

# Liman Workshop

# IMPRISONED

Spring 2017 Syllabus  
Mondays, 6:10-8 pm, room 124

Judith Resnik, Arthur Liman Professor of Law  
Anna VanCleave, Director, Liman Program  
Kristen Bell, Senior Liman Fellow in Residence  
A.T. Wall, Director, Rhode Island Department of Corrections  
Student Directors: Skylar Albertson, Alison Gifford, Diana Li, Joseph Meyers,  
Jessi Purcell

**All readings will be available on the Yale website, inside page.**

The numbers of people in jails and prisons rose substantially from the 1970s through the present. In 2014, more than 2 million persons were in jails or prisons. Another 4.7 million people were under supervision through probation, parole, and supervised release. Data from the Bureau of Justice Statistics reported that one in 36 American adults was under correctional supervision even as, in a few jurisdictions, the population of those in detention has recently leveled off or declined somewhat.

Incarceration does not have the same impact on all who live in the United States; race, gender, class, age, nationality, and ethnicity interact to affect the likelihood that any one individual will personally experience detention or have family and community members in detention. People of color are disproportionately imprisoned. In 2010, black men were six times as likely to be incarcerated as white men; African Americans and Latinos constituted more than 60% of the people who were imprisoned.

This Workshop considers the political, legal, and moral dimensions of incarceration as a dominant mode of responding to behaviors deemed criminal. We will address the law of prisons, the market for prisons, and the perspectives of those who direct prisons, work in prisons, and are detained in prison, as well as the communities and families affected by prisons. Our topics include the sources and development of prisoners' rights; the use of specific forms of detention such as solitary confinement; the rise of detention facilities owned and operated by the private sector; and growing concerns about the costs — dignitary, social, political, and financial — of the system now in use. When doing so, we will look at both U.S. and non-U.S. law (such as the 1933 Guidelines of the League of Nations; the European Prison Rules of the Council of Europe; the 2015 U.N. Standard Minimum Rules for the Treatment of Prisoners (“the Nelson Mandela Rules”); and court decisions). We will consider the degree of oversight that courts, legislatures, and other actors have in shaping the parameters of permissible sanctions, in regulating conditions of confinement, and in crafting remedies for violations.

## Requirements, Credits, and Readings

We meet weekly; preparation for and attendance at these discussions is required for credit. You will receive directions in class as to which readings are required and which are optional. If you need to miss a class, please be in touch with the professors in advance of the meeting. Whether taking the class for graded or ungraded credit, students missing more than two sessions without permission will not receive credit.

The Workshop can be taken ungraded, or for credit. The requirements vary accordingly. If choosing credit/fail, a student must submit written reflections four times during the semester, *after* the first two sessions. The reflections should comment on the readings and discuss the relationships among the materials assigned. The reflections should be no more than two-pages (double-spaced, size-12 font). The point is for both other students and the instructors to be able to read your comments in advance of the class, so that discussions can build from these exchanges. To do so, students must send by email to each of the instructors (via an email sheet to be provided) and to Christine Mullen, the Liman Program Coordinator, and post their reflections on “Inside Yale” so that other Workshop students can read them NO LATER than Sunday at 1 p.m. before that week’s session. Students who do not complete and send reflections four times during the semester will not receive credit for the class.

If a student wants two graded credits, the requirement is that, in addition to the four reflections, a student must write a responsive essay of no more than 3,000 words during the examination period. Students who select this option will be provided with specific questions and directions that will require them to draw on the course materials and class discussions. NO additional research is to be done.

A third option, with permission of the instructors, is to write a paper as either a Supervised Analytic Writing or a Substantial Paper. Students seeking to do so must also complete the four reflections. A proposed topic needs to be submitted by the fifth week of the semester. (We will explain more in class about the content of the proposal; the concern is to be sure that the issues to be analyzed are clear and materials available to do the requisite research). Thereafter, students need to meet with instructors to determine the feasibility, possibly to revise the proposal, and then to agree upon a research plan and schedule.

In addition, this class may be audited with permission of the instructor; doing so requires regular attendance. Visitors, with permission, are also welcome.

## **The Analytic Puzzles Posed by Incarceration**

Our focus is on the treatment of prisoners. But thinking about prisons requires considering the boundaries of the state's authority to punish, the idea of sentencing to prisons, and the relationship between the act of imposing a sentence and the forms of incarceration imposed. The idea of prisoners as having juridical authority to call their keepers to account is relatively recent and tied to the horrors of World War II. During the second half of the twentieth century, prisoners gained the status of rights-holders; constitutional courts around the world have shaped a law of prisoners' rights, drawing on provisions at the national and transnational levels to protect individuals from torture and other cruel and degrading forms of treatment.

Several puzzles reside in this relatively new body of law, not the least of which is its parameters. The law of sentencing has a longer pedigree and is often assumed to be discrete from the law of prisons. Further, in many jurisdictions, decisions on punishment (the length of a sentence, the imposition of fines, and whether confinement to prisons is ordered) are made by judges. Questions related to the execution of sentences (such as assignments to prisons, transfers, placement in solitary confinement, and access to visitors) are often seen as belonging to the executive. Of course, such a binary is made complex by legislative enactments, which sometimes direct judges by setting ranges of sentences and fines or by requiring mandatory minimums. Moreover, legislation can structure the implications of imprisonment, such as precluding prisoners from voting, getting housing benefits, or directing prison officials on how to classify prisoners. And in some jurisdictions, judges and not the executive control prisoner classification decisions.

Thus, the lines blur. As the Israel Supreme Court concluded in its 2009 ruling holding unlawful the legislative judgment to permit private prisons, decisions about where to confine prisoners, whether to strip search them, and whether to discipline them can be viewed as a sequence of mini-sentencing decisions, punishing anew or varying the forms of punishment. Analyses of whether constitutions and international law limit the forms of punishment and the nature of conditions within a prison are continuous with inquiries into whether constitutions impose constraints on the forms, duration, nature, and implications of sentences. To think through the problems requires considering whether "whole life" and "life without parole" sentences are impermissible, along with whether the death penalty and voter disenfranchisement, and other "collateral consequences" of sentences are permissible forms of punishment. In one semester, we cannot read materials about all of these issues but we wanted to be sure that our discussions about the ideas and the practices of prison-as-punishment are not cordoned off from other practices of punishment, in and out of prison.

The continuity between sentencing-as-punishment and prison-as-punishment raises questions about whether courts' relationship to prison administration is distinctive from judicial interaction with other executive agencies. Does the fact that judges are the conduit to prison put them in a special relationship that authorizes more judicial oversight than over other

executive branch actors? Or do concerns about safety and security counsel more deference? Such debates are, in turn, informed by background assumptions about whether persons incarcerated after conviction ought to be understood as citizens, remaining part of the body politic and retaining all rights possible, or whether incarceration licenses many incursions into a panoply of rights. At its core, these debates reflect views on the extent to which “the privileges of society” (to borrow from discussions in Europe) and of sociability may be suspended, and what aspects of life are understood not as privileges but as rights, with the burden of justification on limitations residing with the state. Thus, several cases excerpted consider whether practices in prisons impose more punishment than is constitutionally permissible.

Courts examine these issues in the context of whipping, caning, profound isolation, transfers to higher security settings, conditions of confinement, visitor bans, whole-life sentences, and disenfranchisement. Some of the cases seek to overturn administrative judgments, while others challenge legislative directives, such as prisoner disenfranchisement. Repeatedly at issue are the underlying presumptions about what burdens of justification belong to the states and about the scope and function of judicial review. The remedial debate is likewise intense, with sharp disagreements about structural orders mandating improved health care, better sanitation, caps on prison populations, constraints on life-long confinement and blanket voting bans, as well as about individualized orders reducing the length of sentences, ordering damages, or imposing legal fees and costs on the state.

As the course synopsis also made plain, thinking about prisons requires contemplating the different effects that the system of incarceration has on individuals and communities. Race, gender, class, age, nationality, ethnicity, and physical and mental health interact to alter the likelihood that individuals will be imprisoned or have family and community members in detention. Moreover, being incarcerated poses challenges to the well-being of those in prison and those running prisons. Hence, throughout, we will ask why and how prisons have become a dominant feature of punishment, and we will explore the arguments to alter or abolish the totalizing control commonly found in contemporary U.S. prisons.

## January 23    Licensing and Constraining Punishment: Whipping and Rights

The readings for the first session have been selected to give you a sense of the relative novelty of prisoners as rights-holders, and of the degree to which the state assumes the power to punish. We also wanted to invite you to think across decades and oceans to consider the social movements and traumas that produced the change in attitude and in law –insistent that states not be unfettered in their treatment of people in detention.

As you review these materials, think about the sources for state power to imprison and of the boundaries on incarceration that have come to exist. What are the descriptions of conditions in Arkansas and New York for prisoners in the 1960s? The premises behind the decision in 1967 by federal judges that Arkansas could “lash” a prisoner, if done with the procedural constraints that the court outlined? And behind the ruling that a federal court should not interfere in New York’s placement of a prisoner in solitary? The 1968 appellate decisions ruling whipping out and imposing some oversight in New York? How do the materials on Attica inform your reading of these courts’ rulings?

Are the theories from major philosophers of punishment (such as Beccaria, Bentham, and Foucault, in extremely brief excerpted) reflected in these decisions? Or the posture of the 1930s League of Nation? And how do the 1970s’ recommendations of the Attica Commission resemble the U.N.’s more recent rules, also excerpted?

We then invite you to come forward to the last decade. What is the reasoning of the Israel Supreme Court that private prisons are impermissible? As you read description of prisons in Norway and Germany, consider whether to think of them as a utopian reading for U.S. audiences, or as plausible future paths.

### State Power to Punish

Cesare Beccaria, *An Essay on Crimes and Punishments* (1764)

Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation* (1780)

Jeremy Bentham, *Panopticon* (1787)

Michel Foucault, *Discipline and Punish: The Birth of the Prison* (1975)

Antony Duff, “Legal Punishment” (2013)

Academic Center of Law and Business v. Minister of Finance  
(Supreme Court of Israel, 2009)

## **The Rise of Rights**

League of Nations, Improvements in Penal Administration:  
Standard Minimum Rules for the Treatment of Prisoners,  
Drawn Up by the International Penal  
and Prison Commission (1930)

United Nations, Standard Minimum Rules for the Treatment of Prisoners (1955)

United Nations, International Covenant on Civil and Political  
Rights (1966)

A Sampling of National Constitutional Protections of Prisoners

## **Punishment *in* Prisons**

### **Whipping**

Jackson v. Bishop (U.S. Eastern District of Arkansas, 1967)

Jackson v. Bishop (U.S. Court of Appeals, Eighth Circuit, 1968)

### **Solitary**

Wright v. McMann, 257 F. Supp. 739 (N.D. N.Y. 1966)

Wright v. McMann, 387 F.2d 519 (2d Cir 1967)

## **Prisoner Protests: Attica's Impact**

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

Arthur Liman, LAWYER: A LIFE OF COUNSEL AND CONTROVERSY, 175-178, 190-194 (2002)

Heather Thompson, BLOOD IN THE WATER xiv-xvii (2016).

## **Reorienting Prisons**

VERA Institute of Justice, Sentencing and Prison Practices in Germany and  
the Netherlands: Implications for the United States (2013)

## **January 30 Experiencing and Expanding Incarceration: Prisoners, Staff, their Families, and the Carceral State**

How can we comprehend the fact and the experiences of incarceration? What perspectives are available and how do they overlap or diverge? Thus, the readings take up these questions through the lenses of people who have been prisoners, who have worked as correctional officials, and whose families and communities regularly experience incarceration. We also think through some of the incentives for the expansion of prisons and for their contraction. What do prisons “cost” (in which senses of that word), and what impact do prisons as local industries have on their surroundings?

How does law shape the experiences, and how should law alter the shape of incarceration? Consider the distance between David Rothman's famous analysis, in the 1970s, of the "End of the Asylum" and the excerpts from Marie Gottschalk about why the "asylum" did not end. What are the goals for reform laid out by President Obama as he was leaving office in 2017?

Gresham M. Sykes, *THE SOCIETY OF CAPTIVES, A STUDY OF A MAXIMUM SECURITY PRISON* 63-83 (1958, republished in 1971)

Robert L. Johnson, *Revolving Door*, in *UNDOING TIME: AMERICAN PRISONERS IN THEIR OWN WORDS* 87-94 (Jeff Evans ed. 2001)

Irma Rodriguez, selection from *INSIDE THIS PLACE NOT OUT OF IT: NARRATIVES FROM WOMEN'S PRISONS* (2016)

Ted Conover, *NEW JACK: GUARDING SING SING* 95-107, 121-26, 169-70 (2012)

Tom Mooney, *Prison Guards, Director Have Uneasy History*, *THE PROVIDENCE JOURNAL* (Feb. 13, 2007)

David J. Rothman, *THE DISCOVERY OF THE ASYLUM: SOCIAL ORDER AND DISORDER IN THE NEW REPUBLIC* *xiii - xx*, 79-108 (1971)

Marie Gottschalk, "Are We There Yet? The Promise, Perils, and Politics of Penal Reform," excerpted from *PRISON LEGAL NEWS* (Jan. 2016)

Gregory Hooks, Clayton Mosher, Shaun Genter, Thomas Rotolo, and Linda Lobao, "Revisiting the Impact of Prison Building on Job Growth: Education, Incarceration and County-Level Employment, 1976-2004," *SOCIAL SCIENCE QUARTERLY* Vol. 91, No. 1 (2010)

VERA Institute of Justice, "The Price of Prisons: What Incarceration Costs Taxpayers" (2012), with Fact Sheets on Alabama, California, Connecticut, New York, and Texas

Barack Obama, "The President's Role in Advancing Criminal Justice Reform," *HARVARD LAW REVIEW* Vol. 130, No. 3, 811-822 (Jan. 2017)

## February 6    Oversight of Prison Officials' Decisions: Substantive and Procedural Constraints or Doctrines of Deference

In the first class, we looked at the “hands off” doctrine in which federal courts generally declined to impose constraints on state prison systems. The political and social movements of the 1960s and prisoners’ uprisings pressed the courts to revisit that posture; as horrific treatment was documented time and again, judges shifted their attitudes. Review *Wolff v. McDonnell* to understand its underpinnings and the essay by federal district court judge William Wayne Justice, discussing how and why federal judges became concerned and involved in prison reform, and the report on the prisons in Puerto Rico that Director Wall co-authored.

Delineate the various legal questions (decisions affecting time and discipline and conditions of confinement). Then consider the shifts in doctrine represented by *Meachum v. Fano* and *Sandin v. Conner* (on obligations to provide procedural due process prior to transfer decisions) and in *Rhodes v. Chapman* and *Turner v. Safley*, announcing standards of deference related to prison conditions such as double cells and other rules. What are the different legal tests? What are the justifications for oversight? For deference to prison officials? How does the Canadian Supreme Court approach the issues?

The shifting attitudes in courts interacted with changing attitudes in Congress, here exemplified by the Civil Rights of Institutionalized Persons Act of 1980 (CRIPA), authorizing the Justice Department to investigate, negotiate, and litigate conditions problems, as contrasted with the Prison Litigation Reform Act of 1996 (PLRA), aiming to limit judicial involvement, as Professor Schlanger explores. Reflect back on the 1997 expert report describing the horrid conditions in the Puerto Rican prisons as you read the 2011 *Brown v. Plata* holding unconstitutional conditions in California’s prisons. Review the differences between the majority and the dissenters in *Brown v. Plata*. What premises divide them? About the role of judges? Prison officials? The function of punishment? Think about the first class materials on theories of punishment and institutional allocations of authority as you read these excerpts.

What law should govern prisons, and what institutions should oversee implementation? What role does federalism play? What are the mechanisms for the enforcement of rights (individual, aggregate, public, private), the range of remedies and their utilities? What about outside monitors, as discussed in the materials from Europe?

*Wolff v. McDonnell*, 418 U.S. 539 (1974)

The Civil Rights of Institutionalized Persons Act, 42 U.S.C. § 1997 et seq. (1980)

William Wayne Justice, *The Origins of Ruiz*, 43 Stan. L. Rev. 1 (1990) [Excerpted]

George R. Vose, Jr. & Ashbel T. Wall II, Inmate Management Audit, Administration of Correction, Commonwealth of Puerto Rico 1-23, 36-44 (1997)

*Meachum v. Fano*, 427 U.S. 215 (1976)

*Sandin v Conner*, 515 U.S. 472 (1995)

*May v. Ferndale Institution*, Supreme Court of Canada (2005)

*Rhodes v. Chapman*, 452 U.S. 337 (1981)

*Turner v. Safley*, 482 U.S. 78 (1987)

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

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

Margo Schlanger, Trends in Prisoner Litigation, as the PLRA Enters Adulthood, 5 UC IRVINE L. REV. 153 (2015)

Cormac Behan & Richard Kirkham, Monitoring, Inspection and Complaints Adjudication in Prison: The Limits of Prison Accountability Frameworks, 55 THE HOWARD JOURNAL 4, 432-451 (2016)

## **February 13 Solitary : Screening the HBO film and Panel Discussion.**

This class will be devoted to screening the film, *Solitary*, premiering on HBO in February. The class will be held in a larger room, as others will join, and the filmmaker Kristi Jacobson, joined by Director Wall and Dwayne Betts, a current Liman Fellow, will take part of a panel discussion.

Before class, read the materials for the February 13<sup>th</sup> session, that will help you formulate questions for the panel. We will also discuss these materials, along with additional readings, in the class of February 20<sup>th</sup>, when we are back in our regular setting.

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. More details providing a national overview come from excerpts of reports, co-authored by the Association of State Correctional Administrators (ASCA) and the Liman Program in 2015 and 2016. We include the two press releases for the reports (widely discussed in national media) and two of the essays from the Yale Law Journal Forum, on line.

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? Review the standards put into place by the American Correctional Association in 2016. And what is the “it” -- what would be the marker of ending solitary confinement?

Unpack “isolation” some to distinguish separation from deprivation of sensory experiences, as you sort out arguments for the justifiability of either. Further, disentangle questions of regulation of the criteria for placement from questions of the process due. Thus, look at *Prieto v. Clarke*, an appellate decision after *Wilkinson* in the Fourth Circuit, to understand the conflicting views of the majority and dissent. What are the grounds for limiting isolation for categories of prisoners, as Elizabeth Alexander discusses? What standards exist, and what are the sources, of regulating the conditions while in isolation? How do the mental health professionals inform this discussion? What is the debate about the impact of isolation?

A final background reading for this class is 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? And what is the relationship of solitary confinement to prison reform more generally?

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

*Prieto v. Clarke*, 780 F.3d 245 (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)

Executive summary of Association of State Correctional Administrators and The Arthur Liman Public Interest Program, Yale Law School, *Time-In-Cell: The ASCA-Liman 2014 National Survey of Administrative Segregation in Prison* (Aug. 2015)

Executive summary, first two sections, and graphs from Association of State Correctional Administrators and The Arthur Liman Public Interest Program, Yale Law School, *Aiming to Reduce Time-in-Cell: Reports from Correctional Systems on the Numbers of Prisoners in Restricted Housing and on the Potential of Policy Changes to Bring About Reforms* (Nov. 2016)

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)

ACA Restrictive Housing Standards, American Correctional Association (Approved Aug. 2016),  
[http://www.aca.org/ACA\\_Prod\\_IMIS/ACA\\_Member/Standards\\_\\_\\_Accreditation/Standards/Restrictive\\_Housing\\_Committee/ACA\\_Member/Standards\\_and\\_Accreditation/Restrictive\\_Housing\\_Committee/Restrictive\\_Housing\\_Committee.aspx?hkey=458418a3-8c6c-48bb-93e2-b1fcbca482a2](http://www.aca.org/ACA_Prod_IMIS/ACA_Member/Standards___Accreditation/Standards/Restrictive_Housing_Committee/ACA_Member/Standards_and_Accreditation/Restrictive_Housing_Committee/Restrictive_Housing_Committee.aspx?hkey=458418a3-8c6c-48bb-93e2-b1fcbca482a2)

Craig Haney, *Mental Health Issues in Long-Term Solitary and 'Supermax' Confinement* 49 CRIME & DELINQUENCY 124-156 (2003).

Robert D. Morgan, Paul Gendreau, Paula Smith, Andrew L. Gray, Ryan M. Labrecque, Nina MacLean, Stephanie A. Van Horn, Angelea D. Bolanos, and Ashley B. Batastini, *Quantitative Syntheses of the Effects of Administrative Segregation on Inmates' Well-Being*, 22 PSYCHOLOGY, PUBLIC POLICY, AND LAW 439-461 (2016)

Taylor Pendergrass, *What Can Reforming Solitary Confinement Teach Us About Reducing Mass incarceration?* THE MARSHALL PROJECT (Oct. 13, 2015)

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

## February 20 Isolating Conditions

We return to our regular setting to continue discussion of solitary. We will explore more of the questions. Before class, please view the film, produced by the Virginia Department of Corrections in response to the Jacobson film: the link is <https://www.youtube.com/watch?v=H-nnDf88zmE&feature=youtu>. That film is about 50 minutes.

A few additional readings come from some of the major lower court settlements of class actions challenging solitary and brief excerpts help us consider the practice from outside the United States. What institutions ought to write the rules for

placement in segregation? How do the two films on solitary diverge and overlap? The law in the United States and in Europe? What are the international standards and how would they alter conditions of isolation? Were you writing the rules, what would you do on placement, review, conditions, and exit? Or would you ban it? And if so, how would you respond to questions of safety and discipline inside prisons?

Keramet Reiter, Introduction to 23/7: PELICAN BAY PRISON AND THE RISE OF LONG-TERM SOLITARY CONFINEMENT, 1-9 (2016)

Settlement Agreement in *Ashker, et. al., v. Governor of the State of California*, 09-05796CW, Settlement Agreement (N.D. Cal. Sep. 1, 2015)  
Overview of the Settlement Provisions

Overview of the Settlement Provisions in *Disability Rights Network of Pennsylvania v. Wetzel*, Civil Case No. 1:13-CV-00635, Settlement Agreement (M.D. Pa. Jan. 5, 2015)

### **The U.S. Law in Context**

*Ramirez-Sanchez v. France*, European Court of Human Rights (Grand Chamber)  
ECHR 685 (2006)

*Öcalan v. Turkey* (No. 2), European Court of Human Rights (Second Section) ECHR 286 (2014)

*Brevik v. Ministry of Justice*, Oslo District Court, Norway (2014)

*Shahid v. Scottish Ministers*, Supreme Court of the United Kingdom UKSC 58 (2015)

United Nations, Standard Minimum Rules for the Treatment of Prisoners (“Nelson Mandela Rules”) (2015)

*Seeing into Solitary: A Review of the Laws and Policies of Certain Nations around the World with Regard to Solitary Confinement of Detainees* (2016), on behalf of Juan E. Méndez, U.N. Special Rapporteur on Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment; with Weil Gotshal & Manges LLP, the Cyrus R. Vance Ctr. for Int’l Justice, and the American Univ. Washington College of Law Ctr. for Human Rights & Humanitarian Law’s Anti-Torture Initiative

*British Columbia Civil Liberties Association and the John Howard Society of Canada v. Attorney General of Canada*, S 150615 (pending, Supreme Court of British Columbia, 2016)

## **February 24-26 *Philosophy and Massive Incarceration***

### ***Whitney Humanities Center: Co-Sponsored Conference***

Topics of discussion include Rhetoric, Propaganda, and Ideology; Prison Abolition; Prison Education as Transformative Experience; Boundaries of Permissibility; and Philosophy of Mass Incarceration: What and Why?

Speakers include: Kristen Bell, Reginald Dwayne Betts, Milton S.F. Curry, Lori Gruen, Lisa Guenther, Sally Haslanger, Brady Heiner, Kristen Inglis, Christia Mercer, L.A. Paul, Andrea Pitts, Judith Resnik, Tommie Shelby, and Vesla Weaver.

## **February 27 *Prisons as Race***

We read for the opening class session the case of *McMann v. Wright*, decided in the 1960s and detailing the harshness of the New York State disciplinary system. We also looked at excerpts from the Attica report describing the racial divide between staff and prisoners.

We now bring those concerns forward to the current prison system. The newspaper accounts of December 2016 from the *New York Times* give us a glimpse into the contemporary problems in prison life. As you read, please consider what, if any, rights prisoners subjected to this system have and how they might enforce them in light of our discussion of the governing law of prison life. Race has been central to the formation and practices of the criminal justice system in the United States. To clarify how central it is, the readings mix contemporary materials with history and analyses of the role of race in efforts to bring about sustainable reforms.

To begin, review the compilation of articles from the *New York Times*, which in December of 2016 published its investigation into racial discrimination against prisoners in New York. Efforts to rethink those practices are reflected in materials on the legitimacy of prisons and from ASCA. Then turn to two major Supreme Court decisions. In *McCleskey v. Kemp*, the Supreme Court rejected a study showing racial discrimination in capital punishment sentences as the grounds for invalidating Mr. McCleskey's sentence. We next look at a case from the California prison system, which used race as a variable to identify gang members and segregate individuals, a policy that the Supreme Court found constitutionally wanting in 2005 in *Johnson v. California*.

Reva Siegel's article creates a framework to think about the current law on equal protection and how the doctrine on intent, shaped in the context of school and employment discrimination cases, relates to equality claims in sentencing and in prisons. How would the law look different if disparate impact (which was once the test of a Fourteenth Amendment

violation) remained in place? What forms of race-based categories (affirmative action of what kinds) should or could be used in sentencing and in prison?

The question of reform moves, of course, beyond legal doctrine. Michelle Alexander, James Forman, and Elizabeth Hinton debate whether Jim Crow is the lens through which to look at contemporary incarceration. What are the reasons for underscoring the relationship between slavery and incarceration? What are the reasons for embracing this framing now or for being leery of it?

**“Racial Bias in New York State’s Prisons,” THE NEW YORK TIMES (Dec. 2016)**

Michael Schwartz, Michael Winerip, & Robert Gebeloff, “The Scourge of Racial Bias in New York State’s Prisons,” THE NEW YORK TIMES (Dec. 3, 2016); “For Blacks Facing Parole in New York State, Signs of a Broken System,” THE NEW YORK TIMES (Dec. 4, 2016); “Governor Cuomo Orders Investigation of Racial Bias in N.Y. State Prisons,” THE NEW YORK TIMES (Dec. 5, 2016); “Inquiry into Racial Bias in New York Prisons Is Big Job for Small Team,” THE NEW YORK TIMES (Dec. 11, 2016)

**Responses from within Corrections**

Jonathan Jackson, Tom R. Tyler, Ben Bradford, Dominic Taylor, & Mike Shiner, *Legitimacy and Procedural Justice in Prisons*, PRISON SERV. J., Sept. 2010

Association of State Correctional Administrators, Racial Disparity Committee, “Mission Statement” (adopted January 23, 2010)

**Law’s Approach to Racial Classifications**

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

*Johnson v. California*, 543 U.S. 499 (2005)

Reva B. Siegel, *The Supreme Court, 2012 Term – Forward: Equality Divided*, 127 HARVARD LAW REVIEW 1 (Nov. 2013)

**Political and Social Reform**

James Forman, Jr., “Racial Critiques of Mass Incarceration: Beyond the New Jim Crow,” N.Y.U. LAW REVIEW Vol. 87, No. 21, 22-25, 34-48, 53-63 (Feb. 2012)

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

Elizabeth Hinton, FROM THE WAR ON POVERTY TO THE WAR ON CRIME: THE MAKING OF MASS INCARCERATION IN AMERICA 333-340 (2016)

## Race and Sentencing

18 U.S.C. § 3593(f)

Criminal Code, Part XXII § 718 (Canada)

Kim Severson, “North Carolina Repeals Law Allowing Racial Bias Claim in Death Penalty Challenges,” *THE NEW YORK TIMES* (June 5, 2013)

*Foster v. Chatman*, 136 S.Ct. 1737 (2016)

*Buck v. Davis*, Slip opinion (2017)

**March 6, 2017**

## **Social Movements, Organizations, and Communities: In and Out of Prisons**

Having looked at the degree of isolation that solitary confinement imposes, we now turn to the question of general conditions of confinement and the possibilities for community, both within the facility and beyond.

As we have seen, the prisoners’ rights movement – from Attica and Angola to Pelican Bay – has been central to changing conditions in U.S. prisons. We turn to some of the law and policies governing prisoners’ access to each other, to courts, and to communities outside of prison. The questions are how to think about all the forms of rights (political, social, civil) and about sociability in prison.

As the readings and the films relating to solitary confinement illustrated, communities inside prisons, like communities outside prisons, also raise questions about personal security and safety. What are the rationales for limiting prisoner socializing/organizing/visiting? What forms of self-governance should be available? What impact do protests, such as hunger strikes, have on your views about regulations on community work based in prison? What questions about prisoner conflict and “security groups” (“gangs”) shape rules and how would you reshape them?

Why does law protect prisoners’ access to courts? The constitutional sources and ambiguities? For which kinds of claims? As individuals or in groups? What about protection of contact with other outsiders? Rights to marry? To practice religion? To see children and other family members?

In this class, we’ll be joined by Dr. Kathy Boudin, Co-Director of the Center for Justice at Columbia University.

### **Collectivity Inside**

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

Judy Clark & Kathy Boudin, *Community of Women Organize Themselves to Cope with the AIDS Crisis: A Case Study from Bedford Hills Correctional Facility*, 1 COLUM. J. GENDER & L. 47 (1991)

## Prisoners' Political Action

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

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

Tom Kutsh, *Inmates Strike in Prisons Nationwide over 'Slave Labor' Working Conditions*, Guardian (Sept. 9, 2016)

## The Question of Gangs

Graeme Wood, *How Gangs Took Over Prisons*, ATLANTIC (Oct. 2014)

Andrew Cohen, *The Ambiguities of Prison Gangs*, ATLANTIC (Oct. 2, 2014)

## Access to Courts and Lawyers

### Constitutional Right to What?

*Johnson v. Avery*, 393 U.S. 483 (1969)

*Bounds v. Smith*, 430 U.S. 817 (1977)

*Lewis v. Casey*, 518 U.S. 343 (1996)

### For Which Detainees and What Claims?

Hope Metcalf & Judith Resnik, *Gideon at Guantánamo: Democratic and Despotic Detention*, 122 YALE L.J. 2504 (2013)

## Regulating Attorney Visits

Visits by Attorneys, 28 C.F.R. § 543.13 (2017)

Fed. Bureau of Prisons, Visiting Regulations, U.S. Dep't of Just. §§ 540.40, 540.46 (2015)

Harvey Rice, *Jails Break the Law When They Record Conversations of Lawyers & Inmates*, TEX. JAIL PROJECT (Mar. 20, 2012)

## Visiting

### Rights to Visitors

*Overton v. Bazzetta*, 539 U.S. 126 (2003)

*Öcalan v. Turkey* (No. 2), European Court of Human Rights (Second Section) ECHR 286 (2014)

### Visiting Practices

Chesa Boudin, Trevor Stutz & Aaron Littman, *Prison Visitation Policies: A Fifty-State Survey*, 32 YALE L. & POL'Y REV. 149, 149-55, 172-79 (2013); *Prison Visitation Policies that Promote or Discourage Visiting*

Ashbel T. ("A.T.") Wall, II, *Why Do They Do It That Way?: A Response to Prison Visitation Policies: A Fifty-State Survey*, 32 YALE L. & POL'Y REV. 199 (2013)

Kenneth Lovett, *EXCLUSIVE: Gov. Cuomo Proposes Reduction in Visitation Days for Inmates at State's Maximum Security Prison*, N.Y. DAILY NEWS (Jan. 24, 2017)

Grant Duwe & Valerie Clark, *Blessed be the Social Tie that Binds: The Effects of Prison Visitation on Offender Recidivism*, 24 CRIM. JUST. POL'Y REV. 271, 277, 282-84, 289-90 (2013)

#### Visiting Challenges

Johnna Christian, *Riding the Bus: Barriers to Prison Visitation and Family Management Strategies*, 21 J. CONTEMP. CRIM. JUST. 31 (2005)

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

Rob Ryser, *Federal Prison Reopening to Women*, NEWSTIMES (Dec. 2, 2016)

#### Phone Calls

Joe Palazzolo, *Agency Caps Inmates' Phone Rates*, WALL. ST. J. (Aug. 9, 2013)

Letter from David M. Gosset, Deputy Gen. Counsel, Fed. Commc'ns Comm'n, to Mark J. Langer, Clerk, United States Court of Appeals for the D.C. Circuit, *Global Tel\*Link, et al. v. Fed. Commc'ns Comm'n & United States of America*, No. 15-1461 (D.C. Cir. Jan. 31, 2017)

#### Optional Reading

MEGAN COMFORT, *DOING TIME TOGETHER: LOVE AND FAMILY IN THE SHADOW OF THE PRISON* (2008)

**March 13** No class, Spring break

#### **March 20, 2017 Health and Illness: from the Young to the Old**

For whom (if anyone) are prisons designed? Can a person be physically unfit for prison? Too ill for prison? Too young or too old? This class explores some of the many dimensions—health, disabilities, and age—of individuals living in and leaving prisons.

We begin with health care. How did the U.S. Constitution come to be understood as mandating health care in prison? What is and what ought to be the constitutional minimum level of health care required in prisons? And what are the component parts of “health care” that are or should be required? The Supreme Court first addressed the issue of constitutionally mandated prison health care in *Estelle v. Gamble*. What are the parameters of the requirements that the Court articulated? What substantive entitlements flow from these requirements? How did *Madrid v. Gomez* read the decision, and what were the bases for deciding that the health and mental health care systems at Pelican Bay fell below constitutional minimum standards? In terms of the challenges for prison administrators, consider the costs of drugs, as detailed in an article on hepatitis C. Should *Estelle v. Gamble* be read to mean that hepatitis C treatment is constitutionally mandated? If so, who should bear the costs? Consider

also issues of post-release health care, as detailed in a recent study. Should the government provide health care for people transitioning from prisons to their communities?

Do your thoughts on health care change depending on the situation of individuals before they entered prison? One focus of law is the treatment of people with physical challenges, often termed “disabilities.” What does the Americans with Disabilities Act provide and how should it apply in prisons? What about constitutional rights to care based on one’s physical abilities? Margo Schlanger’s article surveys the legal framework for litigating on behalf of differently abled prisoners, and the *Disability Law Center* opinion provides an example of the reach and limits of litigation in this area. Consider the proposals for reform from the ACLU report—what would your recommendations be?

Then turn to age, and focus first on persons who are old, some of whom are also infirm. Should the law treat elderly people differently, such as by according presumptive release at a certain age? The Ferri article provides an overview of the problems posed by elderly prisoners. The California Board of Parole Hearings memorandum and the French Correctional Law are examples of statutory and regulatory attempts to respond to these challenges.

Next, turn to the question of children, juveniles, or youth, and what kinds of distinct rights or treatment they ought to be accorded. Are “juveniles” a subset of prisoners in need of more careful specification through markers such as gender, race, or literacy? Should we create special facilities for juveniles, or should they not be imprisoned at all? As you read materials on younger prisoners, consider whether law does or should mandate different treatment. The Rikers CRIPA letter illustrates the harrowing violence that young people often face while incarcerated. The Kupchik study examines whether youth prisons are meaningfully different from adult prisons. The California Leadership Academy proposal offers what it termed an alternative to youth prisons, even as that approach has also garnered the criticism that it is a new prison with a different name.

Think about yourself as an advocate, a prison administrator, a prisoner, or a judge. How would you approach these problems—would your approach vary depending on your role? What are the tensions for reformers concerned about prisoners with different needs and abilities? Should prisons become more accessible, or should people with certain characteristics be excluded from prisons entirely?

## Healthcare

*Estelle v. Gamble*, 429 U.S. 97 (1976)

*Madrid v. Gomez*, 889 F. Supp. 1146 (N.D. Cal. 1995)

Adam L. Beckman, Alyssa Bilinski, Ryan Boyko, George M. Camp, A.T. Wall, Joseph K. Lim, Emily A. Wang, R. Douglas Bruce & Gregg S. Gonsalves, *New Hepatitis C*

*Drugs Are Very Costly and Unavailable to Many State Prisoners*, 35 No. 10 HEALTH AFFAIRS 1893 (2016)

Emily A. Wang, Yongfei Wang & Harlan M. Krumholz, *A High Risk of Hospitalization Following Release from Correctional Facilities in Medicare Beneficiaries: A Retrospective Matched Cohort Study, 2002 to 2010*, 173 JAMA INTERN MED. 1621 (Sept. 23, 2013)

### **Disabilities, the Americans with Disabilities Act, and the Rehabilitation Act**

Margo Schlanger, *How the ADA Regulates and Restricts Solitary Confinement for People with Mental Disabilities*, AMER. CONSTITUTION SOC'Y FOR LAW & POLICY BLOG (May 19, 2016), <https://www.acslaw.org/acsblog/how-the-ada-regulates-and-restricts-solitary-confinement-for-people-with-mental-0>

Disability Law Ctr. v. Mass. Dep't of Corr., 960 F. Supp. 2d 271 (D. Mass. 2012)

Maria Cramer & Jenna Russell, *Advocates: Mass. Unlawfully Isolates Mentally Ill Inmates*, THE BOSTON GLOBE (Dec. 31, 2016)

Jamelia Morgan, *Caged In: Solitary Confinement's Devastating Harm on Prisoners with Physical Disabilities*, ACLU FOUNDATION (Jan. 2017), [https://www.aclu.org/sites/default/files/field\\_document/010916-aclu-solitarydisabilityreport-single.pdf](https://www.aclu.org/sites/default/files/field_document/010916-aclu-solitarydisabilityreport-single.pdf)

### **Age: Young and Old**

Cassie N. Ferri, *A Stuck Safety Valve: The Inadequacy of Compassionate Release for Elderly Inmates*, 43 STETSON L. REV. 197 (2013)

CAL. BD. OF PAROLE HEARINGS, Memorandum, Elderly Parole Program (June 16, 2014)

French Correctional Law, Art. 729 (2015)

CRIPA Investigation of the New York City Department of Correction Jails on Rikers Island, Letter from Preet Bharara, U.S. Attorney for the Southern Dist. of N.Y., to Bill de Blasio, Mayor of N.Y.C. (Aug. 4, 2014)

Aaron Kupchik, *The Correctional Experiences of Youth in Adult and Juvenile Prisons*, 24 JUST. Q. 247 (2007)

*A Model Program: Re-examining, Re-imagining, and Redesigning the Approach to Recidivism Reduction in California—A Proposal to the California Department of Corrections and Rehabilitation to Create the California Leadership Academy for Young Adult Offenders Age 18 to 25 Sentenced to State Prison*,

CAMPBELL CONSULTING (Apr. 2016), [http://www.cjcj.org/uploads/cjcj/documents/cla\\_full\\_report.pdf](http://www.cjcj.org/uploads/cjcj/documents/cla_full_report.pdf)

Maureen Washburn, *Young Adult Prisons Are Not the Answer*, CTR ON JUVENILE & CRIM. JUSTICE: BLOG (Apr. 26, 2016), <http://www.cjcj.org/news/10359>

## **March 27 Sex, Gender, and Safety: Constructing, Reflecting, and Reifying Categories of Identity**

This session considers the role that gender plays in prison, as we think through questions of sexuality, identity, safety, and control. We begin with the categories of “women and men,” as sex-segregation is common in both prisoner housing and staff assignments. What are the assumptions – or realities – of “differences” between women and men prisoners? What is the relationship between the fact that women constitute under ten percent of the populations of jails and prisons and the kinds of prisons designed and the services provided? Does the gender-identity of prisoners have an impact on who should work as prison staff? What are “gender responsive programs” and why should they be provided? We also excerpt decisions on prisoners’ privacy and job opportunities. As women seek to be prison staff and as men serve as correctional officers in women’s prisons, what are the differing viewpoints about law’s regulation of staff and prisoners? The Ninth Circuit decision in *Jordan* has several opinions – on what questions to the judges diverge? How does their understanding compare with the United Nations Rules for the Treatment of Women Prisoners and Non-Custodial Measures for Women Offenders?

How do prisons respond beyond the binary of women/men? What rules emerge from *Farmer v. Brennan*? What are Dolovich’s views about the propriety of segregated housing? How does this form of segregation relate to the arguments in *California v. Johnson*? And what is the relationship of these approaches to the problem of sexualized violence? We provide excerpts of the Prison Rape Elimination Act of 2003 (“PREA”), enacted with bi-partisan support. What obligations does the Act impose, upon whom, and to what end? What are the auditing processes and how do those compare with the monitoring efforts to looked at earlier in the semester? To what does Ristroph attribute the relatively high rate of sexual assault in U.S. prisons? Finally, what are the criticisms of the PREA? Would you rewrite it, and, if so, how?

### **Women in Prisons as Prisoners and Staff**

Rising Numbers, Classification, and Policies

Elizabeth Swavola, Kristin Rily & Ram Subramanian, *Overlooked: Women and Jails in an Era of Reform*, VERA INSTITUTE OF JUSTICE (2016)

#### Classification and Treatment

Attending to Difference, excerpts from the ABA Subcommittee Report, *Revising Security Classification Instruments and Need Assessments for Women Offenders*, in *Isolation and Reintegration: Punishment Circa* (Liman Colloquium Report, 2014)

Federal Bureau of Prisons, Female Offender Manual, Program Statement 5200.02 (Nov. 23, 2016), <http://www.bop.gov/policy/progstat/5200.01.pdf>

Joseph Goldstein, *Pregnant Inmates Say a Federal Jail Is No Place for Them, and Some Judges Agree*, N.Y. Times, Mar. 14, 2017

*Mulvania v. Sheriff of Rock Island Country*, \_ F.3d \_ (March 9, 2017)

#### Women and Men as Correctional Officers and as Prisoners

*Dothard v. Rawlinson*, 433 U.S. 321 (1977)

*Jordan v. Gardner*, 986 F.2d 1521 (9<sup>th</sup> Cir. 1993) (en banc)

*Teamsters Local Union v. Washington Department of Corrections*, 789 F.3d 979 (9<sup>th</sup> Cir. 2015)

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

#### Sexual Orientation, Gender Identity, and Safety

*Farmer v. Brennan*, 511 U.S. 831 (1994)

Sharon Dolovich, *Strategic Segregation in the Modern Prison*, 48 AM. CRIM. L. REV. 1, 2-11, 54-91 (2011)

#### Responding to Sexualized Violence in Prisons

Prison Rape Elimination Act of 2003, P.L. 108-79, 10 Stat. 972 (2003)

Alice Ristroph, *Sexual Punishments*, 15 COLUM. J. OF GENDER & L. 139, 174-84 (2006)

#### Optional Readings

NATIONAL PRISON RAPE ELIMINATION COMMISSION, *Report of the National Prison Rape Elimination Commission*, Executive Summary (June 2009)

Brenda V. Smith, *Uncomfortable Places, Close Spaces: Female Correctional Workers' Sexual Interactions with Men and Boys in Custody*, 59 U.C.L.A. L. Rev. 1690, 1693-99, 1705-15 (2012)

The Liman Program, *Dislocation and Relocation: Women in the Federal Prison System and Repurposing FCI Danbury for Men* (Sept. 2014)

Piper Kerman, *ORANGE IS THE NEW BLACK* 52-71, 278-95 (2010)

## **April 3            Privatization**

Who pays for prisons? The answer has varied over time and place, in terms of whether prisons are staffed and funded from the public fisc or paid for privately.

According to a 2011 report by the American Civil Liberties Union that was highly critical of private prisons,

Private prisons for adults were virtually non-existent [in the United States] until the early 1980s, but the number of prisoners in private prisons increased by approximately 1600% between 1990 and 2009. Today, for-profit companies are responsible for approximately 6% of state prisoners, 16% of federal prisoners, and, according to one report, nearly half of all immigrants detained by the federal government. In 2010, the two largest private prison companies alone received nearly \$3 billion dollars in revenue, and their top executives, according to one source, each received annual compensation packages worth well over \$3 million.

Of course, a question is what counts as a “private” prison as compared to a “public” prison? For example, one could have a prison system in which the state pays for its support from its general revenue, and the state provides for all prison services using state employees. In a second model, the state pays for prisons, but uses private providers and contractors to supply services, such as food, education, security, etc. In this model, the state could be purchasing these services from a non-profit or a for-profit company. In a third model, the state could require the user (i.e. the prisoner) to pay for his or her own incarceration. None of these brief descriptions includes discussion of whether the legal obligations of the prison officials vary depending on the source of funding, and hence another question is what the relationship is between privatization and regulation.

What are the concerns raised by and arguments for private prisons? The materials debate whether privatization of prisons raises issues distinct from privatization in general and what constraints are or ought to be imposed. Our focus is on prisons, but of course the questions of funding run the gamut of the criminal justice system – from whether individuals can post bail to whether defendants pay for their attorneys or other fees, whether fees for “conviction” can be leveled, and whether probationers pay for services form ankle “bracelets” to meetings with probation officers.

### **What Are Private Prisons?**

*Human Rights Division Academic College of Law vs. Minister of Finance, Opinion of Jeffrey Jowell (2006).*

*Menocal v. GEO Group, Inc.*, Class Certification, No. 1:14-CV-02887-JLK (D. Colo. 2017).

### **Licensing or Prohibiting Private Prisons**

*Pischke v. Litscher*, 178 F.3d 497 (7th Cir. 1999).

*American Center of Law & Business v. Minister of Finance*, HCJ 2605/05 (2009) (Supreme Court of Israel).

### **Debating Prison Privatization**

Sharon Dolovich, *State Punishment and Private Prisons*, 55 DUKE L.J. 439, 480-506, 523-34 (2005).

Malcolm M. Feeley, *The Unconvincing Case Against Private Prisons*, 89 IND. L.J. 1401 (2013).

Mattheus Wassenaar, Raymond Gradus & Toon Molleman, *Public vs Nonprofit Incarceration: The Case of the Netherlands*, TINBERGEN INST. (2017).

Judith Resnik, *Globalization(s), Privatization(s), Constitutional-ization, and Statization: Icons and Experiences of Sovereignty in the 21<sup>st</sup> Century*, 11 ICON 162, 162-73, 190-95 (2013).

### **Investing and Divesting in Private Prisons**

The GEO Group, Inc., *2015 Annual Report* 1-3, 6-11 (2015).

*Corrections Corporation of America Rebrands as CoreCivic*, CORRECTIONS CORP. OF AM. (2016).

#### Public Investors

Reducing Our Use of Private Prisons: Memo from Deputy Attorney General Sally Q Yates (Aug. 18, 2016).

Matt Zapotosky, *Justice Department Will Again Use Private Prisons*, WASH. POST (Feb. 23, 2017).

Elizabeth Compa, *The High Price of Prison Privatization in Georgia*, SOUTHERN CENTER FOR HUMAN RIGHTS ANNUAL NEWSLETTER (2012).

#### Private Investors

Yale Students for Prison Divestment Report: Advisory Committee on Investor Responsibility (Dec. 2016).

### **User-Pays Model**

*Your Kid Goes to Jail, You Get the Bill*, MARSHALL PROJECT (Mar. 2, 2017).

**April 6-7**      **Liman Colloquium**

**April 10**      No class, Passover

**April 17, 2017**      **Unending Incarceration**

This class explores some of the many ways incarceration can be “unending,” from a literal de jure life sentence, to de facto life through stacked consecutive sentences, repeated denials of parole, and forms of punishment that do not end after release from prison. Our questions are about whether the law bounds or prohibits any of these practices.

A first example comes from the 1977 decision by the Constitutional Court of Germany which held impermissible life imprisonment with no prospect for release. A quarter century later, the European Court of Human Rights (ECtHR) insisted on what has come to be called a “right to hope” by finding that the U.K.’s “whole life sentences” violated the Convention. What are the legal sources for these rulings? The reasoning from theories of punishment? Are they founded in moral or religious beliefs? Do their holdings have relevance to U.S. constitutional law? The brief excerpts from *Montgomery v. Louisiana*, decided by the U.S. Supreme Court in 2016, address a sub-population – juveniles. What is the basis for differential treatment? Do any of the rationales apply to other prisoners? And how would a prisoner qualify for release under the Court’s opinion? Are prison systems obliged to provide programs and therapy?

What are the arguments (exemplified in the Rhode Island Supreme Court’s decision in *State v. Mlyniec*) about why life in prison is an appropriate punishment? In the overview by Dirk Van Zyl Smit, Catherine Appleton, and Georgie Benford, one takes a world-wide tour of life in prison. What are the reasons for the prevalence of this form of punishment? What distinguishes countries with and without life imprisonment? What is the interaction between death penalty advocacy and long sentences?

How would opportunities for release affect those incarcerated and prison systems in general? How likely need release be? Think back to the *Solitary* documentary and the comments from the incarcerated individuals about what release could mean. What are the bases for and the ideas that animate the 2003 recommendations from the Committee of Ministers in the EU on the “management” of prisoners with life or long-term sentences?

We then turn from prison to individuals who have been released but face a myriad of post-conviction disabilities imposed as a consequence of conviction – once known as “civil death,” some of which Jeremy Travis calls “invisible punishment.” What are the different kinds of resources denied to individuals with criminal records? The range of civil disabilities? The

reasons for them? Are there any arguments for their unconstitutionality? For the disutility or immorality of imposing such punishments?

The question of whether democracy limits punishment cuts across all these materials, and is vivid in the context of disenfranchisement. What are the arguments from democracy for limiting voter rights (seen in the Second Circuit's 1967 decision *Green v. Board of Elections*), as well as for providing them? What are the relevant political and penological theories at work? Does it matter what the impact is on particular populations (as detailed in the Sentencing Project's 2016 policy brief)?

Turn then to the case law from the ECtHR, and the discussion about it in the essay by Judith Resnik on accommodations and variability in federalism(s). At what level should decisions about voting be made? Turn to U.S. law, and re-read the relevant part of the Fourteenth Amendment. What does it license? Why did the Court hold unconstitutional the Alabama Constitution's disenfranchisement provision in *Hunter v. Underwood*? What are the bases for the holding in *Richardson v. Ramirez*, and what would be the ways to change its rule?

#### Life Imprisonment

Life Imprisonment Case (Federal Constitutional Court of Germany, 1977)

Vinter and Others v. United Kingdom (European Court of Human Rights, Grand Chamber, 2013)

R v. McLoughlin (Court of Appeal of England and Wales, 2014)

Hutchinson v. United Kingdom (European Court of Human Rights, Grand Chamber, 2017)

Montgomery v. Louisiana, 136 S. Ct. 718 (2016)

State v. Mlyniec, 15 A.3d 983 (R.I. 2011)

Long-term Incarceration: the Framework in Europe and Abroad

Dirk van Zyl Smit, Catherine Appleton & Georgie Benford, *Introduction*, in LIFE IMPRISONMENT AND HUMAN RIGHTS 1-19 (Dirk van Zyl Smit & Catherine Appleton eds., 2016)

Council of Europe, Recommendation of the Committee of Ministers to Member States on the Management by Prison Administrations of Life Sentence and Other Long-Term Prisoners (2003)

## Civil Disabilities

Jeremy Travis, *Invisible Punishment: An Instrument of Social Exclusion*, in *INVISIBLE PUNISHMENT: THE COLLATERAL CONSEQUENCES OF MASS IMPRISONMENT* (Marc Mauer & Meda Chesney-Lind eds., 2002)

Springstead v. Bunk, 8 N.Y.S.3d 834 (N.Y. App. Div. 2015)

## Inside and Out: The Right to Vote

What are the Rationales Behind and Impacts of Disenfranchisement?

Green v. Board of Elections, 380 F.2d 445 (2d Cir. 1967)

*Felony Disenfranchisement: A Primer*, SENT'G PROJECT (2016)

What About the Law?

In Europe and Abroad

Hirst v. United Kingdom (European Court of Human Rights, Grand Chamber, 2005)

R (Chester) v. Secretary of State for Justice (Supreme Court of the United Kingdom, 2013)

Delvigne v. Commune de Lesparre Médoc and Préfet de la Gironde (Court of Justice of the European Union, Grand Chamber, 2015)

Sauvé v. Canada (Supreme Court of Canada, 2002)

Minister of Home Affairs v. NICRO (Constitutional Court of South Africa, 2004)

Judith Resnik, *Accommodations, Discounts, and Displacement: The Variability of Rights as a Norm of Federalism(s)*, 17 *JUS POLITICUM* 1-2, 50-62 (2017)

In the U.S.

Hunter v. Underwood, 471 U.S. 222 (1985)

Richardson v. Ramirez, 418 U.S. 24 (1974)

**April 25, 2017 (4:00 pm)**

## **Abolition**

Should prisons end? What are the reasons that incarceration became so dominant a mode of punishment in the United States and elsewhere? Can it be curtailed? Should the issue be put into the framework of “abolition”?

We begin with Angela Davis’s central 2003 work, *Are Prisons Obsolete?*, and then turn to the 2016 essay by Peter Salib, offering “an economic critique” of prisons and recommending alternatives. Given the appetite for punishment, one alternative – sanctioned as constitutional in 2015 by the Supreme Court of Singapore – is *Yong Vui Kong v. Public Prosecutor*, upholding the corporal punishment of caning (not in lieu of incarceration but in addition to prison). On the other end of the spectrum are hopes for “restorative justice,” here exemplified by an excerpt from John Braithwaite. Yet another approach comes from the technologies of surveillance, described in *Technological Incarceration and the End of the Prison Crisis*, published in 2017. The obvious concerns are both net-widening and micro-managing, as discussed in Fiona Doherty’s 2016 essay, *Obey All Laws and Be Good*. Allegra McLeod sets out reasons to press for abolition, while Marie Gottschalk reminds us, in excerpts from her 2015 book, *Caught*, of the appetite for punishment and the role of prosecutors in driving incarceration.

ANGELA DAVIS, *ARE PRISONS OBSOLETE?* (2003)

Peter N. Salib, *Why Prison?: An Economic Critique* (2016), available at <https://ssrn.com/abstract=2928219>

*Yong Vui Kong v. Public Prosecutor*, Court of Appeal of Singapore, SGHC 178 (2015).

John Braithwaite, *Restorative Justice and a Better Future*, in *A RESTORATIVE JUSTICE READER* (ed. Gerry Johnstone, ed. 2013)

Mirko Bagaric, Dan Hunter & Gabrielle Wolf, *Technological Incarceration and the End of the Prison Crisis*, 108 J. OF CRIM. L. AND CRIMINOLOGY 1 (2017), available at <https://ssrn.com/abstract=2929781>

Fiona Doherty, *Obey All Laws and Be Good: Probation and the Meaning of Recidivism*, 104 GEORGETOWN L.J. 291 (2016).

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

MARIE GOTTSCHALK, *CAUGHT: THE PRISON STATE AND THE LOCKDOWN OF AMERICAN POLITICS*, 258-282 (2015).

Ursula K. Le Guin, *The Ones Who Walk Away from Omelas*, in *THE WIND’S TWELVE QUARTERS: SHORT STORIES* (1975).