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Introduction: Civil Legal Representation

Lisa E. Brodoff

In early 2002, I was among a group of legal aid lawyers, law professors, private practitioners, and former judges that began meeting both locally and nationally to discuss the possibility of establishing a “civil Gideon”—the legal right to counsel in civil cases.¹ These client advocates had seen with their own eyes what more and more studies were proving—low-income litigants were going into courts and administrative hearings on their own to fight for basic human rights and critical human needs.² They were fighting not only to keep their homes, income, healthcare, and food, but also to keep their families safe from abuse. The results were disturbing. Many were unable to navigate the judicial or administrative hearing systems at all without representation, never even getting through the first steps of establishing their rights. Others may have gotten through the courthouse doors, only to be thwarted by legal procedures, rules of evidence, or the inability to access or understand the legal strategies that could have saved their families from eviction, prevented the loss of benefits, or protected their children from an abusive parent.³

Washington State advocates were among the early leaders in pursuing a coordinated advocacy plan that sought recognition of a basic right to counsel for indigent civil litigants. The Coalition for Indigent Representation and Civil Legal Equality (CIRCLE) was established in that early meeting with the purpose of using the tools of litigation, empirical evidence, social science research, and public education and outreach to establish the need for and the right to counsel in civil cases.⁴ The primary initial legal strategy to secure a civil Gideon focused on state constitutional theories rather than the federal constitution. Federal constitutional

arguments had been tried and lost in the past.⁵ A new movement was afoot to argue that the more expansive rights to due process and access to the courts under state constitutions required representation in civil matters when significant rights or basic human needs were at stake.⁶

The *Seattle Journal for Social Justice (SJSJ)* was the first law journal to publish the scholarship emanating from CIRCLE members advocating a civil right to counsel and discussing possible legal theories on which to base such a right.⁷ In 2004, three articles were published on civil Gideon. One article, by Deborah Perluss, one of the authors in this current cluster, described the significant need in Washington State for free civil legal services “to advance the cause of justice, reduce the social and financial costs of adverse conditions such as homelessness and family violence, and instill confidence and trust in the judicial system,”⁸ and set out potential Washington State constitutional arguments for a right to counsel in civil cases.⁹ Perluss argued that access to justice is a fundamental right under the state constitution’s Article I, Section 10, and that the right to counsel is an incident of that right to access the courts.

A second article from the 2004 issue of SJSJ—by myself, Susan McClellan, and Elizabeth Anderson—posited a new theory for the provision of counsel for a subset of litigants who have severe disabilities. This article proposed a novel legal theory for providing counsel to people whose disabilities prevented them from representing themselves in civil courts or administrative proceedings. We argued that the Americans with Disabilities Act requires these courts to provide representation as a reasonable accommodation for those litigants who lack the physical or mental capabilities to understand the proceedings or to put forward an adequate case/defense.¹⁰

The third article, by Sudha Shetty, asserted that access to civil representation is particularly acute among the immigrant and refugee populations of our country, and that “first responders” in the legal profession need to be trained to assess and triage potential clients in these

underserved communities.¹¹ These articles set the stage for future advocacy over the next six years in Washington and other states for a civil right to counsel to ensure that the fundamental right to access to the courts is guaranteed or that, at a minimum, those who were disabled and unable to put on a case because of their disabilities be provided representation to secure access to the courts and the administrative hearing system.

The results of this advocacy have, thus far, been mixed. In a huge victory for people with disabilities, the Washington Supreme Court was convinced that the Americans with Disability Act did, in appropriate cases, provide for a representational accommodation. It adopted GR 33 in 2007, which sets out a procedure for all the courts in the state to provide counsel (as well as other services) as an accommodation to allow access to the court system.¹² However, the legal theories proposed by Perluss ran into a significant roadblock in 2007 with the Washington Supreme Court decision in the case of *In re Marriage of King*.¹³ The court held that a low-income parent is not entitled to the provision of free legal counsel under the state constitution, even when she is threatened with the loss of her parent-child relationship in a custody battle where the father is represented, she has limited education, and her ability to present an effective legal argument is extremely limited.

After the blow of the *King* decision, CIRCLE regrouped to consider where to go from there. What other strategies were available to argue for a civil right to counsel? How should we move forward after our state's Supreme Court, a national leader in forwarding equal justice, failed to be convinced (in one of the most egregious factual situations) that legal representation was required by the state constitution's guarantee of access to justice? We decided to bring together a group of experts for a symposium at Seattle University School of Law to grapple with and consider these questions and to develop a new plan of action.

On February 19, 2010, Washington's equal justice community, under the auspices of the Korematsu Center for Law and Equality at Seattle University School of Law, sponsored a day-long symposium called *Civil*

Legal Representation and Access to Justice: Breaking Point or Opportunity for Change. Speakers included social scientists, academics, practitioners, legal aid advocates, and others who are deeply engaged in examining both criminal and civil indigent legal services delivery systems. A primary focus of the symposium was consideration of how to identify where the greatest need for representation currently exists and how to have the most beneficial impact on outcomes in proceedings involving people who would otherwise lose or forgo asserting basic rights. The symposium resulted in both the development of a set of principles for the provision of civil representation,¹⁴ as well as the cluster of articles now being published in this current issue.

With the publication of this cluster of articles, *SJSJ* is once again at the forefront in fostering scholarship centering on advocacy for providing representation in civil courts and administrative hearings to those litigants who could not otherwise afford to pay for counsel. This group of articles as a whole moves the discussion of right to counsel to the next phase by examining the following questions: What specifically is the impact on our justice system and on the people using it when legal representation is unavailable and human rights or critical needs are at stake? Is there empirical evidence to support the universal belief that having a lawyer does matter and does have an impact on the outcomes in a case? If so, in which settings and subject matters, or for what types of litigants does legal representation make a difference? How do other countries approach the issue of providing counsel to low-income civil parties? What can the United States learn from the international community? And, what strategies are still available for furthering access to the courts and to justice for those who cannot afford counsel, especially in light of recent negative case law?

The cluster begins with Deborah Perluss' article, *Civil Right to Counsel: In Re Marriage of King and the Continuing Journey*.¹⁵ Perluss walks us through a critical examination of the *King* decision specifically and the history of the fight for civil representation generally in Washington State. She demonstrates that, in order to move forward from *King*, we must

understand what may have motivated the state Supreme Court, a leader in the access to justice movement, to render such a broad and negative decision against a state constitutional theory supporting civil legal representation. One of the more fascinating insights Perluss posits is a psychological one—that one of the underlying reasons for the courts’ decision may be an inability to confront the reality that our judicial system is biased and unfair to pro se litigants. Implicit in a finding that counsel is required for fairness and access is that, without representation, people will more likely lose their claim. Judges and courts alone do not provide fair access. Our Supreme Court may have been unwilling to face the reality that people are denied justice before them by mere virtue of the fact that they are poor and cannot pay for a lawyer.¹⁶ Perluss goes on to suggest that the most fertile areas for post-*King* litigation are for the provision of counsel for particularly vulnerable groups like children, people with disabilities, and victims of violence, as well as when constitutionally cognizable interests are at stake in the proceedings (rather than the “purely private” custody matter at stake in *King*). Still, she remains optimistic that the *King* decision “will not stand the test of time. The need is too great, the reasons too compelling, and the momentum toward change too strong to be turned back.”¹⁷

One of the major theoretical underpinnings to the argument that indigent parties should be provided with counsel is that having a lawyer makes a positive difference, both to the particular people involved in the litigation and, more generally, to the civil justice system as a whole. Rebecca Sandefur, in her article, *The Impact of Counsel: An Analysis of Empirical Evidence*,¹⁸ examines those assumptions by actually looking at the empirical data to determine if and when this is true. She moves us forward from our theoretical assumption that having a competent lawyer can change the outcome of a case to actually proving it. Sandefur examines the empirical evidence to determine if and when lawyers make a difference. While her analysis does clearly support the finding that people who are represented by lawyers are more likely to prevail than those who appear pro se, she also

finds that the amount of impact varies wildly. The studies show that the more procedurally complex the case is, the greater the positive impact of representation. But, she takes her analysis further. Lawyers may not always be the best solution to reaching a fair and correct outcome, particularly when the area of litigation is of low to average complexity. She calls for basing decisions on how to provide better civil justice access on an empirical analysis to determine when advice or representation from a trained nonlawyer advocate, government ombudsmen's offices, or simplified procedures might be a better approach than providing lawyer representation. Finally, Sandefur critiques the traditional focus on access to legal forums as the only solution to the access to justice issues facing our communities (she calls this traditional focus "myopic").¹⁹ The research shows that Americans, in fact, do not generally turn to lawyers and courthouses to solve their social justice problems, and they may well prefer to use nonlegal resources of advice and assistance to come to resolutions rather than representation. And, she points to this financial reality—we are not able to afford the costs of a model that relies heavily on lawyers and litigation for the resolution of all of our civil justice problems.

Given limited resources, when and how should lines be drawn on the provision of civil counsel for people who need but cannot otherwise afford representation? When must counsel be provided, and when might other "less than full legal counsel" assistance be a reasonable solution to accessing justice for particular kinds of cases or clients? Russell Engler takes on how to parse these painful choices in *Reflections on a Civil Right to Counsel and Drawing Lines: When Does Access to Justice Mean Full Representation by Counsel, and When Might Less Assistance Suffice?*²⁰ Engler advises us to embrace these line-drawing choices as creating starting points and beach heads in a strategy towards building momentum for broader expansion. He warns us that "an unwillingness to begin with incremental steps runs the risk of achieving no movement at all, as the initiatives get stalled by concerns about the ultimate landscape (civil right to

counsel for all), or opportunities for potential gains are passed over in the face of the enormity of the task [of] achieving a more broad-based right.”²¹ Engler suggests a three-prong approach to determining which cases and/or clients are the most appropriate beneficiaries of a full right to civil counsel and which are not—first, determine whether litigants’ needs can be met by expanding the roles of court personnel (judges, mediators, and clerks) in assisting unrepresented parties; second, determine whether assistance programs short of full attorney representation (hotlines, self-help centers, and advice offices) can prevent the forfeiture of legal rights without counsel; and finally, if neither changes in the role of court personnel nor the use of assistance programs are sufficient in protecting litigants’ rights, only then must full representation be provided. Engler advocates the use of current data and future research to explore where the stakes for unrepresented parties are too high and the power imbalances too great to risk anything less than full counsel, and, conversely, where other strategies can meet the needs of parties. He urges the use of pilot projects to test out the efficacy of counsel versus other methods of assistance and to create new data to support increased funding for projects. This article in the cluster gives advocates hope and a clear roadmap for moving forward in the face of recent setbacks in the movement for a civil Gideon.

During difficult economic times, the need for free civil legal services becomes even greater, while at the same time, the funding for legal aid programs becomes even more scarce. This cruel irony can be fought, say authors Laura K. Abel and Susan Vignola in their article, *Economic And Other Benefits Associated With The Provision Of Civil Legal Aid*,²² by documenting the concrete financial rewards and other benefits to the local community of providing free legal services to the poor. If we can show with real data that civil legal aid representation can have a direct and net positive economic effect on the community, then that evidence can be a “powerful motivator”²³ for state legislatures and other funding sources to expand legal aid rather than contract it when budgets are especially tight. Abel and

Vignola convincingly, and for the first time, bring together existing studies to prove that legal representation results in reduced domestic violence rates and associated law enforcement costs, reduction in the time children spend in costly foster care, improved client health and increased revenue for hospitals, and lower juvenile rearrest rates and concomitant law enforcement costs. By focusing us in this article on proving the concrete financial benefits to local communities, rather than only to the individuals receiving the legal representation or the more theoretical larger societal benefits, Abel and Vignola advance the cause of civil right to counsel and set us in a new direction for future research and advocacy.

In the next article in the cluster, we are given the opportunity to apply many of the points made by Sandefur and Engler on how to make the hard choices in the provision of civil counsel, and the constitutional legal theories proposed by Perluss on potential due process arguments post-*King*, to a specific group of litigants—people who are faced with the possibility of prolonged incarceration and forcible expulsion from the United States in removal proceedings. Matt Adams, in *Advancing the “Right” To Counsel In Removal Proceedings*,²⁴ argues that, “[G]iven the enormous interests that are at stake in removal proceedings, the sharp imbalance of powers created by the indisputably complex and adversarial nature of the proceedings, constitutional case law provides a framework to assert the right to assigned counsel.” As he describes the severe impacts on a person when the government subjects him/her to deportation—the loss of country, home, property, employment, liberty; permanent separation from family and loved ones; and potentially “all that makes life worth living”²⁵—I reflected back on the other articles in the cluster. Where else, if not in this type of civil proceeding, would we ever see the need for representation, no less the constitutional due process right to representation? Adams convinces us that lesser forms of assistance than counsel have been tried and are inadequate in the removal setting. He discusses the Legal Orientation Programs (LOP) that provide limited assistance to unrepresented individuals to help them, at

least initially, identify possible forms of relief and to orient them to the process ahead. Still, these programs are not a viable alternative to representation.

Even those respondents who understand the substance of the basic charges against them, or those who are advised that they may qualify for an application for relief, are left with little or no understanding of the intricacies of the substantive provisions of the law. Nor can they generally learn the particulars of the legal process, which are required to successfully contest charges and present applications for relief.²⁶

In removal proceedings, advocates can and must fight for legislative and administrative changes granting free counsel or, as Adams argues, make the case that federal constitutional due process requires it.²⁷

The final piece in this Civil Right to Counsel cluster is an amicus brief, authored by Raven Lidman and Martha F. Davis,²⁸ which was filed in the *In re Marriage of King* case on behalf of international human rights law professors and scholars. For me, this is a sobering yet hopeful conclusion to this set of articles. The brief asks the Washington State Supreme Court to look at and honor foreign and international law, which holds that a fair trial may require publicly provided civil legal counsel. It points out that fifty countries in Europe, including Serbia, the Ukraine, and Azerbaijan; and nine other foreign countries, including India, Zambia, South Africa, and Brazil; broadly provide free lawyers for low-income people in both civil courts and administrative fora. How is it that so much of the rest of the world has a long history of providing representation as a basic right to access social justice, and we remain so far behind? Although the *King* court did not look to transnational law to inform its decision on the right to civil counsel as a matter of due process, as the brief urges, I still find hope that other courts, and possibly even this court in other settings, may someday be persuaded that the majority of countries and courts have it right—that access to the

courts may require state funded legal representation for low-income litigants in order for the proceeding to be fair.

I predict that this cluster of articles, like the first *SJSJ* cluster in 2004, will have a real impact on advocacy for the future expansion of the civil right to counsel in Washington State and around the country. They provide us with a framework going forward for examining the questions of when counsel is required for accessing justice, and when, instead, other forms of assistance can better meet the needs of the parties. They set us up for further research and pilot projects to test out the need for and the impact of counsel in discrete settings. And they encourage us to continue on, despite recent setbacks, because the need is so great and the cause so important to the individuals involved in the cases, the court system, the local community, and society as a whole.

¹ See National Coalition for a Civil Right to Counsel, <http://www.civilrighttocounsel.org>. The National Coalition for a Civil Right to Counsel (NCCRC) is an association of individuals and organizations committed to ensuring meaningful access to the courts for all. Its mission is to encourage, support, and coordinate advocacy to expand recognition and implementation of a right to counsel in civil cases. Organizations with members participating in the National Coalition include the Brennan Center for Justice, the Center for Law and Social Policy, the National Center on Poverty Law, the National Legal Aid and Defender Association, and the Public Justice Center, as well as numerous legal services organizations, private law firms, IOLTA commissions and universities.

² See, e.g., Task Force on Civil Equal Justice Funding, Washington Supreme Court, *The Washington State Civil Legal Needs Study (2003)*, available at <http://www.courts.wa.gov>. The study concluded that 75 percent of low-income households experienced a minimum of one civil legal problem per year, and that 88 percent faced their legal problems without the assistance of a lawyer. Most of the legal issues experienced by low-income families involved access to basic human needs like housing, healthcare, and family safety. *Id.* at 23–25.

³ *Id.* at 55–56.

⁴ CIRCLE consists of individuals and representatives from the Northwest Justice Project, Columbia Legal Services, the Northwest Women’s Law Center, the Center for Justice in Spokane, Teamchild, The Defender Association, the Washington State Bar Association, Seattle University School of Law, the University of Washington School of

Law, University Legal Services at Gonzaga University, Perkins Coie, and other members of the private bar.

⁵ See *Lassiter v. Dept. of Soc. Servs. Of Durham County*, 452 U.S. 18 (1981).

⁶ See, e.g., Deborah Perluss, *Washington's Constitutional Right to Counsel in Civil Cases: Access to Justice v. Fundamental Interest*, 2 SEATTLE J. FOR SOC. JUST. 571 (2004).

⁷ The first *SJSJ* published article was by Justice Earl Johnson, Jr., wherein he argued that the United States should join the large number of foreign countries and courts that have held that equal justice requires representation in civil matters for low-income litigants. Earl Johnson, Jr., *Will Gideon's Trumpet Sound a New Melody? The Globalization of Constitutional Values and Its Implications for a Right to Equal Justice in Civil Cases*, 2 SEATTLE J. FOR SOC. JUST. 201 (2003).

⁸ Perluss, *supra* note 6, at 576. Fewer than one in five low-income people are represented in cases involving obtaining critical benefits or securing significant legal rights. Task Force on Civil Equal Justice Funding, Washington Supreme Court, *The Washington State Civil Legal Needs Study* (2003), available at <http://www.courts.wa.gov/newsinfo/content/taskforce/CivilLegalNeeds.pdf>.

⁹ Perluss, *supra* note 6.

¹⁰ Lisa Brodoff, Susan McClellan, & Elizabeth Anderson, *The ADA: One Avenue to Appointed Counsel Before a Full Civil Gideon*, 2 SEATTLE J. FOR SOC. JUST. 609 (2004).

¹¹ Sudha Shetty, *Equal Justice under the Law: Myth or Reality for Immigrants and Refugees?* 2 SEATTLE J. FOR SOC. JUST. 565 (2004).

¹² General Rule 33, adopted by the Washington State Supreme Court effective September 1, 2007.

¹³ 162 Wash.2d 378, 174 P.3d 659 (2007).

¹⁴ See Materials from the Seattle Symposium on Civil Legal Representation and Access to Justice: Breaking Point or Opportunity for Change, available at, http://www.law.seattleu.edu/Continuing_Legal_Education/Event_Archives/2010/Korematu.xml [hereinafter "Symposium Materials"].

¹⁵ Deborah Perluss, *Civil Right to Counsel: In re Marriage of King and the Continuing Journey*, 9 SEATTLE J. FOR SOC. JUST. 13 (2010).

¹⁶ Symposium Materials, *supra* note 14, at 8.

¹⁷ *Id.* at 24.

¹⁸ Rebecca L. Sandefur, *The Impact of Counsel: An Analysis of Empirical Evidence*, 9 SEATTLE J. FOR SOC. JUST. 51 (2010).

¹⁹ Symposium Materials, *supra* note 14, at 31.

²⁰ Russell Engler, *Reflections on a Civil Right to Counsel and Drawing Lines: When Does Access to Justice Mean Full Representation by Counsel, and When Might Less Assistance Suffice?*, 9 SEATTLE J. FOR SOC. JUST. 97 (2010)

²¹ *Id.* at 116.

²² Laura K. Abel & Susan Vignola, *Economic and Other Benefits Associated with the Provision of Civil Legal Aid*, 9 SEATTLE J. FOR SOC. JUST. 139 (2010).

²³ *Id.* at 140.

²⁴ Matt Adams, *Advancing the "Right" to Counsel in Removal Proceedings*, 9 SEATTLE J. FOR SOC. JUST. 169 (2010).

²⁵ *Id.* at 171 (quoting *Ng Fung Ho v. White*, 259 U.S. 276, 284 (1921)).

²⁶ *Id.* at 179.

²⁷ See, for example, an attempt by advocates to convince the U.S. Attorney General to provide counsel for non-citizens with mental disabilities in removal proceedings. Letter from Merrill Rotter, M.D. et al., to Eric Holder, Attorney Gen. of the U.S. (July 24, 2009), available at http://ccrjustice.org/files/Letter%20to%20AG%20Holder%20_Mental%20Health.pdf.

See also a recent U.S. district court victory wherein the court held that the Rehabilitation Act requires counsel for individuals with severe mental disabilities in removal proceedings. Press Release, Northwest Immigrant Rights Project, Immigrants Win Right to Representation (Dec. 23, 2010), available at

<http://www.nwirp.org/domains/nwirp.org/UDocuments/Announcements/Immigrants%20Win%20Right%20to%20Representation%20Press%20Release%2012%2023%2010.pdf>.

²⁸ Martha F. Davis & Raven Lidman, *In re Marriage of King: Amicus Curiae Brief of International Law Scholars in Support of Appellant*, 9 SEATTLE J. FOR SOC. JUST. 185 (2010).