

Liman Workshop

IMPRISONED:

FROM CONCEPTION AND CONSTRUCTION TO ABOLITION

Overview and List of Class Sessions

Spring 2022 Syllabus, Mondays, 6:10-8 pm

Jenny Carroll, Visiting Professor of Law, Liman Director

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All readings will be available on the Yale Canvas website.

The numbers of people in jails and prisons rose substantially from the 1970s through the present. As of 2021, some 1.8 million people were detained in these facilities. In addition, data from the U.S. Bureau of Justice Statistics from 2019 identified around 4.5 million people under supervision on probation, parole, and the like. In 2020, when COVID hit, some commentators had thought that the risk of infection for people in congregate housing would be the impetus for a major revamping of the practices of detention. Yet, while in detention populations had leveled off or declined in some jurisdictions, as of 2019, one in 40 American adults was under correctional supervision. See Jacob Kang-Brown, Chase Montagnet, and Jasmine Heiss, *People in Jail and Prison in Spring 2021*, VERA INSTITUTE OF JUSTICE (June 2021), available at <https://www.vera.org/downloads/publications/people-in-jail-and-prison-in-spring-2021.pdf>.

Incarceration does not have the same impact on all who live in the United States – both in terms of the likelihood of being victims of crime and the likelihood of being in detention. Race, gender, class, age, nationality, ethnicity, health, and ability interact to make subgroups more vulnerable to experience both. Many studies have documented that people of color are disproportionately affected by discriminatory law enforcement practices. See, e.g., Elizabeth Hinton, LeShae Henderson, Cindy Reed, *An Unjust Burden: The Disparate Treatment of Black Americans in the Criminal Justice System*, VERA INSTITUTE OF JUSTICE (May 2018), available at <https://www.vera.org/downloads/publications/for-the-record-unjust-burden-racial-disparities.pdf>. In 2020, Black men were six times as likely to be incarcerated as white men; African Americans and Latinos constituted more than 60% of the people imprisoned. *Trends in U.S. Corrections*, The Sentencing Project (Aug. 2020), at 4, available at <https://www.sentencingproject.org/wp-content/uploads/2020/08/Trends-in-US-Corrections.pdf>. Thus, communities of color in and out of prison bear the brunt of the many harms, COVID-19 included.

This Workshop considers the political, legal, and moral dimensions of incarceration, which over the last few centuries became a dominant response to behaviors deemed criminal. Our topics include the ideas that animated the “invention of the penitentiary” in the eighteenth century as a great “reform,” the justifications for its totalizing control, the emergence in the wake of World War II and the civil rights revolution of prisoners’ rights; in-prison punishments such as solitary confinement; and growing concerns about the costs — dignitary, social, political, and financial — of the system now in use.

We will examine actions by government officials (judges, legislators, executive officials) and by non-governmental organizations and by communities and social movements. Our inquiries include the role courts have played in normalizing conditions in prisons, the experiences and perspectives of people confined in prison, as well as those of people who direct and who work in prisons, and their families and communities of incarcerated people. Our materials reflect this array, as we assign excerpts from U.S. and non-U.S. law; as well as the history of professional “standard-setting,” including the first 1934 Standard Minimum Rules for the Treatment of Prisoners, promulgated by the League of Nations; the 1972 Model Statute for Prisoners’ Rights; the current European Prison Rules of the Council of Europe; and the 2015 U.N. Standard Minimum Rules for the Treatment of Prisoners (“the Nelson Mandela Rules”).

Our questions include the effects of the critiques and of the oversight propelled by prisoners and their communities, as they sought protection from courts, legislatures, and other actors. As we will discuss, interactions over the centuries have shaped debates about the parameters of permissible sanctions, the conditions of confinement, and the potential remedies, such as improving or abolishing detention as a form of punishment.

Requirements, Credits, and Readings

We aim to have an engaged discussion among all members of the class about these hard topics. This overview provides a list of each class. The syllabus will detail the readings (posted on Canvas) and explain the reasons we ask you to look at the selections we have compiled. Not all of the materials listed are assigned; in advance of each session, we will direct you to required readings and flag those that are optional.

We expect that students attend the weekly class meeting and prepare in advance. In the syllabus, we provide questions and comments to consider as you read. This class pivots around the readings and discussions; preparation for and attendance at these discussions is required for credit. Do note that, 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 for ungraded credit (explained below), students missing more than two sessions without permission will not receive credit.

We provide packets of readings for each week's class. If choosing to take the Workshop *ungraded* (credit/no credit), a student must, starting in the week after the first two sessions, submit written reflections four times during the semester. The reflections should comment on and discuss the relationships among the materials assigned and do so in no more than two-pages (double-spaced, size-12 font). The point of these submissions is for both other students and the instructors to be able to read the comments in advance of the class, so that discussions can build from these exchanges.

Students must send by email to each of the instructors (our emails are listed below) and to Elizabeth Keane, the Liman Center Coordinator (elizabeth.keane@yale.edu), as well as post their reflections on Canvas in the "Discussion" tab, so that other Workshop participants can read them. Please do so 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 course of the semester will not receive credit for the class. Please keep track of your own submissions to ensure you comply with this requirement and to receive ungraded credit.

If a student wants to have two *graded* credits, the requirement is that, in addition to the four reflections, a student must write a responsive essay of no more than 4,000 words during the examination period. By the beginning of reading period, we will provide specific questions and directions for this assignment that asks for commentary drawn from course materials and class discussions. NO additional research is to be done.

For *three graded credits*, a student can seek to write a paper (that can also be either as a Supervised Analytic Writing or a Substantial Paper). Students seeking to do so must also complete the requirements of four reflections on the readings in addition to doing this paper. Students interested in this option should let the teachers know, and by the fifth week of the semester, submit a proposal. The purpose is to clarify the questions you want to address, the materials you will use for research, and the fit between what you can know from published sources and your inquiries. Therefore, 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.

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

The Analytic Puzzles Posed by Incarceration

By way of a preview, we thought it helpful to unpack more about the ideas underlying the readings during the semester. Our focus is on the treatment of prisoners. But thinking about prisons requires considering the boundaries of the state's authority to criminalize, to punish, and to sentence to prisons. Who decides those parameters? Until relatively recently, the answer was "the keepers." 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 and the mid-century U.S. Civil Rights Revolution. During the second half of

the twentieth century, prisoners gained the status of rights-holders, and constitutional courts around the world have shaped a law of prisoners' rights that draws on provisions at the national and transnational levels and aims to provide some protection from torture and other cruel and degrading forms of treatment. And while we are focused on the United States, our discussions will regularly engage non-United States laws and practices, as proponents of incarceration have for more than two hundred years interacted to shape the system called prison.

Several puzzles reside in the relatively new entry of a body of law addressing prisoners' rights, 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. For example, in the United States, some statutes authorized judges to sentence people to "hard labor" and/or to "bread and water." Moreover, subject to constitutional constraints, 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. See *Academic Center of Law and Business v. Minister of Finance*, Supreme Court of Israel, Case No. HJC 2605/05 [19 November 2009]. 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. Lawsuits in some places have challenged "whole life" and "life without parole" sentences, along with whether the death penalty and voter disenfranchisement, and other "collateral consequences" of sentences. In one semester, we cannot read materials about all of these issues but we aim for discussions about the ideas and the practices of prison-as-punishment to reflect the relationships among 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 claims of correctional expertise related to

concerns about safety and security suggest judges ought to defer to these executive officials more than others? 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 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 assigned consider whether practices in prisons impose more punishment than is constitutionally permissible.

Courts have examined these issues in a host of contexts, including the use of whipping as “discipline,” segregation by race, risks to health, profound isolation, overcrowding, transfers to higher security settings, visitor bans, whole-life sentences, and disenfranchisement. Some of the lawsuits ask courts 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, the nature of “rights” in prison, 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 this overview of the issues makes plain, thinking about prisons requires contemplating the different effects that the system of incarceration has on individuals and communities. The constant reminder is that to speak of “mass incarceration” could mask differential impacts, as this “massive” incarceration enterprise is not distributed equally among all peoples. Race, gender, class, age, nationality, ethnicity, and physical and mental health predict who goes into detention.

Throughout the semester, we will ask why and how prisons have become a dominant feature of punishment and we will explore abolitionist critiques that aim to link the carceral state to legacies of chattel slavery and settler colonialism. We will puzzle about whether and if what “prison” means could be changed; whether and how to seek to abolish the totalizing control commonly found in contemporary U.S. prisons; and what “abolition” means in this context. Doing so requires considering how a social order, subcommunities, and individuals do, should, and could respond when humans hurt each other in grievous ways? We look forward to learning a lot in these discussions, as we explore together deeply-felt and different answers to the complex questions raised in each class.

The Topics to be Considered

January 24, 2022	Licensing and Constraining Punishment: Whipping and Rights
January 31, 2022	Health and Illness
February 7, 2022	COVID and Detention
February 14, 2022	Prisons as Sites of Racial Subordination
February 21, 2022	Sex, Gender, and Safety: Constructing, Reflecting, and Reifying Categories of Identity
February 28, 2022	Conditions of Prisons
March 7, 2022	“Liberty” as a Constraint on In-Prison Punishments
March 14, 2022	Abolishing Solitary Confinement
[Spring Break]	
March 28, 2022	Disenfranchisement, Re-enfranchisement, and Access to Voting
April 4, 2022	Association and Incarceration
April 11, 2022	Routes to Changing Prisons
April 18, 2022	The Concept of and Accounting for “Costs” of the Carceral State
April 25, 2022	Abolition of What?