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Book Review

Fred Cohen[*]


In 2004 in this journal I reviewed the third edition of Michael B. Mushlin's Rights of Prisoners.[1] There were three volumes then, there are now four; the cost was $350, now it is $550.

I noted then that:

There are certain treatises in well-defined areas of the law that are simply a must. Whether you are an academic or a practitioner concerned with prisons and prisoners, Professor Mushlin's newest edition simply must be at your fingertips. Not in the library or down the hall — at your fingertips. This is not just me talking either; it is every academic and practitioner that I know who works in this area.

One reason is that while there are other works out there, none are competitive. The author's goal is “to set out in one place a comprehensive description of the complex body of law that has developed governing the law of prisoners' rights.” He has done that well.[2]

The fourth edition follows the same structure and style of the third edition except for well-justified, expanded coverage of Turner v. Safely.[3] The Supreme Court developed an enveloping reasonableness test, with four factors, to decide a prisoner's First Amendment claim. Turner expanded to an all-purpose test that is used in a variety of prisoners' rights claims. The expanded average is clearly justified although the author's preface describes a new chapter for Turner where, so far as I can discern, Turner is covered — and covered quite well — in Section III of Chapter 2.

Turner has become the great leveler of prisoners' rights in the sense that First Amendment claims were accorded a higher degree of constitutional protection prior to Turner. Now there is constitutional “equality” and Turner has also become the default test in a great many prison cases, as author Mushlin points out.

Let me confess that I did not sit down and read every word, not even every other word, of these four volumes with some 700 pages per volume. Were I reviewing a novel, every page would be a must. Reviewing a comprehensive, multi-volume treatise imposes no similar burden. Professor Mushlin's treatise is to be used and not experienced. Thus, comprehensiveness, ease of access, currency, and accuracy are among the key criteria that a reviewer (and user) should employ. Sampling, hopefully, is a fair way to review the currency and accuracy of a work of this nature. Lingering in areas known best to the reviewer may not be fair but it is wonderfully expedient.
That is what I did.

Comprehensiveness and clarity in the writing are among the strongest points in this work. If there is an area of prisoners' rights law not covered then I did not detect it.

Breadth of coverage usually comes at a price or perhaps simply reflects an author's ambition. Finding a topic of concern to a user will not usually end the user's research journey. It will surely launch the necessary more detailed and in depth study and a good launch nowadays is hard to find. Rights of Prisoners is, indeed a good launch. It is a smooth entry to the further research good scholars and practitioners will pursue.

Each chapter includes numerous research references, typically to other West publications and law review articles. Law review articles can be an enormous help in grasping a subject and discovering new pathways of analysis and research. Articles that are 10 or 20 years old, unless they have achieved the sacrosanct status of a Brandeis & Warren, Right to Privacy, are not likely to be of much help.

In such areas of medical and mental health care, while the basic legal formulae remains rather constant, the permutations of “seriousness” and “deliberate indifference” are such that only the most recent legal periodical writing will be of much help.

Ease of access is accomplished in part with comprehensive chapter outlines. Access is compromised, as is the case generally with a West publication, by an inexplicably abbreviated Index. In my review of the third edition, I described my futile quest for an entry on females. The quest remains futile in the fourth edition, which does illustrate the power of a book review.

I consulted the Index for discharge planning, covered in chapter 4:23 but found no entry. I then tried youthful offenders and juveniles but to no avail. However, I'm not certain if there is coverage of the special problems faced by youth (juveniles) confined in adult prisons. With so many young people confined in adult prisons, some reference, e.g., to special diets, exercise, isolation, education, would be appropriate. Therein is the Index problem: There is no entry where there is coverage and where there is no entry and if one is uncertain regarding coverage, the would-be user does not know where to look.

Professor Mushlin clearly has updated this new edition and omitted some of the older debris, always a challenging task in doing a new edition. With each new edition, the omission questions become more nagging. Footnotes can become old friends; some that are 40 to 50 years old and can hardly move on their own.

As for accuracy, I know the author to be a judicious, careful researcher. In my frequent research use of the third edition, I cannot recall encountering what I would view as erroneous (versus debatable or incomplete) material. In my sampling of the latest edition, the same result ensued.

Because of my personal interest and professional involvement in medical and mental health issues, covered in Chapter 4, I lingered there longer than most other areas. The coverage is comprehensive, although the amount of detail in certain areas — e.g., suicide and discharge planning — is understandably abbreviated and may lull some readers into unwarranted complacency. With regard to discharge planning and continuity of care, for example, there are some decisions that take a small step beyond the DeShaney principle creating the possibility of a novel continuity of care principle being developed and refined.

Author Mushlin does discuss the important New York City case of Brad H., which may be useful in other jurisdictions. Since there is, in fact, no federal constitutional right to discharge planning, Brad H., then, can serve as persuasive authority and perhaps stimulate reform elsewhere.
Suicide, in turn, is a huge and complex area of the law with enormous burdens on plaintiffs. Again, the author correctly makes clear how difficult it is for a plaintiff to prevail on an Eighth Amendment claim. With more space, the point could be made that a suicide case may be brought on a failure to provide adequate mental health care or a failure to protect. A mental health claim will require expensive medical experts where a failure to protect claim can be made out with less expensive experts in the area of security.

However, and to repeat myself, subjects like mental health[9] or suicide to be exhaustive would require a book themselves and even then may not be exhaustive. The Mushlin treatise is a terrific point of beginning in many chapters and also close to an end point, e. g., on Turner v. Safely issues, the Supreme Court's definition of cruel and unusual punishment, use of force issues, civil disabilities, and other areas.

As I noted in my earlier review, if you work, litigate, or do research in prisoners' rights you must have this publication. While there are other treatises out there, there is no competition for a work of this breadth. Use it wisely, sense where to stop your research and when to use the Mushlin treatise to dig in and go further and deeper.

As I wrote in 2004, it must be at your fingertips and its attractive production values actually will look good there.

[FN*] Fred Cohen is Professor Emeritus, State University of New York at Albany, School of Criminal Justice; Coeditor of the Correctional Mental Health Report and the Correctional Law Reporter. He is the author of The Mentally Disordered Inmate and the Law (2d ed. 2008) and numerous books and articles in the area of correctional law, mental health, and juvenile justice. He is currently a federal court monitor in Fussell v. Wilkinson, Case No. C-1-03-704 (S.D. Ohio 2005)) and S.H. v. Stickrath, Case No. 2:04-CV-1206 (S.D. Ohio 2008). Mr. Cohen is also a consultant to the American Bar Association in its revision of Correctional Standards and a frequent lecturer and consultant in the area of correctional law and correctional mental health.

[FN2] Cohen, supra note 1, at 415.


[FN5] Typing in “Correctional Medical Care” on Westlaw for just the past two years brought up over 100 articles on point.


[FN7] See note 2, supra. The “continuity of care” principle, more accurately an argument I have constructed, goes something like this: Once treatment is undertaken in a correctional facility, there is an obligation to pursue it to its clinical conclusion. A stent implanted after surgery must be removed even after discharge; substance abuse treatment must be continued, since relapse is virtually certain without it, and so who provides what care for how long are the obvious and difficult issues.

[FN8] Brad H. is based on local law, although there are implications for federal constitutional law.

[FN9] In my two volume treatise entitled, The Mentally Disordered Inmate and the Law (2d ed. 2008), which is actually about correctional mental health and the law, I devote some 82 pages to custodial suicide and with more time (and help) I could double or triple that coverage.