

Liman Public Interest Workshop
HUMAN RIGHTS, INCARCERATION AND CRIMINAL JUSTICE REFORM

Spring 2016 Syllabus
Mondays, 6:10-8 pm, room 124

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All readings available at:
<http://www.law.yale.edu/intellecтуallife/workshopsyllabus.htm>

Today there are reform projects underway at every stage of the U.S. criminal justice system, working to reshape policing, prosecution and defense, sentencing, incarceration, and reintegration. While concerns about the financial and human toll of mass incarceration have created consensus across the political spectrum about the need for change, the question remains how law, organizing, media, and advocacy tools can be successfully deployed and towards what ends. Our conversation will consider how reform agendas are formulated, gain currency, and result in changes in laws and practices that produce consequences, both generative and harmful.

Participants in this Workshop will examine the drivers for and the strategies employed in successful criminal justice reform movements in the United States. We will consider the role that international human rights law and strategies have played in these movements. Our discussion will critically explore the drivers for and the impacts of these strategies. We will then consider the challenge of rights enforcement as it relates to questions of American sovereignty, culture, democratic politics, foreign policy, and federalism. We will explore the efficacy and legitimacy of the multi-faceted strategies that advocates have adopted to advance human rights law, inside and outside the courts, through UN and regional mechanisms, and in the mobilization of grassroots communities. 2 units, credit/fail.

Requirements and Readings

Students participating in the Workshop will receive 2 units of ungraded credit. We meet weekly; preparation for and attendance at these discussions is required for credit. To facilitate our conversation, we will provide questions for you to consider as you read for each class. If you need to miss a class, please be in touch with us in advance of the meeting. *Students missing more than two sessions without permission will not receive credit for the course.*

All students must choose five times during the semester, after the first two sessions, to submit two-page reflections (double-spaced, size 12 font) that offer integrated comments on that week's readings. Students must post their reflections on "Inside Yale" NO LATER than 10 p.m. on Sunday prior to that week's workshop -- and should also circulate them via email the instructors, as well as to Katherine Lawton. *Students who do not complete these requirements during the semester will not receive credit for the course.*

The class may be audited, with permission of the instructor, but doing so requires regular attendance. Visitors, again with permission, are also welcome.

Jan 25 (Class 1): A Reform Moment (?)

Commentators across the political spectrum have argued that this is a unique historical moment for criminal justice reform. Is that true? Which issues and constituencies are included or excluded in this reform agenda and why? What are the opportunities and points of leverage in the system for this reform project? What structural elements of our society stand in its way? How do the actors who participate in this system every day facilitate or hinder reform? How are other agencies and actors outside the system (including those formerly inside) innovating and contributing to reform? To what extent is the reform dialogue in the U.S. influenced by the global conversation – and how are changes here influencing developments abroad?

Jennifer Gonnerman, *Before the Law*, New Yorker (Oct. 6, 2014)

Jennifer Gonnerman, *Kalief Browder, 1993-2015*, New Yorker (Jun. 7, 2015)

Aman Banerji, *Are We Living in a Historic Moment for Criminal Justice Reform*, Speakout (Oct. 14, 2015)

New York State Special Commission on Attica, *ATTICA: THE OFFICIAL REPORT OF THE NEW YORK STATE SPECIAL COMMISSION ON ATTICA (1972)*(excerpts)

William J. Stuntz, *THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE* (2011).

Marie Gottschalk, *CAUGHT: THE PRISON STATE AND THE LOCKDOWN OF AMERICAN POLITICS* (2015) (excerpt)

Jason Stanley and Vesla Weaver, *Is the United States a 'Racial Democracy'?*, N.Y. Times, (Jan. 12, 2014)

David Segal, *Prison Vendors See Continued Signs of a Captive Market*, N.Y. Times, (Aug. 29, 2015)

Nigel Rodley, *Bringing the standards up to standard*, Penal Reform International (May 19, 2015)

David Fathi, *Victory! UN Crime Commission Approves Mandela Rules on Treatment of Prisoners*, ACLU (May 27, 2015)

Feb 1 (Class 2) : Framing Reforms Through the Demography of Incarceration

We begin by reflecting on the long history of slavery, Reconstruction, and Jim Crow. Consider the debate about framing reforms in terms of race – the “new Jim Crow.” Michelle Alexander offers Jim Crow as the lens through which to look at contemporary incarceration. Is that conceptualization illuminating? What is James Forman’s critique? What are the reasons for underscoring the relationship between slavery and incarceration? For being leery of that frame? How does reliance on race work as a frame for legislation, litigation, and organizing? What avenues are foreclosed by this frame; what opportunities are created?

Politics Analytics

MICHELE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS 234-59 (2010)

James Forman, *Beyond the New Jim Crow*, 87 N.Y.U. L. REV. 21, 22-25, 34-48, 53-63 (2012)

Constitutional and Legislative Responses

McCleskey v. Kemp, 481 U.S. 279 (1987) (excerpts)

North Carolina Racial Justice Act, N.C.G.S.A. § 15A-201 1 (2009)

North Carolina Repeal of Racial Justice Act

North Carolina Repeals Law Allowing Racial Bias Claim in Death Penalty Challenges, NY Times June 5, 2013)

Floyd v. City of New York, 959 F. Supp. 540 (S.D.N.Y. 2013) (merits opinion)

Floyd v. City of New York, 959 F. Supp. 668(S.D.N.Y. 2013) (remedies opinion)

Mobilizing for Reform

Jay Caspian Kang, "Our Demand is Simple: Stop Killing Us", *The New York Times Magazine* (May 4, 2015),
<http://www.nytimes.com/2015/05/10/magazine/ourdemand-is-simple-stop-killing-us.html>

Donna Murch, "Ferguson's Inheritance", *Jacobin* (Aug. 5, 2015),
<https://www.jacobinmag.com/2015/08/ferguson-police-black-lives-matter/>

Conor Friedersdorf, "Will Black Lives Matter Be a Movement That Persuades?", *The Atlantic* (Sep. 24, 2015),
<http://www.theatlantic.com/politics/archive/2015/09/willblack-lives-matter-be-a-movement-that-persuades/407017/>

Amnesty International, A Submission to the UN Committee on the Elimination of Racial Discrimination (July 24, 2014)

UN Committee on the Elimination of Racial Discrimination, Concluding observations on the combined seventh to ninth periodic reports of the United States of America (Aug. 29, 2014)

Charles Pulliam-Moore, UN Committee Condemns U.S. for Racial Disparity, Police Brutality, PBS (Aug. 29, 2014)

Feb 8 (Class 3): Police, Race, and Order

Guest Lecturers: Monica Bell, Megan Quattlebaum

Highly-publicized cases of police brutality have helped spark and sustain reform efforts. This week's readings begin by exploring the Constitutional constraints (or lack thereof) placed on the exercise of police power. In *Floyd*, Judge Scheindlin grappled with police use of so-called *Terry* stops. This week, we go back to *Terry* to see under what circumstances the Supreme Court first sanctioned investigatory stops; trace how this policing technique proliferated; briefly glimpse other exercises of police authority; and consider the consequences of these techniques for police legitimacy. Contrast the role of law, and position of the Supreme Court, in this sphere versus other stages of the criminal justice system that we examine this semester. Also consider police incorporation of legal standards and even concepts of procedural justice into their actions, and how and whether this is truly generative of justice.

Terry v. Ohio, 392 U.S. 1 (1968) (excerpts)

Whren v. United States, 517 U.S. 806 (1996) (excerpts)

Heien v. North Carolina (excerpts)

Brosseau v. Haugen, 543 U.S. 194 (2004) (excerpts)

Tracey L. Meares, *The Legitimacy of Police Among Young African-American Men*, 92 MARQUETTE LAW REVIEW 650 (2009)

Charles R. Epp et al., *Pulled Over: How Stops Define Race and Citizenship* (2014), 1-17

Ta-Nehisi Coates, *The Myth of Police Reform*, The Atlantic.

<http://www.theatlantic.com/politics/archive/2015/04/the-myth-of-policereform/390057>

Radley Balko, *Overkill: The Rise of Paramilitary Police Raids in America*, Cato Institute White Paper (2006), pp. 1-11

Naomi Murakawa, *The First Civil Right: How Liberals Built Prison America* (2014) excerpt

Feb 15 (Class 4): Prosecutorial Misconduct and Accountability

Prosecutors have broad authority to decide when and which criminal charges to bring. In a system in which over 95 percent of cases are resolved without trial, these charging decisions are almost always determinative of case outcomes. Given their broad power, prosecutors are required under *Brady v. Maryland* to provide the defense with any exculpatory evidence that would materially impact the case. But what happens with prosecutors fail to fulfill their constitutional obligations? This week, we will examine the forms and consequences of prosecutorial misconduct and evaluate the mechanisms of accountability that exist, both inside and outside the courts.

Guest Lecturer: Laura Fernandez

Prosecutorial Power

John Langbein, *Torture and Plea Bargaining*, 46 U. Chi. L. Rev. 3 (1978)

Bordenkircher v. Hayes, 434 U.S. 357 (1978)

U.S. v. Armstrong, 517 US 456 (1996)

Prosecutorial Accountability

Brady v Maryland, 373 U.S. 83 (1963)

Connick v. Thompson, 563 U.S. 51 (2011)

David Keenan, Deborah Jane Cooper, David Lebowitz & Tamar Lerer, *The Myth of Prosecutorial Accountability After Connick v. Thompson: Why Existing Professional Responsibility Measures Cannot Protect Against Prosecutorial Misconduct*, 121 Yale L.J. Online 203 (Oct. 25, 2011)

Hon. Alex Kozinski, *Criminal Law 2.0*, Preface to 44 Geo. L.J. Ann. Rev. Crim. Pro. (2015)

Rachel Aviv, *Revenge Killing: Race and the Death Penalty in a Louisiana Parish*, The New Yorker (July 6, 2015)

Gary Hines, *Acting Caddo DA Dale Cox will not run in fall election*, KTBS (July 14, 2015)

Optional

Stephen Reinhardt, *The Anatomy of an Execution*, 74 N.Y.U. L. Rev. 313 (1999)

Feb 22 (Class 5): Defense Lawyering and *Gideon's* Unsettled Legacy

Criminal defense lawyers, particularly those appointed to represent the indigent, would seem uniquely well positioned to work for criminal justice reform. Unfortunately, since the Supreme Court's landmark decision in *Gideon v. Wainwright*, the promise of effective assistance of counsel for every accused has remained unfulfilled: in many jurisdictions, public defenders are grossly underfunded, unqualified, or otherwise unable to serve as dedicated advocates for their clients. And too often, the supposed availability of counsel, or the provision of essentially incompetent counsel, is used to legitimate a state-dominated process that lacks substantive fairness and accuracy. This class considers the mixed blessing of *Gideon*; states' continued resistance to its mandates; and courts' ongoing regulation of appointed counsel, which focuses primarily on loyalty and diligence, but has increasingly engaged actual competence. How has the system realized or failed to realize *Gideon's* promise and how have the courts and other system actors abetted this success or failure?

Gideon v. Wainwright, 372 U.S. 335 (1963) excerpts

Missouri v. Frye, 132 S. Ct. 1399 (2011) excerpts

Padilla v. Kentucky, 559 U.S. 356 (2010) excerpts

Robin Steinberg, *Addressing Racial Disparity in the Criminal Justice System Through Holistic Defense*, CHAMPION, July 2013, at 51

Tina Peng, *I'm a Public Defender. It's impossible for me to do a good job representing my clients.*, THE WASHINGTON POST, Sep. 3, 2015

Excerpt of Stephen B. Bright & Sia M. Sanneh, *Fifty Years of Defiance and Resistance After Gideon*, 122 Yale L.J. 2150 (2013), pp. 2160-2174

Paul D. Butler, *Poor People Lose: Gideon and the Critique of Rights*, 122 Yale L.J. 2176 (2013) (excerpts)

Feb 29 (Class 6) Pre-Trial Detention and Bail Reform

The United States system of pretrial detention and bail has witnessed multiple waves of reform. Around the 1960s, efforts focused on limiting excessive cash bail and the use of rigid bail schedules, which starkly divided release on economic grounds. Even as reformers sought to reduce reliance on cash bail and professional bondsmen, crime rose and lawmakers moved to expand the criteria for pretrial detention. The current federal bail statute, the Bail Reform Act of 1984, neatly encapsulates these divergent trends: it is in some ways a model in its use of the alternatives to cash bail and professional pretrial services, but it also includes a presumption of detention for large classes of the accused and specifically sanctions pretrial detention on grounds of future dangerousness. This week reviews the legal foundations of pretrial detention and its uncomfortable relationship with the presumption of innocence; the progress that has been made (or not) on cash bail; and the potential dangers of the current “progressive” reform towards the Bail Reform Act/ pretrial services model.

Incarceration's Front Door: The Misuse of Jails in America, Vera Institute of Justice (Feb. 2015)

Bail Reform Act of 1984, 18 U.S.C. § 3142

United States v. Salerno, 481 U.S. 739 (1987) excerpt

Bell v. Wolfish, 441 U.S. 520 (1979) excerpt

Last Week Tonight with John Oliver: Bail, *available at*
<https://www.youtube.com/watch?v=IS5mwymTIJU>

Samuel R. Wiseman, *Pretrial Detention and the Right to Be Monitored*, Yale Law Journal, excerpts pp. 1346-1361 (before part C), 1364-1367, 1375-1380

Robin Steinberg & David Feige, *The Problem with NYC's Bail Reform*, The Marshall Project (Jul. 2015)

Mar. 7 (Class 7) Death Penalty Abolition: Globally, Locally

Death penalty opponents are currently debating whether the time is ripe to bring a challenge to the constitutionality of the death penalty to the Supreme Court. To understand the competing positions, this session will examine the history of the abolition movement and evaluate the success of the abolition strategies deployed. What are the arguments for abolition? The lines to be drawn or refused? How is the doctrine and practice of the death penalty impacted by global developments? To what end? To what extent does death penalty abolition frustrate other reform efforts, for example in the use of LWOP and solitary confinement; in which ways does it benefit?

Adam Liptak, *Death Penalty Foes Split Over Taking Issue to the Supreme Court*, NY Times (Nov. 3, 2015)

Furman v. Georgia, 408 U.S. 238 (1972) (excerpts)

Gregg v. Georgia, 428 U.S. 153 (1976) (excerpts)

McCleskey v. Kemp, 481 U.S. 279 (1987) (review from week 2)

Roper v. Simmons, 543 U.S. 551 (2005) (excerpts)

Ernest A. Young, *Comment: Foreign Law and the Denominator Problem*, 119 HARV. L. REV. 148 (2005)

Glossip v. Gross, 135 S.Ct. 1885 (2015) (excerpts)

Dahlia Lithwick, *Fates Worse Than Death? Justice Kennedy's own logic shows why he should make the Supreme Court abolish the death penalty*, http://www.slate.com/articles/news_and_politics/jurisprudence/2015/07/will_kennedy_overturn_the_death_penalty_his_views_on_solitary_confinement.html

Chris McDaniel, *Oklahoma General Asks to Halt Three Executions After State Didn't Follow Own Procedures*, BuzzFeed News (Oct. 2, 2015)

Optional Readings

David Garland, *PECULIAR INSTITUTION: AMERICA'S DEATH PENALTY IN AN AGE OF ABOLITION*, (2012) (excerpts)

Mar. 14 (SPRING BREAK)

March 21 (Class 8) Life and Death Sentencing

Mass incarceration is the product of this country's last sentencing reform movement. Sentencing policy shifted away from rehabilitation towards the retributive, punitive model. At the same time, reformers across the political spectrum supported "truth in sentencing" initiatives, as well as efforts to limit the sentencing discretion of judges, whom many perceived as arbitrary and discriminatory in their sentencing choices. In seeking to standardize punishment, policymakers also attempted to bring white-collar sentences in line with sentences for other types of offenses. The combined result of these reforms was a massive and sustained ratcheting up of punishment for all offenses, with little ability to consider the individual circumstances of defendants to mitigate punishment. Courts abdicated any role that they might have played in tempering these harsh outcomes by essentially abandoning Eighth Amendment- based proportionality review of sentences, other than the death penalty.

Today the pendulum is swinging back. For the first time in roughly 40 years, there is widespread political support to reduce prison sentences. This has been driven by increased social mobilization around criminal justice issues, shifting attitudes regarding drugs, and fiscal concerns. In addition, although many believed that the jurisprudence of death would always be different, the Eighth Amendment has reemerged as a tool for challenging non-death sentences. This class surveys trends in U.S. sentencing laws; the different legal doctrines that structure sentencing today; and the changing role of the Eighth Amendment, which shows renewed promise as a vehicle for reform.

William J. Stuntz, *THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE* (2011) excerpt

Rummel v. Estelle, 445 U.S. 263 (1980) excerpt

Harmelin v. Michigan, 501 U.S. 957 (1991) excerpt

Sixth Amendment - Right to Jury Trial - Mandatory Minimum Sentences - Alleyne v. United States, 127 Harv. L. Rev. 248 (2013) excerpt (*Apprendi* and its progeny in 60 seconds)

James Q. Whitman, *Harsh Justice* (2003), Introduction excerpt

James Q. Whitman, *Equality in Criminal Law: The Two Divergent Western Roads*, 1 J. Legal Analysis 119, (2009)

Miller v. Alabama, 132 S. Ct. 2455 (2012) excerpt

Carol S. Steiker & Jordan M. Steiker, *The Death Penalty and Mass Incarceration: Convergences and Divergences*, 41 Am. J. Crim. L. 189 (2014)

Playbook for Change? States Reconsider Mandatory Sentences, Vera Institute of Justice (Feb. 2014)

March 28 (NO CLASS)

March 31 – April 1 Liman Colloquium: Moving Criminal Justice

April 4 (Class 9) Prison Litigation: Courts as a Source of Oversight & Reform

What is the role of courts in criminal justice reform? This class examines the relationships among courts, the administration of prisons, and prisoners' rights. We do so by considering the work of William Wayne Justice, the federal judge involved in the Texas prison litigation (*Ruiz v. Estelle*); the development of congressional efforts to limit courts' authority (the Prison Litigation Reform Act — PLRA); and the contemporary conflict over the most recent prison conditions case to reach the Supreme Court (*Plata v. Brown*). Our focus is on the various actors endowed with constitutional, legislative, administrative, political, and practical powers to oversee the administration of prisons. How did Judge Justice understand the role of judges in prison conditions cases? Is it different than in other kinds of cases? What were the concerns that animated the PLRA? How has the PLRA affected the balance of authority among judges, administrators, and legislatures? What are the metrics to assess the impact of litigation on conditions? The daily lives of inmates and administrators? The resources available to prisons? Do courts have a role in dismantling our system of mass incarceration? How does the Plata experience inform this question?

Hon. William Wayne Justice, *The Origins of Ruiz v. Estelle*, 43 STANFORD L. REV. 1, 1-12 (1990)

MALCOLM M. FEELEY & EDWARD L. RUBIN, JUDICIAL POLICY MAKING AND THE MODERN STATE: HOW THE COURTS REFORMED AMERICA'S PRISONS (1998) (excerpts)

Statement of Senator Abraham, 143 CONG. REC. S14312 (daily ed. Sept. 26, 1995)

Prison Litigation Reform Act, 42 U.S.C. § 1997e et seq.

Margo Schlanger, *Civil Rights Injunctions Over Time: A Case Study of Jail and Prison Court Orders*, 81 N.Y.U. L. REV. 550, 558-69, 589-622 (2006) (excerpts)

Heather Schoenfeld, *Mass Incarceration and the Paradox of Prison Conditions Litigation*, 44 LAW & SOCIETY REV. 731, 731-37 (2010) (excerpts)

Brown v. Plata, 563 U.S. 493 (2011) (excerpts)

Marie Gottschalk, *Prison Overcrowding and Brown v. Plata*, New Republic (June 8, 2011) <http://www.newrepublic.com/article/politics/89575/prison-overcrowding-brown-plata-supreme-court-california>

Joan Petersilia, *California Prison Downsizing and its Impact on Local Criminal Justice Systems*, 8 Harv. L. & Pol'y Rev. 327 (2014) (excerpts)

April 11 (Class 10) Ending Isolation: The Movement to #Stop Solitary

The last ten years have seen a radical shift in public opinion about the use of solitary confinement. Commitments to lessen the numbers of people in isolated settings and to reduce the degrees of isolation have emerged from across the political spectrum. Legislators, judges, and directors of correctional systems at both state and federal levels, joined by a host of private sector voices, have called for change. In many jurisdictions, prison directors are revising their

policies to limit the use of restricted housing and the deprivations it entails. The law of solitary appears ripe for change as well; in 2015, Justices Breyer and Kennedy suggested that conditions in solitary might violate the 8th Amendment. What accounts for this rapid change? Which actors and what forms of advocacy were mobilized get to this point, and what lessons can be drawn for prison reform more generally from the stop solitary movement?

Atul Gawande, *Hellhole*, New Yorker (Mar. 30, 2009)

Wilkinson v. Austin, 545 U.S. 209 (2005)

Benjamin Wallace-Wells, *The Plot From Solitary*, New York Magazine (Feb. 26, 2014)

Elizabeth Alexander, "This Experiment, So Fatal": *Some Initial Thoughts on Strategic Choices in the Campaign Against Solitary Confinement*, 5 U.C. Irvine L. Rev. 1 (2015)

David Fathi, *Victory! UN Crime Commission Approves Mandela Rules on Treatment of Prisoners*, ACLU (May 27, 2015)

Mandela Rules (excerpts)

Settlement Agreement, *Ashker v. Brown*, C 09-05796 (Aug. 31, 2015)

Press Release, Liman Program Releases New Report on Prisoners in Administrative Segregation (Sept. 1, 2015)

Davis v. Ayala, 135 S. Ct. 2187 (2015) (excerpts)

Taylor Pendergrass, *What Can Reforming Solitary Confinement Teach Us About Reducing Mass Incarceration?*, The Marshall Project (Oct. 13, 2015)

April 18 (Class 11) Incarceration and/or Surveillance

Even with a consensus that too many people are enmeshed within the criminal justice system, or that certain offenses would be better addressed outside a prison setting, the carceral state has proven resistant to reform. Jurisdictions have experimented with diversionary or alternative courts and intensive community based supervision. These programs appear to offer a promising alternative to prison, but some worry that they are not employed as "alternatives," but rather as a means of broadening and extending coercive control. These concerns are exacerbated as both the public and private sector garner profits through these alternatives. This panel explores the market in surveillance, the commitments to de-incarceration, and whether and how to constrain instead of extending systems of control.

United States v. Leitch, 2013 WL 753445, Nos. 11–CR–00609 (JG), 11–CR–00457 (JG), 11–CR–00039 (JG) (E.D.N.Y. Feb. 28, 2013)

Mike Riggs, *Want to Go to Drug Court? Say Goodbye to Your Rights*, reason.com (Aug. 17, 2012)

United States Sentencing Guidelines § 5B1.3 – Conditions of Probation

Fiona Doherty, *The Power to Make People Good*, Georgetown Law Review

Allegra M. McLeod, *Decarceration Courts: Possibilities and Perils of a Shifting Criminal Law*, 100 Geo. L.J. 1587 (2012)

Cecelia Klingele, *Rethinking the Use of Community Supervision*, 103 J. Crim. L. & Criminology 1015 (2013)

The GEO Group Closes \$415 Million Acquisition of B.I. Incorporated, Business Wire (Feb. 11, 2011), available at

<http://www.businesswire.com/news/home/20110211005372/en/GEO-Group-Closes-415-Million-Acquisition-B.I.#.VeTIWdNVhBc>

April 25 (Class 12) Charting a Path Toward Reform