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Imprisoned: Liman Reflects Four Decades After Attica

The topic of prisons is one that was central to Arthur Liman, who served as Special Counsel to a commission convened by New York State in the early 1970s to understand the causes of the uprising at Attica. The report by the New York State Special Commission opened: “Forty-three citizens of New York State died at Attica Correctional Facility between Sept. 9 and 13, 1971.” Thirty-nine were killed on September 13, as the state police came to retake the prison in an assault that was one of the “bloodiest one-day encounters between Americans since the Civil War.” What the *Attica Report* said then is all too relevant now:

The worrisome reality is that prisons, prisoners, and the problems of both are essentially invisible in the United States. We Americans have made our prisons disappear from sight as if by an act of will. We locate them mostly in places remote from view, [and] we emphasize security almost to the exclusion of rehabilitation.¹

For two days in March 2010, the Thirteenth Annual Liman Public Interest Colloquium—*Imprisoned*—interrupted that “worrisome reality” through a different kind of “act of will”—aiming to make visible the institutions of incarceration and the social contexts that produce them. Co-sponsored by the Oscar M. Ruebhausen Fund, the Jerome N. Frank Legal Services Organization, and Yale Law School, the Colloquium brought together some 400 people who explored various facets of the state of incarceration in contemporary America.

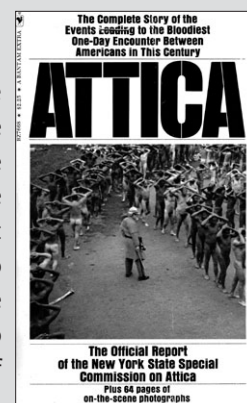
As the following essays, based on presentations at the 2010 Liman Colloquium, make plain, the participants – while coming from different vantage points—shared concerns about over-

Excerpts From *Attica: The Official Report Of The New York State Special Commission On Attica* (Bantam Books, 1972)

By way of backdrop, we provide a brief excerpt from the *Attica Report*:

The New York State Special Commission on Attica was asked to reconstruct the events of those September days and to determine why they happened... But the facts and the judgments disclose only the tip of the fiery hell that lies below. It is not enough to answer the doubts about the events themselves, or even to fix responsibility for defects of planning and performance...

Whatever explanation might be advanced for official failure to deal effectively with an emergency of crisis proportions, no excuse can justify the failure of the American public to demand a better system of criminal justice, from arrest, trial and sentencing to ultimate release from confinement. Chief Justice Burger has spoken of “correction systems that do not correct” and has warned that “our national trait of impatience has distorted our approach to the



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Imprisoned: Liman Reflects Four Decades After Attica

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reliance on incarceration and the costs it imposes on those inside and outside prison walls. Also acknowledged were the difficulties of shifting away from current trends. Yet the packed auditorium confirmed an intergenerational commitment to a version of criminal justice different from the current regime.

Excerpts From Attica: The Official Report Of The New York State Special Commission On Attica

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problems of prisoners and rehabilitation.” But, as he also observed, time is running out, particularly when we *know* better than we *do*. . . .

Members of the Commission, individually and collectively, are so persuaded of the urgency of these matters that we do not consider ourselves discharged from our original undertaking except in the most literal sense. The larger obligation to continue the search for a better and a more humane system of criminal justice, from arrest to release after imprisonment, requires the alert attention of every thinking citizen. . . .

Unless the cry to “Avenge Attica” can be turned to reforms that will make repetition impossible, all efforts will have been in vain. Change should not be lightly undertaken, but the status quo can no longer be defended. The only way to salvage meaning out of the otherwise senseless killings at Attica is to learn from this experience that our Atticas are failures. The crucial issues remain unresolved; and they will continue unresolved until an aroused public demands something better.

What did the Attica Commission recommend? The 1972 *Report* called for prisoners to have all the responsibilities of citizens except liberty—the right to mail, political views, religion, protection from summary disabilities, and minimum legal disabilities. The Attica Commission recommended that confinement be less restrictive; that prisoners have more access to press, to furloughs, and to work release; and that programs inside prisons should be “directed at elevating and enhancing dignity, worth and self confidence of inmates, not at debasing and dehumanizing them.” The *Report* further focused on the importance of the relationship between “inmates and officers,” often freighted by race and reflective of larger dynamics within the criminal justice system. As the *Attica Report* explained, “until the entire judicial system is purged of racism, . . . [t]he process of criminal justice will never fulfill either its promises or obligations.”

Incarceration American-Style

Sharon Dolovich

. . . American-style incarceration, through the conditions it inflicts, *produces* the very anti-social conduct society claims to abhor, and thereby guarantees a steady supply of offenders whose incarceration the public will continue to demand. The most obvious mechanism for this form of institutional parthenogenesis is the infliction of significant burdens on the incarcerated, both during the prison term and afterwards, which collectively increase the likelihood that they will commit new crimes after release.

In American prisons today, there is little effective drug treatment, although as many as half or more of incarcerated offenders have reported problems with drug and/or alcohol addiction. Nor is there anything like sufficient mental health care to provide adequate treatment for the estimated 56 percent of state prisoners who suffer from serious mental illness. The emphasis on custody over what might be termed “rehabilitation” means that whatever skills people may have had on admission are likely to deteriorate during their prison term, and also that few people are likely to develop new skills while in prison that will be useful to them on release.

Strict limits on visiting, combined with the high cost of phone calls from prison and the widespread practice of siting prisons far from the urban centers where prisoners’ families are most likely to live, mean that few people in prison are able to retain close family ties—even though “one of the predictors of post-release success is the quality of a person’s ongoing contact with loved ones.”

Grossly inadequate medical care leaves many prisoners with serious and/or chronic medical conditions which can impair successful reintegration. Severe overcrowding in often unhygienic conditions, together with what is frequently an absence of institutional strategies for preventing the spread of disease, means that prisoners face infection rates for HIV, hepatitis C, tuberculosis, and even staph that are far in excess of infection rates outside the prison. Add to this picture the multiplicity of civil disabilities—some formal, some informal—that make it hard for former prisoners to piece together the components of a stable life (home, family, work, schooling), and it should come as no surprise if many former prisoners are unable to avoid reoffending on release.

At the same time, the day-to-day experience of imprisonment can take a severe emotional and psychological toll, which, as Terry Kupers puts it, can “destroy prisoners’ ability to cope in the free world,” leaving them “broken, with no skills, and a very high risk of recidivism.” The experience of long-term incarceration alone can undermine a person’s capacity to function in a healthy “pro-social” way on the outside. But it is not only that those who have been to prison for committing a crime will face material and psychological challenges making them more likely to commit further crimes on release. It is also

that the experience of living under the conditions that currently define life in many of the nation's prisons and jails can do such psychological and emotional *damage* that at least some people subject to those conditions, whatever their character prior to imprisonment, will invariably come to resemble the image of the angry, unstable, anti-social, and potentially dangerous deviant that already justifies the state's persistent recourse to incarceration.

Consider the matter of personal space. As Justice Marshall noted in his dissent in *Rhodes v. Chapman*, "long term inmate[s]"

require a minimum amount of personal space if they are "to avoid serious mental, emotional, and physical deterioration."¹ But American prisons today are often chronically overcrowded, which means that people routinely live jammed into dormitories or doubled up in tiny cells designed for a single person, a situation that alone may seriously compromise prisoners' "mental [and] emotional" capacities, and which can readily give rise to anger, tension, and hostility—and thus to disorder and violence—even among people not typically prone to aggression.



Craig Haney, Judith Resnik, Sharon Dolovich, James Austin, and David Fathi

The Hardening of Prison Conditions

Panelists on *The Hardening of Prison Conditions* provided graphic details regarding the effects on inmates of prolonged solitary confinement, addressed the roles to be played by policymakers and by judges, and discussed what interventions could decrease the numbers confined in supermax.

"Judges have by and large accepted that months or years of almost total isolation, environmental deprivation and enforced idleness can be profoundly damaging to human beings. . . . The Supreme Court in 1940 referred to prolonged isolation as an instrument of torture to extract confessions. . . . Yet judges have proved reluctant to recognize recent challenges to supermax conditions. If exposure to second hand tobacco smoke can violate the Eighth Amendment—and the Supreme Court has told us that it can—then why not conditions that press the outer bounds of what most humans can endure?"

—David Fathi is Director of the ACLU National Prison Project, which has filed lawsuits challenging supermax and other highly restrictive conditions in correctional systems run by Mississippi, Virginia, and the federal government.

"A modern twenty-first century technology of surveillance and control was applied to brute eighteenth century logic of forceful domination and isolation. . . . In supermax . . . meals are served cellside each day, to be enjoyed just a few feet from your toilet and the bed where you sleep, inside the room where you are required to spend 23 hours

a day, completely devoid of normal human interaction, going for years without ever touching anyone with affection. . . .

Prisoners in supermax are suffering. [In our study of Pelican Bay prisoners], our attempt to find another group of prisoners comparably psychologically harmed led us to a study of East German political prisoners who sought psychiatric care for their symptoms after they had been released, but even they appeared to be less psychologically harmed than the Pelican Bay prisoners. . . . The era of mass incarceration and supermax has imperceptibly but inexorably shifted the terms of the debate about human treatment so that another kind of hardening has occurred. We are encouraged to argue only at the margins of these issues: How much harm is inflicted on people in these exotic and hidden places, and how much is too much? [W]e have begun to just get used to it, even though in any other context it is treatment that would be seen as cruel, degrading and inhuman."

—Craig Haney is Professor of Psychology at University of California at Santa Cruz and has researched the psychological effects of solitary confinement.

"There is a group of people who are in prison who are dangerous—they may not be dangerous in the future—but they are dangerous right now. . . . [T]he people we see today in supermaxes can change and change dramatically. The question we must ask is do we need to put them there and what can we do to facilitate that change. . . .

The number one thing I do is to have objective criteria applied as to who can be sent there . . . [instead] of wardens . . . exchanging bodies among themselves. . . . The other thing is setting up a program that tells people 'you will get out if you do certain things.' . . . We have been able to significantly decrease the supermax populations [in Ohio and Mississippi], and I leave you with hope that we can accomplish something."

—James Austin, President of the JFA Institute, worked as a counselor in a supermax facility early in his career and has since served as a consultant at the behest of plaintiffs, defendants, and courts.

At the same time, the increased use of solitary confinement as punishment for disciplinary infractions means that more and more prisoners are experiencing the damaging effects of isolation. In addition to producing those cases of extreme dysfunction that justify the ongoing use of punitive isolation, whether in supermax or under less extreme conditions, the profligate infliction of extended solitary confinement is also undermining the psychological and emotional capacities of innumerable prisoners who will at some point be released. Studies show that people who have lived in supermax are likely to be not only more erratic and violent in their behavior but also angrier. Craig Haney's research involving prisoners in the "secure housing unit" (SHU) of California's Pelican Bay facility found that "almost ninety per cent of [residents] had difficulties with 'irrational anger,' compared with just three per cent of the [prison's] general population." These combined effects on residents can lead to longer stays in isolation. But the self-perpetuating tendencies of supermax and other forms of solitary confinement have also meant that in a growing number of cases, prisoners are completing their sentences while in highly restrictive solitary confinement and being released directly to the community. Unsurprisingly, when prisoners are freed straight from any type of solitary confinement, "there is often trouble," since "[t]he anger that has been mounting during their stints in isolation causes many prisoners great difficulty controlling their tempers just after being released."² Thus, both crowding and isolation contribute to the reproductive logic of the prison, producing inmates whose anger, volatility, and general inability to function successfully in a social milieu are very likely to prompt disruptive and antisocial behavior both out in the free world and in the prisons themselves. Such behavior, in turn, seems to validate the collective commitment to the ongoing use of ever more restrictive forms of carceral restraint.

The degradation of prisoners provides a pat normative justification for the perpetuation of the whole carceral system. If prisoners are "a breed apart," and if, despite knowing the consequences, they persist in their "choice to be bad,"³ then perhaps there is nothing left for society but to shut them out of the public space altogether, in a place where the threat they pose can be contained. In this way, society never has to confront the fact that the perceived need to control an out-of-control population may stem from the conditions, both inside and outside the prison, to which the incarcerated have been subjected. The absence of any meaningful re-integrative project is thus revealed as both cause and effect of the system's reproductive success; without such a project, prisoners' re-entry efforts will in many cases be doomed to fail, and one can expect no real social investment to reintegrate those regarded as (non) people unfit for society. Here is an effective recipe for the twin moves of social abandonment and continued carceral control, as those who have been incarcerated and subsequently deprived of any meaningful social or psychological support are sure to become ever more marginalized from the body politic, and the

more marginalized they become, the more likely they are to wind up back in prison.

The self-perpetuating character of the American carceral system will not be disrupted until society as a whole begins to see that it is fellow human beings we are incarcerating.

Sharon Dolovich is Professor of Law at UCLA School of Law; this essay is excerpted from an article of the same name, published in 3 Harv. L. and Pol'y. Rev. 237 (2009) and draws on other work, including Cruelty, Prison Conditions and the Eighth Amendment, 84 N.Y.U. L. Rev. 881 (2009).

Supermax and the Judiciary

Judith Resnik

According to research from the Pew Center, as of 2008, more than 2.3 million people were in jails and prisons in the United States. The Center's report "One in 100: Behind Bars in America 2008" focused on the racial impact of incarceration; while one in 100 adults is in prison, for African American males, "ages 20 to 34," the figure is "1 in 9."¹ Further, in 2008, more than 378,000 people had been held by Immigration and Customs Enforcement (ICE) in some 300 detention facilities; daily counts run at about 31,000 in detention.²

Numbers and race are two factors shaping American prisons. Another is the development, in the last few decades, of a new level of secured incarceration in facilities called "supermax," subjecting inmates to a level of confinement beyond that in high security or temporary punitive segregation. These facilities rely on a practice of prolonged isolation that one physician termed a "hellhole."³

Details of one supermax, opened in Ohio in 1998 to confine more than five hundred prisoners, come from a 2005 unanimous Supreme Court decision, *Wilkinson v. Austin*, 545 U.S. 209 (2005). Conditions there were:

more restrictive than any other form of incarceration in Ohio, including conditions on its death row.... [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, though it is sometimes dimmed, and an inmate who attempts to shield the light to sleep is subject to further discipline. During the one hour per day that an inmate may leave his cell, access is limited to one of two indoor recreation cells.

Incarceration . . . 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 in the inmate's cell instead of in a common eating area. Opportunities for visitation are rare and in all events are conducted through glass walls. It is fair to say [supermax] inmates are deprived of almost any environmental or sensory stimuli and of almost all human contact.

Aside from the severity of the conditions, placement at [the supermax] is for an indefinite period of time, limited only by an inmate's sentence. For an inmate serving a life sentence, there is no indication how long he may be incarcerated . . . once assigned there.

One might think that such a description would lead to a prohibition—that individuals could not be subjected to isolation, sensory deprivation, and observance indefinitely. Indeed, in 1890, the Supreme Court had objected to the solitary confinement of a person convicted of murder; the Court described that, “after even a short confinement,” such detention put a prisoner “into a semi-fatuous condition,” making him unable to “recover sufficient mental activity to be of any subsequent service to the community.”⁴ About a century later, in the 1970s, the Court approved district court findings that Arkansas’s use of indefinite punitive isolation (in that instance, an “average of 4 . . . prisoners were crowded into windowless 8’x10’ cells containing no furniture other than a source of water and a toilet that could only be flushed from outside the cell”) violated the Eighth Amendment.⁵ Several lower court decisions addressing prison conditions in various parts of the United States limited the duration of isolation and regulated the process for placement.

In 2005, in the *Wilkinson* case, the Eighth Amendment issue was not directly before the Court, as some claims relating to the constitutionality of conditions had been dealt with by way of settlement. Although an amicus brief by health care professionals documented the disabling effects of supermax and the limited evidence of its utility, none of the justices pursued a discussion of whether, if challenged, courts ought to consider banning long-term isolation. The decision was not, however, silent on the question of supermax; rather the opinion appeared to bolster its legitimacy. Justice Kennedy’s opinion commented on the fearsomeness of inmates and the fragility of prison security; the Court described the institution as “imperiled by the brutal reality of prison gangs, . . . [c]landestine, organized, fueled by race-based hostility, and committed to fear and violence.” The *Wilkinson* Court further advised that the “harsh conditions [of supermax] may well be necessary and appropriate in light of the danger that high-risk inmates pose both to prison officials and to other prisoners.”

The Court’s gruesome details (“almost all human contact is prohibited, even to the point that conversation is not permitted from cell to cell”) served as a way to distinguish supermax placements from other decisions made by prison officials that had, over the last twenty years, been insulated from court oversight. In the 1970s, the Court affirmed that the Constitution did not stop at the prison door, and the Court obliged correctional officials to provide procedural safeguards when disciplining prisoners by taking away good-time or by placing persons in administrative or punitive segregation.⁶

But over the last decades, the Court retreated from that level of engagement with prisoners. Instead, the Court concluded that conviction and incarceration extinguished most liberty

interests of prisoners, and the justices limited judicial review of various prison officials’ rules, such as restrictions or prohibitions on visitors,⁷ prisoner transfers from one facility to another,⁸ and placement in segregation after alleged disciplinary infractions.⁹ Under current doctrine, absent a showing of an “atypical and significant hardship,”¹⁰ no federal judicial intervention is permissible.

The Court’s detailed description of the isolating conditions at the Ohio Supermax, however, sufficed to constitute a “dramatic departure from the basic conditions of [the inmate’s] sentence.” Because Ohio’s supermax imposed an “atypical and significant hardship,” prisoners had a “protected liberty interest in avoiding assignment” to the Ohio Supermax Prison.

That appraisal had been the basis for the trial judge in the *Wilkinson* litigation to install a system of court-based oversight of the substantive grounds for solitary confinement—that certain kinds of minor infractions could not result in that severe a sanction. Further, the lower courts had detailed procedural protections required for placements. In contrast, the Supreme Court cut back on the lower courts’ imposition of more procedural requirements (such as a right of review of the supermax placement) and reinstated Ohio’s minimal process. All that was required was notice of “a brief summary of the factual basis for the classification,” and “a rebuttal opportunity” at the two levels of internal review. Detained prisoners could not present adverse witnesses; the Court concluded that any right to confront adverse witnesses was outweighed by the state’s interests in order and control. The obligation for a short statement of reasons for confinement was, according to the Court, enough to buffer against “arbitrary decision-making.”

Since the ruling, a few forms of solitary confinement have been found actionable, such as “28 to 35 year confinements” in lockdown in the Louisiana State Penitentiary in Angola.¹¹ But courts also have rejected a variety of claims, including the isolation of a prisoner for an aggregate of thirty months, the transfer of an individual for six weeks to isolation pending the investigation into his culpability for a prison murder, and a three-year stint in segregation.¹² On the other hand, a few lower court judges have found for prisoners. As Judge Terence Evans of the Court of Appeals for the Seventh Circuit began one opinion reinstating a case that the lower court had dismissed:

Stripped naked in a small prison cell with nothing except a toilet; forced to sleep on a concrete floor or slab; denied any human contact; fed nothing but “nutri-loaf”; and given just a modicum of toilet paper—four squares—only a few times. Although this might sound like a stay at a Soviet gulag in the 1930s, it is, according to the claims in this case, Wisconsin in 2002.¹³

Judith Resnik is the Arthur Liman Professor of Law at Yale Law School. These comments are adapted from Resnik’s article, Detention, The War on Terror, and the Federal Courts, 110 Colum. L. Rev. 579 (2010).

Over-incarceration and Decarceration

Over-incarceration and Decarceration reflected on the four-fold increase in prison populations since the 1980s and considered possible methods to reverse the growth.

“The inequality created could be said to be invisible, cumulative, and intergenerational. Invisible because it is a concentrated and segregative, hidden from mainstream society. . . . There is a collective responsibility as well as individual responsibility at work in the processes that produce these social dysfunctions that we then respond to with imprisonment.”

– Glenn Loury is the Merton P. Stoltz Professor of the Social Sciences and Professor of Economics at Brown University and author of *Racial Stigma, Mass Incarceration and American Values* (MIT Press, 2008).

“For many, the greatest shame of our carceral regime is not its size, but its deeply racialized character.”

– Kate Stith is the Lafayette S. Foster Professor of Law at Yale Law School and co-author of the book, *Fear of Judging, on the federal sentencing guidelines*.

“There is a form of racial blindsight that is in operation that has obscured the moral and social consequences of [increased incarceration rates]. . . . Where the police choose to put their strategic choices, what they choose to enforce, and against whom is a very large part of the supply of possible offenders. . . . Of 18- to 19-year-old African-American men in the City of New York [in 2007], the probability of being stopped at least once by police was 80 percent. The comparable datapoint for Hispanics was 38 percent, and for white men, 10 percent.”

– Jeffrey Fagan is the Professor of Law and Public Health at Columbia University, Director of the Center for Crime, Community and Law at Columbia Law School, and co-editor and co-author of *Legitimacy, Criminal Justice, and the State in Comparative Perspective* (Russell Sage Foundation Press, 2008).

“One has to ask whether [incarceration] is worth it. . . . And to answer that question, we have to look beyond the people—most often men of color—who are incarcerated. . . . We must also look at the impacts on the communities from which people who are imprisoned come from and to which they return. The effects are

not straightforward. While it can be a benefit for some people to be removed . . . it is also true that we can predict that removing large numbers of demographically and geographically concentrated people impacts negatively a community’s ability to engage in strategies, behaviors, and norms that keep that community safe and that perpetuate norms of law-abidingness.”

– Tracey Meares is Deputy Dean and the Walton Hale Hamilton Professor of Law at Yale Law School, and author of *Punishment, Deterrence and Social Control: The Paradox of Punishment in Minority Communities*, 6 *Ohio St. J. Crim. L.* 173 (2008) (with Jeffrey Fagan).

“We have entered an era of stability—the phenomenon of mass incarceration is going to be our social reality for the next generation unless we can find a game-changer. . . . We now live in an era when imprisonment is the province of the legislature much more than it ever was in the



Kate Stith (moderator), Glenn Loury, Jeremy Travis, Tracey Meares, and Jeffrey Fagan

past. . . . Any effort to reduce prison populations must deal with that reality. . . . So the question is: What will be the political game-changer? I am hoping for a far-sighted candidate for governor who makes a three-part pledge: My state will lead the nation by reducing the prison population while simultaneously reducing crime rates by half, and we will reinvest the savings in public higher education. The idea is to tie a crime reduction pledge to prison reduction and community reinvestment. We have examples of success from across the country. The question is do we have the will to make it happen.”

– Jeremy Travis is President of John Jay College of Criminal Justice at the City University of New York, and author of *Prisoner Reentry and Crime in America* (Cambridge University Press, 2005).

From Realism to Hope

Alice Ristroph

America is imprisoned. With over two million people incarcerated, the nation has the highest documented incarceration rate in the world. And the numbers may not even capture the full sense in which America is imprisoned. The country seems to be trapped in policing and sentencing practices that leave everyone dissatisfied. . . . It is easier, however, to amass data on the pathologies of the criminal justice system than it is to devise agendas for reform. James Forman, Professor at Georgetown University Law Center . . . noted the darkness that had shadowed many of the Liman Colloquium's presentations. . . .

To get out of our metaphorical prison, and to get men and women out of literal prisons, we need realism without despair. It is important to acknowledge, as many Colloquium participants did, the obstacles to legislative reform, the incentives for the executive branch to pursue aggressive penal policies, and the reluctance of the judiciary to limit the sentences selected by the other branches. Nevertheless,

reasons for hope occasionally present themselves, and two such opportunities followed closely on the heels of the 2010 Liman Colloquium.

Less than two weeks after the Colloquium, the Pew Center on the States announced that after almost four decades of steady year-to-year increases, state prison populations had decreased from 2009 to 2010.¹ The change was small—only a few thousand prisoners, or less than half of one percent of the total population in state prisons. And budget pressures in tough economic times (rather than more enduring policy changes) explain some of the decline, though the Pew report emphasized that other factors were at work as well. But even if the Pew report reflects no radical change, it demonstrates that incarceration trends are not necessarily a one-way ratchet. As the Pew Center and other researchers gather more data on the decrease in state prisoners, specific strategies merit more attention. In particular, the diversion of non-violent offenders from prison and the development of better community resources for probationers and parolees seem promising strategies for criminal justice reform.



Martin Horn, Lynn Branham, Rebekah Tosado, Kathy Boudin, Alice Ristroph and James Forman, Jr.

Changing Prison Conditions and Cultures

Changing Prison Conditions and Cultures explored the roles played in prison reform by standards promulgated by organizations such as the American Bar Association, decision-making by prison officials, statutory limits on incarceration rates, and prisoner participation in institutional governance.

"A great thing about this conference . . . is just the number of people that are in this room. . . . All of these incredible people in this room, working very hard and from many different vantages, but we are losing. . . . [W]hat it is that we need to do differently in the next ten years?"

— James Forman, Jr. is Professor of Law, Georgetown University Law Center and Visiting Clinical Professor, Yale Law School (Spring 2011); recent publications include *The Secret History of School Choice: How Progressives Got There First*, 93 *Georgetown L. J.* 1287 (2010).

"There have been articles in the *New York Times*, the *Washington Post*, Congressional hearings and reports from every NGO about the state of conditions for immigration detainees—but none of this has changed the culture of immigration detention. Still, there is hope, and a lot of work going on."

— Rebekah Tosado is Senior Advisor in the Department of Homeland Security's Office for Civil Rights and Civil Liberties.

"I don't think we can speak about prison culture without disaggregating it. Prisons exist within the wider political and cultural climate. I might be so bold as to say that society gets the prisons that it wants. . . . We have to recognize that the wider culture is today driven more than ever by the public media demonization of the people who live in prison as well as the people who work in prison. . . . Prison leaders must say to the people they supervise, who are we and what do we represent. . . . That takes time. Prisons and jails operate because the prisoners inside allow us to do so. . . . We have to have legitimacy in the way we manage prisons. We teach respect for the law by exhibiting respect for the law. . . ."

— Martin Horn, Distinguished Lecturer at John Jay College of Criminal Justice at the City University of New York, is former Correction Commissioner and Probation Commissioner for the City of New York.



Alice Ristroph

Two months later, the Supreme Court offered another glimmer of hope, in an opinion that was at least tangentially itself about hope. In *Graham v. Florida*, the Court held that life imprisonment without the possibility of parole is a cruel and unusual punishment when imposed on a juvenile offender who did not commit homicide.² The majority reasoned that life imprisonment without parole, as opposed to a long prison term with periodic parole review, was a distinctively severe sentence in that it denied the prisoner not only freedom, but hope. As with the Pew Center report, the news is at best reason for cautious optimism. *Graham* does not actually promise shorter sentences for juvenile offenders. Instead, a juvenile offender need only be afforded “some realistic opportunity to obtain release,” and the *Graham* majority offers almost no guidance on the issue of what makes an opportunity for parole into a realistic one. Nevertheless, the ethos of the decision is promising. It demonstrates that the Court is still willing, at least in some cases, to apply the Constitution as a meaningful limitation on states’ power to punish. And the Court’s characterization of the denial of hope as a factor affecting the severity of punishment could open the door to greater scrutiny of solitary confinement, security classifications, and other dimensions of prison conditions that render a sentence more severe without necessarily extending its duration.

Neither the Pew Center report nor the *Graham* decision is reason to forget the grim realities of American criminal justice discussed at the Liman Colloquium. But both developments illustrate that while the pathologies of prisons are our problems, they are not our only option.

Alice Ristroph is Associate Professor of Law at Seton Hall University School of Law; this essay draws on Respect and Resistance in Punishment Theory, 97 CAL. L. REV. 601 (2009) and State Intentions and the Law of Punishment, 98 J. Crim. L. & Criminology 1353 (2008).

“The Mess We’re In”: Five Steps to Get Out

Lynn S. Branham

I once saw a sign that serves as a reminder of the importance of details. The sign said:

“Let’s eat, Grandpa.”

“Let’s eat Grandpa.”

What a difference one small detail—in this case, a comma—can make.

Whether proposals for reforming prison conditions and changing prison cultures can realize their objectives depends on myriad details. Some of those details bear on the content of those proposals. Others relate to their implementation. But while it behooves us to remember that “the devil (or his counterpart) is in the details,” I have set forth below five abbreviated proposals designed to overhaul prisons and transform prison cultures.

Recommendation #1: Each state and the federal government should establish a maximal limit on the per-capita imprisonment rate for that jurisdiction that is dramatically lower than the current national rate, and should adopt mechanisms to implement and enforce that limit responsibly. These per-capita imprisonment caps—whether half the current national rate or even lower—will free us from a mindset fixated on the status quo. This inertia-driven mindset leads, at best, to changes in prison conditions only at the margins and helps to foster unrelentingly high recidivism rates. As President Ronald Reagan once aptly observed, “Status quo, you know, that is Latin for the mess we’re in.”

It bears emphasizing that the proposal calls for each state and the federal government to establish a firm cap on their imprisonment rates. The taking of what, by comparison, is the tepid step of setting only a goal to decrease the imprisonment rate would not suffice. Rather, each jurisdiction would need to emplace this cap in a statute, making the cap not just an aspiration, but a codified requirement.

Recommendation #2: Each state and the federal government should develop a comprehensive plan to ensure that the public is aware of conditions and operations in that jurisdiction’s prisons. The plan should include, among other components, the establishment of an independent, public entity to monitor, and report publicly on, conditions in the prisons. These entities should meet the “Key Requirements for the Effective Monitoring of Correctional and Detention Facilities” promulgated by the American Bar Association.¹

Five of the twenty requirements endorsed by the ABA for the effective monitoring of prisons particularly warrant highlighting:

1. The independent, public monitoring entity would have the duty to inspect, on a regular basis, each prison in the jurisdiction.

2. The monitoring entity would have the authority to conduct scheduled and unannounced inspections of the prisons at any time, day or night.
3. The monitoring entity would be vested with the authority to examine all facets of a prison's operations and conditions.
4. The monitoring entity's reports on a prison would be public and readily accessible. They would be posted on the Internet as well as distributed to the media, the legislature in that jurisdiction, and its top elected official—the governor or the president.
5. Facility administrators would be required to develop and implement, with dispatch, action plans to resolve problems identified in a monitoring report. And they would need to inform and update the public every six months on their implementation progress.

Recommendation #3: To transform prison cultures, prisons should be suffused with a restorative-justice ethos. A premise of restorative justice is that people convicted of a crime have the responsibility to repair, to the extent possible, the harm caused by their criminal conduct. Obviously, restorative aims can be achieved much more readily when individuals remain within the community while being held accountable for their criminal misdeeds. But for those who must be confined in

was convicted who can impress upon the prisoner the real-life impact of his or her crime; (3) prison work programs that produce goods or services that benefit the neighborhoods most directly affected by prisoners' crimes; and (4) opportunities to live in faith-based prison units. Restorative justice principles should also be integrated into prison disciplinary processes so that prisoners become more cognizant of the harm their misconduct inflicts on the prison community and have the opportunity to remedy that harm.



Avram Ludwig, film producer

Recommendation #4: Each prisoner should be assigned a trained and dedicated mentor at the outset of his or her imprisonment. Mentors can provide significant assistance in preparing prisoners for their return to the community. But the assignment of a mentor to a prisoner at the very beginning of the prisoner's confinement can serve another laudable purpose, mitigating the debilitating isolation from the outside world that attends incarceration. And the support and encouragement of mentors can help to eradicate the hopelessness, despair, and bitterness that, today, permeate prisons.

Recommendation #5: Prisoners should play a central role in the development of their reentry plans, whose implementation would commence upon incarceration and would encompass involvement in prison programs and other constructive activities. There is a tendency for people to want to intercede in prisoners' lives and "fix" them. But if reentry plans are to be effective and if visible and comprehensive efforts to prepare prisoners for reentry are going to alter prison cultures for the better, prisoners need to be in the forefront, not at the sidelines, in the preparation of those plans. Assigning prisoners this responsibility will bring them something that is so elusive in prisons . . . hope. And treating prisoners not as objects, but as the human beings they are, no matter how despicable their prior acts, will demonstrate an unflagging commitment to human dignity. It is that commitment that will be the essential underpinning of any endeavor to transform prison cultures.

Lynn Branham is Visiting Professor of Law at the St. Louis University School of Law and Washington University School of Law. She is co-author of The Law and Policy of Sentencing and Corrections (8th ed., Thomson Reuters/West, 2009) and chaired the American Bar Association's Prison Litigation Reform Act Task Force and Subcommittee on Effective Prison Oversight.



Margaret Love, former U.S. Pardon Attorney, and The Hon. Guido Calabresi, former Dean of Yale Law School, Sterling Emeritus Professor of Law, and Senior Judge for the U.S. Court of Appeals for the Second Circuit, speak with Lynn Branham.

prison, effective structures and processes should be in place in each prison to make restorative justice a shared and expected norm. Those structures and practices, if contoured properly, would enable prisoners to understand the harm their crimes have caused others and to redress that harm as much as it is possible to do so.

Examples of mechanisms for reorienting the culture and normative values in prisons towards restorative justice include: (1) victim-offender mediation programs; (2) victim-impact panels comprised of victims of the crime of which a prisoner

Recognizing People in Prison as Partners for Change

Dr. Kathy Boudin

As I sat in the packed and energized auditorium at the Yale Law School Liman Colloquium *Imprisoned*, where I participated in the panel *Changing Prison Conditions and Cultures*, I listened to presentations by people who are doing extraordinary work in the area of incarceration—providing quality representation to those in need, making the conditions more humane through challenging long-term isolation, changing policies away from pure retribution toward rehabilitation through class action lawsuits regarding prisoners' rights, and I was inspired. I felt privileged to participate in such a gathering of people whose lives had been dedicated to change on behalf of those incarcerated and to creating a more just and safe society. At the same time, I became aware of the overall absence of roles and voices of those who are in prison. It was odd for me because during the 22 years in which I myself was incarcerated, I worked with other women inside prison to make change and saw the fruits of the engagement and initiative of women in prison. We saw ourselves as the engine of change—always in collaboration with people outside, staff in the prison and with the required permission of the prison administration—but still as agents of our own transformation.

During the height of the AIDS epidemic in 1988, almost 20% of the women entering the New York State system were HIV positive. The prison atmosphere was defined by fear, lack of knowledge, and stigma: “Don’t sit next to her,” they whispered, “she’s been to see the nurse a lot.” “Don’t use her tray,” they said loud enough for people to hear in the mess hall. Corrections personnel knew change was needed for management as well as public health.



Kathy Boudin

But in most prisons it led to isolation of those who were infected. We knew we needed to change the culture in the prison away from fear and stigma to caring, support and knowledge; this would be the foundation for stability, humane conditions for those who had AIDS, and possibly a reduction of transmission. We became educated, held memorials, taught workshops, made quilts, held the dying in our arms, did walkathons around the prison yard, created support for those with the virus who now spoke out, giving others courage and changing the face from a *monster* to your next door cell neighbor, to your friend, even to your best friend.

In six months the AIDS Counseling and Education Program—called ACE—was funded by the AIDS Institute; in two years, the head of correctional health care saw ACE as a model for all the NYS prisons, and the men’s prisons, funded by the AIDS Institute, created PACE; in four years ACE became an inspiration for people in other states and a model sometimes adopted by other prison administrations; in eight years, we published a book with the ACE history, activities and curriculum, distributed to prison libraries around the country. People changed, grew, went home to real jobs to become much needed HIV/AIDS counselors and educators in their own communities. This same process happened over and over again.

In 1986, women at Bedford who had been convicted of murder in domestic violence cases participated in public hearings set up in the prison gym, telling about how violence in their lives had affected them and raising the consciousness of judges, prosecutors and legislators about the issue of



Elizabeth Alexander, former director of the ACLU’s National Prison Project, with David Fathi, its current director

domestic violence and its relationship to crime. Mothers in prison took parenting classes that helped them move beyond the guilt and paralysis of the “bad mother” label to supporting and understanding their children. And they became teachers of parenting through films, pre-natal classes or mothers of adolescents encouraging other mothers.

Women at all different educational levels were devastated about the closure of the college program when Congress ended Pell grants for people in prison; within a year they initiated a process of creating a privately funded college working with outside community and academic support. College presidents began visiting the women and learned from them about the urgent role of higher education to help redirect their lives. One by one, the college presidents signed on to donating a professor per semester to the newly established consortium led by Marymount Manhattan College that would offer bachelor’s degrees to the incarcerated women. While there is still no public funding, variations of privately funded colleges throughout New York State now exist, and formerly incarcerated people are leading organizations to support men and women returning

from prison who want to pursue higher education and are advocates for public financial support for college inside prisons.

In each of these situations, women faced individual problems of health, motherhood, abuse. They were aware that these were shared by others and approached these issues together. And the issues related to larger social problems beyond the prison. Women became involved on all these levels, and through this engagement they grew personally and contributed socially. This is a reproducible process. And *none* of this could have happened without collaboration with people out of prison—lawyers, activists, professors, medical professionals, women in government. It is hard to get to work with people in prison and it is hard to be a person in prison and feel connected to the outside or possess a sense of self-efficacy. Given the separation and isolation and the primacy of “security and control” that views self-reliance and initiative as a threat. Moreover, people in prison are often defined as dangerous and bad, flattened solely into their crime and usually described by their deficits—drug addicts, low literacy, bad mothers, and sometimes especially for

women as “victims,” with the implication of passivity.

Each of these definitions has an aspect of truth. But together they miss the strengths and the potential of people who are locked up also being agents of change for self and others. Language is significant in affecting how people in prison are viewed: Talking about a *person* who is incarcerated or in prison rather than *offender* or *prisoner* contributes to imagining the positive role that people inside can play. People in prison are an extraordinary resource and central to the process of change of culture and conditions in prison. They contribute knowledge and problem-solving and bring the passion and drive from having a deep stake in change both within themselves and in their environment. The challenge is to build the collaboration while grappling with real obstacles, becoming partners for change.

Kathy Boudin is Director of the Criminal Justice Initiative: Supporting Children, Families and Communities, Columbia University School of Social Work. She is editor and co-author of the book, Breaking the Walls of Silence: AIDS and Women in a New York State Maximum Security Prison (1998).



Audience members, including Matthew Lowe (standing), American Friends Service Committee

Correctional Systems: An Administrator's Point of View

Ashbel T. Wall, II

As a longtime correctional practitioner, I have experienced the skepticism and frustration of advocates and litigators about the operation of prisons. Why are abuses occurring? Why is there a plethora of seemingly arbitrary rules and restrictions? Why does custody always seem to trump programming and rehabilitation? Why are correctional systems so resistant to innovation and the pace of change so slow?

These are fair questions to ask of a publicly funded agency. The answers are complex and multifaceted. As a representative of those responsible for running these systems, I would like to offer some observations drawn from our vantage point. I hope that they will provide some insight into our perspective and serve as a springboard for further discussion.



Ashbel T. Wall, II

By definition, correctional administrators accept that incarceration is a legitimate form of social control, one that is authorized by the processes of our constitutional democracy as *punishment* for commission of a crime. The authority of corrections officials to intervene in someone's life is grounded solely in his or her violation of criminal statutes.

Whatever else a sentence to jail or prison may seek to accomplish, it is a penalty for the conviction of a criminal offense.

Correctional facilities are also perhaps the prime example of what the sociologist Irving Goffman termed "total institutions": self-contained units, isolated from the larger world, in which the activities of daily life occur among the same small group of people restricted to a single location and subject to the dominion and control of authority figures. As with other organizations of this type (mental hospitals, monasteries and traditional boarding schools to name some) a significant imbalance in status between the inhabitants and the authorities is the norm.

Incarceration also entails certain deprivations: the loss of liberty and freedom of movement, denial of access to various goods and services, lack of autonomy (the ability to make one's own decisions) and prohibition of sexual contact are examples. The staff's duty to enforce these rules creates an adversarial relationship between the keepers and the kept.

Added to the mix is the reality that, perhaps more than any other societal institution, corrections is bound by an ironclad no refusal policy. We can never say no. If a judge decrees that you have to go there, we have to take you in. As a result, our institutional personnel are faced with managing—all in very close quarters—a diverse array of people differentiated by race,

ethnicity, age, religious affiliation, gang and neighborhood ties, sexual orientation, physical characteristics, history, geography, personality type and behavior. What they hold in common are (1) a court's determination that they have violated criminal law and (2) the fact that they do not want to be there. Our fundamental obligation is to keep every one of them safe, along with staff, visitors and the surrounding community. Safety is the bottom line: If inmates, staff and the public don't feel protected, then nothing good—including programs, treatment and rehabilitation—can happen in a prison setting. To accomplish this result, a management approach with strong authoritarian features is, I believe, operationally necessary.

All of these characteristics of corrections militate toward the exercise of power. Similar to settings in which power (the military, the church, politics, corporate America, educational institutions and even families) is a defining feature, the characteristics of correctional institutions create the very real potential for abuses. Power does corrupt. Even good people can be corrupted by power. Prison settings are especially vulnerable because the disparity in power is so great, the space so concentrated and, given security needs, the transparency of operations so problematic. It would be disingenuous to express surprise that abuses can and do occur there.

This acknowledgement is by no means intended to suggest that maltreatment should be tolerated or that the circumstances that give rise to it should be ignored. One of the most important duties of any correctional administrator is to create and enforce checks and balances that minimize risk of harm. Another is to hold the responsible parties accountable when we find out about them. I believe that the vast majority of us take this obligation very, very seriously and act on it in a variety of ways. They include management presence; multiple channels for communicating problems and grievances; access to outside authorities; a strong investigative arm; policy and training; close attention to the culture; and very stiff consequences for misconduct.

Looking beyond individual cases to the larger picture, systematic change is particularly challenging in correctional institutions. By definition, we are conservative entities. We value order and stability. Change, particularly if it is not managed very carefully, can upset the established practices, routines and norms on which staff and inmates alike rely. The results can be serious and even frightening.

We also exemplify the characteristics of all bureaucracies. Departments of Corrections are themselves large bureaucratic organizations, often dependant on still other bureaucracies to obtain the physical, human and financial resources they need. Governmental institutions reflect many values, but efficiency and speed are not necessarily among them. They tend to be multi-layered, unwieldy and slow moving. As administrators, our ability to act is constrained by myriad statutes, operational regulations, personnel, purchasing and spending rules, labor agreements and sometimes sheer inertia.

None of these observations should relieve us of our duty to manage systems in which the facilities are clean, secure and safe, humane and constitutional. We also know that advocates, litigators and the media play a vital role in pushing us to live up to this mission in spite of the obstacles. There will always be some tension in our relationship with you and an adversarial quality to many of our encounters.

But I also believe there is room for a constructive dialogue. We need to hear one another's perspectives. In the end, many of us seek common ground: A credible correctional system where inmates and staff are protected from harm and a safe environment allows effective preparation for life after release. I hope we continue to find these opportunities to talk, listen and build bridges where we can.

Ashbel T. ("AT") Wall, II is Director of the Rhode Island Department of Corrections. A graduate of Yale College and Yale Law School, he has also worked at the Vera Institute of Justice, where he directed a sentencing project for New York City.

Improving Conditions of Confinement for Criminal Inmates and Immigrant Detainees

Dora Schriro

Over 2.3 million pretrial and sentenced inmates are incarcerated today in the United States. But for the few of them who are sentenced to prison for capital punishment, all inmates are sentenced to prison *as* punishment. An additional 30,000 aliens are held in civil confinement daily by the Department of Homeland Security as immigrant detainees. *Neither* immigrant detainees *nor* criminal pretrial detainees may be confined as punishment.

Both case law and legislation have positively impacted the operation of jails and prisons and, by and large, the conditions of criminal incarceration have improved over time. Still, conditions vary appreciably from place to place and in general, criminal inmates fare better than do civil detainees. Striving continuously to improve the conditions under which criminal and civil inmates are held is worthwhile—it creates public value. Eventually, almost all inmates, criminal and civil alike, are released and return to their communities, or, stay in ours. The conditions of their confinement affect whether they are more or less able than before to be contributing members of the community when they are released, and that impacts us all.

The Criminal and Civil Systems' Considerable Strengths and Opportunities to Improve

Criminal incarceration and civil detention systems perform a number of functions with exceptional efficiency. They manage the equivalent of city-sized populations around the country with far fewer negative occurrences than most communities.

They direct the daily activities of thousands of inmates, secure the compliance of the persons involuntarily in their custody and only infrequently with force, and provide for their safety and wellbeing. They transport hundreds daily to court and other court mandated destinations, effectuate removals, serve millions of meals and deliver the mail. They operate hospitals, ambulance services, and firehouses. They exercise police powers without the equipment upon which police routinely rely, render quasi-legal findings with far fewer resources than the courts, and act as round-the-clock emergency responders. By and large, most systems provide at least minimum levels of care and effectively control an appreciable percentage of the country's population. Many do much more. Still, every system—those that perform at consistently high levels of excellence as well as those that perform poorly—can contribute to the commonwealth by striving to do more.

Exceptional incarceration systems, systems that adhere to the field's highest standards and best practices, distinguish themselves from low functioning facilities in three appreciable ways—capacity, competency, and commitment.

Capacity is the means by which an organization gets its work done. It is its infrastructure—the published policies, procedures, and post orders that guide the workforce; the physical plant and facilities that are congruent with the underlying assumptions about the delivery of care, custody, and control; and personnel whose knowledge, skills, and abilities enable the system to excel. There is capacity to perform the work well where written expectations are clear, facilities support and sustain core operating assumptions, and the workforce provides leadership in every level of the organization.

Competency describes a system's *consistently* effective and efficient performance. Competent systems focus on outcomes and not output. These systems are safe places for innovation, environments that nurture a confident workforce, ready to take calculated risks and to recognize mistakes as opportunities to improve and to perform better over time. Competent systems are proactive, willing to find and fix root causes of real concerns, and to achieve measurable, meaningful results that transform the field. Competent organizations recognize that excellence is a moving target and that they must continuously strive to succeed. Where systems are unwilling or unable to evaluate their current performance, are closed to considering other systems' successes, or reject feedback from others, they fall back and fail.

Commitment concerns constituency, the communities that are the intended beneficiaries of civil and criminal incarceration systems. Criminal incapacitation and immigrant detention are core governmental functions, funded by government to protect



Dora Schriro

and to serve all of us who are here. We are all members of this community, and each of us enjoys rights and bears responsibility for its size, its safety and security, its success and failures. Commitment keeps systems centered. Where the interests of any group of stakeholders—whether inmates and advocates on their behalf, or labor and labor groups on their behalf, or one political party or another—overtake that of the others, the resulting imbalance is ultimately to everyone's detriment.

Case law makes clear that the Court's involvement in correctional systems occurs for many reasons, each of them fact specific. Once engaged, the duration of the Court's involvement appears to be commensurate with the degree to which individual systems evidence capacity, competency, and commitment. As the field has grown in stature and individual systems have evidenced high standards of professionalism and expertise by and large, the Court's intervention in their affairs has waned. Where individual systems have performed inconsistently or poorly, the Court's intervention has continued or increased.

Summary and Suggestions

High performance systems draw upon their capacity, competency and commitment to comply with statutory minimum requirements and to satisfy, if not to exceed, the professional standards they adopt. The decision to adopt professional standards is an important step towards continuous improvement. It is a means by which a system can assess its capacity, competency and commitment, sustain compliance with statute and case law, improve its performance and excel.

The selection of standards is as important as the decision to adopt any at all. The standards that a system adopts should reflect the custody management needs and legal requirements of its population. Once selected, standards should be implemented in full. Compliance must be enforced. Enforcement should be swift, and certain. The ultimate form of enforcement is regulation which also affords opportunity for relief.

Finally, neither the law, nor court intervention, nor the adoption of professional standards alone is sufficient to improve performance. The system's fundamental design and ongoing delivery of incapacitation must be sufficient to satisfy case law and statute and to sustain excellence over time. Both criminal incarceration and immigrant detention systems should strive to cultivate high levels of capacity, competency, and commitment and to sustain generous giving for the commonwealth.

Dora Schriro is Commissioner of the NYC Department of Correction. She served previously as Director of the Missouri and Arizona Departments of Correction, Commissioner of the St. Louis city jails, and was the founding Director of the Immigration and Customs Enforcement (ICE) Office of Detention Policy and Planning.

Women on the Bench and Women in Prison

The Honorable Brenda Murray

The National Association of Women Judges (NAWJ) began the Women in Prison (WIP) Committee based on the work of Professor Judith Resnik and a few others, who pointed out the stark disparity in treatment of incarcerated females as compared to males. Professor Resnik's writings made the point that this disparity was extreme in the lack of gender-specific health care. When NAWJ began this effort in the early nineties, many policy makers complained that the judiciary had no business examining the conditions of confinement because jails and prisons were the responsibility of the executive branch. NAWJ won the battle but not the war. It did prevail on the argument that conditions of confinement were a legitimate area of concern based on a judge's obligation to work for the administration of justice and, in many cases, a judge's specific obligation to make sure that the sentence ordered is fulfilled. However, it has not been able to improve conditions.

In 2010, it is both astonishing and depressing that legislators and policy makers refuse to view the conditions of women in prison and the impact those conditions have on the women and their children as a priority issue that merits attention. Despite NAWJ's long and continued efforts to get people in positions of power to focus on the issue, no matter what the administration, other matters are always considered more significant and pressing.

Judge Patricia Wald advised the WIP Committee years ago that we would need studies to support the positions we advanced. Sad to say, even in 2010 there is a lack of scholarship on incarcerated women's issues so that on subjects such as in-house prison nurseries, greater educational opportunities, health care, the need for visits and communications with



Kim Buchanan and Brenda Smith

children, and shackling women in childbirth, we need empirical evidence to make it obvious beyond a reasonable doubt that change is required.

Finally, the position and title of judge bring prestige and credibility that permit a person to do a lot of good things. Besides taking a position on policy issues, many NAWJ members especially those in Alaska, Maryland, and New York engage in grassroots efforts to improve conditions for women in local jails and prisons. They initiate re-entry conferences that inform soon-to-be released women of community resources, they tape mothers reading to their minor children, they arrange speakers and holiday gifts for inmates and their children, and they organize in-prison book clubs. NAWJ also played a major role in establishing the Maryland Correctional Institution for Women's College Degree Program, one of the few programs in the country that allows incarcerated women the opportunity to earn a college degree.

Hon. Brenda Murray is Chief Administrative Law Judge of the Securities and Exchange Commission and Co-Chair of the National Association of Women Judges' Women in Prison Committee.



Hon. Brenda Murray with Muneer Ahmad



Kim Buchanan, Brenda Smith, Muneer Ahmad, and Hon. Brenda Murray

From Classification to Reentry: Gender, Race, and Incarceration

The panel *From Classification to Reentry: Gender, Race, and Incarceration* considered the particular difficulties facing incarcerated women, as well as the impact of gender and race on prison inmates and employees.

“Some issues, such as the shackling of pregnant women, have more cultural traction than others. Perhaps that narrative resonance is due to the interest in regulating reproduction. That raises the question of what is the relationship between narrative and social change.”

– Muneer Ahmad is Clinical Professor of Law at Yale Law School, author of *Resisting Guantánamo: Rights at the Brink of Dehumanization*, 103 Nw. U. L. Rev. 1683 (2009), and co-teaches the *Worker and Immigrant Rights Advocacy Clinic*.

“Female staff members [are among the perpetrators] of abuse in prison. . . . We declared victory when women entered correctional environments . . . but we stopped thinking about what their experience would be in these environments they penetrated. . . . Maybe the conditions of work in prisons not only harm inmates but harm other people who are viewed as less powerful: female officers.”

– Brenda Smith, Professor, American University Washington College of Law, served on the National Prison Rape Elimination Commission from 2003-2009 and is the principal investigator and Project Director for the United States Department of Justice, National Institute of Corrections Cooperative Agreement on Addressing Prison Rape.

“We hear a lot in the anti-prison violence discourse about women and children . . . [but] [t]he realities of racism and sexual violence in prison reflect an exaggerated version of race and gender in the outside world. . . . In prisons plagued by high levels of sexual violence, we see a lot of evidence that prison administrators and guards respond to reports of sexual abuse in two ways that reinforce the most harmful forms of masculinity: ‘Be a man by fighting or you don’t deserve our protection because you are gay.’”

– Kim Buchanan, Assistant Professor of Law, USC Gould School of Law, is the author of *The Sex Discount*, 57 UCLA L. Rev. 1149 (2010) and *Impunity: Sexual Abuse in Women’s Prisons*, 42 Harv. C.R.-C.L. L. Rev. 85 (2007).



Stephen Bright, Hon. Nancy Gertner, Anya McMurray, Dennis Parker, Jonathan Wroblewski, Hon. Lois Bloom, and Brett Dignam

Courts, Congress, and Prisons

The panel *Courts, Congress, and Prisons* considered the respective roles the current Justice Department and Congress play in structuring and reforming the criminal justice system.

"The great news is that crime rates in this country nationally are at the lowest rates they have been in 30, 40, 50 years. . . . The distressing news is that the prison population . . . continues to rise. . . . The very, very bad news is that . . . there is a toxic political environment. And crime reform, unlike health care, is not going to be passed with 51 votes in the Senate."

— Jonathan Wroblewski is Director of the Office of Policy and Legislation in the Criminal Division of the U.S. Department of Justice and an ex-officio member of the United States Sentencing Commission.

"The biggest concern for legislation is likely opposition from law enforcement and corrections associations. Those opinions matter, they matter a lot . . . and they should matter. That is one thing you have to appreciate when you are trying to make legislative change. . . . I don't think that's something we should necessarily see as a problem. . . . [These groups] can be brought on board. You need to pick your battles and know who your allies might be."

— Anya McMurray, a Yale Law School graduate, is counsel to Senator Patrick Leahy, Chairman of the Senate Judiciary Committee, and works on legislative issues related to criminal justice reform, indigent defense, sentencing, and human rights.

"In civil cases, there is no right to counsel and no right to an interpreter. The one right you do have . . . is to appear for yourself. Many prisoners—too many—have to fight for themselves."

— Hon. Lois Bloom is a U.S. Magistrate Judge for the United States District Court, Eastern District of New York, whose docket includes habeas corpus and civil rights actions brought by state and federal prisoners.

"The issues that we are talking about—disparities in sentences, prison conditions—are vital issues, but they are all fundamentally issues about race. . . . Although they go a long way to addressing some of the problems of discrimination, . . . they are only the beginning because race permeates the criminal justice system in a way that makes it difficult for either courts or legislation to get rid of it. . . . We are justly appalled by being the world leader in the number and percentage of people incarcerated in the United States . . . but that is only the beginning of the crisis. What is a crisis for the country is a full-blown disaster for communities of color."

— Dennis Parker is Director of the ACLU's Racial Justice Program, which has brought lawsuits challenging felon disenfranchisement laws and the operation of juvenile truancy court. Parker was formerly Chief of the Civil Rights Bureau in the Office of the New York State Attorney General.

"There was a time—perhaps before the memory of many of you—when the conditions in this country were barbaric in the extreme. . . . It was federal judges who ended those practices."

— Stephen Bright is President and Senior Counsel of the Southern Center for Human Rights and Harvey Karp Visiting Lecturer in Law at Yale Law School.

"How easy it is to duck and how many pressures there are to duck. . . . Some people believe it is costless to err on the side of imprisonment. You won't be criticized and if the person commits another crime, you won't be blamed. But it's about time we stopped seeing this as costless. It is not costless to send a 19-year-old to five or seven years in an adult prison if he will come out a greater threat to society. It is not costless if all we do is to make him totally dysfunctional. It is not costless if we cement his ties to the gangs he might try to escape. And it is not costless if he walks out even more likely to be violent. And it is not costless if there is a meaningful chance that a lesser sentence will make a difference."

— Hon. Nancy Gertner is United States District Judge for the District of Massachusetts and Visiting Lecturer in Law at Yale Law School, where she co-teaches Sentencing and Comparative Sentencing Law.



Kica Matos, Programme Executive, The Atlantic Philanthropies, and Anne Calabresi, Co-Founder of Leadership, Education, and Athletics in Partnership (L.E.A.P.)

Hope for the Imprisoned?

Brett Dignam

Imprisoned clients look to the law for two forms of relief: release and better conditions. During the last decade of the 20th century, the ranks of the imprisoned increased exponentially. The United States engaged in a “war on drugs” that led to longer prison sentences and climbing populations of women and people of color. Two pieces of sweeping legislation, passed during a single week in April 1996 and signed by President Clinton, placed significant hurdles in the way of prisoners seeking relief. That year, the Supreme Court also reshaped and weakened protections that had afforded prisoners the right of access to courts.

The Anti-Terrorism and Effective Death Penalty Act (AEDPA), passed quickly in response to the bombing of the federal building in Oklahoma City, codified procedural requirements for federal habeas corpus petitioners and included dramatic changes to the jurisdictional and substantive law governing those seeking relief from deportation.¹ Aimed primarily at those seeking federal relief from state death sentences, the statute cast a broad net and spawned litigation on a number of fronts.

AEDPA imposed a one-year time limitation that requires a petitioner to file in federal court no later than one year after her conviction has become final. For a state prisoner, other provisions require exhaustion of all claims before reaching federal court and severely limited the ability of federal courts to engage in evidentiary proceedings. AEDPA (and its successor statutes) also limited habeas corpus review of immigration decisions by federal district court and dramatically expanded the class of crimes that preclude relief from deportation.

Based on a perception that federal courts were overwhelmed by frivolous prisoner cases,² Congress enacted the Prison Litigation Reform Act (PLRA), a statute that targeted civil litigation brought by prisoners to challenge the conditions of their confinement.³ It imposed strict procedural exhaustion requirements that the Supreme Court subsequently strictly interpreted in a manner that causes prisoners to default federal claims if they do not file administrative grievances within the prison and pursue every level of review, even if the relief they seek is unavailable in that forum. The statute also eliminated the ability of prevailing parties to recover attorney fees at market rates and required a showing of physical injury in addition to claims of emotional injury.

These laws were passed during a period when Congress enacted statutes mandating long sentences for a variety of crimes. Criminal justice policies combined to produce burgeoning populations of aging prisoners with a wide range of health issues. Facing overcrowded facilities filled with prisoners that manifest mental health challenges ranging from serious psychosis to the sequella of lives of abuse and poverty, correctional officials found their budgets stretched thin, even in the many states that now spend more on incarceration than education.

In *Lewis v. Casey*, 516 U.S. 804 (1996), the Fourteenth Amendment right of access to court became a flexible concept and prison officials were accorded wide discretion to meet its requirements. As Congress had done with AEDPA and the PLRA, the Court demonstrated its reluctance to intervene and enforce even a minimal threshold in the form of books and legal assistance unless an aggrieved could prove actual prejudice.

As the millennium turned and the US prison population topped one million, human rights organizations reported squalid and unsafe conditions found in many overcrowded prisons. Stories of violence and abuse, told in detailed reports and judicial pleadings, gave rise to new activism and cries for legislative reform. In reaction to coordinated litigation and reporting, Congress began the new century by passing a statute targeted at the very worst physical abuse in prison. The Prison Rape Elimination Act of 2003 (PREA) created a blue ribbon commission charged with investigation and reporting. As the decade ended, the Commission issued its comprehensive report and proposed regulations.



Brett Dignam

Recognizing that the overwhelming majority of the imprisoned will be released back into the community and daunted by the increasing cost of high recidivism rates, legislators turned their focus to improving the likelihood that re-entry into society would succeed. Congress enacted The Second Chance Act of 2007 to provide additional incentives

designed to enhance that likelihood. A modest, but ultimately controversial, provision encouraged the federal Bureau of Prisons to consider releasing prisoners with twelve rather than six months to serve on their sentences. This statute has been the subject of numerous cases charging that the BOP did not change its practice and in fact issued an internal memorandum that could be read as defiant rejection of the legislative change. Those with counsel presented the issue in the context of the legislative and administrative record and were the only cases where decisions were written. After class action litigation in Oregon, the BOP has recently issued a new policy explaining the process and removing the requirement that a Regional Director approve every placement longer than six months.

In California, the overcrowding litigation, *Plata v. Schwarzenegger*, has documented two decades of heartrending conditions, particularly in the treatment of the mentally and physically ill. A comprehensive opinion and prisoner release order under the PLRA issued last year. Predictably, the case is on appeal to the United States Supreme Court. The decision there will be the next chapter in the shaping of the institutions that house our imprisoned.

The law governing habeas corpus and conditions of confinement continues to evolve. The elaborate and lengthy proceedings involved in many death penalty cases and the close examination of several correctional systems by federal courts helped to create legislation that raised the bar for prisoners wishing to challenge either their conviction or their conditions. Serious overcrowding and the concomitant demands on governmental budgets have forced legislatures and the courts

to re-examine the policy choices and their costs. With increased scrutiny, there is hope that meritorious claims will once again receive the consideration they deserve.

Brett Dignam is Clinical Professor of Law at Columbia Law School. From 1992 until 2010, she was a clinical professor at Yale Law School and led the Prison Legal Services, Complex Federal Litigation, and Supreme Court Advocacy clinics.

Brett Dignam: The Reluctant Honoree

Since coming to Yale in 1992, Brett Dignam has sought to improve the lives of inmates and inspired countless students through her work in the Prison Legal Services, Complex Federal Litigation, and Supreme Court Advocacy clinics. In the summer of 2010, Professor Dignam joined the faculty of Columbia Law School, where she will continue to work with students in the representation of prisoners. In addition, Dignam is co-teaching Post-Conviction Remedies at Yale with Professors Dennis Curtis, Judith Resnik, and Liman Director Hope Metcalf.

Colloquium attendees gathered as Dean Robert C. Post honored Dignam as the ideal colleague, teacher, and advocate. Three of her former students—William W. Fick, Assistant Federal Defender for the Federal Public Defender Office of Massachusetts, Sara Norman, Managing Attorney of the Prison Law Office in San Francisco, and Giovanna Shay, teaching criminal law as Assistant Professor of Law at Western New England College School of Law—offered tributes to Dignam as an advocate, teacher, and friend. Dignam's own mentor—and long-time colleague and friend—Dennis Curtis recounted Brett's pioneering work when still a student at the University of Southern California Law Center (USC), where she worked in Curtis's clinic representing federal prisoners at Terminal Island. Judith Resnik also recalled Dignam, a student in the first class Resnik taught at USC, as she thanked her for making "plain just how much I have to learn from my students and how important it is to understand students as peers." Dignam's daughter, Dylan Graetz, gave an impromptu toast to her mother's commitment to friends and family.

To demonstrate their appreciation of Dignam's contributions, her students—assisted by former Liman Director Sarah Russell and 2008-09 Liman Fellow Deborah Marcuse—will update a revised Connecticut Prisoners' Legal Handbook. The Lowenstein Detention and Human Rights Clinic will contribute a chapter on human rights law, and the Liman Program will help distribute the Handbook to prisoners in Connecticut. Law students William Collins, Robert Silverman, Aaron Scherzer, Lindsay Nash (a 2010-11



Front (L to R): nephew J.P. Husky, sister Kevan Husky, Brett Dignam, daughter Casey Graetz, sister Meighan Garnsey, daughter Sydney Graetz; Back: son Lucas Field, sister Erin Dignam, husband Michael J. Graetz, daughter Dylan Graetz.

Liman Fellow), and Megan Quattlebaum (a 2010-11 Liman Fellow) presented Dignam with several gifts as thanks for her provision of sustenance—intellectual, ethical, and personal—to her students.

Some Reflections on Brett Dignam:

"Brett taught us . . . not to take ourselves too seriously, to embrace laughter in adversity and the frequent absurdity of injustice. We learned that humor preserves sanity, fosters endurance, and takes nothing away from the seriousness of the endeavor or the dignity of our clients."

— William W. Fick is Assistant Federal Defender for the Federal Public Defender Office of Massachusetts.

"For fifteen years, you have taught us how to lawyer, and through your example, how to combine work and family, with humor and grace."

— Giovanna Shay is Assistant Professor of Law, Western New England College School of Law.

"Brett taught us how to listen. How to ask questions. That we shouldn't be afraid to not know everything. She taught us that we don't interview people to show them how much we know, but to learn from them."

— Sara Norman is Managing Attorney of the Prison Law Office in San Quentin.

Yale Law School and the Representation of People in Prison

Yale has a long tradition of supporting work to ameliorate conditions of detention. Over more than a half century, faculty members have been at the forefront of such efforts. John Frank, who taught at Yale Law School during the 1950s, represented Ernesto Miranda in the effort to obtain protection against coercive interrogation. Frank's 1966 brief on Miranda's behalf protested the harms, as he argued: "We are not talking with some learned historicity about the *lettre de cachet* of pre-Revolutionary France or the secret prisons of a distant Russia. We are talking about conditions in the United States, in the Twentieth Century, and now."



Yale Law School Professor Dennis Curtis

Moving from the Supreme Court to work here in Connecticut, in 1969, Dennis Curtis and Stephen Wizner joined Daniel Freed in beginning a project that has, since then, provided legal services for prisoners in the Federal Correctional Institution at

Danbury.² Further, Dan Freed, who died in January of 2010, was also instrumental in shaping a new field of study—sentencing—and transforming the understanding of its import. From 1972 to 1987, Freed ran the Daniel and Florence Guggenheim Program in Criminal Justice; in 1989, he co-founded the *Federal Sentencing Reporter*. Freed was also a Trustee of the Vera Institute for Justice. Retired in 1996, Freed continued to teach at Yale until 2006.³

Since the late 1960s, many Yale faculty (including Clinical Professor of Law Jay Pottenger, Judith Resnik, and Sarah Russell) worked to help prisoners at Danbury, and other faculty have represented prisoners in other settings, such as Steve Bright, who represents prisoners challenging their convictions through habeas corpus, and Michael Wishnie and Muneer Ahmad, who represent detained immigrants in the Worker and Immigrant Rights Advocacy Clinic.

Over the decades, not only did these various clinical efforts develop, but the Danbury facility also underwent changes. That facility initially housed male prisoners, while women in the federal system were sent to one of five facilities that were often at great distances from their families. In 1979, Congress held hearings on women prisoners, and a decade thereafter, Danbury became a minimum-security prison for women inmates. In the summer of 2010,

Yale students working with Brett Dignam and Sarah Russell won recognition of the rights of a Muslim woman not to be subjected to invasive body searches by male guards.⁴

The work on criminal justice was enriched by another Yale colleague, Stanton Wheeler, a sociologist on Yale's Law Faculty who pioneered the study of white collar crime and prisons (as well as of sports and the law). Wheeler, who also served as the Master of Morse College, taught at Yale Law School from 1968 until his death in 2007. In a series of empirical studies, Wheeler analyzed the relationships between and among guards and inmates and the effects of "prison culture." He introduced the idea that prisoners' behavior was profoundly impacted by the length of time remaining on their sentences, thereby documenting the negative consequences of indeterminate sentencing.⁵

Persons concerned about prison conditions were also saddened at the death of two federal judges who recognized the constitutional protections afforded those in detention. The Honorable Morris Lasker (YLS '41) sat in the United States District Court for the Southern District of New York and presided during the 1970s and 1980s in a case challenging conditions at the City's jail then known as "the Tombs." In 1974 when he first decided, 2000 men were where fewer than 1000 were supposed to be, sleeping on "concrete floors, without blankets, contending with lice, mice, and roaches."⁶ As Judge Lasker put it, conditions were so horrendous that they would "shock the conscience of any citizen who knew of them."⁷ The headline of his obituary in December of 2009 captured this aspect of his many contributions: "Morris Lasker, Judge Who Forced City to Clean up Jail, Dies." A parallel intervention was made by William Wayne Justice, who presided in the Texas prison litigation, resulting in several decades of efforts to ameliorate conditions there and mitigate the violence and enhance the safety of confinement. Judge Justice died in October 2009.

The contemporary work of Dignam and of many others on the faculty follows in the footsteps of Arthur Liman, Dan Freed, Morris Lasker, William Wayne Justice, and John Frank. They have all marked paths for contemporary and future members of the Yale community committed to a more humane and just vision of the criminal justice system. The celebration of Dignam and the sessions of the Colloquium *Imprisoned* provided opportunities to reflect on what they hoped to bring about, and how much there is left to do.

The agendas that Arthur Liman set forth in the *Attica Report*, forty years ago, remain ours.

Ongoing Liman Projects on Criminal Justice

The fall 2010 Liman Public Interest Workshop, *Community, Confinement, Labor, and Rights*, studies the interaction between communities and the criminal justice system. The topics include the demography of policing and incarceration; probation and proportionality; classification of people in prison; early release, halfway houses, furloughs and reentry; communities and incarceration; the market in and of prisons; children, schools and prisons; and the roles for local and state governments.

Liman Director Hope Metcalf is also focused on the conditions of confinement through her work in the *Lowenstein Detention and Human Rights in the United States Clinic*, co-taught with Professor James Silk. Students are litigating challenges to the military commissions system and writing an amicus brief for the European Court of Human Rights regarding whether transfer to a U.S. supermax facility is a violation of the European Convention on Human Rights.

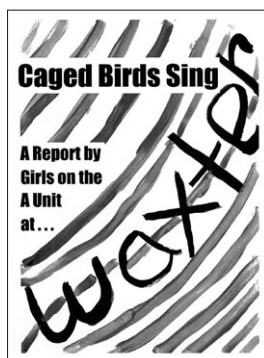
Many Liman Fellows work on aspects of the criminal justice system. Sonia Kumar, a 2009-10 Liman Fellow, continues with



Sonia Kumar

Liman fellowship support at the ACLU of Maryland. Her focus is on the Waxter facility, the main girls' detention facility in the state. Kumar worked with girls there

to write "Caged Birds Sing," a report in which the girls describe their own experiences at Waxter. The Department of Juvenile Services (DJS) has taken steps towards closing Waxter or finding safe alternative placements. In the interim, there have been some improvements, such as reorganization of the housing units to reduce co-mingling of pre- and post-adjudicated girls, increases in the provision of mental health services, and new training of staff on provision of gender-responsive services. In addition,



Cover of Caged Birds Sing

focused on the difficulties of young people encountering the criminal justice system. At the Bronx Defenders, Rebecca worked with McGregor Smyth (a 2002-03 Liman Fellow) to help young people deal with the consequences of criminal convictions. Rebecca has represented individuals in school suspension hearings, special education hearings, eviction proceedings, and employment disputes, and she has also worked to correct errors on their criminal records, to get them access to public benefits, and to allow them to get financial aid for college.

Kathy focused on how New York City-area public schools may rely on the criminal justice system to discipline students, especially those with disabilities. At the New York Civil Liberties Union, Kathy documented the effects of an increased presence of police officers in schools through freedom of information requests and interviews with students, families, police, and school administrators. She also helped a ten-year-old girl who had been incorrectly labeled as mentally disabled, but who instead needed modest supports for speech therapy and better teaching. Following hearings with the special education bureau, the child won placement at an alternative school where she has made rapid progress.

Benjamin Plener and Alicia Bannon worked to help secure fair process for indigent criminal defendants. Benji has Liman support to continue at the Special Litigation Department at the Orleans Public Defenders (OPD). That office won a case before the Louisiana Supreme Court,

DJS convened a task force to develop a statewide strategic plan for girls in the juvenile justice system.

Rebecca Engel and Kathy Hunt Muse also

which held unconstitutional the common New Orleans practice of failing to grant probable cause hearings within 48 hours of arrest. *State v. Wallace*, 25 So.3d 720 (La. 2009). Benji has helped OPD to develop better services for pre-trial detainees; over the last ten months, OPD has recruited over one hundred local volunteers to interview clients before their initial bond-setting.

Alicia Bannon, together with lawyers from the Brennan Center, examined state laws that impose high court costs on indigent criminal defendants; people who are unable to pay those fees face arrest and even incarceration. Alicia contributed



Benjamin Plener

to a multi-state report about the effects of those laws to be released jointly by the ACLU and the Brennan Center in late 2010. Alicia also wrote an amicus brief to the New York Court of Appeals in *Hurrell-Harring v. State*, a suit on behalf of 20 criminal defendants in five counties who claim that they were denied effective assistance of counsel due to inadequate state funding and supervision of defense services for the poor. The brief was submitted on behalf of 62 former prosecutors, including Robert Morgenthau and Lewis Liman.

Other 2009-10 Liman Fellows worked on projects ranging from representing asylum-seekers and low-wage workers to challenging the siting of coal plants. At Ayuda, a D.C.-area legal services provider for immigrants, Jean C. Han sought asylum on behalf of clients trying to flee gang-related violence in their home countries. Many victims of gang violence are children, and Jean represented children in asylum and other immigration proceedings.

Vasudha Talla worked with attorneys at Sanctuary for Families, a non-profit organization in New York City, to establish

a project focused on immigrant domestic violence survivors in detention who face deportation. She traveled to immigration detention facilities in the New York and New Jersey area to educate women about their rights and the immigration process. She helped clients to obtain asylum, U visa status, and other forms of relief.

Margot Mendelson joined the University of Arizona in Tucson and the Migration Policy Institute in Washington, D.C. to address the issue of mandatory electronic employment verification systems (E-Verify). That program requires employers to check applicants' immigration status; mistaken information can have severe consequences for low-wage workers, who might be fired without

cause. Margot researched the impact of those policies in Tucson, Arizona. She also co-directed a Spanish-language workers' rights clinic at the University of Arizona College of Law and represented detained individuals at the remote Eloy Detention Center in a variety of immigration-related actions.

Kirill Penteshin was at UNITE HERE Local 11, which represents mostly immigrant women employed in the hotel sector in Los Angeles, California. The union is seeking to organize women in that sector to try to win health care, sick leave and other basic benefits. Kirill brought actions before the National Labor Relations Board on behalf of individual workers who claimed they were fired

in retaliation for union activity. He also sought relief on behalf of the union against employers, claimed to be illegally interfering with organizing efforts.

Josh Berman joined attorneys at the Natural Resources Defense Council (NRDC) to try to prevent the construction of new coal-fired power plants that do not comply with the requirements of the Clean Air and Clean Water Acts. Coal plants, which are disproportionately located in poor neighborhoods, must go through a permitting process; Josh helped to litigate the first of NRDC's permit challenges in Ohio and also contributed to litigation efforts in Michigan and Illinois.

The 2009 – 2010 Liman Fellows



Back row: Josh Berman, Alicia Bannon, Kirill Penteshin, Benjamin Plener; front row: Sonia Kumar, Vasudha Talla, Rebecca Engel, Jean C. Han, Kathy Hunt Muse, Margot Mendelson

Introducing the 2010–2011 Liman Law Fellows

The Arthur Liman Public Interest Program awarded seven Liman Fellowships for 2010–11. The fellows are providing legal services at national and local organizations in Austin, Texas; Durham, North Carolina; New York, New York; Pittsburgh, Pennsylvania; and Washington, D.C. Their projects relate to immigration, the environment, poverty, labor law, and the experience of prisoners during and after incarceration.



The 2010–11 Fellows, from left, back row: Seth Atkinson, Ady Barkan; front row: Megan Quattlebaum, Lindsay Nash, Elizabeth Guild Simpson, Adrienna Wong, Monica Bell

Seth Atkinson is a 2009 graduate of Yale Law School who clerked for the Honorable J. Garvan Murtha of the District of Vermont. Seth earned a master's degree in Environmental Management from the Yale School of Forestry & Environmental Studies, and graduated *summa cum laude* from Amherst College. As a Liman Fellow based at the **Natural Resources Defense Council** in Washington, D.C., Seth is helping to develop proposals for the National Oceanic Committee, an interagency body formed by executive order in July 2010 to address overfishing and pollution in U.S. waters. He is also investigating possible litigation to

enforce the 2006 amendments to the Magnuson-Stevens Act, which mandates an end to overfishing.

Ady Barkan is a member of the Yale Law School class of 2010. He graduated *cum laude* from Columbia University. Ady is working at **Make the Road New York**, a community organization and workers' center with offices in Brooklyn and Queens. With Make the Road's members, organizers, and allies, Ady is helping to enforce wage and hour laws on behalf of employees of restaurants. One focus is legislative advocacy in New York City and Albany to reform labor laws to provide paid sick leave for employees of the

food industry. Following his fellowship, Ady will clerk for the Honorable Shira Scheindlin in the Southern District of New York.

Monica Bell is a 2009 graduate of Yale Law School who clerked for the Honorable Cameron McGowan Currie in the District of South Carolina. Monica graduated *magna cum laude* from Furman University, where she became a Harry S. Truman Scholar. She also received a master's degree as a George J. Mitchell Scholar at University College Dublin's Equality Studies Centre. Before and during law school, Monica was active in South Carolina politics. As a Liman Fellow,

Monica has joined the **Legal Aid Society of the District of Columbia** to help coordinate a support center that assists legal services providers throughout the District provide structural responses to poverty. Priorities include improving the notice system for recipients of federal benefits and making appeals processes more accessible to self-represented litigants.

Lindsay Nash is a member of Yale Law School class of 2010. She graduated *magna cum laude* from American University. As a Liman Fellow, Lindsay is working with the **Cardozo Immigrant Rights' Clinic** in New York City to address the legal needs of individuals facing deportation because of prior criminal convictions. In addition to assisting with a study by a task force led by the Hon. Robert Katzmann to evaluate the unmet need for indigent deportation defense in New York City, Lindsay represents petitioners seeking pardons from the newly formed New York Special Immigration Board of Pardons. After her fellowship, Lindsay will clerk for the Hon. Ellen Huvelle of the district court for the District of Columbia.

Megan Quattlebaum is a member of the Yale Law School class of 2010. Following her graduation from Sarah Lawrence College, she worked as the Associate Director of Common Cause/ NY, a nonprofit organization focused on making government more open and accountable. Megan is spending her Liman Fellowship year at the **Neighborhood Legal Services Association** in Pittsburgh, PA, where she is helping to develop and implement a model program of comprehensive civil legal services for formerly incarcerated individuals. A focus is to facilitate the process by which individuals released from prison can rejoin their families and communities and find work.

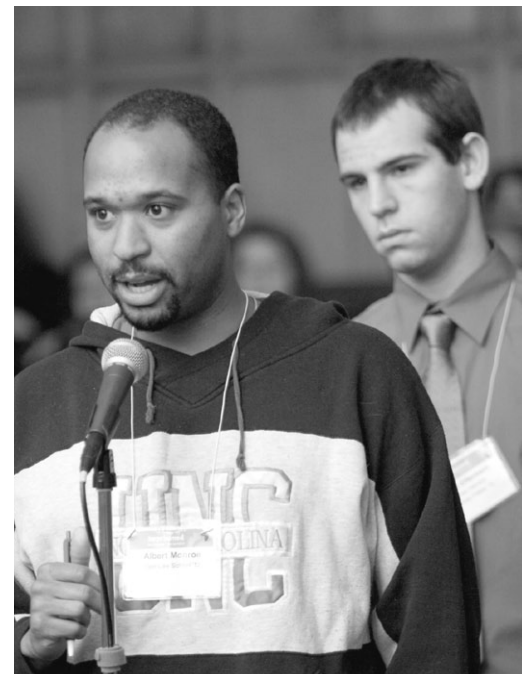
Elizabeth Guild Simpson is a 2009 graduate of Yale Law School who clerked for the Honorable Denny Chin in the Southern District of New York. Elizabeth graduated with high distinction from the University of Virginia. Before law school, Elizabeth was part of a Catholic Worker community serving new immigrants in Houston, Texas; thereafter she joined the community organizing group ACORN in its efforts related to the

Little Havana neighborhood of Miami, Florida. As a Liman Fellow, Elizabeth is at **Southern Coalition for Social Justice** in Durham, North Carolina to help address local community concerns regarding partnerships between local sheriffs and Immigration and Customs Enforcement. She represents detained immigrants and works to limit discriminatory practices related to immigrant communities.

Adrienna Wong is a member of the Yale Law School class of 2010. She graduated with highest honors from the University of California, Berkeley. As a Liman Fellow, Adrienna works with the **ACLU of Texas** to improve conditions of confinement for immigrants in remote private prisons such as the Reeves County Detention Center near Pecos, Texas. Because of the location, those detained have little access to families, lawyers, and services. Adrienna is focusing on improving inmate access to essential medical care. After her fellowship, she will clerk for Judge Wallace Tashima on the Ninth Circuit.



Judith Resnik speaks with Archana Pyati and Avidah Moussavian, attorneys for Sanctuary for Families, and Vasudha Talla, who worked at Sanctuary as a 2009–2010 Liman Fellow.



Albert Monroe, YLS '12, and Scott Elfenbein, Liman Harvard Summer Fellow, 2010

Doug Liman Premieres *Fair Game* and Prepares to Film *Attica*



Doug Liman

The 2010 Colloquium concluded with an advance screening of producer/director Doug Liman's film, *Fair Game*, which stars two-time Academy Award winner Sean Penn and Oscar nominee Naomi Watts. In May 2010, *Fair Game* premiered at the Cannes Film Festival as the only film by a director from the United States in competition for the Palme d'Or.

The film details how, in the lead up to the war in Iraq, Bush administration officials leaked Plame's identity. They did so in retaliation after Plame's husband, Joe Wilson, wrote a *New York Times* op-ed that accused President Bush of making misleading statements about the presence of weapons of mass destruction in Iraq.

After the Yale screening, commentary on the film came from Beverly Gage, a member of the History Department faculty at Yale; *New York Times* writer Neil Lewis; Matthew Waxman from Columbia Law School; and Doug Liman who described his inspiration for the film and recounted the investigative process behind the story. *Fair Game* will be in release in November 2010.

One of Liman's upcoming projects will focus on the story of the 1971 Attica uprising and its aftermath. The screenplay—based partly on Liman's father's accounts—will be written by *Precious* screenwriter Geoffrey Fletcher. "My father's report literally reads like a page turner," Liman stated in a press release in February 2010. "It is filled with stories of guards and prisoners from vastly different backgrounds learning to trust each other in the face of real human tragedy."

The Liman Senior Fellow in Residence

The Liman Program warmly welcomes Fiona Doherty (YLS '99) as the first Liman Senior Fellow in Residence. With support from the Vital Projects Fund, Doherty will join the Liman Program in the spring semester of 2011 to expand the work relating to the criminal justice system. Connecticut data suggest that probation violations account for a significant portion of incarceration. Fiona will explore the nature of probation conditions and the proportionality of sanctions for violations.

Another set of questions relates to how classification, punishment, and grievance mechanisms work within prisons, and how students and faculty might contribute to improving those processes. In conjunction with current and former fellows, Doherty will also consider how to address administrative segregation, supermax, and death row.

Doherty, who graduated from Yale Law School in 1999,



Fiona Doherty

clerked on the Sixth Circuit for the Honorable Martha Craig Daughtrey and then received a Bernstein Fellowship from Yale Law School to pursue a project in international human rights. Through that fellowship, Doherty worked in Northern Ireland for the Committee on the Administration of Justice on cases involving the targeting of defense lawyers during the conflict and on a European Court of Human Rights case, challenging the legitimacy of the government's investigation into the killing of a civilian by the Army. On her return, she worked at Human Rights First on post-9/11 detention issues, including the detention of U.S. citizens as enemy combatants and the treatment of U.S. detainees in Guantánamo, Afghanistan, and Iraq. Since 2005, Doherty has been at the

Federal Defenders of New York, where she has defended clients in criminal cases ranging from drug conspiracies to immigration fraud to piracy charges.

Liman Law and Summer Fellows



Judith Resnik and Sarah Russell (front row, from left) with fellows from the Liman Law and Summer Fellowship Programs

Liman Transitions



Sarah H. Russell

Sarah Russell, who directed the Liman Program from 2007–2010, has joined the faculty at Quinnipiac Law School as assistant professor. At Yale, Russell taught in the Law School's prison, criminal defense, and Supreme Court clinics. She was co-counsel on *Forde v. Baird*, in which a Connecticut district court recognized the right of a

Muslim female inmate not to be pat-searched by male guards. She also co-convoked Liman Public Interest Workshops on topics including detention, clinical education, and federalism and social movements.

Sarah, whose research interests include the problems of access to justice, prisoners' rights, sentencing, criminal procedure, and gender and equality, teaches primarily in Quinnipiac's clinical program. Recent work includes, *Rethinking Recidivist Enhancements: The Role of Prior Drug Convictions in Federal Sentencing*, 43 U.C. Davis L. Rev. 1146 (2010). Sarah earned her B.A. from Yale College and her J.D. from Yale Law School.



Hope Metcalf

Hope Metcalf started as the new Liman Director in July 2010. Hope, a graduate of Yale College and of New York University School of Law, was the Project Director of Yale's National Litigation Project of the Allard K. Lowenstein International Human Rights Clinic. That program was founded by Harold

Hongju Koh in 2002 to respond to infringements on civil liberties and human rights arising out of U.S. counterterrorism policy.

Since joining Yale in 2005, Hope has worked with dozens of students on challenges to post-9/11 detention and interrogation practices. She is co-counsel in actions seeking habeas relief for individuals held at Bagram Prison in Afghanistan and damages for torture survivors, and has co-authored numerous amicus briefs on access to courts and remedies in cases before the United States Supreme Court, including *Boumediene v. Bush* and *Munaf v. Geren*.

2010 Liman Summer Fellows

In conjunction with other schools, the Liman Program helps support public interest work by students at Barnard, Brown, Harvard, Princeton, Spelman and Yale. The 2010 Summer Fellows worked on a range of issues such as children's rights, immigrants' rights, drug policies, indigent criminal defense, and the death penalty.



Brown Summer Fellows (From Left: Jamal Hill and Mindy Phillips; not pictured Wendy Castillo, Jee Hyun Choi, Michael Ewart)

Brown University

Wendy Castillo '11, Public Counsel, Los Angeles, CA
Jee Hyun Choi '11, Legal Aid Society, Special Litigations Unit, New York, NY
Michael G. Ewart '11, Innocence Project New Orleans, New Orleans, LA
Jamal C. Hill '11, Southern Center for Human Rights, Atlanta, GA
Mindy M. Phillips '10, Asian Pacific Islander Legal Outreach, San Francisco, CA
Faculty advisor: Alan Flam, Senior Associate University Chaplain; Senior Fellow, Howard R. Swearer Center for Public Service



Spelman Summer Fellows (From Left: Advisor DeKimberlen Neely, Jayla Randleman, and Danielle Stallings; not pictured Jordan Webber)

Spelman College

Jayla Randleman '10, Bay Area Legal Services, Saint Petersburg, Florida
Danielle Stallings '11, Dallas Public Defenders Office, Dallas, TX
Jordan Webber '11, Joint Center for Political and Economic Studies, Washington, DC
Faculty advisors: Dr. DeKimberlen Neely, Interim Associate Dean Dr. Desiree Pedescleaux, Dean of Undergraduate Studies, Associate Professor of Political Science

Barnard College

Tina Law '11, *The Housing Help Program of The Legal Aid Society*, Brooklyn, NY
Gabriella Stern '11, Center for Law and Education, Boston, MA
Kaitlyn Tongalson '12, Lawyers for Children, New York, NY
Faculty advisor: Christina Kuan Tsu, Associate Dean of Studies



Harvard Summer Fellows (From Left: Advisor Amanda Sonis Glynn, Advisor Leanne Gaffney, Katherine O'Leary, Katherine Walecka, and Adam Kern; not pictured Scott Elfenbein, Kelly Quinlan, Marsha Sukach)

Harvard College

Scott Elfenbein '11, American Jewish Committee, Washington, DC
Adam Kern '13, The Public Defender Service for the District of Columbia, Washington, DC
Katherine O'Leary '11, The Public Defender Service for the District of Columbia, Washington, DC
Kelly Quinlan '11, Advocates for Children of New York City, Inc., New York, NY
Marsha Sukach '11, The Legal Aid Society of New York City, New York, NY
Katherine Walecka '11, The University of Chicago Law School: The Exoneration Project, Chicago, IL
Faculty advisors: Leanne Gaffney, Center for Public Interest Careers Fellow
Amanda Sonis Glynn, Director, Harvard Public Service Network and Center for Public Interest Careers

Princeton University

Rush Doshi '11, U. S. Department of State, Bureau of Democracy, Human Rights and Labor: China/Latin America Division, Washington, DC
Ashley Eberhart '13, Oglala Lakota CASA, Pine Ridge, SD

Sierra Gronewold '11, Bronx Defenders:

Family Defense Program, Bronx, NY
Sarah Paige '11, American Bar Association: Immigration Justice Project, San Diego, CA
Susan Reid, 1st year MPA/JD, ACLU of Northern California, San Francisco, CA
Thomas J.G. Scott, 1st year MPA/JD, Office of Native American Affairs, Domestic Policy Council, Washington, DC
Sarah Solon, 1st year MPA/JD, Berkeley Center on Health, Economic and Family Security, UC Berkeley, Berkeley, CA
Alicia Yue Zeng '12, California Environmental Protection Agency, Department of Toxic Substances Control, Sacramento, CA
Faculty advisors: Kim Lane Scheppele, Visiting Professor, Yale Law School; Laurance S. Rockefeller Professor of Public Affairs; Director of Program in Law and Public Affairs, Woodrow Wilson School, Princeton University
Leslie Gerwin, Associate Director, Program in Law and Public Affairs



Yale Summer Fellows (Back Row From Left: Julia Knight, Carolyn M. Herring, Marcus Strong, Lee West; Front Row From Left: Katherine Munyan, and Rachel Achs; not pictured, Meng Jia Yang)

Yale College

Rachel Achs '11, Osborne Association, New York, NY
Carolyn Herring '12, Southern Poverty Law Center, Atlanta, GA
Julia Knight '11, Bronx Defenders, Bronx, NY
Katherine Munyan '11, Sanctuary for Families, New York, NY
Marcus Strong '11, Southern Alliance for Clean Energy, Atlanta, GA
Lee West '10, The Reinvestment Fund, Philadelphia, PA
Meng Jia Yang '12, Catholic Charities Immigration Legal Services, Washington, DC
Faculty advisor: Richard Schottenfeld, Master, Davenport College; Professor of Psychiatry, Yale Medical School



Deborah Marcuse presents a mock-up of the new prisoners' rights handbook to be published. Also shown are Sarah Mehta, Maureen Furtak, Sara Norman, Debbie Tropiano, Hope Metcalf, Sarah Russell, Anand Balakrishnan, and Katie Eyer.



Barbara Fair of New Haven-based People Against Injustice, with another Colloquium participant



David Menschel, 2002-03 Liman Fellow and Director, Vital Projects Fund, and Brett Dignam



Paul Thomas of the Federal Defender for the District of Connecticut, converses with Colloquium participants.



Yale Law School Dean Robert Post and Lucas Guttentag, Director of the ACLU's Immigrants' Rights Project, speak with another Colloquium participant.

The Liman Program congratulates Yale Law School graduates who received other public interest fellowships for 2010–2011

Arthur Liman Public Interest Fellowships

Seth Atkinson '09–Natural Resources Defense Council, Washington, DC
 Ady Barkan '10–Make the Road New York, Brooklyn, NY
 Monica Bell '09–Legal Aid Society of the District of Columbia, Washington, DC
 Lindsay Nash '10–Immigrant Defense Project and the Katzmman Study Group, New York, NY
 Megan Quattlebaum '10–Neighborhood Legal Services Association, Pittsburgh, PA
 Elizabeth Guild Simpson '09–Southern Coalition for Social Justice, Durham, NC
 Adrienna Wong '10–ACLU of Texas, Austin, TX

Heyman Federal Public Service Fellowships

Sam Berger '10–General Counsel's Office, Office of Management and Budget, Washington, DC
 Anjali Dalal '10–White House Office of Science and Technology Policy
 Aneesh Chopra, U.S. Chief Technology Officer, Washington, DC
 Jessica Schumer '10–U.S. Department of the Treasury and the National Economic Council, Lawrence Summers, Director of the National Economic Council, Washington, DC

Robert L. Bernstein Fellowships in International Human Rights

Itamar Mann-Kanowitz LLM '10–Refugee Policy Program, Human Rights Watch and Open Society Justice Initiative, New York, NY
 Thomas Stutsman '10–Legal Reform in China Program, Vera Institute of Justice, New York, NY

Robina Foundation Fellowships

Terra Gearhart-Serna '10–Appeals Chamber, International Criminal Tribunal for the former Yugoslavia, The Hague, Netherlands
 Jason Pielemeier '07–Bureau of Democracy, Human Rights and Labor, U.S. Department of State, Washington, DC
 Aaron Zelinsky '10–Office of the Legal Advisor, U.S. Department of State, Washington, DC

San Francisco Affirmative Litigation Project Fellowship

Kaitlin Ainsworth '10–Yale Law School, New Haven, CT

YLS Fellowship at the Permanent Court of Arbitration

Anna Vinnik '10–The Permanent Court of Arbitration, The Hague, Netherlands

YLS International Court of Justice Internship / Clerkship

Diane Desierto LLM '09–International Court of Justice, The Hague, Netherlands

YLS Public Interest Fellowship Program

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 Sumon Dantiki '09–U.S. Department of Justice, National Security Division, Washington, DC
 Sara Edelstein '10–Santa Clara County Office of the Public Defender, Santa Clara, CA
 Ben Gross '10–City of New Haven's Livable Cities Initiative, New Haven, CT
 Karen Kudelko '10–Lakeshore Legal Aid, Port Huron, MI
 Ashley Leonczyk '10–Office of the Secretary of Defense, Ambassador
 Vicki Huddleston, Deputy Assistant Secretary of Defense for Africa, Washington, DC
 Ben Lindy '10–District of Columbia Public Schools, Washington, DC
 Ana Muñoz '10–The Bronx Defenders, Bronx, NY

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E. Barrett Prettyman Fellowship

Emily Stirba '10–Georgetown University Law Center, Washington, DC

Equal Justice Initiative Fellowship

Jennifer Taylor '10–The Equal Justice Initiative, Montgomery, AL

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Skadden Fellowships

Nicole Hallet '08–Urban Justice Center, New York, NY
 Rebecca Heller '10–Urban Justice Center, New York, NY
 Robert Silverman '10–Business and Professional People for the Public Interest, Chicago, IL
 Michael Tan '08–ACLU Immigrants Rights Project, New York, NY

Soros Justice Advocacy Fellowship

William Collins '10–Louisiana Capital Assistance Center, New Orleans, LA

Supreme Court Assistance Project Fellowship

Brian Frazelle '10–Public Citizen Litigation Group, Washington, DC

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Arthur Liman Professor of Law and Founding Director

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

There, you can learn more about the Liman Fellows, read reports by the Fellows about their work, 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 Hope Metcalf. For information about hosting a Liman Summer Fellow or applying for a Liman Summer Fellowship, please contact Hope Metcalf or one of the Liman Faculty Advisors listed on this page.



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Endnotes to essays

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¹ ATTICA: The Official Report of the New York State Special Commission on Attica xi (Bantam Books, 1972).

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¹ Rhodes v. Chapman, 452 U.S. 337, 371 (1981).

² Terry A. Kupers, *What To Do With the Survivors? Coping With the Long-Term Effects of Isolated Confinement*, 35 Crim. Just. & Behav. 1005, 1010 (2008).

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¹ Pew Center on the States, *One in 100: Behind Bars in America 2008* (Feb. 2008), available at <http://www.pewcenteronthestates.org/uploadedFiles/One%20in%20100.pdf>.

² See Dora Schiro, U.S. Dep't of Homeland Sec., *Immigration Detention Overview and Recommendations 2* (2009), available at http://www.ice.gov/doclib/091005_ice_detention_report-final.pdf.

³ Atul Gawande, *Hellhole: The United States Holds Tens of Thousands of Inmates in Long-Term Solitary Confinement. Is this Torture?*, *The New Yorker*, Mar. 30, 2009.

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⁵ *Hutto v. Finney*, 437 U.S. 678, 682 (1978).

⁶ See *Wolff v. McDonnell*, 418 U.S. 539, 563 (1974).

⁷ See, e.g., *Overton v. Bazzetta*, 539 U.S. 126 (2003).

⁸ See, e.g., *Meachum v. Fano*, 427 U.S. 215 (1976).

⁹ See, e.g., *Sandin v. Conner*, 515 U.S. 472 (1995).

¹⁰ *Sandin*, 515 U.S. at 484.

¹¹ *Wilkerson v. Stalder*, No. 00-304-C, 2007 WL 2693852, at *1 (M.D. La. Sept. 11, 2007).

¹² See, e.g., *Estate of DiMarco v. Wyo. Dept. of Corrections*, 473 F.3d 1334, 1336 (10th Cir. 2007); *Al-Amin v. Donald*, 165 Fed.Appx. 733, 738 (11th Cir. 2006); *Skinner v. Cunningham*, 430 F.3d 483, 485 (1st Cir. 2005).

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¹ Pew Center on the States, *State of the States 2010: How the Recession Might Change States 7* (2010), available at http://www.pewcenteronthestates.org/uploadedFiles/State_of_the_States_2010.pdf.

² *Graham v. Florida*, 130 S.Ct. 2011 (2010).

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¹ See American Bar Association, Criminal Justice Section, *Report to the House of Delegates* (Aug. 10, 2004), available at <http://www.abanet.org/crimjust/policy/amo8104b.pdf>, for these requirements and explanatory comments.

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¹ Pub. L. No. 104-132, 110 Stat. 1214 (1996), codified in relevant part at 28 U.S.C. § 2254.

² Hon. Jon O. Newman, *Pro Se Prisoner Litigation: Looking for Needles in Haystacks*, 62 Brook. L. Rev. 519 (1996).

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¹ Brief of Petitioner at 47, *Miranda v. Arizona*, 384 U.S. 436 (1966).

² Their work is chronicled in the Fall 2009 Liman Newsletter, available at [http://www.law.yale.edu/documents/pdf/Liman.newsletter.final_\(Fall_2009\).pdf](http://www.law.yale.edu/documents/pdf/Liman.newsletter.final_(Fall_2009).pdf).

³ Freed's many contributions are sketched out in his obituary in Daniel Lewis, *Daniel J. Freed Dies at 82; Shaped Sentencing in U.S.*, *N.Y. Times*, Jan. 22, 2010, available at <http://www.nytimes.com/2010/01/22/us/22freed.html>.

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⁵ See e.g., Stanton Wheeler, *Socialization in Correctional Communities*, 26 *American Soc. Rev.* 697-712 (Oct. 1961).

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March 3 – 4, 2011 • Yale Law School

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