Criminal Justice & the Constitution

American Bar Association Division for Public Education
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Director’s Note

The criminal justice system is an abstract concept for most of us; we usually have little first-hand experience beyond traffic court. Yet crime and the criminal justice system also seem so familiar to us—its stories appear regularly on the local evening news, in prime-time television shows, and in movies, books, and magazines. As a result, we think we understand how the police, prosecutors, and criminal courts do their work of identifying suspects and processing defendants. These stories often highlight the apparent tensions between “doing justice” and upholding the Constitution that arise in arrests, interrogations, and trials. But where does fiction end and reality begin?

In this issue of Insights, we explore the realities of today’s criminal justice system, key constitutional and policy issues, and their historical antecedents. Christopher Smith begins by examining how the now-famous Miranda warnings and search and seizure rules have been reinforced yet also weakened by U.S. Supreme Court decisions since the 1960s. Cary Federman analyzes the history of habeas corpus, showing how the Great Writ has expanded its reach over time. Aaron Kupchik critiques the recent trend toward prosecuting young people under the age of 18 in the adult criminal courts rather than in a juvenile court system founded on rehabilitative ideals. Kayla Gassmann and Kirsten D. Levingston report on the plight of the growing numbers of women in the criminal justice system and prisons. One common theme that emerges from these articles is the persistence of racial and ethnic inequalities in the operation of the criminal and juvenile justice systems.

The Fourth Amendment gets a closer look in Perspectives, where Vikram Amar and Elizabeth E. Joh explore how increasingly sophisticated electronic and forensic technologies pose new challenges to privacy and its constitutional protection. In Law Review, Charles F. Williams examines how the Supreme Court has interpreted the Fourth Amendment in recent cases involving police searches and chases of vehicles. Several of the departments echo themes from the feature articles. In Learning Gateways, Kathryn King and Michelle Parrini outline a classroom simulation using President Lincoln’s suspension of the writ of habeas corpus during the Civil War and the Supreme Court’s review of his actions in Ex parte Merryman (1861). In Students in Action, Debra Eisenman of the National Crime Prevention Council shows how young people have developed innovative school-based and community programs to enhance public safety. In Teaching with the News, we offer a cross-national perspective on the criminal justice system—by way of a news article reprinted from The Washington Post on Mexico. Be sure to visit www.insightsmagazine.org for more features.

Mabel McKinney-Browning
Director, ABA Division for Public Education
mckinneyb@staff.abanet.org
The Supreme Court era (1953–1969) is widely recognized as a period in which the U.S. Supreme Court expanded the definition and application of constitutional rights, especially in the criminal justice process. Many of the Warren Court’s decisions affecting criminal justice aroused controversy and criticism. For example, law enforcement officials and political commentators complained that the expansion of the exclusionary rule (which prevents courts from hearing evidence collected illegally) in *Mapp v. Ohio* (1961) improperly deprived police and prosecutors of valuable evidence. Similarly, police chiefs claimed that mandated Miranda warnings to suspects about their rights to remain silent, be represented by an attorney, etc. (*Miranda v. Arizona*, 1966), made it impossible to obtain essential incriminating evidence. Richard Nixon and later Republican presidents used criticisms of the Warren Court’s criminal justice decisions as campaign themes and promised to appoint new justices who would limit criminal justice rights.

In the decades since the end of the Warren Court era, scholars and journalists have written extensively about subsequent Supreme Court justices’ efforts to diminish rights in the justice system. These articles typically focus on the decisions of the Burger Court (1969–1986) and the Rehnquist Court (1986–2005) that limited the scope of the exclusionary rule and otherwise granted increased discretion and authority to law enforcement officials. Thus, analyses of the Supreme Court’s impact on criminal justice in the past half century typically contrast the “liberal” Warren Court with the “conservative” Burger and Rehnquist Courts.

In seeking to communicate effectively with their intended audiences, scholars and journalists, as well as teachers, employ generalizations in describing the Supreme Court’s actions. There are risks, however, that generalized characteri-
zations may diminish the accuracy of descriptions of a complex institution. When considering the Supreme Court’s impact on criminal justice, it is important to examine whether standard generalizations about the “conservative” Burger and Rehnquist eras adequately describe more than three decades’ worth of decisions. Although specific decisions from these later eras are clearly more conservative in political terms than those produced during the Warren Court era, the legacies of the Burger and Rehnquist Court eras should be described in terms that move beyond simple labels. Descriptions and analyses of Supreme Court eras should recognize the complex forces influencing whether and how judicial decisions affect—or fail to affect—human behavior. They should also acknowledge the mix of liberal and conservative decisions produced in every modern Supreme Court era.

Conservative Decisions Since 1971
The end of the Warren Court era in 1969 ushered in a period of relatively rapid change in the Supreme Court’s composition. President Nixon appointed four new justices to the Supreme Court from 1969 to 1971. Subsequent Republican presidents made six additional appointments to the Supreme Court before the next Democratic appointment occurred, President Bill Clinton’s nomination of Ruth Bader Ginsburg in 1993. The 10 consecutive appointees from Republican presidents did not all fulfill their nominators’ expectations, but most of these new justices were more supportive of broad law enforcement authority than were their Warren Court predecessors.

When the Warren Court issued its decision in Mapp v. Ohio (1961), it imposed a broad, clear exclusionary rule on all criminal investigations: Any evidence obtained through improper searches—and later also from improper questioning of suspects (Miranda v. Arizona, 1966)—was to be excluded from use in the prosecution of criminal defendants. By contrast, decisions of the Burger and Rehnquist Courts created exceptions to the exclusionary rule that granted law enforcement officials greater discretionary authority and forgave certain errors in conducting searches and questioning suspects.

Beginning with Harris v. New York (1971), the Burger Court permitted prosecutors to use improperly obtained incriminating statements to challenge the consistency of a defendant’s in-court testimony. Later, the Burger Court created broader exceptions to the exclusionary rule. For example, in three 1984 cases, the Court significantly diluted the commands of Mapp v. Ohio and Miranda v. Arizona. The Court permitted the use of evidence from improper searches and questioning when the police could plausibly claim that they would have later discovered the same evidence inevitably anyway through the use of proper investigation methods (Nix v. Williams). Police could use statements obtained from an arrested suspect prior to the administration of Miranda warnings if the police claimed that it was necessary to question the suspect quickly in order to protect “public safety” (New York v. Quarles). When judicial officers improperly approved search warrants that were not actually supported by probable cause, police and prosecutors could make use of any evidence obtained during the resulting improper search as long as they acted in “good faith” in seeking the warrant (United States v. Leon).

In subsequent years, the Rehnquist Court produced similar decisions. In Arizona v. Evans (1995), computer records erroneously reported that an arrest warrant had been issued for a specific individual. When police found marijuana in the individual’s car during a search based on the nonexistent warrant, they were permitted to use the evidence. As with many examples from the Burger Court era, this case illustrated an important shift in perspective that occurred in the transition from the Warren Court to the Burger and Rehnquist Courts. During the Warren Court, when the majority of justices identified a violation of a Fourth or Fifth Amendment right, they approached the case by saying “How

![Specific Warning Regarding Interrogations](image-url)
can we remedy this rights violation?” By contrast, the majority of justices on the Burger and Rehnquist Courts began their analysis with a very different question: “Did the police do anything wrong?” Thus, the later cases tolerated violations of rights through improper searches and questioning as long as the violations stemmed from errors by judges (Leon) and computer data entry clerks (Evans) or from actions by the police to protect public safety (Quarles).

With respect to the requirement of Miranda warnings, a similar expansion of police authority and flexibility occurred. For example, the Burger Court permitted police officers to change the precise wording of Miranda warnings, despite dissenter’s objections that changes in wording can defeat the underlying purposes of Miranda by confusing suspects about the nature of their rights (Duckworth v. Eagan, 1989).

The Impact of the Burger and Rehnquist Courts
It is notable that neither the Burger Court nor the Rehnquist Court eliminated the exclusionary rule or Miranda warnings despite being urged to do so by critics of the Warren Court. The later justices preserved Miranda warnings because, in the words of Chief Justice William H. Rehnquist, “Miranda has become embedded in routine police practice to the point where the warnings have become part of our national culture” (Dickerson v. United States, 2000). They also preserved the exclusionary rule in specific contexts, such as a police officer’s failure to seek a search warrant in a nonurgent situation (e.g., Arizona v. Hicks, 1987).

The preservation of central elements from harshly criticized Warren Court rules apparently stems from two key beliefs about the relationship between law and human behavior. First, Supreme Court justices’ recitation of principles concerning the existence of rights and the limits of police authority in a democracy helps to professionalize police and remind them about the need to be conscious of the U.S. Constitution. Contemporary police officials often say that they accept and support the exclusionary rule and Miranda warnings in their current forms because these rules demonstrate to the public, as well as to police officers, that principles of law guide decisions and actions in the justice system. These principles help to distinguish modern police from their 19th century predecessors, who were often untrained political appointees employed to suppress minority groups and attack political opponents of local governmental leaders.

Second, it appears that contemporary Supreme Court justices and many critics of the Warren Court have come to realize that the exclusionary rule and Miranda warnings, especially in their current forms, do not impede police investigations. Police have adapted their training and procedures to avoid Miranda problems. For example, they question suspects on a street or doorstep prior to taking the suspects into custody and triggering the requirements of Miranda. During custodial questioning, police use conversational techniques to downplay the seriousness of crimes, feign empathy with the suspects, and otherwise subtly encourage suspects to waive their right to the presence of counsel during questioning. With respect to the exclusionary rule, when police realize that they have made an improper search, they now have a long list of exceptions to utilize in creating an acceptable, after-the-fact rationalization for their violations of the Fourth and Fifth Amendments. For example, the public safety exception (Quarles) for improper questioning is so broad and undefined that police have myriad opportunities to persuasively characterize their rights-violating actions as necessary measures for the protection of the public.

Some commentators argue that the Burger and Rehnquist Courts’ preservation of Miranda and the exclusionary rule is largely symbolic because so many opportunities exist for police to avoid the imposition of those Warren Court-created rules. In addition, there are legitimate questions about the effectiveness of these rules, even in their broader, clearer forms during the Warren Court era, because continued on page 17.
Habeas corpus is a powerful but complex vehicle for individual rights in criminal justice cases. In this article, political scientist Cary Federman explores the rise of the writ of habeas corpus in Britain and the United States, its constitutional and statutory bases here, and the contexts in which habeas petitions arise today.

The writ of habeas corpus began in feudal England as a court order to a jailor to “show the body” of the person being detained. By the 17th century, after epic struggles between kings and Parliaments regarding who had jurisdiction over the arrest and release of prisoners, habeas corpus became a way for the common-law courts, controlled by Parliament, to inquire into the cause of an individual’s detention by the king’s orders. The shift to common-law courts meant that the King’s power to detain persons would be limited by law and subject to oversight by an independent judiciary. Although it would take some time before habeas corpus would truly be a “writ of liberty,” the transfer of power to common-law courts was a milestone in the development of individual rights against the state.

In the United States, before the Civil War, habeas corpus’s purpose was to provide a remedy for those unjustly detained before trial. Today, the writ of habeas corpus is a postconviction remedy and the principal means by which state prisoners attack the constitutionality of their convictions in federal courts. The change after the Civil War to a postconviction remedy was largely because of the passage of the Fourteenth Amendment (1868). Prisoners could now tie a claim of unconstitutional confinement by a state (under the Habeas Corpus Act of 1867) to a due process violation under the Fourteenth Amendment. Combining these two laws, habeas corpus could be used to attack a state judgment of guilt, and not just detention.

Between the Civil War and World War I, however, the federal courts defined federalism as state sovereignty and rarely issued habeas corpus to state prisoners. Indeed, not until the 1960s did habeas corpus gain wide use among prisoners. The reason for the federal courts’ restriction of habeas corpus is that the habeas petitioner operates without clean hands. Because the conviction is the reason for the appeal, the habeas challenge is seen as a fundamental threat to the justice system. Habeas corpus allows the convicted criminal to separate guilt from constitutional

“Habeas corpus is a tool of liberty in the fight against governmental oppression.”

Cary Federman (federman@mail.montclair.edu) is assistant professor in the department of Justice Studies at Montclair State University, Montclair, New Jersey 07043; he is the author of The Body and the State: Habeas Corpus and American Jurisprudence (SUNY Press, 2006).
infractions that, he or she might argue, unfairly produced a guilty verdict. A habeas petition, then, does more than prevent and delay the operations of justice. It creates doubt about the states’ ability to administer a criminal justice system according to constitutional norms. For this reason, habeas corpus can be seen as an “unceasing contest” between the power of the state to arrest criminals, establish their guilt, and imprison them, and the ability of state prisoners to make their case in federal courts that their confinements violate the Constitution.

**Background**

The history of habeas corpus for state prisoners in the United States is long and complex. In general, it is of a limited availability before the Civil War, an era of slow but rising availability from 1886 to 1915, a period of greater availability from 1923 to 1969, and a time of greater restriction from 1970 that continues to this day. The Habeas Corpus Act of 1867 no longer governs state prisoners. The Antiterrorism and Effective Death Penalty Act of 1996 supersedes this Act and, through a variety of provisions such as imposing a one-year deadline on the filing of habeas petitions, further restricts the availability of habeas corpus for state prisoners.

Habeas corpus (in Latin, “you have the body”) appears under Article I, Section 9 of the United States Constitution. It reads: “The privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.” President Abraham Lincoln relied on this clause, and the executive powers given to the president under Article II, when he twice suspended habeas corpus during the Civil War to discourage war protests and preserve the Union. After the Civil War, Congress passed the Habeas Corpus Act of 1867, which gives power to “the several courts of the United States, and the several justices and judges of such courts, within their respective jurisdictions ... to grant writs of habeas corpus in all cases where any person may be restrained of his or her liberty in violation of the Constitution, or of any treaty or law of the United States.”

The Judiciary Act of 1789 had restricted habeas corpus to prisoners held “in custody, under or by colour of the authority of the United States,” which meant it applied only to federal, not state, prisoners (the states had their own laws). The new law of 1867 gave power to the federal courts to grant habeas corpus to state prisoners claiming unlawful confinement, presumably under the Due Process Clause of the Fourteenth Amendment. (The purpose of the Fourteenth Amendment’s Due Process Clause is to prevent the states from violating federal constitutional rights. The Due Process Clause is also used to apply the Bill of Rights to the states).

After the Civil War, however, fearing greater centralization of power by the federal government, and trusting the states to manage criminal justice without unnecessary federal supervision, the Supreme Court rarely issued habeas corpus to state prisoners, despite the language of the 1867 Act granting state prisoners access to the federal courts. Indeed, throughout the 19th century, and into the first quarter of the 20th century, the Supreme Court remained reluctant to apply the Due Process Clause of the Fourteenth Amendment to the states in criminal justice cases. This policy of deference prevented state habeas petitioners from successfully gaining their freedom until due process took on greater meaning in the 1930s. Only a blatant misuse of the trial court’s jurisdiction, for example, imposing a punishment greater than required by law, could result in a prisoner’s release by habeas corpus. By the 1960s, however, following *Fay v. Noia*, 1963 (where the Supreme Court granted relief to a state prison petitioner) habeas corpus came to be used to support the right to a fair trial, the right to an attorney, and the right to be humanely treated while in custody — in other words, issues related to criminal justice. Habeas corpus and due process, then, have a legal rela-
tionship under the Constitution: They both prevent (or repair) arbitrary governmental action.

**Habeas Corpus: Procedures & Laws**

A prisoner can apply for habeas corpus in a federal district court only after a state trial court determines guilt and the prisoner exhausts all of his or her available state appellate remedies. Because the Supreme Court does not accept criminal cases as of right, a writ of certiorari is the formal petition for appeal to the Supreme Court, following exhaustion of state appellate remedies.

When a federal judge issues habeas corpus, the state that incarcerated the prisoner must either retry the prisoner under new guidelines or release the prisoner. For this reason, habeas corpus causes friction between the states and the federal government. The state holds the prisoner because he or she is guilty of a crime, but the federal courts have the power to release that person and uphold constitutional rights. Defenders of federalism find this situation constitutionally uncomfortable for two reasons: (1) it denies the states full sovereignty over criminal justice policy, and (2) the petition for habeas corpus relief comes from a convicted criminal, contesting a conviction years after a trial court found the accused guilty.

**Habeas Corpus: Cases**

I would like to focus on two important habeas corpus cases decided by the U.S. Supreme Court—Brown v. Allen (1953) and Coleman v. Thompson (1991). Both cases raise issues typical of the eras in which they were decided. More important, they highlight the central connection between habeas appeals and capital punishment by demonstrating, 40 years apart, the effect restricting habeas corpus appeals can have on death-row inmates.

That is, despite this extra layer of review, state prisoners can still go to their deaths without a hearing to inquire into the prisoner’s federal due process complaints. In both cases discussed, the federal courts refused to decide the petitioners’ cases on the merits, citing the importance of deferring to the state courts’ judgments.

Brown v. Allen (1953). Brown was typical of the kinds of habeas corpus cases the Supreme Court heard in the 1950s and 1960s—cases involving allegations of racial discrimination and coerced confessions. The Brown decision is significant for two reasons. First, it established that federal habeas courts could determine for themselves the constitutional issues already decided in the state courts. This was a radical break with the Court’s deferential policy of the past because, in a sense, the federal courts would function as courts of appeal from state courts, which they are not. Second, the state court refused to hear Clyde Brown’s appeal because his lawyer filed a notice of appeal to the state supreme court one day late. An all-white jury found Brown, an illiterate black man, guilty of killing a white man. Brown alleged two constitutional arguments against North Carolina, both based on the Sixth and Fourteenth Amendments: (1) that blacks had been discriminated against in the selection of the grand and petit juries, and (2) that his confession was coerced and therefore unconstitutional. Years before Brown v. Allen, the Supreme Court had outlawed jury discrimination and coerced confessions, but some states—including North Carolina—persisted in preventing blacks from sitting on juries. Brown v. Allen, then, sheds important light on the problem of the states’ enforcement of civil rights protections for racial minorities and the difficulty of implementing federal due process protections at mid-century. Deadlines, however, are state jurisdic-

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Roger Keith Coleman was executed in Virginia in 1992, after the Supreme Court rejected his petition for a writ of habeas corpus.

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Throughout most of the 20th century, juveniles in trouble were sent to juvenile court. The idea behind the juvenile court (the first of which opened in Chicago in 1899) was to separate juvenile and adult offenders so that juvenile delinquency could be handled efficiently and effectively, in a way that recognizes the unique limitations and needs of youth under the age of 18.

Over the past few decades, however, nearly every state in the United States has changed its laws to partially dismantle this separation of juvenile and adult offenders. These new laws make it easier to transfer adolescents from juvenile to criminal court, where these juveniles are prosecuted as if they were adults (these are called “transfer laws” or “waiver laws”). Some states have lowered the age at which an adolescent is eligible for a judge to transfer him or her to criminal court (usually as young as from 10 to 14 years old, though some states have made youth eligible at any age); some states have allowed prosecutors to decide which adolescents’ cases should go to criminal court, prior to any hearing in the juvenile court; and some states created laws that automatically exclude whole groups of adolescents (based on their ages and charged offenses) from juvenile court. As a result, increasing numbers of youth under the age of 18 are now prosecuted in criminal court rather than juvenile court. The range of cases for which juveniles are transferred is broad—it includes violent offenses such as homicide and robbery, but also theft and drug use as well.

It is difficult to identify why states have changed their laws to transfer more youth to the criminal court. Some authors have suggested that it has been a response to high rates of juvenile crime, but others point out that these two trends are only loosely related. The movement towards transferring youth to criminal court is probably best understood as part of a broader “tough on crime” movement in the United States. Over the past three decades, the nation has also seen a quadrupling of its prison rate along with a host of punitive laws such as “three

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Aaron Kupchik is assistant professor in the Department of Sociology and Criminal Justice at the University of Delaware. He is the author of Judging Juveniles: Prosecuting Adolescents in Adult and Juvenile Courts (NYU Press, 2006).
strikes you’re out” and a harsh war on drugs. Due to a variety of political, cultural, economic, and other social issues, policy-makers have used crime control policies as a way to appeal to the insecurities of large numbers of constituents. These laws resonate with common-sense values by promising to punish those who deserve punishment, and they respond to the common fear of being a victim of crime.

Do Transfer Laws Work?

When these policy-makers promote transfer laws, they usually promise that the laws will result in tougher punishments for out-of-control youth, often using catchy phrases like “old enough to do the crime, old enough to do the time.” Early research on whether this is true was mixed. Some studies found that transferred youth receive harsher punishment than youth in juvenile court. But other studies found that when youth appear before criminal court judges, judges look at them as children who are less dangerous than the adults who usually appear in criminal court, and they then sentence youth more leniently than a juvenile court might. More recent research, however, finds that adolescents do receive consistently harsher treatment when they are transferred, especially for violent offenses.

Policy-makers also promise that transfer laws will help protect the public from predatory juveniles. Unfortunately, the evidence fails to support this claim. When scholars have considered whether transfer laws are a general deterrent—whether they prevent youth in general from committing crimes for fear of the law—they find either no effect, or possible increases in juvenile crime overall after passage of transfer laws. Additionally, research comparing rearrest rates among youth finds that adolescents transferred to the criminal court tend to be rearrested at greater rates than similar adolescents who stay in the juvenile court. Why? Prosecuting adolescents in the criminal court usually means that they don’t receive the rehabilitative treatments available through the juvenile court. Additionally, by being marked as adult felons, these youth may then be less likely to successfully re-enter society after their official punishments end. What is most compelling about this research is the convergence of a wide variety of studies using different methodologies. This consistently bad news for the effectiveness of transfer laws strongly suggests that, if anything, prosecuting large numbers of youth in criminal court increases crime. Thus, though these “tough on crime” measures are promoted as ways to keep the public safe, they may actually put us at greater risk of being crime victims.

Furthermore, contemporary transfer laws do not correspond with the contemporary science on children’s cognitive development. Recent research by psychologists demonstrates that, relative to adults, adolescents are: less likely to foresee the consequences of their actions, more influenced by peer pressure, more likely to act rashly and without thought about their behaviors, and less likely to comprehend the law and their legal rights. These deficiencies were a key part of the creation of the juvenile court over 100 years ago, but they seem to be ignored in favor of the contemporary desire to punish juveniles.

Additionally, transfer laws exacerbate the problem of racial/ethnic imbalance that plagues the justice system. Research on transfer to criminal court generally finds that African American and Latino/a youth are more likely to be transferred to criminal court than white youth, even when controlling for their offenses and their prior records. This discrepancy gets compounded when these minority youth who get transferred are then more likely than others to receive severe punishment.

Finally, as I argue in my book, Judging Juveniles, prosecuting youth in criminal courts does not fit with our cultural view of childhood. The American public views children to be different than adults, more deserving of second chances when they make mistakes, and better candidates for rehabilitation and treatment. Judges are no exception, and when criminal court judges see youth before them, they view these youth to be different than adult criminals. As I find from my research, judges are forced to readapt transfer laws to fit this cultural view of youth. They do so by trying to make the criminal court more like the

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There are more than two million people behind bars, locked away in federal and state prisons and jails across the country. Increasingly, women are occupying those cells—women like Michaelene Sexton. A drug-addicted single mother of three convicted of selling cocaine to fund her habit, Sexton is serving a 10-year prison sentence. Hamedah Hasan is serving a 27-year sentence; this single mother of three was living in shelters and enrolled in a welfare-to-work program when she was convicted of participating in a drug conspiracy.

In 1980, only 12,300 women were incarcerated in state and federal prisons. By 2006, that number had risen to 111,400. Over the course of their lifetime, women are now six times more likely to spend time in prison than they were 30 years ago. If we include women on probation and parole, a total of more than one million women are currently under the supervision of the criminal justice system in the United States.

Much of this increase is due to the toughening of the drug laws. From 1986 to 1999, the number of women incarcerated in state prisons for drug offenses increased by 888%, compared to a rise of 129% for other offenses. Overall, drug offenses accounted for half of the increased number of women in state prisons in this period. Women are more likely to be in prison for drug or property offenses and less likely to be imprisoned for a violent crime, compared with men.

Women now account for more than 7% of the population in state and federal prisons. This seemingly small percentage masks the alarming fact that, since 1985, the number of women in prison has increased at almost double the rate for incarcerated men. The fact that women are still a relatively small percentage of the prison population conceals the harsh consequences of conviction that uniquely affect women.

“Two-thirds of all female state prisoners are mothers of a minor child.”

Kirsten D. Levingston (Kirsten.Levingston@nyu.edu) is director of public initiatives at the Brennan Center for Justice at New York University School of Law, and Kayla Gassmann is a third-year student at New York University School of Law.
The Characteristics of Women in Prison

You know, I was so exhausted living my life the way I’d been living. When I got arrested the third time I was just praying and saying God please just help me … I can’t live in the street anymore, I can’t use any more drugs, but I don’t want to stop. And then people from the [treatment] program came into the jail. I said, this is it, this is my way out.

—Woman who formerly abused drugs

Women who go to prison have faced serious personal, social, and economic challenges in their lives. Many risk factors are strongly related to women’s involvement in the criminal justice system—including substance abuse, mental illness, and prior physical or sexual abuse. Nearly three quarters of women in state prison have a mental health problem, compared to 55% of men. Forty percent of those imprisoned reported that they were using drugs at the time. Women offenders report extremely high rates of physical and sexual abuse, totaling nearly 60% of state inmates, 50% of federal inmates, 47% of women in local jails, and 40% of women on probation. The incidence of prior victimization accords with the prior relationship with the victim—either as an intimate, relative, or acquaintance. Fully 62% of women convicted of violent offenses knew their victims, compared to 36% of men. Currently, there are 51 women on death row throughout the country, and more than half were sentenced to death for killing their husband, boyfriend, or children.

The Consequences of Incarceration

Exacerbated health problems. Although we have seen that drug addiction, mental illness, and prior victimization are the conditions driving many women into the criminal justice system and prison, prison services remain woefully inadequate to address these issues. The inadequacy is two-fold. First, the number of women in need of healthcare and treatment services outpaces the availability of those services. Second, where treatment is available, it may not be suitably tailored to meet the unique issues of trauma and abuse women in prison have suffered. Some facilities, for example, treat drug addiction through group therapy that includes men and women. For women whose drug use and addiction are driven by physical and emotional abuse by men, this method is ineffective.

Sixty percent of women in state prison and 42% in federal prison have a history of drug dependence. But only about 40% participate in any drug counseling, and only about 15% receive professional treatment. In 2006, 73% of women inmates in the state system and 60% in the federal system had a mental health problem. Yet only one-third of inmates in state prison receive any kind of treatment; even fewer receive treatment in the federal system.

Many women enter prison with continuing health problems. “These are women for whom the mainstream health system has failed or been inadequate, both from the standpoints of prevention and treatment,” said Richard Mauery, a senior research scientist at The George Washington University School of Public Health. Incarcerated women engage in activities with health risks, such as smoking or physical inactivity, at higher rates than those who are not incarcerated. Many enter the corrections system with physical conditions associated with poverty and poor nutrition, such as asthma, obesity, diabetes, hypertension, anemia, and ulcers. Faced with inadequate health care in prison, the stressful physical and emotional conditions of prison life only exacerbate existing health problems.

Family disruption and loss. Rapidly rising incarceration rates affect children and families as well as women behind bars. Two-thirds of all female state prisoners are mothers of a minor child. Nine out of 10 mothers reported that their children lived with a grandparent, other relative, or a friend. By contrast, nearly 90% of fathers in prison report that their children live with their mother. The majority of parents in state and federal prisons are incarcerated over 100 miles away from their previous residence, making visitation difficult. In the federal system, 43% are held more than 300 miles away from their last home. More than half of mothers in state prison, and 42% of mothers in federal prison, reported that they had never received a personal visit from their children.

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New Technologies and Privacy: Hazards and Benefits
by Vikram Amar

Deciding when the government has violated the Fourth Amendment’s ban on “unreasonable searches and seizures” is not as easy as the simplicity of these words might suggest. What counts as a “search” and what passes for “reasonable” are questions that often divide judges, academics, and citizens. One thing most people seem to agree on, however, is that advances in technology over the past generation have created unprecedented dangers to privacy and have made the task of defining and implementing the Fourth Amendment that much harder.

This somewhat fearful assessment of the effect of modern technology is justified in some respects, but is lacking in others. To be sure, there are ways today that government—and other private citizens as well—can obtain private information about each of us that would have been unimaginable a century ago, let alone in the 1780s when the Constitution was written and ratified. The idea of government being able to intercept (by enlisting the help of telecommunications companies) all of the correspondence we engage in, because our chosen mode of written communication these days is e-mail, is scary to be sure. So too is the prospect of facial recognition software being used to scan all the attendees in the stands of a Super Bowl game by security agents concerned about terrorism. Thermal imaging (heat sensing) technologies now allow government (and perhaps one day everyone) the ability to detect from a street the nature of activities that go on behind walls and closed doors. And helicopter overflights can expose much that goes on in our backyard barbeques to bureaucratic prying eyes. Then, there is the possibility of government abuse of genetic data that can be culled from analyzing human tissue samples that we all might leave in many places whether we intend to or not—“abandoned” DNA, as Elizabeth Joh addresses in the essay following.

But alongside this understandable angst about modern technology, a few potentially calming observations deserve mention. First, and perhaps most important, the need for society and our legal system to accommodate technological advances into a workable and sensible Fourth Amendment framework is not new; we’ve been encountering this general question—admittedly with a mixed track record of success—far before the advent of the Internet or DNA analysis. In 1928, the Supreme Court took up the (in)famous *Olmstead* case, where the government’s use of phone wiretaps to gather evidence against a bootlegger was challenged (*Olmstead v. United States*, 277 U.S. 438, 1928). Because the privacy incursion from the wiretap did not involve a physical invasion of Olmstead’s person or property—but rather was accomplished by tapping the phone lines in the streets outside his house—the Court found no Fourth Amendment problem.

The *Olmstead* result and reasoning proved unsatisfactory precisely because everyone knew that 20th century technology increasingly allowed government to penetrate our privacy without breaking and entering into our homes or bodies. Justice Brandeis’ dissent in *Olmstead* recognized this, and so did the majority of the Supreme Court 40 years later in the famous *Katz* case, where the justices overruled *Olmstead* and disallowed the government’s placement of eavesdropping/recording devices in public phone booths (*Katz v. United States*, 389 U.S. 347, 1967).

From *Katz*, a test emerged that remains important to modern Fourth Amendment analysis: In order to be protected, a person must have a subjective expectation of privacy, and one that society is prepared to accept as reasonable. This test has a certain circularity and malleability about it, inasmuch as what is considered objectively unreasonable depends on what the courts allow and don’t allow government. Continued on page 16
Your “Abandoned” DNA: Up for Grabs by the Police?
by Elizabeth E. Joh

We discard our DNA behind us everywhere we go; shedding skin flakes and leaving behind saliva is an unavoidable fact of life. Should we permit the police to collect DNA and use it in criminal investigations, with little or no restriction? Under current law, it appears that the police are permitted to do so. The real question is whether this “abandoned” DNA ought to be left to virtually unregulated police practice. The prudent response is no. Characterizing shed human tissue capable of DNA analysis as no different than trash poses a threat to basic civil liberties.

The issue of “abandoned” DNA has arisen because such DNA can be easily collected without the targeted person’s knowledge, and because only a miniscule amount of tissue is necessary to obtain enough DNA for forensic analysis. In cases around the country, police have secured convictions based on DNA evidence taken from used soda straws, cigarette butts, and the like. In a much publicized case, Seattle police in 2003 obtained DNA evidence through an elaborate ruse from a person they had long suspected was involved in a 1982 murder. Using the letterhead of a fictitious law firm, the police asked the defendant, John Athan, to join a class action lawsuit regarding overcharged traffic tickets. He did so, and by licking the return envelope, delivered his own incriminating evidence.

There are few legal restraints on the police when they obtain this DNA evidence. While the United States Supreme Court has not yet decided a case involving “abandoned” DNA, the handful of lower courts to address the issue have refused to recognize privacy rights with regard to shed genetic material. The Supreme Court’s decision in California v. Greenwood (486 U.S. 35 (1988)) provides the relevant legal framework. In Greenwood, the Court rejected the defendants’ claims that they retained a reasonable expectation of privacy in trash bags left out on the curb for collection; the police had taken the bags and found within them evidence of narcotics trafficking. According to the Court, leaving evidence in a place where anyone could obtain easy access erased any objective expectation of privacy. Like the garbage bags in Greenwood, the few legal decisions on “abandoned” DNA have found that there is no constitutional protection for the discarded coffee cups, cigarettes, and straws left behind by defendants—as well as the genetic evidence contained therein.

This “trash” analysis stands in contrast to the rules governing more conventional collection of evidence by the police. In most circumstances, the Fourth Amendment’s prohibition on “unreasonable searches and seizures” requires that the police obtain a warrant before invading a person’s privacy. This investigative technique is more than fodder for the odd news story. The legal treatment of “abandoned” DNA should be a matter of concern for everyone. If such evidence receives no Fourth Amendment protection at all, this means that the police may collect discarded tissue containing genetic material from anyone, for any reason, and without any prior judicial oversight or other regulatory constraint. And, because the police can obtain this evidence without force or coercion, it also means that the targeted person may have no knowledge or notice that his or her DNA is being taken for police investigative purposes.

Once “abandoned” DNA is collected, even more questions arise. Should the analysis of this genetic material be included in the FBI’s Combined DNA Index System (CODIS), the national
ment to do and also on how widespread any particular invasive technique or technology is. But the test has allowed the Supreme Court to safeguard traditional notions of privacy in a number of settings, including some involving cutting-edge technology.

In the 21st century case of Kyllo v. United States (533 U.S. 27, 2001), for example, Justice Scalia invoked the Katz test to strike down the federal government’s efforts to use thermal imaging technology to gather evidence against persons who employ indoor heat-lamp devices to grow illegal marijuana. Noting that the thermal imagers might detect not just information about illegal activity, but also information about private (and potentially embarrassing) activities that were perfectly legal (such as “at what hour each night the lady of the house takes her daily sauna and bath” or how many people congregate in the bedrooms after midnight), the Court rather confidently applied old-fashioned Fourth Amendment values in a brave new world. So judges are doing—and will continue to do—what some fear they have no ability to do well.

Second, we should remember that just as technology can threaten privacy, it can also often enhance privacy. Consider, for example, people who want to keep their daily diary entries guarded, even from those who live with them, and certainly from the government. A generation ago, they would be relegated to hiding the diary, placing a physical lock on it, storing it in a safe, etc.—all strategies that would be time consuming and not terribly effective if a nosy spouse, roommate, or police officer really wanted access. Today, by contrast, password protection devices on computers can allow individuals to store information much more easily and securely, and in a way that can be disturbed only by someone with very sophisticated technological training and equipment.

Consider also the very problem raised in Katz. In the 1960s, it might have been difficult to find a place to make a phone call where you would be confident no one else—including the Ma Bell operator—could hear the conversation. Even without government recording devices in them, public phone booths weren’t very private places. And many folks couldn’t afford a private room at home with a phone in it. Today, however, cell phones allow everybody to take their conversations to a remote place where fellow citizens cannot hear. And disposable cell phones reduce the ability of even phone companies or government to track and record conversations.

Finally, if developed properly, technology has the potential to allow government to search in a more targeted and focused way, protecting innocent information from view without allowing the wrongdoers to escape detection. Imagine, for example, that the thermal imaging technology in Kyllo gets so advanced that we could set the machine so that it would detect only the presence of marijuana heat lamps—and nothing else. Wouldn’t we then feel that such a search technique would be preferable to other, often more invasive and dangerous, ways that drug agents today must go about trying to investigate possible criminals?

Elizabeth E. Joh (eejoh@ucdavis.edu) is professor of law at the University of California, Davis School of Law. She has written on a variety of topics regarding criminal law and procedure, including private policing, traffic stops, and “abandoned” DNA.

Perspectives—Amar continued from page 14

Perspectives—Joh continued from page 15

DNA database? What should happen to the tissue sample if the targeted person is cleared from suspicion?

No one disputes that DNA evidence has proven to be an important aspect of modern police work. But in the case of “abandoned” DNA, the law has yet to catch up with police practices. Even if the Fourth Amendment provides little protection—and this is far from settled—state legislatures and Congress can and should introduce appropriate legislation: for instance, a requirement that police seek a judicial warrant before retrieving “abandoned” DNA. Moreover, a simple change in perspective can have a dramatic impact on the handling of this evidence. Is it clear that the genetic information we leave behind everywhere, on an invol-
the breadth of police discretion and the low public visibility of individual officers’ actions in conducting searches and interrogations often prevent suspects from proving that officers violated their Fourth and Fifth Amendment rights—even when rights violations occurred. Alternatively, one can argue that there are specific contexts in which the later justices applied the rules concretely to exclude evidence and therefore the rules are meaningful, albeit in limited situations. Thus, there is broad agreement that the Burger and Rehnquist Courts’ decisions diminished the definitions of Fourth and Fifth Amendment rights established by the Warren Court. There are serious debates, however, about the impact of these changes because of uncertainty about the efficacy of the Warren Court rules and because the preservation of central elements from these rules continue to shape police performance and training.

The Liberal Legacy of the Burger and Rehnquist Courts

Although the Burger and Rehnquist Court eras are typically described as politically “conservative” because of many decisions that enhanced law enforcement authority, there are also notable decisions in which these later justices expanded rights. For example, many people are not aware that the Burger Court produced the key decisions recognizing rights for prisoners. The Burger Court endorsed federal judges’ authority to mandate improvements in living conditions inside prisons (Hutto v. Finney, 1978). The creation of an Eighth Amendment entitlement to limited medical care within prisons also came from the same era (Estelle v. Gamble, 1976). So, too, came such prisoners’ rights as free exercise of religion (Cruz v. Beto, 1972), access to prison law libraries for preparation of appeals (Bounds v. Smith, 1977), and due process rights in disciplinary cases (Wolff v. McDonnell, 1974). Although the Rehnquist Court limited the scope of prisoners’ rights, the essential elements of these basic rights created by the Burger Court are still in place.

The Rehnquist Court also created several major precedents expanding rights in criminal justice. In particular, in Lawrence v. Texas (2003) the Court decriminalized private, consensual, non-commercial sexual contact between adults, regardless of sexual orientation. The Rehnquist Court limited the scope of capital punishment by forbidding imposition of the death penalty on mentally retarded offenders (Atkins v. Virginia, 2002) and teenage killers who committed their crimes prior to the age of 18 (Roper v. Simmons, 2005). Although it is uncertain whether these precedents will survive after further changes in the Court’s composition during the Roberts Court era (2005–current), they help to demonstrate that analysts must move beyond the simple label “conservative” to adequately describe the actions and impact of the Rehnquist Court.

Conclusion

The complex legacy of the Burger and Rehnquist Courts in the area of criminal justice includes the expansion of law enforcement authority along with the preservation of the central principles of the exclusionary rule and Miranda warnings. Both of these post-Warren Court eras also produced an expansion of specific rights, especially prisoners’ rights and new Eighth Amendment limitations on which offenders are eligible for the death penalty. Although commentators can justify describing the Burger and Rehnquist Courts as generally conservative in addressing criminal justice issues, a more accurate appraisal of these eras also requires recognition of decisions that expanded the procedural rights of suspects, defendants, and prison inmates.
The safety and protection of children and youth has always been a priority for the National Crime Prevention Council (NCPC), home of the McGruff the Crime Dog® “Take a Bite Out of Crime®” campaign. Throughout the years, NCPC’s programs have educated and engaged students in developing projects to address violence or other safety-related issues in their schools and communities. Two such programs, Community Works and the Youth Outreach for Victim Assistance project, educate and engage youth in a variety of crime prevention topics including conflict management, gang prevention, neighborhood safety, substance abuse prevention, dating violence awareness and prevention, and Internet safety. Teens are then challenged to take action by implementing projects and campaigns to address a community problem that they have identified.

Youth-led service-learning is a major component of the Community Works program, which, through a 31-session curriculum, educates youth about crime and victimization prevention, engages them in a variety of critical thinking and problem-solving activities, and gives them the opportunity to voice beliefs and feelings in response to real-life situations. Community Works students work with their peers and other community members to assess their community’s needs, set goals, plan and execute a project, and reflect on the process. Community Works students have completed a broad range of short and longer-term projects. These range from one-step, quick projects where students created posters and table tent-cards with safety tips posted throughout their school, to longer-term projects in which students organized a 911 cell phone drive, collecting old cell phones and distributing them to victims of domestic violence for use in emergency situations.

Community Works students at Farmington (MN) Middle School West used their knowledge of preventing property crime and creating safe spaces when they engaged in a service project to paint out graffiti near their school. The area they chose to beautify is along an underpass walkway that leads from their middle school to the high school. The path is often used by students for sports, theater, and other activities. Students brainstormed a design and determined the amount of paint they would need for the project and then collected donations to pay for the supplies. The mural included blocks painted with different colors (symbolizing diversity), the students’ handprints (symbolizing unity) and the quote, “there is only one thing finer than to have a friend you can trust … but to have a friend who can trust you.”

Community Works students involved in this project felt a strong sense of achievement. One student remarked, “Together we accomplished something great. We didn’t exactly put a stop to vandalism but we let the people in our community know that we actually care. Before, I would look at the graffiti and say, ‘Why do people do that?’ as I would pass by. But now I know that I can actually do something about it.” Another student, who was impressed by his own ability to affect change on his community, said, “People our age don’t really understand that we can have an impact on the community.”

Community Works students at Benson (AZ) High School used their newfound knowledge of substance abuse prevention to educate their peers through a service-learning project addressing underage drinking and driving. The students developed an educational program on underage, impaired driving that included...
two school assemblies and a presentation by Mothers Against Drunk Driving (MADD). The students also developed an awareness campaign and produced posters, along with 500 dog tag necklaces emblazoned with the words, “For your family, for your friends, for the community: stay sober, stay alive.” The dog tags were distributed to all Benson High students, teachers, and administrators.

Benson High’s service-learning project received positive feedback from students, teachers, and other community members. The project greatly affected the Community Works students who led it; the youth felt empowered by the content of the material they presented, the assemblies they conducted, and the number of people they engaged.

The Youth Outreach for Victim Assistance (YOVA) project, a joint effort between NCPC and the National Center for Victims of Crime, strives to empower, engage, and educate youth. The YOVA project addresses teen victimization through the initiation of media campaigns that educate teens about victimization and the services available to teen victims. Teens involved in the YOVA project at the Philip Martin Taylor School of Discipline in Walterboro, SC, chose to raise awareness of, and prevent, bullying and intimidation. The YOVA teens’ “Friendship Beats Bullying” campaign included skits, which the teens performed for third graders at Ben Hazel Primary School. After the presentation of skits and a discussion session, the third graders contributed to the campaign by designing and creating posters, and competing in a poster contest.

While many of today’s youth participate in some form of voluntary service in their communities, there is an unrealized opportunity to capitalize on teens’ willingness to serve by directing their attention to projects that can help prevent teen victimization or bring awareness to safety-related issues. October is Crime Prevention Month, an ideal time to engage students in volunteer opportunities and other service projects that address violence or other safety issues in their schools and communities.

Like the projects described above, service projects that youth engage in can vary by topic, audience, and scope. The impact and benefit of service—fostering an ethic of social responsibility—on the youth who serve is undeniable. We at the National Crime Prevention Council understand that our mission to be the nation’s leader in helping people to keep themselves, their families, and their communities safe from crime.

To achieve this, NCPC produces tools that communities can use to learn crime prevention strategies, engage community members, and coordinate with local agencies, including publications and teaching materials on a variety of topics; programs that can be implemented in communities and schools; local, regional, and national trainings; posters that address violence or other safety issues in their schools and communities.

Debra Eisenman (deisenman@ncpc.org) is a program associate for the National Crime Prevention Council’s Teens, Crime, and the Community Initiative; she has written a variety of articles and publications for NCPC on topics that include cyber bullying and gang prevention.

**About NCPC**

The National Crime Prevention Council (NCPC) strives to be the nation’s leader in helping people to keep themselves, their families, and their communities safe from crime. To achieve this, NCPC produces tools that communities can use to learn crime prevention strategies, engage community members, and coordinate with local agencies, including publications and teaching materials on a variety of topics; programs that can be implemented in communities and schools; local, regional, and national trainings; public service announcements broadcast nationwide starring McGruff® the Crime Dog; and support for a national coalition of crime prevention practitioners.

To learn more about NCPC’s programs and resources, including Community Works, YOVA, or Crime Prevention Month, visit www.ncpc.org, or contact NCPC staff at 202.466.6272 or tcc@ncpc.org.
Learning Gateways

Criminal Justice & the Constitution

by Kathryn King and Michelle Parrini

Ex Parte Merryman Simulation

The following article describes an active learning class experience focusing on the topic of habeas corpus. Students will participate in a simulation of the denial of a writ of habeas corpus to John Merryman, pursuant to President Lincoln's suspension of the writ in 1861.

Objectives

Students will be able to:

■ Define the term “writ of habeas corpus.”
■ Identify the facts of the Ex Parte Merryman case and its historical context.
■ Articulate the arguments made for suspension of the writ by President Lincoln and his attorney general, Edwin Bates; arguments against suspension of the writ by Merryman’s lawyer; as well as Justice Taney’s decision.
■ Articulate their arguments for and against the suspension of the writ.

Materials

Handout 1—“Brief Sketch of Cast of Characters”

The following materials are available online in pdf form at www.insights-magazine.org; go to the “Learning Gateways” feature for Fall 2007:

■ “Ex parte Merryman and Debates on Civil Liberties During the Civil War,” by Bruce Ragsdale, a teaching unit from Federal Trials and Great Debates in U.S. History, developed by the Federal Judicial History Office of the Federal Judicial Center. Make or download student copies of the following excerpts from the Merryman teaching unit: (1) Lincoln on habeas (pp. 5–6); (2) Bates opinion (p. 6); (3) Legal Arguments in Court (p. 22); and (4) Taney’s opinion (pp. 4–5).
■ Ex parte Merryman Teacher Script.
See also: Cary Federman, “Habeas Corpus: The Great Writ of Liberty,” pp. 7–9, 23 of this issue.

Target Group: Students in Grades 9–12

This activity and resources are suitable for high school students in history, government, law, and other social studies classes. The content and objectives address several national government and social studies standards (see the Insights Web site). The activity can be used as three 50-minute class periods or two 80-minute periods, as well as one night of homework.

Procedures

1. Read and become familiar with the Ex Parte Merryman teaching unit, which includes an overview of the case, biographies of key individuals, excerpts from primary source documents, a chronology of the trial, and resources (available online, see “Materials”). Make copies of the excerpts from that unit for student use.

2. Write the language from the Constitution about the writ on the board or on overhead: The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it. Explain that a writ of habeas corpus is an order to bring a person being held in custody before a court to show cause or explain why that person is being held. Mention that of all our liberties, it is the only one included in the original Constitution (Article I, Sec. 9); others were outlined later in the Bill of Rights.

3. Distribute the excerpt, “Legal Arguments in Court” from the Ex Parte Merryman teaching unit. Give students time to read the handout. Discuss it, and teach the facts of the Merryman case, including the background on Maryland Governor Thomas Hick’s action, the state of the rebellion in spring of 1861 (one-third of the states were actively rebelling), Merryman’s involvement in destruction of railroad lines and the suspicions about his future actions, Lincoln’s suspension of the writ, Taney’s issuance of the writ, Cadwalader’s refusal to produce Mer-
ryman in court, etc., through the end of Merryman's story.

4. Facilitate a discussion among students of arguments for and against Lincoln's suspension of the writ.

5. Break the students into small groups. Have one-third read the handout about Lincoln's thoughts on habeas, one-third on Taney's, and one-third on Attorney General Bates. Have them analyze the arguments of each individual and report back to the whole class.

6. Assign students to play each of the roles identified in the “Brief Sketch of Cast of Characters” in Handout 1.

7. Distribute Handout 1, “Brief Sketch of Cast of Characters.” Give the students time to study the information in their sketches and the opportunity to ask more questions about how their “character” was involved, what he believed, and what he did during the Merryman case. Discuss with the students the role or job of each individual involved in the Merryman case. For example, discuss what Chief Justice Taney’s job involved as a federal judge (although he was also a Supreme Court justice, in Merryman, Taney issued his final opinion acting as a federal district court judge).

8. Ask each student to make a large sign or name tag to wear, with his or her name and role assignment in the play on the sign. For example, the student playing Roger Taney will make a sign saying, “Roger B. Taney, Chief Justice, U.S. Supreme Court, issuer of the writ of habeas corpus.”

9. Direct and narrate a short, extemporaneous play in which the students act out the Merryman story. Students should wear their signs/name tags so that any audience members and other actors can see who is doing what.

You might give each role player a speech bubble on which they could write important ideas or actions, to be held up at the teacher's signal. Students should have the chance during the play to ask questions of each other “in character,” and if necessary, of the narrator. (See Insights online for an example of a “Teacher Script” that you might use for your narration).

10. After students act out the play, facilitate a discussion about what
they may still not understand about the writ, the positions of the parties in the case, and what happened.

11. Return to the students’ original arguments for and against suspension of the writ by Lincoln. Which of the arguments were made by actual parties in the case? Do students still agree with all of their original arguments? Can they think of new arguments?

Assessment & Extension

1. As homework, ask students to write an opinion column from the perspective of a newspaper editor in 1861, either supporting or opposing Lincoln’s suspension of the writ. Ask them to identify and discuss at least three reasons to support their positions.

2. Compare students’ opinion columns with the four available in the Ex Parte Merryman teaching unit (see pp. 47–48).

Epilogue

About 10,000 people were subject to military arrests during the Civil War, mostly in the border states and the Confederacy. Merryman remained in custody. He was indicted for treason and eventually released on bail. The initial treason charges were dismissed. Then in May 1963, he was indicted again on treason charges, but no trial took place. In 1867, Maryland’s U.S. attorney dropped the charges. ■

Kathryn King is a social studies teacher at Hampden Academy, Hampden, Maine.

Michelle Parrini is a program manager with the ABA Division for Public Education. This lesson is adapted from an activity originally developed by Kathryn King during the “Federal Trials and Great Debates in U.S. History” Summer Teacher Institute (July 2007), sponsored by the American Bar Association Division for Public Education and the Federal Judicial History Office of the Federal Judicial Center.

Lincoln, Habeas Corpus, and Terrorism

John Ashcroft, who is depicted in the cartoon below with President Lincoln, served as Attorney General of the United States from 2001 to 2005. He was a key supporter of anti-terror legislation and government programs following the September 11 terrorist attacks. Use the cartoon with the accompanying discussion questions to explore contemporary issues of terrorism in historical perspective.

2. The political cartoon (below) suggests that the response to the threat of terrorism has been “soft” compared to President Lincoln’s actions during the Civil War. Does the United States today face a threat equivalent to the Civil War? Has the nation’s response to terrorism been too soft? Too aggressive?

3. Judge Richard Posner, a leading scholar and a judge from the Seventh Circuit of the U.S. Court of Appeals, has said that “the mere granting of the right to seek habeas corpus … neither endangers national security nor imposes significant costs on the judicial system.” If Judge Posner is correct, why has there been congressional legislation and, in the wake of 9/11, new calls for further restricting the right to seek habeas relief?
convicted of rape and murder in Virginia and sentenced to death. Coleman's lawyer filed a notice of appeal one day after the state's deadline for appeals had passed. The Virginia Supreme Court ruled against Coleman's petition. Coleman filed a habeas petition arguing that his lawyer had been ineffective, Sixth and Fourteenth Amendment violations. In a capital case in which a man's contention of unconstitutional state confinement was denied a federal habeas hearing because of a late filing of an appeal, Supreme Court Justice Sandra O'Connor, writing for the Court, began her opinion with these words: “This is a case about federalism. It concerns the respect that federal courts owe the States and the States' procedural rules when reviewing the claims of state prisoners in federal habeas corpus.”

Why did the Supreme Court reject Coleman's claims and consider this a case “about federalism” when a man's life was at stake? In Brown, Justice Frankfurter had asked, in dissent, whether a denial of federal habeas review by the Supreme Court because of an inadvertent procedural default (a late filing) “is an act so arbitrary and so cruel in its operation, considering that life is at stake, that in the circumstances of this case it constitutes a denial of due process in its rudimentary procedural aspect.” By the time Coleman's case reached the Supreme Court in 1991, due process had gained a more expansive meaning from the Supreme Court. Indeed, after Brown, the Supreme Court was more willing to accept late filing cases involving capital punishment. But in light of the perception that habeas corpus was a “get out of jail” card for convicted criminals, following the liberalization of both due process and habeas corpus in the 1960s, after Coleman, this is no longer the case. Moreover, the makeup of the Supreme Court had changed substantially by the early 1990s. A majority of justices now believed that the states could manage criminal justice with minimal federal supervision. Habeas corpus would be necessary only in extraordinary cases of illegal confinement. For Justice O'Connor, individual procedural errors have substantive effects on state criminal justice policy, not the other way around. “By filing late,” she wrote, “Coleman defaulted his entire state collateral appeal.” By filing late, Coleman, like Brown before him, went to his death.

Conclusion

Variously called “the great writ of liberty” and a “human right,” the writ of habeas corpus has achieved a status in American jurisprudence that has surpassed even those rights deemed by the United States Supreme Court to be “preferred” or “fundamental,” such as free speech and the right to privacy. In large part because of the writ's historic association with Magna Carta, legal scholars consider habeas corpus as a tool of liberty in the fight against governmental oppression. But habeas corpus is controversial in the United States because it does more than upset relations between the states and the federal government; it can overturn death sentences. By allowing us to see the Supreme Court's struggle to find the balance between respecting the procedures of federalism and the protection of individual rights, Brown v. Allen and Coleman v. Thompson highlight the continuing difficulties raised by habeas corpus in a federal republic.

References


Cases


In Juarez, Expiring Justice

Most countries have a statute of limitations—a period of time during which criminal charges must be filed—for most criminal offenses, although usually not for offenses such as genocide, treason, or homicide. This article explores Mexico’s statute of limitations for homicide (14 years) and the implications for investigating and solving a disturbing number of murders, especially of women. Women’s and human rights organizations have drawn international attention to the statute and to hundreds of these cases, which have been marred by sloppy, insensitive, and delayed investigations.

and that transformed the town into the fourth most populous city in Mexico.

Young women were especially prized by factory supervisors because they were considered more reliable and less rowdy than men. Almost overnight, women were making money while men were still struggling to find jobs, leading to resentment in the local macho culture that activists cite as a social undercurrent to the slayings.

Salas walked each day down a treeless dirt road, past piles of rotting garbage and shacks with sagging walls, to catch a bus that took her to a television parts manufacturer. She made about $35 a week, sometimes pulling night shifts and returning home to a neighborhood with no streetlights.

The day that she disappeared should have been joyous; she was getting ready to celebrate her daughter’s first birthday. Griselda Salas remembers her sister saying that a friend was going to lend her money to buy presents and party supplies.

“She’s probably gone off with some stud,” Griselda Salas remembers being told by police when her sister did not return home. “You watch, she’ll come back pregnant with a fat belly in a few months.”

Vicky Salas was on a religious retreat at the time of her daughter’s disappearance. When she returned several days later, members of her church were in tears. “They’ve found a dead girl,” she remembers her friends telling her. “They think it’s Ivonne.”

A car accident delayed Vicky Salas’s trip to the morgue, which was closed when she arrived. An unsmiling police officer told her, “You’ll have to come back tomorrow,” and no amount of pleading by a panic-stricken mother could change his mind, she recalled.

Even as the death toll rose, victims’ families continued to complain about insensitive investigators. One state attorney general suggested that the women encouraged their attackers by dressing provocatively. Other officials implied that the victims were prostitutes, living “double lives,” though their mothers insisted they were poor factory workers.

“They called them the morenitas,” Juarez police criminologist Oscar Maynez said in an interview, invoking a derogative term that was in vogue at the time and roughly translates to “little brown ones.” “No one cared about the treatment of victims—especially, the insensitive language and assumptions about women used by police and other investigators in this story?”

Maynez said in an interview, invoking a derogative term that was in vogue at the time and roughly translates to “little brown ones.” “No one cared about the treatment of victims—especially, the insensitive language and assumptions about women used by police and other investigators in this story?”

One relative of a murder victim received a threatening voicemail message warning her to drop the case; the caller ID showed the call had come from

In the Classroom

Use these discussion questions, teaching activity, and web resources on page 26 to help students extend their understanding of the news article, promote classroom discussion, and offer opportunities for small research projects.

Discussion Questions

1. Why do you think most countries employ a statute of limitations for most criminal offenses? Should murder be treated as an exception to such statutes? Why (not)?

2. Some of the women whose murders have gone unsolved worked for assembly plants (maquiladoras) owned by U.S. companies. What legal or moral responsibility does the United States have to ensure that justice is served in these cases?

3. What lessons would you draw from the treatment of victims—especially, the insensitive language and assumptions about women used by police and other investigators in this story?

4. How would you evaluate the criminal justice issues raised in this news article in light of Mexico’s continuing efforts to sustain new democratic processes? [To help enrich this discussion, see “Furthering Democracy in Mexico” in Foreign Affairs (January/February 2006) at www.foreignaffairs.org]

Teaching Activity

As a homework or in-class exercise, ask your students to examine human rights issues in Mexico. Guide them to authoritative Web sites on the subject, such as Human Rights Watch (http://hrw.org) or Amnesty International (http://www.amnesty.org). Assign a few small groups of students to explore different areas of human rights concerns in Mexico; they can study a variety of issues (e.g., criminal justice, domestic violence, labor rights, etc.) through news stories and annual human rights reports for Mexico. Ask each group to summarize their concerns and recommend ways that Mexico could address these issues.
the state judicial police,” a WOLA report said.

Flor Rocio Munguía González, the special prosecutor for what has become known as the femicides in Juarez, said in an interview that such offenses are “things of the past” and that she has more than tripled her investigative staff to solve old cases before the time limits expire and to track down those responsible for the ongoing killings of women in Juarez. “I take great satisfaction in our efforts—we’re doing everything we can,” said Munguía González, who has been in office since February 2006.

After seeing eight special prosecutors come and go with no results, local activists are not impressed. Maureen Meyer, a WOLA analyst, said that a special federal investigator had found that 130 public officials had either been negligent or abused their authority during the murder investigations, but none has been disciplined. “There’s a real failure to hold them accountable,” Meyer said in an interview.

Maynez, the criminologist, said he believes a powerful network of police, municipal officials and organized crime figures still protects the killers. He resigned from the job for a short time, after being asked to help frame two bus drivers in one of the cases. He refused, but the two men were arrested anyway. One died in suspicious circumstances during a jailhouse surgery. The other was released after testifying that he had been tortured by police into confessing.

An attorney for the bus drivers was killed by Chihuahua state police in a drive-by shooting in 2005, four days after vowing to file a corruption complaint. The police said the shooting was a case of mistaken identity.

Skepticism is growing as the Argentine forensics team nears the conclusion of its inquiry. The team has discovered that forensics officials in Ciudad Juarez boiled the corpses of some victims, destroying crucial DNA. The group also has found that the families of at least three victims received the wrong bodies for burial. “The authorities just sealed the coffins and told the families not to ask any questions,” said Doretti, the lead forensics investigator. The Juarez families, Doretti said, have insisted that no evidence be sent to Mexican laboratories. Instead, Doretti has sent samples to a U.S. lab; she is expecting results soon.

The new forensic evidence and the approach of the statute of limitations deadlines are the sorts of developments that once would have prompted demonstrations in downtown Juarez. But the mothers who for years have pleaded for justice are exhausted, aging and in poor health.

The case of Silvia Morales, who was killed when she was 16, will expire in less than two years. Her mother, Ramona Morales, had been one of the most vocal critics in a protest movement of victim relatives, but is now suffering from diabetes and a bad knee. “I can’t do it anymore,” she said one recent afternoon, tears trickling down her face.

Eva Arce, whose daughter Silvia Arce disappeared in 1998, was twice beaten by thugs after demonstrations demanding justice. She spends her days clipping newspaper articles about a new generation of murdered women in Juarez and writing poems. “A tortured soul pours from a river of blood,” she said one recent afternoon, reading from her notebook.

That same day, the newspaper El Norte of Ciudad Juarez carried a photograph of a pretty, dark-haired young woman. She didn’t look so different from Silvia Arce or Silvia Morales or Guadalupe Ivonne Salas. The caption read: “Edith Aranda Longoria, 729 days since she was last seen.”

Web Resources

Below are some web-based resources on Mexico, its criminal justice system, and related human rights abuses, as well as examples of recent discussions involving extensions or repeal of statutes of limitations for murder in Japan and the United States.


Washington Office on Latin America (WOLA) [http://www.wola.org; go to Mexico, then to Juarez Murders]. As part of its human rights mission, WOLA provides information, reports, and resources designed to address and prevent violence against women in both Guatemala and Mexico, including the murders in Juarez.


juvenile court—by sparing youth from harsh punishments, seeking rehabilitative options, and judging youth for their personal circumstances as much as for their actual offenses. Since these adaptations are the very things that transfer laws seek to avoid, transfer laws simply do not match the reality of juvenile crime or juvenile offenders.

Of course, one can find positive benefits of transfer laws as well. Transfer laws can serve as a symbolic marker of our identity. They allow us to express a common value of obeying the law, and they give us an opportunity to collectively express our outrage against a common enemy: juvenile delinquents. But these symbolic benefits are undermined by the fact that these laws are not effective, and might even be harmful. In sum, transfer laws fail to reduce crime or protect the public.

A Return to the Past
The studies I discuss above evaluate the effects of moving large numbers of youth from juvenile to criminal court, as mandated (or facilitated) by the laws passed across the United States since the 1970s. But it is important to also recognize that the selective use of transfer is an important and necessary tool for juvenile courts. Transferring small numbers of youth to criminal court is a necessary “safety-valve” for the juvenile court. By removing the most serious offenders from juvenile court, the vast majority of juvenile cases can then be dealt with more effectively, without diverting resources to offenders who may not benefit from them. Moreover, the most serious juvenile offenders are indeed beyond the court’s capacity to punish appropriately, and society is best served by these exceptional cases being dealt with more severely in the adult justice system. The debate is therefore one of degree. It makes sense to select the most serious and appropriate cases for transfer and to punish these juveniles as adults. But to expand the numbers of youth sent to criminal court with new transfer policies—a policy reform we have seen across the United States—is counterproductive, counter-intuitive, and aggravates existing racial/ethnic disparities.

The type of policy I am referring to as helpful and effective, where judges can select the most serious juvenile cases for transfer to criminal court, is exactly the sort of policy that had been in place since the first juvenile courts opened. Over the past 30 years these policies have been dismantled in order to increase the numbers of youth who get transferred and to take this decision out of judges’ hands. Instead, many newer laws establish entire categories of youth who are automatically transferred or allow prosecutors to decide who should be prosecuted in criminal court. As a result of automatically transferring entire categories of juveniles, courts are no longer able to make decisions based on factors such as the juvenile’s intent, personal circumstances, or whether the juvenile fully understood the consequences of his/her offense. Furthermore, prosecutors are poorly suited for making this decision because they often do not have access to information about the juvenile’s personal circumstances, their job depends on conviction and punishment rates rather than doing justice to both victims and offenders, and frequently there are few incentives for keeping juveniles in the juvenile court. In other words, judges are a more neutral decision maker, and as a result, prosecutors tend to overuse transfer laws far more than judges. Returning to a model where judges can select those few youth who should be transferred, and rolling back the clock on the punitive, counter-productive transfer policies of the past three decades, would be an improvement to our juvenile justice policies that contributes to public safety, efficiency, and fairness.

For Discussion

Why were juvenile courts created? In what ways were they supposed to be different from adult criminal courts?

What were some of the factors leading to the passage of new state laws authorizing the transfer of juveniles into the adult courts? Are these laws a good idea, in your opinion? Why (not)?

For Further Reading


The Supreme Court’s 2006–07 term included a variety of criminal justice cases and issues. Some defendants pressed their rights under the Fourth, Fifth, and Sixth Amendments, as well as the federal habeas corpus statute, while others continued the trend of making successful constitutional challenges to death-penalty verdicts in Texas.

The term’s two Fourth Amendment cases seemed to strike a special chord with Court watchers, perhaps because they had the potential to change long-established police procedures, but also because they involved police stops of automobiles, the one criminal justice scenario to which most of us can easily relate. It is difficult to envision being a murder defendant; it is not so hard to picture a police car appearing in the rearview mirror, lights flashing.

Searching Passengers

In *Brendlin v. California*, No. 06-8120 (June 18, 2007), the Court ruled unanimously that passengers—and not just drivers—may challenge the constitutionality of a traffic stop and demand the suppression of evidence obtained as a result of the stop. Under the Court’s prior decisions interpreting the Fourth Amendment, drivers who are illegally stopped and searched by police could ask a court to block the government from using any of the resulting evidence against them. But the Supreme Court had not previously addressed the question of whether passengers in such a vehicle enjoyed similar rights and protections.

The defendant in this case, Bruce Brendlin, was a passenger in a car that police stopped in order to “check its registration” (even though, as the police later conceded, they had no objective reason to believe there was anything wrong with the registration). As one of the officers spoke to the driver, he recognized that her passenger was “one of the Brendlin brothers” and recalled that one of those brothers was wanted for a parole violation. After verifying Brendlin’s identity, the officers then placed Brendlin under arrest, searched him, and found an orange syringe cap. A “pat down” search of the driver uncovered syringes and a “plastic bag of a green leafy substance,” and she too was arrested. The officers then searched the car and found tubing, a scale, and other things used to produce methamphetamine. After Brendlin was charged with the manufacture, transporting, and possession of methamphetamine, he asked the trial court to suppress the officers’ drug evidence as the “fruits of an unconstitutional seizure.”

The initial traffic stop in this case was clearly unlawful—the officers lacked any probable cause or reasonable suspicion to make the stop. At trial, therefore, the state instead contended that, as a passenger, Brendlin didn’t have the right to question the legality of the traffic stop; rather, only the person who is wrongfully “seized” by the government can object to the use of evidence discovered as the result of that seizure. And here, California argued, the officers had not seized Brendlin, because when they stopped the car to verify the car’s registration they were targeting the car’s driver, not its passengers. The California Supreme Court agreed, contending that Brendlin, as a passenger, had been free to do what the driver could not—“exit the car and thereby terminate the encounter with the officer.”

On review, all nine U.S. Supreme Court justices disagreed. Writing for the Court, Justice Souter explained that “the test for telling when a seizure occurs is whether, in light of all the surrounding circumstances, a reasonable person would have believed he was not free to leave.” When police pull over a car, its passengers are seized just as surely as its driver is. “We think,” Justice Souter wrote, “that in these circumstances any reasonable passenger would have understood the police officers to be exercising control to the point that no one in the car was free to depart without police permission.”

Charles F. Williams is the editor of PREVIEW of United States Supreme Court Cases, a publication of the ABA Division for Public Education.
The term’s second Fourth Amendment case, *Scott v. Harris*, No. 05-1631 (April 30, 2007), arrived in the form of a civil rights lawsuit filed by a man who had been rendered quadriplegic by a car crash that ended his attempt to flee police. Also at stake, however, was the constitutionality of high-speed police chases and the circumstances in which police can use force to stop fleeing drivers.

The plaintiff, Victor Harris, was 19 years old when a county deputy sheriff clocked him driving 73 mph in a 55 mph zone on a two-lane Georgia road. Although the deputy flashed his blue lights and activated his siren, Harris refused to pull over. Instead, he fled down the narrow road at speeds that exceeded 80 mph, as he passed vehicles and ran red lights. Another deputy sheriff, Timothy Scott, joined the chase. Scott radioed and received permission to end Harris’s flight by initiating a “Precision Intervention Technique” (PIT), designed to cause a fleeing vehicle to spin to a stop. Scott pulled up close to Harris but then decided they were traveling too fast for the PIT maneuver. Instead, he struck Harris’s back bumper with his police car’s front “push bumper,” causing Harris to lose control of his car, which ran down an embankment and overturned. Tragically, the serious injuries left Harris quadriplegic. He sued Deputy Scott, charging him with violating his federal constitutional rights by using excessive force that resulted in an unreasonable seizure.

Scott sought to block the suit on the grounds that his actions were protected by “qualified immunity.” (This defense protects government officials from liability for civil damages, so long as their alleged conduct did not violate clearly established statutory or constitutional rights of which “a reasonable person” would have known). The federal court of appeals concluded that Scott was not entitled to qualified immunity because his actions could constitute “deadly force,” and the use of deadly force would violate Harris’s constitutional right to be free from excessive force during a seizure. Accordingly, the appellate court held, “a reasonable jury” could find that Scott violated Harris’s Fourth Amendment rights.

The Supreme Court reversed by an 8-1 vote. Writing for the majority, Justice Scalia reasoned that although Deputy Scott had indeed seized Harris, this seizure was not “unreasonable.” Instead, it was necessary to terminate a dangerous high-speed car chase that threatened the lives of innocent bystanders. Justice Scalia also unveiled a new high-tech weapon in the Court’s arsenal—the police videotape of the chase, which the Court posted online for the public’s viewing at www.supremecourtus.gov/opinions/video/scott_v_harris.rmvb.

**The 2007–08 Term**

Although by September 2007 the Court had granted certiorari in only 28 new cases, two of them—*Gall v. United States*, No. 06-7949, and *Kimbrough v. United States*, No. 06-6330—are already raising interest among criminal justice scholars and practitioners. Both offer the Court another chance to clarify the effect of its ruling in *United States v. Booker*, 543 U.S. 220 (2005), which held that the mandatory application of the U.S. Sentencing Guidelines violates a criminal defendant’s right under the Sixth Amendment to have facts that increase his or her sentence determined by a jury.

Gall asks whether, when determining the “reasonableness” of a district court sentence under Booker, it is appropriate to require district courts to justify a sentence outside the range recommended by the Guidelines with a finding of extraordinary circumstances. In *Kimbrough*, the Court will review the actions of a federal judge who imposed a below-guidelines sentence in a crack-cocaine possession case, on the grounds that the sentence required under the Guidelines was higher than necessary to do justice.

Also being watched closely is a case that (as of this writing) the Court had not yet agreed to review—*District of Columbia v. Heller*, No. 07-290. Here, the District of Columbia is seeking review of a court of appeals decision that struck down the District’s gun control laws as an unconstitutional violation of the Second Amendment.
These familial effects are also skewed by race. One of every 14 black children has a parent in prison, compared to one in every 125 white children. Thus, black children are almost nine times more likely than white children to have a parent in prison, and Hispanic children are three times more likely. Termination of parental rights is also an important issue for families in this situation. In 1997, the Adoption and Safe Families Act (ASFA) established that states can take steps to terminate parental rights if children have spent 15 of the last 22 months in foster care. Sixty percent of mothers in prison are expected to serve more than 24 months. Thus, the growth in the number of women sentenced to prison raises the specter of mothers losing custody of their children.

**Alternatives to Incarceration**

“When people are in crisis, it’s one of the best opportunities to change. If you can intervene during the crisis of arrest and incarceration, and help someone identify ways to change, it’s a tremendous opportunity,” says Arlene Lee, who has served on the staff of the Federal Resource Center for Children of Prisoners. In some jurisdictions, rather than incarcerating women, judges are directing them to programs where they receive treatment, education, and employment training in the community, while under strict supervision. These programs have protected public safety while effectively addressing the real problems underlying a woman’s involvement in the system. Alternative sentencing is part of the strategy that has allowed New York City to reduce crime and jail populations. Moreover, by keeping program participants in their own communities, alternative sentences lead to less family disruption and stronger communities.

Critical Resistance, a group that advocates against prisons and prison expansion, issued a 2007 report offering alternatives to a gubernatorial proposal to increase the number of prison beds for women in California. The report included these sound recommendations: (1) reduce the number of women in prisons through reforms to parole, medical release, geriatric parole, and other methods; (2) provide six months housing to women paroled from prison, since homelessness is a major reason for reincarceration; and (3) reappropriate funds saved from foregoing new prison construction to create community-based programs that provide women leaving the system with housing, clothing, and skills development. While those who profit from filled prisons want to keep them that way, using alternatives such as these to reduce the number of women in prison will avoid the human and financial toll it takes on individuals, families, and communities. Policy-makers should pursue them not just for women, but also for the raft of men and young people behind bars.

**Conclusion**

The criminal justice system has become a repository for women with personal, social, and economic problems—such as mental illness, substance abuse, poverty, and prior physical and emotional victimization. Because women continue to play the primary caretaker role for children, their incarceration destabilizes families in a unique way. And because of ongoing racial and class divides, the hardships of women’s incarceration fall disproportionately on poor families and families of color. Unless alternatives to incarceration are explored and widely implemented, we are in real danger of creating a permanent underclass of women and children with less access to opportunity, benefits, and services, exacerbating the problems that led women to prison in the first place.

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**Resources**

To learn more about women and the criminal justice system, visit the Web sites of the following organizations:

- Critical Resistance (www.criticalresistance.org)
- The Sentencing Project (www.sentencingproject.org)
- Women’s Prison Association (www.wpaonline.org/resources)

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**FOR DISCUSSION**

What are the unique problems facing women in the criminal justice system and in prison? What programs could successfully address these problems?

Women comprise a small, but rapidly growing, portion of the prison population. Should prisons develop different rehabilitative and educational programs for women than men? Should we spend more money, per inmate, on women than men? Why (not)?

What are the social benefits of incarceration? What are its negative consequences?
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