

Liman Workshop

IMPRISONED:

FROM CONCEPTION AND CONSTRUCTION TO ABOLITION

Overview and List of Class Sessions

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

Jenny Carroll, Visiting Professor of Law, Liman Director

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All readings will be available on the Yale Canvas website.

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

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

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

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

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

Requirements, Credits, and Readings

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

We expect that students attend the weekly class meeting and prepare in advance. In the syllabus, we provide questions and comments to consider as you read. This class pivots around the readings and discussions; preparation for and attendance at these discussions is required for credit. Do note that, if you need to miss a class, please be in touch with the professors in advance of the meeting.

Whether taking the class for graded or for ungraded credit (explained below), students missing more than two sessions without permission will not receive credit.

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

Students must send by email to each of the instructors (our emails are listed below) and to Elizabeth Keane, the Liman Center Coordinator (elizabeth.keane@yale.edu), as well as post their reflections on Canvas in the "Discussion" tab, so that other Workshop participants can read them. Please do so NO LATER than Sunday at 1 p.m. before that week's session. Students who do not complete and send reflections four times during the course of the semester will not receive credit for the class. Please keep track of your own submissions to ensure you comply with this requirement and to receive ungraded credit.

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

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

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

The Analytic Puzzles Posed by Incarceration

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

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

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

Thus, the lines blur. As the Israel Supreme Court concluded in its 2009 ruling holding unlawful the legislative judgment to permit private prisons, decisions about where to confine prisoners, whether to strip search them, and whether to discipline them can be viewed as a sequence of mini-sentencing decisions, punishing anew or varying the forms of punishment. See *Academic Center of Law and Business v. Minister of Finance*, Supreme Court of Israel, Case No. HJC 2605/05 [19 November 2009]. Analyses of whether constitutions and international law limit the forms of punishment and the nature of conditions within a prison are continuous with inquiries into whether constitutions impose constraints on the forms, duration, nature, and implications of sentences. Lawsuits in some places have challenged "whole life" and "life without parole" sentences, along with whether the death penalty and voter disenfranchisement, and other "collateral consequences" of sentences. In one semester, we cannot read materials about all of these issues but we aim for discussions about the ideas and the practices of prison-as-punishment to reflect the relationships among practices of punishment, in and out of prison.

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

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

Courts have examined these issues in a host of contexts, including the use of whipping as “discipline,” segregation by race, risks to health, profound isolation, overcrowding, transfers to higher security settings, visitor bans, whole-life sentences, and disenfranchisement. Some of the lawsuits ask courts to overturn administrative judgments, while others challenge legislative directives, such as prisoner disenfranchisement. Repeatedly at issue are the underlying presumptions about what burdens of justification belong to the states, the nature of “rights” in prison, and about the scope and function of judicial review. The remedial debate is likewise intense, with sharp disagreements about structural orders mandating improved health care, better sanitation, caps on prison populations, constraints on life-long confinement and blanket voting bans, as well as about individualized orders reducing the length of sentences, ordering damages, or imposing legal fees and costs on the state.

As this overview of the issues makes plain, thinking about prisons requires contemplating the different effects that the system of incarceration has on individuals and communities. The constant reminder is that to speak of “mass incarceration” could mask differential impacts, as this “massive” incarceration enterprise is not distributed equally among all peoples. Race, gender, class, age, nationality, ethnicity, and physical and mental health predict who goes into detention.

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

The Topics to be Considered

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

January 24, 2022 Licensing and Constraining Punishment: Whipping and Rights

The readings for the first session give you a sense of how the question of punishment became an issue of political and legal theory and of the debates about what justifies the sovereign power to punish. The reminder is that the “invention of the penitentiary” was heralded as a great Enlightenment reform—promoted to replace branding, lashing, executions, and transportation. The first week’s overview of more than two hundred years is a rapid orientation to the idea and entailments of prison as a form of punishment.

Through these introductory readings, 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 produced the current understanding—that governments 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 government punishment practices should be constrained by stated purposes for their imposition. Brief excerpts from Cesare Beccaria and Jeremy Bentham make that point. Michele Foucault is a well-known twentieth century critic of what he ascribes to them to have been the result. The overview by Antony Duff and Zachary Hoskins provides more context.

The second point of these readings is to have you see the sea change that took place after World War II. We use the 1960s in the United States as our example 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. Brief descriptions of prisons in Norway and Germany are one way to start to think about the reasoning that undergirds the law and practices in other countries. Think about what structural assumptions of the relationship between citizen and state frame these practices and the different structural assumptions at play in the United States.

Punishment in Prisons

Whipping

Winston Talley's petition commending *Talley v. Stephens*, 247 F.Supp. 683 (E.D. Ark. 1965)

Jackson v. Bishop, 268 F. Supp. 804 (E.D. Ark. 1967)

Jackson v. Bishop, 404 F.2d 571 (8th Cir. 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)

Developing Premises that State Punishment Requires Justification in Relationship to Appropriate Purposes

Cesare Beccaria, *AN ESSAY ON CRIMES AND PUNISHMENTS* (1764) (New Brunswick, NJ: Transaction Publishers, Graeme R. Newman & Pietro Marongiu, eds. & trans., 5th ed. 2009)

Jeremy Bentham:

AN INTRODUCTION TO THE PRINCIPLES AND MORALS OF LEGISLATION (Ch. XIII, "Cases Unmeet for Punishment") (reprint 1907) (1823 edition, 1780), available at <http://www.econlib.org/library/Bentham/bnthPML.html>

THE PANOPTICON WRITINGS (LETTERS V, VI & VII) (1787) (Miran Božovič editor, 1995)

THE RATIONALE OF PUNISHMENT (Robert Heward editor, 1830)

Michel Foucault, *DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON* (Alan Sheridan trans., Vintage Books 2d edition 1995) (1975)

Optional: Antony Duff and Zachary Hoskins, *Legal Punishment*, Entry in Stanford Encyclopedia of Philosophy (Summer 2017 Edition)

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)

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

Heather Ann Thompson:

BLOOD IN THE WATER xiv-xvii (2016)

"Reckoning with the Artifacts of Attica: What Was Found, What Wasn't, and Why It Matters." *New York History*. Special Issue. (Summer, 2021)

Reorienting Prisons

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

Questions

To help you prepare for each class, we introduce the topic before listing readings and pose questions thereafter keyed to the readings.

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

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

Likewise, what prompted the federal district court judges in Arkansas to conclude that whipping was constitutional but only under specified conditions? The legal sources for that ruling?

What were the bases for the reversal by then-Judge Harry Blackmun for the Eighth Circuit? What ideas about the Eighth Amendment come to the fore? Their sources? Does the opinion provide guidance on the forms of in-prison punishment that could be used? What are the implications from the Second and Eighth Circuit decisions for other kinds of in-prison punishments, like solitary confinement, food deprivation, lack of safety and sanitation? What role, if any, does federalism (state as contrasted to federal prisons) play?

How do these decisions relate (or not) to the ideas about punishment that Beccaria, Bentham, Foucault, and Duff discuss? What is Foucault's view of the forms of punishment that are pernicious?

Race is front and center in the discussion of Attica as is the prisoners' political organization and aspirations. What might Judge Blackmun have meant when he wrote in the 1968 whipping case that "race as such" was not present? And what would have been the impact of race and the civil rights movement on the various participants and the audience for these decisions?

January 31, 2022 Health and Illness

No discussion of confinement can now proceed without considering how COVID has cast light on the harms of prison and illuminated the longstanding costs associated with leaving people in prison. Before turning to the case law that has come into being since March of 2020 when prison-COVID litigation came to the fore, we think it helpful to pause to consider 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 in general?

Some responses come from the development of the “law” of prisons. 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? What are the affirmative obligations to provide care imposed on people who run prisons? Where do those requirements come from? What role do the Eighth and Fourteenth Amendments of the U.S. Constitution play? Are other provisions relevant?

In the last decades, an extensive debate through litigation has centered on the reach of rights of treatment and of prevention. In this class, we provide examples in the context of Hepatitis C and opioid addiction; in the next class, we turn to COVID. A few lower court decisions read *Estelle v. Gamble* to mean that prisons must provide treatment and protection, 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 healthcare needs and ration access to healthcare? Consider also issues of post-release health care, as detailed in a recent data from healthcare providers. What, if any, obligations do governments have to help people transition from prisons to their communities?

To underscore that legal boundaries come from statutes as well as the U.S. Constitution, we also provide brief discussion of the Americans with Disabilities Act provide and its role in prisons. 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?

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; researchers there have collaborated with others in documenting the health costs for staff members who work in prisons. See Amend – Changing Correctional Culture (<https://amend.us/>).

As you look at this array of problems and 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 for those with mobility challenges, or should people with certain characteristics be excluded from prisons entirely?

Health, Illness, Disease, and Pandemics

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 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 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)

Questions

What are the different doctrinal homes for the right recognized in *Estelle v. Gamble*? What are the arguments for locating it in Fourteenth Amendment Substantive Due Process Clause as contrasted with the Eighth Amendment? And need it be either/or?

Why, if seeking to make long term change, would a prisoners' rights attorney have wished that Gamble's case was not the first in which the Court addressed the issues?

What is the holding and what aspects of the decision by Justice Marshall would you want to alter? What are the tensions?

What justifies medical care for prisoners while non-imprisoners lack such care?

Turn then to the application in other case law. In the context of Hep-C, the district and circuit court opinions differ dramatically about Hep-C treatment. What are the disagreements and which opinion is more faithful to *Estelle v. Gamble*?

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

Are there downsides and the upsides of focusing reform efforts on discrete groups of prisons (e.g., disabled, substance abuse issues)? And to focusing on the health issues of the people who work in prisons?

February 7, 2022 COVID and Detention

As of February 16, 2021, one in three prisoners tested positive for COVID, more than four times the rate outside of prisons. Impact Report: COVID-19 Testing in State Prisons, National Commission on COVID-19 and Criminal Justice (Apr. 1, 2021), available at <https://covid19.counciloncj.org/2021/04/01/covid-19-testing-in-state-prisons/>. By the end of November 2021, at least 440,611 had tested positive for COVID since the onset of the pandemic, and at least 2,663 had died. The COVID Prison Project, available at <https://covidprisonproject.com/>. According to data from the Los Angeles Times, updated December 16, 2021, California, with the largest prison population in the country, had reported the most cases since testing and tracking began – 51,764 total cases, or 518.8 per 1,000 prisoners, compared to 131 per 1,000 people in California. Population COVID-19 Tracking, California Department of Corrections and Rehabilitation, available at <https://www.cdcr.ca.gov/covid19/population-status-tracking/>. Connecticut has the highest incarcerated case rate of all states at 1,030.6 per 1,000 people. COVID Prison Project, available at <https://covidprisonproject.com/data/national-overview/>.

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. And tens of hundreds of lawsuits were filed; we provide just a few decisions, some focused on post-conviction detention while others addressed people held before conviction.

As you think about the problems of COVID, consider what has, does, and should U.S. constitutional law say about government obligations to people in detention. What ought courts do if executives and legislators do not provide means to reduce the risk of death and injury? Reflect again on the 1976 *Estelle v. Gamble* ruling and the Hepatitis C cases, as you read *Helling v. McKinney* and the other cases. Who needs to prove what? Should requirements change in emergency situations, and in which direction? Ought the tests and standards under the Eighth Amendment (for prisoners) and the Fourteenth Amendment (for detainees) be the same? What is the relevance of a person's status as convicted or not? What are the sources of the disagreements among judges sitting at different levels of the federal system?

We need to explain (but we will not study this issue in depth) that 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. (If you want to read more about the legal parameters, we provide 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 “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, and do answers vary depending on what role?

COVID in Detention: An Overview of the Public Health Challenges

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)

Neal Marquez, MPH; Julie A. Ward, MN, RN2; Kalind Parish, MA; Brendan Saloner, PhD; Sharon Dolovich, JD, PhD, COVID-19 Incidence and Mortality in Federal and State Prisons Compared With the US Population, April 5, 2020, to April 3, 2021, *Journal of the American Medical Association*, (Oct. 6, 2021)

Brennan Klein, C. Brandon Ogbunugafor, Benjamin J. Schafer, Zarana Bhadracha, Preeti Kori, Jim Sheldon, Nitish Kaza, Emily A. Wang, Tina Eliassi-Rad, Samuel V. Scarpino, Elizabeth Hinton, *The COVID-19 pandemic amplified long-standing racial disparities in the United States criminal justice system*, MEDRXIV (Jan. 11, 2022), available at <https://www.medrxiv.org/content/10.1101/2021.12.14.21267199v2.full.pdf>.

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)

Dr. Homer Venters, “Health Priorities for the Federal Bureau of Prisons,” Statement for U.S. Senate Judiciary Committee, (Apr. 14, 2021), available at <https://assets.documentcloud.org/documents/20616259/ventersbop.pdf>

Sharon Dolovich, Aaron Littman, Megan Arellano, Cecilia Bobbit, Liz DeWolf, Michael Everett, Hope Johnson, Amanda Klonsky, Joshua Manson, Neal Marquez, UCLA Law COVID-19 Behind Bars Data Project, UCLA Law, 2021, <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)

Jenny E. Carroll, *COVID-19 Relief and the Ordinary Inmate*, 18 OHIO STATE J. OF CRIM. L. 427 (Sept. 7, 2021)

Optional:

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

Maney v. Brown, 516 F.Supp.3d 1161 (D. Oregon 2021)

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

Plata v. Newsom, 01-cv-01351-JST, 2021 WL 4448953, at *13 (N.D. Cal. Sept. 27, 2021)

Optional: The power of federal judges

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

What did doctors and some correctional administrators have to say about what prisons should do? Turn from those views to the case law, and start first with the 1990s, when in *Helling v. McKinney* the Court applied *Estelle v. Gamble*. Did the Court change the standard? What would an “objective” as contrasted to a “subjective” standard entail? Ought intentions be relevant for injunctive relief? For monetary damages?

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 of it to the term and concept of punishment?

Turn then to the more recent COVID law and consider whether the appellate courts rely on 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 the claim of a subjective mental state of deliberate indifference? Consider whether answers to these questions differ depending on whether the issue is disease prevention or disease treatment as in *Estelle* and the Hepatitis C decisions.

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

What was the District Court’s response in *Valentine* to the Fifth Circuit’s rebuke? How does the Fifth Circuit respond in turn? What deference does each court give the other, as to fact and to law? How did the district court’s consideration of the ADA claim differ from its consideration of the Eighth Amendment claim?

What happens when official prison policy and actual staff conduct diverge? What were the bases for analyses by the different courts, and what weight went to the policies as contrasted with individualized record-based determinations? What impact did the rulings have on the Eighth Amendment health care right? And then turn to the rapid decisionmaking at the Supreme Court. Why did the Court move so quickly? What signaling did it provide to other pending cases?

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

Is part of the reason prisoners did not obtain remedies in many of the cases that the right is linked to the Eighth Amendment? What could be the consequence of removing the notion of punishment from the assessment of liability for health care delivery failures?

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?

February 14, 2022: 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. 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. 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," 87 *N.Y.U. L. REV.* 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, Appellants' Jurisdictional Statement, 1967 WL 129475 (1967)

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

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

2004 WL 1790882 (U.S.), Brief of the National Association of Black Law Enforcement Officers, Inc. as Amicus Curiae in Support of Respondents

2004 WL 1261069 (U.S.), Brief of Former State Corrections Officials as Amici Curiae in Support of Petitioner

NY State and Racial Bias, 2016: Michael Schwirtz, Michael Winerip, & Robert Gebeloff, "The Scourge of Racial Bias in New York State's Prisons," *THE N.Y. TIMES* (Dec. 3, 2016); "For Blacks Facing Parole in New York State, Signs of a Broken System," *THE N.Y. TIMES* (Dec. 4, 2016); "Governor Cuomo Orders Investigation of Racial Bias in N.Y. State Prisons," *THE N.Y. TIMES* (Dec. 5, 2016); "Inquiry into Racial Bias in New York Prisons Is Big Job for Small Team," *THE N.Y. TIMES* (Dec. 11, 2016)

Reginald Dwayne Betts, "Kamala Harris, Mass Incarceration, and Me", *THE N.Y. TIMES MAGAZINE*, (Oct. 20, 2020)

Optional:

Emma Kaufman, Segregation by Citizenship, 132 *HARVARD L. REV.* 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 Black, Latinx, and Indigenous/Native American communities?

How does the Supreme Court define the 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? What was the relevance of double-celling? 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?

Why does Justice Thomas argue that the 1968 decision in *Lee v. Washington* 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? What are the reasons for the *Turner* standard, and what are the critiques of it?

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, what are the options to limit the harms? What aspect of the system (racial profiling, stop-and-frisk, prosecution, pre-trial detention, sentencing, bias in the parole system) should be the focus or do all these issues have to be pursued and, if so, how?

February 21, 2021: Sex, Gender, and Safety: Constructing, Reflecting, and Reifying Categories of Identity

This session considers the interplay of 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. Women were about ten percent of the prison population, and questions were raised about the lack of resources allotted to them. In addition to reflecting on the sources of disparities by gender, 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?

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 1744 v. United Brotherhood of Carpenters and Joiners of America* probes the reasons for and impact of norms in arguments about whether a prison system can assign women to staff a facility “for” women. Those materials are also a bridge to the next area of discussion, about how to move beyond the binary of women/men? Consider the reasoning and the holdings in *Farmer v. Brennan* and in *Edmo v. Corizon*. What are the premises, constitutional bases, and impact of these rulings? How does prison “construct” gender of the incarcerated individuals and of staff?

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_Colloum_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)

Harrison v. Kernan, 971 F.3d 1069 (9th Cir. 2020)

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)

First Step Act of 2018: Risk and Needs Assessment System – UPDATE, U.S. Department of Justice, Office of the Attorney General (Jan. 2020)

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

California Senate Bill No. 132 (2020)

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

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

New York Assembly Bill 08846, Senate Bill 06077 (2019)

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)

We have just discussed classifications based on race, and we turn now to probe classifying incarcerated people by gender. 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? What impact should those differences have for detention?

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? Should such programs be a signature of facilities “for” women?

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/nonbinary 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?

Under U.S. law, would the approaches be seen as lawful?

February 28, 2022: Conditions of Prisons

In the first class, we discussed the “hands off” doctrine under which federal courts had 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.”

Is there a distinction between the idea of conditions of confinement and of 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?

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

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 (5th Cir. 1977) (affirming in part and reversing in part)

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

United States v. State of Alabama and Alabama Department of Corrections, Amended Complaint Civil. No. 2:20-cv-01971-RDP (May 19, 2021)

Optional: *Braggs v. Dunn*, CIVIL ACTION NO. 2:14cv601-MHT (WO), Phase 2A Omnibus Remedial Opinion Part I (Dec. 27, 2021)

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)

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

The court in *Jordan v. Fitzharris* describes the odious use of strip cells as a form of punishment in California prisons. What were California's rationales? What forms of in-prison punishment for violent acts exist or should many such acts be referred to prosecutors for new indictments?

How did judges come to conclude (as Judge Frank Johnson did) that a "totality of conditions" violated the Eighth Amendment? What are state obligations for violence among prisoners, including as described in the complaint of *Pugh v. Sullivan*?

Judge Frank Johnson is often venerated among legal liberals, most prominently for his many civil rights decisions that addressed voting, schools, mental hospitals, and prisons, when he served as a federal district court judge in Alabama. What were his premises and his reasons in *James v. Wallace* for ruling as he did? How does the Fifth Circuit's treatment of Judge Johnson's opinion in 1977 inform your analysis?

What are the differences between what is described in the U.S. Department of Justice's complaint against the Alabama Department of Correction and what you read about Alabama's prisons decades ago? What had and what had not changed? What do you think are the sources of the persistent harms?

Judge Justice is also a celebrated figure among legal liberals, including for this decision invalidating the Texas exclusion of non-documented children from its public schools that was upheld in *Plyler v. Doe*. What were his explanations for why he became involved in the litigation over safety in Texas's prisons? What roles did he take? What is the meaning of and is there utility in using the phrase "judicial activism"?

Turner v. Safley is commonly regarded as one of the most important cases in prison law. What were the issues and what is the test? Some constitutional law classes herald the holding of a right to marriage, which was cited favorably in *Obergefell*. What are the reasons to be more critical of *Turner v. Safley*?

What were the harms in *Rhodes*, as seen through the lens of the Court that rejected them as the basis for holding double-celling unconstitutional? What facts made the case a good vehicle for defending prison systems to get to the U.S. Supreme Court?

Prof. Schlanger's article underscores how important the PLRA is. Review the reasoning in *Brown v. Plata* about why it was not a bar on release? What would the various Justices have done in response to the medical harms caused by overcrowding identified in *Plata*? Does *Bucklew* signal a turn away from *Brown v. Plata*?

March 7, 2022: “Liberty” as a Constraint on In-Prison Punishments

In the materials thus far, we have read about people who sought through a variety of means to end some of the treatment accorded them in prison. At issue throughout is what forms of punishment prison can impose, and whether prison itself is an illicit form of punishment. But “prison” is a construct (literal, legal, and metaphorical), and hence also at issue throughout is what “prison” is, or can do, and can be, or cannot be.

We continue to explore how prison officials, courts, and legislatures licensed and normalized some practices in prisons and prohibited others. We begin with a proposed statute set forth in 1972 to list a set of rights for prisoners. The National Commission Crime and Delinquency chartered a committee – that included people who ran prison systems – and they proposed a packet of rights. Think about what might have prompted such work, their outline of prisoners’ rights, and what impact such provisions might have had, in terms of remedies and implementation. In other words, as we look at the impact of prisoners calling for legal remedies, we want to probe responses in many sectors, of which courts are but one.

We then turn to another kind of effort at constraint: constitutional law, and to a set of cases that addressed the “punishment” or “administration” and “management” of prisoners in prison. As is familiar, prisons have internal codes that make unlawful a host of behaviors. Some are akin to the criminal law outside of prison, and most go far beyond what is “criminal” for those who are not incarcerated.

Since the 1960s, incarcerated people have challenged forms of punishments (loss of good time credits, transfers to other prisons, disciplinary and solitary segregation) as well as to the processes by which decisions were made. What ideas about human liberty, movement, autonomy, and agency animate the prisoners and the justices and result in disagreements about the role that the U.S. Constitution ought to have in regulating in-prison punishment? What are the conceptions of “liberty” and sources of “liberty” for people in prison? What are the legal principles developed? Their premises? What are the differing understandings of the liberty that remains post-conviction and in prison?

What is the range of sanctions imposed? 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 the rules they imposed and the punishments or transfers?

A pioneer in making arguments about rights against punishment in prison was Martin Sostre, who in the 1960s challenged his placement in solitary for his pursuit of the right to observe his faith. The Honorable Constance Baker Motley insisted on his release pending the merits decision and found his punishment unconstitutional. Her relief mixed substantive limits on solitary with procedural protections. An *en banc*

Second Circuit cut back the remedies she required. Reflect on Judge Johnson's creation of a Human Rights Committee in the Alabama litigation that was likewise cut back in the Fifth Circuit's ruling.

Judge Motley sought to impose procedural and substantive limits on punishment in prison. During the decades that followed, litigation focused on both kinds of constraints. One line of arguments, relying on the "due process revolution," advanced ideas about prisoners' liberty (sometimes intertwined with what came to be known as "statutory entitlements") that could not be infringed without procedures to guard against arbitrariness. We will turn next week to another line of challenges trying to "stop solitary."

By the time *Wolff v. McDonnell*, a 1974 decision, was decided, many prison systems were holding hearings before imposing certain punishments. Consider why prison officials did so. Moreover, since *Wolff*, tens of 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* (1976) and *Sandin v. Conner* (1995), both declining to require procedural due process prior to disciplinary decisions. Those cases developed a test about "atypical and significant hardships" that triggered some procedural protections. 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.

These readings serve as a refresher on 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 are the factors that emerge from *Sandin* and how are they applied in *Wilkinson*? What is the "test" in *Wilkinson* for when some procedural protections are required? 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?

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? Moreover, were courts to use the "atypical and significant" hardship or other tests, and were procedural protections due, what should those protections be? Right to counsel? Call witnesses? Cross examine? What kind of decision maker? Appeals? Ought the process vary with the kind of punishment imposed?

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?

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

Sostre v. Rockefeller, 312 F. Supp. 863 (S.D.N.Y. 1970)

Sostre v. McGinnis, 442 F.2d 178 (2d Cir. 1971) (en banc)

Alexandria Symonds, *Overlooked No More: Martin Sostre, Who Reformed America's Prisons From His Cell*, N.Y. Times (Apr. 24, 2019)

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)

Optional readings:

“Line-Drawing: The Quest to Distinguish Among In-Prison Punishments” from 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 14, 2022: Abolishing Solitary Confinement

One can look back at the whipping case as an effort to abolish one form of corporal punishment. The national movement “Stop Solitary” aims to end another kind of corporal punishment. This concerted effort by prisoners, communities, religious leaders, correctional officials, legislators, and litigators has reshaped the last decade’s discussions of solitary confinement.

We begin with some ways to learn about this practice. The film made in Virginia’s “Red Onion” solitary units (the subject of litigation excerpted below) is one way to do so. Other routes into solitary come from materials on the hunger strike at Pelican Bay and the essay by Dwayne Betts. Aggregate data on solitary’s use nationwide exists by virtue of surveys sent by the Liman Center, working with a national organization of correctional administrators. The first such report was from 2014; an overview of some findings is provided from the 2020 report, *Time-in-Cell*. To understand arguments that solitary confinement is necessary and/or not as harmful as others claim it to be, we provide commentary from Craig Haney and from the Morgan group of authors.

Last week, we read *Wilkinson v. Austin* (2005), which both accepted solitary confinement and opened up the potential for litigation about procedural protections. Excerpts from the article *Punishment in Prison* provide a glimpse at the volume of decisions and the limited relief that resulted, even as the many lawsuits are documentation of the suffering imposed. A claim to obtain procedural protection interacted with efforts to hold solitary confinement unconstitutional *per se* under the Eighth or Fourteenth Amendments (or both). For such challenges, pause to think about the “it” – what is “solitary confinement,” and how long must a person be in isolation for it to be “solitary confinement”? Read Justice Kennedy’s concurrence in *Davis v. Ayala*, Justice Thomas’s response, and the *Porter* decision. Why was it necessary to “prove” solitary was harmful? What role did mental health professionals play? What remedies did the Fourth Circuit provide?

Again, action in court is part of a spectrum of efforts, including regulations by the correctional establishment. Review the standards put into place by the American Correctional Association in 2016; the Colorado 2017 policy; the New York HALT Act of 2021, and the proposed PROTECT Act in Connecticut. Skim the overview of the paper “Legislative Regulation of Isolation in Prison” to see distinctions among statutes, some of which address subpopulations, like juveniles or those with mental illness, while others are of more general application; some statutes have reporting requirements and others have caps on the time in cell. Consider the differences, the boundaries set, the utilities of these approaches, and their limits.

Were you writing the rules, what would you do about 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? Assume that one person who is incarcerated, unprovoked, has

done grievous injury to another incarcerated individual. How should the institution respond?

Consider the question of abolition efforts and the shapes that they can take. What is the “it” that should be abolished? Elizabeth Alexander’s essay explores the pros and cons of a “subpopulation” or “vulnerable” population litigation approach. Margo Schlanger looks at “incrementalism” as opposed to “maximalism.” What are the metrics by which to assess the effects? What makes solitary confinement harder to stop than whipping? And how do efforts to abolish solitary confinement inform abolition work on other facets of incarceration?

Optional:

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=chSy5Ck0OJE&feature=youtu.be> (part 2)

The Experiences of Solitary, Its Widespread Use, Its Impacts

Benjamin Wallace-Wells, *The Plot from Solitary*, *New York Magazine* (Feb. 21, 2014)

Reginald Dwayne Betts, *Only Once I Thought About Suicide*, 125 *YALE L.J. F.* 222 (2016)

Optional: Muneer I. Ahmad, *Resisting Guantanamo: Rights at the Brink of Dehumanization*, 103 *NW. U. L. REV.* 1683 (2009).

Optional: 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)

Optional: (we will discuss and read if you have time, but not required)

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)

Optional: Craig Haney, *The Science of Solitary: Expanding the Harmfulness Narrative*, 115 *NW. U. L. REV.* 211 (2020).

Constitutional Rights and Remedies

"Mining Hundreds of Solitary Confinement Rulings" from Judith Resnik, Hirsia 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).

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)

Skim this set of readings: The Role of Negotiated Settlements

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

Ashker v. Newsom, 968 *F.3d* 939 (9th Cir. 2020)

Enforcement litigation: 2022 *WL* 309862 (N.D. Cal. 2022)

Legislation and Regulations

ACA Restrictive Housing Standards, American Correctional Association (Approved Aug. 2016)

Colorado Department of Corrections, Code of Penal Discipline, Regulation No. 150-01 (Nov. 1, 2019), available at <https://drive.google.com/file/d/10CYpnSs7DDuZwP7BSTt9QmKd5xw7liuN/view>

New York Humane Alternatives to Long-Term Solitary Confinement Act (HALT), Enacted, S.2936 (2021)

Connecticut PROTECT Act, Proposed (2022)

Optional: Judith Resnik, Jenny Carroll, Skylar Albertson, Sarita Benesch, Wynne Muscatine Graham, *Legislative Regulation of Isolation in Prison: 2018-2021* (2021)

Stopping Solitary

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)

March 28, 2022: Disenfranchisement and Re-enfranchisement

Given the many examples of horrific conditions of confinement we have discussed in class, the question of voting may appear to be a kind of luxury. Yet voting rights are continuous with the questions of the boundaries of licit punishment explored thus far and the debate around enfranchisement is animated by questions about what it means to be a citizen of a state and what it means to lose that identity.

Below, we consider a series of cases spanning a variety of jurisdictions. We begin with an excerpt from the UK/ECtHR exchanges and a 2015 decision by the Court of Justice of the European Union before turning to decisions from Canada, South Africa, and South Korea. Before turning cases in the United States, we provide the text of the Fourteenth Amendment, which in Section 2 appears to create a route to disenfranchise those convicted. We provide two Supreme Court decisions from the United States, where the debate is whether the Fourteenth Amendment of the U.S. Constitution should be read to permit states to disenfranchise felons, including after release from prison. In addition, we consider the 11th Circuit's recent *en banc* decision regarding legislative interpretation of Florida's recent state constitutional amendment that sought to restore voting rights to those convicted of felony offenses. We provide the constitutional amendment and the legislative efforts to modify that amendment discussed in the case. By way of comparison, we have also included Connecticut's statute that disenfranchises those convicted of felonies during their period of incarceration. Finally, we turn to two scholarly articles. The first provides historical context for disenfranchisement based on conviction. The second argues that voting rights are entwined with other welfare rights. Both call into question the conclusions of the cases we provide and suggest that rights of citizenship carry far-reaching downstream consequences.

Consider questions regarding the role of the judiciary (as opposed to the legislative branch) and the proper role of the federal versus state government abound. Do judges have a special obligation to protect the disenfranchised? Does the answer change if, as the dissenters in South Africa argue, crime rates become disablingly high? In addition to these questions, the readings raise fundamental substantive questions around the rights of citizenship. Should the rights of citizenship depend on the virtue of an individual? Can the state require permanent forfeiture of such rights?

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

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

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

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

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

Restriction on Right to Vote of Prisoners and Probationers with Suspended Sentence (Constitutional Court of South Korea, 2014)

U.S. Const., Amendment XIV

Hunter v. Underwood (Supreme Court of the United States, 1985)

Richardson v. Ramirez (Supreme Court of the United States, 1974)

Jones v. Florida, 975 F. 3d 106, (11th Circ, *en banc*, 2020)

FL. Const., Amendment 4, Florida Statute on Requalification

CT. Gen. Statutes Sections 9-46 and 9-46a

Richard M. Re and Christopher M. Re, *Voting and Vice: Criminal Disenfranchisement and the Reconstruction Amendments*, 121 YALE L. J. 1584 (2012)

Abhay P. Aneja, *Voting for Welfare*, 109 CALIF. L. REV. 2013 (2021)

April 4: Association and Incarceration

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 movements grow out of in-prison organizations, groups, or social ties, and, as the Pelican Bay strikers' account made plain, incarcerated individuals have been remarkably resourceful in forging connections despite prison officials' efforts to prevent them. In addition to protest, people come together in families, for religious observance, athletics, art, music, and work, and as part of ethnic and race-based groups. Some of those bonds - such as in clubs and in gangs - entail efforts to exclude others and to make membership have certain kinds of meanings.

This array of relationships can be seen as generative as well as threatening both for people living in communities and those incarcerated. Prison officials have at times promoted group affiliations and at others sought to limit them. This segment examines some of the rules, policies, concerns, and politics of regulating people's association within prison and their access to family and friends outside. We have selected a few cases and readings addressing prison "unions," a peer education group, prison newspapers, family life, and religious observances, as well as excerpts from the book, *Rethinking the American Prison Movement*, which addresses gangs, "Inmate Advisory Councils," and unions, and the essay by Professors Driver and Kaufman. What are the claims asserted by individuals or groups, and what are the legal principles courts deploy in thinking about access to others and sociability in prison? What work does the *Turner v. Safely* approach do?

Consider the rationales for limiting prisoner collective action. What do prison officials fear from collective action? What forms of self-governance should be available? (Do answers vary by the kind of institution? Subpopulation? Location?) How do peer education organizations and prison newspapers interact with collective political action? What other effects do they have on their members? On non-members in the same prison? What needs prompt the creation of such groups?

What are the reasons for the Court's limited willingness to provide robust protections for intimate 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 could be the bases for family association rights for any of us, in and out of prison? Why did Michigan take away family visits? What is the majority's test in *Overton v. Bazetta* of the punishment imposed and the parameters of its review and holding?

What are the sources and parameters of the decisions about religious liberties and ought community based in religion have more protection than other forms of association? Why? How does the religion to which individuals belong affect the rights articulated? How does deference to prison officials apply? What can Congress or states do in this arena?

Collective and Political Action

“Radicalism: Unions, Feminism, and the Crisis of Prison Managerialism, 1972-1980”
from DAN BERGER AND TOUSSAINT LOSIER, *RETHINKING THE AMERICAN PRISON
MOVEMENT* 108-119 (2019)

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

Kalen M. A. Churcher, *Journalism Behind Bars: The Louisiana State Penitentiary’s
Angolite Magazine*, 4 *Communication, Culture & Critique* 382, 385-391 (2011)

WILLIAM J. DRUMMOND, *PRISON TRUTH: THE STORY OF THE SAN QUENTIN NEWS*, 65-77
(2020)

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)

Family Visits

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

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

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)

Religious Community and Observance

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

GARRETT FELBER, *THOSE WHO KNOW DON’T SAY*, 65-84 (2020)

42 U.S.C. § 2000cc et seq., *The Religious Land Use and Institutionalized Persons Act
(RLUIPA)*

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

Justin Driver & Emma Kaufman, *The Incoherence of Prison Law*, 135 *HARVARD LAW
REVIEW* 515, 516-525, 542-566 (2021)

April 11, 2022: Routes to Changing Prisons

Last week, we looked at associations inside prison. This week, we'll begin by finishing our discussion of *Overton v. Bazzetta* and access to religion in prisons. For the rest of this week's class, we'll focus on interactions with those outside prisons. Courts and legislators configure the contours of prisons, and thus we begin with a brief recap of the history of incarcerated people gaining access to both. As you read the case law, focus on who has rights of access to whom and for what. Ask then about the sources of those rights and their instantiation in practice. The brief excerpts from the essay, *Gideon at Guantanamo*, illustrate that the U.S. government took the position that after losing habeas petitions, individuals held there had no constitutional right to turn to U.S. courts. Who can call, write, see whom, and how?

We then turn to concerns that have emerged outside prisons about the need for reform. A host of religious, philanthropic, scientific, and political groups help to generate the idea of an expertise in "corrections," a category that came into being during the last centuries. Defendant institutions argued their expertise in such matters, and judges regularly deferred to their policies. Over these centuries, organizations of corrections came into being and promulgated standards at the national and transnational levels. Thus, we continue to probe the sources of what has come to be seen as the "normal" practices of prisons.

From early on in the twentieth century, some voices could be heard arguing that detention was abysmal and ought to end. One example comes from a 1927 draft, the "Minimum Rights for Prisoners in All Civilized Countries," drafted by the leadership of the English Howard League (named after John Howard); 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 thereafter, including the 2015 revisions now called the "Nelson Mandela Rules," from which we provided brief excerpts in Week 5. Recall also the 1972 Model Statute on the Rights of Prisons drafted by the U.S. National Council on Crime and Delinquency.

Consider this approach to prison reform and/or abolition and what kinds of organizations you would want there to be or join to reframe detention practices. What would be the mechanisms for their effectuation? And, to help see approaches different from those in the United States, we also excerpt 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 "mission statements" of the American Corrections Association (ACA) and of the Department of Corrections of Connecticut.

As you think about these issues, consider implementation questions. Professional self-assessment has a long and freighted history (think of the controversy about self-policing U.S. Supreme Justices). Commentary critical of the ACA accreditation process comes from Richard Allison's 1972 essay, "The Politics of Prison Standards" and from Senator Elizabeth Warren in 2021. What about outside monitoring? By whom? With what goals, rules, or enforcement mechanisms?

Access to Courts and to Lawyers

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

Review the materials on Martin Sostre and GARRETT FELBER, *THOSE WHO KNOW DON'T SAY*, 77-84, 74-75 (2020).

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

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

Matthew Caldwell, *The End of Public Defenders*, INQUEST (Feb. 25, 2022)

For Which Detainees and What Claims?

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

An Assessment of Impacts and Implementation: Optional

James B. Jacobs, *The Prisoners' Rights Movement and Its Impacts, 1960-80*, 2 CRIME & Just. 429, 435-36, 457-466 (1980).

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 (2022)

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

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

Optional:

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 [XX1] (December 16, 1966)

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 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)

Connecticut Department of Correction, Mission Statement (accessed March 2022)

The American Correctional Association, Mission Statement (accessed March 2022)

Implementation: Outside Monitors and Professional Insiders

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)

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>

April 18, 2022: The Concept of and Accounting for “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. Money is needed to fund detention of any kind, and hence who pays for incarceration’s infrastructure could be understood in terms of dollars as well as human suffering. The shorthand of “pay-to-stay” denotes the view that individuals and their families ought to pay for detention, as contrasted with or in addition to taxpayers. Another question is whether detention ought to be run by the government or “privatized” – sometimes in an effort to lower costs and or to create incentives for more/better/different facilities.

These readings include one of the rare decisions exploring the legality of private prisons. In 2009, the Israel Supreme Court ruled that because incarceration is a form of punishment and a myriad of decisions (like strip searches or segregated housing) are made by those who run prisons, only the state – and not a private enterprise – can be the agent of such deprivations of liberty and dignity. The essay by Brittany Freedman provides an analysis of the impetus for “pay-to-stay.”

These readings provide the backdrop for learning more about the economics 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.

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 dollars to spend on government responses to criminal law breaking, how would you think about how to allocate the funds? To public and private sector actors?

Public and Private Prisons and Their Financing

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

People v. Cameron, 319 Mich.App. 215 (2017)

504 Mich. 927 (2019)

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)

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)

More on the Economics of Incarceration

Chris Mai and Ram Subramanian, Vera Institute of Justice, *The Price of Prisons: Examining State Spending Trends, 2010- 2015* (2017)

Russell Bogue, Broderick Johnson, and Shunhe Wang, *The Road from Rhodes: The Impact of Double-Celling on State Investment in Incarceration* (2021)

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)

The Community and the Personal Costs

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)

Peter Enns, Youngmin Yi, Megan Comfort, Alyssa Goldman, Hedwig Lee, Christopher Muller, *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)

Judith Resnik, *(Un)Constitutional Punishments: Eighth Amendment Silos, Penological Purposes, and People’s “Ruin,”* Yale L.J.F. 365, 408-414 (2020).

April 25, 2022: Abolition of What?

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 a 1968 essay by Hans Mattick, a sociologist at the University of Chicago who called for the use of incarceration to end. We then turn to Angela Davis's central 2003 work, *Are Prisons Obsolete?*. As you read, consider if and how, since those articles were written, the issues have remained constant or changed in some respects.

As discussed in class, one criticism of reform is that it can make prisons more plausible and extend their durability. What kinds of normative and empirical arguments can be made for and against this position. Think of the different forms of interventions – litigation by incarcerated people, standard setting such as the Nelson Mandela Rules, legislative and court involvement of a host of kinds. How does one sort the differences in time, scope, and focus of those various kinds of “reforms”?

Consider also the impact of words and the references to chattel slavery, as an analogy drawn by Davis.

Dorothy Roberts' *Abolition Constitutionalism* argues for a reading of the U.S. Constitution that aligns with an abolitionist framework. “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.” Is there a way to use constitutional text instrumentally? Do cases we have read this semester 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?” What sorts of legal challenges or policy changes could such abolitionist constitutionalist approaches include, and do any fit abolitionist themes of dismantling and rebuilding, accountability, harm reduction and abolitionists reforms?

In the excerpt we read from Allegra McCleod, we consider strategies to pursue preventative justice and discuss its role in abolitionist movements. 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?” 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?

As you consider the politics of using abolition, review the 2020 essay by a group focused on Connecticut and thinking that COVID would be part of rallying support for decarceration. As you know from other readings, that did not much occur. Does that marker of politics (of which, since 2021, more exist) affect your thoughts on what forms of action to pursue to lessen the use of incarceration?

Look also at Kaba and Sterling's article, and return to the question "abolish what"? They wrote, "PIC abolition refuses premature death and organized abandonment, the state's modes of reprisal and punishment." What efforts fall under the realm of "abolition" and is that mantle helpful conceptually and /or politically?

Next, we review Tommie Shelby's chapter from *The Idea of Prison Abolition*, his book project addressing the conceptual underpinnings of the abolition movement. What are Shelby's critiques of abolition theory (as examined primarily through the work of Angela Davis)? For example, in that draft, he asked:

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?

Hans Mattick, *The Future of Imprisonment in a Free Society*, 8 *British J. Criminology* 450-454 (1967)

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

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

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

Skim: Joshua Petersen, James Cavallaro, & Andrew Clark, *Connecticut at the Crossroads: COVID-19, the State Budget Crisis and the Path Towards Decarceration, Public Safety and Community Investment*, UNIV. NETWORK FOR HUMAN RIGHTS (Jan. 2021),
https://static1.squarespace.com/static/5b3538249d5abb21360e858f/t/600f29b9d383732f202b08dc/1611606459237/ConnecticutAtTheCrossroads_25Jan21.pdf

Mariame Kaba and Rachel Herzing, *Transforming Punishment: What Is Accountability without Punishment?* WE DO THIS 'TIL WE FREE US (2021)

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

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)

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