A Punishing Court Docket

Stephen Wermiel

*American University Washington College of Law, swermiel@wcl.american.edu*

Follow this and additional works at: [https://digitalcommons.wcl.american.edu/facsch_lawrev](https://digitalcommons.wcl.american.edu/facsch_lawrev)

Part of the Evidence Commons, and the Health Law and Policy Commons

**Recommended Citation**


[https://digitalcommons.wcl.american.edu/facsch_lawrev/1355](https://digitalcommons.wcl.american.edu/facsch_lawrev/1355)

This Article is brought to you for free and open access by the Scholarship & Research at Digital Commons @ American University Washington College of Law. It has been accepted for inclusion in Articles in Law Reviews & Other Academic Journals by an authorized administrator of Digital Commons @ American University Washington College of Law. For more information, please contact kclay@wcl.american.edu.
A Punishing Court Docket

By Stephen J. Wermiel

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

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

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

The cases are the third round for Supreme Court consideration of juvenile punishment. In 2005, in Roper v. Simmons, the Court ruled that juveniles who commit crimes when they are younger than eighteen may not be sentenced to death. In 2010, the Court ruled in Graham v. Florida that juveniles who commit crimes that do not involve murder may not be sentenced to life without parole.

Now the question is whether younger offenders, those fourteen and younger, may be sentenced to life without parole for murder. There are seventy-three young offenders serving life without parole, according to the appeals, but a Supreme Court decision expected by June, 2012 will further define the constitutional standards for treatment of juveniles in the criminal justice system.

The other case the Court decided on January 10 involves the application to private prison contractors of a forty-year-old ruling that allowed individuals to sue federal officials for damages for violating their constitutional rights. In Bivens v. Six Unknown Agents in 1971, the Court said individuals should be able to recover damages for constitutional wrongs in the narrow circumstance when there is no other remedy under federal law. The Bivens case allowed a lawsuit against federal drug agents for a warrantless search of a New York family and their apartment. In 1979, in Davis v. Passman, the Court allowed a similar damages lawsuit for sexual harassment against a member of Congress by an employee. In yet another use of the same type of lawsuit, the Court in Carlson v. Green in 1980 allowed a lawsuit for damages against federal prison officials for the death of an inmate who allegedly did not receive adequate medical care. However, despite the Supreme Court’s three decisions allowing damages claims against federal officials, federal courts have generally taken a narrow view of when such lawsuits can be filed.

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

Stephen J. Wermiel teaches constitutional law at American University Washington College of Law and is chair-elect of the Section of Individual Rights and Responsibilities.
Introduction
continued from inside front cover

This country also has long led the Western world in incarceration rates. The current “lock ‘em up” mentality among the public and its lawmakers began with mandatory sentences for drug use and sales in the 1980’s “war on drugs,” which perhaps inevitably led to more mandatory minimum sentences for a range of other offenses as well. Nationwide, record numbers and percentages of offenders (disproportionately young males and minorities, with females catching up) now reside long term, perhaps for life, in local jails or state or federal prisons. Jails and prisons literally cannot hold the numbers sentenced to incarceration, and the cost of keeping so many behind bars is breaking state and federal budgets. There are other costs as well: hampering judicial decision making in individual cases, disrupting families and support systems, ending rehabilitation initiatives, undermining alternatives to prison, and the most tragic cost of all—wrongful incarceration in the first instance.

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

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

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

From the Chair
continued from inside front cover

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

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

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

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

human rights hero
continued from back cover

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

These are only the most recent and ongoing developments in an extraordinary life that includes proving the innocence of Walter McMillan, who spent six years on Alabama’s death row for a crime he did not commit; challenging Alabama’s law that allows elected judges to override jury verdicts of life imprisonment in capital cases; teaching at New York University Law School since 1998; inspiring and training dozens of young attorneys; and winning the prestigious MacArthur Foundation “Genius” Award in 1995.

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