

April 2013

Panel Discussion: International, National, and Local Perspectives on Civil Right to Counsel

Andrew Scherer

Martha F. Davis
Northeastern University School of Law


Debra Gardner

Rosie Mendez

Juanita B. Newton

See next page for additional authors

Follow this and additional works at: <https://digitalcommons.tourolaw.edu/lawreview>

 Part of the [Civil Rights and Discrimination Commons](#), [Family Law Commons](#), [Housing Law Commons](#), [Human Rights Law Commons](#), [Legal Profession Commons](#), and the [Social Welfare Law Commons](#)

Recommended Citation

Scherer, Andrew; Davis, Martha F.; Gardner, Debra; Mendez, Rosie; Newton, Juanita B.; Holder, Adriene; and Abel, Laura K. (2013) "Panel Discussion: International, National, and Local Perspectives on Civil Right to Counsel," *Touro Law Review*. Vol. 25: No. 1, Article 13.

Available at: <https://digitalcommons.tourolaw.edu/lawreview/vol25/iss1/13>

This Prefatory Matter is brought to you for free and open access by Digital Commons @ Touro Law Center. It has been accepted for inclusion in Touro Law Review by an authorized editor of Digital Commons @ Touro Law Center. For more information, please contact lross@tourolaw.edu.

Panel Discussion: International, National, and Local Perspectives on Civil Right to Counsel

Authors

Andrew Scherer, Martha F. Davis, Debra Gardner, Rosie Mendez, Juanita B. Newton, Adriene Holder, and Laura K. Abel

**PANEL DISCUSSION:
INTERNATIONAL, NATIONAL, AND LOCAL PERSPECTIVES
ON CIVIL RIGHT TO COUNSEL**

The following is based on a transcript of a panel discussion which took place at An Obvious Truth: Creating an Action Blueprint for a Civil Right to Counsel in New York State, held at Touro Law Center, Central Islip, New York, in March 2008.

TABLE OF CONTENTS

INTRODUCTION

 A. *Andrew Scherer*82

I. THE INTERNATIONAL PERSPECTIVE

 A. *Professor Martha F. Davis*.....83

II. THE NATIONAL PERSPECTIVE

 A. *Debra Gardner*91

III. THE NEW YORK CITY AND SENIOR CITIZEN PERSPECTIVE

 A. *Councilwoman Rosie Mendez*99

IV. THE JUDICIAL PERSPECTIVE

 A. *The Honorable Juanita Bing Newton*104

V. THE LEGAL AID PROSPECTIVE

 A. *Adriene Holder*113

VI. LESSONS LEARNED

 A. *Laura Klein Abel*122

**PANEL DISCUSSION:
INTERNATIONAL, NATIONAL, AND LOCAL PERSPECTIVES
ON CIVIL RIGHT TO COUNSEL**

INTRODUCTION

A. *Andrew Scherer**

Good morning and thank you very much, Wade, for your inspiring speech this morning. I want to thank both Dean Raful and Tom Maligno for hosting us in this spectacular space, and President Madigan for being so bold and strong in taking this issue on in such a meaningful way. And many thanks to the planning committee that put this together, which modeled what we are hoping will come out of this conference. This was a real cooperative effort in which everybody pulled their weight and made this event come together in an excellent way. I look around this room and see who is here—many of you I know and know very well—it is really an awesome crowd of people. We talk a lot about funding, but this conference is really about shifting the paradigm to talking about rights. We call this conference an “Obvious Truth,” and I think the people in this room do not need to be convinced. For you, this is an obvious truth. We did not invite you to debate whether or not a civil right to counsel is a good idea. There is plenty of opportunity and places for that to happen. This is a space for us—we invited you because we assume you

* Andrew Scherer is the Executive Director and President for Legal Services NYC, a non-profit group that represents lower-income people in civil cases. Mr. Scherer has authored various law review articles.

agree. It is a space to work on developing a vision for where we go, an opportunity to develop strategies for how we get there. We hope this conference will engage, energize, and activate you. One important part of the ability to make social change, I think, is changing public sentiment. There is a great quote from Abraham Lincoln. He said, “[w]ith public sentiment, nothing can fail; without it, nothing can succeed. Consequently, he who moulds public sentiment goes deeper than he who enacts statutes and pronounces decisions.”¹ This is a very powerful group, well positioned to influence public sentiment and promote legislation, both in the community and academia. I am really glad you are all here today for the conference and discussion. We have spectacular people who know the issue from very different, but very complementary perspectives.

I. THE INTERNATIONAL PERSPECTIVE

A. *Professor Martha F. Davis**

I am going to talk about international law. I will put the civil right to counsel in an international context and advocate that international approaches should inform some of the specific strategies we discuss later this afternoon. One of the things I do at Northeastern University School of Law is co-direct the program on human rights in

¹ Bruce Ledewitz, *A Constitution for Everyone*, 43 DUQ. L. REV. 1, 4-5 (2004).

* Martha Davis is a Professor at Northeastern University School of Law and Co-Director of the Program on Human Rights and the Global Economy. Ms. Davis is the past Vice President and legal director of the NOW Legal Defense and Education Fund in New York. She is also the co-editor of “Bringing Human Rights Home” and author of “Brutal Need: Lawyers and the Welfare Rights Movement.”

a global economy.² How does that relate to the civil right to counsel? When the American Bar Association resolution on Civil Gideon came out, now a year and a half ago, we had an insight.³ I am not sure we were the only ones that had this revelation, but we realized that the ABA's resolution is not just about procedure. It is not just about the importance of counsel in the courtroom, but it is about the importance of the rights that are at issue: the fundamental right to shelter, to food, to safety, and so on. These are fundamental economic and social rights. We know that the United States does not have a strong history of protecting these kinds of rights,⁴ and that is one of the reasons a right to counsel is necessary in this area. Domestic protection of such rights has been sporadic at best.⁵

It is ironic in a way that this energy to promote a civil right to counsel is amassing at a time when, in many respects, substantive rights have been cut back. For example, Aid to Families with Dependent Children ("AFDC") and the welfare entitlement were eliminated in 1996,⁶ and efforts to try to establish a right to education under state constitutions have had sporadic success.⁷ In many respects,

² See Northeastern University School of Law, Program on Human Rights and the Global Economy, <http://www.slaw.neu.edu/clinics/phrge.html> (last visited Sept. 4, 2008) (discussing the Program on Human Rights and the Global Economy, which is engaged in the "international movement to promote economic, social and cultural . . . rights").

³ See Justice Howard H. Dana, Jr., *Introduction: ABA 2006 Resolution on Civil Right to Counsel*, 15 TEMP. POL. & CIV. RTS. L. REV. 501, 501 (2006).

⁴ See, e.g., Jeffrey M. Shaman, *On the 100th Anniversary of Lochner v. New York*, 72 TENN. L. REV. 455, 461 (2005).

⁵ See National Legal Aid & Defender Ass'n, About NLADA: History of Right to Counsel, http://www.nlada.org/About/About_HistoryDefender (last visited Nov. 23, 2008).

⁶ George Will, *Social Security's Future: A State Welfare Program*, TULSA WORLD, May 11, 2005, at A15.

⁷ Brent E. Troyan, Note, *The Silent Treatment: Perpetual In-School Suspension and the Education Rights of Students*, 81 TEX. L. REV. 1637, 1648 (2003).

economic and social rights in the U.S. are dissipating. I think there is a relationship between this phenomenon and the Civil Gideon movement. The right to counsel becomes more important because it also helps elevate substantive rights that have been minimized. If something is important enough to have a right to counsel attached to it, it must be important, even if we have, in other respects marginalized it and said it is not a constitutional right.

There is comfort as a policymaker in realizing you are not the first ones being asked to address an issue. I wrote an amicus brief with Raven Lidman in a right to counsel case in Washington State, *King v. King*.⁸ I was not able to attend the argument, but I watched it on video. One of the supreme court justices asked the counsel during oral argument whether any court had ever upheld this basic right to counsel in the way they were arguing in *King* under the state constitution.⁹ The lawyer for King said, “No, you would be the first.”¹⁰ Of course, my heart sank because we had written an amicus brief that said, in fact, countries all around the world recognized this.¹¹ I thought how much better it would have been if she had said, “Yes, courts around the world found this to be a critically important right,” instead of responding, “No, you would be the first to do it.” In any event, we lost the case.¹² Even though the ultimate opinion did not

⁸ 174 P.3d 659, 661 (Wash. 2007).

⁹ See TVW.org, Washington State Supreme Court, <http://www.tvw.org/media/mediaplayer.cfm?evid=2007050057B&TYPE=V&CFID=8046920&CFTOKEN=6cfd1402e12a8e37-3049F0F2-3048-349E-4E36B07158FE72CB&bhcp=1> (last visited Sept. 7, 2008); WASH. CONST. art. 1, § 22.

¹⁰ See *id.*

¹¹ *King*, 174 P.3d at 661.

¹² *Id.* at 681.

cite international or comparative law, judges say that it makes a difference in their deliberations.¹³ They find it helpful to know about supportive international precedent even if, for political reasons or their own personal reasons, they choose not to cite it.

When we are talking about economic and social rights, the international system of jurisprudence offers some models and potential fora that are stronger and richer than the United States in many ways. There are at least two specific strategic ways in which we should consider using international law. First, in whatever strategy we pursue—legislation, state court litigation, advocacy—we should use comparative examples, as Wade Henderson said in his remarks, to present workable models.¹⁴ For example, most of the nations of Europe are bound to provide low-income persons with legal representation in civil matters by virtue of their participation in the European Convention on Human Rights.¹⁵ In addition, many of these nations have already reached similar conclusions under their domestic laws.¹⁶ There is case law from European courts and foreign courts that link this rationale to the right to counsel.¹⁷ As we advocate, I think it is

¹³ Rebecca Lefler, Note, *A Comparison of Comparison: Use of Foreign Case Law as Persuasive Authority by the United States Supreme Court, The Supreme Court of Canada, and the High Court of Australia*, 11 S. CAL. INTERDISC. L.J. 165, 168 (2001).

¹⁴ Wade Henderson, *Keynote Address: The Evolution and Importance of Creating a Civil Right to Counsel*, 25 TOURO L. REV. 71 (2009) (explaining that in certain situations, you “just might need to see a lawyer”).

¹⁵ Earl Johnson, Jr., *Toward Equal Justice: Where the United States Stands Two Decades Later*, 5 MD. J. CONTEMP. LEGAL ISSUES 199, 207 (1994).

¹⁶ *Developments in the Law—Experience in Other Countries*, 79 HARV. L. REV. 1090, 1114 (1966).

¹⁷ See Deborah M. Weissman, *Law as Largess: Shifting Paradigms of Law for the Poor*, 44 WM. & MARY L. REV. 737, 823 (2002) (explaining that the “European Convention on Human Rights has . . . been interpreted to require member governments to provide free legal representation in civil matters as a means of giving effect to the Convention’s mandate to provide a fair hearing”); Jeanne M. Woods, *Emerging Paradigms of Protection for “Second-*

worth knowing about and citing these.

Second, international human rights law is useful in that international human rights mechanisms can be part of a strategic approach to expanding the civil right to counsel in New York and the nation. International human rights law is not only for the federal government, even though the federal government is the entity that ratifies treaties.¹⁸ When the federal government ratifies a treaty, states as well as municipalities are bound by it.¹⁹ There are opportunities for advocates to participate in the international monitoring processes regardless of whether the advocates operate on the state or federal level. The United States is a signatory to two relevant treaties: the International Covenant on Civil and Political Rights (“ICCPR”)²⁰ and the Convention on the Elimination of All Forms of Racial Discrimination (“CERD”).²¹ Both treaties address the civil right to counsel. The ICCPR, especially, frames the issue as one of “equality of arms” and expresses concern about the fairness of judicial processes when only one side is represented.²² As a signatory, the United States must

Generation” Human Rights, 6 LOY. J. PUB. INT. L. 103, 121 (2005) (discussing the judicial proceedings in Ireland that cost a lot and require complex procedures which can “be handled competently only by trained legal counsel”); *see, e.g., Airey v. Ireland*, 32 Eur. Ct. H.R. (ser. A) (1979), available at

http://www.eschr-net.org/caselaw/caselaw_show.htm?doc_id=400936 (last visited Sept 7, 2008) (discussing the right to legal assistance as an “integral part of human rights”).

¹⁸ Elizabeth Samson, *Revisiting Miranda After Avena: The Implications of Mexico v. United States of America for the Implementation of the Vienna Convention on Consular Relations in the United States*, 29 FORDHAM INT’L. L.J. 1068, 1075 (2006).

¹⁹ *United States v. Pink*, 315 U.S. 203, 231 (1942).

²⁰ Joan L. Larsen, *Importing Constitutional Norms From a “Wider Civilization”: Lawrence and the Rehnquist Court’s Use of Foreign and International Law in Domestic Constitutional Interpretation*, 65 OHIO ST. L.J. 1283, 1321 (2004).

²¹ *Id.*

²² Andrew Hudson, *Not a Great Asset: The UN Security Council’s Counter-Terrorism Regime: Violating Human Rights*, 25 BERKELEY J. INT’L L. 203, 217 (2007).

comply with this treaty and file a compliance report with the United Nations every few years.²³ The treaty process with respect to the ICCPR happened about two years ago now, so another will shortly follow.²⁴

Just a few weeks ago, there was a review process involving CERD. The CERD Committee met in Geneva, where a number of organizations came together to file a report on race discrimination and the right to counsel, and the way in which the lack of a comprehensive right to counsel exacerbates discriminatory biases already present in the courts.²⁵ The report was presented to the CERD Committee along with a number of other issues involving race discrimination in the United States.²⁶ Concluding observations are being issued today.²⁷ I have not seen these observations yet, but we are hopeful they will mention the issue of the right to counsel and race discrimination and suggest to the United States it is an issue the nation needs to be concerned about as it looks at United States treaty compliance.²⁸ This creates new pressure to address the Civil Gideon issue.

²³ G. Kristian Miccio, *With All Due Deliberate Care: Using International Law and the Federal Violence Against Women Act to Locate the Contours of State Responsibility for Violence Against Mothers in the Age of Deshaney*, 29 COLUM. HUM. RTS. L. REV. 641, 648 n.23 (1998).

²⁴ U.N. Human Rights Comm., *International Covenant on Civil Rights and Political Rights: Rules of Procedure of the Human Rights Committee*, Rule 66(2), U.N. Doc. CCPR/C/3/Rev.6 (Apr. 24, 2001).

²⁵ U.N. Comm. on the Elimination of Racial Discrimination, *International Convention on the Elimination of all Forms of Racial Discrimination Consideration of Reports Submitted by States Parties Under Article 9 of the Convention*, U.N. Doc. CERD/C/USA/CO/6 ¶ 22 (Feb. 2008) [hereinafter U.N. Comm. on the Elimination of Racial Discrimination].

²⁶ Human Rights Watch, *U.S.: Uphold Treaty Against Racial Discrimination*, Feb. 7, 2008, available at <http://www.hrw.org/english/docs/2008/02/07/usdom17999.htm> (last visited Sept. 10, 2008).

²⁷ U.N. Comm. on the Elimination of Racial Discrimination, *supra* note 25.

²⁸ *Id.* ¶ 22.

The U.N. monitoring bodies have often cited specific examples in their concluding observations. So the question is, can these review processes help the cause of expanding the civil right to counsel in New York? I think it is worth exploring whether or not there are ways these processes could be an organizing tool as well as a tool for putting pressure on the state. Here is how one might use the international system to further goals in New York. The next Human Rights Committee review of U.S. compliance is scheduled for 2010, not too far away. One could plan a report focusing on the New York City Housing Court, where there has already been significant data collection. We know a lot about the inequality of arms and the impact of lack of counsel in housing court,²⁹ which we could show the committee in hopes that it would take up the issue. This sort of advocacy is another way to help focus attention on the issue.

What sorts of international systems might a U.N. monitoring body or U.S. policymakers look to in crafting a domestic Civil Gideon right? In the amicus brief I worked on with Raven Lidman, which we presented to the Washington Supreme Court, we included a number of citations to websites outlining the practices in Europe. As I understand it, many of these systems are funded through general tax dollars and set up through the general bar, rather than having a legal services system of the kind we have here. I know there has been some concern expressed in the United States about looking at some of the international models for that reason; there is a commitment here to providing a specialized bar instead of allowing a general bar

²⁹ 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, 574 (1988).

to take up entirely the representation of low income people.³⁰

It is interesting to note that the European Court of Human Rights essentially has rules that the civil right to counsel should be available extremely broadly, including in defamation cases, which are cases that are typically excluded from this kind of broad right. But in practice, as countries have implemented it, they have not implemented it that broadly, even though that is the legal standard. There is typically some sort of need assessment even though the formal right under the European Convention would read more broadly.³¹ There may also be a test of nonfrivolity—that is, claims for which counsel is appointed cannot be frivolous claims. There is often some kind of merit assessment—not a high standard, but a low standard merit assessment.

Further, the nations that have adopted these measures have diverse populations. South Africa, for example, is one place that has at least a limited right to counsel in the area of right to shelter.³² The European system covers fifty countries—virtually all the countries of Europe—so there is some level of diversity in many of those nations.³³ The U.K. is increasingly diverse, for example, and these laws

³⁰ See, e.g., HKBA.org, Hong Kong Bar Association: Bar Free Legal Service Scheme, <http://www.hkba.org/the-bar/free-legal-service/free-legal-service2.html> (last visited Sept. 11, 2008) (discussing the requirements for applicants to obtain free legal services in civil cases in Hong Kong).

³¹ ECHR.coe.int, European Court of Human Rights: Basic Information on Procedures, <http://www.echr.coe.int/ECHR> (follow “The Court” hyperlink; then follow the “Basic Information on Procedures” hyperlink) (last visited Sept. 11, 2008).

³² Barbara Bennett Woodhouse, *Recognizing Children’s Rights: Lessons from South Africa*, 26 HUM. RTS. 15, 15 (1999).

³³ Julie M. Spanbauer, *Lost in Translation in the Law School Classroom: Assessing Required Coursework in L.L.M. Programs for International Students*, 35 INT’L. J. LEGAL INFO. 396, 426 n.126 (2007); NationsOnline.org, Countries by Continents—Countries of Europe, <http://www.nationsonline.org/oneworld/europe/htm> (last visited Sept. 8, 2008).

cover the country.³⁴ Looking at the right to counsel in this global context provides a source of aspiration and inspiration. That is the nature of the international human rights system. But I think it also allows us to think beyond the right to counsel, to what it is these counselors are going to be doing, what is it they are going to be enforcing. One of the reasons I embrace that framework is because it says not only is there a right to counsel, but there is also a right to something counsel will get for you.

Would I recommend pursuing these issues in an international forum alone? No. But I think it makes sense to think globally at the same time we are thinking locally, making sure we are using the available international mechanisms to shine a light on, and light a fire under, the civil right to counsel issue in New York and the United States.

II. THE NATIONAL PERSPECTIVE

A. *Debra Gardner**

We will now move from the international context to the national context. I am the coordinator of the National Coalition for a Civil Right to Counsel, which has about 150 individuals and organizations involved in thirty-five states and a couple of foreign coun-

³⁴ Penny Lewis, *Give Me Shelter*, THE INDEPENDENT, May 7, 2002, available at <http://www.independent.co.uk/news/uk/crime/give-me-shelter-650500.html> (last visited Sept. 29, 2008).

* Debra Gardner serves as legal director of the Public Justice Center in Baltimore, Maryland. The Public Justice Center seeks to expand the rights of people who suffer from injustice as a result of their poverty. Ms. Gardner also coordinates the National Coalition for a Civil Right to Counsel.

tries.³⁵ We are a loose association of legal services advocates, with access to justice advocates, academics, public interest lawyers, bar leaders, as well as a fair number of private attorneys.³⁶ Our primary purpose is to provide a venue for strategic thinking, critical analysis, information sharing, and networking among folks who are working on civil right to counsel or thinking about civil right to counsel initiatives in states and locales.³⁷ We do not have a national agenda, *per se*.

Depending on whether you are fond of quoting Mao Tse-tung or George Herbert Walker Bush, you can think about our strategy as allowing “a hundred flowers to bloom”³⁸ or seeking “a thousand points of light.”³⁹ We would love to see folks in virtually every state at least think about how to advance the civil right to counsel. There are certainly people in some states who would say that it is not time to launch an initiative in their state for a variety of reasons, and that they are far from ready to think about that. And I think that is absolutely true. In some states it is absolutely true that launching a major initiative would not be a very wise strategy. But even in those states, I think it is time to start a conversation among folks who are interested, among folks who are passionate about the idea, to begin think-

³⁵ CivilRightToCounsel.org, National Coalition for a Civil Right to Counsel: About the Coalition, <http://www.civilrighttocounsel.org/> (last visited Sept. 28, 2008).

³⁶ *Id.*

³⁷ *Id.*

³⁸ See Patrick E. Tyler, *Deng Xiaoping: A Political Wizard Who Put China on the Capitalist Road*, N.Y. TIMES, Feb. 20, 1997, at 12 (noting Mao Tse-tung’s coined phrase “let a hundred flowers bloom”).

³⁹ See Andrew Rosenthal, *Bush Introduces a Daily Presidential Citation*, N.Y. TIMES, Nov. 23, 1989, at A13 (“President Bush announced a new twist to his ‘thousand points of light’ voluntarism campaign . . .”).

ing about how to build towards the day where an initiative would make sense. And there certainly are states like New York and Maryland, where I live and practice, where the time is ripe to launch an initiative that might actually, in my lifetime, advance the civil right to counsel for poor people.⁴⁰

The goal of the national coalition is to help people in states and locales in any way that we can. We do not, as I mentioned, have a national message, except for perhaps on a couple of fronts. The first is that we need to think very carefully about certain issues to make sure that we are advancing our cause in a strategic way. One primary example of that is counseling everyone to think very carefully to ensure their efforts do not suggest that a civil right to counsel is more important than criminal defense for the indigent. We do not want to compete with our brothers and sisters in indigent defense for limited state funding.

We are really talking about doing whatever we might be able to do to help folks in New York, in Maryland, in Massachusetts, and anywhere else people are interested to figure out how they might advance this cause in their state. Frankly, many of us waited two decades after *Lassiter v. Department of Social Services*⁴¹ to exhale and

⁴⁰ See Julie A. Nice, *No Scrutiny Whatsoever: Deconstitutionalization of Poverty Law, Dual Rules of Law, & Dialogic Default*, 35 FORDHAM URB. L.J. 629, 666 (2008) (noting that there is a movement “across the country” towards a civil right to counsel); Kathryn Grant Madigan, *Justice for All*, 79 N.Y. ST. B.J. 5, 5 (2007) (“This was an historic year in New York State. For the first time, the Governor included funding for civil legal services . . . moving us from 30th place to 20th in state funding per poor person.”); Leigh Goodmark, *A Right to Counsel in Civil Cases: Civil Gideon in Maryland & Beyond*, 37 U. BALT. L. REV. 1, 1 (2007) (noting the “leading role” that Maryland has attempted to establish in a right to secure civil counsel for poor persons).

⁴¹ 452 U.S. 18, 33-34 (1981) (finding that in certain circumstances civil counsel should be appointed).

begin to think about this issue again. And I certainly was one of those people. The national coalition grew quite organically as you can imagine. We passed a sign-up sheet around at a National Legal Aid & Defender Association⁴² introductory workshop on right to counsel in November 2003 and out of that sheet grew a national private secure listserve and monthly conference calls that have been going on ever since. We took up the trail blazed by Andy Scherer and other folks in New York who barely skipped a beat after *Lassiter* before they were developing a new strategy in New York, and have been working very closely together ever since. We are very thankful for that leadership.

At this point, the National Coalition for Civil Right to Counsel has formed a five-organization partnership with funding and staff to boost the level of resources and organization to provide advocacy support in states who are thinking about this issue.⁴³ We also worked very closely with the ABA on the ABA resolution, passed unanimously in 2006 by the house of delegates under Mike Greco's leadership.⁴⁴ That resolution grew out of one of our national monthly conference calls when someone in the national coalition, Jayne Tyrrell, said, "I wonder if the ABA has ever said anything about this and whether they might want to now."⁴⁵ We eventually learned that they

⁴² See NLADA.org, Board of Directors, http://www.nlada.org/About/About_Home (last visited Sept. 30, 2008) for general information on the members.

⁴³ See http://www.civilrighttocounsel.org/who_we_are/leadership_and_support_initiative. (last visited Nov. 26, 2008).

⁴⁴ See AM. BAR ASS'N HOUSE OF DELEGATES, TASK FORCE ON ACCESS TO CIVIL JUSTICE, 1 (Aug. 7, 2006), available at <http://www.abanet.org/legalservices/sclaid/downloads/06A112A.pdf> (unanimously passing a resolution to urge governments to provide for civil counsel).

⁴⁵ For an analysis of the ABA's leadership on indigent defense after *Gideon*, see Tran-

had filed many briefs after *Gideon v. Wainwright*.⁴⁶ They also filed an amicus brief urging a right to counsel in civil matters in *Lassiter*.⁴⁷ We really did have a wonderful springboard to approach the ABA's Standing Committee on Legal Aid and Indigent Defendants. We had a very passionate advocate in the president of the ABA at the time and in what I understand to be record time, the ABA adopted the resolution that has spurred a great deal of conversation and momentum on this issue around the country.⁴⁸

As noted, some of us waited a couple of decades after *Lassiter* to start thinking about the civil right to counsel. What were we doing during those decades? We were fighting tooth and nail in every possible creative way, scrapping for every dime of funding, for every new, innovative, and creative way to increase funding for civil legal services. That was the approach. That is what we thought would be the best approach after an aborted effort to zero out federal funding

script of *Gideon Undone: The Crisis in Indigent Defense Funding*, Annual Conference of the National Legal Aid and Defender Association in cooperation with the American Bar Association (Nov. 1982) (“[W]e must recognize that in defaulting on the constitutional mandate to furnish legal services to all indigent accused . . . in this country, we are on a dangerous, slippery slope headed towards the same sorry state that exists in many of the countries we ridicule for having excellent law *on the books* but nowhere else.”). Additionally, Robert L. Spangenberg wrote a commentary, which gives a brief overview on how the ABA has made efforts to improve the availability of counsel. Robert L. Spangenberg, *National Association of Criminal Defense Lawyers*, <http://www.nacdl.org/public.nsf/championarticles/A0301p34?OpenDocument> (last visited Sept. 29, 2008); see also ABANet.org, *Indigent Defense/Public Defender Systems*, <http://www.abanet.org/legalservices/sclaid/defender/reports.html> (last visited Sept. 30, 2008) (reporting the studies of indigent defendants and the availability of defense).

⁴⁶ 372 U.S. 335, 344-45 (1963) (holding that there is a right to counsel in criminal proceedings).

⁴⁷ Brief of the ABA Amicus Curiae Supporting Petitioner, *Lassiter v. Dep’t of Soc. Servs.*, 452 U.S. 18 (1981) (No. 79-6423), 1980 WL 340036, at *9 (“In light of the high stakes involved, these cases call for counsel . . .”).

⁴⁸ Paul Marvy, Laura Klein Abel, *Current Developments in Advocacy to Expand the Civil Right to Counsel*, 25 TOURO L. REV. 131 (2009).

succeeded in causing significant federal funding cuts. We turned to states and to private fundraising. And what happened as a result? Every time a new legal needs assessment study came out from the ABA, from this state bar association, from that state bar association, from the Legal Services Corporation, over those two decades, every study confirmed the same thing: in terms of access to civil legal services, all of those efforts had barely managed to keep poor people's heads above water. We are still just always confirming, over and over again, that we are meeting twenty to twenty-five percent of the need. So we started thinking about how to break that logjam, how to do something more. Some states are well resourced in comparison to others, but nobody is covering all of the need.

We thought in Maryland—and I think people have thought in other states as well—if we are able to secure a right, it will give us a great deal more leverage to go back and fight anew for additional funding. The whole purpose of our effort to secure a right to civil counsel from my perspective is to secure adequate funding for civil legal services because we have not been able to do it without the establishment or the expansion of a right.

Advocates in different states are working on a variety of strategies they have deemed as the right approach in their state. Some of us are pursuing litigation. There is a very interesting case going now to the Supreme Court in Alaska, where a very energetic, intelligent, and compassionate trial judge asked for amicus briefing in a custody dispute, finding a civil right to counsel under the Alaska

Constitution.⁴⁹ We brought a case in Maryland several years ago, *Frase v. Barnhart*.⁵⁰ Unfortunately, the court did not reach the issue, but a three judge concurrence would have reached the issue, and would have recognized the right.⁵¹ We are very hopeful to bring the issue back before the Court of Appeals of Maryland for a favorable decision.

Folks argue for a civil right to counsel through state constitutional due process arguments, equal protection arguments, state constitutional access to courts provisions, and even separation of powers. In many states there is very strong jurisprudence suggesting the court has the obligation to administer justice and to administer the judicial system so as to provide access to justice.

Some folks are also pursuing legislation.⁵² Folks in California have created very useful model statutes.⁵³ You have heard and will

⁴⁹ See ALASKA CONST. art. I, § 7 (“No person shall be deprived of life, liberty, or property, without due process of law.”); Order Granting Defendant’s Motion For Appointment of Counsel at 10, *Gordanier v. Jonsson*, No. 3AN-06-8887 CI (Alaska Aug. 14, 2007), available at http://www.courtrecords.alaska.gov/pa/pa.urd/pamw2000.docket_lst?70566236 (last visited Sept. 30, 2008) (“There is no meaningful distinction between Ms. Jonsson’s situation and those in which the Alaska Supreme Court has found that a right to counsel exists.”); see also Martindale.com, Judge Profile: Mark Rindner, <http://www.martindale.com/Mark-Rindner/39333-lawyer.htm> (last visited Sept. 21, 2008) (noting the profile of Judge Mark Rindner of Alaska).

⁵⁰ 840 A.2d 114 (Md. 2003).

⁵¹ *Id.* at 137 (Cathell, J., concurring) (“In my opinion the reasons supporting the conclusion that the Due Process Clause of the Fourteenth Amendment entitles the defendant in a criminal case to representation by counsel apply with equal force to a [civil] case of this kind.”).

⁵² See Laura K. Abel & Max Rettig, *State Statutes Providing for a Right to Counsel in Civil Cases*, 40 CLEARINGHOUSE REV. 245, 252 (2006) (noting the right to counsel statutes across the United States).

⁵³ See California Access to Justice Commission, California Model Statute Task Force, *State Equal Justice Act*, http://www.courtrecords.alaska.gov/pa/pa.urd/pamw2000.docket_lst?70566236; *State Basic Access Act*, <http://www.civilrighttocounsel.org/pdfs/State%20Basic%20Access%20Act%20Feb%2008%20final.pdf>.

hear more about legislative efforts here in New York, which are very exciting. Rulemaking is another endeavor people found to be strategically wise. There has been a rule adopted in Washington State authorizing the court to appoint an attorney as a reasonable accommodation in a civil matter for a litigant who has a disability.⁵⁴

As I mentioned earlier, many states are starting with activities coordinated under the auspices of their bar leadership to start the conversation. Efforts have been made to figure out whether they need to start with public education, whether they need to start with bar and bench education, or whether they can easily come together, as you have in New York, around the idea that this is the right thing to do. The first question to be asked is how. Having said all of that, I hope it is very clear to you now the depth of my sincerity when I say how exciting this event really is. If you harbor any small doubt about whether this is a realistic goal, I can tell you from my own personal tortured reflections over a period of years, it does not matter if it is realistic. It is a fight worth fighting.

It is amazing that we can bring together such an incredible group of serious thinkers to deliberate on what the best approach would be for New York, to cover it from all the angles, to get perspectives from throughout New York, and elsewhere. This is just absolutely dead brilliant. Thank you.

⁵⁴ WASH. REV. CODE ANN. GR 33(a)(1)(C) (West 2007). *See also* Memorandum from the Access to Justice Bd. on The *State Plan* Implementation Update Report to Alliance Members and Supporters 16 (Aug. 20, 2008) (on file with the author) (noting the progress Washington State has made with respect to the appointment of civil counsel, especially for persons with disabilities).

III. THE NEW YORK CITY AND SENIOR CITIZEN PERSPECTIVE

A. *Councilwoman Rosie Mendez**

I am one of fifty-one members in the New York City Council. In November, I introduced a bill providing for a right to counsel for senior citizens.⁵⁵ My friends, some of my mentors, and people I worked with while in legal aid and in different coalitions, came to me and said we need to do this. As the City Council started to look at framing the issue, we did not want to leave it up to our attorneys to draft this for us and then have to rewrite it. So my friends and I got together—they actually wrote it—and we started looking through all the constitutional issues this legislation could raise. We ultimately decided to limit the scope to senior citizens.

We wanted to limit it to senior citizens for a variety of reasons. Seniors are more vulnerable, on limited incomes, and are more apt, through our experiences as tenant advocates, to be harassed out of their rent stabilized apartments.⁵⁶ Also, in foreclosure procedures,

* Rosie Mendez graduated from New York University and Rutgers Law School—Newark. She is a New York City Councilwoman, elected in January 2006 from District 2, which encompasses the lower east side of Manhattan. Councilwoman Mendez was at one point a tenant organizer. She was a housing specialist at the Parodneck Foundation and a Revson Fellow at Columbia. But most importantly, she has a legal services background as well, both as a student and as a lawyer out of law school, working in legal services as an IOLA Legal Services Fellow at Brooklyn Legal Services Corp., a program of Legal Services NYC. As a legal staff worker she became a member of the United Auto Workers Union. Prior to her election to the Council, Rosie was the Democratic District Leader for her community and served as the Chief of Staff to her predecessor in the City Council. She is the prime sponsor of a very important piece of legislation being introduced in the New York City Council that would provide, if it passes, a right to counsel for low income senior citizens in eviction and foreclosure procedures.

⁵⁵ See NEW YORK, N.Y., INT. NO. 648 (Oct. 24, 2007), available at <http://www.nycouncil.info/html/legislation/legislation.cfm> (last visited Sept. 28, 2008).

⁵⁶ Manny Fernandez, *Free Legal Aid Sought for Elderly Tenants*, N.Y. TIMES, Nov. 16, 2007, at B3.

senior homeowners are more apt to be targeted by predatory lenders.⁵⁷ We also wanted to make sure there would be no constitutional issue that the City Council could raise as to just limiting it to this one group. But the bigger reason was because of the fiscal impact. Right now that seems to be my heavy lift in the city council.⁵⁸

I have thirty-nine Council members, including myself, signed onto this bill.⁵⁹ That means we can introduce it, we can pass it, and if vetoed by the mayor, we can override that veto.⁶⁰ The administration and speaker's office all sat with me and said this is a great bill, but the independent budget office has stated that it is going to be about \$10 million to implement just for housing court, not even for the foreclosure part.⁶¹ My argument to them is, "sure, but there are so many cost-saving measures and some of them are hard to quantify," which is what we are trying to do now.

The legislation, as originally drafted, provided civil representation to seniors in housing court. We realized in our small group meetings that there were a lot of loopholes. I have been introducing a lot of legislation to get around some of these loopholes. We realized a loophole up front—that a landlord with money could decide not to

⁵⁷ Mark Huffman, *Seniors Bear Brunt of Predatory Lending*, CONSUMERAFFAIRS.COM, Apr. 23, 2007, http://www.consumeraffairs.com/news04/2007/04/seniors_predatory.html.

⁵⁸ Fernandez, *supra* note 56 (stating Councilwoman Mendez's position as "[g]iving senior citizens the right to counsel in civil proceedings when they're about to lose their homes is the humane thing to do").

⁵⁹ As of September 3, 2008, of the fifty-one New York City Council Members, thirteen members did not sign on to the bill. Those members include Council Members Barron, Como, Dickens, Dilan, Eugene, Fidler, Gennaro, Ignizio, Katz, Martinez, Oddo, Quinn, and Vallone, Jr.

⁶⁰ N.Y.C. CHARTER ch. 2 §§ 34-37 (2004), available at <http://www.nyc.gov/html/charter/downloads/pdf/citycharter2004.pdf>.

⁶¹ Fernandez, *supra* note 56.

go to housing court, but go to supreme court on an action in ejectment.⁶² We decided to address this for those going into court with the possibility of losing their home, which included foreclosures. Because of the big predatory lending problem in New York City,⁶³ I thought it would be a better bill, treating all seniors equally. It would also get my colleagues in the Council, whose constituents are mostly one and two family homeowners, to sign on to the bill and not say, “Oh, it is only about tenants and I do not have that many tenants in my district.”

Another obstacle we had in drafting this legislation is that it was reviewed by counsel to the City Council, who then wanted to add the line “subject to appropriation.” And we argued, well, then it is not a right to counsel if it is subject to appropriation. We finally won that battle because ultimately everything is subject to appropriation.⁶⁴ We battled that out during the budget process but we did not want it in the language of the bill.⁶⁵ One of the facts we have unraveled so far is, according to the independent budget office, about 8,000 to 10,000 senior citizens go into Housing Court and end up getting evicted.⁶⁶ Of those, not all of them go into the shelter system. Some

⁶² DANIEL FINKELSTEIN & LUCAS A. FERRARA, *LANDLORD & TENANT PRACTICE IN NEW YORK* § 14:11 (2007).

⁶³ Press Release, N.Y. City Dep’t of Housing & Preservation & Dev., City Housing Agency Joins Parodneck Foundation in Announcing Expansion of Program to Counter Effects of Predatory Lending (May 21, 2002), *available at* <http://home.nyc.gov/html/hpd/html/pr2002/predatory-lending-remediation-pr.shtml>; *see also* Jonathan L. Entin & Shadya Y. Yazback, *City Governments and Predatory Lending*, 34 *FORDHAM URB. L.J.* 757, 776 (2007).

⁶⁴ *See infra* Part V.

⁶⁵ *See* N.Y. CONST. art. XVII, § 1. Article 17 of the New York Constitution provides for the state, through the legislature’s determination, to come to the aid and support of the needy from time to time because it is a matter of public concern.

⁶⁶ Fernandez, *supra* note 56.

of them end up getting doubled up with a family member, with a friend, doubled up a couple times and then finding themselves in the shelter system.⁶⁷ Some end up going into a nursing home. Many end up going into our public hospitals and have a heart attack or stroke. If they are diabetic, their medications and their insulin levels are not working well, and they end up going into the hospitals. This puts a drain on our public resources in the public hospitals. Which is harder to quantify. It costs the city \$23,000 per senior citizen a year if they go into the shelter system.⁶⁸

We are also finding a new trend where seniors are not only doubled up, but they have a grandchild they are raising. We now are seeing the Administration for Children's Services ("ACS") and social workers getting involved, which also have costs associated with them. Just based on providing representation, which the independent budget office states is ten million dollars, if all 8 to 10,000 seniors evicted a year go into the shelter system, it would cost the city \$184 million to \$230 million just to put them in the shelter system.⁶⁹ Having an effective housing court for seniors is clearly a cost-saving measure, not taking into account what we would save at ACS and HHC, the Health and Hospitals Corporation.

It is very helpful to us that seniors vote, and we know where

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.*; see also Has the Rise in Homelessness Prevention Spending Decreased the Shelter Population?, NEW YORK CITY INDEP. BUDGET OFFICE NEWS FAX, Aug. 7, 2008, www.ibo.nyc.ny.us/newsfax/insidethebudget157.pdf ("The cost per day for adult shelter was \$63.75 per person in 2007."). Utilizing the cost per day—\$63.75—for an adult to enter a shelter, multiplied by 8,000 to 10,000, the total amount the city would spend per senior is between \$186.15 million and \$232.69 million per year.

to find them. I have been going to all of my centers, and whether they are receiving congregate services or meals, they are going to the centers. If they are fine, if they happen to be protected or live in a senior center or in subsidized housing, they are seeing their friends being displaced. This is particularly the case in Manhattan, where we get a new owner purchasing a ten-unit building, for example, paying five people a lot of money to move, and then take the other five to court. Those five usually are the seniors. They are also women with children, who are even more vulnerable, who the developer-owner can prey on and harass out. And, if the tenant is taken to court, she would probably not have an attorney and end up signing a stipulation to move at some point. This is one aspect of the housing crisis in New York City.

Just thinking about some of our discussion here and having been a tenant organizer and legal services lawyer and now seeing my constituency—I represent a very economically diverse district. Whether you are middle income or low income, everyone is now at risk of losing their housing in my district, where we see all this luxury housing coming in and everyone being displaced. I think people are sort of now starting to get it; while they may not be poor, they are legally poor—they cannot afford a lawyer. If they do get a lawyer that does not know housing and they go into housing court, they are really screwed, and the best lawyers are ones at legal aid and legal services, who are practicing this on a day in, day out basis. And they are just becoming aware of the fact that we should have Civil Gideon.

In conclusion, there is a shortage of housing. We are not

building it in the amounts that we need, and we are losing more of our affordable units. We have lost countless units of Mitchell-Lama, middle-class housing.⁷⁰ The New York City Housing Authority (“NYCHA”), which has become the last resort for individuals, is having a financial crisis.⁷¹ We are seeing more individuals on the waiting list, taking longer to get into a public housing apartment. With a lot of the seniors, that is their last hope, whether it is in a senior facility through the NYCHA or just a regular apartment in one of their federal developments. Seniors are looking to NYCHA to be the last place they can get affordable housing. Currently, thirty-seven percent of NYCHA participants are senior citizens residing in public housing, many of them with children.⁷² Thank you.

IV. THE JUDICIAL PERSPECTIVE

A. *The Honorable Juanita Bing Newton**

I think this issue is both “an obvious truth” and an “inconvenient” one. What amazes me after three decades in this area is how

⁷⁰ WILLIAM C. THOMPSON, JR., N.Y. CITY OFFICE OF THE COMPTROLLER, AFFORDABLE NO MORE: NEW YORK CITY’S LOOMING CRISIS IN MITCHELL-LAMA AND LIMITED DIVIDEND HOUS. 1 (2004), http://www.comptroller.nyc.gov/bureaus/opm/reports/Feb18-04_Mitchell-Lama_Report.pdf.

⁷¹ Manny Fernandez, *Housing Cuts Are Proposed to Help Close Budget Gap*, N.Y. TIMES, May 30, 2008, at B1.

⁷² New York City Housing Authority—Fact Sheet, <http://www.nyc.gov/html/nycha/downloads/pdf/factsheet.pdf> (last visited Sept. 29, 2008). The actual figure as of June 30, 2008 is 34.9% of households are headed by persons over 62 years of age. *Id.*

* Judge Juanita Bing Newton is Deputy Chief Administrative Judge for Justice Initiatives in New York State Courts. Judge Newton is also Administrative Judge of the Criminal Court of the City of New York. She has also played a prominent role in issues having to do with access to justice in New York State for the years she has been in this position. She is involved in access to justice issues on the national level as well as a member of the ABA’s standing committee on legal aid and indigent defense.

dramatically the lives of poor people are punctuated with legal issues. Having never been rich, I do not know if that is true for wealthy people.

A young man recently called our office and one of the secretaries spoke to him at my request. At the conclusion of his tale, we discovered he had a housing problem, he had a surrogate's problem, he had a civil court problem and hopefully, with sufficient intervention, he would not have a criminal court problem. He had no idea where to go. He had issues bubbling up in pending cases, and he had no right to counsel as he did not come into any group that would give him a right to counsel. He was not elderly, he was not handicapped; he was just a person working two jobs, trying to make ends meet. What can the courts do and offer to this discussion—that is what I was asked to speak about briefly.

I think there are two issues where the courts may be helpful. One is, how do we get the message out about what it means to be poor and how dramatic legal matters affect poor people. Secondly, how that has a negative effect on the administration of justice. I think our leaders in the main do not really understand the significant challenges affecting poor people as it relates to legal issues. However, I think the courts were successful in working with all of you in trying to get more money into the assigned counsel plan. People just do not understand the issue. But having offered information to help people understand, the difficulty is that you have to get them to care about what they understand. I do not want to sound smart-alecky, but highbrow notions that translate into a lot of money cause people to

say, “Why do I care about that?” I think that is one of the ways we were successful with assigned counsel because we did a study and offered it as a bedrock issue that affected the administration of justice. It was a broader based issue than just Civil Gideon, it was a public safety issue. It was a victims’ issue. I think that we have not done enough to get the word out to executive and legislative leaders, and the courts as well, to understand that these issues, court administration, are issues implicated when people do not have attorneys.

I think the analysis is more difficult than the assigned counsel issue, which was focused in one area, criminal law. We could look at the numbers and say we have X number of cases, they are taking Y amount of time to resolve. It affects people this way and that way. We can tell you about the processing of discrete cases where there are time limits and statutory imperatives to meet. On the more global issue on access to justice, it is harder. I am sure people would say with housing court, whether the outcomes are right or not, the place runs pretty efficiently. It efficiently gets people in and out, with some outcomes that we do not particularly like, but the work gets done. I submit that what we have to do is come up with a tool that will permit the courts to assess not only the ultimate outcome, but the process as well. Has it been dilatory? Has it been helpful? Does it meet the ends of justice and the outcomes? Is there substantial justice or does it get people into the shelters?

I think people working together on this access to justice issue might want to take a hard look at more than one court to examine the process and come up with markers that measure substantial justice as

well as procedural and monetary issues that are important to policy-makers. I think we also need to take a look at some of the things courts can do to address the issue of meeting the needs of poor people.

One interesting case on this issue involved service by publication in the matrimonial area. It was an interesting case that went all the way to the New York Court of Appeals.⁷³ The case on remand was interesting to me. The court in that case ordered service by publication and the litigant told the court he could not afford to do that.⁷⁴ The court basically told him, “too bad, that’s life, there is no constitutional right to be divorced.”⁷⁵ It went to the court of appeals, which did not say there was a constitutional right for divorce, but did say there was a constitutional right to equal access, and if you are indigent, if you cannot pay for services by publication, the county has to pay.⁷⁶ It is a wonderful notion, but the part I found interesting, on remand, was that the county asked to be impleaded in the case to argue against service by publication.⁷⁷ The judge then concluded there were other ways to do service by publication.⁷⁸ I think that is a story about how to get allies for this issue.

When we did the assigned counsel plan, the only group that was not in the room was the 18B attorneys,⁷⁹ because we wanted to galvanize support from others in the broader community of law who

⁷³ *Deason v. Deason (Deason II)*, 296 N.E.2d 229 (N.Y. 1973).

⁷⁴ *Deason v. Deason (Deason I)*, 334 N.Y.S.2d 236, 237 (App. Div. 3d Dep’t 1972).

⁷⁵ *Id.*

⁷⁶ *Deason II*, 296 N.E.2d at 230.

⁷⁷ *Deason v. Deason (Deason III)*, 343 N.Y.S.2d 276, 279 (Sup. Ct. Albany County 1973).

⁷⁸ *Id.* at 280.

⁷⁹ See N.Y. COUNTY LAW §722 (McKinney 2008).

were affected by the assigned counsel inadequacies. The prosecutors, the attorney generals, and the county executives were tremendous supporters of doing something differently. I think that is what the courts can offer again.

And, of course, the reason why we have to be concerned in courts is because it directly implicates what we do. Public trust and confidence, which I think President Madigan mentioned, is dramatically eroding when the public at large thinks the courts are unfair, biased towards poor people, and biased towards black people in particular. We lose our moral authority. At the end of the day, all judges really have in a system of rule of law is the ability to write decisions and hold people in contempt of court. Also, judges are, to a high degree, consistently uncomfortable. It is hard to be there when one side is represented and the other side is not, and even harder to be in that room when no one is represented. There should not be this ethical tension of judges trying to remain neutral magistrates and hoping to see an outcome that is fair.

We need to look more closely at how a court's management and administration of justice would be better served at every end by having more attorneys. I think you also have to be careful with looking at what the outcomes mean. I remember I was with a legislator in a court upstate and there was an attorney for the day program. Half of the housing court litigants got an attorney for the day and the other half did not. At the end of maybe ten or twelve cases, the legislator leaned over to me and said, "The cases all look the same." Everybody agreed to move out. They did not have the low vacancy rate

problem we have here in the metropolitan New York area. Everybody seemed to be happy. I told him the difference, though, was that the people who had no lawyers all had a judgment of at least \$2,000 entered against them, which will affect them in the future, and the people who had attorneys in the main did not have a judgment entered against them. They were able to negotiate it out.

An attorney present in a case can have a demonstrable difference that the public at large, and our leaders in particular, do not really understand because it looked all very Judge Judy to them. Everybody got their say and everybody walked away happy. But the nuances were significant, and the message to the legislature is lawyers really do matter in these cases.

We actually have to a limited degree, under Article 11, created a civil right to counsel with motions to assign counsel to a particular lawyer. We have some experts that may be able to share this with us as a result of the matrimonial report a couple years ago. It was concluded that the judges could, for matters in a matrimonial case in supreme court, actually also be heard in family court, where there is a right to counsel. The argument was if you brought that action in family court, you would have counsel but because it is brought in supreme court as part of a matrimonial action you do not have counsel, we will give you counsel in the supreme court.⁸⁰

I understand that the jury is still out on how that is being handled, because the reality is, if I am a judge and I have a complex mat-

⁸⁰ SONDRA MILLER, MATRIMONIAL COMMISSION, REPORT TO THE CHIEF JUDGE OF THE STATE OF NEW YORK (2006), <http://www.courts.state.ny.us/reports/matrimonialcommissionreport.pdf>.

rimonial action, you are asking me to piece it out. You know, there is no counsel on the question of grounds and there is no counsel on the question of equitable distribution. I am going to give you counsel on custody. I am going to say, "Listen, counsel, you are here. Let's just do the work." Right? Of course, that was kind of squashed because that is not what the rule is.

We are rule of law based. But I think it may be a better place than for judges. I got a call from a reporter the other day criticizing all of us on the criminal side for not being better gatekeepers in giving out counsel in criminal matters. Does legal aid make that decision on who gets counsel, or should I make that decision, or should a criminal justice agency make that decision? Should somebody else make the decision? People really want to know that the decision to give someone counsel that is paid for by the public, the taxpayer, is really someone who is of the deserving poor. Does that not sort of punctuate everything we do? We want to do stuff for poor people but first you have got to prove you are a deserving poor person.

There is also no more deserving group than senior citizens. I think the bottom line is, whoever is the gatekeeper would have to work with others to come up with a process and a rule that is not easily applicable, because nothing is easily applied to anything. But something that is clearer, that will go to public trust and confidence as well, is when people look at the actual amount of money. They want to know you are giving money for a good cause—for the right to counsel. A lot of people think there already is a right to counsel on important civil matters. They want to be able to make sure the

money is not used frivolously and they are smart decisions. I do not know that judges are the best people to make that determination. I think if that is what it takes, I am sure we would be happy to have the assignment to give people attorneys. From our point of view, judges want people with attorneys because it makes our lives cleaner. We have a process that is geared for attorneys. We could have all the plain language, pro se help, et cetera, but what judges would really like to have is more attorneys. I do not know that we should be the gatekeepers, but I think we would take that assignment.

I think the bar leaders also deserve a tremendous amount of congratulations for this. The whole idea of access to justice being a focal point of the presidents of every bar association has changed the discussion to more traditional trade-like issues that can get into the dialogue of our leaders. I think once you have the bar saying among their top three things, one is always an access to justice issue, along with those other very specific lawyer issues, adds to the discussion in a very positive way. Bar sponsorship is crucial. And I think we sort of mature as a nation. We tackle one issue and go on to another. When we see that these issues implicate other areas of the community, I think that also makes them ripe for further discussion. Those are at least two issues that make this one truth a challenging truth.

So it is “an obvious truth,” but an “inconvenient” truth. Our leaders do not really understand, and the courts can add to this discussion by trying to develop an instrument that clearly demonstrates not only the very institutionally based issues that we feel strongly about, but how, in practical terms, having lawyers for people while

they are in the court and, equally important, before they come to court, can have dramatic effects that are fiscal in nature. I say it is an “inconvenient” truth because we do not want to fight with our friends on the criminal side. Believe me, they are having a significant battle about *Gideon*, and it is the law.⁸¹ Their issues are the caseloads. You have defenders in Chicago with two-thousand misdemeanors in their caseload. In some places, four-hundred felonies.⁸² And more interestingly, a debate on the other side about what is effective assistance of counsel?

Some people say that effective assistance of counsel is at the lowest possible rung you can imagine.⁸³ So the justice issue is still equally complex on both sides of the aisle. You know, when you read the white paper you will see New York has made significant steps. I am a native New Yorker. That is always a platform. When people do well, they like to do better. That is one of the reasons I think this can get done in New York. The other thing I want to say is something I say all the time. We will be judged by how we treat the least among us. So too, our efforts will reward us in that way. Lastly, it may be an “inconvenient” truth. Listen, life is inconvenient and nobody wants to give up on that right now. You have to do something when you get up in the morning. Why not this? Thank you for inviting me.

⁸¹ See generally *Gideon*, 372 U.S. at 339-40 (noting that an indigent criminal defendant has a right to assigned counsel).

⁸² Alan Maimon, NAT'L ASSOC. OF CRIMINAL DEFENSE LAWYERS, *Lyon County Attorney Juggles Massive Indigent Caseload*, Aug. 25, 2007, <http://www.nacdl.org/public.nsf/defenseupdates/nevada011>.

⁸³ Ben Coate, Ryan Lewis & Paul Parker, *Miscarriages of Justice: Eye of the Beholder*, 2007 J. INST. JUST. INT'L STUD. 104, 107 (2007).

V. THE LEGAL AID PROSPECTIVE**A. Adriene Holder***

I am the Attorney-in-Charge of the Legal Aid Society's civil practice area. The Legal Aid Society has three practice areas, criminal defense practice,⁸⁴ juvenile rights practice,⁸⁵ and civil practice.⁸⁶ I am here to speak to you about lessons learned and also about the concept of triage. The Legal Aid Society employs close to 1,500 people, but only 700 of those are attorneys.⁸⁷ During fiscal year 2006, in the criminal defense practice where there is a right to counsel, the criminal defense division actually handled 210,000 matters.⁸⁸ During this past fiscal year, despite the fact that crime is down, cases went up to 225,000.⁸⁹ What you find is that the first department has set caseload guidelines for what the proper caseloads are for attorneys to carry; to make sure that there is proper quality service for low income indi-

* J.D., 1991, Columbia Law School. Adriene Holder is the Attorney-in-Charge of the Civil Division of the Legal Aid Society of New York. She is a longtime legal aid attorney in the civil realm. Legal Aid has both a huge criminal division and a civil division. Adriene, in addition to being an incredible advocate on behalf of poor people as a housing lawyer, was also appointed by Mayor Bloomberg as a member of the rent guidelines board.

⁸⁴ Legal-Aid.org, Legal Aid Soc'y of New York—Criminal Practice, <http://www.legal-aid.org/en/whatwedo/criminalpractice.aspx> (last visited Sept. 11, 2008).

⁸⁵ Legal-Aid.org, Legal Aid Soc'y of New York—Juvenile Rights Practice, <http://www.legal-aid.org/en/whatwedo/juvenilepractice.aspx> (last visited Sept. 11, 2008).

⁸⁶ Legal-Aid.org, Legal Aid Soc'y of New York—Civil Practice, <http://www.legal-aid.org/en/whatwedo/civilpractice.aspx> (last visited Sept. 11, 2008).

⁸⁷ STEVEN BANKS, ATT'Y-IN-CHIEF, THE LEGAL AID SOC'Y, TESTIMONY OF THE LEGAL AID SOC'Y ON THE MAYOR'S PRELIMINARY BUDGET 2 (Mar. 14, 2008), <http://www.legal-aid.org/media/46053/testimonyfy09citybudget0031408.pdf> (noting how although almost half the staff are attorneys, the Legal Aid Society handled nearly 300,000 cases in 2007).

⁸⁸ THE LEGAL AID SOC'Y, 2006 ANNUAL REPORT (Oct. 2006), *available at* http://www.legal-aid.org/media/5873/the_legal_aid_society_2006_annual_report_reduced.pdf.

⁸⁹ THE LEGAL AID SOC'Y, 2007 ANNUAL REPORT 19 (Oct. 2007), *available at* <http://www.legal-aid.org/media/29450/las%202007%20annual%20report3.pdf>.

viduals.⁹⁰ But those are not incorporated in our contract. To further complicate matters, we are the primary provider or defender in New York City, so we take all non-conflict cases.⁹¹ So, again, you see that as the caseloads go up, we still have to take these cases, but our contract has remained flat for over five years.⁹² So even though other city agencies have received increases of three percent or such, we do not get that. The only time we are able to get any additional money is when we go to the City Council and in the last five years we have been able to get anywhere from six and a half to ten and a half million dollars to help us to deal with the increased costs that there are in representing low income individuals through our criminal defense division.⁹³ It is extremely tiresome. It is obvious from this that there has to be room for additional funding to look at these services and caseload evaluation. We could take it further and talk about the need for workload evaluation, which is sometimes different from cases.

Another example is in family court. In our juvenile rights practice, we represent the majority of children who are in family court.⁹⁴ We represent them through our abuse and neglect proceedings, PINS, or Persons in Need of Supervision proceedings, and what some people call delinquency proceedings.⁹⁵ During the time we appear in court, people will often see an attorney has one case, but that

⁹⁰ See N.Y. COMP. CODES R. & REGS. Tit. 22 § 3(D)(11)(f) (2008).

⁹¹ See BANKS, *supra* note 87 at 2, 4.

⁹² From 2005-2007, the total supporting expenses for the Legal Aid Society has remained between \$120 and \$121 million. THE LEGAL AID SOC'Y, 2007 ANNUAL REPORT, *supra* note 89, at 4; THE LEGAL AID SOCIETY, 2006 ANNUAL REPORT, *supra* note 88, at 4.

⁹³ See BANKS, *supra* note 87, at 3.

⁹⁴ See The Legal Aid Society—Juvenile Rights Practice, *supra* note 85.

⁹⁵ *Id.*

one case may have several siblings. So, is it really one case or is that attorney actually responsible for three children? If so, are we talking about caseload caps that only deal with the number of cases or the number of children that is actually proper for an attorney to represent at any given time? Wonderfully, this last year the state legislature passed, and the governor signed, caseload cap legislation that now is requiring the Office of Court Administration to do a review, which they are doing as we speak.⁹⁶ It is a review to establish what that caseload cap should be, which is the number of children.⁹⁷ And we are so grateful for that. Not for the number of cases as in some jurisdictions, but for the actual number of children that is proper for a child attorney to have. That was a real triumph, but it is something that took a very long time for us to advocate for.

With caseload versus workload, it is not even just the number of children, but about the type of cases. I am glad we are focusing on the different practice areas we really want to center on. The idea that in abuse and neglect proceedings the average amount of time a legal aid attorney spends on those cases is close to forty hours,⁹⁸ as opposed to a delinquency proceeding, where the average amount of

⁹⁶ The Office of Court Administration completed its review on April 1, 2008. See Joel Stashenko, *Law Guardian Cases are Capped at 150*, 239 N.Y.L.J. 1 (2008).

⁹⁷ See *id.* As of April 2, 2008, the caseload cap is at a maximum of 150 children per guardian. *Id.*

⁹⁸ This is based on the panelist's own experience as Attorney-in-Charge of the Legal Aid Society's civil practice area. For a further discussion, see ABA CTR. ON CHILDREN AND THE LAW, NAT'L CTR. FOR STATE COURTS, AND NAT'L COUNCIL OF JUVENILE AND FAMILY COURT JUDGES, BUILDING A BETTER COURT: MEASURING AND IMPROVING COURT PERFORMANCE AND JUDICIAL WORKLOAD IN CHILD ABUSE AND NEGLECT CASES 31-32 (2004), available at <http://www.ncjfcj.org/images/stories/dept/ppcd/pdf/buildingabettercourt.pdf> (examining a California workload study which shows that delinquency cases took nearly four times as long to resolve than a typical delinquency case).

time a legal aid attorney spends might be twenty-one hours.⁹⁹ You can see where there may be significant differences for some of our senior attorneys who may have caseloads more heavily geared within a practice area. So it is really important we pay attention; we also want to always monitor workload.

As laws change, as policies change, as the economy changes, oftentimes cases get even more complex. For example, when looking at the criminal defense case area, I mentioned that the caseload this past fiscal year that ended on June 30th of 2007 was up to 225,000 cases.¹⁰⁰ What you should look further into is that of the 225,000 cases, over 100,000 of them survived the first court appearance.¹⁰¹ Of these 100,000 cases, 30,000 were felonies.¹⁰² We are talking about different types of cases, such as violations, misdemeanors, felonies, where the number of appearances actually does run our costs up, especially considering quality representation for low income individuals.

It is an “obvious truth” and an “inconvenient” truth, an idea of where we are going to have to continue to move to get to this. It is going to be very difficult. For a lot of people, for government and individuals, it is necessary that we get there. However, some folks are going to say it is going to be very expensive for the government. But when you really take into consideration the opportunities lost for our clients as well as money diverted to try to deal with these issues

⁹⁹ See *id.*

¹⁰⁰ See BANKS, *supra* note 87, at 3.

¹⁰¹ *Id.*

¹⁰² *Id.*

as people's lives or situations become completely unraveled, we see there is greater cost on the other side of it. I am encouraged. I am about to join this coalition and I think that we can continue to push it through. If no other place—I am originally from California. I grew up outside of San Francisco and Los Angeles. I stay in New York because I know that the advocates here are just so tenacious. And I have grown to love and respect the advocates throughout the state. Together we have been a powerful coalition, not just on funding, but trying to make this place a better place for low income people. New York has a rich history of standing up for people who could not speak for themselves. My organization has a rich history in starting out as an organization for immigrants in 1876.¹⁰³ I know we can continue to do this and continue to be an example for other districts. We work and play well together these days so I know it is going to work out.

I mentioned earlier the issue of triage. I run a civil practice handling over 30,000 matters a year.¹⁰⁴ As civil practitioners, we understand all too well, as do many of you, the issue of triage. We oftentimes feel we are only in a position to take those cases or attend to those matters within our cases that have the most urgent deadlines or appear the most exigent in nature. You can imagine our juvenile rights attorneys, with staggering caseloads, especially because of the new state permanency law requiring them to have semi-annual hearings for their clients as opposed to annual hearings,¹⁰⁵ who are easily

¹⁰³ Legal-Aid.org, Legal Aid Soc'y of New York—Our History, <http://www.legal-aid.org/en/aboutus/ourhistory.aspx> (last visited Sept. 11, 2008).

¹⁰⁴ See THE LEGAL AID SOC'Y, 2007 ANNUAL REPORT, *supra* note 89, at 9.

¹⁰⁵ N.Y. FAM. CT. ACT § 1089(3) (McKinney 2007).

representing 220 children a year;¹⁰⁶ and our criminal defense attorneys, who have, as I told you, seen a jump of over 15,000 cases in just a year.¹⁰⁷ They also are in triage mode, which is unfortunate. Those attorneys who practice in an area where there is a right to counsel should not have to look at balancing whether they are meeting with social workers for their children placed in foster care, and whether they are able to engage in the proper education advocacy. Many of these children have some delays in learning or learning disabilities.¹⁰⁸ There is no reason in the world they should have to prioritize or feel that only the emergency issues come up and that they cannot plan their case to best represent the young people, to be forced in a difficult position.

When you actually look at the hours required to work on those caseloads, they more than surpass the number of hours that we have at forty hours a week, when we are actually thirty-five hour a week attorneys, having taken no vacation or no holidays.¹⁰⁹ In fact, in all three of the practice areas, but particularly in civil, where there is no right to counsel, we find oftentimes our attorneys are just not taking vacation. I have to force some of my staff to take vacations

¹⁰⁶ See THE LEGAL AID SOC'Y, 2007 ANNUAL REPORT, *supra* note 89, at 16.

¹⁰⁷ *Id.* at 19.

¹⁰⁸ See The Legal Aid Soc'y—Juvenile Rights Practice, *supra* note 85 (“The Juvenile Services Unit . . . team[s] social workers with lawyers in order to adequately address the educational, social, and psychological issues that arise in Family Court proceedings.”); THE LEGAL AID SOC'Y, 2006 ANNUAL REPORT, *supra* note 88 (describing a juvenile rights case where a 16-year-old student who was eligible for special resource room services was denied entry into a school, and the development of a “Books for Kids” project).

¹⁰⁹ Tammy S. Korgie, *Court-Appointed Attorneys Face Legal and Financial Challenges*, 73 N.Y. ST. B. J. 5, 5 (2001) (indicating the average overhead costs for law guardians working a 35-hour work week, in so much that one law guardian decided not to take on any more law guardian cases due to the extreme burden on his family).

because people feel completely overwhelmed. It is the idea that not only do they want to perform well on their cases, but they are trying to keep abreast of all the other things that are going on, all of the policy issues, all of the advocacy that takes place in the communities, to perhaps prevent some of these issues from being as great as they are.¹¹⁰ So it is something more for us to consider.

I do not have to tell you that we not only provide services through the criminal defense practice—we also have a parole revocation defense unit. Since 2004, we have been the primary provider of legal services and social diversion services to people who are accused of violating their parole and who were convicted in New York City.¹¹¹ I do not have to tell you that the idea of keeping people out of the jail system saves the city and the state money. I do not have to tell you that. You know that. I do not have to tell you that through our mentally ill and chemically addicted projects, where we actually deal with individuals and get them into great programs and give them alternatives to incarceration,¹¹² we save money for the city and state. I do not have to tell you how important that is. But I should also tell you that we should do it because it is the right thing to do in this soci-

¹¹⁰ See, e.g., BUILDING A BETTER COURT, *supra* note 98, at 6 (“While the availability of sufficient resources does not guarantee good performance or positive outcomes for children, the lack of adequate resources will almost always hamper . . . performance.”); see also HOWARD DAVIDSON & ERIK S. PITCHAL, CASELOADS MUST BE CONTROLLED SO ALL CHILD CLIENTS CAN RECEIVE COMPETENT LAWYERING 7-8 (2006), available at <http://www.firststar.org/documents/CaseloadCrisisStudy.pdf> (determining that a lower caseload will result in a higher quality of representation).

¹¹¹ Legal-Aid.org, Legal Aid Soc’y of New York—Parole Revocation Defense Unit, <http://www.legal-aid.org/en/whatwedo/criminalpractice/parolerevocationdefenseunit.aspx> (last visited Nov. 19, 2008).

¹¹² Legal-Aid.org, Legal Aid Soc’y of New York—Enhanced Defense-MICA Project, <http://www.legal-aid.org/en/whatwedo/criminalpractice/enhanceddefense-micaproject.aspx> (last visited Nov. 19, 2008).

ety. We are supposed to be taking care of our low-income folks and the people who have the least amount of resources.

I think a lot of people in this room as well as people on this panel really have been able to come together. I hope that folks from outside of New York City understand what a big deal the legislation that was introduced is. At first we actually had Council members who were dangling money in front of legal services groups' faces saying, "You guys could have this big pot of money to do these services and you could do it for housing court or whatever you want." But we wanted to establish a right. We were going to fight for the right first and worry about the money later. Get the right first. That is a huge breakthrough for so many of us who are just hemorrhaging with our budgets and with the need to be able to serve New Yorkers. That was just a huge thing. I do not think that people like Andy Scherer, Councilwoman Mendez, and other folks in this audience, and Laura Abel, who is actually responsible for getting us a lot of written work that was able to really show the need and how compelling the stories were, and a lot of you there who will be part of the breakout groups. That gives us hope because there are a lot of us coming from different places to get together on this, bite the bullet, saying we are going for the right and will not be distracted by the millions of dollars someone will try to put on the table that we can have.

We talk to people every day who believe there is actually a right to counsel in civil matters. I got a call yesterday from a gentleman. At the same time the news was announcing all this horrific

stuff about the foreclosure crisis, I got a call from a gentleman in Far Rockaway who wanted to be referred to our Queens office to get some assistance on his foreclosure and he said, “I may not qualify for your services, but I really would like to think you all could provide me with some information. Just tell me the number and what time I can get in to see you folks. I am available. I will be off work next Monday.” It really is the idea that I have to explain to him we are more than happy to provide him with some information and we will have some outreach available in his area to be able to talk more and help screen for folks having those issues. There is really a perception among people that there already is a right, especially for something as devastating as losing your home, or losing your health benefits. We represent people through our health law unit, employment law unit, housing unit, who really do not get it. “But my father’s detained.” “I know. But you don’t necessarily have a right. I am glad you made it to Legal Aid, we are going to try to assist you as best we can, even if just giving you advice, but that is not enough.” I think there is this bubbling awareness and kind of a little anger. I think anger is sometimes good as long as it can be channeled toward things that are productive, as we are seeing now. People are saying, “Why not?” Talking about the most basic things. “Why can’t I have access to a lawyer for that? My life is being complicated because you all passed a whole lot of different hoops for my mother to get Medicare, for me to be able to keep my home. Why can’t I get access to a lawyer when you have made it so complicated? You all tell me why it is happening.”

I know I am preaching to the choir, but what is amazing about all those things that has kept all of us in the business so long, even as a guilty pleasure, is that when they are taken care of, we are all very much well taken care of. When they have adequate healthcare, access to housing, proper representation, and additional income support, when they are getting the family services they need, when children get the educational opportunities or are given stable homes, and when individuals accused of crimes are processed through the system in the correct way, it makes the system better, and it makes us better. We need to continue to work towards getting the right to counsel in civil matters, but we also need to look at the lessons gleaned from other areas where we already have the right to counsel but where we still could make it a lot better for the individuals we serve. I feel that we are really at the point where something great is going to happen relatively soon. Thank you.

VI. LESSONS LEARNED

A. *Laura Klein Abel**

I would like to take on the challenging task of drawing some lessons from all of the commentary thus far on the civil right to counsel. Here is what I came up with. A civil right to counsel in the cases that we care about is achievable. We need to be creative; we need to

* J.D., 1994, Yale Law School. Laura Klein Abel is the Deputy Director of the Justice Program at the Brennan Center for Justice at NYU School of Law. Earlier in her career, Ms. Abel was a Gibbons Fellow and a Staff Attorney Fellow for the ACLU Reproductive Freedom Project. Ms. Abel has been one of the mainstays of the right to counsel effort in recent years, both at the local and national levels. Ms. Abel is the primary author of the white paper.

be open to using a variety of methods. If you were to read the white paper through cover to cover, you would see in New York State the right to counsel in civil and criminal proceedings comes from a variety of places. It comes from New York Court of Appeals rulings,¹¹³ it comes from the United States Supreme Court's ruling in *Gideon*,¹¹⁴ and it comes from state legislation responding to policy imperatives and to the state constitution.¹¹⁵ It also comes from federal legislation, which I have to say was a surprise to me when I sat down to write the white paper. For example, the right to counsel for kids in dependency cases comes from federal child welfare legislation that says if states want funding for foster care systems, they have to provide counsel, or it can be a guardian ad litem for kids in dependency cases.¹¹⁶ I urge folks to think about how there will be a new administration and new Congress in a year. Are there things that we could get from Congress to expand the right to counsel in civil cases? I think Congress is wide open for us and they will be very receptive to our cause. We may soon have legislation from the New York City Council. So there are a variety of forums we can go to.

¹¹³ See, e.g., *In re Ella B.*, 285 N.E.2d 288, 290 (N.Y. 1972) (constitutional right to counsel for indigent respondent parents in child protective proceedings); *Jennings v. Jennings*, 344 N.Y.S.2d 93, 94 (App. Div. 2d Dep't 1973) (constitutional right to counsel for respondent spouses in proceeding to enforce a support order because of the possibility of incarceration).

¹¹⁴ 372 U.S. at 344 (holding that in an adversarial system of justice, a criminal defendant who is "haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him").

¹¹⁵ See, e.g., N.Y. FAM. CT. ACT § 262(a) (requiring appointment of counsel in a variety of types of family matters); N.Y. SOC. SERV. LAW §§ 473-a(5)(b) (stating that adults who, because of mental or physical impairments, are allegedly unable to protect themselves from abuse, neglect, or other hazardous situations, have a right to counsel in any proceeding regarding involuntary protective services from the State).

¹¹⁶ 42 U.S.C. § 5101 (1996).

I would urge us to think about using a couple of those forums at the same time with the same goal in mind. The right to counsel is a money issue, as a number of folks have mentioned already. When you are trying to get money, you need support from a lot of different quarters. There are a couple of initiatives that I always think about in connection with this. One is the Campaign for Fiscal Equity; the effort to work through the courts to get a right to better funding for public school children.¹¹⁷ One thing that campaign was very effective at, in addition to being very good litigators, was also doing a lot of public education and making sure that there was support in the legislature for this.¹¹⁸ Even after the litigation is done, they still continue to be very active in the legislature, making sure that what was promised in the court and in the legislature actually comes through.¹¹⁹ That is an effort that will never be over. Even when we get a right to counsel, we still have an obligation to make sure it is adequately funded and adequately supervised.¹²⁰ But it is important on the front end too, even if we are working in the courts, to make sure we have allies in the legislature so whatever rulings we get will actually be carried out.

I wanted to end with a recent example of how the Brennan

¹¹⁷ Campaign for Fiscal Equity—Background, <http://www.cfequity.org/background.html> (last visited Sept. 30, 2008); see also *Campaign for Fiscal Equity, Inc., v. New York*, 861 N.E.2d 50, 61 (N.Y. 2006) (concluding New York City needs to provide a “sound basic education” plan).

¹¹⁸ See Editorial, *Mobilizing for Movement*, THE JOURNAL NEWS, Sept. 18, 2006, available at <http://www.cfequity.org/Clippings/09-20-06JournalNews.htm>.

¹¹⁹ *Id.*

¹²⁰ See Laura K. Abel & the Honorable Lora J. Livingston, *The Existing Civil Right to Counsel Infrastructure*, THE JUDGES’ J. (forthcoming Fall 2008); Laura K. Abel, *A Right to Counsel in Civil Cases: Lessons From Gideon v. Wainwright*, 15 TEMPLE POL. & CIV. R. L. REV. 527, 538-50 (2006).

Center tries to use a variety of different methods to get better legal representation for low-income people. This is an example in which we used right to counsel concepts to achieve something more akin to access to representation. A number of years ago, we filed a complaint with the Mexican government regarding the category of H-2B guest workers.¹²¹ These are unskilled, nonagricultural workers. Some of you may work with them. There are a bunch of them in New York State.¹²² They are brought in by their employers to work in non-agricultural areas, often in rural areas. They have no access to lawyers and they are statutorily barred from getting representation from Legal Services Corporation-funded programs.¹²³ We filed a complaint with the Mexican government stating that when the United States signed NAFTA, it also signed a side labor agreement.¹²⁴ This agreement said that when foreign workers are in the United States, they are entitled to all the labor protections that United States workers are entitled to. They are also entitled to enforcement of their labor rights in the same way United States workers are able to enforce their rights.¹²⁵

We went to the Mexican government with a bunch of exam-

¹²¹ Laura K. Abel et al., Petition on Labor Law Matters Arising in the United States submitted to the National Administrative Office of Mexico, at 5 (Apr. 13, 2005) [hereinafter Complaint], available at <http://www.dol.gov/ILAB/media/reports/nao/submissions/2005-01petition.htm>.

¹²² See *Petition to Compel Compliance With Subpoenas Probing Carnival's Treatment of Aliens Remanded*, 240 N.Y.L.J. 25 (2008); Paul Nelson, *Road to Seasonal Help Lined With Bureaucracy*, ALBANY TIMES UNION, Mar. 30, 2008, at 23.

¹²³ Consolidated Appropriations Act, 2005, Pub. L. 108-447, 118 Stat. 2809 (2004) ("None of the funds appropriated in this Act to the Legal Services Corporation shall be expended for any purpose prohibited or limited by, or contrary to any of the provisions of, sections 501, 502, 503, 504, 505, and 506 of Public Law 105-119 . . ."); 45 C.F.R. § 1626.

¹²⁴ See Complaint, *supra* note 121.

¹²⁵ *Id.* at 2.

ples of H-2B workers who had been horribly abused by their employers and who had no access to the legal system because they could not get lawyers. And they tried to go to state and federal agencies. Those agencies said, "We do not know who you are and there is nothing we can do for you." So we filed a complaint with the Mexican government and then we waited and we waited. After a couple of years, last October we got a response from the Mexican government, which is basically their first step in sort of a complicated process set up by our treaty with Mexico.¹²⁶ They asked the United States government a whole series of questions about whether it was true that these workers really have no access to legal representation and whether it was true that United States workers are eligible for assistance from Legal Services Corporation funded programs and these people are not. What happens when one of these workers is not paid minimum wage? We are in the process of preparing a response, and the United States government is as well. But what happened is, in the meantime, while this petition was pending, a reporter picked up on it and wrote a very compelling series of stories in a newspaper in California talking about the plight of these H-2B workers and particularly workers working in the forestry industry.¹²⁷ Congress picked this up

¹²⁶ Letter from Claudia Anel Valencia Carmona, Subcoordinator of Hemispheric Labor Politics to Laura K. Abel et al., translated by the Brennan Center for Justice at NYU School of Law (Oct. 24, 2007), available at <http://www.dol.gov/ILAB/media/reports/nao/submissions/2005-01petition.htm> (responding to the H2B worker Complaint).

¹²⁷ Tom Knudson & Hector Amezcua, *The Pineros: Forest Workers Caught in Web of Exploitation*, THE SACRAMENTO BEE, Nov. 13, 2005 (Part 1 of 3), available at <http://www.sacbee.com/static/content/news/projects/pineros/c1/>. The First of three articles illustrating the hope of work, wage exploitation, and poor working conditions of the forestry industry for H2-B workers. *Id.* See also Tom Knudson & Hector Amezcua, *The Pineros: Hidden Hazards*, THE SACRAMENTO BEE, Nov. 14, 2005 (Part 2 of 3), available at

and held a series of compelling hearings about how these workers are abused when they are working on federal lands in forestry, and how many of them have no access to the legal system.¹²⁸ This past December, Congress attached a rider to an omnibus appropriations bill saying that for the first time ever, H-2B workers have access to federally funded legal services if they work in the forestry industry.¹²⁹ We are not entirely there. It is not a right to counsel. And it is not a right to counsel for H-2Bs who do not work in forestry. But it is something.

What I take away from this is that we are in an era where the rest of the world thinks the United States does not care about international obligations. And we have done a number of things to make them think that, but here we were able to use an international process to bring attention to issues going on here at home and we were able to get the United States Congress to act. In New York State, we can also use a variety of different kinds of arguments. Maybe we use processes like the NAFTA process, which, frankly, we did not ever think would result in the United States government saying, "Oh, yes, we have an obligation under NAFTA that we are violating and we are going to change the way we do business." But we can use arguments and use processes to bring attention to the problem and then get fixes maybe in the places we were not directly targeting, but in places that

<http://sacbee.com/static/content/news/projects/pineros/c2/>; Tom Knudson & Hector Amezcua, *The Pineros: Going Home*, THE SACRAMENTO BEE, Nov. 15, 2005 (Part 3 of 3), available at <http://www.sacbee.com/static/content/news/projects/pineros/c3>.

¹²⁸ Tom Knudson, *Senators Get Earful on Forest Labor Abuse*, THE SACRAMENTO BEE, Mar. 2, 2006, available at <http://www.sacbee.com/static/content/news/project/pinoeros/update/>.

¹²⁹ Consolidated Appropriations Act, Pub. L. No. 110-161, 121 Stat. 1844, 1850-51 (2007).

can fix the problem.

We are here because we have a dream. That is a scary thing, as I think we have talked about. It is hard to figure out how to implement it. But it is not that hard. We do have a right to counsel in a wide variety of family cases and some other kinds of civil cases. We know how those cases work. It is not perfect, but we have ABA guidelines.¹³⁰ We have guidelines from the NLADA.¹³¹ We know some things about how to operate a right to counsel system that works. It does not mean that we do it always, but we do know how to do it. So we do not have to reinvent the wheel here. We just have to expand the pie.

I want to read from the end of the introduction in the white paper that I gave you because the white paper tells you where we are today with respect to the right to counsel. Then it suggests some areas for expansion. At the end of the introduction we say:

The paper does not try to make decisions about where the need for right to counsel is most urgent, in which kinds of cases lawyers could make the most difference, whether there exist other mechanisms for ensuring access to counsel . . . , or the types of cases to which the courts or legislature are most likely to expand the right. Those are among the factors we hope conference participants will consider in creating their

¹³⁰ See e.g., AM. BAR ASS'N, STANDARDS OF PRACTICE FOR ATTORNEYS REPRESENTING PARENTS IN ABUSE AND NEGLECT CASES (2006), *available at* <http://www.abanet.org/child/clp/ParentStds.pdf>; AM. BAR ASS'N, STANDARDS OF PRACTICE FOR LAWYERS REPRESENTING VICTIMS OF DOMESTIC VIOLENCE, SEXUAL ASSAULT AND STALKING IN CIVIL PROTECTION ORDER CASES (2007), *available at* <http://www.abanet.org/domviol/docs/StandardsCommentary.pdf>.

¹³¹ See, e.g., NAT'L LEGAL AID & DEFENDER ASS'N, STANDARDS FOR THE ADMINISTRATION OF ASSIGNED COUNSEL SYSTEMS (1989), *available at* http://www.nlada.org/Defender/Defender_Standards/Defender_Standards_NLADA.

“action blueprint.”¹³²

I really hope those are the kinds of things we discuss this afternoon and that we come out of this conference with some ideas and a real dedication to working to expand the right, where it is needed, and where we think we can make change. Thank you.

¹³² Laura K. Abel, *Toward a Right to Counsel in Civil Cases in New York State: A Briefing Paper for “An Obvious Truth: Creating an Action Blueprint for a Civil Right to Counsel in New York State”* (March 7, 2008).

