# Civil Rights Law & Policy (excerpt)

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# RIGHTS BEFORE THE REPUBLIC

Ideas of liberty, freedom and rights have existed throughout human history, but what we would today consider human rights did not come about until 20th century. Nonetheless, societies around the world began conceptualizing ideas of human dignity, justice and well-being from the earliest flourishing of civilization. These ideas, and the institutions that supported them, can be thought of as "proto-human rights," and they find their earliest expression in the Cyrus Cylinder, an ancient 6th century BCE clay cylinder, upon which are written the rights and privileges to be assigned to the Jewish people by the ancient Persian king, Cyrus the Great. The Cyrus Cylinder is the first known example of a governing body affirmatively granting a people under it's rule liberty and holding itself obligated to guarantee this liberty under penalty and punishment. (Source)

Further advancements in proto-human rights occurred in ancient Athens with the development of the idea of "citizenship" (albeit citizenship was conferred only on certain males in Athenian society) where those with citizenship could vote and had the right to speak in the political assembly.[[1]](#endnote-1)

In South Asia, the ancient inscriptions of stone pillars known as the Edicts of Ashoka, emphasized the importance of tolerance in public policy by the government, forbid the slaughter of prisoners of war, and according to some interpretations, outlawed slavery.

Throughout Chinese history, but perhaps most importantly during the rise of Confucianism in the 6th century BCE, the idea closest to human rights was that of jen: treating others as you would wish to be treated yourself. This idea of a morally superior, loving and just ruler was studied by many in China. This humanistic approach to man, independent of rank and status, led to a formulation of human rights in the sense of a philosophical recognition of the worth of man and his potentiality.

Roman jurisprudence further strengthened the idea of the state's obligations to its people, especially citizens of the Roman empire. The idea of the Roman jus or "right due to a Roman" was the precursor to the modern American right of petitioning the state for redress of grievances. Indeed, the word "justice" derives from jus.

The fall of Rome presaged a degradation of legal progress as many concepts of Athenian democracy and Roman citizenship were overtaken by patron-client relationships between feudal lords and peasant farmers. The Magna Carta, an English charter issued in 1215, was a rare exception in these dark times. Written due to a disagreement between King John, the Pope and other landed English nobility, the Magna Carta required the King to renounce certain powers, respect certain legal procedures, and accept that his will could be bound by the law and not just divine mandate. These ideas eventually ended up transforming into modern American concepts of civil liberties, due process and the rule of law, respectively.

As Rome fell and the Dark Ages swallowed much of continental Europe, the Early Islamic Caliphate introduced innovative social reforms in the Middle East, many of which were later adopted by Renaissance thinkers in Europe. These included the denunciation of aristocratic privilege, an expansion in the rights of women to own property and assert legal claims against men as well as represent themselves in divorce proceedings, an expansion of certain rights to ethnic minorities and perhaps most remarkably, the enshrining of religious freedom in the Charter of Medina, a formal agreement between Muslims and those living under their rule from different faiths. These practices continued relatively unabated through to the end of the Ottoman Empire after World War I.[[2]](#endnote-2)

The Renaissance, the Protestant Reformation and the disappearance of feudal authoritarianism in Europe from the 1400 to 1600’s led to transformation of “proto-human rights” into the modern conception of "rights" as a set of laws and precepts, independent of divine mandate, and similar to the way they are perceived today in the United States. Prior to this time, the Magna Carta and other efforts in the Islamic world and antiquity, constituted a form of limited political and legal agreements to address specific rather than broad-ranging political circumstances.

The conquest of the Americas in the 15th and 16th centuries by Spain, during the Age of Discovery, resulted in vigorous debate about human rights in Colonial Spanish America. This led to the issuance of the Laws of Burgos by Ferdinand the Catholic on behalf of his daughter, Joanna of Castile. Among the provisions of the Laws of Burgos were novel ideas regarding child labor; women's rights; wages; suitable accommodations; and rest/vacation, among others.

Several 17th- and 18th-century European philosophers, most notably John Locke, developed the concept of natural rights, the notion that people are born free and equal irrespective of who they are. Though Locke believed natural rights were derived from divinity since humans were creations of God, his ideas were important in the development of the modern notion of rights. Locke's conception of rights is at the core of what Western democracies today view as human rights: natural rights that do not rely on citizenship nor any law of the state, nor are they necessarily limited to one particular ethnic, cultural or religious group.

The U.S. Declaration of Independence essentially adopted Locke's ideas wholesale, and along with the French Declaration of the Rights of Man and Citizen, defined a set of individual and collective rights (e.g. "certain unalienable rights, that among these are life, liberty and the pursuit of happiness") that apply not only to French or American citizens, but to all men without exception (though "men" as defined in these documents excluded many males, and all women).

A similar seminal document, the Virginia Declaration of Rights, also incorporated many of Locke's ideas regarding natural rights. The Virginia Declaration of Rights was one of the earliest documents to emphasize the protection of individual rights, rather than advocating for the protection of only members of Parliament or consisting of simple laws that can be changed as easily as passed. For instance, it was the first declaration of rights to call for a free press.[[3]](#endnote-3) The Virginia Declaration went on to influence both the U.S. Declaration of Independence and the U.S. Constitution and more importantly, the Bill of Rights - a set of amendments to the U.S. Constitution outlining specific rights to be given to all persons.

# FROM THE REVOLUTION TO WORLD WAR II

"I confess that there are several parts of this Constitution which I do not at present approve, but I am not sure I shall never approve them. For having lived long, I have experienced many instances of being obliged by better information, or fuller consideration, to change opinions even on important subjects, which I once thought right, but found to be otherwise" — Benjamin Franklin

As originally ratified, the U.S. Constitution primarily addressed the structure of the government and provided for few individual liberties. Instead, these rights were set forth later in the Bill of Rights, comprised of the first ten amendments to the Constitution. A bill of rights was demanded by many states in return for ratification of the Constitution itself. Though the Constitution continues to undergo a process of formal amendment and interpretation by courts, the fundamental principles on which this country was founded remain at the core of this document more than 200 years later.

The Bill of Rights remained little more than an empty promise of individual freedom until 1803, when the U.S. Supreme Court held in Marbury vs. Madison that the Supreme Court had the authority to strike down legislation it found unconstitutional. Even then, the Bill of Rights applied only to the federal government and failed to bind individual states until the late 1890's, when the **Incorporation Doctrine** began to take shape.

Through a series of decisions beginning in 1897, the Supreme Court held that the Fourteenth Amendment ensured that portions of the Bill of Rights were enforceable against the states and not just the federal government. Since then, the rights enshrined in the Bill of Rights have been progressively enumerated by the Supreme Court as worthy of constitutional protection irrespective of whether government interference is the result of state or federal action. These rights are said to be "incorporated" against the states through the Fourteenth Amendment.

A prominent and relatively recent example of this incorporation can be found in Gideon v. Wainwright where the Supreme Court unanimously held that states were required under the Sixth Amendment to provide counsel in criminal cases to represent defendants unable to afford their own attorneys. 375 U.S. 335 at 372. The Gideon decision dramatically transformed the rights of indigent, low-income and unsophisticated litigants throughout the country. The decision effectively created and then expanded the need for public defenders which had previously been rare for non-federal cases. For example, immediately following the decision, the state of Florida required public defenders for all parties in need in each of the state's circuit courts.[[4]](#endnote-4)

Chief among the ten amendments is the first one. The First Amendment is primary for a reason: it bestows among the most comprehensive and expansive of rights upon the American polity. The First Amendment protects the free exercise of religion, the freedom of speech and the press, and the freedom to petition the government and assemble as a group to protest or express grievances. A discussion of the development of a few of the most important of these rights: the freedom of religion and the freedom of speech and the press is instructive because these rights are foundational to the American ethos, due mostly to the circumstances of religious and state-sponsored persecution which spurred the creation of the United States.

# THE MODERN CIVIL RIGHTS MOVEMENT

Although amendments to the Constitution after the Civil War guaranteed equal rights to all Americans, many U.S. citizens—especially African Americans—still experienced discrimination and segregation on a wide scale. Southern states passed **“Jim Crow”** laws, which required African Americans and white people to be separated in most public places, such as schools or restaurants. African Americans had to ride in the back of buses and use separate public restrooms. In the North, African Americans could vote, and segregation was less noticeable, but prejudice still restricted opportunities for them. From an early time, many Americans objected to the unfair treatment of African Americans, and in 1909, a group of mostly African-Americans founded the National Association for the Advancement of Colored People (NAACP). The NAACP worked through the courts to challenge laws and customs that denied African Americans their constitutional rights. In 1910, other concerned citizens formed the National Urban League to help African Americans find jobs and reach economic parity with other Americans. These and other groups built a civil rights movement supported by millions of people across the United States.

In 1948, President Harry Truman ordered an end to segregation in the nation’s armed forces; and in 1954, the Supreme Court ruled in favor of NAACP lawyers in Brown v. Board of Education, deeming racial segregation in public schools unconstitutional under the Fourteenth Amendment’s equal protection principle. In the 1950s, Dr. Martin Luther King, Jr., a Baptist minister and a central leader in the civil rights movement, inspired others to join the movement through marches, boycotts, and demonstrations that expressed non-violent resistance to and peaceful protest of discriminatory laws and practices. Some African-American students participated in “sit-ins” at lunch counters reserved for white people, while other African Americans, along with many white citizens, teamed up as “Freedom Riders” to ride buses together throughout the South to protest segregation. On August 23, 1963, more than 200,000 people marched in Washington D.C. to demand equal rights regardless of skin color.

Finally, in 1964, Congress listened to the demands of the people and passed the Civil Rights Act, which prohibited discrimination in public facilities, employment, education, and voter registration based on race, color, gender, religion, and national origin. Then in 1965, the Voting Rights Act was enacted, further ensuring that minorities gained equal access to the polls.

This broad period from the end of World War II until the late 1960's is often referred to the as the "Second Reconstruction," a time when grassroots movements, coupled with gradual but progressive actions by elected leaders and the judiciary, granted all Americans full political rights (at least in name).

This "Second Reconstruction" and the civil rights movement that arose before, during and after Dr. King's passing encouraged the passage of statutes expanding the application of constitutional amendments in other, more modern, areas of public life. State and federal statutes passed throughout the 1950's and 1960's addressed civil rights in the context of education, employment, and housing. These statutes typically outline the scope of the penalties and remedies against interference with the right, and often create a government agency or office (such as the Equal Employment Opportunity Commission or EEOC) to enforce the right through investigation, penalties and prosecution.[[5]](#endnote-5)

## **Who is Protected?**

Civil rights legislation and policy promulgated since the civil rights movement is ordered around the idea of "protected classes" or characteristics. Protected characteristics include the aforementioned gender, age, or religion but can also include other categories such as pregnancy or sexual orientation. There are some characteristics that are only protected against discrimination at work or school or only in certain states, such as gender identity or criminal record.

Arguably the most influential civil rights law since the end of the civil war is the Civil Rights Act of 1964. This law prohibits discrimination on the basis of race, color, national origin, or religion in public establishments with connections to interstate commerce or those that the state supports with financial assistance. Certain parts of the Civil Rights Act prohibit specific areas of discrimination. For instance, Title VI, prohibits discrimination in educational programs that receive federal financial assistance, and Title VII prohibits employment discrimination when an employer engages in interstate commerce.

Additional anti-discrimination statutes include: The Voting Rights Act of 1965, the American with Disabilities Act (ADA), the Age Discrimination in Employment Act of 1967 and the Civil Rights Act of 1991. As seen above these statutes are codifications of situations Congress has thought deserve remedies, primarily because they occur often or are widespread. Despite these laws, the Supreme Court and other state and federal courts frequently interpret situations not covered by statute. For example, the Supreme Court’s interpretation of Title IX of the Civil Rights Act of 1964 found that a victim of intentional sex discrimination has the private right to bring a civil action for damages against a recipient of federal financial assistance. Source. Federal courts were also crucial in mandating school desegregation.

In some cases, multiple civil rights statutes are implicated. For example, if a pregnant female applicant of Middle Eastern descent over the age of 40 does not get a job for which she is qualified in California, her civil rights under Title VII of the Civil Rights Act of 1964, the Pregnancy Discrimination Act that is part of Title VII, and California’s Fair Employment and Housing Act may all be implicated. Similarly, a pregnant and disabled teenager who is banned from attending high school because of her pregnancy may have grounds to file suit or obtain other remedies under Title IX, the Americans with Disabilities Act (ADA), the Individuals with Disabilities Education Act (IDEA), and Section 504 of the Rehabilitation Act of 1973 (Section 504).

Often, retaliation related to the exercise of an individual's civil rights is also prohibited, both in law and policy. This means that an employer or academic institution cannot take an adverse action against someone merely because they seek to address a civil rights related grievance. The Equal Employment Opportunity Commission's (EEOC) policy is illustrative:

"A manager may not fire, demote, harass or otherwise "retaliate" against an individual for filing a complaint of discrimination, participating in a discrimination proceeding, or otherwise opposing discrimination. The same laws that prohibit discrimination based on race, color, sex, religion, national origin, age, disability and genetic information also prohibit retaliation against individuals who oppose unlawful discrimination or participate in an employment discrimination proceeding.

It is important to understand how retaliation manifests and to prevent it from occurring. If retaliation for such activities were permitted, it would have a chilling effect upon the willingness of individuals to speak out against employment discrimination or to participate in the EEOC's administrative process or other employment discrimination proceedings. Thus, EEO practitioners must work diligently with managers to ensure that retaliation is not permitted in the workplace.

It is obvious that the cause and effect of interpersonal conflicts can potentially implicate a legal process. This is particularly apparent with retaliation law because the legal standard requires an examination of the behavior after the allegation. The standard for proving a retaliation claim requires showing that the manager's action might deter a reasonable person from opposing discrimination or participating in the EEOC complaint process."[[6]](#endnote-6)

# BEYOND CIVIL RIGHTS

Since the 1960's overt discrimination, such as the segregation of public facilities on the basis of race, has diminished or vanished completely. Nonetheless, circumstantial discrimination remains a persistent problem. The ability to address much of this indirect discrimination lies beyond the confines of the law discussed thus far. Thus, a hundred and fifty years after the end of slavery, African-American families remain on average 13 times poorer than their white counterparts. School segregation and housing discrimination have been illegal since the passage of the Housing Discrimination Act, yet African-Americans live in poorer school districts and neighborhoods that remain informally segregated. The Civil Rights Act of 1964 addressed voting rights and the Supreme Court's seminal Brown vs. Board of Education decision did away with "separate but equal," but a law cannot change the underlying problems, such as poverty, that create the conditions in which inequality thrives.

Modern civil rights movements (often referred to as "social justice movements") such as "Black Lives Matter," and the "Occupy Wall Street" movement are consciously or subconsciously calling attention to a long-held legal and policy doctrine known as **disparate impact**. In the United States, disparate impact refers to practices in employment, housing and other areas that adversely affects one group of people (usually referring to those with a protected characteristic) more than another, even though the rules applied by employers, teachers, the government, landlords, etc., are prima facie neutral (i.e. neutral on their face). In most cases, a civil rights violation can be shown if an official practice has a disproportionally adverse effect on members of the protected class as compared with non-members of the protected class. The impact of policies that disparately impact a group of people are often felt over time, and indirectly. For instance, state-sponsored surveillance of a group of individuals with a specific last name isn’t facially discriminatory against Orthodox Jews, nonetheless if the last name is one commonly shared by many Orthodox Jews and is a name chosen due to their faith, they end up being discriminated against merely because of their religion.

As communities attempt to come to term with these more nuanced civil rights issues, they often find that legal concepts and policies are inadequate to address multilayered and circumstantial discrimination. Thus, though adequate legal concepts of disparate impact are nonetheless insufficient descriptors of the kinds of nuanced, hidden and indirect discrimination that is part of American life today. To describe these problems more accurately, modern social justice movements rely on ideas of structural racism, institutional racism/sexism, privilege and racial/gender equity. For example, even though the First Amendment guarantees freedom of speech, how powerful is that speech as an advocacy tool if you are an African-American in jail, a woman working in a male-dominated profession, or an American Muslim in the armed forces? What barriers silence or chill your speech? What institutions and cultural values perpetuate a system whereby you self-censor your thoughts for fear of retaliation or discrimination?

# Looking Ahead

"What used to be racial segregation now mirrors itself in class segregation." — Barack H. Obama

A growing movement for economic civil rights is now taking hold in the United States. One that acknowledges that racial and religious bigotry in the United States isn't over, but that there is a parallel set of worsening problems, chief among them a division of the populace by extremes of the economic classes. Even Martin Luther King Jr. recognized this issue half a century earlier when he advocated for a “Poor People's Campaign” to supplement civil rights efforts for low-income African-Americans. Since that time, as economic inequality in the United States has worsened, a movement to address class inequality has only grown.

Consider the issue of marriage across racial and class lines. Whereas interracial marriage was illegal in many states half a century ago, today it is common. By contrast, while marriage across class lines was increasingly accepted in the first half of the twentieth century, that trend has reversed itself as educated people have become less likely than in the past to marry those with less education.

1. Shelton, Dinah. "An Introduction to the History of International Human Rights Law," SSRN.com. George Washington University Law School. SSRN 1010489.
 [↑](#endnote-ref-1)
2. Firestone (1999) p. 118; "Muhammad", Encyclopedia of Islam Online. *See also*, Watt. Muhammad at Medina and R. B. Serjeant "The Constitution of Medina." Islamic Quarterly 8 (1964) p. 4.
 [↑](#endnote-ref-2)
3. Smith, Craig R. (1993). To form a more perfect union. Long Beach, CA: Center for First Amendment Studies. p. 21.
 [↑](#endnote-ref-3)
4. "Gideon's Promise, Still Unkept". The New York Times. 1993-03-18. Retrieved 2008-08-08. As funding for public defender programs has increased, novel ways of representing the poorest have emerged. For instance, In 2010, a public defender's office in the South Bronx called The Bronx Defenders created the Center for Holistic Defense, which has helped other public defender offices, from Montana to Massachusetts, develop a model of public defense called holistic defense or holistic advocacy. In it, criminal defense attorneys work on interdisciplinary teams, alongside civil attorneys, social workers, and legal advocates to help clients with direct and collateral aspects of their criminal cases. *See* Daniel June (May 7, 2013). "How Well are the Poor Publicly Defended?". jdjournal.com. [↑](#endnote-ref-4)
5. Though federal law pre-empts state and local laws, in many cases state and local laws can provide greater civil rights protections than federal law. For instance, California's Unruh Civil Rights Act outlaws workplace discrimination based on not only the federal categories of sex, race, religion, age and national origin, but extends these protections to discrimination on the basis of medical condition, genetic information, marital status and sexual orientation. [↑](#endnote-ref-5)
6. Equal Employment Opportunity Commission, “Retaliation Considerations” available at: <https://www.eeoc.gov/laws/types/retaliation_considerations.cfm> [↑](#endnote-ref-6)