A RIGHT TO A LAWYER?
MOMENTUM GROWS
In 1923 John MacArthur Maguire, a Harvard law professor, called for establishing a comprehensive in forma pauperis system—a system that was to include a right to counsel in some civil cases. His article, *Poverty and Civil Litigation*, 36 Harvard Law Review 361 (1923), is a good read and a better reminder that a significant amount of critical thinking has preceded contemporary advocacy efforts.

Maguire traces the development of the right to civil counsel at common law. He also surveys state and federal statutes, equal protection and due process principles, international law, and even Massachusetts’ open courts provision. He outlines general principles to follow in implementing the system but recommends that specifics be left to experimentation in individual states. And, to reach his ideal, he discusses the relative merits of litigation and legislation.

The article is no isolated event, to be invoked dutifully for legitimacy or inspiration. Since Maguire put pen to paper, a tremendous amount of ink, typewriter ribbon, and hard-drive space has been devoted to discussing the right to representation in civil matters. Casual inspection of the amassed literature written since Maguire’s article, much of which is categorized below, shows that the theoretical terrain has been well explored.

Scholars have argued that, as a general proposition, a right to counsel should attach in at least some civil cases. Many others have made the case in regard to particular areas of substantive law, such as housing, termination of parental rights, child neglect, immigration, custody disputes, paternity, and civil contempt. Still others have argued that because of vulnerabilities in the dispute process, a right to civil counsel should be extended to particular populations of litigants, including people with disabilities, children, women, domestic violence victims, and civil defendants. Yet another branch of this discourse focuses on developing legal justifications for the right and variously invokes due process, equal protection, the first amendment, a right of access to the justice system, international law, the common law, and state constitutional law.

And there has been a lot of litigation.
Reading much of this material creates the impression that proponents have found every available position from which to argue the case for a civil right to counsel. Where Maguire was less than thorough, those who have followed appear to have covered the remaining ground. Yet the concept still seems daring—a quality that is palpable each time the idea is introduced in a new setting.

Some portion of this reaction derives from a general lack of awareness of our legal tradition’s commitment to open accessible courts. Some, too, is due to the low profile of the writing devoted to a civil right to counsel. More, I suspect, comes from the sheer dissonance of the concept with the conditions that prevail for most indigent civil litigants.

While calls for a basic right to appointed legal counsel in civil cases have been voiced for many decades, in recent years efforts to advance the idea have developed significant new momentum. Innovative legal arguments may have added some steam, but the breadth and depth of the scholarly work already devoted to the topic suggest that something rather more substantial is happening. Without conjecturing here about what precisely that “something” is, it finally seems plausible that we may see recognition of principles that have been articulated at least since 1923 (or, for the more historically minded, since 1495 or 1215).

See Maguire’s article for an explanation of those last two dates. Some of that old-time thinking may prove very useful.

Articles Discussing the Right to Counsel in Civil Cases

As a General Proposition

Paul Marvy & Debra Gardner, A Civil Right to Counsel for the Poor, 32 Human Rights 8 (Summer 2005)


Robert Sweet, Civil Gideon and Justice in the Trial Court (the Rabbi’s Beard), 52 Record of the Association of the Bar of the City of New York 915 (1997)


Note: Indigents’ Right to Appointed Counsel in Civil Litigation, 66 Georgetown Law Journal 113 (1977)


**In Particular Substantive Areas of Law**

**Housing**


**Termination of Parental Rights and Child Neglect**


*Note: Representation in Child Neglect Cases: Are Parents Neglected?*, 4 *Columbia Journal of Law and Social Problems* 230 (1968)

**Immigration**

Donald Kerwin, *Revisiting the Need for Appointed Counsel*, MPI Insight No. 4 (April 2005)


Robert Black, *Due Process and Deportation—Is There a Right to Assigned Counsel?*, 8 *University of California Davis Law Review* 289 (1975)

**Custody Disputes**


John Nethercut, *“This Issue Will Not Go Away…”: Continuing to Seek the Right to Counsel in Civil Cases*, 38 *Clearinghouse Review* 481 (Nov.–Dec. 2004)

**Paternity Actions**


**Civil Contempt**


**For Particular Populations of Litigants**

**People with Disabilities**


**Children**


**Women**


**Victims of Domestic Violence**


**Civil Defendants**


**Legal Theories**

**First Amendment**


**Equal Protection**


**A Right of Access to the Justice System**


**International Law**


**Common Law**

John Nethercut, *“This Issue Will Not Go Away…”*: Continuing to Seek the Right to Counsel in Civil Cases, 38 *Clearinghouse Review* 481 (Nov.–Dec. 2004)


**State Constitutional Law**


See also the 23rd Annual Edward V. Sparer Symposium, *Civil Gideon: Making the Case*, 15 *Temple Political and Civil Rights Law Review* (forthcoming 2006), which will have several articles discussing the civil right to counsel.
Civil Gideon Fundamentals: Basic Resources on the Right to Counsel in Civil Cases

[Editor’s Note: The supply of scholarly analyses of the right to counsel in civil cases is extensive and growing. Readers seeking a basic introduction to the concept of a civil right to counsel might consult the following resources.]


Lisa Brodoff et al., The ADA: One Avenue to Appoint Counsel Before a full Civil Gideon, 2 Seattle Journal for Social Justice 609 (2004)


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


Joan Ritchey, Limits on Justice: The United States’ Failure to Recognize a Right to Counsel in Civil Litigation, 79 Washington University Law Quarterly 317 (2001)

Andrew Scherer, Why People Who Face Losing Their Homes in Legal Proceedings Must Have a Right to Counsel, 3 Cardozo Public Law Policy and Ethics Journal 699 (2006)

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)


23rd Annual Edward V. Sparer Symposium, Civil Gideon: Making the Case, 15 Temple Political and Civil Rights Law Review (forthcoming 2006) (to obtain symposium papers, contact Susan Feathers, assistant dean, Penn Law Public Service Program, at sfeathers@law.upenn.edu)