

INCARCERATION AND THE LAW

CASES AND MATERIALS

Tenth Edition



Margo Schlanger

*Wade H. and Dores M. McCree Collegiate Professor of Law
University of Michigan Law School*

Sheila Bedi

*Clinical Professor of Law
Northwestern Pritzker School of Law*

David M. Shapiro

*Clinical Associate Professor of Law
Northwestern Pritzker School of Law
Director, Supreme Court and Appellate Program
Roderick and Solange MacArthur Justice Center*

Lynn S. Branham

*Visiting Professor of Law
Saint Louis University School of Law*

AMERICAN CASEBOOK SERIES®

 **WEST
ACADEMIC
PUBLISHING**

TABLE OF CONTENTS

PREFACE	V
ACKNOWLEDGMENTS	VII
TABLE OF CASES	XXVII
TABLE OF STATUTES	XXXV
TABLE OF REGULATIONS.....	XXXIX
Chapter 1. Prisons, Jails, and Prisoners' Rights: An Introduction.....	1
Sharon Dolovich, Teaching Prison Law	1
A Note on Terminology	3
A. Background on American Incarceration	4
1. Jails and Prisons	4
a. Definitions.....	4
b. Gallery: Jails, Prisons, Immigration Detention.....	6
c. Differences Between Jails and Prisons	8
d. Daily Life.....	12
Norval Morris, from a diary by Simon “Sam” Gutierrez, One Day in the Life of #12345	12
2. Historical Foundations of American Incarceration.....	17
David J. Rothman, Perfecting the Prison: United States, 1789– 1865	18
Edgardo Rotman, The Failure of Reform: United States, 1865– 1965	20
Andrea Armstrong, The Impact of 300 Years of Jail Conditions	22
Kelly Lytle Hernández, City of Inmates: Conquest, Rebellion, and the Rise of Human Caging in Los Angeles, 1771–1965	23
3. Population Trends	25
4. Incarceration in Fuller Perspective.....	32
B. What Is Prison for?.....	33
Dan Berger, Mariame Kaba & David Stein, What Abolitionists Do.....	37
C. History of Prisoners' Rights—General Overview.....	41
1. Slaves of the State—Through the 1800s.....	41
Ruffin v. Commonwealth	41
2. The “Hands-Off” Era—Early- to Mid-1900s	43
3. The Prisoners’ Rights Era—the 1960s & ’70s	45
Cooper v. Pate	45
a. Legal Developments Preceding the End of the “Hands-Off” Era	46

b.	Reasons for the End of the “Hands-Off” Era.....	49
	Matthew L. Myers, The Alabama Case: 12 Years after <i>James v. Wallace</i>	50
4.	Prisoners’ Rights Today	53
PART I. CONDITIONS OF CONFINEMENT		
Chapter 2. Conditions of Confinement		57
A.	Cruel and Unusual Punishment: Convicted Prisoners.....	58
	<i>Jackson v. Bishop</i>	59
	Model Penal Code § 2.02. General Requirements of Culpability	62
	Restatement (2d) Torts, §§ 283, 500	64
	<i>Estelle v. Gamble</i>	64
	Note on <i>Hutto v. Finney</i>	70
	<i>Rhodes v. Chapman</i>	71
	Note and Question.....	82
	<i>Whitley v. Albers</i>	83
	Notes and Questions	91
	<i>Wilson v. Seiter</i>	92
	Notes and Questions on the Objective/Subjective Dispute and “Totality of Conditions”	100
	<i>Hudson v. McMillian</i>	101
	Notes and Questions	109
	<i>Helling v. McKinney</i>	110
	Petition for a Writ of Certiorari to the United States Court of Appeals for the 7th Cir., <i>Farmer v. Brennan</i>	117
	<i>Farmer v. Brennan</i>	118
	Note on <i>Hope v. Pelzer</i>	133
	Note on Scienter, Obviousness, Deliberate Indifference	133
B.	Subjective Standards Critiqued	135
	Sharon Dolovich, Cruelty, Prison Conditions, and the Eighth Amendment.....	135
	Margo Schlangen, The Constitutional Law of Incarceration, Reconfigured	136
	John Stinneford, The Original Meaning of Cruel	137
C.	Due Process: Pretrial Detainees.....	138
	<i>Bell v. Wolfish</i>	139
	Note on <i>Bell v. Wolfish</i> and <i>City of Revere v. Mass. Gen. Hosp.</i>	159
	<i>Kingsley v. Hendrickson</i>	160
	Brief of Former Corrections Administrators and Experts as Amici Curiae in Support of Petitioner, <i>Kingsley v. Hendrickson</i>	171
	<i>Castro v. County of Los Angeles</i>	176
	Notes and Questions on Standards for Pretrial Detention Conditions	184

Chapter 3. Solitary Confinement.....	187
A. How Is Solitary Confinement Experienced?	188
William Blake, A Sentence Worse Than Death.....	188
1. Gallery: Solitary Confinement Photographs.....	192
B. A Brief History of American Solitary Confinement	194
In re Medley.....	194
Questions	196
Madrid v. Gomez	199
C. Challenges to Solitary Confinement, 1995 to Present	211
1. The Advocacy That Followed <i>Madrid v. Gomez</i>	211
Margo Schlanger, Incrementalist vs. Maximalist Reform: Solitary Confinement Case Studies.....	213
Brief of Corrections Directors and Experts as Amici Curiae in Support of Plaintiff-Appellant and Reversal, Porter v. Pennsylvania Department of Corrections	215
Amy Fettig & Margo Schlanger, Eight Principles for Reforming Solitary Confinement	221
2. International Law.....	221
Juan E. Méndez, Interim report of the Special Rapporteur of the Human Rights Council on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment	223
Amy Fettig, Why I Worked on the Mandela Rules	225
U.N. Standard Minimum Rules for the Treatment of Prisoners (The Nelson Mandela Rules).....	227
3. Case Study: <i>Ashker v. Brown</i>	228
California Hunger Strikers, Prisoners' Demands	228
Plaintiffs' Second Amended Complaint, <i>Ashker v. Brown</i> , Governor of the State of California	231
Brief of Amici Curiae California Correctional Peace Officers Association in Opposition to Settlement, <i>Ashker v. Brown</i>	238
Notes and Questions	240
4. A Tipping Point?	240
Davis v. Ayala	240
Porter v. Clarke	244
Amy Fettig, Are We Reaching a Tipping Point in the Campaign to End Solitary Confinement?.....	246
Association of State Correctional Administrators & Liman Center for Public Interest Law at Yale Law School, Reforming Restrictive Housing: The 2018 ASCA-Liman Nationwide Survey of Time-in-Cell	249
Notes and Questions	250
Chapter 4. Programming, Work, Reentry.....	253
A. Context: What Do Prison Programs Look like?	254
Michigan Department of Corrections: Prisoner Programming; Educational Programming.....	254
Benny Rios, Reflection on Prison Law Class	256

B.	Rehabilitative Programming	256
	Laaman v. Helgemoe.....	257
	U.N. Standard Minimum Rules for the Treatment of Prisoners (The Nelson Mandela Rules).....	260
	Notes and Questions	261
C.	Prison/Jail Labor	261
1.	Forced Labor	263
	Third Amended Complaint, Novoa v. The GEO Group Inc.	265
	Notes and Questions	267
2.	Statutory Labor Regulation	268
	Vanskike v. Peters.....	268
	Notes and Questions	275
D.	Reentry Services.....	276
	ABA Criminal Justice Standards (3d ed.), Treatment of Prisoners, Standard 23–8.9: Transition to the Community	279
Chapter 5. Sexual Abuse		283
A.	The Prison Rape Elimination Act.....	286
	National Prison Rape Elimination Commission Report	287
	Jacoby v. PREA Coordinator	295
	Notes and Questions	297
B.	Constitutional Rights.....	299
	Crawford v. Cuomo.....	299
	Graham v. Sheriff of Logan County	303
	Notes and Questions	308
	U.S. Dep’t of Just., [CRIPA] Investigation of the Walnut Grove [Mississippi] Youth Correctional Facility	309
C.	Case Study: Cross-Gender Viewing and Searches	314
	Timm v. Gunter	315
	Jordan v. Gardner	323
	28 C.F.R. § 115.15. Limits to Cross-Gender Viewing and Searches	327
	Notes and Questions	327
D.	Criminal Law.....	329
	Fla. Stat. § 944.35	330
	Okla. Stat. Tit. 21 § 1111	331
	Notes and Questions	331
PART II. CIVIL LIBERTIES		
Chapter 6. Freedom of Expression and Religion.....		335
A.	Prisoner Voices	336
	Anthony Ray Hinton, The Death Row Book Club.....	336
	Malcom X, Learning to Read	336
	Reginald Dwayne Betts, House of Unending	337
	Arthur Longworth, Why It’s So Hard To Write in Prison	337
	Seth Ferranti, <i>Prison Legal News</i> Is a Publication by Prisoners, for Prisoners	338

B.	First Amendment Rights in Prisons and Jails	338
1.	The Development of the Legitimate Penological Interest Test	338
	Procurier v. Martinez	339
	Jones v. North Carolina Prisoners' Labor Union, Inc.	345
	Turner v. Safley	355
	O'Lone v. Estate of Shabazz	366
	Thornburgh v. Abbott.....	377
	Beard v. Banks	386
2.	Applying the Legitimate Penological Interest Test	399
	Singer v. Raemisch.....	400
	Prison Legal News v. Cook	407
	Notes and Questions	412
3.	Visitation and Family	413
	Liliana Segura, Observations on a Prison Visit	413
	Note on <i>Overton v. Bazzetta</i>	414
4.	Critiques of the Legitimate Penological Interest Test	416
	Erwin Chemerinsky, The Constitution in Authoritarian Institutions.....	416
	David M. Shapiro, Lenient in Theory, Dumb in Fact: Prison, Speech, and Scrutiny.....	418
C.	Heightened Statutory Protection for Religious Exercise	421
1.	Statutory Texts.....	422
	Religious Freedom Restoration Act.....	422
	Religious Land Use and Institutionalized Persons Act	423
2.	Strict Scrutiny in Prison	423
	Holt v. Hobbs	424
	Notes and Questions	432
3.	Critiques of Heightened Scrutiny for Prisoners' Religious Exercise	432
	Florida Office of the Att'y Gen'l, Preliminary Results of the RFRA Survey of All States: The Impact of the Religious Freedom Restoration Act on State Correctional Systems.....	433
	Brief of Former Corrections Officials as Amici Curiae in Support of Plaintiff-Appellant, <i>Greenhill v. Clarke</i>	436
	Chapter 7. Access to the Courts.....	439
A.	Communications with Courts and Attorneys	440
	Ex parte Hull	440
	Procurier v. Martinez	442
	Notes and Questions	443
B.	Jailhouse Lawyers, Law Libraries, and Other Legal Assistance.....	446
	Johnson v. Avery	446
	Note on "Jailhouse Lawyers" and Retaliation Claims	449
	Bounds v. Smith	451
	Notes and Questions on <i>Lewis v. Casey</i>	455
	Eric Blackmon, Litigating from the Inside.....	457

Chapter 8. Procedural Due Process.....	461
A. Parole Revocation	462
Morrissey v. Brewer	463
Notes and Questions	468
B. Prison/Jail Disciplinary Proceedings, Transfers, and Placement in Solitary Confinement	470
1. Background on Prison Discipline	470
2. What Process Is Due?	472
Wolff v. McDonnell	472
Notes and Questions	483
Superintendent, Massachusetts Correctional Institution at Walpole v. Hill	484
Notes and Questions on the “Some Evidence” Rule and Other Procedural Rights	487
3. Is Any Process Due?	488
Meachum v. Fano	489
Vitek v. Jones.....	493
Notes and Questions on Prisoner Transfers.....	498
Sandin v. Conner	502
Notes and Questions on <i>Sandin v. Conner</i>	507
Wilkinson v. Austin	509
Notes and Questions	516
Chapter 9. Searches	517
A. Fourth Amendment Search Claims	518
1. Searches of Living Quarters	518
Hudson v. Palmer	518
2. Bodily Searches	525
Swain v. Spinney	526
Florence v. Board of Chosen Freeholders	527
B. Eighth and Fourteenth Amendment Search Claims	536
Brief of Law Professors and Scholars of Sexual Violence et al. as Amici Curiae in Support of Plaintiffs-Appellants’ Petition for Rehearing En Banc, <i>Henry v. Hulett</i>	537
PART III. PARTICULAR PRISONER POPULATIONS	
Chapter 10. Race and National Origin Discrimination.....	541
A. Race and Who Goes to Prison	541
James Forman, Jr., Racial Critiques of Mass Incarceration: Beyond the New Jim Crow	543
Vera Institute of Justice, Reimagining Prison	547
Notes and Questions	549
B. Race and What Happens in Prison	549
1. Intentional Race Discrimination	549
Washington v. Lee	550
Lee v. Washington	554

Johnson v. California	555
Richardson v. Runnels	564
Mitchell v. Cate.....	565
Notes and Questions	567
2. Language Access.....	569
U.S. Dep't of Just., Civil Rights Investigation of the Orleans Parish Prison, Louisiana System	569
Consent Judgment, Jones v. Gusman.....	573
Notes and Questions	574
Chapter 11. Women Prisoners.....	575
A. Conditions of Confinement: Programming and Sexual Abuse	578
Women Prisoners of D.C. Dept. of Corrections v. District of Columbia	578
Interview with Brenda V. Smith, Co-Lead Counsel for the Plaintiffs in <i>Women Prisoners of D.C.</i>	588
Notes and Questions	591
B. Reproduction and Childrearing.....	592
1. Shackling Prisoners Giving Birth	593
Nelson v. Correctional Medical Services.....	593
Notes and Questions	598
2. Breastfeeding and Nurseries	599
Southerland v. Thigpen.....	599
Elizabeth Chuck, Prison Nurseries Give Incarcerated Women a Chance to Raise Their Babies—Behind Bars	604
Notes and Questions	608
3. Abortion.....	608
Roe v. Crawford	608
Notes and Questions	613
C. Alternative Models for Serving Women's Needs	614
United Nations Rules for the Treatment of Women Prisoners and Non-Custodial Measures for Women Offenders (The Bangkok Rules).....	615
Michele Deitch & Colleagues, Advisory Committee to the Travis County (TX) Sheriff's Office, Designing and Planning a New Women's Jail Facility for Travis County: A Roadmap for Reform	616
Andrea James, Ending the Incarceration of Women and Girls	620
Notes and Questions	621
Chapter 12. LGBTQ Prisoners.....	623
A. Staff Harassment/Discrimination	624
Davis v. Prison Health Service.....	625
Notes and Questions	626
B. Preventing Sexual Victimization.....	629
1. Constitutional Theories: Failure to Protect and Equal Protection	629

Johnson v. Johnson	629
Notes and Questions	635
2. Housing Decisions	636
Joey L. Mogul, Andrea J. Ritchie, & Kay Whitlock, Queer (In)justice: The Criminalization of LGBT People in the United States	636
a. Prison Rape Elimination Act Regulations on LGBT Housing Decisionmaking	639
28 C.F.R. § 115.41. Screening for risk of victimization and abusiveness	639
28 C.F.R. § 115.42. Use of screening information.....	639
28 C.F.R. § 115.43. Protective custody	640
b. Isolation and Its Alternatives	641
i. Case Study: McKibben v. McMahon	641
Settlement Agreement, McKibben v. McMahon	642
c. Dedicated LGBTQ Units	646
d. Transgender Prisoners and Prison Assignments	647
Hampton v. Baldwin.....	648
Strawberry Deon Hampton, Testimony, Hampton v. Baldwin.....	655
Notes and Questions.....	657
C. Transgender Medical Care	658
Edmo v. Corizon, Inc.	659
Monroe v. Baldwin	665
Notes and Questions	668
Chapter 13. Disability.....	671
A. Why Is Disability a Challenge?	673
B. What Does the Law Require?	675
United States v. Georgia.....	675
1. Statutory Coverage and Theories of Liability	680
2. Disparate Treatment.....	682
3. Reasonable Modification	685
Andrews v. Rauner	685
4. Effective Communication.....	692
McBride v. Michigan Department of Corrections.....	693
Notes and Questions	698
5. The Integration Mandate.....	699

PART IV. LITIGATION AND REMEDIES

Chapter 14. Injunctive Litigation.....	705
A. The Boundary Between Habeas Corpus, Injunctive, and Damages Relief	707
B. Pre-PLRA Prerequisites to Entry of a Systemic Injunction	711
1. General Principles for Entry of Injunctive Orders.....	711

2.	"Fit" in a 1970s Context.....	712
	Hutto v. Finney.....	713
3.	The Spread of Prison and Jail Injunctions	719
4.	1990s Skepticism.....	722
	Lewis v. Casey	722
	Notes and Questions	734
C.	Pre-PLRA Modification/Termination	734
	Rufo v. Inmates of the Suffolk County Jail	735
	John Boston, Modification of Judgments/Consent Judgments	746
D.	The Prison Litigation Reform Act	747
	Sen. Spencer Abraham, Introductory statement for the Prison Conditions Litigation Reform Act.....	749
1.	PLRA Text.....	752
	Prison Litigation Reform Act.....	752
2.	The PLRA in Operation	756
a.	Termination and Automatic Stay	756
	Miller v. French	757
b.	Scope of Relief Authorized	760
c.	Settlement After Appropriate Judicial Finding	763
d.	Settlement by Conditional Dismissal/Private Settlement Agreement.....	765
e.	Settlement with State-Court Enforcement	766
f.	Termination of Prospective Relief	766
	Notes and Questions	767
3.	Prisoners' Rights Bar Response.....	768
4.	Population Caps: <i>Brown v. Plata</i>	771
	<i>Brown v. Plata</i>	771
E.	Enforcing Court Orders Through Contempt Proceedings and Other Means	811
	Badgley v. Santacroce	811
F.	Injunctive Litigation: Assessment.....	813
1.	The Positive Account	814
	Margo Schlanger, Civil Rights Injunctions Over Time: A Case Study of Jail and Prison Court Orders.....	814
2.	The Negative Account	817
	Ross Sandler & David Schoenbrod, Democracy by Decree: What Happens When Courts Run Government	817
3.	The Perverse Assessment	820
	Heather Schoenfeld, Building the Prison State: Race and the Politics of Mass Incarceration.....	821
Chapter 15. Damages: Causes of Action and Defenses.....		825
A.	Damage Actions Against State/Local Officials: 42 U.S.C. § 1983	825
1.	Violation of Federal Rights	826
2.	"Under Color of" State Law.....	826
3.	"Person" (and State Immunity)	827

4.	Official- vs. Personal-Capacity Lawsuits	829
5.	Causation	830
B.	Civil Rights Actions Against the Federal Government: <i>Bivens</i>	834
	Correctional Services Corp. v. Malesko	835
	Notes and Questions	842
	Notes and Questions on <i>Ziglar v. Abbasi</i>	843
C.	Qualified Immunity.....	846
	Hope v. Pelzer	848
	Notes and Questions	854
D.	The Federal Tort Claims Act	855
	Federal Torts Claims Act.....	857
1.	The Inclusion of Prisons in the FTCA.....	858
	United States v. Muniz	858
2.	The Need for a “Private Person” Analogue	862
3.	Scope of Employment	863
4.	The Discretionary Function Exception	863
	Cohen v. United States	863
5.	The Intentional Tort Exception and the Law Enforcement Proviso.....	868
E.	Other Causes of Action	869
F.	Damages: Types and Recovery	870
1.	The PLRA Physical Injury Rule	870
2.	Damages.....	872
3.	Reallocation of Damage Awards.....	874
G.	Litigating a Prisoner’s Case for Damages	875
	Sheila Bedi, Attorney for Plaintiff, Opening Statement, White v. Watson.....	876
	Thomas Ysursa, Attorney for Defendants, Opening Statement, White v. Watson	882
	Notes and Questions	885
Chapter 16. The Litigation Process.....		887
	Statement of Senator Kyl, Top 10 Frivolous Inmate Lawsuits	
	Nationally	888
A.	Exhaustion of Remedies.....	890
	Woodford v. Ngo	893
	Ross v. Blake.....	899
B.	Filing Fees and “Three-Strikes”	904
C.	Judicial Screening	907
D.	Pleading	908
E.	Court-Appointed Counsel	910
F.	Attorney’s Fees	912
	1. In General	912
	2. Calculating Attorney’s Fees.....	913

Chapter 17. Private Prisons and Prison Contractors.....	915
A. The Scale of Private Incarceration and the Resulting Debate	916
Kara Gotsch and Vinay Basti, The Sentencing Project, Capitalizing on Mass Incarceration: U.S. Growth in Private Prisons	917
Jennifer M. Chacón, Privatized Immigration Enforcement	920
Alexander Volokh, A Tale of Two Systems: Cost, Quality, And Accountability In Private Prisons	921
Sharon Dolovich, State Punishment and Private Prisons.....	924
Notes and Questions	925
B. Monitoring and Oversight	926
ABA Criminal Justice Standards (3d ed.), Treatment of Prisoners, Standard 23–10.5, Privately Operated Correctional Facilities	926
U.S. Dep’t of Just., Office of the Inspector General, Review of the Federal Bureau of Prisons’ Monitoring of Contract Prisons.....	928
Sally Q. Yates, Deputy Att’y Gen’l, Reducing our Use of Private Prisons, Memorandum for the Acting Director, Federal Bureau of Prisons.....	931
Jefferson B. Sessions III, Att’y Gen’l, Memorandum for the Acting Director, Federal Bureau of Prisons	932
C. Litigation Against Prison Contractors.....	933
West v. Atkins	933
Richardson v. McKnight	937
Note and Question.....	946
Complaint, C.B. v. Walnut Grove Correctional Authority	946
Chapter 18. Criminal Prosecution of Prison/Jail Staff.....	951
A. “Color of Law” Prosecutions.....	953
18 U.S.C. § 242. Deprivation of Rights Under Color of Law	953
Screws v. United States	954
B. Other Federal Criminal Statutes	967
C. In Operation: Sample Prosecutions	967
Indictment, United States v. Almodovar	968
United States v. Hickman.....	971
D. State Prosecutions.....	976
Indictment, State of Maryland v. Hickson.....	977
Notes and Questions	979
Chapter 19. Accountability: Voting, Standards, and External Oversight	981
A. Political Power.....	982
B. Standards.....	984
ABA Criminal Justice Standards (3d ed.), Treatment of Prisoners, Introduction: Commentary on the Purpose of Standards	986
American Correctional Association, Performance-Based Expected Practices for Adult Correctional Institutions	988
ABA Criminal Justice Standards (3d ed.), Treatment of Prisoners, Part III: Conditions of Confinement.....	990

C. Oversight Concepts	992
Michele Deitch, Distinguishing the Various Functions of Effective Prison Oversight.....	992
ABA Criminal Justice Standards (3d ed.), Treatment of Prisoners, Part XI: Accountability and Oversight.....	995
D. Oversight Examples	1002
Joanna Carns, Director, [Washington State] Office of the Corrections Ombuds, Annual Report 2019.....	1004
Notes and Questions	1010
INDEX.....	1013