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### Section Office

740 15th St., N.W.  
Washington, D.C. 20005  
tel: 202/662-1030, fax: 202/662-1032  
e-mail: [irr@americanbar.org](mailto:irr@americanbar.org)  
[www.americanbar.org/groups/individual\\_rights.html](http://www.americanbar.org/groups/individual_rights.html)

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Section of  
**Individual Rights**  
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## Introduction

# Perspectives on a Premise

By Penny Wakefield

“**A**ccountability” is the current watchword in this country. For many, however, “accountability” means “punishment,” and “punishment” means “jail” or “prison.” With so many high-profile offenses in the news recently, public outrage is driving demands that someone be held responsible—and made to pay dearly—for acts and decisions that have caused great personal harm to many individuals: the financial debacle, the housing bubble and collapse, the wars.

Other types of crimes—child sexual abuse, negligent medical care—are intensely personal and ostensibly affect fewer people, but so deeply offend the collective moral conscience that some conclude that current sanctions, whatever they are, may not be enough.

The apparent desire for punishment has spilled into other areas—users of medical marijuana, immigrants and their U.S.-born children—where the perceived harm to others may be more anticipated than real.

This current demand for more, or more severe, punishment is not new in our society, but it has exacerbated already pervasive political rhetoric about being “tough on crime.” Historically, such rhetoric has led to more laws criminalizing more offenses. If those laws don’t reduce crime, more laws follow. As for the goal, the results are mixed; the United States has one of the highest crime rates in the Western world.

*continued on page 25*

## From the Chair

By Kay H. Hodge

It is my honor and privilege to serve as chair of the Section for 2011–12. My hope is that this will be a year that we engage those of you who are members of the Section of Individual Rights and Responsibilities (IRR) to work on projects in areas that interest you. I also hope that we will begin to engage those who are not members to join us in our work.

Our Section works to ensure that the rights protected by the Constitution and the Bill of Rights are a vital part of discussions and decisions related to our democracy, our justice system, and individuals both within and outside our country. We raise questions and concerns on many of the most important issues confronting our society—questions of life and death, of equality and opportunity, of power and victimization. For many of us, the issues and concerns of the Section are the reason that we went to law school.

Although few of us are able to devote our professional lives to these issues, each of us can and should support the work of IRR by our participation and resources. We should also convince our friends to do likewise. It cannot be said often enough that the rights and privileges provided by our Constitution and laws are meaningless unless lawyers continue to work to effectuate the purpose of those words in real-life situations. That is what we do at IRR.

We welcome your participation on one of our substantive committees: Civil Rights & Equal Opportunity, Environmental Justice, First Amendment Rights, National Security & Civil Liberties, Elder Rights, Native American

*continued on page 25*

## 2 When the Punishment Doesn't Fit the Crime: Reinventing Forgiveness in Unforgiving Times

We should look for more effective ways to give convicted individuals a fair chance to reintegrate and become productive members of society. Consider the second-chance story of Darrell Langdon, who tried to get his old job back at Chicago Public Schools but had to rely on Cabrini Green Legal Aid to do so.

By Margaret Colgate Love

## 6 The Political Climate Change Surrounding Alternatives to Incarceration

As budget crises sweep the nation, what it means to cut back on incarceration and penal harshness is changing. Recent legislation offers examples of recalibrating incentives to foster rehabilitation and how to integrate former inmates into the community.

By Mary D. Fan

## 9 Sometimes the Cure Is Worse Than the Disease: The One-Way White-Collar Sentencing Ratchet

The U.S. Sentencing Commission has been hard at work since 1987 amending the sentencing guidelines to narrow the disparity between white-collar offenses and such crimes as those involving violence, stealing, and firearms. While lessening the disparity between white-collar and blue-collar crime is a good thing, there is still an unhesitating and excessive use of incarceration as a remedy for crime.

By Carlton Gunn and Myra Sun

## 10 Crack Cocaine Sentencing

The U.S. Sentencing Commission recently voted to apply retroactively the federal sentencing guidelines amendment that allows federal crack cocaine offenders who meet certain criteria to have their sentences reduced.

Compiled from information from the U.S. Sentencing Commission

## 13 Prisons for Profit: Incarceration for Sale

With budget cuts looming, several states are considering privatizing prisons as a way to cut costs. In 2011, legislators in Florida, Ohio, and Louisiana introduced laws that would greatly expand the use of private prisons. Human rights

activists pushed back by emphasizing that privatization does not yield cost savings, may lead to corruption, and undermines sentencing reform.

By Michael Brickner and Shakyra Diaz

## 17 Double-Edged Paring Knives: Human Rights Dilemmas for Special Populations

The U.S. incarceration crisis has focused increasing attention on the problems of special populations in corrections: women, LGBT prisoners, juveniles, the elderly, and the mentally ill. ABA policy, including the Standards on the Treatment of Prisoners, attempts to protect the health and safety of these groups. However, such reform measures are not wholly uncontroversial, even among human rights advocates.

By Giovanna Shay

## 20 The Legal Community's Collaborative Effort to Address Collateral Consequences for Youth

Hopefully, one day lawmakers will pass legislation that will significantly reduce the collateral consequences of an arrest or conviction for youth in this country. Until that day, lawyers, judges, prosecutors, and advocates should be keenly aware of those repercussions when working with any child that has gone through the juvenile justice system.

By Christopher Gowen and Anne Geraghty Helms

## 24 A Punishing Court Docket

Two cases in the Supreme Court's current term will get the justices into atypical punishment issues. One case involves life sentences for juvenile offenders who commit murder, and the other involves liability for employees at privately run federal prisons.

By Stephen J. Wermiel

## 26 Bryan Stevenson As Hero

This Human Rights Hero's extraordinary life includes proving the innocence of a man who spent six years on death row for a crime he didn't commit, teaching at NYU Law School since 1998, inspiring and training dozens of young attorneys, and winning the prestigious MacArthur Foundation "Genius" Award in 1995.

By Stephen B. Bright



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# When the Punishment Doesn't Fit the Crime

## Reinventing Forgiveness in Unforgiving Times

By Margaret Colgate Love

People who commit a crime and are brought before a court to be sentenced expect to face a prison term or at least probation, and perhaps a fine. If this is their first brush with the justice system, they have a general sense that they will experience a degree of social opprobrium, the so-called stigma of conviction. But it is an article of faith for most Americans that people who violate the law will in time pay their debt to society and be welcomed back to its good graces.

President George W. Bush called us the “land of second chance,” and President Barack Obama famously congratulated the Philadelphia Eagles for letting Michael Vick walk from prison back into the team’s starting line-up. But the reality for people of ordinary abilities is very different. The following story (drawn from my article in the spring 2011 *Howard Law Journal*) illustrates the new normal in American punishment, in which the so-called collateral consequences of conviction are numerous, severe, and very hard to avoid or mitigate.

### A Second-Chance Story

At the time Darrell Langdon came to public attention in the summer of 2010, he had just been turned down for a job as a boiler-room engineer with the Chicago Public Schools (CPS) under a state law barring anyone with a drug conviction from working in the public school system. Langdon’s conviction for drug possession was minor and dated, and he had gotten a court order relieving the legal impediment. Still, CPS refused to give him a chance. It was Langdon’s good fortune that a reporter



An ex-offender is seen at work in Philadelphia, where an effort is being made to spur the hiring of ex-convicts to help deal with the problems of high recidivism, growing crime rates, and exploding prison populations.

Associated Press, AP

from the *Chicago Tribune* took an interest in his story: “Darrell Langdon made a mistake more than two decades ago. A Cook County judge believes Langdon deserves a second chance. Until Monday, Chicago Public Schools officials didn’t—but, in response to my questions, they’re taking a second look.” Dawn Turner Trice, *CPS: Good Conduct Certificate Not Good Enough*, CHI. TRIB., July 29, 2010, at 10.

What made Darrell Langdon’s case unusual was that he had worked successfully for CPS years before. In fact, he had been employed by CPS in 1985 when he was caught with a half gram of cocaine and sentenced to six months’ probation. He had kept his job then but struggled with his addiction. Finally, in 1988, CPS sent him to its employee assistance program for drug treatment. It was a turning point. Langdon later reported, “I did so well that I was eventually called on to tell my story and help others with their addictions.”

Langdon’s recovery was remarkable, and he became a responsible family man and well-respected member of his community. In 1995, he left CPS to work in real estate, but thirteen years later the market downturn led him to reapply for his old job with the school system. By that time he had been sober for two decades, raised two sons as a single parent, and mentored many others through Alcoholics Anonymous. CPS interviewed him three times over a sixteen-month period, gave him various tests to determine his engineering aptitude and skills, and finally offered him the job. Then came the background check. There would be no possibility of hiring him with his record.

Determined to get his old job back, Langdon sought help from Cabrini Green Legal Aid, where he found an advocate who was familiar with various relief provisions in Illinois law. Beth Johnson advised him against trying for a governor’s par-

don because it would take too long to get his request considered. While he was eligible to have his record sealed, that would not benefit him in applying for school employment. But the Illinois courts had recently been authorized to issue a Certificate of Good Conduct that lifted statutory barriers to employment, including those applicable to employment at CPS, for someone determined by a court to be “a law-abiding citizen and . . . fully rehabilitated.” With only one conviction so long ago and a strong record of rehabilitation, Langdon was an excellent candidate for this relief.

Johnson filed a petition in Cook County Circuit Court, attaching letters attesting to Langdon’s two decades of sobriety and dedicated service to others in recovery, his steadfast commitment as a parent despite many difficulties, the respect and affection of his neighbors and business associates, and even his talents as a cook. At a hearing before Judge Paul Biebel, Langdon spoke movingly about his journey to sobriety in the 1980s, and how he had maintained his sobriety over the years. Judge Biebel, satisfied that he met the statutory standard, issued him the certificate.

This should have been the end of Langdon’s story because CPS was no longer legally barred from hiring him. But he ran into that bureaucratic aversion to risk that people with a criminal record frequently encounter. A CPS official explained to the *Chicago Tribune*: “We have to ensure we’re hiring people who won’t put our children in jeopardy.” A policy of blanket rejection was safe and easy to administer. But the media attention provided the necessary encouragement for CPS to consider Langdon’s application more seriously, and eventually he was offered his old job back under a new hiring policy developed with his case in mind.

In many ways, Darrell Langdon’s story is fairly typical in terms of the difficulties faced by people with a criminal record seeking employment:

Even where there are no disqualifying legal barriers, and even with convincing evidence of ability and good character, they may be excluded without rational explanation. In other words, Langdon’s story is happily atypical: He had a skilled advocate for his cause, a legal system that was well-suited to his particular need, and a sympathetic and determined reporter to tell his story and to shame a risk-averse employer into doing the right thing. Most people are not so lucky.

Langdon’s fight to regain his old job with CPS shows how hard it is these days to overcome a criminal record, even one that is dated and minor. And if the law poses no obstacle to advancement, there remains the fear and loathing that a criminal record inspires. But Langdon’s story also shows that the system is capable of change. The following discussion puts the story into a larger context.

### Modern Civil Death

From colonial times, the American legal system has recognized the reduced status of a convicted criminal, derived from the ancient Greek concept of “infamia,” or “outlawry,” among the Germanic tribes. The idea that criminals should be separated from the rest of society led to “civil death” in the Middle Ages, and to exile by transportation in the Enlightenment. A half century ago, Chief Justice Earl Warren observed that “[c]onviction of a felony imposes a status upon a person which not only makes him vulnerable to future sanctions through new civil disability statutes, but which also seriously affects his reputation and economic opportunities.” It is this semi-outlaw status more than any prison term or fine that is frequently a criminal defendant’s most serious punishment.

In 1960, the phenomenon that Nora Demleitner has described as “internal exile” had a limited impact on American society because conviction was comparatively rare, criminal records were hard to access, and official forgiveness was relatively easy to obtain. Chief executives still treated

pardoning as an integral part of their job, and the Model Penal Code reflected the new fascination with judicial restoration of rights through vacatur or expungement. The reformers of the era thought permanent branding inhumane and inefficient.

In 1967, the President’s Crime Commission called for the wholesale reform of “the system of disabilities and disqualifications that has grown up” because it interfered with rehabilitative efforts. Other reform groups, including the American Bar Association (ABA), called for the abolition of mandatory status-generated sanctions, favoring “an informed and restrained exercise of discretion.” As late as 1981, the ABA confidently predicted that “collateral consequences” were on their way to extinction: “As the number of disabilities diminishes and their imposition becomes more rationally based and restricted in coverage, the need for expungement and nullification statutes decreases.” We will see just how wrong that prediction was.

The modern era of escalating prison populations that began in the mid-1980s saw a retreat from the forgiving spirit of the earlier period. In the past two decades, the status imposed by conviction has become increasingly public, the sanctions generated by it have become ever more severe and hard to mitigate, and the number of people trapped in that status—usually for life—has ballooned. Promulgated indiscriminately over three decades in the War on Crime, and administered rigidly in the risk-averse post-9/11 environment, collateral sanctions now mandate exclusion of people with a criminal record from a wide range of benefits and opportunities.

A minor drug conviction like Darrell Langdon’s, for instance, can make a person ineligible for welfare benefits, public housing, a driver’s license, student loans, insurance, voting, government employment, and hundreds of different types of jobs requiring a license. It can also lead to mandatory deportation for

a noncitizen. Sex offenders may be effectively barred from living in urban areas because they cannot reside near schools, playgrounds, or even bus stops where children congregate. Repeat offenses can result in designation as a “career criminal” and harsh recidivist or three-strikes sentences. In August 2010, as part of a federally funded study, the ABA Criminal Justice Section identified 38,000 laws and regulations imposing collateral penalties.

Beyond legal obstacles, there is social stigma. A recent study of online job ads posted on Craigslist in five major cities noted widespread use of blanket policies excluding from consideration anyone with any type of conviction in entry-level jobs such as warehouse workers, delivery drivers, and sales clerks. People of means are not exempt from this chill, as government procurement officials and private insurance companies steer clear of businesses that employ people with a record. Law firms and human resource consultants counsel their clients (“just to be safe”) against hiring anyone whose background includes any brush with the law.

As collateral penalties have proliferated in legal codes and administrative rules, the mechanisms for overcoming them (such as executive pardon) have atrophied. Background checks are routine even for volunteer jobs in the community, and criminal records are available online for as little as \$15. (It is now surprisingly easy to delve anonymously into someone’s past: A Google name search may bring up an unsolicited offer from a private screening company to do a criminal background check on a neighbor, coworker, or teacher for a nominal fee.)

And, of course, more and more people are caught up in the dragnet of the criminal justice system. Most don’t go to prison, but all face a modern civil death, in law and in fact. That people of color are disproportionately branded and ostracized is particular cause for alarm. That was the new reality facing Darrell Langdon when he tried

to get his old job back.

Today there are more than 90 million Americans with a criminal record who cannot hope to pay their debt to society. If we still like to imagine our country as the “land of second chance,” and rejoice at Michael Vick’s redemption, as a practical matter, our laws and attitudes point in the opposite direction.

### **Countervailing Trends and Influences**

There are the beginnings of resistance to a regime of exclusionary laws and policies, as policymakers understand that degraded status and lost opportunities exact a high price in public safety and taxpayer burden, quite apart from considerations of fair play for the individuals affected. When people returning from prison are barred from jobs and housing, they are more likely to slip back into a life of crime. It is the goal of reentry programs to see that this doesn’t happen. When people like Darrell Langdon continue to experience discrimination decades after their rehabilitation is secure, they may reasonably ask what the point was in trying.

The Supreme Court has been an unexpected change agent, giving lawyers and judges new reason to concern themselves with how collateral sanctions are imposed and how they may be avoided. In its groundbreaking decision in *Padilla v. Kentucky* (130 S. Ct. 1473 (2010)), the Court held that a criminal defense lawyer was constitutionally required to advise his noncitizen client considering a guilty plea that he was almost certain to be deported as a result. Characterized by the concurring justices as a “major upheaval in Sixth Amendment law,” *Padilla*’s rationale is hard to confine to deportation consequences alone but potentially extends to other status-generated penalties that are sufficiently important to a criminal defendant to influence his willingness to plead guilty.

Because of *Padilla*, competent defense lawyers will now advise their cli-

ents about collateral penalties and incorporate them into negotiations over the disposition of criminal charges. Judicious prosecutors will take steps to protect against post-conviction challenges based on consequences no one was aware of and may be more open to alternative dispositions that do not result in a conviction record. And courts will no longer declare collateral consequences to be “none of our business” just because they do not control their imposition.

The *Padilla* decision suggests that forgiveness has a constitutional dimension as well. In finding a constitutional obligation to warn, the Court emphasized that deportation is a “virtually inevitable” consequence of a guilty plea because Congress has eliminated judicial and administrative mechanisms for discretionary relief. Lower courts have held that the availability of relief from collateral sanctions in post-conviction proceedings is relevant in constitutional challenges to the imposition of these sanctions in the first instance, under the ex post facto and due process clauses.

Competent lawyers therefore need to know not only what collateral sanctions will apply to their clients upon conviction, but also how to avoid or mitigate them, including at sentencing itself. Prosecutors and judges need this information too in order to understand their own obligations to core principles of proportionality and fairness—principles that must now be understood to apply not just to the court-imposed sentence, but to collateral penalties affecting significant private interests that otherwise will last a lifetime.

In one case now pending in the Pennsylvania Supreme Court, a long-time school teacher unwittingly lost his pension after pleading guilty to a misdemeanor involving one of his students. Fairness is a particularly relevant concern where such penalties bear little or no relationship to the underlying criminal conduct, or where the passage of time has attenuated any relationship that might

once have existed. It is not farfetched to suggest that the dispensation provided by the Certificate of Good Conduct in Darrell Langdon's case was constitutionally required.

Finally, in making and enforcing laws, government officials need to consider whether status-generated sanctions are a form of reasonable regulation or simply additional punishment that impairs the ability for self-support in the legitimate economy and perpetuates social alienation. Social science research suggests the latter may be closer to the truth.

Alfred Blumstein and Kiminori Nakamura have shown that "some point in time is reached when a person with a criminal record, who remained free of further contact with the criminal justice system, is of no greater risk than a counterpart of the same age—an indication of redemption from the mark of crime." It is something of an embarrassment that the law, supposedly the manifestation of society's most enlightened values, should lag behind cold science in recognizing the virtues of forgiveness.

If forgiveness for those convicted of crime finds support in both public policy and emerging legal doctrine, it remains to consider how it can best be packaged for a modern audience.

### Reinventing Pardon

In *The Federalist No. 74*, Alexander Hamilton argued that "humanity and good policy conspire to dictate that the benign prerogative of pardoning should be as little as possible fettered or embarrassed." He spoke of the "necessary severity" of the criminal code that required "an easy access to exceptions in favor of unfortunate guilt." As Hamilton expected, pardon functioned as a fully operational part of the justice system from the earliest days of the Republic. Pardon was useful not only to cut short mandatory prison sentences, but also to remove legal disabilities and signify an individual's good character. Until quite recently, the routine availability of pardon after service of sentence meant that a

convicted person could look forward to a full and early reintegration into free society—with the same benefits and opportunities available to any other member of the general public—free of unwarranted collateral penalties and the stigma of conviction. Expungement and set-aside statutes, enacted as a substitute for pardon, relieved minor offenders of the need to report their convictions.

In the past thirty years, the old routes to official forgiveness have become impassable. Pardon has come to be regarded as a bothersome and politically dangerous anachronism. Relief premised on concealment has become increasingly unreliable and unpopular in the face of technological advances and a public appetite for full disclosure. Systemic efforts to avoid threshold rejection, like "ban-the-box" legislation or limits on pre-employment inquiries, have driven discretion underground.

Yet, as we have seen, the idea of official forgiveness finds new policy support in efforts to reduce recidivism through reentry programming and new legal support in the reasoning of the *Padilla* decision. If the pardon power cannot be reinvigorated, as Supreme Court Justice Anthony Kennedy urged at the 2003 ABA Annual Meeting, perhaps it can be reinvented.

It happened that just two days after Justice Kennedy delivered his now-iconic speech, the ABA House adopted a set of standards that proposed a new template for limiting and rationalizing the collateral consequences of conviction. Among other things, the Criminal Justice Standards on Collateral Sanctions and Discretionary Disqualification proposed that forgiveness should be an important responsibility of the court that imposes punishment. Borrowing the framework proposed some forty years earlier in § 306.6 of the Model Penal Code, the ABA Standards provided that "timely and effective" relief from mandatory collateral sanctions should be available as early as sentencing itself, to alleviate impediments to successful reha-

bilitation. The preferable dispenser of forgiveness is the sentencing court. There should also be a later opportunity for a fuller restoration of legal rights and social status, also from the sentencing court (though a specialized administrative agency might serve as well).

Six years later, the Uniform Collateral Consequences of Conviction Act (UCCCA) adopted the two-tiered relief scheme of the ABA Standards, adding protections against negligence liability for anyone willing to take a risk on a person deemed rehabilitated. The idea of this relief is to remove mandatory legal barriers and allow a decision maker to consider an individual fairly on the merits. Conviction should be grounds for disqualification only if the criminal conduct is reasonably and substantially related to the benefit or opportunity at issue.

The need for a back-end pardoning mechanism will diminish by virtue of other provisions of the ABA Standards and the UCCCA that introduce a degree of transparency into the process by which collateral sanctions and disqualifications are imposed in the first instance. If it turns out that there are really 38,000 such laws and rules, as the aforementioned federally funded study indicates, perhaps the shock will result in some retrenching. In addition, the fuller integration of collateral sanctions into plea negotiations and sentencing hastened by the *Padilla* decision will in time lead away from the punitive model of collateral penalties that has developed over the past three decades. If (as both the ABA Standards and the UCCCA require) courts must ensure that defendants are informed about applicable collateral sanctions before they accept a guilty plea, excessive severity may disrupt a system of negotiations on which the criminal justice system has come to depend. When prosecutors find it harder to craft acceptable plea offers because of collateral sanctions, when defendants are willing to risk

*continued on page 23*

# The Political Climate Change Surrounding Alternatives to Incarceration

By Mary D. Fan

As the costs of imprisonment are proving unsustainable, we are realizing that out of sight does not mean we can put offenders out of mind. For decades, the fierce politics of crime made it difficult to explore and expand alternatives to the dominant penal paradigm of incarceration. The wisdom is so widespread it seems obvious—politicians cannot afford to look soft on crime or risk backlash if someone let out of jail early recidivates. As budget crises sweep the states, however, the social meaning of cutting back on incarceration and penal harshness is changing.

Rather than being soft on crime, the search for alternatives to incarceration is a way to cut costs and staunch the fiscal bleeding from maintaining an incarceration nation. Because of the social-meaning change of exploring alternatives to imprisonment from being too soft and fuzzy on crime to being fiscally responsive and responsible, the political climate for exploring alternatives to incarceration is changing.

## Coming to Consciousness

In a steep recession, confronting the fiscal and human costs of incarceration has become unavoidable. Today, one in thirty-one adults is under some form of correctional control, either in jail, in prison, or on probation or parole. The statistics are even starker and more troubling for African Americans and men because of disproportionate incarceration: One in eighteen men and one in eleven African Americans are under correctional control. There is widespread concern among criminal justice experts that



Patricia Winckler, of Newark, N.J., holds a sign outside the New Jersey statehouse while the legislature holds hearings on various bills, including legislative reforms that could save money and reduce recidivism by ex-prisoners.

Associated Press, AP

we have reached a tipping point where such high rates of imprisonment may buy us less safety and even be criminogenic.

As more and more people are incarcerated, not only the most dangerous are locked away. The efficacy of the incapacitation strategy is diminished because lower-risk people are also warehoused away rather than doing good in their communities as fathers, mothers, brothers, sisters, sons, and daughters. In disadvantaged communities where the vast proportion of imprisoned people originate, imprisonment decimates social and family structures that supply the bonds and nurturing against lawbreaking. High rates of incarceration therefore can be criminogenic outside prison walls, in disadvantaged communities, as well as within the pressure cooker of prisons.

For these diminishing or even perverse returns, the fiscal burden is crippling. The bill for incarceration has swelled dramatically as incarceration surged 240 percent between 1980 and 2008. The nation spent \$75

billion on corrections in 2008—the majority of the money on incarceration. The \$68 billion total spent on prisons was a 336 percent increase from the amount two and a half decades ago. Prisons have become the nation's second fastest-growing general fund expenditure. To house just one prisoner in 2005, taxpayers spent an average of \$23,876 a year. These steep costs are unsustainable in a deep recession and halting recovery when at least forty-two states and the District of Columbia are struggling with at least \$103 billion in budget shortfalls.

## Searching for Alternatives

The pressures of cutting costs are changing the meaning and political momentum for seeking alternatives to incarceration in many states. About half of the states have adjusted early release and parole programs and sentencing laws or have plans to do so. Putting people back in the community early puts the emphasis on the important question of how we prepare people to reintegrate in the community.

Some recent legislation offer examples of recalibrating incentives to foster rehabilitation and reintegration.

For example, in 2008, Pennsylvania passed the Recidivism Risk Reduction Act, which allows for a reduction of up to a quarter of the sentence of a nonviolent offender as an incentive to attend rehabilitative programs. (PA. CODE tit. 61, ch. 45, §§ 4504–06 (2008).) The legislation is projected to help save \$71.5 million in five years. At the time, severe overcrowding was forcing the state to construct four new prisons at \$200 million each. In a striking change from the tough-on-crime politics that had dominated the Pennsylvania legislature since the 1980s, the incentive for rehabilitation was widely backed by criminal justice insiders, including prosecutors, police, and prison officials.

In August 2009, Colorado officials launched early release initiatives intended to save the state \$19 million and to help redress a \$318 million budgetary shortfall. Colorado's House Bill 1352, enacted after bipartisan sponsorship, also reduces the penalties for drug possession and use crimes. (COLO. REV. STAT. ANN. §§ 18-18-401 to 18-18-406.) The legislation's statement of purpose explains:

Successful, community-based substance abuse treatment and education programs, in conjunction with mental health treatment as necessary, provide effective tools in the effort to reduce drug usage and criminal behavior in communities. Therapeutic intervention and ongoing individualized treatment plans prepared through the use of meaningful and proven assessment tools and evaluations offer a potential alternative to incarceration in appropriate circumstances and should be utilized accordingly. (COLO. REV. STAT. ANN. § 18-18-401(b), (c) (2011).)

One of the bill's sponsors, Republican Representative Mike Waller, a former prosecutor, explained, "It's time to switch our focus from being tough on crime to being smart on crime. This bill is about how we can get the best

bang for our public-safety dollars." Demonstrating a bipartisan coming to consciousness, Representative Waller stated, "I'm convinced that warehousing people who are addicts doesn't do anything to solve the problem."

Budgetary pressures may also build political will to explore sentencing alternatives, such as house arrest. In Mississippi, for example, budgetary pressures led the Department of Corrections to increase the number of nonviolent drug offenders serving time under house arrest rather than parole. According to Mississippi Department of Corrections figures, in fiscal year 2007, putting an offender in the intensive supervision program under house arrest cost an average of \$9.96 per day compared to \$45.48 a day to house a prisoner in the state penitentiary. The difference represents a nearly fivefold savings for each prisoner per day.

The search for alternatives to incarceration in the nonviolent drug offender context has also led to the increasing popularity of drug courts. Well before the present economic contraction, drug courts began in the 1980s as a tactic to relieve some of the pressures of high drug caseloads overburdening the courts. Drug courts represent a break from the punitive approach to incarcerating those with substance abuse problems, adopting a disease model and giving incentives to engage and succeed in treatment to avoid incarceration. Criminal justice actors, including judges, act alternately as cheerleaders and "tough love" providers toward overcoming the problem and reducing the risk of recidivism. Avoiding or reducing prison time is an important incentive for successful completion of rehabilitative programming.

Because of the success of drug courts, the notion of mental health courts is also gaining political traction. Mental health courts are also anchored in a therapeutic model. Approaches vary in the jurisdictions experimenting with this alternative model. In general, however, the

goal is to offer an alternative to the traditional penal model to provide incentives for treatment that address the root problems of lawbreaking and reduce recidivism. The hope is to stop the expensive recycling of people through the system because root problems are not redressed.

### **A Precarious Time**

While budgetary pressures may create political conditions conducive to exploring alternatives to incarceration, the need to slash and burn also may imperil promising programs. For example, Kentucky is phasing out its family and drug court to address a \$7 million deficit as part of short-term cost-cutting measures with long-term consequences.

Kansas also has cut important therapeutic programs for reducing recidivism and breaking the cycle of reoffending. Though as many as 80 percent of inmates in the Kansas system have substance abuse problems and 40 percent can be considered addicts, Kansas cut its substance abuse treatment programs. The state also slashed community residential programs that help the mentally ill transition back to the regular population after serving their sentence and stay on their medications, thereby posing less of a risk of harm to others and themselves.

Backlash against back-end sentence reductions, such as expanding early release, has in some instances led to attempts to cut costs in less politically perilous ways by slashing rehabilitative programs. Colorado, for example, recently cut \$1.9 million in funding for prisoner treatment programs for substance abuse and mental health problems to address its budgetary woes after an expanded early release program to save money got off to a rocky and controversial start and few inmates were actually released. As budgetary shortfalls lead to recurrent states of emergency or urgent program cuts, the danger is misaimed slashes to relieve short-term pain at the expense of long-term pathologies.

## The Judicial Awakening

While much of the fomentation is in the political branches, courts have an important role to play in curbing the excesses of an incarceration nation that transgress the human rights safeguarded in the Bill of Rights. The judicial awakening is demonstrated by Justice Anthony Kennedy's recent opinions for the Supreme Court in *Graham v. Florida*, 130 S. Ct. 2011 (May 17, 2010), and *Brown v. Plata*, 131 S. Ct. 1910 (May 23, 2011).

*Graham* categorically invalidated sentences of life imprisonment without possibility of parole for juveniles in nonhomicide cases as a violation of the Eighth Amendment prohibition against cruel and unusual punishment. The case reinvigorated Eighth Amendment proportionality review, which had been essentially dormant for more than a half decade since the Court's famously fractured decisions in cases such as *Ewing v. California*, 538 U.S. 11 (2003), and *Lockyer v. Andrade*, 538 U.S. 63 (2003), let stand sentences of twenty-five years to life for shoplifting three golf clubs and fifty years to life for shoplifting videotapes.

The same year as the Court decided *Ewing* and *Lockyer*, in 2003, Justice Kennedy gave a memorable speech to the American Bar Association urging that lawyers do something to ease the fiscal and community toll of spiraling penal severity. Justice Kennedy told the audience, "Our resources are misspent, our punishments too severe, our sentences too long." He said:

The debate on the purposes of prison—should it be deterrence, should it be prevention, should it be rehabilitation—has gone on for a long time. But please do not think it is a tired debate. That debate must be renewed given the number of people we have in our prisons. We have to find some way to bridge the gap between skepticism about rehabilitation and the fact that so many of your fellow citizens and your fellow humans are being maintained in prison. We have to ask, "why are they there?" We have to ask if there are some better ways to

prevent the addiction of crime which causes the cycle of recidivism.

For seven years, the Court sat back and waited for the political process and branches to do something about the pathologies of the system. But the political process was stuck. Finally, Justice Kennedy led the Court in *Graham* and in *Brown v. Plata* in acting to address the human toll and vindicate the values enshrined in the Eighth Amendment.

In *Graham*, Justice Kennedy explained that the penalty's forswearance of the rehabilitative ideal and snuffing out of hope for juvenile non-homicide offenders was relevant to the severity analysis. The legislature is free to choose among penal approaches, Justice Kennedy wrote. But "[i]ncapacitation cannot overwhelm all other considerations, lest the Eighth Amendment's rule against disproportionate sentences be a nullity."

Soon after *Graham*, Justice Kennedy again wrote for the Court in affirming a prisoner release order "of unprecedented sweep and extent" requiring California to reduce its prison population to 137.5 percent of design capacity within two years. The order would necessitate the release of as many as 46,000 prisoners to ameliorate Eighth Amendment violations in the provision of health and mental care to prisoners because of severe overcrowding. The Court ruled the order was required to redress what Justice Stephen Breyer in oral argument termed "a big human rights problem."

These landmark decisions are important nudges for a nation stuck in the pathological politics of crime. It is not the province of courts to set penal policy. It is the task of courts, however, to make constitutional values salient to the polity and to act rather than abdicate review when process dysfunction leads to legislation that pushes the gray boundaries of constitutionality. The judicial nudges show the value of our system of cross-checks that envisions the need for the vision of institutions set outside of the political quagmires in which political actors may be stuck.

## A Return to Our Roots and Humanity

For much of the twentieth century, the prevailing orientation of American criminal justice was rehabilitation and hope for redemption, centered on the belief that the system and its sentences should reform the offender. Dubbed the "rehabilitative ideal," the prevalent penal approach reflected faith in modern therapeutic intervention as well as older Western beliefs in punishment as loving chastisement meant to correct and improve the offender. Oriented by this penal philosophy, the American incarceration rate of around 100 per 100,000 people in the population was in line with much of the democratic West until around 1974.

The spike in our appetite for incarceration is the aberration rather than the cultural norm. Despair over surging crime rates, collapse of faith in government institutions to successfully rehabilitate, and a governance structure highly responsive to flare-ups of passion and Manichean crusading led to the decline of the rehabilitative ideal beginning in the 1970s. Times and crime rates have changed again. We can afford a return to our cultural roots of hope for reintegration.

In a forthcoming article, I will explore the future of penal approaches and contend that the future of penal law may be shaped by what I term "rehabilitation pragmatism." Rehabilitation pragmatism is not the starry-eyed and egalitarian hope for reclamation of every soul of the rehabilitative ideal. Program beneficiaries will be selected for suitability and chances of success. Rehabilitative pragmatism will be data-driven in selecting its beneficiaries, held accountable for its costs through demand for evidence of success, and derive its bipartisan support from the notion of cost savings and empirical support for efficacy.

Limitation on access, in turn, poses challenges of potential disparities in who becomes a beneficiary of rehabilitation pragmatism and who

*continued on page 22*

# Sometimes the Cure Is Worse Than the Disease

## The One-Way White-Collar Sentencing Ratchet

By Carlton Gunn and Myra Sun



Associated Press, AP

Former Enron CEO Kenneth Lay turns himself in after a nearly three-year federal investigation of the scandal-ridden energy company.

disparity between sentences for white-collar offenses and crimes such as those involving violence, stealing, and firearms through amendments to the sentencing guidelines. As a result, this disparity is disappearing. For better or worse, Madoff's sentence of 1,800 months following his early guilty plea is nearly six times longer than the high end of the 262–327-month advisory sentencing guideline range for a “career offender” defendant

### The “Cure” for Disparity: Higher Sentences for White-Collar Crime

Concern for disparity in sentencing first arose as a political issue on the national stage in the 1970s and 1980s and led eventually to the federal Sentencing Reform Act. Concerns about disparity in sentencing were one of the driving forces behind that Act. See S. REP. NO. 98-473, at 38, 41–46, 52, *reprinted in* 1984 U.S.C.C.A.N. 3182, 3221, 3224–29, 3235. The Act created federal sentencing guidelines modeled after the sentencing guidelines that several states had already begun using. Using such guidelines, it was believed, would at least eliminate disparity between defendants with similar records who had been found guilty of similar kinds of conduct. See, e.g., Justice Stephen Breyer, *Justice Breyer: Federal Sentencing Guidelines Revisited*, 14 CRIM. JUST. 28 (spring 1999) [hereinafter *Guidelines Revisited*].

Indeed, one of the statutory provisions that was included in the Act specifically made disparity a consideration. See 18 U.S.C. § 3553(a) (6) (requiring sentencing court to consider “the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct”). The statute also provided that the Sentencing Commission “shall assure that the guidelines and policy statements are entirely neutral as to the race, sex, national origin, creed, and socioeconomic status of offenders.” 28 U.S.C. § 994(d). It did not address how the correlation between those factors and other factors, such as community ties, employment record, and family ties and

#### From the Bureau of Prisons Web site:

Name	Register No.	Age-Race-Sex	Release Date
BERNARD L. MADOFF	61727-054	73-White-Male	11-14-2139
[Age at commencement of sentence: 70		Age at end of sentence: Death]	

Not so long ago, the phrase “white-collar crime” conjured up visions of “Club Fed,” federal prison “camps” that allowed offenders to serve short prison sentences in dormitory settings with fewer restrictions on their personal freedom than other prisoners. This is no longer true. To the general public, these changes came in the wake of the relatively recent, large-scale fraud schemes of the 2000s, such as those involving the corporate officers of the Texas energy company Enron and New York’s investment guru Bernard Madoff. In reality, however, the U.S. Sentencing Commission has been hard at work since 1987, gradually narrowing the

entering an early guilty plea to his third bank robbery conviction—even one committed with a firearm. See U.S.S.G. § 4B1.1(c)(3).

The Sentencing Commission thus has focused on the problem of white-collar and “blue-collar” sentence disparity. But it has done it in the wrong way, by grossly increasing white-collar crime sentences. It has eliminated, or at least lessened, the human rights problem of disparity between defendants whose differences may be rooted in race, class, and social factors. But it highlights another human rights problem in this country—the unhesitating and grossly excessive use of incarceration as a purported remedy for crime.

# Crack Cocaine Sentencing

## Compiled from Information from the U.S. Sentencing Commission

On June 30, 2011, the U.S. Sentencing Commission voted unanimously to give retroactive effect to its proposed permanent amendment to the federal sentencing guidelines that implements the Fair Sentencing Act of 2010. Retroactivity of the amendment became effective on November 1, 2011, the same day the proposed permanent amendment would take effect, unless Congress acts to disapprove the amendment.

“In passing the Fair Sentencing Act, Congress recognized the fundamental unfairness of federal cocaine sentencing policy and ameliorated it through bipartisan legislation,” noted Commission chair, Judge Patti B. Saris. “The Commission’s action ensures that the longstanding injustice recognized by Congress is remedied, and that federal crack cocaine offenders who meet certain criteria established by the Commission and considered by the courts may have their sentences reduced to a level consistent with the Fair Sentencing Act of 2010.”

The Commission made its decision on retroactivity after significant deliberation and many years of research on federal cocaine sentencing policy. The Commission has issued four research reports to Congress on federal cocaine sentencing policy, testified numerous times before Congress, and held several public hearings on the topic of federal cocaine sentencing policy. The Commission solicited public comment on the issue of retroactivity and received

over 43,500 written responses, the overwhelming majority of which were in favor of retroactivity. On June 1, 2011, the Commission held a full-day hearing at which it heard from twenty experts and advocates within the criminal justice community. The Commission also carefully considered the views it received from Congress, the federal judiciary, and the Department of Justice.

The Commission considered a number of factors during its deliberations, including the purpose of the Commission’s amendment implementing the Fair Sentencing Act of 2010, which lowers the penalties for crack cocaine offenses consistent with the Act, the limit on any reduction allowed by the amendment, whether it would be difficult for the courts to apply the reduction, and whether making the amendment retroactive would raise public safety concerns or cause unwarranted sentencing disparity in the federal system. Ultimately, the Commission determined that the statutory purposes of sentencing are best served by retroactive application of the amendment.

A federal sentencing judge will make the final determination of whether an offender is eligible for a lower sentence and by how much that sentence should be lowered in accordance with instruction given by the Commission. The ultimate determination will be made only after consideration of many factors, including the Commission’s instruc-

tion to consider whether reducing an offender’s sentence would pose a risk to public safety. “The Commission is aware of concern that today’s actions may negatively impact public safety. However, every potential offender must have his or her case considered by a federal district court judge in accordance with the Commission’s policy statement, and with careful thought given to the offender’s potential risk to public safety. The average sentence for a federal crack cocaine offender will remain significant at about 127 months,” explained Judge Saris.

In December 2007, the Commission voted to give retroactive effect to its 2007 crack cocaine amendment effective March 3, 2008, and the process was smoothly coordinated among the courts, probation officers, U.S. Attorney offices, and the federal public defenders community. Since that time, the federal district courts have processed 25,515 motions, granting 16,433 motions for a reduced sentence and denying 9,082. The Commission has conducted a study of the recidivism rate of those offenders who received a reduced sentence as a result of the 2007 amendment, as compared to a similarly situated group of federal crack cocaine offenders who served their normal term of imprisonment, and determined that there is no statistically significant difference in recidivism rates between the two groups of offenders.

responsibilities should be addressed, though it did direct the Commission to take those factors into account “only to the extent that they do have relevance.” *Id.*

Left unaddressed by the Sentencing Reform Act—perhaps because it is a problem akin to comparing apples and oranges—was how to address disparities between sentences

for different *types* of crimes, such as white-collar crime and blue-collar crime. That was left—at least initially—to the Sentencing Commission’s development of the guidelines. And it was a relatively lesser concern at the start; Justice Breyer, who was a member of the first Sentencing Commission that wrote the original guidelines and reputedly was the

main drafter, has explained that seemingly conflicting goals of punishment led to a “key compromise,” in the form of an agreement to base the guidelines largely on judges’ “typical past practice” in imposing sentences, as established by an analysis of data from thousands of past cases. *See Guidelines Revisited*, at 30; Stephen Breyer, *The Federal*

*Sentencing Guidelines and the Key Compromises upon Which They Rest*, 17 HOFSTRA L. REV. 1 (fall 1988) [hereinafter *Key Compromises*]. The averages were biased upward, however, by the unexplained exclusion of cases in which nonincarceration sentences of probation had been granted, which if included presumably would have been entered as “0-month” sentences and would have pulled the averages down significantly. See Amy Baron-Evans, *Sentencing by the Statute*, at 36–37 (Apr. 29, 2009), available at [www.fd.org/odstb\\_SentencingResource3.htm](http://www.fd.org/odstb_SentencingResource3.htm) (last visited Oct. 21, 2011) (citing and discussing U.S. SENTENCING COMMISSION, SUPPLEMENTARY REPORT ON THE INITIAL SENTENCING GUIDELINES AND POLICY STATEMENTS (June 18, 1987)).

Various concerns, including a concern about the disparity between white-collar crime sentences and blue-collar crime sentences, did lead to some variation from past practice. As Justice Breyer has put it, there was an “adjust[ment] to avoid unfair anomalies” in the treatment of white-collar crime compared to what he referred to as “blue-collar crime,” *Guidelines Revisited*, at 30, and white-collar crime sentence guidelines were therefore somewhat greater than “past practice,” *id.* See also *Key Compromises*, at 20–21 (“To mitigate the inequities of these discrepancies, the Commission decided to require short but certain terms of confinement for many white-collar offenders, including tax, insider trading, and antitrust offenders who previously would have likely received only probation.”). The alternative of eliminating or reducing the disparity through decreases in blue-collar sentences from past practice was apparently not considered.

Thus began a narrowing of the white-collar crime/blue-collar crime disparity by a slow but steady ratcheting up of the white-collar crime guidelines—in particular, the fraud/theft guideline. One commentator who was previously a Department of Justice (DOJ) expert, Professor Frank

Bowman, noted in a critical article after leaving the DOJ that the Commission “tweaked the theft and fraud guidelines nearly annually” after they were first written. Frank Bowman, *Pour Encourager les Autres? The Curious History and Distressing Implications of the Criminal Provisions of the Sarbanes-Oxley Act and the Sentencing Guidelines Amendments That Followed*, 1 OHIO ST. J. CRIM. LAW 373, 387 (spring 2004) [hereinafter *Distressing Implications*].

The changes always “tended to increase guideline sentence levels for economic offenders,” *id.*, and they were not prompted by the empirical research that the Supreme Court described in *Kimbrough v. United States*, 552 U.S. 85 (2007), as the Sentencing Commission’s “important institutional role,” *id.* at 109. Rather, the Commission started with its conclusions; as one example, the 1989 amendment was justified simply as intended “to provide additional deterrence and better reflect the seriousness of the conduct,” U.S.S.G. app. C, amend. 99 (explanation for amendment). In later instances, the amendments were driven by congressional directives arising out of bills passed in response to high-visibility frauds or the “crime problem du jour.” See, e.g., U.S.S.G. app. C, amend. 647 (explanation for amendment) (“This amendment implements directives to the Commission contained in sections 805, 905, and 1104 of the Sarbanes-Oxley Act of 2002. . . .”); U.S.S.G. app. C, amend. 576 (explanation for amendment) (“This amendment responds to the directives to the Commission contained in section 4 of the Identity Theft and Assumption Deterrence Act of 1998. . . .”).

One commissioner warned that “the perceived absence of empirical research establishing the need” for these early changes meant the Commission’s mandate of “policy development through research was being supplanted by symbolic signal sending by Congress.” U.S. SENTENCING COMMISSION, FIFTEEN YEARS OF GUIDELINE SENTENCING 56 (Nov. 2004). The process was driven not by

data that showed that current sentences were, for example, failing to deter, but by entities in the system—judges on the Judicial Conference’s criminal law committee, the Probation Office, and the DOJ—who all favored higher sentences. While the defense bar was represented, their influence was limited; in the 2001 discussions, for example, the defense bar merely obtained mitigating changes at lower levels of loss. Frank Bowman, *The 2001 Federal Economic Crime Sentencing Reforms: An Analysis and Legislative History*, 35 INDIANA L. REV. 5, 30, 33 (2001).

After the 2003 increases in the loss guidelines, nominally tied to the Sarbanes-Oxley Act, the politically driven quest for higher guidelines lost credibility even with the former DOJ expert, Professor Bowman, who had supported the 2001 amendments. “Reducing sentences may sometimes be a bad idea,” he observed, “but raising sentences cannot always be a good idea.” *Distressing Implications*, at 439–40. Professor Bowman later spoke generally of the guidelines as having become “a one-way upward ratchet increasingly divorced from considerations of sound public policy and even from the commonsense judgments of frontline sentencing professionals who apply the rules.” Frank Bowman, *The Failure of the Federal Sentencing Guidelines: A Structural Analysis*, 105 COLUM. L. REV. 1315, 1319–20 (2005) [hereinafter *Guidelines Failure*].

What has been the cumulative impact of these amendments on white-collar crime sentences? It will obviously depend on the case, but one example discussed in a sample Federal Public Defender sentencing memorandum for an actual case illustrates a fivefold increase in the federal sentencing guideline range for one client—from 30–37 months in 1987 to 151–88 months in 2003. See *Sentencing Memo in Fraud Case*, at 29–30, available at [www.fd.org/odstb\\_SentencingResource3.htm#DECONS](http://www.fd.org/odstb_SentencingResource3.htm#DECONS) (last visited Oct. 21, 2011).

## The Greater Disease: The Overuse of Incarceration to Attack Crime

There is an obvious alternative remedy for the disparity between sentences for white-collar crime and sentences for blue-collar crime. That is the reduction of sentences for blue-collar crime, or even a partial reduction for those sentences and a partial increase in white-collar crime sentences. The Sentencing Commission and Congress have largely ignored this possibility, however, with the notable recent exception of the reduction in crack cocaine sentences that is discussed in the sidebar on p. 10.

Lest one think the sentences we impose in this country for crime are innately reasonable and reflective of how any civilized society might choose to deal with crime, compare the sentences we impose in this country to the sentences imposed in other “first world” countries, for example, some of the countries in Western Europe. It is relatively well known that the United States has the highest prison population rate in the world; a 2009 estimate from the International Centre for Prison Studies at King’s College in London put the incarceration rate here at 756 per 100,000 of the country’s population, with Russia second at 629 per 100,000. The same survey found that prisons in the United States hold almost half of all persons held in penal institutions around the world. See ROY WALMSLEY, *WORLD PRISON POPULATION LIST* (8th ed. Jan. 2009), [www.kcl.ac.uk/depsta/law/research/icps/downloads.php?searchtitle=world+prison&type=0&month=0&year=0&lang=0&author=&search=Search](http://www.kcl.ac.uk/depsta/law/research/icps/downloads.php?searchtitle=world+prison&type=0&month=0&year=0&lang=0&author=&search=Search) (last visited Nov. 15, 2011).

It is difficult to make completely accurate comparisons between sentences imposed here to those in other countries. However, not only are more people incarcerated in this country, but their sentences—based on studies that compared similar offenses—seem to be longer. One comparative study found that “in the case of property crime, it is clear that

the United States incarcerates more and for longer periods of time than similar nations.” Persons sentenced for burglary in the United States served 16.2 months in prison on average, compared to 5.3 months in Canada and 6.8 months in England and Wales. J. Lynch, *Crime in International Perspective*, in *CRIME* 37 (J. Wilson & J. Petersilia eds., Institute for Contemporary Studies (1995)).

So, why do we put people in prison for so much longer in this country than other first-world countries? Such long sentences do not seem to be necessary to deter crime. A wealth of studies suggest, perhaps especially in the case of white-collar offenders but also more generally, that it is the certainty of punishment, i.e., the certainty of being caught, that deters more than the extent of punishment once caught. See, e.g., Michael Tonry, *Purposes and Functions of Sentencing*, 34 *CRIME & JUST.: A REVIEW OF RESEARCH* 28–29 (2006); Gary Kleck et al., *The Missing Link in General Deterrence Theory*, 43 *CRIMINOLOGY* 623 (2005); ANDREW VON HIRSCH ET AL., *CRIMINAL DETERRENCE AND SENTENCE SEVERITY: AN ANALYSIS OF RECENT RESEARCH* (1999); David Weisburd et al., *Specific Deterrence in a Sample of Offenders Convicted of White-Collar Crimes*, 33 *CRIMINOLOGY* 587 (1995).

One part of the problem lies in the creation of guidelines that necessarily rely on quantification of sentencing considerations. Certain aggravating factors, such as loss, tend to be easy to quantify, while most mitigating factors, such as mental health factors, motive and intent, remorse, and family responsibilities and/or contributions to the community are nearly impossible to put a number on. As a result, the more easily quantifiable factors get readily included in a detailed escalating table and the less easily quantifiable ones are either ignored or have a single, random number attached with no recognition of the inherent variability of the factor. Compare U.S.S.G. § 2B1.1(b)(1) (loss table for

theft and fraud with sixteen separate subcategories of loss ranging from \$5,000 or less to more than \$400 million) with U.S.S.G. § 3E1.1 (fixed two-level decrease for “acceptance of responsibility” in cases with offense levels of less than sixteen, with the possibility of additional one-level decrease in cases with offense levels of sixteen or more in which “acceptance” is sufficiently early to save government resources).

Federal judges have recognized this problem in applying the amended sentencing guidelines for fraud. Not every white-collar offender is a Bernard Madoff. District judges sentencing defendants under these guidelines have spoken of the guidelines’ “inordinate emphasis” on loss, *United States v. Adelson*, 441 F. Supp. 2d 506, 509 (S.D.N.Y. 2006); the guidelines’ “effort to fit infinite variations on the theme of greed into a limited set of narrow sentencing boxes,” *United States v. Emmenegger*, 329 F. Supp. 2d 416, 427 (S.D.N.Y. 2004); and the guidelines’ “fetish with absolute arithmetic,” *United States v. Parris*, 573 F. Supp. 2d 744, 751 (E.D.N.Y. 2006) (quoting *Adelson*, 441 F. Supp. 2d at 509). They have further pointed out that “[i]n many cases, . . . the amount stolen is a relatively weak indicator of the moral seriousness of the offense [and that] [t]o a considerable extent, the amount of loss . . . is a kind of accident, dependent as much on the diligence of the victim’s security procedures as on [a defendant’s] cupidity.” *Emmenegger*, 329 F. Supp. 2d at 427. They have expressed concern about “the harm that guideline calculations can visit on human beings, if not cabined by common sense.” *Parris*, 573 F. Supp. 2d at 751 (quoting *Adelson*, 441 F. Supp. 2d at 512).

Another part of the problem is the formulation of sentencing standards at a generalized policy or political level rather than the focusing on individualized sentences in individual cases. The percentage of our senators, congressmen, and congresswomen—and Sen-

*continued on page 23*

# Prisons for Profit Incarceration for Sale

By Michael Brickner  
and Shakyra Diaz

The July 30, 2010, escape of three inmates from an Arizona medium-security private prison was a series of worst-case scenarios come to life, not only for the public, but for the private companies that operate and profit from state prison facilities. While two of the escapees were captured quickly, John McCluskey and his accomplice Casslyn Welch avoided capture for nearly three weeks. Their time on the lam was not without incident—they were linked to the murder of Gary and Linda Haas, an Oklahoma couple whose burned bodies were found in their camper parked in New Mexico.

In the weeks authorities searched for McCluskey and Welch, Arizona officials began an investigation into the Management & Training Company (MTC)-operated prison. They found several glaring security oversights that contributed to the maelstrom, including a faulty perimeter alarm, inadequate maintenance on the alarm system, no security guards posted at the perimeter when the escape occurred, a sluggish response to the reported escape, and nonoperational flood lights at the perimeter.

The report left the Haas family and many across the country to conclude that this tragedy simply did not have to happen if MTC had done its due diligence. McCluskey and Welch were apprehended on August 20, 2010, but the damage was done. The Haas family filed a wrongful death lawsuit against MTC and the State of Arizona. Subsequent media reports on the close relationships between private prison lobbyists, Arizona Governor Jan Brewer, and state lawmakers exposed a “pay-to-play” system that



Arizona Governor Jan Brewer answers questions from the media. Adopting private prisons can open the door to corruption, as was seen in the Arizona scandal involving Brewer, who accepted campaign contributions from persons with interests in private prisons.

Associated Press, AP

allowed private prisons to flourish in Arizona at the detriment of taxpayer resources and public safety.

The negative press could not have come at a worse time for MTC and other private prison operators. After the 2010 midterm elections, a new crop of legislators in states such as Florida, Louisiana, and Ohio ushered in grand proposals for broad-scale prison privatization as a means to raise funds to counteract sharp budget cuts. Arizona’s cautionary tale set the tone for debates in other states where advocates questioned whether private prisons yield cost savings, provide adequate safety measures, and increase the state’s reliance on incarceration rather than rehabilitation.

## The Rise of the Private Prison Industry

The rise of private prisons cannot be discussed without first recognizing that it was fueled by the explosion of “tough on crime” policies such as the failed War on Drugs that have left the United States with the largest prison population in the world. Policies such as mandatory minimum sentencing,

three strikes laws, and a de-emphasis on diversion, probation, and parole meant that more people were incarcerated for crimes that would have led to rehabilitation or community control only a few years earlier.

As the number of Americans incarcerated for low-level, nonviolent offenses has increased, so has the number of private prisons. In 1990, only a few years after private prisons first began to proliferate, 7,000 prisoners were housed in private facilities nationwide. In June 2010, the number rose to 126,000 prisoners, or 9 percent of the nation’s total state and federal prison population. In recent years, tremendous growth in private prisons has occurred on the federal level, particularly in the area of immigration detention. However, 2011 marked a renewed push toward expanding private prisons on the state level.

As the number of private prisons has grown, it has also led to banner profits for the companies. The largest private prison company, Corrections Corporation of America (CCA), reported revenues of \$1.675 billion in 2010 alone.

This is no coincidence. Across the country, states have struggled to maintain prison systems that are over capacity and over budget because of the large influx of inmates. In light of the May 2011 U.S. Supreme Court decision in *Brown v. Plata* ordering California to alleviate its overcrowded prisons, more states began to seek solutions to reduce costs and prison populations. *Brown v. Plata*, 131 S. Ct. 1910, 179 L. Ed. 2d 969 (2011). Private prison operators are often touted as savings magnets—playing into the conservative belief that private industry can operate more efficiently and eliminate wasteful bureaucracy that often characterizes government.

Numerous studies have called into question whether private prison companies actually produce any cost savings, and some raise the possibility that they may cost states more in the long term. In 2011, the Arizona Department of Corrections released its report on per capita operations costs for the 2010 fiscal year and found that private prisons offered no demonstrable cost savings—and in some cases cost more than state-operated prisons. Another 2011 report issued by Policy Matters Ohio, a nonprofit research organization, also found Ohio private prisons’ touted savings were nearly nonexistent and private prisons could be more costly than state prisons.

The growing crisis in U.S. prison overcrowding has contributed to private prisons’ resurgence in recent years. While the prisons were *en vogue* in the mid- to late-1990s, several scandals set back the privatization movement. Most notable was CCA’s Northeast Ohio Correctional Facility in Youngstown, Ohio, in 1999. Within its first fourteen months of operation, there were thirteen stabbings, two murders, and six escapes—eventually requiring the city of Youngstown to file a lawsuit to require CCA to uphold minimum security standards. The facility closed because it was no longer profitable, but it serves as a warning

for other states that wish to pursue prison privatization.

### **The Power of the Private Prison Lobby**

Another significant factor in private prisons’ proliferation is the calculated lobbying strategy employed by the companies to ensure they have favorable policies in place to maximize their profits.

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## **Private prisons’ failures in public safety and rehabilitation should be enough for taxpayers to question whether investing in these for-profit companies is wise.**

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One of the most famous corruption scandals involving dubious activities by private prison operators erupted in February 2011, when Luzerne County, Pennsylvania, Juvenile Court Judge Mark Ciavarella was convicted of racketeering in a “cash for kids” jail scheme. For years, the judge was paid by private prison officials to sentence kids to harsher punishments in order to keep the company’s private facility filled. The scandal led to the reversal of thousands of cases and the release of many of the juveniles, and Judge Ciavarella was sentenced to serve twenty-eight years in prison for his crime.

In the wake of the Arizona scandal, Governor Jan Brewer’s relationship with private prison companies came under intense scrutiny. According to the American Civil Liberties Union’s (ACLU) November 2011 report, *Banking on Bondage*,

several of her key staff, including her chief of staff and campaign manager, were connected with lobbyists for private prisons. She also accepted nearly \$60,000 in campaign contributions from people associated with private prisons. Brewer came under fire after signing S.1070, which would have increased enforcement of immigration laws and likely would have allowed private companies to increase detention of undocumented immigrants in the state.

Florida-based GEO Group, formerly known as Wackenhut Industries, is the second largest private prison operator. The Justice Policy Center found in its June 2011 report *Gaming the System* that GEO Group has made nearly \$1.5 million in state campaign contributions from 2003 to 2010. Florida law requires a minimum number of beds be operated by a private company, and is attempting to privatize twenty-nine additional state prisons.

Justice Police Institute’s report also outlined the connections between private prison operators and Ohio officials. Governor John Kasich appointed Gary Mohr, a former employee of CCA, as director of the state’s Department of Corrections. Kasich’s former chief of staff was hired by CCA in January 2011 as a lobbyist. Finally, Kasich himself is a former executive with Lehman Brothers, which has a long-standing relationship with CCA, underwriting bonds during the 1990s to keep the company out of bankruptcy. In 2011, Kasich announced a plan to sell and privatize five state facilities to a private prison operator.

In each of these cases, the private prison company uses its relationships and resources to create the most favorable environment for it to earn a profit. The result is a culture of corruption where state officials support and enact policies that will enhance the profits of the private prisons. While this is beneficial for the company, it often comes at the expense of the taxpayer, who must pay more

for an expanding prison system and to incarcerate people who would be better served in a less expensive community corrections setting.

### **A Price for Liberty?**

The success of any private company is measured by the profit it generates for shareholders. Just as Nike or Apple seeks to maximize their revenues on sneakers or iPods, private prisons' mission is to earn the maximum profit on the inmates housed in its facilities. This is demonstrably different from the state's interest in incarcerating criminals. Traditionally, the purpose of imprisoning a person falls into three distinct areas: protection for the public, rehabilitation for the offender, and punishment for the criminal. In all three of these areas, private prisons perform no better than public prisons—and may actually perform worse.

As outlined in the Arizona scandal, private prisons often fail to keep the public safe. Many of the problems were caused by the private prison cutting corners on maintenance and training in order to maximize their profit. Private prisons nationwide suffer from untrained and undisciplined staff that are ill-equipped to cope with the problems that occur in most prisons. In order to increase profits, private prisons pay staff less than public workers, with little or no benefits. As a result, those who work at private prisons do not have the level of experience that state prison workers have.

Private prison staff also tend not to stay for long: The staff turnover rate at private facilities is 53 percent, while the public facilities' rate was only 16 percent. With such an unstable, inexperienced workforce, it is difficult for private prison facilities to maintain safety and good staffing protocols. This also results in a dangerous environment for both the prisoner and the employee. According to a 2004 *Federal Probation Journal* report, inmate-on-staff and inmate-on-inmate assaults were 50 percent higher at private prisons

than at their public counterparts. As the environment in the private facility becomes more dangerous, employees are less likely to stay, leading to more turnover and even more dire circumstances.

Taxpayers also have an interest in rehabilitating offenders to ensure they do not commit future crimes and to assist them in becoming contributing members of society. The failure of states to stop the cycle of incarceration has led to the current overcrowding of our prison system and budgetary crisis. Punishment alone cannot reverse this trend; it must include reforms that will direct more people into community corrections and rehabilitation. Unfortunately, this goal is in direct opposition to the mission of private prisons.

Companies like CCA earn their profits by incarcerating the maximum amount of people for the minimum amount of money. Programs such as drug counseling, mental health care, and job training diminish their profits. Private prisons have no incentive to rehabilitate individuals either, as their livelihood depends on more people being incarcerated, not less. In most cases, private prisons offer little or no rehabilitative programming. When they do, it is often poorly implemented with little oversight. States such as New Mexico, Alaska, Hawaii, and Vermont, which have some of the highest percentages of privatized prison beds, also have some of the highest three-year recidivism rates.

The lack of effective programming also affects the private prisons' duty to protect the public. If offenders are emerging from prison with few tools to reintegrate successfully back into society, they are more likely to commit future crimes and pose a danger to public safety. In addition, the growing number of unemployed ex-offenders has diminished the tax base, in turn decreasing funds available for education, social services, and other important programs. This has sped the urban decay that has plagued many cities with high populations of formerly incarcerated people.

While private prisons may not be demonstrably worse than public prisons in punishing those who are incarcerated, their failures in public safety and rehabilitation should be enough for taxpayers to question whether investing in these for-profit companies is wise. Public prisons also have their shortcomings, but the very nature of private prisons will lead to instability in prison facilities and further over-incarceration.

### **Operating in the Shadows**

States that wish to provide oversight to private prisons are at a significant disadvantage, as the normal transparency and accountability tools are rarely effective. It is highly disputed whether private prisons are required to abide by state public records laws. Federal private prisons have also resisted Freedom of Information Act requests on several occasions, leading to a culture of secrecy in many of the private facilities. This leaves watchdog organizations and the press with little ability to root out corruption and other problems.

While private prison companies and state officials point to auditors and compliance officers who may monitor their private prisons, they rarely have enforcement ability and can do little to punish companies that do not adhere to state guidelines. In public facilities, the governor typically has the ability to fire a warden who is not performing adequately. However, the governor has no such right in private facilities. Officials do have the power to terminate their contract with private prisons, but this rarely happens. The close relationship elected officials have with companies coupled with the inconvenience of scrambling to find a new company or find alternative facilities to house their inmates discourages states from switching operators.

As with any government function, there must be accountability to ensure nothing unethical or illegal occurs. Given the distinct profit motive of these private corporations, as

well as the reality that their business involves depriving some Americans of their liberty, these companies should be subject to the same expectations of transparency as any public prison.

### **Activists Fight Move Toward Privatization**

In 2011, three states considered radical privatization plans that would drastically increase these states' reliance on private prisons. Officials in Florida, Louisiana, and Ohio proposed legislation, but civil rights groups, public workers, and public interest watchdogs met each with opposition.

Florida officials responded to rising incarceration costs by including plans in the state's budget to privatize nearly thirty prisons. Union officials responded by filing *Baiardi v. Tucker*, claiming that the move violated the state constitution's prohibition against enacting major policy changes in legislation that include appropriation. On September 30, 2011, Judge Jackie L. Fulford ruled that the state did violate the constitution by not passing the privatization legislation in a separate bill. The ruling halted the state's plans to open the private prisons at the beginning of 2012; however, state officials pledged to appeal the decision.

Officials in Louisiana also considered privatization as a means of overcoming budget shortfalls. Notably, this proposal would have privatized and sold three state prisons to private companies. Typically, privatization only includes the state leasing the property to the private prison. However, Governor Bobby Jindal and others wanted to sell state property so they could obtain short-term funds to supplement the budget. State legislators narrowly rejected the proposal by one vote, after several officials raised concerns over the long-term wisdom of selling state assets.

Like Louisiana, officials in Ohio proposed selling and privatizing state prisons as part of its biennial

budget. Governor John Kasich originally included five prisons, but state lawmakers expanded the number to six. A coalition led by the Ohio Civil Service Employees Association, public research agency Policy Matters Ohio, and the American Civil Liberties Union (ACLU) of Ohio launched a campaign to halt the move toward privatization. In April 2011, the ACLU of Ohio released *Prisons for Profit: A Look at Prison Privatization*, a report that explored many of the shortcomings of privatization and how it may counteract positive criminal sentencing reforms. Policy Matters Ohio followed suit a few weeks later with *Cells for Sale: Understanding Prison Costs & Savings*, which specifically addressed whether private prisons delivered their promised cost savings. The three organizations toured the state speaking to local communities about the effect prison privatization may have on public safety and the local economy.

State legislators eventually passed the biennial budget with prison privatization included, allowing the Ohio Department of Rehabilitation and Correction (ODRC) to issue a request for proposals for the facilities. On September 1, 2011, the department stunned many by announcing that it would only sell one of the six facilities. In its announcement, ODRC officials said they did not sell more of the facilities because they did not pose an economic benefit for taxpayers. Ohio is the first state to sell a prison to a private company.

A constitutional challenge filed by state prison workers is still pending in *Progress Ohio v. State of Ohio*. The lawsuit alleges that the state violated the constitution's rule prohibiting more than one subject in legislation, as well as the prohibition against joining public and private property rights.

While each of these plans sought to greatly expand the role of private prisons in each of these states, officials were met with strong opposition by a wide coalition of groups utilizing

the courts, legislatures, and public education. Despite the continuing push toward privatization in these states, they provide a blueprint for other activists who wish to counteract dangerous private prison proposals.

### **Sentencing Reform: The Only Reasonable Solution**

Prison privatization is gaining traction in some states because officials and the public are concerned about the rising cost of incarceration. However, privatization will not improve the long-term budget problems that overcrowded prisons pose, but will likely exacerbate them.

If legislators truly wish to alleviate the growing prison problem, they must enact sentencing reforms that will channel more low-level, nonviolent offenders into community corrections settings; promote rehabilitation through programs such as earned credit; correct unfair and draconian sentencing disparities; and implement release programs for geriatric and chronically ill people who no longer pose a danger to society. States like Ohio have recently enacted such proposals, but their movement toward privatization may impede whatever progress may be achieved. If officials continue to allow the "tough on crime" mentality to dictate public policy, the public can expect more private prisons and less funds for other critical state programs that must be budgeted.

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*Michael Brickner is the director of communications and public policy at the ACLU of Ohio. Shakyra Diaz is the policy director at the ACLU of Ohio. They coauthored the ACLU of Ohio's recent report on prison privatization.*

Web links:  
ACLU of Ohio Web site:  
[www.acluohio.org](http://www.acluohio.org)

ACLU of Ohio report:  
[www.acluohio.org/issues/CriminalJustice/PrisonsForProfit2011\\_04.pdf](http://www.acluohio.org/issues/CriminalJustice/PrisonsForProfit2011_04.pdf)

# Double-Edged Paring Knives

## Human Rights Dilemmas for Special Populations

By **Giovanna Shay**

It has become a commonplace observation that the United States is the world's largest jailer. In an August 2011 report, *SMART REFORM IS POSSIBLE*, the American Civil Liberties Union (ACLU) confirmed that while the United States makes up only 5 percent of the world's population, it incarcerates 25 percent of the globe's prisoners. This unprecedented level of incarceration, first described as "mass incarceration" by NYU sociologist David Garland, has brought increased attention to the problems of particular subsets of prisoners sometimes called "special populations." These groups include female prisoners; lesbian, gay, bisexual, transgender (LGBT), and questioning inmates; older prisoners; and prisoners with mental illness and physical disabilities.

Conditions for these prisoners can sometimes raise significant human rights issues. In its 2011 decision *Brown v. Plata*, affirming an order of a three-judge panel requiring California prisons to reduce their populations to 137.5 percent of design capacity, the Supreme Court described gruesome conditions for prisoners with mental illness. Prisoners with mental illness routinely waited months for care, producing a suicide rate 80 percent higher than the national average. Prisoners with mental illness were held for long periods in administrative segregation, where lack of human contact exacerbated their condition. Officials sometimes placed suicidal inmates in "telephone-booth sized cages"; the *Plata* opinion described one found standing in his own waste.

Another example of issues facing



Two HIV inmates at Tutwiler Prison in Wetumpka, Ala., the nation's last prison that completely segregates these inmates from other prisoners, are shown in their confines of Dorm 8, the living quarters for infected female offenders.

Associated Press, AP

special populations is that women prisoners and LGBT prisoners are vulnerable to sexual abuse while incarcerated. In an ongoing case in New York, *Amador v. Andrews*, a class of women prisoners has alleged systemic sexual abuse and harassment by corrections officers. This case follows suits in other states, including Michigan, where women prisoners represented by attorney Deborah LaBelle settled a suit involving allegations of egregious sexual abuse and retaliation. Transgender women in facilities designated for men face particular risks. A leading Supreme Court Eighth Amendment case involved the rape of a transgender woman, Dee Farmer, in the U.S. Penitentiary at Terre Haute, Indiana. And corrections officials have sometimes turned a blind eye to the rape of gay men. In a Texas state facility, Roderick Johnson was brutalized by other inmates for weeks,

while corrections officers said, "We don't protect punks on this farm."

One of the ways that advocates have attempted to grapple with the issues of these "special populations" is through special classification methods, to parse prisoner populations and ensure their safety and appropriate treatment. American Bar Association (ABA) Standards—policies passed by the ABA to provide a model to jurisdictions—have incorporated such measures. However, these classification efforts have some drawbacks. They are "double-edged paring knives."

### The Problem of "Special Populations"

The incarceration crisis has focused increasing attention on prisoners in special populations. The reason for this growing awareness is multifaceted. The absolute number of prisoners in special population groups has grown solely by virtue of the

massive number of people currently incarcerated in the United States. As the ACLU report notes, many are serving long sentences, which leads to more elderly prisoners. And, according to the Sentencing Project, the incarceration rate for women has grown at a pace double that of men.

The heightened focus on treatment of incarcerated women is due in part to the work of human rights advocates. Reports by Human Rights Watch (HRW) and Amnesty International in the 1990s were among the first to draw widespread attention to the problem of custodial sexual abuse of women prisoners, as was a 1998 report by the U.N. Special Rapporteur on Violence Against Women, Radhika Coomaraswamy. This U.N. report was followed up by another mission in 2011, again examining the problem of violence against women in custody, among other issues. The focus on women prisoners has included not only the problem of custodial sexual abuse, but also issues relating to medical care, pregnancy, and parenting, such as the shackling of women prisoners laboring to give birth.

At the same time, as a recent article by sociologist Valerie Jenness in the *STANFORD LAW & POLICY REVIEW* has pointed out, numerous movements have coalesced to address prison sexual violence and custodial sexual abuse. This movement has further highlighted issues affecting special populations, including gay and transgender prisoners, as well as younger prisoners and women. It produced the Prison Rape Elimination Act of 2003 (PREA), which established a National Prison Rape Elimination Commission (NPREC) to study the problem and propose regulations. The NPREC report, released in 2009, highlighted the heightened risk of abuse to prisoners with nonheterosexual orientations, among others. PREA mandates that the Department of Justice (DOJ) promulgate regulations designed to protect all prisoners from prison

sexual violence. LGBT rights organizations contributed to the shaping of these proposed regulations through the notice-and-comment period. At the time this article went to press, the DOJ was at work on a final version of those regulations.

Perhaps one of the largest incarcerated special populations is the group of prisoners with mental illness. This group is so large, and overlaps with so many other cohorts, that it can hardly be called a subset. In 2006, HRW cited Bureau of Justice Statistics figures that more than half of male prisoners and

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**The absolute number of prisoners in special population groups has grown solely by virtue of the massive number of people currently incarcerated in the United States.**

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about three-quarters of women prisoners suffered from a mental health problem. A 2003 HRW report, *ILL-EQUIPPED: U.S. PRISONS AND OFFENDERS WITH MENTAL ILLNESS*, explained how jails and prisons have become social service agencies of last resort, due to the deinstitutionalization of persons with mental illness and a dearth of community-based resources. HRW noted that the Los Angeles and Cook County, Illinois jails were among the nation's largest mental facilities. The report recounted stories of prisoners with mental illness disciplined for "acting out," and placed in segregation, with the result that they decompensated yet further, sometimes with tragic results.

Long sentences have contributed to growth in the population of elderly prisoners. According to the ACLU

report *SMART REFORM*, in Louisiana, where there is a rate of life sentences four times the national average, the warden of the Louisiana State Penitentiary at Angola has publicly complained that the notorious prison is "turning into a nursing home." Caring for geriatric prisoners is expensive. The ACLU reports that it costs the state of Louisiana \$80,000 per year to house an ailing inmate. As a result of an unlikely coalition between the ACLU and the warden, this year the Louisiana state legislature passed a measure that would permit parole for prisoners over sixty.

**ABA Standards and Resolutions**

The ABA has been at the forefront of developing standards to ensure safety and dignity for the incarcerated. These efforts have included standards regarding the classification of prisoners who are sometimes termed "special populations." Of course, ABA Standards do not in themselves have the force of law. Their impact may be debated. However, ABA Standards can serve as models for jurisdictions seeking to enact best practices, and as a resource for advocates.

In its Criminal Justice Standards on the Treatment of Prisoners adopted in February 2010, the ABA emphasized the importance of screening and classification protocols for prisoners "vulnerab[le] to physical or sexual abuse" [Standard 23-2.1(b)(i) Intake Screening]. The ABA Standards urge the use of "special protocols" for women prisoners, prisoners with mental disabilities, and prisoners who are "geriatric" or under eighteen. They also state that corrections agencies should provide housing and programming to "meet the . . . needs of special types of prisoners, including female prisoners, prisoners who have physical or mental disabilities or communicable diseases, and prisoners who are under the age of eighteen or geriatric" [Standard 23-3.2(a)]. The health care standard similarly mandates "special

health care protocols” for “female prisoners, prisoners who have physical or mental disabilities, and prisoners who are under the age of eighteen or geriatric” [Standard 23-6.1(a)(iv)].

The ABA Standards contain numerous other specific provisions on management of “special populations,” including “services for prisoners with mental disabilities” [Standard 23-6.11], “prisoners with chronic or communicable diseases” [Standard 23-6.12], “pregnant prisoners and new mothers” [Standard 23-6.9], “prisoners with disabilities and other special needs” [Standard 23-7.2], and “impairment-related aids” [Standard 23-6.10]. In the “Personal Dignity” part, it provides that correctional officials should not subject prisoners to “harassment, bullying or disparaging language or treatment” or to “invidious discrimination based on race, gender, sexual orientation, gender identity, religion, language, national origin, citizenship, age, or physical or mental disability” [Standard 23-7.1(a)].

In a particularly ground-breaking provision, the ABA Standards recommend that correctional facilities make “individualized housing and custody decisions” for transgender prisoners who have undergone surgery or hormone treatment for gender identity disorder. The Standard [23-2.4] provides that “[i]n deciding whether to assign such a prisoner to a facility for male or female prisoners and in making other housing and programming assignments, staff should consider on a case by case basis whether a placement would ensure the prisoner’s health and safety.” It also provides that “[t]he prisoner’s own views with respect to his or her own safety should be given serious consideration.” With respect to medical care for gender identity disorder, the Standards assure “treatment necessary to maintain the prisoner at the stage of transition reached at the time of admission . . .” [Standard 23-6.13].

At its Annual Meeting in 2011, the ABA passed a “Resolution on

Security Classification Instruments and Needs Assessments for Women Offenders.” The Resolution urged federal and local authorities to adopt “gender-responsive needs assessments and programming,” to address women prisoners’ higher incidence of domestic violence victimization, mental illness, and substance abuse, as well as their typically heavier parenting responsibilities. The report accompanying the Resolution explained that prisons often use classification instruments designed for men, frequently producing inappropriately high custody scores for women. It urged corrections authorities to adopt security risk assessments that avoided this “over-classification” of women prisoners, as well as to redefine the meaning of “maximum custody” for female inmates. Ultimately, the hope is that using appropriate classification tools for women could produce decarceration through placing more women prisoners in community corrections.

The ABA Standards also contain numerous provisions regarding the treatment of prisoners with mental illness, including a provision mandating “appropriate and individualized mental health care treatment” [Standard 23-6.11], and provisions restricting the use of segregated housing for prisoners with serious mental illness [Standards 23-2.8(a) and (b), 23-3.8]. The ABA Standards also include provisions for monitoring the mental health of prisoners in administrative segregation [Standard 23-2.8(c)].

The ABA Standards are also notable for their emphasis on external oversight [Standard 23-11.3]. Professor Michele Deitch of the University of Texas LBJ Public Policy School, a co-chair of the ABA Corrections Committee Subcommittee on External Oversight, has written an article in the *AMERICAN CRIMINAL LAW REVIEW* entitled *Special Populations and the Importance of Prison Oversight*, arguing that external oversight can help prisoners in special populations. Deitch details how independent monitoring can protect prisoners who are in segregation, vulnerable to

sexual assault, or living with disabilities or serious medical needs.

### Double-Edged Reforms

While standards governing the management of special populations may be necessary to ensure humane treatment and avoid victimization and loss of life, they can be controversial, even among human rights advocates. There are two types of critiques: that reforms perpetuate stigma and stereotypes and that reforms reinforce our reliance on prisons.

As an example of the first category, some critics charge that policies specific to women prisoners reinforce gender stereotypes. In a provocative essay in the book *THE VIOLENCE OF INCARCERATION*, prison abolitionist Cassandra Shaylor argues that “gender-responsive” programming is “essentialist” and risks stereotyping men as “violen[t] and dangerous[ ]” and women as “care givers” who are more deserving of a less-restrictive setting.

Brett Dignam, clinical professor of law at Columbia and a co-chair of the ABA Corrections Committee when the Resolution on Security Classification for Women Offenders was passed, acknowledged the controversy, saying, “[i]t’s a double-edged sword.” While gender-responsive programming can be very appealing, she explained, “implementation is always where you see the issues that are in conflict.” Dignam emphasized that security issues for women prisoners often overlap with their mental health needs, dramatizing the multifaceted nature of the problems.

Despite the danger of stereotyping, when faced with immediate threats to human life and dignity, some advocates favor adopting imperfect measures, reminiscent of Professor Margaret Radin’s urging to adopt pragmatic solutions to “double-binds” in earlier feminist law reform efforts. In a recent article in the *AMERICAN CRIMINAL LAW REVIEW*, Professor Sharon Dolovich defended the Los Angeles County Detention Center’s controversial policy of segregating

# The Legal Community's Collaborative Effort to Address Collateral Consequences for Youth

By Christopher Gowen and Anne Geraghty Helms

Over two million children under the age of eighteen are arrested in the United States every year. Regardless of whether they are ever formally charged or found guilty of an offense, every one of these two million children will face repercussions. These repercussions can be severe and can last a lifetime.

Most people are aware that an arrest can result in criminal charges, convictions, jail time, fines, or probation. But few consider the non-criminal sanctions, or collateral consequences, that stem from an arrest or conviction until they are turned down for a job or denied access to college because of their record. This is especially true of children because of the widely held misconception that juvenile records are protected from public view. Unfortunately, this is not the case. Although most states do have rules that shield juvenile records, these rules are riddled with exceptions, which vary from state to state and even from county to county. Privacy laws do not apply at all when children are tried in the adult system.

Juvenile records or convictions routinely result in the loss of public housing, financial aid, job opportunities, professional licenses, and driving privileges for children. They can bar admission to college or to the military. They can trigger deportation. In cases involving sex offenses, they may result in lifetime

public registration. Yet, most children are not informed of any of these consequences when they are arrested or consider them when they agree to take a plea.

Often, the only way to avoid these collateral consequences is to affirmatively apply to expunge or seal records, but expungement rules can be technical and difficult to follow, and many are not even aware that they exist.

To provide one example, in 2010, the law firm of DLA Piper represented, pro bono, a Chicago public high school student with a bright

future. The student was a senior, set to graduate on time; was applying to college; and was enrolled in a class through her high school to become a Certified Nursing Assistant (CNA). The class had a qualifying exam that in part required applicants to disclose past "arrests or juvenile adjudications." When she was fourteen, she had been at the mall with a few friends and was arrested when, on a dare, she shoplifted a low-value item from a department store. The store did not pursue charges and the State of Illinois declined prosecution. Yet, the student

**Table: Justice Policy Institute's State Scores\***

Rating	States
Above average (63–100)	Wyoming
Average (31–55)	Florida, Rhode Island, Hawaii, New Jersey, Missouri, Ohio, North Dakota, Texas, Kentucky, District of Columbia, Montana, New Hampshire, Vermont, Illinois, California, Pennsylvania, Mississippi, Arkansas, West Virginia, Virginia, South Dakota, Alaska, Alabama, Maryland, Connecticut, New Mexico, Maine, Oklahoma, North Carolina, Colorado, Nevada, Minnesota, Massachusetts, Tennessee, New York, Louisiana
Below average (0–29)	Washington, Oregon, Nebraska, Michigan, South Carolina, Arizona, Iowa, Georgia, Utah, Kansas, Wisconsin, Indiana, Idaho, Delaware

\*Scores are based on a scale of 1 to 100. Wyoming had the highest score of only 63. Delaware had the lowest score of 15.

Source: Justice Policy Institute, *Never-Ending Punishment: Collateral Consequences of Juvenile Justice System Involvement*, App. A.

gating gay prisoners in a special unit, known as K6G (a measure on which the ABA Standards take no position, according to the commentary). While critics deride the policy as stigmatizing and an unacceptable use of government power based on an identity category, Dolovich argues that it is the

lesser of two evils, given the high level of violence and sexual victimization in that facility. She writes, "[g]iven the current state of the American carceral system—overcrowded, understaffed, volatile and often violent . . . there is at present no prospect for risk-free reform." By contrast, in a forthcom-

ing article in the *CALIFORNIA LAW REVIEW*, Berkeley law professor Russell Robinson criticizes the K6G unit for relying on stereotypes about gay men and for forcing prisoners to come out in order to qualify for protection. He describes the choice to come out as a "double-edged" one for inmates be-

faced a serious consequence two years later—when she applied to take her qualifying exam, she answered the question about past arrests truthfully. Because state law would not allow her to become a CNA with an arrest on her record, the school told her she could not sit for the exam, that she would fail the class and not graduate from high school. Despite recent reports in Illinois showing a nursing shortage of over 21,000 nurses, the system not only denied a willing applicant because of a minor incident that occurred when she was fourteen—it also denied her a high school diploma.

Her only option was to expunge her arrest record. She tried to do so *pro se*, but the state objected, arguing that, under its interpretation of Illinois law, a person had to wait until his or her eighteenth birthday before petitioning to expunge an arrest. She was seventeen and a half. At this point, DLA Piper took her case and argued that under the relevant statute, seventeen-year-olds were, in fact, allowed to expunge their records. The court agreed, permitting her to sit for the nursing exam, which she passed.

This is just one example of how a single juvenile error resulting in an arrest or conviction can have a lasting impact. Although DLA Piper regularly takes on expungement matters, most youth do not have access to pro bono lawyers from law firms. In fact, juvenile defense attorneys are rarely trained on expungement because their focus is on their clients' criminal charges. Youth who are arrested but never prosecuted do not qualify for a public defender in any case.

### Addressing the Problem: [beforeyouplea.com](http://beforeyouplea.com)

There is no easy fix to the problems surrounding collateral consequences. Working together, however, a diverse group of individuals interested in juvenile justice issues—including lawyers from DLA Piper; Kathryn Richtman, the chief juvenile prosecutor in Ramsey County, Minnesota; Lisa Thureau of Strategies for Youth; the ABA; and the Justice Policy Institute—recently came together to shed some light on the issue. They assembled a network of lawyers, law librarians, students, and experts from around the country to develop a Web site that would inform youth, their families, and their attorneys about collateral consequences.

The Web site, [www.beforeyouplea.com](http://www.beforeyouplea.com), was made public in October 2011. The site offers accurate and up-to-date information about each state's policies regarding juvenile collateral consequences. It catalogues the privacy laws in each state, as well as the exceptions to those laws and the special consequences that attach when a child is prosecuted in adult court. It also offers guidance on state expungement laws. The Web site operates as a "wiki" site, allowing individuals to make updates, which are checked for accuracy, as laws are changed.

Legislators also can use the site to see how their state ranks nationally according to a scoring system developed by the Justice Policy Institute. Each state's score is calculated based on the confidentiality of juvenile records; whether children can be suspended or expelled from school

as a result of juvenile adjudications; the impact a juvenile record has on employment, public benefits, higher education, and sex offender registration; as well as the ease of expungement. *See, e.g.*, <http://beforeyouplea.com/ny/score>.

Hopefully one day, lawmakers will pass legislation that will significantly reduce the collateral consequences of an arrest or conviction for youth in this country. This hope is reflective of the long-held philosophy, upon which our juvenile justice system was founded, that children should be able to make youthful mistakes and still have a second chance to succeed in life. Until that day, the reality is that collateral consequences can be severe and that they can last a lifetime. For that reason, lawyers, judges, prosecutors, and advocates should be keenly aware of those consequences in working with any child that has touched the juvenile justice system. [Beforeyouplea.com](http://beforeyouplea.com) is a terrific resource for them all.

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*Christopher Gowen is an adjunct professor of law at American University Washington College of Law. He was the project director for two large grants, including one funded by the National Institute of Justice studying the collateral consequences of criminal convictions and a second focused on collateral consequences of juvenile adjudications. Anne Geraghty Helms is pro bono counsel at DLA Piper LLP (U.S.) and is responsible for the firm's pro bono program in eight of its domestic offices. She concentrates her practice on juvenile and criminal justice issues.*

cause it could expose them to violence in other contexts.

To complicate matters yet further, not even decarceration efforts are immune from "double-edged" dilemmas. Recently, the L.A. TIMES reported that, in an effort to reduce overcrowding in the wake of the *Plata* decision,

California corrections officials would release thousands of nonviolent women prisoners who met the definition of "primary caregiver." The story quoted prison officials as saying that more than 4,000 of the 9,500 women prisoners in California might qualify. Although corrections officials would

not tell journalists how many male prisoners might be released under the measure, far fewer are expected to qualify. Apparently, California officials are first planning the release of eligible women. Indeed, the legislative director for the state senator who introduced the measure candid-

ly admitted to the L.A. TIMES that, “In crafting the bill, the Senator’s intent was to single out female inmates with children.” However, the sponsor could not do that without running afoul of equal protection, and so substituted the term “primary caregiver.”

The second critique leveled by commentators is that advocating higher standards for conditions of confinement can prove counterproductive, by perpetuating the cycle of prison-building. In her 2003 book *ARE PRISONS OBSOLETE?*, Professor Angela Y. Davis urged that rather than focus on “generating the changes that will produce a *better* prison system,” we should pursue “strategies of decarceration.” A recent study of Florida’s history of prison litigation and prison building by Northwestern University sociologist Heather Schoenfeld, *Mass Incarceration and the Paradox of Prison Conditions Litigation*, suggests that consent decrees ultimately contributed to prison growth, by mandating construction of new facilities.

Indeed, the potential for this dynamic was evident in the *Plata* case. At oral argument in the Supreme Court, the justices discussed new construction of prisons as one of the possible remedies. In a podcast on scotusblog, former U.S. Solicitor General Paul Clement, counsel for one of the *Plata* plaintiff classes in the

Supreme Court, stated candidly that California’s draconian sentencing policies would have been fine if the state had only built enough prisons.

These controversies expose tensions regarding the role of prison conditions reform in the vast American corrections system. In an unexpected twist, the economic crisis may be pointing us toward new solutions to these dilemmas.

### **Lasting Solution: Fewer Prisoners**

One of the few silver linings of the current economic situation is that it has made clear that historic levels of American incarceration are unsustainable. The NEW YORK TIMES reported recently a “trend to lighten harsh sentences catch[ing] on in conservative states,” notably Texas. The ACLU report described how traditionally “tough on crime” states like Texas, Mississippi, and Kentucky have reduced their incarceration rates through measures such as increasing the use of pretrial release, eliminating mandatory sentences and recidivism provisions, decriminalizing minor offenses, and implementing geriatric parole.

In an op-ed in the NEW YORK TIMES in the summer of 2011, Brigham Young University professor Shima Baradaran argued that reforming pretrial detention standards is probably a better “way to shrink

prisons” than a court order like the one in *Plata* that may prompt mass transfers to county jails.

In a new State Policy Implementation Project, which Professor Baradaran helps to lead, the ABA Criminal Justice Section (CJS) seeks to implement such reforms. Building on the urgency created by the fiscal crisis, the CJS has inaugurated the State Policy Implementation Project to work state by state on reducing incarceration through legislative and policy changes. The CJS describes key issues, including changes to pretrial release procedures, decriminalization of minor crimes, improved reentry efforts, expanded use of supervised release, and reliance on community corrections.

While this new effort may not eliminate all of the double-edged dilemmas, it is hoped to reduce the number of incarcerated people. Shrinking the number of U.S. prisons will provide the most lasting resolution to these human rights issues.

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*Giovanna Shay is an associate professor of law, Western New England University School of Law, and co-chair, Corrections Committee of the ABA Criminal Justice Section. Thanks to my co-chair, David Ball, for his feedback. The views expressed in this article are the author’s alone and may not reflect ABA policy or the views of other Criminal Justice Section members.*

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## **Alternatives to Incarceration**

*continued from page 8*

is left out that must be addressed. As we use the political cover of budget-cut criminal justice and the judicial awakening to explore alter-

natives to incarceration, we must take care to address rather than aggravate inequities in who bears the burdens of penal harshness and who benefits from measures of mercy. Performance measures should take improvement of humans and community as well as fiscal costs into ac-

count for a sustainable transformation and progress forward.

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*Mary D. Fan is an assistant professor of law at the University of Washington School of Law specializing in U.S. and international criminal law and procedure.*

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## Reinventing Forgiveness

*continued from page 5*

going to trial to avoid them, and when judges are moved to set pleas aside because the agreed-upon deal later seems unfair, the system of collateral consequences that traps so many in a degraded social status must change. As Stephanos Bibas has argued respecting the impact of the *Padilla* decision on the procedural aspects of the plea process, the move toward a consumer protection model now seems inevitable. The result will be a fairer, safer, and more efficient justice system.

### Conclusion

Collateral sanctions have been recognized as an impediment to successful reentry and reintegration of

persons with a conviction record, but very few jurisdictions have developed an effective way of avoiding or mitigating them. Many years after conviction, these legal barriers frequently serve only as irrational punishment, not reasonable regulation. Even if a convicted person is not legally barred from eligibility for some benefit or opportunity, decision makers are frequently reluctant to take a chance on someone with a criminal record, even with evidence that conviction is a poor predictor of future criminality after an extended period of law-abiding conduct.

The law provides little by way of encouragement or support for those otherwise willing to recognize redemption. This is as systemically shortsighted as it is unfair to the individuals involved. That is why, so many years later, Hamilton's observation about

the conspiracy of humanity and good policy still rings true. Unless we as a society are comfortable living with a growing class of "internal exiles" who have no way to pay their debt to society and return to its good graces, with its attendant public safety risks and moral dilemmas, we should be looking for a more effective way of giving convicted individuals a fair chance to become fully productive members of society. As lawyers, it is our job to make the law forgiving.

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*Margaret Colgate Love chaired the Drafting Task Force of the ABA Criminal Justice Standards on Collateral Sanctions and Discretionary Disqualification of Convicted Persons (2001–04) and serves as ABA liaison to the Uniform Law Commission's collateral consequences project. She represents applicants for executive clemency.*

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## White-Collar Sentencing

*continued from page 12*

tencing Commissioners—who know or have had close contact with someone who has been a victim of crime is probably relatively high. The percentage who know or have had close contact with someone who has had to serve time in prison, on the other hand, is probably relatively low. So the senators, congressmen, and congresswomen—and Sentencing Commissioners—naturally empathize with crime victims and not criminal defendants and their families. While judges may not be any more diverse in their social associations, a judge sentencing a defendant in an individual case at least has the individual defendant and that defendant's family in front of him or her in person when he or she imposes a sentence.

Similar observations have been made by Justice Breyer and Professor Bowman. In one of his discussions of the development of the original guide-

lines and the Sentencing Commission's consideration of the purposes of punishment that should underlie them, Justice Breyer noted that different commissioners might see the relative harm of different crimes differently and suggested that "[a] group process in which members accept each other's strongly held views may lead to a compromise that results in higher sentences than a majority of the commission would believe appropriate in respect to any one set of crimes." *Guidelines Revisited*, at 30. Professor Bowman similarly concluded, at least eventually, that "[b]asic structural features . . . , in combination with a series of choices by the Commission, Congress, the judiciary, and the Department of Justice, have shifted the institutional balance of power" and made the guidelines the "one way upward ratchet increasingly divorced from considerations of sound public policy and . . . commonsense judgments of frontline sentencing professionals who apply the rules" that are described above. *Guidelines Failure*, at 1319–20.

### Conclusion

Based on all of this, the sentencing guidelines may be fairly described as "flawed in ways that cannot be corrected without fundamental change." *Guidelines Failure*, at 1320. The authors would submit that the same could be said of sentencing schemes in most states over the last thirty to forty years. While our country certainly has much to be proud of in its human rights record, its excessive use of imprisonment is a dark blemish on that record.

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*Carlton Gunn worked as an assistant federal public defender from 1983–2011 in Los Angeles; Tacoma, Washington; and as a visiting assistant for four months in Alaska. He recently became of counsel to the criminal defense and civil rights law firm of Kaye, McLane, and Bednarski. Myra Sun has been a federal public defender in the Central District of California, and a public defender in the Washington state courts, since 1989.*

# A Punishing Court Docket

By Stephen J. Wermiel

Issues of punishment in one form or another typically occupy a significant portion of the U.S. Supreme Court's docket, from reviewing death penalty appeals to arguing over the process of sentencing. But two cases in the Court's current term will get the justices into some different punishment issues. One case involves life sentences for young juvenile offenders who commit murder, and the other involves liability for employees at privately run federal prisons.

The issue of how to sentence juvenile offenders who commit crimes before they reach the age of eighteen has been a challenging one for society and no less so for the Supreme Court. From a public policy standpoint, the vexing question is one of balancing the various traditional goals of punishment—retribution, public safety, and potential for rehabilitation—against the young age of offenders who are still developing mentally and physically when they commit crimes. In constitutional terms, the question is whether different forms of punishment for juvenile offenders violate the Eighth Amendment's prohibition against "cruel and unusual punishment."

The Court will decide two appeals, one from Alabama and the other from Arkansas, in which fourteen-year-old boys were convicted of murder and sentenced to life in prison without any possibility of parole. The lawyer for both boys, Bryan Stevenson, who is the Human Rights Hero in this issue of *Human Rights*, argues that "none of the purposes of punishment adequately supports a sentence of life without parole for a fourteen-year-old child" and describes the sentence as "severe and hopeless."

The cases are the third round for Supreme Court consideration of juvenile punishment. In 2005, in *Roper v. Simmons*, the Court ruled that

juveniles who commit crimes when they are younger than eighteen may not be sentenced to death. In 2010, the Court ruled in *Graham v. Florida* that juveniles who commit crimes that do not involve murder may not be sentenced to life without parole.

Now the question is whether younger offenders, those fourteen and younger, may be sentenced to life without parole for murder. There are seventy-three young offenders serving life without parole, accord-

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**Now the question is whether younger offenders, those fourteen and younger, may be sentenced to life without parole for murder.**

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ing to the appeals, but a Supreme Court decision expected by June, 2012 will further define the constitutional standards for treatment of juveniles in the criminal justice system.

The other case the Court decided on January 10 involves the application to private prison contractors of a forty-year-old ruling that allowed individuals to sue federal officials for damages for violating their constitutional rights. In *Bivens v. Six Unknown Agents* in 1971, the Court said individuals should be able to recover damages for constitutional wrongs in the narrow circumstance when there is no other remedy under federal law. The *Bivens* case allowed a lawsuit against federal drug agents for a warrantless search of a New York family and their apartment. In 1979, in *Davis*

*v. Passman*, the Court allowed a similar damages lawsuit for sexual harassment against a member of Congress by an employee. In yet another use of the same type of lawsuit, the Court in *Carlson v. Green* in 1980 allowed a lawsuit for damages against federal prison officials for the death of an inmate who allegedly did not receive adequate medical care. However, despite the Supreme Court's three decisions allowing damages claims against federal officials, federal courts have generally taken a narrow view of when such lawsuits can be filed.

The current Supreme Court appeal is by Richard Lee Pollard, an inmate at Taft Correctional Institution, a federal prison about forty miles from Bakersfield, California. The prison was run by the GEO Group, a private corrections company once known as Wackenhut Corrections Corp. Pollard claims that about a decade ago he slipped on a cart in a prison doorway, injured his arms, but didn't receive the proper medical treatment. Pollard sued the prison guards who are private employees, not government workers. The U.S. Court of Appeals for the Ninth Circuit ruled that Pollard should be allowed to sue the guards and the company for damages. Pollard argues that the *Bivens*-type lawsuit should be available even against private employees if they are performing a public role like running a federal prison. The company and the U.S. Justice Department argue that the lawsuit should be dismissed because there are adequate personal injury remedies under California law. The Supreme Court, by a vote of 8-1, decided that the state law remedies should be sufficient

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*Stephen J. Wermiel teaches constitutional law at American University Washington College of Law and is chair-elect of the Section of Individual Rights and Responsibilities.*

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## Introduction

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This country also has long led the Western world in incarceration rates. The current “lock ‘em up” mentality among the public and its lawmakers began with mandatory sentences for drug use and sales in the 1980’s “war on drugs,” which perhaps inevitably led to more mandatory minimum sentences for a range of other offenses as well. Nationwide, record numbers and percentages of offenders (disproportionately young males and minorities, with females catching up) now reside long term, perhaps for life, in local jails or state or federal prisons.

Jails and prisons literally cannot hold the numbers sentenced to incarceration, and the cost of keeping so many behind bars is breaking state and federal budgets. There are

other costs as well: hampering judicial decision making in individual cases, disrupting families and support systems, ending rehabilitation initiatives, undermining alternatives to prison, and the most tragic cost of all—wrongful incarceration in the first instance.

This issue of *Human Rights* explores punishment issues with significant implications for law, legal processes, and individual rights: sentencing guidelines’ perhaps surprising role in enhancing sentences and reducing discretion in both white-collar and other criminal cases; collateral consequences for both juveniles and adults attempting to move on with their lives after incarceration; unintended consequences of efforts to address needs of special populations in jails and prisons; political and financial factors, including private-sector prisons, driving incarceration rates; and alternatives

to incarceration. Human Rights Hero Bryan Stevenson reflects the best of defenders’ work in trying to address punishment abuses, from inhumane conditions to wrongful incarceration.

The debate whether/when punishment becomes retribution becomes vengeance is left for another time. It is worth considering, however, whether a justice system so dependent upon punishment can be reconciled with our concurrent deeply held beliefs in the rule of law and international human rights norms.

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*Penny Wakefield, who works on legislative and public policy matters affecting women’s rights and international human rights, chairs the Individual Rights and Responsibilities Section’s International Human Rights Committee and serves on the Leadership Conference’s CEDAW Task Force.*

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## From the Chair

*continued from inside front cover*

Concerns, Rights of Immigrants, Rights of Persons with Disabilities, Rights of Women, Sexual Orientation & Gender Identity, Criminal Justice, Death Penalty, Health Rights and Bioethics, International Human Rights, Public Education, or the Joint Committee with Criminal Justice Section on Terrorism and War Detention. If you prefer, work with us on one of the following operational committees: Development, Membership,

Amicus Curiae, Thurgood Marshall Dinner, *Human Rights* magazine Editorial Board, or Diversity.

I particularly look forward to welcoming you to my hometown of Boston on May 3–5, 2012, for a conference on how we, as lawyers, can work to narrow the educational achievement gap of poor and minority children and build on the work of Thurgood Marshall. More information about the conference will be available on the Section’s Web site in early 2012 and in the next issue of this magazine.

I also encourage you to get others to join us in our work. Anyone who

is already a member of the ABA can join the Section for only \$45 per year. For lawyers who are not already ABA members, they will need to first join the ABA and then the Section. Importantly, for those of you who work for nonprofit organizations that focus on, among other things, issues related to poor people, you may take advantage of the new \$100 ABA dues category. Law students may join for free.

We invite you to join us. Please go to our Web site at [www.americanbar.org/irr](http://www.americanbar.org/irr) or contact the IRR office at 202-662-1030.

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## humanrights hero

*continued from back cover*

rural Black Belt region to social justice issues through workshops with EJI staff.

These are only the most recent and ongoing developments in an extraordinary life that includes proving the innocence of Walter McMillan, who spent six years on Alabama’s death row for a crime he did not commit; challenging Alabama’s law that allows elected judges

to override jury verdicts of life imprisonment in capital cases; teaching at New York University Law School since 1998; inspiring and training dozens of young attorneys; and winning the prestigious MacArthur Foundation “Genius” Award in 1995.

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*Stephen B. Bright is president and senior counsel of the Southern Center for Human Rights in Atlanta and a visiting lecturer at Yale Law School. He received the American Bar Association’s Thurgood Marshall Award in 1998.*



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## Bryan Stevenson As Hero

By Stephen B. Bright

**B**randon Washington, sentenced to death in Alabama, had virtually no appellate review of his case in the Alabama Court of Criminal Appeals. His court-appointed lawyer filed a thirteen-page brief that cited only three cases—two Supreme Court cases decided in 1920 and 1963 and a Fifth Circuit case decided in 1955—and said oral argument was not needed.

Fortunately for Washington, Bryan Stevenson and his organization, the Equal Justice Initiative (EJI), intervened in his case, filed a comprehensive brief, and won a reversal of the death sentence from the Alabama Supreme Court on an issue that had not even been raised by the court-appointed lawyer.

It was one of eight reversals of death sentences obtained by Stevenson and his colleagues at EJI in the last two years. In two of those cases, they obtained reversals at the Alabama Supreme Court after intervening where equally bad briefs had been filed and death sentences upheld at the Court of Criminal Appeals. They also obtained remands of four other cases to trial courts to present evidence of racial discrimination in jury selection.

In response to the habitual practice of striking blacks from serving on juries in capital and other serious felony cases by southeast Alabama District Attorney Douglas Valeska, Stevenson and his team filed a civil rights lawsuit in October 2011 on behalf of prospective jurors struck by Valeska seeking an injunction to prevent him from continuing the practice. In 2010, EJI completed a comprehensive study of racial bias in jury selection, *Illegal Racial Discrimination in Jury Selection: A Continuing Legacy*. The study concluded that people of color continue to be excluded from jury service because of their race.

Stevenson and his lawyers are also representing over



Associated Press, AP

seventy-five clients in at least fifteen states sentenced to life imprisonment without parole for crimes committed as juveniles. The Supreme Court recently granted review in two of those cases to decide whether the sentence may be imposed on children who are convicted of murder at the age of fourteen. Stevenson argued *Sullivan v. Florida* before the U.S. Supreme Court in 2009. The Court ruled the sentence is unconstitutional for children in nonhomicide cases in the companion case, *Graham v. Florida*.

Stevenson founded EJI's Post-Release Education and Preparation program, a reentry initiative designed to assist people who entered adult prisons as juveniles and have been incarcerated for years and who therefore face unique challenges upon release.

He also launched the Black Belt Education Project, a program to expose high school students from Alabama's

*continued on page 25*