

“Laws grind the poor, and rich men rule the law.”
(Oliver Goldsmith, *The Vicar of Wakefield*, 1766)

For many jailhouse lawyers, especially those new to the craft, there is a sort of “awe” that governs their study, contemplation and utility of the law. Like new converts to a religion they ascribe all power, all rationality and the penultimate of wisdom to this area of human endeavour. Luckily, like those new converts, they come down to earth and may even come to the realization that their earlier impressions were either naive or overblown.

What may prove most enlightening to those who remain naive about the field of prisoners’ rights law is a study of legal history, as shown by rulings of America’s Court of Last Resort. In this history of the Court’s written opinions, one finds the true face of America with a clarity that is lost (or ignored) in the study of U.S. history. Here is history unadorned, naked and yes, ugly.

If you were to speak in purely neutral legal principles, you might be able to say things like: 1) someone held in unlawful detention need only apply for judicial relief; 2) people have an inherent right to reproduction; 3) the right to practice one’s faith is inviolate, and the like.

An honest examination of U.S. law, as articulated by justices of its Supreme Court, betrays a history that is replete with repression, and a line of reasoning that has historically upheld the strong, while overruling the weak. It has stood with slaveowners against slaves, the rich against the poor, the empowered against the powerless, and the established against those crushed beneath the establishment

Consider these historical precedents:

1. *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857): When an African-American man, who lived briefly in a “free” state, claimed the Constitution protected his new status and that of his wife, Harriet and his two daughters, Eliza and Lizzie, the nation’s highest Court made it abundantly clear that freedom was not the concern of this tribunal. Chief

Justice Roger Brooke Taney (a former slaveowner) and six other justices held that the U.S. Constitution did not, and would never, apply to persons of the “negro African race” who were, in the words of Taney, “regarded as beings . . . so far inferior, that they had no rights which the white man was bound to respect.”

2. *Plessy v. Ferguson* 163 U.S. 537 (1896): Here, the U.S. Supreme Court upheld the practice of American apartheid, under the “separate but equal” doctrine that legitimized the second-class citizenship of Blacks. For over half a century Plessy justified this state of repression.

3. *Buck v. Bell*, 274 U.S. 200 (1927): A young white woman, from the Appalachians, described as “feeble-minded,” challenged the constitutionality of Virginia’s involuntary sterilization statute. Justice Oliver Wendell Holmes, in upholding Virginia’s legal eugenics reasoned, “Three generations of imbeciles is enough.” She was sterilized.

4. *Minersville School District v. Gobitis*, 310 U.S. 589 (1940): When a group of Jehovah’s Witnesses refused to salute the flag, a rural Pennsylvania school district excluded them, and expelled them from school. One family, the Gobitas family (the Court would later misspell their name, “Gobitis”) sued the Board and won, hands down, in every court they appeared, until the U.S. Supreme Court, through an 8-1 decision, held for the school district, reasoning that the state could punish refusal to salute the flag, as it promoted the sense of patriotism. In a lone dissent, Justice Stone wrote that the mandatory flag salute “does more than suppress freedom of speech and more than prohibit the free exercise of religion. . . . For by this law the state seeks to coerce these children to express a sentiment which, as they interpret it, they do not entertain, and which violates their deepest religious convictions.”

5. *Korematsu v. United States*, 323 U.S. 214 (1944): In spring 1942, shortly after Pearl Harbor’s bombing by Japan, the U.S. government evacuated and interned over 100,000 Japanese-Americans, many of whom were nisei (second generation) born, raised and educated in the U.S. It would be over 40 years before the U.S. District Court held that the internment of its so-called “citizens” was unconstitutional and absent of due process. Tens of thousands of people were placed in concentration camps for being Japanese, okayed by the Supremes.

What do these cases mean? Don't they come from "the old days?"

They demonstrate, over an 87-year period, how real people, a slave and his family, a mulatto businessman, a "slow" white woman, a family holding a (then) unpopular faith, and a second-generation Japanese-"American" came to their nation's highest court, claimed fundamental rights under the U.S. Constitution, and had those claims shattered on the anvil of political expediency and by the preconceived notions of small-minded men. What was popular prevailed over what was right.

Nor were these cases legal "aberrations," as some would suggest, as reflected by the considerable expanse of time. Professor A. Leon Higginbotham's exhaustive research into colonial and post-Revolutionary War law (as in his classic, *In the Matter of Color*) proves these cases are firmly embedded in the bedrock of American law.

Dred Scott pushed the nation to civil war; Plessy lasted over half a century. Buck's plaintiff, Carrie Buck, was sterilized for all eternity, and as late as 1966 some 26 states had sterilization laws on the books, after some 70,000 people had been sterilized. The Gobitas (Gobitis) children, and many other Witnesses' children had to be privately schooled, at great cost to their families, even though *Minersville* was overturned three years later in *West Virginia State Bd. of Ed. v. Barnette* (1943) by a 6-3 decision. Korematsu suffered over 40 years as no government agency or corporation would hire him, as a result of his criminal conviction for failing to report to a concentration camp (called "Relocation Centers"). His conviction was overturned on a writ of *Coram Nobis* in *Korematsu v. U.S.*, 584 F. Suppl. 1406 (N.D. Cal. 1984) some 40 years later, when he was then a man in his 60's. (Interestingly, this remedy would be unavailable to Korematsu under the new "Anti-Terrorism" laws, which time-bars appeals).

You will notice none of the cases discussed were prisoner-related. They reflect the alleged rights and privileges accorded to all Americans, yet denied when they went to court and attempted to exercise these rights.

The human right to freedom, the right to be free from repression, the right to be free from sterilization, the right to practice one's faith, and the right to be free from race-based internment, met bitter and decisive

defeats in the nation's highest court, damning millions to broken lives and shattered dreams. It was the Civil Rights movement, the Black Liberation and successive movements that transformed social and political policy in America. The Civil Rights movement brought *Brown v. Bd. of Education*, and the NAACP influenced Japanese-Americans Citizens League (JACL) was an important force in winning *Korematsu II* and the *Coram Nobis* cases. The women's movement, through *Roe v. Wade* and similar cases, have discredited the *Buck v. Bell* line of cases.

The point is, no freedom came from the court, but from social movements that created the struggle for freedoms, of all causes and kinds. The same must be said of the prisoners' rights movement, which grew in the 1970s in the periphery of the Black Liberation movement of the period. When movements falter, the inherent, repressive and restrictive nature of ruling class law finds its expression.

The "law" does not arise from a vacuum, but exists in a social context which elects a status quo, the existing social order, and protects the interests of the propertied and established against the interests of the impoverished and the disinherited. That is the nature of American law, as expressed over the bulk of its history, and jailhouse lawyers would do well to remember it.