

LIMAN AT FIFTEEN

1997 Alison Hirschel, Michigan Protection and Advocacy Service • **1998 Lisa Daugaard**, The Defender Association • **Julia Greenfield**, Lawyers' Committee for Civil Rights of San Francisco • **Douglas Stevick**, Texas Rural Legal Aid • **1999 Paula Gaber**, Western Center on Law & Poverty • **Juliet McKenna**, Lawyers for Children America • **Jessica Sager**, All Our Kin • **2000 Marjorie Allard**, Alaska Public Defender Agency • **Rebecca Bernhardt**, Lawyers' Committee for Civil Rights of Texas • **Kenneth Sugarman**, ACLU of Northern California • **2001 Susan Hazeldean**, Urban Justice Center • **Serena Hoy**, Capital Area Immigrants' Rights Coalition • **Joseph Luby**, Public Interest Litigation Clinic • **2002 Tania Galloni**, Migrant Farmworker Justice Project • **Andrea Marsh**, Texas Rural Legal Aid • **David Menschel**, The Innocence Project • **Amy Meselson**, Legal Aid Society of New York • **2003 Adam Grumbach**, Legal Aid Society of New York • **Kristen Jackson**, Public Counsel Law Center • **Grace Meng**, Asian Law Caucus • **McGregor Smyth**, Bronx Defenders • **2004 Joshua Civil**, NAACP Legal Defense & Educational Fund • **Cyd Fremmer Oppenheimer**, The EdLaw Project • **Robert Hoo**, Legal Services of Northern California • **Tom Jawetz**, Washington Lawyers' Committee for Civil Rights & Urban Affairs • **Lisa Powell**, Northwest Immigrant Rights Project • **2005 Jorge Barón**, New Haven Legal Assistance Association • **Kim Pattillo Brownson**, ACLU of Southern Maryland • **Holly Thomas**, NAACP **Sofia Yakren**, Urban Justice Center • Rights Project • **Sameera Fazili**, North-Women's Law Center • **Anna Rich**, Na-Schwartztol, Brennan Center for Justice • • **Charisa Smith**, JustChildren • **2007** Advocates • **Jamie Dycus**, ACLU Racial York Civil Liberties Union • **Raquiba Huq**, **Kavey**, Lambda Legal Defense & Education Center • **Leah Wilson**, Natural Resources de Maryland • **Zahra Hayat**, National Southern Migrant Legal Services • **Allegra McLeod**, Immigration Justice Project • **Deborah Marcuse**, Office of the Mayor, City of New Haven, CT • **Marisol Orihuela**, ACLU of Southern California • **Michael Tan**, ACLU Immigrants' Rights Project • **Tianna Terry**, Legal Aid Society of the District of Columbia • **2009 Alicia Bannon**, Brennan Center for Justice • **Josh Berman**, Natural Resources Defense Council • **Rebecca Engel**, Bronx Defenders • **Jean C. Han**, Ayuda • **Kathy Hunt Muse**, New York Civil Liberties Union • **Sonia Kumar**, ACLU of Maryland • **Margot Mendelson**, University of Arizona School of Law and Migration Policy Institute • **Kirill Penteshin**, UNITE HERE Local 11 • **Benjamin Plener**, Orleans Public Defenders • **Vasudha Talla**, Sanctuary for Families • **2010 Seth Atkinson**, Natural Resources Defense Council • **Ady Barkan**, Make the Road New York • **Monica Bell**, Legal Aid Society of the District of Columbia • **Lindsay Nash**, Immigration Justice Clinic, Cardozo Law School • **Megan Quattlebaum**, Neighborhood Legal Services Organization of Pittsburgh • **Elizabeth Simpson**, Southern Coalition for Social Justice • **Adrienna Wong**, ACLU of Texas • **2011 Robert Braun**, Southeast Louisiana Legal Services • **Isabel Bussarakum**, The Defender Association • **Elizabeth Compa**, Southern Center for Human Rights • **Daniel Mullkoff**, New York Civil Liberties Union • **Diala Shamas**, Creating Law Enforcement Accountability and Responsibility at CUNY School of Law • **Emily Washington**, Louisiana Capital Assistance Center • **Seth Wayne**, Orleans Public Defenders • **2012 Chesa Boudin**, San Francisco Public Defender's Office • **Forrest Dunbar**, Alaska Office of Public Advocacy • **Romy Ganschow**, Brooklyn Legal Services • **Edward McCarthy**, Office of the Connecticut Public Defender • **Yaman Salahi**, ACLU of Southern California • **Rebecca Scholtz**, Legal Aid of Minneapolis • **Sirine Shebaya**, ACLU of Maryland • **Olivia Sinaiko**, Southeast Alaska Conservation Council • **Jenny Zhao**, ACLU of Northern California

Public service is not an act of duty or charity. For a lawyer, it is as natural as breathing. It is what we do when we are at our best.

Arthur Liman, *Lawyer: A Life of Counsel and Controversy* (1998)

ern California • **Eliza Leighton**, CASA Legal Defense & Educational Fund • **2006 Alice Clapman**, ACLU Immigrants' ern Initiatives • **Paige Herwig**, National Senior Citizens Law Center • **Larry Marc Silverman**, Advocates for Children **Stephanie Biedermann**, Disability Rights Justice Program • **Daniel Freeman**, New Legal Services of New Jersey • **Michael tion Fund** • **Sia Sanneh**, Legal Action Defense Council • **2008 Justin Cox**, CASA Center for Youth Law • **Stacie Jonas**,

“California courts are often the last refuge for our most vulnerable citizens—domestic violence victims; elder and dependent adults who need protection from financial or physical abuse, or to be conserved to protect their assets; or children who suffer from abuse and neglect.”

— The Honorable Tani G. Cantil-Sakauye, Chief Justice, Supreme Court of California

“What is needed, I believe, is the unequivocal commitment of state government to fund civil legal services, a permanent commitment backed by the public fisc that recognizes that civil legal assistance for poor and vulnerable litigants pursuing the necessities of life is a basic responsibility of state government – every bit as important as the other fundamental priorities of our society and our government.”

— The Honorable Jonathan Lippman, Chief Judge of the State of New York

“We must not look at the right to competent legal counsel as an issue that is unique to our indigent population. Instead, we must understand that providing access to our courts to the poor, the near poor, and the middle class is a basic obligation of government.”

— The Honorable Chase T. Rogers, Chief Justice, Connecticut Supreme Court

“To be sure, there are times when citizens need direct help from an actual lawyer rather than a virtual one, but even on those occasions a full-time paid litigator or counselor is not the only alternative. Any conversation about the legal needs of the poor must perforce examine the full range of methods by which we may work to make good on the promise of equal justice.”

— The Honorable Randall T. Shepard, Chief Justice, Indiana Supreme Court (retired 2012)

“Having worn a judge’s robe for 30 years, I can assure you that I could not easily and quickly improve people’s lives, but the one thing that was really easy to do was to lock them up. Alabama’s overreliance on incarceration has created a significant and unsustainable drain on state resources, including courts and corrections.”

— The Honorable Sue Bell Cobb, Chief Justice, Alabama Supreme Court (retired 2012)

“One municipal court judge in Houston sees approximately 150 juvenile ticketing cases *per day* during the school year. We should reevaluate how we punish our children. Detention facilities should be a last resort. Our courtrooms should be used for those who need judicial intervention most.”

— The Honorable Wallace B. Jefferson, Chief Justice, Supreme Court of Texas

ARTHUR LIMAN PROGRAM • 15TH ANNIVERSARY ISSUE



Accessing Justice/Rationing Law

To mark the fifteenth anniversary of the Arthur Liman Program at Yale Law School, some seventy current and former Liman Fellows joined judges, economists, sociologists, lawyers, legal scholars, and students to examine the challenges of providing legal and judicial services in an era of scarce resources. Our subject—*Accessing Justice/Rationing Law*—reflected the initiatives of Arthur Liman, who served as the chair of the Legal Aid Society of New York, the Neighborhood Defender Services of Harlem, and the Legal Action Center in New York City.

Sessions focused on the adequacy of representation of criminal defendants, the idea of “civil *Gideon*” to fund lawyers for indigent litigants in cases involving core human concerns like housing and family, and the roles played by alternative processes and new kinds of courts. Speakers largely agreed on the scale and urgency of the problem, but their explanations and proposed solutions were at times in tension with each other. Some states, such as Connecticut and Texas, have increased court fees and fines to fund civil legal assistance for poor litigants. Concerns included that additional fees may place the court system out of reach for the near-poor and could result in incarceration for the failure to pay.

Other states, such as New York, have relied principally on general revenues to fund civil legal services, but many questioned the political feasibility of financing new programs during state budget crises. One focus was on enlisting the business

community about the fiscal impact and utility of a functioning court system. A 2011 report by the Task Force to Expand Access to Civil Legal Services in New York estimated investing in expanded legal services would save the state \$85 million by protecting against domestic violence and \$116 million by preventing unwarranted evictions and homelessness.

Some participants emphasized that more lies behind the gap in civil legal assistance than a lack of funding. Several argued that the justice system faces essential structural problems: due to the burgeoning criminal docket, many states are unable to meet their constitutional obligations to criminal defendants and fewer dollars are left to maintain the civil system. Examples included some rural Texas counties, where some misdemeanor defendants go unrepresented.

Other speakers agreed that the current U.S. justice system is unsustainable and focused on increasing the “supply” side for civil litigants. One proposal was, for example, to reform the legal profession so that lawyers do not have exclusive control over all areas of practice. Simpler or specialized tasks could be delegated to non-attorney legal professionals, in much the same way that a wide range of non-doctor medical professionals (such as pharmacists, nurses, and nurse practitioners) increase access to health care. The hope is that opening up the options would increase the capacity of legal services providers and expand access across class lines.

Essays by many of the participants follow.

Gatekeepers to Justice: The State of State Courts, 2012



(Left to right): Judith Resnik, Arthur Liman Professor of Law at Yale Law School, joined by Chief Justices Randall Shepard (IN), Jonathan Lippman (NY), Tani Cantil-Sakauye (CA), Wallace Jefferson (TX), Chase Rogers (CT), Sue Bell Cobb (AL), and Yale Law School Dean Robert Post.

The opening panel took up an overarching question for the twenty-first century: How can courts respond to the demand for their services? California counted 4.3 million civil litigants without lawyers in its courts in 2009; New York tallied 2.3 million in 2010, and that number includes almost all facing evictions and 95 percent of those in

family conflicts. Recent budget crises, meanwhile, have placed great strain on state court systems. Chief justices from Alabama, California, Connecticut, Indiana, New York, and Texas discussed the challenges of serving the growing numbers of people who find themselves in court without lawyers.

When Courtrooms Close: The Impact of California's Fiscal Crisis on Access to Justice

The Honorable Tani G. Cantil-Sakauye, Chief Justice of the Supreme Court of California

In California, the Judicial Council is the constitutional policymaking body for the state court system. The council is charged with the responsibility of ensuring the consistent, independent, impartial, and accessible administration of justice. But we cannot meet that charge alone. We depend on our sister branches of government to provide an appropriate level of funding to allow us to meet our constitutional and statutory obligations to California's 38 million residents, to ensure access to a forum to resolve disputes, get restraining orders to protect against violence, serve our criminal system, and do much, much more.

Yet we have been stymied in our ability to deliver justice. Over the past four years, the judicial branch has received a staggering \$653 million in ongoing budget reductions. In fiscal year 2011–12, with the addition of one-time sweeps and loans to the General Fund, the branch provided over \$1.1 billion in budget solutions to address the state budget shortfall—from a

total budget of \$3.1 billion.

The Judicial Council has made significant efforts to mitigate the effect of the reductions on the public's access to justice. We redirected automation funds, construction funds, education and program funds, and other monies on a one-time basis to ease some of the reductions to the trial courts. As a result of these efforts, the branch has been able to absorb an ongoing \$300 million reduction. But the remaining cuts are unsustainable. And the additional \$544 million reduction proposed for the next fiscal year will simply disable the judicial branch. Trial and appellate courts are already being forced to limit Californians' access to justice through shuttered courtrooms and reduced and limited services.

The past budget cuts have put justice at risk in California. The proposed additional cuts threaten to dismantle our system of justice entirely.

Evolution of the California Courts

The state court system we have today is very different than the one I joined when appointed to the municipal bench in Sacramento 21 years ago. It has evolved as the result of efforts by many smart and dedicated people.

The shift in funding responsibility for the courts from the counties to the state in 1997 was a leap forward for the state and for judicial administration. State funding allowed us to institute new court services that have measurably improved the lives of Californians. We are talking about jury reform, self-help centers for unrepresented litigants in every county, complex litigation courts, and more uniform rules and access to justice.

The following year—in 1998—California voters approved a constitutional amendment permitting the unification of the state's more than 200 superior and municipal courts into 58 trial courts, one in each county. Unification has allowed greater flexibility in the use of judicial staff and courthouse resources, eliminated duplicative services, and led to the creation of new court programs serving the public. Finally, the Trial Court Facilities Act of 2002 initiated the transfer of ownership and management responsibility for the state's 532 court facilities from the counties to the state, under judicial branch management.

Thus, while our judicial branch is as old as statehood, it is in many ways 15 years young. The court system is still evolving—still realizing the full potential of the structural reforms and the extraordinary talents of my 2200 colleagues on the California bench and more than 20,000 court employees serving in the Supreme Court, the six districts of the Courts of Appeal, and the 58 Superior Courts. This evolution has taken an unexpected turn in recent years due largely to the effects of the Great Recession and an ongoing state fiscal crisis now entering its fifth year.

Impact of Cuts on the Courts and the Public

Over the last four fiscal years, more than 750 court staff in over 20 courts have been laid off—including clerks, court reporters, self-help attorneys, mediators, commissioners and other crucial employees. At least 44 of the 58 trial courts have instituted furlough days or hours. At least 18 counties have closed entire courthouses, individual courtrooms, or both, for fiscal reasons. Others are contemplating shutting down courthouses and courtrooms in the coming year.

Many jurisdictions have consolidated court functions and departments into fewer locations, making it harder for the public to access courts to handle their cases. At least 25 courts have reduced self-help or family law facilitator services for the public. Almost all of the 58 Superior Courts have left vacancies unfilled or have eliminated positions.

One court has a vacancy rate of 33% and many others have vacancy rates ranging from 15 to 30%. Case processing backlogs are growing due to understaffing of judges. One court reports that there is a two-week delay for the issuance of family law custody orders and a 60-day delay for civil judgments.

In the appellate courts, the greatest impact has been felt on civil cases. In some instances, civil cases are being “back burnered” so that the court can focus on criminal and juvenile matters. The curtailment or suspension of a mediation/settlement program in one appellate division has increased the number of cases that must be fully processed and decided, thus increasing costs and workload. In addition, there is lost

time and money to the parties that successfully settle their cases and loss of good will, as the majority of the parties that do not settle are still thankful for the opportunity to have had the mediation/settlement program available to them.

And the individuals most hurt by this will be the same individuals whose welfare benefits are being reduced, whose in-home support is being eliminated, whose healthcare is disappearing, and whose children's education is failing.

California courts are often the last refuge for our most vulnerable citizens—domestic violence victims, elder and dependent adults who need protection from financial or physical abuse, or to be conserved to protect their assets, or children

who suffer from abuse and neglect. Cutting courts that protect them will only result in additional harm. Further, reductions to the court system undermine a key part of our public safety fabric, including the courts' new role in parole and probation revocation as part of criminal justice realignment.

The public is experiencing longer lines, backlogs in the processing of filings and judicial orders, and significant encroachment on due process rights of defendants as interpreters become less available and other courtroom support services are sharply diminished. Advocates of greater funding also point to restraining orders in domestic violence cases, judgments in traffic accidents, and homeowners fighting foreclosures as services that have been significantly delayed because of cutbacks. As of May 2012, in some California counties, courts were scheduling contested custody hearings for mid-2013.

Let me give just one simple example of how the budget cuts have impacted our families. Not long ago, on a late Friday afternoon in Sacramento Superior Court, staff members were going through their daily routine of advising all of those in the lobby of the family law court that the court was closing and they would have to come back on the next court day—in this case, Monday. On this particular Friday, the court was sending away approximately 20 court customers, many of whom had been there all day with children, family, or friends. One family in particular stood out from the rest—a father with three



Tani G. Cantil-Sakauye

children, with ages ranging from one to four. They had had been at the courthouse since 9 a.m. The father wanted to file for a divorce and obtain a domestic violence restraining order. He said he wanted to get a “kick out” order because his wife was abusive to him and the children and she refused to leave their residence. The father had made it to the filing counter once, but his paperwork was incomplete. Because of the high volume of court customers and lack of staff to assist him, he never made it back to the counter. He left the court, dejected.



Unprecedented Support

Fortunately, the judiciary has influential partners in our efforts to secure adequate funding to ensure access to justice in California. Unprecedented budget reductions to the courts have resulted in an unprecedented outpouring of support from the bar and others. State Bar President Jon Streeter, One Justice, the Open Courts Coalition, members of the Judicial Council’s Bench Bar Coalition, and many others have devoted considerable resources to making the case for the courts. On two occasions, the Open Courts Coalition literally took the streets—in downtown Los Angeles in January and on the steps of City Hall in San Francisco in April—to call attention to the impact of additional cuts on the courts and on the public.

A Two-Tier System of Justice

Very simply, the judicial branch must be funded adequately if we are to keep courtrooms open and to make good on that promise of equal justice. I am an optimist, so I believe that in California we have among the finest bench and bar in the nation. We will rise to the challenge, and come out of these terrible years stronger and smarter

than before. But that doesn’t mean there won’t be pain and sacrifice in the court family and also for the public statewide.

My broader concern is that our state may be headed for a two-tier system of justice: a private system of arbitration and for-hire judges for those who can afford to pay, and the public court system for everyone else. The implications of a two-tier justice system for a society already struggling with growing income inequality are troubling. Particularly in California, where I believe the improvements in the administration of justice have been one of the greatest successes of state government in this generation, unequal access to justice would be especially tragic.

For most Americans, justice lives in their local courthouse. We must do everything we can to be sure the doors of their courthouses remain open. ♣

Justice for All: A Principle and a Practice

The Honorable Chase T. Rogers, Chief Justice of the Connecticut Supreme Court



Many assume that the only people who represent themselves in court are those who make a deliberate choice to do so. The truth is many people who represent themselves do so because they have no other choice. They are frequently making decisions about which bills to pay, how much money to spend on groceries, and how much gas to put in their car that week. And to make matters worse,

the growing numbers of self-represented parties in our courts is one of the most difficult and pressing issues facing the judicial system over the coming years.

In fact, it’s fair to say that the judicial system is straining under the weight of a population of people economically decimated by the recession. In addition, the courts are operating within the constraints of a budgetary reality unlike any we have seen before.

Our statistics alone are enough to give pause.

- In fiscal year 2011, the percentage of family cases in which there was at least one party self-represented was 84.9%.
- In fiscal year 2006, 19 % of our civil cases had at least one self-represented litigant. By fiscal year 2011, it had increased to 28 %.
- Similarly, in 2011 our Court Service Centers assisted 335,569 court patrons, 79% of whom were self-represented parties.
- Anecdotally, there were three self-represented parties at the Supreme Court last term, a situation that I had never seen before. This number will increase as cases percolate their way up the system.

Why is it a problem that so many people are representing themselves? It's a concern because the bedrock principle of our court system is justice for all. Not justice for some or justice for the person who has the lawyer. We must not look at the right to competent legal counsel as an issue that is unique to our indigent population. Instead, we must understand that providing access to our courts to the poor, the near poor, and the middle class is a basic obligation of government. Bluntly stated, it is much harder to make certain that justice is being served when parties are not being represented by counsel. It is incumbent upon our judiciary to understand fully the scope of this issue and to try and figure out the best way to fix it.

The surge of self-represented parties has had a profound effect on attorneys as well.

They are often waiting longer to have their cases heard by the court because of the volume of self-represented parties and the amount of assistance they require by judges and court staff. Particularly in family cases, attorneys are often faced with a self-represented party as the adversarial side and they must contend with the logistical and procedural complications that are inherent in this dynamic.

Consider this example:

An attorney represents one party in a divorce and the opposing party has no money to hire an attorney. He or she has been laid off, the house is in foreclosure, and the children are the subject of a nasty custody dispute; and about the only thing that anybody can agree upon is that nobody can agree on anything. The judge and clerks, however, can provide only limited advice to the self-represented party, who has absolutely no understanding of basic court procedure. So, as the hearing gets underway, the attorney realizes that what should have taken 30 minutes will now take two hours. The attorney's client, meanwhile, took off another day from work to return to court, the children's conflict-filled situation remains unresolved, the self-represented litigant is angry beyond words, and the judge is frustrated that three-quarters of the proceeding was taken up by discussing what forms need to be presented. And to top things off, lawyers and other parties are lined up outside—upset that their cases have been delayed.

These types of cases have a domino effect that negatively impacts every single party and attorney who appear in our courts—not to mention the justice system itself. Compounding the problem is the lack of quick or easy solutions. We've all heard that the economy is improving, but in courts we still see the wreckage of a years-long recession. The crisis in our courts

did not happen overnight, but our response to the problem must be swift and decisive.

So we've worked hard in Connecticut to make a difference wherever we can by utilizing two of our strongest resources—our Judicial Branch staff and our attorneys. With the assistance of the family law sections of the Hartford County Bar Association and the Waterbury Bar Association, we have organized Volunteer Attorney Days. This program provides free legal assistance to self-represented parties who have legal questions in the area of family and/or domestic law. This initiative has provided hundreds of self-represented parties who otherwise would not have access to competent legal counsel, with the chance to discuss their family court case with

a lawyer. The importance of this opportunity to a person who is faced with the possibility of losing custody of their child or having their visitation suspended cannot be overstated.

Similarly, we have implemented Volunteer Attorney programs in New Haven and Bridgeport to address our sustained foreclosure crisis. These volunteer lawyers assist individuals who have

questions about foreclosure. This program uniquely allows a self-represented party with foreclosure questions to meet with the volunteer lawyers even before a foreclosure action has been commenced, affording them some peace of mind early on in the process. The Bridgeport program is our latest volunteer program to begin. The program began on January 11, 2012 and as of March 1, 2012, the volunteer attorneys have assisted 86 self-represented parties with their foreclosure questions.

Another area that we have focused on is the creation of plain language forms. We've "translated" many of them into plain English and grouped them together on our website so that they are easier to find. While we don't formally collect statistics on the number of self-represented parties in our courts who have limited English, in 2010, the Branch's telephonic bilingual services vendor provided language assistance in 39 languages totalling 10,000 separate calls for language services. In addition, in 2010, Judicial Branch interpreter services received 48,177 requests for court interpreter and translator services. Not only must self-represented parties who have limited English cope with the stress and the emotion of being in court, they must also navigate and understand our justice system without the benefit of fully understanding our language. We have also developed procedural "how-to" videos to assist people and we continue to look at ways to educate those who will go before



Eliza Leighton, Policy Director, CASA de Maryland; Liman Fellow 2005–06.



(Left to right): Julia Greenfield, Disability Rights Oregon and Liman Fellow 1998–99; Francis X. Dineen, Clinical Lecturer, Yale Law School; and Stacie Jonas, Texas RioGrande Legal Aid and Liman Fellow 2008–09.

the court as self-represented parties. Many of these videos are posted on our website and act as an additional resource for self-represented parties who may not be able to come to the courthouse for assistance during regular business hours.

Meanwhile, we have implemented a Courthouse Information Officer program at several of our court locations. Many people who come into our facilities are doing so for the first time and often not under the best of circumstances. The goal is to make a trip to the court a little easier for people, because the experience can be both overwhelming and intimidating. Our Information Officers are stationed at the entrance to the courthouse at the metal detector and provide not only a welcoming smile and a warm greeting to patrons as they enter the facility, but basic, essential information such as directions and docket information. These friendly faces have not only helped approximately 19,000 people; they've also eased congestion in the clerks' offices and made it easier for our Judicial Branch marshals to concentrate on the task of providing courthouse security.

We take these steps because we can't stick our heads in the sand. Self-represented parties are here to stay whether the economy improves or not. We simply cannot lose sight of the fact that somebody who has a lawyer invariably is better off than the person who does not.

In addition to the above measures, we need to step up the courts' efforts to make it easier for attorneys to do pro bono work. Doing so is among my top priorities as Chief Justice, and we've already had some success in this area. Just last year, we held a first-ever summit intended not only to encourage lawyers to volunteer their services to assist

low-income individuals but also to provide them with the resources to do so. More than 100 attorneys from our large law firms and corporations as well as sole practitioners, attorneys from smaller firms and from legal aid, and representatives from our law schools attended the program, which was an overwhelming success. In addition, our Chief Administrative Judges and many of our Administrative Judges attended the summit to participate in what was an open and frank discussion about what can be done, what needs to be done, and how we are going to do it together.

To that end, organizers provided the summit attendees with practical information that will make doing pro bono service easier, including opportunities for training and access to a diverse list of pro bono opportunities through the creation of a pro bono catalogue and a pro bono portal. Bound copies of the catalogue were distributed at the summit and the electronic version is posted on the portal and on the Judicial Branch website at www.jud.ct.gov. The summit also provided a forum for the Judicial Branch and the legal aid providers to answer questions and address concerns about such issues as malpractice insurance and coverage for attorneys who participate in pro bono programs. Most of the pro bono opportunities that were highlighted at the summit, in the catalog, and on the portal are operated by legal aid providers and attorneys who choose to participate in these programs would be covered under the broad umbrella of the legal aid provider's malpractice insurance policy.

When people left the summit, they were armed with the tools and resources necessary to begin working on a new pro bono initiative. They knew where to sign up and whom to contact for training. More importantly, the attendees understood and appreciated that providing access to justice should not be a privilege afforded only to some, but a basic right available to all.

In Connecticut, the Judicial Branch's Access to Justice Commission and the Pro Bono Committee will play key roles as we move forward. While we are making some progress, it is clear the successes of the future will be contingent upon all stakeholders doing what they can to ensure that justice for all is both a principle and a practice. ♣

Accessing Justice in a Time of Reduced Court Resources

The Honorable Jonathan Lippman, Chief Judge of the State of New York



New York today is similar to so many other states in our country that are working to ensure meaningful access to the courts and equal justice for all who need our courts—in the midst of a severe economic downturn that has most impacted the poor and the vulnerable. Every day in courthouses around the country we see the fallout from the depressed economy reflected in our court dockets.

State courts are truly the emergency room for the ills of society, and our caseloads are the proof of that fact.

Millions of Americans need the courts to resolve the most intractable human problems of our time: the scourges of domestic violence and drug-related crime in our criminal courts; family breakdown, child abuse and neglect in our family courts; home foreclosures, evictions and consumer debt defaults, especially during these difficult economic times.

While New York's courts are busier than ever before, given current economic realities, we have fewer resources at our disposal to help us manage the staggering workloads. Last year, in 2011, New York State adopted a budget intended to close a \$10 billion dollar deficit. It contained traumatic spending cuts for all of state government, including an unprecedented \$170 million dollar reduction in the judiciary's budget. The result was layoffs of well over 400 court employees and very direct adverse consequences for the New York Judiciary, our court family, and our continued ability to deliver timely and effective justice.

While the New York Judiciary's budget outlook is now improving, budget cuts across the nation continue to result in court closings, layoffs and furloughs, and the elimination of court programs that are vital to serving the public. This critical funding problem for the courts goes largely unnoticed amidst the overall reductions in government spending emanating from the economic downturn.

Yet, the implications for access to the courts are staggering. Because, despite it all, in New York and other states, the courts are still constitutionally bound to deliver justice, no matter the state of the economy. How do we preserve meaningful access to justice for all in this time of stress for state judiciaries? A record number of Americans desperately need the protection of our laws but cannot afford a lawyer to help them deal with the essentials of life—a roof over their heads, family stability, personal safety free from domestic violence, access to health care and education, or subsistence income and benefits. Last year, 2.3 million litigants appeared in the New York courts

without a lawyer, including 98% of tenants in eviction cases, 95% of parents in child support matters, and two-thirds of homeowners facing foreclosure proceedings.

We in New York have redoubled our efforts within the judiciary, and in partnership with the Bar, to expand pro bono programs and provide more services for the self-represented. But all of these efforts have not come close to meeting the overwhelming needs of low-income New Yorkers, 20% of whom live in poverty in New York City and 15% across the state—record levels, as is the case in so many other states. I have become convinced that the totality of what we are doing in New York, and as far as I can see around the country, is simply not enough. It is simply not enough to rely on the declining resources of the Federal Legal Services Corporation, on revenue streams like IOLTA [Income on Lawyer Trust Accounts] or court fees that fluctuate with the economy, or even to rely on the wonderful good works of the Bar.

Access to justice cannot be a pay-as-you-go enterprise, dependant on funding that is unstable by nature—and, in the case of fees, funding that serves to expand access to justice with one hand while creating new obstacles with the other. What is needed, I believe, is the unequivocal commitment of state government to fund civil legal services, a permanent commitment backed by the public fisc that recognizes that civil legal assistance for poor and vulnerable litigants pursuing the necessities of life is a basic responsibility of state government—every bit as important as the other fundamental priorities of our society and our government. We don't say that there won't be public schools or hospitals this year to serve our children or to treat our sick because the economy is bad, just as we cannot say that we are going to let the indigent, the working poor, and the near poor fall off a cliff because civil legal services for the poor cost too much money.



Chief Judge Jonathan Lippman and McGregor Smyth, Managing Attorney, Bronx Defenders and Liman Fellow 2003–04.

We can no longer be passive or reticent about this central issue, particularly when state judiciary budgets are in peril and we are looked to for leadership as to our institutional priorities. Two years ago, on Law Day 2010, I began our own efforts in New York by forming a Task Force to Expand Access to Civil Legal Services, headed by the former president of the Federal Legal Services Corporation, Helaine Barnett. For each of the past two years, I personally presided over four public hearings around the state, along with the top leaders of the State Bar and the judiciary, to assess the extent and nature of the unmet civil legal needs. We all recognized that if the judiciary and the profession in our state did not stand up for civil legal services for the poor, no one else would—if not us, who?

What we learned from the hearings is that New York is at best meeting only 20% of the civil legal services requirements of the indigent. The Task Force recommended that the judiciary include \$25 million for civil legal services in its budget as part of a four-year phased-in effort to increase annual funding by \$100 million dollars.

Notwithstanding the economic tsunami that we faced, the final judiciary budget approved by the Legislature and Governor included \$12.5 million dollars for civil legal services, and an additional \$15 million dollars in our budget to rescue New York's IOLTA Fund—with the end result being \$27.5 million dollars of funding for civil legal services under the umbrella of the judiciary's budget—just the tip of the iceberg given the need, but yet the most state funding for civil legal services in the country.

Through this funding, 56 organizations received grants this past year to provide civil legal services to low-income families and individuals in every county of our state; and the IOLTA funding system, devastated by the economic downturn, has been rescued through an infusion of state funding. The judiciary's budget for the fiscal year beginning April 2012, which was just enacted, continues our support of legal services for the poor in cases involving basic human needs with a total of \$40 million for civil legal services.

This is not just a moral and ethical issue, and it is not just about the special responsibility and constitutional mission of the profession and the judiciary to foster equal justice. What too many people fail to recognize is that publicly funded civil legal representation pays for itself many times over. At our hearings, the most telling testimony was counterintuitive in nature—it came from business leaders, bankers, property owners, health care providers, and government and community

leaders who stated again and again that increasing access to legal assistance benefitted their own institutional performance and financial bottom lines.

We created a public record that justified the funding of civil legal services as making good economic sense for our state. Our Task Force concluded that there is a total return to New York of close to five dollars for every dollar spent to support civil legal services—by enabling people to pay their bills, preventing unwarranted evictions and homelessness, avoiding foster care placements and other social services costs, and bringing federal funds into the state.

Over the past two years, we have established a vital precedent for our state, and hopefully elsewhere, by implementing a systemic annual process to fund civil legal

services through state general fund monies that are part and parcel of the judiciary's budget. While there is no magic formula for what exact system will work best, we must in every state create the plumbing and infrastructure to ensure stable consistent funding for civil legal services—now and for the future.

That is the best way we can make immediate and meaningful progress, while at the same time ultimately laying the foundation for the day when litigants in

civil proceedings will receive representation in keeping with the ethos of the Supreme Court's decision almost 50 years ago in the landmark case of *Gideon v. Wainwright*—a case that was not just about the constitutional right to counsel for criminal defendants but a clarion call to recognize our societal obligation to give legal assistance to human beings facing life-transforming legal crises. Clarence Earl Gideon's trumpet, forever memorialized in Tony Lewis's Pulitzer Prize winning book, sounds for all those whose basic human needs are at stake in a legal system that must be meaningful for each and every one of us, regardless of means.

Make no mistake, the issues at stake in civil cases involving the necessities of life can be every bit as critical to one's existence and well being on this earth as the very loss of liberty itself. The recognition of a right to counsel in criminal cases was a landmark in the fight for equal justice in our country, although to be sure there is still much work to be done. I believe there is a valid analogy to be made with regard to legal representation of the poor in civil cases involving the necessities of life. A diverse and growing coalition of bar associations, judicial leaders, service providers, academics, and others are experimenting on the ground with creative ideas and approaches to expand legal



(Left to right): Chief Judge Jonathan Lippman with Liman Fellows (2011–13) Dan Mullkoff and Dila Shamas.

representation through new funding streams, greater lawyer volunteerism, and other programs and initiatives.

These efforts and more around the country reinforce the idea that legal representation in cases involving the basic necessities of life is fundamental to the delivery of justice. Equal justice for all under the law is inextricably linked to court funding levels. However, increasing court funding without ensuring access to justice is a hollow victory. The state courts must have the resources they need, not just as an end in itself, but to support their constitutional and ethical role as the protector of the legal rights of all Americans. All people, regardless of means, are

entitled to their day in court.

The rule of law—the very bedrock of our society—loses its meaning when the protection of our laws is available only to those who can afford it. We might as well close the courthouse doors if we are not able to provide equal justice for all—our very reason for being. This is the fundamental challenge facing the justice system today. The pursuit of justice is what we are all about in the courts. It defines us and it is this unique quest that makes what we do so absolutely critical to the well-being of our nation and its people—who precisely, in these difficult times, need the courts more than ever before. ♣

Assuring Access Comes in Many Forms

The Honorable Randall T. Shepard, Chief Justice of the Indiana Supreme Court (retired 2012)

In the midst of the Great Recession, people who care about access to civil justice feel with special keenness the need to assist the many citizens who find themselves on the wrong end of mortgage foreclosures or debt collections or the host of other adverse actions that hard times bring to people of limited means. A particular feature of the current conversation about access has been a focus on the value of having a lawyer at one's side to navigate a legal proceeding at each of its junctures. Thus, there is high-profile talk of the need for a "civil *Gideon*" and much concern over the limited federal appropriations for the Legal Services Corporation.

Improving and expanding these resources for civil access is an important part of the defense of justice in the current environment. Still, they do not represent the full range of tools that are in our box. One leading tool for access is the powerful combination of legal self-help and the Internet. While the first self-help centers became operational in Arizona courthouses more than a decade ago, the near ubiquity of Internet access and the relative ease of its use have made it possible for citizens without lawyers to learn more about law and learn it more quickly than we might have ever imagined possible.

Librarians tell me that substantial numbers of the people crowding library computer carrels these days are low-income citizens taking advantage of legal information offered by legal aid organizations and by courts. These electronic resources do include the classics like standard forms for various legal actions, of course, but the Web now also typically makes available a great deal of material that for all the world passes as legal advice. This appears especially useful in the two areas where the largest number of unrepresented citizens find themselves in need of legal help: family law and landlord-tenant.

Taking but one example, as for one very common legal



dispute that involves unrepresented litigants—child support—the power of web-based assistance is clear to see. The Indiana court system created a straightforward child support calculator aimed at helping unrepresented people handle their cases. Throughout most of the waking hours, one litigant or another clicks on this helper something like every 40 seconds.

And web-based pages are especially useful for reaching people who lack proficiency in English. The ability to provide text, forms, explanations, and frequently-asked-questions in other languages and

to distribute them to thousands of people simply cannot be matched through any other means.

To be sure, there are times when citizens need direct help from an actual lawyer rather than a virtual one, but even on those occasions a full-time paid litigator or counselor is not the only alternative. Well-organized pro bono programs like those initiated by the Florida Bar can add exponentially to the chance for direct legal help.

Left to haphazard organization this does not work particularly well, but careful construction can matter. There are now more than 1250 pro bono projects in the country. And a recent report by the ABA Standing Committee on Pro Bono and Public Service indicates that the level of volunteering by lawyers is on the rise. Moreover, while proposals for mandatory pro bono service have historically met with little acceptance, the recent announcement that New York will require pro bono participation by its new bar applicants demonstrates that the notion still has legs.

A great many new lawyers come to the profession already having had experience helping low-income citizens by virtue of a growing commitment by the nation's law schools to expand their clinics. In the course of a single recent month, I encountered students and faculty who were part of three new

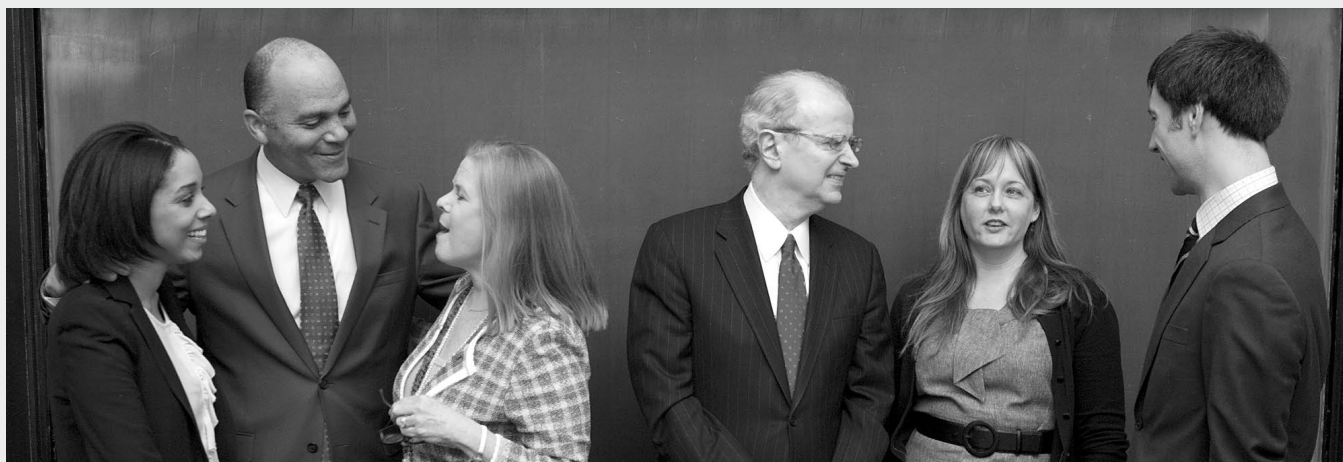
clinics at different law schools now providing assistance to clients in fields like immigration, post-conviction, and actual innocence. This contribution by America's law schools is often overlooked in the literature, and it is a good sign that these clinics continue to grow even as the schools face financial challenges of their own.

Of course, these extensions of legal service in various forms are not replacements for staffed legal services offices. Indeed, the availability and value of such tools often depends on the willingness and capacity of legal aid offices and bar associations and court administrators to support such efforts. But any conversation about the legal needs of the poor must perforce examine the full range of methods by which we may work to make good on the promise of equal justice. ♣



Back row (left to right): Liman Fellows Isabel Bussarakum (2011–13), Robby Braun (2011–12), and Emily Washington (2011–12); front row (left to right): Dennis Curtis and Jonathan Curtis-Resnik.

***Gideon* Revived: Criminal Defense, Financial Austerity, and Overcriminalization**



(Left to right): Sia Sanneh, Senior Liman Fellow in Residence and Liman Fellow 2007–08; The Honorable Wallace Jefferson, Chief Justice, Texas Supreme Court; The Honorable Sue Bell Cobb, Chief Justice, Alabama Supreme Court (ret.); The Honorable Jonathan Lippman, Chief Judge of the State of New York; Andrea Marsh, Executive Director, Texas Fair Defense Project and Liman Fellow 2002–03; and McGregor Smyth, Managing Attorney, Civil Action Practice and Reentry Net Director, Bronx Defenders and Liman Fellow 2002–03.

As state courts face severe cuts, layoffs, and furloughs, the criminal justice system continues to produce defendants, detainees, and prisoners. More than a half century ago, the debate was whether the federal constitution mandated that indigent criminal felony defendants be provided state-paid lawyers. Contemporary discussions focus on *Gideon*'s scope and implementation. A 2004 report by the American Bar Association reached "the disturbing conclusion that thousands of persons are processed through America's courts every year either with no lawyer at all or with a lawyer who does not have the time, resources, or in some cases the inclination to provide effective representation."

Chief Justice Wallace Jefferson focused on how

many school systems resort to the criminal justice system in responding to adolescent misbehavior. Chief Justice Sue Bell Cobb posited that society's reliance on criminalization to manage social problems contributes to broader trends of hyper-incarceration and places great strain on state justice systems. Andrea Marsh (Liman Fellow 2002–03) echoed these sentiments in arguing that in Texas—where many criminal defendants lack effective counsel—lawmakers should cut back on criminalization. Lisa Dugaard (Liman Fellow 1998–99) provided an example of ongoing reforms in Seattle, where The Defender Association is cooperating with police to launch a pilot project that channels low-level drug offenders into intensive services rather than the criminal justice system.

Combating the “School-to-Prison Pipeline” in Texas

The Honorable Wallace B. Jefferson, Chief Justice of the Supreme Court of Texas

A 2005 Texas A&M study concluded that, of the risk factors associated with future involvement in the juvenile justice system, the single greatest predictor is a history of disciplinary referrals at school.¹ Some have tagged this phenomenon—that school discipline serves as a gateway to the juvenile justice and adult criminal justice systems—the “school-to-prison pipeline.” Nowhere is this more evident than in Texas, where one-third of all youth in a locked-down facility have already dropped out of school. More than eighty percent of Texas adult prison inmates are school dropouts.

The Supreme Court hears only civil matters, which includes juvenile cases. About two years ago I received an invitation to see the faces behind the juvenile case files. I sat in during juvenile court proceedings in Travis County and observed a day in the lives of families whose children were in trouble. The experience changed me. On that day, the court considered cases involving young girls addicted to methamphetamine, teenage car thieves, and parents who were as young as twelve years old. In most cases, one parent showed up for the proceeding; in several cases, no parents participated. Public defenders seemed overworked. I was struck by the fact that most of the people in the courtroom, the judge, the public defender, mental health professionals and others, suggested that if detention were necessary, the child should be placed close to home. Yet Texas regularly sends juvenile offenders to detention centers miles away.

The National Geographic published a remarkable piece last year about the adolescent mind. It turns out that adolescents are more likely than adults to engage in risk-taking behavior and are less able to understand the consequences of that behavior because critical areas of the brain have not yet fully matured.² As the brain develops, the ability to control reckless behavior is enhanced. Arrests drop off substantially after adolescence and the vast majority of adolescents who commit a crime do not reoffend as adults.³

We should reevaluate how we punish our children. Detention facilities should be a last resort.



Our courtrooms should be used for those who need judicial intervention most. The safety of our students must be a priority, of course, but the judicial system is currently employed for minor offenses. Consider these documented cases: a boy issued a dozen misdemeanor tickets by school police for cursing, wearing baggy pants, and refusing to follow teachers' instructions; an honor student expelled and charged with violent criminal conduct and possession of a weapon for shooting spitballs at fellow classmates; and a girl, age 12, ticketed for using perfume after her classmates claimed she had body odor. These examples

reflect a growing problem: the criminalization of children for non-violent offenses that result in a trip not to the principal's office, but to a courtroom. We must reconsider reflexively subjecting adolescents to adult consequences in our courts for minor misbehavior in the classroom.

The statistics behind these stories are troubling. Nearly 300,000 non-traffic tickets are issued to juveniles in Texas each year, 120,000 of those for truancy.⁴ Each of these tickets requires an appearance in court. One municipal court judge in Houston sees approximately 150 juvenile ticketing cases *per day* during the school year.⁵

In addition, a majority of Texas public school students are suspended or expelled at least once during their junior high and high school years.⁶ Only three percent of these are for behavior for which punishment is mandatory. The rest are discretionary, and most often involve not criminal behavior, but violations of a student code of conduct. As the number of suspensions and expulsions increase for a student, so does the likelihood that the student will be hauled into juvenile court, repeat a grade, or give up. School discipline, in many cases, drives our children away from school. The curtailment of education, which provides tools for productive economic activity and, as important, socialization, is exactly the opposite of what is needed.

Even more troubling is the disproportionate effect school discipline has on minority and special-need students. In Texas public schools, though African-American students represent



(Left to right): Doug Stevick, Litigation Director, Legal Aid NorthWest Texas and Liman Fellow 1999–2000, greeting Chief Justice Wallace Jefferson, and joined by Yale Law School professors Judith Resnik and Tom Tyler.

14% of the population, they account for 33% of out-of-school suspensions, 24% of in-school suspensions, and 25% of all expulsions. Most interesting, the disciplinary rates for mandatory violations—conduct that compels a sanction—are fairly comparable across racial groups. It is only when *discretion* enters the equation that stark disproportionality appears.

The same holds true for students who qualify for special education services: nearly 75% were suspended or expelled at least once between

seventh and twelfth grade. But a student's involvement in the disciplinary system varied depending on disability. Students diagnosed with a learning disability or emotional disturbance have a twenty-four percent higher probability of being suspended or expelled for a discretionary disciplinary action than their peers.

A student's misbehavior at school used to result in a trip to the principal's office and extra homework. Today, misbehavior is often met with a class C misdemeanor and a court hearing. No one system or entity is responsible for creating the current challenges, and no one system can solve these problems unilaterally. School-district officials, policy-makers, jurists, prosecutors, educators, and law enforcement officers must



(Left to right): Laura Fernandez, YLS '02, and Sarah Russell, YLS '02, Assistant Clinical Professor, Quinnipiac Law School, and Liman Director 2007–2010.

work collaboratively to develop solutions that are multi-faceted and address the challenges from several different angles. First, we must look for ways to prevent misbehavior and elicit positive behavior. We must also develop effective interventions when misbehavior does occur. This requires uncovering the roots of the misbehavior, recognizing when mental health issues play a role, and ensuring those students receive the treatment and services they need. Finally, we should set policies that hold students accountable but do not criminalize this

behavior. This includes changing our state's laws so that certain behaviors are no longer subject to ticketing and only certain actions result in suspension or expulsion.

Fortunately, Texas is confronting this challenge head on. The Legislature has amended the laws on zero tolerance policies and ticketing, seeking to reduce the number of children that must appear in our courts.⁷ School districts have implemented behavioral intervention programs that have changed the way they discipline their students. And judges are developing creative solutions, like teen courts, to handle the influx of juvenile cases while at the same keeping kids out of our traditional court system. All of these efforts are crucial to diverting students out of court and back to class. ♣

Fixing People Rather than Filling Prisons

The Honorable Sue Bell Cobb, Chief Justice, Alabama Supreme Court (retired 2012)

Having worn a judge's robe for 30 years, I can assure you that I could not easily and quickly improve people's lives, but the one thing that was really easy to do was to lock them up. Taking away a person's freedom is an enormous responsibility and should never be taken lightly. In our state and country, we now know that we have over-relied on incarceration when sentencing nonviolent offenders. Unfortunately, research has demonstrated that it has not made us safer.

The Public Safety and Performance Project of the Pew Center on the States has reported that we lock up more of our citizens than any other country in the world. My state, Alabama, is experiencing an incarceration crisis that is among the worst in the country. Over the last 30 years, Alabama's prison population has grown from



approximately 6,000 to over 31,000 prisoners incarcerated today. Harsh sentences for minor property and drug offenses and other nonviolent crimes, under the state's Habitual Felony Offender Act, account for much of this dramatic increase.

Alabama's overreliance on incarceration has created a significant and unsustainable drain on state resources, including courts and corrections. Staffing of court personnel at all levels remains insufficient to meet the rising demands placed on an already stretched criminal system, and therefore inadequate

representation for individuals facing prison time remains a persistent problem. Corrections is similarly overburdened: Alabama has the most overcrowded prison system in the country at 195% of capacity—and, regrettably, the least funded.

We rank sixth in the country in the number of adults in prison or jail, with one in 75 behind bars as compared to one in 100 nationally. We have the highest ratio of inmates to correctional officers in the nation, a statistic of which we should not be proud. Short staffing, combined with overcrowding, has contributed to increased violence in our state prisons, a trend that places both staff and prisoners at risk and undermines public safety.

Despite our unwillingness to fund adequately corrections, the Department of Corrections (DOC) budget has quadrupled in 20 years. Although the cost of DOC went from \$105 million in 1988 to \$577 million in 2008, the taxpayers have not seen a solid return on their investment in terms of public safety. As observed by Roger Warren, President Emeritus of the National Center for State Courts: "Today there is a voluminous body of solid research, showing that certain 'evidence-based' sentencing and (community) corrections practices do work and can reduce crime rates as effectively as prisons at a much lower cost."

Let me be absolutely clear: we must lock up violent and serious offenders so that they cannot continue to harm innocent people. However, with nonviolent offenders, less costly alternatives exist which have proven to be more effective. The Alabama Legislature, with the encouragement of court leaders, began to deal seriously with this complicated dilemma creating the Alabama Sentencing Commission in 2000. With a goal of truth in sentencing—in other words, sentences instilling confidence in how much time a defendant would actually serve—the Commission and its staff have labored long and hard. In an effort to achieve more consistency and appropriateness in sentences, the Sentencing Commission adopted voluntary sentencing guidelines. Training trial court judges on the sentencing guidelines, encouraging active local involvement in establishing community punishment programs based on best-evidence, and promoting the use of risk and needs assessments are just a few of the activities which the Sentencing Commission has dedicated its time and energy.

Becoming chief justice in 2007, after 13 years on the trial court and 12 years on the Alabama Court of Criminal Appeals ruling on thousands of criminal cases, I was convinced that with the power of bipartisan, inter-branch cooperation, we could create a safer, more cost-effective criminal justice system. I

determined that the statewide replication of model drug courts would be one of my top priorities. With the help of the Model Drug Court Task Force, model drug courts have been established in almost every county. This could not have happened if the Legislature had not committed to a line item appropriation specifically for model drug courts. This achievement is a testament to bipartisan, inter-branch collaboration and our state is safer because of it. Yet, there is still much to be done.¹

After the failure of the legislature during the 2011 session to pass the recommendations of the Inter-branch Public Safety and Sentencing Coalition, our prison system is literally bursting at the seams, with much human capital and tax dollars being wasted as a result.

Fast forward to February of 2012, with the United States Supreme Court having ruled last year in *Plata v. Brown* that prisons such as those in California which are over 137.5 percent of capacity are unconstitutional. Alabama prisons are hovering at more than 190 percent. It is time for those who have the responsibility of funding essential governmental functions either to raise revenue to ensure the imprisonment of violent criminals or to enact the recommendations like those proposed by the bipartisan Public Safety and Sentencing Reform Coalition.

These proposals were based on best evidence and if enacted, would have made the public safer and saved millions of tax dollars. As Rep. Jay Love, chair of the House Education Appropriations Committee said of the education budget, "Eventually, you have to take your medicine

and begin putting the state on a firm financial footing." This assessment is absolutely applicable to the funding dilemma of our state corrections system. The ideas which have been offered for sentencing reform will save taxpayer dollars, reduce inappropriate sentences and improve public safety by helping to stop the revolving door of inmates being released, reoffending, and returning to prison.

"It's time to take our medicine." The citizens of our state deserve a criminal justice system that focuses precious tax dollars on locking up criminals who cause us to be justifiably afraid, and not those who simply make us mad. We deserve statesmen who will put public safety above politics and act so that a federal take-over can be avoided. Our policymakers must empower our judges, giving them the necessary tools so that they can fix people rather than just fill prisons. ♣



(Front to back): Chief Justice Sue Bell Cobb, joined by Chief Justices Rogers, Jefferson, Cantil-Sakauye, Lippman, and Shepard.

Paying for Justice, not Misdemeanors

Andrea Marsh, Executive Director, Texas Fair Defense Project; Liman Fellow 2002–03



In Texas, access to justice is often conceived to be a civil justice problem. Our state access to justice commission focuses exclusively on meeting unmet needs for civil legal aid, and “access to justice” is a rallying cry used to seek additional support for civil legal services from the legislature and private law firms. But across the state, each week hundreds of

defendants plead guilty to misdemeanors without counsel.

Much of my work at the Texas Fair Defense Project (TFDP) involves helping people obtain the legal assistance guaranteed by the Sixth Amendment when they are charged with a crime and cannot afford to hire a lawyer—not just a lawyer to stand by silently and legitimize a plea, but a lawyer with the training, resources, and commitment necessary to provide a vigorous defense. TFDP is a nonprofit organization that works to improve the fairness of Texas’s criminal courts. We focus primarily on indigent defense reform. The organization has expanded on work I began as a Liman Fellow, when I studied how Texas counties implemented major indigent defense legislation that was enacted in 2001.

As a result of that legislation and the continuing efforts of the Texas Indigent Defense Commission, local officials, and advocacy groups such as TFDP, the Texas indigent defense system has improved in many ways since 2001. In a state that historically had very few institutional defender programs, we now have 19 public defender offices, including a new public defender office in Houston and a regional capital public defender that handles death penalty trials in over 100 counties. The state legislature, which didn’t contribute any money to indigent defense before 2001, now appropriates \$33 million per year in indigent defense grant funding to counties. And every Texas county now has a written indigent defense plan that includes objective indigency standards, attorney qualification

requirements, and an attorney fee schedule.

To many observers in the legislature and the bar, indigent defense looks like a problem that has been solved. Despite high-visibility work to develop over 300 new written indigent defense plans and to distribute millions of dollars in state grant funds, there are many areas in which the reform legislation has not been fully implemented. And many indigent defense problems are not addressed by the legislation at all. Texas’s indigent defense reform legislation doesn’t specify how much counties should pay appointed lawyers, and some counties pay as little as \$25 per hour. Many more pay low flat fees that only cover one appearance at a plea hearing. Because most defense services are provided by solo practitioners rather than public defenders, defense lawyers often lack access to formal defender training and do not receive any supervision. Judges screen lawyers based on whether they have appeared in past trials, not typically how the lawyers actually performed.

Then there are the indigent defendants with no lawyers at all. These defendants ask for a lawyer in the jail, but their requests aren’t forwarded to the courts for review. They ask

court staff for a counsel request form, but staff refuses to provide one because the defendants have been released on bond and thus can’t really be indigent. They are unemployed, but courts refuse to appoint counsel and instead repeatedly reset their case so they can try to hire a lawyer.

These defendants often are literally hidden from view. Their cases are set on special plea dockets that only include the cases of other similarly unrepresented defendants. In a number of counties, these mass plea dockets

occur in courtrooms that are closed to the public. Defendants who cannot speak English rarely have access to licensed interpreters, and instead must rely on court or prosecutor staff to translate the proceedings and explain plea paperwork. Although none of these defendants are forced to plead guilty, they are encouraged to take advantage of the opportunity to speak to a prosecutor before they make up their mind about requesting, or are given any opportunity to request, counsel. This doesn’t happen everywhere in Texas, but in half of Texas’s 254 counties fewer than 20% of individuals who are convicted of misdemeanors receive appointed counsel.

These high-volume misdemeanor courts house the access to



Chief Judge Sue Bell Cobb (right) speaks with Doug Liman (center) and Susan Herman, President of the ACLU and Centennial Professor of Law, Brooklyn Law School (left).

justice problems that are the least visible and most intractable in the criminal justice system. The criminal defense bar is more focused on felony court problems, even though misdemeanors can have permanent immigration, employment, and housing consequences. Texas's indigent defense commission views these questionable waivers as a question of constitutional compliance rather than statutory compliance, and thus outside its purview. And TFDP's litigation challenging practices in these courts has been slow to achieve results—even a 2008 Supreme Court victory in *Rothgery v. Gillespie County* has led only to years of uneven implementation efforts in Texas's 254 counties.

To date, we have rationed law, but we have rationed it in a very lopsided way. We fund the prosecutors who file the cases,

and we divert judicial resources to make sure criminal dockets are covered. We've rationed law only on the defense side, fatally undermining the adversarial process. In the absence of any political will to fill the funding gap on the defense side, particularly in relatively non-serious cases, the remaining option is to ration justice in a more balanced manner by devoting the prosecutorial and judicial time to higher priority uses. I am one of the many criminal justice advocates who believe that the only way to rebalance our justice system is to reduce the number of misdemeanor cases and to develop non-criminal approaches to deal with the underlying behavior. For that reason, I hope the access to justice community will include criminal justice in their efforts as well. ♣

Dismantling the War on Drugs: The Un-Rationing of (Criminal) Law in Drug Cases

Lisa Daugaard, Liman Fellow 1998–99 and Deputy Director, The Defender Association, Seattle, WA

Isabel Bussarakum, Liman Fellow 2011–12, The Defender Association, Seattle, WA

Law Enforcement Assisted Diversion (LEAD)¹ is a pre-arrest diversion program modeled after arrest referral programs in the United Kingdom. After years of collaborating, planning, and fundraising with key criminal justice system partners, LEAD finally launched on October 1, 2011 as a grant-funded pilot program operating in the Belltown neighborhood of Seattle, Washington.

Pioneering a path-breaking approach to addressing drug activity, LEAD allows police officers in the field to divert individuals who commit low-level drug and prostitution offenses to community-based services, instead of booking them into jail and prosecuting them in court.

LEAD initially grew out of The Defender Association Racial Disparity Project's mission to reduce the harm caused by current drug policy to communities of color. From 2001–2008, the Racial Disparity Project engaged in selective enforcement litigation challenging the Seattle Police Department's practice of disproportionately focusing on African American suspects and crack cocaine activity. Through this litigation, we successfully negotiated dismissals of charges against our clients. However, in 2008, we changed our adversarial method to one of collaboration because the police and prosecutors were ready to try a different approach to drug enforcement.

In order to make LEAD possible, we needed to obtain buy-in from traditional adversaries and other stakeholders—law enforcement agencies, prosecutors, the Mayor, the City Council, the County Council, and community members—who were not



Lisa Daugaard

necessarily all motivated by reducing the racially disparate impact of the War on Drugs. What motivated our other partners, instead, is reflected in the Fifteenth Annual Liman Colloquium's theme of "Accessing Justice, Rationing Law."

One common premise that all LEAD partners could agree on was that traditional criminal justice system processing was not making a meaningful impact on street-level drug activity. Even front-line police officers who routinely utilized traditional law enforcement tools—arrest, booking, and referral for prosecution—admitted that those methods more often than not failed to change the behavior and lives of many of the drug-involved individuals they contacted. Those individuals often returned to the streets, resumed drug activity, got re-arrested, spent time in jail, and were released only to initiate the same cycle over and over again. Moreover, the recent economic downturn brought to the forefront of every law enforcement agency's consciousness the tremendous cost of prosecution and incarceration not only in traditional criminal court, but also in existing alternatives such as drug court, community court, probation, or work release.

These tremendous costs can be said to have resulted largely from our nation's preferred drug policy for the last several decades: the War on Drugs. Heavily deployed by our national and local governments since the 1980s, the War on Drugs focuses myopically on increasingly criminalizing drug-related activities and penalizing those drug offenses with longer prison sentences.



Isabel Bussarakum

More than three decades later, the War on Drugs has proven extremely costly. It has contributed to a glutted jail and prison system. The War on Drugs has been the primary contributor to the exponential growth of the United States' prison system. According to the Sentencing Project's report *A 25-Year Quagmire: The War on Drugs and Its Impact on American Society* (2007), drug arrests "have more than tripled in the last 25 years, totaling a record 18 million arrests in 2005," and "drug offenders in prisons and jails have increased 1100% since 1980." The Washington

Association of Sheriffs and Police Chiefs reports that in 2010, the average jail stay at the King County Jail in Seattle cost \$2,479.68 per inmate, or \$126 per day.

Moreover, accompanying each drug-war incarceration is an expensive chain of events, which include the salary of the law enforcement officers making and processing that arrest; the cost of booking that person into jail unless he or she is released; the cost of transporting that person to a county jail if needed; the cost of processing the paperwork between the agency making the arrest, the county jail, and the courtroom; the cost of providing a public defender, prosecutor, judge, and court staff for each hearing; the cost of transporting the individual to each hearing if he or she is incarcerated; the cost of imprisonment if the person is so sentenced; the cost of community supervision or probation if it is ordered; the cost of appeal; and so on.

Looking at this calculus, how is law rationed, and who has access to justice in the War on Drugs? It seems that drug offenders are rationed a tremendous amount of law. In each drug case that is filed, the defendant is provided, for the duration of his or her case, a defense attorney, a prosecutor, a judge, court staff, and possibly incarceration.

Yet with so much law being rationed, who is accessing justice? Research indicates that the criminalization of drugs has not proven effective at curbing drug activity because the criminal justice system is not designed to address the needs that may underlie an individual's drug activity. Outside of specialized courts such as drug court or mental health court, the traditional criminal justice system does not grant defendants access to chemical dependency treatment, mental health counseling, long-term housing, or stable employment.

The fact that justice is not done for the defendant is confirmed by the experiences of the police officers, probation officers, prosecutors, and public defenders working on LEAD, who have all seen drug-involved individuals cycle in and out of



Katie Chamblee, YLS 2012, asks a question. In background (left to right): Katherine Oberembt, YLS 2012 and Liman Student Co-Director, Matthew Lee, YLS 2013 and Liman Student Co-Director, and Rebecca Bernhardt, Policy Director, Texas Defender Service and Liman Fellow 1999–2000.

the criminal justice system, time and again, without any meaningful intervention in their lives. Moreover, if that individual continues the behavior that led him or her to criminal justice involvement, justice can hardly be said to be done for the community to which that individual returns. Thus, in spite of the tremendous rationing of law to drug activity, the law does not seem to provide access to justice at a particularly promising rate.

The idea behind LEAD was to change this calculus by

experimenting with an alternative approach to street-level drug activity. LEAD strips away many of the trappings of law in hopes of providing greater access to justice to both the individual involved in drug activity and the community affected by drug activity. In LEAD, an individual is diverted to community-based services at the pre-booking stage—that is, immediately after being arrested and before being booked into jail or referred for prosecution. By placing diversion at such an early point in the criminal justice system, LEAD hopes not only to bypass the costs of booking the individual and filing a case against him or her, but also to prevent the onslaught of collateral consequences that can attach to a criminal charge or conviction. Moreover, by providing access to needed services, LEAD hopes to implement a more just and meaningful intervention in people's lives by expanding access to resources, rather than limiting that access through jail and through the stigma that accompanies a criminal conviction.

In many ways, LEAD requires a critical self-examination of the efficacy of the legal system and the lawyer's role. For the last duration, our society's response to drug activity has been to add more and more law. The War on Drugs began by criminalizing more drug activities and increasing sanctions. With criminalization comes the possibility that individual rights to property and liberty will be infringed. To protect those rights, those individuals utilize additional rights such as the right to an attorney, to a jury trial, to confront witnesses in a jury trial, to due process of law, to be free of unlawful search and seizure, and so on.

Yet, after decades of addressing drug activity through more law, LEAD posits that perhaps the law is not the proper vehicle for delivering justice in drug cases. Instead, LEAD takes the typical life of a drug case, rewinds it back to its entry point into the criminal justice system, and sets it down an alternative path: one that is guided by public health and social service principles.



(Left to right): Tamar Lerer, YLS 2013, Liman Student Board; McGregor Smyth, Managing Attorney, Bronx Defenders, Liman Fellow 2004–05; Ezekiel Edwards and Jason Williamson of the ACLU's Criminal Justice Reform Project.



(Left to right): Ellen Liman and Leslie Gerwin, Assistant Director, Program in Law and Public Affairs, Woodrow Wilson School, and Liman Adviser, Princeton University.

Certainly, the idea that drug offenses are a public health issue rather than a criminal issue is not new; it is also the premise of drug courts and mental health courts. Such alternative courts, nonetheless, keep drug cases *in court*, and still address drug activity through a criminal case. Drug courts overlay the legal system on top of a public health system, keeping the judges and the lawyers in the decision-making position. LEAD questions whether these legal minds are the best designers of a chemical dependency treatment plan, or the best arbiters of whether someone should continue treatment or be sanctioned with incarceration. LEAD replaces those legal minds with social services providers who make front-line decisions with the participants about their treatment, housing, employment, and other needs.

After two years of operations, LEAD will undergo an evaluation to determine whether LEAD has resulted in reductions in drug use and recidivism, whether LEAD is more cost-effective than traditional criminal justice processing, and whether LEAD has had a positive impact on a community's

quality of life. While we do not yet know the answer to these questions, LEAD opens up exciting possibilities for rationing law and accessing justice. If LEAD demonstrates that cost savings can be captured by un-rationing the amount of criminal law in drug cases, these cost savings can be redirected to other vehicles of justice—not only social services, but also civil legal services.

As lamented by speakers at this year's Colloquium, when the state tightens its budget, it typically squeezes funding from civil legal services, in order to continue providing constitutionally-mandated criminal defense. Our experience with LEAD participants so far is that those civil legal services can be just as critical to assisting participants with re-entering society. As a 2011-2012 Liman Fellow, Isabel Bussarakum has been assisting LEAD participants with reinstating suspended driver licenses, modifying bankrupting child support obligations, and accessing a variety of benefits. We are excited for the opportunity with LEAD to explore the possibility that justice is not the sole province of criminal law, and that perhaps law can be un-rationed to grant greater access to justice. ♣

Access to Courts in the EU and the US – The Role and Influence of Trans-nationalism

Angela Ward, *Référendaire, Court of Justice of the European Union; Adjunct Professor in European Union and Human Rights Law, University College Dublin**



There would seem to be two principal differences between Europe and the USA when it comes to securing public access to courts and the right to judicial determination of legal disputes, irrespective of means. The first is that, in Europe, it is fair to say that it is universally accepted that it is a legitimate function of the

state to provide a legal aid system, of some description, for those who would otherwise lack the financial resources to litigate. This principle is so deeply embedded in Europe that the right to legal aid is elaborated in Article 47 of the EU Charter of Fundamental Rights as a specific component of the right to a fair hearing. Indeed, the law has evolved to the point that the Member States of the European Union and the Council of Europe have a duty to guarantee access to legal aid, albeit subject to conditions and limitations.

The second difference lies in the role of trans-nationalism in broadening public access to courts. In the post-World War II

*The views expressed are those of the author.

***Gideon* Reconceived: State Subsidized Lawyers for Civil Litigants – In and Outside the United States**



(Left to right): Alison Hirschel, Elder Law Attorney, Michigan Poverty Law Program and Liman 1997–98; Rebecca L. Sandefur, Assistant Professor of Sociology, University of Illinois and Senior Research Social Scientist, American Bar Foundation; Dr. Angela Ward, Référendaire, Court of Justice of the European Union, Luxembourg; Adjunct Professor in EU and Human Rights Law, University College Dublin; Hazel Genn, Dean of Laws, Professor of Socio-Legal Studies, and Co-Director, UCL Judicial Institute in the Faculty of Laws, at University College London; Helaine Barnett, Chair, Task Force to Expand Access to Civil Legal Services in New York; Jorge Baron, Executive Director, Northwest Immigrant Rights Project and Liman Fellow 2005–06; Talia Inlender, Staff Attorney, Public Counsel, Los Angeles, California; and the Honorable Tani Cantil-Sakauye, Chief Justice, California Supreme Court.

The United States is not alone in facing funding challenges, as current developments in the United Kingdom and European Union make plain. Snapshots of the issues come from Angela Ward, who recounted the transnational evolution of a right to civil counsel in the European Union. The future scope and availability of state support for legal services remain uncertain, as described by Hazel Genn's critique of cutbacks in the United Kingdom.

The challenges of meeting the needs of low-income litigants have prompted an array of responses by state and private actors. Helaine Barnett reflected on the efforts—including increased funding and greater pro

bono coordination—proposed by New York's Task Force to Expand Civil Legal Services, which she chairs. For advocates, as Jorge Barón recounted, impact litigation may help to increase legal resources for especially vulnerable litigants, such as mentally ill immigrants facing deportation. Gillian Hadfield, an economist and law professor, argued that the current system is unsustainable and the legal profession must reform itself to make access available to the many millions of unrepresented Americans. Rebecca Sandefur, a sociologist, suggested that, while funding is a key issue, coordinating information about services is necessary to meet needs.

era, legal systems in Europe are integrated in a manner that may not be paralleled in the legal traditions of the United States of America. The development of pan-European legal rules on access to courts, including legal aid, has had a significant impact on the development of national initiatives to achieve this end. Given that the influence of trans-nationalism has yet to penetrate the United States legal system to any degree comparable to that which has occurred in Europe, the important influence of European developments has been equally absent in the evolution of public access to courts in the United States.

I do not propose here to address, in any detail, the roots of the divergence in conceptions of the "legitimate" role of the state in the two jurisdictions when it comes to putting into place an

administrative machinery to provide financial support for low-income litigants. Much of the difference lies in contemporary history, such as the advent of the welfare state in Europe in the post-war era, which also lacked an immediate parallel in the United States. Rather, I will focus on explaining how transnationalism emerged in Europe in the last fifty or so years as a dominant force in the elaboration of legal norms in European countries, and how this has impacted on access to courts.

The Tale of Two Europes

After the Second World War, a movement swept the political classes of Europe that was committed to constructing institutions to prevent the reoccurrence of military conflicts

that the continent suffered twice over in the first half of the twentieth century. The Council of Europe, with its European Convention of Human Rights, was the best known of the two leading initiatives. It was championed by figures of the stature of Winston Churchill, and it carried an open agenda to federalize the various sovereign entities of Europe into a political federation of some kind. The second organisation, the European Economic Community, and its sister organs were concerned with economic integration of coal and steel production and atomic energy, respectively. They were led by figures such as Jean Monnet and Robert Schuman, whose political profiles were nearly invisible when compared with their counterparts in the Council of Europe. The EEC aimed at securing a functioning common market in the original six Member States,¹ and, in its original form, carried no human rights jurisdiction at all, including any competence over fairness of hearings and access to courts.

As is well known, one of the paradoxes of twentieth century European history was the spectacular growth in the activities of the European Economic Community, which careered into a “Community” and finally a “Union” with a functional pan-European Parliament, while the lofty ambitions of the Council of Europe have yet to flower. While the latter retained its primary role in securing human rights in



Rachel Stockman, MSL 2013.

Europe through, among other institutions, the European Court of Human Rights, it was the European Union which led the integration charge, culminating in 2000 with the elaboration of an EU Charter of Fundamental Rights.

The European Union came to have an important role in the enforcement of human rights in two ways. First, in light of pressure imposed by the national courts of the Member States, and particularly superior courts in Germany and Italy, the European Court of Justice (ECJ) began implying, and as far back as the late 1960s, fundamental rights as recognised in the legal traditions common to the Member States, and in international human rights treaties on which the Member States have collaborated. In a nutshell, the constitutional courts of Italy and Germany expressed reservations about their willingness to comply with the supremacy of EEC law, as it then was, over conflicting national measures (the linchpin principle of European integration) if the EEC failed to secure human rights protection to the standards set under their respective national constitutions. The ECJ responded by developing a body of rules to ensure that this was not the case. This culminated in the EU Charter of Fundamental Rights in 2000, which is in some

respects a codification of this case law.

Second, because of this corpus of implied human rights, the courts of the Member States of the European Union have always had jurisdiction to refer questions on the interpretation of EU law directly to the European Court of Justice in Luxembourg concerning human rights problems. In contrast with the jurisdiction of the European Court of Human Rights (ECtHR) in Strasbourg, there is no obligation in EU law for victims of human rights violations to seek to exhaust domestic remedies before the Luxembourg court can hear their claim. This means that, even before countries like the United Kingdom implanted the European Convention of Human Rights (ECHR) into national law,² national courts, through EU law, were applying European human rights rules as a normal part of the domestic legal fabric, at least in disputes in which a point of EU law was a live issue.



*Albert Monroe, YLS 2012 and
Liman Student Board Member.*

Trans-nationalism, Access to Courts, and Legal Aid

An entitlement to legal aid also developed by way of a two-step process. It was the ECtHR which led the charge, holding in 1979 in *Airey v Ireland*³ that after the applicant had exhausted all available domestic remedies under Irish law, there were circumstances in which civil litigants were entitled, as part of the Article 6(1) ECHR right of access to a court, to financial support

from the state to pursue their claims. That case concerned an Irish national, Mrs. Airey, who came from a humble background and who was seeking to obtain a decree of judicial separation from her husband on the basis of physical and mental cruelty to her and her children. Given her lack of means, and the absence of a system of legal aid in Ireland that would have enabled her to retain a lawyer, self-representation was the only means through which Mrs. Airey could secure the decree.

The ECtHR fell short of ruling that member states of the Council of Europe were, in all circumstances, bound to provide legal aid in order to guarantee access to courts. Rather, it held that counsel may not be necessary in certain circumstances, such as where simplified procedures in particular matters do not place pro se litigants at an undue disadvantage. However, the court added that Article 6(1) “may sometimes compel the State to provide for the assistance of a lawyer when such assistance proves indispensable for an effective access to court either because legal representation is rendered compulsory . . . or by reason of the complexity of the procedure or of the case.” Given the circumstances at hand, Ireland was found to be in breach of Article 6(1) ECHR. In response, Ireland instituted a system of legal

aid scheme to cover family law matters.

The second, and more comprehensive, step in the development of a European entitlement to legal aid came with the promulgation of the third paragraph of Article 47 of the EU Charter of Fundamental Rights. It states more broadly that legal aid “shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice.” The explanations that accompany the Charter (OJ 2007 C 303/17) read as follows:

With regard to the third paragraph, it should be noted that in accordance with the case law of the European Court of Human Rights, provision should be made for legal aid where the absence of such aid would make it impossible to ensure an effective remedy . . .⁴

There is also a system of legal assistance for cases before the Court of Justice of the European Union.

The European Court of Justice confirmed the ample parameters of the right to legal aid as a matter of European Union law in December 2010, in Case C-279/09 *DEB v. Germany*. The Luxembourg court was asked to consider, in the context of a commercial dispute, the compatibility of EU law with a German rule which precluded the availability of legal aid to cover certain court fees for corporate entities. After examining the case law of the ECtHR, which was yet to address the issue directly arising in *DEB*, the Court of Justice concluded that “the grant of legal aid to legal persons is not in principle impossible, but must be assessed in the light of the applicable rules and the situation of the company concerned.” In making this assessment, the Luxembourg court held that due account had to be taken of “the financial capacity of an applicant” as well as other factors.

Much of what I have described here will undoubtedly sound as far as Venus from the US paradigm on public funding to support access to courts. The influence of inter-court dialogues and trans-nationalism has been a pivotal element in the allocation of resources by European countries in the support of legal aid. The absence of analogous mechanisms in the United



(Left to right): Michael Tan, Staff Attorney with the ACLU Immigrants' Rights Project and Liman Fellow 2008–09, speaks with Jeremy Kaplan-Lyman, YLS 2012 and Liman Student Board Member, and Marisol Orihuela, Staff Attorney with the ACLU of Southern California and Liman Fellow 2008–09.

States may go some way toward explaining the limited federal and constitutional rights to civil legal aid.

However, all is not lost. The Inter-American Court of Human Rights has held that Article 8 of the American Convention of Human Rights must be read to require legal counsel “when it is necessary for a fair hearing and that any state that does not provide indigents with such counsel free of charge cannot, therefore, later assert that appropriate remedies existed but were not exhausted.”⁵ In other words, there is a human rights court in the Americas that has gone down a similar path to the two European courts. Accession of the United States to the Inter-American Convention of Human Rights, acceptance of the jurisdiction of the Inter-American Court of Human Rights, and domestic incorporation would bring a stream of trans-national principle into US domestic law, and might be ammunition in the hands of public interest litigants emanating from the international arena that has, for far too long, been absent in the evolution of US legal systems. Enhanced efforts might therefore be made, at policy level, to fill this significant breach. ♣

The Decline of Access to Civil Justice in England

Dean of Laws, Professor of Socio-Legal Studies, and Co-Director, UCL Judicial Institute in the Faculty of Laws, University College London



For over 60 years England has enjoyed a relatively comprehensive and generous scheme of legal aid for civil and criminal cases. The legal aid system has been a manifestation of successive Governments' commitment to the ideal of equal access to justice and recognition that access is central to the operation of the rule of law. It has

reflected the belief that the ability to participate in redress systems is a measure of the health of democracies. The critical question is not whether citizens ostensibly have rights, but what opportunities are provided for them to enforce those rights and the obligations of others.

More than a decade of legal needs studies around the world has provided us with plentiful evidence of citizens' need for advice and advocacy in relation to pursuing redress for civil legal problems. We know that low-income groups suffer more civil legal problems and disputes and that they experience a significant unmet need for advice and representation. But despite this evidence, for the last fifteen years, English policy on access to civil justice has been on a destructive course—a course

that has accelerated under the Coalition Government elected in May 2010. We are now in a situation in which the value of a public civil justice system is being challenged, and access to that system is being inhibited by new procedural and funding measures. Accompanied by a worrying change in civil justice discourse, the Government is promoting private mediation and the withdrawal of the State from civil disputes; the removal of legal aid from most non-criminal issues; and a reduction in resources for the civil courts with fewer full-time judges.

How did we get here?

I trace the root of the current situation to reforms of the civil justice system in the late 1990s which followed a fundamental review of English civil justice by Lord Harry Woolf. Central features of the new civil justice system introduced in 1999 were judicial case management, proportionate procedures, early settlement, and an emphasis on mediation. Although the ostensible intention of the civil justice reforms was to reduce delay, complexity, and cost in the civil justice system, part of the stimulus for the reforms was the need to save money on civil justice at a time when an exponential increase in the cost of criminal justice was putting the justice budget under pressure.

More than a decade on, it is now accepted that the reform program had only limited success and that civil process is as complex and probably more costly than prior to the reforms. But equally worrying is the damage done by some of the rhetoric that accompanied the reform program. Lord Woolf's Review Reports contained deep criticisms of legal process and the legal profession. At the same time, he promoted settlement as the principal objective of civil justice and mediation as a central element in the new civil justice system. Arguably this approach trivialized civil disputes that involve legal rights and entitlements and redefined judicial determination on the merits as a failure of the justice system rather than as its essential purpose.

One could imagine founding a reform program on a positive desire to achieve modern, swift affordable processes that preserve the value of judicial determination on the merits. However, the terms in which civil justice was being described at the time of the Woolf Reforms and the emphasis on diverting cases to mediation—accompanied by anti-lawyer, anti-litigation language—handed to the government, with a stamp of informed authority, justification for withdrawing state resources from the civil courts. If settlement is the principal aim of civil

justice, and private dispute resolution the new way of getting there, what matter if resources for the civil courts are squeezed?

The message that mediation is more desirable than legal determination was enthusiastically adopted by the Government. For a decade, mediation has increasingly been presented not merely as a useful alternative or supplement to public courts but as an equal or, indeed, *preferable* method of handling disputes. Moreover, despite the private nature of ADR, the Government now argues that diverting legal disputes away from the courts and into mediation is a strategy that will increase access to justice—a claim that requires some scrutiny. In my view, mediation has little to do with access to justice. It is neither about access to the courts nor about just outcomes. A successful mediation outcome is a settlement that the parties “can live with.” The outcome of mediation is not about *just* settlement it is *just about settlement*—and private settlement at that. A critical feature of ADR is its privacy. Both the process and outcome of the

procedures are private and generally confidential to the parties, who pay for the process.

Coalition policy and rhetoric

Following its election in 2010, the first clear policy statement from the new Coalition Government was its *Transforming Justice* agenda. Set in the context of the global financial crisis and the need to save £2 billion from the justice budget by 2014–15,

the Government outlined its intention to reform legal aid, to simplify court processes, rationalize the court estate by closing courts, merge the administration of courts and tribunals, and focus policy on alternatives to court. These proposals were accompanied by a new civil justice rhetoric which presented court proceedings as an “unnecessary” drain on public resources, and public funding for civil and family disputes through legal aid as an “incitement to litigate” rather than a means of facilitating access to justice.

Through a series of speeches and consultation documents since 2010, the Coalition Government has established a consistent party line on civil justice which argues that people should solve their own problems rather than turning to the courts; that Britain has become a litigious society; that it is too easy to seek redress through the courts for “perceived injustice”; and that the courts are only intended for “genuine points of law” or threats to liberty or security. We are told that the fiscal climate is forcing us to tighten our belts and that what we need is more mediation, although we are assured that mediation “is not just about cost-cutting and pushing people away from the justice





Diala Shamas, Liman Fellow 2011–13.

system.” Interestingly, this view seems to be reserved only for individual citizens since the Ministry has recently developed a concurrent policy of promoting the British justice system and legal services to international commercial enterprises for the resolution of business disputes.

Cutting out civil legal aid

In November 2010 the Justice Minister announced

his proposals for changes to the provision of legal aid. The document suggested no significant changes to the scope of *criminal* legal aid, but suggested a dramatic cutting-down of the scope of *civil and family* legal aid, losing support for advice and representation for, among other things, employment, immigration, welfare benefits, and housing cases. In presenting these proposals, it was argued that the measures were needed to “stop the encroachment of unnecessary litigation into society.” What is particularly troubling is the way that arguments about mediation are woven seamlessly into the justificatory fabric. In a disingenuous line of argument, the Government seeks to present the removal of civil legal aid as a social benefit rather than what it is—a removal of an important access to justice benefit for the most disadvantaged groups in society. The approach adopted by the Government is to suggest that legal aid is an “incitement to litigate” and a barrier to dispute resolution whereas private mediation promotes harmony and settlement.

Mandatory mediation

In March 2011 the Ministry of Justice published another set of proposals aimed at procedure in the civil courts. The title of the paper, “Solving Disputes,” communicates the current philosophy and approach, which is to represent the cases that come to court for determination on the merits as *problems* in search of *resolution*—the message and language of mediation. The paper refers back to the fundamental premise of the Woolf Reforms: court proceedings are not the best or most appropriate route for civil disputes. The paper argues that cases which settle between issue and trial are a waste of court resources and judicial time. This suggestion conveniently fails to acknowledge that it is only the threat of coercion that brings defendants to the negotiating table.



Perhaps the most worrying aspect of the tone of the paper is its rejection of the language of justice. We are told that the court system needs to “focus more on dispute resolution . . . for the majority of its users, *rather than the loftier ideals of ‘justice’* (my emphasis), that cause many to pursue their cases beyond the point that it is economic for them to do so.” The vision for the new system is one “where many more avail themselves of the opportunities provided by less costly dispute resolution methods, such as mediation—to collaborate rather than litigate.” This is not a “justice” system at all, or at least not one that is concerned with substantive justice. A mandatory mediation system will be imposed so that most cases will be required to go through mediation before being considered for judicial determination.

The end of civil legal aid

Despite a valiant fight by politicians, the legal profession, the advice sector, and even some senior members of the judiciary, the legal aid proposals became law in May 2012, accomplishing the removal of most civil cases from the legal aid system and wreaking what seems to me to be an irrevocable change to our legal aid system and to access to civil justice.

In June 2011 the campaigning organization *Justice* issued an intentionally powerful

press release warning that the combined effect of changes to legal aid together with compulsory mediation will be the “economic cleansing” of the civil courts. The statement argued that in the future “courts and lawyers will be only for the rich. The poor will make do as best they can with no legal aid and cheap, privatised mediation. There will be no equal justice for all—only those with money.”

These concerns are well-founded. As a by-product of economic expedience, the demands of criminal justice and the relentless movement away from public adjudication to private dispute resolution, we are not merely losing the courts and access to them; we are losing the language of justice in relation to a very wide range of issues affecting the lives of citizens. ♣



DeKimberlen Neely, Associate Dean, Office of Undergraduate Studies and Liman Advisor, Spelman College.

Bridging the Justice Gap

Helaine M. Barnett, Chair, Chief Judge's Task Force to Expand Access to Civil Legal Services in New York; President, Legal Services Corporation, 2004–10

I am honored to once again participate in a Liman Colloquium, as I knew, worked with, and greatly admired Arthur Liman. I am pleased to participate in this particular panel on State Subsidized Lawyers for Civil Litigants, as I have devoted my entire career to the issue of civil legal assistance. My perspective on this issue comes from having spent 37 years providing legal services to the indigent at the Legal Aid Society in New York City and six years serving as President of the Legal Services Corporation (LSC).

LSC, and the annual federal appropriation it administers, remains the single largest source of funding for civil legal assistance to the poor. LSC's 135 programs, with over 900 offices across the nation, provide free civil legal assistance to eligible Americans, defined as those below 125% of the poverty line (a family of four can earn no more than \$28,813).¹ As programs funded by federal appropriations, LSC programs are subject to the provisions of the LSC Act and to additional restrictions imposed by Congress on the use of federal funds. These have included restrictions on certain types of cases, such as the restriction on handling most immigration matters.

The most significant challenge in civil legal assistance is the justice gap – the growing numbers of low-income Americans in need of civil legal assistance for matters that are fundamental to their well being, and the resources available to provide the assistance. Federal funding in the form of appropriations to LSC programs have taken a huge hit this year, with fiscal year 2012 appropriations of \$348 million, a drop of 17% from the all-time high 2010 appropriation of \$420 million, and down from \$405 million in fiscal year 2011.² The President's budget request for fiscal year 2013 is \$402 million in LSC funding.³ The budget picture will likely be very challenging for all federal programs in the foreseeable future.

Funding for Interest on Lawyer Trust Accounts (IOLTA) is under strain as well. Due to historically low interest rates, the level of funding for IOLTA programs has reached new lows. According to the American Bar Association (ABA), for the first time in 15 years, nation-wide income from IOLTA has dropped below \$100 million, from a high



of \$371 million in 2007. The funding challenge will remain for at least the next few years, as the Federal Reserve has stated recently that interest rates will remain exceptionally low through 2014.

At the same time, the economic downturn has resulted in significant increases in the numbers of Americans needing civil legal assistance. According to recent census figures, the population of Americans eligible for LSC assistance, or those living at or below 125% of the poverty line, is now over 63 million, or nearly one in five, including 22 million children. Beyond just the number is the fact that those

seeking help from legal aid offices across the country are facing problems that go to the essentials of life, such as health, safety and security.

In New York, we have been fortunate to have the passionate and effective leadership of Chief Judge Jonathan Lippman and his tireless efforts to make progress on civil legal assistance under the most difficult circumstances. Judge Lippman's allocation of \$27.5 million in this year's judiciary budget, \$15 million to be allocated to IOLTA to partially off-set the losses in that area, and \$12.5 million in new money for civil legal services, have been precedent-setting and remarkable in light of the pressures on the New York State budget.⁴ Due to his actions, New York has the highest dollar amount of state funding for civil legal services in the country. The money was awarded to 56 grantees to provide legal assistance to address matters involving the essentials of life, to persons with incomes at or below 200% of the Federal poverty guidelines, including preventative and early intervention legal assistance.

I have been honored to serve as the Chair of the Chief

Judge's Task Force to Expand Access to Civil Legal Services in New York. Through the Task Force, the Chief Judge has established a process around annual hearings in the four judicial departments presided over by the leadership of the judiciary and the legal profession to demonstrate the current unmet need and identify resources necessary to meet that need. California followed New York's model and held four public hearings late last year to examine the



(Left to right): Liman Summer Fellows Robert Hunter (Brown '12), Jessica Zhang (Yale '13), and Jocelyn Eastman (Harvard '13).

fundamental impact of lack of legal services.

Last year, 2.3 million persons appeared in New York courts without legal representation. In the 2011 Report of the Task Force, we again made the case that the continuing unmet need for civil legal assistance has a negative impact not just on vulnerable individuals but on the functioning of the courts, government and business. We also emphasized new cost-saving analyses to demonstrate that the provision of civil legal services can save the State \$85 million by preventing domestic violence and \$116 million by preventing evictions and homelessness. The Task Force recommended to the Chief Judge that \$25 million in civil legal services funding in addition to the \$15 million IOLTA replacement funding be included in the judiciary budget for fiscal year 2012–2013, with which the Chief Judge agreed and we are awaiting final adoption by the Legislature and Governor of the budget.⁵

While funding will always be a critical issue, it is not a stand-alone solution. The 2011 Task Force Report this year recommended initiatives to simplify legal proceedings, enhance client service delivery and reduce the cost of providing civil legal services. Initiatives include suggestions to simplify forms and procedures, alternative conflict resolution initiatives, and



Ester Murdukhayeva, YLS 2012 and Liman Student Co-Director 2011–12.

ways to achieve greater efficiencies through collaboration among providers and strategic partnerships with non-legal entities, such as medical-legal partnerships.

The Task Force has just begun its third year and will be focusing, among other issues, on developing recommendations to increase pro bono services and contributions and increase law school involvement in helping to close the justice gap. In addition, the Chief Judge will continue to preside over four hearings throughout the State to document the continuing unmet civil legal needs.

The effort to provide civil legal assistance and true equal access to justice requires partnerships involving everyone with a role: federal, state and local governments, private funders, the bar, pro bono programs, law schools, the courts, and the legal services providers, as well as the business community. What we learned from the New York experience is the importance of the leadership of the Chief Judge and the critical role the Chief Judge can play in this effort. Gatherings like this make an important contribution to finding ways in which we can all be more effective in our efforts to ensure that justice is not just for some, but truly for all. ♣

Advocating for the Most Vulnerable Among the Vulnerable

Jorge L. Barón, Executive Director, Northwest Immigrant Rights Project, Seattle, WA; Liman Fellow 2005–06



“Sir, in order to proceed with your case, I need to know, where you are from?”

(Through an interpreter): “I am from Mars, your honor.”

“Okay, well, where were you born?”

“In Mars, judge.”

“Sir, I need to know if you were born outside the United States.”

“I was, your honor, I was born in Mars.”

Several years ago, I was witness to this exchange, which took place in an immigration detention facility, the Northwest Detention Center (NWDC), in Tacoma, Washington. An immigration judge was conducting a deportation hearing (known formally as a “removal hearing”) for one of the thousands of individuals who are processed for deportation through the facility. Like the vast majority of individuals detained at NWDC and other immigration detention centers

around the country, this person was not represented by an attorney, because individuals facing deportation hearings are not entitled to appointed counsel if they cannot afford one. But the individual facing the court without the assistance of counsel on this day faced an additional barrier: he clearly suffered from a significant mental illness. Although it is hard to appreciate from a transcript, everyone in the courtroom understood that the individual being questioned had a mental disability and honestly believed he had been born in Mars.

Anyone facing deportation and having to appear before the immigration court without an attorney faces a nearly insurmountable challenge in trying to navigate an adversarial system without help. Lindsay Nash, a Liman Fellow in 2010–11, worked on research that quantified the disadvantages of unrepresented immigrants in the deportation process.¹ The study found that an individual who was represented by counsel and was not detained was able to successfully contest deportation 74% of the time. By contrast, an individual who was detained and was not represented by an attorney reached such a result only 3% of the time.

The differences in outcomes in the *average* case is itself staggering, but consider what the odds might be for someone

with serious mental disabilities, like the individual whom I saw being questioned by the immigration judge. He of course faced the “normal” challenges confronted by an unrepresented individual facing deportation: language and cultural barriers and lack of knowledge about the substance and procedure governing immigration proceedings. But this individual also had to contend with the fact that his disability meant that he lacked the ability to comprehend the reality about himself or his circumstances.

It does not take a law degree to understand that someone with such a disability is not able to represent himself in immigration court, and yet this is what our current immigration system expects: even individuals with severe mental illness and who have been found to be incompetent in a criminal proceeding are not entitled to appointed representation in immigration court. They are left to operate in the same fiction as the rest of those facing deportation: that they will be able to navigate the system themselves. This notion might strike many as ludicrous, but it’s the reality that plays out at immigration detention facilities throughout the country day in and day out.

At the time that I witnessed the exchange between the immigration judge and the detainee who honestly believed he was born in Mars due to his mental illness, I was working as a staff attorney at Northwest Immigrant Rights Project (NWIRP), a nonprofit organization that provides legal services to low-income immigrants and refugees in Washington State. I now serve as the executive director of NWIRP. We were well aware at the time about the particular crisis that was facing this very vulnerable group in immigration detention. There were almost always two outcomes in these types of cases: either the individual was ordered deported without any opportunity to realistically pursue a defense to removal or the individual’s hearings would continue to be postponed by immigration judges who recognized they could not enter a legitimate deportation order in such cases. Many individuals falling into the second group could remain detained for years without anyone noticing.

For many years, our organization has been trying to respond to the needs of individuals with mental disabilities by representing them directly in immigration court and by trying to connect them with pro bono attorneys who might be willing to assist them. But we and other legal services providers have never come even close to meeting the need for representation for this population. In fact, the gap between services and need

has only grown larger as the immigration detention system has expanded and the resources available to legal service providers have shrunk. We have therefore supplemented our individual representation with policy advocacy to bring this issue to the attention of federal officials. We have asked them to issue regulations to create protections for individuals with mental disabilities, but there has been no effective response by the federal government.



(Left to right): Rebecca Engel, Staff Attorney with New York Civil Liberties Union and Liman Fellow 2009–10, Margot Mendelson, Associate at Rosen, Bien & Galvan and Liman Fellow 2009–10, and Tania Galloni, Managing Attorney of the Florida Office for the Southern Poverty Law Center and Liman Fellow 2002–03.

Faced with the prospect of the continuation of the current, untenable situation, we joined the ACLU, Public Counsel, and Mental Health Advocacy Services Inc., partnering with the law firm of Sullivan & Cromwell in filing a class action against the federal government, *Franco-Gonzales, et al. v. Holder, et al.*, CV 10-02211. The lawsuit asks the court to require the government to do two things: first, create a mechanism to identify individuals who cannot represent themselves

as a result of a mental disability; and second, take specific steps to protect the rights of those individuals identified as falling into the protected category. One of the key protections would be the provision of a qualified legal representative for those who are identified as unable to represent themselves.

Given that these measures make common sense, it is disappointing that we have been forced to litigate. Nonetheless, I am proud of the role we are playing in this litigation because I see it as an example of public interest lawyering at its best: advocating on behalf of those who are at the greatest disadvantage in asserting their rights through the political and legal systems. ♣



(Left to right): Liman Fellows Emily Washington (2011–12), Robby Braun (2011–12), and Dan Mullkoff (2011–13).

Alternative Courts and Alternatives to Courts



(Left to right): Judith Resnik; Tom Tyler, Professor of Law and Psychology, Yale Law School; The Honorable Randall T. Shepard, Chief Justice, Indiana Supreme Court; Gillian Hadfield, Richard L. and Antoinette Kirtland Professor of Law and Professor of Economics, Univ. of Southern California Gould School of Law; William C. Vickrey, Administrative Director of the Courts, State of California (ret.); Lisa Daugaard, Deputy Director, The Defender Association and Liman Fellow 1998–99; and Allegra McLeod, Assistant Professor of Law, Georgetown University Law Center and Liman Fellow 2008–09.

The final panel considered how jurisdictions (in and outside of the United States) are exploring alternatives to civil and criminal litigation. Mediation, arbitration, and settlement are encouraged, and many advocate “problem-solving courts” or specialized courts, with names such as homeless courts, drug courts, reentry courts, veterans’ courts, and girls’ courts. Trade-offs abound, as

some of these alternatives are not voluntary, some do not permit lawyer participation, and some are less public than adjudication. Discussants focused on the experimentation, the successes, the risks, and the relationship of these alternatives to the roles of judges and to the constitutional, statutory, and common law rights of litigants.

The Numbers Don’t Lie: Why It’s Time for Lawyers and Judges to Reduce the Regulatory Barriers to the Provision of Legal Help

Gillian K. Hadfield, Richard L. and Antoinette Kirtland Professor of Law and Professor of Economics, USC Gould School of Law



The escalating crisis in our courts is deeply rooted in a fundamental fact: the U.S. has an excessively restrictive approach to authorizing individuals to provide legal help. Solving the problem of access to justice is simply not possible unless we relax these restrictions to allow a much broader range of individuals and organizations to provide

legal help. This can help reduce the burden on courts directly—through ex ante legal advice and assistance that keep people out of trouble and limit disputes in the first place. And it can help reduce the burdens arising from unrepresented and poorly represented parties if and when they do end up in court. The profession’s emphasis on expanding pro bono and legal aid efforts is welcome, but the hard truth is that the numbers don’t add up: there is no way to meet the gaping demand for legal services with free and subsidized help from lawyers. It’s time to include on the agenda for court reform substantial revision to unauthorized practice of law rules and other professional regulations such as fee-sharing rules.

First, here are some macro numbers about how legal

demand and supply in the U.S. compares to other countries. The U.S. has a much higher per capita number of cases (civil and criminal) than other countries: roughly speaking, 150 per 1,000 citizens in the U.S. compared with 60 in the U.K., 45 in France, 30 in Germany, 50 in Hungary, 60 in Poland, and 90 in the Netherlands. The much higher caseload in the U.S., however, is not matched with much higher resources in terms of the level of public expenditures and expenditures for legal aid, or the numbers of judges and even (surprise) lawyers.

If we look not at per capita but per case measures, the U.S. is woefully under-resourced to handle all the cases that go through the court system. For example, public expenditure per case in the U.S. is well below the levels in Germany, the U.K., the Netherlands and France; we're on a par with Hungary and beat out only Poland in this list. Legal aid expenditures per case are below all the other countries on the list except Hungary and Poland. We have far fewer judges per capita than any country on this list.

As for lawyers—the one thing everyone thinks we're swimming in—the U.S. has half of the lawyers per capita of the U.K. and Germany. And, the numbers for the European countries are understated—because lawyers working for corporations and governments are not counted as lawyers (members of the bar) and non-lawyers (in the U.K. for example) are also available to assist people in legal matters, both in and out of court. In short, no country in the world is trying to do what we're trying to do with so little public money, so few judges, and so little legal assistance.

Now for a set of numbers at the individual level: when Americans face a problem—with housing, employment, consumer finance, family, etc.—they are far less likely than people in other countries to get help dealing with the problem.

Based on the ABA Legal Needs study from 1995, Americans seek third-party assistance less often than citizens in the U.K., Scotland or Japan. The ABA data suggest that contacts with a lawyer are comparable, although subsequent state-based studies suggest that the numbers the ABA reports—21% for the poor and 28% for middle income individuals in the United States—is really probably closer to about 15%. The real difference comes with assistance from other legal providers (such as court personnel) and non-lawyers. The impact of this

Selected Data on Legal Resources and Legal Needs

Country	Public Spend per capita	Public Spend per case	Legal Aid per capita	Legal aid per case	Judges per 100,000 persons	Judges per 100,000 cases	Lawyers per 100,000 persons	Lawyers per 100,000 cases
U.S.	\$157	\$1,049	\$13	\$86	10	67	387	2594
France	\$73	\$1,665	\$6	\$148	12	273	76	1731
Germany	\$143	\$5,031	\$9	\$322	24	862	168	5909
Hungary	\$54	\$1,048	\$0	\$0	28	550	98	1909
Netherlands	\$132	\$1,507	\$29	\$325	13	144	92	1042
Poland	\$53	\$645	\$0	\$9	26	313	68	826
U.K. (England & Wales)	\$133	\$2,270	\$76	\$1,294	7	120	267	4545

Country	No Steps Taken	Sought 3rd Party Assistance	Contact with Lawyer/Legal Professional	Contact with other Legal Advisor/Institution	Contacted other 3rd Party
U.S. Poor	38%	38%	21%	8%	9%
U.S. Middle Income	26%	51%	28%	12%	11%
England & Wales	%	60%	27%	——— 33% ———	
Japan	25%	61%	15%	21%	34%
Scotland	3%	65%	29%	——— 36% ———	
Slovakia	18%	44%	30%	14%	No data
Netherlands	10%	44%	14%	5%	25%

Source: Gillian K. Hadfield "Higher Demand, Lower Supply? A Comparative Assessment of the Legal Resource Landscape for Ordinary Americans," 37 *Fordham Urban L.J.* 129 (2010).

differential in third-party assistance in managing problems shows up in a stark statistic: 38% of the U.S. poor and 26% of middle-income Americans do nothing in response to a problem. Only Japan is comparable in this "lumping-it" rate. (Again, the more recent state data suggest that the numbers for the



(Front row, left to right): Deborah Leff, Deputy Counsel for Access to Justice, U.S. Department of Justice and, Steve Bright, Harvey Karp Visiting Lecturer in Law, Yale Law School and founder, Southern Center for Human Rights.

U.S. are in fact even worse: in Connecticut, 53% of individuals reported they do nothing, while 45% in Massachusetts and 41% in New Jersey similarly reported they do not seek assistance.)

What happens when people “lump” their problems? One result, of course, is that in some cases people simply do not enjoy the rights, entitlements, and protections the law affords them. But I suspect there is another impact: they are more likely to end up with problems that land in the courts—maybe not even today’s problem, but a future problem. A financial problem today can be a family problem tomorrow. Difficulties in housing produce difficulties in employment that breed problems in finances. And so on. In this way, limited legal assistance is probably one cause of the high volume of cases that end up in U.S. courts.

The ABA data on legal needs only capture a small part of the reason for the high volume of cases in U.S. courts. This and other studies ask people about the problems they face—losing a job, a home, access to a child, credit, and so on. A major determinant of whether people face such problems is the availability of legal assistance and advice long before problems arise: advice before the job is lost, the mortgage is signed, the family separates, or the credit card is issued. Americans have effectively no legal assistance at these stages as they navigate a law-thick environment. Imagine a corporation that had no access to legal advice before it signed contracts, shipped products, entered into a merger with a competitor, or laid off employees. We’d certainly expect such a company to end up in hot water more often—with its contracting partners, customers, unions, and regulatory authorities.

Which brings me back to the unauthorized practice of law and other professional regulations. The U.S. also stands out

starkly for the rigid restrictions it places on who may provide legal help—before or after legal problems arise and land in our over-burdened courts. In the U.S., it is only JD-trained, state-bar licensed lawyers may provide legal assistance. This cuts off a whole range of alternatives that go well beyond what courts are experimenting with now: online or on-call legal advice providers, licensed paralegals in courts who provide direct assistance to pro se litigants, document preparers who do more than act as a scrivener by assisting in the choice of form and how to fill it out, data-rich services that review mortgage documents at low cost, and so on. These are alternatives that courts can and should be exploring vigorously.

There is some good news here for our over-burdened state court systems. In most cases, the power to regulate the market for legal services rests, ultimately, in the hands of our state supreme courts. Bar associations may draft rules of professional conduct, but without the endorsement of state supreme courts, these rules cannot exclude service-providers who are not state-licensed JDs from the market. By endorsing and enforcing these rules, state supreme courts are, unfortunately, playing a key role in the cramped set of options available to people with legal needs. Sensible changes in these rules could easily improve the situation: allowing licensed paralegals and document assistants, for example, to operate

independently of expensive JD-supervision, or allowing both profit and non-profit entities to deliver JD services in much more efficient ways—online, through retail settings, and so on.

Opening up these options will be critical to any significant change in our escalating crisis in access to justice. Because here is another set of sobering numbers: just 1% of all lawyers in the U.S. work in either legal aid or public defender work. No more than 2% of all legal effort is done pro bono. The cost of providing just one more hour of legal help to each American family facing a legal problem in a given year at the average hourly rate for a solo or small-firm practitioner would be over \$20 billion. As important as it is to expand legal

aid, public expenditures on courts, and pro bono, the numbers don’t lie: there is simply no way to make a real difference in people’s legal lives with these tools. We need fundamental change in our approach to the regulation of practice to truly deliver on our professional obligation to structure a just, accessible, and effective legal system. ♦



Juan Martinez Hill, Brown Liman Summer Fellow 2011.

Renewing the Conversation: More than More of the Same

Rebecca L. Sandefur, Assistant Professor of Sociology, University of Illinois; Senior Research Fellow, American Bar Foundation



In 2010, the American Bar Foundation established a new research initiative, “Pursuing Law’s Promise,” dedicated to independent, rigorous scholarly research on pressing contemporary questions about access to justice. I founded and lead this initiative. “Pursuing Law’s Promise” begins to fill an important gap, as little independent empirical research currently explores access to civil justice.

Typically, the conversation about access to justice has focused on scarcity and the need for more resources: more public funding, more *pro bono* hours, more private donations from individuals, law firms, and foundations. This need is beyond dispute. At the same time, another key challenge in providing any kind of public good is considering the best uses of existing resources. Recognizing this, we decided to take a different approach, asking *how* rather than *how much*.

In answer to this question, the *Access Across America* report mapped state-by-state and for the nation as a whole the infrastructure of access to civil justice, asking how services are delivered, accessed, funded, coordinated, and regulated. The *Access* report provides a baseline account of what is out there today. The findings highlight the need for a new conversation about access to justice.

Among the most striking findings is the absence of coordination. There is no “access to justice system” or “civil legal assistance system” here: not at the national level, not at the level of states, and often not even within specific communities. This finding has significant implications for the public’s ability to use its public legal system and to find remedies for its civil justice problems.

Currently, civil legal assistance is provided, funded, and organized in a way that creates arbitrary distributions of services both across states and within them. The lack of coordination creates local redundancies in the services that are offered and substantive gaps in the services available. Providers have few opportunities to learn about service innovations, emerging best practices, or even simply what other providers are doing in their own state or community. A lack of coordination means that clients may be referred from provider to provider, eventually giving up in their search for help. Or, clients turned away may

simply not be referred at all, because the referring provider may not have access to information about where to send them. Little coordination also means little scope for giving service providers with information about what people in specific communities or groups actually need. From the perspective of the public – the clients of civil legal assistance – the resources and services available to assist them are a function not of their needs, but of where they happen to live.

The current fragmentation in civil legal assistance persists as a legacy of an unfortunate history. The many different programs and funding sources that have developed over the past 40 years did so in part as a creative response to attacks on the Legal Services Corporation and its grantees. Dedicated providers acted on their own to sustain or develop services in specific places. The diverse landscape of civil legal assistance that we see today is the result of many independent acts of creativity and resilience.

This kind of fragmentation is of course not unique to the legal field. It is characteristic of an “American style” of providing access to a wide range of essential goods. For example, not only access to civil justice, but health care, emergency shelter, and supplemental nutrition are delivered to the public in this way. The fact that fragmentation is typical of how the United States provides access to important goods does not mean that the model is a good one – or a bad one, for that matter. The fact that it is typical simply makes it all the more likely to be unexamined, precisely because it is so very common.

The *Access* report provides an overview of what exists in

each state today. This information has not been widely available or generally known. In my conversations about the report, it has been striking to me how often stakeholders have not known what kinds of programs currently exist in their states. The lack of information does not reflect a lack of care or interest; rather, it reflects the fact that stakeholders often have no way to find out this information except by chance. Devising reliable, effective means for basic information transfer among stakeholders is an important topic for the new conversation.

Providers and funders need to work together to develop mechanisms for coordinating the many services that help the public to access justice. There are many different potential models for coordination, and there is no reason to think that there is one best model that every state should use. Among some providers, there

is resistance to coordinating. This resistance is another legacy of civil legal aid’s troubled past, as providers understandably want to protect their autonomy. Open discussion of these concerns is essential for the new conversation.



Paige Herwig, Senior Counsel, U.S. Department of Justice, Office of Legal Policy and Liman Fellow 2006–07.

Few means currently exist to facilitate all these independent creative actors in coordinating with one another. One possible agent of coordination is state access to justice commissions. These commissions typically do not have powers of the purse or command, but there are a variety of ways they can assist coordination. For example, in consultation with stakeholders, a state commission could set a goal that every county or area in its state has at least one provider serving each of a set of basic needs, such as those identified by the ABA in its 2006



Continuing the conversation over lunch were (Left to right): Adrienna Wong, law clerk for the Honorable A. Wallace Tashima of the Ninth Circuit of the U.S. Court of Appeals and Liman Fellow 2010–11; Susan Hazeldean, Associate Clinical Professor, Cornell Law School and Liman Fellow 2001–02; Tianna Terry, Staff Attorney, D.C. Legal Aid Society and Liman Fellow 2008–09.

call for access to counsel in civil matters. The *how* of achieving this—the specific, concrete arrangements that ensure that every area has at least some coverage for the range of basic needs—might well be different in different places. The people best placed to devise these specific arrangements are the people who understand local conditions.

If we were to decide that it is important to ensure that every county or area has services for some core set of needs, achieving

this would require that at least some providers reconsider their service priorities and coordinate their activities with other providers. It would also likely require that at least some funders be educated about the public's civil legal needs. Many funders' priorities are developed in consultation with other stakeholders. We should be thinking about ways to facilitate more of these provider-funder consultations around access to justice issues.

As Gillian Hadfield demonstrated in her presentation at this year's

Liman conference, funding lawyers to assist every American with civil justice problems—even only those people currently eligible for civil legal assistance—would be insurmountably expensive under current institutional arrangements. To do more and to do it better, we will have to devise ways to do more with what we have. Meaningful, effective coordination in service funding and provision is an essential component of doing more. It's time for a new conversation. ♣

Endnotes to Essays

The Honorable Wallace B. Jefferson, Pages 10–12

- 1 Cited in Texas Appleseed, *Texas' School-to-Prison Pipeline, Dropout to Incarceration: The Impact of School Discipline and Zero Tolerance* (2007), available at <http://www.texasappleseed.net/pdf/Pipeline%20Report.pdf>.
- 2 David Dobbs, *The Beautiful Teen Brain*, National Geographic, Oct. 2011.
- 3 Wisconsin Council on Children & Families, *Rethinking the Juvenile in Juvenile Justice: Implications of Adolescent Brain Development on the Juvenile Justice System* 4, 7–9, 12, and 15 (2010), available at http://www.wccf.org/pdf/rethinkingjuv_jjsrpt.pdf.
- 4 Texas Appleseed, *Texas' School-to-Prison Pipeline, Ticketing, Arrest & Use of Force in Schools: How the Myth of the "Blackboard Jungle" Reshaped School Disciplinary Policy* 1, 18, 76 (2010), available at http://www.texasappleseed.net/images/stories/reports/Ticketing_Booklet_web.pdf.
- 5 Donna St. George, *Texas Students Sent from Classroom to Courtroom*, Wash. Post, Aug. 21, 2011.
- 6 Council of State Governments Justice Center and the Public Policy Research Institute, Texas A&M University, *Breaking Schools' Rules: A Statewide Study of How School Discipline Relates to Students' Success and Juvenile Justice Involvement* (2011), available at <http://justicecenter.csg.org/resources/juveniles>.
- 7 See, e.g., Tex. Educ. Code §§ 37.001(a)(4), 37.124(d).

The Honorable Sue Bell Cobb, Pages 12–14

- 1 This essay was adapted from Chief Justice Cobb's article entitled "The Power of Fixing People Rather than Filling Prisons", 2011 Book of the States, published by the Council of State Governments.

Lisa Daugaard & Isabel Bussarakum, Pages 15–17

- 1 For more information about LEAD, please visit <http://leadingcounty.org>.

Anglea Ward, Pages 17–20

- 1 France, Germany, Belgium, the Netherlands, Luxembourg, and Italy.
- 2 See the Human Rights Act (1998).
- 3 *Airey v. Ireland*, 32 Eur Ct HR Ser A (1979): [1979] 2 E.H.R.R. 305.
- 4 *Exceptions to the Exhaustion of Domestic Remedies*, Advisory Opinion OC 11/90 of 10 August 1990, 11 Inter-Am. Ct H.R. (Ser.A) (1990).

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- 1 *What is LSC?*, Legal Servs. Corp. (last visited April 1, 2012), <http://www.lsc.gov/about/what-is-lsc>; LSC Financial Eligibility, 45 C.F.R. §1611.3(2011).
- 2 Pub. L. No. 112-55, 125 Stat. 552, 629 (2011); Pub. L. No. 112-10, 125 Stat. 38, 199 (2011); Pub. L. No. 111-117, 123 Stat. 3034, 3148 (2009).
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- 4 *Task Force to Expand Access to Civil Legal Servs. in N.Y., Report to the Chief Judge of the State of New York* 5 (2011), available at http://www.nycourts.gov/ip/access-civil-legal-services/PDF/CLS-2011TaskForceREPORT_web.pdf
- 5 Subsequent to these remarks, on March 30, 2012, the Judiciary Budget was approved intact, which included \$40 million in civil legal services funding for fiscal year 2012-13, \$15 million for IOLA replacement funding and \$25 million in judiciary civil legal services funding.

Jorge L. Barón, Pages 24–25

- 1 *New York Immigrant Representation Study Report: Part 1, Accessing Justice: The Availability and Adequacy of Counsel in Removal Proceedings*, 33 Cardozo L. Rev. 357 (2011), available at <http://www.cardozolawreview.com/content/33-2/NYIRS%20Report.33-2.pdf>.

Fifteen Years of Fellowship: Reflections from Alison Hirschel (Liman 1997–98) and Jessica Sager (Liman 1999–2000)



Jessica Sager

Five years ago, preparing for the Liman conference, I wrote about how hard, yet how exciting, it had been to create *All Our Kin* and how nice, yet slightly dull, it was to run a “grown-up” organization. How things change! For here I am, writing this reflection in the middle of what feels like a start-up all over again. In the words of one staff member: “It’s worse, because this time people are watching. Before, at least nobody cared.”

For ten years nobody cared very much about what *All Our Kin* did. We carried on, training parents and providers, helping women build small businesses, trying to ensure that children were receiving the high-quality early learning experiences they deserved. We spoke passionately about the importance of early care and education to those few people who cared, and we existed in a tiny, marginalized corner.

If early care and education is the gutter of the K-12 system, family child care is the gutter of the early

care and education system. No one, besides us and a few loyal funders and friends, really believed that the women with whom we worked were worth the investment we put into them. And then, the economy changed. All of a sudden, *All Our Kin* wasn’t an early care and education program; it was a workforce development program, creating microbusinesses in low-income communities, and giving parents the support they needed to work.

Suddenly, communities around the state wanted to learn how to do what we do, and other states wanted to hear more about our model. We have so much opportunity spread before us. At the same time, we face the same constraints we always have: limited money, talent, and time.

Our core belief remains the same: children, regardless of where they live, their skin color, or how much money their parents earn, deserve to begin their lives with all of the advantages, all of the tools, and all of the experiences that we, as a society, are capable of giving them. Otherwise, we all suffer—not only today, when parents agonize over their children’s inadequate care, not only tomorrow when children are unready for school, but permanently—in our vision of ourselves as a nation committed to equity and justice for all. We still have so far to go. I realize it now: we are just getting started.

Jessica Sager is the co-founder and executive director of All Our Kin, Inc., a New Haven-based nonprofit organization that trains, supports, and sustains community child-care providers, begun in 1999 when Jessica was a Liman Fellow. Through All Our Kin’s programs, child-care professionals succeed as business owners; working

parents find stable, high-quality care for their children; and children get an educational foundation that lays the groundwork for achievement in school and beyond. Jessica graduated from Barnard College and Yale Law School.



Alison Hirschel

When I read Jessica Sager’s inspiring reflection about why she feels, more than a decade into her work, that she is starting all over again, I realized that I, too, am always starting over. It’s the frustration, the joy, and the intrigue of our work.

The vulnerable elders I seek to empower and protect continue to experience harrowing abuse and neglect in long-term care, wrenching loss of control over every aspect of their lives in guardianship proceedings, and a heartbreaking and sometimes life-threatening inability to navigate the complexities of the public benefits and health care systems. While this burgeoning population’s challenges remain the same, the context is always changing. Different administrations, programs, and innovations, advocacy

(continued on next page)

gains and losses, new colleagues and networks, and a host of other factors mean that I am always learning new things, trying new strategies, creating new connections and, indeed, even after 27 years, beginning again.

We have made progress, but it is neither linear nor predictable, especially as my own goals have evolved. For the first fifteen years of my career, I focused primarily on improving the quality of care and life and promoting the rights of nursing home residents. But I eventually had an epiphany that in all those years, hardly any of my hundreds of clients ever wanted to be in a nursing home in the first place. They wanted to receive the services and support they needed in their own homes, a goal the disability rights community understood long before aging advocates caught up, and one that the Americans with Disabilities Act and the *Olmstead* Supreme Court case placed well within our reach.

For a while, we made great strides in “rebalancing” long-term care to ensure more choice, quality, and access to home and community-based care. We believed that our moment had finally come. But with the economic collapse that hit Michigan particularly hard, term limits, squabbling among the formerly united aging and disability rights advocates, and fatigue at the grassroots level, we saw many of our victories diminished and had few new successes to celebrate.

We regrouped, as we always do. The Affordable Care Act brings new innovations and possibilities. The budget crisis creates opportunities as well as barriers. The new governor responds to different approaches. And a variety of new colleagues on the national level continue to widen my horizons and help me to explore new strategies and approaches. All of a sudden, the challenges are once again engaging and absorbing. With a little more wisdom (but, admittedly, a little

less energy) and a chorus of poignant client stories in my head, I too am starting over.

Alison Hirschel was the first Liman Fellow in 1997-98; she spent a year at the Michigan Protection and Advocacy Service helping low-income elders in long-term care facilities. She is now the elder law attorney at the Michigan Poverty Law Program and the director of the Michigan Elder Justice Initiative. Alison also serves several national and state groups, including Life Long Justice, a national policy and advocacy organization that seeks to address elder mistreatment, and the American Bar Association Commission on Law and Aging. Since 1998, Alison has taught elder law at the University of Michigan Law School. Alison graduated from the University of Michigan and Yale Law School, and she clerked for the Hon. Joseph S. Lord III in the U.S. District Court for the Eastern District of Pennsylvania.

Please join us at the Sixteenth Annual Arthur Liman Colloquium

Navigating Boundaries: The Interplay of Immigration and Criminal Justice

April 4–5, 2013 • Yale Law School

The Sixteenth Annual Liman Colloquium, to be held on April 4–5, 2013, will consider the interplay between criminal justice and immigration law. The structures of criminalization and of the regulation of migration raise parallel questions: the identification of individuals as defendants or deportees; the degree to which law enforcement relies on profiling of individuals; whether persons caught in either system receive state-funded counsel, translators, and other forms of support; the conditions of detention; and the consequences – collateral or otherwise – of detention and of findings of either guilt or removability.

For updates on the conference, please visit www.law.yale.edu/liman or contact Hope Metcalf at hope.metcalf@yale.edu or 203.432.9404

2011–12 Liman Fellows: An Update



(Left to right): Liman Director Hope Metcalf with 2011–12 Liman Fellows Elizabeth Compa, Isabel Bussarakum, Seth Wayne, Diala Shamas, Robert Braun, Daniel Mullkoff, and Emily Washington (not pictured, Lindsay Nash).

The 2011–12 Liman Fellows pursued projects relating to police misconduct, mental health, the rights of low-income renters, prison system management, and the use of scientific evidence in criminal proceedings. Working in Seattle, New Orleans, Atlanta, and New York, they confronted many of the difficulties discussed at the Colloquium. In response, they employed a wide array of skills and strategies, such as pairing legal services with social services, outreach and documentation, coalition-building, engagement with scientific experts, impact litigation, and institutional reform.

Several Fellows focused on the interrelated problems of criminal justice and poverty in New Orleans.

Emily Washington worked at the Louisiana Capital Assistance Center—where she is now a staff attorney—to address how scientific evidence is used in criminal proceedings in Louisiana. Emily investigated the methods currently used by state forensic laboratories and consulted on capital trials to challenge the misuse of forensic evidence.

Seth Wayne is now a staff attorney at the Orleans Public Defenders (OPD), where he also spent his fellowship. Seth helped to establish a mental health unit and represented people with mental health and developmental problems who

are facing criminal charges or who are incarcerated.

Robby Braun spent his fellowship year at Southeast Louisiana Legal Services where he represented low-income renters. Robby used state and federal housing laws to protect residents of public housing from wrongful evictions and fraud. He also provided legal services for low-income renters who faced benefits terminations due to pending criminal changes. Robby is clerking in 2012–13 for the Honorable Lee H. Rosenthal of the U.S. District Court for the Southern District of Texas, and, in 2013–14, for the Honorable Carolyn Dineen King of the United States Court of Appeals for the Fifth Circuit.

Elizabeth Compa joined the Southern Center for Human Rights to address the effects of for-profit companies on Georgia's criminal justice and prison systems. She investigated how funds are allocated, the profits garnered, and the incentives created when private sector companies supervise probation, and what kinds of interventions can ameliorate the provision of services. In September 2012, Beth joined the Capital Appeals Project in New Orleans, where she is helping to launch a project on prison conditions in Louisiana.

Four current Liman Fellows have received funding to extend their

fellowships. The extensions are possible thanks to the Vital Projects Fund and because each of the Fellows' host programs have provided matching funds.

Isabel Bussarakum works at The Defender Association in Seattle, Washington. Under the supervision of Lisa Daugaard (Liman Fellow 1998–99), Isabel represents people in a special pilot program, discussed on p. 15, diverting low-level drug and prostitution offenders to enable them to receive community-based services in lieu of criminal charges. In addition, she addresses civil problems related to interaction with the criminal justice system, such as maintaining drivers' licenses and responding to requests for child support.

Daniel Mullkoff's fellowship is at the New York Civil Liberties Union, where he joins a group addressing the New York City Police Department's "stop-and-frisk" practices. Dan is involved in a high-profile class action challenging police stops in and around private apartment buildings.

Diala Shamas is also focusing on profiling and policing in New York City. She continues her fellowship at Creating Law Enforcement Accountability and Responsibility (CLEAR), a project based at CUNY School of Law. Diala serves Muslim, Arab, South-Asian (MASA) and other communities in New York City that are affected by national security and counterterrorism law enforcement policies and practices. Diala joins a coalition to document the surveillance of Muslim communities and to respond to problems of profiling.

Lindsay Nash, after clerking for the Honorable Ellen Segal Huvelle of the District Court for the District of Columbia, has returned to New York for a second fellowship year at the Cardozo Immigration Justice Clinic. During her first year, Lindsay helped to produce a report documenting immigrants' need for lawyers. This year, Lindsay is representing noncitizens with criminal convictions and working to implement a pilot program assigning counsel to individuals facing deportation.

Welcoming the Incoming Liman Law Fellows

Nine Yale Law School graduates received funding for 2012-13. They join the four continuing Liman Fellows, resulting in a total of thirteen—the largest class since the Program’s inception in 1997. Working in Alaska, California, Connecticut, Maryland, Minnesota, and New York, the 2012-13 Fellows are representing non-citizen defendants in criminal and immigration proceedings, enforcing state housing laws that protect low-income renters, investigating detention conditions, assisting immigrant children in foster care, working against religious and racial profiling, and safeguarding the subsistence rights of indigenous Alaskans.

In total, the Liman Program has awarded fellowships to 86 Yale Law School graduates, as well as to hundreds of undergraduates from Barnard, Brown, Harvard, Princeton, Spelman, and Yale. Below are brief descriptions of the incoming Fellows and their projects.

Chesa Boudin is spending his fellowship year at the San Francisco Public Defender’s Office (SF PDO). Chesa’s focus is on the intersection between criminal defense work and immigration removal defense, and he is developing in-house resources for the SF PDO to provide direct representation on misdemeanor cases and to support the efforts of immigration removal counsel working with SF PDO clients. A 2011 graduate of Yale Law School, Chesa clerked for the Honorable Margaret McKeown on the Court of Appeals for the Ninth Circuit. Before law school, Chesa was a Rhodes Scholar at Oxford and graduated *summa cum laude* from Yale College. He is the author of books and articles on topics ranging from Latin

American politics to the rights of children with incarcerated parents.

Forrest Dunbar, who received a joint JD/MPP from the Harvard Kennedy School and Yale Law School in 2012, has returned to his home state to join the Alaskan Office of Public Advocacy. Forrest is researching the impact of sentencing laws on state finances and is exploring sentencing reforms for low-level, non-violent drug offenses. He also represents clients facing low-level, drug-related criminal charges. Forrest graduated *summa cum laude* from American University, after which he was a Truman Scholar and served as a Peace Corps Volunteer in Kazakhstan.

Romy Ganschow works at Brooklyn Legal Services with tenant organizers and tenant associations to protect low-income tenants’ rights to safe and quality affordable housing. Romy focuses on affirmative lawsuits to enforce housing code standards against private landlords whose buildings become uninhabitable as part of a broader effort to preserve affordable housing stock and prevent displacement of low-income residents. Romy, a member of the Yale Law School Class of 2012, graduated with High Honors from U.C. Berkeley with a B.A. in Anthropology. Prior to law school, Romy worked at the ACLU of Northern California, where she assisted attorneys seeking criminal justice reforms and an end to California’s death penalty.



(Left to right): Liman Fellows Olivia Sinaiko (2012–13), Seth Atkinson (2011–12), and Josh Berman (2010–11).

Edward McCarthy has joined the New Haven branch of the Connecticut Office of the Public Defender to help create a program for non-citizen clients. Edward advises public defenders regarding the immigration consequences of their clients’ plea agreements and assists clients in understanding the choices before them. Edward also provides training programs to public defenders on the intersections between criminal and immigration law. A member of the Yale Law School class of 2011, Edward received his B.A. in History with Distinction from Yale College. Following his second year of law school, Edward took a leave of absence to work in Mexico with an organization that provides legal assistance to migrant families.



The 2012–13 Liman Fellows (back row, left to right): Yaman Salahi, Olivia Sinaiko, Forrest Dunbar, Romy Ganschow; (front row, left to right): Jenny Zhao, Chesa Boudin, and Liman Director Hope Metcalf (not pictured: Edward McCarthy, Sirine Shebaya, and Rebecca Scholtz).

Yaman Salahi is at the American Civil Liberties Union of Southern California, where he focuses on police involvement with national enforcement. He is working with Middle Eastern and South Asian communities, and other groups affected by enforcement policies, including student and environmentalist groups. He also provides direct representation to clients in their exchanges with law enforcement. A member of the Yale Law School class of 2012, Yaman graduated from U.C. Berkeley in 2009 with a B.A. in Rhetoric.

Rebecca Scholtz, a 2011 graduate of Yale Law School, works with the Legal Aid Society of Minneapolis. In conjunction with other service providers and community groups, Rebecca is helping to develop a system-wide procedure for identifying and assisting those in the child welfare system who also have immigration needs. Rebecca graduated *summa cum laude* from Middlebury College and then served as a Peace Corps volunteer for two years in a Costa Rican border town, where she focused on at-risk juvenile migrants. Rebecca clerked

for the Honorable Diana E. Murphy on the U.S. Court of Appeals for the Eighth Circuit in Minneapolis.

Sirine Shebaya is addressing racial profiling of Latino youth in police gang prevention activities at the ACLU of Maryland. She is investigating police practices, including “stop-and-frisk” policies and the maintenance of gang databases. Sirine is working with community partners on litigation, advocacy, and community education around these issues. Before coming to Yale Law School, from which she graduated in 2012, Sirine was a postdoctoral fellow at the Johns Hopkins Berman Institute of Bioethics and the Georgetown University Kennedy Institute of Ethics. She graduated with high distinction from the American University of Beirut and received a Ph.D. in philosophy from Columbia University.

Olivia Sinaiko has joined the Southeast Alaska Conservation Council (SEACC) to focus on preserving natural resources for local and native communities. One priority is limiting

the contaminating effects of mining in the region. She also is helping to reform resource management institutions by involving local communities that depend on natural resources such as salmon for their survival. Since Olivia graduated from Yale Law School in 2009, she has been based in Juneau, Alaska, where she clerked for the Honorable Walter L. Carpeneti, Chief Justice of the Alaska Supreme Court, and then worked for SEACC and Earthjustice. Olivia received a B.A. in Philosophy with Distinction from Stanford University.

Jenny Zhao is spending her fellowship year at the ACLU of Northern California, where she assists immigrants detained in county jails during their deportation proceedings. Jenny’s project addresses the problems of detained immigrants, in terms of their access to courts, their right to fair hearings, and the conditions of their confinement. A member of the Yale Law School class of 2012, Jenny graduated from Stanford University with a B.A. in International Relations and, prior to coming to law school, worked at the Antitrust Division of the U.S. Department of Justice.

2012 Liman Summer Fellows

In conjunction with other schools, the Liman Program helps support public interest work by students at Barnard, Brown, Harvard, Princeton, Spelman, and Yale. The 2012 Summer Fellows worked on a range of issues such as immigrants' rights, workplace injustice, indigent criminal defense, the death penalty, and community health.



Barnard Summer Fellows Gabrielle Fromer, Fatema Jannat, Gilana Keller, and Associate Dean Christina Kwan Tsu

Barnard College

Gabrielle Fromer '14, Juvenile Rights Division, Legal Aid Society, New York, NY
Fatema Jannat '14, The Hon. Judy Harris Kluger, Chief of Policy and Planning for the New York State Courts, New York, NY
Gilana Keller '13, Campaign for Educational Equity, Columbia's Teachers College, New York, NY



Yale Summer Fellows Yishai Schwartz, Nia Holston, Aseem Mehta, Jessica Zhang, and Jenny Bright

Yale College

Jenny Bright '13, New York Lawyers for Public Interest, New York, NY
Zachary Groff '13, Ayuda, Washington, D.C.
Nia Holston '14, Bronx Defenders, Bronx, NY
Brandon Levin '13, The Hon. Cory Booker, Mayor of Newark, NJ
Aseem Mehta '14, Vera Institute, New York, NY
Yishai Schwartz '13, Orleans Public Defender, New Orleans, LA
Jessica Zhang '13, The Door, New York, NY



Harvard Summer Fellows Tevin Colbert, Ariana Cernius, Jocelyn Eastman, and Emily Villa

Harvard College

Ariana Cernius '13, Disability Law Center of Massachusetts, Boston, MA
Tevin Colbert '13, Legal Aid Society of New York, New York, NY
Jocelyn Eastman '13, Books Not Bars Campaign at the Ella Baker Center, Los Angeles, CA
Emily Villa '13, Vera Institute of Justice, New York, NY



Brown Summer Fellows Stephanie Medina and Robert Hunter

Brown University

Robert Hunter '12, Vera Institute of Justice, New York, NY
Priya Guar '12, Motley Rice, Providence, RI
Molly Lao '13, Human Rights First, New York, NY
Stephanie Medina '13, UCLA Downtown Labor Center, Los Angeles, CA
Marielle Sanchez '14, All Our Kin, New Haven, CT



Princeton Summer Fellows Tiennhan Phan, Julia Spiegel, Shaina Watrous, and Cody Gray

Princeton University

Cody Gray (Ph.D. Candidate, Politics), White House Domestic Policy Council, Washington, D.C.
George Maliha '13, U.S. Senator John Cornyn, Washington, D.C.
Tiennhan Phan '12, U.S. Department of State, Washington, DC
Julia Spiegel (M.P.A. Woodrow Wilson School), Center for Justice and Accountability, San Francisco, CA
Shaina Watrous '14, National Legal Aid & Defender Association, Washington, D.C.



Spelman Summer Fellows Michelle Eunice, Sharmalee Brooks-Gordon, and Ayana Cash-Clement

Spelman College

Ayana Cash-Clement '12, Atlanta Legal Aid Society, Atlanta, GA
Michelle Eunice '13, Griffin & Strong, P.C., Atlanta, GA
Sharmalee Brooks-Gordon '13, Human Rights Project at the Urban Justice Center, New York, NY

The Liman Public Interest Program

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Nina Rabin
Senior Liman Fellow in Residence

Sia Sanneh
Senior Liman Fellow in Residence

Katherine Lawton
Senior Administrative Assistant

Please visit our website at www.law.yale.edu/liman.
There, you can learn more about the Liman Fellows, read
reports by the Fellows about their work, see information
about projects and upcoming events, and find details about
the fellowship application process.



*(Left to right): Deborah Cantrell, (Liman Director 2001–2007)
embraces Grace Meng (Staff Attorney, Human Rights Watch and
Liman Fellow 2003–04).*

Public Interest Organizations and Fellowship Applicants

Organizations interested in hosting Liman Law Fellows and individuals wishing to apply for Liman Law Fellowships should contact Liman Director Hope Metcalf. For information about hosting a Liman Summer Fellow or applying for a Liman Summer Fellowship, please contact Hope Metcalf or one of the Liman Faculty Advisors at the coordinating schools listed on this page.

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Join Us in Supporting and Expanding the Liman Program

Your financial support of the Arthur Liman Public Interest Program means that more attorneys and students will be able to work on pressing legal issues in the public interest. We have many more applicants than we can currently fund. In these difficult economic times, help is greatly appreciated.

- \$50,000 supports a year-long public interest fellowship for a graduate of Yale Law School
- \$25,000 supports an extension of a fellowship beyond the initial year
- \$15,000 supports an annual conference
- \$10,000 creates a travel fund for Fellows to participate in conferences and research
- \$5,000 supports a publication relating to public interest law or the newsletter
- \$3,000 supports an internship for one summer fellow*
- Other named underwriting opportunities are available and any amount towards the above or for general support is helpful.

☐ \$100 ☐ \$500 ☐ \$2500 ☐ \$5,000 ☐ \$10,000 ☐ \$15,000 ☐ \$25,000 ☐ \$50,000

☐ Other: \$ _____ Indicate if your donation is for a specific purpose and how any credit should read:

☐ I would like to make a multi-year pledge of \$ _____ to be paid in _____ installments.

☐ I would like my donation to be made in honor of / in memory of _____.

☐ Please contact me with information about making a gift to the Liman Program in my will, other planned giving options, or gifts of securities or other assets.

* **Summer Program Support.** Liman programs now exist at six universities (Barnard, Brown, Harvard, Princeton, Spelman, and Yale) and provide stipends for summer fellows. Contributions to supplement existing programs at participating institutions may be designated for the Liman Summer Fellowship Program and donated directly to those schools (see contact listing on page 37). In addition, a new summer fellowship program can be created at another university. Contact the Liman Director to help coordinate these donations.

Please make your charitable donation payable to the Arthur Liman Public Interest Program at Yale Law School, which is a 501(c)(3).

Mail donations to:

Hope Metcalf, Director, Arthur Liman Public Interest Program

Yale Law School, P.O. Box 208215, New Haven, CT 06520-8215

Phone: 203.432.9404 / Fax: 203.432.1426 / Email: hope.metcalf@yale.edu

Add my address to the Liman mailing list or update it as follows:

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Celebrating Arthur Liman and Fifteen Years of Fellowship

On the evening of March 1, 2012, friends and supporters of the Arthur Liman Public Interest Program and Fund gathered to celebrate the Program's fifteenth anniversary. More than 60 of the 77 Liman Fellows returned and heard the reflections of the four deans who nurtured the program—Guido Calabresi, Anthony Kronman, Harold Hongju Koh, and Robert Post—as well as comments from four out of five of the Program's directors—Judith Resnik, Deborah Cantrell, Sarah Russell, and Hope Metcalf—and warm wishes from former director Mary Clarke, now Professor and Associate Dean for Faculty and Academic Affairs at American University Washington College of Law. Also speaking were Ellen Liman and Ellen's and Arthur's sons.



Lewis Liman, a lawyer in private practice at Cleary Gottlieb Stein and Hamilton LLP, spoke of his father's values. Doug Liman, using his skills as a director, produced a short film about his father's commitment to public service, as well as the inception of the Liman Program. Doug's film may be viewed on the Liman Program website. <http://www.law.yale.edu/intellectuallife/aboutarthurliman.htm>



Robert Post

"This law school stands for the proposition that what is intolerable should not, in fact, be tolerated. The Liman Program has been a pioneer in turning that principle into practice. The Liman Fellowship takes students and sets them on the path of naming what's intolerable and changing what's intolerable. The Fellowship program has been an inspiration and a model for other law schools, as well as this school. We now have many different Fellowship programs, but they all come back to what you have done for us, Ellen and Doug and Lewis and Emily, and we couldn't be more grateful for that."

— Robert Post, Dean and Sol & Lillian Goldman Professor of Law, Yale Law School



Judith Resnik

“What is it that Liman Fellows do? They are people, often in their mid-twenties, that other people go to for help, just as I, at age 25, went to Arthur Liman for help. This room is filled with people, called Liman Fellows, whom all sorts of different people around the United States also go to for help. It is my great fortune that I now help to generate more ‘Limans,’ a legacy we all help to celebrate tonight.”

– Judith Resnik, Arthur Liman Professor of Law and Founder, Liman Program

“I have to seize this opportunity to say, for me personally and, I think, from everyone in the room, a most sincere and heartfelt thank you to Judith Resnik for all you’ve done for the program, for the law school and, more broadly, for issues of access to justice in the world. As others have mentioned, you imagined, created, nurtured, and grew the Liman Program into something truly remarkable. As all of us in the room have experienced, Judith has an amazing ability to connect us all together and have us do great work together.”

– Sarah Russell, Assistant Professor of Law, Quinnipiac Law School, and Liman Director, 2007–2010



Hope Metcalf and Sarah Russell

"There is a sense that we're all connected in some way; that there is a kind of living organism that we all form—what we call 'Liman.' We feel it deeply. We feel it personally. We feel it professionally. We feel it with those of you who have just joined us. You don't even know what you just signed up for, but welcome. We're here and you never get to get rid of us, and that's fabulous."

– Deborah Cantrell, Associate Professor of Law and Director of Clinical Programs, University of Colorado Law School, and Liman Director, 2001–2007



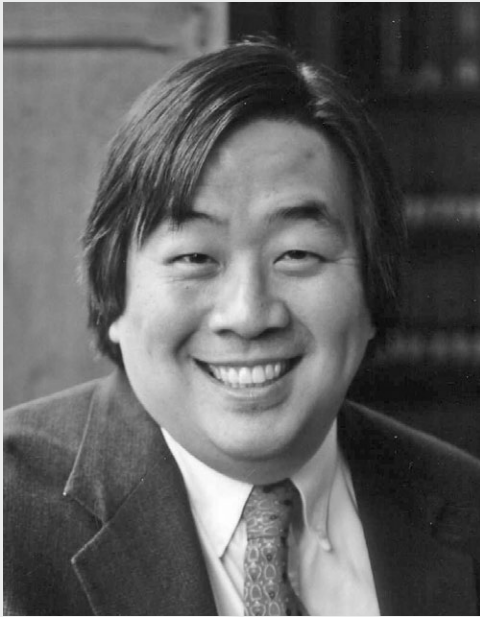
Deborah Cantrell



Sia Sanneh, Ellen Liman, and Hope Metcalf

"As I struggled to find a metaphor to express the fullness of the Liman Program, I came back to the words of Arthur himself. It is a passage from his book, 'Lawyer.' I read it the summer before I started as the Liman director, when I thought I should try in my own small way to get to know this man. One passage jumped out at me: 'Public service is not an act of charity or a duty. It is as natural as breathing. It is what we do when we are at our best.'"

– Hope Metcalf, Liman Director



Harold Hongju Koh

“Arthur was, perhaps, the quintessential private lawyer in the public interest. He epitomized what we want Yale Law graduates to be; lawyers who are admired by the powerful, but who devote themselves to speaking for the powerless. When he died, his family conceived of this innovative program as a living, evolving memorial to Arthur and what a timeless memorial it has become.”

– Harold Hongju Koh, Legal Advisor, U.S. Department of State, and former dean of Yale Law School

“My father was a practicing lawyer. He wasn’t a pro bono lawyer who devoted his life full time to pro bono. He wasn’t a person who devoted all of his efforts to public service. He was a lawyer who worked on commercial cases for much of his practice, like many people who graduate from this law school and most people who go into the law. But he also felt extremely strongly that part, as you’ve heard, of the

lawyer’s obligation and part of what comes with a law license is the obligation to spend some portions of one’s time doing public service and helping those who are less well-off and he viewed with extraordinary admiration both those who did public service full-time as pro bono lawyers and those who are in the government and those who are on the bench. So, it is with those thoughts that I would like to thank all of you—whether you’re a Liman Fellow or whether you’re here just because you support public service or pro bono—for your support of the program and for your embrace of the concept that was so important to my father’s life, which is that the practice of law critically includes and depends upon support for the public interest.”

– Lewis Liman



Lewis Liman and Chief Judge Jonathan Lippman



Lewis Liman, Ellen Liman, and Doug Liman

"Pretty much everything I wanted to say is in the film. What's not in the film is just how proud I am every year when Judith calls us or sends me the reports on what the Liman Fellows have been doing around the world. The fact my father's name travels with them means the world to me. Having moments where I get to step outside Hollywood and participate with the Liman program is what really completes me as a human being. I'm extremely grateful for all the work that Judith and that Yale has done on behalf of this program. I can't believe it's been 15 years—we've produced such incredible Fellows over the 15 years, and this is a time to be happy. Thank you."

– Doug Liman

"This program has had a great effect on all of you but, as you can see, it's had even a more profound effect on the family in a lot of ways. For us, this living memorial has meant a lot and enriched our lives. We do have these wonderful memories and, of course, we wouldn't have them without Judith and Tony, who had the original idea, and Guido, who was so supportive those years, all of you, and Yale, of course, which continues to be so fantastic in helping the program flourish. So thank you everybody."

– Ellen Liman



Guido Calabresi

"I met Arthur 57 years ago, in 1955, when I came to the law school. Arthur, in his second year, was the picture of everything that one should be in the law school. What made Arthur different was that he wasn't only an extraordinary intellectual, but he was also profoundly decent, and everybody knew it. Years later, we wanted him desperately to come and teach here. He was asked again and again and again. But he knew that he could do greater service doing what he did, practicing law and public interest; public interest and practice of law. But despite that, he remained a benchmark for any appointments. When people would be suggested, people would say, 'Well, is he anywhere near what Arthur would be?'"

— The Honorable Guido Calabresi, Circuit Judge, U.S. Court of Appeals for the Second Circuit, and former dean of Yale Law School

"Now we are at 77 plus 9, that's 86 by my accounting. We're coming up on 100 Fellows. You are individually and collectively a force in the world for the good. You carry with you the prestige of this great man after whom the program is named and you ennoble him. He's beaming."

— Anthony T. Kronman, Sterling Professor of Law and former dean of Yale Law School



Ellen Liman and Anthony Kronman

“In half of Texas’s 254 counties fewer than 20% of individuals convicted of misdemeanors receive appointed counsel. To date, we have rationed law, but we have rationed it in a very lopsided way. We’ve rationed law only on the defense side, fatally undermining the adversarial process.”

— *Andrea Marsh, Executive Director, Texas Fair Defense Project and Liman Fellow 2002-03*

“Anyone facing deportation without an attorney faces a nearly insurmountable challenge in trying to navigate an adversarial system without help.”

— *Jorge L. Barón, Executive Director, Northwest Immigrant Rights Project, Seattle, WA, and Liman Fellow 2005-06*

“How has law been rationed, and who has access to justice in the War on Drugs? We are exploring the possibility that justice is not the sole province of criminal law, and that perhaps law can be un-rationed to grant greater access to justice.”

— *Lisa Daugaard, Deputy Director, The Defender Association, Seattle, WA, and Liman Fellow 1999-2000*

“Last year, 2.3 million persons appeared in New York courts without legal representation. The most significant challenge in civil legal assistance is the justice gap – the growing numbers of low-income Americans in need of civil legal assistance for matters that are fundamental to their well being, and the resources available to provide the assistance.”

— *Helaine M. Barnett, Chair, Chief Judge’s Task Force to Expand Access to Civil Legal Services in New York, and President, Legal Services Corporation, 2004-2010*

“There is no ‘access to justice system’ or ‘civil legal assistance system’ here: not at the national level, not at the level of states, and often not even within specific communities. Funding lawyers to assist every American with civil justice problems would be insurmountably expensive under current institutional arrangements. To do more and to do it better, we will have to devise ways to do more with what we have.”

— *Rebecca L. Sandefur, Assistant Professor of Sociology, University of Illinois, and Senior Research Fellow, American Bar Foundation*

“The influence of trans-nationalism has been pivotal to the allocation of resources by European countries in the support of legal aid. The absence of analogous mechanisms in the United States may go some way toward explaining the lack of federal and constitutional rights to civil legal aid.”

— *Angela Ward, Référéndaire, Court of Justice of the European Union; Adjunct Professor in European Union and Human Rights Law, University College Dublin*

“In the United Kingdom, the value of a public civil justice system is being challenged and access to that system is being inhibited by new procedural and funding measures. We are not merely losing the courts and access to them; we are losing the language of justice in relation to a very wide range of issues affecting the lives of citizens.”

— *Professor Dame Hazel Genn, Faculty of Laws, University College London*

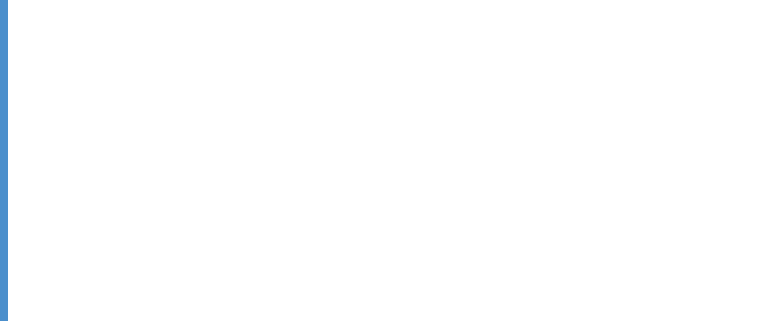
“The escalating crisis in our courts is deeply rooted in a fundamental fact: the U.S. has an excessively restrictive approach to the authorization to provide legal help. Solving the problem of access to justice is simply not possible unless we relax these restrictions to allow a much broader range of individuals and organizations to provide legal help.”

— *Gillian K. Hadfield, Richard L. and Antoinette Kirtland Professor of Law and Professor of Economics, USC Gould School of Law*



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see page 38**