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SECURING A CIVIL RIGHT TO COUNSEL: THE IMPORTANCE OF COLLABORATING

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"To no one will we sell, to no one will we refuse or delay, right or justice."[1]
—*Magna Carta* (1215)

"The right to be heard would be, in many cases, of little avail, if it did not comprehend the right to be heard by counsel."[2]
—*Powell v. Alabama* (1932)

"Together, we can move mountains. Alone, we can't move at all."[3]
—Traditional folksong

INTRODUCTION

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

After more than 200 years of constitutional democracy, the United States has developed an increasingly complex and adversarial system of dispute resolution. The system is structured to require legal counsel for meaningful access. Yet the number of those who cannot afford counsel in the face of increasingly serious legal disputes—disputes with enormously serious consequences upon lives and well-being—is rising. This is unacceptable. This Article argues that the most important collaboration in the interest of "access to justice" is one that seeks to correct the single greatest impediment to a truly just

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1. *Magna Carta* ¶ 40, (Eng. 1215).
2. Powell v. Alabama, 287 U.S. 45, 68–69 (1932).
3. Traditional folk song (unattributed).

system: the lack of a civil right to counsel. Public policy, the fair administration of justice, constitutional and statutory law, and a growing international consensus on the human right to a fair hearing all support the proposition that there should be a right to counsel in the civil as well as the criminal context.

Perhaps the strongest case for a civil right to counsel in New York can be made for tenants who face eviction from their homes. New York City's Housing Court, for example, is unable to fairly and impartially administer justice because most of its litigants, who face eviction, are not able to defend their interests meaningfully because they need legal assistance but cannot afford counsel.[4] Yet, many of the same considerations that warrant a right to counsel in eviction proceedings support a right to counsel in other civil proceedings involving important rights and interests. Other housing matters (*e.g.*, foreclosure or disputes over building conditions that render dwellings uninhabitable) and domestic relations matters (*e.g.*, divorce or domestic violence), legal proceedings involving loss of employment, disability benefits or other government assistance, and deportation all involve complex litigation, extraordinarily important individual interests, and a cost-benefit balance that mitigates in favor of assuring there are adequate procedures, including the availability of counsel, to protect individual interests.

Moreover, the distinction between civil matters and criminal matters has been increasingly blurred. After all, collateral consequences from criminal matters impact crucial civil matters such as evictions (particularly from government-subsidized housing) and deportation. In addition, the same facts that give rise to civil matters can also lead to criminal prosecutions.[5] Thus, a distinction between the right to counsel in criminal matters, which can—in many instances—involve the threat of short-term incarceration, and that in civil matters, which can threaten one's home or the ability to remain in one's lifelong country of residence, is an increasingly meaningless distinction.

Four decades ago, the United States Supreme Court established a right to counsel for a person accused of a crime.[6] And over three decades ago, the New York Court of Appeals established a right to counsel in child custody matters.[7] Other important and fundamental human needs are routinely put in jeopardy in civil legal proceedings as well. To give full meaning to the promise of equal justice, to level the playing field, and to provide meaningful access to that equal

4. *See, e.g.*, COMMUNITY TRAINING AND RESOURCE CENTER AND CITY-WIDE TASK FORCE ON HOUSING COURT, HOUSING COURT, EVICTION AND HOMELESSNESS: THE COSTS AND BENEFITS OF ESTABLISHING A RIGHT TO COUNSEL iv (1993); Carroll Seron, *The Impact of Legal Counsel on Outcomes for Poor Tenants in New York City's Housing Court: Results of a Randomized Experiment*, 35 LAW & SOC'Y REV. 419, 421 (2001).

5. *See generally* McGregor Smyth, *Bridging the Gap: A Practical Guide to Civil-Defender Collaboration*, CLEARINGHOUSE REVIEW 56 (May-June 2003) (thoroughly discussing the collateral consequences of civil and criminal proceedings).

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

7. *In re* Ella R.B., 30 N.Y.2d 352 (N.Y. 1972).

justice for all, we as a society need to move toward a judicial system that is blind to income and assets, a system that allows people to obtain the assistance of counsel on matters for which a reasonable person with the means to hire counsel would choose to use counsel.

I.
CORE LEGAL PRINCIPLES SUPPORT A CIVIL RIGHT TO COUNSEL.

It is not surprising that many people think the indigent possess a right to counsel in civil matters such as evictions.[8] No wonder. Landlords are routinely represented by counsel familiar with the laws and the jargon of the courts, while tenants are routinely left *pro se*. There are persuasive legal arguments in favor of a right to counsel in civil matters that support what people believe out of their own sense of fairness. Indeed, the right to due process and the right to equal treatment are the sound constitutional underpinnings for a civil right to counsel. In addition, Article 11 of New York's Civil Practice Law and Rules ("CPLR") authorizes the Court to assign counsel in civil proceedings, a discretionary power that is not sufficiently exercised.

A. Fairness

Due process is, at its core, an intuitive notion: people are entitled to meaningful opportunities to be heard in court when they face losses of important interests. In *Mathews v Eldridge*,[9] the Supreme Court analyzed the "process due" as a function of three factors: (1) the interest at stake; (2) the difference that would be made by the protection sought; and, (3) the government's interest.[10] Applying these factors, a right to counsel is warranted in a variety of civil matters. Tenants facing eviction, for example, have important interests at stake,[11] and their counsel make important (often determinative) differences in the outcome of their proceedings. What's more, the government has a strong interest in curbing homelessness and assuring the fair administration of justice. All of these factors strongly mitigate in favor of a right to counsel for tenants facing eviction.

In contrast to *Gideon v. Wainwright*,[12] the Supreme Court has not been willing to extend the right to counsel across the board to many different categories of civil litigation, each which may have profound and lasting

8. DEBORAH L. RHODE, ACCESS TO JUSTICE 104 (2004); BELDON, RUSSONELLO & STEWART RESEARCH ASSOCS., NATIONAL SURVEY ON CIVIL LEGAL AID (Apr. 2000), *available at* http://www.nlada.org.

9. 424 U.S. 319 (1976).

10. *Id.* at 335 (citing Goldberg v. Kelly, 397 U.S. 254, 263–71 (1969)).

11. *See, e.g.*, Barnes v. Koch, 518 N.Y.S.2d 539, 542 (N.Y. Sup. Ct. 1987) (recognizing the importance of the right at stake in an eviction by analogizing it to New York's right to secure temporary emergency shelter).

12. *Gideon*, 372 U.S. at 335.

consequences. In *Lassiter v. Department of Social Services,*[13] for example, the Supreme Court refused to recognize a *prima facie* due process right to counsel in a most fundamental matter: the termination of parental rights.[14] However, state courts are free to interpret their constitutions' due process clauses independently of the federal courts' federal understanding of the federal constitution.[15] Indeed, under Chief Judge Judith S. Kaye's leadership, the New York Court of Appeals has demonstrated that New York courts can (and often do) decide that the right to due process requires greater protection under the New York State Constitution than that provided by the Supreme Court's interpretation of the federal constitution.[16]

Pursuant to New York State's due process mandate (and prior to the enactment of some of the statutory provisions discussed herein),[17] New York courts regularly ordered the appointment of counsel in a number of civil settings, including probation proceedings,[18] in which a person may lose the chance of freedom, and neglect proceedings, in which a person may lose the custody of a child.[19] In the latter context, the Court of Appeals has noted that parental rights may not be curtailed without "a meaningful opportunity to be heard, which in these circumstances[,] includes the assistance of counsel."[20] While both of these decisions were rendered as a matter of state and federal constitutional law prior to *Lassiter*, there is no reason that their explication of state constitutional law should not remain the same after *Lassiter*. Indeed, after *Lassiter*, a New York court found that a woman about to be involuntarily transferred to a nursing home had a constitutional right to counsel.[21] Thus, New York has a long-established

13. 452 U.S. 18 (1981).

14. *Id.* (involving termination of parental rights of a mother who was incarcerated at the time of the proceeding). *But see* Nicholson v. Williams, 203 F.Supp.2d 153 (E.D.N.Y. 2002) (finding right to counsel for victims of domestic violence whose children are removed from the home).

15. *See generally* William J. Brennan, *State Constitutions and the Protection of Individual Rights*, 90 Harv. L. Rev. 489, 502–503 (1977); *The Interpretation of State Constitutional Rights*, 95 HARV. L REV. 1324 (1982); *The Emergence of State Constitutional Law*, 63 TEX. L. REV. 959 (1985).

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

17. The text of the Due Process Clause in the New York Constitution, Article 1, Section 6, is identical to its federal counterpart.

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

19. *See In re Ella R.B.*, 285 N.E.2d at 288.

20. *In re* Guardianship and Custody of Ornieka J., 112 A.D.2d 78 (N.Y. App. Div. 1st Dep't 1985).

21. *In re* Application of St. Lukes-Roosevelt Hospital Center, 607 N.Y.S.2d 574 (N.Y. Sup. Ct. 1993) (finding constitutional right as in *Mathews*, *supra* note 9 and accompanying text). *See also* Lang v. Pataki, 707 N.Y.2d 90 (App. Div. 1st Dep't 2000) (due process basis for granting stay for purpose of getting counsel); Carlton v. Bayne, 740 N.Y.S.2d 785 (N.Y. Sup. Ct. 2002) (granting stay for getting a translator).

tradition of recognizing the importance of the right to counsel as a matter of the "process due" in the fair administration of justice.

B. Equal Treatment

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

Overall, New York's court system spends far more per-case dollars on court time and resources (on judges, court personnel, courtrooms, etc.) and on adjudicating disputes between those wealthy enough to afford counsel, than it spends on proceedings that more likely involve unrepresented indigent litigants (*i.e.*, eviction and other deprivation proceedings). For example, the New York Supreme Court and Court of Claims involve larger courtrooms filled with wealthier litigants, and, accordingly, judges are paid more per case to engage in time-consuming processes. Such involved civil disputes cost the system far more per dispute than Housing Court eviction proceedings—an often one-sided, truncated, and rapidly-processed form of litigation—costs taxpayers. For instance, while New York City's Housing Court handled 19.7 percent of all civil cases filed in New York State in 2004, it was allocated a mere 7 percent of the system's nonjudicial staff.[22] The disparity of public resources devoted to eviction proceedings is evidence that courts deny unrepresented litigants equal treatment.[23]

Society subsidizes the cost of legal representation for people of means, *regardless* of the seriousness of the dispute, while, at the same time, it denies legal representation to those with lower incomes in disputes involving basic human necessities. For example, for more than a half-century, under the Internal Revenue Code, the taxpayer has generally been able to deduct legal fees (other than those which are incurred for personal reasons, such as for perfection of title to property, or that which must be capitalized) from taxable income.[24] This tax deduction leads to countless millions, if not billions, of dollars of annual foregone tax revenue,[25] which ultimately benefits (in effect, subsidizes) those of

22. Interview with Hon. Fern Fisher, Administrative Judge of the Civil Court of the City of New York (Feb. 25, 2005) (notes on file with author).

23. To address this disparity, Wilhelm Joseph, Executive Director of the Legal Aid Bureau of Maryland, has suggested that filing fees in civil litigation in which the amount in dispute exceeds one million dollars could be raised significantly to provide free indigent legal assistance. *See* Wilhelm Joseph, *The Right to Counsel in Civil Cases*, JUSTICE JOURNAL (Mar. 2004) (on file with author).

24. I.R.C. §§ 162, 212 (1954) Thus, imposing a "sales" tax of one percent on legal services, where the billable hour exceeds 200 dollars, could generate an enormous amount of revenue to support legal services for the indigent).

25. According to the 1999 Legal Services Corporation Annual Report, local legal service agencies received a combined total of 561 million dollars in federal, state, local, and IOLTA funds, foundation grants, and other private donations in the 1998 fiscal year. *See* Legal Services Corp., *1999 Annual Report* (on file with author). A half dozen law firms in the United States each took in

means and disparately treats low-income litigants who may not be able to afford counsel yet whose disputes have a greater chance of resulting in deprivation of basic human needs.

To make successful legal claims based on disparate treatment and disparate impact would require the support of in depth empirical research and further, comprehensive legal analyses. However, these are worthy avenues to pursue because of the obvious inequity of a justice system in which individuals are denied access to meaningful opportunities to be heard in the face of severe losses of important interests, and all merely because they are too poor to pay for an inroad to justice.

C. New York CPLR Article 11

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

II.
THE UNITED STATES IS OUT OF SYNCH WITH OTHER WESTERN DEMOCRACIES.

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

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more than 600 million dollars that year. Roger Parloff, *Skadden: A Flexible Firm Breaks the Billion Dollar Barrier*, AMERICAN LAWYER 88 (July 2000). For further discussion of these and other similarly revealing statistics, see Hon. Earl Johnson, Jr., *Equal Access To Justice: Comparing Access To Justice In The United States And Other Industrial Democracies*, 24 FORDHAM INT'L L.J. 83 (2000).

26. *See* N.Y. C.P.L.R. § 1102 (McKinney 2005); In re Smiley, 36 N.Y.2d 433 (1975) ("[t]he courts have a broad discretionary power to assign counsel without compensation in a proper case").

27. Based on my observation, there is no documentation of the extent to which counsel is assigned under N.Y. CPLR Article 11. Probable reasons for the limited use of the power to assign counsel are that litigants and judges are not sufficiently familiar with the existence of the provision and that the provision does not authorize payment.

28. *See* N.Y. C.P.L.R. § 1102(a) ("The court in its order permitting a person to proceed as a poor person may provide an attorney.").

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

other countries in addressing the right to counsel in civil litigation is instructive. A right to counsel in complex civil legal matters for those who cannot afford to pay for counsel is now recognized in many other countries.[30]

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

> [t]he question whether the provision of legal aid was necessary for a fair hearing had to be determined on the basis of the particular facts and circumstances of each case and depended inter alia upon the importance of what was at stake for the applicant in the proceedings, the complexity of the relevant law and procedure and the applicant's capacity to represent him or herself effectively.[34]

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

The concept of the right to counsel in civil cases has been included in almost

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30. The Honorable Earl Johnson, Jr., Justice of the California Court of Appeal, has been tracing access to justice in other countries and comparing practices elsewhere to those in the United States for years. *See, e.g.*, MAURO CAPPELLETTI, JAMES GORDLEY & HON. EARL JOHNSON, JR., TOWARD EQUAL JUSTICE: A COMPARATIVE STUDY OF LEGAL AID IN MODERN SOCIETIES (1981); Hon. Earl Johnson, Jr., *Will Gideon's Trumpet Sound a New Melody? The Globalization of Constitutional Values and Its Implications for a Right to Equal Justice in Civil Cases*, 2 SEATTLE J. FOR SOC. JUST. 201, 205 (2003). Johnson has long found that the United States comes up short. *See* Hon. Earl Johnson, Jr. & Elizabeth Schwartz, *Beyond Payne: The Case for a Legally Enforceable Right to Representation in Civil Cases for Indigent California Litigants*, 11 LOY. L.A. L. REV. 249, 249–50 (1978) ("[a]t some point, Americans will look back and ask how concepts like 'due process,' 'equal protection of the law[,]' and 'equal justice under law' were anything but hollow phrases, while our society still tolerated the denial of counsel to low-income civil litigants").

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

32. Convention for the Protection for Human Rights and Fundamental Freedoms, art. 6, ¶ 1, Nov. 4, 1950, 213 U.N.T.S. 222 ("In the determination of his civil rights and obligations . . . everyone is entitled to a fair and public hearing . . .").

33. Steel & Morris v. United Kingdom, Eur. Ct. H.R., *available at* http://www.echr.coe.int (last visited Apr. 11, 2006).

34. *Id.*

35. *Id.*

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

Europe is not alone in recognizing that access to counsel for low-income civil litigants is a matter of right. In 1999, the Supreme Court of Canada held that there was a constitutional right to counsel in the fair hearing requirement of the Canadian Constitution—the Charter of Rights and Freedoms.[39] In *J.G. v. New Brunswick*,[40] the court held that even if the state is continuously trying to assert custody over a child for a period of six additional months, a mother has the right to free counsel.[41] A right to counsel has also been recognized in eviction-type proceedings in post-Apartheid South Africa. In 2001, the Land Claims Court of South Africa, which is charged with the responsibility of handling certain eviction actions, held that "the state is under a duty to provide [such] legal representation or legal aid [to indigent tenants] through mechanisms selected by it."[42]

The very same social contract theory of the Enlightenment that informs the European, Canadian and South African principles also found its way into the Declaration of Independence and into the United States Constitution. While the European Court refers to a right to a "fair hearing," the concept is indistinguishable from the right to "due process" in the United States[43] Thus, despite the difference in the language, the fundamental import of these concepts remains substantially similar, if not identical.[44]

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36. *Id.*

37. Francis William O'Brien, *Why Not Appointed Counsel in Civil Cases? The Swiss Approach*, 28 OHIO ST. L. J. 1, 5 (1967) (citing Judgment of Oct. 8, 1937 (No. 63) 1 Arrêts du Tribunal Fédéral 209 (Switz.)).

38. Decision of June 17, 1953 (No. 26), 2 Entscheidungen des Bundesverfassungsgcrichts 336–41 (1953). *See* CAPPELLETTI, GORDLEY & JOHNSON, JR., *supra* note 30, at 700 (translating opinion into English).

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

40. J.G. v. New Brunswick, [1999] 177 D.L.R. (4th) 124, 131.

41. *Id.*

42. Nkuzi Dev. Assoc. v. Gov't of the Repub. of South Africa, LCC 10/01, 05 (Land Claims Ct. S. Afr. 2001), *available at* http:// www.server.law.wits.ac.za/lcc/ (last visited Apr. 8, 2006).

43. For instance, Justice Oliver Wendell Holmes observed that "[w]hatever disagreement there may be as to the scope of the phrase 'due process of law,' there can be no doubt that it embraces the fundamental conception of a fair trial, with opportunity to be heard." Frank v. Mangum, 237 U.S. 309, 347 (1915) (Holmes, J., dissenting).

44. *Id.* at 208.

While the United States Supreme Court has been reluctant to rely on foreign decisions in the past, former Justice O'Connor, and Justices Kennedy and Ginsburg have all indicated a desire to heed such decisions.[45] Furthermore, the Supreme Court in *Lawrence v. Texas*[46] relied on foreign decisions, particularly those of the European Court.[47] And recently, the Supreme Court relied on the evolving standard of decency around the world, not merely the evolving view in the United States, when it found the juvenile death penalty unconstitutional in *Roper v. Simmons*.[48] While the Court did not find the international view controlling, it did find the views of the international community relevant.[49]

We may yet be a ways off from domestic application of international human rights laws involving social economic and cultural rights in this country,[50] but the extent to which the rest of the world is recognizing a civil right to counsel should be a persuasive (and embarrassing) fact for a nation that thinks of itself as a symbol of democracy and the arbiter of the rule of law.

III.
A CIVIL RIGHT TO COUNSEL MUST BE LEGALLY ENFORCEABLE: FUNDING FOR LEGAL ASSISTANCE PROGRAMS DOES NOT, BY ITSELF, SOLVE THE PROBLEM.

The civil right to counsel must be an enforceable right that can be exercised by individuals who need counsel. Legal assistance programs for the indigent are important vehicles for providing counsel. However, if the need for counsel is merely reflected as increased funding for legal assistance programs, the core point will have been missed. Funding alone is not the complete answer. Legal assistance programs must—out of necessity—operate in their own institutional self-interest; they must secure sufficient funds to support the overall costs of their services (*i.e.*, personnel, space, and administrative and other costs). To survive, legal assistance programs must be able to say "no" to heavier caseloads if they do not have the resources to provide assistance. Alternatively, they must be in a position to demand additional funding when they are called upon to address additional need. Without a mandated right to counsel, funding for such programs is subject to legislative whim. And when funding is outright inadequate or reduced over time, services cannot span the panoply of

45. *Id.* at 224.

46. 539 U.S. 558 (2003) (finding a Texas statute criminalizing consensual sex between men unconstitutional).

47. *Id.*

48. 543 U.S. 551 (2005). *See also* Trop v. Dulles, 356 U.S. 86, 102–03 (1958) (plurality opinion) ("[t]he civilized nations of the world are in virtual unanimity that statelessness is not to be imposed as punishment for crime"); Atkins v. Virginia, 536 U.S. 304 (2002).

49. *Roper*, 543 U.S. at 561–63.

50. *See, e.g.*, Philip Alston, *The U.S. and the Right to Housing: A Funny Thing Happened on the Way to the Forum*, 1 EUR. HUM. RTS. L. REV. 120, 120–133 (1996).

client needs.[51]

When access to counsel is a right, values change. When counsel is a right, sitting judges charged with the administration of justice can actually administer justice: they are able to appoint counsel in order to ensure a fair proceeding when counsel is not otherwise obtainable by the litigant, and they are able to ensure that the counsel who appear before them are competent.[52] If counsel is a right, an entitlement, the litigant will be able to press the court for such representation, by, among other things, asking that the court assign counsel and arguing for a stay of further proceedings until counsel has an opportunity to appear. In the absence of a right, access to counsel is limited by available resources.

IV.
COLLABORATIONS OF THE LEGAL COMMUNITY CAN MAKE POSITIVE CHANGE.[53]

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

One important collaboration of the New York legal community to advance access to justice is LawHelpNY[54] and CourtHelp. LawHelp is a collaborative web site of legal services and pro bono organizations[55] designed to pro-

51. Of course, a recognized right to counsel does not automatically guarantee the appropriation of funds sufficient to procure an adequate quantity and quality of counsel. Yet, it does provide an enforceable legal claim if the right has not been adequately funded. *See, e.g.*, NYCLA v. State, 763 N.Y.S.2d 397 (N.Y. Sup. Ct. 2003) *appeal w'drwn*, 767 N.Y.S.2d 603 (N.Y.A.D. App. Div. 1st Dep't 2003) (finding New York's statutory caps on assigned counsel rates for criminal court and family court work violated constitutional and statutory right to meaningful and effective representation, for caps resulted in an insufficient number of assigned panel attorneys available, thereby denying litigants meaningful representation and seriously impairing the courts' ability to function and process cases in a timely fashion).

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

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

54. See http://www.lawhelp/ny.org (last visited Apr. 11, 2006).

55. Collaborative partners in LawHelp include ProBonoNet, the City Bar Fund of the Association of the Bar of the City of New York, Legal Services for New York City, the Legal Aid Society of New York City, the Legal Aid Society of Northeastern New York, the Empire Justice Center and Legal Assistance of Western New York. See http://www.lawhelp/ny.org (last visited

vide referral and self-help information to low-income individuals. Using the LawHelp template, the Office of Court Administration's public information web site, CourtHelp, provides information about the court system and links to LawHelp. This collaborative effort of the pro bono and legal services bar and the court system has streamlined access to crucial information, has harnessed and made accessible to the community the legal education work of scores of advocates throughout the state, and has used technology in a creative and effective way to inform and empower litigants.

No collaboration has been more effective at advancing access to justice in New York than the relationship between the pro bono bar and legal services organizations. Over the course of the last twenty-five years, New York has developed a strong pro bono culture in which volunteers donate tens of thousands of hours annually, worth millions-upon-millions of dollars, to pro bono work that is done shoulder-to-shoulder with legal services offices.[56] This work has vastly leveraged the resources available for civil legal services and has built a solid constituency that understands—first hand—the enormous difference made by counsel in the lives of the indigent.[57]

CONCLUSION

Our system of justice suffers from a fundamental contradiction: courthouses are emblazoned with the words, "Equal Justice for All," yet significant portions of the population—those who cannot afford or secure counsel to represent them in legal matters that affect their fundamental interests—are effectively barred from meaningful access to the courts. When we talk about "access to justice," we cannot lose sight of this key fact. New York has a wealth of legal talent and goodwill that, if turned to the collaborative task of securing a civil right to counsel, will inevitably succeed in making that courthouse motto true.

Apr. 11, 2006).

56. *See, e.g.*, William Dean, *The Role of the Private Bar*, 25 FORDHAM URB. L.J. 865 (1998) (reporting that twenty-eight New York City law firms reported that they had provided a total of 395,681 *pro bono* hours during 1997).

57. Support for a civil right to counsel by the private bar is growing. On March 14, 2005, the New York County Lawyers' Association passed a resolution endorsing:

> as a matter of principle, a right to the appointment of free counsel for all tenants in Housing Court unable to afford counsel, and support[ing] initiatives to establish a right to the appointment of free counsel for such tenants in Housing Court, including initiatives that recognize the right for particularly vulnerable sub-populations of tenants such as the elderly.

N.Y. County Lawyers' Assoc., *Resolution on Right to Counsel in Housing Court* (Mar. 14, 2004), *available at* www.nycla.org (last visited Apr. 1, 2005).

PART THREE:

SELECTED TOPICS ON OFFENDER REENTRY AND COLLATERAL CONSEQUENCES