The Right to Civil Counsel

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Abstract: The U.S. Constitution grants no categorical right to counsel in civil cases. Undaunted, the legal profession's renewed effort to improve access to justice for low-income unrepresented civil litigants includes a movement to establish this right. How this right is implemented turns out to be as important as whether such a right exists. To be effective, any new right must be national in scope, adequately funded, and protected from political influence. Lawyers must be available early and often in the legal process, so that they can provide assistance for the full scope of their client's legal problem and prevent further legal troubles. A right to civil counsel should encompass proceedings where basic needs are at stake, and not be influenced by inadequately informed judgments of who is worthy of representation.

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Designing a right to counsel for people with civil justice problems is no simple task. Consider the state of the constitutional right to counsel in state criminal cases, which the U.S. Supreme Court recognized in 1963 in *Gideon v. Wainwright*.[1]

The public defender system is in crisis because most state governments do not allocate enough funding to fulfill their constitutional duty. *Gideon* is an unfunded federal mandate. In Missouri in 2016, the governor slashed the annual public-defender budget approved by the legislature from $4.5 million to $1 million. As a result, the director of the state's public-defender system lacked funding to hire the 270 additional attorneys needed to serve the criminal caseload. Advocates decided that a drastic measure was needed to draw attention to the problem, so the director appointed the governor (a lawyer) to represent a poor criminal defendant in place of a court-appointed lawyer.[2] The ploy was ultimately unsuccessful because a state court held that only the state's courts had the power to appoint a lawyer, but it generated national media attention for the budget issue.[3]

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The U.S. Constitution grants no categorical right to counsel in civil cases. Decades of Supreme Court jurisprudence have rejected constitutional claims to this right, most recently in 2011.[4] Undaunted, the legal profession's renewed effort to improve access to justice for low-income unrepresented civil litigants includes a movement to establish this right.

In recent years, there have been impressive gains toward this goal through legislation and court victories. In 2017, New York City became the first city in the United States to enact legislation providing low-income tenants facing eviction with legal representation.[5] In 2016, California put into force a 2009 state law establishing publicly funded counsel for poor litigants in cases about housing, child custody, conservatorship, and guardianship.[6] In 2016, the Supreme Court of New Jersey held that parents have a right to counsel in adoption cases.[7]

The right-to-counsel movement continues to build momentum. By 2018, eighteen right-to-counsel bills had been enacted in fourteen states, and an additional eighty-four were pending in Congress and in state legislatures.[8] The laws enacted include a San Francisco ballot measure providing a publicly funded right to counsel for tenants facing eviction, a Massachusetts law requiring appointment of counsel for anyone at risk of being incarcerated for failure to pay fees or fines, and a Wisconsin law creating a pilot project to provide a right to counsel for parents in child welfare proceedings.[9]

Because right-to-counsel victories like these have proceeded largely on an issue-by-issue basis, they have leapfrogged an important question. What types of problems or legal proceedings *should* trigger the right to civil counsel? In 2006, the American Bar Association (ABA) called on federal, state, and local governments to provide legal counsel to people who are poor or have low income "as a matter of right at public expense" in cases where basic human needs are at stake, such as those involving shelter, food, safety, health, or child custody.[10] The ABA acknowledged that its proposal was "substantially narrower" than what would be necessary to close the justice gap documented in legal-needs studies, and advocated for a "careful, incremental" approach involving the "evolution of a right to civil counsel on a state-by-state basis."[11]

Recent legislative activity has not followed the ABA's cautious approach. The victories, particularly laws creating a right in eviction cases, also challenge widespread political skepticism about state legislatures appropriating money to fund these new rights. Still, successes thus far are piecemeal and clustered in wealthier and Democratic-leaning states. If the right to civil counsel develops state by state, it will likely become more robust and better funded and cover a broader range of matters in blue states such as California, Massachusetts, and New York, while remaining limited and poorly funded in red states such as Oklahoma, Mississippi, and Texas.

To prevent these discrepancies, it would be best for Congress to establish a federal right to civil counsel that reached across state boundaries. To be effective, this right must be secure in the sense that it is adequately funded, resilient in the sense that it is protected from political interference, and unencumbered in the sense that it is not hobbled by limitations and restrictions. The right to counsel in criminal cases has been severely eroded in many states, nearly to the breaking point. Likewise, adjusted for inflation, federal funding for the Legal Services Corporation, which has provided funding for essential civil legal services to low-income Americans since 1974, has declined by

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nearly 40 percent over the last three decades.[12] Restrictions dictate who can and cannot be sued by legal-aid attorneys, what procedural devices they can use, and what claims they can bring.[13] Legal-aid attorneys cannot address systemic problems or leverage the strength of mass claims to challenge wrongful conduct by powerful institutions or governmental entities.

Advocates for a right to civil counsel want to reject these restrictions, empowering legal-aid lawyers to confront systemic injustices on a mass scale. A right to publicly funded lawyers for people with civil legal issues will aid those served, but is unlikely to force changes in their adversary's usual behavior or practices. Providing representation to someone facing unlawful debt collection may resolve that person's case favorably, for example, but it does not prevent the debt collector from continuing to use abusive and deceptive practices with other debtors. A right to counsel that permitted mass claims, by contrast, would allow broader structural and injunctive relief impacting large groups of similarly situated people, a much more efficient and effective way to advance civil justice.

A resilient and secure right to civil counsel would require adequate funding and protection from political interference. The ABA estimates that a right to civil counsel when basic human needs are at stake would cost approximately $4.2 billion in current dollars, or about 1.5 percent of total U.S. expenditures on lawyers.[14] Return-on-investment studies show that an expanded right to civil counsel can be economically feasible. One study estimated that establishing a right to civil counsel in eviction cases in New York City would save the city $320 million per year through reduced spending on homeless shelters, medical care for the homeless, and law enforcement.[15]

Any right to civil counsel should be protected from political interference. Funding a broad expansion of a right to civil counsel with public money would likely encounter political resistance. Even solid evidence that the costs of a right to civil counsel are manageable will not deter detractors inclined to politicize publicly funded rights. Other basic rights in our society – for example, rights to public education, medical care, and welfare benefits – have a long history of political struggle as well as public support. The same is likely to happen with a right to civil counsel.

Funding approaches must insulate civil justice budgets from the vagaries of political winds, annual appropriations battles, and opposition that seeks to weaken the right to counsel. If not, any such right will be forever vulnerable to funding rollbacks (or even elimination), regardless of its cost-effectiveness and vital role in providing essential services. As the histories of the right to counsel in criminal cases and of the Legal Services Corporation show, detractors can undermine justice by burdening the right to counsel with all kinds of restrictions.

An effective right to civil counsel must be implemented so that the lawyers provided can both address existing legal problems and prevent future issues. People should be able to access the right at key turning points, and the right should be broad enough to address their full range of legal needs. At present, when these rights exist, they are highly restricted.[16] For example, in family law matters such as child welfare and child support enforcement, many states that provide access to counsel do so at the last possible moment, when the risk of serious loss is imminent, rather than from the start and throughout the case, leaving parties unrepresented at critical junctures in their case. These rights are also limited,

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providing counsel only for the specific issue at hand.[17] In the case of child welfare proceedings, this means that, in some states, the right to civil counsel is available only to parents defending themselves in a termination-of-parental-rights proceeding.[18] Similarly, states that provide counsel in child support enforcement cases do so only in situations where the defendant is facing civil incarceration for failure to pay court-ordered support.[19] These are late-stage events when the unrepresented individual stands on the precipice of great loss: losing their children or their liberty. To provide counsel only at this eleventh hour is, to put it mildly, too little too late. Cases such as these can stretch back many months, even years. During the long span of time when the party is unrepresented, all kinds of critical events and decisions occur without benefit of advice or representation.

My own research examining the experiences of noncustodial parents in child support proceedings reveals that attorney representation earlier in the case and covering a broader scope of legal issues would substantially change case outcomes. The study seeks to understand how attorney representation and other more limited forms of legal assistance affect civil court proceedings for low-income litigants. Most noncustodial parents in these cases are very low-income black fathers who lack attorney representation and owe current and past-due child support, often in the thousands of dollars. The study examines how their cases are handled by the judges and government attorneys they encounter and how they navigate the civil process in proceedings in which they face a variety of increasingly punitive enforcement measures, including civil incarceration for failure to pay support.

The research reveals that a right to civil counsel would be considerably less effective if restrictions limited when in the legal process appointed counsel were available. For example, lawyers-by-right are not made available when a child support order is established. They are also not provided when a parent must file a motion to modify an existing order to reflect a significant change in circumstances, such as losing one's job and income. In both instances, the timing and the scope of representation matter, whether the attorney provides full representation or is limited to performing only specific tasks. Having access to a full-service attorney earlier would ensure that initial orders are for appropriate amounts and are modified when circumstances warrant. Without counsel at these junctures and for broader purposes, pro se defendants are likely to fall behind in their child support payments and face mounting debts that result in contempt proceedings with a risk of civil incarceration and other harsh penalties.

Dearis Calahan's case illustrates how earlier appointment of counsel can be critical.[20] A fifty-three-year-old father of seven, he had three children with one woman, one child with another woman, and three children with a third woman. All of Dearis's children are now adults. When I spoke with him, he was in court because he owed past-due child support. Dearis recalled that he owed between $7,000 and $10,000 in past-due support. He was frustrated that the state would not explain how it calculated what he owed. Before his hearing, he made calls to several lawyers seeking legal help, but all wanted a retainer of at least $2,500. The state had suspended his driver's license because of the amount he owed in child support. Dearis, representing himself, argued unsuccessfully for getting his license reinstated so he could drive.

In one of his cases, Dearis was not present in court at the initial hearing when the

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amount of child support due was set. According to him, he did not receive notice of that hearing and, in his absence, "they kind of set it, gave me a certain number that they figured that it would be proper for me" to pay. Many child support orders are established as a default judgment when noncustodial parents do not appear in court, sometimes because they receive no notice to appear. Such orders are usually calculated based on presumed rather than actual earnings. For Dearis, his payments amounted to 20 percent of the earnings from a full-time, minimum-wage job, even though his actual earnings fell far short of that amount. Unable to pay the full amount, he fell behind and quickly accumulated child support debt.

Having access to an attorney at that earlier stage in the case – when the child support order was first established – could have made a significant difference. With representation, it is unlikely that a default judgment would have been entered and, even if it had been, an attorney would have filed a motion to vacate it because Dearis did not receive notice of the hearing. An attorney would have (at a minimum) advocated that the child support order be based on Dearis's actual earnings, more realistically reflecting his ability to pay support. An attorney could also have advocated that the court apply low-income defendant guidelines when calculating support, or even for a reduction from the guidelines because Dearis was supporting several other children at the same time. Dearis lacked knowledge about these intricacies and thus could not raise them on his own behalf.

Maurice Shamble's case shows why appointed counsel's scope of representation matters. Until 2014, he had what he considered a good job, paying $26,000 a year. Under an order set at 40 percent of his net income, the state guideline level for four children, payments came straight out of his paychecks through wage garnishment. However, after he lost his job and his income, the order was not adjusted. He did not know that he had to notify the child support agency that he was no longer working. He assumed they would know because payments would no longer be coming directly out of his paycheck. He also did not know that losing his job provided grounds to reduce the award or that, to do so, he needed to file a motion to modify and appear at a court hearing. Instead, his arrears spiraled out of control. When I spoke with him, he owed past-due support of over $10,000.

The other pro se fathers in the study also lacked steady, reliable employment. Some, like Maurice, lost their jobs after a period of relative stability. Others had a reduction in earnings when employers cut back their hours. Most, however, had jobs that did not pay a living wage and, like the low-wage labor force nationally, had precarious and volatile employment. Most were underemployed and struggled to make ends meet, cobbling together temp work, seasonal jobs, part-time jobs, cash jobs in the informal economy (like yard work for neighbors), and assistance from family and friends. Though they faced frequent changes in their employment status, their child support obligations remained static and did not reflect their ability to pay.

Appointed counsel is available only in situations where the defendant is facing civil contempt for nonpayment, and can address only the contempt proceedings themselves. So an appointed attorney may not file a motion to modify the order on the client's behalf, even though an earlier failure to modify the order after a reduction in the parent's earnings contributed to the arrearage and led to the contempt action. Without such a modification, the debt will grow ever-larger and lead a court to summon the defendant

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again to explain why he should not be held in contempt for failure to pay support. Preventing an appointed attorney from addressing the essential underlying issue in the case makes no sense.

Navigating the modification process was no easy feat for the pro se litigants in my study, including Maurice. After he was civilly incarcerated for contempt of court because of the unpaid child support, Maurice realized that he had to understand the legal complications impacting his life. He spent many hours researching the law in the courthouse library and online. He had a binder full of handwritten notes and case printouts from his research and he shuffled through them repeatedly as he discussed his case with me. He believed he had found defenses in doctrines on jurisdiction and separation of powers, but it would be remarkable if Maurice understood all the intricacies of the legal principles he studied. Maurice reported that a judge dismissed his arguments as "Internet gibberish" and denied his motion.

The experiences of Dearis Calahan and Maurice Shamble show that *how* a right to civil counsel is administered is as important as *whether* a right exists. A right triggered only when a defendant faces a contempt action is woefully insufficient. Most of the judges and lawyers interviewed for the study believed that there was little a lawyer could do to help at that stage in the case. They argued that the matter was open and shut: there was a valid order to pay child support and the defendant had not complied; appointing a lawyer would not change the outcome. Their position is debatable, since counsel could argue that the defendant's failure to comply with the order was not willful and, thus, grounds for contempt were not established. But appointing counsel earlier could have prevented these problems entirely.

Though the right to civil counsel for child support defendants is cramped and inadequate, it provides far more than is generally available from legal aid. Funding for civil legal services for indigent Americans falls far below the demand, and providers must necessarily establish service priorities. Few legal-services offices provide representation to noncustodial parents in child support cases. Compared with custodial mothers, noncustodial fathers are not sympathetic parties. Why devote limited resources to advance their claims? Men like Dearis, with his seven children by three different women, are demonized in politics and ridiculed in popular culture. Someone like him, who has fallen behind in his payments and seeks to reduce his monthly order, is more likely to be viewed as a "deadbeat dad" who is not providing for his children than as an economically vulnerable father who cannot pay his current order, despite his best efforts in the low-skilled, low-wage labor market.

The right to counsel in criminal cases is poorly implemented, yet it embraces values worth incorporating into a right to civil counsel: it is broadly available to indigent defendants at risk of incarceration, regardless of how disliked they may be. A right to civil counsel should likewise be broadly available. In the civil system, as in the criminal, a right to counsel should not be based on social acceptance. It should be based on a fair assessment of who needs a lawyer to make their case when the help really matters.

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ENDNOTES

1 *Gideon v. Wainright,* 372 U.S. 335 (1963).

2 Matt Ford, "A Governor Ordered to Serve as a Public Defender," *The Atlantic*, June 4, 2016.

3 A Missouri circuit court reinstated the lawyer, holding that only the state's courts had the authority to appoint a lawyer. See Celeste Bott, "Court Rules Public Defender Can't Appoint Missouri Governor as a Defense Attorney," *St. Louis Post-Dispatch*, August 25, 2016.

4 *Turner v. Rogers,* 564 U.S. 431 (2011); and Tonya L. Brito, David Pate Jr., Daanika Gordon, and Amanda Ward, "What We Know and Need to Know about Civil *Gideon*," *South Carolina Law Review* 67 (2) (2016): 223–243.

5 Ashley Dejean, "New York Becomes First City to Guarantee Lawyers to Tenants Facing Eviction," *Mother Jones*, August 11, 2017.

6 The law was passed in 2009 and the pilot program commenced in 2011. See Erin Gordon, "Advocates Promote a Right to Counsel in Civil Cases, Too," *ABA Journal*, February 2018; and Clare Pastore, "*Gideon* is My Co-Pilot: The Promise of Civil Right to Counsel Pilot Programs," *University of the District of Columbia Law Review* 17 (1) (2014): 75–130. Conservatorship and guardianship are similar concepts in the law. A conservator is a person who has been appointed by a court to manage the estate of someone who is legally incapable of doing so, usually due to disability, illness, or injury. A guardian is a person who has been appointed to care for another's person or estate, or both, because of their infancy, incapacity, or disability.

7 *Adoption by J.E.V.,* 141 A.3d 254 (N.J. 2016).

8 The website for the National Coalition for a Civil Right to Counsel maintains a list of enacted and pending bills. See http://civilrighttocounsel.org/legislative_developments/2018_civil_right_to_counsel_bills#pending.

9 J. K. Dineen, "SF's Measure F Wins, Will Give Tax-Funded Legal Help to Tenants Facing Eviction," *San Francisco Chronicle*, June 5, 2018; *An Act Relative to Criminal Justice Reform*, Mass. Bill S.2371, 190th General Court (Mass. 2018); and *Relating to: a parent's right to counsel in a child in need of protection or services proceeding, providing an exemption from emergency rule procedures, granting rule-making authority, and making an appropriation,* Wisc. Assembly Bill 784, Regular Session of 2017–2018 (Wisc. 2018).

10 American Bar Association Task Force on Access to Civil Justice et al., *Report to the House of Delegates* (Chicago: American Bar Association, 2006). Many state and local bar associations have since passed resolutions similar to the ABA's. Deborah L. Rhode and Scott L. Cummings, "Access to Justice: Looking Back, Thinking Ahead," *Georgetown Journal of Legal Ethics* 30 (3) (2017): 485–500. Also, in 2016, the ABA issued a two-year *Report on the Future of Legal Services in the United States* that "urge[d] the legal profession to commit to the goal of 100 percent access to effective assistance for essential civil legal needs and [made] a number of recommendations that would go a long way towards achieving that goal, including providing civil legal aid as a matter of right when basic human needs are at stake and making wider use of innovative legal technologies"; American Bar Association Commission on the Future of Legal Services, *Report on the Future of Legal Services in the United States* (Chicago: American Bar Association, 2016).

11 American Bar Association Task Force on Access to Civil Justice et al., *Report to the House of Delegates*, 14, 12.

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[12] Deborah L. Rhode, "Legal Services Corporation: One of the Worst Cuts in Trump's Budget," *The Legal Aggregate*, May 31, 2017. Legal Services Corporation (LSC) funding has increased over the years and the decline noted is a relative comparison. For a history of LSC funding, see Alan W. Houseman, "Civil Legal Aid in the United States: An Update for 2015, A Report for the International Legal Aid Group" (Washington, D.C.: Consortium for the National Equal Justice Library, 2015).

[13] Catherine Albiston, Su Li, and Laura Beth Nielsen, "Public Interest Law Organizations and the Two-Tier System of Access to Justice in the United States," *Law and Social Inquiry* 42 (4) (2017): 990–1022.

[14] American Bar Association Task Force on Access to Civil Justice et al., *Report to the House of Delegates*.

[15] Stout Risius Ross, "The Financial Cost and Benefits of Establishing a Right to Counsel in Eviction Proceedings under Intro 214-A" (Chicago: Stout Risius Ross, 2016).

[16] Laura Abel and Max Rettig, "State Statutes Providing for a Right to Counsel in Civil Cases," *Clearinghouse Review Journal of Poverty Law and Policy* 40 (2) (2006): 245–270.

[17] Ibid.

[18] Ibid.

[19] Ibid.

[20] All participant names are pseudonyms.

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