

Liman Workshop

POVERTY AND THE COURTS:

FINES, FEES, BAIL, AND COLLECTIVE REDRESS

Spring 2019 Syllabus
Mondays, 6:10-8 pm, Room 124

Instructors

Judith Resnik, Arthur Liman Professor of Law - Office Hours: sign-up sheet posted on office door
Anna VanCleave, Director, Liman Center - Office Hours: Wednesday 9am – 11am
Ali Harrington, Senior Liman Fellow in Residence - Office Hours: Tuesday 10am – 12pm

Student Directors

Faith Barksdale, Alexandra Eynon, Stephanie Garlock, Daniel Phillips

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This Workshop is focused on the resources of courts and their users and on the economic burdens stemming 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 demand for civil legal services, high arrest and detention rates, declining government budgets, and shifting ideologies about the utility and desirability of using courts.

This class analyzes the fee structures of courts, the impact of private providers of court-based services, the impact of technology and of online filing and dispute resolution, and the role aggregation can play in creating economies of scale. 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.” Throughout, we will look at how social and political movements and at how 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 from 6:10 pm to 8:00 pm. Preparation for and attendance at these discussions is required for credit. All readings will be available on the Yale Law School Canvas website,

<https://canvas.yale.edu>. In each class, we will indicate the readings that are required and those that are optional. Do note that, after the first week, we will explain in each class which materials are assigned. If you need to miss a class, please be in touch with the professors in advance of the meeting. The Workshop can be taken ungraded or for credit. Whether taking the class for graded or ungraded credit, students missing more than two sessions without permission cannot receive credit.

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 assigned readings and the relationships among the materials. The reflections should be no more than two pages (double-spaced, size-12 font). The point is for other students and the instructors to be able to read 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 Discussions page of Canvas 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 cannot receive credit for the class.

In addition to the four reflection papers, students who wish to receive *graded* credit must write another essay of no more than 4,000 words during exam period. That essay must respond to questions posted by the instructors at the beginning of exam period and is due no later than the end of exam period, May 15, 2019 before 5pm. The essay questions will 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 graded 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, 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.

Students with documented disabilities should contact the Yale University Resource Office on Disabilities by email to the director, Sarah Scott Chang (sarah.chang@yale.edu), to request accommodation for examinations or other course related needs. The Resource Office on Disabilities will work directly with the Registrar's Office on accommodations.

January 14, 2019 Are Courts Rights?

Why do courts exist? Are they “rights” that governments must provide? If so, what are the sources for this entitlement? And what flows from an understanding of courts as rights?

Think about these questions in the context of the essays by Pascoe Pleasence and Nigel Balmer, by Judith Resnik, and by Rebecca Sandefur on how law shapes daily life, what “justice” seeking entails, and the role played by “rights” to courts. How is law to help people and how can people gain ways to enforce the laws that are supposed to do so?

Do government obligations and government needs emerge, and if so, what shape do or must government responses take? Must governments create platforms for dispute resolution? How are such services to be supported and who are the beneficiaries? Our questions will explore funding of courts as part of general spending, and imposition of various forms and levels of user fees. As you think about these issues, reflect on whether your views change depending on the kind of case (civil, criminal, administrative), or the stakes (family, incarceration, property).

Yet other questions relate to what constitutes an adequate level of service. What are the metrics of access to courts? As you think about these questions, which will preoccupy us for the semester, consider the bases for your answers. Courts long predate the United States, a fact that prompts questions about whether court-based obligations change depending on whether courts are part of democratic orders or not.

Moreover, the questions of funding and subsidies become more complex because litigation entails strategic interaction. How does Frank Michelman’s piece guide analyses of what types of access should be facilitated? How should governments think about the incentives created for bringing and defending cases? When should governments mitigate the impact of fees for individuals with limited means, or should courts be “free”? And what about the allocation issues more generally: How should governments decide about allocating among the services it provides, such as education, housing, policing, dispute resolving, and incarceration? Where does the private sector fit in this discussion?

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 *Unison* case, consider the bases for requiring reduced costs for the litigants. What roles do the Canadian Charter, Article 6 of the European Convention on Human Rights, and Article 47 of the Charter of Fundamental Rights of the European Union play? How do those texts vary from the provisions for courts in the U.S. Constitution?

Pascoe Pleasence & Nigel J. Balmer, *Justice & Capability to Function in Society*, 148:1 DAEDALUS (Winter 2019)

Boddie v. Connecticut, 401 U.S. 371 (1971)

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)

Rebecca Sandefur, *Access to What?*, 148:1 DAEDALUS (Winter 2019)

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

R (in the matter of Unison) v. Lord Chancellor, [2017] UKSC 51

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)

January 21, 2019 No class: Martin Luther King Day

**January 28, 2019 Government Services:
Revenue Sources and Spending Decisions**

Courts are but one of many government services. Our focus in this class is on government funding and spending. State and local governments currently support schools, roads, and other infrastructure, and organize and sometimes fund utilities. Governments also aim to provide “peace and security” which translates into services such as police, courts, and prisons. In some social orders, governments also support housing, health centers and medical care, young and old age care, and protect environments.

According to 2015 data from a study by the Urban Institute, when states provide services, the funding comes from, among other sources, 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 sewerage and parking. When income taxes are structured to be progressive or proportional, they are calibrated in relationship 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 raises a host of issues in terms of incentives, fairness, and distributional impact. 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 is the value of categorizing a charge as a user fee or a tax, and what does the choice say about the service provided? How does the regime described in the Department of Justice’s report on Ferguson fit into the theories of public finance outlined in the caselaw and the pieces by Sjoquist, Ebel, and Wang? What are the problems with using fees from traffic and criminal violations to fund governments? Think also about the role of fines and the study by Garrett and Wanger. Should we think of fines differently from fees? If so, what role, if any, can fines play in generating revenue for local governments? Does the graduated-fine model in Finland and in the pilot programs described by Colgan offer a satisfying alternative to the user fee vs. tax approach? 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”?

Throughout the course, our focus is on dispute resolution, courts, lawyers, policing, and prisons. This class aims to serve as a constant reminder of our interest in thinking about courts in relation to other government activities and to probe how rationales for state support vary depending on the function. Assume, for example, 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?

User Fees and Taxes

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)

Funding Governments

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

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)

Thomas A. Garrett & Gary A. Wanger, *Red Ink in the Rearview: Local Fiscal Conditions and the Issuance of Traffic Tickets*, 52 J. L. Econ. 71 (Feb. 2009)

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

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)

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

February 4, 2019 Funding Courts: Who Pays for What and Where Does the Money Go?

This class will home in on how courts are currently funded. We will look at when courts fund themselves (and sometimes the government which deploys them) through assessments, and/or support government services more generally, as well as when courts are supported by general revenues from government.

To think through these issues, we have provided charges ranging from a fee for a copy of your indictment (repealed in the federal system in 1927) to contemporary fees for booking, for charging defendants for conviction, and for collecting court debt. We begin with a 1925 federal statute providing for collection of various court fees, including for copies of any record. A law enacted two years later amended that provision to clarify that any defendant requesting a copy of the information or indictment would not be charged unless the court orders costs assessed.

The 2016 Eighth Circuit decision, *Mickelson v. County of Ramsey*, upheld the imposition of a \$25 fee by Minnesota County on people booked in the local jail. In 2017, the Michigan appellate court determined that, although court costs were a “tax,” imposing them did not violate the state constitution. Reflect then on why courts can impose “fees” but not “taxes” or when they can “tax” or whether, as Jeremy Bentham argued, “fees” are really a “tax on distress.”

In the 2017 *Cain* ruling, a district court in Louisiana found unconstitutional how the Orleans Parish Criminal District Court collects post-judgment court debts because of the judges’ conflict of interest; they determined defendants’ ability to pay fines, and the revenues went directly to a Judicial Expense Fund. Also 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. As you read this law, consider whether and how one could attack the imposition of fees on criminal defendants more generally.

Critiques of the current system, in which monetary sanctions are imposed without meaningful consideration of defendants’ ability to pay, comes from Alexes Harris and Katherine Beckett. Similarly, a 2018 New York City Bar Association report urges reconsideration of the imposition of mandatory court fees for people convicted of criminal offenses. As the report explains, every individual convicted of a crime in New York is assessed a mandatory surcharge, which ranges from \$95 for violations to \$300 for felony convictions, plus a “crime victim assistance fee” of \$25, and a “DNA databank fee” of \$50 for any felony or Penal Law misdemeanor. Under N.Y. law, the court cannot waive the surcharges, even upon demonstration

of financial hardship. The Bar Association recommends eliminating the mandatory surcharges or using a sliding scale to impose them.

Return to the questions with which we began the semester. What should governments provide as services? And if doing so, which aspects are “add-ons,” and when part of a basic packet of what is “court”?

Paying for Conviction

An Act to Provide Fees to Be Charged by Clerks of the District Courts of the United States, Pub. L. No. 393 (1925)

An Act to Amend the Act of February 11, 1925, Entitled “An Act to Provide Fees to Be Charged by Clerks of the District Courts of the United States,” Pub. L. No. 563 (1927)

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

Cain v. City of New Orleans, 281 F.Supp.3d 624 (E.D. La. 2017)

People v. Cameron, 900 N.W.2d 658 (Mich. App. 2017)

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

NEW YORK CITY BAR ASSOCIATION, NEW YORK SHOULD RE-EXAMINE MANDATORY COURT FEES IMPOSED ON INDIVIDUALS CONVICTED OF CRIMINAL OFFENSES AND VIOLATIONS (Nov. 2018)

Alexes 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 THE WORKS OF JEREMY BENTHAM 573, 582 (John Bowring ed., 1843)

February 11, 2019 Waiving and Enforcing Obligations to Pay: Fees, Fines, Forfeitures, and Restitution

We begin by glimpsing back to a 1972 essay for the ABA Commission on Standards of Judicial Administration and co-authored by former Yale Law Professor Geoff Hazard. This piece describes what the world of fees looked like then, referencing a small body of case law that stands for the proposition that courts have “inherent power” to require legislative support.

A window into contemporary court financing comes from 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. Next, a report from Oklahoma describes the array of fees and fines imposed in traffic, misdemeanor, and felony cases, the increase in these legal financial obligations (LFOs) over time, and their role in funding government operations.

We then turn to a report from the Conference of State Court Administrators (COSCA), which compiled an array of fees used for revenue generation from jurisdictions around the country. For example, in order to supplement the salaries of its officers, the Greater New Orleans Expressway Commission (“GNOEC”) imposes an additional \$5 for any motor vehicle violation occurring in the areas it patrols. 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.

Next we review more of the law on fee waivers or subsidies. 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. These cases remain central, so it is important to identify what they hold. Who can be assessed fines? What are the options for payment? What are trial judges to do, and what are the limits of what they can 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?

Funding for litigants in civil cases comes into focus with *M.L.B. v. S.L.J.*, 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?

The Excessive Fines Clause offers another possible constraint on fines. Currently pending before the US Supreme Court is *Tyson Timbs v. State of Indiana*, which addresses the question of whether the Excessive Fines Clause applies to the states and limits the amounts to be taken under forfeiture provisions? As you read Beth Colgan’s article arguing a wider applicability of the prohibition on excessive fines, consider the reach of the claim. Would it affect the problems of applying the *Bearden* approach?

In addition to ruling on fees through decisions in cases, the judiciary has (at least) two kinds of administrative responses. One is to develop better guidelines for imposing fines. In 2016 the DOJ issued a letter to court administrators advising judicial actors to conduct individual indigency determinations and provide adequate notice when enforcing fines and fees. (That guidance was retracted in 2018.) We provide an example from state courts promulgating “bench cards” – directions to judges on how to inquire into defendant’s ability to pay. Further, in August 2018, the ABA issued new guidelines that would limit the types and amounts of fines and fees, and the ways that courts can enforce payments.

A second, and related, administrative response 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? For example, consider income

eligibility guidelines for the appointment of counsel in criminal cases in Connecticut, New York, and New Jersey.

While one set of issues is access to courts, with barriers ranging from filing and transcript fees to access to lawyers; another set of issues comes from having to carry the debt that courts impose. One such problem arises from the penalties that flow from an individual's inability to pay fines and fees. Michael Morse and Marc Meredith estimated 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 failure to pay LFOs comes by way of litigation challenging the constitutionality of drivers' license suspensions for failure to pay fees in *Robinson v. Purkey*, which is being litigated in the Middle District of Tennessee. The plaintiffs in these cases are challenging their states' practices of suspending, without individual consideration of a defendant's ability to pay, the licenses of defendants who fail to pay fines and fees.

The proliferation of legal financial obligations (LFOs) has sparked new lawsuits that return to the question of whether people can be held, for example, for contempt for failure to pay LFOs. Jeff Selbin's essay from the *2018 Liman Reports* details the work of the Berkeley Law Clinic in enacting legislation to stop charging the families of juveniles for the costs of their detention.

Not only are there concerns about the return of "debtor prisons," but prison charges can also turn incarcerated people into debtors. Here we provide materials from Connecticut, where prisoners are assessed per-day costs of incarceration and are forced to bear the costs of their incarceration through fees and through liens attached to inheritances and civil judgments.

The Stakes: Funding Courts and Setting Social Policy

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 AND RECOMMENDATIONS FOR ADDRESSING BARRIERS TO ACCESS TO JUSTICE AND ADDITIONAL ISSUES ASSOCIATED WITH FEES AND OTHER COURT COSTS IN CIVIL, CRIMINAL, AND 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)

The Impact of Poverty on Fines, Fees, and Collection

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)

Beth Colgan, *Reviving the Excessive Fines Clause*, 102 CAL. L. REV. 227 (2014)

How Poor Is Poor Enough?

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

Connecticut Income Eligibility Guidelines for Appointment of Counsel

New York State Income Eligibility Guidelines for Appointed Counsel

New Jersey State Income Eligibility Guidelines for Appointed Counsel

Andrew Hammond, *Pleading Poverty in Federal Court*, 128 YALE L. J. ____ (forthcoming 2019)

Court Debt and Its Impact

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

Robinson v. Purkey, 326 F.R.D. 105 (M.D. Tenn. 2018), Memorandum Denying Defendants' Motion to Dismiss

Jeffrey Selbin, *California and the Promise of Debt-Free Juvenile Justice*, THE LIMAN REPORTS: WHO PAYS? FINES, FEES, BAIL, AND THE COST OF COURTS (2018)

Windfalls of former inmates targeted by Connecticut, NEW HAVEN REGISTER (Aug. 2, 2014)

Christopher Reinhart, *Inmates Paying for Costs of Their Incarceration*, OLR RESEARCH REPORT (Mar. 13, 2006)

Optional Reading

American Bar Association, *ABA Ten Guidelines of Court Fines and Fees* (2018); Report to the House of Delegates

Tyson Timbs v. State of Indiana, Brief for Petitioners and Brief for Respondents, No. 17-1091 (U.S. Sup. Ct)

February 18, 2019 Pricing Pretrial Liberty: The History, Law, Debates, and Reforms of Cash Bail Systems

This week, we turn to the relationship between money and pre-adjudication detention. Daniel Freed and Patricia Wald, who were at the forefront of creating the 1966 Bail Reform Act, provide a brief overview of the history of bail. As you read, consider how the concerns then converge with or diverge from current debates.

The question of bail returned to Congress in the midst of the "war on crime" and the "war on drugs," and in 1984, Congress enacted the "Bail Reform Act" governing federal criminal defendants. In 1987, in *United States v. Salerno*, the United States Supreme Court rebuffed challenges to it. What are the grounds Congress provided to license detention? The arguments

for their unconstitutionality? The 1987 commentary from the *Angolite*, a newspaper written by prisoners in Louisiana's Angola Prison, turned out to forecast the impact during the last decades.

Distress about incarceration based on a lack of funds has produced new social and litigation movements aiming, once again, to "reform" bail. Our interest is in understanding the bases for the critiques, the legal challenges mounted, and the responses in legislatures and by prosecutors. Social science has played an important role in shaping an appreciation for the harms of detention. What were the methods of analyses, the metrics, and the harms identified by Paul S. Heaton, Sandra G. Mayson & Megan T. Stevenson? How did those concerns become part of the legal analysis in the Harris County challenge to the use of cash bail in *ODonnell v. Harris County*? What facts are key, and what is the test of constitutionality that Judge Rosenthal relied on at the district court level when she held the bail system unconstitutional? Watch the link of a bail "hearing" as you reflect on the ruling. How did the Fifth Circuit modify the standard for assessing constitutionality? How did the election of 2018 affect the rulemaking on bail in that county? What is the basis for the different standard applied by the Eleventh Circuit in 2018 in *Walker v. Calhoun*?

What are the different methods to respond to the problems mapped in the Harris County litigation? We turn to the idea of "risk assessment," "bail funds" or "freedom funds," and alternative forms of "supervision." Consider the efforts of the Arnold Foundation to create a risk-assessment system based on empirically tested "tools." We provide a brief excerpt from European law on the statutory right that an algorithm not decide a person's outcome. What are the sources for that antipathy? What are the reasons to look to artificial intelligence in lieu of or to try to limit judicial discretion? What metrics do humans or computer-inputters use to decide about pre-trial release? What are the "risks" considered, and how would Crystal Yang alter the calculations? Sandra Mayson? Does the discussion by Samuel Wiseman make the prospect of another form of technology – electronic monitoring – look appealing?

Reviewing these materials, do you become advocates for the end of money bail? What impact would such an approach have on detention rates? To think about those issues, consider excerpts on the statutory changes in New Jersey and California, and the interaction between litigation, legislation, and community organizing.

Finally, to think more about the political economy, note the role played by bail bonding companies and law enforcement personnel. What are the arguments raised in *Holland v. Rosen*? In *Walker v. City of Calhoun*? What would you, as a judge, legislator, attorney, or community organizer advocate?

Detention, Flight "Risk," and "Danger"

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

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

Commentary, *Preventive Detention*, *ANGOLITE* (July/Aug 1987), at 87–88

Present-Day Bail Practices

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

Harris County, Texas

Susan Archer & Michael Hardy, *In Texas Court: ‘Your Bond Just Went Up’*, N.Y. TIMES (Mar. 9, 2017), <https://www.nytimes.com/video/us/100000004974239/court-video-of-judges-setting-bail.html>

ODonnell v. Harris County, Litigation Overview

ODonnell v. Harris County., 251 F. Supp. 3d 1052 (S.D. Tex. 2017)

ODonnell v. Harris County., 892 F.3d 147 (5th Cir. 2018)

Zach Despart, *Federal judge signals she will approve new Harris County bail rules*, HOUSTON CHRON. (Feb. 1, 2019)

Walker v. City of Calhoun, 901 F.3d 1245 (11th Cir. 2018), *petition for cert. filed*, No. 18-814, Dec. 27, 2018

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

Assessments and Supervision: Technologies for Change

LAURA & JOHN ARNOLD FOUND., PUBLIC SAFETY ASSESSMENT: RISK FACTORS & FORMULA (2016)

Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 [“General Data Protection Regulation”], art. 22, 2016 O.J. (L 119) 1

Brandon L. Garrett & John Monahan, *Judging Risk*, No. 2018-44, U. VA. SCH. L. PUB. L. & LEGAL RES. SERIES (July 2018)

THE USE OF PRETRIAL “RISK ASSESSMENT” INSTRUMENTS: A SHARED STATEMENT OF CIVIL RIGHTS CONCERNS (Jul. 30, 2018)

Sandra G. Mayson, *Dangerous Defendants*, 127 Y.L.J. 490 (2018)

Samuel R. Wiseman, *Pretrial Detention and the Right to Be Monitored*, 123 Y.L.J. 1344 (2014)

Bailing People Out: Community Bail Funds

Jocelyn Simonson, *Bail Nullification*, 115 MICH. L. REV. 585 (Mar. 2017)

Alysia Santo, *Bail Reformers Aren’t Waiting for Bail Reform*, MARSHALL PROJECT (Aug. 23, 2016)

The Politics of Bail Reform

New Jersey Bail Reform Statute

N.J. Stat. Ann. § 2A:162-15 (West 2017) (effective Jan. 1, 2017)

Construction of § 2a:162-15 et seq.; goals; “eligible defendant” defined

N.J. Stat. Ann. § 2A:162-16 (West 2017) (effective Jan. 1, 2017)

Temporary detention of eligible defendant during risk assessment; pretrial release decision

N.J. Stat. Ann. § 2A:162-17 (West 2017) (effective Jan. 1, 2017)

Pretrial release decision; timing; considerations; non-monetary conditions; monetary bail

California Bail Reform Litigation and Statute

In re Humphrey, 228 Cal. Rptr. 3d 513, (Cal. Ct. App. 2018), *review granted*, 417 P.3d 769 (May 23, 2018)

S. 1054, 2017–2018 Leg., Reg. Sess. (Ca. 2018) (effective Oct. 1, 2019)

David Feige & Robin Steinberg, *Replacing One Bad Bail System With Another*, N.Y. TIMES (Sept. 11, 2018)

Madeline Carlisle, *The Bail-Reform Tool That Activists Want Abolished*, ATLANTIC (Sep. 21, 2018)

Role of the Bail Bond Industry

Petition for Writ of Certiorari, *Holland v. Rosen*, 895 F.3d 272 (3d Cir. 2018), *cert. denied*, 139 S.Ct. 440 (2018)

Brief Amici Curiae American Bail Coalition, Georgia Association of Professional Bondsmen & Georgia Sheriffs' Association in Support of Defendant-Appellant and Reversal of Preliminary Injunction, *Walker v. City of Calhoun*, 682 Fed. Appx. 721 (2017), *petition for cert. filed*, No. 18-814, Dec. 27, 2018

Optional Reading

Chelsea Barabas, Karthik Dinakar, Joichi Ito, Madars Virza & Jonathan Zittrain, *Interventions Over Predictions: Reframing the Ethical Debate for Actuarial Risk Assessment*, 81 PROC. OF MACH. LEARNING RES. 1 (2018)

February 25, 2019

Rights to “Free” Counsel for Criminal Defendants

We begin our discussion of rights to counsel in criminal proceedings this week. The Sixth Amendment of the United States Constitution states: “In 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.” Do either of these constitutional guarantees require the state to provide people with free lawyers or with other means of defending themselves?

In 1932, in *Powell v. Alabama*, the U.S. Supreme Court addressed these questions in the context of what became known as the “Scottsboro Boys” case. For those of you unfamiliar with this case, we have given you a brief excerpt from Michael Klarman’s article that provides background. Langston Hughes’s poem gives a sense of the outrage many felt at the treatment of the boys. What did *Powell* decide? What was the scope of its holding?

In 1963, the Court held in *Gideon v. Wainwright* that, under the Sixth Amendment, a conviction of an indigent defendant in state court for a felony cannot stand if the state has not provided the defendant with a lawyer. We have excerpted the briefs of the amici states in the case. Alabama and North Carolina filed in support of Florida, the state in which Gideon was convicted. In support of Gideon were Massachusetts, Minnesota, Colorado, Connecticut, Georgia, Hawaii, Idaho, Illinois, Indiana, Kentucky, Maine, Michigan, Missouri, Nevada, Ohio, North Dakota, Rhode Island, South Dakota, Washington, West Virginia, and Alaska. Oregon both joined the group and filed an additional, descriptive brief detailing its experience in appointing counsel for certain indigents. What legal tests did the amici propose and what did the Court hold? Of what relevance were the states' amici filings?

Following *Gideon* was the 1966 case *Miranda v. Arizona*, known from countless television shows and movies as the source of the statement, "if you cannot afford an attorney, one will be provided for you." *Miranda* and an excerpt from "*Gideon* at Guantánamo" situate the Court's criminal process decisions against the backdrop of the Cold War. In this context, what were lawyers supposed to provide?

In the 1972 case of *Argersinger v. Hamlin*, the Court reversed an indigent defendant's misdemeanor conviction for carrying a concealed weapon, for which he was sentenced to ninety days in jail, because it was obtained without a lawyer. In 1979, a plurality held in *Scott v. Illinois* that *Gideon* and *Argersinger* did not require the appointment of counsel in cases where imprisonment is authorized but not ordered. What rule of law emerges from these cases?

Consider the phases of a criminal prosecution, from pre-arrest investigation, initial police encounters and arrest, interrogation, bail setting, pre-trial court appearances, to trial (or plea), post-trial motions, and appeal. As you read the Court's 2008 decision, *Rothgery v. Gillespie County*, think about when and why the right to counsel should attach.

Turning then from the constitutional doctrine to the question, how should rights to counsel be funded? The materials from the Bureau of Justice Statistics and the National Association of Criminal Defense Lawyers show how states have attempted to implement *Gideon*. Note that states vary in the degree to which they rely on institutional public defender offices as opposed to assigned counsel or panel systems, in which private attorneys are paid stipends for representing indigent defendants.

In the federal system, Congress enacted the Criminal Justice Act (CJA) in 1964, codified at 18 U.S.C. § 3006A. Review the current rate schedules for counsel appointed under the Act. Think about pricing and the pros and cons of criminal defense organizations as compared to panels of individual lawyers.

This week also returns us to our earlier 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. Recall that in *Fuller v. Oregon*, decided in 1974, the Supreme Court did not rule out the use of public defender recoupment fees.

Congress included a recoupment provision in the CJA, 18 U.S.C. § 3006A(f). The Fourth Circuit's opinion in *United States v. Moore* provides a window onto how federal courts have interpreted this requirement. A minority of states also include recoupment provisions: South Dakota, which charges defendants more than \$90 per hour for assigned counsel, collected over \$2.5 million in recoupment fees in 2017. 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.

Finally, compare Paul Butler and Sara Mayeux's reflections on the legacy of *Gideon*. What is the "promise" of *Gideon* and what is the worth of the right it announced?

Recognizing and Defining Rights to Counsel for Criminal Defendants

Michael J. Klarman, *The Racial Origins of Modern Criminal Procedure*, 99 MICH. L. REV. 48 (2000).

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

Langston Hughes, *Justice* (1932)

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

Amicus Curiae Brief for the State of Alabama Presented by its Attorney General, MacDonald Gallion, *Gideon v. Cochran*, 1962 WL 115123

Brief for the State Government Amici Curiae, *Gideon v. Cochran*, 1962 WL 115122

Brief for the State of Oregon as Amicus Curiae, *Gideon v. Cochran*, 1962 WL 115529

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)

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

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

Rothgery v. Gillespie County, 554 U.S. 191 (2008)

Implementations of Right to Counsel

Suzanne M. Strong, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, STATE-ADMINISTERED INDIGENT DEFENSE SYSTEMS, 2013 –UPDATED (May 3, 2017)

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)

John P. Gross, NAT'L ASS'N OF CRIMINAL DEFENSE LAWYERS, *Rationing Justice: The Underfunding of Assigned Counsel Systems: A 50-State Survey of Trial Court Assigned Counsel Rates* (2013)

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

Criminal Justice Act

18 U.S.C. § 3006A (2010)

JUDICIAL CONFERENCE OF THE UNITED STATES, GUIDE TO JUDICIARY POLICY VOL. 7, DEFENDER SERVICES (2019) (CJA rate schedules)

State and Federal Recoupment Provisions

United States v. Moore, 666 F.3d 313 (4th Cir. 2012), and review 18 U.S.C. § 3006A(f).

S.D. CODIFIED LAWS §§ 23A-40-10, -12 (2018)

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

COUNTY EXPENDITURES AND REPAYMENT FOR COURT-APPOINTED ATTORNEYS – FY2017, S.D. UNIFIED JUDICIAL SYSTEM (2018)

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 4, 2019

Implementing Rights to Counsel: Metrics of Quality

How good do the services guaranteed by *Gideon* need to be? What is quality and how can standards of quality be enforced? What are the roles of courts, the bar, and legislatures?

One focus has been on post-conviction remedies and the ways in which implementation of *Gideon* can be overseen through decisions of state and federal courts. In 1984, two decades after *Gideon*, the U.S. Supreme Court issued *Strickland v. Washington* and limited these remedies through an exacting test for when a lawyer's inadequacies mandate the reversal of a conviction. The shorthand is "ineffective assistance of counsel." The *Strickland* test continues to be used when assessing lawyers' inadequacies.

What did the Court in *Strickland* require? What are the challenges of deciding when lawyers fail and when they are deliberate in their choices? Who has the burden to establish what? How can information outside the record come before courts to make these claims? What animates such a restrictive test? Reflect back on the amicus brief by the states in *Gideon*, discussing the retroactivity of the right to counsel, and then consider how *Strickland* makes difficult any way of undoing convictions based on lawyer failures. What alternative rules could the Supreme Court have crafted to determine whether lawyers were ineffective?

Another set of questions relate to the scope of "ineffective assistance of counsel." *Strickland* discussed representation at trial. To what other activities of lawyers do rights of

adequate representation apply? Two cases deal with plea bargaining, *Missouri v. Frye* (optional reading) and *Lafler v. Cooper*, decided in 2012. Ninety-seven percent of federal convictions and ninety-four percent of state convictions result from guilty pleas. How does the fact of that volume affect the ruling? What is the test of ineffectiveness in this context?

Claims under *Strickland* and its progeny arise after conviction. Consider the problem *ex ante*: how are and how should the quality of lawyer services be regulated so as to avoid ineffective assistance of counsel problems?

Quality control through standards is one common response in many professions. Efforts to shape international standards on criminal defense are exemplified in excerpts of a 2016 compendium, *Measuring Justice: Defining and Evaluating Quality for Criminal Legal Aid Providers*. Studies using the “Delphi method” look to the time required to provide quality counsel in assessing lawyer caseloads. A report prepared for the Texas Indigent Defense Commission relied on this method. The American Bar Association has also weighed in and provided its *Ten Principles of a Public Defense Delivery System*.

How do lawyers get their offices to comply with such standards? One is voluntary adoption and another is litigation or legislation. Consider how to bring claims into court. What is the cause of action? Who are the plaintiffs and defendants?

Lawyers in upstate New York used habeas corpus as a method to get into court, and the New York Court of Appeals decided (4-3) in 2010 in *Hurrell-Harring* that services in upstate New York were so poor that pre-trial habeas was appropriate. That ruling helped to generate funds for more services.

In Missouri, when funding was not provided, public defenders refused new cases. The *Pratte* (2009) and *Waters* (2012) materials provide that account. Stephen Hanlon’s remarks show how these cases relate to an ongoing movement in public defense litigation. After *Waters*, the Missouri Legislature enacted a new law regulating the ability of state public defenders to decline cases, as detailed in the 2018 appellate opinion *Petsch v. Jackson County Prosecuting Attorneys Office*. The RubinBrown standards mentioned in the opinion are another example of the “Delphi method.” Another illustration comes from the lawsuit against Idaho, *Tucker v. Idaho* (optional reading). You have an excerpt from the 2017 decision in which the Idaho Supreme Court approved the state as an appropriate defendant; a class action of the same name was certified in 2018.

An alternative to litigation is rationing, as commended by Daryl Brown, who proposes that defense lawyers allocate their services according to principles of factual innocence or harm reduction.

How does one assess the different methods of implementing counsel rights? What are the pros and cons? Also note that, while we have focused on the role of lawyers, other forms of expertise are critical to mounting a defense. As an optional set of readings, consider the 2017 ruling in *McWilliams v. Dunn*, about the role of experts. What is the scope of an obligation of prosecuting jurisdictions to fund fact-gathering and to provide experts? How should resources between lawyers and other forms of equipage be allocated? Another question is how changing

technology affect both prosecutors and defendants. Examples include DNA testing and other kinds of forensic information. *Little v. Streiter* and *District Attorney's Office v. Osborne* highlight the question of the needs of litigants in different contexts and the obligations of states to facilitate or provide access to information and experts.

Postconviction Relief for Ineffective Assistance of Counsel

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

Lafler v. Cooper, 566 U.S. 156 (2012)

Setting Standards and Measuring Caseloads

JOSH PERRY, INT'L LEGAL FOUND., MEASURING JUSTICE: DEFINING AND EVALUATING QUALITY FOR CRIMINAL LEGAL AID PROVIDERS (2016)

PUB. POL RESEARCH INST., TEX. A&M UNIV., GUIDELINES FOR INDIGENT DEFENSE CASELOADS (2015)

AMER. BAR ASS'N, TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM (2002)

Caseload Control through Litigation and Legislature

Hurrell-Harring v. State, 930 N.E.2d 217 (N.Y. 2010), and Order of Settlement (Oct. 21, 2014)

Stephen F. Hanlon, *The Gideon Decision: Constitutional Mandate or Empty Promise?*, 52:32 UNIV. OF LOUISVILLE L. REV. 32 (2013)

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 Note on Missouri Public Defense Litigation

Petsch v. Jackson Cnty. Prosecuting Att'ys Office, 553 S.W.3d 404 (Mo. 2018)

Rationing by Public Defenders

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

Optional Reading

Postconviction Relief for Ineffective Assistance of Counsel, Continued

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

Effective Defense beyond Counsel: Experts and Evidence

McWilliams v. Dunn, 137 S. Ct. 1790 (2017)

Little v. Streater, 452 U.S. 1 (1981)

D.A.'s Office v. Osborne, 557 U.S. 52 (2009)

Caseload Control, Continued

Tucker v. State, 394 P.3d 54 (Idaho 2017)

March 11, 2019

No class: Spring Break

March 18, 2019 Expanding Rights to Counsel: “Civil *Gideon*”

Do the concerns that animate state-subsidized rights to counsel for criminal defendants apply to non-criminal litigation? In 2018, more than a quarter of all civil filings in U.S. district courts (75,442 of 282,936 filings) came from unrepresented plaintiffs, as did about half of all civil appeals filed in U.S. circuit courts (24,680 of 49,276). A 2015 study by the National Center for State Courts analyzed a set of almost a million cases and found a predominance of civil debt collection and landlord/tenant litigation. In about 650,000 cases for which information on lawyers was available, plaintiffs (often creditors) were represented by counsel in more than 90 percent of the cases; defendants by counsel in 26 percent of cases. See Nat’l Ctr. for St. Cts., Civil Justice Initiative, *The Landscape of Civil Litigation in State Courts* (2015). Many state surveys find that in family law cases, most of the litigants lack lawyers.

In the wake of *Gideon*, litigants sought to establish constitutional rights to counsel, and to have legislatures enact statutory mandates for free lawyers for certain categories of cases brought by resource-poor civil litigants. *Lassiter v. Dep’t of Social Services*, decided in 1981, addressed the question in the context of state efforts to terminate a mother’s parental rights. What is the holding and how would you apply the Court’s test on remand? What would you need to know to decide whether to require counsel? What presumptions might you use, were you the judge? An excerpt of Elizabeth Thornburg’s essay addresses some issues of implementation.

In the 2011 case of *Turner v. Rogers*, the Court ruled on 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 term; her focus was on the resources and choices 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? Consider the results of a study by Elizabeth Patterson, who studied child-support contempt proceedings before and after *Turner*.

Several state courts have held that rights to counsel attach beyond what the U.S. Supreme Court requires. Compare the approaches of *Lassiter* and *Turner* to those of the two examples we give, from Montana and New Jersey. What is the equal protection analysis in the decision from Montana in *A.W.S.*? How does this analysis differ from the approach of the 2018 *Kavadas* case from New Jersey? How do these state courts’ tests differ from those offered by the U.S. Supreme Court? (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, see Goodwin Liu, *State Constitutions and the Protection of Individual Rights: A Reappraisal*, 92 N.Y.U. L. Rev. 1307 (2017).)

Mandates for state-subsidized lawyers can come from all levels of government. In 1974, Congress created the Legal Services Corporation (LSC) to provide civil legal assistance to those of limited means. In 1996, Congress imposed limits that prohibited LSC from representing people in class actions and in some subject matter areas; LSC continues to work for clients seeking assistance related to domestic violence, veterans' benefits, disability access, housing conditions, and health care. Funding has not, however, been sufficient to the needs. LSC reported that, as of 2016, "86% of the civil legal problems reported by low-income Americans . . . received inadequate or no legal help."

Several states have created legal assistances programs for certain kinds of low-income litigants. For example, as reflected in the excerpt, New York State's court system in 2019-2020 requested more than \$71 million for low income New Yorkers in civil cases involving housing, family matters, and access to services including health care, education, and benefits. In 2017, New York City began funding a pilot program for lawyers in housing court for litigants whose income was 200 percent of the federal poverty guidelines or less. N.Y.C. Admin. Code §§ 26-1301 *et seq.* Consider the New York Times' 2018 description of New York City's housing courts, and the NYU Furman Center report considering aspects of program implementation. The 2016 report of the Connecticut General Assembly's Task Force to Improve Access to Legal Counsel in Civil Matters also recommends counsel for certain kinds of cases.

These efforts enable reflection on how funds are currently allocated. What kinds of cases have been selected? What are or should be the criteria for eligibility? Reflect back on the discussion of *Boddie*, in the *Matter of Unison* and the case from British Columbia, in terms of means-testing. Were an addition \$100 million dollars for lawyers available, how would you allocate them for civil cases? What criteria would be appropriate? Or would you rather have that \$100 million allocated elsewhere? What about allocations in terms of place, and the availability of alternative sources for help? The term "legal deserts," discussed in the article by Lisa Pruitt, Amanda L. Kool, Lauren Sudeal, Michele Statz, Danielle M. Conway, & Hannah Haksgaard, describes areas (sometime rural) where services are inaccessible. What are the ways to respond?

Calls for a civil *Gideon* have not escaped 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 of providing civil litigants with lawyers be linked? Is the issue competition for the same funds? Is a limited "pie" an apt metaphor?

Constitutional "Civil *Gideon*"

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 Adoption of A.W.S., 377 Mont. 234 (2014)
Kavadas v. Martinez, No. MER-L-1004-15 (N.J. Super. Ct. Dec. 7, 2018)

Unmet Civil Legal Needs and State Provisions

LEGAL SERVICES CORPORATION, *THE JUSTICE GAP: MEASURING THE UNMET CIVIL LEGAL NEEDS OF LOW-INCOME AMERICANS* (2017)
N.Y. ST. UNIFIED CT. SYS., *BUDGET: FISCAL YEAR 2019-2020*
Kim Barker, Jessica Silver-Greenberg, Grace Ashford, & Sarah Cohen, *The Eviction Machine Churning through New York City*, N.Y. TIMES (May 20, 2018), available at <https://nyti.ms/2lzhG0p>.
NYU FURMAN CENTER, *IMPLEMENTING NEW YORK CITY'S UNIVERSAL ACCESS TO COUNSEL PROGRAM: LESSONS FOR OTHER JURISDICTIONS* (Dec. 2018)
JUDICIARY COMMITTEE, CONNECTICUT GENERAL ASSEMBLY, *REPORT TO THE TASK FORCE TO IMPROVE ACCESS TO LEGAL COUNSEL IN CIVIL MATTERS* (2016)
Lisa R. Pruitt, Amanda L. Kool, Lauren Sudeall, Michele Statz, Danielle M. Conway, & Hannah Haksgaard, *Legal Deserts: A Multi-State Perspective on Rural Access to Justice*, 13 HARV. L. & POL'Y REV. 15 (2018)

Potential Limits to Civil *Gideon*

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

March 25, 2019 Alternatives to Lawyers and Alternative Modes of Access to Courts

This segment focuses on the role that non-lawyers and alternative technologies can play in mitigating the challenges for litigants in courts. One possibility is to enlist specially-trained people who are not lawyers. Today, these individuals go by names like “navigators” or “limited law license technicians.” We have provided excerpted materials to explain the goals of programs that permit individuals who are not lawyers to provide some forms of assistance that have historically been the exclusive domain of lawyers. In some ways, these efforts not only change prohibitions against the unauthorized practice of law but also change what “practicing law” means.

We begin with Richard Zorza and David Udell’s overview of “new roles for non-lawyers,” and with excerpts describing programs in Washington and in New York City. Rebecca Donaldson analyzes the challenges of the Washington program. Recall from last week’s readings the work required to implement a lawyer-based system in the New York Housing Court. Are the problems of implementing a non-lawyer based system similar? To understand more about the promises

and pitfalls of programs, consider the essay *Can a Little Representation Be a Dangerous Thing?* by Colleen Shanahan, Anna Carpenter, and Alyx Mark. What are the responses to the critiques raised?

When neither lawyers nor professional non-lawyer assistants are available, individuals with legal problems may turn to their communities. A new initiative in criminal justice, “participatory defense,” seeks to tap into the potential offered by families and friends as one way to compensate for inadequate public defense systems, overburdened lawyers, and under-resourced public defender offices. The approach is distinctive in relying on community-level engagement to educate and empower individuals who can teach people how to advocate for their own services and to augment the services provided. As you read the *New York Times* op-ed and one of the first studies by Andrew Davies and Janet Moore, think about the risks and merits of participatory defense, and whether and how it should be implemented more widely. Is this a possible model for civil legal needs? Is it more or less desirable in the civil context? What are the criticisms, and how might proponents respond?

Another option for reducing the “justice gap” is to create better systems for self-help. Think about the reading from Barton and Bibas last week in light of Zorza’s and Udell’s proposal for expanded self-help technologies, the strategies offered by James Greiner, Dalié Jiménez, and Lois Lupica, and the challenges raised by Tanina Rostain, Colleen Shanahan, and Anna Carpenter. What do we need to know to assess the quality and impact of these programs?

Online dispute resolution (ODR) is proffered as yet an additional way to mitigate the lack of resources of litigants and of courts. ODR can be court-based or part of private systems, such as EBay or RHUbarb (www.rhucoin.com). As these variations develop, some promoters argue their generativity, while others see them as part of a backlash against courts and rights. What is the vision for what ODR can do? How does it raise the concerns about law reform that worried critics of limited legal technicians?

The ABA white paper, written nearly two decades ago, presents an overview of ODR and its possibilities as an avenue for “access to justice.” Prescott’s 2017 analysis of the use of platform technology argues that online technology provides a way to “open” the court system and to better, more easily, and more quickly resolve minor cases. The HiiL monograph, which ultimately promotes a fully integrated ODR system, similarly describes how ODR can improve the experiences of people interacting with the courts and reduce the workloads of judges.

Consider these pieces in light of the concerns raised in Sir Ernest Ryder’s keynote address and in Professor Resnik’s chapter on open justice. While recognizing the possibility of ODR and digitization to make justice “more open,” Ryder cautions against creating “digital outlaws” by outsourcing dispute resolutions to algorithms designed by private actors. Professor Resnik highlights the potential consequences of online alternatives – the exclusion of the public and privatization of ODR – and argues for “transposing the norms of public engagement in courts to their replacements/alternatives.”

Is technology inevitably privatizing? Does it deliver on its promise for “100 percent access” to justice? The 2019 Report evaluating the ODR systems in England and Wales provides suggestions for measuring the impacts.

Non-Lawyers in Courts

Specially-trained paraprofessionals

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

Committee on Non-Lawyers and the Justice Gap, New York State Navigator Program, *Navigator Snapshot Report* (December 2014)

Supreme Court of Washington, In the Matter of the Adoption of New Admission to Practice Rule 28 (Limited Practice Rule for Limited License Legal Technicians 2012)

Rebecca M. Donaldson, *Law by Non-Lawyers: The Limit to Limited License Legal Technicians Increasing Access to Justice*, 42 SEATTLE U. L. REV. 1 (2018)

Colleen F. Shanahan, Anna E. Carpenter & Alyx Mark, *Can a Little Representation Be a Dangerous Thing?*, 67 HASTINGS L. J. 1367 (2016)

Communities Filling the Justice Gap

David Bornstein, *Guiding Families to a Fair Day in Court*, N.Y. TIMES (May 29, 2015)

Andrew Davies & Janet Moore, *An Empirical Study of One Participatory Defense Program Facilitated by a Public Defender Office*, 14 OHIO ST. J. CRIM. L. (2017)

Self-Help Representation

D. James Greiner, Dalié Jiménez, Lois R. Lupica, *Self-Help, Reimagined*, 92 IND. L. J. 1119 (2017)

Tanina Rostain, *Techno-Optimism & Access to the Legal System*, DAEDALUS (2019)

Colleen F. Shanahan and Anna E. Carpenter, *Simplified Courts Can't Solve Inequality*, DAEDALUS (2019)

Alternative Dispute Methods in Courts: Online Dispute Resolution

American Bar Association Section on Dispute Resolution, *Access to Justice through Alternative Dispute Resolution White Paper* (2002)

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

Maurits Barendrecht, Jin Ho Verdonchot, 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*, HiiL (2016).

Sir Ernest Ryder, Senior President of Tribunals, *Keynote Address to the Max Planck Institute: Securing Open Justice* (February 1, 2018)

Judith Resnik, *The Functions of Publicity and of Privatization in Courts and Their Replacements (from Jeremy Bentham to #MeToo and Google Spain)*, in OPEN JUSTICE: THE ROLE OF COURTS IN A DEMOCRATIC SOCIETY (Burkhard Hess & Ana Koprivica eds. 2019)

N. Byrom, *DEVELOPING THE DETAIL: EVALUATING THE IMPACT OF COURT REFORM IN ENGLAND AND WALES ON ACCESS TO JUSTICE*, THE LEGAL EDUCATION FOUNDATION (2019)

March 28-29 2019

**Twenty-second Annual Liman Colloquium
Economic Injustice: Courts, Law Schools, and
Institutionalizing Reform**

April 1, 2019

**Collective Redress and Economies of Scale:
Fair Labor Standards Act, Class Actions, Multidistrict
Litigation**

Thus far, we have focused on individuals of limited income and limited wealth in courts. We have looked at costs and fees, and at various forms of subsidies—such as waiving fees or providing lawyers and other personnel to aid with cases. Another mechanism for infusing resources is aggregation—by which we mean enabling individuals to come to courts as part of a collective. Aggregation can work in two ways. It either creates incentives for lawyers to work for a group, in the expectation that they will receive compensation based on a percentage of the recovery from that aggregate; or it permits lawyers to pool resources and hence create cross-subsidies among co-plaintiffs.

This week, we provide a brief overview of both the history of aggregation in the twentieth century and of debates about the legitimacy of joint or collective ventures. One reminder, up front, is that aggregate litigation can come in many forms. Government litigation, as discussed by Margaret Lemos, can serve as a form of aggregation, in which state or federal lawyers bring claims on behalf either of the body politic or individuals—and use taxpayer dollars to do so. Statutes may authorize litigation by both government actors and private individuals. One example is the Sherman Anti-Trust Act of 1890, which included what we today call “litigation incentives”—authorizing the award of triple damages for those who bring suit.

Starting in the early twentieth century, workers’ compensation statutes chartered a path toward new forms of aggregation by creating systems to process claims with redundant features, ultimately lowering the barriers to bringing such claims. These state and federal statutes enabled workers to bring claims against employers (that the common law had barred), and created new obligations for employers to pay into funds. As a tradeoff, they also limited the amounts a victorious plaintiff could win.

What are the incentives to aggregate? We begin by considering inducements to collective action. The essays by John Fabian Witt and Samuel Issacharoff, and by Judith Resnik trace the history of informal mechanisms of aggregate case resolution to respond to concerns about economies of scale when dealing with widespread, similar harms. In 1938, in the Fair Labor Standards Act (FLSA), Congress made it easier for individuals to join pending actions. Read Section 16(b) and imagine how it could have been interpreted. Contrast that with the excerpts from Judith Resnik’s essay, which explain how judges ultimately adopted a more limited reading. What was the concern that prevented judges from reading it as an authorization to bring what we would today call a class action?

Additional pressures to aggregate soon came from banks that, in the 1940s, wanted to pool trust assets and protect themselves from a host of potential claims challenging the prudence of their investment choices. In *Mullane v. Central Hanover Bank & Trust Co.* (1950), the Court upheld a New York banking law allowing fiduciaries to aggregate claims on behalf of beneficiaries of pooled trusts, while laying out parameters for providing notice to known and unknown beneficiaries. In so doing, the Court offered what Judith Resnik has called a “foundational re-conception of the Due Process Clause.” Why did the Court re-conceive of due process, and how did this shift help set the stage for the type of widespread aggregate litigation that would soon become the norm?

The 1966 amendments to Rule 23 built on and accelerated this boom in aggregate litigation. The amendments were intended, as rule reporter Benjamin Kaplan reflected soon after their adoption, “to promote more vigorously than before the dual missions of the class-action device: (1) to reduce units of litigation by bringing under one umbrella what might otherwise be many separate but duplicating actions; (2) even at the expense of increasing litigation, to provide means of vindicating the rights of groups of people who individually would be without effective strength to bring their opponents into court at all.” The drafters hoped, in particular, that this newly invigorated class device would be useful in civil rights cases. As the Rules Committee was redrafting Rule 23, another judicial committee was considering a second managerial tool to aggregate pending cases. The result was 28 U.S.C. § 1407, establishing multi-district litigation. As a formal matter, each case in an MDL should potentially be remanded for trial. In practice, MDLs are run collectively by a centralized committee of lawyers.

The first Supreme Court case to interpret the revised Rule 23 was *Eisen v. Carlilse & Jacquelin* (1974). In *Eisen*, the Court insisted that class plaintiffs bear the burden of providing and paying for notice to individual class members. What did Rule 23 say about notice? How did the Court interpret that rule? How does the court weigh the risk that the cost of notice requirements might price certain claims out of court entirely? Assume you receive a notice in *Eisen*: what would you do with it? What do you do with the class action notices you receive? What functions might notice have?

Rule 23 is not the only way that aggregate litigation is brought today. The essay by Andrew Brandt and Theodore Rave explores the parallel development of multidistrict litigation in the federal courts. On the state side, every state but Mississippi offers a class action device in its court system. An excerpt from the Mississippi Supreme Court in *American Bankers Insurance Co. of Florida v. Alexander* demonstrates that, even without such a mechanism, claimants still come to court collectively in that state. And the European Union study on collective redress demonstrates that the conversations about the need for collective forms of redress is not limited to the United States: the EU member states are currently debating the pros and cons of various potential mechanisms. What do these readings tell us about the inevitable incentives for aggregation? How have various political actors accommodated these calls for collective redress? And how have litigants—or their lawyers—worked around the systems that legislatures and courts have put in place?

Money is, as it has been throughout the semester, central. The excerpt from Judith Resnik, Dennis Curtis, and Deborah Hensler introduces the “common benefit” doctrine. Under the

prototypical application of the doctrine, lawyers whose work helps create a fund for compensation can recover their costs from a portion of all claimants' recoveries, even when they have no attorney-client relationship with those litigants. Private plaintiffs' attorneys are not the only actors who can infuse money into the justice system. The readings then explore two other ways money is introduced: third-party litigation financing (which plays a role in both individual and aggregate litigation), and litigation by government entities—especially state attorneys general offices—undertaken “on behalf of” their citizens. As you read, consider the following questions: Does infusing a profit motive risk undermining the purposes of the justice system? Do we think outside financing is appropriate for some, but not all, categories of cases? How much money is too much for lawyers to recover? What role should courts play in policing the way money moves through the system? Revised Federal Rules 23 (g) and (h) show Congress's reaction to the way money and fees can drive aggregate litigation, giving federal courts a role in policing the way that class counsel is paid.

We consider next week whether these aggregate mechanisms create incentives for too much litigation. Here, we focus on critiques by Elizabeth Chamblee Burch and reform suggestions by John Coffee and Judith Resnik. What are the problems they identify? What potential solutions do they offer? We end with an essay by Brian Fitzpatrick, a former clerk for Justice Scalia whose forthcoming book offers a “conservative case for class actions.” As you read this piece, consider the various arguments in support of aggregation, from the perspective of individuals, the market, and the government. What incentives are there for aggregation, what structures are in place to control these incentives, and what methods of policing them are appropriate?

Why aggregate

Samuel Issacharoff & John Fabian Witt, *The Inevitability of Aggregate Settlement: An Institutional Account of American Tort Law*, 57 VAND. L. REV. 1571 (2004)

Judith Resnik, *From Cases to Litigation*, 54 LAW & CONTEMP. PROBS. 5 (1991)

The Fair Labor Standards Act of 1938 § 16

Judith Resnik, “Vital” State Interests: From Representative Actions for Fair Labor Standards to Pooled Trusts, Class Actions, and MDLs in the Federal Courts, 165 U. PA. L. REV. 1765 (2017).

How to aggregate

Federal Rule of Civil Procedure 23 (1966)

MDL Statute, 28 U.S.C. § 1407

Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950)

Eisen v. Carlisle & Jacquelin, 417 U.S. 156 (1974)

Andrew D. Bradt & D. Theodore Rave, *The Information-Forcing Role of the Judge in Multidistrict Litigation*, 105 CALIF. L. REV. 1259 (2017)

American Bankers Ins. Co. of Florida v. Alexander, 818 So.2d 1073 (Miss. 2001)

Policy Department for Citizens' Rights and Constitutional Affairs, *Collective Redress in the Member States of the European Union*, PE 608.829 (2018)

Money and aggregation: who pays and how are lawyers funded?

Judith Resnik, Dennis E. Curtis & Deborah R. Hensler, *Individuals within the Aggregate: Relationships, Representation, and Fees*, 71 N.Y.U. L. REV. 296 (1996)

Federal Rules of Civil Procedure 23(g), (h) (2019)

Letter from U.S. Chamber Institute for Legal Reform to the Committee on Rules of Practice and Procedure of the Administrative Office of the United States Courts on Renewed Proposal to Amend Fed. R. Civ. P. 26(a)(1)(A), June 1, 2017

Odell v. Legal Bucks, LLC, 665 S.E.2d 767 (N.C. App. 2008)

Margaret H. Lemos, *Aggregate Litigation Goes Public: Representative Suits by State Attorneys General*, 126 HARV. L. REV. 486 (2012)

Policing aggregate litigation

John C. Coffee, Jr., *Class Action Accountability: Reconciling Exit, Voice, and Loyalty in Representative*, 100 Colum. L. Rev. 370 (2000)

Elizabeth Chamblee Burch, *Monopolies in Multidistrict Litigation*, 70 VAND. L. REV. 67 (2017)

Judith Resnik, *Reorienting the Process Due: Using Jurisdiction to Forge Post-Settlement Relationships among Litigants, Courts, and the Public in Class and Other Aggregate Litigation*, 92 N.Y.U. L. REV. 1017 (2017)

Brian T. Fitzpatrick, *Do Class Actions Deter Wrongdoing?* (Vanderbilt Law Research Paper No. 17-40, 2018)

April 8, 2019 The Critiques of Collective Action

Debate about the scope and use of collective action has laced the twentieth-century expansion of its use. We will return therefore to a mix of readings from last week as well as additional materials provided this week.

One set of questions revolve around the quality of representation, the utility of notice, and the shape of settlements. Hence, proposals are made to use technology (as discussed in the essay by Elizabeth Cabraser and Sam Issacharoff) to enhance participation. Another is to extend judicial authority in the post-settlement phase, as Professor Resnik proposed in the excerpt from *Reorienting the Process Due*, which we read last week. To think through these questions, review the excerpts from the class certification and settlement notices in this week's readings.

Last week's readings included discussion of the financing of collective actions. What is the idea behind a "common benefit"? Where does the money to pay attorneys come from under this approach, and how do—and should—judges calculate attorneys' fees? Look also at 42 U.S.C. § 1988, the Civil Rights Attorney's Fee Act of 1976. What incentives does it provide? Reflect then on the materials on "third party funding" from last week, which touch on both the utilities and

the criticisms. What is the difference between a lawyer's contingency fee relationship and third-party funding? Should third-party funding be regulated, and if so, how? Look in this week's readings at the summary of legislation, as of 2015, provided by the Conference of State Legislatures. Would any of those bills be desirable? What groups would be proponents?

Limiting finance is one way to limit collective action. Changing the inquiry on whether to certify a class is another. The Supreme Court's 2011 decision in *Wal-Mart Stores Inc. v. Dukes* focused attention on how to show "commonality" among people proposed to be members of a class. What is the test for commonality and why did Justice Ginsburg, in dissent, argue there was sufficient commonality? What questions about certification of class actions are raised by Justice Alito's 2018 decision in *Jennings v. Rodriguez*? How does the dissent, authored by Justice Breyer, respond? (In 2019, the Court returned to an aspect of the merits in *Jennings*; we provide a sketch of that ruling.)

Review the "Class Action Fairness Act of 2017." What requirements would it superimpose on Rule 23 and on MDLs? What information would plaintiff attorneys need to certify a class? To be paid for their work? To think more about the problem of "ascertainability," read the essay by Geoff Shaw. In what ways, according to Shaw, does this requirement undermine the purposes of Rule 23?

Another way to cut back on class actions is to preclude individuals from joining them through obligations to seek redress individually through arbitration. Doing so depends on using the 1925 Federal Arbitration Act (FAA), which authorized judicial 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 parties of relatively equal bargaining power contracted to do so. The Court rejected mandates when federal statutory rights were at stake and the more powerful party proffered the obligation to arbitration in a form agreement. See *Wilko v. Swan*, 346 U.S. 427 (1953). In later 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 *Epic Systems* decisions address the enforcement of bans on class action or joinder in cases in courts or in arbitration. We also excerpt legislation that would affect those rulings. Review the impact of the 2018 Injustice in Arbitration Act.

In 2015, after a major study, the Consumer Financial Protection Bureau sought to limit such bans, but its rule was blocked in the Senate. We summarize its regulatory proposal and then provide excerpts made by the lawyer for the U.S. Chamber of Commerce, arguing for arbitration obligations. We also provide some empirical evidence on the impact of such clauses, as people rarely arbitrate individually. The intersection between arbitration and collection of fees comes from excerpts of decisions by the Fifth Circuit and the Texas Supreme Court – disagreeing about whether arbitration obligations are enforceable against debtors if lenders seek criminal penalties.

We close with more criticisms of class actions from a lawyer, Ted Frank (at the Competitive Enterprise Institute, who has devoted his time to challenging class settlement) and from the U.S. Chamber of Commerce—seeking to stop the "spread" of class actions to Europe, where many countries and the European Union have expressed interest in expanding opportunities for collective redress, in a host of different ways.

Examples of notices from class certification and settlement (skim)

Class Certification Notice, *National Veterans Legal Services Program, et al. v. United States*, Civil Action No. 1:16-cv-00745-ESH (D.D.C. April 17, 2017)

Class Action Settlement Notice, *McKnight et al. v. Uber Technologies, Inc. et al.*, Case No. 3:14-cv-05615-JST (N.D. Cal. Sept. 6, 2017)

Improving Rule 23

Judith Resnik, *Reorienting the Process Due: Using Jurisdiction To Forge Post- Settlement Relationships Among Litigants, Courts, and the Public in Class and Other Aggregate Litigation*, 92 N.Y.U. L. REV. 1017 (2017) (review from last week)

Elizabeth J. Cabraser & Samuel Issacharoff, *The Participatory Class Action*, 92 N.Y.U. L. REV. 847 (2012)

United States District Court for the Northern District of California, Procedural Guidance for Class Action Settlements (Updated Dec. 5, 2018)

Financing Rule 23

The Civil Rights Attorney's Fee Act, 42 U.S.C. § 1988 (1976)

Georgia Bar Association, Sample Contingency Fee and Retainer Agreement Forms

Judith Resnik, Dennis E. Curtis & Deborah R. Hensler, *Individuals within the Aggregate: Relationships, Representation, and Fees*, 71 N.Y.U. L. REV. 296 (1996) (review from last week)

Heather Morton, *Litigation or Lawsuit Funding Transactions 2015 Legislation*, National Conference of State Legislatures (Jan. 8, 2016)

Limiting the Use of Rule 23

Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338 (2011) (review)

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

Nielsen v. Preap, --- S.Ct. ---- (Mar. 19, 2019) (optional)

Fairness in Class Action Litigation Act, H.R. 985, 115th Cong. (2017)

Geoff Shaw, Note, *Class Ascertainability*, 124 YALE L. J. 2354 (2015)

Limiting the Possibility of Filing Class Actions through Arbitration Clauses

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

Epic Systems Corp. v. Lewis, 138 S. Ct. 1612 (2018)

Bureau of Consumer Financial Protection, Arbitration Agreements Final Rule, 82 Fed. Reg. 33210 (July 19, 2017)

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)

The Critique of the Critique

Judith Resnik, *Diffusing Disputes: The Public in the Private of Arbitration, the Private in Courts, and the Erasure of Rights*, 124 YALE L.J. 2804 (2015)

Cynthia Estlund, *The Black Hole of Mandatory Arbitration*, 96 N.C. L. REV. 679 (2018)

Forced Arbitration Injustice Repeal Act, S. 610, 116th Cong. (introduced Feb. 28 2019)

Critiques of Collective Action Mechanisms

Ted Frank, Statement before the H. Jud. Comm. Subcomm. on the Constitution & Civil Justice: Examination of Litigation Abuse (Mar. 13, 2013)

U.S. Chamber Institute for Legal Reform, *The Growth of Collective Redress in the EU: A Survey of Developments in 10 Member States* (Mar. 2017)

April 15, 2019 Remedying Economic Injustice in Courts

We end the semester by reflecting on what we have discussed as we look toward how reforms—responding to economic inequalities in courts—might take shape. What kinds of interventions are wanted and how could the political will to make changes be generated? How are reformers seeking to marshal public opinion? Can constituencies with different world views and understandings of the problems find common ground?

The Chamber of Commerce’s attacks on class actions exemplify one set of efforts aiming to reform the system—by cutting back on the ability to bring class actions. That approach posits “economic injustice” to be the use of courts to pressure defendants into unfair settlements and the overpricing of innovation through excessive use of liability rules. The first reading for this class exemplifies this aggressive critique. It comes from the American Tort Reform Foundation—a group that the Center for Justice and Democracy has tied to funding by major tobacco, pharmaceutical, and insurance companies, and that provides an annual report of what it terms “Judicial Hellholes.” What are the organization’s main objections to how courts—and judges—work today? How does that approach differ from the report by the Chamber of Commerce, excerpted for the last class, critiquing class actions and third-party financing? We have provided a few excerpts from organizations coming from other perspectives, including Arnold Ventures, Pew Charitable Trusts, and the American Constitution Society. What would an exchange among these commentators entail, or do their visions of the problems and solutions lack a common ground?

What role has the media played in providing windows into the problems or in generating shared narratives? Coverage of the problems of poverty in courts has expanded in the last decade. We link to three in-depth accounts of the experiences of individuals with limited income and wealth facing court-imposed bail or debt.

What kinds of rules, legislation, or interpretations of the U.S. or state Constitutions would you propose? Is there an argument for abolition—of fines, fees, and bail—from current law or does such a reform require legislative revisions? Consider the reforms in Illinois and California. Compare the ordinances eliminating certain probation fees in San Francisco and Alameda County. A memo from the New York Civil Liberties Union outlines a pending proposal for bail reform in New York. What are the differences between the pieces of legislation? What kind of “ill advised reforms” in other states do you think NYCLU worries about? Finally, we look closer to home at reforms in Connecticut, where the legislature is considering eliminating charges for phone calls from state prisons. Who are advocates and what would be the basis for opposition?

Given these readings, what reform agendas aiming to mitigate the costs of courts would you recommend? Should the end-goal be abolition of fines, fees, or cash bail? Would it be better to work for reductions of egregious or particularly burdensome practices? What counts as modest reform or movement towards abolition? What practices (such as day fines) would you advocate—where and why? What are the venues to pursue? Local or state legislatures? Litigation? Review the conflicting decisions on the enforceability of mandates to arbitration when debt collectors seek to enlist state prosecutors in obtain repayment.

We turn then to a short excerpt from an essay by Monica Bell, which reminds us that the problems of poverty in court stem from the racialized criminalization of poverty. We end with Lincoln Caplan’s analysis of the scope of unmet legal needs, the impact of market capitalism in the legal profession, and the importance of “champions in national politics” for access to justice in order to accomplish the original goal of the legal services movement: reducing inequality and economic insecurity. This reading is in dialogue with our first class, in which we asked, “Are courts rights?” While our first question of the semester framed the question as a descriptive one, subsequent readings over the course of the semester asked whether courts should be at the center of a rights-focused discussion. Now we ask, if meaningful access to legal systems should be a government-subsidized right, how do we make it so?

Building Political Will

AMERICAN TORT REFORM FOUNDATION, JUDICIAL HELLHOLES 2018-2019 (2018)

Stephen J. Newman, *Use of Expert Testimony at the Class Certification Stage After Wal-Mart v. Dukes*, Federalist Society Class Action Watch (June 2012)

ARNOLD VENTURES, STATEMENT OF PRINCIPLES ON PRETRIAL JUSTICE AND USE OF PRETRIAL RISK ASSESSMENT (2019)

PEW CHARITABLE TRUSTS, STATEMENT ON PUBLIC SAFETY (2019)

Danielle Conley & Arielle Levinson-Waldman, Issue Brief, *Discriminatory Driver's License Suspension Schemes*, American Constitution Society (Mar. 2019)

The Role of the Media

Selected media coverage of fines and fees (skim, at links):

Sarah Stillman, *Get Out of Jail, Inc.*, NEW YORKER (June 16, 2014),
<https://www.newyorker.com/magazine/2014/06/23/get-out-of-jail-inc>

Matthew Shaer, *How Cities Make Money by Fining the Poor*, N.Y. TIMES MAG. (Jan. 8, 2019), <https://www.nytimes.com/2019/01/08/magazine/cities-fine-poor-jail.html>

Josie Duffy Rice & Clint Smith, *Justice in America Episode 1: Justice for the Rich, Money Bail* (July 25, 2018) (podcast), <https://theappeal.org/justice-in-america-episode-1-justice-for-the-rich-money-bail/>

Remedies

Price Control

Supreme Court of Illinois, *Supreme Court Announces Changes to Make Court Costs More Manageable* (Feb. 13, 2019)

Abolition

Ordinance Amending the Administrative Code to Abolish Fees Associated with Probation Costs, Restitution, Booking, the Sheriff's Work Alternative Program, the Automated County Warrant System, the Sheriff's Home Detention Program, and to Abolish Local Penalties Associated with Alcohol Testing and Court-Ordered Penalties for Misdemeanor and Felony Offenses, City and County of San Francisco Administrative Ordinance – Criminal Justice System Fees and Penalties, Ordinance 131-18 (passed June 5, 2018, effective July 1, 2018)

An Ordinance Amending Section 2.42.190 of the Administrative Code to Eliminate Probation Fees; Repealing Resolution 2011-142 Regarding Public Defender/Conflict Counsel Fees for Representation of Indigent Adults; and Eliminating Sheriff's Work Alternative Program Administrative and Attendance Fees, Alameda County, Cal., Ordinance No. 2018-67 (Dec. 4, 2018)

New York Civil Liberties Union, Legislative Memorandum: Bail Elimination Act (2019)

An Act Concerning the Cost of Telecommunications Services in Correctional Facilities, Committee Bill No. 6714, Connecticut General Assembly (2019)

The Scope of the Problem

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

Henry v. Cash Biz, LP, 551 S.W.3d 111 (Tex. 2018)

Monica C. Bell, *Hidden Laws in the Time of Ferguson*, 123 HARV. L. REV. F. 1 (2018)

Lincoln Caplan, *The Invisible Justice Problem*, 148 DAEDALUS 19 (2019)