# The Uphill Road to Prisoners' Rights

By **F.T. Green** | 6 hours ago

*Photo by Joshua Davis via Flickr*

In the fall of 2010, a 12-year-old was in a fight at her middle school in northern Mississippi.

The police officer assigned to the school as a School Resource Officer arrested her for simple assault and brought her to the local juvenile jail. A guard there patted her down by hand, and then went over her with a metal detector wand.

Because she was booked for a "violent" offense, the jail's rules also required a cavity search. The girl had to take off all her clothes, bend over, spread her butt apart, and cough, so the guard could check if she had contraband hidden in her rectum. The guard didn't find anything.

In 2013, the girl's mother sued the county over the cavity search, alleging it violated her daughter's civil rights. She had a straightforward case: Cavity-searching children harms them psychologically—the girl had never even been naked in front of her doctor without her mother present, their lawyer said.

Considering the girl's jailers admitted they didn't suspect that she was hiding anything in her rectum, that harm seemed unjustifiable.

The notion that prisoners have rights is a relatively new development in the U.S. Until the 1960s, incarcerated individuals had effectively no constitutional protections. But over the ensuing two decades, extralegal violence against inmates began to diminish as prisoners gained standing under the law.

But courts, lawmakers and prison administrators have carefully limited inmates' civil rights in the years since, ushering in the modern era of hygienic, systematized and lawful cruelty, as some see it.

The Mississippi county authorities argued they had the right to make and enforce the rules at their jail. After all, the cavity search wasn't arbitrary or malicious. It was protocol for anyone detained on charges of violence, drug possession or theft. The jail dealt with dangerous people. The administrators had a responsibility to protect their inmates from themselves and each other.

"A razor blade is a razor blade is a razor blade, whether it's concealed in the anus of an adult or whether it's concealed in the anus of a child," said the county's lawyer (https://www.courtlistener.com/audio/27155/nicole-mabry-v-lee-county/). "That razor blade can still slash somebody's jugular vein."

Courts have a long tradition of hostility to prisoners' rights.

In 1871, a court ruled that a citizen was a "slave of the state (https://www.ncjrs.gov/App/publications/abstract.aspx?ID=162920)" for the duration of his or her prison sentence. Later rulings softened in tone, though not substance.

As a rule, judges refused to intervene in the affairs of prisons, and their various legal rationales were collectively known as the Hands-Off Doctrine (https://definitions.uslegal.com/h/hands-off-doctrine/). A judgment (https://law.justia.com/cases/federal/district-courts/FSupp/101/285/1642890/) from 1951, for example, conceded that there was a good chance the old coal stove in the inmates' dormitory of an Alaskan jail would set the building on fire and burn them alive. But it went on to dismiss the claim that the conditions amounted to cruel and unusual punishment.

The judge justified his ruling, in part, by comparing the inmates' circumstances to the suffering of American soldiers who were then serving in combat in Korea.

The broader civil rights movement spurred change, together with the activism, riots and lawsuits of people in prison. A seminal case (https://law.justia.com/cases/federal/district-courts/FSupp/503/1265/1466998/) in Texas, for instance, exposed heinous overcrowding and the torture of prisoners. Other cases rounded out prisoners' rights to free speech, to practice their religion, and to access the courts, among other things.

But the progressiveness of those rulings was inextricable from the barbarity they were overturning, Lisa Kerr, an expert in prison law at Queen's University in Kingston, Ont. explained in an interview.

Almost as soon as medieval abuses, such as the dark, disease-ridden cells and the use of prisoners as guards, were uncovered, courts (https://www.themarshallproject.org/records/4263-qualified-immunity), lawmakers (https://www.themarshallproject.org/records/1152-prison-litigation-reform-act) and prison administrators began building new ways to deny rights to people in prison.

In the Mississippi girl's case, the county's lawyer had a powerful argument grounded in decades of precedent: Courts owe prison administrators "wide-ranging deference (https://supreme.justia.com/cases/federal/us/441/520/)." People in cages may have rights, the principle goes, but only if they don't interfere with administrators' "herculean (https://supreme.justia.com/cases/federal/us/416/396/)" work of maintaining order and encouraging rehabilitation.

Judges regularly imply that prison officials deal with monstrous people (read: jugular-slashing children with razors in their rectums). As a result, they give the officials special latitude to do their work—so long as they stay within a constitutional, rules-based "penal philosophy."

*Courts weigh restrictions on prisoners' rights against the need to run the prison effectively.*

But that check on administrators, the requirement that they run their prisons constitutionally, is often meaningless. The courts weigh restrictions on prisoners' rights against the need to run the prison effectively. But the deck is stacked: courts also justify those same restrictions based on the need to run the prison effectively.

It's circular logic under which rights almost always lose out to restrictions.

Administrators also take matters into their own hands. In one notorious case (https://www.themarshallproject.org/2018/04/23/the-catalyst), a California prison facing a lawsuit staged a riot during the judge's tour of the facility, to encourage him to see it in a more terrifying light.

On a subtler level (https://scholarship.law.uci.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=1187&context=ucilr), prison officials often make it hard to assess whether their rights-restricting rules actually work, because they don't keep records that would serve up measurable evidence. For example, it's not an accident that there's so little data on the effect solitary confinement has on safety in U.S. prisons.

When there's no hard evidence, prison officials' "expertise" reliably wins by default. Sometimes, even facing evidence that a prison's rules aren't justified, they still win.

The cavity searches at that Mississippi jail had literally never turned up anything that a wand and a pat-down didn't find, according to court records (https://caselaw.findlaw.com/us-5th-circuit/1849642.html), which seemed to undermine the argument that they served a legitimate purpose.

But the court still ruled last year for the jailers (https://caselaw.findlaw.com/us-5th-circuit/1849642.html), who now have a constitutional blessing to force 12-year-olds to strip, bend over, spread their butts, and cough.

American penal policies make sense if prisoners are monsters. If not, they're just making monsters out of their jailers. History suggests it's the latter.

**Editor's Note: Identifying details of the Mississippi school case have been omitted from the story to protect the girl's identity.**

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