

Prison and Jail Introductory Materials

(Scott Medlock, August 2009)

The state of the law makes prisoners' rights cases very difficult. This section discusses the major sources of law for the prisoners' rights cases TCRP works on, highlighting the problems the law creates.

Eighth Amendment

The Eighth Amendment states that "excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." Cruel and unusual punishments are evaluated through "evolving standards of decency." See, e.g., *Roper v. Simmons*, 543 U.S. 551, 560 (2005). This essentially means that punishments that were commonplace at the time of the framing (such as the stocks) could be legally "cruel and unusual" today.

The state of constitutional law makes prisoners' rights cases very difficult. Whether prison officials' behavior is "cruel and unusual" is determined by whether the conditions demonstrate officials "deliberate indifference" to inmates' health and safety. *Farmer v. Brennan*, 511 U.S. 825 (1994). Deliberate indifference requires an official to "know of and disregard an excessive risk to inmate health and safety." *Id.* at 832. This is a very difficult standard to prove.¹ To hold a prison official liable under the Eighth Amendment, an inmate must prove that the official's actions were not objectively reasonable and demonstrated deliberate indifference. Of course, like other areas of civil rights law, prison officials are also entitled to qualified immunity when their actions are "objectively reasonable." The combination of the deliberate indifference standard and qualified immunity mean TCRP takes very few of the prisoners' rights cases that come to us.²

Moreover, prison entities are also entitled to sovereign immunity under the Eleventh Amendment. Thus, inmates cannot sue the state directly for violations of their civil rights under § 1983. As in other areas of civil rights law, inmates must utilize the *Ex Parte Young* exception to the Eleventh Amendment: suits for injunctive relief can be filed against the director of a state agency and will function as if they were filed against the agency itself. Actions for damages must be filed against individual officers in their individual capacity.

Americans with Disabilities Act

Because of the difficulties created by Eighth Amendment law, plaintiffs may be better off filing their claims under Title II of the Americans with Disabilities Act (ADA) and Rehabilitation Act. As the most frequent complaint about prisons is the medical services provided to inmates, many inmates will have a cognizable ADA claim.

Title II of the ADA requires that public entities, including prisons, provide reasonable accommodations to inmates with disabilities. See *Pennsylvania Department of Corrections v. Yeskey*, 524 U.S. 206 (1998). Moreover, it now appears that states are not entitled to Eleventh Amendment sovereign immunity in prison cases brought under the ADA. See *United States v. Georgia*, 126 S.Ct. 877 (2006). The Court in *Georgia* concluded that when prisons' conduct

¹ Cf. *Volk v. Gonzalez*, 1997 U.S. Dist. LEXIS 22197 (W. Dist. Tex. 1997) ("[D]irecting a prisoner to catch live rattlesnakes with his bare hands is not only a monumentally dangerous act but also such a clear violation of the Eighth Amendment's prohibition on cruel and unusual punishment that, absent extraordinary circumstances not present in this cause, no one could rationally conceive of such an action as 'objectively reasonable.'"); *Payne v. Parnell*, 246 Fed. Appx. 884 (5th Cir. 2007) (shocking docile inmate with cattle prod was objectively unreasonable).

² In some federal circuits, there are less exacting standards for cases involving conditions in jails (where pre-trial detainees are held) and immigration detention facilities. In the Fifth Circuit, the standards for all these facilities is the same.

actually violates the Eight Amendment, Congress successfully abrogated state's Eleventh Amendment immunity. For these reasons, prison disability cases are much more attractive for civil rights attorneys than vanilla Eighth Amendment cases.

Despite the advantages the ADA creates, it does not solve all the problems posed by Eighth Amendment case law. A major example is cases where prisoners are denied medical care. If a prisoner is completely denied medical care because of his or her disability, then it could be an ADA claim. If, however, the prisoner received some medical care but was treated incorrectly then the prisoner is limited to medical malpractice remedies. (Basically, the ADA is not a medical malpractice statute.)

Religious Land Use and Institutionalized Persons Act

A diverse coalition of groups came together to pass the Religious Land Use and Institutionalized Persons Act (RLUIPA), which, in part, guarantees inmates religious freedoms. (It is doubtful that the inmate provisions of RLUIPA would have passed without the advocacy of Chuck Colson, one of the Watergate burglars who “found Jesus” while serving his federal prison sentence and became a televangelist.) RLUIPA was a reaction to the Supreme Court's decision in *City of Boerne v. Flores*, 521 U.S. 507 (1997), which struck down the Religious Freedom Restoration Act under the Eleventh Amendment.

RLUIPA relies on Congress' spending power—any correctional facility which accepts federal funds must refrain from imposing “substantial burdens on religious exercise” without showing a “compelling governmental interest.” The Supreme Court held that RLUIPA was constitutional in *Cutter v. Wilkinson*, 544 U.S. 709 (2005).

Prison Reform Litigation Act (PLRA)

The Prison Reform Litigation Act, 42 U.S.C. § 1997e, was passed by Congress in an attempt to cut down on the amount of lawsuits filed by inmates.³ *Pro se* inmate lawsuits make up approximately twenty percent of the federal courts dockets. The PLRA has had the effect of making it significantly more difficult to litigate prisoner rights cases, and otherwise meritorious cases are frequently dismissed for failure to comply with the requirements of PLRA. Please note that in addition to the more frequently encountered requirements below, PLRA has a number hurdles related to filing fees, the number of previous lawsuits an inmate has filed, limitations on damages and attorneys' fees, etc.

Among other requirements, PLRA requires inmates to exhaust the administrative remedies available in the correctional facility before filing suit. In most prisons and jails, inmates must file grievances in order to exhaust their remedies. Depending on the facility, this usually requires filing at least two grievances—an initial grievance and an appeal of the denial of the initial grievance. (In Texas Department of Criminal Justice facilities these are called “Step 1” and “Step 2” grievances.) The timing requirements for each prison and jail are usually different, but may be as short as 15 days.

When evaluating potential prison cases, it is very important that the inmate has complied with PLRA. When investigating a potential case for a prisoner, make sure to obtain copies of all the grievances the inmate has filed, including the appeals.

³ For purposes of the PLRA, immigration detainees are *not* “prisoners” and do not have to comply with the PLRA, because they are civil detainees. *Ojo v. INS*, 1997 U.S. App. LEXIS 12683 (5th Cir. 1997). Confusingly, juveniles, who are also civil detainees, are, however, “prisoners.”

The PLRA also requires a prisoner to have suffered a “physical injury” in order to recover damages. Some federal courts have held this provision is unconstitutional because it denies prisoners a remedy for some violations of their constitutional rights—a First Amendment injury, for example, would have no other remedy. Courts that have upheld this provision have even dismissed sexual assault cases where there was no “physical injury.”

Finally, the PLRA caps attorneys’ fees at 150% of what court appointed counsel can be compensated at. In a recent case TCRP litigated, our fees would be capped at \$177/hour even though Jim’s 30+ years of experience would otherwise entitle him to \$475/hour. This provision is designed to discourage the private bar from taking prison cases.

The major exception to PLRA is when an inmate has subsequently been released from confinement. If the plaintiff is not incarcerated at the time the lawsuit was filed, the PLRA does not apply because it only regulates suits by “prisoners.” There are also exceptions to some of the individual provisions. If a prisoner is physically unable to file a grievance, for example, they can be excused from complying with the exhaustion of remedies requirements. In the Fifth Circuit, an inmate did not have to comply with the grievance requirement when he broke his hand and was unable to write out the grievance within the prison’s deadlines. *Days v. Johnson*, 322 F.3d 863 (5th Cir. 2003). There is no Fifth Circuit caselaw on whether or not a mental disability could qualify an inmate for this exception.

For more information about the PLRA, please see John Boston’s PLRA treatise which is saved in the Models/Prisons folder on the shared drive. Boston is the pre-eminent authority on the PLRA.

For all the above reasons, TCRP is very selective when taking a prisoners’ rights case. If possible, we would rather represent someone who is *not* a prisoner in a case that still addresses prison conditions (such as a wrongful death suit where the family is not imprisoned, or a suit where another person has the same problems as the prisoner). TCRP also generally does not take excessive force cases (unless there is a horrific injury). TCRP rarely takes cases involving medical care, unless there is a specific link showing the client was denied medical care because of their disability. TCRP never takes cases involving confiscated property and many of the other relatively minor indignities of prison life.

Visiting Prisons in Texas

In Texas, there are three primary types of correctional facilities:

- 1) State prisons, which are operated by the Texas Department of Criminal Justice (TDCJ), and house convicted felons (inmates serving sentences longer than one year);
- 2) County jails, which are operated by individual counties, and house pre-trial detainees and inmates convicted of misdemeanors (serving sentences less than one year); and,
- 3) Immigration detention centers, which are operated by Immigration and Customs Enforcement, and house individuals awaiting deportation.

Each type of facility may be operated by either a governmental entity or by a private corporation contracting with the government. Several different private corrections companies run facilities in Texas. In my experience, the privately run facilities are less professional than the government run facilities. Be prepared for longer waits when visiting a private prison.

If you are a licensed attorney, you can visit any TDCJ prisoners you want. There is a form you have to fill out and fax to the prison a few days before hand, and then you are required to call ahead to confirm the day before. If you are not a licensed attorney, to enter a TDCJ facility you must complete the attorney representative to visit offender application and send it to TDCJ's Access to Court's department in Huntsville. You will need to submit it to the individual unit a week before your trip to the facility, and call between 4 and 5 pm on the day before your visit to confirm that you are coming. To minimize waiting and ensure that you get into the prison (after what is likely to be a lengthy drive), make sure that you follow these steps! I have been denied visits with inmates for failure to comply with these requirements. All these forms are on the TDCJ website, and saved on the shared drive at F:\CASES & LEGAL\--- PRISONS AND JAILS\--- Prison Visit Procedures

Each county jail has different policies regarding visiting inmates. You will need to call the jail before you make your visit. I recommend calling them a week before you plan to make your visit because some jails requirements may be onerous. For example, Bexar County requires you to obtain the permission of the inmate's attorney of record. Since many criminal defense attorneys spend most of their days in court, it can take awhile to reach them, explain why you want to talk to their client, and obtain written permission to speak with the inmate.

Immigration facilities require that you have each inmate you want to speak to complete a G-28 form, which states that you represent the inmate. This form requires the inmate's signature, so you will need to plan several weeks ahead to have the inmate sign the form and return it to you. Again, you will need to call each facility to see what the procedures are for non-attorneys to visit the inmates.

Just because you have been cleared to visit one facility does not mean you are cleared to visit ALL facilities. If you have visited a county jail, you still need to complete the paperwork to visit TDCJ. If you have visited TDCJ, you still need to complete the paperwork to visit a county jail. These are all separate bureaucracies and they do not communicate with each other about who has or has not been allowed in their facilities.

Locating Inmates

Being able to locate inmates is important. If you cannot find them, you cannot talk to them. Frequently, inmate witnesses will be moved around and will neglect to tell us they have been relocated. Clients usually keep us updated on their locations, but witnesses do not.

There are several online search engines that you can use to find where inmates are located. These sites also provide helpful information such as what county the inmate was convicted in, what crime they were convicted of, their estimated release dates, etc. Before completing the paperwork to visit an inmate, it is important to check their current location.

Texas Department of Criminal Justice:

http://www.tdcj.state.tx.us/offender_information.htm#General

(click on the “offender information” link, which will take you to the search engine. Enter as much information on the inmate as you have, then hit “search”—be sure to hold down “control” while it is “searching” because the site utilizes a pop-up window that most pop-up blockers shut down)

County Jails:

<http://www.vinelink.com/offender/searchNew.jsp?siteID=44900>

Federal Bureau of Prisons:

<http://www.bop.gov/iloc2/LocateInmate.jsp>

Other Helpful Websites

Texas Department of Criminal Justice: <http://www.tdcj.state.tx.us/>

Website has many useful forms for contacting inmates, locating prisons, etc.

TDCJ Unit Profiles: <http://www.tdcj.state.tx.us/stat/unitdirectory/all.htm>

Location and basic information about each prison

TDCJ Policies: <http://www.tdcj.state.tx.us/policy/policy-home.htm>

Useful information about TDCJ policies

TDCJ Application for Visit: <http://www.tdcj.state.tx.us/policy/I-166.pdf>

Form to be completed to obtain an attorney representative legal visit with an inmate

TDCJ Application for Phone Call: http://www.tdcj.state.tx.us/policy/I-162_Rev1103.pdf

Form to be completed to allow attorney a phone call with an inmate

Bexar County Detention Center: <http://www.co.bexar.tx.us/BCsheriff/adultdetention.htm>

Travis County Jail: <http://www.tcsheiff.org/corrections.htm>