



The Program on
Human Rights and
the Global Economy
NORTHEASTERN UNIVERSITY
SCHOOL OF LAW

NCCRC
National Coalition for a
Civil Right to Counsel



October 4, 2017

Re: The Civil Right to Counsel

Dear Professor Alston:

On behalf of the National Coalition for a Civil Right to Counsel (NCCRC) and the Program on Human Rights and the Global Economy (PHRGE), we welcome your upcoming visit to the United States in your capacity as the Special Rapporteur on Extreme Poverty. We appreciate this opportunity to express concerns regarding the lack of a civil right to counsel in the United States. As we set out below, while the civil right to counsel might be termed a civil and political right, the absence of such a right has dramatic impacts on economic and social rights such as access to housing and social supports. Further, the United States' failure to recognize the civil right to counsel exacerbates and reinforces existing race and gender inequalities.

The NCCRC, organized and funded in part by the Public Justice Center, is an association of individuals and organizations committed to ensuring meaningful access to the courts for all. Founded in 2003, its mission is to encourage, support, and coordinate advocacy to expand recognition and implementation of a right to counsel for low-income people in civil cases that involve basic human needs such as shelter, safety, sustenance, health, and child custody. PHRGE, the human rights program based at Northeastern University School of Law in Boston, Massachusetts, has supported this work through amicus briefs, testimony and submissions to international bodies addressing the civil right to counsel as a human right.¹

¹ The NCCRC and PHRGE thank Jennifer Cohen, Kaitlyn Tucker, Jocelyn Volk and Hannah Zukoff, students at the Northeastern University School of Law, for their substantial contributions to this submission.

Human Rights Norms, Access to Justice, and the Civil Right to Counsel

Access to justice is a critically important human right. As the UN Special Rapporteur on Extreme Poverty and Human Rights noted in her 2012 report to the UN General Assembly, “access to justice is crucial for tackling the root causes of poverty, exclusion and vulnerability.”² Further, the Special Rapporteur observed, “persons living in poverty have a right to access justice without discrimination of any kind, and a right to due process, understood as the right to be treated fairly, efficiently and effectively throughout the justice chain.”³

UN bodies have recognized the civil right to counsel as a central component of access to justice, indispensable to ensuring equal treatment in the justice system.⁴ For example, the Committee on Elimination of Racial Discrimination (the “CERD Committee”) has called on State Parties “take the necessary steps to secure equal access to the justice system for all members of descent-based communities, *including by providing legal aid.*”⁵

The United States’ failure to provide civil counsel has received particular attention. In its Concluding Observations following the 2014 review of the United States’ CERD compliance, the CERD Committee

reiterate[d] its concern at the lack of a generally recognized right to counsel in civil proceedings (para.22), which disproportionately affects indigent persons belonging to racial and ethnic minorities, and hinders their seeking an effective remedy in matters such as evictions, foreclosures, domestic violence, discrimination in employment, termination of subsistence income or medical assistance, loss of child custody, and deportation (art. 6).⁶

The Committee further recommended that the United States “allocate sufficient resources to ensure effective access to legal representation for indigent persons belonging to racial and ethnic minorities in civil proceedings.”⁷

² Extreme Poverty and Human Rights, 67th Session, ¶ 5, U.N. Doc. A/67/278 (Aug. 9, 2012).

³ *Id.* at ¶ 6.

⁴ *See, e.g.*, International Convention for Civil and Political Rights, art. 14 (all persons shall be equal before the courts and tribunals”); Goal 16: Promote just, peaceful and inclusive societies, Sustainable Development Goals, <http://www.un.org/sustainabledevelopment/peace-justice/>.

⁵ CERD Comm., *General Recommendation No. 29: Article 1, paragraph 1, of the Convention (Descent)*, ¶ 5(u), U.N. Doc. A/57/18 at 111 (2002) (emphasis added).

⁶ CERD Comm., *Concluding Observations on the Combined Seventh to Ninth Periodic Reports of the United States of America*, U.N. Doc. CERD/C/USA/CO/7-9 (Sept. 25, 2014).

⁷ *Id.*

In its Concluding Observations concerning U.S. compliance with its obligations under the International Covenant on Civil and Political Rights (ICCPR), the UN Human Rights Committee specifically addressed the civil right to counsel in the contexts of domestic violence (urging that the U.S. “take steps to improve . . . legal representation for women victims of domestic violence”) and immigration.⁸

Despite this strong language from the international community, there has been little attention at the federal level to expanding access to civil counsel. In the next section, we provide a brief overview of the justice gap in the U.S., and set out information concerning two particular areas that affect low income individuals: domestic violence and debt collection. Following that, we highlight two model local programs that – with greater engagement and support from the federal government -- could be expanded to begin realizing the civil right to counsel in the areas of housing and immigration.

The Impacts of U.S. Failure to Provide a Civil Right to Counsel

A recent report produced by the Legal Services Corporation and National Opinion Research Council at the University of Chicago concluded that in 2016, 86 percent of the civil legal problems reported by low-income Americans were met with inadequate or no legal help.⁹ Common legal problems facing low income individuals include housing issues, child custody, health, and disability.¹⁰ Overall, 71 percent of low income people surveyed had experienced at least one civil legal problem over the prior year, with only a fraction finding legal representation to assist them with their problem.¹¹ Indeed, a study from the National Center for State Courts shows that three-fourths of all civil cases involve at least one unrepresented party.¹² While the Legal Services Corporation receives modest federal contributions to support legal aid programs that assist low income individuals, the resources are very limited; without adequate staff, legal services offices must turn away more than half of the requests for help that they receive. Significantly, the current Administration’s proposed 2018 budget would eliminate all funding for the

⁸ Human Rights Comm., Concluding observations on the fourth report of the United States, ¶ 16, UN Doc. CCPR/C/USA/CO/4 (April. 23, 2014).

⁹ Legal Services Corp’n, THE JUSTICE GAP: MEASURING THE UNMET CIVIL LEGAL NEEDS OF LOW INCOME AMERICANS: EXECUTIVE SUMMARY 6 (2017) (hereafter, The Justice Gap).

¹⁰ *Id.* at 22.

¹¹ *Id.* at 21.

¹² Civil Justice Initiative, THE LANDSCAPE OF CIVIL LITIGATION IN STATE COURTS (National Center for State Courts 2015).

Legal Services Corporation, ensuring a dramatic drop in access to legal assistance for low income people around the country.

■ Gender impacts: The Example of Domestic Violence

Eight percent of respondents to the LSC/NORC survey reported civil legal problems arising from domestic violence.¹³ Nationally, victims of domestic violence are rarely represented in restraining order hearings. On the surface, these proceedings may seem equal since alleged perpetrators are also often unrepresented. However, because domestic violence relationships are based on an abusive power dynamic, restraining order hearings have an inherent imbalance that is not present in other types of proceedings. Being in court exacerbates this imbalance, whether the abuser is represented or proceeding pro se.

At least three factors contribute to this power imbalance in court. First, it arises from the abuse itself. The victim is often terrified, unaware of her rights, and very vulnerable to the batterer's control even in the context of judicial proceedings.¹⁴

Second, imbalances arise because of judicial misconceptions about domestic violence. Judges may lack understanding of the dynamics of domestic violence, believing that it is a private matter or something that could be easily addressed if the victim just left the relationship. This outdated viewpoint can stand unchallenged if there is no counsel to help educate the judge or enforce the victim's rights in court.

Third, gender and poverty may contribute to the imbalance of power in restraining order hearings. Women are the primary victims of domestic violence, and are also more likely to experience poverty in the United States.¹⁵ In terms of access to justice and right to representation, domestic violence victims often have a double burden: they have less access to counsel (1) because they cannot afford it, and (2) because they are either in, or just left a violent and controlling relationship that inhibits their ability to reach out for assistance.

¹³ THE JUSTICE GAP, at 24.

¹⁴ Catherine Klein, Leslye Orloff, *Providing Legal Protection for Battered Women: An Analysis of State Statutes and Case Law*, 21 HOFSTRA L. REV. 801, 811 (1993).

¹⁵ Columbia Law School Human Rights Institute and PHRGE, *Equal Access to Justice: Ensuring Meaningful Access to Counsel in Civil Cases, Including Immigration Proceedings* (2014).

New York State has long guaranteed appointed counsel to low income individuals in domestic violence proceedings.¹⁶ However, few states have followed New York's lead. Instead of accepting a patchwork of state responses, the federal government should exercise leadership to ensure access to justice nationwide in these dangerous circumstances.

■ Race-based Impacts: The Example of Consumer Debt Collection¹⁷

The scope of the debt-buying and debt-collecting industry in the U.S. is difficult to overstate. Each year, hundreds of thousands of people across the U.S. are sued by companies they may have never even heard of or done any business with. While a few large firms dominate the business, “there are hundreds and perhaps thousands of companies buying up delinquent debts across the US at any given point in time.”¹⁸

The majority of debt buyers collect a significant portion of their revenue – estimated to be about half – by suing debtors in court. One leading firm alone regularly file between 245,000 and 470,000 new lawsuits in a single year.¹⁹ Debt buyers, i.e., “repeat players” in the legal system, have the advantage. They know all of the required paperwork, court procedures, and often the judges themselves. In contrast, most of the individuals being sued are “one-shotters,” individuals without counsel and little to no understanding of the legal system. Yet because they have only a single case, which may involve a significant asset such as their house or car, these one-shotters have a much higher stake in the outcome of their individual cases.

The debt collection business disparately impacts people of color, in part because black families typically have “far smaller financial reserves to fall back on than white families.”²⁰ When ProPublica examined the judgments stemming from

¹⁶ Laura Abel & Max Rettig, *State Statutes Providing a Right to Counsel in Civil Cases*, CLEARINGHOUSE REV. 245 (July-Aug. 2006).

¹⁷ While this submission focuses on consumer debt, court debt has many of the same hallmarks. See, e.g., Nick Allen, et al., *Tackling Criminal Justice Debt: Efforts by Restricted and Unrestricted Legal Aid Programs to End Practices that Unjustly Target the Poor*, CLEARINGHOUSE (May 2017), available at <http://povertylaw.org/clearinghouse/article/tacklingdebt>.

¹⁸ Human Rights Watch, RUBBER STAMP JUSTICE: US COURTS, DEBT BUYING CORPORATIONS, AND THE POOR (2016), https://www.hrw.org/sites/default/files/report_pdf/us0116_web.pdf (hereafter, Rubber Stamp Justice).

¹⁹ *Id.* at 13.

²⁰ Paul Kiel, *Debt and the Racial Wealth Gap*, NY TIMES, Dec. 31, 2015.

debt-collection lawsuits, a clear pattern emerged: they were massed in black neighborhoods.²¹ In a study of debt-collection lawsuits in three different cities in the U.S., researchers found “the rate of court judgments from these lawsuits was twice as high in mostly black communities as it was in mostly white ones.”²²

In most debt buyer suits, alleged debtors fail to challenge the case against them, often because they never receive proper notice of the suit. In studies of debt-collection lawsuits, an overwhelming number of defendants – as high as 85% - did not respond to the suit, and therefore automatically defaulted.²³ If a defendant does respond, it is highly unlikely that he or she has counsel; only 2% of individuals who respond are represented by attorneys.²⁴

Default judgments are routinely awarded to debt buyers in these lawsuits, without judicial analysis of the claims; according to one study, “many individual courts issue thousands, or even tens of thousands of no questions asked default judgments in favor of debt buyers every year.”²⁵ Judges will often routinely enter default judgements for debt buyers over the course of just a few hours, with one judge even stating that he “does this at home while relaxing on a Sunday afternoon.”²⁶

Once a judgment has been entered against an individual, a debt-collector can collect on the debt through wage garnishment or property seizures, and can even sell the judgment to a different debt collection firm. In some states, the debt-collector may seek a body attachment if the debtor fails to appear, resulting in prison. Federal and state laws protect only the most indigent debtors, and “because judgments are valid for a decade or more, the threat of garnishment can linger for years.”²⁷ In some cases, federal law allows garnishment of up to 25% of an individual’s after-tax wages.²⁸

²¹ Paul Kiel & Annie Waldman, *THE COLOR OF DEBT: HOW COLLECTION SUITS SQUEEZE BLACK NEIGHBORHOODS* (ProPublica 2015), available at <https://www.propublica.org/article/debt-collection-lawsuits-squeeze-black-neighborhoods>.

²² *Id.*

²³ Peter A. Holland, *Junk Justice: A Statistical Study of 4,400 Lawsuits Filed by Debt Buyers*, 26 *LOY. CONSUMER L. REV.* 179, 208 (2014).

²⁴ *Id.*

²⁵ *RUBBER STAMP JUSTICE* at 3 (2016).

²⁶ *Id.*

²⁷ Paul Kiel, *Debt and the Racial Wealth Gap*, *NY TIMES*, Dec. 31, 2015.

²⁸ *See, e.g.*, 15 U.S.C. §1693(a).

The amount of debt in any one lawsuit very rarely exceeds a few thousand dollars, but the impact of a judgment on a low income defendant can be devastating. Unfortunately, underlying flaws in debt buyer lawsuits may go undiscovered until much later, or perhaps never.

When defendants do attempt to defend themselves in court, the inequalities between the parties is stark, and courts themselves may exacerbate the problem. Many courts “push defendants into unsupervised ‘discussions’ with debt buyer attorneys in hopes that the parties will settle and obviate the need for a trial.”²⁹ While many defendants may come to court intending to defend themselves, they end up surrendering in the courthouse hallways, persuaded that they have no choice. Unfortunately, some judges are only too ready to accept a defendant’s sudden surrender, and ask no questions regarding how it was achieved. Many alleged debtors who may have viable defenses to the cases being brought against them never have a real opportunity to articulate them because, without counsel, they lack the knowledge or resources to do so.

Promising Local Models

Two particularly promising local models have emerged in recent years to address this justice gap by expanding access to counsel in the areas of housing and immigration.

Representation in Eviction Proceedings

On July 20, 2017, the New York City Council approved a measure to guarantee legal counsel to low income New Yorkers facing eviction. New York is the first city in the U.S. to make this commitment. The law providing access to counsel in eviction proceedings was introduced in response to the reality that the majority of landlords are represented in eviction matters while most tenants are pro se litigants, leading to “an uneven playing field [where] the results have predictably been disastrous for tenants: over 20,000 families evicted a year.”³⁰ The city has allocated \$155 million to bring the program to scale, but it expects to

²⁹ RUBBER STAMP JUSTICE at 4.

³⁰City Council Member Mark Levine, Remarks at the Announcement of Universal Access to Counsel in Housing Court (Feb. 12, 2017), transcript available at http://www.marklevine.nyc/remarks_at_the_announcement_of_universal_access_to_counsel_in_housing_court.

recoup a significant portion of that allocation through savings on shelter and homelessness services.

Households with incomes below \$50,000 a year that are facing eviction can obtain a lawyer by calling the city's hotline at 3-1-1. Even during its pilot phase, the program resulted in "a dramatic decrease in residential evictions despite the city's worsening housing affordability crisis," with "[r]esidential evictions dropp[ing] 24 percent between 2013 and 2015."³¹

Representation in Immigration Proceedings

The New York Immigrant Family Unity Project (NYIFUP) began as a pilot program in 2013, and now provides legal representation for all low-income immigrants facing deportation proceedings in New York City and State.³² The NYIFUP provides "universal immigration representation regardless of income, criminal history, or relief eligibility." According to its website,

If relief is not possible, our immigration attorneys remain by a client's side to ensure due process, safeguard rights for future attempts at admission, and help facilitate voluntary departure. If relief against removal is available to a client, NYIFUP staff files all necessary applications, seeks release from detention on bond, and litigates the cases to trial and, when necessary, before the Board of Immigration Appeals.³³

NYIFUP has produced astounding results in the New York Immigration Courts during the past four years. According to a rigorous study, 97% of immigrants detained without legal representation will be unsuccessful in challenging their deportation, but when detained immigrants are provided legal representation the chance that they will win their case improves as much as 1000%.³⁴

In addition to providing justice for immigrants, the NYIFUP will help immigration courts become more efficient and fair. Reducing the number of self-

³¹ NYC Office of Civil Justice Report (June 2016), *available at* https://www1.nyc.gov/assets/hra/downloads/pdf/services/civiljustice/OCJ%202016%20Annual%20Report%20FINAL_08_29_2016.pdf.

³² New York Family Immigrant Unity Project, <https://www.bronxdefenders.org/programs/new-york-immigrant-family-unity-project/>.

³³ *Id.*

³⁴ The Center for Popular Democracy, *et al.*, THE NEW YORK FAMILY IMMIGRANT UNITY PROJECT: GOOD FOR FAMILIES, GOOD FOR EMPLOYERS, AND GOOD FOR ALL NEW YORKERS, at 8.

represented cases will reduce the backlog of cases as well as the economic costs of detaining thousands of people.³⁵

Conclusion

The lack of a civil right to counsel is a national problem that undermines the human right of access to justice. The need for legal assistance, and the impacts of lack of counsel, span many subject areas. Housing, immigration, domestic violence, and debt collection are among the most critical needs. In this submission, we highlighted domestic violence and debt collection as two areas where lack of a civil right to counsel particularly affects low income individuals. In addition, we highlight and commend the model initiatives in housing and immigration that are beginning to address the civil counsel gap on the local level.

However, given the national scope of the problem, local initiatives alone are inadequate. National leadership is required if the United States is to meet its international human rights obligations.

We applaud the efforts of the UN Special Rapporteur to bring attention to this issue in her 2012 report to the UN General Assembly. We urge you to continue this work and we stand ready to provide any assistance that we can as you prepare for your official visit to the United States.

Respectfully submitted,



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³⁵ BACKGROUND REPORT: REDUCING THE IMMIGRATION COURT BACKLOG AND DELAYS (Human Rights First 2016), available at <http://www.humanrightsfirst.org/sites/default/files/HRF-Backgrounder-Immigration-Courts.pdf>.

A handwritten signature in black ink, appearing to read 'Kevin Murray', with a long horizontal stroke extending to the right.

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