

Liman Workshop

# IMPRISONED : FROM CONCEPTION AND CONSTRUCTION TO ABOLITION

Spring 2021 Syllabus  
Mondays, 6:10-8 pm, virtually

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**All readings and the course Zoom link will be available on the Yale Canvas website.**

The numbers of people in jails and prisons rose substantially from the 1970s through the present resulting in more than 2.2 million persons detained in 2020 in these facilities.<sup>1</sup> In addition, data from the U.S. Bureau of Justice Statistics from 2018 identified more than four million people on probation, parole, and the like were under supervision, and even as in some jurisdictions detention populations had leveled off or declined somewhat, one in 40 American adults was under correctional supervision.<sup>2</sup>

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.<sup>3</sup> In 2020, black men

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<sup>1</sup> Wendy Sawyer and Peter Wagner, *Mass Incarceration: The Whole Pie 2020*, PRISON POLICY INITIATIVE (Mar. 24, 2020), available at <https://www.prisonpolicy.org/reports/pie2020.html>.

<sup>2</sup> Laura M. Maruschak and Todd D. Minton, *Correctional Populations in the United States, 2017-2018*, U.S. Dep't of Justice, Bureau of Justice Statistics (August 2020), available at <https://www.bjs.gov/content/pub/pdf/cpus1718.pdf>.

were six times as likely to be incarcerated as white men; African Americans and Latinos constituted more than 60% of the people imprisoned.<sup>4</sup> Moreover, communities of color currently bear the brunt of COVID-19, which puts people in all forms of congruent housing at heightened risk of illness and death.<sup>5</sup>

This Workshop considers the political, legal, and moral dimensions of incarceration, as it dominates responses to behaviors deemed criminal. We will address the role that courts have played in normalizing conditions in prisons, the perspectives of those who live in prisons, work in prisons, direct prisons, and of their families and communities. 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. When doing so, we will look at actions by government officials (judges, legislators, executive officials) and by non-governmental organizations and by communities and social movements. Our materials reflect this array as we assign both U.S. and non-U.S. law, map some of the history of professional “standard-setting” (the 1934 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 analyze a mix of court decisions and commentary. Our questions include the effects of critique and of oversight by prisoners and their communities, courts, legislatures, and other actors, as they shape and debate the parameters of permissible sanctions, the conditions of confinement, and remedies including proposals to abolish prisons 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. The syllabus aims to provide an overview and some depth; we will not assign all of the materials listed; in advance of each session, we will explain which readings are required and which are optional.

We expect that students attend the weekly class meeting and prepare in advance. To be clear, 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.

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<sup>3</sup> 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>.

<sup>4</sup> *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>

<sup>5</sup> *Double Jeopardy: COVID-19 and Behavioral Health Disparities for Black and Latino Communities in the U.S.*, U.S. Substance Abuse and Mental Health Services Administration (2020), available at <https://www.samhsa.gov/sites/default/files/covid19-behavioral-health-disparities-black-latino-communities.pdf>.

Whether taking the class for graded or 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 credit/fail, a student must submit written reflections *four* times during the semester - *after* the first two sessions. The reflections should comment on and discuss the relationships among the materials assigned. The reflections should be 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 your 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.

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 4,000 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 requires specific permission of the instructors, and that 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. Our concern is that the issues proposed to be analyzed are clear and that materials are 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 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,<sup>6</sup> 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. 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

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<sup>6</sup> See *Academic Center of Law and Business v. Minister of Finance*, Supreme Court of Israel, Case No. HJC 2605/05 [19 November 2009].

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 the context of whipping, caning, risks to health, profound isolation, transfers to higher security settings, 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 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.

## February 1    **Licensing and Constraining Punishment: Whipping and Rights**

The readings for the first session have been selected to give you a sense of the degree to which sovereigns assume the power to punish by providing a glimpse of the history of punishment practices and the invention of prisons. The reminder is that the “invention of the penitentiary” was heralded as a great Enlightenment reform that ought to replace branding, lashing, executions, and transportation. This ambitious scan of more than two hundred years is a rapid orientation to the idea and entailments of prison as a punishment.

We hope to anchor an understanding of the relative novelty of prisoners as rights-holders and raise questions about what “having rights” in prison means. We also invite you to think across decades and oceans to consider the social movements and traumas that produced the change in attitude and in law that now takes the position that states are not completely 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. A first proposition, established in the Enlightenment for Europe and the United States is that punishment is supposed to be purposeful, not aimless. Brief excerpts from Beccaria, Bentham, and Foucault make that point, and Antony Duff’s overview provides more context.

Prisons in the 1960s in the United States come to the fore through excerpts from decisions challenging whippings in Arkansas and solitary strip cells in New York. In each instance we give you lower court decisions and appellate court reversals and ask that you explore the ideas animating the conflicting rulings. What are the premises behind the decision in 1967 by federal judges that Arkansas could “lash” a prisoner, if done with the procedural constraints outlined? And behind the district court ruling that a federal court should not interfere in New York’s placement of a prisoner in solitary? Turn then to the 1968 appellate decisions rulings—one from the Eighth Circuit that ruled whipping unconstitutional and the other from the Second Circuit imposing some oversight in New York state prisons. Consider the role of prisoner uprisings and how the materials on Attica inform your reading of these courts’ rulings.

As we come forward to more recent decades, consider ideas and practices outside the United States. Read descriptions of prisons in Norway and Germany, and think about the reasoning that undergirds the law and practices in other countries. Do you see them as plausible and desirable future paths in the United States?

### **Developing Premises that State Punishment Should be Purposeful**

The brief snippets in the materials come from two of the major early Enlightenment theorists of punishment – Beccaria and Bentham. A twentieth century critic was Michel Foucault, and Duff and Hoskins provide an overview of contemporary approaches.

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)  
Jeremy Bentham, *The Rationale of Punishment* (1770s)  
Michel Foucault, *Discipline and Punish: The Birth of the Prison* (1975)  
Antony Duff, "Legal Punishment" (2013)

## **Punishment in Prisons**

### **Whipping**

Talley v. Stephens, unrepresented prisoner filing, E.D. Ark, 1965  
Jackson v. Bishop (U.S. Eastern District of Arkansas, 1967)  
Jackson v. Bishop (U.S. Court of Appeals, Eighth Circuit, 1968)

### **Stripped, Cold, and in 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)

## **Questions**

What might have animated unrepresented prisoners to think that federal courts and the U.S. Constitution could help them? (note, we did not give you the pile of cases before the 1960s, when others tried and lost, but the Wright district court opinion is an example of the rejections by other judges). What were the "reasons" for the punishments of strip cells and whipping? Why were prisoners forced to work or to comply with the many rules of prisons?

Look at the decisions issued in the 1960s as you think about what was changing that prompted the lower courts to rule as they did and then the appellate reversals.

What prompted the federal judge in upstate New York to throw Lawrence William Wright out of court? What were the legal bases and premises for his decision, and what are the legal bases and ideas animating the reversal by the Second Circuit?

What prompted the federal judge in Arkansas to appoint a lawyer for Winston Talley and to conclude that whipping was constitutional but only under specified conditions? What interpretation of the Eighth Amendment did he rest his judgment on? The sources?

What are the bases for the reversal by then Judge Harry Blackmun for the Eighth Circuit. What idea about the Eighth Amendment come to the fore? Their sources?

How do these decisions relate (or not) to the ideas about punishment that Beccaria, Bentham, Foucault, and Duff discuss?

Are there analytic boundaries of these constitutional rulings. What are the implications for other kinds of in-prison punishments, like solitary confinement, food deprivation, lack of safety and sanitation? What is the relevance (if any) of prisons being run by states or the federal government?

Race is front and center in the discussion of Attica as is the prisoners' political organization and aspirations. In our eagerness to pare down readings, we did not include (but should have) where Blackmun writes that "race as such" was not present – which referred to the fact that the prisoners and the defendants were all white, even as the prison population was disproportionately not white. What roles are race and the civil rights movement playing for the various participants and the audience of these decisions?

Reflect on the efforts to ameliorate (if implemented) prison conditions. Why were these efforts in focus and how do they interact with social movements critical of prisons? What role do "rights" play when thinking about punishment? The reasons for that frame? Its limits?



## February 8 Health and Illness: from the Young to the Old, Pre and In -COVID

No discussion of confinement in 2021 can proceed without considering how COVID has cast light on the harms of prison and illuminated the longstanding costs associated with leaving and putting people into prison. As a backdrop to excerpts from the large body of case law that has come into being since March of 2020, ask the following preliminary questions: for whom (if anyone) are prisons designed? Can a person be physically unfit for prison? Too ill for prison? Too young or too old? Should those factors be part of decisions at sentencing without pandemic conditions?

Framing answers for some come from the development of the “law” of prisons. We assign some materials on health care. As you read, consider what affirmative obligations to provide care people who run prisons have. How did the U.S. Constitution come to be understood as mandating health care in prison and what parts of the document (the Eighth and Fourteenth Amendments or others) are relevant? The Supreme Court first addressed the issue of constitutionally mandated prison health care in one of its early prisoner rights cases, *Estelle v. Gamble*, decided in 1976. What is the majority’s test of unconstitutionality? How does a prisoner establish a violation and what substantive entitlements flow?

Two current areas about the reach of health care rights of treatment are Hepatitis C and opioid addiction. Recent lower court decisions read *Estelle v. Gamble* to mean that prisons must provide treatment for both, and appellate courts have, in some instances, rejected those conclusions. As you think about these rulings and the arguments for and against them, consider what relevance, if any, it is that people “on the streets” do not (yet) have rights to health care? Think also about funding inside prisons: how do decisions affect allocation among health care needs and raise issues of rationing access to health care? Consider also issues of post-release health care, as detailed in a recent data from health care providers. What, if any, obligations do governments have to help people transition from prisons to their communities?

Consider also how people with disabilities need accommodations. 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, cognitive, and psychiatric disabilities? Margo Schlanger’s article surveys the legal framework for litigating on behalf of disabled prisoners under the Americans with Disabilities Act, 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?

Age is an important factor, as prisons have many people 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?<sup>7</sup> The California Board of Parole Hearings memorandum and the French

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<sup>7</sup> For example, Mississippi is one state with an age-based parole provision, granting automatic parole hearings for certain individuals not convicted of excludable offenses who reach the age of 60 and have served at least 10 years. See Vera Institute of Justice, *Aging Out: Using Compassionate Release to Address*

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. Should we create special facilities for juveniles, or should they not be imprisoned at all? The harms at Rikers illustrate the harrowing violence that young people often face while incarcerated. 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.

Another segment of people with health challenges in prison are the staff that works in such settings. AMEND is an organization based at UCSF Medical School and researchers there have collaborated with others in documenting how bad being a staff member in a prison is for a person's health.<sup>8</sup>

As you look at this array of concerns, think about yourself as a prisoner, a prison administrator, a legislator, a judge, a family member of people who live or who work in prison, a community activist, and a lawyer/law student. How would you approach these problems, and does the 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?

### Health and Illness

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

*Hoffer v. Jones*, 290 F.Supp.3d 1292 (N.D. Fla. 2017), *reversed by*  
*Hoffer v. Secretary*, 973 F.3d 1263 (11th Cir. 2020)

Michael Linden, Sam Marullo, Curtis Bonne, Declan T. Barry & Kristen Bell, *Prisoners as Patients: The Opioid Epidemic, Medication-Assisted Treatment, and the Eighth Amendment*, 46 (2) J. Law Med. Ethics 252-267 (2018)

James Brower, Psy.D., *Correctional Officer Wellness and Safety Literature Review*, U.S. Department of Justice Office of Justice Programs Diagnostic Center (July 2013).

Emily A. Wang, Yongfei Wang & Harlan M. Krumholz, *A High Risk of Hospitalization*

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*the Growth of Aging and Infirm Prison Populations* (December 2017), at <https://www.prisonpolicy.org/scans/vera/Using-Compassionate-Release-to-Address-the-Growth-of-Aging-and-Infirm-Prison-Populations-Full-Report.pdf>. At least 17 states have such provisions, referred to as "geriatric parole." See National Conference of State Legislatures, *State Medical and Geriatric Parole Laws* (August 27, 2018), at <https://www.ncsl.org/research/civil-and-criminal-justice/state-medical-and-geriatric-parole-laws.aspx>.

<sup>8</sup> For more information on AMEND, see Amend –Changing Correctional Culture (<https://amend.us/>).

*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)

Jamelia Morgan, *Caged In: Solitary Confinement's Devastating Harm on Prisoners with Physical Disabilities*, ACLU FOUNDATION (Jan. 2017)

Jamelia Morgan, *Reflections on Representing Incarcerated People with Disabilities: Ableism in Prison Reform Litigation*, 96 Denv. L. Rev. 973 (2019).

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

CAL. BD. OF PAROLE HEARINGS, Memorandum, Elderly Parole Program (June 16, 2014), *available at* <http://www.dianeletarte.com/files/3616008/uploaded/elderly-parole-program-overview-061614.pdf>.

French Correctional Law, Art. 729 (2015)

Benjamin Weiser, "Kalief Browder's Suicide Brought changes to Rikers. Now it Has Led to a \$3 Million Settlement," The New York Times (January 24, 2019)

*Conditions of Confinement for Incarcerated Youth Age 15 to 21 at Manson Youth Institution and York Correctional Institution*, Office of the Child Advocate (Nov. 2020)

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

### **Optional**

Mary Crowley, *How Connecticut Reimagines Prison for Young Men*, Vera Institute of Justice (2017), *available at* <https://www.vera.org/blog/dispatches-from-t-r-u-e/how-connecticut-reimagines-prison-for-young-men>

## Questions

### **Abolishing corporal punishment? Improvement or not?**

Foucault – what replaces the lash?

### **What is the most attractive doctrinal home for the right recognized in *Estelle v. Gamble*?**

Is the Fourteenth Amendment Substantive Due Process Clause a more attractive option than the Eighth Amendment?

From the perspective of a prisoners' rights attorney, was Gamble's case an ideal one in which to pursue this claim?

What does the prison believe is happening with Gamble?

How would you change Justice Marshall's opinion?

How do we explain the oddity of prisoners being entitled to medical care that some non-imprisoners lack?

Can *Estelle v. Gamble* be regarded as internally inconsistent?

### **Hepatitis**

The district court and circuit court opinions differ dramatically along several dimensions. Which dimensions? How so?

Which opinion is more faithful to *Estelle v. Gamble*?

PLRA: How should that statute, which is hostile to prisoners' rights, be interpreted?

What role should cost play in legal determinations regarding prisoners' healthcare?

### **Opioids**

**Why do you suppose the authors of the piece on the opioid crisis framed the piece in the relatively narrow fashion that they did?**

Was that decision wise?

**Are there downsides to focusing reform efforts on discrete groups of prisons (e.g., young, old, disabled, substance abuse issues)? What could those be?**

What are the strategic upsides to such approaches?

### **Disability**

**Applying notions of disability in prisons could succeed in destabilizing penal institutions in significant ways. How so?**

Why does Professor Schlanger focus on statutory claims rather than constitutional claims?

Is that statutory focus likely to bear fruit?

How is ableism different in prison than nonprison settings?

Should youthfulness or elderliness be regarded as a form of disability?

**Should we study the stressors of life as a correctional officer? Why? Why not?**

## February 15: COVID-19 in Detention

As of December 18, 2020, one in five prisoners had tested positive for COVID-19, as compared to one in twenty in the population outside of prison.<sup>9</sup> By January 12, 2021, at least 343,008 prisoners had tested positive since the onset of the pandemic, and at least 2,144 prisoners in total had died.<sup>10</sup> According to data from the Marshall Project updated January 14, 2021, California, with the largest prison population in the country, had reported the most cases since testing and tracking began – 44,079 total cases, or 3,747 per 10,000 prisoners. South Dakota had the highest rate of infection, with 6,312 total cases per 10,000 prisoners. Connecticut reported a total of 3,508 cases among pre- and post-trial detainees, or 2,854 per 10,000 prisoners.<sup>11</sup>

Beginning in the spring of 2020, as the COVID crisis was beginning, some correctional systems adopted new policies aiming to provide forms of protection, such as distributing masks, promoting frequent sanitization, and shifting meals, programs, and other operations away from large group settings. Researchers began to track infections and deaths, the CDC provided some guidance for correctional facilities, and many lawsuits were filed. One compendium, regularly updated, is the UCLA Law COVID-19 Behind Bars Data Project, which tracks data related to infection rates, releases, department policies, and litigation arising from the pandemic.

What has, does, and should U.S. constitutional law say about government obligations to people in detention during COVID? What ought courts do if executives and legislators do not provide means to reduce the risk of death and injury? As you read the cases excerpted, reflect on the 1976 *Estelle v. Gamble* ruling, the Hepatitis C case, and the *Helling v. McKinney* decision, and think about what the law requires. Who needs to prove what? Should requirements change in emergency situations, and in which direction? Are the standards under the Eighth Amendment and the Fourteenth Amendment the same? What relevance does and should a person's status as convicted or not have in the analyses? What do you make of disagreements among judges sitting at different levels of the federal system? The case law we have provided is the tip of a much larger body of decisions, and some focus on post-conviction detention while others address people held before conviction.

The litigation has been shaped by complex layers of law addressing the role that federal courts can play in state prisons -- in light of the 1995 Prison Litigation Reform Act (PLRA), habeas corpus doctrine, and debates about structural injunctions. (More about the legal parameters come from an (optional) law professors' brief arguing that federal judges have some power to respond to the urgencies of COVID by providing "provisional relief" in the form of bail or

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<sup>9</sup> Beth Schwartzapel, Katie Park, and Andrew Demillo, *1 in 5 Prisoners in the U.S. Has Had COVID-19*, The Marshall Project (Dec. 18, 2020), <https://www.themarshallproject.org/2020/12/18/1-in-5-prisoners-in-the-u-s-has-had-covid-19>

<sup>10</sup> The Marshall Project, *A State-by-State Look at Coronavirus in Prisons* (Jan. 14, 2021), <https://www.themarshallproject.org/2020/05/01/a-state-by-state-look-at-coronavirus-in-prisons>

<sup>11</sup> *Id.*

“enlargement” of custody—permitting people to leave prison temporarily to protect them from COVID.)

Once again, as you read, think about yourself as a prisoner, a prison administrator, a legislator, a governor with pardon or other powers, a judge, a family member of people who live or who work in prison, a community activist, and a lawyer/law student. How would you approach these COVID-era problems? Does the approach vary depending on what role you imagine yourself having?

### **COVID in Detention**

*Martinez-Brooks v. Easter*, No. 3:20-cv-00569 (MPS), Declaration of Dr. Jaimie Meyer, M.D., ECF No. 1-1 (D. Conn. filed Apr. 27, 2020)

Brendan Saloner, PhD, Kalind Parish, MA, Julie A. Ward, MN, RN, Grace DiLaura, JD, and Sharon Dolovich, JD, PhD, *COVID-19 Cases and Deaths in Federal and State Prisons*, Journal of the American Medical Association, July 8, 2020

Rick Raemisch, *Releasing Prisoners is Essential for Protecting Inmates, Officers and Communities from COVID-19*, NEWSWEEK (April 30, 2020)

Brie Williams, Leann Bertsch, *A Public Health Doctor and Head of Corrections Agree: We Must Immediately Release People from Jails and Prisons*, THE APPEAL (March 27, 2020)

David Cloud, Dallas Augustine, Cyrus Ahalt, & Brie Williams, *The Ethical Use of Medical Isolation – Not Solitary Confinement – to Reduce COVID-19 Transmission in Correctional Settings*, AMEND (April 9, 2020)

Nathaniel Lash, *The Coronavirus Has Found a Safe Harbor*, New York Times (December 18, 2020) (see graphics at <https://www.nytimes.com/interactive/2020/12/18/opinion/jails-covid.html>)

Sharon Dolovich, Aaron Littman, Kalind Parish, Grace DiLaura, Chase Hommeyer, Michael Everett, Hope Johnson, Neal Marquez, and Erika Tyagi. UCLA Law Covid-19 Behind Bars Data Project, UCLA Law, 2020, <https://uclacovidbehindbars.org/>

### **Legal and Ethical Duties to Protect Prisoners' Health**

*Helling v. McKinney*, 509 U.S. 25 (1993)

*Valentine v. Collier*

2020 WL 1899274 (S. D. Tex. Apr. 16, 2020) (preliminary injunction order)

455 F. Supp. 3d 308 (S.D. Tex. Apr. 20, 2020) (Memorandum and Order)

956 F.3d 797 (5th Cir. Apr. 22, 2020) (staying preliminary injunction)

140 S. Ct. 1598 (May 14, 2020) (affirming stay)

960 F.3d 707 (5th Cir. June 5, 2020) (remanding)

2020 WL 5797881 (S.D. Tex. Sept. 29, 2020) (granting permanent injunction)  
978 F.3d 154 (5th Cir. Oct. 13, 2020) (staying permanent injunction)  
141 S.Ct. 57 (Nov. 16, 2020) (affirming stay)

*Martinez-Brooks v. Easter*, later *Whitted v. Easter*

459 F. Supp. 3d 411 (D. Conn. May 12, 2020) (TRO Order)

Class Action Settlement Agreement

2020 WL 7297016 (D. Conn. Dec. 11, 2020) (Settlement Agreement enforcement order)

Letter from U.S. Senators Blumenthal and Murphy and Representative Hayes to FCI  
Danbury Warden Easter (Jan. 8, 2021)

*Mays v. Dart*, 974 F.3d 810 (7th Cir. Aug. 18, 2020)

### **Vaccination in Prison**

Emily Wang, Lauren Brinkley-Rubinstein, Lisa Puglisi, Bruce Western, *Recommendations for Prioritization and Distribution of COVID-19 Vaccine in Prisons and Jails*, White Paper (Dec. 16, 2020)

[https://justicelab.columbia.edu/sites/default/files/content/COVID\\_Vaccine\\_White\\_Paper.pdf](https://justicelab.columbia.edu/sites/default/files/content/COVID_Vaccine_White_Paper.pdf)

### **Optional**

*Roman v. Wolf*, No. 20-55436, Brief of Amici Law Professors on the Remedial Powers of the Federal Courts (9th Cir. filed Aug. 17, 2020)

## **Questions**

We look forward to continuing the discussion and wanted to return to some of the materials from last week and integrate them with those for this week. Think both about the issues more broadly as well as the specifics in the materials. How do the materials about disability, youth, older people, and COVID, affect your reading, thoughts, and views of *Estelle v. Gamble* and *Hoffer*? Who ought to have done what – prisoners, prison officials, public health officials, governors, legislators, courts, community activists, the media? Below are some of the remaining questions from our discussion last week, as well as the questions we pose to you from our third week of readings.

### **Disability**

**Applying notions of disability in prisons could succeed in destabilizing penal institutions in significant ways. How so?**

Why does Professor Schlanger focus on statutory claims rather than constitutional claims? What are the pros and cons of each? What are the remedies available? Standards for liability?

How is ableism different in prison than nonprison settings?

Should youthfulness or elderliness be regarded as a form of disability?



What does it mean to make a prison “better” for subpopulations? And how does that affect agendas of de-incarceration? The lives of people in detention?

***Helling v. McKinney:***

How does the Court adjust the deliberate indifference standard set forth in *Estelle v. Gamble*?

What are the implications of injecting “attitudes and conduct” into the subjective prong of an Eighth Amendment claim?

What motivates the Court’s reference to policy as a potential cure for the subjective mental state of deliberate indifference? What are the consequences of the primacy of policy in this inquiry?

Consider Justice Thomas’ dissent. To what extent is the majority’s gloss on what constitutes deliberate indifference also informed by a tethering to the term and concept of *punishment*?

***Valentine v. Collier:***

Is the Eighth Amendment a test of good intentions? To what extent is goodwill, or the absence of malice, sufficient to cure deliberate indifference? Do remedial measures, even when wholly ineffective, defeat a subjective mental state of deliberate indifference? Consider how the answers to these questions differ between the case of disease *prevention* here as opposed to the context of disease *treatment* from *Estelle* and the Hepatitis C case.

How do the rapidly evolving dynamics of prison administration during the pandemic alter the plaintiffs’ prospects in the litigation? What about the severity of outbreaks at the facility?

What is the District Court’s response to the Fifth Circuit’s rebuke, and how does it seek to avoid the Fifth Circuit’s signals about the deliberate indifference standard? How does the Fifth Circuit respond in turn? What deference does each court give the other, as to fact and to law?

What is the conflict between official prison policy and actual staff conduct, and how are these questions ultimately resolved? Are these truly individualized record-based determinations, or does the mere existence of policy operate to dismantle the Eighth Amendment claim as a matter of law?

Consider the Supreme Court’s posture of review in this case, and the power of making law in summary fashion by stay. What are the consequences of this posture? What effect on nationwide litigation efforts?

How does the district court’s consideration of the ADA claim differ from its consideration of the Eighth Amendment claim?

What is the consequence of removing the notion of *punishment* from the assessment of liability? What result for relief?

Note: we will not expect you to know the details of the PLRA but we will discuss the provisions and their impact on litigation. As you think about access, what is limited and what impact does it have on judges, lawyers, defendants, and prisoners? Focus on the relief to be granted. What does losing access to federal court mean for prisoners seeking to vindicate constitutional claims? What other fora are available?

***Martinez-Brooks v. Easter:***

What does one additional month into the pandemic do to inform both the atmospherics and the outcome of the Court's TRO order when compared with *Valentine*? How does the Court credit or adopt the series of COVID prison cases decided in the interim?

To what extent is deliberate indifference informed by the availability of pre-existing de-densification tools, such as statutory home confinement authority? Can a violation of the Eighth Amendment be sustained in the absence of clearly available administrative avenues to de-densify prisons?

What are the remedies pursued by Judge Shea and how are those remedies justified? Do those remedies intrude on the deference owed to prison authorities?

What does the Settlement Agreement secure, and how does the Agreement relate to the court's TRO order?

What can be gleaned from the court's enforcement order and the BOP's recent conduct in response to the pandemic?

***Long- and Short-Term Goals and Strategic Advocacy:***

Consider the various non-litigation avenues employed to improve conditions for people incarcerated during the pandemic—from legislators and civil rights advocacy groups to public health experts and correctional leaders. What is the efficacy of these differing strategies, who are the different audiences, and what are the levers for change? Who makes these assessments? Trade-offs?

## February 22: Prisons as Sites of Racial Subordination

The criminal system disproportionately puts people of color into prisons, and the racism in the system has been documented for decades. 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?

We provide some of the law about the use of race in prison and we begin where it did, in Alabama in 1966 and then in the U.S. Supreme Court in *Lee v. Washington*, the (aptly named) first prisoner rights class action to reach the U.S. Supreme Court. Decided in 1968, the Court affirmed a three-judge court in Alabama holding the state's segregation of its prisons by race to be unconstitutional. We then turn to *Johnson v. California*, a 2005 ruling rejecting a policy of that state that used race as a variable to identify gang members and segregate individuals. As you think about the decisions, reflect on your views of the use of race as a factor for admissions to schools or for placements in other institutions and for jobs. In *Schuette v. Coalition to Defend Affirmative Action*, Justice Kennedy's opinion and Justice Sotomayor's dissent bring these tensions to bear. How do the different contexts inform your thoughts on when/whether/how/if to take race into account when people are incarcerated?

A window into systemic racism in New York prisons comes from the December 2016 *New York Times* overview, and 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, and of what kinds) should or could be used in sentencing and in prison? What about sorting by gender, age, and citizenship status?

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

James Forman, Jr., "Racial Critiques of Mass Incarceration: Beyond the New Jim Crow,"  
N.Y.U. LAW REVIEW Vol. 87, No. 21, 22-25, 34-61 (Feb. 2012)

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

*Washington v. Lee*, 263 F. Supp. 327 (three-judge court M.D. Ala. 1966)

*Lee v. Washington*, 390 U.S. 333 (1968) (*per curiam*)

*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)

*Schuetz v. Coalition to Defend Affirmative Action*, 572 U.S. 291 (2014)

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)

Reginald Dwayne Betts, “Kamala Harris, Mass Incarceration, and Me”, THE NEW YORK TIMES MAGAZINE, (Oct. 20, 2020).

Optional: Emma Kaufman, Segregation by Citizenship, 132 HARVARD LAW REVIEW 1379, 1380-1387 (2019).

## Questions

The readings focus in part on political mobilization to end incarceration and/or its expansive reach. How have advocates and activists (legal, policymakers, community groups, etc.) framed the problem of mass incarceration and racial disparities in incarceration rates? What are the ways to think about the “New Jim Crow” framing, or comparisons to chattel slavery, to describe the problem of racialized mass (or hyper) incarceration?

What are reasons for adopting the “New Jim Crow” framework for discussing mass incarceration and racial disparities? What are the drawbacks to such framing in prison reform and abolitionist movements?

Does the “New Jim Crow” framing respond to problems pertaining to violence or class? Why or not?

Prof. Forman’s article and subsequent book, *Locking Up Our Own*, specifically addresses Black communities support for punitive crime policies. What are his concerns about the Jim Crow frame and what are his thoughts about the problem of incarceration as a tool of racial subordination? Are there distinctions between the problem of racial disparities and the claim that prisons—and the carceral state more broadly—function to subordinate a Black, Latinx, and Indigenous/Native American communities?

How does the Supreme Court define the racial injury in *Johnson v. California*? What were the reasons California gave for using “race” as a category, and what are the reasons for the Court’s rejection? Why did the Court conclude that strict scrutiny applied to the CDC’s policy? What about prison administrators using race affirmatively – for job opportunities or education – for incarcerated people or staff? How would Justice Stevens approach the problem? With what result?

Does *Lee v. Washington* support the decision in *Johnson*? Why does Justice Thomas argue

that Lee provides a weak basis for support?

Consider the range of standards possible under the Court's approach to prison officials' decisions? What is the Turner standard and what others – with more or less deference – would or could be apt here? Or is the Turner standard problematic?

Why does the Supreme Court in Schuette uphold the ban on affirmative action in the Michigan Constitution?

What's the legal injury that Justice Sotomayor identifies in her dissenting opinion? How does Justice Sotomayor's discussion of race and racism inform her EPC analysis? And does it inform your thoughts on what an opinion in Johnson might have said?

What does racial subordination look like in NYS prisons and its parole system? Given the roll back of civil rights protections for racial minorities in the last few decades, should legal advocates turn to the EPC to challenge racial profiling, stop-and-frisk, and even bias in the parole system?

## March 1: Sex, Gender, and Safety: Constructing, Reflecting, and Reifying Categories of Identity

This session considers gendered identities, sexuality, safety, and control in prison. We begin with the categories of “women and men,” which are used by criminal law enforcement. Sex-segregation is common for housing incarcerated people and for staff assignments. What are the assumptions about “differences” between women and men and the sources of the distinctions, in and out of prisons?

In 2020, the U.S. Civil Rights Commission issued a report on women and girls behind bars and called for major reforms. Excerpts reflect that women are about ten percent of the prison population and concerns about the lack of resources allotted to them. In addition to reflecting on the sources of disparity, consider what responses are needed and where they could come from. What work can constitutional law do? How do ideas about affirmative action (often called positive discrimination outside the United States), “gender parity,” and “gender responsive programming” affect what courts, executive actors, and legislation can do? How have social movements affected and framed the problems and remedies?

The materials provide examples of efforts. Included are excerpts from case law (on privacy and equality), and federal and state legislation addressing women. What are the ideas about women’s needs reflected in these materials? How do the United Nations Rules for the Treatment of Women Prisoners and Non-Custodial Measures for Women Offenders, the “Bangkok” Rules of 2010 and the Mandela Rules of 2015 illuminate concerns about women in confinement?

Throughout the semester, we have thought about the ecosystem of prisons, in which some people are confined all the time and staff and others come and go. Here, the decision in *Teamsters Local* probes the reasons for and impact of norms of women guarding women. Those materials are a bridge to the next area of discussion, about how to move beyond the binary of women/men? Consider the reasoning and the holding in *Farmer v. Brennan* and in *Edmo v. Corizon*. What are the premises, constitutional bases, and impact of these rulings?

As you reflect on the packet of readings, think about the concerns about people and how they illuminate the relationship between gendered identities and incarceration.

### Women as Prisoners

Susan Burton & Cari Lynn, BECOMING Ms. BURTON: FROM PRISON TO RECOVERY TO LEADING THE FIGHT FOR INCARCERATED WOMEN 7-10 (2017)

Piper Kerman, ORANGE IS THE NEW BLACK 279-93 (2010)

Attending to Difference, excerpts from the ABA Subcommittee Report, *Revising Security Classification Instruments and Need Assessments for Women Offenders*, in Liman Center, *Isolation and Reintegration: Punishment Circa 2014* (2015) [https://law.yale.edu/sites/default/files/area/center/liman/document/Liman\\_Colloquium\\_2014\\_Isolation\\_and\\_Reintegration\\_Punishment\\_Circa\\_2014\\_revised\\_Jan\\_8\\_2015.pdf](https://law.yale.edu/sites/default/files/area/center/liman/document/Liman_Colloquium_2014_Isolation_and_Reintegration_Punishment_Circa_2014_revised_Jan_8_2015.pdf)

*Women in Prison: Seeking Justice Behind Bars*, U.S. Commission on Civil Rights (2020),

Introduction and Background, <https://www.usccr.gov/pubs/briefing-reports/2020-02-26-Women-in-Prison.php>

### **Constitutional Law's Relationship to Gender as a Category in Detention**

*Jeldness v. Pearce*, 30 F.3d 1220 (9th Cir. 1994)

*Henry v. Hulett*, 969 F. 3d 769 (7th Cir. 2020)

*Mendiola-Martinez v. Arpaio*, 836 F.3d 1239 (9th Cir. 2016)

### **Executive and Legislative Efforts Naming Gender**

*Women in Prison: Seeking Justice Behind Bars*, U.S. Commission on Civil Rights (2020), Executive Summary; Dissenting Statement of Commissioner Gail L. Heriot; Gender An Overview of State Legislation Enacted in 2018 and Early 2019 Addressing Incarcerated Women, Ali Harrington & Molly Petchenik (2019)

First Step Act, 18 U.S.C. 4042 (Statutory Notes on "Healthcare Products"); Pub.L. 115-391, Title III (2018)

Press Release: Virginia DOC's Gender Responsivity Plan Calls for Moving Offenders, Transitioning Facilities, Virginia Department of Corrections (Sept. 17, 2019)

Federal Bureau of Prisons, Female Offender Manual, Program Statement 5200.02 (Jan. 2, 2018), [https://www.bop.gov/policy/progstat/5200.02\\_cn1.pdf](https://www.bop.gov/policy/progstat/5200.02_cn1.pdf)

Nancy Gertner and Judith Resnik, *Keep Female Prisoners Close to Family*, Boston Globe (Sept. 3, 2013)

### **Staffing Detention Facilities Holding Women**

*Teamsters Local Union No. 117 v. Washington Dept. of Corrections*, 789 F.3d 979 (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)

United Nations Standard Minimum Rules for the Treatment of Prisoners (Nelson Mandela Rules), Res. 70/175 (January 8, 2016)

### **Moving away from Binaries**

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

*Edmo v. Corizon, Inc.*, 935 757 (9th Cir. 2020)

### **Optional Readings**

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)

## **Questions**

We have just discussed classifications based on race, and we turn now to probe classifying incarcerated people by gender. As you read this segment of readings, consider:

What animates the practice of gender-based segregation in jails and prisons? from whose perspectives are those policies wise and desirable or problematic?

What are the claims and sources of “difference” and what are the needs or services that may distinguish women and men in detention? Do these purported “differences” in genders suggest transforming single-sex prisons, assuming those institutions persist?

In the last decades, the idea of “gender-responsive programming” has come to the fore. What could/does/might that mean? What obligations do prison systems have to provide “for” women and men and how would/does/should that translate on the ground? How should prisons respond to the particular needs of incarcerated women with disabilities and survivors of sexual violence?

What is US constitutional and statutory law’s relationship(s) to classifications by gender for prisoners or staff, to gender-responsive programming, and to accommodating and making spaces “for” women/men/non binary delineations? Consider for example a claim that women ought to have the “same” services, programs, spaces, and facilities as do men. What equal protection arguments could be made and by whom? Statutory claims?

Consider *Henry v. Hulett*: What are the rights that emerge under the Fourth Amendment for prisoners? Are they engendered? What is Judge Easterbrook’s theory of the relationship of the Eighth Amendment to the Fourth?

How do standards, like the UN rules, consider the issues of gender delineations?



## March 8: Conditions of Prisons

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. Where do lines about what kinds of treatment are illicit in prison come from? How can they be changed?

We begin where the law of prison conditions began – in the middle of the twentieth century when prisoners, unrepresented, sought help from judges. In some instances, judges saw patterns or problems and appointed lawyers. The *pro se* complaints in this segment are but the tip of an iceberg, and several resulted in class-wide rulings, of which we excerpt a few to provide a sense of the doctrine that developed. In addition, the Honorable William Wayne Justice, who presided for decades over the Texas prison litigation, explained what animated him to become involved in prison reform.

The shifting attitudes in courts interacted with changing attitudes in Congress. A door opened when, in 1980, Congress enacted the Civil Rights of Institutionalized Persons Act (CRIPA), and other doors closed with the Prison Litigation Reform Act of 1996 (PLRA). We provide an example of efforts by the U.S. Department of Justice to enforce CRIPA, and an overview of the retrenchment mapped by Professor Margo Schlanger in her 2015 article, *Trends in Prisoner Litigation*.

What is the distinction between the idea of a condition of confinement and of a punishment in prison? Why were courts and the federal government (with support from Congress) willing to become involved in conditions of confinement for a time, and what tests of unconstitutionality did they generate? Why the retrenchment from this more active involvement? As you think about these questions, what parts of the U.S. Constitution are relevant and what standards for prison conditions did courts shape? Review *Rhodes v. Chapman* (1981) and *Turner v. Safley* (1987), announcing standards of deference related to confinement in double cells and other rules. What are the different legal tests? What are the justifications for oversight? For deference to prison officials?

As you read the 2011 *Brown v. Plata* decision, upholding a lower court conclusion that conditions in California’s prisons were unconstitutional, consider the differences between the majority and the dissenters. What premises divide them? What about their views on the role of judges? Prison officials? The function of punishment? Class actions? What role does federalism play? What are the mechanisms for the enforcement of rights (individual, aggregate, public, private), the range of remedies (injunctions, damages) and their utilities?

Again, think from the many perspectives about what roles respective actors in this polity should take in deciding on conditions of confinement for incarcerated people?

Complaint in *Pugh v. Sullivan*, Civil Action No. 74-57-N, filed in the Middle District of Alabama, Feb. 26, 1974

Complaint in *James v. Wallace*, Civil Action No. 74-203-N, filed in the Middle District of Alabama, June 21, 1974

(both reprinted in Judith Resnik, *The Puzzles of Prisoners and Rights: an Essay in Honor of Frank Johnson*, Judge Frank M. Johnson Jr. Centennial Symposium & Law Clerks Reunion, 71 ALA. L. REV. 665 (2020))

*James v. Wallace*, 382 F. Supp. 1177 (M.D. Ala. 1974)

*Newman v. Alabama*, 559 F.2d 283 (5<sup>th</sup> Cir. 1977) (affirming in part and reversing in part)

*Jordan v. Fitzharris*, 257 F.Supp. 674 (N.D. Cal. 1966)

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

U.S. DEP'T OF JUST., INVESTIGATION OF ALABAMA'S STATE PRISONS FOR MEN (2020)

PrisonLitigation Reform Act (PLRA), 42 U.S.C. § 1997e, *et seq.*

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

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

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

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

## Questions

To what extent should prisons be deemed responsible to violate the Eighth Amendment for violence that occurs among prisoners, including as described in the complaint of Pugh v. Sullivan? If courts routinely held prisons violated the Eighth Amendment in such conditions, might those decisions ultimately have deleterious consequences for the lives of prisoners?

Judge Frank Johnson is often venerated among legal liberals, most prominently for his civil rights decisions, inter alia, as a district court judge in Alabama. Should Judge Johnson's opinion in *James v. Wallace* be viewed as burnishing or marring his reputation with legal liberals? Why so? How does the Fifth Circuit's treatment of Judge Johnson's opinion in 1977 inform your analysis?

Does the U.S. Department of Justice's recent investigation suggest that Alabama's prisons are defined more by continuity or change over the last 45 years?

*Jordan v. Fitzharris* describes, rather dispassionately, the odious use of strip cells as a form of punishment in California prisons. How should prisoners be punished, if at all, for, say, violently attacking a correctional officer or a fellow prisoner?

Judge Justice is also a celebrated figure among legal liberals, including for this decision invalidating the Texas measure at issue in *Plyler v. Doe*. What accounts for this

transformation over time on the question of prisoners' rights? How do you evaluate his depictions of lawyers and prisoners? Is Judge Justice misguided to embrace the mantle of "judicial activism"?

Turner v. Safley is commonly regarded as one of the most important cases in prison law. Why? What does the test hold? The decision is sometimes hailed in constitutional law courses, not least because its marriage holding is cited favorably in Obergefell. Does Turner v. Safley merit a rosy reputation?

If you were a prisoners' rights attorney, would Rhodes v. Chapman constitute an ideal set of facts to challenge double-celling? Why?

After reading Prof. Schlanger's article, is it possible that the PLRA is the most significant piece of civil rights legislation from the last 25 years? The PLRA did not prevent the Court from issuing a pro-prisoner decision regarding overcrowding in Brown v. Plata. Why not? What would the various Justices have done in response to the overcrowding identified in Plata?

## March 15: Punishment in Prison

We continue to reflect on the respective roles of prison officials, courts, and legislatures in licensing and normalizing some practices in prisons and prohibiting others. Prisons have internal codes that make unlawful a host of behaviors. Obedience is expected, and violations are punished by taking away “good time” credits, or other incentives or opportunities, through transfers to more restrictive facilities, and by putting people into disciplinary isolation. What ideas about human liberty, movement, autonomy, and agency animate the views of justices and result in disagreements about the role that the U.S. Constitution ought to have in regulating in-prison punishment?

We begin with *Wolff v. McDonnell*, a 1974 decision; by the time it was rendered, some prison systems were holding hearings before imposing certain punishments and since its issuance, thousands of disciplinary hearings have been held. The Court’s subsequent limits on what could have been the reach of *Wolff* can be seen from *Meachum v. Fano* (in 1976) and *Sandin v. Conner* (1995), both declining to require procedural due process prior to disciplinary decisions. What are the legal principles developed? Their premises? How does the Canadian Supreme Court’s approach in *May v. Ferndale* (2005) differ on the issues of the power of prison officials to change the severity of conditions of confinement? What are the factors that emerge from *Sandin* and how are they applied in *Wilkinson*? In the next class, we continue to examine in-prison punishment.

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

*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)

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

Judith Resnik, Hirsu Amin, Sophie Angelis, Megan Hauptman, Laura Kokotailo, Aseem Mehta, Madeline Silva, Tor Tarantola & Meredith Wheeler, *Punishment in Prison: Constituting the “Normal” and the “Atypical” in Solitary and Other Forms of Confinement*, 115 Nw. U. L. REV. 45 (2020).

Sharon Dolovich, *Forms of Deference in Prison Law*, 24 Federal Sentencing Reporter 245 (2012)

## Questions

Before turning to this week’s materials, we will conclude our discussion of last week’s remaining materials. To refresh your recollection, we will continue exploring:

If you were a prisoners’ rights attorney, would *Rhodes v. Chapman* constitute an ideal set of facts to challenge double-celling? Why?

After reading Prof. Schlanger’s article, is it possible that the PLRA is the most significant

piece of civil rights legislation from the last 25 years? The PLRA did not prevent the Court from issuing a pro-prisoner decision regarding overcrowding in *Brown v. Plata*. Why not? What would the various Justices have done in response to the overcrowding identified in *Plata*?

*Turner v. Safley* is commonly regarded as one of the most important cases in prison law. Why? What does the test hold? The decision is sometimes hailed in constitutional law courses, not least because its marriage holding is cited favorably in *Obergefell*. Does *Turner v. Safley* merit a rosy reputation?

Thereafter, we will turn to think more about the forms of punishment imposed in prison and the regulation, if any, of that decision-making.

Were you running a prison system, what rules would you want to have about in person punishment? What behaviors would you sanction, why and how?

As you read the cases, consider the distinctions between taking away good time credits, transferring people to other facilities, and putting them into isolation. What other forms of punishment could be available? And what were the reasons prison administrators provided for why they imposed punishment or made transfers?

What remedies did the incarcerated individuals seek in *Wolff*, *Meacham*, *Sandin*, and *Wilkinson*? Why might prisoners care about process as well as stopping a form of punishment?

What are the Justices' differing understandings of the liberty that remains post-conviction and in prison? The sources of that liberty?

To be clear, for those of you not currently steeped in due process doctrine and theory, look at Justice White's discussion in *Wolff v. McDonald* and in *Meacham*, and Justice Steven's analysis in dissent, before turning to Chief Justice Rehnquist in *Sandin*, and returning to the dissent by Justice Ginsburg. Why does Justice Breyer write separately in *Sandin*? What is the "test" in *Wilkinson* for when some procedural protections are required?

Where do the justices get their ideas about what is "normal" in prison, and what is "atypical"?

How does the Canadian Supreme Court approach these issues?

## March 22 Solitary Confinement:

What is solitary confinement? Look at the film made in Virginia's "Red Onion" solitary units (the subject of litigation excerpted below) and review some of the aggregate data on solitary's use nationwide that resulted from surveys sent by the Liman Center working with a national organization of correctional administrators. The first such report was in 2014; an overview is provided from the 2020 report, *Time-in-Cell*.

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? How common is it, and what does law have to say about solitary confinement? What legal regimes permit or constrain it?

Debates are underway about whether solitary confinement is unconstitutional per se under the Eighth or Fourteenth Amendments (or both). Another is that it is licit but requires procedural protections as a predicate to such confinement. In all of these arguments, questions exist about the "It" – how long must a person be in isolation for it to be "solitary confinement"?

In 2005, the Supreme Court in *Wilkinson v. Austin* described the "supermax" prison in Ohio– an environment of extreme sensory deprivation in which prisoners may be placed indefinitely. The unanimous decision by Justice Kennedy concluded that a combination of factors rendered the confinement in Ohio to impose "atypical and a significant hardship" that required prison officials to provide some procedural protections. (In 2015, Justice Kennedy appeared to have reconsidered the harms of solitary confinement, as recorded in his concurrence in *Davis v. Ayala*.)

Litigation challenges since *Wilkinson* have argued that certain categories of prisoners (pregnant women for example) ought not be placed in isolation. Other lawsuits have attacked the placement of anyone in certain kinds of isolation. Elizabeth Alexander's essay explores the pros and cons of a "subpopulation" or "vulnerable" population litigation approach. Consider also the role mental health professionals play in debates on this form of punishment. What are the disagreements between Craig Haney and the Morgan group of authors?

Where have and can reforms and abolition come from? Review the standards put into place by the American Correctional Association in 2016 and the Colorado 2017 policy. What are boundaries set? The mechanisms for limiting its use? The problems with these approaches?

Were you writing the rules, what would you do on placement, review, conditions, and exit? Would you ban solitary confinement and if so, how would you define it? And how would you respond when arguments are made (by correctional staff, legislators, researchers or others) about the "need" for isolation to protect safety and discipline inside prisons?

## Film

Kristi Jacobson, *Solitary: Inside Red Onion State Prison*, HBO (2017)  
<https://www.youtube.com/watch?v=IYKGs2MLvdA> (part 1)  
<https://www.youtube.com/watch?v=chSy5Ck00JE&feature=youtu.be> (part 2)

## The Experience of Solitary

Reginald Dwayne Betts, *Only Once I Thought About Suicide*, 125 YALE L.J. F. 222  
Ashbel T. (A.T.) Wall, *Time-In-Cell: A Practitioner's Perspective*, 125 YALE L.J. F. 246 (2016)  
*Time-in Cell 2019*, A Snapshot of Restrictive Housing Based on a Nationwide Survey of U.S. Prison Systems, Arthur Liman Center for Public Interest Law (September 2020)

## Punishment in Prison

*Davis v. Ayala*, 135 S.Ct. 2187 (2015)  
*Porter v. Clarke*, 923 F.3d 348 (4th Cir. 2019), *rehearing and rehearing en banc denied* (Jul 26, 2019)  
*Ashker v. Newsom*, 968 F.3d 939 (9<sup>th</sup> Cir. 2020)  
*Disability Rights Network of Pennsylvania v. Wetzel*, Civil Case No. 1:13-CV-00635, Settlement Agreement (M.D. Pa. Jan. 5, 2015)

## Tackling Reform

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)  
Margo Schlanger, *Incrementalist vs. Maximalist Reform: Solitary Confinement Case Studies*, 115 NW. U. L. REV. 273, 273-79, 307-09 (2020)  
Craig Haney, *The Science of Solitary: Expanding the Harmfulness Narrative*, 115 NW. U. L. REV. 211 (2020).  
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)  
ACA Restrictive Housing Standards, American Correctional Association (Approved Aug. 2016)  
Colorado Department of Corrections, Code of Penal Discipline, Regulation No. 150-01 (November 1, 2019), available at <https://drive.google.com/file/d/10CYpnSs7DDuZwP7BSTt9QmKd5xw7liuN/view>

## Questions

We continue our discussion of forms of punishment imposed in prison and the regulation, if any, of that decision-making. Focus on what was the alleged misbehavior for which sanctions were imposed, and then before turning to this week's materials, we will conclude our discussion of last week's remaining materials – *Wilkinson v. Austin*. Therefore, we will continue exploring the idea of what were the sources of liberty that prompted the *Wilkinson* Court to require process.

What were the conditions in Ohio's supermax? The factors and baseline and remedy. Review the table in the essay Punishment in Prison to glimpse the hundreds of cases that followed thereafter debating "atypical and significant hardships."

Why is solitary confinement? What defines it, and how did solitary confinement come to be a common practice? What are the various justifications for solitary? In thinking about solitary confinement and justifications for it, do you agree with Dwayne Betts that "we justify prison policy based on our characterizations of those confined, not any normative belief about what confinement in prison should look like?"

How does law regulate, permit, or constrain solitary confinement? Is solitary confinement per se unconstitutional? How long must a person be in isolation for it to be considered solitary confinement? What role did the scientific literature regarding the harms of solitary confinement play in the Fourth Circuit's decision in *Porter v. Clarke*? What is the remedy?

What role do mental health professionals play in debates regarding the constitutionality of solitary confinement? Why would judges or prison administrators want input from health professionals? Why would mental health professionals want – or not want – to be involved in making decisions inside prisons about solitary confinement? In providing information to judges? What are the disagreements between Haney and Morgan et al. as to the harms of solitary confinement? Which account is more persuasive?

If conditions of confinement pose an "atypical and significant" hardship, prisoners have a liberty interest in avoiding such conditions and are entitled to some procedural protections. What should those protections be?

What are the limits of solitary confinement reform? Is reform or incremental change an effective pathway to abolition? How does Prof. Margo Schlanger's article influence your response? What are some of the pros and cons of the "vulnerable population" litigation approach that Elizabeth Alexander identifies? What strategies should proponents for abolishing solitary confinement pursue?

Review the standards put into place by the American Correctional Association in 2016, the Colorado 2017 policy, along with the settlement agreement in *Disability Rights Network of Pennsylvania*. What are boundaries set and what are the mechanisms for limiting its use? Do you see any problems with these approaches?

Were you writing the rules, what would you do on placement, review, conditions, and exit? Would you ban solitary confinement and if so, how would you define it? And how would you respond when arguments are made (by correctional staff, legislators, researchers or others) about the "need" for isolation to protect safety and discipline inside prisons?

What about *Ashker v. Newman*? Do you agree with the Ninth Circuit's interpretation of paragraphs 25 and 28 of the settlement agreement? What, if anything, does the opinion suggest about the nature of structural reform litigation in prison systems?



## **March 29: The First Amendment in Prison: Access to Courts, Rights of Collective Action, Religion, and Association**

Having looked at the profound isolation imposed in solitary confinement, we turn to the possibilities for connection and community— in solitary confinement, within prison facilities generally, and with people outside those facilities. Prisoners’ rights movements – from Attica and Angola to Pelican Bay to the August 21 Strike– have been central to changing conditions in U.S. prisons. Some forms of community aim to generate sociability, connectivity, family life, and organization; some focus on religion, and some can be viewed as threatening, such as “gang” affinity or affiliation that exists both in and outside of prison. All touch in some way on fundamental First Amendment freedoms, and how they are to be applied in prison.

This segment examines some of the rules, policies, concerns, and politics of regulating people’s communities inside prison and their access to people and institutions outside of prison (courts included). The goal is to explore the animating ideas shaping rights of liberties, autonomy, and sociability in the context of incarceration. We will look at cases addressing access to lawyers, prison “unions,” religious practices, and family life.

One of the older bodies of First Amendment law in prisons protect, at least at a formal level, prisoners’ access to courts, lawyers, and to petition for redress. What are the constitutional sources of these rights and the ambiguities? For which kinds of claims, what people, and as individuals or in groups?

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. Consider the rationales for limiting prisoner collective action. What forms of self-governance should be available? (Do answers vary by the kind of institution? Subpopulation? Location?) How do people in solitary confinement organize hunger strikes, and what impacts do such protests have?

Religion is another arena, first of discrimination against people practicing religious other than Christianity and targeted discrimination against Muslims. More recently, protection for religion has gained a more secure foothold, as the Supreme Court has expanded its views of religious liberties in other areas. Again, what are the sources and parameters of these decisions and ought community based in religion have more protection than other forms of association? Why?

Yet another set of cases and regulations are about prisoners’ organizations and access to family and outsiders who are neither lawyers nor spiritual advisors. What are the reasons for the Court’s limited willingness to provide robust protections for these associational rights? Think about ideas more generally about the substantive due process rights of people to marry, and to be with and see children and other family members. What concerns or assumptions about prisoner conflict and “security groups” (“gangs”) shape rules about association with other incarcerated individuals and First Amendment jurisprudence in prisons, and how would you reshape them?

NOTE: COVID has led to many cutbacks on visits and contact among prisoners. Some of the optional readings provide an overview of how COVID has impacted contact with people in prison and community building inside and outside prison.

## **Access to Courts and to 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

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

Johanna Kalb, *Gideon Incarcerated: Access to Counsel in Pretrial Detention*, 9 U.C. IRVINE L. REV. 101 (2018)

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)

## **Prisoners' Collective and Political Action**

*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)

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)

Demands from the Pelican Bay Hunger Strike (July 8, 2013)

## **Access to Religion**

*Sostre v. McGinnis*, 334 F.2d 906 (2d Cir. 1964)

*Holt v. Hobbs*, 574 U.S. 352 (2015)

## **Access to Family**

### Limiting Rights to Visits

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

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

## **“Gang” Activity and Association**

*Rios v. Lane*, 812 F.2d 1032 (7th Cir. 1987)

## **OPTIONAL READING (All of the Below)**

### ***The Impact of COVID***

Video Visiting and Telephone Calls Under the Coronavirus Aid, Relief, and Economic Security (CARES) Act, 28 C.F.R §540 (2020)

Andrew M. Cuomo and Anthony Annucci, New York Department of Corrections and Community Supervision Re-Opening Plan Fact Sheet (2020)

Senator Cory Booker Letter to BOP Director (March 18, 2020)

Kelan Lyons, For People with Relatives in Prison, Coronavirus Makes Calls More Urgent – And Harder to Afford, the CT Mirror (May 25, 2020)

### ***Visiting in Practice***

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)

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)

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)

### ***The Challenges of Visiting***

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)

## Questions

In this class session, we examine how associational, expressive, and religious freedoms are – or are not - protected constitutional rights when individuals are in prisons. We have provided readings that range across the different kinds of “access” claims – to courts directly or via lawyers, to family and friends outside or inside prisons, and to political and religious engagement. Think about these issues in the context of solitary confinement: what kinds of isolation are licit and why? What kinds of sociability and interaction are mandated and why? What sources of law and understandings of rights and of prisons drive the different responses in the templates provided?

**Access to Courts:** *Johnson v. Avery*; *Bounds v. Smith*; *Lewis v. Casey* , Guantánamo Bay, and on the ground implementation (or not).

What are the possible sources in the U.S. Constitution that protect detainees’ access to courts? What is their breadth - i.e for what kinds of claims? The discussion of Guantánamo Bay illuminates some of these issues. To what degree can statutes alter these rights? Do the rights that exist create affirmative obligations (as in health care) for prison officials to provide means to help enable people who want to go to court do so? What is the idea of a “writ writer” and what rights might accrue to such people?

How robust are these rights, and what is the interplay among the cases? What more ought to be accorded, or where do you see further retrenchment coming from? Where do costs come into play? In reflecting on the law that evolved, think about the images the justices have about the kinds of help people in detention need. And think about the practicalities: who can call, write, see whom, and how?

**Access to Each Other as Collective Actors in Detention; Political and Social Action, and the premises of** *Jones v. North Carolina Prisoners’ Labor Union, Inc.*

What are the forms of group activities prisoners could create and participate in, and when does the Constitution limit prison officials in regulating them? What do prison officials fear from collective action? How might those concerns be accommodated while enabling associational freedoms in prison?

Do concerns about “gangs” or “security threat groups” affect this arena? And are such issues also of concern in cases about religious practices and family visits?

**Religion as an individual and collective practice:** *Sostre v. McGinnis*; *Holt v. Hobbs*

What are the sources for treating religious claims differently than other associational rights? From what place or source do judges’ antipathy towards or concerns about the Muslim Brotherhood stem? How does the religion to which individuals belong affect the rights articulated? (Recall that Connor was disciplined when he rebuffed the search as he was on route to a religious service). How does deference to prison officials apply or is this, like *Johnson v. California*, an arena in which such deference is cabined? What can Congress or states do in this arena?

**Seeing Family and Friends:** *Overton v. Bazzetta*

Why did Michigan take away family visits? What could be the bases for family association rights for any of us, in and out of prison? What is the majority’s test of the punishment

imposed and the parameters of its review and holding?

## **April 5    Experiencing and Staffing Detention: The Costs of the Carceral State**

We began the semester by reading some of the literature on the reasons for incarceration, expounded by theorists of punishment in centuries past. In this session we want to understand more about contemporary practices and experiences of incarceration, its impact on people and their communities, and about the infra-structure that sustains it.

We begin with one of the rare decisions exploring the legality of private prisons, because the Israel Supreme Court aims to capture the impact of incarceration on individuals as it concludes that only the state – and not a private enterprise – can be the agent of such deprivations of liberty and dignity.

Turning to those who have been experienced incarceration and those who have worked in prisons provides ways for those who have done neither to learn from people who have been prisoners, who have worked as correctional officers, and whose families and communities regularly experience incarceration.

These readings provide the backdrop for learning more about the dollars and sense of incarceration in terms of what taxpayers and the individuals incarcerated are forced to pay, and of course invite reflection on the taxing, assessing, and spending on prisons as a form of social “investment.” We invite reflection on incentives for the expansion and for the contraction of incarceration, and therefore provide some materials on public and private lobbying for and against more prisons.

### Readings

#### **The Power to Imprison**

*Academic Center of Law and Business v. Minister of Finance*, Supreme Court of Israel,  
Case No. HJC 2605/05 [19 November 2009]

#### **Life Inside (All Optional Reading)**

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* 203-214 (2016)

Ted Conover, *NEWJACK: GUARDING SING SING* 95-107, 120-26, 169-70 (2012)

## How to Conceptualize Costs? Who Pays?

The Pew Charitable Trusts, "One in 100: Behind Bars in America 2008," Executive Summary and Pre-K, Higher Ed Funding Lags 3-4, 15-16 (2008)

Vera Institute of Justice, "The Price of Prisons: Examining State Spending Trends, 2010-2015" (2017)

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," 91 SOCIAL SCIENCE QUARTERLY 228-244 (2010)

The Marshall Project, "So You Think a New Prison Will Save Your Town?" (2016)

Peter Wagner and Bernadette Rabuy, "Following the Money of Mass Incarceration" (2017)

### *Optional Reading:*

Peter Enns, Youngmin Yi, Megan Comfort, Alyssa Goldman, Hedwig Lee, Christopher Muller, et al., "What Percentage of Americans Have Ever Had a Family Member Incarcerated?: Evidence from the Family History of Incarceration Survey (FamHIS)," 5 SOCIUS: SOCIOLOGICAL RESEARCH FOR A DYNAMIC WORLD 1-10 (2019)

## Financing Incarceration

Brittany Friedman, *Unveiling the Necrocapitalist Dimensions of the Shadow Carceral State: On Pay-to-Stay to Recoup the Cost of Incarceration*, 2020 J. OF CONTEMPORARY CRIM. JUSTICE 1 (2020)

### *Optional Readings:*

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

Jeffrey Selbin, *Juvenile Fee Abolition in California: Early Lessons and Challenges for the Debt-Free Justice Movement*, 98 NORTH CAROLINA LAW REVIEW 401 (2020)

Judith Resnik, Russell Bogue, Broderick Johnson, and Shunhe Wang, *The Impact of Double-Celling on State Investment in Incarceration* (2021)

## Questions

To think about the issue of "privatization" in the context of punishment, assume that the federal Bureau of Prisons (BOP) decides it would be more economically efficient to outsource to private providers of the following: Health care, Food services, Security staffing and Law library materials. Would doing so be problematic and if so, why?

Assume that Congress determines that it wants to abolish the BOP and in its place authorize the Department of Justice to identify and hire private entities to run federal prisons. Would doing so be problematic and if so, why? How do the very brief excerpts of the hundreds of pages of the Israel Supreme Court's decision on prison privatization (Academic Center of Law) inform your thoughts? In U.S. terms, is running a prison an "essential attribute of sovereignty" or do individual prisoners have rights to be held by the state instead of by private providers? Are private prisons *inherently* undesirable?

Assume that Connecticut contracts with a private provider to run its probation and parole services, including to decide when violations occur. Is that a legal problem? And if Connecticut also has that provider service decide (after a "due process hearing") who is to be returned to prison?

What are the potential vices, if any, of emphasizing the high costs associated with prisons? What are the arguments for "pay to stay" detention?

When thinking about the "costs" or "price" of prisons, what are the components? Reflect on the readings over the semester and the *Overton* family visiting case as well.

What are the arguments that prisons are underfunded? Overfunded? That funds are misallocated? If you had one billion to spend on punishment practices, how would you think about how to allocate the funds? to public and private sector actors?

For those who read the narratives from the Life Inside section—written by Robert L. Johnson, Irma Rodriguez, and Ted Conover—what are the common themes that connect these materials?



## April 12, 2021      Social Movements: Corrections and Anti-Corrections

Who makes and who unmakes prisons? How did these institutions emerge, what sustains them, and what can end them? Much of the class material to date include attempts to define what prisons are and how to regulate them via judicial intervention. In this class, we look at the social movements during the last two centuries which promoted prisons and the professionalization of corrections as significant reform, and we begin discussion of the social movements aiming to limit or abolish the use of incarceration as a punishment.

“Social movements” promote “reforms” across an array of issues and political, religious, and social viewpoints. Rather than take “corrections” for granted, we map some of the development of corrections as a profession and the authority garnered. We have already discussed judicial doctrines of deference to corrections and the political capital of that profession, and here we bring to the fore efforts to make standards for self-regulation. The concern about self-regulation are that it is often self-interested, which is an issue of great saliency for lawyers, judges, doctors, and many other professionals as well as for people running prisons.

Why study corrections and the standards made for this profession? Courts routinely (see many of the decisions we have read, including *Turner v. Safely*) defer to what judges describe as the “expertise” of corrections. Indeed both popular and judicial understandings of “prison” have been shaped by standards promulgated for more than a century by national and supranational bodies of correctional officials and then either endorsed or ignored by courts, also major contributors to what are the “normal” practices of prisons.

We begin in 1927 with a draft, the “Minimum Rights for Prisoners in All Civilized Countries,” written by The Howard League whose leadership (Margery Fry, Gertrude Eaton, and Cicely Craven) pressed the League of Nations to create an international convention for prisoners; these women also lobbied an entity called the International Penal and Penitentiary Commission (IPPC) to draft and the League of Nations to adopt Standard Minimum Rules for the Treatment of Prisoners. The IPPC was an early geo-political bureaucracy that existed from 1872 to 1951, and then its practices and rules became the template for later rules adopted by the United Nations in 1955 and subsequently, including the 2015 revisions to what are now called the “Nelson Mandela Rules.” What would “good” prison practices include under this rule regime? What did having “rules” in this context mean? To glimpse more of the non-U.S. framework, we excerpt from the 2006 European Prison Rules, as amended in 2020, which are premised on the goals of the “normalization” of prisoners’ experiences to mirror those of ordinary life.

We then return to the United States, and look at the 1972 “Model Act for the Protection of Rights of Prisoners, a product of the “National Council on Crime and Delinquency” and then to the “mission statements” of the American Corrections Association (ACA) and of the Department of Corrections of Connecticut. In 1971 and then in these statements: what are the goals? The means? Consider the crucial assessment of the ACA accreditation process from Richard Allison’s 1972 essay, *The Politics of Prison Standards* and from Senator Elizabeth Warren in 2021. Should some form of accreditation be salvaged and if so, how? By whom? With what goals, rules, or enforcement mechanisms?

Having focused on the self-descriptions, and stated aspirations of the corrections establishment and some criticisms, we turn to social movement critiques from across the political spectrum. We have been reading some of the prisoners' rights litigation and commentary (more optional readings are below). We add to that mix movements calling for being "right on crime" and for justice "reinvestment," as well as from the Colson prison ministry and then some critiques from the left. Next week, we look at the ideas of prison abolitionists and the critiques.

## Readings

NOTE: Many of the readings are optional this week, as indicated in the Table of Contents here

Review the case law we have read such as *Rhodes v. Chapman* (1981), *Turner v. Safley* (1987)

## Calling for and Promulgating Standards

"Minimum Rights for Prisoners in All Civilized Countries," in Gertrude Eaton, *The Need for an International Charter for Prisoners*, 2 *The Howard Journal* 93 (1927)

*Improvements in Penal Administration: Standard Minimum Rules for the Treatment of Prisoners Drawn up by the International Prison Commission*, *League of Nations Official Journal*, Spec. Supp. 123 (1934) Official No. A.45.1934.IV., 24 September 1934

*Standard Minimum Rules for the Treatment of Prisoners*, United Nations Congress on the Prevention of Crime and the Treatment of Offenders (1955)

*International Covenant on Civil and Political Rights*. United Nations General Assembly Resolution 2200A [XXI] (December 16, 1966)

*United Nations Standard Minimum Rules for the Treatment of Prisoners* (Nelson Mandela Rules), U.N. General Assembly, U.N. Doc. A/Res/70/175 (January 8, 2016)

Optional: *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, United Nations Committee Against Torture, CAT/C/51/4 (December 16, 2013)

Optional: *Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment*, U.N. General Assembly, U.N. Doc. A/RES/57/199 (December 18, 2002)

Council of Europe, *European Prison Rules* (2006, revised and amended by the Committee of Ministers 2020)

Optional: 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)

Optional: Monitoring Places of Detention: Ninth Annual Report of the United Kingdom's National Preventive Mechanism (April 1, 2017-March 31, 2018)

A Model Act for the Protection of the Rights of Prisoners (National Council on Crime and Delinquency, 1972)

American Correctional Association Mission Statement (accessed March 2021)

[https://www.aca.org/ACA\\_Prod\\_IMIS/ACA\\_Member/AboutUs/MissionStatement\\_home.aspx?WebsiteKey=139f6b09-e150-4c56-9c66-284b92f21e51&hkey=7a39e689-8de2-47d4-a7d4-93cce9442142#:~:text=The%20American%20Correctional%20Association%20provides,of%20improving%20the%20justice%20system.](https://www.aca.org/ACA_Prod_IMIS/ACA_Member/AboutUs/MissionStatement_home.aspx?WebsiteKey=139f6b09-e150-4c56-9c66-284b92f21e51&hkey=7a39e689-8de2-47d4-a7d4-93cce9442142#:~:text=The%20American%20Correctional%20Association%20provides,of%20improving%20the%20justice%20system.)

American Correctional Association Accreditation Overview (accessed January 2021)

[https://www.aca.org/ACA\\_Prod\\_IMIS/ACA\\_Member/Standards\\_and\\_Accreditation/StandardsInfo\\_Home.aspx?WebsiteKey=139f6b09-e150-4c56-9c66-284b92f21e51&hkey=7c1b31e5-95cf-4bde-b400-8b5bb32a2bad&New\\_ContentCollectionOrganizerCommon=1#New\\_ContentCollectionOrganizerCommon](https://www.aca.org/ACA_Prod_IMIS/ACA_Member/Standards_and_Accreditation/StandardsInfo_Home.aspx?WebsiteKey=139f6b09-e150-4c56-9c66-284b92f21e51&hkey=7c1b31e5-95cf-4bde-b400-8b5bb32a2bad&New_ContentCollectionOrganizerCommon=1#New_ContentCollectionOrganizerCommon)

Richard S. Allinson, *The Politics of Prison Standards*, 5 CORRECTIONS MAGAZINE 54 (Mar. 1979)

The Office of Senator Elizabeth Warren, *The Accreditation Con: A Broken Prison and Detention Facility Accreditation System That Puts Profits Over People* (December 2020)

<https://www.warren.senate.gov/imo/media/doc/The%20Accreditation%20Con%20-%20December%202020.pdf>

Connecticut Department of Correction, Mission Statement (accessed March 2021)

<https://portal.ct.gov/DOC/History/History-Department-of-Correction#:~:text=The%20Mission%20Statement%20now%20reads,that%20support%20successful%20community%20reintegration.%22>

### **Social, Political, and Religious Movements Encountering the Massive Carceral System (March 2021)**

The Prison Fellowship, <https://www.prisonfellowship.org/about/>;

<https://www.prisonfellowship.org/about/chuck-colson/>

Right on Crime, <http://rightoncrime.com/about/>

All of Us or None, <https://prisonerswithchildren.org/about-aouon/>

Black and Pink, <https://www.blackandpink.org/>

ACLU – Stop Solitary, <https://www.aclu.org/other/stop-solitary-two-pager?redirect=criminal-law-reform-prisoners-rights/stop-solitary-two-pager>

### **Optional**

Robert T. Chase, *We Are Not Slaves: Rethinking the Rise of Carceral States through the Lens of the Prisoners' Rights Movement*, 2015 J AMER. HIST. 23 (June 2015).

Keramet Reiter, *After Solitary Confinement: A New Era of Punishment?*, 77 *STUDIES IN LAW, POLITICS, AND SOCIETY* 1, 1-10, 20-22 (2018).

## Questions

We provided you with the outlines for an “international charter” for prisoners in 1927, the preamble and the 55 Standard Minimum Rules for the Treatment of Prisoners that was adopted in 1934 by the League of Nations, and some of the 1955 U.N. Rules. What within them is admirable and what is disturbing? What kinds of social and political mobilizations would have been the bases for the calling for and the adoption of such rules? For not making them a charter or convention? Who are the audiences and what impact could/would/should such rules have?

We then provided a packet from 2006 on the Optional Protocol to the Torture and Other Cruel, Inhuman, Or Degrading Treatment or Punishment), 2013 Commentary, and the European Prison Rules of 2006, as revised in 2020. How do they depart from the template of these earlier rules? What about implementation?

From the U.S. case law you have read on prisoners’ rights, where are there overlaps with these rules, over almost a century? What would the Model Act for the Protection of the Rights of Prisoners have done? How do they compare to the case law you read?

What are the politics of prison standards, as Allison addressed it in the early 1970s and as Senator Warren did in 2020?

What are the other mobilization movements of the contemporary era (stop solitary, right on crime, and the Colson ministry) and communities and the incarcerated and what kinds of standards or rules or conventions or practices do they aspire to put into place?

## April 19, 2020: Abolition

Should prisons be abolished? What are the reasons that incarceration became so dominant a mode of punishment in the United States and elsewhere, and can that mode of punishment be curtailed or ended? In this class, we will close with a discussion about abolition theory and whether law can be aligned with abolitionist principles.

We begin with Angela Davis's central 2003 work, *Are Prisons Obsolete?*, which makes the classical case for abolishing prisons and jails. We next review Dorothy Roberts' *Abolition Constitutionalism*, which argues for a reading of the U.S. Constitution that aligns with an abolitionist framework. In the excerpt we read from Allegra McCleod, we consider strategies to pursue preventative justice and discuss its role in abolitionist movements. In order to identify the relationship between abolitionist theory and practice, we read Dan Berger's article, which highlights on-the-ground organizing strategies and recounts concrete gains made by abolitionist campaigns in several states. Next, we review Tommie Shelby's draft chapter from *The Idea of Prison Abolition*, his book project addressing the conceptual underpinnings of the abolition movement.

ANGELA DAVIS, *ARE PRISONS OBSOLETE?*, CHAPTERS 1-2 (2003)

Dorothy Roberts, *Abolition Constitutionalism*, 133 HARV. L. REV. 1. 105-122 (2019)

Allegra McCleod, *Envisioning Abolition Democracy*, 132 Harvard Law Review 1613-1649 (2019)

Dan Berger, Mariame Kaba, David Stein, *What Abolitionists Do*, JACOBIN (Aug. 24, 2017), <https://www.jacobinmag.com/2017/08/prison-abolition-reform-mass-incarceration>

Tommie Shelby, Draft Excerpts of *The Idea of Prison Abolition* (Winter 2021 – Not for Circulation)

## Questions

Is Angela Davis correct that we take prisons for granted? She wrote decades ago, and how, reading now do you view what she discussed? Has the saliency and accuracy of her claims shifted, and if so, are there pivotal events (such as the uprisings of summer 2020) that make reading her work different from when she wrote?

On pp. 7, Davis asserts that reforms extend the longevity of the prison. How so? Elaborate on this argument. Is this an empirical or normative claim? Reflect back on the discussion of standards and the Nelson Mandela Rules, as you think about your views of her assertion

We spent time in last class exploring the impact of words. In this segment, we again see abolition described in reference to chattel slavery. Davis discusses slavery as a comparison to show another social institution that people “couldn’t conceive society without.” What do you make of the reference to slavery here? Is it useful if we see Davis’ goal as part of advancing arguments in favor of abolition?

On pp. 28 of the PDF, Dorothy Roberts writes: “Because we can read the Reconstruction Constitution as incorporating the abolition constitutionalism of antislavery activists, we should reciprocally interrogate both the Constitution’s relevance to today’s prison abolition movement and the movement’s relevance to interpreting the Constitution’s provisions.” As you process Roberts’ article, consider the following questions (in part reflecting questions Roberts poses):

Can we apply prison abolitionist theories to the Constitution’s text not only to condemn it but also to use it instrumentally to achieve abolitionist objectives? In responding to this question, think constitutional challenges brought by or on behalf of prisoners that we’ve read this past semester. Do these cases demonstrate what Roberts’ describes as the “utility of making constitutional law part of abolition activism and the inadequacy of relying on legal institutions to create and enforce effective remedies”? Why or why not?

Can today’s abolitionists imagine a new abolition constitutionalism that helps to chart the path toward a society without prisons? What sorts of legal challenges or policy changes could such abolitionist constitutionalist approaches include? As you consider the question, consider the following concepts, themes, and methodologies that are consistent with the abolitionist ethic: Dismantling and rebuilding, Accountability, Harm reduction and Nonreformist reforms.

Berger, Kaba, Stein note the following: “Abolitionists have worked to end solitary confinement and the death penalty, stop the construction of new prisons, eradicate cash bail, organized to free people from prison, opposed the expansion of punishment through hate crime laws and surveillance, pushed for universal health care, and developed alternative modes of conflict resolution that do not rely on the criminal punishment system.” How do they describe the role of reform in abolitionist organizing?

How does McLeod define abolition democracy? How do the abolitionist organizers whom McLeod describes grapple with “the most awful forms of violence in a manner consistent with an abolitionist ethic.” (pp. 1623). What forms of accountability have the abolitionist organizers McLeod describes sought in their various campaigns? How are organizers building what McLeod refers to as “local power in support of more peaceable means of collective democratic governance”? How can law be used to shift resources, values, and political power away from the state and toward building local power?

Does Tommie Shelby convince you that abolition theory (as examined primarily through the work of Angela Davis) doesn’t provide sufficient justification for abolition instead of reform? Let’s consider also the questions that Shelby poses in his draft paper:

First, can current practices of imprisonment, after suitable reforms, be justified despite existing structural injustices (for example, institutional racism and economic injustice), or should the use of prisons be discontinued until these structural injustices have been corrected? Second, would the practice of imprisonment be justified in a just social order, or would a fully just society be one without prisons? According to Shelby, what justifies penalizing someone? If abolitionist claims about function of prisons is true, would that justify abolishing prisons?

## **April 26, 2021      Reconsidering the Law of Prisons**

In this final class (with Grubhub!), we provide you with the Supreme Court's most recent articulation of Eighth Amendment standards, *Bucklew v. Precythe*. As we do so, we take the opportunity to re-consider both the evolution of the law of prisons and its theoretical underpinnings. The readings for this week will frame a discussion about the issues we have explored over the semester. We are delighted to be joined by Prof. Emma Kaufman from NYU who was once a student in a class like this one.

### **Readings:**

*Bucklew v. Precythe*, 139 S.Ct. 1112 (2019)

Judith Resnik, (Un)Constitutional Punishments: Eighth Amendment Silos, Penological Purposes, and People's "Ruin," Yale L.J.F. 365 (2020).

Justin Driver & Emma Kaufman, The Incoherence of Prison Law, 135 HARVARD LAW REVIEW (forthcoming 2021)

Ursula K. Le Guin, She Unnames Them, THE NEW YORKER (Jan. 21, 1985)