The Right to Civil Counsel

Tonya L. Brito

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.

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 onlomfh r.

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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 . . 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 pub-

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.

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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

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

- *Gideon v. Wainright,*

The Atlantic

St. Louis Post-Dispatch

- *Turner v. Rogers,*