

**LAW 389: Prison Law & Policy**

Course Administration:

1. The casebook we will be using this semester is:

*Incarceration and the Law: Cases and Materials* (10<sup>th</sup> ed.); Margo Schlanger, Sheila Bedi, David Shapiro and Lynn Branham, eds. (SBSB)

Other supplementary materials will be made available on MyLaw.

2. For background reading, I also recommend:

David Oshinsky, *Worse Than Slavery: Parchman Farm and the Ordeal of Jim Crow Justice*, (1996)

Douglas A. Blackmon, *Slavery by Another Name: The Re-Enslavement of Black Americans from the Civil War to WWII*, (2008)

Joseph T. Hallinan, *Going up the River: Travels in a Prison Nation* (2001)

Kenneth E. Hartman, *Mother California: A Story of Redemption Behind Bars* (2009)

Albert Woodfox, *Solitary: Unbroken by Four Decades in Solitary Confinement* (2019)

3. In the attached syllabus, SBSB refers to the Schlanger et al casebook, Oshinsky refers to the Oshinsky book, *Worse than Slavery*, Blackmon refers to the Blackmon book, *Slavery by Another Name*, and Hallinan refers to the Hallinan book, *Going up the River*. All book excerpts will be available on MyLaw with the other supplementary reading. I will also be handing out further supplementary materials in class from time to time. Please have the casebook to hand during class.
4. Class meets Monday and Wednesday from 3:20-5:20 p.m in Room 2436 (I hope!)
5. Regular attendance and participation is expected. Persistent absences may be treated as an involuntary withdrawal from the course. I mean this seriously.
6. I will be holding office hours Mondays and Wednesdays from 5:30-6:30 p.m. or by appointment. I look forward to meeting as many of you as possible over the course of the semester. While we are virtual, my office hours will be held on zoom. (Link available on the course page.) Once we are back in person, OH will be held outside in the Glickman Courtyard, which is next to the stairs to the main entrance to the law school. tucked inside the ramp into the building. Because it is outside, no masks will be required. I look forward to meeting — and seeing — as many of you as possible over the course of the semester.
7. The best way to reach me is by email at [dolovich@law.ucla.edu](mailto:dolovich@law.ucla.edu).
8. As part of the materials assigned at Pt.VII.1 of the syllabus (Prisoners' Right of Access to the Courts: The Basic Right), I have included a film called Writ Writers. This film is one hour

and will form the basis for our discussions for that portion of the course. You will be responsible for viewing the film in advance. You can stream the film through the UCLA's Kanopy subscription. The link to the catalog entry is here: <https://catalog.library.ucla.edu/vwebv/holdingsInfo?bibId=8509105>. From there, you can click on the Kanopy link to the film itself. I'm told that if you are on campus, you can access the film via Eduroam, and if you are at home you must connect through the VPN.

9. The final exam will be held on Tuesday, May 10<sup>th</sup>. It is an 8-hour take-home exam.

**Prison Law & Policy**  
**Syllabus (Part I)**

**I. Introduction to Prisons and Prison Law**

- SBSB 1-40
- Marc Mauer, *Addressing Racial Disparities in Incarceration*, 9 (Supp.) PRISON JOURNAL: read ONLY pp. 88S-96S (2011)
- Terry A. Kupers, *Prison and the Decimation of Pro-Social Life Skills* in TRAUMA OF PSYCHOLOGICAL TORTURE (Ojeda, ed., 2008).
- Sharon Dolovich, *Mass Incarceration, Meet COVID-19*, UNIVERSITY OF CHICAGO LAW REVIEW ONLINE (Nov. 16, 2020) (read ONLY \*8-\*11, \*25-\*28)

**II. Introducing Deference/ Religious Freedom**

- SBSB 421-38 (Holt v. Hobbs)
- Greenhill v. Clarke, 944 F.3d 243 (4th Cir. 2019) (read ONLY intro, Pts I-III)

**III. The History of Prisoners' Rights Litigation**

1. "Slaves of the State"

- SBSB 41-43
- Taja-Nia Y. Henderson, *Property, Penalty, and (Racial) Profiling*, 12 STAN. J. CIVIL RTS-CIVIL LIBERTIES 177 (2016) (read ONLY pp. 182-208)
- Blackmon, pp. 1-2, 7-9, 299-304
- Oshinsky, pp. 55-84, 135-77 (chs 3, 5-6) (on convict leasing and Southern plantation prisons post-Emancipation)
- Constitutional (Washington Post podcast): Fair Punishment (episode 9), Oct. 23, 2017  
<https://itunes.apple.com/us/podcast/constitutional/id1254001472?mt=2&i=1000393876010>

2. The "Hands-off: Era

- SBSB 43-45
- *Atterbury v. Ragen*, 237 F.2d 953 (1956)
  - When reading *Atterbury*, keep a list of the (many) different arguments the court offers as to why it cannot (will not?) hear the case. Which if any do you find compelling reasons for federal courts to maintain a "hands-off" attitude over prisoner suits?

3. The Reform Era and Beyond

- SBSB 45-54
- Pugh v. Locke, 406 F.Supp. 318 (Ala.1976) read ONLY pp.321-35
- Hallinan, pp. 21-33 (ch.2 + first two pages ch.3)

#### IV. Deference in Action: 1<sup>st</sup> Amendment Speech, *Turner* and Beyond

1. Freedom of Speech, pre-Turner
  - SBSB 335-345 (*Procunier v. Martinez*)
    - What is the standard of review in *Martinez*? Why? How would you characterize the Court's disposition to prison officials' arguments?
  - *Pell v. Procunier*, 417 U.S. 817 (1974) (read ONLY intro + Pt. I of majority)
  - Heather Anne Thompson, *What's Hidden Behind the Walls of America's Prisons?* THE CONVERSATION, June 4, 2017
2. *Turner v. Safley*
  - SBSB 355-66 (*Turner*)
    - What is the *Turner* standard? How deferential is it to prison officials, and in what ways? How would you compare J. O'Connor's treatment of the mail reg v. the marriage reg? How do you explain the difference? What does J. Stevens mean by the first sentence of his dissent?
3. Critiques of *Turner* test/deference
  - SBSB 371-74 (Intro + Pt. 1 of J. Brennan's dissent on *O'Lone*)
  - SBSB 416-20
4. *Turner* Applied
  - SBSB 377-86 (*Thornburgh v. Abbott*)
    - What is left of *Martinez* after *Thornburgh*? How does *Thornburgh* interpret the "neutrality" requirement of *Turner*'s first prong? What is J. Stevens objecting to in Part III of his dissent, and how valid is his objection? What if anything does his concern tell us about *Turner* going forward?
  - SBSB 413-16 (*Overton*; First Am. Association)
    - What is the Court's view of the 2-year ban on visits for those with 2+ substance abuse violations? Is this a valid management strategy? What guidance does *Overton* provide re *Turner*'s second factor ("alternative means of exercising the right")?
  - *Greenhill v. Pacholke* (4<sup>th</sup> Cir.; filed Dec 6, 2019) (review facts; read Pt. IV)
  - *In re Collins*, 86 Cal App 4<sup>th</sup> 1176 (2001)
  - *Clement v. CDC*, 220 F.Supp.2d 1098 (2002): read ONLY pp. 1098 (summary paragraph), 1101 (intro graph), 1103 (Part C ONLY), 1109-14 (Part IV: A-F)
  - *Clement v. CDC*, 364 F.3d 1148 (9<sup>th</sup> Cir. 2004): read ONLY pp. 1148-52 (intro, Parts I & II)
    - When reading *Collins* and *Clement*, pay attention to the posture the respect courts take to the defendants' arguments. How would you characterize the difference? How, if at all, does that difference affect the outcome?

- SBSB 407-12 (*Prison Legal News v. Cook*)
  - Is the *PLN* court's approach more like *Collins* or more like *Clement*? What aspects of the *PLN* opinion inform your answer?
- *Turner 2.0: Beard v. Banks*
  - SBSB 386-99 (*Beard*)
    - Is *Turner* a good fit for the claim at issue in *Beard*? (See SBSB 389-90 and J. Thomas's dissent for relevant discussion.) What quantum of evidence must the defendants present to satisfy their burden? And what quantum of evidence must plaintiffs present? Why the difference?
  - *Beard v. Banks*, Justice Ginsburg dissent (pp. 2591-93)
  - SBSB 400-407 (*Singer v. Raemisch*)
    - Is *Singer* a fair application of *Beard*? Do you agree that *Singer* failed to meet the evidentiary burden established in *Beard*? Was *Singer* decided correctly? Why or why not?

## V. Eighth Amendment Punishments Clause I: Conditions

1. Deliberate Indifference
  - SBSB 62-64 (MPC § 2.02)
  - SBSB 64-70 (*Estelle v. Gamble*)
    - When, according to *Gamble*, is medical neglect an 8<sup>th</sup> Am violation? Why? What standard does J. Stevens endorse in his opinion, and how does it differ from the standard established by J. Marshall in the majority?
  - SBSB 92-96, 98-101 (*Wilson v. Seiter*, Intro & Parts I-II majority opinion, parts of J. White dissent)
    - What is the holding of *Wilson*? How does the majority justify it?
  - SBSB 117-27 (*Farmer v. Brennan* majority)
    - What, after *Farmer*, constitutes deliberate indifference? How, according to the majority, might this mental state be proved? What potential objections to its holding does the majority identify, and how does it respond to each?
2. Deliberate Indifference III: Justifications and Critiques
  - SBSB 127-38
3. Deliberate Indifference II: COVID Edition
  - SBSB supplement 1-12 (*Wilson v. Williams*)
  - Sharon Dolovich, *Mass Incarceration, Meet COVID-19*, UNIVERSITY OF CHICAGO LAW REVIEW ONLINE (Nov. 16, 2020) (read ONLY \*19-\*25)
4. Conditions of Confinement
  - SBSB 71-83 (*Rhodes v. Chapman*)
  - SBSB 96-98 (*Wilson* Part III only)
    - After *Wilson*, what showing must incarcerated plaintiffs make in order to succeed on a conditions claim? In what way does *Wilson* alter the requisite showing in place after *Rhodes*?
  - SBSB 100-101 (notes)

- *Gray v. Hardy*, 826 F.3d 1000 (7<sup>th</sup> Cir. 2016)
- Craig Haney, *The Wages of Prison Overcrowding*, 22 WASH. U. JOURNAL OF LAW & POLICY 265 (2006) (pp. 269-77, 282-92 only)
- Terry A. Kupers, *Prison and the Decimation of Pro-Social Life Skills in TRAUMA OF PSYCHOLOGICAL TORTURE* (Ojeda, ed., 2008) (review)
- Jane Kahn, *Safety Concerns of a Prisoners' Rights Lawyer*, LOS ANGELES DAILY JOURNAL, Feb. 4, 2011

5. Solitary Confinement: Constitutional Prisons?

- SBSB 187-92 (background)
- SBSB 199-200, 210-212 (*Madrid* intro/conclusion/post-*Madrid* advocacy)
- SBSB 215-220, 223-24 (perspectives)
- SBSB 228-30, 238-40 (CA hunger strike/ CCPOA opposition to strike demands)
- SBSB 244-46 (*Porter v. Clarke*)
- SBSB 246-51 (Fettig/Liman/notes)

5. Failure to Protect

- SBSB 283-292 (PREA Commission Report)
- SBSB 295-97 (Jacoby), 298 (notes #2-4)
- NATIONAL PRISON RAPE ELIMINATION COMMISSION REPORT, June 2009, read ONLY National Standards (pp.215-221)
- United States Department of Justice, *PREA Notice of Proposed Rulemaking*, January 24, 2011, read ONLY pp. 6275-6302
- PREA Final Rule (2012), read ONLY pp.185-86, 196-215
- § 115.402 Auditor qualifications (handout)

**VI. The Eighth Amendment Punishments Clause II: Use of Force**

- SBSB 59-62 (*Jackson v. Bishop*)
- SBSB 83-92 (*Whitley v. Albers*)
  - When reading the *Whitley* dissent, look for the differences (1) in the way Justice O'Connor and Justice Marshall presents the facts, and (2) the mens rea standard each advocates.
- SBSB 101-109 (*Hudson v. McMillian*)
- Hallinan pp. 82-91 (ch.7)
- Bruce Porter, *Terror on an Eight-Hour Shift*, N.Y. TIMES MAG., Nov. 26, 1995, at 42 (CS 78-89)
- Editorial, *The Youngest, Cruellest Justice*, N.Y. TIMES, Feb. 27, 1992.
- SBSB 160-67 (*Kingsley v. Hendrickson*)
  - How does the *Kingsley* standard compare with the standard established in *Whitley*? What is the doctrinal relationship between the two cases?

**VII. Brown v Plata**

- SBSB 771-810 (*Plata*)
  - What showing is required in order for a district court to order a population

reduction? Track J. Kennedy's arguments as to each. Are they convincing?  
What if anything surprises you about the majority opinion? About J. Scalia's  
dissent? About J. Alito's dissent?

- SBSB 752-53 (18 U.S.C. § 3626(a)(1)-(3))

## **VIII. Prisoners' Right of Access to the Courts**

### 1. The Basic Right

- WRIT WRITER (Passage Productions, 2008) (to be screened prior to class)
- SBSB 439-41 (*Ex Parte Hull*)

### 2. The Past and Present of Right of Access Claims

- SBSB 446-51 (*Johnson v. Avery*)
- SBSB 451-55 (Bounds v. Smith)
- SBSB 722-34
  - What is left of the right of access to the courts after *Lewis*?
- SBSB 455-49

### 3. The PLRA: Limits on Prisoner Suits

- 28 U.S.C. § 1915
- 42 U.S.C. § 1997e
- SBSB 887-90, 904-08, 910-14
- Margo Schlanger & Giovanna Shay, *Preserving the Rule of Law in America's Prisons and Jails: The Case for Amending the PLRA*, 11 PA J. CON. LAW 139 (2008)

### 4. PLRA Redux: The Exhaustion Requirement

- SBSB 890-904 (*Woodford, Ross*)
- *Valentine v. Collier*, 2020 U.S. Dist. LEXIS 112807 (S.D. Tex. June 27, 2020), read ONLY pp.1-2 (to end left-hand column) + Pt III.A
- SBSB supp. 12 (bottom)-17 (*Valentine*, J. Sotomayor dissent from denial of application to vacate stay)

## **IX. Disability/the ADA in Prison**

- SBSB 671-701