

7-2016

Filling the Gaps: Another Way to Tackle the Access to Justice Crisis

Karen Simmons

Follow this and additional works at: http://digitalcommons.nyls.edu/impact_center

 Part of the [Courts Commons](#), [Family Law Commons](#), [Juvenile Law Commons](#), [Legal Ethics and Professional Responsibility Commons](#), and the [Social Welfare Law Commons](#)

Recommended Citation

Simmons, Karen, "Filling the Gaps: Another Way to Tackle the Access to Justice Crisis" (2016). *Impact Center for Public Interest Law*. Book 8.

http://digitalcommons.nyls.edu/impact_center/8

This Article is brought to you for free and open access by the Academic Centers and Programs at DigitalCommons@NYLS. It has been accepted for inclusion in Impact Center for Public Interest Law by an authorized administrator of DigitalCommons@NYLS.

Impact Center for Public Interest Law
Racial Justice Project

JUSTICE, JUSTICE SHALL YE PURSUE

Honorable Jonathan Lippman

SPECIFIC AREAS FOR REFORM

HOUSING

Andrew Scherer
Susanna Blankley

IMMIGRATION

Claire Thomas & Lenni Benson
Fidèle Menavanza

PRISONERS' RIGHTS

Brett Dignam

TORT LIABILITY

Joanne Doroshov

WOMEN'S RIGHTS

Catherine Carr

ALTERNATIVE MODELS

David Udell
Randal Jeffrey
Karen Simmons
Amy Barasch
Joan Vermeulen
Raymond Brescia

THE ROLE OF GOVERNMENT OFFICIALS

Paris Baldacci
Lisa Grumet

IMPACT

**COLLECTED
ESSAYS ON
EXPANDING
ACCESS TO
JUSTICE**



Filling the Gaps: Another Way to Tackle the Access to Justice Crisis

Karen Simmons¹

Working in public interest law, which intersects with social services and social justice, I have had the opportunity to do more than just handle an individual client's case or reach beyond my individual caseload. I work in this profession to provide greater support and engagement for communities in need. Access to justice as a societal framework is a logical extension when you are immersed in this work. Many access to justice work groups and task forces that encompass our judiciary, state, city, and affinity bar associations, along with many law schools, public interest, and legal services programs collaborate to work on the thorny issues that plague and daunt the disenfranchised.² The areas that immediately come to mind when we talk about access issues are food and income security, housing, domestic violence, and many family issues. Over the years, the various entities focused on access to justice with the bench, the bar, schools, and public sector stakeholders have continued to expand our reach in providing access to legal assistance through self-help tools, pro bono attorneys or trained non-legal professionals and clinics. Access to justice is also stretching to address long-persistent problems such as human trafficking, advocacy for LGBT rights on many fronts, consumer debt, and the needed support for our elderly and veterans.³

However, there are grey areas where the lack of access to justice does not fit into an existing category or assistance area. The lack of access or gaps in access have been created by the actions or inactions of the systems that are designed to support or care for the person they are now negatively impacting. Those gaps constitute the continuing frontier in tackling barriers to access to justice. There have been great strides made in meeting access to justice needs, but even as we make progress on one issue, many more rise up to challenge us. How do we see the gaps before us so we can prevent them from becoming barriers that contribute to further marginalizing communities trying to access justice?

This essay considers three populations for whom access to justice may be limited because of these gaps: children in foster care; adults facing child protective investigations; and children who have experienced "broken adoptions," in that they were adopted out of foster care but did not remain in the adoptive home. The essay explores the gaps in access to justice faced by these populations by considering the examples of Kay and Ollie,⁴ both of whom had experiences with the child welfare system as children and as adults.

¹ Karen Simmons is the Executive Director of The Children's Law Center (CLC), a not for profit law firm that represents children in custody, guardianship, visitation, paternity, child support, family offense domestic violence and connected child protective cases in family court and the Integrated Domestic Violence Parts in Supreme Court.

² The American Bar Association's Resource Center for Access to Justice (ATJ) Initiatives serves judicial, private bar, and legal aid leaders who work together to provide people of low and modest income with meaningful access to their justice systems. The Center's two main focuses are: (1) "Supporting the growth and development of state-based Access to Justice Commissions;" and (2) "Collecting and analyzing data on the various sources of funding for civil legal aid." *Resource Center for Access to Justice Initiatives*, A.B.A., http://www.americanbar.org/groups/legal_aid_indigent_defendants/initiatives/resource_center_for_access_to_justice.html.

³ For examples of access to justice resources from the New York State Unified Court System, see New York State Courts Access to Justice Program, <https://www.nycourts.gov/ip/nya2j/index.shtml>; CourtHelp, <http://www.nycourts.gov/courthelp/>.

⁴ All the names in this document have been changed.

I. Children in Foster Care

Transparent and effective justice that is within the reach of all people is essential to achieving access to justice. But is access to justice obtainable for everyone? Because the lens I work from focuses on the family and in particular children, sometimes I see that systems have obstacles that may be unintended but create negative consequences. Solutions are not always readily available or the system hampers people's ability to move forward in making a life for themselves or their families. Children often live in this nether world because a child's access is dependent on others. Access to the justice system for children is something that is usually explored through the adults that they are connected to. However, that access is constrained and might be invisible if the child's caretaker's ability to protect the child's access to justice is at issue or the caretaker is the impediment.

"Child protection" are the words that we often use. Child policies have evolved over the centuries. Child labor laws were enacted, orphanages grew into a child protective and foster care system, and ensuring that children received primary educational instruction became a part of our mandate. Protecting children is important. If a parent lacks stellar parenting ability, it is not questioned unless safety is at issue. Sometimes, in the child custody law area, you wish that parents could see the harm that they are doing when the disintegration of their relationship negatively impacts their children. However, when the design of the system has children move through it with the possibility of becoming vulnerable adults, we have to assess whether their access to justice as a child was fully actualized. We see the costs on them as adults and on their children, and how the system has contributed to the marginalizing cycle.

Kay's Story

Kay grew up in foster care. When she was younger, she lived in a foster home. She thought she would stay with this family because it was her home. Her foster mother wanted to keep her, but she needed to move to North Carolina to care for sick relatives and the Interstate Compact for the Placement for Children (ICPC) unit in the receiving state did not authorize Kay moving with her so Kay had to stay in New York. ICPC is an agreement between states that was created so that children who are before a court do not move from one state to another without the knowledge of authorities in each state and without a mechanism for oversight.⁵

From the time when her foster mother moved until she was 18, Kay resided in a group home where people stole her clothes and physical fights were the norm. She left that environment. After she left foster care, she would stop by the foster care agency, but never seemed to connect with anyone there for a meaningful discharge from care. She never had a discharge plan meeting or knew she could receive a discharge grant. She never had a permanency review in court that she was part of, and she never learned that she might be eligible for Special Immigrant Juvenile

⁵ See *ICPC FAQ*, ASS'N OF ADMIN. OF THE INTERSTATE COMPACT ON THE PLACEMENT OF CHILDREN, <http://www.aphsa.org/content/AAICPC/en/resources/ICPCFAQ.html>.

Status (SIJS)⁶.

As a baby, Kay arrived in New York and was never aware that she was undocumented. By the time she learned about her legal status, she had two babies of her own and a shaky relationship with her children's father, Ollie. Ollie also was in foster care and also had left placement. Kay went back to her foster care agency to try and obtain her birth certificate and other identification documents and there she learned about SIJS. SIJS is available to some children who are present in the United States without legal immigration status and may be in need because they have been abused, abandoned, or neglected by a parent. SIJS would have given Kay lawful permanent residence status, but at the time Kay learned about this, the steps to access this status were not clear to her and time was not on her side. SIJS for Kay was never a possibility because she did not have access to the information in a timely way and had turned 21 years old two weeks earlier. There are other remedies to obtain lawful status for Kay to pursue, but Kay never had access to SIJS.

Access to justice can be defined as the ability to know that information is out there that may inform you and impact you and with that knowledge, have the ability to seek a formal or informal forum to be heard and learn what possible remedies are available. Gaps in access to justice exist if people, notably the poor and the vulnerable including current and former foster children like Kay, suffer from the injustice of lack of knowledge and do not have the ability to make their grievances or issues known or heard. Kay's lack of information encumbered her access to justice to obtain her green card via SIJS, even though she had been a ward of the state for years. Being undocumented impacts every aspect of her life. The government, laws, and the courts are vessels for increasing access for people with little to no access. Kay has not been able to go to school and works at a low-paying job with no benefits.

II. Adults in Child Protective Investigations

As an adult, Kay returned home with her three children at the end of a long work day and found a note at her door stating that child protective services had been to her apartment to investigate her for neglect of her children. An anonymous state central registry report⁷ was called in alleging that Kay takes drugs and her children do not regularly attend school. Neither of these allegations was true and many months later the report was deemed unfounded. Kay had recently completed a series of court dates in housing court where she prevailed over her landlord. She was looking

⁶ See INA § 101(a)(27)(J), codified at 8 U.S.C. § 1101(a)(27)(J).

Special Immigrant Juvenile Status (SIJS) allows undocumented children under the age of 21 who have been abused, neglected, or abandoned by one or both parents to obtain lawful, permanent immigration status within the United States. Qualifying children must meet the criteria codified in § 101(a)(27)(J) of the Immigration and Nationality Act:

1. The applicant must be under 21 years old;
2. He/she must be unmarried;
3. He/she must be declared dependent upon the state – this means that a state court has taken jurisdiction over a petition addressing the needs of the applicant;
4. Reunification with one or both of the applicant's parents must no longer be a viable option; AND
5. It is not in the best interests of the applicant to return to his/her country of nationality or last habitual residence.

SAFE PASSAGE PROJECT, SPECIAL IMMIGRANT JUVENILE STATUS: A STEP-BY-STEP GUIDE FOR SAFE PASSAGE PROJECT VOLUNTEER ATTORNEYS 7 (updated Nov. 23, 2014), available at <http://www.safepassageproject.org/wp-content/uploads/2013/02/SIJS-Manual-11.24.2014-CT-FINAL-AMENDED.pdf>.

⁷ The Statewide Central Register of Child Abuse and Maltreatment (SCR) of the New York State Office of Children and Family Services, receives reports of child abuse and neglect. *Statewide Central Register of Child Abuse and Maltreatment*, N.Y.S. OFFICE OF CHILDREN & FAMILY SERVS., <http://ocfs.ny.gov/main/cps/>.

for another place to live because her housing was marginal. Continuing to stay there felt like an uphill battle to make it a good place to remain with her children, but she could not afford higher rents. Needless to say, the landlord-tenant relationship was not the best. In order to attend housing court, Kay had to take off from work and now, in order to meet with the caseworker for an appointment that is scheduled during her work hours, she will have to take off from work again. If Kay does not work, she does not get paid. Kay is frustrated and nervous that she now has to talk to the caseworker.

Access for Kay to have her landlord make repairs to her apartment was fraught with many challenges that she navigated with self-help resources that are part of the access to justice toolkit. It is scary; even with many of those do-it-yourself tools, navigating the legal system with limited understanding is not easy, especially versus a landlord who has more resources and legal counsel. Now, having dealt with her housing situation, which is still not great, she receives an anonymous complaint about her care of her children. What is even more challenging is when you are not involved in a court proceeding but you still have to answer to an investigatory body. Kay is now about to enter discussions with a child welfare system because of anonymous allegations. The child welfare system is designed to help children and families, but the child welfare system is a protective system that also has a duty to investigate and a duty to protect children, if necessary, from their caretaker. Every action or inaction Kay takes will, in this dynamic, be scrutinized. It is a system that she abandoned and one that she may not fully trust.

Access to justice is more than improving an individual's access to courts or guaranteeing legal representation. Access to justice should be the ability of people to seek and obtain a remedy through formal as well as informal decision makers. When you are involved in an investigative process, the rules of contact and resolution are not always clearly defined. Access should include self-help, legal information, and legal representation as well as include reliable time frames or procedures when issues are raised that could impact your liberty or ability to raise your children. After the initial contact, Kay waited eight months for the investigation to conclude. The caseworker contacted Kay's children's school and monitored attendance. Kay provided what documents she had and submitted to the drug test when requested. She lost time and pay at work in order to follow up with the caseworker. Kay felt constrained with these allegations hanging over her head, but with nothing before the court, she felt she had to comply and felt helpless. Access to justice may feel like an illusion in these circumstances to a person subjected to anonymous allegations that take eight months to investigate. To further tackle access to justice and flesh out this definition, we need to explore how to safeguard and mitigate gaps that may give people the perception that their access does not exist.

III. Broken Adoptions

Ollie's Story

Ollie, the father of Kay's children, was adopted from foster care when he was two years old. As he approached his teen years, his adoptive mother stated his behavior was problematic. She sent Ollie to a therapist, but did not accept the therapist's suggestions and refused to come in for weekly family therapy. She put Ollie out of the apartment and put Ollie back in to foster care.

Ollie's group home was nearby the group home that Kay was living in and that is how they got together. They left the group homes and worked odd jobs and jobs off the books so they could afford a room, make a life, and have children. They also had a troubled relationship. When

they could not make ends meet, Ollie went to apply for welfare benefits and learned that his adoptive mother was receiving funds for him called an adoption subsidy. The adoption subsidy is a contract between the adoptive parent and the state.⁸ The subsidy payments are paid to the adoptive parent for the care of the child. Children designated as hard-to-place children out of foster care may be eligible for this subsidy as well as medical coverage, depending on their needs, until the age of 18, or in New York, the age of 21.⁹ Ollie learned three months before his 21st birthday that his adoptive mother was still receiving these payments even though she put him back into foster care. His adoptive mother never planned for Ollie to return home, did not even visit him, and did not let his younger brother, whom she also adopted, see him.

Ollie experienced what is called a “broken adoption.”¹⁰ This has also been called failed adoption or adoption discontinuity. For some adopted youth, something happens in the family structure that results in a break, and the child does not remain in the home, may return to family court, and even sometimes back into foster care. Ollie never realized his adoptive mother received money for him. Every year, children are adopted out of foster care presumably into their “forever family” and that should be their happy ending. The reality for some of these adopted children has been quite the opposite of a happy ending, resulting in the broken adoption. In 2014, a *New York Daily News* article highlighted that many adoptive parents continue to receive money for children not in their care or for children who are never going to return to their care and that what persists is “a confusing tangle of bureaucratic rules and a lack of city oversight.”¹¹ Adoptive parents who have kicked children out of their home and are providing no financial support often continue to receive subsidy checks which are intended for the adopted child’s care. The data to quantify this issue is just starting to come together, but we have a long way to go and we do know that some youth and young adults end up a part of the homeless or other systems.

Until recently, under the interpretation of the adoption subsidy regulations and statute,¹² in practice the only way the subsidy would stop flowing to the adoptive parent (other than the child reaching the maximum age for the subsidy) was through the death of the adoptive parent, or if the adoptive parent elected to stop the subsidy payment by informing the agency in writing that he/she no longer wished to receive the subsidy payment.¹³ The intent was to ensure that the adopted child received the basic necessities of life with the subsidy. Unfortunately, the impact

⁸ See N.Y. SOC. SERV. LAW § 453; *New York Adoption Subsidies*, N.Y.S. OFFICE OF CHILDREN & FAMILY SERVS., <http://ocfs.ny.gov/adopt/subsidy.asp>.

⁹ See 42 U.S.C. § 673; N.Y. SOC. SERV. LAW § 453.

¹⁰ CLC began looking at this issue by surveying practitioners in the Family Law field about broken adoptions. See Dawn J. Post & Brian Zimmerman, *The Revolving Doors of Family Court: Confronting Broken Adoptions*, 40 CAP. U. L. REV. 437 (2012).

¹¹ Nick Nehamas, *Children Still Bring in Subsidy Checks for the Adoptive Parents Who Tossed Them Aside*, N.Y. DAILY NEWS, Sept. 2, 2014, <http://www.nydailynews.com/new-york/discarded-children-bring-checks-adoptive-parents-gave-article-1.1862778>.

¹² See N.Y. SOC. SERV. LAW § 453.

¹³ The New York State Office of Children and Family Services recently issued guidance that clarifies when an adoption subsidy can be terminated, and “follow up” measures local services agencies can take when they have “reasonable cause to suspect that the adoptive parent(s) is no longer providing any support” for the child. See N.Y.S. Office of Children & Family Services, Local Commissioners’ Memorandum No. 16-OCFS-LCM-02, Changes Impacting Adoption Assistance Payments (Feb. 3, 2016), http://ocfs.ny.gov/main/policies/external/OCFS_2016/LCMs/16-OCFS-LCM-02%20Changes%20Impacting%20Adoption%20Assistance%20Payments.pdf. However, if the funds to the adoptive parent are terminated for this reason, they are not currently available to a new custodian or guardian for the child.

in some cases has been quite the opposite.¹⁴ Children in broken adoption situations continue to be in dire need of legal and social work advocacy as it relates to the inability to access the subsidy and also they can lose their medical coverage. Some young people need access to medication or other mental health services and an inchoate mental health system that is not attuned to these young people's unique trauma experience may be a barrier to their well-being. These children experience removal from a birth parent and family, possible trauma in foster care, and now the break of the adoptive relationship with little recourse. Also the lack of understanding of the behavioral conduct and attachment disorders as well as the issues related to identity exploration and formation that youth face as they approach adulthood are part of this jumbled experience for them. Access to justice where no one sees their needs has left a part of our youth and young adult population invisible to any access to justice paradigm.

When Ollie was put back into foster care, he lost contact with his sibling. Another common issue for broken adoption youth, is the refusal of their adoptive family to allow contact between them and their sibling(s). Many children are adopted out of foster care with at least one of their biological siblings. When their relationship with their adoptive parent ends and they are not welcome in the home, they may lose contact with siblings who remain in the home.

The current posture of New York State adoption regulations only mandates that foster care agencies ensure contact between siblings if they are placed in different foster homes.¹⁵ However, once the adoption is finalized, the foster care agency is no longer obligated to maintain sibling contact; it is up to the adoptive parent. In fact, the adoptive parent can simply terminate all contact between the siblings. In either situation—being adopted into different families or being barred from contact with siblings who remain in the adoptive home after a sibling leaves—there is a growing number of siblings who have lost contact, and access to justice for them does not exist.¹⁶ Social science research has noted that the longest continuous relationship that people may have is with a sibling, but in the eyes of the law, that relationship is not paramount.¹⁷

IV. Conclusion

Seeking to have access to justice programs for the poor or other vulnerable people is embraced as a public charge. The plan to provide access to these communities varies by each state. The key points for an access to justice system are that the system must endeavor toward transparency, quality, and quantity of resources in order to have equal access and readily obtainable legal information. Groups in and connected to the legal community in the private, public, and government sectors strive to provide needed resources for a modicum of access to their justice systems. States within this framework are at the forefront of trying to enhance funding for attorneys through civil legal aid, pro bono attorney support from the private bar, self-help services for the self-represented, and other creative projects.

Methods for addressing barriers to both quantity and quality of legal assistance continue to evolve. However, gaps to access exist. They exist in several different ways. Even though Kay and Ollie have had some access to the legal system, they still face the cracks within the systems

¹⁴ See Post & Zimmerman, *supra* note 10.

¹⁵ See 18 N.Y.C.R.R. § 431.10(e).

¹⁶ Dawn J. Post et al., *Are you Still my Family? Post-Adoption Sibling Visitation*, 43 *CAP. U. L. REV.* 308 (2015).

¹⁷ See *id.* at 319-26.

that have been created, or were designed to protect and care for them as children but instead created other life narratives for them as young adults. The lack of access or the crisis that we still face and need to further combat are the cracks in transparency, quality, and quantity to equal access and legal information; if we fail to repair these cracks, the gaps to access to justice will widen. As we evolve as a society, the types of legal needs continue to evolve and the resource development sometimes is outpaced by the legal needs. The allegations against Kay that brought the child welfare system back in to Kay's life may be false, but she has to submit to the inquiry and lose pay. She cannot obtain a job that provides more money and benefits because she cannot go to school and she is not eligible for certain jobs. Her immigration status instability makes each step she takes difficult. Ollie could not address the problem that his adoptive mother continued to receive money for his care; she did not provide him any support for the majority of his life; and he has lost access to his sibling. Improving access requires a fully resourced system that seeks to evolve and address gaps that the system itself may inadvertently cause. Access to justice must be part of system planning when we look at established areas and new areas that arise, but also these systems need to be cognizant and willing to work to prevent creating the gaps that cause the need for the access-fragile populations, like Kay and Ollie. They were children that were immersed in a system to care for them, but as adults the system as currently structured has caused gaps that impede their access. •