

THE LIMAN CENTER REPORTS: 2018



Crack, Jury Chairs, Warren County Courthouse, Warrenton, Missouri, 1975
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Who Pays? Fines, Fees, Bail, and the Cost of Courts

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Pricing People Out of Justice

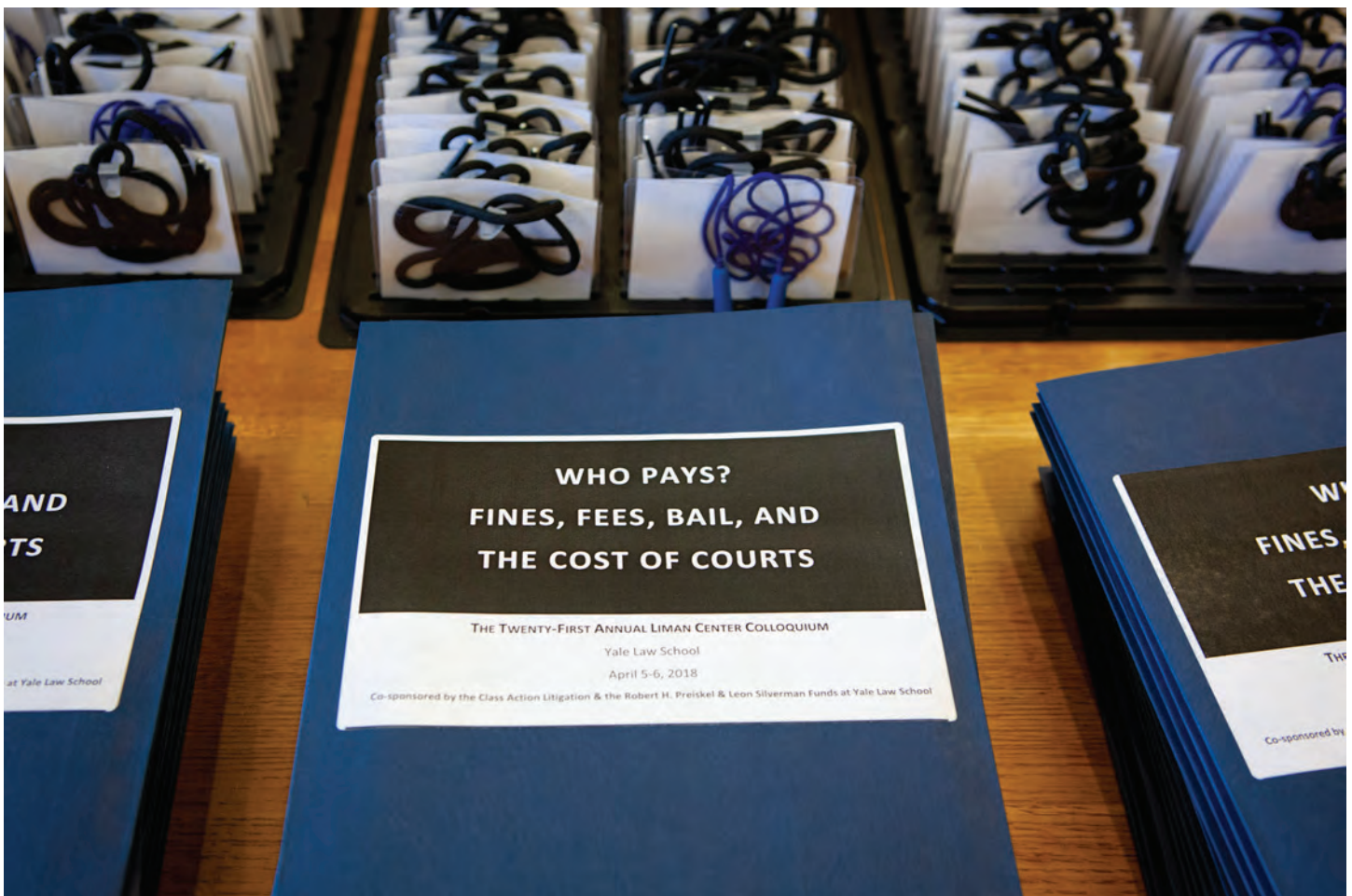
Who pays to run our courts? What are the charges imposed on participants? And what happens to people who cannot afford to pay? In this era of declining government budgets, of large numbers of people involved in the civil and criminal systems, and of high arrest and detention rates, these questions have become central.

The Liman Center took up the issues in its weekly seminar, *Rationing Access to Justice in Democracies: Fines, Fees, and Bail*, and in its 2018 Colloquium, *Who Pays? Fines, Fees, Bail, and the Cost of Courts*. The edited volume of background readings is available online (see www.law.yale.edu/liman). We devote the bulk of this Report to discussion of the economic challenges faced by courts and participants and of the efforts underway to roll back what has come to be termed as “legal financial obligations” (LFOs)—and what, more bluntly, is “court debt.”

Court funding has long depended on a mix of general tax revenue, fees charged to users, and fines imposed as sanctions. In recent decades, courts have increased both the amounts and the array of fees, surcharges, and fines. Litigants—whether plaintiffs or defendants—can be charged for filing papers in

court or for obtaining transcripts, for opting to have a trial, and for facilities such as family waiting rooms and libraries. Criminal defendants are exposed to yet other charges—to post money bail, to “register” for a “free” lawyer, to pay for electronic monitoring or drug testing, for meetings with public or private probation officers, and sometimes for detention itself. In addition to charges for “services” in civil, criminal, and administrative processes, monetary sanctions can be imposed. Race, class, and gender lace these discussions, as the burdens of court debt—like the harms of incarceration—impose special hardships on subsets of our polity.

This Report and the edited online volume explore how constitutional democracies should respond to meet their obligations to make justice accessible to all disputants and to make fair treatment visible to the public. Below, we provide brief excerpts of essays sketching some of the research on and projects to reform court debt. The Liman Center and its Fellows join with many other researchers, litigators, and organizations in exploring how to develop a more just legal system, even as that goal continues to be elusive.



Limiting Legal Debt

To many people who use the courts, a single fee may not be onerous. But when court fees multiply and when incomes are limited, the consequences can be life-altering. Two introductory essays highlight the ongoing work in law schools, where research projects aim to document and then to change policies that overtax individuals.

Jeff Selbin outlines how court fees have harmed families in California. Under his guidance, a clinical program at Berkeley Law School demonstrated the harsh impact and prompted California to enact new legislation limiting fees for families of juveniles caught in the legal system. That work has become a model for other jurisdictions, including Louisiana, where in 2018 the Orleans Parish Juvenile Court adopted a resolution that judges not impose fees unless required by statute.

The discussion by Mitali Nagrecha and Ranit Patel provides an overview of the range of monetary obligations incurred in the criminal justice system and how, in a locality in North Carolina, they have helped to introduce the concept of proportionality so that the amount of debt is not overwhelming. Nagrecha directs Harvard Law School's National Criminal Justice Debt Initiative, which has mapped the costs imposed around the United States.

We then turn to projects of current and former Liman Fellows who have represented individuals and groups who have been subjected to fees or who have lost their licenses because of their inability to pay court costs. Katie Chamblee-Ryan and Josh Bendor joined with others in challenging the fees for a "diversion program," which ostensibly aims to take people out of the criminal justice system, but which, through a myriad of fees, causes individuals of limited means to stay in the program or risk jail. Jonas Wang details the litigation in Tennessee in

which the state suspended the driver's licenses of those unable to pay fees until lawsuits stopped the practice. Rachel Shur hones in on New Orleans, where courts have found aspects of the criminal justice process—from policing to prosecution to defense lawyers, courts, and jails—unfair and unconstitutional.

Money bail raises discrete problems for criminal defendants. In jurisdictions across the country, people who are arrested must post bail in order to be released. An extended effort in the 1960s aimed for profound bail reform, and Yale Law School graduates Patricia Wald and Daniel Freed were at its helm. But the "war on crime" cut back on those reforms and substituted presumptions of detention and high bail schedules.

Crystal Yang of Harvard Law School has documented the impact for those unable to post bail and held instead in detention. She offers an innovative argument that the "risk" analysis, which usually focuses on a person's "risk of flight" or of committing further crimes, be revised. Yang turns the focus onto the "risk" to a person who, if detained, could lose a job and community ties and become more likely to be convicted and remain incarcerated. Her insights and other empirical research have been the basis for lawsuits challenging money bail systems.

As of this writing, lower courts have found unconstitutional aspects of the bail system in Harris County, Texas, and in California, and appeals are pending. Political will is needed to design and implement alternatives. Timothy Fisher is both the Dean of the University of Connecticut School of Law and Co-Chair of the Connecticut Task Force on Access to Legal Counsel in Civil Matters. His essay focuses on how to craft legislation to change money bail.

California and the Promise of Debt-Free Juvenile Justice

Jeff Selbin

Clinical Professor of Law, UC Berkeley School of Law;
Faculty Director, Policy Advocacy Clinic



\$25 a day for detention. \$15 a day for electronic monitoring. \$90 a month for probation supervision. \$30 for each drug test. \$300 for a public defender.

According to lawyers and law students at the East Bay Community Law Center, these were just some of the fees routinely charged to families with youth in the Alameda County (Oakland) juvenile legal system. The fees were not supposed to punish youth, but they often added up to thousands of dollars per family.

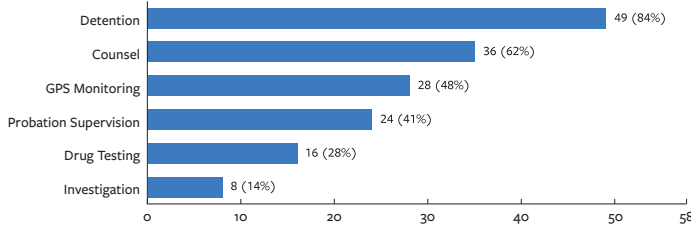
In Berkeley Law's Policy Advocacy Clinic, we began investigating Alameda County's juvenile fee practices in 2013 by

interviewing key stakeholders, including youth, families, advocates, and probation and collection officials. We surveyed the chief probation officers in every California county, and we sent Public Records Act requests to selected others.

What we found shocked us:

First, juvenile fees were pervasive. California law permitted counties to bill parents and guardians for a wide range of administrative costs associated with their child's involvement in the juvenile system. The state first authorized detention fees in the 1960s, and lawmakers approved additional fees during the 1980s and 1990s. Counties increased local fee amounts significantly in response to the budget crisis of the Great Recession. In 2009, for example, Alameda County increased its juvenile fees tenfold. As recently as 2016, 57 of 58 California counties charged one or more of these fees.

California Counties Charging Juvenile Fees (2016)



Second, juvenile fees harmed families. The fees caused financial distress by forcing families to choose between paying fees or buying necessities. In particular, we found that the fees contribute to family disunity and incentivize perverse outcomes. We interviewed a grandmother on leave from the U.S. Army who was considering relinquishing the custody of her grandchild to the state because of fee debt. Not surprisingly, criminologists have found that juvenile fees correlate with increased recidivism. In other words, juvenile fees undermine both rehabilitation and public safety, the twin purposes of the juvenile system.

Third, juvenile fees were regressive and racially discriminatory, falling hardest on low income families of color. Because Black and Brown youth are punished more frequently and harshly in the juvenile system—and most juvenile fees are assessed according to the severity and duration of the sanctions—we found that juvenile fees compounded racial disparities. Even as juvenile caseloads have dropped in California and elsewhere over the last two decades, racial disparities have increased, so families of color bore an even greater share of juvenile fees. In Alameda County, for example, the family of a Black youth serving average probation conditions was liable for more than double the fees of a similarly situated family with a White youth.

Juvenile Fees & Race in Alameda County, CA (2013)

Race and Ethnicity	Total Fee Liability	Average Probation Conditions			
		Juvenile Hall (days)	Probation Supervision (months)	Electronic Monitoring (days)	Drug Testing (tests)
		\$25.29/day	\$90.00/mo.	\$15.00/day	\$28.68/test
Black	\$3,438	25	22	34	11
Latino	\$2,563	24	14	33	7
Asian	\$2,269	7	12	56	6
White	\$1,637	11	10	21	5
Other	\$1,192	4	6	31	3

Fourth, juvenile fees were imposed unlawfully. We found that many counties assessed fees in violation of state law, including charging fees not authorized by statute and charging fees to families of youth who are not found guilty. We found counties that violated federal law by charging families for meals for their children while obtaining reimbursement for those same costs from national meal programs. And we found counties engaged in a range of other fee practices that violate constitutional guarantees of due process and equal protection by failing to assess families' ability to pay and by charging families for costs related to public safety.

Finally, many counties netted little revenue from juvenile fees. In our fiscal analysis of a sample of California counties, we

found that most jurisdictions did not recoup significant net revenue. In fact, because of the high cost and low return associated with trying to collect fees from poor families, counties spent on average more than 70 cents of every dollar of fee revenue on collection activities. For example, Santa Clara County lost money in fiscal year 2014–15, spending more than \$450,000 to collect less than \$400,000 in juvenile fees.

California Juvenile Fee Revenue & Collection Costs (2014–15)

County	Revenue	Collection Costs (% of Revenue)	Youth Support (% of Revenue)
Alameda	\$419,830	59.77%	40.23%
Contra Costa	\$430,926	67.38%	32.62%
Orange	\$2,071,347	82.07%	17.93%
Sacramento	\$682,636	32.53%	67.47%
Santa Clara	\$399,228	112.72%	-12.72%

Armed with this disturbing data about juvenile fee practices, we worked closely with advocates and policymakers to pursue reform. We published a 2016 report about juvenile fees in Alameda County that called for an immediate fee moratorium. In response to our findings, the County Board of Supervisors ended all juvenile fee assessment and collection, and two other large Bay Area counties (Santa Clara and Contra Costa) quickly followed suit.

We subsequently published a 2017 report about fee practices across California and included a recommendation to repeal the fees statewide. After a nearly two-year advocacy campaign informed by courageous youth and guided by the Western Center on Law & Poverty, in October 2017 Governor Jerry Brown signed into law Senate Bill 190, a bipartisan fee repeal bill. Effective January 1, 2018, SB 190 revoked county authority to assess all juvenile fees.

Notably, SB 190 did not discharge fees charged prior to 2018—leaving families with roughly \$375 million in outstanding bills. As a result of ongoing efforts led by clinic students, counties have voluntarily ended collection on almost 200,000 accounts, relieving families of well over \$200 million in previously assessed fees. Currently, more than \$150 million remains under active collection, which often entails aggressive billing practices such as intercepting families' tax refunds, garnishing their wages, levying their bank accounts, and chasing them into bankruptcy.

We are cautiously optimistic that continued advocacy will root out most of the remaining fees. All counties will eventually end collection as the old charges become stale and revenue drops. Even once collection activity ends, however, much of the debt will remain in civil judgments and liens. And many families made payments on fees that were charged unlawfully. To date, we have persuaded fourteen counties to discharge outstanding judgments and liens, and at least one county has begun refunding unlawfully collected fees to families.

Sadly, California is not alone in charging juvenile fees. Thanks to a pathbreaking 2016 report by the Juvenile Law Center, we know that most states authorize juvenile fees. Our best estimate is that youth and their families across the country are suffering

under several billion dollars in outstanding fee assessments, with tens or hundreds of millions of dollars in new fees imposed annually. In some states, youth can have their probation extended or even be detained for failure to pay juvenile fees, in effect creating debtors' prisons for kids.

Fortunately, with support from the Laura and John Arnold Foundation, we are working closely with the Juvenile Law Center and other activists, advocates, and academics on a multi-year effort to end juvenile fees across the country. The goal of our #DebtFreeJustice campaign is to reach a tipping point, after which any jurisdiction that charges juvenile fees will be the exception and not the norm. Juvenile fee reform will vary among and within states. California now stands as proof that fee abolition, and not just tinkering, is possible. For more information, see *Making Families Pay*, Berkeley's Policy Advocacy Clinic, at www.law.berkeley.edu/experiential/clinics/policy-advocacy-clinic.

The Need for Proportionality in Criminal Justice Debt Practices

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Over the last few years, jurisdictions across the country have begun implementing criminal justice debt reforms. These efforts have revitalized the Supreme Court's 1983 case, *Bearden v. Georgia*, which requires courts to consider willfulness before incarcerating individuals for nonpayment of fines and fees. While policymakers have instituted changes beyond *Bearden's* specific mandate, the goals of the movement are often defined as ending harsh enforcement practices such as debtors' prisons and driver's license revocations, and finding solutions under *Bearden's* framework.

Reformers are right to focus on remedying the worst harms first, but the movement's emphasis on *Bearden* runs the risk of avoiding a larger conversation about how to achieve justice in individual cases. At the Criminal Justice Policy Program (CJPP),

our goal is to spark this broader discussion with a focus on proportionality. Through our work advising judges on fees and fines reform across the country, we have found proportionality to be a helpful guiding framework in developing a set of policies we view as necessary to reform. These policies would likely fall under *subjective proportionality*, as we advocate for punishment tailored to an individual's crime, ability to pay, and personal circumstances. With this framing, we design reforms for proportionate financial penalties at sentencing and proportionate responses to nonpayment.

Over the last two years, CJPP has used this proportionality framework to create a bench card for judges in Charlotte-Mecklenburg, North Carolina. Under state law, individuals charged with the lowest level misdemeanor (including acts like littering and trespassing) face one to ten days in jail or a maximum \$200 fine. In addition to the fine, individuals with convictions face hundreds of dollars in fees, some of which are imposed only on indigent individuals, including a \$60 fee for a public defender. While some judges imposed modified financial-penalty amounts based on individuals' ability to pay, more often, when individuals were unable to pay their financial penalties at sentencing, they were placed on probation and a payment plan. Judges reported that they set the length of probation to accommodate collections rather than in proportion to the nature of the offense. Individuals with low-level misdemeanors were commonly sentenced to probation for at least 12 months, and often for two years.

These sentences were disproportionate relative to the sentences received by non-indigent individuals who could pay their fines and fees immediately. They were also out of proportion with the individual's initial offense. Two years of supervision for trespassing is simply not necessary to achieve justice. To address this problem, we advise courts to adopt meaningful ability-to-pay determinations at sentencing that explicitly consider how long an individual should be in the system.

The ultimate fairness of the sentence hinges on this ability-to-pay inquiry, so it must be done well. Yet, recent ability-to-pay reforms entrench unequal treatment of indigent individuals in two ways. First, vague ability-to-pay standards (such as "substantial hardship") and specifically enumerated factors (such as other debts, education level) provide insufficient guidance to judges and lead to inconsistent treatment of defendants and high monthly payment amounts. Second, payment plans tied to individual's ability to pay can last indefinitely. Many reform states are enacting new requirements to consider ability to pay in setting monthly payment amounts, but are setting no upper limit on how long an individual will be required to pay. Such reforms ensure states continue to collect, but do not proportionately tailor legal financial obligations ("LFOs"). Instead, they extend the period of punishment.

These are problems with solutions. Over 30 countries in Europe and Latin America currently set fines based on the severity of the offense committed and the financial circumstances of

individuals. Often referred to as *day fines*, these systems are a model for setting fair payment amounts based on individuals' daily wage. In Charlotte-Mecklenburg, we used a similar model. We suggested that LFOs be set at 10% of an individual's net monthly income after basic living expenses. Our bench card also included presumptions of indigence and factors for determining ability to pay to help judges determine when and how to depart from our baseline suggestion. We addressed the problem of indefinite payment plans by suggesting judges limit the amount of time an individual remains on a plan based on the nature of the crime. For low-level offenses for which individuals previously paid \$300 over two years, they would instead be ordered to pay \$10 per month for six months. We provided the judges with clear guidance for setting a fair, proportionate penalty, rather than giving them a broad mandate to "do better," and they were receptive to our recommendations. While imposing proportionate LFOs at sentencing goes a long way towards a more equitable system of fines and fees, should individuals fail to pay, our system must also respond proportionately.

Throughout the country, when individuals fall behind on their payments, they face harsh consequences. In addition to the harshest consequences—driver's license revocation and incarceration—there are a number of recurring harms individuals experience. Missed payments, even because of an inability to pay, lead to court appearances, orders to show cause, warrants, and arrests. When individuals fail to appear for a hearing—perhaps because they can't afford to pay or they have no access to transportation—they face additional punishment, often including new criminal charges. This entanglement with the justice system persists so long as individuals hold outstanding debt, which can often be for decades. Judges may view these life disrupting responses to nonpayment as collection methods rather than as additional punishment, but to the individuals experiencing them, this is a distinction without a difference. Viewed from our proportionality lens, this spiral of consequences is inappropriate given the underlying crime and the lack of culpability associated with inability to pay.

In Charlotte-Mecklenburg, we worked with the judges to reduce the use of orders to show cause and warrants in response to nonpayment or failure to appear. Instead, judges in Charlotte-Mecklenburg now rely on reminders to respond to nonpayment. After three reminders, the Court may issue an order to show cause, but only after a judge reviews the case and determines that modification of the amount owed, waiver, or civil judgment of remaining fees and fines would not better serve the interests of justice. (CJPP has concerns about the use of civil judgments but the jurisdiction included this as an option for judges under current state law.) Judges consider the original charge and indicia of poverty, and determine whether orders to show cause or warrants are necessary and proportionate responses to nonpayment. Judges must conduct the same analysis before issuing a warrant for failure to appear; this is often a difficult reform to adopt because of judges' concerns about failures to respect their authority and courtroom management.

Underlying these changes is the recognition that inability to pay requires a proportionate, non-punitive response.

Shifting our focus towards proportionality helps us craft policy changes that address the inequalities inherent in current practices of imposing and enforcing fines and fees. Preliminary data shows that our work in Charlotte-Mecklenburg has led payment plan amounts and orders for arrest to decrease by almost half. As we continue to monitor the results of our work, we are hopeful for more evidence of success and believe this model can produce similar results in jurisdictions across the country. For more information, see <http://cjpp.law.harvard.edu/criminalization-of-poverty>.

Challenging Predatory Diversion Programs

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In Maricopa County, individuals accused of marijuana possession can be eligible for a "diversion" program to avoid felony prosecution. But the diversion program costs money. The program itself imposed fees of \$950 to \$1000 and then requires drug tests at many intervals in a week. Each test costs \$15 or \$17. The fees are hefty, as a *New York Times* headline reflected. See Shaila Dewan, *Caught with Pot? Get-Out-of-Jail Program Comes with \$950 Catch*, *New York Times*, August 24, 2018.

People who can afford to pay and who meet other requirements can finish the program in 90 days and no longer face prosecution. People who cannot afford to pay have to stay on the program until they have paid off the program fees. In addition, participants are required to pay for drug tests at the time of each test. If they cannot afford to pay, they are not allowed to take the test at all, and it counts against them as if they had failed. Thus, people who do not take drug tests solely because they cannot afford to pay can be failed out of the diversion program. The result is that they are ultimately prosecuted for felony possession of marijuana, while those with funds could avoid prosecution.

On August 23, 2018, Chamblee-Ryan and Bendor, along with others, filed a class action lawsuit on behalf of former and current participants in the marijuana diversion program to challenge the diversion program's policies. The lawsuit alleged that between 2006 and 2016, Maricopa County "collected nearly \$15 million in revenue by diverting threatened prosecutions" to its "Treatment Assessment Screening Center." The complaint argues that these policies violate the Fourteenth Amendment to the U.S. Constitution because they penalize people solely because of their poverty and that they violate the Fourth Amendment because they subject people to searches solely because of their poverty.

Stopping Driver's License Suspensions

Jonas Wang, Liman Fellow 2016–2018
Attorney, Civil Rights Corps, Washington, DC



Wang is class counsel in two cases challenging Tennessee's license revocation or suspension for nonpayment of fines and fees. Wang is joined by the National Center for Law and Economic Justice, Just City, and the Tennessee law firm of Baker Donelson. In *Thomas v. Haslam*, filed in January 2017 in federal court in Tennessee, a class of plaintiffs responded to a Tennessee statute

that became effective in 2012. That statute mandated license revocation for people who did not, within a year of conviction, pay court fines and fees that were assessed as part of those convictions, whether for misdemeanors or felonies.

The Tennessee statute had no provision for an inquiry into whether a person was willfully refusing to pay or could not afford to do so. The result was that individuals too poor to pay were losing their licenses on top of whatever sentence and punishment was imposed for the underlying misdemeanor or felony convictions.

The impact was profound. Between 2012 and 2016, more than 140,000 people had their licenses revoked under the statute. Not having a driver's license makes it hard—or impossible for some—to get to work, take care of families, get groceries, see doctors, and do so much else. In practice, some people drove and then were sent to jail for driving without a license.

The plaintiff class argued that these procedures violated the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the U.S. Constitution. In July 2018, the Honorable Aleta A. Trauger of the Middle District of Tennessee agreed. See *Thomas v. Haslam*, 2018 WL 3301648 (M.D. Tenn. July 2, 2018). The court ruled that Tennessee could not revoke driver's licenses without notice and opportunity for a hearing to determine that

the nonpayment was willful. Judge Trauger wrote:

[T]he ability to drive is crucial to the debtor's ability to actually establish the economic self-sufficiency that is necessary to be able to pay the relevant debt. It does not require reams of expert testimony to understand that an individual who cannot drive is at an extraordinary disadvantage in both earning and maintaining material resources. . . . There is reason to believe that taking away a driver's license is not merely out of proportion to the underlying purpose of ensuring payment, but affirmatively destructive of that end. . . . This court previously suggested that taking a person's driver's license away to try to make him more likely to pay a fine is more like using a shotgun to treat a broken arm. Maybe it is more like using the shotgun to shoot oneself in the foot.

In short, when "applied to indigent drivers, the law is not merely ineffective; it is powerfully counterproductive." Judge Trauger ordered Tennessee's Department of Safety to halt license revocations unless and until it offered the constitutionally required procedures and substantive determinations of ability to pay.

The court also ordered the Department of Safety not to withhold reinstatement of licenses for individuals who had already had their licenses revoked under the statute. The result were hundreds of calls to the agency by people seeking to get back their licenses. The court also called on the agency to submit a plan outlining how it would identify and reinstate licenses revoked under the statute. An appeal is pending, and the only aspect of the decision stayed was the requirement of creating a plan to identify those harmed by the policy. See Richard A. Oppel, Jr., *Being Poor Can Mean Losing a Driver's License. Not Anymore in Tennessee* (*New York Times*, July 4, 2018).

Another case, *Robinson v. Purkey*, was filed in September of 2017, also by Civil Rights Corps and their colleagues. The lawsuit is focused on Tennessee's suspension of driver's licenses for nonpayment of a subset of court debt—fines, fees, and litigation taxes from traffic citations and driving offenses. According to data provided by Tennessee, this statute resulted in over a quarter million license suspensions in Tennessee. The same district court judge who decided the *Thomas* case rejected efforts to have the case dismissed and, as of the fall of 2018, is considering arguments that the practice should be enjoined. *Robinson v. Purkey*, 326 F.R.D. 105 (M.D. Tenn. 2018).

The case proceeds against the state agency that suspends the licenses, but whether the case will proceed to judgment against the local governments is in question because of some policy changes that took place after the lawsuit was filed. The local governments defending the case—Wilson County and the City of Lebanon—adopted new rules requiring courts to provide notice of ability-to-pay hearings. If a "traffic debtor" requests a hearing, the court must provide one. The policy also created categories of presumptive indigence if an individual's income falls below 200% of the federal poverty level, or if an individual

receives a means-tested federal or state benefit, or fills in a short affidavit demonstrating lack of financial means. A person who is deemed indigent is protected from license suspension for inability to pay.

Wang is also part of a group litigating a proposed federal class action case, *McNeil v. CPS*, which challenges the treatment of individuals on probation in Giles County, Tennessee. Private companies Community Probation Services, LLC, and PSI Probation, LLC threatened poor people with probation violations, which can lead to jailing and more debt, if people did not pay fees charged by the companies or fines and fees assessed by Giles County.

In the summer of 2018, the lawyers sought to restrain Giles County and its Sheriff from putting named plaintiff Indya Hilfort in jail on a warrant for “violation of probation.” This warrant had a money bond amount set at \$2,500 without inquiry and findings on her ability to pay. Her violation was that she was charged with a new crime. Despite the presumption of innocence, the rules of these private companies turn an accusation of a crime into a violation of probation. Ms. Hilfort could not post bail and she feared losing her job and being separated from her children.

The Honorable William L. Campbell of the Middle District of Tennessee granted a temporary restraining order, which was subsequently extended by agreement of the parties, to keep her out of jail. As of this writing, the lawyers are pursuing the same protection for others on a class-wide basis, in the form of a preliminary injunction against Giles County and the Sheriff for enforcing other such violation-of-probation warrants that tell people either to post bond or go to jail—without any judge finding that people have the ability to pay. Giles County argued that it was not responsible, but did not dispute that systemic constitutional and statutory violations have occurred.

Aiming to Limit the Impact of Financial Hardships in the Big Easy

Rachel Shur, Liman Fellow 2017–2019

Orleans Public Defenders



Indigent criminal defendants in Orleans Parish, Louisiana, find themselves shuffled through an array of broken institutions. Their communities are policed by a law enforcement agency that since July 24, 2012 has been subject to a consent decree to rectify misconduct. The U.S. Department of Justice had filed *United States v. The City of New Orleans* based on its view of widespread practices of unlawful policing.

Defendants are incarcerated in a jail that has been the

subject of civil rights litigation begun in 1969. Since 2013, the jail has been governed by another consent decree. The U.S. Department of Justice filed *Jones v. Gusman* after it had written, as required by the Civil Rights of Institutional Persons Act (CRIPA), to Orleans Parish Sheriff Marlin Gusman. The U.S. government filings detailed the lack of safety at the jail, the rampant violence, the excessive use of force by deputies and prison staff, and the lack of adequate medical and mental health care.

Indigent defendants are also prosecuted by a district attorney's office whose violations of constitutional law pepper the pages of Criminal Procedure textbooks. Cases like *Connick v. Thompson*, *Kyles v. Whitley*, and *Smith v. Cain* involved the failure to turn over exculpatory evidence to defendants charged with first-degree murder.

The public defender's office obligated to protect these defendants' rights is itself the subject of a federal class-action lawsuit alleging that its high caseloads and lack of resources fail to provide defendants with their Sixth Amendment right to counsel. All this occurs within a court system that is substantially funded by the fines and fees defendants are forced to pay—or end up incarcerated in a modern-day debtor's prison.

In short, failures across the board call into question the basic legitimacy of the court system within Orleans Parish and perpetuate a cycle of criminal indebtedness and incarceration that is morally and constitutionally unacceptable. Under current budgetary provisions, the court is asked to generate its own revenue to continue operating. The judges themselves are thus tasked with collecting their operating expenses from the very individuals over whose cases they preside. In 2018, this structural conflict of interest was ruled unconstitutional by a federal judge in *Cain v. City of New Orleans*. As former Criminal District Court Chief Judge Calvin Johnson told a reporter in 2010, “I was as guilty of [this funding scheme] as any when I was on the bench, but you have to fund yourself in some fashion. And so you did it on the backs of the people who were least able to pay.”

The inescapable fact is that the criminal justice system in Orleans Parish deals primarily with, and takes primarily from, poor black residents charged with crime. In Orleans Parish, poverty and incarceration are closely intertwined. The rate of incarceration in New Orleans is nearly twice the national average. Likewise, the poverty rate in New Orleans is double the nationwide average, with nearly a quarter of residents living below the poverty line. Eighty-five percent of defendants in the Orleans Parish court system qualify as indigent and are eligible for representation by an attorney from the Orleans Public Defenders Office. New Orleans's black residents are disproportionately involved in the criminal justice system and are disproportionately poor. Eighty percent of the incarcerated population in Orleans Parish identifies as black. The median household income for black residents of New Orleans is \$26,819—57% lower than the median income of white households.

Having worked in New Orleans since 2017 as a Liman Fellow at the Orleans Public Defenders, I focus on responding to these

many inequities facing our indigent clients. In an office where our attorneys dedicate their rationed time to avoiding lengthy jail sentences for their clients, we have traditionally failed to advance the full host of Due Process, Equal Protection, and Louisiana statutory arguments to curtail imposition of fines and fees upon our clients. I have been able to build and maintain institutional knowledge within the public defender's office by creating training materials, form motions, and appellate filings for our attorneys to use when the courts attempt to impose and collect excessive sums from our indigent clients.

As a result, judges have begun to assess clients' ability to pay at sentencing, waive fines and fees for indigent defendants, and consider alternatives to financial impositions. By filing motions for many of our clients charged with court costs statutorily limited to apply only to defendants who were not indigent, we've been able effectively to stop the practice of judges imposing illegal financial obligations and have had clients absolved of hundreds of dollars of improper court debt.

In addition, I am assisting in obtaining waivers for court-ordered GPS monitoring (which costs our clients \$10 per day in monitoring fees), and I am working on collecting and reporting data for use by outside organizations litigating state and federal lawsuits targeting fines and fees practices in Orleans Parish. As of this writing, I am set to argue against the Louisiana Attorney General in the Fourth District Court of Appeal in a case in which I represent individuals who face mandatory minimum fines. We assert that doing so to indigent defendants is unconstitutional.

In short, criminal justice reform work in New Orleans is an uphill battle in an often hostile atmosphere. Yet, in my time as a Liman Fellow, I have seen the steady progress that can be made when resources and effort are thoughtfully deployed in a place of need.

Empirical Evidence and the Criminal Justice System

Crystal Yang

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On any given day, over half a million defendants across the United States are detained pending trial. The scope is unprecedented and places the United States as the world leader in pretrial detention. In recent years, altering the current bail system has come to the forefront of reform efforts, with potentially unprecedented changes on the horizon stemming from litigation and legislative changes alike. At the same time, a new wave of empirical research has emerged, providing causal

evidence on the short- and long-term effects of pretrial detention.

What can this research, and economics more generally, teach us as we embark on bail reform? The goal of my commentary is twofold: to argue that empirical analysis plays an indispensable role in reform; and to illustrate one way in which empirical evidence can help us reform our bail system towards one that is more just, more equitable, and that enhances the well-being of individuals in our society.

First, I argue that not only *can* empirical evidence be useful in reform efforts in the criminal justice system, but that it *ought* to be used. Specifically, I believe that there is a *moral* case to be made for using empirical evidence in policy-making more broadly. My views on this issue are encapsulated by recent remarks made by Ruth Levine, director of the Hewlett Foundation's Global Development and Population Program. As Levine eloquently stated, evidence-based decision-making is "not only valuable as an instrument for technocrats, but is an expression itself of the timeless value of pursuing truth, justice, and human progress."¹ Importantly, this type of work is not a substitute for important value judgments that we as a society must make, but it is an integral part of how we translate our values and aspirations into action. We are tasked with decisions that on a daily basis affect the lives of tens of thousands of individuals, decisions that in the criminal justice system can have long-lasting if not intergenerational effects. To make these decisions on the basis of hunches or guesses or untested assumptions is morally indefensible, or as Levine says "lazy and irresponsible."

And in the context of bail, emerging research shows that millions of decisions every year are likely infected by heuristics and bias. Bail judges make massive mistakes in their pretrial release decisions if the goal is to minimize pretrial misconduct,² and bail judges over-detain black defendants because they seem to rely on exaggerated stereotypes about the riskiness of minority defendants.³ The consequences of these mistakes are staggering.⁴ I certainly do not argue that empirical evidence should be the only consideration when making policy, but I believe it is an essential tool that is too often ignored. Indeed, our refusal to integrate empirical evidence into the criminal justice system means we have been rolling the dice with people's lives. If we hold dear the values of truth, justice, and fairness, then we are

1. Ruth Levine, "The Moral Case for Evidence in Policymaking," William & Flora Hewlett Foundation (2017) (www.hewlett.org/moral-case-evidence-means-impact-evaluation)
2. Jon Kleinberg, Himabindu Lakkaraju, Jure Leskovec, Jens Ludwig, Sendhil Mullainathan, "Human Decisions and Machine Predictions," *The Quarterly Journal of Economics*, 133 (2018), 237-293.
3. David Arnold, Will Dobbie, and Crystal S. Yang, "Racial Bias in Bail Decisions," *The Quarterly Journal of Economics*, forthcoming.
4. See Will Dobbie, Jacob Goldin, and Crystal S. Yang, "The Effects of Pre-Trial Detention on Conviction, Future Crime, and Employment: Evidence from Randomly Assigned Judges," *American Economic Review*, 108 (2018), 201-240.

obligated to vigorously study the consequences of our current practices, to critically examine their pros and cons, and to investigate viable alternatives.

Second, I want to illustrate how we can use the new wave of empirical research on the pretrial system to think about new directions for bail using insights from the field of economics. One potential way to use this work is through cost-benefit analysis (CBA). As reflected in case law and bail statutes across the country, the decision of whether to detain an individual, and relatedly, the decision of what pretrial conditions to impose (such as monetary bail) reflect balancing several objectives. Judges are instructed to release as many defendants as possible to prevent the infliction of punishment prior to conviction. As the American Bar Association states in its pretrial release standards, “deprivation of liberty pending trial is harsh and oppressive, subjects defendants to economic and psychological hardship, interferes with their ability to defend themselves, and, in many instances, deprives their families of support.”

On the other hand, bail is meant to preserve the integrity of the court system by ensuring that defendants appear in court as required and, additionally in some jurisdictions, to protect the community by preventing the commission of new crimes. CBA provides a tractable framework in which to compare and weigh these competing objectives, as pretrial detention can impose both private and social costs, but simultaneously can yield social benefits in the form of preventing pretrial flight and new crime.

Recent empirical research shows that pretrial detention imposes both costs and benefits, and more speculatively, this work suggests that on net, detention generates far larger costs than benefits. The costs to defendants in terms of lost employment and wages up to several years following arrest, coupled with the criminogenic effects of pretrial detention, appear to largely outweigh the short-run incapacitative benefits to reducing new crime and flight.

This empirical evidence hints that dramatically reducing our reliance on detention or money bail may increase social welfare. If anything, there is reason to believe that the case for reduced reliance may be even stronger as we currently have insufficient evidence on the broader harms that pretrial detention may impose on families and communities. This is an area of research and scholarship that deserves far more attention than it has traditionally received. More work also remains to be done on the precise pretrial practices we may want to shift towards as we move away from our high detention rates, whether that be a default presumption of release on recognizance (ROR) or supervision as an alternative to detention. But this empirical evidence provides useful and objective information that sheds light on reform. In short, the evidence suggests that pretrial detention “does not pay.” For more analysis, see Crystal Yang, *Toward an Optimal Bail System*, 92 *New York University Law Review* 1399 (2017).

The Political and Institutional Framework for Successful Bail Reform Movements

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These comments focus on bail reform, and in particular the public dialogue, institutional engagement, and political steps that have and will continue to lead toward reform. Connecticut has certain advantages in this effort. We have a pre-existing robust system of support for pretrial services, including a well-developed risk assessment tool and staff trained in its use. We also have a Governor who has made criminal justice, including bail reform, a hallmark of his “Second Chance Society” initiatives.

We have made some progress already. But the system remains flawed in fundamental ways. First, we continue to have a money bail system that allows the worst outcomes: wealthy but dangerous defendants who go free, and others who are imprisoned though they pose neither danger nor a flight risk. So, efforts must continue.

Bail reform in Connecticut will require a constitutional amendment. Article I, § 8 of the Connecticut Constitution guarantees a right to bail. Courts need some means of detaining individuals who are dangerous or flight risks, and no rational risk-based approach can be enacted until that “right” to bail is repealed.

The experience in Connecticut of the forces bearing on this repeal are familiar, and similar to those in other states. First and foremost, the bail industry will oppose reform since it will eliminate its source of income. This is a \$2 billion industry countrywide, and there are many bail agents in Connecticut who would have to search for other work. There are also certain groups associated with law enforcement who believe that the bail system bolsters their power. The most powerful obstacle to change, however, is simple inertia and fear of change.

We can expect that a successful effort to overcome this resistance will consist of several initiatives. The first is convincing the leadership of the key institutions involved (judges, prosecutors, defense community) that bail reform is mandated by the principles underlying their mission. This should not be too difficult, as there is no principled basis for defending the money bail system. Further, many empirical studies reflect the harm caused by even a few days of imprisonment, which makes the imperative

for change even more urgent. Once the institutional leaders are converted, the reform movement gains greater credibility.

A second element of a reform movement would consist of public education through extensive communications through media channels regarding the injustice and self-defeating elements of the existing system.

A third element is forming coalitions across what would otherwise be widely divergent interests. In New Jersey, doing so entailed gaining support from former Republican Governor Chris Christie, who sought pretrial detention for defendants considered dangerous, while the defense and civil liberties communities needed to be convinced that the change would not significantly increase the number of pretrial detainees.

A fourth element might be powerful narratives, featuring stories of defendants whose lives and families were ruined by unjust detention, and others who were victimized by dangerous defendants who made bail and then went on to commit other crimes. While anecdote is never a justification for policy change, those opposed to reform will do so based on anecdotes in the absence of a principled or evidence-based grounds for opposition. It might be wise to have anecdotes available in response.

Finally, any reform effort has to include a recognition of the reactions of the most interested groups, whose immediate response will likely be a question of “what will this mean for me?” Police will lose the ability to set initial bail at the station

for warrantless crimes, thereby losing their ability to control the first night of detention. Prosecutors will lose the advantage of offering “time served” plea deals to defendants who effectively serve their entire sentence without ever being convicted. Judges may worry about bearing responsibility for allowing defendants to remain free pending trial, fearing that they will be blamed in the event of another crime by such a defendant, while under the current system, judges could simply say that they had no control over the defendant’s ability to post bail.

The forces of reform will continue to work towards a constitutional amendment. In the meantime, there are other things that can be accomplished. In particular, the Judicial Branch’s Court Support Services Division employs pretrial personnel who are responsible for the risk assessment process. They can be encouraged to recommend alternatives to money bail. Defense counsel should also argue against money bail in all cases where some alternative to address safety and flight risks is available. And while it would be difficult to accomplish, Connecticut could, without a constitutional amendment, remove from the police the role of setting initial bail for warrantless crimes and reserve that to a bail commissioner. That change might be accomplished along with a removal of the police role in choosing the initial charges against a defendant, so as to have that decision made by a prosecutor, as it is in most jurisdictions.

Realigning Costs and Incentives

Even when political will exists to reorganize bail or to reduce fines and fees, the question of court funding remains. Below, Gloria Gong proposes a “Pay for Success” model as an alternative method of funding court services. Robert Ebel discusses the way that public finance theories can be applied in the context of court fees. As he notes, economists have focused on the role of user fees in contexts like toll roads, water usage, trash pickup, and public parks, yet little attention has been given to how this body of research applies to the courts.

Could “Pay for Success” Help Catalyze Pretrial Reform?

Gloria Gong

Director of Research and Innovation, Government Performance Lab, Harvard Kennedy School



Where do tools like “Pay for Success” or other approaches used by the Government Performance Lab fit in with the tremendous work being done by bail funds, impact litigators, and national professional organizations? Much of this work lends powerful argument to why government ought to change its pretrial detention practices. The lens I bring from my work is what

set of tools can help governments take on and successfully implement system transformation.

I think that tools like Pay For Success (PFS) may have the most relevance for jurisdictions with reform-minded parties—perhaps a court or a county—that don’t have the necessary buy-in from state executives, legislators, or budget office leaders to implement a full-fledged reform. A tool like PFS would allow such a jurisdiction to run a demonstration project and carefully track internal government data in order to make the argument about why these reforms need budgetary and other support. Below, I outline some preliminary thoughts about how a tool like Pay for Success could help further pretrial detention reform efforts.

New Jersey has led the nation with one of the most ambitious reforms of pretrial detention, posting an impressive twenty percent decrease in its pretrial jail population in the first year. However, a recent report from the state’s courts warned that the program’s costs pose a serious threat to its sustainability—a

troubling but unsurprising result of imposing the costs of pretrial services and monitoring on the court system.

The New Jersey report demonstrates both the promise of bail reform and the need to marshal evidence that shows legislatures and state budget offices why they should fund pretrial services. Reform-minded stakeholders must be able to overcome the “wrong pockets” problem—the benefits of the new system, such as decreased jail costs, accrue to a different part of the system than the one implementing and paying for the change. The New Jersey report also brings to the surface the point that simply implementing pretrial release does not sufficiently address underlying causes: As the report points out, many individuals released from pretrial detention are in need of supports such as housing and mental-health and substance-abuse treatment. To be successful, reforms to pretrial detention must be paired with thoughtful development of pretrial services that help defendants avoid Failures to Appear in court and divert them to programs likely to reduce the need for incarceration overall.

The combination of the wrong pockets problem, the opportunity for improved services, and the need to make a data-driven case for sustained funding suggest that jurisdictions contemplating bail reform might consider PFS demonstration projects as stepping stones to larger reforms. In PFS projects, governments agree to make payments for a program based on rigorously demonstrated metrics of success. The program costs are paid for by third-party funders that take on the risk of program failure: If the success metrics are not met, the funders rather than the taxpayers lose their money.

Bail funds across the country are already doing heroic work using philanthropic and grassroots funding to demonstrate the benefits of allowing detainees to return to families, jobs, and communities, as bail funds develop models of supporting detainees in showing up for court. Like bail funds, PFS contracts are not a long-term solution to the challenges endemic in the current system. Rather, PFS could build on work done by bail funds and others by offering a set of tools that engage governments as partners in piloting innovations that require significant systems changes.

Capturing benefits: One of the core aspects of PFS contracts is their potential to break down barriers between siloed parts of government. For example, a PFS contract in pretrial detention reform could commit a government to tracking and capturing benefits generated outside of the court system, including reduction in jail usage. PFS contracts also allow governments to bridge the gap between the upfront spending on preventive services and the savings that are often generated farther in the future. A PFS project addressing chronic homelessness in Massachusetts, for example, allowed the state to invest in permanent supportive housing designed eventually to reduce the need for emergency shelter—smoothing the transition when the state was still paying for both.

Rigorous evaluation: Good PFS projects use rigorous evaluations and data analysis to track outcomes for individuals served

as well as metrics such as provider performance and potential cost savings. If the tested approach works, the implementing agency is armed with the data to explain to the state’s budget office, legislature, or judiciary why more support in the form of dedicated funding and permanent changes to existing practices may be warranted. PFS projects are best used to generate rigorous evidence about the outcomes of an intervention that, if successful, can be taken to scale through direct funding.

Improved services: PFS projects are not just performance contracts; they rest on creating outcomes-focused, data-driven improvements to the way individuals are served that last long beyond the specific project. Governments have leveraged PFS projects to use data to target interventions to the individuals most at risk for poor outcomes, improve the handoff between government and service providers to prevent individuals from falling through the cracks, and establish data-driven collaborations with providers to improve the outcomes of services. One of the main challenges of reforming pretrial detention practices, for example, is establishing effective pretrial services that, in addition to supervision and monitoring, may also include interventions such as sending text messages to remind releasees to appear for their court dates, and handoffs to social services such as community-based substance-abuse treatment.

Because PFS deals can be slow and costly to set up, a government should use them only if it thinks there are significant barriers to undertaking the reform directly. But for jurisdictions considering reforms to bail and pretrial detention and in need of additional groundwork around feasibility, infrastructure to capture savings, or improvements to service-delivery systems, Pay for Success may be an approach worth considering.



Fees and Fines: An Economist's View of Who Should Pay for Courts

Robert D. Ebel

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In *Bearden v. Georgia* (1983), the U.S. Supreme Court held that an indigent defendant could not be jailed for an inability to pay a fee or fine unless the defendant had “willfully refused to pay the fine or restitution when he has the resources to pay or has failed to make . . . efforts to seek employment or borrow money to pay” However, the Court stopped short of giving clear

guidance on the meaning of either ability or willingness to pay. The U.S. Constitution is explicit that once a person is convicted of a crime, the fines imposed shall not be excessive.

Yet, in practice things can go badly. It is not uncommon for a state or local court to impose a combination of charges that range from fees to access the courts to fees plus fines that cause low-income defendants to lose employment and be forced into a lifetime of poverty for themselves and their family. A national alert about how fines and fees punish the poor gained nationwide attention following the 2014 police shooting of Michael Brown in Ferguson, Missouri. The U.S. Department of Justice investigation into those events found that the city’s emphasis on revenue generation had a “profound effect” on the police department’s approach to law enforcement. And, as recent examinations of the trends in state courts further reveal, Ferguson is not an isolated example.

(Some) Public Finance Economics: The purpose of this essay is to take a public finance economics view of the topic “who should pay?” when it comes to the matter of fees that apply to innocent and guilty alike, and the fines assessed for those found guilty. There are two normative precepts that apply, focused first on the benefits received and second on the ability to pay.

The Benefits doctrine holds that people should pay for the public services they receive. Taxes and fees are seen as prices paid for public services similar to what the consumer pays for purchasing a private good or service. If the payment is fair—there is a match between “who benefits” and “who pays”—then the system is fair. It is about “getting the prices right.”

Fees: There are two groups that benefit from access to justice, and here the Benefits doctrine comes into play. The first

is clear-cut: the accused. In economics jargon, the benefits of access are internal to the defendant. The second is those who are not directly involved in a judicial activity, but who nevertheless gain from having a system that is available to all citizens and, too, who want to keep the option open for their own use if needed at another time. Now the benefits flow to external parties—they are shared by all. This leads to the policy conclusion that for a society that declares equality and liberty for all, access to justice not only has important aspects of a pure public good (no one can be excluded), but also, that in getting the prices right, the benefits are so broad that the cost of access should be funded through general taxes, not fees.

Fines: Dating back to Adam Smith, the Ability doctrine calls for people to contribute to the cost of government according to one’s capacity to pay. Again, things can go terribly awry. Other essays in this 2018 Report and elsewhere document that low-income defendants may plead guilty to a charge just to avoid further fines and penalties on unpaid fines and/or end up in the vortex of an often corrupt bail system. This said, it is also important that when a person is convicted of breaking the law, a penalty must be assessed.

Again, the task is about “getting the prices right.” There are two matters to consider. The first is that in measuring ability to pay, it is important to keep it simple. Two centuries ago, property and wealth revealed ability to pay; today income is the preferred indicator. Yes, in concept, ability includes more than current income (e.g., change in net asset worth plus even some forms of imputed income), but for purposes of measuring “ability” there is a compliance and administrative case to be made to go with current income. If income is not available, proxies are. Income in this calculation may be zero or even negative.

The second, which is related to the first, is to recognize that society can achieve a high degree of equity by pegging a penalty to a convicted defendant’s opportunity cost. An example is the approach used in several European countries whereby offenders with different abilities to pay and who commit the same crime pay the same “day fine”—that is, a similar proportion of their income as distinct from the same absolute amount of money. There are also non-monetary approaches (which can be monetized) including community service and/or some form of restitution.

Finally, on the matter of *Bearden’s* willingness to pay: It is not a good working approach. Willingness is a concept that can be used to ascertain how much a user values a public service. This works for finance and funding of infrastructure where there is a market-like exchange among parties, but justice system fines and fees are a one-way government coercion.

* The views expressed are those of the author and not the Andrew Young School.

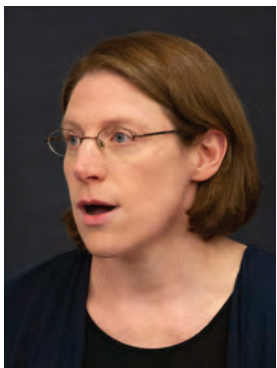
Rethinking the Legal Parameters

Cases like *Bearden v. Georgia* form the backbone of much of the litigation against fines, fees, and bail systems. Today, even with the retrenchment in the law of equality and due process, this line of cases continues to have a profound effect in the lower courts. Yet as Cary Franklin details, in arenas other than courts, the challenges of poverty are not recognized, resulting in what she has termed “class blindness.” Of course, the risk is that the limiting law may foreshadow restrictions on the scope of *Bearden* and related decisions. Arguments against doing so come from Danieli Evans, who explains the analytic missteps in analyses of relative and absolute deprivations.

The New Class Blindness

Cary Franklin

W.H. Francis, Jr. Professor, University of Texas School of Law



Legal advocates have scored some major class-related victories in 2018. In January, an appellate court held that the administration of California’s money bail system violated the Fourteenth Amendment rights of indigent defendants. In February, the Fifth Circuit held Harris County’s money bail procedures unconstitutional on the ground that they keep the “poor arrestee” behind bars “simply because he has less

money than his wealthy counterpart.” But holdings that explicitly vindicate the constitutional rights of people without financial resources remain rare, and that rarity bolsters the widespread perception that American constitutional law offers virtually no protection against class-based discrimination.

It is true that class-based discrimination does not trigger heightened scrutiny under the Equal Protection Clause, the way that race-based and sex-based discrimination do. Fifty years ago—in the era of *Gideon v. Wainwright*—it looked to many as if the Court was poised to recognize the poor as a protected class or perhaps, as some argued, to recognize a constitutional right to some form of minimum welfare. But in *San Antonio v. Rodriguez* and the abortion funding decisions, the Burger Court both declined to recognize the poor as a protected class and rejected the idea that the Constitution guarantees minimum welfare.

Scholars have often viewed those decisions as excising all class-related concerns from Fourteenth Amendment law. But that view has obscured an important and ongoing form of class-related constitutional protection: one that resides not in equal protection but in fundamental rights doctrine. My project (more fully explained in *The New Class Blindness*, forthcoming in volume 128 of the *Yale Law Journal*) examines the long-standing and often overlooked forms of class-related constitutional protection the Court has developed in the fundamental rights context. The undue burden test the Court uses to assess the constitutionality of abortion regulations is one such form of

protection. To determine whether an abortion regulation is constitutional, the Court asks whether it imposes an undue burden on the subset of women who are actually affected by it—a group that in many cases consists of poor women. If a regulation unduly burdens those women’s rights, it is unconstitutional—even if it does not unduly burden the rights of wealthier women.

The Court has developed a similar test in the context of voting. In cases involving voter ID laws, for instance, it asks whether the ID requirement unduly burdens not the average voter, but those for whom the requirement actually constitutes an obstacle. And, of course, there are numerous criminal procedure cases still on the books in which the Court protects rights essential to equal justice for indigents. Occasionally, the Court even expands this line of cases.

It should not be surprising that fundamental rights doctrine continues to protect people without financial resources, despite the Court’s very pronounced shift to the right in the 1970s. Concerns about class helped to drive the Court’s recognition of a number of key fundamental rights in the first place; such concerns were thus embedded in the marrow of fundamental rights doctrine from the start. It is easy to see how class-related concerns motivated the Court to require the government to provide indigent criminal defendants with lawyers and trial transcripts. But, my new project shows, such concerns also informed the Court’s decision to recognize birth control and abortion as fundamental rights. The struggles of poor women—and the very real dangers they faced as a result of the criminalization of birth control and abortion—helped Americans in the 1960s to see how such bans deprived people of equal citizenship and encroached on the basic forms of liberty the Fourteenth Amendment was designed to protect. The Burger Court was not willing to extend heightened scrutiny to all class-based discrimination, or to require the government to provide its citizens with affirmative welfare benefits. But it did not excise all class-related concerns from Fourteenth Amendment law. Although the Court has narrowed some of the protections it affords fundamental rights, it has never held—or even suggested—that class-related concerns are irrelevant to the constitutionality of laws that impinge on such rights.

Today, however, these remaining forms of class-based constitutional protection are under threat from what I call “the new class blindness.” Some judges—even some Supreme Court Justices—have begun to argue that it is constitutionally

impermissible for courts to take class into account under the Fourteenth Amendment. The Fifth Circuit reached this conclusion a few years ago in the *Whole Woman's Health* case, in which it asserted that judges could consider only obstacles created by “the law itself” when determining whether a law unduly burdens the right to abortion—a category that excluded obstacles such as lack of transportation, childcare, days off from work, and money for overnight stays. When *Whole Woman's Health* reached the Supreme Court, some of the Justices (in dissent) expressed support for this approach.

A number of Justices have also expressed support for this class-blind approach in the voting context, asserting that courts in voter ID cases should ask whether the law imposes an undue burden on the average voter (who, of course, already possesses a government-issued ID). In both the reproductive rights and voting contexts, judicial advocates of the new class blindness cite Burger Court precedents in support of the proposition that it is illegitimate to take class into account under the Fourteenth Amendment. Indeed, Justice Thomas has argued that a good number of the Warren Court's criminal procedure decisions are no longer good law for this reason: they took account of class in a way the Court later rejected.

This is a misreading of the law. The Burger Court certainly narrowed class-based constitutional protections. But it did not hold that class is irrelevant where fundamental rights are concerned. Indeed, the opposite is true: The Court has consistently preserved doctrinal mechanisms for taking class into account in the area of fundamental rights. Thus far, a majority of the Justices have rejected the new class blindness in every context in which it has arisen.

Whether the Court will continue to resist these increasingly insistent efforts to dismantle class-related fundamental rights protections remains to be seen. Ultimately, the fate of these efforts depends on constitutional politics and judicial appointments, and it is unclear which way these will turn. What is clear is that the emergent notion that class-based considerations have no place anywhere under the Fourteenth Amendment is a product not of the Burger Court era, but of our own.



The Senseless Distinction Between Absolute and Relative Deprivation

Danieli Evans

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The Supreme Court has long recognized that “the ability to pay . . . bears no rational relationship to a defendant's guilt or innocence,” and “[i]n criminal trials a State can no more discriminate on account of poverty than on account of religion, race, or color.” Those words, from the Supreme Court's 1956 decision, *Griffin v. Illinois*, applied to a series of cases that followed: *Williams v. Illinois* (1970); *Tate v. Short* (1971); *Bearden v. Georgia* (1983). These cases stand for the principle that governments cannot imprison people or extend their prison sentences solely because they are indigent and incapable of paying a fine or posting bail. Stating the principle at the heart of these cases more abstractly: Severity of punishment should not be a function of wealth—in other words, if two people are equally culpable, one should not be punished more severely based on poverty.

Yet the courts have not carried this principle through to its logical conclusion. While the current law requires relief for people who are deemed “indigent”—have no means whatsoever of paying a fine/fee/bail—it does not require any relief whatsoever for people who are relatively poor, but not quite indigent. Governments are allowed to charge the same flat-rate fines/fees/bail to everyone who is not indigent, regardless of how poor or wealthy they are. These flat-rate fine/fee/bail schedules impose much more significant hardship on the relatively poor, compared to wealthier people: For example, if the flat-rate bail for a given offense is \$1000, for someone who earns just above minimum wage (but is not indigent), paying will likely require huge sacrifice. Individuals can be placed in the situation of foregoing food, rent, a birthday gift for a child, asking family members for money, or taking out a high-interest loan. This person is under significantly more coercion to serve jail time, compared to a wealthier person, for whom \$1000 is a drop in the bucket. Current law fails to recognize this disparity as a form of impermissible wealth discrimination, even though it imposes significantly greater hardship on relatively poorer people.

This limitation in the law is due to an unprincipled distinction between “relative” and “absolute” deprivation. The Court introduced this distinction in *San Antonio v. Rodriguez* (1973). It upheld Texas's policy of financing education through local property taxes, which meant that poorer school districts had fewer educational resources—even when they taxed themselves at

higher rates than wealthier ones. The Court reasoned that this policy was acceptable because Texas was not altogether denying a class of indigent people an education, it was only providing poorer people relatively fewer educational resources. Hence, under *Rodriguez*, the state could not *absolutely* deprive a defined class of indigent children of an education, but so long as everyone gets some basic level of education, the state can maintain a system whereby poorer people get relatively worse education.

This distinction between relative and absolute deprivation is arbitrary and unprincipled. Equal treatment means that the protected trait should not influence one's treatment in any way, whether it be absolute denial of a benefit or relatively inferior access. To make this point more concrete: If (as the Court has held) governments cannot deprive poor people of a vote, by the same principle, they should not be able to count poorer peoples' ballots as 50% of a vote, or make it more difficult for poorer people to vote—for example, by making them wait at the back of the line. Likewise, if the government cannot altogether deprive poor children of a public education, it should not be able to give poorer children only 2%, 20%, or even 50% of the educational resources that the state provides to wealthier ones.

Apply this logic to fines, fees, and bail: If the government cannot imprison indigent people because they are absolutely unable to afford a fine/fee/bail, it should not be able to make it substantially more difficult for relatively poorer (but non-indigent) people to buy their freedom than it is for wealthier counterparts. This is the effect of flat-rate fine/fee/bail schedules. There is no principled argument for punishing poorer people more harshly than wealthier people who commit the same offenses. If the Fourteenth Amendment prohibits punishing a person more severely because they are poor, it should prohibit flat-rate fine/fee/bail schedules, and instead require these payments to be adjusted for wealth. This would mean that the fine/fee/bail for any particular offense or service is set in terms of a proportion of the individual's income/wealth, rather than as a flat-rate dollar amount. Only under this system would freedom from prison no longer be a function of wealth.

It may seem like such a scheme would be administratively unworkable. But there are several successful models: Finland and other Scandinavian countries have long recognized and have used a "day fine" system, where fines are set in terms of a specific number of days of the offender's income. So the larger the offender's daily income, the larger the dollar amount of the fine. As Beth Colgan described in a 2017 article, there have been at least six day-fine pilot projects in the U.S., and studies of these pilot projects found that they were administrable and did not compromise the need to raise revenue. Even though lower income offenders were fined less money, they were likelier to pay the fine.

This research suggests it could be feasible for jurisdictions within the U.S. to adopt income-adjusted fine/fee/bail schedules. Undoubtedly it would involve significant restructuring, and there are always up-front costs associated with this. But

the same is true of many of the most important and celebrated constitutional decisions, such as ending segregated schooling, requiring *Miranda* warnings, and guaranteeing all criminal defendants the right to counsel. The challenges associated with restructuring should not justify falling short of the fundamental constitutional principle that severity of punishment should not depend on a person's wealth.

The Arthur Liman Center for Public Interest Law

Who Pays? Fines, Fees, Bail, and the Cost of Courts

The Twenty-First Annual Liman Center Colloquium

Thursday, April 5, 2018
Fines, Fees, Bail, and the Financing of Justice: Political Will and Paths to Reform
4:10 - 6:00 pm

Alison Harris, Professor, University of Washington, Department of Sociology
Nathan Hecht, Chief Justice, Supreme Court of Texas, National Task Force on Fines, Fees, and Bail Practices
Dorland Malloy, Governor, State of Connecticut
Mary McQueen, President, National Center for State Courts, National Task Force on Fines, Fees, and Bail Practices
Blaine Wood, Chief Judge, US Court of Appeals for the Seventh Circuit
Judith Kevork, Action Issues Professor of Law, Yale Law School, Moderator
Jocelyn Downes, Liman Center for Public Interest Law

Friday, April 6, 2018

Understanding the Challenges
Faced by Low-Income Litigants 8:45 - 10:00 am
Brendan Beasley, Staff Attorney, ACLU Central Law Reform Project
Andrew Hammel, Lecturer, The University of Chicago Law School
Drew Keener, Senior Director, National Center on Poverty Law
ACLS of Southern California
Jeffrey Sebbin, Chief Law Professor, UC Berkeley School of Law
Nancy Steiner, Policy Advisory Clinic
Monika Bell, Associate Professor of Law, YLS, Moderator
Lizian Rubin, 2010-2011

Bail and Bond
Emily Madden, Staff Writer, New York Times Magazine
Nina Rubin, Clinical Professor of Law, University of Arizona College of Law
Cynthia Rosen, Associate Professor of Law & Policy Program
Senior Lecturer in Residence, 2012-2013
Paul Hagan, Senior Fellow and Academic Director, Quinoneo Center for the
100th Anniversary of Justice, University of Pennsylvania Law School
Robyn Steinberg, Moderator, The Red Project
Kathleen O'Rourke, Clinical Associate Professor of Law, YLS, Moderator
Lizian Rubin, 2008-2009

The Consequences of Legal Debt
Nancy Gertner, U.S. District Court, D. Mass. (Ret.)
Senior Lecturer on Law, Harvard Law School
Michael Moore, J.D. Candidate at Yale Law School
P.D. Cantelano, Director of Government
Mimi Nagelsch, Director, National Criminal Justice Policy Institute
Criminal Justice Policy Program, Harvard Law School
Kath Fisher, Professor of Criminal Justice, Harvard Law School
Director and International Court Institute
Staff Counsel, National Task Force on Fines, Fees, and Bail Practices
Shy Wood, Director of Justice Policy, Yale Institute of Justice
Senior Lecturer in Residence, 2011-2012

**Legal Theories of Mandates for Change:
Litigating Economic Barriers to Courts** 1:30 - 3:00 pm
Beth Colgan, Assistant Professor of Law, UCLA Law
Cary Franklin, Will Francis, Jr. Professor, University of Texas School of Law
Alex Karantatzis, President & Executive Director, Civil Rights Corps
Bera Siegel, Nicholas Dahl, Karantatzis Professor of Law, YLS
Ivy Wang, Staff Attorney, Southern Poverty Law Center
Lizian Rubin, 2012-2014
Marian Gohara, Clinical Associate Professor of Law, YLS, Moderator

Political Will and Making Change 3:15 - 4:30 pm
Bill Gendelson, Co-Chair, Task Force to Improve Access to
Legal Counsel in Civil Matters; Founder, Gendelson & Silver, LLC
Derek Cohen, Director, Center for Effective Justice
Texas Policy Foundation and Right to Crime
The Fisher, Co-Chair, Task Force to Improve Access to
Legal Counsel in Civil Matters; Dean & Professor of Law,
University of Connecticut School of Law
Mikaela Kravitz, Faculty Director, Fair and Just Prosecution
University of Connecticut School of Law
Mike Lawlor, Under Secretary for Criminal Justice
Policy and Planning, Connecticut
Cathy Malloy, First Lady, Criminal Justice Reform Advocate, Connecticut
Steven Piliavin, Chair of Illinois's Substantive Court Fee Task Force;
Pastor, New Garden Episcopal
James Forman, Professor of Law, YLS, Moderator

**Alternative Financing
and Alternative Norms** 4:45 - 6:00 pm
Robert Doh, Consultant and former Lead Economist,
World Bank Institute
Lisa Foster, Co-Director, Fines and Fees Justice Center;
California Superior Court, San Diego (Ret.)
Gloria Gong, Director of Research and Innovation,
Government Performance Lab, Harvard Kennedy School
Tania Kravitz, Professor of Law, Georgetown Law School
Joanna Weiss, Co-Director, Fines and Fees Justice Center
Crystal Yang, Associate Professor, Harvard Law School
Anna Vaccaro, Professor, Liman Center, YLS, Moderator

co-sponsored by
The Class Action Litigation Fund & the Robert H. Preiskel & Leon Silverman Fund

Doing More on the Price of Justice

The 2018 Liman Center Colloquium: Who Pays? Fines, Fees, Bail, and the Cost of Courts

The essays excerpted in the previous pages provide a glimpse of the many discussions at the 21st Annual Liman Colloquium, held in the spring of 2018. As the titles of the sessions and the brief descriptions of the questions reflect, the Colloquium explored the reasons why fees and costs have risen, the ways in which courts and legal services are financed, and how to make changes. Panelists from jurisdictions around the country brought an array of experiences, expertise, and insights. The extent of court reliance on user fees made plain the ambition required to move from the regressive tax system that exists to other models.

Credit for the volume of readings goes to Yale Law Students Natalia Friedlander, Illyana Green, Michael Morse, and Skylar Albertson, who were the Liman Student Directors for the weekly seminar and who compiled and edited the volume of readings, available at www.law.yale.edu/liman.

Fines, Fees, Bail, and the Financing of Justice: Political Will and Paths to Reform



Nathan Hecht, Chief Justice, Supreme Court of Texas, and a Member of the National Task Force on Fines, Fees, and Bail Practices; Tina Vagenas, Chief Counsel of the Access to Justice Initiatives, National Center for State Courts; Alex Harris, Presidential Term Professor, University of Washington, Department of Sociology; Dannel Malloy, Governor of Connecticut; Diane Wood, Chief Judge, U.S. Court of Appeals for the Seventh Circuit; Judith Resnik, Arthur Liman Professor of Law

Democracies promise “open courts” and “access to justice,” yet the costs of participation in courts price many people out and create debt for those who are in courts. Hence, we began by asking about why fees, surcharges, and fines have risen; how the problems differ in state and federal courts; the role played by overly punitive criminal justice policies; and what reforms are needed and possible.

Understanding the Challenges Faced by Low-Income Litigants



Andrew Hammond, Of Counsel, The Sargent Shriver National Center on Poverty Law and Lecturer at The University of Chicago Law School; Brandon Buskey, Staff Attorney, ACLU Criminal Law Reform Project; Devon Porter, Liman Fellow, 2016–2018, ACLU of Southern California; Jeff Selbin, Clinical Law Professor, Berkeley Law School; Monica Bell, Associate Professor of Law, Yale Law School, Liman Fellow, 2010–2011

A significant body of research has examined the legal financial obligations imposed by courts. This session gave an overview of the charges levied by public and private sector actors and of when and how fees are waived.

Bail and Bond



Paul Heaton, Senior Fellow and Academic Director, Quattrone Center for the Fair Administration of Justice, University of Pennsylvania Law School; Emily Bazelon, Staff Writer, New York Times Magazine, and Truman Capote Fellow, Yale Law School; Nina Rabin, Director, Immigrant Family Legal Clinic, UCLA Law School, Senior Liman Fellow in Residence, 2012–2013; Marisol Orihuela, Clinical Associate Professor of Law, Yale Law School, Liman Fellow, 2008–2009; Robin Steinberg, Founder, The Bail Project

Money bail for criminal defendants and bond for individuals in immigration detention are vivid instances in which liberty is linked to economic resources. Researchers have documented the impact of the fees imposed by the bail bonds industry, and by court rules and schedules. Litigators have argued that several systems are unconstitutional. Reform efforts vary, as some focus on abolishing money bail, while others seek to lower the amount of bail imposed, create “freedom” funds to assist individuals to post bail, and help them appear as required. This session explored the debates about whether a system focused on detention of only those “dangerous,” as contrasted with those unable to pay, would result in more or fewer people in jail.

The Consequences of Legal Debt



Michael Morse, J.D. Candidate at Yale Law School and Ph.D. Candidate in Harvard's Department of Government; Keith Fisher, Principal Consultant and Senior Counsel, Domestic and International Court Initiatives, National Center for State Courts; Mitali Nagrecha, Director, National Criminal Justice Debt Initiative, Criminal Justice Policy Program, Harvard Law School; Nancy Gertner, Senior Lecturer on Law, Harvard Law School, and U.S. District Court for the District of Massachusetts (retired judge); Jon Wool, Director of Justice Policy, Vera Institute of Justice; Fiona Doherty, Clinical Professor of Law, Yale Law School, Senior Liman Fellow in Residence, 2011–2012

What are the costs on the ground for people who cannot afford to pay court fees? This session looked at the consequences—from losing driver's licenses to voting rights, from being held in detention to being priced out of seeking child support. A robust literature maps both the harms and directions that state and federal courts can take to intervene.

Legal Theories of Mandates for Change: Litigating Economic Barriers to Courts



Alec Karakatsanis, Founder and Executive Director, Civil Rights Corps; Ivy Wang, Staff Attorney, Southern Poverty Law Center, Liman Fellow 2013–2014; Cary Franklin, W.H. Francis, Jr. Professor, University of Texas School of Law; Beth Colgan, Assistant Professor of Law, UCLA Law School; Reva Siegel, Nicholas deB. Katzenbach Professor of Law, Yale Law School; Danieli Evans, Research Scholar in Law, The Justice Collaboratory, and Ph.D. candidate, Yale Law School; Miriam Gohara, Clinical Associate Professor of Law, Yale Law School

High costs are problematic, but are they illegal? This session looked at interpretations of state and federal constitutions, some of which guarantee “open” courts and “rights to remedies,” as well as equal protection, due process, and prohibitions on excessive fines. In addition to mining the parameters of these guarantees, the discussion considered rulings from abroad. In the U.K. and in Canada, recent decisions have relied on laws committing governments to provide courts as the basis for finding unlawful fees that impose “substantial” hardships, in contrast to a focus on indigency alone.

Political Will and Making Change



Mike Lawlor, Under Secretary for Criminal Justice Policy and Planning, Connecticut; Cathy Malloy, First Lady, and Criminal Justice Reform Advocate, Connecticut; Tim Fisher, Dean and Professor of Law, University of Connecticut School of Law, and Co-Chair, Task Force to Improve Access to Legal Counsel in Civil Matters; Bill Clendenen, Co-Chair, Task Force to Improve Access to Legal Counsel in Civil Matters; Stephen Pflaum, Chair of Illinois's Statutory Court Fee Task Force; Miriam Krinsky, Executive Director, Fair and Just Prosecution; James Forman, Professor of Law, Yale Law School

This panel explored the various avenues for reforming the law and changing culture, from the perspectives of prosecutors, policy makers, academics, and reform advocates. In Connecticut and Illinois, legislators have created task forces charged with mapping out reforms—specifically, reviewing and revising fee systems in Illinois and understanding barriers to accessing counsel in Connecticut. Those projects are part of the nationwide efforts addressing “A2J”—access to justice—and a wave of committees and reports that look hard at “court assessments” and map their injustices. Legislative reforms are on the table in many jurisdictions, and other changes come about because of executive leadership.

Alternative Financing and Alternative Norms



Crystal Yang, Associate Professor, Harvard Law School; Joanna Weiss, Co-Director, Fines and Fees Justice Center; Lisa Foster, Co-Director, Fines and Fees Justice Center, and California Superior Court, San Diego (retired judge); Anna VanCleave, Director, Liman Center, Yale Law School; Tanina Rostain, Professor of Law, Georgetown Law School; Gloria Gong, Director of Research and Innovation, Government Performance Lab, Harvard Kennedy School; Robert Ebel, affiliated Senior Research Associate, Andrew Young School of Policy Studies, George State University

We ended where we began by asking: Who pays? Even if many of the proposals to limit fees and fines were put into place, the question of financing remains. Change entails developing new models of costs, services, and processes in order to support both courts and users. Possibilities include innovative technologies, new structures for assessments and collections for those able to pay, and alternative revenue sources. This session looked at the options and explored ways to make change sustainable.



Nathan Hecht, Chief Justice, Supreme Court of Texas, and Diane Wood, Chief Judge, U.S. Court of Appeals for the Seventh Circuit



Nina Rabin, Director, Immigrant Family Legal Clinic, UCLA Law School, Senior Liman Fellow in Residence, 2012–2013, and Marisol Orihuela, Clinical Associate Professor of Law and Liman Fellow 2008–2009, Yale Law School



Michael Lawlor, Under Secretary for Criminal Justice Policy and Planning, Connecticut, and Cathy Malloy, First Lady and Criminal Justice Reform Advocate, Connecticut



Michael Morse, class of 2019 Yale Law School, Ph.D. Candidate in Harvard's Department of Government



Reva Siegel, Nicholas deB. Katzenbach Professor of Law, Yale Law School (right), and Danieli Evans, Research Scholar in Law, The Justice Collaboratory, and Ph.D. candidate, Yale Law School (left)



Terry Segal, Yale Law School class of 1967, and Nancy Gertner, Senior Lecturer on Law, Harvard Law School, U.S. District Court for the District of Massachusetts (retired judge)



Anna VanCleave, Director, Liman Center; Olevia Boykin, Liman Fellow 2018–2019; Steve Bright, Harvey Karp Visiting Lecturer in Law, Yale Law School, and former President of Southern Center for Human Rights; My Khanh Ngo, Liman Fellow 2017–2018; and Yusuf Saei, Liman Fellow 2018–2019

Poverty and Courts: The 2018–2019 Liman Center Agenda

By convening the 2018 Colloquium, the Liman Center joined many ongoing efforts to address the impact of the financial needs of litigants and of courts. A brief snapshot is in order. In 2016, the National Center for State Courts (NCSC) created the NCSC National Task Force on Fines, Fees, and Bail Practices. Many state judiciaries and bar associations have commissioned working groups.

A new nonprofit, the Fines and Fees Justice Center, formed in 2018, has launched a national clearinghouse so that research, litigation, and media coverage of these problems is readily accessible. In addition to judges, prosecutors have joined in the calls for reforms. Fair and Just Prosecution is the name of a group that has issued reports (for example, on the impact of money bail and of fines) and collaborates with district attorney offices across the country to reshape policies.

The American Academy of Arts and Sciences has a forthcoming volume, *Access to Justice*, co-edited by Lincoln Caplan, Lance M. Liebman, and Rebecca Sandefur. Law schools around the country are likewise launching projects, such as the Access to Justice (A2J) Initiative at Fordham Law School. Efforts to understand what access-to-justice work is ongoing in the academy is the subject of a new project, funded in 2018 by the National

Science Foundation; lead investigators Rebecca Sandefur, Alyx Mark, and David Udell will shape this study, sponsored by the American Bar Foundation. In January of 2019, at the annual meeting of the American Association of Law Schools, the Section on Civil Procedure (chaired this year by Judith Resnik and joined by several other Sections) is hosting two sessions under the rubric of “Court Debt”: Fines, Fees, and Bail, Circa 2019, to help bring these issues into the mainstream of law school classes.

In the spring of 2019, the Liman Center will teach a seminar, *Poverty and the Courts: Fines, Fees, Bail, and Collective Redress*, to continue to understand the economic burdens and when and how group-based responses (such as class actions) can be used to ease the burdens on individuals. The Liman Center’s 22nd Annual Colloquium, *Inside/Out: Poverty, the Courts, and the Academy*, will be another occasion to explore how civil, criminal, and administrative adjudication generates undue costs and what responses are possible. In addition, the Liman Center is joining with the Quinnipiac School of Law in hosting the Quinnipiac-Yale Dispute Resolution Workshop, which began two decades ago under the leadership of now Dean Jennifer Brown at Quinnipiac.



The Liman Center's New Research on Isolation in U.S. Prisons

Solitary confinement in American prisons has long been the focus of the Liman Center's research. Beginning in 2012, the Liman Center has worked with the Association of State Correctional Administrators (ASCA), which includes the directors of all prison systems in the United States, to learn about the policies governing solitary confinement.

In October of 2018, we released two new monographs, *Reforming Restrictive Housing: The 2018 ASCA-Liman Nationwide Survey of Time-in-Cell*, and *Working to Limit Restrictive Housing: Efforts in Four Jurisdictions to Make Changes*. These reports are part of a series of studies that provide the only nationwide data on "restrictive housing," defined as separating prisoners from the general population and holding them in their cells for an average of 22 hours or more per day for 15 continuous days or more. This practice is often termed "solitary confinement." *Reforming Restrictive Housing* documents the numbers of people in solitary confinement and the changes underway as prison administrators aim to limit the use of segregation and find alternatives to the isolation of restrictive housing. Excerpts are below.

In 2013, the first report of the series, *Administrative Segregation, Degrees of Isolation, and Incarceration*, analyzed the restrictive housing policies of 47 jurisdictions. The 2013 Report found that the criteria for placement in isolation were broad. Getting into segregation was relatively easy, but few policies addressed release.

In contrast, in 2018, directors around the country reported narrowing the bases for placement in restrictive housing, increasing oversight, and limiting time spent in isolation. In some places, behaviors that once put people into restrictive housing—from "horse play" to possession of small amounts of marijuana—no longer do. And for those people in restrictive housing, efforts are reportedly underway in some jurisdictions to create more out-of-cell time and more group-based activities.

Since 2013, ASCA and the Liman Center have conducted national surveys of the number of people in restrictive housing. The 2015 report, *Time-in-Cell*, estimated that 80,000 to 100,000 prisoners were in segregation across the country. The 2016 report, *Aiming to Reduce Time-in-Cell*, identified almost 68,000 people held in isolation.

For the 2017-2018 data collection, ASCA-Liman sent surveys to the 50 states, the Federal Bureau of Prisons (FBOP), the District of Columbia, and four jail systems in large metropolitan areas. The 43 prison systems that provided data on prisoners in restrictive housing held 80.6% of the U.S. prison population. They reported that 49,197 individuals—4.5% of the people in their custody—were in restrictive housing.

Across all the reporting jurisdictions, the median percentage of the population held in restrictive housing was 4.2%; the average was 4.6%. The percentage of prisoners in restrictive housing ranged from 0.05% to 19%. Extrapolating from these numbers to the systems not reporting, we estimate that some 61,000 individuals were in isolation in prisons in the fall of 2017.

Thirty jurisdictions reported when they began to track how long people had been in restrictive housing. Some jurisdictions began gathering this information as recently as 2017. Within the responding jurisdictions, most people were held in segregation for a year or less. Twenty-five jurisdictions counted more than 3,500 individuals who were held for more than three years. Almost 2,000 of those individuals had been there for more than six years.

The 2017–2018 survey also gathered information about gender, race and ethnicity, and age. Men were much more likely than women to be in solitary confinement. Black prisoners comprised a greater percentage of the restrictive housing population than they did the total custodial population. The reverse was true for White prisoners. Likewise, in the jurisdictions reporting on ethnicity, Hispanic male prisoners represented a greater percentage of the restrictive housing population than they did the total custodial population. Prisoners between the ages of 18 and 36 were more likely to be segregated than were older individuals.

Reforming Restrictive Housing also documents the many and varying definitions of "serious mental illness." Using each jurisdiction's own definition, we learned that more than 4,000 people with serious mental illness were in restrictive housing.

Other subpopulations detailed were pregnant prisoners and transgender individuals. Responses indicated a total of 613 pregnant prisoners, none of whom were in restrictive housing. Prison systems reported incarcerating roughly 2,500 transgender individuals, of whom about 150 were reported to be in segregation.

In addition to the prison systems responding, the jail systems in Los Angeles County and Philadelphia provided restrictive housing data. In these two systems, the restrictive housing population ranged from 3.6% to 6.2% of the total jail population. Both jurisdictions described revising

their restrictive housing policies, including by limiting its use for people with serious mental illness. One of the jail systems explained that, given the turnover in some jail populations, the administrators faced challenges in avoiding direct release from restrictive housing into the community.

The 2018 Report tracks the impact of the 2016 American Correctional Association’s (ACA) Restrictive Housing Performance Based Standards. Thirty-six prison systems reported reviewing their policies since the release of the ACA Standards. More than half had implemented one or more reforms to align with the ACA. Those Standards reflect the national consensus to limit the use of restrictive housing for pregnant women, juveniles, and seriously mentally ill individuals, as well as not to use a person’s gender identity as the sole basis for segregation.

In this Report and the related 2018 ASCA-Liman monograph, *Efforts in Four Jurisdictions to Make Changes*, the directors of the prison systems in Colorado, Idaho, Ohio, and North Dakota detail how they were limiting and, in Colorado, abolishing holding people in cells 22 hours or more for 15 days or more. These individual accounts reflect the broader trend of policy changes.

This Report puts the data collected from the 2017-2018 survey in the context of national and international actions regulating the use of restrictive housing. Correctional systems around the country are engaging in targeted efforts to reform their practices of isolating prisoners. Examples of such efforts are contained in the Vera Institute of Justice’s 2018 monograph, *Rethinking Restrictive Housing*.

In other instances, reforms have come from state legislatures. Some statutes now place limits on the length of time individuals can be held in segregation, require reviews of placement decisions, and ban the use of isolation for juveniles and other subpopulations. Litigation has also resulted in decisions that highlight the harms of restrictive housing and, in some cases, prohibit its use. Parallel efforts and mandates can be found outside the United States—from implementation of the Nelson Mandela Rules to litigation and reform through policy changes.

The ASCA-Liman surveys provide a longitudinal database to enable evidence-based analysis of the practice of holding people in isolation. This Report compares the responses of the 40 prison systems that answered the ASCA-Liman surveys in both 2015 and 2017. In those 40 systems, we learned about 56,000 people in restrictive housing in 2015. The number of prisoners reported to be in restrictive housing decreased by almost 9,500 to 47,000 people in 2017. The percentage of individuals in isolation decreased from 5.0% to 4.4%.

The changes are not uniform. In more than two dozen states, the numbers of people in restrictive housing decreased. In eleven states, the numbers went up. What accounts for the changing numbers is unclear. Variables include new policies and practices, litigation, legislation, fluctuations in the overall prison population, and staffing patterns. For example, in 20 of the 29 jurisdictions in which restrictive housing numbers declined, so too did the total prison population. In two of the 11 jurisdictions that had an increase in restrictive housing numbers, the total prison population increased as well.

The amount of time spent in restrictive housing is of widespread concern. Not all correctional systems track length of confinement. Nineteen jurisdictions reported that they began tracking in 2013 or thereafter. In 31 jurisdictions responding to questions about length of time in both 2015 and 2017, the number of individuals in restrictive housing for three months or less increased. The number of people in isolation for longer than three months decreased. The decreases were greatest for time periods longer than six months.

Correctional administrations’ efforts to reduce the numbers of people in restrictive housing are part of a larger picture in which legislatures, courts, and other institutions are seeking to limit holding people in cells 22 hours or more for 15 days or more. These endeavors reflect the national and international consensus that restrictive housing imposes grave harms on individuals confined, on staff, and on the communities to which prisoners return. Once solitary confinement was seen as a solution to a problem. Now prison officials around the United States are finding ways to solve the problem of restrictive housing.



Jenny Tumas, a YLS Liman student researcher, presents the findings from the latest restrictive housing survey at the August 2018 conference of the Association of State Correctional Administrators in Minneapolis, Minnesota.

Liman Center Updates

The Inaugural Resnik-Curtis Fellow



Last spring, the Liman Center announced the creation of a new Resnik-Curtis Fellowship to honor Judith Resnik, the Arthur Liman Professor of Law and the Center's Founding Director, and Dennis Curtis, class of 1966, Clinical Professor Emeritus, and a pioneering founder of Yale's Clinical Program. The fellowship was made possible through a remarkable outpouring of support from some 150 donors, including from more than eighty former Liman Fellows and a large number of law school classmates of Dennis Curtis.

The first fellow is Natalia Nazarewicz Friedlander, who is working at the Rhode Island Center for Justice. Her focus is on the needs of prisoners with serious and persistent mental illness. That group comprises more than fifteen percent of the state's incarcerated population. Natalia will address their placement in solitary confinement and their treatment by prison officials in disciplinary proceedings.

To date, the funding will support one fellow per year through 2021. The Resnik-Curtis Fellow is selected by a Liman subcommittee that does not include the honorees of the fellowship. The subject matter of the fellowship reflects the professors' long-standing commitment to criminal justice reform and the rights of prisoners.

The first fellow is Natalia Nazarewicz Friedlander, who is working at the Rhode Island Center for Justice. Her focus is on the needs of prisoners with serious and persistent mental illness. That group comprises more than fifteen percent of the state's incarcerated population. Natalia will address their placement in solitary confinement and their treatment by prison officials in disciplinary proceedings.

Friedlander graduated from Brown University in 2011 and from Yale Law School in 2018. She was born in Poland and grew up in Oak Ridge, Tennessee, where she received the Young Epidemiology Scholarship for a study on self-harm and suicidal thinking among her high school class. At Brown, she majored in public health and received the Howard R. Swearer International Service Fellowship for research and advocacy on medication access in Tanzania. After graduation, she worked on health policy in Washington, DC, and at an HIV/AIDS non-profit in Zambia.

Before starting law school, Friedlander spent six months at Prisoners' Legal Services of Massachusetts, an internship which galvanized her interest in criminal justice. Afterwards, she participated in the Criminal Justice Clinic, the Advanced Sentencing Clinic, the Worker and Immigrant Rights Advocacy Clinic, and the Reentry Clinic. She was also president of the American Constitution Society at YLS and co-chair of the Mental Health Alliance.

Transitions at Liman



Elizabeth Keane, Liman Center Coordinator; Judith Resnik; Skylar Albertson, Liman Fellow 2018–2019; Denny Curtis, Clinical Professor Emeritus of Law, Yale Law School; Jonathan Curtis-Resnik; Natalia Friedlander, Resnik-Curtis Fellow 2018–2019

The Liman Center is delighted to welcome Alexandra Harrington, who joined as a Senior Liman Fellow in Residence, and Jamelia Morgan, who was a Liman fellow in 2016–2017 and is now an Associate Professor at the University of Connecticut School of Law. Morgan returns to the Liman Center as a new Senior Liman Fellow Affiliate. This past year, we also welcomed Elizabeth Keane, who is now the Liman Center Coordinator.

These new members of the Liman community join Anna VanCleave, the Liman Center's Director; Judith Resnik, Arthur Liman Professor of Law and the Founding Director; and Laura Fernandez, also a Senior Liman Fellow in Residence.



Ali Harrington, Senior Liman Fellow in Residence

Alexandra Harrington, who graduated from Yale Law School in 2014, came to the Liman Center after her work as a Deputy Assistant Public Defender with the Connecticut Division of Public Defender Services. She was part of the Innocence Project/Post-Conviction Unit. Harrington helped to shape the Division's efforts to implement the rights of juveniles in the criminal justice system. Her work grew out of her law school project with the Lowenstein International Human

Rights Clinic, which focused on fairness in sentencing of individuals under eighteen and how to enable them to have reviews (termed "second-looks") once long prison terms had been imposed. Harrington was also in the Capital Punishment Clinic

and the Iraqi Refugee Assistance Project, and she served as student director of the Schell Center for International Human Rights, the Initiative for Public Interest Law at Yale, and the Rebellious Lawyering Public Interest Conference. She holds a B.A. from Vanderbilt University. Before coming to law school, Harrington worked as a paralegal for a small law firm in Seattle, Washington.



Jamelia Morgan, Senior Liman Fellow Affiliate, Associate Professor, University of Connecticut School of Law

Jamelia Morgan has joined the faculty of the University of Connecticut School of Law, and is now a Senior Liman Fellow Affiliate. Morgan graduated from Yale Law School in 2013 and clerked for the Honorable Richard W. Roberts of the U.S. District Court for the District of Columbia from 2014 to 2015. From 2015 to 2017, Morgan was a Liman Fellow with the ACLU National Prison Project, where she focused on reducing the use of solitary confinement in American prisons. In July 2016, she spoke at the White

House Forum on Criminal Justice and Disability, which was convened to address the overrepresentation of individuals with disabilities in the criminal justice system. Morgan is the author of an ACLU report released in January 2017, *Caged In: Solitary Confinement's Devastating Harm on Prisoners with Disabilities*. After completing her fellowship, Morgan became a staff attorney at the Abolitionist Law Center in Pittsburgh.

Elizabeth Keane joined the Liman Center in January as the Coordinator. Keane, a graduate of Albertus Magnus College, has a degree in Business and Economics. She began her career in banking operations before focusing on business development for GMAC Mortgage Corporation. Thereafter, Keane spent nearly a decade at Shipman & Goodwin LLP, where she worked in the department of Legal Marketing and oversaw its Business Development and Marketing Communications. Keane is delighted to be able to use her many skills to expand the scope and work of Yale's Liman Center for Public Interest Law.

Departures

Kristen Bell, now an Assistant Professor of Law at the University of Oregon, came to Yale in 2016 as a Senior Liman Fellow in Residence. She graduated from Stanford Law School and earned her Ph.D. in legal and moral philosophy at UNC-Chapel Hill. She clerked for the Massachusetts Supreme Judicial Court and was a Soros Justice Fellow at the Post-Conviction Justice Project at USC, where she did research on the California parole system, coordinated projects on in-prison education, and participated in impact litigation aimed at improving opportunities for release of California prisoners sentenced when juveniles to life in prison. Bell is the author of *A Reparative Approach to Parole Release Decisions* in *Rethinking Punishment in the Era of Mass*



Johanna Kalb, Professor of Law, Loyola University New Orleans College of Law, Liman Director 2014–2016; Bonnie Posick, Senior Administrative Assistant, Yale Law School; Anna VanCleave, Liman Center Director

Incarceration, edited by Chris W. Suprenant and published in 2017. During her Liman Fellowship, Bell contributed to reports on solitary confinement and analyzed more than 400 parole hearings of individuals serving life sentences.

Last winter, Christine Donahue Mullen, who had been the Center's Program Coordinator, joined Yale's Spanish and Portuguese department as a Senior Administrative Assistant. Before coming to the Liman Center, she worked as a journalist and as a communications director. She also co-founded a healthcare start-up on addiction treatment.

At the Liman Center

Anna VanCleave is the Director of the Arthur Liman Center for Public Interest Law, a Clinical Lecturer, and an Associate Research Scholar at Yale Law School. She was a public defender at the Public Defender Service for the District of Columbia for five years and spent a year in New Orleans, where she focused on reform of indigent defense in the wake of Hurricane Katrina. She then worked as a death penalty litigator at the Louisiana Capital Assistance Center (LCAC). In 2012, she joined the Tulane Law School faculty as a Forrester Fellow, and in 2014 she became the Chief of the Capital Division of the Orleans Public Defenders. She graduated from NYU School of Law, where she was a Root-Tilden-Kern Public Interest Scholar.

Laura Fernandez is a Lecturer in Law, Research Scholar in Law, and Senior Liman Fellow in Residence at Yale Law School. Her research focuses on questions of prosecutorial power, ethics, and accountability. Before joining Yale Law School, she was Senior Counsel at Holland & Knight, LLP, where she worked as a full-time member of the Community Services Team. She also clerked for the Honorable Jack B. Weinstein of the Eastern District of New York, and was an E. Barrett Prettyman Fellow at Georgetown Law Center, where she received her LL.M. She is a graduate of Harvard College and Yale Law School (Class of 2002). Fernandez's work now entails researching, identifying, analyzing, and bringing to public attention cases of egregious misconduct across the country. These projects aim to assess the

consequences of misconduct, capture and convey the human costs of injustice, and explore the wider threat misconduct poses to the integrity of our criminal justice system.

Judith Resnik is the Arthur Liman Professor of Law at Yale Law School, where she teaches about federalism, procedure, courts, prisons, equality, and citizenship. Her scholarship focuses on the impact of democracy on government services, from courts and prisons to post offices, on the relationships of states to citizens and non-citizens, on the forms and norms of federalism, and on equality and gender. She is also an occasional litigator. Resnik's books include *Representing Justice: Invention, Controversy, and Rights in City-States and Democratic Courtrooms* (with Dennis Curtis, Yale University Press, 2011); *Federal Courts Stories* (co-edited with Vicki C. Jackson, Foundation Press, 2010); and *Migrations and Mobilities: Citizenship, Borders, and Gender* (co-edited with Seyla Benhabib, NYU, 2009). In 2014, Resnik was the co-editor (with Linda Greenhouse) of the Daedalus volume, *The Invention of Courts*. In addition to being the Founding Director of the Liman Center, Resnik chairs Yale Law School's Global Constitutional Law Seminar, a part of the Gruber Program on Global Justice and Women's Rights. She is the editor of the global seminar's volumes, published as e-books, from 2012 forward, including *Global Reconfigurations, Constitutional Obligations, and Everyday Life* (2018); *Reconstituting Constitutional Orders* (2017), and *The Reach of Rights* (2015).

Judith Resnik Receives Carnegie Fellowship and Honorary Doctorate from UCL

This year, Judith Resnik received honors for her scholarship and her work as a teacher and lawyer. In April of 2018, Resnik was awarded an Andrew Carnegie Fellowship for 2018–2020; the grant will enable her to research and write a book, *Impermissible Punishments*. As she explains:

while law is the engine that puts people into prisons, until the 1960s, law stopped at the prison gate. In contrast, today we think it ordinary that constitutions and international human rights limit the forms that punishment can take. We assume that law is a barrier to whipping or branding and a source of obligations to keep prisoners safe.

In this book, I put these post-1960s achievements in the context of an untold history of centuries-long reform efforts, recorded in national and international conferences of prison leaders. I aim to ensure recognition of what a remarkable group of prisoners accomplished—insisting that, despite being duly convicted and incarcerated, they were people entitled to constitutional protection.

This book analyzes debates about imprisonment and the criminal justice system by focusing on prisoners as major

contributors to punishment theories and practices. In the nineteenth century, law rarely protected prisoners. Illustrative are the Thirteenth and Fourteenth Amendments of the U.S. Constitution, which exempted the “duly convicted” from their proscriptions against involuntary servitude and disenfranchisement.

Yet in the second half of the twentieth century and for the first time in history, prisoners succeeded in enlisting judges to bar certain forms of punishment in prison. They may still be forced to work and not all of them can vote, but prisoners can no longer be whipped, starved, or denied all medical care. Understanding how and why law banned punishments that were once widely used is central to responding to today's pressing questions: what kinds of punishment can prisons impose and what should no longer be tolerated?

In July of 2018, Resnik was awarded an honorary doctorate from University College London (UCL). The presentation was at the UCL Law Faculty graduation held at the Royal Festival Hall in London. At the ceremony, Dame Hazel Genn described Resnik as “an academic and legal practitioner of outstanding productivity and distinction, whose interests range very widely across constitutionalism, the impact of democracy on government services, court procedure and adjudication, prisons, gender, citizenship, and access to justice.”

Remarking on the power of Resnik's academic work, Genn discussed *Representing Justice: Invention, Controversy, and Rights in City-States and Democratic Courtrooms*, co-authored by Resnik and her husband, Dennis Curtis, Clinical Emeritus Professor of Law. “The exposition of the thesis is accomplished via an analysis of the way that the art and iconography of justice reflects the impact of democracy on courts,” Genn said. “The scope of the book is breathtaking. The combination of haunting and often visceral imagery with powerful analysis makes the book both a joy to read and an inspiration.”

Resnik accepted the honorary degree and addressed the 2018 graduates and their families in a speech that acknowledged the



current historical moment in which the graduates embarked on their legal careers. Her address drew on the theme of separation—as describing the nature of graduation itself but also as a symbol of the fraught status of national borders, whether in the Brexit context or in the form of a physical border wall designed to impede migration. The rise of nationalistic populism, Resnik urged, creates obligations for those who are launching legal careers:

Indeed, it is this context that makes all the more important your work and institutions such as this. Your studies have given you a set of skills that oblige you—and all of us with law degrees—to ask ourselves, what can we do to help? How can we be useful amidst the many challenges and the acts of hostility? How can the past inform this moment? What precepts of law need to be underscored? And what new institutions and ideas do we need to invent?

Resnik's work reflects her own commitment to answer these questions and fulfill these obligations. "Despite the breadth of her interests, the unifying and motivating objective of her teaching, research, and litigation work is her profound commitment to equality and social justice," said Genn. "The arc of her career and her unrivalled achievements reflect the scale of her interests, but also her ability to integrate her focus on civil rights, courts, and democracy and equal treatment through all three aspects of her professional life."

Recent Publications by Liman Faculty and Fellows

The Liman Center Publications

The Liman Center's 2018 publications include *Reforming Restrictive Housing: The 2018 ASCA-Liman Nationwide Survey of Time-in-Cell* and *Working to Limit Restrictive Housing: Efforts in Four Jurisdictions to Make Changes*. Both reports are co-authored with the Association of State Correctional Administrators. The research and drafting were a collaboration that included Judith Resnik, Anna VanCleave, Kristen Bell, and Alexandra Harrington (at Yale) and Leann Bertsch, Wayne Choinski, Kevin Kempf, Bob Lampert, Gary Mohr, Rick Raemisch, and A.T. Wall (at ASCA). YLS Students Greg Conyers, Catherine McCarthy, Jenny Tumas, and Annie Wang played major roles in the research, analysis, and drafting, and YLS students Faith Barksdale, Stephanie Garlock, and Daniel Phillips reviewed and edited the final drafts.

In addition, Judith Resnik and Kristin Bell authored *Sentencing Inside Prisons: Efforts to Reduce Isolating Conditions* as part of a symposium on sentencing, published in 2018 by the UMKC Law Review. The Liman Center has also published a volume of readings for its 2018 Colloquium. That book, *Who Pays? Fines, Fees, Bail, and the Cost of Courts*, was edited by Judith Resnik, Anna VanCleave, Kristen Bell, and YLS students Skylar Albertson, Natalia Friedlander, Illyana Green, and Michael Morse.

Other publications by Liman Faculty and Fellows (current and past) include:

Spencer Amdur & David Hausman, *Nationwide Injunctions and Nationwide Harm*, 131 Harvard Law Review Forum 49 (2017) (Amdur was a Liman Fellow in 2013–2014.)

Alicia Bannon, Cathleen Lisk & Peter Hardin, *Who Pays for Judicial Races? The Politics of Judicial Elections 2015–16* (Brennan Center for Justice, December 2017), available at https://www.brennancenter.org/sites/default/files/publications/Politics_of_Judicial_Elections_Final.pdf. (Bannon was a Liman Fellow in 2009–2010.)

Alicia Bannon, *How Secretive Money Is Influencing the Judicial System*, Time (Dec. 14, 2017), available at <http://time.com/5063724/state-supreme-court-elections-dark-money/>.

Curtis Bone, Lindsay Eysenbach, Kristen Bell & Declan T. Barry, *Our Ethical Obligation to Treat Opioid Use Disorder in Prisons: A Patient and Physician's Perspective*, Journal of Law, Medicine, and Ethics (forthcoming 2018). (Bell was a Senior Liman Fellow in Residence in 2016–2018.)

Michael Linden, Sam Marullo, Curtis Bone, Declan Barry & Kristen Bell, *Prisoners as Patients: The Opioid Epidemic, Medication-Assisted Treatment, and the Eighth Amendment*, 46 Journal of Law Medicine and Ethics 252 (forthcoming 2018).

Monica Bell, Tanya K. Hernandez, Solangel Maldonado, Rachelle Perkins, Chantal Thomas, Olatunde Johnson & Elise Lopez, *Advocacy in Ideas: Legal Education and Social Movements*, 36 Columbia Journal of Gender & Law 40 (2018). (Bell was a Liman Fellow in 2010–2011.)

Erika C. Poethig, Joseph Schilling, Laurie Goodman, Bing Bai, James Gastner, Rolf Pendall & Sameera Fazili, *The Detroit Housing Market: Challenges and Innovations for a Path Forward* (Urban Institute, 2017). (Fazili was a Liman Fellow in 2006–2007.)

Ellen Seidman, Sameera Fazili & Brett Theodos, *Making Sure There Is a Future: Capitalizing Community Development Financial Institutions* (Urban Institute 2017).

Sameera Fazili, *Can Community Development Improve Health? Emerging Opportunities for Collaboration Between the Health and Community Development Sectors* (Community and Economic Development Department, Federal Reserve Bank of Atlanta, 2017).

Lynsey Gaudio & Mashael Majid, *Building a Reasonable Housing Equity Agenda*, Affordable Housing Guidebook: Building Communities, Building Power (East Bay Housing Organization 2018). (Gaudio was a Liman Fellow in 2017–2018.)

Kathy Hunt Muse, *The City of Chicago Just Entered Into an Unprecedented Agreement with Community Groups on Police Reform: What Does That Mean?* ACLU (March 28, 2018),

- available at <https://www.aclu-il.org/en/news/city-chicago-just-entered-unprecedented-agreement-community-groups-police-reform-what-does-mean>. (Hunt Muse was a Liman Fellow in 2009–2010.)
- Johanna Kalb, *Gideon Incarcerated: Access to Counsel in Pre-Trial Detention*, 9 U.C. Irvine Law Review (2018). (Kalb was the Liman Director from 2014–2016.)
- Bradford Adams & Dana Montalto, *With Malice Toward None, Revisiting the Historical Basis for Exclusion of Veterans from Veteran Services*, 122 Pennsylvania State Law Review 69 (2017). (Montalto was a Liman Fellow in 2014–2016.)
- Allegra McLeod, *Police, Violence, Constitutional Complicity, and Another Vantage*, 2016 Supreme Court Review 158 (2017). (McLeod was a Liman Fellow in 2008–2009.)
- Clara Long, Brian Root & Grace Meng, *The Deported: An Interactive Feature Highlighting the Stories of People Deported Under Trump*, Human Rights Watch (Dec. 5, 2017), available at <https://www.hrw.org/report/2017/12/05/deported-immigrants-uprooted-country-they-call-home>. (Meng was a Liman Fellow in 2003–2004.)
- Nancy Morawetz & Lindsay Nash, *Get ICE out of N.Y.'s courtrooms*, NY Daily News (Jan. 25, 2018), available at <http://www.nydailynews.com/opinion/ice-n-y-s-courtrooms-article-1.3777389>. (Nash was a Liman Fellow in 2010–2011.)
- Peter Markowitz & Lindsay Nash, *Pardoning Immigrants*, 93 NYU Law Review 58 (2018).
- Nathan Nash, *The Tarnished Golden Rule: The Corrosive Effect of Federal Prevailing-Party Standards on State Reciprocal-Fee Statutes*, 127 Yale Law Journal 1068 (2018). (Nash was a Liman Fellow in 2017–2018.)
- Marisol Orihuela, *Positive Emotions and Immigrant Rights: Love as Resistance*, 14 Stanford Journal of Civil Rights & Civil Liberties 19 (2018). (Orihuela was a Liman Fellow in 2008–2009.)
- Marisol Orihuela, *The Unconstitutionality of Mandatory Detention During Competency Restoration*, 22 Berkeley Journal of Criminal Law 1 (2017).
- Benjamin Plener Cover, *Quantifying Partisan Gerrymandering: An Evaluation of the Efficiency Gap Proposal*, 70 Stanford Law Review (forthcoming 2018). (Plener Cover was a Liman Fellow in 2009–2010.)
- Megan Quattlebaum, *Let's Get Real: Behavioral Realism, Implicit Bias, and the Reasonable Police Officer*, 14 Stanford Journal of Civil Rights & Civil Liberties 1 (2018). (Quattlebaum was a Liman Senior Fellow in Residence in 2010–2011.)
- Nina Rabin, *Understanding Secondary Immigration Enforcement: Immigrant Youth and Family Separation in a Border County*, 47 Journal of Law & Education 1 (2018). (Rabin was a Liman Senior Fellow in Residence in 2012–2013.)
- Diala Shamas, *A Nation of Informants: Reining in Post-9/11 Coercion of Intelligence Informants*, 83 Brooklyn Law Review 1175 (2018). (Shamas was a Liman Fellow in 2011–2012.)
- Judith Resnik, *The Supreme Court's Arbitration Ruling Undercuts the Court System*, HuffPost (May 25, 2010), available at https://www.huffingtonpost.com/entry/opinion-resnik-forced-arbitration_us_5b08395ae4b0802d69caeb47. (Resnik is the Arthur Liman Professor of Law.)
- Judith Resnik, *To Help #MeToo Stick, End Mandatory Arbitration*, HuffPost (January 23, 2018), available at https://www.huffingtonpost.com/entry/opinion-resnik-mandatory-arbitration_us_5a65fc39e4b0e5630071c15d?g9r.
- Judith Resnik, *A2J/A2K: Access to Justice, Access to Knowledge, Economic Inequalities, and Open Courts and Arbitrations*, 96 North Carolina Law Review 605 (2018).
- 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 New York University Law Review 1017 (2017).
- Judith Resnik, *"Vital" State Interests: From Representative Actions for Fair Labor Standards to Pooled Trusts, Class Actions, and MDLs in the Federal Courts*, 165 University of Pennsylvania Law Review 1765 (2017).
- Sirine Shebaya, *Current Developments in Immigration Law: The Permanent Muslim Ban*, 32 Georgetown Immigration Law Journal 249 (2018). (Shebaya was a Liman Fellow in 2012–2013.)
- Sirine Shebaya & Johnathan Smith, *The US Says It Gives Waivers for Trump's Travel Ban. We Haven't Seen Any*, Washington Post (June 26, 2018).
- Michael Tan & Michael Kaufman, *Jailing the Immigrant Poor: Rodriguez v. Sessions*, 21 CUNY Law Review 69 (2017). (Tan was a Liman Fellow in 2008–2009.)
- Molly Weston Williamson, *Structuring Paid Family and Medical Leave: Lessons from Temporary Disability Insurance*, 17 Connecticut Public Interest Law Journal 1 (2018). (Weston Williamson was a Liman Fellow in 2014–2015).
- Molly Weston Williamson, *Millennials Deserve Real Paid Leave and a Secure Retirement*, Feministing (Feb. 22, 2018), available at <http://feministing.com/2018/02/22/millennials-deserve-real-paid-leave-and-a-secure-retirement/>.
- Sherry Leiwaint, Julie Kashen & Molly Weston Williamson, *Constructing 21st Century Rights for a Changing Workforce: A Policy Brief Series*, A Better Balance (July 2018), available at <https://www.abetterbalance.org/resources/report-constructing-21st-century-rights-for-a-changing-workforce-a-policy-brief-series/>.

Sofia Yakren, “*Wrongful Birth*” Claims and the Paradox of Parenting a Child with a Disability, 87 Fordham Law Review (forthcoming 2018). (Yakren was a Liman Fellow in 2005–2006.)

The Liman Law Fellows

Nine new Fellows were selected for 2018–2019, as were the Resnik-Curtis Fellow and the Meselson/Liman Fellow. In addition, one 2017–2018 Fellow received an extension to continue her project for a second year. Since its inception in 1997 and including the 2018 Fellows, the Liman Center has supported 133 Yale Law School graduates for year-long projects.

Skylar Albertson is spending his fellowship year working at The Bail Project, the first nationwide community bail fund, where he is facilitating the Project’s expansion to new jurisdictions, working with individual clients to post bail, and pursuing litigation related to the bail system. Albertson, a 2018 graduate, participated in the Criminal Justice Clinic, the Liman Project, and the Initiative for Public Interest Law. Prior to law school, Albertson worked as the Assistant to the Executive Director at the Bronx Defenders. He graduated from Brown University in 2013.

Benjamin Alter is working at the National Association for the Advancement of Colored People (NAACP), where he is focusing on defending the fairness and accuracy of the 2020 Census. Alter, who graduated from Yale College in 2011 and Yale Law School in 2018, participated in the Rule of Law Clinic and the Appellate Litigation Project. He previously worked as an editor at Foreign Affairs and as a policy advisor at the U.S. Treasury Department.

Olevia Boykin is spending her fellowship year with Civil Rights Corps. Her focus is on how North Carolina programs diverting individuals from the criminal justice system are financed and the ways in which they affect those with limited incomes. Boykin, who graduated from the University of Notre Dame in 2014 and from Yale Law School in 2017, clerked for the Honorable Myron H. Thompson of the U.S. District Court for the Middle District of Alabama. At the Law School, Olevia served as the director of the Reentry Clinic at New Haven Legal Assistance and participated in the Criminal Justice Clinic, the Capital Punishment Clinic, and the Liman Project. She also designed and led Know-Your-Rights programs at schools and community centers throughout the greater New Haven area.

Joanne Lee joins Gulfcoast Legal Services in Tampa Bay, Florida, where she works with indigent immigrants who have experienced domestic violence. She is providing direct representation and is working with local and national organizations to create an infrastructure of assistance for immigrants who are survivors of domestic violence. Lee graduated in 2015 from Oberlin College and from Yale Law School in 2018. She directed the Rebellious Lawyering Conference in 2017 and participated in the Immigration Legal Services Clinic, the Asylum Seeker Advocacy Project, and the Temporary Restraining Order Project.



Skylar Albertson



Benjamin Alter



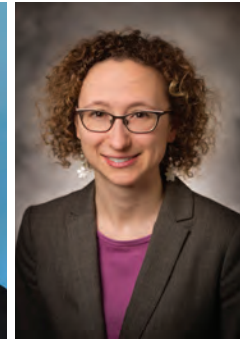
Olevia Boykin



Joanne Lee



Maya Menlo



Elizabeth Pierson

Maya Menlo is working at the Washtenaw County Office of the Public Defender, where she is helping to improve the indigent defense system in Michigan by focusing on providing counsel at arraignments. Born and raised in Michigan, and a 2015 graduate of the University of Michigan, Maya graduated from Yale Law School in 2018. At YLS, Maya was in the Reentry Clinic, the Criminal Justice Clinic, the Advanced Sentencing Clinic, and the Challenging Mass Incarceration Clinic. She was also involved in New Haven’s Sex Workers and Allies Network beginning with its formation in October 2016, and she was a Senior Global Health and Justice Project Fellow.

Elizabeth Pierson joins Legal Action of Wisconsin in her hometown of Milwaukee. She is working to improve housing conditions for low-income renters through eviction defense, affirmative litigation targeting exploitative landlords, and renter education. Pierson, who graduated in 2012 from Haverford College and from Yale Law School in 2018, was active in the Mortgage Foreclosure Litigation Clinic and volunteered with the Asylum Seeker Advocacy Project and the Temporary Restraining Order Project. She served on the 2016–17 Executive Board of Yale Law Women.

Yusuf Saei joins Muslim Advocates in Washington, DC, where he will focus on the religious free exercise rights of prisoners. Specifically, Saei will work with prisoners who identify as Muslim to improve their conditions of confinement. Saei graduated from the College of Charleston in 2010, was a Peace Corps volunteer in Morocco, and graduated from Yale Law School in December 2017. He was a member of the Lowenstein International Human Rights Clinic and the Worker and Immigrant Rights

Advocacy Clinic. In 2015–2016, he was a Yale Fox Fellow at Sciences Po Law School in Paris.

Rachel Shur is spending a second fellowship year with the Orleans Public Defenders, where she has been challenging the imposition of fines and fees on poor defendants and incarceration for failure to pay. She is also working with area advocates to press for widespread reforms and implementation of new legislation limiting the fees that can be imposed. Shur graduated from Brown University in 2012 and from Yale Law School in 2017. While at Yale, Shur participated in the Criminal Justice Clinic and the Capital Punishment Clinic, and also served as a Co-Director of the Capital Assistance Project.

Theo Torres is spending his fellowship year at the Federal Defender Program for the Northern District of Illinois in Chicago. His focus is on understanding the effects of policing by the federal Bureau of Alcohol, Tobacco, Firearms, and Explosives and the new Chicago Gun Strike Force. Torres graduated from the University of Texas in Dallas in 2015 and was a member of the Yale Law School Class of 2018. While in law school, Theo participated in the Criminal Justice Clinic, the Advanced Sentencing Clinic, and the Capital Punishment Clinic, and he directed the Green Haven Prison Project.

Henry Weaver joins Earthjustice's Coal Program in Chicago to build partnerships with low-income communities affected by hazardous coal ash disposal sites. He will focus on communities in southern Indiana, where a concentration of coal-fired power plants has left behind unlined and structurally unsound coal ash impoundments. Henry graduated from Amherst College in 2013 and from Yale Law School in 2018. He participated in the Environmental Justice and Mortgage Foreclosure Clinics and served as an Articles Editor for the Yale Law Journal.

Completed Projects

Celina Aldape concluded her fellowship at Law Students in Court in Washington, DC and is continuing her work there as a staff attorney assisting low-income tenants, often with limited English proficiency, whose rights as tenants are being violated as a result of under-enforcement by the city. For her project, Aldape represented tenants at risk of eviction and worked with tenant organizers, lawyers, and others to press for laws that would strengthen rent control before the DC Council. Aldape graduated from Columbia University in 2014 and from Yale Law School in 2017, where she was a participant in the Criminal Justice Clinic, the Landlord/Tenant Legal Services Clinic, and the Liman Project.

Ryan Cooper has completed his fellowship with the Travis County Mental Health Public Defender, working to develop alternatives to detention for individuals with mental illness and cognitive impairments. Cooper represented defendants directly and also worked with area groups to provide training on the needs of individuals with mental and intellectual disabilities. Cooper graduated from the University of Texas at Austin in 2010 and from Yale Law School in 2015, where he was the Co-Editor-in-Chief of the Yale Law & Policy Review, a student director



Yusuf Saei



Theo Torres



Henry Weaver



Celina Aldape



Ryan Cooper



Lynsey Gaudio



Corey Guilmette



Carly Levenson



Havi Mirell

of the Green Haven Prison Project, a member of the Criminal Justice Clinic, and a participant in the Liman Project. Prior to his fellowship, Cooper clerked for the Honorable Robert L. Pitman of the U.S. District Court for the Western District of Texas.

Lynsey Gaudio spent her fellowship year at Public Advocates in San Francisco. She worked to address the housing crisis in the Bay Area, where rising rents, low wages, and a legacy of exclusionary policies marginalize low-income communities and communities of color and displace families to the outer region where there is limited access to opportunities. Gaudio co-led a coalition of over 20 social justice organizations focused on these issues. A 2017 graduate of the Yale Law School and the Yale School of Forestry & Environmental Studies, Gaudio was active in the Environmental Protection Clinic, the Community and Economic Development Clinic, and the Native Peacemaking Clinic. She also served as the Diversity and Membership Officer for the Yale Law Journal. Prior to law school, Gaudio was



Nathan Nash



My Khanh Ngo



Devon Porter



Abigail Rich

a Luce Scholar at the Centre of Live and Learn for Environment and Community in Vietnam. She graduated from Vanderbilt University in 2010. Gaudioso is currently clerking for the Honorable William Fletcher of the Ninth Circuit Court of Appeals.

Corey Guilmette has completed his fellowship at the Public Defender Association in Seattle, and has since joined the organization as a Staff Attorney. His project focused on reforming the use of trespass bans that give law enforcement and businesses unlimited discretion to bar any individual from any location, for any reason, for any length of time; these practices have a racially discriminatory impact. He has filed suit over public records relating to these practices and secured a \$170,000 settlement from the city of Kent, Washington over the failure to disclose information about the trespass bans. Guilmette graduated from Wesleyan University in 2013 and from Yale Law School in 2016, where he was in the Criminal Justice Clinic, the Green Haven Prison Project, and the Liman Project. He was a co-author of the ASCA-Liman 2014 report, *Time-in-Cell*.

Carly Levenson spent her fellowship year at the Connecticut Division of Public Defender Services, where she helped to establish a DNA Unit for public defenders across the state. She is now an Assistant Federal Defender for the District of Connecticut. During her fellowship, Levenson provided consultation and expertise to defense attorneys for cases raising DNA issues, developed sample motions, assisted with trial preparation, conducted trainings, and helped to create an online resource bank for lawyers around the state. She also handled her own docket of trial-level cases. Levenson graduated from Amherst College in 2009 and from Yale Law School in 2016, where she worked in the Criminal Justice Clinic, Capital Assistance Project, and Legal Assistance Clinic. Prior to her fellowship, she clerked for the Honorable Jeffrey Meyer of the U.S. District Court for the District of Connecticut.

Havi Mirell concluded her fellowship project as a criminal justice policy advisor to Rhode Island Governor Gina Raimondo

and as the state's Justice Reinvestment Coordinator. She oversaw all legislation referred to the House and Senate Judiciary Committees and coordinated agency responses to these bills. She drafted an executive order preventing people from having guns if they are deemed a danger to themselves or others and assembled the Governor's Gun Safety Working Group. Mirell is a 2016 graduate of Yale Law School. She participated in the Liman Project and served as an Articles Editor for the Yale Law Journal. She graduated from Stanford University in 2012 and clerked for the Honorable Denise Cote of the U.S. District Court for the Southern District of New York. She is now clerking for the Honorable José Cabranes of the U.S. Court of Appeals for the Second Circuit.

Nathan Nash completed his fellowship with the Lawyers' Committee for Better Housing in Chicago, where he focused on the intersection between housing, health, and access to justice through the Healthy Housing Chicago Medical-Legal Partnership. Nash provided direct legal services for tenants and pushed for wider reforms through strategic litigation in individual cases. Nash graduated from Amherst College in 2012 and spent two years working for the U.S. Department of Health and Human Services before law school. He graduated from Yale Law School in 2017. He was a co-director of two of Yale's medical-legal partnerships, a member of Yale's Mortgage Foreclosure Litigation Clinic, and a student fellow at the Solomon Center for Health Law & Policy. He is currently clerking for the Honorable Gary Feinerman of the Northern District of Illinois.

My Khanh Ngo spent her fellowship year at the Alameda County Public Defender's Office, where she built the office's capacity to provide effective defense to noncitizen clients at risk of deportation because of their interactions with the criminal justice system. She worked with other public defenders to intervene early in clients' immigration cases and to apply for benefits like Special Juvenile Immigrant Status and U-Visa certification. A 2017 graduate of Yale Law School, Ngo participated in the Worker and Immigrant Rights Advocacy Clinic, the International Refugee Assistance Project, the Asylum Seeker Advocacy Project, and the Capital Punishment Clinic. She graduated from Yale College in 2010. Ngo is currently clerking for the Honorable Richard Paez of the U.S. Court of Appeals for the Ninth Circuit.

Devon Porter concluded her fellowship at the ACLU of Southern California. Her project focused on eliminating fees that indigent defendants were charged for using the services of a public defender and, more generally, building a statewide coalition dedicated to reducing the impact of monetary sanctions. Porter graduated from Reed College in 2011 and from Yale Law School in 2015, where she worked with the Liman Project on designing a survey of prison systems across the country and co-authoring the 2014 ASCA-Liman Report, *Time-in-Cell*, which focused on the conditions and numbers of people in U.S. prisons in solitary confinement. Before her fellowship, Porter clerked for the Honorable Richard A. Paez of the U.S. Court of Appeals for the Ninth Circuit.

Abigail Rich completed her fellowship at East Bay Sanctuary Covenant, where she coordinated and provided trauma-informed services to asylum seekers. Her project sought to improve services to clients with trauma histories by training lawyers to reduce their clients' re-traumatization and by providing holistic representation with a team that includes mental health providers and other specialists. A member of the Yale Law School class of 2016, Rich was in the Immigration Legal Services Clinic, the Worker and Immigrant Rights Advocacy Clinic, the Landlord/Tenant Clinic, and the International Refugee Assistance Project. She graduated from Washington University in St. Louis in 2009. Rich is staying on at East Bay Sanctuary Covenant as a staff attorney.

Jonas Wang spent a second fellowship year at Civil Rights Corps, focusing on challenging the fines and fees imposed on poor criminal defendants and the consequences of nonpayment in Texas, Louisiana, Alabama, and Tennessee. Wang's efforts included a challenge to Tennessee's system of suspending driver's licenses for failure to pay court debt, which resulted in a ruling striking down the practice. A graduate of Harvard College in 2012 and of Yale Law School in 2016, Wang was in the Veteran's Legal Services Clinic and was an Articles Editor of the Yale Law Journal. Wang is continuing work at Civil Rights Corps as a staff attorney and will begin a clerkship with the Honorable Analisa Torres in the Southern District of New York in the summer of 2019.

The 2018 Liman Summer Fellows: Their Colloquium and Their Work

Every year, the Liman Center sponsors summer public interest fellowships for students at several colleges and universities across the country. This year, Bryn Mawr College joined Barnard, Brown, Harvard, Princeton, Spelman, Stanford, and Yale to become the eighth institution to participate.

Summer Fellows come to the annual Liman Colloquium, and part of their time in New Haven is spent in a separate meeting, hosted by Davenport College at Yale University. The 2018 program was organized by Kristen Bell, a Senior Liman Fellow in Residence. Under her guidance, former Fellows discussed their public interest experiences working for public defenders, immigration lawyers, civil legal service providers, and a juvenile court. Incoming Fellows spoke about the ways in which they had contributed to social justice efforts at their universities. For example, at Yale College, students worked on an effort to prevent the university from investing in private prisons.

Summer Fellows provide reports on their work. Below we excerpt one account by Jillian Lea, a student at Spelman College, who worked in Georgia to prevent children from being thrust into the justice system after being arrested while at school.

Keeping Kids out of the Juvenile Justice System: School-Based Arrests in Fulton County, Georgia

Jillian Lea, Liman Undergraduate 2017 Fellow at Spelman College
Fulton County Juvenile Court, Atlanta, GA



Students who receive school suspension or expulsion in response to behavioral misconduct are three times more likely to encounter the juvenile justice system the following year than students who are not removed from their academic environment for school policy violations. Among youth who interact with the juvenile justice system, one variable is their educational experience and environment. The demographic breakdown, family history and involvement, school rank, physical location, investment of faculty and staff, available resources, and disciplinary philosophy of the school shape the experiences of the students and the environment the institution wishes to create.

Studies show that there are certain parallels between misbehavior in school and legal infractions. With school policing, some conflicts that would otherwise be handled as a matter of school policy now create a potentially harmful introduction to the justice system. Moreover, some of the officers placed in lower-performing school environments can come in with a bias about the school and its student body due to its composition. These attitudes often create tension between students and those in authority, resulting in escalated altercations that negatively impact the child. A police presence on a school campus can induce an atmosphere of contention and distrust of both law enforcement and the administration.

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The School Pathways initiative at the Fulton County Juvenile Court analyzes the school-to-prison pipeline in an effort to change the destructive relationship between the justice system and educational spaces. The project aims to decrease the rates of school suspensions, expulsions, and arrests. Fulton County-Atlanta serves as a blueprint for other juvenile courts across the country. It is the first to implement alternative disciplinary and sentencing practices as a municipality.

My job as a Liman Summer Fellow was to investigate the frequency of school arrests, the demographics affected, the schools where arrests were most common, and the protocol by which resource officers (campus police) interact with the student body. Because children in lower-performing schools and socioeconomic areas are affected by school arrests at a much higher rate than other children, we wanted to understand the differences in police procedures and in police attitudes at the various schools.

This Pathways initiative has already been used to implement informal disciplinary procedures so that youth experience more successful and transformative probation and sentencing periods. Our focus was on restorative practices, and our goal was to reduce the overreliance on detention, particularly when the offense did not warrant incarceration. My duties as a Fellow centered on standardizing this initiative in all jurisdictions.



Front Row: Sukhandeep Kaur, Bryn Mawr '19; Kimberly Davila, Brown '20; Paula Pacheco Soto, Brown '20; Ethan Morelion, Brown '20; Mariana Garcia, Bryn Mawr '19; Sophia Hunt, Harvard '19; Victoria Taylor Hicks, Spelman '17; Betanya Mahary, Spelman '18; Kristen Bell, Assistant Professor of Law, University of Oregon School of Law, Senior Liman Fellow in Residence 2016–2018, Yale Law School

Second Row: Abigail Cipparone, Yale '19; Maxime Pradier, Yale '19; Mara Roth, Harvard '19; Shreya Sunderram, Barnard '19; Rose Reiken, Barnard '20; Ruth Sherman, Barnard '19; Miranda Bolef, Princeton '19; Keerthana Annamaneni, Yale '20; Rebekah Ninan, Princeton '19; Margaret Gorman, Bryn Mawr '19; Ry Walker, Yale '20

Third Row: Marwan Safar Jalani, Yale '20; Alisha Zhao, Stanford '21; Azucena Marquez, Stanford '19; Alida Pitcher-Murray, Barnard '19; Riley Tillitt, Yale '19; Jake Pechet, Harvard '19

Fourth Row: Caleb Martin, Stanford '20; Paul Butler, Brown '18; Benjamin Laufer, Princeton '19; Joseph Gaylin, Yale '19; Marisa Vargas-Morawetz, Yale '20; Evan MacKay, Harvard '19; Micah Herskind, Princeton '19; Liam Arnade-Colwill, Yale '19

BARNARD KAYE-LIMAN SUMMER FELLOWS

Alida Pitcher-Murray '19. The Door, New York, NY
 Rose Reiken '20. The Children's Law Center, Brooklyn, NY
 Ruth Sherman '19. Columbia Law School Mass Incarceration Clinic, New York, NY
 Shreya Sunderram '19. Legal and Policy Division of NYC Public Advocate Letitia James' Office, Civil Rights Investigations and Policy, New York, NY

BROWN UNIVERSITY LIMAN SUMMER FELLOWS

Paul Butler '18. Communications Workers of America, Washington, DC
 Kimberly Davila '20. Legal Aid Foundation of Los Angeles, Los Angeles, CA
 Ethan Morelion '20. The Mexican American Legal Defense and Education Fund, San Antonio, TX
 Paula Pacheco-Soto '20. CARA Pro Bono Project, Karnes, TX

BRYN MAWR COLLEGE SUMMER FELLOWS

Mariana Garcia '19. ACLU, Puerto Rico
 Margaret Gorman '19. Office of Congressman Lou Correa, Washington, DC
 Sukhandeep Kaur '19. WOAR (Woman Organized Against Rape), Philadelphia, PA

HARVARD LIMAN SUMMER FELLOWS

Sophia Hunt '19. Center for Court Innovation, New York, NY
 Evan Mackay '19. Boston Area Research Initiative, Boston, MA
 Jake Pechet '19. New York County District Attorney's Office, New York, NY
 Mara Roth '19. ArchCity Defenders, St. Louis, MO

PRINCETON LIMAN SUMMER FELLOWS

Miranda Bolef '19. Southern Poverty Law Center, Montgomery, AL
 Ramzie Fathy '20. Mid-Atlantic Innocence Project at George Washington Law, Washington, DC
 Micah Herskind '19. Poverty and Race Research Action Council, Washington, DC
 Benjamin Laufer '19. National Center for Access to Justice, New York, NY
 Rebekah Ninan '19. United Nations – UNICEF, UN Women, UNFPA, New York, NY

SPELMAN LIMAN SUMMER FELLOWS

Annia Cyani Rochester '19. U.S. Department of State, Office of Global Women's Issues, Washington, DC
 Betanya Mahary '18. Eritrean-American Association of Georgia, Refugee Resettlement Office, Stone Mountain, GA
 Victoria Taylor Hicks '17. DeKalb County Office of the Solicitor General. Special Victims Unit, Decatur, GA

STANFORD LIMAN SUMMER FELLOWS

Azucena Marquez '19. Immigration Center for Women and Children, San Francisco, CA
 Caleb Martin '20. Transgender Law Center, Oakland, CA
 Alisha Zhao '21. National Law Center on Homelessness & Poverty, Washington, DC

YALE LIMAN SUMMER FELLOWS

Keerthana Annamaneni '20. Bronx Defenders, Bronx, NY
 Liam Arnade-Colwill '19. All Our Kin, New Haven, CT
 Abigail Cipparone '19. ACLU of Michigan, Grand Rapids, MI
 Joseph Gaylin '19. Yale Prison Education Initiative, New Haven, CT
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 Maxime Pradier '19. Legal Aid of NYC, New York, NY
 Adrian Rivera '20. Public Defender Service, Washington, DC
 Riley Tillitt '19. Legal Action Center, NY
 Marisa Vargas-Morawetz '20. Centro de los Derechos del Migrante, Baltimore, MD
 Ry Walker '20. National Women's Law Center, Washington, DC

Celebrating and Commemorating Liman Fellow Amy Meselson, 1971–2018



Amy Meselson, who was a Liman Fellow in 2002–2003, passed away in the summer of 2018. Meselson was a pioneer in representing immigrant youth. Almost two decades ago, she outlined an ambitious agenda for her Liman Fellowship at the Legal Aid Society of New York. Meselson sought to develop an advocacy program for unaccompanied immigrant youth facing deportation in New York City. As she put it in 2002, her plan was to “represent immigrant youth, create a coordinated program to train attorneys on how to represent juveniles in INS removal proceedings, organize a pro bono network, and work with local officials to reform the immigration court system to recognize the unique needs of juveniles.”

Meselson did all of these things and more. Within a year of graduation, she had created the juvenile immigration docket in New York and coordinated countless resources for immigrant children. Over the course of her career, her work was high-impact, in terms of both the subsequent impact on individual clients’ lives and the number of lives affected through her systemic efforts.

Meselson was known for her compassion and her tenacity. One client, Amadou Ly, was a Senegalese immigrant abandoned by his mother after his visa expired. With few avenues for relief, and after a failed attempt by Congress to secure legal status for immigrants like Ly, many lawyers would have given up. Meselson brought his problems to public attention.

As the *New York Times* reported, Ly was a member of his East Harlem high school robot-building team that, against long odds, outperformed elite schools to win first place in a city-wide contest. See Nina Bernstein, *Student’s Prize Is a Trip Into Immigration Limbo*, *New York Times*, April 26, 2006. His immigration status prevented him from boarding a plane to the national competition, and he faced deportation. But in 2009, Meselson

persuaded the government not to pursue that effort; Ly was given a student visa and then became a citizen. As the *New York Times* reported after Meselson’s death, Ly told her family, “I was able to stay in this country, I was able to live my dream and grow up and feed my family and help out others because she helped me and she did it with open arms. She was my hero.”

Chief Judge Robert Katzmann of the U.S. Court of Appeals for the Second Circuit told the *New York Times*, “What Amy did was to give hope to immigrants and their families, to make it possible for dreams for a better life to be realized, for despair to be transformed into hope.” She was, according to Katzmann, “a life saver and life giver.”

. . .

In the fall of 2018, the Liman Center was able to honor Meselson’s legacy by creating, for one year, a fellowship in her name. The 2018 Meselson/Liman Fellow is Yenisey Rodriguez, a 2015 Yale Law School graduate. Rodriguez is at the Public Defender Service in Washington, DC, in its juvenile section, where she provides direct representation to juveniles and works to understand the effects of a new law that requires that children charged with crimes as adults be held in juvenile facilities.

Rodriguez graduated from the University of Chicago in 2006 and from Yale’s Graduate School of Arts and Sciences in 2012, where she received her M.A. in American Studies and her M.Phil. in 20th Century U.S. and Latin American History. In 2015, she graduated from Yale Law School, where she was Co-Chair of the Rebellious Lawyering Conference and a Coker Fellow. She clerked for the Honorable Nelson S. Román of the Southern District of New York.

Rodriguez is an apt recipient of this fellowship. Her project is in sync with Meselson’s commitment to children. Moreover,



Yenisey Rodriguez, Meselson/
Liman Fellow 2018–2019

Meselson’s pioneering work dealing with children in immigration intersects with Rodriguez’s own experiences. Her family came from Cuba where, upon entering the U.S., she and her mother were detained in federal prison until a pro bono attorney helped them to win asylum. We are especially delighted that Rodriguez will be working with Hannah McElhinney, who is a 1998 graduate of YLS and in charge of the juvenile unit. Hannah was both a student of Judith Resnik and of Denny Curtis when they returned to YLS in 1997 and was Anna VanCleave’s supervisor and colleague at the DC Public Defender Service.

. . .

Many of Meselson’s classmates and several Liman Fellows who worked with her on immigration cases wrote to us and to her family. Below, we provide a few excerpts to capture their admiration and affection for this remarkable, talented, and generous woman.

Brisk fall air and sharp stars above with crackling leaves underfoot, Amy and I walked home from a law school party deep in conversation. At the time we had our age, our Brown degrees, and a certain sense of humor in common. It was 1999, and we had just begun. Fast forward fifteen years, to an immigration lawyers conference in Boston. Amy and I ran into one another by chance, and immediately fell back into our comfortable exchange. By this time, we had even more of a kinship—having both completed Liman fellowships designed to serve immigrant youth and then continued this work for a decade, she in New York and I in Los Angeles.

At the conference, I was struck by the alignment of our concerns, as I had been over the years. But I also was reminded of something central to Amy's character: her inclination to turn fully toward, not away, from suffering and complexity. To embrace discomfort and be wholly alive to the pain of others—whether clients or co-workers or creatures—requires a certain unflinching resolve. That resolve, combined with her brilliance and creativity, made her beloved. Though I cannot pretend to know, I suspect that our vile immigration policies of late weighed heavily on Amy. And I suspect she refused to look away for as long as she could bear.

I do not believe in an afterlife. But I strongly believe that Amy still animates our shared world, both through actions she set in motion and people she inspired. I know many young immigrants have created full lives with Amy's support. And just as many young attorneys do important work drawn directly from her example. My new colleague from Brooklyn is one such attorney, and so in ways subtle and overt Amy continues to influence me. I want to believe Amy knew the life-affirming mark she made on others. And I invite us all to honor her memory by increasingly turning toward suffering with compassion, including that of colleagues whose pain may be deeply guarded. Peace, Amy, and gratitude.

Kristen Jackson, Liman Fellow 2003–2004,
Senior Staff Attorney, Public Counsel,
Los Angeles, CA

I knew Amy more as a dear friend than as a lawyer. I've been following tributes to her from lawyers and clients who knew her work much better than I did, and what strikes me most is how closely her rare virtues as a friend mirrored her qualities as a lawyer and advocate.

Amy was someone who threw herself into her many friendships, just as she worked so passionately and tirelessly to help clients who were on the verge of losing hope themselves. Up until the end of her life, she was a wholly present, loving, supportive, thoughtful, caring friend. Somehow, she managed to be so even while

struggling with terrible depression. I know many of us wish we could have given more back to her during her life. I'm grateful to everyone who is finding ways to honor her now.

Alice Clapman, Liman Fellow 2006–2007,
Staff Attorney, Planned Parenthood
Federation of America, Washington, DC

As soon as I met Amy Meselson, I knew two things: I wanted to know her better, and I wanted to spend more time together. Since Amy died, many friends and acquaintances who knew and loved her have shared this same, telling experience. In each encounter with Amy, you experienced the talent, empathy, humor, delicacy, strength, beauty and grace that she embodied simultaneously—offered freely and generously—enriching our lives so we wanted to know her more and spend more time with her.

I vividly remember my first conversations with Amy in the Fall of 1999 when we began our studies at Yale, where she became my best friend in law school. Even then, her advocacy, care, and empathy seemed boundless. As Amy's parents have recounted, her courageous willingness to take unpopular positions and defend the defenseless began in childhood and continued all her life. For Amy, people, compassion and justice mattered above all.

As a lawyer and recipient of the prestigious Liman Fellowship, Amy pioneered work on many important causes, especially on behalf of neglected, abused, and abandoned immigrant children. One of Amy's signature contributions was championing Special Immigrant Juvenile Status, which not only protected young people from deportation and separation from their families but also gave them a path to lawful permanent residence and, later, citizenship.

When Amy started practicing, this legal remedy, which combined family court litigation and foster care advocacy with proceedings in immigration court, was infrequently used. Amy's vision was to combine zealous litigation with targeted advocacy. She prompted New York City's immigration attorneys to amplify the needs of immigrant youth to the press and convinced New York's immigration court to create a special youth docket to ensure that children and teenagers were ensured access to pro bono attorneys who understood the range of remedies available to immigrant youth.

In other words, while many people were concerned about young immigrants, it was only Amy—who possessed the legal imagination and brilliant insights into how existing law could support her cause—who provided a solution. Thousands of immigrant children continue to benefit from Amy's strategic brilliance. And countless new lawyers and interns grew and shone under her mentorship and leadership. In the wake of Amy's passing, I have

learned of how generously Amy shared advice, experience and ideas with other attorneys, and how helpful she was no matter how constrained her time.

Here we saw all that we loved—and still love—about Amy: how she combined care, compassion, and commitment to justice with a keen and creative intellect, subtle and insightful perceptions, and a fierce dedication to doing the right and moral thing. And her unwavering goodness, generosity and brilliance will live on through the countless children and families whose lives she worked unceasingly to improve.

In 2016, Amy spent time in upstate New York to volunteer on a farm for abused animals. Later that year, she expanded her commitment to immigrants by relocating to Greece, where she worked with relief organizations helping Syrian refugees. Amy did not simply grieve in the face of need and suffering. She was *inspired* by need—inspired to action. Her empathy knew no bounds; she selflessly offered her brilliance, her passion, and her every energy to the powerless and afflicted. And, yet, in confronting so much of the world's pain, she was not impervious to it. Amy shared in that suffering—deeply and personally. In our sorrow, I, like many others, only wish we could have helped extricate her from that pain.

Yet despite her empathy with those who suffered, it is equally true that Amy was also incredibly funny. Her dry wit possessed an illuminating clarity about the world around us, finding the absurdity, the profundity, the wonder, and ironies in everyday occurrences that most of us overlook. And her sense of humor was also an invitation—impelling us to pile on one joke on top of another in a mountain of hilarity. That's what I loved about Amy: as hard as she was on herself, and as much pain as she suffered, she found ways to shield those she loved from that pain. She could see the heart of the matter, distilling the horrible into the harmlessly hilarious.

I and each of us deeply mourn Amy's death. We grieve and wonder what each of us might have done—for her and, selfishly, for us—to console her and keep her with us longer. However, as Amy's life and achievements demonstrate, we must face the world as it is—and we must act. Inspired by Amy and her eternal legacy of justice and compassion, we can hold Amy tightly and forever in our hearts and minds by committing ourselves with love, compassion and care for others. That's who she was. That's who Amy Meselson is. And that—like our love for Amy—never dies.

Joseph Landau, Yale Law School Class of 2002
Visiting Professor of Law, Columbia Law School
Professor of Law, Fordham Law School

Among Amy's many wonderful qualities, she was a great adviser to public interest lawyers just starting out—something I learned when I was fortunate enough to have her as my Liman mentor. The first time I met her, I felt totally at ease—her bright smile and open face, her curly hair, her warm manner—and comfortable enough to prod her with all sorts of questions about her work. What remains astonishing is that across the many clients she served and the difficult cases she navigated, Amy was totally humble about her accomplishments. She'll continue to be a mentor to those of us who place the client first in our work.

Vasudha Talla, Liman Fellow 2009–2010
Staff Attorney, ACLU of Northern California

Amy was one of the first immigration defense attorneys I had ever met and, in retrospect, the one who likely snowballed my legal career to what it is today. She was a speaker at a Yale Law Women event my 1L fall in 2014, and I was immediately drawn to Amy's deep knowledge, passion, and commitment to her work at the Legal Aid Society (LAS) Immigration Unit. I was initially intimidated about approaching her after the talk, but Amy's kindness and enthusiasm immediately melted away my doubts. She encouraged me to apply for an internship at LAS and later mentored me throughout my summer there. We kept in touch and Amy eventually advised me on my application for the Liman Fellowship to build the immigration representation capacity within the Alameda County Public Defender's Office in Northern CA. Her feedback and insight were absolutely invaluable, and I feel lucky to have had her support throughout the process.

I was not as close to Amy as many of her classmates and colleagues, who are also sharing their tributes here. But I know that my story is not unique in reflecting the role that Amy played in inspiring young public interest lawyers like myself, especially those working in immigrants' rights, and juvenile and racial justice. Her legacy lives on, not only in the clients and families she has helped, the practice she helped build at LAS and beyond, but also in the generations of activists and defenders for whom she paved a path.

The last I heard from Amy, she was volunteering at an immigration detention center in Etowah, Alabama. She was supposed to be on hiatus from work, but I was not at all surprised. She worked tirelessly until the end for the cause. Rest in peace and power, Amy.

My Khanh Ngo, Liman Fellow 2017–2018
Clerk, Honorable Richard Paez of the
U.S. Court of Appeals for the Ninth Circuit

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Please contact the Liman Director if you are interested in supporting the new named funds or gift categories, in making a bequest to the Liman Center, in other planned giving options, or in making gifts of securities or other assets. Establishing a named fund for publications, travel, or expenses is also possible.

In addition, \$5,000 covers the cost of an internship for one Liman Summer Fellow. Liman summer programs now exist at eight colleges and universities (Barnard, Brown, Bryn Mawr, Harvard, Princeton, Spelman, Stanford, and Yale) to provide stipends for students working in the public interest during the summer. Contributions to supplement existing programs at participating institutions may be designated for the Liman Summer Fellowship Program and donated directly to those schools. A new summer fellowship program could be created at another college or university. Contact the Liman Director to help coordinate these contributions.

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Among the many talents of the intergenerational group of Liman Fellows are the vocal abilities of former Liman Summer Fellows. Brandon Levin, a Yale Liman Summer Fellow in 2012 and a current law student here, was also a member of Yale's *a cappella* group, the Whiffenpoofs. Ashtan Towles, a Yale senior, was a Liman Summer Fellow in 2017 and is a member of another *a cappella* group, Shades of Yale. Taonga Leslie was a 2013 undergraduate Liman Summer Fellow at Harvard and was in the Glee Club before coming to Yale Law School, where he is in his third year. These students performed at the Liman Colloquium dinner and are shown here with Governor Dannel Malloy, who spoke at the Colloquium.

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The 2016–2018 and 2017–2018 Liman Fellows

FRONT ROW: Lynsey Gaudioso, Jonas Wang, Abigail Rich
SECOND ROW: Celina Aldape, My Khanh Ngo
THIRD ROW: Devon Porter, Havi Mirell, Rachel Shur, Carly Levenson
BACK ROW: Ryan Cooper, Corey Guilmette, Nathan Nash

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