**Incarceration Law, Law 6930 (3 credits)**

# Spring 2024

**Syllabus v. 1.0 (1/2/23)**

Professor Mark Fenster

[fenster@law.ufl.edu](mailto:fenster@law.ufl.edu) and 273-0962

Office: Holland Hall Room 371

**Class meetings and classroom**:

* T-Th 10:45-11:40, Holland Hall 382

**Office hours**:

* W 1:00-2:00 (online) at <https://ufl.zoom.us/j/3415941766>
* T 2:45-3:45 (in person) &
* by appointment.

**Texts:**

* Schlanger, Bedi, Shapiro, Branham, Incarceration and the Law, Cases and Materials (10th ed.).
* Any additional assignments will be available for download from the course’s Canvas site.

**Course Description and Student Learning Outcomes**: Incarceration is both a pervasive element of society and a hidden aspect of our criminal justice system. This course studies the conditions of confinement, the constitutional and statutory basis for challenging them, and the remedies, limited though they may be, that litigation offers. It also considers other avenues for reform.

The objective of this course is for you to develop a greater understanding of incarceration as a set of institutions and practices that the federal, state, and local governments have created, operate, and can better control. The course is descriptive, critical, and prescriptive. We will cover the law, politics, and sociology of incarceration, justifications for its existence and the problems it creates, and avenues for its reform, including but not exclusively litigation.

Among other objectives, at the end of this course, students should:

* learn about how the various carceral institutions in the U.S. punish, incapacitate, and rehabilitate their subjects, and how well they do so;
* gain understanding of the various constitutional provisions that the judiciary has applied to prisoner complaints about prison conditions and prison officials’ action, and gain facility in using those provisions and the doctrines that courts developed to make arguments on prisoners’ and officials’ behalf;
* obtain a deeper understanding and appreciation of specific constitutional provisions, including the First and Eight Amendments, and consider the extent to which prisoners continue to enjoy those rights while incarcerated;
* appreciate some of the basic dynamics and realities of civil rights litigation practice on behalf of indigent clients;
* understand the continually evolving politics of criminal justice reform; and
* continue to develop close reading and critical thinking skills.

**Office Hours:** My office hours are listed above. I am teaching two courses this semester and will share my office hours with both sets of students. Normally, I will invite multiple students from the same course to share their time to facilitate discussion and use our time more efficiently. Depending on the state of COVID-19 spread, I may hold in-person office hours outside or request that everyone attending wear masks. I encourage you to use appointments outside of office hours to discuss matters unrelated to the class materials. I will hold individual appointments outside of office hours in-person or remote by agreement.

**In Person/ Zoom:** Although most class periods this semester will be in-person, I will occasionally hold classes on Zoom, especially when we have visiting speakers. I have not yet decided how I will decide which class will be held in each modality, but I will endeavor to make that decision at least a week in advance. Certain extenuating circumstances about the progress of infection on campus, in the city, and among us may well force us to retreat to Zoom. *Note: Unless you receive permission from me prior to class, I will expect that you will leave your camera on if you are joining the class via Zoom, and I will mark absent those who fail to do so.*

**Common Courtesy (late arrivals, getting up during class):** Please do not arrive late to class or leave class early absent extenuating circumstances. Please be certain to obtain essential items or relieve yourself before class begins. If you think you will need to get up on a regular basis during class, *including because you anticipate that you will need to go to the bathroom*, please choose a seat near one of the exits. I reserve the right to deduct points from your final grade if you engage in behavior that significantly disrupts the learning environment for your classmates. I also reserve the right to lock the doors at the beginning of class and to remove anyone from class who is being disruptive.

**Class Preparation and ABA Out-of-Class Hours Requirements:** You should arrive in class having read the materials closely. You should expect to spend, on average, approximately two hours preparing for every hour of class; therefore, expect to spend four hours each week to prepare for class. Reading assignments are posted below and I will announce specific class assignments in class and posted on the Canvas page. You should expect to have between 60 and 100 pages of reading each week.

**Attendance/ Participation:** Attendance is required, as per the requirements of both the ABA and the Law School. Each day, I will have at the front of the classroom an attendance chart for you to initial before class begins, and will employ a similar system for classes held remotely.

* If you are “prepared,” I can cold-call on you. Before I may not review the attendance chart before class, feel free (and without shame) to respond to a cold-call by saying that you did not sign in that day.
* To be “prepared” you must have read the assignment and have made a good faith effort to think through the materials so that I may cold-call on you. You do not have to have perfect answers to the questions we might pose, but you must be willing to discuss the assigned reading (and prior readings) and work through the questions with the class. If I call on you and I believe you are not prepared even though you have signed in as prepared, I reserve the right to lower your final grade. Also, I will consider it a violation of the honor code if you have someone else sign you in and you are not present, and I reserve the right to dock your final grade.
* If you are not “present and prepared” for 6 or more of our regularly scheduled classes, your grade for the semester will be adversely affected. Conversely, I reserve the right to increase your final grade for superior classroom participation, both when I call on you and for voluntary participation.
* *You may not sign in as present and prepared if you arrive late for class or if you forget to sign in before class*.
* If you have a medical reason for missing class, you must contact me ASAP before or soon after class and provide documentation for your absence to be excused. To be excused from class for religious holidays, students must contact me beforehand by e-mail.

**Seating:** I will circulate a seating chart on the second class meeting. You must occupy the same seat each day. It will help me learn your names—a skill with which I was not born, sadly—and provide some order to the class sessions.

**Evaluation, Class Participation:** This is my first time teaching this course. I had initially envisioned it as a seminar, but I sensed there was sufficient demand to turn it into a traditional course. I haven’t yet considered how best to draft, administer, and evaluate exams. My thinking, prior to having a discussion with the enrolled students, is that I will give a take-home exam with an extended deadline and draft questions that require more thoughtful answers than the typical issue-spotting questions. But I am also open to administering a midterm over a weekend if the enrolled students would prefer multiple assessments and a shorter final.

I grade your exams anonymously. This is especially important as the size of the class will subject the course to the enforced mean. After a blind grade is assigned, I may boost borderline grades if the student has participated actively in the class. Participation is judged by quality, not quantity. I may also lower grades for excessive absences or disruptive behavior. The exam(s) will be worth 100% of your grade and evaluated anonymously, though can be affected by in-class participation.

During the first two days of class, I will cold call on any student in the class. You may pass, but you will be marked absent and I will call on you first the next day of class. After the first week of class, I will divide the class into three sections, one of which will be on-call each day. I will expect that those on call will engage in serious preparation and have a thoroughgoing knowledge of the facts, statutes, result, and reasoning in the case they have been assigned. I reserve the right to change this approach to cold-calling as circumstances develop over the course of the term.

**Use of Computers in Class**

I expect and encourage the use of computers in class for activities related to class, including taking notes and referring to readings from Canvas. I will not, however, tolerate the use of computers for activities unrelated to the class (e.g., e-mail, instant messaging, web surfing, game playing, shopping). I reserve the right to call on people whom I sense are engaging in unauthorized computer use during class, and to lower their final grades, *even if they have not signed in as present and prepared*.

**Class Cancellation Policy**

I may have to cancel class during the term. If I do, I will plan make-up classes later in the semester that will likely be held on Zoom. I will not take attendance for make-up classes and will make certain they are recorded.

**UF Levin College of Law Standard Syllabus Policies**

Other information about UF Levin College of Law policies, including compliance with the UF Honor Code, Grading, Accommodations, Class Recordings, and Course Evaluations can be found at this link: <https://ufl.instructure.com/courses/427635/files/74674656?wrap=1>.

**Reading Assignments**

The specific assignments listed below cover the weeks prior to Spring Break. Some of the remaining five weeks are generally accounted for but with dates TBA. The other class periods will cover subjects that interest you as a group. I have listed at the end possible topics, many of which are covered in the casebook.

Week 1:

* Tuesday: What are the Purposes of Incarceration?
  + Sharon Dolovich, “Teaching Prison Law” (Canvas)
  + Wayne LaFave, “Theories of Punishment” and “Conflict Between the Theories” (both on Canvas)
  + Casebook, pp. 33-40
* Wednesday: The History and Current State of Incarceration in the U.S.
  + Introduction & History of Mass Incarceration in the U.S., pp. 1-33
  + History of Prisoners’ Rights movement, pp. 41-54
  + Prison Policy Initiative, [*Mass Incarceration: The Whole Pie 2023*](https://www.prisonpolicy.org/reports/pie2023.html)
* Thursday: Overview of Prisoner Rights Litigation
  + Visit of [Dante Trevisani](https://www.floridajusticeinstitute.org/staff/dante-p-trevisani/), Legal Director, Florida Justice Institute
  + Readings TBA

Week 2:

* Tuesday: Overview of Florida Prison Administration
  + Visit of TBA, Florida DOC
  + Readings TBA
* Wednesday and Thursday: Conditions of Confinement – Cruel and Unusual Punishment of Prisoners with Conviction
  + pp. 57-101

Week 3:

* Tuesday: Conditions of Confinement – Cruel and Unusual Punishment of Prisoners with Conviction (continued)
  + pp. 101-135 (Supplemental Materials will be posted on Canvas)
* Wednesday: Due Process: Pretrial Detainees
  + pp. 138-159
* Thursday: Cruel and Usual Punishment, doctrine, theory, critique
  + pp. 135-138 and supplemental materials on Canvas

Week 4:

* Tuesday: Conditions of Confinement – Due Process: Pretrial Detainees
  + pp. 160-185 (Supplemental Materials will be posted on Canvas)
* Wednesday: Solitary Confinement 1: History and *Madrid v. Gomez*
  + pp. 187-210 (with supplemental materials on Canvas)
* Thursday: Solitary Confinement 2: after *Madrid*
  + pp. 211-228

Week 5:

* Tuesday: Solitary Confinement 3
  + pp. 228-251
* Wednesday: Solitary Confinement 1: History and *Madrid v. Gomez*
  + pp. 187-210 (with supplemental materials on Canvas)
* Thursday: Solitary Confinement 2: after *Madrid*
  + pp. 211-228

Week 6:

* Tuesday: Solitary Confinement 3
  + pp. 228-251
* Wednesday: Injunctive Litigation: Before the PLRA
  + pp. 705-746
* Thursday: Injunctive Litigation: PLRA
  + pp. 747-771

Week 7:

* Tuesday: *Brown v. Plata*
  + pp. 771-811
* Wednesday: Contempt Proceedings and Assessing the PLRA
  + pp. 811-824
* Thursday: Damages 1: § 1983, *Bivens*, and Qualified Immunity
  + pp. 825-855

Week 8:

* Tuesday: Damages 2: FTCA and other issues
  + pp. 855-886
* Wednesday and Thursday: Litigation Process
  + pp. 887-914

Following spring break, we will consider a variety of issues, some of which will be based on class interest. We will spend a week, dates TBA, on immigration detention, and 2-3 days on women prisoners, but among the other issues we could consider include:

* First Amendment: Freedom of Expression and Religion
* Prisoner Access to the Courts
* Procedural Due Process: Parole and Discipline
* Fourth Amendment: Searches and Seizures
* Specific Concerns of Particular Populations: Race and National Origin; LGBTQ; Disability
* Programming, Work, Reentry, and Restoration of Civil Liberties
* Sexual Abuse and the Prison Rape Elimination Act
* Private Prisons and Prison Contractors
* Sources of Accountability: Politics and Oversight
* Comparative Incarceration: How Other Countries Incarcerate