

Added Protections Of NH Constitution Must Be Afforded Meaning

By Gilles Bissonnette and Charles G. Douglas III

In *Duncan v. State of New Hampshire*, the New Hampshire Supreme Court recently held that taxpayer standing violates the New Hampshire Constitution – a decision that was recently praised by attorney Eugene M. Van Loan III in the *Bar News*. Respectfully, the Court got it wrong. The decision fails to appreciate critical differences between the state and federal constitutions and, in doing so, will negatively impact government accountability.

In *Duncan*, nine New Hampshire parents and taxpayers challenged an education tax credit program that allowed businesses to receive a tax credit for donations made to scholarship organizations that would then pay for tuition at religious and other K-12 private schools. In arguing they had standing to challenge the program, the plaintiffs relied on a 2012 amendment to New Hampshire's declaratory judgment statute that gave taxpayers standing to bring declaratory judgment lawsuits challenging unlawful government actions.

When the New Hampshire Legislature considered this taxpayer standing amendment in 2012 to ensure that citizens could hold the government accountable, few questioned the amendment's constitutionality under the State Constitution. At the time, the amendment had wide support, and the New Hampshire Supreme Court's general counsel testified before the Senate that, although the judiciary opposed the amendment on fiscal grounds, "it is clear that the policy here is a matter for the legislature... [a]nd you clearly have the authority to [pass this bill] if you so choose." He added: "[It's] not a question." In short, the amendment did not raise a constitutional question, but rather raised only a policy question that fell squarely within the Legislature's purview.

However, last August, the Supreme Court in *Duncan* struck down the 2012



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taxpayer standing amendment as unconstitutional and declined to address the case's merits. The Court held that the amendment violated Part II, Article 74 of the State Constitution, which requires the Court to issue advisory opinions when requested by the Legislature, governor, or executive council "upon important questions of law and upon solemn occasions." The Court read Article 74 to include "case or controversy" standing requirements similar to those found in Article III of the Federal Constitution.

Under such requirements, the Court opined that a plaintiff must demonstrate harm beyond his or her injury as a taxpayer. As the Court explained, "although the State Constitution does not contain a provision similar to [Article III of the Federal Constitution], as a practical matter, Part II, Article 74 imposes standing requirements that are

similar to those imposed by Article III of the Federal Constitution."

The Court's decision to superimpose federal standing principles on the State Constitution is incorrect.

First, the decision undermines the ability of citizens to challenge certain unlawful governmental actions in state court. For example, it is now unclear how certain provisions of the State Constitution's Bill of Rights, including articles restricting the use of public funds for religious schools, will be enforceable in the future. In addition, for those concerned about the fiscal responsibility of municipal governments, few will have the ability to challenge municipal taxes and expenditures that, for example, exceed a local "tax cap" or otherwise violate the law. Taxpayer standing does not, as attorney Van Loan argued, "abuse our political institutions;" rather, it ensures that citizens can seek relief from those political institutions. After all, how strong is a legal right if no one can go to court to enforce it?

Second, the decision is inconsistent

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We Must Ensure Everyone Has Access to Equal Justice

Editor's Note: This article is a collaboration of the author and the New Hampshire Bar Association based on an article that was first published in The Boston Globe on Oct. 23, 2014.

By Martha Minow

Neglected in today's headlines, blogs, and talk radio is a silent, shameful crisis that inflicts suffering and costs the nation money, legitimacy, and decency. Our justice system has become inaccessible to millions of poor people and so every day we violate the "equal justice under law" motto engraved on the front of the grand United States Supreme Court.

Americans who cannot afford legal help routinely forfeit basic rights as a result. Because the law does not enforce itself, veterans seeking benefits the nation has guaranteed, victims of domestic violence needing legal protection, and tenants or homeowners pursuing their rights since the financial disaster, all need advisors and guides through the law and its agencies and courts.

Across the country non-profit organizations, private law firms, and individual lawyers offer civil legal aid to those with limited incomes by handling their legal cases. I serve as vice chair of the federal Legal Services Corporation, which distributes grants to states based on their low-income populations. When this bipartisan federal effort started in 1974 with legislation signed by President Richard Nixon, 12 percent of the population was qualified, but today, due to soaring poverty levels, nearly 21 percent of Americans are eligible. Yet the federal contribution has dropped \$35 million in the last 20 years.

The problem is not remote; low-income people denied their legal rights live around the corner from you.

As vice chair of the Legal Services Corporation, I have worked with colleagues in New Hampshire who are on the frontlines. I salute the advocates at New Hampshire Legal Advice & Refer-



ral Center (LARC), an LSC grantee, New Hampshire Legal Assistance, and the New Hampshire Pro Bono Referral Program – one of the oldest statewide pro bono programs in the country.

Research funded by the New Hampshire Bar Foundation found that in the Granite State the gap between resources and civil legal needs is jaw-dropping: in 2010, the three main legal services providers were able to play a role in only 8,403 civil cases. That amounts to less than 6 percent of the estimated total assistance needed. Conservatively, the study estimated that New Hampshire has 149,101 low-income residents with civil legal needs. Since that study was completed, the needs have grown at the same rate that the available resources have diminished.

Failure to support civil legal services does not only abandon those in need – it also costs everyone else. In 2012, the New Hampshire Access to Justice Com-

mission funded an important study of the potential economic impact of increasing resources for civil legal services. Taking a long view, the study found that greater funding for civil legal services would boost the state's economy by \$84 million over 10 years, including:

- \$26 million in boosted incomes through successful advocacy for federal benefits such as social security, disability benefits, and tax refunds;
- \$42.7 million in additional economic activity with spending on food, clothing, health care, and so on;
- \$12.8 million in child and spousal support, usually received for at least five years;
- \$2.8 million in estimated annual savings on avoided costs where legal advocacy helped prevent domestic violence and homelessness.

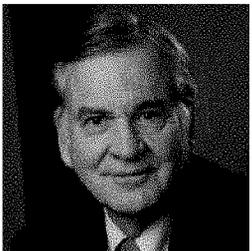
The Boston Bar Association's State-wide Task Force to Expand Civil Legal Aid in Massachusetts, on which I served, similarly found that every dollar spent

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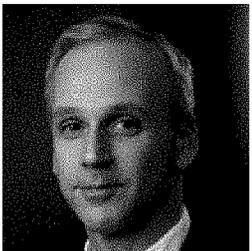
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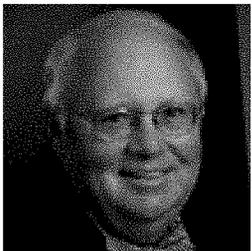
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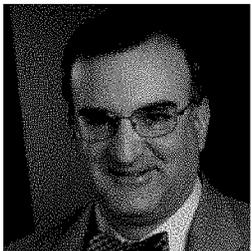
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with the text and intent of the State Constitution. Article 74 does not contain “case or controversy” standing requirements. To the contrary, the State Constitution indicates the Legislature has broad authority to expand the judiciary’s jurisdiction, just as it did in 2012. For example, in 1966, Article 72-a was added to Part II of the State Constitution to create independent state courts. The constitutional-convention report that recommended the amendment made clear that “the legislature would still have authority to... *define the jurisdiction* of the courts.” (Emphasis added). Furthermore, consistent with the Legislature’s broad authority to expand the jurisdiction of the courts, Article 4 of Part II states that, subject to Article 72-a of Part II, the Legislature “shall forever have full power and authority to erect and constitute [courts]... for the hearing, trying, and determining, all manner of... causes, matters

and things whatsoever...”
 Third, the NH Supreme Court has allowed taxpayer lawsuits to proceed for more than a century and, until Duncan, had made clear that federal standing principles do not apply in New Hampshire. In *Wheeler v. Morin* (1943), the Court expressly rejected the proposition that judicial power under the State Constitution was intended by its framers to be limited to “the determination of controversies between litigants.” Similarly, in *Wyman v. Gregory* (1957), the Court explained that, unlike the Federal Constitution, “[n]owhere in the law of this state is the function of our courts specifically limited to ‘cases’ and ‘controversies.’”
 Finally, the Court in Duncan failed to recognize that federal and state courts have different functions. A litigant’s access to federal court is understandably restricted under the Federal Constitution because the framers viewed federal courts as bodies of limited jurisdiction. State courts, on the other hand,

are bodies of general jurisdiction designed to host the vast majority of disputes, including those arising out of the state government’s police powers. Our State Constitution, in allowing the Legislature to provide broader access to state courts, embodies this important distinction.
 In *Duncan*, the Court declined to embrace the uniqueness of our New Hampshire Constitution, the second-oldest state constitution and the first to use the phrase “Bill of Rights.” Adopted five years before the Federal Constitution, the State Constitution provides broader rights than the Federal Constitution, as well as broader access to the courts to defend those rights. If our courts ignore these differences and simply rely on federal

principles in interpreting its text, we lose our State Constitution’s added safeguards against government abuse.

Gilles Bissonnette is the staff attorney for the American Civil Liberties Union of New Hampshire. He was co-counsel for the plaintiffs in Duncan v. State of New Hampshire, along with Americans United for the Separation of Church and State and the American Civil Liberties Union.

Charles G. “Chuck” Douglas III is a principal of Douglas, Leonard & Garvey in Concord. He is a former judge on the NH Superior Court and the NH Supreme Court, and well as a former member of Congress.

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on legal assistance for low-income individuals returns between \$2 and \$5 to the Commonwealth in savings to foster care, emergency housing, emergency health care, other social services, and economic growth. These economic benefits are just one way of measuring the impact of addressing the justice gap. More important, clients receiving civil legal help find their lives positively transformed as their legal rights are enforced.

Other states are finding ways to address civil legal services needs. A task force created by the New York Legislature and led by New York’s Chief Judge Jonathan Lippman last year persuaded the legislature to more than double yearly funding of civil legal assistance to \$70 million. New Hampshire could become a model for other states. New Hampshire’s civil legal services providers are already recognized nationally for their innovations in leveraging their modest funding, collaborating effectively to provide services, and inventing effective ways to help low-income people navigate courts and agen-

cies.
 Civil legal services help people stay in their homes, obtain services for which they qualify, keep their children in school, and enjoy the rights that the law says they have. Meeting the needs in New Hampshire is a winnable goal with a combination of increased public support and smart deployment of financial resources and pro bono services.

Lawyers volunteer their time by taking pro bono cases, and non-lawyers can help, too. Volunteers can assist legal services providers with time, technical assistance, and donations to advance the Campaign for Legal Services, which supports civil legal services providers in New Hampshire. Anyone can help by speaking to your elected representatives and so we can make real the promise of “Equal Justice Under Law.”

Martha Minow is dean of Harvard Law School, vice chair of the Legal Services Corporation, and a member of Boston Bar Association’s Statewide Task Force to Expand Civil Legal Aid in Massachusetts.

Fancy Pants



FROM THE ARCHIVES – Who can you identify from this 1983 NHBA Membership meeting photo? Please email us at news@nhbar.org.

Morning Mail

Remembering Dave Nixon

To The Editor:

I would expect that every one of us older members of the bar have stories about David Nixon, and all of them showing Dave to be one of the truly great lawyers in New Hampshire.

My experience, and one that I will always remember happened a few years ago when Dave, his wife Patricia, my wife Helen and I dined together at the Mile A Way restaurant in Milford. As we were leaving the dining room, walking towards the door,

a middle aged woman rose from her table and rushed over. She said, “Are you David Nixon?” Dave replied, “Yes.” She blurted out, “I want to thank you for what you did for my mother 30 years ago. Your taking her case saved her life.”

Dave was embarrassed in that he didn’t remember her name or the case; he just thanked her.

How many of us would be thanked for our legal services 30 years later?

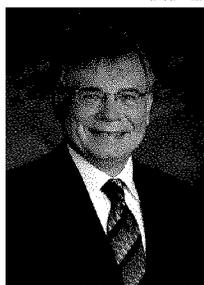
Robert Rowe

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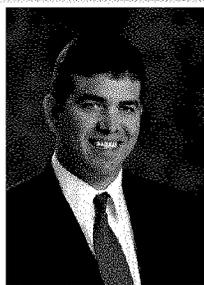
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