman v. Georgia Supreme Court case that established that capital punishment is cruel and unusual and violates the Eighth Amendment.

Gregg v. Georgia Supreme Court case that held that the new death penalty statutes in Florida, Georgia, and Texas were constitutional, and that the death penalty itself was constitutional under the Eighth Amendment.

habeas corpus The legal doctrine that grants correctional clients access to the courts to challenge the legality of their sentences.

Hudson v. Palmer Court case in which the Court ruled that inmates do not have a reasonable expectation of privacy.

Johnson v. Avery Court case in which the Court ruled that access to courts to present legal complaints cannot be denied or obstructed.

Lewis v. Casey Court case in which the Court ruled that prisoners who claim that they have been denied access to the courts and that the prisons failed to comply with *Bounds v. Smith* must show that their rights were prejudiced as a result of the denial of these rights in order to recover in a Section 1983 suit.

mitigating circumstances Characteristics such as youth, mental retardation, or victimization that render a crime less serious or add context that seems to reduce the overall viciousness of the behavior.

Pell v. Procunier Case that established the balancing test.

precedent A decision by the appellate court (usually the Supreme Court) that serves to guide all future legal decisions that encompass a similar topic.

Procunier v. Martinez Case whose ruling set the precedent that mail correspondence between inmates and outside parties was speech protected by the First Amendment.

proportionality review Judicial review of criminal sentences which helps the state to identify and eliminate sentencing disparities by comparing the sentence in the case with other cases within the state.

Pugh v. Locke Case that established the totality-of-conditions test.

Rhodes v. Chapman Case that resulted in a ruling that double celling at a prison does not constitute cruel and unusual punishment where there is no evidence that the conditions in question inflict unnecessary or wanton pain, or are disproportionate to the severity of crimes warranting imprisonment.

Roper v. Simmons Case in which the Supreme Court ruled that it is unconstitutional to impose the death penalty on offenders younger than 18 at the time of their capital crimes.

Section 1983 Part of the United States Code that covers inmate allegations and petitions for money damages or injunctive relief from their sentence.

totality-of-conditions test The standard that is used to evaluate the overall quality of a prison environment.

Trop v. Dulles Established the evolving standards of decency doctrine.

Weems v. United States Case that established that criminal punishments must be graduated, proportionate, or commensurate to the seriousness of the underlying crime.

Wolff v. McDonnell Case in which the ruling specified the due process guidelines for major prison disciplinary proceedings.

writ of mandamus Extraordinary remedies used when the plaintiff has no other way to access the courts for relief and he or she seeks to compel a governmental duty.

Critical Thinking Questions

1. How does the meaning of intelligence as measured by IQ change depending on the legal status of the offender? If the mentally retarded are exempt from capital punishment, should they then be exempt from any punishment?
2. Did the Supreme Court rule correctly in *Roper v. Simmons*? Are adolescents different in terms of their decision making and thus not as legally responsible for their conduct as adults?
3. What are the characteristics of judges who are nominated to be Supreme Court Justices from both liberal and conservative perspectives? Are there commonalities between liberal and conservative perspectives?
4. Which aggravating factors are most effective at making a criminal event appear much worse?
5. Which mitigating factors are most effective at making a criminal event appear less serious?

Notes

1. *Trop v. Dulles,* 356 U.S. 86 (1958).
2. *Gregg v. Georgia*, 428 U.S. 153 (1976).
3. *Lewis v. Casey*, 518 U.S. 343 (1996).
4. Rubin, S. (1971). Loss and curtailment of rights. In L. Radzinowicz & M. E. Wolfgang (Eds.), *Crime and justice Volume III: The criminal in confinement* (pp. 25–40). New York: Basic Books.
5. *Hudson v. Palmer*, 468 U.S. 517 (1984).
6. Roberts, J. (2008). *Opinion* in Baze et al. v. Rees, Commissioner, Kentucky Department of Corrections et al. Retrieved June 1, 2008, from http://www.scotusblog.com/wp/wp-content/uploads/2008/04/07-5439.pdf.
7. Cornell University Law School, Legal Information Institute. (n.d.). *United States Constitution*, Retrieved July 3, 2007, from http://www.law.cornell.edu/constitution/constitution.table.html#amendments.
8. Cripe, C. A., & Pearlman, M. G. (2005). *Legal aspects of corrections management*. Sudbury, MA: Jones & Bartlett.
9. Scalia, J. (2002). *Prisoner petitions filed in U.S. district courts, 2000, with trends 1980–2000*. Washington, DC: U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics.

10. Hammel, A. (2002). Diabolical federalism: A functional critique and proposed reconstruction of death penalty federal habeas. *American Criminal Law Review, 39*, 1–99.
11. Antiterrorism and Effective Death Penalty Act 28 U.S.C. §§ 2241–2255.
12. Cripe & Pearlman.
13. Scalia.
14. *Civil Rights Act of 1871*, 42 U.S.C. § 1983.
15. *Bivens v. Six Unknown Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971).
16. *Civil Rights of Institutionalized Persons Act of 1980*, 42 U.S.C. § 1997e.
17. *Prison Litigation Reform Act of 1996*, Pub. L. No. 104-134; H.R. 3019, 104th Cong. (1996).
18. Scalia.
19. *Ex parte Hull*, 312 U.S. 546 (1941).
20. *Smith v. Bennett*, 365 U.S. 708 (1961).
21. *Long v. District Court*, 385 U.S. 192 (1966).
22. *Johnson v. Avery*, 393 U.S. 483 (1969).
23. *Bounds v. Smith*, 430 U.S. 817 (1977).
24. *Lewis v. Casey*, 518 U.S. 343 (1996).
25. *Turner v. Safley*, 482 U.S. 78 (1987).
26. *Thornburgh v. Abbot*, 490 U.S. 401 (1989).
27. *Pell v. Procunier*, 417 U.S. 817 (1974).
28. Associated Press. (2007). *Jail chaplain suspended for anti-Islam books*. Retrieved April 13, 2007, from http://www.msnbc.msn.com/id/18094396/.
29 *Cooper v. Pate*, 378 U.S. 546 (1964).
30. Religious Freedom Restoration Act of 1993 (42 U.S.C. § 2000bb).
31. Religious Land Use and Institutionalized Persons Act of 2000 (42 U.S.C. § 2000cc).
32. *Cruz v. Beto*, 405 U.S. 319 (1972).
33. *Theriault v. Carlson*, 339 F.Supp. 375 (1973) and 495 F.2d 390 (1974); *Theriault v. Silber*, 391 F.Supp 578 (1975).
34. *McCorkle v. Johnson*, 881 F.2d 993 (11th Cir. 1989).
35. *O'Lone v. Shabazz*, 482 U.S. 342 (1987).
36. *Hamilton v. Schriro*, 74 F.3d 1545 (8th Cir. 1996).
37. *Walker v. Blackwell*, 411 F.2d 23 (1969).
38. *Kahane v. Carlson*, 527 F.2d 492 (2nd Cir. 1975).
39. *Jackson v. Mann*, 196 F.3d 316 (2nd Cir. 1999).
40. *Procunier v. Martinez*, 416 U.S. 396 (1974).
41. McCullagh, D. (2007). *Police blotter: Prison inmate wants personal ad replies.* Retrieved July 10, 2007, from http://news.com.com/2102-1030_3-6134417.html.
42. *Turner v. Safley*, 482 U.S. 78 (1987).
43. *Thornburgh v. Abbot*, 490 U.S. 401 (1989).
44. *Bell v. Wolfish*, 441 U.S. 520 (1979).
45. *Jones v. North Carolina Prisoners' Labor Union, Inc.*, 433 U.S. 119 (1977).
46. *Pell v. Procunier*, 417 U.S. 817 (1974).
47. *Block v. Rutherford*, 468 U.S. 576 (1984).

48. *Overton v. Bazzetta*, 539 U.S. 126 (2003).
49. *Kentucky Department of Corrections v. Thompson*, 490 U.S. 454 (1989).
50. Associated Press. (2007). *Calif. gay, lesbian inmates get conjugal visits*. Retrieved June 4, 2007, from http://www.msnbc.msn.com/id/18994457/.
51. *Lyons v. Gilligan*, 382 F.Supp 198 (Northern District of Ohio, 1974).
52. *Mary of Oak Knoll v. Coughlin*, 475 NYS 2d 644 (N.Y. Appeals Division, 1984).
53. *Hudson v. Palmer*, 468 U.S. 517 (1984).
54. *Bell v. Wolfish*, 441 U.S. 520 (1979).
55. *Lanza v. New York*, 370 U.S. 139 (1962).
56. *United States v. Hearst*, 435 U.S. 1000 (1978).
57. Hoffman, H. C., Dickinson, G. E., & Dunn, C. L. (2007). Communication policy changes in state adult correctional facilities from 1971 to 2005. *Criminal Justice Review, 32*, 47–64.
58. Rush, G. E. (2000). *The dictionary of criminal justice* (5th ed.). New York: McGraw-Hill.
59. *Wolff v. McDonnell*, 418 U.S. 539 (1974).
60. *Baxter v. Palmigiano*, 425 U.S. 308 (1976).
61. *Morrissey v. Brewer*, 408 U.S. 471 (1972).
62. *Gagnon v. Scarpelli*, 411 U.S. 778 (1973).
63. *Estelle v. Dorrough*, 420 U.S. 534 (1975).
64. *Meachum v. Fano*, 427 U.S. 215 (1976).
65. *Craig v. Boren*, 429 U.S. 190 (1976).
66. *Montanye v. Haymes*, 427 U.S. 236 (1976).
67. *Greenholtz v. Inmates of the Nebraska Penal and Correctional Complex*, 442 U.S. 1 (1979).
68. *Viteck v. Jones*, 445 U.S. 480 (1980).
69. *Jago v. Van Curen*, 454 U.S. 14 (1981).
70. *Hewitt v. Helms*, 459 U.S. 460 (1983).
71. *Olim v. Wakinekona*, 461 U.S. 238 (1983).
72. *United States v. Gouveia*, 467 U.S. 180 (1984).
73. *Superintendent v. Hill*, 472 U.S. 445 (1985).
74. *Daniels v. Williams*, 474 U.S. 327 (1986).
75. *Davidson v. Cannon*, 474 U.S. 344 (1986).
76. *Pugh v. Locke*, 406 F.2d 318 (1976).
77. *Estelle v. Gamble*, 429 U.S. 97 (1976).
78. *Wilson v. Seiter*, 111 S.Ct. 2321 (1991).
79. *Farmer v. Brennan*, 511 U.S. 825 (1994).
80. *Trop v. Dulles*, 356 U.S. 86 (1958).
81. *Furman v. Georgia*, 408 U. S. 238, (1972).
82. *Branch v. Texas*, 408 U. S. 238 (1972).
83. *Jackson v. Georgia*, 408 U. S. 238 (1972).
84. *Gregg v. Georgia*, 428 U. S. 153, (1976).
85. *Jurek v. Texas*, 428 U. S. 262 (1976).
86. *Roberts v. Louisiana*, 428 U. S. 325 (1976).

87. *Proffitt v. Florida*, 428 U. S. 242 (1976).
88. *Woodson v. North Carolina*, 428 U. S. 280 (1976).
89. *Ford v. Wainwright*, 477 U.S. 399 (1986).
90. *Atkins v. Virginia*, 536 U.S. 304 (2002).
91. *Penry v. Lynaugh*, 492 U.S. 302 (1989).
92. *Roper v. Simmons*, 543 U.S. 551 (2005).
93. *Thompson v. Oklahoma*, 487 U.S. 815 (1988).
94. *Stanford v. Kentucky*, 492 U.S. 361 (1989).
95. Myers, W. (2006). *Roper v. Simmons*: The collision of national consensus and proportionality review. *Journal of Criminal Law and Criminology, 96*, 947–994.
96. Lutze, F. E., & Brody, D. C. (1999). Mental abuse as cruel and unusual punishment: Do boot camp prisons violate the Eighth Amendment? *Crime & Delinquency, 45*, 242–255.
97. Aarons, D. (1998). Can inordinate delay between a death sentence and execution constitute cruel and unusual punishment? *Seton Hall Law Review, 29*, 147–207.
98. *Wright v. McMann*, 387 F.2d 519 (2d Cir. 1967).
99. *Bell v. Wolfish*, 441 U.S. 520 (1979).
100. *Rhodes v. Chapman*, 452 U.S. 337 (1981).
101. *Whitley v. Albers*, 475 U.S. 312 (1986).
102. *Hudson v. McMillian*, 503 U.S. 1 (1992).
103. *Weems v. United States*, 217 U.S. 349 (1910).
104. *Graham v. West Virginia*, 224 U.S. 616 (1912). Also see *O'Neil v. Vermont*, 144 U.S. 323 (1892) and *Howard v. Fleming*, 191 U.S. 126 (1903).
105. *Robinson v. California*, 370 U.S. 660 (1962).
106. *Rummel v. Estelle*, 445 U.S. 263 (1980).
107. *Hutto v. Davis*, 454 U.S. 370 (1982).
108. *Solem v. Helm*, 463 U.S. 277 (1983).
109. *Harmelin v. Michigan*, 501 U.S. 957 (1991).
110. *Ewing v. California*, 528 U.S. 11 (2003).
111. *Lockyer v. Andrade*, 538 U.S. 63 (2003).