

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 Schwartz, 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 174 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?