

**Liman Public Interest Workshop**

**Rationing Law:  
Constitutional Entitlements to Courts in an Era of Fiscal Austerity**

**Spring 2012 Syllabus**

**Mondays, 6:10-8 pm, room 124**

Hope Metcalf, Director, Liman Public Interest Program  
Judith Resnik, Arthur Liman Professor of Law  
Sia Sanneh, Senior Liman Fellow in Residence

Student Convenors: Romy Ganschow, Shari Iniss-Grant, Matthew Lee, Doug Lieb,  
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**All readings available at <http://www.law.yale.edu/intellectuallife/workshopsyllabus.htm>**

This Workshop considers how law is currently rationed. We explore court systems in which constitutional and statutory commitments to access to courts and enforcement of rights are challenged by high demands for services, high arrest and detention rates, and declining government budgets. Topics and questions focus on what features of the systems in place are subject to change and in what directions. Hence, we will consider how courts, litigants, and criminal justice detention are financed; when and where government subsidies are deployed; the sources of the high demand for criminal sanctions; and how certain kinds of litigation are seen as evidence of excessive reliance on courts through concepts such as “litigiousness,” “over- criminalization,” and “excessive” punishment. We will explore controversies over subsidies for civil and criminal litigants (counsel, experts, transcripts, and court-based assistance); whether gender, race, ethnicity, age and the like affect understandings of the need for subsidies; and the remodeling of courts to address certain kinds of claims (veterans, mental health, drugs, reentry, family). Our inquiries entail comparisons – state/federal; domestic/transnational; civil/criminal; administrative/judicial, and the like. Throughout, we will look at how social and political movements have and do affect our understandings of all of these issues, and when systems out to be admired or criticized in terms of fairness and justice.

**Requirements and Readings: 2 units/credit fail**

This Workshop is a two credit ungraded course. We meet weekly; preparation and attendance at these discussions is required for credit. If you need to miss a class, please be in touch with the professors in advance of the meeting. Students missing more than two sessions without permission will not receive credit. Auditing is possible if arranged at the beginning of the semester. Visitors are welcome, with permission from the teachers.

Readings will be available on the Liman Public Interest Program's website: <http://www.law.yale.edu/intellectuallife/workshopsyllabus.htm>. In addition, at least six times during the semester, students must post on "Inside Yale" a one-page reflection on readings -- due NO LATER than 9 a.m. on the Monday mornings of the workshop and circulated to the class. Please email your reflections as well to Hope Metcalf, Judith Resnik, and Sia Sanneh. The purpose of writing is to encourage you to begin the conversations before class as you think about the relationship among readings. Further, failing to turn in the six reading reflections **on time** will result in not receiving credit. With permission, some students may do additional work (including research and clinical opportunities) and receive more credit. The amount and kind of credit (SAW, etc.) depends on the project approved. Below is an outline of the sessions that, as always, may change.

**January 30 Class 1: *Gideon* Revisited or Rejected? *Turner v. Rogers* and the Right to Counsel for Criminal Defendants, Civil Contemnors, and Others in Detention**

In 1963, the Supreme Court held that defendants facing felony charges must be afforded counsel paid for by the state. In 2011, the Supreme Court returned to the question of when counsel must be provided to indigent litigants, in the context of a person facing civil contempt detention for failure to pay child support. The Court declined to require appointed counsel when defendants, opposed by private parties, faced jail time for nonpayment; if counsel is not provided however, "alternative" procedures had to ensure "fairness." How do the arguments about lawyers for indigent contemnors in 2011 parallel or diverge from the claims made in 1963 about right to counsel for felony defendants? What are the federal constitutional parameters and the different views of the justices? What incentives do requirements for lawyers create? Were you justices in state courts, what views might you have about obligations to provide counsel or alternative procedures?

Readings. To capture the discussions of the 1960s, please look at the excerpted briefs from those opposing the interpretation of the Sixth Amendment as obliging counsel, as well as the Court's opinion. Then compare the 2010-2011 materials and the commentary.

*Gideon*

Briefs, excerpted, and available at *Gideon v. Cochran*, 372 U.S. 355 (1963) (No. 155).

Respondent Florida.

Alabama as Amici Curiae Supporting Respondent.

*Gideon v. Wainwright*, 372 U.S. 335 (1963).

*Turner*

Order for Contempt of Court, State of South Carolina, County of Oconee, No. 2003-DR-37-472, Jan. 3, 2008.

*Price v. Turner*, 691 S.E.2d 470 (S.C. 2010).

Briefs, excerpted, and available at *Turner v. Rogers*, 131 S.Ct. 2507 (2011) (No. 10-10).

Petitioner Turner.

Respondents (excerpted).

Law Professors Benjamin Barton and Darryl Brown as Amici in Support of Respondents (excerpted).

*Turner v. Rogers*, 131 S. Ct. 2507 (2011).

Post *Turner*:

Bill Rankin, *Judge Allows Thousands to Join Child Support Lawsuit*, ATLANTA JOURNAL-CONSTITUTION, Jan. 3, 2012.

Judith Resnik, *Fairness in Numbers: A Comment on AT&T v. Concepcion, Wal-Mart v. Dukes, and Turner v. Rogers*, 125 HARV. L. REV. 78 (2011) (excerpted).

## February 6 Class 2: “Civil *Gideon*”: Moving Outside Detention

Guest: Tom Tyler, Professor of Law, Yale Law School

Both the federal government and several states—including California and New York—have provided statutory access to civil legal services for low-income people, and a few jurisdictions also provide that, as a matter of state constitutions, some civil litigants have counsel rights. We will explore the legal arguments and rationales advanced for and against appointed civil counsel. After *Turner*, what federal constitutional arguments are available? Were such an affirmative obligation understood to be constitutionally required, how could it be implemented? Ought interpretation of constitutional rights to civil legal assistance be affected by knowledge of the inadequacies of criminal defense resources? Turn them to the statutory provisions and analyze the lines drawn. What types of cases and kinds of recipients receive assistance? What other categories or mechanisms are available? Requiring lawyers to provide free services? Capped amounts of lawyer time? And what related kinds of services – aside from lawyers – might need to be provided?

Legal Services Corporation Act, 42 U.S.C. § 2996e; *see also* 45 C.F.R. 1611.1, 1611.4 & Appendix A (financial eligibility requirements).

State Funding for Legal Services:

California: Sargent Shriver Civil Counsel Act; Cal. Gov. Code § 68651 (2012).

New York: The Task Force to Expand Access to Civil Legal Services in New York, *Report to the Chief Judge of the State of New York*, 1-15 (November 2011).

Benjamin H. Barton & Stephanos Bibas, *Triaging Appointed-Counsel Funding and Pro Se Access to Justice* (2011) (U. of Penn. Law School, Public Law Research Paper No. 11-36, SRNN 1919534) (excerpted).

Rebecca L. Sandefur & Aaron C. Smyth, *Access Across America: First Report of the Civil Justice Infrastructure Mapping Project*, 10-39 (2011).

Neil Rickman & James M. Anderson, *Innovations in the Provision of Legal Services in the United States: An Overview for Policy Makers*, Kauffman-RAND Institute for Entrepreneurship Public Policy (2011).

Nourit Zimmerman & Tom R. Tyler, *Between Access to Counsel and Access to Justice: A Psychological Perspective*, 37 FORDHAM URB. L. J. 473, 486-507 (2010).

Financing Legal Services Around the World: THE COSTS AND FUNDING OF CIVIL LITIGATION: A COMPARATIVE PERSPECTIVE (CHRISTOPHER HODGES, STEFAN VOGENAUER, & MAGDALENA TULIBACKA EDS. 2010) (pp. 4-8).

**February 13 Class 3: New Revenue Sources for Courts: Fees, Fines, and the Potential Return of Debtors' Prisons**

As courts face budget shortfalls, many courts have increased usage fees for both criminal defendants and civil litigants. The ACLU, distressed at this approach, cited a woman in Georgia who incurred a fee of \$705 for a drug possession conviction and a defendant in Michigan fined \$300 for a traffic offense. Failures to pay can result in various sanctions, such as contempt, which can in turn result in detention. In the 1970s and 1980s, the Supreme Court addressed the question of "debtor prisons." What do those cases hold and do current practices violate the parameters? What kinds of fees for court services do/should users pay? With or without sliding scales -- based on kind of use or ability to pay? And what should be supported through general revenues? Should court-based revenues be used for court services so that courts can be seen as self-supporting or become part of the general state budget?

Guest: Steve Bright, Harvey Karp Visiting Lecturer in Law, Yale Law School

*Williams v. Illinois*, 399 US 235 (1969).

*Bearden v. Georgia*, 461 U.S. 660 (1983).

Fee Schedules

Circuit Court Fee Schedule, Oregon Judicial Department (2010).

Judicial Conference, Recommended Inflationary Increases in Miscellaneous Fee Schedules (Sept. 13, 2011); see also 28 U.S.C. § 1913.

28 U.S.C. § 1920, § 1923.

Oregon State Bar Fees Task Force, *Initial Report* (June 2010).

Brennan Center, *Criminal Justice Debt: A Barrier to Reentry* 1-33 (2010).

Daniel J. Hall, *Reshaping the Face of Justice: The Economic Tsunami Continues*, in National Center for the State Courts, *Future Trends in State Courts 2011*.

American Civil Liberties Union (ACLU), *In for a Penny: The Rise of America's New Debtors' Prisons*, (Oct. 2010) (excerpted).

**February 20 Class 4: Alternative Courts and Alternatives to Courts: "Girls' Courts," "Veterans' Courts," "Drug Courts," and "Foreclosure Courts"**

In the past two decades, there has been a proliferation of "problem-solving courts" to address particular issues. We will explore the turn to this form of decision making, its practices, its proponents, and its critics. What rules should govern these fora? What role, if any, do and should lawyers play? What range of authority over what kinds of claims with what forms of sanctions do "alternatives" have? Who has access to watching what transpires? What forms of constraint on power are in place for those who have authority in such venues?

Guests: Robin Golden, Selma M. Levine Clinical Lecturer in Law, Yale Law School  
Fiona Doherty, Visiting Clinical Associate Professor of Law, Yale Law School

U.S. Dep't of Justice, Bureau of Justice Assistance, Center for Court Innovation, *What Is a Community Court?* 1-14 (2011).

The Hon. Jonathan Lippman, *Achieving Better Outcomes for Litigants in the New York State Courts*, 34 FORDHAM URB. L.J. 813 (2007).

Raymond H. Brescia, *Beyond Balls and Strikes: Towards a Problem-Solving Ethic in Foreclosure Proceedings*, 59 CASE WESTERN RESERVE L. REV. 305 (2009) (excerpted).

Jane M. Spinak, *Why Defenders Feel Defensive: The Defender's Role in Problem-Solving Courts*, 40 AM. CRIM. L. REV. 1671 (2003).

Allegra McLeod, *Decarceration Courts: Possibilities and Perils of a Shifting Criminal Law* (forthcoming GEORGETOWN LAW JOURNAL 2012).

**Optional:**

Russell Engler, *Connecting Self-Representation to Civil Gideon: What Existing Data Reveal About when Counsel Is Most Needed*, 473 FORDHAM URB. L. J. 37, 37-66 (2010).

**Review:**

Nourit Zimerman & Tom R. Tyler, *Between Access to Counsel and Access to Justice: A Psychological Perspective*, 37 FORDHAM URB. L. J. 473, 486-507 (2010).

**February 27 Class Time Changed:** Instead of meeting on 2/27, workshop participants will attend the Thursday, March 1 Liman Colloquium Session, 4-6 pm.

Note: Students interested in attending the daylong Liman Colloquium program on March 2 should sign up in advance with Judith, Hope, or Sia.

**March 5 Class 5: Reflecting on Resources and Rationing: The Implications of "Costs" as the Frame for Court Access and Use**

**March 12 Vacation (no class)**

**March 19 Class 6: Mentally-Ill Litigants, Courts, and Detention**

Co-Convenors: Howard Zonana, Professor of Psychiatry  
Reena Kapoor, Professor of Psychiatry  
Matthew Lee, YLS 2013  
Alyssa Work, YLS 2013

The responses to mental illness challenge legal categories of criminal and civil, prisoners and patients. This week's readings focus on detention of the mentally ill, either after service of a criminal sentence has been concluded, or in lieu of criminal prosecution or upon acquittal. How is the category "mentally ill" constituted? What are the legal justifications for detention

and what is the distinction between “civil commitment” and “criminal detention”? What are the constitutional constraints on state detention? What are the alternative responses, other than detention? How do courts, legislators, medical experts, and legal commentators evaluate these questions? What are the relevant factors?

Tammy Seltzer, *Mental Health Courts: A Misguided Attempt to Address the Criminal Justice System’s Unfair Treatment of People With Mental Illnesses*, 11 Psychol. Pub. Pol’y & L. 570 (2005).

*United States v. Comstock*, 130 S. Ct. 1949 (2010).

18 U.S.C.A. § 4241, § 4245, § 4248 ; *see also* 42 U.S.C.A. § 1396d(a)(29).

*Foucha v. Louisiana*, 504 U.S. 71 (1992) (excerpted).

Transcript of a Lunacy Hearing in Orleans Parish Criminal District Court (2011) (redacted and excerpted).

Alexander Tsesis, *Due Process in Civil Commitments*, 68 Wash. & Lee L. Rev. 253 (2011).

Jason A. Cantone, *Rational Enough to Punish, but Too Irrational to Release: The Integrity of Sex Offender Civil Commitment*, 57 Drake L. Rev. 693 (2009) (excerpted).

### **March 26      Class 7: “Over” Criminalization**

Co-Convenors:    Romy Ganschow, YLS 2012  
                         Ester Murdukhayeva, YLS 2012

In 1972 the U.S. penal population was approximately 300,000. Today, the United States has the highest incarceration rate in the world, with more than 2 million people currently imprisoned in America’s prisons and jails. This week’s readings explore the phenomenon of mass incarceration, its origins and development, as well as proposals for reform. How are the effects of overcriminalization distributed? What discretionary decisions generate detention? What are the costs of overcriminalization and to whom? What role does and should race play in framing the discussion about mass incarceration and in developing solutions?

Jeffrey Fagan, *Crime, Law, and the Community: Dynamics of Incarceration in New York City*, in *The Future of Imprisonment* (Michael Tonry ed.) (2004) (pp. 27-54).

WILLIAM J. STUNTZ, *THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE* (2011) (pp. 260-74).

*McCleskey v. Kemp*, 481 U.S. 279 (1987) (excerpt).

Michelle Alexander, *The New Jim Crow: How the War on Drugs Give Birth to a Permanent American Undercaste*, Truthout.org (2010).

MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (2010) (pp. 235-61).

James Forman, Jr., *Racial Critiques of Mass Incarceration: Beyond the New Jim Crow* (forthcoming N.Y.U. L. REV. 2012) (SSRN #19660810).

## **April 2            Class 8: Strikes and Refusals: Lawyers, Judges, and Prisoners**

Co-Convenors:        Matthew Lee, YLS 2013  
                              Alyssa Work, YLS 2013

We have focused primarily on the role of lawyers in ensuring access to justice. Last week's materials explore the phenomenon of "overcriminalization," and the facets of the justice system that have produced mass incarceration. This week, we consider both the challenges that limited resources impose, and the sectors of the criminal justice system that have the capacity, authority, and willingness to limit or reshape presumptions, by strikes, in the case of prisoners, or refusals, in the case of lawyers. One shorthand for this question is – who can say no? What are the role of institutional actors such as prosecutors, defense attorneys, prisoners, and judges, in reshaping the allocation of resources by strikes and refusals?

*FTC v. Superior Court Trial Lawyers Association*, 493 U.S. 411 (1990).

*Missouri Public Defender Commission v. Pratte*, 298 SW 3d. 870 (Mo. 2009).

Letter from Donald S. Clark, Secretary, Federal Trade Commission, to Thomas C. Willcox, Esq., Superior Court Trial Lawyers Association (Jan. 16, 2002).

Report of the Special Master, *MSPD v. Waters*, No. SC90050 (2011).

*Hurrell-Harring, et al., v. State*, 15 N.Y.3d 8 (May 6, 2010).

John Simerman, *Public Defender Layoffs Could Gum Up the Works at New Orleans Criminal Court*, TIMES-PICAYUNE, July 8, 2011.

*Brown v. Plata*, 131 S.Ct. 1910 (2011) (excerpts).

Ian Lovett, *Hunger Strike by Inmates Is Latest Challenge to California's Prison System*, N.Y. TIMES, July 8, 2011, at A16.

Ian Lovett, *California Prison Hunger Strike Resumes as Sides Dig In*, N.Y. TIMES, Oct. 7, 2011.

Laird Harrison, *Convicted Murderer Dies While on Hunger Strike in California*, REUTERS, Feb. 21, 2012.

### **Optional:**

Richard Klein, *The Eleventh Commandment: Thou Shalt Not Be Compelled to Render the Ineffective Assistance of Counsel*, 68 IND. L.J. 363 (1993).

## **April 9            Class 9: Allocating Legal Resources: The Role of Law Schools**

Co-Convenors:        Romy Ganschow, YLS 2012  
                              Ester Murdukhayeva, YLS 2012

This week's materials explore the relationship between law schools and access to justice. When, in the 1970s, clinical education began to be a part of several law schools' curricula, a good deal of the focus was on serving populations without access to lawyers, leading to a focus on poverty law, prisoners, the mentally ill, and their struggles for justice. This session will explore whether today's clinics are and should be understood as having a similar orientation.

Our questions this week include: How should law schools allocate resources? When and why ought law schools provide direct services? To whom? And who decides?

Stephen Wizner & Dennis Curtis, *Here's What We Do: Some Notes About Clinical Legal Education*, 29 Clev. St. L. Rev. 673 (1980).

Brent Newton, *Preaching What They Don't Practice: Why Law Faculties' Preoccupation with Impractical Scholarship and Devaluation of Practical Competencies Obstruct Reform in the Legal Academy*, 62 S. C. L. REV. 105 (2010) (excerpt) 105-113, 126-156.

Neil H. Buchanan, *In Defense of Teaching About Old Things – and In Defense of Teaching and Writing*, DORF ON LAW (Nov. 23, 2011)

Sameer M. Ashar, *Law Clinics and Collective Mobilization*, 14 CLINICAL L. REV. 355, 389-405 (2008).

John O. McGinnis & Russell D. Mangas, *First Thing We Do, Let's Kill All the Law Schools*, WALL STREET J., Jan. 17 2012 at A15.

Lifting the Burden: Law Student Debt as a Barrier to Public Service, ABA Comm'n on Loan Repayment and Forgiveness (2003) 14-18, 23-29, 47-51.

#### **April 16      Class 10: Lawyering, Resources, and Impacts**

One issue in this Workshop has been that poor civil litigants do not have enough access to lawyers and to courts. During the last century, responses have ranged from pursuing “impact litigation” to reform certain areas of law (immigration, prisoners’ rights, consumer protection), to seeking funding for lawyers for the poor (the Legal Services Corporation), to the training of “lay lawyers.” In this class, the question is how to puzzle about priorities, how those priorities are set, and the role(s) lawyers play in shaping agendas.

The readings aim to spark reflections by reviewing debates about what it means to be a lawyer “for the poor,” about who speaks for groups seeking legal change and how the speakers alter the changes sought, and where today’s priorities are and should be. For example, the speech by Chief Judge Jonathan Lippman calls for a “civil *Gideon*” movement, *i.e.* he focuses low-income people who cannot afford lawyers. Should these ideas be focused on providing resources for particular groups, as contrasted with providing resources for individual decision-making (e.g., vouchers)? How should one think about emphasizing access to justice as contrasted with a particular subject (e.g., immigration, family law, etc.)? What are the rationales for focusing on courts and legislation as sources of change rather than other methods of changing societal norms and priorities? Review materials from earlier classes as you think now about these issues through the lens of “social movements.”

Stephen Wexler, *Practicing Law for Poor People*, 79 YALE L. J. 1049 (1970)

Derrick A. Bell, *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L.J. 470, 470-72, 482-93, 512-16 (1976)



Sandra R. Levitsky, *To Lead with Law: Reassessing the Influence of Legal Advocacy Organizations in Social Movements* in CAUSE LAWYERS AND SOCIAL MOVEMENTS 37 (Austin Sarat & Stuart A. Scheingold eds., 2006).

Michael McCann & Jeffrey Dudas, *Retrenchment...and Resurgence?*, in CAUSE LAWYERS AND SOCIAL MOVEMENTS 37 (Austin Sarat & Stuart A. Scheingold eds., 2006).

Jonathan Lippman, *Courts in Times of Fiscal Crisis - Who Needs Courts?*, National Association of Women Judges, Midyear Meeting, Harvard Law School (Mar. 9, 2012).

Paul Heaton & Eric Helland, *Judicial Expenditures and Litigation Access: Evidence from Auto Injuries* 3-4, 21-22 (RAND 2009).

**April 23      Class 11: Re-Sourcing Courts**

We began the semester by revisiting the U.S. Supreme Court's decision establishing a right to counsel in certain criminal cases in *Gideon* and the Court's recent consideration in 2011 of *Gideon*-like claims to civil contemnors in *Turner v. Rogers*. This week, we reflect on the semester and return to the relationship between funding for courts and access to justice, the role of lawyers, individually and collectively, and the role of courts in making themselves accessible venues.

The Bentham essay aims to remind us that our challenges are not new. Should all access fees ("taxes on distress") be dropped as impermissible constraints on use of courts? Should state "right to remedy clauses" be the basis for individual enforcement, and if so, as understood to mandate or impose limits on what kinds of state provision of services? Should courts be understood as a form of social services that states must provide as a matter of affirmative right? And if framed in such a way, does this framing make courts all the more vulnerable, under US law, to attacks or more likely to garner support? Or are courts better understood today as processing mills, coupled with a venue for high-end users including constitutional claimants?

Anthony Lewis, *American Lawyers: Gideon's Army?*, 50 CORNELL L. QUARTLY 155 (1965).

Loic Wacquant, *Class, Race, and Hyperincarceration in Revanchist America*, 74 DEADALUS (2010).

Tony Fabelo, *Taking Gideon's Pulse: Impacts of the Texas Fair Defense Act 10 Years Later*, Presentation at the Indigent Defense Symposium, Austin, Texas (Oct. 27, 2011).

Jeremy Bentham, *A Protest Against Law-Taxes* (1795).

Christine M. Durham, *Open Courts/Remedies Guarantees and State Court Funding: An Emerging Narrative* (forthcoming KENTUCKY L. J. 2012).

Judith Resnik, *Constitutional Entitlements to and in Courts* (forthcoming, 2012) (excerpt).