

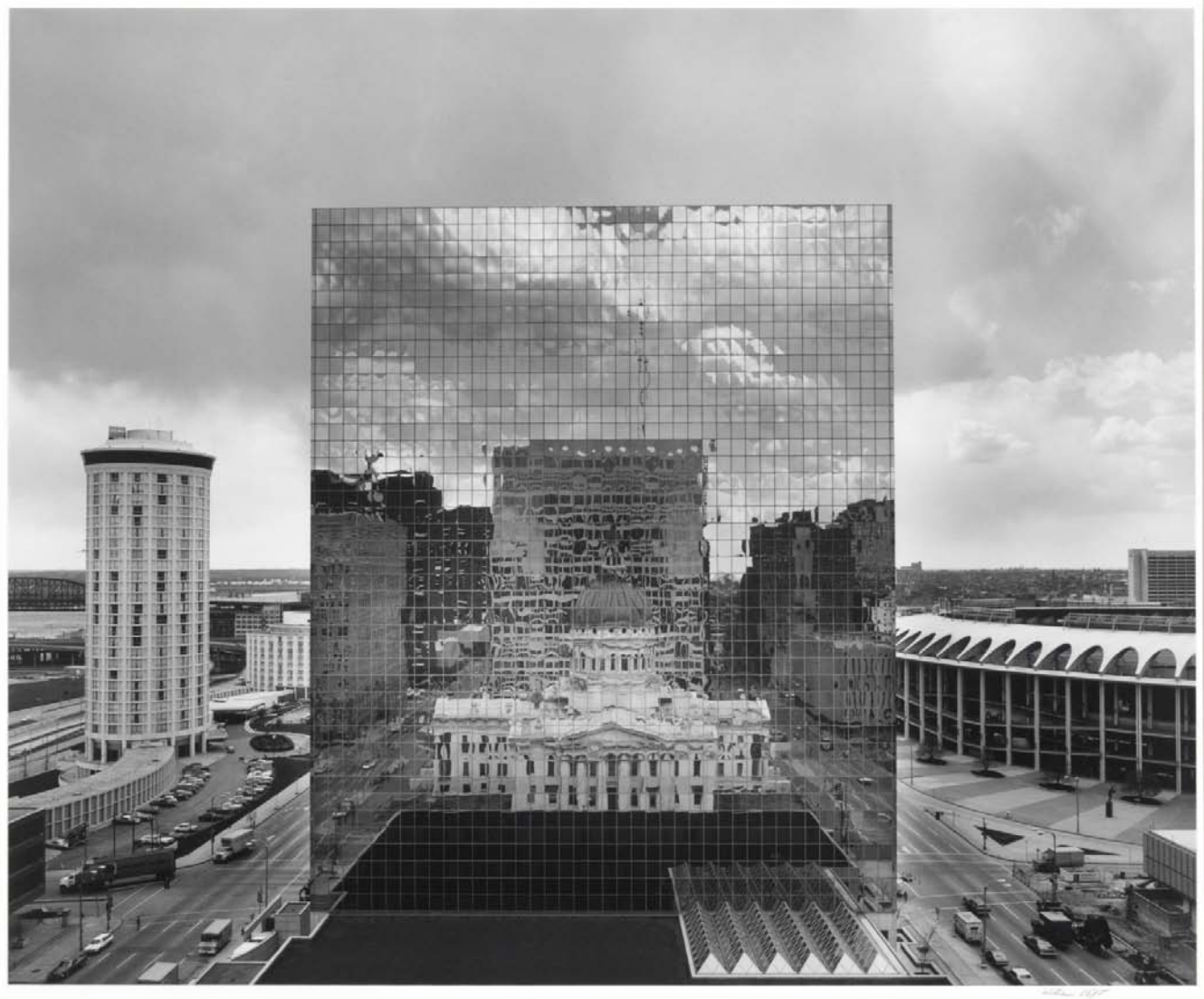
COLLOQUIUM MATERIALS

Accessing Justice, Rationing Law

**The Fifteenth Annual Liman Colloquium
Yale Law School
March 1-2, 2012**

Co-sponsored by the Arthur Liman Public Interest Program and Fund, the Oscar M. Ruebhausen Fund, the Preiskel/Silverman Fund, and the Yale Law School

These materials were prepared with the assistance of the participants and compiled by Hope Metcalf, Judith Resnik, and Sia Sanneh, and by Yale Law students Jeremy Kaplan-Lyman, Ester Murdukhayeva, Katherine Oberembt, and Brandon Trice.



Reflections, Old St. Louis County Courthouse. Photographer: William Clift ©
Image reproduced courtesy of the photographer

“That all courts shall be open; and that every person, for any injury done him, in his lands, goods, person, or reputation, shall have a remedy by due process of law; and right and justice shall be administered without sale, denial, or delay.”

ALABAMA CONST. art. I, § 13 (1819)

“[T]his Constitution . . . guarantees that a person may not be deprived of life, liberty, or property without due process of law.”

CALIFORNIA CONST. art. I, § 3 (1849)

“All courts shall be open, and every person, for an injury done to him in his person, property or reputation, shall have remedy by due course of law, and right and justice administered without sale, denial or delay.”

CONNECTICUT CONST. art. I, § 10 (1818)

“All courts shall be open; and every person, for injury done to him in his person, property, or reputation, shall have remedy by due course of law. Justice shall be administered freely, and without purchase, completely, and without denial; speedily, and without delay.”

INDIANA CONST. art. I, § 12 (1851)

“Every subject of the commonwealth ought to find a certain remedy, by having recourse to the laws, for all injuries or wrongs which he may receive in his person, property, or character. He ought to obtain right and justice freely, and without being obliged to purchase it; completely, and without any denial; promptly, and without delay; conformably to the laws.”

MASSACHUSETTS. CONST. pt. I, art. 11 (1780)

“No member of this state shall be disfranchised, or deprived of any of the rights or privileges secured to any citizen thereof, unless by the law of the land, or the judgment of his or her peers.”

NEW YORK CONST., art. I, § 1 (1821)

“All courts shall be open, and every person for an injury done him, in his lands, goods, person or reputation, shall have remedy by due course of law.”

TEXAS CONST., art. I, § 13 (1850)

“No person shall be . . . deprived of life, liberty, or property, without due process of law.”

UNITED STATES CONST. amend. V (1791)

“In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.”

EUR. CONVENTION ON HUMAN RTS., art. 6, § 1 (1953)

All of our participants are concerned about the challenges that courts and governments face in making good on the aspirations and constitutional commitments to open courts, rights to remedies, and due process. The transformation in the understanding of rights, brought about by social and political movements in the twentieth century, rendered everyone entitled to equal and dignified treatment in courts. Democratic principles of equality thus pose enormous challenges to courts. This sampling of materials (followed by a fuller bibliography) captures some of the successes of the progressive realization of the ideals, as well as the challenges and tensions produced by substantive entitlements to courts.

Gatekeepers to Justice: The State of State Courts, 2012

Most state constitutions guarantee “open courts” and rights to remedies. Further, in 1963, *Gideon v. Wainwright* established a constitutional right to counsel for indigent defendants facing felony charges. Implementation of these rights, however, continues to occupy the legal profession. A 2004 report by the American Bar Association reached “the disturbing conclusion that thousands of persons are processed through America’s courts every year either with no lawyer at all or with a lawyer who does not have the time, resources, or in some cases the inclination to provide effective representation.” On the civil side, California counted 4.3 million civil litigants without lawyers in its courts in 2009; New York tallied 2.3 million in 2010, and that number includes almost all facing evictions and 95 percent of those in family conflicts.

The excerpts below, from Alabama, California, Connecticut, Indiana, Massachusetts, New York, and Texas, as well as data from their and the federal court systems, explore the challenges courts face in response to demand for their services.

Glimpsing the Docket

State Court Filings, 1976-2008.

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Connecticut Filings, A Comparison: 2006-07/ 2009-2010.

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Margaret H. Marshall, Putting it All Together: Or What Can We Do Now?, Address at the Kentucky Law Journal Symposium (Sept. 24, 2011).

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***Gideon* Revived: Criminal Defendants, Financial Austerity, and Overcriminalization**

As state courts experience severe cuts, layoffs, and furloughs, the criminal justice system continues to produce defendants, detainees, and prisoners. More than a half century ago, the debate was whether the federal constitution mandated that indigent criminal felony defendants be provided state-paid lawyers. A 1962 brief (excerpted below) from a state opposing that right provides a window into both the transformations that *Gideon* produced and the degree to which contemporary arguments parallel claims made decades ago. The U.S. Supreme Court's commitment to *Gideon* continues in the 2008 *Rothgery* decision, while the dissents raise questions about *Gideon's* scope.

Implementation remains incomplete, as other materials below detail. Some state courts have responded by creating mechanisms for public defenders to decline assignments and by recognizing pre-conviction habeas review of ineffective assistance of counsel. Additional responses include task forces, diversion programs, and sentencing reforms.

These materials prompt a series of questions. What remedies can courts order, and what are the limits on what judges can do? Should lawyers decline appointments when their caseloads become too large? What role might prosecutors play in selecting cases? What can the executive branch do? What forms of rationing, by which institutions, are acceptable? Should the narrative be one of progressive realization of constitutional ideals or of a failure of political will to support courts and litigants?

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***Gideon* Reconceived: State Subsidized Lawyers for Civil Litigants— In and Outside the United States**

Both the federal government and several states—including California and New York—have provided statutory access to civil legal services for low-income people. A few jurisdictions also have read their constitutions to require rights to counsel for some litigants. But, as New York’s Chief Judge Jonathan Lippman cautioned in 2011, “we cannot provide a lawyer to every poor person with a legal problem, as much as we would want to. What we are seeking is to provide legal representation to those struggling to access life’s most basic necessities, such as shelter, food, and personal safety.”

These materials reflect why certain kinds of proceedings are characterized as “civil” or “criminal,” and how – and which institutions – decide priorities for legal counsel. Variables proposed include age, income, the type of service sought, and the kind of claim raised. And, of course, the United States is not alone in facing funding challenges, as comparative readings, focused in part on the United Kingdom, make plain.

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Alternative Courts and Alternatives to Courts

Many jurisdictions (in and outside of the United States) are exploring alternatives to civil and criminal litigation. Mediation, arbitration, and settlement are encouraged, and many advocate “problem-solving courts” or specialized courts, with names such as homeless courts, drug courts, reentry courts, veterans’ courts, and girls’ courts. Trade-offs abound, as some of these alternatives are not voluntary, and some do not permit lawyer participation. Moreover, such alternatives are less public than adjudication. This segment focuses on the extant experimentation, the successes, the risks, and the relationship of these alternatives to constitutional, statutory, and common law rights of litigants. Questions include what types of litigants and cases have been sent to alternative courts, the desirability of limiting reliance on lawyers, the sustainability of innovation, and the relationship of these changes to the ideology of “rights to remedies.”

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Note: These materials are heavily excerpted and most of the footnotes or endnotes have been deleted.

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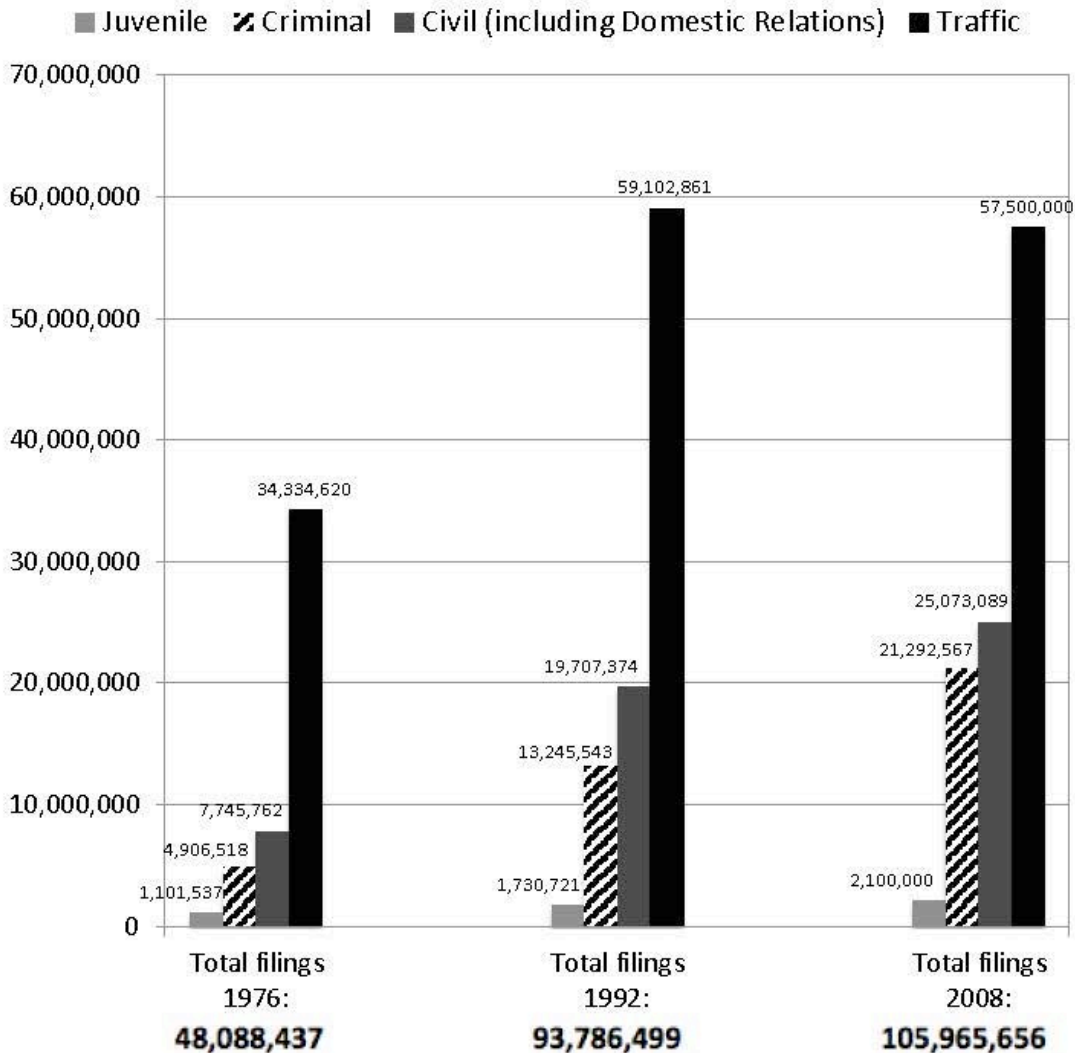
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I. GATEKEEPERS TO JUSTICE: THE STATE OF STATE COURTS, 2012

Glimpsing the Docket

Compiled by Ruth Anne French-Hodson (YLS 2012) and Jason Glick (YLS 2012)

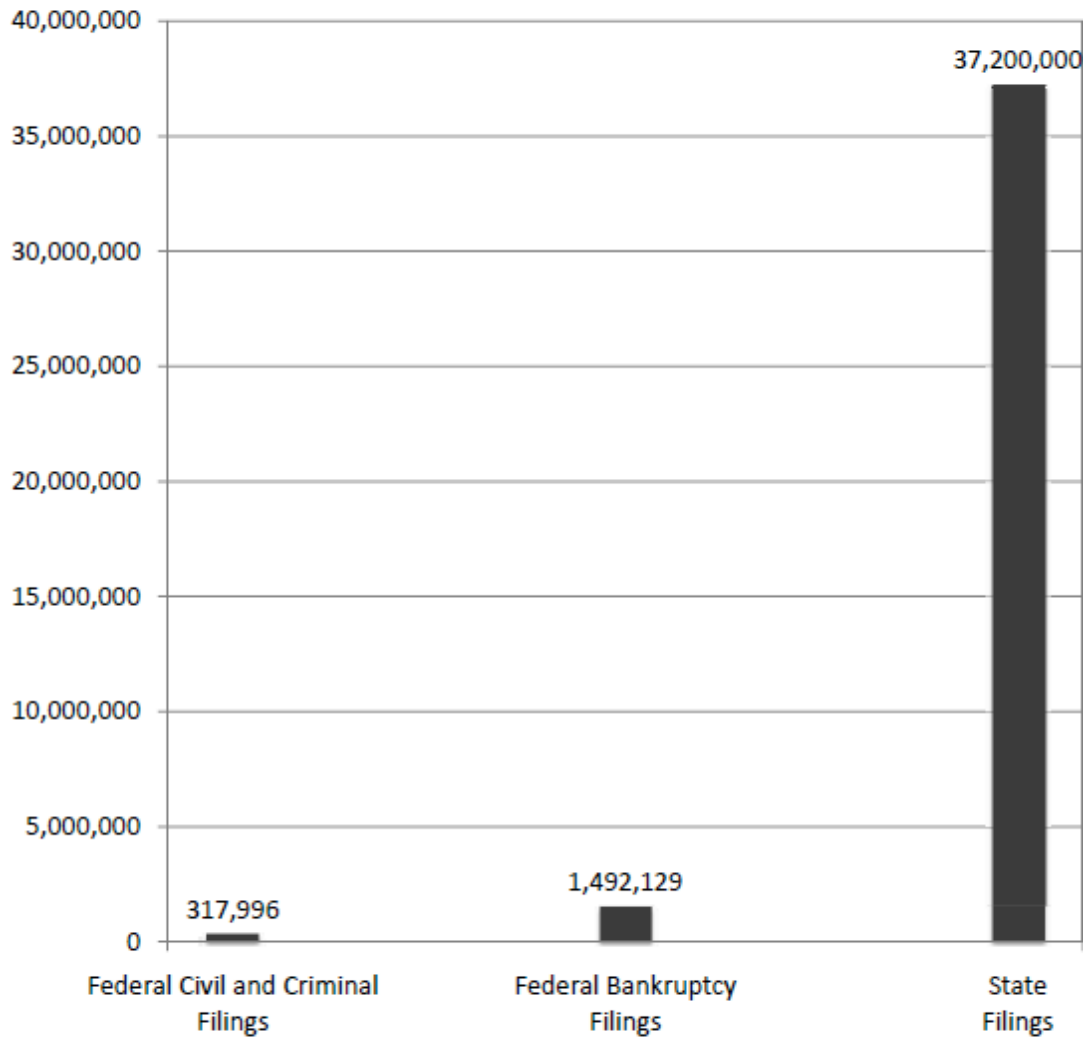
State Court Filings, 1976-2008



Source: National Center for State Courts annual reports, entitled *Examining the Work of State Courts*, http://www.ncsconline.org/D_Research/csp/EWSC-pastreports.html. Figures are estimates, as not all states report data in all categories.

Resnik, French-Hodson, Glick © 2011.

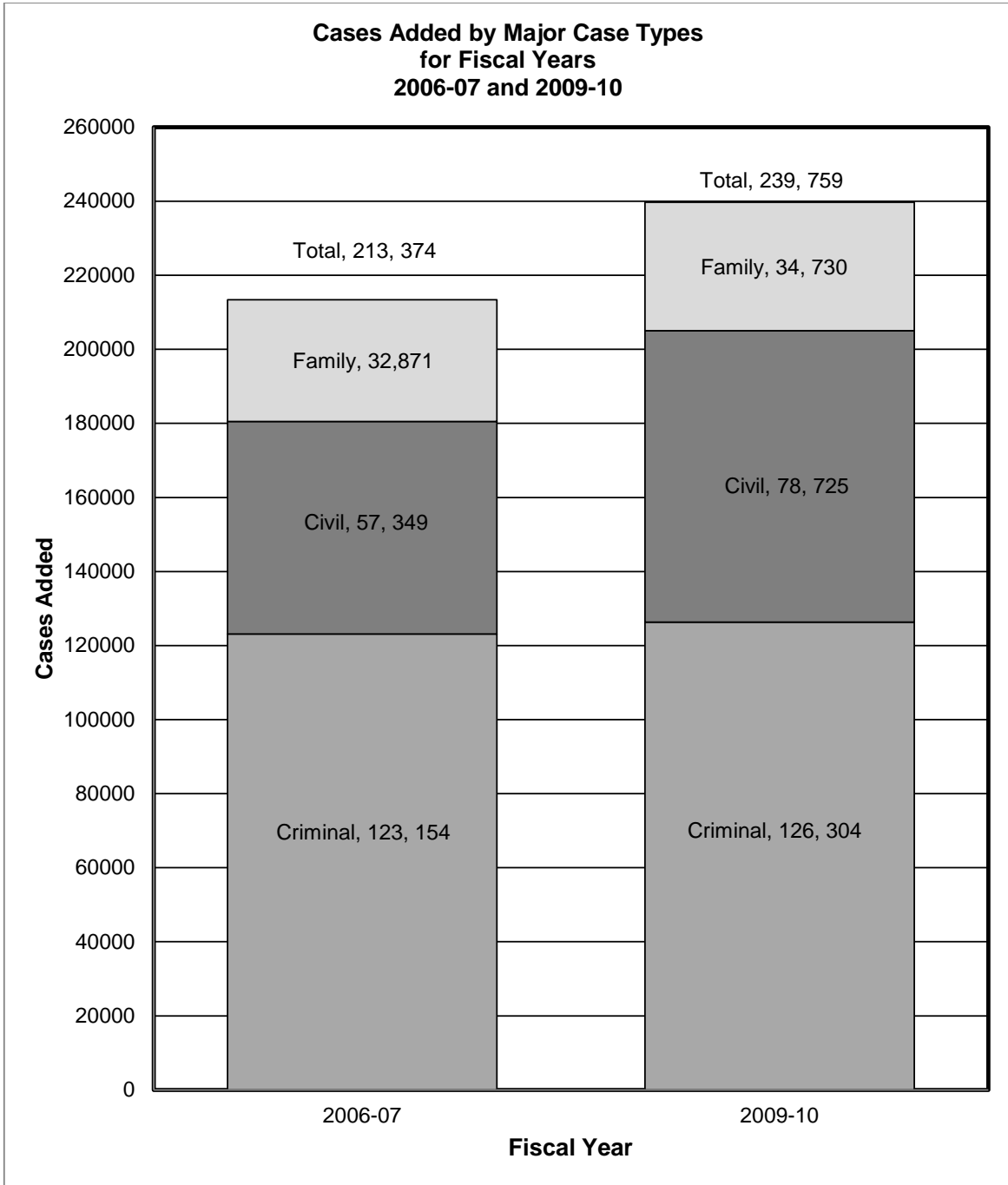
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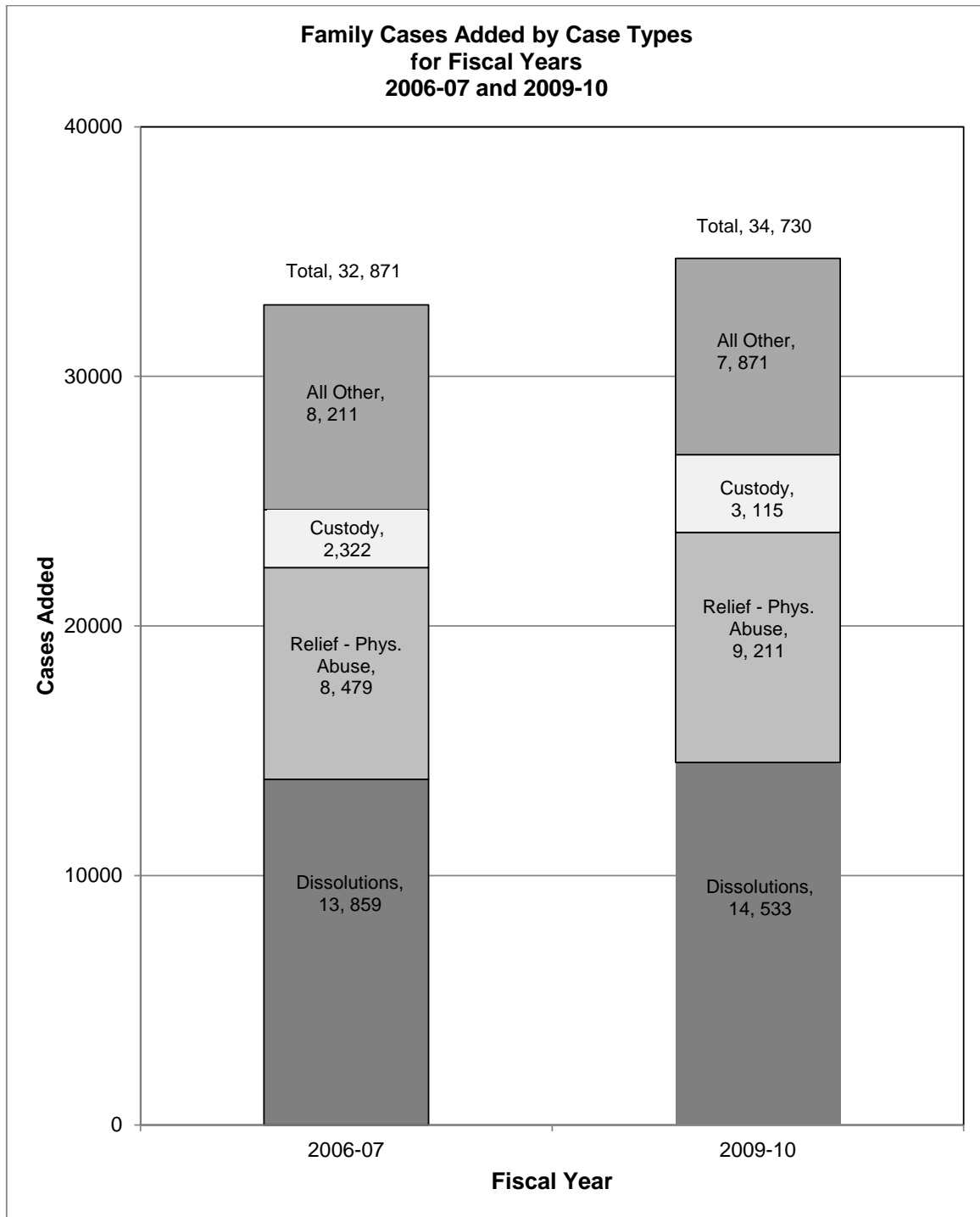


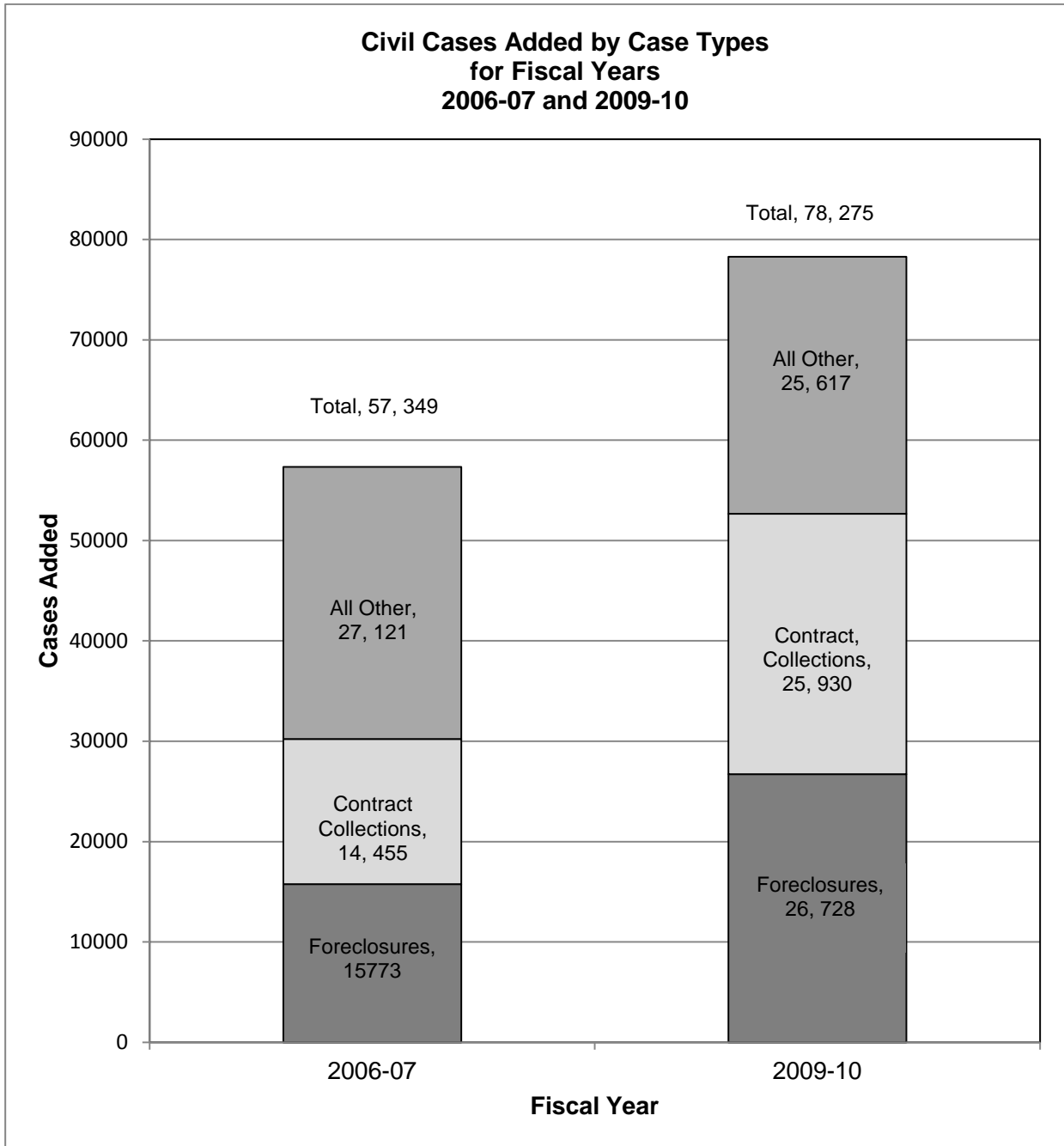
Sources: Administrative Office of the U.S. Courts; National Center for State Courts. State figures are estimates, as not all states report data in all categories. State figures do not include traffic cases.

Resnik, French-Hodson, Glick © 2011

Connecticut Filings: A Comparison







**Number of Self-Represented Parties by Type of Case
2005 to 2010**

Type of Case	Number of Self-Represented Parties						
	2005	2006	2007	2008	2009	2010	% Change over Period
Civil Case	12, 356	12, 953	16, 519	20, 326	26, 252	24, 851	101%
Family Case	36, 386	38, 199	37, 822	38, 454	39, 561	43, 241	19%
All Cases	48, 742	51, 152	54, 341	58, 780	65, 813	68, 092	40%

Note: In 2010, 27% of all civil cases had at least one party that was self represented and 84% of all family cases had at least one party that was self-represented.

The Honorable Sue Bell Cobb

State of the Judiciary Address, Alabama, Jan. 26, 2010

. . . . And today as I appear before you I want to leave you with three basic but important messages. First, the crisis of funding the Courts and indeed all of state government. Second, our efforts to do more with less and the assistance we can give with the Department of Corrections and its budget. Third, as we look to the future – the fundamental changes we must make to our court system in order to be more efficient. With your help, we will make the state safer and conserve precious tax dollars . . .

According to the budget proposed by Governor Riley, the Supreme Court will see an effective cut 15.5% and the Appellate Courts will be cut 16-17%. Where our justice system begins, the trial courts, the Governor has proposed a cut of 8% which translates to an effective cut of 12%.

. . . That may not seem like a financial crisis to the Governor – but tell that to the 500-600 Court employees who would be laid off if the Legislature allows the Governor’s proposed budget to stand. . . .

Although the courts are the only branch of government for which our State Constitution has required “adequate and reasonable” funding, we know that we are not immune from the economic reality, for our Constitution also mandates a balanced budget. . . .

During my previous addresses to you, the members of the Alabama Legislature, one of the common themes has been the deplorable situation in our prison system. As I said, it is time for truth-telling: Alabama is first in the nation in overcrowded prisons, and we are dead last in funding per inmate. A recent study showed that Alabama’s prisons were 195% of capacity, California were 185% of capacity, and Massachusetts were 145% of capacity.

The truth is that all three branches of government must join together to remedy this situation and work to make the people of Alabama safer and simultaneously save tax dollars. Pew Charitable Trust, VERA Institute for Justice, and Crime Justice Institute, all have a presence in Alabama. They are working with the Alabama Sentencing Commission in an effort entitled “The Community Cooperative Alternative Sentencing Project.” With assistance being provided by these out-of-state experts and local and state partners, we are developing model-mentor community punishment systems in four counties – which will have a complete continuum of appropriate sentencing alternatives for non-violent offenders, addressing the underlying causes of criminal behavior. . . .

Court systems around the county are facing a future of significant budget constraints and cannot count on a return to business as usual. Short term cost reduction steps, though necessary, will not suffice. Courts must undertake fundamental change such as restructuring delivery systems, redesigning business processes, expanding the use of technology, and even reorganization. . . .

. . . . Be assured that your concerns are our concerns. We want the same thing: A judicial system that affords justice and provides safety for you, your families, and your communities.

May God bless you and your family in 2010 and beyond.

The Honorable Tani Cantil-Sakauye
First Annual Address to the State Bar of California¹
Saturday, September 17, 2011
Long Beach, California

. . . . And so when I became chief, I inherited this legacy, and I promise not to squander it and I stand by that promise. But it looks like we are reaching a point in the result of budget cuts [where] the judicial branch is in peril. Because, as you know this year, the judicial branch is 2.4 percent of the [State Budget], and we also unwillingly contributed \$1.1 billion back to the General Fund.

Something is wrong with these arrows. Something is wrong with that equation.

[That's] 2.4 percent of the [State Budget] to protect the constitutional rights of 38 million Californians, to provide a place for the resolution of civil dispute, to protect public rights, to protect the rule of law. I tell you 2.4 percent is unconscionable in good years. But in the bad years that we have suffered, with an economic crisis and where jobs are lost, privileges are taken, services are cut, that's when courts need to be open. You need to be able to go to court to defend your client in that kind of squeeze.

I recognize that there has been a national, global, state economic downturn and I recognize as a third branch of government, we need to do our part—and we have done our part, I think, admirably and heroically with shrinking resources, trying to provide the same level of service. And how have we done that? We have looked to efficiencies, we have changed funds, transferred money to operations. We have tried technological business models. We've done a number of things. But the remedy doesn't exist to fix the branch with 2.4 percent of the [State Budget]. We can slice the pie any way we want, but 2.4 percent is never going to be enough.

. . . . And I'm going to submit to you that I've thought of a four-point plan for the immediate and midterm future. And that four-point plan consists of keeping courts open across the state with your help.

It will be a coalition effort, as we do that, and none of us can succeed alone, and it really is the legacy of how the branch was built—by collaborative leadership, muscle, and sheer will. And I think the second component of my four-point plan is to strengthen the branch from within. I thank Chief Justice George for the institution he created, but now it's time for us to be advocates for ourselves. It's time to take the great talent we have here, the persuasion, the connections and

¹ This is a transcript of remarks made by Chief Justice Tani Cantil-Sakauye at the State Bar of California annual meeting. The transcript has been adjusted slightly to conform her remarks to a written format.

strengthen the branch so that we can move forward and do the best we can for the public, our clients, and ourselves.

My third point in the four-point plan is to coax—not force, not strong-arm—but to coax the branch into the 21st century. And you know and I know (how many of you checked your smart phones this morning?) we can coax ourselves into the 21st century, not only by building safe accessible buildings but by having a user-friendly case management system. That will take some time and it will also require your insistence.

And the last thing we have to do and always must do is that we have to engage the public in the important work you do and the important work we do so that there's an appreciation that it is lawyers and the judicial branch that protect their rights.

And so we will, and I have engaged a federal judge and an appellate justice in moving together for a civics education initiative this year. And amidst all of those plans, I commit to you a partnership in working together, in being inclusive, and working with civility and integrity.

Now, given my background as a blackjack dealer, I'll tell you, I always note the wager, but I wait and watch for the tell. And I'm also going to say, that as the mother of two teenage girls, I know drama. But it never gets in the way of a solution. And even when we have our dramatic moments, my husband and I with our two girls, we love them the next day. So I look forward to partnering with you. I think we have a really strong branch and a great bar. And that's why California is the model for the United States.

So I thank you for giving me these few moments and I look forward to administering the oath of office to the new board of governors and the president.

Sargent Shriver Civil Counsel Act

CAL. GOV. CODE § 68651 (eff. July 1, 2011)

§ 68651. Representation of counsel for low-income persons in specified civil actions; Model pilot projects;

Funding of projects

(a) Legal counsel shall be appointed to represent low-income parties in civil matters involving critical issues affecting basic human needs in those specified courts selected by the Judicial Council as provided in this section.

(b) (1) Subject to funding specifically provided for this purpose pursuant to subdivision (d) of Section 70626, the Judicial Council shall develop one or more model pilot projects in selected courts pursuant to a competitive grant process and a request for proposals. Projects authorized under this section shall provide representation of counsel for low-income persons who require legal services in civil matters involving housing-related matters, domestic violence and civil

harassment restraining orders, probate conservatorships, guardianships of the person, elder abuse, or actions by a parent to obtain sole legal or physical custody of a child, as well as providing court procedures, personnel, training, and case management and administration methods that reflect best practices to ensure unrepresented parties in those cases have meaningful access to justice, and to gather information on the outcomes associated with providing these services, to guard against the involuntary waiver of those rights or their disposition by default. These pilot projects should be designed to address the substantial inequities in timely and effective access to justice that often give rise to an undue risk of erroneous decision because of the nature and complexity of the law and the proceeding or disparities between the parties in education, sophistication, language proficiency, legal representation, access to self-help, and alternative dispute resolution services. In order to ensure that the scarce funds available for the program are used to serve the most critical cases and the parties least able to access the courts without representation, eligibility for representation shall be limited to clients whose household income falls at or below 200 percent of the federal poverty level. Projects shall impose asset limitations consistent with their existing practices in order to ensure optimal use of funds.

(2) (A) In light of the significant percentage of parties who are unrepresented in family law matters, proposals to provide counsel in child custody cases should be considered among the highest priorities for funding, particularly when one side is represented and the other is not.

(B) Up to 20 percent of available funds shall be directed to projects regarding civil matters involving actions by a parent to obtain sole legal or physical custody of a child. . . .

(4) Each project shall be a partnership between the court, a qualified legal services project, as defined by subdivision (a) of *Section 6213 of the Business and Professions Code*, that shall serve as the lead agency for case assessment and direction, and other legal services providers in the community who are able to provide the services for the project. The lead legal services agency shall be the central point of contact for receipt of referrals to the project and to make determinations of eligibility based on uniform criteria. The lead legal services agency shall be responsible for providing representation to the clients or referring the matter to one of the organization or individual providers with whom the lead legal services agency contracts to provide the service....

(5) The participating projects shall be selected by a committee appointed by the Judicial Council with representation from key stakeholder groups, including judicial officers, legal services providers, and others, as appropriate. The committee shall assess the applicants' capacity for success, innovation, and efficiency, including, but not limited to, the likelihood that the project would deliver quality representation in an effective manner that would meet critical needs in the community and address the needs of the court with regard to access to justice and calendar management, and the unique local unmet needs for representation in the community. Projects approved pursuant to this section shall initially be authorized for a three-year period, commencing July 1, 2011, subject to renewal for a period to be determined by the Judicial Council, in consultation with the participating project in light of the project's capacity and success. . . . Projects shall be selected on the basis of whether in the cases proposed for service the persons to be assisted are likely to be opposed by a party who is represented by counsel. The Judicial Council shall also consider the following factors in selecting the projects:

- (A) The likelihood that representation in the proposed case type tends to affect whether a party prevails or otherwise obtains a significantly more favorable outcome in a matter in which they would otherwise frequently have judgment entered against them or suffer the deprivation of the basic human need at issue.
- (B) The likelihood of reducing the risk of erroneous decision.
- (C) The nature and severity of potential consequences for the unrepresented party regarding the basic human need at stake if representation is not provided.
- (D) Whether the provision of legal services may eliminate or reduce the potential need for and cost of public social services regarding the basic human need at stake for the client and others in the client's household.
- (E) The unmet need for legal services in the geographic area to be served.
- (F) The availability and effectiveness of other types of court services, such as self-help.
- ...

(10)

- (e) The section shall become operative on July 1, 2011.

Elkins v. Superior Court of Contra Costa Co.

Supreme Court of California

41 Cal. 4th 1337 (2007)

OPINION delivered by GEORGE, C.J.

Petitioner Jeffrey Elkins represented himself during a trial conducted in marital dissolution proceedings instituted by his wife, Marilyn Elkins (real party in interest), in the Contra Costa Superior Court. A local superior court rule and a trial scheduling order in the family law court provided that in dissolution trials, parties must present their case by means of written declarations. The testimony of witnesses under direct examination was not allowed except in "unusual circumstances," although upon request parties were permitted to cross-examine declarants. In addition, parties were required to establish in their pretrial declarations the admissibility of all exhibits they sought to introduce at trial.

Petitioner's pretrial declaration apparently failed to establish the evidentiary foundation for all but two of his exhibits. Accordingly, the court excluded the 34 remaining exhibits. Without the exhibits, and without the ability through oral testimony to present his case or establish a foundation for his exhibits, petitioner rested his case. As the court observed, the trial proceeded "quasi by default," and the court's disposition of the parties' property claims demonstrated that the court divided the marital property substantially in the manner requested by petitioner's former spouse.

Petitioner challenges the local court rule and trial scheduling order on the grounds that they are inconsistent with the guarantee of due process of law, and that they conflict with various provisions of the Evidence Code and the Code of Civil Procedure. Respondent court counters

that the promulgation of the rule and order comes within its power to govern the proceedings before it, and that its rule and order are consistent with constitutional and statutory provisions.

We need not reach petitioner's constitutional claim because, as applied to contested marital dissolution trials, the rule and order are inconsistent with various statutory provisions.² As we explain below, we reach this conclusion because, pursuant to state law, marital dissolution trials proceed under the same general rules of procedure that govern other civil trials. Written testimony in the form of a declaration constitutes hearsay and is subject to statutory provisions governing the introduction of such evidence. Our interpretation of the hearsay rule is consistent with various statutes affording litigants a "day in court," including the opportunity to present all relevant, competent evidence on material issues, ordinarily through the oral testimony of witnesses testifying in the presence of the trier of fact. . . .

III

. . . . Respondent claims "[f]irst and foremost" that efficiency and the "expeditious resolution of family law cases" support its rule and order. It also seeks to justify these requirements on the theory that they serve to reduce rancor and "adversarial confrontation between estranged spouses," and to assist the many self-represented litigants in the family law courts by "giving them direction as to how to prepare for trial, how to frame issues properly, and how to provide evidentiary support for their positions and ... avoid being 'blindsided' by the adverse party."

That a procedure is efficient and moves cases through the system is admirable, but even more important is for the courts to provide fair and accessible justice. In the absence of a legislative decision to create a system by which a judgment may be rendered in a contested marital dissolution case without a trial conducted pursuant to the usual rules of evidence, we do not view respondent's curtailment of the rights of family law litigants as justified by the goal of efficiency. What was observed three decades ago remains true today: "While the speedy disposition of cases is desirable, speed is not always compatible with justice. Actually, in its use of courtroom time the present judicial process seems to have its priorities confused. Domestic relations litigation, one of the most important and sensitive tasks a judge faces, too often is given the low-man-on-the-totem-pole treatment." (*In re Marriage of Brantner* (1977) 67 Cal.App.3d 416, 422, 136 Cal.Rptr. 635.)

Moreover, the amicus curiae briefs we have received strongly dispute respondent's assertion that its rule and order promote efficiency, reduce rancor or costs, promote settlement, or aid unrepresented litigants. In their brief, the Northern and Southern California Chapters of the American Academy of Matrimonial Lawyers (Academy) argue that the local rule and order only increase the burden on the trial courts and further strain limited judicial resources, because it is more time consuming for the court to examine lengthy declarations than it is to listen to testimony, leaving courts "with two options: (1) spend more time than they have available at court to read the lengthy materials, or (2) just give the written materials a cursory review, and rule by 'guesstimate.'" This is not a choice favored by litigants, lawyers, or judicial officers."

² Our conclusion does not affect hearings on motions.

The same brief characterizes as an “absurdity” respondent's claim that the rule and order help self-represented litigants by describing in detail how they must prepare for trial. On the contrary, the brief claims, “[t]he burdens created by the local court rule and [order] are so onerous that they overwhelm most attorneys, let alone self-represented litigants.” According to the Academy's brief, the rule and order restrict access to justice by increasing the cost of litigation. The brief points to the added costs of preparing exhaustive declarations of all *potential* witnesses, including an evidentiary foundation for all proposed exhibits, and taking the deposition of nonparty witnesses in the event they refuse to prepare a declaration.

The Family Law Section of the Contra Costa County Bar Association commissioned a professional survey of family law practitioners in the county, and the great majority of those surveyed were decidedly critical of the rule and order, including the successor to the order at issue in the present case, believing the order did not increase judicial efficiency and, along with their clients, questioning whether courts have the time to read the voluminous binders of declarations and exhibits required by the rule. A substantial majority of family law attorneys in the county also reported finding the rule and order inordinately time consuming, difficult, and costly to comply with.

Respondent suggests its rule and order encourage settlement by “apprising both sides, well in advance of trial, of the facts that will be presented.” Local attorneys reported, however, that unfortunately the rule and order have not aided settlement, because parties take extreme positions in their declarations, causing an increase in animosity and a diminished likelihood of settlement. The various amici curiae, including local practitioners, confidently claim that any increase in settlements achieved by the rule and order occur because litigants generally cannot afford the substantial added litigation costs created by compliance with the rules.

We are most disturbed by the possible effect the rule and order have had in diminishing litigants' respect for and trust in the legal system. The Contra Costa survey confirmed that litigants believed the rule and order deprived them of the essential opportunity to “tell their story” and “have their day in court,” and felt the rule and order caused the lawyers who drafted the declarations to be the persons testifying, not themselves. “Members uniformly report that their clients are stunned to be told that they will not get to tell their story to the judge,” and express “shock, anxiety and outrage” along with the belief that “they had been denied their right to have their case heard by a judicial officer.” Overwhelmingly, practitioners criticized the rule and order for creating what their clients understood to be a lesser standard of justice for family law litigants.

A recent statewide survey reflects a similar concern with court procedures that do not permit family law litigants to tell their story, a circumstance reported by litigants to diminish their confidence in the courts. (Judicial Council of Cal., Admin. Off. of Courts, Rep. on Trust and Confidence in the California Courts (2006) Phase II, pp. 31–36 [self-represented litigants “express[ed] frustration that they did not have a chance to fully explain their side of the story to the judge”]; “public trust and confidence in the courts ... will continue to be negatively affected

[by] procedures [that] do not permit [litigants] to tell their story at some length and in their own words”].)

We are aware that superior courts face a heavy volume of marital dissolution matters, and the case load is made all the more difficult because a substantial majority of cases are litigated by parties who are not represented by counsel. (See Judicial Council of Cal., Rep on Statewide Action Plan for Serving Self-Represented Litigants (2004) Executive Summary, p. 2 [80% of the cases have at least one unrepresented party by the time of disposition].) In its 2006 report, the Judicial Council estimated that “although family and juvenile cases represent 7.5 percent of total filings, they account for nearly *one-third* of the trial courts’ judicial workload....” (Judicial Council of Cal., Ann. Rep. (2006), p. 26, italics added.)

In light of the volume of cases faced by trial courts, we understand their efforts to streamline family law procedures. But family law litigants should not be subjected to second-class status or deprived of access to justice. Litigants with other civil claims are entitled to resolve their disputes in the usual adversary trial proceeding governed by the rules of evidence established by statute. It is at least as important that courts employ fair proceedings when the stakes involve a judgment providing for custody in the best interest of a child and governing a parent’s future involvement in his or her child’s life, dividing all of a family’s assets, or determining levels of spousal and child support. The same judicial resources and safeguards should be committed to a family law trial as are committed to other civil proceedings.

Trial courts certainly require resources adequate to enable them to perform their function. If sufficient resources are lacking in the superior court or have not been allocated to the family courts, courts should not obscure the source of their difficulties by adopting procedures that exalt efficiency over fairness, but instead should devote their efforts to allocating or securing the necessary resources. (See Cal. Stds. Jud. Admin, § 5.30(c).) As stated in the advisory committee comment to the California Standards for Judicial Administration: “It is only through the constant exertion of pressure to maintain resources and the continuous education of court-related personnel and administrators that the historic trend to give less priority and provide fewer resources to the family court can be changed.” (Advis.Com.com., Cal.Stds.Jud.Admin, foll. § 5.30(c).)

Courts must earn the public trust. (See Cal. Stds. Jud. Admin., § 10.17, subd.(b)(5)(A) & (B).) We fear that respondent's rule and order had the opposite effect despite the court’s best intentions.

[Werdegar, J. concurring opinion omitted]

Chief Justice Chase T. Rogers
State of the Judiciary, Connecticut, April 13, 2011

. . . . Regardless of the resources that are available, however, I can assure you that our commitment to three basic principles will remain intact. These principles are: Number one, access; Number two, the efficient resolution of cases; and Number three, fairness.

Starting with the first principle, we must provide access to everyone regardless of race, religion, age, sex, sexual preference, disability, marital status or national origin.

I can assure you that the Judicial Branch takes its obligation to provide access to justice very seriously. For this reason, we have established an Access to Justice Commission to oversee and coordinate all of the Branch's efforts in this regard.

While its charge is broad, a key area the Commission will address is one of our court system's biggest challenges – providing access to self represented parties. If you aren't aware of this troubling trend, the following numbers may surprise you.

In 2010, an astounding 84 percent of all family cases and 27 percent of all civil cases had at least one party who was self-represented. The numbers are close to 90 percent in housing matters.

The Judicial Branch is concerned about this trend because we all know that people are far better off when they have legal representation. In addition, this trend impacts the entire court system. Judges and staff must spend more time going over basic procedures, which ultimately results in delays. This is frustrating, not only to the self represented party but also to the judges, staff, opposing counsel and the other litigant.

In short, we must find ways to address this growing challenge. The current situation is of even greater concern when you consider that legal aid organizations are able to meet only a small fraction of the legal needs of those who cannot afford an attorney.

To address this problem, I have appointed a Pro Bono Committee that brings together members of the bench, the private bar, the legal aid community and senior in-house attorneys at some of our largest Connecticut-based corporations. The goal of the committee is to increase the number of attorneys willing to assist people who cannot afford legal services....

. . . . To ensure that disputes are resolved efficiently, we have been re-evaluating the programs that we have in place, particularly in the area of civil litigation. It is important to recognize that the resolution of civil cases has serious implications, not only for the parties but for the state as a whole.

Two years ago, a report was issued in Florida entitled "The Economic Impacts of Delays in Civil Trials in Florida's State Courts Due to Under-Funding." The report showed that a growing population and a growing foreclosure docket combined to create a civil case backlog. More

important, it showed that this development severely affected Florida's ability to create and keep jobs.

This problem could become a reality in Connecticut and it is essential that we avoid a similar situation here.

To that end, one area of extensive review has been our Complex Litigation Docket. This is an effective resource for handling some of our most complicated civil cases involving, for instance, commercial disputes or complex medical malpractice claims. The regular civil trial dockets are currently not backlogged and trial dates are readily available. Nonetheless, for especially complicated cases, the litigants may choose to apply to have their case transferred to the Complex Litigation Docket, where they will benefit from the oversight and management of a single judge.

And to ensure that Connecticut has one of the strongest complex litigation dockets in the country, the Judicial Branch is committed to assigning judges with expertise in these matters to serve on the docket and to train all judges on issues relevant to commercial and business litigation. To further enhance the docket's efficiency, and by again shifting resources, each judge assigned to the docket has recently been given access to a dedicated group of experienced law clerks to assist with research.

We are also examining our court-sponsored Alternative Dispute Resolution programs that resolve civil matters short of trial and provide an off-ramp from full-blown litigation. The importance of this program is that it can save considerable time and money for individuals and businesses in Connecticut.

Yet another area that has a substantial impact on the state is the process by which land is developed in Connecticut. The courts play an integral role in overseeing disputes involving such development. Over the past year, we have worked diligently with members of the land use bar to propose sweeping revisions to our court rules regarding planning and zoning and other land use appeals.

We also plan to institute special land use dockets with dedicated judges and staff. The impact of these changes should be far-reaching and expedite the processing of land-use appeals.

Another area of great concern is foreclosures. As you are well aware, the number of foreclosure cases filed in the courts has reached unprecedented levels. Fortunately, for Connecticut, you had the foresight in 2008 to enact legislation creating the Foreclosure Mediation Program, which we administer.

Through January of this year, over 9,400 homeowners have completed mediation. Of those, 79 percent reached a resolution and 64 percent were able to stay in their homes. These settlements obviously benefit not only the homeowner but also lending institutions and communities throughout the state. . . .

The Honorable Randall T. Shepard

The Self-Represented Litigant: Implications for the Bench and Bar

48 Family Court Review 607 (2010)

A courtroom is a fine place for discovering the truth of a given matter, resolving a seemingly intractable problem, or untangling a complicated issue to come to a just result. One thing it is not is a place for the faint of heart. Given that a main purpose of a courtroom or court proceeding is to bring a matter to closure, and that the prospects of a successful appeal are usually uncertain, the decisions made in the trial court are frequently long lasting. In the family law arena, these decisions can have lengthy, even permanent, implications for custody, property settlements, and agreements that govern how much time each parent spends with a child. For these and many other reasons, it is most often preferable for a litigant to be represented in court by qualified counsel. This is as true in complicated securities and tax law cases as it is in testy divorce cases.

A sad reality associated with our current legal structure is that litigants of limited means in family law cases frequently come to court without an attorney or, as is often the case, only one of the parties has an attorney. As a result, several disquieting possibilities emerge: a represented party may obtain a significant advantage over an unschooled, unrepresented party; the judge may experience feelings of angst over providing some level of assistance to the unrepresented party simply to level the playing field; or the unrepresented litigant might depart the courtroom with a just result but wondering if a better outcome might have been obtained if an attorney had been present. In any event, these cases represent a significant part of a court system's caseload and, in certain case types, may represent more than half of a court's caseload. . . .

Put more plainly, at least one litigant in one out of every three Indiana families involved in a dissolution is facing a trial judge and putting potentially life-altering changes at risk in matters involving the time spent with a child; decision making for the child; child support; an equitable division of property, including pension or 401(k) benefits and other financial matters, without the benefit of trained legal counsel. We are aware of no evidence, anecdotal or otherwise, that demonstrates families being treated unjustly because of these situations. Some divorces and other domestic relations disputes are settled amicably and quickly where there are few issues at risk. But having such a large percentage of cases without representation within what is a traditionally prickly and contentious area of law suggests that policy makers and societal leaders should regard the certainty of just outcomes as an area of concern. . . .

It is widely accepted that the number of self-represented litigants has skyrocketed nationwide, especially in family law cases. Some reports estimate that 80 to 90 percent of family law cases involve at least one self-represented litigant. Discussions of the impact of this increase in self-representation have migrated from courts and law journals to the mainstream media. In April 2009, the *New York Times* reported that tough economic times are causing more people to represent themselves in court. In spite of this widespread interest, comprehensive data on the number of self-represented litigants does not exist. There is no nationwide data collection on this point, and states vary in their collection efforts. According to one commentator, the number of

people who are representing themselves in court across the country is “staggering, and as yet uncounted.”³

Anecdotal evidence and observational reports support the belief that self-representation is increasing. Records from New York’s family courts indicate that in the first six weeks of 2009, approximately 95 percent of litigants in paternity and support cases were unrepresented, compared with 88 percent during all of 2008. . . . In 2007, Florida reported that 65 percent of divorces and 80 percent of all family law cases statewide involved at least one self-represented litigant. . . .

Indiana has currently put in place a number of projects to assist courts with the increasing numbers of self-represented litigants and to help demystify the court process for those who, by choice or by necessity, find themselves in court without the benefit of legal representation. The intent of these efforts is not to encourage self-representation, but to promote informed decision-making. We anticipate that some of these efforts will encourage many litigants to seek legal representation. For these litigants, the Division provides information on pro bono services and other resources for attorney referrals. We recognize that some litigants will still proceed without an attorney, either because they choose to do so or because they cannot afford to hire an attorney and do not qualify for free or reduced cost legal services. It is our hope that the resources we have put in place will help this population to better navigate the court system, while also easing the burden on courts and court staff.

The Honorable Margaret H. Marshall

Putting it All Together: Or What Can We Do Now

Remarks at the Kentucky Law Journal Symposium on State Courts (Sept. 24, 2011).

The bookends: “We have a funding crisis that is crippling state courts across the country. It seriously threatens the ability of state courts to meet their constitutional obligation to provide access to justice.” Those are the words of Chief Justice Minton as he opened this Conference yesterday. “I never do business in a country that does not respect the rule of law.” Those are the words of the CEO of one of Massachusetts’ most successful, global companies as I met with him early in my tenure as Chief Justice. . . .

Why state courts and why now? Because “the health of the entire legal system – both state and federal – depends on a strong *state* judiciary.”⁴

. . . . Sheer numbers tell the story, at least in part. In 2008, the latest date for which comparative data are available, the total number of cases filed in all federal district and appellate courts nationwide, not including bankruptcy cases, was 325,260. And the number of cases filed in state courts, trial and appellate nationwide? 48.5 *million* cases, not including traffic offenses. With

³ John M. Greacen, *Framing the Issues for the Summit on the Future of Self-Represented Litigants*, in *The Future of Self-Represented Litigation Report* from the March 2005 Summit 19, 22 (National Center for State Courts 2005).

⁴ Sandra Day O’Connor, *The Majesty of the Law: Reflections of a Supreme Court Justice* 142 (New York: Random House 2004).

two parties at least in every case, each year some 100 million Americans intersect in some way with our state courts; for many they have no alternative but to go to state court as criminal defendants, or seeking a divorce, or challenging an eviction order. 100 million each year, in this country of some 300 million. Do we deliver justice to all of them?

More than just numbers, state courts often lead the way on important jurisprudential developments, even though they do not have the “prestige” of the federal courts, to use Professor Baron’s term.⁵ The Massachusetts Supreme Judicial Court has a long, proud history of expanding the boundaries of human liberties. The first constitutional matter decided by my court in 1783 held that slavery was “repugnant” to the freedom and equality guarantees of the then newly minted Massachusetts Constitution providing that “All [people] are born free and equal.” The case was the first anywhere in the world to abolish slavery. (The Justices of the United States Supreme Court might remember from time to time that it is worth paying attention to State supreme courts, for to this day their decision in the *Dred Scott* case remains a stain on that august body.)

Groundbreaking decisions. Massachusetts courts were the first, or among the first, to recognize the right of workers to form unions to improve wages and working conditions, a decision that flew in the face of settled law deeming such associations criminal conspiracies.⁶ We were the first to invalidate the use of peremptory challenges based on race,⁷ and to provide counsel for indigent defendants in criminal cases.⁸ More recently, my court was the first to recognize marriage for same gender couples.⁹

Other state courts have, of course, also contributed significantly to paradigmatic shifts in the law. Here are a few examples familiar to you all. *Perez v. Sharp*¹⁰ was the California state case affirming interracial marriage that laid the groundwork for the United States Supreme Court’s decision in *Loving v. Virginia*,¹¹ nineteen years later. Consider *Buick Motor Co. v. McPherson*,¹² in which Justice Cardozo held in 1916 that Buick had a duty to third-party consumers to ensure that its automobiles were safe. *McPherson* did not express national consensus, or anything close to it. The opinion was widely rejected, at first. Yet today no one seriously argues that a retail customer cannot recover from an automobile maker if its product is defective. *McPherson* led straight to consumer protection law, as we know it.

⁵ Professor David Barron, remarks as a panelist: “Court Funding: Autonomy, Access and Accountability”, Kentucky Law Journal Symposium, September 23, 2011.

⁶ *Commonwealth v. Hunt*, 45 Mass. 111 (1842).

⁷ *Commonwealth v. Soares*, 377 Mass. 461 (1979) (art. 12 of Massachusetts Constitution prohibits use of peremptory challenges on the basis of race).

⁸ *Pugliese v. Commonwealth*, 335 Mass. 441 (1957).

⁹ *Goodridge v. Department of Public Health*, 440 Mass. 309 (2003).

¹⁰ *Perez v. Sharp*, 32 Cal.2d 711, S.C. sub. nom. *Perez v. Lippold*, 32 Cal. 2d 711 (1948).

¹¹ *Loving v. Virginia*, 388 U.S. 1 (1967).

¹² *Buick Motor Co. v. McPherson*, 217 N.Y. 382, 111 N.E. 1050 (1916). Buick “was not at liberty,” Cardozo said, “to put the finished product on the market without subjecting the component parts to ordinary and simple tests.” *Id.* at 394.

I mention these cases as examples of ways in which state courts have refashioned whole areas of law far in advance of their general acceptance in the United States. State courts are, they remain, they are essential for the development of our *national* law. . . .

For two centuries and more we in the United States have benefitted from a well-functioning independent judiciary. Do we now take that for granted? In a word, yes. A perfect storm of circumstances threatens much that we know, or think we know, about our American system of justice. Funding, the subject of this conference: no one in this auditorium doubts that there is a funding crisis. Here is Iowa's Chief Justice Mark Cady speaking earlier this year in his first State of the Judiciary address: "Today, Iowa's court system operates with a smaller workforce than it had in 1987. In contrast, over the same period, the total number of legal actions brought by Iowans and Iowa businesses has nearly doubled. In short Iowa's courts are overrun with work, and Iowans are paying the price with reduced access to justice."¹³

Reduced access to justice, that jewel of American democracy. Iowa is, of course, not alone. New York has 1,000 fewer non-judicial personnel today than it had just two years ago.¹⁴ In August 2011, the San Francisco Superior Court announced that it would lay off 200 of its 460 employees to meet its budget.¹⁵ Yesterday and today, we heard repeatedly that these are lean times for almost all state judiciaries. And the picture grows gloomier every day.¹⁶ "[T]he courts of virtually every state have been forced into debilitating combinations of hiring freezes, pay cuts, judicial furloughs, staff layoffs, early retirements, increased filing fees and outright closures", the ABA Task Force on Preservation of the Justice System reported in July.¹⁷ Court budgets are being decimated, even as we know that in times of economic stress, people turn in even greater numbers to state courts for relief. Again Chief Justice Cady: "In the past three years, mortgage foreclosure cases filed in Iowa have increased 17%, debt collection cases have increased 15%, child-in-need-of-assistance cases have increased 23%, and adult civil commitment cases have increased 19%. These legal actions", he said, "may have a life-altering effect on the Iowans involved. This is not the time to give them ration cards for justice", the Chief Justice implored.

This is not the time for *any* state to give its residents ration cards for justice. State courts are the legal equivalent of the emergency room. This audience knows that it matters, it really matters, whether a case moves expeditiously through the court system.¹⁸ It matters to the business

¹³ Mark S. Cady, 2011 *State of the Judiciary* (January 12, 2011), at

<http://www.iowacourts.gov/wfdata/files/StateofJudiciary/StateoftheJudiciary2011.pdf>

¹⁴ Chief Judge Jonathan Lippman, *Pursuing Justice: State of the Judiciary 2011* (February 15, 2011)

¹⁵ Pamela MacLean, *Belt Tightening for California Judges*, *Trial Insider* (Aug. 12, 2011), at <http://www.trialinsider.com/?p=633>.

¹⁶ See National Center for State Courts, Budget Resource Center, at <http://www.ncsconline.org/wc/budget/activities/utah.asp>

¹⁷ American Bar Association Task Force on Preservation of the Justice System, *Report to the House of Delegates*, July 11, 2011, p.1

¹⁸ "In Massachusetts, while the clearance rate remains fairly stable, the number of cases pending beyond the time standards increased by almost 6,000 in the first six months of 2010. Backlogs and delays are increasing in Minnesota. Almost one-third of the serious felony dispositions in 2009 (29 percent) occurred beyond the 12-month time standards. Clearance rates for minor criminal cases have fallen below 100 percent for the last five years, resulting in increased numbers of pending cases. It now takes more than a year for a misdemeanor case to be set for

damaged by theft of its intellectual property. Or the crime victim seeking justice. Or the injured worker with mounting medical bills. Or the parent who has been laid off and needs to modify a child support order. It matters to lawyers trying to manage their caseloads. And, ultimately, it matters to the public's perception of its government.

There *is* a funding level below which state courts will be unable to function at even minimally adequate levels. Are we at that precipice? I believe we are. And I am not alone. Here is President Bill Robinson speaking at the recent ABA conference in Toronto: “[A]dditional cuts in funding for our already underfunded state courts,” he said, “threatens the very viability of our entire justice system in America and puts at risk the third co-equal branch of government.”¹⁹ Former Chief Justice John Broderick of New Hampshire is more blunt: “What’s happening now is that the United States justice system as we all remember it is being dismantled and butchered down,” he said. “At some point, I guarantee you, you’ll wake up and say, ‘What happened?’”²⁰ What *is* happening is the real question? . . .

Today I ask each of you, judges and lawyers, faculty and students, citizens all, to sound the alarm. You are the leaders of America's bench and bar, and you are perfectly positioned to make a difference. Sound the alarm. Nationally. Speak up, speak loudly, when your state courts are underfunded or its judges unfairly attacked. This is not, it should not be, a county by county, state by state, effort, with a fix here and an adjustment there. Judges can no longer talk in measured terms about the initiatives we have taken to meet “our share” of the budget deficiencies, or the steps we have taken to increase efficiencies in the judiciary. Lawyers can no longer accept as an irritating given the shuttering of courthouses, cancellation of jury trials, reduction of court hours or leaving judicial vacancies unfilled. As lawyers you have crafted extraordinary solutions for your clients. Help state courts craft theirs. Take back to your home states what you have learned from this extraordinary conference. Create national coalitions to advocate for adequate court funding. Become part of, lead, a national conversation on long-term solutions, nationally, for preserving state courts. “No one, not even lawyers and judges, understand what a financial bind the courts are in,” Justice Sandra Day O’Connor said recently, “we have to wake them up.”²¹ My message to you today is “wake up!” Wake up, and wake up our great nation, before it is too late. I believe that Americans do not want to live in a society that does not have a functioning judiciary, with independent judges. I also believe that Americans do not know what is at risk, now.

What will you take away from this meeting in Kentucky? I hope that you will return home with fire in the belly to fight for something that is precious beyond measure: well-functioning,

trial in many areas of that state. The Utah courts are seeing considerable delay in civil cases. The average age of pending cases is up 84 days over the past two years, approximately 50 percent for many civil cases.” Daniel J. Hall *Reshaping the Face of Justice: the Economic Tsunami Continues*, <http://www.ncsc.org/Information-and-Resources/~media/Files/PDF/Information%20and%20Resources/Budget%20Resou>

¹⁹ Quoted in James Podgers “The Crisis Grows”, ABA Journal, September 2011 at p.56.

²⁰ Amanda Terkel, *Liberty and Justice for Some: State Budget Cuts Imperil Americans’ Access to Courts*. http://www.huffingtonpost.com/2011/08/02/state-budget-cuts-access-courts_n_898190.html?page=1

²¹ Quoted in James Podgers “The Crisis Grows”, ABA Journal, September 2011 at p.56.

independent courts. I hope, too, you will carry home with you the words of the oldest written constitution in the world still being enforced each day, the Massachusetts Constitution: we are “a government of laws and not of men.” When John Adams placed that phrase into the Massachusetts Declaration of Rights, “he was not indulging in a rhetorical flourish”, said Justice Felix Frankfurter in a great opinion in 1947. “He was expressing the aim of those who, with him, framed the Declaration of Independence and founded the Republic. ‘A government of laws and not of men’ was the rejection in positive terms”, the Justice said, “of rule by fiat . . .”²²

Rule by fiat. In South Africa as a young student I faced the juggernaut of apartheid. At that time the impediments to founding a society founded on the principles of justice and equality seemed insurmountable. But the impediments were surmounted; the principles of justice and equality did prevail. In 1990, after twenty-seven years, Nelson Mandela walked out of prison, a free man, becoming our time’s most revered political leader. How did that happen? I have learned that when each one of us, every one of us, refuses to accept what appears to be the inevitable, the consequences can be extraordinary. May each of you refuse to accept the inevitable. . . today, tomorrow, next year, always. The journey may be long. The journey will be long, but it is time to begin. The future of our country rests in your hands.

The Honorable Jonathan Lippman

Law in the 21st Century: Enduring Traditions, Emerging Challenges
May 23, 2010

What I want to say briefly on this Law Day is that it is precisely in times like these, when New York’s economy is at risk and New Yorkers’ ability to live the American dream is in question, that the Judiciary more than ever plays a unique and critical role in holding together the fabric of society and our way of life—fostering the rule of law, protecting individual liberties, and meeting the constitutional mandate to provide equal justice for all. . . .

Forty-seven years ago, the United States Supreme Court in *Gideon v. Wainwright*, said that in regard to criminal case representation that:

In our adversary system of justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him. This seems to us to be an obvious truth.

Nearly half a century later, it is an equally obvious truth that in civil proceedings involving fundamental human needs, it is extremely difficult, if not impossible, for a person to be assured a fair outcome without a lawyer’s help.

As Chief Judge, I see this as one of the great challenges facing our justice system today. No issue is more fundamental to our constitutional mandate of providing equal justice under law than ensuring adequate legal representation.

²² *United States v. United Mine Workers of America*, 330 U.S. 258, 307-308 (1947) (Frankfurter, J., concurring).

In 2006, the American Bar Association promulgated a resolution urging governments to provide legal counsel *as a matter of right* at public expense to low-income persons in cases where basic human needs are at stake—shelter, sustenance, personal safety, health, or child custody. While New York provides for a limited statutory right to counsel in certain family proceedings, there generally is no right to counsel in certain family proceedings, there generally is no right to counsel in civil cases in New York, or for that matter around the county, even where the most basic necessities of life are at risk.

For all these reasons, and to meet our constitutional and ethical mandates, the Judiciary of this State is determined to bring us closer to the ideal of equal access to civil justice. I am not talking about a single initiative, pilot project, or temporary program, but what I believe must be a comprehensive, multi-faceted, systemic approach to providing counsel to the indigent in civil cases. . . .

By doing so, New York will be the first state in the nation to have the entire leadership of the Judicial branch of government, and the leadership of the state’s bar, in our case 150,000 strong, make such a singular and unequivocal commitment to providing civil legal representation to the poor in matters where they need it most, where their well being as human beings, and that of their families, is at stake. . . .

Helaine Barnett

Task Force to Expand Access to Civil Legal Services in New York,
Report to the Chief Judge of the State of New York (November 2010)

EXECUTIVE SUMMARY

This is the second report of Chief Judge Jonathan Lippman’s Task Force to Expand Access to Civil Legal Services (“Task Force”). Last year, the Task Force found that there is a growing crisis in the New York State Courts because 2.3 million New Yorkers must navigate our State’s complex civil justice system without an attorney. Beyond harming vulnerable low-income families and individuals, this crisis of the unrepresented burdens our courts and represented parties.

The Continuing Crisis: In the face of the worst economic downturn since the Great Depression, the Task Force concludes that the crisis of the unrepresented has grown over the past year. For example, 63 percent of New Yorkers are unrepresented at statutorily required settlement conferences in foreclosure cases, and 90 percent of the reports from civil legal services providers in New York documented that they had to turn away the same number or even more potential clients than they did just one year ago.

Based on its 2010 Legal Needs Study and the new evidence developed this year, the Task Force finds that, at best, no more than 20 percent of the legal needs of low-income families and individuals are met, because civil legal services providers simply lack the resources to meet

them. This crisis has been exacerbated by the drop in revenues from the Interest on Lawyers Account Fund of New York State (“IOLA”), because of the sharp decrease in interest rates during the continuing economic downturn. In fact, annual IOLA revenues for civil legal services have plummeted from \$32 million in 2008 to a flat \$6.5 million for 2010 and 2011.

Judiciary Civil Legal Services Funding: In its first Report last year, to try to bridge the substantial access to justice gap, the Task Force proposed a four-year plan to allocate funding within the Judiciary’s budget for civil legal services for New Yorkers in all areas of the State living at or below 200 percent of the federal poverty level (\$44,700 in annual income for a family of four in 2011) who face civil legal problems involving the “essentials of life” – housing, family matters, access to health care and education, and subsistence income.

This year, in keeping with its four-year plan, the Task Force recommends a modest allocation of \$12.5 million in additional civil legal services funding within the Judiciary’s budget for the coming State fiscal year. Thus far, the 56 grants awarded to civil justice providers from current Judiciary funding have benefited many low-income New Yorkers across our State. In just the first three months after issuance of these awards, 51,297 low-income families and individuals have received legal help in addressing the “essentials of life” who otherwise would not have been assisted. Nevertheless, the Task Force finds that there remains a substantial gap in access to justice in these core civil legal matters to be bridged.

Non-Monetary Initiatives: In addition to its funding recommendation, based on its work over the past year, the Task Force is making significant non-monetary recommendations to help address the gap in access to justice. These include:

- Increasing the available *pro bono* assistance provided by private lawyers and law student resources to supplement civil legal services staff resources through new initiatives with law schools and private lawyers;
- Averting or reducing litigation by prioritizing the provision of early intervention and preventative civil legal services and the implementation of alternative conflict resolution initiatives;
- Enhancing access to justice for unrepresented litigants through simplification efforts to help them navigate the court system without legal assistance; and
- Increasing efficiencies in the delivery system for civil legal services in New York State.

As detailed in this Report, while not a substitute for additional civil legal services funding within the Judiciary’s budget, each of these initiatives can help to promote access to justice in our State.

Civil Legal Services Is A Good Investment For New York: In the past year, the Task Force commissioned two independent studies from leading financial analysis firms, which found that civil legal services can generate some \$200 million in annual savings: \$85 million by providing legal assistance to avert the immediate expenses resulting from domestic violence (which does

not consider the victims' longer term health care costs and longer term productivity losses), and \$116.1 million by preventing evictions and resulting shelter costs.

Moreover, based on updated IOLA data and the new study of actual eviction prevention savings, this Report documents nearly \$1 billion in positive economic impact over the past year in New York State from civil legal services. Specifically, civil legal aid creates this economic impact in our State by: (1) bringing in \$348.1 million in federal benefits for clients; (2) generating \$516.4 million in additional economic activity, according to the United States Department of Commerce's calculation that every dollar brought into New York has a multiplier effect of 1.48, as low-income families and individuals use those federal dollars to purchase necessities like food, rent, and clothing which, in turn, support local businesses (1.48 multiplied by \$348.1 million in federal benefits equals \$516.4 million); and (3) achieving \$116.1 million in actual eviction prevention savings. This analysis of positive economic impact does not include the projected \$85 million in savings resulting from the provision of civil legal services in domestic violence matters.

Beyond these economic benefits, witness after witness at the Chief Judge's access to justice hearings this year in each of the four Judicial Departments of the State described the importance of providing civil legal services to the economic bottom line for private businesses, government and represented parties. When New Yorkers appear in civil matters in court without representation, litigation and other costs are higher and the opportunity to resolve disputes without litigation or settle cases expeditiously is lost. Likewise, as front-line Judges described eloquently, when there are substantial numbers of unrepresented New Yorkers in court, the overall quality of justice suffers, because courts are less efficient when resources have to be diverted from matters involving represented parties to try to assist unrepresented parties. Even with these efforts by Judges – which can appear to undermine the Judge's role as a neutral arbiter – the results for unrepresented parties differ markedly from what can be achieved with counsel.

Of course, no dollar amount can be placed on the life-changing impact that the provision of civil legal assistance can have for vulnerable low-income families and individuals who can remain in their homes, escape domestic violence, stabilize their families, maintain or obtain subsistence income, or gain access to health care or an education – truly the essentials of life.

The Task Force's Central Findings This Year: In this Report, we detail the work of the Task Force and its recommendations, which center on four key findings:

Finding 1: *A Continuing Unmet Need Exists For Civil Legal Assistance For Low-Income Families And Individuals In All Areas Of The State.*

Finding 2: *The Continuing Unmet Need For Civil Legal Assistance In All Areas Of The State Has A Negative Impact On The Functioning Of The Courts, Businesses And Government, And A Profound Impact On Vulnerable Families And Individuals.*

Finding 3: *New Cost Savings Analyses Demonstrate That Civil Legal Services In New York State Can Save At Least \$85 Million In Costs Associated With Domestic Violence And At Least \$116.1 Million In Shelter Costs In Addition To The Continuing Substantial Economic Benefits To The State Documented By The Task Force.*

Finding 4: *New Task Force Initiatives Can Streamline And Enhance Client Service Delivery, Help Limit The Costs Of Providing Civil Legal Services, And Reduce Court Expenditures And Litigation Costs For Represented Parties.*

The Honorable Wallace B. Jefferson and the Honorable Nathan Hecht

Letter to Hon. Royce West, Texas State Senate

June 1, 2011

Hon. Royce West
Texas State Senate
Texas Capitol

Dear Senator West:

For its own integrity's sake, the civil justice system must be available to every Texan victim of domestic violence, to each veteran wrongly denied the benefits our country has promised, and to all families who have paid their bills but are nevertheless evicted from their homes. These situations occur in Texas. But under current funding sources, we can reach less than one-fourth of those in need.

You have asked what the probable consequences will be if we are unable to secure funding to give these citizens access to our courts. We hesitate to contemplate that outcome. But having consulted the Texas Access to Justice Foundation, which administers grants to legal aid providers in Texas, supervised by the Supreme Court, we offer the following report.

First, we know of no way to replace the \$20 million that the Legislature appropriated in 2009. For decades, the IOLTA program has been a principal source of funding for Texas legal aid. But IOLTA funds are a product of federal interest rates, which are near zero. Those funds have fallen over 75%, from about \$20 million in 2007, to a projected \$4.4 million this year. The other major source of funding, the Legal Services Corporation, has been cut 4% this year. Deeper cuts are forecast for next year.

Second, we know that, for lack of a minor investment, Texas will be denied great rewards. The forty programs the Foundation funds help about 104,000 families a year. The Foundation estimates that a \$20 million reduction in funding would result in the denial of basic civil legal services to some 25,000 struggling Texans. As many of those Texans are single-parent heads of households, the number truly impacted would exceed 75,000.

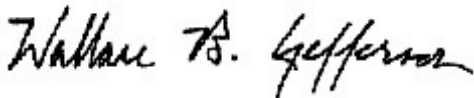
Third, lawyers that work in legal aid organizations (for a fraction of what their peers earn) not only represent poor Texans, but also coordinate and support volunteer efforts by other Texas lawyers. It is triage work; the legal aids lawyers help when they can, and enlist the services of private attorneys who donate their time and money to provide free assistance. When legal aid organizations perish through lack of funding, the portal through which clients are aligned with private attorneys will collapse.

Fourth, the funding we seek is not to compensate lawyers. The lawyer who represents an indigent victim of domestic violence works for free or for sums vastly below what the private sector commands. Legal aid lawyers work to preserve the rule of law, and thus the integrity of our civil justice system. They represent our neighbors who fall below the poverty level (annual income of \$13,613 for an individual, \$27,938 for a family of four). These include veterans and their families, the disabled, children, the elderly, and victims of natural disasters. About 5.7 million Texans qualify for legal aid.

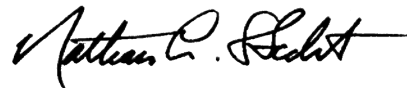
Some consider this Court conservative. Conservative principles do not call for the rule of law to be denied the most vulnerable members of our community. The civil justice system is where people can claim for themselves the benefits of the rule of law. It is where the promises of the rule of law become real. A society that denies access to the courts for the least among us denigrates the law for us all. For these reasons, securing funding for basic civil legal services has been a priority for the Supreme Court, one to which its members are unanimously committed.

Thank you, Senator West, for your assistance in obtaining this funding.

Sincerely,



Wallace B. Jefferson
Chief Justice



Nathan L. Hecht
Justice

The Honorable Wallace B. Jefferson

*State of the Judiciary, Presented to the 82nd Legislative Session
Austin, Texas, February 23, 2011*

. . . . I got a call a few months ago from a judge who said: “Chief, I would like you to see the faces behind those files.” And so I sat in on Judge Jeanne Meurer’s court and observed a day in the lives of families dealing with juvenile offenders. The experience would change you.

I have seen the faces of little girls addicted to methamphetamine, of teenage car thieves, of bullies. I have heard the pleas of frustrated working mothers and desperate public defenders. Sending juveniles away to remote detention centers is sometimes necessary, but it is not the answer to our societal problem. The future of Texas youth depends on rehabilitative services, on psychiatric care, on vocational training. More than 25 percent of Texas children live in poverty.²³ Thirty-three percent of youth referred to juvenile probation have a diagnosed mental illness, and 60 percent of our sons and daughters incarcerated in the Texas Youth Commission need mental health treatment.²⁴

Schools are central to this equation. More than 80 percent of Texas adult prison inmates are school dropouts. Charging kids with criminal offenses for low-level behavioral issues exacerbates the problem. Among those suspended and expelled, minority and special education students are heavily over-represented. Of course, disruptive behavior must be addressed, but criminal records close doors to opportunities that less punitive intervention would keep open. Let us endeavor to give them a chance at life, before setting them on a path into the adult criminal justice system. . . .

The increasing inaccessibility of legal services – for the poor, for even the middle class – undermines the rule of law for us all. We are a nation and state that believes the law provides protection for those who are most powerful, for those who are most vulnerable. But today, the courthouse door is closed to many who have lost their jobs, to military veterans who are on the streets, to women who suffer physical abuse. . . .

Even in the face of a tremendous budget crisis, I ask the legislature to duplicate what it courageously did last Session and appropriate \$20 million from general revenue for basic civil legal services. Advanced legislation that would add a small fee to case filings, so that money is available to help Texans secure the legal rights that our constitution and laws give them.

Indigent Defense

Our commitment to equal justice does not end with civil justice. Recent efforts to find and rectify wrongful convictions in Texas provide a promising example of how our courts are working to free the innocent. The Court of Criminal Appeals has worked with the Timothy Cole

²³ See Justice Nathan L. Hecht, *Legal Aid Groups Need Support*, Houston Chronicle (Sept. 25, 2010), available at <http://www.chron.com/dispatch/story.mpl/editorial/outlook/7217957.html>.

²⁴ See TEXAS APPLESEED, TEXAS’ SCHOOL-TO-PRISON PIPELINE: SCHOOL EXPULSION – THE PATH FROM LOCKOUT TO DROPOUT, Executive Summary 6 (April 2010).

Advisory Panel, established by the Legislature last session, to study the causes of ... and solutions to ... wrongful convictions in our state. In the last 10 years more than 40 Texas prisoners have been exonerated based on DNA evidence. This is not just a Texas problem, but no other state has found an equal number of wrongfully convicted prisoners.²⁵

Yet Texas ranks among the lowest of the 50 states how much money it spends per person on indigent defense.²⁶ Projected cuts to expenditures from the Fair Defense Account, created by the Legislature, would drain the system of resources we need to assure indigent criminal defendants get competent lawyers who make the system fair. We need to fund criminal justice initiatives that will make investigations more accurate, trials more just and DNA evidence more widely available.

We in the judiciary are trying to do our part. The Court of Criminal Appeals' Criminal Justice Integrity Unit organized a two-day Forensic Science Seminar, educating more than 400 attorneys, judges, police officers, legislators and lab personnel on evidence standards and specific sciences. The judicial Task Force on Indigent Defense recently helped establish the Harris County Public Defender's Office. Up to that time, Harris County was the largest urban jurisdiction *in the country* without a public defender office. . . .

American Bar Association

Incoming American Bar Association President to Appoint Ted Olson and David Boies to Task Force on Justice System (Oct. 2008)

SAN FRANCISCO, Aug. 6, 2010 – Miami lawyer Stephen N. Zack, incoming president of the American Bar Association for the 2010-11 bar year, will announce Monday, Aug. 9, that lawyers Ted Olson and David Boies will co-chair a new ABA task force on the preservation of the justice system.

Zack — who will make his announcement during a speech to the association's House of Delegates — says it is important to include lawyers from all political persuasions and areas of the legal profession to examine the issue of access to justice.

“Our system of government was created with the basic belief that the doors to our courts would always be open to all citizens. Equal justice under law is the birthright of Americans. It is a promise enshrined in our Constitution and written over the entrance of our Supreme Court. We need to make good on this promise,” says Zack.

²⁵ See Editorial, *Get it right: Houston state senator' agenda: Reduce erroneous convictions*, Houston Chronicle, February 7, 2011, <http://www.chron.com/disp.story.mpl/editorial/7417281.html>.

²⁶ John Reynolds, “Though Underfunded, Indigent Legal Defense Much Improved: State May End Up Cost-Shifting More of the Burden Back to the Counties,” Quorum Report (May 13, 2010), available at <http://www.county.org/resources/news/dynContView.asp?cid=438>.

Zack will outline his core presidential initiatives during his speech, as well as announce additional blue-ribbon participants for the ABA entities that will focus on the following topics:

- access to justice and the underfunding of the judiciary;
- the need for increased civic education in our schools and society;
- Hispanic legal rights; and
- the ABA's work in the area of disaster response and preparedness. . . .

American Bar Association

Access to Civil Justice for Low-Income People: Recent Developments
August 2011 – January 2012

The eleventh annual National Meeting of State Access to Justice Chairs will begin with a special Friday afternoon session on supporting and expanding state legislative funding for civil legal aid in the current economic climate, with a particular focus on the role of state Supreme Courts in providing leadership on this issue. The special session is being developed at the suggestion of Texas Chief Justice Wallace Jefferson and Justice Nathan Hecht, the Texas Supreme Court's liaison to the state's Access to Justice Commission. Chief Justice Jefferson and Justice Hecht, with support from the rest of the Court and the Access to Justice community, led a successful effort in the 2011 legislative session to ensure that civil legal aid remained available to Texans. . . .

Federal Funding for Civil Legal Aid

LSC funding cut. In November, Congress approved a final FY 2012 spending package that funds the Legal Services Corporation (LSC) at \$348,000,000. This represents a reduction in overall funding for LSC of \$56,190,000. The entire cut comes from funding for basic field programs, which will result in a 14.8 percent reduction to local legal aid programs funded by LSC.

State Legislative Funding for Civil Legal Aid

Final results from the 2011 legislative sessions showed a net reduction nationwide in state funding for civil legal aid for the first time since the ABA began tracking data in the late 1990s. This was almost exclusively the result of serious budget problems faced by state legislatures rather than political forces opposing legal aid. Reductions in funding are likely to continue at least until state economies become stronger.

- *Increases were outweighed by decreases.* There were increases in seven jurisdictions, with almost 75 percent of the net increase (\$10 million) going to one state (New York). On the other hand, there were net reductions in 14 states and complete elimination of state funding for legal aid in three. Although the overall net decrease of about \$2.7

million, or one percent of the total, seems small, the impact on programs in many states has been significant.

- *There are now four states with no state legislative funding for civil legal aid.* Last year, Idaho was the only state with no state legislative funding for legal aid. Florida, Louisiana and Wisconsin have now joined that group. (In Florida and Louisiana, there are state statutes that enable local public funds to go to legal aid, but there is no direct legislative funding.)
- *Increases are offsetting losses from other funding sources rather than increasing services.* Reductions in IOLTA and LSC funding mean that resources overall are likely to be down this year, even in states with increases in state funding. For the 17 states that had reductions in state monies, the cuts come at a particularly bad time.
- *Preventing major reductions required an enormous investment of resources, and bench and bar leaders in many states made that investment:* In most states, bench, bar and legal aid leaders worked very hard to avoid major cuts. As previously reported, Chief Justices and Supreme Courts played a leading role in a number of states. In the face of legislative proposals for deep cuts, smaller reductions were victories. The level of support for civil legal aid funding among bench and bar leaders is higher than ever. However, resources that could be spent looking for new funding are being diverted to protecting existing revenues.
- *Funding remained level in most states that use court fees and fines rather than appropriations as the funding mechanism for legal aid:* Although there were some proposals to siphon off filing fee funds for other purposes, almost all state court fees and fines benefitting legal aid have been retained. (In a few states, programs will see an increase in revenue from filing fees, as court-based activity continues to be high.)

Here is a state-by-state breakdown of the 2011 state legislative changes:

Alaska – Legislature appropriated \$110,000 from the Civil Legal Services Fund (established in 2008 to receive up to 50 percent of punitive damage awards to the state), increasing the total state funding for the year to \$350,000.

California – Appropriation will be reduced by about 6.9 percent, or \$709,000, from \$10,392,000 to \$9,683,000.

Colorado – Total funding for legal aid (primarily from appropriations, with smaller amount from filing fee on dissolution proceedings) will be reduced by \$218,000, from \$893,000 to \$675,000.

Delaware – Appropriation to Bar Foundation for distribution to legal aid increased by \$125,000, from \$275,000 to \$400,000. Grant-in-aid to Volunteer Legal Services increased by \$12,600, from \$62,400 to \$75,000.

District of Columbia – Continuation of reinstatement of funding lost in 2009, begun last year; increase from \$3,150,000 to \$3,250,000.

Florida – Governor vetoed \$1,000,000 for general legal services; \$1,000,000 for foreclosure work was not reappropriated, although equivalent funding for foreclosure work will come to legal aid through a penalty assessed by the Attorney General. (A state statute enables local public funds to go to legal aid, but there now is no direct legislative funding.)

Georgia – Appropriation reduced by less than 1 percent (\$6,658), from \$1,724,829 to \$1,718,171.

Hawaii – Increase in filing fees, to be phased in over two years, beginning January 1, 2012. When fully implemented, filing fee revenues are expected to increase by approximately \$1,200,000, from \$330,000 to \$1,500,000.

Iowa – Appropriation reduced by \$115,840, from \$1,930,671 to \$1,814,831.

Louisiana– Appropriation of \$150,000 eliminated. (A state statute enables local filing fee surcharges to be directed to legal aid, but there is no direct legislative funding.)

Maryland – Legislature approved pro hac vice fee of \$100, of which \$75 will help fund a loan repayment assistance program for public sector attorneys.

Minnesota – Appropriation reduced by \$782,560, from \$11,798,560 to \$11,016,000.

Missouri – Legislation approved extending sunset provision on filing fee surcharge for legal aid from December 31, 2012, to December 31, 2018.

Nevada – Legislature redirected \$10 from filing fees and \$5 from foreclosure mediation program to fund legal aid; estimated revenue approximately \$2,500,000. Also, legislature passed legislation to permit counties to add a new \$3 fee for recording of documents to provide legal representation for abused/neglected children in foster care. Could generate \$3,000,000 if all counties participate.

New Hampshire – Appropriation reduced by \$1,040,000, from \$1,740,000 to \$700,000.

New Jersey – Appropriation reduced by \$5,100,000, from \$20,000,000 to \$14,900,000.

New Mexico – Appropriation reduced by \$476,000, from \$1,978,000 to \$1,511,000.

New York – New funding of \$12,500,000 from State Judicial Department budget. An appropriation of \$2,500,000 was eliminated, for a net increase of \$10,000,000.

North Carolina – Appropriation for general legal aid reduced by \$112,000, from \$731,000 to \$619,000. Filing fee surcharge for general legal aid reduced by 25 percent, or \$747,000, from approximately \$2,991,000 to \$2,244,000. Funding of \$356,000 for loan repayment program eliminated.

Oklahoma – Appropriation reduced by 3 percent (\$28,000), from \$933,000 to \$905,000.

Oregon– Appropriation of \$500,000 annually eliminated. (State legislative funding of approximately \$5,950,000 annually continues through filing fees.)

Pennsylvania – Appropriation reduced by 9.1 percent (\$277,000), from \$3,039,000 to \$2,762,000.

Texas – Appropriation (net) will decrease by \$2,750,000, from \$11,500,000 to \$8,750,000; increase in civil fines of approximately \$950,000 will make net reduction overall of approximately \$1,800,000.

Washington – Appropriation reduced by \$117,000 from \$11,707,000 to \$11,590,000.

West Virginia – Civil filing fee increase will generate up to \$300,000 additional for domestic violence victims, from \$314,000 to \$714,000. New filing fee on Supreme Court cases expected to generate \$100,000, for total overall increase of \$400,000.

Wisconsin– Appropriation of \$1,959,000 annually eliminated. . . .

Rights to Remedies: A Compendium of State Constitutional Commitments (2012)
 Compiled by Meghan McCormack (YLS 2013) and Jason Glick (YLS 2012)

	Const. of adoption	Text as of adoption	Present const.	Present text	Year Present Text Adopted
Alabama	Const. of 1819, art. I, § 14 (1st. Const.)	That all courts shall be open; and that every person, for any injury done him, in his lands, goods, person, or reputation, shall have a remedy by due process of law; and right and justice shall be administered without sale, denial, or delay.	Const. of 1901, art. I, § 13 (current through 2010)	Same	1819
Alaska	Const. of 1959 (1st. Const.) art. I, § 1 (Inherent rights) art. I, § 7 (Due process)	This constitution is dedicated to the principles that all persons have a natural right to life, liberty, the pursuit of happiness, and the enjoyment of the rewards of their own industry; that all persons are equal and entitled to equal rights, opportunities, and protection under the law; and that all persons have corresponding obligations to the people and to the State. No person shall be deprived of life, liberty, or property, without due process of law. The right of all persons to fair and just treatment in the course of legislative and executive investigation shall not be infringed.	Const. of 1959, art. I, §§ 1 and 7 (current through 2011)	Same	1959
Arizona	Const. of 1912, art. II, § 11 (1st. Const.)	Justice in all cases shall be administered openly, and without unnecessary delay.	Const. of 1912, art. II, § 11 (current through 2011)	Same	1912

Assessing Justice, Rationing Law

	Const. of adoption	Text as of adoption	Present const.	Present text	Year Present Text Adopted
Arkansas	Const. of 1868, art. I, § 10 (3rd Const.)	Every person is entitled to a certain remedy in the laws for all injuries or wrongs he may receive in his person, property or character; he ought to obtain justice freely, and without purchase; completely, and without denial; promptly and without delay; conformably to the laws.	Const. of 1874, art. II, § 13 (current through 2011)	Same	1868
California	Const. of 1849 (1st Const.) art. I, § 10 (Right to petition) art. I, § 8 (Due process)	The people shall have the right freely to assemble together to consult for the common good, to instruct their representatives, and to petition the legislature for redress of grievances. No person shall . . . be deprived of life, liberty, or property without due process of law; . . .	Const. of 1879 (2nd Const.) art. I, § 3, ¶ a (added 1974, current through 2011) art. I, § 7 (added 1974, amended 1979, current through 2011)	The people have the right to instruct their representatives, petition government for redress of grievances, and assemble freely to consult for the common good. A person may not be deprived of life, liberty or property without due process of law or denied equal protection of the laws;. . .	1974
Colorado	Const. of 1876, art. II, § 6 (1st Const.)	Courts of justice shall be open to every person, and a speedy remedy afforded for every injury to person, property or character; and right and justice should be administered without sale, denial or delay.	Const. of 1876, art. II, § 6 (current through 2010)	Same	1876
Connecticut	Const. of 1818, art. I, § 12 (1st Const.)	All courts shall be open, and every person, for an injury done to him in his person, property or reputation, shall have remedy by due course of law, and right and justice administered without sale, denial or delay.	Const. of 1965, art. I, § 10 (current through 2011)	Same	1818

The State of State Courts

	Const. of adoption	Text as of adoption	Present const.	Present text	Year Present Text Adopted
Delaware	Const. of 1792, art. I, § 9 (2nd Const.)	All courts shall be open; and every man, for an injury done him in his reputation, person, movable or immovable possessions, shall have remedy by the due course of law, and justice administered according to the very right of the cause and the law of the land, without sale, denial, or unreasonable delay or expense; . . .	Const. of 1897, art. I, § 9 (as amended in 1977 and 1999, current through 2010)	All courts shall be open; and every person for an injury done him or her in his or her reputation, person, movable or immovable possessions, shall have remedy by the due course of law, and justice administered according to the very right of the cause and the law of the land, without sale, denial, or unreasonable delay or expense.	1999
Florida	Const. of 1839, art. I, § 9 (1st Const.)	[All] courts shall be open, and every person, for an injury done him, in his lands, goods, person, or reputation, shall have remedy by due course of law, and right and justice administered, without sale, denial, or delay.	Const. of 1968, art. I, § 21 (current through 2010)	The courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial or delay.	1968
Georgia	Const. of 1877, art. I, § 1, ¶ 4 (5th Const.)	No person shall be deprived of the right to prosecute or defend his own cause in any of the Courts of this State, in person, by attorney, or both.	Const. of 1983, art. I, § 1, ¶ 12 (current through 2011)	No person shall be deprived of the right to prosecute or defend, either in person or by an attorney, that person's own cause in any of the courts of this state.	1983

Accessing Justice, Rationing Law

	Const. of adoption	Text as of adoption	Present const.	Present text	Year Present Text Adopted
Hawaii	Const. of 1959 (1st Const.) art. I, § 4 (Due Process) art. I, § 6 (Rights of citizens)	No person shall be deprived of life, liberty or property without due process of law, nor be denied the equal protection of the laws, nor be denied the enjoyment of his civil rights or be discriminated against in the exercise thereof because of race, religion, sex or ancestry. No citizen shall be disfranchised, or deprived of any of the rights or privileges secured to other citizens, unless by the law of the land.	Const. of 1978 (current through 2011) art. I, § 5 (Due process) art. I, § 8 (Rights of citizens)	Same	1959
Idaho	Const. of 1890, art. I, § 18 (1st Const.)	Courts of justice shall be open to every person, and a speedy remedy afforded for every injury of person, property or character, and right and justice shall be administered without sale, denial, delay, or prejudice.	Const. of 1890, art. I, § 18 (current through 2011)	Same	1890
Illinois	Const. of 1818, art. VIII, § 12 (1st Const.)	Every person within this State ought to find a certain remedy in the laws for all injuries or wrongs which he may receive in his person, property, or character; he ought to obtain right and justice freely, and without being obliged to purchase it, completely and without denial, promptly and without delay, conformably to the laws.	Const. of 1970, art. I, § 12 (current through 2012)	Every person shall find a certain remedy in the laws for all injuries and wrongs which he receives to his person, privacy, property or reputation. He shall obtain justice by law, freely, completely, and promptly.	1970

The State of State Courts

	Const. of adoption	Text as of adoption	Present const.	Present text	Year Present Text Adopted
Indiana	Const. of 1816, art. I, § 11 (1st Const.)	[A]ll Courts shall be open, and every person, for an injury done him, in his lands, goods, person, or reputation shall have remedy by the due course of law; and right and justice administered without denial or delay.	Const of 1851, art. 1, § 12 (as amended in 1984, current through 2011)	All courts shall be open; and every person, for injury done to him in his person, property, or reputation, shall have remedy by due course of law. Justice shall be administered freely, and without purchase, completely, and without denial; speedily, and without delay.	1984
Iowa	Const. of 1857, art. I, § 9 (2nd Const.)	[N]o person shall be deprived of life, liberty, or property, without due process of law.	Const. of 1857, art. I, § 9 (current through 2010)	Same	1857
Kansas	Const. of 1859, Bill of Rights, § 18 (1st Const.)	All persons, for injuries suffered in person, reputation or property, shall have remedy by due course of law, and justice administered without delay.	Const. of 1859, Bill of Rights, § 18 (current through 2011)	Same	1859
Kentucky	Const. of 1792, art. XII, § 13 (1st Const.)	[A]ll courts shall be open, and every person for an injury done him in his lands, goods, person or reputation, shall have remedy by the due course of law, and right and justice administered without sale, denial or delay.	Const. of 1891, Bill of Rights, § 14 (current through 2011)	Same	1792
Louisiana	Const. of 1864, art. VII, § 110 (5th Const.)	All courts shall be open; and every person, for an injury done him, in his lands, goods, person, or reputation, shall have remedy by due course of law, and right and justice administered without denial or unreasonable delay.	Const. of 1974, art. I, § 22 (current through 2012)	All courts shall be open, and every person shall have an adequate remedy by due process of law and justice, administered without denial, partiality, or unreasonable delay, for injury to him in his person, property, reputation, or other rights.	1974

Assessing Justice, Rationing Law

	Const. of adoption	Text as of adoption	Present const.	Present text	Year Present Text Adopted
Maine	Const. of 1819, art. I, § 19 (1st Const.)	Every person, for an injury inflicted on the person or the person's reputation, property or immunities, shall have remedy by due course of law; and right and justice shall be administered freely and without sale, completely and without denial, promptly and without delay.	Const. of 1819, art. I, § 19 (current through 2011)	Same	1819
Maryland	Const. of 1776, Decl. of Rights, art. 17 (1st Const.)	That every freeman, for any injury done to him in his person or property, ought to have remedy, by the course of the law of the land, and ought to have justice and right, freely without sale, fully without any denial, and speedily without delay, according to the law of the land.	Const. of 1867, Decl. of Rights, art. 19 (current through 2011)	That every man, for any injury done to him in his person or property, ought to have remedy by the course of the Law of the Land, and ought to have justice and right, freely without sale, fully without any denial, and speedily without delay, according to the Law of the Land.	1864
Massachusetts	Const. of 1780, pt. I, art. 11 (1st Const.)	Every subject of the commonwealth ought to find a certain remedy, by having recourse to the laws, for all injuries or wrongs which he may receive in his person, property, or character. He ought to obtain right and justice freely, and without being obliged to purchase it; completely, and without any denial; promptly, and without delay; conformably to the laws.	Const. of 1780, pt. I, art. 11 (current through 2011)	Same	1780
Michigan	Const. of 1850, art. VI, § 24 (2nd Const.)	Any suitor in any court of this State shall have the right to prosecute or defend his suit, either in his own proper person, or by an attorney or agent of his choice.	Const. of 1963, art. I, § 13 (current through 2010)	A suitor in any court of this state has the right to prosecute or defend his suit, either in his own proper person or by an attorney.	1963

The State of State Courts

	Const. of adoption	Text as of adoption	Present const.	Present text	Year Present Text Adopted
Minnesota	Const. of 1857, art. I, § 8 (1st Const.)	Every person is entitled to a certain remedy in the laws for all injuries or wrongs which he may receive in his person, property or character; he ought to obtain justice freely and without purchase; completely and without denial, promptly and without delay, conformable to the laws.	Const. of 1974, art. I, § 8 (current through 2011)	Every person is entitled to a certain remedy in the laws for all injuries or wrongs which he may receive to his person, property or character, and to obtain justice freely and without purchase, completely and without denial, promptly and without delay, conformable to the laws.	1974
Mississippi	Const. of 1817, art. I, § 14 (1st Const.)	All courts shall be open; and every person for an injury done him in his lands, goods, person, or reputation, shall have remedy by due course of law, and right and justice shall be administered without sale, denial, or delay.	Const. of 1890, art. III, § 24 (current through 2011)	Same	1817
Missouri	Const. of 1820, art. XIII, § 7 (1st Const.)	That courts of justice ought to be open to every person, and certain remedy afforded for every injury to person, property, or character; and that right and justice ought to be administered without sale, denial, or delay; and that no private property ought to be taken or applied to public use without just compensation.	Const. of 1945, art. I, § 14 (current through 2011)	That the courts of justice shall be open to every person, and certain remedy afforded for every injury to person, property or character, and that right and justice shall be administered without sale, denial or delay.	1865

Accessing Justice, Rationing Law

	Const. of adoption	Text as of adoption	Present const.	Present text	Year Present Text Adopted
Montana	Const. of 1889, art. III, § 6 (1st Const.)	Courts of justice shall be open to every person, and a speedy remedy afforded for every injury of person, property or character; and that right and justice shall be administered without sale, denial or delay.	Const. of 1973, art. II, § 16 (current through 2010)	Courts of justice shall be open to every person, and speedy remedy afforded for every injury of person, property, or character. No person shall be deprived of this full legal redress for injury incurred in employment for which another person may be liable except as to fellow employees and his immediate employer who hired him if such immediate employer provides coverage under the Workmen's Compensation Laws of this state. Right and justice shall be administered without sale, denial, or delay.	1973
Nebraska	Const. of 1866, art. I, § 9 (1st Const.)	All courts shall be open, and every person, for any injury done to him in his land, goods, person or reputation, shall have remedy by due course of law and justice administered without denial or delay.	Const. of 1875, art. I, § 13 (as amended 1996, current through 2011)	All courts shall be open, and every person, for any injury done him or her in his or her lands, goods, person, or reputation, shall have a remedy by due course of law and justice administered without denial or delay, except that the Legislature may provide for the enforcement of mediation, binding arbitration agreements, and other forms of dispute resolution which are entered into voluntarily and which are not revocable other than upon such grounds as exist at law or in equity for the revocation of any contract.	1996

The State of State Courts

	Const. of adoption	Text as of adoption	Present const.	Present text	Year Present Text Adopted
Nevada	Const. of 1864, art. I, § 8 (1st Const.)	No person shall . . . be deprived of life, liberty, or property, without due process of law	Const. of 1864, art. I, § 8 (current through 2010)	Same (due process text has remained constant despite changes to other textual commitments)	1864
New Hampshire	Const. of 1784, pt. I, § 14 (2nd Const.)	Every subject of this state is entitled to a certain remedy, by having recourse to the laws, for all injuries he may receive in his person, property, or character; to obtain right and justice freely, without being obliged to purchase it; completely, and without any denial; promptly, and without delay; conformably to the laws.	Const. of 1792, pt. I, § 14 (current through 2011)	Same	1784
New Jersey	Const. of 1844, art. I, § 1 (Natural and unalienable rights) (2nd Const.)	All men are by nature free and independent, and have certain natural and inalienable rights, among which are those of enjoying and defending life and liberty; acquiring, possessing, and protecting property, and of pursuing and obtaining safety and happiness.	Const. of 1947, art. I, § 1 (current through 2011)	All persons are by nature free and independent, and have certain natural and unalienable rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing, and protecting property, and of pursuing and obtaining safety and happiness.	1947
New Mexico	Const. of 1911, art. II, § 4 (Inalienable rights) (1st Const.)	All persons are born equally free, and have certain natural, inherent and inalienable rights, among which are the rights of enjoying and defending life and liberty, of acquiring, possessing and protecting property, and of seeking and obtaining safety and happiness.	Const. of 1911, art. II, § 4 (current through 2011)	Same	1911

Accessing Justice, Rationing Law

	Const. of adoption	Text as of adoption	Present const.	Present text	Year Present Text Adopted
New York	Const. of 1777, art. XIII (Rights and privileges) (1st Const.)	And this convention doth further, in the name and by the authority of the good people of this State, ordain, determine, and declare, that no member of this State shall be disfranchised, or deprived of any the rights or privileges secured to the subjects of this State by this constitution, unless by the law of the land, or the judgment of his peers.	Const. of 1938, art. I, § 1 (as amended in 1959, current through 2011)	No member of this state shall be disfranchised, or deprived of any of the rights or privileges secured to any citizen thereof, unless by the law of the land, or the judgment of his or her peers, except that the legislature may provide that there shall be no primary election held to nominate candidates for public office or to elect persons to party positions for any political party or parties in any unit of representation of the state from which such candidates or persons are nominated or elected whenever there is no contest or contests for such nominations or election as may be prescribed by general law.	1959
North Carolina	Const. of 1868, art I, § 35 (2nd Const.)	All courts shall be open; every person for an injury done him in his lands, goods, person, or reputation shall have remedy by due course of law; and right and justice shall be administered without sale denial, or delay.	Const. of 1971, art. I, § 18 (current through 2011)	All courts shall be open; every person for an injury done him in his lands, goods, person, or reputation shall have remedy by due course of law; and right and justice shall be administered without favor, denial, or delay.	1971

The State of State Courts

	Const. of adoption	Text as of adoption	Present const.	Present text	Year Present Text Adopted
North Dakota	Const. of 1889, art. I, § 22 (1st Const.)	All courts shall be open, and every man for any injury done him in his lands, goods, person or reputation shall have remedy by due process of law, and right and justice administered without sale, denial or delay. Suits may be brought against the state in such manner, in such courts, and in such cases, as the legislative assembly may, by law, direct.	Const. of 1981, art. I, § 9 (current through 2011)	Same	1889
Ohio	Const. of 1802, art. VIII, § 7 (1st Const.)	All courts shall be open, and every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law, and shall have justice administered without denial or delay.	Const. of 1851, art. I, § 16 (as amended in 1913, current through 2011)	All courts shall be open, and every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law, and shall have justice administered without denial or delay. Suits may be brought against the state, in such courts and in such manner, as may be provided by law.	1913
Oklahoma	Const. of 1907, art. II, § 6 (1st Const.)	The courts of justice of the State shall be open to every person, and speedy and certain remedy afforded for every wrong and for every injury to person, property, or reputation; and right and justice shall be administered without sale, denial, delay, or prejudice.	Const. of 1917, art. II, § 6 (current through 2011)	Same	1907

Accessing Justice, Rationing Law

	Const. of adoption	Text as of adoption	Present const.	Present text	Year Present Text Adopted
Oregon	Const. of 1857, art. I, § 10 (1st Const.)	No court shall be secret, but justice shall be administered, openly and without purchase, completely and without delay, and every man shall have remedy by due course of law for injury done him in his person, property, or reputation.	Oregon Const. of 1857, art. I, § 10 (current through 2010)	Same	1857
Pennsylvania	Const. of 1776, art. II, § 26 (1st Const.)	All courts shall be open, and justice shall be impartially administered without corruption or unnecessary delay.	Const. of 1969, art. I, § 11 (current through 2012)	All courts shall be open; and every man for an injury done him in his lands, goods, person or reputation shall have remedy by due course of law, and right and justice administered without sale, denial or delay.	1790
Rhode Island	Const. of 1843, art. I, § 5 (1st Const.)	Every person within this state ought to find a certain remedy, by having recourse to the laws, for all injuries or wrongs which he may receive in his person, property, or character. He ought to obtain right and justice freely and without purchase, completely and without denial; promptly and without delay; conformably to the laws.	Const. of 1986, art. I, § 5 (current through 2011)	Every person within this state ought to find a certain remedy, by having recourse to the laws, for all injuries or wrongs which may be received in one's person, property, or character. Every person ought to obtain right and justice freely, and without purchase, completely and without denial; promptly and without delay; conformably to the laws.	1986
South Carolina	Const. of 1868, art. I, § 15 (6th Const.)	All courts shall be public, and every person, for any injury that he may receive in his lands, goods, person or reputation, shall have remedy by due course of law and justice administered without unnecessary delay.	Const. of 1895, art. I, § 9 (current through 2011)	All courts shall be public, and every person shall have speedy remedy therein for wrongs sustained.	1895

The State of State Courts

	Const. of adoption	Text as of adoption	Present const.	Present text	Year Present Text Adopted
South Dakota	Const. of 1889, art. VI, § 20 (1st Const.)	All courts shall be open, and every man for an injury done him in his property, person or reputation, shall have remedy by due course of law, and right and justice, administered without denial or delay.	Const. of 1889, art. VI, § 20 (current through 2011)	Same	1889
Tennessee	Const. of 1796, art. XI, § 17 (1st Const.)	That all courts shall be open; and every man, for an injury done him in his lands, goods, person or reputation, shall have remedy by due course of law, and right and justice administered without sale, denial, or delay. Suits may be brought against the State in such manner and in such courts as the legislature may by law direct: Provided, The right of bringing suit be limited to the citizens of this State.	Const. of 1870, art. I, § 17 (current through 2011)	That all courts shall be open; and every man, for an injury done him in his lands, goods, person or reputation, shall have remedy by due course of law, and right and justice administered without sale, denial, or delay. Suits may be brought against the State in such manner and in such courts as the Legislature may by law direct.	1835
Texas	Const. of 1845, art. I, § 11 (1st Const.)	All courts shall be open; and every person, for an injury done him in his lands, goods, person, or reputation, shall have remedy by due course of law.	Const. of 1876, art. I, § 13 (current through 2011)	Same	1845
Utah	Const. of 1895, art. I, § 11 (1st Const.)	All courts shall be open, and every person, for an injury done to him in his person, property or reputation, shall have remedy by due course of law, which shall be administered without denial or unnecessary delay; and no person shall be barred from prosecuting or defending before any tribunal in this State, by himself or counsel, any civil cause to which he is a party.	Const. of 1895, art. I, § 11 (current through 2011)	Same	1895

Accessing Justice, Rationing Law

	Const. of adoption	Text as of adoption	Present const.	Present text	Year Present Text Adopted
Vermont	Const. of 1786, ch. I, art. 4 (2nd Const.)	Every person within this Commonwealth ought to find a certain remedy by having recourse to the laws, for all injuries or wrongs which he may receive in his person, property, or character: he ought to obtain right and justice freely, and without being obliged to purchase it-completely, and without any denial, promptly and without delay; conformably to the laws.	Const. of 1793, ch. I, art. 4 (current through 2010)	Every person within this state ought to find a certain remedy, by having recourse to the laws, for all injuries or wrongs which one may receive in person, property or character; every person ought to obtain right and justice, freely, and without being obliged to purchase it; completely and without any denial; promptly and without delay; conformably to the laws.	1793
Virginia	Const. of 1776, Bill of Rights § 8 (1st Const.) Const. of 1902, art. I, § 11	[I]n criminal prosecutions a man . . . shall not be deprived of life or liberty, except by the law of the land or the judgment of his peers. [N]o person shall be deprived of his property without due process of law.	Const. of 1971, art. I, §§ 8 and 11 (current through 2011)	art. I, § 8: same as 1776 art. I, § 11: [N]o person shall be deprived of his life, liberty, or property without due process of law.	1971
Washington	Const. of 1889, art. I, § 10 (1st Const.)	Justice in all cases shall be administered openly, and without unnecessary delay.	Const. of 1889, art. I, § 10 (current through 2011)	Same	1889
West Virginia	Const. of 1872, art. III, § 17 (2nd Const.)	The courts of this state shall be open, and every person, for an injury done to him, in his person, property or reputation, shall have remedy by due course of law; and justice shall be administered without sale, denial or delay.	Const. of 1872, art. III, § 17 (current through 2011)	Same	1872

The State of State Courts

	Const. of adoption	Text as of adoption	Present const.	Present text	Year Present Text Adopted
Wisconsin	Const. of 1848, art. I, § 9 (1st Const.)	Every person is entitled to a certain remedy in the laws for all injuries, or wrongs which he may receive in his person, property, or character; he ought to obtain justice freely, and without being obliged to purchase it, completely and without denial, promptly and without delay, conformably to the laws.	Const. of 1848, art. I, § 9 (current through 2012)	Same	1848
Wyoming	Const. of 1889, art. 1, § 8 (1st Const.)	All courts shall be open and every person for an injury done to person, reputation or property shall have justice administered without sale, denial or delay. Suits may be brought against the state in such manner and in such courts as the legislature may by law direct.	Const. of 1889, art. 1, § 8 (current through 2011)	Same	1889

***Gideon* Revived: Criminal Defendants, Financial Austerity, and Overcriminalization**

As state courts experience severe cuts, layoffs, and furloughs, the criminal justice system continues to produce defendants, detainees, and prisoners. More than a half century ago, the debate was whether the federal constitution mandated that indigent criminal felony defendants be provided state-paid lawyers. A 1962 brief (excerpted below) from a state opposing that right provides a window into both the transformations that *Gideon* produced and the degree to which contemporary arguments parallel claims made decades ago. The U.S. Supreme Court's commitment to *Gideon* continues in the 2008 *Rothgery* decision, while the dissents raise questions about *Gideon's* scope.

Implementation remains incomplete, as other materials below detail. Some state courts have responded by creating mechanisms for public defenders to decline assignments and by recognizing pre-conviction habeas review of ineffective assistance of counsel. Additional responses include task forces, diversion programs, and sentencing reforms.

Brief Amicus Curiae, for the State of Alabama in support of Florida, *Gideon v. Wainwright*, No. 155, 372 U.S. 335 (1963).

Anthony Lewis, *American Lawyers: Gideon's Army?* 50 CORNELL LAW QUARTERLY 155 (1965).
Rothgery v. Gillespie County, 554 U.S. 191 (2008).

JUSTICE DENIED: AMERICA'S CONTINUING NEGLECT OF OUR CONSTITUTIONAL RIGHT TO COUNSEL: REPORT OF THE NATIONAL RIGHT TO COUNSEL COMMITTEE (The Constitution Project, April 2009).

State v. Pratte, 298 S.W.3d 870 (Mo. Banc 2009).

Report of the Special Master in Missouri Sys. of Public Defenders v. Waters (Feb. 9, 2011).
Hurrell-Harring v. New York, 930 N.E.2d 217 (N.Y. 2010).

Darryl K. Brown, *Rationing Criminal Defense Entitlements: An Argument from Institutional Design*, 104 COLUMBIA LAW REVIEW 801 (2004).

WHAT YOU DON'T KNOW CAN HURT YOU (TEXAS FAIR DEFENSE PROJECT, 2011).

McGregor Smyth, *From "Collateral" to "Integral": The Seismic Evolution of Padilla v. Kentucky and its Impact on Penalties Beyond Deportation*, 54 HOWARD LAW JOURNAL 795 (2011).

**II. GIDEON REVIVED: COUNSEL FOR CRIMINAL DEFENDANTS, FINANCIAL
AUSTERITY, AND OVERCRIMINALIZATION**

**Brief Amicus Curiae, for the State of Alabama in support of Florida
Gideon v. Wainwright
No. 155, 372 U.S. 335 (1963)**

In granting the motion to proceed *in forma pauperis* and the petition for writ of certiorari, this Court requested counsel to discuss the following in their briefs and oral argument: “Should this Court’s holding in *Betts v. Brady*, 316 U.S. 455, be reconsidered?”

Because of the importance of the question, Honorable Richard W. Ervin, Attorney General, State of Florida, invited the attorneys general of other states to submit amicus curiae briefs on this point. . . .

. . . . Admittedly, on that distant clay when finally the millennium is reached, no layman shall be compelled to defend himself without legal assistance in a state criminal prosecution. No indigent individual shall be compelled to suffer illness or injury without the attention of a physician or benefit of necessary medicine or hospital care. No poor person shall be compelled to suffer the pangs of hunger or the discomforts occasioned by a lack of adequate clothing, suitable housing or other creature comforts. Humanitarian principles require that such assistance be given to the needy even today, but it cannot be argued logically that, under the due process or equal protection clauses of the Fourteenth Amendment, the states must furnish them. If and when, in the considered judgment of the people of the individual states, such gratuitous services or aid are warranted morally or are feasible financially, they will be provided. Though man’s social evolution is slow, history proves that he does advance in all fields. To be lasting, however, his progress must result from his own volition rather than come from judicial fiat.

The rule of *Betts v. Brady*, that counsel must be appointed when a failure to do so would be “shocking to the universal sense of justice,” is no more vague, fickle, or confusing as a standard than is the nationally accepted requirement that before a person can be convicted of crime, the state must convince the court or the jury of his guilt “beyond a reasonable doubt and to a moral certainty.” Undoubtedly, many juries have been perplexed and confused by these vague terms and have caused miscarriages of justice; but seldom, if ever, has this point been argued as a ground for abolishing the jury system which Mr. Justice, in *Carnley v. Cochran*, describes as the “pride of the English-speaking world.”

Undoubtedly, this Court has observed some cases where the failures of state trial judges to appoint counsel have shocked its sense of justice. Disregarded, however, is the fact that of the multitude of criminal trials which have been conducted in state courts throughout the nation, absent the assistance of defense counsel, only a relatively few have been attacked successfully on the ground that they were “shocking to the universal sense of justice.” No claim is made that our state judges are perfect. They, even as do members of the federal judiciary, labor under the limitations and shortcomings imposed on mortal men. We do insist, however, that, by and large, state judge,; are intellectually and morally capable of fulfilling the duties of their offices and are

conscientious in their efforts to see that all litigants who come before them are afforded justice under the law. This is true with respect to the appointment of counsel for indigents charged with crime. Some errors are made; but, frequently, even those cases which this Court has seen fit to reverse because counsel were not appointed, afford grounds for honest differences of opinion.

Title 28, Section 1915, United States Code, and this Court's own Rule 53 refute Mr. Justice Black's charge that "all defendants who have been convicted of crime without benefit of counsel cannot possibly bring their cases to us." In recent years there has been a growing trend among the states to expand the rights of indigent prisoners who seek relief from their convictions in the state appellate courts; and, particularly in the past few years, few, if any, state prisoners have been unaware of their right to proceed in the federal courts in *forma pauperis*. Casual inspection of the several state and federal reporter systems reflect the voluminous number of habeas corpus, coram nobis, and other proceedings which have been instituted by state prisoners throughout this country. The means for even indigent state prisoners bringing their cases to this Court exist, and the records of this Court will show that there is no hesitancy, reluctance, inability, or lack of ingenuity on the part of state prisoners to employ them. . . .

Then, too, since the due process clause of the Fourteenth Amendment protects property as well as life and liberty, it seems illogical to confine the mandatory appointment of counsel for indigents to criminal prosecutions. Not infrequently, a man's property is nearly as dear to him as is his liberty. As observed by Mr. Justice Roberts in *Betts v. Brady*, if the Fourteenth Amendment requires that counsel be furnished in all criminal trials, logic would require the furnishing of counsel in civil cases involving property. Surely, this was not intended by those who fashioned the Fourteenth Amendment. . . .

. . . . Where an accused is tried without the assistance of counsel, it is a widespread practice in Alabama, and presumably in the other states as well, those who prosecute for the State to allow the accused great latitude in the presentation of his case. Few objections are interposed with respect to the admission of documentary evidence or during the direct and cross-examination of witnesses by the accused, with the result that much incompetent, irrelevant and hearsay evidence gets to the jury. Furthermore, where, as is generally the case, the accused makes no arguments to the jury, the prosecuting attorney also refrains from making any jury arguments. Those who are familiar with criminal prosecutions know that a closing argument to the jury, reviewing the really significant evidence and emphasizing its importance, is one of the most critical stages of a trial. It is there that an astute and skilled prosecutor exerts his greatest influence on the jury.

Admittedly, this leniency is usually grounded on the ulterior realization that any other course of conduct would generate in the mind of the jury an antagonism toward the prosecutor and would intensify the already present sympathy for the accused who, being unaided by counsel, appears in the role of the underdog. Whatever the reason, it deprives the state's attorney of a potent weapon and works to the advantage of the accused. At the last meeting of the Alabama Bar Association, when this subject was discussed with a group of the State's prosecuting attorneys, there was widespread agreement among them that an accused, tried without aid of counsel, stands a better chance of obtaining from a jury either an outright acquittal or less severe punishment the one represented by an attorney. Many observers of the criminal trial scene are of the opinion that today only a few lawyers who undertake criminal defense cases are equal matches for career

prosecutors whose intimate familiarity with a wide variety of criminal charges and prosecution techniques make them very formidable adversaries.

This demonstrates that, generally speaking, indigent persons charged with crimes are not as unfortunately situated as critics of the *Betts v. Brady* rule would have us believe. It also dilutes to a great extent Mr. Justice Douglas' statement in *Carnley v. Cochran* that the rule of *Betts v. Brady*, projected in a jury trial, faces a layman with a with a labyrinth he can never understand nor negotiate. Many of today's defendants are recidivists who are not strangers to legal proceedings; but even he who appears in court for the first time and is unattended by counsel, though not understanding it, usually can negotiate the "labyrinth" of a criminal prosecution. The record in the instant case reflects the fact that the petitioner presented the available defense about as ably as an average lawyer could have done. . . .

The people of our United States have long favored a free enterprise system under which they take care of themselves. They have sought to avoid socialism which, as we understand it, is a state of affairs in which the government takes care of the people. A graphic illustration of this occurred on July 17, 1962, when, for the second time in two years, the United States Senate, a deliberative body which is responsive to the will of the people, defeated a medical aid bill which was designed primarily for the benefit of some 17,000,000 citizens over 65 years of age who reportedly are in dire need of medical treatment and cannot get it because they cannot afford it. The same bill bogged down in the Ways and Means Committee and never reached the floor of the House of Representatives for a vote.

Because of the inherent disparity in ability among people, our free enterprise system has always produced two classes of people-those who have and those who have not. No one questions the desirability of having furnished to those who are economically underprivileged many of the things which are available only to our more prosperous citizens. Yet it cannot be argued logically that a state's failure to provide such things is a violation of the due process clause of the Fourteenth Amendment. Why, then, single out a state's failure to furnish counsel for a poor person charged with a non-capital crime and hold that it is repugnant to due process? . . .

Footnote 24 on page 27 of petitioner's brief asserts that from seventy-five to ninety percent of all state cases are decided by pleas of guilty. Surely, it is illogical, unwarranted and unrealistic to assume that, at most, anything more than a minute number of such guilty pleas are the product of anything other than a recognition by the accused that he is guilty, coupled with a knowledge that the state has uncontrovertible proof of his guilt, and an attendant awareness that his only hope for receiving the lightest punishment possible for his crime lies in cooperating with the state to the extent of dispensing with an unnecessary trial. For such accused persons as do enter guilty pleas under these circumstances, can it be argued with reason that, if the accused is indigent, the state must be burdened with the necessity of appointing and paying an attorney solely for the purpose of pleading his client guilty?

Many of the less affluent counties of a state may find that in non-capital prosecutions it is an unbearably onerous financial burden to pay the fees of attorneys, especially where in good conscience the lawyers can only recommend that their clients enter guilty pleas. Conceivably, this might act as a deterrent to effective law enforcement. Furthermore, it is not an uncommon

situation in thinly populated rural counties for there to be more persons charged with crime than there are lawyers versed in criminal practice; and some judges may encounter real difficulty in appointing enough qualified lawyers to serve at their criminal terms of court.

Clearly, the desirability or necessity for the appointment of counsel to represent indigents being prosecuted for noncapital crimes under these and other circumstances calls for a determination, not by a court far removed from the local scene, but by state authorities who have an intimate familiarity with and an understanding of the conditions, problems and attitudes of their own people.

Even with its exposure to occasional abuses, the rule of *Betts v. Brady* remains the best one for our American way of life. Any decision to make mandatory the appointment of counsel for all indigents charged with crime in state courts should come not from this Court but from the people of the individual states acting through their elected legislatures or judges.

Anthony Lewis

American Lawyers: Gideon's Army?
50 CORNELL LAW QUARTERLY 155 (1965).

The topic suggested for the talk from which this article is adapted was how I came to write a book on the *Gideon* case. In the narrow sense, that question is easily answered. Various persons had suggested over a long period that I write what they would call “a book on the Supreme Court.” Of course the trouble with that idea was that it was not an idea at all. There have been innumerable books on the Supreme Court, and a worthwhile new one would have to have a fresh viewpoint. Then, one Monday in June of 1962, the Supreme Court handed down a most interesting order. It granted certiorari in a case brought to the Court by a pauper and noted, in the order, that it wanted counsel to canvass whether the Court should now reconsider its 1942 decision in *Betts v. Brady*. Like many lawyers and commentators, I had wondered for some time how long it would be before the court would overrule *Betts v. Brady*, which held that poor men charged with crime were entitled to free defense counsel in state courts only if they could demonstrate that they were the victims of some special circumstance such as mental deficiency. And now the moment seemed to be at hand for the demise of *Betts*.

I went directly from the courtroom that day to the clerk's office and got out the file on the case. It involved a man named Clarence Earl Gideon, and it came from Florida—that much appeared on the jacket of the file. When I looked inside, it turned out that the petition which the Court had granted had been written in pencil, on a prison form, by Mr. Gideon. That fascinated me; here the Supreme Court was about to overrule a leading case, as it seemed, and the vehicle for such a great event was to be a poor prisoner writing to the Court in pencil from his cell. And so, over a period of months, the idea took form for a book on the *Gideon* case.

I have really gone on too long with this personal account. And of course that is only the surface statement of how I came to write the book. The real reason, the underlying reason, was my feeling for law and lawyers and judges.

That feeling can only be described as one of awe. After some years of observing the law at work, the process still seems exciting and wonderful to me. I think not enough Americans appreciate the role of law in this country, and in the book I wanted to convey my feelings about it.

As a matter of fact, there are some American lawyers and judges who do not sufficiently appreciate the special, the unique role that their profession plays in this country. . . .

More serious than the salary pinprick is the proposal pending before the Senate this very day, offered by Senator Dirksen, to make the courts withhold action from two to four years in all lawsuits brought to require reapportionment of state legislatures. Now some lawyers like and some lawyers dislike the decisions of the Supreme Court on apportionment. But surely every lawyer who thinks about it should recognize the terrible precedent that would be set by the Dirksen proposal. The net of it is to say, without amending the Constitution, that for a period of time American citizens should not be able to enforce a declared constitutional right in the courts. This year it is the right to equality of representation; next year it may be the right to be free of racial discrimination, or the right to just compensation when the Government takes your property.

Now I ask again: Where is the voice of the American bar on this proposal? Yesterday a group of distinguished law professors condemned it for what it was, a radical, a revolutionary attack on the integrity of our constitutional system. But that is the only voice I have heard. Granted that the threat has arisen suddenly: The more reason for a swift and powerful response from the leaders of the bar. Surely it is a dispiriting thing to see American lawyers standing silently by while the institution they supposedly cherish—the right to enforce one's constitutional rights in the courts—is subjected to a devious and deadly assault.

The great problem of race relations in this country is another on which the record of the American bar is less luminous than it might be. The American Bar Association now has before it a committee report making what it calls “a clarion call for law and order” in race relations. The report goes on to say that “there would be chaos and anarchy if each citizen were free to choose which laws he would obey.” These are wise views, and it is good to have them expressed by the organized bar. My only question is whether they are not just a little tardy.

Today the issue of law and order is raised most acutely by Negro violence in the streets of great Northern cities. But for much of the last ten years the same issue has been raised by lawlessness in the South, and this has not been mere misbehavior by private individuals but calculated corruption of the law by officials sworn to uphold it. I refer to the voting registrars who have disqualified Negro college graduates as illiterate, to the policemen and sheriffs who have beaten quiet young men and women for exercising their constitutional rights, to the judges who have cynically attempted to slip around higher court decisions in the effort to maintain white supremacy. These are not a majority of officials in the South, but they are a significant number. An example may be more compelling than generalizations.

There was the case of the Georgia prosecutor who brought a charge of insurrection against four student civil rights workers in Americus, Georgia. This was a capital charge, and so the students were held without bail—for months. Finally a hearing was held in Federal court on the case. This

prosecutor then admitted that he had not expected to obtain a conviction that would stick, because the Georgia insurrection statute had been held unconstitutional in 1937. His idea instead was to intimidate the defendants. He said, "The basic reason for bringing these charges was to deny the defendants, on to ask the court to deny them bond. We were in hopes that by holding these men, we would be able to talk to their lawyers and talk to their people and convince them that this type of activity . . . is not the right way to go about it." In short, keep them in jail on an admittedly worthless charge until they agreed to stop exercising their rights.

It could not happen here. But it did. And where was the voice of the bar?

Again I want to make clear that I intend no wholesale condemnation of lawyers or the profession. The Committee for Civil Rights Under Law, headed by Harrison Tweed and Bernard Segal, has done magnificent work in the last two years. If it had not been for that committee, for example, those students in the Americus, Ga. case might still be in jail. I say only that the response of the bar to the crisis of respect for law in the field of race relations has been too little and much too late.

Last year and again this year the American Bar committee has called for law and order; it says now that only chaos can result "if each citizen were free to choose which laws he would obey." But where was the bar during the years when United States Senators were solemnly avowing that decisions of the Supreme Court were not binding and need not be obeyed, when Governors used armed force to prevent compliance with the orders of the Federal courts? We are paying a terrible price for those examples of lawlessness, and the bar shares some of the responsibility.

To me the most disheartening failure has been in the simple duty of a lawyer to represent unpopular clients—a duty proclaimed by every bar worth its name. Of course we all know courageous examples of lawyers who have sacrificed themselves for the principle of every man's right to legal assistance. But for an example to the contrary we need only look again to the racial field. Let me say it shortly: At least until recently not a single white lawyer in Mississippi would represent anyone involved in civil rights activities. In the entire state there are only four Negro lawyers who will do so. And I repeat: not a single white lawyer. The Mississippi bar has just passed a resolution affirming the obligation to represent all citizens, and one hopes that there will be concrete results. But for the longest time not one of the prominent lawyers of that state has had the courage to demonstrate his belief in a basic preconception of our legal system, that all are entitled to representation. Not even lawyers in the most impregnable position of public esteem. Not even, I must say sadly, a Mississippi lawyer who was president of the American Bar Association.

What I have said may seem harsh, but it has not been said in any spirit of disrespect. On the contrary, it was said because I have the greatest respect for lawyers. If I am acutely disappointed at their failures, it is because I know from the example of so many that it is possible to live greatly in the law.

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

JUSTICE SOUTER delivered the opinion of the Court.

This Court has held that the right to counsel guaranteed by the Sixth Amendment applies at the first appearance before a judicial officer at which a defendant is told of the formal accusation against him and restrictions are imposed on his liberty. See *Brewer v. Williams*, 430 U.S. 387, 398-399 (1977); *Michigan v. Jackson*, 475 U.S. 625, 629, n. 3 (1986). The question here is whether attachment of the right also requires that a public prosecutor (as distinct from a police officer) be aware of that initial proceeding or involved in its conduct. We hold that it does not.

Although petitioner Walter Rothgery has never been convicted of a felony, a criminal background check disclosed an erroneous record that he had been, and on July 15, 2002, Texas police officers relied on this record to arrest him as a felon in possession of a firearm. The officers lacked a warrant, and so promptly brought Rothgery before a magistrate, as required by Tex. Code Grim. Proc. Ann., Art. 14.06(a) (Vernon Supp. 2007). Texas law has no formal label for this initial appearance before a magistrate, see 41 G. Dix & R. Dawson, *Texas Practice Series: Criminal Practice and Procedure* § 15.01 (2d ed. 2001), which is sometimes called the “article 15.17 hearing,” see, e. g., *Kirk v. State*, 199 S. W. 3d 467, 476-477 (Tex. App. 2006); it combines the Fourth Amendment’s required probable-cause determination with the setting of bail, and is the point at which the arrestee is formally apprised of the accusation against him, see Tex. Code Grim. Proc. Ann., Art. 15.17(a) (Vernon Supp. 2007). . . .

Rothgery had no money for a lawyer and made several oral and written requests for appointed counsel which went unheeded. The following January, he was indicted by a Texas grand jury for unlawful possession of a firearm by a felon, resulting in rearrest the next day, and an order increasing bail to \$15,000. When he could not post it, he was put in jail and remained there for three weeks.

On January 23, 2003, six months after the article 15.17 hearing, Rothgery was finally assigned a lawyer, who promptly obtained a bail reduction (so Rothgery could get out of jail), and assembled the paperwork confirming that Rothgery had never been convicted of a felony. Counsel relayed this information to the district attorney, who in turn filed a motion to dismiss the indictment, which was granted.

Rothgery then brought this 42 U. S. C. § 1983 action against respondent Gillespie County (County), claiming that if the County had provided a lawyer within a reasonable time after the article 15.17 hearing, he would not have been indicted, rearrested, or jailed for three weeks. The County’s failure is said to be owing to its unwritten policy of denying appointed counsel to indigent defendants out on bond until at least the entry of an information or indictment. Rothgery sees this policy as violating his Sixth Amendment right to counsel. . . .

Our latest look at the significance of the initial appearance was *McNeil*, 601 U. S. 171, which is no help to the County. In *McNeil* the State had conceded that the right to counsel attached at the first appearance before a county court commissioner, who set bail and scheduled a preliminary

examination. See *id.*, at 173; see also *id.*, at 175 (“It is undisputed, and we accept for purposes of the present case, that at the time petitioner provided the incriminating statements at issue, his Sixth Amendment right had attached.). But we did more than just accept the concession; we went on to reaffirm that “[the Sixth Amendment right to counsel attaches at the first formal proceeding against an accused,” and observed that “in most States, at least with respect to serious offenses, free counsel is made available at that time. . . .” *Id.*, at 180-181.

That was 17 years ago, the same is true today, and the overwhelming consensus practice conforms to the rule that the first formal proceeding is the point of attachment. We are advised without contradiction that not only the Federal Government, including the District of Columbia, but 43 States take the first step toward appointing counsel “before, at, or just after initial appearance.” App. to Brief for National Association of Criminal Defense Lawyers as Amicus Curiae 1a; see *id.*, at 1a-7a (listing jurisdictions); see also Brief for American Bar Association as Amicus Curiae 5-8 (describing the ABA’s position for the past 40 years that counsel should be appointed “certainly no later than the accused’s initial appearance before a judicial officer”). And even in the remaining seven States (Alabama, Colorado, Kansas, Oklahoma, South Carolina, Texas, and Virginia) the practice is not free of ambiguity. See App. to Brief for National Association of Criminal Defense Lawyers as Amicus Curiae 5a-7a (suggesting that the practice in Alabama, Kansas, South Carolina, and Virginia might actually be consistent with the majority approach); see also n. 7, *supra*. In any event, to the extent these States have been denying appointed counsel on the heels of the first appearance, they are a distinct minority.

The only question is whether there may be some arguable justification for the minority practice. Neither the Court of Appeals in its opinion, nor the County in its briefing to us, has offered an acceptable one. . . .

CHIEF JUSTICE ROBERTS, with whom JUSTICE SCALIA joins, concurring.

Justice Thomas’s analysis of the present issue is compelling, but I believe the result here is controlled by *Brewer v. Williams*, 430 U.S. 387 (1977), and *Michigan v. Jackson*, 475 U.S. 625 (1986). A sufficient case has not been made for revisiting those precedents, and accordingly I join the Court’s opinion.

I also join Justice Alito’s concurrence, which correctly distinguishes between the time the right to counsel attaches and the circumstances under which counsel must be provided.

JUSTICE ALITO, with whom the CHIEF JUSTICE and JUSTICE SCALIA join, concurring.

I join the Court’s opinion because I do not understand it to hold that a defendant is entitled to the assistance of appointed counsel as soon as his Sixth Amendment right attaches. As I interpret our precedents, the term “attachment” signifies nothing more than the beginning of the defendant’s prosecution. It does not mark the beginning of a substantive entitlement to the assistance of counsel. I write separately to elaborate on my understanding of the term “attachment” and its relationship to the Amendment’s substantive guarantee of “the Assistance of Counsel for [the] defence.”

JUSTICE THOMAS, dissenting.

The Court holds today—for the first time after plenary consideration of the question—that a criminal prosecution begins, and that the Sixth Amendment right to counsel therefore attaches, when an individual who has been placed under arrest makes an initial appearance before a magistrate for a probable-cause determination and the setting of bail. Because the Court's holding is not supported by the original meaning of the Sixth Amendment or any reasonable interpretation of our precedents, I respectfully dissent.

Justice Denied: America's Continuing Neglect of our Constitutional Right to Counsel
Report of the National Right to Counsel Committee, Constitution Project (2009)

A. The Need for Reform is Decades Old

Since the U.S. Supreme Court's *Gideon* decision in 1963, several organizations have conducted national studies of indigent defense over several decades. Invariably, these studies conveyed a grim view of defense services in criminal and juvenile cases, pointing out many problems in providing counsel across the country, including inadequate funding of defense systems as a whole; inadequate compensation for assigned counsel; inadequate funding of public defenders who are “treated like stepchildren;” pressure to waive counsel on juveniles and adult defendants; inconsistent indigency standards; incompetent or inexperienced counsel; late appointment of counsel; the need for greater public financing of indigent defense; increased pressure on defendants by defense attorneys to accept guilty pleas to expedite the movement of cases; large differences between urban versus rural representation; disproportionate salaries between public defenders and prosecutors; overwhelming caseloads of juvenile defenders; excessive caseloads of public defenders; lack of investigative resources; and understaffing of public defense offices.

In the 1970's and 1980's, most public defender programs employed lawyers who provided representation on a part-time basis. County governments mostly organized and funded indigent defense. In 1962, the year before the *Gideon* decision, it was estimated that indigent defense expenditures for felony cases would cost \$25 million if representation were provided by assigned counsel at the average fee rates then being paid by county governments. But by 1972, estimated expenditures for indigent defense were \$87 million, \$200 million in 1976, \$436 million in 1980, \$625 million in 1982, and \$991 million in 1986. A 1973 study estimated that the average cost per indigent defense case was \$122. Although funding of indigent defense increased after *Gideon*, in 1982, nearly 20 years after the decision, one source revealed that criminal defense services only accounted for 1.5% of total expenditures of the entire criminal justice system. However, the criminal justice system as a whole was also underfunded. A study in 1985 stated that “less than 3% of all government spending in the United States went to support all civil and criminal justice activities.”

These national reports made clear that there needed to be important indigent defense improvements, as well as increased funding. Although funding has gone up, it is still woefully insufficient, and many of the same problems exist today, more than four decades later. Our country's failure to provide adequate representation to indigent defendants and juveniles is not

just a problem of the past.

B. Insufficient Funding

Indigent Defense Models

State and local governments choose from three primary models for implementing the right to counsel: public defender, contract counsel, or private assigned counsel. In the public defender model, attorneys are hired to handle the bulk of cases requiring counsel in that jurisdiction. Public defender attorneys are full- or part-time salaried employees who frequently work together in an office with a director or administrator and support staff. Even when public defenders are the primary indigent defense providers in the jurisdiction, because some cases present a conflict of interest, public defenders cannot accept every case, and an alternative method for providing counsel must also exist. In the contract model, private attorneys are chosen by a jurisdiction—often after a bidding contest—and provide representation as provided by contractual terms. Most contracts are annual and require counsel to handle a certain number of cases or a particular type of case (e.g., misdemeanors), although some require counsel to handle all cases except where conflicts exist. Finally, in the assigned counsel model, private attorneys are appointed by the court from a formal or informal list of attorneys who accept cases for a fixed rate per hour or per case. This model is also typically used for cases when public defenders or contract counsel exist but cannot provide representation.

State and County Funding

Across the country, funding for these indigent defense models is provided by states, counties, or a combination of both. As the table below shows, the majority of states (28) now essentially fully fund indigent defense (i.e., provide more than 90% of the funding).

Table 1: Sources of Indigent Defense Funding in the 50 States

Full State Funding ²⁹		More Than 50% State Funding	Full County Funding	More Than 50% County Funding
Alaska	Montana	Kansas	Pennsylvania	Alabama
Arkansas	New Hampshire	Louisiana	Utah	Arizona
Colorado	New Jersey	Oklahoma		California
Connecticut	New Mexico	South Carolina		Georgia
Delaware	North Carolina			Idaho
Florida	North Dakota			Illinois
Hawaii	Oregon			Indiana
Iowa	Rhode Island			Michigan
Kentucky	Tennessee			Mississippi
Maine	Vermont			Nebraska
Maryland	Virginia			Nevada
Massachusetts	West Virginia			New York
Minnesota	Wisconsin			Ohio
Missouri	Wyoming ³⁰			South Dakota
				Texas
				Washington

. . . . Fortunately, more states are beginning to recognize the importance of providing greater state funding. In 1986, 10 states contributed nothing toward indigent defense. In 1986, the 50 states combined contributed 38% of the total funding of indigent defense, while the counties contributed 62%. In 2005, the states contributed just over 50% of overall funding. In several states, the comparative share of state funding has increased dramatically. For instance, between 1986 and 2005, Arkansas went from contributing nothing toward indigent defense to contributing 91% of the overall costs; Iowa went from contributing less than three percent to full state funding; and Minnesota went from 11% to 93% state funding.

During the past several years, more states have begun to relieve the counties of their funding burden. This has occurred along with the creation of more unified statewide systems or oversight bodies, which is further discussed in Chapter 4. In 2002, Montana spent only slightly more than the counties to fund indigent defense.

In 2005, following a statewide study and class-action lawsuit, Montana created a new statewide system and accepted full funding of the new system, substantially increasing state expenditures. In 2006, including supplemental expenditures, state spending again increased significantly. In Georgia, following the efforts of a study commission and statewide study of indigent defense, the state created a statewide system and in 2005, compared with 2002, more than doubled its share of funding. However, this increase in state funding did not totally relieve the counties. While the state took over the funding of adult felonies, criminal appeals, and juvenile delinquency cases, the counties still must fund all misdemeanor and ordinance violation cases. Between 2002 and 2005, the counties' expenditures increased by 28%.

In Texas, the Fair Defense Act of 2001 created the Texas Task Force on Indigent Defense to help the counties improve their local indigent defense systems and provide state oversight. Through the Task Force, state funds are awarded to counties whose indigent defense programs meet certain criteria. Since 2002, following the creation of the Task Force, Texas has nearly doubled its share of indigent defense funding. . . .

Funding Shortages

As the cost of indigent defense continues to increase nationwide, funding shortages are guaranteed to worsen, given the country's economic condition at the beginning of 2009. Even before today's economic crisis, many indigent defense systems across the country were already facing serious budget shortfalls and cutbacks. Between 2002 and 2005, when adjusted for inflation, many states that fully fund their indigent defense systems actually decreased their level of financial support, including Connecticut, Hawaii, Missouri, New Mexico, Oregon, and Wisconsin. Now, 37 states are facing mid-year budget shortfalls for fiscal year 2009, and 22 of these states fully fund their indigent defense systems. Obviously, when states reduce financial support for public defense, which is already underfunded, there is a substantially greater risk that accused persons will not receive adequate legal representation and that wrongful convictions will occur. . . .

Resource Inequities

In the battle for adequate funding, indigent defense faces tough competition for resources, especially in comparison to prosecutors. Even conceding that prosecutors consider some cases that are never charged and that some cases are represented by retained counsel, financial support of indigent defense typically lags well behind that provided for prosecutors. The ABA has urged “parity between defense counsel and the prosecution with respect to resources,” but this goal is not being achieved. The inequities between prosecution and defense can take several forms, including disparity in the amount of funds, sources of funding, in-kind resources, staffing, and salaries.

In Tennessee, a one-of-a-kind study was conducted that illustrates the problem. Using state budget information, the study compared the overall resources of prosecution and defense by examining the funding of all agencies related to the prosecution and defense functions. The study reviewed both state and non-state funds and concluded that total prosecution funding that could be attributed to indigent cases amounted to between \$130 and \$139 million for FY 2005. In contrast, indigent defense funding amounted to \$56.4 million, a stunning difference of over \$73 million. Tennessee is not alone in this inequity. In California, where the counties fund indigent defense at the trial level, a comparison of FY 2006–07 county indigent defense and prosecution budgets revealed that indigent defense was “under-funded statewide by at least 300 million dollars.” Moreover, between FY 2003–04 and FY 2006–07, the statewide disparity in indigent defense and prosecution funding increased by over 20%.

In addition to disparity in the overall amount of funding, differences also exist in funding sources and in-kind resources provided to the prosecution and indigent defense. Beyond general funding, the prosecution frequently receives special federal, state, and/or local funding for particular prosecution programs (e.g., domestic violence prosecutions, bad checks, highway safety, and drug enforcement programs), while the defense is fortunate if it receives small amounts of grant funding. Furthermore, the prosecution has the benefit of accessing many federal, state, and local in-kind resources that cannot be quantified, including the resources of law enforcement, crime labs, special investigators, and expert witnesses. In contrast, indigent defense must either fight for special funding in their budgets to allow for these resources or seek prior approval from the court in order to access them, which is often denied. . . .

Excessive Caseloads

When there are too many cases, lawyers are forced to choose among their clients, spending their time in court handling emergencies and other matters that cannot be postponed. Thus, they are prevented from performing such essential tasks as conducting client interviews, performing legal research, drafting various motions, requesting investigative or expert services, interviewing defense witnesses, and otherwise preparing for pretrial hearings, trials, and sentencing hearings. Eventually, working under such conditions on a daily basis undermines attorney morale and leads to turnover, which in turn, contributes to excessive caseloads for the remaining defenders and increases the likelihood that a new, inexperienced attorney will be assigned to handle at least part of the caseload. . . .

In Missouri, the Public Defender Commission found in 2005 that “excessive caseloads can and do prevent Missouri State Public Defenders from fulfilling the statutory requirements [for representation] and their ethical obligations and responsibilities as lawyers.” The State Public Defender Deputy Director stated that 2004 caseloads required trial public defenders “to dispose of a case every 6.6 hours of every working day.” He further described the situation: “The present M.A.S.H. style operating procedure requires public defenders to divvy effective legal assistance to a narrowing group of clients,” remarking that the situation forces public defenders “to choose among clients as to who will receive effective legal assistance” Since 2006, some cases have been assigned to private attorneys to ease public defender workloads, but this has not alleviated the problem. In October 2008, public defender offices in four counties began to refuse certain categories of cases. In one of those counties, public defenders have been averaging 395 cases a year. The State Public Defender maximum caseload standard, which was fixed some years ago, is 235. In November 2008, the State Public Defender Director said of the situation, “[w]e keep diluting the representation that the indigent person is able to get, and mistakes will be made, and are being made.”

...

State v. Pratte

298 S.W.3d 870 (Mo. Banc 2009)

Michael A. Wolff, Judge.

These writ proceedings raise the question of the role of the courts, the public defender commission and the legal profession in fulfilling Missouri’s constitutional obligation to provide attorneys to represent indigent defendants facing incarceration for their alleged crimes.

There is an apocryphal story in legal circles that a well-known prosecutor some years ago voiced his support for the state to provide attorneys for those accused of serious crimes, noting that without legal representation, an accused cannot be tried: “I can’t fry ‘em if I can’t try ‘em.”

The quip lacks good taste, but it highlights the state’s problem. These cases are about public safety as well as constitutional rights. An adequate supply of lawyers available to represent indigent defendants is as important to the functioning of the criminal justice system as are adequate resources for law enforcement, prosecutors and the courts.

The public defender brought these writ proceedings after the respondent judges appointed public defenders in three cases, contrary to rules established by the commission to control the caseload of the statewide public defender program.

These cases are three of more than 83,000 in the most recent fiscal year in which a public defender was assigned to defend indigent persons charged with crimes that carried potential for incarceration.

The constitution protects the right of an accused to an attorney; the state of Missouri, through its executive and the General Assembly, provides the funds to meet this obligation. The problem that the commission confronts is that the resources provided for indigent defense are inadequate.

The statewide public defender system, under rules adopted by the commission, had the capacity last fiscal year to spend only 7.7 hours per case, including trial, appellate and capital cases.

After the commission adopted the rules to control its caseload, the disputes arose that are the subjects of these three writ proceedings. In St. Francois County, respondent Judge Kenneth W. Pratte appointed the public defender in violation of a provision in the commission's rules that denied services to indigent defendants who at some point had retained private counsel. In Boone County, respondent Judge Gary Oxenhandler appointed the public defender to defend a person accused of a probation violation; his order countermanded the public defender's designation of its district office as being of limited availability, under which the office declined to take cases of alleged probation violations, because the office caseload exceeded its maximum allowable cases. In the other Boone County case, respondent Judge Gene Hamilton appointed a full-time public defender in the lawyer's private capacity as a member of the local bar to represent an indigent person accused of a probation violation.

These three writ proceedings raise questions as to the validity of the commission's rules governing caseload management. . . .

History of the office of the State Public Defender

When a defendant is found to be indigent in Missouri, the defendant's Sixth Amendment right to counsel is usually met by the judge appointing the "Office of State Public Defender." The public defender's office, however, currently is facing significant case overload problems. Its lawyers and its staff are overworked.

Following the Gideon decision in 1963, Missouri's indigent defendants were represented by unpaid court-appointed attorneys. *State v. Green*, 470 S.W.2d 571, 572 (Mo. banc 1971). But in 1971, this Court held that it would no longer "compel the attorneys of Missouri to discharge alone 'a duty which constitutionally is the burden of the State.'" *Id.* at 573 (citing *State v. Rush*, 46 N.J. 399, 217 A.2d 441, 446 (1966)). The Missouri legislature in 1972 enacted legislation establishing a public defender commission and creating a "blended system of local public defender offices and appointed counsel programs."

By 1981, however, the funding appropriated by the legislature was running out before the end of each fiscal year. In *State ex rel. Wolff v. Ruddy*, the Court was asked to compel the state to pay attorneys for their work. 617 S.W.2d 64, 64 (Mo. banc 1981). At that time, this Court said that it did not have the power to do so but that it did have the power to turn to The Missouri Bar and compel lawyers to represent indigent defendants. *Id.* at 65–66. As a result, the Court directed that the members of the legal profession represent indigent defendants until the legislature chose to fix the lack of funding. *Id.* at 67.9

One year later, in 1982, the General Assembly created the Office of State Public Defender under the control of the public defender commission. Sections 600.011 et seq., RSMo Supp.1983, cited in *State ex rel. Public Defender Comm'n v. Williamson*, 971 S.W.2d 835, 838 (Mo.App.1998).

The legislation authorized the director of the office to determine if an accused was indigent and, if so, to appoint private counsel to take the case for a set contract fee. . . .

Finally, in 1989, in response “to the rising cost of the contract counsel program and the increasing difficulty finding private practitioners willing to take on indigent cases for the fees paid by the State Public Defender System, the system was reorganized” Public Defender Timeline at 2. . . .

During the last two decades, the number of persons sentenced for felonies in Missouri has nearly tripled. The public defender represents about 80 percent of those charged with crimes that carry the potential for incarceration. Since 1985, the number of offenders convicted of drug offenses (possession, distribution and trafficking) has increased by nearly 650 percent, while non-drug sentencing has increased by nearly 230 percent.

When the state established the public defender system in the early 1980s, one in 97 Missourians was under correctional control— either in jail or prison 12 or on probation or parole. In 2007, by contrast, one in 36 was under correctional control, and 32 percent of those were incarcerated in prison or jail.

During the decade of the 1990s, the population of Missouri grew by 9.3 percent, while the prison population grew by 184 percent. Recent data show more than 56,000 individuals on probation; nearly 20,000 on parole (supervision that follows a prison term); more than 10,000 in Missouri jails (many of whom are awaiting trial) and about 30,000 in state prisons.

The state’s vast increases in criminal prosecutions have not included commensurately increasing resources for the public defender. Much of Missouri’s law enforcement and prosecutorial budgets are from local sources, while the public defender system is funded by the state government.

Current Status of the Office of State Public Defender

Although the General Assembly’s creation of the public defender’s office may have lessened the problems that were occurring at the time this Court decided *Wolff*, the office once again is facing inadequate resources, largely as a result of the increasing caseloads generated by the increasing numbers of persons charged with crimes. In January 2006, an interim committee of the Missouri Senate issued a “Report on the Missouri State Public Defender System.” The committee found that although the public defender’s office had had no addition to its staff in six years, its caseload had risen by more than 12,000 cases. REPORT ON THE MISSOURI STATE PUBLIC DEFENDER SYSTEM A-1, Jan. 2006. The report cited an assessment of the system stating that “the probability that public defenders are failing to provide effective assistance of counsel and are violating their ethical obligations to their clients increases every day.” *Id.* At the same time, however, the Senate committee stated that the office had no way to control or reduce its workload except to refuse cases and “throw the state of Missouri into federal court for constitutionally violating the right of indigent clients to effective assistance of counsel.” *Id.* Despite the Senate committee’s report, the “caseload crisis” of the public defender’s office has continued to grow.

The commission enacted 18 CSR 10–4.010 in December 2007 16 to limit the number of cases each public defender district could take. The rule authorizes the commission to “maintain a caseload standards protocol identifying the maximum caseload each district office can be assigned without compromising effective representation.” 18 CSR 10–4.010(1). The protocol, authorized by the rule and developed by the public defender commission, modifies the maximum recommended caseload standards developed by the National Advisory Council of the United States Department of Justice Task Force on the Courts in 1972 (See Appendix A), in which the National Advisory Council determined the maximum number of cases one lawyer could handle each year based on each type of case. The commission gives each case a weight based on how many hours a lawyer can be expected to work on the case. (See Appendix B). This is distinguishable from the National Advisory Council, which gives each case a weight based on the number of each type of case a lawyer can be expected to handle in a year.

The commission also distinguishes among the different types of felony offenses in its calculations by dividing the broad National Advisory Council “felony” category into subcategories of “sex offenses” and “other felony offenses.” In addition, the commission’s standards add categories for probation violation cases, Rule 29.15 motions 19 and appeals, and Rule 24.035 motions 20 and appeals. The result is a chart that denotes how many hours it should take one lawyer to work on one of each type of case. (See Appendix C).

The commission determined that each lawyer has 2,340 hours per year, or 45 hours per week, available. Yet other factors must be taken into account, which are subtracted from that number: (1) 216 hours of annual personal and holiday leave; 21 (2) sick leave; 22 and (3) 13.4 percent of total available attorney hours are used for non-case-related tasks such as continuing legal education, waiting in court for cases to be called and administrative tasks. After subtracting these factors from 2,340 hours, the result is 1,752 available hours per attorney per year. (See Appendix D). This number does not include a reduction for travel time 23 and management/supervisory time of 1.5 hours per week for each employee supervised, because that number must be calculated separately for each district. The number of available hours per attorney per year (1,752 minus travel time and management time) then is multiplied by the number of lawyers in a district office to determine the district office’s maximum-allowable caseload standard.

To determine whether a district office has exceeded its caseload standard, the commission determines the number of cases assigned to the office in each category of case types. Each case then is multiplied by the number of hours that a lawyer should need to devote to the case (see Appendix C) and then totaled to determine the total number of hours needed for attorneys to handle the caseload assigned to that district. This is done based on the number of cases in three-month intervals. If the number of hours needed to handle the caseload is greater than the number of available attorney hours, the district is placed on “limited availability” status pursuant to 18 CSR 10–4.010(2).

When that determination is made, the director must file a certification of limited availability with the presiding judge of each circuit court or chief judge of each appellate district affected. This certification must be accompanied by statistical verification that the office has exceeded its maximum-allowable caseload for at least three consecutive months. Notice that an office is at risk of limited availability also must be provided to each presiding or chief judge at least one

month before limiting the availability of the district office. After notice is given, the rule requires the district defender and other members of the public defender management personnel to consult with the court and prosecutors to determine which categories of cases are to be excluded from representation when the district is designated as having limited availability. Once a district office is certified as having limited availability, the district defender must file with the court a final list of categories of cases that it no longer will take. 18 CSR 10–4.010(2). After certification, the public defender must provide the presiding or chief judge with a caseload report each month verifying that the district’s availability remains limited. The district office is reinstated to full availability when the caseload has fallen below the maximum for two consecutive months. 18 CSR 10–4.010(3).

As of July 2009, every Missouri public defender office was over its calculated capacity under 18 CSR 10–4.010. Beyond the constitutional problems this may be creating for indigent defendants in Missouri, the public defenders themselves are risking their own professional lives. The American Bar Association has stated that there is “no exception [to the Model Rules of Professional Responsibility] for lawyers who represent indigent persons charged with crimes.” Nor has this Court created an exception in the Code of Professional Responsibility, Rule 4, which governs all Missouri lawyers.

The excessive number of cases to which the public defender’s offices currently are being assigned calls into question whether any public defender fully is meeting his or her ethical duties of competent and diligent representation in all cases assigned. The cases presented here to this Court show both the constitutional and ethical dilemmas currently facing the Office of State Public Defender and its clients. . . .

Analysis

The public defender contends here that 18 CSR 10–4.010 was promulgated properly and is not inconsistent with the Office of State Public Defender’s enabling statute, the same argument as is raised in the writ proceeding against Judge Pratte. The public defender argues that because the rule is not unreasonable, it should be valid and binding under Missouri law. The state responds by arguing that the public defender’s office statutorily is required to represent indigent defendants in probation violation hearings. Therefore, the state argues, the rule is inconsistent with the statute and cannot be valid. The question is whether the public defender’s office has the right to restrict or eliminate a specified category of indigent defendants from representation when its office becomes overburdened.

While the Court notes that the commission’s rule authorizes the public defender to limit when an office is available to serve indigent defendants, the rule cannot authorize the public defender to decline *categories* of cases that the statute requires the public defender to represent. . . .

The Remedy Under the Commission’s Rule

When current state funding is inadequate to provide the effective representation to all of Missouri’s indigent defendants that the United States and Missouri constitutions require, the commission’s rules present an approach to dealing with the situation. The statute assigns the management of the public defender system to the commission and the director. The commission

is empowered to make “any rules needed for administration of the state public defender system,” section 600.017(10), and the director, with the commission's approval, shall “promulgate rules, regulations and instructions . . . defining the organization of his office and the responsibilities” of the lawyers and other personnel, section 600.042.8.

The proper remedy for the public defender—under the caseload management portions of the rule—is to certify the office as having “limited availability” once its maximum caseload is exceeded for three consecutive months as prescribed in 18 CSR 10–4.010. When that occurs, 18 CSR 10–4.010 requires the public defender to notify the presiding judge and prosecutors of the impending unavailability of services. When the public defender, prosecutors and presiding judge confer, they may agree on measures to reduce the demand for public defender services. Such measures might include:

- the prosecutors’ agreement to limit the cases in which the state seeks incarceration;
- determining cases or categories of cases in which private attorneys are to be appointed;
- a determination by the judges not to appoint any counsel in certain cases (which would result in the cases not being available for trial or disposition); or
- in the absence of agreement by prosecutors and judge to any resolution, the rule authorizes the public defender to make the office unavailable for any appointments until the caseload falls below the commission's standard.

This prevents the rejection of categories of cases, such as occurred here and which the Court expressly rejected in *Bonacker* and *Sullivan*. By applying the caseload management provisions of the commission's rule, the public defender system is allowed to manage its offices and control its caseload.

That said, the Court expects that presiding judges, prosecutors and the public defender will work together cooperatively to decide the appropriate measures to take when a public defender office is on “limited availability” status because its caseload exceeds the commission's standards as determined by the maximum caseload protocol. The challenge for the public defender, judges and prosecutors is to find a way to assure that all defendants who are represented by the public defender's office will be ensured effective representation and that other indigent defendants will be represented effectively as well.

Appointing Lawyers to Fill the Need

The resolution of these writ proceedings leaves remaining a troubling question: can lawyers be conscripted to fulfill the state’s obligation to provide counsel without being paid for their services? This Court in 1971 announced that it no longer would appoint counsel without pay to meet the state's obligation to provide counsel. *Green*, 470 S.W.2d at 572. But the Court drew back a bit 10 years later in *Wolff*. That case drew a distinction between the lawyer’s time and out-of-pocket expenses—the lawyer's time can be conscripted but not the lawyer's money. *Wolff*, 617 S.W.2d at 67.

The problem has grown substantially in the 28 years since *Wolff* was decided. The commission estimates that, to handle the public defender’s current assigned caseload, 176 additional trial division lawyers and 21.87 additional appellate division lawyers would be needed to meet the standards the commission has set in its rules. Annual Report of the Public Defender Commission at 70, 72. There currently are 300 trial division attorneys and 35.5 appellate division attorneys. *Id.* These numbers tend to show that if the criminal justice system depends on appointing lawyers to work without compensation, the burden of taking such work in many communities may fall disproportionately on the relatively few lawyers who are experienced in handling criminal cases.

Since *Wolff*, a number of courts in other states have confronted this issue, and some have gone so far as to require the state to increase funding for public defender services, a course that most courts, including this Court, would be reluctant to pursue. The appointment of sufficient numbers of private lawyers to meet the need, however, raises the prospect of the state being sued under the federal civil rights law, 42 U.S.C. section 1983, in either a state or federal court, for violation of the individual lawyer’s right not to be deprived of his or her livelihood.

Lawyers, however, are members of a profession and have an obligation to perform public service, as this Court has noted in *Wolff* and other cases. This Court has held that Missouri courts have no power to compel attorneys to serve in civil actions without compensation. *State ex rel. Scott v. Roper*, 688 S.W.2d 757, 769 (Mo. banc 1985). In doing so, the Court noted that requiring lawyers to take civil cases as members of a profession was unsupported in the most recent draft of the Model Code of Professional Responsibility, in which a mandatory provision for *pro bono* representation had been rejected. The Court further discerned “that courts have [no] inherent power in civil cases to [compel] representation without compensation[;]” to do so, the Court reasoned would allow courts to infringe on the constitutional right of Missouri citizens to “‘have a natural right to ... the enjoyment of the gains of their own industry.’” *Id.* at 768–69 (citing Mo. Const. art. I, sec. 2) (omission in original). In contrast to parties in civil cases, indigent defendants in criminal cases have a constitutional right to counsel that the courts are obligated to ensure is met. *See Argersinger*, 407 U.S. at 42, 92 S.Ct. 2006. As members of the legal profession, Missouri lawyers also have an obligation to ensure that this constitutional right is met. Missouri’s lawyers have been appointed to represent indigent defendants since Missouri first became a state and long before any court ever found a constitutional right to counsel. *See Scott*, 688 S.W.2d at 759–60.

Lawyers, as members of a public profession, accept the duty to perform public service without compensation. But there are many criminal cases that are sufficiently difficult or complex that an appointment to provide representation without compensation may be oppressive or confiscatory, especially if the burden of providing such representation falls on the relatively few lawyers who appear fully qualified to defend difficult criminal cases. The prerogative of the state, through its courts or otherwise, to dictate how an individual lawyer’s professional obligation is to be discharged may be limited by principles that apply to regulatory takings and other deprivations of property without due process of law.

The troubling question of paying lawyers is not presented directly in these writ proceedings, but the issue lurks behind the application of the only coercive remedy the trial judges of this state currently possess—the appointment of counsel who would be required to work without pay.

While not a coercive remedy available to the courts, the provision in 18 CSR 10–4.010 for the public defender to notify the presiding judge and prosecutors may provide the courts, the prosecutors and public defenders an opportunity to develop workable strategies to reduce the demand for public defender services, as discussed above.

Conclusion

The statute, chapter 600, creates the public defender's office and gives the commission authority to manage the system. In the commission's effort to do so in a manner that allows the attorneys to uphold their ethical duty to provide effective assistance of counsel to their clients, the commission promulgated 18 CSR 10–4.010(2) to set standards and protocols regarding how many cases the attorneys can be assigned. The rule also requires cooperative decisionmaking with the presiding judges and prosecutors as a reasonable means for the public defender to maintain proper caseloads.

The provision in the rule that excludes an otherwise indigent person from representation on the basis of having retained private counsel previously is contrary to the statute and is invalid. This Court's preliminary writ in case No. SC89882 against respondent Judge Pratte is quashed. The provision of the commission rule allowing a public defender office to decline categories of cases is contrary to the statute and is invalid. The preliminary writ in case No. SC89948 against respondent Judge Oxenhandler is quashed.

The trial court has no authority to appoint a full-time public defender in the lawyer's "private capacity." The writ against respondent Judge Hamilton in case No. SC89948 is made permanent. Price, C.J., Teitelman, Russell, Buckenridge and Fischer, JJ., and Sweeney, Sr. J., concur. Stith, J. not participating.

Gideon Revived

Appendix A

Appendix A: NAC (National Advisory Council) Caseload Standards

Non-capital homicides	12 cases per year or 1 new case per month
Felonies	150 cases per year or 12.5 new cases per month
Misdemeanors	400 cases per year or 33 new cases per month
Juvenile cases	200 cases per year or 17 new cases per month
Appeals	25 cases per year or 2 new cases per month

Appendix B

Appendix B: Missouri Public Defender Modifications to NAC Standards

Non-capital homicides	173 hours per case
Felonies	14 hours per case
Misdemeanors	5 hours per case
Juvenile cases	10 hours per case
Appeals	83 hours per case

Appendix C

Appendix C: Missouri Public Defender Modifications to NAC Standards with Additional Distinctions within the NAC Categories

Non-capital homicides	173 hours per case
Sex offenses	31 hours per case
Other felony offenses	14 hours per case



Report of the Special Master in Missouri System of Public Defenders v. Waters

Feb. 9, 2011

J. Miles Sweeney

Procedural History

On January 6, 2010, Missouri Public Defender Director, J. Marty Robinson informed the presiding Judge of the 38th Judicial Circuit, the Honorable Mark Orr, that the Public Defender's caseload had exceeded the maximum caseload standards for 3 consecutive months, and that there was a risk that the Public Defender's Office may seek certification for limited availability as a result of the caseload. Meetings were held between the Public Defender, the Prosecuting Attorneys and the Court to attempt to avoid the certification, but no agreement was reached that would significantly reduce the Public Defender's caseload in the 31st Circuit.

By June 30, 2010, the caseload had not declined and Director Robinson certified that District 31 would now begin limited availability on appointed cases starting on July 1, 2010. This system of accepting cases revolved around the principle that the Public Defender would accept cases on a given month until they reached their case load maximum. At that point, they would no longer accept appointments for defendants. On July 21, 2010, the Public Defender reached its case load maximum. After the Public Defender was no longer accepting cases, Jared Blacksher's application was received by the Public Defender on two felony cases in Christian County, and although he was determined to be indigent, the Public Defender filed notice with the court that the Public Defender's Office would not represent Mr. Blacksher.

On July 28, 2010 the Public Defender was appointed to the cases over their objection by the Honorable John Waters whereby the Public Defender filed a motion to set aside the appointment. After a hearing on the 10th of August 2010, the motion to set aside the appointment by was overruled by Judge Waters, and the Public Defender remained on Mr. Blacksher's case.

The Commission

On October 14, 2010, the Chief Justice issued a Commission to the Special Master. It included the authority to take testimony, compel documents, and to report findings of fact and conclusions of law. It posed three questions for the Special Master:

1. Is the factual basis for the caseload standards protocol referenced in 18 CSR 10-4.010 accurate and appropriate?
2. Were the procedures in 18 CSR- 4.010(2) followed?
3. If the procedures were followed, identify the reasons why such procedures did not resolve the issue of representation by the public defender.

A hearing was conducted at the Greene County Judicial Facility on November 12, 2010. Notice was given to all interested parties and to the public. Testimony was received under oath which was subsequently transcribed. Documents were received both at the hearing and independently. They are listed by attachment. The Missouri State Public Defenders Office, (hereinafter referred to as MSPD), submitted an agreed statement of facts. For the facts addressed, it is accurate and therefore attached hereto as the Master's Findings of Fact. The Master believes that Conclusions

of Law would be inappropriate in this situation, and will instead raise questions of law which are worthy of the Court's consideration.

The Questions

Question number one, regarding the accuracy and appropriateness of the protocol, is the true center of this controversy. It is also the most difficult and complex. We will therefore address questions two and three before attacking question number one. . . .

3. Why did such procedures not resolve the issue of representation by the public defender?

Analysis of this question involves more opinion than fact. Still, the dynamics of the situation are apparent. The procedures in 18 CSR do not and cannot address the underlying problem of ever increasing caseload and lack of resources. Further, the procedures cannot compel other stakeholders to agree to anything. Judges do not have to agree to expedited case management or appointment of private counsel. Prosecutors do not have to agree to file fewer cases, ask for less jail time, or initiate diversion programs. . . .

In this case, the parties met, but there was no agreement by the prosecutor or the judge to do anything differently. There was no requirement from any higher authority that they should even try. There was no particular incentive for them to do so. While some jurisdictions have benefitted from these meetings, and others may in the future, they are bound to fail in some situations, either by the inactions of the other stakeholders, or by the sheer enormity of the problem. Judges and prosecutors do not carry all the blame for this. The regulation does not require any concessions from the MSPD either.

FINDING: The 18 CSR procedures did not resolve the issue of representation in this case because there was no voluntary agreement by the parties to find solutions and there is no indication that such a solution was even possible.

Back to question number one: Is the factual basis for the caseload standards protocol referenced in 18 CSR 10-4.010 accurate and appropriate?

This question can be analyzed from several aspects. The threshold issue is whether it is appropriate to limit caseload at all in the face of RSMo 600.042.4(1) which states that "The director and defenders shall provide legal services to an eligible person who is detained or charged with a felony" and Missouri Supreme Court Rule 31.02(a) which states "Upon a showing of indigency, it shall be the duty of the court to appoint counsel to represent him."

The MSPD believes that the *Pratt* case (State ex rel. Public Defender Commission v. Pratt, 298 S.W. 3d 870 (Mo Banc 2009) gives approval for this process. The prosecutors think otherwise. We should not ignore the fact that this apparent conflict was the basis for Judge Water's original ruling which gives rise to this case. This is a matter of law, and rests with the Court's collective wisdom. The Master makes no findings in this regard, except to point out the issue.

The second feature of the protocol which merits analysis is the impact the limiting process has on the rest of the criminal justice system. Appropriateness, like beauty, can lie in the eye of the beholder.

Before proceeding further, we should step back and take note of the unique dilemma faced by the public defender. The defender has a statutory mandate to represent the indigent. The caseload keeps increasing but the resources remain stagnant. There is not enough time in the day to properly represent all the defendants assigned, but the defender must adequately defend clients because there is no immunity from the profession's ethical requirements nor from civil liability for legal malpractice. No one else in the criminal justice system faces such a dilemma. The Judge, seeing an increasing caseload, sets cases further out and hopes for the best at election time. The prosecuting attorney controls caseload by deciding which cases to file and which to decline, which to pursue, and which to ignore. Beyond the opinion of the voters, they face no personal consequences. Only the defender puts license and purse on the line.

With that in mind, we return to the propriety of caseload limitation by monthly cutoff. During the testimony of Peter Sterling, the MSPD guru on the subject, I posed a question. I asked whether the procedure included cutting off cases on the day of the month when the guidelines were exceeded and then reinstating them on the first of the next month. (TR. 202) He agreed that it did. I then asked if, in the face of ever increasing caseloads, the cutoff date could fall earlier and earlier in each month until the MSPD would take no cases at all. He agreed that could be the eventual result. He likened it to snow building up in front of a snowplow. It is clear that caseload cutoff solves the defender dilemma but exacerbates the problem for the rest of the system. No disrespect to Mr. Sterling. He simply restated the obvious. He compared the MSPD to the canary in the mine. The death of the canary eventually means the death of the miners.

Finding: Caseload limitation by monthly cutoff goes a long way toward solving the public defender dilemma, but makes the problem worse for everyone else.

So then we address the accuracy of the caseload protocol. The statistical protocol currently used to assess caseload limitations was developed within the MSPD. It is based on the Department of Justice's National Advisory Commission on Public Defender Caseloads (NAC) guidelines published in 1973. The MSPD undertook a time study within their system in 2006 patterned on the study done on Judicial Caseload for the Judiciary by the National Center for State Courts (NCSC). The MSPD modified the NAC standards by converting case numbers to hours used and factoring in other time consuming activities such as travel, vacation, legal education, etc. Based on the information from their study, they modified the NAC standards in the area of sex abuse cases and assigned values for probation violation cases and post conviction cases which are not addressed in the original NAC standards. This Court is familiar with the process since it is well summarized by Judge Wolff in the *Pratte* case.

Since the protocol was developed in-house, it comes under criticism as being self-serving and lacking transparency. (TR 11) The Bar Association did fund an outside study called the Spangenberg Report. It has been criticized as not being a scientifically or statistically based document. Dr. Jeff Milyo from the University of Missouri testified about the report and submitted a written review of it. Someone suggested it was more of a piece of advocacy than a

valid statistical report. As advocacy, it has been enormously successful, having been quoted by everyone from the Missouri Legislature to the New York Times. It turns out, however, that it was not instrumental in the formulation of the protocol. (TR 170). It is interesting that Dr Milyo, using what statistics from the Spangenberg Report he could discern, was able to reach quite a different conclusion on case time available than the current protocol.

At the request of the Special Master, the protocol and its formulation were critiqued by David Steelman and others from the National Center for State Courts. His response is attached in its entirety. His criticism may be summarized in three categories.

First is the protocol's reliance on the 1973 NAC standards. Many things have changed since 1973, not the least of which is the ability to gather data through electronic means for the formulation of reliable statistics. The MSPD did a fairly elaborate time study themselves, but utilized it only in the limited fashion of augmenting the NAC standards in the areas of sex cases, probation violation cases, etc. Mr. Sterling testified that there were differences in the time study analysis and the NAC standards, other than those mentioned above. A skeptic might suggest that the actual study conclusions justified a lesser cutoff than the NAC standards. The MSPD says that reliance on the 2006 time study would memorialize deficiencies in the current system, and so that reliance on nationally recognized standards would be more representative of adequate representation. It is also noteworthy that the MSPD's own expert, Norman Lefstein, is critical of the NAC standards for the reasons enumerated above and also because they were not based on statistical studies, they cannot be consistent across many jurisdictions, and they do not differentiate between different kinds of felonies. Mr. Lefstein approves of the MSPD's use of the NAC standards because he believes they are a baseline and should not be exceeded. (His complete affidavit is attached.)

Second, the MSPD protocol does not take into account the utilization of support staff such as paralegals, investigators, secretaries, etc. The MSPD testimony complains of lack of such personnel and properly notes that PD attorney time may be taken up with ministerial duties more efficiently performed by staff. But the protocol does not address this issue at all. Clearly, some districts will be better staffed than others and a proper computation of attorney time available is very much dependent on the amount of staff time available.

Third, the MSPD protocol only considers raw case numbers and does not take into account other factors in the system. The NCSC report draws interesting comparisons regarding the ratio of prosecutors to PDs and the relation of time management by the judges in a particular circuit to the demands on the available personnel resources of the Public Defender. Greene County Prosecuting attorney Patterson gives us information on the use of diversion programs in Greene County. Greene County is in the same PD District as Christian County, yet the PD challenged the caseload in the less populated counties of Christian and Taney, neither of which has been proactive in diversion programs except drug court. Drug court is not really a diversion program since it is usually post-plea. Taney County prosecutor Lebeck pointed out that the Christian-Taney County circuit is woefully understaffed from a judicial point of view, based on the judicial weighted caseload study done by the NCSC. None of these factors come into play in the MSPD protocol. A more complete discussion of these issues is contained in the NSCS paper.

Is the MSPD protocol accurate? Accuracy is a relative term. Finding: The MSPD protocol is not inaccurate, but there is serious question as to whether it is sufficiently accurate to justify the imposition of the negative consequences on the rest of the criminal justice system.

Alternatives

If the MSPD is allowed to limit its caseload, either under this protocol, or some future revised one, the show must go on. At the hearing we received testimony regarding some of the other options for indigent defense.

Volunteer attorney programs: Crista Hogan, executive director of the Springfield Metropolitan Bar Association, described the volunteer program initiated by the Springfield Bar. (TR 103) It utilized volunteer attorneys on a temporary (one year) basis to supplement the MSPD. The volunteers took only probation violation cases, one or two per attorney. The MSPD held instructional workshops to orient the volunteers. Approximately 60 attorneys participated. Given the enthusiasm and level of participation, this represents probably as good a program of this type that one can imagine.

Though the program was a success from the standpoint of good participation, it does not represent a workable solution for the system in the long run. For one thing, it was for one year only. Recruitment was based on that premise. A permanent program would not attract the same kind of participation. Also, the size and collegiality of the Springfield Bar was about right for this kind of thing. Smaller communities would not have the numbers necessary and metro areas might not generate the same level of interest. Administration is a nightmare. The Bar cannot be expected to take this on statewide, and there is no quality control.

Contract Attorneys: Contract attorneys have their place in the current system. They are used for conflicts, etc. They offer no advantage over full time PD attorneys, but have many disadvantages. They cost at least as much from a budget standpoint, and probably more. There is currently a bill in the Missouri legislature which would do away with the MSPD and leave indigent defense to the Circuits. The OSCA director indicates that the fiscal note will be between 20 and 40 million dollars more to do it all by contract. Full time, specially trained PD attorneys are almost universally accepted as the best value for indigent defense. Administration of contract attorneys is far more difficult than full time PDs and controls on education, etc. are almost nonexistent.

Appointment of all attorneys: The problem with this approach may be summed up in the term "ineffective assistance of counsel". It is particularly problematic in the small counties where there may be only 2 or 3 lawyers. The number of appointments in those counties would have constitutional implications as a taking of services without compensation.

Appointment of qualified attorneys: This is inherently unfair as it visits the obligation on some but not others. Actually, it would affect a fairly small proportion of the attorney population. Attorney Bruce Galloway (TR 84) from the Missouri Association of Criminal Defense Lawyers (MACDL) reminds us that in appointing attorneys, whether criminal attorneys or not, we must consider not just the attorney time, which might be donated, but also the attorney's overhead,

which is associated with the case and otherwise comes directly out of the attorney's pocket. Once again, the small circuit problem rears its head.

Finally, the biggest vice associated with attorney participation, whether voluntary or conscripted, is that it tends to relieve the Legislature of its responsibility to properly fund and maintain an effective public defender system. The Springfield project elicited some true altruistic enthusiasm from the attorneys involved because they felt they were really helping to relieve a community emergency. When it becomes chronic, enthusiasm wanes. The biggest danger is that the legislature will decide that if they can palm it all off on the lawyers, they will never have to fulfill their fundamental responsibility to properly fund the MSPD.

Finding: None of the alternatives in indigent defense are as cost effective or professionally effective as a well funded and well managed PD system.

Other Approaches

Testimony was given by Senator Jack Goodman's representative about Senate Bill 37. It would have incorporated much the same type of case limiting procedure by statute rather than regulation. After much hard work on the part of Senator Goodman and others, such as former Missouri Bar president Doug Copeland, the bill was passed with unanimity almost unheard of in today's political climate. It was vetoed by the governor who acknowledged the serious problems with the PD system but did not agree that caseload limitation was the answer. Conspicuously absent from his veto message were any other proposed solutions to the problem. A cynic might conclude that the legislature recognized the obvious problem and was more than happy to vote for any solution that did not require additional funding.

Also considered was Proposed Supreme Court Rule 26 which would have incorporated the case limitation procedures by Supreme Court Rule. A committee was formed including distinguished attorneys and judges and chaired by the aforementioned Doug Copeland. It was not adopted either.

Observation: Implementation of caseload limitation might be better received by the other stakeholders from a higher authority rather than from the PD itself which can be viewed as "self serving".

Public Comment

Though advertised to the public, only one person appeared. Susan Warner testified about her experience with her son's case and the PD. While we were not in a position to intervene in her situation, her testimony put a personal face on the problems we seek to address.

Another relevant issue

Though it is not part of the Commission, Your Special Master feels strongly that a potential solution to the PD problem lies in the Missouri Criminal Code. It was developed in the early '70's by a nonpartisan committee of the Missouri Legislature. Since then, the legislature has added, virtually every year, new and more extensive crimes and penalties. It has become a Christmas tree of oddball crimes and inconsistent punishments. Major revisions to the code would be politically impossible since politicians must be "tough on crime". The only true

solution would be another bipartisan committee, formed by the legislature, to completely redo the code. Simply equalizing penalties for similar crimes could reduce the PD caseload along with the court's, the prosecutor's, probation and parole, and the department of corrections. I attach a memo I did for a state committee studying the problem.

Hurrell-Harring v. New York
930 N.E.2d 217 (N.Y. 2010)

LIPPMAN, Chief Judge.

The Sixth Amendment to the United States Constitution guarantees a criminal defendant “the right to . . . have the Assistance of Counsel for his defence,” and since *Gideon v. Wainwright*, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963) it has been established that that entitlement may not be effectively denied by the State by reason of a defendant's inability to pay for a lawyer. *Gideon* is not now controversial either as an expression of what the Constitution requires or as an exercise in elemental fair play. Serious questions have, however, arisen in this and other jurisdictions as to whether *Gideon*'s mandate is being met in practice (*see e.g., Lavallee v. Justices in Hampden Superior Ct.*, 812 N.E.2d 895 (2004)).

In New York, the Legislature has left the performance of the State's obligation under *Gideon* to the counties, where it is discharged, for the most part, with county resources and according to local rules and practices (*see* County Law arts. 18–A, 18–B). Plaintiffs in this action, defendants in various criminal prosecutions ongoing at the time of the action's commencement in Washington, Onondaga, Ontario, Schuyler and Suffolk counties, contend that this arrangement, involving what is in essence a costly, largely unfunded and politically unpopular mandate upon local government, has functioned to deprive them and other similarly situated indigent defendants in the aforementioned counties of constitutionally and statutorily guaranteed representational rights. They seek a declaration that their rights and those of the class they seek to represent are being violated and an injunction to avert further abridgment of their right to counsel; they do not seek relief within the criminal cases out of which their claims arise.

This appeal results from dispositions of defendants' motion pursuant to CPLR 3211 to dismiss the action as nonjusticiable. Supreme Court denied the motion, but in the decision and order now before us (66 A.D.3d 84, 883 (2009)) the sought relief was granted by the Appellate Division. That court held that there was no cognizable claim for ineffective assistance of counsel other than one seeking postconviction relief, and, relatedly, that violation of a criminal defendant's right to counsel could not be vindicated in a collateral civil proceeding, particularly where the object of the collateral action was to compel an additional allocation of public resources, which the court found to be a properly legislative prerogative. . . .

Recognizing the crucial importance of arraignment and the extent to which a defendant's basic liberty and due process interests may then be affected, CPL 180.10(3) expressly provides for the “right to the aid of counsel at the arraignment and at every subsequent stage of the action” and forbids a court from going forward with the proceeding without counsel for the defendant, unless the defendant has knowingly agreed to proceed in counsel's absence (CPL 180.10[5]). Contrary

to defendants' suggestion and that of the dissent, nothing in the statute may be read to justify the conclusion that the presence of defense counsel at arraignment is ever dispensable, except at a defendant's informed option, when matters affecting the defendant's pretrial liberty or ability subsequently to defend against the charges are to be decided. Nor is there merit to defendants' suggestion that the Sixth Amendment right to counsel is not yet fully implicated (*see Rothgery*, 554 U.S. at —, 128 S.Ct. at 2589). . . .

Collateral preconviction claims seeking prospective relief for absolute, core denials of the right to the assistance of counsel cannot be understood to be incompatible with *Strickland*. These are not the sort of contextually sensitive claims that are typically involved when ineffectiveness is alleged. The basic, unadorned question presented by such claims where, as here, the defendant-claimants are poor, is whether the State has met its obligation to provide counsel, not whether under all the circumstances counsel's performance was inadequate or prejudicial. Indeed, in cases of outright denial of the right to counsel prejudice is presumed. *Strickland* itself, of course, recognizes the critical distinction between a claim for ineffective assistance and one alleging simply that the right to the assistance of counsel has been denied and specifically acknowledges that the latter kind of claim may be disposed of without inquiring as to prejudice:

In certain Sixth Amendment contexts, prejudice is presumed. Actual or constructive denial of the assistance of counsel altogether is legally presumed to result in prejudice. So are various kinds of state interference with counsel's assistance. See *United States v. Cronin*, [466 U.S.] at 659, and n. 25 [104 S.Ct. 2039]. Prejudice in these circumstances is so likely that case-by-case inquiry into prejudice is not worth the cost. *Ante*, at 658 [104 S.Ct. 2039]. Moreover, such circumstances involve impairments of the Sixth Amendment right that are easy to identify and, for that reason and because the prosecution is directly responsible, easy for the government to prevent (466 U.S. at 692, 104 S.Ct. 2052).

The allegations before us state claims falling precisely within this described category. It is true, as the dissent points out, that claims, even within this category, have been most frequently litigated postconviction, but it does not follow from this circumstance that they are not cognizable apart from the postconviction context. Given the simplicity and autonomy of a claim for nonrepresentation, as opposed to one truly involving the adequacy of an attorney's performance, there is no reason—and certainly none is identified in the dissent—why such a claim cannot or should not be brought without the context of a completed prosecution.

Although defendants contend otherwise, we perceive no real danger that allowing these claims to proceed would impede the orderly progress of plaintiffs' underlying criminal actions. Those actions have, for the most part, been concluded, and we have, in any event, removed from the action the issue of ineffective assistance, thus eliminating any possibility that the collateral adjudication of generalized claims of ineffective assistance might be used to obtain relief from individual judgments of conviction. Here we emphasize that our recognition that plaintiffs may have claims for constructive denial of counsel should not be viewed as a back door for what would be nonjusticiable assertions of ineffective assistance seeking remedies specifically addressed to attorney performance, such as uniform hiring, training and practice standards. To

the extent that a cognizable Sixth Amendment claim is stated in this collateral civil action, it is to the effect that in one or more of the five counties at issue the basic constitutional mandate for the provision of counsel to indigent defendants at all critical stages is at risk of being left unmet because of systemic conditions, not by reason of the personal failings and poor professional decisions of individual attorneys. While the defense of indigents in the five subject counties might perhaps be improved in many ways that the Legislature is free to explore, the much narrower focus of the constitutionally based judicial remedy here sought must be simply to assure that every indigent defendant is afforded actual assistance of counsel, as *Gideon* commands. Plainly, we do not, even while narrowing the scope of this action as we believe the law requires, deny plaintiffs a remedy for systemic violations of *Gideon*, as the dissent suggests. It is rather the dissent that would foreclose plaintiffs from any prospect of obtaining such relief. And, when all is said and done, the dissent's proposed denial is premised solely upon the availability of relief from a judgment of conviction. Neither law, nor logic, nor sound public policy dictates that one form of relief should be preclusive of the other.

As against the fairly minimal risks involved in sustaining the closely defined claim of nonrepresentation we have recognized must be weighed the very serious dangers that the alleged denial of counsel entails. “Of all [of] the rights that an accused person has, the right to be represented by counsel is by far the most pervasive for it affects his ability to assert any other rights he may have’ ” (*United States v. Cronin*, 466 U.S. at 654, quoting Schaefer, *Federalism and State Criminal Procedure*, 70 Harv. L. Rev. 1, 8 [1956]). The failure to honor this right, then, cannot but be presumed to impair the reliability of the adversary process through which criminal justice is under our system of government dispensed. This action properly understood, as it has been by distinguished members of the prosecution and defense bars alike, does not threaten but endeavors to preserve our means of criminal adjudication from the inevitably corrosive effects and unjust consequences of an unfair adversary process.

It is not clear that defendants actually contend that stated claims for the denial of assistance of counsel would be nonjusticiable; their appellate presentation, both written and oral, has been principally to the effect that the claims alleged are exclusively predicated on deficient performance, a characterization which we have rejected. Supposing, however, a persisting, relevant contention of nonjusticiability, it is clear that it would be without merit. This is obvious because the right that plaintiffs would enforce—that of a poor person accused of a crime to have counsel provided for his or her defense—is the very same right that *Gideon* has already commanded the states to honor as a matter of fundamental constitutional necessity. There is no argument that what was justiciable in *Gideon* is now beyond the power of a court to decide.

It is, of course, possible that a remedy in this action would necessitate the appropriation of funds and perhaps, particularly in a time of scarcity, some reordering of legislative priorities. But this does not amount to an argument upon which a court might be relieved of its essential obligation to provide a remedy for violation of a fundamental constitutional right (*see Marbury v. Madison*, 1 Cranch [5 U.S. 137, 147, 2 L.Ed. 60 [1803] [“every right, when withheld, must have a remedy, and every injury its proper redress”]).

We have consistently held that enforcement of a clear constitutional or statutory mandate is the proper work of the courts . . . and it would be odd if we made an exception in the case of a

mandate as well-established and as essential to our institutional integrity as the one requiring the State to provide legal representation to indigent criminal defendants at all critical stages of the proceedings against them.

Assuming the allegations of the complaint to be true, there is considerable risk that indigent defendants are, with a fair degree of regularity, being denied constitutionally mandated counsel in the five subject counties. The severe imbalance in the adversary process that such a state of affairs would produce cannot be doubted. Nor can it be doubted that courts would in consequence of such imbalance become breeding grounds for unreliable judgments. Wrongful conviction, the ultimate sign of a criminal justice system's breakdown and failure, has been documented in too many cases. Wrongful convictions, however, are not the only injustices that command our present concern. As plaintiffs rightly point out, the absence of representation at critical stages is capable of causing grave and irreparable injury to persons who will not be convicted. *Gideon's* guarantee to the assistance of counsel does not turn upon a defendant's guilt or innocence, and neither can the availability of a remedy for its denial.

Accordingly, the order of the Appellate Division should be modified, without costs, by reinstating the complaint in accordance with this opinion, and remitting the case to that court to consider issues raised but not determined on the appeal to that court, and, as so modified, affirmed.

PIGOTT, J. (dissenting).

There is no doubt that there are inadequacies in the delivery of indigent legal services in this state, as pointed out by the New York State Commission on the Future of Indigent Defense Services, convened by former Chief Judge Kaye. I respectfully dissent, however, because, despite this, in my view, the complaint here fails to state a claim, either under the theories proffered by plaintiffs—ineffective assistance of counsel and deprivation of the right to counsel at a critical stage (arraignment)—or under the “constructive denial” theory read into the complaint by the majority. . . .

Rather than stopping at its rejection of the *Strickland* standard with respect to these allegations, however, the majority advances a third theory, and reads the complaint as stating a claim for “constructive denial” of the right to counsel, i.e., that upon having counsel appointed, plaintiffs received only “nominal” representation, such that there is a question as to whether the counties were in compliance with the constitutional mandate of *Gideon* (majority op. at 22–23, 930 N.E.2d at 224–25). . . .

While the perfect system of justice is beyond human attainment, plaintiffs’ frustration with the deficiencies in the present indigent defense system is understandable. Legal services for the indigent have routinely been underfunded, and appointed counsel are all too often overworked and confronted with excessive caseloads, which affects the amount of time counsel may spend with any given client. Many, if not all, of plaintiffs’ grievances have been acknowledged in the Kaye Commission Report, which is implicitly addressed—as it should be—to the Legislature, the proper forum for weighing proposals to enhance indigent defense services in New York. This

complaint is, at heart, an attempt to convert what are properly policy questions for the Legislature into constitutional claims for the courts.

Accordingly, I would affirm the order of the Appellate Division.

Judges CIPARICK, GRAFFEO and JONES concur with Chief Judge LIPPMAN; Judge PIGOTT dissents and votes to affirm in a separate opinion in which Judges READ and SMITH concur. Order modified, etc.

Darryl K. Brown

Rationing Criminal Defense Entitlements: An Argument for Institutional Design
104 COLUMBIA LAW REVIEW 801 (2004)

The key explanations for the uneven systemic effectiveness of defense counsel are well known. Indigent defense is widely underfunded, and the political structures through which funding decisions are made suggest little hope for improvement. Beginning in earnest with *Gideon v. Wainwright*, the Supreme Court recognized constitutional entitlements to effective counsel and expert assistance, but some components of the doctrine, such as the *Strickland* standard for assessing ineffective assistance, are widely viewed as inadequate. Courts could change this. At some cost, they could engage in greater governance of defense counsel funding through the *Gideon* doctrine and could make *Strickland* a more meaningful regulator of requirements of attorney competence. But those are, at present, unlikely projects.

Some constitutional rights are unfunded mandates to legislatures. Rights such as effective defense counsel require money to become reality: Not surprisingly, underfunding the primary enforcers of rights (defense attorneys) results in those rights being exercised less frequently and effectively. Courts create formal entitlements, but legislative funding defines the real content and scope of those rights. Legislatures have responded to these judicial mandates by constricting budgets for items such as defense lawyers that are required for exercising those rights. Courts have been unwilling (and may be politically unable) to govern those funding decisions so as to reinforce legal guarantees.

Yet funding is a blunt policy tool. Legislatures cannot constrict the content of rights more specifically; they cannot, for example, order defense lawyers to interview witnesses but not file suppression motions. They cannot specify *how* limited funds should be allocated—that is, how rights should be rationed—because constitutional criminal procedure rules forbid that. In that sense broad constitutional rules stifle innovation in the management of criminal justice even though innovation is critical to managing the tension between entitlements and inadequate funding. Consequently, legislatures implicitly delegate that task. Funding decisions, in effect, delegate to trial attorneys and judges the job of rationing rights. That is, these actors have the job of choosing which of the formal entitlements courts have created will see practical implementation, and in which cases. Underfunding ensures that rights will be less than the full promise of their formal statement and that counsel and trial courts will define the practical content of those constrained entitlements.

This underfunding of criminal defense is, in effect, a permanent feature of American criminal justice. It requires (and has long required) a permanent, ongoing process of defining the working parameters of constitutional entitlements and allocating those rights among defendants and within cases. Trial judges and attorneys distribute defense funding among cases within a given funding system, and they allocate rights within cases. In this way, trial lawyers take the lead role in an ongoing collaboration with courts and legislatures to define the real meaning and effect of constitutional rights, a process that fits the broader pattern of collaborative constitutional lawmaking among judicial and political actors identified by scholars in a wide range of settings.

In this Essay, I argue for more explicit acknowledgement of this permanent process of managing scarce resources—which defines the working content of criminal procedure rights—and sketch a means to improve it. I argue that trial lawyers and, to a lesser extent, trial judges should consciously devise policies for implementing choices about entitlement allocation, and I suggest a particular approach to that task. The specifics of the approach adapt insights from recent research on the causes of wrongful convictions, and it urges factual innocence as a pre-dominant concern of criminal procedure over other competing goals, such as regulation of police conduct. .

..

II. How We Already Ration Rights

Courts and other funding allocators (county and city governments or indigent defense boards, depending on local arrangements) already ration defense funds in some obvious ways as well as some slightly less obvious ones. Most plainly, public defenders or court-appointed attorneys are assigned more cases than they can plausibly handle well; underfunding simply means too few lawyers for too many cases. Almost as obviously, courts may give preference in appointments to attorneys who dispatch cases expeditiously, without a level of motion practice, investigation, or pleas for expert assistance that would slow dockets and drain limited funds. The famously lax standard of effective assistance under *Strickland v. Washington* indirectly serves this rationing function as well. It signals to attorneys and trial courts how little assistance will pass constitutional muster, allowing defense functions to be funded more thinly. It also prevents greater resources from going to more frequent retrials that might be necessary under a more stringent effectiveness standard.

Finally, the crucial, related entitlement to expert assistance for indigent defendants under *Ake v. Oklahoma* poses a potentially substantial financial commitment, which states and localities often underfund at levels comparable to funding for defense counsel. Trial judges are largely responsible for allocating (though not setting) *Ake* budgets. Faced with limited funding, they have basically two mechanisms to manage that budget. One is to read the doctrine narrowly (or disingenuously) and conclude that any given defendant's request for expert assistance does not meet *Ake*'s due process standard of assistance on issues that are "significant factors" in the trial. Or, they can read the doctrine more honestly, grant funds on all fair readings of the doctrine, but send signals to local practitioners in other ways that *Ake* funds should not be requested in all cases for which the formal entitlement exists—particularly for lower-level crimes (say, DUIs). There is strong anecdotal evidence that this sort of signaling—consider it a local practice norm—occurs through, for instance, a greater trial penalty for defendants who demand *Ake* funds and lose. That is, courts gain practitioners' cooperation with an informal rule that limits expert funds to certain sorts of cases, perhaps serious felonies with particular sorts of evidence. In this way,

lower courts implicitly revise the formal *Ake* entitlement to a more limited one that accords with fiscal reality. Analogously, there is strong evidence that this occurs for jury trials. Cooperative attorneys fail to move for such entitlements, and ineffective-assistance doctrine generally protects them. . . .

III. HOW WE OUGHT TO RATION RIGHTS

B. How to Ration: Default Rules for Defense Lawyers

. . . . In the range of settings in which rationing is both necessary and feasible, attorneys can adopt informal practice guidelines—default rules—that improve resource allocation. Overburdened attorneys who cannot provide thorough representation for all clients have to sort by some criteria. No system is feasible unless attorneys have resources for initial case evaluations. But evaluate on what criteria? The basic options, arising from traditional, competing notions of defense lawyers’ functions, are to give priority (1) to cases of likely factual innocence or (2) to cases in which the prospect of defense litigation success is highest *regardless of factual innocence*. The paradigm for the latter are cases in which the defense can enforce exclusionary rules, or employ related tactics such as “greymail,” that frustrate prosecution and serve systemic functions such as deterrence of unconstitutional police conduct.

I will argue the better approach is the former. Beyond its intuitive normative appeal, an approach giving priority to factual innocence draws its legitimacy from both core constitutional values and its correlation with plausible assumptions about legislative preferences. Legislative choices need not bind attorneys’ professional judgment, especially if the legislature seeks to frustrate constitutional rights. But just as we can infer from underfunding that legislatures disapprove of some criminal procedure entitlements, it is plausible to assume they do not want limitations on rights such as access to counsel to hurt the factually innocent. And to the extent errors are inevitable, we would rather those errors be small than large. Those two assumptions correlate with a view of defense lawyers as critical components of an adversary process with a primary goal of truth-finding, and they merit adoption regardless of whether they reflect a legislative preference.

Furthermore, prevention of wrongful convictions is a central goal of constitutional commitments to due process and fundamental fairness. The constitutionally-based requirement of proof beyond a reasonable doubt serves to reduce the risk that “innocent men are being condemned.” Appellate review of sufficiency of the evidence that support convictions is a further means to prevent wrongful conviction. The requirement of *Brady v. Maryland* that the prosecution reveal any evidence tending to exculpate the defendant serves the same purpose of reducing the risk of punishing the innocent. And evidence of actual innocence is the only claim that has a chance to overcome otherwise prohibitive procedural bars to collateral relief of convictions.

In short, protection of factual innocence is a primary function of a range of criminal procedure rules. With these constitutional guideposts in mind, we should distribute limited defense resources (1) toward strategies more likely to vindicate factual innocence, and (2) toward charges and clients who have the most at stake or are likely to gain the greatest life benefit. Both principles have substantial costs and face considerable implementation challenges.

The latter principle is a complex commitment to harm reduction. It posits as a first step that we should do more to help serious-felony clients than misdemeanor and minor-felony clients—in doctrinal terms, we should implicitly restrict *Argersinger* rights to the extent necessary to make *Gideon* more meaningful. Rationing defense services means a higher risk of error in some cases, and that risk should be allocated toward parties with less to lose. That means clients facing lower-level offenses, who should far outnumber serious felony clients, get deliberately poorer representation and thus face greater likelihood of conviction and punishment than they otherwise would.

Yet the commitment is not simply a rule of preference for clients with more serious charges. Another concern carries weight. This measure can be mediated by assessments of the odds of prevailing for different clients. Attorneys should be reluctant to trade off low-level offenders whose prospects for reduced sanction or acquittal initially look promising in favor of serious offenders with great exposure but (after some investigation) little chance of prevailing. This refines the commitment to harm reduction: It is often better to put resources toward a project with a high chance of reducing small harms than a small chance of preventing a great harm.

Additionally, lawyers might be tempted to give certain lesser offenders priority over some serious offenders who have equal prospects of acquittal. Reduced sanctions or acquittals for younger offenders with good life prospects (e.g., because this criminal charge is their first) that could be greatly harmed by relatively short prison terms may deserve priority over similar reductions for serious offenders who have substantial records and thereby less promising post-conviction life prospects. Adopting such criteria is an ethical minefield. It entails complicated, if not indefensible, judgments of interpersonal utility and the comparative values of lives. It requires answering such questions as: “Who would enjoy freedom more, or make better use of it?” While attorneys can be tempted to favor the young first-offender over the older recidivist when each is wrongly accused, it is more defensible, in an already ethically fraught project of rationing resources among clients, to limit decisionmaking criteria to the risk and degree of wrongful harm threatened by the state, rather than the full, particularized effects of such harm on individuals.

The first principle—the primacy of factual innocence—has significant costs as well and it is also much harder to implement. To put the point sharply, consider that this principle can mean forgoing the investment of pursuing a *Miranda* or illegal-search claim to exclude critical evidence that could result in dismissal, acquittal, or reduced punishment. That is a substantial cost for a client. But if we hold aside cases involving false confessions and planted evidence, those are acquittals of clients who are, by hypothesis, factually guilty and who, again by the hypothesis of resource constraints, take counsel resources away from clients who are more likely to be factually innocent (or at least over charged, meaning partly factually innocent). Again, the question is not what zealous attorneys would do with adequate resources. The issue is, when one is forced to choose by resource constraints, which right does one enforce? Investments in advocacy that pursues plausible claims of actual innocence should supercede investments in advocacy that advances plausible claims for factually guilty clients who have a strong legal basis for avoiding conviction. All of these are complicated judgments to be sure, and in practice will sometimes be made quite roughly. But they are not different in kind from the judgments defense attorneys have long made when faced with resource constraints that force choices between cases.

. . . . To manage such constrained choices, we can refine the priority for factual innocence by devising default rules that accord with likely sources of wrongful convictions. We have a growing literature on practices, such as witness identification methods, that are prone to error and that largely accord with our improving knowledge of the causes of wrongful convictions. From that research we can identify which of those causes (a) occur most frequently and (b) can be prevented with pretrial defense strategies directed toward them.

An initial picture of such a default-rule regime is easy to sketch. In the minority of cases in which DNA and other scientific evidence is both available and arises in a manner that strongly suggests the identity of the offender, counsel should seek testing of that evidence. If state lab results return incriminating reports, counsel should seek independent testing of that evidence. At the same time, attorneys should be more skeptical of scientific evidence for which there is weak empirical support, such as fingerprint analysis, firearms identification, and bite-mark comparisons. Note some of this is counterintuitive to long-established practice. Fingerprint evidence has long been accepted by courts and lawyers as more reliable than recent studies show it to be. Research-based default rules combat those established assumptions and thereby redirect attorney efforts.

A much more common source of wrongful conviction is eyewitness testimony. A large body of research suggests that eyewitnesses selecting suspects from live or photographic line-ups have error rates in the range of thirty to forty percent. Error rates are higher in some circumstances, especially in cross-racial identifications, identifications of suspects previously unknown to the witness, and identifications made under difficult or suggestive circumstances, including police line-ups that do not meet protocols for high reliability. When such testimony is critical to the state's case, counsel should employ a default rule of putting limited resources into close examination of that evidence.

Similarly, jailhouse informants with critical state evidence are sources with higher-than-average rates of unreliability. Those witnesses presumptively deserve special background investigation in a way other witnesses often do not, even when the state denies a cooperation agreement, and especially if the client's account contradicts the informant's. Further, attorneys may have local knowledge of particular police officers' or prosecutors' poor reputations for veracity or fair dealing. In those instances, they should put more effort into evidence related to that actor, whether it be a confession taken by the officer or a prosecutor's denial that *Brady* evidence exists (again, especially if the client or other source suggests it may exist). Finally, while documented false confessions are relatively rare as a percentage of all criminal cases, they are nonetheless clearly recurrent contributions to wrongful convictions. Again, we have some contextual indicators for when they are likely to occur: when suspects are young or of marginal intellectual capacity, when interrogation extends for long periods, when the state is under public pressure to resolve a high-profile crime and other evidence is relatively weak. (Note this indicator could overlap with knowledge of a particular officer's track record for custodial investigations.) Practitioners can follow an empirically grounded default rule here as well and invest effort in suspect confessions when circumstances indicate a higher-than-average risk of suspect confessions. . . .

Despite their inadequacy as a means for greatly stretching inadequate defense resources, default rules are a promising basis for practice protocols. Much as medical doctors follow standard diagnostic protocols—checklists of diagnostic strategies—when faced with initial symptom indicators, lawyers can rely on such default rules for improving the distribution of scarce resources over indigent cases in ways that maximize protection of the innocent. Scholars can help formulate these default rules by furthering empirical work on the most common sources of wrongful convictions and then adapting and disseminating it for practitioners' use. Nonetheless, there remains much room for (and need to rely on) attorneys' considered judgments about entitlement allocation. Rationing means leaving some needs unfilled; in criminal litigation, that means leaving more possibilities for inaccurate and unjust outcomes. . . .

V. CONCLUSION

Without a consensus between the judicial and legislative branches on the scope and content of constitutional rights, legislatures can restrict the practical access to and meaning of entitlements that cost money. Yet they are barred from doing so with much specificity. The task of allocating scarce entitlements among criminal cases is left largely to attorneys and trial judges.

A world of insufficient resources for indigent defense is not pretty. In this world, rationing occurs whether or not it is thoughtful and deliberate. The likely improvement we can expect from a more deliberate, well-conceived approach to rationing criminal defense is probably moderate at best. A policy for rationing brings to light the harsh choices that underfunding imposes. It does so while leaving open broader distributive issues, such as different qualities of justice for the rich and poor; it does little to undermine the policy argument for greater funding of indigent defense. Rationing parameters that give priority to innocence and harm reduction also accord with criminal law's commitment to just deserts.

Rationing is a limited response. Regardless of improvements in American criminal justice on other fronts, we can improve defense practices of triage. This rationing regime can hardly compensate for necessary improvements in a range of criminal justice practices, such as better line-up and witness-interview procedures for minimizing misidentifications, revised suspect interrogations to prevent false confessions, more reliable and independent testing of forensic evidence, and greater caution using evidence (such as fingerprints) whose reliability has been overrated. Rationing defense practices does not fully compensate for deficiencies in police, prosecution, and judicial practices. It does not displace the strong arguments for greater criminal justice resources.

Rationing is also unlikely to facilitate those needed reforms. Even if implemented publicly—loudly and blatantly—it is hard to imagine explicit shortchanging of some defendants would prompt legislative attention that current tales of underfunded offices, excessive caseloads, and grossly ineffective assistance do not. But rationing can be implemented independently of those other practices, and the modest improvement we would get from intelligent rationing is unlikely to ameliorate the deficiencies of criminal justice to a degree that would reduce whatever political pressure exists for broader improvements. It is likewise unlikely to damage client confidence in defense counsel, given the tenuous nature of that confidence under the current regime of scarce funding, which is made clear to defendants by the limited time many attorneys devote to their cases. Rationing criminal defense entitlements is both a long-standing court practice and, as a

practical matter, inevitable. As such, it should be brought into the light of day and carried out thoughtfully as well as deliberately.

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2011

What you don't know can hurt you.

**Why you need a defense lawyer if
you are charged with a misdemeanor.**

A misdemeanor conviction is SERIOUS

A misdemeanor is not a “minor” crime. If you are convicted of a Class A or Class B misdemeanor you will be exposed to a number of penalties that will remain with you and your family long after you have completed your sentence. Many of the penalties that you will face if you are convicted of a Class A or Class B misdemeanor are “hidden” because the judge and the prosecutor don't have to tell you about them. If you do not have a defense lawyer to explain all of these penalties to you, you may only find out about them after it's too late.

If you feel that you were wrongly denied an appointed lawyer or did not receive adequate representation from a court-appointed lawyer, visit www.fairdefense.org or call 1-866-207-6532.

A misdemeanor conviction has SEVERE long-term consequences.

If you are convicted of a Class A or Class B misdemeanor in Texas, the consequences may include:

- Increased penalties if you are ever arrested for another crime (see box)
- Loss of custody of your children
- Ineligibility for foster care and adoption
- Possible loss of your immigration status and/or deportation
- Registration as a sex offender
- Limited employment opportunities
- Ineligibility for professional licenses (health care, security guard, insurance agent, peace officer, etc.)
- Ineligibility for federal and state assistance (TANF cash assistance, food stamps, public housing, and education grants and loans)
- Eviction by your landlord
- Suspension of your driver's license
- Greatly increased fees for renewal of your driver's license
- Disqualification from possessing or receiving a handgun or ammunition

Enhancements

If convicted of certain misdemeanors, you will face increased penalties if you are arrested in the future for the same type of offense. You may even face felony charges for what would otherwise be a misdemeanor offense if the charges against you are "enhanced" based on a prior misdemeanor conviction. For example, a third charge of driving while intoxicated will automatically be treated as a felony.

Probation is NOT EASY.

If you plead guilty or no contest (nolo contendere) or are found guilty of a Class A or Class B misdemeanor, you may have to pay a fine and/or receive probation or jail time. If you receive probation, you can be required to remain under the court's supervision for up to three years. The judge will set conditions for your probation, requiring you to do (or not do) certain things during the entire time that you are on probation.

While on probation, you may be required to:

- Report on a regular basis to a supervisor for up to three years
- Submit to searches of your person, home, or car
- Submit to unannounced drug and alcohol tests
- Participate in drug or alcohol treatment programs and counseling
- Receive counseling for violent behavior
- Maintain steady employment
- Remain in custody at a community correctional facility for up to 24 months or in a county jail for up to 30 days
- Submit to electronic monitoring
- Pay fines, court costs, treatment and counseling fees, victim restitution, etc.
- Complete up to 600+ hours of community service without pay
- Install a breath-testing device in your vehicle
- Obtain the judge's permission before you will be allowed to relocate or travel outside a specific region

Many of the conditions of probation, such as mandatory supervision and/or counseling services, require you to make payments that can total thousands of dollars. If you fail to make these payments, or if you violate any of the other conditions of probation, the judge can revoke your probation and send you to jail for up to one year.

Half of the defendants sentenced to probation in Texas fail to comply with all of the conditions of probation and are sent to jail.

Deferred adjudication probation

If you receive probation, you can be placed on regular probation or deferred adjudication probation. Even though a prosecutor may tell you that your case will be dismissed if you successfully complete deferred adjudication probation, you should talk to a defense lawyer before accepting a plea that includes deferred adjudication. A charge dismissed after you successfully complete deferred adjudication probation will still appear on your record and often cannot be expunged. It is treated as a final conviction for immigration purposes and you may receive increased penalties if you are arrested for the same type of offense in the future.

A lawyer is your first line of DEFENSE against a misdemeanor conviction.

When you are charged with a Class A or Class B misdemeanor, your lawyer is the only person who will fight to protect your rights. Having an attorney ensures that you are aware of your rights, reduces your chances of being convicted of a crime that you did not commit, and helps to prevent you from receiving unfair and unequal punishments. A criminal defense lawyer's job is to represent you in all criminal proceedings.

Your lawyer should:

- Explain the offense you are charged with, the possible punishments, and probation options
- Advise you of your rights and explain what to expect during the different stages of the criminal process
- Investigate the facts of your case
- Ensure that your constitutional rights are not violated by law enforcement conduct or in court proceedings
- Provide a knowledgeable, objective view of your situation and give you advice
- Explain what is likely to happen if your case goes to trial
- Understand local court customs and procedures that aren't written down anywhere
- Negotiate a plea bargain with the prosecutor on your behalf — possibly arranging for reduced charges, a shorter sentence, and/or probation—if you decide to plead guilty
- Cross-examine government witnesses, object to improper questions and evidence, and present applicable legal defenses if you decide to go to trial.

What you tell your lawyer about your legal problem is confidential. You can talk honestly and openly with your lawyer without being afraid that what you say will be repeated or will be held against you.

You have a RIGHT to be represented by a lawyer.

The Sixth Amendment to the U.S. Constitution gives you a right to be represented by a lawyer. If you cannot afford to hire a lawyer, you are entitled to a court-appointed lawyer for any offense that is punishable by confinement in jail or prison—even if the charge is a misdemeanor.

Defendants have the right to be assisted by a lawyer during most stages of the criminal process, including:

- Police interrogations
- Police line-up after charges are filed
- Any court appearance after your initial appearance before the magistrate in jail
- Entry of a plea
- Trial
- Sentencing
- Probation revocation hearing

If you are uncertain about how to respond to any request made by a police officer or prosecutor, you should ask to speak to a lawyer before taking further action.

A judge normally appoints a lawyer for an indigent defendant at the defendant's first court appearance. Your first court appearance likely will be either your bail hearing or your arraignment (the hearing at which you enter your plea of guilty or not guilty). The sooner you obtain a defense lawyer, the more likely it is that your lawyer will be able to fully protect all of your rights.

Asking for a lawyer is your right. You should not be worried that asking for a lawyer will make other people think that you are guilty or inconvenience the judge.

You may QUALIFY for a court-appointed lawyer.

If you are charged with a Class A or Class B misdemeanor, you need a lawyer to help you with your case.

If you cannot afford a private lawyer, you should tell the judge as soon as possible and definitely no later than your first court appearance. A judge must appoint a lawyer for anyone who cannot afford to hire a one.

The appointment of a lawyer is not automatic — you must request a lawyer and complete a financial questionnaire under oath to prove to the court that you can't afford to hire your own lawyer. The court will review the questionnaire and consider the following factors to determine if you are too poor to hire a lawyer:

- your income and the source of that income
- your assets (valuables such as cash, bank accounts, any property that you own, etc.)
- your mandatory obligations and necessary expenses
the number and ages of your dependents
- any available income from your husband/wife.

When you ask for an appointed lawyer, the judge is likely to ask you the following questions: Do you have a job? How much money do you make? If you don't have a job, why not? Where have you applied for a job? Do you have a car? What kind of car do you have? You should be prepared to answer these questions, and bring any papers (such as pay stubs, etc.) to support your answers.

Even if you have POSTED BOND, you may qualify for a court-appointed lawyer.

Whatever questions the judge asks you, state law limits the factors on which the judge can base his or her decision about whether you receive an appointed lawyer.

The court generally may not consider whether you have posted bond or are capable of posting bond. The court's financial inquiry must focus only on you, the defendant. With the exception of your husband or wife (and, only if you are juvenile, your parents), your relatives are not legally required to pay for the expense of hiring a lawyer, even though they may have the money to hire a lawyer for you or may have posted bond for you.

If you qualify for a court-appointed lawyer, the court must appoint a lawyer within 1 to 3 working days after receiving your request for a lawyer.

If the judge determines that you have enough money to hire a lawyer, the judge cannot appoint a lawyer for you. If the judge finds that you are not financially eligible for a court-appointed lawyer and you do not know a lawyer to contact, you can call the State Bar of Texas Lawyer Referral and Information Service toll-free at 1-877-9TEXBAR.

The **Texas Criminal Justice Coalition** develops and advocates for real solutions to the problems facing Texas's criminal justice system. TCJC promotes evidence-based criminal justice solutions that embody the principles of effective management, accountability, public safety, and human and civil rights.

The **Texas Fair Defense Project** works to improve the fairness and accuracy of the criminal justice system in Texas, with a primary focus on improving access to counsel and the quality of representation provided to poor people accused of crime. The Project defends the rights of indigent criminal defendants through litigation, education, and advocacy.

For more information about the collateral consequences of misdemeanor convictions or if you have a complaint regarding your right to a lawyer, visit

www.fairdefense.org

or call

1-866-207-6532

This brochure is not a substitute for the advice of a lawyer and is intended for general information concerning a misdemeanor defendant's right to counsel and the collateral consequences of a misdemeanor conviction.



**TEXAS CRIMINAL
JUSTICE COALITION**

Texas Fair Defense Project

McGregor Smyth

From “Collateral” to “Integral”: The Seismic Evolution of Padilla v. Kentucky and its Impact on Penalties Beyond Deportation

54 HOWARD LAW JOURNAL 795 (2011)

From the moment of arrest, people charged with crimes find themselves caught in a web of punitive sanctions, in danger of losing their jobs, homes, children, and right to live in this country. Politicians over the past thirty years, eager to be “tough on crime” at the expense of being smart on crime, have piled layer upon layer of these “collateral” consequences on even a person’s most minor involvement in the criminal justice system.

As this web grew to overshadow the traditional criminal sanctions for most offenses, criminal courts and practitioners struggled to create legal justifications for ignoring it. The “collateral consequences” doctrine resulted. Arising out of Fifth Amendment challenges to convictions on the theory that courts had not adequately notified people of this web at plea or sentencing, this doctrine draws a sharp but false distinction between “direct” consequences of criminal proceedings (such as incarceration) and “collateral” consequences (such as deportation).

In a move last Term that shocked commentators and practitioners alike, the Supreme Court ignored decades of lower court case law to effectively repudiate this doctrine--which has been one of the most dominant (and most harmful) legal fictions of the criminal justice system. In *Padilla v. Kentucky*, the Court held that to provide effective assistance of counsel, a criminal defense attorney has an affirmative duty to give specific, accurate advice to noncitizen clients of the deportation risk of potential pleas.² The majority’s analysis, however, reaches far beyond advice on immigration penalties, extending to any and all penalties intimately related to criminal charges. The Court’s recasting of Sixth Amendment jurisprudence will have significant ripple effects, leaving a rich set of legal issues for the courts to resolve in the coming years. These issues include those related to post-conviction relief, the Ex Post Facto Clause, Eighth Amendment definitions of punishment, the adequacy of defense funding, the expansion of the right to a jury trial, and the extension of the right to counsel.

This Article examines the practical effect of *Padilla* for criminal defense attorneys currently working with clients on pending cases. Post hoc analysis of the failure to advise a client on a particular penalty presents doctrinal and factual hurdles (particularly in proving prejudice). But the penalty itself is already identified because it forms the basis for the post-conviction challenge. Defense attorneys face a more significant challenge in the first instance--teasing the threads of relevant penalties and risks from the immense web of “collateral” consequences. . . .

IV. A REALISTIC STANDARD OF CARE—FROM THEORY TO PRACTICE

Under *Padilla*, the client takes his or her rightful place of authority in the attorney-client relationship and as the holder of the right to effective assistance of counsel. It should not have taken a Supreme Court decision to remind defense lawyers about a significant set of minimum professional standards that they consistently failed to meet. While rational and critically necessary from the client's perspective, these duties entail a significant level of work that cannot be ignored. Attorneys should approach enmeshed penalties like a complex new sentencing

guidelines regime, taking the necessary time to understand the legal and practical implications for clients and daily practice.

For defense attorneys struggling with compliance, meeting the appropriate standard of care for clients requires a focus on at least two dimensions – the personal and the operational. Although this Article touches briefly on these issues, a future article will explore these dimensions in greater detail. Attorneys must build relationships with their clients to discover clients' risk-related statuses, priorities, and goals and empower them to make informed decisions. To do this intelligently and consistently requires operationalizing a certain due diligence – what counsel has to know about their clients and their goals, and what they have to know about enmeshed penalties.

To adequately screen for risk, attorneys must understand the ontology of penalties enmeshed with criminal charges. At least four interrelated variables define the network structure and control the imposition of the penalties. First, practitioners must understand the various sources of law behind the penalties. Enmeshed penalties arise from every level of the legal hierarchy, statutory and regulatory, federal, state, and local. Second, many penalties trigger because of specific offense classes (felony, misdemeanor, or petty offense). Similarly, other penalties depend on charges or convictions for special offense categories, such as “serious offense,” sex offense, violent offense, “aggravated felony,” “crime involving moral turpitude,” or drug offense. Just to make things more interesting, most jurisdictions have their own definitions of these categories. Special offense categories should raise red flags for risk in daily practice. Finally, practitioners must be familiar with the full range of penalty categories, including immigration and foreign travel; federally-assisted housing; employment, licensing, and military service; parental rights; government benefits; civic participation; forfeiture and financial consequences; student financial aid; and firearms.

No one can know all of these penalties, but we can understand their structure and engage in one of the first lawyering skills attorneys learn – issue-spotting. Dealing with this complexity presents a classic management problem: applying a vast set of legal knowledge consistently and correctly, and within time to do any good. A forthcoming article will explore the process for and benefits of integrating this knowledge into the major steps of criminal practice. From building client relationships to developing checklists, it will use the lessons and leverage of *Padilla* as a part of a robust vision of holistic defense practice. . . .

***Gideon* Reconceived: State Subsidized Lawyers
for Civil Litigants – In and Outside the United States**

Both the federal government and several states—including California and New York—have provided statutory access to civil legal services for low-income people. A few jurisdictions have read their constitutions to require rights to counsel for some litigants. But, as New York’s Chief Judge Jonathan Lippman cautioned in 2011, “we cannot provide a lawyer to every poor person with a legal problem, as much as we would want to. What we are seeking is to provide legal representation to those struggling to access life’s most basic necessities, such as shelter, food, and personal safety.” These materials reflect why certain kinds of proceedings are characterized as “civil” or “criminal,” and how – and which institutions – decide priorities for legal counsel. Variables proposed include age, income, the type of service sought, and the kind of claim raised. And, of course, the United States is not alone in facing funding challenges, as comparative readings, focused in part on the United Kingdom, make plain.

ABA Basic Principles for a Right to Counsel in Civil Legal Proceedings (Aug. 2010).

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

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Jonathan Lippman, Equal Justice at Risk: Confronting the Crisis in Civil Legal Services, Remarks at New York University School of Law (Oct. 24, 2011).

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Gillian K. Hadfield, Higher Demand, Lower Supply? A Comparative Assessment of the Legal Resource Landscape for Ordinary Americans, 37 FORDHAM URBAN LAW JOURNAL 129 (2010).

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ABA Resource Center, Access to Civil Justice for Low-Income People: Recent Developments August 2011-January 2012 (Jan. 2012).

Judith Resnik, Fairness in Numbers, 125 HARVARD LAW REVIEW 80 (2011).

MINISTRY OF JUSTICE, PROPOSALS FOR THE REFORM OF LEGAL AID IN ENGLAND AND WALES (2011).

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Lady Hale, Justice of the Supreme Court of the United Kingdom, Opening Address at the Law Centres Federation Annual Conference (2011).

European Convention on Human Rights, Article 6; EU Character of Fundamental Rights, Art. 47.

Lady Hale, Justice of the Supreme Court of the United Kingdom, Equal Access to Justice? Who is Responsible, Address to the Hungarian Association of Women Judges (April, 2011).

III. GIDEON RECONCEIVED: STATE SUBSIDIZED LAWYERS FOR CIVIL LITIGANTS – IN AND OUTSIDE THE UNITED STATES

American Bar Association

Basic Principles for a Right to Counsel in Civil Legal Proceedings (2010)

Principle One

Legal representation is provided as a matter of right at public expense to low-income persons in adversarial proceedings where basic human needs – such as shelter, sustenance, safety, health, or child custody – are at stake. A system is established whereby it can be readily ascertained whether a particular case falls within the categories of proceedings for which publicly-funded legal counsel is provided, and whether a person is otherwise eligible to receive such representation. The failure to designate a category of proceedings as one in which the right to counsel applies does not preclude the provision of legal representation from other sources. The jurisdiction ordinarily does not provide publicly-funded counsel in a case where the existing legal aid delivery system is willing and able to provide representation, or where the person can otherwise receive such representation at no cost.

Turner v. Rogers

Supreme Court of the United States

131 S. Ct. 2507 (2011)

BREYER, J., delivered the opinion of the Court, in which KENNEDY, GINSBURG, SOTOMAYOR, and KAGAN, JJ., joined. THOMAS, J., filed a dissenting opinion, in which SCALIA, J., joined, and in which ROBERTS, C.J., and ALITO, JJ., joined as to Parts I–B and II.

South Carolina's Family Court enforces its child support orders by threatening with incarceration for civil contempt those who are (1) subject to a child support order, (2) able to comply with that order, but (3) fail to do so. We must decide whether the Fourteenth Amendment's Due Process Clause requires the State to provide counsel (at a civil contempt hearing) to an *indigent* person potentially faced with such incarceration. We conclude that where as here the custodial parent (entitled to receive the support) is unrepresented by counsel, the State need not provide counsel to the noncustodial parent (required to provide the support). But we attach an important caveat, namely, that the State must nonetheless have in place alternative procedures that assure a fundamentally fair determination of the critical incarceration-related question, whether the supporting parent is able to comply with the support order

In June 2003 a South Carolina family court entered an order, which (as amended) required petitioner, Michael Turner, to pay \$51.73 per week to respondent, Rebecca Rogers, to help support their child. (Rogers' father, Larry Price, currently has custody of the child and is also a respondent before this Court.) Over the next three years, Turner repeatedly failed to pay the amount due and was held in contempt on five occasions. The first four times he was sentenced to 90 days' imprisonment, but he ultimately paid the amount due (twice without being jailed, twice

after spending two or three days in custody). The fifth time he did not pay but completed a 6-month sentence.

After his release in 2006 Turner remained in arrears. On March 27, 2006, the clerk issued a new “show cause” order. And after an initial postponement due to Turner’s failure to appear, Turner’s civil contempt hearing took place on January 3, 2008. Turner and Rogers were present, each without representation by counsel.

The hearing was brief. The court clerk said that Turner was \$5,728.76 behind in his payments. The judge asked Turner if there was “anything you want to say.” Turner replied,

“Well, when I first got out, I got back on dope. I done meth, smoked pot and everything else, and I paid a little bit here and there. And, when I finally did get to working, I broke my back, back in September. I filed for disability and SSI. And, I didn’t get straightened out off the dope until I broke my back and laid up for two months. And, now I’m off the dope and everything. I just hope that you give me a chance. I don’t know what else to say. I mean, I know I done wrong, and I should have been paying and helping her, and I’m sorry. I mean, dope had a hold to me.”

The judge then said, “[o]kay,” and asked Rogers if she had anything to say. After a brief discussion of federal benefits, the judge stated, “If there’s nothing else, this will be the Order of the Court. I find the Defendant in willful contempt. I’m [going to] sentence him to twelve months in the Oconee County Detention Center. He may purge himself of the contempt and avoid the sentence by having a zero balance on or before his release. I’ve also placed a lien on any SSI or other benefits.”

The judge added that Turner would not receive good-time or work credits, but “[i]f you’ve got a job, I’ll make you eligible for work release.” When Turner asked why he could not receive good-time or work credits, the judge said, “[b]ecause that’s my ruling.”

The court made no express finding concerning Turner’s ability to pay his arrearage (though Turner’s wife had voluntarily submitted a copy of Turner’s application for disability benefits). Nor did the judge ask any followup questions or otherwise address the ability-to-pay issue. After the hearing, the judge filled out a prewritten form titled “Order for Contempt of Court,” which included the statement:

“Defendant (was) (was not) gainfully employed and/or (had) (did not have) the ability to make these support payments when due.”

But the judge left this statement as is without indicating whether Turner was able to make support payments.

While serving his 12-month sentence, Turner, with the help of *pro bono* counsel, appealed. He claimed that the Federal Constitution entitled him to counsel at his contempt hearing. The South Carolina Supreme Court decided Turner’s appeal after he had completed his sentence. And it rejected his “right to counsel” claim. The court pointed out that civil contempt differs significantly from criminal contempt. The former does not require all the “constitutional safeguards” applicable in criminal proceedings. 387 S.C., at 145, 691 S.E.2d, at 472. And the

right to government-paid counsel, the Supreme Court held, was one of the “safeguards” not required. *Ibid.*

Turner sought certiorari. In light of differences among state courts (and some federal courts) on the applicability of a “right to counsel” in civil contempt proceedings enforcing child support orders, we granted the writ. Compare, *e.g.*, *Pasqua v. Council*, 186 N.J. 127, 141–146, 892 A.2d 663, 671–674 (2006); *Black v. Division of Child Support Enforcement*, 686 A.2d 164, 167–168 (Del.1996); *Mead v. Batchlor*, 435 Mich. 480, 488–505, 460 N.W.2d 493, 496–504 (1990); *Ridgway v. Baker*, 720 F.2d 1409, 1413–1415 (C.A.5 1983) (all finding a federal constitutional right to counsel for indigents facing imprisonment in a child support civil contempt proceeding), with *Rodriguez v. Eighth Judicial Dist. Ct., County of Clark*, 120 Nev. 798, 808–813, 102 P.3d 41, 48–51 (2004) (no right to counsel in civil contempt hearing for nonsupport, except in “rarest of cases”); *Andrews v. Walton*, 428 So.2d 663, 666 (Fla.1983) (“no circumstances in which a parent is entitled to court-appointed counsel in a civil contempt proceeding for failure to pay child support”). Compare also *In re Grand Jury Proceedings*, 468 F.2d 1368, 1369 (C.A.9 1972) (*per curiam*) (general right to counsel in civil contempt proceedings), with *Duval v. Duval*, 114 N.H. 422, 425–427, 322 A.2d 1, 3–4 (1974) (no general right, but counsel may be required on case-by-case basis). . . .

We must decide whether the Due Process Clause grants an indigent defendant, such as Turner, a right to state-appointed counsel at a civil contempt proceeding, which may lead to his incarceration. This Court’s precedents provide no definitive answer to that question. This Court has long held that the Sixth Amendment grants an indigent defendant the right to state-appointed counsel in a *criminal* case. *Gideon v. Wainwright*, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963). And we have held that this same rule applies to *criminal contempt* proceedings (other than summary proceedings). *United States v. Dixon*, 509 U.S. 688, 696, 113 S.Ct. 2849, 125 L.Ed.2d 556 (1993); *Cooke v. United States*, 267 U.S. 517, 537, 45 S.Ct. 390, 69 L.Ed. 767 (1925).

But the Sixth Amendment does not govern civil cases. Civil contempt differs from criminal contempt in that it seeks only to “coerc[e] the defendant to do” what a court had previously ordered him to do. *Gompers v. Bucks Stove & Range Co.*, 221 U.S. 418, 442, 31 S.Ct. 492, 55 L.Ed. 797 (1911). A court may not impose punishment “in a civil contempt proceeding when it is clearly established that the alleged contemnor is unable to comply with the terms of the order.” *Hicks v. Feiock*, 485 U.S. 624, 638, n. 9, 108 S.Ct. 1423, 99 L.Ed.2d 721 (1988). And once a civil contemnor complies with the underlying order, he is purged of the contempt and is free. *Id.*, at 633, 108 S.Ct. 1423 (he “carr[ies] the keys of [his] prison in [his] own pockets” (internal quotation marks omitted)).

Consequently, the Court has made clear (in a case not involving the right to counsel) that, where civil contempt is at issue, the Fourteenth Amendment’s Due Process Clause allows a State to provide fewer procedural protections than in a criminal case. *Id.*, at 637–641, 108 S.Ct. 1423 (State may place the burden of proving inability to pay on the defendant).

This Court has decided only a handful of cases that more directly concern a right to counsel in civil matters. And the application of those decisions to the present case is not clear. On the one

hand, the Court has held that the Fourteenth Amendment requires the State to pay for representation by counsel in a *civil* “juvenile delinquency” proceeding (which could lead to incarceration). *In re Gault*, 387 U.S. 1, 35–42, 87 S.Ct. 1428, 18 L.Ed.2d 527 (1967). Moreover, in *Vitek v. Jones*, 445 U.S. 480, 496–497, 100 S.Ct. 1254, 63 L.Ed.2d 552 (1980), a plurality of four Members of this Court would have held that the Fourteenth Amendment requires representation by counsel in a proceeding to transfer a prison inmate to a state hospital for the mentally ill. Further, in *Lassiter v. Department of Social Servs. of Durham Cty.*, 452 U.S. 18, 101 S.Ct. 2153, 68 L.Ed.2d 640 (1981), a case that focused upon civil proceedings leading to loss of parental rights, the Court wrote that the

“pre-eminent generalization that emerges from this Court’s precedents on an indigent’s right to appointed counsel is that such a right has been recognized to exist only where the litigant may lose his physical liberty if he loses the litigation.” *Id.*, at 25, 101 S.Ct. 2153.

And the Court then drew from these precedents “the presumption that an indigent litigant has a right to appointed counsel only when, if he loses, he may be deprived of his physical liberty.” *Id.*, at 26–27, 101 S.Ct. 2153.

On the other hand, the Court has held that a criminal offender facing revocation of probation and imprisonment does *not* ordinarily have a right to counsel at a probation revocation hearing. *Gagnon v. Scarpelli*, 411 U.S. 778, 93 S.Ct. 1756, 36 L.Ed.2d 656 (1973); see also *Middendorf v. Henry*, 425 U.S. 25, 96 S.Ct. 1281, 47 L.Ed.2d 556 (1976) (no due process right to counsel in summary court-martial proceedings). And, at the same time, *Gault*, *Vitek*, and *Lassiter* are readily distinguishable. The civil juvenile delinquency proceeding at issue in *Gault* was “little different” from, and “comparable in seriousness” to, a criminal prosecution. 387 U.S., at 28, 36, 87 S.Ct. 1428. In *Vitek*, the controlling opinion found *no* right to counsel. 445 U.S., at 499–500, 100 S.Ct. 1254 (Powell, J., concurring in part) (assistance of mental health professionals sufficient). And the Court’s statements in *Lassiter* constitute part of its rationale for *denying* a right to counsel in that case. We believe those statements are best read as pointing out that the Court previously had found a right to counsel “*only*” in cases involving incarceration, not that a right to counsel exists in *all* such cases (a position that would have been difficult to reconcile with *Gagnon*).

Civil contempt proceedings in child support cases constitute one part of a highly complex system de-signed to assure a noncustodial parent’s regular payment of funds typically necessary for the support of his children. Often the family receives welfare support from a state-administered federal program, and the State then seeks reimbursement from the noncustodial parent. See 42 U.S.C. §§ 608(a)(3) (2006 ed., Supp. III), 656(a)(1) (2006 ed.); S.C.Code Ann. §§ 43–5–65(a)(1), (2) (2010 Cum.Supp.). Other times the custodial parent (often the mother, but sometimes the father, a grandparent, or another person with custody) does not receive government benefits and is entitled to receive the support payments herself.

The Federal Government has created an elaborate procedural mechanism designed to help both the government and custodial parents to secure the payments to which they are entitled. See generally *Blessing v. Freestone*, 520 U.S. 329, 333, 117 S.Ct. 1353, 137 L.Ed.2d 569 (1997) (describing the “inter-locking set of cooperative federal-state welfare pro-grams” as they relate to child support enforcement); 45 CFR pt. 303 (2010) (prescribing standards for state child support

agencies). These systems often rely upon wage withholding, expedited procedures for modifying and enforcing child support orders, and automated data processing. 42 U.S.C. §§ 666(a), (b), 654(24). But sometimes States will use contempt orders to ensure that the custodial parent receives support payments or the government receives reimbursement. Although some experts have criticized this last-mentioned procedure, and the Federal Government believes that “the routine use of contempt for non-payment of child support is likely to be an ineffective strategy,” the Government also tells us that “coercive enforcement remedies, such as contempt, have a role to play.” Brief for United States as *Amicus Curiae* 21–22, and n. 8 (citing Dept. of Health and Human Services, National Child Support Enforcement, Strategic Plan: FY 2005–2009, pp. 2, 10). South Carolina, which relies heavily on contempt proceedings, agrees that they are an important tool.

We here consider an indigent’s right to paid counsel at such a contempt proceeding. It is a civil proceeding. And we consequently determine the “specific dictates of due process” by examining the “distinct factors” that this Court has previously found useful in deciding what specific safeguards the Constitution’s Due Process Clause requires in order to make a civil proceeding fundamentally fair. *Mathews v. Eldridge*, 424 U.S. 319, 335, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976) (considering fairness of an administrative proceeding). As relevant here those factors include (1) the nature of “the private interest that will be affected,” (2) the comparative “risk” of an “erroneous deprivation” of that interest with and without “additional or substitute procedural safe-guards,” and (3) the nature and magnitude of any countervailing interest in not providing “additional or substitute procedural requirement [s].” *Ibid.* See also *Lassiter*, 452 U.S., at 27–31, 101 S.Ct. 2153 (applying the *Mathews* framework).

The “private interest that will be affected” argues strongly for the right to counsel that Turner advocates. That interest consists of an indigent defendant’s loss of personal liberty through imprisonment. The interest in securing that freedom, the freedom “from bodily restraint,” lies “at the core of the liberty protected by the Due Process Clause.” *Foucha v. Louisiana*, 504 U.S. 71, 80, 112 S.Ct. 1780, 118 L.Ed.2d 437 (1992). And we have made clear that its threatened loss through legal proceedings demands “due process protection.” *Addington v. Texas*, 441 U.S. 418, 425, 99 S.Ct. 1804, 60 L.Ed.2d 323 (1979).

Given the importance of the interest at stake, it is obviously important to assure accurate decisionmaking in respect to the key “ability to pay” question. Moreover, the fact that ability to comply marks a dividing line between civil and criminal contempt, *Hicks*, 485 U.S., at 635, n. 7, 108 S.Ct. 1423, reinforces the need for accuracy. That is because an in-correct decision (wrongly classifying the contempt proceeding as civil) can increase the risk of wrongful incarceration by depriving the defendant of the procedural protections (including counsel) that the Constitution would demand in a criminal proceeding. See, e.g., *Dixon*, 509 U.S., at 696, 113 S.Ct. 2849 (proof beyond a reasonable doubt, protection from double jeopardy); *Codispoti v. Pennsylvania*, 418 U.S. 506, 512–513, 517, 94 S.Ct. 2687, 41 L.Ed.2d 912 (1974) (jury trial where the result is more than six months’ imprisonment). And since 70% of child support arrears nationwide are owed by parents with either no reported income or income of \$10,000 per year or less, the issue of ability to pay may arise fairly often. See E. Sorensen, L. Sousa, & S. Schaner, *Assessing Child Support Arrears in Nine Large States and the Nation* 22 (2007) (prepared by The Urban Institute) . . . ; Patterson, *Civil Contempt and the Indigent Child Support Obligor: The Silent Return of*

Debtor's Prison, 18 Cornell J. L. & Pub. Pol'y 95, 117 (2008). . . .

On the other hand, the Due Process Clause does not always require the provision of counsel in civil proceedings where incarceration is threatened. See *Gagnon*, 411 U.S. 778, 93 S.Ct. 1756. And in determining whether the Clause requires a right to counsel here, we must take account of opposing interests, as well as consider the probable value of “additional or substitute procedural safeguards.” *Mathews*, *supra*, at 335, 96 S.Ct. 893.

Doing so, we find three related considerations that, when taken together, argue strongly against the Due Process Clause requiring the State to provide indigents with counsel in every proceeding of the kind before us.

First, the critical question likely at issue in these cases concerns, as we have said, the defendant's ability to pay. That question is often closely related to the question of the defendant's indigence. But when the right procedures are in place, indigence can be a question that in many—but not all—cases is sufficiently straightforward to warrant determination *prior* to providing a defendant with counsel, even in a criminal case. Federal law, for example, requires a criminal defendant to provide information showing that he is indigent, and therefore entitled to state-funded counsel, *before* he can receive that assistance. See 18 U.S.C. § 3006A(b).

Second, sometimes, as here, the person opposing the defendant at the hearing is not the government represented by counsel but the custodial parent *un* represented by counsel. See Dept. of Health and Human Services, Office of Child Support Enforcement, *Understanding Child Support Debt: A Guide to Exploring Child Support Debt in Your State* 5, 6 (2004) (51% of nationwide arrears, and 58% in South Carolina, are not owed to the government). The custodial parent, perhaps a woman with custody of one or more children, may be relatively poor, unemployed, and unable to afford counsel. Yet she may have encouraged the court to enforce its order through contempt. Cf. *Tr. Contempt Proceedings* (Sept. 14, 2005), App. 44a–45a (Rogers asks court, in light of pattern of nonpayment, to confine Turner). She may be able to provide the court with significant information. Cf. *id.*, at 41a–43a (Rogers describes where Turner lived and worked). And the proceeding is ultimately for her benefit.

A requirement that the State provide counsel to the noncustodial parent in these cases could create an asymmetry of representation that would “alter significantly the nature of the proceeding.” *Gagnon*, *supra*, at 787, 93 S.Ct. 1756. Doing so could mean a degree of formality or delay that would unduly slow payment to those immediately in need. And, perhaps more important for present purposes, doing so could make the proceedings *less* fair overall, increasing the risk of a decision that would erroneously deprive a family of the support it is entitled to receive. The needs of such families play an important role in our analysis. Cf. *post*, at 2525 – 2527 (opinion of THOMAS, J.).

Third, as the Solicitor General points out, there is available a set of “substitute procedural safeguards,” *Mathews*, 424 U.S., at 335, 96 S.Ct. 893, which, if employed together, can significantly reduce the risk of an erroneous deprivation of liberty. They can do so, moreover, without incurring some of the drawbacks inherent in recognizing an automatic right to counsel. Those safeguards include (1) notice to the defendant that his “ability to pay” is a critical issue in the

contempt proceeding; (2) the use of a form (or the equivalent) to elicit relevant financial information; (3) an opportunity at the hearing for the defendant to respond to statements and questions about his financial status, (*e.g.*, those triggered by his responses on the form); and (4) an express finding by the court that the defendant has the ability to pay. See Tr. of Oral Arg. 26–27; Brief for United States as *Amicus Curiae* 23–25. In presenting these alternatives, the Government draws upon considerable experience in helping to manage statutorily mandated federal-state efforts to enforce child support orders. See *supra*, at 2517. It does not claim that they are the only possible alternatives, and this Court's cases suggest, for example, that sometimes assistance other than purely legal assistance (here, say, that of a neutral social worker) can prove constitutionally sufficient. Cf. *Vitek*, 445 U.S., at 499–500, 100 S.Ct. 1254 (Powell, J., concurring in part) (provision of mental health professional). But the Government does claim that these alternatives can assure the “fundamental fairness” of the proceeding even where the State does not pay for counsel for an indigent defendant.

While recognizing the strength of Turner's arguments, we ultimately believe that the three considerations we have just discussed must carry the day. In our view, a categorical right to counsel in proceedings of the kind before us would carry with it disadvantages (in the form of unfairness and delay) that, in terms of ultimate fairness, would deprive it of significant superiority over the alternatives that we have mentioned. We consequently hold that the Due Process Clause does not *automatically* require the provision of counsel at civil contempt proceedings to an indigent individual who is subject to a child support order, even if that individual faces incarceration (for up to a year). In particular, that Clause does not require the provision of counsel where the opposing parent or other custodian (to whom support funds are owed) is not represented by counsel and the State provides alternative procedural safeguards equivalent to those we have mentioned (adequate notice of the importance of ability to pay, fair opportunity to pre-sent, and to dispute, relevant information, and court findings).

We do not address civil contempt proceedings where the underlying child support payment is owed to the State, for example, for reimbursement of welfare funds paid to the parent with custody. See *supra*, at 2517. Those proceedings more closely resemble debt-collection proceedings. The government is likely to have counsel or some other competent representative. Cf. *Johnson v. Zerbst*, 304 U.S. 458, 462–463, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938) (“[T]he average defendant does not have the professional legal skill to protect himself when brought before a tribunal with power to take his life or liberty, *wherein the prosecution is presented by experienced and learned counsel*” (emphasis added)). And this kind of proceeding is not before us. Neither do we address what due process requires in an unusually complex case where a defendant “can fairly be represented only by a trained advocate.” *Gagnon*, 411 U.S., at 788, 93 S.Ct. 1756; see also Reply Brief for Petitioner 18–20 (not claiming that Turner's case is especially complex).

The record indicates that Turner received neither counsel nor the benefit of alternative procedures like those we have described. He did not receive clear notice that his ability to pay would constitute the critical question in his civil contempt proceeding. No one provided him with a form (or the equivalent) designed to elicit information about his financial circumstances. The court did not find that Turner was able to pay his arrearage, but instead left the relevant “finding” section of the contempt order blank. The court nonetheless found Turner in contempt and

ordered him incarcerated. Under these circumstances Turner's incarceration violated the Due Process Clause.

We vacate the judgment of the South Carolina Supreme Court and remand the case for further proceedings not inconsistent with this opinion.

Justice THOMAS, with whom Justice SCALIA joins, and with whom THE CHIEF JUSTICE and Justice ALITO join as to Parts I–B and II, dissenting.

The Due Process Clause of the Fourteenth Amendment does not provide a right to appointed counsel for indigent defendants facing incarceration in civil contempt proceedings. Therefore, I would affirm. Although the Court agrees that appointed counsel was not required in this case, it nevertheless vacates the judgment of the South Carolina Supreme Court on a different ground, which the parties have never raised. Solely at the invitation of the United States as *amicus curiae*, the majority decides that Turner's contempt proceeding violated due process because it did not include “alternative procedural safeguards.” *Ante*, at 2520. Consistent with this Court's longstanding practice, I would not reach that question.¹

The only question raised in this case is whether the Due Process Clause of the Fourteenth Amendment creates a right to appointed counsel for all indigent defendants facing incarceration in civil contempt proceedings. It does not.

Under an original understanding of the Constitution, there is no basis for concluding that the guarantee of due process secures a right to appointed counsel in civil contempt proceedings. It certainly does not do so to the extent that the Due Process Clause requires “that our Government must proceed according to the “law of the land”—that is, according to written constitutional and statutory provisions.’ ” *Hamdi v. Rumsfeld*, 542 U.S. 507, 589, 124 S.Ct. 2633, 159 L.Ed.2d 578 (2004) (THOMAS, J., dissenting) (quoting *In re Winship*, 397 U.S. 358, 382, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970) (Black, J., dissenting)). No one contends that South Carolina law entitles Turner to appointed counsel. Nor does any federal statute or constitutional provision so provide. Although the Sixth Amendment secures a right to “the Assistance of Counsel,” it does not apply here because civil contempt proceedings are not “criminal prosecutions.” U.S. Const., Amdt. 6; see *ante*, at 2523. Moreover, as originally understood, the Sixth Amendment guaranteed only the “right to employ counsel, or to use volunteered services of counsel”; it did not require the court to appoint counsel in any circumstance. *Padilla v. Kentucky*, 559 U.S. —, —, 130 S.Ct. 1473, 1478, 176 L.Ed.2d 284 (2010) (SCALIA, J., dissenting). . . .

Appointed counsel is also not required in civil contempt proceedings under a somewhat broader reading of the Due Process Clause, which takes it to approve “ [a] process of law, which is not otherwise forbidden, ... [that] can show the sanction of settled usage.’ ” *Weiss v. United States*, 510 U.S. 163, 197, 114 S.Ct. 752, 127 L.Ed.2d 1 (1994) (SCALIA, J., concurring in part and concurring in judgment) (quoting *Hurtado v. California*, 110 U.S. 516, 528, 4 S.Ct. 111, 28 L.Ed. 232 (1884)). Despite a long history of courts exercising contempt authority, Turner has not

¹ I agree with the Court that this case is not moot because the challenged action is likely to recur yet is so brief that it otherwise evades our review. *Ante*, at 2514 – 2516.

identified any evidence that courts appointed counsel in those proceedings. See *Mine Workers v. Bagwell*, 512 U.S. 821, 831, 114 S.Ct. 2552, 129 L.Ed.2d 642 (1994) (describing courts' traditional assumption of "inherent contempt authority"); see also 4 W. Blackstone, Commentaries on the Laws of England 280–285 (1769) (describing the "summary proceedings" used to adjudicate contempt). Indeed, Turner concedes that contempt proceedings without appointed counsel have the blessing of history. See Tr. of Oral Arg. 15–16 (admitting that there is no historical support for Turner's rule); see also Brief for Respondents 47–48.

Even under the Court's modern interpretation of the Constitution, the Due Process Clause does not provide a right to appointed counsel for all indigent defendants facing incarceration in civil contempt proceedings. Such a reading would render the Sixth Amendment right to counsel—as it is currently understood—superfluous. Moreover, it appears that even cases applying the Court's modern interpretation of due process have not understood it to categorically require appointed counsel in circumstances outside those otherwise covered by the Sixth Amendment.

Under the Court's current jurisprudence, the Sixth Amendment entitles indigent defendants to appointed counsel in felony cases and other criminal cases resulting in a sentence of imprisonment. See *Gideon v. Wainwright*, 372 U.S. 335, 344–345, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963); *Argersinger v. Hamlin*, 407 U.S. 25, 37, 92 S.Ct. 2006, 32 L.Ed.2d 530 (1972); *Scott v. Illinois*, 440 U.S. 367, 373–374, 99 S.Ct. 1158, 59 L.Ed.2d 383 (1979); *Alabama v. Shelton*, 535 U.S. 654, 662, 122 S.Ct. 1764, 152 L.Ed.2d 888 (2002). Turner concedes that, even under these cases, the Sixth Amendment does not entitle him to appointed counsel. See Reply Brief for Petitioner 12 (acknowledging that "civil contempt is not a 'criminal prosecution' within the meaning of the Sixth Amendment"). He argues instead that "the right to the assistance of counsel for persons facing incarceration arises not only from the Sixth Amendment, but also from the requirement of fundamental fairness under the Due Process Clause of the Fourteenth Amendment." Brief for Petitioner 28. In his view, this Court has relied on due process to "rejec[t] formalistic distinctions between criminal and civil proceedings, instead concluding that incarceration or other confinement triggers the right to counsel." *Id.*, at 33.

But if the Due Process Clause created a right to appointed counsel in all proceedings with the potential for detention, then the Sixth Amendment right to appointed counsel would be unnecessary. Under Turner's theory, every instance in which the Sixth Amendment guarantees a right to appointed counsel is covered also by the Due Process Clause. The Sixth Amendment, however, is the only constitutional provision that even mentions the assistance of counsel; the Due Process Clause says nothing about counsel. Ordinarily, we do not read a general provision to render a specific one superfluous. Cf. *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 384, 112 S.Ct. 2031, 119 L.Ed.2d 157 (1992) ("[I]t is a commonplace of statutory construction that the specific governs the general"). The fact that one constitutional provision expressly provides a right to appointed counsel in specific circumstances indicates that the Constitution does not also *sub silentio* provide that right far more broadly in another, more general, provision. Cf. *Albright v. Oliver*, 510 U.S. 266, 273, 114 S.Ct. 807, 127 L.Ed.2d 114 (1994) (plurality opinion) ("Where a particular Amendment provides an explicit textual source of constitutional protection against a particular sort of government behavior, that Amendment, not the more generalized notion of 'substantive due process,' must be the guide for analyzing these claims" (internal quotation marks omitted)); *id.*, at 281, 114 S.Ct. 807 (KENNEDY, J.,

concurring in judgment) (“I agree with the plurality that an allegation of arrest without probable cause must be analyzed under the Fourth Amendment without reference to more general considerations of due process”). . . .

Moreover, contrary to Turner’s assertions, the holdings in this Court’s due process decisions regarding the right to counsel are actually quite narrow. The Court has never found in the Due Process Clause a categorical right to appointed counsel outside of criminal prosecutions or proceedings “functionally akin to a criminal trial.” *Gagnon v. Scarpelli*, 411 U.S. 778, 789, n. 12, 93 S.Ct. 1756, 36 L.Ed.2d 656 (1973) (discussing *In re Gault*, 387 U.S. 1, 87 S.Ct. 1428, 18 L.Ed.2d 527 (1967)). This is consistent with the conclusion that the Due Process Clause does not expand the right to counsel beyond the boundaries set by the Sixth Amendment.

After countless factors weighed, mores evaluated, and practices surveyed, the Court has not determined that due process principles of fundamental fairness categorically require counsel in any context outside criminal proceedings. See, e.g., *Lassiter v. Department of Social Servs. of Durham Cty.*, 452 U.S. 18, 31–32, 101 S.Ct. 2153, 68 L.Ed.2d 640 (1981); *Wolff v. McDonnell*, 418 U.S. 539, 569–570, 94 S.Ct. 2963, 41 L.Ed.2d 935 (1974); see also *Walters v. National Assn. of Radiation Survivors*, 473 U.S. 305, 307–308, 320–326, 105 S.Ct. 3180, 87 L.Ed.2d 220 (1985); *Goss v. Lopez*, 419 U.S. 565, 583, 95 S.Ct. 729, 42 L.Ed.2d 725 (1975). Even when the defendant’s liberty is at stake, the Court has not concluded that fundamental fairness requires that counsel always be appointed if the proceeding is not criminal.² See, e.g., *Scarpelli, supra*, at 790, 93 S.Ct. 1756 (probation revocation); *Middendorf v. Henry*, 425 U.S. 25, 48, 96 S.Ct. 1281, 47 L.Ed.2d 556 (1976) (summary court-martial); *Parham v. J. R.*, 442 U.S. 584, 599–600, 606–607, 610, n. 18, 99 S.Ct. 2493, 61 L.Ed.2d 101 (1979) (commitment of minor to mental hospital); *Vitek v. Jones*, 445 U.S. 480, 497–500, 100 S.Ct. 1254, 63 L.Ed.2d 552 (1980) (Powell, J., controlling opinion concurring in part) (transfer of prisoner to mental hospital). Indeed, the only circumstance in which the Court has found that due process categorically requires appointed counsel is juvenile delinquency proceedings, which the Court has de-scribed as “functionally akin to a criminal trial.” *Scarpelli, supra*, at 789, n. 12, 93 S.Ct. 1756 (discussing *In re Gault, supra*); see *ante*, at 2516 – 2517.

Despite language in its opinions that suggests it could find otherwise, the Court’s consistent judgment has been that fundamental fairness does not categorically require appointed counsel in any context outside of criminal proceedings. The majority is correct, therefore, that the Court’s precedent does not require appointed counsel in the absence of a deprivation of liberty. *Id.*, at 2525 – 2526. But a more complete description of this Court’s cases is that even when liberty is at stake, the Court has required appointed counsel in a category of cases only where it would have found the Sixth Amendment required it—in criminal prosecutions.

The majority agrees that the Constitution does not entitle Turner to appointed counsel. But at the invitation of the Federal Government as *amicus curiae*, the majority holds that his contempt

² “Criminal contempt is a crime in the ordinary sense”; therefore, criminal contemnors are entitled to “the protections that the Constitution requires of such criminal proceedings,” including the right to counsel. *Mine Workers v. Bagwell*, 512 U.S. 821, 826, 114 S.Ct. 2552, 129 L.Ed.2d 642 (1994) (citing *Cooke v. United States*, 267 U.S. 517, 537, 45 S.Ct. 390, 69 L.Ed. 767 (1925); internal quotation marks omitted).

hearing violated the Due Process Clause for an entirely different reason, which the parties have never raised: The family court’s procedures “were in adequate to ensure an accurate determination of [Turner's] present ability to pay.” Brief for United States as *Amicus Curiae* 19 (capitalization and boldface type deleted); see *ante*, at 2519 – 2520. I would not reach this issue. . . .

For the reasons explained in the previous two sections, I would not engage in the majority's balancing analysis. But there is yet another reason not to undertake the *Mathews v. Eldridge* balancing test here. 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976). That test weighs an individual's interest against that of the Government. *Id.*, at 335, 96 S.Ct. 893 (identifying the opposing interest as “the Government’s interest”); *Lassiter*, 452 U.S., at 27, 101 S.Ct. 2153 (same). It does not account for the interests of the child and custodial parent, who is usually the child's mother. But their interests are the very reason for the child support obligation and the civil contempt proceedings that enforce it. . . .

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Accessing Civil Justice in the United States Today

Access Across America: First Report of the Civil Justice Infrastructure Mapping Project
(American Bar Association, 2011)

ACCESSING CIVIL JUSTICE IN THE UNITED STATES TODAY

In the contemporary United States, free legal information, advice and representation (or, civil legal assistance services) are delivered in an enormous variety of ways, to a number of different groups, by a large and diverse set of providers who are themselves funded by many different sources. Service projects are typically locally initiated and funded through grants and donations. Individual providers of many different kinds – for example, courts, legal aid offices, volunteer lawyer groups, non-profit service organizations, law school clinics – conceive of projects that target clients in their own state or local area and apply for grants from a variety of public and private sources to fund them. The existing civil legal assistance infrastructure is, in effect, the output of many public-private partnerships, most of them on a small scale.

The products of this activity are summarized in the national portrait presented below. It documents both the contemporary landscape of service provision and recent changes in the regulation of lawyers, legal services markets and allied occupations that may affect how both market-based and free civil legal services can be provided in different states. The portrait reveals an enormous diversity of programs and provision models, with very little coordination at either the state or the national level. Diversity and fragmentation combine to create an access to civil justice infrastructure characterized by large inequalities both between states and within them. In this context, geography is destiny: the services available to people from eligible populations who face civil justice problems are determined not by what their problems are or the kinds of services they may need or be able to use, but rather by where they happen to live. . . .

A NATIONAL PORTRAIT

Who is Eligible for Civil Legal Assistance?

In the United States, a wide range of groups is eligible for free civil legal information, advice or representation. The largest subgroup of the population targeted for assistance by contemporary social and justice policies is the low-income population. People living in households with incomes at or below 125% of the federal poverty level are eligible for assistance under the financial means test established by the central national funder of civil legal assistance, the federal Legal Services Corporation. In 2010, a family of four making \$27,641 or less would qualify under this means test (US Bureau of the Census 2011a); almost 57 million people were eligible for civil legal assistance by this standard in 2009.

Though poor people are perhaps the best-known recipients of civil legal assistance, there are in fact a number of population groups eligible for aid. Publicly supported programs exist to provide assistance in accessing civil justice to the elderly (approximately 55 million people), American Indians (two and a half million people), veterans (over 22 million people), homeless people (over 600,000 people), people with disabilities (more than 36 million people), and people with HIV/AIDS (over a million people). In addition, some free services are offered to the general public. The most prominent example of such services is court-sponsored self-help services for unrepresented civil litigants. Some kinds of legal information, such as the information and forms provided free on some state court websites, are available to the general public, as well.

Table 1 lists the principal groups targeted by civil legal assistance programs in the United States and the number of persons in each group, as well as the total US population. The state reports present this information for each individual state.

Table 1. Principal Populations (in Millions) Eligible for Civil Legal Assistance and Total Population: United States, 2009

Income below 125% of federal poverty level	56.8
Elderly (aged 60 or older)	55.4
American Indians	2.5
Veterans	22.4
Homeless persons	0.64
People with disabilities	36.2
People with a diagnosis of HIV/AIDS	1.04
Total US population	307.0

Source: Civil Justice Infrastructure Mapping Project

How is Civil Legal Assistance Delivered?

States exhibit a great diversity of delivery models for civil legal assistance. The Civil Justice Infrastructure Mapping Project collected information about the existence in each state of 11

different mechanisms through which civil legal assistance may be delivered to eligible populations: staffed civil legal aid offices; organized civil pro bono programs; formal judicare programs; clinical programs that serve a high volume of clients, telephone hotlines delivering legal advice; telephone hotlines delivering legal information; courthouse lawyer-for-a-day programs; computer kiosks in court houses that provide assistance to *pro se* civil litigants; staffed assistance centers in court houses that provide assistance to *pro se* civil litigants; court websites that provide court forms; court websites that provide information about accessing and using courts.

Figure 1 reports the percentage of states that exhibit at least one example of each delivery mechanism. While there are some commonalities, states differ substantially in how programs deliver civil legal assistance. As the figure shows, two delivery mechanisms are universal, with at least one staffed civil legal aid office and one organized civil pro bono program existing in every state. A majority of states have at least one hotline serving eligible populations with legal information or legal advice. Across states, the group most commonly served by such hotlines is the elderly.

Some access services available to the general public are widely present. In nearly every state, at least some lower courts have moved to put selected court forms or some basic information about court operations on the internet (98% and 100% of states, respectively). Over 70% of states have at least one staffed self-help center located in a courthouse. In these centers, members of the public receive information and sometimes advice about how to pursue civil legal claims on their own using formal court processes, including – sometimes – how to represent themselves in trials and hearings. Over half of states (59%) have at least one program that places computer kiosks in court-houses to assist unrepresented civil litigants in pursuing their claims. These kiosks contain computer programs that assist people in providing the information required by specific court forms or describe the process that people will go through as they pursue or respond to a claim.

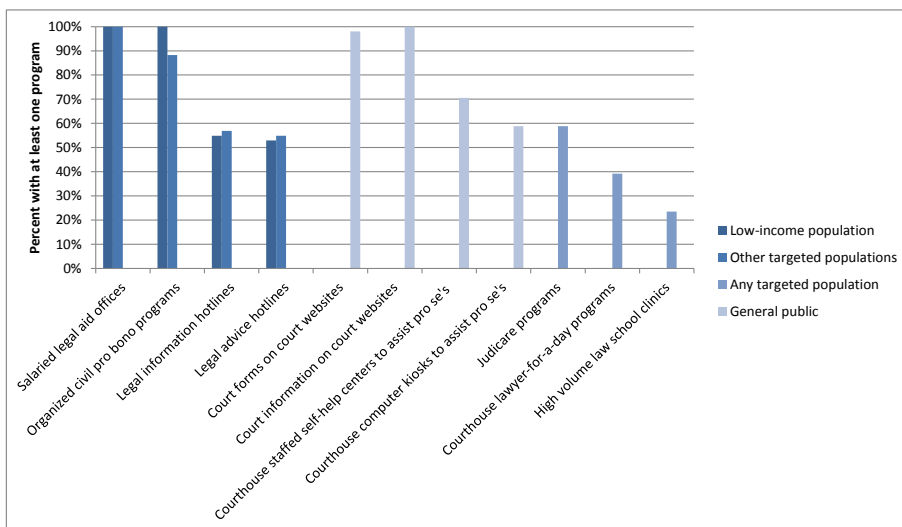
Other means of delivering civil legal assistance are less common. Throughout the country, clinical legal education programs include clinics in which law students work under the supervision of fully qualified attorneys to serve – “live” clients with civil justice problems. Such clinics typically do not serve high volumes of people. The smallest LSC-funded office in the United States serves about 1500 clients a year. Only three of the 94 law school clinical programs for which data are available served 1500 or more clients per year. CJIMP designated as —high volumell programs those that serve at least 500 clients per year across all civil clinics at a single law school; 24% of states have at least once such clinical program (see Appendix A for details). Over half of states (59%) have at least one formal judicare program serving some of the eligible populations in the state. Two fifths (39%) of states have at least one —lawyer for a dayl program in which one or more lawyers appears at a specific courthouse on a single day and assists eligible litigants appearing on that day.

In different areas of the country, these delivery mechanisms co-exist in a wide variety of combinations. At the state level, across the 50 states and Washington, DC, almost 40 unique combinations of the 11 delivery mechanisms are observed, with no single combination characterizing more than three states. The state reports provide information about the existence

of each delivery mechanism serving the indigent and other groups targeted by civil legal aid policy.

While this portrait of civil legal assistance delivery models reveals great variety across states, this diversity is not exhaustive of the enormous variety that exists in the field. Programs that look similar in the present analysis differ both in terms of the kinds of services they provide and in how they produce those services. For example, many staffed legal aid offices specialize in assisting with specific kinds of justice problems, such as evictions, or debt, or domestic violence restraining orders, or employment issues, or troubles with public benefits. Different staffed offices deliver services through very different means. For example, some provide one-on-one service to eligible members of the public, while others use group workshops in which one staff member provides information to many people simultaneously. Some staffed offices provide principally information or advice, seldom representing clients in court proceedings or negotiations, while other offices provide representation to the majority of the clients they serve (Moore 2011; Sandefur 2010). Similarly, specific assistance providers differ substantially in how they combine the work of different kinds of personnel to produce the services that the public receives, including how much they rely on fully qualified attorneys or on paralegals or other non-lawyer staff to deliver services to the public (Legal Services Corporation 2011; Moore 2011; Sandefur 2010). Many different models of service provision exist around the country. While some case studies of specific programs exist, little research systematically explores the effectiveness or efficiency of different models of service provision for serving different populations or different kinds of justice problems.

Figure 1. Delivery Mechanisms for Civil Legal Assistance: Percentage of the 50 US States and the District of Columbia Exhibiting at Least One Example of Each Type of Program, by Service Population: 2010.



Source: Civil Justice Infrastructure Mapping Project (see Appendix A for details).

How Can People Connect with Civil Legal Assistance?

One traditional model of public access to civil legal assistance involves lawyers waiting in their offices for potential clients to stop by or call on the phone. While this model still exists, a

number of programs have developed innovative means of connecting with clients. The Civil Justice Infrastructure Mapping Project sought evidence of five different routes of connecting with assistance that constitute innovations with respect to that traditional model. These routes were: state-wide hotlines for civil legal assistance intake; information and advice hotlines; court-based civil legal assistance intake; co-located civil legal assistance services; and, web-based intake for civil legal assistance. In most states, there exist multiple routes through which people eligible for civil legal assistance can connect with providers, but all routes are not available to every population eligible for services.

Figure 2 reports the prevalence across states of the five innovative routes to connecting with services. The most common innovation is a state-wide intake hotline that serves at least one eligible population in a state. These hotlines are a single number, often toll-free, that people may call to be connected with providers who are members of the network comprised by the hotline. Across states, hotlines differ in how comprehensively they incorporate the state's existing civil legal assistance providers, with some including most providers in the state and others including only those providers that receive money from a particular source, such as the Legal Services Corporation. In no state is every provider of civil legal assistance as we have defined them integrated into the hotline network (see below, *How Is Civil Legal Assistance Coordinated?*). In about three quarters of states (76%), there exists a state-wide intake hotline that serves a population other than the poor; the most commonly served group is the elderly. In almost half of states (49%), there exists a state-wide intake hotline that serves the state low-income population.

Legal advice and information hotlines similarly use the telephone as a means of connecting with eligible populations, delivering services directly through this means (Pearson and Davis 2002). Some hotlines provide services for only a single type of problem (for example, consumer problems), while others provide services for a wider range of problems. Most serve a single population, such as people with low incomes, the elderly, or people with disabilities. About half of states have at least one advice or information hotline that serves low income people (53% and 55%, respectively). Similarly, about half of states have at least one advice or information hotline that serves at least one other group (55% and 57% respectively). As is the case with many of the access to civil justice resources available to groups other than the poor, the other group most commonly served by legal advice and information hotlines is the elderly.

Another relatively recent innovation in connecting people with civil legal assistance services appears in service centers that are physically located in courthouses (see, *e.g.*, National Center for State Courts 2006). This model of connecting with assistance favors people who are facing or want to initiate court proceedings, because these are the people who appear in courthouses – for example, people wishing to file for divorce, people trying to respond to a notice of eviction, or people seeking civil orders of protection. Court-based entry points to civil legal assistance service include staffed court-based self-help centers and also staffed legal aid offices physically located in courthouses. A majority of states exhibit at least one example of some kind of court-based entry point. The most common is court-based self-help, which exists in 71% of states. In a third (33%) of states, there exists at least one example of a court-sited civil legal aid office that conducts client intake in a courthouse.

Co-located civil legal assistance services represent yet another innovative model of connecting

members of the public with services. In this model, potential clients who visit a service office for a problem that they may not understand as having legal aspects are assessed for whether they may be experiencing legal problems in addition to or contributing to the problems for which they originally sought services. For example, a parent visiting a hospital or community health clinic about a child's asthma might receive legal help with sub-standard housing conditions contributing to the child's illness (Eckholm 2010). Co-located services exist in a variety of kinds of partnerships, including with social services and public housing; the most prevalent model is medical-legal partnerships. At least one example of co-location exists in three quarters of states (75%).

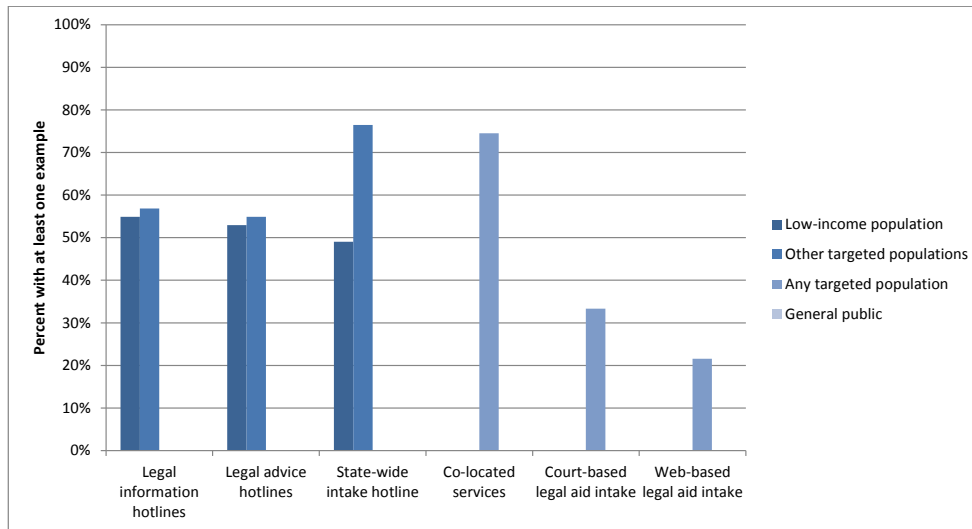
The least common of the five innovative means of connecting with services is web-based civil legal assistance intake. Just over one fifth of states (22%) have at least one program that uses a web interface to perform client intake for civil legal assistance services.

Different ways of connecting with services will be more accessible to some populations than to others. For example, to be useful to a client, services that consist largely of providing written materials, such as forms or information sheets, typically require that the client be functionally literate in English, though some materials may accommodate literacy in other languages. Because internet services are heavily text-based, using them requires that clients both have access to an internet-connected computer and be functionally literate, typically in English.

Nationally, a majority of American households have in-home access to the internet. Internet access rates range widely across states from a low of 61.7% of state populations to a high of 84.7%. The average across states is 73.7%. Similarly, while most Americans are functionally literate in English, illiteracy rates range widely across states, from a low of 6% of state populations lacking basic prose literacy in English to a high of 23%. An average of 11.7% of state populations lack basic prose literacy skills in English.

Each of the state reports presents information about the existence of each of the five innovative means of connecting with services. Each state report also presents information about literacy and internet access among the residents of the state. Comparing these two pieces of information for each state reveals that some of the states in which providers have begun web-based civil legal aid intake are states in which rates of illiteracy are among the highest and rates of in-home internet access are among the lowest in the nation.

Figure 2. Selected Means of Connecting with Civil Legal Assistance: Percentage of the 50 US States and the District of Columbia Exhibiting at Least One Example of Each Type of Program, by Service Population: 2010.



Source: Civil Justice Infrastructure Mapping Project (see Appendix A for details).

How Is Civil Legal Assistance Funded?

Few precise figures are available concerning the amount of money spent on civil legal assistance in the United States. Capturing accurate and precise funding information is challenging in a context in which hundreds of different funders of many different types support hundreds of different providers serving distinct populations. Conservative estimates drawing on unpublished data collected by the American Bar Association suggest that total public and private funding amounted to around \$1.3 billion in a recent year (Houseman 2009). While over a billion dollars is in some ways a substantial expenditure, the amount is small when compared to total public spending on justice-related activities. In 2007, — federal, state and local governments spent an estimated \$228 billion for police protection, corrections and judicial and legal services (Bureau of Justice Statistics 2011). In the context of overall government spending and national economic activity, the estimated amounts spent on civil legal assistance appear even more modest: In 2010, total U.S. federal spending was around \$3.6 trillion and gross domestic product was expected to be \$14.6 trillion (Office of Management and Budget 2009).

Funding for civil legal assistance comes from a wide range of sources, including entities of government at the local, state and federal levels, bar associations, law firms, private foundations, state Interest on Lawyers’ Trust Accounts (IOLTA) funds, and generous individuals. Numerous federal programs give grants that support civil legal assistance, including not only the federal Legal Services Corporation, but also federal programs for veterans, American Indians, homeless people, victims of domestic violence, victims of natural disasters, people with disabilities, and people with a diagnosis of HIV/AIDS.

Some of these funders support civil legal assistance exclusively, while others support it among a

range of services that grantees provide for their clients, such as human and social services, public education, or community organizing. Any single program or organization that provides civil legal assistance may receive funding from dozens of different sources. For example, a single legal services agency in Florida lists 25 different public and private organizations as sources of funding on its website, while a law school community clinic in California reports over 50 sources of support in addition to the funding it receives from its parent law school (Bay Area Legal Services 2011; East Bay Community Law Clinic 2011).

The Civil Justice Infrastructure Mapping Project gathered facts about funding that were publicly available and comparable across states (see Appendix A for details). We located information about LSC funding for programs in each state and about monies that states themselves generate for civil legal assistance through legislative appropriations or by creating funds from court fees or fines. This information is reported for each state. We also collected information about selected federal sources of funding that can support, among other services, civil legal assistance to specific groups. Because we cannot isolate funding for civil legal assistance for these funding sources, we do not report this latter information for each state. However, this information is analyzed in a disparity analysis that reveals that states differ dramatically in the degree of success that providers have had in attaching to these funds (see below, this section, and also the next section of the report, *How is Civil Legal Assistance Coordinated?*).

LSC basic funding for field operations is allocated across states according to a formula that ties the amount of funding given to programs in each state to US Census Bureau counts of the size of each state's poverty-level population (Perle 2011). Consequently, Legal Services Corporation funds are distributed with little disparity. Figure 3 reports the results of an analysis of how LSC funds are distributed across states. As the Figure reports, 59% of states are at parity for LSC funds: these states receive a proportion of national LSC funds that is the same as the proportion of the national LSC-eligible population that lives in the state. Eighteen percent (18%) of states are below parity: they receive a share of total national LSC funds that is smaller than their share of the national LSC-eligible population. Twenty-four percent (24%) of states are above parity: they receive a share of total national LSC funds that is larger than their share of the national LSC-eligible population.

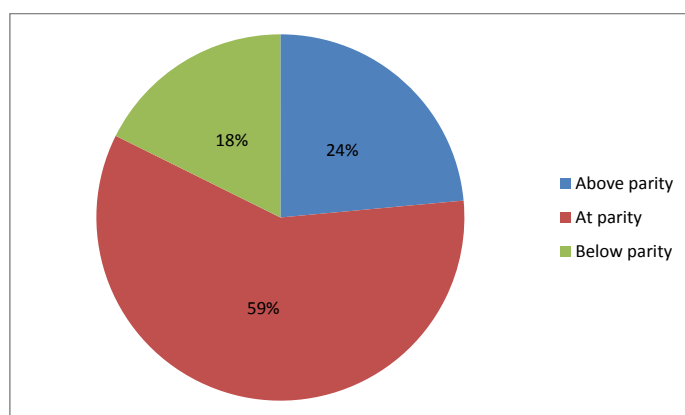
Departures from parity for LSC funds are relatively small in magnitude. Table 2 reports the average disparity ratio for states below, at and above parity for LSC funds. As the table reports, among states that get more LSC money than expected based on LSC-eligible population size, the average ratio of funding to population is 1.5. That is, among states above parity, the average state gets a 50% greater share of LSC funds than its share of the national LSC-eligible population. Among states that get less LSC funding than one would expect based on LSC-eligible population size, the average disparity score is 0.7. Thus, for states below parity for LSC funding the average state gets a 30% smaller share of total LSC funding than its share of the LSC-eligible population.

By comparison, disparity in state-generated funding is much more common and much larger. Figure 4 reports on a disparity analysis of the funds that states themselves generate for civil legal assistance through legislative appropriations or from court fees or fines set aside for that purpose. As the figure reports, 2 states provided no funding for civil legal assistance in 2009. Among states that did provide at least some funding for civil legal assistance, very few generated a share

of total state-generated funding that was comparable to their share of the national population. A majority of states (55%) generate less funding for civil legal assistance than would be predicted by the size of their populations. About a third of states (35%) created a share of total state-generated funding that was greater than their share of the national population. Only 6% of states are at parity on this measure; that is, in only 6% of states does the state’s share of total national state-generated funding for civil legal assistance match the state’s share of the total national population.

Disparity in state-generated funding is not only very common, it is also large in magnitude. As Table 2 shows, among states above parity on state-generated funding, the average ratio of funding to population is 2.4. That is, among states above parity, the average state generates a share of total state-generated funding that is almost two and a half times (240%) what one would expect based on its population size. Among states below parity on state-generated funding, the average ratio of funding to population is 0.4. Thus, among these states, the average state gets a 60% smaller share of total state-generated funding than its share of the national population.

Figure 3. Funding for Civil Legal Assistance: Percentage of States in Which LSC Funding is Above, At and Below Parity with the Size of the State LSC-Eligible Population: 2010.



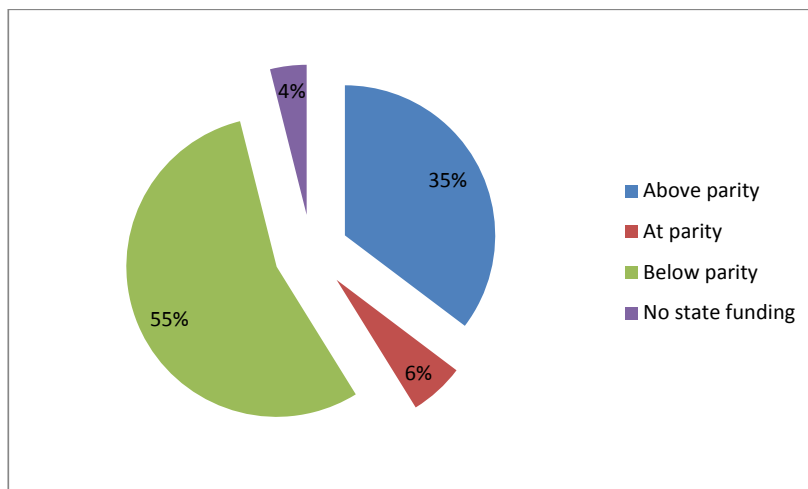
Source: Civil Justice Infrastructure Mapping Project. Quantities may not sum to 100% due to rounding. Note 2 describes the calculation of the disparity scores.

Table 2. Departures from Parity for LSC Funding and State-Generated Funding, by Parity Category: Average Ratio of Funding Share to Population Share.

	LSC Funding	State-Generated Funding
Above parity	1.5	2.4
At parity	1	1
Below parity	0.7	0.4

Source: Civil Justice Infrastructure Mapping Project. Note 2 describes the calculation of the disparity scores.

Figure 4. Funding for Civil Legal Assistance: Percentage of States in which State-Generated Funding is Above, At and Below Parity with State Population Size, and Percentage of States with No State Funding: 2009.



Source: Civil Justice Infrastructure Mapping Project. Quantities may not sum to 100% due to rounding. Note 2 describes the calculation of the disparity scores.

In addition to the Legal Services Corporation and monies that states themselves generate to fund civil legal assistance, additional funding for civil legal assistance comes from a range of federal programs supporting services to groups such as the elderly, American Indians, and people with disabilities. As noted above, the publicly reported amounts for these funds include money that pays not only for civil legal assistance but also for other services received by these groups. Because we cannot isolate civil legal assistance funding amounts, we do not report such amounts for each state. However, we did conduct a disparity score analysis of these sources of funding, to assess the degree to which providers in different states have been successful in attaching to federal funds that could support civil legal assistance among other services. This analysis, like the one presented above, compared each state's share of total monies disbursed to its share of the total national population eligible for services supported by those funds. The analysis revealed large differences between states. For example, a number of states collected a share of total identified funds for the elderly that was at least twice the size of their share of the national elderly population, while two states collected a share of total funding that was less than half the size of their share of the total national elderly population. Twenty-two percent (22%) of states collected a share of total identified funds supporting services to people with disabilities that was at least twice the size of their share of the national disabled population.

Appendix A discusses the funding landscape in greater detail, with a particular emphasis on federal sources and the challenges of acquiring precise information. We return to the results of the disparity analysis in the next section, *How is Civil Legal Assistance Coordinated?*

How is Civil Legal Assistance Coordinated?

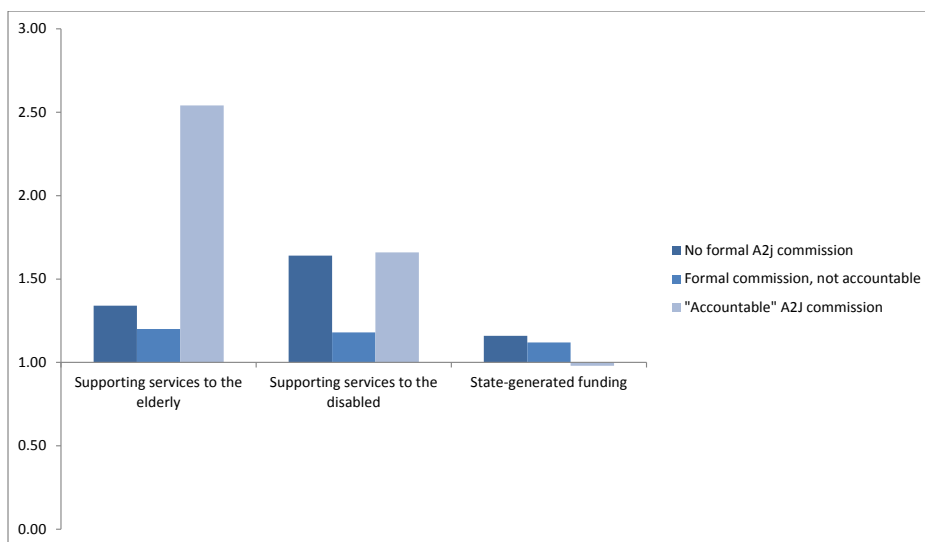
At the national level and within most states, civil legal assistance is organized much like a body without a brain: it has many operating parts, but no guiding center. Little coordination exists for civil legal assistance in the United States, and existing mechanisms of coordination often have powers only of exhortation and consultation. However, even with these limited powers, the presence of coordination mechanisms is related to some of the differences between states in funding for civil legal assistance and may affect the effectiveness and efficiency of service delivery.

The CJIMP project examined two different kinds of coordination for civil legal assistance: activities that coordinate the provision of civil legal assistance services to the public and higher-level coordination of state priorities and goals for civil legal assistance. The most prominent example of the first kind of coordination is state-wide civil legal assistance hotlines that integrate individual member providers into a single network of assistance delivery. The most prominent example of the second form of coordination is state access to justice commissions, which typically bring together a variety of stakeholders to do work such as identifying public legal needs, or envisioning state access to civil justice policy, or strategizing ways to increase civil legal assistance in the state. . . .

Because the U.S. has no central entity charged with the responsibility of gathering information about the functioning of the civil justice system, much basic information about civil justice activity is simply not available. For example, it is not known how many evictions from rental housing are filed in courts in any given year in the United States, nor how many people appear as litigants without lawyer representation (Greacen 2002; Sandefur 2010). Similarly, no national, public entity has the responsibility of gathering information about public civil legal needs or providers' capacities to serve different groups in the public (Selbin, Rosenthal and Charn 2011). The last national survey of public civil legal need is almost 20 years old, and was a service project of the organized bar (American Bar Association Consortium on Legal Services and the Public 1994a). . . .

Accessing Justice, Rationing Law

Figure 6. Average Departures from Parity by Presence and Type of State Access to Justice Commission: Selected Federal Funding for the Elderly, Selected Federal Funding for Persons with Disabilities, and State-Generated Funding, 2009-2010.



Source: Civil Justice Infrastructure Mapping Project. Note 2 describes the calculation of the disparity scores.

How Are Legal Services Regulated?

In investigating the relationship between access to services and legal services regulation, the Civil Justice Infrastructure Mapping Project focused on two aspects of state-level regulation of legal services provision. First, we collected information for each state on the population of attorneys licensed to practice in that state. Second, we examined how limited-scope legal services are regulated in the different states.

In the United States, attorneys are admitted to practice in individual states according to the rules established in each state. Across states, the population of admitted and active attorneys varies widely, from just under 1,400 lawyers in North Dakota to almost 158,000 in New York. Each of the state reports includes information about both the number of attorneys resident and active in each state and about each state's share of the total national number of attorneys.

Depending on where they are licensed to practice, the United States' more than 1 million attorneys are subject to different rules governing how they may provide legal services and with whom they must compete to do so. The Mapping Project focused specifically on rules and laws governing limited-scope legal services, because such services are an important element of how civil legal assistance is currently delivered and are often suggested as one way of making market-based civil legal services more affordable to the public.

As defined by the American Bar Association Section on Litigation's Modest Means Task Force, limited scope assistance involves providing a client with something less than the "full package of legal services of (1) gathering facts, (2) advising the client, (3) discovering facts of opposing party, (4) researching the law, (5) drafting correspondence and documents, (6) negotiating, and (7) representing the client in court" (Forrest S. Mosten, 1994, cited in American Bar Association 2003: 4). Among this array of services, limited-scope legal service comprises specific,

“designated service or services” that are agreed upon by the lawyer and the client (American Bar Association 2003: 4).

While limited-scope services may perhaps be most familiar from current discussions of unbundling, they have been an important element of both civil legal assistance and market-based legal services provision for many years (American Bar Association 2003: 5-7, 2011c; Hannaford-Agar 2003). Building on the ABA’s definition of limited-scope service, we construed such service broadly and examined rules governing limited-scope legal services provided through a variety of arrangements: no-fee arrangements when services are provided by legal aid, volunteer or court-appointed attorneys; lawyers providing services in the context of fee arrangements; and, non-lawyers working independently of attorneys in the context of fee arrangements.

Limited Legal Assistance in the No-Fee Context Members of the public seeking free civil legal services often face limitations in the assistance they can receive. Assistance is effectively limited in scope when civil legal assistance providers offer services for only certain types of justice problems, as is common; these limitations reflect both individual programs’ choices about their service priorities and restrictions placed on services by funders of civil legal assistance, such as Congressional restrictions on what services and populations can be supported by Legal Services Corporation funds (Houseman and Perle 2008). Assistance is also limited in scope when civil legal assistance providers offer only certain kinds of services, such as information-only or advice-only services that do not extend to representation (American Bar Association 2003, 2009; Hannaford-Agar 2003).

In recent years, regulators in a number of states have enacted ethical rules modeled on American Bar Association Model Rule of Professional Conduct 6.5 that are intended to make it easier for legal aid, volunteer and court-appointed attorneys to provide limited-scope assistance. Rule 6.5 is often interpreted to mean that, when the services to be provided are — short-term limited legal services . . . without expectation by either the lawyer or the client that the lawyer will provide continuing representation in the matter, “lawyers working — under the auspices of a program sponsored by a nonprofit organization or a court are excused — from the duty to conduct an in-depth conflict of interest check on new” clients (American Bar Association n.d.: 9-10). The Rule was developed in response to concerns that — a strict application of the conflict-of-interest rules may be deterring lawyers from serving as volunteers in programs in which clients are provided limited legal advice (American Bar Association n.d.: 10). The Civil Justice Infrastructure Mapping Project found that, as of 2010, all but 8 states had adopted Model Rule 6.5 or a similar rule. The state reports indicate the status of each state’s adoption of this rule as of 2010.

Limited Legal Assistance in Market-Based Legal Services The market is clearly an important source of legal services for groups eligible for civil legal assistance. Available evidence suggests that when low-income people face civil justice problems and seek out a lawyer’s help, most of their contacts with attorneys are actually not with legal aid or pro bono attorneys, but rather with private practice lawyers and in the context of fee arrangements (American Bar Association Consortium on Legal Services and the Public 1994b: Table 5-12; Sandefur 2007:82-83). In a number of states, services traditionally regarded as legal services are available legitimately not only from licensed attorneys but also from independent non-lawyer practitioners such as legal

document assistants, independent paralegals, immigration assistants and civil law notaries. Understanding what markets can and do provide is essential to a complete picture of the access to civil justice infrastructure (Hadfield 2010; Hornsby 2011).

CJIMP collected information about two sets of regulations governing how limited-scope legal services may be provided on markets: ethical rules that govern limited scope representation by attorneys and regulations governing the provision of market-based legal services by non-lawyer providers.

Fee-generating limited-scope legal services by attorneys are a topic of considerable attention and lively discussion (American Bar Association 2003, 2009). A 2010 survey of Americans commissioned by the American Bar Association found that, while most people were unfamiliar with limited-scope representation, many found the idea attractive once it was explained to them. A majority of those surveyed who lived in households with annual incomes less than \$100,000 —believe[d] it [was] important for lawyers they are considering using for personal legal matters to offer unbundled legal services. The percentage regarding this as important increased as household income declined, with almost four fifths of people in households with incomes less than \$15,000 regarding the availability of unbundled services as somewhat or very important in their choice of a lawyer (American Bar Association 2011c: 5, 20).

American Bar Association Model Rule of Professional Conduct 1.2(c) speaks to the permissibility of limited-scope representation in a fee-generating context. The “ultimate purpose” of the rule “is to expand access to legal services by providing limited but nonetheless valuable legal services to low or moderate income persons who otherwise would be unable to obtain counsel” (American Bar Association 2003: 90, citation suppressed). The rule authorizes lawyers to “limit the scope of the representation if the limitation is reasonable under the circumstances and the client” agrees to this “course of action after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct” (American Bar Association 2003: 89-90). The Civil Justice Infrastructure Mapping Project found that most states (86%) had adopted a rule identical or similar to 1.2c. The state reports indicate the status of each state’s adoption of this rule as of 2010.

In addition to lawyers, another important source of limited legal services comes from people who are not lawyers and work outside of lawyers’ supervision. These services include advice, information, and assistance in preparing letters or legal documents, and may also extend to representation in front of adjudicators. Indeed, nonlawyer advocates can appear in a number of different federal forums as representatives of litigants. This is true, for example, in immigration hearings and in proceedings related to a variety of government benefits, such as social security and unemployment insurance (Executive Office for Immigration Review 2009; Rhode 1981, 1990). Some state-level forums, such as state tax courts, also allow nonlawyer advocates (Kritzer 1998).

The Civil Justice Infrastructure Mapping Project collected information about states’ regulation of three different non-lawyer occupations that provide limited-scope legal services: civil law notaries, legal document assistants or independent paralegals, and immigration assistants. The

Mapping Project sought evidence of whether states explicitly regulated each of these three occupations and, if so, whether they were permitted or forbidden. In most states, independent occupations providing what have been traditionally regarded as legal services, such as immigration assistants and legal document assistants, have not been specifically forbidden or permitted; rather, their activities are regulated by general state unauthorized practice rules, which do not permit independent practice by these occupations.

The state of Louisiana, in which the courts grew out of a civil rather than a common law system, commissions civil law notary publics. Louisiana civil law notaries need not be attorneys, but must pass an examination on the areas of law in which notaries are empowered to practice. This examination is waived for licensed attorneys. Louisiana civil law notaries can prepare and execute a wide range of legal documents, including wills, affidavits, acts of adoption, and various other forms of contract. Other states permit more limited services provided by “legal document assistants,” who aid members of the public in preparing specific kinds of legal documents, such as those related to uncontested divorces or wills. In these states, members of these permitted occupations practice independently of attorneys. About a quarter (24%) of states specifically regulate legal document assistants and independent paralegals, typically forbidding such practice. Two states permit independent legal document assistants working outside a lawyer’s supervision.

A larger number of states permit immigration assistants (sometimes termed immigration consultants). Immigration assistants are distinct from the non-lawyer “accredited representatives” authorized to appear in federal immigration courts (Executive Office for Immigration Review 2009). In the words of one scholar, state statutes permitting immigration assistants “permit non-attorneys to fill in blank spaces on forms, translate answers and gather documents, but prohibit the giving of legal advice or other services constituting the practice of law” (Moore 2004: 3). Six states regulate and permit immigration assistants; one state regulates and explicitly forbids such practice.

Judith Resnik & Emily Bazelon

Legal Services: Then and Now

17 YALE LAW & POLICY REVIEW 291 (1998)

This volume includes papers from the first annual Arthur Liman Colloquium, *The Future of Legal Services*, held at Yale Law School in the spring of 1998. There, we learned that half of the federally funded legal services offices no longer receive free of charge the national publication *The Clearinghouse Review* and that many staff attorneys do not have computer links to the Internet and other electronic sources. We thus are pleased to provide this collection of essays, written by lawyers (both public and private), academics (both students and faculty), judges (both state and federal), and program administrators, all concerned about the system of justice for and the provision of legal services to people unable to pay attorneys directly.

This is an eclectic set of essays, representing the array of individuals (some 125 people) who gathered in March 1998 in New Haven to explore the state of legal services in light of congressional legislation that placed restrictions on the kinds of services provided by federally funded programs, limited funding of legal services programs, and increasing poverty. The 1996

restrictions provided a focal point for some of the discussion, because lawyers working for legal services programs receiving federal funds are now barred from initiating or participating in class action lawsuits, engaging in some forms of legislative advocacy, handling voter redistricting claims, initiating representation on behalf of prison inmates, advocating that welfare laws are unconstitutional, or seeking attorneys' fees. Simply put, federally funded lawyers for the poor are regulated and limited in the kinds of representation that they provide in a way that other lawyers are not.

Together, we grappled with—and the papers that follow address—three central questions: 1) how the 1996 restrictions and cutbacks on funding by the Legal Services Corporation (LSC) affected the services and priorities of recipients of such funds; 2) what adaptations and innovations have occurred in response to changes in funding, to the restrictions, and to new legal regimes relating to the receipt of government benefits; and 3) whether funding cutbacks, the restrictions on lawyering, and contemporary issues facing poor people require an altered vision for legal services.

An answer to the first question (about the effects of funding cutbacks, the restrictions, and new legal regimes governing poor people) comes from the contributions of practicing and former legal services lawyers Lawrence Fox, Alan Houseman, David Udell, Gordon Bonnyman, Catherine Carr and Alison Hirschel. Lawrence Fox and Alan Houseman provide the necessary context by giving the history of legal services and the array of options once available to poverty lawyers. Houseman also details legal services operations before 1996 and then discusses the impact of the restrictions on the kinds of services that federally funded legal services attorneys can provide. His essay and others in this volume document how those restrictions have disrupted client services, discontinued pending cases, and curtailed access to justice for thousands of poor people.

In detail-rich specifics, contributors describe how their programs and their clients have had to cope. Some have terminated services, and others have had to create two sets of providers, one federally funded and one freestanding. In the process, many lawyers (both public and private) have had to contribute their talents and energies to restructuring legal service programs rather than to delivering services to clients. A comprehensive and poignant illustration comes from Catherine Carr and Alison Hirschel, who describe the break-up of Philadelphia's Community Legal Services into two separate organizations: one that engages in class-action litigation and political lobbying, and so cannot accept federal funds, and another that provides only direct services to individual clients so that it can take the restricted money.

More description of contemporary problems comes from David Udell, who reports on how the restrictions prevented him, as a then-staff member of Legal Services for the Elderly in New York City, from continuing to represent disabled recipients in several class actions. He discusses LSC implementation of the new mandates, including the prohibition on “adversarial” enforcement of final judgment and consent decrees. Udell and others argue that the restrictions should be rescinded because it is fundamentally wrong to impose limits on poverty lawyers' ability to represent their clients as paid lawyers can. Udell adds to the description of his own clients the accounts of similar difficulties, disruption, and retreat provided to him by legal services attorneys in Oregon, Virginia, and Florida. In these states, the new rules forced programs to pull back from

remote locations, reshuffle staff, and scramble for funds. Those organizations deserve credit for making the best of the post-restrictions reality and for their candor and scrupulousness in following mandates.

But the cost—in terms of clients not served and lawyers having to sever the provision of individual representation from that of aggregate responses—has been enormous. As Karen Lash, Pauline Gee, and Laurie Zelon detail, many of the poor are women, children, and the elderly, a disproportionate number of whom are people of color. The populations served by legal services programs live within a web of legal regulations and, sometimes, with discrimination. Felix Lopez adds moving descriptions of the needs of individual clients, some of whom have a history of drug or alcohol addiction, others of whom have been diagnosed as HIV-positive. His account makes plain the contributions that lawyering can make to people's well-being. The proliferation of regulations related to the receipt of government benefits for housing, food, and medical care have made lawyers all the more necessary, and limitations on legal assistance all the more disabling.

The prominent role of law in the lives of people seeking government assistance underscores another disheartening effect of government restrictions on legal services—the dismantling of national networks of coordination and communication. Lawrence Fox, now a lawyer at Drinker Biddle & Reath in Philadelphia and in the 1960s a legal services lawyer, recounts the energy and insight gained in the early days of legal services, when newly entering attorneys came together in orientation programs. Few such nationally based mechanisms exist today. It was striking at the Arthur Liman Colloquium to learn that people experienced in the provision of legal services in states as close as Connecticut and New York did not know of each others' programs. Given that ordinary methods of exchange (such as e-mail, web sites, conference calls, funded travel to conferences, and newsletters) are still not routinely available to many direct providers of legal services, the occasion was a luxury—a rare opportunity to share information and to offer empathy and support.

The issue of communication relates to another problem spawned by the 1996 restrictions and the limited funding. Since its inception at the national level in the 1960s and with the creation of the Legal Services Corporation in 1975, federal organizations have been a conduit for information about the legal needs of many within the United States. Yet in the 1990s, even as many private-sector corporations consolidate resources through mergers that create ever-larger corporate entities, government-sponsored legal services programs are declining in numbers and legal services attorneys are working under fragmented conditions.

As several of our contributors note, the congressional funding restrictions have left both an economic and an organizational gap. Cutbacks have made fundraising a requirement for all legal services programs, and those that choose not to follow federal mandates must not only do their own fundraising, goal-setting, and institutional planning, but often must do so as solo ventures. Upon reading about the labor-intensive process of legal services lawyers learning to do “development” (also known as fundraising), it is difficult to tell a cheerful story about the many small spin-offs the restrictions have produced. While programs in some states may blossom, “devolution” risks leaving behind many poor clients, including those who live in states that do nothing to fill the gap—and those who seek assistance from providers without the skills to generate

the needed funds. Small legal services organizations struggling to pay salaries and shield their clients from cutbacks may not have the wherewithal to do the multifaceted work of client representation, coalition-building, institutional infrastructure reorganization, and fundraising. While in the last few years some states have increased state-wide coordination and integration, in other states the restrictions have made the late twentieth-century provision of legal services resemble the early twentieth-century era, in which a diverse group of individual programs provided a patchwork set of services across the United States.

What institutions might provide unifying functions? Will LSC-funded back-up centers be able to sustain such activities? How much coordination can the National Legal Aid and Defender Association do? Should efforts be made to reconstitute a well-funded national network, either public or private, or should the focus shift to private sources or to the state or regional level? Such questions are familiar to those immersed in issues of federalism. One of our contributors, Gordon Bonnyman of the Tennessee Justice Center, proposes a national “brokering” organization to appeal to funders who might not respond to a series of calls from small local organizations. Alan Houseman of the Center for Law and Social Policy focuses on state-wide coordination, working at a level that reflects the devolution of welfare policy. Lorna Blake, executive director of New York’s Interest on Lawyer Account (IOLA) Fund, stresses the Fund’s role in promoting statewide planning and coordination. Lawrence Fox recounts the work done by the American Bar Association (ABA) in helping to preserve LSC funding. He sees the ABA as an important mechanism for coordination of ongoing efforts, while both Professor Louise Trubek of the University of Wisconsin Law School and Professor Louis Rulli of the University of Pennsylvania Law School call for greater reliance on law schools to fill some of the gaps.

As their discussion illustrates, inquiring into the problems caused by the 1996 restrictions and the details of restructuring yields answers to the second question posed, about the adaptations and innovations that have occurred in light of the forced reorganization, ever-more limited funds, and growing numbers of poor people. Alan Houseman describes the use of telephone hot lines and forms of “brief advice systems” to provide quick and limited services. Lorna Blake explains how New York distributes IOLA funds in ways that create incentives for new programs and services. The goal is to avoid the fragmentation and isolation of programs by tying funding to collaborative efforts that push legal services providers to use new technologies, team up with law school clinics, and organize regionally. Professor Louise Trubek details the role that fellowship programs, some based at law schools, others supported by law firms or foundations, have played in generating a new group of public interest lawyers well-versed in “cobbling” together funds to create small projects servicing a targeted population or a specific kind of legal problem.

Turning to the third question, about revising underlying aspirations for legal services, this volume is filled with suggestions for fundamental restructuring. Some of the recommendations are doctrinal, some are functional, and many call for changes in several institutional settings and in their interrelationships. For some, the answer is expanding legal rights. The Honorable Robert Sweet of the United States District Court for the Southern District of New York argues for what he calls a “civil Gideon,” a federal constitutional right, based on the Due Process Clause, to counsel for poor people dealing with civil justice matters such as family and housing law cases. Professor Louis Rulli also calls for a change in the legal rights regime by proposing a statutory right to counsel for a poor person facing forfeiture of property.

Many contributors propose new means of funding legal services. Judge Sweet suggests a tax on for-profit lawyering to pay for lawyers for poor litigants in civil justice matters. Professor Rulli urges the use of forfeited money as a means of providing services. Helaine Barnett, head of the Civil Division of the Legal Aid Society of New York, describes the funding proposal of a committee she participated in, appointed by the Honorable Judith Kaye, Chief Judge of the State of New York. The New York State committee proposed the use of “abandoned property” as an alternative source of funds for legal services.

Several contributors address the problems of representation of impoverished clients, a disparate population tied together only by its members’ inability to pay for legal representation. The poignancy for legal services lawyers, unlike attorneys in the private sector, is that choice of cases and legal strategy always require allocation of resources. The clients they turn away cannot “shop” for other options, for the market offers none. The choices and priorities of legal services lawyers thus become decisions about distribution of scarce resources, necessarily carrying political and social freight. To respond to the difficulty of such allocation decisions, Andrea Luby proposes an innovation she terms a “shadow market.” She suggests having poor clients “pay” in a minimal or “shadow” fashion to provide a mechanism by which clients, rather than lawyers, decide how to set priorities and allocate resources. Robin Golden also argues that members of the client community should help set priorities and criticizes modes of representation of some legal services offices. She uses the example of housing evictions to propose that community input would create a shift away from individualized representation (of those evicted) and towards pursuit of group-based interests in safer living spaces.

Several essays discuss the reorientation of law schools. Professor Rulli proposes that law school clinical programs reorganize their work to fill gaps in services, to teach students about lawyers’ obligations to all segments of society, and to use the resources of law schools to analyze legal rights and government obligations. Professor Stephen Wizner of Yale Law School similarly calls on law schools to revamp their curricula. He argues that law schools need to reorient their educational mission away from a technocratic “think-like-a-lawyer” approach that privileges problem-solving and rule-memorizing over moral responsibility. Professor Wizner believes that law faculty need to help students tackle the broader moral questions they will face in their practices; to do so, law schools need to understand the integral relationship among all aspects of their curriculum, both clinical and nonclinical, and to undertake service to the poor as a goal of legal education and of law students’ future practice. Professor Louise Trubek draws on her own experiences as a law student, which she describes as nurturing her commitment to public interest work, to remind law schools of their longstanding efforts to provide legal services to the poor and their obligations to remain faithful to the values of social justice.

Other contributors call for changes in the institutions of which they are members. Lawrence Fox writes of the distance between private lawyers and public interest lawyers. He describes efforts to integrate the two groups and hopes for a reconceptualization of the relationship between the various sectors of the bar. Alan Houseman discusses the ways in which legal services providers had themselves become too large, too bureaucratic, and too distant from the populations that they serve. He argues that one benefit of the current restrictions is that they have forced restructuring, a focus on flexibility, and outreach to law schools and the private bar to create more collaborative, community-based work. Felix Lopez, Catherine Carr, and Alison Hirschel all note

the possibility of integrating lawyering services with other social services in hopes of providing new sources of funds and better services.

A few essays call not only for reorganization of legal education and the practice of law but also of the very processes of law themselves. The Honorable Denise Johnson of Vermont's Supreme Court, proposes restructuring the processes of justice to be less lawyer-dependent, as do University of Southern California Law School Associate Dean Karen Lash and attorneys Pauline Gee and Laurie Zelon. These contributors argue that the problem needs to be framed not as a discussion only about access by "poor" people to law but as a conversation about improving all citizens' access. Justice Johnson discusses the difficulty faced by the middle class in paying for legal help to handle divorce matters or landlord-tenant disputes. To begin to solve the problem, Justice Johnson would increase reliance on alternative dispute resolution, self-representation, and paralegals.

A few shared themes merit further discussion. First is the fragility of even the current, limited programs. Legal services lack stability not only because of the threat of further reductions and greater restrictions in government funding, but also because of the uncertainty surrounding the legality of using interest from lawyers' trusts accounts. A second theme is the interrelationship between lawyering for poor people and lawyering in general. Dissatisfaction by members of the bar with their own practice and by users of courts with court processes is prompting a range of "reform" proposals. Thus this collection of papers discusses how court systems and legal practice can be revised to serve better not only poor clients but all clients. A third shared theme is that response to both of these issues cannot be expected to come only from the bar. Lawyer-based solutions are not now—if they ever were—sufficient to the task. However energetic both private and public lawyers may be, they alone cannot fill the demand for services nor respond to the needs that underlie the search for legal help.

Rather, coalitions—cutting across class and professional lines and informed by an appreciation of the color and gender of many of the impoverished—need to work together to engender concern and compassion for a range of individuals and groups not currently commanding popular support. In essays by contributors from around the country, we learn of efforts to create such coalitions. Helaine Barnett writes about the Legal Services Project of the New York State Courts. Its membership included individuals (such as business leaders) who had not had any prior affiliation with legal services, and its purpose was to bring together this diverse set of supporters to persuade New York State's legislators of the social utility—for all segments of society—of enhancing access to legal services and to courts. Karen Lash, Pauline Gee, and Laurie Zelon (respectively an academic, a poverty lawyer, and a member of the private bar) write together about another model of broad partnership, the California Access to Justice Commission, which also endeavors to draw all segments of the community into improving the justice system and making it more accessible to those who cannot pay for lawyers, including but not limited to the "officially" poor.

The papers published here capture a good deal of the discussion at the Colloquium. But the exchanges that transpired during the Colloquium deserve mention as well, for from those conversations come other dimensions of the current state—and future—of legal services. The Colloquium's atmosphere was both congenial and charged. Practitioners, administrators

(including the president of the Legal Services Corporation), faculty, and students generated conversation from a range of perspectives. The fault lines were many: between legal services organizations that accepted restricted federal funding and those that did not; between lawyers who believed strongly in providing individual representation to poor clients and those who emphasized group or “community-based” approaches; between participants who saw the fact of restrictions as an opportunity for needed changes in the delivery of legal services and those to whom the cutbacks spelled only disaster.

The tensions led to some distress, particularly from some long-term legal services lawyers. These participants voiced frustration that even as they faced attacks from Congress on the right, they also heard criticism from allies, students, and community activists on the left. For participants old enough to remember the 1960s, when the first federally subsidized poverty lawyers worked on projects sponsored by the Office of Equal Opportunity, it was remarkable to see that, from the vantage point of later generations, government-funded legal services had become old and entrenched enough to be a tradition against which a current generation might rebel. That’s a measure of success, of sorts. We cannot help but wish that this intergenerational struggle was generated by a more cheery occasion than the sharp reduction in funding for such programs. But impatience helped to launch legal services thirty years ago; it is now the next generation's turn to push.

We also wish that, during the past thirty years, the commitment to economic equality had become sufficiently strong to make the prospect of joining the public interest bar less daunting for law school students and young lawyers. Students reading guides about public interest law learn of hundreds of legal services organizations and dozens of public interest fellowships. But they also learn of the absence of coordination among legal services providers and fellowship sources. Law students now speak of seeking their own support, of applying to a multitude of post-graduate fellowships, of “cobbling together funding” by obtaining bits of money from an array of grantors who themselves have a diverse set of stated objectives. While Professor Louise Trubek reminds students of the creativity thus engendered, the fellowship mill is an exhausting process in which not all prospective public interest lawyers flourish. Moreover, as Burt Neuborne pointed out in the Arthur Liman Colloquium discussions, the split between organizations that do and do not take government funds also threatens to create a two-tier career track, separating out “daily” individual representation from work such as class-action litigation or state capitol lobbying that is often seen as more prestigious. We will need another thirty years of experience to learn what kinds of careers lawyers entering legal services today will have and how the strains on the practice of law experienced by all lawyers will affect the ongoing efforts to expand services beyond those who can afford them.

In the end, we are both celebratory and distressed. We are pleased that Yale Law School sponsored both the Colloquium and this volume, impressed with the commitment and energy of all the participants, especially delighted by the level of student interest, and glad that public interest programs not only exist at law schools but are the focus of a great deal of attention outside the academy. We are proud of the academy’s willingness to donate resources, institutional presence, and capability to exploring poverty law concerns; we recognize and applaud the capacity of universities to be a locus of exchange that helps to create enduring and effective institutional infrastructures.

Yet we are deeply troubled by the scarcity of services and the seeming lack of national political interest about the needs of so many members of this society. Neither lawyers nor poor people are currently objects of popular affection. We are keenly aware of the insufficiency of a response based in an array of specialized settings, such as universities and foundations. The central lesson to be learned is that shared responsibility – public and private, academic and general, legal and non-legal – is required. Over the last three decades, federally funded legal services grew from a model program to a nationwide multi-faceted institution, and then recently shrunk (due to the unremitting debate about legitimacy and propriety of funding lawyers for the poor) to a fragile, limited project. Legal services attorneys can no longer participate in the full range of activities understood to constitute “lawyering.” As several contributors note, the public needs to be reminded that it has a self-interested as well as selfless stake in making justice accessible to all. The ability to enforce the rule of law cannot – and should not – be available only to certain segments of a social order.

Lawyering as an array of activities, lawyering as an act of shared responsibility, those were the tenets of Arthur Liman’s life. The *Foreword* to the volume by Lewis Liman and the *Afterword* by the Honorable A. Leon Higginbotham are eloquent statements of Arthur Liman’s efforts to weave together the many institutions needed to respond, comprehensively, to enable justice for all members of this polity. As Judge Higginbotham reminds us, Arthur Liman recognized the need to move beyond his role as a private attorney throughout his legal career. He took responsibility for broader social concerns not out of professional obligation, but because he could. Judge Higginbotham remembers that his friend used to say “Having a successful career in private practice was more than a matter of earning a good living. It gave me the independence when I took public assignments to do what was right.”

In providing for a program on public interest law at Yale, the Liman family, Arthur Liman’s firm, his friends, and his colleagues have begun to weave together the relevant segments of the legal community – academics and practicing lawyers, young and old lawyers, public and private lawyers, members of the judiciary—needed to continue the work that was so much a part of Arthur Liman’s life. It is an honor to dedicate to his memory this first volume of papers from the Arthur Liman Public Interest Program and Fund. Through projects such as this, his work carries on.

The Honorable Jonathan Lippman

Equal Justice at Risk: Confronting the Crisis in Civil Legal Services
Keynote Address, New York University School of Law (Oct. 24, 2011)

I am honored and privileged to have been asked to speak at my alma mater, the New York University School of Law – which has a long and rich history of serving the public and working for a just society. I would like to share some thoughts with you today about one of the most daunting challenges confronting our justice system – the crisis in civil legal aid for the poor – and what the judiciary and the profession, here in New York, and around the country can do to foster equal access to justice, at a time of economic hardship for our nation and for state judiciaries.

The country is dealing with serious and seemingly intractable fiscal problems very much reflected here in our State. On April 1, New York adopted a new budget, intended to close a \$10 billion deficit, which contains traumatic spending cuts at the State and local levels, including an unprecedented \$170 million or 6.3% reduction in the Judiciary's budget request. At the same time, the economic crisis and the ongoing recession has pushed the highest number of Americans into poverty since the early 1960s, with state court dockets swelling with cases related to the economic downturn. When families can't pay their mortgages or rent, when people default on credit card payments or child support obligations, when frustrations over household finances boil over into domestic violence . . . it all ends up as a matter on a court docket. State courts are truly the emergency room for the ills of society, and our caseloads are the proof of that fact.

The kinds of crises that bring so many people into our courts – foreclosure, consumer credit, family and personal issues that flare up in times of stress – are all the more common during a downturn. Activity in our courts is counter-cyclical: when the economy goes south, the need for legal services rises.

Yet our mission in the courts transcends these developments – we must hear and resolve each and every case that is filed with us. In the best economic times and in the worst – and maybe especially in the worst – we are constitutionally bound to deliver justice. Our doors must be open to all.

Unfortunately, millions of our neighbors today desperately need the protection of our laws but cannot afford a lawyer to help them deal with life-altering legal problems – saving their homes from predatory lenders, recovering back wages from employers, ending abuse by a violent spouse or partner, obtaining custody of a child, and so many more. Last year alone, 2.3 million litigants appeared in the New York courts without a lawyer, including 98% of tenants in eviction cases, 99% of borrowers in hundreds of thousands of consumer credit cases, 95% of parents in child support matters, and until recently, two-thirds of homeowners facing foreclosure proceedings.

According to the latest federal poverty data, statewide in New York 2.8 million people – nearly 15% of our population – are living below the poverty level, and in New York City that figure rises to a staggering 20.1% of residents. And those numbers do not take into account the estimated six million working poor in our State who live below 200% of the poverty level or \$44,700 a year for a family of four – and cannot possibly afford to hire a lawyer.

It is no wonder, then, that providers of civil legal services to the poor in New York City are turning away eight or nine clients for every one that they serve. Many of our courtrooms in New York are standing room only, filled with unrepresented litigants – frightened and vulnerable people – the elderly on fixed incomes, single parents, the disabled and mentally ill, abuse victims, and so many more. And just as the need for free legal services for poor and low-income Americans is at an all-time high, the resources available to provide those services are becoming more limited than ever before. Funding for the Legal Services Corporation in Washington is under siege, and in New York, our IOLA Fund, traditionally the leading source of State funding for civil legal services, has seen its revenues plummet to a fifth of what they were just a few short years ago – from \$32 million to \$6.5 million.

In response, we have been redoubling our efforts, both within the Judiciary and in partnership with the Bar, to assist the unrepresented, opening more offices of the self-represented in our high-volume courthouses; expanding volunteer lawyer-for-a-day programs that provide lawyers for poor litigants when they enter our New York City courthouses; and expanding pro bono programs throughout the State.

All of these creative efforts are helpful in easing the access to justice problem. But they do not come anywhere close to solving the problem. The needs are simply too overwhelming. I have become convinced that the totality of what we are doing in New York, and as far as I can see around the country, is simply not enough. It is simply not enough to rely on the wonderful good works of the Bar, and on a patchwork of unreliable revenue streams that constantly fluctuate with the ups and downs of the economy and the political winds of the day.

What is needed, I believe, is the unequivocal commitment of State government to fund civil legal services, a commitment backed by the public fisc. And while I recognize that this is a very tall order in these difficult economic times – like going directly into the teeth of a hurricane – the bottom line is that access to justice is one of the most fundamental obligations we owe our citizenry, and it must be treated as such. I also have come to believe that the Judiciary as an institution must take a strong and visible leadership role on this issue, because we cannot properly carry out our constitutional mission of providing equal justice under the law when millions of people are appearing in court without a lawyer to guide them through adversarial proceedings that involve the very necessities of life. As judges and lawyers, we are all witnesses to how the lack of civil legal aid can unbalance the scales of justice and prove devastating to the lives of our fellow citizens and their families. We cannot stand by passively and consider litigants faceless numbers on crowded court dockets, without regard to whether they are represented, without regard to whether they are able to protect their rights, and without regard to whether justice is really and truly being done. We cannot stand by when equal justice is so seriously at risk.

In New York, the thrust of our efforts has been to develop a systemic approach to this critical problem. I am convinced that without the infrastructure – the plumbing, if you will – to ensure stable, consistent ongoing funding for civil legal services, now and for the future, legal services providers will, in large numbers, literally have to shut their doors. To systemically achieve what needed to be accomplished in New York, I began, on Law Day 2010, by forming the Task Force to Expand Access to Civil Legal Services in New York, chaired by former president of the Federal Legal Services Corporation, Helaine Barnett . . .

What we learned from last year's hearings is that New York is at best meeting only 20% of the civil legal services needs of its low-income residents. The Task Force recommended – and I adopted the recommendation – that the Judiciary include \$25 million for civil legal services in its budget for the 2011-12 fiscal year as part of a four-year phased-in effort to increase annual funding by \$100 million dollars. In New York, treating funding for civil legal services, including legal assistance that helps keep cases out of court, as part and parcel of the Judiciary budget, makes total sense to me. The message it sends is simple – as far as the Judiciary is concerned, ensuring access to justice goes to the very heart of our constitutional mission. Just as important as keeping our courthouse doors open is the substance of what is actually happening behind

those doors. Justice, to be meaningful, must be accessible to all, both poor and rich. If we don't have that, we might as well shut the courthouse doors. Increasing court funding, without ensuring access to justice, would be a hollow victory. State courts in New York and elsewhere must have the resources they need, not just as an end in itself, but to support their constitutional and ethical role as the protector of the legal rights of all Americans, regardless of means.

Despite the deep cuts imposed on the Judiciary, our final budget approved by the Governor and the Legislature included \$12.5 million new funding for civil legal services, which was distributed to 56 non-profit, legal services organizations, and a \$15 million appropriation to the Judiciary to rescue IOLA, with the end result being \$27.5 million dollars of State funding for civil legal services under the umbrella of the Judiciary's budget. This is an accomplishment that the legal community in New York is proud of, particularly given the economic tsunami that we in New York and around the country recognize as today's reality.

To me, most importantly, we established a vital precedent and template for our State, and possibly elsewhere, by implementing a systemic annual process to fund civil legal services through State monies that are an integral part of the Judiciary's overall budget. At the legislature's request we hold hearings to assess the gap in civil legal representation for the poor; we recommend the amounts needed by the Judiciary to close or at least narrow that gap; and the Legislature and the Governor act on our request. And that is the process we have again undertaken this year, already holding hearings in New York City, White Plains, Albany and Buffalo.

It is my firm belief that reliance on revenue streams like IOLA or court fees that fluctuate with the economy, while sometimes necessary and justifiable on a pragmatic level, is not in the end the answer. Access to justice cannot be a pay-as-you-go enterprise, dependent on funding that is unstable by nature and that, while intended to make the justice system more available with one hand, often erects new obstacles to access, like higher filing fees, with the other.

Civil legal assistance for poor and vulnerable litigants should come out of state general fund monies – it is a basic responsibility of state government, every bit as important as other fundamental priorities of a civilized society. We don't say that we're eliminating public schools or hospitals or courts this year to serve our children or treat our sick or deliver justice because the economy is bad, just as we cannot say that we won't fund civil legal services for the indigent because it is too difficult to afford. Access to justice is not a luxury, affordable only in good times – it is a bedrock principle in a society based on the rule of law and transcends the vagaries of our economy.

Beyond the compelling legal and moral justifications, assuring civil legal assistance for the poor and the working poor makes sense on so many other levels. What too many people fail to recognize is that expanding civil legal representation at public expense actually pays for itself many times over. At last year's and this year's hearings, business leaders, bankers, property owners, health care providers, and government and community leaders testified that increasing access to legal assistance benefits their institutional performance and financial bottom lines.

We heard, again and again, that civil legal services save our State and local governments

hundreds of millions of dollars a year by enabling people to pay their bills, preventing unwarranted evictions and homelessness, avoiding foster care placements and other social services costs, and bringing federal funds into the State. We developed a public record that justified the funding of civil legal services as making good economic sense for our State. Our Task Force concluded that New York receives a total return of close to five dollars for every dollar spent to support civil legal assistance for the poor.

What we are doing is focusing, first and foremost, on providing counsel for those people who come to our courthouses seeking the “essentials of life” – a roof over their heads, family stability, personal safety free from domestic violence, access to health care and education, or subsistence income and benefits – as well as legal assistance that can help resolve these issues without even having to come to court.

That is the best way we can make immediate and meaningful progress to help the most vulnerable among the poor and working poor. Money for civil legal services is surely the major part of the equation – but we also critically need a comprehensive, multi-faceted approach that involves the entire legal community working together to foster more self-help programs for the unrepresented, and more pro bono programs from law schools, bar associations, law firms, and the courts, such as the court system’s Attorney Emeritus program which targets an underutilized pro bono resource – retired and senior lawyers, including the baby boomers who are nearing retirement age and want to continue having a meaningful role in the legal world. We are all responsible for doing the hard and necessary groundwork, to make sure that equal justice is a reality and not just an ideal.

Litigants in civil proceedings should receive representation in keeping with the ethos of the Supreme Court’s decision almost 50 years ago in the landmark case of *Gideon v. Wainwright* – a case that was not just about the constitutional right to counsel for criminal defendants but a clarion call to recognize our societal obligation to give legal assistance to human beings facing life-transforming crises in our courts. Clarence Earl Gideon’s trumpet, forever memorialized in Tony Lewis’s Pulitzer Prize winning book, sounds for all those whose basic human needs are at stake in a legal system that must be meaningful for each and every one of us, whether in criminal or civil cases, and regardless of means. Make no mistake, the issues at stake in civil cases involving the necessities of life can be every bit as critical to one’s existence and well being as the very loss of liberty itself.

And I am not suggesting that each and every person with a legal problem should have legal representation at the public’s expense. There is no way our government could possibly provide a lawyer to every poor person in every civil matter. Instead, we need a measured, common-sense approach that recognizes our obligations to the less fortunate among us, while at the same time prioritizing our resources, particularly in light of today’s fiscal realities.

We are seeing more and more experiments on the ground with new ideas and approaches designed to increase funding for counsel in civil matters, to increase lawyer volunteerism, and to otherwise expand the availability of counsel in civil cases involving the necessities of life. It is being manifested today in pilot projects in California, Philadelphia, Boston, and elsewhere across the country, and in the template that I have talked about tonight that we have developed in New

York for the systemic public funding of civil legal services. The growing momentum is supported by the endorsement of influential national organizations like the Conference of Chief Judges and the American Bar Association, which adopted resolutions in support of, respectively, leadership by chief judges in expanding funding for civil legal assistance and the establishment of government-provided legal counsel as a matter of right at public expense to low-income persons where basic human needs are at stake.

We are incrementally creating a climate that may one day enable courts of law to affirm what the court of public opinion will have already recognized – that equal justice and fundamental fairness requires public funding of legal counsel in civil matters involving basic human needs. Each time a state or local legislature or a bar association or law school expands the availability of counsel in its own domain, we come one step closer to this goal. Each time another Task Force or study shows the positive benefits to litigants and society of providing counsel, and each year that we obtain significant funding in the Judiciary budget for civil legal services in New York, we come one step closer to making the scales of justice evenly balanced for all.

Without question, all of these efforts are part of a larger ongoing process to foster a societal understanding that fundamental fairness is not possible in our courts unless there are lawyers to help people with civil matters implicating fundamental human needs. At the hearings we have conducted in New York, we have heard from the poor, the working poor, educated and uneducated alike, immigrants, members of a wide range of racial and ethnic groups, young mothers, and the elderly about how free civil legal services salvaged their lives and prevented them from falling off the societal cliff and through the cracks of the safety net, allowing them and their families to be contributing members of society and their local communities.

The public hearings also allowed us to assemble a diverse coalition representing a consensus in support of public funding of civil counsel. It sends a powerful message when such a broad and diverse group manages to join together across very different political and ideological perspectives to speak out in support of civil legal services for the poor.

We must combine the human stories with the empirical data that can inform policymakers and provide a strong factual basis for change. It is absolutely critical that we quantify through statistically reliable studies the cost savings to our government and society derived from the provision of counsel. We can and must create a record that justifies the public funding of civil legal services as a good investment that makes economic sense for our country and states. The alleged unaffordability of public funding of civil legal services has long proven to be one of the most insurmountable obstacles in this area. It is a fallacy. We cannot afford not to fund civil legal services for the well being and stability of our society and our institutions, for the ethical underpinnings of our democratic way of life, for the financial bottom line of our State and local governments, and for our constitutional and professional duty to foster equal justice for all – which is for us, as judges and lawyers, our very reason for being.

All of us – not only judges, lawyers and law professors, but also law-makers and people who care about equal justice in this State and country – can change the dialogue and ultimately the legal landscape of America when it comes to civil legal representation.

The rule of law, which is the bedrock of our profession and our society, loses its meaning when the protection of our laws is available only to those who can afford it. Any civilized society, going back to biblical times, is judged by how it treats its most vulnerable citizens. And the admonition of the Old Testament – justice, justice shall you pursue for rich and poor, high and low alike – is just as relevant today as it was thousands of years ago. The pursuit of justice is what our noble profession is all about, and pursuing justice is what we must do if we are to maintain the ethical core and the very legitimacy of our system of justice.

Franco-Gonzales v. Holder
Central District of California
767 F. Supp. 2d 1034 (C.D. Cal. 2010)

Dolly M. Gee, District Judge.

This matter is before the Court on the Motion for a Preliminary Injunction filed by Plaintiffs Aleksandr Petrovich Khukhryanskiy and Ever Francisco Martinez–Rivas (“Plaintiffs”). The Court conducted a hearing on December 8, 2010 (the “December 8 Hearing”). Having duly considered the parties’ respective positions, as presented in their briefs and at oral argument, the Court now renders its decision. For the reasons set forth below, Plaintiffs’ Motion is GRANTED in part. . . .

Plaintiff Khukhryanskiy is a 45–year–old native and citizen of Ukraine who was admitted to the United States as a refugee on January 9, 1998. According to Defendants, Khukhryanskiy failed to adjust his status to that of a legal permanent resident, a step that he was required to take as early as January 9, 1999, pursuant to 8 U.S.C. § 1159(a)(1)(C).

On April 15, 2010, Khukhryanskiy was taken into custody by Department of Homeland Security (“DHS”). He was referred to Immigration and Customs Enforcement (“ICE”) from the United States Citizenship and Immigration Services (“USCIS”) after submitting his application for refugee adjustment of status pursuant to 8 U.S.C. § 1159. DHS initiated removal proceedings against him, charging him as deportable for having been convicted of an aggravated felony on the basis of his 2005 conviction for attempted assault and robbery. He is currently detained at the Northwest Detention Center in Tacoma, Washington.

Khukhryanskiy has been diagnosed with paranoid schizophrenia and psychosis (not otherwise specified), post-traumatic stress disorder, and major depression. He has been receiving mental health treatment after being involuntarily placed at Adventist Mental Health Services in 2004 through a mental health commitment hearing. . . .

At a hearing on May 25, 2010, Khukhryanskiy stated to the Immigration Judge: “I have to say that I have to be back—to go urgently to the hospital. I have some problems with my head.” In response, the Immigration Judge stated: “All right, sir. There is a public health clinic here at the facility and you can see them on a daily basis, sir. Let the officer know you need to go to the clinic for any reason.”

On August 25, 2010, the Immigration Judge held a master calendar hearing (the “August 25 Hearing”). At that hearing, Khukhryanskiy stated, “I just want to leave this country.” Defendants also highlight the following exchange:

Judge to Respondent: ... Sir, are you afraid to return to the Ukraine?

Respondent to Judge: No.

Judge to Respondent: Would you like to choose the Ukraine as the country of deportation?

Respondent to Judge: Yes, I want to be deported to the Ukraine.

Judge to Respondent: Okay. All right, then I will enter an Order of Removal. You do not wish to apply for any relief from removal? You just want to go home?

Respondent to Judge: Yes.

On that basis, the Immigration Judge ordered Khukhryanskiy removed from the United States to Ukraine. The Order of the Immigration Judge indicates that Khukhryanskiy waived his right to appeal, even though no such waiver is explicit in the record.

During that same August 25 Hearing, Khukhryanskiy stated that he did not understand the proceedings:

Judge to Respondent: Okay. But before I do that, sir, we’ve got to go through some other things first. Do you understand what’s happening today?

Respondent to Judge: Yes. But I don't understand anything now. . . .

Plaintiffs maintain that they are likely to succeed on the merits of their claims because: (1) the Due Process Clause requires (a) the appointment of counsel for unrepresented non-citizens whose serious mental disabilities render them incompetent to represent themselves and (b) the provision of a custody hearing in light of Plaintiffs’ prolonged detention; (2) Plaintiffs’ liberty interests at stake entitle them to appointed counsel; and (3) Section 504 of the Rehabilitation Act requires (a) the appointment of counsel as an accommodation for non-citizens who are not competent to represent themselves and (b) a custody hearing in light of Plaintiffs’ prolonged detention.

The Court discusses Plaintiffs’ claims for appointment of counsel and for a custody hearing in turn. As explained below, the Court finds that Plaintiffs have demonstrated that they are likely to succeed on the merits of their claims. . . .

a. *Plaintiffs State a Prima Facie Case for Violation of the Rehabilitation Act*

Section 504 provides that no “qualified individual with a disability” be “excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency.” 29 U.S.C. § 794(a). . . .

To state a *prima facie* case under Section 504, Plaintiffs must demonstrate that: (1) they are qualified individuals with a disability, as defined under the Americans with Disabilities Act (“ADA”), (2) they are otherwise qualified for the benefit or services sought; (3) that they were denied the benefit or services solely by reason of their handicap; and (4) the program providing

the benefit or services receives federal financial assistance. *Lovell v. Chandler*, 303 F.3d 1039, 1052 (9th Cir.2002). A “disability” is defined as:

- (A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual,
- (B) a record of such an impairment, or
- (C) being regarded as having such an impairment.

42 U.S.C. § 12102(1). . . .

b. Existing Safeguards Are Inadequate And Do Not Satisfy The Requirements Of The Rehabilitation Act

Although the INA provides aliens with the “privilege” of representation, such representation is not provided at the Government's expense. *See* 8 U.S.C. § 1229a(b)(4)(B), 8 U.S.C. § 1362. Nevertheless, 8 U.S.C. § 1229a(b)(3) requires the Attorney General to provide certain “safeguards” to protect the rights of mentally incompetent aliens:

If it is impracticable by reason of an alien’s mental incompetency for the alien to be present at the proceeding, the Attorney General shall prescribe *safeguards* to protect the rights and privileges of the alien.

8 U.S.C. § 1229a(b)(3) (emphasis added). Among such existing “safeguards” are that (1) Immigration Judges are prohibited from accepting admissions of removability from unassisted mentally ill aliens, *see* 8 C.F.R. § 1240.10(c) and (2) the Government is required to serve the NTA on a mentally incompetent alien’s representative, *see* 8 C.F.R. § 103.5a(c)(2)(ii). In addition, pursuant to 8 C.F.R. § 1240.4, a *representative* or *guardian* is permitted to appear on behalf of the alien in removal proceedings:

When it is impracticable for the respondent to be present at the hearing because of mental incompetency, the attorney, legal representative, legal guardian, near relative, or friend who was served with a copy of the notice to appear *shall be permitted to appear* on behalf of the respondent. *If such a person cannot reasonably be found or fails or refuses to appear, the custodian of the respondent shall be requested to appear on behalf of the respondent.* 8 C.F.R. § 1240.4 (emphasis added).

The parties appear to agree that neither Plaintiff received the appropriate existing “safeguards,” as required by 8 U.S.C. § 1229a(b)(3). In both cases, service of the NTA was defective because it was not served on either Plaintiff's representative and, as a result, neither Plaintiff was accompanied by a representative, as contemplated by 8 C.F.R. § 1240.4. Thus, Plaintiffs were not provided with even the most minimal of existing safeguards under section 1240.4, let alone more robust accommodations required under the Rehabilitation Act.

Where the parties diverge is on what must be done at this juncture. According to Plaintiffs, none of the regulatory “safeguards,” discussed *supra* and cited to by Defendants, even if properly implemented, would assist Plaintiffs in their appeals before the BIA absent the appointment of

counsel. Defendants contend that the BIA should first be allowed to determine what procedural rights are necessary for mentally incompetent aliens.

c. Plaintiffs' Individual Circumstances Warrant A Reasonable Accommodation

The unique circumstances of Plaintiffs' case present a matter of first impression to the Court. The Court must take into account Plaintiffs' individual characteristics and the procedural posture of their cases pending before the BIA in order to assess the reasonableness of the accommodation requested. *See Mark H.*, 620 F.3d at 1098 (a determination of what is “reasonable” depends on an individualized inquiry and requires a “fact-specific, individualized analysis of the disabled individual’s circumstances and the accommodations that might allow meaningful access to the program”). . . .

In light of the foregoing:

(1) The Court GRANTS Plaintiffs' Motion for a Preliminary Injunction as follows:

- (a) Pending a trial on the merits, Defendants, and their officers, agents, servants, employees and attorneys, and all those who are in active concert or participation with them, are hereby enjoined from pursuing further immigration proceedings against Plaintiffs until such time as (i) Plaintiffs are afforded a Qualified Representative(s) who is willing and able to represent Plaintiffs during all phases of their immigration proceedings, including appeals and/or custody hearings, whether *pro bono* or at Defendants’ expense, and (ii) after the implementation of a briefing schedule to be mutually agreed upon by the parties in the underlying BIA proceedings;
- (b) Pending a trial on the merits, Defendants, and their officers, agents, servants, employees and attorneys, and all those who are in active concert or participation with them, are hereby enjoined from detaining Plaintiffs Martinez and Khukhryanskiy under 8 U.S.C. § 1226(c) unless, within 30 days of this Order, they provide both Plaintiffs with a bond hearing before an Immigration Judge with the authority to order their release on conditions of supervision, unless the Government shows that Plaintiffs’ ongoing detention is justified. . . .

Benjamin H. Barton & Stephanos Bibas

Triaging Appointed-Counsel Funding and Pro-Se Access to Justice

U. Penn. Research Paper No. 11-36, SSRN 1919534 (2011)

. . . III. Two and a Half Cheers for *Turner*

Turner got it right, as this Part argues. First, by refusing to constitutionalize a new civil *Gideon* right, the Court avoided imposing a one-size-fits-all rule on a variety of states and lawsuits. Second, by endorsing much less intrusive alternatives, the Court steered future developments toward more sustainable pro se court reform. And third, by taking into account the complexity of the issue and the interests of pro se mothers on the other side, the Court accommodated the role of resource constraints and tradeoffs. While the Court could have been more explicit about the

need to triage limited resources, its ruling reinforces a sound policy of husbanding scarce funds instead of spreading them too thin.

A. The Wisdom of Not Recognizing a Procrustean Right

First, neither *Turner* nor *Lassiter* held that counsel may never be appointed in any particularly complicated or contested civil case. To the contrary, both cases asked whether the Due Process Clause “automatically” requires appointment of counsel in every termination of parental rights or every civil contempt/child support case. An indigent litigant can still request appointed counsel, and the judge must weigh, case by case, whether fundamental fairness requires appointing a lawyer in that case.

Thus, the question is not whether finding an unrepresented person in civil contempt is sometimes fundamentally unfair, but whether it is always or very often unfair. Here, the answer is no: the opposing party is often unrepresented and the issue is simple, so lawyers are not essential across the board.

Second, the Court finally acknowledged that lawyers can make proceedings less fair, not more. The Court’s Sixth Amendment cases have regularly praised counsel as indispensable for procedural fairness. *Powell* waxed eloquent about how “[t]he right to be heard” would be hollow without “the guiding hand of counsel” “skill[ed] in the science of law.” *Gideon* likewise viewed it as “an obvious truth” that lawyers uphold the “noble ideal” of “fair trials before impartial tribunals.” And when, in *Miranda*, the Court sought to protect the right to remain silent, it mandated warning suspects that they have the right to an attorney.

In doing so, the Court praised counsel’s importance in protecting the accused while promoting the administration of justice.

In short, the Court has long equated more lawyers with more justice. That faith is finally waning. In other recent cases, the Court has rejected lawyers’ claims that the lawyer-client relationship or the duty of zealous advocacy requires special or broader protections. *Turner*’s turn away from blind faith in lawyers is part of this landmark development.

B. More Sustainable Pro Se Court Reform

All over the country, state and local courts have found themselves deluged by pro se litigants. The crush of *pro se* litigation has been one of the main arguments of civil-*Gideon* proponents. Yet this phenomenon has largely been below the Supreme Courts’ and academics’ radar. Outside of the civil-*Gideon* debate, a quiet revolution in lower-court procedures has begun. All over the country, judges, court administrators, legal-aid lawyers, and advocates for the poor have been working together on *pro se* court reform. These reforms aim to make court processes simpler, fairer, and more user-friendly.

Examples of organized pro se court reform abound. In judges interested in making their courts more pro se friendly. The AJS has also published a set of core materials that gathers national best practices. The National Center for State Courts has published *The Self-Help Friendly Court: Designed from the Ground Up to Work for People Without Lawyers* and research projects gathering a number of innovative court processes.

The national adoption of court appointed special advocate (CASA) programs for custody matters serves as a model. These non-lawyers assist courts and pro se litigants for a fraction of the cost of lawyers. Turner echoes these programs by mentioning the possibility of having social workers assist in child support disputes.

Individual forward-thinking courts have established influential programs as well. For example, the Eastern District of New York has created a special magistrate court for *pro se* matters. San Antonio and other cities have established specialized *pro se* courts based partly on the suggestions listed above.

The programs listed above are the tip of the iceberg, as they are only the government-supported *pro se* efforts. There are also plenty of for-profit *pro se* websites like legalzoom.com and rocketlawyer.com. If one includes these, the opportunities for innovative, inexpensive, and effective pro se representation are growing exponentially.

This leads us to the second big surprise in *Turner*: the Court's recognition of, and protections for, pro se litigants. Properly understood, Turner offers courts and poverty advocates a once-in-a-generation opportunity: the chance to abandon a focus on 1963 solutions to 1963 court processes. Not every court dispute needs to be lawyered. Nor can the litigants or society pay for lawyers for each dispute. Rather than looking backward to *Gideon*, *Turner* invites forward-looking, flexible *pro se* alternatives.

The danger is that Turner's suggestions will ossify. Turner itself lays out rather minimal safeguards: notice, a form, an opportunity to respond at a hearing, and a clear finding. But it is quite explicit that these are not "the only possible alternatives" and that other assistance (like a neutral social worker) might also be helpful. Nevertheless, the Supreme Court's suggestions often become not only a constitutional floor but also, in practice, a ceiling. Instead of falling into this pitfall and abandoning their experimentation, lower courts should take Turner as a spur to further innovation.

Judges and court clerks need to understand that they cannot address pro se-heavy dockets by trying to recreate the traditional, lawyer-dependent adversarial system without lawyers. Instead, all court personnel must adopt a more managerial posture. Civil-law courts may be an excellent model for study and imitation.

Courts should also look carefully at the sufficiency of existing pro se practices. Sometimes, hearings do not even include explicit findings of fact. Though the Supreme Court has started the ball rolling, legislatures, academics, court administrators, public interest groups, and others must take up the baton. . . .

Conclusion

Turner arrives at a particularly interesting time for the judiciary and the legal profession. While computing technology has transformed most other areas of life, court-based dispute resolution has remained remarkably impervious to change. Courts across the country must adapt an adversary system designed for lawyers to the reality of mass *pro se* representation.

If *pro se* reform is to go beyond the bare minimum, all of the stakeholders must work together. Judges, court administrators and clerks must accelerate their efforts to adapt to the *pro se* flood. Judges need to recognize that in many *pro se* cases a more aggressive and inquisitorial approach is appropriate. Court clerks need to abandon their refusal to answer questions or assist *pro se* litigants for fear of the unauthorized practice of law.

Bar associations and judges will likewise need to rethink their strict enforcement of unauthorized-practice-of-law rules. Throughout the economy, routine and mechanical tasks are being outsourced or handled by computers. Lawyers can try in vain to stem that tide by prosecuting unauthorized practice of law, or they can abandon the cookie-cutter cases and focus on those that need individualized legal judgment. Where the law is simple and disputes are factual, paralegals, investigators, and social workers can help to investigate facts, marshal evidence, and prepare clients to tell their own stories.

The real danger to the legal profession has always been that *pro se* court reform will spread upwards from the poor to the middle class and beyond. Certainly, paid divorce lawyers have no incentive to support straightforward, cheap and fast *pro se* divorces for the poor. But what is bad for lawyers' self-interest may be good for citizens and the economy as a whole, by reducing the deadweight burden of legal fees.

Technology may make these disputes moot sooner rather than later. In the meantime, Turner was right to recognize that more lawyers do not always equal more justice and that fair *pro se* procedures can work better for everyone. Other actors must now translate *pro se* court reform from Turner's sketch into a viable *pro se* system.

Gillian K. Hadfield

Higher Demand, Lower Supply? A Comparative Assessment of the Legal Resource Landscape for Ordinary Americans

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. . . . In this section, I review some indicators – incomplete at best – of the overall extent to which the U.S. devotes resources at a macro level to the delivery of legality, both in absolute terms and in comparison to other countries. By focusing on the macro perspective, I hope to move the emphasis away from the provision of legal support to the poor in ex post crisis and towards the systemic everyday use of law in fact by ordinary citizens throughout the income spectrum.

In 2005, legal services provided by private practitioners generated \$180.9 billion in gross domestic product in the United States; total receipts for law firms totaled \$221.6 billion. Neither figure counts legal services provided within corporations, government, legal aid providers, or other private associations, which account for 18% of all lawyers. If we “gross up” these numbers to value the contributions of lawyers in these other settings, the total size of the legal services sector in the United States is thus roughly \$226 billion in GDP terms and \$277 billion in expenditures on legal services.

Of the roughly \$277 billion spent on legal services, approximately 31% is consumed by individuals as part of personal consumption expenditures (\$85.6 billion in 2005). Another 1% (\$2.8 billion) can be attributed to services provided by legal aid lawyers and public defenders. Some share, but it is not possible to easily say how much of the expenditure on government lawyers other than legal aid and public defenders may be attributable to providing services to individual Americans; in some sense, one could classify all of those expenditures (approximately \$22 billion or 8%) as being on behalf of ordinary citizens. This suggests that at most 40% of legal services are serving the needs of individual citizens as opposed to corporations and businesses. . . .

In 1990, total expenditures by households on legal services were \$62.2 billion in 2000 dollars. At that time, the average hourly rate for lawyers in small firms (less than 20 lawyers, where we find most of the lawyers providing services to individuals) was roughly (very roughly!) \$157 in 2000 dollars. Based on the total U.S. population for that year, this implies an average of 1.6 hours per person for the year or 4.15 hours per average household. Conducting the same calculation for 2005 (total expenditures of \$67.4 billion in 2000 dollars, an average hourly rate of \$182 for small-firm lawyers) yields an average of 1.3 hours per person or 3.34 hours per household, a decline of 20%. As a rough calculation, using the ABA 1994 Legal Needs estimates of numbers of problems per household in a given year (1.0) and a straight average of the number of problems per household reported by the state surveys (2.0) for 2005 this suggests that in 1990 American households were able on average to draw on approximately 4 hours of legal time to address a legal problem and in 2005 they were able to draw on 1 hour and 40 minutes of legal time to address a problem.

These are startlingly low numbers, and they reflect only the corner of the legal landscape that involves a crisis such as a dispute over employment, a foreclosure, a denial of health care, or the risk of injury to or a diminished relationship with a child. They exclude the demand for legal assistance before problems arise, such as legal advice in assessing a complex mortgage offer, employment options, insurance coverage, or the potential for conduct to influence custody of a child. Suppose that for every dispute-related need there is an *ex ante* advice-related need (as appears to be the case for large corporations), meaning that there are twice as many legal needs as those measured by studies asking only about dispute-related needs. This would then imply that the average household is able to draw on less than an hour's worth of legal advice or assistance in dealing with the points at which their everyday lives intersect with the legal system.

How does this compare with the availability of legal resources for those who live in ostensibly less law-thick environments around the globe? I do not have comparable data on personal expenditures on legal services and average hourly rates in other countries with which to do similar calculations. But we do have recently released comparative data on expenditures in the legal system as a whole for a large set of European countries and it is to these data that I turn for (again, rough) estimates of the availability of legal resources in the economy as a whole for ordinary citizens to address their relationships with and through the legal system.

Table 3 provides data for the U.S. and a selection of European countries showing the following: total population; total public expenditure on courts, public prosecution and legal aid; total numbers of criminal and civil cases; and total numbers of judges and lawyers. These data should

be read carefully, keeping in mind the potential for differences in the categories of what is counted and how data requests in the European survey were interpreted. United States criminal cases include serious crimes and misdemeanors but exclude the fifty-five million traffic cases that also appear in state courts; the European data cover both serious crimes and misdemeanors but purport to exclude administrative offenses and those processed by the police such as minor traffic offenses. Civil cases include all non-criminal filings in the U.S. state and federal courts but exclude filings before administrative agencies that are not appealed to a court.

Table 3. Total Resources And Cases

Country	Population	Public Expenditure on Courts, Prosecutors & Legal Aid (\$B)	Legal Aid (\$M)	Criminal Cases (M)	Civil Cases (M)	Judges	Lawyers
U.S.	300,000,000	47.0	3,857*	20.8	24	30,000	1,162,124
France	63,195,000	4.59	409	1.1	1.7	7,532	47,765
Germany	82,351,000	11.76	753	1.2	1.1	20,138	138,104
Hungary	10,006,600	0.54	0.27	0.3	0.2	2,838	9,850
Netherlands	16,334,210	2.16	466	0.4	1	2,072	14,955
Poland	38,125,479	2.03	30	2.1	1	9,853	25,972
U.K. (England & Wales)	53,728,000	7.16	4,081	1.1	2.1	3,774	143,381

Sources: European Judicial Systems (2008, 2006 data); U.S. Census Bureau; National Center for State Courts 2005 State Court Statistics; Federal Judicial Center Annual Report of the Director: Judicial Business of the United States Courts (2007); American Bar Foundation Lawyer Demographics (2008); Bureau of Justice Statistics: National Survey of Indigent Defense Systems (1999) (scaled up using population share from data for 100 most populous counties); Bureau of Justice Statistics: Annual Government Finance Survey (2005); Alan W. Houseman “The Future of Civil Legal Aid: A National Perspective” 10 UDC/DCSL L. Rev. 35 (2007) (estimate includes public and private charitable sources).

* Includes private charitable expenditure on civil legal aid.

The European case counts include litigious and non-litigious cases but exclude enforcement, land, and business registry cases and, for those countries with separate administrative law courts, administrative law cases. The count of judges for the U.S. includes all full-time federal and state judicial officers including magistrates, but does not include judicial officers sitting pro tem (temporary judges) or administrative law judges in state or federal governments. The European data includes full-time professional judges and excludes part-time professional judges and lay-judges. The count of lawyers includes both advocates and legal advisors who are members of a bar. This is a particularly difficult number to compare. While the count of lawyers who belong to a bar association in the U.S. is a very good measure of the availability of legal advice and representation – as only these people can provide these services – in most other countries bar membership is not co-extensive with an authorization to provide services. In the U.K., for

example, anyone may provide legal advice, although only bar members (barristers and solicitors) are counted here. In many European countries lawyers who are employed by a company, government, or organization need not – and in some cases may not – be a member of the bar and thus are not counted. In addition, in several of these settings also, while representation in courts is restricted to bar members, legal advice may not be. With these caveats in mind, Table 4 calculates the availability of legal resources per person and per case in the system.

Country	Public Expenditure Per Capita	Public Expenditure Per Case	Legal Aid Per Capita	Legal Aid Per Case	Judges Per 100,000 Persons	Judges Per 100,000 Cases	Lawyers Per 100,000 Persons	Lawyers Per 100,000 Cases
U.S.	\$157	\$1,049	\$13	\$86	10	67	387	2594
France	\$73	\$1,665	\$6	\$148	12	273	76	1731
Germany	\$143	\$5,031	\$9	\$322	24	862	168	5909
Hungary	\$54	\$1,048	\$0	\$0	28	550	98	1909
Netherlands	\$132	\$1,507	\$29	\$325	13	144	92	1042
Poland	\$53	\$645	\$0	\$9	26	313	68	826
U.K. (England & Wales)	\$133	\$2,270	\$76	\$1,294	7	120	267	4545

Table 4. Comparative Resources Per Person And Per Case³

Table 4 suggests a stark picture of how few resources the U.S. economy as a whole may devote to delivering to the legal system. U.S. public expenditure per capita on courts, judges, prosecutors, and legal aid is the highest among this set of both advanced and transitioning European countries. U.S. public expenditure per case, however, is significantly lower than in other advanced democracies, when accounting for the apparently vastly higher numbers of cases in those countries (less than half compared to the U.K. and barely one-fifth of the expenditure in Germany) and comparable or higher than that spent in emerging market democracies that are still seeking to build the rule of law in their countries. American legal aid per capita is lower than in the Netherlands and the U.K. and higher than in other advanced and emerging democracies; but legal aid per case is well below that expended in other advanced democracies, exceeding only the low levels available in Hungary and Poland. Legally-trained personnel also appear much less available in the U.S. when we take into account the number of cases in the U.S. The number of American judges per capita is significantly lower than in Germany, Poland, and Hungary, comparable to the levels in France and the Netherlands and higher than in the U.K.

But again the intensity of legal demand in the U.S., as measured by number of cases, reveals that per case there are far fewer judges available than in any of these European countries: half as many as in the U.K. and the Netherlands, roughly a quarter of those available in France and less than one-tenth of those in Germany and Hungary. Lawyers do not clearly make up the

³ All calculations were conducted from data noted in Table 3.

difference: while there are more lawyers per capita in the U.S. than in this set of comparison countries, again the numbers per case reveal that Germany and the U.K., with more than twice the number of judges per case, also have more than twice as many lawyers per case. In Table 4, the U.S. numbers per case appear to be higher than in France, Hungary, the Netherlands, and Poland—but recall that in those countries bar members do not have the complete monopoly on provision of legal services that they do in the U.S. and so the European numbers are (perhaps significantly) understated. Moreover, given that the ultimate goal is making legal services available to individuals as opposed to business, the relatively large corporate sector in the U.S. also suggests that the U.S. figure is an overstatement.

Not all the lawyers in these counts, of course, are delivering litigation-related services such as those that would be demanded by individuals (and businesses—the data here do not separate out client types) in court cases. But we can interpret the number of cases in the courts as an indicator of the level of overall demand in the economy for legal inputs in the planning and management of social and economic relationships. There is no clear or singular interpretation of the substantially higher number of cases per capita in the U.S.: this could be because of more law, greater willingness to use courts as opposed to alternative means for dispute resolution, and/or higher levels of unmet needs for ex ante legal advice, planning and dispute resolution assistance. But this is precisely what makes the strikingly low levels of legal resources so salient: U.S. socio-economic life is, as Robert Kagan has emphasized, substantially more reliant on law and legal management of relationships, and yet the U.S. devotes far fewer resources to providing the legal services needed to translate law on the books into law on the ground.

The data in Table 4 thus reinforce what we learned from a comparative look at the legal needs surveys. Interestingly, although poor Americans do not report significantly higher rates of legal problems than average income citizens in other countries, they do report much lower use of legal assistance in resolving their problems—and much higher rates of simply giving up and assuming nothing can be done. Table 4 suggests the macro context in which these differences emerge. Americans face a legal world that is thick with legal structure but thin on legal resources.

Conclusion

The evidence presented above is suggestive only. This is not a careful study that controls for the nature of legal problems, the opportunity for problems to be resolved in less litigious ways, and the resources necessary to achieve that goal. The thinness of the available data simply does not allow for such careful comparison, although the existing data clearly suggest the need for such a study to be conducted. The results, however, as rough and ready as they are, nonetheless present a serious challenge to the American courts which have, for the last 100 years, claimed exclusive authority to regulate the entire legal system in the U.S. The profession's assertion of regulatory authority has arguably blocked the capacity for federal or state regulatory or policy responses to the crises in U.S. legal systems.

What accounts for the significantly lower level of legal resources—public expenditure, legal aid, judges, and (for Germany and the U.K.) lawyers—available at the macro level in the U.S. as compared to other advanced market democracies? For the roughly 60% decline over the past fifteen years in the total effective number of hours of legal services per household per problem?

For the apparent 50% drop in the use of legal services by the poor in addressing their problems in the decade since the 1995 A.B.A. study? The lack of systematic data makes causal analysis difficult and speculative. Clearly we need substantially more attention to detailed study of the nature of legal systems and how they shape and meet the demand for legal services. In this concluding section I offer some preliminary thoughts on how those studies should be framed.

The access problems in the U.S. legal system are largely conceptualized by the profession as problems of the ethical commitments of individual lawyers to assist the poor and the failure of federal and state bodies to provide adequate levels of funding to legal aid agencies and the courts. The first conceptualization fails, I believe, to come to grips with the dimensions of the problem, which cannot be solved with an increase in pro bono efforts, as welcome as such an increase would be. Pro bono currently accounts for at most 1-2% of legal effort in the country; even if every lawyer in the country did 100 more hours a year of pro bono work, this would amount to an extra thirty minutes per U.S. person a year, or about an hour per dispute-related (potentially litigation-related) problem per household. This does not even begin to address the realistic demands that ordinary households have for ex ante assistance with navigating the law-thick world in which they live, some of which could indeed reduce the need for ex post legal representation in litigation and crisis. The problem is not a problem of the ethical commitment of lawyers to help the poor. Nor is an increase in public legal aid likely to make a substantial impact. The cost of even that extra hour per dispute-related problem per household would be on the order of \$20 billion annually at a market rate of \$200 per hour. That would entail a twenty-fold increase in current U.S. levels of public and private (charitable) legal aid funding. Again, more legal aid funding would be welcome and is clearly called for, but it cannot make a serious dent in the nature of the problem.

So what is the problem? The bits of data we can see in the comparative analyses are suggestive of an important role for the regulatory and policymaking structure governing legal markets in the U.S. The U.S. stands largely alone in the world in terms of the extraordinary extent to which the bar and judiciary wield exclusive authority for shaping the cost and market structure of legal goods and services. Some of this difference can be seen to come from the structure of the courts and legal profession as elements of the civil service bureaucracy in countries such as Germany and France; this locates policy and funding decisions squarely within a government agency. In addition, civil law systems emphasize a much broader role for the judge, as opposed to parties and their lawyers, in the conduct of litigation. This arguably accounts for the substantially higher allocation of resources to the court systems in Germany, with many more judges per case; it may also account for the higher number of lawyers “per case” given that legal fees in Germany are frequently governed by statute in cases involving ordinary individuals.

But the U.K. is a powerful counterexample to the hypothesis that we are seeing a difference between common law and civil code systems. The U.K. clearly devotes substantially more resources to the provision of legal services to ordinary citizens, measured in terms of public expenditure, legal aid or judges per “case,” even though the U.K. follows the common law practice of much greater reliance on the adversarial resources of parties to structure litigation. What explains this? Again, I believe it has to do with the central role for governments in overseeing and regulating the legal system. Although the U.K. does not have a civil service judiciary as in civil code regimes, it has until very recently had central responsibility located in a

single office, that of the Lord Chancellor who historically has been simultaneously the chief justice of the highest court (the House of Lords), a cabinet minister, and a member of Parliament. This merger of functions (recently disaggregated to separate out the judicial functions of chief justice from the executive and parliamentary functions of a minister of justice) created a single policy head capable of making decisions about civil procedure, the staffing and funding of courts, and the regulation of legal services providers. The longstanding commitment to robust legal aid arguably has sharpened the quality of policymaking in this integrated setting: because the government, ultimately led in this regard by someone who is both a judge and a politically accountable member of Parliament, pays the bills for legal aid, it has been both motivated to and capable of ensuring that ordinary citizens have wide access to a variety of sources of legal advice and assistance. And indeed the U.K., especially after significant reforms in 2007, has probably the most open access legal system in the world. A wide variety of non-lawyers can provide legal advice and some representational services; these can be offered through corporate entities with either private equity investment or publicly-traded shares and non-lawyer owners and managers. There are multiple legal professions with separate regulatory bodies, all of which are accountable to a super-regulatory body which must be composed of a majority of non-lawyers, which is appointed by the Minister of Justice (formerly Lord Chancellor).

When the data from the Netherlands, which has a comparably open system allowing many non-lawyer service providers, is viewed alongside that of the U.K., the importance of empirically investigating the hypothesis that the regulatory system accounts for the failure of the U.S. legal system to provide an adequate level of legal inputs for ordinary people becomes even more apparent. The striking difference in the rate at which people do nothing in response to legal difficulties between the U.S. (29% or higher) and the U.K. (3-5%) and the Netherlands (10%) is highly suggestive of the role that a robust system of legal inputs plays in making a legal system a real, rather than apparent, basis on which everyday lives are structured. A careful study of how different regulatory regimes influence not only the use of legal resources in resolving problems once they have erupted but also the use of these resources *ex ante* to decide what transactions and relationships to enter into, leave, modify, and so on is clearly called for by these results.

Those concerned with access to justice have long emphasized how the extreme approach to unauthorized practice of law in the United States drastically curtails the potential for ordinary folks to obtain assistance with their law-related needs and problems. Key contributions have been made in this regard by Deborah Rhode, David Luban, and Barlow Christensen. American lawyers often take for granted that it is natural that anyone who wishes to practice law must be an authorized member of a bar association and subject to the admissions, ethical, and disciplinary controls of the profession, including the judiciary. The regulatory problem, however, goes beyond a straightforward restriction on supply. The more fundamental problem with the existing regulatory structure is traceable to the fact that the American legal profession is a politically unaccountable regulator, which lacks the funding levers and policymaking apparatus needed for a sector that is a huge share of the American economy and one that plays an increasingly important role in a rapidly changing and decentralized economic system. Many critics of the bar's self-regulation have decried the tendency for the bar to put professional self-interest ahead of public interest. But this is what one would predict given that the bar is not a politically accountable policymaker. Even if the bar's narrow focus on ethical duties that govern attorney-client relationships were, as it likely often is, a well-intentioned execution of the norms that are

absorbed through the process of legal training, rather than craven self-interest, the fact remains that like any body it responds to its constituencies. The bar has by and large steered utterly clear of the idea that it is responsible—politically responsible—for the system-wide cost and complexity of the legal system, far beyond the ethical call to help the poor and perform pro bono work. It requires a political process to shift perceptions—much as perceptions about the federal government’s responsibility for high gas prices or stock market failures are molded not in the abstract but in the crucible of political contest and public debate. The public does not hear policy positions from the policymaker—the bar—and does not vote or otherwise express its views on how the policymaker is executing on policy.

Because the bar, together with the state judiciaries, asserts exclusive policy authority in this field but is not in fact a politically accountable policymaking body, there is effectively no mechanism for policy change. There is nowhere to address policy proposals and no process for influencing policy adoption. The process is a wholly closed shop; indeed, legal researchers who like myself are not members of any bar have nowhere to address policy recommendations and no avenues through which to put substantive policy options on the agenda. That this does not seem an extraordinary way for an advanced market democracy to make economic and social policy is itself a consequence of the framing that results from the bar’s assertion of authority. The bar bases its role on its expertise in the attorney-client relationship— and it styles its regulatory functions as the promulgation and enforcement of ethical standards. There are indeed ethical demands on lawyers and their professional bodies. But this defines out of the frame the fundamentally economic character of the market regulation the bar and judiciary control. The problem of access to justice, however, needs to be seen not as an ethical problem but as a market regulatory problem. Lawyers do not possess the expertise, the accountability, the tax-and-spend authority, or the policy making apparatus necessary to design and implement economic policy.

The problem we face in the American legal system is not a problem of how to increase pro bono or legal aid (although we should do that too), which are ultimately mere drops in the bucket on the order of a few percentage points of total legal effort and resources. Rather, the problem is one of urgent need for structural reform in the regulatory and policy/funding system responsible for the critical infrastructure of market democracy, particularly one that draws as heavily as the American system does on law and legalism to structure economic, political, and social relationships.

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

SECTION 2: The Existing Legal System in the United States

2.1 The Size of the Legal Services Industry

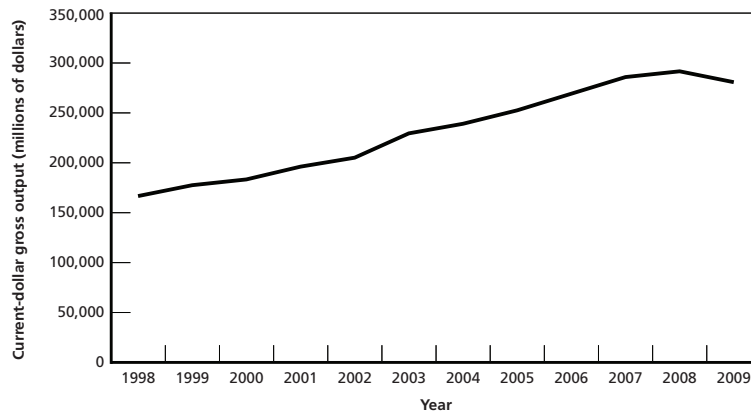
One way to understand the importance of legal services in the United States is simply to measure it as we might any other industry— in terms of the revenues it generates. While the practice of law takes place in a variety of forms and venues, the one that is most conducive to measurement in terms of revenues is lawyers in private practice. The U.S. Department of Commerce’s Bureau of Economic Analysis estimates that in 2009, the LSI generated \$281,687,000,000 in output (see Figure 2.1). This is substantially larger than accounting (\$151,352,000,000) and management consulting (\$158,904,000,000) (Bureau of Economic Analysis, undated-a).

To the extent that private practice excludes many of the other circumstances in which law is practiced in the United States, this figure of almost \$3 billion is a clear underestimate of the LSI’s contribution to economic activity.

Of course, gross revenues are not the same as profits—maybe law firms have very high costs. This is an important point in itself, but is especially so when considering innovation, because profits (rather than revenues) are conventionally a major source of funding for investment and innovation. In fact, the U.S. Census Bureau estimates that law firms earned gross profits of \$51 billion in 2003, which is a profit rate of 40 percent compared with revenues. Again, this outperforms many other professional services: profits of \$13 billion (32 percent profit rate) for certified public accountants and \$9 billion (12 percent profit rate) for management consultants (U.S. Census Bureau, 2005, pp. 82, 88).

The legal industry is a net contributor to the U.S.’s balance of trade (later in the paper, we discuss trends in the globalization of law). The Bureau of Economic Analysis estimates that U.S. law firms produced \$5 billion of invisible exports in 2006, while invisible imports of legal services were \$1 billion, yielding a positive net contribution of \$4 billion to the U.S. balance of trade (Bureau of Economic Analysis, undated-b).

Figure 2.1
Gross Revenues of Legal Services Industry, 1998–2009



SOURCE: Bureau of Economic Analysis, undated-a.
RAND OP354-2.1

2.2 Employment in the U.S. Legal Services Industry

A different way to gauge the significance of legal services in the United States is to look at the numbers employed in the industry. The number of lawyers practicing in the United States in 2007 has been estimated to be between 760,000 and 1,100,000 (the first figure is from the U.S. Department of Labor’s Bureau of Labor Statistics [BLS]; the second is from the ABA) (Harvard Law School Program on the Legal Profession, undated). The BLS data suggest roughly one lawyer per 300 people and one lawyer per 140 employed people in the United States. Table 2.1 provides comparable figures for other nations.

How does this break down across the various sectors that employ lawyers? Private lawyers are employed by some 180,000 law offices across the United States, though, as one would expect, the distribution of employment is skewed toward larger firms.

Table 2.2 shows the skewed distribution of employment toward larger firms (in the American Lawyer top 50 and the National Law Journal 250. Some 250 firms (out of approximately 180,000) account for 15 percent of lawyers. Working down the table, the split of government lawyers is roughly equal between federal, state, and local government. Lawyers in business include in-house counsel (i.e., those employed in commercial firms other than private law practices), with insurance being the most heavily populated (11,000), as might be expected given that many legal matters involve insurance claims. Investment banks, manufacturing, and commercial banks each employ about 4,000 lawyers. As with private practice, the spread of in-house counsel is uneven: The top 200 corporate law departments in U.S. companies employed around 27,700 lawyers in 2006, with both Citigroup and GE employing over 1,000 each (Harvard Law School Program on the Legal Profession, undated). The numbers in education include over 10,000 law teachers reported by the American Association of Law Schools (undated), while those for public interest organizations include lawyers involved in charities, social assistance organizations, etc. . . .

Table 2.1
Population per Attorney in Selected Countries

Nation	Number of Attorneys ^a	Population (in millions) ^b	Population per Attorney
U.S.	760,000–1,100,000	315	414–286
UK	155,323	62	399
Sweden	4,503	9	1,999
The Netherlands	14,882	17	1,142
France	47,765	62	1,298
Germany	146,910	82	558

^a Figures for European Union nations are from the Council of Bars and Law Societies of Europe, 2008.

^b Population figures are from the United Nations Department of Economic and Social Affairs Population Division, 2009.

2.3 Summary

This section has reviewed the size of legal services in the U.S. economy. Whether measured by employment or revenue and profits, the industry is large compared with many other professional service sectors. In terms of its impact on individual lives, the snapshot provided above indicates that the law is a potentially wide-ranging component of U.S. life, in terms of both the breadth of circumstances it can affect (and shape) and the number of times it appears to be called upon to do this.

For these reasons, the LSI's efficiency and effectiveness are important to national economic well-being. In theory, innovation in the provision of legal services can play a vital role in improving their delivery. Yet the variety and complexities illustrated above can make it difficult to analyze the circumstances in which successful innovation can take place. Thus, we now set out a framework for thinking about the possible sources and impacts of, and possible impediments to, innovation within legal services.

SECTION 3: A Framework for Analyzing Innovation in Legal Services

...

3.1 Characteristics of Legal Services

Here, we identify several key characteristics of legal services that are likely to influence modes of demand and delivery in different settings—hiring lawyers, developing in-house counsel, investment in search costs, international competition, etc. In turn, these characteristics may influence the opportunities for, and evaluations of, innovation.

- **Complexity and rules:** Most legal services involve the interpretation and application of rules. But particular areas of the law can vary widely in complexity and this, in turn, can affect the opportunities for innovation. So, for example, the more complex the rules in a particular area of law, the more specialized the knowledge likely to be required to provide competent legal advice. In contrast, the analysis and application of less-complex areas of the law will involve more

application of “codified knowledge” and can be performed by less-experienced providers.

- **Information asymmetry:** When complex services are involved, it may be difficult to judge their quality in advance. This means that it is difficult to know in advance what may be required or, once the service has been delivered, whether it was of satisfactory quality. In the language of economists, most legal services are “experience” goods (i.e., goods whose quality can only be confirmed after use) or “credence” goods (i.e., goods whose quality may still be unclear after use). In such settings, word-of-mouth recommendations may assist demanders when making their decisions about what, and from whom, to purchase, and suppliers may seek to invest in reputations for desirable elements of service provision (such as speed or overall quality). The less information asymmetry there is, the easier it will be for clients to devise metrics to measure the quality of the legal services and the greater the possibility of fee arrangements that more closely align the quality of the legal services with payment.
- **Risk:** Some legal cases involve considerable risk, risk that the lawyer, as well as the client, may face. A well-functioning market could create arrangements that transferred these risks to those most willing to bear them (perhaps through the fees charged by the lawyer).
- **Repeat purchase:** Some of the above issues are alleviated when the buyer is a repeat purchaser (as might be the case for an automobile insurer). In such circumstances, the buyer will be familiar with what is required and, indeed, may have a long-term relationship with the supplier (or may integrate with a supplier to form an in-house team). Clients with recurring risks of a particular type will be in a better position to estimate the aggregate likelihood of those risks.
- **Jurisdiction:** Some legal services involve the interpretation and application of rules from other jurisdictions, perhaps from abroad or from other U.S. states. This requires additional expertise and may encourage specialization by certain suppliers. It means that the competitive pressures faced by some firms must be gauged in the context of the international (or intranational) market, not their local position. Other legal services involve highly localized expertise. The degree to which the production of legal services depends on local expertise or knowledge may affect the geographic size of the competitive market. For example, if clients perceive that local relationships between, say, lawyers and courts matter, this will limit the geographic extent of their search for suitable lawyers.
- **Commercial or noncommercial:** Some legal services involve businesses (“commercial”), and others involve individuals (“noncommercial”). These services may relate to a number of the dimensions listed above—e.g., commercial firms may be repeat players, international, or better suited to risk bearing than are individuals.
- **Government involvement:** Some cases involve the government, either as the party seeking to enforce legal rights or as the party defending itself against others seeking to do so. Thus, government agencies may, for example, pursue unpaid tax liabilities, defend requests for possible overpayments, or sue contractors (or be sued by them) for breach of contract.
- **Inputs:** Some legal services may require the aggregation of a relatively discrete body of legal information and its application to a discrete body of facts. Other legal services might require

much broader sets of inputs, in terms of either the legal knowledge required or the extent of facts that must be organized. The size and nature of inputs required for the legal services affect the kinds of innovations that are possible.

- Collaboration: Some legal services are conducted with more or less required collaboration with the client or even other legal services providers. The extent to which the provided legal services can be aided by collaboration shapes the kinds of innovations that are possible and most productive.

3.2 A Typology of Innovation in Legal Services

Economists view innovation as a process with several stages (Stoneman, 2002), the first of which (where ideas are formed and prototypes developed) is typically referred to as the invention stage. Next is the adoption stage, where the innovation is taken up by a select group, or “champions,” before it is eventually diffused (if successful) across the sector in question. We might then consider a number of sources of such innovation and the unique obstacles to this model in the legal setting.

To begin, at a broad level, we can distinguish between product and process innovation:

- Product innovation: This relates to the production and delivery of new (or improved) legal services by suppliers. For this to be successful, it must be possible to identify potential demanders who will buy the new service at a price that covers its costs of development and production.
- Process innovation: This relates to the way in which legal services are produced and the incentives that suppliers have to seek more efficient ways to achieve this. An example of such innovation in legal services is the use of IT by providers of legal services to increase productivity.

Both of these can be accomplished by introducing specific products or processes within a particular law firm. They can also be achieved by reorganizing the firm (or several firms), which might bring together a new set of skills in order to offer a new service or to capitalize on economies of scale and/or scope to lower costs. Thus, beneath the broad notions of product and process innovation, we have

- Organizational innovation: A form of innovation that involves existing legal service providers seeking efficiencies and opportunities to deliver new services through reorganization. Examples observed recently include mergers of law firms (including multinational ones) and offshore outsourcing of some legal practices. Looking to the future, plans for multidisciplinary law firms constitute another potential example.
- Entry innovation: Organizational innovation may take place at the level of the existing firm but may also result in new entry—of existing firms into new areas or of new firms created “from scratch” (i.e., not from reorganization of an existing firm or firms). Innovation may provide opportunities for this, via the supply of new products or the use of new delivery methods. New

entry may also involve the emergence of nonlaw firms that provide legal services, such as the intermediaries described in Subsection 4.5.

While the preceding examples of innovation are common to many industries (and examples can be found in the LSI), we can find several that are more closely related to some of the service characteristics we set out earlier.

- **Price innovation:** Price is an important means by which suppliers of any good/service compete. As we have seen, however, the nature of the product on offer can be difficult to assess in the service sector. In turn, this can make price an awkward signal for potential clients to read—an attractive price for a high-quality legal service may be an unacceptable one for a low-quality alternative. Thus, innovative practitioners may seek to gain a market advantage by altering the nature of their billing—i.e., by finding ways to price their services that give clients some potential reassurance on quality (e.g., they might cap the price as a commitment to supplying an efficient service, or they might agree to charging higher prices only if pre-established performance criteria are met. In addition, the riskiness of many legal services creates another task for prices to perform: the allocation of risk between lawyer and client. Once again, innovative suppliers may find ways to redistribute risk that are attractive to clients (and to themselves) given their respective appetites for risk.

- **Informational innovation:** Any market with information asymmetries raises the potential for existing suppliers to seek to overcome such problems (e.g., by establishing a reputation) or for intermediaries to enter and help transfer information from sellers to buyers (perhaps through collaboration with existing suppliers). This may be simple locational or price information, more-detailed quality and performance information, or advice on the service that is required. Developments in IT make this a natural opportunity for innovation in legal services.

- **Regulation-induced innovation:** In most industries, much innovation takes place in a decentralized fashion, with individual suppliers seeking to gain competitive advantage by offering innovative products, services, or modes of delivery. Yet the wider legal context in which this happens may also exhibit innovation. Thus, a particular state might experiment with permitting a particularly attractive form of legal organization in an effort to attract legal services providers from its neighbors. More ambitiously, it might hope to develop a dispute resolution regime more congenial to economic activity and thereby improve the welfare of its citizens. It is helpful, therefore, to distinguish this from other (more decentralized) innovation processes, because it is the direct result of policymakers' interventions and may affect the whole legal system.

3.3 Socially Beneficial Innovation

. . . The following are some of the criteria that policymakers can use to evaluate different kinds of innovations:

- **Internalized services:** If the innovation produces no (or, perhaps more realistically, very limited) external costs and benefits, the private market for legal services will be sufficient for examining whether the innovation is socially beneficial. This may be the case for niche legal

services used by relatively few individuals.

- **Partial innovation:** If the innovation takes place in specific parts of the legal system, with no appreciable spillovers, socially beneficial innovation can be evaluated with reference to those parts alone. This may be the case for innovations in specific areas—say, the practice of medical malpractice law, where services are often specialized (so the effects of innovations may be restricted largely to the particular service in question).
- **Systemwide innovation:** If the whole legal system is affected by an innovation, one must account for all the potential private and external costs and benefits of the innovation, including its direct and indirect effects, in order to determine whether it is socially beneficial. This may be the case for a change to the structure or practice within the court services or to professional licensing for lawyers.
- **Winners and losers:** Not everyone will gain from an innovation. The buyers of one service may gain while the buyers of another lose, private benefits may increase while external benefits decline, and firms may gain while consumers lose. This does not necessarily mean that the innovation is undesirable.
- **Relative costs and benefits:** In principle, an innovation that generates, say, small changes in benefits can still be socially beneficial if it also generates small changes in costs. In some situations (for example, if policymakers are themselves leading the innovation and face an overall budget constraint), it may not be possible to implement all socially beneficial innovations. In this case, it may be reasonable to rank innovations according to the largest change in net social benefit that they produce—i.e., innovation X may be preferred to innovation Y if X produces more social benefits.
- **Time lags:** If an innovation is likely to take place over a long time or to last for a long time, the costs and benefits over the whole of that time period should be estimated.

...

SECTION 4: The Potential for Innovation in Legal Services: Examples and Research Questions

... [W]e sketch some reasonably high-level research questions whose answers might provide a better understanding of the conditions for successful innovation in legal services. The areas we cover are

- unbundling and outsourcing of legal services
- multidisciplinary partnerships
- alternative litigation finance
- billing arrangements
- use of IT.

...

4.6 Regulation and Legal Service Innovation

Having discussed some individual examples of ongoing and potential innovations, we now discuss the ways in which the regulation of legal services — broadly defined to include court rules, case law, and legislation — impacts legal services:

- Professional bodies and state supreme courts regulate who can provide these services—the skills they require, the amount of training they need, and in which geographic jurisdictions they are allowed to practice law. The professional bodies have economic incentives to limit innovations in the provision of legal services that threaten the economic interest of their membership, such as the provision of legal services by nonlawyers. As discussed in Section 1, this resistance is partly economic and partly cultural.
- Courts directly regulate some of the kinds of services that need to be supplied and some of the ways in which this should happen by setting standards for legal malpractice or the ineffective assistance of counsel.
- States ultimately regulate elements of both of the above by, for example, recognizing the professional bodies and producing legislation that encourages some services and reduces (or removes) the demand for others. For example, a law that liberalizes divorce is likely to create more legal activity of a particular type. Similarly, states compete in developing law that might attract beneficial economic activity. For example, most corporations are chartered under Delaware law because of the perception that doing so provides advantages. . . .

Entry Barriers and Professional Licensing. Many innovative activities can generate potential gains for consumers by making goods and services cheaper to produce and, in a competitive market, cheaper for a consumer to purchase. In reality, however, while cost reductions may take place, producers will appropriate the gains unless they are forced to pass on some fraction of the cost savings in the form of lower prices. Perhaps the most effective way to achieve this is through supply-side competition. Such competition may also have an additional benefit in that it encourages suppliers to seek new products (as well as processes) and to attract new customers to them. Thus, when assessing the potential for innovation in legal services, it is important to discuss the regulatory context governing suppliers, as this may either stimulate or retard competition. . . .

A number of regulations currently restrict the supply of legal services in the United States. These include 1) the requirement that one have a law license from a particular state jurisdiction in order to practice law in the jurisdiction 2) the requirement that lawyers be graduates of accredited law schools, and 3) the restrictions that the rules of ethics place on the actions of attorneys, including the prohibition of lawyers partnering with nonlawyers. While each of these categories of restriction has its own nuances and particular justifications, they are generally all part of the effort to define the practice of law as a particular, distinct profession with its own professional norms and self-governance. We focus on the first two of these restrictions (noting that the third appeared in Subsection 4.2).

Every state requires that in order to practice law, a person must pass the bar of the state. The

“practice of law” is broadly defined and, in most states, it is a criminal offense to practice law without a license, though there are relatively few prosecutions. Under the language of most statutes, nonlawyers can provide general legal advice but are prohibited from providing individualized counsel (Rhode, 2004, p. 87). In 2002, an ABA task force proposed a model definition: “the practice of law is the application of legal principles and judgment with regard to the circumstances or objectives of a person that require the knowledge and skill of a person trained in the law” (Turner, 2003). Under the proposed definition, the practice of law is presumed when a person is acting on behalf of another in 1) giving advice or counsel to persons as to their legal rights or responsibilities or to those of others; 2) selecting, drafting, or completing legal documents or agreements that affect the legal rights of a person; 3) representing a person before an adjudicative body, including, but not limited to, preparing or filing documents or conducting discovery; or 4) negotiating legal rights or responsibilities on behalf of a person.

This definition of the practice of law is quite broad. And the states have adopted an even broader set of definitions of what constitutes the practice of law (Fountaine, 2002, pp. 152– 158). Even the publication of legal self-help books and computer software has been found to violate the practice-of-law prohibitions. Similarly, the legal document preparation company LegalZoom was sued for the unlawful practice of law (Weiss, 2010). These restrictions obviously substantially inhibit competition in the market for legal services from nonlawyers and lawyers who are licensed in other jurisdictions.

State bar associations justify these prohibitions as being necessary to ensure that those providing legal services are familiar with the relevant state and local laws and to protect ignorant consumers of legal services from exploitation (Rhode, 2004, p. 88). By restricting the practice of law to attorneys, states guarantee that consumers of legal services receive the benefits of the attorney-client relationship, which includes the duty of loyalty (which includes a duty to identify and avoid conflicts of interests), of confidentiality, and of competence, which nonattorneys lack. Hadfield (2008) analogizes these to mandatory terms in the contract for legal services. . . .

Similarly, the training that lawyers undergo is standardized. Currently, the ABA imposes numerous requirements on law schools that want to become ABA accredited, and ABA accreditation is critical to a law school’s graduates being admitted to practice law in most states. The ABA governs admissions, the number of hours that must be taught physically at the law school (as opposed to remote teaching), the classes that must be taught by full-time faculty (as opposed to practitioners or adjuncts), bar passage rates, materials that must be physically possessed by the law school’s library, maximum faculty-to-student ratios, and a host of other requirements (American Bar Association Section of Legal Education and Admissions to the Bar, 2007). The result has been a highly standardized law school curriculum modeled after the one developed by Langdell at Harvard in the 1870s (Gordon, 2007, p. 340).

The one-size-fits-all requirement that everyone who practices any kind of law must pass the bar exam and receive training in a wide variety of areas of the law also restricts those who provide legal services and may, arguably, restrict innovative ways of looking at the law. As the practice of law has grown more specialized, the justification for requiring that those providing legal services receive training in all areas of the law lessens. Perhaps at one time, when most lawyers were general practitioners, it made more sense to ensure that all those offering legal services

were generally familiar with most areas of the law. But today, it is not clear that a specialist in real-estate transactions, for example, must be trained in criminal procedure. From an economic perspective, it would seem more sensible to permit firms providing legal services and their clients to determine what qualifications are necessary.

More radically, Hadfield (2008) suggests that if lawyers were not involved by mandate, disputes might be resolved completely outside the law. She envisions a jointly retained firm that might resolve disputes between two organizations without recourse to formal law and suggests that the system that might develop may not resemble conventional “contract law” (p. 1711; and Hadfield, 2004). At the very least, she argues, the standardization of legal training reduces the likelihood of radical innovation in dispute resolution. . . .

But at the very least, we should seriously examine whether innovations in providing legal services, including the liberalization of the restrictions on providing legal services, could promote social welfare. From the perspective of innovation, the real question is how much innovation could be encouraged by liberalizing entry into the U.S. legal profession, and would the gains from such innovations outweigh the losses. . . .

American Bar Association

Access to Civil Justice for Low-Income People: Recent Developments

August 2011 – January 2012

Unbundling/Limited Scope Representation

New rules in Colorado and Indiana. Both Colorado and Indiana have amended their rules of civil procedure to facilitate limited scope representation (“unbundling”). The new rules provide for limited appearances and attorney withdrawal.

Proposed Tennessee rule. In the 2012 rules package it will submit to the legislature for ratification, the Tennessee Supreme Court has included proposed amendments to the Tennessee Rules of Civil Procedure explicitly providing for limited scope representation and giving attorneys guidance on how to provide such services. The proposed amendments were developed collaboratively by the Tennessee Access to Justice Commission and the Tennessee Bar Association. As a consequence of extensive collaboration among stakeholders in developing the proposal, only one comment (positive) was offered during the public comment period.

Connecticut symposium. In October, the James W. Cooper Fellows of the Connecticut Bar Foundation and the Connecticut Bar Association co-sponsored a symposium for attorneys and judges at Quinnipiac University on limited scope representation. Attorneys from California and Massachusetts made presentations on the challenges and rewards of providing unbundled legal services. Judge Raymond R. Noriko, chair of Connecticut’s Access to Justice Commission and a Cooper Fellow, participated in a plenary panel and question-and-answer session covering the perspective of the bench on limited scope representation and issues related to professional liability, insurance, private practice, ethics, and grievances.

Wisconsin report. The Subcommittee on Limited Scope Representation of the Wisconsin Supreme Court’s Planning and Policy Advisory Committee has issued a report recommending development of proposed amendments to the Rules of Civil and Appellate Procedure and Rules of Professional Conduct for Attorneys to insure that limited scope representation services support the best interests of the client, both procedurally and ethically.

Judith Resnik

*Fairness in Numbers: A Comment on AT&T v. Concepcion,
Wal-Mart v. Dukes, and Turner v. Rogers*
125 HARVARD LAW REVIEW 80 (2011)

I. The *Mise-en-Scène*: Positive Rights to Courts and Lawyers—Individually and in the Aggregate

A. Challenging Courts

The reason to link *AT&T v. Concepcion*, *Wal-Mart v. Dukes*, and *Turner v. Rogers* is that all three rest on the role of lawyers in making courts accessible, on the challenges courts face when adverse litigants have asymmetrical resources and when large numbers of claimants seek their services, on the impact of public processes on rights enforcement, and on the function of courts in democratic orders. Each case involved individual plaintiffs claiming modest sums—consumers alleging an illegal telephone overcharge of \$30, employees arguing the loss of pay raises of \$2 per hour because of sex discrimination, and a parent seeking \$51 a week in child support. Given the stakes, lawyers would be unavailable absent two forms of market intervention—reallocating resources among litigants (such as through the class action rules on which *AT&T* and *Wal-Mart* turn) and state subsidies (at issue in *Turner*).

The three cases present related questions about how the form of dispute resolution (individual or aggregate) and the place of dispute resolution (public or private, state or federal) alter the level of public regulation of transactions that are rarely custom made. In *AT&T* and *Wal-Mart*, the Court concluded that class actions put corporate defendants and absent co-plaintiffs in unfair positions. In *Turner*, the Court declined to require counsel as of right when the opponent also lacked counsel but held that civil contempt detention was unfair absent procedures to ensure that a court had information to assess whether a violation of a payment order was willful.

When read together, these cases provide a wide window into adjudication circa 2011. They make plain that the constitutional concept of courts as a basic public service provided by government is under siege. Pressures come from the demands imposed by the host of new claimants who, because of twentieth-century equality movements, gained recognition as rights holders; from institutional defendants arguing the overuse of courts and proffering alternatives; and from competition for scarce funds in government budgets.

This problem is not unique to the United States. Parallel challenges can be found in Europe, where Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms expressly endows “everyone” with a right to a “fair and public hearing.” That

aspiration is likewise made vulnerable by the volume of eligible claimants, limited funds, and transnational actors debating the utilities of public regulatory mechanisms.

Like the terms of Article 6, the three 2011 Supreme Court decisions revolve around questions of fairness and of the relationship between fairness and public adjudicatory processes. Is it fair (in *AT&T*) to enforce a boilerplate provision in a cell phone contract waiving court access and class actions, fair to hold a class arbitration, or fair to insist on individual and private arbitrations? Is it fair (in *Wal-Mart*) to determine corporate liability for discrimination across thousands of employees through a class action, and is it fair to require individuals to participate in class actions? Is it fair (in *Turner*) to incarcerate a person for civil contempt without first providing a lawyer?

In each case, pivotal texts—the Federal Arbitration Act (FAA), Rule 23 of the Federal Rules of Civil Procedure, and the Due Process Clause—are embroidered by the Court’s precedents and its assessments of the quality and adequacy of certain processes. In each, the holdings (that the FAA preempts state contract law finding the class action waiver unconscionable; that the class action cannot proceed against Wal-Mart; that Turner has no right to counsel but a right to alternative procedures) reveal how procedure gives meaning to rights.

The two class action cases are encased in a thicket of precedents and distinctions about kinds of class actions, rendering the Court's rulings inaccessible; they defy ready translations for popular consumption. Indeed, they do not make for easy reading by lawyers not fluent in a sequence of FAA decisions and in the distinctions among class actions as “mandatory” 23(b)(2) or “opt-out” 23(b)(3) classes. Turner is likewise opaque. Absent familiarity with its precedents, readers can easily miss the import of the majority’s due process ruling, just as they might underestimate the role played by judicial assessments of procedural fairness in *AT&T* and *Wal-Mart*.

Yet, despite the doctrinal distinctions, all three decisions raise larger questions of whether positive rights imposing obligations on government to provide certain services (in this instance courts) constitute enforceable entitlements, what forms of participation and kinds of procedures sustain the legitimacy of contracts and of court judgments, and what role judges play in shaping answers. Hence, analysis of the trio prompts inquiries into the normative underpinnings of the law of courts, the reasons to regulate their practices, the desirability of enabling or disabling their use, and the relationship of the use of courts to the democratic character of a political order.

Before turning to the three cases, I need to delineate the constitutional, institutional, and litigation contexts that render this trio important as a set. Hence, this introduction begins with a brief tour of the analytic structure of sixty years of due process law. These doctrines are the result of social and political movements that posed questions about the meaning of “equal justice under law” and that helped to produce the growth in state and federal courts as well as a market for private dispute resolution. I then discuss the participants in each case, who, as detailed below, were picture perfect in representing twentieth-century rights holders as they teed up twenty-first-century problems.

B. Open Courts and the Process Due

All courts shall be open, and every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law, and justice administered without denial or delay.

– Nebraska Constitution of 1867

Because the three rulings are shadowed by what, in 1950, Justice Jackson called the “cryptic and abstract” commands of the Due Process Clause, unpacking their import requires understanding how, during the last century, law came to recognize four distinct ideas as problems of “due process” – procedural inadequacies in decisionmaking, asymmetrical resources of adversaries, disparities among co-litigants, and lack of access to courts. Each of the 2011 cases engages these issues and reveals the relevance of a fifth idea, public processes, that the case law has nested in an amalgam of rights to jury trial, the First Amendment, and common law traditions but that ought also to be more clearly identified as another facet of due process norms – the obligation to open adjudicatory processes to third parties, so as to illuminate and monitor the other facets of the process “due” and, in democratic orders, to legitimate the binding power of the judgments made.

A first genre of due process analysis probes the authority, the nature, and the kinds of procedures that make specific decisionmaking “fair.” *Turner* holds that to jail a person for civil contempt without a finding of ability to comply with the court order is fundamentally unfair. *AT&T* evaluates class arbitrations and finds them too informal and unreviewable to be fair. *Wal-Mart* relies on due process to conclude that absent plaintiffs must have opt-out rights and further invokes due process to establish that *Wal-Mart* cannot be obliged to make payments for back wages without an opportunity to rebut each individual's claim of discriminatory treatment.

These assessments fall into a line of “fair hearing” cases in which the Court has concluded that, when individuals are at risk of losing certain forms of property and liberty (such as statutory entitlements to government benefits, jobs, or licenses), process is due. Depending on the context, constitutionally fair decisionmaking entails various attributes, including in-person hearings, specific allocations of burdens of proof, reasons for the decisions rendered by impartial decisionmakers, oversight of whether evidence supports a criminal verdict and of the quality of eyewitness identification, and review of the award of punitive damages.

A second due process inquiry, also at work in the 2011 decisions, shifts the focus from fair procedures to the problem of adversaries with asymmetrical resources. Due process (coupled, at times, with other constitutional provisions) is sometimes the basis for a determination that certain power imbalances require government subsidies for one party, made vulnerable for reasons such as poverty or the stakes of a proceeding. Government versus an individual was the initial paradigm, and the classic example (central to *Turner*) is the 1963 decision of *Gideon v. Wainwright*, which read the Sixth Amendment “right to counsel” to require states to provide lawyers for indigent criminal defendants facing prosecutors seeking felony convictions. Due process has also been the basis of constitutional obligations to give indigent criminal defendants resources such as experts and translators necessary to mount a defense. Moreover, due process commands that the government give exculpatory, material information to all criminal defendants—whether rich or poor.

Asymmetrical power and high stakes have also been the predicate for civil litigants in certain family conflicts to be accorded due process-based equipage rights. Had Michael Turner argued he was not the child's father, the state would have paid for a paternity test because, as Chief Justice Burger explained for a unanimous Court in 1981, the "requirement of 'fundamental fairness' expressed by the Due Process Clause" would not otherwise be "satisfied." That year the Court also concluded that, although a parent facing the loss of that status had no per se right to counsel, the presumption against appointment of lawyers beyond what the Sixth Amendment requires could be overcome if a sufficient showing was made. Rights to state-paid transcripts, if required to appeal child custody terminations, followed in 1996.

The 1966 class action rule (at issue in *AT&T* and *Wal-Mart*) provides another form of intervention to respond to power asymmetries in civil litigation. Aiming to be due process compliant, rulemakers fashioned group proceedings to give members of racial minorities the ability to seek enforcement of injunctions mandating school desegregation and to give consumers claiming statutory rights the capacity to attract lawyers through the potential for large monetary recoveries. The utilities for would-be defendants included the potential to close out liability claims through one proceeding.

A third due process question, intra-litigant disparities, arises when similarly situated litigants on the same side of a dispute are in court. Differential resources and capacities can result in "like" cases not being treated "alike." Constitutional adjudication on intra-litigant equity initially focused on criminal defendants. For example, in 1956, the Court concluded that unfairness resulted if some defendants could afford to pay for transcripts for appeals and for lawyers while others could not. Sentencing guidelines exemplify another effort to make decisions fair across a set of individuals proceeding single file; the implementation reflects the complexity of determining when persons are enough alike to be treated the same. Congress and the courts have struggled with mandates that judges punish similarly those persons whose crimes and backgrounds are comparable and justify the differentiations ("departures") made.

Not all "like" litigants are, however, in court involuntarily. Persons who are part of a cohort outside court sometimes seek judgments that could affect others who have not filed lawsuits. Aggregation becomes a method to avoid disparate outcomes. Once again, the challenges are to determine what shared experiences suffice to generate a group that courts ought to treat as a set, what commonalities of interests (central to *Wal-Mart*) permit representatives to go forth on behalf of absent others, what kinds of affiliations and forms of consent (affirmative, implicit, or inferred) legitimate binding all through final judgments. And, when judges authorize aggregates, a new version of the question of asymmetrical resources of opponents arises, for (as argued in both *AT&T* and *Wal-Mart*) a class action could give one party undue leverage over an opponent.

What about individuals hoping to get into court, rather than those commanded to appear? The idea that fairness entails access rights for those standing at the door shaped a fourth line of cases that began when a class of "welfare recipients residing in Connecticut" argued that state-imposed fees of sixty dollars for filing and service precluded them from filing for divorce. In 1971, in *Boddie v. Connecticut*, Justice Harlan wrote for the Court that the combination of "the basic position of the marriage relationship in this society's hierarchy of values and the . . . state

monopolization” of lawful dissolution resulted in a due process obligation by the state to provide access.

Given the debate on the current Court about the legitimacy of judicial appraisals of fairness, the concurring opinions filed in *Boddie* illuminate why access questions have become centered on the Due Process Clause and on the evaluative judgments produced. Forecasting Justice Scalia’s objections to due process analyses, Justice Douglas argued that due process was too “subjective.” Unlike Justice Scalia, however, Justice Douglas read the Equal Protection Clause’s prohibition of “invidious discrimination based on . . . poverty” to require subsidizing access. (Two years later, the Court rejected poverty as a suspect classification for purposes of equal protection.) Justice Brennan agreed that *Boddie* presented a “classic problem of equal protection” on top of due process; the state’s legal monopoly required access for all attempting to “vindicate any . . . right arising under federal or state law.” The breadth of that proposition, coupled with limited resources, resulted in a constitutional retreat from the logic Justice Brennan argued. Rather than mandate equipage for all poor civil litigants, the Court identified a narrow band (largely in family conflicts), garnering constitutional entitlements to government subsidies to use courts.

Less clearly articulated in the doctrine to date is the idea that the public, as an audience empowered to watch and critique in open courts, produces another form of fairness that the Due Process Clause should shelter. Fairness requires not only procedurally adequate hearings as well as efforts addressing inter- and intra-litigant asymmetries and easing access to courts but also participation from those outside a litigation triangle, invited to partake in interactive exchanges that produce, confirm, or reject legal rules. That publicity enables assessments of whether procedures and decisionmakers are fair and permits an understanding of the impact of resources (symmetrical or not), of the treatment of similarly situated litigants, and of why one would want to get into (or avoid) court. The presence of the public divests both the government and private litigants of control over the meanings of the claims made and the judgments rendered and enables popular debate about and means to seek revision of law's content and application.

Publicity could well be understood as an aspect of the quality of decisionmaking and, hence, subsumed within the first fairness inquiry, addressing the procedures for making binding judgments. But because publicity entails imbuing a third party – the public – with a specific role, and because fairness doctrine has not to date focused specially on the function of an “open” hearing, publicity stands in its own right. Without authorization for an audience to have a discrete and protected place – to serve as what Jeremy Bentham termed “auditors” (in his famous commitment to publicity as a disciplinary mechanism for government as well as for prisoners) – one has no way to assess the practices or understand how nuanced law application can be. Indeed, it is the performance of fairness before the public that legitimates adjudication. (The phrase in the European Convention on Human Rights is, after all, a “fair and public hearing.”) Moreover, third-party participation facilitates democratic lawmaking, in which court judgments serve as both an object of attention and a basis on which to argue for changing legal norms.

Courts in democratic social orders are thus one of several venues in which the content of law is debated, and other branches of government may, in turn, respond.⁴

Underlying these various formulations of fairness are different kinds of theories, themselves doing work in more than one arena. Some of the inquiry into the quality of procedure, for example, is justified through utilitarian concerns for accuracy, as well as by interests in guarding against non-arbitrary treatment by the government. Given that the linguistic lineage of due process traces back to traditions around the Magna Carta,⁵ non-arbitrary treatment has a historical pedigree independent of democracy. But democratic values have come to provide new understandings of the purposes of non-arbitrary treatment, sounding today in terms of dignity, equality, and in the sovereignty of the people. Similarly, the demand for subsidizing and equalizing opportunities to participate, like the insistence on publicity, comes in service of democratic values that recognize the contribution of and need for diverse voices and participants being heard in social orders.

Thus, while political orders of all stripes have courts, the development of egalitarian norms during the twentieth century transformed the obligations of courts in democracies. The meaning of constitutional guarantees that “every person . . . shall have remedy by due course of law” (to borrow from Nebraska’s 1867 Constitution) expanded, as it was reread to embrace persons of all kinds. While theorists of courts often worry about whether court judgments tread on majoritarian decisionmaking, the argument here is that courts are themselves democratic institutions. The entitlement that “all courts shall be open” produces a government-sponsored occasion to level differences of resources and to impose, albeit fleetingly, the dignity reflected in the status held by a juridical person, competent to sue or be sued, able to prompt an answer from and entitled to be treated on a par with one’s adversary – whether that be an individual, a corporation, or the government itself. The odd etiquette of the courtroom disciplines both disputants and the state, as all are required to respond respectfully to claims. The public enactment of process and judgment documents how government officials are to treat individuals in democratic orders and enables debate about compliance with those goals as well as about the content of the governing legal norms.

The variegated constitutional case law outlined above documents both the development of aspirations to produce fair and equal treatment of disputants and the difficulty of doing so. For decades, finding methods to materialize these forms of fairness has also occupied Congress, the states, and procedural rulemakers in the public and private sectors. The results are eclectic and uneven, including a few legislated subsidies for criminal and civil litigation, statutes authorizing aggregation, rules promulgated to facilitate filings, and efforts to reroute disputes to various alternative fora. Examples (detailed below) range from the banking laws in New York State in 1937 and the Fair Labor Standards Act of 1938, both of which pioneered group-based resolution techniques, to the 1966 federal class action rule, multidistrict litigation, and the revamped

⁴ For further discussion of the shift from rituals of performance to rights of access, see JUDITH RESNIK & DENNIS CURTIS, REPRESENTING JUSTICE: INVENTION, CONTROVERSY, AND RIGHTS IN CITY-STATES AND DEMOCRATIC COURTROOMS 288-305 (2011).

⁵ The history of the terminology of “due process” is provided by Charles A. Miller, *The Forest of Due Process of Law: The American Constitutional Tradition*, in 18 NOMOS: DUE PROCESS 3 (J. Roland Pennock & John W. Chapman eds., 1977) [hereinafter Miller, *Due Process*].

reliance on bankruptcy in mass torts. Legislatures also devolved adjudication to administrative agencies (such as the Equal Employment Opportunity Commission (EEOC), which played a role in *Wal-Mart*) and outsourced to private providers (as the mandate to arbitrate in *AT&T* exemplifies). Some of these innovations, such as administrative adjudication and class actions, are more visible and regulated than others, such as arbitration and other alternative dispute resolution (ADR) programs.

States have a special place in the dialogue about procedural entitlements. Despite the conventional claim that, unlike other constitutional orders, positive rights are not common in United States constitutionalism, most states operate under mandates such as the nineteenth-century provision in the Nebraska Constitution. Guarantees of “a right of access to the courts to obtain a remedy for injury” can be found “expressly or implicitly” in forty state constitutions. Thus, while readings of the United States Constitution have elaborated remedies available under certain circumstances, many state constitutions offer express guarantees of rights to remedies in open courts. And some states have recognized private enforcement of such rights. For example, Nebraska's substantive right to use courts was the basis in 1889 and in 1991 on which that state's Supreme Court refused to enforce arbitration provisions. As the Nebraska Supreme Court explained its 1889 decision a few years later, in 1902, to enforce contracts to arbitrate would “open a leak in the dike of constitutional guaranties which might some day carry all away.”

But not all celebrate the trajectory that identifies these due process obligations, producing more rights and more claimants knocking at courthouse doors. The intersection of high demand curves for courts, the burdens of procedures, the costs of lawyers, and the regulatory successes achieved by some plaintiffs have prompted diverse critiques, styling the civil justice system as overburdened, overreaching, and overly adversarial. Critics also argue that courts can generate unwise policies and that the risk of being sued chills productive economic exchanges. Energetic enthusiasts, sometimes gaining funds from institutions identified with repeat-player defendants, have fueled movements to shape avenues outside courts for dispute resolution (becoming known as “DR”) and to encourage judges to rethink their roles in focusing on access to courts.

From rules mandating the use of court-annexed arbitration and requiring judges to encourage settlement to federal doctrine declining to imply private causes of action and reading governmental immunities broadly, evidence of a different vision for courts came to the fore during the latter part of the twentieth century. As the debates in *AT&T* and *Wal-Mart* detail, supporters of privatization argue in terms of utility and fairness, as do proponents of public adjudication. Yet the sides diverge on the vectors of liberty and autonomy (invoked in support of limiting courts by enforcing provisions mandating arbitration and of protecting individuals from group-based litigation so that they can pursue their own property interests in court), and on the import of equality (argued to support forms of aggregation).

C. Equal, Public, and Stressed Justice

AT&T, *Wal-Mart*, and *Turner* sit at the juncture of these competing visions for courts. Before I turn to the interstices, the next frame to be introduced is the set of political and social forces that underlie the ability of the plaintiffs in the three cases – consumers, employees, and parents – to seek redress in court. The words “equal justice under law” were etched in 1935 above the Court's

grand staircase when the building opened, but the debate about their meaning came to the fore – as *Gideon* and *Boddie* exemplify – only in the decades thereafter. The phrase, picked to fit the facade, proved prescient in referencing a concept broader than what the law of equal protection may entail. Invoked in dozens of opinions and by Justices ranging from Brennan to Scalia, the phrase serves as a signpost for the hopes that democratic orders place in courts.

During the second half of the twentieth century, women and men of all colors gained authority to invoke protection as consumers, entitlements to nondiscrimination in employment, and obligations to support their children. The due process law sketched above emerged when this array of newly endowed rights holders, with limited economic resources, presented themselves publicly as also entitled to equal and dignified treatment in court.

Courts were specially attractive venues for these pursuits, not only because of the power to order change but also because of the qualities of adjudication itself. Judges are supposed to treat all with dignity and respect, and disputants are obliged to do the same toward their adversaries. These egalitarian exchanges of mutual recognition make adjudication itself a democratic practice, and, as discussed above, third-party rights of access put the performance of these obligations before the public eye. As Bentham put it, “publicity” enables the “Public-Opinion Tribunal” to form independent judgments about the quality of government actions. While presiding over a trial, the judge is, to paraphrase Bentham, on trial. The information forced into the public realm by court processes becomes part of iterative exchanges with other branches of government.

Both federal and state constitutions entrenched this norm of publicity in courts by turning rituals of public attendance into rights. The federal courts have repeatedly insisted that neither the Constitution nor the common law tolerates blanket closures of criminal or civil proceedings. Further, in 2011, in *Borough of Duryea v. Guarnieri*, the Court reiterated that litigation, which facilitates “informed public participation that is a cornerstone of democratic society,” is also protected under the First Amendment’s Petition Clause. As the Nebraska Constitution illustrates, state constitutions often directly express a substantive entitlement to “open courts” linked with rights to obtaining remedies without undue delay.

Further, although the South Carolina Supreme Court in *Turner* adopted the minority position that civil contemnors had no right to counsel, several jurisdictions require counsel for indigent civil contemnors facing jail, and a few also provide lawyers for poor individuals in other civil proceedings. Impetus for expanding rights to counsel comes from firsthand experience with legions of lawyer-less litigants. In 2009, California tallied 4.3 million people in civil litigation without the assistance of lawyers. In 2010, New York counted 2.3 million civil litigants without lawyers—including almost all tenants in eviction cases, debtors in consumer credit cases, and ninety-five percent of parents in child support matters.

These figures have sparked a national movement, dubbed “Civil *Gideon*,” championed by bench and bar leaders to facilitate court access through guaranteeing counsel rights for some impoverished litigants. Evocative of Justice Brennan’s *Boddie* analysis, the American Bar Association argued in its *Turner* amicus brief that “counsel should be provided as a matter of

right to low-income persons in adversarial proceedings where basic human needs are at stake, such as those involving sustenance, safety, health, or child custody determinations.”

The challenges of providing access are at the core of *AT&T*, *Wal-Mart*, and *Turner*. All three cases are about the problem of generating legitimate decisions enforced by law in a world in which courts have limited funds, lawyers are expensive, and substantive rights are contested. In response, all nine Justices assessed what fairness requires, in resources and in process, in or out of public courts. Couched in terms of the Constitution, the FAA, Title VII, and Rule 23, all three rulings are judge-made balances of procedural costs and benefits. All three also invoke the resources of the opponent as a justification for limiting procedural rights for claimants.

AT&T and *Wal-Mart* insisted on disaggregation, devolution, and privatization, while *Turner* rejected a bright-line right to counsel for civil contemnors sent to jail at the behest of opposing private litigants. Those results were predicated on Justices’ own impressionistic senses of both the costs and the benefits of using particular procedures. Not much analyzed were constitutional stipulations of courts as constitutional entitlements available to everyone, including litigants of limited means, or the remarkable success courts have had in attracting a high level of demand for and in obtaining a significant amount of public and private investment in their services, or courts’ role as contributors to democratic lawmaking. The consequence of these rulings is that the substance of procedural due process thins. To paraphrase Grant Gilmore on contract’s being “swallowed up by tort,” procedure is being swallowed up by contract. . . .

Ministry of Justice

Proposals for the Reform of Legal Aid in England and Wales
Consultation Paper CP 12/10 (Nov. 2010)

Ministerial Foreword

The modern legal aid scheme was established in 1949 with a laudable aim: to provide equality of access and the right to representation before the law. However, the scope of legal matters covered was very tightly drawn.

The current scheme bears very little resemblance to the one that was introduced in 1949. It has expanded, so much so that it is now one of the most expensive in the world, available for a very wide range of issues, including some which should not require any legal expertise to resolve. I believe that this has encouraged people to bring their problems before the courts too readily, even sometimes when the courts are not well placed to provide the best solutions. This has led to the availability of taxpayer funding for unnecessary litigation. There is a compelling case for going back to first principles in reforming legal aid.

There have been many attempts to reform the system by previous administrations. Since 2006, there have been over thirty separate consultation exercises on legal aid. Although successive changes have managed to contain the growth in overall spending, they have not addressed the underlying problems facing the scheme. With some justification, lawyers have complained that they cannot reasonably be expected to manage their practices against a background of almost

constant change.

To continue like this is unsustainable, and I want to use these lessons as an opportunity for fundamental reform of the scheme. I want to discourage people from resorting to lawyers whenever they face a problem, and instead encourage them, wherever it is sensible to do so, to consider alternative methods of dispute resolution which may be more effective and suitable. I want to reserve taxpayer funding of legal advice and representation for serious issues which have sufficient priority to justify the use of public funds, subject to people's means and the merits of the case.

Legal aid must also play its part in fulfilling the Government's commitment to reducing the fiscal deficit and returning this country's economy to stability and growth. The proposals on which I am consulting are therefore designed with the additional aim of achieving substantial savings.

It is an approach which demands that we make tough choices to ensure access to public funding in those cases that really require it, the protection of the most vulnerable in our society and the efficient performance of our justice system.

My legal aid reform proposals complement the wider programme of reform which I will be bringing forward to move towards a simpler justice system: one which is more responsive to public needs, which allows people to resolve their issues out of court using simpler, more informal, remedies where they are appropriate, and which encourages more efficient resolution of contested cases where necessary. But these legal aid proposals are not dependent on the implementation of those wider reforms.

Today, I am also publishing a consultation on implementing recommendations on civil funding and costs arrangements set out in Lord Justice Jackson's *Review of the Costs of Civil Litigation*.

I intend to consult on reforms of sentencing, as well as other proposals designed to deliver an improvement in the way we seek to punish offenders while reducing their propensity to re-offend. Next year I am expecting to receive final recommendations for reforming family proceedings, which are being developed under the independent chairmanship of David Norgrove. And early next year, I also intend to set out my proposals for simplifying and reforming the procedures used in the civil courts, making greater use of mediation to deliver the services clients want in a way that suits their needs.

In the meantime, I have been working with the Home Secretary and the Attorney General on ways in which we can transform procedures in the criminal justice system. We will be announcing details in due course.

I would welcome your views on the proposals in this paper. We will need to consider responses within the overall fiscal context. However, I am sure that they will provide a helpful contribution to the development of a fair, balanced and sustainable legal aid scheme for the future. . . .

2.1 We said in our document, *The Coalition: our programme for government*, published in May, that we would undertake a review of legal aid in England and Wales.

2.2 The Government strongly believes that access to justice is a hallmark of a civilised society. The proposals set out in this consultation paper represent a radical, wide-ranging and ambitious programme of reform which aims to ensure that legal aid is targeted to those who need it most, for the most serious cases in which legal advice or representation is justified. It is an approach which demands tough choices to ensure access to public funding for those who need it most, the protection of the most vulnerable in our society, and the efficient performance of the justice system.

2.3 Against a background of considerable financial pressure on the legal aid fund, the proposals set out in this paper have been developed with the aim of providing a substantial contribution to the Ministry of Justice's target of a real reduction of 23% in its budget, worth nearly £2bn in 2014–15. Sound finances are critical to the delivery of the Government's ambitions for public services: reducing the burden of debt, by reducing public spending, is essential to economic recovery.

2.4 Decisions on how the Ministry of Justice will allocate its resources over the next spending round have not yet been made, and they will, in any event, need to be reviewed in the light of actual expenditure and emerging pressures. Nevertheless, we estimate that the proposals set out in this consultation would, if implemented, deliver savings of some £3505 million in 2014–15 on legal aid by the final year of the spending review period. This is an estimate, and the final package of proposals that we decide to implement following consultation might in the event achieve more or less.

2.5 These proposals support wider plans to move towards a simpler justice system; one which is more accessible to the public, which limits the scope for inappropriate litigation and the involvement of lawyers in issues which do not need legal input; and which supports people in resolving their issues out of Court, using simpler, more informal remedies.

2.6 Views are invited on the questions set out below. When expressing views on those questions, respondents are advised to have the overall fiscal context firmly in mind.

2.7 Although reducing spend is one of the main drivers for reform, the Government also believes that there is an overwhelming case for reform of the legal aid system. Since the modern scheme was established in 1949 its scope has been widened far beyond what was originally intended. By 1999 legal aid was available for very wide range of issues, including some which should not require any legal expertise to resolve.

2.8 We believe that this has encouraged people to bring their problems before the courts too readily, even sometimes when the courts are not well placed to provide the best solutions. This has led to the availability of taxpayer funding for unnecessary litigation. There is a compelling case for going back to first principles in reforming legal aid.

2.9 The expansion of the legal aid scheme has also had inevitable consequences for its cost. The scheme now costs over £2bn per annum. While comparisons with other countries are difficult (because their systems of justice operate differently and their budgets are distributed differently), evidence suggests that we spend more on legal aid than other comparable countries in Europe and elsewhere. Further information on international comparisons is set out in Chapter 3.

2.10 These problems were recognised by previous administrations, but their attempts at reform were piecemeal. As set out at Annex E, since 2006 there have been over thirty separate consultation exercises on reform of legal aid. While the resulting reforms managed to contain the growth in the overall cost of the scheme, they did not address the underlying causes. The Government recognises the difficulties that providers must have faced in planning and managing their practices during a period of almost constant change. The reforms set out in this paper are designed to place legal aid on a sustainable long term financial footing.

2.11 To help establish the right balance, we have been guided in particular by the following considerations:

- the desire to stop the encroachment of unnecessary litigation into society by encouraging people to take greater personal responsibility for their problems, and to take advantage of alternative sources of help, advice or routes to resolution;
- the need to improve and reduce the costs of the whole criminal justice system through the removal of perverse incentives; and
- the extent to which the market can provide other ways of accessing funding and
- the need to fulfil our domestic and international legal obligations (including those under the European Convention on Human Rights). . . .

Legal aid expenditure

3.35 In 2008–09, the latest year for which audited information is available, total spend on legal aid was £2.1bn, a breakdown of which is set out in Table 1 below. The LSC’s provisional outturn for 2009–10 indicates that there has been an increase of around 31/2% (in cash terms) in the overall cost of legal aid. In criminal legal aid, the increase is around 21/2% and in civil and family, just over 4%.

Table 1: Legal aid expenditure by category 2008–09

Criminal Cases	Cost (£m)
Advice	192
Magistrates’ courts	291
Crown Court (and higher)	699
Total Criminal Legal Aid	1,182
Civil and Family Cases (net cost)	
Help (including immigration proceedings)	257
Representation	660
Total: Civil Legal Aid	917
Total: Legal Aid	2,10827⁶

⁶ Source: Legal Services Commission.

3.36 These services were delivered through 1,781 criminal contracts and 2,613 civil and family contracts between the LSC and legal service providers. Of the civil providers, 360 contracts are with not for profit organisations.⁷

Trends in legal aid expenditure

3.37 During the 1990s and the early years of the 2000s, spending on legal aid rose steadily. Between 1988–89 and 2003–04 the total cost of legal aid increased by over 160% in real terms (at 2008–09 prices). The increase in spending was seen across all categories of spending: Crime Higher (cases before the Crown Court and Court of Appeal) rose by over 230%; Crime Lower (advice and magistrates' courts cases) by over 100%; civil representation by over 135%; and civil help by over 240% (all in real terms).

3.38 This led to the introduction of a series of measures to contain growth in spend. In 2004 the LSC introduced major reforms in relation to immigration and asylum law, and a fixed fee scheme for advice and assistance in civil and family law. Changes to tighten up the merits tests for civil representation were also introduced: for example, enforcing the use of complaints procedures before litigation and removing some exemptions from the assessment of assets in civil means testing and the statutory charge. Community Legal Service Direct (now Community Legal Advice) was launched providing specialist legal advice via its helpline and information via a website and leaflet series.

3.39 In 2006 means testing (which had been abolished in 2000) was reintroduced to the magistrates' court. This, combined with the interests of justice test and other factors, means that the defendant is legally aided in around one third of magistrates' courts proceedings. From April 2007 onwards, in a series of remuneration reforms following the recommendations of the Carter Review, fixed and graduated fees and rate cuts were delivered to further control the budget in civil and criminal legal aid.

3.40 Since 2003–04, the increase in legal aid spending has been contained, and the overall cost of legal aid has fallen by around 11% in real terms. Nevertheless, by 2008–09, legal aid expenditure was more than double its cost in 1988–89 in real terms.

International comparisons

3.41 The legal aid scheme in England and Wales is considered to be one of the most comprehensive, and generous, in the world.

3.42 Making international comparisons is complicated by differences in data collection methods and definitions. Costs in our justice system are distributed differently to those in other jurisdictions. A more inquisitorial style system is likely to spend more on inquisitors and the court process, and less on legal aid; and expenditure may be categorised under different budgets.

3.43 In 2009 the Centre for Criminal Justice Economics & Psychology at the University of York was commissioned by the MoJ to provide explanations as to why we appeared to spend more on legal aid in England and Wales than most other countries. That study concluded that, having

⁷ Legal Services Commission data, as at 31 March 2009.

adjusted for differences in justice systems, spending on the legal aid scheme in England and Wales remained higher than the other countries studied. They found that this was due to three main factors:

- more cases per capita are funded for criminal and non-criminal areas;
- more criminal suspects are brought to court, and more of this group are given criminal legal aid; and
- there is higher spending per case on criminal and non-criminal cases.

3.44 The research highlighted the areas where practice in England and Wales could be leading to higher costs:

- higher income ceilings on eligibility;
- wider scope in terms of what is covered; and
- our adversarial rather than inquisitorial legal tradition.

3.45 The report has provided a helpful background to the development of proposals for reform of legal aid. . . .

Mental health

4.92 Legal aid currently funds all cases where the primary legal issue relates to mental health, particularly where this is covered by the Mental Health Acts of 1983 and 2007, and the Mental Capacity Act 2005. The majority of funding is used to provide assistance to sectioned clients appealing the terms of their detention before the First-tier (Mental Health) Tribunal, and the Mental Health Review Tribunal for Wales.

4.93 We consider that most of these cases concern a very important issue – the individual’s liberty. Due to the nature of their illness, many of this client group will be very vulnerable and are unlikely to have the capacity to represent themselves properly at a tribunal without legal assistance. Although advice is available from other sources, through voluntary sector organisations such as Mind, which provides a legal advice service, we do not consider that these are sufficient, or that there are alternative sources of funding which would enable individuals to resolve these issues without publicly funded legal assistance. Nor do we consider that these cases are ones where the individual could be expected to resolve the issue themselves given the involvement of the state and the nature of the illness.

4.94 We therefore propose to retain legal aid for mental health and capacity detention cases, including appeals to the First-tier (Mental Health) Tribunal, and onward appeals to the Upper Tribunal, and appeals to the Court of Protection on deprivation of liberty issues. As set out in paragraphs 4.95 to 4.99, legal aid will also remain available for judicial review challenges to help enforce the rights of this client group. It will not, however, be available for tort⁸ or other general damages claims (see paragraph 4.241), unless the claims are of a very serious nature (see from paragraph 4.43 on claims against public authorities). . . .

⁸ A civil wrong, for which an action for damages exists.

Category of law /type of proceedings	Current Scope	We propose to retain in scope	We propose to remove from scope	Relevant factors ¹⁴²	
				Factors for retention	Factors for removal
			<p>We also propose to remove all Legal Help and representation for proceedings under the Insolvency Act 1986, including:</p> <ul style="list-style-type: none"> • proceedings concerning the making, discharge or annulment of a bankruptcy order; and • matters concerning an Individual Voluntary Arrangement. 	<p>Ability to self-represent: more likely to be ill or disabled.</p>	<p>Importance of issues: relatively low (financial issues).</p>
Discrimination proceedings	<p>Currently, civil legal aid is available (either for Legal Help or Representation) for a range of claims arising from allegations of unlawful discrimination.</p> <p>These claims can arise in a variety of contexts, for example, discrimination in educational provision, employment matters or consumer claims.</p>	<p>We propose that legal aid is retained for all claims of unlawful discrimination currently within scope, regardless of the category in which they arise.</p>		<p>Importance of the issues: relatively high (addressing societal prejudice, and ensuring equality of opportunity). Ability to self represent: some client groups may face difficulties.</p>	<p>Importance of the issues: primarily damages claims. Alternative routes to resolution: Equality and Human Rights Commission offers advice and legal assistance.</p>
Education	<p>This category covers Legal Help and some Legal Representation in relation to alleged failures in education provision.</p> <p>This includes:</p> <ul style="list-style-type: none"> • advice on appealing to local authority or tribunal in relation to establishing, revising, or acting on a statement of special educational need; • representation at the Upper Tribunal in appeals against decisions of the First-tier Tribunal in special educational needs cases; • advice on claims for negligence in the provision of education; and • advice in relation to long term exclusion from, or refusal to provide education. 		<p>We propose to remove all Legal Help and Representation on education matters.</p>	<p>Ability to self-represent: parents of disabled children involved in SEN cases are more likely to be disabled themselves.</p>	<p>Importance of issues: relatively low (some issues arise from personal choices, e.g. conduct at school). Ability to self-represent: Tribunal accessible to lay people. Alternative sources of funding: damages claims suitable for CFAs. Alternative routes to resolution: help available from parent partnerships, charities (e.g. IPSEA).</p>

Category of law /type of proceedings	Current Scope	We propose to retain in scope	Relevant factors ¹⁴²	
			We propose to remove from scope	Factors for removal
Housing	<p>This category covers advice and representation relating to issues concerning property or the home, particularly homelessness and disrepair issues.</p> <p>This includes:</p> <ul style="list-style-type: none"> • representation in an action for possession of property and/or demotion of tenancy and, if appropriate, for arrears of rent and/or other remedies in the same action; • advice and representation in relation to homelessness or threat of homelessness; • advice and representation in relation to possession for rent arrears; • representation in an action for judicial review; • advice and representation in actions regarding anti-social behaviour; and • advice and representation in an action for housing disrepair against the opponent. 	<p>We propose to retain Legal Help and Representation for:</p> <ul style="list-style-type: none"> • advice and representation for repossession cases, including actions for possession due to rent, service charge, or mortgage arrears, adverse possession and similar matters arising out of tenancy agreements; • advice and representation for damages claims for disrepair, where they are brought as a counterclaim in rent arrears possession cases; • appeals to the county court on points of law under section 204 of the Housing Act 1996 which relate to the obligations of local authorities to those who are homeless or threatened with the risk of homelessness; • actions under the Mobile Homes Act 1983 where the site owner is seeking eviction. 	<p>Importance of issues: relatively high (immediate risk to clients' livelihood, health, safety and well-being).</p>	<p>Ability to self-represent: no specific complexity issues.</p>
	<ul style="list-style-type: none"> • housing disrepair (where the action is for a remedy other than damages and the case involves serious disrepair); • advice and representation for clients challenging Anti-Social Behaviour Orders in the county court, typically alongside possession proceedings, and for injunctions concerning anti-social behaviour. 	<p>Importance of issues: relatively high (immediate risk to clients' health, safety and well-being).</p>	<p>Ability to self-represent: no specific issues of complexity.</p>	
			<p>Importance of issues: relatively high (restrictions on liberty, criminal sanction in case of breach).</p>	

Section A: Advocates graduated fees – proposed fees

Table A: Fees and uplifts in guilty pleas and trials which crack (excluding those cases committed for trial at the election of the defendant)

Class of Offence	Proposed fees until March 2012			Proposed fees from April 2012		
	Basic Fee	Evidence uplift per page of prosecution evidence (pages 1 to 1,000)	Evidence uplift per page of prosecution evidence (1,001 to 10,000)	Basic Fee	Evidence uplift per page of prosecution evidence (pages 1 to 1,000)	Evidence uplift per page of prosecution evidence (1,001 to 10,000)
QC						
A	2254	3.75	1.88	2143	3.56	1.79
B	1716	2.36	1.19	1631	2.25	1.13
C	1610	1.69	0.84	1530	1.60	0.80
D	1716	3.75	1.88	1631	3.56	1.79
E	1423	1.20	0.60	1351	1.15	0.58
F	1423	1.58	0.80	1351	1.50	0.76
G	1423	1.58	0.80	1351	1.50	0.76
H	1610	2.18	1.08	1530	2.06	1.03
I	1610	2.11	1.05	1530	2.01	1.00
J	2254	3.75	1.88	2143	3.56	1.79
K	2254	2.09	1.05	2143	1.99	1.00
Leading Junior						
A	1690	2.83	1.41	1606	2.69	1.34
B	1288	1.78	0.89	1224	1.69	0.84
C	1208	1.26	0.64	1148	1.20	0.60
D	1288	2.83	1.41	1224	2.69	1.34
E	1066	0.91	0.45	1014	0.86	0.44
F	1066	1.19	0.60	1014	1.13	0.58
G	1066	1.19	0.60	1014	1.13	0.58
H	1208	1.63	0.81	1148	1.55	0.76
I	1208	1.59	0.79	1148	1.51	0.75
J	1690	2.83	1.41	1606	2.69	1.34
K	1690	1.58	0.79	1606	1.49	0.75

Justice for All UK

Saving Justice: Where Next for Legal Aid? Views from the Responses to the Ministry of Justice Green Paper Consultation Reform of Legal Aid in England and Wales (2011).

Introduction

Justice for All is the simple notion that everyone should be treated fairly under the law, no matter who you are, how much money you have or where you live. Our coalition of organisations and individuals have come together because we value free legal advice – we believe free, independent advice and representation on legal matters is essential to achieve justice for all. But access to free legal advice and help – including representation – is becoming increasingly restricted, and the funding for free advice and legal services to those who cannot afford it is increasingly under threat from several directions, especially from the Ministry of Justice’s proposals for legal aid.

The Ministry of Justice received over 5,000 responses to their consultation on legal aid reform. What follows is an analysis of some of those stakeholders’ responses. A common worry from respondents was that the proposals were lacking in evidence, misunderstood the extent and range of legal advice needs, underestimated the potential impact on the poorest and most vulnerable, and risked inflicting collateral damage on the legal advice sector (especially voluntary sector agencies) and the justice system. Respondents were extremely concerned that well over half a million clients would miss out on free advice under the proposals.

The principal flaw is the reliance on thematic categories of law as proxies for determining who is in need. These categories only have a loose association with real lives and real problems. Judge Robert Martin, President of the Social Entitlement Chamber

The legal aid scheme has expanded according to need. This need has been driven by increasing complexity of law, welfare, education, employment and immigration administration over the years, coupled with easier credit access and consequent growth of indebtedness. AdviceUK

If implemented, the proposals will lead to considerable hardship and stress for people who face legal problems. The proposals will also significantly reduce people’s faith in the fairness of the law and public administration. Advice Services Alliance

In excluding large areas of the law from the scope of legal aid, Liberty believes that the proposed reforms will create alarming gaps in protection, denying justice to many but hitting the most vulnerable the hardest. Liberty

Early advice is legal advice

The Green Paper proposes to restrict the scope of civil legal aid to issues which incur seriously harmful legal consequences and proceedings such as homelessness, domestic violence, loss of liberty, discrimination, human rights issues and abuse of power by the state. For other legal problems or rights involving housing, welfare benefits, debt, housing, employment, immigration, education, clinical negligence or family breakdown advice and help will not ordinarily be funded

by legal aid.

Without advice problems become more serious, complex and costly

Several respondents questioned that, given the focus of Government policy on early intervention and prevention (for example avoiding ‘unnecessary litigation’), it was counter-productive to take early legal advice and interventions out of the scope of legal aid.

The proposed scope changes, insofar as they are aimed at social welfare law (housing, debt, welfare benefits, education and employment) attack not unnecessary litigation but the very level of service which is used to provide early legal advice and assistance aimed at avoiding litigation and at assisting individuals in dealing with their own problems. Law Centres Federation

The Government has set out a test by which it has judged which areas of law should remain in scope, and which should be taken out...it is wrong to judge whole classes of case on this basis, rather than individual cases. Law Society

The proposals would separate areas of law that are inextricably intertwined, such as welfare, housing, and debt issues. Young Legal Aid Lawyers

The proposals to exclude legal aid from early stages of problem solving (which are not threatening to life or liberty, to family life or to loss of a home) risk the escalation of these problems, especially for vulnerable groups, until threats to health and personal safety, family life or loss of a home become very real, greatly increasing the fear and distress of the people involved and the costs to the legal aid fund and to society generally. Discrimination Law Association

If [private family law applications] are removed from the scope of public funding unless there is domestic violence, many potential family and friends care placements will be lost...[people] lack the confidence and/or resources to make the necessary application to court as a litigant in person with the result that more children may end up in care, contrary to Government policy and at huge cost to the public purse. Kinship Care Alliance

Everyday social welfare and family problems are legal, serious and complex

Nearly all respondents questioned the premise of the proposed changes that the issues which are identified for removal from scope (debt, welfare benefits, housing, employment, immigration and asylum support) are insufficiently ‘serious’ or ‘complex’ to merit funding specialist legal help and advice. For example:

In 2010 alone there were 50 new statutory instruments in social security, housing benefit and tax credits combined. Child Poverty Action Group

A debt, by definition, is a breach, or alleged breach of contract, attracting legal consequences, which are defined and/or limited by numerous statutes and regulations (and some case law)...Debts vary considerably in terms of the legal rules that apply to them...Advisers need to

correctly advise the client about and deal with priority debts. This requires detailed knowledge of the different kinds of enforcement...They also need to correctly advise clients about and deal with non-priority debts. This may include advising clients on the implications of a County Court Judgment, especially if the client is a home owner at risk of an application for a charging order or an order for sale. Advice Services Alliance

The proposals are largely presented as if private family law cases do not raise legal issues. They do. Whilst mediation and other non-court resolution methods are to be applauded and should be encouraged, they are not a universal panacea. Legal issues require legal advice. Mediation works best in partnership with and supported by independent legal advice. There are just too many examples of cases where there are compelling reasons to justify a person receiving legal aid where the Government seeks to remove it and where mediation cannot provide the solution. Resolution

We do not agree with the Government's contention that much of the work covered by social welfare law is practical rather than legal and therefore should not be funded by legal aid. The idea that problems only become legal at the point of court proceedings seems fundamentally to misunderstand the nature of specialist legal advice. Shelter

Family breakdown and educational underachievement are precisely the kinds of matters that can benefit from early legal intervention. This intervention will no longer be available if the proposed changes are implemented. The logical conclusion of reducing legal aid is that, as the impact assessments of the paper suggest, youth crime will increase and greater economic costs will be incurred further down the line. Howard League for Penal Reform

Tax credits disputes are notoriously complex. Low Incomes Tax Reform Group

**The most vulnerable will not get the help they need
People need advice across different areas of legal scope to solve their problems sustainably**

Respondents also observed that the client groups who seek help with these areas are amongst the most vulnerable, usually they have multiple problems or experience 'clusters' of interrelated problems so need a seamless (or 'holistic') service. . . .

No legal aid will mean no help or advice for many

There was a widespread view from respondents that for the 'out of scope' categories, the Green Paper contained misleading assertions about alternative sources of advice, and the capacity within the pro-bono and voluntary sectors to provide appropriate help. For example, National Debtline do not provide face-to-face debt advice and refer cases requiring specialist legal advice elsewhere. The ability of clients to use paid for, or conditional fee (CFA) and insurance funded services as an alternative to public funding was also questioned.

The implication that charities like Disability Alliance are available to help people in the advent of legal aid cuts misrepresents the reality that we do not provide such support. Disability Alliance

The Green Paper mentions IPSEA, the Advisory Centre for Education (ACE) and Parent Partnership Services (PPS) as alternative sources of support to legal aid in education cases...they do not have the capacity, and in some cases do not have the remit to deliver the level of support parents need in SEN education cases. Ambitious about Autism

Reducing legal aid in the area of employment law will increase the demand on our free helpline but in the current economic climate it is unlikely that we will be able to meet the additional demand. Working Families

One of the major barriers to the greater use of CFAs is disbursement funding and the costs of investigation. These costs are substantial in clinical negligence claims. Action Against Medical Accidents

Legal aid saves the public purse money

Many responses pointed to the value of legal aid, both in terms of its social value and its outcomes for clients, but also in terms of the cost savings to the justice system and to other statutory services, and the Government's broader agenda to improve family and relationship support. . . .

The Law Society, LAPG, ILPA, EHRC, LASA, ASA and many others referred to the 'business case' research by Citizens Advice which used LSC outcomes and data from the LSRC's civil and social justice survey to estimate (on 2008-9 figures) the cost-benefit ratio for key civil categories of legal aid advice. This research looked at the 'adverse consequences' of civil problems and found that:

- for every £1 of legal aid expenditure on housing advice, the state potentially saves £2.34
- for every £1 of legal aid expenditure on debt advice, the state potentially saves £2.98
- for every £1 of legal aid expenditure on benefits advice, the state potentially saves £8.80
- for every £1 of legal aid expenditure on employment advice, the state potentially saves £7.13. . . .

Many people will be unable to 'afford' legal aid advice

A common theme across all responses was that given only those on the lowest incomes currently qualify for legal aid, many respondents had concerns about proposals to tighten eligibility criteria. Issues were raised about the abolition of passporting and the application of capital limits. . . .

A telephone gateway must not be the only gateway

Most respondents thought there was an important role for telephone advice, but were also concerned that the proposed 'telephone gateway' would restrict access, and that for many client groups a telephone only service would not be able to meet their needs for reasons of vulnerability and comprehension, or complexity of the issues. For example clients with immigration, detention or asylum cases may have linguistic barriers – as ILPA's response notes the Community Legal Advice helpline has never been used to provide immigration and asylum advice for precisely this

reason. . . .

Reducing legal aid will make courts and tribunals less fair and more costly

Several respondents raised concerns that reducing free advice entitlement would be detrimental to the fair, impartial and efficient administration of the justice system. It was a commonly expressed view that a consequential increase in unassisted litigants would clog up the court and tribunals system, and result in a real imbalance in ‘equality of arms’. Other concerns included the potential for increased complaints and regulatory problems, especially in the market for quasi-legal services such as mediation, claims management and fee charging debt management firms. The Green Paper’s assertions that many types of legal processes were sufficiently ‘user friendly’ to enable users to navigate and progress their own cases without any assistance or representation were roundly criticised. . . .

The administration of legal aid is inefficient and too costly

Many respondents also felt that the administration of legal aid itself was inefficient and should be improved.

Substantial savings could be made for providers and the Legal Services Commission if the application process was simplified. Housing Law Practitioners Association

The whole scheme should be reviewed to see whether the way it is administered is fit for purpose. Overall administrative and procurement costs of the legal aid system have continued to rise in recent years, and are disproportionate to the amount of funding available for delivering frontline legal advice and representation services; in 2008/09 the figure for the LSC’s administrative costs was £124.4 million. The system involves too much micro management by the LSC, leading to case by case form-filling and scrutiny and to significant audit activity. Citizens Advice

The complexity of the legal aid remuneration and claims system is itself burdensome and costly. We would urgently recommend abandoning a great part of this complexity, micromanagement and micro-audit. Immigration Advisory Service

There is significant scope to make efficiency savings within the legal aid and the civil and criminal justice systems that will enable at least £400 million to be saved. The Law Society

Frontline advice services will be lost

The cumulative impact on legal aid providers, not only of the proposed scope restrictions, eligibility and delivery changes but also the proposal to cut all civil fees by 10 per cent across the board was a key concern for many of the organisations responding. . . .

Charities will be hit hardest

Some respondents were particularly concerned about the disproportionate impact on not for profit providers – a predicted loss of at least 77 per cent loss of legal aid income to this sector,

coming at a time when other sources of funding were also reducing or disappearing altogether. . .

The negative impact of cuts to legal aid has not been adequately thought through

The Ministry of Justice published no less than 18 impact assessments, but many respondents questioned their methodology and quality of the evidence and data used. For example, the Law Centres Federation noted that the Impact Assessments projections on reduced case volumes from current levels were based on 2008-9 data and therefore underestimated – the real number of cases taken out of scope would be 720,000. This is confirmed by recent research by the Legal Action Group. Most respondents thought the impact assessments left too many gaps, or raised more questions than they answered. Several respondents questioned also whether the Ministry of Justice had applied public sector equality duties consistently and robustly. . . .

A considered, cross-government approach is needed to save money while protecting free legal advice

Many of the respondents, mindful of the budget cuts required of the Ministry of Justice, challenged policymakers in the MoJ to find fairer, creative, and more effective ways of achieving costs savings other than reducing the availability and coverage of a vital frontline service. Some respondents commented that the limited options for alternative funding, such as a ‘Supplementary’ legal aid fund (SLAS) and a charge on client accounts’ interest (IOLATA), explored in the Green Paper had not been fully thought through and that whilst the ideas have merit they would not bring significant income into the legal aid fund. . . .

Addressing poor government decisions and inefficiencies which mean people need advice

Virtually all respondents suggested that efficiency savings could also be found through tackling wasteful bureaucracy in legal aid and the wider justice system, and that there should be a concerted effort across Government to tackle the ‘cost drivers’ of legal aid – for example reducing the costs of appeals by raising the quality of first instance decisions by public authorities. The Law Society’s response included an annex of alternative proposals for reducing costs by £350 million, including reforming advocacy fees.¹⁴ But most respondents also agreed that this challenge was wider than the justice system and concerned how agents and systems in the public and private sectors interact with their customers in ensuring they can access their rights. . . .

As a coalition of organisations we are mindful of the budgetary challenges the Ministry of Justice faces, but we urge policymakers to engage with concerns raised by our organisation about the false economies and detrimental consequences that may result from any serious reduction in access to free legal support. There may be serious knock-on costs to public expenditure and public sector budgets from cuts to civil legal aid, the sustainability of services providing free advice, and support services in the community could be irretrievably undermined.

These aspects of the proposals need an urgent and comprehensive review. This review should also scope out law and procedural reforms which could improve efficiency, reduce costs and save frontline services. By engaging more widely with civil society and stakeholders able to

reach different client groups, solutions can be found which will fulfil the Ministry's objective to deliver a less costly and bureaucratic system in which legal solutions are used proportionately and people can be empowered to access their rights, resolve their problems and obtain redress through appropriate channels. Our coalition sees ability to use the legal system as essential to its continued fairness and effectiveness, and to the rule of law.

Lady Brenda Hale, Justice of the Supreme Court of the United Kingdom
Opening Address, Law Centres Federal Annual Conference (2011)

It is not the proper role of any judge to attack Government policy. If the Government of the day decides that the right solution to a massive budget deficit is massive cuts in public spending, that is a matter for them to decide and Her Majesty's loyal opposition to oppose if they see fit. The role of Her Majesty's loyal judges is to decide the resulting disputes according to law.

But it is the proper role of the judges to warn the Government of the consequences of the particular choices they make in pursuit of their policies. In the case of legal aid cuts, there is no shortage of warnings, because those consequences are on several different levels.

First, there is the level of constitutional principle. We are a society and an economy built on the rule of law. Businessmen need to know that their contracts will be enforced by an independent and incorruptible judiciary. But everyone else in society also needs to know that their legal rights will be observed and legal obligations enforced. As the Bar Council has put it, 'individuals' belief that they live in a society in which harm done falls to be recompensed, or that obligations made will be honoured, is important.' If not, the strong will resort to extra-legal methods of enforcement and the weak will go to the wall.

This means that everyone must have access to the courts or other machinery to vindicate their rights and enforce the obligations of others towards them. I would not automatically equate access to justice with access to lawyers. If our justice system were resourced and equipped to deliver equal justice to everyone, irrespective of the quality of the legal representation they had, then I would not argue for universal legal aid.

But it is perfectly clear that we do not have such a justice system. We have, as the late and much lamented Lord Bingham pointed out, an adversarial legal system which depends upon lawyers to prepare, present and argue the case. The judge is a neutral umpire between the competing sides. The quality of the advocacy should not win the case. But we all know that it often does. And this is true at all levels of the system – from the First Tier Tribunal to the United Kingdom Supreme Court.

We do not resource our courts to do the job of preparing the case. We used to resource some tribunals to do it but the assimilation of courts and tribunals means that while this does still happen in some tribunals it is happening less and less. So much of our system is essentially reliant on the parties to prepare and present their cases.

So that is why lawyers of my generation agree with those European scholars who argued during

the second world war that a legal service was as important as a health service, indeed, perhaps more so:⁹

‘Legal aid is a service which the modern state owes to its citizens as a matter of principle. . . . Just as the modern State tries to protect the poorer classes against the common dangers of life, such as unemployment, disease, old age, social oppression, etc, so it should protect them when legal difficulties arise. Indeed the case for such protection is stronger than the case for any other form of protection. The State is not responsible for the outbreak of epidemics, for old age or economic crises. But the State is responsible for the law.’

But secondly, even if we did not believe this as a matter of constitutional principle, we might believe it as a matter of practical common sense. It is a great mistake to believe that most legal rights are vindicated, and most legal obligations enforced, in the courts. We are the tiny tip of a very big iceberg.

Many legal rights and obligations are not enforced at all. Most people do not recognise that a practical problem they may have is also a legal problem – unless they are forced to do so because they are the defendant in proceedings brought by someone else – a creditor, landlord, spouse or whatever.

But what everybody who may have a legal problem – and particularly the people who find themselves defendants to their creditors’ or landlords’ or even spouses’ claims – needs is access to good legal advice and practical help. It was a big moment when the legal aid scheme extended, from representation in court proceedings, to advice and assistance with all manner of legal problems.

My legal assistant has written movingly of his pro bono work relating to home safety for women and children. He has conducted numerous cases, arguing for the rights of tenants who have been left with no electricity or no hot water, or who have been told that they are intentionally homeless because they refuse to live in damp, squalid and unsafe accommodation on violent estates with young children. He has nearly always been able to negotiate a reasonable settlement without the need to go to court. As he says,

‘I know it is contrary to the safety and welfare of these people to leave them to negotiate the system on their own. I also find it hard to believe that it would make economic sense to do so, given that their problems will almost certainly be exacerbated and present, in time, a much increased drain on public resources.’

We all know that early help to sort things out, before anyone might think of going to court, is most effective. Just a little advice and a few letters can save such a lot. So the most worrying feature of the new scheme is its all or nothing character – if the subject matter is in, you can get advice, help and representation; if the subject matter is out, you cannot even get advice and help,

⁹ EJ Cohn, ‘Legal Aid for the Poor: A Study in Comparative Law and Legal Reform’ (1943) 59 *Law Quarterly Review* 250, 253.

let alone representation, through legal aid.

Surely we can warn Government that this is a false economy. It is the reverse of the old woman who swallowed a fly . . .

Thirdly, we can warn about the particular subject-matters that are in and out. The Government has obviously had the ECHR jurisprudence in mind. It has devised a test of seriousness of consequences, no doubt inspired by the *McLibel* case:¹⁰

‘The question whether the provision of legal aid is necessary for a fair hearing must be determined on the basis of the particular facts and circumstances of each case and will depend, *inter alia*, upon the importance of what is at stake for the applicant in the proceedings, the complexity of the relevant law and procedure and the applicant's capacity to represent him or herself effectively.’

So the Bill has cleverly added the power to grant legal aid if denial would be in breach of the applicant's convention rights: yet another example of leaving it to the judges to pick up the hard cases?

But we all know that the seriousness of the consequences is not directly linked to the subject matter of the case. A credit card debt can easily lead to homelessness. A family breakdown can easily lead to debt and ultimate homelessness. Losing your job can lead to family breakdown, debt and homelessness. If the problem had been tackled in the right way at the right time it might not have done so.

Fourthly, we can point out the disproportionate impact upon the poorest and most vulnerable in society. Indeed, the government's own equality impact statement accepts that the changes will have a disproportionate impact upon women, ethnic minorities and people with disabilities. And they say that this is justifiable because they are disproportionate users of the service in these areas. This is an interesting argument about which I had better not say anything more, as it is bound to come before us in one shape or form in future. Others have warned that children will be the losers if their parents are not given sensible advice. The Legal Action Group fears ‘that this would lead to an underclass of people disenfranchised from civil justice and indifferent to the rule of law’.

We can all pick holes in – warn of the consequences of - the particular inclusions and exclusions but my personal view is that exclusion by subject matter is fundamentally misconceived. In the olden days the distinctions were between representation and help, and courts and other dispute resolution machinery. It was a legal practice-based model. It took a long time to include the non-court, non-legal practice-based areas, such as welfare benefits, education and disability. These, rather than the traditional court-based disputes, are where the real help is needed, yet these are the ones which are most under threat.

Fifthly, we in the courts can of course warn that the consequence will either be that some very vulnerable people do not get the chance to bring their claims or defend themselves properly before the courts, or that the courts will be overflowing with people attempting to assert their claims or defend themselves as litigants in person. I think that is very selfish of us. We ought all

¹⁰ *Steel and Morris v United Kingdom* (2005) 41 EHRR 22.

to be taking courses in how best to preserve judicial neutrality in an adversarial system where one party is represented and the other is not. I am not worried as much by an increase in litigants in person as I am by the likely increase in people with good claims or good defences who do not realise this and give up before they begin to fight.

I do not know whether the battle of the Bill is yet over. The House of Lords Constitution Committee delivered a short, sharp commentary on the Bill on 16 November. The House of Lords itself debated the second reading from 15.07 until 23.09 on 21 November (with their usual break for dinner). Almost all the debate was about the changes to legal aid and almost everyone who spoke was against it. It is, as someone has commented, an ironical fact that the best protectors of the rights of the marginalised and vulnerable in society are not our elected representatives but the unelected mix of the great, the good and the superannuated who populate our upper chamber. Where would we be without them?

But of course we cannot pin all our hopes on amendments to the Bill. I know that many law centres are successfully exploring other forms of funding. There are some philanthropic sources out there to be tapped. Long may they, too, remain devoted to the cause of equal access to justice. But, like pro bono work, these are all dependent upon the good will of those in charge. Having been for 15 years a trustee of a charitable foundation, I know how fickle they can be. They go for the exciting new projects which can make a difference rather than for boring and predictable core-funding. But proper advice and help in complex areas of the law needs specialists who can stay in post for reliable lengths of time. A well meaning lawyer who knows nothing about the area in question can do more harm than good.

The hope for the future is that there are now so many people, all over the system, who recognise and believe in these truths. When I was young that simply would not have been so - the poor got whatever the system let them have, there was no such thing as community care law, employees had no claims beyond their notice period, and victims of domestic abuse stayed victims. But now the great and the good in Parliament are fighting for equal access for justice for the most vulnerable and marginalised members of our society. Whatever our fears for the future, the world is now a different and better place than it was when I was young. The Law Centres movement has had a lot to do with that and long may to continue to do so.

European Convention on Human Rights

Article 6 – Right to a Fair Trial

- 1 In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

- 2 Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.
- 3 Everyone charged with a criminal offence has the following minimum rights:
 - a to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;
 - b to have adequate time and facilities for the preparation of his defence;
 - c to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;
 - d to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
 - e to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

European Union Charter of Fundamental Rights

Article 47- Right to an effective remedy and to a fair trial

Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article.

Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented.

Legal aid shall be made available to those who lack sufficient resources in so far such aid is necessary to ensure effective access to justice.

Lady Brenda Hale, Justice of the Supreme Court of the United Kingdom

Equal Access to Justice – Who is Responsible?

Address to the Hungarian Association of Women Judges (Apr. 2011).

. . . . But is a right to legal aid inherent in the right of access to a court under article 6? We have seen that in *Golder* ‘access to a court’ meant access to a lawyer who could advise him about the causes of action available and begin proceedings for him. Not surprisingly, therefore, the next

important case in Strasbourg was about paying for a lawyer. In *Airey v Ireland*,¹¹ a wife wanted to petition for judicial separation in the Irish High Court, but lacked the means to employ the services of a lawyer and there was no legal aid. The Government argued that the applicant did have access to the court, since she was free to represent herself: it was not like *Golder*, where the applicant had been positively prevented from going to court. The Strasbourg Court famously stated (para 24):

‘The Convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective. This is particularly so of the right of access to the courts in view of the prominent place held in a democratic society by the right to a fair trial’.

The Court went on to consider whether Mrs Airey’s appearance before the High Court without the assistance of a lawyer would be effective, in the sense of whether she would be able to present her case properly and satisfactorily. The Court held that in the particular context, she would not: the procedure in the High Court was complex, there might be complicated points of law, the grounds for a decree would have to be proved, perhaps with the help of expert evidence, and ‘marital disputes often entail an emotional involvement that is scarcely compatible with the degree of objectivity required by advocacy in court’ (para 24). The Court did not accept that because there was no positive obstacle to Mrs Airey appearing in court, she had a right of access (para 25):

‘... fulfilment of a duty under the Convention on occasion necessitates some positive action on the part of the State. ... The obligation to secure an effective right of access to the courts falls into this category of duty.’

However, the Court made clear that the State did not have to provide free legal aid for every dispute relating to a ‘civil right’ (para 26). The Court also recognised that the State had a free choice of means to ensure that litigants did have an effective right of access to the courts. A legal aid scheme was one. Simplification of procedure was another. I will come back to that later.

The limited scope of the *Airey* decision became clear in *X v United Kingdom*.¹² Mr X complained that he had been denied access to a court because the only representation available before an Industrial Tribunal was through his trade union, but his union had refused to represent him or provide him with legal aid. The European Commission on Human Rights held that the Convention does not guarantee as such a right to free legal aid in civil cases (para 3):

‘Only in exceptional circumstances, namely where the withholding of legal aid would make the assertion of a civil claim practically impossible, or where it would lead to an obvious unfairness of the proceedings, can such a right be invoked....’

¹¹ (1979-80) 2 EHRR 305.

¹² (1984) 6 EHRR 136.

Mr X could have represented himself before the Industrial Tribunal, where the proceedings were designed to be conducted in a practical and straightforward manner. Further, the applicant had not qualified for the grant of free legal aid due to the level of his family income.

Things may be different if there is a marked lack of ‘equality of arms’ in a complex case. In the UK, we have never allowed legal aid for defamation cases, perhaps fearful that too many people would want to sue over trivial insults. This means that only the rich can sue. Usually, of course, the defendants are the media, newspapers or other publishers, who are often also rich. But there are exceptions. In 1986 some members of the environmental campaigning organisation Greenpeace published a leaflet called ‘What’s wrong with McDonald’s?’. This contained some very critical comments on McDonald’s policies and products. McDonald’s sued for libel. The trial took 313 days. McDonald’s were, of course, represented by a team of very experienced and highly paid barristers and solicitors. The defendants raised some money for their defence and had some pro bono help from lawyers. But mostly they defended themselves. And their formidable task was to try and prove that their allegations were true. They lost on most points and complained to Strasbourg.

In *Steel and Morris v United Kingdom*,¹³ the ‘McLibel case’, the Court held (para 61) that:

‘The question whether the provision of legal aid is necessary for a fair hearing must be determined on the basis of the particular facts and circumstances of each case and will depend, *inter alia*, upon the importance of what is at stake for the applicant in the proceedings, the complexity of the relevant law and procedure and the applicant’s capacity to represent him or herself effectively.’

The Court found that the denial of legal aid to the applicants deprived them of the opportunity to present their case effectively before the court and contributed to an unacceptable inequality of arms with McDonald’s (para 72). Although it was a defamation action, the ‘McLibel Two’ had been defending the case to protect their right to freedom of expression. The financial consequences of losing were significant. The proceedings had been complex. The applicants would have fulfilled the financial criteria for the grant of legal aid. The disparity between the legal assistance enjoyed by the applicants and McDonald’s was such as to have given rise to unfairness.

But cases as dramatic as that are rare. Strasbourg will not often insist on legal aid in civil cases. In a world of shrinking resources, we may have to look for other ways in which we can assure equal access to justice for all. In *Airey*, the Strasbourg court suggested that simplification of procedure was another solution. . . .

¹³ (2005) 41 EHRR 22.

Alternative Courts and Alternatives to Courts

Many jurisdictions (in and outside of the United States) are exploring alternatives to civil and criminal litigation. Mediation, arbitration, and settlement are encouraged, and many advocate “problem-solving courts” or specialized courts, with names such as homeless courts, drug courts, reentry courts, veterans’ courts, and girls’ courts. Trade-offs abound, as some of these alternatives are not voluntary, and some do not permit lawyer participation. Moreover, such alternatives are less public than adjudication. This segment focuses on the extant experimentation, the successes, the risks, and the relationship of these alternatives to constitutional, statutory, and common law rights of litigants. Questions include what types of litigants and cases have been sent to alternative courts, the desirability of limiting reliance on lawyers, the sustainability of innovation, and the relationship of these changes to the ideology of “rights to remedies.”

Hon. Randall T. Shepard, *The Great Recession as a Catalyst for More Effective Sentencing*, 23 *Federal Sentencing Reporter* 2 (2010).

Chief Justice Sue Bell Cobb, *The Power of Fixing People Rather than Filling Prisons*, Council of State Governments, *BOOK OF THE STATES* (2011).

California’s Collaborative Justice Courts: Building a Problem-Solving Judiciary, Judicial Counsel of California (2005).

Allegra McLeod, *Decarceration Courts: Possibilities and Perils of a Shifting Criminal Law*, 100 *GEORGETOWN LAW JOURNAL* (forthcoming 2012).

The Defender Association, *Law Enforcement Assisted Diversion (LEAD) Evaluation Panel* (Oct. 2011).

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

Professor Dame Hazel Genn, *What is Civil Justice For? Reform, ADR and Access to Justice*, *YALE JOURNAL OF LAW AND HUMANITIES* (forthcoming 2012).

IV. ALTERNATIVE COURTS AND ALTERNATIVES TO COURTS

The Honorable Randall T. Shepard

The Great Recession as a Catalyst for More Effective Sentencing

23 Federal Sentencing Reporter 2 (2010)

During the most serious economic downturn since the Great Depression, the distress in public budgets has generated a forceful movement aimed at renovating corrections policy. This movement has propelled to the forefront a host of new techniques for analyzing offenders and fashioning more effective sanctions and services. The process is evident even in political environments some might think inhospitable to change.

I. Snapshot of a System Under Stress

Indiana has long prided itself on its reputation as a state that is tough on crime. When Indianapolis prosecutors charged boxer Mike Tyson with rape some fifteen years ago, one lawyer said, “If you commit murder [in Indiana], make sure to drag the body across the state line.”

This image of the state is not mere folklore. Visible public-policy decisions reflect its reality. In the last decade, the Indiana General Assembly has enacted at least 117 criminal laws or penalty enhancements. By contrast, during 2010, the General Assembly passed only one measure meant to reduce a prison sentence.

Nevertheless, the great recession has created a moment when robust incarceration practices have lost some of their political punch. The cost of running Indiana’s prisons has surged 76 percent since 2000, to more than \$679 million a year. During this period, the prison population increased by 41 percent. Indeed, Indiana added nearly 1,500 inmates to its prisons in 2009, a year when the national state prison population declined for the first time in nearly forty years. Unless the state’s present trajectory is somehow altered, Indiana Department of Correction officials expect that annual incarceration costs will rise to more than \$1 billion by 2017.

This statistic is serious news for a state already facing persistent revenue shortfalls. Thus, various state actors are combining efforts with the hope of reducing the amount of money spent on incarceration while still keeping the most dangerous offenders segregated from their fellow citizens—from building a system of problem-solving courts to fashioning a more robust approach to appellate review of sentences.

II. Appellate Sentence Review

Trial court judges and their staffs have generated most of the sentencing innovations. Still, it has been important for the state’s highest court to demonstrate a commitment to sentencing change. One such demonstration has been through appellate review.

Major amendments to the Indiana Constitution were adopted in 1970, including provisions giving the Indiana Supreme Court explicit authority to review and revise all criminal sentences.

Nevertheless, during most of the ensuing three decades, the court rejected nearly all such requests and the state's intermediate court nearly never exercised its similar power conferred by delegation. The appellate attitude toward this new constitutional authority was reflected in rules governing the claims, which declared that relief was available only when the sentence was "manifestly unreasonable," meaning "no reasonable person could find the sentence appropriate." In 2003, the court amended its rules to declare that a revision in sentence could occur when the "Court finds that the sentence is inappropriate in light of the nature of the offense and the character of the offender."

These changes have allowed the courts to shed the old way of thinking that left appellate judges straitjacketed by the trial court's initial sentencing determination. Although it has hardly been open season for criminal-appellants seeking a sentence revision, Indiana appellate courts are now more able to engage in genuine sentencing review and shorten a sentence when warranted—leavening the outliers, one might say. To make clear that this process was not a one-way street, the court held that it was at least theoretically possible that a prisoner appealing for a reduced sentence might receive a higher sentence.

III. Judicial Leadership on Problem-Solving Drug and Reentry Courts

Perhaps the most visible court-initiated actions have been the movements on problem-solving courts. The most prevalent of these courts are drug courts, which target nonviolent offenders who are believed to have a high risk of recidivism. These low-level offenders are especially costly for traditional prisons, because they cycle in and out of the system quickly but still incur thousands of dollars in intake and transportation costs. In 2009, Indiana's trial courts sent more than 1,300 offenders to the Department of Correction with less than thirty days to serve. The average expense per inmate for intake alone is \$1,000.

. . . . Today, twenty-seven Indiana counties have established drug courts (including nearly all the sizeable ones), and another six counties are in various stages of planning and establishing such courts.

The outline of Indiana's drug courts fits typical national norms. Participants, in lieu of jail time, engage in addiction treatment and counseling and are subject to frequent drug testing. Those who do not comply with the conditions set by the court are subject to sanctions and possible jail time; those who do comply receive incentives. Participants may be involved in the drug court program from twelve to thirty-six months, depending on the court's guidelines and the severity of the underlying offense.

Of course, national data show that drug courts have resulted in dramatic decreases in recidivism over the last twenty years. Some 75 percent of adult drug court graduates avoid rearrest, whereas conservative analyses have concluded that drug courts reduce crime rates as much as 35 percent more than other sentencing options. Drug courts are also cost effective, producing savings ranging from \$4,000 to \$12,000 per client. These costs are based on a variety of factors, including reduced prison costs, reduced revolving-door arrests and trials, and reduced victimization.

Still, skepticism among Indiana decision makers about whether these techniques might be effective in the Indiana setting proved persistent. Accordingly, the Judicial Conference of Indiana commissioned its own examination of court techniques and offender outcomes in five urban counties with programs mature enough to produce legitimate results. The Judicial Conference study found that, in Indiana, the rearrest rate for drug court graduates is 7 percent to 18 percent, which is significantly lower than the 34 percent to 41 percent rearrest rate for similar offenders in the same counties who were eligible for drug court but did not participate. Indiana was the first state in the country to certify drug and reentry courts. The Indiana General Assembly has given the Indiana Judicial Center the authority to administer and certify individual drug and reentry courts. The certification process begins when a court submits an application and proposed policies and procedures to the Indiana Judicial Center. The process ends when the Judicial Center approves the new drug court and the court receives funds from the legislature. The cost savings associated with the drug courts in Indiana is over \$7 million.

More recently, Indiana has established a growing number of reentry courts, which provide recently released offenders with access to comprehensive services to promote their successful reintegration into the community. Many offenders find themselves homeless and unemployed upon their release from incarceration. Without support services, they may see continued criminal activity as their only option for survival.

The reentry court matches its participants with a case manager who guides them through the reentry process, which may include enrollment in mental health and substance abuse treatment, anger management classes, and courses in life skills, as well as housing, financial, educational, and employment services. These case managers also conduct risk and needs assessments of each participant, tailoring program requirements to each participant's specific situation. Indiana currently has seven reentry courts, with another in the planning stages. . . .

The drug court model is now being applied to various other problem-solving courts in Indiana, including mental health courts, family dependency courts, and one community court. Several counties have implemented more than one problem-solving court, and several other counties are planning domestic violence courts and veterans' treatment courts.

IV. Risk Assessment

Perhaps the most ambitious project in Indiana sentencing reform involves the Indiana Risk Assessment Task Force, formed in 2006. This task force includes representatives from probation departments, the Department of Correction, community corrections, reentry courts, court alcohol and drug programs, and drug courts. The Judicial Conference charged the Task Force with selecting a new risk assessment tool.

Risk assessment is surely the foundation of recidivism reduction. It involves assessing an individual's risk of reoffense by evaluating numerous objective criteria—such as the individual's age, employment and education history, number of prior offenses, any history of drug and alcohol abuse, and any factors that may affect criminal behavior. The assessment also identifies the individual's needs that can be targeted with appropriate programs and treatment to reduce the likelihood of recidivism.

This risk assessment project is critical to improving Indiana’s criminal justice system by effectively managing and treating offenders. Assessment results can follow an offender through the continuum of the criminal justice system and identify the best response to an offender’s needs at each phase of the system. The information from these risk-assessment tools can also be used to track offender changes that may be used to adjust supervision and case plans for the offender—leading to improved public safety and recidivism reduction.

In 2008, the Task Force recommended the adoption of newly created public domain risk and needs assessment tools for both adults and juveniles, which are currently being implemented throughout the state. In 2010, the Judicial Center trained 695 juvenile officers and 712 adult officers in risk assessment.

V. Enlisting Help—Partnership with Pew Center and Council of State

In June 2010, the three branches of Indiana state government asked to partner with the Pew Center on the States and the Council of State Governments Justice Center, which has been focusing on a select group of states to improve sentencing policy. A bipartisan steering committee will study criminal sentencing data, compare Indiana’s current sentencing and corrections policies with nationally recognized best practices, and generate proposals for reducing the funds spent on incarceration while improving public safety and bolstering the chance of offender rehabilitation. . . .

There is reason to believe that initiatives of this sort will both save money and keep people safer. Several states have recently engaged the Pew Center and the Council of State Governments to make recommendations on increasing public safety while reducing the amount spent on incarceration. In 2007, Texas lawmakers were faced with a harrowing request to build the estimated 17,000 new prison beds that would be needed within the next five years, at a taxpayer cost of more than \$2.6 billion.²⁰ Instead, legislators allocated \$241 million for the enhancement of treatment programs for nonviolent offenders and hiring of reentry coordinators. Since this overhaul, Texas’s crime rate has steadily dropped, along with its prison population and the percentage of parolees convicted of a new crime. In Dallas alone, the per capita crime rate dropped 10 percent from 2007 to 2008, reaching its lowest level in forty years. From January 2008 to August 2009, the Dallas crime rate dropped an additional 10.7 percent. Texas, along with Massachusetts, had the sharpest drop in incarceration rates from 2007 to 2008, at a time when the average state incarceration rate actually increased. . . .

The Honorable Sue Bell Cobb

The Power of Fixing People Rather than Filling Prisons
Council of State Governments, BOOK OF THE STATES (2011)

Like most states, Alabama is currently facing the crisis of an overcrowded prison population and a recidivism rate that significantly threatens public safety and exacerbates already bleak state and local government budget shortfalls. Rather than continue to spend vast sums of money on a system that is clearly broken, Alabama is beginning the process of interbranch cooperation to implement effective reforms in the areas of sentencing and corrections at the state and local

levels. A number of efforts are currently underway. For the sake of public safety and stark financial reality, Alabama must continue to modify its laws and carry out reforms to lower the costly burden of corrections and stop the revolving door of recidivism.

I cannot begin to count the number of times during my thirteen years as a trial judge that I said to victims of crime, troubled youth, or dysfunctional families, “I wish I could snap my fingers and make things better. I wish I could snap my fingers and undo all the harm that has caused you to be in court today. Unfortunately, I do not have that kind of power.”

No human being has that kind of power. However, judges can use their power in sentencing juvenile and adult offenders in a way that significantly reduces the likelihood that offenders will again cause harm. That ultimately makes life better for the offender, for his or her potential victims, and for the community. This power—the power “to fix people rather than fill prisons”—is growing in Alabama’s criminal justice system.

Fulfilling the Power and Mission of a Unified Court System

As chief justice of a unified court system, I feel privileged to be given the opportunity to enhance that “positive coercive power” possessed by every trial judge in our state. Because of the wisdom and political courage of former Chief Justice Howell Heflin, in 1973 Alabama became one of the first states to unify its judicial system. The result was the placement of the administrative oversight of the trial courts with the chief justice and the abolition of non-lawyer judges. Adequate and reasonable funding of the court system became the responsibility of the state. Consolidation such as this empowers state court leaders to promote policy changes that are in the best interest of the people. Thus, the courts can fulfill their ultimate mission to fairly, impartially and swiftly resolve disputes, and to adjudicate criminal matters in order to make the public safer.

Making the Public Safer Under Increased Budgetary Constraint

. . . . Alabama has the most overcrowded prison system in the United States, at 190 percent of institutional capacity, and, unfortunately, the least funded. Alabama ranks sixth in the country in the number of adults in prison or jail, with one in 75 behind bars, compared to one in 100 nationally. Alabama’s per diem per inmate could be doubled and not even meet the national average. Alabamians are more at risk because of our failure to keep corrections funding at the same pace as our prison population. This has resulted in Alabama having one of the largest ratios of inmates to correctional officers in the country.

Despite our failure to adequately fund corrections, corrections costs consume an ever larger portion of our state budget. Over the past 20 years, the annual cost of corrections in Alabama has more than quadrupled—growing from \$105 million in 1988 to \$577 million in 2008. Yet for all this spending, taxpayers are not seeing a solid return in terms of public safety. In fact, recidivism rates are on the rise.

Let me be absolutely clear: We must lock up violent and serious offenders so they cannot continue to harm innocent people. However, where nonviolent offenders are concerned, an alternative to the costly cycle of crime, incarceration and recidivism exists. As observed by Roger Warren, president emeritus of the National Center for State Courts: “Today, ... there is a

voluminous body of solid research showing that certain ‘evidence-based’ sentencing and corrections practices do work and can reduce crime rates as effectively as prisons at much lower cost.”

The Alabama Sentencing Commission

As the administrative leader of the court system, I stated in my 2010 State of the Judiciary Address that, “[w]e pledge ourselves to the change necessary to stop the revolving door. I see a day when someone breaks the law, that he or she will go before a judge committed to fixing people rather than filling prisons, a judge empowered by the legislature to do just that.”

In an effort to make that pledge a reality, court leaders and the Alabama Legislature have taken many steps. Of enormous significance was the creation of the Alabama Sentencing Commission in 2000. The Sentencing Commission’s mission is to review Alabama’s criminal justice system and recommend changes that provide just and adequate punishment for crime, improve public safety, address prison overcrowding, and establish a fair and effective sentencing system while providing judges with flexibility in sentencing options and meaningful discretion in imposing sentences.

The Sentencing Commission has determined public safety and crime prevention can best be improved in Alabama by encouraging the use of alternative sentencing options for nonviolent offenders. To reach these goals, the commission adopted voluntary sentencing standards, which the legislature approved in 2006. Since then, the Commission has continued providing recommendations, assistance, and training in implementing the new sentencing guidelines.

Currently, “[o]ne of the most exciting initiatives of the Alabama Sentencing Commission is the Cooperative Community Alternative Sentencing Project,” a project that began in 2007. Funded by the Pew Center on the States, the Cooperative Community Alternative Sentencing Project (“CCASP”) is a joint venture of the sentencing commission and the chief justice, with technical assistance provided by Vera Institute of Justice and the Crime and Justice Institute.

Since its inception, the Sentencing Commission was aware that, although Alabama has a number of agencies and government entities involved in community supervision of felony offenders, it lacks an organized, continuous system of community punishment, intermediate criminal sanctioning alternatives, and community supervision. Local district attorneys operate pre-trial diversion programs; circuit courts in the various counties handle the day-to-day operation of drug courts; the Alabama Administrative Office of Courts oversees the Court Referral program, which places criminal defendants in drug treatment programs; county governments operate localized community corrections programs; the Alabama Department of Corrections provides for work release programs; and the Alabama Board of Pardons and Paroles operates probation and parole services. While each of these services is beneficial, the Sentencing Commission has questioned the effectiveness and efficiency of operating these programs as a diffracted system that sometimes duplicates services. Further, Alabama currently has no comprehensive, consistent data collection system for these programs that would aid in determining and improving their effectiveness. The need for proven solutions to Alabama’s current lack of a cohesive community punishment system is exacerbated by the current financial crisis. As the Sentencing Commission

recognizes, “Alabama cannot afford to duplicate services or provide services to offenders the services will not benefit.”

For seven years, the Sentencing Commission attempted through various means to bring the parties together at the state and local levels to address the problems caused by lack of a cohesive system of community supervision of nonviolent felony offenders. Until recently, state efforts on these issues largely failed to actively engage local jurisdictions or substantially correct these problems.

CCASP, however, offers a new and promising approach by encouraging active community involvement at the local level and focusing on evidence-based practices, collaboration among agencies, and coordination of services. Starting in 2010, CCASP has been working with four pilot sites in Alabama that are expected to become models and mentors for other community programs in the state. Currently, the primary goal is for each of the four pilot jurisdictions to actively involve all major criminal justice stakeholders and, through self-examination and meaningful data analysis, collaboration, and cooperation, improve corrections services at the local level. Although CCASP is guided by a state steering committee, a committee of local stakeholders determines the best options for each jurisdiction using evidence-based practices to accomplish proven changes in criminal behavior. By forming local alliances among the agencies supervising offenders in the community, each jurisdiction can define a cohesive model system that establishes a continuum of graduated supervision for the fair, effective, and efficient delivery of services.

Currently, each pilot jurisdiction is testing a comprehensive risk and needs assessment system that could greatly benefit the criminal justice system by (1) determining the risk of reoffending for each convicted offender and (2) suggesting the dynamic factors present for each offender that, if changed, can lower the risk. As the Sentencing Commission notes, “[l]owering the risk of reoffending, of course, increases public safety. By identifying those whose behavior can be changed by addressing needs, and identifying those needs, the criminal justice system can target those offenders most likely to change and identify the services needed to accomplish those changes. The use of the risk and needs assessment system [will] thereby allow the State to more specifically target the best use of its scarce resources.”

The ongoing success of the Alabama Sentencing Commission in achieving its mission demonstrates the power of cooperation in providing Alabama with a safer, more cost-efficient criminal justice system. Alabama is moving away from anger- and fear-based “sentencing that ignores cost and effectiveness to evidence-based sentencing that focuses on results.”

The Importance and Expansion of Drug Courts and Community Corrections in Evidence-Based Sentencing

. . . . The expansion and implementation of community corrections programs is also imperative in order to “stop the revolving door.” Securing funding—which requires a voluntary partnership between county, state and criminal justice stakeholders—continues to be the most significant challenge. However, thanks to the assistance of Pew Center on the States, Vera Institute of Justice and the Crime and Justice Institute, and the participation of trial judges and local

stakeholders, the success of the joint Cooperative Community Alternative Sentencing Project demonstrates the progress that can be made with the cooperation of key parties.

Mandatory Judicial Conference: Taking Evidence-Based Practices to Alabama's Judges

History was made in 2010. With funding provided by the U.S. Department of Justice's Bureau of Justice Assistance and the State Justice Institute, with support from the Pew Center on the States, I was able to use my power as administrative head of the trial courts to order all judges having jurisdiction over criminal felony offenders to attend a sentencing workshop at the Alabama Judicial College.

The goal was clear. Fifty percent of those "behind the wire" are violent offenders and should be incarcerated for sufficiently long sentences to protect the public and deter others from committing similar crimes. The focus of the mandatory training session was appropriate sentencing for nonviolent offenders. Sentencing judges need to examine their practices, recognize the importance of their gate-keeping function and its impact on public safety, and understand the importance of risk and need factors in determining sentences. Judges also need to have an opportunity to express their concerns, frustrations and ideas concerning community corrections and sentencing matters. A bipartisan group of local and national experts presented Alabama's judges with evidence that sentencing certain lower-risk offenders to mandatory supervision rather than prison does improve public safety.

The success of this training event depended on two elements: an order mandating judges' attendance with a direction to reschedule all cases unless specifically excused, and mandatory tours of four Alabama prisons. The presence of justices and judges from six other states who were themselves experts on the topic of evidence-based sentencing practices was also key to the overall effectiveness of the conference.

During the training session, one question was repeatedly presented to Alabama jurists: Why are you putting criminal offenders behind bars? Is it because you are mad at them or because you are afraid of them? The overwhelming majority of judges had confined hundreds of inmates, a large number of them nonviolent offenders imprisoned for technical violations of probation and repeat nonviolent offenders sentenced under Alabama's Habitual Felony Offender Act. These sentencing decisions were and are made by well-intended judges who lack local sentencing options. Now they sentence having personally seen at least two of Alabama's massively overcrowded correctional institutions.

Although a number of judges initially took umbrage at my order of mandatory attendance—and many of them during training sessions stated quite fervently their opinions, which conflicted with the overall message of the expert presenters—the prison tours were sobering and certainly motivated many to re-evaluate their sentencing policies. As the Vera Institute of Justice reported following the conference:

On the second day of the conference, nearly 200 participants boarded buses, received box lunches, and saw for themselves the problems facing the Alabama

prison system by touring medium- and maximum-level correctional facilities. For many, it was the first time they stepped inside the places where they send thousands of individuals every year.

What they saw astonished them: 196 inmates in a bunk house monitored by a single correctional officer. Feeding schedules that require inmates to be served breakfast at 3:30 in the morning. Temperatures that soar over 100 degrees Fahrenheit in the summer, cooled only by fans. In the judges' own words, the visit was life-changing. One judge told Chief Justice Cobb that the tours had a 'tremendous impact' on him. As a result, the week after the conference this judge changed the sentences of two incarcerated individuals to mandatory community corrections supervision.

As a result of the evidence presented at the conference, judges promised to not just consider the voluntary sentencing guidelines, but to apply them in all drug cases. Judges also offered their own recommendations for improvements to Alabama's sentencing laws. In addition, the judges committed to use their "positive coercive power" to establish community corrections programs and model drug courts.

Where Do We Go From Here?

In 2010, the Alabama Legislature enacted several important sentencing reforms. These included enactment of minimum standards for drug courts, an amendment to the Community Punishment and Corrections Act to allow participation in Community Corrections programs of offenders convicted of selling controlled substances, and enactment of the technical violator bill, which limits incarceration in the penitentiary for technical violations of probation.

In addition, before the legislature adjourned, it enacted legislation establishing a bipartisan, interbranch Public Safety and Sentencing Coalition. Among its members are legislators, members of the judiciary, district attorneys, defense lawyers, the Board of Pardons and Paroles, the Sentencing Commission, law enforcement and victims' advocates. The coalition has secured the services of John Speir of Applied Research Services Inc., who has performed a detailed analysis of Alabama's prison population. Speir's study showed the number of felony convictions in Alabama had increased 31 percent since 2001. Similarly, the Alabama Department of Corrections' jurisdictional population has increased 27 percent since 2000, and its in-house population has increased 16 percent since 2000. Although Alabama's overall in-house prison population is approximately 190 percent of designed capacity, three facilities are at 314 percent, 271 percent and 257 percent of designed capacity.

Speir's study has shown that Alabama has a major problem with the revolving door of recidivism. Within the current jurisdictional population of the state Department of Corrections, 40.5 percent have had a previous sentence. Even more staggering is the fact that 24.4 percent of the current prison population had returned to prison within three years of a previous release. Speir's study also revealed that a significant percentage of Department of Corrections' in-house population are not violent offenders. A ranking of the top 10 offenses for admissions during the 2009 fiscal year included four nonviolent offenses. The number one offense for admission was

possession or receipt of a controlled substance. The other nonviolent offenses included in the top 10 were distribution of a controlled substance at number three, third-degree burglary at number four, and first-degree possession of marijuana at number seven.

After being educated as to the drivers of our burgeoning prison population, the coalition has endorsed the following concepts: (1) the creation of a new Class D felony classification and the reclassification of certain drug and property offenses as Class D felonies; (2) revising the valuation threshold for property offenses; (3) restructuring and reclassifying offenses involving marijuana and controlled substances; (4) establishing an earned compliance credit for probationers who comply with the conditions of probation so officers may focus limited resources on those who need more intense supervision; (5) mandatory re-entry supervision for offenders near the end of their sentence; (6) codifying minimum standards for jurisdictions in Alabama, which are emulating Hawaii's Opportunity Probation with Enforcement Program; and (7) amending Alabama's driver's license suspension law to remove certain drug-related offenses to assist participants in drug court and other rehabilitative programs in mobility.

Currently, "the devil is in the details" as legal experts draft proposed legislation that implement the reforms. Change is never easy, but change is essential. We must modify our laws in a way that enhances public safety and focuses limited tax dollars on programs that reduce recidivism, thereby stopping the revolving door.

Conclusion

As chief justice, clearly I cannot snap my fingers and instantly improve life for the citizens of my state. I can, however, use whatever power or influence I have to encourage meaningful change that is proved to make communities safer. This is not a partisan issue or just a legislative and executive branch issue. It is an issue of enhancing public safety while saving desperately needed state and local funding. I want to encourage leaders of all three branches and of every political persuasion to do as we are doing in Alabama. All of us working together can use our power to transform the lives and communities of those we have taken an oath to protect—"to the best of [our] ability, so help [us] God."

Judicial Council of California

California's Collaborative Justice Courts: Building a Problem-Solving Judiciary

Homeless Court

The nation's first homeless court started in San Diego in 1989, born out of a frustration with the way traditional courts process homeless defendants. According to Deputy Public Defender Steve Binder, who helped launch and still coordinates the San Diego court after 16 years, judges in traditional court either issue a fine—which homeless individuals normally can't pay—or place offenders in custody, but do little to help them find a permanent home or link them to services that might help them improve their lives. Meanwhile, homeless offenders accrue criminal records and warrants that make it difficult for them to make a fresh start down the road.

Binder was inspired by the veterans' stand-down movement, which started in 1988 in San Diego and brought services and support to homeless veterans in the parks and public areas where they lived. A stand-down event typically lasted several days and offered veterans everything from dental care and donated clothes to counseling and help with benefits. What the event didn't offer, however, was a chance to resolve outstanding criminal cases. Binder proposed establishing a temporary court complete with judge at these events to offer those veterans who actively participated in services a chance to clear their records.

The social service programs, rather than the court, set requirements for graduation and monitor clients' progress. In addition, clients appear in court only at the end of the process rather than throughout. Still, homeless courts, like drug courts, require a high degree of collaboration among multiple partners. They also seek outcomes beyond a simple determination of guilt or innocence; rather, by seeking to improve participants' lives, they are looking for solutions that are good for both defendants and the larger community.

Approximately 80 to 90 percent of cases before the court result in dismissal of charges. Of those remaining, most involve a case that has already been adjudicated (and therefore cannot be dismissed); in the vast majority of these situations, however, the participant is able to satisfy the sentence by meeting the social service provider's goals. . . .

Peer Court

Among the earliest of the state's collaborative justice courts are peer courts, in which students determine the consequences to be imposed on other young people for low-level criminal conduct. Peer courts emerged in Odessa, Texas, in the early 1980s and eventually migrated to California's Humboldt and Contra Costa Counties in the mid- to late-1980s.

Like drug courts, peer courts offer an alternative to business as usual. Rather than send low-level cases involving first-time offenders through the traditional juvenile court, offenders go before a true jury of their peers—other juveniles who have been trained to assume various roles, including those of attorneys, court staff, judges and, most important of all, jurors who determine what should happen to a peer who has violated the law.

Placer County Peer Court, which started in 1991, handles about 550 cases a year, or about 40 percent of the county's juvenile cases. "It frees up juvenile probation officers to better manage those cases that need more of their time," said coordinator Karen Green. "We're saving the county about \$500,000 a year. Despite the fact that we're the fastest-growing county in California, juvenile crime is down."

Drug Court

The most often-cited reason behind the development of drug courts is the so called revolving door, whereby the same drug-addicted offenders cycle in and out of the criminal justice system on a regular basis. . . .

DRUG COURTS: NATIONAL PERSPECTIVE

- *The first drug court was founded in Miami in 1989*
- *More than 70,000 drug court clients are being served at any given time throughout the United States and its territories*
- *There were 1,624 drug courts in the U.S. by Dec. 2004*
- *8 percent of drug courts are located in California*

Source: Bureau of Justice Assistance, May 2005 ⁸

The state's earliest drug courts reflected an eclectic array of thinking and resources. Most were, initially at least, pre-plea (allowing offenders to enter the court without a plea) but at least some were post-plea (requiring participants to plead guilty to a charge that, upon successful completion of the program, was dismissed or reduced). Some used pre-existing drug treatment facilities and others created their own programs. In Los Angeles, for example, Judge Marcus lobbied fellow judges, court administrators, legislators and treatment providers, who cooperated in the establishment of a drug treatment center in an empty court building about four blocks from the courthouse. After 18 months of planning—including a five-month delay precipitated by the Northridge earthquake—the Los Angeles County Municipal Drug Court opened in January 1994.

. . . . One of the biggest achievements of these early courts was the bridge built between the judiciary and treatment providers. "The treatment providers and court system historically had never worked together at all," Morris said. "In fact, the idea that you couldn't force an addict into treatment still prevailed. We had to convince them that we could do this, that we could force behavioral modification and use the power of the court to effect change."

. . . . The state's first DUI court—launched in 1996 in Butte County by Judge Darrell Stevens—brought some new partners to the table, including a drug company, which donated a medication to block cravings for alcohol, and a local hospital, which distributed the medication to court participants. "The local hospital really jumped on to it," Stevens said. "Their staff would observe the person ingesting the medication. Later, we were able to enlist the aid of every pharmacy in the county. They also agreed to supervise the ingestion of the medication."

By the mid-1990s, California was considered a leader in the creation of drug courts. Its courts began to serve as national models and, through the NADCP, many of its practitioners assumed prominent roles in the rapidly growing movement. California judges, for example, were among those who successfully lobbied Congress for the inclusion of drug court money in the 1994 Anti-Crime Bill. That eventually resulted in tens of millions of dollars distributed to drug courts around the country, including about \$3.5 million through the Edward Byrne Memorial State and

Local Law Enforcement Formula Assistance Program to 25 California drug courts from 1996 to 2000. . . .

With the financial backing of both federal grants and the state Legislature, California by 2000 had 153 drug courts, more than any state in the nation.

Drug courts are the most common problem-solving court model and their effectiveness has been documented by a substantial and growing body of research. Through a federally endorsed list of ten “key components,” drug courts have come in many ways to define the parameters of collaborative justice courts. The ten components include the integration of drug treatment with case processing, a non-adversarial approach, rapid placement of defendants into treatment, frequent testing to monitor abstinence, ongoing judicial interaction with each participant, and the development of partnerships among the court and other agencies to generate local support and enhance drug court effectiveness. In 2001, the Judicial Council’s Collaborative Justice Courts Advisory Committee adopted an 11th “essential component” of collaborative justice courts in California: emphasizing team and individual commitment to cultural competency. For a list of California’s key components, see *Figure 1*.

**Figure 1: GUIDING PRINCIPLES
OF COLLABORATIVE JUSTICE COURTS**

The Collaborative Justice Courts Advisory Committee identified 11 components, recognizing that they apply differently in different types of courts. For instance, non-adversarial approaches will not be appropriate in some case types, such as domestic violence.

1. Integrate services with justice system processing;
2. Achieve the desired goals without the use of the traditional adversarial process;
3. Intervene early, and promptly place participants in the collaborative justice court program;
4. Provide access to a continuum of services, including treatment and rehabilitation services;
5. Use a coordinated strategy that governs the court's responses to participants' compliance, using a system of sanctions and incentives to foster compliance;
6. Use ongoing judicial interaction with each collaborative justice court participant;
7. Use monitoring and evaluation to measure the achievement of program goals and gauge effectiveness;
8. Ensure continuing interdisciplinary education;
9. Forge partnerships among collaborative justice courts, public agencies and community-based organizations to increase the availability of services;
10. Enhance the program's effectiveness and generate local support; and
11. Emphasize team and individual commitments to cultural competency.

Domestic Violence Court

The first domestic violence court was launched in Quincy, Massachusetts, in 1987. Eighteen years later, more than 300 such courts are estimated to exist nationally. However, different states

and jurisdictions emphasize different models. . . .

Domestic violence courts in criminal cases are guided by twin goals: improving victim safety and holding batterers accountable for their actions. In family law courts, the focus continues to be on victim safety, but is also on child custody and visitation or financial issues. Juvenile courts and “integrated” courts offer yet another model. “This is an emerging field that has yet to yield one particular best-practices model and instead encompass . . . myriad processes and procedures employed by the courts to respond to the fundamental concerns of safety and accountability,” according to a report by the Judicial Council of California. In California, 25 projects now identify themselves as domestic violence courts.

One important distinction that has been noted between domestic violence courts and drug treatment courts is that domestic violence courts address violent criminal activity. Moreover, domestic violence cases involve a targeted victim. Many criminal domestic violence courts focus on regular monitoring of defendants to ensure that they comply with court orders, including the requirement that they complete a batterer intervention program. In civil domestic violence courts, courts are often involved with linking restraining order petitioners to services appropriate to their situation, such as victim-advocacy programs or assistance with finding safe housing.

Numerous varieties have emerged in recent years, including courts that combine civil and criminal cases, as well as calendars with a narrow focus, such as child custody or juvenile dating violence. For instance, the Juvenile Domestic and Family Violence Court was started in 1999 in Santa Clara, California, and operates much like an adult criminal domestic violence court. The project includes a 26-week batterers program, with access to substance abuse programs, mental health services and other counseling as needed.

New directions in all types of domestic violence cases include consideration of co-occurring problems, such as substance abuse, homelessness or mental illness. For instance, an exploratory study on domestic violence and substance abuse developed by staff in the Administrative Office of the Courts’ Collaborative Justice Unit and the Center for Families, Children & the Courts’ featured roundtable discussions by judges from drug courts and domestic violence courts about addressing domestic violence cases involving substance abuse.

Mental Health Court

Like other collaborative justice courts in California, mental health courts emerged in response to a problem—specifically, the high percentage of offenders who were mentally ill.

A 1999 Department of Justice survey found that 16 percent of the inmates in United States prisons and jails reported having a mental condition or mental health hospitalization. That translated to about a quarter-of-a million inmates with mental illness.

Unfortunately, jails and prisons were not only unable to provide adequate treatment, they also proved costly. In 1998, for example, the San Bernardino County jail’s medication budget for mentally ill inmates came close to \$1 million, according to Superior Court of San Bernardino County’s Judge Patrick J. Morris, who has presided over mental health court since 1999.

Mental health courts provide an alternative approach. By steering offenders from jail into judicially supervised treatment, they reduce both jail overcrowding and hopefully, by getting mentally ill defendants the help they need, recidivism.

“Before the advent of mental health courts, that group would have simply gone to jail or state prison, and then come back again because we furnished them no treatment or chance of success,” said Judge Becky L. Dugan of the Riverside Mental Health Court, established in 2001. “What a mental health court does is actually decriminalize the mentally ill by setting up probation terms and mental health treatment, including medication compliance, that will help them succeed in being on probation and not picking up a new criminal offense and then getting out of the system.”

From the outset, the Riverside Court accepted a broad range of participants. “We took everybody, even people that were initially screened as just drug addicts, because sometimes once you get past the drug addiction, you see the mental illness,” Dugan said.

Other courts, like the adult mental health court in Los Angeles, accept only misdemeanors, including quality-of-life crimes such as possessing a shopping cart. In the Los Angeles court, compliance is monitored by the provider rather than through regular court appearances. If all goes well, the only time the participant shows up in court is when, after a year of being compliant and not committing a new offense, his or her case is dismissed. If the provider reports that a participant is non-compliant, however, the judge may order the defendant incarcerated.

Los Angeles County also has a mental health court for juveniles. The court addresses the alarmingly high rate of mental illness among juvenile offenders—as high as 40 percent, according to the county Probation Department. “It is one thing to talk about guilt or innocence,” said Deputy Public Defender Nancy Ramseyer. “In the Juvenile Mental Health Court we are looking at why a kid got involved in the system and how we can prevent it from happening again.”

Although similar in many ways to drug courts, mental health courts tend to emphasize rewards rather than sanctions. “The need to use sanctions is rare,” said Judge Manley, who presides over the Santa Clara County Mental Health Court, which opened in 1999. Manley said participants do not respond as well to sanctions as they do to positive reinforcement. “We continue to encourage them to participate, keep trying to win them over. This is a very different concept from trying to punish them for refusing treatment.”

Community Court

Community courts, which have been established in downtown San Diego and the Van Nuys section of Los Angeles, focus on problems that traditional courts have been too overwhelmed to address effectively, specifically low-level crime, such as prostitution, shoplifting, vandalism and graffiti.

The courts, which serve neighborhoods disproportionately affected by low-level crime, incorporate many of the principles of other collaborative justice courts. They link offenders to

treatment and other social services, such as job training programs and GED classes. And they depend on partnerships among multiple stakeholders, including prosecutors, defense attorneys, police, probation departments and community-based groups.

But community courts don't just offer help; they also seek to hold offenders accountable by requiring participants to perform community service. The idea is to repay the neighborhood for the damage caused by their offending. Offenders sentenced by the Downtown San Diego Community Court, for instance, have performed over 1,400 hours of community service in the downtown area since the court opened in October 2002, according to Stewart Payne, executive director of the Downtown Property and Business Improvement District. Community service activities include picking up trash, cleaning parks and painting over graffiti.

Community courts also focus on citizens as important partners. The Van Nuys Community Court, for example, has an advisory panel that includes members of the public who meet regularly with the judge to discuss community conditions and sentencing options. And the planning process for a new community court in Santa Ana, in central Orange County, included interviews with nearly 100 stakeholders, including community residents. . . .

Juvenile Justice Collaborative Courts

. . . . In other areas of innovation, California was the first state in the country to create courts for youth that focus on dating violence and on mental health. In developing these models, jurisdictions sought to address difficult problems. Research indicates that 15 to 20 percent of juveniles in the justice system nationwide suffer from a severe biologically based mental illness and at least one out five juvenile offenders has serious mental health problems. Recognizing this, U.C.L.A.'s Neuropsychiatric Institute joined the treatment team of Los Angeles' juvenile mental health court to provide assessment and treatment for the court's most severely afflicted participants. . . .

The dating violence court, officially known as the Juvenile Domestic and Family Violence Court, was started in 1999 by Superior Court Judge Eugene Hyman, who sought to address the problem of youth who were committing acts of domestic violence. According to the Santa Clara County Domestic Violence Council's Death Review Committee, 12 to 42 percent of deaths in the county linked to domestic violence occurred in relationships that started when the victim was underage. "Clearly," Hyman and co-authors wrote in an article describing the court in 2002, "domestic violence among teens can have very serious outcomes."

The Santa Clara court operates much like an adult domestic violence court. The court worked closely with a private agency to create a batterer intervention program. The program is supplemented by substance abuse programs, mental health services and other counseling as needed.

Consistent with the overarching theme of juvenile courts, the emphasis in all these specialized courts is the combination of services and programs designed to change behavior while holding juveniles accountable for their offenses. Like their counterparts that serve adults, these juvenile courts combine judicial supervision with social services in a team approach.

Studying Cost Savings

The financial benefits have probably proved to be the most persuasive argument for sustaining drug court funding during the state's ongoing financial crisis. Although drug court funding has repeatedly been on the chopping block the last few years, drug court advocates have argued successfully that money saved in incarceration costs makes the state's investment worthwhile. This has led the Legislature in recent years to continue to fund drug courts—but with the caveat that drug courts, whether funded by the Partnership Act or the Comprehensive Drug Court Implementation Act—should focus on generating savings for the state through strategies such as serving felons with prison exposure.

Remarkably, drug courts have seen their state funding grow even with the state facing a \$6 billion plus deficit.

Drug court advocates have also used financial arguments to create a state funding stream for dependency drug courts, arguing that by more speedily reuniting families torn apart by drugs, the state not only saves money in foster care and related social service costs but also avoids federal penalties by ensuring compliance with federally mandated guidelines for speedy permanency planning. In 2004, the Legislature and Governor approved \$1.8 million for dependency drug courts, an amount distributed to nine courts. In 2005, the Legislature appropriated funds for the Department of Social Services to evaluate the costs and benefits of dependency drug courts.

A significant tool in the funding debate is a study sponsored by the California Administrative Office of the Courts. Called "California Drug Courts: A Methodology for Determining Costs and Avoided Costs," the three phase study made cost savings tangible. Eight of the nine drug courts in this study produced net benefits over a four-year period. For a group of 900 participants who entered these drug courts, the state realized a combined net benefit of \$9,032,626, and similar benefits could be expected in the future, the study said. However, the study found that savings varied among sites—from about \$3,200 to over \$20,000 per participant.

COSTS SAVED BY DRUG COURTS

Investment Costs

- *Investment in drug court is similar to that in traditional court processing, ranging from about \$5,000 to \$19,000 per participant*

Outcomes

- *Most of the benefits of drug court come from less costly outcomes for participants due to higher retention rates and reduced recidivism*
- *Retention rates for drug courts in the study averaged 52 percent and nearly half the courts had retention rates greater than 65 percent*
- *Recidivism rates averaged 17 percent for graduates, 29 percent for all drug court participants and 41 percent for a comparison group of offenders*

Outcome Costs

- *Outcome benefits ranged from about \$3,200 to over \$20,000 saved per participant*

Source: "California Drug Courts: A Methodology for Determining Costs and Benefits; Phase II: Testing the Methodology" (October 2004)

Allegra M. McLeod

Decarceration Courts: Possibilities and Perils of a Shifting Criminal Law

100 GEORGETOWN LAW JOURNAL ____ (forthcoming 2012)

I. A Shifting Criminal Law

. . . . There are, as of this writing, in jurisdictions across the United States, approximately 300 mental health courts, approximately 200 domestic violence courts, 30 community courts, more than 2,000 drug courts, and in excess of 500 other specialized criminal courts including sex offense and veterans courts. Those states with numerous specialized criminal courts span the country, including jurisdictions as diverse as Alaska, California, Indiana and New York. There is no single foundational document to which all specialized criminal courts refer, and no unified theory that captures their complicated interrelationships and diverse projects. But although the initial impetuses for convening specialized criminal courts differed, most of their founders share in common the hope of devising better substantially non-carceral approaches to criminal law administration, at least for certain categories of offenders.

Specialized criminal courts have now reached some measure of maturity and there are four competing legal institutional and conceptual reformist models to which the existing courts roughly correspond. The following Part will explore the significant differences between these four models. In fact, what may make specialized criminal courts politically palatable is also what makes their eventual outcome uncertain: their form is sufficiently open so as to incorporate any or several of these four often quite divergent reformist approaches. As a result, what specialized criminal courts ultimately portend for U.S. criminal law remains ambiguous, a matter over which there should be much more rigorous and reasoned debate than has occurred to date.

II. Four Reformist Models at Work in Specialized Criminal Courts

This Part introduces a typology and critical analysis of four models of specialized criminal law administration—(a) a therapeutic jurisprudence model; (b) a judicial monitoring model; (c) an order maintenance model; and (d) a decarceration model—with particular emphasis on the models’ respective aspirations, potential unintended harms, and reformist possibilities. This Part argues that while the first three more predominant models possess characteristics that threaten a range of unintended and harmful consequences, the fourth model—a decarceration model—holds considerable promise to initiate broader welfare-enhancing criminal law reform. The following Part, Part III, explores in greater detail three criminal law reform strategies that a decarceration model may set in motion.

A. Therapeutic Jurisprudence Model

Specialized criminal courts adopting a therapeutic jurisprudence model are at work in every state in the country and increasingly in a wide range of foreign jurisdictions. This model draws heavily on a theoretical framework developed by law professors David Wexler and Bruce Winick: therapeutic jurisprudence. Wexler and Winick’s fundamental premise is that law may operate in ways that are therapeutic or anti-therapeutic, so as to improve or undermine people’s psychological well-being. According to Wexler and Winick, all other things being equal, legal

actors should seek to promote therapeutic outcomes over anti-therapeutic ones. In urging attention to the therapeutic consequences of legal arrangements, Wexler and Winick recommend: “[W]e should . . . see if the law could be reshaped to make it into more of a healing force, a therapeutic force.”

In a certain respect, in the criminal law context, a therapeutic jurisprudence model is a repackaging of a rehabilitative theory of sentencing that also borrows from restorative justice approaches, but therapeutic jurisprudence is farther reaching. The judge in a therapeutic specialized criminal court does not simply assign a sentence that aims to rehabilitate or serve a therapeutic or restorative function. Instead, the court proceedings themselves—whether through the judge’s warm encouragement or “tough love”—are to promote therapeutic outcomes. The entire legal process—in fact the entire institutional operation of the court as such—is to be reconceived on the therapeutic model. Although Wexler and Winick make clear that therapeutic concerns ought not necessarily to take precedence over other considerations, they do not provide any concrete manner to evaluate therapeutic priorities relative to other matters, leading their adherents in therapeutic criminal courts to prioritize therapeutic concerns over others when conflicts between contending values emerge. Accordingly, to the extent earlier critiques leveled against rehabilitative punishment and indeterminate sentencing may apply to a therapeutic jurisprudence model, they apply with even greater force, because on a therapeutic jurisprudence model the rehabilitative or therapeutic ambition stretches beyond sentencing and punishment to nearly every aspect of the court proceedings.

Once a defendant opts into a specialized therapeutic criminal court, “all of the major players in the courtroom—judge, prosecutor, and defense attorney—explicitly acknowledge that the goal is to change the defendant’s behavior, moving the defendant from addiction to sobriety or from a life of crime to law-abiding behavior.” In contrast to the traditional adversarial model of the disengaged, dispassionate judge whose primary task is to decide cases fairly and impartially, therapeutic judges are active, engaged, invested in acquiring expertise regarding the problems they address. On a therapeutic model, the specialized criminal court judge—whether in drug court, mental health court, therapeutic sex offense court, or another type of specialized therapeutic criminal court—engages in a direct, emotional, and frequently effusive manner with defendants, who are often referred to as the courts’ “clients.” . . .

This potential “net-widening” effect of a therapeutic model of specialized criminal law administration underscores that criminal courts are part of a working institutional and social system, not simply sites for interpersonal conduct modification. As criminal law scholar Guyora Binder has persuasively argued: “Punishment is not a behavior, but an institution. It is part of a system that involves conduct norms, an authoritative procedure for generating these norms, an authoritative procedure for decisions to impose sanctions, and some measure of practical power over persons or resources.” When specialized criminal courts operate on a therapeutic model they exert system-wide institutional effects, likely shaping what cases are brought to criminal court, and to which agencies treatment resources are allocated. And all the while, therapeutic judges exercise substantial power over defendants/clients.

. . . Therapeutic courts attempt to rid themselves of the various traditional approaches to criminal law administration and punishment—retribution, deterrence, incapacitation—in favor of

a therapeutic approach. While conventional criminal courts generally at least in principle administer criminal law with self-conscious reference to a compound of retributive, deterrent, and other punishment approaches, specialized criminal courts adapting a therapeutic cast seek to purify the administration of criminal law to one putatively rehabilitative “therapeutic” variant. The risk of this attempted purification is that it is difficult to disentangle deterrent, therapeutic, and retributive impulses in criminal punishment, and so cordoning off certain courts as purely involved in therapeutic interventions may both misstate what is actually occurring in those courts and undermine judicial self-consciousness about whether the punitive effects of particular decisions are proportional to the offending conduct and no greater than necessary to deter offending behavior. Indeed, some judges administering specialized criminal courts on a therapeutic model label their courts’ sanctions “smart punishment” but propose that “[s]mart punishment is not really punishment at all, but a therapeutic response.”

Although the problem of disproportionate punitiveness might in principle be solved by having all specialized criminal courts adopt sentencing ceilings for technical violations above which sentences could not go, courts operating on a therapeutic model embrace an anti-formalist, problem-oriented, discretionary approach that rejects such externally imposed, pre-fixed constraints. This model, when it comes to predominate over other approaches to criminal law administration, thus threatens to place judges with extraordinary power in a position where they act in what they perceive to be defendants’/clients’ therapeutic interests, but with unchecked potentially punitive effects, unimpeded by principles of proportionality characteristic of a retributive theory of punishment. This is all the more troubling because these judges may lack formal psycho-therapeutic expertise and many are likely exhausted by the undoubtedly difficult work of dealing with criminally accused addicted or mentally ill individuals, often in under-resourced environments. The relaxation of procedural safeguards as part of an anti-formalist, team-based, therapeutic approach only stands to exacerbate these problems if judges are not particularly conscientious.

A further limitation of the therapeutic jurisprudence model has to do with the difficulty of bringing a therapeutic court-based approach to scale, even were that to be a desirable outcome—a matter on which the preceding analysis should cast some doubt. Although the reformist potential of a therapeutic model of specialized criminal law administration rests on being able to administer therapy to individual defendants through the courts, these courts only address a small fraction of drug cases or other relevant categories of cases in the system. As of 2005, the number of individuals in drug court programs was 70,000, as compared to a population on probation of about four million individuals, many of whom are drug-involved offenders. To reach even 10% of individuals serving a probationary sentence, the number of therapeutic drug courts would need to increase enormously. The Akron Mental Health Court as of 2004, handled at one time approximately 120 clients, only a small fraction of the many thousands mentally ill individuals in Ohio’s criminal justice system. The Louisiana Mental Health Court as of 2009 had eighty-five participants and operated one day per week. Administering therapeutic jurisprudence through convening separate specialized criminal courts is also relatively costly, further decreasing the likelihood that it will be possible to bring this model to scale were this to be a sought after outcome.

In any event, there is considerable cause to question whether specialized criminal courts adopting

a therapeutic jurisprudence model ought to be brought to scale given that proceedings in these courts appear to possess certain inherent features that may tend to exacerbate some of the most troubling problems associated with the adjudication of criminal cases in conventional courts: including, unnecessary terms of incarceration for minor or technical violations and prevalent procedural irregularities. On a therapeutic model, any judicial tendencies in these directions are more likely to be unchecked.

Worse still, on a therapeutic model, procedural shortcutting or unnecessary incarceration may be defended as therapeutic, rendering it less susceptible to critical engagement. For instance, when California drug court judges wished to amend the California penal code to reduce privacy rights of drug court defendants/clients, one judge defended the practice as follows:

I support a search clause for drug treatment court clients because I think a search clause is therapeutic.... I don't see a search clause as a sanction so much as an additional therapeutic intervention that will help them succeed.

The potentially problematic effects of this curtailment of privacy are obscured by a therapeutic justificatory approach that is difficult for non-experts to critically confront on its own terms. And even if, on balance, relinquishing some privacy protections may be socially desirable because it serves to reduce recidivism, casting the argument for this approach in vague psychotherapeutic terms obscures rather than illuminates the relevant considerations at stake.

A therapeutic model thus does little by itself to reduce reliance on criminal law supervision and incarceration unless administered by a judge already inclined to reduce carceral sentencing and enable other positive interventions; and in fact, in the wrong judge's hands a therapeutic approach may cause significant harm. Reliance on jail sentences as a sanction for non-compliance with treatment or other technical requirements can actually result in substantial carceral penalties. Potential net-widening effects associated with placing criminal courts in the role of administering therapeutic interventions also threatens to increase criminal case filings, and hence overall levels of criminal supervision and quite possibly incarceration. Although a therapeutic jurisprudence model nonetheless appeals to many because it repackages (and resurrects) a rehabilitative sentencing approach, it does so with considerable risk of engendering a variety of unintended and undesirable consequences, both for rule of law principles and for the persons it is intended to benefit.

The answer to these problems is to disentangle reformist criminal law administration in specialized criminal courts and more broadly from a particular set of predefined therapeutic jurisprudential commitments, and instead to experiment with jurisprudential content so as to reduce reliance on incarceration and to divert cases to other sectors that may more meaningfully address social goals. The appropriate reconceptualization for the courts is as a strategy to enable decarceration, their unifying feature being that they are experimenting with criminal law administration to reduce carceral sentencing in favor of preferable approaches, rather than adapting a therapeutic methodology for criminal law. But before turning to a decarceration model, it remains in the following sections to explore the other predominant reformist models of specialized criminal law administration.

B. Judicial Monitoring Model

The defining characteristic of specialized criminal courts operating on a judicial monitoring model is that they rely primarily on judges to engage in monitoring of defendants or participants, who may be asked to submit to urine tests and curfews and to attend court appointments as often as several times per week. The theoretical basis of the judicial monitoring model is that intensified judicially administered criminal surveillance will reduce future misconduct, at lesser cost than incarceration and with greater efficacy than conventional probation or parole. As distinct from the therapeutic jurisprudence model, specialized criminal courts operating exclusively on a judicial monitoring model do not aim to generate therapeutic outcomes through courtroom proceedings. Instead, the judge is empowered to closely monitor defendants' compliance with court mandates in a manner akin to a probation or parole officer. On the judicial monitoring model, the court retains jurisdiction to monitor the defendant/participant during pre-trial proceedings, and when the court assigns a non-carceral sentence, the judge mandates reporting back to the court on a regular basis.

The impetus for judicial monitoring courts arose largely due to an acute sense of the limits of conventional probation and other non-carceral forms of criminal supervision. Although probation is by far the most common criminal sanction in the United States, with caseloads of up to 1,000 probationers per officer, the degree of supervision is frequently minimal. Judicial monitoring aims to improve supervision, by transferring authority to judges to monitor defendants. This, it is hoped, will reduce recidivism and thereby reduce incarceration.

Two examples of specialized criminal courts operating primarily on the judicial monitoring model are domestic violence courts and sex offense courts, though certain drug courts and other specialized criminal courts also function primarily as judicial monitoring bodies. Intensive monitoring of defendants in domestic violence cases aims to encourage greater compliance with protective orders and attendance of anger management trainings. Judicial monitoring sex offense courts likewise supervise defendants' compliance with court mandates and mandatory treatment. A judicial monitoring model as applied to drug courts extends judicial supervision over drug offenders. In some jurisdictions' drug courts, judicial monitoring is coupled with a therapeutic jurisprudential approach. In other jurisdictions it is not.

Although judicial monitoring relies in part on technological devices to facilitate monitoring, the judicial role shifts in these courts in ways that pose considerable risks of judicial overreaching, expanded surveillance, and increased incarceration for technical violations. Due to the large numbers of criminal cases disposed of with probationary sentences—and the tremendous capacity of the defense, computer, and electronic industries—there is an extensive market for electronic monitoring, voice verifications systems and inexpensive on-site drug testing on which judicial monitoring courts may rely. But the central feature of judicial monitoring as opposed to probation or parole is that the judge plays an active role in overseeing surveillance of defendants. And once a judge becomes the monitor of defendants' compliance with court orders, the judge's role changes from one of, at least in principle, adjudicative neutrality, to more active investigative supervision on behalf of the state. Simultaneously, a judicial monitoring model threatens to expand rather than reduce levels of criminal supervision and at least short-term incarceration, because more intensive supervision increases the likelihood of identifying

technical violations, which increases the likelihood of short-term incarceration. This is true particularly because in many judicial monitoring courts, incarceration is the default penalty for technical violations that do not even rise to the level of criminally chargeable misconduct. . . .

Further, because a judicial monitoring model is frequently dominant in specialized courts where retributive responses are likely to be triggered—such as domestic violence and sex offense courts—the threat of punitive judicial overreaching in carrying out purportedly purely deterrent monitoring is of special concern. In other words, whereas the therapeutic approach tends to dominate in courts addressing more sympathetic cases—those involving drug addicts, veterans, or the mentally ill—the punitive excesses of judicial monitoring threaten to surface with particular force given that the model plays a central role in courts with less conventionally sympathetically received defendants. There is even a risk that the monitoring courts will become partially insulated from conventional adversarial advocacy because they are specialized anti-formalist team-oriented courts, and judicial monitoring will serve as a vehicle for enhanced punitiveness for unpopular classes of defendants: those charged with domestic violence or sex offenses, for example.

In addition to the liberty infringing risks posed by courts operating on a judicial monitoring model, there remain fundamental questions about the ability of such courts to reduce recidivism and achieve other desired ends. Part of the motivation for court specialization is that judges in a specialized judicial monitoring court may become experts with regard to the particular offense at issue. But problems arise when judges believe they possess special expertise about a single best approach to monitoring a problem when in fact there is profound uncertainty as to how best to handle such matters. For example, there is preliminary empirical evidence that a judicial monitoring approach is less effective than might be anticipated in reducing recidivism in domestic violence cases. A study of the Bronx Misdemeanor Domestic Violence Court tracked randomly assigned groups of offenders who received varying combinations of judicial monitoring and batterer’s intervention. The differential rates of recidivism of violent conduct among the groups (including those who received no judicial monitoring or other intervention) were not statistically significant. This suggests that the routine judicial monitoring interventions of the domestic violence court—Batterer’s Intervention and Court Monitoring—may have limited success in reducing the incidence of domestic violence. So while in at least one jurisdiction domestic violence recidivism remained unchanged, substantial resources were devoted to a judicial monitoring regime that threatens to significantly transform the role of the judge with other uncertain and potentially undesirable effects.

What is more, in the reentry context at least, a judicial monitoring model has been associated with substantial increases in re-incarceration for technical violations, even when criminal recidivist conduct decreased. A study of the Harlem Reentry Court’s initial judicial monitoring program found that “technical revocations occurred more frequently for Reentry Court participants than comparison parolees” for all three years of the study—an effect the Court’s researchers ascribe to a “supervision effect” (that is, increased discovery of punishable violations produced by increased supervision). Thus, the Harlem Reentry Court study reflects that even when a judicial monitoring approach functions to reduce recidivism, it still threatens to increase incarceration for technical violations, such as missed curfews or other failures to conform with the court’s monitoring orders.

These findings are consistent with the best available evidence regarding intensive supervision programs during an earlier period of experimentation with intensive criminal surveillance. Monitoring aimed at deterrence when uncoupled from a substantial rehabilitative component tends strongly to expand incarceration, with little in the way of countervailing benefits. According to Stanford criminologist Joan Petersilia, who is among the country's leading experts on intermediate sanctions:

The empirical evidence regarding intermediate sanctions is decisive: Without a rehabilitation component, reductions in recidivism are elusive. In sum...programs were seldom used for prison diversion but rather to increase accountability and supervision of serious offenders on probation. In addition, programs did not reduce new crimes, but instead increased the discovery of technical violations and ultimately increased incarceration rates and system costs.

The ineffectiveness of judicial monitoring may be further aggravated if judicial monitoring undermines defendants' perceptions of legitimacy of the courts. Diminished perceptions of procedural fairness on the part of defendants in judicial monitoring courts may actually undermine compliance with court orders by fostering resentment and exacerbating recidivism.

So as with the therapeutic model, on the judicial monitoring model the role of the judge expands, potentially dramatically beyond its traditional bounds. Surveillance increases. Procedural protections are curtailed to enable judicial monitoring. And there is no overriding commitment to avoid incarceration in the instance of discovery of technical violations. As a consequence, increased periods of at least short-term incarceration are likely to follow, even if only as a product of technical violations, and the reach of the criminal law threatens to radically expand. Monitoring that is not merely extending surveillance for its own sake must attend to what forms of surveillance actually promote social welfare by eliminating crime and reducing incarceration. This is in significant part the ambition of a decarceration model, to which we will turn after exploring the order-maintenance model—the final criminal law reformist model commonly at work in specialized criminal courts.

C. Order Maintenance Model

The third widely occurring specialized criminal law administrative model focuses on order maintenance in local tribunals devoted to prosecutions of relatively minor quality of life crimes. Although the goal of specialized criminal courts generally was to address the impacted and poor quality of conventional criminal law administration by shifting cases out of conventional courts into specialized courts, in the view of some advocates, “in many cases, the current system works just fine” such as “murders, rapes, and robberies”—they believe that alternatives for prosecution of more serious offenses would be inappropriate. As a consequence, efforts focused on more minor crimes: “prostitution, low-level drug possession, and disorderly conduct” that conventional courts were otherwise inclined to ignore.

The theoretical framework underlying the order maintenance model is largely derived from the broken windows theory of policing. The broken windows or order maintenance hypothesis maintains that minor physical and social disorder—turnstile jumping, marijuana use, public

drinking—if not addressed, contributes to more serious crime. A specialized order maintenance criminal court responds to public order violations by assigning initially intermediate sanctions such as community service. This, in turn, it is hoped will improve perceptions of the law’s legitimacy and hence social order. The theory as applied to specialized criminal courts holds that as a consequence of prosecuting public order offenses, crime overall will decline, and with it more general reliance on criminal arrests and incarceration.

Along these lines, community courts, the quintessential order maintenance courts, aim to improve social order by providing a venue for the prosecution of relatively minor quality of life offenses occurring in a delimited geographic area. Incarceration is imposed only if a defendant is non-compliant with intermediate sanctions or if his offense is relatively serious. Generally, misdemeanor defendants are able to opt-in to courts operating on an order maintenance model, rather than being mandatorily assigned. . . .

There are three supposed advantages to an order maintenance model of specialized criminal law administration, all of which fail to withstand close scrutiny. First, proponents suggest that these courts will increase potential offenders’ perceptions of the criminal law’s legitimacy and hence will increase law-abiding behavior overall. This is thought to be the case because the courts assign presumably more meaningful non-carceral sanctions. But order maintenance courts are often perceived as harsher and less legitimate than conventional courts in their response to public order violations. Community courts are less inclined to dismiss cases with “time served” sentences, and where jail time is imposed it is imposed for longer periods. Further, community service sentences will not necessarily be perceived as more legitimate than jail sentences. One sex-worker sentenced at the Midtown Community Court explained: “Community service is all day—cleaning toilets and stuffing envelopes. . . .” Rather than improving perceptions of legitimacy, routine reliance on community service of this sort as a sanction may reduce opportunities for paid work in a jurisdiction and cause further economic hardship for defendants, rendering them more rather than less likely to risk future criminal engagement. Further, the onerous requirements of unpaid community service work coupled with associated fines may increase pressures to participate in criminalized markets.

A second purported advantage of an order maintenance model is that it will reduce reliance on conventional carceral sentencing, instead introducing more effective and beneficial intermediate sanctions, like community service. However, when defendants fail to comply with intermediate sanctions, they are often punished with at least short-term incarceration. Indeed, empirical analyses establish that increased short-term incarceration is the unintended outcome of at least certain courts operating on an order maintenance model.

Additionally, in a manner distinct from that of therapeutic courts, order maintenance courts widen the net of infractions addressed by criminal courts since they focus primarily on low-level misdemeanor offenses, which otherwise would receive less attention: disorderly conduct prosecutions are commonplace in order maintenance courts for pedi-cab drivers’ obstruction of cross-walks or unlicensed vending of t-shirts or otherwise licit goods. This net-widening tendency is consistent with the findings of Professors Michael Tonry and Norval Morris, who demonstrated in their famous study of intermediate sanctions that: “when an intermediate choice is offered it will tend to be filled more by those previously treated more leniently than by those

previously treated more severely.” This is not to suggest that intermediate sanctions are never appropriate, but that there is a risk of net-widening where such sanctions are made available, and order maintenance courts stand to considerably expand the class of offenses subject to criminal prosecution by emphasizing offenses that would otherwise be unlikely targets for prosecution. As a result of this net-widening tendency, an order maintenance model threatens to expand criminal law supervision and increase short-term incarceration when individuals are unable to comply with intermediate sanctions. . . .

D. Decarceration Model

A decarceration model is committed foremost to reducing reliance on incarceration and to a sociologically and empirically informed framework that links court participants to local social services and other institutions, shifting the management of socially disruptive conduct from the criminal courts to other sectors. The ultimate aim of a decarceration model as applied to specialized criminal courts is to isolate those crimes for which conventional criminal law administration may be most fitting, contributing gradually to the de facto decriminalization of certain other categories of conduct, and enabling alternative regulatory approaches to a range of social ills. The basic premise underlying a decarceration model in the specialized courts context is that overcriminalization and overincarceration are in part structural problems, which specialized criminal courts may begin to address. . . .

The theoretical framework that informs the decarceration model focuses on deploying social structures separate from criminal law administrative components—such as mental health, public health, job training, and other social services—to reduce criminal offending and to foster socially constructive citizenship behaviors. The foundational idea is that social institutions outside the criminal law context are critical to the maintenance of social order and to organizing informal surveillance. Correspondingly, a shift away from current carceral practices will be enabled by bolstering opportunities for social integration and institutional involvement, particularly for those persons with limited access to such conventional social institutions.

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Law Enforcement Assisted Diversion (LEAD) Evaluation Panel

The Defender’s Association (2011)

Program Overview

The overall goals of the Law Enforcement Assisted Diversion (LEAD) Program are to improve public safety and public order in Belltown and Skyway and to reduce criminal behavior by the program’s participants. The program, which drug offenders and potential offender (“social contacts”) access through referral by law enforcement officers, provides harm reduction – oriented, on – demand, comprehensive services and case management as an alternative to booking and prosecution to facilitate improvements in the lives, health, and opportunities of participants.

LEAD is governed by a Coordinating Group, which is made up of representatives from the

Seattle Mayor's Office, the King County Executive's Office, the Seattle City Attorney's Office, the King County Prosecutor's Office, the Seattle Police Department, the King County Sheriff's Office, The Defender Association – Racial Disparity Project, the ACLU of Washington, and community advisory boards. Please see the LEAD logic model for a complete depiction of the program and its desired outcomes.

Context, Assumptions, and Guiding Principles

The following context, assumptions and principles have guided LEAD's program and evaluation design.

Context

- LEAD stakeholders share a dissatisfaction with the results achieved through existing enforcement strategies applied to low - level drug and prostitution offenders, and a desire to provide a more effective, less harmful response to the problems posed by street - level drug activity.
- This model has not been tried yet in the US.
- Rigorous evaluation of LEAD has the potential to help make the case for similar policies and programs, and for the reallocation of public resources for public safety uses other than arrest and prosecution of low - level drug offenders.
- Evaluation findings are intended to contribute to the replication and scaling of LEAD.
- Therefore, evaluation efforts should be rigorous and able to stand up to external scrutiny, and results should create knowledge about the program's implementation and outcomes that will facilitate LEAD's replication and scaling.

Assumptions, Beliefs, and Guiding Principles

- Addiction and poverty are drivers of crime.
- Much of the harm associated with drug use is a result of its criminal prosecution.
- Drug crime can best be addressed through a public health approach combined with sufficient resources.
- Improvements in the health and life conditions of participants due to the delivery of services will result in less criminal behavior and that, in addition to criminal justice system related cost savings, reduced recidivism will improve public safety and/or perceptions of public order.
- A harm reduction approach is critical.
- Social contact referrals are desirable in order to create opportunities for law enforcement officers to help connect people to services without involving an arrest.

Referral and Intervention Activities and Approaches

Activities and Services Provided

- Law Enforcement Referrals
 - In Belltown, eligible low-level drug and prostitution offenders will be referred by the Seattle Police Department's West Precinct.
 - In Skyway, eligible offenders will be referred by the King County Sheriff's

Office.

- Eligible offenders will be enrolled in LEAD according to program availability.
 - At the beginning of each month, service providers designate the number of people the program has capacity to serve and will inform SPD's West Precinct and the KC Sheriff's Office which days of the month they can process referrals. On other days of the month LEAD-eligible offenders cannot be enrolled (and will thus follow typical booking procedures) instead of being referred to the program. Officers will not know until they return to the precinct/Sheriff's office with the potential divertee whether the program is accepting referrals that day.
 - Eligible offenders never enrolled in program because of resource constraints will serve as a control group for evaluation purposes.
- Individual Intervention Plans
 - Intensive Case Management
 - Peer Outreach and Counseling
 - Well-funded, comprehensive direct services (housing, treatment, education, job development and stipends)
 - Legal Advocacy
 - Inclusion of neighborhood public safety leaders
 - Leadership Development Training

Key Approaches

- A harm reduction approach should be used for all referrals and service provision.
- Meet people where they are at each encounter. Referrals and service provision should address each individual's immediate and stated needs, and should be provided without delay, purchased on the private market where necessary to avoid waiting lists.

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Appendix: Randomization Design and Considerations

Comparison Group Design and Procedure	Considerations			
	Potential for Bias	Level of Rigor	Ethics	Feasibility
<p>Capacity Based Enrollment: LEAD-eligible offenders enrolled according to program availability. Control group consists of eligible offenders never enrolled in program because of resource constraints.</p> <p>At the beginning of each month, service providers designate the number of people the program has capacity to serve and select random days of the month that those people should be enrolled on. On other days of the month LEAD-eligible offenders would not be enrolled (and thus follow typical booking procedures) instead of being referred to the program.</p>	<p>This design mitigates the possibility that officers may change their behavior or patrolling patterns based on which shifts were assigned, to minimize any systematic bias of random assignment to program.</p>	<p>If design is carried out with fidelity, this design has a high level of rigor. The comparison group is a true control group. Due to randomization, there would be baseline equivalence between the two groups.</p>	<p>Employing an experimental design with a largely African American population raises ethical questions; historical trauma of Tuskegee study and perception of officers withholding treatment may threaten community relations.</p> <p>Because this design is based on resource constraints, we anticipate that ethical concerns around experimentation will be minimized.</p>	<p>Easy to implement: service providers will select the days of the month that are enrollment days based on their capacity and availability. Officer training and buy-in would be critical to faithful implementation.</p>
				<p>No direct associated costs with implementation of design.</p>

Nourit Zimmerman & Tom R. Tyler

Between Access to Counsel and Access to Justice: A Psychological Perspective

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Introduction

. . . . The primary purpose of this paper is to explore a psychological perspective on some of the issues concerning access to justice in civil litigation. This is an attempt to present what the existing literature, as well as additional suggested research, can and should teach us about the psychological aspects of the access challenge in civil litigation and about the needs concerning the expansion of the right to counsel to civil cases. Hopefully, the psychological point of view will enrich the discussion around the bar's proposal by focusing on the subjective experiences of represented and unrepresented litigants within the legal system. We will present a discussion that is based on needs rather than rights, on the subjective perceptions of individuals rather than objective, and normative evaluations concerning the value of representation. We are interested in the way individuals perceive the concept of "access", and to what degree they actually feel they have gained, or been denied, access to justice and under which specific circumstances. The values we will discuss are those procedural values that individuals identify with legal procedures that are fair and satisfactory. Public views, we believe, are one factor that needs to be considered when thinking about policy change. . . .

Our interest in this paper will go beyond this specific group of self-represented litigants to try to understand better the procedural values that matter to people and how they are related to having or not having professional legal representation. We would distinguish several questions: The first is whether, and in what ways, having a lawyer or not having a lawyer influences the experiences of lay people operating within the legal system, their evaluations of the process and the system, and of the outcomes obtained by them. Reading the procedural justice literature we will ask how representation, or the lack thereof, is related to the procedural aspects identified by individuals as fair and just.

The second question is whether, and to what degree, having or being denied access to counsel influences one's decision to take a problem into court (in cases in which a person might have either a legitimate legal claim or a frivolous claim).

The third question is whether feeling that one is denied access to a lawyer and/or to court due to the inability to have legal representation has an influence upon non-lawyers. What are the consequences when people feel that they are unable to obtain access to counsel? Do people who have access to counsel necessarily use counsel, and how do people feel when they have access to counsel but decide not to use it?

And finally, irrespective of why people do not have counsel, what can we say about the pro se experience and what can we learn from the ways in which non-lawyers and legal actors interact within the legal system. . . .

II. The Subjective Experience of Litigants: Empirical Findings to Date

. . . . Research indicates that procedural values not only influence individuals' evaluations of the fairness of any specific process, but that greater perceived fairness also enhances "voluntary acceptance of decisions, voluntary compliance with legal rules, and the willingness to proactively help society and social authorities." In other words, perceived procedural fairness enhances the perceived legitimacy of legal institutions as well as citizens' commitment to the law.

An example of the findings of procedural justice in that respect can be drawn from a study of public willingness to accept judicial decisions in two California communities—Oakland and Los Angeles. This study considered both those who came to these authorities seeking help, and those being regulated by the authorities. The sample included 1,656 people in Los Angeles and Oakland with a recent personal experience with the police or the courts. Fourteen percent (239 people) had contact with a court.

Why did people who dealt with the courts accept court decisions? The study asked participants about their willingness to accept such decisions. In particular, it focused on willing acceptance, rather than mere compliance. It also asked about participants' overall evaluations of the law, the courts, and the legal system.

Reactions to the court could potentially be linked to three judgments people made about their personal experiences in court: whether the procedures used by the court were just; whether the outcome was just; and/or whether the outcome was favorable. Researchers applied a regression analysis to explore the influence of these various factors on the willingness to accept decisions made by the court. As expected by the procedural justice argument, the primary factor shaping the willingness to accept decisions was the perceived fairness of court procedures. Procedural justice was also the primary factor shaping the influence of personal experience upon overall views about the court system. What is striking is that procedural justice overwhelms other factors, explaining three to four times as much of the variance in both decision acceptance and court evaluations.

The findings noted above are especially important because they are true of people irrespective of their social or economic background. The California study was designed to compare the experiences of White, Hispanic, and African-American residents of Los Angeles and Oakland. The members of all three groups reacted in basically the same ways to their experiences. The same is true of those who were economically advantaged and disadvantaged, men and women, and those with varying degrees of education. It was also true of plaintiffs and defendants, and of people who dealt with the police or the courts. In other words, people generally reacted to their experience in terms of procedural justice whatever their background, suggesting that focusing on procedural justice is a very good way to build trust and encourage compliance irrespective of who is using the courts.

The strong link between procedural justice and evaluations of the courts was recently affirmed by another study conducted within the State Courts of California. The Administrative Office of the Courts undertook a study in 2005 in which a random sample of the residents of the state was

interviewed about trust and confidence in the California courts. An analysis of that information suggests that “[h]aving a sense that court decisions are made through processes that are fair is the strongest predictor by far of whether members of the public approve of or have confidence in the California courts.” The California courts are rated as being very fair in terms of treating people with dignity and respect, but not particularly fair in terms of allowing them to participate in decisions that affect them. The report argues that “[p]olicies that promote procedural fairness offer the vehicle with the greatest potential for changing how the public views the state courts.” Interestingly, the report points to experiences with low-stakes courts, such as traffic court, as a particular source of dissatisfaction. It goes on to argue that all experiences with legal authorities, even relatively trivial interactions, are important to members of the public and need to be the focus of court-design efforts.

These procedural justice findings point to the centrality of process issues in the reactions of litigants to their experiences in court. They suggest that issues of “due process,” as these are perceived by the public, are the key to creating and sustaining trust and confidence in the courts. Hence, the findings reinforce the value of viewing the issue of access to counsel within this general framework of creating a litigation experience that involves a fair procedure-perceived as such-for resolving disputes. The question remains: what are the elements that make such a process and how are they connected to providing people with an attorney? In other words, the value, goals, and quality of legal representation should be examined in view of the set of criteria people use to evaluate their legal experience, in addition to the outcomes obtained by them. . . .

The previously mentioned 2005 California court study of a random sample of Californians asked people to evaluate the courts on a number of dimensions. Voice (defined as being listened to) was among the lowest ranked dimension of the courts, with about 35% of those interviewed indicating that the courts do not listen to people. This suggests that there is a widespread perception that people lack voice in the courts. Among those with personal experience in courts, 38% indicated that courts do not listen, as compared to 30% among those without experience. Hence, people are more likely to say that courts do not listen to people if they have actually been to court. Yet, the degree to which people evaluate procedures as providing voice can be based on various factors, including whether or not they were represented, as well as factors such as the attitudes of judges, the design of court procedures, limitations imposed by evidence law, caseload, etc. There is a need, then, to examine more closely the specific impact of representation on people’s evaluations of their court experiences.

C. Does it Matter to People if They Have a Lawyer and in What Ways?

Does it matter if people have a lawyer when they go to court? It is possible that people with an attorney feel more able to effectively represent their case in court. It is also possible, though, that people with an attorney feel denied the opportunity to speak their mind, leading them to feel less fairly treated. This would suggest that pro se litigation might have the benefit of giving people a stronger feeling of voice. Obviously, when we speak here about the potential benefits of pro se litigation, we focus on those psychological benefits—i.e., those factors that better the subjective experiences of litigants. We do not consider the questions of whether, and how much, having a lawyer betters the outcome obtained by litigants, or possible biases in the system against pro se litigants.

Tyler looked at how going to court with or without a lawyer influenced the litigation experience of individuals. He did so among a random sample of 1,575 of Chicago residents. Each person was asked if they had had recent experience with legal authorities. Of the 733 with recent experience, 147 indicated that their most important recent experience was with a court. The study focused upon people's subjective experience during their visit to the courts, not their objective outcomes. It did not, for example, examine whether lawyers obtained better outcomes for their clients. Instead it looked at how people evaluated their experience.

Of the recent court users interviewed by Tyler, 29% had an attorney, and 71% did not. People were more likely to have a lawyer when they viewed the legal issues involved as serious ($r = .35$, $p < .001$) and if they were the plaintiff in the case ($r = .29$, $p < .001$). Age, race, income, education, and gender did not, however, influence whether people had a lawyer.

The study looked at four judgments that people made about their experience. First, people were asked whether they felt they had received a desirable outcome. Second, they were asked whether they felt that the procedures were fair. Third, they were asked whether they felt that they had an opportunity to present their case to the judge. Fourth, they were asked about their feelings (anger, happiness, etc.) with regard to their experience with the courts.

In each case regression analysis was used to examine the influence of whether people had a lawyer on the relevant evaluation, controlling for the seriousness of the case and whether the person was the plaintiff. That regression analysis indicated that whether people had a lawyer did not significantly influence the following: whether they felt that their outcome was desirable; whether they believed that the procedures were fair; and whether they had an opportunity to present their case. Finally, whether people had a lawyer did not influence their post-experience feelings. In this study at least, controlling upon case characteristics, there is no evidence that, whether people had a lawyer shaped their evaluations of their experience in court.

Similar findings emerge from a study of pro se divorce litigants in Arizona, which found that self-represented litigants had the same level of positive reaction to their court experience as represented ones, while pro se litigants had fewer dissatisfied and very dissatisfied reactions than represented litigants. In other words, in the Arizona study self-representation lowered unfavorable reactions, but did not heighten favorable ones.

Going back to Tyler's study, it is especially striking that there were no differences in the degrees to which people felt that they were able to present their evidence to the judge, since having a lawyer leads to a more indirect form of participation. Hence, people did not indicate feeling deprived of voice via this indirect form of participation.

Another study examining unrepresented litigants was conducted among Australian adults on trial for driving after drinking. In the study, 397 adults who had courtroom trials were examined, of whom 138 had an attorney and 259 did not. Participants were asked to assess their court experiences.

The results of the study suggest, first, that litigants did not believe that they received a worse outcome, or were more strongly pressured to accept an outcome, if they did not have a lawyer.

Those with a lawyer, however, did feel they better understood their rights, were treated with greater respect, and were not disadvantaged during the trial. On the other hand, those without lawyers felt they had greater opportunity to speak. Interestingly, though, this did not mean that they felt they had control over what happened, since those with lawyers felt more in control. Finally, those with lawyers were more likely to say that their respect for law enforcement increased through their experience, and were found to have higher levels of perceived legitimacy than did those without lawyers.

These findings are similar to others noted in that the gains of having a lawyer are not necessarily linked to the actual outcome; they come through a sense of understanding what is happening and feeling comfortable in the courtroom setting. These feelings, at least in this study, meant that having a lawyer was linked to higher levels of legitimacy and respect for the law. Consistent with other studies, however, people also felt that when they had a lawyer they traded the opportunity to speak for other gains.

To conclude thus far, none of the studies suggest that people represented by lawyers express lower levels of control over the outcome or dissatisfaction with limited opportunities for voice, when compared with unrepresented litigants. Hence, the evidence supports the suggestion that indirect participation does not diminish the perception of voice. Given the general value of voice, this is important. The studies outlined suggest that people who go to court with or without lawyers have similar feelings about their voice during their trial experience. . . .

Pro se litigants seem, in fact, to experience all of the difficulties one would expect a layperson would have when going through a highly professionalized system. While there are no specific rules of procedure that discriminate against pro se litigants, the nature and design of court procedures are such that nonprofessionals would find them difficult to maneuver. Pro se litigants need to deal with a language they do not always understand, evidentiary constraints and procedural protocols. Such rules are not always in sync with people's common sense and social instincts, which are based on their behavior and interactions outside the legal sphere.

On the other hand, research does evidence possible benefits associated with self-representation. Moreover, while the common perception of pro se litigants is that they are forced to represent themselves due to the cost of legal services, and would prefer being represented by an attorney, there are litigants who choose self-representation even when they can afford an attorney.

Studies indicate that the most cited reasons for self-representation are: inability to pay for an attorney; belief that the matter is simple enough to be handled without an attorney; and reluctance to pay the high cost of an attorney, despite the ability to pay.

We would like to focus our discussion here on two other explanations for choosing self representation. These two explanations—the view of self representation as an empowering tool, and the choice of self representation because of the low quality of appointed counsel—we find to be particularly relevant to our discussion of the various psychological values attached to direct or indirect participation.

One very interesting view of pro se litigation is the view that identifies self-representation “as a

self-affirming experience that many litigants might select precisely because of the personal empowerment that arises from maintaining control over the elements of their case.” In theory, it is not hard to see how pro se litigation has the potential of being an empowering and self-affirming tool. Pro se litigation allows control over the management of one's case and pro se litigants can choose how to present the case and which aspects to stress. Their participation in the court procedure is active and direct. Again, in theory at least, self-representation can serve to solve many of the difficulties and sources of dissatisfaction that characterize the legal experiences of represented litigants (the feeling of passivity and lack of control, the inability to tell one's story, or the difficulty of communicating with lawyers).

In reality, as the data presented here shows, for most pro se litigants, self-representation does not prove to be such a positive experience. Evidence that individuals benefited from pro se representation on a personal level is merely anecdotal. Much of this evidence comes from discussions of the informal dispute resolution literature, which involves procedures such as mediation that may not be relevant to the courts. . . .

Conclusion

. . . . Our review reveals that there is not a great deal of empirical research addressing questions resulting from access to counsel. Moreover, the existing data presents some contradictory findings. One general impression from this review is that current research fails to capture and measure the quality of individuals' legal experiences. People's evaluations of legal procedures in which they participated are determined, eventually, by the quality of the legal representation they had or the quality of the treatment they received from the judge or other court personnel. It is difficult to compare the experience of a person who had a zealous lawyer with that of a litigant who had an attorney who provided a less than satisfactory level of representation. It is similarly complicated to compare the experience of these two litigants with that of a pro se litigant, in order to draw general conclusions about self-representation more generally. Future research should aim to overcome these obstacles in assessing individuals' legal experiences. Meanwhile, any conclusions or recommendations regarding the provision of a lawyer as a means to increased access to justice should take into account the quality of legal representation that could be offered.

There are still, however, several conclusions that can be drawn from what we know at this time.

A. The Denial of Access to the Courts

One clear finding is that the feeling of being denied access to the system, due to lack of financial resources to consult with and retain counsel, clearly leads to negative feelings about the courts and the law. In addition, the inability to obtain legal representation for financial reasons decreases the number of people who go to court and, as a consequence, lowers the general level at which legal grievances are represented in court. Provision of counsel is likely to improve public views of the courts and the law by lessening the number of potential litigants who feel that they are not able to pursue their claims because they lack the financial resources to do so.

B. The Psychology of Representation

One of the primary concerns emerging from an examination of the psychological literature on representation is that people might prefer direct participation. That argument flows from the suggestion that people value direct interaction with the decision-maker for two reasons: first, because it allows them to tell their side of the story and present their own evidence; second, because the attention of authorities provides direct evidence that the decision-maker is listening to and considering their arguments. This is reassuring. It reinforces the belief that authorities are benevolent and, further, are concerned about the problems of ordinary citizens.

In view of these possible benefits associated with direct interaction with authority figures and voice, the question is whether individuals are less able to experience that sense of control and less likely to feel listened to if the communication occurs through an attorney. Based upon the research reviewed, we saw that overall, having or not having an attorney is not generally associated with changes in litigants' feeling that they have a voice in the litigation process. Fears that representation by an attorney will undermine the satisfaction associated with directly presenting one's side of the case are not supported by currently available evidence. As mentioned before, given the importance of voice this is an important finding. Conversely though, there is no evidence that providing people with an attorney will increase their feeling of having voice. The potential advantages of having legal representation are not manifested in enhancing litigants' satisfaction with their level of participation and voice. There are, however, other advantages related to legal representation.

In reviewing the currently available literature, we found a number of anecdotal suggestions about potential consequences of representation by an attorney. One commonly noted consequence of legal representation is that people usually feel that they understand the procedures used and the decisions made better if they have a trained and experienced lawyer representing them. Litigants with lawyers frequently feel that they better understand the law and legal procedures than do those litigants who represent themselves. As a consequence, the litigation experience is often generally a more satisfying experience when people are represented by a lawyer. It is clear, however, that this is not always the case, and some litigants react positively to the challenges posed by pro se litigation. This might also not be true of cases where the attorney does not provide clients with the appropriate information and guidance. Our conclusions regarding provision of attorney assume adequate level of representation.

Overall, we know that pro se litigants experience a lot of frustration in court but at the same time we have a large body of evidence showing that represented litigants can also feel lack of control or involvement with their own case which leads to frustration as well. There is a need for future research to directly address the different psychological effects of direct and mediated participation. Additional research is also required in order to determine how the different procedural values are ranked and balanced by individuals. For example, how do people compare voice opportunities (direct or mediated), control, or understanding of the legal procedures with the security and reassurance provided by a professional? Or, how do individuals balance the opportunity to completely control the management of their case, with the difficulties they face as outsiders in a professional system?

C. Potential Changes in the Legal System

In considering the benefits and costs of pro se litigation, some aspects of the legal system need to be mentioned. The first is the quality of legal representation. The impact of the provision of counsel in and of itself is unlikely to have an influence. By retaining counsel, people lose their opportunity to directly represent themselves. Therefore, the quality of their experience will depend upon the quality of their legal representation, relative to what the litigant might have been able, or at least imagines he might have been able, to accomplish himself. To improve the quality of legal representation the organized bar needs to support training in lawyering techniques. It is equally important to provide the resources that allow attorneys the time to be effective advocates for their clients, something that the provision of access to counsel should help to do.

The form of legal procedure is also relevant. Irrespective of whether litigants are provided counsel, it is crucial that their concerns about receiving a fair process are addressed. As we have noted, the current litigation system does not provide opportunities for involvement and voice once litigants are represented by counsel. Conversely, while the court system has taken serious strides to address the pro se phenomenon, many traditional court systems still do too little to aid those litigants who do not have attorneys to master and navigate the complexity of the courthouse. Further, judges vary in the degree to which they are willing to aid pro se litigants trying to make legally relevant arguments in support of their cases. Procedures need to be modified to correct both of these problems.

As an example of creating opportunities for voice, courts have accommodated victim statements at sentencing hearings. While victims have no legal standing to speak before those convicted of crimes against them are sentenced, many jurisdictions provide them with opportunities for voice. In a similar vein, legal authorities should consider ways that represented litigants can be given opportunities for voice. One example, already mentioned, is the use of more informal procedures such as mediation. Or, judges may simply allow represented litigants to have some opportunities to directly address them, to speak to the jury, and or to participate in discussions about the evidence.

The accommodation of courts to pro se litigation is already ongoing. The courts have created help desks in courthouses, offices whose function is to provide legal guidance and to explain court procedures, and translation services that enable people to more effectively communicate with judges and other court personnel. These accommodations reflect the simple reality that pro se litigation is increasing in frequency and must be dealt with in some way by the courts, in addition to any attempt to increase access to counsel.

Professor Dame Hazel Genn

What is Civil Justice For? Reform, ADR and Access to Justice
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This paper focuses on current civil justice policy in England and Wales and argues that, as a result of trends over the last fifteen years, the value of a public civil justice system is being challenged while access to that system is being inhibited both by new procedural and funding

measures. Accompanied by a profound change in civil justice discourse, the relevant interdependent justice policy strands involve the promotion of mediation and the withdrawal of the State from civil disputes; the removal of legal aid from most non-criminal issues; and a reduction in resources for the courts with fewer full-time judges.

Civil justice as a public good

My starting point is that the civil justice system is a public good that serves more than private interests. The civil courts contribute quietly and significantly to social and economic well-being. They play a part in the sense that we live in an orderly society where there are rights and protections, and that these rights and protections can be made good. In societies governed by the rule of law, the courts provide the community's defence against arbitrary government action; they promote social order and facilitate the peaceful resolution of disputes. In publishing their decisions, the courts communicate and reinforce civic values and norms. Most importantly, the civil courts support economic activity. Law is pivotal to the functioning of markets. Contracts between strangers are possible because rights are fairly allocated within a known legal framework and are enforceable through the courts if they are breached. Thriving economies depend on a strong State that will secure property rights and investment.

In my view we have witnessed in England over the past decade the decline of the civil justice system and official pressure to divert civil disputes to private dispute resolution, accompanied by a troubling anti-adjudication rhetoric. It seems as though State responsibility for providing effective and peaceful forums for resolving civil disputes is being shrugged off through a discourse that locates civil justice as a private matter rather than as a public and socially important good. The public courts and judiciary may not be a *public service* like health or transport systems, but the judicial system *serves the public* and the rule of law in a way that transcends private interests.

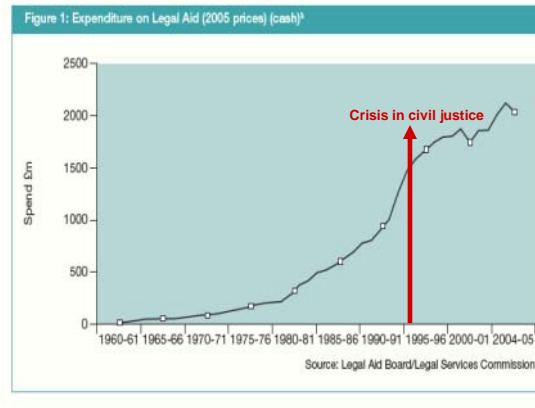
While the private value of civil justice is in the termination of disputes, the public function of civil justice is explicitly linked with the value of adjudication. Authoritative judicial determination has a critical public function in common law systems, creating the framework or the "shadow" in which the settlement of disputes can be achieved. That it is underpinned by the coercive power of the State provides the background threat that brings unwilling litigants to the negotiating table and makes it possible for weaker parties to enforce their rights and to expose wrongdoing. Even though most disputes settle without the need for trial, a flow of adjudicated cases is necessary to provide guidance on the law and, occasionally to make new leaps. Take the case of Mrs Donoghue and the snail in the ginger beer bottle, decided by the House of Lords in 1932. The case effectively transformed the law. Whatever view is taken of the decision, the case established protection for consumers, created an incentive for those who create risks to take care, and the possibility of redress for those harmed by negligent actions. In this way the common law has developed on the back of private and business disputes and millions of cases have been settled in its wake. Teaching this recently and turning over some of these issues, I was fascinated by the question of how Mrs. Donoghue succeeded in having her suit heard by the House of Lords and wondered whether such a case would be likely to reach the courts today.

Civil Justice Reform in England 1999

In analysing current civil justice policy and trying to understand how we got here, my starting point is the context for the major reforms to civil justice in England & Wales that took place in 1999 following the Woolf reports on Access to Justice of 1995 and 1996. Context is important because it explains some of the Government's motivation for the review of civil justice and some of the policy initiatives that have followed the review recommendations. The review process began in 1994 when the Government charged Lord Woolf with the job of producing a unified set of procedural rules for the High Court and County Courts, a task which then expanded to a full review of civil justice in response to a perceived 'crisis' in civil justice. At the time of the review, complaints about the civil courts were not new. Since the C19th there have been significant reforms of civil justice undertaken in order to improve the speed and accessibility of the civil courts, and during the 20th Century numerous reports were published proposing procedural change. A major review of the civil courts in 1989 preceded the Courts and Legal Services Act 1990 which resulted in procedural innovations and modification of the relationship between the jurisdiction of the county courts and the High Court.

What then was new in 1994? From where did the sense of 'crisis' in the civil justice system emanate, particularly at a time when the number of cases being issued in the High Court was actually decreasing? In my view, the sense of urgency about a review of the civil courts came less from any new problems in civil justice and more from concern about expenditure on legal aid, and, paradoxically, the rising cost of criminal justice. A central problem for the English Government since the mid-1980s has been the rapid growth in the cost of legal aid and, in particular, criminal legal aid. Since its establishment in 1949, the underlying purpose of civil legal aid has been to provide access to justice so that the weak and powerless are able to protect their rights in the same way as the strong and powerful. In the criminal justice context, legal representation is considered necessary to ensure fairness for citizens prosecuted by the State with all of its resources. The history of legal aid expenditure has been of gradual and then exponential increases and the increase in the legal aid bill, which had been rising steadily throughout the 1980s by the mid-1990s, had started to look uncontrollable.

This was not helped by criminal justice policy involving an extensive criminal legislative programme, greater emphasis on detection and enforcement, promotion of stronger crime control policies and emphasis on custodial sentences. While these policies may be entirely appropriate for criminal justice objectives, in a fixed justice budget that has to accommodate both the rising cost of criminal justice and the civil justice system, such policies will inevitably place pressure on resources for civil justice.



The determination to hold down expenditure on civil justice had already been signalled in the Courts and Legal Services Act 1990 which had effectively modified the historic ban on champerty by permitting conditional fee arrangements – the beginning of the ‘no win, no fee’ system for financing a limited range of civil claims. Such arrangements were heralded as increasing access to justice for middle income potential litigants.

Thus the motivations for the 1994-1996 civil justice review were mixed. On the one hand there was justifiable interest in simplifying some of the complexities of the civil justice system and in rendering it more accessible and less costly for both business and private litigants. From the Government’s point of view, reform of the system might offer the potential for cost savings in general and in particular in relation to civil legal aid.

The English Civil Justice Reforms and the place of ADR

The review of English civil justice carried out by Lord Woolf and his advisers was conducted very swiftly. Only a year after the review was launched an *Interim Report* was published providing an analysis of “The Problems and Their Causes” and an outline of the main recommendations for change. The analysis concluded that while the problems of cost, delay and complexity in civil justice were linked together, the principal cause of the shortcomings of the civil justice system was to be found in the behaviour of lawyers and their adversarial tactics. The proposed solution involved judicial case management and measures to promote early settlement. A year later, the Final Report was published together with a unified set of Civil Procedure Rules for the county courts and High Court. While the Final Report provided greater detail on the proposed reforms, the fundamental approach and new structure remained unchanged.

The solution to the problems of civil justice, therefore, lay in judicial case management; proportionate and rationed procedures; strictly enforced timetables; greater co-operation and less adversarialism; earlier settlements and strong pressure to mediate applied through costs sanctions. The judiciary were to become case managers responsible for rationing procedure, guided by principles of efficiency, equality of arms, and expedition.

In the “new landscape” of civil justice ADR was to have a central position. A fundamental premise of the Access to Justice Final Report was that court proceedings should be issued as a

last resort, that all cases should be settled as soon as possible, and that ADR should be tried before and after the issue of court proceedings in order to achieve early settlement. While the 1995 *Interim Report* provided encouragement for litigants to consider using ADR, the tone was more directive in the 1996 *Final Report* which warns that:

T]he court will encourage the use of ADR at case management conferences and pre-trial reviews, and will take into account whether the parties have unreasonably refused to try ADR or behaved unreasonably in the course of ADR.

ADR was promoted because it was deemed to have the advantage of saving scarce judicial resources, and because it was believed to offer benefits to litigants or potential litigants by being cheaper than litigation and producing quicker results. The strength of the conviction that the public should be trying mediation rather than litigation was given expression in the Civil Procedure Rules, which conferred on the court the authority to order parties to attempt to settle their case using ADR and the judge the power to deprive a party of their legal costs if, in the court's view, the party has behaved unreasonably during the course of the litigation. This discretion is of considerable significance when legal costs are often equal to, and may dwarf, the amount of money at stake in the dispute. The effect of the rules in relation to ADR is not to provide a direct incentive for parties to settle disputes by mediation, but to impose a future threat of financial penalty on a party who might be deemed to have unreasonably refused an offer of mediation.

Although Lord Woolf did not propose that ADR should be compulsory before or after the issue of proceedings, the inclusion in the Civil Procedure Rules of a judicial power to direct the parties to attempt ADR coupled with the court's discretion to impose a costs penalty on those who behave unreasonably during the course of litigation, has created a situation in which parties may feel that they have no choice.

Post 1996-mediation developments

Government policy on mediation in relation to civil disputes initially rather lagged behind judicial enthusiasm and activism. But in the late 1990s, as pressure on justice budgets became more severe and legal aid expenditure continued to rise, Ministers became more interested in the promise of mediation. In 1998 the new Labour Government signalled its interest in shifting dispute resolution attention away from the courts. In its landmark White Paper, *Modernising Justice* published in 1998, the Government made clear that it was seeking to improve the range of options available for dispute resolution.

While the Final Report on civil justice reforms and the new Civil Procedure Rules were published in 1996, the reforms were not implemented until April 1999. Ominously, the implementation of the CPR coincided with the most major changes to Legal Aid to have been introduced since the scheme's establishment in 1949. In the misleadingly named Access to Justice Act 1999, legal aid for civil cases was effectively swept away and replaced with no-win no-fee arrangements for most money claims. The 1999 Act did many things, but increasing access to justice was not one of them. The 1999 Act manifested the Government's determination to promote mediation by including the cost of mediation within the legal aid system and

signalling that parties should first try ADR options before seeking legal aid for legal representation.

This emphasis on mediation has been reinforced in subsequent documents and through the Legal Services Commission's Funding Code, the 2005 version of which indicates that, 'an application for funding may be refused if there are complaint systems, ombudsman schemes or forms of alternative dispute resolution which should be tried before litigation is pursued.' The ADR section of the Code's Decision-Making Guidance states interestingly that 'all forms of ADR are accepted to have *at least equal validity* (my emphasis) to court proceedings' and goes on to point out that decisions about legal aid may be contingent on willingness to enter mediation. Moreover, the Guidance contains a clear preference for mandatory mediation as a means of overcoming the apparently frustrating and inexplicable preference of parties to litigate – or at least to initiate court proceedings:

Most solicitors or clients who are considering or are engaged in litigation seem to prefer to continue litigating rather than attempting mediation. The Commission believes that it is in the interests of clients for more non-family cases to attempt mediation and that some solicitors or clients will not properly consider mediation unless required to do so.

Court-based mediation schemes

In the wake of the civil justice reforms and following the lead provided by Lord Woolf, several enthusiastic judges in courts around England collaborated with mediation providers to set up mediation schemes offering no or low-cost, time-limited mediation, held on court premises for litigants who had already commenced court proceedings. The first and largest of these court-based mediation schemes was established in a county court trial centre in central London (Central London County Court) in 1996. Although the courts administered the schemes, the mediations themselves were undertaken by trained mediators, initially on a pro bono basis by trained mediators keen to try out their newly acquired skills.

As part of its programme of promoting mediation, the Government invested quite heavily in evaluating a number of court-based mediation schemes and we have therefore learned quite a lot about mediation of civil disputes. We know, for example, that despite the promotion of mediation and the pressure exerted by the judiciary, there has been a relatively weak 'bottom-up' demand even for very low cost court-linked mediation schemes. This is particularly so for cases involving personal injury where historically the vast majority of cases have settled without adjudication. Although the value of mediation is generally compared with trial and adjudication, the challenge for mediation policy since the mid-1990s has been that it is seeking to encourage facilitated settlement in a system in which settlement is in any case the norm. Since most cases settle, mediation is principally offering the possibility of accelerated settlement, but in the early stages of a dispute at least, many litigants may not be ready to compromise, which is what mediation largely demands.

As far as party satisfaction is concerned, evaluations of court-annexed mediation schemes show high levels of satisfaction among those who have *volunteered* to enter the process. When disputing parties discuss the positive aspects of mediation, they generally do so by comparing it

with what they imagine a trial might have been like. This tendency to compare mediation experiences with what might have happened at a trial is largely generated and reinforced by the mediation process. In a typical mediation, one of the main tools for achieving settlement is for the mediator constantly to remind parties of the ‘dangers’ of not settling on the day and the unpleasantness that awaits them if they continue to litigate and run the risk of proceeding through to trial.

On the question of speed and cost, analysis of large-scale data from court-based mediation schemes compared with control data provides no evidence to suggest any difference in case length durations between mediated and non-mediated cases. The same analysis does, however, show that time limited mediation can avoid trials in cases not involving personal injury, either through immediate settlement or through bringing the parties closer to settlement so that they can settle before trial. The perceptions of mediators, parties and their lawyers is that successful mediation can save cost, but it is difficult to estimate how much, since, although the touchstone is always trial, the overwhelming majority of cases would not proceed to trial and would not therefore incur the costs of trial. On the other hand, it is also clear that unsuccessful mediation may *increase* the costs for parties (estimated at between £1,500 and £2,000) and this fact raises serious questions for policies that seek to pressure parties to enter mediation unwillingly.

The other important lesson from mediation programmes for civil and commercial disputes is that most settlements involve simply a transfer of money. Only a small minority of settlements are in any way creative or provide something different from what would be available in court. It also seems clear that claimants significantly discount their claims in reaching mediated settlements. There is a price to pay in terms of substantive justice for early settlement.

Evidence from evaluation of mediation schemes also revealed that the interest of mediating parties was primarily in *outcome*, not in the mediation *process*. It was not about repairing relationships, creative settlements, or the resolution of deep conflicts. What many parties actually want is “a fair, inexpensive and rapid *adjudication* of their claims.” Parties mediate because they have been told that what they want is not available, and that by mediating they can quickly and cheaply achieve some sort of end to the dispute.

Predicting settlement

Not all mediated cases result in settlement. Settlement rates in court based mediation schemes have varied and statistical analysis of a large number of mediated cases in civil disputes shows that it is difficult to predict which factors lead to settlement, or, indeed, inhibit settlement. It seems that factors which are difficult to quantify – such as personalities, depth of grievance, degree of conflict, willingness to negotiate and compromise – all play a part. Indeed, analyses of the outcome of mediation in these court-based schemes show that the readiness of parties to mediate is an important factor in settlement. Put simply, cases are more likely to settle at mediation if the parties enter the process voluntarily rather than being pressured into the process and increased pressure to mediate depresses settlement rates. Thus one broad conclusion of evaluation research has been that facilitation and encouragement together with selective and appropriate pressure are likely to be more effective and possibly efficient in producing settlements than blanket coercion to mediate.

These findings chime with learning from court-based mediation programmes in the Netherlands where it is argued that: “The only reliable predictor of potential success is the motivation of the parties themselves.” In her comprehensive analysis of effective court referral to mediation, Judge Machteld Pel argues that successful referral to mediation depends on appropriate analysis of the nature of the dispute or conflict. She says that “the degree of escalation of a conflict is an important indicator of the applicability and potential effectiveness of mediation”. According to Pel, commercial disputes in which there is more likely to be a difference of opinion than a deep-seated conflict are better suited to round-table settlement negotiations than mediation. In Pel’s analysis, while mediation is more appropriate for cases involving conflict, susceptibility to settlement and prospects for success decrease as the depth of the conflict increases and there are some cases where only adjudication and coercion are capable of bringing an end to the dispute. Whether or not one agrees with Pel’s analysis, it is instructive to note that in the Netherlands it is accepted that dispute or conflict diagnosis as a necessary step in determining whether a dispute is or is not appropriate for referral to mediation.

Mandatory mediation in civil disputes

In the years after the introduction of the civil justice reforms, while the uptake of mediation was slow and steady, there was not the sudden rush to mediate that had been expected or hoped for by mediation enthusiasts. Perhaps in frustration at this slow start and presumably intending to push things along, in 2002 and 2003 judges in the Court of Appeal and High Court handed down a series of decisions underlining the importance of ADR and the need for parties to take it seriously.

In *Cowl* in 2002 Lord Woolf held that parties must consider ADR before starting legal proceedings, particularly where public money was involved. This was followed more significantly by *Dunnett v Railtrack* in which the Court applied Part 44 of the CPR and denied the successful defendant their legal costs on the ground that their refusal to contemplate mediation prior to the appeal (after it had been suggested by the Court) was unreasonable.

The message of *Dunnett v Railtrack* was reinforced in the later case of *Hurst v. Leeming* in which Mr Justice Lightman held that it is for the court to decide whether a refusal to mediate was justified. In a frequently repeated statement he argued that ‘mediation is not in law compulsory, but alternative dispute resolution is at the heart of today’s civil justice system’. He went on to threaten that an unjustified failure to consider mediation would attract adverse consequences.

Another case in 2003 confirmed the risks for parties if they unreasonably refused to try ADR or withdrew unreasonably from an ADR process. However, the high-water mark in the line of cases came in May 2003 when the High Court made another significant decision in relation to the use of ADR. The case of *Royal Bank of Canada Trust Corporation Ltd v Secretary of State for Defence*, centred on a point of law relating to a lease. The claimant was willing to try to resolve the dispute by ADR, but the Ministry of Defence rejected the suggestion on the ground that the dispute involved a point of law that required a “black and white” answer. In the High Court, the Department was successful on the point of law, but the judge refused to award the Department its legal costs as a result of its refusal to mediate. The judge stated that the reason

given for refusing mediation (i.e. that the case involved a point of law) did not make the case unsuitable.

Although Lord Woolf had not been in favour of compulsory mediation, commercial providers and other mediation enthusiasts have not shared his concerns. By 2003, frustration at the low voluntary uptake of mediation in civil disputes and unease about the number of trained mediators without work led mediation providers to press the Government to take a more radical approach. It was argued by a coalition of mediation practitioners and judges that a pilot compulsory mediation scheme should be set up. The justification for such a step was that even if disputing parties were forced against their will to undergo a mediation experience, the attractions of the process would overcome resistance and the parties would be likely to settle. Moreover, compulsion would rapidly expose a large number of people to the positive experience of mediation, thus leading to the kind of 'take-off' that had to date been elusive. Positive experience in Canada of a large mandatory mediation programme for civil disputes gave some credence to this argument and in March 2004, a one-year mandatory pilot scheme was set up in Central London County Court where the voluntary scheme had been running for some years. Cases were automatically referred to mediation (ARM) and while it was possible for parties to object to the referral, any unreasonable refusal to mediate would lead to costs sanctions.

Unfortunately, the launch of the scheme precisely coincided with a ruling by the Court of Appeal in the case of *Halsey* that the court had no power to compel parties to enter a mediation process. It is difficult to assess precisely what impact the *Halsey* judgment had on the behaviour of those who were automatically referred to mediation during the course of the pilot, but there can be little doubt that the judgment did not help. The result of the pilot was almost exactly the opposite of what happened in Canada. While the Canadians experienced only a handful of cases in which the parties opted out of the mandatory mediation scheme, in the ARM pilot about 80% of those referred to mediation objected to the referral and following the *Halsey* judgment the court seemed to be uneasy about forcing people to mediate against their will. Indeed, it was a classic example of policies colliding and of the danger of extrapolating from one culture to another. The applicability across jurisdictions of procedural innovations depends, among other things, on the culture of litigation, the formal court structures for dispute resolution, the characteristics of disputes, and on costs rules.

A decision that the pilot had been largely unsuccessful was effectively taken after the experience of the first six months, although the scheme was allowed to run its course for a full year before being abandoned. What is instructive, however, in the current context is the fact that despite the failure of the ARM pilot, the appetite for mandatory mediation for civil disputes continues among mediators, the judiciary and the Ministry of Justice and is now being revived in England for family disputes.

Reflections

Although the intention of the civil justice reforms was to reduce delay, complexity and cost in the civil justice system, the evidence suggests that some of the key objectives have not been met. While there have undoubtedly been some positive gains from the introduction of the reforms, it seems that the Civil Procedure Rules are as elaborate as ever and the cost of litigation has

actually risen. Moreover, in my view there have been some dangerous unintended consequences of the reform process. The Access to Justice Reports contained confusing messages promising access to justice at the same time as launching deep criticisms of legal process and the legal profession. The formal promotion of mediation as a central element in the new civil justice system trivialised civil disputes that involve legal rights and entitlements and redefined judicial determination as a failure of the justice system rather than as its heart and essential purpose.

I am concerned that the case for mediation has routinely been made not so much on the strength of its own special benefits, but by setting it up in opposition to adjudication and promoting it through anti-adjudication and anti-law discourse. This reinforces the negative or jaundiced view of legal process which has been in the ascendance in England since the mid 1980s. Some members of the senior judiciary have played into the hands of Government by criticising the legal profession and arguing for diversion of cases into private dispute resolution. The messages that ADR processes are more desirable than legal determination have been enthusiastically adopted by Government. Indeed, we have witnessed a revolution in dispute resolution discourse. At the beginning of the 21st century, political arguments, judicial speeches and policy pronouncements about how civil and family justice should be working now focus on how to encourage or force more people to mediate, on worrying about why more people aren't mediating, and on promoting the value of mediation to the justice system and society as a whole. This is a remarkable success story and the root of the mediation movement's rhetorical achievement can be found in its ability to communicate simple (if empirically unverified) messages to policy-makers struggling to manage justice system costs.

Despite the evidence that willingness to mediate is critical to achieving a settlement at the end of the mediation process, that there are financial and other costs to unsuccessful mediation, and that it is important to tailor dispute resolution processes to the dispute, the enthusiasm of policy-makers for mediation remains largely undimmed and in some jurisdictions it is becoming more pronounced with a growing interest in compulsory mediation for civil and family disputes. Although the case for private mediation has traditionally been framed around process – quicker, cheaper, less stressful than trial – it is increasingly being presented not merely as a useful alternative or supplement to public courts, but as an equal or, indeed, *preferable* method of handling disputes. The terms of reference of the fundamental review of family justice launched by the British Government in 2010 states explicitly that mediation is the preferred approach to dealing with disputes following relationship breakdown. In Australia the National ADR Advisory Council (NADRAC) advising the Attorney General's Department on its *Strategic Framework for Access to Justice* is promoting mandatory mediation on the ground that “the more ADR is used successfully and is seen to provide benefits that cannot be achieved in litigation, the more receptive disputants and their lawyers will be to its use.

This growing “preference” for private dispute resolution over public processes raises some profound questions about the role of judicial determination in common law systems governed by the rule of law and presents a challenge to comfortable assumptions about the nature of *legal* disputes and the moral content of legal rights and interests. In attempting to establish private dispute resolution as a viable alternative to litigation or as an option within litigation, are we in danger of overestimating what mediation can offer to the range of civil and family disputes that

are dealt with through the public justice system and of losing our sense of the public value of courts and what they stand for?

The role of law and the rule of law are fundamental to liberal democracies which emphasize liberty and promise justice and equality before the law. Under the rule of law, law stands above all people and all people are equal before it. Access to justice is an essential element in the rule of law. Despite the private nature of ADR, it is argued that diverting legal disputes away from the courts and into mediation is, in fact, a strategy that will increase access to justice. But this is a claim that requires some scrutiny. Mediation does not contribute to access to the courts because it is specifically non-court based. It does not contribute to substantive justice because mediation requires the parties to relinquish ideas of legal rights during mediation and focus, instead, on problem-solving. Mediators are not concerned about substantive justice because the mediator's role is to assist the parties in reaching a settlement of their dispute. The mediator does not make a judgement about the quality of the settlement. Success in mediation is defined in the mediation literature and by mediators themselves as a settlement that the parties 'can live with'. The outcome of mediation, therefore, is not about *just* settlement it is *just about settlement*. Moreover, a critical feature of ADR is its privacy. Both the process and outcome of the procedures are private and generally confidential to the parties, who pay themselves for the process. Like other types of out of court settlement, the terms of mediated agreements are not publicly known.

If the evidence about mediation is not wholly consistent and supportive of the claims made for it, why does mediation have such a grip on policy debate? A huge conflict resolution literature has developed in which messages about mediation and caricatures of adjudication are constantly presented and re-presented. In this polarised world, judicial determination is seen as shackled to excessively adversarial procedure and competitive advocacy. Litigation is characterized as a single track to the trauma of trial conducted by lawyers possessing an attenuated range of primitive aggressive skills. The experience for disputing parties is portrayed as disempowering, miserable and expensive.

Arguably the power of the mediation message lies not only in the simplicity and consistency of its claims, but in its virtual monopoly on new thinking. Mediation enthusiasts have seized the policy initiative and captured the imagination of thought-leaders while the legal profession and mediation sceptics have largely been spectators in this battle of ideas. The point is not to challenge and resist in order to preserve the status quo, but to engage in the debate, to argue for the benefits of public justice while recognizing where and how the public justice system and legal practice needs to change and to offer a realistic programme for improvement in order to meet the needs of disputing parties seeking justice through the legal system. The legal profession has developed new ways of working through collaboration and co-operation in family cases, but there is a need for more imaginative thinking in civil justice practice and procedure.

Coalition policy – accelerating the trend

In the decade following the implementation of the civil justice reforms in England we have been through several phases:

1. *unwarranted euphoria* – during which phase the reforms were greeted as the final answer to the historic problems of civil justice;
2. *denial* – during which phase individual practitioners began to whisper growing reservations, although it remained ‘politically incorrect’ to voice doubts about aspects of the reforms;
3. *grudging recognition* – during which phase it became acceptable to suggest that the hoped for impact on costs had not been realized and that the CPR seemed to be getting rather cumbersome;
4. *reflection and debate* – the phase that we have now entered in which practitioners and the judiciary are reflecting on the learning of the past decade and considering what direction should be taken now to improve the system.

During the fourth phase, leading up to the General Election of 2010, the Ministry of Justice seemed to be largely uninterested in civil justice issues, with energies focused principally on the challenges of managing the criminal justice system. Save for continuing to argue for the diversion of civil and family disputes into private mediation, they had little to offer in the way of proposals for civil justice.

The outcome of the election in May 2010 was the creation of a Coalition Government which brought together the right of centre Conservative Party and the left of centre Liberal Democrats – an odd coupling. Prior to the election, neither party had articulated coherent justice system policies outside of the sphere of crime and criminal justice. A review of pre-election manifestos reveals a sprinkling of proposals for family and civil cases, largely related to legal aid, and some suggestions about the need for further procedural change. The first clear policy statement from the new Government was their *Transforming Justice* agenda. Set in the context of the global financial crisis and the need to save £2billion from the justice budget by 2014-5, the Government outlined its intention to reform legal aid, to simplify court processes, rationalise the court estate by closing courts, merge the administration of courts and tribunals and focus policy on alternatives to court. These proposals were accompanied by a new civil justice rhetoric which presented court proceedings as an unnecessary drain on public resources, and public funding for civil and family disputes through legal aid as an incitement to litigate rather than a means of facilitating access to justice. For example:

“The current system encourages lengthy, acrimonious and sometimes unnecessary court proceedings, at tax payers’ expense, which do not always ensure the best result for those involved.”

Through a series of speeches and consultation documents since 2010, the Coalition Government has established a consistent party-line on civil justice which argues that people should solve their own problems rather than turning to the courts; that Britain has become a litigious society; that it is too easy to seek redress through the courts for “perceived injustice”; and that the courts are only intended for “genuine points of law” or threats to liberty or security. We are told that the fiscal climate is forcing us to tighten our belts and that what we need is more mediation, although we are assured that mediation “is not just about cost-cutting and pushing people away from the justice system”.

In November 2010 the Justice Minister announced his proposals for changes to the provision of legal aid. The document suggested no significant changes to the scope of *criminal* legal aid, but a dramatic cutting-down of the scope of *civil and family* legal aid. In presenting these proposals, it was argued that the measures were necessary to “stop the encroachment of unnecessary litigation into society”. Arguing that the legal aid scheme in its current form “is no longer sustainable if the government is to reduce debt” the Government proposes effectively to exclude from the ambit of legal aid most civil and family cases. What is particularly troubling is the way that arguments about mediation are woven seamlessly into the justificatory fabric. The Minister tells us that, “*the courts should not be used as arenas of conflict, argument and debate when a more mature and considered discussion of the issues at hand between parties could see a better outcome for them.*”

The implicit argument runs something along these lines:

1. Sensible people resolve their disputes through discussion, not by going to court;
2. Mediation provides the opportunity for such mature and considered discussion;
3. Legal aid encourages people to go to court rather than have these mature discussions and so creates a barrier to dispute resolution rather than facilitating it;
4. Thus removing legal aid constitutes a social benefit.

A coordinated campaign supported by the legal profession and advice sector is in progress to oppose the proposed changes, but the realistic hope is simply to achieve damage limitation.

In March 2011 the Ministry of Justice published a further set of proposals as part of the *Transforming Justice* agenda. These focused on changes to procedure in the civil courts. The title of the paper “Solving Disputes” communicates the current philosophy and approach, which is to represent the cases that come to court for determination on the merits as *problems* in search of *resolution* - the message and language of mediation. The paper refers back explicitly to the Woolf Access to Justice Report. It poses the rhetorical question: “What has gone wrong with civil justice?” and answers its own question by reference to Woolf. It reminds us that the fundamental premise of the Woolf Reforms was that court proceedings are not the best or most appropriate route for civil disputes. The paper goes on to argue that “far too many cases are going to court unnecessarily” and that many cases settle between issue and trial, which is deemed to be a “waste of court resources and judicial time”. This suggestion conveniently fails to acknowledge that it is only the threat of coercion that brings defendants to the negotiating table.

Perhaps the most worrying aspect of the tone of the paper is its rejection of the language of justice. We are told that the court system needs to “focus more on dispute resolution...for the majority of its users, *rather than the loftier ideals of ‘justice’* (my emphasis), that cause many to pursue their cases beyond the point that it is economic for them to do so.”

We are told that the policy objective is to create yet another “new” civil justice system. The characteristic of this new justice system is that it will be one “where many more avail themselves of the opportunities provided by less costly dispute resolution methods, such as mediation – to collaborate rather than litigate.” So not a “justice” system at all or at least not one that is concerned with substantive justice.

In order to achieve this change the proposal is effectively to impose compulsory mediation by drastically increasing the scope of the simplified small claims procedure so that most civil cases will fall within that jurisdiction and then to insist that all claims go through mediation before being considered for judicial determination

Judicial fight back? Too little, too late.....

What we are now seeing is a bifurcation between the views of the senior judiciary and policy-makers. The judiciary are beginning to display some nervousness about the emphasis on private dispute resolution. More than a decade after the reforms of civil justice, with resources for civil justice severely strained and a change in the leadership of the judiciary, we are hearing a more nuanced analysis of the issues. For example, in an address to the Civil Mediation Council's Annual conference shortly after his appointment in 2009, the Lord Chief Justice emphasised the need for an effective civil justice system and hinted at some concerns about the prospect of compulsory mediation.

If I were to enter into the debate on whether the court process could or should have the power to compel mediation, in effect as part of its own process, I should have to speak for a very long time..... on this I have to confess to an underlying concern not so much directed at the mediation issue, which is about too many people telling too many other people what they must do and thus compel an additional step in the process of litigation.

At the same conference a year later, Lord Neuberger, the Master of the Rolls and Head of Civil Justice, also gave rather more cautious support for the mediation 'project' than that expressed by his two immediate predecessors:

[L]et us not get carried away by zeal. Zeal for justice, zeal for one's client are fine, but zeal for a form of dispute resolution or any other idea, theory, or practice is not so healthy. It smacks of fanaticism, and it drives out one of the three most important qualities a lawyer should have – scepticism or, if you prefer, objectivity. (The others being honesty and ability.) Overstating the virtues of mediation will rebound in the long term, even in the medium term, to the disadvantage of mediation.

In his recent comprehensive review of costs in civil litigation, Lord Justice Jackson considered the role of mediation in the resolution of civil disputes. He rejected the submission by mediation providers that procedural judges should impose sanctions on parties who had not mediated prior to the issue of proceedings without a good reason. He also rejected the suggestion that "compulsion may even be needed" to ensure that procedural judges implement such a policy. Lord Justice Jackson favoured an approach that would support education and facilitation of ADR rather than coercion.

Most recently, Lord Neuberger has sought to emphasise the public purpose of courts and to reject the notion that judicial determination represents a failure of the justice system rather than being fundamental to its purpose. There seems to be some deeper thinking going on about what it means to deliver justice in the realm of civil disputes. He argued that neither arbitration nor ADR can provide a framework for securing the enforcement of rights and the rule of law and that without the framework provided by formal adjudication "they would be mere epiphenomena." In November 2010 Lord Neuberger gave a speech, which he provocatively entitled 'Has Mediation

Had its Day?’ He argued that the increasing emphasis on mediation and ADR may well be “antipathetic to our commitment to equal access to justice, to our commitment to a government of law.” He went on to say that: “Citizens are bearers of rights; they are not simply consumers of services. The civil justice system exists to enable them to secure those rights. It does not exist to merely supply a service, which like a bar of chocolate may be consumed.”

Other commentators are beginning to wade into the “wretched waters” of civil justice. In June 2011 the campaigning organization *Justice* issued an intentionally powerful press release warning that the combined effect of changes to legal aid together with compulsory mediation will be the “economic cleansing” of the civil courts. The statement argued that in the future “courts and lawyers will be only for the rich. The poor will make do as best they can with no legal aid and cheap, privatised mediation. There will be no equal justice for all – only those with money.”

In a relatively unusual departure from normal practice, the Supreme Court Justice, Lady Hale, has been contributing to the debate. She has made two recent high-profile speeches in which, in the context of proposed changes to legal aid, she has argued that access to justice is a constitutional principle:

We are a society and an economy built on the rule of law. Businessmen need to know that their contracts will be enforced by an independent and incorruptible judiciary. But everyone else in society also needs to know that their legal rights will be observed and legal obligations enforced....If not, the strong will resort to extra-legal methods of enforcement and the weak will go to the wall.

These concerns are well-founded. As a by-product of economic expedience and the relentless movement away from public adjudication to private dispute resolution, we are not merely losing the courts and access to them; we are losing the language of justice in relation to a very wide range of issues affecting the lives of citizens.

The Fifteenth Annual Liman Colloquium

Accessing Justice, Rationing Law

Thursday, March 1

3-4 Registration Yale Law School, 127 Wall Street, Room 122

4:15 Welcome

4:30-6:30 **Gatekeepers to Justice: The State of State Courts, 2012**

Most state constitutions guarantee “open courts” and rights to remedies. Further, in 1963, *Gideon v. Wainwright* established a constitutional right to counsel for indigent defendants facing felony charges. Implementation of these rights, however, continues to occupy the legal profession. A 2004 report by the American Bar Association reached “the disturbing conclusion that thousands of persons are processed through America’s courts every year either with no lawyer at all or with a lawyer who does not have the time, resources, or in some cases the inclination to provide effective representation.” On the civil side, California counted 4.3 million civil litigants without lawyers in its courts in 2009; New York tallied 2.3 million in 2010, and that number includes almost all facing evictions and 95 percent of those in family conflicts. This opening panel will take up an overarching question for the twenty-first century: how can courts respond to the demand for their services?

The Honorable Tani Cantil-Sakauye
Chief Justice
California Supreme Court

The Honorable Sue Bell Cobb
former Chief Justice
Alabama Supreme Court

The Honorable Wallace Jefferson
Chief Justice
Supreme Court of Texas

The Honorable Margaret H. Marshall
former Chief Justice
Supreme Judicial Court of Massachusetts

The Honorable Chase Rogers
Chief Justice
Connecticut Supreme Court

The Honorable Randall T. Shepard
Chief Justice
Indiana Supreme Court

The Honorable Jonathan Lippman
Chief Judge
State of New York

Friday, March 2

8:30-9 am Breakfast

President's Room, Woolsey Hall

9:15-11:00 *Gideon* Revived: Criminal Defense, Financial Austerity, and
Overcriminalization

As state courts experience severe cuts, layoffs, and furloughs, the criminal justice system continues to produce defendants, detainees, and prisoners. More than a half century ago, the debate was whether the federal constitution mandated that indigent criminal felony defendants be provided state-paid lawyers. Contemporary discussions focus on *Gideon's* scope and implementation. Some state courts have responded by creating mechanisms for public defenders to decline assignments and by recognizing pre-conviction habeas review of ineffective assistance of counsel. Other responses include task forces, diversion programs, and sentencing reforms. Questions include: What remedies can courts order, and what are the limits on what judges can do? Should lawyers decline appointments when their caseloads become too large? What role might prosecutors play in selecting cases? What can the executive branch do? What forms of rationing, by which institutions, are acceptable? Should the narrative be one of progressive realization of constitutional ideals or of a failure of political will to support courts and litigants?

Discussants: The Honorable Sue Bell Cobb, former Chief Justice, Alabama Supreme Court

The Honorable Wallace Jefferson, Chief Justice, Texas Supreme Court

The Honorable Jonathan Lippman, Chief Judge, State of New York

Commentators: Andrea Marsh, Executive Director, Texas Fair Defense Project,
Liman 2002-03

McGregor Smyth, Managing Attorney, Civil Action Practice and
Reentry Net Director, Bronx Defenders, Bronx, NY

Moderator: Sia Sanneh, Senior Liman Fellow in Residence, Yale Law School,
Liman 2007-08

11:15-1:00 *Gideon* Reconceived: State Subsidized Lawyers for Civil Litigants—
In and Outside the United States

Both the federal government and several states—including California and New York—have provided statutory access to civil legal services for low-income people, and a few jurisdictions also provide that, as a matter of state constitutions, some civil litigants have a right to counsel. But, as New York's Chief Judge Jonathan Lippman cautioned in 2011, "we cannot provide a lawyer to every poor person with a legal problem, as much as we would want to. What we are seeking is to provide legal representation to those struggling to access life's most basic necessities, such as shelter, food, and personal safety." These materials reflect on how and why certain kinds of proceedings are characterized as "civil" or "criminal," and how – and which institutions – decide priorities for legal counsel. Variables proposed include age, income, the type of service sought, and the kind of claim raised. And, of course, the United States is not

alone in facing funding challenges, as current developments in the United Kingdom and European Union make plain.

- Discussants: Helaine Barnett, Chair, Task Force to Expand Access to Civil Legal Services in New York
The Honorable Tani Cantil-Sakauye, Chief Justice, California Supreme Court
Hazel Genn, Dean of Laws, Professor of Socio-Legal Studies and Co-Director, Judicial Institute in the Faculty of Laws at University College London
Rebecca Sandefur, Senior Research Fellow, American Bar Foundation
Dr. Angela Ward, Référendaire, Court of Justice of the European Union, Luxembourg and Adjunct Professor in EU and Human Rights Law, University College Dublin
- Commentators: Talia Inlender, Public Counsel, Los Angeles, California
Jorge Baron, Executive Director, Northwest Immigrant Rights Project, Seattle, WA, Liman 2005-06
- Moderator: Allison Hirschel, University of Michigan Law School, Liman 1997-98

1:15 – 2:30 Lunch Yale Law School

2:45 – 5 Alternative Courts and Alternatives to Courts President's Room, Woolsey Hall

Many jurisdictions (in and outside of the United States) are exploring alternatives to civil and criminal litigation. Mediation, arbitration, and settlement are encouraged, and many advocate “problem-solving courts” or specialized courts, with names such as homeless courts, drug courts, reentry courts, veterans’ courts, girls’ courts. Trade-offs abound, as some of these alternatives are not voluntary, and some do not permit lawyer participation. Moreover, such alternatives are less public than adjudication. This segment focuses on the extant experimentation, the successes, the risks, and the relationship of these alternatives to constitutional, statutory, and common law rights of litigants. Questions include what types of litigants and cases have been sent to alternative courts, the desirability of limiting reliance on lawyers, the sustainability of innovation, and the relationship of these changes to the ideology of “rights to remedies.”

- Discussants: Gillian Hadfield, Richard L. and Antoinette S. Kirtland Professor of Law and Professor of Economics, USC Gould School of Law and Visiting Professor of Law, Harvard Law School
The Honorable Randall T. Shepard, Chief Justice, Indiana Supreme Court
Tom Tyler, Professor of Law and Psychology, Yale Law School
William Vickrey, former Administrative Director of the Courts, California
- Commentators: Lisa Daugaard, Liman Fellow 1998-99 and Deputy Director, The Defender Association, Seattle, WA
Allegra McLeod, Liman Fellow 2008-09 and Law Research Fellow, Georgetown University Law Center
- Moderator: Judith Resnik, Arthur Liman Professor of Law, Yale Law School