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Sargent Shriver National Center on Poverty Law

Civil Right to Counsel's Relationship to Antipoverty Advocacy



Further Reflections

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In *Poverty Warriors: A Historical Perspective on the Mission of Legal Services*, Gary F. Smith's recent reflection in *CLEARINGHOUSE REVIEW* on the occasion of Sargent Shriver's passing, Smith reminds us of the incontestable historical roots of legal services in the war on poverty.¹ Then he issues an important call for each of us to examine whether we have focused too heavily on the resolution of demands for individual representation at the cost of forgetting the goal of ending poverty. Smith's call for self-examination is one that we embrace and urge all of our legal services colleagues to take seriously as we determine how best to pursue antipoverty advocacy in this century.

As advocates for a civil right to counsel and as legal services practitioners, we would like to discuss a couple of assumptions we perceive within Smith's article about civil right to counsel's relationship to antipoverty work, both in the spirit of the exploration he urges and in order to foster conversation on these issues. These assumptions are that representation resulting from newly created rights to counsel could be imposed on advocates at the cost of their antipoverty work and that right-to-counsel efforts are entirely distinct from an antipoverty agenda. From our knowledge of Smith's work, we know that he does not oppose the concept of indigent litigants having a right to counsel in cases involving basic human needs such as shelter, sustenance, safety, health, and child custody, and we understand that his recognition of access to the courts as both vital and a fundamental governmental obligation is intended to include an endorsement of the concept of the civil right to counsel. Rather, his concern is the effect that such new rights might have on the undeniably important antipoverty work of legal services programs. We believe that his concern is based on a misapprehension of the nature and direction of the civil right-to-counsel movement.² We are

¹Gary F. Smith, *Poverty Warriors: A Historical Perspective on the Mission of Legal Services*, 45 *CLEARINGHOUSE REVIEW* 34 (May–June 2011).

²Because we cannot speak for all of those in the right-to-counsel movement, we hope to draw from our own experiences and perceptions as coordinators of the National Coalition for a Civil Right to Counsel, www.civilrighttocounsel.org, as well as our years in civil legal services and public interest antipoverty law.

grateful for this opportunity to explain why the civil right to counsel not only supports the antipoverty work of legal services but also is itself a significant antipoverty strategy.

As a preliminary matter, Smith suggests that the right-to-counsel movement is narrowly focused on defendants, and not necessarily all defendants (he alludes to a reluctance to provide counsel for those accused of domestic violence in addition to victims thereof). However, in our own informational material, the National Coalition for a Civil Right to Counsel speaks of providing counsel to litigants, not plaintiffs or defendants.³ Moreover, the 2006 American Bar Association (ABA) Resolution in support of a civil right to counsel, which closely mirrors the goals of the National Coalition, is clear that the right should exist for all *persons* who have a basic human need at stake, regardless of their procedural posture in the case.⁴ The ABA's Model Access Act, adopted in August 2010, also explicitly provides for counsel for both plaintiffs and defendants.⁵

Turning to the concern about the imposition of new priorities on legal services by new civil rights to counsel, we in the National Coalition hold as a core principle that legal services and other community leaders in each state must lead the way and make the critical decisions about what new rights to counsel (if any) to pursue and whether the existing system for delivery of legal services could or should assume those responsibilities:

Civil right to counsel initiatives are likely to succeed insofar as they are driven by the commu-

nities in which they would operate. Local dialogue is essential to determine what is appropriate in a local community and to assess whether new initiatives pose a risk of any sort to existing provider systems. No community need pursue any civil right to counsel initiative unless it chooses to do so.... The civil right to counsel should complement, not undercut, other civil and criminal legal representation services for low income individuals.... Civil right to counsel initiatives should be developed in consultation with stakeholders in the civil legal aid delivery system.⁶

The ABA's Model Access Act is unequivocal as well: "This Act shall not supersede the local or national priorities of legal services programs in existence on the date that this Act is enacted."⁷

We should also note that, despite Smith's legitimate concern, we are not aware of situations where new rights to counsel have displaced or interfered with legal services systemic advocacy efforts, and the legal services programs that have led efforts for new rights to counsel seem to have come to terms with that concern. For example, the recent legislative success in Massachusetts in establishing a right to counsel in guardianship proceedings was the result of legal services advocacy, and similar legal services organizations have driven and supported legislation for a right to counsel for seniors in eviction and foreclosure proceedings in New York

³David Udell & Laura Abel, National Coalition for a Civil Right to Counsel, Information for Civil Justice Systems About Civil Right to Counsel Initiatives (June 9, 2009), <http://bit.ly/jlVu2j> [hereinafter National Coalition Memo]. With respect to domestic violence proceedings in particular, see Beverly Balos, *Domestic Violence Matters: The Case for Appointed Counsel in Protective Order Proceedings*, 15 TEMPLE POLITICAL AND CIVIL RIGHTS LAW REVIEW 557, 558 (2006), <http://bit.ly/jlLibT> ("If petitioners were found to have a right to appointed counsel, it is likely that the appointment of counsel for indigent defendant/respondents would follow."). While we have encountered advocates who might be reluctant to extend a right to counsel to those accused of domestic violence, we have always made clear that, when they are indigent and face loss of shelter or custody, among other needs, they must logically be afforded the right.

⁴American Bar Association, Report to the House of Delegates (Resolution 112A approved Aug. 7, 2006), <http://bit.ly/jsmYLO> [hereinafter ABA Resolution 112A].

⁵American Bar Association, Report to the House of Delegates (Resolution 104 approved Aug. 2010), <http://bit.ly/mvx43j> [hereinafter ABA Resolution 104]. Much of the American Bar Association's Model Access Act was drawn from the California State Basic Access Act, which has similar provisions in this respect (Feb. 8, 2008), <http://bit.ly/m5U02X> (draft).

⁶National Coalition Memo, *supra* note 3, at 3,4, 9.

⁷ABA Resolution 104, *supra* note 5, at 2.

City. These legal services communities grappled with the very concerns we discuss here and determined how to move through them.

Far from detracting from systemic work, a civil right to counsel can enhance anti-poverty efforts. For instance, a new right to counsel can lead to the creation of new organizations with new funding streams to handle the right, freeing up legal services organizations to do the impact antipoverty work we see as critical for our client communities. In fact, some of the systemic advocacy that Smith describes (such as extending the notice period statewide for evictions) could have diminished value if tenants did not have attorneys to enforce such new rights. And some efforts arising from the momentum to achieve a civil right to counsel, such as California's Sargent Shriver Civil Counsel Act (A.B. 590), have infused new funding into legal services organizations.⁸

To avoid siphoning resources away from existing legal services priorities, right-to-counsel advocates are also universally committed to ensuring that sufficient funding accompanies any new rights to counsel. In essence, our steadfast position is that the right to counsel should not and must not be allowed to supplant, but rather must supplement, the critical systemic work undertaken by legal services advocates:

The civil right to counsel should complement, not undercut, other civil and criminal legal representation services for low income individuals.... stakeholders in communities exploring oppor-

tunities for creating such a right (whether broad or narrow, and whether a product of litigation or legislation) will want to advocate vigorously to assure that new rights do not take the form of unfunded mandates.⁹

The Model Access Act adds, "Funding provided pursuant to this Act shall not reduce either the amount or sources of funding for existing civil legal services programs below the level of funding in existence on the date that this Act is enacted."¹⁰ Other right-to-counsel advocates have articulated the same position. Most recently the Maryland Access to Justice Commission released a report that sets forth an implementation plan for a right to counsel in Maryland; the report warns in a comment that "[t]he implementation of a right to counsel should not result in the diversion of existing funding away from the current civil legal services delivery system, nor should it eliminate the discretionary legal services currently provided by that system."¹¹

We are not naive about the risks, however. This is why we feel so strongly that this aspiration can be achieved only if civil right-to-counsel efforts, wherever they are undertaken, deeply engage those who are astute about priorities for vulnerable communities. In many instances legal services folk will head that list.¹²

The civil right to counsel can and, we firmly believe, will be an antipoverty strategy in its own right. For instance, tenants are unrepresented 90 percent to 99 percent of the time, depending on the jurisdiction, while landlords are repre-

⁸See Kevin G. Baker & Julia R. Wilson, *Stepping Across the Threshold: Assembly Bill 590 Boosts Legislative Strategies for Expanding Access to Civil Counsel*, 43 CLEARINGHOUSE REVIEW 550 (March–April 2010).

⁹National Coalition Memo, *supra* note 3, at 3, 7.

¹⁰ABA Resolution 104, *supra* note 5, at 2.

¹¹Maryland Access to Justice Commission, *Implementing a Civil Right to Counsel in Maryland* 6 (2011), <http://bit.ly/IHf5A>.

¹²As much as legal aid is well positioned to lead this fight, the support of the judiciary is also helpful. That the judiciary's support is often motivated by a desire for judicial efficiency may well be true, as Smith suggests, but many judges also view the matter as one of fair administration of justice. Nor does responding to the concerns of judges mean that our quest for a right to counsel must be limited to court proceedings. Judges also value measures that can prevent disputes from arriving at the courthouse door. For instance, the courts have been leaders in establishing prelitigation mediation programs for foreclosure. And, even though the support of the judiciary may help us achieve our goals, it does not confine the scope of our interest in securing a right to counsel in civil adversarial proceedings involving basic human needs. To give one example, the 2006 ABA report makes clear that such proceedings may well include administrative proceedings (ABA Resolution 112A, *supra* note 4, at 12).

sented at least 90 percent of the time.¹³ Landlords are aware of this imbalance, and landlord-tenant courts are chronically underfunded, resulting in the rampant abuse of the rights of low-income tenants that we see virtually everywhere in the United States.¹⁴ Beyond the impact on each client's life, the mere presence of a guaranteed attorney in indigent tenants' cases and landlords' awareness of that presence should cause a seismic shift in the treatment of tenants even prior to any litigation. A similar paradigm shift in the funding and thus the functioning of courts dealing with poor people's issues should also result. In custody cases an adverse decision can have significant financial impact on child support or division of property, among other questions, and a parent who is left indigent by separation and is without counsel may find it difficult to convince a judge that the parent can raise a child as well as the other parent who now controls the former household's income. A right to counsel in such cases offers the promise that courts will become accustomed to taking such litigants more seriously than they do now.

The right to counsel dramatically increases the prospects for law reform through appellate advocacy that could set statewide precedents on a breathtaking range of key issues affecting poor people.¹⁵ Litigation of mass numbers of cases would also offer greater ability to identify and tackle systemic issues and trends.

Given that the right-to-counsel movement focuses exclusively on basic human-needs cases such as shelter, sustenance,

and health—needs that are undeniably caused or exacerbated by poverty—providing counsel for people who face legal harm in these arenas clearly will itself help counter the causes and effects of poverty. Countless studies show the economic consequences to both individuals and communities when indigent people lose their homes, their medical care, and their life-sustaining benefits, and an equal number of studies show how lawyers help avoid these outcomes more often than not.¹⁶ We are not, however, simply resting on prior studies but rather are attempting the difficult work of measuring the actual economic and societal costs *and benefits* associated with providing counsel in basic human-needs cases. Such is the purpose of pilot programs operating in California, Massachusetts, and Texas.

To sustain these efforts, we need to continue the dialogue about the right to counsel in civil cases, dialogue such as that Smith initiated in his article. No one would argue that indigent defense would be better off today without the *Gideon* decision.¹⁷ We follow that same line of thinking in believing that these concerns should drive *how* we fight for a civil right to counsel, not *whether* we should do so. We look forward to continuing the conversation and are exploring ways to engage more deeply with our legal services colleagues on these issues. And when communities and legal services programs determine that the time is right in their state to work to advance a civil right to counsel, the National Coalition stands ready to help.

¹³See, e.g., New York County Lawyers' Association, *The New York City Housing Court in the 21st Century: Can It Better Address the Problems Before It?* 12 n.1 (Oct. 2005), <http://bit.ly/14Eu8c>.

¹⁴Wade Henderson & Jonathan M. Smith, *The Right to Counsel and Civil Rights: An Opportunity to Broaden the Debate*, 40 CLEARINGHOUSE REVIEW 210, 214 (July–Aug. 2006).

¹⁵The ABA Model Access Act includes the right to counsel on appeal as part of its model, and we believe that any meaningful right to counsel must extend to appeals by right.

¹⁶For just a few examples, see Laura Abel & Susan Vignola, *Economic and Other Benefits Associated with the Provision of Civil Legal Aid*, 9 SEATTLE JOURNAL FOR SOCIAL JUSTICE 139 (2010); Rebecca Sandefur, *The Impact of Counsel: An Analysis of Empirical Evidence*, 9 SEATTLE JOURNAL FOR SOCIAL JUSTICE 51 (2010); Carroll Seron et al., *The Impact of Legal Counsel on Outcomes for Poor Tenants in New York City's Housing Court: Results of a Randomized Experiment*, 35 LAW AND SOCIETY REVIEW 419 (2001); Lou Marano, *Odd News: Access to Legal Aid Lowers Domestic Abuse*, UPI.COM (Jan. 8, 2003, 4:38 p.m.), <http://bit.ly/mwYmjF>; Phillip Granberry & Randy Albelda, Massachusetts Legal Assistance Corporation, *Assessing the Benefits of Provision of Legal Services Through the Disability Benefits Project* (Aug. 2006), <http://www.nlada.org/DMS/Documents/1236007115.86/Disability%20benefit%20report%207-07.doc>.

¹⁷*Gideon v. Wainwright*, 372 U.S. 335 (1963).



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