

THE LIMAN REPORT

Arthur Liman Public Interest Program • Yale Law School

Fall 2014

Isolation and Reintegration: Punishment Circa 2014



F House, Stateville Correctional Center, Crest Hill, Illinois (1925) W. C. Zimmerman, photographer.

Courtesy of Joe Day, *Corrections and Collections: Architectures for Art and Crime* (Routledge 2013)

Help Support and Expand the Liman Program, see page 58

1972/2014

In 1972, Arthur Liman chaired the New York State Special Commission on Attica. The Commission investigated the prison disturbance that resulted in the deaths of 43 New Yorkers, including prisoners and staff. Sadly, the report's concluding paragraphs are equally resonant today:

The problem of Attica will never be solved if we focus only upon the prisons themselves and ignore what the inmates have gone through before they arrive at Attica. The criminal justice system is at least as great a part of the problem of Attica as the correctional facility itself.

The process of criminal justice will never fulfill either its promises or its obligations until the entire judicial system is purged of racism and is restructured to eliminate the strained and dishonest scenes now played out daily in our courtrooms. Justice is sacrificed to administrative efficiency, and there are no winners. Experiences with the inequities of bail with plea bargaining, adjournments, overworked defense attorneys, interminable presentence delays, and disparities in sentences imposed for identical offenses leave those who are convicted with a deep sense of disgust and betrayal. If the criminal justice system fails to dispense justice and impose punishment fairly, equally, and swiftly, there can be little hope of rehabilitating the offender after he is processed through that system and deposited in a prison – even a prison remodeled on the principles enunciated above.

We cannot expect even the most dramatic changes inside the prison walls to cure the evils of our criminal justice system, nor of society at large. On the other hand, eradication of those evils would go a long way toward solving the problems of our prisons. In the meantime the public has a right to expect the state to maintain prisons for the protection of society and to demand that those prisons not turn out men more embittered, more antisocial, and more prone to violence than they were when they entered

Change should not be lightly undertaken, but the status quo can no longer be defended. The only way to salvage meaning out of the otherwise senseless killings at Attica is to learn from this experience that our Atticas are failures. The crucial issues remain unresolved; and they will continue unresolved until an aroused public demands something better.

September 13, 1972

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Interrogating How and Why Prisoners are Isolated by Place and by Rule

Solitary confinement is an American invention. One of the earliest experiments in large-scale incarceration was Eastern State Penitentiary in Philadelphia. Inspired by Enlightenment-era principles eschewing public displays of physical punishment, reformers instituted a strict regime of solitary reflection and penance. Charles Dickens, who visited the prison in 1842, described the experience:

Looking down these dreary passages, the dull repose and quiet that prevails, is awful. Occasionally, there is a drowsy sound from some lone weaver's shuttle, or shoemaker's last, but it is stifled by the thick walls and heavy dungeon-door, and only serves to make the general stillness more profound. Over the head and face of every prisoner who comes into this melancholy house, a black hood is drawn; and in this dark shroud, an emblem of the curtain dropped between him and the living world, he is led to the cell from which he never again comes forth, until his whole term of imprisonment has expired He is a man buried alive; to be dug out in the slow round of years

The “Eastern model,” as it came to be called, was replicated across the United States. In 1913, Eastern State Penitentiary abandoned the rigid system of solitary confinement, and the prison itself closed in 1971. Today, the building is a U.S. Historic Landmark, and tourists are welcomed daily to enter the cells and wander its corridors.

During the past year, the Liman Program has explored how far we have come, and how close we remain, to the model of incarceration that the Eastern State Penitentiary represents. The 2013 fall Workshop, *Incarceration*, a seminar at Yale Law School for our students, addressed the law of prisons; the market for prisons; the perspectives of those who direct prisons, who work in them, and who are detained by them; and the impact of prisons on the polity. In addition to Liman Director Hope Metcalf, Senior Fellow Megan Quattlebaum, and Liman Professor Judith Resnik, the workshop was co-taught by Ashbel T. Wall, II, Director of Corrections for Rhode Island, then-President of the Association of State Correctional Administrators, and a graduate of Yale College and Yale Law School. The 2014 spring Workshop, *Moving Criminal Justice: Prohibition, Abolition, Regulation, and Reform*, considered how criminal justice reform agendas are developed, gain currency, become law, and do, or do not, make change.

Several Liman Projects, undertaken by law students and Liman faculty, addressed how prisons integrate or exclude incarcerated people. Every prison system in the United States uses some form of administrative segregation – confining

prisoners in cells for 23 hours a day without access to most educational or rehabilitative programming. This form of isolation within prisons has produced a good deal of concern, reflected in the contemporary movement to “stop solitary.”

To understand the parameters of administrative segregation, in 2013, the Liman Program concluded a survey of prison policies in the states and federal system; that report documented the wide discretion accorded prison administrators to isolate individuals. In February 2014, U.S. Senator Dick Durbin convened *Reassessing Solitary Confinement: The Human Rights, Fiscal, and Public Safety Consequences*, which was the second congressional hearing on that topic. Below, we excerpt four of the submissions provided to a subcommittee of the Senate Judiciary Committee – from Rick Raemisch, the Director of the Colorado Prison system; from Gary Mohr on behalf of the Association of State Correctional Administrators; from the National Prison Project of the ACLU; and excerpts from the Liman statement. Senator Durbin concluded the hearing by calling for the end of the use of isolation for people with serious mental illness, juveniles, and pregnant women. The exchanges at the hearing reflected the consensus that profound reforms are needed, even as the shape and the means of change remain subject to debate.

In addition to segregation in prisons, other sources of isolation are the distance at which prisons are placed and policies that make visiting difficult. Research on visiting demonstrates the contributions made by ongoing contact between inmates and their families. Prisoners who are visited do better once released, as well as while incarcerated. A Liman Project – *Prison Visitation Policies: A Fifty State Survey*, co-authored by Chesa Boudin YLS '11, Trevor Stutz YLS '12, and Aaron Littman YLS '14 – provided the first comprehensive comparison of such policies in the states and federal system. In 2014, the Yale Law and Policy Review published their essay, with commentary from those who run, who study, and who sue prisons. Specifically, Rhode Island Director of Corrections A.T. Wall, II offered his thoughts in “*Why Do They Do It That Way?*,” and David Fathi, Director of the ACLU’s National Prison Project, raised concerns in his discussion “*An Endangered Necessity*” about a shift away from in-person visits, while Giovanna Shay offered comparative perspectives in her essay “*Visiting Room.*”

Additional efforts to mitigate the isolation are the subject of projects by several current and former Liman Fellows, addressing the challenges that distances and conditions of confinement impose on detainees in both the criminal justice and immigration systems. Essays by Burke Butler and Beth Compa describe the disabling conditions of death row in Louisiana and

Texas and how staff and inmates share some common ground in making units habitable. Amanda Alexander and Caitlin Mitchell reflect upon their work – in Michigan and in Oregon – to help incarcerated parents to maintain ties with their children. In Connecticut, the proposal by the Federal Bureau of Prisons (BOP) to close Danbury FCI – its sole prison for women in the Northeast – prompted concerns. Emma Kaufman and Anna Arons, who joined other students in working with Judith Resnik and Megan Quattlebaum, recount ongoing efforts – supported by eleven members of the Senate who are from the Northeast – to prevent FCI Danbury from closing to women and to return it to use for federal women prisoners from the Northeast.

In April of 2014, the Seventeenth Annual Liman Colloquium, *Isolation and Reintegration: Punishment Circa 2014*, brought

together several directors of state correctional systems, judges, scholars, architects, foundation and non-profit organization leaders, law students, faculty, and Liman Fellows to explore together how to reorient sentencing and prison practices. By including essays from some of the participants, we hope to enable readers to share the sense of urgency felt by those who attended and to appreciate the complexity of the issues, as well as the many different views about the processes and pathways to change. Yet despite differences, agreement exists on a central point: over-incarceration is a great burden on both the individuals subjected to prison and on the United States. The consensus forming around a need for change presents an opportunity for cooperation across sectors, disciplines, regions, and political divides.

Reassessing Solitary Confinement: Excerpts from Testimony submitted for the February 2014 U.S. Senate Hearing

The Liman Program, with the assistance of the Association of State Corrections Administrators (ASCA), reviewed policies on administrative segregation in effect in 2013 in 46 states and the Federal Bureau of Prisons. A statement based on that study was submitted to the Subcommittee on Civil Rights and Human Rights of the Senate Judiciary Committee at its February 25, 2014 Hearing, *Reassessing Solitary Confinement II: The Human Rights, Fiscal, and Public Safety Consequences*. It is available at http://www.law.yale.edu/documents/pdf/News_&_Events/Liman_Senate_Statement.pdf.

Following are excerpts from the Liman statement and from statements submitted by Rick Raemisch, Executive Director of Colorado's Department of Corrections, discussing the overuse of isolation; from the National Prison Project of the American Civil Liberties Union on the national movement to "stop solitary," and from Gary Mohr, Director of Ohio's Department of Rehabilitation and Correction, who outlined on behalf of ASCA its recent efforts to identify principles for when and how to use segregation.

The Policies Governing Placement in Isolation in U.S. Prisons

Hope Metcalf and Judith Resnik

We detail how corrections departments define the criteria for placement in administrative segregation, the processes for determining who falls within those criteria, some of the rules governing contact while in isolation, and the provisions for exit . . .

What we can report is that, despite the 47 different policies, administrative segregation throughout the United States shares the same basic features: criteria for placement give broad discretion to decision-makers; detention generally is open-ended, rather than for a fixed duration; confinement is close and restrictive; and access to contact with visitors and to activities is very limited.

Looking at the rules sheds light on why the practice of administrative segregation has become so prevalent. The policies provide relatively little guidance about which concerns and what risks necessitate segregation, and under which circumstances or by which criteria an inmate should be returned to general population. Thus, the rules do not reflect how segregation is actually used, either in the

jurisdictions where isolation remains commonplace or in those that, in recent years, have reduced their segregation populations. As a consequence, we remain concerned that isolation is used too often, for too long, and with too little oversight . . .

Correctional systems explain that administrative segregation is used to ensure the safety of inmates, staff, and the public. As testimony presented at the Hearing on February 25, 2014 emphasized, the issue is not whether safety is central but whether reliance on isolation promotes safety. Reading the many policies makes plain the degree of discretion accorded to correctional officials when deciding whether to put individuals into isolation:

"Presence of the inmate in general population would pose a serious threat to the community, property, self, staff, other inmates, or the security or the good government of the facility." – Hawaii, COR.11.01.2.2.a.2; *see also* North Dakota, DOC 5A-20.2.a; Vermont, DOC 410.03;

"Based on: 1) threat an offender's continued presence in the general population poses to life, self, staff, other offenders, or property; 2) threat posed by the offender to the orderly operation and security of the facility; and 3) regulation of an offender's behavior which was not within acceptable limits while in the general offender population." - Indiana, DOC 02-01-111-II;

"Administrative segregation admission results from a determination by the facility that the inmate's presence in general population would pose a threat to the safety and security of the facility." - New York, 7 NYCRR 301.4(b).

... A few jurisdictions have narrowed or are planning to narrow the criteria. For example, in Colorado as of 2013, administrative segregation policies were under revision to require showings of serious bodily harm or other discrete acts. Virginia revised its policy in 2012 to require specific predicate acts for admission to long-term segregation.

All of the policies authorize immediate temporary placement in segregation. Thereafter, some but not all jurisdictions provide for notice of the grounds for the placement and an opportunity for a hearing evaluating the need for

continued segregated detention. The kind of notice and hearing required varies substantially, as do the decision-makers. Some systems leave decision-making at the unit-level, others place authority in committees, and others require oversight by the warden or the central office.

Thirty-eight jurisdictions specify that a hearing be held upon initial placement, while nine jurisdictions authorize administrative segregation and do not mention hearings. All but seven of the jurisdictions mandating hearings also require that some form of written notice be provided to the inmate in advance of the hearing. Among states that require hearings, nearly all specify that the hearings must take place within 14 days of placement

Most of the policies authorize a diverse set of institutional authorities – staff, shift commanders, deputy wardens, wardens – to make initial decisions on placing prisoners immediately in segregation. Policies call for additional procedures thereafter. Thirty-one jurisdictions authorize decision-making by a committee In three jurisdictions, Hawaii, Kentucky, and Tennessee, the warden or his/her designee is responsible for making initial determinations.

Of the 38 jurisdictions that specify hearing procedures, 30 authorize inmates to present evidence (by oral statements,

written submissions, or documents) and/or to call witnesses, subject to security considerations. Eight states (Arizona, Connecticut, Idaho, Maine, Mississippi, Nevada, New Mexico, and New York) do not specify that inmates can present evidence. Of these 38 jurisdictions, eight authorize inmates to have a representative, advocate, assistant, or counselor to assist with hearing proceedings. Nine additional jurisdictions provide for assistance or appoint representatives in specified circumstances – such as language barriers, illiteracy, or mental illness – so as to help in preparation for the hearing or to explain the inmate's rights and/or the proceedings

Fifteen jurisdictions authorize automatic review by the warden (or designee). For example, in Ohio, a hearing officer issues a report to the warden, who decides whether placement is appropriate. Six of these states (Alaska, Colorado, Nebraska, Ohio, Vermont, and Washington) provide for another level

of review, typically at the central office. Nine jurisdictions provide for automatic review by the central office: Arizona, the Federal Bureau of Prisons, Maine, Massachusetts, Minnesota, Mississippi, New Mexico, Rhode Island, and Virginia. North Dakota and Oklahoma state that reviews will be done by "the appropriate authority."

A fewer number of states

specify that inmates can appeal a placement. Five states permit inmates to appeal placement decisions to the warden: Kansas, Maine, Mississippi, Pennsylvania, and South Dakota. Two of those states, Pennsylvania and South Dakota, provide for another level of review. In some states, such as Arizona, Michigan, New York, and Oregon, inmates can appeal to the central office

Reading dozens of policies on isolation underscores the reliance placed on this practice in American prisons. Policies cast a wide net of authority and provide dozens of predicates to permit placement of inmates in isolation. Only a few jurisdictions make placements more difficult by imposing specific controls on such decisions. As of 2013 and despite efforts in several jurisdictions to address the overuse of isolation, the written criteria for placing individuals into segregation facilitate its ready use.

Missing from policies are concrete directives to diminish the reliance on isolation and to restructure isolation to limit the degrees of isolation when prisoners are so confined. The policies governing isolation did not describe isolation as a last resort, to be used sparingly for the shortest duration possible, and under the least isolating conditions.



Judith Resnik, Arthur Liman Professor.



Hope Metcalf, former Liman Director.

Administrative Segregation: A Story Without an End

Rick Raemisch, Executive Director of the Colorado Department of Corrections

... I was appointed to my position following the murder of the Department's former Executive Director on March 19th of last year. Tom Clements, as many of you know, was murdered answering the door of his home by a recent parolee who had been released directly into the community from Administrative Segregation. I am honored to appear before the Subcommittee, and I look forward to talking to you about Administrative Segregation and what we are doing in Colorado to prevent such tragedies from ever happening again.

My career in law enforcement began in 1976 when I became Deputy Sheriff in Dane County, Wisconsin. During the three decades that followed, I served the citizens of my home state as Deputy; Undercover Narcotics Detective; elected Sheriff; Assistant District Attorney; Assistant U.S. Attorney; Administrator of Probation and Parole, Wisconsin Department of Corrections; Deputy Secretary, Wisconsin Department of Corrections; and Secretary, Wisconsin Department of Corrections.

My experiences in law enforcement have led me to the conclusion that Administrative Segregation has been overused, misused, and abused for over 100 years. "The Steel Door Solution" of segregation, as I call it, either suspends the problem or multiplies it, but definitely does not solve it. If our goal is to decrease the number of victims inside prison, and outside prison, like Tom Clements, then we must rethink how we use Administrative Segregation, especially when it comes to the mentally ill. This is a goal I pursued in Wisconsin and now am pursuing in Colorado.

While head of the Wisconsin Department of Corrections (DOC), I was accountable for more than 22,000 inmates, 73,000 individuals on probation or parole, and approximately 1,000 juveniles. During my three and a half years leading the Department, we made tremendous strides in reducing the number of offenders in Administrative Segregation and removing those with mental illness so they could receive treatment.

I was in Wisconsin when I heard of Tom Clements' murder. After the initial shock, I became angry someone had the audacity to take the life of someone who was working hard to improve the quality of life for inmates while also protecting the public. I applied for the position, and was appointed Executive Director by Governor John Hickenlooper, who wanted me to continue Mr. Clements' vision. For me, it was an opportunity to bring to Colorado what I had started in Wisconsin. Moreover, it was an opportunity for me to channel my anger about Mr. Clements' death into developing and implementing a plan that focuses on using segregation only for those who really need it, making sure those offenders who are released from solitary do not cause more harm, and making sure segregation does not



Rick Raemisch (left), joined by the Honorable Myron Thompson, in New Haven, at the 2014 Liman Colloquium.

make people more violent.

My belief was, and still is, that it's impossible to hold an offender with an unstable serious mental illness accountable for violating the prison's rules, if the offender doesn't understand the rules he is supposed to be playing by. So expecting a mentally ill inmate who is housed in Administrative Segregation long-term and without treatment to follow the rules is pointless. It's my conviction that long-term segregation creates or exacerbates mental illness. I try to visit institutions at least once a week to talk with staff and inmates including some who are in Administrative Segregation. Often times, the mental illness was apparent. Sometimes inmates were so low-functioning they could not meaningfully function or communicate.

During my time in Wisconsin, I developed many of the philosophies and practices that we are successfully incorporating at the Colorado DOC. Some of this work had already begun under the direction of former Executive Director Tom Clements.

Since leading the CDOC, I've worked with my Executive Team to develop a workable action plan to reduce the use of Administrative Segregation. We are reducing the number of offenders in Administrative Segregation by assessing each case individually. We have made reductions among those with a serious mental illness, those who are released directly from Administrative Segregation into the community, and all other persons in Administrative Segregation.

Along with my Executive Team, I am focusing on allowing the use of Administrative Segregation only for those who truly are a danger to others or themselves. But just because an offender needs to be in Administrative Segregation for safety

reasons, that doesn't mean they should sit in a windowless, tiny cell for 23 hours a day. There are other solutions. There are other options.

In Colorado, our goal is to get the number of offenders in Administrative Segregation as close to zero as possible, with the exception of that small number for whom there are no other alternatives. We have put in place an action plan that I believe will get us to that goal by the end of this year. This action plan consists of:

- focusing the use of Administrative Segregation on truly violent offenders who pose an immediate danger to others or themselves;
- not releasing an offender into the community directly from Administrative Segregation;
- removing levels of Restrictive Housing (housing will be driven by incentives);
- developing a Sanction Matrix for violent acts, which will result in placement in Administrative Segregation;
- ending indeterminate lengths of Administrative Segregation placement;
- reviewing the cases of offenders currently housed in Administrative Segregation for longer than 12 months;
- establishing a "Management Control Unit" where offenders have 4 hours a day out of their cells in small groups;
- establishing a "Transition Unit" with a cognitive course to prepare offenders for transition to General Population;
- redefining the housing assignments with incentives for Death Row offenders; and
- these offenders will no longer be classified as Administrative Segregation cases and will have opportunities to leave their cells 4 hours a day together.

While the goal is to decrease the number of offenders housed in Administrative Segregation, there will always be a need for a prison within a prison. Some offenders will need to be isolated to provide a secure environment for both staff and offenders, but they should not be locked away and forgotten.

Administrative Segregation cannot be a story without an end for offenders. While I continue to believe that offenders who are violent should remain in Administrative Segregation until they can demonstrate good behavior, there must be a defined plan. Offenders, if they are to meet expectations, must know what those expectations are; to succeed, they must know what success looks like. When individuals enter the prison system

they know the length of their sentence. The same philosophy should apply to those entering an Administrative Segregation cell.

Since putting the first stage of the Department's action plan into effect in December, we are seeing successes. In these few months, the number of serious mentally ill housed in Administrative Segregation has been reduced to one offender. These offenders removed from Administrative Segregation are receiving treatment in Residential Treatment Programs outside of the containment of Administrative Segregation.

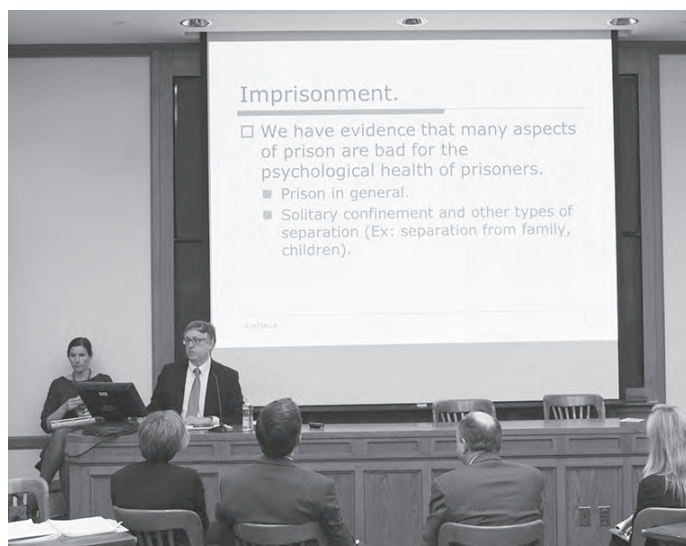
As a result of recent changes, the Colorado Department of Corrections has seen a reduction in the Administrative Segregation population from 1,451 in January 2011 to 597 in January 2014. That is a reduction of nearly 60 percent. Because Colorado's total adult offender incarcerated population is currently 17,574, this means the Colorado DOC Administrative Segregation population is currently just 3.4%, down from a peak of 1,505 or 6.8% in August of 2011. As a result of these reductions, we did not see an immediate increase in assaults. We believe as we track this further, our institutions will actually be safer.

Of course, there is no question that Administrative Segregation is more expensive. The cost of housing an offender in Administrative

Segregation is \$45,311 a year, compared to the \$29,979 a year it costs to house an offender in general population. Therefore, each offender that is housed in the general population and not Administrative Segregation saves the state \$15,332 annually per offender.

I am data driven. And if what you care about is victims and the community, you must do what works. What I want is fewer victims. Each person we turn around who was in Administrative Segregation means fewer victims of crime and violence. Ninety-seven percent of all offenders will eventually go back to their communities. Releasing offenders directly from Administrative Segregation into the community is a recipe for disaster. Our job is to effectively prepare each of them for successful re-entry, not to return them to the community worse than before their time in prison. In Colorado, in 2012, 140 people were released into the public from Administrative Segregation; last year, 70; so far in 2014, two.

This is a message I deliver directly to my wardens. I say to them: "Who wants to live directly next to someone who was just released from solitary confinement? Think about how



Tom Tyler, Macklin Fleming Professor of Law and Professor of Psychology at Yale Law School, presents a summary of his findings to the Liman roundtable participants in New Haven. Tyler has studied how perceptions of fairness contribute to the legitimacy of – and thus, public willingness to follow rules set by – institutions such as courts, police, and prisons.

dangerous that is.” I also encourage my staff to spend some time in segregation so that they understand the experience. I have done that myself, and the experience was eye-opening.

The current reliance on Administrative Segregation is not a Colorado problem. It’s not even only a national problem. The use of Administrative Segregation is an international problem

and it will take many of us to solve it. I believe reform requires the cooperation of corrections leadership, corrections staff, legislators, stakeholders and the community. But I do see change. I see an evolution that will better serve our citizens and make our communities safer. . . .

American Civil Liberties Union, Statement for “Reassessing Solitary Confinement II: The Human Rights, Fiscal, and Public Safety Consequences”

... [T]he ACLU established the National Prison Project in 1972 to protect and promote the civil and constitutional rights of prisoners. Since its founding, the Project has challenged unconstitutional conditions of confinement and over-incarceration at the local, state and federal level through public education, advocacy and successful litigation. The ACLU’s national “Stop Solitary” campaign works to end the pervasive use of solitary confinement and to divert children and persons with mental disabilities and mental illness out of solitary altogether. The monetary cost of solitary confinement, coupled with the human cost of increased psychological suffering and sometimes irreparable harm, far outweighs any purported benefits. More effective and humane and less costly alternatives exist

Over the last two decades, corrections systems have increasingly relied on solitary confinement, even building entire “supermax” prisons, where prisoners are held in extreme isolation, often for years or even decades. Although supermax prisons were rare in the United States before the 1990s, today forty-four states and the federal government have supermax units or facilities, housing at least 25,000 people nationwide. But this figure does not reflect the total number of prisoners held in solitary confinement in the United States on any given day. Using data from the Bureau of Justice Statistics, researchers estimated in 2011 that over 80,000 prisoners are held in “restricted housing,” including administrative segregation, disciplinary segregation and protective custody – all forms of housing involving substantial social isolation.

This massive increase in the use of solitary confinement has led many to question whether it is an effective or humane use of public resources. Legal and medical professionals criticize solitary confinement and supermax prisons as unconstitutional and inhumane, pointing to the well-known harms associated with placing people in isolation and the rejection of its use in American prisons decades earlier.

Other critics point to the expense of solitary confinement. Supermax prisons typically cost two or three times more to build and operate than even traditional maximum-security



Amy Fetting, Senior Staff Attorney of the ACLU’s National Prison Project and Director of the Stop Solitary Campaign, addresses the 2014 Liman Colloquium.

prisons. Yet there is little evidence to suggest that solitary confinement makes prisons safer. Indeed, research suggests that supermax prisons actually have a negative effect on public safety. Despite these concerns, states and the federal government continue to invest taxpayer dollars in constructing supermax prisons and enforcing solitary confinement conditions. As new fiscal realities force state and federal cuts to essential public services like health and education, it is time to ask whether we should continue to use solitary confinement despite its high fiscal and human costs

... Numerous states have taken steps to investigate, monitor, reduce, and reform their use of solitary. These reforms have resulted from agency initiative as well as legislative action. A growing number of state corrections officials have taken direct steps to regulate the use of solitary confinement, especially as it relates to mental health issues and potential litigation. Responding to litigation that was settled in 2012, the Massachusetts Department of Correction rewrote its mental health care policies to exclude prisoners with severe mental illness from long-term segregation and designed two maximum security mental health treatment units to divert the mentally ill out of segregated housing

U.S. Immigration and Customs Enforcement (ICE) has since September 2013 imposed monitoring requirements and substantive limits on the use of solitary confinement, providing an example for reform which BOP should strive to emulate. The directive, which applies to over 250 immigration detention facilities, requires that any placement in solitary confinement for longer than 14 days receive field office director approval; it also places substantive safeguards on “protective” segregation of vulnerable individuals. Because ICE is comparable to BOP in many ways, including its extensive national network of facilities and private contract facilities, the ICE directive sets a strong example of rigorous monitoring and substantive requirements which BOP can and should follow

Recognizing the inherent problems of solitary confinement, the American Bar Association recently approved *Standards for*

Criminal Justice, Treatment of Prisoners to address all aspects of solitary confinement (the Standards use the term “segregated housing”). The solutions presented in the Standards represent a consensus view of representatives of all segments of the criminal justice system who collaborated exhaustively in formulating the final ABA Standards. These solutions include the provision of adequate and meaningful process prior to placing or retaining a prisoner in segregation; limitations on the duration of disciplinary segregation and the least restrictive protective segregation possible; allowing social activities such as in-cell programming, access to television, phone calls, and reading material, even for those in isolation; decreasing sensory deprivation by limiting the use of auditory isolation, deprivation of light and reasonable darkness, and punitive diets; allowing prisoners to gradually gain more privileges and be subject to fewer restrictions, even if they continue to require physical separation; refraining from placing prisoners with serious mental illness in segregation; careful monitoring of prisoners in segregation for mental health deterioration and provision of appropriate services for those who experience such deterioration.

Recommendations

1. The ACLU urges Congress to enact legislation that would establish a commission to create national standards to address the overuse of solitary confinement in federal, state and local prisons, jails and other detention facilities. This commission would conduct a comprehensive study of the use of solitary confinement in corrections and detention facilities across the country, the impact of the practice on cost, facility safety, incidents of self-harm, and recidivism. In addition, the commission would develop national standards to address the overuse of solitary confinement. The Department of Justice would take the commission’s recommendations and create regulations that ensure the development of smart, humane and evidence-based best practices that will limit the use of all forms of isolation and solitary confinement, and ban the practice for children under the age of 18, persons with mental illness, and other vulnerable individuals.
2. The ACLU urges Congress to pass legislation to require reforms to the use of solitary confinement in federal facilities operated by or contracted with BOP. This legislation should include a BOP ban on the solitary confinement of juveniles held in federal custody and prisoners with mental illness. BOP should be required to reduce its use of solitary confinement and other forms of isolation in federal prisons by implementing reforms based on the standards for long-term segregated housing established by the American Bar Association’s *Standards for Criminal Justice: Treatment of Prisoners*, as well as the findings of the Government Accountability Office (GAO), and the ongoing study of BOP’s use of segregation being conducted by outside contractors. Consistent with this type of legislation that would require reforms to the use of solitary confinement, BOP’s newly acquired facility at Thomson, Illinois, should not be designated for use as an ADX (supermax) facility. Instead, it should be converted for use as a lower custody, general population prison.
3. The ACLU urges Congress to engage in increased federal oversight and monitoring of BOP’s use of solitary confinement and provide more funding to the agency for alternatives to solitary confinement in order to further the goals of transparency and substantive reform. A necessary first step toward reform is the promotion of transparency in segregation practices. Greater accountability would empower citizens, taxpayers, lawmakers, and corrections officials to make informed choices about the use of segregation, a practice which has been shrouded in secrecy and therefore subject to abuse.
4. The ACLU urges Congress to enact legislation that would require federal, state, and local prisons, jails, detention centers, and juvenile facilities to report to the Bureau of Justice Statistics (BJS) who is held in solitary confinement and for what reason and the length of their segregation. BJS should annually publish the statistical analysis and present a comprehensive review of the use of solitary confinement in the United States.
5. The ACLU urges Congress to provide federal funding through the Bureau of Justice Assistance (BJA) or other entity to support federal, state, and local efforts to reduce the use of solitary confinement, with a focus on programming and other alternatives.
6. The ACLU urges Congress to conduct oversight into why the Department of State has not yet granted the United Nations Special Rapporteur on Torture an official invitation to visit the United States to examine the use of solitary confinement in U.S. prisons and detention facilities. Also, the Congress should inquire about the State Department’s role in the overdue process of updating the United Nations Standard Minimum Rules for the Treatment of Prisoners (SMRs). New provisions of the SMRs should include a ban on solitary confinement of juveniles and individuals with serious mental illness and protect against prolonged solitary confinement for all persons.

Gary Mohr, Director of Ohio Department for Rehabilitation and Corrections, Statement of the Association of State Correctional Administrators for Senate Judiciary Subcommittee Hearing on Solitary Confinement (2014)

Chairman Durbin, Ranking Member Cruz, and members of the Subcommittee, I appreciate the opportunity to submit this written statement on behalf of the Association of State Correctional Administrators (ASCA). We understand that there have been multiple references to ASCA during the proceedings of this Subcommittee and as a result felt it important to provide our position on this very significant matter under your consideration. ASCA is the membership association for state correctional commissioners, the Federal Bureau of Prisons and select large city correctional systems. Our members participate in established committees and attend association meetings and trainings multiple times each year. ASCA is committed to providing a safe and programmatically rich environment with a mission to reduce recidivism for those placed in our custody and care.

I have the privilege of serving as the Chair of the ASCA Policy, Resolutions, Legislation and Legal Issues Committee. In this capacity, I have had the opportunity to work with some very dedicated Commissioners of Corrections as well as Professor Judith Resnik, Director Hope Metcalf and the team representing the Arthur Liman Public Interest Program at Yale Law School on the matter of "Restrictive Housing." The Liman Public Interest Program has had the opportunity to analyze state agency policies on restrictive housing including the type of offenses that generate assignment to a restrictive unit, processes to approve placement and release, programs and services provided to inmates in this status, including access to visiting and mental health services and other issues related to this restrictive setting. The analysis conducted by this team from Yale Law School provided a foundation for correctional administrators to consider individual state practices within a national framework. The work on restrictive housing in the past year by ASCA is best described as collaborative, spirited, intense and committed to provide a framework for change.

The members of ASCA uniformly recognize the need to maintain a placement where offenders who act out in a manner that seriously jeopardizes the safety and security of those staff and offenders under our care can be safely and

effectively managed. Given our responsibility for reducing recidivism, it is imperative that our prisons maintain a climate that supports the delivery of evidenced-based programs and the participation of community partners to assist with transition from prison to the community. In order for that to occur, inmates, often associated with security threat groups, who are committed to disrupting facility operations and programs must not be allowed to cause intimidation and interfere with the rehabilitative process. Correctional administrators also recognize and understand that our work

does not end with the transfer of inmates to restrictive housing. Our responsibility extends to providing a pathway to a positive transition out of this status.

ASCA recognized that effectively managing inmates who are placed in restrictive housing must be a priority of our organization. Our members consistently state that the number of dangerous incidents is higher in restrictive housing. These incidents include assaults on staff and inmates. Also of serious concern is the elevated

rate of suicides beyond that in general population settings. Suicides are a tragic indicator of failure and are devastating both to families who have planned on the safe return home of their loved ones and to the staff who supervise and work with these offenders.

Restrictive housing by its purpose is a controlling environment. It includes real limitations on the freedom of movement of inmate occupants and access to other inmates and staff. It has also historically reduced inmate access to programs and services as well as to visiting. The analysis of these restrictions was depicted in the study conducted by Yale Law School. As ASCA continued to drill down into the implications of restrictive housing, we determined that more often than many of us realized inmates released from a restrictive housing status were actually discharged directly into our communities. In fact, Ohio found this number to be 20%. Some states actually discovered a higher rate. This practice does not support a successful transition for the inmates to their families and neighborhoods and increases the risk to the public whom we are committed to protect.



Gary Mohr addresses the 2014 Liman Colloquium in New Haven.

It became clear to the membership of ASCA that the issues surrounding restrictive housing must be a priority of our organization and that we have a clear calling to assist our members in creating an environment of hope and positive transition into the future for those who reside in these settings

Phase I – Commitment to Reform:

To move forward on almost any significant challenge, it is imperative first to recognize that the subject at hand needs to be addressed. In the past two years, ASCA has inserted this topic into all of its meeting agendas, with presenters who were not only commissioners but also with partners at Yale Law School and its Liman Public Interest Program. These sessions have provided a framework for initiating meaningful approaches to improve the quality of operations and conditions in restrictive housing. As ASCA considered the matter of balancing the necessity of restricting those inmates who pose a threat to others or to facility operations with the fundamental belief that people can change and the environment in restrictive housing should support positive change, several themes arose. These themes included the following:

1. We should reduce the number of inmates in restrictive housing. As Tom Clements, former Director of Colorado Department of Corrections said during an early meeting of our ASCA Restrictive Housing Committee, “We should ensure those inmates in restrictive placement are those we have reason to fear and not those we are mad at.”
2. The intent of restrictive housing is to protect others and preserve order and not to punish.
3. Inmates in restrictive housing require the attention of medical and mental health staff to monitor their wellness and to support their transition to a general population setting.
4. Inmates should not be released from restrictive housing directly to the community unless extraordinary circumstances exist.
5. Inmates should have access to family and pro-social community sources while in restrictive housing.
6. Inmates should have access to programming that is consistent with their transition out of restrictive housing into a general population setting.
7. Inmates in restrictive housing should have access, consistent with security needs, to congregate programs and activities in order to prepare them for transitioning to general population when their conduct allows.

Phase II – Approval of Guiding Principles for Restrictive Housing:

The ASCA Committee on Restrictive Housing drew on the energy generated by the many association sessions held with the collaboration of Yale Law School and the thoughtful discussions that accompanied those gatherings to begin to forge some general parameters for our members to

consider and further debate. This committee was committed to developing a set of principles that could be used by any correctional system to evaluate current practices and to design new approaches aimed at creating a rehabilitative environment in restrictive housing. The process utilized by the committee was first to draft guiding principles that achieved consensus of the team and then to send out these statements to the ASCA membership for refinement and further debate. This approach led to evolving versions of the Guiding Principles which served as the centerpiece for multiple sessions held in person with our ASCA members.

Finally, during our ASCA Summer Meetings in August 2013, the Guiding Principles for Restrictive Housing were presented for membership consideration in advance of a formal resolution to accept them. Shortly following the presentations to the Executive Committee and then to the ASCA membership a ballot was distributed to 100% of our members for a vote to accept. The following Guiding Principles were overwhelmingly endorsed by ASCA members as a framework for systems to use in reforming their practices:

1. Provide a process, a separate review for decisions to place an offender in restrictive housing.
2. Provide periodic classification reviews of offenders in restrictive housing every 180 days or less.
3. Provide in-person mental health assessments, by trained personnel within 72 hours of an offender being placed in restrictive housing and periodic mental health assessments thereafter including an appropriate mental health treatment plan.
4. Provide structured and progressive levels that include increased privileges as an incentive for positive behavior and/or program participation.
5. Determine an offender’s length of stay in restrictive housing on the nature and level of threat to the safe and orderly operation of the general population as well as program participation, rule compliance and recommendation of the person[s] assigned to conduct classification review as opposed to strictly held time periods.
6. Provide appropriate access to medical and mental health staff and services.
7. Provide access to visiting opportunities.
8. Provide appropriate exercise opportunities.
9. Provide the ability to provide proper hygiene.
10. Provide program opportunities appropriate to support transition back to a general population setting or to the community.
11. Collect sufficient data to assess the effectiveness of implementation of these Guiding Principles.
12. Conduct an objective review of all offenders in restrictive housing by persons independent of the placement authority to determine the offenders’ need for continued placement in restrictive housing.

13. Require all staff assigned to work in restrictive housing units to receive appropriate training in managing offenders on restrictive status housing.

Phase III – Creating Best Practices Suitable for Replication:

The ASCA Committee on Restrictive Housing understands that the Guiding Principles are only the beginning of an effort to reform operations in restrictive housing. It is simply a template for systems to evaluate their operations and begin to put basic services and practices in place. ASCA is committed to continue discussing challenges and opportunities related to restrictive housing and has launched Phase III: the development of best practices that will push a continuous improvement process in our principles. We are calling for systems to provide practices that can be certified by the ASCA Committee on Restrictive Housing and placed on the ASCA website to assist members with replication and refinement of those approaches in their respective organizations. Best practices include specific strategies for mental health inmates, effective programs that can be delivered to assist with transitioning, congregate programs for those assigned to restrictive housing and training initiatives to assist staff with their role in this developmental process. The designers of these practices will have the opportunity to present their programs in person to other commissioners at upcoming meetings of ASCA.

Phase IV – Collaboration and Continuous Refinement:

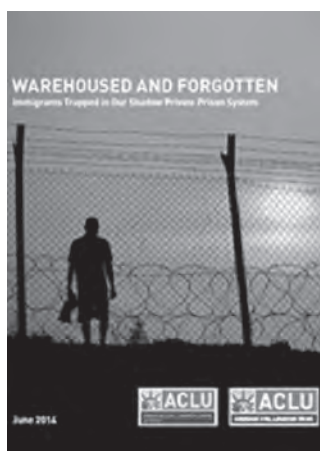
The foundation for positive change has been established through on-going meetings, development of the Guiding Principles and now the process of collecting best practices that can be used and adapted by systems around the country. As we move forward, ASCA is dedicated to working with interested parties such as Yale Law School. In fact, as of the preparation of this written testimony, some correctional systems have embarked on a relationship with The Liman Public Interest Program that includes inviting participants into our restrictive housing units in order to review our practices. Given the interest from both Yale and these commissioners, we anticipate that reform of restrictive housing will be on-going and accelerated

The membership of ASCA is committed to the continuous process of improving our operations by creating safer environments for all offenders. We are far from finished in our on-going work with this most difficult population. We also recognize that providing effective programming and a sense of hope for those inmates who have committed serious offenses and infractions while incarcerated can assist with a more positive environment for our staff and inmates and will ultimately create a safer community for the residents of our jurisdictions. The metrics of our work are expected to reveal fewer inmates in restrictive housing, smoother transition from this status to general population and ultimately a safer environment for staff, inmates and the public we serve.

Undoing Isolation: A Snapshot of the Work of Liman Fellows and Students

The work of many current and former Liman Fellows and of Yale Law students addresses the challenges faced by people involved in the criminal justice and immigration systems. Below we highlight aspects of their work and provide brief essays discussing their ongoing efforts to bring about reforms in Louisiana, Michigan, Oregon, and Texas as well as in the federal prison system.

The theme of isolation was front and center for **Adrienna Wong**, Liman Fellow 2010. Adrienna spent her fellowship with the ACLU of Texas, where she joined a multi-year investigation into the proliferation of privately run immigration detention centers along the United States-Mexico border. In June 2014, the ACLU released the resulting report, *Warehoused and Forgotten: Immigrants Trapped in Our Shadow Private Prison System*, which details the network of 13 private prisons throughout rural Texas that hold more than



25,000 low-security immigrants. Described are the overuse of solitary confinement, the lack of mental health and medical care, and the absence of transparency and accountability for these for-profit enterprises. The report is available at: www.aclu.org/CARabuse. As documented in the report, the contracts entered into by the Federal Bureau of Prisons with private prisons create financial incentives for overcrowding, thereby leading to a variety of abuses; further, government oversight has been insufficient. After her fellowship, Adrienna has continued to work on behalf of immigrants in rural California where, as a staff attorney for the ACLU of Southern California, she has helped to open the Inland Empire Office.

Margot Mendelson, Liman Fellow 2009, has worked on behalf of both immigrants and prisoners. As a Liman Fellow, Margot joined the immigrants' rights clinic, led by former Senior Liman Fellow Nina Rabin, at the University of Arizona College of Law. She represented detained individuals at the remote Eloy Detention Center in a variety of immigration-related actions. Margot, now an associate at Rosen Bien Galvan & Grunfeld LLP in San Francisco, is one of the attorneys on *Coleman v. Brown*, a class action brought on behalf of people with mental illness in California's prisons. In an earlier

incarnation of the case, *Brown v. Plata*, 131 S.Ct. 1910 (2011), the U.S. Supreme Court upheld a decision by a three judge panel, which had ordered California to reduce its prison population to 137.5% of design capacity within two years in order to improve mental health resources for the remaining prisoners. As a part of the subsequent litigation brought by Margot and her colleagues, the state has agreed to avoid placement of mentally ill inmates in isolation pending their transfer to mental health facilities. In those proceedings, the Civil Rights Division of the U.S. Department of Justice took the unusual step of filing a statement of interest; the Department wrote that “segregation of prisoners with serious mental illness in solitary confinement may, under certain circumstances, violate both the ADA and the Eighth Amendment.”

Burke Butler, Liman Fellow 2013–15, and **Beth Compa**, Liman Fellow 2012, are seeking to change conditions for prisoners on death row in Texas and Louisiana. As law students, they worked with former Liman Director **Hope Metcalf** to found a project to reform the use of solitary confinement in Connecticut. Upon graduation, both continued to try to improve living conditions for incarcerated people, particularly those in extreme isolation on death row. Beth spent a year at Southern Center for Human Rights as a Liman Fellow, where she researched private probation companies in Georgia. She is now a staff attorney at The Promise of Justice Initiative in New Orleans, and she is involved in a lawsuit challenging the extreme heat on Louisiana’s death row. In December 2013, a district judge held that, given that the heat index remained above 100 degrees for hours and days at a time, Louisiana had violated the Eighth Amendment. Pursuant to the court’s order to devise a method to maintain a heat index below 88 degrees, the prison proposed to retrofit the facility’s existing ductwork with air conditioning. The court ordered implementation of that plan in May 2014. As of this writing, the order has been stayed by the Fifth Circuit pending its ruling on the appeal. Burke, now working at the Texas Defender Service, also aims to lessen the use of isolation and other harsh conditions for prisoners on death row. One of her successes was to enlist Texas’s largest correctional officers’ union, AFSCME 3807, to join in arguing that automatic solitary confinement of prisoners sentenced to death poses serious problems for correctional officers as well as for inmates.

Another form of isolation is the displacement – legal, social, economic, and geographic – imposed by detention for individuals facing deportation, now called “removal.” Most of these migrants have no legal assistance. New York City made headlines in spring 2014 by initiating the nation’s first public defender system for such migrants. The New York Immigrant Family Unity Project (NYIFUP) is funded through the City’s budget and is a partnership of Cardozo’s Immigration Justice Clinic, The Center for Popular Democracy, Make the Road New York, the Northern Manhattan Coalition for Immigrant Rights, and the Vera Institute for Justice. NYIFUP grew out of the work

of the Study Group on Immigrant Representation, created by the Honorable Robert Katzmann, now Chief Judge of the U.S. Court of Appeals for the Second Circuit. **Lindsay Nash**, Liman Fellow 2010 and 2012, served on the Study Group during her fellowship. The New York City Council funded NYIFUP to help thousands of immigrants in removal proceedings. NYIFUP will host some 35 law school and college graduates through the newly founded Immigrant Justice Corps. Among the inaugural IJC fellows will be **Aseem Mehta** (Yale College 2014), who was a Liman Yale Summer Fellow in 2012.

Pre-trial detention for those charged in the criminal system imposes challenges on many poor defendants. **Alyssa Work**, Liman Fellow 2013–14, has helped to launch the Bronx Freedom Fund, the nation’s first non-profit, community bail fund. Opened in October 2013, the Fund helps poor defendants facing misdemeanor charges to avoid pre-trial detention. The collateral consequences of pre-trial detention – lost jobs, housing, child care – are often more onerous than any potential criminal sanction. The Fund will post bail up to \$2,000 to participants who demonstrate that they have roots in the community, and therefore are likely to return to court. As described in a recent report, the Fund has posted an average bail of \$781 for 102 defendants since October 2013. By avoiding pretrial detention, individuals have been better able to maintain jobs, to avoid homelessness, and to continue as parents and caregivers. There may also be a link with outcomes. Forty-four of the cases in the study had reached final disposition – conviction, dismissal, or plea. Of those 44 cases, 28 were dismissed, suggesting that individuals who post bail are better able to assist in their defense or less likely to plea. Finally, as reported in the New York Times and elsewhere, by avoiding unnecessary detention, the Fund has saved taxpayers many thousands of dollars.

Caitlin Mitchell, Liman Fellow 2013–15, and **Amanda Alexander**, YLS Class of 2013 and a Soros Justice Fellow, represent incarcerated parents seeking to preserve relationships with their children. As students with the Liman Project, Caitlin and Amanda were part of a student team who created a guidebook on the rights and obligations for parents in Connecticut’s prisons. Their essay reflects on the frustrations and opportunities presented by helping families navigate the criminal justice and family law systems. They advocate for a system that, rather than viewing incarceration as indicating that a parent is unfit, instead recognizes that children are often best served by maintaining ties with parents, even from afar.

A related Liman project concerns how the siting of prisons can affect family ties. In July 2013, the Federal Bureau of Prisons (BOP) announced plans to close Danbury FCI – its sole prison for women in the Northeast. The Liman Program – led by Judith Resnik and Senior Liman Fellow in Residence Megan Quattlebaum – joined federal judges, U.S. Senators, an array of organizations, as well as many women incarcerated at Danbury FCI, in opposing the BOP’s proposal. In November of

2013, after press coverage and concern from so many quarters, the BOP announced a plan to build additional bed-space at Danbury for women classified as low-custody and from the Northeast and, in the interim, to help keep federal women prisoners from the Northeast in the Northeast. But in September of 2014, the Liman Program reported, as requested, to Senators Richard Blumenthal and Chris Murphy of Connecticut, on the lack of implementation of that plan and that dozens of convicted women were held in jails in Brooklyn and in Philadelphia – facilities ill-equipped for long-term incarceration. Therefore, eleven Senators from the Northeast once again requested information from the BOP. An essay by **Emma Kaufman** and **Anna Arons**, YLS Class of 2015, describes the efforts to maintain Danbury FCI as an option for incarcerated women from the Northeast.

Intersections between family, community, and criminal justice are also of concern to **Monica Bell**, Liman Fellow 2010.



Monica Bell, Liman Fellow 2010.

Monica spent her fellowship year with the Legal Aid Society of the District of Columbia. She worked with broad coalitions to develop standards for guardians ad litem and successfully opposed budget cuts to family support programs. Monica is now a doctoral candidate in sociology and social policy at Harvard University. Her current research questions the theory that individuals in poor, predominantly black neighborhoods are reluctant to cooperate with the criminal justice system. Drawing on dozens of interviews with poor African-American mothers in the District of Columbia, Monica found that residents of these neighborhoods, particularly women, call police at higher rates than others. Monica posits greater dynamism in cultural conceptions of the law, as she identifies moments of trust and of distrust of police, and she suggests ways that institutions can adjust their practices to build trust and common ground with disadvantaged mothers.

Solitary Confinement on Texas's Death Row

Burke Butler, Liman Fellow 2013–15, Texas Defender Services, Austin, TX



Burke Butler, Liman Fellow 2013–15.

All 270 inmates on Texas's death row are housed in permanent solitary confinement. Unlike other Texas inmates, they receive no individualized evaluation to determine their most appropriate security level. Instead, they are all locked in tiny cells, alone, for at least 22 hours a day. Death-row inmates exercise by themselves in a small yard with almost

no exercise equipment. They eat meals alone in their cell, off of trays pushed through a slot in their cell door. Because they are not allowed contact visits, they are unable to ever touch friends or loved ones. Death-row inmates are not allowed to work in manufacturing jobs, like other inmates can. They have no educational programming. They cannot watch television. Death-row inmates cannot even practice their faith with others. Because of the lengthy nature of post-conviction proceedings, many languish in these conditions for over a decade.

Texas death-row prisoners were not always confined this way. Until 1999, they were housed at the Ellis Unit, where they were permitted all of these privileges. Due primarily to officer mismanagement, several death-row prisoners escaped from the

Ellis Unit in the late 1990s. Rather than dealing with the specific problems that gave rise to the escape, however, the Texas Department of Criminal Justice (TDCJ) responded by moving all death-row inmates to the Polunsky Unit and confining them to the most restrictive conditions possible.

Texas is unfortunately not unique: The vast majority of states with death rows isolate everyone sentenced to death in complete solitary confinement.

Earlier this year, I learned that TDCJ was revising its Death Row Plan, which governs all aspects of life on death row. I then organized a coalition of organizations to write letters to TDCJ recommending changes to the death row plan; the coalition included Texas Impact, the ACLU of Texas, Texas Defender Service, and the Texas Coalition to Abolish the Death Penalty. In addition, family members, security experts, correctional officers, and religious leaders contributed letters explaining why Texas can't automatically house all death-row inmates in solitary confinement. We pointed out that to ensure safety on death row, TDCJ must reinstitute some of the policies it took away, allowing inmates who demonstrate good behavior group recreation, the opportunity to work, contact visits, and communal religious services.

TDCJ has said that it won't implement these changes, and we think that's a big mistake. Increased privileges would actually improve security on death row. It comes down to basic psychology: When inmates have no incentive to behave well, they won't. Now, death-row inmates have no reason to comply with security

rules. By automatically housing all death-row inmates in highly restrictive conditions, TDCJ deprives correctional officers of any way to punish offenders for bad behavior.

For example, people on death row used to be able to work as part of the Death Row Work Capable Program. In an op-ed published in the *Houston Chronicle* and the *Dallas Morning News*, former general counsel of TDCJ Steve Martin pointed out that the work program increased safety on the row. Mr. Martin helped develop and implement the Work Capable Program, and he found that inmates wanted to work because it allowed them an opportunity to apply themselves constructively and interact with others. Because they could only work if they demonstrated good behavior, people strove to act peacefully and conform with prison regulations.

Moreover, Texas's largest correctional officers' union, AFSCME 3807, has pointed out that automatic solitary confinement on death row is a serious threat to correctional officers. As researchers have documented, prolonged, extreme isolation drives people insane. Humans are simply not designed to be alone for 22 hours a day without any human interaction or any stimulation. When prisoners develop mental illnesses, their behavior deteriorates and they become increasingly difficult, if not impossible, to manage. Out of desperation, prisoners take it out on the officers.

There is another reason that it's time for correctional departments to rethink how they run death row: Courts have found that these conditions of confinement violate the United States Constitution. In a significant ruling last November, the District Court for the Eastern District of Virginia determined that the Fourteenth Amendment protects people on death row from automatic confinement to permanent solitary confinement without any due-process protections. *See Prieto v. Clarke*, No. 1:12-cv-01199-LMB-IDD, Doc. No. 91 (E.D. Va. Nov. 11, 2013).

Alfredo Prieto, an inmate who had been on death row for half a decade, filed a lawsuit arguing that the Virginia department of corrections violated his right to due process by

automatically housing him in near-complete isolation, without offering him any opportunity to seek review of his placement. The district court agreed that housing Mr. Prieto in such "dehumanizing" conditions without any procedural recourse violated his constitutional rights. It also determined that there was no legitimate penal objective justifying the complete lack of procedural protections. Indeed, it rejected the argument that death-row inmates had no incentive to behave well or take rehabilitation seriously, noting that there was always "the possibility that new forensic evidence might undercut a conviction, a habeas petition might be granted, or that good behavior might improve the prospects of a commuted sentence." The *Prieto* case, which is now on appeal in the Fourth Circuit, should serve as a warning to states like Texas that give no procedural protections to death-row prisoners.

And courts across the country have held that the Eighth Amendment prohibits correctional departments from placing seriously mentally ill people in solitary confinement. At last count, 106 people on death row have a history of a mental disorder, are currently on psychotropic medications, or receive ongoing counseling or monitoring for a mental illness. To see why Texas shouldn't house people with serious mental illness in solitary confinement, we need look no further than the case of Andre Thomas, who had a history of paranoid schizophrenia and auditory hallucinations. He pulled out one of his eyes before his criminal trial. After he was convicted of capital murder, TDCJ sent him to death row, where he was housed in solitary confinement – and proceeded to pull out his only remaining good eye and eat it. Only then did TDCJ send him to a psychiatric unit for treatment.

After a decade and a half of isolating its death-row prisoners, TDCJ needs to change its policies. By doing so, TDCJ can ensure that its correctional practices conform with constitutional standards. It can also protect its correctional officers on the front-lines – the people who actually bear the consequences of TDCJ's misguided policymaking.

Litigating Civil Rights on Death Row: A Louisiana Perspective*

Elizabeth Compa, Staff Attorney and Liman Fellow 2012, Promise of Justice Initiative, New Orleans, LA

Individuals sentenced to death in Louisiana are promptly transported from the parish prison to death row at Angola, where they will stay for the next decade at least. Recent reforms have turned death row inmates into long-term tenants, although the facility, built on the Angola grounds in 2007, was – by virtue of its nature housing men awaiting the imposition of death – not made for extended stays. Unlike the general prison population, death row inmates cannot earn incentive wages Death row inmates are automatically segregated from the general population and live in permanent solitary confinement, with one hour out per day to exercise, shower, and make phone calls

. . . . Severely mentally ill individuals are interspersed within the rest of death row and receive minimal treatment

In our work, we have observed several features of Louisiana's death row that distinguish it from other prison settings. Some of these differences are obvious: clients have ongoing criminal cases rather than serving a sentence following a final judgment; they will almost certainly spend their future in prison rather than potentially rejoining the community; and twenty-three hours a day are spent alone in their cells rather than being in open dormitories or on work crews. Other differences are harder to define, most notably, the

*Excerpted from 15 Loy. J. Pub. Int. L. 293, 302-04 (2014) (with Cecelia Trenticosta Kappel & Mercedes Montagnes).

psychological effects of living under a death sentence for several years and the role of public sentiment in dispensing justice. Still other characteristics of the men on death row in Louisiana are fairly common among all state prisoners but less pervasive outside the prison setting – mental illness and indigence are chief among these . . .

Through our nonprofit organization, The Promise of Justice Initiative, we sued the Louisiana Department of Corrections, its Secretary, and the wardens of Angola prison and death row in June 2013 on behalf of three plaintiffs. Claims arose from the lack of any mechanical cooling system aside from fans, during the thick Louisiana summer heat, constituting cruel and unusual punishment as well as discrimination under the ADA and related statutes. Our work in putting together this lawsuit drew in large part from similar actions elsewhere in the Fifth Circuit.

In *Gates v. Cook*, 376 F.3d 323 (5th Cir. 2004), the U.S. Court of Appeal for the Fifth Circuit approved a district court's injunctive relief relating to extreme heat and other conditions of confinement on Mississippi's death row . . . Part of the remedy ordered was an injunction requiring the prison to provide individual fans, ice water, and showers when the heat index exceeded ninety degrees. The lawyers in the *Gates* litigation were subsequently able to craft a consent decree with the Mississippi Department of Corrections governing the conditions of confinement in Unit 32, the maximum security



Elizabeth Compa, Liman Fellow 2012.

unit within which death row was contained. In 2011, Unit 32 was closed altogether . . .

There has also been litigation in other circuits on this issue . . . Taken together, these lawsuits represent an important step forward in recognizing the Eighth Amendment's protections against prolonged exposure to dangerous heat levels.

Working on behalf of condemned men and women to assert their civil rights can be a deeply rewarding experience for lawyers, but it must be undertaken with care . . . Civil attorneys interested in prisoners' rights should consider whether there are unmet needs in

their home states related to death row. Those interested in learning more about this topic might, as a starting point, reach out to capital criminal defense attorneys in the state who might share what they know about problematic conditions of confinement or other problems their clients face that might be resolved through civil litigation. In doing so, it is important to be mindful of and sensitive to the special concerns that criminal attorneys might have about their clients participating in civil litigation.

The use of the death penalty in the United States could end within a generation. In the meantime, however, each state has a solemn obligation to ensure that the way in which it carries out the gravest of all punishments meets constitutional standards. Civil litigation is an essential tool in holding states to that obligation.

Keeping Families Together: Addressing the Consequences of Incarceration

Amanda Alexander, YLS 2013 and Soros Justice Fellow, University of Michigan Law School Prison & Family Justice Project, Detroit, MI; Caitlin Mitchell, Liman Fellow 2013–14, Youth, Rights & Justice, Portland, OR

The number of families impacted by the prison system in the U.S. is staggering – more than 2.7 million children have a parent behind bars and an estimated 10 million children have experienced parental incarceration at some point in their lives. Put more sharply, one in every 28 children in the U.S. has a parent in prison; for Black children, the rate is more than one in nine. Even though studies have identified family relationships as one of the most important factors in successful reentry, states continue to place barriers to family visitation and communication.

Rising incarceration rates have coincided with stricter timelines for achieving permanency for children in the foster care system. The Adoption and Safe Families Act (ASFA), a federal law enacted in 1997, creates a default requirement that states file a petition to terminate parental rights if a child has been in foster care for 15 of the past 22 months – a timeframe that is shorter than the average prison sentence. Though the law's aim of encouraging state foster agencies to

find permanent placements for youth is worthy, states have begun to recognize its negative impact on many families involved with the prison system. Mothers who enter prison are at particularly high risk of having their children placed in foster care – and of having their rights terminated under ASFA – as most are primary caretakers of their children before arrest, many as single parents.

One major challenge in working with incarcerated parents and their children is that these families are caught at an intersection of multiple systems that are not designed to work in coordination with one another – in particular, Child Protective Services, the Department of Corrections, and the courts. As a result, the devastating familial consequences of a criminal conviction often fall between the cracks of both child welfare law and criminal law. Incarcerated parents and their families also must contend with numerous assumptions on the part of judges, caseworkers, and others: that a person cannot play a positive parental role while they are incarcerated;

that visiting a prison is necessarily a scary and traumatic experience for a child; and that children of incarcerated parents are more likely to become involved in criminal activity themselves.

We first began working in this field as law students, when, under the auspices of the Liman Program, we investigated the barriers that incarcerated parents in



Amanda Alexander, YLS 2013.

Connecticut face as they attempt to maintain relationships with their children. We created and distributed a handbook for incarcerated parents in Connecticut that explained their rights and responsibilities. Since graduating, and as we have represented incarcerated parents and worked in more depth with their families and communities, we have learned that overcoming the barriers that they face requires creative and sometimes non-traditional advocacy strategies.

In one of our recent cases, the attorney was able to prevent the possibility of a family being separated permanently. The client discovered she was pregnant after entering prison, and she gave birth to her child while serving her sentence. Planning for her baby's care proved difficult from jail and prison, and the client was not able to finalize a plan before giving birth. Even though the client's sentence was relatively short – she would be out by the time her child was talking – the agency filed a petition to make her newborn a ward of the state, and placed her with foster parents shortly after birth. By working with the client's family, and after several months and much coordination and communication, all parties came to an agreement that the state's petition should be dismissed and the baby should be placed in a guardianship with her grandmother until the client is released from prison next year.

It is far better if a foster care placement can be avoided entirely. If parents have the information and tools they need to plan for their children, they can sometimes set up a legal arrangement that will provide for their children's care. For example, a mother who assigns power of attorney to a relative can empower that caregiver to make decisions about her child until she is released; thus the child is less likely to be placed in foster care, which means that termination proceedings are not triggered.

Sometimes the most important work that an attorney or other advocate can do in providing support for incarcerated



Caitlin Mitchell, Liman Fellow 2013–14.

parents and their children is assisting parents in combating isolation. Parents in prison are cut off from their families and children by restrictive visitation and communication policies, prohibitively expensive collect phone call rates, and locations far from home. Some prisons have programs that allow for frequent and high-quality

visitation opportunities between children and parents. For example, the Family Preservation Project at Coffee Creek Correctional Facility in Wilsonville, Oregon sponsors three-hour visits for children every other weekend in a family-friendly environment, as well as a support group for the caregivers who bring the children to their visit. The program also provides classes on child development and parenting for the incarcerated mothers, facilitates phone calls and letter writing, and helps mothers to contact their children's teachers in order to learn more about their children's education and support them in school.

Most prisons do not provide these kinds of opportunities, and even those that do have limited capacity. Thus, it is important that attorneys advocate for other kinds of support for parents in maintaining bonds with their children, for example, providing storybooks to parents and their kids so that they can read and discuss the same stories; providing recordable storybooks so that the child can hear their parent's voice; and expanding communication options through Skype and similar technology. Toward this end, a group of incarcerated fathers in Michigan created the Building Bridges workbook for children of incarcerated parents with poems and stories, suggestions for letter-writing prompts, and other ideas for activities to help maintain relationships between parents and children. People in prison often make extraordinary efforts to parent – and to help others parent – and attorneys can assist them by removing all the barriers that we can.

Too many families have become casualties of our criminal justice policies and the drug war. Families and communities stand to benefit enormously from sentencing reform efforts and a reduced reliance on incarceration. In the meantime, parents' attorneys can reduce the impact on families by supporting parents in their efforts to parent from prison and jail.

Monitoring the “Mission Change”: An Update on Women Incarcerated at Danbury FCI

Anna Arons and Emma Kaufman, Class of 2015, Yale Law School



Aerial photo of Danbury prison and camp. Source: Wikicommons.

A new report by the Liman Program, *Dislocation and Relocation: Women in the Federal Prison System and Repurposing FCI Danbury for Men*, tracks the lack of progress in keeping federal prison space in the Northeast available for women. The report, provided to Senators Blumenthal and Murphy in September 2014, provides one window into the impact of federal prison policies, the degree to which location of prisoners affects their opportunities, and the ways in which women in the federal prison system are currently disadvantaged. In addition to harms to individual women and their family, the report concludes the absence of bed-spaces for women closer to home runs counter to federal policies committed to reducing over-incarceration.

The problems began in the summer of 2013, when the Federal Bureau of Prisons (BOP) announced plans to transform its only prison for women in the Northeast – FCI Danbury – into a facility for men. The BOP explained that this self-described “mission change” was a response to the need to provide more low-security beds for male prisoners.

At the time of the announcement, the Danbury prison complex was composed, as it had been since 1994, of two separate facilities for women: a low-security Federal Correctional Institution (FCI) and an adjacent satellite camp for minimum-security prisoners. At full capacity, the FCI housed about 1,100 women and the camp held approximately 150 women. Both were often over the stated capacity.

The BOP’s 2013 proposal was to fill the main prison with men and to maintain the adjacent smaller camp as the only

facility in the Northeast for women in the federal prison system. The BOP planned to transfer women who were at FCI Danbury elsewhere; many were slated to be sent to a new federal prison in Aliceville, Alabama, some 1,100 miles from Danbury and, in many cases, far from their homes and families.

This proposal raised concerns, voiced by women prisoners, their families and friends, and lawyers, as well as by the Women in Prison Committee of the National Association of Women Judges (NAWJ); the American Bar Association; the Osborne Association; and professors at Yale Law School, which had provided legal services to inmates at Danbury since the 1970s. The press also focused on the situation and ran op-eds and editorials questioning the closing of beds in the Northeast for women.

In August of 2013, eleven senators from the Northeast wrote to the director of the BOP and asked that the plans to use the facility for men be put on hold until the BOP provided Congress with more information about “the rationale behind this dramatic change in the mission of the Danbury facility and the impact it will have on women and families from our states.” In the fall of 2013, the chief judges of twelve federal district courts in the Northeast also asked Attorney General Eric Holder to reconsider the proposed plan. The judges explained that if “the planned mission change for Danbury goes forward, our ability to recommend incarceration near family members and children for male inmates will continue, but we will have no ability to do the same for female inmates.”

On November 4, 2013, before a BOP congressional oversight hearing, Senators Chris Murphy and Richard Blumenthal of Connecticut, joined by Senator Kirsten Gillibrand of New York, announced that the BOP had informed them of a revision to its plans for Danbury. In addition to creating a facility for men, the BOP announced it would convert the existing minimum-security satellite camp into a low-security facility for women, and that it planned to construct a new minimum-security camp for women on the Danbury site. The goal was to have enough beds for women who were U.S. citizens and sentenced from the Northeast; non-citizens from the Northeast would still face the prospect of being incarcerated at great distances from their families. The Senators' press release reported that the "entire transfer and construction process w[ould] take 18 months to complete." Further, the "agency ... assured the senators that it [was] making every effort to keep the U.S. citizen inmates in the Northeast and maintain the same level of programming available by the end of the process."

Yet, ten months later, in September of 2014, no ground has been broken at Danbury for new construction, and the BOP has declined to provide a clear timeline for the completion of the new facility. Indeed, it appears that the requisite environmental impact assessment may just be getting underway. According to current projections, that process could take eight months to complete even if no problems arise, and the construction thereafter could take another fourteen months. Those projections suggest that the new facility might not be completed until 2017. In the interim, many women who were at FCI Danbury have been placed in federal jails (the Metropolitan Detention Center in Brooklyn and the Federal Detention Center in Philadelphia) and in institutions much farther from the Northeast. Others have been sent to Danbury's satellite camp and to residential treatment centers (RTCs), and some number have been released.

The current treatment of women incarcerated from the Northeast is at odds with federal criminal justice policy priorities. All branches of the government have recognized the problem of over-incarceration and enacted initiatives to reduce federal prison populations and to ensure that the time inmates spend behind bars – and the funds taxpayers invest in incarceration – are put to good use, equipping women and men for a successful return to their communities.



*Emma Kaufman, YLS Class of 2015.
Corey Guilmette YLS Class of 2016 is in
the background.*



Anna Arons, YLS Class of 2015.

The BOP's decision to incarcerate women from the Northeast far from their homes and families or in urban jails that lack programming opportunities undercuts these federal policies. To provide just one example, while FCI Danbury provided female inmates with a Residential Drug Abuse Program (RDAP), urban jails do not

currently offer this opportunity. RDAP is a 500-hour, nine-to-twelve-month intensive drug treatment program; if inmates successfully complete the program, they become eligible for a sentence reduction of up to twelve months, as well as other benefits. Unless RDAP is brought to the jails in Brooklyn and Philadelphia, Northeast women who are currently confined there will face the difficult choice of seeking to be moved further from their homes and families to participate in RDAP or losing the opportunity to obtain the therapeutic and sentence-reducing benefits of the program.

In short, the optimism that greeted the November 2013 announcement of the revised plans for Danbury may not have been warranted. A return to the issue is required by all who are concerned about enabling women in the federal prison system to share equally in the opportunities to remain close to their families and communities while in detention, to participate in programs and work, to have access to the outdoors, and to maximize their opportunities for successful reentries.

In September 2014, Senators Richard Blumenthal and Chris Murphy joined with the Liman Program and author and advocate Piper Kerman, who was incarcerated at Danbury, to speak out about the continued delays at Danbury. Senator Blumenthal commented: "This inexplicable delay is causing real, serious harm to hundreds of women The BOP was wise to reverse its wrongheaded decision to close the Danbury women's prison, and they have an obligation now to honor its promise." Senator Murphy explained: "It's a no-brainer that these women need to be closer to their families and the services they need to successfully reenter their communities when they have done their time."

The Liman program continues to monitor development at Danbury and to advocate for fair treatment of women in the federal prison system. The full report can be found at http://www.law.yale.edu/images/liman/Liman_DanburyPrisonReport_9.3.14.pdf, and the press release can be found at <http://www.law.yale.edu/news/18706.htm>.



Reflections on Punishment Circa 2014: The 17th Annual Liman Colloquium

In April 2014, the Seventeenth Annual Liman Colloquium gathered a diverse group of people who run prison systems, who sue prison systems, who sentence people to prisons, who study prisons, and who have inhabited prisons. In advance of the roundtable, the Liman Program provided a volume of materials (available on the Liman website, detailing relevant prison policies, court opinions, statutes, news articles, and research from various disciplines. Below are essays written by some of the participants at the Colloquium.

SLOWING THE FLOW INTO PRISON

Reducing Federal Drug Sentences

The Honorable Patti B. Saris, Chief Judge, U.S. District Court for the District of Massachusetts, and Chair, U.S. Sentencing Commission

The United States Sentencing Commission, an independent bipartisan commission within the judiciary, has been focused over the past year on finding ways to reduce federal prison costs and overcapacity without negatively impacting public safety. That has appropriately led to a focus on drug offenders, who make up about a third of the offenders sentenced federally every year and a majority of the prisoners serving in the federal Bureau of Prisons. They are in many ways the key to the size and nature of the federal prison population.

As background, over the past three decades, prison populations and costs have skyrocketed. The federal prison population is almost three times what it was in 1991. Director Charles Samuels of the Federal Bureau of Prisons testified to the Commission this spring that federal prisons are 32 percent



The Honorable Patti Saris (right), with Beth Compa, Liman Fellow 2012, and Paul Wright, Editor, Prison Legal news.

over capacity, and 52 percent over capacity at high-security institutions. Federal prison spending exceeds six billion dollars a year, making up more than a quarter of the budget of the entire Department of Justice. This increasing utilization of resources for federal prison populations has occurred during a mounting budget crisis. As the Department of Justice's budget has flattened and even decreased, a consistent increase in prison costs has meant less

money for federal law enforcement and prosecutors, for services to victims, for aid to state and local law enforcement, for crime prevention programs, and many other priorities. It has also meant that limited funds for prison guards and programs for prisoners are stretched further.

At a very basic level, when prison populations exceed

capacity, particularly at a time of fixed or falling budgets, that overcrowding affects the conditions in which prisoners are held. The fact that there are more prisoners per guard can affect decisions about how to enforce discipline, and stretched budgets can limit prisoners' access to beneficial programs and services.

The current rate of incarceration has a disproportionate impact on certain communities. Inner-city communities and racial and ethnic minorities have borne the brunt of the emphasis on incarceration. Sentencing Commission data shows that Black and Hispanic offenders make up a majority of federal drug offenders. In some communities, large segments of a generation of people have spent a significant amount of time in prison. This damages the economy and morale of communities and families, as well as the respect of some for the criminal justice system. In other words, this effect isolates offenders from their community.

The Commission's review has led us to conclude that changes are needed. At the state level, we have seen that many states have been able to reduce their prison populations and save money without seeing an increase in crime rates. This real-life experience in the states, together with new academic research, has begun to indicate that drug sentences may now be longer than needed to advance the purposes for which we have prison sentences, including public safety, justice, and deterrence.

At the federal level, the Commission conducted a large-scale study of federal mandatory minimum penalties in 2011. We found that when mandatory minimum penalties are perceived as excessive, disparate sentencing practices result. The Commission also concluded that mandatory minimum penalties sweep more broadly than Congress likely intended and that mandatory minimum drug penalties have contributed to growing prison populations.

As a result, the Commission unanimously recommended that mandatory minimum drug sentences should be reduced, that a broader group of non-violent, low-level offenders should qualify for a "safety valve" that allows them to be sentenced below a mandatory minimum, and that a 2010 law reducing crack sentences should be made retroactive.

Significantly, the Commission also voted unanimously in April 2014 to reduce federal sentencing guidelines for most offenders convicted of drug trafficking by two levels. This change was

intended to address excessive prison costs and populations and respond to changes in the law and the guidelines over the past quarter century, without endangering public safety. If Congress does not overturn this change, it should reduce the federal prison population by more than 6,500 after five years and considerably more thereafter. The Commission is now deciding whether the change should be made retroactive.

The April amendment could have a real impact on individual prisoners, prison conditions, and on particular communities. Indeed, Director Samuels testified this spring that reductions in the federal prison population could lead to better staffing for prisons and more comprehensive recidivism reduction programs. We believe the amendment can confer these benefits without sacrificing public safety.

In 2007, the Commission modestly reduced sentences by two levels, or 27 months on average, for offenders convicted of trafficking crack cocaine, three years before Congress acted to reduce the disparity in sentences between crack and powder cocaine offenders. Commission studies have shown that these offenders are no more likely to reoffend and no less likely to cooperate than offenders who served longer sentences. That has led the Commission to conclude that modest changes to drug sentences may not adversely impact public safety.

For the first time in decades, there is interest across all branches of the federal government and all parts of the political spectrum in reducing sentences. The Senate Judiciary Committee reported legislation earlier this year that includes the kinds of reductions in drug sentences that the Commission has recommended.

The Commission is pleased to see the widespread interest in federal sentencing policy right now and to be playing a major role in this reconsideration of what kinds of sentences are most appropriate. I should also note that one of the next major issues the Commission will focus on is a large-scale study of recidivism. This project will include looking at what kinds of prison conditions, programs for prisoners, and alternatives to incarceration are most effective in reducing recidivism. I hope that we can continue to move to reasonably and safely reduce the number of prisoners and find ways to help those who are released successfully reintegrate into society.

Getting It Right: The Case for Bipartisan Criminal Justice Reform

Brett L. Tolman, Ray, Quinney and Nebeker LLP, and former U.S. Attorney for Utah and Legal Counsel for the U.S. Senate Judiciary Committee

The federal criminal justice system currently faces unprecedented and significant challenges. The prison population in the U.S. has increased dramatically over the past several decades, putting immense strain on both the human and financial capital of the Department of Justice. There are two meaningful ways the justice system needs to be reformed to begin addressing these issues: first, on the

front end, through a thoughtful editing and redrafting of current federal criminal laws and sentencing policies, and second, on the back end, through the implementation of corrections policy reforms designed to enhance public safety by improving the effectiveness and efficiency of the federal prison system. Focusing on sentencing reforms is not enough. The issues associated with risk and recidivism reduction must

also be addressed in order to offset the out-of-control incarceration costs plaguing the federal system.

It is universally acknowledged that there has been a shift over the past several decades in investigative and prosecutorial practices. Instead of focusing scarce and valuable resources on the highest level of criminal conduct, today's federal system is too often pursuing the lowest level offenders, who are often over-punished due to over-aggressive guideline calculations and over-reliance on minimum mandatory sentencing laws. The federal system has, unfortunately, been neither thoughtful nor conscientious in its punishment of those it convicts.

For drug offenses the Department of Justice is expected to use the hammer of mandatory minimum sentences to dismantle drug trafficking. But the reality on the ground is that most prosecutions, despite resulting in significant prison sentences, only net insignificant "mules" or small-time traffickers. Long federal sentences routinely go to the lower-level targets while the "kingpins" and their drug trafficking operations continue to thrive.

This problem is not confined to the punishment of drug offenses. In the white collar world, for example, long sentences are too easily the product of manipulating the "dollar-loss figure" guideline calculations – resulting in baffling and unfortunate prosecutions. One example of this is Sholom Rubashkin, a 52-year old Jewish Rabbi with no criminal history who is serving 27 years in federal prison for financial fraud despite there being no actual financial victim of the alleged fraud.

This obsession with count stacking and maximizing every prison sentence also endangers the integrity of the criminal justice system. Law enforcement is incentivized to allow the commission of multiple offenses in order to enable federal prosecutors to stack charges and get the longest possible mandatory minimum sentence. Rather than make an arrest as soon as they have evidence of an offense, agents may watch the offenders commit one or more further crimes, which unnecessarily increases the potential for further crime victims.

Consequently, the rising cost of sustaining this burgeoning prison population has also created a real and immediate threat to public safety. The growing prison budget is consuming an ever-increasing percentage of the DOJ's budget. Over the last 15 years, the Bureau of Prison's budget has increased from 15% of the DOJ's budget to more than 25%. The overall cost of detaining federal offenders consumes more than 30% of the DOJ's budget. This number has doubled since 2000. During my tenure as U.S. Attorney for the District of Utah I saw first-hand the effects of budget constraints within the DOJ. Many U.S. Attorneys' offices were unable to hire additional prosecutors



Brett Tolman

and were forced to abandon law enforcement obligations and longtime partnerships.

All too often, the budget – not law enforcement – has become the absolute center of focus of the DOJ and its U.S. Attorneys.

One very promising solution to the problem of the rapid growth of the prison population, and the associated costs and dangers to our communities, is the Federal Prison Reform Act. This bill, which passed the Senate Judiciary Committee in March of this year on a 15-2 bipartisan vote, would begin addressing the issues of overcrowding in our federal prisons (one symptom of mandatory minimum and

aggressive guideline sentences run amok), would make our communities safer, and would save millions of dollars a year. Senators Whitehouse, a former U.S. Attorney and Attorney General for Rhode Island, and Cornyn, a former judge and Attorney General for Texas, co-authored the legislation.

The bill would require all eligible offenders to undergo regular risk assessment of recidivism into low, medium, or high risk categories. The bill would allow low and medium-risk offenders credits for successful completion of recidivism reduction programs. They could then spend the remainder of their sentences, determined by the amount of credit they earned, in either a halfway house or on home confinement. Certain low-risk offenders who could demonstrate exemplary behavior would be allowed to spend the final portion of their earned credit time on community supervision. This program would entail very little new spending, as the programs would be provided by faith-based groups, non-profits, or through the savings generated by the legislation.

Perhaps the best part is that the practices underlying this bill have already proven successful in states such as Texas and Rhode Island. In both states the program has cut costs, improved safety in communities, better prepared inmates to re-enter society, helped ensure first-time offenders don't become repeat offenders, and reduced the prison population. In Texas it has even led to the closure of a prison for the first time in the state's history. In the two years after the legislation was enacted in 2007, Texas saved over \$443 million. Since 2008, when the legislation was enacted in Rhode Island, the state has seen a 9% decline in its prison population and a 7% decrease in the crime rate. One reason for the reduction in crime is that inmates that are better prepared to re-enter communities are at a lower risk for recidivism.

The Smarter Sentencing Act, which passed the Senate Judiciary Committee in January of this year on a 13-5 bipartisan vote, is potentially a good start to remedying some of the issues associated with our current minimum mandatory scheme. This legislation would not repeal any mandatory minimums, but rather would reduce mandatory minimums for non-violent drug offenders. This bill would reduce prison costs

and populations by creating fairer, less costly minimum prison terms for non-violent drug offenders. The effects of this bill are not as well-known as those for the Federal Prison Reform Act. As such, Congress should consider the implications of this bill and benefit itself through careful, statute-by-statute analysis of the criminal code prior to enactment.

The U.S. federal justice system locks up far too many people for far too long. The practice of charge stacking too often leads to sentences that are grossly disproportionate to any actual offense committed. The lowest level offenders are swept up while those who are at the head of the criminal activity are free to continue their illicit behavior. In designing our criminal justice system we must balance the interests of justice, economy, and safety. Prosecuting and imprisoning the relatively less-dangerous is extremely expensive. We should not lock

them up for longer than is necessary, and once imprisoned our goal should be to make them productive members of society and reintegrate them into society as quickly and as safely as possible. Spending the vast amount of our finite time and resources on these offenders only serves to make our communities less safe as there is less time and money to pursue the worst offenders.

The principles contained in the Federal Prison Reform Bill have proven successful and should be implemented as soon as possible. This bill would free up the time and resources of the DOJ and would better prepare inmates to become contributing members of society. The Smarter Sentencing Act is a step in the right direction for the review of mandatory minimum sentencing laws that have gone too far and cost too much.

An Important Window for Federal Criminal Justice Reform

Noah Bookbinder, Director of Legislative and Public Affairs, United States Sentencing Commission

A convergence of interest in federal criminal justice reform across the political spectrum has created a rare opportunity for real change. This opportunity is limited, however, and proponents of criminal justice reform must act carefully to seize it.

New approaches to criminal justice have proliferated in the states over the past decade or more, but the federal government has been slower to change its approach. Until very recently, federal crime legislation tended to lead to increased sentences, and the federal system focused very little on alternatives to incarceration or improving prison conditions, even as states moved in very different directions.

Several factors made it easier for states to try new approaches to criminal justice. States are required to balance their budgets, and prisons make up one of the largest budget items in many states. Accordingly, states seeking to address budget crises often had little choice but to address the number of people they imprisoned. Also, many states are dominated by a single party, which can mean less political vulnerability in taking on difficult criminal justice issues. For many years, in federal elections, if crime issues came up at all, it was usually not a good thing for a candidate. The famous Willie Horton commercial in the 1988 presidential election and others like it were cautionary tales for elected officials considering different approaches to criminal justice.

Now, however, there are more signs of openness to federal criminal justice reform. Increasing budget concerns have forced federal officials to look for new places to cut budgets. As the Bureau of Prisons budget has gone up and up, it has accounted for a larger and larger portion of the Department of Justice's



Noah Bookbinder

budget, now accounting for more than 25%. In a time of fixed or decreasing overall budgets, that means less money for popular and effective items like law enforcement, crime prevention programs, and victim assistance programs. That has led many to begin considering measures aimed at reducing the federal prison population.

At the same time, thinkers and advocates across the political spectrum have begun to discuss new approaches to criminal justice. Conservative organizations like Right on Crime and the Heritage Foundation have joined groups that traditionally advocated for criminal justice reform like Families Against Mandatory

Minimums and the American Civil Liberties Union in calling for limiting sentences, boosting reentry programs, and increasing alternatives to incarceration. Stakeholders in the federal criminal justice system also began to take more notice of effective and successful reforms in states across the country and the political spectrum.

All of this created momentum and gave political cover to federal officials interested in new approaches to criminal justice. In the past few years, bipartisan criminal justice reform legislation has begun to move in Congress, and the Department of Justice and United States Sentencing Commission have each begun trying new approaches.

In Congress, interest has coalesced around a few specific initiatives. The bipartisan Smarter Sentencing Act would reduce mandatory minimum drug sentences and modestly expand exceptions to mandatory minimum penalties. Other bipartisan legislation would offer credits allowing some federal prisoners who participate in recidivism reduction programs to reduce their sentences. There has been some interest in reducing the use of

solitary confinement in the federal system, but that has not yet led to legislative movement.

Federal agencies are pursuing more limited, but important, opportunities for reform. The United States Sentencing Commission voted unanimously in April to reduce guidelines related to drug quantity for most drug trafficking offenders by two levels. The Commission determined that this was a way to reduce prison costs and populations as well as address changes in the law and guidelines, without compromising public safety. This change, if permitted by Congress to stand, will likely reduce the federal prison population by more than 6,500 after five years and still more in the long term. The Commission is now deciding whether to make this change retroactive.

The Department of Justice has changed internal policies governing charging decisions related to drug offenses carrying mandatory minimums, as well as its compassionate release program. It has also launched a new clemency initiative. These policy changes represent a substantial shift in attitude and philosophy for the Department; it is not yet clear how many cases they will actually affect. The Department has also expressed sympathy to concerns about solitary confinement, but has not yet changed its policies.

Despite the changing political dynamics and some significant changes in policy, there continue to be major obstacles to additional criminal justice reform. Passing any major legislation is challenging in the current political environment, and those challenges only increase in an election year. There continue to be influential Republican and Democratic members of Congress who are reluctant to reduce sentences and pursue other criminal justice reforms, and some are outright opposed. While the Smarter Sentencing Act and other criminal justice reform legislation has passed through the Senate Judiciary Committee, the House has yet to demonstrate similar interest in this kind of legislation, and even further action in the Senate may be challenging. Many prominent law enforcement organizations also have strongly opposed any significant reduction to federal drug sentences. Indeed, while some of the factors that have created the current openness toward new approaches to criminal justice may represent long term shifts, it is possible that political and other factors may make the climate less hospitable to criminal justice reform next year.

Still, the current window of opportunity has already resulted in significant progress. The drug guideline reduction the United States Sentencing Commission has sent to Congress is one of the more impactful changes made in the quarter century history

of the guidelines, and the retroactivity decision currently under consideration by the Commission is very significant. The changes made by the Department of Justice represent at the least a sea change in prosecutorial attitudes, and the serious discussion of important criminal justice reform in Congress, throughout the government, and among outside stakeholders in the criminal justice system is in and of itself an important development. Actual changes in policy at the federal level are likely to be incremental, but the change in direction has been real.

Proponents of federal criminal justice reform seeking to support some of the policy options currently under consideration and create receptivity to broader changes eventually should consider new tactics that are already proving effective. It is important to develop policy thinking and advocacy across the political spectrum and from a diverse set of stakeholders. It will be particularly important to work with conservative supporters of criminal justice reform and with sympathetic segments of the law enforcement community. It can be persuasive to cite to reforms in traditionally conservative states, whose progress provides an important example regardless of their starting point on criminal justice issues, and to consider a broader set of rationales for change, including budget, efficiency, and compassion. While change at the federal level will be slow and challenging, proponents of criminal justice reform should not ignore the federal system, which continues to offer possibilities for future reform.

(This essay is written in my personal capacity and is not representative of the views of the United States Sentencing Commission.)



Fiona Doherty (center), former Federal Defender and former Liman Senior Fellow in Residence, is now Associate Clinical Professor at Yale Law School, where she directs the Criminal Defense Clinic at Yale Law School. Also pictured left to right): Alyssa Work, Liman Fellow 2013–15; Brandy Lee, Yale Medical School; and Marie Gottschalk, University of Pennsylvania.

CHANGING THE CULTURE OF AND ABOUT PUNISHMENT

Holistic Culture Change within the Virginia Department of Corrections

Harold Clarke, Commissioner, Virginia Department of Corrections

The Corrections umbrella, in general, has historically covered imprisonment, supervision, and treatment. Preparing offenders for successful re-entry into society was a desired outcome placed on corrections professionals and agencies – the Virginia Department of Corrections included – but many times without matching funding and resources. Primary focus was given to immediate housing, and “command and control” measures while treatment and programming were secondary. The standard treatments available to most of the incarcerated typically included several classes



Harold Clarke

of a rehabilitative nature with little to no measurability, academic courses, vocational training and substance abuse therapies. Though temporarily effective, none achieved the long term results required as prison populations and communities were faced with the challenges of their release. What treatment has been remiss in including are components that furnish a holistic change in correctional culture providing a full and multi-angled approach to assisting one's return into society as a law abiding and productive citizen.

In 2010 we began efforts to shift the Virginia Department of Corrections' culture in multiple ways. Taken into consideration were how its culture was viewed and experienced as a corrections professional, how it was assessed by external entities and the general public, and how the care was dispensed to and received by the populations it served. No small feat considering Virginia's vast geographical differences, socio-economic inequalities, multi-generational staffs, and regionally influenced attitudes toward correctional practices. “Turning a battleship” is perfectly analogous to the tremendous breadth and depth of these desired adjustments. Operational and philosophical changes needed to be made and sustained; leadership efforts were focused and strategic. These efforts, combined with research based practices, are just a few of the methods employed to achieve success.

The Integrated Model for Reentry was shared as a simple way to articulate the vision to achieve long-term public safety and initiate the changes. Looking to the private sector's experience with culture change, various books centering on professional development and change management were selected and shared with staff. Techniques harvested from these readings helped employees see the importance of being engaged in creating change rather than fearing and resisting it, assuming

accountability at all levels, and not fearing their abilities to respectfully challenge the process.

Reorganizing the Agency helped create a clear leadership model by promoting oneness between institutional, community, educational, and administrative staff. The Department focused on operational measures, reentry outcomes, expansion of the executive staff and regional leadership teams, augmentation of case management procedures, enhancement of our automated offender records system VACORIS, and the development of a Strategic Plan through the use of a collaborative learning technique termed “Future Search.” These

changes helped create opportunities for all levels of staff to voice their opinions through the study and practice of dialogue, in which all of our employees have been trained through the adoption of an effective communication platform. Recognizing the importance of cultivating healthy mental, physical, and emotional surroundings for both staff and offenders precipitated the introduction of the “Healing Environment” concept, which is defined as follows:

The ‘Healing Environment’ is purposefully created by the way we work together and treat each other while encouraging all to use their initiative to make positive, progressive changes to improve lives. It is safe, respectful, and ethical – where people are both supported and challenged to be accountable for their actions.

While articulating the safety benefits of culture change, the Department focused to advance our security practices and staff training as well. These efforts to reexamine our traditional practices with evidence based practices have led to quite a few successes. Two innovative efforts were the development of the “Step Down Program” at Red Onion State Prison and the formation of Correctional Treatment Officers to assist in administering offender programming.

A critical component of Evidenced Based Practices that we achieved in 2011 was the full implementation of the risk-need-responsivity model. This model recognizes the importance of assisting offenders in achieving long term positive results by assessing their risks and needs. Resulting from the process is a developed re-entry case plan, offering evidence-based programming, and providing services that address identified criminogenic needs.

The “Step Down Program” is a pathway for offenders to, quite literally, progress through different phases to achieve



Judith Resnik (far left) at the Seventeenth Annual Liman Colloquium, joined by (left to right): the Honorable Patti Saris, Chief Judge of the U.S. District Court for the District of Massachusetts and Chair of the U.S. Sentencing Commission; Harold Clarke, Commissioner of Virginia's Department of Corrections; Rick Raemisch, Executive Director of Colorado's Department of Corrections; the Honorable Myron Thompson, Judge of the U.S. District Court for the Middle District of Alabama; and Nicholas Turner, President of the Vera Institute for Justice.

a decrease in their security level and housing in the most highly secured facility in Virginia. Previously referred to as administrative segregation, restricted housing is the highest and most controlled form of incarceration. It is reserved for those individuals who cannot be safely managed at lower security levels due to the extremely serious risks they pose to the other offenders, the staff, or the public.

The "Step Down Program" participants are offered a creative and unique voluntary opportunity. Offenders take part in a cognitive behavioral interactive journaling program called the "Challenge Series." It starts within the single cell environment, then, as participants progress through the phases, they are brought out of the cell into Therapy Modules, then Security Chairs, and later participation in small groups. Correctional Treatment Officers have been carefully selected and trained to address security issues and to work side-by-side with Cognitive Counselors to conduct groups and deliver the curriculum. This also teaches the offenders that, beyond enforcement, these authority figures can also support, teach, and act as role models. Over a two year period, this program has reduced the number of offenders assigned to long term segregation by 68%, reduced

the number of incident reports by 65%, and reduced grievances by 79%. There were 486 offenders in restricted housing in 2011 and only 162 offenders in restricted housing today.

Although resources are often times sparse, and it would be ideal to have more funding, transforming an agency to better focus on recidivism reduction outcomes and helping offenders change is more about transforming the culture and staff paradigms than funding. It is from this that true public safety is realized and maintained. There have been outside pressures on corrections as there always will be; our changes have been, and continue to be, driven by our professional beliefs about what is right and evidence based, not by special interest groups or sentiment that may not be sound correctional practices. These beliefs have become the operating system for our Agency. It is an operating system that has led to reductions in prison incidents and grievances, major reductions in the number of offenders assigned to long term restricted housing, and an increase in positive organizational commitment from staff. All of these, in concert with one another, allow Virginia to proudly maintain the second lowest recidivism rate in the nation.

Healing Justice

Chris Innes, Ph.D.*

Our most basic human problems so often appear intractable to us because they originate in the very way we typically think. Then we seek solutions using the logic that created the problem in the first place, only to find ourselves boxed in by that self-same logic. Whenever we start telling each other we need to start thinking outside the box that is a sure sign we have reached a dead end. This is because whenever we try to think

outside the box, we end up mostly thinking *about* the box. What we really need to do is to think *inside* the box, to unpack it as if it were a never ending series of nested boxes. It does not matter if you call it a mental model, a paradigm, or the culture, the point should not be thinking inside or outside the box, it should be to forget the box altogether. By doing so, we can begin to dismantle the tacit understandings and meanings that keep the boxes in

* Innes is the former chief of the Research and Information Services Division of the National Institute of Corrections. He is the author of *Healing Corrections, The Future of Imprisonment*, scheduled for publication by Northeastern University Press in early 2015.

place. Our contemporary system of justice is a perfect example of a box we need to forget.

Our habitual ways of talking about our system of justice in our ongoing debates about crime, punishment, and rehabilitation repeatedly fail to produce a shared understanding of the challenges before us or a consensus on how we ought to respond to them. This is because the system itself has become a problem in itself; it is an unworkable collection of often competing subsystems with their own cultures and priorities that have become disconnected even from its supposed goals of administering justice or preserving public safety. Like many other institutions in our society, this system has become deeply fragmented.

Among the factors that fragment the justice system (and continue to drive high incarceration rates) are the cultural functions and symbolism of punishment. While our opinions about the necessity or wisdom of punishment may differ, I do not anticipate that the American criminal justice system will abandon it soon. We may need prisons, jails, probation and parole to help us deal with people we do not know what else to do with, but that does not mean we need or must keep millions of people under supervision or spend tens of billions doing it. In an imperfect world justice will never be perfect, if for no other reason than that once harm has been done it can never be wholly undone. But our response should not magnify the effects of that harm; our only goal cannot be simply to have a system that punishes people more efficiently, effectively, or even more fairly. Instead, we need a system that is not built on punishment at all. Instead, our system of justice should be designed to with the intention to heal.

To heal something is to make it whole. This is as true for social systems as it is for individuals. Both are complex systems with identifiable parts that (hopefully) make up a coherent whole. In a healthy system, each part fulfills specific functions in the service of survival and growth. When a system is fragmented, it is not working as a system made of interrelated sub-parts so much as it is a collection of disconnected pieces, like a pile of broken fragments left after destroying a machine (or dissecting a body). Our individual and collective ability to make things happen as we intend them to happen is far more difficult under fragmented circumstances than when our lives and social systems are coherent and meaningful to us.

When we are living a fragmented life or within a fragmented culture it takes much more psychological, human, social, and political capital to produce whatever results we want. Not only does it take more resources to accomplish something, but success becomes more uncertain and unintended results are more frequent. The solution is to make the fragmented, incoherent system more coherent by healing the fragmentation so we can connect with each other in meaningful ways. Altering the cultural dynamic that stymies our ability to constructively address ways to fundamentally change the justice system requires a national dialogue to challenge the tacit cultural patterns of the system and American culture. We are in what could be a historic moment, if we choose to seize it, in our collective understanding of how the contradictions of and between our social, legal, and economic systems can be used

to catalyze fundamental changes to recreate our justice system and redefine its role in our society.

One essential source of this change must be the transformation of the culture of corrections that will, in turn, bring a shift in our society's relationship to both the people who work for, and those who literally live within, our justice system. Based on my experience in jails, prisons, and community corrections agencies across the U.S., I believe that it is possible to change the culture of corrections. It can be done by creating a healing environment within correctional facilities and agencies. Accomplishing this will require focusing on correctional workforce development and the use of innovative practices to help people working within correctional settings to communicate with each other and with people under correctional

supervision in constructive and compassionate ways. Such a transformation within corrections will catalyze a shift in our society's relationship to our system of justice as well as the people working or living within and beyond it.

This strategy, of working with the people who work within corrections, is not the usual way advocates approach the task of reform. This is a profound mistake. It hampered early progress on addressing sexual assault in prisons and jails and it is hampering attempts to address administrative segregation now. We need to keep in mind that nearly all of the services and support now being provided to people in prisons and jails or during reentry is being delivered by people working in corrections. If we want to alter the way they do their work, we need to engage



Chris Innes (speaking) with Angela Browne, Senior Fellow, Vera Institute of Justice, Harold Clarke, Director, Virginia Department of Corrections, and Martin F. Horn, Distinguished Lecturer in Corrections John Jay College, City University of New York and Chair, New York Sentencing Commission (left to right).

with them constructively and compassionately, not lay at their doorstep all the blame for social problems that are not of their making.

This work has, in fact, already begun. It was the outgrowth of the Norval Morris Project at the National Institute of Corrections. Established in 2004, the project focused on how corrections could apply evidence-based approaches from any discipline, evaluate their potential to inform correctional policy and practice, and create opportunities to test these

innovations in correctional settings. In 2010, when the project reached its implementation phase, designed to put into practice at the systems level this knowledge, it found a willing partner in the Virginia Department of Corrections and its director, Harold Clarke.

Clarke had participated in the Morris Project and introduced us to the idea of creating a “healing environment” in correctional settings. In a healing environment, staff learn and practice behaviors and communication skills that support change, both at the individual and organizational level. The Healing Environment Initiative in Virginia was implemented by training staff at all levels in the use of dialogue. Properly done, dialogue helps people unpack the boxes of their own organizational culture and discover what it is that they share and holds them together.



Jeffrey Fagan, a social scientist and professor of law at Columbia Law School, at the opening session of the Colloquium.

In the Virginia project, which is ongoing, the Department of Corrections has seen improvements – preliminary data indicate that charges for infractions by inmates, disciplinary actions against staff, and were even on-the-job injuries among staff all fell.¹

In April, 2014, the National Research Council’s Committee on Law and Justice issued an exhaustive review of the state of knowledge on the causes and consequences of the growth of incarceration in the United States in recent

decades. The report offered a number of conclusions, policy recommendations, and an ambitious research agenda. But during the webcast announcing the release of the report, Jeremy Travis, the chair of the committee that produced the report and co-editor of the report itself, made clear that more was needed than changes in policy or additional research. He called for a national dialogue aimed at clarifying our society’s vision, values, and purpose in how we use our system of justice. While calls for a “national dialogue” often lead nowhere, the Virginia Department of Corrections has demonstrated that there is a right way to do this and, when done right, it can have a real impact on a corrections organization. The lessons they have learned can be applied just as effectively in communities across the country.

¹ These results were supplied by W.D. Jennings, Ph.D., Administrator, Research and Management Services Unit at the Virginia Department of Corrections. See also Virginia Department of Corrections (2012), *State responsible offender population trends, FY2008–FY2012*, Virginia Department of Corrections, Richmond, VA. Retrieved from http://vadoc.virginia.gov/about/facts/research/new-statsum/offenderpopulationtrends_fy08-fy12.pdf.

About Language

Kathy Boudin, Assistant Professor, Columbia School of Social Work

The Liman Colloquium 2014 was entitled *Isolation and Reintegration: Punishment Circa 2014*. Its goal was to examine different aspects of isolation within the criminal justice system, explore the consequences of isolation both within prison and upon release, and to learn about possible alternatives. Isolation can



Kathy Boudin

be physical: incarcerated people are isolated from the broader society, and some are isolated even within the prisons through solitary confinement. Isolation takes place even without the separation of fences and walls – when people come home and try to reintegrate. Legislation, policies and practices create “collateral” punishments that make it difficult for people to get jobs, housing, and education. Isolation occurs through social and political exclusion when formerly incarcerated people are denied the right to participate in the fundamental democratic process of voting. And isolation is reinforced by language. Language plays a role in how we view and treat people with criminal justice involvement.

Language describing incarcerated people has followed



The 2014 Liman roundtable.

the development of the prison system and its purposes. In an earlier period the word “convict” was replaced by “inmate” and “prison” was replaced by “correctional facility,” suggesting that prisons could correct behavior. During the past four decades the overriding goal of the criminal justice system has been to punish. Now, the official word used by the New York State Department of Corrections and Community Supervision for incarcerated people is “offenders,” and it is “ex-offenders” for people who have returned home. This language is not unique to New York State; it is tied to the literature of criminal justice – in grant proposals, research, classrooms and state and federal agencies throughout the country. And it is used in discussions amongst people working in the field of criminal justice, including advocates.

The word “offender” defines individuals solely by the crimes for which they were convicted. This defines a person one-dimensionally; the whole person disappears and instead one sees an individual – in prison and after release – only as a criminal. The student, mother, father, chef, electrician, musician or artist, community leader – future or present social worker, is invisible; only “offender” and “ex-offender” are seen. The words “offender” and “ex-offender” contribute to policies that deny change and growth, continue isolation and punishment after prison, and inflate the prison population by ignoring the actual public safety risk posed by a parole applicant, focusing instead only on the crime committed.

Two examples of how language can affect people’s views follow. First, in my teaching about criminal justice, I often ask students to say quickly all the words that come to mind when I say the word “criminal.” Words flow: “dangerous, violent, guilty, scary . . .” Then I ask them to say the words that come to mind when I say “mother.” They say, “nurturing, caring, protective, loving.” Next I ask whether one person could possibly be

described by both lists, perhaps at different times. Usually there is silence as people try to think about it. Finally, I show a short video of mothers in prison and their teens sharing loving and important time together. The film also shows that most of the mothers are there for a serious crime. This challenges the bifurcated and fractured way the students (emblematic of society as a whole) view people in prison.

A second example shows how the “offender” language freezes people into the particular crime, “a violent felony,” rationalizing parole denials and undercutting basic values of our penal system – rehabilitation, transformation, redemption, not just punishment. This is reflected in a dramatic growth of aging people in prison. Between 1995 and 2010 the number of state and federal prisoners age 55 and over quadrupled to 124,000, while the prison population as a whole grew by about 41%. In New York State over the past 12 the overall prison population decreased by 21% – from 71,466 in 2000 to 56,315 in 2011. At the same time the population of elders (50 and over) increased by 64% – from 5,111 in 2,000 to 8,392 in 2011.

Aging people in prison are frequently those who have committed serious crimes causing death or possibly death and injury. They are defined as “violent offenders.” The number of aging people in prison is expanding in part because of the dramatic increase in length of sentencing in this period. Another reason can be found in parole policies that deny incarcerated elders release solely because of their crime – something that occurred 15 or more years ago. Parole decisions often ignore risk and release assessments, disregarding both public safety assessments and the transformation and rehabilitation that reliably predict successful parole release. One man was turned down by the parole board because of a crime that he committed 32 years ago; he is 84, hard of hearing, and in a wheel chair. Another man was held 18 years

beyond his 15 to life sentence – in spite of having achieved 2 undergraduate degrees, two masters' degrees and initiating an HIV/AIDS peer education at the height of the epidemic with no indication from parole that he represented a risk. He was released finally at 63.

These men exemplify the thousands of men and women who are not rejected because of public safety issues or failure to rehabilitate, but because the parole board continues to define them only by the nature of their offense.

Although it would be an overstatement to say that the term "violent offender" in itself is responsible for the parole denials, the label characterizes them in every document, parole hearing, media, and statistical report, and helps justify holding them in prison. The crime itself is the one thing that they cannot change. Who they have become in prison, their maturing, regrets, accomplishments, and years of punishment are ignored as the language freezes them into the crime. The irony is that these very same people when they are finally released after serving long sentences, have the lowest recidivism rate, as exemplified in New York and it is well known that they often play a role inside the prisons as leaders, role models for others. Some are infirm; others are aging but able

to make important contributions when they come home.

We need to change the language of researchers, advocates, and professionals to move the criminal justice system away from freezing people in the nature of the crime/offense towards acknowledging the whole person. In 2004, a group called Nu Leadership – a policy institute founded and led by formerly people who were formerly incarcerated – asked that friends and supporters use the word "person" or "people" when referring to those who are either in prison or returning from incarceration. And, agencies in many cities are changing their language from "ex-offenders" to "returning citizens". By calling people what they are – "grandfathers," "grandmothers," "returning citizens," or "a *person* who is incarcerated" – we can begin to move beyond the punishment paradigm and allow people to move forward in their lives, whether in prison or returning home. The truth is that formerly incarcerated people already play key and energizing roles in the prison reform effort as a whole. Changing language not only benefits the individual and his or her family, but society at large because of the contributions people can and do make to their communities.

Democracy and Criminal Justice Reform

Glenn Martin, President and Founder, Just Leadership USA

The right to democratic participation: few maxims in the history of our constitutional republic are treated with greater rhetorical reverence. Yet, as with other non-binding commitments, we often dither when the time comes to align practice with our doctrinal pronouncements.

No community wants, or needs, true reform to occur more than the ones directly impacted by a failed criminal justice system. Why, then, are we not seeking their advice about what needs to change, where we can improve, and what strategies we need to implement to manifest such change?

People of color and poor people are heavily overrepresented among the incarcerated. In 2004, Hispanics represented approximately one-fifth of people in state prisons, and one-quarter of people in federal prisons. Slightly less than half of people in both state and federal prison were black. Today, for black males in their thirties, one of every ten is in prison or jail any day of the week.

Taken to its logical and strategic conclusions, one might expect the disproportionate representation of people of color within prisons to translate into movements with a similar composition. One cursory look at mainstream commentary and political action on the matter of criminal justice reform, however, and one realizes that is far from the case. The South



Glenn Martin

African freedom fighter Steven Biko wrote of similar dynamics in the context of the black freedom struggle:

"When workers come together under the auspices of a trade union to strive for the betterment of their conditions, nobody expresses surprise in the Western world. It is the done thing. Nobody accuses them of separatist tendencies. Teachers fight their battles, garbage men do the same, nobody acts as a trustee for another. Somehow, however, when blacks want to do their thing the liberal establishment seems to detect an anomaly. This is in fact a counter-anomaly. The

anomaly was there in the first instance when the liberals were presumptuous enough to think that it behooved them to fight the battle for the blacks."

The idea of self-determination has long possessed currency in Western political thought. It remains a curiosity, then, that ostensibly progressive thinkers recoil at the insistence of affected parties to shepherd the movements aimed at alleviating their collective grievances. The insistence of typically well-meaning liberals to position themselves at the helm is knitted into the very fabric of anti-oppressive movement history. This reality readily avails itself to anyone interested in interrogating the trajectory of the social justice campaigns of the past half-century. Thus, while it may be historically

anomalous for outsider groups to lead on behalf of others, the attempt made at doing so is consistent with the historical record.

This recurrent motif belies the notion of genuine progressive commitment to social change, underscoring a much more dubious adherence to political vanguardism, wherein the validity of a movement is measured by its fealty to the liberal and progressive intelligentsia.

When our politics are tainted by the specter of paternalism, we diminish the agency and humanity of those we purport to serve, particularly when advocating for the freedom of those people – for if freedom means anything, it must mean determination of self. To undermine that principle is not merely a tactical sacrifice of theory to praxis, but rather serves to erode the transformative capacity of our movements. Specifically, we cannot with moral legitimacy lambast a legal regime for failing to affirm the humanity of oppressed peoples as we refuse to do so in our own movements.

This isn't to say that the presence of allies is not necessary for social change. Indeed, allies have been integral to every movement against systemic injustice – from the abolition of slavery to women's suffrage to our continued civil rights movement – but it is at the behest and direction of oppressed peoples that allies best maximize their political influence.

Restorative Justice

Craig DeRoche, President, Justice Fellowship

To many Americans today, justice is unfortunately more of a concept than a certainty. The criminal justice system is not accomplishing its goal of restoring communities, respecting victims and transforming offenders to crime-free lives and self-sufficiency. Critics of the current federal, state and local justice system grow each day. Such critics and policy minds debate what is and isn't working – too often the vocabulary doesn't accurately address the yearnings of the men and women exposed to, or participating in the justice system. In nearly every discussion, the *basis* for seeking a more restorative system is seldom mentioned.

Criminal justice in practice represents how we value human life in our culture. This fact must remain at the heart of any attempts to improve our justice system, because crime isn't just broken laws. Crime shatters lives and fractures communities.



Among attendees were Kumar Viswanathan, a co-founder of The Phoenix Association, which is a Connecticut-based group of formerly incarcerated people who help to provide exchanges, dialogues, and public education about criminal justice reform.

It is, as it always has been, more a function of the self-determinative spirit of oppressed communities than it is of progressive America's due reverence to the principle of self-determination that affected communities have led their own movements for social transformation.

It is incumbent on those working for criminal justice reform to recognize that there are no "voiceless" who must be spoken on behalf of. The notion of a faceless, suffering mass of people certainly comforts our sensibilities and assuages our narcissistic impulse to speak out forcefully against tyranny, but it has no basis in lived reality. After all, if someone is voiceless then we need not interrogate the tyranny of our own voices. Our reductionism obscures the reality of marginalized

speech, namely that there are only the willfully neglected and systematically silenced. We reinforce the tyranny of silence every time we speak on behalf of, rather than with people.

The bottom line is this: the voices of the currently and formerly incarcerated must be given due reverence within the criminal justice reform movement. If they remain barred from speaking and leading from the truth of their own experience, then we can hardly take seriously any notion of meaningful societal reintegration. Our job is not to speak, but to listen and follow with compassion, reverence and humanistic fervor.

Our response to crime demonstrates the value we place on human life – the lives of the victims, the lives of the person committing the crime, and the lives of those who make up the communities of America.

Since the criminal justice system has forgotten its proper foundation, Justice Fellowship has identified and defined the "building blocks" needed to restore justice in America. These "building blocks" make up the Restorative Justice Model and advocacy campaign Justice Fellowship has created to lead a movement committed to restoring and healing the lives of those affected by crime.

Restorative Justice is an approach to the criminal justice system that recognizes and advances the dignity of human life. It prioritizes victim participation, promotes offender responsibility, and cultivates community engagement.



Craig DeRoche

This approach to justice is not intended to grow through the promotion of Christian values at the expense of secularist government or religious diversity. Rather, Justice Fellowship's model is intended to attract people of faith, academics, criminal justice practitioners, and political leaders toward solutions based in our shared values

of restorative justice. Judeo-Christian values have remained at the center of our justice system, and have been at the core of the greatest advancements in American history. Our cultural and personal rights, freedom, prosperity, civil rights and equitable justice have all advanced greatly when public policy is aligned with our shared moral values and respect for each other's lives.

Justice Fellowship grew out of Christian values as well. Over 30 years ago, the ministry was founded by the late Chuck Colson, who served as special counsel to President Richard Nixon until he was incarcerated in federal prison for his role in the Watergate scandal. As a result of his spiritual transformation in prison, Colson founded Justice Fellowship – the national leader in advancing restorative justice principles into policy solutions, and Prison Fellowship – today the world's largest prison ministry.

For those who have criminal records, who have gone to jail or prison, who have been addicted to drugs or alcohol, Colson demonstrated that each one of those experiences can be of the highest value to our fellow man when the experience is used for good and growth from it is applied to benefit others. Through Colson and others, our society continues to be introduced to the fact that those who have been offenders in the criminal justice system can help point the way toward greater public safety. Those who have been victims of crime can likewise show us how to respect crime victims far better than any government officials acting in their stead.

Justice Fellowship submits that the 65 million men and women in America with criminal backgrounds know exactly what we are talking now that the discussion is properly changing to include a valuation of their life equal to their fellow citizens. Victims of crime understand this too. Together,

these two parties, along with their greater communities, can advance their interests in a way that reduces crime, respects and restores victims, and sets people on a path to self-sufficiency and productivity.

For Christians, these values derive from Christ's teachings and the Bible. Yet Justice Fellowship has found that, regardless of race, creed, religion, or sex, there exists in Americans not only an agreement on much of what should be described as "crime", but also on the values-based, restorative approach to solving our criminal justice problems today. Thus, shared values among people of different faiths as well as agnostics and atheists are pointing us in a common destination.

An opportunity exists to change lives, communities, and American culture in a way that increases public safety, restores victims and families, and celebrates redemption. There is an opportunity to build restorative justice.

Justice Fellowship believes the keys to starting the restorative justice movement are as follows: first, to recognize the priority of the victims and communities affected by crime over the modern practice of centering our attention on "needs" of the government; second, to focus on working with the



Justice Fellowship's model for restorative justice, which envisions mutually reinforcing interests among victim, offender, and community.

person who has committed the crime – *because this is truly the key to stopping new crimes from occurring and new victims from being created.*

Carrying out Colson's vision to fix our broken criminal justice system, Justice Fellowship and Prison Fellowship know the solutions are not just about saving money or keeping someone out of prison. The way forward lies in implementing policies, programs, and procedures that adhere to the values of justice described in the Bible. These principles, when put into action, work.

RECOGNIZING AND RESPONDING TO DISTINCTIVE NEEDS

Sentencing and Sensibility: The Mentally Ill and the Intellectually Disabled

The Honorable Myron H. Thompson, U.S. District Court, Middle District of Alabama

As many have observed, our prison systems are in the midst of a mental-health crisis. The Department of Justice has found that half of all prisoners suffer from mental illness and, while reliable data regarding prisoners with intellectual disabilities are harder to come by, it seems clear that these prisoners are also incarcerated at disproportionate rates. It could reasonably be argued that, for many of these mentally ill or intellectually disabled prisoners, the net effect of the litigation from



The Honorable Myron Thompson (center), with Rick Raemisch (left) and Nicholas Turner (right).

the second half of the last century challenging the mass civil institutionalization of the mentally ill and the intellectually disabled, has been the mere relabeling of the signs over the entrance doors to the buildings in which they are housed: from mental-health hospitals to corrections facilities.

Those who are mentally ill or intellectually disabled are significantly more likely to have difficulty complying with the strict rules that accompany incarceration, and so often end up serving longer sentences and being placed in punitive solitary confinement. Prison is, suffice it to say, not the ideal setting to treat mental illness or accommodate intellectual disability.

As a judge, I see such defendants all the time. Indeed, litigation about mental illness or intellectual disability is a central feature of many criminal cases. These issues almost always come up in three contexts. The first question is whether the defendant is competent to proceed at all, that is, whether he can understand the proceedings and assist his attorney. This is a critically important inquiry. It is also a low bar: even quite seriously ill or disabled individuals can still be competent. The second question is whether the defendant was insane at the time of the alleged crime, such that he cannot be held responsible at all. Again, this is extremely important, but very difficult to establish. Finally, the third question is whether the fact of mental illness or intellectual disability is a mitigating factor suggesting that a lower sentence would be appropriate (in the language of federal sentencing, a “variance”). While, under some circumstances, such conditions may be sufficient to justify a sentence without incarceration, more frequently the question is simply how much incarceration to order.

These three inquiries are necessary, but they are not enough. There are many mentally ill or intellectually disabled defendants who are competent, criminally responsible, and either must or should be sentenced to prison. Judges, prosecutors, and defense attorneys need to do more to ensure that these defendants receive adequate care and accommodation. We all often feel that our hands are tied on this score, that the solutions to these problems lie elsewhere: in increased

funding for mental-health treatment, or civil litigation to enforce prisoners’ access to mental-health care, or abolition of harsh mandatory minimum sentences in order to allow courts to take account of individual factors like mental illness or intellectual disability. But, in reality, those of us involved in criminal cases are not without available tools. I will discuss two relatively under-utilized arrows in the quiver of federal judges and attorneys.

The first is 18 U.S.C. § 3552(b). Before a defendant is sentenced in federal court, a U.S. probation officer prepares a presentence investigation report which, among other things, discusses the defendant’s mental health. But § 3552(b) allows the court to order an additional presentence study of the defendant if it desires more information in order to determine a reasonable sentence. Such a study may help inform the court’s determination of the appropriate sentence.

The second tool available in federal court is 18 U.S.C. § 4244. That statute allows the court to order hospitalization in lieu of imprisonment for a defendant who requires inpatient treatment. It also authorizes the court to order an evaluation to determine whether such hospitalization is required or, if it is not, how the court can best accord the defendant the treatment he needs. Unlike § 3552(b), the § 4244 evaluation is intended to address the question of whether prison is appropriate at all in light of the defendant’s mental condition, rather than the question of, for example, how much prison time is appropriate.

Both types of evaluations, however, may well offer an additional benefit. Assuming that the defendant is sentenced

to a term of imprisonment, the Bureau of Prisons relies on mental evaluations both in determining to which facility a defendant will be assigned and, once he arrives, in establishing a plan for providing him with mental-health care. Unless the defendant has been previously evaluated, for example in the course of establishing his competency to stand trial, the mental-health information otherwise available to the BOP may be woefully inadequate. The BOP does have access to the presentence

investigation report, but the probation officer's report is often based only on self-reporting and documented diagnoses.

From experience, it is clear that the signs of undiagnosed mental illness or intellectual disability are often there, but may be missed by both the probation officer and the BOP. Does that history of violent conduct simply show a bad character, or could it be related to a previously undocumented traumatic brain injury? Is interest in child pornography just 'perversion,' or could it also be an indication that the defendant was subjected to child sexual abuse? Did the defendant agree to go along with that absurd financial scheme out of greed, or could that be an indication of dementia or intellectual disability?

These two statutes offer courts a way to explore these issues, and to document, perhaps for the first time, problems



Sonia Kumar, a 2009–10 Liman Fellow and now a staff attorney with the ACLU of Maryland, works to address gender and racial disparities for youth in the justice system in Maryland.



David Menschel (center), Liman Fellow 2002 and director of Vital Projects Fund, supports criminal reform efforts nationally. Lisa Kerr (right), PhD candidate at New York University, studies prison policies in Canada and the United States. Giovanna Shay (left) has represented prisoners and taught criminal law; she is now Litigation and Advocacy Director of Greater Hartford Legal Aid.

that may have always lingered below the surface. Furthermore, both statutes allow courts, under some circumstances, to order the BOP itself to conduct the evaluations. Experience suggests that, upon the defendant's incarceration, the BOP may take such internal evaluations particularly seriously in providing mental-health care and accommodation.

Neither § 3552(b) nor § 4244 gives me the jurisdiction to order the BOP to do anything more than take a careful look at a particular defendant's mental state. But that alone may be an important step towards affording that defendant the mental-health care and accommodation he needs if and when he is incarcerated. In view of the mental-health crisis in our prisons, courts have the opportunity and, I would argue, the obligation to take all such steps whenever they can.

Washington State's Gender-Responsive Initiative

Bernie Warner, Secretary of Corrections, Washington State

Starting in 2008, the Washington State Department of Corrections (DOC) has developed a set of tools to address the unique needs of women offenders. With the intent of providing organizational leadership, the Department created an executive position solely responsible for women's facilities. Having served as superintendent of both men's and women's facilities in Washington, the newly selected leader began to address the fact that women's pathways to prison and subsequent behaviors during incarceration were different than men's. At the same time, the increasing female population was leading to overcrowding issues. The Department needed a way to address both the structural needs related to the increasing population and a way to improve public safety outcomes for female offenders.

The resulting Master Plan for Female Offenders focused on three key areas: assessment and classification of offenders, programming available, and facility development. In 2012, the National Resource Center on Justice Involved Women, at DOC's invitation, convened a taskforce to examine the 2008 Master Plan for Female Offenders in light of organizational, legislative, and offender population changes in the previous four years. The Department relied on the taskforce's recommendations when we launched the Gender Responsive Initiative in 2013.

The Initiative's long-term goal is to define a culture that is relationship-focused, trauma-informed, and sensitive to individuals' sexual and gender orientation. We are most effective at changing offender behavior when we accurately address the risks and needs of all offenders. In the case of the

Gender Responsive Initiative, this means examining our policies, procedures, programs, language and assessments to ensure they are inclusive of the entire incarcerated population, not just the 92 percent who are men. The Department created gender-conscious terminology and definitions for policy language and drafted an agency policy for gender responsiveness. The Initiative also strives to implement evidence-based and research-based programs designed to address the risks and needs of female offenders.

We took small-scale actions such as providing better-fitting clothes designed for women and expanding commissary options to include items frequently requested by our female population. These seemingly small actions helped address some common complaints from the female population which allowed us and the offenders to focus on improving the broader issues. The Initiative also creates a better case management process and increases gender-responsive programming to serve female offenders. Health care is a special concern, and the Department is reviewing the Offender Health Plan to ensure gender awareness.

The Gender Responsive Initiative includes a plan to revise the current risk and needs assessment tool, which has been shown to overestimate female offenders' risk to reoffend. Of the 866 female offenders released from prison in 2010, 156 returned to prison within three years, a rate of 18 percent. During the same time period, 2,065 of 6,874 male offenders re-entered prison, a rate of 30 percent. The Department hopes to produce a risk and needs assessment that is weighted and scored to more accurately reflect the risks and treatment needs for females. This will increase our ability to match offenders with the right services and programs to change behavior and close the revolving door of incarceration. The staff at the Washington Corrections Center for Women (WCCW) and Mission Creek Corrections Center for Women (MCCCW) began a pilot using a risk and needs assessment designed specifically for women – the Women's



Bernie Warner (center) speaks about gender and incarceration, with fellow panelists Gary Mohr, Nkechi Taija, and Kathy Boudin (left to right).

Risk Needs Assessment (WRNA). Additionally, Washington State University is evaluating the current risk and needs assessment to look at factors that contribute to recidivism for women offenders.

In 2013, the Initiative developed new vocational programs, trauma-response programs, and self-care seminars. WCCW launched its Electrician Apprentice Program in February 2013, and plans are in the works for a similar program at MCCCW.

Two vocational Certified Nursing Assistant programs have been approved and will be offered in the spring at the WCCW. This program will provide long-term offenders with opportunities to become certified nursing assistants so they can work in the prison helping aging offenders.

We have also worked to make our programs both evidence-based and responsive to female inmates' own views. The Gender Responsive Initiative created a 10-week series of women's self-care seminars at the WCCW, which was presented four times in 2013. The seminar topics were selected through a survey of approximately 900 female offenders. The topics include communication skills, healthy relationships, coping skills, self-

esteem and personal empowerment, family relationships, health and nutrition, life planning and goal setting, domestic violence, violence prevention, and sexual health. In addition, given that so many of the women have experienced difficult histories of violence, staff members at the prison are trained to provide several specialized, multi-week programs to better engage with offenders who have suffered trauma.

The women incarcerated at WCCW created their own organization, known as the Women's Village, to address similar issues of mental health, self-empowerment, education, and development of life skills. Since its founding in 2008, the Village has grown from five members to more than 200, and the prison has seen drastic drops in violence rates. These women are collaborating with the Freedom Education Project of Puget



Nkechi Taija, Senior Policy Analyst, Open Society Foundations (front), discusses the situation for female prisoners in the federal system, alongside Rick Raemisch, Executive Director, Colorado Department of Corrections, and Gary Mohr, Secretary, Ohio Department of Rehabilitation and Corrections (left to right).

Sound (FEPPS) to develop a higher education program for the prison. Monthly meetings of the Village Education Advisory Committee of prisoners with the FEPPS allow female prisoners to express their concerns and develop their leadership skills.

For the future, the Gender Responsive Initiative aims to implement several new strategies to change offender behavior. First, we are expanding possible placement options for women offenders, including work release and community corrections.

Second, we will extend programs offering a curriculum for unhealthy relationships. Third, we are developing a training curriculum for employees, including an in-service training on trauma-informed care. Most recently, a Gender Responsive Summit brought in national experts to foster conversation among staff in town hall style meetings to consider where additional improvements may occur.

HELPING PEOPLE TO EXIT AND SUPPORTING THE COMMUNITIES TO WHICH THEY RETURN

Reforming the Federal Criminal Justice System: Clemency Should Be Part of the Conversation

Megan Quattlebaum, Senior Liman Fellow in Residence

Contributors to this issue of *The Liman Report* have commented on the need and opportunity for reform of federal sentencing laws. As the Honorable Patti Saris, Chair of the United States Sentencing Commission, notes, “[f]or the first time in decades, there is interest across all branches of the federal government and all parts of the political spectrum in reducing sentences.”

Indeed, this year has seen tangible progress toward that goal. In May, the U.S. Sentencing Commission voted to reduce sentences for most drug offenders by about 17 percent. And in July, the Commission opted to make those reductions retroactive; as a result, it estimates that over 50,000 individuals who are currently in prison (an incredible 23 percent of the total population) will be eligible to seek a reduction in their sentences. In Congress, bills have been put forward that would reduce mandatory minimum sentences (the Smarter Sentencing Act) and allow inmates who successfully complete recidivism reduction programs to spend more time out of prison on community supervision (the Federal Prison Reform Act). Though neither bill seems likely to pass this year, the fact that bipartisan solutions to the problem of overincarceration are being seriously debated is encouraging.

While so-called “front-end” reforms to the way we punish are vital, we should also be sure to include the presidential pardon power as part of the conversation. Clemency matters because it allows the executive to intervene on behalf of those already enmeshed in the criminal justice system, in cases where society has revised its view of what constitutes a just penalty for a given offense or where an individual has been rehabilitated such that additional punishment – or the continued stigma of a criminal record – would serve no purpose.



Megan Quattlebaum

Indeed, clemency has received some attention in this time of sentencing reform enthusiasm. Earlier this year, the Department of Justice announced an initiative to seek out nonviolent drug offenders with long prison sentences whom it will consider for clemency. The initiative is open to federal prisoners who meet six criteria, including that they have served at least ten years of their sentence and likely would have received a substantially lower sentence if convicted of the same offense today. The goal, according to President Obama, is to help “restor[e] to fundamental ideals of justice and fairness” to

our penal system by releasing those who “would have already served their time and paid their debt to society” had they been sentenced under current law.

Many view the new initiative as a welcome development, particularly given that President Obama has thus far made only begrudging use of his clemency power, granting fewer pardons and commutations than any of his predecessors since at least President McKinley, who during two years in office granted over five times as many pardons as Obama has as of today. But some disagree: not long after the initiative was announced, the House of Representatives approved a measure sponsored by North Carolina Representative George Holding that would prohibit any Justice Department funds from being used to add staff to the Pardon Attorney’s Office to review the large number of commutation petitions that the Office expects to receive in light of the Department of Justice’s announcement.

Representative Holding and his allies suggested that the President was making an improper end-run around the legislature, which should do the work of changing the mandatory minimum laws, but Obama does not need to wait

for the legislature to act in cases of manifest injustice. The clemency power is not an invention of an activist president but a guarantee of Article II of the United States Constitution. Our Founding Fathers gave the president this power because they recognized that “there may be many instances where, though a man offends against the letter of the law . . . peculiar circumstances in his case may entitle him to mercy.”

Indeed, the President should not only seek out new candidates for clemency, but undergo a careful review to identify those meritorious individuals whose cases are already before him. The Pardon Attorney’s Office has in hand 754 pardon petitions and 2,785 sentence commutation petitions on which it has not yet acted. My own experience representing applicants for clemency suggests that there are no shortage of compelling cases in the pile.

One of them is Michael Keating. Shortly after high school, he fell in with a bad crowd in his rural hometown in Missouri, and began experimenting with meth. By the age of 20, he was hooked and using the drug on a daily basis. He met a man who said that if Michael allowed him to use the woods behind his house to produce drugs, he would give the young addict some of what he made. Soon thereafter, police officers received information that meth was being made at Michael’s



Marcella Coburn, YLS Class of 2016, worked with Jessica Asrat, YLS 2014, to plan the Friday afternoon session of the Liman Colloquium. Asrat was also a student convener of the Liman Workshop in 2013–14, and Coburn will co-convene the Liman Workshop in the spring of 2015.

home. They searched his property and found a bucket of waste water in the backyard. Although the waste water contained only trace amounts of methamphetamine, he was convicted and sentenced to serve more than 11 years in federal prison.

At his sentencing allocution, Michael promised the judge that “[n]o matter what you decide . . . I’ll try to do my best to get the full benefit of my time [in prison] so that I can come home healthier and more educated so I can live a better quality of life and appreciate the things I

once took for granted.” Before entering prison, he successfully completed an in-patient rehabilitation program and kicked his drug habit. And, since entering prison, he has had a perfect disciplinary record, completing thousands of hours of apprenticeship and vocational training. Indeed, Michael’s record inside is so good that the federal prison in which he is incarcerated frequently lets him out: Michael serves as a town driver for the facility, running errands outside the prison in an official vehicle. He could try to escape, but he doesn’t. That’s what it means to be rehabilitated. Michael has learned valuable skills as an automotive electrician while behind bars; a compassionate approach to executive clemency would allow Michael, and others like him, to be sent home to put their talents to work for their communities.

Leveraging the Moment: Resources for High Incarceration Communities

Nicole D. Porter, Director of Advocacy, The Sentencing Project

The coalition in support of criminal justice reform is expanding. I recently had the opportunity to present at the League of Women Voters’ national convention. In a meeting room at a Washington area hotel, older women from suburban communities in Missouri and Arizona were very concerned about the nation’s “war on drugs” and the failures of our prison system.

That afternoon underscored just how far the conversation has progressed in the past decade. Leaders from different ideological perspectives are calling for changes to the nation’s criminal justice system. Newt Gingrich, the former Republican Speaker of the House, recently announced an effort to lower the nation’s incarceration rate by fifty percent by 2050. And earlier this year, Attorney General Eric Holder announced a significant expansion of the federal clemency process in order

to reduce excessive prison terms for low-level drug offenders.

At the state level, there has been a significant shift in criminal justice policy, too. After nearly four decades of steadily rising imprisonment – a 500% increase since 1972 – prison populations have started to decline. More than half the states have scaled back their mandatory sentencing laws. California voters scaled back that state’s draconian “three strikes and you’re out” law in 2012. The law resulted in high profile cases like Curtis Wilkerson who was sentenced to 25 years to life on a third strike for shoplifting socks worth a few dollars. These changes have led to a decline in the nation’s prison count by 4% since its 2009 peak and represent growing consensus.

Yet any optimism should be tempered by the very modest rate of decline: just 1.8 percent in recent years. At this rate it will take until 2101 – 87 years – for the prison population to

return to its 1980 level. The nation's scale of incarceration demands approaches that can improve public safety and address the destructive effects that mass incarceration and harsh punishment have visited disproportionately upon individuals and communities of color.

Certain efforts, like Justice Reinvestment (JR), were conceived as part of the solution to this problem. The intent was to reduce corrections populations, thereby generating savings for the purpose of reinvesting in high incarceration communities to make them safer, stronger, more prosperous, and equitable. The reasoning for this was simple: these communities are the feeder system for prisons, jail, probation and parole, and strategic investment in them would be essential to decrease correctional demand.

This is also a moral argument. Individually and collectively, residents of high incarceration communities – already suffering from social exclusion due to race, poverty, disenfranchisement, etc. – have been disproportionately subjected to the further destabilizing and downwardly mobile consequences of high incarceration rates; therefore, it is incumbent upon policy leadership to make investments that promote greater economic and social equality and stability.

Recent changes in policy, while helpful, are insufficient to meet the challenges of improving public safety in high incarceration communities. Current policy reforms have not maintained the pragmatic and moral connections between prison reductions and reversing the systemic social and economic obstacles facing communities with high concentrations of criminalized residents. To date, the implementation of JR has helped to shift the mood, but efforts must also direct attention to investing in high incarceration communities.

Moreover, legislative reforms in states like Oklahoma and Pennsylvania are likely to strengthen the very corrections policies that have played such a prominent role in the system's growth in the first place. Increased funding for "intensive community supervision" (i.e. closer control and scrutiny) can result in higher rates of return to prison by widening the net of social control. Even investment in rehabilitation services, such as drug treatment, can backfire if services are inappropriate or inadequate since relapse (which is common among recovering addicts) can result in revocation to prison.

This is not the approach we should want. Current practices



Nicole Porter (center), with Noah Bookbinder, Bandy Lee, Fiona Doherty, and Marie Gottschalk (left to right).

in public safety policy have resulted in a great imbalance that relies too heavily on the criminal justice system. This has produced excessive levels of punishment and a diversion of resources from investments that could strengthen the capacity of families and communities to address the circumstances that contribute to crime. Research has demonstrated that many social interventions are more cost-effective in producing better public safety outcomes than expanded incarceration.

Initiatives that prioritize early childhood education, programs for at risk youth, and community investment have demonstrated effectiveness in reducing crime. Programs like the Nurse Family Partnership, a visitation program, have shown that home visits can significantly reduce child abuse and neglect among participating families, as well as arrest rates for children and their mothers. A proven program for at risk youth is Functional Family Therapy (FFT), an initiative that works to improve family interaction by enhancing emotional connections. And research shows that a community-level approach can be effective at preventing crime in urban neighborhoods; studies have concluded that organizational participation and informal social control mechanisms can address criminal violence at the neighborhood level.

In order to achieve a better balance in our approach to public safety we need to focus on three areas. First, we must target investment in effective interventions proven to reduce crime in high incarceration communities. Second, we should reverse the course of the drug war by shifting to a model of prevention that relies more on the public health system than the criminal justice system. Finally, we should scale back the length of prison terms across the board, even for more serious crimes. The 21-year-old former gang member convicted of robbery may be a very different person at age 40.

The current atmosphere for reform provides an opening to scale back incarceration and address the imbalance in the nation's approach to public safety. Reforming criminal justice policies and practices may result in the avoidance of state correctional expenditures and offers an opportunity to leverage public resources towards services proven to reduce crime. The country will benefit from a strategy that uses evidence-based practices to strengthen early childhood education, alternatives to juvenile incarceration, and community investment.

Visiting Prisons: Excerpts from the Yale Law and Policy Review Symposium



Andrea Armstrong, David Fathi, Paul Wright, Giovanna Shay, Aaron Littman, and A.T. Wall.

Under the auspices of the Liman Program, three former students – including Chesa Boudin, YLS Class of 2012 and Liman Fellow 2012, Aaron Littman, YLS Class of 2014 and Liman Summer Fellow 2008, and Trevor Stutz, YLS Class of 2012 – surveyed the rules governing prisoners’ access to visitors. A central finding was the diversity of visiting rules: thirty jurisdictions have a stated goal of promoting increased visits but, in practice, fewer have policies that bridge the divide between “inside” and “outside” by, for example, making the hours longer and opening up many days for visits. Further, some policies strictly limited the number of people who may visit and subject both visitors and inmates to invasive search procedures.

The study prompted a special issue of the Yale Law and Policy Review, which also included commentary from David Fathi, who directs the ACLU’s National Prison Project, A.T. Wall, who runs Rhode Island’s corrections system, Giovanna Shay, Litigation and Advocacy Director, Greater Hartford Legal Aid, and Philip Genty, Professor in Professional Responsibility at Columbia Law School. See 32 Yale L. & Pol’y Rev. 149 (2013). The study has proven to be a source for policy changes in several states, including Utah, Connecticut, and Washington.

Fathi, Shay, and Wall joined Littman at the Liman Colloquium in April 2014 for a conversation about how policies, law, and technologies lessen or increase the isolation of incarcerated people. Also presenting was Paul Wright, President and Founder of Prison Legal News. Andrea Armstrong, Associate Professor of Law at Loyola Law School and YLS Class of 2007, moderated the discussion. Excerpts of the essays follow.

Prison Visitation Policies: A Fifty State Survey

Chesa Boudin, Trevor Stutz, and Aaron Littman

Written policies allow prisoners and their visitors to plan and utilize available visitation opportunities. When policies are clear and readily accessible, visitors and prisoners can more easily follow the rules. Statewide policy directives often provide more detail than administrative regulations, though facilities may have additional local rules.

Forty-six jurisdictions have DOC policy directives – policies promulgated by the head of the DOC. All of the five states that lack policy directives follow an administrative regulation or have written policies on the department website.

Number and Duration of Visits

Visiting a prisoner is not always an easy task. States vary widely as to the lengths of visits allowed, and the number of times in a given period during which friends and family may visit. The statewide policy then binds individual facilities to a minimum or maximum amount of visitation. Especially for visitors who live a great distance from the prison, or who have jobs, children, or other responsibilities, the greater the number of visitation options, the easier it is to visit . . .

Twenty-eight jurisdictions have a floor for the minimum number of days or hours visitation must be made available. For example, in Georgia, “[a] minimum of SIX (6) hours shall be

allotted each day for visitation periods on Saturdays, Sundays and holidays Normally, there will be no restrictions placed on the length of visits during the facility's established visitation periods."

Several other states provide for ceilings on visitation hours. For instance, Oregon allows only one visit per day per visitor on weekends and holidays, and Utah allows no more than two hours per visit per day. Overall, New York State's maximum security prisons provide perhaps the most welcoming visitation policy, allowing for up to six hours of visits 365 days per year and overnight visits approximately every two months. North Carolina is perhaps the most restrictive, establishing a ceiling of no more than one visit per week of up to two hours (excluding legal and clerical visits).

Inmate Eligibility for Visits

Because states uniformly consider visiting a "privilege," policies often limit prisoners' access to visitors as a sanction and may reward good behavior with greater access to visitation. In contrast, some policies provide greater access to visitation for prisoners who may have the greatest need for visits. Prisoners are categorized by their crimes and primarily based upon their behavior within the prison.

Twenty-three jurisdictions specify that offenders at certain security classifications will be subject to limits on visitation In most states that differentiate based on security classification, higher-security inmates are allowed fewer visiting opportunities.

In Oklahoma, for example, maximum-security inmates are given up to four hours per week of visitation, while minimum-security inmates get up to eight hours per week. Likewise, Mississippi's regulations state that Long-Term Administrative Segregation Status offenders are allowed only "one (1) hour non-contact visit each quarter of any year with any approved visitors on their visitation list." In contrast, New York is the only state that provides more visitation opportunities and more flexible timing of visits to inmates in higher-security settings. While New York's policy does not articulate a particular reason for this uncommon approach, one can infer that it is to provide the inmates with the greatest needs and most long-term, profound isolation from their communities with ongoing, meaningful contacts outside of prison.

In general, higher-security inmates and those in segregation within the prison may face additional barriers to visitation, such as restriction to "no-contact" visits. Georgia, however, has a specific provision to allow visitation to inmates in the most restrictive custody. Additionally, prisoners may be temporarily or permanently banned from visits for disciplinary violations. Michigan enforces a potentially irrevocable permanent ban on visiting in some circumstances. And new regulations in New York have introduced harsher penalties for inmate misconduct, including a six-month to year-long suspension of all visiting privileges for any drug-related charges, whether stemming from a visit or not.

Approval of Visitors

Primarily because of security concerns, every state requires that visitors seek advance approval from the prison before visiting. That process can include a background check, fees, and a waiting period. Many states limit how many visitors may be approved for each prisoner and limit how frequently the approved visitor list may change. These added barriers require that prospective visitors plan their visits, sometimes months in advance.

Thirty-one jurisdictions limit the number of visitors an inmate may have on an approved visiting list. Pennsylvania allows the longest visitor list (forty) and South Dakota the shortest (two plus family). Of these thirty-one jurisdictions, the mean number of visitors allowed is fourteen and the mode numbers are ten and twenty with six states each. In contrast, California affirmatively places no limit on the number of approved visitors.

Many states allow a visitor to be on only one inmate's approved visitors list, unless a visitor has multiple immediate family members incarcerated. Although not usually made explicit, this policy is generally aimed at promoting security by limiting communication between separately housed inmates via outside visitors

States vary in their policies for adding and removing visitors to or from the "approved visitors" list. In some cases, such as North Carolina and Wisconsin, states provide opportunities to add visitors to or remove them from the list only once every six months. Tennessee requires a visitor taken off one inmate's list to wait a full year prior to appearing on another inmate's list. Utah requires that all adult visitors reapply every year to stay on an inmate's visitors list.

Exclusion of Visitors

Not just anyone can visit a prisoner. Policies often exclude individuals with criminal records from visiting, with the likely goal of diminishing security risks and negative influences. In communities and social groups where having a criminal record may be common, this limitation circumscribes the number of potential visitors. In contrast, some policies take the opposite approach, with the goal of encouraging visitation.

Almost every jurisdiction excludes some categories of visitors, often former felons. Sometimes these restrictions bar former felons from ever visiting. For instance, Idaho excludes anyone who has a felony conviction, an arrest within the last five years, or a misdemeanor drug arrest within the last two years. Michigan prohibits visitation by "a prisoner or a former prisoner in any jurisdiction." However, a prisoner or former prisoner who is "an immediate family member may be placed on the prisoner's approved visitors list with prior approval of the Warden of the facility where the visit will occur and written approval of the supervising field agent." Hawaii, by contrast, specifically allows former felons to visit inmates, absent other aggravating circumstances, as do Massachusetts, Vermont, and the BOP. New Jersey and Nebraska are the only states that explicitly provide



Aaron Littman (center), joined by Paul Wright (far left), and Giovanna Shay, A.T. Wall, and David Fathi (left to right).

for inmate-to-inmate visitation in their written policies. States require various levels of background checks for visitors, ranging from nothing to a detailed criminal history check.

... Several jurisdictions have highly specific, and sometimes unique, rules excluding other categories of visitors. The BOP only allows visits from people inmates knew prior to their incarceration. Oklahoma is the only state to prohibit married inmates from receiving visits from friends of the opposite gender. Washington was the only state to explicitly require, in its written policy directive, non-citizens who wish to visit to provide proof of their legal status in the United States; however, thanks in part to our research, Washington abolished that policy in January 2013. Arkansas and Kentucky require visitors to include a social security number on the visiting information form, and this may serve to deter or exclude undocumented immigrants from visiting their incarcerated family members even when the inmates themselves have legal status ...

Extended Visits

Prisons often offer expanded visitation opportunities for certain classes of visitors. Extended visiting opportunities for visitors who must travel long distances incentivize making the trip. Extended visits also allow prisoners to forge stronger bonds with friends or family, sometimes allowing them to interact in more natural and less surveilled settings. For families, these opportunities may permit moments of normalcy and intimacy not generally available in the average visitation setting.

Nearly all states offer some form of extended daytime visit, and some offer overnight family visits. These visits look different in each jurisdiction, however, as there is no consistent length of time allotted for an "extended" visit, and there is no consistent definition of "family" for the purposes of overnight

visit eligibility. In some cases, this category includes only children (of a certain age) or only spouses (and sometimes domestic partners), while in others it includes all immediate family members and legal guardians ... Nine jurisdictions allow for overnight family visits or conjugal visits ...

Virtual Visits

Virtual visitation is a double-edged sword. Virtual visitation refers to video visits conducted over the internet or an intranet. Like other technological means of communication, virtual visits may make visitation far easier and cheaper for some and may also make visits less intimate or more costly for others. Some states use virtual visitation to affirmatively expand visitation opportunities, while others use it as a restrictive sanction in place of normal visits. At least nineteen jurisdictions have

some form of virtual visitation. Indiana and Wisconsin allow video visitation when the inmate is not allowed other forms of visitation, on a temporary or permanent basis. Minnesota, New Mexico, Oregon, Pennsylvania, and Virginia, by contrast, allow for video visitation as a supplement to, rather than a replacement for, other forms of visitation. Alaska, Colorado, Florida, Georgia, Idaho, Kansas, Louisiana, New Jersey, New York, and Ohio reported that they also have programs, many of which are limited in scope and/or privately operated, but these programs do not appear in their policy directives or regulations.

The Alaska program is only for inmates at a contract facility in Hudson, Colorado run by the GEO Group; visitors must either go to a halfway house run by the GEO Group in Anchorage or use a videolink maintained by the Tanana Chiefs Conference in Fairbanks. The Colorado program likewise exists in only one facility; the Georgia program is being piloted in women's facilities. The New York program is facilitated, in part, by the Osborne Association. The Ohio program operates in four facilities. The Virginia program has recently expanded from one facility to ten and is now incorporated into the state's official policy. Oregon explicitly permits video visitation in its policy documents but has decided to allow access to interactive video phones and includes the related policy directives as part of its administrative phone rule; it will offer interactive video phone calls at all institutions after piloting the concept at the two located most remotely from population centers. Florida, Idaho, Missouri, and Washington also have limited programs that do not appear in their policy directive or regulations.

Similarities and Differences Across the Fifty States

Substantial consistency and significant commonalities exist across all the jurisdictions surveyed. All states have some

provisions for prison visitation; all states screen visitors and place limitations on who can visit and when; and all states provide a substantial amount of discretion to each prison's warden or superintendent in implementing the policy directives. Reading through the various policy directives, administrative regulations, and visitation codes makes clear that all DOCs treat visitation as a privilege, not a right. In most of the policies reviewed, DOCs note that inmates are not entitled to visits.

The significant differences between states' visitation policies are also revealing. First, limits on visitation are often justified in terms of security, which may lead one to expect more consistent policies across jurisdictions than we observed. In some instances there is a direct tradeoff between security and prisoner access to the outside world through visitation such that limiting visitation increases security. However, most of the time, providing prisoners with access to the outside world through visitation decreases prison violence and facilitates rehabilitation. Thus, while contact visits may serve as a vehicle for contraband to enter the prison, they may also be essential to reduce fights in the prison and recidivism after release. We do not know why similar security concerns yield widely variant statewide policies. Jurisdictions evaluate security in different ways in different contexts, so we need to learn more about policy in practice in order to understand this variation.

No clear regional, geographic, or political trends appear to explain the variation in policies. One might expect that certain policies – for example, overnight family visits – would exist in a state or group of states with certain common characteristics. Instead, the states in each category we examined do not appear to have much in common. The nine states that allow for overnight family visits, for example, are not from any one or even two geographic regions, and it is unclear what else of significance California, Colorado, Connecticut, Mississippi, Nebraska, New Mexico, New York, South Dakota, and Washington have in common.

Further, while the states often serve as laboratories of policy experimentation, one might expect some harmonization of best practices. If there has been such a harmonization or cross-pollination process, it is not apparent in several key areas. For example, North Carolina allows just one visit per week for a maximum of two hours, while New York allows its maximum-security offenders 365 days of visiting. While South Dakota allows only two people (plus family members) to be placed on

an inmate's list of approved visitors, California allows inmates to list an unlimited number of visitors. It would be useful to know more about how these policies are developed and revised, both procedurally and substantively. What resources and which stakeholders are consulted when policy directives are drafted or updated? What prompts the issuance of new policies?

Recent Policy Reforms

We presented our research and an early draft of this Feature at an ASCA conference in October 2012. Since then, we have continued to dialogue with many departments of corrections about policies we consider to be counterproductive outliers. In response, two states have already made significant reforms.

In February 2013, Washington State published a revised visitation policy that made numerous changes. Most significantly, Washington removed the requirement that noncitizen visitors provide proof of legal status in the United States, and added a section outlining procedures for video visits and for "videograms." These reforms will help ensure that inmates in Washington can maintain ties to their families and communities while incarcerated. The reforms to the identification requirements eliminated the only state policy in the country to require that visitors present proof of legal status and are a major step towards ending discrimination based on country of origin. The development of the video visitation policy helps modernize Washington's visiting options and ensure that those visitors who live across the state or out of state may still be able to maintain contact.

In July 2013, Utah announced significant reforms to its visitation policy. Most significantly, Utah abolished what had been the only state policy in the country to require that English be the only language spoken during visits. Another change allows visitors to be on more than one inmate's approved visitation list. This change will allow, for example, parents with two children in prison to visit both (though not at the same time). Yet another reform "allow[s] unmarried inmates to have more than one unmarried person of the opposite gender" listed as a friend on the approved visitor list. The antiquated, gender-based policy this reform eliminated was originally justified in the interests of preventing fights between two girlfriends who showed up to visit on the same day, but in practice served to restrict inmates' ability to maintain contact with friends and support networks. Overall, Utah's reforms were a significant step towards increasing equitable access to visitation.

Why Do They Do It That Way?

Ashbel T. ("A.T.") Wall, II, Director, Rhode Island Department of Corrections

Through an unprecedented collaboration between Yale Law School's Liman Program and the Association of State Correctional Administrators (ASCA) – the membership organization encompassing the Chief Executive Officers of the fifty-state corrections departments and the Federal Bureau

of Prisons – we practitioners now have available a full and fascinating set of data describing every jurisdiction's policies governing visiting. The effect is that of a large mirror. It reflects back to us how each of our systems handles this universal feature of prison operations – one of the most significant

aspects of institutional life. The results fairly cry out for us to compare and contrast. [ASCA] members are now pondering a host of questions. Why do we do it this way? Why don't our colleagues? Why do they do it that way? Why don't we? What is the logic of particular practices? Do they make sense?

Many of these questions concern the details of visiting arrangements. Some of them are: their frequency and duration; the numbers of visitors allowed and what attire is permissible or unacceptable; search procedures; conduct in the visiting room itself; and restrictions and exclusions placed on those who wish to visit. In each of these categories, our various agencies come to different conclusions according to such variables as history, culture, location, technology, the philosophy of organizational leaders, the custody level of a given institution, architecture, staffing patterns, and the nature of security breaches attempted or completed. Interestingly, as the authors observe, one factor that almost never comes into play is judicial intervention. This domain is ours alone, largely unconstrained by court decrees. Yet while these decisions may strike the public at large as so much minutiae, they matter enormously to those who live and work in prisons, and to those who visit the facilities.

The lack of uniformity across the nation reflects not only these myriad individualized considerations but also the role of corrections as a traditional domain of state and local governments. While membership in professional associations, development of professional standards, and technical assistance from the federal government have facilitated the exchange of information in recent decades, the corrections profession has traditionally been highly state- and local-centric. The rapid expansion of electronic communication and what appears to be increasing interest in our field at the national level may lead to greater similarity in a variety of correctional practices, including visiting rules and protocols.

This study, which was itself greatly facilitated by the ease of information exchange, has already begun to stimulate self-examination and alterations in our regulations. One jurisdiction, for instance, quickly discovered that it was a unique outlier in its prohibition of visits conducted in any language other than English. It rapidly revised its policy in conformity with the norm. I expect that the publication of this feature will also generate movement toward general guiding principles. This has been the case with administrative segregation, where the Liman Program produced a similar survey using data provided by ASCA. There will undoubtedly be some adoption of one another's practices as well. Ultimately, however, for reasons related to the particular characteristics



A.T. Wall, II, a graduate of Yale College and Yale Law School, returned in fall 2013 to co-teach the Liman Workshop. As the past President of the Association of State Corrections Administrators, Wall has facilitated several collaborations with the Liman Program, including the visiting study.

of the different systems (and even among institutions in the same system), there will still be plenty of variation in both official policy and actual practice. For example, a jurisdiction that may have no objection to overnight family visits in principle may reject the idea based on a consideration of the advantages versus the downsides. Factors might include needed modifications to the physical plant, changes in staffing patterns, alterations in facility scheduling, and attitudes of those inmates who don't receive this privilege as opposed to the numbers who can and do participate in the program. Is the payoff worth the fuss? In another vein, liberal visitation policies that appear generous on their face can be an empty promise in practice if inmates are situated in such remote areas that their loved ones lack the money or the means to travel there.

Embodied in the ways we structure visitation is also a larger set of issues than those raised by the idiosyncrasies in our specific visiting procedures. They arise from certain tensions among some of our profession's core values and principles. There is a broad consensus among all corrections directors about our purpose. In essence, we understand our mission to include both the administration of safe, secure, orderly, and constitutional facilities *and* the provision of programs and opportunities that will promote lawful and pro-social behavior following release. Visitation policies and practices stand at the intersection of these two fundamental and sometimes conflicting goals. The way in which visiting is actually experienced on the ground reflects the challenges we face in our efforts to honor each.

Since the beginning of the current century, the concept of effective prisoner reentry into the community post-release has emerged as a key organizing principle of our profession. Among its many strands is the belief that the maintenance of ties to family and other loved ones has a powerful role in easing the sensitive transition from an institutional setting to the far less structured environment of life in the free world. For example, ASCA's members immediately grasped the troubling implications of research done in some of our agencies that revealed the large numbers of inmates (forty percent or more in some instances) who had received no visits whatsoever in the past twelve months. As the feature's authors note, a careful study in Minnesota has shown that prisoners who had visitors were significantly less likely to reoffend. Research done in Ohio provides evidence of the benefits of visitation for inmate compliance with institutional rules.

Uniformed personnel are familiar with the relationship between successful prisoner reentry and public safety. They understand that visiting is an important inducement to good behavior and that it keeps inmates connected to loved ones.

But custody staff also know that the sine qua non of their job is the maintenance of security inside the prisons. Their performance is judged by their success in providing safety and maintaining order. Their failure to do so can lead to serious consequences for them, their peers, and the inmates. Visiting introduces an element of unpredictability. It can lead to disruption in the routines, difficult encounters with visitors and inmates, and security threats such as the conveyance of contraband (including drugs and weapons in particular). The introduction of these items to prison settings sets the stage for all manner of security breaches and a destabilization of the inmate climate. Correctional officers and supervisors are expected to exercise a very high level of scrutiny throughout the visiting process, checking to see if visitors are authorized to enter the facility, making sure that clothing conforms to the regulations, conducting thorough searches without being impermissibly intrusive, keeping careful watch over the interaction between inmates and visitors, assuring that children are under control, and terminating visits if the parties don't follow the rules. For the front-line guardians of institutional security, the idea that visiting can help lead to better outcomes for public safety down the road can seem highly attenuated when compared to the risks and threats it raises in the here and now.

The results can be difficult for all concerned. Staff must be hyper-vigilant throughout the visitation process, sometimes interjecting themselves into intimate encounters between people whose privacy is already severely constrained. Visitors frequently complain that they are treated like criminals, denied entrance or subjected to peremptory termination of their visits without being given satisfactory explanations. Inmates become angry if they perceive that their visitors have been treated poorly or that a much-anticipated visit has been cut short. Staff, for their part, uncover ruses to hide the visitor's true identity and criminal history or ever-changing schemes to smuggle in forbidden and even dangerous items. These experiences reinforce their concerns about the risks associated with the visiting process in general.

There are other contingencies that exacerbate the potential for a fraught and tense visiting experience. Issues that arise in prison management – sudden lockdowns, changes in institutional schedules, disciplinary infractions, the movement of inmates to different housing units when visiting days and times are organized by housing location – occur regularly in environments as complex as these. Harried personnel may lack the time or skill to explain what is happening while they are trying to manage long lines of sometimes impatient members of the public or ordering inmates back to their cells. Differing

interpretations of the rules by various staff and visitors lead to additional frustration and stress.

Given the competing considerations, what are some options that could make the experience of visiting less charged for all concerned? Recognizing the evidence that visitation fosters a positive institutional climate and better reintegration post-release, how can visitation be promoted without unduly compromising essential managerial objectives?

One way to increase visiting opportunities without the attendant security concerns lies in the use of technology to expand virtual visitation. In discussing this option, the Feature's authors set forth its potential benefits and drawbacks. In addition to these pros and cons there are also some less tangible considerations. For example, is there a qualitative but measurable difference between face-to-face contact and technologically facilitated visiting? How important is the element of touch, however constrained? In a presentation to

ASCA members, one of the authors raised the troubling case of a young child whose experience of seeing his incarcerated father via video had such a powerful impact on him that when he saw his dad in person he had difficulty distinguishing which of the two persons was "real." Although public reaction to the enhanced screening technology of the federal Transportation Safety Administration may not give cause for optimism, the use of similar equipment in prison to replace the increasingly outmoded metal detectors may boost the ability of correctional officials to detect a wider array of contraband without raising the ire of visitors or inmates. In those jurisdictions where institutional managers have the flexibility to deploy staff on posts where their abilities are best suited to

the tasks at hand, careful consideration could – and should – be given to assigning those with the best combination of customer service skills and watchfulness.

In view of its centrality to both the prison experience and to successful reentry, visitation in policy and in practice deserves the careful attention it receives in the feature, *Prison Visitation Policies: A Fifty-State Survey*. In many ways, the topic encapsulates the contradictions of correctional administration as a whole. Weighing the interests of both security and rehabilitation when they come into conflict is perhaps the most profound challenge faced by our profession. The efforts we make to sort out the relationship between these two priorities in both the microcosm of visitation and institutional management as a whole is at the essence of the query, "why do they do it that way?" There is no simple answer to the question. The fact is that we will always be calibrating and recalibrating, trying to get the balance right.

"Weighing the interests of both security and rehabilitation when they come into conflict is perhaps the most profound challenge faced by our profession."

An Endangered Necessity

David Fathi, Director, National Prison Project, American Civil Liberties Union Foundation



David Fathi

Humans are social animals. Our very sense of our own existence depends on interaction with others who respond and react to us in myriad ways. Beyond that, some of our most important roles – as a brother, a mother, a husband, a friend – are inherently relational; these terms make sense only in relation to other persons.

This is true for all of us, but particularly true for prisoners. Prison is a total institution that, partly by design and partly as an unavoidable result of incarceration, strips its residents of much of their personal and professional identity. No longer are you a doctor or a teacher or a plumber, a volunteer firefighter or a PTA member. No longer may you express yourself through the clothes or hairstyle you wear. Even your ability to read and write, and by extension to think, may be significantly curtailed.

In this starkly deprived environment, personal relationships take on increased importance. Unfortunately, such relationships within the prison are usually unsatisfactory at best. Friendships with other prisoners are subject to interruption at any time due to frequent transfers over which prisoners have no control. And while many prisoners have positive interactions with corrections officers and other staff, these relationships are inherently limited, both by prisoner transfers and staff turnover and by the unavoidably coercive and adversarial nature of incarceration. Your captors are never really going to be your friends. And tens of thousands of U.S. prisoners are held in solitary confinement, deprived of all but the most fleeting and perfunctory interaction with staff and other prisoners.

For all of these reasons, many prisoners characterize their relationships with friends and family on the outside as a

vital lifeline that helps them maintain their sense of self, their emotional equilibrium, and in some cases their will to go on living in a harsh and punitive environment. These relationships can be maintained through letters and telephone calls, but each has important limitations. Telephone calls from prison are often extraordinarily expensive, due to monopoly arrangements in which the prison system awards an exclusive contract to a single provider in exchange for “commissions.” Mail is unsatisfactory as a means of communicating with young children and others with limited literacy, and may be subject to a host of restrictions.

No one who has ever spent an hour in a prison visiting room can doubt the paramount importance of visiting to both prisoners and their loved ones. Even non-contact visiting, though far from ideal, is a deeply emotional experience for many, with tears welling up and hands pressed wistfully against the Plexiglas when visiting time is over.

Unfortunately, visiting exists at the sufferance of prison officials. Both before and after the Supreme Court’s decision in *Overton v. Bazzetta*, 539 U.S. 126 (2003), courts have been extraordinarily willing to uphold severe limitations on visiting, although some of the most draconian and nonsensical restrictions have attracted judicial scrutiny...

One of the Feature’s most significant contributions is to show the extraordinary range and diversity of prison visiting practices. Its central finding that “some jurisdictions generally restrict visitation, while other states specifically encourage and promote visitation as a core part of the rehabilitation process,” shows that there is nothing inevitable about harsh and restrictive visiting policies. Clearly, some states are able to maintain prison safety and security while facilitating and

encouraging visiting. As the Feature’s authors tactfully put it, “we do not know why similar security concerns yield widely variant statewide policies.” As the United States clings to its dubious distinction as the world’s leading incarcerator, the Feature’s findings will be a powerful tool for those advocating more humane and progressive prison visiting policies.

“Many prisoners characterize their relationships with friends and family ... as a vital lifeline that helps them maintain their sense of self, their emotional equilibrium, and in some cases, their will to go on living”

Visiting Room: A Response to Prison Visitation Policies: A Fifty-State Survey

Giovanna Shay, Litigation and Advocacy Director, Greater Hartford Legal Aid



Giovanna Shay

... Chesa Boudin, Trevor Stutz, and Aaron Littman bring long-overdue attention to prison visitation, which affects so many American families, and especially the children of the incarcerated. The authors' important effort could help to undermine the radically isolating style of imprisonment that has developed in the U.S. during an era of mass

incarceration, in which visitation is markedly restricted compared to other advanced democracies.

... The project makes available information that previously was difficult to obtain, and provides a much fuller picture of visitation in jurisdictions across the country. The scrutiny of prison policies is all the more important, as the authors explain, because courts accord tremendous deference to prison officials' judgment, even when their policies impinge on prisoners' federal constitutional rights ...

The miserly "American-style" of prison visitation is unique among advanced democracies, a facet of what James Q. Whitman has described as America's exceptional harshness compared to Western Europe. A 2013 Vera Institute report described how Dutch and German corrections authorities strive for "normalization," or making prisoners' lives as much like the free world as possible. In her book on women's incarceration, Silja Talvi noted the relatively family-friendly atmosphere for visitors at Holloway Prison in the United Kingdom and the presence of mother/baby units in correctional facilities in the U.K., Finland, and Canada.

Holloway Prison has a Visitors Center run by a children's charity, which states that its "aim is to provide a supportive, friendly and welcoming environment for everybody." HMP Askham Grange, an "open" prison for women in the U.K., hosts Acorn House, where imprisoned mothers care for their children unsupervised for up to 48 hours. In the U.K., opportunities for high-quality family visitation are not limited to women's prisons ...

Other advanced democracies have similar policies. Canada provides eligible prisoners with "private family visits" for up to seventy-two hours every two months, occurring in separate quarters with kitchens and living areas. As Talvi has described,

Finnish women are permitted monthly overnight visits with their partners and even "vacations" from prison. In Denmark, residents of "open" state prisons are permitted leave from prison every third weekend, and, in Norway, prisoners can be granted a "leave of absence."

Of course, liberalizing visitation policies alone cannot increase visitation. ... "Friendly" visitation policies cannot undo the structural effects of locating facilities in remote rural areas without easy access to trains and airports. Disturbingly, as this Response was being written, the United States' Federal Bureau of Prisons (BOP) announced plans to close the only federal facility designated for women on the Eastern seaboard and relocate the 1,100 women housed there (many of them from the cities of the Northeastern corridor) to rural Alabama. After eleven U.S. senators called for the BOP to provide more information about the move, the BOP temporarily suspended the plan, then resumed it, then halted it during the government shutdown of

2013. As of this writing, it appears that the BOP has agreed to construct a new facility for women in the Northeast.

Some visitation practices pose a risk of reinforcing the "prison industrial complex." The Feature describes one form of visitation – video visitation – that could boomerang when it involves private vendors. Phone companies have charged notoriously high rates for prison phone service, which the Federal Communications Commission (FCC) recently voted to limit for interstate calls. More troubling, as the authors acknowledge, is the possibility that private vendors will benefit from growing their market. This can result from expanded

visitation or (worse) from growing numbers of prisoners. Even as the media heralds declining incarceration rates, the Corrections Corporation of America reportedly forecasts prison growth as the economy rebounds ...

[S]ome argue that bringing children to prison regularly (and especially housing them there on mother baby units) will do more harm than good. Others might fear – for different reasons – that expanding family visitation might cause us to accept over-incarceration as the new normal. However, comparing our visitation policies to other advanced democracies suggests that American mass incarceration is about more than the numbers. Imprisonment in the U.S. is qualitatively different. Implementing high-quality visitation programs could help to end this destructive "cultural practice," which may finally have run its terrible course ...

"Comparing our visitation policies to other advanced democracies suggests that American mass incarceration is about more than just the numbers."

LIMAN UPDATES

Welcoming Johanna Kalb as Liman Director

The Liman Program is delighted to announce that Johanna Kalb, an associate professor at Loyola University New Orleans College of Law and a 2006 graduate of Yale Law School, has come back to Yale to serve as the Liman Director and as a visiting professor, co-teaching the Spring 2015 Liman Workshop, *Rationing Law: Subsidizing Access to Justice in Democracies*, and working on projects related to prisons, access to law, and the impact of transnational and comparative law in domestic legal systems. Hope Metcalf, who has served as the Liman Director since 2010, became the Executive Director of the Orville H. Schell, Jr. Center for International Human Rights.



Johanna Kalb

While Liman Director, Metcalf co-designed and co-taught the Liman Workshop; the topics included *Accessing Justice/Rationing Law*, *Imprisoned*, and *Moving Criminal Justice: Practices of Prohibition, Abolition, Regulation, and Reform*. During her tenure, the Liman Program began a working relationship with the Association of State Corrections Administrators Faculty and students analyzed prison policies on visiting and on administrative segregation of inmates, filed testimony with the U.S. Senate, and convened



Hope Metcalf

conferences on racial disparity in prison, on incarceration, and on over-criminalization. In addition to her Liman duties, Metcalf has co-taught the Lowenstein International Human Rights Clinic, and she will continue to collaborate with the Liman Program on work related to prisoners' rights.

Kalb, who is on leave from Loyola, teaches civil procedure, constitutional law, human rights advocacy, and national security law. Her scholarship is focused on transnational legal interactions; recent articles include *The Judicial Role in New Democracies: A Strategic Account of Comparative Citation* (Yale J. Int'l Law, 2013) and *The Persistence of Dualism in Human Rights Treaty Implementation* (Yale L. & Pol'y Rev., 2011). She is currently co-authoring the casebook, *Human Rights Advocacy in the United States* (forthcoming Thomson West 2014) (with Martha F. Davis & Risa Kaufman). Since 2013, Kalb has served as the Jurisprudence Fellow at the Brennan Center for Justice. After law school, Kalb clerked for the Honorable E. Grady Jolly of the United States Court of Appeals for the Fifth Circuit and for the Honorable Ellen Segal Huvelle of the District Court of the District of Columbia.

A New Senior Fellow in Residence: Prosecutorial Accountability



Laura Fernandez

Laura Fernandez will join the Yale Law School as a Senior Liman Fellow in Residence in the fall of 2014. Her work at Yale, made possible through the generosity of the Vital Projects Fund, will focus on prosecutorial misconduct and accountability.

In 2011, a group of Liman students, working in connection with Professor Fiona Doherty, then a Senior Liman Fellow in Residence, began to approach the question of filing grievances when prosecutors violate their ethical obligations. One result of that collaboration was "*The Myth of Prosecutorial Accountability After Connick v. Thompson: Why Existing Professional Responsibility Measures Cannot Protect Against Prosecutorial Misconduct*," published in 2011 in the Yale Law Journal Online. The piece has been cited widely, including in The National Law Journal, SCOTUSblog, and The New York Times.

As a Senior Liman Fellow in Residence, Fernandez will examine

the practical challenges of bringing ethical grievances against prosecutors. She will also consider ways to engage prosecutors who may share concerns about misconduct within the profession. In *Banks v. Dretke*, 540 U.S. 668, 696 (2004), Justice Ginsberg noted that "[a] rule thus declaring 'prosecutor must hide, defendant must seek,' is not tenable in a system constitutionally bound to accord defendants due process." The project aims to make clear that ours is not a hide-and-go-seek system of criminal justice: that both sides, not just the defendants in criminal cases, must bear the consequences of their own misconduct.

A graduate of Harvard College and Yale Law School, Fernandez was formerly Senior Counsel at Holland & Knight, where she worked as a full-time member of its pro bono team, with a particular focus on criminal justice and capital defense. Fernandez clerked for the Honorable Jack B. Weinstein in the United States District Court for the Eastern District of New York. Following her clerkship, and prior to returning to Holland & Knight, Fernandez was a Prettyman fellow in the Criminal Justice Clinic at Georgetown Law School, where she received an L.L.M.

Update on the 2013 – 2014 Liman Fellows

Last year's Liman Fellows – including eight new fellows and three who received extensions – worked in Georgia, New Orleans, New York, Oregon, San Francisco, and Texas on projects related to immigration, incarceration, criminal defense, and legal services. Four members of the 2013-14 class will continue for a second year, thanks to matching funds from their host organizations.



Spencer Amdur spent his fellowship year with the Lawyers' Committee for Civil Rights of the San Francisco Bay Area. Spencer's project focused on the interactions among migrant residents and police. He worked with a statewide coalition to monitor enforcement of the TRUST Act, a state law (enacted in 2013) that prohibits police from detaining

individuals at the behest of federal immigration authorities unless such persons also meet other specified conditions relating to criminal charges. Part of those efforts involved outreach to public defender offices as well as assistance to coalitions in San Francisco, Santa Clara, and Alameda Counties. Spencer also represented individuals seeking asylum and . Spencer, a member of the Yale Law School class of 2013, graduated magna cum laude from Brown University with a B.A. in Economics. Spencer is now clerking for the Honorable Judith W. Rogers of the U.S. Court of Appeals for the D.C. Circuit.



Alyssa Briody, at the Louisiana Center for Children's Rights (LCCR) in New Orleans, provided legal services for young people in the juvenile justice system. She assisted boys, incarcerated at the Bridge City Center for Youth, to modify the terms of confinement, to become eligible for release, and to develop plans for their return to their communities.

She succeeded in helping her young clients find alternative placements, connect with health care and mental health providers, and gain access educational services. Given the ongoing need for these services, Alyssa has helped LCCR to design the Second Chances Project, to continue after the end of her fellowship. A member of the Yale Law School class of 2013, Briody graduated cum laude from Amherst College in 2007 with a B.A. in Latin American History. Briody began this fall a clerkship with the Honorable Sidney Stein in the U.S. District Court for the Southern District of New York.



Burke Butler is spending a second fellowship year at the Texas Defender Services (TDS), where she aims to improve living conditions for people on death row, all of whom are housed in solitary confinement. The focus is on post-conviction representation related to the conditions of confinement. Burke spent her first year at the Texas Civil Rights

Project, where she aided in efforts to address the over-reliance on long-term isolation by Texas prison authorities. In addition to investigating and documenting conditions for prisoners in isolation, Burke also forged collaborations with various groups, including a local corrections officers' union, to improve death row conditions for prisoners and staff alike. Burke, a 2011 graduate of Yale Law School, clerked for the Honorable Harris Hartz of the U.S. Court of Appeals for the Tenth Circuit and for the Honorable Keith Ellison of the U.S. District Court for the Southern District of Texas.



Katie Chamblee, who is at the Southern Center for Human Rights, seeks to strengthen the quality of counsel for poor people facing the death penalty in Alabama, Florida, and Georgia. Katie, who developed training and other resources for trial counsel during her first year as a Liman Fellow, is focused during her second year on pre-trial strategies

for defendants. The effort aims to help at the front end, so as to enable defendants to avoid capital trials when possible, and to reduce the instances in which death penalty sentences are imposed. During the first year of her fellowship, Katie joined Steve Bright and others in representing Ricky Adkins, who had his conviction vacated by the Eleventh Circuit Court of Appeals because the prosecution had unconstitutionally excluded African American jurors. Katie has since been helping to represent Mr. Adkins at the trial-level. Katie graduated from Swarthmore College and Yale Law School. She clerked for the Honorable Myron H. Thompson on the U.S. District Court for the Middle District of Alabama.



Jeremy Kaplan-Lyman joined the Civil Action Practice at The Bronx Defenders. Jeremy represented individuals in Summons Court and investigated how the New York City Police Department (NYPD) uses summonses in poor communities in the Bronx. He supported efforts of Communities United for Police Reform (CPR), a citywide coalition of

legal, policy, and community-based organizations that advocate for the reform of the NYPD. Jeremy researched best practices from police departments around the country that are working to build trust and collaboration between police and marginalized communities. Jeremy remains at The Bronx Defenders as a staff attorney. A 2012 graduate of Yale Law School, Jeremy clerked for the Honorable Rosemary Barkett of the U.S. Court of Appeals for the Eleventh Circuit.



Caitlin Mitchell is building on work begun during her first fellowship year at Youth, Rights, & Justice, in Portland, Oregon, where she represents incarcerated parents, aiming to help them continue their parental relationships while incarcerated. Caitlin has also assisted in appellate-level strategy so as to assist individual clients as well

as to identify broad-reaching issues, such as the definition of “permanency” for purposes of determining the rights of incarcerated parents. During her second year, Caitlin is reviving a coalition – the Children of Incarcerated Parents Workgroup – that seeks to make the criminal justice and family law systems more responsive to the needs of poor families affected by incarceration. Caitlin graduated from Yale Law School in 2012 and from Yale College in 2006. Following law school, she clerked for the Honorable Martha Lee Walters of the Oregon Supreme Court.



Rebecca Scholtz received an extension to continue her fellowship at Mid-Minnesota Legal Aid, where she is now a staff attorney. She works with children who are not citizens and who are involved in the child welfare system. Rebecca represents children in immigration proceedings and provides training and technical assistance on children’s

immigration issues to child welfare system professionals. As a Fellow, Rebecca worked with other children’s advocates and service providers to create more effective ways to identify and to assist young people who are in the child welfare system and who also have immigration needs.



Sirine Shebaya, spent a second fellowship year at the ACLU of Maryland, where she focuses on immigrants’ rights, particularly in interactions with local law enforcement. In 2013, she advocated for legislation that was enacted to expand access to driver’s licenses for all Maryland residents, regardless of immigration status. This past year,

Sirine worked with a statewide coalition seeking to enact the Maryland Trust Act, which would forbid local police from detaining individuals at the behest of federal immigration authorities absent other specified conditions relating to criminal charges. She also collaborated with other organizations in the community to address complaints about racial profiling of Latino immigrants. Sirine remains that the ACLU of Maryland as a staff attorney.



Ivy Wang, hosted by Southeast Louisiana Legal Services in New Orleans, focused on the many collateral consequences of incarceration, such as evictions based on family members’ involvement with the criminal justice system, the loss of employment opportunities, and the withdrawal of public benefits. Over the

course of her fellowship, Ivy represented dozens of clients facing eviction and the end of housing support. She also worked with the Vera Institute and the Housing Authority of New Orleans to revise policies so that individuals with criminal records could obtain subsidized housing. In collaboration with the Orleans Public Defenders, Ivy created a guide on the collateral consequences of incarceration; she is also doing training sessions to help other lawyers learn how to lessen these long-term effects. Ivy, a member of the Yale Law School class of 2013, graduated in 2006 from Yale College with distinctions in English and History. Ivy is now clerking for the Honorable Helen Berrigan of the U.S. District Court for the Eastern District of Louisiana.



Alyssa Work has extended her fellowship at the Bronx Freedom Fund in New York. There, she assists individuals facing misdemeanor criminal charges to post bail and to avoid pretrial detention. Alyssa has enabled dozens of clients to stay out of jail, and that buffer is important because even short periods of time in detention can disrupt work and

family. This year, Alyssa is also documenting the effects of pre-trial detention on misdemeanor defendants and is exploring how to create legislative alternatives to bail. The Bronx Freedom Fund has attracted national attention as a potential model for reform. Alyssa is a member of the Yale Law School Class of 2013 and graduated in 2008 with High Honors in Political Science from Swarthmore College.



Jenny Zhao spent a second fellowship year at the ACLU of Northern California, where she provided assistance to immigrants detained in county jails during their deportation proceedings. Along with other lawyers, Jenny litigated a class action lawsuit, which challenges the practice of shackling all immigrant detainees during their court

hearings. She represented several individuals in challenges to prolonged immigration detention, and she investigated how conditions of confinement affect immigrants’ access to courts and their rights to fair hearings. Jenny has joined Yaman Salahi, Liman Fellow 2011, at the Asian Law Caucus in San Francisco, California, where she represents detained immigrants.



Alyssa Work, Liman Fellow 2013–15, catches up with Aaron Littman, YLS Class of 2014.

Welcoming the Incoming Liman Fellows, 2014 – 15

The Liman Program awarded eight new fellowships for 2014–15, in addition to the four – Burke Butler, Katie Chamblee, Caitlin Mitchell, and Alyssa Work – who received extensions. Brief overviews of the new Fellows' projects are below. Since 1997, when the Program was founded, 102 Yale Law School graduates have received Liman Fellowships.



Anna Arkin-Gallagher is helping the Louisiana Center for Children's Rights to create a program to provide civil legal services to young people involved in the New Orleans juvenile justice system. Services include representation on issues related to education, school discipline, housing, and access to mental health services. Anna, who graduated

from Yale College in 2004 and from Yale Law School in 2009, worked in the Civil Action Practice of the Bronx Defenders. There, she provided comprehensive civil legal representations for clients in need of assistance with housing, employment, education, and civil rights.



At the ACLU of Arizona, **Josh Bendor** works to ensure that local officials respect the rights of migrants. In 2013, the ACLU obtained a judgment requiring the Maricopa County Sheriff's Office to refrain from targeting Latinos for traffic stops and from engaging in other activities on the basis of race and ethnicity. Josh works with a newly-appointed

monitor to implement that order. Josh, a member of the Yale Law School Class of 2013, graduated magna cum laude from Yale College, where he was also a Liman Summer Fellow. He clerked for the Honorable Paul A. Engelmayer of the U.S. District Court for the Southern District of New York, and after his Liman Fellowship, he will clerk for the Honorable Andrew Hurwitz of the U.S. Court of Appeals for the Ninth Circuit.



Emily Gerrick joined the Texas Fair Defense Project to oppose modern-day debtors' prisons in Texas. Through litigation and legislative advocacy, her focus is on reforming the practices of counties which incarcerate poor people who are unable to pay legal fees and fines. Emily is a member of the Yale Law School Class of 2014 and graduated summa

cum laude from UCLA with a B.A. in philosophy. In law school, she was a student director of the Detention and Human Rights Project and a member of the Capital Punishment Clinic.



At the Veterans Legal Clinic at the Legal Services Center and the Home Base program in Boston, **Dana Montalto** helps veterans gain access to treatments and benefits. One focus is on veterans who suffer from mental illness and other disabilities but are ineligible for benefits due to having discharges other than honorable. Dana graduated magna cum laude

from Wellesley College in 2009 and from Yale Law School in 2013. She clerked for the Honorable F. Dennis Saylor IV of the U.S. District Court for the District of Massachusetts.



Matthew Vogel is spending his fellowship year at the Capital Defense Unit at Orleans Public Defenders in New Orleans, where he aims to strengthen and support capital public defense and capital reform in Louisiana. He aids capital public defenders to ensure that they have the tools they need to avoid potential capital indictments, or to resolve

those charges without trials and to assist in litigating the many issues that arise if cases do go to trial. A 2013 graduate of Yale Law School, where he was active in the Worker and Immigrant Rights Advocacy Clinic, Matt clerked for the Honorable Keith P. Ellison of the U.S. District Court for the Southern District of Texas. Prior to law school, Matt, a 2001 graduate of Harvard College, served homeless people at New York City's Catholic Worker.



Jessica Vosburgh is working with the National Day Laborer Organizing Network to establish a workers' center in Birmingham, Alabama. The center, which opened its doors in November 2013, is dedicated to defending and expanding the rights of day laborers, domestic workers, and other low-wage and immigrant workers in the region. Jessica,

who graduated from Brown University in 2007, received her J.D. from Yale Law School in 2013, where she represented clients in deportation defense cases, wage claims, and civil rights litigation. Before law school, Jessica curated exhibits and events at a small café and arts venue in Manhattan.



Adrien A. Weibgen joined the Community Development Project of the Urban Justice Center in New York City. Adrien, a member of the Yale Law School Class of 2014, is helping to launch a land use practice so that low-income communities of color are represented in negotiations with developers about local real estate projects. Prior to

law school, Adrien, who graduated from Wesleyan University in 2005, worked in racial justice advocacy, including at the ACLU Racial Justice Program and the Center for Social Inclusion. In the wake of Hurricane Sandy, Adrien co-founded People's Relief, a grassroots canvassing effort in Coney Island that assisted thousands of elderly and disabled people trapped in high-rise buildings. Adrien's project will focus especially on communities affected by Hurricane Sandy.



Molly Weston is spending her fellowship year at A Better Balance in New York City. She assists low-income workers enforce the Earned Sick Time Act and Pregnant Workers Fairness Act, a municipal law enacted in 2013 that requires employers of more than 15 workers to provide paid family and sick leave. Molly, a member of the Yale Law School Class

of 2013, is currently clerking for the Honorable Thomas L. Ambro of the U.S. Court of Appeals for the Third Circuit in Wilmington, DE. She graduated with High Honors in Political Science from Swarthmore College in 2010, where she was a Lang Opportunity Scholar.



Josh Bendor, Liman Fellow 2014, with Alyssa Briody and Ivy Wang, Liman Fellows 2013.



Liman Fellows Caitlin Mitchell (left) and Alyssa Work (center) with Anna Arons (right).



Sirine Shebaya, Liman Fellow 2011-13, with her baby Malek Shakib.



Rebecca Scholtz, Liman Fellow 2012-14, with Jonathan Herzog, Harvard Summer Fellow 2014.

Liman Summer Fellows Work Throughout the United States

The Liman Program provided students from Barnard, Brown, Harvard, Princeton, Spelman, and Yale with the opportunity to experience public interest lawyering. The summer fellows, working at host organizations that serve underrepresented communities in places such as Atlanta, New Orleans, New York, Philadelphia, and Seattle, joined the hundreds of Liman Summer Fellows who have been funded since the Liman Program began in 1999.



Barnard Liman Summer Fellows

Kelly Kang '15, Legal Aid Society, New York, NY
 Emma Schuster '15, Sexual Violence Law Center, Seattle, WA
 Adiya Taylor '16, Center for Education Reform, Bethesda, MD



Harvard Liman Summer Fellows

Jonathan Herzog '15, New York State Attorney General's Office, New York, NY
 James Holloway '16, Transgender Legal Defense and Education Fund, New York, NY
 Andrea Ortiz '16, ACLU, New York, NY
 Lauren Reisig '16, Children's Rights, New York, NY
 Maria Smith '16, The Public Defender Service for the District of Columbia, Washington, DC



Princeton Liman Summer Fellows

Duncan Hosie '16, Center for Voting and Democracy, Tacoma Park, MD
 Lawrence Liu '16, Manhattan District Attorney's Office, New York, NY
 Amanda Cheong Ph.D. candidate in Sociology and Social Policy, United Nations Refugee Agency
 Yahui Liang '15, Veterans Legal Clinic of Harvard Law School, Jamaica Plains, MA
 Jessica Zou '16, The Public Defender Service for the District of Columbia, Washington, DC



Yale Liman Summer Fellows

Joy Chen '15, Bronx Defenders, Bronx, NY
 Alisha Jarwala '15, Lawyers Committee for Civil Rights Under Law, Washington, DC
 Sterling Johnson '15, New Orleans Redevelopment Authority, New Orleans, LA
 Jordan Konell '15, Public Interest Law Center of Philadelphia, Philadelphia, PA
 Lourdes Ortiz '15, Vera Institute of Justice, New York, NY
 Scott Stern '15, Department of Justice Civil Rights Department, Washington, DC



Brown Liman Summer Fellows

Michelle Bailhe '15, New York Lawyers for the Public Interest, New York, NY
 Tynesia Fields '17, Brownsville Community Justice Center, Brooklyn, NY
 Juhee Kwon '14, National Asian Pacific American Women's Forum, Washington, DC
 Ariel Sydney Peak '15, Sanctuary for Families, New York, NY
 Erin Kelly '15, Rhode Island Center for Justice, Providence, RI



Spelman Liman Summer Fellows

Fabienne Antoine '15, U.S. Department of Justice, Washington, D.C.
 Shana Dunning '14, Macon County Illinois Public Defender's Office, Decatur, IL
 Kevonna Nathaniel '14, Living Waters Resource Center, Atlanta, GA

The Liman Public Interest Program

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Please visit our website at www.law.yale.edu/liman.

Learn more about the Liman Fellows, see information about projects and upcoming events, and find details about the fellowship application process.

Public Interest Organizations and Fellowship Applicants

Organizations interested in hosting Liman Law Fellows and individuals wishing to apply for Liman Law Fellowships should contact Liman Director Johanna Kalb. For information about hosting a Liman Summer Fellow or applying for a Liman Summer Fellowship, please contact Johanna Kalb or one of the Liman Faculty Advisors at the coordinating schools listed on this page.

Yale Law School and Yale College

Johanna Kalb
Director, Arthur Liman Public Interest Program

Yale Law School
P.O. Box 208215
New Haven, CT 06520-8215
203.436.3520
johanna.kalb@yale.edu

Judith Resnik
Arthur Liman Professor of Law and Founding Director

Richard Schottenfeld
Professor of Psychiatry, and Master of Davenport College

Megan Quattlebaum
Senior Liman Fellow in Residence

Katherine Lawton
Senior Administrative Assistant

Barnard College

Adjua Starks
Dean for Pre-Law and Pre-Health Professions Advising
212.854.2024
astarks@barnard.edu

Brown University

Linda Dunleavy
Associate Dean of the College for Fellowships and Pre-Law
401.863.2538
Linda_Dunleavy@brown.edu

Harvard College

Travis A. Lovett
Director, Center for Public Interest Careers
617.495.1842
tlovett@fas.harvard.edu

Princeton University

Leslie E. Gerwin
Assistant Director, Program in Law and Public Affairs
609.258.4989
lgerwin@princeton.edu

Kim Lane Scheppele
Laurance S. Rockefeller Professor of Sociology and International Affairs

Spelman College

Dr. DeKimberlen Neely
Associate Dean, Office of Undergraduate Studies
404.270.5695
dneely@spelman.edu



Liman Law and Summer Fellows at the 2014 colloquium.

PLEASE JOIN US AT THE EIGHTEENTH ANNUAL ARTHUR LIMAN COLLOQUIUM

Detention on a Global Scale: Punishment and Beyond

April 9–10, 2015 • Yale Law School

This colloquium, jointly sponsored by the Arthur Liman Public Interest Program and the Robert L. Bernstein International Human Rights Fellowship, explores the expansion of the justifications for and forms of confinement. A record number—more than 11 million—of people are in detention. In addition to the classic justification of criminal punishment and detention prior to criminal trial, governments also have categories of “civil” detainees, including the mentally ill, juveniles, migrants, and those deemed a threat to national security. Their confinement often takes forms largely indistinguishable from prisons. Critics have numerous objections, and because the numbers in detention place immense fiscal burdens on governments, many commentators believe that opportunities now exist to revisit these practices.

**For updates on the conference, please visit www.law.yale.edu/liman
or contact Johanna Kalb at johanna.kalb@yale.edu or 203.436.3520**



Margot Mendelson, Liman 2009, catches up with Brett Dignam, Clinical Law Professor at Columbia Law School. As an attorney at Rosen Bien Galvan & Grunfeld LLP in San Francisco, Mendelson is one of the attorneys on Coleman v. Brown, the lawsuit brought on behalf of people with mental illness in California's prisons. Dignam directed the Prisoners Legal Services Clinic at Yale for nearly two decades and runs a similar clinic at Columbia.



Michael Mushlin (left), law professor at Pace Law School and pioneer in teaching prison law, speaks with George Camp (right), Executive Director of ASCA. Lise Rahdert, YLS Class of 2015 is in the background.



Hope Metcalf catches up with Aseem Mehta and Nia Holston, Yale Liman Summer Fellows 2012. Aseem works for the Immigrant Justice Corps in New York City, and Nia is with Equal Justice Initiative in Birmingham, Alabama.



*Judith Resnik with Joe Day, architect and author of *Corrections and Collections: Architectures for Art and Crime* (Routledge 2013).*



Sonia Kumar, Liman Fellow 2010–12 and staff attorney with the ACLU of Maryland, speaks with Harold Clarke, Director of Virginia's Department of Corrections.



Burke Butler (right), Liman Fellow 2013–15, with Paul Wright (left), founder of Prison Legal News, and Doug Liman (center)

Remembering Jacob D. Zeldes, Class of 1957

Jacob ("Jack") D. Zeldes, a member of YLS Class of 1957, spent his long career championing defendants' rights in Connecticut. He died on September 18, 2013, at home in Fairfield, Connecticut. A classmate of Arthur Liman, Jack and his wife, Nancy, were steadfast, generous, and enthusiastic supporters of the Liman Program as well as frequent participants in Liman events. The Zeldes family helped the Liman Program to expand the number of fellows. Jack maintained many other ties with Yale Law School, including as a member of the school's Executive Committee. He is survived by Nancy, their three children and their partners, and four grandchildren.



Born in 1929 in Galesburg, Illinois, Jack graduated from the University of Wisconsin, where he met Nancy. They married in 1953, following Jack's service in the Navy in the Korean War. The couple hitchhiked through Europe for six months before moving to New Haven, where Jack attended Yale Law School. While a student, he became the head of the Public Defenders Program and began representing Harold Rogers, who had been sentenced to death, under the supervision of then-Professor Louis Pollak. For nearly a decade, Zeldes fought on Rogers' behalf, ultimately winning a reversal of Rogers' conviction by the U.S. Supreme Court. The Court, in a 5-4 decision written by Judge Felix Frankfurter, held that the trial court had improperly admitted Rogers' confession. The majority opinion emphasized that "the State must establish guilt by evidence independently and freely secured and may not by coercion prove its charge against an accused out of his own mouth." The touchstone for such a determination was the officials' own behavior, not the likelihood of the defendant's guilt. In addition to saving Rogers' life, the decision set new and more protective standards for forced confessions.

Upon graduation from Yale, Jack clerked for the Honorable Robert Anderson, of the U.S. District Court for the District of Connecticut, and then returned to criminal defense, first at the Bridgeport law firm of Goldstein and Peck, and then at Zeldes, Needle and Cooper, which he co-founded in 1971 and where he where he practiced for 42 years, until his death. His integrity and professionalism earned him the respect of his peers and many awards. As the beloved "Dean" of the criminal bar, Jack mentored many young lawyers who would go on to be public defenders, U.S. Attorneys, professors, and judges.

In May 2014, a large gathering of Jack's former colleagues, judges, and opposing counsel filled the auditorium at Yale Law School to honor his memory. Speakers included Charles Needle, co-founder of Zeldes, Needle, and Cooper; the Honorable Alfred Jennings, Jr., Connecticut Superior Court; the Honorable Joette Katz, Commissioner of the Connecticut Department of Children and Families and former Associate Justice of the Connecticut Supreme Court; David Atkins, Partner, Pullman and Comley; the Honorable Chatigny, U.S. District Court for the District of Connecticut; and Jack's son, Steven Zeldes, who is the Benjamin M. Rosen Professor of Economics and Finance at Columbia University. The discussion centered on Jack's extraordinary work ethic and boundless intelligence, his generosity to the generations of lawyers he trained, as well as his frequent and humorous malapropisms. But, above all, they honored the dedication that Jack displayed throughout his life to the law, to fairness, and to kindness. Judge Chatigny quoted one of the ten "rules" that Jack advised a graduating class from University of Connecticut Law School: "We always gain the most by believing the best of others rather than believing the worst."



Join Us in Supporting and Expanding the Liman Program

Your financial support of the Arthur Liman Public Interest Program means that more attorneys and students will be able to work on pressing legal issues in the public interest. We have many more applicants than we can currently fund. In these difficult economic times, help is greatly appreciated.

- \$50,000 supports a year-long public interest fellowship for a graduate of Yale Law School
- \$25,000 supports an extension of a fellowship beyond the initial year
- \$15,000 supports an annual conference
- \$10,000 creates a travel fund for Fellows to participate in conferences and research
- \$5,000 supports a publication relating to public interest law or the newsletter
- \$3,000 supports an internship for one summer fellow*
- Other named underwriting opportunities are available and any amount towards the above or for general support is helpful.

☐ \$100 ☐ \$500 ☐ \$2500 ☐ \$5,000 ☐ \$10,000 ☐ \$15,000 ☐ \$25,000 ☐ \$50,000

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☐ I would like to make a multi-year pledge of \$ _____ to be paid in _____ installments.

☐ I would like my donation to be made in honor of / in memory of _____.

☐ Please contact me with information about making a gift to the Liman Program in my will, other planned giving options, or gifts of securities or other assets.

* **Summer Program Support.** Liman programs now exist at six universities (Barnard, Brown, Harvard, Princeton, Spelman, and Yale) and provide stipends for summer fellows. Contributions to supplement existing programs at participating institutions may be designated for the Liman Summer Fellowship Program and donated directly to those schools (see contact listing on page 34). In addition, a new summer fellowship program can be created at another university. Contact the Liman Director to help coordinate these donations.

Please make your charitable donation payable to the Arthur Liman Public Interest Program at Yale Law School, which is a 501(c)(3).

Mail donations to:

***Johanna Kalb, Director, Arthur Liman Public Interest Program
Yale Law School, P.O. Box 208215, New Haven, CT 06520-8215***

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“As punishments become more cruel, so the minds of men, like fluids that always adjust their level according to the objects around them This is because one punishment obtains sufficient effect when its severity just exceeds the benefit the offender receives from the crime, and the degree of excess must be calculated precisely according to the damage to public good caused by the crime. Any additional punishment is superfluous and therefore a tyranny.”

– Cesare Beccaria, ON CRIMES AND PUNISHMENTS 69-70 (XXVII, The Mildness of Punishment) (5th ed. Trans. Graeme R. Newman & Pietro Marongui, 2009, republishing 1754 edition).

“The general object which all laws have, or ought to have, in common, is to augment the total happiness of the community; and therefore, in the first place, to exclude, as far as may be, every thing that tends to subtract from that happiness: in other words, to exclude mischief. But all punishment is mischief: all punishment in itself is evil. Upon the principle of utility, if it ought at all to be admitted, it ought only to be admitted in as far as it promises to exclude some greater evil.”

– Jeremy Bentham, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION, paras.1-2 (VII, Cases Unmeet for Punishment) (1822).



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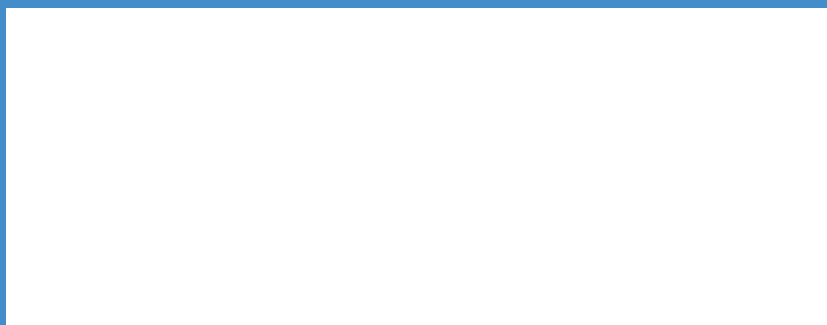
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