

# THE LIMAN REPORT

Arthur Liman Public Interest Program

Fall 2016

## Moving Criminal Justice



Yale Law School

Supporting the Liman Program, see page 61

“The heroes of the legal profession are not the lawyers who achieve celebrity status by self-promotion or mugging for the cameras but the often unsung and young lawyers (some just out of law school) who brought about the social revolution in this country that led to the repeal of the Jim Crow laws; the lawyers in Connecticut who won the case establishing a right of privacy to keep government out of personal decisions relating to reproductive freedom; and the lawyers who, for little or no fee, take on the defense or appeals in cases for indigent defendants who have no means of obtaining effective representation. These are the lawyers against whom we should measure ourselves.”

—Arthur Liman, *Lawyer: A Life of Counsel and Controversy* (1998)

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## Moving Criminal Justice

Reforms are underway in every phase of the U.S. criminal justice system—to reshape policing, prosecution and defense, sentencing, incarceration, and reintegration. Concerns about the toll of mass incarceration have created consensus across the political spectrum about the need for change. But questions abound about how law, organizing, media, and advocacy tools can be successfully deployed and to what ends.

During the past year, the Liman Program has explored these questions in a variety of venues. In the Liman Workshop, *Human Rights, Mass Incarceration, and Criminal Justice Reform*, the class considered the ways in which reform agendas are formulated, gain currency, and result in changes in laws and practices that produce consequences, whether generative or harmful. We looked at the history of reforms and how they built on extant social, legal, and political movements, or created new ones, and imagined the future, so as to better understand both the promise of this political moment and its limits.

In the 19th Annual Liman Colloquium, *Moving Criminal Justice*, held on March 31 and April 1, 2016, we continued to explore these themes by bringing together academics, Liman Fellows, judges, prison officials, law students, and other practitioners from all facets of the criminal justice system to consider which areas of reform hold promise and why.

The opening and closing sessions focused on the possibilities available and the perils of the contemporary sense that reform is afoot. We chose three arenas to consider in depth: efforts to cut down the prison population and move away from incarceration as the dominant mode of punishment; abolition of the death penalty and its relationship to challenges to sentences of life without parole; and strategies for limiting or ending solitary confinement. Central to the discussion was the role to be played by lawyers, as well as the limits of lawyering. What follows is a sampling of commentary that reflects some of the Colloquium's exchanges.



Liman Colloquium, 2016



## A Moment of Reform?: Making Changes from Inside and Out

Commentators across the political spectrum argue that we are in a unique moment, in which substantial reform of the criminal justice system is possible. Both the opening and closing panels of the Colloquium considered and challenged this claim.



Tom R. Tyler, Macklin Fleming Professor of Law and Professor of Psychology, Yale Law School; Jonathan Lippman, Former Chief Judge, New York Court of Appeals; Glenn E. Martin, Founder and President, JustLeadershipUSA; Allegra McLeod, Professor, Georgetown University Law Center (Liman Fellow 2008–2009); David Fathi, Director, ACLU National Prison Project; Paul N. Samuels, Director and President, Legal Action Center, New York; and Judith Resnik, Arthur Liman Professor of Law, Yale Law School

The breadth of the criminal justice system was the focus of the first discussion, moderated by Judith Resnik, Arthur Liman Professor of Law. Tom Tyler, Professor at Yale Law School and in Yale's Department of Psychology, focused on the problems of policing and his work as the co-chair (along with Professor Tracey Meares) of Yale Law School's Justice Collaboratory, a national effort to reform policing. The Collaboratory is directed by Megan Quattlebaum, who was a Liman Fellow from 2010 to 2011 and then was a Senior Liman Fellow in Residence in 2013.

Jonathan Lippman, former Chief Judge of the New York Court of Appeals, and speaking just after his retirement, discussed the gamut of reforms underway, from bail to grand juries, from the age of criminal responsibility to the inadequacies of indigent defense, and overly harsh sentencing. David Fathi, the Director of the ACLU's National Prison Project, underscored the need to put conditions of incarceration at the front of reforms.

Glenn Martin, founder and President of JustLeadershipUSA, argued for the need to see the criminal justice system as a form of quarantine in need of urgent redress. He emphasized the importance of transforming this "moment" into a "movement." He raised the concern that the structure of criminal justice—and its reform—marginalizes people who are or were incarcerated and limits their role in the public debate. As Martin noted, even as he was invited to join a meeting at the White House on the need for reform, his entry was made complicated because he had been incarcerated.

Paul Samuels, Director and President of the Legal Action Center (LAC), which Arthur Liman founded in 1973, shared the view that criminal justice must be seen through the lens of disease, as he argued that reforms should rely on public health models. Allegra McLeod (Liman Fellow 2008–2009), Professor at Georgetown University Law Center, proposed a new abolition framework to refocus the overall project on decarceration.



*Sarah Baumgartel, Senior Liman Fellow in Residence (2015–2016); James Forman Jr., Clinical Professor of Law, Yale Law School; Paul Wright, Founder and Executive Director, Human Rights Defense Center, and Editor, Prison Legal News; Paul Butler, Professor, Georgetown University Law Center; Alec Karakatsanis, Founder and Executive Director, Civil Rights Corps, Washington, DC; McGregor Smyth, Executive Director, New York Lawyers for the Public Interest (Liman Fellow 2003–2004); and Jee Park, Deputy District Defender, Orleans Public Defenders*

In the closing discussion, moderated by Sarah Baumgartel (Senior Liman Fellow in Residence 2015–2016), the question was whether and how different sectors contribute to making change. Institutional litigators were the focus of comments by Jee Park, who is the Deputy District Defender of the Orleans Public Defenders. Likewise, McGregor Smyth (Liman Fellow 2003–2004), who heads Lawyers for the Public Interest in New York, considered the interaction between working on behalf of individual clients and building institutions and coalitions necessary to systemic reform. Alec Karakatsanis, the founder of Civil Rights Corps, which brings lawsuits to challenge the imposition of fines and fees on persons with limited means, emphasized the importance of recognizing the fundamental

illegitimacy of the current system, even while working within it. Professor James Forman, who teaches at Yale Law School, emphasized the challenges that lawyers face in maintaining their own energy to engage critically with, and in many instances to resist, the current structures of the criminal justice system, as lawyers also work for and with clients, whose needs have to remain paramount.

Paul Butler, Professor at Georgetown University Law Center, and Paul Wright, the founder and editor of Prison Legal News, voiced skepticism about achieving meaningful and long-lasting change. They were concerned about marshalling the will to unravel the expansive carceral state, the racism that pervades it, and the economically entrenched prison system.





## ARENAS OF REFORM

### Decarceration



*Johanna Kalb, outgoing Director of the Liman Program, Associate Professor of Law, Loyola University New Orleans College of Law; Alix McLearn, National Female Offender Branch Administrator, U.S. Bureau of Prisons; Scott Semple, Commissioner, Connecticut Department of Corrections; Kathy Boudin, Co-Director and Co-Founder of the Center for Justice at Columbia University; Issa Kohler-Hausmann, Associate Professor, Yale Law School, and Associate Professor of Sociology, Yale University; Fiona Doherty, Clinical Associate Professor, Yale Law School; Monica Bell (Liman Fellow 2010–2011), PhD Candidate, Sociology & Social Policy, Harvard University, and Climenko Fellow, Harvard Law School*

Supervision of people in the criminal justice system can be a source of oppressive control, a conduit to reincarceration, or a form of social services. In a session devoted to decarceration, all these versions of the criminal justice system were in high relief.

Prison officials reflected on the challenges inherent in providing services through the criminal justice system and on the centrality of the relationship between staff and prisoners. Scott Semple, Commissioner of the Connecticut Department of Corrections, discussed the importance of having staff responsive to the needs of people in prison. From his work with formerly incarcerated people, Semple drew lessons on the need to create an environment that was conducive to building relationships. He described the specialized units for veterans, women, and persons convicted of driving under the influence that his Department in Connecticut was creating. Alix McLearn, the U.S. Bureau of Prisons' Female Offender Branch Administrator, detailed the types of programs available to women incarcerated in the federal system. As she noted, some crucial services, such as trauma-informed therapies, may not be available to women outside prison.

The role of prisoners in shaping programs was central to the comments of Kathy Boudin, who also challenged the notion that decarceration should be limited to non-violent offenders. Drawing on her own experiences while incarcerated in counseling women on HIV/AIDS, Boudin encouraged deeper engagement

with prisoners in conceptualizing and implementing prison programming.

Concerns about the degree to which criminal justice release programs, both before and after conviction, result in more people being sent to prisons were raised by Professors Issa Kohler-Hausmann and by Fiona Doherty (Senior Liman Fellow in Residence 2011–2012). Kohler-Hausmann, Associate Professor at Yale Law School and in Yale's Sociology Department, discussed her research findings regarding individuals accused of misdemeanors in New York City. What she termed "misdemeanorland" was a system of management and control—without adjudication—that oppressed the individuals subjected to the many requirements to present themselves to authorities. Doherty, a Clinical Associate Professor at Yale Law School, detailed the degree to which conditions of probation and parole can be conduits to re-incarceration, often for minor violations that would not result in incarceration otherwise.

The question of who turns to the criminal justice system was central to the discussion by Monica Bell (Liman Fellow 2010–2011), formerly a Research Associate in Yale's Justice Collaboratory and now a Climenko Fellow at Harvard Law School. Bell emphasized the ways in which minority communities both turn to police as well as feel oppressed by police. Her ethnographic exploration of relationships between police and poor African-American mothers documented how police can be both a threat and a resource.



## Ending Capital Punishment and Life Without Parole



*Kate Stith, Lafayette S. Foster Professor of Law, Yale Law School; Nicole Porter, Director of Advocacy, The Sentencing Project; Anna VanCleave, former Chief of the Capital Division, Orleans Public Defenders and current Director of the Liman Program; Christopher Seeds, PhD Candidate, Sociology Department, New York University; Sarah Russell, Professor and Co-Director, Civil Justice Clinic, Quinnipiac University School of Law, and former Director of the Liman Program; and Sia Sanneh, Senior Attorney, Equal Justice Initiative, Montgomery, Alabama and Visiting Clinical Lecturer in Law, Yale Law School (Liman Fellow 2007–2008 and Senior Liman Fellow in Residence 2011–2013)*

The relationship among reform efforts was at the center of the discussion about the abolition of the death penalty and of life without parole (LWOP). During the last two decades, concerted and tireless advocacy has helped to reduce the number of executions occurring in the United States by almost two-thirds. This session focused on whether this success could be translated into reforming what Nicole Porter, Director of Advocacy for The Sentencing Project, termed “excessive sentencing practices.” Anna VanCleave, then Chief of the Capital Division of Orleans Public Defenders (and now Director of the Liman Program) discussed the way in which practicing lawyers apply the methods that limited the use of death penalties into the context of LWOP sentences. Christopher Seeds, a PhD candidate in sociology at NYU, provided a history of the development of LWOP and outlined the complexity of identifying what constitutes a sentence of LWOP. As he explained, LWOP was not only an artifact of pressure to create alternatives to the death penalty but also of harsher and longer sentences and

of changes to post-sentencing modification practices. Many individuals are sentenced to successive long terms, resulting in lifetime incarceration with, in practice, no possibility of release. Changes in parole and clemency practices have also added to the numbers of individuals serving de facto LWOP sentences.

The sentencing of juveniles was the focus of discussion by Sia Sanneh, a senior attorney at the Equal Justice Initiative, and by Sarah Russell, Professor at Quinnipiac University. Sanneh detailed the work of shaping the law related to sentences of life without parole for juveniles, many of whom have spent decades incarcerated and are now in their sixties and seventies. Russell focused on the challenges of translating the formal right to parole into a “meaningful” opportunity for release for the thousands of people currently serving juvenile LWOP sentences in the United States. Sanneh was a Liman Fellow from 2007–2008 and was a Senior Liman Fellow in Residence in 2011. Russell is a former director of the Liman Program.

## The Movement to Stop Solitary Confinement



*Hope Metcalf, former Director of the Liman Program and currently the Executive Director, Orville H. Schell, Jr. Center for International Human Rights; Jules Lobel, Bessie McKee Walthour Professor of Law, University of Pittsburgh School of Law, and President, Center for Constitutional Rights; Dwayne Betts, New Haven Office of the Public Defender (Liman Fellow 2016–2017); Bernie Warner, Former Secretary, Washington Department of Corrections; Amy Fetting, Associate Director of the ACLU National Prison Project; and Rick Raemisch, Executive Director, Colorado Department of Corrections*

Conditions inside prison, and specifically solitary confinement, were the topics of another session. During the 1980s and 1990s, prison officials expanded their use of solitary confinement, sometimes through construction of special long-term isolation units and of entire prisons, colloquially termed “supermax” facilities.

But during the past few years, concerns have grown about the harm that isolation causes for prisoners. Increasingly, legislators, judges, correctional administrators, prisoners, academics, and the media have focused on how to reduce the numbers of people held in solitary confinement and the degrees of prisoners’ isolation.

Thus, participants explored the factors used to support the placement of 80,000 to 100,000 people in isolation, the growing awareness of its harms, the efforts to reduce or eliminate isolation, and the challenges that remain. Hope Metcalf, Executive Director of the Orville H. Schell, Jr. Center for International Human Rights at Yale Law School and former Director of the Liman Program, detailed how many forms of isolation have come to be a part of penal systems around the country. Bernie Warner, former Secretary of the Washington Department of Corrections, and Rick Raemisch, Executive Director of the Colorado Department of Corrections, described how correctional officials increasingly understand profound isolation to be counterproductive and ineffective. Warner emphasized the challenges of

shifting away from isolation and the need to create substitute forms of punishment and constraint. He also raised concerns that too quick a shift could create a backlash and undermine long-term progress. Raemisch discussed the need to document the positive effects of reducing isolation—in reducing violence in and outside prisons—and therefore the need for data, given the risk that problems will occasionally emerge regarding people who have been released.

Professor Jules Lobel, from the University of Pittsburgh School of Law, spoke about the future. Lobel was the lead counsel for prisoners in solitary confinement in Pelican Bay in California. He discussed the idea that, once widespread misuse of solitary confinement has been addressed, humane conditions must be put into place for individuals who cannot be housed safely with others. Lobel explained that prisons must find ways to reduce the degrees of isolation that such people face, even if they cannot be safely housed in the general population. Dwayne Betts (Liman Fellow 2016–2017) emphasized that the violence and deprivations visited upon those in isolation in prisons are on a continuum with the violence and deprivations faced by those in the general population. “General population” is not a baseline to which to aspire; rather, conditions must be improved for all incarcerated individuals.

Essays from some of the commentators on the panels are excerpted in the pages that follow.

# Toward Systemic Reform

## The Charles Evan Hughes Memorial Lecture

Jonathan Lippman

Former Chief Judge of the New York Court of Appeals; of Counsel, Lathan & Watkins LLP

Excerpted with permission from Chief Judge Lippman's November 30, 2015, lecture at the New York County Lawyers' Association



... I want to talk about criminal justice in New York and the United States—so urgently in need of fundamental reform. I have gone around our nation and the world these past seven years speaking about the actions needed to address the desperate crisis in access to justice in civil matters, and the equally troubling injustices that occur in the criminal arena that cry out for immediate

attention. In the civil context, I believe we are changing the landscape on legal services for the poor, as a thousand flowers bloom with new ideas and initiatives to provide legal representation and effective legal assistance for society's most vulnerable, who are struggling to obtain the essentials of life. And the results are encouraging.

Yet, in criminal matters, even 50 years after *Gideon*, a person's liberty more often than not is determined by how much money is in his pocket; children, whose lives have barely begun, continue to be treated like adults in our criminal justice system; suggestive police line-ups and photo identifications, and aggressive interrogations result in wrongful convictions of innocent people. A 16-year-old named Kalief Browder can find himself on Rikers Island for three years without being convicted of a crime and end up hanging himself even after being released, unable to face the toll that years in solitary confinement took on him. Public defenders in many counties in New York are toiling under untenable caseloads and lack the time and resources to vigorously represent their indigent clients, and our communities of color continue to suffer the ill effects of breakdowns in the criminal justice system, which have a disproportionate effect on them.

The realities are sobering, and once our eyes are open to these truths, it is unthinkable to shut them. This is about ensuring equal justice in our criminal justice system. We need gut wrenching and fundamental criminal justice reform, and these reforms—first and foremost—must come by way of the legislative process. As Chief Judge and head of the non-political branch of government, I am not risk averse, and I am in the unique position of being able to put bold reform proposals on the table without fear of running for election or reelection and

to put administrative fixes into place within existing statutory constraints—and we have made great inroads. However, the judiciary can only go so far in our tripartite system of government, and statutory change is the ultimate solution to almost all of these problems. Elected officials, policy makers, and criminal justice stakeholders all need to realize that events here in New York and around the country have demonstrated that the criminal justice system is losing the public trust and confidence of many of our communities—and therefore is in danger of losing its very credibility...

*Bail:* One area where this stagnation is strikingly evident is bail. Research has shown that money bail keeps people in jail when they otherwise could be safely released to their families and their jobs in the community while they await trial. The use of money bail does not automatically make us safer and has a negative effect on vulnerable populations. We need to take money out of the equation. Defendants should be assessed based on whether they are a threat to public safety, not based on their ability to pay. Studies by the New York City Criminal Justice Agency show that the amount of bail that defendants must pay to be released, ranging from \$50 to \$5000, has a negligible effect on return rates to court. Whether bail is set high or low in that range, defendants have the same approximate return rate—around 90 percent. Effective alternatives to money bail are available, and we need to make these options accessible to judges. Evidence-based risk assessments, taken along with the professional judgment of judges, produce better safety results, lower rates of defendants who fail to appear, and lower rates of re-arrest.

As they currently stand, New York's bail statutes create a two-tiered system of justice, one for those with money and one for those without. Each year in New York City, nearly 50,000 defendants are jailed because they cannot make bail. I hear stories nearly every day: low-risk defendants with low-level, non-violent charges, locked away because they can't afford to pay \$250. A homeless teenager who jumped a turnstile, and can't afford bail, spends weeks in Rikers. A man arrested for drug paraphernalia because he was holding a straw for his soda spends three weeks there. To what end?

In 2013, I proposed legislation for a top to bottom reform of the bail system in New York. First, when a defendant is charged with a serious offense, the proposal requires judges to consider whether the defendant poses a risk to the "safety of any person



or community”—could anyone reasonably disagree with that? Unlike 46 other states and the District of Columbia, New York inexplicably does not require or even permit judges to take public safety or the dangerousness of the defendant into account. Second, the proposed legislation would also create a statutory presumption of release without bail where the judge concludes that the defendant poses no risk to public safety or legitimate risk of failure to return to court. Right now, you’re in jail unless there is a reason for you to be out, or you can get a bail bondsman to spring you, in a for-profit, money-making enterprise. And perversely, defendants charged with serious offenses who have higher bail amounts are more likely to obtain bail bonds than those accused of lesser crimes, since the bail bonds industry derives minimal profits when bail is set at a low amount. It should be exactly the opposite—you’re out unless there is a public safety reason for you to be in custody, and money should not be a factor. If you’re not going to hurt others or flee, why should your liberty be taken away and taxpayers have to pay \$170,000 a year to lock you up? That flies in the face of the constitutional presumption of innocence.

Despite compelling logic, no real discussion by the New York State Legislature on the subject of bail occurred until horrific events confronted us—like the Kalief Browder suicide—and a human face was put on criminal justice reform. In the face of inexcusable inaction, I announced this past October a series of reforms that we are instituting within present law. First, in misdemeanor cases, where bail is set but the defendant is unable to post bail, a designated judge in each of the five boroughs of New York City, focusing on bail, will conduct a *de novo* review. This is not to second guess the judges’ original bail decisions, who work so hard under what are often strict time constraints and overwhelming case volumes. It is to ensure, with the benefit of more time and consideration, a fuller exploration of whether bail should be imposed, and if so, what amount.

Second, in felony cases where the defendant is held on bail, judges will regularly review the strength of the prosecution’s case and its continued viability and make bail modifications when appropriate. We will also be starting a pilot electronic supervision program in Manhattan Criminal Court to give judges an alternative to bail where a defendant is not an appropriate candidate for release on recognizance. Finally, through information and training, judges will be encouraged to set alternative forms of bail that are authorized by statute but little used. In New York City, several judges in each of the five counties will make a concerted effort to use statutory alternative forms of bail, such as partially secured bail bonds. As part of the pilot program, the Vera Institute will track the progress of these cases and determine whether the bail alternatives are just as effective as cash bail and bail bonds in securing defendants’ return to court. All of this again will be done within existing statutory law.

I stand firm in the belief that these efforts are crucial to the integrity of our criminal justice system and to creating a safe and fair bail system in keeping with modern and forward-looking

thinking on pretrial justice. In the meantime, we continue to wait for legislative action. From New Jersey, to Arizona, to Hawaii, to Delaware, to California—people are talking about bail and taking action to foster change. New York must follow suit and change this fundamentally unfair system before another tragedy besets us.

*Raising the Age of Criminal Responsibility:* Talk about tragedies, must we lose another child before we learn that children should not be treated in the courts of New York as adult criminals? Scientific research demonstrates that the human brain is not fully formed until the age of 25. The adolescent brain is impulsive, and teenagers lack the ability to focus on the consequences of their behavior.

Yet in spite of these documented findings, which have been cited by the United States Supreme Court, New York has the dubious distinction of being one of only two states whose criminal justice laws treat 16- and 17-year olds as adults. Since 2011, I have been advocating to raise the age of criminal responsibility in New York and have proposed legislation to do exactly that. While waiting for the Legislature to act, in early 2012, we took action to establish Adolescent Diversion courts in nine locations around the state: the five boroughs of New York City, the suburban counties of Nassau and Westchester, and the upstate counties of Erie and Onondaga. The program established specialized court parts for 16- and 17-year-old defendants charged with non-violent offenses. Defendants in these courts receive a clinical assessment; age-appropriate services; rigorous compliance monitoring; and non-criminal case outcomes when they complete assigned services. The Adolescent Diversion Parts bring to these cases a rehabilitative, developmentally appropriate approach to responding to misconduct by teens—often silly and infantile but not with the same moral culpability as an adult who should know better.

The Adolescent Division Program is an important step in the right direction. Nevertheless, it is the Legislature that must once and for all establish that children should be treated as children—how much imagination does that take? Prosecuting adolescents and placing them in the adult criminal justice system is outrageous and heartbreaking. In New York, we write off 16- and 17-year-old criminal defendants as lost causes, with only minimal services and programs available to them. We need to implement solutions that respond to definitive research showing that adolescents are more receptive to rehabilitation than adults and can greatly benefit from treatment and support. . . . [T]hey are victimized over and over again by the adult criminal justice system.

*Grand Jury Reform:* Both bail and the age of criminal responsibility have been in the public consciousness, but let’s also look at recent deadly police-civilian encounters in New York and around the country that cry out for reform of our grand jury system that dates back to the Magna Carta—eight hundred years ago. It is time to update this archaic institution before it loses all relevance.

The Judiciary has proposed legislation that would require grand jury proceedings, in cases involving allegations of homicide or felony assault arising out of police-civilian encounters, to be presided over by a judge. The proposed legislation puts the ultimate responsibility for the grand jury where it belongs: with the court. The judge would be present to provide legal rulings, ask questions of witnesses, decide along with the grand jurors whether additional witnesses should be called to testify, preclude inadmissible evidence or improper questions, and provide final legal instructions before the grand jury deliberates—and most importantly, provide much needed gravitas and impartiality to the proceeding.

And the proposed legislation also addresses the critical issue of grand jury secrecy. While there are legitimate reasons for grand jury secrecy, these reasons are far outweighed by the need for transparency in cases of great public interest. The proposed legislation creates a statutory presumption in favor of the court disclosing the records of a grand jury proceeding that has resulted in no charges, in cases where the court finds that the public is generally aware that the matter is the subject of grand jury proceedings, the identity of the subject of the investigation has already been disclosed or the subject consents to disclosure, and disclosure of the proceedings advances a significant public interest. Upon such a finding, the court would be authorized to disclose the record of the proceedings, including the charges submitted to the grand jury, the legal instructions provided in support of those charges and, critically, the testimony of all public servants and experts.

The world is not going to come to an end by bringing transparency to the grand jury process. The prosecutor would have the opportunity to redact testimony that would identify a civilian witness and to move for a protective order upon a showing that disclosure would jeopardize an ongoing investigation or the safety of any witness—and the public would actually have some clue as to what the grand jury did and why it failed to take action. These changes would enhance public access to, and confidence in, the justice system and preserve the integrity of the judicial branch, law enforcement, and ultimately, the venerable, but to be quite frank, antiquated institution of the grand jury. . . .

*Addressing Wrongful Convictions:* . . . There is no greater failure in the criminal justice system than to unjustly deprive an innocent person of his or her liberty. Wrongful convictions are a matter of crucial concern to all of us. One of my first acts upon taking office as Chief Judge in 2009 was to form the New York State Justice Task Force . . . to examine the causes of known wrongful convictions in New York State and to recommend actions to reduce the likelihood of this miscarriage of justice. The Task Force is a perfect example of bringing the players in the criminal justice system together, without any political agenda, to think out of the box about criminal justice reform. And the process has worked.

Two of the Task Force's most significant recommendations—the expansion of the State's DNA Databank and providing

criminal defendants with greater access to post-conviction DNA testing—have been enacted. Three other critically important steps await immediate legislative attention: requiring video-recording of custodial interrogations by law enforcement throughout our state in the most serious cases; adopting procedural safeguards when the police conduct lineups and photo identifications; and reforming discovery laws to accelerate and broaden pre-trial disclosure of evidence in criminal cases. For example, of the numerous wrongful convictions in the United States that have been overturned based on DNA evidence, nearly 25 percent involved a false confession or false incriminating statements. These straightforward measures will drastically reduce the likelihood of false confessions and should have bipartisan support—nobody wants the real perpetrator of crime on the loose while an innocent person suffers in jail. It is a travesty of our criminal justice system—even one wrongful conviction is one too many.

*Indigent Legal Defense:* . . . Where the political will exists, our Legislature can accomplish amazing things. Look at the state legislation enacted in 2009, which capped the caseloads for indigent criminal defense providers in New York City. Working with various stakeholders, the courts were involved in critical negotiations that led to the implementation of case cap rules and the provision of funding for case caps in the Judiciary's state budget. With the case caps in place, the result has been a stark improvement—night and day—in the time and commitment that defense providers in New York City are able to devote to their clients. Attorneys in New York City are now limited to handling no more than either 400 misdemeanors or 150 felony cases (or a proportionate combination) annually, a dramatic sea change with respect to ensuring a level playing field for indigent defendants.

New York has also established an independent State Office of Indigent Legal Services or (ILS). . . . Since its inception in 2010, the office has taken concerted action to improve the quality of representation in all of New York's 62 counties. We have strengthened the process for distribution to the counties of existing state funds for indigent criminal defense, established performance standards for criminal representation, provided funds to ensure counsel at the first court appearance in over two dozen counties, and distributed funds to 45 upstate counties for reducing excessive caseloads and improving the quality of representation.

But our work cannot stop there. The quality of indigent criminal representation continues to suffer because of insufficient funding and resources. . . . We need the caseload caps implemented in New York City applicable throughout the state, and we need the funding to safeguard the constitutional rights of those who cannot afford representation when their liberty is at stake. Right now, attorneys at the institutional providers of indigent legal services outside the City are handling an average of 616 cases per year, well over 200 more cases than their counterparts in New York City—there can be no justice and the system

fails when an overburdened defense system cannot provide a level playing field between prosecution and defense.

*Sentencing:* . . . While indeterminate sentencing has been eliminated for violent felonies and other selected crimes, it should be eliminated for every crime.

With indeterminate sentencing, judges are required to impose a sentence range rather than an exact sentence for many crimes. That leaves the ultimate decision to the parole board, not judges, to decide how long a sentence offenders will serve. This makes no sense, particularly where the parole board is subject to political headwinds. Eliminating indeterminate sentencing will return judging to our judges, where it properly belongs. At the time of sentence, everyone—the judge, the prosecutor, the defense attorney, the defendant, and the victim—should know the length of the sentence. We must have truth in sentencing. . . .

*Conclusion:* In all of these areas, bail, raising the age, grand jury reform, wrongful convictions, indigent legal defense, and sentencing, there is a dire need and great potential for positive

change that will even the scales of Lady Justice. I have pushed as hard as I can, using my pulpit as Chief Judge, for reform on all of these fronts. The pursuit of justice demands that the Judiciary confront these critical subjects, and that pursuit demands that the policy-making branches of government do the same. . . .

Now is the time for the policy making branches of government, using the legislative process, to act boldly to protect public safety and the fairness of our criminal justice system—for the public good. This is the way enduring, systemic reform is supposed to and must happen, and it goes to the very heart of our public institutions—our democracy depends on it. The crisis of confidence in our criminal justice system among our diverse communities is real, and so evident in the news of the day. It cannot be ignored. These headlines tell us that the very fabric of our society is in danger if we cannot overcome intransigent ideological differences and extricate ourselves from tough-on-crime, soft-on-crime rhetoric and gridlock, and find common ground. If we fail to do so, the very viability and fairness of the criminal justice system is surely at stake. . . .

## Marching Upstream: Moving Beyond Reentry Mania

Glenn E. Martin

Founder and President of JustLeadership USA

Excerpted with permission from *The Sentencing Project: 25th Anniversary Essays* (2014)



Poverty and addiction are treated as incurable diseases in the United States, and prisons are the fear-driven quarantine facilities that have allowed us all to sleep at night, but they are not solutions. While reentry mania has created renewed momentum for progressive criminal justice reform advocates, it's a downstream strategy.

For every body we're able to pluck out of the river and save, thousands of others are swept away. In the next 25 years, we must think and act more boldly, and recognize that mass incarceration will be judged by our children as an indelible stain on our generation's legacy. The United States currently has the highest documented incarceration rate and highest total prison population in the world. The magnitude of incarceration and the stark disparity in rates of incarceration by race means that a black man in this country has a one in three chance of going to prison during his lifetime. While women are incarcerated at lower rates, the rate of incarceration of women of color has been on the rise in recent decades. To our shame, these rates do not correlate with criminal behavior along racial lines and reflect real injustice.

We, as a society, have made—and continue to make—a deliberate choice to address a history of poverty, neglect, racism, and classism by creating penal codes rather than addressing these fundamental inequities. As one segment of America is taught to learn and earn, another segment of society gets stopped and frisked. While there has been some measurable progress in recent years, including the passage of the Second Chance Act and the successful reduction of the crack/cocaine sentencing disparity, the nation has schizophrenically persisted in tough on crime policies.

Furthermore, our nation's thirst for punishment and revenge does not end when people leave prison. There are 700,000 people due to be released from incarceration this year and try as they may to reintegrate into mainstream society, these individuals will face a maze of policies and regulations that keep them from accessing the very things they need to rebuild their lives and become functioning members of society. . . .

In his 2004 State of the Union address, President George Bush provided a ray of hope and transcended traditional partisan rhetoric when he announced his Prisoner Reentry Initiative and declared that "America is the land of the second chance, and when the gates of the prison open, the path ahead should lead to a better life." That important pronouncement led to a number of meaningful shifts in the distribution of scarce resources, and in local and national policy. . . .



Over the eight years since that important speech, reentry mania swept across our nation as people hoped reentry programs might cure our country's addiction to mass incarceration. Bipartisan attention to reentry was inspiring; it could have signaled a tipping point on the way to a redefined, race-neutral, and equitable criminal justice system in America, one that viewed victimization and subsequent incarceration as not just the failure of the defendant, but also as a failure of society. But reentry programs, if not combined with front-end strategies, rely on the banks downstream to collect and mend the bodies of young, poor, black and Latino men and women who are chewed up and spit out by our unforgiving prison system. We need to march upstream.

In the same communities in which government officials and law enforcement have embraced a new focus on reentry, policing, enforcement, prosecution, and incarceration policies remain racialized and class-biased. For example, law enforcement's approach to certain communities designated as "high crime" is often fear-driven, short sighted, and sends a strong message about the devaluation of the residents of certain

communities. These communities are composed of residents who could help law enforcement to maintain safety, but instead are seen as threats, and stopped regularly and frisked. These policing strategies reinforce mass incarceration and centuries of story-telling about the legitimization of racism by law enforcement.

Over the next 25 years, we must take on this bigger "upstream" challenge even at a time when we are at a critical juncture and risk backsliding. It is critically important that as we fight to sustain and build on the reentry momentum, we demand that reentry be a concern at all junctures of the criminal justice system. At sentencing, we must ask our judges, "And then what?" When the head of our police department decides that aggressive policing is the way to public safety, we must ask, "And then what?" When our governors tinker around the edges by right-sizing prisons instead of downsizing the system, we must ask, "And then what?" We should all ask ourselves this question and begin our next 25 years of criminal justice reform advocacy by first marching upstream. If not, the ultimate indictment will come from our children.

## All Americans Deserve a Chance to Rebuild Their Lives

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Excerpted with permission from *The Huffington Post* (September 30, 2015)



America is finally waking up and realizing its drug and criminal justice policies are failing its own citizens, especially those with a substance use disorder. A bipartisan coalition in the U.S. Congress is now pushing for serious reform of our justice system—with support from both the Koch brothers and President Obama—which institutionalizes the warehousing of millions of people and treats

substance use as a crime deserving jail time rather than a health disorder needing treatment. This new wave of reform needs to ensure that once people with substance use disorders leave prison or probation, they are not confronted with insurmountable barriers to employment, education, housing, health care and other necessities.

The American Bar Association identified no less than 45,000 barriers to reentry for people with criminal records. Many of these deserve to be toppled, but singularly onerous obstacles confront millions of people with criminal records that include drug offenses.

For example, if you ever worked any job in a health facility—doctor, nurse, lab technician, food service, or janitor to name a few—and are convicted of a drug felony, you will be barred from further work in the health care industry for a minimum of five years and possibly more. Furthermore, employers often reject hiring suitable prospective employees after learning their histories. And there are thousands of other unfair restrictions on employment like these for people with histories of addiction.

Sanctions against people with drug convictions also create obstacles to education, housing and public benefits—the very things we know reduce recidivism and make communities safer, healthier and better places to live. For example, impoverished Americans trying to keep their families afloat can be permanently denied access to the Supplemental Nutrition Assistance Program (SNAP) and Temporary Assistance for Needy Families (TANF) benefits if they have drug felony convictions. This is true even for those with substance use disorders who are successfully treated and spend years in recovery if they happen to live in one of the twelve states that still have the full ban on SNAP, TANF or both. Moreover, the Higher Education Act denies Americans with drug convictions financial aid if they want to attend or remain in college. Just one mistake made when they were young can block their access to higher education.

These harsh sanctions make no sense. Student aid is a stepping stone to success and self-sufficiency, and public benefits provide the minimum support many Americans need to survive. Incarcerated people also are denied study grants even though research shows higher education is one of the most effective ways to prevent future criminal behavior. Denying any American, incarcerated or not, these resources is counter-productive to becoming successful and contributing members of our society.

Housing is vital to successful re-entry after incarceration. Yet publicly funded and private housing is often unavailable to people with criminal records and their families. For example, landlords and public housing authorities have a great deal of leeway to keep people with drug convictions out of federally-assisted housing. They can do this without considering other factors about the individuals who apply, such as character references and evidence of successful treatment. Landlords and housing authorities, who reflexively shut doors on people with drug histories, are contributing to the epidemic of homelessness sweeping America's cities and towns.

Specific remedies are available. To help address the student aid problem, President Obama recently moved to expand access to Pell Grants in prison. Congress should build on this momentum by passing the Comprehensive Addiction and Recovery Act (CARA) and REAL Act, which supports postsecondary education in prison and prepares those returning home for a global economy.

The inexcusable federal bans on SNAP and TANF should be eliminated. The REDEEM Act, sponsored by Senators Corey Booker (D-NJ) and Rand Paul (R-Ky.), would take a significant step in this direction, eliminating the ban for some offenses and providing a mechanism for people to have their benefits restored.

Restrictions on housing and employment may be appropriate in some cases, but across-the-board criminal record bans should be eliminated so that each case is considered individually. Decision-makers should account for the nature of an applicant's crime, how it relates to the opportunity they are seeking, how long ago it occurred and other aspects of their life that show how they have changed, learned, become healthier, or otherwise improved themselves. . . .

Easing the path to re-entry after prison is only part of the challenge confronting our criminal justice system. A broad range of other reforms are necessary, including those that ensure life-saving addiction treatment is available to justice-involved individuals. These include diversion programs to treatment facilities and more widespread use of Medication Assisted Treatment for individuals with opioid addictions, among others.

Once Americans with substance use disorders pay their debts to society, they deserve a chance to rebuild their lives. Ultimately it is in this country's interest to help them to do so. To make that possible, we need to eliminate harmful criminal record barriers and restore their civil rights and liberties.

## Decarceration

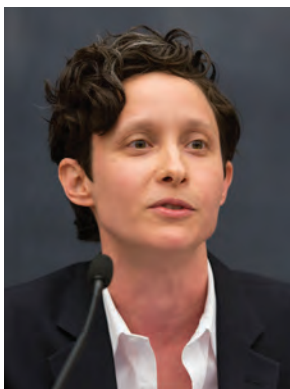
### Prison Abolition and Grounded Justice

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In 1973, the U.S. Department of Justice sponsored a National Advisory Commission on Criminal Justice Standards and Goals to study the "American Correctional System," and after extensive research and analysis, the Commission published a report concluding that U.S. prisons, juvenile detention centers, and jails had established a "shocking record of failure." The Commission recom-

mended a moratorium on prison construction to last ten years. Instead, as a vast and compelling body of scholarship attests, in the years to follow, both prison construction and the U.S. prison population—characterized by stark racial disparities—boomed.

Forty years later, one in every thirty-five American adults was under criminal supervision of some form. Penal intervention had become even more alarmingly prevalent among African American men. According to some estimates, one of every three young African American men may expect to spend part of his life in prison or jail. In 2009, Senator Jim Webb tried and failed to establish another National Criminal Justice Commission, though numerous experts testified that U.S. prisons and jails were still "broken and ailing," a "national disgrace," and reflected rampant "horrors" of sexual abuse and violence—in short, that U.S. prisons and jails were in a state of "crisis."

Apart from the inhumanity of incarceration, there is good reason to doubt the efficacy of incarceration and prison-backed policing as means of managing the complex social problems they are tasked with addressing, whether interpersonal violence, addiction, mental illness, or sexual abuse. Moreover,

beyond prisons and jails, broader reliance on punitive policing to handle myriad social problems leads to routine use of excessive police force and to volatile, often violent, police-citizen relations.

Yet, despite persistent and increasing recognition of the problems that attend incarceration and punitive policing in the United States, criminal law and criminological scholarship almost uniformly stop short of considering how the professed goals of the criminal law—principally deterrence, incapacitation, rehabilitation, and retributive justice—might be approached by means entirely apart from criminal law enforcement. Abandoning carceral punishment and punitive policing remains generally unfathomable.

If prison abolition is conceptualized as an immediate and indiscriminate opening of prison doors—that is, the imminent physical elimination of all structures of incarceration—rejection of abolition is perhaps warranted. But abolition may be understood instead as a gradual project of decarceration, in which radically different legal and institutional regulatory forms supplant criminal law enforcement. These institutional alternatives include meaningful justice reinvestment to strengthen the social arm of the state and improve human welfare; decriminalizing less serious infractions; improved design of spaces and products to reduce opportunities for offending; urban redevelopment and “greening” projects; proliferating restorative forms of redress; and creating both safe harbors for individuals at risk of or fleeing violence and alternative livelihoods for persons otherwise subject to criminal law enforcement. When abolition is conceptualized in these terms—as a transformative goal of gradual decarceration and positive regulatory substitution wherein penal regulation is recognized as morally unsustainable—then inattention to abolition in criminal law scholarship and reformist discourses comes into focus as a more troubling absence. Further, the rejection of abolition as a horizon for reform mistakenly assumes that reformist critiques concern only the occasional, peripheral excesses of imprisonment and prison-backed policing rather than more fundamentally impugning the core operations of criminal law enforcement, and therefore requiring a departure from prison-backed criminal regulation to other regulatory frameworks.

I seek to introduce into legal scholarship the first sustained discussion of what I will call a “prison abolitionist framework” and a “prison abolitionist ethic.” By a “prison abolitionist framework,” I mean a set of principles and positive projects oriented toward substituting a constellation of other regulatory and social projects for criminal law enforcement. By a “prison

abolitionist ethic,” I intend to invoke and build upon a moral orientation elaborated in an existing body of abolitionist writings and nascent social movement efforts, which are committed to ending the practice of confining people in cages and eliminating the control of human beings through imminently threatened police use of violent force. I argue that abolition in these terms issues a more compelling moral, legal, and political call than has been recognized to date.

Prison abolition—both as a body of critical social thought and as an emergent social movement—draws on earlier abolitionist ideas, particularly the writings of W.E.B. Du Bois on the abolition of slavery. According to Du Bois, to be meaningful, abolition required more than the simple eradication of slavery; abolition ought to have been a positive project as opposed to

a merely negative one. Du Bois wrote that simply declaring an end to a tradition of violent forced labor was insufficient to abolish slavery. Abolition instead required the creation of new democratic forms in which the institutions and ideas previously implicated in slavery would be remade to incorporate those persons formerly enslaved and to enable a different future for all members of the polity. To be meaningful, the abolition of slavery required fundamentally reconstructing social, economic and political arrangements. In the aftermath of slavery in the United States, reconstruction fell far short of this mark in many respects, and criminal law administration played a central role in the brutal afterlife of slavery. The work of abolition remained then—and arguably still remains today—to be completed.

Confronting criminal law’s continuing violence is an important part of that undertaking.

Along these lines, then, a prison abolitionist framework involves initiatives directed toward positive rather than exclusively negative abolition. A prison abolitionist framework entails, more specifically, developing and implementing other positive substitutive social projects, institutions, and conceptions of regulating our collective social lives and redressing shared problems—interventions that might over the longer term render imprisonment and criminal law enforcement peripheral to ensuring relative peace and security. Efforts of prison abolitionist organizations, such as Critical Resistance and the Prison Moratorium Project, to both oppose imprisonment and enable access to food, shelter, community-based mediation, public safety, and well-being without penal intervention exemplify this orientation towards positive abolition. Conceived of as such, abolition is a matter both of decarceration and substitutive social—not penal—regulation....

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## Challenging the Punishment Paradigm

Kathy Boudin

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It's often said: "We over-incarcerate, there are too many people in prison; we have to let people out; I mean those with non-violent crimes, I don't mean the *murderers*."

These words can be heard from policy-makers and at conferences of people committed to criminal justice reform. Calls for ending mass incarceration come from every part of the political

spectrum, yet they typically exclude people convicted of violent crimes from criminal justice reform. President Obama articulated these sentiments in a speech at the NAACP in the summer of 2015. Calling for the end of mass incarceration, he said, "... Murderers, predators, rapists, gang leaders, drug kingpins; we need some of these folks behind bars."

These sentiments are embedded in existing laws, rules, regulations, and practices and they have devastating, concrete consequences for people in prison and their families. People convicted of violent crimes are excluded from opportunities for release in many ways: extreme sentences; parole denials; exclusion from compassionate release; denials of pardons and clemencies. Further, a shortage of nursing homes willing to accept people convicted of violent crimes has led to longer stays in prison beyond parole eligibility. The combined result of these factors has been an explosion of aging people in prison.

Immediately following the President's comments, news articles appeared that challenged the position that mass incarceration could be put to an end by simply letting out the nonviolent drug offenders. About half of those incarcerated in federal prison are serving sentences for drug crimes, which (just within the federal system) accounts for only about 200,000 people; however, in the state prison system, which houses about 1.3 million people, only 16% are serving time for non-violent drug crimes and about 54% are imprisoned for violent crimes. Assuming that every single person incarcerated for a non-violent drug offense was released (both from the state and federal systems), the incarcerated US population would stand at around 1.7 million, still nearly a fifth of the world total.

Of course, as pointed out in numerous reports and journal articles, even the concept of "violent crime" is not fixed: with "felony murder," the US has created a unique system that greatly expands the category of "violent" crime; prosecutors have flexibility in what people are charged with; and the very definition

of a "violent crime" varies from state to state, and it changes as penal laws are amended.

Why does the United States incarcerate people convicted of violent crimes for extremely lengthy sentences that are unparalleled anywhere else in the world? One factor is fear. People fear that those convicted of a violent crime will again commit a violent act. And those in power fear that a person will commit a crime and they will be held responsible and thus, lose their job or an election.

Yet, evidence suggests that this fear is misplaced. When people convicted of murder are released and go home, they have the lowest rate of return, both for technical violations and for new convictions. In New York, the return rate of long-termers convicted of murder is 6.6% system-wide, with only 1.3% returning for a new commitment, compared to a recidivism rate of 40–60% among the general prison population. And, inside the prison, the long-termers are frequently the ones who mentor new people coming in, who serve as teachers' aides and group facilitators, and who create stability and offer a model of transformation and leadership. In part, because of their long sentences, when they settle and mature, they are the ones who invest in the prison community to create a life with meaning. When these "long-termers" do come home, they are likely the ones who mentor youth, provide reentry services and lead policy efforts for justice reforms.

But popular fear of the formerly incarcerated is secondary to the deep, particularly "American" emphasis on extreme punishment. For example, Farid was a young man when he was convicted of attempted murder and sentenced to 15-to-life by a judge. By the time 15 years had passed and he went to his first parole board he had earned his GED, two 4-year college degrees and two masters degrees, initiated the first peer AIDS program, and was a highly skilled law clerk. But Farid served 18 more years beyond the minimum sentence that the judge had given him, 33 years in prison instead of 15. The ten parole denials were based on parole boards' decisions that the offense deserved more of a punishment than the minimum sentence given by the judge; there was no indication in his record that he would endanger public safety. He came home at age 63 instead of 45. He has now received a Soros Justice Fellowship to support his work to help secure the release of aging people from prison.

Koti, in 2013, an 86-year-old man, having served 35 years for felonies committed in the 1970s, came before the parole board in New York. He was confined to a wheel chair, suffered from a serious neuromuscular disorder, asthma, high blood pressure and cancer. Prison officials called him a peacemaker and

protector of the vulnerable. Koti had a place to live and people to support him if released, but the parole board denied his application, claiming that he was likely to re-offend and that his release would undermine respect for the law.

Farid or Koti and thousands of others were not released because of our society's commitment to emphasizing and valuing punishment. The length of sentences for serious crimes in the United States is far greater than in most countries in Western Europe. One in nine people in prison in the United States is serving a life sentence. Solitary confinement is widely used. The conditions inside American prisons dehumanize and deny dignity to the people within them; programs that promote rehabilitation receive limited attention and funding. Even after release, the formerly incarcerated continue to struggle with the so-called "collateral" consequences of their convictions—including the loss of voting rights; of access to students loans; of opportunities for employment; and the opportunity to live in public housing. This emphasis on punishment is inhumane and a waste of money. It creates a culture of cruelty while undermining the goals of rehabilitation and public safety.

What can be done to reduce the US reliance on over-incarceration? The harm and suffering caused by violence is rarely healed by endless punishment. Perhaps cap sentences at 20 years as suggested by Marc Mauer, Director of The Sentencing Project. We could also, through the mechanisms of parole and medical and work release, do periodic and careful assessment of each incarcerated person to ensure that we are not holding people beyond the time that she or he poses a danger and need to be "incapacitated."

But in order for concrete changes to take place, we have to grapple with deeper issues. First, we must see all people in prison as human beings. The word "murderer" freezes a person in the very act that brought him/her to prison, denying both the likelihood of transformation and the complexity of human beings who are always more than the worst act of their lives.

Second, we need to be aware of the racial underpinnings in both the exaggeration of fear and danger and the desire and ability to inflict greater punishment. Toxic aspects of US racial and racist history reinforce media images, academic theories and policy makers who contribute to creating an image of black boys and men (and increasingly of black girls and black women)

as "dangerous." This enhances the need and ability to punish because the largely white power structure can more easily punish when there is no popular empathy and instead a vast separation by race.

Third, we must increase awareness of the racialized punishment paradigm that has gripped our nation—not just in the criminal justice system but in other institutions, most evident in the punitive and disciplinary approach in schools in low-resourced neighborhoods, resulting in the school-to-prison-pipeline and in a zero-tolerance and non-problem-solving approach to situations on many college campuses.

In thinking about these issues, it could help to learn how other western democratic nations that we compare ourselves to treat people convicted of violent offenses and to interrogate the reasons why our sentences are far longer in general and the treatment of people in our prisons is often harsher.

Some folks say change has to happen slowly, and once society is open to letting those with non-violent convictions out, then we can move on to those convicted of a violent offense. But the current process is creating two groups of people—the "good" (those with non-violent convictions) and the "bad" (those with "violent crime" convictions). It deepens the dehumanization of a large proportion of the prison population and continues to devalue or ignore transformation. It does not actually relate to protecting public safety, nor does it adequately address transforming a system of mass incarceration.

When I teach my social work students, sometimes I ask, "Do you think being in prison is a punishment?" Often there is a silence as people ponder the question. My students, like so many in our society, are used to such extremes of punishment that they are not even certain that incapacitation in prison is itself a punishment. The issue of excluding people convicted of violent crimes from criminal justice reform and keeping them in prison far

beyond a minimum sentence is a lens to look at the deeper questions related to real change in our justice system: How much punishment is enough? What role does race play in determining what punishment a person gets? Are there other methods of sanctioning law-breaking that could be more effective? What are the goals of this criminal justice system? Our conversations, research and policies must focus on these questions if we are to implement an effective, meaningful end to mass incarceration.

*Why does the United States incarcerate people convicted of violent crimes for extremely lengthy sentences that are unparalleled anywhere else in the world? One factor is fear. People fear that those convicted of a violent crime will again commit a violent act. Yet, evidence suggests that this fear is misplaced.*

# Ending Capital Punishment and Life Without Parole

## Abolition at the Intersection of Capital Punishment and Life Without Parole

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The United States has the highest rate of incarceration in the world. More than 2.2 million people are in prison or jail, while 4.7 million are monitored in the community on probation or parole. The nation's lifer population stands at nearly 160,000, or one of every nine people in prison, with almost 50,000 of this total serving life sentences without parole (LWOP).

The excessive criminal penalties of capital punishment and life sentences have impacted criminal justice policy in substantial ways. These punitive terms set a "reference price for crime" that normalizes extreme penalties that are out of step with other western democracies. Whole-life sentences are exceedingly rare in other countries. In the United Kingdom, for example, only 49 persons are serving such sentences. A mix of crime rates and legislative and administrative policies have produced the abnormally high rate of incarceration in the U.S.

Efforts are underway to challenge excessive sentences, including life without parole. Recent Supreme Court decisions allow for most of the approximately 2,500 individuals sentenced as juveniles to life without the possibility of parole (JLWOP) to have a chance for release. Litigation has been key in restricting JLWOP. Organizations like the Equal Justice Initiative and the Juvenile Law Center have anchored efforts to restrict JLWOP in the courts. Policy advocates, organizers, and lawmakers have worked to advance legislative remedies and to codify court decisions into state policy. Policies that authorize teenagers to receive the harshest available sentence vary across states. Eighteen states and the District of Columbia have banned life sentences without the possibility of parole for juveniles; in a handful of other states, there is no ban on such sentences, but no one is serving the sentence.

Stakeholders working to eliminate life without parole might learn lessons from death penalty abolitionists. Many death penalty abolition efforts have supported life without parole as a compromise resulting in bipartisan coalitions with tough on crime lawmakers and practitioners. Yet, the advocacy community does include death penalty abolitionists who are also opposed to life without parole and excessive sentences. Further dialogue is needed, but lessons are to be learned from death

penalty abolitionists who also oppose life prison terms. LWOP abolitionists might leverage the experiences and successes of death penalty abolitionists to determine what strategies are relevant for LWOP abolition. Strategy discussions may surface tactics involving victims who support progressive reforms and affirming support from unlikely allies including law enforcement or conservatives.

LWOP abolitionists might also consider the death penalty movement in terms of strategic direction. As has been seen in the death penalty movement to ban capital punishment for juveniles and people with intellectual disabilities, legislative campaigns can be developed to carve out certain populations from LWOP sentences. These might include persons sentenced to life prison terms that are now elderly, defendants sentenced for murdering their domestic abusers, and persons with disabilities. Other strategies might target LWOP abolition in states where no one or a low number of prisoners are sentenced to the penalty.

During 2016, Delaware lawmakers considered legislation to scale back mandatory life sentences for habitual offenders convicted on their third strike. The effort was supported by a coalition of interests including advocacy organizations and the governor's office. The increase in the lifer population also animated a political strategy to address elderly prisoners sentenced to lengthy prison terms. Organizations in California, Michigan, New York, Vermont and Wisconsin have prioritized legislative, litigation, and public education strategies to support parole eligibility for prisoners who meet minimum age requirements and have served a term of years. Legislation that would authorize presumptive release for parole eligible lifers cleared one chamber of the Michigan legislature in 2015.

Today, there is growing consensus that the nation incarcerates past the point of diminishing return. Bipartisan support has been evidenced by support from President Obama to Republican Senator John Cornyn; similar consensus has supported state level reforms. After a decades-long surge, modest changes in prison populations are now occurring nationally and various state legislatures have reformed sentencing laws that have reduced the incarceration of people convicted of certain offenses. Yet, the population of prisoners serving life without parole has continued to rise: there has been a 22.2% increase in LWOP from 2008 to 2012, from 40,1745 individuals to 49,081.

Life without parole sentences are ill-considered and ignore the potential for transformative growth. Monitoring



efforts to abolish life without parole sentences will serve as a barometer for efforts to scale back mass incarceration. Recent proposals have called for the adoption of a presumptive 20-year maximum sentence, with a provision for extension on public safety grounds. The American Law Institute has proposed as part of its model penal code calibrating sentences for all offenses to a 15-year maximum for adults and a 10-year maximum for juveniles; prisoners would be eligible for a second look to determine eligibility for release. In Canada, for example,

all persons serving life are considered for parole after serving between 10 to 25 years.

Adopting these changes would not necessarily mean that all parole-eligible persons would be released; individualized calculations of public safety risk would influence release considerations. Eliminating life without parole and establishing a fair process will strengthen public safety if each person receives a meaningful opportunity for release that encourages efforts of rehabilitation and transformation.

## Life Without Parole: From Sanction to Condition

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Aspects of life imprisonment without the possibility of parole (LWOP) seem evident enough, but deserve a closer look. First, exactly what is meant by LWOP is rarely discussed; second, the bases of LWOP's emergence remain unstudied in any depth. Each has bearing on how to think about the relation between abolishing capital punishment and abolishing or reforming LWOP.

The conventional wisdom on LWOP's history has two parts. The first is that LWOP came to light in the 1970s when touted by death penalty abolitionists as a viable alternative to capital punishment. The second is that LWOP laws spread in ensuing decades in response to high crime rates and social unrest amidst a flow of tough-on-crime sentencing policy, which included the "war on drugs," truth-in-sentencing initiatives, and three-strikes laws. These hypotheses are reasonable, but they are simplifications, and neither has been explored in detail.

There is also a third channel of LWOP's emergence, a mechanism *other* than the death penalty, often *prior* to the tough on crime policies, that is far less talked about. Yet it is integral to LWOP's development, and to what LWOP actually is. The following discussion draws from my dissertation research on LWOP as a social and legal phenomenon.

At the precipice of the 1970s, twenty-some states precluded parole for all or some subset of lifers. These states provided that the Governor or a pardons board had to commute a life sentence before a lifer could be paroled or have any good-time credits applied toward early release. One example is Louisiana. Another is Pennsylvania. Both states had statutes under which parole did not extend to life-sentenced prisoners. Yet both states operated a regular system of executive clemency under

which lifers obtained release with some regularity. The average sentence served by lifers in Pennsylvania between the 1930s and the mid-1960s, for example, was around 15 years. In other states with similar provisions, it was less.

In the late 1970s, early 1980s and onward, however, clemency practices dried up. Suddenly lifers who thought they had a channel out realized they did not. Prisoners entering prison under a life sentence in these states in the 1980s did so with a sentence of distinctively different quality than their predecessors. On paper, the statute precluding parole for lifers may not have changed much, if at all. But the reality of how the promise made at sentencing played out in practice was altered.

A similar point about a related posture: One aspect of indeterminate sentencing in practice was that judges were often free to impose severe sentences, sometimes in expressive fashion, which would later be evened out at the back end of the system by parole. There was no real expectation, in the system at least, that the sentence given would necessarily be the sentence served. This mismatch fueled critiques against parole. Even before what we call truth-in-sentencing statutes, parole abolition reforms referred to themselves as movements for "truth." In this pursuit—amidst transfers to determinate sentencing models or other overhauls in which parole was abolished—the back end of this procedure was lost.

In short, LWOP is not only a product of death penalty alternatives or tough on crime laws that single out particular offenses or offender categories for harsher punishment. It also occurred because back-end release practices, sometimes long-standing practices, changed their meaning. These trends *also* normalized LWOP.

What are the implications of this history for the relationship between death penalty abolition and LWOP reform? With the death penalty as a guide, the impulse has been to make LWOP look like death—a sanction unique in its cruelty. But history reminds that LWOP is also a condition achieved ultimately

through practices. A reform approach that treats LWOP only as a sanction—even one uniquely cruel enough to qualify for another “different” sort of jurisprudence along the lines of the death penalty model—however accurate, also has the side effect of differentiating LWOP from other back-end practices that lack the formal sanction but generate the same results. Several of these virtual or de facto LWOP conditions are familiar:

- prison sentences outlasting a prisoner’s lifespan, such as a mandatory minimum of 40 or more years;
- life-with-parole sentences where parole decision-making focuses on circumstances of the offense that will never

change, or where the parole board has established over a duration of time that it is not going to release life prisoners;

- life-with-parole sentences in a jurisdiction where the Governor declares an intent to veto all parole release recommendations for lifers.

In conclusion, rather than a reform approach that would knock the death penalty out, and then tackle LWOP in the same way, one might see LWOP as presenting a separate problem—not only of disproportionate sentencing, but of the intolerable *conditions* generated by back-end practices.

## Death in Prison: Changing the Language of Life Without Parole

Anna VanCleave

Former Chief of the Capital Division at Orleans Public Defenders

In the fall of 2016, VanCleave became the Director of the Liman Program.



There are a number of ways in which the abolition movements against the death penalty and against life-without-parole sentences are complementary, and the experiences of death penalty abolition work bring important lessons to the growing movement against LWOP. In particular, as juvenile LWOP work gains momentum, the lessons of death penalty abolition are more important than ever.

But it is also important for both movements to be aware of the points at which their efforts collide, specifically where the rhetoric of capital litigation and advocacy has had the unintended consequence of normalizing non-death extreme sentences. Death penalty litigation and advocacy has long relied on the concept that “death is different,” and this sharp demarcation between death and life now raises significant issues for LWOP litigation and advocacy.

In individual cases, the strategies for saving a client from death in the capital context and for saving a client from an LWOP sentence often diverge sharply. In capital cases, the legal team undertakes a thorough mitigation investigation in order to present a narrative of a life deeply affected by trauma, brain damage, intellectual disability, serious mental illness, and other exceptionalities, such that the non-death sentencing alternative—usually life without parole—is understood to be the lenient and merciful option given this exceptional defendant. But to save a client from a sentence of life without parole, the mitigation investigation is aimed at uncovering evidence of

rehabilitation potential. Life without parole in this context can be neither lenient nor merciful. As a result, the bright line drawn by death penalty opponents between death and life is problematic. Drawing a binary between death and life in the capital context is critical; but for the defendant advocating against life without parole, this binary between death and life/leniency is dangerous. The effect of this rhetoric in capital jurisdictions then is that even extreme sentences like life without parole have been normalized and have come to be viewed as lenient.

It is easy to see how this happens in practice. Polls in recent years have demonstrated that popular support for the death penalty depends in part on the presentation of options to the person being surveyed. Survey respondents who are asked simply whether they support or oppose the death penalty are more likely to voice support for the death penalty than if they are asked whether they support the death penalty in the face of an LWOP alternative.

This phenomenon has motivated death penalty abolitionists in some contexts to push their jurisdictions to adopt an LWOP alternative to death where one did not exist before. In Texas, for example, some opponents of the death penalty helped to carry the bill that implemented an LWOP alternative to death in 2005. But the effect was not merely that certain defendants charged with certain capital cases who would have received death instead were granted leniency in the form of life without parole. On the contrary, the effect of the law was far-reaching. Prosecutors who would not have pursued a capital prosecution before passage of the law now used the threat of death liberally in order to secure more LWOP sentences. The upshot is that, while death sentences are down in Texas, the number of prisoners serving life without parole has skyrocketed. With the death/leniency binary in place, LWOP was framed by death penalty

opponents as the most publicly palatable “lenient” option.

In the context of individual capital cases in litigation, the rhetoric of “death is different” can have reverberating institutional effects. The more litigators rely on the death/leniency binary in defending individual cases, the more the sentence of life without parole becomes normalized. In any circumstance, the degree to which a certain sentence in a certain jurisdiction is considered harsh or lenient depends on where the maximum sentence falls; in a capital jurisdiction the sentence of life without parole is obviously closer to the median, and therefore more normalized, than it would be if there were no death penalty available. But the fear for LWOP opponents is that, after decades of framing life without parole as the palatable option, abolition of the death penalty in a particular jurisdiction will not actually have the effect of resetting the goal posts. In fact, history may suggest otherwise. After *Furman v. Georgia* led to a de facto moratorium on the death penalty in 1972, jurisdictions that did not have an LWOP alternative rushed to create one. Removing the most extreme sentence did not move the norm so much as it set the stage for wider application of LWOP sentences.

But on the brighter side, the current historical moment looks very different than the mid-1970s. At least in the context of sentencing for children, the concept of life-without-parole is being redefined as “death in prison”—an initial step in reversing the normalization of extreme sentences. The most significant development in this reframing process has been the new line of jurisprudence established by *Graham v. Florida* and *Miller v. Alabama*, the first Supreme Court cases that endorsed the notion that sentencing a child to die in prison is an extreme step and one that requires the application of Eighth Amendment principles.

Framing the death-in-prison sentence as an extreme one—at

least where children are concerned—is already having an effect in the way these cases are litigated. Death penalty attorneys and attorneys who represent children facing death-in-prison sentences are partnering in order to map out strategies for litigating against extreme sentences, and we can see the results of this partnership in the importation of capital defense practices into juvenile LWOP litigation. In 2015, the Campaign for the Fair Sentencing of Youth (CFSY) laid out trial practice standards for attorneys representing children facing death-in-prison sentences—standards that were modeled partly off of the ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases. Among other things, these standards set strict guidelines for the ethics and qualifications of defense counsel; require a defense team that includes an investigator and mitigation specialist with appropriate skill levels, experience, and qualifications; and require a life history investigation akin to that which is required in capital cases. Similarly, in Louisiana, the state with the most prisoners serving juvenile LWOP sentences per capita, the state board that oversees indigent defense has approved a set of practice standards that closely tracks the strict capital standards that Louisiana promulgated into law in 2015.

And here is where the divergent strategies of death penalty abolitionists and LWOP abolitionists become reunited. The effect of the CFSY standards and the Louisiana standards is to set *both* death sentences and death-in-prison sentences apart as extreme sentences. The full effect of this grouping remains to be seen, but at least preliminarily, the fact that capital performance standards and strategies are making inroads into non-capital practice for the first time offers some hope for advocating against other non-death extreme sentences.



## PIONEERING WORK TO END LIFE SENTENCES FOR CHILDREN

For more than a decade, Liman Fellows—both during and after their fellowship years—have focused on the harms of imposing lifetime sentences on children. As a Liman Fellow in 2005–2006 at the NAACP Legal Defense Fund, Holly Thomas worked to identify individuals who were serving juvenile LWOP sentences at a time when no one knew how many such prisoners existed or who they were. Focusing on Mississippi, Thomas found 25 prisoners serving juvenile LWOP sentences and described their backgrounds, circumstances, and demographic characteristics in the report excerpted below. Sia Sanneh, Senior Attorney at the Equal Justice Initiative, describes her work advocating for children serving LWOP sentences in Alabama. Sarah French Russell, who heads the Juvenile Sentencing Project at Quinnipiac University School of Law, discusses how parole-eligible sentences can be functional life sentences where the possibility of being paroled is so remote as to be meaningless. In the same vein, Sonia Kumar, a staff attorney at the ACLU of Maryland, details the ACLU's efforts to use the Supreme Court's line of juvenile sentencing cases to launch a systemic challenge against Maryland's system of de facto life sentences for individuals sentenced as juveniles. Sanneh was a Liman Fellow from 2007 to 2008 and was a Senior Liman Fellow in Residence in 2011. Russell is a former director of the Liman Program and is now a Professor at Quinnipiac University School of Law, and Kumar was a Liman Fellow from 2009 to 2011.

### No Chance to Make it Right: Life Without Parole for Youth Offenders in Mississippi

Holly A. Thomas

Liman Fellow 2005–2006

Deputy Director of Executive Programs at the California Department of Fair Employment and Housing

Excerpted with permission from *No Chance to Make it Right: Life Without Parole for Youth Offenders in Mississippi*, NAACP Legal Defense & Educational Fund (2008)



David grew up in a small town in Mississippi, in a county of just over 12,000 people. Twenty percent of his town's population lives below the poverty line. David's mother and father divorced when he was four years old. Thereafter, his mother "bounced from one man to the next." David reports that his mother's boyfriends were almost always alcoholics and frequently abusive.

When David was in his early teen years, he left his mother's home and went to live with an older cousin—his co-defendant in the crime for which David is serving life without parole. David says that although his mom warned him that living with this cousin would cause him trouble, David moved in with him anyway because he saw his cousin as a cool older figure, someone to look up to.

When asked about what happened on the day of the crime, he described his recollection of the events as a "bad nightmare" that replays in his mind over and over again. Shaking his head, he repeats, "I was just 14 years old."

When David was 14 and his cousin, Kenneth, was 20, they were arrested for the murder of 27-year-old William Hatcher and the rape and murder of 21-year-old Robbie Bond, a local couple

who were out star-gazing on a bridge. David was convicted of capital murder, and sentenced to life without parole. David's cousin Kenneth pled guilty and testified against David in order to escape the death penalty. Kenneth too was given a life without parole sentence.

According to David, the murders occurred after he and Kenneth, who were out drinking and joyriding, came upon the couple alone on a bridge. Upon seeing the couple, Kenneth suddenly and inexplicably jumped out of the truck and assaulted both Mr. Hatcher and Ms. Bond. David was in the truck when the assault occurred. Thereafter, Kenneth told him to get out of the truck and help, telling David, "Help me with her or I'll put you in the same hole with her."

Shortly thereafter, David's cousin drove out to a secluded area where he raped Ms. Bond and instructed David to do the same, saying "Now, you're going to do it too. Do it or I'm gonna kill you." In both his trial testimony and an interview, David stated that out of terror for his own life, he pretended to rape Ms. Bond. As noted by the Mississippi Court of Appeals, "this claim is corroborated by the fact that DNA testing on bodily fluids . . . excluded David as the donor of any fluid samples recovered."

David recalls that the days after the murder were ones of sheer terror: "For the next four days, everywhere [my cousin] went, I went. He said he was going to kill me. He told me how he had killed my uncle and where he had buried him. I start to think I'm losing my mind." Finally, David's cousin took him to



another relative's house. Once there, David immediately told his aunt what had happened, and together they went to the police station and reported the murders. Because David felt that he had been another victim of his cousin's madness, he saw going to the police as an escape from the situation and as the right thing to do. When he spoke with Sheriff Billy McGee, he told the Sheriff everything he knew.

When David was arrested and offered a plea deal, his aunt encouraged him to reject it because she did not think that David had done anything wrong and felt that he was the victim of circumstance. After a four year delay (during which time Kenneth's plea negotiations took place), David went to trial and was convicted of murder.

After spending more than 11 years in jail, David says: "I used to think it was God's plan for this to happen to me, but now I see no purpose. I'm just taking up space. I feel like I should get another chance, not spend the rest of my life in here."...

For David and the other young men discussed in this report, life without parole is a final sentence. It denies them of the opportunity to develop, to learn from their mistakes, and to grow into contributing members of society. It represents a judgment that they are beyond hope.

Since 1994, the State of Mississippi has allowed juvenile offenders to be sentenced to life without parole. In Mississippi, children as young as thirteen may receive such a sentence. The NAACP Legal Defense & Educational Fund, Inc. (LDF) has identified 25 young men serving a sentence of life without parole in Mississippi. In preparing this report, LDF reviewed their court files and interviewed two-thirds of the young men, attorneys, family members, relatives, community members, judges, and prosecutors.

The young people in Mississippi who are sentenced to life without parole are struggling in many different ways to cope with the finality of their sentence. Some remain hopeful that one day someone will examine their case and give them a chance. Others struggle with the finality of the sentence they have received. As one young man sentenced to life without parole put it:

Some people change, and some people don't. But you cannot rehabilitate a child with a life sentence. Their life is gone. I can see if I got a second chance and screwed up. But I was thrown away on one charge. —Paul C.

These young men traveled many different paths before ultimately being convicted of capital murder and sentenced to life without parole. The one thing they all have in common, however, is that their convictions and sentences occurred when they were at an age that scientists, courts, parents, and others agree that their brains are not fully developed, that critical maturation and growth is still occurring, and that they are still amenable to positive influence. Each of the young men discussed in this report was sentenced to die behind bars, at an age where they were not yet the people they could eventually become.

There is no doubt that any crime as serious as murder must be punished, even when it is committed by a young person. However, the lifetime incarceration of teenagers has consequences that reach far into society: costs associated with imprisonment, an aging prison population, and the impact upon the families and communities from which these children come. If our criminal justice system is to provide rehabilitation as well as retribution and deterrence, then the sentence must fit the crime and the offender. Thus, when the offender is a child, judges and advocates should have the opportunity to develop a punishment that considers the individual and environmental factors that led to the commission of a crime and that can help make the child offender a productive member of society. Life without parole utterly fails to meet this standard because it deprives children of any opportunity for rehabilitation and any chance to try and give back to the families and communities that they harmed.

Because sentencing policy need not be irretrievably harsh to be just, this report recommends the elimination of the sentence of life without parole for juveniles. If the State of Mississippi eliminates such sentences, it will lead the nation towards much-needed sentencing reform....



Dwayne Betts, New Haven Office of the Public Defender (Liman Fellow 2016–2017)



A.T. Wall, Director, Rhode Island Department of Corrections. In the background are Paul Wright, Founder and Executive Director, Human Rights Defense Center, and Editor, Prison Legal News, and Alix McLearn, National Female Offender Branch Administrator, U.S. Bureau of Prisons.

## All Children Are Children: Stopping Abusive Punishment of Juveniles

Sia Sanneh

Liman Fellow 2007–2008 and Senior Liman Fellow in Residence 2011–2013

Senior Attorney at the Equal Justice Initiative



Across the United States, thousands of children have been tried in adult courts, sentenced as adults, and incarcerated in adult prisons. At least 3000 kids nationwide—some as young as 13—have been sentenced to life imprisonment without the possibility of parole. These death in prison sentences were typically imposed without any consideration of the child's age or the circumstances of the offense. For more than a

decade, the Equal Justice Initiative (EJI) has challenged the constitutionality of these sentences, litigating on behalf of dozens of children in more than 20 states and publishing reports and advocacy materials about these issues. This campaign culminated in two rulings from the U.S. Supreme Court: *Graham v. Florida* (2010), where the Supreme Court abolished life without parole sentences for children convicted of non-homicide crimes; and *Miller v. Alabama* (2012) where the Court abolished mandatory life without parole sentences for children.

Proximity to our clients—men, women, and children incarcerated in Alabama, Mississippi, Florida, Louisiana, and throughout the country—has long animated our efforts in this area. EJI's work with kids began long before *Graham* and *Miller*: for many years we represented kids on death row in Alabama, the state with the largest number of children sentenced to be executed prior to the Supreme Court's ruling in *Roper v. Simmons* (2004) abolishing the death penalty for children.

Working with these clients, who were convicted of serious crimes, reaffirmed our belief that *all children are children* and that children are fundamentally different than adults; that they are more susceptible to peer pressure and addiction, that many of these kids were trapped in violent situations where they suffered abuse and neglect they could not escape, and most importantly, that because children's brains are still developing, their characters are not fixed and they possess a unique capacity for rehabilitation. We began urging the state courts around the country to treat these children as children—not as adults—even when serious crimes were at issue.

As we began to represent even younger children across more than a dozen states, these concepts became the central tenets of EJI's challenge to the constitutionality of death in prison sentences as cruel and unusual under the Eighth Amendment, and ultimately formed the basis of the Supreme Court's rulings in *Graham* and *Miller*, and a third decision earlier this year,

*Montgomery v. Louisiana* (2016). There the Court held that the *Miller* rule applied retroactively and that, because of "children's diminished culpability, and heightened capacity for change, [the] appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon."

EJI continues to represent more than 100 kids in over a dozen states in resentencing and parole proceedings as they seek a meaningful possibility of release following *Miller* and *Graham*. In doing this work, we are confronting prison environments where it is extraordinarily difficult for teenagers, many of whom are housed in adult facilities with no protection or special assistance, not only to survive, but to create the kinds of records that will offer them a chance at release. Some 10,000 children are incarcerated in adult jails and prisons on any given day in America, where they face increased risk of suicide, and are five times more likely to be sexually assaulted. EJI believes confinement of children with adults in jails and prisons is indefensible, cruel, and unusual, and we are committed to ending this practice. We are also committed to addressing the shocking conditions of confinement in these state prisons. We are currently litigating a class action lawsuit against a facility in Alabama, a state system where the prisons currently hold more than twice as many people as they were built to accommodate.

And yet, despite having entered unimaginably challenging and violent prison settings as teenagers, many of our clients committed themselves to rehabilitation and built strong institutional records, long before they had any hope for release. These clients face unique challenges upon release—they have never learned to drive a car, shopped for groceries, had their own bank account, or held a job. In order to help our clients succeed upon release, EJI created a reentry program, the Post-Release Education and Preparation (PREP) Program, to provide wrap-around services for these clients, assisting them with basic needs like housing, employment, life skills education, and support in dealing with the mental and emotional challenges of reentry. Our PREP program has already assisted over a dozen clients who reentered society after being incarcerated as children and spending decades in prison.

Finally, extreme racial disparities exist throughout the criminal system, and these disparities are especially severe in the context of children in the adult system: of the children nationwide condemned to die in prison when they were 14 or younger, seventy percent are children of color. There are narratives in our society that create and sustain unjust laws and policies, including racialized narratives that demonize, marginalize, and allow us to discard poor and minority children and remain indifferent to their trauma. The narrative of racial difference has deep

historical roots, and EJI is committed to documenting and confronting its origins as well as the impact of this historical legacy on America's criminal system. Our newest Race and Poverty Project is designed to address these issues through education, community outreach, litigation, and policy reform.

More than a decade ago, I was a first year law student, concerned that I had made a mistake in coming to law school, when I read about the Texas Prison Litigation in Judith Resnik's Civil Procedure class. It was in that class where, for the first time, I was exposed to the suffering in our nation's prisons, particularly those in the South, and began to wonder if I might want to become a lawyer after all. I now experience, every day, how much difference a lawyer can make, especially in places like Alabama and other Deep South states where there is tremendous need.

At EJI, I have been privileged to work alongside incredibly skilled advocates, led by Bryan Stevenson, on behalf of indigent

children in the adult prison system as well as men and women on death row. While there is much—much—more work to be done, we have seen tremendous progress in the last ten years as we push courts to rethink harsh and hopeless sentences in favor of more just outcomes for kids. A few years ago, EJI saw the first of our clients leave prison, as a result of the *Graham* decision, and reunite with his family after spending 49 years at Angola prison for a crime committed when he was only 16. We have celebrated with another client who, after being sentenced to die in prison as a teenager, finally walked free three days before his 64th birthday. And we have now helped over a dozen more clients leave prison after being sentenced as juveniles to die there. These remarkable clients found rehabilitation and hope in the face of a hopeless sentence. They and many others—in the free world and still incarcerated—are the embodiment of *Graham* and *Miller*, and inspired by their example, we continue the fight.



Mary Yanik, New Orleans Workers' Center for Racial Justice (Liman Fellow 2015–2017); Adrien Weibgen, Community Development Project of the Urban Justice Center (Liman Fellow 2015–2017); and Johanna Kalb, Associate Professor, Loyola University New Orleans College of Law



Glenn E. Martin, Founder and President, JustLeadershipUSA; Allegra McLeod, Associate Professor of Law, Georgetown University Law Center (Liman Fellow 2008–2009); David Fathi, Director, ACLU National Prison Project



Marc Silverman, Assistant U.S. Attorney, District of Connecticut; Visiting Clinical Lecturer, Yale Law School (Liman Fellow 2006–2007)



Paul Butler, Professor, Georgetown University Law Center, and James Forman Jr., Clinical Professor of Law, Yale Law School



## A Meaningful Opportunity for Release: Sentences of Life *with* Parole and the Eighth Amendment

Sarah French Russell

Professor, Quinnipiac University School of Law; former Director, Liman Public Interest Program, Yale Law School



Recent advocacy has focused on eliminating sentences of life without parole for certain categories of offenses or individuals. However, converting these sentences to life *with* parole will have little impact if state parole boards do not provide prisoners with a meaningful opportunity for release.

Historically, courts have imposed few constraints on parole release decisionmaking. As

a result, in many states, prisoners who are technically eligible for parole do not have meaningful parole hearings or any realistic chance of release.

In response to several recent U.S. Supreme Court cases, courts are starting to take a closer look at parole board procedures and criteria. The Court's decisions in *Graham v. Florida*, *Miller v. Alabama*, and *Montgomery v. Louisiana* place categorical Eighth Amendment limits on sentences for children. Together, the decisions require that children have "a meaningful opportunity for release based on demonstrated maturity and rehabilitation"—except in the rarest of homicide cases where the sentencer determines that the child is "irreparably corrupt" and rehabilitation is impossible.

States should not assume that they can satisfy the Eighth Amendment by simply making juveniles eligible for parole under existing parole systems. Across the country, many state parole systems lack procedures that are necessary to ensure meaningful hearings. In some states, there is no hearing at all when a prisoner becomes eligible for parole—parole can be denied based on review of a paper file. Many states deny prisoners the right to see and rebut information that may have a significant impact on the release decision. The vast majority of states do not appoint counsel for parole release hearings, and many states greatly restrict the role of retained counsel.

In addition, many states use criteria for release that are inconsistent with the Eighth Amendment's mandate to provide a "realistic" and "meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." Some states routinely deny parole based solely on the severity of

the offense, without regard to the prisoner's rehabilitation. In essence, although the sentence imposed for the offense is life *with* parole, the parole board itself converts the sentence to life without parole based on the nature of the offense. Yet under the Supreme Court's decisions, the central question for the parole board should be whether a juvenile offender has demonstrated maturity and rehabilitation. The severity of the crime was already taken into account at the time the original sentence was imposed. Parole boards may look to the circumstances of the crime to assess whether the individual has matured and rehabilitated since the time of the crime. But the severity of the crime should not influence the release decision as the opportunity for release for juveniles must be "based on demonstrated maturity and rehabilitation."

In response to the Supreme Court decisions, some states have enacted legislation providing special criteria and procedures for parole boards to use in considering juvenile cases. In my view, the most critical component for meaningful hearings is for counsel to be appointed to help juvenile offenders to pre-

pare for the hearings. New legislation in Connecticut requires exactly that. The Massachusetts Supreme Judicial Court held that juvenile offenders serving life sentences are entitled to counsel for their initial parole hearings, access to funding for experts, and judicial review of parole board decisions.

Litigation brought by former Liman Fellows is challenging how state parole boards are handling juvenile cases in Maryland and North Carolina. Maryland is one of only three states where the governor must approve parole for people serving life sentences. In 20 years, no gov-

ernor in Maryland has approved parole for a lifer. In April 2016, the ACLU of Maryland (with Sonia Kumar, Liman Fellow 2009–2011) filed suit, alleging that the system violates the Eighth Amendment. In North Carolina, in a case brought by Prisoner Legal Services (with Elizabeth Simpson, Liman Fellow 2010–2011), a federal district court held that North Carolina's parole process for juveniles serving life with parole failed to provide a meaningful opportunity for release. In North Carolina, prisoners can be denied parole at the "review" stage—with no notice to the prisoner in advance of the review, and no chance to be heard in person or through written submissions. The release decision is made by four commissioners who each review approximately 91 cases a day (along with their other responsibilities), and who

*Litigation brought by  
former Liman Fellows is  
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parole boards are handling  
juvenile cases in Maryland  
and North Carolina.*



vote electronically without consulting each other. Courts in Florida and New York have recently concluded that parole board processes in those states do not provide a meaningful opportunity for release under the Eighth Amendment.

I hope that with the new focus on improving parole procedures for juveniles, we might begin to improve processes for

adults as well. When a parole eligibility date has been set by a legislature or a court, then a prisoner should have a meaningful hearing on that date. In addition, the parole board's focus should be on assessing the prisoner's rehabilitation. The severity of the original crime impacts the date of parole eligibility but should not drive the parole release decision—for juveniles or adults.

## Challenging De Facto Life Without Parole in Maryland

Sonia Kumar

Liman Fellow 2009–2011

Staff Attorney, ACLU of Maryland



More than 2,000 people are serving “parole-eligible” life sentences in Maryland, many for offenses committed when they were 17 or younger. These men and women were sentenced with the understanding that if they proved themselves genuinely rehabilitated they would one day be paroled. But, in fact, they are now more likely to die

in prison than they are to be paroled, often after serving many more decades than anyone expected, regardless of their individual merit. In fact, no lifer has been paroled in Maryland in the last 20 years.

This is so because Maryland is one of only three states in the country that requires the Governor personally to approve parole for lifers, a rule that has deeply politicized parole. Since the 1990s, when a Democratic Governor announced that “life means life,” parole has been a legal fiction here. Opportunities previously available to prepare lifers to rejoin society were abolished—such as the ability to move below medium security or the ability to participate in work release and family leave programs. Rather than preparing individuals for release, Maryland's correctional system, parole commission and governors conspired to do the opposite. “Life with parole” sentences became de facto life without parole sentences.

Last year, my office, the ACLU of Maryland, represented Odell Newton, a 57-year-old man serving a life sentence, at his 13th parole hearing. Odell was sent to prison at age 16 in 1974 for his role in a robbery attempt in which a man was killed. At the time, Odell had never been in trouble with the law. He was living at

home with his family, going to school, and working. But Maryland's sentencing laws mandated life in prison, and both his own lawyer and the judge who sentenced him believed there was no other option.

Still, at the time Odell was sentenced, the widespread understanding was that lifers had a meaningful opportunity for release if they earned it. As he matured, Odell, like hundreds of others, was on track toward earning this opportunity. As early as 1988, in recognition of his excellent record, he was approved

for the state's work-release program and commended by the Parole Commission for his “excellent progress” and full compliance with everything asked of him. He spent five years on work release, earning rave reviews from his employers, and making periodic trips home to his family through the system's family leave program. In 1992, Odell was recommended for parole. The Governor refused. Soon after, the entire machinery of Maryland's parole system ground to a halt.

As of last year, Odell had spent 41 years incarcerated, 23 of them since he was first recommended for parole. He had not had an infraction in 36 years—an extraordinary feat. He had been recommended for commutations twice—once in 2003 and once in 2006, and denied by two different Governors without any explanation. He had a remarkable and loving family that visited him every month (even when he was shipped across the state) and who wanted him to come home. No one—not the family of the man who was killed, not correctional staff, not any prosecutor—argued that Odell should continue to be incarcerated. Yet, at his parole hearing last year, Odell was, inexplicably, denied parole.

Ultimately, Odell was released on other grounds and he is now at home with his family. But his story is emblematic of the many people we have met living through this farcical system—Etta,

*The men and women serving life sentences have been and continue to be incredible leaders in their own cause, organizing themselves, calling upon family members, advocates, policy-makers and others.*

who'd been recommended for release multiple times since the 1990s; William, now in his 60s, who entered the system as a 15 year old; Calvin, who'd had only one infraction in the last quarter of a century. And then there are those who've only just begun serving their time, like the 23-year-old kid whose face I'll never forget, telling me he'd already been inside for seven years and was looking ahead to decades more without any real hope of release.

The men and women serving life sentences have been and continue to be incredible leaders in their own cause, organizing themselves, calling upon family members, advocates, policy-makers and others. They engage in legislative advocacy, pro se litigation, and personal persuasion. They have been very successful in raising awareness and building support for their plight. But, thus far, the political climate has never warmed to the prospect of providing a meaningful opportunity for release to those responsible for serious offenses. Worse still, state and federal courts have given this sham system the imprimatur of legitimacy, rejecting claim after claim brought by lifers. Until recently, there was simply no vehicle to call the state to task for its practices.

Through its decisions in *Roper*, *Graham*, *Miller*, and in 2016 in *Montgomery*, the Supreme Court breathed new life into the

possibility of returning to the courts to address Maryland's de facto LWOP system. Now, it is clear: the Eighth Amendment bars sentences that deny a "meaningful opportunity for release" for all juveniles other than the "rarest" juvenile offender "whose crime reflects irreparable corruption."

Relying on these cases, a few months ago, three individual plaintiffs and the Maryland Restorative Justice Initiative, an umbrella organization including juvenile lifers and their families, filed suit against the state. The suit, brought by the ACLU of Maryland and pro bono counsel at Kilpatrick Townsend Stockton, argues that Maryland unconstitutionally condemns youth to spend the rest of their lives in prison without any meaningful chance at parole and without adequate consideration of their youth.

The suit was filed on behalf of the subset of approximately 200 lifers who were youth at the time of their offense, because that is where the law is right now. But our strong belief is that every person serving a life sentence deserves the opportunity for redemption and we will continue to fight for that goal. As advocates, our job is not to accept what is politically or legally possible to achieve right now. Our job is to help *change* what is possible.



George and Camille Camp, Co-Executive Directors of the Association of State Correctional Administrators, and Bernie Warner, former Secretary of the Washington Department of Corrections

# Ending Isolation: The Movement to Stop Solitary Confinement

## Open the Door—Segregation Reforms in Colorado

Rick Raemisch

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Excerpted from Rick Raemisch & Kellie Wasko, *Open the Door—Segregation Reforms in Colorado*, Colorado Department of Corrections, <https://www.colorado.gov/pacific/cdoc/news/open-door-segregation-reforms-colorado>

In 1993, the Colorado Department of Corrections (CDOC) completed construction of its first facility entirely dedicated to Administrative Segregation: Colorado State Penitentiary. Located in the historic prison town of Cañon City, the facility was built for the specific purpose of handling Colorado's most dangerous offenders through isolation and containment in single cells. These offenders had been physically violent toward staff or other offenders, or were at risk of becoming victims of violence themselves. For such offenders, Administrative Segregation meant safety. But as time went on, the housing assignment was not used for just those who were dangerous, but instead became accepted practice for housing those with non-violent infractions and affiliations, as also became common in most states. At that point in time, Colorado was leading the industry in designing and building this institution, and representatives from other state corrections came to Colorado to look at the facility as a model to be replicated.

During the late 20th century, assignment to Administrative Segregation—in some states known as solitary confinement—was standard protocol for difficult, dangerous offenders. Like traditional Administrative Segregation programs of the time, Colorado's program involved 23 hours of cell time and one hour out to exercise and shower each day. . . . [T]he model of containment and the architecture of isolation was booming in Colorado as it was growing across the nation as a remedy to manage offenders who would not conform to orderly operations of general population through dangerous and violent behaviors.

*Reforming Administrative Segregation:* In 2011, philosophies regarding Administrative Segregation began to shift. The late Tom Clements, then Executive Director of CDOC, felt that

change was in order for Colorado. Armed with more than 30 years of experience working with the Missouri Department of Corrections, Clements began advocating for a restructuring of Colorado's Administrative Segregation program. Clements was not the only one pushing for change. In 2011, the Colorado legislature laid the foundation for Administrative Segregation overhaul in the form of Senate Bill 11-176, which set forth guidelines for reclassification efforts and the awarding of earned time. The

bill mandated significant changes, the likes of which few U.S. departments of correction had adopted. Clements brought in the National Institute of Corrections to lend expertise to the reform process. These experts made the following recommendations regarding offender placement in Administrative Segregation: narrow the criteria for placement of offenders in Administrative Segregation; use Punitive Segregation before Administrative Segregation; and develop a step down process for release from Administrative Segregation.

When reform implementation began in 2011, Colorado's Administrative Segregation offenders numbered more than 1,500 or 7% of the DOC population. . . . Initial reviews resulted in a

push of more than 700 offenders from Administrative Segregation to General Population. And a Residential Treatment Program was developed and implemented in late 2012 to support the transition of offenders with serious mental illness out of the administrative segregation housing setting. In 2014, the CDOC expanded the model of Residential Treatment to the San Carlos and Denver Women's Correctional Facilities.

*From Administrative Segregation to Restrictive Housing:* Horrifically, in March of 2013, an offender was released directly from Administrative Segregation, after years of isolation, to the

*One seasoned staff member even “warned” executive staff that the reforms were going to get someone hurt or killed. That same staff member, a year later, said they could not believe the changes in the offender behavior and participation in treatment.*



community as a parolee. This parolee assassinated a citizen in Denver as well as the Executive Director, Tom Clements. In July of 2013, one of us—Rick Raemisch, former Secretary of the Wisconsin Department of Corrections—took the helm at CDOC after Clements' murder.

At this time, approximately 700 offenders remained housed in CDOC's reformed Administrative Segregation with 49% of the offenders being released from Administrative Segregation directly back into the community. There were still offenders who had been housed within Administrative Segregation for over 24 years; offenders with death penalty cases were being housed and managed in Administrative Segregation solely in response to their sentence and not institutional behaviors; and the five reformed statuses or levels of Administrative Segregation had resulted in a revolving door, with offenders progressing and then being regressed for minor rule infractions. . . . Director Raemisch recognized that the CDOC facilities and the public were not safer as a result of the continued use of long term Administrative Segregation.

Under Raemisch's leadership, it was clear that in order for the CDOC to operate safer facilities and to meet and fulfill the Department's ultimate mission of long term public safety, further Administrative Segregation reforms had to occur. As such the Department initiated a number of ongoing reform efforts focused upon ending the reliance on the use of Administrative Segregation and developing a new determinate "Restrictive Housing Policy" . . . . The reform efforts were focused upon the use of restrictive housing for only the most violent, dangerous and disruptive offenders, while excluding offenders with Serious Mental Illnesses from being considered for restrictive housing placement.

Administrative Segregation terminology and all previous levels of Administrative Segregation were abolished and replaced with a newly developed restrictive housing policy which included a sanction matrix for violent acts that could result in consideration for placement in restrictive housing . . . . Indeterminate sentences were also eliminated and replaced with determinate sanctions to ensure that offenders know why they are being assigned to Restrictive Housing-Maximum Security status and specifically for how long. Furthermore the practice of releasing offenders directly from Administrative Segregation environments to the community was immediately ceased . . . .

To support the newly developed restrictive housing policies and to ensure a successful transition from restrictive housing to general population, the CDOC established a progressive Management (step-down) Process where offenders transition out of

restrictive housing-maximum security status and are allowed to come out of their assigned rooms and re-socialize with small groups of other offenders, yet still be managed within highly structured and controlled close custody environments to ensure for the safety of our staff and the offender populations. . . . [B]y July 2014 the Colorado Department of Corrections had successfully decreased their Administrative Segregation population to less than 1% of the total population of offenders with under 150 offenders remaining [in that] status. . . .

*Lessons Learned:* CDOC encountered roadblocks during the creation and implementation of its unique, unprecedented Administrative Segregation reform efforts. Staff initially noticed that offenders who had been transitioned out of Administrative Segregation may attempt to commit infractions in order to make their way "back" to the newly minted Restrictive Housing-Maximum Security Status, as they preferred the solitude and individual cells offered within this environment.

In response, CDOC developed steps to reduce the number of "revolving door" offenders. New statuses were created. An offender can now be placed in a protective custody status, only allowing him contact with offenders who have been vetted for security purposes. If an offender poses too great a security threat, possibly due to a highly publicized case, he can be exchanged with an out-of-state correctional facility.

Staff began to witness successful, permanent transitions. Even offenders serving death sentences were able to interact with other offenders and land prison jobs. . . . We have identified better ways to accomplish our goals and adjusted our practices as we design this manner of managing offenders.

We manage offenders through sched-

uling and opportunities for them to come out of their cells. If they refuse these opportunities, we don't document the refusal. Housing units are structured to manage offenders according to schedules to maximize staff resources. We offer our offenders in Residential Treatment Programs out-of-cell opportunities for both therapeutic and non-therapeutic time—we don't force them to come out if they don't want to. . . . [W]e feel that we are reaching these offenders through time and patience and consistent dose and frequency of treatment availability.

One seasoned staff member even "warned" executive staff that the reforms were going to get someone hurt or killed. That same staff member, a year later, said they could not believe the changes in the offender behavior and participation in treatment. . . .

*Looking Forward:* Since 2011, CDOC's Administrative Segregation/Restrictive Housing population has shrunk from more than 1,500 offenders to approximately 160. Remaining Restrictive

*Restrictive Housing's  
incentive-based foundation  
requires staff to develop new  
techniques that discourage  
negative behaviors without  
invoking formal disciplinary  
procedures.*



Housing offenders receive continual review, with the goal of transitioning them back into General Population as soon as safely possible.

While working to decrease the number of offenders in Restrictive Housing, correctional officers and clinical staff have introduced the use of de-escalation rooms in which offenders can “take a timeout” when they need a break from General Population. The statistical success of CDOC’s de-escalation rooms has yet to be determined. Anecdotally, many frontline workers report that these rooms seem to prevent incidents of offender-on-offender and offender-on-staff violence, as well as self-inflicted injuries.

Since the implementation of its Restrictive Housing Policy, CDOC has placed a special emphasis on providing staff with continuing education opportunities. The reason for this is two-fold: to ensure the effective rehabilitation of offenders; and to decrease both staff and offender injuries by equipping staff to deal with difficult offenders using preventative measures instead of force. All staff are trained on mental health and trauma awareness and receive regular education on professionalism and positive communication.

The Department continues to adjust program protocols to facilitate the most effective atmosphere for rehabilitation. Restrictive Housing’s incentive-based foundation requires staff to develop new techniques that discourage negative behaviors without invoking formal disciplinary procedures. CDOC aims continually to improve both incentives and appropriate consequences. The Department’s ultimate goal is to create a Restrictive Housing system that looks at an offender’s documented behaviors as well as his program participation when

determining the success of his rehabilitation. Additionally, the Department is looking to develop and incorporate additional evidence-based, gender-specific programming for females, a traditionally underserved prison population. . . .

In all of their endeavors, CDOC staff are guided and inspired by the Department’s mission statement: “to protect the citizens of Colorado by holding offenders accountable and engaging them in opportunities to make positive behavioral changes and become law-abiding, productive citizens.” Staff accomplish this mission by using open and clear communication, supporting fellow staff in all lines of work, and working together to promote offender success. . . .

The reforms have been implemented over the course of two years at various stages. The data are raw and without adequate time to define best practice—yet. But the initial results are worth celebrating. There were no suicides in Restrictive Housing in the last year. The rate of assaults on staff, across the agency, are half of what they were in 2006. The average length of stay in Restrictive Housing is currently approximately 7½ months, and less than 1% of the CDOC population is housed in Restrictive Housing. Something that we are doing is working. We will continue to move forward with our design and re-design as we collect more data over time to write “best practice” for the industry.

As the old adage goes, “The only constant is change.” CDOC aims continually to develop new and better pathways for offender success, and to implement best practices developed by other agencies. The Department will continue its groundbreaking work motivated by the ultimate goal of “building a safer Colorado for today and tomorrow”—a Colorado safer for all those held dear by staff and offenders alike.



*Rick Raemisch, Executive Director, Colorado Department of Corrections, and his daughter, Devan Raemisch*



*Amy Fettig, Associate Director of the ACLU National Prison Project, and Brett Dignam, Clinical Professor of Law, Columbia Law School*



McGregor Smyth, Executive Director, New York Lawyers for the Public Interest (Liman Fellow 2003–2004); Jee Park, Deputy Chief Defender, Orleans Public Defenders; and Glenn E. Martin, Founder and President, JustLeadershipUSA



Judith Resnik, Arthur Liman Professor of Law, welcomes the participants to the 19th Annual Liman Colloquium.



Jamelia Morgan, Litigation Fellow, ACLU National Prison Project (Liman Fellow 2015–2017), and Issa Kohler-Hausmann, Associate Professor, Yale Law School, and Associate Professor of Sociology, Yale University



Scott Semple, Commissioner, Connecticut Department of Corrections; George Camp, Co-Executive Director, Association of State Correctional Administrators; and Jules Lobel, Bessie McKee Walthour Professor of Law, University of Pittsburgh School of Law, and President, Center for Constitutional Rights



Caitlin Bellis, Public Counsel in Los Angeles (Liman Fellow 2015–2017), and Jonas Wang, Civil Rights Corps (Liman Fellow 2016–2017)



Bonnie Posick, Senior Administrative Assistant, and Kathi Lawton, former Liman Program Assistant



Spelman Summer Fellows Brianna Baker, Shelby Smith, and Lauren Fleming, and Harvard Summer Fellow Bailey Colfax



Joseph Meyers, class of 2018 YLS, Liman Student Director 2016–2017, and Geoff Shaw, class of 2016 YLS, Liman Workshop Convenor 2015–2016



Celina Aldape, class of 2017 YLS, Liman Student Director 2015–2016



Fiona Doherty, Clinical Associate Professor of Law, Yale Law School





*Christine Donahue Mullen, Liman Program Coordinator*



*Anna VanCleave, incoming Director, Liman Public Interest Program, Yale Law School*



*Shelley Sadin, Associate Dean of Professional and Career Development, Quinnipiac University School of Law*



*Corey Guilmette, Public Defender Association (Liman Fellow 2016-2017), and Ryan Sakoda, Committee for Public Counsel Services (Liman Fellow 2015-2017)*



*A.T. Wall, Director, Rhode Island Department of Corrections, and Julie Jones, Secretary, Florida Department of Corrections*



*Vivien Blackford, Founder and Chair, The Phoenix Association*



*Liman Fellows 2016-2017 Jonas Wang, Civil Rights Corps; Abigail Rich, East Bay Sanctuary Covenant; Dwayne Betts, New Haven Office of the Public Defender; and Corey Guilmette, Public Defender Association*

# Liman Projects: Research and Commentary on Solitary Confinement

## Working with the Association of State Correctional Administrators (ASCA) on National Surveys on the Use of Isolation in Prisons

During the last several years, the Liman Program has joined with ASCA to understand more about the practices of isolation in prisons and the people living under such conditions. Working together, the Association of State Correctional Administrators (ASCA) and the Liman Program have sought to understand the formal rules governing aspects of segregation of prisoners; the numbers of individuals confined; the conditions under which they live; and how to limit the use of isolation. The focus has been on what correctional officials often call “restrictive housing” and what is known more generally as “solitary confinement.” That work with ASCA and other projects has been supported in part by the Vital Projects Fund and by the Oscar M. Ruebhausen Fund at Yale Law School.

Prison systems in the United States separate some prisoners from general population and put them into special housing units, typically with more isolating conditions. The reasons for doing so include the imposition of punishment (“disciplinary segregation”), protection (“protective custody”), and incapacitation (often termed “administrative segregation”).

In *Administrative Segregation, Degrees of Isolation, and Incarceration: A National Overview of State and Federal Correctional Policies*, published in 2013, we asked directors of state and federal corrections systems to provide their policies on administrative segregation, defined as removing a prisoner from general population to spend 22 to 23 hours a day in a cell for 30 days or more. Administrative segregation was the form of confinement that we believed was the most common basis for segregation.

What we learned, based on responses from 47 jurisdictions, was that correctional policies made getting *into* segregation relatively easy, and few systems focused on getting people *out*. The criteria for entry were broad. Many jurisdictions permitted moving a prisoner into segregation if that prisoner posed “a threat” to institutional safety or a danger to “self, staff, or other inmates.” Constraints on decision-making were minimal; the kind of notice provided and what constituted a “hearing” varied substantially.

In 2014, the Liman Program and ASCA took the next step by asking correctional administrators more than 130 questions—this time about the number of people in restricted housing and the conditions under which they lived. Responses came from 46 jurisdictions (albeit not all jurisdictions answered all the

questions). The resulting report, *Time-in-Cell: The ASCA-Liman 2014 National Survey of Administrative Segregation in Prisons*, provided a unique inter-jurisdictional window into segregation.

Before that Report, information on the number of prisoners held in restricted housing was a decade old or more; the figure often cited was 25,000. In contrast, by 2014, the 34 jurisdictions (housing about 73% of the more than 1.5 million people incarcerated in U.S. prisons) reported that more than 66,000 people were held in restrictive housing, whether termed administrative segregation, disciplinary segregation, or protective custody. Given that number, ASCA and Liman estimated that some 80,000 to 100,000 people were, in 2014, in restrictive housing in prisons—about one in every 6 or 7 prisoners. Those figures, in turn, did not include jails, juvenile facilities, or immigration and military detention.

What we also learned is that, across the country, in many jurisdictions, prisoners were required to spend 23 hours in their cells on weekdays and in many, 24 hours in their cells on weekends. Jurisdictions reported that cells ranged in size from 45 to 128 square feet, sometimes holding two people.

Opportunities for social contact, such as out-of-cell time for exercise, visits, and programs, were limited, ranging from 3 to 7 hours a week in many jurisdictions. Phone calls and social visits could be as infrequent as once per month; a few jurisdictions provided more opportunities. In most jurisdictions, prisoners’ access to social contact, programs, exercise, and items kept in their cells could be cut back as sanctions for misbehavior.

Moreover, administrative segregation generally had no fixed endpoint. Further, several systems did not keep track of the numbers of continuous days that a person remained in isolation. In the 24 jurisdictions reporting on this question, a substantial number indicated that prisoners remained in segregation for more than 3 years. As to release and reentry, in 30 jurisdictions tracking the numbers in 2013, a total of 4,400 prisoners went directly from the isolation of administrative segregation to release in the community.

The running of administrative segregation units posed many challenges for prison systems. These problems—coupled with a surge of concerns about the negative impact of isolation on individuals—have created incentives for change. Prison directors cited prisoner and staff well-being, pending lawsuits, and costs



as reasons to revise their practices. Some also commented that change was important because it was “the right thing to do.”

When releasing *Time-In-Cell*, ASCA stated in its press release that “prolonged isolation of individuals in jails and prisons is a grave problem in the United States.” As that press release also explained, “insistence on change comes not only from legislators across the political spectrum, judges, and a host of private sector voices, but also from the directors of correctional systems at both state and federal levels.”

*Time-in-Cell* provided a window into the prevailing practices and a baseline from which to assess whether the many efforts to limit isolation will have an impact. That Report made plain that segregation practices had become entrenched during the past 40 years, that many correctional systems sought to make changes, and unraveling the structures that produced so much isolation through the use of segregation would require intensive work.

The release of *Time-in-Cell* was covered widely, from the *New York Times* and the *Wall Street Journal* to blogs and the *Huffington Post*. In January of this year, President Obama cited

the ASCA-Liman Report in his *Washington Post* op-ed, calling for “rethinking” solitary confinement. Invoking *Time-in-Cell*’s figures showing that 80,000 to 100,000 prisoners were held in solitary confinement, President Obama called for restricting the use of solitary confinement and announced that federal agencies would be required to review their use of the practice and to produce a plan in response.

At the same time, the Department of Justice (DOJ) issued a report and recommendations concerning restrictive housing. This report provided an overview of restrictive housing practices in the federal system and proposals for reform. In March of 2016, the President issued a Presidential Memorandum, “Limiting the Use of Restrictive Housing by the Federal Government,” in which he directed executive departments and agencies to implement the DOJ’s recommendations. President Obama wrote that in light of “the urgency and importance of this issue, it is critical that DOJ accelerate efforts to reduce the number of Federal inmates and detainees held in restrictive housing and that Federal correctional and detention systems could therefore become models for facilities across the United States.”



Hope Metcalf, Executive Director, Orville H. Schell, Jr. Center for International Human Rights, and former Liman Director, and her mother, Hope Cannon



Kathy Boudin, Co-Director and Co-Founder of the Center for Justice at Columbia University, and Nicole Porter, Director of Advocacy, The Sentencing Project



Christine Donahue Mullen, Liman Program Coordinator, and Kathi Lawton, former Liman Program Assistant



Laura Fernandez, Senior Liman Fellow in Residence, and Johanna Kalb, Associate Professor, Loyola University New Orleans College of Law

## Yale Law Journal Forum on the ASCA-Liman *Time-in-Cell* Report

To foster academic discussion about the ASCA-Liman research, the *Yale Law Journal* provided a forum for a symposium in response to the report. Dwayne Betts (Liman Fellow 2016–2017) introduced the collection with insights into the lived experience of solitary confinement. The Honorable Alex Kozinski of the United States Court of Appeals for the Ninth Circuit analyzed the horrors of solitary confinement. Judith Resnik; Sarah Baumgartel, Senior Liman Fellow in Residence 2015–2016; and Johanna Kalb described the evolution of the constitutional regime governing solitary confinement. Jules Lobel, Professor at the University of Pittsburgh School of Law, and President of the Center for Constitutional Rights, drew on his experiences as the lawyer representing prisoners in solitary confinement in Ohio and California to bring attention to alternatives to restrictive housing. Marie Gottschalk, Professor of Political Science at the University of Pennsylvania, discussed the many barriers to reform, and A.T. Wall, Yale Law School class of 1975, and Director of the Rhode Island Prison system, underscored the need to enlist staff in bringing about change. Excerpts from that discussion are provided below.

### Only Once I Thought About Suicide

Reginald Dwayne Betts

Excerpted with permission from 125 YALE L.J. F. 222 (2016), <http://www.yalelawjournal.org/forum/only-once-i-thought-about-suicide>

Every prison and jail in Virginia has a series of cells used for solitary confinement. Fairfax County Jail had three units for solitary confinement. None had windows. The R-Cells had ceilings so high that a tall man could not reach them by jumping. The other had a door so thick and heavy that when it closed no sounds escaped. The third looked like the cells for the general population.

At Southampton Correctional Center, an entire building had been converted to hold men in solitary. The cells looked just like those housing the general population, except the doors only opened to take you to the shower once every three days, or to the kennel-like cages where you periodically had an hour to pace the fifteen steps back and forth, to do push-ups, jumping jacks, to stare out the window into the open countryside that taunted you.

Some of the cells in solitary confinement at Red Onion State Prison faced what people called the gutted side of a mountain. Three times a week guards would shackle and cuff prisoners and escort them, under the watchful eye of a guard holding a shotgun, to the showers.

Sussex 1 State Prison, like Southampton, had units initially constructed for general population converted into solitary confinement units. Men could stare from their cell into the yard and watch men going about the work of doing time, the basketball games, the circling the yard, the fights. At Sussex, they also held death row prisoners, and on occasion, while being walked to the shower, you would glimpse a man preparing to die.

At Coffeewood Correctional Center, the solitary confinement unit had about a dozen cells. The windows were so high up that a tall man would have to leap to glimpse the green of the outside grass. Of all these prisons, only Southampton's units had

windows wider than an open palm or taller than a man's arm. . . .

In 1996, when I was sixteen, a fifteen-year-old friend and I carjacked a man in Virginia. Shortly after being arrested, I confessed. Back then, I did not know what it meant to be transferred to criminal court. But I would learn. Following John DiIulio's super-predator theory, state prosecutors began to rely increasingly on statutory mechanisms that allowed them to transfer children from juvenile to criminal court, where, if found guilty, they would be exposed to the same punishments and same prisons as people eighteen or older. In Virginia, carjacking carries a minimum sentence of fifteen years and a maximum of life in prison. Five months after my crime, after pleading guilty to carjacking and a weapons charge, I stood before the Honorable Judge Bach to be sentenced. Before sentencing me to nine years, he said, "I am under no illusion that sending you to prison will help, but you can get something out of it if you want." It should not have been a surprise to anyone that part of what I got out of my time in prison was nearly a year and a half of solitary confinement.

For a time, I called cells in the solitary units of the Fairfax County Jail, Southampton Correctional Center, Red Onion State Prison, Sussex 1 State Prison, and Coffeewood Correctional Center home. Inside those cells, I counted everything: days, weeks, months, birthdays, and frequently the tiny markings on the wall. All told, I spent more than fourteen months in isolation at these various institutions. Author Jack Abbott, reflecting on his time spent in solitary confinement, wrote that it could "alter the ontological makeup of a stone." I know that what it does to men and women is far worse. . . .

A hundred and fifty years is a good spell of time to let pass without learning a lesson, but a case as secure as a cell in the

hole attests to our modern failure. Jack Abbott's adage was old news a century before he penned it. The world's first prison kept all of its prisoners in solitary confinement. Built in 1829, Eastern Penitentiary's enabling act required that "the principle of solitary confinement of prisoners be preserved and maintained." Describing this system, Samuel Wood, Eastern's first warden, explained that "no prisoner is seen by another, after he enters the walls." The effects were obvious. One official observer, British Penal Authority William Crawford wrote, "[t]he whip inflicts immediate pain, but solitude inspires permanent terror." For some, including Crawford, this was a good thing; others knew better. When Charles Dickens toured the facility, he described its system as "rigid, strict, and hopeless solitary confinement" and denounced its horrors as "a secret punishment which slumbering humanity is not roused up to stay."

The ASCA-Liman *Time-In-Cell* report provides the numbers that underscore the significance of this discussion. According to the report, between eighty and a hundred thousand men and women are in restrictive housing. Over thirty thousand are in administrative segregation. The report focuses on the

latter group. By arguing that the practice is overused, the report addresses the issue of isolation as a form of social control within the contemporary prison—and raises serious questions about the legitimacy of the practice. But the report leaves equally important work to be done by future scholars. The absence of the voices of men and women who have experienced administrative segregation means that the ontologically troubling questions that pervade all practices involving isolation, whether they be done within a prison (in the form of administrative segregation) or through the use of supermax facilities or solitary confinement units, are not fully confronted. . . .

All around us, there are men and women made invisible, their spirits wiped out by policies that we don't notice. The *Time-In-Cell* report forces us to grapple with their narratives in a way that Due Process and Eighth Amendment challenges brought to court do not, because the majority of the thirty thousand people in administrative segregation will never be represented in a lawsuit. But their stories, if we listen, can be found. And those are the stories that demand change.

## Worse than Death

Alex Kozinski

Excerpted with permission from 125 YALE L.J. F. 230 (2016), <http://www.yalelawjournal.org/forum/worse-than-death>

For decades, lawyers and activists have questioned the constitutionality of our criminal justice system's most severe punishments. Is lethal injection okay? What about a firing squad? How about life sentences for pirates or drug possessors or people who pass rubber checks? But we hear remarkably little about what may be the most severe punishment of all: solitary confinement. Lurking in the shadows of the conversation about inhumane punishments are some 100,000 souls who spend 23 hours a day alone in a cell the size of a parking space. In a world where making a rap video can earn you three years in the box, we should all be asking more questions about how prisoners get into solitary confinement, what "life" is like once they get there, and how they can get out.

The Liman Program's *Time-In-Cell* Report begins this important conversation. The Report's shuddersome findings confirm what I have long suspected: Solitary confinement is just as bad as the death penalty, if not worse. . . .

Many death penalty abolitionists argue that sentencing murderers to life in prison without the possibility of parole (LWOP) is a preferred alternative. It's better, they say, to put murderers in a place where they'll never be able to hurt anyone ever again. But to accomplish that, LWOP isn't enough. The murderer will have to be sent to solitary, or else he'll be able to injure guards or other inmates. If we abandon the death penalty, most murderers who would otherwise have gotten the needle will instead

spend the rest of their lives in the box.

When informed of this alternative, people generally become less supportive of the death penalty. Numerous opinion polls "confirm that abstract support for the death penalty drops significantly when respondents are given a choice between capital punishment and sentences which assure lengthy incarceration and compensation for the family of the victim." Defense lawyers in several recent high-profile murder cases have tried to convince jurors not to impose the death penalty by arguing that life in solitary confinement may be just as bad. Take, for example, the recent trial of Dzhokar Tsarnaev, one of the Boston Marathon bombers. During closing arguments, Tsarnaev's lawyer argued that the jury should let him live because he was "still going to be in isolation for the rest of his life" at ADX Florence. That super-maximum security ("supermax") prison is the stuff of nightmares. Many inmates at ADX Florence spend twenty-three hours a day alone in an eighty-seven-square-foot cell. Part Alcatraz and part Overlook Hotel, Tsarnaev's lawyer described ADX Florence as a place where "29 men vie for the privilege of cleaning the showers, and two get the job." "This isn't a resort," she told the jury. "A sentence of life [at ADX] is not a lesser sentence than death; it is a sentence other than death."

Placing an inmate in the box for the rest of his life will no doubt prevent him from doing any further harm. But man is a social animal. The human mind craves interaction with other



people, and being deprived of human companionship is as damaging to the psyche as deprivation of food and water is to the body. Psychologists now understand that “much of who we are depends on our contact with other people, the social context in which we function, and when you remove people from that context, they begin to lose their very sense of self.”...

Before we decide to swap the death penalty for solitary confinement, we should think long and hard about what we are inflicting on those whose lives we spare. Taking prisoners off death row and putting them in supermax prisons may soothe our collective conscience, but we may be condemning those inmates to decades-long torture that may make a swift execution look like an act of grace.

Many people believe the death penalty is cruel, and it surely is. But the devastating psychological toll of solitary confinement is a beast of its own. The *Time-In-Cell* Report demonstrates that prisoners subjected to solitary confinement may spend as few as three hours a week outside their cells. And on weekends, they are seldom released at all. The Report also shows us that prisoners confined to the box have limited access to personal property, support services, family visits, and telephone calls. Some of their cells are as small as forty-five square-feet. Others—including many in the Deep South—lack air conditioning. In Missouri, inmates are allotted one shower every three days. Some states prohibit inmates in solitary confinement from keeping photographs of their loved ones.

Given these conditions, it should come as no surprise that “incarceration in solitary cause[s] either severe exacerbation or recurrence of preexisting illness, or the appearance of an acute mental illness in individuals who had previously been free of any such illness.” The empirical literature on the effects of solitary confinement is horrifying. It shows that prisoners exposed

to solitary confinement become verbally and physically aggressive; develop fantasy worlds and other paranoid psychoses; and grow anxious, withdrawn, and hopeless. As Justice Kennedy wrote in *Ayala*, “[y]ears on end of near-total isolation exact a terrible price.” One early study found that nearly all of the prisoners in Maine’s isolation unit had either contemplated or attempted suicide. One attempted to swallow the glass from the light bulb in his cell. Another tried twice to hang himself with a sheet. More recent data suggests that prisoners in solitary are five times more likely to kill themselves than those in the general population. “The disparity exists despite the fact that it’s never simple to commit suicide in a bare cell: Some prisoners have resorted to jumping head-first off their bunks; others have bitten through the veins in their arms.”

Given the conditions in solitary confinement and in supermax facilities more generally, it comes as no surprise that some prisoners prefer to die. Timothy McVeigh, who bombed the federal building in Oklahoma City, decided not to seek clemency. McVeigh’s lawyer reported that “[h]aving nothing to look forward to but solitary confinement in a federal penitentiary does not appeal to him.” I encountered a similar prisoner in 1990. Thomas Baal waived his right to appeal his death sentence and asked the district judge to go ahead and “get the ball rolling” on his execution. His parents, claiming their son was incompetent to waive his appeal, sought a stay of the execution from our court. The stay was granted over my dissent. “When we say that a man . . . is not free to choose,” I wrote, “we take away his dignity just as surely as we do when we kill him.” Later that same evening, the Supreme Court lifted the stay. In an essay later published in *The New Yorker*, I described my fitful sleep that night—knowing that I had helped send a man to die. By the time I woke up the next morning, Baal was dead. . . .



Panelists discussed over-incarceration and proposals for reform.



## Time-in-Cell: Isolation and Incarceration

Judith Resnik, Sarah Baumgartel & Johanna Kalb

Excerpted with permission from 125 YALE L.J. F. 212 (2016), <http://www.yalelawjournal.org/forum/time-in-cell-isolation-and-incarceration>

What is solitary confinement, and what has been constitutional law's relationship to the practices of holding prisoners in isolation? One answer comes from *Wilkinson v. Austin*, a 2005 U.S. Supreme Court case discussing Ohio's super-maximum security ("supermax") prison, which opened in 1998 to hold more than five hundred people.

Writing for the unanimous Court in *Wilkinson*, Justice Kennedy detailed a painful litany of conditions.

[A]lmost every aspect of an inmate's life is controlled and monitored. Inmates must remain in their cells, which measure 7 by 14 feet, for 23 hours per day. A light remains on in the cell at all times . . . and an inmate who attempts to shield the light to sleep is subject to further discipline. . . .

Incarceration [in supermax] is synonymous with extreme isolation. In contrast to any other Ohio prison . . . [the] cells have solid metal doors with metal strips along their sides and bottoms which prevent conversation or communication with other inmates. All meals are taken alone. . . . Opportunities for visitation are rare . . . . It is fair to say [that] inmates are deprived of almost any environmental or sensory stimuli and of almost all human contact. . . . [P]lacement . . . is for an indefinite period of time, limited only by an inmate's sentence.

The specifics were in service of meeting the exacting test that the Court had crafted about when constitutional law has a role to play in protecting prisoners. In an earlier case, *Sandin v. Conner*, the Supreme Court held that a prisoner could challenge his placement in segregation only if the change created an "atypical and significant hardship" which, thereby, infringed a prisoner's liberty interests and triggered due process obligations under the Fourteenth Amendment.

In *Wilkinson*, the Court concluded that placement in Ohio's supermax qualified as a significant hardship, since "almost all human contact [was] prohibited, even . . . conversation . . . from cell to cell." Nonetheless, the Court held that Ohio's procedures sufficed to buffer against "arbitrary decisionmaking." The approved procedures included an in-person hearing that the prisoner can attend; the provision of a written "brief summary of the factual basis for the classification;" "a rebuttal opportunity" at two levels of internal review (each authorized to reject the placement); "a short statement of reasons;" and another review thirty days after the initial placement. The *Wilkinson* Court thus required some process but did not discuss whether subjecting individuals to such conditions was itself constitutionally impermissible.

Ten years after *Wilkinson*, Justice Kennedy returned to the topic of solitary confinement in a 2015 concurrence in *Ayala v. Davis*. Justice Kennedy noted that Hector Ayala, who had been sentenced to death in 1989, had spent most of "his more than 25 years in custody in 'administrative segregation' or, as it is better known, solitary confinement." If following "the usual pattern," Mr. Ayala had been held for decades "in a windowless cell no larger than a typical parking spot for 23 hours a day . . . [and] allowed little or no opportunity for conversation or interaction with anyone."

Relying on data collected in the late 1990s, Justice Kennedy observed it was likely that about "25,000 inmates in the United States" were living in such conditions, "many regardless of their conduct in prison." Justice Kennedy called for more "public inquiry or interest" in prisons. And in a vivid protest, he suggested that when imposing a capital sentence, a judge tell such a defendant that "during the many years you will serve in prison before your execution, the penal system has a solitary confinement regime that will bring you to the edge of madness, perhaps to madness itself."

Justice Kennedy raised the prospect that solitary confinement violated substantive constitutional rights. "[T]he judiciary may be required . . . to determine whether workable alternative systems for long-term confinement exist, and, if so, whether a correctional system should be required to adopt them." Within a month, Justice Kennedy's distress was echoed by Justice Breyer who, joined by Justice Ginsburg, condemned the "dehumanizing effect of solitary confinement;" their dissent in *Glossip v. Gross* argued the unconstitutionality of the death penalty.

When these Justices were writing, the question of the constitutionality of profound isolation was en route to the Court in a certiorari petition on behalf of Alfredo Prieto. Under Virginia's policy that offenders "sentenced to Death will be assigned directly to Death Row," Prieto was automatically placed in conditions that a federal district court judge described as "eerily reminiscent" of those in *Wilkinson v. Austin*. Prieto argued that *Wilkinson* required an individualized determination of the need for such segregation. Over a dissent, the Fourth Circuit rejected that claim: Imprisonment in conditions that the trial court had found to be "dehumanizing" and "undeniably severe" did not rise to a constitutional violation. Former corrections officials and mental health professionals urged the Court to take up the question and detailed the harms of isolation and the alternatives available. But the petition became moot when, on October 1, 2015, Virginia executed Mr. Prieto.

Such potential for developments in the law on isolation cannot be understood in isolation, for the legitimacy and legality

of solitary confinement is under siege in several quarters. The source of the growing distress comes in part from the chilling description provided in *Wilkinson*, written as the post-9/11 detention of hundreds of people at Guantánamo Bay made visible the starkness of totalizing control. Detainees there and prisoners in California's supermax at Pelican Bay mounted protests,

including hunger strikes. By 2010, the ACLU's National Prison Project had launched its "Stop Solitary" campaign, producing reports of horrific conditions for thousands of prisoners held in Texas and in "the box" in New York State. As suicides and violence brought media attention to the suffering and deaths, the Vera Institute worked with prison officials to create alternatives. . . .

## The Liman Report and Alternatives to Prolonged Solitary Confinement

Jules Lobel

Excerpted with permission from 125 YALE L.J. 238 (2016), <http://www.yalelawjournal.org/forum/alternatives-to-prolonged-solitary-confinement>

. . . The ASCA-Liman Report strongly suggests that workable alternatives to prolonged isolation do in fact exist. Solitary confinement has been greatly overused in this country. It unnecessarily isolates, for extended periods, prisoners who, for example, have committed minor disciplinary infractions, are mentally ill, or are affiliated with a gang despite having committed no serious violence. My own experience with Ohio and California prisons supports the conclusion that an overwhelming majority of the thousands of people warehoused in administrative segregation could be safely released to the general population. In fact, that is exactly what those two states have done.

While there is undoubtedly a small core of violent prisoners who, for the protection of the general population, should be separated from them, such separation does not require social isolation. The experience of several states' prison systems suggests as much. For example, Ohio has kept the four prisoners it considers most dangerous in its supermax for the past fifteen years and intends to keep them there indefinitely. Properly understood, that permanent segregation should violate both Eighth Amendment and due process protections, since every prisoner—even the most dangerous—should be accorded a meaningful way to get out of segregation through good behavior. . . . [A]fter a hunger strike in 2011, Ohio prison officials provided these men with significantly increased opportunities for social interaction, including daily phone calls, numerous contact visits, and small group recreation with one other prisoner. Thus far, the arrangement has worked without any serious incident.

So too, some European nations have developed alternatives that segregate high-risk prisoners without the harsh social isolation found in American supermax prisons. In Scotland, England, and Wales, for example, dangerous prisoners are confined away from the general population, but in small groups

rather than total isolation, and they are provided family and legal contact visits, telephone calls, access to education, gym facilities, payment for work, association with other prisoners, and in-cell activities. In short, these prisoners are provided far more human contact and stimulation than those under the typical American administrative-segregation regime documented in the ASCA-Liman Report. Perhaps even more striking is the prison at Grendon in England, which houses some of the most "damaged, disturbed and dangerous" prisoners in the English prison system. Despite its difficult population, Grendon provides small group therapy and daily community meetings and has produced, in the words of its Governor, "extraordinary outcomes."

Yet another example of possible alternatives comes from the recent settlement in a class action lawsuit that challenged prolonged solitary confinement at Pelican Bay State Prison. California prison officials agreed to set up a restrictive but non-isolating population unit to house prisoners who could not be released to the general population due to safety or security concerns. The state also agreed to double the out-of-cell recreation and programming time for the handful of prisoners who remain in long-term administrative segregation, providing them three hours per day outside their cells plus additional programming.

Notably, states should also recognize that they have financial incentives to limit the use of solitary confinement: It costs far more to hold a prisoner in solitary than to house that same prisoner in the general population. Thus, removing the enormous numbers of prisoners that the ASCA-Liman Report demonstrates have been held in solitary for lengthy periods of time at tremendous cost and expense should free up resources to provide humane conditions for the few who truly require separation from the general population. . . .

*States should also recognize that they have financial incentives to limit the use of solitary confinement.*

# Staying Alive: Reforming Solitary Confinement in U.S. Prisons and Jails

Marie Gottschalk

Excerpted with permission from 125 YALE L.J. F. 253 (2016), <http://www.yalelawjournal.org/forum/reforming-solitary-confinement-in-us-prisons-and-jails>

... Although concerns about prolonged solitary confinement have escalated in the United States, corrections officials and other political leaders are a long way off from endorsing its abolition. Serious political obstacles lie in the way of serious reform. In May 2013, the U.S. Government Accountability Office (GAO) issued a report criticizing the federal prison system's growing use of administrative segregation without proper monitoring and safeguards. A subsequent audit of the use of prolonged isolation in the federal prison system ended up reaching foregone conclusions. The final report recommended only minimal reforms while affirming the legitimacy and utility of prolonged isolation. Although President Obama raised concerns last summer about solitary confinement, with his blessing the Bureau of Prisons has continued to push forward with plans to transform a state prison in Thomson, Illinois, into the country's second federal supermax prison. Left unsaid was how many of Thomson's high-security prisoners would end up like the high-security prisoners in ADX Florence in Colorado—housed for years, if not lifetimes, in extreme isolation.

More recently, in October 2015 the Senate Judiciary Committee approved the Sentencing Reform and Corrections Act of 2015, which would, among other things, largely abolish prolonged solitary confinement for juvenile offenders incarcerated in federal prisons. The number of individuals who would be affected by this change would be tiny. But the symbolic importance of the federal government rejecting solitary confinement for juveniles is enormous. In a lawsuit settlement reached with the New York Civil Liberties Union [in 2015], New York State agreed to overhaul solitary confinement in state prisons. The agreement is expected to reduce the number of prisoners in solitary confinement by at least 25% and improve the conditions of confinement for those remaining in restrictive housing.

Differing viewpoints among corrections officials over the utility of solitary confinement also stand in the way of reform. The ASCA-Liman Report appropriately characterizes prolonged isolation as a "grave problem." It also notes that the ASCA, the leading national organization for directors of corrections in the United States, has designated administrative segregation as one of its "top five critical issues." Many respondents to the ASCA-Liman survey indicated an interest in reducing the number of people held in solitary confinement and their level of isolation. But unsubstantiated claims by corrections officials that decreasing the use of solitary confinement will increase violence and disorder in their facilities have been a major impediment to restricting this practice. Many respondents in the ASCA-Liman survey "reported that administrative segregation was effective in ensuring the safety of staff and inmates in the general population." This conclusion is at odds with the findings

of the 2014 National Academy of Sciences report on mass incarceration in the United States. This landmark study concluded that supermax facilities and other forms of extreme isolation "have done little or nothing to reduce system-wide prison disorder or disciplinary infractions." Yet even despite extensive evidence that solitary confinement exacerbates and incubates mental illnesses, corrections administrators continue to differ widely about whether it is advisable to place mentally ill people in restricted housing.

Some corrections officials have voiced support for reform—and emphatically so. Rick Raemisch, Director of the Colorado Department of Corrections, has been an outspoken critic of solitary confinement, as was Tom Clements, his predecessor, who was murdered in 2013 by a man released directly from administrative segregation to the community. In 2011, with the support of Clements, Colorado legislators enacted pioneering legislation to restrict and regulate the use of solitary confinement. In 2014, Raemisch wrote a blistering *New York Times* op-ed about the night he spent in solitary confinement in one of his prisons. Written by someone who is part of the system, this was a rare and noteworthy example of a bold individual challenge to the ingrained punitive sensibilities of the carceral state.

Under Raemisch's leadership, the Colorado Department of Corrections has implemented pioneering measures to reduce the use of solitary confinement, including designating three penal facilities for the treatment of inmates with mental illnesses. In 2014, the department joined with supporters in the legislature and community to push through a ban on placing people with serious mental illnesses in restrictive housing, except under extraordinary circumstances. Last year, the department adopted a policy that forbids placing women and youthful offenders in restrictive housing. These policies have delivered results. Between 2011 and 2014, the proportion of men held under administrative segregation in Colorado dropped from 7.4% to 1.1%. During this same period, the proportion of administrative segregation prisoners fell only slightly in a little more than half the states, and remained the same or increased slightly in the rest. Colorado now ranks third from the bottom in the proportion of its prison population held in some form of restrictive housing in 2014.

Colorado's achievements are impressive. But its practices remain problematic when compared to other jurisdictions around the world. As of 2014, Colorado, a state with a population of five million people, was holding six hundred and sixty-two people in restrictive housing. By comparison, the United Kingdom, with a total population of sixty-four million, was holding an estimated five hundred people in isolation. Nearly all of the U.K. inmates were being held in solitary for relatively short



stints—measured in days and weeks, not months and years.

Political considerations dating back decades ago are another major obstacle. In the 1960s and 1970s, the United States was ground zero for a powerful prisoners' rights movement that garnered widespread national and international attention. Indefinite lockdowns in traditional cells were one of the initial weapons of choice to quell this unrest. In the late 1980s and 1990s, prison administrators began deploying more sophisticated supermax facilities with state-of-the-art technology to suffocate political dissent and unrest in U.S. prisons and jails. It is often forgotten that supermaxes like Pelican Bay in California and the federal ADX in Colorado "were built with the explicit purpose of minimizing all forms of collective resistance" and political organization by people who are incarcerated.

It is an open secret that a number of prisoners—we still do not have a good count of how many—have been banished to solitary confinement in U.S. prisons because of their actual or perceived political views and political activities. Political and religious beliefs deemed dangerous or out of the mainstream continue to provide "cause" for subjecting prisoners to prolonged isolation—like Rastafarianism and what Burl Cain, the former warden of Louisiana's infamous Angola prison, dismissively calls "Black Pantherism." Steve Champion, an award-winning author and prisoner on death row in California, was "validated" as a gang member and banished to solitary confinement based on his possession of a Kiswahili dictionary and George Jackson's *Soledad Brother*. And in the wake of 9/11, the federal Bureau of Prisons established Communications Management Units in a couple of federal penitentiaries. According to a lawsuit filed in 2010, these units housed predominantly Muslim prisoners. These inmates were subjected to extreme isolation "for their constitutionally protected religious beliefs, unpopular political views, or in retaliation for challenging poor treatment or other rights violations in the federal prison system."

The barriers to mobilizing and protesting from within U.S. prisons and jails remain extraordinarily high, which makes the 2011–13 hunger strikes in California all the more remarkable. These protests focused public attention on the plight of people in extreme isolation but also reignited correctional administrators' fears of the potential political power of incarcerated people who band together collectively. They were a reminder that the line between a political organization and a gang sometimes rests in the eye of the beholder. Jeffrey Beard, who . . . stepped down [in 2015] after serving for three years as Director

of California's Department of Corrections and Rehabilitation (CDCR), aggressively denounced the hunger strike leaders and sought to reframe their actions as a "gang power play" by "convicted murderers."

The hunger strike leadership, with key support from advocates on the outside, pursued a sophisticated political strategy that did not focus on a call for the abolition of prolonged solitary confinement in California. Their main demands called for improvements in the day-to-day conditions in solitary confinement and for the CDCR to adhere to existing rules, regulations, and court-mandated settlements regarding admission to and release from prolonged confinement. The leaders of the hunger strike also demanded that the state adopt some of the

relatively more lenient policies for restricted housing that prevail in the federal prison system and some state systems. Corrections officials in California deny that the hunger strikes were a catalyst for a recent set of important—albeit potentially limited—reforms to restricted housing in the Golden State. Internal state documents suggest otherwise. . . .

Corrections administrators are often blamed, sometimes unfairly, for the country's high incarceration rate. After all, they did not write the laws. As they often remind us, they have to admit everyone that the police, prosecutors, and the courts send to their gates. However, these facts obscure the reality that corrections officials retain enormous clout to shape penal

policy. For example, corrections officials have considerable discretion to determine the quality of life for people incarcerated in their facilities. They have a wide berth to abolish, or at least greatly restrict, the use of prolonged isolation. They can make the conditions of solitary confinement more lenient.

The ASCA and Yale Law School's Liman Program have taken an important step by acknowledging that extreme isolation is a grave problem and by supporting a survey that enumerates the prevalence and conditions of administrative segregation. This is a major milestone on what remains a long road to transformative reform of solitary confinement in the United States. The recommendations of the blue-ribbon Katzenbach commission almost a decade ago still ring true today. The commission called upon the United States to intensify its efforts to "stop isolating people and ensure that segregated prisoners have regular and meaningful human contact and are free from extreme physical conditions that can cause lasting harm."

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## Time-in-Cell: A Practitioner's Perspective

Ashbel T. (A.T.) Wall

Excerpted with permission from 125 YALE L.J. F. 246 (2016), <http://www.yalelawjournal.org/forum/time-in-cell-a-practitioners-perspective>

... As a career practitioner in the field, I strongly concur in the need for reform. My years in corrections have also given me an appreciation for the complexities associated with preparing for and implementing such a significant change. It is crucial—both to the success of the reforms and to the well-being of the front-line staff who work in high-security settings—that we not underestimate the implications of this change. The success of any such venture will depend on our ability to win and maintain the trust of corrections personnel. ....

Given the stakes involved in reducing our reliance on administrative segregation—and the reality that line staff will be indispensable to the success of this effort—it is essential that we as leaders engage these personnel as partners in the change process. This approach will involve a shift from the hierarchical model that has traditionally characterized many corrections systems. Corrections departments have historically organized their custody operations along paramilitary lines with a top-down, command-and-control structure. Decisions are transmitted from above. Obedience from those below is assumed. To shift the model through changes to administrative segregation calls for a more horizontal, more collaborative approach in which a cross-section of staff from various levels identify challenges and agree upon solutions. We need to listen to and respect our employees' legitimate anxiety and give serious attention to their ideas and points of view.

An initiative from my own department gives me reason for optimism about the potential that alternative models have to advance our goals of reform. Over the years, collaborating with staff at all levels and across different disciplines of custody and

rehabilitative services, we have moved from a mindset that viewed placement in administrative segregation as the end of the line to one that sees it as something very different. Now, uniformed personnel and clinical staff work closely as a team to develop and implement customized strategies that help individual inmates break the cycle of behaviors that have led to their confinement in ad seg. They meet in case management sessions as a multi-disciplinary team to address the most difficult cases. By integrating behavioral health, medical treatment, programming and security-based perspectives, we have enhanced the trust and the level of communication between custody and rehabilitative services. The results include more effective crisis intervention, a reduction in the frequency of repetitious self-injurious actions and a decline in the number of trips to hospitals associated with disruptive behaviors. Inmates are more involved in empirically based treatment programs that serve to promote pro-social conduct. As a result, we have successfully reintegrated a greater number of challenging inmates from administrative segregation into the general population at less restrictive institutions.

Such initiatives take creativity, work, and time to develop. There will not be shortcuts here. In our hands is the health and safety of the millions who live and/or work in our nation's prisons. No matter how lauded we may be outside our agencies for the reforms we create, we cannot afford to become untethered from our workforce. If we do, we risk losing a rare opportunity to obtain the support and commitment essential for achieving the reforms necessary for the wellbeing of the people housed in administrative segregation.

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## 2015–2016 RESEARCH: REDUCING TIME-IN-CELL?

In early October 2015, ASCA and Liman launched a follow-up study to gather national information on all forms of restricted housing and to learn what numbers of people were in that form of detention in the fall of 2015. Further, the groups sought to understand what policy changes were underway. The hope was that the number of persons held in such settings was diminishing and that the conditions in restricted housing were improving by becoming less isolating.

The 2015–2016 study relied again on asking the directors of prison systems to respond to questions. This time, the set of 15 questions focused on the people in any and all forms of restrictive housing. Liman researchers queried 53 jurisdictions (all the states, the federal system, the District of Columbia, and the Virgin Islands) and 52 responded, albeit not to all the questions. As of the fall of 2016, the results from the survey were being compiled for the final report.

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## Commenting on Proposed Changes to National Restrictive Housing Standards of the American Correctional Association (ACA)

In 2015, the American Correctional Association, a professional organization founded in 1870 for practitioners in corrections, formed a committee to address policies governing restrictive housing. That committee, the Restrictive Housing Standards Ad Hoc Committee, invited commentary on a set of proposed revisions in the fall of 2015. In January of 2016, the Liman Program submitted its comments and spoke at the hearing on the proposals. The Liman Program urged the ACA to take greater steps in reducing both the amount of time prisoners spend in isolation and the degree to which the conditions of confinement restrict and isolate prisoners who are segregated from the prisons' general population.

Applauding ACA's decision to revisit the existing standards governing restrictive housing, the comments submitted by the Liman Program first described the results of its work with ASCA in researching administrative segregation policies across the country and surveying prison systems to learn more about the numbers of prisoners in restrictive housing and the conditions of their confinement. The Liman Program made proposals, both broad and specific, designed to limit the use of restrictive housing.

The full statement from the Liman Program can be found at <https://www.law.yale.edu/centers-workshops/arthur-liman-public-interest-program/liman-publications>. Excerpts are provided below.

Whether in a standard or as an introductory statement of purposes, we think it critical to clarify the central goals: that individuals ought *not* be kept for prolonged periods of time in isolation and that restrictive housing itself should be *less* restrictive.

The Revised Standards provide an important beginning towards these goals. By shifting away from the justifications for isolation (discipline, protection, administration) and using the umbrella term of "restrictive housing," the Standards reflect that whatever the justifications, the central harm of this form of housing is that it puts someone inside a cell for most of the hours of a day and for days on end.

We suggest a further step. Instead of continuing the current template reliant on the categories of administrative, protective, and disciplinary segregation as the rubrics and hence focusing on the *justifications* for placements in restrictive housing, the revisions should use the *time spent* inside cells as its framework. The concept of restrictive housing could then be placed in a binary time-frame: a first period of less than 15 days that could be analogized either as a kind of urgent-care or a need for urgent-discipline. Ideally, if 15 days is the maximum permitted, the Standards would be in accord with the Nelson Mandela Rules, adopted in 2015 by the United Nations. However, if a second time period of placement in any restrictive setting for longer than 15 days is deemed necessary, then another set of rules would be relevant. In addition, attention needs to be paid to the 24-hour day itself, to consider how many in-cell hours are needed to constitute "restrictive housing" so as to provide as much out-of-cell time as possible.

Having two sets of rules divided by the 15-day presumptive maximum would help to clarify the extra work, repeated decision-making, and different conditions that would be required if people are held for longer than 15 days. Simply put, after 15 days, restrictive housing should not be permitted to be as isolating as it currently is.

If individuals are housed for a period of more than 15 days, standards should require significantly greater opportunities for time out of cell. The term "ten and ten" (ten hours out for programs and ten for other activities) has entered the parlance as jurisdictions put such plans into their policies. Another approach is to ensure 3–6 hours out of cell, each day. More generally, the new ACA standards ought to incorporate the emphasis on out-of-cell time.

Thus, we suggest that the new standards include an introductory, aspirational statement to orient readers—first, that fewer people should be placed in restrictive housing, and the presumption ought to be against any stays of more than a total of 15 days; and second, that efforts should be made to minimize the degree of isolation within restrictive housing, and that the obligation to do so increases as the time in isolation continues.



Further, an introduction should explain that the decision-making process and the collection of data are key methods of implementing these goals. The central office ought to be involved if exceptions are made to the presumptive 15-day limit, and then keep track of who is being held for those 15 days, and why, as well as any persons held for longer periods of time. Data in a searchable form should include demographic information, the reasons for extending restrictive housing, and the efforts made to begin the transition to less restrictive settings as soon as possible. Below, we detail how, through more specificity about decision-making, conditions in cells, and record-keeping, the standards could be strengthened.

To put these changes into effect, the Liman Program suggested specific policies to implement a presumption against the reliance on the use of restrictive housing, to increase the amount of time that prisoners in restrictive housing spend outside of their cells, and to add greater specificity to the existing terms and definitions used in the restrictive housing standards which aim to constrain the use of restrictive housing but lack the specificity needed to do so.

The comments likewise made suggestions concerning the physical environment in which an individual in restrictive housing lives and the regulations that govern day-to-day existence. These proposals addressed prisoners' access to natural light and sights, temperature, noise levels, the layout of the facilities, and prisoners' capacity for self-care. In particular, the comments addressed the critical need for increased social contact between prisoners in restrictive housing and their family and friends outside of the facility.

In short, opportunities for prisoners to socialize in segregation are already constrained. Yet maintaining social, community, and familial ties plays a critical role in supporting prisoners while incarcerated, reducing violence in prisons, and enabling more successful returns to the community and therefore reducing recidivism. The Nelson Mandela Standards prohibit limiting access to family visits as a sanction (with the caveat for exceptional circumstances requiring temporary limits to preserve safety). That approach is correct, and to implement it, standards could specify that prisoners should have opportunities for telephone use, legal and social visits, written correspondence, access to reading materials, and access to programming on the same basis as inmates in the general population. Further, decisions to limit such access should only be based on a documented danger to others (including the other prisoners, staff or visitors), or the prisoner himself. Such limits should expire as soon as possible, and if after 15 days, senior staff in the central administration should determine the need to continue the sanctions.

Finally, the proposals included special considerations for mentally ill prisoners and women who are kept in restrictive housing, as well as the supervision structure of the facility and prisons' documentation of the use of restrictive housing.

The comments concluded:

We know that the project of Revising Standards for Restrictive Housing is ambitious and entails a host of challenges of financing, staffing, and culture. The proposals made by the Ad Hoc Committee on Restrictive Housing will help to bring about changes that are imperative. Strengthening the new standards will reflect the degree of consensus that has developed about the need to unravel reliance on isolation as a form of incarceration, respond to legal obligations, and provide the necessary roadmap for doing so. The best estimates are, as we noted, that 80,000 to 100,000 people are in restrictive housing now in U.S. prisons. Our hope is that, under revised standards, those numbers will decline steeply in the coming years. Moreover, with new standards in operation, the term "restrictive housing" will no longer be a euphemism for isolation.



Ryan Sakoda, Committee for Public Counsel Services (Liman Fellow 2015–2017), and Brett Dignam, Clinical Professor of Law, Columbia Law School



Laura Fernandez, Senior Liman Fellow in Residence, and Sarah French Russell, Professor, Quinnipiac University School of Law, and former Liman Director

## Liman Reports on Death Row and Isolation

In June of 2015, the Supreme Court reversed a decision providing relief in *Davis v. Ayala*, 135 S. Ct. 2187 (2015). What drew attention from many Supreme Court watchers was a concurring opinion by Justice Kennedy, who took the opportunity to highlight the fact that individuals sentenced to death often spend the entirety of their incarceration in solitary confinement. As the Justice explained, if following “the usual pattern,” the respondent, Hector Ayala, would likely have been held “in a windowless cell no larger than a typical parking spot for 23 hours a day; and in the one hour when he leaves it, he likely is allowed little or no opportunity for conversation or interaction with anyone.” Kennedy warned of the “human toll wrought by extended terms of isolation,” and called for consideration of “whether workable alternative systems for long-term confinement exist, and, if so, whether a correctional system should be required to adopt them.”

In the summer of 2016, the Liman Program published a report examining the law regulating the housing of death-sentenced prisoners nationwide and highlighting the experiences of administrators in three jurisdictions who have chosen not to incarcerate these people in isolation. Excerpts are below.

### Rethinking “Death Row”: Variations in the Housing of Individuals Sentenced to Death

Celina Aldape, Ryan Cooper, Katie Haas, April Hu, Jessica Hunter & Shelle Shimizu

The primary authors of this report are current and former Yale Law School students, who participated in the Liman Project from 2014 to 2016, working under the supervision of Johanna Kalb, then Director of the Liman Program, and Judith Resnik, Arthur Liman Professor of Law.

... In 2015, nearly 3,000 death-sentenced prisoners were incarcerated in state and federal facilities in the United States. Most were housed in some form of isolation. A growing body of research documents the harms of long-term isolation on prisoners’ mental and physical health, and correlates isolation with increased violence in prison. Further, prison administrators report the challenges and costs of staffing isolation units. Proposals for reducing the use of isolating conditions in prison have been put forth by the executive branch of the federal government, by state correctional leaders, and by the legislative branches of the federal and state governments. Detention of juveniles in solitary has been a specific source of concern. In 2016, both the Colorado legislature and the Los Angeles County Board of Supervisors enacted provisions banning the use of isolation for juveniles, defined in Colorado as individuals under the age of 21, and in Los Angeles as individuals younger than 18. Lawsuits have successfully challenged isolating conditions—resulting in consent decrees to limit the use of isolation either for all prisoners or for subpopulations, such as the seriously mentally ill and juveniles. Reports and articles document the harms of such isolating confinement and analyze its legal parameters.

These concerns raise questions—in terms of both practices and as a matter of law—about the use of long-term isolation for a specific set of prisoners, those serving capital sentences and often housed on what is colloquially known as “death row.” A few prior reports have surveyed conditions; for example, in 2013, the American Civil Liberties Union (ACLU) detailed the severity of isolation experienced by death-sentenced prisoners and criticized the practice of imposing long-term isolation as an automatic consequence of death sentences.

Lawsuits challenging the practice have also been filed. In 2012, Alfred Prieto, a death-row prisoner in Virginia, argued that automatic segregation violated his constitutional right to an individualized decision about the need for placement in isolation. A trial-level judge agreed but on appeal, the Fourth Circuit reversed. The court held (over a dissent) that because all death-sentenced prisoners in Virginia were subjected to the same treatment, Mr. Prieto’s isolation was not “atypical” and therefore he had no liberty interest protected by the Due Process Clause in avoiding such confinement. Although U.S. Supreme Court review was sought, after Mr. Prieto was executed, his petition for certiorari was dismissed as moot...

The isolation of prisoners is also the subject of case law in many jurisdictions and is also of international concern. The European Court of Human Rights has concluded that the Convention on Human Rights imposes limits on isolating conditions, and research in Great Britain detailed the injuries of what it termed “deep custody.” International standards also address isolation. In 2015, the United Nations Commission on Crime Prevention and Criminal Justice met to revise its standards for the treatment of prisoners. The result are the Standard Minimum Rules for the Treatment of Prisoners (known as the “Nelson Mandela Rules”), which were adopted by the U.N. General Assembly in 2015.

These rules define “solitary confinement” to be “confinement of prisoners for 22 hours or more a day without meaningful human contact”; “[p]rolonged solitary confinement” is “solitary confinement for a time period in excess of 15 consecutive days.” The Nelsons Mandela Rules state that, “[i]n no circumstances may restrictions or disciplinary sanctions amount to torture or other cruel, inhuman or degrading treatment or punishment.”

The Rules provide specific “practices, in particular” that “shall be prohibited;” included are “[i]ndefinite solitary confinement;” and “[p]rolonged solitary confinement.” Moreover, the Rules state that “[s]olitary confinement shall be used only in exceptional cases as a last resort, for as short a time as possible and subject to independent review, and only pursuant to the authorization by a competent authority,” and “shall not be imposed by virtue of a prisoner’s sentence.” In addition, “solitary confinement should be prohibited in the case of prisoners with mental or physical disabilities when their conditions would be exacerbated by such measures” as well as for “women and children.”

This Liman Report contributes to this discussion by providing an analysis of the statutory, administrative, and procedural rules governing the housing of death-sentenced prisoners in the United States; by summarizing past research on conditions for death-sentenced prisoners; and by offering a detailed account from correctional administrators in three states who have chosen to use their discretion not to put individuals sentenced to death in isolation. Part I provides both an overview of the legal parameters governing the housing of death-sentenced individuals in the thirty-five jurisdictions that had such prisoners in 2015, and a review of prior research on housing conditions of death-sentenced individuals. After examining statutes, administrative codes, and available department of correction policies in those jurisdictions, we learned that correctional officials have substantial discretion to decide how to house death-sentenced prisoners. An appendix provides the legal rules and policies of each jurisdiction.

Part II summarizes interviews conducted in the spring of 2015 with correctional administrators in three jurisdictions—North

Carolina, Missouri, and Colorado—that permitted death-sentenced prisoners some degree of direct contact with each other or the general prison population. Specifically, as of 2015:

**North Carolina** housed 156 death-sentenced prisoners, separated them from the general population, but afforded them similar access to resources and programs as other prisoners had. Death-sentenced prisoners were able to spend sixteen hours each day in a common room and were permitted to exercise and dine in groups.

**Missouri** housed 28 death-sentenced prisoners, integrated into the general population of a maximum-security prison. Death-sentenced prisoners shared cells with other prisoners and had all the same privileges and opportunities as those who had not been sentenced to death.

**Colorado**, which confined 3 death-sentenced prisoners, placed them in a designated unit together with other prisoners classified as in need of increased supervision. All prisoners housed in the unit had access to a common room in small groups for at least four hours each day; death-sentenced individuals had most of the opportunities available to other prisoners in the unit.

A central finding of this Report is that prison officials have many options when determining the housing of individuals sentenced to death. Our hope is that this Report will provide models for lessening the isolation of death-sentenced individuals and invite innovations in the housing arrangements for all prisoners. . . .



*Alix McLearn, National Female Offender Branch Administrator, U.S. Bureau of Prisons*



*Jules Lobel, Bessie McKee Walthour Professor of Law, University of Pittsburgh School of Law, and President, Center for Constitutional Rights; and Paul Wright, Founder and Executive Director, Human Rights Defense Center, and Editor, Prison Legal News*

## The Liman Fellows At Work

The 2015–2016 cohort of Liman Fellows included six new fellows and five fellows who received extensions to continue their projects. These fellows worked in Boston, Birmingham, Los Angeles, New Orleans, New York, and Washington, DC, on projects relating to community development, criminal justice, immigration, incarceration, and workers' and veterans' rights.

Below, four of the Liman Program's 2015–2016 Fellows discuss their work with individuals subjected to various aspects of the criminal justice system. Jamelia Morgan, a Fellow at the ACLU National Prison Project, focuses on the particular challenges faced by prisoners with physical disabilities who are placed in solitary confinement. Disability is also the topic of Freya Pitts' project, which focuses on children in the juvenile justice system in California, who are disabled and need access to education and mental health services.

Two of the Liman Fellows focus their work on helping individuals avoid incarceration and the challenges they encounter in their communities. Ryan Sakoda's clients in Boston face eviction or housing subsidy termination as a result of their criminal cases. Further south, in Alabama, Ruth Swift is providing counsel to individuals dealing with immigration consequences as a result of potential convictions. She trains other public defenders to help their clients address the relation of immigration to their criminal cases.

### Ending Isolation for Persons with Physical Disabilities

Jamelia N. Morgan

Liman Fellow 2015–2017

ACLU National Prison Project, Washington, DC



... The movement to end solitary confinement has had tremendous success in recent years—and calls for reform have come from the highest offices in the land, including both President Obama and Supreme Court Justice Kennedy. Yet, despite these successes, considerably less attention has been given to one of the most vulnerable populations affected by the pervasive use of solitary confinement—prisoners with physical disabilities.

Although data on the exact number of prisoners with disabilities in jails, prisons, and detention centers across the nation are difficult to locate, by some estimates at least 26 percent of state prisoners report possessing a hearing or visual impairment, or physical disability. Given the scale of mass incarceration in the United States, it is expected that the numbers of persons with physical disabilities will increase substantially as the prison population ages.

Shockingly, over 25 years after the passage of the landmark Americans with Disabilities Act, prisoners with physical disabilities are being denied the robust protections afforded them by that law. Persons with ambulatory, hearing, and visual disabilities constitute one of the most vulnerable populations living in isolation in prisons across America. They have to rely on corrections staff for almost every aspect of their everyday

lives—be it assistance in taking showers, getting dressed, utilizing law libraries, or attending meals. For persons with ambulatory disabilities, failure to provide wheelchairs or prosthetic devices to persons in isolation has resulted in persons being forced to crawl or hop around within their cells to access meal trays, wash up and dress, or otherwise attempt to engage in routine daily activities within the confines of their tiny cell. For deaf and hard of hearing prisoners, not providing access to sign language interpreters, hearing aids, or visual alerts and alarms has rendered them unable to communicate effectively with medical and mental health professionals, participate in rehabilitative programming and prison jobs, and otherwise benefit from critical services and privileges, such as telephone calls and visitation with families. Similarly, without materials in Braille or text-to-audio programs that make written text accessible to blind or low vision prisoners, they have struggled to understand prisoner manuals containing the rules for behavior and guidelines for filing grievances, or medical records, and other critical correspondence.

Even more troubling is the fact that prisoners with disabilities are often denied access to prison educational and rehabilitative programs, including mental health classes, vocational courses, substance abuse counseling, and outdoor recreation and exercise. Persons with disabilities in isolation are also often prevented from accessing programs—known as “step-down” programs—that provide a pathway out of solitary confinement. Without a mechanism for progressing out of solitary confinement, many persons with disabilities find



themselves languishing in conditions of extreme isolation for upwards of 22 hours per day—well beyond the 15 day limit that experts and human rights advocates contend constitutes torture.

As a Liman Fellow at the ACLU National Prison Project, I have been working to address these issues by uncovering the stories of prisoners with physical disabilities living in isolation and offering potential reforms to rectify the challenges they face. My

report builds on the ACLU National Prison Project's *Stop Solitary Campaign*, and will build on the Campaign's strategy of highlighting the challenges faced by vulnerable groups placed in solitary confinement, such as persons with mental disabilities, pregnant women, and youth. The overarching goal is to expose the overuse of solitary confinement on persons with physical disabilities and to emphasize the precise and acute harms they experience.



*In July, the White House Forum on Criminal Justice Reform and Disability was convened to address the overrepresentation of individuals with disabilities in the criminal justice system and the specific issues facing such individuals. The session was opened by Valerie Jarrett, Senior Advisor to the President, and featured several experts on the intersection of criminal justice reform and disability rights.*

*Jamelia Morgan (Liman Fellow 2015–2017) presented at this forum and discussed her Liman-supported work on the profound effects of isolation on prisoners with disabilities. She explained that many individuals are placed in isolation because facilities cannot accommodate their disabilities in general population. She further explained that, once in solitary, the condition of being disabled is exacerbated by the physical and sensory deprivation and the denial of access to medical devices, therapies, and medications. A video of the panel discussion can be found at <https://www.whitehouse.gov/photos-and-video/video/2016/07/18/white-house-forum-criminal-justice-reform-and-disability>.*

## Advancing Treatment of Youth with Disabilities in California's Juvenile Halls

Freya Pitts

Liman Fellow 2015–2017

Disability Rights Advocates, Berkeley, California



In California's county juvenile halls, young people with psychiatric, cognitive, developmental, learning, and other disabilities are both hugely overrepresented and particularly vulnerable. As many as seventy-five percent of incarcerated youth have a diagnosable mental health condition. Many face disciplinary sanctions, including solitary confinement, that are triggered by behavior related to

their disabilities, and that result in rapid deterioration of their mental health. Some find themselves stuck in a revolving door of detention and release, unable to comply with probation conditions that fail to take account of their disabilities. Due to resource constraints, administrative disorganization, or a simple lack of proper identification, many are deprived of the supports they need to stay on track academically during their

incarceration and prepare for success afterwards. A shortage of clinicians and psychiatric treatment beds routinely blocks access to adequate mental health care, even for those who need it most. Youth with severe disabilities, particularly those who have been found incompetent to go forward in their delinquency proceedings, can find themselves stranded in this environment, trapped in a system that doesn't know what to do with them.

While youth with disabilities in the juvenile justice system face overwhelming challenges, they are also uniquely protected under the law. The Americans with Disabilities Act, the Rehabilitation Act of 1973, and similar state disability rights laws prohibit discrimination in the adjudication and incarceration of youth with disabilities, and guarantee them equal access to the rehabilitative, educational, and other programs, services, and activities offered within the delinquency system. To comply with these requirements, all entities interacting with incarcerated youth, including juvenile courts, probation departments, county offices of education, and medical and mental health providers, must provide reasonable accommodations to young

people with disabilities. On the education side, the Individuals with Disabilities Education Improvement Act requires schools, including schools inside juvenile halls and other detention facilities, to proactively identify and evaluate students with disabilities, to meet their educational needs through Individualized Education Programs (IEPs), to teach them in the least restrictive environment, and to involve their parents and guardians in decision-making about their education.

As a Liman Fellow, I am working with Disability Rights Advocates (DRA) to make these statutory protections a reality for incarcerated youth with disabilities in county juvenile halls in California. Shortly before I began my fellowship, DRA, along with Public Counsel and pro bono partners, reached two groundbreaking settlement agreements in a case challenging special education services and the use of solitary confinement at Contra Costa County's juvenile hall. Through these settlement agreements, county officials have committed to critical changes to improve conditions for youth with disabilities, including by abolishing solitary confinement for all youth in the juvenile hall, except as a temporary (i.e. capped at four hours) response to behavior that threatens immediate harm. The settlement agreements were approved by the court in November 2015, and we are currently working on implementation and monitoring of these agreements in Contra Costa County.

In addition, we are investigating discriminatory policies and practices plaguing other facilities in California, and expanding our advocacy to reach incarcerated youth in other counties. Through conversations with incarcerated and formerly incarcerated youth, as well as their defense attorneys, family members, and community advocates, we have learned more about the ways that our juvenile justice system fails young people with mental health and special education needs. Youth with disabilities who have come into contact with the juvenile justice system need appropriate education and mental health care to move forward, transition back to their communities, and prepare for a successful future. They must be protected from the damage that isolation, mechanical and chemical restraints, and disruption in treatment can cause to their mental health. When a young person's needs exceed the capacity of a juvenile hall to safely and effectively provide care, they must be diverted to a more appropriate placement. We are committed to pursuing reform that will bring our state's juvenile halls into line with these mandates.

It is an exciting time in the field of juvenile justice, with advocates achieving extraordinary victories across the country. I am honored to have the support of the Liman Program to be a part of this effort.



*Laura Fernandez, Senior Liman Fellow in Residence; Johanna Kalb, Associate Professor, Loyola University New Orleans College of Law; Denny Curtis, Clinical Professor Emeritus, Yale Law School; and David Fathi, Director, ACLU National Prison Project*

## Improving Housing Stability for Criminal Defendants in Massachusetts

Ryan Sakoda

Liman Fellow 2015–2017

Committee for Public Counsel Services, Boston, Massachusetts



Over 100 million individuals, or about one-third of the U.S. population, have some form of criminal record. During 2012 alone, there were over 12 million arrests reported in the United States and about 640,000 individuals were released from state and federal prisons to try to rebuild their lives with the heavy burden of a criminal conviction on their record.

The impact of the criminal justice system has been particularly concentrated among low-income individuals, many of whom rely on public or subsidized housing. These individuals often face eviction or termination of housing subsidies because of the criminal charges brought against them. In many cases, eviction and termination proceedings commence shortly after arrest and well before an individual is even convicted of a crime. These collateral consequences have a profound impact on those living in subsidized housing at the time of the alleged criminal activity, but also affect applications for housing assistance even years after a conviction. Criminal background checks are a routine part of the application process, and current policies allow housing authorities to deny assistance to individuals regardless of the severity or length of time that has transpired between a criminal conviction and their application.

The tremendous amount of discretion granted to housing authorities applies not only to the exclusion and removal of household members who have been arrested and charged with crimes, but even to those household member who had no knowledge of the alleged criminal activity. In 2002, the U.S. Supreme Court decided *Rucker v. Oakland Housing Authority*, holding that the statute governing federal public housing leases allows housing authorities “to terminate the lease of a tenant when a member of the household or a guest engages in drug-related activity, regardless of whether the tenant knew, or should have known, of the drug-related activity.”

While termination in these circumstances is not mandated, many housing authorities treat it as such. For example, during the past several months I have represented a disabled couple who has held their Section 8 voucher for over a decade, but faces termination because a small quantity of substance alleged to

be drugs was left in their apartment without their knowledge. Even though the police investigation leading to the search did not target any member of the household, the landlord chose not to evict the couple from their apartment, and all criminal charges related to the investigation and search have been dismissed, the housing authority continues to pursue termination of their Section 8 voucher. Draconian “one-strike” policies and practices such as this are enforced throughout the country, leading to instability in the lives of individuals who rely on federal housing programs.

To compound the problem, the vast majority of this population is left to face these challenges alone as legal services for housing matters are in short supply. In Massachusetts, public defenders are unable to assist clients in most civil matters and have no formal process for helping their clients obtain legal assistance on these issues. During my fellowship year, I have worked at the Boston public defender’s office to address this

gap in legal services for collateral housing consequences. I provide direct representation to clients facing eviction or subsidy termination based on criminal cases, provide advice to public defenders throughout the state on housing issues faced by their clients, and conduct trainings on housing consequences.

In recent years, the U.S. Department of Housing and Urban Development (HUD) has recognized how important housing assistance programs can be in efforts to reduce recidivism and has issued guidance reminding public housing agencies of their discretion to admit individuals with prior convictions. This guidance, issued in 2011 and 2012, emphasizes the Obama Administration’s belief “in the importance of second chances” and the necessity of “helping ex-offenders gain access to one of the most fundamental building blocks of a stable life—a place to live.” Last fall, HUD issued additional guidance reminding housing providers that HUD does not require them to enforce “one-strike” policies that deny admission to anyone with a criminal record and that a housing provider cannot base a denial of admission, termination of assistance, or eviction on the mere fact that an individual was arrested.

Despite this guidance, housing authorities have been slow to change their practices, but momentum has been generated at the national level from increased attention to prisoner reentry, making this an ideal time to push for reform to housing policies that affect individuals with criminal records.

*Over 100 million individuals, or about one-third of the U.S. population, have some form of criminal record.*

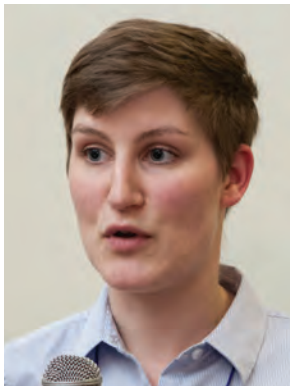


## Advising Noncitizen Criminal Defendants in Birmingham

Ruth Swift

Liman Fellow 2015–2017

Jefferson County Public Defender's Office, Birmingham, Alabama



Political discourse today has shifted from a uniformly “tough on crime” mindset on both the left and the right toward a burgeoning, bipartisan movement for criminal justice reform. Many are taking a second look at the harsh, mandatory sentences and other policies implemented in the 1980s and 1990s that have led to today’s staggering incarceration rates. For example, this past year, the Ala-

bama legislature implemented a criminal justice reform bill intended to reduce sentences.

However, immigrants in the United States are one group that has felt the severe effects of this wave of 1990s “tough on crime” legislation, but are not yet experiencing the benefit of the current turn toward a less punitive legal system. Immigrants caught up in the criminal justice system are essentially punished twice—they are convicted, sentenced, and serve their time just like a US citizen, and then they are incarcerated in an immigration detention facility, often without an opportunity for a bond hearing, while their deportation case is adjudicated; in many cases they are then deported, permanently exiled from their adopted home and family. Immigrants face this risk regardless of their immigration status—they could be green card holders who have lived in the US for decades, or recently arrived and undocumented—and still find themselves facing mandatory deportation after a crime of petty shoplifting when they didn’t serve a day in jail.

One protection that immigrants are entitled to in the criminal justice system is to be advised by their criminal defense attorney of the immigration consequences in their case. The Supreme Court ruled in 2010 in *Padilla v. Kentucky* that it is ineffective assistance of counsel to fail to advise criminal defendants of the clear immigration consequences of their

convictions. Implementing *Padilla* is a challenge facing every public defender’s office in the country, especially in light of our nation’s complex and exceedingly punitive immigration laws. For example, in Jefferson County, we have a drug court program that focuses on treatment and rehabilitation for individuals charged with drug possession crimes. It provides an opportunity for a defendant to complete a drug treatment program and avoid having a conviction on their records for purposes of Alabama law. However, in order to enter drug court, the defendant must sign a conditional guilty plea, which is later withdrawn upon successful completion of the program. Under immigration law, this conditional guilty plea, even after it has been withdrawn, has the exact same effect as if the defendant had pleaded guilty and been sent to prison. When a criminal defense attorney fails to advise an immigrant client that a drug court plea will subject the client to deportability and inadmissibility, that attorney has provided ineffective assistance of counsel.

As a Liman Fellow at the Jefferson County Public Defender’s Office in Birmingham, Alabama, I have been able to steer my colleagues away from these and the many other minefields criminal defense attorneys encounter when representing immigrant clients. I have worked to develop creative plea agreements in individual cases to preserve immigration status or the opportunity to adjust status. I hope in the future to be able to negotiate better local policies around deferred adjudications for immigrants, for example a drug court program that provides immigrant defendants the same opportunity for treatment and rehabilitation that citizens receive.

In the second year of my Liman fellowship, I will continue to serve as the immigration specialist at the Jefferson County Public Defender’s Office. Additionally, I will host an immigration training session for private criminal defense attorneys. I am thankful to work with so many committed criminal defense attorneys and to play my small part in a national movement to decriminalize immigration.



Rick Raemisch, Executive Director of the Colorado Department of Corrections



Johanna Kalb, Associate Professor, Loyola University New Orleans College of Law, and Brett Dignam, Clinical Professor of Law, Columbia Law School

# Liman Program Updates

## Transitions and Continuities in the Liman Program

This year, the leadership of the Liman Program shifted as Professor Johanna Kalb returned to Loyola University New Orleans, Sarah Baumgartel returned to the Federal Defenders in the Southern District of New York, and Kathi Lawton moved to a new position within the Law School. We welcome Anna VanCleave, the new Director of the Liman Program; Kristen Bell, the new Senior Liman Fellow in Residence; and Christine Donahue Mullen, the new Liman Program Coordinator, who join Professor Judith Resnik and Senior Liman Fellow Laura Fernandez in the program.



**Anna VanCleave** graduated in 2004 from New York University Law School, where she was a recipient of a scholarship through the Root-Tilden-Kern public interest scholar program. After law school, VanCleave joined the Public Defender Service (PDS) for the District of Columbia. In 2007–2008, VanCleave took a leave from PDS to join efforts at the newly-formed Orleans Public Defenders to reform the criminal justice system in New Orleans in the wake of Hurricane Katrina. She returned to New Orleans in 2009 to work at the Louisiana Capital Assistance Center, where she represented criminal defendants facing the death penalty. From 2012 to 2014, VanCleave served as a Forrester Fellow teaching Legal Research and Writing at Tulane Law School. While at Tulane, her research focused on the due process rights of criminal defendants to obtain information through discovery. Her publications include *Brady and the Juvenile Courts*, 38 NYU Review of Law and Social Change 551 (2014), and *The Right to Inter-Sovereign Disclosure in Criminal Cases*, 2013 Wisconsin Law Review 1407 (2013). In 2014, VanCleave returned to the Orleans Public Defenders, where she was chief of the Capital Division. At both the Louisiana Capital Assistance Center and at the Orleans Public Defenders, VanCleave served as a supervisor and mentor to former Liman fellows.



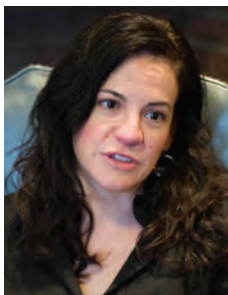
**Kristen Bell** is a graduate of Stanford Law School and earned her PhD in legal and moral philosophy at UNC-Chapel Hill. Her dissertation, *Mercy and Criminal Justice*, explores the concept of mercy and the sense in which conditions of social injustice vitiate the moral justification for criminal punishment. During law school, Bell interned at the Southern Center for Human Rights and the Center for Death Penalty Litigation, taught seminars on mass incarceration at a state prison, and participated in Stanford's Three Strikes Project and Supreme Court Litigation Clinic. After law school, Bell clerked for the Massachusetts Supreme Judicial Court in her hometown of Boston.

Bell was selected as a Soros Justice Fellow in 2013, and her fellowship was at the Post-Conviction Justice Project at USC. As a Soros Justice Fellow, Bell did policy advocacy, in-prison education, and impact litigation toward improving the opportunity for release of California prisoners serving juvenile life sentences. Her research on California's parole process for juvenile lifers will soon be published.



**Judith Resnik**, Arthur Liman Professor of Law, remains actively involved in activities in addition to the Liman Program. She chairs Yale's Global Constitutional Seminar, a part of the Gruber Program for Global Justice and Women's Rights, and edits each year's volume readings for judges on constitutional and supreme courts from many countries. She also co-convoked, with professors from France, Canada, Australia, and Germany, a seminar held at Yale and entitled "Thinking about Federalism(s) Beyond the United States Experience." During the year, she gave the Ainsworth Lecture in New Orleans; her topic was "Incarceration, Isolation, and the Courts." She was also a Phi Beta Kappa Visiting Scholar, and did seminars related to solitary confinement in Paris and in London, as well as spoke at the conference on International and Inter-disciplinary Perspectives on Prolonged Solitary Confinement, held at the University of Pittsburgh Law School.

In addition, several of her essays and articles were published, including "Constructing the 'Foreign': American Law's Relationship to Non-Domestic Sources," in *Courts and Comparative Law* (Mads Andrenas and Duncan Fairgrieve, eds., Oxford University Press, 2015); *Diffusing Disputes: The Public in the Private of Arbitration, the Private in Courts, and the Erasure of Rights*, 124 Yale Law Journal 2804 (2015); "Why Eyes? Cautionary Tales from Law's Blindfolded Justice" (with Dennis E. Curtis), in *Blinding as a Solution to Bias in Biomedical Science and the Courts: A Multidisciplinary Approach* (Aaron Kesselheim and Christopher Robertson, eds., Elsevier Press, 2016); and *The Contingency of Openness in Courts: Changing the Experiences and Logics of the Public's Role in Court-Based ADR*, Nevada Law Journal, 2016.



**Laura Fernandez**, Senior Liman Fellow in Residence, continues her work on prosecutorial accountability. Her work aims to deepen an understanding of prosecutorial misconduct within the legal community and beyond; to alter prosecutorial behavior in practice; and to encourage public debate about the dangers inherent in an adversarial system that affords prosecutors wide discretion and authority. Laura has studied cases of profound, systemic prosecutorial misconduct in a variety of jurisdictions in order to better understand the incidence of such misconduct and its ramifications. In 2016–2017, Laura will be co-teaching the Liman Project, *Incarceration, Isolation, and Criminal Justice Reform*.



**Christine Donahue Mullen** joined us in March as the Liman Program Coordinator. Mullen is a graduate of Northwestern University's Medill School of Journalism. She began her career as a business journalist, first as a reporter for *Forbes*, then as the on-air business reporter for National Public Radio. Mullen spent the next ten years with McKinsey & Company, leading communications functions and working with senior partners and their clients on a range of strategic business communications. Following her time at McKinsey, Mullen served as the Director of Customer Communications at Pitney Bowes and the Director of Global Corporate Communications at Mars. Most recently, Mullen co-founded a healthcare start-up to pilot an innovative model of addiction treatment and co-authored the proof-of-concept article on its outcomes, published in *Connecticut Medicine* in 2014. Mullen brings her many talents to the administration of our Program.

While we celebrate the arrivals of VanCleave, Mullen, and Bell, we also will miss our outgoing leadership. Johanna Kalb served as the Liman Director since 2014, and while at Yale, she co-taught the Liman Workshop, *Rationing Law: Subsidizing Access to Justice in Democracies* in 2015 and the Liman Workshop, *Human Rights, Incarceration, and Criminal Justice Reform* in 2016. She has also worked with students and faculty on several Liman Projects, including a national survey of the conditions of isolation in jurisdictions across the United States. Based on this research, Kalb has, together with Professor Judith Resnik, submitted comments to the American Correctional Association's Committee on Restrictive Housing and to the Charles Colson Task Force on Federal Corrections. During her time at Yale, her casebook, *Human Rights Advocacy in the United States* (2014), with Martha F. Davis and Risa Kaufman, was published.

Sarah Baumgartel served as a Senior Liman Fellow in Residence from 2015–2016. While at Yale, she co-taught the Liman Workshop, *Human Rights, Incarceration, and Criminal Justice Reform*. She worked with students and faculty on several Liman Projects. Baumgartel also worked with Yale's Criminal Justice Clinic to study and recommend reforms to the Connecticut State parole revocation process, and as an advocate on behalf of incarcerated individuals seeking federal clemency. Baumgartel returned to the Federal Defenders in the Southern District of New York, where she had previously worked as a trial attorney.

Kathi Lawton, who has become the Program Coordinator for the Collaboration for Research Integrity and Transparency at Yale Law School, worked with the Liman Program since 2010. Each year, Kathi helped to shepherd a new class of law and summer fellows into their positions at legal advocacy organizations around the country. Every fall, she coordinated the distribution of the annual Liman Report to thousands of the Program's friends; every spring, she organized the annual Liman Colloquium. In 2015, Lawton oversaw our transfer to a new database technology, which will allow the Liman Program to maintain relationships across our many networks.



Abigail Rich, East Bay Sanctuary Covenant (Liman Fellow 2016–2017)



Monica Bell (Liman Fellow 2010–2011), PhD Candidate, Sociology & Social Policy, Harvard University; Climenko Fellow, Harvard Law School



Adrien Weibgen (Liman Fellow 2014–2016) and Norma D'Apolito, Director of Public Interest, Yale Law School



## Welcoming the Incoming Liman Fellows, 2016–2017

The Arthur Liman Public Interest Program is delighted to announce the appointment of six new Fellows—bringing the number of Yale Law School graduates who have received Liman Fellowships since the Liman Program began in 1997 to 114. In addition, we have provided extensions to seven of our current Fellows.

The new Fellows are working on a wide-ranging set of projects, detailed below. The cross-currents among their work are substantial, as all are concerned with how inequality affects the justice system. Some Fellows are focused on improving access to counsel for asylum seekers and indigent criminal defendants. Others are pressing for better policing policies, less pre-trial detention, more protections for children in the criminal justice system, and limits on the use of court fines and fees for those who cannot afford to pay them.

The Liman Fellows bring a remarkable array of commitment and skills to these problems, and we are grateful to be able to support their efforts.



**Dwayne Betts** will spend his fellowship year at the New Haven Office of the Public Defender, where he will seek to ensure that children charged with crimes are not transferred to the regular criminal court, where they could face incarceration in prison and the lifelong consequences of a felony conviction. While a student at Yale Law School, Betts was a student co-director of the Criminal Justice Clinic and of the Rebellious Lawyering Conference, the nation's largest student-led public interest lawyering conference. He received a BA from the University of Maryland and an MFA from Warren Wilson College's MFA Program for Writers. Betts is the author of *Bastards of the Reagan Era* (2015); *A Question of Freedom: A Memoir of Learning, Survival, and Coming of Age in Prison* (2010); and *Shahid Reads His Own Palm* (2010).



**Kory DeClark** is spending his fellowship year at the San Francisco Public Defender's Office, where he has joined the new Pretrial Release Unit, focusing on challenging the unnecessary pretrial incarceration of indigent defendants. Kory earned a BA in philosophy at the University of California, Davis, and a PhD in philosophy at the University of Southern California. His dissertation, *On Being Bound: Law, Authority, and the Politics of Obligation*, focused on the nature of authoritative relationships between states and citizens. DeClark graduated from Yale Law School in 2015, where he was a student co-director of the Criminal Justice Clinic, and then clerked for the Honorable William A. Fletcher of the U.S. Court of Appeals for the Ninth Circuit.



**Corey Guilmette** joined the Public Defender Association in Seattle, where he is working to prevent the discriminatory enforcement of trespass policies, which often target communities of color and the homeless. Guilmette is a member of the Yale Law School Class of 2016 and graduated from Wesleyan University in 2013. During law school, Guilmette participated in the Criminal

Justice Clinic, the Liman Project, and the Green Haven Prison Project.



**Devon Porter** is spending her fellowship year with the ACLU of Southern California. Although criminal defendants have constitutional rights to state-provided lawyers, many counties impose fees—to be paid after the services have ended. Porter is working to lower these economic barriers through advocacy and litigation. Porter graduated from Reed College in 2011 and from Yale Law School in 2015, where she worked with the Liman Project to gather national data on solitary confinement in prison systems across the country. She clerked for the Honorable Richard A. Paez of the U.S. Court of Appeals for the Ninth Circuit.



**Abigail Rich** has joined the East Bay Sanctuary Covenant in Berkeley, California, to provide legal services that are integrated with mental healthcare for refugees with histories of trauma. Rich is working to develop partnerships with mental healthcare facilities to serve asylum seekers with post-traumatic stress disorder; providing direct legal representation to asylum seekers; and creating educational materials to assist in serving refugee clients dealing with trauma. A member of the Yale Law School class of 2016, Rich has participated in the Immigration Legal Services Clinic, the Worker and Immigrant Rights Advocacy Clinic, the Landlord Tenant Clinic, and the International Refugee Assistance Project. She graduated from Washington University in St. Louis in 2009.



**Jonas Wang** is spending the fellowship year with the Civil Rights Corps, based in Washington, DC, which aims to stop practices that result in putting people in jail because they are too poor to pay fines and fees. Wang is gathering information in Louisiana, Alabama, and Georgia on the effects of criminal justice

finances and working on litigation challenging their inappropriate imposition. A member of the Yale Law School class of 2016, Wang participated in the Veterans Legal Services Clinic and

served as an Articles Editor of the *Yale Law Journal*. Wang graduated Phi Beta Kappa from Harvard College in 2012 and received the Ames Award for service.

## Fellowship Extensions, 2016–2017

This year, the Liman Program is granting extensions to several Fellows to continue and expand upon the work of their initial fellowship year. As described below, the work of these Fellows covers a diverse set of practice areas, from public defense to prisoners' rights, immigration to housing, and disability rights advocacy to juvenile justice. The Liman Program is pleased to support the Fellows' ongoing work and dedicated advocacy.

**Anna Arkin-Gallagher** joined the Louisiana Center for Children's Rights (LCCR) in 2014 to provide civil legal services to young people involved in the New Orleans juvenile justice system. She has received an extension to create and staff legal clinics for young people in the New Orleans community and to develop a new project addressing the educational needs of youth held in pretrial detention. Arkin-Gallagher, who graduated from Yale College in 2004 and from Yale Law School in 2009, previously worked in the Civil Action Practice of the Bronx Defenders. There, she provided comprehensive civil legal representation for clients in need of assistance with housing, employment, education, and civil rights.

**Caitlin Bellis** will continue for a second year at Public Counsel in Los Angeles, where she divides her time between representing detained immigrants in deportation proceedings and working with a community coalition to establish a publicly-funded program providing counsel to detained immigrants in the Los Angeles area. Bellis is a 2014 graduate of Yale Law School and a 2010 graduate of Reed College, where she studied Spanish and Anthropology. At law school, Bellis was a participant in the Worker and Immigrant Rights Advocacy Clinic. Bellis clerked for the Honorable Richard A. Paez of the U.S. Court of Appeals for the Ninth Circuit.

**Jamelia Morgan** has received an extension to continue working with the ACLU's National Prison Project on efforts to limit solitary confinement in American prisons. Through litigation, administrative advocacy, and community organizing, she is working to build awareness of the particular challenges facing prisoners with physical disabilities who are placed in isolation. Morgan graduated from Stanford University in 2006 and from Yale Law School in 2013; she was a member of both the Criminal Defense Clinic and the Detention and Human Rights Clinic. She clerked for the Honorable Richard W. Roberts of the U.S. District Court for the District of Columbia.

**Freya Pitts** will continue for a second year at Disability Rights Advocates in Berkeley, California, where she works on behalf of young people with mental health issues and learning disabilities who are confined in California's county juvenile halls. Her focus is on expanding access to special education and related services

and limiting the use of solitary confinement. Pitts, a member of the Yale Law School Class of 2013, clerked for the Honorable Judith W. Rogers of the U.S. Court of Appeals for the District of Columbia Circuit and for the Honorable Jon S. Tigar of the U.S. District Court for the Northern District of California. While in law school, she was a member of the Lowenstein International Human Rights Clinic, the Immigration Legal Services Clinic, and the Advocacy for Children and Youth Clinic. She graduated summa cum laude from Yale College in 2008.

**Ryan Sakoda** has received an extension to spend a second fellowship year at the Committee for Public Counsel Services (CPCS)—Massachusetts's public defender agency. At CPCS, he helps individuals who have been convicted or have pending charges to keep or to obtain public and subsidized housing. Sakoda provides direct services to clients and does empirical research on the interaction between the criminal justice system and public housing policies. Sakoda graduated from Yale Law School in 2012 and is a PhD candidate in economics at Harvard; his research focuses on the empirical analysis of crime and criminal justice policy. Prior to law school, Sakoda was a Fulbright Scholar at the London School of Economics and a Peace Corps Volunteer in Ukraine. He graduated from the University of California, Berkeley in 2003.

**Ruth Swift** will continue for a second year with the Jefferson County Public Defender's Office in Birmingham, Alabama, to advise colleagues and defendants on the immigration consequences of criminal proceedings for those defendants who are not citizens. Swift works to train defenders on the intersection of immigration and criminal law and to ensure that Alabama's growing immigrant population is well served when brought into the criminal justice system. Swift is a member of the Yale Law School class of 2015; she graduated from Hastings College in Nebraska in 2012. During law school, she was an active member of the Worker and Immigrant Rights Advocacy Clinic.

**Mary Yanik** has received an extension to spend a second year with the New Orleans Workers' Center for Racial Justice where she provides legal support for guest workers facing an array of problems in the Gulf Coast energy sector. Her work will focus on administrative advocacy, civil litigation, and immigration

defense to protect workers who face retaliation for reporting workplace violations. Yanik graduated from Yale Law School in 2014, where she participated in the Worker and Immigrant Rights Advocacy Clinic. Before law school, she was an organizer

for United Students Against Sweatshops. She attended the University of Maryland and graduated in 2011. Yanik clerked for the Honorable David F. Hamilton on the U.S. Court of Appeals for the Seventh Circuit.

## The Fellowships Completed, 2015–2016

This past year, four Liman Fellows completed their fellowships in the fields of veterans' legal services, capital defense, community development, and fairness in the workplace. All four of the outgoing Fellows have taken on positions as staff attorneys with their host organizations.

**Dana Montalto** has completed her second fellowship year at the Veterans Legal Clinic of the Legal Services Center and the Home Base Program in Boston. Through individual representation and systemic advocacy, she assisted veterans who did not receive honorable discharges to gain access to treatment and benefits. Montalto 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** has finished a second fellowship year with the Capital Division at Orleans Public Defenders in New Orleans, where he assisted in the trial-level representation of people facing the death penalty. Vogel also helped to represent juveniles facing sentences of life in prison without parole. Vogel is a graduate of Yale Law School and Yale Divinity School; while he was in New Haven, Vogel was active in the Worker and Immigrant Rights Advocacy Clinic. Following graduation, he clerked for the Honorable Keith P. Ellison of the U.S. District Court for the Southern District of Texas. Prior to law school, Vogel, a 2001 graduate of Harvard College, worked with homeless people at New York City's Catholic Worker.

**Adrien A. Weibgen** concluded a second fellowship year at the Community Development Project of the Urban Justice Center in New York, representing community groups in dealing with issues related to land use, development, and neighborhood change. Weibgen provided trainings, technical assistance, and legal support to community groups in neighborhoods facing re-zoning so as to protect their rights and negotiate appropriate agreements with developers. Weibgen graduated from Yale Law School in 2014.

**Molly Weston** spent a second year at A Better Balance in New York City, where she worked to enforce that city's Earned Sick Time Act, providing workers with paid time off when they or their families are sick, injured, or receiving medical treatment. During her fellowship years, Weston also supported efforts to enact family-friendly legislation around the country. Weston, a member of the Yale Law School class of 2013, clerked for the Honorable Thomas L. Ambro of the U.S. Court of Appeals for the Third Circuit in Wilmington, Delaware. She graduated with High Honors in Political Science from Swarthmore College in 2010, where she was a Lang Opportunity Scholar.



*Freya Pitts, Disability Rights Advocates (Liman Fellow 2015–2017); Dana Montalto, Staff Attorney, Veterans Legal Clinic, Harvard Law School (Liman Fellow 2014–2016); Jamelia Morgan, ACLU National Prison Project (Liman Fellow 2015–2017); Mary Yanik, New Orleans Workers' Center for Racial Justice (Liman Fellow 2015–2017); Caitlin Bellis, Public Counsel in Los Angeles (Liman Fellow 2015–2017); Ryan Sakoda, Committee for Public Counsel Services (Liman Fellow 2015–2017); Adrien Weibgen, Staff Attorney, Community Development Project of the Urban Justice Center (Liman Fellow 2014–2016)*



## The 2016 Summer Fellows

The Liman Program is delighted to announce the 2016 class of Liman Summer Fellows, coming from Barnard, Brown, Harvard, Princeton, Spelman, Stanford, and Yale. Including the incoming group, the Liman Program has supported more than 370 students, and as of this year, undergraduates at Stanford University became eligible to serve as Liman Summer Fellows.

This is also the year in which we welcomed the inaugural class of Judith Kaye-Arthur Liman Summer Fellows from Barnard College. Judith Kaye, who died in 2016, spoke at the dinner of the first Liman Colloquium, which inaugurated the Liman Chair at the Law School. Her path crossed with Arthur Liman's many times over the course of their careers. As is recounted in his book, *Lawyer*, they first met in 1975 when both were working on what is called "the Great Salad Oil Scandal of 1963," which involved efforts to manipulate the market in soybeans. After a distinguished career practicing law, Judith Kaye became the first woman to serve as New York's chief judge and provided remarkable leadership in creating a host of programs to improve access to courts and to protect the rights of children.



### Barnard Kaye-Liman Summer Fellows

Isadora Ruyter-Harcourt '16, Southern Center for Human Rights, Atlanta, GA

Evan Zavidow '17, Queer Detainee Empowerment Project, New York, NY (not pictured)

Marielle Greenblatt '17, ACLU Immigrants' Rights Project, New York, NY



### Brown Liman Summer Fellows

Sabiya Ahamed '17, Rhode Island Center for Justice, Providence, RI

Alexis Durand '16, Southern Environmental Law Center, Nashville, TN

Maya Finoh '17, Ella Baker Center, Oakland, CA

Marina Golan-Vilella '17, ACLU National Prison Project, Washington, DC



### Harvard Liman Summer Fellows

Alyssa Chan '16, Food Law and Policy Clinic, Harvard Law School, Cambridge, MA (not pictured)

Bailey Colfax '19, Equal Justice Initiative, Montgomery, AL

Jessica Fournier '17, Children's Rights, New York, NY

Rohan Pavuluri '18, Robin Hood Foundation, New York, NY (not pictured)

Varsha Varman '18, Greater Boston Legal Services, Boston, MA



### Princeton Liman Summer Fellows

Ryan Dukeman '17, U.S. Department of State, Washington, DC  
 Abigail Gellman '17, Brooklyn Defender Services, Brooklyn, NY  
 Yangyi Li '17, Tennessee Justice Center, Nashville, TN  
 Maria Perales '18, Centro De Los Derechos del Migrante, Mexico  
 James Sasso, JD/PhD, Harvard Law School—Criminal Justice Program, Cambridge, MA  
 Anthony Sibley '17, U.S. District Court, Southern District of Mississippi, Jackson, MS



### Spelman Liman Summer Fellows

Brianna Baker '16, Fulton County Juvenile Court, Atlanta, GA  
 Lauren Fleming '17, Planned Parenthood Southeast, Atlanta, GA  
 Shelby Patrice Smith '17, DeKalb County District Attorney, Decatur, GA



### Stanford Liman Summer Fellows

Lauve Gladstone '17, AWARE, Juneau, AK  
 Rodrigo Moreno '18, Brooklyn Defender Services, Brooklyn, NY  
 Oscar Sarabia Roman '17, ACLU Immigrants' Rights Project, San Francisco



### Yale Liman Summer Fellows

Lucia Baca '17, Community Justice Project, Miami, FL (not pictured)  
 Alero Egbe '17, Legal Action Center, Washington, DC (not pictured)  
 J.T. Flowers '17, Bronx Defenders, Bronx, NY (not pictured)  
 Max Goldberg '17, Dui Hua Foundation, San Francisco, CA  
 Kiana Hernandez '18, All Our Kin, New Haven, CT (not pictured)  
 Ezra Husney '17, Center for Responsible Home Education, Canton, MA  
 Anthony Kayruz '17, Florence Immigrant & Refugee Rights Project, Florence, AZ  
 Daisy Ramos '18, New York Lawyers for the Public Interest, New York, NY  
 Cindy Xue '17, New Haven Legal Assistance Association, Inc., New Haven, CT

# The Liman Public Interest Program

## The Liman Report is published by:

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*Photography by Harold Shapiro*

### **Please visit our website at [www.law.yale.edu/liman](http://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 Anna VanCleave. For information about hosting a Liman Summer Fellow or applying for a Liman Summer Fellowship, please contact Anna VanCleave or one of the Liman Faculty Advisors at the coordinating schools listed on this page.

#### **Yale Law School and Yale College**

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*Director, Arthur Liman Public Interest Program*

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*Professor of Psychiatry, and Head of Davenport College*

Kristen Bell  
*Senior Liman Fellow in Residence*

Laura Fernandez  
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*Liman Program Coordinator*

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## 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
- \$4,000 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    ☐ \$2,500    ☐ \$5,000    ☐ \$10,000    ☐ \$15,000    ☐ \$25,000    ☐ \$50,000

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\*Summer Program Support. Liman programs now exist at seven colleges and universities (Barnard, Brown, Harvard, Princeton, Spelman, Stanford, 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 60). 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 this form and donations to:***

***Anna VanCleave, Director, Arthur Liman Public Interest Program***

***Yale Law School, P.O. Box 208215, New Haven, CT 06520-8215***

***Phone: 203.436.3520 / Fax: 203.432.1426 / Email: Anna.VanCleave@yale.edu***

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—Arthur Liman, *Lawyer: A Life of Counsel and Controversy* (1998)

“Arthur’s contribution to the legal profession consists of his insistence on the two interwoven purposes of his career: that lawyering required giving clients honest advice attuned to the consequences to clients as well as to third parties, and that lawyering required devotion to the pursuit of fairness for everyone, not only one’s own clients.”

—Judith Resnik, Afterword: The Legacy of Arthur Liman,  
*Lawyer: A Life of Counsel and Controversy* (1998)

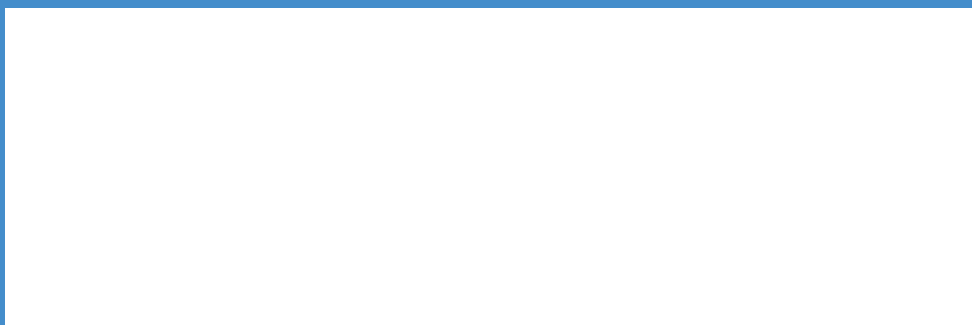


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The 2015–2016 Liman Law Fellows class with Arthur Liman Professor Judith Resnik, Senior Liman Fellow in Residence Sarah Baumgartel, outgoing Director of the Liman Program Johanna Kalb, and incoming Director of the Liman Program Anna VanCleave