



Occupy the Justice System: The Civil Right to Counsel and the Equitable Distribution of Justice

By Andrew Scherer¹

Equal justice under law is not merely a caption on the facade of the Supreme Court building... it is fundamental that justice should be the same, in substance and availability, without regard to economic status.

—U.S. Supreme Court Justice Lewis Powell, Jr.

Occupy Wall Street's message, so loud and clear this past fall (and resurging again this spring), is that there is something fundamentally wrong — unfair,



anti-democratic, wildly imbalanced and wholly unacceptable — about the large and growing disparity in the distribution of wealth and power in the United States. The statistics are familiar but shocking all the same. For example:

- Between 1979 and 2007, households with incomes in the top 1% saw their income increase 275%, over 15 times more than income increased for households with incomes in the bottom 20%;²
- As of 2011, the median net worth of white households in the United States was 20 times that of black households and 18 times that of Hispanic households.³

We in the legal services world know all too well that the distribution of justice in the U.S. suffers from the same inequity. Under our “pay to play” system of justice, the haves, who can afford legal help, get access to the rights and protections of the legal system and the have-nots get evicted. Or they lose custody of their kids. Or employers rip off their already pitifully low wages. Our system of justice fails because it is fundamentally out of balance; it dispenses justice to people with money and denies it to those without. And because of the close nexus between poverty and race in the U.S., that disparity falls almost as much along racial lines as it does along economic lines.

In our rhetoric, we as a community generally describe the issue of access to justice in absolute terms

— the quantity of unmet “legal need.” We talk about the “justice gap” between what low income people need and what they have.⁴ This “legal need” framing makes for a compelling argument for an expansion of civil legal services. It evokes sympathy and resonates with policy makers and funders. But we also should be thinking and talking (at least among ourselves to begin with) about access to justice in relative terms — the gap between the resources that the justice system devotes to the haves and the resources it devotes to the have-nots. And we should be talking about how public policy fosters, subsidizes and perpetuates that imbalance. The imbalance is factual, not theoretical, and can be demonstrated by empirical data. The most glaring reflection of this imbalance is how the federal tax system subsidizes legal expenses for the wealthiest 1% at approximately (and very conservatively) \$23.6 billion annually,⁵ while the federal government funds legal services for the poorest 25% at under \$400 million annually.⁶ That's a per capita benefit of \$11 for each poor person⁷ and a subsidy for legal assistance (in the form of a loss to the treasury and tax savings) for each one percenter of \$754,⁸ or *almost seventy times as much federal benefit per one percenter as for each person living in poverty.*

Other data also reflects the gross imbalance in the distribution of justice.⁹ The astounding contrast between the public resources devoted to the federal court system and the resources devoted to the New York City Housing Court, provides an striking illustration. All the federal district courts throughout the United States combined have a total docket of 361,323 civil and criminal cases,¹⁰ a total of 1,205 judges and magistrates,¹¹ and an annual budget of \$2.618 billion¹² — that's approximately \$7,252 spent per case and a caseload of 300 cases per judge or magistrate. The New York City Housing Court, just one of the innumerable forums throughout the United States that adjudicate legal matters primarily affecting the lives

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of poor people, handles a similar caseload — about 350,000 cases per year.¹³ It has a total of 50 judges¹⁴ and an annual budget of about \$32 million.¹⁵ That's \$91.43 spent per case and a caseload of 7,000 cases per judge. The federal trial level courts, which are far more likely to adjudicate matters affecting the wealthy than New York City's Housing Court, thus spend *almost eighty times as much per case* and the Housing Court asks its judges to manage *140 times as many cases as do federal district court judges and magistrates*. Granted, federal litigation is procedurally more complex and substantively more varied, and the dollar value of each case is no doubt far greater on average, but what is at stake in New York City's Housing Court — the ability to have a home — is far more significant in human terms than what is at stake in much federal court litigation. And the astounding disparity in resources devoted to the administration of justice in these forums is emblematic of the gross imbalance in resources devoted to administration of justice between rich and poor overall.

Because one has to pay to get meaningful access to the justice system, there is a proportional relationship between access to legal help and wealth: the wealthier you are, the greater your access. Since justice is a commodity for sale, lawyers generally earn their living selling access to justice to the highest bidder and the legal profession naturally uses a wildly disproportionate amount of its members to serve people with money. It should come as no surprise, then, that only a small fraction of all lawyers provide legal assistance — both civil legal services and indigent criminal defense services — for low-income people. According to the ABA, of the 1.2 million lawyers in the U.S. in 2010, only 1% provided civil legal services or indigent criminal defense (and that fraction is diminishing: in 1980 the figure was 2%).¹⁶

Why does the relative distribution of justice matter? Why is not it enough to simply focus on the absolute need? And what does this all have to do with the movement for a civil right to counsel? Navigating our system of justice requires familiarity with a complex set of substantive and procedural rules and in many matters counsel is necessary in order to vindicate legal rights. When justice is treated as a commodity and meaningful access is based on wealth (and, by extension, race¹⁷), the justice system is severely misaligned. This misalignment strikes at the heart of who we are and what we stand for as a nation. It implicates our core democratic

values of fairness and equality. The call for a civil right to counsel directly addresses this most fundamental of flaws of the civil justice system, not just because it satisfies a “need” of the poor for legal help with matters of fundamental importance, but because it also moves us toward a more neutral posture for the judicial branch and a more equitable allocation of its resources. In our system of separation of powers, the only branch of government that (openly and blatantly, at least¹⁸) does its business and provides its services in proportion to wealth is the judicial branch. A civil right to counsel will not be a panacea, but it certainly will be an important step toward addressing this most fundamental flaw of the legal system.

We need a concise, simple and practical way to articulate a long-term vision for what a civil right to counsel would mean so that we can make clear how the civil right to counsel would move us closer to an equitable system of justice, a system where justice is not (or at least not solely) for sale. A clear vision also provides a goalpost for us to focus our work. For tactical and strategic reasons, the ABA resolution calling for a right to counsel¹⁹ and local initiatives promoting a right to counsel, have mostly focused on specific issues of law, specific litigant characteristics or consequences of the proceeding.²⁰ These make sense as short term goals. But a long-term vision for a right to counsel in civil matters cannot easily be reduced to the kind of single neat bright-line rule related to the consequence of the proceeding, like facing loss of liberty does in criminal matters. Moreover, the range of civil matters is extremely broad as are the consequences of civil proceedings and the characteristics of civil litigants. And people need counsel in civil litigation when they are plaintiffs, not just when they are defendants.

If we think of the right to counsel as a tool to establish a basic balance of justice in a system that we justifiably critique as unfair and inequitable, we need to articulate an organizing principle for the civil right to counsel that people would generally understand as addressing that critique and making the system in fact fair and equitable. A reasonable person standard for implementation of the civil right to counsel accomplishes that goal. An articulation of that standard could be that:

A person is entitled to counsel at government expense in legal matters for which a reasonable person with sufficient means to afford counsel would engage counsel to advance or protect his or her interests.

This approach fundamentally realigns the playing field to render it more even and fair, and accomplishes a few other important things. It is easily understandable. It avoids the overinclusiveness of presenting the standard as a presumptive right in every single civil case, which would be justifiably perceived as too daunting, costly and impractical. It avoids the underinclusiveness of simply applying the right to particular categories of cases — which does not give us an overarching standard or long-range vision for the right in civil litigation. And it focuses on the individual in need of counsel and not on the court, the process or the outcome.²¹ Most importantly, it provides a vision for a system in which the distribution of justice is no longer solely determined by wealth.

For the most part, low-income people, like the wealthy and their corporations, need counsel in civil legal matters to achieve a comparable goal: to advance and protect their material well-being. Like their wealthy counterparts, low-income people need legal help in the formulation as well as the application of the laws and policies that affect their lives. While the stakes for the wealthy and the corporations are generally greater monetarily, the stakes for low-income folks — home, family integrity, income, community, health, education and the like — are, on a human scale, far higher. And on the scale of what really matters to our clients and their communities — getting the help they need when they need it, help solving legal problems that affect their fundamental human needs — we are (through no fault of our own) doing miserably.

The “state based delivery systems” that we have developed are, while laudable, merely artifices that we have been forced to construct to do our best with unforgivably stingy resources. We create and take responsibility for “delivery systems” for access to justice for the poor because the true delivery system — the justice system itself — fails them. That is a government function. There is no separate “delivery system” for access to justice for the wealthy. We have been forced to take responsibility for a separate “delivery system,” for access to justice for the poor, and to engage in endless debates over intake and priorities, because the demand for legal assistance is so high and the resources to provide it so small that we must expend a large portion of our time and energy in an ongoing exercise of battlefield triage. The notion that we are responsible for the delivery system is a mistake. We are in the business of providing access to justice, but we are not, nor should we be held, responsible for providing access to justice. The government, or at least its judicial branch,

is the only legitimate “delivery system” for access to justice for all under the constitution. We need to thrust that responsibility back on the judicial branch. We are, however, responsible in our role as advocates for pushing the system to address its fundamental flaws.

As the movement for a civil right to counsel has grown in recent years, anxiety has been expressed about the movement from at least some within the legal services community.²²

However, it is hard to believe that there is any real underlying philosophical objection from members of the legal services community to the notion that there should be a recognized civil right to counsel. We should demand and accept no less than a justice system built on equity. Without equity there can be no real justice. No doubt, a reordering of the justice system caused by a meaningful civil right to counsel will raise complicated and even uncomfortable issues. The very idea is certainly threatening to the powers that be. It may make some people at the heart of the “delivery system” feel threatened as well, but they need to be brought along, and we need to get beyond the anxieties and focus our collective energy on how we get from where we are now to a more equitable justice system.

The call to establish a right to counsel in matters of fundamental human need is bold. The call to establish a right to counsel as a matter of fundamental equity is even bolder because it challenges the legitimacy of the entire judicial system, not just how the system fails the poor. But most of us have chosen to do legal services work because we are problem solvers and are motivated to rectify wrongs. We should not shy away from advocating bold solutions and working towards a long-term vision that would fundamentally alter the distribution of, as well as access to, justice. And maybe, just maybe, if we speak with a united voice and keep saying it loudly, clearly and frequently enough, and if we continue to push and experiment with tactics and strategies, we will see real progress.

So let us be bold. Let us take a page from Occupy Wall Street and develop a frank and thorough critique of the inequities and gross imbalance of the justice system and let us gather the empirical data to support that critique. Let us stand firm in support of the principle that justice should not solely be a commodity for sale and the judicial system should not deny economic and racial equity in the distribution of justice. Let us continue to forge a consensus in our community and work together to develop strategies to secure a civil right to counsel that brings true equal justice.

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In 2010, Andrew stepped down after nine years as Executive Director of Legal Services NYC, the largest nonprofit civil legal services organization in the United States. He had been with the organization in a variety of capacities since 1978. As Executive Director, Andrew led the organization through a period of significant growth and development. Accomplishments of his tenure included: markedly increasing services, funding (both private and public), staffing and pro bono participation; greatly expanding the organization's docket of major litigation; and successfully completing a major organizational restructuring.

Among his many affiliations, Andrew is an active member of the NYC Bar Association and a former chair of its Executive Committee, an active member of the NYS Bar Association and the current chair of the Civil Gideon subcommittee of the President's Committee on Access to Justice and a founding member of the National Coalition for a Civil Right to Counsel. In addition to Columbia, Andrew has taught at CUNY Law School, NYU Law School and Bennington College. He has lectured widely in the U.S. and in Latin America and Asia. Andrew may be reached at ascherer@andre-wascherer.com.

- 2 Congress of the United States, Congressional Budget Office, *Trends in the Distribution of Household Income Between 1979 and 2007*, October, 2011, p. iv.
- 3 Pew Research Center, *Twenty-to-One: Wealth Gaps Rise to Record Highs Between Whites, Blacks and Hispanics*, July, 2011, p. 1.
- 4 See, in particular, Legal Services Corporation, *Documenting the Justice Gap In America: A Report of the Legal Services Corporation* (Sept. 2005), available at http://www.lsc.gov/press/pr_detail_T7_R6.php, and http://www.lsc.gov/press/pressrelease_detail_2009_T248_R27.php.
- 5 Under the Internal Revenue Code, legal expenses of corporations and other businesses are tax deductible. 26 USC § 162. According to *American Lawyer*, gross

revenue for the 100 highest grossing law firms in the U.S. in 2010 was \$67.42 billion (and seventeen law firms grossed over \$1 billion). Available (for charge) at <http://almlegalintelligence.com/>. Using that \$67.42 billion as a very rough (but very conservative) proxy for the legal expenses of the top 1% and applying the 35% income tax rate for earners in the highest income bracket (<http://www.irs.gov/pub/irs-pdf/i1040tt.pdf>), the U.S. treasure foregoes \$23.6 billion in tax revenue, in effect subsidizing legal assistance for the 1% to the tune of \$23.6 billion.

- 6 See, LSC Fact Book 2010, http://lsc.gov/sites/default/files/LSC/pdfs/LSC_2010_Fact_Book.pdf.
- 7 *Ibid.* The 2010 federal Legal Services Corporation budget of \$394,582,437 divided by the 36,0013,627 people in poverty equals about \$11 per poor person.
- 8 One percent of the U.S. population in 2012 is about 3.13 million people (<http://www.census.gov/main/www/popclock.html>). The \$23.6 billion in tax revenues forgone by the government divided by number of one percenters is \$754.
- 9 There is a growing body of data on the justice gap, as measured by need (see, fn. 3 *supra.*), the difference in outcome made by counsel (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 & SOC'Y REV. 419 (2001), and the costs and benefits of provision of counsel to low-income people (see, e.g., Maryland Access to Justice Commission, *Implementing a Civil Right to Counsel in Maryland* (2011), available at <http://mdjustice.org/node/1539>). There is relatively little accumulated data, however, on the inequitable distribution of access to justice. This area merits further in-depth research.
- 10 Judicial Business of the United States Courts, 2010 Annual Report of the Director, p. 12, available at <http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2010/JudicialBusinesspdfversion.pdf>.
- 11 *Id.* pp. 40 (678 judges) and 41 (527 magistrates).
- 12 See 2010 Judiciary budget, available at <http://www.gpo.gov/fdsys/pkg/BUDGET-2011-APP/pdf/BUDGET-2011-APP-1-4.pdf>.
- 13 See website of the NYS Unified Court System, at <http://nycourts.gov/courts/nyc/housing/civilhistory.shtml>.
- 14 See website of the NYS Unified Court System, at <http://www.nycourts.gov/courts/nyc/housing/judges.shtml>.
- 15 NYS Unified Court System Budget, 2012-2013, p. 39, available at <http://www.courts.state.ny.us/admin/financialops/BGT12-13/Final2012-13Budget.pdf>.

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- 16 See, ABA *Lawyer Demographics, 2010*, available at http://www.americanbar.org/content/dam/aba/migrated/marketresearch/PublicDocuments/lawyer_demographics_2011.authcheckdam.pdf.
- 17 Where disparities in access to justice create a disparate impact on access to housing based on race, as they do in eviction and foreclosure litigation, a housing discrimination argument under Title VIII may well be available. See, e.g., *Huntington Branch, N.A.A.C.P. v. Town of Huntington*, 844 F.2d 926 (2d Cir. 1988), aff'd in part, 488 U.S. 15 (1988) (town's refusal to rezone was discriminatory under Title VIII of the Civil Rights Act of 1968, because of the disparate impact on minority population).
- 18 Disregarding, of course, the unofficial distortions of power and influence related to money that are attributable to lobbying and campaign contributions.
- 19 ABA *Resolution 104* (Model Access Act) (Aug. 2010), available at http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_104_revised_final_aug_2010.authcheckdam.pdf.
- 20 See, e.g., John Pollock's article in this *Journal*; Paul Marvy & Laura Klein Abel, *Current Developments in Advocacy to Expand the Civil Right to Counsel*, 25 *Touro L. Rev.* 132 (2009).
- 21 Some version of this "reasonable person" standard is applied in European countries. See, Johnson, Earl, *Equality Before the Law and the Social Contract*, 37 *Ford. U. L. Rev.* 157, 182-83, ("England combines the merits and significance tests in a formula that asks whether a person of modest but sufficient means would employ counsel to prosecute or defend the case.") See also, California Equal Justice Act, which would provide counsel to plaintiffs "only if a reasonable person. . . with the financial means to employ counsel, would be likely to pursue the matter in light of the costs and potential benefits" available at http://www.brennancenter.org/content/resource/state_equal_justice_act.
- 22 The Coalition for a Civil Right to Counsel has responded to many of these concerns in an "Informational Memo drafted by Laura Abel and David Udell. See, <http://www.civilrighttocounsel.org/pdfs/NCCRC%20Informational%20Memo.pdf>. Cathy Carr also addresses many of these concerns eloquently in her discussion of the evolution of her own thinking on the civil right to counsel in her article in this *Journal*.

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any state, a full range of stakeholders, including legislators, will need to be at the table. Until then, it is important to keep the conversation going.

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- 2 See, for example, *Frase v. Barnhart*, 379 Md. 100 (2003).
- 3 Maryland Access to Justice Commission, *Interim Report, 2009*. Available at: <http://mdcourts.gov/mdatjc/pdfs/interimreport111009.pdf>.
- 4 Available at <http://mdcourts.gov/mdatjc/pdfs/implementingcivilrighttocounselinmd2011.pdf>.
- 5 *Id.*, p. 2.
- 6 *Id.*

The Maryland Access to Justice Commission was created by Chief Judge Robert M. Bell in 2008, to enhance the resources available to support civil legal services, and improve access to the courts and to legal help for the most vulnerable Marylanders.
