

Liman Public Interest Workshop

Accessing Justice and Rights—From Streets to Prisons

Spring 2011 Syllabus

Mondays, 6:10-8 pm, room 124

**Fiona Doherty, Liman Senior Fellow in Residence
Hope Metcalf, Director, Liman Public Interest Program
Judith Resnik, Arthur Liman Professor of Law**

**Student Co-Conveners: Isabel Bussarakum, Rachel Clapp, Jeremy Kaplan-Lyman,
Tara Rice, Matthew Smith, and Trevor Stutz**

NOTE: all readings available at <http://www.law.yale.edu/intellectuallife/workshopsyllabus.htm>

The Workshop explores problems of access to justice pre- and post-conviction, the problems of the delivery of legal services, and the inner workings of detention centers, jails, and prisons. We will consider how those within and without obtain justice – from the structure of public defender and legal services offices to prisons’ internal grievance systems, self-help, or looking beyond the institutional walls to external oversight by executive or other public bodies, organizations of correctional officials, and litigation brought by public and private actors.

Our topics include (1) the delivery of civil and criminal legal services, including the structure of the Legal Services Corporation, the function of public defender offices (state and federal), and state provisions regarding “civil Gideon”; (2) conflict and challenges to prison conditions, rules on visitation, education, health care, and the like; (3) techniques for releasing individuals, such as early release, good time, probation, parole, supervised release (as well as revoking); and (4) the collateral consequences of incarceration, including disenfranchisement, welfare, and labor. We will make comparisons within the United States and abroad, as we consider questions such as: How do people receive legal assistance? What legal resources exist for people within prison, and what does adjudication via administrative procedures inside prisons look like? What routes exist via standard-setting and accreditation? What role is played in enforcement by public bodies such as by the U.S. Department of Justice working under the Civil Rights of Institutional Persons Act? How might citizenship and membership be constituted for those detained? What are the various mechanisms for early release, and how do they operate in practice? What challenges face people leaving prison, and how do state policies intersect with that process? As we reflect on this range of questions, we will bear in mind how gender, race, ethnicity, age, and geography affect these issues.

Participants will include those directly engaged in these problems and those who study them. This workshop welcomes students continuing from either 2009 or fall 2010 as well as those who want to join for this semester. Two units, credit/fail. Additional credits for research or clinical projects available with permission of the professors. Dennis Curtis, Judith Resnik, Fiona Doherty, and Hope Metcalf.

Requirements and Readings

This Workshop is a two credit ungraded course. We meet weekly; preparation and attendance at these discussions is required for credit. In addition, **at least six times during the semester**, students must submit a one-page reflection on readings – due by 9 a.m. on the Monday mornings of the workshop and circulated to the class. Our purpose is to encourage you to begin the conversations before class as you think about the relationship among readings. If you need to miss a class, please be in touch in advance with the professors in advance of the meeting. Students missing more than two sessions without permission will not receive credit.

In the event that you would prefer to receive one credit instead of two, please speak with the professors about the possibility of making special arrangements. Further, with permission, some students may do additional work (including research and clinical opportunities) for additional credit. The amount and kind of credit (SAW, etc.) depends on the project approved. Auditing is possible, and visitors are also welcome, again with permission from the teachers. Below is an outline of the sessions and a list of readings, to be supplemented or varied in light of our discussions and your suggestions.

Readings will be available on the Liman Public Interest Workshop's "Yale Inside" site¹ as well as through weekly emails through a list-serv. Below we outline the first few weeks of classes and questions as well as outline the topics of the semester. Participants are welcome to make suggestions about upcoming sessions.

January 24 Class 1: Justice and Injustice

Co-Convenors: Fiona Doherty, Jeremy Lyman-Kaplan, Hope Metcalf, and Judith Resnik

Over the last several years, public defenders in several major U.S. cities have refused to accept any new cases. They contend they are unable to serve the large numbers of criminal defendants in a manner consistent with their ethical obligations and the Fifth and Sixth Amendments of the Constitution. When should lawyers refuse to take clients? Might we consider "rationing" legal services under some circumstances?

Meanwhile, courts and legislatures are increasingly turning to criminal sanctions for what have been categorized as civil offenses, such as the failure to pay child support payments. The Supreme Court has granted certiorari to consider whether counsel must be provided where a defendant faces incarceration as a result of *civil* contempt proceedings arising out of child support arrears. Our opening session begins to explore the causes and consequences of the lack of quality counsel for criminal and civil litigants, as we consider whether and how the government should pay for counsel, for whom, for what sorts of proceedings and why.

¹. Enrolled students can access these materials; if problems arise, please contact Hope Metcalf, hope.metcalf@yale.edu or Kathi Lawton, katherine.lawton@yale.edu or (203) 432-9165.

- Readings:** Eric Eckholm, *Citing Workload, Public Lawyers Reject New Cases*, N.Y. TIMES, Nov. 9, 2008, at A1
- Darryl K. Brown, *Rationing Criminal Defense Entitlements: An Argument from Institutional Design*, 104 COLUM. L. REV. 801 (2004)
- Price v. Turner*, 387 S.C. 142 (2010), cert. granted, *Price v. Rogers*, 131 S.Ct. 504 (granted Nov. 1, 2010) and Petition for Certiorari, *Price v. Rogers*, available at 2010 WL 2604155 (June 25, 2010)
- Lawrence M. Friedman, *Access to Justice: Some Historical Comments*, 37 FORDHAM URB. L.J. 3 (2010)

January 31 Class 2: *Gideon's* Promise, Poor Defendants, and Poor Courts

- Co-Convenors: Fiona Doherty, Trevor Stutz
- Guests: Alicia Bannon, Liman Fellow, 2009-10

This session will examine the intersection of the challenges facing poor criminal defendants and the under-funding of courts. In 1963, the United States Supreme Court required that all felony defendants be accorded counsel. Thereafter, the court developed the test that any individual facing a loss of liberty had a right to free legal counsel. Yet quality defense counsel is often unavailable as states face shortfalls and allocate funds elsewhere. State courts themselves struggle for funds, as evidenced by recent court closings and the longstanding battle over judicial salaries. Facing cutbacks, many courts have imposed fees on criminal defendants.

How should courts react to budget shortfalls? Are court closings an acceptable response? Building from last week's discussion, how should courts, prosecutors, and public defenders try to implement the promise of *Gideon*? What are the minimum standards for adequate representation in criminal cases? What are the obligations of the bar (including private lawyers)? How does funding affect perceptions of fairness? What are the legal boundaries on assessing fees from criminal defendants? When can state courts order their own legislatures to provide more support to themselves and to criminal defendants? Should the federal government intervene?

Readings: Court Finances

Sheri Qualters, *Nationwide, State Court Systems Continue to Feel the Pinch*, NATIONAL LAW JOURNAL, March 11, 2010.

William Welch, *Court Budget Cuts Swift Hand of Justice*, USA TODAY, April 1, 2010.

Bob Egelko, *San Francisco Courts to Cut Hours of Clerks' Offices*, SAN FRANCISCO CHRONICLE, December 8, 2010.

Hon. Jonathan Lippman, Chief Judge of the State of New York, *Public Statement of Chief Judge Jonathan Lippman*, February 23, 2010.

The Implementation of *Gideon*

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

18 U.S.C. § 3006A.

American Bar Association, *Gideon's Broken Promise: America's Continuing Quest for Equal Justice - A Report on the American Bar Association's Hearings on the Right to Counsel in Criminal Proceedings*, Executive Summary (2003),

<http://www.abanet.org/legalservices/sclaid/defender/brokenpromise/execsummary.pdf>

Barbara Mantel, *Public Defenders: Do indigent defendants get adequate legal representation?*, CONGRESSIONAL QUARTERLY RESEARCHER, April 18, 2008, 337-43.

American Bar Association, *State, County and Local Expenditures for Indigent Defense Services, Fiscal Year 2008*, 1-8, 12-13, 16-18, 22, 48-49, 69, 71-73 (2009),

http://www.abanet.org/legalservices/sclaid/defender/downloads/Indigent_Defense_Expenditures_FY08.pdf

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

Stephen B. Bright & Lauren Sudeall Lucas, *Overcoming Defiance of the Constitution: The Need for a Federal Role in Protecting the Right to Counsel in Georgia*, ACS ISSUE BRIEF (September 2010).

Fees on Criminal Defendants

Brennan Center, *Criminal Justice Debt: A Barrier to Reentry* (2010),

http://www.brennancenter.org/content/resource/criminal_justice_debt_a_barrier_to_reentry/

February 7 Class 3: Mercy and Justice

Co-Convenors: Hope Metcalf, Matthew Smith

Guest: Linda Meyer, Carmen Tortora Professor of Law at Quinnipiac University School of Law

This session will consider the relationship between claims of morality (variously defined, and sometimes religiously inflected) and the criminal justice system. Explanations for punishment generally rely on retribution, rehabilitation, incapacitation, and deterrence. What role does/should “mercy” play? What does that term entail and how might its import vary? With respect to recent cases regarding juveniles sentenced to life without parole, is mercy the right framing?

Readings: Linda Meyer, *THE JUSTICE OF MERCY*, CHS. 3, 4 (2010)

Jean Hampton, *Correcting Harms versus Righting Wrongs: The Goal of Retribution*, 39 *UCLA L. REV.* 1659 (1992)

State v. Andrews, --- S.W.3d ----, 2010 WL 5209310 (Mo. 2010)

Robin Ledbetter, “Laying Roots”

February 14 Class 4: Civil *Gideon*—Lawyers, Courts, and Poverty

Co-Convenors: Fiona Doherty, Trevor Stutz

Guests: Tom Tyler, University Professor, New York University

While indigent *criminal* defendants are entitled to counsel under *Gideon v. Wainwright* and the Sixth Amendment, poor *civil* litigants have a more limited right to counsel. In *Lassiter v. Dep’t Social Services of Durham Cty.*, 452 U.S. 18 (1981), the Supreme Court held that the presumption against providing counsel for civil litigants can be outweighed if the risk of error is shown to be too great, and the Court has subsequently held that civil litigants may be entitled to transcripts and certain fee waivers. A few state courts have upheld a state right to counsel for civil litigants in particular circumstances, such as child custody proceedings. In this session, drawing upon our prior discussions of the role of counsel in criminal cases, we will consider the scope and demographics of the need for appointed counsel within the civil realm. We will also discuss how federal, state, and private actors are trying to fill the gaps in civil legal services. (We will contemplate these issues from a comparative perspective in another session.)

What are the arguments for providing lawyers to civil litigants? What sources (constitutional or statutory) provide a basis for doing so? What contributions do lawyers make? How do we balance the advantages of legal representation against the heavy cost of lawyers’ fees? What kinds of problems

should be prioritized? Given the large number of civil litigants, how would we monitor the quality of legal representation? How realistic are civil *Gideon* proposals given the state court budget problems, explored in our second session? Would providing free lawyers encourage even more litigation in overburdened courts? What reforms—short of the provision of counsel—might improve access to justice for pro se litigants? Conversely, does the emphasis on individual legal services come at the expense, for example, of complex litigation or class actions, and a less efficient means of change? Or does the individual right to counsel trump any such concerns?

Readings: Legal Backdrop

Lassiter v. Dep't Social Services of Durham Cty., 452 U.S. 18 (1981)

Termination of Parent-Child Relationship of I.B. v. Indiana Dept. of Child Services, 933 N.E.2d 1264 (Ind. 2010)

The Civil *Gideon* Movement

Legal Services Corporation Act, 42 U.S.C. § 2996 et seq.

American Bar Association, 2010 Resolution 105 [Amending “Civil Gideon”] (Aug. 2010). (**18 pages**)

Kevin G. Baker & Julia R. Wilson, *Stepping Across the Threshold: Assembly Bill 590 Boosts Legislative Strategies for Expanding Access to Civil Counsel*, 43 CLEARINGHOUSE REV. 550 (Mar/Apr 2010)

Tamara Audi, ‘Civil Gideon’ Trumpets Legal Discord, WALL ST. J., Oct. 27, 2009, available at <http://online.wsj.com/article/SB125659997034609181.html> (**2 pages**)

The State of Indigent Representation

Mauricio Vivero, *From “Renegade” Agency to Institution of Justice: The Transformation of Legal Services Corporation*, 29 FORDHAM URB. L.J. 1323 (2002)

Deborah L. Rhode, *Whatever Happened to Access to Justice?*, 42 Loy. L.A. L. Rev. 869 (2009)

Critiques and Reflections on the Value of Counsel

Ted Frank, *The Trouble with the Civil Gideon Movement*, LIABILITY OUTLOOK (American Enterprise Institute) (Aug. 2008) (**4 pages**)

Benjamin H. Barton, *Against Civil Gideon (And For Pro Se Court Reform)*, 62 FLA. L. REV. 1227 (Dec. 2010) (excerpt)

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

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

Optional Listening: *Pro Se*, This American Life, Aired July 10, 2009 available at <http://www.thisamericanlife.org/radio-archives/episode/385/pro-se>

February 21 Class 5: Comparative Perspectives on Access to Justice

Co-Convenors: Hope Metcalf and Tara Rice

Guest: Allyson McKinney, Cover Lowenstein Fellow

Thus far, our focus has been on the United States and the possible meanings of access to justice. We turn now to consider access to justice in other legal systems. What roles do resources, lawyers, structures of legal systems, geography, and language play in access to justice? What equipage should the state provide, what forms of subsidies are available, for what kinds of cases? How might provision of justice be reorganized so as to diminish the need for lawyers and judges? Is this desirable?

Consider the example of the European Court of Human Rights. By way of background, we provide a few pages explaining the European Convention of Human Rights and the European Court of Human Rights. As you review the cases included, focus on the application of facts as to Article 6 of the European Convention on Human Rights. When is there a breach of a right to a public hearing and a right to appointed counsel? What do you think about the court's decision regarding when a hearing is necessary? To what extent does cost figure into the court's analysis? Should it? How are those rights supposed to be funded?

Next, consider the comparison between the provision of legal services in the United Kingdom vs. the United States. Note that the United Kingdom was long considered to have the best access to justice of all the member states, but has recently cut legal aid. As we saw in Week 4, some critics of the civil *Gideon* movement in the United States have argued that the real cause for any justice gap for the poor is the overreliance on litigation and lawyers. Consider England's extensive use of alternative dispute resolution. Might ADR be a path for greater access in the United States?

Comparative examples also offer a lens by which to consider other forms of alternative courts. What are barriers to people's access to justice in Uganda? Which of those same barriers—to a greater or lesser extent—exist in the United States? How might customary law contribute to greater access? What might its limitations be? How does the alternative system described in Uganda compare to those described (albeit in less detail) in the Mattei article or the New Haven problem-solving court? Consider the relative roles of parties, mediators, and judges. How do these roles shift in the various

alternative systems? For what sorts of problems do the various strategies seem best suited? Where might they fall short?

Readings: Judith Resnik & Dennis Curtis, REPRESENTING JUSTICE: INVENTION, CONTROVERSY, AND RIGHTS IN CITY-STATES AND DEMOCRATIC COURTROOMS (Yale Univ. Press 2010) (excerpted)

Article 6 of the European Convention on Human Rights

For each of the following cases, we will focus on the holdings regarding Article 6:

Airey v. Ireland, 32 Eur Ct HR Ser A (1979), available at http://www.escri-net.org/caselaw/caselaw_show.htm?doc_id=400936

Vilho Eskelinen v. Finland, [2007] ECHR [GC] 63235/00 (19 April 2007)

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

Afua Hirsch, *Legal Aid Cuts: Who Receives Aid and How Much Does It Cost?*, Guardian, Nov. 16, 2010, available at <http://www.guardian.co.uk/law/datablog/2010/nov/16/legal-aid-cut>.

Ugo Mattei, *Access to Justice. A Renewed Global Issue*, 11 Elec. J. of Comp. L. 3 (2007), available at <http://www.ejcl.org/113/article113-14.pdf>

Christine Ampaire, et al., *Baseline Study Report on Succession-Related Property Grabbing in Mukono County, Uganda*, International Justice Mission, pp **27-75 (skim)**, **76-84**, July 25, 2008.

Minneh Kane, J. Oloka-Onyango, & Abdul Tejan-Cole, *Reassessing Customary Law Systems as a Vehicle for Providing Equitable Access to Justice for the Poor*, Arusha Conference, "New Frontiers of Social Policy," Dec. 12-15, 2005.

Problem Solving Initiative Report, New Haven Family Support Magistrate Division, June 30, 2010, available at http://www.jud.state.ct.us/Committees/pst/problemsolving/NH_pilot/Problem_Solving_Initiative_Report_063010.pdf.

February 28 Class 6: Supervision and Release

Co-Convenors: Rachel Clapp and Fiona Doherty

Over the last twenty years, sex offender registries have become pervasive. Today, all 50 states have registries, as do the District of Columbia, Guam, Puerto Rico, and many participating Native American tribes. Using Connecticut as an example, we will consider the laws that restrict sex offenders after their release and discuss the policy implications of these laws. Who is defined as a sex offender? What types of restrictions apply to these people and for how long? Are the restrictions necessary or wise? How should the restrictions be modified? What are the most important public security concerns to consider?

In 2010, the Supreme Court held that a mentally ill and sexually dangerous federal prisoner may be civilly committed under the Necessary and Proper Clause of the Constitution. What do you think about the Court's decision? Are civil commitment laws justified? What do you think about other proposed solutions, such as chemical castration? What is the best way to promote public safety and also uphold the liberty and privacy rights of individual offenders?

Readings: Overview

Human Rights Watch, *No Easy Answers: Sex Offender Laws in the U.S.*, (September 2007), available at <http://www.hrw.org/en/node/10685/section/1>, pages 35-46.

Justice Policy Institute, *What will it cost states to comply with the Sex Offender Registration and Notification Act?*, Feb. 2, 2008, <http://justicepolicy.org/content-hmID=1811&smID=1588.htm>.

Connecticut

Connecticut Department of Public Safety v. Doe, 538 U.S. 1 (2003)

C.G.S.A. § 54-251, 252, 255, & 258 (registration of sexual offenders)

State of Connecticut, Department of Public Safety, Sex Offender Registry, available at http://www.communitynotification.com/cap_main.php?office=54567 (some illustrative pages included)

Community Notification

Gita Sitaramiah, *Promise Gives Way to Pain in and around Grand Forks*, ST. PAUL PIONEER PRESS (MN), Apr. 19, 2004, at A1.

United States Department of Justice National Sex Offender Public Website: About the Dru Sjodin National Sex Offender Public Website,
<http://www.nsopw.gov/Core/About.aspx> (last visited Feb. 10, 2011)

Jeff Raasch, *Carnival Worker Recognized as Sex Offender, Is Arrested*, KCRG, Jul. 28, 2010, available at
<http://www.kcrg.com/news/local/Carnival-Worker-Recognized-As-Sex-Offender-Is-Arrested-99460894.html>

Man accused of downloading porn at library, NBC 10 NEWS, Feb. 8, 2011, available at
<http://www2.turnto10.com/news/2011/feb/08/man-accused-downloading-porn-library-ar-389984/>.

Robert McMillan, *Texas County to Name Drunk Drivers on Twitter*, IDG NEWS SERV., DEC. 24, 2009, available at
<http://www.networkworld.com/news/2009/122409-texas-county-to-name-drunk.html>.

Post-Incarceration Sanctions

Jeremy Travis, *Invisible Punishment: An Instrument of Social Exclusion*, in *INVISIBLE PUNISHMENT: THE COLLATERAL CONSEQUENCES OF MASS IMPRISONMENT* 15, 20-25 (Marc Mauer & Meda Chesney-Lind eds. 2002)

Richard G. Wright, *Sex Offender Post-Incarceration Sanctions: Are There Any Limits?* 34 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 17 (2008)

United States v. Kebodeaux, No. 08-51185, 2011 WL 507424 (5th Cir. Feb. 15, 2011)

Scott Michels, *Ga. Woman Challenges Sex Offender Laws*, ABC NEWS, Jul. 15, 2008, available at <http://abcnews.go.com/TheLaw/story?id=5373858&page=1>.

Jordan Flaherty, *Her Crime? Sex Work in New Orleans*, Jan. 13, 2010, COLOR LINES, available at
http://www.colorlines.com/archives/2010/01/her_crime_sex_work_in_new_orleans.html

Nate Anderson, *New Jersey to sex offenders: No Internet for you*, Dec. 28, 2007,
<http://arstechnica.com/tech-policy/news/2007/12/new-jersey-to-sex-offenders-no-internet-for-you.ars>.

Katie Zezima, *Sex Offender Accused of Raping Boy, 6, in Public Library*, N.Y. TIMES, Feb. 2, 2008, available at <http://www.nytimes.com/2008/02/02/us/02rape.html?fta=y>.

Matthew Reichbach, *Court rules sex offender library ban unconstitutional*, N.M. INDEPENDENT, Apr. 1, 2010, available at <http://newmexicoindependent.com/50658/court-rules-sex-offender-library-ban-unconstitutional>.

Candace Rondeaux, *Can Castration Be a Solution for Sex Offenders?*, WASH. POST, Jul. 5, 2006, available at http://www.washingtonpost.com/wp-dyn/content/article/2006/07/04/AR2006070400960_pf.html

Civil Commitment

18 U.S.C.A. § 4248, (civil commitment of a sexually dangerous person)

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

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)

Act Pertaining to Post-Sentence Preventive Detention and Diminished Criminal Responsibility due to Mental Deficiency, Constitutional Council (France), Decision 2008-562 DC of February 21st, 2008

MARCH 3-4, 2011 FOURTEENTH ANNUAL LIMAN COLLOQUIUM, YALE LAW SCHOOL

Confrontation, Collaboration, and Cooperation: (En)Countering Disagreement in Pursuit of Social Justice

March 7 Class 7: Sexuality, Gender Identity, and Detention

Co-Convenors: Hope Metcalf and Rachel Clapp

Guest: Ali Miller, Robina Fellow, Yale Law School

In this session, we will examine issues of sexuality and gender identity in prison. We will consider the types of sexual activity that occurs in prison—both between inmates and between inmates and custodial staff—as well as state responses to those acts. State responses have ranged from toleration of sexual activity—including rape—to outright ban, including consensual sex among

inmates. What penological interests does the state have in regulating sex in prison, and how do those relate to individual interests in privacy and self-expression?

What special issues face inmates who are perceived as, gay, lesbian, bisexual, transgender, or queer? How should prison administrators address issues of rape and sexual coercion? Should “gay” inmates have their own housing units? When should protective custody be mandatory, prohibited, or available? How do issues of funding and overcrowding come into play?

Readings: Prison Sex vs. Prison Rape

Optional viewing: Turned Out: Sexual Assault Behind Bars, *available at* http://www.youtube.com/watch?v=M4_uvvcADqw

Farmer v. Brennan, 511 U.S. 825 (1994).

Alice M. Miller, Mindy J. Roseman, & Corey Friedman, *Sexual Health and Human Rights: United States & Canada*, THE INTERNATIONAL COUNCIL ON HUMAN RIGHTS POLICY (2010). (excerpted)

Brenda V. Smith, *Rethinking Prison Sex: Self-Expression and Safety*, 15 COLUM. J. GENDER & L. 185 (2006). (excerpted)

Project on Addressing Prison Rape, *PREA Standards Comparison: Standards for Adult Prisons and Jails* (February 2011). (excerpted)

Craig J. Forsyth, Rhonda D. Evans, and D. Burk Foster, *An Analysis of Inmate Explanations for Lesbian Relationships in Prison*, 30 INT’L J. OF SOC. OF THE FAMILY (2002), *available at* <http://www.yorku.ca/irjs/Archives/F20/F204.pdf>

Jesse McKinley, *California to permit conjugal visits for gay inmates*, N.Y. TIMES, Jun. 3, 2007, *available at* <http://www.nytimes.com/2007/06/03/world/americas/03iht-conjugal.1.5975371.html>.

Classification and Segregation

Judith Resnik, “*Women’s Prisons and Men’s Prisons*”: *Should Prisoners Be Classified By Sex?*” 2 POL. STUD. REV. (1982).

Dena Potter, *Virginia Women’s Prison Segregated Lesbians, Others*, THE HUFFINGTON POST, Jun. 10, 2009, http://www.huffingtonpost.com/2009/06/10/virginia-womens-prison-se_n_213967.html.

Veney v. Wyche, 293 F.3d 726 (4th Cir. 2002).

Paul von Zielbauer, *New York Set to Close Jail Unit for Gays*, N.Y TIMES, Dec. 30, 2005, available at <http://www.nytimes.com/2005/12/30/nyregion/30jails.html>.

Russell K. Robinson, *Masculinity as Prison: Race, Sexual Identity and Incarceration (draft)*. (excerpted)

National Center for Lesbian Rights, *Rights of Transgender Prisoners* (2006), available at http://www.nclrights.org/site/PageServer?pagename=issue_transgender_docsDownloads.

Ryan J. Foley, *Wis. Inmate seeks to nix deal in sex-change case*, AP, Nov. 10, 2010.

March 14 **NO CLASS (Spring Break)**

March 21 **Class 8: Access to Justice for People in Prison: Internal Grievances, Jailhouse Lawyers, and Public Records**

Co-Convenors: Isabel Bussarakum and Hope Metcalf

Guest: Paul Wright, Prison Legal News

The 1996 Prison Litigation Reform Act (PLRA) imposed significant burdens on the lawsuits that prisoners can bring to challenge prison conditions. The PLRA requires prisoners to exhaust administrative remedies before resorting to courts and also limits judicial review of such litigation. The argument in favor of the PLRA is that it curbed increasing amounts of frivolous litigation, freeing up dockets to handle more important claims. The argument against the PLRA is that it significantly chilled prison reform litigation, silencing prisoners who have meritorious complaints.

The PLRA begs the questions: (1) who *is* overseeing prison life and prison administration; and (2) who *should* take on that role? On the one hand, prisoners may seem to be in the best position to file grievances against corrections officers and to challenge prison conditions because they have first-hand knowledge of these problems. On the other hand, prisoners have very limited access to legal help and resources outside prison walls. Given these limitations, who should step in to help oversee prison life, and what oversight mechanisms should be used? American prisoners have long turned to other prisoners who play the part of jailhouse lawyers. But are jailhouse lawyers effective, and do they do more to hurt or help prison reform in the long run? NGOs sometimes bring litigation challenging prison conditions, but these organizations run into obstacles gaining access to prisoners and information about prison life. There are processes, other than litigation, which can be used to effect reform. Prisoners can file grievances with the Department of Corrections, but is that a neutral enough body? How much can be accomplished when prisoners and reporters harness the power of the press to

publicize problems with prison conditions? How does the American model compare to the United Kingdom's system, in which various interlocking, administrative bodies monitor prison life and protect prisoners' rights?

Readings: **Supreme Court Doctrine: Prison Libraries & Inmate-to-Inmate Correspondence**

Bounds v. Smith, 430 U.S. 817 (1977) (Westlaw Headnotes only).

Lewis v. Case, 518 U.S. 343 (1996) (Westlaw Headnotes only).

Turner v. Safley, 482 U.S. 78 (1987) (Westlaw Headnotes only).

Connecticut Prison Grievance Procedures

Connecticut Prison Grievance Policy, Mar. 5, 2003.

Sample Connecticut Grievance Form.

Limited Judicial Oversight: Prison Litigation Reform Act

42 U.S.C.A. § 1997e(a)-(c), (e)-(f)

Brian J. Ostrom, Roger A. Hanson & Fred L. Cheesman II, *Congress, Courts and Corrections: An Empirical Perspective on the Prison Litigation Reform Act*, 78 NOTRE DAME L. REV. 1525 (2003).

Access to Courts from Within Prison: Jailhouse Lawyering

Jessica Feerman, "*The Power of the Pen*": *Jailhouse Lawyers, Literacy, and Civic Engagement*, 41 HARV. C.R.-C.L. L. REVIEW 369, 369-73, 384-89 (2006).

Mumia Abu-Jamal, *JAILHOUSE LAWYERS: PRISONERS DEFENDING PRISONERS V. THE USA*, 235-41, 243-48 (2009).

Jim Thomas, *PRISONER LITIGATION: THE PARADOX OF A JAILHOUSE LAWYER* 227-33 (1988).

Free Press & Access to Prisons

Beau Hodai, *Voices from Hellmouth; For Convict Journalists, Freedom of the Press Is Not So Black and White*, EXTRA!, Dec. 2009.

ACLU Lawsuit Charges that Jail Policy Banning Books and Magazines Is Unconstitutional, STS. NEWS SERVICES, Oct. 6, 2010.

A Comparative Example: Prison Oversight in the UK

Anne Owers, *Prison Inspection and the Protection of Prisoners' Rights*, 30 PACE L. REV. 1535 (2010).

Examples of Prisoner Speech

CARNELL HUNNICUTT, SR., WHY IS IT SO HARD TO BELIEVE?

CAGED BIRDS SING: A REPORT BY GIRLS ON THE A UNIT AT WAXTER, 4, 6, 9-11, 15-17 (2010).

March 28 Class 9: Ethics, Lawyers' Misconduct, and Criminal Justice

Co-Convenors: Fiona Doherty and Isabel Bussarakum

Guest: Lawrence Fox, George W. Crawford Visiting Lecturer in Law, Yale Law School
David Menschel, Vital Projects Fund; Liman Fellow, 2002-03

Given the high stakes of criminal proceedings, the law imposes special burdens and responsibilities on prosecutors. The prosecutor's duty is not to win a case, but to see that justice is done. As the Supreme Court has famously emphasized, the prosecutor "may strike hard blows, but he is not at liberty to strike foul ones." *Berger v. U.S.*, 295 U.S. 78, 88 (1935). The special ethical obligations of a prosecutor include, for example, turning over exculpatory evidence to the defendant, refraining from improper argument at trial, and correcting false evidence. However, prosecutorial misconduct appears to be a recurring problem that is inadequately prevented and redressed. What are the tensions between a prosecutor's role as a minister for justice and his or her role as an advocate in an adversarial proceeding? Who is in the best position to police prosecutorial misconduct: other prosecutors, opposing counsel, defendants, judges, or state bar associations? Should prosecutors be held personally accountable for their misconduct – with sanctions such as disbarment? Is prosecutorial misconduct an institutional problem for which individual prosecutors cannot fairly be held to account? Are widespread institutional changes required to redress the problem?

Defense counsel is also under special obligation in a criminal proceeding to ensure that a defendant's Sixth Amendment right to counsel is fulfilled. Because defense counsel is representing a client against a potential deprivation of property or liberty, is defense counsel entitled to utilize more aggressive, adversarial tactics than prosecutors? Should defense lawyers be considered ministers of justice like prosecutors, or should they be allowed to function simply as zealous advocates?

Readings: The Prosecutorial Function

American Bar Association Model Rule 3.8.

The National Center for Prosecution Ethics, *Quotes About Prosecutors and the Prosecution Function*, available at <http://www.ethicsforprosecutors.com/quotes.html> (last visited Feb. 24, 2011).

MARK BAKER, D.A.: PROSECUTORS IN THEIR OWN WORDS 77-85 (1999).

Self-Policing by the Legal Profession: State Bar Disciplinary Procedures

DAVID KEENAN, LIMAN PROSECUTORIAL MISCONDUCT PROJECT, STATE REPORT: ILLINOIS, Mar. 15, 2011.

DAVID LEBOWITZ, LIMAN PROSECUTORIAL MISCONDUCT PROJECT, STATE REPORT: FLORIDA, Mar. 11, 2011.

TAMAR LERER, LIMAN PROSECUTORIAL MISCONDUCT PROJECT, STATE REPORT: GEORGIA, Mar. 15, 2011.

EMILY WASHINGTON, LIMAN PROSECUTORIAL MISCONDUCT PROJECT, STATE REPORT: LOUISIANA, Mar. 15, 2011.

Litigating Claims and Seeking Remedies in Court

Sheldon H. Nahmod, NAHMOD LAW, *Certiorari Granted in Connick v. Thompson: A Prosecutorial Failure to Train Local Government Liability Case*, at <http://nahmodlaw.com/2010/04/06/certiorari-granted-in-connick-v-thompson-a-prosecutorial-failure-to-train-local-government-liability-case/> (last visited Mar. 20, 2011) [excerpted].

Jonathan Tilove, *U.S. Supreme Court hears ex-inmate's appeal against Orleans Parish DA's office*, THE TIMES-PICAYUNE, Oct. 7, 2010.

In re Riehlmann, 891 So.2d 1239 (2005).

The Scope of the Prosecutorial Misconduct Problem

KATHLEEN M. RIDLOFI & MAURICE POSSLEY, PREVENTABLE ERROR: A REPORT ON PROSECUTORIAL MISCONDUCT IN CALIFORNIA 1997-2009, 2-8, 16-25, 38-41, 48-51, 54-61, 64-71, 74-82 (2010).

Policing & Preventing Prosecutorial Misconduct: Possibilities for Reform

Lawton P. Cummings, *Can An Ethical Person Be An Ethical Prosecutor? A Social Cognitive Approach to Systemic Reform*, 31 CARDOZO L. REV. 2139 (2010).

Ethical Duties of Criminal Defense Attorneys

Robert S. Bennett, *Ethics, Zealous Advocacy, and the Criminal Defense Attorney*, 2001 *CARDOZO LIFE* 24-27.

William H. Simon, *The Ethics of Criminal Defense*, 91 *MICH. L. REV.* 1703, 1703-22 (1993).

April 4 Class 10: Detention, Criminal Justice, and Citizenship

Co-Convenors: Fiona Doherty and Jeremy Kaplan-Lyman

Guests: Lucas Guttentag, Robina Foundation Distinguished Senior Fellow in
Residence, Yale Law School
Alexandra Dufresne, Senior Policy Fellow at Connecticut Voices for
Children

This week's readings consider the intersection of detention, the criminal justice system, and immigration policy. Non-citizens in the United States may be detained in two distinct systems. First, they may be detained for *civil* immigration violations by Immigration and Custom Enforcement (ICE). Second, they may be held in regular criminal custody if convicted of *criminal* acts, immigration related or not. The operation of these two distinct detention systems raises questions about the role of incarceration in our society, the shape of immigration enforcement, and the heavy costs involved in detaining non-citizens.

In December 2010, Yale Law School Professor Peter Schuck argued in the *New York Times* that one way to alleviate the California prison crisis was to deport non-citizens incarcerated for non-violent offenses – before they had finished serving their sentences. Should federal and state prison systems release non-citizens to ICE custody as quickly as possible for the purposes of deportation? Who should decide whether ICE deports prisoners before the end of their prison term? What theories of sentencing should drive the incarceration of non-citizen convicts (e.g. deterrence, retribution, incapacitation, rehabilitation)?

Senator Lieberman has proposed legislation to strip convicted “terrorists” of their citizenship. Do you support the denationalization of individuals convicted of a certain class of crimes? Does denationalization as a technology of punishment present a different set of concerns than deportation for a criminal conviction?

The civil detention of non-citizens in ICE custody also presents tough questions. Detainees under the control of ICE include, for example, non-citizens convicted of relatively minor crimes, undocumented aliens with no criminal history, and arriving asylum seekers. These detainees are held in a network of ICE-operated detention centers, private prisons, and local jails. Given the civil (non-punitive) nature of this detention system, what kinds of conditions should prevail? Who should be funding improvements to immigration detention facilities? Is detention more justified for some categories of non-citizens than others? What policy changes would you recommend?

Readings: Please note that some readings are excerpted and one is a graphical feature on a website

The Detention of Undocumented Immigrants in the American Prison System

Peter Schuck, *Immigrant Criminals in Overcrowded Prisons: Rethinking an Anachronistic Policy*, (Feb. 25, 2011) (unpublished draft). **Excerpted.**

US Immigration and Customs Enforcement, Fact Sheet: ICE Rapid REPAT Program (Aug. 24, 2009).

J.J. Hensley, *Arizona Transfers Migrant Inmates to ICE Custody: Significant Savings Expected as Prisoners are Turned Over to Customs*, *The Arizona Republic*, Jan. 29, 2010
<http://www.azcentral.com/arizonarepublic/local/articles/2010/01/29/20100129icexfer0129.html>.

Federal Bureau of Prisons, Quick Facts About the Bureau of Prisons,
<http://www.bop.gov/news/quick.jsp#2>.

Letter from Richard M. Stana, Director of Homeland Security and Justice Issue, to The Honorable John N. Hostettler, Chairman, Subcommittee on Immigration, Border Security, and Claims, Committee on the Judiciary, House of Representatives, et al. (Apr. 7, 2005). **Read: letter, skim attached power point.**

Anna Gorman, *U.S. Funding for Jailing Illegal Immigrants Falls Far Short of Costs*, *L.A. Times*, Feb. 05, 2010, <http://articles.latimes.com/2010/feb/05/local/la-me-immig-jails5-2010feb05>.

Maureen A. Sweeney, *Fact or Fiction: The Legal Construction of Immigration Removal For Crimes*, 27 *Yale J. on Reg.* 47 (Winter 2010). **Excerpted.**

Robert J. Sampson, *Rethinking Crime and Immigration*, *Contexts*, Winter 2008, 28-33.

Padilla v. Kentucky, 130 S.Ct. 1437 (2010). **Read through part I of the decision.**

Trop v. Dulles, 356 U.S. 86 (1958). **Excerpted.**

Summary of the Terrorist Expatriation Act, available at http://lieberman.senate.gov/assets/pdf/TEA_summary.pdf.

Civil Immigration Detention

Explore graphic and video features associated with article at:
<http://www.nytimes.com/2008/12/27/us/27detain.html>.

Margaret Talbot, *The Lost Children: What Do Tougher Detention Policies Mean for Illegal Immigrant Families?*, The New Yorker, Mar. 3, 2008, available at http://www.newyorker.com/reporting/2008/03/03/080303fa_fact_talbot. **Excerpted.**

U.S. Immigration and Customs Enforcement, Fact Sheet: 2009 Immigration Detention Reforms, <http://www.ice.gov/news/library/factsheets/reform-2009reform.htm>.

Susan Carroll, ICE to Make Detention Centers More Humane, Houston Chronicle, Jun. 8, 2010, available at <http://www.chron.com/disp/story.mpl/special/immigration/7043040.html>.

American Civil Liberties Union Immigrant Rights Project, Issue Brief Prolonged Immigration Detention of Individuals Who Are Challenging Removal, Jul. 2009, http://www.aclu.org/images/asset_upload_file766_40474.pdf.

National Immigration Forum, The Math of Immigration Detention, Jul. 7, 2009, <http://www.immigrationforum.org/images/uploads/MathofImmigrationDetention.pdf>.

On "Moving Toward More Effective Immigration Detention Management": Hearing Before the H. Comm. on Homeland Sec., Subcomm. on Border, Maritime, and Global Counterterrorism, Dec. 10, 2009, (statement of Mark Krikorian, Executive Director, Center for Immigration Studies), reprinted at <http://www.cis.org/node/1629>.

Excerpted Transcript of Oral Argument, *Turner v. Rogers*, No. 10-10 (U.S. Mar. 23, 2011).

April 11 Class 11: Poverty, Race, Criminal Justice, and Enfranchisement

Co-Convenors: Hope Metcalf and Matthew Smith

Felon disenfranchisement is an overarching term used to describe various state laws that remove the right to vote from all or various subsets of felons. Although the term is often used monolithically, the laws in question are often quite different in origin and scope. Axes of variation include the legal bases for disenfranchisement (in some states it is constitutional rather than statutory matter); the crimes for which disenfranchisement is imposed (in some states all felonies result in disenfranchisement while in others it is an enumerated list); the duration of disenfranchisement (at the extremes it is permanent while in others states it lasts only for the term of incarceration); and the definition of disenfranchisement (at a minimum such laws remove the right to vote but they may also remove other civic possibilities, including the right to run for public office). The goal of this class is to

consider the normative bases for and against felon disenfranchisement specifically with regard to the right to vote.

What punitive reasons may states have for disenfranchising felons? Might disenfranchising felons deter crime *ex ante*; prevent certain anti-social acts *ex post*; or further rehabilitative goals? Does the answer depend on the felony? What about retribution? Is disenfranchisement justified as a form of strict retribution? As a form of expressive condemnation? What expressive goals are implicit in the readings? Does Lippke's suggestion that felon disenfranchisement affirms the authority of the law seem plausible?

What democratic reasons may states have for disenfranchising felons? How might conceptions of enfranchisement, as opposed to disenfranchisement, and the creation of citizenship factor into this? Should citizens with the same set of characteristics be allowed to vote in every democracy? Or should the right to vote depend on the particular demos? The international cases suggest various conceptions of voting and citizenship. What are they and what entailments do they have for felon disenfranchisement? Even if we can locate grounds for the disenfranchisement of some felons, do they apply in practice? Does race complicate the picture? How would we change the laws to reflect these conclusions?

How does felon disenfranchisement relate to exclusion from and access to justice in civil and criminal cases, the role of lawyers, and the possibility of progressive change? Would the reasoning that justifies barring felons from the voting booth justify exclusion from the courts?

Readings: Follow-Up to Class 9: Prosecutorial Ethics

Connick v. Thompson, 563 U.S. ____ (2011).

Felon Disenfranchisement

Washington v. State, 75 Ala. 582 (1884).

Green v. Board of Elections, 380 F.2d 445 (2d Cir. 1967).

Richardson v. Ramirez, 418 U.S. 23, 23-56 (1974).

Hirst v. United Kingdom (No. 2), 2010 Eur. Ct. H.R. 1-90.

Roach v. Electoral Commissioner (2007) 43 C.L.R. 1.

Richard Lippke, *The Disenfranchisement of Felons*, 20 L & PHIL. 553 (2001)

Ross Hawkins, *UK to Challenge Prisoner Votes Ruling by European Court*, BBC News, March 2, 2011.

Voting by Prisoners: Hearing on HC 776 before the House of Commons, 493-504 (U.K. 2011).

Reflecting on Our Workshop

Deborah Rhode, *Too Much Law, Too Little Justice: Too Much Rhetoric, Too Little Reform*, 11 GEO. J. LEGAL ETHICS 996 (1997-1998).

The Community Justice Project, Georgetown Law School, "Letter to Attorney General Holder Regarding National Standards to Prevent, Detect, and Respond to Prison Rape," April 4, 2011.

April 18 **NO CLASS**

April 25 **Class 12: Access to Justice – Room 127, 6:10 – 7:30**

Speaker: The Honorable Stephen Reinhardt

Judge Stephen Reinhardt, a graduate of the Yale Law School, has spent a remarkable 30 years as a judge on the Court of Appeals for the Ninth Circuit. Volume 120 of the Yale Law Journal has a special tribute to Judge Reinhardt to mark the anniversary. Judge Reinhardt has focused a good deal of his career on justice and access to courts. The YLJ - along with ACS (American Constitution Society) - will honor the judge in person. In addition to Judge Reinhardt, speaking will be Heather Gerken and Judith Resnik, both contributors to the YLJ tribute.

Readings: Farrakhan v. Washington, 338 F.3d 1009 (9th Cir. 2003).
Farrakhan v. Gregoire, 623 F.3d 990 (9th Cir. 2010) (en banc).
Erwin Chemerinsky, *Tribute: A Progressive Visionary: Stephen Reinhardt and the First Amendment*, 120 YALE L.J. 515 (2010).
Heather K. Gerken, *Tribute: Judge Stories*, 120 YALE L.J. 529 (2010).
Alex Kozinski, *Tribute: The Judicial "Odd Couple,"* 120 YALE L.J. 535 (2010).
Judith Resnik, *Tribute: Reading Reinhardt: The Work of Constructing Legal Virtue (Exempla Iustitiae)*, 120 YALE L.J. 539 (2010).
Benjamin I. Sachs, *Tribute: Reinhardt at Work*, 120 YALE L.J. 573 (2010).
Justice Ginsburg, *Bench Announcement in Connick v. Thompson*, March 29, 2011.

Beginning at 7:30, we will meet in our regular room.