

# Teaching Prison Law

Sharon Dolovich

In most American law schools, courses in criminal law focus on what might be called the “front end” of the criminal justice process. In Criminal Procedure, law students learn the constitutional law of investigation and policing. In Criminal Law, they learn the elements that make up a crime, what exactly a prosecutor has to prove to get a conviction, and the elements of available defenses. In Evidence, they learn what kinds of proof may be introduced at trial, and in Criminal Adjudication (aka “Bail to Jail”), they study a variety of front-end topics not covered in other criminal law classes, including grand juries, jury selection, effective assistance of counsel, double jeopardy, and plea bargaining.

To judge from this curriculum, the criminal justice process starts with the investigation of a crime and ends with a determination of guilt. But for many if not most defendants, the period from arrest to verdict (or plea) is only a preamble to an extended period under state control, whether on probation or in custody. It is during the administration of punishment that the state’s criminal justice power is at its zenith, and at this point that the laws constraining the exercise of that power become most crucial. Yet it is precisely at this point that the curriculum in most law schools falls silent.<sup>1</sup>

This silence is a problem. The law school course catalogue is not just the place where students look to decide what to study next semester. It is where future lawyers are exposed to the range of possible practice areas, where they discover interests they did not know they had, and where they begin to imagine their professional lives. However, as things currently stand, most law students at most schools will not even realize the vast reach of the criminal law post-conviction, much less that there are millions of people in prison or jail or on probation or parole who are struggling daily to navigate complex and highly consequential legal regimes without counsel.

The numbers are worth rehearsing. At present, there are more than 2.3 million people in custody in state and federal prisons and jails in the United

**Sharon Dolovich** is a Professor of Law, UCLA School of Law. Thanks to Giovanna Shay for organizing this symposium and for helpful comments on an early draft of this essay, and to Scott Dewey and Brian Priestley for their research assistance.

1. Even “Bail to Jail” rarely gets all the way to jail.

States,<sup>2</sup> and another five million or so on probation or parole.<sup>3</sup> Every year, between 650,000 and 700,000 people are released from prison, and another 12 to 13 million churn through the nation's jails.<sup>4</sup> Even granting the likelihood of many repeat players, this is an enormous number of people.<sup>5</sup> And for the most part, these are people uniquely unqualified to protect their own legal interests. In the United States, those who end up under criminal justice control are disproportionately likely to be suffering from drug addiction,<sup>6</sup> severe mental illness,<sup>7</sup> and/or learning disabilities;<sup>8</sup> to be indigent, unskilled,

2. The Pew Center on States, *One in 100: Behind Bars in America* 5 (2008) ("With 1,596,127 in state or federal prison custody, and another 723,131 in local jails, the total adult inmate count at the beginning of 2008 stood at 2,319,258.").
3. Lauren E. Glaze & Thomas P. Bonczar, Bureau of Justice Statistics, *Probation and Parole in the United States, 2010*, at 1, 30 app. tbl. 2, 40 app. tbl. 12, available at <http://bjs.gov/content/pub/pdf/ppus10.pdf> (finding 4,055,514 adults on probation and 840,676 adults on parole in the United States as of December 31, 2010, for a total of 4,887,900 adults under community supervision).
4. See William J. Sabol & Heather Couture, U.S. Bureau of Justice Statistics, *Prison Inmates at Midyear 2007* 4 tbl. 4 (2007), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/pim07.pdf> (revised June 2008) (reporting that since 2000, an average of around 650,000 people have been released annually from American prisons); Todd S. Minton, Bureau of Justice Statistics, *Jail Inmates at Midyear 2009—Statistical Tables 2* (June 2010), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/jim09st.pdf> (reporting that "[l]ocal jails admitted an estimated 12.8 million persons during the 12 months ending June 30, 2009, or about 17 times the size of the inmate population (767,620) at midyear").
5. See Thomas P. Bonczar, Bureau of Justice Statistics, *Prevalence of Imprisonment in the U.S. Population, 1974-2001*, at 1 (Aug. 2003), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/piuspo1.pdf> ("At yearend 2001 there were 1,319,000 adults confined in State or Federal prison and an estimated 4,299,000 living former prisoners. A total of 5,618,000 U.S. adult residents, or about 1 in every 37 U.S. adults, had ever served time in prison.").
6. See Christopher J. Mumola & Jennifer C. Karberg, *Special Report: Drug Use and Dependence, State and Federal Prisoners 2004*, at 6 (Bureau of Justice Statistics Oct. 2006), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/dudsfp04.pdf> (revised Jan. 19, 2007); Jennifer C. Karberg & Doris J. James, *Special Report: Substance Dependence, Abuse, and Treatment of Jail Inmates 2002*, at 1-2 (Bureau of Justice Statistics July 2005), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/sdatjio2.pdf>.
7. See Terry A. Kupers, *What To Do With the Survivors? Coping With the Long-Term Effects of Isolated Confinement*, 35 *Crim. Just. & Behav.* 1005, 1008 (2008) (citing Lauren E. Glaze & Doris J. James, Bureau of Justice Statistics, *Mental Health Problems of Prison and Jail Inmates* (Sept. 2006), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/mhppji.pdf> (revised Dec. 14 2006)).
8. See Laura M. Maruschak, *Medical Problems of Prisoners 2* (Bureau of Justice Statistics Apr. 2008), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/mpp.pdf> (reporting that "[l]earning was the most commonly reported impairment among state and federal inmates (23 percent and 13 percent respectively)"); Laura M. Maruschak *Medical Problems of Jail Inmates 1* (Bureau of Justice Statistics Nov. 2006), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/mpji.pdf> (reporting that an "estimated 227,200 jail inmates reported having impaired functioning, most commonly a learning impairment (22 percent), such as dyslexia or attention deficit disorder, or having been enrolled in special education classes").

under-educated,<sup>9</sup> and/or illiterate.<sup>10</sup> If ever a group had an urgent and unmet legal need, this is it.

It might be wondered: Is there really enough material here for an entire semester's worth of study? This is like asking whether there is enough material for a whole course on business law. This latter inquiry, of course, is laughable; most law schools today offer a wide array of business law courses, enough for a whole curriculum.<sup>11</sup> Were there as much collective interest in the legal needs of people with criminal convictions, one could readily imagine an equally rich curriculum covering the back end of the criminal justice system. Such a curriculum could include courses on sentencing,<sup>12</sup> on habeas, on prisoners' constitutional rights, and on prison oversight and administration.<sup>13</sup> Parole alone is an institution with sufficient legal complexity to merit a course to itself. Such a class could cover the creation and operation of parole boards; the statutory and constitutional standards, both substantive and procedural, by which parole decisions are made and parole revoked; the legal burdens on parolees; and the administration of the parole system in general. A course on post-conviction legal rehabilitation could cover the law and procedure of pardons, clemency, expungements, certificates of rehabilitation, and so on. A class on the business law of corrections could cover the host of economic issues arising from the administration of the penal system, including procurement, financing, and privatization as well as the structure and influence of prison guard unions, the use of prison labor, and "pay to stay" programs.<sup>14</sup> Other courses could address the (considerable) collateral consequences of a criminal conviction;<sup>15</sup> penal practice in a comparative/international perspective; and

9. See Joan Petersilia, *When Prisoners Come Home: Parole and Prisoner Reentry* 4 (2003) ("Fully one-third of all prisoners were unemployed at their most recent arrest, and just 60 percent of inmates have a GED or high school diploma (compared to 85 percent of the U.S. adult population).").
10. *Id.*
11. These courses typically include corporations, secured transactions, securities regulation, antitrust, bankruptcy, and tax, among others.
12. The law surrounding the use of sentencing guidelines alone may merit its own course, as would, of course, the law of the death penalty.
13. See, e.g., Symposium, *Opening Up a Closed World: A Sourcebook on Prison Oversight*, 30 *Pace L. Rev.* 1383 (2010).
14. See, e.g., Jennifer Medina, *In California, a Plan to Charge Inmates for Their Stay*, *N.Y. Times*, Dec. 11, 2012.
15. See, e.g., *Invisible Punishment: The Collateral Consequences of Mass Imprisonment* 120 (Marc Mauer & Meda Chesney-Lind eds., New Press 2002). It is hard to overstate the breadth of the legal disabilities placed on people with criminal convictions in the United States. The American Bar Association Criminal Justice Section has pursued a project to catalogue all state and federal statutes and regulations that impose legal consequences on the fact of a criminal conviction. See Project Website, available at <http://isrweb.isr.temple.edu/projects/acproject/>. As of May 2011, the project had catalogued over 38,000 such provisions.

the race and gender dimensions of incarceration and of penal policy more broadly.<sup>16</sup>

I am not proposing here that all law schools go this far—although it would be a welcome development if one or more schools were to build a specialized curriculum in this area, and, indeed, if faculty who teach in areas with significant implications for prisoners were to incorporate prisoners’ rights topics into their regular course coverage. This latter reform—recently proposed by Giovanna Shay<sup>17</sup>—could encompass a surprisingly wide array of courses in the standard law school curriculum. To name just a few: In Family Law, students could learn about “termination of incarcerated parents’ parental rights and corrections policies regarding family visitation”;<sup>18</sup> in Administrative Law, about the prison exception to state and federal Administrative Procedure Acts,<sup>19</sup> and the distinctive “some evidence” standard of review applied to cases involving prison disciplinary hearings;<sup>20</sup> in Civil Procedure, about the Supreme Court’s unusual interpretation of Rule 56<sup>21</sup> in cases involving prisoners;<sup>22</sup> in Federal Courts, about the limits imposed by the Prison Litigation Reform Act (PLRA) on federal courts’ authority in the prison context; and in First Amendment, about the scope of constitutional protection afforded prisoners’ rights of expression,<sup>23</sup> association,<sup>24</sup> and religion,<sup>25</sup> as well the media’s right of access to prisons and jails.<sup>26</sup> Classes in Labor Law could include coverage of the vexing issue of prison labor; and classes in Remedies could cover

16. The post-conviction arena also has rich clinical possibilities.
17. Giovanna Shay, *Why Do Law Schools Overlook the Incarcerated?* Prawfsblawg (June 1, 2011), available at <http://prawfsblawg.blogs.com/prawfsblawg/2011/06/why-do-law-schools-overlook-the-incarcerated.html>.
18. *Id.*
19. On this point, see Giovanna Shay, *Ad Law Incarcerated*, 14 Berkeley J. Crim. L. 329, 344-61 (2009).
20. Superintendent, Massachusetts Correctional Institution, *Walpole v. Hill*, 472 U.S. 445, 455 (1985).
21. See Fed. R. Civ. P. 56 (Summary Judgment).
22. See *Beard v. Banks*, 548 U.S. 521, 530 (2006) (plurality opinion) (holding that, although “all justified inferences” must be drawn in favor of the party challenging summary judgment, in cases involving prisoners, inferences concerning “disputed matters of professional judgment” must be drawn in favor of defendants).
23. See *Turner v. Safley*, 482 U.S. 78, 89 (1987) (holding that regulations that burden prisoners’ constitutional rights may nonetheless be upheld if they are “reasonably related to legitimate penological interests”).
24. See *Overton v. Bazzetta*, 539 U.S. 126, 132-33 (2003) (applying *Turner* to First Amendment claims of intimate association).
25. See *O’Lone v. Estate of Shabazz*, 482 U.S. 342, 350-54 (1987) (applying *Turner* to First Amendment freedom of religion claims); 42 U.S.C. §§ 2000cc-2000cc-5 (Protection of religious exercise of institutionalized persons).
26. See *Pell v. Procunier*, 417 U.S. 817, 834 (1974) (holding that the media has “no constitutional right of access to prisons or their inmates beyond that afforded the general public”).

structural injunctions in the prison context, as well as the particular remedy of the Prisoner Release Order, authorized in very narrow circumstances by the PLRA<sup>27</sup> and upheld 5-4 by the Supreme Court (over vociferous dissent) as applied to the massive California prison system in 2011.<sup>28</sup> And of course, Constitutional Law could expand its coverage of the substantive protections of the Bill of Rights to include the Eighth Amendment,<sup>29</sup> and “Bail to Jail” could as a regular matter include a unit on jail.<sup>30</sup>

Expanding the coverage of standard law school classes in this way would considerably widen the number of future lawyers exposed to legal issues facing prisoners. In the meantime, I propose a more modest reform: that some class or classes covering the “back end” of the criminal justice system be routinely offered in all American law schools. And I would further suggest that, if law schools were to offer just one class in this area, that class ought to focus on the law governing prisons. Some readers might argue that it is the death penalty, and not prison law, that should be the priority if a school had to choose.<sup>31</sup> And certainly, it is hard to think of an exercise of state power more intrusive and extreme than the deliberate execution of a fellow citizen.<sup>32</sup> But incarceration is a close second. And by contrast with capital punishment, the imposition of which is relatively rare, every day around the country trial judges collectively sentence hundreds and even thousands of people to jail or prison.<sup>33</sup> Again, the numbers tell the story. There are at present around 3100 people on death rows

27. 18 U.S.C. § 3626(a)(3) (2011).

28. See *Brown v. Plata*, 131 S. Ct. 1910 (2011); *id.* at 1950 (Scalia, J., dissenting); *id.* at 1959 (Alito, J., dissenting).

29. U.S. Const. Amend. VIII (“Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”).

30. *Block v. Rutherford*, 468 U.S. 576 (1984) is a particularly rich case for this purpose. In addition to covering an important legal issue—the scope of pretrial detainees’ right to contact visits with loved ones—*Block* serves as an effective introduction to the field. It does so by addressing in short order several key themes, including: the high degree of judicial deference afforded prison officials; the (low) standard of review for cases brought by people in custody; the difference between pretrial detainees and convicted criminal offenders for constitutional rights purposes; and the relevance of cost considerations to the scope of constitutional protections for incarcerated people.

31. Ideally, of course, a law school would not have to choose, since both areas are of vital national importance.

32. I use the term “citizen” here not in the narrow legal sense, but broadly, to include all people who live together in a political community.

33. In 2006 alone, more than 840,000 people were convicted of felonies and sentenced to some period of confinement. See Sean Rosenmerkel, Matthew Durose & Donald J. Farole, Jr., *Felony Sentences in State Courts, 2006—Statistical Tables 9* (Table 1.6) (Bureau of Justice Statistics Dec. 30, 2009). This figure does not include misdemeanants. Of these 840,000, approximately 460,000 were sent to state prison, with an average sentence of 4 years and 11 months. *Id.* at 2, 5-6 (Tables 1.2.1 and 1.3).

across the United States.<sup>34</sup> This is a relatively small group even compared with those people doing life without parole (LWOP), who currently number just over 41,000.<sup>35</sup> And people with LWOP make up only 1.4 percent of the entire incarcerated population, which, as already noted, includes over 2.3 million people.

What might a course in prison law look like? As with any law school class, the structure and coverage would vary according to the professor's inclination. I teach a four-unit lecture class called Prison Law & Policy.<sup>36</sup> This course begins with a unit on sentencing, which typically covers the late 20<sup>th</sup> century shift from indeterminate to determinate sentencing (as a way of accounting for the dramatic increase in the American prison population over the past four decades), Eighth Amendment challenges to noncapital sentences, and the legitimacy of risk-based diversionary sentences. It then moves through the history of prisoners' rights litigation from the post-Civil War era to the present, before embarking on the heart of the course, which is a long unit on prisoners' constitutional rights. This section generally covers First Amendment expression and association, Fourteenth Amendment procedural due process and Equal Protection, the right of access to the courts, and Eighth Amendment challenges to prison conditions and excessive use of force.<sup>37</sup> The course ends with various procedural topics, including qualified immunity and the PLRA.

I have already touched on a number of reasons why prison law ought to be a standard part of the law school curriculum, including the sheer number of people in custody, the extreme vulnerability of this population, and its enormous unmet legal need. But there are other reasons as well. For one thing, at any given time, every law school has a substantial subset of students planning careers in criminal law, and anyone who intends to work in this field in any capacity should be exposed to the realities of the American prison system and its governing legal framework. In all but the rarest cases, a criminal defense attorney's clients will do time in custody (whether jail or prison or both<sup>38</sup>), and for these lawyers, some understanding of the experience and legal status of incarcerated people will add immeasurably to the quality of their representation. As for prosecutors, who will spend their careers sending people to prison, the value of a class in this area—and the understanding of

34. See Tracey L. Snell, *Capital Punishment 2009—Statistical Tables 1* (Bureau of Justice Statistics Dec. 2010) (finding 3,173 federal or state prison inmates on death row as of Dec. 31, 2009).

35. See Ashley Nellis & Ryan S. King, Sentencing Project, *No Exit: The Expanding Use of Life Sentences in America 9-10* (Figure 2) (July 2009), available at [http://www.sentencingproject.org/doc/publications/publications/inc\\_noexitseptember2009.pdf](http://www.sentencingproject.org/doc/publications/publications/inc_noexitseptember2009.pdf).

36. I also teach a seminar on the Eighth Amendment as it applies to prison sentences and prison conditions. Please contact me via email if you are interested in seeing either syllabus.

37. The contents of this section will often vary to account for live issues in the Supreme Court.

38. See Sharon Dolovich, *Strategic Segregation in the Modern Prison*, 48 *Am. Crim. L. Rev.* 1, 4 n.14 (2011) (explaining the difference between jails and prisons).

the prison experience it would convey—should go without saying. The same is true for future judges, who will sentence people to prison or entertain their criminal appeals, and for future legislators—most of whom are lawyers—who will help to craft the sentencing policies in their jurisdictions.

Future criminal law practitioners are not the only law students who would benefit from an understanding of the prison system and its governing laws. For many lay people, the criminal law is the most salient component of the legal system, the aspect of state power that most commonly comes to mind when a person imagines “the law.” As a result, even lawyers whose work has nothing to do with criminal law may be called upon to account for the nation’s prison system—the biggest in the world—and the conditions that prevail in prisons and jails around the country, which to many observers appear inhumane and in some cases even to constitute torture.<sup>39</sup> That lawyers in general should have

39. Among other things, rape and other forms of sexual assault are endemic in U.S. prisons and jails, and health care is frequently so inadequate that people routinely suffer greatly and even die for want of basic medical attention. As to rape, a 2007 survey conducted by the Bureau of Justice Statistics (BJS) estimated that more than 60,000 people serving time in prison annually experience some form of sexual misconduct. Allen J. Beck & Paige M. Harrison, Special Report: Sexual Victimization in State and Federal Prisons Reported by Inmates, 2007, at 1 (Bureau of Justice Statistics 2007), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/svsfprio7.pdf> (revised Apr. 9, 2008). The definitions used by BJS did not even account for sex that takes place in protective pairings, in which prisoners frequently consent to sex (often experienced as serial rape) only to avoid more violent sexual assaults, and the data only identifies the number of victims rather than the number of incidents, despite the fact that “[o]nce raped, an inmate is likely to be marked as a victim and abused repeatedly.” Stop Prisoner Rape, PREA Update: Unique Opportunity to Stimulate Reform 6 (2008), available at [http://www.justdetention.org/pdf/PREA\\_Update\\_June\\_2008.pdf](http://www.justdetention.org/pdf/PREA_Update_June_2008.pdf); see also Stephen “Donny” Donaldson, A Million Jockers, Punks, and Queens, in *Prison Masculinities* 118, 119–120 (Don Sabo, Terry A. Kupers & Willie London eds., Temple Univ. Press 2001) (discussing protective pairings). Anecdotal evidence suggests that the actual number of sexual assault victims in prison is higher, and in some cases far higher, than BJS estimates. The sexual abuse can also be relentless. For example, Roderick Johnson, “a black gay man with a gentle manner,” spent 18 months in a Texas prison as a sex slave to the Gangster Disciples prison gang. Adam Liptak, Ex-Inmate’s Suit Offers View into Sexual Slavery in Prisons, *N.Y. Times*, Oct. 16, 2004, at A1. During this period, Johnson was repeatedly gang-raped in the prison’s cells, stairwells, and showers. *Id.* A 2001 Human Rights Watch report documented similar cases of sexual slavery in prisons in Illinois, Michigan, California, and Arkansas as well as Texas, where, according to prisoners’ reports, sexual slavery is “commonplace in the system’s more dangerous prison units.” Human Rights Watch Report, No Escape: Male Rape in U.S. Prisons 14 (Apr. 2001), available at [news.findlaw.com/cnn/docs/hrw/hrwmalerape0401.pdf](http://news.findlaw.com/cnn/docs/hrw/hrwmalerape0401.pdf). As to medical care, there are endless examples of such preventable suffering in American prisons and jails. See Benjamin Fleury-Steiner with Carla Crowder, Dying Inside: The HIV/AIDS Ward at Limestone Prison 177–80 (Univ. of Michigan Press 2008) (providing “snapshots” of “institutional problems associated with penal health bureaucracies in the contemporary United States”). To take just two such examples, Brian Tetrault, jailed for burglary and suffering from Parkinson’s disease, died in a cell in upstate New York after jail staff cut off the medications he needed to control the disease. Paul von Zielbauer, As Health Care in Jails Goes Private, 10 Days Can Be a Death Sentence, *N.Y. Times*, Feb. 27, 2005, at A1. Although Tetrault quickly slid “into a stupor, soaked in his own sweat and urine” and unable to move, jail nurses “dismissed him as a faker.” *Id.* While Tetrault was in this incapacitated condition, a jail nurse wrote in the log that he “[c]ontinues to be manipulative.” *Id.* And Diane Nelson, held in a jail in Pinnelas

to answer for the law's seeming inability to rein in the penal system's worst abuses is not unreasonable. The very first line of the Preamble to the ABA's Model Rules of Professional Conduct states that a lawyer wears many hats: she is at once "a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice."<sup>40</sup> In prisons and jails, the power of the state is at its apex. When the conditions of confinement in these houses of detention routinely put hundreds of thousands of people at substantial risk of serious harm, it is appropriate to regard this situation as a failure of law. If individual lawyers are not responsible for this circumstance, they ought at a minimum to understand it.

There is a further aspect of the American penal system that is important for future lawyers to understand: the considerable overrepresentation among American prisoners of people of color, African Americans in particular. Although African Americans make up no more than 13 percent of the nation's

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County, Florida, died of a heart attack ten days after being admitted, "after nurses failed for two days to order the heart medication her private doctor had prescribed." *Id.* When Nelson collapsed, a nurse told her to "[s]top the theatrics." *Id.* In *Dying Inside*, Benjamin Fleury-Steiner reports "catastrophic" medical care in prisons and jails around the country and describes what he calls "the normalization of preventable suffering and death behind bars by overwhelmed medical personnel." Fleury-Steiner with Crowder, *supra*, at 5. In 2005, one federal court judge in California found as

"an uncontested fact that, on average, an inmate in one of California's prisons needlessly dies every six to seven days due to constitutional deficiencies in the [California Department of Corrections and Rehabilitation's] medical delivery system. This statistic, awful as it is, barely provides a window into the waste of human life occurring behind California's prison walls due to the gross failures of the medical delivery system."

*Plata v. Schwarzenegger*, No. Cor-1351 TEH, 2005 U.S. Dist. LEXIS 43796, at \*2-3 (N.D. Cal. Oct. 3, 2005). So extreme were the failures of the California prison health care system that the allegations of unconstitutionality raised in a class action brought by state prisoners were not even contested by the government, which instead stipulated to the constitutional violations. Even the Supreme Court has not hesitated to use the word torture in this context. *See, e.g.*, *Brown v. Plata*, 131 S.Ct. 1910, 1928 (2011) (commenting that "[a] prison's failure to provide sustenance for inmates may actually produce physical torture or a lingering death; [j]ust as a prisoner may starve if not fed, he or she may suffer or die if not provided adequate medical care.") (internal citation and quotation marks omitted). *See also* Atul Gawande, *Hellhole: The United States Holds Tens of Thousands of Inmates in Long-Term Solitary Confinement: Is This Torture?* *The New Yorker*, Mar. 30, 2009, at 36 (answering in the affirmative the question posed in the article's title).

40. The American Bar Association Model Rules of Professional Conduct, Preamble: A Lawyer's Responsibilities, para. 1. As paragraph 6 of the Preamble goes on to explain:

As a public citizen, a lawyer should seek improvement of the law, access to the legal system, the administration of justice and the quality of service rendered by the legal profession. . . . In addition, a lawyer should further the public's understanding of and confidence in the rule of law and the justice system because legal institutions in a constitutional democracy depend on popular participation and support to maintain their authority.

population, they comprise almost 40 percent of the people behind bars.<sup>41</sup> Perhaps even more telling, African Americans comprise roughly 48 percent of all lifers, and more than 56 percent of the people serving life without the possibility of parole.<sup>42</sup> It is no exaggeration to call the mass incarceration of people of color the premier civil rights issue of the 21<sup>st</sup> century. Over the past several decades, it has come to be taken for granted that future lawyers should understand the law's role in regulating and maintaining racial inequality. For this reason, law schools routinely offer courses that expose and dissect the legal mechanisms of racial discrimination. The central role the penal system plays in the lives of an enormous number of African Americans, young men in particular,<sup>43</sup> means that anyone wanting to understand the realities of racial inequality in the United States today, and the law's role in sustaining that inequality, cannot avoid studying prisons.

Finally, in terms of a possible constituency, prison law is an important and even necessary subject for students interested in a range of legal fields, including poverty law, immigration law, juvenile justice, mental health law and even national security. It would therefore enhance curricular offerings not only in the area of criminal justice but in these other fields as well. For example, for students interested in poverty law, a study of prison law is important not only because the vast majority of people in custody are indigent, but also because the experience of incarceration is increasingly emerging as a ticket to permanent social marginalization and ongoing poverty for poor people in the United States.<sup>44</sup> In the immigration law context, the detention of undocumented immigrants, asylum seekers, and legal immigrants with

41. Latinos, too, are overrepresented among those in custody, making up 20 percent of the incarcerated population although they are no more than 15 percent of the population in general. See Sharon Dolovich, *Cruelty, Prison Conditions, and the Eighth Amendment*, 84 *N.Y.U. L. Rev.* 881, 976-77 (2009).
42. See Sharon Dolovich, *Exclusion and Control in the Carceral State*, 16 *Berkeley J. Crim. L.* 259, 315 (2011) (discussing in detail the overrepresentation of African-Americans in the U.S. prison system).
43. In 1995, the Sentencing Project found that "almost one in three (32.2 percent) young black men in the age group 20-29 is under criminal justice supervision on any given day—in prison or jail, on probation or parole." Marc Mauer & Tracy Huling, *Sentencing Project, Young Black Americans and the Criminal Justice System: Five Years Later 1* (1995), available at [http://www.sentencingproject.org/doc/publications/rd\\_youngblack\\_5yrslater.pdf](http://www.sentencingproject.org/doc/publications/rd_youngblack_5yrslater.pdf). In 2011, Marc Mauer, the lead author of the original Sentencing Project research on this issue, recently observed that "[i]f current trends continue, 1 of every 3 African American males born today can expect to go to prison in his lifetime, as can 1 of every 6 Latino males, compared to 1 in 17 White males." Marc Mauer, *Addressing Racial Disparities in Incarceration*, 91 *The Prison J.* 88S (SAGE Publ. 2011) (supplement to volume 91, number 3).
44. As Western and Pettit have succinctly put it, former prisoners have collectively become "a group of social outcasts," whose "[s]ocial and economic disadvantage, crystallizing in penal confinement, is sustained over the life course." Bruce Western & Becky Pettit, *Incarceration and Social Inequality 8* *Daedalus* (Summer 2010). This group has "little access to the social mobility available to the mainstream." *Id.*

prior felony convictions<sup>45</sup> has become standard practice, so much so that the web of detention centers administered by the Department of Homeland Security Immigration and Customs Enforcement Division (ICE) has come to rival in size the Federal Bureau of Prisons—itsself now the biggest prison system in the country.<sup>46</sup> Moreover, ICE detention centers are increasingly operated by private prison providers who developed their methods running state prisons. As a consequence, the experience of immigration detention is often indistinguishable from the experience of prison. If as a formal matter the legal rights of undocumented immigrants in detention differ considerably from those of convicted criminal offenders, it is an open question what this difference amounts to in practice. The Supreme Court has been clear that pretrial detainees are constitutionally protected from punitive conditions of confinement,<sup>47</sup> but courts have consistently interpreted the due process rights of pretrial detainees as equivalent in scope to (and no greater than) the Eighth Amendment rights of convicted offenders.<sup>48</sup> And although the Ninth Circuit has held that “conditions of confinement for [immigration] detainees must be superior not only to [those for] convicted prisoners but also to [those for] pretrial criminal detainees,”<sup>49</sup> both the Third and Fifth Circuits have held that immigration detainees are entitled to the same level of protection as pretrial detainees,<sup>50</sup>—which, again, is in practice identical to the protections extended to convicted prisoners. Whichever way a given court comes out on this question, the constitutional baseline for conditions in immigration detention is set by the prison law cases.

Even students interested in national security law or international human rights would benefit from an understanding of the legal standards governing prisons.<sup>51</sup> The direct influence of domestic prison law on these other areas was

45. See Sharon Dolovich, *Incarceration American-Style*, 3 *Harv. L. & Policy Rev.* 237, 238-29 & n.16 (2009).
46. See DHS Office of Immigration Statistics, *Immigration Enforcement Actions: 2010*, at 1 (Annual Report June 2011), available at <http://www.dhs.gov/xlibrary/assets/statistics/publications/enforcement-ar-2010.pdf> (stating that ICE detained approximately 363,000 foreign nationals in 2010).
47. See *Bell v. Wolfish*, 441 U.S. 529, 535-39 (1979); *Block v. Rutherford*, 468 U.S. 576, 583-84 (1983).
48. See Dolovich, *supra* note 41, at 881, 886 n.15 (collecting cases).
49. Tom Jawetz, *Litigating Immigration Detention Conditions 2* (2008) (citing *Jones v. Blanas*, 393 F.3d 918 (9th Cir. 2004)), available at [http://www.law.ucdavis.edu/alumni/alumni-events/files/MCLE-files/Jawetz\\_Detention\\_Conditions.pdf](http://www.law.ucdavis.edu/alumni/alumni-events/files/MCLE-files/Jawetz_Detention_Conditions.pdf).
50. See *id.* (citing *Dahlan v. DHS*, 215 Fed. Appx. 97 (3d Cir. 2007) (unpublished opinion); *Edwards v. Johnson*, 209 F.3d 772 (5th Cir. 2000)).
51. Although the experience of detainees in Guantanamo and even Abu Ghraib may have seemed *sui generis*, conditions in these facilities are in many ways indistinguishable from what prevails in standard American prisons. For example, the hyper-solitary conditions in which detainees in Guantanamo are held mimic directly the conditions in supermax and other forms of punitive isolation employed in prisons and jails around the country. See, e.g., Gawande, *supra* note 39. And although many Americans reacted with shock and surprise

made crystal clear in one of the infamous “torture memos” to emerge from the Bush (II) Administration Office of Legal Counsel (OLC). In one such memo, OLC lawyers sought to demonstrate that “interrogation techniques” used against detainees in the “war on terror”—including isolation, hooding, forced nakedness, waterboarding, “[u]sing detainees’ individual phobias (such as fear of dogs) to induce stress,” and the “use of scenarios designed to convince the detainee that death or severely painful consequences are imminent for him and/or his family”<sup>52</sup>—were not in violation of applicable federal or international law.<sup>53</sup> The memo’s author relied heavily on the constitutional standards governing excessive force claims in the prison context, in which the use of force has been held not to violate the Eighth Amendment unless the force was inflicted “maliciously and sadistically for the very purpose of causing harm.”<sup>54</sup> In reciting this standard, the memo’s author emphasized the word “very,” thus reinforcing her argument that the “enhanced interrogation methods” then being authorized were not in violation of the Eighth Amendment because, regardless of whether they were malicious and sadistic, they were being imposed to elicit information necessary to protect U.S. citizens from terrorist attacks, and thus were not inflicted “for the *very* purpose of causing harm.”<sup>55</sup> The memo, moreover, explicitly tied the Administration’s interpretation of its

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to the revelations of the humiliation and abuse suffered by detainees in Abu Ghraib, those familiar with conditions in American prisons recognized the same forms of abuse of power that are present to a greater or lesser degree in many carceral facilities stateside. *See, e.g.*, Dolovich, *supra* note 41, at 931-35 (arguing that prisons are sites of institutional cruelty and noting in particular the dehumanizing effects of the booking process and its attendant strip search); *see also* James Gilligan, *Violence: Our Deadly Epidemic and Its Causes* 152-54 (G.P. Putnam 1996) (describing the strip search as a “status degradation ceremony” that is “consciously and deliberately intended to terrify and humiliate the new inmate”) (quoting Harold Garfinkel, *Conditions of Successful Degradation Ceremonies*, 61 *Am. J. Soc.* 420, 420 (1956)).

52. Memorandum from Jerald Phifer, LTC, U.S. Army, Dir. J2, to Commander, Joint Task Force 170, Guantanamo, Cuba, on Request for Approval of Counter-Resistance Strategies (Oct. 11, 2002) [hereinafter Phifer memo], *available at* <http://www.defense.gov/news/Jun2004/d20040622doc3.pdf>; *reprinted in* *The Torture Papers: The Road to Abu Ghraib* 227-228 (Karen J. Greenberg & Joshua L. Dratel eds., Cambridge Univ. Press 2005). Waterboarding is referred to in the Phifer memo as “[u]se of a wet towel and dripping water to induce the misperception of suffocation.” Phifer memo, *supra* at 2.
53. Memorandum from Diane E. Beaver, LTC, Staff Judge Advocate, to Commander, Joint Task Force 170, Guantanamo, Cuba, on Legal Brief on Proposed Counter-Resistance Strategies (Oct. 11, 2002) [hereinafter Beaver memo], *available at* <http://www.defense.gov/news/Jun2004/d20040622doc3.pdf>, *reprinted in* *The Torture Papers*, *supra* note 52, at 229-236. The entire contents of *The Torture Papers* are available online at <http://www.american-buddha.com/911.torturepaperskarengreen.htm>.
54. *See* *Whitley v. Albers*, 475 U.S. 312, 320-21 (1986) (holding that the standard for use of force claims in the context of a prison “disturbance” is “whether force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm”) (internal quotations omitted); *Hudson v. McMillian*, 508 U.S. 1, 6-7 (1992) (extending *Whitley* to all Eighth Amendment claims of “excessive physical force”).
55. Beaver Memo, *supra* note 53, at 3 (emphasis in original).

obligations under the International Convention Against Torture, and Other Cruel, Inhuman and Degrading Treatment (CAT) to the prevailing Eighth Amendment law governing prisons, explaining that when the U.S. adopted CAT, “it did so deferring to the Eighth Amendment.”<sup>56</sup> In short, those interested in what the state may legally do to people taken into custody under the auspices of the fight against terrorism would benefit from studying the domestic law governing the treatment of convicted criminal offenders.

Elsewhere, I have written about what I call “society’s carceral bargain,”<sup>57</sup> by which the state commits to keeping separate from society those individuals singled out for banishment by the criminal justice system, thereby allowing society’s remaining members to regard the incarcerated as people about whom they need never spare another thought.<sup>58</sup> This arrangement has an overtly normative cast; to mark someone out for erasure from the public consciousness is to signal that person’s exclusion from the category of moral subjects to whom respect and consideration are owed just by virtue of their shared humanity. As a consequence of society’s carceral bargain, people in prison or jail come to be collectively regarded as not just non-citizens<sup>59</sup> but also “nonhumans,”<sup>60</sup> who exist beyond the shared public space in both a physical and a moral sense.

This is a troubling posture for a polity that regards itself as a constitutional democracy. And it is one that law schools should set themselves against. In rule of law societies, the law governs all interactions between the state and its citizens. It is the mechanism by which the state constrains private power,<sup>61</sup> and also the means through which the state’s own power is constrained. In the United States, the law school has become the place where the law’s full scope—and thus, the exercise of state power—is revealed, examined, and critically assessed. For law schools to omit the law of prisons from their otherwise capacious course offerings is to reproduce the normative exclusion at the core of society’s carceral bargain, and to keep prisoners invisible to the very people—future lawyers—best positioned to help vindicate their legal rights.

There are certainly exceptions, law schools that offer classes in this area. The death penalty is widely taught, and I personally know of perhaps two dozen

56. *Id.* at 3.

57. See Dolovich, *supra* note 41, at 892, 922 (introducing the concept of society’s carceral bargain); Dolovich, *supra* note 42 (further developing the concept).

58. Of course, those who choose to notice the people society has thereby excluded are free to do so. The point is that they need not do so unless they so choose.

59. See *supra* note 32.

60. See, e.g., *Furman v. Georgia*, 408 U.S. 238, 272-73 (1972) (Brennan, J., concurring) (explaining that the “barbaric punishments condemned by history” are those that “treat members of the human race as nonhumans, as objects to be toyed with and discarded,” and that as such they are “inconsistent with the fundamental premise of the [Eighth Amendment prohibition on cruel and unusual punishment] that even the vilest criminal remains a human being possessed of common human dignity”).

61. The law achieves this effect through both the criminalization of harmful conduct and the regulation of business and other private enterprise.

law faculty who have offered courses covering post-conviction issues, whether in lecture classes, seminars, or a clinical setting. No doubt there are others as well.<sup>62</sup> Yet to judge from the curriculum of most American law schools, the role of law—and thus of lawyers—ceases once people charged with crimes are found guilty or not guilty. In reality, the law reaches well past this point, as the sheer size of the American penal system can attest. As things stand, however, most law schools only reinforce the invisibility of the vast shadow system of carceral institutions in which millions of Americans are currently locked away. Making prison law a standard curricular offering would be an appropriate first step toward reversing this troubling effect.

62. If you teach in this area, please send me your syllabus.