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The Impact of the Lack of a Right to Civil Counsel on the Social and Economic Rights of Impoverished Children in Rural New Mexico

Endorsed by:

- New Mexico Legal Aid, Inc.
- Northeastern University’s Program on Human Rights and the Global Economy (PHRGE)

To:
Professor Philip Alston
United Nations Special Rapporteur on Extreme Poverty and Human Rights

Re:
Response to the Call for Input: Visit to the United States (December 4-15, 2017)

Date:
October 3, 2017

I. Introduction

1. Please accept this submission in response to the call for input in advance of your official visit to the United States. The paragraphs below document the ways in which the lack of a right to civil counsel is negatively impacting impoverished children in rural New Mexico. The appendix lists three communities in the state where these issues are particularly salient. We respectfully request that you consider one or more of them for your official visit.

2. The failure to guarantee civil counsel is a human rights issue. Through its ratification of the International Covenant on Civil and Political Rights (ICCPR), the United States is strongly encouraged and in some cases obliged to provide a right to civil counsel. Furthermore, the prevalence of access to justice issues for people of color implicates U.S. commitments under the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD). Critically, lack of representation in civil matters is vitiating the economic and social rights of the poor. It also affects their ability to be recognized with dignity by the
state, a concept at the heart of the international human rights framework. In the words of U.S. federal appellate judge Richard Posner, “most judges regard these people [pro se litigants] as a kind of trash not worth the time of a federal judge.”

3. The realities of rural New Mexico compound the effects of the lack of a right to civil counsel at every turn. First, the relative scarcity of attorneys in many parts of the state makes finding free or low-cost representation particularly difficult. Second, the coalescence of a number of socioeconomic barriers makes competent pro se representation frequently unattainable. Third, the relative lack of resources for many institutions and organizations that provide social and economic services exacerbates the ultimate impact of negative outcomes for poor children and families.

II. The Impact of the Lack of a Right to Civil Counsel on Access to Justice in Rural New Mexico

4. Civil litigants in New Mexico are accorded a right to counsel only in certain discrete areas. Judges are given the discretion to appoint counsel in several additional areas. The majority of these rights to appointed civil counsel involve cases in which parental rights or physical liberty hang in the balance. In the vast majority of civil and administrative proceedings, including many cases in which basic human needs are at stake, there is no right to counsel. Indigent civil litigants must therefore seek out their own representation.

5. The scarcity of attorneys in rural New Mexico makes this a difficult task. Statewide, there are 26.6 lawyers per 10,000 people and 0.47 civil legal aid lawyers per 10,000 people in poverty, well below the national average of 40.3 and 0.64, respectively. The concentration of attorneys in Albuquerque and Santa Fe, where the density of attorneys actually exceeds the national average, masks the full extent of the shortage in the state’s rural areas. Half of
New Mexicans, but less than one third of legal service providers, live in rural parts of the state.\textsuperscript{13} The gravity of these statistics is better understood in the context of New Mexico’s severe poverty problem. New Mexico has the second highest rate of poverty of any U.S. state at 20.4%.\textsuperscript{14} Many of the state’s poorest areas are deeply rural, with the poverty rate reaching 34.1% and 30.9% in McKinley and Luna Counties, respectively.\textsuperscript{15}

6. Despite the commendable \textit{pro bono} efforts of many rural attorneys, the private bar does not adequately meet the civil legal needs of indigent, rural New Mexicans. Although attorneys licensed in New Mexico are required by the New Mexico Supreme Court to report the number of pro bono service hours performed each year, they are not required to perform any particular amount of \textit{pro bono} work.\textsuperscript{16} When they are willing to do so, they may lack the expertise to deal with the issues faced by indigent clients.\textsuperscript{17} When they do have the expertise, they are likely to choose clients close by, due to the difficulties of navigating the rugged and underdeveloped landscape of rural New Mexico.\textsuperscript{18} The most isolated people stand the least chance of acquiring voluntary representation.

7. Publicly funded civil legal aid organizations are also unable to adequately address the needs of New Mexico’s rural poor. New Mexico Legal Aid, Inc. (NMLA) relies more heavily on federal Legal Services Corporation (LSC) funding than most of its counterparts nationwide.\textsuperscript{19} As LSC and other sources of funding have been cut in recent years, NMLA has had to lay off attorneys, with a markedly outsized impact on rural offices.\textsuperscript{20} Eliminating the LSC altogether, as proposed by the Trump Administration,\textsuperscript{21} or cutting its budget by 24% as proposed by a House of Representatives appropriations subcommittee,\textsuperscript{22} would be potentially disastrous for rural access to justice.
8. Most other legal services organizations in the state are largely or exclusively based in Albuquerque.\(^{23}\) One exception is DNA-People’s Legal Services (DNA), which mostly provides legal services to the Navajo and Hopi Nations in northern Arizona, and serves only one county in northwestern New Mexico where the eastern edge of the Navajo Nation spills over into the Farmington and Shiprock areas.\(^{24}\) Due to budget shortfalls, however, DNA has had to lay off over a dozen employees and close two of its offices in rural New Mexico this year.\(^{25}\) This is particularly concerning. Native American communities experience distressingly high levels of poverty and childhood poverty and face unique legal issues that require attorneys who specialize in serving that population.\(^{26}\)

9. In 2014, Law Access New Mexico, a hotline that performs intake services for legal aid organizations, was forced to reject over 2,000 cases from rural counties.\(^{27}\) This number will only increase as funding cuts continue to shrink these organizations’ capacities.

**III. The Impact of a Lack of Representation on the Outcome of Civil Legal Issues in Rural New Mexico**

10. Nationwide, the unrepresented poor are faced with intractable challenges, some of which are particularly relevant to rural communities. Numerous studies have shown that *pro se* litigants fare much worse than represented parties in front of both courts and administrative agencies.\(^{28}\) Furthermore, the following barriers cause some people who are unable to secure an attorney to forego pursuit of a remedy altogether.\(^{29}\)

11. Physical distance is especially problematic in a state as vast as New Mexico. For instance, the nearest state court to Alamo, NM is 58 miles away in Socorro.\(^{30}\) Access to a reliable vehicle and the money to fill it with gas for such a long trip are not trivial concerns for poor, rural New Mexicans.\(^{31}\)
12. Language barriers are a serious problem as well. In most of New Mexico’s judicial districts, translated materials are available, though less extensively in Navajo, Keres or other tribal languages than in Spanish, and hardly at all in any other language. While interpreters are available, they typically must be requested ahead of time. A judge may order a postponement if an interpreter is unavailable. However, the cost of another 100-mile round trip may lead someone with limited English proficiency to either continue without an interpreter or fail to return for a rescheduled hearing.

13. Many rural New Mexicans have not had the extensive formal education that is needed to submit a persuasive written argument. Furthermore, rural New Mexico lacks a robust, affordable internet infrastructure, making informal legal education resources more difficult to access.

14. Noncitizens may be especially unfamiliar with the American legal system, while also being subject to exceptionally complex rights and obligations. For example, temporary, low-wage guestworkers in the H-2A and H-2B visa programs are the beneficiaries of an intricate regulatory regime of rights, which are almost certain to go unasserted without counsel.

15. In December 2014, 61% of New Mexicans, but only 37% of state judges, were people of color. Some advocates have suggested that this imbalance inevitably leads to implicit bias in some New Mexico courts. At best, these figures illustrate a disconnect between the public and the judiciary, a distance that it is the lawyer’s role to bridge.

IV. The Impact of Losing Civil Cases on the Social and Economic Rights of Children in Rural New Mexico

16. The negative outcomes that result from the lack of a right to civil counsel have an exceedingly detrimental impact on poor, rural children. New Mexico has the second highest rate of childhood poverty in the United States, and nine of its ten poorest counties are
rural. Income and birth rates are inversely correlated in the United States: poor families have more children than rich families. Native American communities, some of the country’s poorest, have experienced a population growth rate of twice the national average in recent decades. Families with children have more civil legal needs than those without children. Eighty percent of low income families with children under the age of 18 had at least one civil legal problem in the last year.

17. The most commonly faced civil legal needs of the poor fall into the categories of health, consumer and finance, rental housing, children and custody, and education. The nexus to child well-being is clear with the latter two, but the other issues have an outsized impact on children as well. Healthy children do better in school. Parents’ debt and financial instability can harm children’s socio-emotional well-being, in addition to making it more difficult for parents to provide for their children’s basic needs. Homelessness has an incredibly dramatic effect on child development.

18. In rural areas, the problems of poor children are exacerbated by a lack of robust social services. For a rural family to uproot in order to seek the socioeconomic safety net of a city could itself have a disruptive impact on their children’s education and overall well-being.

V. Current Status of Efforts to Establish a Right to Civil Counsel as a Realization of Human Rights

19. The realities of an already overburdened criminal public defender system and the costs and difficulties of implementation contribute to resistance to a civil right to counsel, causing some to advocate instead for pro se reform. However, as the quote from Richard Posner in Section I, supra, elucidates, there are certain inimitable advantages to legal representation. Additionally, studies have shown full representation to provide significantly better results over lesser interventions such as lawyer for the day or pro se assistance.
20. The American Bar Association (ABA) has proposed extending a right to civil counsel whenever basic human needs are at stake.\textsuperscript{52} In its report, the ABA cited to the 1979 European Court of Human Rights decision, \textit{Airey v. Ireland}, which held that the right to a fair hearing demands the provision of an attorney to indigent civil litigants.\textsuperscript{53} Indeed, the ABA proposal resonates strongly with many of the interrelated human rights of the international framework. Providing a right to civil counsel when their basic needs are on the line is believed by many advocates to be essential to help poor people across the United States in very tangible ways to realize their rights to health, to shelter, to food, and to water.

21. For poor children, especially those who are hidden on the margins of society, the fulfillment, or non-fulfillment, of these rights could have even greater positive or negative consequences. Not only are their immediate economic and social rights staked on the outcome of a legal problem, but so too is their right to opportunity. As stated in the Convention on the Rights of the Child, every “child should be fully prepared to live an individual life in society.”\textsuperscript{54} The persistence of poverty from generation to generation in many of New Mexico’s rural counties suggests that children there are much less than “fully prepared” to realize their individual potentials.\textsuperscript{55} When a child’s family gets help for their civil legal problems, that legal aid can serve as the critical outside intervention that alleviates the anxiety of instability and allows a child to focus on her happiness and education and be prepared to escape from a cycle of persistent, generational poverty.\textsuperscript{56}
## APPENDIX A – Suggested Locations for Official Visit

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<tr>
<th>Location</th>
<th>Poverty</th>
<th>Remoteness</th>
<th>Key Demographic Barriers to Access to Justice</th>
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| Columbus, Luna County, NM<br>1,265 residents | 54.1% of the population and 75.5% of children live below the federal poverty line. | Columbus is separated from Palomas, Chihuahua (pop. 4,688) by the U.S.-Mexico border. The nearest legal aid office in New Mexico is 92 miles away, in Las Cruces (pop. 101,164). The nearest attorney is in Deming (pop. 14,667), 33 miles away. Albuquerque is 267 miles away. | **Race/Ethnicity:** 88% of the population is Latinx.  
**Language:** 92% of the population speaks Spanish as their primary language at home, and 56% speak English less than “very well.”  
**Immigration Status:** 45% of the population was born outside of the United States. Of that group, 85% are non-citizens.  
**Attorneys:** There are no attorneys in Columbus. |
| Navajo, McKinley County, NM<br>1,918 residents | 62.9% of the population and 74.1% of children live in poverty. | Navajo is located within the Navajo Nation, on the border of New Mexico and Arizona. The nearest legal aid office is 20 miles away in Window Rock, AZ (pop. 3,255). Albuquerque is 184 miles away. | **Race/Ethnicity:** 93% of the population is Native American.  
**Language:** 66% of the population speaks Navajo as their primary language at home, and 10% speak English less than “very well.”  
**Attorneys:** There are no attorneys in Navajo. |
| Truth or Consequences, Sierra County, NM<br>6,266 residents | 25.9% of the population and 33.5% of children live in poverty. | “T or C” is located on a major, interstate highway. The nearest city with a legal aid office, Las Cruces, is 77 miles away. Albuquerque is 150 miles away. | The majority of the residents of Truth or Consequences are white, English speaking, U.S. citizens.  
**Attorneys:** There are only five (5) active attorneys registered in Truth or Consequences. That amounts to one local attorney for every 1,253 people. |
New Mexico Legal Aid, Inc. and Northeastern University’s Program on Human Rights and the Global Economy thank Max Dismukes, J.D. Candidate, Northeastern University School of Law, for his contributions to this submission.

11. Compare Bureau of Labor Statistics, Occupation: Lawyers, in May 2016 METROPOLITAN AND NONMETROPOLITAN AREA OCCUPATIONAL EMPLOYMENT AND WAGE ESTIMATES: SANTA FE (2016), available at https://www.bls.gov/oes/current/oes_42140.htm#23-0000 (location quotient 1.72; “A location quotient greater than one indicates the occupation has a higher share of employment than average, and a location quotient less than one indicates the occupation is less prevalent in the area than average”) and ALBUQUERQUE, available at https://www.bls.gov/oes/current/oes_10740.htm#23-0000 (location quotient 1.06) with FARMINGTON, available at https://www.bls.gov/oes/current/oes_22140.htm#23-0000 (location quotient 0.30) and SOUTHWESTERN NEW MEXICO, available at https://www.bls.gov/oes/current/oes_3500003.htm#23-0000 (location quotient 0.37).
15. N.M. CODE R. § 24.108 (LexisNexis 2017) (suggesting but not requiring either 50 hours or $500 donation annually and mandating reporting).
19. Id.
21. E-mail from Ed Marks, Executive Director, New Mexico Legal Aid, to author (Sep. 22, 2017, 18:28 EST) (on file with author).
33. See, e.g., STATE OF NEW MEXICO, SEVENTH JUDICIAL DISTRICT, LANGUAGE ACCESS PLAN 7-9, available at https://languageaccess.nmcourts.gov/language-access-plans.aspx.
34. Id. at 7.
35. Id. at 8.
36. 2006 ATJ Report, supra note 10, at 35, 42
37. 2014 ATJ State Plan, supra note 13, at 62.
40. 2006 ATJ Report, supra note 10, at 42.
41. State Poverty Map, POVERTYUSA, http://www.povertyusa.org/the-state-of-poverty/poverty-map-state (last visited Sep. 24, 2017) (showing a childhood poverty rate of 28.6% in New Mexico, behind only Mississippi’s 31.3%).
Association, Details on the number of attorneys in a given community are available through the New Mexico State Bar. Driving distances between locations were derived from Google Maps, available at http://www.maps.google.com. Details on the number of attorneys in a given community are available through the New Mexico State Bar Association, available at https://www.nmbar.org/FindAnAttorney.

45 Id.
49 2014 ATJ State Plan, supra note 13, at 44.
50 Benjamin H. Barton, Against Civil Gideon (And for Pro Se Court Reform), 62 Fla. L. Rev. 1227 (2010).
53 Id. at 9.