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Book Review [The Rights of Suspects]

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BOOK REVIEWS: ACLU HANDBOOK SERIES

The American Civil Liberties Union has embarked on a project to publish a series of handbooks which describe and explain the civil and legal rights of selected groups. In an effort to acquaint readers of the *Santa Clara Lawyer* with this series, we have obtained reviews of some of the more recently published handbooks.

Other handbooks which are now available outline the rights of servicemen, teachers, reporters, and the poor. The remaining handbooks projected for publication concern the rights of hospital patients, old people, ex-servicemen, aliens, homosexuals, government employees, candidates, young people, lawyers, union members, and the mentally retarded. For further information about the handbook series, our readers are urged to contact the American Civil Liberties Union, 22 East 40th Street, New York, New York 10016.


Oliver Rosengart's handbook on the rights of suspects is one of a series of books, now in publication or preparation by the American Civil Liberties Union, which are intended to acquaint American citizens with their basic civil and legal rights. The need for such an undertaking is obvious and the attempt commendable. It is therefore with some reluctance that I conclude Mr. Rosengart's book fails to achieve the ACLU's objectives. Indeed, in some respects, its value is questionable, for it may do the unwary reader more harm than good.

The faults of the book can be classified into four categories. First, some areas of discussion are poorly organized. Second, and more important, it contains a number of serious misstatements of law. Third, its statements of the law are applicable only to a limited number of American jurisdictions and thus do not present a comprehensive legal overview of the topics it covers. Fourth, the infusion of Mr. Rosengart's very strong, albeit sincere, political
beliefs has biased what should arguably have been an objective statement of legal rights, thereby resulting in a somewhat one-sided and unrealistic statement of suspects' rights. The effect of any one of these shortcomings would be to detract from the merits of the book; the combined effect of all four is seriously to impair its usefulness.

1. **Poor organization.** The author has divided his subject matter into four parts: Rights in Individual Confrontations with the Police, Rights Upon Arrest, Rights in Court, and Remedies. One problem created by this division is immediately evident: how does the lay reader realistically distinguish between "a confrontation with the police" and an "arrest," particularly if he or she is not cognizant of the arcane legal distinctions between temporary detention and actual arrest?

This is not a minor cavil. A citizen's possible involvement with the criminal process as a criminal suspect is not limited solely to individual confrontations with the police. For example, the fourth amendment, which protects persons from unreasonable searches and seizures, has also been construed to extend protection to an individual's reasonable expectation of privacy.\(^1\) Fourth amendment protections have also extended to the sanctity of the suspect's home and to protect personal effects against illegal search or seizure. These restrictions are not limited only to police searches, but extended also to actions taken by private citizens when acting as unofficial agents of the police.\(^2\) It appears that the author's attempt to explain these fourth amendment protections in the context of various individual police confrontations could better have been accomplished under a separate chapter heading which would have clearly explained the basic aspects of the suspect's protections against illegal search and seizure. Specific examples of police confrontations could have been provided to clarify and illustrate the explanatory material.

Mr. Rosengart's organizational method (and lack of an index) prevent a reader who is unfamiliar with the terminology of the criminal process from finding the information he seeks. For example, every criminal lawyer knows that a search of a home, pursuant to a warrant, may be performed in the owner's absence.\(^3\) Yet an unsophisticated reader whose home had been searched while he was away might not expect the book's coverage of his situation to be located in the chapter which is ostensibly devoted to individual encounters with the police.

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As another organizational matter, the question and answer format used in *The Rights of Suspects* is an ineffective method of presenting a comprehensive explanation of such important areas as fourth and fifth amendment protections. While the question and answer method may be an appropriate format for presenting the more generalized areas of individual rights covered by the ACLU series, it strikes this reviewer as not well suited to providing crucial informational assistance to the criminal suspect. Although most criminal suspects will promptly seek the advice of knowledgable counsel, any who choose to rely on this book for at least an initial primer of their rights should have a quick, concise summary of these rights available, so that they will not be inadvertently waived, or so that incriminating statements as a result of incomplete information will not be made. If the question and answer format was necessary to maintain consistency within the ACLU series, then additional treatment should have been provided in this volume through a concise chapter summary or an appendix outlining such vital areas as the scope of the fourth and fifth amendment protections, and the exclusionary rule.

These omissions are quite serious. As a criminal defense attorney representing indigent defendants in court almost daily, I can state with some assurance that it is quite difficult to explain the concept of suppression to a client who is completely unfamiliar with this legal term. For Rosengart to proceed directly into an exposition of various fourth amendment situations without a preliminary explanation is to invite complete confusion from the lay reader. Although it may be safe to assume that the practicing bar is familiar with the impact of *Mapp v. Ohio*, the same cannot be said of the American public.

It would have been far better for Rosengart to have begun each section of his book with a definition of the basic right involved (perhaps, for example, by dividing the fourth amendment discussion into searches and arrests), to have explained very clearly the ramifications of a violation of the right, and then to have proceeded to specific examples. This would have helped considerably to insure that the reader obtain a basic understanding of his rights—which was, after all, the author's primary objective.

2. *Misstatements of law*. Several serious errors of law are included in the text, at least one of which is unforgivably negligent.

(a) *Illegally obtained confession as impeachment*. Although Mr. Rosengart discusses the admissibility of confessions

5. O. ROSENGART, *THE RIGHTS OF SUSPECTS* 99-100 (1973) [hereafter cited as ROSENGART].
and the warnings required by *Miranda v. Arizona,* he fails to warn his readers that any confession obtained in violation of the *Miranda* rule may nonetheless be admissible to impeach the suspect, should he attempt to vary his account at a subsequent trial. This distinction is important, and the omission unfortunate, for as my experience has taught, the most prevalent police abuse of a suspect's rights is the failure to acknowledge his assertion of *Miranda* rights. This abuse generally flows from the widely-held belief by the police that an illegally obtained confession is better than no confession at all. Moreover, fear of impeachment will usually prevent the defendant from taking the stand, allowing the de facto presumption of guilt attendant upon a defendant's failure to explain himself to infect the jury, unless a countervailing instruction is given by the judge.

(b) *Auto searches.* Mr. Rosengart gives what appears to be an authoritative explanation of the circumstances under which the police may search a vehicle. Yet he does not mention that the mere existence of probable cause to believe the vehicle contains contraband will provide sufficient justification for a search—a rule of law which was first established in 1925 and has been considerably broadened by subsequent decisions.

(c) *Vicarious exclusion.* The author explains in his discussion of suppression hearings that the defendant must testify that he actually possessed the disputed evidence at the time of its seizure in order to have standing to seek suppression. This is definitely not the rule in California, nor perhaps in several other states as well. While the failure to indicate exceptions to the author's stated rule is not a serious shortcoming, it indicates a lack of thoroughness which is not expected from a book of this sort, nor particularly from the American Civil Liberties Union.

3. *Lack of general applicability.* Legal reasoning is generally reasoning by analogy. In every legal analysis, there is the danger that the attempt to analogize a rule will be fatally infected by peculiar or specialized facts from the specific case or cases from which the analysis begins. Mr. Rosengart, a lawyer who obviously has had a good deal of experience in handling narcotics cases in New York City, nevertheless falls victim to this analytical hazard. Although, he has written a book which will be of value to persons

charged with narcotics offenses in New York City, it is considerably less valuable to anyone so charged in other jurisdictions. The author has provided specialized advice for people whose homes have been ransacked by the police, who are ordered by a police officer to turn out their pockets while in the possession of contraband, or who are searched by police at borders or airports. He also provides some specific references to specialized laws in other states. The book, however, would have been of greater value had it provided more general statements of these laws which would have applied to all American jurisdictions. In this way all criminal suspects could derive valuable advice from the book, after which the author could provide his specialized data in these areas once his conceptual foundation was firmly laid.

4. Political bias. When I undertook to write this review I hardly expected I would have to defend police officers as a class, but I find to my dismay that such a defense is required. One of Mr. Rosengart's basic premises seems to be that a police officer will use any means, whether fair or foul, and no matter how degrading or unscrupulous, to convict the hapless suspect. The contention is generally incorrect but often repeated in the book.

Then the reader is first told that the police often lie to justify an illegal search. He is then led to believe the police will refuse to reveal public records which they are dutybound to disclose. Next, the author claims the Robinson-Gustafson rule will be circumvented by police perjury as to the actual facts surrounding the custodial arrest. The reader is informed the police make completely arbitrary stops of minorities and youths, search them thoroughly, then claim the resulting product of the search was initially in "plain view." Finally, the reader is told that judges sign search warrants without reading the supporting affidavits; that the police circumvent Chimel v. California by perjuring themselves as to the location of contraband, that they deliberately fail to give Miranda warnings and then perjure themselves by asserting the opposite on the witness stand; and that they

12. ROSENGART, supra note 5, at 37.
13. Id. at 25-26.
14. Id. at 38-41.
15. Id. at 23.
16. Id. at 27.
18. ROSENGART, supra note 5, at 29.
19. Id. at 31.
20. Id. at 33.
22. ROSENGART, supra note 5, at 37.
23. Id. at 55.
deliberately prejudice line-up identifications by appearing in them as comparison “suspects” while wearing items of clothing which easily distinguish them as police officers.24

Police perjury is an unfortunate fact of life in criminal practice, but it is far less common than Mr. Rosengart would have his readers believe. The average police officer is a highly partisan witness who has nevertheless become proficient at maintaining the appearance of detached neutrality during a trial. The “convenient memory,” a characteristic of most interested witnesses, is no less common among police witnesses; but the insinuation that the police are universally guilty of committing the sort of premeditated perjury that the author describes is simply unfair and without foundation.

My principal objection to the author’s insinuations about police practices is that they are out of place. The book would be more effective if it were a more neutral description of a suspect’s constitutional rights. Despite the existence of police abuses, the author’s generalized bias not only tends to color his own perceptions, but also detracts from his more valid criticisms of unfair police practices. Although police malfeasance certainly affects the treatment a criminal suspect receives, the handbook would have better served its purpose had it focused more closely on the constitutional rights of suspects, relegating warnings against possible police abuses to a more secondary role.

Conclusion

This book has a laudable purpose which has been only partially fulfilled. The rights of criminal suspects are highly precious—the consequences resulting from their abuse are not simply employment discrimination, poor working conditions, ineligibility for welfare or even infringement of first amendment freedoms, which are ably treated in other ACLU handbooks, but imprisonment, a criminal record and a loss of important civil rights. For this reason alone, The Rights of Suspects requires a more comprehensive and accurate portrayal of these important legal rights than the author has provided. The attempt is commendable, but the final result may prove harmful to anyone who chooses to rely solely on the legal advice contained therein. I would sincerely hope that the ACLU and Mr. Rosengart soon publish a second edition of the book which will remedy these shortcomings.

Frank Dudley Berry, Jr.*

24. Id. at 61.
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Susan C. Ross' *The Rights of Women* is exactly what it claims to be, a basic and thorough guide to women's rights. It is written primarily for the lay person who is interested in learning about the legal protections available to women. I would have no hesitation, however, in strongly recommending this book for use as a primer to any attorney who has not previously worked in the field of women's rights.

Unlike most commentaries on women's rights, *The Rights of Women* is a positive book. Instead of dwelling on the many injustices which women have suffered under the law, it addresses the remedies which a woman should pursue when, solely because of her sex, she is treated differently in her employment or schooling, or by the criminal justice system. In addition, the author's explanation of the many legal and administrative procedures through which violations of women's rights may be redressed will afford the average reader the opportunity more fully to understand the functioning of our legal system.

For example, there is an excellent discussion of how the state action clause of the United States Constitution presently relates to the equal protection clause of the fourteenth amendment, and how it may one day relate to the equal rights amendment. This discussion is characteristic of Ross' ability to express in simple terms those basic legal principles which have been known to confuse many attorneys as well as lay persons.

The section on employment illustrates the author's ability to simplify and organize. Like the remainder of the book, this section is written in question and answer format:

Under what law is it illegal to discriminate against women workers?

Five major Federal laws and a myriad of state laws forbid such discrimination. Federal laws are Title VII of the 1964 Civil Rights Act (generally referred to as Title VII); the Equal Pay Act; two Executive Orders issued by Presidents Johnson and Nixon, Executive Order 11246 (as amended by E.O. 11375) and Executive Order 11478; and the Age Discrimination Act of 1967.1

Ross discusses separately each of these federal laws. In her treatment of Title VII, also through the question and answer for-

mat, she deals with bona fide occupational qualifications, light work versus heavy work, protective state labor laws, illegal sex segregation, seniority and its effects in locking women into lower paying jobs, sex-segregated want ads, employee testing, child care responsibilities as they relate to employment, marriage, retirement age, and job recruitment, training and promotion.

After discussing each of these topics, she examines the procedures for filing an Equal Opportunity Commission (E.E.O.C.) complaint and for avoiding the two to three year delay normally experienced in waiting for the E.E.O.C. to process complaints. She advises anyone seeking relief under Title VII to retain an attorney and request a "Right to Sue" letter from the E.E.O.C., which will then permit the recipient to by-pass the Commission's administrative process and more rapidly prosecute her case in court. The Commission will generally issue such a letter on request. On receipt of the "Right to Sue" letter, the recipient or her attorney is allowed ninety days in which to initiate litigation. Statutes of limitation establishing the period within which a charge must be filed with the E.E.O.C. are explained and potential claimants are urged to file within the 180 or 300 day statute. Those against whom the applicable statute has run, however, are urged to file anyway and claim that the discrimination which they have suffered is continuing. This is a wise suggestion, for most discrimination occurs repeatedly and is not confined to a single incident.

Title VII provides that a court may award attorney fees and costs to the prevailing party. The author encourages women to seek attorneys who will take their cases on a cost only basis and later look to the court for an award of attorney's fees. Any attorney who is filing his or her first cause of action under Title VII would be well-advised to read carefully this procedural section. It is both concise and accurate, and may be an invaluable guide for finding one's way through the Title VII procedural mire.

The Equal Pay Act and Executive Order 11246, as amended by Executive Order 11375, are discussed in some detail. These Executive Orders compel compliance with existing laws by requiring contractors and subcontractors of the federal government to promise not to discriminate, and to take affirmative action to remedy the effects of past discrimination as a condition precedent to entering into government contracts.

In the event that a government contractor fails to comply with these laws, Ross states that a woman can file a complaint with the

Office of Federal Contract Compliance (O.F.C.C.), a division of the Department of Labor, to seek enforcement of the Executive Orders. She also describes the possible penalties for violation, among which are the delay or cancellation of a particular contract, or even a denial to the offending contractor of the opportunity to obtain future contracts from the federal government. Ms. Ross is critical of the O.F.C.C.'s failure to utilize these penalties, but since she believes the same relief to be available under Title VII, she discourages women from bringing lawsuits for enforcement under the Executive Orders because of prior court failures to provide adequate relief.

Although many lawyers might not be interested in filing legal actions pursuant to the Executive Orders, since the orders do not provide for damages or attorney's fees, I strongly disagree with Ms. Ross' reasons for discouraging such litigation. The Executive Orders can provide a great deal of leverage against those companies whose primary source of business is the federal government. Although the possibility of a class action under Title VII is a risk which such companies are often willing to accept, the threat of losing important government contracts for even a year is not. Since publication of *The Rights of Women*, there have been numerous cases in which courts have granted standing to women under the Executive Orders. These cases have been brought only because women and their lawyers have refused to accept continued discrimination without a fight. The extension to women of standing to sue under the Orders would not have occurred had these same attorneys concentrated only on Title VII actions, as Ms. Ross suggests. Hopefully, these court cases will pressure the O.F.C.C. into beginning the job of enforcement for which it was created.

From the area of employment, Ross moves on to consider education, more specifically, the Education Amendments of 1972, Title VII of the 1964 Civil Rights Act, the Public Service Health Act, and the equal protection clause of the fourteenth amendment. The above are discussed in conjunction with such practical problems as courses required only for girls, school athletic programs, pregnant students, campus living arrangements, distinctions vis a vis women's rights between private and public schools, and admissions policies.

The section on crime and delinquency considers such important issues as sentencing, prison conditions, rape, prostitution and other sex offenses. In addition to this informative discussion, Ms.

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Ross also explains how women can assist in making much needed changes in these areas.

An important chapter of the *The Rights of Women* deals primarily with the ways in which women can make the mass media more responsive to their needs. The author specifically considers the licensing authority and jurisdiction over the air waves vested in the Federal Communications Commission, and she explains how women can effectively challenge the licensing of a station which is not acting in the public interest. The possibilities of using the Fairness Doctrine as a tool to correct degrading stereotyping of women and to ensure media responsibility in the discussion of women's rights issues are also mentioned.

Of course, no women's guide would be complete without a section on abortion, and *The Rights of Women* is not deficient in this regard. The recent United States Supreme Court decisions on abortion are considered and interpreted by the author. Sterilization, birth control, and the special problems minors encounter in these areas are also addressed.

A fairly informative section on divorce is included which is too elementary to be of much use to most attorneys, but which provides women with helpful advice on such ordinary problems as child custody and support, spousal support, and division of property. It also includes a lengthy discussion about what to expect from one's attorney in divorce matters and advice as to how and when to terminate an unsatisfactory attorney-client relationship.

Any attorney who has not previously worked in the area of sex discrimination might find the 100-page appendix to this volume to be a useful research tool. The appendix charts the state laws which forbid sex-based discrimination in employment and housing. It also surveys the laws relating to financing in education and name changes. Finally, it lists and describes important sources of legal help for those who feel they are in need of more consultation or assistance than this book can provide.

*The Rights of Women* is a concise, readable, and highly useful publication. It is a welcome addition to the American Civil Liberties Union handbook series and will provide helpful guidance to women who seek to enforce their rights, as well as being of service to anyone interested in becoming better informed about the legal rights of women in our society.

*Barbara Lawless Bourhis*


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The assertion that some involuntarily hospitalized mental patients suffer a loss of civil rights is unquestionably true. Such a loss of freedom and autonomy can, and in many cases does, interfere with treatment, adding ironic insult to the injury inflicted by the denial of constitutional rights. It is equally true that freedom and autonomy are mere illusions to many mental patients; if suddenly given their freedom, their capacity to exercise rational control over themselves and their environment would be limited. Absolutists, who insist that either extreme is the prevailing condition for all mental patients, do a disservice to the mentally ill. The arrogance of some psychiatrists and psychologists at one extreme is matched by the arrogance of some civil libertarian lawyers at the other.

Reluctantly, I find it necessary to begin this review of the ACLU handbook, *The Rights of Mental Patients*, by Bruce Ennis and Loren Siegal, with the foregoing paragraph. The book is strident and arrogant; it does not help mental patients to suggest, as the authors do, that “every prospective patient should hire a lawyer, if he can afford one, or ask the court to appoint a free lawyer, if he cannot.” Although the authors make plain their suspicion and distrust of psychiatrists, my own experience has indicated that most psychiatrists and psychologists are interested in the well-being of their patients and are sensitive to their civil rights. In most cases, I have also found that involuntarily hospitalized patients do require hospitalization.

In California, the common experience of many mentally ill persons is not that they have been subjected to excessive hospitalization, but rather that they have suffered over the past several years because of premature discharge from state hospitals. Inadequate alternative care arrangements in their local communities has only exacerbated the problem of incomplete mental health care. In my

2. E.g., “mental illness” is an “unproven theory,” *id.* at 11; “it is quite common for psychiatrists to hospitalize patients against their will,” *id.* at 12; it is “distressingly common” for psychiatrists to coerce patients into voluntary commitment, *id.* at 36; it is “distressingly common” for doctors to change medications before a hearing so that patients appear at their worst, *id.* at 294-95. No statistics or cited studies support these assertions.
3. Final Report dated March 5, 1974, of California Senate Select Committee on Proposed Phaseout of State Hospital Services, established by Senate Resolution No. 20, March 28, 1975.
judgment, such patients are not necessarily better off with the “freedom” given to them as a by-product of the efforts to dismantle the state hospital systems.

Even with a more balanced statement of the problem, there still remain those instances in which mentally ill patients are denied their rights. Involuntary hospitalization, denial of access to telephones and contact with visitors, and custody without treatment are examples. It is to these situations that *The Rights of Mental Patients* is most usefully directed, despite its shrillness.

The textual portion of the book is short—only seventy-five pages—but in that space there is a complete statement of the various situations in which the civil rights of mentally ill persons can be violated and suggestions as to what can be done to redress the denial of these rights. The book also contains an appendix of 189 pages, keyed to the textual discussion of the rights of the mentally ill, in which the law of each of the fifty states and the District of Columbia is summarized. Additional appendices include a chapter which discusses trial techniques, a bibliography of cases and authorities, and a reprint of the opinion in *Wyatt v. Stickney*, which established the right to treatment for involuntary patients.

The book is crisp, to the point and helpful in a situation where a patient’s civil rights have been violated. To an attorney confronting the legal issues of mental illness for the first time the book is invaluable. The chapter on trial techniques is well constructed and makes appropriate reference to the useful book by Jay Ziskin (who is both a psychologist and lawyer), *Coping with Psychiatric and Psychological Testimony*. Although not suggested by the authors, their book would be exceptionally useful in educating mental health professionals as to the constitutional rights of the mentally ill.

As counsel for the California State Psychological Association, a member of the San Francisco Mental Health Advisory Board, and a long-time member of the ACLU, I find myself subject to divergent sympathies in reacting to this book. Mentally ill patients need the help of both mental health professionals sensitive to civil rights and lawyers who are also trained to be aware of the nature of mental illness and the means of treating it. There is a need for a method of delivering legal services and advocacy to the mentally ill which is independent of the system of medical treatment.

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The lawyers who provide this legal assistance must be able to understand the varieties of human behavior under the stresses of mental disability without becoming distrustful of mental health professionals. At the same time, these lawyers must be on the watch for a denial of their clients' civil rights and be willing to act vigorously in the patients' interest. Despite the extreme rhetoric used in *The Rights of Mental Patients*, the book can be a useful tool in effectuating such legal representation.

*Irwin Leff*

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Only a few years ago, a book entitled *The Rights of Students* would have made a rather slim volume. Except in a handful of cases dealing with matters such as exemptions from the mandatory recitation of the pledge of allegiance¹ and similar issues related to the separation of church and state,² the concept of student rights was virtually unrecognized by either school officials or the judiciary. Schools were generally accepted by both the public at large and educational professionals as enclaves of totalitarianism. As a result, students were routinely subjected to the sometimes arbitrary whims of school administrators.

The past decade, however, has witnessed literally a flood of litigation concerning the conditions imposed upon children and adolescents in the schools of this nation; the result has been an enormous broadening of the rights of students. Along with the steady erosion of the traditional doctrine of *in loco parentis*—the archaic notion that school authorities possess the same authority over students as their parents—numerous petty and demeaning restrictions placed upon students have been struck down by state and federal courts throughout the country.³ From the multiplicity

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of cases involving the imposition of rigid dress codes and hair restrictions on students, to the even more insidious attempts of school authorities to silence legitimate dissent and the exercise of first amendment rights by young people, courts repeatedly have been called upon to intercede on behalf of students to curb such arbitrary and capricious exercises of authority by school officials.

Although courts have affirmed the right of the school authorities to impose restrictive conditions upon students in some of these cases, the modern trend among the judiciary has been to protect students against arbitrary and unnecessary infringement of their activities. This progressive trend was given a tremendous impetus by the 1969 landmark decision of the United States Supreme Court in Tinker v. Des Moines Independent School District. In that case the Court held that students "in school as well as out of school are persons under our Constitution" and are "possessed of fundamental rights which the State must respect." Although that view had been expressed by student advocates for several years prior to the Tinker decision, the acknowledgement by the highest court in the land that people do not lose their constitutional rights simply because of their status as students marked the real beginning of the students' rights movement. The 1975 decision of the Supreme Court, in Goss v. Lopez, holding that students may not be expelled or subjected to substantial interference with their right to receive an education without adherence to procedural due process requirements, provides further protection for the constitutional rights of students against arbitrary action by school officials. While numerous state and federal courts had reached similar conclusions during the past five years, the Goss decision dispelled any lingering doubts as to the application of constitutional principles to students and to the educational process generally.

Within this context, the ACLU's The Rights of Students provides exactly what it promises: a basic guide to the public school

5. E.g., Massie v. Henry, 455 F.2d 779 (4th Cir. 1972); Bishop v. Colaw, 450 F.2d 1069 (8th Cir. 1971).
6. E.g., Tinker v. Des Moines Ind. Sch. Dist., 393 U.S. 503 (1969) (right to wear black armbands); Riseman v. School Comm. of City of Quincy, 439 F.2d 148 (1st Cir. 1971) (right to distribute literature on school property); Burnside v. Byars, 363 F.2d 744 (5th Cir. 1966) (right to wear buttons with printed slogans).
7. See, e.g., Guzik v. Drebush, 431 F.2d 594 (6th Cir. 1970) (no right to wear buttons with printed slogans); Blackwell v. Issaquena County Bd. of Educ., 363 F.2d 749 (5th Cir. 1966) (same).
9. Id. at 511.
student's rights. It is written in a simple, easy to interpret question and answer style designed primarily to be used by the lay person or student. Although its simplicity makes the handbook less valuable as a research tool for the practicing attorney, it nevertheless provides a handy reference to facilitate a rapid understanding of some of the principles and cases in this developing area. Like most of the ACLU books, it was not designed to serve as a legal treatise on its subject matter, but rather as an elementary guide to students, parents and educators, highlighting the law peculiar to the area of student rights. Used in this fashion, it can be a very helpful tool in facilitating the exercise of these rights while providing valuable information to students and adults alike.

Any area of law which is relatively new and has been the subject of a considerable amount of litigation frequently generates a diversity of opinion on particular legal issues from one jurisdiction to another, reflecting the rapid and continuous change in caselaw. Student rights is no exception, and the authors readily acknowledge this problem with The Rights of Students. Textual statements as to what "the law is" are therefore often outdated in a relatively short time. For example, the entire section on student records has been superseded by new federal legislation on the subject.¹¹

There are also some flaws to be found in the book's attempt authoritatively to declare on a national or state-by-state basis what the law is on a particular position. An example of this difficulty can be found in the section dealing with the regulation of the personal appearance of students in public schools. The handbook lists twenty-five states in which the authors claim a student's hair length cannot be regulated without a showing of disruption or a relationship to a legitimate educational purpose.¹² The remaining states, it is claimed, permit schools to regulate hair length without restriction. California is listed among the second group, but in actual fact, California law is unsettled.¹³

Despite the book's problems with over-simplification of complex issues and over-generalization in some areas, it more than

¹³. Compare, e.g., the fate of hair codes in the liberal northern half of the state, Myers v. Arcata Union High Sch. Dist., 269 Cal. App. 2d 549, 75 Cal. Rptr. 68 (1969) (student wins), with that in the more conservative southern half of the state, Akin v. Board of Educ., 262 Cal. App. 161, 68 Cal. Rptr. 557 (1968) (student loses) and the flat refusal of the federal court system even to consider that the issue involves substantial constitutional rights, King v. Saddleback Junior College, 445 F.2d 932 (9th Cir. 1971).
compensates for its weaknesses by its broad and comprehensive coverage of student rights issues and its general sensitivity to emerging questions in this area. In many ways, the unique approach to the subject of students' rights used in the ACLU handbook can better be understood if it is contrasted with a recent publication of the California Attorney General's office entitled *Law in the Schools*, which is characteristic of most books dealing with students' rights. This work has been fairly widely disseminated to school authorities by the Attorney General's office. It is touted as the "official guide" for California teachers, parents and students and takes a distinctly traditional view of "students' rights." For example, it contains only a rather short and uninspiring treatment of the issue of first amendment rights of students, giving considerably more attention to the limits of free speech than to an explanation of the right itself. In fact, this important subject area does not even warrant its own chapter in the Attorney General's book, but is hidden in a section entitled "The Limits of Discipline." Needless to say, the ACLU places a much heavier emphasis on affirmative rights than on negative restraints.

Another example of the differing approaches and analyses used by the ACLU and the Attorney General's office is the issue of police authority to interrogate students on school grounds for non-school related activities. Although there have been no reported cases directly on point, both books nevertheless attempt to deal with the question and reach distinctly different conclusions. *Law in the Schools* states flatly that "law enforcement officers have the right to interview students who are suspects or witnesses while those students are at school." That statement is supported only by a footnote to an earlier opinion of the Attorney General which reached the same conclusion on nothing more substantive than the Attorney General's claim to possess such authority. In contrast, *The Rights of Students* is more honest in its treatment of the subject, pointing out simply that students have the right to remain silent and that neither school officials nor anyone else can *make* a student talk to the police, irrespective of any police authority to question students on school grounds.

The ACLU handbook also points out that several states have adopted policies by which police are specifically denied the power
to interrogate on the school grounds. For example, the text cites a New York State Education Department provision which states that “children are given over to the custody of the school authorities for one purpose only and that is education in all its phases,” and therefore that “police authorities have no power to interview children in the school building or to use school facilities in connection with police department work, and the [school] board has no right to make children available for such purposes.”

In general, The Rights of Students provides a respectable overview of the present status of student rights in our public schools and some suggestions for the expansion of these rights. As might be expected, the authors emphasize decisions which are favorable to students while they de-emphasize those which have restricted student rights. In some cases that tendency might mislead students into a belief that their rights are more secure and extensive than they actually are. Nevertheless, the authors are quite candid in distinguishing the possession of an abstract right from the actual enforcement or protection of that right. They state in the preface: “This guide offers no assurances that your rights will be respected.” That cautionary note is particularly appropriate in the area of student rights; hopefully, students and others relying upon The Rights of Students will give due consideration to this caveat.

In sum, The Rights of Students is an innovative and sorely needed practical reference book which will prove highly useful to students, their parents, teachers and school administrators.

Susanne Martinez*


Intended as an introductory catalog and explanation of the rights of prisoners, this ACLU handbook is designed primarily for use by prisoners themselves in the hope of fostering a greater awareness and more frequent exercise of their rights. Rather than academically listing and explaining the few fundamental rights which prisoners possess, author David Rudovsky also informs his reader how these rights are frequently infringed and
even denied altogether as a result of the harsh realities of our prison system.

The author advocates judicial intervention in prison affairs to obtain an effective restoration and future protection of these prisoner rights. Clearly, he sees the courts as a foil between two hostile camps—prisoners and prison staff. In his discussion of the prison environment, where guards and officials have the discretionary power to change the judicially imposed conditions of a prisoner's confinement—and even the length of his prison term—Rudovsky concentrates on explaining the prisoner's rights to due process and identifying recent trends toward more complete adversarial hearings, assistance of counsel, and requirements for statements of charges and provisions for review. In the main body of this compact work, the author examines the status of the battle for substantive prisoners' rights. Lastly, and with only a trifle of self-consciousness, the author exposes the cruel hoax of a prisoner's actual prospects for judicial intervention to protect his rights. Any reader who has had experience with prison reform knows that very few lawyers accept free prison cases, that few organizations litigate on prisoners' behalf, that jail-house lawyers cannot adequately litigate cases from their cells, and that the time it takes to carry a civil rights action to completion can fatigue even the hardiest and most dedicated attorney. Arrayed against the single prisoner (and his volunteer attorney, if one can be secured) stand the prison staff and administrators, their witnesses, their resources and mobility, their correctional officers' association, the state Attorney General's office, and sometimes the court itself.

When confronted with these overwhelming odds against reform through judicial intervention, anyone who would encourage prisoners to undertake the battle alone with the expectation of quick success is simply being unrealistic. Rudovsky's emphasis on remedies and procedures, particularly in Chapter X, confirms the genuinely optimistic view which the author has of reform through litigation. The facts, however, indicate that even the most eloquent denunciations of actual prison practices by liberal state and federal judges (many of whom are quoted in part in the handbook) have been all but ignored in practice.

1. D. Rudovsky, The Rights of Prisoners 21 (1973) [hereinafter cited as Rudovsky]. In California, a prisoner's term is fixed by a parole authority within the limits prescribed by law; information placed in a prisoner's file by guards may be relied upon by the parole authority as a basis for denying parole or refusing to release prior to the expiration of the maximum term.

2. Some of the important rights guaranteed to prisoners include the right to correspond with and petition the courts, to practice a preferred religion, to receive medical treatment, and to be free from cruel and unusual punishment.

3. In Jordan v. Fitzharris, 257 F. Supp. 674 (N.D. Cal. 1966), the court
As an example, the courts have declared that prisoners have the right to read any book which does not pose a threat to the security of the institution. A noble gesture, but of minor significance when one considers the actual hurdles the prisoner must vault to exercise this "right." First, if the book is not objectionable to prison authorities, the prisoner must persuade the prison library to order the book he desires; then he must obtain permission to visit the prison library before he can read the book. This is more difficult than it appears, for often the more politically oriented prisoners find themselves in restricted units or isolation cells where library privileges are denied. If, for any reason, the library is unwilling to purchase the book, then the prisoner must get the prison administration to agree that the particular book he desires does not pose the prohibited threat to security. Next he must obtain sufficient funds to purchase the book himself, locate the publisher, place the order and wait. This procedure must be repeated each time the prisoner wishes to acquire a new and controversial book, and a refusal at any step will frustrate his efforts. If permission is denied at any stage of the process, the prisoner must either abandon his efforts, or resort to the lengthy and often ineffective litigation discussed above. The fact that the prisoner's right to read what he pleases, although protected in principle by the courts, has been so often denied in practice by prison officials, illustrates that Rudovsky was overly optimistic in looking to judicial intervention for the protection of prisoners' rights.

Despite the general ineffectiveness of judicial intervention in prison administration, the courts have produced significant changes in prison disciplinary methods through their development of the concept of cruel and unusual punishment. Rudovsky devotes one of his chapters to cruel and unusual punishment and its use as a ground for prohibiting perverse prison practices. What evaded Rudovsky's detection, however, is the metamorphosis of the entire prison system in many states from one in which prisoners are punished by the loss of their liberty for a specified term under conditions which are more or less tolerable, to one in which the length of the term served depends upon a change in an individual's personality, outlook, philosophy and character as measured solely by the prison authorities. Whereas prisoners in the past were commonly subjected to physical punishments, or

enjoined the use of strip cells at Soledad Prison, recognizing that they endangered the health of prisoners and threatened their sanity. The same cells are still in use today, as are substantially identical ones at San Quentin and Folsom prisons, with minor variations supposedly designed to insure that a reasonable modicum of sanitation is maintained within the cells.

4. See note 3 and accompanying text supra.
confined under physically cruel and unusual conditions, in modern
prisons punishment is primarily psychological and is imposed
through isolation, segregation, and indeterminate sentencing. Nev-
evertheless, the consequences of indeterminate sentencing in “security
housing” have not yet been recognized by the courts as constituting
“punishment,” nor were these consequences included in Rudov-
sky’s appraisal of the realities of prison life.

Rudovsky’s text concisely summarizes the recent state of
“prison law” and, for this reason, the handbook is useful both to
lawyers and prisoners. He misleads the reader, however, when
he emphasizes that it is the prison guard, underpaid, undertrained
and drawn from society’s lower ranks, who sabotages efforts to ob-
serve prisoners’ rights within the prisons. In actual fact, most
prison oppression is created by the prison structure itself rather
than by individual guards.

By criticizing Rudovsky’s acceptance of the present system
I do not seek to discourage efforts to eliminate prison abuses, but
instead to urge that such efforts be directed with more precision
and awareness of actual prison conditions. For example, a close
look at the functioning of the prison system reveals the euphemism
in the phrase “prisoners’ rights.” Prisoners do have the right to
limited access to the media, yet the prison retains the right to seg-
regate certain prisoners “for their protection and the protection
of other prisoners and guards.” In practical effect, this denies
some of them the right to be interviewed by the press. Prisoners
have won certain due process guarantees at prison disciplinary
hearings. Contrast these “guarantees” with the facts that the
members of the disciplinary committees are all prison staff, there
is no jury of the prisoner’s peers, no independent review of the
committees’ decisions, and no presumption of innocence for the
prisoner.

Aside from the disciplinary committee process, the prison
possesses a very effective alternative method of disciplining the
resisting, unsubmissive or rebellious prisoner—“classification.”
Far more serious than the comparatively benign punishments the

5. In the recent decision In re Rodriguez (Crim. 18044) decided July 1,
1975, the California Supreme Court modified the state’s indeterminate sentencing
law (Section 1168 of the Penal Code) by requiring the Adult Authority to fix
a “primary term” within the limits of the indeterminate sentence which is propor-
tionate to the offense for which the prisoner was incarcerated. Earlier decisions
had upheld the constitutionality of the indeterminate sentence: Bennet v. People
of State of Calif., 406 F.2d 36 (9th Cir. 1969); Application of Gordon, 157 F.2d
659 (9th Cir. 1946); In re Lynch, 8 Cal. 3d 410, 503 P.2d 921, 105 Cal. Rptr.
603 (1962). None of the limits which have been imposed on the indeterminate
sentence has, as yet, been applied to the choice of housing within the prison itself.
RUDOVSKY, supra note 1, at 85-87.
disciplinary committee can decree, the classification committee can declare prisoners “management problems” for whom special security precautions, including segregation, exclusion from rehabilitation programs, denial of contact with other prisoners, and visiting limitations are appropriate, all in the name of “institutional security.” Program participation and housing designation, both determined by the classification committee, figure importantly in the Adult Authority’s parole considerations and may be the basis on which parole is denied. Prisoners, for instance, are seldom paroled directly from “security housing.”

I do not mean to belittle Rudovsky’s efforts, for he has made a substantial contribution in a frustrating field, yet he does not seem to understand how serious the problems are and whence they spring. Prison hospitals, for instance, are criticized in the book as being mismanaged and understaffed for the number of inmates they must handle. Nevertheless, it is a fact that many patients in prison hospitals are malingers. When, because of the resultant overcrowding, over-worked hospital staffs become short-tempered, sloppy, or hostile, the problem is not simply the result of inadequate medical facilities. It is caused instead by the institutional structure of prisons which encourages inmates to seek relief from the stark conditions of their prison existence in the comparative comfort of the hospital.

Similarly, humiliating personal “strip searches” or searches of a prisoner’s cell for contraband can be opposed on the principle that they violate rights of privacy, confidentiality, or the fourth amendment. But can such protestations stand in the face of the prison’s interest in the preservation of security, and in its need to detect weapons or discover escape plans? Clearly not. We prison reformers are naive if we do not realize that prisoners do fashion and carry weapons and that they do make plans to escape. Instead of denying the validity of the fundamental reasons underlying these prison procedures, we must relieve the pressures on inmates and guarantee the personal safety of prisoners so that they do not have to arm themselves for protection to insure that they survive their terms! One solution to the problem of prisoner safety is to reduce the density of the prison population.

Rudovsky’s manual is a start toward exposing the abuses of the prison system, while providing the factual materials which prisoners and prison reform groups can use to work more effectively for needed change, but it is only a start. Prisoners need access to additional information which will apprise them of the means by which to continue their struggle for recognition of their basic civil rights. The Prison Law Collective’s Jailhouse Lawyer’s Manual, the basic guide for prisoners’ civil rights litigation, is an
example of the format that could be emulated in books covering other areas of concern to prisoners and prison reform groups.

Apart from Rudovsky's intended audience of prisoners and prison reformers, however, this book serves another vital role—to sensitize the average citizen to the actual problems existing within our current prison system. Because prisons reflect society and its values, significant changes in the prisons must be preceded by a revolution in societal values. True success in prisoner "rehabilitation" and the elimination of criminal recidivism presupposes the existence of a society whose overriding objective is the satisfaction of the needs and fulfillment of the aspirations of all of its members. It comes then as no surprise that our prisons do not accomplish their correctional objectives when the social system itself is antagonistic to the interests of prisoners and channels higher proportionate shares of minorities than whites to prison, and more blacks to prison than to college; when the prisoner knows that he faces divorce or poverty for his family as a result of his imprisonment; and when "equal justice under law" is distorted so that the rich and powerful who run astray of the law are given favored treatment, while the poor receive stiff terms. Perhaps Rudovsky's book will enable more people to understand the importance of the basic human need to be assured of a job and a place in society, and to realize that some criminal attempts to fill this need are not the product of "sickness," but of lack of skills, education or social opportunity. If so, his book will have served an even greater purpose than that for which it was written.

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