

## Foreword

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## FOREWORD

*MARGINS*: Maryland's Law Journal on Race, Religion, Gender and Class held a Symposium in the spring of 2002, entitled, "Experiences of Women Inmates in the Twenty-First Century." The purpose of this event was to recognize and discuss the many difficult issues raised by incarceration of women, particularly those concerns not elicited by the incarceration of men. Panelists for this event included policymakers, law enforcement officials, professors, and criminal justice advocates. Many of the articles in this publication are authored by these panelists and expand on the main issues and ideas presented at the Symposium. Prefacing these articles is a transcription of opening remarks by Holly Holeman, an activist and former inmate of the Kentucky State Prison, and Eric Sterling, the President of the Criminal Justice Policy Foundation, a private, non-profit educational organization that promotes solutions to the problems facing the criminal justice system.

### OPENING REMARKS SPRING 2002 SYMPOSIUM

H.L.A. HOLEMAN\*

In the course of this symposium, a good number of issues will be raised. The value of such a forum is in the sharing of information, allowing exposure to the particulars of challenges, programs, and solutions with which other individual entities (agencies/departments/facilities) may have experience. As with most criminal justice related events, the participants and attendants promise to be an eclectic mix of practitioners, academics, agents from policy bureaus, missionaries and all matter of counsel. In a realm in which theory and practice too often have evidently parted ways, *this* is where theory and practice meet. I am not an academic, agency vet, or "Corrections Professional." I am bound by no Mission Statement or departmental policy. I meddle in legal reform issues on my own dime and in my own time.

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\* Activist and Former Inmate

I was invited to participate in this event because of my familiarity with a practice employed in the Kentucky prison system. It is my hope that the program (in whole or in part) can be developed, adapted and implemented for practice within the Maryland prison system. Kentucky's state prisoners have a Resident Legal Aid<sup>1</sup> program in place that benefits the inmates, the individual institutions, the Department of Corrections and the State's Department of Public Advocacy. Legal Aides are capable and obligated to prepare documents for filing both civil and post-conviction (non-direct appeal) motions on behalf of fellow prisoners. They can do so because they have the benefits of: (1) training executed by the Department of Public Advocacy, (with on-going supervision for more technical filings as necessary); (2) the equivalent of a hammer and chisel law library; and (3) the time which they've got to spend somehow.

#### I. BENEFITS OF THE KENTUCKY MODEL

The inmate has the benefit of competent assistance in basic civil matters such as child custody, divorce, name changes and bankruptcy filings. In a post-Prison Litigation Reform Act environment, the Kentucky Model affords services imperative to individuals who might otherwise be hard-pressed to gain such access to courts. Additionally, the services of a resident legal aide are available to any inmate facing an in-house "court call" hearing over an institutional infraction. Participation by resident legal aides diminishes the need to schedule staff representatives. Post-conviction research and filings generated through the Legal Aid Center and law library relieve some of the burden from the State Department of Public Advocacy (DPA). Only in the event that a hearing on a particular post-conviction motion is ordered, the Appointment of Counsel assignment will fall to the DPA.

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1. Resident legal aides are inmates of the correctional facility.

## II. IMPLEMENTATION OF THE PROGRAM

Resident legal aides work daily to ensure that a variety of institutional procedures with due process implications are carried out effectively. They routinely make tours of segregation units to confer with court-call clients and to offer other legal services to anyone serving time in detention. Legal aides are required to attend certain “administrative segregation” proceedings. Frankly, having a legal aide within earshot is likely to bring out more “judicially self-aware” behavior on the part of staff. They provide a sense of empowerment and a means to address legal issues. This does not mean facilitating the proverbial “crunchy versus smooth peanut butter” frivolous or nuisance lawsuits. It means that once someone enters the prison, he or she will have the tools to settle legal matters which remain outside the fence, to be represented within the institution, to have immediate adjudication of any peripheral cases leveled while in custody and in some cases to have a court relieve them of all or part of their sentence.

The Kentucky Model is not typical jailhouse lawyering. The connotation of the latter seems to be that of prisoners in business for themselves. Kentucky’s resident legal aides are in business for the state – literally. Being a legal aide is a paid institutional position. It is classified as “Institutional NEED.” There are procedures for individual institutions which designate that there be one certified legal aide for every one hundred members of the prison population. The Kentucky Department of Corrections’ Corrections Policy and Procedures (hereinafter CPPs) give a broader definition to the program. They also outline the minimal requirements for initial training and continuing legal education programs, functions of the legal aides, performance standards, rights/responsibilities for both client and aide, as well as defining what basic texts, digests and periodicals must be available to inmates within the law library.

### III. DEVELOPMENT OF THE KENTUCKY MODEL

It has been said that Kentucky does not lead the league in progressive thought. There have been darker days for prisoners there. The Legal Services program was developed subsequent to some protracted litigation that came to be known as “The Consent Decree and the *Canterino* Lawsuit.” Together, those actions addressed an array of conditions/policies/customs and practice within the Kentucky system, ranging from arbitrary classification, absence of segregated housing for differing levels of custody, dearth of vocational/educational training facilities, disparity of treatment between the men’s and women’s institutions, and a particular desire on the part of the men’s institutions to do away with the celebrated “Blue Room” where they would be brought to take the odd beating at the hands of properly motivated staff.

Clearly, the Kentucky prison system did not come to foster a Resident Legal Aide Program by accident, nor did they necessarily relish the idea of having one in their midst. They do, now, some twenty years later have a different relationship with it. They have fine-tuned the particulars of its operation over that time. The demonstrative value of the modern “Kentucky Model” for resident legal aid services is in that it has indeed been refined by practice.

### IV. PROPOSAL FOR A MARYLAND PROGRAM

In the throes of this symposium, it may become painfully apparent that there are certain needed services that are not effectively being made available to female prisoners at a particular point in their travels through the Maryland system. It may be that the services are never offered, or that any combination of a lack of funding, staff or enthusiasm has made them scarce. Much credit should be given to the handful of overburdened service providers and grant dependent doers-good for making the contributions they do. I would propose that if some program analogous to the Kentucky Model can be instituted to provide for a working law library and resident legal aide service at the state prison level – the resources of those service providers could be concentrated for better use elsewhere. It may also become evident that women exiting the prison (through the variety of facilities/programs as well as through serve-out or parole) would not be in such dire need of assistance – with custody issues for example.

The principle is sound and logical. The practice has been done. Teach them to fish.

Following the symposium, a number of interested folks have asked about the particulars of the training itself. The Lady Warden of MCIW and others have expressed reservations about the practice of a given inmate being somehow beholden to another inmate for legal services. There are precious few abuses of the position and swift justice for those who would abuse it. Provisions in both Institutional SOPs and State Corrections Cabinet Policies/Procedures are actively employed to assure that the Resident Legal Aide program is free and effective access to courts for anyone who has paid the price of admission to a State facility. The particulars of who participates in the training, what topics are covered, and how the institutional Law Libraries are maintained seems to generally be the second line of questioning. The shortlist of topics covered in the training materials used by the KY DPA in the Resident Legal Aid program.

- Shock Probation pursuant to KRS 439.265
- Motions/memoranda and sample filings.
- Jail Time Credit pursuant to KRS 532.120
- Detainers (in-state/out-of-state) KRS 500.110/440.450
- Pre-Release Probation pursuant to KRS 439.470
- Belated Appeals (comprehensive)
- RCr 11.42 (comprehensive)
- Post Conviction Appeals in KY State Courts
- Civil Rights Actions (28 USC~1983)
- Constitutional Law (comprehensive)
- 14th Amendment (specific guide)
- 8th Amendment (specific guide)
- 6th Amendment (specific guide)
- 5th Amendment (specific guide)
- Federal Habeas
- Federal and State Court Systems
- Criminal Procedure
- Legal Research (w/ hammer and chisel law library)
- Board of Claims
- Divorce/custody/paternity.
- Bankruptcy
- Glossary - Judicial and Legal Terms
- Adjustment Committee Representation (Institutional "Court-Call" over institutional infractions)

The logistics of the training bears mentioning, and might give those interested in helping to develop an analogous training program a view of it that might not otherwise be shown. It might serve as a blueprint, or be dismissed as a patently bad idea, or just a bit of stranger than fiction happenstance which might be an unconventional read in MARGINS. It is the one who brung me. So on to the dance.

### OPENING REMARKS SPRING 2002 SYMPOSIUM

ERIC STERLING \*

Last night was the world premiere of CourtTV's first special television program, entitled "Guilt by Association." It was a fictionalized story about a woman who discovered her boyfriend was a pot dealer. She broke up with him because she did not want a pot dealer around her kids. Unbeknownst to her, while they were dating, he was under investigation. But she got busted. She had loved him and broke up with him because she did not want to have anything to do with his pot dealing. But she was still prosecuted and sentenced under federal guidelines and mandatory minimums to twenty years. The co-defendant pot dealers received sentences in the range of five years. She went to federal prison, and after quite a number of years, tried to publicize her case for mercy. The press became interested, and she learned of a group called Families Against Mandatory Minimums (FAMM). FAMM is a national association working to end mandatory minimums on the state and local level. The movie culminated with President Clinton pardoning the woman on his last day at the White House last year.

During 2000, I worked a lot on the issue of pardons. In my newsletter, *On Balance*, there is reprinted a column I wrote for the Chicago Tribune entitled "Pardon Me, Please"<sup>1</sup> about why President Clinton should have let out thousands of people who were low-level non-violent drug offenders before he left office in addition to the two dozen whose sentences he did commute.

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\* President, Criminal Justice Policy Foundation

1. Dec. 20, 2000

Albert Schweitzer said in 1923, “[H]umanitarianism consists in never sacrificing a human being to a purpose.”<sup>2</sup> Unfortunately, our society has lost this understanding of humanitarianism. We sacrifice millions for the purposes of the war on drugs.

We have had a phenomenal set of speakers today examining conditions in prison. I am going to look at the other side of the prison gates – at the system that puts people in prison. I want to talk about the big picture, something bigger than the criminal justice system itself, and that is, the war on drugs.

Let us look at some of the relevant background data. The number of women in prison has grown at a rate double the rate for men since 1980.<sup>3</sup> In 1980, there were 12,300 women in prison around the nation.<sup>4</sup> By 1997, there were 82,000, an increase of 573%.<sup>5</sup> An estimated additional 63,000 women are incarcerated in jails, for a total of over 146,000 women behind bars in 1997.<sup>6</sup> From 1986 to 1996, the number of women in state prisons for drug offenses rose by 888%, compared to a rise for 129% for non-drug offenses.<sup>7</sup> By 1997, drug offenses accounted for thirty-seven percent of all women in prison, up from twelve percent in 1996.<sup>8</sup> Drug offenses accounted for about half of the increase in incarceration for all women between 1986 and 1996, compared to about one-third of the increase for men.<sup>9</sup> But for some states, drug offenses accounted for much more of the increase. In New York, drug offenses accounted for ninety-one percent of the increase;<sup>10</sup> in California, fifty-five percent of the increase.<sup>11</sup>

We have heard speakers today who have alluded to the racially disproportionate impact of imprisonment, and in the drug area, this problem is magnified. In New York, Black and Hispanic women received ninety-one percent of all drug sentences for prison when they comprised only thirty-two percent of the state population.<sup>12</sup> In California, Black and Hispanic women received fifty-four percent of

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2. ALBERT SCHWEITZER, *THE PHILOSOPHY OF CIVILIZATION* (1923).

3. MARC MAUER, CATHY POTLER & RICHARD WOLF, *THE SENTENCING PROJECT, GENDER AND JUSTICE: WOMEN DRUGS, AND SENTENCING POLICY* (1999).

4. *Id.*

5. *Id.*

6. *Id.*

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.*

the drug sentences to prison, when they were thirty-eight percent of the population.<sup>13</sup> In Minnesota, Black and Hispanic women received twenty-seven percent of the drug sentences to prison when they were five percent of the population.<sup>14</sup>

Now, how did this come about? This arose out of the war on drugs. Let me suggest that the war on drugs is racism incarnate. Go back to the beginning of the twentieth century. That was the time when the KKK was rising, and when lynching was at its greatest. That was the time when Congress began America's war on drugs.

In 1910, the first effort to create comprehensive federal narcotics laws failed. Republicans controlled the Congress. By 1914, Democrats controlled the Congress, Woodrow Wilson was President, and the Harrison Narcotics Act<sup>15</sup> passed. The difference between 1910 and 1914 was that, in the interim, the promoters of the legislation promoted the message that "cocainized" Negroes were the cause of the rape of white women in the South. They claimed that "cocainized" Negroes acquired superhuman strength and that when they ran amok the only way that they could be stopped was if the cops shot them with bigger weapons than were standard issue at the time. Shooting a .32-caliber gun would not stop a black man high on cocaine; one had to use a .36 or .38 or .45-caliber gun. These stories were published in the newspapers. In order to get the Southern Democrats in the Congress to go along with this vast expansion of federal power, promoters attached cocaine to Blacks and crime in the South.

What was behind the 1937 Marijuana Tax Act?<sup>16</sup> In the competition for scarce agricultural jobs during the Depression, Mexican-American natives of California were competing with refugees from Oklahoma and the Dust Bowl. One goal of the promoters of the Marijuana Tax Act of 1937 was to create the impression that these Mexicans use "marihuana" and are dangerous; "they are high on drugs, and you do not want to hire them."

Let us move forward to our lifetime. In 1986, what was the story about the drug problem in America? Two words: crack cocaine. In the popular imagination that meant urban black men selling dope in America's city streets, urban black men who were spreading their

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13. *Id.*

14. *Id.*

15. Harrison Narcotics Act, 26 U.S.C. 4705(a) (1914).

16. Marijuana Tax Act, 26 USC 4742(a) (1937).

plague out to the suburbs. And we know who, in the popular mind, lives in the suburbs.

Many of you are familiar with the work of Professor Al Blumstein at Carnegie Mellon University. He wrote a very influential paper on sentencing in 1973 about the remarkable stability of the rate of incarceration in America.<sup>17</sup> He hypothesized that generally, no matter what happens, rates of incarceration remain fairly stable. In the U.S., he looked at the period from 1930 to 1970, and found that the rate of incarceration was actually quite steady, averaging about 110 per 100,000 people for forty years. This was fairly constant over a vast period of differing social conditions. From the end of the Roaring Twenties associated with alcohol prohibition, the Great Depression, World War II, the Post-War Boom, the Eisenhower years, through the turbulent Sixties, the curve of the rate of incarceration remained relatively flat. Well, Professor Blumstein has since noted that this paper, while influential at the time, did not have much long-term influence.

Because, after 1970, the American rate of incarceration goes off like a rocket – the rate of incarceration is now about 650 per 100,000 people. For African-American males, it is closer to 5,000 per 100,000 people. That 40-year flat line now shoots off the top of the chart. What happened in 1970 to make that change? The vestiges of legal segregation were nailed in its coffin.

How do I see the twentieth-century history of segregation? For the first two-thirds of this century, segregation was the law. *Plessy v. Ferguson*<sup>18</sup> in 1896 said separate but equal was okay. Racism was institutionalized and it was lawful throughout the first two-thirds of the century. The issue was settled. Then came the domestic turmoil of the 1950's with Martin Luther King, *Brown v. Board of Education*,<sup>19</sup> and the Civil Rights movement to end segregation. After a long struggle, bitterly resisted by powerful forces in every corner of our society, by the late 1960's segregation was finally outlawed. You could no longer discriminate in favor of whites and against the "colored." You could no longer lawfully segregate in the workplace, in schools, in higher education, in transportation, in housing.

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17. Al Blumstein & Jacqueline Cohen, *A Theory of the Stability of Punishment*, 64 J. AM. INST. CRIM. L. & CRIM. 2 (1973).

18. 163 U.S. 537.

19. 347 U.S. 483 (1954).

At this moment in history, we had a dramatic change in the nation's rate of incarceration. When Republican Richard Nixon ran for President in 1968, he ran on an explicit "Southern Strategy" to get the "Solid South," long-Democratic states of the former Confederacy (which seceded from the Union when the first Republican President, Abraham Lincoln, was elected), to vote for him. His appeal was to point to urban unrest and the civil rights movement and to call for a restoration of "Law and Order."

What is the connection between this history and the war on drugs? President Richard Nixon created the Office of Drug Law Enforcement, the National Institute on Drug Abuse, and the Drug Enforcement Administration. Nixon was responsible for the creation of the Controlled Substances Act, declaring, in 1971, the modern war on drugs.

On Labor Day weekend 1980, Ronald Reagan, after winning the Republican nomination, went to Philadelphia, Mississippi to kick off his general election campaign for President of the United States. Why would a candidate for President of the U.S. go to Philadelphia, Mississippi to symbolically start his campaign? Philadelphia, Mississippi, with a population of 7000, is not New York or Chicago or Los Angeles. Philadelphia, Mississippi, county seat of Neshoba County (population 25,000), is known for only one thing in American history – it is where civil rights workers Chaney, Goodman, and Schwerner were kidnapped and murdered by the Neshoba County Sheriff's deputies in June 1964. Governor Ronald Reagan did not go there to honor the slain civil rights workers, he went there to send a political message at the start of his campaign. He was signaling an affinity with a certain kind of conservatism.

President Ronald Reagan came in to office declaring, "I am going to cut the budget. I am going to stop the expansion of federal spending." He did cut domestic spending. But what was the first exception, the first increase in domestic spending that Ronald Reagan brought to the Congress? In October 1982, three weeks before the mid-term election, Rudy Giuliani, then-Associate Attorney General, unveiled a \$175 million drug enforcement and organized crime agenda. From that point forward, throughout Reagan's two terms, we saw an expansion of the war on drugs.

When Reagan became President, the federal prison population was about 24,000 people. It was up to 36,000 in 1986 when Congress wrote the mandatory minimums. It was about 45,000 when Reagan left office. During George Bush's four years, the federal prison

population grew by another 25,000. When Bill Clinton became President, the federal prison population was about 70,000. It was 146,000 when Clinton left office. It is 160,000 today. That is just the federal prison system. The percentage of those in Federal prison on drug charges has grown from twenty-six percent in 1981 to fifty percent in 1989 to almost sixty-one percent from 1993 to 1996. In 1999, the Federal prison population was thirty-nine percent Black, thirty-one percent Hispanic, and the balance, almost thirty percent non-Hispanic White. All of this flows out of the agencies, laws and policies created, shaped and fought for by Presidents Nixon and Reagan and Bush.

Last year, of the 23,000 federal drug cases, only one in four of those sentenced to federal prison were white, three-quarters were Black and Hispanic. On a national basis, thirty-eight percent of those arrested for state and local drug offenses are Black. However, at the end of the criminal justice process, fifty-six percent of those convicted of such offenses are Black. What happened in court? Who makes the decisions? How can there be such a dramatic difference in how Whites and Blacks are treated in the course of a drug prosecution? Indeed, why is there such a dramatic difference?

When we look back at the entirety of the twentieth century from this century and ask for a thumbnail history of race relations in America, here is my answer: "Racial segregation throughout. Lawful segregation was found throughout the society for the first seventy years. For the balance of the century, segregation was found throughout the society – educationally, economically, socially, and by correctional status due to the war on drugs." Explicit segregation was no longer permitted. But the war on drugs is conveniently facially, racially neutral. Racially neutral? Ha.

Now, nothing can justify racial segregation and discrimination. But perhaps that terrible social cost in injustice is substantially ameliorated because the war on drugs is good for the society. Perhaps it is saving thousands of lives and keeping dangerous drugs out of the hands of kids. After all, the White House and national leadership have been telling us that it is a cruel, cynical myth that the war on drugs is failing.

Well, here is the latest version of the National Drug Control Strategy Report, issued by the White House in February 2002.<sup>20</sup> Let

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20. THE WHITE HOUSE, NAT'L DRUG CONTROL STRATEGY REPORT (2002), *available at* <http://montevideo.usembassy.gov/drugstrat.pdf>.

us look at the latest official data. Let us look at the number of people who have died from illegal drugs. After all, what is the most important objective of the war on drugs? It is to save lives, isn't it? There ought to be fewer people dying from drug abuse each year, compared to the year before or the decade before, right? Table 20 of the report says that in 1979, 7,101 people died from drug abuse. In 1998, 20,227 people died from drug abuse. The drug-related death rate in 1979 was 3.2 per 100,000. In 1998, it was 7.5 per 100,000. The death rate has *doubled* during the war on drugs. Well, we ain't saving more lives, folks, more people are dying every year.

Maybe the war on drugs is leading to fewer people going to hospital emergency rooms because of their use of illegal drugs? Table 21 reports that in 1988, about 400,000 people went to the hospital emergency room compared with 600,000 in the year 2000.

Well, surely we are protecting the kids, by making it harder for them to get their hands on drugs aren't we? According to the government's "Monitoring the Future" survey,<sup>21</sup> in 1998, a higher percentage of high school seniors reported that it is "very easy" or "fairly easy" to get marijuana than any percentage reported since 1975 – 90.4 percent. The high school seniors said the same thing about *heroin* – more seniors in 1998 found heroin easy to get compared to any senior class since 1975 – 35.6 percent. In 1978, only 16.4 percent of the seniors found heroin easy to get. In 1986 when Congress wrote the extremely harsh and long mandatory minimum sentences, only 22.0 percent reported heroin easy to get.

"We're winning the war on drugs," says the White House, the Administration and the Republican congressional leadership. According to the continuous flood of press releases, op-eds and speeches from the Directors of the Office of National Drug Control Policy and DEA Administrator Asa Hutchinson, we are winning. Government Exhibit One is that drug use is down from 25.4 million "current" drug users (use at least once in the past 30 days) in 1979 to 14 million in 2000.<sup>22</sup> That is an enormous drop, they note. But all of that drop took place in the thirteen years before 1992 when the number of drug users dropped to twelve million. In the past ten years, there has been an increase of two million drug users. In the past decade, as

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21. L. D. JOHNSTON, P. M. O'MALLEY & J. G. BACHMAN, NAT'L INST. ON DRUG ABUSE, NAT'L SURVEY RESULTS ON DRUG USE FROM THE MONITORING THE FUTURE STUDY, 1975-1998 VOLUME I: SECONDARY SCHOOL STUDENTS (1999).

22. *Id.* at tbl.2.

the prison population has soared and the anti-drug budget has doubled, there has been no progress, according to the government's principal scale of success.

How do we truly measure drug enforcement success (other than saving lives)? One measure is if we make it more expensive to be a drug trafficker. We measure this in the marketplace. If drugs are more expensive, this is evidence that the drug traffickers are finding that it is more expensive to operate. When the purity of the drugs in the market goes down, that's another measure – there is less dope to go around. So how are we doing in the real world marketplace?

According to the data from the White House National Drug Control Strategy Report, for street-level purchases of cocaine, the price for a pure gram of cocaine in 1981 was \$423. In 2000, it was down to \$212.<sup>23</sup> The price is *half*. Cocaine is *half* as expensive as it used to be. Let's consider the purity of the average retail cocaine purchase. In 1981, the average purchase was thirty-six percent pure. In 2000, cocaine was sixty-one percent pure in the street. It is almost twice as pure. The traffickers can supply so much cocaine they are now competing for market share, so they have to make it purer to get customers.

How about heroin? The price for a pure gram at street level was \$3,285 in 1981; it was \$2,088 in 2000. The purity of heroin purchased by a user in 1981 averaged at four percent. In the year 2000, the average heroin purchase was twenty-five percent pure. That is the average – an increase of more than 500 percent in purity. No wonder more people are dying from heroin overdoses.

What is the price of gold per gram? About \$9.00 per gram. \$9.00 for gold, \$212.00 for cocaine, \$2088.00 for heroin. You tell me – what kind of business should I go into? Where is the big profit?

Look at this whole anti-drug enterprise, at its history and at its execution. Does it protect public health and safety? It's a fraud. It's a crime. If we call it a war on drugs, it's time we had some war crimes trials. Figuratively, we should be indicting the Ronald Reagans, the Asa Hutchinsons, the Congressmen Bob Barrs. They should be indicted for sending people to prison who have the disease of addiction, for imprisoning people pointlessly, for destroying families, for promoting a social policy that is killing more people every year.

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23. *Id.* at tbl.33.

“Humanitarianism consists in never sacrificing a human being to a purpose,” Albert Schweitzer said in 1923. He won the Nobel Peace Prize in 1952.