# Book Reviews

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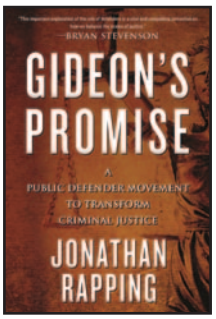
## Gideon's Promise

### A Public Defender Movement to Transform Criminal Justice

**By Jonathan Rapping**
**Beacon Press (2020)**
**Reviewed by David Patton**




Talk of criminal justice reform always includes certain topics: the crisis of mass incarceration, the endemic racism in the system, the desperate lack of resources for indigent defense, and the need for bail and sentencing reform, among many others. While Jonathan Rapping addresses those topics in his powerful call to arms, *Gideon's Promise: A Public Defender Movement to Transform Criminal Justice*, the beating heart of the book is a topic that receives far less attention: culture.

The book recounts horrifying conduct by judges and prosecutors around the country that shapes norms and bends the will of too many who come into contact with it: judges who force plea decisions or hearings or trials on people who were appointed lawyers only hours earlier; contempt orders for lawyers who refuse to proceed; and casual inhumanity expressed from the bench or across the prosecution table. With these examples and many others, Rapping makes a compelling case that legal and budget reform are necessary but not nearly sufficient to achieve real and lasting change. For that, reformers need to focus on hearts and minds. And who better to lead that culture change than public defenders and their clients, groups uniquely privy to the powerful stories of the daily injustices reformers are seeking to remedy?

And yet, as *Gideon's Promise* recounts, public defenders are not immune to the powerful impact of a corrosive culture. Like swimming against a strong current, a person will too often "either get out of the water or be carried away by its flow." Perhaps the most illustrative — and chilling — example comes midway through the book. Rapping quotes the statements of the chief public defender of an office that covers five counties in Tennessee. The chief is testifying before the Tennessee legislature. He is there to report on the financial needs of his office. He assures lawmakers that he and his office are "blessed." He proudly explains that his five lawyers (one for each county) give "good quality representation" to the 4,000 people they represent each year. Rest assured, he tells the committee, he has "enough assistance to cover the caseload that I have."

Rapping reviews the math and suggests that any public defender who thinks he or she can provide quality representation to 800 clients per year does not understand what it means to be a good lawyer. The mindset, and the courthouse culture that shaped it, shows what a deep-seated problem the system faces. As Rapping notes, even if they had all the money they needed to cut their caseload dramatically, "these lawyers had lost sight of what it means to be a public defender" and would surely "continue to ignore critical aspects of the work, invariably not recognizing its importance." Rather than spending time with their clients, investigating facts, researching the law, filing motions, and pressing for hearings and trials, they might just go home early, satisfied that what they consider "good quality representation" had been provided.

But the book is not a screed against public defenders. It is a love letter to them and a recognition of their importance. Young public defenders, Rapping suggests, do not come out of law school thinking, "You know what I want to do with my life? I want to help process 800 people a year into cages." The vast majority want to do the right thing, but the courthouse (or law school) culture that shapes them either teaches them the wrong lessons or simply beats them into submission. *Gideon's Promise* tells the story of Rapping's and his wife, Ilham Askia's, mission to change that culture. It is the incredible story of Gideon's Promise the organization.

In 2005 at the urging of the legendary leader of the Southern Center for Human Rights, Steven Bright, Rapping and his wife Ilham Askia left their comfortable lives in Washington, D.C., where Rapping was the training director for the vaunted Public Defender Service (PDS) and Askia was a public school teacher, to move to Atlanta to begin training public defenders in Georgia's new statewide public defender system. The move was full of personal sacrifice, but as Rapping puts it, he felt compelled to "to take what I had learned at PDS and transfer it to a place where change was desperately needed." The path to founding Gideon's Promise was a winding one. One year after they arrived in Atlanta, the Georgia Legislature de-funded the training program. The couple then founded the

### About the Reviewer

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*The opinions expressed in reviews are those of the reviewers and do not necessarily reflect the opinion of NACDL.*

Southern Public Defender Training Center, which later became Gideon's Promise. The idea, which would earn Rapping a MacArthur "genius" award, was straightforward: provide a place for public defender offices throughout the country to send their young lawyers to be trained, not just in trial skills, but in a truly client-centered model that emphasizes client value and the power of narrative. The basic structure has remained the same: a three-year program starting with a two-week "bootcamp" followed by a weekend every six months with mentors available to bridge the time gap in between.

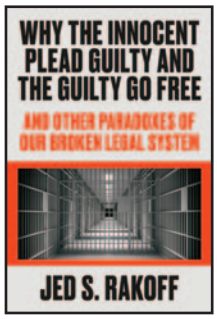
Over the years, the ambitions have grown. The organization has continually added components: a leadership program for the heads of public defender offices, a more comprehensive mentoring program, and a graduate program for participants who complete the initial three-year curriculum. The curriculum has continued to change and evolve as well, notably embracing the "participatory defense" model championed by advocates like Raj Jayadev, who reframed the picture of the public defender as David versus Goliath to show that the community, not the public defender, is David and "the public defender is the slingshot."

In talking about his efforts to build and support a new generation of values-driven, culture-changing public defenders, Rapping reminds us of the famous quote by management guru Peter Drucker: "Culture eats strategy for breakfast." Indeed. Fortunately for all of us, Rapping and Askia recognize it, and they seem to have big appetites for change. ■

## Why the Innocent Plead Guilty and the Guilty Go Free

### And Other Paradoxes of Our Broken Legal System

**By Jed S. Rakoff**
**Farrar, Straus, and Giroux (2021)**
**Reviewed by Hon. John L. Kane**




Our legal system is broken, and no lawyer should represent a criminal defendant without being versed in its faults, fracture lines, inadequacies, and aberrational practices. Fortunately, Judge Jed S. Rakoff, one of the most admired members of the federal bench, has provided a clear and succinct description of this troubled terrain for those wandering through it.

That something is profoundly amiss with American criminal justice is obvious. Judge Rakoff's statistics alone are sobering. We account for five percent of the world's population and house 25 percent of the world's prison population. Our per capita incarceration rate is one-and-a-half times second place El Salvador's and third place Turkmenistan's, and more than six times Canada's. We subject another 4.75 million Americans to probation or parole. More profoundly, it is a bitter irony that a system intended to ensure equal justice under law is administered to produce results dictated by algorithms.

Judge Rakoff explains why innocent people plead guilty, why jury trials are increasingly rare, and why plea bargaining — indeed sentence bargaining — has become the main product of a failed system that also features deferred prosecutions for high-level corporate crimes. These deferred prosecutions seldom produce structural or ethical reform within the companies themselves; fines are a revenue measure readily absorbed as a cost of doing business. In about two-thirds of these cases, the real miscreants, the controlling employees and executives, are not prosecuted.

Civil and criminal jury trials are disappearing. Less than two percent of cases filed ever get to a jury; the majority of criminal cases are "disposed of," a process shamelessly referred to in the trade as "dispos." The Sentencing Reform Act of 1984 is primarily to blame. Previously, sentences in the federal system were imposed by jurists appointed for life. Imposing a sentence no greater than the statutory maximum required an independent evaluation of the defendant, the facts and circumstances of the case, the damage done to victims, and the availability of programs to protect the public and help the defendant achieve a law-abiding life when released. Once Guideline sentencing was put into place, states followed suit. The solemn act of sentencing became a bureaucratic exercise.

The Sentencing Guidelines were initially mandatory and reduced judicial discretion to trivial departures from the norm. In 2005, the U.S. Supreme Court determined that the Guidelines were advisory. Well, sort of advisory. The sentencing judge first had to determine the guideline range and then, should he or she decide not to follow the "advice," articulate specific reasons for deviating and the reasons for the sentence actually imposed. Under the Act, sentences were also subject to appeal. While the Guidelines remain advisory, an entire generation of federal judges — from 1987 on — has no experience sentencing outside that regimen.

The Guidelines increased the authority and control of prosecutors in sentencing. They were formulated and developed with the U.S. Department of Justice's intense participation and effort. Line prosecutors make charging decisions over which judges have no control. Indictments routinely contain multiple counts, each charging a separate crime with its own penalty. Faced with the possibility of guilty verdicts on three, four, five, six or more counts, defense attorneys are compelled to bargain. In plea bargaining, the prosecutor holds all the chips.

Defense attorneys look at the charges, consult the guidelines, and determine the likely sentences on one, two, three, or more counts. The calculus is obvious: a sentence on a guilty plea to one count is significantly lower than one for multiple counts. The Guidelines also contain the added and bewildering inducement that pleading guilty (eliminating a trial) constitutes "acceptance of responsibility," thus resulting in a lower Guideline calculation. This Orwellian formulation makes a child pornographer who pleads guilty more responsible than one convicted at trial, and getting the best deal more responsible than facing the truth of one's actions established by evidence at trial and a jury's verdict. "Verdict" means "a true declaration." There's no truth in a "dispo."

Judge Rakoff poignantly observes that plea bargain transactions are secret and unreviewable "in ways that invite inconsistency at best and oppression at worst." When legislatures intending to reduce sentencing disparities and judicial arbitrariness empower prosecutors to control a bargaining process conducted in secrecy and unimpaired by objective regulation or review, the law of unintended consequences is at work.

Judge Rakoff provides many cases of defendants who have pleaded guilty to crimes they did not commit. In over 300 wrongful convictions the Innocence Project and affiliated lawyers have gotten overturned, 10 percent of the innocent defendants pleaded guilty. Why? The cyn-

### About the Reviewer

The Honorable John L. Kane is a Senior District Judge of the U.S. District Court for the District of Colorado.

ical answer is obvious: "Better the devil you know than the devil you don't know."

Plea bargaining is not the only thing that has broken our system. Judge Rakoff comments perceptively on the vagaries of eyewitness testimony, the failures and sometimes deliberately false or misleading uses of forensic evidence, the death penalty's lingering malaise, mandatory minimum sentences, the rush to employ a nascent understanding of cognitive neuroscience, preliminary court approval of bargained sentences, and the pervasive denial of equal access to costly resources. Although his observations tend to focus on the federal system, he does not overlook state jurisdictions. Public and individual access to courts is an essential measure of self-government — government by the people. He calls to judges and lawyers to bring these problems to the public's attention and save trial by jury from being eliminated entirely.

After serving on a jury, the philosopher G.K. Chesterton wrote:

> Many legalists have declared that the untrained jury should be altogether supplanted by the trained judge…. The Fabian argument of the expert, that the man who is trained should be the man who is trusted, would be absolutely unanswerable if it were true that a man who studied a thing and practiced it every day went on seeing more and more of its significance. But he does not…. [T]he horrible thing about all legal officials, even the best, about all judges, magistrates, barristers, detectives, and policemen, is not that they are wicked (some of them are good), not that they are stupid (some of them are quite intelligent), it is simply that they have got used to it…. They do not see the awful court of judgment; they only see their own workshop.[1]

Legislatures respond to voter pressure. Courts, too, must respond to criticism or face becoming irrelevant to society's needs and requirements. When the abdication of judicial responsibility fails to provide equal justice under law and aberrant practices and decisions occur instead, the fault and the cure lie at the courthouse door. Judge Rakoff concludes: "I remain cautiously optimistic that my fellow Americans will rise to the challenge."

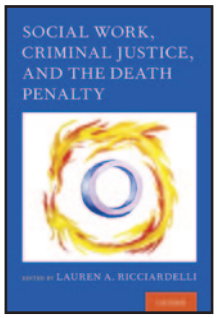
Will we?

## Note

1. G.K. Chesterton, *The Twelve Men,* in TREMENDOUS TRIFLES, 54-56 (1968). ■

# Social Work, Criminal Justice and the Death Penalty

**By Lauren A. Ricciardelli (Ed.)**
**Oxford University Press (2020)**
**Reviewed by Dana L. Cook, MSW**




The use of mitigation specialists as core members of defense teams has long been a staple of capital defense work. The profession is rooted in a long history that spans from the post-*Furman* era to the present where they are "acknowledged by the *ABA Death Penalty Representation Guidelines* as essential members of the core team required for effective representation in capital punishment cases."[1] Likewise, the social work profession has evolved from "friendly visitors" during the 1860s into the well-defined profession of today. Given the discipline's tradition of a commitment to social justice as a guiding value and ethical obligation as laid out in the National Association of Social Workers Code of Ethics,[2] it only stands to reason that there is a tremendous amount of crossover between the pursuit of social justice in the criminal justice system and the social work profession. A social worker's educational training and background make him or her well suited to assist defense teams in achieving the longstanding constitutional requirement to conduct a thorough mitigation investigation as part of effective representation in death penalty cases.[3]

By its very nature, the field of social work is an ideal training ground for the skills and knowledge required of mitigation specialists. Social workers are trained to understand and draw on various areas of study on the individual in his or her environment such as human behavior and development, sociology, psychology, and anthropology. There is also a focus on understanding the etiology and symptomology of mental health issues and trauma as well as field experience that develops and hones the necessary clinical skills required of the profession. These various foundations of knowledge in social work are also critical to the role of the mitigation specialist in a capital case who must have the ability to compile "a comprehensive and well-documented psycho-social history of a client based on an exhaustive investigation."[4]

Given this overlap between the death penalty and social work, more universities and colleges are offering courses in forensic social work or social work and the death penalty. As such, the book clearly fills a critical need as a resource in the educational arena. *Social Work, Criminal Justice and the Death Penalty* was edited by Laruen A. Ricciardelli, who is well credentialed and experienced in the social work field. The book covers a wide array of topics in chapters written by experts in various disciplines, including several well-respected professionals in the death penalty community — lawyers, social workers, and practitioners from other backgrounds. Their chapters offer the unique and important perspective on this work as experienced capital defense practitioners.

The book begins with a broad overview of the history of the death penalty in the United States and then covers in more detail various components of the process, including the role of juries, mitigation investigation, poverty, mass incarceration, mental illness, intellectual disability, and foreign nationals. It also dedicates an entire chapter to the role of trauma, which is a required area of understanding for any mitigation specialist given that trauma is "an almost universal feature of the lives of capitally charged and convicted defendants."[5]

In addition to its discussion of the role that social workers can play when conducting mitigation investigations as a member of the defense team, the book highlights the myriad ways in which social work professionals can work to facilitate change in the administration of justice, such as legislative advocacy or research contributions. While working as a mitigation specialist is one role social workers can play, it is critical that these other avenues are equally presented and discussed as ways that social workers can have a more systemic impact.

There is only one critical discussion as it relates to social workers as members of capital defense teams that is not addressed in the book. This issue is about the legal and ethical obligations that are incumbent upon a mitigation specialist


## About the Reviewer

Dana L. Cook, MSW, is the National Mitigation Coordinator for the federal death penalty resource projects.The views expressed in this article are her own.

in that role and the potential for those to conflict with the ethical obligations of a traditional social worker.

As a member of the defense team, the mitigation specialist is an agent of the attorney and as such falls under the obligations of the attorney-client relationship. This is what allows a mitigation specialist to conduct a mitigation investigation with the same protections as a lawyer and prevents the mitigation specialist from being compelled to divulge information that may be harmful to a client. The Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases lay out that members of the defense team are in fact agents of counsel and thus "are bound by rules of professional responsibility that govern the conduct of counsel respecting privilege, diligence, and loyalty to the client."[6]

It is critical that social workers are educated about these legal obligations required of members of a defense team. More importantly, potential areas of conflict, such as mandated reporting, should be integrated into the classroom discussions so that social workers fully understand the different roles and obligations. Before deciding to work on a capital defense team, individuals must give considerable thought to whether they can abide by a very different set of legal and ethical obligations — ones that are critical to the fair administration of justice as they are designed to protect a defendant's constitutional rights.

In conclusion, the editor notes that the "overarching purpose of this book is to prepare students, and aspiring advocates and activists, to take an active role in the death penalty discourse." I feel that the book achieves that goal through robust and critical discussions, offered from various disciplines and perspectives, of the many issues that are necessary to lay the foundation for a solid understanding of the death penalty as it relates to the role of social workers. This book has the potential to be a staple for courses in forensic social work and the death penalty. In fact, there could be advantages to law students reading this book as a way to broaden their understanding of these issues as well. I would, however, caution any professionals who plan to utilize this book as a teaching tool for social workers to consider the issue of competing ethical obligations as discussed above and work to incorporate a thorough exploration of the topic either through additional resources, class discussion, or guest speakers. Only with an understanding and respect for how those obligations differ can a social worker make an informed decision to work as a mitigation specialist and ensure that potential conflicts will not jeopardize a capital defendant's constitutional rights in the most serious of cases where a life hangs in the balance.

## Notes

1. Russell Stetler, *The Past, Present, and Future of the Mitigation Profession: Fulfilling the Constitutional Requirement of Individualized Sentencing in Capital Cases*, 46 Hofstra L. Rev. 1161 (2018).

2. Available at https://www.socialworkers.org/About/Ethics/Code-of-Ethics/Code-of-Ethics-English.

3. *See Williams v. Taylor*, 529 U.S. 362 (2000); *Wiggins v. Smith*, 539 U.S. 521 (2003); *Rompilla v. Beard*, 545 U.S. 374 (2005); *Porter v. McCollum*, 558 U.S. 30 (2009) (per curiam); and *Sears v. Upton*, 561 U.S. 945 (2010) (per curiam).

4. ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (Commentary to Guideline 4.1, The Defense Team) 31 Hofstra L. Rev. 913, 959 (2003).

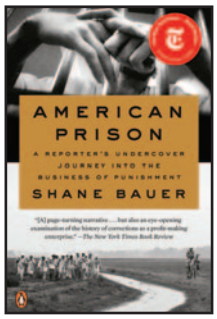
5. Kathleen Wayland, *The Importance of Recognizing Trauma Throughout Capital Mitigation Investigations and Presentations*, 36 Hofstra L. Rev. 923 (2008).

6. 36 Hofstra L. Rev. 677, 680 (2008). ■

# American Prison

### A Reporter's Undercover Journey into the Business of Punishment

**By Shane Bauer**
**Penguin Books (2019)**
**Reviewed by Susan Elizabeth Reese**




As COVID-19 threatens to make our prisons death camps, Shane Bauer's exposé of incarceration — specifically the private prison system — in America is horrifying but essential.

In 2009, as a freelance reporter in the Middle East, Bauer was captured and spent 26 months in Iran's Evin prison. Struggling with PTSD after his release, he felt a kinship with American prisoners. He wrote to some and visited Pelican Bay, which helped, he said, "to put my own struggle into perspective." (p. 5)

Recognizing we are in "a time of mass incarceration with few parallels in world history," Bauer was hired as a guard at Winn Correctional Center in Winnfield, Louisiana.[1] Although he used his own name, he worked undercover for *Mother Jones*; as a senior reporter, he and his bosses had carefully worked through the legal issues and bureaucratic details. With full support from his magazine, he was embedded in the oldest privately run medium security prison in America. Situated in Louisiana, which has the highest incarceration rate in the world, Winn houses approximately 1,500 inmates.

Telling the truth (to the extent possible) when asked,[2] Bauer began as a corrections recruit in November 2014. Apprehensive as a trainee, he took extensive notes with a pen that doubled as an audio recorder. His thermos had a small hidden camera built into its lid. Adding his studies of history, archives, and old memoirs, his book is a meticulously documented, chilling account of the prison-for-profit business, a movement parallel to and rooted in racism and slavery. Disturbingly, he observed, "there has never been a time in American history in which companies or governments weren't trying to make money from other people's captivity." (p. 6)

After the Civil War, plantations had lost their workers at the same time the devastated Southern states were desperate for reconstruction. The Thirteenth Amendment had abolished slavery but provided a loophole: slavery and involuntary servitude were banned *except* "as punishment for a crime." State legislators quickly found ways to charge the newly "freed" black men with crimes: "pig laws" defined theft of any cattle as grand larceny with sentences up to five years; some states ensured more years of work by charging the new convicts with additional time for the "costs of conviction." Minimizing services and maximizing profits seemed a win-win system for states leasing prisons to private companies. As a result, "convicts worked the most arduous jobs in the most dangerous reaches of the South, often where free laborers refused to work." (p. 124)

In this system, Bauer learned the primacy of profit: what is "right" required following the rules. Subtle lessons marked the difference between "them" and "us." Expressions of authority and needless cruelty helped label inmates as "other." Underpaid and poorly trained guards enforced arbitrary, callous restrictions. Instead of offering support, suicidal inmates were sent to segregation: naked and alone, with neither books nor proper food, these desperate souls were isolated "for protection" and "as deterrent." When one inmate hanged himself with a bedsheet, his death was not counted against

Winn as a suicide because he lingered a few days before expiring in a local hospital.

An inmate who took a broom from a closet at the wrong time lost 30 days' good time, extra punishment for which the prison managers, CCA,[3] received over $1,000. Inmates' medical needs were minimized; expensive hospital visits were delayed until a prisoner was near death.

Bauer found himself torn between his need to enforce "order" and his impulse to treat an inmate with humanity. Suspicious of lenient gestures, prisoners pushed him to bend the rules or taunted him with obscenities. Fitting in, Bauer eventually found it "getting in my blood. The boundary between pleasure and anger is blurring. … I take pleasure in saying no to prisoners. … All that matters anymore is action." (p. 265) He wondered what was happening to him and how, after spending over two years in segregation, he could sanction putting a man in isolation for a minor infraction. Comparing his captivity to that of the prisoners at Winn, Bauer noted the difference between one man's sanity and another's instability comes in tiny details: in Iran, he had a mattress and breathed air free of pepper spray. He had some personal privacy and a larger exercise area. But those at Winn choked fumes of pepper or gas; exercised an hour a day in a cage; and were forced to perform bodily functions next to their cell mates. Bauer found inside his mind "a prison guard and a former prisoner fighting with each other," and decided to quit. (p. 266) His exit occurred in a harrowing escapade with his photographer arrested, stripped, and shackled.

Some two years later, Bauer bought one share of CCA stock so he could attend the shareholders meeting in Nashville. Although former inmates and guards had written to him after *Mother Jones* published his story about Winn, no one in corporate headquarters would talk with him. At the meeting, Bauer confronted a CEO with his observations at Winn — violence, understaffing, use of force, low morale, lack of security — but the fellow brushed him off with "alternative facts": "If we weren't enjoying high rates of security, adequate staffing levels, low recidivism, we wouldn't have those renewal rates. I am extremely proud of what we do. … We have a wonderful track record." (p. 289)

After receiving a damning DOJ report on conditions in private prisons, the Obama administration stopped federal contracts with private institutions. But a month into the succeeding administration in 2017, the Department of Justice reversed that edict, strengthening CCA's stock almost instantly.

As — once again — we begin conversations about racism and the legacy of slavery, we must recognize the useless savagery our private prison system adds to that mix as the enforcers of that system "convince themselves, with remarkable ease, that they are in the business of punishment because it makes the world better, not because it makes them rich." (p. 290)

## Notes

1. With almost five percent of the world's population, the United States has nearly 25 percent of the world's prisoners. (p. 5).

2. He and his editors agreed the project was open-ended and he could leave at any time.

3. Correction Corporation of America is the company that ran Winn and several other institutions throughout the country. During Bauer's four-month stint, CCA received about $34 per inmate per day, compared to about $52 at the state's publicly run prisons. ■

## About the Reviewer

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