



Criminal Defendants, Immigrants, Prisoners, and Rights

The Sixteenth Year of the Arthur Liman Program at the Yale Law School

Gideon at Fifty

March 2013 marked a half century after the Supreme Court held, in *Gideon v. Wainwright*, that states must provide lawyers to criminal defendants who cannot afford to pay for counsel. To explore the impact of *Gideon*, the Yale Law Journal and the Liman Program co-sponsored a symposium, *The Gideon Effect*, and the Law Journal dedicated a volume to the 25 papers presented.

"Fifty years of Gideon is not only a historic moment that deserves to be commemorated," said Doug Lieb '13, editor-in-chief of the Law Journal and a convener of the Liman Workshop. "It's also an opportunity for critical dialogue that will inform future scholarship and policymaking on issues of rights and justice."

The Symposium opened with a screening of "*Gideon's Army*," a 2013 documentary that tracks several attorneys in the South in their early years as public defenders. Through the daily struggles – both personal and professional – of these lawyers, the film made clear the shortcomings in America's indigent defense system as well as the passionate determination of many to ensure justice for their clients. Joining in a discussion were Dawn Porter, the director and producer, and Travis Williams, a public defender who was featured in the film and who works in Hall County, Georgia. *Gideon's Army* debuted on HBO in July 2013 and is being screened nationwide.

The Law Journal students welcomed Abe Krash who, along with Abe Fortas (YLS class of 1933) at Arnold & Porter, was appointed by the Supreme Court to represent Clarence Earl Gideon; they were assisted by then-law student John Hart Ely. Krash provided a detailed overview of the litigation's history.

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**THE
GIDEON
EFFECT**

**RIGHTS, JUSTICE, AND LAWYERS
FIFTY YEARS AFTER
GIDEON V. WAINWRIGHT
THE YALE LAW JOURNAL SYMPOSIUM
MARCH 8-9, 2013
COSPONSORED BY THE ARTHUR LIMAN PUBLIC INTEREST PROGRAM
AT YALE LAW SCHOOL**

Other participants discussed *Gideon's* meaning and impact. The decision helped to spawn thousands of public defender positions and to build an institutional infra-structure of criminal defense lawyers. Yet *Gideon's* right to counsel was soon followed by soaring numbers of individuals charged with crimes as the "war on drugs" and the "war on crime" unfolded in the 1980s. Many states and localities have been unable or unwilling to provide the resources needed, and the Supreme Court has been reticent to enforce *Gideon* through post-conviction claims of ineffective assistance of counsel. The challenges of supplying lawyers to criminal defendants underscores questions about the extension of rights to counsel ("civil *Gideon*") to contexts such as immigration and family law.

The Law Journal's Symposium issue included two essays by Liman faculty. Brief excerpts follow.



Abe Krash (right), one of *Gideon's* lawyers; Jenny Roberts (middle), Professor of Law and Co-Director, Criminal Justice Clinic, Washington School of Law, American University; Derwyn Bunton, Chief, Orleans Public Defender (left).

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Fifty Years of Defiance and Resistance After *Gideon v. Wainwright*

Stephen B. Bright, President and Senior Counsel, Southern Center for Human Rights and Visiting Lecturer, Yale Law School
Sia Sanneh, Senior Attorney, Equal Justice Initiative, and Senior Liman Fellow in Residence, 2011–13, Yale Law School

Nothing is more fundamental to justice than the right of one accused of a crime to a lawyer. Fifty years ago, in *Gideon v. Wainwright*, the Supreme Court called this right to representation “fundamental and essential” to fairness and held that lawyers must be provided for people who could not afford them so that every person “stands equal before the law.” The Court later ruled that a poor person facing any loss of liberty must have a lawyer “so that the accused may know precisely what he is doing, so that he is fully aware of the prospect of going to jail or prison, and so that he is treated fairly by the prosecution.” And yet, every day in thousands of courtrooms across the nation, the right to counsel is violated.

Guilty pleas account for about 95 percent of criminal convictions in what the Supreme Court has called “a system of pleas, not a system of trials.” The system of pleas is known as “meet ‘em and plead ‘em” or “McJustice” in many places, where poor people plead guilty and are sentenced without lawyers or with having had only brief discussions with lawyers they just met and will never see again.

In some courts, lawyers are not provided or are very difficult to obtain. In others, judges and prosecutors talk the accused into doing without a lawyer. People facing criminal charges may be unable to pay “application fees,” which range from \$50 to \$200, that many states impose on the indigent before a determination of whether they are poor enough to qualify for a lawyer is made. Frequently, they are not informed that they have a constitutional right to a lawyer, regardless of their ability to pay an application fee, so they proceed without one, unaware that the fee can be waived.

It is not uncommon for those who plead guilty to have little or no understanding of the consequences of their pleas, such as deportation, denial of business or professional licenses, exclusion from public housing and other benefits, and loss of the right to vote.

People who can afford lawyers retain them to help them get out of jail after arrest. But many poor people are detained in jails after arrest without lawyers for weeks or months. They may lose their jobs and homes even if they are eventually not convicted. Often, poor people, including some who are innocent, plead guilty to get out of jail. They are fined and released on probation. But those unable to pay – and without a lawyer to explain their circumstances to the judge – will be returned to jails, our modern day debtors’ prisons.

The right to a lawyer is often violated as well when poor people are represented by lawyers struggling with enormous caseloads without the resources to investigate cases, retain experts, and pay other necessary expenses. In the rare cases that go to trial, the lawyers are often unable to contest the prosecution case, mount a defense, or provide information about

their clients that is essential for individualized sentencing.

The director of Missouri’s Public Defender Commission has warned that “triage has replaced justice” in the state’s courts, people languish in jail “for weeks or even months with no access to counsel,” and attorneys are forced to take “shortcuts that lead to wrongful convictions.”

Too often the right to a lawyer is violated by lawyers who are ignorant of the law, do not investigate cases, fail to present critical evidence, and simply lack the ability to try a case. Some people sentenced to death were represented by lawyers who were asleep (three in capital cases in Houston), intoxicated, or under the influence of alcohol or drugs during trial.

The reason for such everyday defiance of the *Gideon* decision’s guarantee of a lawyer is that most states, counties, and municipalities – responsible for over 95 percent of all criminal prosecutions – have no incentive to provide competent lawyers to represent the people they are trying to convict, fine, imprison and execute. A bad or mediocre system of providing lawyers facilitates pleas, moves dockets, and lessens the risk that anyone accused of a crime will be acquitted. So many governments spend as little as they can get away with.

The cost of disregarding the right to counsel is enormous. Innocent people are convicted and sent to prison, while the perpetrators of crime remain at large, as exonerations based on DNA testing have repeatedly shown. Important issues, like the pervasive racism of the system, are ignored and unchallenged. People are sentenced to death, prison, jail, and probation without consideration of individual characteristics, such as mental illness or intellectual disability.

Beyond that, a system in which all of the key actors routinely ignore one of its most fundamental constitutional requirements is not a system based on the rule of law. Such a system – particularly when it brings the immense power of the state down most heavily on African Americans and Latinos – lacks legitimacy and credibility and is undeserving of respect.

Of course, there are exceptions – public defender and assigned counsel programs in which lawyers are trained and supervised and have the resources needed.

But most governments have treated the Supreme Court’s decision in *Gideon v. Wainwright* not as a bright star pointing the way to justice, but as an unfunded mandate to be resisted. That will change only when courts begin enforcing the right to counsel, instead of being complicit in its denial; when the legal profession meets its responsibility to make the legal system work for everyone; and when the media, law professors and law students, and others hold the system up to public examination until governments are shamed into providing lawyers that are “fundamental and essential” for fairness and justice.

***Gideon* at Guantánamo: Democratic and Despotic Detention**

Hope Metcalf, Liman Director, Yale Law School

Judith Resnik, Arthur Liman Professor of Law, Yale Law School

What did *Gideon* promise, and to whom? Soon after 9/11 and some forty years after the Supreme Court's decision in *Gideon v. Wainwright*, the federal government detained individuals, claimed by the government to be terrorists, and sent them to Guantánamo Bay; to Norfolk, Virginia; and to Charleston, South Carolina. In all three sites, the government asserted the legal authority to impose an interrogation and detention system outside the purview of courts, lawyers, and rights.

National and international objections erupted. Lawyers became high-profile participants, filing cases on behalf of individuals with whom, for a period of time, the government would not permit them to communicate. Those filings opened up to public scrutiny the otherwise closed and totalizing authority of the state. In 2004, in *Hamdi v. Rumsfeld*, the Supreme Court ruled aspects of the government's system unconstitutional. In *Boumediene v. Bush*, in 2008, the Court affirmed the availability of habeas corpus for detainees and, implicitly, a role for lawyers in helping detainees to seek relief.

The 1963 decision in *Gideon v. Wainwright* is part of what made the exclusion of lawyers, process, the public, and rights impossible – both politically and legally. *Gideon*, along with another icon of that era, *Miranda v. Arizona*, recognize the dignity of individuals in their encounters with the state, and require that a person not be left alone and subjected to the totalizing power of the state. Both *Gideon* and *Miranda* deploy lawyers to serve as witnesses to government interrogation and as advocates, buffering against abuses and bringing claims to public light through court filings. And both decisions insist on government subsidies for those who cannot afford counsel.

These decisions prompt our use of the term “democratic detention” – calling for disciplined and accountable government action that stood in contrast to the unfettered intrusions that “despotic” regimes visited on people under their control. In a series of mid-twentieth century decisions, judges repeatedly adverted to other, “totalitarian” regimes, as courts insisted that the United States was different because it provided protection for those in detention. These rulings relied on lawyers as a method to police the state by opening up closed encounters, and judges identified themselves as overseers to limit government misconduct. Although famously (and scandalously) underfunded, *Gideon* as an ideal is rarely challenged.

Yet, even after the Supreme Court set up avenues of access for process and third-party participation for the 9/11 detainees, *Gideon*-esque battles continued. The government claimed that it had the power to monitor attorney-client communications, and judges acceded in part by imposing “significant limitations” on lawyer-client exchanges. In 2012, *Gideon* – and the legal

puzzles of the scope of detainees' rights to counsel and to courts – became central when the federal government argued that, aside from those with pending or proposed habeas petitions, it had authority over detainees' access to counsel.

Guantánamo detainees sit in limbo, doctrinally and literally. They are neither ordinary *Gideon* Sixth Amendment rights-bearers awaiting criminal prosecution, nor are they post-conviction prisoners who have constitutionally protected access to courts and rights to employ counsel (albeit without state-funding). And most 9/11 detainees are not being subjected to military commissions, for which Congress has by statute authorized that counsel be provided.

That 9/11 detainees are positioned in this legal gap is not happenstance. The government has sought to avoid the rights afforded defendants in criminal prosecutions, to block public knowledge about what has transpired, and to make lawful whatever treatment is accorded.

Conflicts in the wake of 9/11 about the boundaries of both *Gideon* and *Miranda* underscore the two decisions' interdependencies as well as the stakes of their evisceration. Those two judgments stand for a democratic understanding of all individuals – even the reviled – as rights-bearers who cannot be left alone with the state and subjected to its power, sealed off from lawyers and others able to make public how the state is exercising its control.

The experiences of 9/11 reaffirm the utilities of judicial intervention to insist on lawyers-as-buffers and the importance of courts as public venues. Lawyers – joining with detainees, their families, the media, and others – interrupted the most egregious forms of torture at Guantánamo and elsewhere. The public processes helped to prompt the release, eventually, of hundreds of detainees.

Yet *Gideon* at Guantánamo also underscores the limits of lawyering, a topic that is also a leit-motif of discussions about *Gideon* more generally. Lawyers are one “hallmark of due process” (to borrow from Justice Stevens' dissent in *Rumsfeld v. Padilla*). Substantive justice requires more. The litany of specific wrongs of 9/11 remains. Many detainees remain in infinite detention, and conflicts continue about whether detainees have any rights independent of government largess. When faced with painful evidence of torture, the courts have been unwilling to permit the possibility of remedies for a series of civil rights claimants. Echoing the inequities in indigent defense, post-9/11 detention reveals the incompleteness of contemporary constitutional protections and practices, which have yet to limit governmental powers and to make clear that all individuals under the control of the United States are persons, entitled to seek redress through public proceedings in courts.

The Sixteenth Annual Liman Colloquium: Navigating Boundaries: Immigration and Criminal Law



Yale Law School, April 2013.

Criminalization and the regulation of migration raise parallel questions: the degree to which law enforcement relies on profiling of individuals and communities; whether persons caught in either system receive state-funded counsel, translators, and other forms of support; and the consequences – collateral or otherwise – of detention and of findings of either guilt or removability. Thus, many lessons can be learned when the law of crime and the law of migration are considered in tandem. At issue are questions about the meaning of citizenship, about how governments define and regulate their social orders, and about the role of social movements in bringing about changes, in all directions.

Extending the Right to Counsel to Criminal Defendants

Brandon Buskey, Staff Attorney, ACLU Criminal Law Reform Project

The United States Supreme Court's ruling in *Padilla v. Kentucky* – that a defense lawyer must competently advise a defendant of certain immigration consequences – stands as one of the most significant decisions on the right to counsel in recent memory. Despite this landmark opinion, a *Washington Post* article from earlier this year describes a troubling paradox: while a defendant may have the right to effective advice about immigration consequences, an indigent defendant may not be entitled to counsel to provide that advice.

In states like Virginia, prosecutors commonly waive jail time on misdemeanors, and judges subsequently refuse to appoint counsel. Untold numbers of indigent defendants

therefore plead guilty without an attorney, and many of them subsequently face irreparably harmful consequences like deportation. Prosecutors justify the tactic as a cost-saving measure for minor offenses they believe do not warrant jail time. But prosecutors and judges are not required to inform



defendants of whether a conviction may lead to deportation, making it more likely that the unsuspecting defendant will be baited into a plea.

This puzzling circumstance is possible because, although the Sixth Amendment ostensibly guarantees the right to counsel “[i]n all criminal prosecutions,” the Supreme Court held in the 1979 case of *Scott v. Illinois* that a person only has the right to counsel if the conviction results in incarceration. Owing to this “actual incarceration” standard, misdemeanor defendants may not know whether they have a right to counsel until *after* conviction.

As with prosecutors in Virginia, the Court’s decision was heavily influenced by economics – namely avoiding expending the enormous resources necessary for states to provide attorneys to all they accuse of crimes. In dissent, Justice Brennan, who elsewhere famously criticized the Court for its “fear of too much justice,” advocated appointing counsel whenever imprisonment was authorized. Brennan observed that an “authorized incarceration” rule might compel a state to “re-examine [its] criminal statutes” and conclude that incarceration for minor offenses was imprudent “in light of the expense of meeting the requirements of the Constitution,” an appraisal the Justice Brennan deemed “long overdue.”

Justice Brennan’s dissent highlights a critical point: rights cannot be fully realized on the cheap. When states are required to internalize the price of securing rights, their priorities must alter. A comparison on this front may be made to the boycotts of the civil rights movement, which allowed the oppressed to communicate in economics with an oppressor who refused to speak the language of justice.

Advocates desperately need to press a similar conversation about criminal justice. Over the past four decades, the United States has been consumed by a carceral epidemic. Home to only 5% of the world’s population, the U.S. holds captive 25% of its prisoners. States, to accommodate their “tough on crime” policies, have increased their corrections spending by 674% over the past twenty-five years, a rate exceeding that of other expenditures, like education. Tragically, racial disparities predominate. Drug law enforcement deserves particular blame. African Americans, despite being 13% of the U.S. population and 14% of drug users, constitute 37% of those arrested for drug offenses and 56% of those incarcerated for drug offenses. These disparities are deeply disturbing in a nation still suffering with the malignant legacy of slavery.

To its detriment, public debate about the criminal justice system has focused obsessively on sensational crimes. Nonviolent misdemeanors have become the dark matter of the

system, invisible, yet largely accounting for its overwhelming mass. The National Center for State Courts estimates that misdemeanors comprise 80% of state cases. Over 90% of these defendants plead guilty. For many, the prosecutor is the only attorney with whom they speak before waiving their constitutional right to a trial and before the state forever brands them criminals. Jail may not follow, but a lifetime of collateral consequences surely will.

Being evicted from one’s home, losing one’s employment license, or being summarily deported are all objectively more severe than a lone day in jail. It is only the contrary legal fiction underlying *Scott* that allows states to blind themselves to reality. This inherently flawed premise is undeniable after

Padilla. For this reason, momentum is building to undo *Scott* and force the re-examination Justice Brennan called for over thirty years ago. If – and it is admittedly a big “if” – successful, many states will have little choice but to re-think crimes and punishments.

The progress of criminal justice reform during the Great Recession provides hope for this path. Work the U.S. Supreme Court should have been doing to limit state prerogatives in criminal justice is now being done by Wall Street, as budget shortages push states to confront their wasteful incarceration policies. Louisiana, Mississippi, and Texas, the states with the first, second, and fourth highest rates of incarceration, have implemented or

are considering unprecedented measures to reduce prison populations. “Front end” measures like reclassifying minor, non-violent offenses as civil infractions, and “back end” reforms such as increasing the availability of earned early release based on demonstrated rehabilitation, are suddenly viable. These advances demonstrate that, with enough pressure, legislators will swallow their vitriol long enough to consider rational solutions.

Of course, the economy must eventually improve – raising the specter of retrenchment. The threat is real, since the recent slate of dollars-and-cents reforms has done little to strengthen the rights of criminal defendants. States remain free to abandon reform once their coffers refill. Litigation to abolish the atrocity of uncounseled misdemeanor convictions may help create the necessary pressure for sustained reform. The chaos this would wreak in courtrooms like those in Virginia, which are fiscally dependent on defendants unwittingly forgoing their right to a trial, would be crippling. Such states would have to decide if pursuing low-level criminal convictions was worth the price of providing a competent lawyer. Defendants would stand to benefit under either scenario.

This approach can work. In Maryland, the state’s high court ruled last year that state law required providing counsel to

Misdemeanor defendants may not know whether they have a right to counsel until *after* conviction.

the indigent for bail hearings. Anticipating the resulting \$23 million price tag, the state opted to reduce pre-trial detention by emphasizing diversion programs and relying on criminal citations rather than arrests. In Missouri, public defenders facing unethically high caseloads recently won the right to refuse additional assignments. The state supreme court noted that overwhelming dockets should be triaged to focus on the most serious offenses, expressly contemplating the outright dismissal of lesser cases. To manage this fallout, the legislature is debating whether to decriminalize certain minor offenses.

Still, the task ahead is daunting. *Scott* has stood largely undisturbed for over three decades. Reformers thus may rightly be wary of a strategy premised on impact litigation. However, the reforms brought about by the recession have predictably not included expanding the right to counsel. Quite the opposite, defense attorneys are among the first targets when budgets tighten. Indigent defendants are left alone to bear the burden of these choices. Through efforts like fighting to make states provide counsel to all those they seek to deem criminals, advocates can both enlarge the scope of individuals' rights and persuade states to retreat from excessive criminalization.



Tom Tyler, Macklin Fleming Professor of Law and Professor of Psychology, Yale Law School.

Rights and Reality for Indigent Defendants in Texas

Andrea Marsh, Executive Director, Texas Fair Defense Project, and Liman Fellow 2002

Exactly one week after the 50th anniversary of *Gideon v. Wainwright*, a Texas judge revoked a woman's bond and ordered her jailed when she asked the court to appoint a lawyer to represent her on an assault charge. The woman lived in public housing with her three children. She had lost her job when she was arrested, and her only household income came from her son's disability payments. She was presumptively eligible for appointed counsel under the county's published financial guidelines, but the judge didn't grant her request for counsel. Instead, he conditioned his ruling on the results of a drug test.



If the woman passed the drug test, the judge would postpone ruling on her request for counsel for one week while she applied for fifteen jobs. If she could find a job – any job – she'd be expected to hire a lawyer, regardless of whether she had enough money to pay a lawyer's fee. If she failed the drug test, the judge would send her to jail on a bond set so high that there was no doubt she would remain in jail for months until her case went to trial. But, on the upside, he would give her a lawyer once she was in jail. The woman could exercise her right to bail or her right to counsel, but not both.

While press releases commemorating *Gideon's* anniversary were still flying, in this Texas courtroom the right to counsel existed as little more than a tool to control and punish poor people. National commentators questioned whether public defenders were capable of fulfilling *Gideon's* promise, burdened

as they are with too many cases and too few resources, and several pundits mentioned the problem of defendants who don't have a chance to consult with a lawyer before they plead guilty. However, even those experts who were the most downbeat about the status of the right to counsel upon its anniversary didn't raise the alarm that some people are actually doing time because they asked for an appointed lawyer.

This woman's situation is not the most common Sixth Amendment violation that my organization, the Texas Fair Defense Project (TFDP), documents and challenges in Texas courts. The uncounseled guilty pleas and excessive caseloads referenced by many during the national *Gideon* anniversary coverage are present here too. But the woman's situation is not an aberration. After TFDP filed a petition to secure a release of a first jailed defendant, we were immediately contacted by the family of a second defendant who was jailed under similar circumstances in a different county. And each year we receive dozens of requests for assistance from indigent defendants who are threatened with jail when they assert their right to counsel. Although the threat is usually an empty one, such defendants make decisions about whether to pursue or abandon their requests for counsel in fear that they will be one of the unlucky ones who actually are imprisoned.

In principle, poor people accused of criminal offenses in Texas enjoy the right to counsel on the same basis as poor criminal defendants in every other state. Indigent defendants even had a right to counsel under the Texas constitution before *Gideon* extended the right nationwide. And in the past twelve years, TFDP and other advocates have reinforced the right to counsel with proposed legislation providing special protections to defendants who appear in court without counsel. TFDP also has used litigation successfully to challenge systemic right

to counsel violations, and won a U.S. Supreme Court ruling clarifying that the right to counsel includes jailed and bonded defendants. So we have rights on top of rights, backed up with case law and legislation, that are directly on point and that should prevent the jailing of criminal defendants who request counsel.

But there are rights and there is reality, and in Texas the right to counsel exists in a culture where it frequently is not respected by the judges and defense lawyers charged with protecting it. An essential part of our work occurs at the local level, where we work collaboratively with communities and officials to start new public defense programs that are capable of transforming the courthouse culture. These programs, such as the new public defender office in Houston, provide an institutional counterbalance to the judiciary and the prosecution to help establish local justice policy in a way that the solo practitioners who used to handle all of the court appointments could not do. These new programs help to shift

the culture by disrupting established roles and assumptions.

Although I have just detailed how rights alone don't produce change, TFDP can only do the work we do because the right to counsel exists. For example, state grant funding for model indigent defense programs prompted local jurisdictions to reexamine longstanding practices. Further, after concerned judges and advocates convinced Texas legislators that many local indigent defense systems were unconstitutional, appropriations followed.

There is no question that in some counties local courthouse culture has not yet changed and the right to counsel is not respected in practice. Nevertheless, the right to counsel has been an invaluable tool for creating opportunities for the cultural changes that have occurred in jurisdictions across the state, and it created those opportunities for systemic improvements in local indigent defense systems precisely because it can be invoked with the power of a right.



Jeremy Kaplan-Lyman, Liman Fellow 2013. Kaplan-Lyman, working at Bronx Defenders, represents low-income people summoned to court for minor offenses.



Stacy Washington, Spelman College; Charissa Smith, Staff Attorney, Advocates for Children of NY, Inc., and Liman Fellow 2008; Anita Warner, Liman Barnard Summer Fellow; and Ivy Wang, Liman Fellow 2013 (left to right).

***Padilla's* Precedents: Access to Justice for Non-Citizen Criminal Defendants**

Michael J. Churgin, Raybourne Thompson Centennial Professor, The University of Texas School of Law

Non-citizens facing criminal charges are doubly cursed. First, retained or appointed counsel are often ill-prepared to advise defendants about the immigration consequences of pending charges, even though immigration laws trigger deportation for an astonishingly broad list of crimes. Second, once non-citizens have been



convicted and are facing deportation, these individuals have no right to immigration counsel to assist in the uphill battle to stay in the United States. This intersection of criminal and immigration law is a recipe for disaster, as immigration practitioners have known for a long time and as the Supreme Court finally recognized in *Padilla v. Kentucky* in 2010. The Liman Colloquium puts a spotlight on various aspects of this phenomenon and on the many efforts of current and former Liman Fellows working on these issues.

Yale Law School has been involved in this conundrum for a long time. Upon graduation from the law school in 1973, I was the first supervising attorney and teaching fellow for Yale's Jerome N. Frank Legal Services Organization (LSO). Among the

earliest LSO programs was the representation of inmates at the Federal Correctional Institution (FCI) Danbury, then a men's facility. One day in 1974, the Department of Justice announced that deportation hearings would begin at Danbury. Denny Curtis, Steve Wizner, and I discussed how we would prepare students to handle this new element of the caseload.

As the rookie, I drew the assignment of learning immigration law. I supervised an LSO law student in a *Padilla*-like case. The facts were undisputed. The client had pleaded guilty to a drug-related offense and faced deportation. We had an affidavit from the client's former criminal defense attorney that he had never discussed immigration consequences when his non-citizen client pleaded guilty to a drug trafficking offense. A drug conviction was the surest way to a deportation order; no forms of discretionary relief were available. The Second Circuit previously had indicated that because deportation was collateral and not a direct consequence of the plea, no advice needed to be given to the non-citizen.

We unsuccessfully attempted to persuade the district court and the Second Circuit that the client's underlying conviction had to be overturned because he had not been advised of the immigration consequences. Our client had come to the United States as a child, had spent decades here, and had no contact with his birth country. He surely would have chosen a trial to avoid the possibility of deportation.

Forty years ago, the Second Circuit did not anticipate the 2010 decision of *Padilla v. Kentucky*, holding that deportation was so serious and so implicated by criminal convictions that defense counsel must advise clients on possible immigration consequences. In 1971, the Second Circuit rejected that argument, and the Supreme Court declined to take the case. (The one achievement was that the Second Circuit permitted the Yale Law student to do the oral argument, and that precedent anticipated a subsequently-adopted student practice rule.)

As the justice gap for immigrants became more apparent over the years, LSO's involvement with immigration matters broadened. In fact, law school immigration clinics have been a growth industry during the last decade. Yet, the need for lawyers far outstrips clinic capacity, and most individuals facing removal have no legal representation.

At one time there was hope that Legal Services Corporation grantees could help fill the void. Upon its creation in the mid-1970s, LSC grantees were able to assist non-citizens without restriction. Ensuing decades saw limits placed on this representation, and innovative programs depended upon non-LSC funds to provide assistance to those ineligible for LSC-funded assistance. In 1996, when passing draconian immigration laws, Congress also indicated that LSC-funded programs could no longer use outside funds for this representation. Just as the need for legal assistance grew with the new statutes, the availability dwindled.

In 2001, I was named to a negotiated rulemaking effort

to revise the LSC rules on representation of non-citizens. The endeavor failed. The most dispiriting aspect was the catch-22 faced by LSC grantees. The programs had to jump through hoops to show eligibility of non-citizens, which slowed intake processing. Funding for all representation of eligible clients was far below the need. A small group of us proposed some affirmative language that programs should represent those non-citizen clients eligible for services – beneficiaries of the Violence Against Women Act, asylum-seekers, etc. – but were unsuccessful. It was too difficult and not cost-effective for most grantees with their reduced funding, and immigration representation remains a low priority among many pressing needs. (Some, like California Rural Legal Aid and Texas Rio Grande, do provide assistance to this population.)

Some bar pro bono programs and legal non-profits have

endeavored to help stem the tide; Catholic Charities and its Catholic Immigration Network Inc. (CLINIC) probably have become the biggest source of funding. With *Padilla*, there is some hope that criminal defense attorneys will consult with immigration practitioners when representing non-citizens. Overall, however, the lack of legal assistance for those facing deportation is an appalling situation.



Jenny Zhao, Liman Fellow 2012–2013. At the ACLU of Northern California, Zhao is exploring how conditions at remote immigration detention centers can impede detainees' access to courts and counsel.



Raquiba Huq, Supervising Attorney at Legal Services of New Jersey and Liman Fellow 2007, represents detained immigrants in removal proceedings.

Public-Private Partnership to Aid Immigrants Facing Removal

Lindsay Nash, Liman Fellow 2010 and 2012, Kathryn O. Greenberg Immigration Justice Clinic, Benjamin N. Cardozo School of Law

Even for experienced lawyers, immigration law can be difficult. The complex statutory scheme, procedural hurdles, and jurisdictional bars create obstacles that, for pro se immigrants, are often insurmountable. The consequences of these barriers to justice are profound and irremediable; misunderstanding a single technicality can easily mean deportation and permanent exile from family members – even children – in the United States.



A robust movement to remedy the crisis in immigration representation is underway in New York City, but the current need for counsel far outstrips the demand. Although it is well established that representation is often critical to winning a deportation case, even immigrants with meritorious claims for relief are turned away because non-profit providers simply lack the resources to represent them. As a consequence, thousands of New Yorkers are deported each year without the aid of an attorney to help them make their case in any meaningful way. Many New Yorkers are deported without even realizing that they have options for relief.

My Liman Fellowship has focused on this problem. In my two years as a Liman Fellow, I provided direct representation to noncitizens with criminal convictions and worked to establish a pilot project of the first system of assigned counsel for individuals who are detained and facing deportation.

As long-term solutions are being worked through, private pro bono attorneys can help meet immediate demands. In January 2013, the U.S. Court of Appeals for the Second Circuit identified pro se asylum-seekers with cases pending before the Court and who needed access to counsel. These individuals sought to challenge their deportation orders and appeared to have options to prevent their deportations. Facing the complex immigration laws without representation and opposed by experienced government counsel, however, their ability to understand their legal options and pursue relief was limited. Meanwhile, non-profit deportation defense providers – who are already stretched thin – did not have the capacity to take on these cases.

It was at this point that, at the suggestion of the Honorable Robert A. Katzmann of the U.S. Court of Appeals for the Second Circuit, I began working with Lewis Liman to draw upon the resources of the federal bar and law firms. Liman is Chair of the Public Service Committee and a member of the Steering Committee Study Group on Immigrant Representation

(Study Group), a coalition that was convened by Chief Judge Katzmann and that consists of attorneys, government officials, and judges who work in the field of immigrant representation. By pairing law firm attorneys with immigration law experts from the Study Group, we created a cadre of highly skilled lawyers who were able to offer pro bono representation to each of the fifteen to twenty pro se litigants.

Members of the Public Service Committee – seven major law firms – responded quickly to Liman's call, immediately volunteering partners and associates to take on these cases. "It has been gratifying to see these how these firms have dedicated their resources to meeting this urgent need," Liman said, explaining that it "is a testament to the service the private bar can provide in serving the public interest and in meeting the needs of the less fortunate members of our society."

Study Group members also offered their time and expertise. Peter Markowitz, Director of the Kathryn O. Greenberg Immigration Justice Clinic at Cardozo Law School, and I trained the law firm attorneys, provided technical assistance on the cases, and matched firm attorneys with other Study Group members who volunteered to impart their immigration expertise. "Their knowledge of the practice," Liman said, "was critical to the success of this effort."

As a result, numerous immigrants – many of whom are long-time New Yorkers with spouses and children – have been able to remain with their families. They can return home, contribute to their households, and watch their children grow up. This effort has had an important impact on firm attorneys as well. David Toscano, an attorney at Davis Polk & Wardwell, LLP who participated, said that he and his colleagues found it "rewarding to help our client, who is an educated, productive member of society." Moreover, he expressed the hope that the Second Circuit's "creative and practical" approach inspires the bar and the government to reach similar common sense resolutions at other stages of deportation proceedings, which he sees as an area "where pro bono representation could have a significant effect."

This joint effort demonstrated how the private bar and the non-profit sector can join together to increase and enhance access to justice in the field of immigration law. As Judge Katzmann put it, "Lewis Liman and colleagues have performed a substantial service to the Second Circuit; their work is a model for how bar and bench can work together to promote the fair and effective administration of justice." The two reports by the Study Group have been published by the Cardozo Law Review and are available online: http://www.cardozolawreview.com/content/denovo/NYIRS_Report.pdf; http://www.cardozolawreview.com/content/denovo/NYIRS_ReportII.pdf.

Immigration Preemption, Discrimination, and Equality

Lucas Guttentag, Ford Foundation Distinguished Senior Research Scholar in Law and Robina Foundation Distinguished Senior Fellow, in Residence, Yale Law School

State and local immigration laws have exploded since Hazleton, Pennsylvania enacted the first punitive ordinance in 2006. A slew of recent measures focus almost single-mindedly on aggressive enforcement against foreign nationals suspected of immigration violations. The laws deploy local police to arrest and detain individuals suspected of unauthorized status; deny housing and employment to immigrants deemed undocumented; create state crimes that punish civil immigration violations; deny access to educational institutions based on immigration status; and broadly stigmatize and ostracize non-citizens who are (purportedly) in violation of federal immigration requirements.



These local laws are widely criticized on a range of grounds, including that they incentivize racial and ethnic profiling, engender discriminatory practices, and cater to parochial prejudices and fears. Laws that target suspected undocumented immigrants cast a pall of suspicion over entire communities, diminish everyone who looks or sounds “foreign” in the eyes of the beholder, and constitute a misguided reaction to new Latino residents and to changes in the demography of many states and regions. Engaging local police in immigration enforcement is rejected by many law enforcement experts and civil rights advocates as undermining public safety and diminishing personal security by frightening away immigrants (and their citizen family members) from reporting crimes, participating as witnesses, or protecting themselves against abusive treatment.

Notably, some communities have responded differently. Various cities and towns have enacted ordinances to protect and integrate immigrant communities by providing universal municipal identification documents, instituting equal tuition rates at public colleges and universities, and imposing policy guidelines that bar police from engaging in immigration enforcement or inquiry. These laws, often referred to collectively as “sanctuary” ordinances, operate by rejecting the salience of federal immigration status for local matters. They typically operate by declining to inquire into an individual’s immigration status and seeking to put all residents on equal footing for municipal treatment.

The proliferation of sub-federal measures raises important

questions about immigration federalism, i.e., the role – and the limits – of state authority to enact immigration laws, to take account of immigration status for local matters, and to penalize or enforce federal immigration violations under state law. In *Arizona v. United States*, the Supreme Court struck down – on preemption and Supremacy Clause grounds – essential parts of Arizona’s notorious SB1070 immigration enforcement law and sharply curtailed the states’ power to act unilaterally without affirmative federal authorization. The Court adopted a muscular view of immigration preemption based on its reading of the Immigration and Nationality Act (INA), federal enforcement discretion, and the foreign affairs power of the federal government. These sources, which I refer to as the “immigration control” basis for federal preemption, derive from the federal government’s sweeping power to set immigration policy and to regulate foreign nationals who are in the United States. Courts of appeals addressing additional state laws have largely followed suit.

Questions of race, racial discrimination, and ethnic profiling are absent. They may be operating in the background, but they have not been recognized as part of the courts’ Supremacy Clause analysis. I believe that a fuller and historically more complete understanding of the federal framework restricting state immigration legislation would more directly recognize that prohibiting race or “alienage” discrimination against non-citizens is a proper – indeed an essential – component of the federal norms that preempt state immigration laws. In the past, that is precisely the understanding that helped animate the Supreme Court’s immigration preemption rulings. In particular, the Court has found that the federal prohibitions on “alienage” discrimination in the Civil Rights Act of 1870 enacted by the Reconstruction Congress after the Civil War constitute a key component of federal law that preempts state measures. I refer to this as the “immigrant equality” prong of immigration preemption. It derives not from the federal government’s broad immigration power but from civil rights legislation crafted to protect non-citizens against state discrimination. This source of preemption appears to have been forgotten and needs to be resurrected.

The 1870 Civil Rights Act contained two key provisions, both of which remain embedded in federal law today, prohibiting discrimination on the basis of “alienage.” These prohibitions were consciously added to expand the protections of the landmark 1866 Civil Rights Act beyond race and color to encompass “aliens.” First, in Section 16 of the 1870 Act, Congress provided that “all persons” shall have the same rights as “white citizens” in “every State and Territory” with regard to a long list of enumerated rights. This prohibition, now codified at

42 U.S.C. § 1981, outlawed “alienage” discrimination by states (and others). Second, in Section 17 of the Act, Congress imposed criminal penalties for certain types of alienage discrimination. This protection, now codified at 18 U.S.C. § 242, expanded the coverage of the 1866 law (which applied only to discrimination based on “color or race” or prior slavery) to also criminalize discrimination “on account of such person being an alien.”

These were not accidental or inadvertent additions. They were carefully and consciously enacted to protect the population of immigrants then most vilified by the states – Chinese laborers in California and the West. The protections were first introduced in a separate bill by Senator William Morris Stewart of Nevada. When Congress was considering the 1870 Civil Rights Act to enforce the rights of newly enfranchised black citizens, the bill was amended to include Senator Stewart’s separate measures to protect the then-disparaged Chinese “aliens.”

For almost a century after adoption of the 1870 Civil Rights Act, the Supreme Court understood the principle of immigrant equality as part of the federal framework preempting state or local laws denying rights, protections, and benefits to non-citizens. Beginning with *Yick Wo v. Hopkins* in 1886 and continuing for nearly ninety years through its landmark decision in *Graham v. Richardson* in 1971, the Court recognized the equality principle embodied in the Civil Rights Act of 1870 for its importance to the preemption of state and local immigration measures. As Graham explained, the equality mandate of the 1870 Act constitutes a part of the country’s “overriding national policies” that are the guideposts for preemption.

Revitalizing the immigrant equality element of preemption has important consequences today. First, enforcing the equality principle obliges courts to assess whether local immigration measures interfere with the federal civil rights mandate. Immigration preemption would properly and directly be concerned with the discriminatory consequences of state and local measures. Second, federal preemption would also recognize an essential distinction between those local laws that advance the equality of non-citizens and those that retard it. Local measures that further equality and reduce discrimination – i.e., immigrant-friendly protection laws – would find affirmative support in the federal framework.

This understanding may help address a concern that is sometimes raised, namely that forceful preemption of state immigration enforcement measures might also limit the leeway of localities to adopt immigrant-friendly (“sanctuary”) laws. In other words, supporters of local immigrant integration policies have worried that robust federal immigration preemption of punitive state laws may undermine the capacity of states to adopt welcoming immigrant-protection policies. I believe a proper recognition of the value that federal law places on non-discrimination compels the conclusion that local

laws advancing immigrant equality are conceptually distinct from laws that target immigrants for enforcement. Forceful preemption of enforcement initiatives does not diminish state flexibility to enact equality measures that further immigrant integration.

In recent months, public attention has shifted away from concern with local laws to focus instead on the promise of federal immigration reform, commonly referred to as “comprehensive immigration reform” or CIR. This may tempt some to think that if CIR were enacted the importance of defining the parameters of state immigration power would be diminished. After all, the assumption would be, if undocumented immigrants are able to gain lawful status the impact and significance of local enforcement recede dramatically. I believe this misunderstands the consequences of CIR. As the legislative process lurches forward toward an unpredictable resolution, reining in state enforcement and encouraging local protection – regardless of whether CIR succeeds or fails – remains urgent.

To be sure, the cornerstone of CIR has long been the quest for a “path to citizenship” for the estimated 11 million vulnerable and insecure undocumented immigrants residing in the United States. But any bill that passes will inevitably benefit only a fraction of that number. The bill passed by the Senate in June 2013, S.744, contains laudable but complex mechanisms designed to achieve legalization for some large but unknown number of undocumented residents in various categories (e.g., young arrivals, agricultural workers, longtime residents, etc.). A Congressional Budget Office analysis estimates that the bill would lead to an estimated 6.8 million individuals qualifying for legal status, i.e., leaving out approximately 3.2 million, with some percentage of those initially qualifying later reverting to unauthorized status for failure to meet ongoing requirements. Some more skeptical advocates with long expertise estimate that 4 to 5 million immigrants of the 11 million would be left out. Under either analysis, millions would not gain legal status.

Moreover, future arrivals would, by definition, not be covered. Like the 1986 Immigration Reform and Control Act (IRCA), the CIR proposals view legalization as a one-time backwards looking “fix” that does not provide for future unauthorized residents and lacks any mechanism for legalization of those who develop deep ties in the future. And of course, any bill that emerges from the House is expected to be narrower still and, at best, to lengthen and complicate the trek to legal status. In short, while millions might qualify, millions of others are sure to be left out, and future arrivals who are indistinguishable from those who came earlier will not be eligible.

What then? Ironically, CIR may generate even more sweeping and aggressive enforcement initiatives against those who are not included in whatever legalization program

might emerge. It is not difficult to imagine a post-CIR world in which the undocumented immigrants who are left behind are treated even more harshly and summarily than today. They may face even greater levels of hostility and discrimination on the ground that the “deserving” undocumented immigrants were covered by CIR and that everyone else is undeserving and relegated to a new “super-illegal” or “super-undocumented” category unworthy of tolerance and vulnerable to a new no-holds barred enforcement regime. The law that benefits some will further diminish the status and claims of others.

Thus, whether legislation passes or fails, demands for new and more aggressive state enforcement are likely to emerge to target those left vulnerable under federal law. A revitalized immigrant equality norm is necessary to ensure that states cannot adopt their own immigration enforcement policies and to preserve ample leeway for sub-federal initiatives that provide affirmative protection for immigrant communities.



Sirine Shebaya, Liman Fellow 2012–13, ACLU of Maryland. Her work helped persuade the Maryland legislature to enact a bill providing drivers' licenses to all state residents, regardless of immigration status.

Profiling Beyond Policing

Justin Cox, Staff Attorney, ACLU Immigrants Rights Project, Atlanta, Georgia, and Liman Fellow 2008

Mention “profiling” and most individuals think of actions taken by police officers on account of race. But for some, the lived experience of profiling – being treated differently based on group membership(s) – is far more pervasive, infecting everyday interactions with public and private actors alike.



After I spoke at a community event in Alabama last year, a Spanish-speaking man approached me and asked for help getting his wife Lily (not her real name) out of the county jail where she was being held for driving without a license. After calling to ascertain the bond amount and learning the jail did not accept cash bonds, I called a local bail bonding company. The first question the young woman asked was to the point: “Where is your client from?” Playing dumb, I replied that Lily lived in a nearby town. Undeterred, the bail bondswoman asked for Lily’s name; equally stubborn, I gave her first name. When finally she drew out of me Lily’s last name (Rodriguez), the bondswoman asked rhetorically, “So she’s Hispanic?,” and explained: “It’ll be a Hispanic bond, then.”

Tired of losing money when Immigration and Customs Enforcement takes custody and whisks people out of state, this bonding company had decided to take no chances; Latino arrestees now have to pay one hundred percent of the bond,

plus the company’s fee, in order to secure their freedom. In the months since, I have encountered bonding companies in other parts of the state with the same requirements. When questioned, one defended the practice by pointing out that “a lot of companies won’t do Hispanic bonds at all.”

But profiling is not confined to the criminal justice world. Walk into the offices of many utility companies in the South with an interpreter or an accent, and you will be told that, despite what was said on the phone or online, you need a driver’s license and Social Security number to open an account. Go to the probate judge and ask for a marriage license. Try to get a prescription filled at some national chain stores and learn that you need “an American ID.” Even unassailably-clear constitutional law is sometimes not enough to discourage profilers: a public school administrator in Dekalb County, Alabama told me last fall that a student had been denied enrollment (for two weeks) because he appeared to be undocumented. School officials were concerned that if he were enrolled but eventually deported, his departure would hurt the school’s dropout rate.

Many of these issues are consequences of historically monochromatic and monolingual communities experiencing their first sustained contact with those who are neither white nor black, and who speak a different language to boot. But the problem of profiling has been exacerbated by the passage of anti-immigrant laws common in the region (Alabama, Georgia, and South Carolina all have a variant of Arizona’s SB 1070). These laws both reflect and freeze in time a particular popular conception – a profile – of the costs, motivations, and desirability of the states’ recent arrivals. They give license,

moreover, to those who already were profiling or were otherwise inclined to do so by signaling official opprobrium of a certain segment of the population that correlates so well in the popular imagination with “Hispanic” that debates about the need for such legislation invariably were framed in racial terms.

Recent legal victories against these laws have blunted their sharpest edges, and the havoc they have wrought has helped served as a cautionary tale to dissuade some states to follow suit. But so long as “Hispanics” are seen as social outsiders in this region, they will continue to experience the ill-fitting profiles hung onto them by others.



Taonga Leslie, Liman Harvard Summer Fellow, spent the summer at the ACLU's Immigrant Rights Project.

Profiling vs. Enforcement: Asking the Wrong Question?

Rebecca Bernhardt, Policy Director, Texas Defender Service, and Liman Fellow 2000

The Liman Colloquium's panel on racial profiling began with the question: “When, if ever, is profiling legitimate law enforcement?” The very question made me challenge its premise: How much “legitimate” law enforcement exists solely because it targets blacks, Hispanics, Asians and Muslims? It astounds me how much policing, arresting, jailing, prosecuting, convicting and sentencing of people in the United States is perceived as necessary law enforcement activity because of stereotypes about the targets of that policing.



On the U.S.-Mexico border, the line between profiling and enforcement can seem irrelevant at best. As immigration and criminal law have merged, whole communities are subject to enforcement activity performed under statutes that, while facially neutral, target Latino migrants and locals without a meaningful public safety benefit. The most commonly charged federal crimes – unlawful entry into the United States (8 U.S.C. § 1325(a)) and unlawful re-entry into the United States (8 U.S.C. § 1326) – have been part of the immigration law since 1952. 8 U.S.C. § 1325(a) makes it a federal misdemeanor for a non-citizen/national to enter the U.S. while avoiding inspection at a port. This is such a common “status” for unauthorized immigrants taken into custody by federal immigration authorities that the forms are pre-printed with the acronym “EWI” for “entered without inspection.” But until very recently, very few “EWI” immigrants were charged for the crime of entry

without inspection. That has all changed. Since 2008, there has been a 67.8 percent increase in immigration-related criminal prosecutions.

This policy diverts federal resources from criminal law enforcement that could have an impact on the causes of violence and instability in the border region: large scale smuggling of drugs, weapons, and people; corruption in law enforcement; money laundering; and extortion kidnappings. As one former narcotics officer put it, prosecuting the immigrants is like putting the drugs in jail. Migrants are not the cause of the criminal activity. In the border region, they are the contraband.

Why is improved security so often equated with prosecuting immigrants for entering the United States without inspection? An association between immigrants and crime in public opinion has enabled, if not made politically necessary, the increased prosecution of immigrants for unauthorized entry.

Over-policing of low-level drug crimes has a longer history but is similarly tainted by racial bias. Even as the “drug war” has come to be perceived by many across the political spectrum as a law enforcement failure, drug possession arrests and prosecutions continue to clog courtrooms from New York to Houston.

Possession of a use-amount of marijuana does not harm others or, by itself, create a serious public safety threat. According to a recent ACLU report, African Americans are four times more likely than whites to be arrested for marijuana possession even though whites and blacks use at comparable rates.

Some have said that the perpetuation of low-level drug enforcement, which predominately impacts communities of color, is part of the criminal justice system's broader function as a tool of social control. But I look at the contradiction

between liberal American opinions on drugs and the draconian and counterproductive reality of the drug enforcement police state slightly differently. This fool's errand of arresting low-level drug users is difficult to stop, in part, because over-policing helps to create and to perpetuate the very problems that such policing is deemed necessary to solve. In other words, the disproportionate impact of drug law enforcement on black and brown communities in the U.S. is one of the few things that continue to legitimate it. Thus, drug possession laws, over-enforced in black and Hispanic neighborhoods throughout the United States, enable a sort of "preventive detention."

Houston provides an example of the merry-go-round atmosphere of over-criminalization. The Houston Police Officer's Union has explicitly endorsed charging individuals with felony drug possession if they are found with used drug paraphernalia. The rationale is that arresting drug addicts (assuming carrying used paraphernalia is a proxy for drug addiction) prevents burglaries, because drug addicts generally commit burglaries to fuel their drug habits.

Yet, the justification for this expensive and harmful policy is unsupported by the last three years of crime rate data.

For the period during which Houston did *not* charge people found carrying used paraphernalia with felonies, the region's property crime rate dropped significantly. Unfortunately, those facts have not influenced the politics; the newly elected District Attorney has reinstated the original policy.

To expose the weaknesses of profiling, we need to ask a more fundamental question. What evidence do we have that the dominant law enforcement strategy actually achieves a shared public safety goal? If we are spending millions of dollars and cannot show that we are safer, the strategy should be mothballed, like other outmoded and ineffective government programs.



Jorge Barón, Executive Director of Northwest Immigrant Rights Project and Liman Fellow 2005, responds to the panel.

Responding to NYPD Surveillance of Muslims

Ramzi Kassem, Clinical Professor of Law, CUNY School of Law

Diala Shamas, Staff Attorney, Creating Law Enforcement Accountability & Responsibility (CLEAR), and Liman Fellow 2011–13



Ramzi Kassem



Diala Shamas

News of the National Security Agency's (NSA) telephonic surveillance program has sparked widespread criticism in Washington, but New York's Muslim communities learned they have been targets of a far more intrusive dragnet by the New York City Police Department (NYPD).

As revealed in Pulitzer Prize-winning Associated Press (AP) reports in 2011, the NYPD's intelligence division has sent undercover officers and paid informants to spy on all things Muslim in New York and surrounding states: targets include neighborhood cafes, student groups, and places of worship. No facet of American-Muslim life has been deemed too innocent or

too personal for police surveillance.

The NYPD, in published studies, equated religious behavior with indicators of potential criminal activity, thus justifying placing all Muslims under intensive police scrutiny. Officers have infiltrated Muslim student whitewater-rafting trips, recorded mosque sermons, and noted which TV channels cafes screened. Despite this expansive – and expensive – program, as NYPD chief Thomas Galati admitted during sworn testimony, during his six-year tenure at the division, this work has not yielded a single criminal lead.

Diala Shamas started a Liman Fellowship at the Creating Law Enforcement Accountability & Responsibility (CLEAR) project in August of 2011, just three weeks before the first AP reports made headlines. Since then, CLEAR, which Ramzi Kassem founded in the clinical branch of CUNY School of Law, has taken on several aspects of the community response to these confirmations of sprawling surveillance.

The first step was to approach affected communities and to offer our assistance as they responded to the news. We reached out to Muslim student groups and mosques whose names had turned up in the leaked NYPD internal documents. Across the board, there was a significant hesitation to discuss surveillance out of fear of retaliation. Eventually, we were able to facilitate conversations through rights-awareness workshops. These conversations, and our work with other coalitions, demonstrated

a need for elevating these muted voices and for countering the NYPD's most common response to its critics: that surveillance is harmless.

CLEAR's research has shown that the program is as harmful as it is ineffective. In a report our organization researched and published, *Mapping Muslims: NYPD Spying and Its Impact on American Muslims*, interviews with a wide swath of American-Muslims showed the devastating impacts of NYPD surveillance on their daily lives. Muslim students described remaining silent during class discussions and posting signs in their clubroom urging their Muslim peers not to discuss politics. Individuals refrain from gathering to worship, not knowing whether the person praying next to them is an informant. In short, the NYPD has alienated the very communities with whom it should be developing relationships of trust.

The report also contextualizes surveillance, showing that the NYPD's over-zealous approach is neither new nor unique. Historically, the NYPD has engaged in mapping of various immigrant communities. This pattern can be traced as far back as 1904, when the NYPD monitored the practices and activities of Italian immigrants. Surveillance of progressive groups – communists, anarchists, labor unionists, and civil rights activists – continued through the 1960s.

Today, other communities of color are responding to similar practices that are based on equally faulty premises. For years, community activists and groups have engaged in a significant and sustained campaign to counter the NYPD's controversial "Stop and Frisk" policies. These efforts have matured in recent years, leading to large-scale protests, legislative campaigns, as well as several lawsuits focused on various aspects of the NYPD's policies. One lawsuit, brought by the New York Civil Liberties Union with the assistance of Liman Fellow Dan Mullkoff, resulted in a federal court injunction forbidding the NYPD from continuing its practice of making widespread suspicionless stops and trespass arrests at private apartment buildings.

American Muslim groups have dovetailed their efforts with the broader police-accountability movements, creating a synergy that has not gone unnoticed by elected officials. CLEAR's community partners, including the Muslim American Civil

Liberties Coalition, have partnered with Communities United Against Police Reform – an umbrella coalition seeking to end discriminatory policing practices in New York.

These groups have spearheaded legislative efforts within the City Council. In June of this year, the City Council passed, with overwhelming majority, two bills that would bring oversight and accountability to the NYPD. The first prohibits profiling and discrimination in the department and creates a private right of action that would allow bringing discrimination claims against the NYPD. The second bill establishes an independent oversight body for the NYPD, housed at the Department of Investigations. Mayor Bloomberg vetoed both bills, arguing that the NYPD would be overrun by lawsuits and that the measures would chill officers from doing their jobs. CLEAR and our partners worked to secure veto-overrides from City Council members.

Communities have also turned to the federal courts. In June 2013, CLEAR, along with the ACLU and NYCLU, filed a lawsuit challenging the constitutionality of the NYPD's discriminatory, suspicionless surveillance program. The plaintiffs represent different facets of American Muslim communities: two mosques, three imams or religious leaders, a young activist, and a charity have all come together to ask for judicial intervention. In June 2013, we announced the lawsuit at a press conference with over a hundred community members in attendance – including representatives from churches, mosques, synagogues, and allied groups. It was an inspirational moment for everyone involved.

There has been a palpable shift in tone among community members since we first began our work: from initial shock and silence to awareness and mobilization. CLEAR continues to work with grassroots groups, speaking at mosques, Muslim students' associations, and other community centers about surveillance, and a host of other post-9/11 policies affecting them on a day-to-day basis. Thus far, the NYPD refuses to scale back the surveillance program or to disavow its policing practices. But there is a positive story to be told and celebrated in New York: communities have organized, and alliances have been forged.

The report is available online: <http://www.law.cuny.edu/academics/clinics/immigration/clear/Mapping-Muslims.pdf>.



Press conference announcing CLEAR lawsuit, June 2013, City Hall, Manhattan.

Bringing Profiling into Public View: Documenting Discrimination on Film



The Colloquium screened two short documentaries that capture the experiences of profiling. The first film, *Stopped and Frisked for Being a "F&@!ing Mutt"* focused on New York City's controversial "stop-and-frisk" program and centered on a recording that a young man had made of one such encounter with police near his home in Brooklyn. The second film, *Alienation*, made by Yale's Visual Law Project, detailed a 2007 immigration raid of a convenience store in Baltimore, where agents arrested dozens of bystanders for alleged immigration violations. The film follows the story of two of the families swept up in that raid.

Speakers included David Menschel, who produced the NYPD film; Valarie Kaur, who co-founded the Visual Law Project; and

Ruthie Epstein, who with Human Rights First has organized advocates' roundtables across the country to find common ground among immigration and civil rights communities. The utility of such films was debated. Are they art, activism, or propaganda? Do films raise awareness beyond the short term? Do social media outlets give the film staying power? Can they be used to prompt exchanges within and among communities? The films are available online: <http://www.thenation.com/blog/175728/secret-recording-stop-and-frisk-makes-it-federal-court#axzz2dqVYbovb>; <http://yalevisuallawproject.org/film/alienation>.



David Menschel, Valarie Kaur, and Ruthie Epstein (left to right).



Ivy Wang, Liman Fellow 2013 and Student Director, Yale Visual Law Project. At Southeast Louisiana Legal Services, Wang is working to help people with criminal records gain access to housing.

Profiling, Surveillance, and Safety



Liman Director and Moderator Hope Metcalf with participants Justin Cox, Ramzi Kassem, Becky Bernhardt, and Holly Thomas (left to right).

Interactions between individuals and government officials have raised concerns among communities of color. One panel explored the concept of “profiling” and its relevance to policing in New York City, to surveillance of Muslim Americans in New York and Los Angeles, to immigration and drug enforcement in Texas, and to anti-immigrant ordinances in the Deep South and Midwest.

“If you think about the ideology underlying the NYPD’s covert surveillance program among American Muslim communities in New York City and the ideology that has been constructed to justify the NYPD’s ‘stop-and-frisk’ program – the similarities are striking. The logic is the same: If you use crude profiling categories, you can prevent criminal activity downstream. And the costs are borne predominantly by poor and working class communities of color.”

– **Ramzi Kassem**, Associate Professor of Law, City University of New York

“It is hard for me to separate profiling from enforcement. If you look at what’s on the books in the federal system and what’s happening in practice – it’s enforcement, sure, but in Texas about 80% of prosecutions are criminal immigration violations. There are a lot of questions to be asked about those priorities and whether they actually make us safer. Similar questions abound as to drug enforcement.”

– **Rebecca Bernhardt**, Policy Director, Texas Defender Service, and Liman Fellow 2000

“When I hear the word profiling, I think of police activity. But it’s a broader issue than that. It can happen whenever you have a government agency interacting with a private individual. Enrolling your child for school, signing up with the water utility, applying for a marriage license. If you speak English with an accent, a whole other set of rules apply.”

– **Justin Cox**, Staff Attorney, ACLU Immigrant Rights Project, and Liman Fellow 2008

“Anti-immigrant housing ordinances criminalize what is otherwise lawful activity. These laws have an *in terrorem* effect. Cities call it attrition by enforcement. We call it striking fear into people, even among those who may be here lawfully. The message is clear: you’re not welcome. For me, that has a lot of resonance with other civil rights struggles.”

– **Holly Thomas**, Appellate Attorney, U.S. Dept. of Justice, Civil Rights Division, and Liman Fellow 2005

Accessing Counsel and Courts



Senior Liman Fellow and Moderator Sia Sanneh with Andrea Marsh, Brandon Buskey, Raquiba Huq, Michael Churgin, and Allegra McLeod (left to right).

“You could take a dart and throw it at a map of the United States and hit a failing indigent defense system. In all these places, we’re trying to figure out how to argue for the right to representation in a way that is meaningful. As a guiding principle, we’ve sought opportunities to combine our advocacy for right to counsel with other issues, like decriminalization, which can take minor offenses off the books to free up more funds for a properly resourced defender system.”

– **Brandon Buskey**, Staff Attorney, ACLU Criminal Justice Reform Project

“Immigration hearings regularly happen in places where access to counsel is almost non-existent. Due to the restrictions on the Legal Services Organization from 1996, we have a situation in which the largest provider of legal services for non-citizens is the Catholic Church.”

– **Michael J. Churgin**, Raybourne Thompson Centennial Professor, The University of Texas School of Law

“What a difference it makes to have a lawyer. It’s so hard to fight your case while detained. Without a lawyer or connections to the outside world, it’s almost impossible. But even if we had an attorney for everyone, it still won’t be enough because the immigration laws are so harsh and draconian.”

– **Raquiba Huq**, Supervising Attorney, Legal Services of New Jersey, and Liman Fellow 2007

“I work in a field in which we have a right to counsel. A Texas Supreme Court case found a right to counsel before *Gideon v. Wainwright*, and since *Gideon*, we’ve brought litigation to further those rights. So we’re full up on rights. But despite those rights, in practice, we still have in Texas many people who plead guilty without any access to a lawyer. In some cases they are denied counsel outright, and in others, they are discouraged from asking. We have two clients who were jailed because they asked for counsel in their felony cases.”

– **Andrea Marsh**, Executive Director, Texas Fair Defense Project, and Liman Fellow 2002

“We have all become inured to criminal and immigration law’s rationalized, sanitized, and proceduralized violence. Our law, court processes, and legal training make this violence sometimes hard to see and even harder to confront. While providing more and better lawyers is important for individual cases, an emphasis on incorporating criminal procedure-style protections in the immigration context threatens to obscure injustice, and could undermine our efforts to address more powerfully overenforcement, overcriminalization, and overincarceration.”

– **Allegra McLeod**, Associate Professor, Georgetown University Law Center, and Liman Fellow 2008

Detention, Households, and Community



Senior Liman Fellow in Residence and Moderator Nina Rabin with Michelle Brané, McGregor Smyth, Phillip Genty, Jorge Barón (left to right).

“As a parent, I’ve heard stories that literally took my breath away. One female immigration detainee asked if I could call her sister to find out where her children were. She had been picked up on a traffic stop, taken on a detainer to an ICE facility, and she had been held for three weeks without knowing anything about her children’s whereabouts. This happens shockingly often, and in many cases, children can end up in child protective custody, in termination proceedings, and even adoption.”

– **Michelle Brané**, Director, Migrant Rights and Justice Program, Women’s Refugee Commission

“A simple traffic stop can end up tearing a family apart. The intersection between local law enforcement and federal immigration produces tragic results and creates an immense amount of work. You have to tackle it at the municipal or county level.”

– **Jorge Barón**, Executive Director, Northwest Immigrant Rights Project, and Liman Fellow 2005

“It’s useful to take a collateral consequences framework in thinking about families and incarceration. The effects are absolute, automatic, and permanent. There is a huge impact on families when someone is incarcerated. Between 50-60% of people in prison have minor children, and between 1.5-2 million children have an incarcerated parent. Of the children in the foster care system who had incarcerated parents, 80% had parents whose rights had been terminated.”

– **Phillip Genty**, Everett B. Birch Innovative Teaching Clinical Professor in Professional Responsibility, Columbia Law School

“There is an ever-increasing web of sanctions for even the most minor contact with law enforcement. Every single year, legislators add to the list of penalties and disabilities that attach to having a criminal record. It goes to every area of life.”

– **McGregor Smyth**, Executive Director, New York Lawyers for the Public Interest, and Liman Fellow 2003

Migrants and Defendants: 30 Years of Rights Claims



Lucas Guttentag, Muneer Ahmad (front); Judith Resnik, Stephen Bright (rear).

The concluding panel reflected on the genesis of rights movements for criminal defendants and immigrants. Moderated by Judith Resnik, the panel included Yale Law School faculty members Stephen Bright, who founded the Southern Center for Human Rights and who directs the Capital Defense Clinic; Lucas Guttentag, who established the ACLU's Immigrants' Rights Project and who teaches immigration law and policy; and Muneer Ahmad, who supervises the Worker and Immigrant Rights Advocacy Clinic.

"One thing that has changed since I started is the number of people in this room. When I went to law school, immigrants' rights didn't exist as a discipline. So to see this explosion of energy, commitment, devotion, and creativity is absolutely amazing. That is, to me, the starting point. . . . Doctrinally, not that much has changed. We're still in the *Dred Scott* era – so we've got a long way to go."

– Lucas Guttentag, *Ford Foundation Distinguished Senior Research Scholar in Law and Robina Foundation Distinguished Senior Fellow in Residence, Yale Law School*

"I graduated from law school in 1996, a very bad year for immigrants' rights. We are still living with the consequences of the marriage of criminalization and immigration law. And here we are now in 2013, perhaps on the cusp of comprehensive immigration reform. One lesson from the past is that most immigration reform has been framed as a grand compromise, with lasting and often negative effects. But the critical difference

today is the vitality of the immigrant movement. Now, immigrants themselves are involved in the conversation."

– Muneer Ahmad, *Clinical Professor of Law, Yale Law School*

"There is really no question that the right to counsel is not a reality in most places. We still have not done what the Supreme Court said was not just a good idea but was constitutionally required. The criminal justice system is the area least affected by the civil rights movement. I go into courthouses throughout the South, and it looks like a slave ship. On the flip side, though, I see what Andrea Marsh and others have done in Texas and elsewhere. It shows what a difference a person can make, if there's a person there to make the difference."

– Stephen B. Bright, *President and Senior Counsel, Southern Center for Human Rights and Visiting Lecturer, Yale Law School*

Liman and Prisons

In keeping with the commitments of Arthur Liman, the Liman Program devotes significant energy to the subject of prisons and the people who live and work there. This year, our weekly seminar is exploring various facets of criminal justice. The Fall 2013 Liman Workshop, *Incarceration*, addresses the law of prisons; the market for prisons; the perspectives of those who direct prisons, who work in them, and who are detained by them; and the impact of prisons on the polity. Co-teaching the course is Ashbel T. Wall, II, a graduate of Yale College and Yale Law School and Director of Corrections for Rhode Island. The Spring 2014 Workshop, *Moving Criminal Justice*, will consider how criminal justice “reform” agendas are developed, gain currency, become law, and make change – for better and for worse.

Outside the classroom, Liman faculty and students continue this work. Our ongoing research goals include understanding policies across the United States that govern visiting prisoners as well as those isolating prisoners in special housing. In 2013–2014, these projects will also entail mapping the locations of women and men in the federal prison system. Of specific concern is a proposal by the federal Bureau of Prisons to close Danbury FCI – its sole prison facility for women in the Northeast.

The Proposed Closing of the Northeast’s Only Federal Correctional Facility for Women

In early July 2013, local press reported that the federal Bureau of Prisons (BOP) planned to convert its Federal Correctional Institution (FCI) at Danbury, the only women’s prison in the Northeast, to a men’s facility. Members of the Committee on Women in Prison of the National Association of Judges (NAWJ) grew concerned about the proposed closure, as the 1,100 women who lived at Danbury were slated to be transferred to other facilities, including a newly-opened 1,800 prison in Aliceville, Alabama. (The 200-bed lower security satellite facility at Danbury is to remain open.)

In July of 2013, Judith Resnik wrote an op-ed, published in *Slate*, to detail the impact on inmates of the planned closure. Danbury is 70 miles from New York City and is accessible by public transportation. In contrast, Aliceville – more than one thousand miles from New York City – is in a town of 2,500 that has no airport, train, or long-distance bus service.

Being moved far from home limits inmates’ opportunities. Recent research from Michigan and Ohio documents that inmates who receive regular visits are less likely to have disciplinary problems while in prison and have better chances of staying out of prison once released. Family ties are important, as the White House and the Department of Justice recognized in their 2013 initiatives to reduce the “collateral costs” of incarceration on the children of prisoners.

As the Justice website explained: “Research shows that maintaining contact and healthy relationships in spite of the barriers represented by prison walls is not only possible but beneficial, for both the children and their parents. We owe these children the opportunity to remain connected to their mothers and fathers.” In June of 2013, the Director of the federal prison system sent a memo to all inmates to announce that his staff was “committed to giving you opportunities to enhance

your relationship with your children and your role as a parent.” In addition to letters and calls, he hoped that inmates’ families would bring their children to visit. “There is no substitute for seeing your children, looking them in the eye, and letting them know you care about them,” he wrote.

According to the National Women’s Law Center, more than one-half of female federal prisoners have a child under the age of 18. Yet for prisoners from New England and the Mid-Atlantic states, being transferred far away closes off possibilities for family visits, as well as access to local lawyers, educational programs, and community volunteers.

Resnik’s op-ed joined others bringing national attention to the issue. Eleven Senators from the northeastern states wrote to the director of the federal prison bureau to request a suspension of transfers until many “important concerns” were “properly addressed,” including how women offenders would be able to be in touch with the communities from which they came. The American Bar Association, the National Association of Women Judges, the New York Initiative for Children of Incarcerated Parents, the Osborne Association, and the Human Rights Defense Center have all written to ask that Danbury not be closed to women. An editorial by the *New York Times* called for the plan to be halted. In mid-August, the BOP agreed temporarily to halt transfers out of Danbury, so as to gather answers to the questions posed by the Senators.

The Liman Program’s efforts on this issue continue Yale Law School’s long-standing relationship with inmates at Danbury. The Yale Law School clinical program, founded by Denny Curtis, Dan Freed, and Stephen Wizner, began providing legal services to Danbury prisoners in the early 1970s. In the late 1970s, while a clinical teaching fellow at Yale Law School, Judith Resnik testified before a subcommittee of the House Judiciary

Committee about the lack of any low-security “camps” for women throughout the federal system and the lack of housing for women in the Northeast. In 1994, Danbury became a facility for women, with both a camp and a prison. Working under the supervision of Brett Dignam, who was then teaching at Yale, Megan Quattlebaum, now a Senior Liman Fellow in Residence, visited Danbury frequently when a student in Yale’s Prisoner Legal Services Clinic.

More detail comes from Resnik’s op-eds: “Harder Time: Why are the federal prison beds for women in the Northeast going to men—while the

women get shipped to Alabama?”, July 25, 2013, *Slate*, and “Keep Female Prisoners Close to Family,” (with Nancy Gertner) September 3, 2013, *The Boston Globe*.



Judith Resnik



Hope Metcalf



Megan Quattlebaum

Degrees of Isolation in Prison

Administrative Segregation, Degrees of Isolation, and Incarceration: A National Overview of State and Federal Correctional Policies, published in June 2013, is the culmination of two years of research by Liman students and faculty. Working with the Association of State Correctional Administrators (ASCA), researchers reviewed the written policies on administrative segregation that have been promulgated by correctional systems in the United States. With ASCA’s assistance, the Liman Program received policies from 46 states and the Federal Bureau of Prisons.

The report – the first ever to survey policies across so many jurisdictions – provides a window into “administrative segregation,” a decision made by prison officials that can result in isolation of inmates for periods ranging from a brief time to many years. The goals were to understand the rules governing placement, the authority of decision-makers in prisons to put inmates into segregation, and the procedures for making and reviewing those judgments. From the formal policies, it was possible to gain some information about the degrees of isolation, the possibility of visits, and the steps necessary for inmates to return to general population.

By way of background, separation of prisoners has become standard throughout the country. Correctional policies typically permit the placement of inmates in administrative segregation based upon the determination that the inmate poses a safety risk to themselves, other inmates, staff, or institutional order. Correctional administrators view authority to do so as necessary to protect prison systems and their inhabitants.

Recently, these practices have generated a good deal of



Liman Fellows Alyssa Briody (2013), Alyssa Work (2013), and Jenny Zhao (2012) (left to right). Alyssa Work co-authored the report with Jamelia Morgan (YLS 2013), Samuel Olikier-Friedland (YLS 2014), Julia Spiegel (YLS 2013), Haran Tae (YLS 2014), Hope Metcalf, and Judith Resnik, and participated in presenting the findings to the Association of State Corrections Administrators at its annual meeting in January 2013.

controversy because of the potential for indefinite separation and the varying degrees of social contact permitted. Much of the public discussion discusses the problems of “solitary confinement” and “isolation.” In 2012, a subcommittee of the U.S. Senate held hearings to “reassess solitary confinement,” and in 2013, the General Accountability Office registered many concerns about the federal Bureau of Prisons’ reliance on “separated housing.” Many correctional systems are currently reviewing their use of segregated confinement as they reconsider this form of control, its duration, and its effects.

Findings of the Liman Report include that all jurisdictions

in the United States provide for some form of separation of inmates from the general population and that the policies share the same basic features: the placement of an inmate singly or doubly in a cell for 23 hours a day; assignment for a potentially indefinite period; close supervision over all out-of-cell movements; and restrictions on participation in everyday activities such as recreation, shared meals, visitation, and religious, educational, and other programs. The Liman study also identified several states that have narrowed entry criteria, either through revised standards or centralized review.

Yet, in general, correctional systems use broad criteria to place individuals in segregation. Further, the policies alone do not inform the questions about who is in segregation, for what reasons, or for how long. Given the diversity in procedures used to enter and to exit administrative segregation, much more research is needed to define the appropriate purposes and parameters of segregation. The Liman Program is exploring how to do some of this work. The Report can be found at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2286861.

Research Helps to Produce Changes in Prison Visiting Policies



Aaron Littman, *Liman Yale Summer Fellow 2009, Liman Student Director 2012–13*



Chesa Boudin, *2013 Liman Fellow*

The Utah Department of Corrections announced that, as of August 1, it has abandoned its “English only” policy for visitors to prisoners in its system, and undertaken other important reforms to facilitate visiting. Research by Yale students and faculty working in the Arthur Liman Public Interest Program at Yale Law School helped provide the backdrop for this change. The report, co-authored by Chesa Boudin ’11, Trevor Stutz ’12, and Aaron Littman ’14, provided the first comprehensive comparison of all fifty state prison systems and of the Federal Bureau of Prisons. The study found that Utah was the only state to forbid inmates from speaking with visitors in languages other than English.

This research is complemented by a growing body of data on the important role that visitors play in prisons. Other studies have documented that inmates who receive regular visits are less likely to have disciplinary problems while in prison and have better chances of staying out of prison once released.

“Visitation policies have real life implications for the people in prison and their mothers, fathers, sons, daughters, husbands, wives and friends. Research has shown that increasing access to visitation is related to decreased prison violence and lower recidivism rates, and helps to break the cycle of intergenerational incarceration. We are tremendously heartened by Utah’s willingness to modernize its visitation policies. We look forward to working with other states across the country to do the same,” said Boudin.

As the Liman Report details, states vary widely in terms of both their rules on visiting and how easy it is for the public to find those policies. The study, like the report on administrative segregation, is part of an ongoing collaboration with the Association of State Corrections Administrators (ASCA), which asked its members to provide copies of their visiting policies and welcomed the students’ presentation last October at its annual meeting. At the request of ASCA members, the Liman Program also provided an overview of policies facilitating, as well as those impeding, visiting. Articles based on the report are: *Prison Visitation: A Fifty State Survey*, in 32 *Yale Law & Policy Review* (forthcoming 2014), and *Prison Visitation: A Fifty State Survey*, *Prison Legal News*, May 2013, at 1.

Exploring Common Challenges for Migrants and Defendants in Detention

The presence of two Senior Liman Fellows in Residence – Sia Sanneh and Nina Rabin – provided a special opportunity in 2012–13 for the Liman Program to explore intersections between criminal justice and immigration. Sia Sanneh (YLS ’07) joined the Liman Program from Equal Justice Initiative in Alabama, to which she has returned to lead a new project to address racial disparities in the criminal justice system; she also co-teaches Yale’s Capital Defense Clinic with Stephen Bright. Nina

Rabin (YLS ’02) directs an immigration clinic at James E. Rogers College of Law, University of Arizona and the interdisciplinary Bacon Immigration Law & Policy Program. Her research interests include the impact of immigration enforcement on women and families.

When both were at Yale in 2012–2013, the Liman Workshop focused on challenges faced by people in the criminal justice and immigration systems. In the fall semester, our topic was

Borders, and we were joined by Lucas Guttentag who, as noted, founded the ACLU's Immigrant Rights Project and teaches at Yale Law School. In the spring, the focus was *Racial Justice and Immigrants' Rights: Debates and Dialogues*.

Liman students also researched and published a handbook on the rights and responsibilities of incarcerated parents in Connecticut. Federal legislation, the Adoption and Safe Families Act, mandates that the state bring parental termination proceedings for children who are in foster care



Nina Rabin, Clinical Professor of Law, University of Arizona Rogers College of Law, and Liman Senior Fellow in Residence 2012–13.

for more than 15 months; consequently, many incarcerated parents struggle to maintain family ties. Rabin worked with students to update the handbook to include a special section for non-citizen parents, who face many of the same challenges. Further, following the presentation of the students' research to the Connecticut Department of Children and Families, the Department has revised its policy so that citizenship status is not considered when the state places children in alternative care because the parents are in detention. Thus, non-citizen children are far less likely to end up in foster care and are more likely to maintain relationships with their biological parents.

The guidebook, which educates parents and families about how the law operates in Connecticut, is available electronically and a team of students has provided trainings to various service providers. http://www.law.yale.edu/documents/pdf/Liman/CT_FamilyLawHandbook.pdf.

Judith Resnik Receives Top Honor from National Association of Women Lawyers



In July 2013, the National Association of Women Lawyers (NAWL) awarded its highest tribute, the Arabella Babb Mansfield Award, to Judith Resnik. The award is named after the first woman licensed in 1869 to practice law in the United States. The NAWL presents the award annually to a woman whose career embodies qualities

of professional achievement, positive influence, and valuable contribution to the advancement of women's interests in and under the law.

NAWL, founded in 1899, is the country's oldest national voluntary legal professional organization devoted to promoting the interests and progress of women lawyers and women's legal rights. NAWL responds to societal issues confronting women worldwide. Some of the Arabella Babb Mansfield award's past recipients include the Honorable Ruth Bader Ginsburg; then-Judge Sonia Sotomayor; then-Harvard Law School Dean Elena Kagan; Hon. Nancy Gertner (ret.); Marcia Greenberger, Founder and Co-President of the National Women's Law Center; and New York Chief Judge Judith Kaye (ret.).

Liman Faculty and Fellows' Articles

To glimpse the work of the Liman Program, we provide some of the recent publications by current and former faculty and fellows.

Deborah Cantrell, *Re-Problematizing Anger in Domestic Violence Advocacy*, Am. U. J. Gender Soc. Pol'y & L. (forthcoming 2013).

Fiona Doherty, *Indeterminate Sentencing Returns: The Invention of Supervised Release*, 88 N.Y.U. L. Rev. 958 (2013).

Allegra M. McLeod, *Regulating Sexual Harm: Strangers, Intimates, and Social Institutional Reform*, 102 Cal. L. Rev. (2014).

Hope Metcalf and Judith Resnik, *Gideon at Guantánamo: Democratic and Despotic Detention*, 122 Yale L.J. 2504 (2013).

Nina Rabin, *Disappearing Parents: Immigration Enforcement and the Child Welfare System*, 44 Conn. L. Rev. 99 (2011).

Judith Resnik & Dennis Curtis, *Inventing Democratic Courts: A New and Iconic Supreme Court*, 38 Journal of Supreme Court History 207 (2013).

Judith Resnik, *Globalization(s), privatization(s), constitutionalization and statization: Icons and experiences of sovereignty in the 21st century*, 11 International Journal of Constitutional Law (I·CON) 162 (2013).

Sia M. Sanneh and Steven B. Bright, *Fifty Years of Defiance and Resistance After Gideon v. Wainwright*, 122 Yale L.J. 2150 (2013).

Sarah Russell, *Review for Release: Juvenile Offenders, State Parole Practices, and the Eighth Amendment*, Indiana Law Journal (forthcoming 2014).

Charisa Smith, *Nothing About Us Without Us! The Failure of the Modern Juvenile Justice System and a Call for Community-Based Justice*, 4 Journal of Applied Research on Children 11 (2013).



Liman Fellows 2012–13: Chesa Boudin, Rebecca Scholtz, Edward McCarthy (back row, left to right); Olivia Sinaiko, Lindsay Nash, Jenny Zhao, Diala Shamas, Romy Ganschow, Forrest Dunbar, Yaman Salahi (middle row, left to right); Isabel Bussarakum, Sirine Shebaya, Dan Mullkoff (front row, left to right), and with Judith Resnik (front left) and Hope Metcalf (front right).

Update on the 2012 – 2013 Liman Fellows

Since its inception in 1997, the Liman Fellowship has awarded fellowships to 94 Yale Law School graduates, who have served at more than 70 host organizations throughout the United States. In 2012–13, the Liman Program awarded nine fellowships as well as four extensions, which were made possible by matching funds from the host organizations.

Working in Alaska, California, Connecticut, Maryland, Minnesota, and New York, the Fellows dealt with a range of problems, such as representing non-citizen defendants in criminal and immigration proceedings, enforcing state housing laws that protect low-income renters, and safeguarding the subsistence rights of indigenous Alaskans. In the coming year, thanks to matching funds from their host organizations, three Liman Fellows will continue their projects for an additional year.

Chesa Boudin, at the San Francisco Public Defender (SFPD), represented indigent defendants in misdemeanor cases. In addition, he assisted the SFPD to revisit its policies regarding non-citizens in light of *Padilla v. Kentucky*, 559 U.S. 356 (2010), which requires that defendants be advised of the immigration consequences of criminal convictions. Boudin also collaborated with immigration advocacy organizations to persuade the Sheriff's Office and the San Francisco Board of Supervisors to develop new policies so that local police no longer

automatically turn over offenders to Immigration and Customs Enforcement (ICE). He is clerking in 2013–14 for the Honorable Charles Breyer of the Northern District of California.

Isabel Bussarakum joined Lisa Daugaard (Liman Fellow 1998) at the Public Defender Association's Racial Disparity Project in Seattle, Washington. She provided civil legal services to participants of the Law Enforcement Assisted Diversion pilot program, which diverts low-level drug and prostitution offenders to community-based services, in lieu of criminal prosecution. She worked to lower systemic barriers for former prisoners, for example, by joining with local advocates in Seattle to pass a "ban-the-box" bill, which changes how city job applicants are asked to disclose criminal histories. Bussarakum is currently clerking for the Honorable Michael W. Fitzgerald of the U.S. District Court for the Central District of California.

Forrest Dunbar worked at the Alaska Office of Public Advocacy, where he did research and policy advocacy related to drug laws. The bill he worked on most closely, SB56 – an effort to reclassify low-level drug possession from a felony to a misdemeanor – passed the Alaska State Senate in April and, as of this writing, is currently before the State House Finance Committee. He continues to live and to work in Alaska.

Romy Ganschow, as a Fellow at Brooklyn Legal Services Corporation, represented low-income tenants and tenants' associations in North Brooklyn, which has been transformed in recent years by rapid gentrification and the loss of rent-regulated housing. She assisted tenants to enforce their rights to safe, quality affordable housing by organizing tenants, bringing affirmative litigation against negligent and abusive landlords, and defending tenants in eviction proceedings.

Edward McCarthy represented indigent defendants in both criminal and immigration court during his fellowship at the Office of the Public Defender in New Haven, Connecticut. Further, he assisted other defense attorneys in crafting criminal dispositions that would avoid immigration consequences for their clients. McCarthy is clerking in 2013-2014 for the Honorable Victor Marrero of the U.S. District Court for the Southern District of New York.

Daniel Mullkoff is a staff attorney at the New York Civil Liberties Union, where he spent two years as a Liman Fellow challenging police misconduct related to the NYPD's controversial stop-and-frisk program. As a Fellow, Mullkoff focused on a class action alleging a widespread pattern of unlawful stops and arrests for trespassing at private apartment buildings. That litigation resulted in a first-ever injunction of the stop-and-frisk program.

Lindsay Nash spent 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 and represented noncitizens with criminal convictions. In her second year, she continued to represent individuals with criminal-immigration issues and helped to establish a pilot program – the first of its kind – to appoint counsel for indigent

individuals facing deportation. She is now clerking for the Honorable Robert A. Katzmann of the U.S. Court of Appeals for the Second Circuit.

Yaman Salahi joined the American Civil Liberties Union of Southern California to provide legal support to Middle Eastern, Muslim, and South Asian communities affected by government surveillance programs. He represented individuals in FBI interviews and created a community education program. As part of his project, Salahi also assisted in lawsuits challenging the FBI's use of informants in mosques and the Los Angeles Sheriff's Department's characterization of activities, like photography, as potential pre-terrorist indicators. Salahi is now a staff attorney at the Asian Law Caucus in San Francisco, where he continues to work on the intersection of national security and civil rights.

Rebecca Scholtz continues her fellowship at Mid-Minnesota Legal Aid, where she works with non-citizen children involved in the child welfare system. She represents children in immigration proceedings and provides training and technical assistance on children's immigration issues to child welfare system professionals. Scholtz is working with other children's advocates and service providers to create more effective mechanisms for identifying and assisting those in the child welfare system who also have immigration needs.

Diala Shamas is a staff attorney at the CLEAR (Creating Law Enforcement Alternatives & Responsibility) Project at the City University of New York School of Law, where she was a Fellow for two years. During her fellowship, she worked with Muslim, Arab, and South Asian community groups to develop rights-education materials and strategies to respond to the NYPD's surveillance program. Her report, *Mapping Muslims: NYPD*



Spying and Its Impact on American Muslims, documented the effects of that program and garnered attention from national media.

Sirine Shebaya, now in her second fellowship year at the ACLU of Maryland, focuses on immigrants' rights and racial profiling. Over the past year, she advocated for legislation that was enacted to expand access to driver's licenses for all Maryland residents, regardless of immigration status. Additional areas of focus are immigration detainers and immigration enforcement by local authorities; one project involves working with community partners to address complaints about racial profiling of Latino immigrants.

Olivia Sinaiko spent her fellowship year at the Southeast Alaska Conservation Council. She worked on a range of natural resource management issues related to rural subsistence,

particularly affecting Alaska Native tribes. Sinaiko helped tribal communities to engage with state and federal regulatory processes surrounding environmental threats to subsistence resources and published a comprehensive tool kit for civic engagement. In collaboration with local leaders and activists, Sinaiko successfully advocated for subsistence fishing permits that will increase access to food for those living in rural villages.

Jenny Zhao continues at the ACLU of Northern California, where she provides assistance to immigrants detained in county jails during their deportation proceedings. Along with other lawyers, Zhao is litigating a class action challenge to the practice of shackling all immigrant detainees during their court hearings. She is also bringing challenges to prolonged immigration detention, and she is investigating how conditions of confinement affect immigrants' access to courts and their rights to fair hearings.

Megan Quattlebaum: Senior Liman Fellow in Residence



Megan Quattlebaum (right) with Past Senior Liman Fellows, Sia Sanneh, Nina Rabin, and Fiona Doherty (left to right).

Megan Quattlebaum joined the Yale Law School as the Senior Liman Fellow in Residence in the summer of 2013. Quattlebaum's work at Yale, made possible through the generosity of the Vital Projects Fund, focuses on prisons and the criminal justice system. A graduate of Sarah Lawrence College, Quattlebaum served for five years as Associate Director of Common Cause/NY, an organization dedicated to open and accountable government. Her work included campaign finance reform, voting rights, redistricting, and election reform.

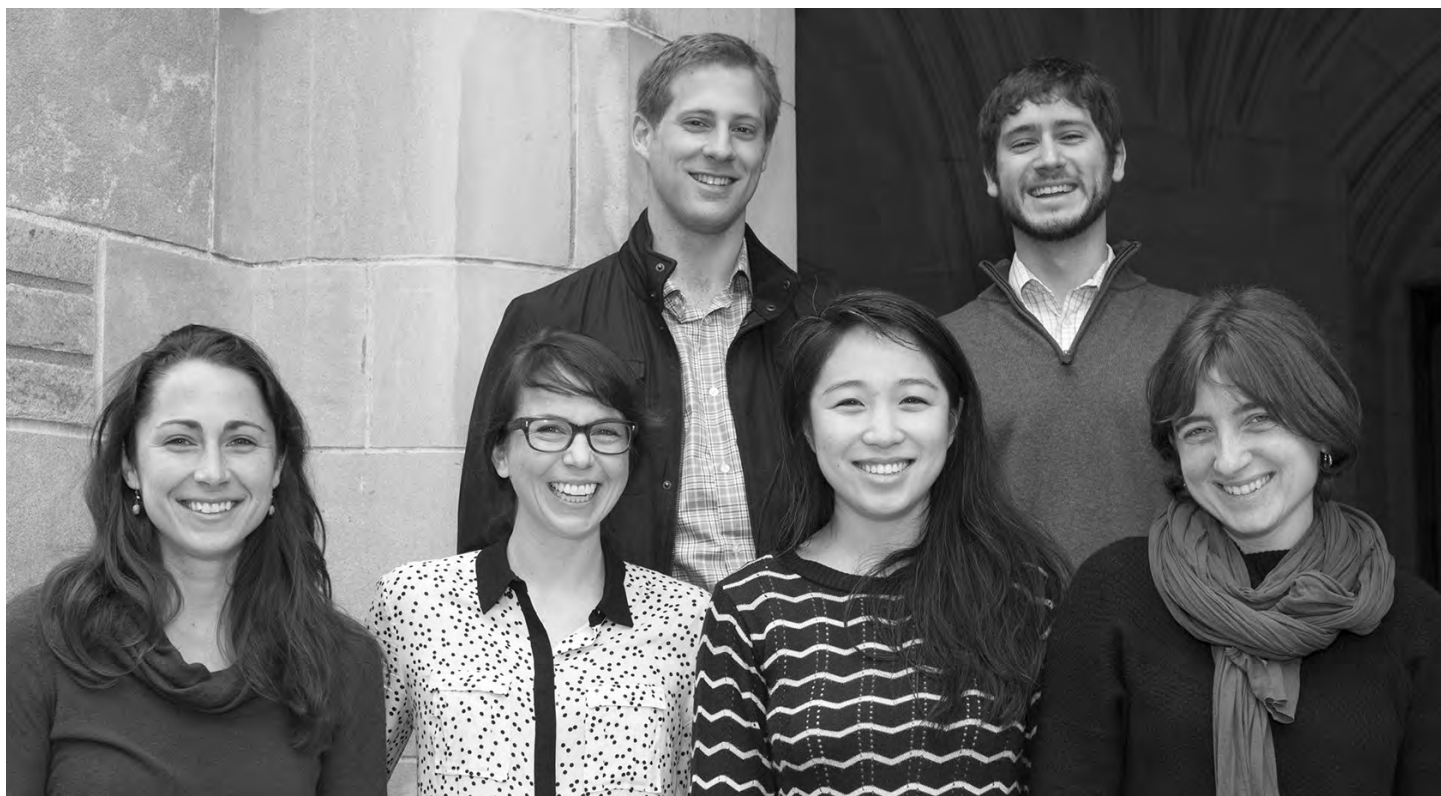
Upon graduation from Yale Law School in 2010, Quattlebaum received a Liman Fellowship; she worked at the Neighborhood Legal Services Association in Pittsburgh, Pennsylvania, where she developed and implemented a program to provide civil legal services for people with criminal records.

During the fellowship, she assisted some 400 individuals, who were reentering their communities, to expunge their criminal records and to obtain housing, driver's licenses, employment, and public benefits. Following her fellowship, Quattlebaum clerked for Judge Julio M. Fuentes of the United States Court of Appeals for the Third Circuit and then worked as a litigation associate for Zuckerman Spaeder LLP, a New York City-based law firm, where her practice focused on criminal defense and appellate litigation.

Quattlebaum is co-teaching the Liman Workshop and supervising students in the Liman Practicum. Projects include research on the regulation of long-term isolation in prisons and gender disparities in the federal correctional system. Quattlebaum will also continue her research on the history of public defender offices, which began a century ago in Los Angeles.



Nina Rabin, Fiona Doherty, Megan Quattlebaum, Hope Metcalf, Sarah Russell, Sia Sanneh, and Judith Resnik (left to right).



Liman Fellows 2013–14: Jeremy Kaplan-Lyman, Spencer Amdur (back row, left to right); Alyssa Briody, Alyssa Work, Ivy Wang, and Caitlin Mitchell (front row, left to right). Not pictured: Burke Butler and Katie Chamblee.

Welcoming the 2013 – 14 Liman Fellows

The Liman Program awarded eight fellowships for 2013–14, as well as three extensions. The new Fellows are serving juveniles and people leaving prison in New Orleans, immigrants in San Francisco, incarcerated parents in Oregon, mentally ill prisoners in Texas, and indigent defendants in Georgia and New York.

Spencer Amdur is spending his fellowship year working on immigration issues with the Lawyers' Committee for Civil Rights of the San Francisco Bay Area. Amdur provides free legal services to immigrants facing removal and to address enforcement by federal and local authorities of immigration laws. Amdur, a member of the Yale Law School class of 2013, graduated magna cum laude from Brown University with a B.A. in Economics. Before law school, he worked as an Assistant Economist at the Federal Reserve Bank of New York and taught math at the Harlem Village Academy. After his fellowship, Amdur will clerk for the Honorable Judith W. Rogers of the U.S. Court of Appeals for the D.C. Circuit.

Alyssa Briody has joined Juvenile Regional Services in New Orleans; her focus is to provide post-disposition legal services for young people in the juvenile justice system. She helps boys, incarcerated at the Bridge City Center for Youth, to modify their terms of confinement, to become eligible for release,

and to develop plans for their return to their communities. A member of the Yale Law School class of 2013, Briody graduated cum laude from Amherst College in 2007 with a B.A. in Latin American History. Following her fellowship, she will clerk for the Honorable Sidney Stein in the U.S. District Court for the Southern District of New York.

Burke Butler works at the Texas Civil Rights Project to address the over-reliance of Texas prisons on long-term isolation, particularly with respect to individuals with mental illness. Her project continues the work on prisoners' rights that she began when she was at Yale Law School, from which she graduated in 2011. Prior to law school, Butler attended the University of Chicago, where she focused on human rights projects in Peru, India, and Afghanistan. Before this fellowship, she clerked for the Honorable Harris Hartz of the U.S. Court of Appeals for the Tenth Circuit and for the Honorable Keith Ellison of the U.S. District Court for the Southern District of Texas.

Katie Chamblee is helping the Southern Center for Human Rights to initiate a program to provide systematic consulting assistance to lawyers working on capital cases. The goal is to strengthen the quality of counsel for poor people facing the death penalty in Georgia and throughout the South. Chamblee

graduated from Yale Law School in 2012 and clerked for the Honorable Myron H. Thompson on the U.S. District Court for the Middle District of Alabama. She graduated with Highest Honors in History and English in 2007 from Swarthmore College, where she was a Philip Evans Scholar.

Jeremy Kaplan-Lyman has joined the Civil Action Practice at The Bronx Defenders, where he works on challenges to the quota-based summons practices of the New York City Police Department (NYPD). Kaplan-Lyman represents individuals in Summons Court; he is also investigating the impact of the NYPD's summons practices on marginalized communities and is helping to initiate affirmative litigation when abusive summons practices are identified. A 2012 graduate of Yale Law School, Kaplan-Lyman clerked for the Honorable Rosemary Barkett of the U.S. Court of Appeals for the Eleventh Circuit. Prior to law school, he worked as a teacher and graduation coach in public schools in Camden, New Jersey and Atlanta, Georgia, where he helped found the South Atlanta School for Law and Social Justice, a public school for accomplished, low-income students.

Caitlin Mitchell is spending her fellowship year at Youth, Rights & Justice, in Portland, Oregon, where she represents incarcerated parents in Juvenile Court and helps them to maintain relationships with their children. Through direct representation, coalition-building, and resource development, Mitchell's project aims to improve the quality of legal representation for families interacting with the criminal justice system. Mitchell graduated from Yale Law School in 2012 and

from Yale College in 2006 with a B.A. in English and Gender Studies. Prior to law school, she worked as a counselor and community educator for a sexual assault crisis center in New Haven, CT. Following law school, she clerked for the Honorable Martha Lee Walters of the Oregon Supreme Court.

Ivy Wang, hosted by Southeast Louisiana Legal Services in New Orleans, focuses on the many collateral consequences of incarceration, such as evictions based on family members' involvement with the criminal justice system and the loss of employment opportunities and of public benefits. Her efforts include creating training materials to help other lawyers mitigate these long-term consequences. Wang, a member of the Yale Law School Class of 2013, graduated in 2006 from Yale College with distinctions in English and History. Prior to law school, she spent four years in China working on human rights and legal reform.

Alyssa Work joined the Bronx Freedom Fund, where she assists individuals facing misdemeanor criminal charges to post bail and to avoid pretrial detention. She is helping to develop alternative resources to enable a wider range of individuals to be able to meet bail requirements. Her work is part of broader efforts to reform bail systems to reduce incarceration. Work is a member of the Yale Law School Class of 2013 and graduated in 2008 with High Honors in Political Science from Swarthmore College. Before law school, she worked as a legal assistant at a Washington, D.C.-based firm that focused on immigration law.

Please join us at the Seventeenth Annual Arthur Liman Colloquium

Moving Criminal Justice: Then and Now

April 3–4, 2014 • Yale Law School

The Seventeenth Annual Liman Colloquium, to be held on April 3–4, 2014, will explore past and contemporary movements to reform criminal justice.

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

Liman Summer Fellows Work Throughout the United States

The Liman Program provided students from Barnard, Brown, Harvard, Princeton, Spelman, and Yale with the opportunity to work with public interest lawyers around the United States.



Elina Rodriguez, Victoria Durden, and Anita Warner (left to right).

Barnard Liman Summer Fellows

Victoria Durden '15, U.S. Equal Employment Opportunity Commission, New York, NY
Elina Rodriguez '15, Americans for Immigrant Justice, Miami, FL
Anita Warner '14, U.S. Equal Employment Opportunity Commission, New York, NY



Danielle Feurer, Lincoln Mitchell, Jessica Garland, Suzanna Fritzberg, Chris Zheng (left to right).

Yale Liman Summer Fellows

Omar de los Santos '14, ACLU of Arizona, Tucson, AZ
Suzanna Fritzberg '14, Roosevelt Institute, New York, NY
Danielle Feuer '15, Public Counsel, Los Angeles, CA
Jessica Garland '15, Vera Institute, New York, NY
Armando Ghinaglia '14, Make the Road, New York, NY
Lincoln Mitchell '15, Orleans Public Defender Office, New Orleans, LA
Chris Zheng '14, Harvard Immigration and Refugee Clinic, Boston, MA



Tianhao He, Taonga Leslie, Imelme Umana, Lyla Wasz-Piper (left to right).

Harvard Liman Summer Fellows

Tianhao He '15, Greater Boston Legal Services
Taonga Leslie '15, ACLU Immigrants' Rights Project, San Francisco, CA
Imelme Umana '14, Public Defenders Service for the District of Columbia
Lyla Wasz-Piper '15, Uptown People's Law Center, Chicago, IL



Katherine Hadley, Wendy A. Castillo, Mariela Martinez, and Thaya Uthayophas (left to right).

Brown Liman Summer Fellows

Wendy A. Castillo '15, Mexican American Legal Defense and Educational Fund, Los Angeles, CA
Katherine Hadley '13, Direct Action for Rights and Equality, Providence, RI
Mariela Martinez '14, Labor and Community Strategy Center, Community Rights, Los Angeles, CA
Jesse McGleughlin '14, Urban Justice Center, New York, NY
Thaya Uthayophas '15, ACLU of Connecticut, Hartford, CT



Shawon Jackson, Mengyi Xu, Eleanor Roberts, Ariel Futter, Anna Schrimpf (left to right).

Princeton Liman Summer Fellows

Ariel Futter '15, Equal Employment Opportunity Commission, New York, NY
Shawon Jackson '15, Children's Defense Fund, Washington, DC
Kalyani Ramnath, Ph.D. candidate, Human Rights Watch, Women's Rights Division, New York, NY
Eleanor Roberts '15, ACLU of Northern California, San Francisco, CA
Anna Schrimpf, Ph.D. candidate, Human Rights Watch, Berlin, Germany
Mengyi Xu '14, National Resources Defense Council, Chicago, IL



Imani Lee, Neah Morton, Samantha Arthur (left to right).

Spelman Liman Summer Fellows

Samantha Arthur '14, Human Rights Advocacy Centre, Ghana
Neah Morton '14, Joint Center for Political and Economic Studies, Washington, D.C.
Imani Lee '14, Detroit Coalition Against Police Brutality, Detroit, MI



Liman Summer Fellows had the opportunity to speak in a smaller setting with Judith Resnik, Muneer Ahmad, Lucas Guttentag, and Stephen Bright (left to right).



Doug Liman, McGregor Smyth, Executive Director, New York Lawyers for the Public Interest and Liman Fellow 2002, and Lewis Liman (left to right).



Dennis Curtis and Julia Greenfield, Staff Attorney, Disability Rights Oregon, and Liman Fellow 1998.

Nicole Hallett, Jonathan Manes, Justin Cox, Elizabeth Simpson, and Michael Tan (left to right). Cox and Tan (Liman Fellows 2008) are lawyers with the ACLU's Immigrants Rights Project, Simpson (Liman Fellow 2008) represents prisoners in North Carolina, and Hallett and Manes are clinical teaching fellows at Yale.



Ivy Wang, Liman Fellow 2013, Valarie Kaur, YLS 2012, and Robert Post, Dean, Yale Law School.



Lewis Liman, Nancy Marder, Professor of Law, Chicago-Kent School of Law, Olivia Sinaiko (Liman Fellow 2012), Romy Ganschow (Liman Fellow 2012), and Doug Liman (left to right).



Nina Rabin and Michelle Brané.

The Liman Public Interest Program

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Please visit our website at www.law.yale.edu/liman.

Learn more about the Liman Fellows, see information about projects and upcoming events, and find details about the fellowship application process.

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.

Yale Law School and Yale College

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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

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* **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 34). 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).

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