A Civil Right to Counsel—The Time Has Come for Connecticut to Provide Access to Justice for Connecticut's Economically Disadvantaged

Part One

Connecticut Pro Bono NETWORK

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During the 50 years since I started at the Columbus School of Law at the Catholic University of America, I have witnessed many people of good will endeavor mightily to improve access to justice for our nation's economically disadvantaged. Building on the early efforts of Reginald Heber Smith in Massachusetts and the Connecticut Legal Aid Plan (1915) promoted by Thomas Hewes and others, the Ford Foundation in the early 1960s provided legal aid development grants to New Haven (New Haven Legal Assistance), Boston (Action for Boston Community Development), New York (Mobilization for Youth),[1] and Washington, D.C. (United Planning Organization) in conjunction with multi-purpose social service initiatives.[2]

Professor Joseph Goldstein[3] of the Yale Law School, acting as a consultant to the Ford Foundation, convinced the foundation that human renewal in the form of universal access to justice was as important as urban renewal. Building on the early and impressive success of the foundation's early grants, in 1964, the federal government, as part of passage of the Economic Opportunity Act declaring war on poverty, commenced funding legal services for the poor on a national basis. By 1968, all states except North Dakota had at least one legal services program in place.[4] The goal of all of these efforts was to open our nation's justice system to all, irrespective of the lack of means to hire a lawyer. The message was a drum beat that access to justice was a fundamental American right.

In 1965, I started working as a law student at a Washington, D.C. neighborhood office run by Neighborhood Legal Services.[5] Moving on to work with migrant farm workers in California's Central Valley at Fresno County Legal Services and then back east to New Haven Legal Assistance, the fundamental issues of lack of access to justice remained the same. By the early 1970s it became clear that there were far too many denied access to justice based solely on their lack of economic means for the legal aid lawyers to service, despite their herculean work. It was also crystal clear that our state and local governments lacked the will to face and end the crisis. Fast forward to 2014—almost 50 years later the crisis continues and, if anything, has gotten worse.

Prior *Connecticut Lawyer* "Time to Go Pro Bono" columns have described the extent of the crisis in Connecticut using statistics. According to the Connecticut Bar Foundation's research, only one in four low income people in Connecticut with a civil legal problem obtained any outside help.[6] Statewide Legal Services reports that for FY 2012-13 more than 15,000 people in Connecticut were denied legal services. The Connecticut Judicial Branch reports that for FY 2012-13, 85 percent of family cases had at least one self-represented party. Justice Earl Johnson, Jr., California Court of Appeals (ret.), probably put it best: "Poor people have access to American courts in the same sense that Christians thrown to the lions had access to the Coliseum."

If we are to believe Connecticut's Constitution, Article 1, Section 10[7] and our Connecticut Appellate Courts,[8] access to justice in Connecticut is a fundamental right that does not depend on whether the case is civil or criminal. As a starting point, Connecticut law requires everyone, including the economically disadvantaged, to resolve numerous disputes—divorce, custody, eviction, automobile repossession, etc.—in our court system.

The consequences of the lack of access to justice impose significant costs on Connecticut taxpayers. For example, victims of domestic violence or wrongfully evicted tenants often end up in government funded hospitals, homeless shelters, or other subsidized housing. The worker whose automobile is wrongfully repossessed loses his job, stops paying taxes, and sends his family to receive governmental subsidies. The same is true for workers who have been wrongfully denied their wages. The examples are endless. Is it better to use Connecticut's resources for increased housing, food and cash assistance, increased police services, subsidized housing and shelter, or to face head-on the obvious reality that providing the economically disadvan-

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taged with efficient, cost-effective legal assistance lessens the human toll and saves taxpayers money?

Lest we think that all governmental bodies are so shortsighted, let's look around the world. All member countries in the European Union have had a civil right to counsel in civil cases for many years.[9] In the 2012 Rule of Law Index, the United States was ranked near the bottom in access to civil justice in relation to similarly situated counties by the World Justice Project.[10] The Universal Declaration of Human Rights has been regularly interpreted to ensure a civil right of counsel in appropriate cases.[11] Ms. Davis chronicles the European Court of Human Rights' exploration of the civil right to counsel in several cases. In *Airey v. Ireland*, 32 Eur. Ct. H.R. Ser. A, 12-14 (1979), the court ordered that Ireland provide civil counsel to Ms. Airey in a legal separation matter and create a legal aid scheme to address civil representation needs. In *Alkan v. Turkey*, App. No. 17725-07 (Eur. Ct. H.R. 2012), the court, applying *Airey*, ordered appointed counsel in a matter where an economically disadvantaged person sought damages for actions occurring during military service. In *Steel and Morris v. United Kingdom*, 41 Eur. Ct. H.R. (pt. 3) 403,414 (2005), the court ruled that protestors from Greenpeace were entitled to appointed counsel in the suit that the McDonald's Corporation brought against them about their claims that McDonald's food was unhealthy and its labor practices exploitative.

However, there is no comparable civil right to counsel in Connecticut. **CL**

[To be continued in the next issue.]

Notes

1. Professor Stephen Wizner, a Yale law professor and early MFY staff attorney, is the co-author of the February 15, 2013 Report to the Connecticut Judicial Branch Access to Justice Commission.
2. *See* generally, National Legal Aid and Defender Association, History of Civil Legal Aid at www.NLADA.org.
3. Professor Goldstein was long active on the Board of Directors at New Haven Legal Assistance Association.
4. *See* footnote 2, *supra*.
5. This office, as well as much of the surrounding neighborhood, was destroyed in the riots in Washington in April 1968, following the assassination of Dr. Martin Luther King, Jr.
6. See "Civil Legal Needs Among Low-Income Households in Connecticut," December 2008, pp. 6, 8, 22, 27, available from the Connecticut Bar Foundation.
7. "All courts shall be open, and every person, for an injury done to him in his person, property or reputation, shall have remedy by due course of law, and right and justice administered without sale, denial or delay."
8. *Wilson v. Commissioner of Correction*, 104 Conn. App. 224, 241 (2007)
9. Pollack, "It's All About Justice: Gideon and the Right to Counsel in Civil Cases, *Human Rights*, Vol. 39, No. 4., April 2013.
10. *See* footnote 9, *supra*.
11. Davis, "Participation, Equality and the Civil Right to Counsel," *Yale Law Journal*, Volume 122, No. 8 (Symposium Issue), 2260, 2274, June 2013. Both Ms. Davis' article and the entire Symposium Issue are worth the read.

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the failure to address the issue sua sponte could have led to inconsistency or confusion in the case law, the Supreme Court concluded that the appellate court had not abused its discretion in raising the issue sua sponte.

To the extent that one purpose of *Blumberg* is to convince the reader that, historically, appellate courts in this state have raised—and decided cases on—unbriefed issues, the Supreme Court succeeded. After reading the laundry list of circumstances in which the Court has granted review to unpreserved claims, it's difficult to see that there exists any consistent limitation on the review of unpreserved claims—as long as the parties are given the opportunity to brief the issue. The question that *Blumberg* does not fully answer, however, is, if we truly believe in the adversarial system, *why* should a party that obtains a favorable ruling from a trial court—and spent a pretty penny on attorneys' fees in the process—be foiled on appeal by an issue-spotter wearing a robe?

Though the Court did not fully address that question, after *Blumberg* there can be no doubt that appellate practitioners face the prospect of defeating the claims not only of opposing counsel, but of a (potentially) adversarial court. To steal from an oft-used analogy, *Blumberg* makes clear that a Connecticut appellate judge is most certainly *not* an "umpire"—unless he's an umpire that occasionally tells the catcher what pitch to call. **CL**