

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](mailto: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)

## 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>

## 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 Schwartzapfel, 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)

## 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 *Schuetz 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).

## 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)

## 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) Prison Litigation 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)

## 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)

## 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>

## **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)

## **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)

## 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)

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).

## 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)

## **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)