

CJF grantee UC Berkley Death Penalty clinic, which coordinates strategic litigation, communications, and outreach surrounding lethal injection challenges, is quoted on concerns about the practice.

The Washington Post

Group to censure physicians who play role in lethal injections

By Rob Stein

Washington Post Staff Writer

Sunday, May 2, 2010; A01

A national physicians organization has quietly decided to revoke the certification of any member who participates in executing a prisoner by lethal injection.

The mandate from the American Board of Anesthesiologists reflects its leaders' belief that "we are healers, not executioners," board secretary Mark A. Rockoff said. Although the American Medical Association has long opposed doctor involvement, the anesthesiologists' group is the first to say it will harshly penalize a health-care worker for abetting lethal injections. The loss of certification would prevent an anesthesiologist from working in most hospitals.

About half of the 35 states performing executions, including Virginia and North Carolina, require a doctor to be present. Other states have also recruited doctors, including anesthesiologists, to play a role in executions involving lethal injections. In some jurisdictions, anesthesiologists consult prison officials on dosages. In others, they insert catheters and infuse the three-drug cocktails.

While death penalty opponents welcome the move because it raises yet more questions about lethal injections, capital punishment supporters contend that doctors are not needed during the procedures, which can be administered by prison employees. But as questions mount about the types and combinations of drugs used and whether they cause undue suffering, states have been turning to doctors for advice and assistance. With 3,200 prisoners now on death rows across the country, most of the 50 executions performed each year since 2008 have used lethal injections.

"If I were lying there on the gurney and someone was administering a paralyzing drug . . . I would want someone there who knew what they were doing," said Ty Alper, associate director of the Death Penalty Clinic at the University of California at Berkeley's School of Law. "Just like if I was getting surgery -- I wouldn't want a prison guard administering the anesthesia."

Loss of certification

Under the policy, which the group's 40,000 members learned about in February, any of these activities could lead to a loss of certification. Anesthesiologists can get state medical licenses without certification, but most hospitals require it.

Thus far, no doctors have been disciplined, Rockoff said, but several anesthesiologists, including some who have worked as execution consultants or testified in capital punishment litigation, said the step has had a chilling effect.

"They are clearly drawing a line in the sand and saying, 'If you cross this, we'll come after you,'" said Bryan A. Liang, a law professor at California Western School of Law and a professor of anesthesiology at the University of California at San Diego.

"It sure will deter me. For the ABA to threaten to pull your board certification is a big deal," said one anesthesiologist who has consulted for prison officials in his state about drug dosages. Arguing that the decision should be left up to individual doctors' consciences, none of those who criticized the policy agreed to be named, saying they feared repercussions.

Executions were halted in the United States from 2007 until 2008 until the Supreme Court decided in a Kentucky case that a commonly used three-drug cocktail did not violate the constitutional ban on cruel and unusual punishment. Now Ohio and Washington state have started using one anesthetic, similar to animal euthanasia.

"Before haphazardly making the single injection the new standard, we need to know if this will solve the problem of botched executions," said David B. Waisel, an associate professor of anesthesiology at Harvard Medical School. "If we are going to have capital punishment, it should be done humanely, with no additional harm to the inmate."

The 12-member anesthesiologist board, however, concluded that physicians can never violate the obligation not to do harm.

"This puts anesthesiologists in an untenable position," Rockoff said. "They can assuredly provide effective anesthesia, but doing so in order to cause a patient's death is a violation of their fundamental duty as physicians to do no harm."

A humane death

Critics have argued that prisoners may experience excruciating pain while rendered unable to cry out because one of the three drugs used in most states paralyzes them before they receive the next two, which can cause an intense burning sensation before death. Reports of chaotic, horrific executions have increased calls to involve those with more expertise, namely medical professionals trained in delivering and monitoring anesthesia.

"When execution gets botched, it's usually because of two major problems: because of difficulty inserting the catheters to inject the drugs or because something goes awry with the poisons -- either the prisoner is not unconscious and there's pain involved or the drugs cannot be administered," said Rockoff, an anesthesiologist at Children's Hospital in

Boston. "So some states have thought, 'Why don't we get anesthesiologists involved to help us?' "

Because the identities of executioners are kept secret, no one knows how often doctors assist in executions. But in California, a judge in 2006 ordered that a doctor be present for executions. Two anesthesiologists who had agreed changed their minds at the last minute, however. In Missouri in 2006, a judge ordered the state to revise its procedures and consult an anesthesiologist. Although that decision was overturned, the state recruited an anesthesiologist anyway.

Maryland's executions have been on hold since 2005, and the District does not have capital punishment. In Virginia, the role a doctor plays in an execution and the type of physician involved is unknown.

While not taking a stand against capital punishment per se, the Raleigh, N.C., board decided that not only was the participation of an anesthesiologist unethical, but also it could make patients wary about standard medical procedures.

"When any of us go into surgery, it's a frightening time," Rockoff said. "If lethal injections are medicalized, it could make it look like operating rooms are like death chambers, that anesthesiology drugs are death drugs and anesthesiologists are executioners. That would all undermine public confidence in the medical profession."

Some death penalty supporters said nurses or emergency medical technicians are well-equipped to perform executions.

"Some think it's an effective argument to say you need a doctor to do this," said Michael Rushford, president of the Criminal Justice Legal Foundation, which supports the death penalty. "You don't need a doctor to do this. It's a counterfeit argument."

The New York Civil Liberties Union is managing this challenge to the NY State indigent defense system. CJF grantee National Legal Aid and Defender Association has been part of reform efforts in New York and Michigan.

The New York Times

Suit Over Legal Aid Advances in New York

By WILLIAM GLABERSON

May 6, 2010

New York's highest court ruled Thursday that a broad class-action suit challenging the state's system of providing public defenders can move forward because there are enough signs that the system is failing poor people.

The 4-to-3 ruling by the State Court of Appeals came in a closely watched suit that civil liberties lawyers said could be a model for similar challenges across the country. It also set the stage for a sweeping battle in the courts and perhaps the Legislature.

Written by the state's chief judge, Jonathan Lippman, the ruling said the suit, which had been bitterly opposed by the state, could proceed because it posed fundamental questions about the fairness of the criminal justice system.

"Wrongful conviction, the ultimate sign of a criminal justice system's breakdown and failure, has been documented in too many cases," the decision said.

The ruling was something of a milestone after decades of reports and findings by state commissions that New York's locally financed system for meeting the constitutional requirement to provide lawyers for indigent defendants, which varies greatly by county, is inadequate, with inattentive, unavailable, poorly trained and poorly supervised lawyers handling huge caseloads. In many counties, the ruling noted, poor defendants are routinely arraigned without lawyers at all during initial appearances, where bail is set and many defendants are sent to jail.

The way is now cleared for a trial or a settlement by New York, as has been the result in several other states that have faced such challenges. There have been similar class-action challenges over public defense systems in states like Connecticut, Indiana, Minnesota and Montana that have ended with inconsistent decisions and settlements. Last month, the Michigan Supreme Court permitted a similar challenge to proceed.

By some estimates, the improvements sought by the civil liberties lawyers could cost the state hundreds of millions of dollars.

"Nearly 50 years after the Supreme Court held that criminal defendants have a right to meaningful counsel, the state's highest court has held that New York may well be violating that right every day," said Daniel Greenberg, a lawyer at Schulte Roth & Zabel, which filed the suit with the New York Civil Liberties Union. Mr. Greenberg was

referring to the landmark 1963 Supreme Court ruling, *Gideon v. Wainwright*, that declared poor people facing criminal charges have the right to a lawyer.

Gov. David A. Paterson's office released a statement saying it was reviewing the decision. But the statement also noted that at an event with Judge Lippman on Monday, Mr. Paterson spoke publicly about working with him to improve public defender services in the state.

"We both agree that the current system is a disgrace," the governor said at the event.

The suit was filed in the name of a Rochester woman, Kimberly Hurell-Harring, and 19 other people who were facing criminal charges in five counties: Onondaga, Ontario, Schuyler, Suffolk and Washington.

Ms. Hurell-Harring claimed that a public defender in Washington County, near the Vermont border, did little for her but pressure her to plead guilty after a felony arrest for trying to sneak marijuana to her husband, who was in prison.

The state fought the case, claiming it would be a judicial invasion of the authority of the Legislature and the governor. The three-judge dissent written by Judge Eugene F. Pigott Jr. echoed that argument. It acknowledged that "there is no doubt that there are inadequacies in the delivery of indigent legal services" but said that such a complaint should be addressed to the Legislature.

The majority decision said "there is a considerable risk that indigent defendants are, with a fair degree of regularity, being denied constitutionally mandated counsel" in the five counties, in every part of the state, named in the suit.

The state's defender system consists of Legal Aid societies, private lawyers who are appointed by the courts and local public defender offices. With more than 80 percent of defendants facing criminal charges unable to afford to pay for lawyers, public defender systems have come to define most criminal justice systems in the United States.

Generally in the criminal justice system, defendants who claim they were not adequately represented must wait to make that argument in an appeal after a conviction. But the civil liberties lawyers in New York argued that a broad review was necessary in a class-action case because case-by-case appeals did not address systemic failings.

Law enforcement officials were divided over the class-action suit. Some prosecutors said the case overstated the problems with public defender programs, while others said poorly financed defender programs undermined the credibility of the entire criminal justice system.

Mr. Paterson has proposed legislation that would create an Office of Indigent Defense to evaluate the current system. The bill would also provide a modest \$7 million increase in state subsidies.

Last year, the Legislature passed a law intended to limit defenders' caseloads inside New York City, where on average Legal Aid lawyers each handle more than 700 cases a year.

The 4-to-3 decision on Thursday was the latest in a series of liberal rulings by the state's top court under Judge Lippman, who was appointed last year and has taken the court in a new direction with rulings that have been notably sympathetic to environmental, civil liberties and criminal defense arguments.

As in many other rulings from the Lippman court, which has a majority of judges appointed by a Republican, former Gov. George E. Pataki, the judges voted along party lines but with one defection joining with the three judges appointed by Democratic governors to form a majority. In this case, the Patiki appointee who formed the majority was Judge Victoria A. Graffeo.

Marc Mauer, executive director of CJF grantee the Sentencing Project, is quoted below on the successful prison population reductions being made across the nation.

The Washington Post

States reduce prison populations as budgets shrink

By Krissah Thompson

Washington Post Staff Writer

Wednesday, March 3, 2010; 1:14 PM

Many state governments continued last year to reduce their prison populations through sentencing reforms enacted because of shrinking state budgets, according to two reports released Wednesday by a research group that advocates for lower rates of imprisonment.

In 2009, at least 19 states adopted criminal justice policies intended to cut down on the number of prisoners they house by shortening sentences, according to the Sentencing Project. For example, Minnesota, New York and Rhode Island each scaled back mandatory sentencing laws for some drug offenses.

Three states -- Michigan, New Jersey and New York -- reduced their prison populations by at least 12 percent in the past decade by making similar changes, according to state public safety data cited by the report. Those states saw no increase in crime, according to the report.

New York's prison population is down 20 percent, from 72,899 in 1999 to 58,456 in 2009. Michigan's had a 12 percent reduction, from 51,577 in 2006 to 45,478 in 2009. New Jersey's is down 19 percent, from 31,493 in 1999 to 25,436 in 2009.

State legislators have been largely motivated by the need to cut costs, said Marc Mauer, executive director of the Sentencing Project. "It's really become a nonpartisan issue on the state level given the fiscal crisis," Mauer said. "The cost of funding prisons is competing with the cost of higher education."

Will Marling, executive director of the National Organization for Victim Assistance, has said he is concerned about the trend. "The issue for us is that it seems to be an issue of financial expediency rather than a justice issue."

New York Times Book Review of Soros Justice Fellow Robert Perkinson's media-fellowship-supported book, *Texas Tough: The Rise of America's Prison Empire*, which explores history of the criminal justice system in Texas and its national impact.

The New York Times

March 28, 2010

The Land of Lock and Key

By DANIEL BERGNER

TEXAS TOUGH

The Rise of America's Prison Empire

By Robert Perkinson

Illustrated. 484 pp. Metropolitan Books/Henry Holt & Company. \$35

Prisons are sacred places. There our society claims control over the lives of men and women; there we assume the roles of gods. And whether the prison sprawls over thousands of acres like the penitentiary farms of the Deep South, or compresses its convicts on tight tiers, the air within holds a particular density, a palpable weight created not only by the crimes the inmates have committed but also by the ownership we have taken of the convicts, whether we acknowledge it or not.

In "Texas Tough," Robert Perkinson, a professor of American studies at the University of Hawaii at Manoa, delivers an important reckoning with this societal responsibility. Though his loud, machismo-laden title might better serve for a reality show about life behind bars, Perkinson offers a searching history of American incarceration, tracing the failures of our prisons to the approach that Texas and other Southern states have long taken -toward their criminals and denouncing the fact that, with about 1.6 million people in our penitentiaries and an additional 800,000 in our jails, the United States locks up its citizens at a higher rate than any other country in the world.

Race and slavery lie at the heart of Perkinson's vision of American penology, and a profound dismay infuses the rhetoric of his opening pages. "Freedom is the United States' founding creed," he declaims in the book's first sentence, and immediately he adds pronouncements from Thomas Paine, Andrew Jackson and Barack Obama making the same point. The oncoming irony is unmissable; there isn't much that is subtle about Perkinson's writing, and perhaps there shouldn't be. Not only do we incarcerate at some six times the rate that Britain does, to take one example, or around seven times the rate of Canada, but, Perkinson relates, African-Americans are seven times as likely to be locked up as whites, and -"African-American men today go to prison at twice the rate they go to college."

As Perkinson sets out to tell the story of America's movement from, in his words, "the age of slavery to the age of incarceration," with the latter period beginning in the mid-1960s and continuing to the present day, he concentrates on Texas in part because the modern surge of its inmate population has far outstripped even the spike in national

numbers. Between 1965 and 2000, the number of prisoners in the country rose by 600 percent; in Texas, the growth was twice that. The state ranks near the very top for the percentage of its people kept behind bars. And for well over a century, Texas has held to a perspective on penology — an outlook devoid even of the goal, let alone the reality, of rehabilitation — that now dominates the nation. The state, in Perkinson's eyes, has provided a "template for a more fearful and vengeful society," for a country that no longer aims, with its inmates, "to repair and redeem but to warehouse, avenge and permanently differentiate convicted criminals from law-abiding citizens."

The template was mostly formed, according to "Texas Tough," by slavery and its aftermath. Defeated in the Civil War, Texas and its Southern confederates were desperate to retain as much dominion as possible over their former slaves, and they found a way through law enforcement. Blacks seized for low-level crimes faced severe punishment with little chance of defending themselves in court. Perkinson tells of a black man sentenced to two years for stealing a pair of shoes and another sent away for five for snatching a bushel of corn. In the three years following the war, Texas' inmate population nearly quadrupled — and darkened considerably in skin color, with former slaves soon outnumbering whites. Over the next few decades, these new black prisoners were rented out to an array of private businesses under a system known as convict leasing, which replicated slavery for its brutality and may well have exceeded it in disregard for human life.

Black prisoners in Texas cut sugar cane and picked cotton on the plantations of the state's agricultural barons. They built the railroads that took the cotton to market. White convicts were leased out as well, but often for less arduous labor. Whipped and driven to work despite malaria and dysentery, or shot trying to escape, blacks fell dead nearly twice as frequently as whites. And the death tolls were high. At one work camp, where the men chopped timber for railway ties, almost a quarter of the convicts perished in a period of four months.

Similar toil and treatment prevailed in much of the South, and even when convict leasing came to an end in the early 20th century — in Texas, the end arrived partly through a campaign waged by an outraged prison pastor and a crusading San Antonio journalist — the system was replaced by government-run plantations and chain gangs. Fatalities declined, but subjugation remained the ethos. And this Southern penological tradition, the book argues, stands in important contrast to the Northern one, which was shaped by idealists whose early-19th-century penitentiaries were designed to restore "the vicious part of mankind to virtue and happiness," in the language of Benjamin Rush, a Pennsylvania doctor and signer of the Declaration of Independence who helped create the Northern model. This method, which stressed solitary confinement and silence, may have been a harsh failure at redeeming convicts, but at least it had reformation in mind.

It is the Southern tradition that has proved, in Perkinson's telling, to have the lasting nationwide legacy, both in the current warehousing of inmates and in the racism now powerfully embedded in American penology. Much as emancipation brought on a penal backlash against Southern blacks, so did the civil rights movement — except that this

later reaction was national. Equal protection, desegregation and President Lyndon B. Johnson's war on poverty were quickly followed by tougher drug laws and crackdowns on crime that, with conscious intention or not, made blacks a target. Since the triumphs of the civil rights movement, the disparity between black and white incarceration rates has almost doubled. In the early 21st century, the country, Perkinson suggests, has in a sense become the late-19th-century South.

This is an alarming indictment, built on passionate and exhaustive research. Unfortunately, Perkinson presents his case in a sometimes numbing fashion. He details Texas' prison history decade by decade, failing to fully dramatize the characters who could bring life to his urgent writing. Problematically, too, his case seems, in certain ways, overly broad, and in other ways evasive. The abuses of Abu Ghraib and Guantánamo may not be as easily attributed to the legacy of slavery and Southern penology as Perkinson abruptly and sweepingly asserts in his final pages. And along with his condemnations of Texas and America, Perkinson would have done a service by thoroughly examining, rather than nearly ignoring, recent evidence that both the state and the country are holding incarceration rates in check partly by embracing, however gingerly, the spirit of rehabilitation. A new report from the Pew Center on the States, about the country's correctional systems, highlights Texas' nascent commitment to drug treatment behind bars. Perkinson might have offered a glimpse of such programs and a sense of whether they will last.

By documenting relentlessly, almost without counterpoint, the inhuman-ity that has defined Texan and American incarceration, "Texas Tough" leaves us wondering, despairingly, whether there is any way our society can rise to the godlike responsibility that suffuses prison air, whether there is any way we can rehabilitate our prisons so that we can reliably reform the convicts we lock inside.

Daniel Bergner is the author of "God of the Rodeo: The Quest for Redemption in Louisiana's Angola Prison" and "The Other Side of Desire: Four Journeys Into the Far Realms of Lust and Longing," which has just been published in paperback.

Newsweek's January article on incarceration and the need for federal intervention discusses SJF fellow Michelle Alexander's new book, *The New Jim Crow*.



A New Jim Crow?

The tragedy of America's jails.

By Ellis Cose | NEWSWEEK

Published Jan 28, 2010

From the magazine issue dated Feb 8, 2010

In certain quarters, euphoria greeted Barack Obama's inauguration. Finally America had its post-partisan prince, an elegant figure, full of hope, who would redefine Washington and reclaim America's promise. A year later, Obama's pledge to rein in well-heeled power players lies in shambles—with a strong assist from a Supreme Court inclined to let big money have its say. And post-partisanship seems similarly out of reach, particularly for this president, whose vision most Republicans don't share and whose approval numbers, says Gallup, are the most politically polarized of any first-year president.

No mortal, of course, could have transformed American society in one year—especially with the U.S. economy weathering its worst crisis in nearly a century. It was inevitable that Obama would scale back his ambitions for health-care reform and focus more on propping up banks than on creating new green jobs. Now is probably not the best time to suggest another big—and potentially unpopular—policy battle. Yet, I still find myself wishing that Obama could throw the full weight of his office behind one of the most unacknowledged, and yet most important, issues of this era: repairing the American system of justice.

In a *Parade* magazine article last year, Sen. James Webb noted that the United States houses one fourth of the world's prisoners. "With so many of our citizens in prison ... there are only two possibilities," he observed. "Either we are home to the most evil people on earth or we are doing something ... vastly counterproductive." Webb, a former Marine, is pushing to establish a blue-ribbon commission to look into reforming the system—the first such body since 1965, when America had one seventh the current number of prisoners.

Webb once defended a former Marine unjustly convicted of murder in Vietnam. The man took his own life. "I cleared his name three years later," said Webb, "but having become painfully aware of how sometimes inequities infect our process." Those, unfortunately, include racial inequities. Even allowing for differences in crimes among various groups, blacks and Latinos are disproportionately carted off to prison. They make up two thirds of those jailed for drug offenses, even though drug abuse does not differ greatly across races.

In *The New Jim Crow*, Ohio State law professor Michelle Alexander argues that mass incarceration has become the state's method for repressing an entire generation of African-Americans. Ultimately, she overreaches. Mass imprisonment is not really analogous to Jim Crow. Nor are the majority of young black men in large American cities "under the control of the criminal-justice system." But Alexander is absolutely right to fight for what she describes as a "much needed conversation" about the wide-ranging social costs and divisive racial impact of our criminal-justice policies.

The Obama administration is clearly aware of the issue. The Justice Department has taken aim at the disparity in crack- and cocaine-sentencing practices that have disproportionately hit black men. "We know that even as we imprison more people of all races than any nation in the world, an African-American child is roughly five times as likely as a white child to see the inside of a jail," Obama told the NAACP last year.

The subject deserves presidential attention. But to tackle it requires a willingness to risk being tarred as soft on crime. That's an especially difficult issue for a black president: for Obama to speak the simple truth—that our incarceration practices are expensive, ineffective, and border on insanity—would open him up to the charge of pandering to minorities. We saw that a few months back when Obama initially sided with black Harvard professor Henry Louis Gates Jr., whom a white cop had arrested for breaking into his own home. The president's relatively mild statement—that the cop had acted "stupidly"—drew so much fire he had to backpedal. Precisely because of his race, this president must walk on eggshells when approaching a racially charged subject. Much safer to talk about deficits and jobs.

Given that, now (as midterm panic has broken out in Democratic quarters in the wake of the Massachusetts Senate defeat) may not be the best moment for Obama to tackle the matter head-on. But at some point any president aiming for greatness must grapple with a set of policies that have forced us to build prisons instead of schools. And ultimately even the most hardheaded critics must concede that rethinking a failed policy is not weakness but the only wise way to proceed.

Ellis Cose is also the author of *Bone to Pick: Of Forgiveness, Reconciliation, Reparation, and Revenge* and *The Envy of the World: On Being a Black Man in America*.