

PRACTICAL GUIDE TO CORRECTIONAL MENTAL HEALTH AND THE LAW

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With
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How to Use This Book

Practical Guide to Correctional Mental Health and the Law is meant to provide hands-on guidance to correctional professionals and health care professionals who serve correctional populations, attorneys and policymakers, and students. It is a condensed and updated version of the author's two-volume treatise, *The Mentally Disordered Inmate and the Law*.

There are several ways to find the specific information and guidance you may be seeking. A detailed Table of Contents immediately follows the About the Author section; it provides a broad overview of the scope of the book and serves as a quick aid to locate general areas of interest. Each chapter also begins with a contents listing. Chapter subheadings are paragraph numbered to enable easy cross-referencing.

The Table of Cases, which follows the appendixes, points readers to commentary related to a particular legal case. Specific topics are listed in the Index, which follows the Table of Cases. These "finding aids" are keyed to chapter paragraph numbers and, where relevant, to footnote numbers. To find the referenced text, the first (for left-hand pages) or last (for right-hand pages) numbered paragraph on each page appears at the top outside corner of the page.

The Publisher

Preface

This is not a new book, nor is it simply a newly decorated version of some older works of mine. In 2008, Civic Research Institute published in two volumes a second edition of *The Mentally Disordered Inmate and the Law*. That work has been well received by its intended audience and even well reviewed. While the present work clearly grows out of those earlier volumes, it takes on a more streamlined, and I hope, more friendly demeanor.

What, then, is this volume? Who might find it useful? These eighteen chapters represent complete coverage of correctional mental health law along with practical guidance and policy options. I have written in a style that I hope will be accessible to non-lawyers and yet useful to lawyers. That is a delicate balance and whether I have succeeded will rest with the judgment of others.

The earlier, lengthier version has been used in some medical schools and law school courses. This slimmer version should have at least the same appeal.

Progress in correctional health care has, indeed, been driven by litigation. Over a roughly fifty-year period, correctional medical and mental health care has moved from a wasteland with no system of care in place to the creation of systems, some obviously better than others, to system refinement through litigation.

The architecture of legally acceptable correctional mental health care is in place. It is vital for legal and clinical practitioners, administrators, and policymakers to know that architecture. The courts now engage more in the enforcement and refinement of existing legal rights than the creation of new rights. The architectural blueprints are being converted to building codes. It is a long, and possibly very expensive, path from asking if there is a right to mental health care in prison to the requirements of, say, intake screening, medication delivery and storage, and discharge planning.

This work is a narrative of the evolutionary progress, a compendium of the current legal issues, as well as an excursion into the future on such important matters as discharge planning and custodial alternatives.

I am most grateful to Drs. James Knoll, Terry Kupers, and Jeff Metzner, who, without hesitation, accepted my invitation to write for this volume. I know of no more distinguished and dedicated correctional psychiatrists than this trio. Their work appears, respectively, as Chapter 8, Appendix B, and Appendix C.

I thank Linda Mitchell for her word processing and research assistance and University of Arizona Law School, third-year law student Lyn Stewart Hunter for her excellent research assistance.

I again thank CRI executives Mark Peel and Deborah Launer for their continuing support and excellent assistance. I mourn the passing of Arthur Rosenfeld, a founder of CRI, a friend, a scholar, a man of the utmost integrity. Arthur—it was great to know you.

Fred Cohen

Tucson, Arizona—March 2011

Postscript: May 27, 2011—As this work was going to press, the U.S. Supreme Court decided *Brown v. Plata* (131 S. Ct. 1910 (2011)). This was too late for inclusion in the

text but not for a brief mention. The decision often is erroneously described as a notable prisoner release decision when, in fact, it is notable but as a prisoner population reduction decision.

Brown combines *Plata (v. Schwarzenegger*, No. CO1-1351-TEH (N.D. Cal. Feb. 14, 2006)) (medical care) with the long-running *Coleman (v. Wilson*, 912 F. Supp. 1282 (E.D. Cal. 1995)) (mental health care) litigation. The Supreme Court's decision upholds the lower court (a statutorily required, three-judge court) finding that the unconscionable overcrowding in California's prisons is the primary cause of the unconstitutional provision of medical and mental health care. The "primary cause" finding is required by the Prison Litigation Reform Act.

Justice Kennedy wrote for the slender five-Justice majority in his characteristically fence-straddling fashion. While he consistently upheld the record made below, the Justice just as consistently offered California every opportunity for requesting delays. Justice Scalia, writing one of his more hyperbolic, agitated dissents recognized that the majority was providing an "escape plan" even while reaching the wrong result.

Coleman has more than 16 years of failed compliance; of overheated challenges by California; spirited demands by class counsel; and overwrought decisions by Senior Judge Lawrence Karlton as he tries to move toward compliance. Sorry to say, I doubt that the Supreme Court's decision will have any short-term or even medium-term impact in California. California says it plans to redistribute thousands of prisoners to local jails but does not as yet have the money to reimburse the already financially reeling counties.

The California Department of Corrections and Rehabilitation, after years of a scorched-earth litigation policy from the attorney general's office, accumulating litigation loss after loss, seems institutionally paralyzed. And yet the Special Master's team continues to bill and be paid in the vicinity of \$500,000 every month to describe compliance failure but not be able to solve it.

About the Author

Fred Cohen, LL.B., LL.M., Yale Law School, is one of America's foremost experts on correctional law and is generally recognized as the leading scholar and practitioner in correctional mental health law.

He is currently a federal court monitor for correctional medical and dental care in Ohio's prisons and has served as Monitor in the mental health case of *Dunn v. Voinovich*. In addition, in May 2007 he was appointed to head a team investigating Ohio's Division for Youth Services. He also is an active member of the ABA Task Force to revise "Standards for Corrections." He presented testimony on the legal identity of prison inmates before the ABA, Justice Kennedy Committee in San Antonio in February 2004, and testimony on isolation in penal settings before the Commission on Safety and Abuse in America's Prisons in Newark, New Jersey, in July 2005. He has been consulting with the California Department of Corrections & Rehabilitation on attaining compliance with the long-standing *Coleman* decision.

Fred Cohen is professor emeritus at the Graduate School of Criminal Justice, State University of New York at Albany, a program he helped found. He continues to lecture and consult widely while serving as executive editor of *Correctional Mental Health Report* and coeditor of the widely respected *Correctional Law Reporter*.

His publications number in the hundreds and range from books on sex offenders to a casebook, *The Law of Deprivation of Liberty*, to numerous book chapters on correctional mental health law.

Fred Cohen was involved in the widely acclaimed PBS Frontline documentary "The New Asylums" and worked closely with Jamie Fellner of Human Rights Watch on HRW's important book, *Ill Equipped: U.S. Prisons and Offenders with Mental Illness*.

Mr. Cohen takes pride in continuing to hold the NCAA basketball playoff record of thirty-four rebounds in a single game: Temple University vs. Connecticut, 1956. He notes that while records are meant to be broken, this will probably survive since more players rebound today and they certainly are better shooters.



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