

PARTNERS IN JUSTICE: A COLLOQUIUM ON DEVELOPING COLLABORATIONS AMONG
COURTS, LAW SCHOOL CLINICAL PROGRAMS AND THE PRACTICING BAR
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THE IMPORTANCE OF COLLABORATING TO SECURE A CIVIL RIGHT TO COUNSEL

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“To no one will we sell, to no one will we refuse or delay,
right or justice,”²

- *Magna Carta (1215)*

“The right to be heard would be, in many cases, of little
avail, if it did not comprehend the right to be heard by
counsel.”³

- *Powell v. Alabama (1932)*

Together, we can move mountains.
Alone, we can't move at all.

- traditional folksong

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² *Magna Carta*, cap. 40, (1215)

³ *Powell v. Alabama*, 287 U.S. 45, 68-69 (1932),

Introduction

No gathering of the Judiciary, academics and the practicing bar to address collaborations intended to further access to justice would be complete without a discussion of the right to counsel in civil matters. As all-powerful arbiters of the fates of litigants, as teachers of those who will hold the keys to access to the courts, as monopoly gatekeepers to the courts and, collectively, as those called upon to justify the system we call “justice,” we hold an awesome responsibility. We are responsible for the system that determines the application of the rule of law and the resolution of human conflicts that affect life, income, family, health, community and other fundamentals.

After more than 200 years of constitutional democracy, the United States has an increasingly complex adversarial dispute resolution system. The system is structured to require legal counsel for meaningful access. Yet, large numbers of people cannot afford counsel when they face legal disputes with enormously serious consequences for their lives and well-being. This is unacceptable. This paper argues that there can be no more important collaboration in the interest of “access to justice” than to work together to correct the single greatest impediment to a truly just system – the failure to assure meaningful access to justice through a civil right to counsel. Public policy, the fair administration of justice, constitutional and statutory law, and a growing international consensus on the human right to a fair hearing, all support the proposition that there should be a right to counsel in civil as well as criminal litigation.

Perhaps the strongest case for a civil right to counsel in New York can be made for tenants who face eviction from their homes. New York City’s Housing Court, for example, is unable to fairly and impartially administer justice because the vast majority of people who pass through its doors facing eviction (or whose cases, at least, pass through its doors) are not able to defend their interests meaningfully because they need, yet due to their poverty cannot secure, legal assistance. But many of the same considerations that warrant a right to counsel in eviction proceedings support a right to counsel in other civil proceedings involving important rights and interests as well. Other housing matters such as foreclosure or building conditions that render dwellings uninhabitable, domestic relations matters such as divorce or domestic violence, legal

proceedings involving loss of employment, disability benefits or other government assistance, and deportation, for instance, all involve complex litigation, extraordinarily important individual interests, and a cost-benefit balance that militates in favor of assuring adequate procedures (i.e., a right to counsel) to protect the individual interests at stake.

Moreover, the distinction between civil matters and criminal matters has been increasingly blurred, as collateral consequences from criminal matters impact on crucial civil matters such as evictions (particularly from government subsidized housing) and deportation, and the same facts that give rise to civil matters can lead to criminal prosecutions.⁴ Thus, having a right to counsel in the criminal matters (which can involve the threat of short-term incarceration) and having no such right in closely-related civil matters (which can involve permanent loss of one's home or one's life-long country of residence), is an increasingly invalid distinction.

The U.S. Supreme Court established a right to counsel for a person accused of a crime four decades ago.⁵ New York State established a right to counsel in child custody matters over three decades ago.⁶ Other important and fundamental human needs are routinely at jeopardy in civil legal proceedings as well. To give full meaning to the promise of equal justice under the law, to level the playing field and provide meaningful access to justice for all, we as a society need to move toward a judicial system that enables people, regardless of their lack of income and assets, to obtain the assistance of counsel for matters for which a reasonable person, with the means to hire counsel, would choose to use counsel.

Core Legal Principles Support a Civil Right to Counsel

⁴ For a thorough discussion of the collateral consequences of civil and criminal proceedings, *see*, McGregor Smyth, *Bridging the Gap: A Practical Guide to Civil-Defender Collaboration*, CLEARINGHOUSE REVIEW, (May-June 2003).

⁵ *Gideon v. Wainwright*, 372 U.S. 335 (1963)

⁶ *In re Ella B.*, 285 N.E.2d 288 (N.Y. 1972)

Most people think there already is a right to counsel for the poor in civil matters such as evictions.⁷ No wonder. There is an obvious injustice in a dispute resolution system in which landlords are routinely represented by counsel familiar with the laws and the culture of the courts, whereas tenants are routinely not represented by counsel. Sound and persuasive legal arguments support the guarantee of a right to counsel in civil matters. The right to due process and the right to equal treatment by the courts provide a constitutional basis for a civil right to counsel. In addition, Article 11 of New York’s Civil Practice Law and Rules authorizes the Court to assign counsel in civil proceedings, a discretionary power that is not sufficiently exercised.

a. Fairness (Due Process)

Due process is at its core a simple, intuitive notion—people are entitled to a meaningful opportunity to be heard in court when they face loss of important interests. In *Matthews v Eldridge*,⁸ the U.S. Supreme Court analyzed the “process due” as a function of three factors: the interest at stake, the difference that would be made by the protection sought, and the government’s interest.⁹ Analyzed according to these factors, a right to counsel in many civil matters is warranted. Tenants facing eviction, for example, have enormously important interests at stake,¹⁰ counsel makes an important, often determinative, difference in the outcome of the proceeding, and the government has a strong interest in averting the costs of homelessness and assuring the fair administration of justice. All of these factors militate strongly in favor of a right to counsel for tenants facing eviction.

⁷ Deborah L. Rhode, ACCESS TO JUSTICE, 104 (2004); Beldon, Russonello & Stewart Research Assocs., *National Survey on Civil Legal Aid* (Apr. 2000) (unpublished report, available at www.nlada.org)

⁸ 424 U.S. 319 (1976).

⁹ The Court articulated those factors as follows:

First, the private interest that will be affected by the official action; second, the risk of erroneous deprivation of such interest through the procedures used, and the probable value, if any of additional or substitute procedural safeguards; and finally, the Government’s interest, including . . . [the] administrative burdens that the additional or substitute procedural requirement would entail.

424 U.S. at 335, *citing* *Goldberg v. Kelly*, 397 U.S. 254, 263-71 (1969)

¹⁰ Courts have recognized the importance of the right at stake in eviction by recognizing the right to emergency temporary shelter in New York. *See Barnes v. Koch*, 518 NYS 2d 539, 542 (NY Sup. Ct. 1987)).

In contrast to *Gideon v. Wainwright*,¹¹ the U.S. Supreme Court has not been willing to extend the right to counsel across the board to categories of civil litigation. In *Lassiter v. Department of Social Services*,¹² for example, the Supreme Court failed to find a prima facie due process right to counsel in a matter as fundamental as termination of parental rights.¹³ However, state courts are free to interpret their constitutions' due process clauses independently of the federal analysis of the U.S. Constitution.¹⁴ Indeed, as the New York Court of Appeals under Chief Judge Judith Kaye's leadership has demonstrated, the New York Courts can and often do decide what the right to due process requires under the New York State Constitution independently of the U.S. Supreme Court's interpretation of the U.S. Constitution.¹⁵

Pursuant to New York State's due process requirement¹⁶—and prior to the enactment of some of the statutory provisions discussed below— New York courts ordered the appointment of counsel in a number of civil settings. These included neglect proceedings where a person faces a loss of child custody,¹⁷ where the Court of Appeals noted that parental rights may not be curtailed in New York without “a meaningful opportunity to be heard, which in these circumstances includes the assistance of counsel,”¹⁸ and proceedings involving revocation of probation.¹⁹ While both of these

¹¹ cite

¹² 452 U.S. 18 (1981). *Lassiter* involved termination of parental rights of a mother who was incarcerated at the time of the proceeding.

¹³ *Lassiter*, 452 U.S. 18 (1981). *Lassiter* involved termination of parental rights of a mother who was incarcerated at the time of the proceeding. But see, *Nicholson v. Williams*, 203 F.Supp.2d 153 (E.D.N.Y., 2002) where the court found a right to counsel for victims of domestic violence whose children are removed from the home.

¹⁴ See, generally, Brennan, *State Constitutions and the Protection of Individual Rights*, 90 Harvard L. Rev. 489, 502-503 (1977); Note, *The Interpretation of State Constitutional Rights*, 95 HAR. L. REV. 1324 (1982); Note, *The emergence of State Constitutional Law*, 63 TEX. L. REV. 959 (1985)

¹⁵ See *People v. LaValle*, 3 N.Y.3d 88, 129, 783 N.Y.S.2d 485, 817 N.E.2d 341 (2004) (“[O]n innumerable occasions this court has given ... [the] State Constitution an independent construction, affording the rights and liberties of the citizens of this State even more protection than may be secured under the United States Constitution.” [quoting *Sharrock v. Dell Buick-Cadillac, Inc.*, 45 N.Y.2d 152,159 (1978)

¹⁶ The text of the Due Process Clause in the New York Constitution, Art. I, § 6, is identical to its federal counterpart.

¹⁷ see *In re Ella B.*, 285 N.E.2d 288 (N.Y. 1972)

¹⁸ *In re Guardianship and Custody of Ornieka J.*, 491 N.Y.S.2d 639, 541 (N.Y. App. 1985).

decisions were rendered as a matter of state *and* federal constitutional law prior to *Lassiter*, there is no reason that their explication of state constitutional law would not remain the same after *Lassiter*. Indeed, after *Lassiter*, in *In re Application of St. Lukes-Roosevelt Hosp. Ctr.*,²⁰ a New York Court found a constitutional right to counsel under *Matthews v. Eldridge* for a woman about to be involuntarily transferred to a nursing home.²¹ New York State thus has a long-established tradition of recognizing the importance of the right to counsel as a matter of the “process due” in the administration of justice.

b. Equal Treatment

The lack of a right to assigned counsel in matters involving the fundamental human needs of indigent people implicates constitutional and statutory rights to equal treatment as well to due process.

Overall, the court system in New York State spends far more money per case in court time and resources (judges, other court personnel, courtrooms, etc.) adjudicating disputes that involve people who are wealthy enough to afford counsel than it spends on eviction and other proceedings involving unrepresented litigants. Because the Supreme Court, Court of Claims and other courts that entertain disputes of wealthier litigants involve larger courtrooms, more highly paid judges and more time consuming processes than the one-sided, truncated, rapidly-processed form of litigation that characterizes, for example, Housing Court eviction proceedings, these civil disputes cost the system far more per dispute than Housing Court eviction proceedings. For instance, while New York City’s Housing Court handled 19.7% of the civil cases filed in New York State in 2004, it had only 7% of the non-judicial staff.²² This disparity in public resources

¹⁹ See *People ex rel. Menechino v. Warden*, 267 N.E.2d 238, 240 n.5 (1971) (“[A] parolee is entitled to an attorney under the provisions of section 6 of article I of the New York State Constitution pertaining to the right to counsel and its guarantee of due process.”).

²⁰ 607 N.Y.S.2d 574 (N.Y. Sup. 1993)

²¹ See also, New York cases regarding a due process or other basis for granting a stay for the purpose of getting counsel (*Lang v. Pataki*, 707 NYS 2d 90 (App. Div. 2000)) or getting a translator (*Carlton v. Bayne*, 740 NYS 2d 785 (NY Sup. 2002))

²² Interview with Hon. Fern Fisher, Administrative Judge of the Civil Court of the City of New York, February 25, 2005.

devoted to eviction proceedings denies unrepresented litigants equal treatment in this respect as well.²³

In addition, society subsidizes the cost of legal representation for people of means, regardless of the seriousness of the dispute, while denying legal representation to low-income people in disputes where the basic human necessities are at stake. For example, for more than a half-century, under the Internal Revenue Code, legal fees, other than those which are incurred for personal reasons (such as perfection of title to property), or which must be capitalized, have been generally deductible from taxable income by the taxpayer.²⁴ This tax deduction leads to countless millions, if not billions, of dollars of foregone tax revenue annually.²⁵ This benefit (in effect, a subsidy) to those of means is yet another reflection of disparate treatment of low-income litigants who deal with litigation that affects basic human needs, yet cannot afford to pay for counsel.

To succeed, legal claims based on disparate treatment and disparate impact would need the support of in-depth empirical research and further and comprehensive legal analysis. However, these are avenues worth pursuing because the obvious inequity of a system of justice in which individuals are denied access to a meaningful opportunity to be heard when they face losing their homes simply because they are too poor to pay for that access.

²³ To address this disparity, Wilhelm Joseph, Executive Director of the Legal Aid Bureau of Maryland, has suggested that filing fees in civil litigation in which the amount in dispute exceeds \$1 million could be raised significantly to raise funds to provide free legal assistance to the indigent. Wilhelm Joseph, *The Right to Counsel in Civil Cases*, Justice Journal (Newsletter of the Legal Aid Bureau of Maryland), March 2004 (on file with author).

²⁴ I.R.C. §§162, 212 (1954). A “sales” tax of 1% on legal services where the billable hour exceeds \$200 would generate an enormous amount of revenue that could support legal services for the indigent

²⁵ According to the 1999 Legal Services Corporation Annual Report, local legal service agencies received a combined total of US \$561,000,000 (561 million) in federal, state, local, and IOLTA funds, foundation grants and other private donations in FY 1998. Legal Services Corporation, 1999 Annual Report. A half dozen law firms in the United States each took in more than US \$600,000,000 (600 million) each that year. Roger Parloff, *Skadden: A Flexible Firm Breaks the Billion Dollar Barrier*, Am. Law. July 2000, at 88. For further discussion of these and other similarly revealing statistics, see Justice Earl Johnson, Jr, *Equal Access To Justice: Comparing Access To Justice In The United States And Other Industrial Democracies*, 24 Fordham Int'l L.J. S83 (2000)

c. CPLR Article 11

New York State Judges have the authority to assign counsel to indigent litigants. Civil Practice Law and Rules (CPLR) Article 11 (New York’s “poor person” statute) gives judges the power to assign counsel in a “proper case”²⁶ for an individual who is found to be indigent. This provision is rarely used.²⁷ However, the failure to assign counsel in an appropriate case can be a violation of the obligation to exercise appropriate discretion under Article 11 of the CPLR.²⁸ New York Courts have held, pursuant to Article 11, that where: (1) indigent status is beyond dispute; (2) prima facie merit of the indigent’s claim or defense is apparent; and (3) counsel from federally funded or other free legal services organizations is unavailable, failure to assign counsel is an abuse of discretion.²⁹

The United States is out of Synch with other Western Democracies

The experience of other countries in addressing the right to counsel in civil litigation is instructive. A right to counsel in complex civil legal matters for those who cannot afford to pay for counsel is now recognized in many other countries.³⁰ Yet, in

²⁶ CPLR 1102; *In re Smiley*, 330 N.E.2d 53, 55 (N.Y. 1975) (“[t]he courts have a broad discretionary power to assign counsel without compensation in a proper case.”)

²⁷ There is no documentation of the extent to which counsel is assigned under CPLR Article 11 and this statement is based on the author’s observation. Probable reasons for the limited use of the power to assign counsel are that litigants and judges are not sufficiently familiar with the existence of the provision, and because the provision does not authorize payment so judges would not easily be able to determine who to appoint as counsel.

²⁸ *See id.* § 1102(a) (“The court in its order permitting a person to proceed as a poor person may provide an attorney.”)

²⁹ *Yearwood v. Yearwood*, 387 N.Y.S.2d 433 (N.Y. App. 1977); *see also* Andrew Scherer, *Gideon’s Shelter: The Need To Recognize a Right to Counsel for Indigent Defendants in Eviction Proceedings*, 23 HARV. C.R.-C.L.L. REV. 557, 586 n.122 (1988).

³⁰ Justice Earl Johnson of the California Court of Appeal has been tracing access to justice in other countries for years, and comparing practices elsewhere to those in the U.S. *See, e.g.*, Mauro Cappelletti, James Gordley and Earl Johnson, Jr., *TOWARD EQUAL JUSTICE: A COMPARATIVE STUDY OF LEGAL AID IN MODERN SOCIETIES* (1981); Hon. Earl Johnson, Jr., *Will Gideon’s Trumpet Sound a New Melody? The Globalization of Constitutional Values and its Implications for a Right to Equal Justice in Civil Cases* 2 SEATTLE J. FOR SOC. JUST. 201, 205 (2003). He has long found that the U.S. comes up short: “[a]t some point, Americans will look back and ask how concepts like “due process,” “equal protection of the law” and “equal justice under law” were anything but hollow phrases, while our society still tolerated the denial of counsel to low-income civil litigants.” Earl Johnson, Jr. & Elizabeth Schwartz, *Beyond Payne: The Case for a Legally*

spite of its wealth and long, rich history of judicial vindication of constitutional rights, the U.S. lags far behind other parts of the world in recognizing the right to counsel in civil litigation.

Two years before *Lassiter* was decided by the U. S. Supreme Court denying a right to counsel for a parent in a termination of parental rights case, the European Court of Human Rights (European Court) held, in *Airey v. Ireland*,³¹ that based on the European Convention on Human Rights and Fundamental Freedom (European Convention) right to a “fair hearing in civil cases” the government must provide free counsel to a low-income civil litigant who sought a divorce.³² The right to appointment of counsel to assure a fair hearing was re-affirmed in 2005 in *Steel and Morris v. The United Kingdom*,³³ where the European Court of Human Rights held that two protesters who had been sued for defamation by McDonald’s Corporation and denied legal aid for their defense, were denied their right to a fair hearing under Article 6, § 1 of the European Convention on Human Rights. The court held that

“The question whether the provision of legal aid was necessary for a fair hearing had to be determined on the basis of the particular facts and circumstances of each case and depended *inter alia* upon the importance of what was 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.”³⁴

Airey and *Steel and Morris* are applicable to the forty-five nations in Europe that are signatories to the European Convention on Human Rights, a majority of the western democracies.³⁵

The concept of the right to counsel in civil cases has been included in almost all European Constitutions so that “all citizens were ‘equal before the law’ or in all judicial

Enforceable Right to Representation in Civil Cases for Indigent California Litigants, 11 LOY. L.A. L. REV. 249, 249-50 (1978).

³¹ *Airey v. Ireland*, 2 Eur. Ct. H.R. (ser. A) 305, 309 (1979)

³² "In the determination of his civil rights and obligations ... everyone is entitled to a fair and public hearing ..." CONVENTION FOR THE PROTECTION FOR HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS, Nov. 4, 1950, art. 6, para. 1, 213 U.N.T.S. 222. Much like the Bill of Rights, the European Convention is a document which has been ratified by 45 nations and binds such countries to abide the laws contained therein.

³³ *Steel and Morris v. United Kingdom*, Eur. Ct. H.R. <http://www.echr.coe.int>

³⁴ *Id.*

³⁵ *Id.*

proceedings they were guaranteed ‘fair trials.’”³⁶ In 1937, Switzerland became the first country to address the problem of whether indigent defendants should be provided free government-funded counsel.³⁷ In, Judgment of Oct. 8, 1937, the Swiss Supreme Court held that equality before the law is required in civil cases for all Swiss and this is not attainable for poor people in matters for which knowledge of the law is required unless they are provided with free counsel.³⁸ The German Constitutional Court held in 1953 that the German Constitution’s fair hearing guarantee may require courts to appoint free counsel for indigent defendants when the legal aid statutes do not suffice.³⁹

Europe is not alone in recognizing that access to counsel for low-income civil litigants is a matter of right. In 1999, the Supreme Court of Canada held that there was a constitutional right to counsel in the fair hearing requirement of the Canadian Constitution—the Charter of Rights and Freedoms.⁴⁰ In *J.G. v. New Brunswick*,⁴¹ the court held that even when the state is trying to continue asserting custody over a child for six additional months, a mother has the right to be provided with free counsel.⁴² A right to counsel in eviction-type proceedings has been recognized in post-apartheid South Africa. In 2001, the Land Claims Court of South Africa, which is charged with the responsibility of handling “eviction actions between tenants or occupiers of land and those asserting ownership,”⁴³ held in *Nkuzi v. The Government of the Republic of South Africa and the Legal Aid Board*⁴⁴, that “the state is under a duty to provide [such] legal representation or legal aid [to indigent tenants] through mechanisms selected by it.”⁴⁵

³⁶ Supra note 3, at 206.

³⁷ *Id.*

³⁸ Francis William O'Brien, *Why Not Appointed Counsel in Civil Cases? The Swiss Approach*, 28 Ohio St. L.J. 1, 5 (1967) (citing Judgment of October 8, 1937, Arrêts du Tribunal Fédéral [ATF] 63, 1, 209 (Switz.)).

³⁹ Decision of June 17, 1953 (No. 26), *Entscheidungen des Bundesverfassungsgerichts* vol. 2, at 336-41 (1953). English translation of this opinion appears in CAPPELLETTI, ET. AL, supra note 15, at 700.

⁴⁰ CAN. CONST. (Constitution Act, 1982) pt. 1 (Canadian Charter of Rights and Freedoms).

⁴¹ *New Brunswick (Minister of Health and Community Services) v. G. (J.)*, [1999] 177 D.L.R. (4th) 124, 131.

⁴² *New Brunswick (Minister of Health and Community Services) v. G. (J.)*, [1999] 177 D.L.R. (4th) 124, 131.

⁴³ Supra Johnson, Seattle, at 214.

⁴⁴ *Nkuzi Development Association v. The Government of the Republic of South Africa, LCC 10/01 (Land Claims Ct. S. Afr. 2001)*, available at <http://wwwserver.law.wits.ac.za/lcc/>

⁴⁵ *Nzuki*, at 5.

The same social contract theory of the Enlightenment that informs the European, Canadian and South African principles found its way into the Declaration of Independence and United States Constitution. While the European Court refers to a right to a “fair hearing” this concept is indistinguishable from the right to “due process” in the United States.⁴⁶ Thus, despite the differences in the language employed, the fundamental import of these concepts remains substantially similar if not identical.⁴⁷

While the U.S. Supreme Court has been reluctant to rely on foreign decisions in the past, Justices O’Connor, Kennedy, and Ginsburg have all indicated a desire to pay attention to such decisions.⁴⁸ Furthermore, the Supreme Court, in *Lawrence v. Texas*, relied on foreign decisions, in particular those of the European Court.⁴⁹ And recently again, in *Roper v. Simmons*,⁵⁰ in finding the juvenile death penalty unconstitutional, the Supreme Court relied on the evolving standard of decency around the world on this issue, not just the evolving view in the U.S.⁵¹ While the Court did not find the international view controlling, it did the views of the international community relevant.⁵²

We may yet be a ways off from domestic application of international human rights laws involving social economic and cultural rights in this country,⁵³ but the extent to which the rest of the world is recognizing a civil right to counsel should be a

⁴⁶ Justice Oliver Wendell Holmes observed, "Whatever disagreement there may be as to the scope of the phrase 'due process of law,' there can be no doubt that it embraces the fundamental conception of a fair trial, with opportunity to be heard. [Frank v. Mangum, 237 U.S. 309, 347 \(1915\)](#) (Holmes, J., dissenting) quoted in Johnson, Seattle, supra. at 207.

⁴⁷ *Id.* At 208.

⁴⁸ *Id.* At 224. Justice Johnson’s article describes comments made by the Supreme Court Justices at in international conference sponsored by the World Bank.

⁴⁹ 539 U.S. 558, 123 S. Ct. 2472 (2003) (Texas statute making consensual homosexual sex a crime held unconstitutional.)

⁵⁰ --- S.Ct. ----, 2005 WL 464890 (U.S.Mo.,2005)

⁵¹ “at least from the time of the Court's decision in *Trop v. Dulles*, 356 U.S. 86, 78 S.Ct. 590 (U.S. 1958)], the [U.S. Supreme] Court has referred to the laws of other countries and to international authorities as instructive for its interpretation of the Eighth Amendment's prohibition of "cruel and unusual punishments." [356 U.S., at 102-103, 78 S.Ct. 590](#) (plurality opinion) (“The civilized nations of the world are in virtual unanimity that statelessness is not to be imposed as punishment for crime’); see also [Atkins, supra, at 317, n. 21, 122 S.Ct. 2242](#) [*Atkins v. Virginia*, 536 U.S. 304, 122 S.Ct. 2242

(2002)] (recognizing that ‘within the world community, the imposition of the **death penalty** for crimes committed by mentally retarded offenders is overwhelmingly disapproved’)

⁵² *Id.*

⁵³ See, e.g., Philip Alston (1996) *The U.S. and the Right to Housing: A Funny Thing Happened on the Way to the Forum* in EUROPEAN HUMAN RIGHTS LAW REVIEW, vol. 1, pp. 120-133

persuasive (and an embarrassing) fact for a nation that thinks of itself as a symbol of democracy and the rule of law.

A Civil Right to Counsel must be a Legally-Enforceable: Funding for Legal Assistance Programs Does Not, by Itself, Solve the Problem

The civil right to counsel must be an enforceable right that can be exercised by the individual who needs counsel. Legal assistance programs for the poor are important vehicles for providing counsel, but if the need for counsel is simply seen as a compelling argument for increasing funding for legal assistance programs, the core point will have been missed. As important as increasing funding for such programs is, funding alone is not the complete answer. Legal assistance programs must, out of necessity, operate in their own institutional self-interest. They must secure sufficient funds to support the overall costs of their services, including, in addition to personnel, space, administrative and other costs. To survive, they must be able to say no to additional caseload obligations when they don't have the resources to provide assistance; and they must be in a position to demand additional funding when they are called upon to address additional need. Without a mandated right to counsel, funding for such programs is subject to legislative whims, and when funding is inadequate to begin with or reduced over time, services cannot meet need.⁵⁴

When access to counsel is a right, things change. When counsel is a right, sitting judges charged with the administration of justice in the specific cases before them are able to appoint counsel in order to ensure a fair proceeding when counsel is not otherwise obtainable by the litigant, and judges are able to insure that the counsel who appear

⁵⁴ Of course, a recognized right to counsel does not automatically guarantee that sufficient funding will be appropriated to assure that the appropriate quantity and quality of counsel will be available, but it does provide an enforceable legal claim when the right is not adequately funded. See, e.g. *NYCLA v. State*, 196 Misc.2d 761, 763 N.Y.S.2d 397, (N.Y.Sup., 2003) *Appeal withdrawn*, 2 A.D.3d 1489, 767 N.Y.S.2d 603 (N.Y.A.D. 2003) (New York's statutory caps on assigned counsel rates for criminal court and family court work violated constitutional and statutory right to meaningful and effective representation; the caps resulted in an insufficient number of assigned panel attorneys available, denying litigants meaningful representation and seriously impairing the courts' ability to function and process cases in a timely fashion.)

before them are competent.⁵⁵ If counsel is a right, an entitlement, the litigant will be able to prevail upon the court for a remedy, including assignment of counsel and a stay of further proceedings until counsel has an opportunity to appear. In the absence of a right, access to counsel is limited by the capacity of the available resources.

Collaborations of the Legal Community Can Make Positive Change⁵⁶

The bench and bar, together with colleagues in academia, make for an enormously powerful grouping, that has the power to shift the system of justice. In recent years, we, as a community, have been working in an increasingly collaborative manner to further access to justice. If we work together to secure a civil right to counsel, there is no reason we cannot succeed. Some recent collaborative efforts illustrate the power of effective collaborations to advance access to justice.

In January of 2005, with the assistance of the New York City Civil Court, and in collaboration with Legal Services for New York City and Women in Need, the United Way of New York established an innovative Housing Help Center project in the Bronx Housing Court to provide a combination of legal and social services to tenants who live in zip code 10451 and who are sued for eviction. The legal and social services are intended to prevent eviction and address short and long term needs to help stabilize families and individuals and enable them to stay in their homes and communities. The zip code was chosen because it has a high number of eviction proceedings and a high incidence of families entering the emergency shelter system.⁵⁷ This project, which provides intense legal and social services to low-income people in a small geographic area, models what a right to counsel could be like. Documentation of the work and

⁵⁵ See, Russell Pearce, *Redressing Inequality in the Market for Justice: Why Access to Lawyers will never Solve the Problem and Why Rethinking the Role of Judges Will Help*, 73 *FORDHAM L. REV.* 969 (2004)

⁵⁶ Collaborative efforts to attain a civil right to counsel are already underway. A National Coalition for a Civil Right to Counsel of legal services and legal aid lawyers, private attorneys and academics has been organized by Debra Gardner of the Public Justice Center of Maryland and Deborah Perluss of the Northwest Justice Project. A New York City group of advocates, focused on the right to counsel for tenants in Housing Court, has been organized by Lisa Rubin of N.Y. City Councilmember Alan Gerson's office, with much of the work shouldered by Laura Abel of the Brennan Center.

⁵⁷ See *New York Times* . . .

outcomes of the project, which is underway, will be very instructive as we move forward with access to justice issues.

Another important collaboration of the legal community in New York in furtherance of access to justice is LawHelpNY⁵⁸ and CourtHelp. LawHelp is a collaborative website of legal services and pro bono organizations⁵⁹ that has been designed to provide referral information to low-income people about the availability of legal assistance organizations throughout New York State as well as legal information materials on a wide range of civil legal matters in English and Spanish. Using the LawHelp template, the Office of Court Administration's public information website, CourtHelp, provides information about the court system and links to LawHelp. This collaborative effort of the pro bono and legal services bar and the court system has streamlined access to crucial information, harnessed and made accessible the community legal education work of scores of advocates throughout the state, and used technology in a creative and effective way to inform and empower litigants.

No collaboration has been more powerful in New York in advancing access to justice than the relationship between the pro bono bar and legal services organizations. Over the course of the last twenty-five years, New York State has developed a strong pro bono culture in which tens of thousands of hours worth millions upon millions of dollars are devoted annually to pro bono work that is done shoulder to shoulder with legal services offices. This work has vastly leveraged the resources available for civil legal services, and built a solid constituency that understands, first hand, the enormous difference made by counsel in the lives of low-income people.⁶⁰

⁵⁸ www.lawhelp/ny.org

⁵⁹ Collaborative partners in LawHelp include ProBonoNet, the City Bar Fund of the Association of the Bar of the City of New York, Legal Services for New York City, the Legal Aid Society of NYC, the Legal Aid Society of Northeastern New York and the Greater Upstate Law Project

⁶⁰ Support for a civil right to counsel by the private bar is growing. On March 14, 2005, the New York County Lawyers Association passed a resolution endorsing, "as a matter of principle, a right to the appointment of free counsel for all tenants in Housing Court unable to afford counsel, and support[ing] initiatives to establish a right to the appointment of free counsel for such tenants in Housing Court, including initiatives that recognize the right for particularly vulnerable sub-populations of tenants such as the

Conclusion

Our system of justice suffers from a fundamental contradiction. Courthouses are emblazoned with the motto “Equal Justice for All,” and yet significant portions of the population are effectively barred from meaningful access to the courts because they cannot afford or secure counsel to represent them in legal matters that affect their fundamental interests. When we talk about “access to justice,” we cannot lose sight of this key fact. New York has a wealth of legal talent and good will that, turned to the collaborative task of securing a civil right to counsel, will inevitably succeed.

elderly.” Resolution on Right to Counsel in Housing Court, New York County Lawyers Association, March 14, 2004. www.nycla.org (last checked April 1, 2005).