

## **Liman Workshop**

# **Moving Criminal Justice: Practices of Prohibition, Abolition, Regulation, and Reform**

**Spring 2014**

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

Hope Metcalf, Director, Liman Public Interest Program  
Megan Quattlebaum, Senior Liman Fellow in Residence  
Judith Resnik, Arthur Liman Professor of Law

Student Conveners: Jessica Asrat, Emma Kaufman,  
Josh Levin, Sam Oliker-Friedland

**All readings available at:**

**<http://www.law.yale.edu/intellecтуallife/workshopsyllabus.htm>**

A consensus is emerging that all facets of the criminal justice system -- prosecutorial and police practices, detention, and sentencing -- need reform. This workshop considers how reform agendas are formulated, do or do not gain currency, and result in changes in laws and practices that produce consequences, both generative and harmful. Our questions include the parameters of proposed reforms; the alternative modes of government regulation (e.g., prohibition, abolition, regulation); the intellectual and political gestalts in which reforms are shaped; the impact of federalism and transnational lawmaking; and how such efforts develop traction, build on extant social, religious, and political movements or create new ones, use communication systems and law, receive financing, and imagine the future.

We meet weekly; preparation and attendance at these discussions is required for credit. The syllabus below includes both readings and questions to facilitate preparation for discussion. If you need to miss a class, please be in touch with the professors in advance of the meeting. Students missing more than two sessions without permission will not receive credit. All students participating for the option of credit/fail must submit six comments on readings. To do so, you need to post on "Inside Yale" a one-two page analysis and reflection on readings -- due NO LATER than 9 a.m. on the Monday mornings of the

workshop -- as well as send a set by email to the instructors. Please use these comments to address how you see the relationships among the readings for the particular class. Failure to post the required number of reflections on time results in receiving no credit.

This workshop is offered for 2 units, with the option of graded credit. To receive graded credit, students are, in addition to the required reflections, to write a paper of no more than 15 pages on a topic of their choice. The topic must be approved in advance by the professors and related to the seminar. In addition, students may, with the permission of the instructors, receive SAW/Supervised Analytic and an extra credit for their papers. Students wishing to explore this option must approach the instructors within the first two weeks of the semester.

This syllabus outlines the subject matters and provides sets of readings, not all of which will be assigned. The first week's readings are set forth below; thereafter, we will specify which readings are required for the following week. Readings are posted for each week on the class site as well as on the Liman Public Interest Program's website: <http://www.law.yale.edu/intellectuallife/workshopsyllabus.htm>). Participants are welcome to suggest supplemental readings and/or in comments to post links to relevant additional articles.

Throughout the syllabus, you will find questions following the readings; these prompts are meant to preview the class discussions and to explain the links across the materials. Please be sure to bring a copy of the U.S. Constitution to class (we will provide a pocket version for those who need them).

## Topics

- Jan. 27 The Architecture of Reform: Imagining Alternatives
- Feb. 3 Prohibitions: Alcohol
- Feb. 10 Prohibitions: Drugs
- Feb. 17 Criminalization or Regulation? Smoking/Guns
- Feb. 24 Detention Before Trial: Bail Reform in the 1960s,  
the 1980s, and in 2014
- Mar. 3 Victims' Roles and Rights
- Mar. 10 Death Penalty Abolition
- Mar. 24 Sentencing: Cycles of Reform
- Mar. 31 Framing Reforms through the Demography of  
Incarceration: For and Against "the New Jim Crow"
- APRIL 3-4 LIMAN COLLOQUIUM  
ISOLATION AND REINTEGRATION: PUNISHMENT CIRCA 2014
- Apr. 7 Engendering Punishment: Where are Women and Men? Why?
- Apr. 21 From Prisoners' Rights to Reentry as Social Movements
- Apr. 28 The Political Economies of Reform

## Syllabus

### January 27    **The Architecture of Reform: Imagining Alternatives**

This introductory session serves as a reminder that efforts to change societal approaches to behaviors and label some "crimes," as well as to refashion the modes of punishment, span centuries and continents. As you read the excerpts, consider what ideas about government, individuals, a particular nation-state, and communities are in play in the different eras glimpsed.

We have a host of questions to begin to puzzle through during the semester, and we flag some at the outset to keep in mind throughout the semester. What are the theoretical groundings for punishment and how are they materialized in practice? What harms merit criminalization? Regulation short of criminalization? What are the assumptions about the demographics of those subject to and in need of criminal law control? How universal is the imagined subject or citizen or entity (such as a corporation) whose conduct is being policed? And what turns on identifying a person as a citizen in a democratic polity?

What are the sources of authority to punish and how do/might they vary at the federal, local, or transnational levels? What role does religion (and which religions) play in the formulations? What are the requisite governmental capacities and financial resources to build criminal justice systems? Reflect throughout the semester on how knowledge is produced about the particular topics - what industries, governments, and other groups fund data collection that produces information about the impact of behaviors and laws?

What role does space - public and private - play? What theories animate the architectural choices? What institutions are the predicates for or are sought to be created to implement criminal justice and regulatory programs? When innovations are argued, what are their imagined utilities, and the sources for the various designs?

## **Prisons Over Time and Space: Public and Private Constructions of Authority**

Jeremy Bentham, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION, excerpts, Ch. 1, 4, and 8 (1822)

What justifies punishment? Its limits? Its modes?

Jeremy Bentham, THE PANOPTICON WRITINGS (1787) (ed. Miran Bozovic, 1995) Letter II (Plan for a Penitentiary Inspection-House), pp. 35-37; Letter V (Essential Points of the Plan) pp. 43-45; Letter VI (Advantages of the Plan), pp. 45-48; Letter VII (Penitentiary-Houses, Safe Custody), pp. 47-50; Letter IX (Penitentiary-Houses-Economy-Contract-Plan), pp. 51-54.

What animates the interest in a particular configuration of space? What are the reasons for detailing the arrangement? What are the purposes of observation? How was the proposed system to be organized and financed?

Michel Foucault, DISCIPLINE AND PUNISH (1975, trans. Alan Sheridan, 1977), The Body of the Condemned, 3-16; Panopticonism, 215-228

What are the different modes of discipline imposed by the state? The critique of the privatization of punishment? What is the scope of the critique? The particular objections to what Foucault terms "panopticonism"?

Judith Resnik & Dennis Curtis, *Justice Facilities: Jails, Prisons, and Courts*, from REPRESENTING JUSTICE: INVENTION, CONTROVERSY AND RIGHTS IN CITY-STATES AND DEMOCRATIC COURTROOMS, 222-224, 519-521 (2011)

What political and economic forces have produced prisons? How have the relevant industries changed?

## **The Role of the Judiciary in Structuring Conditions of Confinement**

*Bell v. Wolfish*, 441 U.S. 520, 522-543, 555-564, 568-571, 579-581, 594-96 (1979)

Consider how the case came to be filed. What are the precedents that made it plausible for prisoners to seek relief from courts? How would such litigation be funded? What role would detainees, as contrasted with lawyers and the media, have likely played? What theories of law and what aspects of the U.S. Constitution are advanced as the basis for judicial findings that federal detention rules are unconstitutional? How does the majority respond? What turns on conceptualizing the detention as "punishment" as contrasted with deprivations of liberty and privacy? Would the outcome have been different had the detention center been a state, rather than a federal, facility?

*Florence v. Board of Chosen Freeholders*, 566 U.S. \_\_\_\_ (2012)

### **New Designs for Prisons**

Kaitlin Miner, *Landscape Architecture Students Explore New Designs with Women's Correctional Facility*, IOWA STATE DAILY NEWS (May 18, 2011)

William Petrowski, *New \$68 Million Mitchellville Women's Prison to Offer "Softer, Gentler" Environment for Inmates*, DES MOINES REGISTER (Oct. 25, 2013)

What are the relationships of the news reports on the new design for a prison in Iowa and the commentaries by Bentham and Foucault? What are the reforms—physical and otherwise—described in the two articles? What prompted interest in changing the design? How was the reconceptualization funded? How and why is the gender of the prisoner relevant?

### **Feb. 3 Prohibitions: Alcohol**

Prohibition was an international abolitionist movement, focused on the harms of alcohol to both the individuals addicted and the households in which they lived. Women were in the leadership, and this worldwide movement produced, in the United States, two constitutional amendments. This session explores how Prohibition came to be, the impact of federalism on Prohibition's implementation, and Prohibition's effects on U.S. law. In the next sessions, we turn to other anti-addiction movements, the "war on drugs," and efforts to limit smoking and guns to consider how these movements overlap and differ. As you read, think about framing the problems in terms of criminalization, legalization, regulation, medicalization, public health, autonomy, liberty, and federalism.

### **Social Mobilization**

S. J. Mennell, *Prohibition: A Sociological View*, 3 J. OF AM. STUDIES 159-75 (Dec. 1969)

Ian R. Tyrrell, *WOMAN'S WORLD/WOMAN'S EMPIRE: THE WOMAN'S CHRISTIAN TEMPERANCE UNION IN INTERNATIONAL PERSPECTIVE, 1800-1930*, 1-10 (UNC-Chapel Hill, 1991)

What are the forces that Mennell and Tyrrell credit with producing the Prohibition movement? What roles did religion, gender, race, and ethnicity play in producing amendments to the United States Constitution? What factors contributed to Prohibition's demise?

### **Federal Prohibitions**

United States Constitution, Amends. XVIII, XXI

National Prohibition Act, Pub. L. 66-66, Stat. ch. 85, 41 Stat. 305-323 (1919)

Review the Amendments' texts and the statute. What did the 1919 prohibition amendment authorize? How did Congress implement the constitutional mandate? Look at the many provisions (which is why we gave you these provisions) of the federal legislation. Why is the statute so detailed? And what are its directives to federal, state, and private actors? Who is regulated? Who sanctioned? How?

## **Federalism and Prohibition**

*Lanza v. United States*, 260 U.S. 377 (1922)

*Tumey v. Ohio*, 273 U.S. 510 (1927)

Consider the federal-state interplay in the regulation and prohibition of alcohol, as is discussed in the three cases excerpted below. What animates the "dual sovereignty" exception to double jeopardy? Why would Ohio have provided incentives for prosecution of Prohibition crimes?

## **Repeal, Regulation, and Monopoly**

We turn to the contemporary period, the beverage industry, the Twenty-First Amendment, and transnational policies. What are alcohol's health effects that are today thought to be troubling or useful? What regulatory apparatus is in place? Or missing?

How broad is the constitutional license to states? Why, in 2005, did the Court split 5-4 on state regulation of imported alcohol? What, in practice, constrains diversity and differences in state policies? Then consider the materials on the Nordic monopolies over alcohol and EU policies, as you think about what forms of regulation, control, or criminalization would be desirable, and the role of the industries affected in policy reforms.

Alcohol and Public Policy Group, *Alcohol: No Ordinary Commodity* (a Summary), 105 ADDICTION 769, 769, 770-773, 774, 777 (2010)

*Granholm v. Heald*, 544 U.S. 460 (2005)

Jenny Cisneros Örnberg & Hildigunnur Ölafsdóttir, *How to Sell Alcohol? Nordic alcohol monopolies in a changing epoch*, 25 NORDIC STUDIES ON ALCOHOL AND DRUGS 129, 129-130, 132, 133-134, 136, 140, 141-142, 143, 148-150 (2008)



## **Feb. 10 Prohibitions: Drugs**

As you read, consider how the history of alcohol prohibition informs discussions of "the war on drugs," implemented through many criminal statutes. What sense of harm animates efforts to prohibit drug use? What conflicts about the benefits and the liberties of individuals are played out in the case law. As you read debates about the conflict over state and federal authority, consider whether uniformity is important and why? What range of decisions ought to rest at the state and local levels? Would you be supportive of resolutions through constitutional amendments to license state control over marijuana or other intoxicants? Or ought these issues be ones for national control?

Harry G. Levine & Craig Reinerman, *From Prohibition to Regulation: Lessons from Alcohol Policy for Drug Policy*, 69 MILBANK QUARTERLY 461 (1991)

George Fisher, Tables and Maps from *The Euphoria Taboo: Earliest American Anti-Cocaine Laws* (draft, 2010)

How does Levine and Reinerman's account of Prohibition's inception differ from that provided by Mennell and Tyrrell? What are Levine and Reinerman's views of the impact of Prohibition, its connection to crime in general, and what caused Prohibition's repeal? What controls came in? At what level of government? The aims of regulation? The effects? And what are the lessons they draw for drug control? What do the table and map regarding cocaine bans suggest about the origins of drug prohibitions?

Robin M. Murray, Paul D. Morrison, Cécile Henquet, & Marta Di Forti, *Cannabis, the Mind and Society: The Hash Realities*, 8 NATURE 865, 892-893 (2007)

Wayne Hall & Louisa Degenhardt, *Adverse Effects of Non-Medical Cannabis Use*, 374 LANCET 1383, 1383, 1386, 1389-90 (Oct. 2009)

### **Federalism and Marijuana**

*Gonzales v. Raich*, 545 U.S. 1 (2005)

What kinds of uses of marijuana did California license? What views of federal and state authority animate the different opinions and how do views on personal autonomy, health, and liberty affect readings of the Commerce Clause?

In this case and the others that follow, do note the array of amici and consider how their interests are marshaled and forwarded.

*How Does Colorado's Marijuana Market Work?*, THE ECONOMIST, Jan. 6, 2014

Serge F. Kovalski, *Banks Say No to Marijuana Money, Legal or Not*, N.Y. TIMES, Jan. 11, 2014

Peter Shumlin, Governor of Vermont: 2014 Vermont State of the State Address (Jan. 2014)

MARC MAUER, THE SENTENCING PROJECT, THE CHANGING RACIAL DYNAMICS OF THE WAR ON DRUGS (Apr. 2009)

As you read the materials above, consider how they support arguments for and against legalization, and of what drugs.

**Background reading/optional:** Sarah W. Tracy and Caroline Jean Acker, *Psychoactive Drugs: An American Way of Life*, in ALTERING AMERICAN CONSCIOUSNESS: THE HISTORY OF ALCOHOL AND DRUG USE IN THE UNITED STATES, 1800-2000 1-22 (2004)

## **Feb. 17 Criminalization or Regulation: Smoking/Guns**

Smoking and guns are two current examples of items that some would like to ban - and perhaps criminalize - and others see as objects to be used by choice. Return to many of the questions we asked about alcohol and drugs and consider them in the contexts of the regulation of cigarettes and of guns. How did efforts to regulate smoking and to control guns emerge? What forms of regulation - bans, criminalization, information campaigns, product safety efforts - were proposed? What were the sources and funding of the opposition? What organizations and political mobilizations have produced changes and at what levels of government?

In addition to thinking through a descriptive account, what would be your normative goals in these areas? Is the crime control model desirable? What other forms of regulation would you support? Would you favor constitutional amendments to permit more regulation?

## **Smoking**

The materials below invite consideration of how smoking moved from an unregulated to a regulated substance and the current conflicts about whether states can impose regulations atop those of the federal government and the forms that federal regulation can take. What sectors have been key to the mobilization against tobacco? What hurdles did they encounter? What forms of prohibitions or regulations have been and are advanced? What accounts for leadership at different levels and branches of government?

How would you characterize U.S. efforts to curb tobacco use? What is at stake and for whom? How do those efforts compare with those used against drugs and alcohol? What explains the divergent approaches and the choice to medicalize, to regulate, or to criminalize?

Allan M. Brandt, *From Nicotine to Nicotrol: Addiction, Cigarettes, and American Culture*, in *ALTERING AMERICAN CONSCIOUSNESS* 383-399 (2004).

**Optional:** Taiwo A. Oriola, *Ethical and Legal Analyses of Policy Prohibiting Tobacco Smoking in Enclosed Public Spaces*, 37 *J. OF LAW, MEDICINE AND ETHICS* 828 (2009).

## **Liberty, Speech, and Federalism**

Consider the legal framework. What power does the federal government have? What constraints does the U.S. Constitution impose on regulation? Could the federal government ban smoking? If so, why are regulatory approaches problematic? What explains the different approaches among the justices and judges in the cases excerpted? Should the First Amendment be altered? The Supremacy Clause? The tests of their applications?

Michael Pertschuk, *SMOKE IN THEIR EYES: LESSONS IN MOVEMENT LEADERSHIP FROM THE TOBACCO WARS*, 1-9 (2001)

*Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001)

*R.J. Reynolds Tobacco Co. v. FDA*, 696 F.3d 1205 (D.C. Cir. 2012)

Press Release, FDA Unveils Final Cigarette Warning Labels (June 21, 2011), [www/hhs.gov/news/press/2001](http://www/hhs.gov/news/press/2001)

**Optional:** Helene M. Cole & Michael C. Fiore, *The War Against Tobacco: 50 Years and Counting*, 311 JAMA 131-132 (Jan. 8, 2014)

**Optional:** David B. Abrams, *Promise and Peril of e-Cigarettes: Can Disruptive Technologies Make Cigarettes Obsolete?*, 311 JAMA 135-136 (2014)

**Optional:** Sabrina Tavernise, *List of Smoking-Related Illnesses Grows Significantly in U.S. Report*, N.Y. TIMES (Jan. 17, 2014)

Given the 2014 news that cigarettes have become more deadly and do more harm than has been document, would you argue for criminalization of the manufacturing of cigarettes? More regulations? And if so, of what kinds?

### **Comparative Approaches**

What relevance ought regulations in other countries or transnationally have to debates in the U.S. about smoking? What actors are shaping global policies? What are the proposals for criminalization? For more regulation?

G.T. Fong, A. Hyland, R. Borland, & colleagues, *Reductions in Tobacco Smoke Pollution and increases in Support for Smoke-free Public Places Following the Implementation of Comprehensive Smoke-free Workplace Legislation in the Republic of Ireland*, 15 TOBACCO CONTROL 58 (2006).

Am. J. Inter'l Law, *Adoption of the Framework Convention on Tobacco Control*, 97 ASIL 689-91 (2003)

WHO Framework Convention on Tobacco Control (FCTC) (2003, entered into force 2005), Articles 1-10, 14-16, 19,25

WHO Member States (by regions) that are NOT parties to FCTC (Dec. 2010)

Thomas J. Bollyky & Lawrence O. Gostin, *The United States' Engagement in Global Tobacco Control: Proposals for Comprehensive Funding and Strategies*, 304 JAMA 2637 (2010)

## **Guns**

How did the Second Amendment come to be an engine of liberty? What political mobilization accounts for its rise? What theories of constitutionalism support its deployment? In what segments of society can gun ownership be regulated? Why are cities and states the sources of regulation? What role has federalism played in the debates? Should the Second Amendment be altered? And if so, how?

Reva B. Siegel, *Dead or Alive: Originalism as Popular Constitutionalism in Heller*, 122 HARV. L. REV. 191 (2008)

*Illinois Association of Firearm Retailers*, \_\_\_ F. Supp. 2d \_\_\_, (N.D. Ill. 2014)

Philip J. Cook, *The Great American Gun War: Notes from Four Decades in the Trenches*, 42 CRIME & JUSTICE 19, 19-31 (2013)

David E. Patton, *Guns, Crime Control, and a Systematic Approach to Federal Sentencing*, 32 CARDOZO L. REV. 1427, 1440-1447 (2011)

Ben Wittes, *Ditch the Second Amendment*, THE NEW REPUBLIC (March 19, 2007)

## **Feb. 24 Detention Before Trial: Bail Reform in the 1960s, the 1980s, and in 2014**

A current reform effort underway is focused on changing the practices of pre-trial detention. In the 1960s, concerns about the differential effects of pre-trial detention by class and race prompted a major national effort to overhaul

bail.

Those reforms were eroded in the decades thereafter. The renewed concern in the twenty-first century has focused on reducing the numbers in detention. How do the 1960s, 1980s, and current reforms differ? Are the rationales for pre-trial detention being revisited? The methods for deciding who is detained?

What are the measures of "risk" and their predictive value? What conditions and forms of supervision are imposed? What are the utilities and effects of detention and of release?

### **The Theory of Preventive Detention**

Beccaria, Cesare. *Von Verbrechen und Strafen* Breslau: Johann Friedrich Korn, 1788). Rare Book Collection, Lillian Goldman Law Library, Yale Law School.

Cesare Beccaria, *ON CRIMES AND PUNISHMENTS*, 77-79 (XIX, Preventive Detention) (5<sup>th</sup> ed. Trans. Graeme R. Newman & Pietro Marongui, 2009, republishing volume 1754)

### **Civil Rights-Era Reforms of the Federal Bail System**

What institutional actors pressed for reforms? Why? What were the innovations in the 1966 Bail Act? And what produced the 1984 Bail Act? What are the predicates it provides for detention? The bases for their constitutionality?

Daniel J. Freed & Patricia M. Wald, *Bail in the United States: 1964*, Working Paper for the National Conference on Bail and Criminal Justice, introductory materials through page 8 (May 27, 1964)

Bail Reform Act of 1966, Pub. L. 89-465, June 22, 1966, 80 Stat. 214 (18 U.S.C. 3146-3152)

Patricia M. Wald and Daniel J. Freed, *The Bail Reform Act of 1966: A Practitioner's Primer*, 52 A.B.A. J. 940 (1966)

## Revisions in the 1980s

What prompted congressional revisions of the federal bail regime in the 1980s? How did the Court respond in the face of constitutional claims? What are constitutional limits to pre-trial detention? What assumptions about criminal defendants, the state, and liberty animate the decisions?

Bail Reform Act of 1984, Pub. L. 98-473, title II, ch. I (§202 et seq), Oct. 12, 1984, 98 Stat. 1976

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

## State Regimes

Consider brief excerpts of the provisions on bail from California and Texas and the materials on bail schedules from New Jersey and elsewhere. What crimes are singled out, why, and when would you prefer discretionary standards to rules?

What institutions ought to be charged with determining release on bail? What are the arguments for and against reading constitutions to encode judicial discretion in bail determinations? What roles should lawyers play?

California Const. Art. I, Sect. 12 (Added Nov. 5, 1974. Amended June 8, 1982. Amended by Stats.1994, Res. ch. 95 (A.C.A.37) (Prop. 189, approved Nov. 8, 1994)) (**read carefully**)

Texas Const. Art. 1, Sect. 11a (2007) (**read carefully**)

New Jersey Judiciary Statewide Bail Schedules, Nov. 10, 2004

Lindsey Carlson, *Bail Schedules: A Violation of Judicial Discretion?* 26 CRIMINAL JUSTICE (Spring, 2011)

*DeWolfe v. Richmond*, 434 Md. 444 (2013)

## The Political Economies of Bail and of Current Reforms

What are the claims for and against pre-trial detention? Supervision? What industries have an impact on the agendas?

What distinguishes the bail bonds industry, the tobacco companies, and the liquor distributors?

Christopher T. Lowenkamp, Marie VanNostrand, & Alexander Holsinger, *The Hidden Costs of Pretrial Detention* (Laura and John Arnold Foundation, Nov. 2013)

Christopher T. Lowenkamp & Marie VanNostrand, *Exploring the Impact of Supervision on Pretrial Outcomes* (Laura and John Arnold Foundation Nov. 2013)

Zambito, N. J. *Bail Bondsmen in Battle Against Court Plan That would Cut their Business*, STAR LEDGER (Dec. 8, 2013)

**Optional:** JUSTICE POLICY INSTITUTE, FOR BETTER OR FOR PROFIT: HOW THE BAIL BONDING INDUSTRY STANDS IN THE WAY OF FAIR AND EFFECTIVE PRETRIAL JUSTICE (Sept. 2013)

Focus on who is bailed, and what the bail industry now looks like. What are the reasons for a focus on reform in New York and the differing vantage points on what constitutes "reform"? What should be the bases for release? Detention? What roles do and could lawyers play?

**Optional:** Human Rights Watch, *The Price of Freedom: Bail and Pretrial Detention of Low Income Nonfelony Defendants in New York City*, 1 - 10 (2010)

A New Agenda for Bail in NY: The Honorable Jonathan Lippman, *Fiat Justitia, Ruat Caelum: "Let Justice be Done, Though the Heavens Fall"* 1-6 (Feb. 5, 2013)

An Act to Amend the Criminal Procedure Law, in Relation to the Issuance of Securing Orders, Bill No. S4483 (Apr. 3, 2013)

An Act to Amend the Criminal Procedure Law, in Relation to Establishing the detective Peter Figoski Act of 2013 Including the Risk to Public Safety as a Factor in Bail Determinations, Bill No. A2142 (Jan. 9, 2013)

NEW YORK CITY BAR ASSOCIATION, REPORT ON LEGISLATION BY THE CRIMINAL COURTS COMMITTEE AND THE CORRECTIONS AND COMMUNITY REENTRY COMMITTEE (July 2013) (opposing proposed reform to require consideration of threat to public safety in bail determinations)



**Optional:** Mary T. Phillips, *New York City's Bail System - A World Apart*, Research Brief No. 30, Sept. 2012

### **March 3: Victims' Roles and Rights**

Should victims have "rights" and if so, to what and why? Answers - through social movement mobilization - can be found in state constitutions, federal statutes, and court doctrine. Review the arc of change as you consider what "reforms" you would support, given what is now in place.

#### **Changing State Constitutions**

Review some of the states' constitutional provisions on victims. What rights do they confer? What limits on victims' roles are imposed? What role is there for court enforcement? What other remedies could or should be provided?

Frank Carrington & George Nicholson, *The Victims' Movement: An Idea Whose Time Has Come*, 11 PEPP. L. REV. 1, 1-10 (1984)

Comment, *Victims' Rights Amendments: An Irresistible Political Force Transforms the Criminal Justice System*, 34 IDAHO L. REV. 157, 157-162 (1997)

Ariz. Const., Art. II, Section 2.1 (1990)

Conn. Const. Art. I, Section 8(b) (1996)

Cal. Const. Art. 1, Sect. 28 (Added by Initiative Measure, June 8, 1982. Amended by Initiative Measure (Prop. 9, § 4.1, Nov. 4, 2008))

Texas Const. Sect. 30; 31 (1997)

*Hance v. Arizona Board of Pardons and Paroles*, 875 P.2d 824 (Ariz. Ct. App., 1994)

#### **Federal Constitutional and Statutory Rights and Remedies**

Consider the federal statutory provisions, such as the Crime Victims' Rights Act of 1994 and the "civil rights remedy" in the 1994 Violence Against Women Act that the U.S. Supreme Court held unconstitutional in *United States v. Morrison*, 529 U.S. 598 (2000). How do the federal provisions compare with state protections for victims? What difference does constitutionalization make for claims of "victims rights"? What are the possible constitutional bounds on such rights and to what effects?

*Payne v. Tennessee*, 501 U.S. 808 (1991)

Crime Victims' Rights Act of 2004, 18 U.S.C. § 3771  
(enacted as part of the United States Justice for All Act of 2004, Pub. L. No. 108-405, 118 Stat. 2260 (effective Oct. 30, 2004))

Violence Against Women Act of 1994, Civil rights remedy,  
Violence Against Women Act, 42 U.S.C. § 13981 (1994).

Emily Bazelon, *Paying Amy: Doyle Paroline owned two pornographic picture of an 8-year-old-girl. How much should he have to pay?*, SLATE (Dec. 4, 2013) (discussing *Paroline v. United States*, 701 F. 3d 749 (5<sup>th</sup> Cir. en banc, 2012, cert. granted, 133 S. Ct. 2886 (2013))

U.S. Dep't Justice, Office of Justice Programs Office for Victims of Crime, Resource Guide (2005)

**Optional:** U.S. Dep't Justice, Crime Victims' Rights in America: A Historical Overview (2005)

What government funds are devoted, and how does the US Government encourage work with media and other groups to reach victims? What does the Department encourage victims to do?

### **Reconsidering Victims' Roles**

Kristin Henning, *What's Wrong with Victims' Rights in Juvenile Court?: Retributive Versus Rehabilitative Systems of Justice*, 97 CAL. L. REV. 1108, 1007-10 (2009)

MARIE GOTTSCHALK, *THE PRISON AND THE GALLOWS, The Carceral State and the Welfare State: The Comparative Politics of Victims*, pp. 77-82, 85-98; *Not the Usual Suspects: Feminists*,

Women's Groups, and the Anti-Rape Movement, pp. 121-130 (2006)

M. Cherif Bassiouni, *International Recognition of Victims' Rights*, 6 HUMAN RIGHTS L. REV. 203-11; 239, 243-246, 278-279 (2006)

## **March 10            Death Penalty Abolition**

Like other Prohibition movements, the movement to abolish the death penalty in America involves issues of morality, religion, class, gender, and race. This session will examine the history of the death penalty abolition movement, the strategies and objectives of death penalty abolitionists, the source of funding and the coalitions created, and the challenges facing the movement today, including whether to be a proponent of Life Without Parole (LWOP) as a means to ease concerns about death penalty abolition. What are the arguments for abolition? The strategies of abolition? The lines to be drawn or refused?

### **Readings:**

Cesare Beccaria, *On Crimes and Punishments*, 69-70 (XXVII, The Mildness of Punishment); 71-76 (XXVIII, the Punishment of Death) (5<sup>th</sup> ed. Trans. Graeme R. Newman & Pietro Marongui, 2009, republishing volume 1754)

Marie Gottschalk, *THE PRISON AND THE GALLOWS: THE POLITICS OF MASS INCARCERATION IN AMERICA*, *Capital Punishment, The Courts, and the Early Origins of the Carceral State, 1920s-1960s*, pp. 197-215 (2006)

### **Federal Constitutional Challenges**

United States Constitution, Amends. VIII, XIV

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

*Gilmore v. Utah*, 429 U.S. 1012 (1976); Open Letter From Gary Gilmore; An Open Reply to Gary Gilmore from the ACLU, Jan. 3, 1977 (excerpted from Owen M. Fiss & Judith Resnik,

### **Contemporary Efforts for State-by-State Reforms**

What coalitions, making what arguments, succeed in persuading legislatures to repeal death penalty provisions? When are repeals retroactive? What are your views on the reliance on alternative sanctions – the conditions of confinement or Life without Parole (LWOP) – that are sometimes attached to repeal provisions? What were the arguments marshaled for and against repeal of the death penalty in Connecticut? What does “abolition” look like, per the Connecticut statute? Pending in Connecticut is the question of retroactive application of the statute to persons sentenced to death before repeal. What does the statute provide? What should the Court do?

Jeffrey A. Meyer & Linda Ross Meyer, Op-ed, *Abolish*

*Parole*, N.Y. Times (Oct. 28, 2007) A Letter from Dr.

William Petit, Cheshire Herald (May 29, 2009)

U.S. Gallup Poll, In U.S., Support for Death Penalty Falls to 39-Year Low (Oct. 13, 2011)

Conn. Public Act 12-5 (Apr. 12, 2012)

Gov. Malloy on signing Bill to Repeal Capital Punishment (Apr. 25, 2012)

*State of Conn. v. Santiago*, Brief of Amici Curiae Experts on International Human Rights and Comparative Law, S.Ct. 17413 (filed January 2013)

Ian Lovett, *Executions are Suspended by Governor in Washington*, N.Y. Times (Feb. 11, 2014)

Gov. Inslee's Remarks Announcing a Capital Punishment Moratorium (Feb. 11 2014)

### **European Convention on Human Rights**

European Convention on Human Rights, Arts. 2 and 3

Protocol No. 13 to the Convention for the Protection of Human Rights and Fundamental Freedoms, concerning the abolition of the death penalty in all circumstances

*Al-Salduon v. United Kingdom* [GC], No. 61498/08, ECHR 2010

*Öcalan v. Turkey* [GC], no. 46221/99, ECHR 2005 (dissenting opinion of Judge Garlicki)

### **Death Penalty Abolition and Life Without Parole**

What have death penalty abolitionists achieved? By what means and through what arguments? What are the claims that death penalty abolitionism has frustrated other reform efforts? To the extent intra-movement tensions exist, what are proposed resolutions?

National Research Council of the National Academies,  
*Deterrence and the Death Penalty*, (2012)

Marie Gottschalk, *THE PRISON AND THE GALLOWS: THE POLITICS OF MASS INCARCERATION IN AMERICA*, *The Power to Punish and Execute: The Political Developments of Capital Punishment, 1972 to Today*, pp. 216-35 (2006)

**[OPTIONAL]** Ashley Nellis, *The Sentencing Project*, *Life Goes On: The Historic Rise in Life Sentences in America 1-12* (2013)

Rachel E. Barkow, *Life without Parole and the Hope for Real Sentencing Reform*, in *Life Without Parole: America's New Death Penalty?* (Ogletree & Sarat, eds)

### **March 24 Sentencing: Cycles of Reform**

One way to think about the sequence of reforms is to consider the rationales for indeterminate sentencing, for determinate sentences, and other options. Our questions include: Can one be a proponent of rehabilitation without being

a proponent of indeterminacy? The differences between determinacy and mandatory minimums? What are the institutions to decide sentences? Judges through a common law method? What are the arguments for appellate rules and/or guidelines to limit the discretion of judges? What are the pros and cons of legislative or agency-based sentencing? The bases for rules and criteria? To think through these issues, we review the reforms of the 1980s and the current rebellion against them.

### **Federal Indeterminate Sentencing**

Consider two federal statutes, one for "youth offenders" and the other for "narcotic addicts" that provide indeterminacy and discretion. What is the structure of authority and its purposes? Focus on the energies for reform, the actors, and what they advocate. Who, under what became the Youth Corrections Act, has authority to make what decisions? What accounts of behavior and obligation are provided? How broad are the reform efforts?

U.S. Senate Report, Providing for the Treatment and Rehabilitation of Youth Offenders, Rep. No. 1180 (81<sup>st</sup> Cong., 1<sup>st</sup> Sess. Oct. 17, 1949)

Federal Youth Corrections Act, ch. 1115, 64 Stat. 1085 (1950), codified at 18 U.S.C. 5001-5022

Narcotic Addict Rehabilitation Act of 1966. Pub. L. 89-793, titles I-IV, Nov. 8, 1966, 80 Stat. 1438-1448, codified at 42 U.S.C. §§ 3401-3442

### **Determinate Sentencing, Creeping Indeterminacy, and Discretion**

What prompted reforms of the prior decades' reforms? What role did race play in the discussions of disparities? The relevance of judicial discretion? What prompted mandatory minimums? What new institutions were made and how was power allocated within them? How did indeterminacy return and what is the critique of the current system?

Dennis Curtis, Pierce O'Donnell, & Michael Churgin, TOWARDS A JUST AND EFFECTIVE SENTENCING SYSTEM 1-14 (1977)

Kate Stith & Jose A. Cabranes, *FEAR OF JUDGING: SENTENCING GUIDELINES IN THE FEDERAL COURTS*

24-35, (the model penal Code), *The Invention of the Sentencing Guidelines* 38-48 (1998)

*Mistretta v. United States*, 4 88 U.S. 361 (1989)

Amy Baron-Evons & Kate Stith, *Booker Rules*, 160 U PA. L.

REV. 1631, 1631-35 (2012) Patti Saris, *Proportionality,*

*Disparity, and Recidivism*, 51 JUDGES' JOURNAL 7-10

(2012). Fiona Doherty, *Indeterminate Sentencing Returns:*

*The Invention of Supervised Release,*

88 NYU L. Rev. 958, 958-963, 997 (2013)

Michael Tonry, *The Mostly Unintended Effects of Mandatory Penalties: Two Centuries of*

*Consistent Findings*, 38 CRIME & JUSTICE 65-71 (2009)

Judge Mark W. Bennett, *How Mandatory Minimums Forced Me to Send more than 1,000*

*Nonviolent Drug Offenders to Federal Prison*, NATION

(Oct. 24, 2012)

#### **Reforms, Circa 2014**

Memorandum from Eric Holder, Jr., United States Attorney General, to the United

States Attorneys and Assistant Attorney General for the Criminal Division (Aug. 12, 2013) ("Department Policy on Charging Mandatory Minimum Sentences and Recidivist Enhancements in

Certain Drug Cases") Right on

Crime, Statement of Principles

(2011)

Brooke Rollins: *Criminal Justice Reform - Texas Style*, AUSTIN AMERICAN STATESMAN, Oct. 6,

2013

Editorial, *Our Views: A Coalition on Prisons*, THE ADVOCATE  
(Baton Rouge, LA) (Jan. 12,  
2014)

Families Against Mandatory Minimums, <http://famm.org/>  
(review "Mission" and "What  
We Do" pages)

Justice Safety Valve Act of 2013 (S. 619)

Smarter Sentencing Act of 2013 (S. 1410)

### **March 31 Framing Reforms through the Demography of Incarceration: For and Against "the New Jim Crow"**

The history of slavery and racism pervade the development and contemporary shape of the U.S. criminal justice system. While the racially disparate impact of incarceration is well-established, less clear is how race can and should be marshaled in efforts to change the system.

*Ruffin v. Commonwealth*, 62 Va. (21 Gratt.) 790 (1871)

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

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

North Carolina Repeal of Racial Justice Act,  
<http://www.cnn.com/2013/06/20/justice/north-carolina-death-penalty/>

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

*Floyd v. City of New York*, \_\_\_ F. Supp. \_\_\_ (S.D. N.Y.  
2013) (merits opinion and remedies)

THE PEW CENTER ON THE STATES, ONE IN 100: BEHIND BARS IN AMERICA 2008,  
pp 5-8, 11-21 (2008)



THE PEW CENTER ON THE STATES, ONE IN 31: THE LONG REACH OF AMERICAN CORRECTION 1-7, 11-14 (2009)

The Pew Center, *U.S. Prison Population Drops for Third Year as States Adopt New Policy Strategies* (Aug. 8, 2013)

The Pew Reports reflect both the problem and efforts to limit imprisonment. What do the statistics suggest about the current demography of people in prison? The breakdown by race? Gender? Class? Federalism?

Association of State Correctional Administrators, Committee on Racial Disparity, Mission Statement (Jan. 23, 2010)

### **Political Analytics**

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? What other frames could be useful in lieu of or in addition to race?

Michele Alexander, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 234-59 (2010)

James Forman, Jr., *Beyond the New Jim Crow*, 87 N.Y.U. L. REV. 21, 22-25, 34-48, 53-63, 64-69 (2012)

James M. Bryne, *After the Fall: Assessing the Impact of the Great Prison Experiment on Future Crime Control Policy*, 77 FEDERAL PROBATION (2013)

**APRIL 3-4                    LIMAN COLLOQUIUM**  
**ISOLATION AND REINTEGRATION: PUNISHMENT CIRCA 2014**

**April 7:            Engendering Punishment: Where are Women and Men and Why?**

If one lens through which to look at criminal justice reform is race, another is gender. The questions of sameness, difference, substantive equality, and social control that are the focus of much feminist theory are central to considering the relationships among women, criminalization, and detention. What accounts for the relatively small numbers of women in prison and the rising numbers of such women? What differences ought to be taken into account and why? What are feminist reform agendas and how historically and currently are they framed? How do the intersections of race, ethnicity, gender, and class shape views on reforms? And what social mobilization in which sectors prompt and shape reform agendas?

Estelle B. Freedman, *THEIR SISTERS' KEEPERS: WOMEN'S PRISON REFORM IN AMERICA, 1830-1930, Feminist or Feminine? The Establishment of Separate Women's Prisons, 1870-1900*, pp. 46-64; *The Legacy of Women's Prison Reform: An Epilogue and Evaluation*, pp. 143-157 (1981)

Judith Resnik, *Women's Prisons and Men's Prisons": Should Prisoners Be Classified By Sex?*, 2 POL. STUD. REV. (1982)

*Women Prisoners of the D. of Columbia Dep't of Corrections v. District of Columbia*, 93 F. 3d 910 (D.C. Cir. 1996)

United Nations Rules for the Treatment of Women Prisoners and Non-Custodial Measures for Women Offenders (the Bangkok Rules), Resolution 2010/16 adopted on July 22, 2010

HILARY HODGDON, *THE FUTURE OF CHILDREN, GIRLS AND BOYS IN THE JUVENILE JUSTICE SYSTEM: ARE THERE DIFFERENCES THAT WARRANT POLICY CHANGES IN THE JUVENILE JUSTICE SYSTEM* (2008), available at [http://futureofchildren.org/futureofchildren/publications/highlights/18\\_02\\_Highlights\\_08.pdf](http://futureofchildren.org/futureofchildren/publications/highlights/18_02_Highlights_08.pdf)

OPTIONAL READING: Tamar Lerer, *Hawai'i Girls Courts: Juveniles, Gender, and Justice*, 18 BERKELEY J. OF CRIM. L. 84 (2013)

Judith Resnik, Op-ed, *Women Prisoners in the Northeast Get Shipped to Alabama - and the Men Get Their Beds*, SLATE (July 25, 2013)

Senate Judiciary Committee Bureau of Prisons Oversight  
Hearing, Liman Program Statement for the Record (Nov. 12,  
2013)

Lynne Haney, *Motherhood as Punishment: The Case of  
Parenting in Prison*, 39 SIGNS 105 (2013)

## **April 14 Passover (no class)**

## **April 21 From Prisoners' Rights to Reentry as Social Movements**

This session traces the roots of the prisoners' rights movement of the 1960s and how some of its goals came to be translated into reforms. Debates over the aims and modes of prisoner mobilization continue, illustrated here by discussion of hunger strikes at Pelican Bay. Is a focus on reentry a complementary or a competing method for reform? What role has the federal government played in bringing into focus reentry? Where are prisoners' and their families' voices in either arena?

### **Mobilizations and their Effects**

MARIE GOTTSCHALK, *THE PRISON AND THE GALLOWS, Prison Activism and the Carceral State*, pp. 165-82 (2006)

George Jackson, *SOLEDAD BROTHER: THE PRISON LETTERS OF GEORGE JACKSON* 17-28 (Chicago Review Press, 1994)

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

*Jones v. North Carolina Prisoners' Labor Union*, 433 U.S. 119 (1977)

James B. Jacobs, *The Prisoners' Rights Movement and its Impacts*, 2 Crime & Just. 429, 429-31, 434-443, 446-49, 457-63 (1980)

Lydia Pelot-Hobbs, *Organized Inside and Out: The Angola Special Civics Project and the Crisis of Mass Incarceration*, 15 SOULS 199-213 (2013)

### **Correctional Professionalization and Mobilization**

Judith Resnik & Nancy Shaw, *Prisoners of Their Sex: Health Problems of Incarcerated Women*, in 2 Prisoners' Rights Sourcebook: Theory, Practice, and Litigation 319, 346-56 (ed. Ira Robbins, N.Y.: Clark Boardman, 1980)

American Correctional Association, *Inmate Sleeping Areas: Occupancy and Space Requirements*, Standards for Adult Correctional Institutions 36-37 (4th ed. 2003)

Camille & George Camp, *ASCA History*, in Correctional Best Practices: Directors' Perspectives 275-76 (2000)

Association of State Correctional Administrators (ASCA), Performance Measures Committee: Mission Statement (undated)

ABA Standards for Criminal Justice, History of ABA Involvement in Prison Standard Setting, and Current Standard: Treatment of Prisoners 63-69 (3d ed. 2011)

### **Prisoners' Interventions**

*Ashker v. Brown*, 2013 WL 1435148 (N.D.Cal. Apr. 9, 2013)

Doreen McCallister, *Inmates Across California Join Hunger Strike over Conditions*, NPR (July 11, 2013)

Wilbert Rideau, *When Prisoners Protest*, N.Y. TIMES (July 16, 2013)

Jeffrey Beard, *Hunger Strike in California Prisons Is a Gang Power Play*, L.A. TIMES (Aug. 6, 2013)

Journal of Prisoners on Prisons, <http://www.jpp.org/> (review Mission page)

**Optional:** Muneer I. Ahmad, *Resisting Guantanamo: Rights at the Brink of Dehumanization*, 103 NORTHWESTERN L. REV. 1683, 1686-88, 1753-63 (2009)

## **Reentry as a Movement Frame?**

Jeremy Travis, *Reflections on the Reentry Movement*, 20 FED. SENTENCING REP. 84-87 (2007)

The Second Chance Act, Pub. L. 110-199, 122 Stat. 657 (2008), codified at 42 U.S.C. [section] 17501,

Chris Suellentrop, *The Right Has a Jailhouse Conversion*, N.Y. TIMES, Dec. 24, 2006

Reentry: A Current Snapshot, The Fortune Society (Oct. 2009)

A Message from Attorney General Eric Holder, on Yesterday's Reentry Council Meeting, April 26, 2013 (Dep't Justice)

Kevin Johnson, Holder's Mission, Revamp Federal Justice System, USA Today, Nov. 14, 2013

Charles Samuels, Director of the Federal Bureau of Prisons, Statement, U.S House Representatives Committee on Appropriations Subcommittee on Commerce, Justice, Science and Related Agencies, Federal Bureau of Prisons FY 2014 Budget Request (April 17, 2013)

## **April 28 The Political Economies of Reform**

Reflect on the readings for the first week as you read the excerpts below. We also return to a focus on detention, to consider the aspirations for reform and the political economies making forms of reform plausible, or not. What are the breath of the goals, impediments or opportunities for change, and what agendas might, could, and should come to the fore?

Cesare Beccaria, XLI, *How to Prevent Crimes*, pp. 107-08 in ON CRIMES AND PUNISHMENTS, (5<sup>th</sup> ed. Trans. Graeme R. Newman & Pietro Marongui, 2009, republishing volume 1754)

John Donohue & Peter Siegelman, *Allocating Resources Among Prisons and Social Programs in the Battle against Crime*, 27 J. Leg. Stu. 1 (1998)

THE SENTENCING PROJECT, ENDING MASS INCARCERATION: SOCIAL INTERVENTIONS THAT WORK (2012)

Suzanne M. Kirschhoff, *Economic Impacts of Prison Growth*, CRS 7-5700, R41177 (April. 13, 2010).

Robert Weisberg & Joan Petersilia, *Dangers of Pyrrhic Victories Against Mass Incarceration*, 139 DAEDALUS 124 (2010)

Ball v. Leblanc, Civ. No. 13-00368-BAJ-SCRM, 2013 WL 6705141 (M.D. La., 2013)

Malcolm M. Feeley, *Entrepreneurs of Punishment: The Legacy of Privatization*, 4 PUNISHMENT & SOCIETY 321 (2002)

BRENNAN CENTER, REFORMING FUNDING TO REDUCE MASS INCARCERATION (2013), available at <http://www.brennancenter.org/publication/reforming-funding-reduce-mass-incarceration>

Nicholas Confessore, *A National Strategy Funds State Political Monopolies*, N.Y. Times (Jan. 11, 2014)

Joe Day, *Reduce*, pp. 29-43, and *Rotate*, 89-99 in CORRECTIONS AND COLLECTIONS, ARCHITECTURE FOR ART AND CRIME (2013)