Releasing Prisoners, Redeeming Communities: Reentry, Race, and Politics

By Anthony C. Thompson

New York University Press, New York, NY, 2008. 262 pages, $39.00 (cloth), $21.00 (paper).

Reviewed by Elizabeth Kelley

Every member of the Obama administration, of Congress, and of state legislatures should read, study, and reflect upon *Releasing Prisoners, Redeeming Communities: Reentry, Race, and Politics* by Anthony C. Thompson. A detailed account of how overcriminalization and overincarceration have destroyed individuals, families, and communities, *Releasing Prisoners, Redeeming Communities* is scrupulously researched and footnoted. Yet it is not a tome penned in an ivory tower: its author was a public defender in Contra Costa County, Calif., before he became a professor of clinical law at New York University.

The United States has more people in prison and jail than any other industrialized country, yet, unless we sentence them all to life in prison, most are going to be released at some point. Indeed, approximately 650,000 people are released from prison in the United States every year, and we must grapple with the problems they face when re-entering society. A cynical person would respond that we should not give a second thought to such problems—that those who broke the law should have thought about the consequences before they did so.

Anthony Thompson, however, frames the re-entry issue not just in human terms but in economic terms as well. It costs us untold dollars when we incarcerate people without giving them education, substance abuse treatment, or vocational training. At best, these prisoners become a drain on their families and their communities upon their release; at worst, they commit new crimes, thereby re-victimizing their communities and imposing additional incarceration costs.

People begin a second sentence when they are released from prison, because the collateral consequences of their convictions prevent them from gaining any semblance of a new beginning. A newly released prisoner is barred from most types of employment (a problem that will surely be exacerbated in today's economy), denied financial aid for education, excluded from public housing, ineligible for professional licenses, and prohibited from voting.

Thompson tackles the issue of race in the criminal justice system frankly. He moves beyond the usual criticism that the war on drugs is a failure that has targeted and scapegoated the African-American community, and he provides new insights into the issue. For example, although judges, when they sentence women, may be more likely to grant them probation or some form of diversionary sentence or otherwise to give them a second chance than when judges sentence men, judges do not do so as readily for women of color. Thompson also discusses the stereotypes of incarcerated African-American males versus African-American females. Because, in some communities, so many African-American men are incarcerated, being a prisoner has become an accepted gender role for them. In contrast, African-American women who are incarcerated are not seen as acting within an accepted gender role, and, hence, they are ostracized by their communities upon re-entry.

Race also has an impact on mental health care in the prison system. Generally, unincarcerated African-American males who have a mental illness receive less care in private outpatient facilities. Thus, prisons become de facto mental health facilities. Moreover, African-American males are more often misdiagnosed and overdiagnosed for certain categories of schizophrenia, thereby feeding stereotypes about their future dangerousness.

Thompson criticizes politicians of both parties for their roles in overpunishment. He delivers a blistering attack on President Clinton's support for the statute requiring the eviction of anyone in public housing if a family member or guest was convicted of a drug-related crime, regardless of whether or not the person being evicted had knowledge of the drug activity and regardless of whether or not it occurred on his or her premises. But *Releasing Prisoners* is not a parade of horribles or a rant against pandering politicians, the sensationalist media, or a public that wants simple solutions to intractably complex social problems. Rather, it is a serious book, with each of its chapters concluding with a set of policy recommendations. For example, in the chapter titled "Reentry and Unemployment," Thompson praises a New York law that allows employers to deny employment to an ex-offender only if the ex-offender's crime has a direct connection to the job in question or the ex-offender poses a safety risk, and Thompson suggests that other states replicate this law. Moreover, New York issues certificates of good conduct that create a presumption that ex-convicts have been rehabilitated.

Releasing Prisoners, Redeeming Communities is dense reading. I found the book tough-going, even though,

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Congratulations to Henry Cohen for 20 years of service as The Federal Lawyer's Book Review Editor

as a criminal defense attorney, I am well-versed in the issues that Thompson discusses. Nevertheless, reading his book is well worth the effort as we contemplate ways to make our criminal justice system more effective and less reactionary. **TFL**

Elizabeth Kelley is a criminal defense attorney in Ohio. She has a special commitment to representing individuals suffering from mental illness and mental retardation. She frequently provides legal commentary for TruTV, CNN, and MSNBC, among other media outlets, and can be contacted at ZealousAdvocacy@aol.com.

Lincoln and the Court

By Brian McGinty

Harvard University Press, Cambridge, MA, 2008. 375 pages, $27.95 (cloth), $18.95 (paper).

Reviewed by Lori Riga

Although most books on the Civil War are replete with battlefield accounts and military strategy, in Brian McGinty's *Lincoln and the Court*, cannon fire and military drums are merely a distant rumble. In the foreground are the battles that Abraham Lincoln waged in the U.S. Supreme Court to legitimize his wartime policies. McGinty's fast-paced and engaging account of these conflicts demonstrates how the Court's constitutional power put it in a position to either undermine or support the Union's military efforts. In a series of opinions that it issued both during and after the war, the Court reviewed the constitutionality of an array of efforts that Lincoln undertook to secure a Northern victory. McGinty's portrayal of these events shows that the courtroom battles had a significance comparable to that of the bloody battles of the war.

As in any good war story, the conflicts between the executive and judicial branches during the Civil War had their colorful leaders. Lincoln and his antagonist, Chief Justice Roger Taney, had quite different views of the struggle that erupted between the North and the South as well as of the constitutionality of the executive branch's actions in response to the conflict. Lincoln considered the secession of the Southern states as rebellious acts of states that had formed an unbreakable union. In Lincoln's first inaugural address, he rejected the notion that the union could be severed through secession, stating, "I hold, that in contemplation of universal law, and of the Constitution, the Union of these States is perpetual." Even though the Civil War loomed at his inauguration on March 4, 1861, Lincoln recognized the importance of governing through the broad framework of legal rules and constitutional precepts even in wartime. Consequently, it was vital for him to obtain the Supreme Court's affirmation that his wartime policies were within the scope of his constitutional authority.

That affirmation did not come easily. Chief Justice Taney—known as the "Old Lion" because of his "mane of unruly hair"—held views of government and the Southern secession that were markedly different from Lincoln's. Raised on a slave plantation in Maryland, Taney, not surprisingly, supported slavery. In *Dred Scott v. Sandford*, which he wrote in 1857, he declared the Missouri Compromise—an agreement Congress forged in 1820 that prohibited slavery in states north of the 36°30' parallel—to be unconstitutional. Taney reasoned that, because people of African descent were property, any removal of a slave from his or her master violated due process. Accordingly, Taney concluded, a slave remained the property of his or her owner even if the owner traveled to a free state. Although Taney never had the opportunity to rule on the constitutionality of secession, he privately wrote that, although the Constitution did not confer on states the right to secede, it also did not give the federal government the right to force seceding states to remain in the union.

After the first blood of the Civil War was spilled in Baltimore in 1861 (no one had died at Fort Sumter), Lincoln reluctantly suspended judicial issuance of writs of habeas corpus, believing it necessary to protect Union troops by preventing pro-Southern judges from freeing insurrectionists. Taney reviewed Lincoln's suspension decision in *Ex Parte Merryman*, in which Merryman had been arrested for acts of treason and sought a writ of habeas corpus. Before a large crowd that had gathered in front of the federal courthouse in Baltimore, Taney, in his capacity as a circuit judge, read his opinion to those in attendance. He held that the Constitution neither conferred on the President the ability to suspend writs of habeas corpus nor permitted him to authorize a military officer to do so. Accordingly, Taney ordered Merryman's immediate release. *Merryman* roused strong public opinion, and the *New York Times* decried the decision:

> It is melancholy enough to see young men impelled by the ardor of youth, the impulsiveness of inexperience, and actuated by false patriotism, plunge into rebellion, but it is a thousand times more melancholy to see an octogenarian turning back from the grave, on the verge of which he was standing, to strike one last though impotent blow at the existence of a Government he has repeatedly sworn to support.

Although McGinty observes that *Merryman* "had the impact of a military victory for the South," he notes that this victory was short-lived. Lincoln believed that his suspension of habeas corpus during wartime was constitutional and, disregarding Taney's decision, authorized the military to make arrests throughout the war. It is unclear whether the President would have defied *Merryman* if it had been issued by the full Supreme Court. In any case, Congress settled the matter a few months later, on August 6, 1861, when it approved Lincoln's suspension of the writ.

The contentiousness between Lincoln and Taney extended beyond arrests made on American soil, as Lincoln also sought to restrict the Confederacy's access to the sea. Acknowledging that the Southern rebels used the seas extensively for trade as well as travel, Lincoln struggled with the decision of whether to close the ports (an act within his authority because these rebel ports were still part of the United States) or to blockade them, which would have meant that he recognized the Confederacy as a legitimate government and deemed it a "belligerent" to the Union. Despite these misgivings, Lincoln elected to blockade all Southern ports in 1861. When several foreign ships were seized as they entered them, the resulting litigation, deemed the *Prizes Cases*, afforded the Supreme Court an opportunity to review Lincoln's decision to institute the blockade.

Taney's views in the *Prizes Cases* left him in the minority among the justices. Justice Robert Grier, who wrote the majority opinion and read it from the bench, reasoned that the origin of a President's authority to blockade a port stems from jus belli, or the law of war. Justice Grier concluded, however, that a President need not first determine that he is at war with another nation before invoking this power. It was for the President alone, Grier held, to quell the rebellion in accordance with his powers as commander in chief, "without waiting for Congress to baptize it with a name." The Supreme Court thus legitimized Lincoln's war effort, revealing that, although it would not disregard constitutional precepts altogether, it was willing to stretch the bounds of the Constitution under the pressing circumstances of war.

The Supreme Court also aided Lincoln tacitly by declining to exercise jurisdiction in *Ex parte Vallandigham*, in which the Court reviewed a military tribunal's decision that found that Ohio resident Clement Laird Vallandigham, a vociferous war opponent, had "committ[ed] acts for the benefit of the enemies of our country" and was guilty of treason under a Union Army military order defining the term. Writing for the Court, Justice James Wayne held that a military tribunal was not a "court" over which the Supreme Court had jurisdiction; therefore, he dismissed the case. Old and frail by 1864, the year the Court issued *Ex parte Vallandigham*, Justice Taney took no part in the opinion.

Although seemingly insignificant because it involved no adjudication on the merits, *Ex parte Vallandigham* had far-reaching effects. Facing Democratic criticism that he had abandoned civil liberties, Lincoln responded publicly. He wrote a letter, published in the *New York Times*, rejecting his critics' accusations that he had dispensed with the Constitution to suit his wartime agenda:

> Habeas Corpus does not discharge men who are proved to be guilty of defined crime; and its suspension is allowed by the Constitution on purpose that men may be arrested and held, who can not be proved to be guilty of defined crime, "when in cases of Rebellion or invasion, the public safety may require it." This is precisely our present case, a case of Rebellion, wherein the public safety does require the suspension.

Lincoln refuted the notion that Vallandigham was arrested merely because he had spoken against the war. Rather, Lincoln insisted, Vallandigham had thwarted conscription and incited military desertion. Union citizens found Lincoln's letter persuasive and, as McGinty observes, popular sentiment shifted in favor of the war.

Although the war continued until 1865, the clash between Lincoln and his nemesis, Chief Justice Taney, ended on Oct. 12, 1864, with Taney's death. Lincoln appointed Salmon P. Chase, his former secretary of the treasury, as Taney's successor, largely because of Chase's views regarding Lincoln's financial policy (which Chase himself had implemented) and his favorable views on emancipation. Lincoln was assassinated on April 14, 1865—four months after that appointment.

A new era of postwar Supreme Court decisions began after the deaths of the two rivals. In a series of cases, the Supreme Court interpreted the constitutional provisions at issue more narrowly, reflecting its unwillingness to uphold Lincoln's wartime policies now that the exigencies of war were no longer a consideration. In *Ex parte Milligan*, for example, the Court reviewed the legality of a military arrest and tribunal conviction of Confederate sympathizers. Writing the majority opinion, Justice David Davis held that the military commission was unconstitutional. Distinguishing *Ex parte Vallandigham*, Davis observed that, unlike in *Vallandigham*, the nation was not now at war. Because federal courts were operational in postwar Indiana, where Milligan had been arrested, trial by military tribunal was constitutionally proscribed.

The Supreme Court also struck down a Missouri law that required any person seeking to be a public or corporate officer, professor, teacher, trustee, attorney, bishop, priest, deacon, minister, or even voter to swear an oath that he had never been in "armed hostility to the United States" and had never given "aid, comfort, countenance, or support" to those who had. Persons who engaged in these occupations without first taking this oath could be fined or incarcerated. The Supreme Court reviewed this law when a clergy member, who had been a Southern sympathizer during the war, brought suit. A renowned Supreme Court lawyer, Augustus H. Garland, also sued based on an analogous federal law. Both claimed that these oaths were tantamount to an ex post facto law and bill of attainder, punishing them for past behavior without resort to a judicial trial.

Justice David Dudley Field wrote the majority opinion in these cases—known as the *Test Oath* cases—which struck down both the Missouri law and its federal counterpart. He held that both were ex post facto laws because they punished acts that were not illegal at the time they were committed. Moreover, Field reasoned, the laws dispensed with the constitutional presumption of innocence by requiring the oath-takers to first deny their guilt before they could escape punishment for their acts. Hailed by Democrats, the Supreme Court's opinions in these postwar cases appear to have promoted a healing of the union after its divide—an approach that was contrary to congressional attempts to "reconstruct" the South.

In a final affirmation of Lincoln's assertion that the union was "perpetual," Chief Justice Chase issued his opinion in *Texas v. White*. In this case, which Texas brought to recover bonds it had issued to the defendants, George White and John Chiles, after the state had seceded, White and Chiles argued that Texas no longer had the right to maintain a suit before the Supreme Court because of its secession. Once the state had seceded, they contended, Texas

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had surrendered its rights as a state of the union. Acknowledging the significance of his opinion, Chase traced the roots of Texas' admission into the union. He then declared, as had Lincoln before him, that the union was indissoluble. Enunciating what McGinty considers Chase's "most memorable phrase in all of his constitutional jurisprudence," Chase proclaimed: "The Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States."

McGinty praises Lincoln for having extended the constitutional boundaries during the exigencies of war without exceeding them. At times pressed by Taney's striking down of his actions, as in *Ex parte Merryman*, Lincoln could have chosen to suspend elections or to perform other acts clearly outside his constitutional authority. Instead, McGinty maintains, Lincoln remained within the framework conferred upon him by the Constitution. Because Lincoln's policies ultimately prevailed, McGinty observes, history has judged them—and Lincoln himself—in a favorable light. But we should admire Lincoln not just because of the success of his policies but because of the careful deliberation that preceded them and led to their success. Today, early in a presidency that can be recognized as the ultimate fruition of Lincoln's labors, when our country faces a crisis of unprecedented and historic proportions, as it did in Lincoln's time, we can only hope for such measured responses. **TFL**

Lori Riga is a capital habeas staff attorney for the U.S. District Court in the Northern District of Ohio.

The Americanist

By Daniel Aaron

University of Michigan Press, Ann Arbor, MI, 2007. 199 pages, $24.95.

Reviewed by John C. Holmes

Born in 1912, Daniel Aaron has drawn from his long life—including his academic background, numerous travels, and worldwide friends and acquaintances—to produce a book that is part autobiography and part history—and always interesting. Aaron's parents were nonobservant Jews who had emigrated from Russia as children; his father was a lawyer. In 1917, Aaron's parents took Aaron and his four siblings from Chicago to Hollywood, but Aaron's mother died in 1921 and his father in 1922, and the children were moved back to Chicago to live with relatives. Aaron stoically accepted his difficult childhood.

Aaron graduated from the University of Michigan with a degree in English and then became the first person to receive a Ph.D. in American civilization from Harvard University. He taught for 30 years each at Smith College and Harvard University and founded the popular academic discipline of American studies. Aaron believes that he has the ability and the standing to ruminate on and explain what America is all about; therefore he calls his book and himself "The Americanist."

Aaron is not shy about expressing his personal opinions on politics and on the Presidents he's observed since Woodrow Wilson. His views and his writing style would fit comfortably in the *New Yorker* magazine: he writes, for example, "Shortly before the end of President Reagan's second term, I blurted out to an astonished historian—[Edmond Morris,] the president's authorized biographer—that Ronald Reagan was an odious man and a bad president. I knew less about him than I did about James K. Polk, but that didn't stop me from pegging Reagan as a shill for the corporate interests and the mouthpiece for the Republican radical Right." Later, Aaron gave the matter more thought:

> It was depressing to acknowledge what had long been evident to less-inflamed minds—that Ronald Reagan was politically adept and very popular. Liberals and intellectuals, often the butt of his mechanical witticisms, might lump him (as I did) indiscriminately with the hot GOPsters, but he appealed to a broad aggregate in both parties. Voters, put off a little by Barry Goldwater's truculence, felt easier with the jokey, genial Reagan dressed in the raiment of Uncle Sam. They also identified him with the Marlboro Man, whose cowpuncher image he traded on, and with the fellow next door who lends you a shovel or helps you change a tire. They were behind him when he slapped down the striking air controllers. They stayed loyal to him, if not to all the Reaganite programs and tactics, and comfortable with a commonsensical politician who didn't bluster and who was touchingly attached to his wife.

A theme that recurs throughout *The Americanist* is the academic tussles, particularly at the liberal arts schools such as Smith and Harvard, between the "lefties" (Aaron's term) who, although supporting socialism, criticized communism, and those who embraced it. Aaron, whose books include *Writers on the Left*, had many friends among the communists, but he did not join the Communist Party or approve of communism. Similarly, although he sympathized with many student activists during the tumultuous 1960s, he did not disguise his opposition to their radical and destructive side.

Politics, however, is only one of the many topics that Aaron covers in these rambling musings, which reveal an always curious, observing, thoughtful, and intellectual mind that was formed by an outsized absorption in books and articles as well as in literary friends and acquaintances. He writes frankly about many of the great American and British writers he met and interviewed or with whom he became good friends; they include Robert Frost, Upton Sinclair, Ralph Ellison, Lillian Hellman, Alfred Kazin, Leonard Wolfe, Malcolm Muggeridge, among many others. In 1949, Aaron traveled to Europe as one of 11 academics invited to teach a summer session of the Salzburg Seminar in American Studies. Stopping in Paris, he met Truman Capote, and, in this book—written more than half a century later—Aaron relates in detail their conversations, other people they saw, and the exact furnishings of the restaurants they visited.

Aaron's participation in the Salzburg Seminars continued for several years, and in the 1960s he lectured frequently in Eastern Europe, under a program sponsored by the U.S. Information Agency. He lectured primarily on noncontroversial subjects such as American literature and writers, and he met writers, artists, and dissidents in Eastern Europe's repressive regimes. Only later did he learn that officials of their governments had monitored his conversations with these dissidents—sometimes with dire consequences for the dissidents.

Some readers may find Aaron's almost stream-of-consciousness ramblings about his life and thoughts to be arrogant, self-serving, or intellectually snobbish, and some may question his self-promotion as an "Americanist" who is qualified to explain our nation to its citizens. Nevertheless, all readers should find the book fast-paced and entertaining. Academics, in particular, will identify with Aaron's lifestyle, cohorts, and viewpoints. **TFL**

John C. Holmes served as a U.S. administrative law judge for 30 years, retiring in 2004 as chief administrative law judge at the U.S. Department of the Interior. He currently works part time as an arbitrator and mediator and can be reached at trvlnterry@aol.com.

The Business Guide to Legal Literacy: What Every Manager Should Know About the Law

By Hanna Hasl-Kelchner

Jossey-Bass, San Francisco, CA, 2006. 372 pages, $29.95.

Reviewed by V. John Ella

In *The Business Guide to Legal Literacy: What Every Manager Should Know About the Law*, Hanna Hasl-Kelchner attempts to bridge the gap between the MBAs who run American businesses and the JDs who provide them with legal advice. Her premise is that legal literacy on the part of business managers can be turned into legal leverage. Legal literacy is the ability to read legal risk and spot legal issues; legal leverage is the use of these skills not just to avoid lawsuits but also to transform legal obstacles into strategic opportunities.

Having earned both an MBA and JD, Hasl-Kelchner is well positioned to open a dialogue between these two worlds—worlds that can sometimes seem as far apart as Mars and Venus. Our first President with an MBA is no longer in the White House, but our nation's large corporations are still largely run by business school graduates. Hasl-Kelchner observes that legal literacy must start at the business school level, and perhaps law schools should have a concomitant emphasis on literacy in business and business ethics.

Like any popular business book of the type one might pick up in an airport bookstore, *The Business Guide to Legal Literacy* is replete with real-world examples, some of which—such as Enron, AIG, and Arthur Andersen—are familiar to the general public and others are less so. But the book's parade of horror stories seems to fall primarily into two categories: companies that violated the law and suffered the consequences; and companies, such as Malden Mills, the inventor of Polarfleece, that failed to seek legal protection for its intellectual property and suffered the consequences. It would have been interesting to read more examples of how understanding the law can help a business's bottom line in a positive and creative way outside the field of intellectual property.

The Business Guide to Legal Literacy contains a number of charts with arrows linked to action words such as "neutralize decision-making biases" and "how legal leverage creates value and competitive advantage." It is difficult, however, to summarize the American legal system in a business school format without either overgeneralizing or making statements, such as "People unfamiliar with litigation in the United States often underestimate the depth and breadth of the litigation discovery process." (I did, however, appreciate Hasl-Kelchner's observation that "[s]ome people are under the mistaken belief that to avoid smoking guns it is necessary to avoid raising problems in writing. That approach is simply not practical.")

Hasl-Kelchner also uses her business person's eye to analyze the forces that drive litigation. She writes that "lawsuits are triggered by a breach of duty, supporting evidence and the incentive or motive to take action and sue"—meaning that litigation may result when a plaintiff has a claim, a means to prove the claim, and an incentive to pursue the claim. Therefore, even if an organization does something for which it may be liable, it may avoid being sued if it acts wisely in the way that it handles the crisis and treats its disgruntled constituent.

Beyond the buzzwords, Hasl-Kelchner's thesis seems to be that managers should neither fear nor ignore legal issues (or lawyers). Rather, business managers should embrace the law as a way to increase competitiveness. To the extent that this message boils down to the suggestion that companies should encourage compliance with the law for their own good, it is neither controversial nor necessarily helpful; it is comparable to saying that Americans should eat less and exercise more. To give her credit, though, Hasl-Kelchner acknowledges that this maxim becomes meaningless in the absence of sincere leadership and follow-through. She parades the consequences of mere lip service to corporate ethics and legal compliance in a dollars-and-cents manner that ought to get the attention of any business executive.

The current financial crisis reminds us that corporate decision-making is often, let us say, less than perfect, and the coming tsunami of increased government oversight and regulation makes legal literacy more important than ever. The targeted audience for *The Business Guide to Legal Literacy* is the business community, but lawyers who work for corporate clients will benefit from its insights as well. The ideal reader is anyone involved in corporate compliance or risk management. **TFL**

V. John Ella practices employment law with the Minneapolis office of Jackson Lewis LLP.