Why Judges Support Civil Legal Aid

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Abstract: To fulfill their role as neutral deciders in an adversarial legal system, judges need lawyers. Unrepresented litigants tax the court system and burden the people who work in it. Judges around the country, of all political stripes, are resolute in their support of civil legal aid. Judges support civil legal aid because they value equal justice and the protection of the disadvantaged. They support legal aid because it assists in the efficient and effective administration of the courts they run. They also support legal aid out of self-interest, because it makes their work lives less threatened and more effective.

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The United States judicial system is designed to be adversarial, to resolve disputes of fact and law before a neutral judge.[1] The premise of the system is that each party in a court case is capable of understanding and using the law, since each must present the law and the facts to the judge. An effective adversarial system requires the presence of legally trained experts, typically lawyers, on both sides of a case.

The civil legal needs of both low- and moderate-income individuals in the United States are not being met.[2] The need for legal assistance by over one hundred million people in this country is dire.[3] Today's courts look nothing like the ideal. Around the country, state and federal courts regularly encounter pro se litigants: that is, litigants without attorney representation.[4] When opposed by an adversary with a lawyer, litigants representing themselves often lose even when the merits of the case favor them. The imbalance leads to injustice.

For the many millions of unrepresented litigants appearing in American courts each year, mastering the rules of the adversarial system is next to impossible.[5] Such litigants often do not understand the rules of evidence, and so cannot understand what facts are relevant or how to present them to a judge.

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An attorney opposing an unrepresented litigant is more likely to withhold evidence favorable to the litigant who is unlikely to know that such evidence must be turned over or to ask for it.

The required briefs, memoranda of law, motions, and pleadings are governed by rules that can be difficult for untrained individuals to comply with.[6] Courts sometimes sanction unrepresented litigants who are ignorant of the law or become too emotional in the courtroom for not complying with court rules or for frivolous litigation.[7] For these reasons and others, a litigant without an attorney is much more likely to fail than one who is represented.[8]

Lawyers are necessary outside of traditional litigation, too. Many disputes today are resolved through settlements negotiated outside of court. Even when managed by a professional mediator, the inequality inherent in negotiations between an untrained lay person and a lawyer remains.[9] Even when both parties represent themselves, one or the other often unintentionally negotiates away rights or entitlements that are theirs under the law, because they do not know what is due them.[10]

All of these challenges are made worse by the disparity in education between lawyers and many low-income individuals, who generally read at lower reading levels and are more comfortable with oral communication, in particular by relating stories. The American justice system depends on written rules and on written orders and decisions, written at a reading level much higher than that of the average low-income litigant. Without a lawyer (or other kind of legal problem-solver) to explain the rules, navigate the legal process, and translate orders and decisions into accessible terms, a low-income litigant is likely to be lost in the system and to lose his case.[11]

Either the United States must abandon a pure adversarial system and adopt another justice model – for example, relying on magistrates to find the facts in disputes – or the nation must commit to providing substantially more civil legal services for those who cannot afford them.

The cost of providing attorneys for everyone who needs but cannot afford one would be huge. Providing just one hour of legal services to each person unable to afford it would cost an estimated $20–$25 billion.[12] Courts cannot possibly cover this cost: cutbacks in court budgets by state legislatures mean that many courts cannot even cover their basic operating expenses.[13] Few courts have money in their budgets to provide lawyers for the indigent. With $100 million for civil lawyers, New York State recently had more money for this purpose than any other state. Though the funding was far from enough to close the justice gap, the state saw a significant decline in the number of unrepresented litigants in the courts.[14]

In response to the shortage of lawyers, despite insufficient resources, many court systems are trying to find ways to level the playing field by making legal forms and processes simpler and easier to use by people without lawyers. Simplification works for some kinds of cases, but it is not a substitute for lawyers when people have complicated substantive or procedural defenses or claims to pursue. Providing a lawyer, or a legal problem-solver, to those who cannot afford one is often the only way to equalize justice. Other forms of legal assistance are helpful and necessary, but they are inadequate to close the gap in access to justice.

Judges of all political stripes and at every level of government support providing lawyers for people who cannot afford them. As the late Justice Antonin G. Scalia put it, "in today's law-ridden society,

denial of access to professional legal assistance is denial of equal justice."[15] Judges support legal aid because they want to make good on providing equal justice, or coming much closer to doing so, and because they want to improve the efficient administration of justice, as well as out of self-interest.

Judges support civil legal aid as a means of ensuring that the most vulnerable people in society can have decent, safe, and healthy lives. Adversarial proceedings regularly involve basic human needs, such as shelter, food, safety, health, and child custody. They regularly affect vulnerable groups such as senior citizens, domestic violence victims, and veterans with post-traumatic stress disorder.

While judges supporting civil legal services often cite the lofty ideals of equal justice and assisting the disadvantaged, maintaining an efficient and neutral system is also a motivation. Codes of judicial ethics require judges to be impartial and neutral.[16] But neutrality is not the same as passivity. Judges are permitted "to make reasonable accommodations to ensure pro se litigants the opportunity to have their matters fairly heard."[17] Yet judges worry about appearances: they are concerned that assisting an unrepresented litigant will make them seem to be taking sides, forsaking their neutrality.[18] This concern has led judges to recuse themselves from cases after they have provided assistance to unrepresented litigants.[19]

Because courts are burdened by large numbers of litigants without lawyers, many judges are likely to experience the tension between their duty of neutrality and their responsibility to ensure that pro se litigants are fairly heard.

As the Conference of Chief Judges wrote to the federal Office of Management and Budget in 2017,

> Our research makes clear that the large number of unrepresented citizens overwhelming the nation's courts has negative consequences not only for them but also for the effectiveness and efficiency of courts striving to serve these and other segments of the community who need their disputes resolved. More staff time is required to assist unrepresented parties. In the absence of a fair presentation of relevant facts, court procedures are slowed, backlogs of other court cases occur, and judges confront the challenge of maintaining their impartiality while preventing injustice.[20]

Judges also support greatly increased funding for lawyers in civil cases for litigants who cannot afford representation out of self-interest. Most local and state judges are elected or appointed to serve for a specified term, to which they may be either reelected or reappointed.[21] They are periodically evaluated by the public or the appointing authority. Judges perceived as showing partiality – for example, by providing permitted assistance to unrepresented litigants – may lose elections or reappointments. Judges' careers can be marred by complaints from unrepresented litigants who, because they do not have the benefit of legal advice, have unreasonable expectations about courts and law.[22] The presence of lawyers on both sides of a case insulates judges from perceptions of impartiality and from litigant complaints.

Judges typically have no training in how to cope with unrepresented litigants who may have mental illnesses, or are in the grip of powerful but unfounded feelings that the system is biased and working to hurt them. Unhappy litigants can pose physical danger to judges.[23] Handling cases with unrepresented litigants and writing decisions that can be understood by them takes longer, putting pressure on already full workdays. Unrepresented litigants tax the system and the resilience

of judges. Stressed out and overwhelmed judges cannot do their work well.[24]

The United States ranks an abysmal twenty-five out of thirty-five countries with similar per capita incomes, measured on accessibility and affordability of civil justice in the Rule of Law Index prepared by the World Justice Project.[25] The United States consistently fails to provide accessible and adequate legal assistance, and will continue to do so as long as an adversarial system continues and until much more civil legal service funding is provided. Judges foresee the continued erosion of public confidence in the justice system as it becomes increasingly beleaguered by unrepresented litigants, overtaxed courts, and overwhelmed judges.

The justice system cannot function without the confidence of the public.[26] Lack of confidence will eventually lead to distrust of the system and the rule of law. Trust in the rule of law is an essential part of democracy. Although the public trusts the judiciary more than the other branches of government, confidence in the U.S. civil justice system is low.[27] In an adversarial system, unrepresented litigants threaten public confidence: when individuals perceive or receive unequal treatment, they lose respect and confidence in the institution that is supposed to deal fairly with them.

Other voices in the citizenry must join with the judiciary to ensure that adequate funding is available to provide lawyers to the indigent and to develop mechanisms to make lawyers affordable to moderate income individuals. Lack of action will devastate the justice system. That will leave the rule of law in ruins, shattering the foundation of American democracy. Any other course will diminish the respect and moral standing the United States has enjoyed as a leader of democratic governments.

ENDNOTES

[1] Monroe H. Freedman, "Our Constitutionalized Adversary System," *Chapman Law Review* 1 (57) (1998).

[2] American Bar Association Commission on the Future of Legal Services, *Report on the Future of Legal Services in the United States* (Chicago: American Bar Association, 2016), 11, https://www.americanbar.org/content/dam/aba/images/abanews/2016FLSReport_FNL_WEB.pdf.

[3] Ibid., 12.

[4] Ibid., 15.

[5] Ibid. See also Donna Stienstra, Jared Bataillon, and Jason A. Cantone, *Assistance to Pro Se Litigants in U.S. District Courts: A Report on Surveys of Clerks of Courts and Chief Judges* (Washington, D.C.: Federal Judicial Center, 2011), vii, https://www.fjc.gov/sites/default/files/2012/ProSeUSDC.pdf.

[6] Ibid., 21–22.

[7] Running afoul of Federal Rule 11 has been identified as a problem facing unrepresented litigants pursuing frivolous claims. United States District Court, District of Minnesota, and Federal Bar Association, Minnesota Chapter, *Pro Se Project* (Minneapolis: United States District Court, District of Minnesota, and Federal Bar Association, Minnesota Chapter, 2016), http://www.fedbar.org/Image-Library/Chapters/Minnesota-Chapter/Pro-Se-Project-Description-2016.aspx. See also Stienstra et al., *Assistance to Pro Se Litigants in U.S. District Courts*.

[8] Natalie Anne Knowlton, Logan Cornett, Corina D. Gerety, and Janet L. Drobinske, *Cases without Counsel: Research on Experiences of Self-Representation in U.S. Family Court* (Denver: Institute for the Advancement of the American Legal System, 2016), 3, http://iaals.du.edu/sites/default/files/documents/publications/cases_without_counsel_research_report.pdf.

[9] Jacqueline M. Nolan-Haley, "Court Mediation and the Search for Justice through Law," *Washington University Law Quarterly* 74 (47) (1996): 87–88.

[10] Ibid. Mediators do not ensure that the rights of the parties are not overlooked and violated. Instead, their goal is to mediate a solution that meets the satisfaction of both parties without regard of the law.

[11] Fern Fisher, "Insuring Civil Justice for All: Meeting the Challenges of Poverty," in *Impact: Collected Essays on the Threat of Economic Inequality*, vol. 1 (New York: New York Law School, 2015), 9–17.

[12] Gillian Hadfield, "Lawyers Make Room for Nonlawyers," CNN, November 25, 2012, https://www.cnn.com/2012/11/23/opinion/hadfield-legal-profession/index.html; and Gillian Hadfield, "Why Legal Aid and Pro Bono Can Never Solve the Access to Justice Problem," December 11, 2016, https://gillianhadfield.com/2016/12/11/why-legal-aid-and-pro-bono-can-never-solve-the-access-to-justice-problem/.

[13] National Center for State Courts, "State Budget Cuts Threaten Public's Access to Courts," November 29, 2011, http://www.ncsc.org/newsroom/backgrounder/2011/court-budget-cuts.aspx. See also National Center for State Courts, "Shortfalls in Court Budgets Directly Impact Public," May 25, 2011, http://www.ncsc.org/newsroom/backgrounder/2011/court-budgets.aspx.

[14] Permanent Commission on Access to Justice, State of New York Unified Court System, *Report to the Chief Judge of the State of New York* (New York: Permanent Commission on Access to Justice, 2016), 6, http://ww2.nycourts.gov/sites/default/files/document/files/2018-03/2016_Access_to_Justice-Report.pdf.

[15] Ralph Gants, "Scalia Supported Legal Aid–Trump Doesn't," *The Boston Globe*, June 5, 2017, https://www.bostonglobe.com/opinion/2017/06/04/scalia-supported-legal-aid-trump-doesn/WNgLTkjGulGuEivYEfnxqJ/story.html.

[16] The Code of Conduct for U.S. Judges (Canon 3) requires federal judges to be impartial. United States Courts, "Canon 3: A Judge Should Perform the Duties of the Office Fairly, Impartially and Diligently," Code for Conduct for United States Judges, http://www.uscourts.gov/judges-judgeships/code-conduct-united-states-judges#d (last revised March 20, 2014).

[17] See Self-Represented Litigation Network, "Model Code of Judicial Conduct Provisions on Self-Represented Litigation: Options for Alternative Comment Language Prepared in Support of Potential State Activity in Response to 2012 Resolution 2 of the Conference of Chief Justices and the Conference of State Court Administrators" (Williamsburg, Va.: National Center for State Courts, 2013).

[18] Stienstra et al., *Assistance to Pro Se Litigants in U.S. District Courts*, 22– 23, Table 18.

[19] *Floyd v. Cosi*, 14-cv-3772 (E.D.N.Y. January 21, 2015).

[20] John D. Minton and Arthur W. Pepin, letter to John Michael Mulvaney, "Conference of Chief Justices, Conference of State Court Administrators" (Washington, D.C.: Government Relations Office, 2017), https://www.olaf.org/wp-content/uploads/2018/01/Conference-of-Chief-Justices-LSC-Letter.pdf.

[21] Brennan Center for Justice, "Judicial Selection: Significant Figures," May 8, 2015, https://www.brennancenter.org/rethinking-judicial-selection/significant-figures (accessed August 10, 2018).

[22] As the judge in charge of the Civil Court of the City of New York, which includes the housing court and all trial courts in New York City courts, for over twenty years, I supervised a

number of judges who experienced difficulties with reappointment due to treatment of unrepresented litigants. A number were not reappointed.

[23] Lorelei Laird, "Judges Reflect on Dealing with Difficult Pro Se Litigants," *ABA Journal*, July 31, 2015, http://www.abajournal.com/news/article/judges_reflect_on_dealing_with_difficult_pro_se_litigants/; Arkansas Access to Justice Commission, "Survey of Arkansas Circuit Court Judges Regarding Self-Represented [Pro Se] Litigants" (Little Rock: Little Rock Access to Justice Commission, 2008), http://arkansasjustice.org/wp-content/uploads/2017/04/CompositeCicuitJudgeSurvey2008.pdf; and Allen Baddour, "Civil Pro Se Litigants," October 2010, https://www.sog.unc.edu/sites/www.sog.unc.edu/files/course_materials/Baddour_ProSeCivilLitigants.pdf.

[24] Beverly W. Snukals and Glen H. Sturtevant Jr., "Pro Se Litigation: Best Practices from a Judge's Perspective," *University of Richmond Law Review* 42 (2) (2007), http://www.ppcforchange.com/pro-se-litigation/; United States District Court, District of Minnesota, and the Federal Bar Association, Minnesota Chapter, *The Pro Se Project* (Minneapolis: United States District Court, District of Minnesota, and Federal Bar Association, Minnesota Chapter, 2011), 2, http://www.fedbar.org/proseproject2011; and Commonwealth of Massachusetts, The Trial Court, Probate and Family Court Department, *Pro Se Litigants: The Challenge of the Future* (Boston: Commonwealth of Massachusetts, 1997), 16, https://www.mass.gov/files/documents/2017/11/01/prosefinalreport.pdf.

[25] World Justice Project, Rule of Law Index 2017–2018, "United States," http://data.worldjusticeproject.org/#/groups/USA (accessed August 13, 2018).

[26] *In Re Raab*, 100 N.Y.2d 305, 315–316, 763 N.Y.S.2d 213, 218 (2003).

[27] National Center for State Courts, *Call to Action: Achieving Civil Justice for All* (Williamsburg, Va.: National Center for State Courts, 2016), 37, https://www.ncsc.org/~/media/microsites/files/civil-justice/ncsc-cji-report-web.ashx; Rob Faucheux, "By the Numbers: Americans Lack Confidence in the Legal System," *The Atlantic*, July 6, 2012, https://www.theatlantic.com/national/archive/2012/07/by-the-numbers-americans-lack-confidence-in-the-legal-system/259458/; and GBA Strategies, "2017 State of the State Courts–Survey Analysis," November 15, 2017, http://www.ncsc.org/~/media/Files/PDF/Topics/Public%20Trust%20and%20Confidence/SoSc-2017-Survey-Analysis.ashx.