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Participation, Equality, and the Civil Right to Counsel: Lessons from Domestic and International Law

ABSTRACT. Domestic efforts to establish a right to civil counsel by drawing narrow analogies to *Gideon v. Wainwright* have met with limited success. In contrast, two principles drawn from international jurisprudence—the human right to "civic participation" and the concept of "equality of arms"—resonate with emerging U.S. jurisprudence in both state and federal courts and suggest new directions for domestic advocacy on the civil right to counsel. First, the human right to civic participation, incorporating access to justice, underscores the democratic values at stake when individuals are not able to fully participate in civil judicial processes because of lack of counsel. Second, the concept of equality of arms hones in on the source of that democratic distortion—inequality—and sets a baseline for ensuring acceptable procedural protections. Strengthening considerations of participation and equality within the constitutional due process calculus would position courts to examine the broader class-based impacts of the denial of civil counsel in cases such as mortgage foreclosures or insurance redlining. Rather than conduct a case-by-case review, which slows litigation, creates uncertainty, and deters litigants from coming forward, U.S. courts viewing the civil right to counsel through the lenses of civic participation and equality of arms could act more broadly to mitigate the class-based impacts of procedural inequality in addition to the case-specific impacts. This approach, grounded in democratic values rather than need, does not ignore the lessons of *Gideon*, but draws on its more subtle themes—themes that have sometimes been eclipsed by a focus on liberty interests.

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ESSAY CONTENTS

The origins of the phrase "today's dissent is tomorrow's majority" are obscure, but the phrase itself, a reference to the way in which the Supreme Court's jurisprudence evolves and even reverses itself over time, is ubiquitous.[1] Of course, dissenters' predictions do not always turn into majority views. Justice Black's dissent in *Goldberg v. Kelly*, which predicted the wholesale expansion of appointed counsel to civil cases, is a case in point.[2]

Goldberg famously held that the termination of subsistence welfare benefits triggers constitutional due process rights.[3] Yet even while finding that welfare may be "more like property than like a gratuity,"[4] the Court placed limits on the procedures constitutionally mandated when welfare is terminated. In particular, state-appointed counsel was explicitly not required. Rather, the Court indicated that the recipient must simply "be allowed to retain an attorney if he so desires."[5]

Writing in dissent, Justice Black railed against the majority's extension of constitutional protection to welfare benefits and the burdens that it would put on the state. Though he had authored *Gideon v. Wainwright* only a few years before, the Justice expressed grave concern about the implications of the *Goldberg* majority opinion, warning that

> today's decision requires only the opportunity to have the benefit of counsel at the administrative hearing, but it is difficult to believe that the same reasoning process would not require the appointment of counsel, for otherwise the right to counsel is a meaningless one since these people are too poor to hire their own advocates.[6]

More than four decades later, Justice Black's cynical *Goldberg* prediction has failed to capture a majority of the Supreme Court. Far from expanding the right to counsel in civil cases, the Court has expressly declined to mandate appointed counsel in cases involving child custody (*Lassiter v. Department of Social Services*[7]) and loss of liberty for a civil violation (*Turner v. Rogers*[8]). Cases

1. *See, e.g.*, Cass R. Sunstein, Op-Ed., *Ginsburg's Dissent May Yet Prevail*, L.A. TIMES, Apr. 20, 2007, http://articles.latimes.com/2007/apr/20/opinion/oe-sunstein20.
2. Goldberg v. Kelly, 397 U.S. 254, 278-79 (1970) (Black, J., dissenting).
3. *Id.* at 260-61 (majority opinion).
4. *Id.*
5. *Id.* at 270.
6. *Id.* at 278-79 (Black, J., dissenting).
7. 452 U.S. 18 (1981).

after *Goldberg* considering the procedures constitutionally required when terminating government benefits, such as *Mathews v. Eldridge*, do not mention a right to civil counsel even to disclaim it.[9]

This Essay, nevertheless, argues that Justice Black was essentially correct. But rather than arising from the plaintiff's desperate need, as Justice Black surmised, the seeds of a constitutional right to counsel in civil cases are to be found in *Goldberg*'s emphasis on the values of democratic citizenship and community participation[10] and *Gideon*'s consideration of procedural equality.[11] While these ideas are not themselves new, as detailed below, two principles drawn from international jurisprudence—the human right to "civic participation" and the concept of "equality of arms"—resonate with emerging U.S. jurisprudence in this area, and suggest new approaches to domestic advocacy.

First, the concepts of democratic citizenship and community participation have long been important background values in constitutional jurisprudence. They play a significant role in, for example, many constitutional cases that recognize the importance of equipping individuals to participate in our political system by ensuring equal access to education.[12] However, promotion of community participation is a value underlying due process protections as well.[13] In *Goldberg*, the majority traced these concepts to the original constitutional compact when, in mandating pre-termination hearings, the Court stressed that the "general Welfare" and the "Blessings of Liberty" are promoted and secured when the poor have "the same opportunities that are available to others to participate meaningfully in the life of the community."[14] While participation in a community has many facets, one of the most

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8. 131 S. Ct. 2507 (2011).

9. Mathews v. Eldridge, 424 U.S. 319 (1976) (addressing social security disability benefits); *see also* Richardson v. Wright, 405 U.S. 208 (1972) (per curiam) (same).

10. 397 U.S. 254, 265 (1970).

11. 372 U.S. 335, 344 (1963).

12. *See, e.g.*, Plyler v. Doe, 457 U.S. 202, 221 (1982) ("[S]ome degree of education is necessary to prepare citizens to participate effectively and intelligently in our open political system if we are to preserve freedom and independence." (quoting Wisconsin v. Yoder, 406 U.S. 205, 221 (1972))).

13. *See, e.g.*, Marshall v. Jerrico, 446 U.S. 238, 242 (1980) (noting that the basic goals of due process include fostering participation of those affected by decisions); *see also* Lawrence B. Solum, *Procedural Justice*, 78 S. CAL. L. REV. 181, 275-281 (2004) (discussing participation as a value underlying due process norms).

14. 397 U.S. at 265.

important is certainly participation in civic institutions such as the judicial system.[15]

International law embraces similar values. Under international law, the concept of a human right to civic engagement or a right to participation in public institutions cuts across individual treaties and declarations, attaining recognition as a core tenet of good governance.[16] While descriptions of the right to civic engagement often reference engagement with elected bodies, judicial bodies are not excluded from its ambit.[17] In fact, engagement with judicial bodies is particularly important when the issues before the courts have significance beyond the individual litigants, as is the case in common law systems where decisions are enshrined in precedent and projected forward as a baseline for future decisions.[18] Both the domestic concept of community participation and the international right to civic engagement make clear that access to government institutions in order to participate in decisions affecting oneself or one's community is a universal value necessary for responsible and sustainable governance.

Second, the concept of equality also crosses domestic and international lines and is central to access-to-justice jurisprudence in both arenas. *Gideon v. Wainwright* rests, in part, on equality grounds, as the decision observes repeatedly and with concern that inequalities result when the prosecution is represented while poor defendants are not.[19] This concern is described more succinctly in international jurisprudence as the issue of "equality of arms," which is the fundamental principle that a party should be afforded a reasonable opportunity to present its case in conditions that do not place it at a substantial disadvantage vis-à-vis its adversary.[20] Considered together, the domestic and

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15. *See, e.g.*, Tennessee v. Lane, 541 U.S. 509 (2004) (concluding that Tennessee's failure to provide disabled individuals with access to judicial services and public programs violated due process); Boddie v. Connecticut, 401 U.S. 371 (1971) (finding that due process requires states to ensure access to court to obtain a divorce).

16. JOHANNA JOKINEN, U.N. HUMAN SETTLEMENTS PROGRAM, INTERNATIONAL LEGAL INSTRUMENTS ADDRESSING GOOD GOVERNANCE 11-14 (2002) (reviewing international law on civic engagement).

17. *See, e.g.*, *Good Governance and Human Rights*, U.N. OFF. OF THE HIGH COMMISSIONER FOR HUM. RTS., http://www.ohchr.org/EN/Issues/Development/GoodGovernance/Pages/GoodGovernanceIndex.aspx (last visited Mar. 31, 2013) (linking courts to human rights and good governance principles through their common concern with the rule of law).

18. *See* Michael J. Gerhardt, *The Role of Precedent in Constitutional Decisionmaking and Theory*, 60 GEO. WASH. L. REV. 68, 73 (1991).

19. 372 U.S. 335, 344 (1963).

20. While "equality of arms" is applied primarily in criminal prosecutions and international arbitrations, it has also been repeatedly endorsed in civil cases. *See, e.g.*, Airey v. Ireland, 32

international versions of this concept underscore the extent to which equality is part and parcel of procedural fairness.

Having defined these concepts, I want to put them to use in exploring a specific question: can a civil right to counsel in the United States be grounded in the due process right to an equal opportunity for civic participation?[21] As set out below, I argue that an expanded concept of equality of arms, encompassing broader ideas of societal equality beyond the four walls of the courtroom, may lead to an affirmative answer.

This Essay proceeds as follows. First, I examine U.S. federal and state court jurisprudence on the civil right to counsel to ascertain whether arguments concerning equal opportunity for civic participation have gained purchase. While some state courts have found a civil right to counsel when participation in family life is at issue, the value of ensuring more meaningful civic participation has generally been absent from the discussion. Some courts have, however, identified equality concerns as a consideration in appointing civil counsel under both due process and equal protection provisions. Though not fully developed in domestic jurisprudence, these equality considerations are on a continuum with the broad rationale laid out in *Goldberg*.

Second, I look to the international arena to examine the roles that participation and equality have played in securing international recognition of the civil right to counsel. While an oft-cited rationale supporting the civil right to counsel in individual cases is equality of arms, international actors situate this concept in its larger context. Civic participation and procedural equality are freestanding rights under international law, often playing a central role in discussions of procedural protections.[22] Broader social disparities have been

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Eur. Ct. H.R. (ser. A) (1979). At least one U.S. court has rejected the assertion that the concept is relevant to U.S. criminal law. *See* United States v. Tucker, 249 F.R.D. 58, 63 (S.D.N.Y. 2008) (asserting that equality of arms "has no place in our constitutional jurisprudence" because a criminal defendant is not constitutionally entitled to match the state's resources). Scholars, however, argue that the concept has utility in civil contexts. *See* James R. Maxeiner, *A Right to Legal Aid: The ABA Model Access Act in International Perspective*, 13 LOY. J. PUB. INT. L. 61, 65-68 (2011); Jay Sterling Silver, *Equality of Arms and the Adversarial Process: A New Constitutional Right*, 1990 WIS. L. REV. 1007.

21. Useful empirical research supporting this could examine issues, such as housing, safety, and food, that most influence civic participation and evaluate how those influences are manifested. Post-Occupy analysis concerning the impact of the wealth gap in the United States may be relevant. *See, e.g.*, Pat Garafolo, *Occupy Wall Street One Year Later: Ten Key Charts About Inequality*, THINK PROGRESS (Sept. 17, 2012, 9:45 AM), http://thinkprogress.org/economy/2012/09/17/856711/ten-inequality-charts-occupy/?mobile=nc.

22. Article 21(1) of the Universal Declaration of Human Rights provides that "[e]veryone has the right to take part in the government of his country, directly or through freely chosen representatives." Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc.

acknowledged, and the impact of the lack of counsel on racial minorities and women has been an important marker for international lawmaking bodies.[23]

Finally, I consider what lessons domestic actors might draw from the international law context. International comparators suggest ways in which domestic procedural norms might be reconceived to incorporate the value of civic participation as a basis for expanding the right to counsel. A version of "equality of arms" has begun to take hold in the United States as a factor when courts consider claims for appointed counsel.[24] Greater breadth could be given to that concept by contextualizing it within communities. This approach would not supplant an evaluation of individual need, but provide an alternative analysis promoting the values of civic participation and equality articulated by the majority in *Goldberg* and hinted at in *Gideon*.

I. U.S. JURISPRUDENCE: CIVIC PARTICIPATION, EQUALITY, AND CIVIL COUNSEL

A survey of federal and state cases addressing the civil right to counsel reveals that individual considerations of participation and procedural equality are occasionally referenced, and sometimes included in a list of the relevant factors to be weighed. However, few courts have appreciated the centrality of participation and equality to the fundamental purposes of due process protections. Because court decisions have generally failed to identify the broader community-wide or population-based impacts of the denial of counsel, no case has adequately defined, synthesized, and integrated issues of civic participation and procedural equality into its decisional framework concerning the civil right to counsel.

A. Supreme Court Case Law

1. Due Process Analyses and the Right to Counsel

The concept of civic participation has been a muted presence in the federal right-to-counsel jurisprudence, which has focused principally on individual

A/RES/217(III) (Dec. 10, 1948). Article 14(1) of the International Covenant on Civil and Political Rights provides that "[a]ll persons shall be equal before the courts and tribunals." International Covenant on Civil and Political Rights art. 14(1), Dec. 16, 1966, S. TREATY DOC. NO. 95-20, 999 U.N.T.S. 171.

23. *See infra* text accompanying notes 69-80.

24. *See infra* text accompanying notes 53-55.

harms and whether the interest at stake is "fundamental."

To date, the Supreme Court has found a presumption against appointed counsel in civil cases where physical liberty is not implicated, and has only sometimes required counsel where physical liberty is at issue. After *Gideon v. Wainwright*,[25] the Court extended the mandate of appointed counsel beyond the criminal context in *In re Gault*, holding that appointed counsel was required in juvenile delinquency proceedings because they might "result in commitment to an institution in which the juvenile's freedom is curtailed."[26] A plurality of the Court subsequently found that the Due Process Clause required appointed counsel prior to the involuntary transfer of a prisoner to a state mental institution, reasoning that this civil proceeding would have significant implications for the prisoner's future liberty.[27]

In *Lassiter v. Department of Social Services*, involving the termination of parental rights, the majority began from the presumption that "an indigent litigant has a right to appointed counsel only when, if he loses, he may be deprived of his physical liberty."[28] Employing the balancing test of *Mathews v. Eldridge*, the Court cited several factors that could encourage appointments in individual cases: the "commanding" nature of the parental interests at stake, issues of fairness and procedural equality, and the importance of accurate judicial decisions.[29]

The *Lassiter* court then weighed these factors and speculated that many, though perhaps not all, parental termination cases could not overcome the initial presumption. The Court therefore declined to mandate appointed counsel in all termination cases as a constitutional matter, instead leaving it to individual courts or state legislatures to go beyond the constitutional floor.[30] The Court articulated several factors that trial courts could consider in determining whether a particular termination case warranted counsel, such as whether (1) counsel would make a "determinative difference," (2) expert testimony was used in the case, and (3) there were "troublesome points of law."[31]

In *Turner v. Rogers*, the Court considered the right to counsel in a civil contempt case involving possible loss of physical liberty, again without

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25. 372 U.S. 335 (1963).

26. 387 U.S. 1, 41 (1967).

27. Vitek v. Jones, 445 U.S. 480 (1980).

28. *Lassiter*, 452 U.S. at 26-27.

29. *Id.* at 27-30.

30. *Id.* at 33-34.

31. *Id.* at 32-33.

reference to values of civic participation that might be implicated.[32] Despite the importance of the liberty interest, the majority concluded that court-appointed counsel was not constitutionally required, provided that alternative procedural safeguards were in place and that the opposing party was not represented by counsel either.[33] The Court highlighted the possibility that it might examine equality concerns in the future and expressly left open the question of whether appointed counsel would be required in a proceeding initiated by the State.[34] Likewise, the Court also left open the question of whether an "unusually complex case" might require appointment of a trained advocate.[35]

2. Equality Analyses

One factor in the Supreme Court's failure to fully examine the participation and equality values afoot in civil counsel cases may be the cabining of these claims under the Due Process Clause, where the analytical role of equality is less clear. Yet the *Lassiter* majority's recognition of the power imbalance suggests an underlying concern about full participation.[36] Further, as *Gideon* itself noted, procedural equality is an element of fairness—the hallmark of due process.[37]

Similarly, the *Turner* Court's references to equality considerations reflect the Court's intuitive understanding that inequality in access to the courts might distort the checks and balances underlying our democratic system.[38] Again, portions of the Court's opinion in *Gideon v. Wainwright* point the way, noting the role that procedural equality plays in ensuring the integrity of our judicial system. As Justice Black observed in *Gideon*, "[f]rom the very beginning, our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair

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32. Turner v. Rogers, 131 S. Ct. 2507 (2011).

33. *Id.* at 2520.

34. *Id.*

35. *Id.*

36. *Lassiter*, 452 U.S. at 60.

37. Gideon v. Wainwright, 372 U.S. 335, 344 (1963).

38. In contrast, some criminal cases have explicitly identified equality concerns. *See, e.g.*, Ake v. Oklahoma, 470 U.S. 68, 76 (1986) ("[J]ustice cannot be equal where, simply as a result of his poverty, a defendant is denied the opportunity to participate meaningfully in a judicial proceeding in which his liberty is at stake.").

trials before impartial tribunals in which every defendant stands equal before the law."[39]

The formal role of equality doctrine in the broader context of access to justice was directly addressed in *M.L.B. v. S.L.J*, concerning the right to receive the transcript necessary to appeal a termination of parental rights.[40] Analyzing the issue as a convergence of equal protection and due process, the Court noted the fundamental nature of the parental right at issue as well as the ways in which indigency may complicate individual efforts to defend that right. Holding the state to a standard higher than mere rationality, the majority rejected the argument that the costs of providing transcripts would be too great a burden.[41] Instead, the opinion added the payment of transcript costs in parental termination appeals to the short list of situations in which states must affirmatively take poverty into account: (1) the basic right to participate in political processes such as voting and (2) access to judicial processes that are criminal or quasi-criminal in nature.[42]

With the *M.L.B.* ruling, the Court might have redirected courts to examine access issues through the lens of equal protection and civic participation, building on the explicit language of *Goldberg*. However, while the *M.L.B.* Court avoided the issue, current equal protection jurisprudence generally frustrates efforts to address the most troubling equality issues raised by lack of civil counsel: the disparate impact of such limitations on racial minorities and women. As *Washington v. Davis*[43] (race) and *Massachusetts v. Feeney*[44] (sex) indicate, a litigant must prove invidious intent to sustain such a discrimination claim under the federal Equal Protection Clause. There is considerable evidence that the absence of a right to appointed counsel in housing eviction cases has a disproportionate impact on racial minorities, particularly in certain communities.[45] Similarly, the lack of counsel to obtain or enforce orders of

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39. 372 U.S. at 344.

40. 519 U.S. 102 (1996).

41. *Id.* at 104.

42. *Id.* at 124. *Tennessee v. Lane* clarifies that judicial services are one of the political processes to which individuals have a due process right of access. 541 U.S. 509 (2004).

43. 426 U.S. 229 (1976).

44. 442 U.S. 256 (1979).

45. *See, e.g.*, Matthew Desmond, *Eviction and the Reproduction of Urban Poverty*, 118 AM. J. SOC. 88, 104 (2012) (finding that "[w]omen from black neighborhoods made up only 9.6% of Milwaukee's population but accounted for 30% of evicted tenants").

protection has a disproportionate impact on women.[46] However, disproportionate impact on identity-based groups alone will not support a constitutional claim, leaving the question of how lack of counsel affects civic participation and the status of minorities and women beyond the scope of equal protection analysis—though, as argued here, central to a due process analysis.

B. State Courts

All states reject a limitation of the right to appointed counsel to criminal proceedings alone, but otherwise vary in their approach to the right to civil counsel question. No state ventures nearly so as far as Justice Black cynically warned when he penned his dissent in *Goldberg*. Instead, states generally focus on instances where liberty is restricted or important family rights are at issue when granting a right to civil counsel.[47] As with federal law, concerns about civic participation and procedural equality have sometimes been noted, but have not yet played a coherent role in state cases.

1. Civil Cases Involving Restrictions on Liberty

Rejecting the federal floor set by *Turner*, some states have judicially or legislatively determined that counsel must be provided in cases of civil contempt where restriction of physical liberty is a possible outcome.[48] In addition, many states provide a right to counsel in at least a subset of mental health commitment cases.[49] Further, some states have used equal protection or due process analyses to extend a right to counsel in civil cases challenging involuntary commitment where legislators failed to provide such rights.[50]

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46. In 1998, women were victims of intimate partner violence at five times the rate of men. Callie Marie Rennison & Sarah Welchans, *Intimate Partner Violence*, BUREAU OF JUST. STAT., (May 2000), http://bjs.ojp.usdoj.gov/content/pub/pdf/ipv.pdf.

47. Laura K. Abel & Max Rettig, *State Statutes Providing for a Right to Counsel in Civil Cases*, 40 CLEARINGHOUSE REV. 245, 269 (2006).

48. *See, e.g.*, State *ex rel* Graves v. Daugherty, 266 S.E.2d 142, 144 (W. Va. 1980) (noting in an adversarial paternity proceeding that "[w]e eschew the rubric of 'criminal' versus 'civil' in determining what process is fair"). *See generally* John Pollock, Turner v. Rogers*: Why the Supreme Court is a Day Late and a Dollar Short*, CONCURRING OPINIONS (June 22, 2011, 6:06 PM), http://www.concurringopinions.com/archives/2011/06/turner-v-rogers-why-the-supreme-court-is-a-day-late-and-a-dollar-short.html.

49. Abel & Rettig, *supra* note 47, at 264-68.

50. *See, e.g.*, Merryfield v. State, 241 P.3d 573 (Kan. App. 2010) (relying on equal protection); s*ee also In re* Ontiberos, 287 P.3d 855 (Kan. 2012) (finding a due process right to appointed

However, a minority of states take advantage of the flexibility confirmed in *Turner* to deny appointed counsel in civil matters even when the defendant stands to lose his or her liberty. For example, the Ohio case of *Liming v. Damos*[51] relied on both the federal and state constitutions to deny appointed counsel in a hearing to determine whether the defendant had satisfied the conditions to purge a civil contempt sanction, which could include incarceration. The *Liming* court concluded that the litigant's personal interests in liberty had been diminished as a result of the prior finding of contempt and the obligation for continued compliance with the purge conditions, moderating against a right to appointed counsel.[52]

2. Civil Cases Involving Important Family Relationships

Looking beyond cases involving physical liberty, a number of state courts have expanded the right to counsel to areas involving significant interference with intimate familial relationships, that is, parental termination, child custody, and guardianship. In doing so, courts have interpreted due process principles while appealing to concepts of equality and "fundamental fairness," though they have not framed these factors in terms of promoting more robust civic participation. For example, the Alaska Supreme Court ruled in *Flores v. Flores*[53] that an indigent litigant in a child custody proceeding had a due process right to appointed counsel when her spouse had no-cost representation from the Alaska Legal Services Corporation, defined as a "public agency." The court noted that the underlying interest involved—making decisions about one's child—was one of the most important of civil liberties. Further, concepts of fundamental fairness played an important role. As the court observed,

counsel for an involuntarily committed sexual predator, following the Supreme Court's ruling in *Vitek v. Jones*, 445 U.S. 480 (1980)).

51. 979 N.E.2d 297 (Ohio 2012).

52. *Id.* at 306; *see also* Bowen v. Bowen, 471 So.2d 1274, 1277 (Fla. 1985) (requiring the appointment of counsel only because a civil contempt proceeding transformed into a criminal contempt proceeding); Andrews v. Walton, 428 So.2d 663, 666 (Fla. 1983) (finding counsel unnecessary because "if the parent has the ability to pay, there is no indigency, and if the parent is indigent, there is no threat of imprisonment," which satisfied the concept of "fundamental fairness"); State *ex rel* Dep't of Human Servs. v. Rael, 642 P.2d 1099 (N.M. 1982) (holding that there is no general constitutional right to counsel in civil contempt proceedings).

53. 598 P.2d 893 (Alaska 1979).

"[f]airness alone dictates that the petitioner should be entitled to a similar advantage" as her spouse.[54]

A concern for fairness and procedural equality also animated an Alaska trial court in *Gordanier v. Jonsson*.[55] There, the court ruled that the state constitution's due process and equal protection clauses required appointment of counsel for an indigent parent in an adversarial child custody proceeding where the opposing party was represented by private counsel.

Not all states have approached the issue so expansively. Ruling in 1975 in *In re Smiley*, the New York Court of Appeals rejected a claim for appointed counsel in matrimonial cases.[56] The court expressed concern that mandatory appointment in such cases would signal that counsel is a necessary prerequisite for all access to the justice system, giving rise to dramatically expanded state obligations to provide counsel.[57] Nevertheless, New York courts subsequently invoked equality concerns under the state and federal due process clauses to extend appointed counsel in paternity or support cases where one party is represented by the state.[58]

3. Civil Cases Involving Important Economic and Social Needs

In contrast to the consideration given the right to counsel in family-related cases, no state's high court has found such a right in situations involving "basic

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54. *Id*. at 895. The Alaska Supreme Court has extended this ruling to circumstances where the Alaska Network on Domestic Violence and Sexual Assault (ANDVSA) is counsel to one of the parties, determining that ANDVSA is a "public agency." *In re* Alaska Network on Domestic Violence & Sexual Assault, 264 P.3d 835 (Alaska 2011).

55. Order Granting Defendant's Motion for Appointment of Counsel, Gordanier v. Jonsson, No. 3AN-06-8887 C1 (Alaska Super. Ct. Aug. 14, 2007), http://www.civilrighttocounsel.org/pdfs/Gordanier%20v%20Jonsson%20-%20Order%20Appointing%20Counsel.pdf, *appeal dismissed*, Office of Pub. Advocacy v. Alaska Court Sys., No. S-12999 (Alaska 2009); *see* Paul Marvy & Laura Abel, *Current Developments in Advocacy to Expand the Civil Right to Counsel*, 25 TOURO L. REV. 131, 134-35 (2009) (explaining the case's complicated history).

56. 330 N.E.2d 53 (N.Y. 1975); *see also In re* S.A.J.B., 679 N.W.2d 645, 647 (Iowa 2004) (holding that the state equal protection clause was violated when statutes provided counsel for some indigent parents facing involuntary termination proceedings but not others).

57. *In re Smiley*, 330 N.E.2d at 57-58.

58. *See, e.g.*, Madeline G. v. David R., 407 N.Y.S.2d 414 (N.Y. Fam. Ct. Rensselaer Cnty. 1978). In states where courts have not established a right to counsel in cases involving family relationships, legislatures may have created such rights through statute. *See* Abel & Rettig, *supra* note 47.

subsistence" such as shelter, food, or health.[59] While the fundamental right to family relationships is often deemed to be sufficiently weighty to support a right to appointed counsel, basic physical or financial needs have not been viewed as similarly fundamental.[60] For example, in the Alaska case of *Bustamante v. Alaska Workers Compensation Board*, the court refused to appoint counsel to pursue a workers' compensation claim because the plaintiff's interest in financial support was not deemed sufficiently significant, and because the workers' compensation system is intended to be accessible to nonlawyers.[61] Likewise, the Ohio courts have refused to find a right to appointed counsel in foreclosure cases.[62]

Writing in 1972, just two years after *Goldberg*, the Vermont Supreme Court clarified that it found the democratic distortions arising from lack of counsel to be less troubling than the countermajoritarian issues raised by judicial intervention:

> To enshrine a doctrine as a constitutional principle is, as a practical matter, to extract it from the ordinary democratic process of debate and decision . . . . It is very likely, for this reason, that there has not yet been handed down a United States Supreme Court decision requiring that there be subsidized legal counsel available in civil cases.[63]

As the Vermont court contemplated, concerns about civic participation and procedural equality have sometimes led other state actors to expand counsel

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59. David Udell & Laura Abel, *Information for Civil Justice Systems About Civil Right to Counsel Initiatives*, NAT'L COALITION FOR A CIVIL RIGHT TO COUNSEL 4-5 (June 9, 2009), http://www.civilrighttocounsel.org/pdfs/NCCRC%20Informational%20Memo.pdf; *see* Peter B. Edelman, *The Next Century of Our Constitution: Rethinking Our Duty to the Poor*, 39 HASTINGS L.J. 1 (1987); Stephen Loffredo, *Poverty, Democracy and Constitutional Law*, 141 U. PA. L. REV. 1277 (1993); Frank I. Michelman, *The Supreme Court, 1968 Term—Foreword: On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7 (1969).

60. Abel & Rettig, *supra* note 47. Beyond basic economic needs, lack of safety may undermine individuals' civic participation. Here, the refusal to appoint counsel has not been so absolute. For example, Ohio courts have extended a right to counsel for juvenile respondents in cases where juveniles seek an order of protection against another juvenile. *See In re* D.L., 937 N.E.2d 1042 (Ohio App. 2010).

61. Bustamante v. Alaska Workers' Comp. Bd., 59 P.3d 270 (Alaska 2002); *see also* Lay v. McElven, 96 CA 1325 (La. App. 1 Cir. 3/27/97); 691 So.2d 311 (denying appointed counsel in case seeking to vindicate alleged civil rights violations).

62. Williams v. Mone, No. 70649, 1997 Ohio App. LEXIS 307 (Ohio Ct. App. 1997) (stating that there is no right to appointed counsel in a foreclosure case where physical liberty is not at stake).

63. Caron v. Betit, 300 A.2d 618, 619 (Vt. 1972) (denying attorney's fees for counsel privately retained to challenge a denial of welfare benefits).

rights. For example, when the Chief Judge of the New York Court of Appeals pledged in 2011 that all homeowners facing foreclosure would be entitled to legal assistance, he identified fairness and equality as key concerns. According to the Chief Judge, "[i]t's such an uneven playing field," in which banks invariably have representation and a litigant cannot get a fair day in court "without a lawyer."[64]

However, these developments are on the margins. The basic truth is that states have expanded rights to counsel principally to protect family relationships with only occasional mention of the impact that lack of counsel has on the ability of indigents and other groups to participate equally in decisions directly affecting themselves and their communities.

II. INTERNATIONAL LAW ON THE RIGHT TO CIVIL COUNSEL

In contrast to federal and state law, international law has often situated the right to counsel in the context of larger access-to-justice issues. Civic participation has been a touchstone shaping expert opinions concerning access to procedural protections. Equality has also had a central place in international analysis, and the racial and gender impacts that may result from disparate access to counsel have been widely acknowledged. The discussion below begins with a review of international legal standards, then turns to decisions applying these principles.

A. International Law: Civic Participation and the Right to Counsel

The basic building blocks of access to justice in the international system are prominent in international founding documents. Unlike the U.S. Constitution, which guarantees "due process" without specifying the components of that right, international law enumerates aspects of the guarantee, including the idea that fair procedures encompass a component of equality. The Universal Declaration of Human Rights provides that "[e]veryone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations,"[65] language which has been repeatedly interpreted to include a right to be represented by counsel in

64. David Streitfeld, *New York Courts Vow Legal Aid in Housing*, N.Y. TIMES, Feb. 15, 2011, http://www.nytimes.com/2011/02/16/business/16housing.html (quoting Chief Judge Lippman's State of the Judiciary address).

65. G.A. Res. 217 (III) art. 10, U.N. Doc. A/RES/217(III) (Dec. 10, 1948).

appropriate cases.[66] The International Covenant on Civil and Political Rights, ratified by the United States, also provides for both equality and fairness before the courts and has been construed by the United Nations Human Rights Committee (HRC) to require appointment of counsel in some instances in order to ensure that "no individual is deprived in procedural terms of his/her right to claim justice."[67] In particular, the HRC has opined that "[t]he principle of equality between parties applies . . . to civil proceedings, and demands, inter alia, that each side be given the opportunity to contest all the arguments and evidence adduced by the other party."[68]

The Convention on the Elimination of All Forms of Racial Discrimination ("CERD"), ratified by the United States, addresses procedural fairness through the lens of racial equality.[69] The CERD Committee explicitly addressed the right to civil counsel in its General Recommendation No. 29, urging that State parties "[t]ake the necessary steps to secure equal access to the justice system for all members of descent-based communities, including by providing legal aid."[70] Further, in General Recommendation No. 31, the Committee recommended that "legal aid, including the assistance of counsel" be given to enable victims of racism to more readily bring actions in court.[71]

These general statements of international law gain meaning as they are applied to individual countries and circumstances. One aspect of this application occurs when countries submit compliance reports to the relevant treaty-monitoring bodies.

The CERD Committee's most recent review of U.S. compliance illuminated the meaning of the right to civil counsel set out in the CERD treaty. The Committee specifically noted "the disproportionate impact that the lack of a generally recognized right to counsel in civil proceedings has on

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66. *See* Martha F. Davis, *In the Interests of Justice: Human Rights and the Right to Counsel in Civil Cases*, 25 TOURO L. REV. 147, 162 (2009)

67. *Id.* (citing U.N. Human Rights Comm., General Comment No. 32, ¶ 10, 90th Sess., July 9-27, 2007, UN Doc. CCPR/C/GC/32 (Aug 23, 2007), http://www2.ohchr.org/english/bodies/hrc/docs/gcart14.doc.

68. U.N. Human Rights Comm., *supra* note 67, ¶ 13.

69. International Convention on the Elimination of All Forms of Racial Discrimination arts. 5(a), 6, Mar. 7, 1966, S. EXEC. DOC. C, 95-2, 660 U.N.T.S. 195.

70. Comm. on the Elimination of Racial Discrimination, Rep., at 115, 60th Sess., Mar. 4-22, 2002, 61st Sess., Aug. 5-23, 2002, U.N. Doc. A/57/18 (2002).

71. Comm. on the Elimination of Racial Discrimination, Rep., at 103, 66th Sess., Feb. 21-Mar. 11, 2005, 67th Sess., Aug. 2-19, 2005, U.N. Doc. A/60/18 (2005).

indigent persons belonging to racial, ethnic and national minorities."[72] To remedy the situation, the Committee recommended that the United States "allocate sufficient resources to ensure legal representation of indigent persons belonging to racial, ethnic and national minorities in civil proceedings, with particular regard to those proceedings where basic human needs—such as housing, health care, or child custody—are at stake."[73]

United Nations special rapporteurs have also been outspoken concerning the civil right to counsel and the ways in which its absence can distort civic participation.[74] The Rapporteur on Adequate Housing has repeatedly noted the importance of counsel in addressing issues such as forced evictions and post-disaster displacement.[75] This expert has also highlighted the unique issues facing women, noting that legal aid is "often restricted to criminal matters and fails to address family law, systematically disadvantaging women."[76] The Rapporteur on the Rights of Migrants has observed the negative impact that lack of counsel has on migrants subject to detention.[77] In his report on the United States, the Rapporteur concluded: "[t]he right to counsel is a due process right that is fundamental to ensuring fairness and justice in proceedings. To ensure compliance with domestic and international law, court-appointed counsel should be available to detained immigrants."[78]

Finally, the Rapporteur on Extreme Poverty addressed access-to-justice issues for people living in poverty in a report that places community and civic participation at the center of the discussion. According to the Rapporteur,

> the inability of the poor to pursue justice remedies through existing systems increases their vulnerability to poverty and violations of their rights. In turn, their increased vulnerability and exclusion further

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72. Concluding Observations of the Comm. on the Elimination of Racial Discrimination: U.S., ¶ 22, 72d Sess., Feb. 18-Mar., 2008, U.N. Doc. CERD/C/USA/CO/6 (Feb. 2008).

73. *Id*.

74. For more information on special rapporteurs, see generally TED PICCONE, CATALYSTS FOR CHANGE: HOW THE U.N.'S INDEPENDENT EXPERTS PROMOTE HUMAN RIGHTS (2012).

75. Special Rapporteur on Adequate Housing as a Component of the Right to an Adequate Standard of Living, *Right to Adequate Housing*, ¶ 45, U.N. Doc. A/66/270 (Aug. 5, 2011) (by Raquel Rolnik).

76. Special Rapporteur on Adequate Housing as a Component of the Right to an Adequate Standard of Living, *Economic, Social and Cultural Rights*, ¶ 47, U.N. Doc. E/CN.4/2005/48 (Mar. 3, 2005) (by Miloon Kothari).

77. Special Rapporteur on the Human Rights of Migrants, *Report to the U.N. General Assembly*, ¶ 72(a), U.N. Doc. A/HRC/20/24 (Apr. 2, 2012).

78. Special Rapporteur on the Human Rights of Migrants, *Mission to the United States of America*, ¶ 114, U.N Doc. A/HRC/7/12/Add.2 (Mar. 5, 2008).

> hamper their ability to use justice systems. This vicious circle impairs the enjoyment of several human rights.[79]

The Rapporteur identified free legal assistance as a "fundamental prerequisite" for remedying this situation.[80]

B. Regional Instruments: Civic Participation and the Right to Counsel

Regional human rights bodies have also construed and applied human rights law relevant to the civil right to counsel. The United States is a participant in the Inter-American Commission on Human Rights (IACHR) through its membership in the Organization of American States (OAS).[81] The IACHR has repeatedly noted the importance of removing obstacles to access to justice, including by providing access to counsel.[82] Indeed, the IACHR has concluded that the complexity of certain proceedings involving constitutional rights necessitates appointed civil counsel in order to ensure adequate protection of indigent litigants.[83]

Regional human rights instruments in Europe have also been construed to require appointed civil counsel. In particular, the European Court of Human Rights (ECHR) has explored the bases for the right under the European Convention on Human Rights.

Decided by the ECHR in 1979, the case of *Airey v. Ireland* set the standard for more than forty European countries with membership in the Council of Europe.[84] Ms. Airey, an Irish citizen, sought a legal separation from her husband. When she was denied counsel under Irish law, she appealed to the ECHR. Ruling in her favor, the court required that Ireland provide Ms. Airey

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79. Rep. of the Special Rapporteur on Extreme Poverty and Human Rights, ¶ 5, U.N. Doc. A/67/278 (Aug. 9, 2012).

80. *Id.* ¶ 60.

81. *Member States*, ORG. OF AM. STATES, http://www.oas.org/en/member_states/default.asp (last visited Mar. 31, 2013).

82. *See* Inter-Am. Comm'n on H.R., *Access to Justice as a Guarantee of Economic, Social and Cultural Rights: A Review of the Standards Adopted by the Inter-American System of Human Rights*, OEA/Ser.L/V/II.129, doc. 4 (Sept. 7, 2007) [hereinafter *Access to Justice*]; Inter-Am. Comm'n on H.R., *Guidelines for Preparation of Progress Indicators in the Area of Economic, Social and Cultural Rights* 25-33, OEA/Ser.L/V/II.132, doc. 14 (July 19, 2008).

83. *Access to Justice*, *supra* note 82, ¶ 7.

84. Airey v. Ireland, 32 Eur. Ct. H.R. (ser. A) (1979); Earl Johnson, Jr., *Equality Before the Law and the Social Contract: When Will the United States Finally Guarantee Its People the Equality Before the Law the Social Contract Demands?*, 37 FORDHAM URB. L.J. 157, 164-66 (2010).

with counsel and create a legal aid scheme that would address civil representation needs.[85]

The court construed Article 6 of the European Convention, which guarantees a civil litigant a "fair hearing" before an independent tribunal.[86] According to the Court, "[t]he Convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective."[87] Acknowledging concerns about inequitable access to civic institutions, the Court observed that the right to a fair trial holds "a prominent place . . . in a democratic society."[88] Without counsel, not only might Ms. Airey have been disadvantaged vis-à-vis her husband—an "equality of arms" concern—but she also would have had difficulty conducting the complex proceeding.[89]

The ECHR reaffirmed its position on the civil right to counsel in *Steel & Morris v. United Kingdom*,[90] a case that extended the right to counsel to a corporate defamation claim. Litigated in the United Kingdom for ten years, the dispute resulted in the longest trial ever held in that country.[91] On one side were two indigent protesters, both activists with Greenpeace.[92] On the other side was the McDonald's corporation, one of the largest businesses in the world. When the activists created and distributed a pamphlet alleging that McDonald's food was unhealthy and its labor practices exploitative, McDonald's sued them. The activists could not obtain appointed counsel under the United Kingdom's legal aid scheme.[93] Without dedicated counsel, the length and complexity of the trial made it impossible to maintain continuity in their representation.[94]

In its decision, the ECHR reiterated that the European Convention is intended to provide practical rights, and that access to the courts is a central tenet of a democratic society.[95] Reviewing the particular facts, the court

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85. *Airey*, 32 Eur. Ct. H.R. (ser. A) at 12-14.

86. Convention for the Protection of Human Rights and Fundamental Freedoms art. 6, Nov. 4, 1950, 213 U.N.T.S. 221.

87. *Airey*, 32. Eur. Ct. H.R. (ser. A) at 12.

88. *Id.*

89. *Id.*

90. Steel & Morris v. United Kingdom, 41 Eur. Ct. H.R. (pt. 3) at 403. (2005).

91. *McLibel: Longest Case in English History*, BBC NEWS (Feb. 15, 2005), http://news.bbc.co.uk/2/hi/uk_news/4266741.stm.

92. *Id.*

93. *Steel & Morris*, 41 Eur. Ct. H.R. (pt. 3) at 414.

94. *Id.* at 425.

95. *Id.* at 427.

concluded that denial of appointed counsel violated the human rights of the litigants.[96]

The ECHR applied the *Airey* principle once again in *Alkan v. Turkey*, in which an indigent seeking compensation for alleged wrongs that he experienced during military service was denied counsel. In ruling that the European Convention required appointed counsel, the court cited both "the prominent place held in a democratic society by the right to a fair trial" and the importance of the principle of "equality of arms."[97]

III. LESSONS: FRAMING A RIGHT TO CIVIL COUNSEL

When he penned his dissent in *Goldberg v. Kelly*, Justice Black assumed that dire human need would lead to an interpretation of the Due Process Clause requiring appointed counsel in a wide range of civil cases. In fact, few, if any, courts have found these grounds persuasive. Instead, to the extent that the civil right to counsel has been expanded, concerns about family relationships and procedural fairness have provided the steady, if sometimes faint, drumbeat.

Justice Black's prediction might have nevertheless become a majority holding, were it not for the balancing test of *Mathews*, which weighs the cost to the state of additional procedures against the procedures' effectiveness and the impact on the individual. In practice, this approach tends to reinforce hierarchies of economic privilege and the status quo of access to justice, as what process is due rests on the value of that process to society.[98] While procedural rights always force some redistribution, that function is significantly limited by countervailing considerations, such as the cost to the state and limitations on procedural impacts, weighed under *Mathews*.[99]

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96. *Id.* at 428, 430.

97. Alkan v. Turkey, App. No. 17725/07 (Eur. Ct. H.R. 2012), http://hudoc.echr.coe.int/webservices/content/pdf/001-108973?TID=gorenbhflcv. The United Kingdom recently made significant changes to its venerable legal aid scheme, eliminating broad areas of civil legal representation. *See, e.g.*, Owen Bowcott, *Lawyers Demand Pause in Legal Aid Reforms*, GUARDIAN, May 17, 2011, http://www.guardian.co.uk/law/2011/may/18/lawyers-demand-pause-legal-aid-reforms. The ECHR decisions discussed here suggest that the United Kingdom may now be in violation of its international obligations.

98. *See* Jerry C. Mashaw, *The Supreme Court's Due Process Calculus for Administrative Adjudication in* Mathews v. Eldridge*: Three Factors in Search of a Theory of Value*, 44 U. CHI. L. REV. 28, 52-54 (1976) (describing the ways in which the *Mathews* test may tend to reinforce inequalities).

99. The *Mathews* test does examine the "risk of an erroneous deprivation," often entailing an assessment of the resources available to each side to determine the risk of error. Mathews v. Eldridge, 424 U.S. 319, 335 (1976). However, that formulation entirely ignores the dignitary

In contrast, the concept of equality of arms invokes a broader notion of the social compact underlying the Due Process Clause and, coming under a different analytical strand, potentially avoids the limitations of the *Mathews* test.[100] At the very least, equality of arms means that a litigant will not be ambushed in court by an opponent with dramatically superior resources. However, the concept of equality of arms goes further to provide an assurance that a litigant's claim will be resolved based on justice rather than resources. As the Court indicated in *M.L.B.*, this analysis is a composite of due process and equal protection considerations that moderates the application of *Mathews*.[101]

Federal jurisprudence has paid scant attention to equality principles as a basis for provision of civil counsel, generally identifying equality as a possible factor but leaving it for future consideration.[102] To date, the equality considerations identified by the Supreme Court are case-specific issues such as whether a case is complex. State courts employing both due process and equal protection analyses have also used equality analyses to evaluate whether particular statutes irrationally exclude one narrow group or another from access to appointed counsel.[103]

However, the concept of equality of arms need not be so limited, and adding considerations of equality to the constitutional due process calculus would allow courts to examine the broader class-based impacts of the denial of civil counsel. Equality of arms may be implicated, for example, by the marginalization of low-income communities which are preyed upon by predatory lenders. If none or very few of the individuals affected have counsel, and no counsel is appointed at state expense, an entire community may be devastated. As the CERD Committee suggested in its review of the United States, many communities of color lack "equality of arms" by virtue of their disproportionate poverty or inability to access services. Rather than conduct a case-by-case review, which slows litigation, creates uncertainty and practical difficulties for trial judges, and deters litigants from coming forward in the first

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aspects of procedural equality, while also requiring that the unrepresented litigant prove that the risk of error is unacceptable.

100. *See, e.g.*, M.L.B. v. S.L.J., 519 U.S. 102, 120 (1996) (noting that access-to-justice cases involving equal protection and due process considerations "cannot be resolved by resort to easy slogans or pigeon-hole analysis" (quoting Bearden v. Georgia, 461 U.S. 660, 666 (1983))).

101. *Id.*

102. Indeed, in *Lassiter v. Department of Social Services*, the Court acknowledged that the individual litigant was confused by the proceeding's complexity, but concluded that this inequality was not determinative given the lack of a physical liberty threat. 452 U.S. 18, 29-31 (1981).

103. *See, e.g.*, *In re* S.A.J.B., 679 N.W.2d 645, 647-51 (Iowa 2004).

place, U.S. courts could adopt the approach recommended by the CERD Committee, making appointed counsel available to indigent litigants seeking to vindicate discrimination claims.[104] Building on the equality-of-arms approach to address the class-based impacts of inequality, in addition to the case-specific impacts, would begin to address the concerns of both the majority and the dissent in *Goldberg*. Procedural protections would be employed in the service of strengthening communities and shoring up opportunities for democratic participation, while at the same time, bare need alone would not compel a reallocation of state resources.

CONCLUSION

The values of civic participation and procedural equality have a deep pedigree in domestic due process jurisprudence, yet neither Supreme Court nor state court decisions addressing the civil right to counsel have given these values the consideration that they merit. The concept of equality of arms, developed in international law and now inching its way into U.S. due process jurisprudence, in the *Turner* decision as well as others, is therefore particularly important. Framed within the due process rubric, a broad construction of equality of arms can take into account issues of civic participation and procedural equality that frustrate entire communities and identity groups seeking full and equal access to the courts. Litigators and legislators alike should take note of this concept, which reinforces the same values of equality and participation underlying our democratic system that animated the *Gideon* decision a half-century ago.

104. On the difficulties of case-by-case considerations, see John Pollock & Michael S. Greco, *It's Not Triage if the Patient Bleeds Out*, 161 U. PA. L. REV. PENNUMBRA 40, 42-44 (2012), http://pennumbra.com/responses/11-2012/PollockGreco.pdf.