

**Liman Workshop**  
**RATIONING ACCESS TO JUSTICE IN DEMOCRACIES:**  
**FINES, FEES, AND BAIL**

**Spring 2018 Syllabus**  
**Mondays, 6:10-8 pm, Room 124**

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**All readings will be available on the Yale Law School Inside Site ([inside.law.yale.edu](http://inside.law.yale.edu)).**

This workshop will consider the resources of courts and their users and the economic burdens incurred from involvement in the criminal and civil legal systems. Our plan is to examine when, why, and how courts and lawyers are conceived as “rights” and the implications in terms of public obligations to provide funding in polities understanding themselves as democratic. In the United States and elsewhere, constitutional and statutory commitments to access to courts and opportunities to enforce rights are challenged by the high demand for civil legal services, high arrest and detention rates, declining government budgets, and shifting ideologies about the utility and desirability of using courts.

We will consider the financing of courts, litigants, and criminal justice detention; sources of the demand for civil and criminal litigation; constraints on the allocation of costs, and claims of “litigiousness,” “over-criminalization,” and “excessive” punishment. At times, our lens will be comparative, as we consider other jurisdictions’ views on the obligations to provide subsidies for civil and criminal litigants so as to protect rights to “justice” and to “effective judicial remedies.”

We will also consider the debates about what “access to justice” and “paths to justice” mean, as some focus on expanding access to lawyers and courts in adversarial exchanges, and others promote alternative procedures such as arbitration and mediation, which are often more informal and less public. Examples of reforms include revising bail practices, changing court fees, altering fines, and increasing and improving resources for lawyers. Another set of questions relates to how these innovations comply with or depart from constitutional obligations to provide “due process” and have courts that are open, such that outsiders can observe the interactions.

The readings draw on materials from state and federal, domestic and transnational, civil and criminal, and administrative and judicial proceedings. Throughout, we will look at how social and political movements and race, gender, ethnicity, and class affect our understandings of what constitutes fairness and justice in fashioning systems to respond to claims of injury.

## Requirements, Credits, and Readings

We meet weekly; preparation for and attendance at these discussions is required for credit. You will receive directions in class as to which readings are required and which are optional. If you need to miss a class, please be in touch with the professors in advance of the meeting. Whether taking the class for graded or ungraded credit, students missing more than two sessions without permission will not receive credit.

The Workshop can be taken ungraded or for credit. The requirements vary accordingly. If choosing credit/fail, a student must submit written reflections four times during the semester, *after* the first session. The reflections should comment on the readings and discuss the relationships among the materials assigned. The reflections should be no more than two pages (double-spaced, size-12 font). The point is for both other students and the instructors to be able to read your comments in advance of the class, so that discussions can build from these exchanges. Students must email their reflections to the instructors and to Elizabeth Keane, the Liman Center Coordinator, and post their reflections on the Course Discussion Forum page of the Inside Site NO LATER than Sunday at 1 p.m. before that week's session. Students who do not complete and send reflections four times during the semester will not receive credit for the class.

If a student wants two graded credits, in addition to the four reflections, a student must write a responsive essay of no more than 4,000 words during the law school examination period (April 30, 8:30am – May 15, 5pm). Students who select this option will be provided with specific questions and directions that will require them to draw on the course materials and class discussions. NO additional research is to be done.

A third option, with permission of the instructors, is to write a paper as either a Supervised Analytic Writing (SAW) or a Substantial Paper. Students seeking to do so must also complete the four reflections. A proposed topic needs to be submitted by the fifth week of the semester. (We will explain more in class about the content of the proposal; the concern is to be sure that the issues to be analyzed are clear and that materials are available to do the requisite research). Thereafter, students need to meet with the instructors to determine feasibility, possibly to revise the proposal, and then to agree upon a research plan and schedule.

In addition, this class may be audited with permission of the instructors; doing so requires regular attendance. Visitors, with permission, are also welcome.

## January 22 Are Courts Rights?

This class opens our discussion by inquiring about the idea of courts as “rights.” What are possible legal or historical sources for this claim? If courts are rights, what flows from that characterization? An obligation for governments to provide courts? To subsidize them through general revenues? Or to create platforms for dispute resolution for which users pay directly? Do answers vary for criminal, civil, or administrative proceedings? First tier and appellate proceedings? What are the theories behind supporting courts and their users? What do governments accomplish by doing so? Do the answers vary if the governments understand themselves to be democracies?

Litigation entails strategic interaction, and therefore the need to consider how rules affect incentives. What if the government funded plaintiffs to file lawsuits but did not fund defendants to respond? Should there be means-testing or universal entitlements? Or should support vary by the kind of case? Consider also the challenges of resource constraints and the other services that governments provide. Where ought court funding sit, in relationship to other government services such as education, housing, incarceration? Where does the private sector fit in this discussion?

In short, this class previews many of the questions that we will explore in detail as the semester progresses. The materials offer a glimpse of the judicial decisions from three legal systems with different approaches to courts as rights. What is the legal basis for the majority’s holding in the 1971 decision of the U.S. Supreme Court in *Boddie v. Connecticut*? How might the path of law in the United States look different if the approaches put forth by Justice Douglas or Justice Brennan in their *Boddie* concurrences had prevailed? What state obligations flow from the majority in *Boddie*? Review Article III and the Fifth, Sixth, Seventh, and Fourteenth Amendments of the U.S. Constitution; bring your pocket constitutions to class, and we will have copies for those who do not already have them.

When reading the 2014 ruling, *Trial Lawyers Ass’n of British Columbia v. Att’y Gen. of British Columbia*, by the Supreme Court of Canada, and the July 2017 opinion of the U.K. Supreme Court in the Lord Chancellor Fines and Fees Case, consider the legal basis for requiring reduced costs for the litigants. What roles do Article 6 of the European Convention on Human Rights, and Article 47 of the Charter of Fundamental Rights of the European Union play in the decisions?

*Boddie v. Connecticut*, 401 U.S. 371 (1971), and accompanying materials

Frank I. Michelman, *The Supreme Court and Litigation Access Fees: The Right to Protect One’s Rights*, 1973 DUKE L. J. 1153

Judith Resnik, *Constitutional Entitlements to and in Courts: Remedial Rights in an Age of Egalitarianism: The Childress Lecture*, 56 ST. LOUIS U. L.J. 917 (2012)

European Convention on Human Rights, Article 6 (Right to a Fair Trial) (1950)

Charter of Fundamental Rights of the European Union, Article 47 (Right to an Effective Remedy and to a Fair Trial) (2000)

*Trial Lawyers Ass'n of British Columbia v. Att'y Gen. of British Columbia*, 2014 SCC 59  
(Supreme Court of Canada)

*R v. Lord Chancellor (Fines and Fees Case)*, [2017] UKSC 51

## **January 29      Government Services: Revenue Sources and Spending Decisions**

Revenue generation and spending are central issues for governments and, as the federal tax revisions of 2017 evidence, are key concerns for politicians. Our focus in this class is on spending decisions, particularly at the state and local levels, where governments currently provide public schools, roads and other infrastructure, utilities, and public safety (police and prisons), and in some instances support hospitals and health centers.

According to 2015 data from a study by the Urban Institute, the sources of funding for such “state” services include transfers from the federal government (33%), sales taxes (23%), individual income taxes (18%), and direct user charges such as tuition, tolls, and other payments (11%). At the local level, municipalities rely generally on funds from the state (32%), as well as on property taxes (30%), and user charges and fees (18%), such as for providing sewerage and parking. In terms of the impact of different kinds of taxes, if income taxes are structured to be progressive or proportional, they are calibrated to income. Other forms of revenue from charges and fees could also be proportional but are often imposed across the board (e.g. a seven percent sales tax on all goods bought), and therefore can be regressive.

The question of how to structure government income through taxes raises a host of issues in terms of incentives, fairness, and distributional impact. An oft-cited example is that high taxes can prompt residents—if wealthy and mobile—to move to other jurisdictions. On the other hand, the quality of services—such as schools and transportation—can be reasons to move to a locality. At the political level, the challenges include when to raise taxes, alter services, or make other arguments about how growth, stability, and resources can be maintained.

The materials for this class invite you to think about different kinds of charges and services, and about whether to prefer general revenue taxes as contrasted to user fees. What ideas about the authority or “sovereignty” of the state are at work in rendering the power to tax lawful? What role does or could law play in setting boundaries on the policy choices about the forms of taxes that can be imposed? What are the metrics of “efficiency” or “fairness”?

To provide a frame to explore these issues outside the context of courts, assume that a municipality wants to have garbage collected once a week. What would be the reasons to have a flat charge per person or per household? For tying the amount charged to the value of the property? Or the income of the householders? Or the distance of the household from the waste disposal plant? What if some units wanted to have more garbage collected or more frequent collections? What about incentives for recycling and environmental conservations?

## Funding Governments

Norton Francis and Frank Sammartino, *Governing with Tight Budgets: Long-Term Trends in State Finances*, THE URBAN INSTITUTE (Sept. 2015)

David L. Sjoquist, *Diversifying Municipal Revenue in Connecticut: Report Prepared for the Connecticut Tax Study Panel* (Nov. 2015)

CIVIL RIGHTS DIVISION, U.S. DEP'T OF JUSTICE, *Investigation of the Ferguson Police Department* (Mar. 4, 2015)

Michael W. Sances & Hye Young You, *Who Pays For Government? Descriptive Representation and Exploitative Revenue Sources*, 79 J. POL. 1090 (2017)

## User Fees and Taxes

David L. Sjoquist & Rayna Stoycheva, *Local Revenue Diversification: User Charges, Sales Taxes, and Income Taxes*, in THE OXFORD HANDBOOK OF STATE AND LOCAL GOVERNMENT FINANCE, (Robert D. Ebel & John E. Peterson eds., 2012)

Clayton Gillette & Thomas Hopkins, *Federal User Fees: A Legal and Economic Analysis*, 67 B.U. L. Rev. 795 (1987)

Robert D. Ebel & Yameng Wang, *Using User Charges to Pay for Infrastructure Services by Type of US Government*, in FINANCING INFRASTRUCTURE: WHO SHOULD PAY? (Richard Bird & Enid Slack, eds., 2017)

*Silva v. City of Attleboro*, 908 N.E.2d 722 (Mass. 2009)

*State v. City of Port Orange*, 650 So. 2d 1 (Fla. 1994)

*Bolt v. City of Lansing*, 459 Mich. 152 (1998)

## Day-Fines in the U.S. and Internationally

Suzanne Daley, *Speeding in Finland Can Cost a Fortune, if You Already Have One*, N.Y. TIMES (Apr. 25, 2015)

Nat'l Inst. Of Justice, 136611: *Day Fines in American Courts: The Staten Island and Milwaukee Experiments* (1992)

Beth A. Colgan, *Graduating Economic Sanctions According to Ability to Pay*, 103 IOWA L. REV. 53 (2017)

## February 5 Funding Courts: Who Pays for What?

This class will hone in on how courts are funded. We will consider why courts ought to be required to fund themselves through assessments, and/or support government services more generally, or be supported by government funding and not charge user fees.

To begin, we use examples of funds imposed for “drug courts,” which some see as a progressive reform and others critique, and for “second chances.” Our question is whether, if supportive of such programs, how would you fund such “add-ons,” or do you want to see them as part of the court system? Turn then to the 1970s, soon after *Boddie* was decided, and an essay for the ABA Commission on Standards of Judicial Administration by Geoffrey C. Hazard, Jr., Martin B. McNamara, & Irwin F. Sentilles, III on what the world of fees looked like then. As you can also see, a small body of case law stands for the proposition that courts have “inherent power” to require legislative support.

We provide a window into contemporary court financing through excerpts from the 2016 Illinois Task Force Report, focused on court assessments. The report describes how a state without a unified court budget system has to struggle to find out how much individuals are charged in different counties. Together with a report from Oklahoma, the two state case studies describe the array of fees and fines imposed in traffic, misdemeanor, and felony cases, the increase in these legal financial obligations (LFO) over time, and their role in funding government operations.

The Conference of State Court Administrators (COSCA) has helpfully compiled an array of fees used for revenue generation from jurisdictions around the country. For example, the Greater New Orleans Expressway Commission (“GNOEC”) imposes an additional \$5 for any motor vehicle violation occurring in the areas which it patrols to supplement the salaries of its officers. Oakland County, Michigan requires that if a defendant has had a trial with an expert witness proffered by the prosecution, that defendant has to pay the expenses of the witness as a condition of release from probation. A few localities in Louisiana added three dollars to their civil filing fee to fund a local program to aid victims of domestic violence. Alabama increased its civil jury fee by \$50, a portion of which went to the general revenue fund. Return to the question with which we began, about whether to think of programs as “add-ons,” or part of “court,” and how to fund programs under either categorization.

The COSCA report also gives a brief overview of lawsuits that have challenged fees, and that is the issue to which we turn next. In 2017, the U.S. Supreme Court decided *Nelson v. Colorado*, holding that when a criminal conviction is invalidated, the State is obliged to refund the defendant’s fees, costs, and restitution. During the same term, the Supreme Court declined to review a decision by the Eighth Circuit, which upheld the imposition of a \$25.00 fee by Minnesota County on people booked in the local jail. A third decision, also from 2017, held unconstitutional the manner in which the Orleans Parish Criminal District Court collects post-judgment court debts. The court relied in part on the conflict of interest created because it was the judges who determined defendants’ ability to pay fines and the revenues from those decisions went directly to a Judicial Expense Fund. Nicholas Parillo’s historical study presents a parallel to courts; his research describes how prosecutors were once paid by the case or by the conviction.

A critique of the current system comes from Alexis Harris and Katherine Beckett. Of course, the question is whether their proposal to abolish monetary sanctions is politically tenable. A reminder that the question of funding courts is not new comes by way of Jeremy Bentham.

Nat’l Drug Court Inst., *Ensuring Sustainability for Drug Courts: An Overview of Funding Strategies* (Ap. 2008)

Shaila Dewan & Andrew W. Lehren, *After a Crime, the Price of a Second Chance*, N.Y. TIMES (Dec. 12, 2016)

Geoffrey C. Hazard, Jr., Martin B. McNamara, & Irwin F. Sentilles, III., *Court Finance and Unitary Budgeting*, 81 YALE L.J. 1286 (1972)

ILLINOIS STATUTORY COURT FEE TASK FORCE REPORT, FINDINGS & RECOMMENDATIONS FOR ADDRESSING BARRIERS TO ACCESS TO JUSTICE & ADDITIONAL ISSUES ASSOCIATED WITH FEES & OTHER COURT COSTS IN CIVIL, CRIMINAL & TRAFFIC PROCEEDINGS (June 1, 2016)

Ryan Gentzler, OKLAHOMA POL'Y INST., THE COST TRAP: HOW EXCESSIVE FEES LOCK OKLAHOMANS INTO THE CRIMINAL JUSTICE SYSTEM WITHOUT BOOSTING STATE REVENUE (Feb. 2017)

CONF. OF STATE COURT ADMINISTRATORS, COURTS ARE NOT REVENUE CENTERS (2011-2012)

*Nelson v. Colorado*, 137 S. Ct. 1249 (2017)

*Mickelson v. County of Ramsey*, 823 F.3d 918 (2016), *cert. denied*, 137 S. Ct. 1578 (2017)

*Cain v. City of New Orleans*, No. 15-4479, 2017 WL 6372836 (E.D. La. Dec. 13, 2017)

Nicholas Parrillo, AGAINST THE PROFIT MOTIVE: THE SALARY REVOLUTION IN AMERICAN GOVERNMENT, 1780 – 1940 255-58, 280-81 (2013)

Alexis Harris & Katherine Beckett, *On Cash and Conviction: Monetary Sanctions as Misguided Policy*, 10 CRIMINOLOGY & PUB. POL'Y 509 (2011)

JEREMY BENTHAM, A PROTEST AGAINST LAW-TAXES (1793), reprinted in 2 THE WORKS OF JEREMY BENTHAM 573, 582 (John Bowring ed., 1843)

OPTIONAL: Sandy Baum & Linda Kamas, *Time, Money, and Optimal Criminal Penalties*, 13 CONTEMPORARY ECON. POL'Y 72, 78-79 (1995)

## **February 12     Relieving and Enforcing Obligations to Pay: Fees, Fines, and Restitution**

The Burger Court's jurisprudence in *Williams v. Illinois*, decided in 1970, and *Bearden v. Georgia*, decided in 1983 addressed the constitutionality of incarcerating individuals because they were too poor to pay fines. What are the holdings? Who can be assessed fines? What are the options for payment? What are trial judges to do?

Turn then to *Fuller v. Oregon*. The case, decided in 1974, addressed efforts to recoup the costs of public defenders, imposed because of constitutional mandates to provide "free" lawyers for indigent defense. What ideas animate the proposition that courts "float" indigent individuals and then return to assess their ability to pay at a later time?

The civil context comes into focus with *M.L.B.*, decided in 1996, and addressing a waiver of transcript fees for a person seeking to overturn the loss of her status as a parent. What is the interaction between due process and equal protection and what are the parameters of the holding? What are the contexts to which it could be applied?

One set of issues are therefore access to courts, and barriers range from filing fees to transcript fees and lawyers (to which we will turn later in the semester). Another set of issues come from having to carry the debt that courts impose. The proliferation of legal financial obligations (LFOs) (detailed last week) has sparked new lawsuits that return to the question of whether people can be held, for example, for contempt, for failure to pay LFOs. The concern is that "debtor prisons" have returned.

In addition to ruling on fees through decisions in cases, the judiciary has (at least) two kinds of administrative responses. One is to waive fees. Andrew Hammond's *Pleading Poverty*, provides a window into the federal system. Consider whether a uniform federal or uniform federal/state standard should exist and if so what would be its predicates? What level of proof should be required, or should a declaration suffice? In this vein, we provide Connecticut's income eligibility guidelines for the appointment of counsel.

A second, and related, administrative response is to develop better guidelines for imposing fines. State courts have been on the forefront of promulgating "bench cards" – directions to judges on how to inquire into defendant's ability to pay. In 2016, the Department of Justice also wrote a "dear colleague letter," offering guidance on the need to protect indigent defendants from being incarcerated because they are poor. In January of 2018, the Department rescinded the guidance, along with many others, on the grounds that they were "unnecessary, inconsistent with existing law, or otherwise improper."

Another issue to be addressed – both through litigation and administratively – arises from the penalties that could flow from an individual's inability to pay fines and fees. Return to the ideas behind filing fees, and to Jeremy Bentham and Frank Michelman, from earlier weeks. Then read excerpts from work by Michael Morse and Marc Meredith estimating the magnitude of LFOs owed by individuals involved with the criminal justice system in Alabama. Their work shows that many individuals who had been convicted of felonies are unable to vote as a result of outstanding LFOs. An additional example of the impact of not paying LFOs comes by way of litigation in Virginia, in which a class of plaintiffs argue the unconstitutionality of a state law in which nonpayment of costs or fines results in the suspension, without a hearing, of drivers' licenses.

*Williams v. Illinois*, 399 U.S. 235 (1970)

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

*Fuller v. Oregon*, 417 U.S. 40 (1974)

*M.L.B. v. S.L.J.*, 519 U.S. 102 (1996)

Andrew Hammond, *Pleading Poverty in Federal Court* (2018 draft)

Connecticut Income Eligibility Guidelines for Appointment of Counsel

NAT'L TASK FORCE ON FINES, FEES & BAIL PRACTICES, *LAWFUL COLLECTION OF LEGAL FINANCIAL OBLIGATIONS: A BENCH CARD FOR JUDGES* (2017)

CIVIL RIGHTS DIVISION, U.S. DEP'T OF JUSTICE, *DEAR COLLEAGUE LETTER* (Mar. 14, 2016)

Opinion, Lisa Foster, *Jeff Sessions Has Endorsed an Unconstitutional Fine on the Poor*, WASH. POST (Jan. 9, 2018)

Marc Meredith & Michael Morse, *Discretionary Disenfranchisement: The Case of Legal Financial Obligations*, 46 J. LEG. STUD. 309 (2017)

*Stinnie v. Holcomb*, No. 3:16-CV-00044, 2017 WL 963234 (W.D. Va. Mar. 13, 2017), appeal pending (4th Cir., 2018)



## February 19 Bail, Detention, and Bonds

This is the first of two segments focused on the role played by money in deciding whether to detain individuals charged with crimes. We begin with an overview of the history of bail in the United States: the excerpts from Daniel Freed and Patricia Wald, who were at the forefront of creating the 1966 Bail Reform Act. As you read, reflect on how the concerns they were raising then sound like the concerns governing the current debate on bail. Look also at the names and affiliations of the supporters of reform.

A synopsis on the 1966 Act comes from John-Michael Seibler and Jason Snead at the Heritage Foundation; they summarize the 1966 Act and the retreat from its premises that culminated in the Bail Reform Act of 1984, reflecting the politics of the “war on crime” and the rising concern with “dangerousness.” The Supreme Court’s affirmation of the 1984 Act comes in *United States v. Salerno*, 481 U.S. 739 (1987).

We then turn to the current wave of reform. One concern is the impact of not making bail, as discussed in the excerpts by Paul S. Heaton, Sandra G. Mayson, and Megan T. Stevenson and by David Arnold, Will Dobbie, and Crystal S. Yang. That work dovetails with litigation arguing the unconstitutionality of bail, as exemplified by the decision of the Honorable Lee Rosenthal who, in the spring of 2017, concluded that the Harris County bail system is unconstitutional. As you read excerpts from that opinion and watch videos of the bail hearings that were in the record (link below) consider how you would fix the problems identified. We also include an optional reading of a report by Human Rights Watch detailing the ways in which California’s bail system discriminates against the poor.

Daniel J. Freed & Patricia M. Wald, *Bail in the United States: 1964* (Working Paper, Nat’l Conf. on Bail & Crim. Justice, May 1964)

John-Michael Seibler & Jason Snead, *The History of Cash Bail: Legal Memorandum*, THE HERITAGE FOUNDATION (Aug. 25, 2017)

*United States v. Salerno*, 481 U.S. 739 (1987)

Paul S. Heaton, Sandra G. Mayson & Megan T. Stevenson, *The Downstream Consequences of Misdemeanor Pretrial Detention*, 69 STAN. L. REV. 711 (2017)

Megan Stevenson, *Distortion of Justice: How the Inability to Pay Bail Affects Case Outcomes* (Working Paper, Univ. of Pa., Nov. 2016)

David Arnold, Will Dobbie & Crystal S. Yang, *Racial Bias in Bail Decisions* (Nat’l Bureau of Econ. Research, Working Paper No. 23421, May 2017)

*ODonnell v. Harris County*, 251 F. Supp. 3d 1052 (S.D. Tex. Apr. 28, 2017), appeal filed, No. 17-20333 (5th Cir.)

*What It's Like To Be Poor at a Harris County Bail Hearing* (Video of the Bail hearing of Andrew Goodsend), TEX. OBSERVER, YOUTUBE (Oct. 5, 2017), [https://www.youtube.com/watch?v=Y\\_jpCXIIB-w](https://www.youtube.com/watch?v=Y_jpCXIIB-w)

OPTIONAL: “*Not in it for Justice*”: *How California’s Pretrial Detention and Bail System Unfairly Punishes Poor People*, HUMAN RIGHTS WATCH (Apr. 2017)

## February 26 Abolish Money Bail?

Judge Rosenthal's April 28, 2017 opinion in *Harris County* highlighted the failures of the current money bail system. This week focuses on reform. As you read below, think about proposals ranging from adding lawyers (Douglas L. Colbert, Ray Paternoster, and Shawn D. Bushway), to shifting to a risk-assessment system based on empirically tested "tools" (The Arnold Foundation and California Pretrial Detention Reform Workgroup), to using electronic monitoring (Samuel Wiseman), to analyzing and recalibrating the utilities of bail (Crystal S. Yang). As you look at the different analyses, consider whether you would want a world in which money bail was not a factor to be used in deciding on pretrial detention.

In addition to opponents of money bail, there are proponents. That approach can be found in the excerpts of the brief by the Professional Trade Association of National Bail Insurance Companies arguing the important role that "commercial sureties" play and therefore seeking to sustain the system of money bail through a class action attacking New Jersey's 2017 reforms that prohibit the use of monetary conditions.

The 2018 California state court opinion provides an example of how long reform measures take to be implemented and begs the question of whether the best venue for bail reform is the courts or the legislature. Jeff Adachi's article helps us consider whether judges should be involved in the reform process. The California pretrial detention recommendations to the Chief Justice provide us with a case study of a state working to reform its bail system to ensure that it does not discriminate against the poor. While you read consider what you, the social planner tasked with revamping the bail system for this state, would recommend to replace the current system.

*Public Safety Assessment: Risk Factors & Formula*, LAURA & JOHN ARNOLD FOUNDATION  
(2016)

Douglas L. Colbert, Ray Paternoster & Shawn D. Bushway, *Do Attorneys Really Matter? The Empirical and Legal Case for the Right of Counsel at Bail*, 23 *CARDOZO L. REV.* 1719 (2002)

Samuel Wiseman, *Pretrial Detention and the Right to be Monitored*, 123 *YALE L.J.* 1118 (2014)

Crystal S. Yang, *Toward an Optimal Bail System*, 92 *N.Y.U. L. REV.* 1399-1493 (2017)

Brief for Amici Curiae American Bail Coalition, Georgia Association of Professional Bondsmen & Georgia's Sheriffs' Association in Support of Defendant-Appellant and Reversal of Preliminary Injunction, *Walker v. City of Calhoun*, 2016 WL 3452938, (11<sup>th</sup> Cir. 2016)

Complaint, *Brittan Holland (Lexington Nat'l Ins. Corp.) v. Rosen et al.*, No. 1:17-cv-04317 (D.N.J. filed Jun. 14, 2017)

Eric Westervelt, *Did A Bail Reform Algorithm Contribute to This San Francisco Man's Murder*, NPR: ALL THINGS CONSIDERED (Aug. 18, 2017),  
<https://www.npr.org/2017/08/18/543976003/did-a-bail-reform-algorithm-contribute-to-this-san-francisco-man-s-murder>

*Pretrial Detention Reform — Recommendations to the Chief Justice*, CAL. PRETRIAL  
DETENTION REFORM WORKGROUP (Oct. 2017)

Jeff Adachi, *Don't Let Judges Hijack California Bail Reform*, THE SACRAMENTO BEE (Nov. 27,  
2017 12:00PM), <http://www.sacbee.com/opinion/oped/soapbox/article186040863.html>

*In re Humphrey*, No. A152056, 2018 WL 550512 (Cal. Ct. App. Jan. 25, 2018)

## March 5 “Free” Counsel for Criminal Defendants

This is the first of two weeks considering the right to counsel in criminal proceedings. This week examines the development and the contours of the right to have a lawyer provided by the government and states’ approaches to organizing and funding indigent criminal defense. Next week’s class focuses on assessing the quality of representation; we will look at standard-setting, as well as some of the case law defining what constitutes “ineffective” assistance of counsel mandating reversals of convictions. Both weeks thus take up the relationship of rights to financing defense and the current widespread problem of underfunded defense.

Here, we begin by asking what a “right to counsel” entails (in terms of the case law) and what the limits of the current parameters are. The Sixth Amendment provides that “[i]n all criminal prosecutions, the accused shall enjoy the right to . . . have the Assistance of Counsel for his defense.” The Fifth and Fourteenth Amendments guarantee “due process.” The 1932 case of *Powell v. Alabama*, invoking due process, found that the rushed appointment of counsel on the eve of a capital trial, coupled with other problems, required vacatur of the conviction of one of the “Scottsboro Boys,” a group of black teenagers falsely accused of raping two white women in Alabama. That case became the subject of international criticism. Langston Hughes wrote a book about it, as well as a poem, included here, about Justice’s eyes. The defendants were convicted, spent decades in prison, and were eventually released.

About thirty years after *Powell v. Alabama*, the question of whether the Sixth Amendment requires states to provide counsel for indigent defendants was answered by the Supreme Court in its 1963 decision, *Gideon v. Wainwright*. The Court reversed the conviction of Clarence Earl Gideon, who was unrepresented when he was sentenced to prison in Florida for breaking and entering with intent to commit larceny. In the 1972 case of *Argersinger v. Hamlin*, the Court similarly reversed the misdemeanor conviction of John Richard Argersinger, who was unrepresented when he was sentenced to ninety days in jail for carrying a concealed weapon. In contrast, a plurality of the Court held in the 1979 case of *Scott v. Illinois* that the Constitution does not require the appointment of counsel for defendants when imprisonment is authorized but not imposed.

We excerpt these cases to focus attention on the ideas that animate why lawyers are needed and for what kinds of proceedings. Should it matter whether imprisonment is at stake? Whether a defendant faces misdemeanor or felony charges? On appeal? For habeas petitions? Do answers come from the values that the assistance of lawyers promotes? From the numbers of defendants charged?

The 1966 case of *Miranda v. Arizona* and the brief excerpt from the essay, “*Gideon at Guantánamo*,” situate the Court’s decisions in the context of the Cold War and introduce the idea of equipping individuals in their encounters with state police power. *Miranda* also raises questions of when the right to counsel attaches. Do the Court’s decisions provide a basis for requiring counsel at bail, probation, or parole hearings? What about a role for lawyers in indigency determinations?

We next turn to examples of the various approaches states have adopted for organizing indigent defense – institutional public defender offices or private assigned counsel; elected or appointed defenders; organized at the state, county, or municipal levels. In the federal system, Congress enacted the Criminal Justice Act (CJA) in 1964; recall our discussion of the Bail Reform Act of 1966, which emerged during an era of political mobilization and optimism concerning criminal justice reform. How should we price these lawyers’ services? Market rates? Salaries? Capped amounts or open-ended options?

As you read, consider your views on which government entities should decide how to organize and fund indigent criminal defense. Is the organization of prosecutors’ offices and their funding relevant? For example, should prosecutors and public defenders receive symmetrical support, as mandated by Connecticut’s “parity” statute, which is excerpted? What are the means of implementing such an obligation? Consider also a 2017 bill introduced by Senator Booker, calling for increased support for public defenders when they litigate before the Supreme Court. How does this fit with John Pfaff’s argument for federal funding of indigent defense in state courts?

Notice that the CJA provides for “investigative, expert, and other services necessary for adequate representation.” Are all of these services part of the right to counsel? Are there independent rights to investigative or expert services? Are or should lawyers be the gatekeepers to such services? The Supreme Court’s decision in *Ake v. Oklahoma* addresses psychiatric experts in capital cases.

This week also returns us to discussions of funding by general taxes and by user fees. According to the Bureau of Justice Statistics (BJS), states spent \$2.4 billion on indigent defense in 2012. However, governments are not the only sources of funding for indigent defense. Recall that in *Fuller v. Oregon*, decided in 1974, the Supreme Court did not rule out the use of public defender recoupment fees.

The timing, frequency, and import of imposing defense fees, *ex ante* or *ex post*, are examined in the ACLU report and the Eighth Circuit’s opinion in *Hanson*. The ACLU report found that most states impose fees of some form for indigent defense. Note that after that report, Los Angeles County agreed to drop its \$50 “registration fee,” and hence about \$300,000 in revenue was no longer coming from that source.

Many charges are not collected until after trial. For example, South Dakota, which charges more than \$90 per hour for assigned counsel, collected over \$3 million in recoupment fees in 2016. Congress included a recoupment provision in the CJA, codified at 18 U.S.C. §

3006A(f). The Fourth Circuit's opinion in *United States v. Moore* provides a window into how federal courts have applied *Fuller* to this requirement.

Step back from the rules and doctrine and consider what you think should happen if an accused person is unable to pay for counsel up front but becomes able to pay later on. What about the *Bearden* approach of borrowing from family members? Does the source of funds matter? As detailed in a *New York Times* article circulated to the class, Michigan is currently seeking to collect the costs of imprisonment out of the proceeds of a novel published by a prisoner.

We end this session with Paul Butler's and Sara Mayeux's reflections on the legacy of *Gideon*. What was *Gideon*'s "promise"? In what ways has *Gideon* succeeded or fallen short? What are the factors that have affected implementation?

#### Recognizing the Right to Counsel

*Powell v. Alabama*, 287 U.S. 45 (1932)

Poem, Langston Hughes, *Blind Justice* (1932)

*Gideon v. Wainwright*, 372 U.S. 335 (1963), and selected amicus briefs

*Argersinger v. Hamlin*, 407 U.S. 25 (1972)

*Scott v. Illinois*, 440 U.S. 367 (1979)

*Miranda v. Arizona*, 384 U.S. 436 (1966)

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

#### Organization of Indigent Defense

Stephen D. Owens, Elizabeth Accetta, Jennifer J. Charles & Samantha E. Shoemaker, DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, INDIGENT DEFENSE SERVICES IN THE UNITED STATES, FY 2008-2012 – UPDATED (July 2014)

Geoffrey T. Cheshire, *A History of the Criminal Justice Act of 1964*, 62 FED. LAWYER 66 (2015)

The Criminal Justice Act, 18 U.S.C. § 3006A

CONN. GEN. STAT. § 51-289 (Public Defender Services Commission established, Compensation plan)

Clarence Gideon Full Access to Justice Act, S. 330, 115th CONG. (2017)

Opinion, John Pfaff, *A Mockery of Justice for the Poor*, N.Y. TIMES (Apr. 19, 2016)

*Ake v. Oklahoma*, 470 U.S. 68 (1986)

#### Paying for Indigent Defense

Erinn Herberman & Tracey Kyckelhahn, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, STATE GOVERNMENT INDIGENT DEFENSE EXPENDITURES, FY 2008-2012 – UPDATED (Apr. 21, 2015)

Devon Porter, ACLU OF S. CAL. *Paying for Justice: The Human Cost of Public Defender Fees* (June 2017)

*Hanson v. Passer*, 13 F.3d 275 (8th Cir. 1994)

Mark Walker, *In S.D., Right to an Attorney Comes with a Price*, ARGUS LEADER (Mar. 4, 2016)

S.D. CODIFIED LAWS §§ 23A-40-10, -12 (Funds Available from or on Behalf of Defendant, Public Defender's Lien)

COUNTY EXPENDITURES AND REPAYMENT FOR COURT-APPOINTED ATTORNEYS – FY2016, S.D. UNIFIED JUDICIAL SYSTEM (2017)

*United States v. Moore*, 666 F.3d 313 (4th Cir. 2012)

Reflections on *Gideon*

Paul D. Butler, *Poor People Lose: Gideon and the Critique of Rights*, 122 YALE L. J. 2176 (2013)

Sara Mayeux, *What Gideon Did*, 116 COLUM. L. REV. (2016)

## **March 12            NO CLASS (Spring Break)**

## **March 19            Implementing Rights to Counsel: Measuring and Mandating Quality**

Last week's readings introduced cases recognizing the right to counsel in certain types of criminal proceedings and examined how this right is organized and funded. This week, we explore the challenges of assessing counsel to ensure (or not) that representation meets particular levels of quality. Consider the issues from the vantage point of different actors. What should lawyers do when their caseloads outstrip their time to prepare? How should judges respond when legislatures do not budget enough for criminal defense? What new structures have been and can be made? Or should the focus shift away from pressing for more lawyers?

The materials provide examples of innovative decisions in state courts, detailed in materials from *Pratte* and *Waters* (in Missouri) and from *Hurrell-Harring* (in New York). These excerpts chronicle the systemic problems of underfunded public defender offices and the efforts taken by lawyers and judges to intervene through litigation in light of legislative unwillingness to support adequate criminal defense services. What alternatives are available to public defenders, short of refusing to take on new clients? How would they do so? Striking? Declining individual appointments? Consider the role law plays in affecting legislative priorities.

Another avenue for promoting quality representation is the use of performance standards and internal management practices. The report from the International Legal Foundation and the American Bar Association's "Ten Principles of a Public Defense Delivery System" provide examples of standards for indigent defense. Lawyers are also subject to disciplinary sanctions and at risk of malpractice claims. Excerpts from the essay, "Grieving Criminal Defense Lawyers," explore the potential for oversight from lawyers' ethics bodies to help police quality representation. The excerpt from the 1998 California Supreme Court case, *Wiley v. County of San Diego*, provides a glimpse into the treatment of malpractice claims in the criminal context.

What can judges do? Peter Joy argues for active monitoring of criminal defense attorneys during individual hearings and trials. Contrast this approach with post-conviction review, the primary vehicle that the U.S. Supreme Court has used to address quality of representation. What is the “test” in *Strickland*, and what are alternative approaches to the Court’s metric? How did the Court apply *Strickland* to the plea-bargaining process in *Frye*? The post-conviction template is a reminder that knowledge of problems of “ineffective” or incompetent assistance are unlikely to be easily evident from the record on direct review – particularly since such records will have been constructed in part by allegedly incompetent counsel. What about changing the focus? Consider Darryl Brown’s argument that public defenders should ration their services according to identifiable principles. What are the legal and moral implications of this proposal?

#### Underfunded Public Defender Offices

*State ex rel. Missouri Public Defender Comm’n v. Pratte*, 298 S.W.3d 870 (Mo. 2009)

*State ex rel. Missouri Public Defender Comm’n v. Waters*, 370 S.W.3d 592 (Mo. 2012), and accompanying materials

*Hurrell-Harring v. State*, 15 N.Y.3d 8 (2010), and Order of Settlement

#### Performance Standards

Josh Perry, INT’L LEGAL FOUND., *Measuring Justice: Defining and Evaluating Quality for Criminal Legal Aid Providers* (Sept. 2016)

AMER. BAR. ASS’N, *Ten Principles of a Public Defense Delivery System* (Feb. 2002)

#### Grievance and Malpractice Claims

Dennis E. Curtis & Judith Resnik, *Grieving Criminal Defense Lawyers*, 70 *FORDHAM L. REV.* 1615 (2002)

*Wiley v. County of San Diego*, 966 P.2d 983 (Cal. 1998)

#### Ex Ante Monitoring by Judges

Peter A. Joy, *A Judge’s Duty to Do Justice: Ensuring the Accused’s Right to the Effective Assistance of Counsel*, 46 *HOFSTRA L. REV.* 139 (2017)

#### Post-Conviction Claims of “Ineffective” Assistance of Counsel

*Strickland v. Washington*, 466 U.S. 668 (1984)

*Missouri v. Frye*, 566 U.S. 134 (2012)

#### Rationing by Public Defenders Among Individual Clients

Darryl K. Brown, *Rationing Criminal Defense Entitlements: An Argument from Institutional Design*, 104 *Colum. L. Rev.* 801 (2004)

## **March 26      Expanding Rights to Counsel and Developing Alternatives to the Lawyer-Focused System: “Civil Gideon”**

This week, we turn to the civil context, where many litigants have no lawyer and where some cases look a lot like “criminal” proceedings. The readings outline some of the needs and some of the forms of services provided. As you review the materials, outlined below, consider whether state-subsidized lawyer services should be a priority and why. Do or should state or federal constitutions mandate a right to the assistance of counsel in cases denominated “civil”?

For all cases or subsets of cases? How does your answer intersect with (1) whether a state is a party to the litigation, (2) the kind of claim that is being raised, or (3) the type of remedy requested? What methods of constitutional interpretation would you rely on to read such a right in these constitutions? Why would you want a constitutional as compared to a statutory mandate? What level of government – national, states, localities – should be responsive to mandate or design services?

By way of background on the demand side, in 2017, more than a quarter of all civil filings in U.S. district courts (73,745 of 279,036 filings) came from unrepresented plaintiffs, as did more than fifty percent of all civil appeals filed in U.S. circuit courts (24,247 of 41,318 cases). State courts have higher rates of unrepresented litigants, particularly in areas related to family and landlord/tenant conflicts.

In terms of the forms of funding, Congress created the Legal Services Corporation (LSC) in 1974, but has not (as the materials detail) provided adequate funding for the clients seeking assistance, such as help for problems related to domestic violence, veterans' benefits, disability access, housing conditions, and health care. LSC concluded in 2016 that it could not help many eligible for its services, and stated that "86% of the civil legal problems reported by low-income Americans . . . received inadequate or no legal help." Also excerpted is a 2016 report of the Connecticut General Assembly's Task Force to Improve Access to Legal Counsel in Civil Matters; it identified barriers to justice in the state. Problems identified included inadequate funding of legal services and a lack of affordable attorneys for those who are ineligible for such legal aid.

Those materials provide a backdrop to evaluate calls for a "civil *Gideon*," which came decades ago, as exemplified by Honorable Robert W. Sweet's 1988 speech that surveyed what he called the "justice gap." He bemoaned the Supreme Court's 1981 decision in *Lassiter v. Dep't of Social Services of Durham County*. That case, also assigned, held that a parent, facing the termination of her rights, had no per se right to counsel but that the issue was, as a matter of due process, to be decided on a case-by-case basis. After reading the excerpts of the decision, consider how you would apply the Court's test on remand. What would you need to know to decide if a lawyer ought to be provided? What presumptions might you use, were you the judge? How likely would it be to get reversed? An excerpt of Elizabeth Thornburg's essay addresses some the issues of implementation.

In the 2011 case of *Turner v. Rogers*, the Court addressed the question of a right to a lawyer for a person facing twelve months in detention for civil contempt at the behest of a private party seeking child support. Background on the case comes from excerpts of Judith Resnik's Comment, *Fairness in Numbers*, for the annual *Harvard Law Review* overview of that Supreme Court term; her focus was on the resources of the litigants and of state and federal judges. What did the Court hold about the role lawyers play in "fair" proceedings? What are the incentives created by Justice Breyer's majority decision? What should South Carolina do to comply? How could implementation be enforced? As you think about doing so, review a study by Elizabeth Patterson, who examined contempt proceedings before and after *Turner*.

Compare the approaches of *Lassiter* and *Turner* to those illustrated by two state court decisions, in which these courts based a right to counsel on their own constitutions. What is the



reasoning in the 2014 case *In re T.M.*, in which the Supreme Court of Hawaii held that parents facing termination have a substantive due process right to a lawyer? What is the equal protection analysis in the decision from Montana in *A.W.S*? (A substantial literature examines ideas about when state constitutional interpretation differs from that of the Supreme Court. For those interested in the different approaches to overlapping or identical texts, a recent analysis comes from Goodwin Liu, *State Constitutions and the Protection of Individual Rights: A Reappraisal*, 92 N.Y.U. L. Rev. 1307 (2017).)

Constitutional interpretation is by no means the only or principal route to funding legal services. As noted, Congress created the LSC to provide civil legal assistance to those of limited means. Some of the history and the immediate aftermath are discussed in the excerpts from the *Politics of Pro Bono*, by Scott Cummings, which details the attacks that emerged in the wake of lawyering in the 1980s on behalf of farm workers in California. An overview of the decades of limits on funding and on the use of class actions comes from excerpts of Judith Resnik's *Beyond the Vanishing Trial*.

These excerpts also sketch recent state statutory initiatives for civil legal counsel, which returns us to the questions of whether to conceive of lawyers as part of government court services and the sources of funding. Were funding available, consider what kinds of cases should be priorities. Compare enactments and proposals in California, New York, and Connecticut. How are the services funded? And for what kinds of problems?

As you will see, the Sargent Shriver Civil Counsel Act of 2009 ear-marked \$10 million per year to fund pilot projects for the legal representation of low-income Californians. That funding exemplifies the user-pays approach, with cross-subsidies from the imposition of a special \$10 supplemental fee “for various court services, including, but not limited to, issuing a writ for the enforcement of an order or judgment . . . recording or registering any license or certificate, issuing an order of sale, and filing and entering an award under the Workers’ Compensation Law.” In contrast, the Honorable Jonathan Lippman, the former Chief Judge of New York, successfully proposed a \$100 million increase in the state budget for direct grants to civil legal services providers. Connecticut’s 2016 report on access to civil justice likewise proposed legislative action, including “a statutory right to civil counsel [for] . . . restraining orders[,] child custody and detained removal (deportation) proceedings[,] and] defense of residential evictions.” The report characterized these as areas “where the fiscal and social cost of likely injustice significantly outweighs the fiscal cost.” Also proposed were increasing state funding for civil legal services (though it did not specify how much), fee-shifting statutes, and redirecting some revenue from fines to legal services providers. Another resource is class actions, which, as we will discuss later in the semester, are also under attack.

The call for a civil *Gideon* has not been without criticism. Benjamin H. Barton and Stephanos Bibas argue against creating an expanded right to counsel, in part by arguing that the difficulties of implementing *Gideon* for criminal defendants serves as a cautionary lesson. Given the shortfalls in funding criminal defense services, should the problems be seen as linked? Is the issue competition for the same funds? Is a limited “pie” an apt metaphor?

What role can non-lawyers play in closing the “justice gap”? And what about changing the processes for making decisions? Richard Zorza and David Udell survey “new roles for non-lawyers” as an alternative route for expanding access to justice. Washington offers an example through its 2012 rules authorizing a role for “limited license legal technicians.” Consider also roles for technology – which we will also discuss in the weeks to come.

LEGAL SERVICES CORPORATION, *THE JUSTICE GAP: MEASURING THE UNMET CIVIL LEGAL NEEDS OF LOW-INCOME AMERICANS* (2017)

JUDICIARY COMMITTEE, CONNECTICUT GENERAL ASSEMBLY, *REPORT TO THE TASK FORCE TO IMPROVE ACCESS TO LEGAL COUNSEL IN CIVIL MATTERS* (2016)

Robert W. Sweet, *Civil Gideon and Confidence in a Just Society*, 17 *YALE L. & POL’Y REV.* 503 (1998)

*Lassiter v. Dep’t of Social Services of Durham County, N. C.*, 452 U.S. 18 (1981)

Elizabeth Thornburg, *The Story of Lassiter: The Importance of Counsel in an Adversary System*, in *CIVIL PROCEDURE STORIES* (Kevin Clermont, 2d ed. 2004)

*Turner v. Rogers*, 564 U.S. 431 (2011)

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

Elizabeth Patterson, *Turner in the Trenches: A Study of How Turner Affected Child Support Contempt Proceedings*, 25 *Geo. J. on Poverty L. & Pol’y* 75 (2017)

*In re T.M.*, 131 *Hawai’i* 419 (2014)

*In re Adoption of A.W.S.*, 377 *Mont.* 234 (2014)

Scott L. Cummings, *The Politics of Pro Bono*, 52 *UCLA L. REV.* 1 (2004)

Judith Resnik, *Lawyers’ Ethics Beyond the Vanishing Trial*, 85 *FORDHAM L. REV.* 101 (2017)

JUDICIAL COUNCIL OF CALIFORNIA, *FACT SHEET: SARGENT SHRIVER CIVIL COUNSEL ACT* (2012)

William Glaberson, *Judge’s Budget Will Seek Big Expansion of Legal Aid to the Poor in Civil Cases*, *N.Y. TIMES* (Oct. 8, 2014)

Benjamin H. Barton & Stephanos Bibas, *Triaging Appointed-Counsel Funding and Pro-Se Access to Justice*, 160 *U. PA. L. REV.* 967 (2012)

Richard Zorza & David Udell, *New Roles for Non-Lawyers*, 41 *FORDHAM URB. L.J.* 1259 (2014)

*In the Matter of the Adoption of New Admission to Practice Rule 28 -- Limited Practice Rule for Limited License Legal Technicians*, Supreme Court of Washington

## **April 2            Prisoners’ Access to Law**

This week, we turn to how people incarcerated following a criminal conviction have access to law. Until the latter part of the twentieth century, many prisoners were said to be “civilly dead,” which meant that they had no legal status to enter into or to enforce rights, be they contract, property, or family law. As the U.S. Supreme Court put it, a prisoner “has, as a consequence of his crime, not only forfeited his liberty, but all his personal rights except those

which the law in its humanity accords to him. He is for the time being the slave of the state.” *Ruffin v. Commonwealth*, 62 Va. 790, 796 (1871).

While a slim window for post-conviction remedies existed via habeas corpus in rare circumstances, the U.S. Constitution played almost no role in regulating prison conditions. A series of federal court decisions in the mid-twentieth century began recognizing prisoners as people and disavowed the “iron curtain drawn between the Constitution and the prisons of this country.” *Wolff v. McDonnell*, 418 U.S. 539, 555 (1974). But as the materials detail, the impact is far from uniform. Rhode Island remains one of three states in which civil death continues, as you will see from the excerpts in *Paiva v. Aceto* and *Ferreira v. Wall*.

Prisoners, of course, have a variety of legal needs. Many of them relate to the fact of incarceration; some of the post-conviction claims are seen as part of the criminal process, while others (such as habeas) are characterized as “civil litigation.” The kinds of cases include direct appeals of verdicts and sentences; post-conviction relief, such as writs of habeas corpus or requests for pardons; and challenges to conditions of confinement, ranging from access to medical care, safety, and sanitary living conditions to religious liberty, fair discipline, and equal treatment. In addition, prisoners have “regular” legal needs, from family life to property and contract disputes.

Yet there is nothing “regular” about prisoners’ access to courts, counsel, and legal information. Unlike people on the “outside,” incarcerated persons cannot drop in to a legal aid office, ask a court clerk for in-person assistance with a legal problem, or research an issue online—their actions are highly regulated by departments of corrections. Further, most prisoners cannot afford a private attorney, and Congress has barred Legal Services Corporation-funded offices from representing incarcerated persons.

As you read the materials, consider first: What constitutional mandates—if any—require that prisoners receive help in bringing legal claims, and for which kinds of claims? Consider then how detention affects access and what kinds of accommodations are required, as a matter of constitutional or statutory law, to be provided. What are the financial costs and how should they be allocated by federal, state, and local government? What kinds of obligations ought private lawyers have, if any?

To help you think through these issues, the first section of readings focuses on the basic rights questions. What rights do prisoners have to access courts and petition the government for redress of grievances, and how do those rights differ from those outside prison? The cases explore the constitutional sources of the state’s obligation to help detainees use courts. *Ex Parte Hull*, *Bounds v. Smith*, and *Lewis v. Casey* differed in their judgments of what kinds of assistance states must provide and for what types of actions. As you read the essay about technology’s impact, consider how access to legal information for prisoners can and should change in light of the proliferation of legal resources on the Internet.

The second section focuses on access to lawyers for those in detention. Johanna Kalb’s forthcoming piece examines *Gideon* in the context of *Turner v. Safley*, 482 US 78 (1987), which permits prison officials to restrict prisoners’ constitutional rights if that limitation “is reasonably

related to legitimate penological interests.” Prison officials on occasion have argued that security needs ought to permit monitoring of what would otherwise be confidential exchanges. Excerpts from the *Gusman* brief by the New Orleans Public Defenders details the challenges faced by lawyers seeking to represent incarcerated clients. What are the bases for concern by corrections departments? What factors ought to go into balancing safety with the right to privacy in attorney-client communications? How does technology as access and technology as surveillance affect your analyses?

During the course of the semester, we have raised questions about the wisdom of being lawyer-centric. What are the options for helping prisoners, such as an ombudsman or prison inspectorate, that could be in lieu or addition to lawyers? Recall our discussion of the utilities of lawyers for criminal defense. Connecticut closed its prison ombudsman’s office in 2009 due to budget cuts. Consider the alternative sources of oversight, and the benefits and drawbacks of a prison ombudsman or inspectorate, litigation, and regulation, as well as different rules that would make prisons more open to outsiders.

In the 1990s, Congress made it harder for prisoners to use the courts, and the last segment of readings focused on two laws enacted in 1996 that aimed to limit prisoners’ access to courts and legal remedies: the Antiterrorism and Effective Death Penalty Act (AEDPA), which limited remedies in federal court for prisoners whose constitutional rights were violated in state court, and the Prison Litigation Reform Act (PLRA), which constrained prisoner conditions litigation and the authority of judges to issue relief.

A vast body of law interprets these provisions. We provide brief examples in each arena. The majority opinion and dissent in *Williams v. Taylor* disagree on whether the Virginia Supreme Court “unreasonably” applied *Strickland* and whether the defendant was entitled to habeas relief for ineffective assistance of counsel under AEDPA. What limitations and costs did the PLRA impose on prison litigation? Excerpts from *Miller v. French* lay out the arguments for or against the PLRA’s constitutionality, and *Murphy v. Smith* is a recent opinion by Justice Gorsuch on how judges are to interpret the mandate in the PLRA that prisoners could be charged up to 25% of the attorneys’ fees awarded to successful litigants. How do the approaches of Justices Gorsuch and Sotomayor differ? How would you organize a system for supporting prisoner litigation? Are there tensions between supporting legal services for those in and out of prison?

#### Access to Courts:

*Ex Parte Hull*, 312 U.S. 546 (1941)

*Bounds v. Smith*, 430 U.S. 817 (1977)

*Lewis v. Casey*, 518 U.S. 343 (1996)

Jailhouse Lawyer’s Manual, 11ed. *Chapter 3: Your Right to Learn the Law and Go to Court*

Benjamin Dryden, *Technological Leaps and Bounds: Pro Se Prisoner Litigation in the Internet Age*, 10 J. OF CONST. L. 819 (2008)

*Paiva v. Aceto*, P.C. 17-1486, P’s Suppl. Mem. In Opp’n to Mot. To Dismiss (R.I. 2017)

*Ferreira v. Wall*, 2016 WL 8235110 (R.I. 2016)

Access and Alternatives to Counsel:

Johanna Kalb, *Access to Counsel While in Detention* (excerpt from *Gideon Incarcerated*) (forthcoming Irvine L. Rev., 2018)

Memorandum in Support of Motion for Preliminary Injunction, *Orleans Public Defenders v. Marlin Gusman*, No. 2011-10638 (Mar. 2012)

Jacqueline Rabe Thomas, *Dwindling Oversight Heightens Concern Over Medical, Mental Health Care for Inmates*, CT MIRROR (March 6, 2018)

Howard Sapers and Ivan Zinger, *The Ombudsman as a Monitor of Human Rights in Canadian Federal Corrections*, 30 Pace L. Rev. 1512 (2010)

Mark Leech, *The prisons inspectorate: When the recommendations are ignored what is the point?*, THE INDEPENDENT (Aug. 23, 2017)

AEDPA and PLRA:

*Williams v. Taylor*, 529 US 362 (2000)

Jailhouse Lawyer's Manual, 11ed. *Chapter 14: The Prison Litigation Reform Act*

*Miller v. French*, 530 U.S. 327 (2000)

Margo Schlanger, *Trends in Prisoner Litigation, as the PLRA Enters Adulthood*, 5 U.C. Irvine L. Rev. 153 (2015)

*Murphy v. Smith*, 138 S. Ct. 784 (2018)

**April 5-6            Twenty-First Annual Liman Colloquium:  
                                 *Who Pays? Fines, Fees, Bail and the Cost of Courts*  
                                 Thursday, Apr. 5, 4-6pm; Friday, Apr. 6, 9am-5pm**

**April 9                Immigrants' Access to Law and to Release from Detention**

In previous weeks, we have studied the impact of race, gender, and poverty on the interactions of individuals with the criminal justice system. Today's class focuses on what, if any, obligations the state owes to immigrants, whether in detention or not. To frame this question, we begin with Jeremy Waldron's 2017 article, exploring ideas about why concepts of sovereignty and territory can function as sources of political authority to exclude individuals seeking to move across borders.

With Waldron's questions in mind, we turn to the threshold question of how to conceptualize immigration proceedings that can end in deportation. If "criminal," then a packet of rights, such as bail, counsel, cross-examination and confrontation attach. If "civil," then what is the process due? In terms of the numbers, the Department of Homeland Security's 2009 report on the U.S. immigration detention and deportation system provides a glimpse. Because of the intersection of civil and criminal processes, we provide an excerpt from Juliet Stumpf's landmark 2006 article, one of the first to use the term "crimmigration." The excerpt from Dan Kanstroom's book maps the impact of deportation itself.

One set of issues relates to release from detention, and another focuses on immigrants' access to lawyers, whether in detention or not. Given our exploration of bail, we provide a brief excerpt from the class action lawsuit *Robbins v. Rodriguez* in which the plaintiffs argued that the government could not put people into prolonged detention without providing them a hearing to be considered for release with or without bond (which is the term used in immigration for what the criminal justice system called "bail"). That case was predicated on a reading of the Immigration and Nationality Act (INA) as well as the Constitution. The Ninth Circuit concluded in 2015 that, as a statutory matter, consideration for bond was required after a person had spent six months in detention. That case, renamed *Jennings v. Rodriguez*, was decided in February of 2018, when the U.S. Supreme Court held that immigrants facing removal have no statutory right to a bond hearing. The Court remanded the case for consideration of the constitutional claims and, while doing so, the *Jennings* decision raised questions about the propriety of class action certification. Excerpted are the opinions, including Justice Breyer's dissent; to underscore his concerns, he took the unusual step of reading a summary of his dissent from the bench—included as an optional reading. What are the rights to law that the justices debate in *Jennings*? Note that one way to leave detention is to agree to deportation. What are the reasons to think that is, or is not, the appropriate response?

We then turn to the question of right to counsel. In *Franco-Gonzales v. Holder*, decided in 2011, a class of intellectually disabled immigrants argued successfully that the INA required that they receive assistance of counsel. The concern about the absence of lawyers and about poor lawyers prompted Chief Judge Robert Katzmann of the U.S. Court of Appeals for the Second Circuit in 2008 to convene a task force to gather data on the impact of lawyers. The result was a series of studies, the second of which is excerpted in the readings, which documented the absence of lawyers for immigrants in detention in New York. Kari Hong and Stephen Manning's 2018 article explores "rapid removal proceedings," a catchall phrase for expedited removal proceedings that affect asylum seekers and that therefore rarely take place within a time frame in which lawyers can participate.

In short, the questions we have asked about individuals' relationship to state power and state resources in and outside of prison are here raised through a lens of distinctions drawn between citizens, non-citizens, and non-lawfully admitted individuals. How does and how should an individual's immigration status affect the obligation of the state to that person? Professor Resnik's 2015 essay discussed how the Equal Protection Clause seemed to offer more protection than the current approach and how the invention of cross-border mail (now taken for granted) ought to be a reminder of the role that governments can play in crafting collaborative migration systems and policies.

Jeremy Waldron, *Exclusion: Property Analogies in the Immigration Debate*, 18  
Theoretical Inquiries L. 469 (2017)

HOMELAND SECURITY IMMIGRATION AND CUSTOMS ENFORCEMENT, IMMIGRATION DETENTION OVERVIEW  
AND RECOMMENDATIONS (2009)

Juliet Stumpf, *The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power*, 56  
AM.U. L. REV. 367 (2006)

DANIEL KANSTROOM, *AFTERMATH: DEPORTATION LAW AND THE NEW AMERICAN DIASPORA*  
28-31 (2012)

Nina Rabin, Amicus Brief on Behalf of 46 Social Science Researchers and Professor in Support of Petitioners-Appellees/Cross-Appellants and Urging Affirmance, *Rodriguez v. Robbins*, 804 F.3d 1060 (9<sup>th</sup> Cir. 2015) *rev'd sub nom. Jennings v. Rodriguez*, 138 S. Ct. 830 (2018).

*Rodriguez v. Robbins*, 804 F.3d 1060 (9th Cir. 2015), *rev'd sub nom. Jennings v. Rodriguez*, 138 S.Ct. 830 (2018)

*Jennings v. Rodriguez*, 138 S.Ct. 830 (Feb. 27, 2018)

*Franco-Gonzales v. Holder*, 767 F. Supp. 2d 1034 (C.D. Cal. 2011)

Robert A. Katzmann, *The Legal Profession and the Unmet Needs of the Immigrant Poor*, 21 GEO. J. LEGAL ETHICS 3 (2008)

Jojo Annobil, Noel Brennan, Sarah Burr, Stacy Caplow, Peter Cobb, Amy Gottlieb, Lynn Kelly, Linda Kenepaske, Peter Markowitz, Lindsay Nash, Raluca Oncioiu, Maribel Hernández Rivera, Oren Root, Tom Sharkey, Claudia Slovinsky, Jane Stern, Isaac Wheeler and Marianne Yang, STUDY GROUP ON IMMIGRANT REPRESENTATION, N.Y. IMMIGRANT REPRESENTATION STUDY, ACCESSING JUSTICE II: A MODEL FOR PROVIDING COUNSEL TO NEW YORK IMMIGRANTS IN REMOVAL PROCEEDINGS (2012)

Kari E. Hong and Stephen Manning, *Getting It Righted: Access to Counsel in Rapid Removals*, 102 MARQ. L. REV. (forthcoming 2018).

Judith Resnik, "Within Its Jurisdiction": Moving Boundaries, People, and the Law of Migration, 160 PROCEEDINGS OF THE AMER. PHILOSOPHICAL SOC'Y 117 (2016)

OPTIONAL: Justice Breyer's remarks from the Bench when *Jennings* decision was handed down

## **April 16            Courts and Their Alternatives and/or Replacements: Dispute Resolution as a State Service, Circa 2018?**

Our focus has been on courts, which are one locus of dispute resolution in which the public have a right to be present. Concerns about how courts work are longstanding. In the nineteenth century, Jeremy Bentham famously railed against "Judge[s] & Co." (to wit, lawyers), whom he believed developed common-law practices that promoted their own self-interest. Bentham argued that their legal system created "so thick a mist" that one could not, if "not in the trade," get anywhere. The "artificial rules" of the common law produced a "factitious" practice full of procedural obfuscation that cost clients and the public. Civil courts were thus "shops" at which "delay [was] sold by the year as broadcloth [was] sold by the piece."

Bentham was thus an early proponent of what today we call ADR – alternative dispute resolution. During the course of the twentieth century in the United States, many forms of ADR gained popularity and now seem so ordinary that they are not seen as "ADR" – although at the time they were shaped as alternatives to courts. Examples include workers compensation laws and administrative adjudication under the Administrative Procedure Act. In the latter part of the century, many courts embraced ADR as their own and reformatted their internal processes to focus on case management and settlement. Judges took up what were once seen as extra-

judicial activities and which have come to be seen as “what judges do.” One kind of reform involved reorganizing procedures inside courts, another entailed more devolution to alternative government institutions, and a third outsourced decision-making to private providers. Today, administrative adjudication (in agencies) far outstrips what happens in the federal courts. In FY 2014, the Social Security Administration alone decided about 2.8 million initial disability benefit claims and held 680,000 hearings, and the Veterans Administration dealt with 1.3 million disability claims. The federal courts saw about 376,000 civil and criminal filings that year.

Thus, in the twenty-first century, some are arguing that the term ADR is dated and that DR – dispute resolution – is better, with courts as just one stop on a spectrum. ODR, or online dispute resolution, is yet another acronym, enlisting technology to facilitate processes and lower the costs of dispute resolution. ODR can be court-based or part of private systems, such as eBay.

As these variations develop, some promoters argue their generativity, while others see them as part of a backlash against courts and rights. Thus, proponents of alternatives include a wide range of actors, including some who seek to create more paths to justice, reduce dependency on lawyers, and make dispute resolution less adversarial, and others who aspire for more privacy and deregulation.

Our hope in this session is to tease out the ideas about what dispute resolution systems in democratic orders ought to provide as the predicate to resolutions that are enforceable by law. Through reading this set of materials on courts and their alternatives/replacements, we hope to understand the arguments for and the critiques of the current wave of “reforms,” and to think through their relationships to access to justice and rationing law in democracies. Our questions are therefore the familiar ones: who decides the boundaries of dispute resolution? What roles do state and federal constitutions play? How free could legislatures and the private sector be to reshape dispute resolution processes that produce binding outcomes, enforced by courts? What aspects of decision-making should be public, in terms of accountability? When and why should governments subsidize what forms of dispute resolution and their users?

A word about the selections is in order, as the topic of ADR/ODR/administrative adjudication is huge. We begin with an overview, written in 2002 by the ABA, advocating on behalf of more use of various forms of ADR. Given the contemporary focus on arbitration, we then use some of the law and empiricism on the history and changing interpretations of the 1925 Federal Arbitration Act (FAA), which authorized enforcement of contractual arbitration clauses. Through the first sixty years, the U.S. Supreme Court enforced provisions in contracts requiring arbitration in lieu of adjudication only when equal bargaining partners agreed to exit courts. For example, in the mid-1950s, the Supreme Court concluded that when federal statutory rights were at issue, a brokerage customer was not closed out of courts by a form arbitration clause. See *Wilko v. Swan*, 346 U.S. 427 (1953). Within a few decades, the Court reinterpreted the FAA to require consumers and employees to use arbitration, if specified in documents accompanying the purchase of goods and services or in job applications. Excerpts from the 2011 *AT&T* case and the *Italian Colors* decisions illustrate that approach, and, in both, the Court also enforced clauses precluding class actions in courts and arbitrations. The *Green-Tree* decision directly addresses the question of costs: Who pays for arbitration?



The Court based its holdings on two ideas: consent and arbitration’s utility—sometimes discussed in terms of the “effective vindication” of statutory rights. In the readings below, the lawyer for the U.S. Chamber of Commerce made those arguments in opposition to efforts to regulate arbitration and limit class action waivers. The Consumer Financial Protection Bureau sought to regulate the use of such bans, but its rule was blocked in the Senate. Pending now is a proposal, crafted in the wake of #MeToo, to limit the arbitration mandate for employment-based sexual harassment claims. Empirical work on the use of arbitration shows that individuals rarely use the system provided, in part because of the challenges of bringing claims. The intersection between arbitration and collection of fees comes from excerpts of decisions by the Fifth Circuit and the Texas Supreme Court, which interpreted differently whether arbitration obligations are enforceable against debtors if lenders seek criminal penalties. Another source of regulation comes from private providers. Excerpts from the American Arbitration Association (AAA)’s Consumer Arbitration Protocol provide windows into the rules for arbitration. As you will read, the AAA imposes fees for filing (with different fees for consumers and business respondents), and the AAA requires service providers to pay the fees of the arbitrators.

Thus, the FAA, as interpreted, has had significant distributional impact. It is now available to be used to cut off access to public courts, in part because of bans on collective actions, which could otherwise be one instrument to reduce costs and facilitate claims. As you read these materials, reflect back over the semester and consider the role you want courts to play, the impact of limited resources on procedural opportunities, and the systems that you would craft to respond to these concerns. Further, as you read the segment of materials focused on the role of ODR, think about the place of technology, championed by some as a panacea and viewed by others as a source of concern.

*ABA, Access to Justice through Alternative Dispute Resolution White Paper (2002)*

*Green Tree Fin. Corp.-Alabama v. Randolph*, 531 U.S. 79 (2000)

*AT&T v. Concepcion*, 131 S. Ct. 1740 (2011)

*Amer. Express v. Italian Colors*, 133 S. Ct. 2304 (2013)

AM. ARBITRATION ASS’N, CONSUMER ARBITRATION RULES (2016)

*Examining the CFPB’s Proposed Rulemaking on Arbitration: Is it in the Public Interest and for the Protection of Consumers?: Hearing Before the Subcomm. on Fin. Insts. & Consumer Credit of the House Comm. on Fin. Servs.*, 114th Cong. 4 (2016)  
(Statement of Andrew Pincus, Partner, Mayer Brown LLP)

Judith Resnik, *A2J/A2K: Access to Justice, Access to Knowledge, and Economic Inequalities in Open Courts and Arbitrations*, 96 N.C. L. REV. 605, 646-56 (2018)

*Ending Forced Arbitration of Sexual Harassment Act of 2017*, S. 2203, 115th Cong. (2018)

*Vine v. PLS Financial Services, Inc.*, 689 Fed. Appx. 800 (5th Cir. 2017)

*Henry v. Cash Biz, LP*, 61 Tex. Sup. Ct. J. 401 (2018)

J.J. Prescott, *Improving Access to Justice in State Courts with Platform Technology*, 70 VAND. L. REV. 1993 (2017)

Maurits Barendrecht, Jin Ho Verdonschot, Frances Singleton-Clift, Jamie Poeteray, Gintare Petreikyte, and Filippa Braarud, *ODR and the Courts: The Promise of 100% Access to Justice? Online Dispute Resolution 2016*, a monograph from Hiil.

Sir Ernest Ryder, Senior President of Tribunals, Keynote Address to the Max Planck Institute (Feb. 1, 2018)

Resnik, *A2J/A2K*, at 606-14

**April 23**            **NO CLASS**