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A RIGHT TO A LAWYER? MOMENTUM GROWS

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The Right to Counsel and Civil Rights: An Opportunity to Broaden the Debate

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In recent years legal aid lawyers have renewed the call to create a right to counsel in civil cases. In state courts across the country they are advancing the powerful argument that state constitutional due process and open-court provisions, English common law, the Americans with Disabilities Act, or international law mandate such a right.[1] Advocates are also looking to the state legislatures for relief: create the right by statute or through increased funding of poverty lawyers.[2]

The intersection of a civil right to counsel and racial, ethnic, and gender fairness is an area that can offer new arguments in support of the right and can bring important new allies into the campaign. Racial minorities and women are disproportionately likely to be poor.[3] As we discuss further below, the inability to access counsel for a range of legal problems is one element in the mosaic of circumstances that keep people in poverty and that lock into place income disparities along race and gender lines. Think of the creation of a right to counsel in civil cases as a strategy to reduce this disparity. When a person living in poverty cannot get a lawyer to protect an important right, this is both a civil rights and an antipoverty issue.

[1]Other articles in this issue of CLEARINGHOUSE REVIEW discuss many of these ideas. See also *Frase v. Barnhart*, 840 A.2d 114, 129 (Md. 2003) (Cathell, J., concurring) (Clearinghouse No. 55,347); Lisa Brodoff et al., *The ADA: One Avenue to Appoint Counsel Before a Full Civil Gideon*, 2 SEATTLE JOURNAL FOR SOCIAL JUSTICE 609 (2004); Paul Marvy & Debra Gardner, *A Civil Right to Counsel for the Poor,* HUMAN RIGHTS MAGAZINE, Summer 2005, at 8, available at www.abanet.org/irr/hr/summer05/counsel.html.

[2]State and local appropriations are now a very significant part of the funding for civil legal aid. A majority of states now directly appropriate money, totaling more than $180 million, for legal services. See *Funding News*, LEGAL SERVICES NOW (SCLAID, American Bar Association), Oct. 19, 2005, available at www.abanet.org/legalservices/sclaid/lsn/docs/200510.html; NATIONAL LEGAL AID AND DEFENDER ASSOCIATION, PERLS REPORT: A BANNER YEAR FOR LEGAL AID FUNDING IN STATE LEGISLATURES, available at www.nlada.org/Civil/Civil_SPAN/Civil/News_From_The_Field/Items/2005071958155231.

[3]CARMEN DENAVAS-WALT ET AL., U.S. CENSUS BUREAU, INCOME, POVERTY AND HEALTH INSURANCE COVERAGE IN THE UNITED STATES: 2004, at 21 (2005), available at www.census.gov/prod/2005pubs/p60-229.pdf.

Women and Racial Minorities Are More Likely to Be Poor and Thus to Suffer the Effects of Not Having a Lawyer

Children, women, African Americans, Latinos, and other minorities disproportionately bear the burden of poverty.[4] There are in the United States almost 37 million poor persons, or 12.7 percent of the total population.[5] Whites, with a poverty rate of just 8.6 percent, are less likely to be poor than the population as a whole; that is, fewer than one out of every ten white persons lives in poverty.[6] African Americans and Latinos are more than twice as likely to be poor. Twenty-two percent of African Americans or Latinos—one in every five persons—have incomes below the federal poverty line.[7] The picture is starker for female heads of households: 30 percent of families with only the mother present live in poverty.[8] For white households with women as heads, the rate of poverty is 21 percent, more than twice the average for all whites.[9] Families with African American or Latino women as heads are poor at a rate of nearly 40 percent.[10]

Many poor white families experience poverty, need counsel, and cannot get help. Just under half of all persons living in poverty are white.[11] For African Americans and Hispanics, the problem is magnified; though collectively making up less than 25 percent of the population, they represent more than 50 percent of the poor.[12]

As a result of this disparity, racial minorities and women are significantly less likely to have a lawyer when they need one. Given the state of equal protection jurisprudence, a winning constitutional challenge is extremely unlikely to be mounted to confront this imbalance. However, the adverse impact on women and racial minorities may have relevance to equal protection arguments being advanced under state constitutional law and should be a critical element of the public policy debate to create legislatively a right or for increased funding.[13] Moreover, with race and gender included in the discussion, civil rights advocates are invited to add their voices to the right-to-counsel effort.

The work of poverty lawyers promotes racial and gender fairness in dynamic ways:

First, with more lawyers providing representation, fewer poor persons will suffer the economic and social consequences of an avoidable negative outcome. Given that

[4]The federal poverty line probably understates the real scope of poverty especially in urban areas where housing costs in recent years have risen so quickly. See PATRICK SIMMONS, FANNIE MAE FOUNDATION, A TALE OF TWO CITIES: GROWING AFFORDABILITY PROBLEMS AMIDST RISING HOME OWNERSHIP FOR URBAN MINORITIES app. A (2004) available at www.fanniemaefoundation.org/programs/pdf/census/notes_14.pdf; DANILO PELLETIERE ET AL., NATIONAL LOW-INCOME HOUSING COALITION, OUT OF REACH 2005 (2005), available at www.nlihc.org/oor2005. The poverty numbers in this context are useful not as an absolute measure but as a convenient tool for comparing the differing experience of whites, African Americans, Latinos, and women.

[5]U.S. Census Bureau, Historical Poverty Tables, www.census.gov/hhes/www/poverty/histpov/hstpov2.html (last visited May17, 2006).

[6]*Id.*

[7]*Id.*

[8]*Id.*

[9]*Id.*

[10]*Id.*

[11]*Id.*

[12]*Id.*

[13]E.g., in *Frase v. Barnhart* the appellant argued that the due process protections in the Maryland Constitution were broader than those in the U.S. Constitution and thus urged the Maryland court to find that counsel must be appointed where the case involved a challenge to the parent-child relationship and not be bound by the presumption against a right to counsel found in *Lassiter v. Department of Social Services,* 425 U.S. 18 (1981). See Brief of Appellant at 62, *Frase*, 840 A.2d 114 (No. 691). In another example, the Canadian Bar Association relied heavily on the disproportionate impact on women and native populations when suing the Province of British Columbia for failing to implement a right-to-counsel law. See CANADIAN BAR ASSOCIATION, CANADA'S CRISIS IN ACCESS TO JUSTICE 1 (2006), available at www.ohchr.org/english/bodies/cescr/docs/info-ngos/canadianbarassociation.pdf.

these economic hardships have a larger impact on racial minorities and women, a universal right to counsel, while alone not a solution, will have a leveling effect.

Second, lawyers can serve as a buffer to institutional racism that lingers in courts and administrative tribunals. By rigorously ensuring the protection of a client's rights, a legal aid lawyer can mitigate hidden and bias-rooted barriers that prevent a just result.

Third, poverty lawyers can use civil rights statutes and race and gender analysis to assist clients vigorously. Shortages of funding, however, make it difficult to bring many resource-intensive cases.

Lack of Access to Lawyers to Resolve Civil Disputes Locks Individuals, Families, and Communities in Poverty

Families and individuals living in poverty have extraordinary needs for legal services. The 1994 American Bar Association Comprehensive Legal Needs Study found that nationally, on average, low-income families had civil legal problems about once a year.[14] Subsequent studies conclude that this report may have understated the problem and that the level of need is, in fact, higher.[15] However we measure the need, clearly we are not meeting it. Less than 20 percent of poor families can obtain help from a legal aid program or a pro bono private lawyer.[16] Where they can receive legal assistance, it is often short of required representation.[17]

The economic circumstances of persons living in poverty are, by definition, fragile. One small setback can be catastrophic. As a result, the legal problems that poor families experience often relate to the very basics of life, including housing, health care, income, and family stability. The inability to resolve these issues further exacerbates economic inequality and perpetuates racial and gender disparities in income and wealth.

It is expensive to be poor. Persons living in poverty pay a premium for everything. The lack of a steady income can result in frequent utility shutoffs, with costly fees to reinitiate service. Inner-city groceries are more expensive and offer fewer options than big box stores in the suburbs.[18] Credit through payday lending and rent-to-own is often at rates that would be usurious in other contexts.[19] Unresolved legal problems make these costs worse. An avoidable eviction may increase the next landlord's demand for a security deposit or make it impossible to obtain credit from a conventional bank.

The vulnerability of persons living in poverty to fraud, predatory practices, and other abuse compounds the problem. With few advocates available to help, the poor family who is losing a home as a result of an illegally predatory subprime loan has nowhere to go. These cases, often complex to even the experienced advocate, are well beyond the reach of the unrepresented litigant. As a result, the family loses its home's equity—one of the greatest sources of wealth creation for low- and medium-income families in the United States.[20]

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[14] Consortium on Legal Services and the Public Interest, American Bar Association, Legal Needs and Civil Justice: A Survey of Americans—Major Findings from the Comprehensive Legal Needs Study 23 (1994), available at www.abanet.org/legalservices/downloads/sclaid/legalneedstudy.pdf.

[15] Legal Services Corporation, Documenting the Justice Gap in America 11 (2005), available at www.lsc.gov/press/documents/LSC%20Justice%20Gap_FINAL_1001.pdf.

[16] *Id.* at 4.

[17] The Legal Services Corporation (LSC) found that 76,000 clients that LSC-funded programs served received limited service when representation would have been more effective—a number that does not include the work of non-LSC programs. *Id.* at 6 n.8.

[18] Dick Mendel, *Double Jeopardy: Why the Poor Pay More*, Advocasey, Winter 2005, at 5, available at www.aecf.org/publications/advocasey/winter2005/pdf/double_jeopardy.pdf.

[19] *Id.*

[20] Thomas Boehm & Alan Schlottmann, Department of Housing and Urban Development, Wealth Accumulation and Homeownership: Evidence for Low-Income Households 8 (2004), available at www.huduser.org/Publications/pdf/WealthAccumulationAndHomeownership.pdf.

The avoidable loss of accumulated wealth need not be the result of malicious motives or illegal conduct. In urban settings with rapidly rising property values, neutrally applied tax laws can have the same effect as fraud. A low-income family may have acquired a home decades ago when an hourly wage-paying job could support a modest mortgage. Now dying, the generation that purchased these homes passed them down, often informally, to children who cared for their parents in later years. If the purchaser never properly transferred the title and the home is in a transitional neighborhood, a speculator will buy the property from the city at the first default on ever-rising taxes. Since there is confusion about the title, an inability to navigate the system, and sometimes an inability to pay property taxes, the owners can lose their homes together with their equity to developers selling the homes to high-income city dwellers.

The equity in the home, especially in a neighborhood of rising property values, represents a real opportunity for the family to move from poverty. The family can lose it for no other reason than the complexity of the legal process and the unavailability of lawyers to provide help. The loss of these properties is but one mechanism promoting gentrification, a process that tends to reduce both economic and racial integration. In places such as the District of Columbia, which middle-class whites abandoned in the 1980s and 1990s, the result is often displacement of stable minority communities in favor of upscale development.

This is far from the only example of how the lack of access to a lawyer can be a factor in keeping a family poor. Virtually every case that a legal aid lawyer handles has economic consequences. Matters so common as to be thought of as routine frequently have cascading adverse economic affects. The following are but a few of the thousands of scenarios that illustrate this point:

- If a woman is fired because her abuser threatens her at work and she does not have a lawyer to help her get her job back, she and her children are now without an income.
- If a child is improperly denied Medicaid, she could go untreated for common conditions, such as ear infections, exposure to lead paint, or mold, that will later impair her ability to learn.
- If a family is evicted and becomes homeless when eviction could be avoided, a predictable consequence is job loss, disruption of education, and other setbacks.
- If an illegal debt collection practice results in the repossession of a car, the owner could lose his job and his family's income.

Thus the legal system helps lock people in poverty and keeps in place the economic status quo, deeply divided along racial and gender lines. If representation can help circumvent the economic hardships described above, a right to counsel can be part of a strategy to reduce the effects along racial and gender lines in our economy. This is not to suggest that a right to counsel will eliminate poverty or racial injustice, but it will help by making the legal process fair and by reducing the courts' role in keeping people poor.

Poverty Lawyers Confront Racial Imbalances in Otherwise Neutral Judicial Processes

Subtle and not-so-subtle racial and gender biases continue to plague the legal system. While hidden bias can be difficult to quantify, it is oppressive nonetheless. It manifests itself as language inaccessibility, lack of transparency in decision making, and the lack of respect that the tribunal shows for the time litigants spend away from work or for which they need child care. *Pro se* litigants dominate the civil dockets of most courts. In many specialized courts, such as those that hear landlord-and-tenant and family law cases, an overwhelming majority of cases have at least one unrepresented party.[21] Despite the volume and the

[21] According to the National Center on State Courts, some jurisdictions see as many as 80 percent of all civil cases involving at least one unrepresented litigant. See NATIONAL CENTER ON STATE COURTS, ACCESS TO JUSTICE: MEETING THE NEEDS OF SELF-REPRESENTED LITIGANTS—EXECUTIVE SUMMARY 2 (2002), available at www.ncsconline.org/WC/Publications/Res_ProSe_AccessJustMeetNeedsExecSumPub.pdf.

demands created on judicial resources by *pro se* litigants, these "poor person" courts tend to be the most neglected in the system.[22]

In many urban areas, the litigants are overwhelmingly racial minorities. Whether the courts commit the fewest resources to the cases involving poor litigants because they are poor or because they are disproportionately black and brown is hard to measure. Nevertheless, the effect is the same: clerk offices are understaffed, personnel are poorly trained and overworked, courtrooms are crowded, judges are impatient, dockets are rushed, and justice becomes a commodity that values efficiency over substance. Since all litigants are treated with equal disrespect, bias is hidden behind apparent, though not altogether benign, neutrality.

For persons who do not speak English, it is only worse. Even where interpreters are available, they are often not qualified. Without an interpreter or a lawyer who can speak the client's language, the chance that a non-English speaker can get justice in most courts can be very close to nonexistent.

The hidden nature of the bias in civil justice was the subject of an extensive study of racial attitudes in Philadelphia legal proceedings. After interviews, focus groups, and case studies, the researchers concluded:

> For U.S. lawyers comfortable with the cultural assumptions of the legal system, it is hard to prove that the workings of the legal system can be discriminatory when on the surface the laws are not.... [S]uch injustice may be hidden in the unrecorded and often unofficial stages of the process, where few lawyers have been trained to look.[23]

Where legal aid lawyers are available, they are likely to challenge bias hidden in procedures. Represented parties have better outcomes, and lawyers make a difference.[24]

As a result of the decision in *Gideon v. Wainwright*, there are significantly greater resources for indigent defense than for civil legal aid.[25] Not surprisingly therefore, criminal law has produced race-based challenges to procedural rules, such as the discriminatory use of the peremptory challenge and practices that exclude minorities from grand jury pools.[26] This is not to suggest that public defenders have succeeded in eliminating racial bias in criminal proceedings. To the contrary, discrimination in the criminal process is apparent, and young African American and Latino men are incarcerated at alarming rates. The difference is that the indigent defense bar frequently raises challenges to the bias, and public attention has followed. Poor litigants on the civil side are subjected to an equal level of discrimination, which goes unnoticed, unchallenged, and unaddressed.

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[22]See, e.g., KAREN DORAN ET AL., NO TIME FOR JUSTICE: CHICAGO'S EVICTION COURT 4 (2004), available at www.lcbh.org/pdf/full_report.pdf (finding that the average hearing in Chicago's housing court was just one minute and forty-four seconds).

[23]William Westerman, Cultural Barriers to Justice in Greater Philadelphia: Background, Bias and the Law 11 (Philadelphia Folklore Project, Working Paper No. 9, 2001).

[24]See, e.g., 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) ("The findings from this experiment clearly show that when low-income tenants in New York City's Housing Court are provided with legal counsel, they experience significantly more beneficial procedural outcomes than their pro se counterparts.").

[25]In 1999 criminal defense programs spent approximately $1.2 billion on indigent defense in the nation's largest 100 counties, covering about 42 percent of the nation's population. See CAROL DEFRANCES & MARIKA F.X. LITRAS, U.S. DEPARTMENT OF JUSTICE, INDIGENT SERVICES IN LARGE COUNTIES, 1999 (2000), available at www.ojp.usdoj.gov/bjs/pub/ascii/idslc99.txt. By contrast, total federal and local government spending on civil legal aid for the entire country was only $600 million. See Earl Johnson Jr., *Equal Access to Justice: Comparing Access to Justice in the United States and other Industrial Democracies*, 24 FORDHAM INTERNATIONAL LAW JOURNAL S83, S84 (2000).

[26]See, e.g., *Batson v. Kentucky*, 476 U.S. 79 (1986) (holding that the use of race as basis for a peremptory challenge is unconstitutional); *Rose v. Mitchell*, 443 U.S. 545 (1979) (holding that mechanisms that have the effect of excluding minorities from jury pools are unconstitutional).

Justice Earl Johnson points out in his history of the early days of federal funding of legal aid that one of the effects of the neighborhood programs was the "[e]qualization of opportunity among racial, economic, and geographic groups."[27] He noted that this was the by-product of improved access to counsel as much as a deliberate strategy to bring cases that challenge discrimination:

> In describing the social and economic impact of cases taken by poverty lawyers, I do not mean to suggest that these attorneys deliberately set out to achieve such results. Undoubtedly, the vast majority of cases were brought or defended by counsel bent only on serving a specific client and his or her goals. Even where a test case was filed or a legislative measure advocated, the long run impact on the overall poverty community was only vaguely perceived.[28]

While the guarantee of a lawyer for every person who needs counsel does not necessarily ensure the correction of bias, that bias will go unchallenged if counsel is not present is a certainty. There are valuable lessons to be learned from the forty years of experience in implementing the *Gideon* decision. Counsel available to indigent defendants is, in many places, very good; in other parts of the country the provision of a lawyer is form over substance and of little benefit to the defendant.[29] If there is a right to a civil lawyer, the lawyers involved will be only as good as their programs demand and the support they receive. To the extent to which a goal to be achieved through a civil right to counsel includes addressing racism and sexism in the courts, legal aid organizations must ensure that they adequately train and supervise staff, that there is a staff culture of excellence and a client-centered focus, that there is a commitment to race-based advocacy, that they draw staff from a diverse pool, and that they give preferences for jobs to applicants who grew up in poverty or that they draw them from the racial and ethnic communities they serve.

A Civil Right to Counsel Will Increase the Resources for Civil Rights Advocacy

Civil rights statutes are powerful tools to address the concerns that clients bring to a legal aid office. Over the last several years, CLEARINGHOUSE REVIEW has published several excellent articles that discuss the use of race-based advocacy in legal services work.[30] There is no need to repeat the arguments in those papers. It is sufficient to note that there is a history of race- and gender-based advocacy by legal aid lawyers, that they have won important victories, and that programs that the Legal Services Corporation (LSC) funds or does not fund can do much of this work alike. Race-based advocacy strategies are effective in challenging discrimination in credit, housing, health care, welfare, and employment. Nevertheless, even though gender and race compose the backdrop of most legal aid work, cases directly raising issues of race and gender fairness are only a very small part of the docket of most programs.

There is a multitude of reasons, including fear of LSC restrictions, lack of expertise, lack of training, and the absence of a commitment by program leadership, why programs do not pursue such aforementioned cases.[31] One of the dominant reasons, however, is the lack of sufficient resources. Cases brought to challenge discrimination under civil rights laws are often complex and time-consuming. In the absence of a smoking gun, successful cases depend on

[27] EARL JOHNSON JR., JUSTICE AND REFORM: THE FORMATIVE YEARS OF THE AMERICAN LEGAL SERVICES PROGRAM 195 (1974).

[28] *Id.*

[29] See, e.g., STEPHEN BRIGHT ET AL., SOUTHERN CENTER FOR HUMAN RIGHTS, PROMISES TO KEEP: ACHIEVING FAIRNESS AND EQUAL JUSTICE FOR THE POOR IN CRIMINAL CASES (2000), available at www.schr.org/news/news_indigentdefense.htm).

[30] See, e.g., Camille D. Holmes et al., *Race-Based Advocacy: The Role and Responsibility of LSC-Funded Programs,* 36 CLEARINGHOUSE REVIEW 61 (May–June 2002); Alan W. Houseman, *Racial Justice: The Role of Civil Legal Assistance, id.* at 5.

[31] See Holmes, *supra* note 30, at 62.

effective prefiling investigation and careful and extensive discovery. Even litigation on behalf of an individual that does not involve a class action will require materially more effort than many traditional poverty cases. Defendants will always fight back because of the stigma of being accused of bias.

Legal aid programs and lawyers are always making triage decisions. Each day many more clients seek help than the staff can possibly adequately meet. The hardest decisions are those that relate to which clients to represent and which to allow to "go it alone," possibly with disastrous results. Programs understandably take the case that they can handle today, the problem that they can solve with a modest amount of work, in a familiar forum. Also, most funding sources like to see high case numbers.

The decision to handle more complex or systemic matters is often a difficult choice. It requires the discipline to turn away clients that the program could help in favor of the broader case.[32] For example, while the investment in litigation that will overcome housing discrimination or credit redlining has the potential for a much greater payoff in the medium and long term, it may mean not helping dozens or hundreds of clients in the interim.

There are many reasons why poverty lawyers and legal aid programs should bring a much higher volume of cases to address race and gender discrimination now. However, should the effort to create a right to counsel be successful, this volume will become far easier to reach. If the creation of the federally funded programs is any guide, there is reason to be optimistic that a civil Gideon will facilitate increased advocacy to eliminate bias. With the influx of new resources in the late 1960s came a commitment to systemic advocacy in general and to racial justice advocacy in particular. The group of lawyers who became Reginald Heber Smith Fellows, together with the founding of the backup centers, ensured that advocacy on behalf of the poor and against race and gender discrimination remained a high priority.[33]

The Problem Is the Same Seen Through the Lens of Either Civil Rights or Equal Justice

From the perspective of clients who cannot afford counsel and are seeking help, the effects of poverty and bias are bound together. That they are forced to live in dangerous housing, denied medical treatment, or subjected to predatory practices because of greed, racism, sexism, illegality, or indifference may not matter. The classification of the solution to their problem as solely a civil legal aid or as solely a civil rights matter ignores that poverty, race, and gender are always at play and that every tool in the kit should be available in every case. A civil right to counsel should embrace race- and gender-based advocacy as an essential element.

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The denial of equal justice because of the unavailability of counsel in civil matters is not just a legal aid or poverty law question but a matter of civil rights as well. If successful, the effort to establish a right to counsel in civil matters will create a cadre of lawyers who not only can but also, to represent their clients properly, must include racial and gender justice arguments in their work. More significant, however, is that, by testing the mechanisms designed to keep people poor, these lawyers will, by necessity, work to eliminate racial and gender economic disparity.

The civil rights community can be an important ally in the struggle for a civil equivalent to *Gideon v. Wainwright*. This is a profound opportunity for legal aid and civil rights lawyers to join forces.

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[32]This is even true where the legal aid organization recruits pro bono counsel. In many cases the private lawyers do a great deal of the work, but often client relations, fact development, and outreach falls on the legal aid lawyers.

[33]Alan W. Houseman & Linda E. Perle, Center for Law and Social Policy, Securing Equal Justice for All: A Brief History of Civil Legal Assistance in the United States 11 (2003), available at www.clasp.org/publications/Legal_Aid_History.pdf.