**The Criminal System at a Crossroads**

**Spring 2020 Syllabus**

**Mondays, 6:10-8 pm, Room 124**

**Instructors**

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The systemic and individual harms of the criminal legal system are not new. But with events like the protests in Ferguson, Baltimore, and other cities; increased focus on rates of incarceration; high profile cases of misconduct, wrongful conviction, and extreme sentencing; and recordings of racialized police violence, certain aspects of the criminal justice crisis are receiving greater attention. In response, reform efforts are gaining ground at local, state, and national levels. Strategies include community mobilization, policy advocacy, litigation, electoral politics, and coalition work that combines these efforts.

This seminar explores the movements for change and the objectives and methods of those pushing for reforms, both across the country and here in Connecticut. Topics include: frames, narratives, and strategies for change; decriminalization and policing; the funding of criminal systems, by individuals and by governments; pretrial liberty, detention, and bail; extreme sentencing and efforts to curb it; the right to counsel, the quality of appointed counsel, and lawyering for people in prison; conditions of confinement and isolation in prisons; and privatization and profits from the criminal system.

As we move through the topics, we will explore the tensions and choices between incremental and large-scale efforts; the roles of history, race, and class; the use of narrative and framing as strategies; how to understand and evaluate the success of movements for change; anticipating and reflecting on failures and backlash; and the meaning of abolition.

We ask that you approach the readings with a critical eye. Know that the readings we have selected are not necessarily ones we agree with, and that all of the readings are meant to be in conversation with each other and with you.

**Office Hours and Contact Information**

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**Requirements**

This two-credit class will meet weekly and is a credit/fail class. Preparation, attendance, and class participation are required for credit. Students must submit four reflection papers throughout the semester. The reflection papers, circulated in advance of the week’s class, should be no longer than two pages and should comment on the readings, reflect on other students’ responses, and discuss the relationships among the materials assigned. Reflection papers are due at 1 pm Sunday before the Monday class.

All readings will be available on the Yale Law School Canvas website, [https://canvas.yale.edu](https://na01.safelinks.protection.outlook.com/?url=https%3A%2F%2Fcanvas.yale.edu&data=02%7C01%7C%7Ca6949c39c5644fbe111108d609d2bb89%7Cdd8cbebb21394df8b4114e3e87abeb5c%7C0%7C0%7C636707198015014466&sdata=87ULxqnCQpWMgIoSlnDnKs%2F7ov0AyIk%2Bng3GHJ8C8iw%3D&reserved=0). Not all of the readings listed below will be required. We will notify you at least one week before each class which readings are required and which are optional.

Class attendance is required. If you need to miss a class, please be in touch with the professors in advance of the meeting. Any student who misses more than two classes without permission will not receive credit for the course.

**Laptops and Other Devices**

The use of laptops to take notes is permitted but strongly discouraged. Especially in a small class, teachers can usually tell when students are using their devices to multitask. However, the decision of whether to use a laptop in class is yours to make. We understand that taking notes on a laptop is an important part of how some students learn, and for some, the use of laptops is necessary as an accommodation. While we do strongly discourage the practice of using laptops in class, our evaluation of your performance will not be affected by your decision to use one.

**Class Discussions: Norms, Respect, Inclusion, and Good Faith**

We recognize that each student brings different experiences and knowledge to their law school experience and to the subject matter of this course. We also recognize that discussions about criminal systems and efforts to change them can inspire comments that reflect deeply held personal beliefs, emotional responses, and thought-provoking ideas. With this understanding in mind, we request that each participant abide by a few norms in order to foster productive and respectful dialogue.

We ask that each participant listen carefully to the comments of other students and to give space for each member of the class to contribute. Please do not interrupt other speakers or engage in side conversations, and be aware of body language as you speak. Keep confidential any personal information that members of the class share for purposes of discussion.

We ask that you respect others’ rights to hold opinions and beliefs that differ from your own. We encourage disagreement and recognize that it is necessary for productive discussion. Where there is disagreement, we ask that you be courteous and challenge or critique ideas and not people.

Each participant in the class is entitled to a presumption of good faith. Recognize that we are all still learning, every day, and be open to changing your perspective. Make space for others to do the same.

**Classroom Environment, Modifications, and Accommodations**

 We recognize that there are many reasons that modification of teaching style and methods may assist students in the learning process. If any aspect of the course is not accessible to you, we are happy to work with you to develop a plan that supports your learning needs.

All students are welcome to contact us about modifications and accommodations. Students with documented disabilities should contact the Yale University Resource Office on Disabilities (ROD) by email to the director, Sarah Scott Chang (sarah.chang@yale.edu), to request accommodations or other course related needs. ROD will work directly with the Registrar’s Office on accommodations. Know that you do not need a documented disability or diagnosis in order to reach out to us about your access to the course.

General information for students can be found on the Student Information page of the Resource Office on Disabilities’ website. ROD offers resources and coordinates reasonable accommodations for students with disabilities and/or temporary health conditions. Reasonable accommodations are established through an interactive process between you, your instructor(s), and ROD.

**Week 1 – January 13, 2020**

**Introduction and the Framing of Debates**

In the United States of America, over 2.3 million people are held behind bars. This figure represents almost twenty-five percent of the total population incarcerated in the world in a country that is less than five percent of the world’s population. Though these figures are troubling, the figures are far from the complete picture, as they do not include the approximately 4.5 million people on community supervision—i.e. probation and parole. Beyond this, the past and extant harms stemming from decades of a failed “War on Drugs,” racial profiling, aggressive policing tactics, like broken windows styled efforts targeting negatively racialized and historically marginalized groups, are concrete yet difficult to quantity. With these concrete harms in mind, how do we understanding the ongoing problems that plague the criminal legal system in America?

This class introduces the landscape and theorizing of criminal system reform and beyond. The readings critically engage with some of the central problems related to the criminal legal system while situating the problems in a historical, political, economic, and sociocultural context. In this class, we will explore how reformers frame the problems endemic to the criminal system and how the authors contextualize proposed reforms. How well do these frameworks explain the central features, functions, and injustices of the criminal legal system? Do these frameworks provide a lens by which directly impacted communities, legal actors, policymakers, and voters can explain and understand the causes and ongoing problems facing the criminal legal system? What is missing from our collective understandings and what assumptions should be challenged?

Additional questions to consider in this introductory class and as we move through the various reform topics throughout the semester are:

* What do we mean by the criminal system? What does reform mean? What are the problems to be solved?
* How might we frame, reframe, or contextualize the problem? For example, what are the contextual issues necessary to understanding the problem—poverty, racial disparity, etc.?
* How do we theorize strategies and decide which strategies are useful for which problems?
* What are the appropriate forms of activism and methods for change?
* What are the limits of reform?
* What narratives are useful in driving reforms? How do we choose one narrative over another on a specific reform issue?

We will return to these themes and questions throughout the semester and will use this set of prompts to talk about the reforms (or lack of reform) underway in each of the areas explored throughout the semester.

***Readings***

Michelle Alexander, The New Jim Crow: Mass Incarceration in the Age of

Colorblindness (2010)

Sharon Dolovich & Alexandra Natapoff, The New Criminal Justice Thinking (2017)

James Forman, Locking Up Our Own: Crime and Punishment in Black America (2017)

Alec Karakatsanis, *Policing Mass Imprisonment and the Failure of American Lawyers*, 128 Harv. L. Rev. F. 253 (2015).

Kelly Lytle Hernández, City of Inmates: Conquest, Rebellion, and the Rise of Human Caging in Los Angeles, 1771–1965 (2017)

Criminal Justice Policy Committee, Lamont-Bysiewicz Transition Policy Committee Reporting Template (2019), https://portal.ct.gov/-/media/Office-of-the-Governor/Working-Groups/Transition-Policy-Working-Group/Criminal-Justice-Policy-Committee---Final-Memo.pdf?la=en

**Week 2 – January 27, 2020**

**Criminalization and Policing: The Conduct and Impact of Policing**

 This class and the next class explore the relationship between criminalization and policing. Criminalization is the process by which certain behaviors and certain individuals obtain the label of “criminal.” The modern process of criminalization is not solely a legislative or policy choice driven by objective judgments as to which conduct poses harms to society but is rather the result of social, political, and historical processes that collectively serve to further the social subordination of historically marginalized groups. Beyond this, policing reinforces deeply rooted notions of criminality linked to historically marginalized identities and statuses through enforcement priorities that target individuals from these groups. The readings for this week discuss how Fourth Amendment doctrine facilitates and entrenches these processes of criminalization and discriminatory policing, legal impediments to collective resistance against these processes, as well as possibilities for legal reform.

Questions to consider

* Is it possible to reform police without reforming/rethinking what we criminalize?
* How do we understand what happened in the Deray McKesson decision? Did strategies used to combat white nationalism backfire?
* Do proposed solutions around policing match the causes that the authors discuss?
* How do we think about the relationship between different strategies—civil litigation, federal involvement, community activism—in responding to deeply entrenched and historical problems of policing?

***Readings***

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

*Doe v. Mckesson*, 935 F.3d 253 (5th Cir. 2019)

Devon W. Carbado, *Blue-on-Black Violence: A Provisional Model of Some of the Causes*,

1. Geo. L.J. 1479 (2016)

Ann Cammett, *Queer Lockdown: Coming to Terms with the Ongoing Criminalization of LGBTQ Communities*, 7 (3) The Scholar and Feminist Online (Summer 2009), <http://www.barnard.edu/sfonline/sexecon/cammett_01.htm>

S.B. 380, 2019 Leg., Reg. Sess. (Conn. 2019), OLR Public Act Summary

Lisa Backus, *Recent Police Shootings Breathe New Life Into Transparency Laws*, CT Post

(May 2, 2019), https://www.ctpost.com/local/article/Recent-police-shootings-breathe-new-life-into-13814574.php

**Week 3 – February 3, 2020**

**Criminalization and Policing: Surveillance and the Scope of Criminal Laws**

In this class, we continue and expand our discussion on the relationship between criminalization and policing, from street policing and into the broader criminal legal system. This week’s readings continue to explore how policing and enforcement decisions facilitate the criminalization of historically marginalized communities, with a particular focus on Black communities in Baltimore, while also discussing how Fourth Amendment doctrine permits such discriminatory policing by authorizing pretextual arrests. We will also shift our discussion from policing to a by-product of an era of intensive broken-windows policing in large cities like New York—namely, mass misdemeanor processing and the management of individuals charged with misdemeanor offenses. We will focus on one site in a system that collectively handles approximately 13 million misdemeanor cases filed every year and discuss how misdemeanor courts function as a site of social control targeting individuals who come into contact with the criminal legal system through misdemeanor arrests. Finally, given the immense harms stemming from criminalization and discriminatory policing targeting historically marginalized groups, we will discuss advocacy efforts to reduce these harms, centering decriminalization and diversionary efforts in our discussion of criminal justice reforms.

Questions to consider:

* What is the managerial model of criminal law administration and how does it differ from the adjudicative model of criminal law administration?
* What specific strategies do courts adopt to manage individuals entangled in the criminal legal system?
* What are the limits and opportunities of Department of Justice involvement in police departments?
* What are the limits and opportunities of decriminalization as a criminal justice reform strategy?

***Readings***

*Whren v. U.S.*, 517 U.S. 806 (1996)

United States Department of Justice, Civil Rights Division, Investigation of the Baltimore Police Department (Aug. 10, 2016)

Issa Kohler-Hausmann, *Managerial Justice and Mass Misdemeanors*, 66 Stan. L. Rev. 611 (2014)

John Pfaff, *What Democrats Get Wrong About Prison Reform*, Politico (Aug. 14, 2019), <https://www.politico.com/magazine/story/2019/08/14/what-democrats-get-wrong-about-prison-reform-227623>

Working Group on Marijuana Legalization, Criminal Justice Policy Committee, *Legalization of Marijuana in Connecticut* (Dec. 31, 2018)

Thomas Breen, *City Slammed on LEAD Experiment*, New Haven Indep. (Sept. 27, 2018), https://www.newhavenindependent.org/index.php/archives/entry/activists\_slam\_city\_on\_lead\_pilot\_so\_far/

##### Week 4 – February 10, 2020

**Who Pays for Criminal Systems? Fines, Fees, and the Funding of Justice**

In recent decades, states and local jurisdictions have imposed increasingly onerous fines and fees onto criminal defendants and their families in order to fund courts, law enforcement, prisons, public defenders, prosecutors, probation, and parole. Rather than fund criminal systems through city/county/state general revenues, these systems are increasingly dependent on the revenue from fines and fees. This “user-funded” model of courts has resulted in unstable and unpredictable budgets and questionable incentives. As this shift in funding has taken place, the impacts on criminal defendants and their families have been severe.

The readings for this week and Week 5 lay the groundwork for thinking of new movements to abolish or reduce the imposition of debt through the criminal system by providing background information about how systems are funded, the constitutional limits on imposing fines and fees and enforcing debts, and the impacts of monetary sanctions on people and communities. The readings below provide a snapshot of funding crises and impacts in New Orleans, Louisiana; Ferguson, Missouri; Oklahoma, and Michigan. In Connecticut, we look at the use of a per diem charge for incarceration, how those charges are imposed and enforced, and what the revenue is used for.

Many conversations about the impact of fines and fees on people in the criminal system start with the fiscal crisis of 2008, which put significant budget pressure on state court systems, or even before that, with the emergence and rise of criminal system fees starting in the 1970s. Our readings reach back to the era of slavery and the passage of the Thirteenth Amendment and take us to the present.

Questions to consider:

What are the various narratives told in these readings about the root causes of current user- funded model of criminal systems? How might the narratives – whether centered on the legacy of slavery and the Thirteenth Amendment or of contemporary stories of state and local fiscal crises – shape reform strategies?

Who do we want making the decisions about how courts are funded? Courts, cities, state governments? What means of shaping the fiscal structure are most democratic? Most fair?

Think about Ariel Jurow Kleiman’s piece *Nonmarket Fees* next to the two *Cameron* decisions. What is at stake in deciding whether a charge is a “tax” or a “user fee”? Why does the distinction matter as much as it does in determining the funding structure of a criminal court system?

In Connecticut, the court system is unified in that it is operated by a state-level judiciary and receives centralized funding for its main operations, with central oversight from the Connecticut Supreme Court. Funding for all levels of courts – from traffic court to the Connecticut Supreme Court – comes from a centralized state disbursement. How is such a system different from that which we see in Louisiana, Oklahoma, and Missouri? Think about how the design of a state judiciary alters the incentives of the actors within that system. Why might the design and funding of court systems be so varied across the states? What are the political incentives to have a unified, centrally funded court system versus a decentralized one that draws its funding locally?

How is change possible given real structural and fiscal constraints?

***Readings***

ALEXIS HARRIS, A POUND OF FLESH: MONETARY SANCTIONS AS PUNISHMENT FOR THE POOR (2016) (skim pages 28-41)

Tamar R. Birckhead, *The New Peonage*, 72 Wash. & Lee L. Rev. 1595 (2015) United States Department of Justice, Civil Rights Division, Investigation of the Ferguson Police Department (Mar. 4, 2015)

Ryan Gentzler, *The Cost Trap: How Excessive Fees Lock Oklahomans Into The Criminal Justice System Without Boosting State Revenue*, Oklahoma Policy Institute (Feb. 2017) (skim charts)

Michael W. Sances & Hye Young You, *Who pays for Government? Descriptive Representation and Exploitative Revenue Sources*, 79 J. Pol. 1090 (2017)

Ariel Jurow Kleiman, *Nonmarket Fees*, 71 HASTINGS L.J. (forthcoming 2020)

*People* v. *Cameron*, 900 N.W.2d 658 (Mich. 2017)

*People* v. *Cameron*, 929 N.W.2d 785 (Mich. 2019)

*Bonilla* v. *Semple*, 2016 WL4582038 Ct. Ge. Stat. Ann. § 18-85b (2001) *Cain v. White*, 937 F.3d 446 (2019)

# **Week 5 – February 17, 2020**

# **Fines and Fees: Ability to Pay and Abolition**

Last week we looked at structures of funding for criminal systems, the incentives that different funding models create, and the impacts of fines and fees on communities and individuals. This week we look at efforts to change these systems through litigation, organizing, and policy change.

We begin with two of the foundational constitutional cases, which lay out a relationship between the Equal Protection Clause and the Due Process Clause that produces some protections for people who are too poor to pay their court debts. We then look at three recent cases showcasing different legal theories about the protections for poor people with criminal system debt. We turn next to some of the proposals to change the way criminal systems are funded and the way fines and fees are imposed.

As you read about these reform efforts—in and out of court—think about the different ways of funding courts and criminal systems, including the unified court system in Connecticut and the fees imposed by prison systems, and consider some of the following questions:

* What legal arguments and doctrinal hooks are deployed to attack fines and fees systems? How do the Equal Protection Clause and the Due Process Clause interact in these cases? What kind of limits—procedural and substantive—does the Constitution impose on states and municipalities imposing fines and fees? Do the *Fowler* and *Robinson* opinions reach different outcomes because of the law, the facts, or both? What are the limits of the litigation reform strategies?
* How do budgetary pressures limit the viability of reform efforts?
* What policies would effectively transform the user-funded model of many criminal systems? Is wholesale change realistic? If so, how? And if not, what are the options for more incremental changes?
* What other barriers—political, social, legal—stand in the way of reform?

# **Foundational Constitutional Protections**

*Williams v. Illinois*, 399 U.S. 235 (1970)

*Bearden v. Georgia*, 461 U.S. 660 (1983)

# **Litigating for Change: Recent Challenges, the Evolving Constitutional Framework, and New Narratives**

*Fowler v. Benson*, 924 F.3d 247 (6th Cir. 2019)

*Robinson v. Purkey*, 3:17-cv-01263, 2018 WL 5023330 (M.D. Tenn. Oct. 16, 2018)

*Timbs v. Indiana*, 139 S. Ct. 682 (2019)

# **The Limits and Promise of Reform Efforts**

Supreme Court of Illinois, Supreme Court Announces Changes to Make Court Costs More Manageable (Feb. 13, 2019)

Application for Waiver of Court Fees & Application for Waiver of Court Assessments, ILL. SUP. CT. AMENDED R. 404 (2019)

Theresa Zhen, *(Color)Blind Reform: How Ability-to-Pay Determinations Are Inadequate to Transform a Racialized System of Penal Debt*, 43 N.Y.U. REV. L. & SOC. CHANGE 175 (2019).

Sharon Brett & Mitali Nagrecha, *Proportionate Financial Sanctions: Policy Prescriptions for Judicial Reform*, Harvard Law School Criminal Justice Policy Program (Sept. 2019)

ArchCity Defenders, *It’s Not Just Ferguson: Missouri Supreme Court Should Consolidate the Municipal Court System* (2015)

Worth Rising, *In Review: Connect Connecticut* (2019)

**Week 6 – February 24, 2020**

**Pricing Pretrial Liberty: Cash Bail Debates and Reforms**

This week, we turn to the relationship between money and pre-adjudication detention. Kellen Funk outlines the “present crisis in American bail” and reviews the landscape of bail litigation in the federal courts. As you read this piece and the excerpts from the more recent litigation in Texas, Georgia, and California, think about the lens through which the courts are analyzing the claims about these bail systems and how the constitutional question and the level of scrutiny applied affect the courts’ conclusions.

We look then to 1984 when, in the midst of the “war on crime” and the “war on drugs,” Congress enacted the “Bail Reform Act” governing federal criminal defendants. In 1987, in *United States v. Salerno*, the United States Supreme Court rebuffed challenges to the Act. Think about what you make of the court’s constitutional assessment. What are the ways in which the commentary from the *Angolite*, a newspaper written by prisoners in Louisiana’s Angola Prison, forecasted the lasting impact of the *Salerno* decision?

Distress about incarceration based on a lack of funds has produced new litigation aiming to “reform” bail. Our interest is in understanding the bases for critiques, the legal challenges mounted, and the responses by courts and legislatures. Consider the facts that were key to Judge Rosenthal’s decision in *O’Donnell v. Harris County*. Watch the link to the bail “hearing” as you reflect on the ruling. Think about the interaction between the litigation and legislation in California, and what the pending state referendum and the backlash against the recent reform suggest about the risks of different reform strategies. Consider the role of the bail bondsmen. What do you make of the arguments raised in the bail bondsmen and sheriffs’ association amicus brief?

Finally, reflect on the history of bail reform in Connecticut, as well as on the current bail system. What do you think of the Sentencing Commission’s recommendations for reform? Do they address the concerns we might have about money bail?

We will continue to talk about bail next week, and bring into the conversation analyses of different technologies for change, assessing risk or dangerousness, the use of electronic monitoring and supervision as alternatives to pre-trial detention, and community bail funds or bail nullification. Before we get to those discussions, think about the following questions:

* Should we end the use of money bail?
* What impact would this approach have on incarceration rates?
* Are there some circumstances in which we think the state ought to be able to hold someone pre-trial based on safety concerns?
* What are the alternatives to money bail in terms of ensuring a defendant’s appearance? What incentives do defendants have to appear when facing serious criminal charges?
* Why did the courts in *O’Donnell v. Harris County* and *Walker v. Calhoun* reach such different conclusions? How should the court assess questions of pre-trial detention?

**Introduction: Detention, Flight “Risk,” and “Danger”**

Kellen Funk, *The Present Crisis in American Bail*, 128 Yale L. J. Forum 1098 (2019)

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

Commentary, *Preventive Detention*, Angolite (July/Aug 1987), at 87–88

**Current Bail Practices**

**Bail Reform in Litigation**

Harris County, Texas

Susan Archer & Michael Hardy, *In Texas Court: ‘Your Bond Just Went Up’*, N.Y. Times (Mar. 9, 2017), https://www.nytimes.com/video/us/100000004974239/court-video-of-judges-setting-bail.html

*O’Donnell v. Harris County* litigation overview

*O’Donnell v. Harris County*, 251 F. Supp. 3d 1052 (S.D. Tex. 2017)

*O’Donnell v. Harris County*, 892 F.3d 147 (5th Cir. 2018)

*Walker v. City of Calhoun,* 901 F.3d 1245 (11th Cir. 2018), *petition for cert. denied*, \_\_ U.S. \_\_, 139 S. Ct. 1446 (2019).

**Reforms through Legislation**

California Bail Reform Litigation and Statute

*In re Humphrey*, 228 Cal. Rptr. 3d 513, (Cal. Ct. App. 2018), *review granted*, 417 P.3d 769 (May 23, 2018)

S. 1054, 2017–2018 Leg., Reg. Sess. (Ca. 2018) (effective Oct. 1, 2019)

Jeremy B. White, *California Ended Cash Bail. Why Are So Many Reformers Unhappy About It?*, Politico(Aug. 29, 2018)

California Referendum to Overturn a 2018 Law that Replaced Money Bail System with a System Based on Public Safety Risk

**The Intractability of the Problem**

Daniel J. Freed & Patricia M. Wald, *Bail in the United States: 1964* (Nat’l Conf. on Bail & Criminal Justice, Working Paper 1964)

Brief Amici Curiae American Bail Coalition, Georgia Association of Professional Bondsmen & Georgia Sheriffs’ Association in Support of Defendant-Appellant and Reversal of Preliminary Injunction, *Walker v. City of Calhoun,* 682 Fed. Appx. 721 (2017), *petition for cert. filed*, No. 18-814, Dec. 27, 2018

**Connecticut**

Connecticut Sentencing Commission, Pretrial Release and Detention in Connecticut (Feb. 2017)

Connecticut Sentencing Commission, A Study of the Disparities in Pretrial and Sentencing Outcomes of Criminal Defendants, Executive Summary (Jan. 2020)

**Week 7 – March 2, 2020**

**Cash Bail and Its Alternatives**

We continue our conversation about cash bail and pre-adjudication detention. This week we focus on the different methods to respond to the problems of cash bail, and on the technologies that are becoming increasingly common as part of or substitutes for pre-adjudication detention. We begin with Sandra Mayson’s article, which picks up on concerns raised in the *Angolite* response to the 1987 *Salerno* decision: ought we detain defendants based on concern of future risk of dangerousness, and if so, what probability of future criminal behavior justifies detention?

Reflect, then, on the consequences of being incarcerated pre-adjudication and whether the Public Safety Assessment and the Connecticut point scale adequately account for the costs of detention, as identified by Heaton, Mayson, & Stevenson, and by Yang. Does Connecticut’s incorporation of more “positive” factors offset these concerns? Consider the efforts of the Arnold Foundation to create a risk-assessment system based on “neutral information” and empirically tested “tools.” What are the reasons to look to artificial intelligence in lieu of or to try to limit judicial discretion? Think about the concerns raised in the Shared Statement of Civil Rights Concerns and in the Koepke & Robinson article.

Electronic monitoring has emerged as a perhaps appealing alternative to pre-trial detention, allowing defendants to avoid incarceration and to remain in their own homes. Are you persuaded by Wiseman’s analysis? Or is electronic monitoring another form of prison, or, as Michelle Alexander describes, the newest Jim Crow?

 Finally, consider the role of community bail funds. How do we make sense of the competing conceptions of bail funds from those within the system: are bail funds a form of bail nullification, a tool for prison abolition, or a method of perpetuating money bail? What do you think of the critiques from the Brooklyn Community Bail Fund and Survived & Punished NY? What is the way forward on bail reform, and what does “truly transformative change” look like?

In light of these readings, revisit some of the questions we raised last week, and consider:

* Are there some circumstances in which we think the state ought to be able to hold someone pre-trial based on safety concerns?
* Should we end the use of money bail?
* What are the alternatives?
* What should bail reform look like? Blanket release? Some bail or preventative detention? Supervision? Pre-trial support and diversion?

**Assessing Risk and the Costs of Pretrial Detention**

Sandra G. Mayson, *Dangerous Defendants*, 127 Y.L.J. 490 (2018)

Paul S. Heaton, Sandra G. Mayson & Megan T. Stevenson, *The Downstream Consequences of Misdemeanor Pretrial Detention*, 69 Stan. L. Rev. 711 (2017)

Crystal S. Yang, *Toward an Optimal Bail System*, 92 N.Y.U. L. Rev. 1399 (2017)

**Assessments and Supervision: Technologies for Change**

**Risk Assessments**

Laura & John Arnold Found., Public Safety Assessment: Risk Factors & Formula (2016)

Urban Institute, Pretrial Risk Assessment in Connecticut: Assessment of Current Instrument and Recommendations Moving Forward (Oct. 30, 2019)

The Use of Pretrial “Risk Assessment”’ Instruments: A Shared Statement of Civil Rights Concerns (Jul. 30, 2018)

John Logan Koepke & David G. Robinson, *Danger Ahead: Risk Assessment and the Future of Bail Reform*, 93 Wash. Law Review 1725 (2017)

**Electronic Monitoring**

Samuel R. Wiseman, *Pretrial Detention and the Right to Be Monitored*, 123 Y.L.J. 1344 (2014)

James Kilgore & Emmett Sanders, *Ankle Monitors Aren’t Humane. They’re Another Kind of Jail*, WIRED (Aug. 04, 2018), *available at* https://www.wired.com/story/opinion-ankle-monitors-are-another-kind-of-jail/

Michelle Alexander, *The Newest Jim Crow*, New York Times (Nov. 8, 2018), *available at* https://www.nytimes.com/2018/11/08/opinion/sunday/criminal-justice-reforms-race-technology.html

**Bailing People Out: Community Bail Funds & Bail Nullification**

Jocelyn Simonson, *Bail Nullification*, 115 Mich. L. Rev. 585 (Mar. 2017)

Brett Davidson, Elisabeth Epps, Sharlyn Grace & Atara Rich-Shea, *Community Bail Funds as a Tool for Prison Abolition*, Law & Pol. Econ. Blog, Money Bail Series (Feb. 13, 2020), *available at* <https://lpeblog.org/2020/02/13/community-bail-funds-as-a-tool-for-prison-abolition/>

Brooklyn Community Bail Fund, *Community Bail Funds & the Fight for Freedom*, Medium (Sept. 27, 2019), *available at* https://medium.com/@bkbailfund/community-bail-funds-the-fight-for-freedom-17dc40311230

Survived & Punished NY, *“Bail Reform” & Carceral Control: A Critique of New York’s New Bail Laws*, Law & Pol. Econ. Blog, Money Bail Series (Feb. 11, 2020), *available at* https://lpeblog.org/2020/02/11/bail-reform-carceral-control-a-critique-of-new-yorks-new-bail-laws/

**Week 8 – March 16, 2020**

**Extreme Sentencing: Death Penalty, Abolition, Reform, and Life without Parole**

This week our readings focus on extreme sentencing in two of its many forms: the death penalty and life without parole. We start with the repeal of the death penalty in Connecticut.

In 2012 the Connecticut legislature voted to repeal the death penalty prospectively, leaving the punishment intact for those already under a sentence of death. Much of the debate over whether to make the repeal retroactive or prospective centered on the nature of the crimes for which the prisoners then on death row were convicted. One crime in particular loomed large. In 2007 a family was attacked in their suburban home, the mother and two daughters killed, and two of them sexually assaulted. Two men were convicted of the crime and sentenced to death. Retroactively eliminating the death penalty would have meant commuting those two sentences and the sentences of the other nine men then on death row.

In 2015 the Connecticut Supreme Court addressed whether, in light of the retroactive repeal of the death penalty, that sentence violates the state prohibition against cruel and unusual punishment. As you read the court’s decision in *Santiago*, consider the role of the legislative debate, as well as concerns about the judiciary usurping the role of the legislature. Consider, too, the weight of the discussion regarding racial disparities in capital sentencing among the concurring Justices Norcott and McDonald, and the Chief Justice in her dissent.

Challenges to the death penalty have taken other forms, including categorical challenges and attacks on the methods used for carrying out the sentence. Think about the criticisms—quite different in perspective—of these strategies by Justice Scalia in his *Glossip* concurrence and by Pifer in her article on the limitations of categorical exemptions.

Death penalty reform efforts have also been criticized as placing too much emphasis on life without parole as a sentencing alternative. The articles by Nellis and by Kleinstuber, Joy, and Mansley frame some of these critiques. Judge Underhill’s decision confronts another consequence specific to the Connecticut reform: the requirement, post-death-penalty repeal, that individuals convicted of a capital felony or murder with special circumstances be imprisoned under restrictive, isolating conditions. How ought reformers approach these issues?

Finally, consider the implications of these arguments on a particular category of life without parole: JLWOP. In Connecticut, responding to U.S. Supreme Court decisions creating categorical exceptions to extreme sentences for juveniles, the state legislature provided parole eligibility to individuals who were kids at the time of the crime. Previously, individuals convicted of murder with special circumstances, murder, and felony murder were been ineligible for parole, and individuals convicted of any crimes involving violence against another person were functionally ineligible for parole. After the legislative enactment, litigants challenged parole eligibility as a fix for their life sentences. ACLU’s 2016 report provides insight into the limitations of parole as a means to ensure people who were incarcerated as juveniles will see a life outside of prison.

**Readings**

**Connecticut Death Penalty Repeal**

An Act Revising the Penalty for Capital Felonies, Pub. Act No. 12-5 (Conn. 2012)

*State v. Santiago*, 318 Conn. 1 (2015)

**Lethal Injection and Litigation Strategies**

*Glossip v. Gross*, \_\_\_ U.S. \_\_\_, 135 S.Ct. 2726 (2015) (Scalia, J., concurring)

[OPTIONAL] Radiolab story about abolition litigation strategizing on lethal injection: <https://www.wnycstudios.org/podcasts/radiolab/articles/radiolab-more-perfect-cruel-and-unusual> (Warning: contains some graphic descriptions of executions)

**Categorical Bans**

Natalie A. Pifer*, Re-Entrenchment through Reform: The Promises and Perils of Categorical Exemptions for Extreme Punishment Policy*, 7 Ala. C.R. & C.L. L. Rev. 171 (2016)

**Life without Parole**

Ashley Nellis, *Tinkering with Life: A Look at the Inappropriateness of Life without Parole as an Alternative to the Death Penalty*, 67 U. Miami L. Rev. 439 (2013)

Ross Kleinstuber, Sandra Joy & Elizabeth A. Mansley, *Into the Abyss: The Unintended Consequences of Death Penalty Abolition*, 19 U. Pa. J. L. & Soc. Change 185 (2016)

Conn. Gen. Stat. Ann. § 18-10b. Placement of inmate convicted of capital felony or murder with special circumstances (2012)

*Reynolds v. Arnone*, 402 F. Supp. 3d 3 (D. Conn. 2019)

*State v. McCleese*, 333 Conn. 378 (2019)

ACLU, False Hope: How Parole Systems Fail Youth Serving Extreme Sentences (2016)

**Week 9 – March 23, 2020**

**Public Defense: Rights to Counsel and Reflections on *Gideon***

We begin our discussion of rights to counsel in criminal proceedings this week. The Sixth Amendment of the United States Constitution states: “In all criminal prosecutions, the accused shall enjoy the right to . . . have the Assistance of Counsel for his defense.” The Fifth and Fourteenth Amendments guarantee “due process.” Do either of these constitutional guarantees require the state to provide people with free lawyers or with other means of defending themselves? In 1932, in *Powell v. Alabama*, the U.S. Supreme Court addressed these questions in the context of what became known as the “Scottsboro Boys” case. As background, we have provided a brief excerpt from Michael Klarman’s article. Langston Hughes’s poem gives a sense of the outrage many felt at the treatment of the boys.

In 1963, the Court held in *Gideon v. Wainwright* that, under the Sixth Amendment, a conviction of an indigent defendant in state court for a felony cannot stand if the state has not provided the defendant with a lawyer. Following *Gideon* was the 1966 case *Miranda v. Arizona*, known from countless television shows and movies as the source of the statement, “if you cannot afford an attorney, one will be provided for you.” *Miranda* situates the Court’s criminal process decisions against the backdrop of the Cold War. In this context, what function do lawyers serve?

Consider the phases of a criminal prosecution, from pre-arrest investigation, initial police encounters and arrest, interrogation, bail setting, pre-trial court appearances, to trial (or plea), post-trial motions, and appeal. As you read the overview from *Argersinger* and *Scott*, the Court’s 2008 decision in *Rothgery v. Gillespie County*, and the NACDL report, think about when and why the right to counsel should attach.

Turn then from the constitutional doctrine to the question, how should rights to counsel be implemented? And in what circumstances, if ever, should jurisdictions be able to recoup costs of public defender services?

Finally, compare Paul Butler and Sara Mayeux’s reflections on the legacy of *Gideon*. What is the “promise” of *Gideon* and what is the worth of the right it announced?

**Readings**

# **Recognizing and Defining Rights to Counsel for Criminal Defendants**

Michael J. Klarman, *The Racial Origins of Modern Criminal Procedure*, 99 Mich. L. Rev. 48 (2000)

*Powell v. Alabama*, 287 U.S. 45 (1932)

Langston Hughes, *Justice* (1932)

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

*Miranda v. Arizona*, 384 U.S. 436 (1966)

Overview of *Argersinger v. Hamlin*, 407 U.S. 25 (1972) and *Scott v. Illinois*, 440 U.S. 367 (1979)

*Rothgery v. Gillespie County*, 554 U.S. 191 (2008)

# **Implementations of Right to Counsel**

Suzanne M. Strong, BJS, State Administered Indigent Defense Systems (2013)

John P. Gross, Nat’l Ass’n of Criminal Defense Lawyers, Representation in All Criminal Prosecutions: The Right to Counsel in State Courts(2016)

John Pfaff, *A Mockery of Justice for the Poor,* N.Y. Times (Apr. 19, 2016)

# **State and Federal Recoupment Provisions**

Beth A. Colgan, *Paying for* Gideon, 99 Iowa L. Rev. 1929 (2014)

*United States v. Moore*, 666 F.3d 313 (4th Cir. 2012)

**Reflections on *Gideon***

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

Sara Mayeux, *What* Gideon *Did*, 116 Colum. L. Rev. (2016)

**Week 10 – April 6, 2020**

***Gideon*, the Quality of Lawyers, and Proceeding Without Counsel**

Last week we discussed the right to counsel, it’s origin, what *Gideon* achieved, and where it fell short. This week we look at how we understand and evaluate the quality of counsel, and efforts to reform, transform, and respond to the chronic failure of public defense systems.

Litigation is one avenue for enforcing the quality of lawyers for poor defendants. The readings start with a seminal case, *Strickland v. Washington*, decided by the Supreme Court in 1984 in the context of an individual’s challenge to his own conviction. The case itself and those that followed demonstrate the scope and limitations of constitutional challenges in individual cases. The last decade has also seen an increasing use of class action litigation to challenge the underfunding and failed oversight of public defenders at the systemic level, along with the implementation of new standards and the emergence of new research about optimal caseloads and quality.

But despite these reform efforts, real change has been lagging. The readings explore two very different directions in which reforms might be directed:

1. What would happen if we shifted the focus away from the funding and training and oversight of lawyers themselves and looked to non-lawyers to build up an infrastructure of zealous indigent defense? One movement underway, Participatory Defense, explores the potential of families and communities of defendants to establish more robust legal representation. And in prison systems across the country, jailhouse (non)lawyers have already been carrying the burden of absent, underfunded, and unavailable counsel.
2. The question of cultural change in indigent defense systems. Consent decrees and standards may sometimes lay out the basic elements of quality indigent defense, but changing the culture and underlying performance incentives is a different question. Think about the issue of cultural change as you read Eve Primus’s article, [insert name]. And think about the challenges in place.

As you read for this week, consider the following questions:

* What is the abolitionist frame when talking about indigent defense? Are there meaningful ways of improving indigent defense – and measuring those improvements – without further legitimizing the work of criminal systems?
* What does effective advocacy look like? Can it be measured, and can it be improved through the strategies described in the readings?
* What is the role of empirical data in measuring the quality of what lawyers for criminal defendants do? Can data tell us what a good lawyer looks like?
* Should the focus shift away from lawyers? Or something less than full legal representation? What are the implications of deploying a “triage” approach to criminal defense?
* Can indigent defense systems meaningfully escape the racial and ethnic biases endemic to the criminal system as a whole? Is racial discrimination in indigent defense systems an issue that can be meaningfully extracted from questions of underfunding and poor oversight?

**Readings**

**Effective Assistance of Counsel and the Constitutional Floor**

*Strickland v. Washington*, 466 U.S. 668 (1984)

*Bobby v. VanHook*, 558 U.S. 4 (2009)

**Setting Standards and Measuring Caseloads**

PUB. POL RESEARCH INST., TEX. A&M UNIV., GUIDELINES FOR INDIGENT DEFENSE CASELOADS (2015)

AMER. BAR ASS’N, TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM (2002)

*Hurrell-Harring v. State*, 930 N.E.2d 217 (N.Y. 2010), and Order of Settlement (10/21/14) (**skim settlement**)

**Substitutes for Full Legal Representation**

Darryl K. Brown, *Rationing Criminal Defense Entitlements: An Argument from Institutional Design*, 104 COLUM. L. REV. 801 (2004)

David Bornstein, *Guiding Families to a Fair Day in Court*, N.Y. TIMES (May 29, 2015)

*In re Morales*, 202 Vt. 549 (2016)

**Cultural Change in Indigent Defense Systems and Challenges**

L. Song Richardson & Phillip Atiba Goff, *Implicit Racial Bias in Public Defender Triage*, 122 Yale L. J. 2626 (2013)

Eve Brensike Primus, *Culture as a Structural Problem in Indigent Defense*, 100 Minn. L. Rev. 1768 (2016)

Vinny Vello, *Protesters Descend on Montgomery County Commissioners Meeting to Oppose Public Defenders’ Firings*, Philadelphia Inquirer (March 5, 2020)

**Week 11 – April 13, 2020**

**Prison Conditions and Isolation**

This week’s readings discuss prison conditions and the ongoing problem of solitary confinement within the American punishment system. Consider the Supreme Court’s 2005 description in *Wilkinson* of the “supermax” prison in Ohio – an environment of extreme sensory deprivation in which prisoners may be placed indefinitely. As you can see from these materials, a current definition of “solitary confinement” is 22 hours a day in a cell for 15 consecutive days or more, and across the country, prisons hold individuals for months and years in such settings. Why and how did isolation (now often described as restrictive housing, of various kinds) come to be a common practice? What are the rationales for isolation? What legal regimes permit or constrain it? What are arguments from the U.S. Constitution about its permissibility? Should law or correctional officials prohibit it? What are the grounds for limiting isolation for categories of prisoners, as Elizabeth Alexander discusses? How do the mental health professionals and survivors of solitary inform this discussion? What is the debate about the impact of isolation? Consider also Justice Kennedy’s discussion in 2015 in *Davis v. Ayala*. He called for an “appropriate case” to reconsider the constitutionality of solitary confinement. What kinds of cases would be helpful to get before the Court? What is the relationship of solitary confinement to prison reform and abolition more generally? How do abolitionists like Robert Saleem Holbrook frame the problem of solitary confinement? What is the purpose and utility of solitary confinement from an abolitionist perspective? Is the Protect Act, proposed by StopSolitaryCT advocates, an example of prison reform or abolition praxis?

**Readings**

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

*Prieto v. Clarke*,780 F.3d 245 (4th Cir. 2015)

Elizabeth Alexander, ‘*This Experiment, So Fatal’: Some Initial Thoughts on Strategic Choices in the Campaign Against Solitary Confinement*, 5 UC Irvine L Rev 1-48 (2015)

Reginald Dwayne Betts, *Only Once I Thought About Suicide*, 125 Yale L.J. F. 222 (2016)

Ashbel T. (A.T.) Wall, *Time-In-Cell:* *A Practitioner’s Perspective*, 125 Yale L.J. F. 246 (2016)

Craig Haney, *Mental Health Issues in Long-Term Solitary and ‘Supermax’ Confinement* 49 Crime & Delinquency 124-156 (2003).

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

Robert Saleem Holbrook, *Control Units: High-Tech Brutality*, FreeSalim.Net (Last visited Apr. 4, 2020), http://freesalim.net/high-tech\_brutality

Protect Act (An Act Promoting Responsible Oversight and Treatment, and Ensuring Correctional Transparency)

StopSolitaryCT, *How Many People Are in Isolated Confinement in CT?*

**Week 12 – April 20, 2020**

**Privatization and Profits**

As we wind down the semester, we will spend this second-to-last class session returning to themes from earlier classes and getting ready to talk about paths forward to reform or transformation in the final class.

We have talked in previous class about the profit motives of governments in seeking to extract wealth from individuals charged with even the most minor of crimes. Here we turn toward the role that profit-making entities play as quasi-government actors in criminal systems, the impact of the profit motive on efficacy, and the harms that ensue. The trend in recent decades has been toward increasing privatization in a number of areas – pretrial supervision, diversion programs, probation, prison health care, prison services, and prisons themselves. Private entities present distinct problems for advocates. They are subject to little scrutiny and oversight, both because their accountability systems are almost entirely internal and because they are often not subject to the same laws governing transparency and public records; they evade accountability by dissolving and reforming under new names; and they have powerful lobbyists at their disposal.

The readings below outline the extent to which criminal systems are privatized, and some of the harms that result, including an overrepresentation of people of color in private prisons.

The readings also cover a variety of reform strategies: a lawsuit in Massachusetts that challenges phone fees under a unique legal theory and other litigation strategies; Congressional inquiries, internal contracting changes to alter the incentives of private corporations, and private prison divestment.

As you read, consider the following questions:

* Think back to the discussion of the company Securus phone fees in Connecticut and the strategies for eliminating phone call fees. Recall that advocacy efforts led the privaty equity firm that owns Securus to withdraw its opposition to a bill that would have eliminated prison phone fees. Is there a broader opportunity in lobbying/shaming private providers in other areas of the criminal system?
* Think about the problems laid out by Alexes Harris et al in “Cost Points,” as well as the type of harms represented in the news article about private prison transport. Are the reform strategies described well-structured to address these issues?
* Are the objections to privatization based purely on the evidence of egregiously oppressive and extortionary tactics by private entities – that is, the substandard performance of these companies? Or is the primary objection more centrally with the fact of private profit in the traditionally governmental space? Or with the echoes of debt peonage? In other words, are well-run private prisons or other criminal system entities nonetheless problematic?
* Are there other reform strategies not envisioned here? To what extent do the strategies described in these readings shift the incentives?

**Readings**

Alexes Harris, Tyler Smith, Emmi Obara, *Justice “Cost Points”: Examination of Privatization Within Public Systems of Justice*, 18 Criminology & Public Policy 33 (2019)

Christopher Petrella & Josh Begley, *The Color of Corporate Corrections: The Overrepresentation of People of Color in the For-Profit Corrections Industry*, 2013 Radical Criminology 143 (2013).

Alysia Santo & Eli Hager, *A Man Died in a Private Prison Van: The Company Says: Not Our Problem,* The Marshall Project (3/29/2013)

Elizabeth Warren, Ted Deutch, Cory Booker, Letter to Josh Bradford, President, Prison Transportation Services (2/29/2019)

*Pearson v. Hodgson*, 363 F.Supp.3d 197 (2018)

Criminal Justice Policy Program, *Confronting Criminal Justice Debt: A Guide for Policy Reform* (2016)

Lauren-Brooke Eisen, Down Under, More Humane Private Prisons, NY Times (11/14/2018)

Yale Students for Prison Divestment Report, Advisory Committee on Investor Responsibility 2016

Laura Appelman, *Cashing in on Convicts: Privatization, Punishment and the People*, 2018 Utah Law Review 580 (2018)

**Week 13 – April 27, 2020**

**Abolition Theory and Praxis**

In our last class, we’ll close with a discussion on abolition theory and praxis. We’ll discuss three foundational texts in abolitionist theory and one recent article. Dr. Angela Davis’ pathbreaking book, *Are Prisons Obsolete?* is considered the formative text in abolitionist theory and makes the classical case for abolishing prisons and jails. Grounding her argument in a critique of the prison industrial complex, Dr. Davis documents the similarities between chattel slavery and the current punishment regime that targets Black, indigenous, and Latinx people, and explains how gender structures the prison environment. Notably, Davis is credited for urging hope despite the dismal realities of (at the time) surging incarceration rates. As Davis maintains, just as the abolition of slavery was once seen as unimaginable, some may believe that it is impossible to imagine the end of prisons. Her clarion call is a classic in its pronouncement that a world without prisons is possible.

Professor’s Allegra McLeod’s text is considered the first to offer sustained engagement with abolition in legal scholarship. In the except we’ll read from *Prison Abolition and Grounded Justice*, Prof. McLeod provides an overview of preventative justice and its role in abolitionist movements. As McLeod explains, “[p]reventive justice designates a range of measures aimed at reducing the incidence of harmful behavior, typically by targeting the risks posed by specific individuals and less often by addressing the potential harm posed by given social situations.” How does preventive justice further humanitarian goals of harm reductive while furthering abolitionist principles relating to dismantling policing and punishment systems? How does preventive justice respond to crime prevention goals and justifications centered in the criminal legal system? Prof. McLeod’s article discusses the prison abolitionist ethic, a theme Prof. Amna Akbar picks up on in her article, *Toward a Radical Imagination of American Law*. What does Prof. Akbar define as the abolitionist ethic? What are the central goals, values, and properties of such an approach? As you reflect on the semester, think about whether you think law can be aligned with abolitionist principles, as Dorothy Roberts argues in *Abolition Constitutionalism*.

**Readings**

Angela Y. Davis, Are Prisons Obsolete (2003)

Allegra McLeod, *Prison Abolition and Grounded Justice*, 62 UCLA L. Rev. 1156 (2015)

Amna Akbar, *Toward a Radical Imagination of American Law*, 93 NYU L. Rev. 405 (2018)

Dorothy Roberts, *Abolition Constitutionalism*, 133 Harvard L. Rev. 1 (2019)