



ACCESS TO JUSTICE JOURNAL

VOLUME 1, No. 1
FALL 2013

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201 South College Street Suite 600
Charlotte, North Carolina 28244

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Letter from Editor

Access to justice, we all deserve it but everyone does not have it. Access can be defined as “an ability to communicate with [courts].” In the criminal context, some defendants have a right to counsel that provides them access – the ability to communicate with courts through a lawyer. In the civil context, there is a movement towards providing that same access – legal counsel as a matter of right, at public expense, to low income persons in adversarial proceedings where shelter, sustenance, safety, health, or child custody are at stake. This civil right to counsel is commonly referred to as civil *Gideon*.

This inaugural and symposium issue of the *Access to Justice Journal (AtJJ)* is dedicated to the civil *Gideon* movement. During the *AtJJ*'s Inaugural Symposium in October 2012, Gene Nichol, John Pollock, Susan Patterson, Kenneth Schorr and David Udell discussed their perspectives on the movement and the need for its growth. Until such civil right to counsel is established, it is important for law students to provide pro bono services to assist low income persons that find themselves alone in court, and at risk of losing any of their basic human needs. As such, this issue also features a published book chapter by Cynthia Adcock that focuses on the history of law student pro bono service.

I am pleased to present this inaugural edition of the *Access to Justice Journal*. I would like to thank the *AtJJ* staff and faculty advisors for their dedication and contributions. Thank you, the reader, for taking time to explore our issue. I hope you will share it with your family, friends, and colleagues. If you would like to contribute to the journal or have general comments, please email me at pulliaml@students.charlottelaw.edu.

Sincerely,
Lachelle H. Pulliam
J.D. Candidate, 2014
Editor-in-Chief



CHARLOTTE SCHOOL *of* LAW

THE INAUGURAL ACCESS TO JUSTICE JOURNAL SYMPOSIUM AN INTRODUCTION TO “THE FUTURE OF THE CIVIL GIDEON MOVEMENT—THE RIGHT TO CIVIL COUNSEL FOR THOSE MOST VULNERABLE IN SOCIETY”

Compiled by Adria R. Crannell¹

The *Access to Justice Journal (AtJJ)* held its inaugural Symposium during Pro Bono Week, October 23-24, 2012, entitled The Future of the Civil Gideon Movement—The Right to Civil Counsel for Those Most Vulnerable in Society.

The Symposium began with Lindsey Vawter, the *AtJJ*'s 2012 - 2013 Editor-in-Chief, thanking the Faculty Advisory Board, particularly Professors Cindy Adcock and Sean Lew. She also thanked Symposium Editor, Bianca Sahni; *AtJJ*'s Executive and Associate Editors; Kier Duncan for her administrative support; Jenny Jolliet for designing the Symposium flyer; and the *Charlotte Law Review*, especially 2012-2013 Editor-in-Chief, Karen Good, for their help and support early on. Ms. Vawter described the *AtJJ* as “a Charlotte School of Law (CSL) student-run journal whose main purpose is to publish scholarly and practice-oriented works focused on legal topics concerning civil access to justice.” The Symposium brought together students, professors, scholars, and members of the Bar to discuss the benefits of creating a civil right to counsel and problems with implementing that right once it is created.

Following Ms. Vawter, interim Dean Denise Spriggs welcomed panel members, attorney guests, students, faculty, and staff. Dean Spriggs also congratulated the *AtJJ* for establishing CSL's second academic journal, working hard to put the Symposium together, and embodying

¹ Juris Doctorate, May 2013, Charlotte School of Law.

CSL's core mission pillar of serving the underserved. Dean Spriggs continued by recognizing how the right to civil counsel is "critical to expanding legal representation to those with the most need." Dean Spriggs closed by encouraging the guests and students to ask insightful questions, engage in critical thinking, and bring a zest for representing the underserved.

Ms. Vawter returned to the stage and introduced the Civil Gideon Movement by explaining how the Supreme Court's 1963 landmark decision in *Gideon v. Wainwright*² "established the constitutional right to counsel in criminal cases." Ms. Vawter told the audience the disdainful truth that although criminal and civil cases can be similarly complex and the stakes similarly high, no equivalent right exists for appointed counsel in civil cases. Consequently, disadvantaged citizens are forced to navigate the legal system alone.

Next, Ms. Vawter discussed the American Bar Association's (ABA) 2006 Resolution 112A "urg[ing] federal, state, and territorial governments to provide legal counsel as a matter of right at public expense to low income persons in those categories of adversarial proceedings where basic human needs are at stake, such as those involving shelter, sustenance, safety, health or child custody."³ Even though the ABA unanimously passed the resolution, Ms. Vawter recognized that the ranks of pro-se parties are growing and struggling. To answer the question "why Civil Gideon should matter to attorneys as a profession," Ms. Vawter introduced distinguished keynote speaker, University of North Carolina School of Law Professor and Director of the Center on Poverty, Work & Opportunity, Gene Nichol.

² *Gideon v. Wainwright*, 372 U.S. 335 (1963) (unanimous).

³ Task Force on Access to Civil Justice, *Report to the House of Deles*. 2006 A.B.A. 1, available at http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_06A112A.aut_hcheckdam.pdf. The House of Delegates unanimously adopted the report in A.B.A. Res. 112A.



CHARLOTTE SCHOOL *of* LAW

THE INAUGURAL ACCESS TO JUSTICE JOURNAL SYMPOSIUM
“THE FUTURE OF THE CIVIL GIDEON MOVEMENT—THE RIGHT TO CIVIL COUNSEL
FOR THOSE MOST VULNERABLE IN SOCIETY”

KEYNOTE ADDRESS OF GENE NICHOL:
“OVERTURNING CURRENT NOTIONS OF DUE PROCESS—IT IS IMPOSSIBLE TO
SQUARE WHAT WE SAY WITH WHAT WE DO”

Compiled by Bianca Sahni¹

Why should Civil Gideon matter to us as a legal community? To make the case for Civil Gideon, the *Access to Justice Journal (AtJJ)* invited Mr. Gene Nichol, law professor and Director of the Center on Poverty, Work and Opportunity at the University of North Carolina at Chapel Hill (UNC) to share his thoughts. Mr. Nichol has been involved in public affairs and civil law for more than twenty years. During that time, he has enjoyed wide publication in law reviews, newspapers, and professional journals. Mr. Nichol has received accolades for his active role in public service, and is a luminary in the area of justice and equality. As a mentor and a role model, Mr. Nichol is a true champion of change. The following, with minimal editing, are Gene Nichol's remarks.

Mr. Nichol began the discussion with a few jovial remarks. Then, Mr. Nichol paid tribute to Mr. William Friday of UNC for his great work in combating the challenges of equal justice: “When we think of the challenges of equal justice, of access and full membership, full participation. . . . Carolina’s strongest advocate for the marginalized, President William Friday has been our one-man multi-generational anti-poverty core for ninety years.”

¹ Candidate for Juris Doctorate, May 2014, Charlotte School of Law.

Next, Mr. Nichol congratulated Charlotte School of Law (CSL) on “its burgeoning commitment to questions of access to justice.” Mr. Nichol stated, “it would be easy to assume that the corrosive denial of equal access to the civil justice system far and away, [is] the largest single transgression of the American judicial system. It would be easier to assume that it worked its way potently to the core of the variegated, three-year law school curriculum that dominates all of our law schools nationally.”

However, Mr. Nichol stated that while it is easy to assume that law schools would focus on these notable gaps in our justice system, this is not the case. Mr. Nichol continued, “deconstruction, cognate theory, anthropology, economic modeling, religious hermeneutics, of course, we all are heavily focused on these central matters. But rank, blatant, longstanding, and undeniable exclusion of the poor from the civil justice system – not so much. The poor, as it is said, will always be with us.”

Nevertheless, Mr. Nichol stated that “most legal education occurs as if there were no poor and near poor persons in America.” Consequently, Mr. Nichol lamented that “the effective and pervasive exclusion is swept unceremoniously aside. In the halls of the legal academy, poor folks are allowed to disappear – as they typically do from the bench and from the bar.” Then, Mr. Nichol pointed to the reality that “[e]conomic justice plays virtually no role in the exploration and aspiration of the American judicial system. Economic privilege sits secure center stage.”

“But I get ahead of myself,” Mr. Nichol exclaimed while turning the discussion to a broader perspective on equal justice. “I’ve been asked to explore a challenging commitment to equal justice. I am delighted to do that. In truth, I’m glad to have an important and challenging topic to explore, even if it rankles.” Mr. Nichol has served in the capacity of a law school dean or a university president for nearly three decades. During those long tenures, he was surprised how

often deans and presidents were called on, not to discuss important matters, but to give what he refers to as “warm and mindless remarks.” Mr. Nichol joked, “[y]ou know the drill – speeches to touch the affections, and maybe, more importantly, the pocketbooks of various alumni and friends and their respective institutions, never to say anything controversial, or strident, or interesting, or worth listening to.”

Mr. Nichol added, “I was surprised how big a duty giving ‘warm and mindless remarks’ was for the position of university president. I was even more surprised when my colleagues started saying almost euphorically that I was actually very good at giving warm and mindless remarks, and I’m something of a natural at it. So notice that today, this afternoon, I will depart from my usual habits and I will reportedly go on to my sharper talents: I’m going to talk about some things that matter. But, if in a few minutes I forget myself and start asking you for money, please forgive me, old habits die – hard.

“I thought, as I considered exploring this right to counsel, that I should confess another shortcoming: I live just at the edge of Durham County, North Carolina, thankfully on the Chapel Hill side. And here I should say that means my neighborhood is famous not only for obvious evils like Mike Krzyzewski, but even more pernicious sins against humanity like the famed and odious United States Supreme Court decision in *Lassiter v. Social Services of Durham County, North Carolina*² – effectively de-constitutionalizing the question of access to civil justice in the United States. We didn’t write the opinion, and I admit that, but we did offer the occasion. So I begin on shaky ground and I’ve got a lot to make up for it.

Mr. Nichol continued by prompting a question: “What then is all the fuss? What are we here exploring? What is the deal with access to justice? Let me start with the obvious.” To

² 452 U.S. 18, 31-32 (1981) (5-4 decision).

illustrate America's hypocrisy, he stated, "We carved 'equal justice under law' on our courthouse walls. It is the cornerstone of our system of adjudication. We swear fealty to it, all of us, every day. For a half a century, we've announced, as the fundamental principle of American constitutional law, that there can be no justice for the kind of trial a person gets. It depends upon the amount of money that he has.³ But what we do is impossible to square with what we say."

"Lawyers cost money; some have it, lots don't. Yet, unlike many advanced industrial nations, and unlike our own criminal justice system, we do not recognize those rights to representation in civil cases." Quoting U.S. Attorney General Eric Holder, Mr. Nichol reported that "there remains no guaranteed right to counsel in the civil context. The day has not arrived when all of our citizens can access legal help without having to wait, and to sacrifice, and to worry, simply to be rejected or marginalized and ignored. . . . This is unconscionable, the Court claims, and to all Americans it must be viewed as unacceptable.⁴

Next, Mr. Nichol provided the audience with some astonishing statistics. According to Mr. Nichol, "less than one percent of our total expenditure for lawyers in the United States goes towards services for the poor.⁵ Legal aid budgets are capped at levels making effective representation of the poor a statistical impossibility.⁶ Even at that, they've been cut by large margins over the past three decades, and they are being cut further still all over the nation as we speak, though we have more poor people in the United States this very afternoon than ever before in our nation's long history.⁷

³ Griffin v. Illinois, 351 U.S. 12, 19 (1956).

⁴ Justice News, DOJ, Attorney General Eric Holder Speaks at the Legal Aid Society of Cleveland Annual Luncheon (Sept. 28, 2012), <http://www.justice.gov/iso/opa/ag/speeches/2012/ag-speech-1209282.html>.

⁵ See Robert J. Rhudy, *Comparing Legal Services to the Poor in the United States with Other Western Countries: Some Preliminary Lessons*, 5 MD. J. CONTEMP. LEGAL ISSUES 223, 236-38 (1994) (describing the unmet needs of the poor); see Deborah L. Rhode, *Access To Justice*, 69 FORDHAM L. REV. 1785, 1788 n.10 (2001) (elaborating on governmental statistics regarding budgets appropriated to the Legal Services Corporation).

⁶ Rhode, *supra* note 5, at 1785.

⁷ See *id.* at 1819 n.1.

Then, Mr. Nichol discussed empirical data found in the Legal Services Corporation Pro Bono Task Force Report.⁸ Mr. Nichol explained that the Pro Bono Task Force outlines what it considers a perfect storm of exclusion.⁹ After the past five years of recession, explosions of poverty, and increased demand, legal aid societies are facing catastrophic numbers. The Task Force Report found that over 61 million Americans now qualify for legal aid, reaching above 10 million in the last half -decade.¹⁰

“At least fifty percent of eligible seekers are turned away from our strained legal aid offices.¹¹ As demand has risen, the combined funding for the Legal Services Corporation for federal, state, local, and other sources have dropped from \$960 million to \$878 million.¹² Last fall, budget cuts forced Legal Aid of North Carolina to shut down three field offices, and eliminate thirty positions, dramatically diminishing [its] services in eleven counties.¹³ We have one lawyer for about every 400 persons generally and one legal services lawyer for every 7,000 people living in poverty.¹⁴ We fence folks out further by creating categories of unworthy poor, placing restrictions on what would be the most efficient and effective avenues of representation.

Mr. Nichol reported, “study after study shows that even after the heroic work of the legal aid lawyers and the daunting efforts of pro bono lawyers, at least eighty percent of the legal need of the poor and the near poor in the United States is unmet in North Carolina; in Mecklenburg County; in the south; and in the country at large. It is almost as bleak for middle-class Americans: the New York State Bar study found that we leave the poor unrepresented on the

⁸ Pro Bono Task Force, Legal Servs. Corp., Report of the Pro Bono Task Force (2012), *available at* http://www.lsc.gov/sites/default/files/LSC/lscgov4/PBTF_%20Report_FINAL.pdf.

⁹ *Id.* at 1-2.

¹⁰ John G. Levi, *Losing Access to Legal Aid*, RALEIGH NEWS & OBSERVER, Oct. 1, 2012, <http://www.newsobserver.com/2012/10/01/2375641/losing-access-to-legal-aid.html>.

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ Thomas Lambeth and Gene Nichol, *Access to Justice*, 13 N.C. STATE BAR J. 8, 11-12 (Spring 2008), www.ncbar.com/journal/archive/journal_13.1.pdf.

most crushing issues of life—divorce, child custody, domestic violence, education, housing, benefits disputes. We think it natural that a commercial dispute between battling corporations takes six months to try while determining the fate of an abandoned child is done in sixty seconds. What passes for civil justice among the have-nots is stunning.

Next, Mr. Nichol discussed the tattered state of the right to counsel in criminal matters. According to Mr. Nichol, “we trivialize the right to counsel that we have declared. Public defenders have crushing caseloads, rates of compensation for appointed lawyers are often laughable, and \$1,000 caps in felony cases are common. Competitive bid schemes across the country can make it worse, leading to ‘meet‘em, greet‘em and plead‘em’ defense machines. We’ve developed embarrassing rules of constitutional effectiveness that Deborah Rhode calls ‘our jurists group of dozing.’ The rulings of inexperienced lawyers, drunken lawyers, drugged lawyers, mentally ill lawyers, and sleeping lawyers can pass constitutional muster. One court explained that the Constitution does not say that the lawyer has to be awake. That’s a literalism for you. I suppose it doesn’t say a lawyer has to be alive either. Another esteemed tribunal ruled that sleeping might have been just a strategic ploy to gain sympathy from the jury.¹⁵ This must have provided only modest consolation for the convicted defendant.

“The Eleventh Circuit just ruled in *Holsey*, a death row case, that the Constitution is undisturbed by a lawyer who conceded that ‘[he] probably shouldn’t have been allowed to represent anybody’, much less a death penalty defendant, because ‘[he] drank a quart of vodka every night of [the trial]’, and during the entire trial, he was distracted by trying to prepare for his disbarment defense.¹⁶ And [he] forgot to mention the beatings [his] client had sustained as a child, and what his neighbors had previously testified was a torture chamber, leaving a five or

¹⁵ *McFarland v. State*, 928 S.W.2d 482, 505 n.20 (Tex. Crim. App. 1996) (en banc).

¹⁶ *Holsey v. Warden, Ga. Diagnostic Prison*, 694 F.3d 1230, 1276 (11th Cir. 2012).

six-year-old to sleep outside, or to avoid the belts and broom handles where he emphasized his IQ of seventy.¹⁷

Mr. Nichol declared that North Carolina is not immune from this deep south treatment. Mr. Nichol reported from his work on the demoralizing of Ronald Frye, who was put to death in North Carolina despite the fact that his lawyer drank over twelve ounces of rum every night instead of preparing for trial the next day, and who failed to present crucial evidence that could have saved Frye's life.¹⁸

According to Mr. Nichol, Frye's counsel "drank a good deal more on the weekends and those admissions likely underserved the case because, on one of the nights of the trial, he was involved in a car wreck and his blood alcohol was measured at a near lethal 476 percent, even though it was eleven o'clock in the morning and he had nothing to drink for hours. Mr. Nichol was surprised "that Frye's counsel missed the fact that he had been beaten so severely as a six-year-old that the North Carolina Highway Patrol had literally made his bruised and bloody back the poster for their anti-abuse campaign. But the jury heard none of it in mitigation."

"Therefore," Mr. Nichol concluded, "if Frye had even a marginally competent lawyer, he wouldn't have received the death penalty." Mr. Nichol believes "we're still dealing with the North Carolina Supreme Court under Governor Hunt, not the present governor. May Frye rest in peace."

"We enthuse about access [to justice] and equality rhetorically, but we don't make serious efforts to give them practical content. Equal justice under the law does not approximate the way our system operates in reality. Average citizens are priced out of the justice system. They are also barred from participating in the closed regulatory regime that excludes them. The

¹⁷ *Id.* at 1243-51.

¹⁸ *Frye v. Lee*, 235 F.3d 897, 904, 907 (4th Cir. 2000).

system we have is powerfully, dramatically, and fundamentally at odds with who we say we are, and I think that we all know it. It's like Lyndon Johnson once said, 'We may not know everything, but we know the difference between chicken shit and chicken salad.'¹⁹ For almost eighty years in the criminal text, through the Supreme Court, we've declared flatly [that] the right to be heard would be, in many cases, of little avail if it did not include the right to be heard by counsel.²⁰ Our high Court has written an '*obvious truth*' that 'any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided.'²¹

Mr. Nichol added that the American justice system could learn from Europe's successes: "This obvious verity escapes us in the civil justice system, but it does not escape our peers around the globe. The nations of the European Union and the British Commonwealth countries have had a bolstered ride, a bolstered form of the right to counsel in civil cases since the late 1970s."²² In rulings that bind over fifty nations and 500 million people, the European Court of Human Rights determined that, at least in complex cases, indigents failed to receive a fair trial unless they were represented by counsel at public expense.²³

Last year's massive rule of law study, funded by the Gates Foundation, explored the actual operations of the justice systems of the world – not what countries say or what they write down, but what they actually do. The Gates Study found that the United States received an "F" in access to justice, coming in last place among the wealthy developed nations.²⁴

¹⁹ GARY B. NASH ET AL., *THE AMERICAN PEOPLE: CREATING A NATION AND A SOCIETY* 756 (Addison Wesley Longman, abr. 3d ed. 2000).

²⁰ *Powell v. Alabama*, 287 U.S. 45, 68-69 (1932).

²¹ *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963) (emphasis added).

²² Task Force on Access to Civil Justice, *Report to the House of Deles*, 2006 A.B.A. 1, available at http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_06A112A.authcheckdam.pdf. The House of Delegates unanimously adopted the report in A.B.A. Res. 112A.

²³ See generally *Airey v. Ireland*, 32 Eur. Ct. H.R. (ser. A) 305, (1979); *Steel & Morris v. United Kingdom*, 41 Eur. Ct. H.R. 22, (2005).

²⁴ Roderick B. Mathews, *Access to Justice in the United States: Findings from the Newly Released Rule of Law Index of the World Justice Project* (December 2010) (available at

America's scores in the Gates Study, according to Mr. Nichol, bring to mind Lindsey Graham's claim during the Justice Sotomayor hearings a couple of years ago, that "the best thing that could possibly happen to the world at large would be if the American justice system was to be exported, jot and tiltered, to every corner of the earth." Mr. Nichol concluded that he could not have made that statement if he were poor. Then, Mr. Nichol reported, "not long after that the bulk of North Carolina's congressional delegation voted to zero out entirely the legal services budget, concluding in effect that last place for us is not good enough."

Mr. Nichol insists, "you [should not] let anyone convince you, as we often claim, that we are merely neutral arbiters in this, [as] disengaged, faithful referees. We have created overarching tribunals, state and federal, which are the only effective means of finally resolving the huge array of civil controversies. We have assured, in turn, that they are complicated, mysterious, cumbersome, professionally technical, adversarial, and expensive. No one knows this better than you as you try to master it. They are as far beyond the ken of even intelligent laypersons as brain surgery is to me. We could, of course, have done otherwise. Even now, it would be possible to dramatically simplify the rules and resolution methods for entire categories of disputes, making the use of lawyers unnecessary. We have chosen not to do so, and that is at bottom a choice, a studied and knowing decision, entirely foreseeable in its impact, impossible not to perceive its impact. It's a decision that cannot possibly be squared with the ideals and standards that we claim guide our decision-making. It is the American asterisk, a notable wink. Equal justice, at least for those with significant resources – not exactly what you want to etch on the courthouse walls.

Mr. Nichol continued to emphasize the lack of equal justice in our courts: “A reality that leaves us unable to characterize, with even a whiff of honesty, what we have as even being a system of justice. We have, I fear, played our parts. The best available research indicates that the American legal profession averages less than half an hour of pro bono work per week, and under half a dollar per day in support of legal services to the poor.²⁵ Most lawyers do no pro bono work at all. Nationally, service to the poor represents less than one percent of lawyers’ working hours.²⁶ And I can report with personal experience that bar associations have fought mandatory pro bono requirements with a zeal and passion unsurpassed. Sometimes we operate exactly like the self-regulated monopoly that we are. American judges, unlike many of their counterparts in the industrial world, have refused broadly to constitutionalize questions of civil access. They have degraded the rights declared, [and] criminal ones. Nor have judges, in the face of the exclusion that they supervise, construct and maintain, moved in overarching ways to simplify legal processes to make representation less necessary. Mostly, these are sins of omission. Though, sometimes they move beyond that.

For example, Mr. Nichol stated that some “state courts have stepped in, shockingly, to restrict representation in legal clinics, even at private law schools;²⁷ as if a favorable business requirement and atmosphere demands that the poor be prevented from asserting even the clearly established legal rights that they have.

Mr. Nichol focused the discussion on law school curriculums, stating, “few law schools, including [the University of North Carolina at Chapel Hill], have mandatory pro bono requirements, though my associate dean would kill me if I did not mention that we have a very

²⁵ Deborah L. Rhode, *Pro Bono in Principle and in Practice* 33 (Stanford Law Sch. Pub. Law Working Paper No. 66, 2003).

²⁶ *See id.*

²⁷ Mr. Nichol reported that these clinics provide free and effective representation for poor organizations unable to obtain legal help elsewhere.

vibrant voluntary one. Issues of access to justice are either missing or marginalized in our curriculum. Relatively little of our research focuses on what passes for justice among the have-nots. The written work of our faculties rarely involves areas where the poor are most afflicted. Our curriculum takes the present deployment of legal resources as a given. Who uses the system is unexplored. Law firms are not the topic of study or critique. Despite all the marvelous outreach, pro bono, and varied clinical programs expanding law schools across the country, unequal access to justice has not made it to the core of legal education. The greatest shortcoming of American law schools, among many, may be the failure to explore and articulate a theory of the just deployment of legal resources.

Mr. Nichol avowed that these large questions are often “unasked and unanswered.” Moreover, Mr. Nichol stated, “law schools are in a unique position, and have a unique obligation, to see that issues of access to justice occupy a simple place in our study, research, and debate. In the meantime, we add to the problem with tuition increases that have driven inflation, and, for many, [has affected] the ability to pay. Our students’ aspirations can become swamped by their debts. We seem caught in our own cycles and status and competition – adding to the cost of legal services and further fencing out the underserved.

Next, Mr. Nichol offered a personal reflection on the overall challenges facing unrepresented parties. “When we survey this landscape, I think we would be compelled to say that we would have hoped for more from our nation’s justice system, hoped for more from ourselves. I think we would be expected to say that we thought we would live up to our claims; that we too, even in this time, are called upon to help achieve our nation, to contribute our chapters. So it’s my hope that our future efforts – in the academy, in the courts, in the bar – will point more powerfully in these necessary directions.

“The flight from equality is a great barrier to the administration of justice in each of our communities, a greater barrier than other matters that have received far greater attention in the bar and in the halls of our law schools, matters like the erosion of ethics and professionalism, loss of civility, abuses of discovery, and the like. The flight from equality is a greater barrier to justice than any of these matters, far greater, even, if it receives fewer of our attention.

Then, Mr. Nichol turned his attention to proposed solutions for equality in the administration of justice, noting that it is more difficult to solve than the other matters currently addressed by law schools today. However, Mr. Nichol asserted, “that’s not a reason to turn away. If a problem is great enough, the violation of our constitutive ideals is strong enough, the threat to our democratic standards is real enough, the gap between our words and our deeds is massive enough, then we surely decide to go at it full force. We experiment, we try, we fail maybe, we regroup, and we try again. We try again because we know that what we are, what we believe in, is at stake. That’s why these burgeoning steps toward access being driven now in states, from California to Maine, many of which you will hear about in these discussions, are so crucial and defining. The work of the National Coalition for the Right to Civil Counsel, the ABA’s Gideon Work, the North Carolina Bar’s terrific [Justice for All campaign](#), the heartening pilot project in California, the efforts of a handful of courageous and truth telling chief justices, cutting edge municipal commitments in San Francisco, unfolding litigation in Georgia, Montana, Arkansas, Ohio, Maryland, [New York’s](#) remarkable pro bono move, [and] Wisconsin’s court rule ethics. All of these examples recognize that in a broad array of civil disputes, our legal system cannot be navigated without counsel. To pretend otherwise is laughable, if tragedy can be deemed laughable. Due process of law, and its central requirement of a meaningful opportunity to be

heard, cannot be satisfied by the formal opening of a courthouse door, as in real terms it seals shut.

Mr. Nichol suggested that it is flatly unacceptable to say that the effective exclusion of huge segments of the citizenry from access to the civil justice system is constitutionally insignificant. He proffered, “there is no larger hypocrisy in American constitutional law. Though there may be a variety of paths to achieving due process of law, they don’t include riding it out with the constitution. Given the challenges that we face economically, politically, institutionally, this might be the toughest of times to present these vital claims. Public resources constrict at every turn. Demands rise. A safety net of dignity and access is always easier to pay for when you don't need it.

Mr. Nichol remarked, “but these are, I would guess, life-altering times as well. The brutal face of American economic inequality is more glaring and pervasive and destructive and patent and loathed than at any time in the last hundred years. There are, perhaps, moments in time when our collective mirror of self-perception cracks, allowing a new stream of light and illumination. If there ever was a time to ask whether we might, after all, live up to our aspirations, this is it: Whether we are the people we claim to be.

Ralph Ellison wrote, just before he died:

We are a nation born in blood, fire, and sacrifice, thus we are judged, questioned, weighed by the [ideals and events, which marked our ideals....] These transcendent ideals interrogate us, judge us, pursue us, in what we do, and what we do not do. They accuse us [ruthlessly and their interrogation is ceaseless, stained until we are reminded of who we are and what we are about, and the costs we have assumed...] we pull ourselves together. We lift our eyes to the hills and we arise.²⁸

“Our constitutive call to equal justice surely interrogates and accuses us. It judges us and finds us lacking. The answers we offer and the excuses we provide do not satisfy. Not if we are

²⁸ RALPH ELLISON, *THREE DAYS BEFORE THE SHOOTING* 236-38 (John Callahan et al. eds., Modern Library 2d ed. 2011).

the country we profess to be. Not if we are to live by the commitments that we daily proclaim. For we do every day make such promises; we swear our fealty to them. We say they define us; they cast our national character. They set forth our initiative; they charge us.

Mr. Nichol concluded his speech with inspirational rhetoric regarding the fight for civil access to justice. “They charge us, because somewhere we read: ‘We hold these truths to be self-evident that all [men] are created [equal].’²⁹ And somewhere we read of ‘one nation, under God, indivisible, with liberty and justice for all.’ And somewhere we read that ‘history will judge us on the extent to which we’ve used our gifts to lighten and enrich the lives of our fellows.’³⁰ And somewhere we read that ‘injustice anywhere is a threat to justice everywhere.’³¹ And somewhere we read that ‘we ought to believe the things we teach our children, believe them and make them real.’³² And somewhere we read, of course, ‘The arc of the moral universe is long, but it bends toward justice.’³³ And somewhere most of the people in this room read ‘whenever you did these things for the least of these, you did them for me.’³⁴ And in that same group, ‘you reap what you sow.’³⁵ And somewhere we read that ‘the pursuit of justice and the pursuit of happiness can be as one. They march not in opposite directions, but hand in hand.’ And somewhere we read ‘no we are not satisfied and we will not be satisfied until justice rolls down like waters and righteousness like a mighty stream.’³⁶ Congratulations on these efforts and thanks for letting me join you.

²⁹ THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

³⁰ Senator Robert Kennedy, Address at the Berkeley Campus of the Univ. of Cal. (Oct. 22, 1966), *available at* <http://research.archives.gov/description/194053>.

³¹ Letter from Martin Luther King, Jr. to his Clergymen (Apr. 16, 1963), *available at* http://mlk-kpp01.stanford.edu/index.php/resources/article/annotated_letter_from_birmingham/#authors_note.

³² HENRY ALFORD, THE CONSISTENCY OF THE DIVINE CONDUCT IN REVEALING THE DOCTRINES OF REDEMPTION 4 (Cambridge 1841).

³³ Martin Luther King, Jr., A Testament of Hope: The Essential Writings and Speeches of Martin Luther King, Jr. (James M. Washington ed., 1986) (*available at* <http://www.archives.gov/press/exhibits/dream-speech.pdf>).

³⁴ *Matthew* 25:45.

³⁵ *Galatians* 6:7.

³⁶ Dr. Martin Luther King Jr., I Have a Dream Speech (Aug. 28, 1963), *in* United States National Recording Registry, 2002.

After Mr. Nichol concluded his speech, he responded to questions from the audience. During this time, Mr. Nichol stated that the biggest problem facing marginalized [populations] in America “is the lack of civil justice. I was shocked to learn the rest of world does better than we do. Other countries treat the marginalized [groups] better than America. We talk about helping the marginalized the most, but do the least.”

THE INAUGURAL ACCESS TO JUSTICE JOURNAL SYMPOSIUM
EXCERPTS FROM “THE FUTURE OF THE CIVIL GIDEON MOVEMENT—THE RIGHT
TO CIVIL COUNSEL FOR THOSE MOST VULNERABLE IN SOCIETY”
PANEL ONE: A NATIONAL LOOK AT CIVIL GIDEON

Compiled by Adria R. Crannell, Lachelle H. Pulliam, & Andrew T. Tamer¹

In October 2012, Charlotte School of Law’s *Access to Justice Journal* (*AtJJ*) hosted its inaugural symposium, “The Future of the Civil Gideon Movement – The Right to Civil Counsel for Those Most Vulnerable in Society.” On the second day of the Symposium, the *AtJJ* hosted panelists who discussed a national perspective of civil *Gideon*. The national panel consisted of John Pollock, Professor Elizabeth Patterson, Kenneth Schorr, and Professor David Udell.

John Pollock is a staff attorney at the [Public Justice Center](#), through which he serves as Coordinator of the [National Coalition for a Civil Right to Counsel](#). Mr. Pollock previously worked as the Central Alabama Fair Housing Center’s Enforcement Director and as a legal fellow with the [Southern Poverty Law Center](#). Mr. Pollock is also the founder and coordinator of the [Heirs’ Property Retention Coalition](#), which works to protect the ancestral property of low-income landowners, and he has worked extensively with social justice organizations including: Northeastern University’s [Poverty Law and Practice Clinic](#), the [Massachusetts Law Reform Institute](#), and the [National Lawyers Guild](#) Immigration Detention Group. Mr. Pollock graduated with honors from Wesleyan University, and obtained his law degree at Northeastern University School of Law.

Professor Elizabeth Patterson specializes in child and family issues, poverty law and policy, bioethics, and public law at the University of South Carolina (USC) School of Law. Among her publications is the article, Civil Contempt and the Indigent Child Support Obligor:

¹ Candidates for Juris Doctorate, respectively, May 2013, May 2014, & May 2014, Charlotte School of Law.

The Silent Return of Debtor's Prison², which was cited by the U.S. Supreme Court in Turner v. Rogers³. Professor Patterson was instrumental in creating the [Children's Law Center](#) at the USC School of Law and the South Carolina Bar's [Children's Committee](#), and served as the initial leader of both organizations. Professor Patterson has been active in reforming South Carolina's laws relating to family and health issues, and drafted much of South Carolina's 1996 Child Protection Reform Act,⁴ as well as legislation governing living wills, health care powers of attorney, and medical decision making by surrogates. Previously, Professor Patterson was the Director of [South Carolina Department of Social Services](#) and was a member of the [American Public Human Services Association's](#) Board of Directors. Professor Patterson also received the United States Department of Health and Human Services' Commissioner's Award for outstanding leadership and service in the prevention of child abuse and neglect. Professor Patterson is a graduate of Agnes Scott College in Decatur, Georgia, and obtained her law degree from the University of Arizona James E. Rogers College of Law.

Mr. Kenneth Schorr has been the Executive Director of [Legal Services of Southern Piedmont](#) since 1988. Prior to this position, Mr. Schorr was in private practice in Little Rock, Arkansas, where he specialized in labor and civil rights cases, and representing community organizations, labor unions, and individual employees. Mr. Schorr also served as [Community Legal Services'](#) (Phoenix) Litigation Director and as Legal Services of North Texas' Executive Director. Currently, Mr. Schorr is a member of the [North Carolina Equal Access to Justice Commission](#), and a former member of the [North Carolina Justice Center](#), [Crisis Assistance Ministry](#), [United Way of Central Carolinas'](#), and the [National Legal Aid and Defender Association's](#) Civil Committee. In 2012, the Mecklenburg County Bar Association awarded Mr.

² 18 Cornell J.L. & Pub. Pol'y 95 (Fall 2008).

³ 131 S. Ct. 2507, 2518 (2011).

⁴ S.C. CODE ANN. §63-7-10 (West 2008).

Schorr the Ayscue Professionalism Award for his commitment to providing quality legal representation for low-income clients in Mecklenburg County. Mr. Schorr obtained a B.A. degree from Brandeis University, a law degree from the University of Michigan Law School, and an M.S. Degree in organization development from the American University School of Public Affairs and the National Training Laboratories Institute.

Professor David Udell is the [National Center for Access to Justice's](#) Executive Director and a visiting professor from practice at Cardozo Law School, where he teaches a seminar, "The Justice Gap: Strategies for Securing the Delivery of Equal Justice in American Courts." He has also taught at New York University (NYU) School of Law and Fordham Law School. Additionally, Professor Udell worked at the [Brennan Center for Justice](#) at NYU School of Law for twelve years. Professor Udell held leadership positions in the national civil right to counsel and indigent defense reform movements. Professor Udell also coordinated national advocacy initiatives to help strengthen the nation's Legal Services Corporation. Professor Udell chairs the Association of the Bar of the City of New York's Committee on Professional Responsibility's Subcommittee on Access to Justice. He is a member of the Advisory Board to the [Justice Center of the New York County Lawyers' Association](#). Professor Udell obtained a B.A. degree from Brandeis University, and a law degree from NYU School of Law.

AtJJ Faculty Advisor and panel moderator, **Professor Cindy Adcock**, introduced the panelists and then gave the floor to John Pollock. Mr. Pollock began the discussion by focusing on the necessity of appointed counsel for indigent civil defendants in proceedings that involve deprivation of basic human needs. This notion is commonly referred to as a civil right to counsel or Civil Gideon. In 2006, the ABA unanimously passed a resolution endorsing a civil right to counsel in cases involving five basic human needs: shelter, sustenance, safety, health, and child

custody.⁵ Mr. Pollock stated that the National Coalition for a Civil Right to Counsel is comprised of over two hundred legal aid attorneys, practitioners, academics, and members of the judiciary who work for a right to counsel for individuals who traditionally have been without a voice in certain civil cases.

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Mr. Pollock stated that the five basic human needs are fundamental, and threatening to deprive an individual of a basic human need demands a right to counsel. Mr. Pollock also discussed the significant amount of study data that the presence of counsel dramatically affects case outcomes, restores faith in the fairness of the judicial system, and results in financial benefits for both the litigant and the state. According to Mr. Pollock, a civil right to counsel is also important to the proper functioning of the courts because it would result in more accurate

⁵ Task Force on Access to Civil Justice, *Report to the House of Deles*. 2006 A.B.A. 1, available at http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_06A112A.aut_hcheckdam.pdf. The House of Delegates unanimously adopted the report in A.B.A. Res. 112A.

⁶ Many advocates prefer the term “civil right to counsel”, because a) “civil *Gideon*” suggests that the right to counsel sought for civil cases is identical to what *Gideon* established for criminal cases, while in actuality it is considerably narrower; and b) the implementation of *Gideon* for criminal cases has been plagued by insufficient funding and other issues, and civil right to counsel advocates hope for a system for civil cases that does not import all of those problems from the criminal sphere.

⁷ Task Force on Access to Civil Justice, *Report to the House of Deles*. 2006 A.B.A. 1, available at http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_06A112A.aut_hcheckdam.pdf. The House of Delegates unanimously adopted the report in A.B.A. Res. 112A.

outcomes, provide equity in court proceedings, reduce court costs, increase efficiency by avoiding the burdens that pro se litigants impose on court staff and judges, and provide defendants an opportunity to actively and meaningfully participate in proceedings.

Next, Mr. Pollock provided a historical background for the civil right to counsel, explaining that the movement was born from the right to counsel granted in criminal cases.⁸ Mr. Pollock discussed a series of criminal cases that laid the foundation for a civil right to counsel over the course of forty years: *Powell v. Alabama* granted a right to counsel in death penalty cases;⁹ *Johnson v. Zerbst* granted a right to counsel in federal felony cases;¹⁰ *Gideon v. Wainwright* extended *Johnson* to state felony cases;¹¹ and *Argersinger v. Hamelin* extended *Gideon* to state misdemeanor cases.¹²

Despite the progress in the criminal realm, progress in the civil realm has been relatively slow, with the U.S. Supreme Court being reluctant to recognize a federal constitutional right to counsel in civil cases. He listed four Supreme Court cases as having a significant impact on the movement: *In re Gault* granted defendants in juvenile delinquency cases a right to counsel;¹³ *Vitek v. Jones* granted prisoners a right to assistance by a qualified representative before they are involuntarily transferred to a mental health facility;¹⁴ *Lassiter v. Dep't of Soc. Servs. of Durham Cnty., N.C.* held that there is no categorical right to counsel in termination of parental rights cases;¹⁵ and *Turner v. Rogers* held that there is no right to counsel for parents in civil contempt proceedings for non-payment of child support, even though they may face lengthy imprisonment,

⁸ See generally *Gideon v. Wainwright*, 372 U.S. 335 (1963) (unanimous) (discussing the need for a right to counsel in criminal cases).

⁹ *Powell v. Alabama*, 287 U.S. 45, 71 (1932).

¹⁰ *Johnson v. Zerbst*, 304 U.S. 458, 459, 463 (1938).

¹¹ *Gideon*, 372 U.S. at 336-37, 343-44.

¹² *Argersinger v. Hamelin*, 407 U.S. 25, 37 (2006).

¹³ *In re Gault*, 387 U.S. 1, 41 (1967).

¹⁴ *Vitek v. Jones*, 445 U.S. 480, 496-97 (1980) (5-4 decision).

¹⁵ *Lassiter v. Dep't of Soc. Servs. of Durham Cnty., N.C.*, 452 U.S. 18, 31-32 (1981) (5-4 decision).

in situations where the plaintiff is neither the government nor represented by counsel or the matter is not “unusually complex.”¹⁶

Mr. Pollock expressed bewilderment by the negative ruling in *Lassiter* despite the Court’s acknowledgment that parenting *is* a fundamental right, its finding that there *is* a decent chance for error in termination of parental rights cases, and its determination that the cost to the State in providing counsel does *not* outweigh what is at stake.¹⁷ In applying the *Mathews v. Eldridge* test for due process – weighing the private interest, the government’s interest, and the risk that the procedures applied will lead to erroneous decisions¹⁸ – the *Lassiter* Court held that there is a presumption against appointment of counsel in all types of civil cases (including the basic human needs cases) unless physical liberty is at stake.¹⁹

Notwithstanding the Court’s decision in *Turner*, Mr. Pollock reported that all states have established a right to counsel by either statute or court decision for at least some types of civil cases. Mr. Pollock explained that the states are not obligated to follow the U.S. Supreme Court when interpreting their own state constitutional due process or equal protection clauses, and thus can provide more protection. States can also pass statutes establishing a right to counsel (and in fact, Mr. Pollock also noted that states that provide a statutory right to counsel in civil contempt cases were not affected by the ruling in *Turner v. Rogers*).

Mr. Pollock explained that the vast majority of states provide a right to counsel for parents and children in abuse/neglect and termination of parental rights cases, either by statute²⁰ or state constitutional decisions. Mr. Pollock further reported that a majority states provide a

¹⁶ *Turner v. Rogers*, 131 S. Ct. 2507, 2516 (2012) (5-4 decision).

¹⁷ *Lassiter*, 452 U.S. at 26-28.

¹⁸ *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

¹⁹ *Lassiter*, 452 U.S. at 26-27, 31-32.

²⁰ Laura K. Abel & Max Rettig, *State Statutes Providing for a Right to Counsel in Civil Cases*, 40 CLEARINGHOUSE REV. 245 (July-Aug. 2006), available at http://www.civilrighttocounsel.org/resources/state_statutes.

right to counsel in matters involving involuntary commitment for mental health and quarantine, in guardianship proceedings, and in judicial bypass proceedings in states that require minors to gain parental consent to have an abortion. Many states provide a right to counsel for adult protective proceedings, contested adoptions, and paternity proceedings. Additionally, one or two states grant the right to counsel in some cases involving custody, domestic violence, public benefits, and special immigrant juvenile status. Mr. Pollock asserted that although the Supreme Court may have discouraged some in their fight for a civil right to counsel, much work has been done to achieve it. Mr. Pollock pointed out that a right to counsel in civil cases has been expanded most in family law despite the negative ruling in *Lassiter*. However, Mr. Pollock expressed frustration that some judges avoid the question of whether there is a right to counsel in civil cases.

Mr. Pollock described one of the more recent positive decisions in federal court. In a class action lawsuit, filed in a federal district court in California, the court construed the Federal Rehabilitation Act, 29 U.S.C. § 794 (2006) as providing mentally impaired detainees in immigration proceedings a right to assistance by a qualified representative, although not necessarily counsel.²¹ According to Mr. Pollock, this case has the potential to have a great impact on immigration law.

Overall, Mr. Pollock is optimistic about activity in the area of a civil right to counsel in cases involving the five basic human needs: shelter, sustenance, safety, health, and child custody.²² He noted that the activity will continue to increase as more states adopt legislation or

²¹ *Franco-Gonzales v. Holder*, 767 F. Supp. 2d 1034, 1054 (C.D. Cal. 2010).

²² Task Force on Access to Civil Justice, *Report to the House of Deles*, 2006 A.B.A. 1, available at http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_06A112A.aut_hcheckdam.pdf. The House of Delegates unanimously adopted the report in A.B.A. Res. 112A.

constitutional decisions granting a civil right to counsel. In closing, Mr. Pollock stated that there has been much progress, despite the Supreme Court's reluctance.

Then, Mr. Pollock turned the floor over to Professor Elizabeth G. Patterson. Professor Patterson focused her discussion on the right to counsel in civil proceedings where individuals who owe back child support are faced with possible imprisonment for contempt of court.

Professor Patterson became aware of the routine use of civil contempt to induce payment of child support arrearages near the end of her term as the Director of the Department of Social Services in South Carolina. After leaving the agency she researched the extent to which child support obligors are imprisoned as a result of these proceedings. Based on her research, she estimates that on any given day in South Carolina there are between 1,000 and 2,000 persons in jail for non-payment of child support.²³ Professor Patterson's later research demonstrated that most of these incarcerated obligors were low-income persons who lacked the means to comply with the court-ordered support obligation. Professor Patterson stated that recidivism is common for child support contemnors. In most cases the arrearage that led to incarceration remains outstanding when the contemnor is released, and to it has been added child support debt that accrued during the term of imprisonment. Yet the obligor's ability to pay has, if anything, decreased. Hence, the vicious cycle continues. Professor Patterson's research findings are summarized in an amicus brief filed with the United States Supreme Court in *Turner v. Rogers*.²⁴ Professor Patterson explained that the form of contempt of court involved in these cases -- willful non-compliance with a court order -- can be dealt with in either criminal and civil proceedings, and that incarceration is a possible outcome in either case. In a criminal

²³ Brief for Elizabeth G. Patterson & S.C. Appleseed Legal Justice Ctr. as Amici Curiae Supporting Petitioner, at 23, *Turner v. Rogers*, 131 S. Ct. 2507 (2011) (No. 10-10), 2011 WL 141223 at *23 (click [here](#) to view Professor Patterson's survey data for years 2005 and 2009).

²⁴ Amici Brief Supporting Petitioner, *supra* note 20, at 1.

prosecution for contempt, a specific period of incarceration is ordered as punishment for violation of the court order. As in any criminal proceeding, the defendant is protected by various rights and privileges, including the right to counsel.

In civil contempt cases, on the other hand, incarceration has the purpose of coercing compliance with the court's order. Although a term of imprisonment is ordered, the contemnor can gain his release at any time by complying with the court order. Thus, it is often said that the civil contemnor "“carries the keys of his prison in his own pocket.””²⁵ Because of this feature, incarceration for civil contempt is considered less weighty than criminal incarceration, and does not give rise to a right to counsel. Professor Patterson noted that the coercive justification for civil incarceration is specious when applied to an individual who is unable to pay the ordered support because of poverty. Such an individual is unable to secure his release by complying with the order. Hence his incarceration cannot legitimately be considered coercive, and must instead be treated as punitive.

In the case of *Turner v. Rogers* the U.S. Supreme Court was asked to recognize that child support obligors have a right to counsel in civil contempt proceedings that could result in their incarceration. This case was closely followed by the Civil Gideon community because of the potential that it would yield a U.S. Supreme Court ruling regarding a particular application of the civil right to counsel. Professor Patterson explained that many legal observers believed the right to counsel claim in *Turner* was a “slam dunk,” based on a statement by the Supreme Court in a 1981 case that linked the right to counsel with the potential for incarceration: In sum, the Court's precedents speak with one voice about what “fundamental fairness” has meant when the Court has considered the right to appointed counsel, and we thus draw from them the presumption that an indigent litigant has a right to appointed counsel only when, if he loses, he may be deprived of

²⁵ Patterson, *supra* note 21, at 103 (quoting *Gompers v. Buck's Stove & Range Co.*, 221 U.S. 418, 442 (1911)).

physical liberty.²⁶

In *Turner*, however, the Court rejected the implications of its earlier statement, and failed to adopt any bright-line test for determining whether a right to counsel existed in child support contempt proceedings or any other civil context. Rather, the Court endorsed a case-by-case analysis based on the traditional *Mathews v. Eldridge* criteria for determining the demands of due process in civil matters.²⁷ The *Mathews* test weighs the private interest, government interest, and risk of error.²⁸

Professor Paterson briefly outlined the Court's application of the *Mathews* analysis to the situation presented in *Turner*. She noted that the Court did not downplay the importance of the alleged contemnor's interest in freedom from bodily restraint, but found that this interest must be balanced against the interest of the opposing party to the proceeding – who in the *Turner* case was the custodial parent, also unrepresented by counsel.²⁹ The Court was concerned that providing appointed counsel for the noncustodial parent would “create an asymmetry of representation” that would impede rather than advance the interests of justice.³⁰ Professor Patterson explained that another key factor in the decision was the Court's belief that a right to counsel was not necessary in order to protect *Turner* against the risk of an erroneous determination regarding his ability to comply with the court order. The Court stated that alternative procedural safeguards could provide adequate assurance of the accuracy of the court's

²⁶ *Lassiter*, 452 U.S. at 26-27.

²⁷ *See id.* at 2520.

²⁸ *Mathews*, 424 U.S. at 335.

²⁹ *Turner*, 131 S. Ct. at 2513.

³⁰ *Id.* at 2519. Professor Patterson was critical of this line of reasoning, pointing out that the custodial parent, unlike *Turner*, did not face a potential jail sentence. The Court acknowledged that its decision was influenced by the context of the case (child support enforcement), expressing a reluctance to adopt a rule that could “erroneously deprive a family of the support it is entitled to receive. The needs of such families play an important role in our analysis. *Id.*

findings of fact on this key issue.³¹ Thus representation by counsel was seen as unnecessary to protect the admittedly important interest of the alleged contemnor in avoiding unjustified incarceration. The Court expressly left open the question of whether counsel would be required in cases where the opposing party is the state child support agency, represented by counsel.³² This is an important caveat, as Professor Patterson found in her court observation study that most child support contempt proceedings were brought by the agency.

Professor Patterson noted that in the two years since *Turner* was decided, significant steps have been taken to diminish inappropriate use of civil contempt in child support actions. To conclude her remarks, Professor Patterson briefly commented on some of these steps. She expressed the view that the alternative procedures approved by the Court in *Turner* are not sufficiently demanding to assure that the alleged contemnor receives a fundamentally fair hearing on the issue of ability to pay the ordered child support. She stated that most of the contempt proceedings observed in her study arguably satisfied the four criteria approved by the Court in *Turner*, yet many resulted in incarceration of persons who were clearly unable to pay the amount ordered. The fairness of post-*Turner* contempt hearing thus is dependent on whether state courts and administrative bodies undertake to implement the spirit as well as the letter of *Turner*'s alternative procedures requirement. Happily, she stated, that is what is happening in at least some of the states. She also praised the federal Department of Health & Human Services, the agency that administers the child support enforcement program at the national level, for

³¹ *Id.* at 2520. The Court approved a list of alternative procedures proposed by the United States as amicus: (1) notice to the defendant that his "ability to pay" is a critical issue in the contempt proceeding; (2) the use of a form to elicit relevant financial information; (3) an opportunity at the hearing for the defendant to respond to statements and questions about his financial status; and (4) an express finding by the court that the defendant has the ability to pay. *Id.* at 2519. However, the Court expressly recognized the possibility that other alternative procedures might also be sufficient. *Id.* It is important to note that the issue of procedures other than representation by counsel that might be sufficient to protect the alleged contemnor's rights was not argued by the parties. Only the amicus addressed this issue. *See id.* at 2520-2521.

³² The Court stated that counsel also may be required where the issues raised by a case are unusually complex. *Id.* at 2520.

issuing a far-reaching guidance to state child support agencies concerning the use of civil contempt and the conduct of civil contempt hearings.³³ In addition to expanding on the four alternative procedures approved by the Court, the guidance calls for more discriminating processes for determining which contempt cases to prosecute. Where nonpayment does not appear to be willful, states are encouraged to negotiate a workable payment plan or if necessary, to initiate an adjustment in the child support order itself. Processes such as these should substantially reduce the number of civil contempt proceedings, and hence the number of incarcerations, while at the same time increasing the amount of support obtained from the obligor.

Professor Patterson stated her belief that one of the most important effects of *Turner* was simply the increased awareness among the judiciary of the constitutional significance of civil incarceration decisions and their factual underpinnings. Regardless of the specifics of the Supreme Court's due process holding, conscientious judges will translate this awareness into more careful fact-finding on the issue of ability to pay, and even into increased use of appointed counsel to assist in the marshalling of facts in some cases.

Professor Patterson expressed the view that the current state and federal efforts to implement the spirit of *Turner* can provide examples and ideas to those interested in assuring procedural fairness for a broader range of civil litigants. Some of these ideas will involve counsel, but many will involve alternative measures and processes – either within or outside of the judicial settings. Alternative measures and processes may prove adequate to assure fundamental fairness in some areas; in others, they may serve to clarify the issues and the needs of low-income litigants that can only be fully met with the help of counsel.

³³ Office of Child Support Enforcement (OCSE) Action Transmittal 12-01: *Turner v. Rogers* Guidance (June 18, 2012).

Mr. Kenneth Schorr followed Professor Patterson's discussion, sharing his insight on a right to counsel's effect on the existing legal aid system. He began by recognizing that there is no easy solution to providing a civil right to counsel, noting that prior to 1963, the legal aid system did not distinguish between civil and criminal matters. Mr. Schorr reported that although there were a few private agencies like the [Community Chest](#), a [United Way](#) predecessor, there was no public funding for the legal aid system. He went on to explain that no funding coupled with no right to representation meant the private agencies offering legal aid were hamstrung in providing legal services to those in need.

Mr. Schorr noted, "the *Gideon* decision in 1963, however, drove the system into separate civil and defender branches. The criminal defense system was transformed by the "right" of criminal defendants to have counsel and the corresponding obligation of the state and federal governments to fund those lawyers. The criminal defense system is a mix of public defender offices and appointed private lawyers who are obligated to represent those individuals who have a right to counsel under constitutional or statutory law. It has some advantages and some disadvantages compared to the civil legal aid system, but it is surely very different.

Mr. Schorr stated that after *Gideon*, the federal government launched a war on poverty via the Office of Economic Opportunity (OEO), an agency that no longer exists. He explained that the OEO identified communities with existing legal aid efforts and offered additional funding incentives to expand their efforts.

Focusing on how these changes affected Charlotte, North Carolina, and surrounding areas, Mr. Schorr stated that the first legal aid program in NC was the Legal Aid Society of Forsyth County, started before 1963, and the Legal Aid Society of Mecklenburg County was the second, formed by OEO, the Mecklenburg County Bar and the Charlotte Area Fund in 1967,

later becoming Legal Services of Southern Piedmont. Mr. Schorr explained that beginning in 1996, legal service providers underwent some evolution, but the system is still primarily individual private agencies that decide what kind of services to provide. No individual client has a right to the civil system. What has changed, according to Mr. Schorr, is current policy that is aimed at changing the conditions affecting poverty, broadly advocating for the impoverished communities, and being more aggressive in agency operations.

However, Mr. Schorr emphasized, “if we get a civil right to counsel in North Carolina or any place else, broadly or narrowly, in any of these areas I catalogued,³⁴ it will not fit very neatly into the existing structure for legal aid programs.” Consequently, providing a civil right to counsel will present challenges, but Mr. Schorr reassured the audience, “these are the kinds of challenges we want.” Mr. Schorr supports efforts to realize a civil right to counsel because more people will be served and there will be more justice: “That’s what we’re about; to the extent that we can establish the right to counsel, this is a mountain we want to climb.”

Mr. Schorr discussed ways in which a civil right to counsel would challenge the existing system. First, he explained, a right to counsel would stretch existing resources. Mr. Schorr reported that the North Carolina Access to Civil Justice Act (ACJA)³⁵ helps fund representation of indigent persons in certain types of legal matters.³⁶ Funds raised by court fees are disbursed to the North Carolina State Bar, and then distributed directly to [Pisgah Legal Services](#) and Legal Aid of Southern Piedmont.³⁷ Mr. Schorr explained that another avenue of funding for civil access to justice comes from the [Interest on Lawyer Trust Accounts \(IOLTA\)](#).³⁸ According to Mr. Schorr, the ACJA provides approximately \$4 million and IOLTA provides about \$2 million for

³⁴ See *e.g.*, *supra* pp. 4-6 and notes 4, 10-13.

³⁵ N.C. GEN. STAT. §§ 7A-474.1 - 474.5 (2013).

³⁶ *Id.* § 7A-474.3 (2013).

³⁷ *Id.* § 7A-474.4 (2013).

³⁸ 27 N.C. ADMIN. CODE 01D.1301 (2013).

civil legal aid. Mr. Pollock stated that additional funding for specific programs³⁹ brings the total funds provided by the State to approximately \$10 million. Separately, Mr. Schorr reported that [Legal Aid of North Carolina](#) receives around \$12 million in federal funding from the [Legal Services Corporation](#) and another \$8-10 million comes from grants, contracts, and individual contributions. Mr. Schorr contrasted the nearly \$30 million that civil legal services agencies operate on annually with the \$112 million the criminal defense system received in 2012.⁴⁰

Continuing, Mr. Schorr explained that setting priorities is a challenge for legal services agencies because there is not enough money to serve everyone, and financial problems are further exacerbated when the courts or legislature say people with specific problems have to be represented.⁴¹

Next, Mr. Schorr reiterated that legal service agencies are committed to advocating for persons who cannot afford representation. For example, Legal Services of Southern Piedmont participates in legislative and administrative lobbying, and community action that includes impact litigation. In summary, Mr. Schorr emphasized that although extending a right to civil counsel will challenge legal service agencies' already strained budgets, the agencies strive to best allocate their limited resources.

Finally, Mr. Schorr discussed quality control in the context of providing legal services with grossly inadequate funding. According to Mr. Schorr, legal service agencies only have enough resources to do approximately of the work.⁴² Yet, the legal service agencies are

³⁹ Mr. Schorr specifically mentioned, [Disability Rights North Carolina](#), [North Carolina Prisoner Legal Services](#), and the [Land Loss Protection Program](#).

⁴⁰ 4 N.C. OFFICE OF STATE BUDGET & MGMT., CERTIFIED BUDGET (BD-307), JUSTICE AND PUBLIC SAFETY, INDIGENT DEFENSE, FISCAL YEARS 2012-2013, SUMMARY BY ACCOUNT 2 (Oct. 11, 2012), http://www.osbm.state.nc.us/files/pdf_files/2012_BD307_Vol4.pdf.

⁴¹ See, e.g., MD. ACCESS TO JUSTICE COMM'N, IMPLEMENTING A CIVIL RIGHT TO COUNSEL IN MARYLAND 5-10 (2011), <http://mdcourts.gov/mdatjc/pdfs/implementingacivilrighttocounselinmd2011.pdf>.

⁴² Mr. Schorr stated how difficult it is to perform a specific statistical analysis on the number of needy people the civil legal aid system serves, but recognized twenty percent aid is a statistic that is widely used. E.g., LEGAL SERVS.

committed to delivering high quality representation. Consequently, the agencies set their priorities knowing that there are simply not enough resources to do it all. Mr. Schorr lamented, “we struggle with how to maintain our quality standards when we do not have the money to do the work.”

In closing, Mr. Schorr stated that a civil right to counsel will challenge us, but it is a challenge that he wants to see: “I have spent many years in the legal services world and the right to [civil] counsel is a better place to be than we are, so I appreciate your interest in the issue and look forward to turning over some of this work to many of you.”

Professor Udell offered a vision of the access to justice reform movement, describing opportunities for law students to become more involved, tools of policy advocacy (and especially the role of research) in the context of the reform movement, and some of the many important initiatives that comprise the movement, including the initiative to establish and expand a civil right to counsel.⁴³

Professor Udell began by presenting an overarching vision of our state-based justice systems trying to cope with an influx of millions of people who are unrepresented in civil legal matters, and who will not necessarily obtain constitutionally adequate representation in criminal matters even though the constitution guarantees the provision of counsel to people unable to afford private counsel in such matters. He pointed out that there are many steps that law students and attorneys can take to help fulfill their professional obligation to help assure equal access to justice in our country.

CORP., *Documenting the Justice Gap in America: The Current Unmet Civil Legal Needs of Low-Income Americans*, 15 (Sept. 2005), http://www.lsc.gov/press/documents/LSC%20Justice%20Gap_FINAL_1001.pdf.

⁴³ David Udell also presented a workshop, “The New York 50-Hour Pro Bono Requirement,” at the *AtJJ* inaugural Symposium.

Professor Udell then began to describe the broad range of opportunities for law students to become involved in helping to increase access to justice. He initially described the organized bar and the young lawyer divisions of state and local bar associations, minority bar associations, legal services bar associations, and the ABA. Professor Udell asserted that through these organizations, students can play important roles in helping reform the justice system.

Professor Udell then described opportunities for law students to become involved through the work of nonprofit organizations dedicated to justice system reform. He spoke about the work of eight organizations: the [American Civil Liberties Union](#), the [Brennan Center for Justice](#), the [Innocence Project](#), the [National Center for State Courts](#), the [National Legal Aid and Defenders Association](#), and the Appleseed Legal Justice Centers, in addition to his own organization, the [National Center for Access to Justice](#). Professor Udell singled out the [National Legal Aid and Defenders Association](#) (NLADA), as a unique resource for civil legal services lawyers and public defenders that plays a key role in supporting organizations that are a voice for vulnerable individuals, families, and communities. He credited Cait Clarke, of NLADA, the Symposium's closing Keynote Speaker, for her important work in support of the indigent defense reform movement.⁴⁴

Professor Udell then spoke of opportunities for students to participate in reform through their writing. Touching on Charlotte Law's new *AtJJ*, he explained his hope that the *AtJJ* will become "an outlet for views on how to improve our justice system and increase access to justice." Professor Udell mentioned that while some law reviews and journal publications are

⁴⁴ Cait Clarke, J.D., S.J.D., is currently Assistant Director of the Office of Defender Services. Ms. Clarke formerly served the National Legal Aid and Defenders Association as Director of Strategic Initiatives, the National Defender Leadership Institute as Director, and managed the Harvard John F. Kennedy School of Government Program in Criminal Justice, Policy and Management's federally-funded Executive Session on Public Defense. Prior to earning her doctorate at Harvard Law School, Ms. Clarke was an Associate Professor at the Loyola University School of Law in New Orleans. In addition, Ms. Clarke served as an E. Barrett Prettyman Fellow, clinical instructor in the Criminal Justice Clinic at the Georgetown University Law Center, and law clerk to the Honorable John A. Terry of the District of Columbia Court of Appeals.

criticized for their distance from real world concerns, others that take on serious questions of justice system policy analysis can in fact actually help to shape laws and policies.

Professor Udell then described how law students can help to increase access to justice by developing a public voice in a variety of contexts, both as students and as emerging professional attorneys. Everyone can author op-ed pieces or letters to the editor. Everyone can help to educate reporters about the necessity of covering otherwise neglected topics about the justice system. Professor Udell recalled a practical lesson learned from a colleague who was especially effective in inspiring reporters to write important stories by repeatedly emailing them about the consequences of justice system policies for real people.

Professor Udell described the tools of policy advocacy in the context of the access to justice movement. Professor Udell stressed that many tools are potentially important, including public writing, research, scholarship, organizing, litigation, and lobbying.

Initially, he focused on research, outlining three broad categories: policy analysis, qualitative research, and empirical research. Professor Udell explained that policy analysis involves describing the design of policies, how they are expected to operate, who they are expected to affect, and their potential impacts. Qualitative research is also descriptive, but may consider in greater detail how policies are actually playing out on the ground. Empirical research relies on a variety of strategies and methodologies in an attempt to understand more definitively the effects of policies. Professor Udell explained that there is a need for all of these types of research as part of the greater effort to understand what approaches to justice system reform can make the greatest difference.

Professor Udell noted that his own organization, the [National Center for Access to Justice](#), is pursuing one novel research initiative: the [Justice Index](#). The Justice Index is being

created to provide an online picture of the performance of each state based justice system in assuring access to justice. By allowing comparisons of one state to the next, the Justice Index will help to show where best practices are in place in state justice systems, with the hope of promoting the replication of those best practices in all 50 states.

Professor Udell also pointed to another example of valuable qualitative research -- a [series of videos](#) produced by the National Coalition for a Civil Right to Counsel and the Brennan Center for Justice, showing men and women discussing how the outcomes of their foreclosure cases changed after they were able to obtain an attorney. Professor Udell explained that videos of this nature, and these videos in particular, offer a very powerful way of making the case for reform. The videos are being used to help support the policy argument in favor of establishing a civil right to counsel for people facing foreclosure.

Professor Udell also discussed the importance of empirical research to figure out what works, and what doesn't work, in increasing access to justice. He noted that research is needed to explore the efficacy of advocacy by lawyers (for example, the impact of a civil right to counsel) as compared to non-representational approaches such as providing forms to people to enable them to initiate litigation and to respond to lawsuits filed against them.

He spoke briefly about another tool of advocacy, lobbying, explaining the importance of partnering with "strange bedfellows" to accomplish shared goals. For example, according to Professor Udell, some faith based organizations had in earlier decades opposed funding for civil legal aid for the poor, so it was unexpected when in recent years some national leaders of faith based organizations became outspoken in their support of such programs.

Next, Professor Udell discussed the importance of increasing funding for the justice system. He noted that the ABA-led [Task Force on the Preservation of the Justice System](#) is

helping to coordinate advocacy that responds to funding cuts that have caused courthouses to close their doors and to leave judicial and staff positions unfilled. Professor Udell gave specific examples of court funding problems: New Hampshire suspended civil jury trials for months in 2009;⁴⁵ Maine installed new security systems in its courts, but did not have enough money to run them every day.⁴⁶

Professor Udell noted that importance of initiatives to preserve and increase funding for both civil legal aid programs and indigent defense programs. On the civil side, funding has been cut, and funding restrictions also circumscribe activities of lawyers in some programs, prohibiting them from lobbying or bringing class action suits, and from representing certain categories of people, including certain categories of immigrants. Likewise, on the criminal side, budget cuts have undercut the criminal right to counsel in many parts of the country – many lawyers operate with minimal salaries, lack of administrative support, little funding for investigation, and huge caseloads. Work is needed to advocate for increased funding for legal representation in both civil and criminal contexts.

Turning to the pro bono movement, Professor Udell recognized it as “important for professionals and students,” noting that approximately thirty law schools, including Charlotte Law, have instituted a mandatory pro bono graduation requirement for students.⁴⁷ Further, Professor Udell reported that the new statewide rule in New York requires fifty hours of law-related pro bono service as a condition of admission to the New York Bar.⁴⁸ The new rule is

⁴⁵ Lisa A. Rickard and Bill Robinson III, *Column: Why Underfunded Courts Hurt All Americans*, USA TODAY, Jan. 4, 2012, <http://usatoday30.usatoday.com/news/opinion/forum/story/2012-01-04/courts-judiciary-budget-funding/52379760/1>.

⁴⁶ Judy Harrison, *Chief Justice Seeks \$3.1M for Full-Time Entry Screening at Courts*, BANGOR DAILY NEWS, Jan. 22, 2012, <http://bangordailynews.com/2012/01/21/news/state/chief-justice-seeks-3-1m-for-full-time-entry-screening-at-courts>.

⁴⁷ As of August 2013, Charlotte Law will require its incoming students to complete fifty hours of pro bono service as a graduation requirement.

⁴⁸ N.Y. COMP. CODES R. & REGS. tit. 22, § 520.16 (2013).

applicable to all persons who seek to practice law in New York, regardless of where they attended law school. Courts and legal services programs need students to help them respond to the justice gap. States have so far refrained from adopting mandatory pro bono requirements for admitted attorneys, but Professor Udell pointed out that advocacy for pro bono bar admission requirements like New York's, and for mandatory pro bono for professionals, are both worthwhile reform goals. For more information on pro bono reform he referred interested persons to the [Pro Bono Institute](#), and to [NCAJ's own web site](#). Professor Udell also noted that all of this work follows in the legacy of Charlotte Law Professor Cindy Adcock⁴⁹ and Stanford Law Professor Deborah Rhode, who collaborated on the American Association of Law School's publication, [Learning to Serve](#), that initially mapped out ways to strengthen law student pro to assure that it will make more of a difference in the world. He also acknowledged the importance of Professor Adcock's additional report for AALS, entitled, [A Handbook on Law School Pro Bono Programs](#).

Professor Udell then described another several access to justice initiatives, including:

- *Incubator projects* – Some law schools are giving increased support to new graduates to help them set up their own solo practices in which they provide legal services, at affordable fees, to clients with limited financial resources.
- *Second career projects* – Some communities are experimenting with structures that bring newly retired attorneys into roles in providing free or low cost legal services to low income clients. The Pro Bono Institute's [Second Acts Movement](#) is among these initiatives.

⁴⁹ See *supra* text accompanying note 3.

- *New categories of nonlawyer professionals* – Some communities are considering whether to authorize the provision of certain forms of legal services, for fee, by people with fewer than three years of legal education.

Finally, Professor Udell, discussed the civil right to counsel movement, placing it within the context of the comprehensive access to justice movement. He began by acknowledging that even though *Gideon* has been less than fully effectuated, the right to counsel recognized in *Gideon* nevertheless provides an important foundation for advocating more broadly for people's rights in the justice system.

Professor Udell noted that while some critics argue that there will never be a civil right to counsel, that it would be too expensive if it did exist, or that a universal right to counsel would not make sense for other reasons, the civil right to counsel reform movement is more nuanced than these mis-characterizations presume. The American Bar Association has urged that jurisdictions recognize a right to counsel only for civil legal proceedings involving the five basic human needs of shelter, sustenance, safety, health, and child custody.⁵⁰

But, the claims for a civil right to counsel are perhaps especially compelling for some subcategories of cases involving these needs and for some specific categories of litigants. Indeed, as addressed in greater detail at the conference by John Pollock,⁵¹ some communities have already recognized a right to counsel for some people in certain categories of civil legal proceedings, Professor Udell acknowledged the important work of Mr. Pollock, Coordinator for the National Coalition for the Civil Right to Counsel, and of the Public Justice Center, in helping to build momentum in the states and nationally to expand existing civil rights to counsel into new

⁵⁰ Task Force on Access to Civil Justice, *Report to the House of Deles*. 2006 A.B.A. 1, available at http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_06A112A.aut_hcheckdam.pdf. The House of Delegates unanimously adopted the report in A.B.A. Res. 112A.

⁵¹ See *supra* p. 6 [check this citation for accuracy]

and particular contexts, consistent with the broad mandate embodied in the American Bar Association's model right to counsel law.

Professor Udell closed by observing that the civil right to counsel movement is important not only on its own terms, but also because it helps to underline the importance of civil legal aid, the importance of social science research to increase access to justice, and the importance of the full access to justice reform agenda.

After this enlightening discussion, Professor Cindy Adcock concluded the panel by reminding students and guests that Charlotte Law is beginning an [incubator project](#) at its Center for Experiential Education and Entrepreneurship. Professor Adcock then thanked the speakers for sharing their knowledge about the current challenges and issues the legal community faces.