



The Path Forward: Columbia Law Confronts Criminal Justice Reform

Mass incarceration is one of the defining civil rights issues of our time. With 2.2 million people in prisons and jails across the United States, it is imperative that we remediate bias and inhumanity when it encroaches on our system of criminal justice.

The passage in late 2018 of the bipartisan First Step Act, a federal criminal justice reform bill, marked significant progress. But meaningful and lasting change cannot be left to legislators and policymakers alone.

Through scholarship, litigation, advocacy, and representation, Columbia Law School faculty, students, and alumni are exploring and promoting strategies that will reduce mass incarceration, create safer communities, respect individual rights, and affirm human dignity.

Gillian Lester
Dean and the Lucy G. Moses Professor of Law

law.columbia.edu/criminal-justice-reform

Policing

What reforms follow the decline of stop and frisk?

The steep drop in crime in the United States over the past 25 years has coincided with the spread of a style of policing that aggressively enforces low-level offenses (turnstile jumping, public urination) to deter more-serious crimes. The effectiveness of the so-called broken-windows strategy is disputed and controversial, but such enforcement remains significant: Over 80 percent of the 10.6 million arrests in 2016 were for low-level, nonviolent crimes, according to the Vera Institute of Justice, which tracks arrest data.

Research by **Professor Jeffrey A. Fagan** showing racial bias and ineffectiveness in police stop-and-frisk tactics was key in *Floyd v. City of New York*, a 2013 federal class action against the New York City Police Department. Fagan's work led to a dramatic decrease in the use of stop and frisk. His research in New York and in Ferguson, Missouri, after the 2014 death of Michael Brown, also documents the crushing effect of broken-windows policing on low-income communities and among blacks and Hispanics. Vigorous enforcement can lead to "legal proceedings that over time evolve into tougher penalties that leave criminal records with lasting consequences," he says.

"The model of intensive face-to-face physical contact between police and civilians is outmoded," Fagan says. "There needs to be experimentation in different policing models. We can substitute smart analytics for heavy-handed police tactics."

Professor Justin McCrary's research has shown that the mere presence of police in a neighborhood reduces crime, but the challenge remains in determining how to police in high-crime areas where residents feel simultaneously underprotected and overpoliced. "People tend to have both mind-sets: 'I need the police, but they also just roughed up my brother for no good reason,'" McCrary says. "Police departments need to engage with their communities in a way that actually makes them feel protected."

"In some ways, you're asking police to do things that are inconsistent with what they are sworn to do, which is simply to enforce the law. But you can't have blinders on. What is, at the end of the day, the best solution? What is the fair solution? What's going to be the best resolution? It may not simply be to just enforce the law as it's written."

Former U.S. Attorney General Eric H. Holder Jr. '76, on the arrests of two African-American men for sitting at a table at Starbucks

More than **10.6 million** arrests were made in the United States in 2016, down from a peak of 15.3 million in 1997. A sample of those arrests:

Violent offenses **4.8%**

Simple assault **10.1%**

Property offenses (theft, burglary, arson) **12.7%**

Drug crimes **14.8%**

Other nontraffic offenses **30.5%**

Vera Institute of Justice report "Every Three Seconds"

Who gets arrested?*

WHITE

69% of arrests

77% of U.S. population

BLACK

27% of arrests

13% of U.S. population

NATIVE AMERICAN

2.3% of arrests

1.3% of U.S. population

ASIAN

1.5% of arrests

5.8% of U.S. population

Vera Institute of Justice report "Every Three Seconds"; U.S. Census population estimates 2017, U.S. Census Bureau

*Vera Institute and the U.S. Census Bureau categorize "Hispanic" as an ethnicity, not a race.

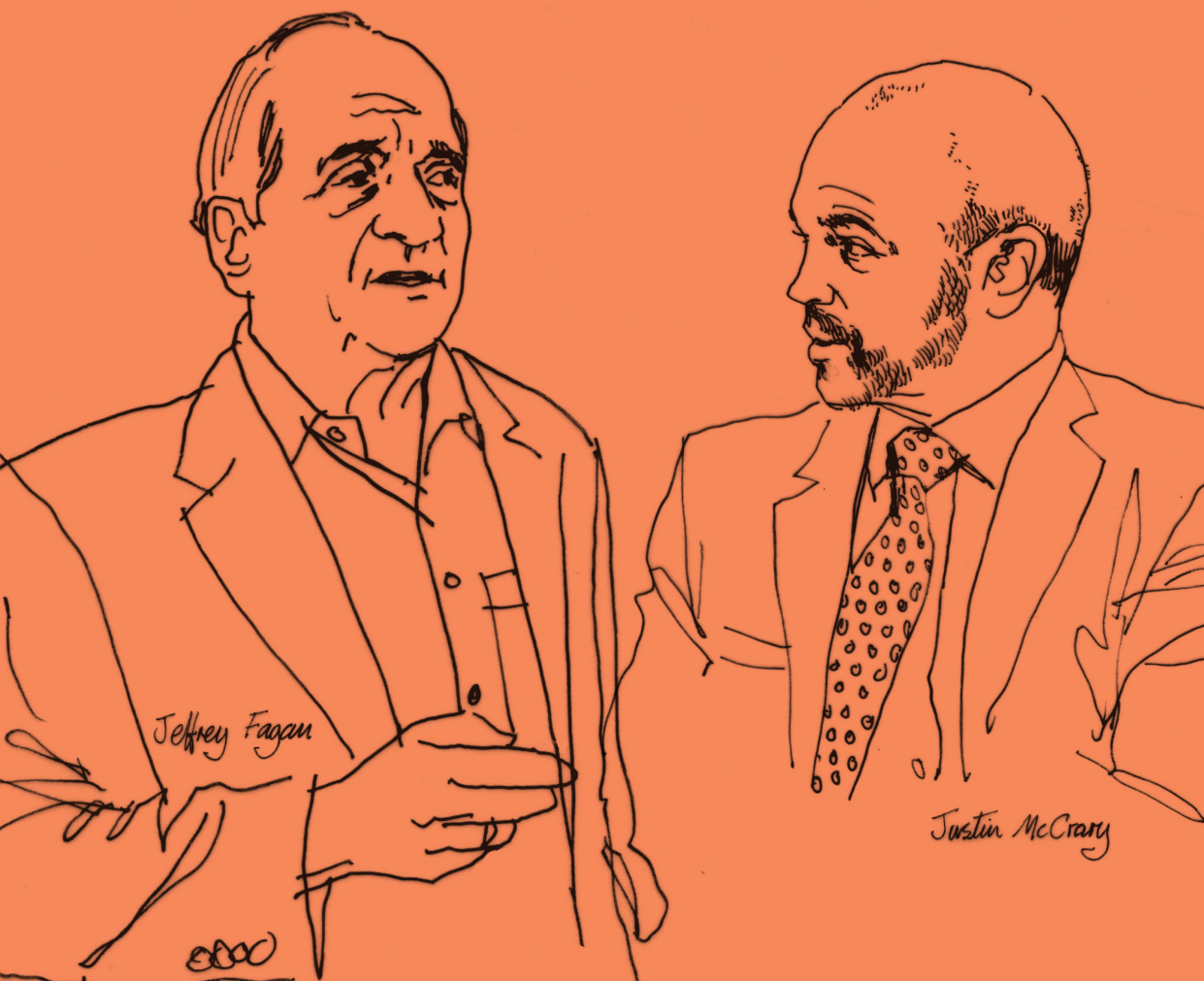
Arrest rates by location (per 100,000 residents)

Major cities (>50,000 residents) **3,332**

City suburbs **4,604**

Small cities (<50,000 residents) **4,090**

Vera Institute of Justice



Cash Bail

Are algorithms the answer?

The social and economic costs of the bail system and pretrial incarceration are pervasive and corrosive. “People can lose their jobs, homes, and even custody of their children after only a day or two in detention,” says **Associate Professor Kellen Funk**, who recently published “The Present Crisis in American Bail” in *The Yale Law Journal*. “Studies show that locking people up pretrial can be a cause of future criminality.”

The California Money Bail Reform Act that was signed into law in August 2018 was supposed to end cash bail in that state and was hailed as a model for other jurisdictions. No longer would judges incarcerate individuals awaiting trial based on rigid bail schedules and inability to pay. Instead, risk-assessment algorithms would help determine which defendants should be incarcerated, based on how much of a threat they pose to public safety or the likelihood that they would not show up for court appearances.

But many of the bill’s original proponents opposed the final version, including the ACLU of California, which said it could not “promise a system with a substantial reduction in pretrial detention.” The bail bond industry also fought the law and gathered enough signatures for a referendum; California voters will decide the fate of the law in November 2020, when the question appears on the ballot.

The proposed alternatives to cash bail that are sweeping the nation may not be a panacea. Funk and students in his seminar on the American bail system submitted a paper to the Criminal Law Advisory Committee of the Judicial Council of California in 2018 cautioning that risk assessment, even by algorithm, involves subjective judgments and political choices that could lead to the continued detention of the same population of low-income arrestees.

Nevertheless, Funk is optimistic about the bail reform movement: New Jersey has virtually eliminated cash bail, New Mexico has restricted it, and New York will eliminate it for most misdemeanors and nonviolent felonies beginning in 2020. He continues to write and file amicus briefs in federal courts challenging the constitutionality of cash bail. “Protection of pretrial liberty from arbitrary detention is a core part of our constitutional tradition,” Funk says.

“Pretrial practice and the bail experience are shaped almost entirely by the peculiarities of local law. An individual arraigned in one jurisdiction may find even the most critical rules of criminal procedure . . . unrecognizable from that of her peer, accused of the identical crime in a neighboring state.”

Dorothy Weldon '19, founder of the Columbia Bail Fund Project, which trains students to be licensed bail bond agents who post bail for indigent clients, in her article “Bail Again: Reforming Appellate Review of Bail Determinations in State Court” (*Columbia Law Review*)

63% of the **720,000** people in local jails are there pretrial.

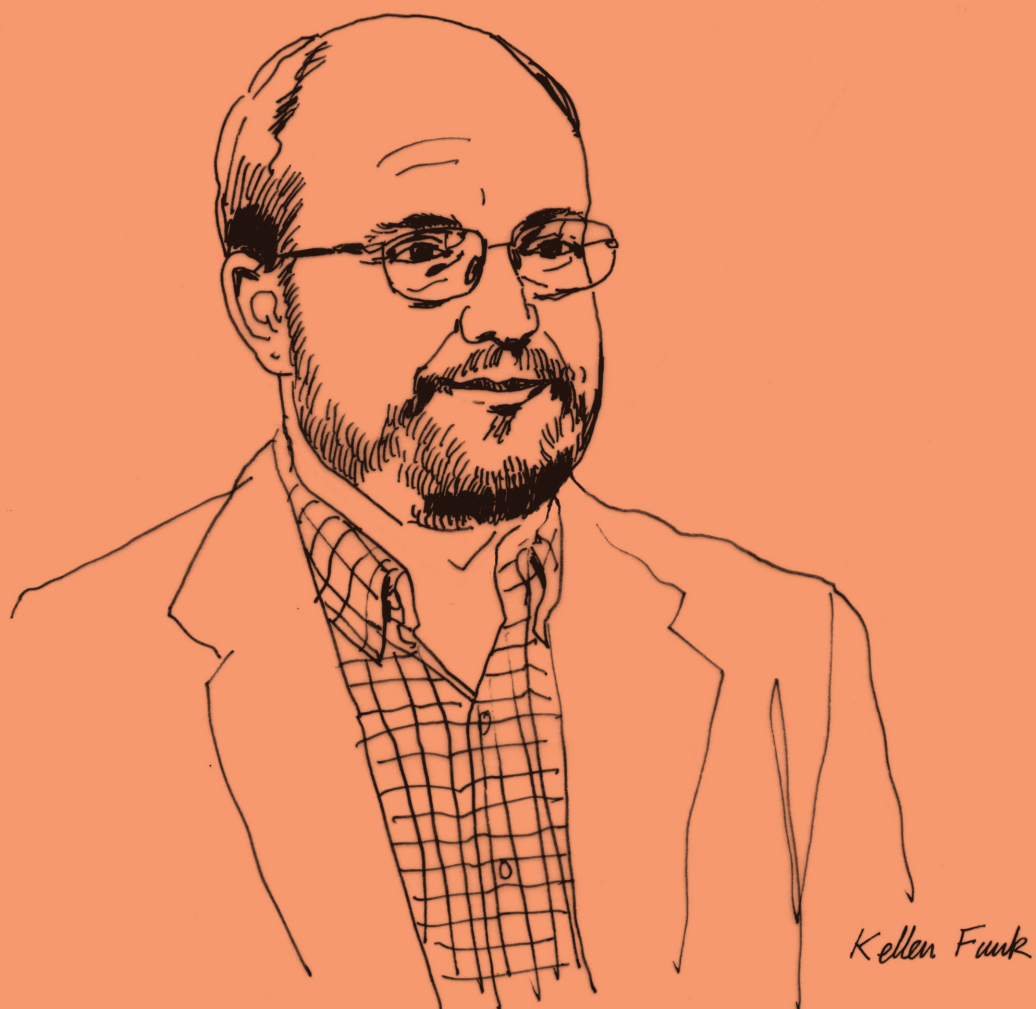
U.S. Bureau of Justice Statistics

99% of jail population growth from 1999 to 2014 was in the detention of pretrial and other non-convicted individuals.

Prison Policy Initiative

The **25,000** bail bond agencies in the United States generate \$14 billion in annual revenue and **\$2 billion in profit.**

“Selling Off Our Freedom,” a joint report by Color of Change and the American Civil Liberties Union



Sentencing

Does the punishment fit the crime?

Should a rapist go to prison for two years, five years, or life? Should an embezzler serve one year or 10? Policymakers, legislators, prosecutors, and judges share responsibility for the length of criminal sentences and the growth of state and federal prison populations by 350 percent from 1980 to 2016. The rise is attributed in part to changes in mandatory minimum sentencing policies.

Professor Daniel C. Richman, a former federal prosecutor, explored the topic in his essay “Accounting for Prosecutors,” published in *Prosecutors and Democracy* (Cambridge University Press, 2017). Since prosecutors decide what charges to bring and against whom, he says, they in effect define criminal law.

In Richman’s seminar on sentencing (which he teaches with Judge Richard Sullivan of the U.S. Court of Appeals for the 2nd Circuit), students consider the purposes of prison sentences: keeping criminals off the streets, deterring crime, and providing retributive justice.

“Retribution sounds medieval because people think of vengeance, but you can think about it in terms of moral deserts,” Richman says.

Discussions about sentencing reform often focus on reducing mandatory minimum sentences for drug offenders, who comprise just 20 percent of the overall prison population. By contrast, 50 percent of the prison population is serving time for violent crimes, including aggravated assault, kidnapping, murder, and rape.

“You could release the entire population of drug offenders across American jurisdictions, and it wouldn’t change America’s status as the world leader in incarceration,” Richman says, though he adds that the harsh realities of the drug trade must still be addressed.

“Until we figure out how long it is appropriate to keep violent offenders in prison,” he continues, “we’re not going to have serious sentencing reform.”

“The conservative case for reform is obvious: Spending billions of dollars on prison expansion and lengthy sentences is outdated and ineffective. And the state level is where reform will be the most effective—the majority of people are incarcerated in state systems.”

Brandon Garrett ’01, author of *Convicting the Innocent: Where Criminal Prosecutions Go Wrong* and a professor at Duke Law School, in *Slate*

Nearly **one in nine** people in U.S. prisons—162,000 inmates—**are serving a life sentence.**

That is an all-time high. An additional 44,333 individuals are serving “virtual life sentences” of 50 years or more.

The Sentencing Project

97% of federal defendants convicted of a felony or Class A misdemeanor offense **accepted a plea-bargain agreement with prosecutors rather than receiving a verdict at trial.**

U.S. Sentencing Commission

First-time violent offenders sentenced to probation rather than prison:

1984:
37%

2015:
7.1%

Bureau of Justice Statistics and U.S. Sentencing Commission



Juvenile Justice

Why are police arresting so many children of color?

Although the overall incarceration rate has increased nationwide, the number of children locked up in the United States has fallen by more than 50 percent since 2001. But as in the larger criminal justice system, a disproportionate number of them are children of color.

Research shows that racial disparity in arrests especially among African-American youth drives the disproportionate incarceration rates, says **Associate Clinical Professor Colleen Shanahan '03**, who has documented the impact of juvenile court fees on low-income families of color. **"The question becomes, what explains the racial disparity in arrests?"**

In schools, for one, zero-tolerance discipline policies and more police officers have created a school-to-prison pipeline in which students accused of misbehavior—a situation that is itself subject to racial bias—end up in juvenile court. Girls of color face harsher school discipline than their white peers, as **Professor Kimberlé Crenshaw** detailed in her 2015 report "Black Girls Matter: Pushed Out, Overpoliced, and Underprotected."

But many states have recognized the enormous expense of juvenile detention facilities and their failure to prevent repeat offenses. Alternatives like community-based programs and smaller group-living facilities prioritize age-appropriate rehabilitation. The sharp decrease also reflects a developmental model of juvenile justice—much of it based on work by **Professor Elizabeth Scott**—that recognizes that a significant portion of juvenile crime is due to adolescent immaturity.

This newer approach to young offenders has support across the political spectrum because it is "more effective and cheaper than locking kids up, which is more likely to result in kids' engaging in a life of crime," Scott says.

In 2005, the U.S. Supreme Court ruled in *Roper v. Simmons* that the death penalty for juveniles is unconstitutional. The court cited "Less Guilty by Reason of Adolescence," a 2003 journal article Scott co-wrote. In 2012, citing *Roper* and Scott, the court held that juveniles could not be subjected to a mandatory sentence of life imprisonment without parole. The court adopted Scott's argument that adolescents are less culpable than adults because their brains are not fully formed, and therefore they deserve less punishment.

"Safety does not exist when black and brown young people are forced to interact with a system of policing that views them as a threat and not as students. . . . Police in schools is an issue of American racial disparity that requires deep structural change."

Judith Browne Dianis '92, executive director of the **Advancement Project**, in the report **"We Came to Learn: A Call to Action for Police-Free Schools"**

Number of children incarcerated in 2000:

108,802

in 2016:

45,567

69%

of children sent to residential placement by a juvenile court

are children of color.

Office of Juvenile Justice and Delinquency Prevention (OJJDP)

In 2016, **2,100 people were serving a juvenile sentence of life without parole.**

Since *Montgomery v. Louisiana* (2016) made retroactive a previous ruling ending such sentences, 1,700 people have been resentenced (but remain in prison).

Slate, Campaign for the Fair Sentencing of Youth

African-American youth in the Los Angeles school system

25% of arrests, citations, or diversions in 2018

<9% of the student population

University of California, Los Angeles, Million Dollar Hoods Project



Punishment

What is cruel and unusual?

Professor Robert Ferguson wrote that **U.S. prisons are “harsher than those in any but totalitarian countries”** in his seminal book, *Inferno: An Anatomy of American Punishment*. He quoted U.S. Supreme Court Justice Anthony Kennedy, who bemoaned in a speech to the American Bar Association that allowing a penal system “to degrade or demean individuals is not acceptable in a society founded on respect for inalienable rights of the people.”

These concerns are at the heart of separate cases taken up by Columbia Law **Professors Brett Dignam and Bernard E. Harcourt** on behalf of individuals in solitary confinement and on death row. Working with teams of students, they have raised challenges to practices they argue are unconstitutional and inhumane.

In 2018, Harcourt tried to stop the execution of Alabama inmate Doyle Lee Hamm, whom he has represented pro bono since 1990. He submitted detailed medical evidence to demonstrate that cancer and intravenous drug use had compromised Hamm’s veins and that attempting to perform a lethal injection would be “barbaric” and violate the Eighth Amendment’s prohibition of “cruel and unusual punishment.” Harcourt was proved right: The execution attempt was halted after Hamm was subjected to more than two hours of bloody prodding.

Similarly, solitary confinement is tantamount to torture, according to research by Dignam and students in the Challenging the Consequences of Mass Incarceration Clinic, which she directs. They are representing Richard Reynolds, who had been living in “extreme isolation” on death row for 21 years when, in 2016, the Connecticut Supreme Court upheld the state’s 2012 abolition of capital punishment. As a result, he was later resentenced to life imprisonment but subjected to a new statute that mandated permanent solitary confinement. In April 2019, five clinic students argued in U.S. District Court for the District of Connecticut that Reynolds’s treatment violates the Eighth Amendment, the 14th Amendment, and the Constitution’s ex post facto clause.

“The legal claims are complicated,” says Dignam, “but our immediate goal was to get him out of solitary and into the general prison population.”

*“If I were a queen,
there would be no
death penalty.”*

U.S. Supreme Court Justice
Ruth Bader Ginsburg ’59,
at Columbia Law School,
September 21, 2018

*“The victims’
families have been
told their catharsis
is going to come
from punishment.
And it’s just cruel,
because it doesn’t.”*

Clive Stafford Smith ’84,
author of *Injustice:
Life and Death in the
Courtrooms of America*,
in *The Guardian*

**80,000
people
are in solitary
confinement
in the United
States.**

U. S. Bureau of
Justice Statistics via
American Friends
Service Committee

Individuals
in solitary
confinement
spend
**22 to 23
hours a day
in cells
measuring
60 to 80
square feet.**

U.S. Department
of Justice

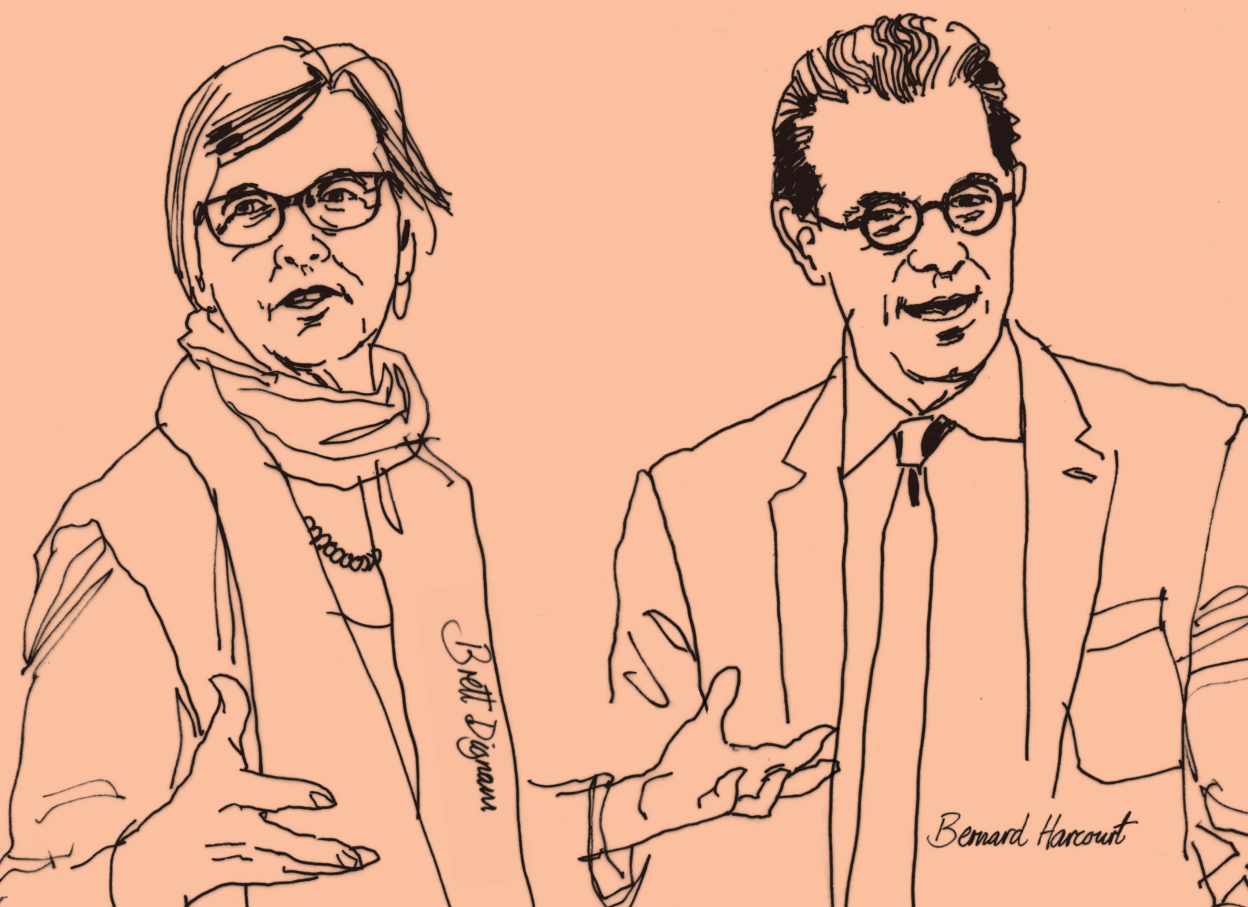
2,721
individuals are on
death row in the
30 states where
capital punishment
is legal.

55 (2 percent)
are women.

Criminal Justice
Project of the NAACP
Legal Defense and
Educational Fund

517
people were on
death row in 1968.

U.S. Bureau of
Justice Statistics



Release and Reentry

How can the formerly incarcerated make a new life?

As the prison population has soared since 1990, so has the number of people released: In 2016, nearly 875,000 people were under parole supervision in the United States, according to the U.S. Bureau of Justice Statistics (BJS). Reentry programs aim to reduce the high rate of recidivism, but the difficulty, **Professor Susan Sturm** says, is matching the scale of the programs to the need.

“There is very good data about what works to help formerly incarcerated people transition to living in the community,” Sturm says. **“How you implement programs at a systemic level—that can have the impact on the programmatic level—is something that we don’t have answers to.”**

Some federal funding is available for reentry programs to help formerly incarcerated people find jobs, housing, and health care. The First Step Act of 2018, for instance, provides \$375 million over five years for reentry programs, though it has not yet been fully funded.

Sturm’s work has focused on access to education because it is “one of the most important ways” of preventing recidivism. Only half of adults in prison have a high school diploma or an equivalent, according to BJS statistics. The Center for Institutional and Social Change, which Sturm directs, teamed with Hostos Community College in New York City to identify the barriers keeping formerly incarcerated people out of education programs.

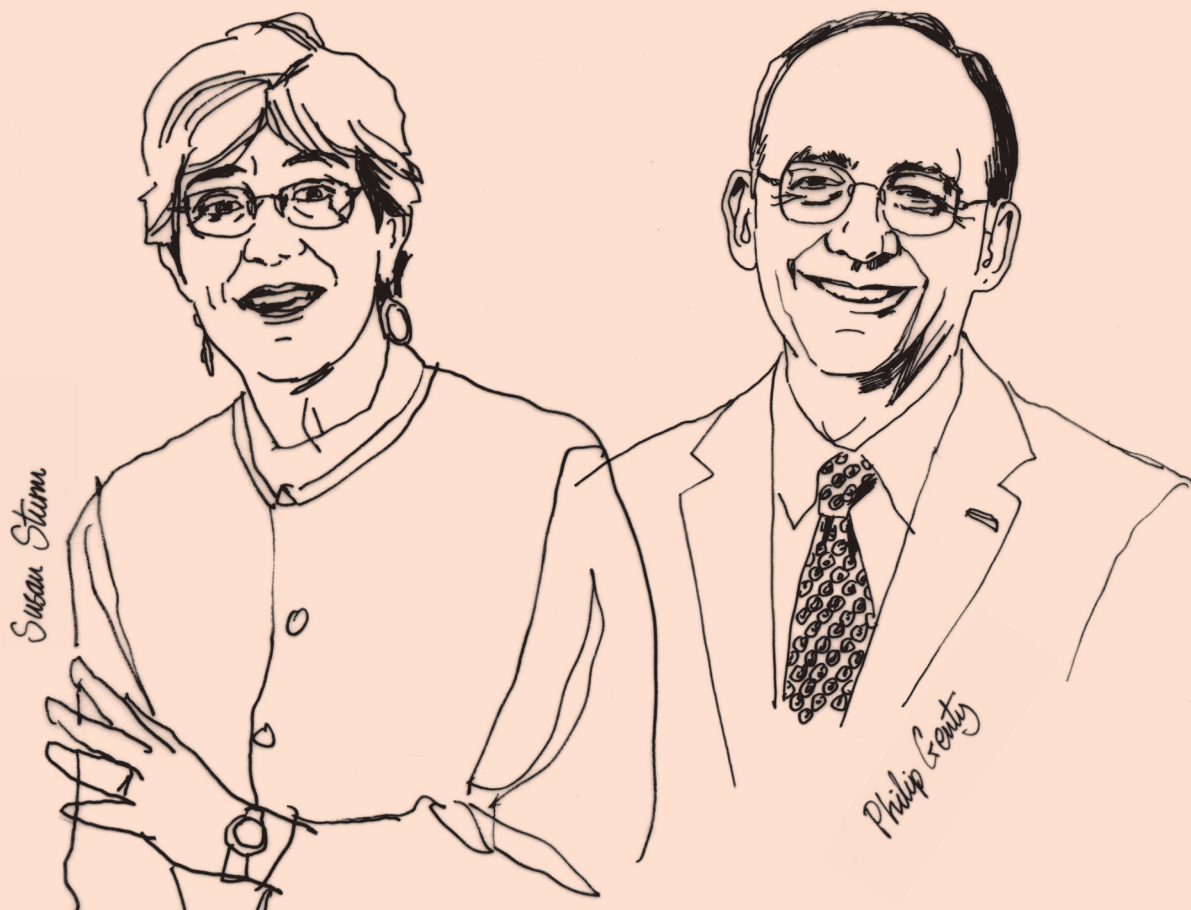
Columbia Law **Professor Philip Genty**, an expert in prisoners’ rights and family law, is designing a new clinic for Columbia Law students that will focus on remedies for “collateral consequences” of incarceration, such as the ability to seal a conviction or win back a work-related license.

Genty wants to find ways for formerly incarcerated people to build on skills they learned in prison, whether it is pro se legal research or peer mentoring.

A program to help a jailhouse lawyer become a paralegal, for instance, would provide not only a good job but also the ability to help other formerly incarcerated people. “Part of what works, I think, is bringing people together who have experiences from inside the prison,” Genty says, “not only to support each other but also to build on each other’s strengths.”

“Recidivism is often linked to financial insecurity, and finding work after incarceration is difficult. Helping individuals develop skills to build their own businesses offers them a route to a more secure and stable future.”

Meg Gould ’21, who is co-developing a program to help formerly incarcerated people become certified paralegals



More than **two-thirds** of former state prisoners are **rearrested within three years of release.**

U.S. Bureau of Justice Statistics

Since 2000, **the number of adults under parole supervision has risen 21% to 874,800.**

U.S. Bureau of Justice Statistics

Adults with no high school or college credentials (25+)

25% of the formerly incarcerated

13% of the public

Adults with bachelor’s degree (25+)

4% of the formerly incarcerated

29% of the public

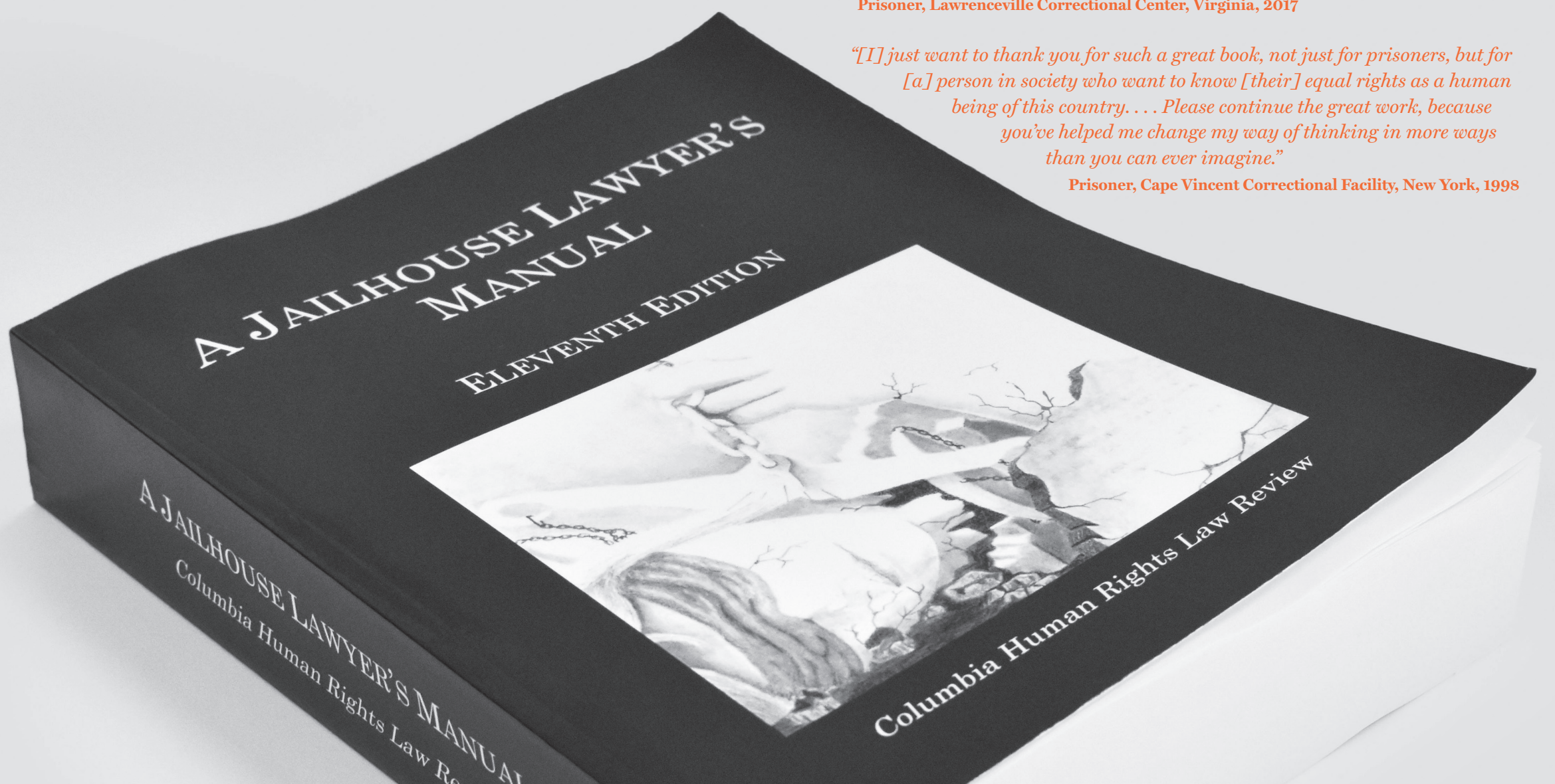
Prison Policy Initiative

A Jailhouse Lawyer's Manual

“The manual helps to empower prisoners to exercise a right we, as a society, hold dear—the right to speak for oneself. . . . *A Jailhouse Lawyer's Manual* should be read by everyone involved in, or concerned about, prisoners' rights.”

Foreword by U.S. Supreme Court Justice Thurgood Marshall, 1992

A Jailhouse Lawyer's Manual is a handbook of legal rights and procedures produced for use by people in prison by the student editors of the *Columbia Human Rights Law Review*. Since the publication of the first edition in 1978, tens of thousands of incarcerated people have used the manual to learn about and exercise their legal rights. More than 1,000 copies are shipped annually to prisoners, institutions, libraries, and legal practitioners across the United States.



“You guys should be given medals. I am an HIV positive inmate. I've learned so much and been able to give my fellow prisoners a lot of help. I love your BOOK. I wish I could have typed this letter but I'm confined to SHU [solitary confinement] punishment housing. . . . I think every person who comes to prison in NY State needs this fantastic book. . . . This Book could also be called Law for Dummies. I knew nothing the first time I got ahold of this book. Please keep up the good work.”

Prisoner, Auburn Correctional Facility, New York, 2003

“Enclosed is a Final Judgment Order from a litigation enforcing my civil rights. Be happy to know I justly used my JLM throughout the case acting pro se. Specifically, utilizing the Summary Judgment [template] provided. Attorneys that I contacted seeking representation as the case was being set for trial wrote and said my work is some of the best pro se they've seen.”

Prisoner, Mount Olive Correctional Complex, West Virginia, 2017

“I went to settlement in the United States District Court. . . . A Jailhouse Lawyer's Manual is the reason for my success. The manual is easy to use and understand. It is important you know your hard work pays off.”

Prisoner, Lawrenceville Correctional Center, Virginia, 2017

“[I] just want to thank you for such a great book, not just for prisoners, but for [a] person in society who want to know [their] equal rights as a human being of this country. . . . Please continue the great work, because you've helped me change my way of thinking in more ways than you can ever imagine.”

Prisoner, Cape Vincent Correctional Facility, New York, 1998

Faculty Scholarship

In addition to the works cited on the previous pages, Columbia Law School faculty have produced these and other influential articles and books. Read these pieces and more at law.columbia.edu/criminal-justice-reform.

Harold S.H. Edgar

“Herbert Wechsler and the Criminal Law: A Brief Tribute,” *Columbia Law Review* (2000)*

Jeffrey A. Fagan

“Aggressive Policing and the Educational Performance of Minority Youth,” with Joscha Legewie, *American Sociological Review* (2019)

George P. Fletcher

Rethinking Criminal Law, Little, Brown (1978)

Kent Greenawalt

“The Perplexing Borders of Justification and Excuse,” *Columbia Law Review* (1984)

Bernard E. Harcourt

The Illusion of Free Markets: Punishment and the Myth of Natural Order, Harvard University Press (2011)

James S. Liebman

“A Broken System: The Persistent Patterns of Reversals of Death Sentences in the United States,” with Andrew Gelman, Valerie West, and Alexander Kiss, *Journal of Empirical Studies* (2004)

Gerard E. Lynch '75

“Our Administrative System of Criminal Justice,” *Fordham Law Review* (1998)

Justin McCrary

Controlling Crime: Strategies and Tradeoffs, co-edited with Phil Cook and Jens Ludwig, University of Chicago Press (2011)

Daniel C. Richman and Jeffrey A. Fagan

“Understanding Recent Spikes and Longer Trends in American Murders,” *Columbia Law Review* (2017)

*Herbert Wechsler '31 was a longtime faculty member at Columbia Law School and, as director of the American Law Institute for 21 years, created the still-influential *Model Penal Code* (1962).

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