Designing Access: Using Institutional Design to Improve Decision Making About the Distribution of Free Civil Legal Aid

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Introduction

Civil legal assistance is essential to the operation of our courts, to the ability of low-income people to access the courts and satisfy their basic human needs, and to our conception of our democracy as one in which there is equal justice for all. Yet the most important fact about civil legal assistance for low-income people is that there is not enough of it. There is a right to counsel in only a few types of civil cases. The types of cases, and the amount of legal assistance provided under a right-to-counsel scheme, vary widely from state to state.[1] Most people with civil legal problems never seek help from a civil legal aid program.[2] Half of those who do seek help are turned away.[3] A large proportion of the people who get help do not get full, adversary representation. Rather, they get brief advice, help filling out a form, or representation in just a single appearance before the court.[4]

This chronic, severe shortage of assistance means that decisions about who gets counsel or some other sort of legal assistance and who does not must be made constantly, and in myriad ways. Here are just a few examples. The Supreme Court decides, in *Turner v. Rogers*, that parents facing prison for failure to pay child support do not need a lawyer to obtain "meaningful

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[1] *See* Laura K. Abel & Lora J. Livingston, *The Existing Civil Right to Counsel Infrastructure*, 47 Judges' J. 24, 25–27 (2008); Laura Abel & Max Rettig, *State Statutes Providing for a Right to Counsel in Civil Cases*, 40 Clearinghouse Rev. 245, 252–70 (2006).

[2] *See* Rebecca L. Sandefur, *The Impact of Counsel: An Analysis of Empirical Evidence*, 9 Seattle J. Soc. Just. 51, 53 (2010).

[3] Legal Servs. Corp., Documenting the Justice Gap in America: The Current Unmet Civil Legal Needs of Low-Income Americans 2–3 (2009), *available at* http://www.lsc.gov/sites/default/files/LSC/pdfs/documenting_the_justice_gap_in_america_2009.pdf.

[4] *See* Rob Paral & Assocs. & The Chi. Bar Found., Legal Aid in Cook County: A Report on Basic Trends in Need, Service and Funding 16–17 (2010), *available at* http://www.robparal.com/downloads/Legal%20Aid%20in%20Cook%20County%20CBF%20-%20Nov%202010.pdf (stating that eighty percent of services provided by civil legal aid programs in the Chicago area in 2009 consisted of "brief services" including drafting a pleading or legal advice); Rebecca L. Sandefur & Aaron C. Smyth, Access Across America: First Report of the Civil Justice Infrastructure Mapping Project 11 (2011), *available at* http://www.americanbarfoundation.org/uploads/cms/documents/access_across_america_first_report_of_the_civil_justice_infrastructure_mapping_project.pdf (listing "11 different mechanisms through which civil legal assistance may be delivered to eligible populations").

access" to court, although they might need other types of assistance.[5] The Louisiana Supreme Court, bowing to pressure from the petrochemical industry, bars law students from representing community groups opposed to the siting of petrochemical plants in their neighborhood.[6] The Illinois Attorney General directs a portion of the proceeds from a mortgage fraud settlement to local civil legal aid programs.[7] Finally, the board of the Virginia Legal Aid Society puts a high priority on representing people in cases concerning access to health care and a low priority on representing people in eviction cases involving private landlords.[8]

Those decisions are of the utmost importance given the impact legal assistance can have on both the lives of the people seeking that assistance and the legal system itself. This article uses the frame of institutional design to examine how choices are made about who gets access to civil legal aid and who does not. Institutional design analysis asks whether an institution is organized in a way that achieves its desired goals and whether changes can be made that would better achieve those goals.[9] The name "institutional design" is a bit of a misnomer because this sort of analysis can usefully be applied not only to discrete institutions but also to systems in which multiple people or entities interact. And it can be used not only to shape the initial design of these systems but also, as Australian political scientist Philip Pettit says, to "examin[e] existing arrangements to see if they are satisfactory and . . . alter[ ] them where necessary."[10] Particularly relevant here is the question of mechanism design, which focuses on how to ensure both that relevant information is known and taken into account and that actors have the right incentives to produce the desired outcome (accurate decision making, obeying the institution's governing rules, etc.).[11]

Section I of this article describes the many different people and entities that routinely make decisions that affect access to civil legal aid: the judiciary, civil legal aid programs, and government and private funders. Section II applies an institutional design lens to the decision-making process. It assesses the ability of these various actors to make decisions in a manner that is insulated from political pressure and self-interest, and is rational, meaning

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[5] 131 S. Ct. 2507, 2519 (2011) (holding that due process requires that parents be provided with notice about the critical issues in the case, a form on which they can describe their ability to pay, a hearing, and a finding regarding ability to pay).

[6] *See* Press Release, Brennan Center for Justice, Citizen Coalition Sues Louisiana Supreme Court Over Law Clinic Restrictions (April 16, 1999), http://www.brennancenter.org/content/resource/citizen_coalition_sues_louisiana_supreme_court_over_law_clinic_restrictions/.

[7] Tracy Russo, *Balancing the Scales Amid Foreclosure Crisis*, DEPARTMENT JUST. BLOG (July 23, 2012), http://blogs.justice.gov/main/archives/2398.

[8] *Strategic Plan 2013–2017*, VA. LEGAL AID SOC'Y (July 27, 2012), http://www.vlas.org/RTF1.cfm?pagename=Strategic%20Planning%20Process (unpublished draft).

[9] Robert E. Goodin, *Institutions and Their Design*, *in* THE THEORY OF INSTITUTIONAL DESIGN 1, 31 (Robert E. Goodin ed., 1996).

[10] Philip Pettit, *Institutional Design and Rational Choice*, *in* THE THEORY OF INSTITUTIONAL DESIGN, *supra* note 9, at 54, 55.

[11] Goodin, *supra* note 9, at 32.

that the decision makers possess the relevant information and expertise. Finally, Section III suggests some measures to improve the accountability and rationality of decision making about access to civil legal aid. These include entrusting funding decisions to a body insulated from political pressure, building in protections against the exercise of self-interest, building a body of empirical knowledge to guide funding decisions, and ensuring that people with the necessary knowledge and expertise are involved.

I. Many Different Decision Makers

A. The Judiciary

In the course of deciding cases, judges often make decisions about who should receive legal assistance, effectively commanding resources from state appropriations, the judiciary's budget, the private bar, or opposing parties. "Civil right to counsel" or "civil *Gideon*" cases seek the appointment of counsel as a matter of right under constitutional or statutory provisions. Litigants also seek the appointment of counsel on equitable grounds or under statutes giving judges discretion to appoint counsel.[12] And, litigants may ask judges to require an opposing party to pay attorneys' fees under a fee-shifting statute.[13]

Such cases often call on judges to assess the need for and availability of free or low-cost legal assistance.[14] In *Turner v. Rogers*, for instance, a father who was incarcerated for failure to pay child support asserted that due process required that the court appoint counsel for him. The Supreme Court disagreed, holding that free legal assistance was not necessary for most parents facing incarceration on civil contempt charges for failure to pay child support. The Court's ruling hinged on its conclusion that notice, a form, an opportunity to answer questions orally, and a finding about the parent's ability to pay would enable the parent to participate meaningfully in the proceeding.[15] To take another example, in civil cases filed by indigent pro se litigants, "the inability of the *pro se* party to retain counsel by other means" and "the degree to which the ends of justice will be served by appointment of counsel" are among the factors the U.S. District Court for the Southern

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[12] *See, e.g.*, 28 U.S.C. § 1915(e) (1996).

[13] *See, e.g.*, Millea v. Metro-North R.R. Co., 658 F.3d 154, 169 (2d Cir. 2011) (describing the purpose of fee-shifting under the Family and Medical Leave Act as "assuring that civil rights claims of modest cash value can attract competent counsel"); Earl Johnson, Jr., *Justice and Reform: A Quarter Century Later*, *in* The Transformation of Legal Aid 9, 38 (Francis Regan et al. eds., 1999) ("[L]egislatures and sometimes courts . . . promote socially desirable litigation through *one-way* fee-shifting.").

[14] *See, e.g.*, Michael Millemann, *The State Due Process Justification for a Right to Counsel in Some Civil Cases*, 15 Temp. Pol. & Civ. Rts. L. Rev. 733, 759–60 (2006) (describing courts' analyses of the risk of error in civil right to counsel cases).

[15] 131 S. Ct. 2507, 2519 (2011).

District of California considers in deciding whether to appoint pro bono counsel.[16]

In recent decades, judges and court administrators have taken on a new role: making administrative decisions that bear on the availability of legal help for the poor. They may decide to use the judiciary's own resources to help pro se litigants: courts in California and New York operate "self-help" centers and "lawyer for a day" programs, for instance.[17] Decisions about the size of a judge's docket also bear on the judge's ability to provide the extra help that a pro se litigant may require.[18] Court administrators and judges may also arrange for the delivery of counsel to criminal defendants or others with a right to counsel, requiring them to make decisions about which attorneys to hire,[19] what services those attorneys should provide,[20] and to whom.[21] Some judiciaries use money from their own budgets to fund civil legal services.[22] And, judges decide whether to allocate unclaimed awards in class action matters to civil legal aid under the principle of *cy pres*.[23]

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[16] *Plan of the United States District Court for the Southern District of California for the Representation of* Pro Se *Litigants in Civil Cases*, U.S. District Ct. S. District California (Aug. 3, 2011), http://www.casd.uscourts.gov/uploads/Rules/General%20Orders/GO_596.pdf.

[17] *See, e.g.*, Bonnie Hough, *Self-Represented Litigants in Family Law: The Response of California's Courts*, 1 Cal. L. Rev. Circuit 15, 19 (2010) (discussing the adoption of self-help centers by California courts); Jim Dwyer, *In Civil Court, Reckoning Awaits Those Who Got Seduced by Plastic*, N.Y. Times, Oct. 11, 2008, at A19 (referencing lawyer-for-a-day program operated by New York Civil Court).

[18] *See* Am. Bar Ass'n, Best Practices for Judges in the Settlement and Trial of Cases Involving Unrepresented Litigants in Housing Court 3 (2008) (recognizing "concerns that limited resources may pose difficulties" for judges in following best practices for dealing with pro se individuals).

[19] *See* Norman Lefstein & Robert L. Spangenberg, Nat'l Right to Counsel Comm., Justice Denied: America's Continuing Neglect of Our Constitutional Right to Counsel 80–84 (2009), *available at* http://www.constitutionproject.org/pdf/139.pdf (describing ability of judges in one Texas county "to favor some attorneys with political or judicial connections," and of judges in Nebraska who have "'paid [indigent defense] attorneys back' for too many trials or other offenses by not appointing them again"). *But see* Am. Bar Ass'n, Basic Principles for a Right to Counsel in Civil Legal Proceedings 5–7 (2010), *available at* http://www.abanow.org/2010/07/am-2010-105/ (elaborating the ideal that appointed counsel should operate independently of the court).

[20] For instance, in 2003, the Hawaii Judiciary responded to budget pressures by providing parents facing abuse or neglect charges with a different lawyer for each proceeding, rather than a single attorney to handle the entire case. *See In re* D.W., 155 P.3d 682, 683–84 (Haw. Ct. App. 2007) (citing Memorandum from Haw. First Circuit Family Court to Family Court Practitioners (Nov. 7, 2003)).

[21] *See generally* Am. Bar Ass'n, *supra* note 19.

[22] *See, e.g.*, Hough, *supra* note 17, at 22 (reporting that in California, "over $16 million of the judicial branch's budget is distributed annually to legal services agencies through the Equal Access Fund"); Jonathan Lippman, Remark, *The City University of New York Law Review and CUNY School of Law Present a Conversation With Chief Judge Jonathan Lippman February 3, 2011*, 14 N.Y. City L. Rev. 3, 10–11 (2010).

[23] *See, e.g.*, Tex. Access to Justice Found., Cy Pres*: Impact on Justice*, http://www.teajf.org/donate/cy_pres.aspx (last visited Dec. 20, 2012). *See generally* Nachshin v. AOL, LLC, 663 F.3d 1034, 1036 (9th Cir. 2011) (explaining that *cy pres* is a common law doctrine that "allows a court to distribute unclaimed or non-distributable portions of a class action settlement fund to the 'next best' class of beneficiaries").

B. Civil Legal Aid Programs

Individual civil legal aid programs make decisions constantly about the best way to spend their scarce resources in the face of overwhelming need. The federal Legal Services Corporation (LSC) requires the programs it funds to assess the legal needs of their community, the other sources of civil legal aid in that community, the ability of legal assistance to solve client problems, and a number of other factors. Based on this assessment, they must set "priorities" for the use of their resources.[24] This usually takes the form of prioritizing certain types of cases over others.[25] Non-LSC programs, too, decide to focus on certain types of cases and clients and to put others off limits. In fact, many are founded precisely to provide assistance to a particular population.[26] Some triage decisions are made more randomly:[27] help may be given only to the first twenty people to show up on a certain day, for instance.

C. Funders

For several decades, LSC was the primary funder of civil legal aid in this country. After Congress slashed LSC funding in 1995, state governments, the judiciary, and private philanthropy all increased their involvement in civil legal aid funding and delivery.[28] Today, a single civil legal aid program might receive funding from as many as twenty-five different sources, each of which must decide how to allocate its funding.[29] Alan Houseman, a longtime scholar of civil legal aid, puts the current funding available from all sources at $1.3 billion annually.[30]

Each of these funders must make many types of decisions bearing on who should receive what type of civil legal aid. State and federal legislatures decide whether to create a statutory right to counsel (binding the government to pay for counsel in future years) and whether to allocate funding to civil legal aid programs out of the state's budget.[31] Executive agencies

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[24] 45 C.F.R. § 1607.3 (1994).

[25] *See, e.g.*, Linda F. Smith, *Access to Justice in Utah: Time for a Comprehensive Plan*, 2006 UTAH L. REV. 1117, 1166–67 ("At the present time, ULS prioritizes all cases into three classes. ULS 'First Priority: Most Important Case Services' involve 'meeting a prospective client's immediate need for food, shelter, health care, and freedom from physical harm.'").

[26] For example, New Mexico's Senior Citizens Law Office provides "legal assistance, education and advocacy for older New Mexicans." *Our Services*, SENIOR CITIZEN'S L. OFF., http://sclonm.org/our-services/ (last visited Dec. 20, 2012).

[27] *See* Paul R. Tremblay, *Acting "A Very Moral Type of God": Triage Among Poor Clients*, 67 FORDHAM L. REV. 2475, 2487 (1999).

[28] *See* Helaine M. Barnett, *Justice for All: Are We Fulfilling the Pledge?*, 41 IDAHO L. REV. 403, 416 (2005); Alan W. Houseman, *The Future of Civil Legal Aid: Initial Thoughts*, 13 U. PA. J.L. & SOC. CHANGE 265, 269, 274–75 (2010).

[29] SANDEFUR & SMYTH, *supra* note 4, at 17.

[30] *See* Houseman, *supra* note 28, at 266.

[31] *See, e.g.*, TEX. FAM. CODE ANN. §§ 107.013, .015 (West 2008) (establishing a civil right to counsel in all cases in which the government is seeking care, control, custody, or the right to determine a child's placement, effectively expanding the civil right to counsel that had existed

make grants to individual civil legal aid programs. Attorneys general sometimes direct significant amounts of funding to civil legal aid from settlements of cases involving consumer fraud and other issues.[32] Quasi-public entities called Interest on Lawyer Trust Account (IOLTA) programs distribute money that comes from interest generated by lawyer trust accounts. Private foundations (including bar foundations) make grants to individual civil legal aid programs. Individual lawyers and other donors contribute as well.[33]

Each must decide what types of representation to fund, through which providers, where in the country, which clients, and which types of cases. Some limit the types of cases that they will fund—only domestic violence cases[34] or foreclosure representation,[35] for instance. Some limit the types of clients that can be represented—no undocumented immigrants or prisoners, for instance.[36] And some limit the types of services they will fund—no class action representation or lawsuits against the government, for instance.[37]

II. Applying Institutional Design Theory to the Civil Legal Aid System: The Need for Rationality and Insulation From Self-Interest in Decisions About the Allocation of Legal Aid

This section examines the ability of each of the decision makers identified in Section I to make decisions about the distribution of civil legal aid in a manner that satisfies the goals of the civil legal aid system. The principles of institutional design recognize that people and entities that make allocation decisions may have self-interested impulses.[38] For instance, they may want

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only in those dependency cases in which the government sought to terminate a parent's rights). The Legislature characterized the change as "essential for the operation of a balanced system." H. Comm. on Human Servs., Interim Rep. to the 79th H.R., at 56 (Tex. 2004). *See generally* Laura K. Abel, *Keeping Families Together, Saving Money, and Other Motivations Behind New Civil Right to Counsel Laws*, 42 Loy. L.A. L. Rev. 1087 (2009).

[32] *See, e.g.*, Press Release, Beau Biden, Del. Attorney Gen., Delaware Gov. Jack Markell and Attorney General Beau Biden Make Funds to Aid Delaware Homeowners (June 21, 2012), *available at* http://www.loansafe.org/delaware-gov-jack-markell-and-attorney-general-beau-biden-make-funds-to-aid-delaware-homeowners (announcing that Delaware Attorney General Beau Biden would direct more than $800,000 from a national mortgage fraud settlement to civil legal aid programs for the representation of homeowners facing foreclosure); Russo, *supra* note 7.

[33] Kermit V. Lipez, *Reflections of an Access to Justice Chair*, 62 Me. L. Rev. 585, 596 (2010) ("[M]ore than one third of the lawyers in Maine's legal community now contribute to the efforts of the legal services providers.").

[34] Smith, *supra* note 25, at 1164 (noting that the Utah Legislature has "appropriated $100,000 annually in general funds for domestic violence and family law representation").

[35] Russo, *supra* note 7.

[36] David S. Udell & Rebekah Diller, *Access to the Courts: An Essay for the Georgetown University Law Center Conference on the Independence of the Courts*, 95 Geo. L.J. 1127, 1132 (2007) (describing restrictions Congress imposed on recipients of LSC funding).

[37] Dennis A. Kaufman, *The Tipping Point on the Scales of Civil Justice*, 25 Touro L. Rev. 347, 383 n.100 (2009); Laura K. Abel & David S. Udell, *If You Gag the Lawyers, Do You Choke the Courts? Some Implications for Judges When Funding Restrictions Curb Advocacy by Lawyers on Behalf of the Poor*, 29 Fordham Urb. L.J. 873, 879 n.23 (2002).

[38] Goodin, *supra* note 9, at 41.

to steer resources to their friends and away from their enemies, or they may want to rush through the allocation process so that they can go home early. The impulses are not necessarily bad. Indeed, they may stem from a desire to preserve other values that a person holds dear; a judge might want to steer civil legal aid resources in a manner that helps the judiciary manage its docket, or a parent might want to speed up the allocation process in order to get home to care for children. A major focus of institutional design theory is the attempt to understand the interaction between self-interested impulses and other types of values, such as a desire to maximize fairness or efficiency.[39] Without making a judgment about the virtue of the impulses that affect the allocation of civil legal aid, this article recognizes that in order for public institutions to achieve their goals, they must acknowledge these impulses and build in safeguards against them. In the words of philosopher Robert Goodin, they must be "sensitiv[e] to motivational complexity."[40]

Section II.A starts by explaining that independence from inappropriate self-interest is particularly important in the context of a civil legal aid system, the success of which is integral to the functioning of our nation's justice system and to the protection of individual rights. It then considers several self-interested impulses that sometimes affect the distribution of civil legal aid: undue political influence, particularly by businesses, executive agencies, and prosecutors sued by legal aid clients; courts motivated to move their dockets quickly; executive agencies and attorneys general wanting to forestall lawsuits against the government; and civil legal aid attorneys wanting to protect their own programs.

Section II.B applies another institutional design imperative to civil legal aid decision making: the need for "bureaucratic rationality," which Karen Hult and Charles Walcott describe as the ability to "incorporat[e] relevant expertise and information into agency decision making."[41] Just as a widget factory that uses lousy raw materials will produce poor quality widgets, an institution that makes decisions without an adequate knowledge base, and the expertise to assess and use that knowledge, will make poor quality decisions. As Hult and Walcott write, "[S]tructures that increase an organization's ability to search for and consider a wide range of information may lead to improved performance . . . ."[42]

In order to decide how much civil legal aid to provide, to whom, and in what form, decision makers must have a vast amount of information about who has what type of legal problems; what type of legal assistance will resolve that problem best and, because of the constant financial constraints, most cheaply; and which providers can best supply the needed assistance.

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[39] *See* Pettit, *supra* note 10, at 66–70.

[40] Goodin, *supra* note 9, at 41.

[41] KAREN M. HULT & CHARLES WALCOTT, GOVERNING PUBLIC ORGANIZATIONS: POLITICS, STRUCTURES, AND INSTITUTIONAL DESIGN 63 (1990).

[42] *Id.*

Section II.B assesses the strengths and weaknesses of different civil legal aid decision makers when it comes to amassing the necessary information and expertise. This section identifies two types of information deficits that plague most civil legal aid systems: a lack of knowledge about who needs what sort of assistance, and an inadequate body of empirical knowledge regarding what sorts of assistance best satisfy which legal needs.

This article thus focuses on the *process* of making legal aid allocation decisions. It does not take a position on which types of cases should receive civil legal aid funding: the cases most likely to help individuals improve their lives and leave poverty, help individuals access the courts, or help the courts administer justice, cases in which lawyers can make the biggest difference in outcome, or in which the lawyers' participation can make the tribunal follow its own rules.[43] This article merely argues that whichever of these priorities the decision makers choose, they must make the decision in a manner that is both insulated from improper pressure and rational.

A. Insulation From Improper Influence

1. *Political Influence*

While protection from improper political influence is important in any public institution, it is particularly important in civil legal aid systems, given the constitutional dimension of the services they provide. Direct democracy is appropriate, even essential, for policy matters. But federal and state constitutions put some topics beyond the reach of direct democracy. In effect, the founders wrote constitutions to "bind [themselves] to a certain course of action and to ensure that [their successors would] resist any temptations to deviate from it."[44] Thus, the separation of powers required by the Federal Constitution bars Congress from imposing restrictions on civil legal aid funding when those restrictions interfere with the proper functioning of the judiciary, no matter how politically popular they may be.[45] In some circumstances, the federal and state constitutions require the legislature to allocate adequate funding for civil legal aid to protect court users' rights to due process, court access, and equal protection.[46]

In spite of these constitutional imperatives, civil legal aid systems are particularly vulnerable to undue political influence. Voters are ill equipped

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[43] For additional discussion of these issues, see MODEL ACCESS ACT § 1.F (2010) (describing how counsel for low-income people in civil cases will "result in greater judicial efficiency . . . , will produce fairer outcomes, and will promote public confidence in the systems of justice"); Tremblay, *supra* note 27, at 2477–78 (advocating an emphasis on cases that empower clients); and Justine A. Dunlap, *I Don't Want to Play God—A Response to Professor Tremblay*, 67 FORDHAM L. REV. 2601 (1999) (defending the goal of providing clients with access to the courts).

[44] *See* Goodin, *supra* note 9, at 40.

[45] Legal Servs. Corp. v. Velazquez, 531 U.S. 533, 534 (2001).

[46] Clare Pastore, *Life After* Lassiter*: An Overview of State-Court Right-to-Counsel Decisions*, 40 CLEARINGHOUSE REV. 186 (2006).

to monitor most legislative funding decisions because of the difficulty of understanding an opaque budget process and of bringing electoral power to bear to punish bad budget decisions.[47] The situation is worse with respect to legal aid. Most voters are unfamiliar with the legal system, which is famously incomprehensible to all but trained lawyers. The civil legal aid component of the legal system is equally misunderstood.[48] In polls, people tend to express a belief that there is a right to counsel in high-stakes civil cases.[49] This fundamental misunderstanding may make it hard to understand why there is a need for a civil legal aid system and why it must ask for funding from the legislature. The prevailing view of lawyers as wealthy and predatory makes requests for public funding even more incomprehensible.[50]

Additionally, people generally need a lawyer only when bad things happen: they can no longer pay their rent or mortgage, debt collectors are knocking on the door, their marriage is in shambles. No one wants to contemplate the prospect of such a tragedy befalling him or her. This, too, makes civil legal aid something voters tend to ignore until they actually need it.

For these reasons, civil legal aid funding is not a political issue that grabs the attention of many voters. Parents will rally when school funding is slashed; the size of the military budget is a perennial campaign issue. The size of the civil legal aid budget, on the other hand, is rarely the subject of rallies or campaign debates. As a result, the major players in legislative decisions about civil legal aid funding and restrictions tend to be the organized bar and lobbyists employed by industries sued by civil legal aid lawyers, not grassroots groups.[51]

In contrast to the voters, some special interests have extensive knowledge about civil legal aid and a strong motivation to weaken or destroy it. Every time a civil legal aid lawyer represents a client, there is someone on the other side.[52] Some people or companies—such as slum landlords, big employers who frequently violate wage and hour laws, environmental polluters, and companies that prey on consumers—frequently find themselves on the opposite side of a case from a civil legal aid attorney. In a perfect world, they would view the civil legal aid lawyers as essential for the fair adjudication of disputes. But some realize that if the lawyers were not avail-

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[47] *See* ADRIAN VERMEULE, MECHANISMS OF DEMOCRACY: INSTITUTIONAL DESIGN WRIT SMALL 199 (2007) ("The voter bears all the costs of monitoring, yet can do little, unilaterally, to punish a wayward representative.").

[48] *See* DEBORAH L. RHODE, ACCESS TO JUSTICE 116 (2004).

[49] Andrew Scherer, *Why People Who Face Losing Their Homes in Legal Proceedings Must Have a Right to Counsel*, 3 CARDOZO PUB. L. POL'Y & ETHICS J. 699, 716 (2006).

[50] Julie Swearingen, *Replacing Unfairness With Justice*, 44 TENN. B.J. 12, 18 (2008) (quoting long-time civil legal aid director Dwight Yoder as stating that because of lawyers' reputations, "the public does not cotton to the idea of giving their resources to any lawyer even if the cause is good").

[51] *See, e.g.*, Johnson, *supra* note 13, at 33; John Kilwein, *The Decline of the Legal Services Corporation: 'It's Ideological, Stupid!'*, *in* THE TRANSFORMATION OF LEGAL AID, *supra* note 13, at 41, 50.

[52] *See* Johnson, *supra* note 13, at 33.

able, many of the disputes would never make it to court and those that did make it would have a different outcome. Thus, some try to make it impossible for low-income people to find civil legal aid lawyers, a practice that the philosopher David Luban has termed both "taking out the adversary" and, more harshly, "dirty law."[53] For instance, organizations representing farmers and seafood and poultry processors, many of whom hire large numbers of migrant workers, have persuaded Congress and state legislatures to place severe restrictions on the ability of civil legal aid lawyers to represent immigrants.[54] Petrochemical and timber companies that fear environmental lawsuits have likewise tried to defund or restrict civil legal aid programs and the law school clinics that work with them.[55] These types of industry groups have the resources both to learn a lot about civil legal aid and the legislative funding process and to use the political process to defund and restrict civil legal aid.

2. *Other Types of Self-Interest*

In addition to outside political pressure, many of the entities involved in making decisions about civil legal aid have their own interests that may color their decisions. Judges want to move their dockets quickly, so some object to civil legal aid attorneys making too many motions or otherwise representing their clients vigorously.[56] Judges may also want civil legal aid attorneys to focus their resources on the cases in which pro se litigants appear most frequently, such as family or housing cases.[57] Executive agencies and attorneys general may want to ensure that civil legal aid attorneys do not sue the government.[58] This sort of self-interest was on display in 1995, when

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[53] David Luban, *Taking Out the Adversary: The Assault on Progressive Public Interest Lawyers*, 91 CALIF. L. REV. 209, 209–11 (2005).

[54] *See, e.g.*, Laura Abel & Risa Kaufman, *Preserving Aliens' and Migrant Workers' Access to Civil Legal Representation: Constitutional and Policy Considerations*, 5 U. PA. J. CONST. L. 491, 495–97 (2003); Michael Holley, *Disadvantaged by Design: How the Law Inhibits Agricultural Guest Workers From Enforcing Their Rights*, 18 HOFSTRA LAB. & EMP. L.J. 575, 614 (2001); Robert R. Kuehn, *Undermining Justice: The Legal Profession's Role in Restricting Access to Legal Representation*, 2006 UTAH L. REV. 1039, 1043–44, 1050.

[55] Robert R. Kuehn & Bridget M. McCormack, *Lessons From Forty Years of Interference in Law School Clinics*, 24 GEO. J. LEGAL ETHICS 59, 64–69 (2011).

[56] *See* Russell Engler, *Shaping a Context-Based Civil Gideon From the Dynamics of Social Change*, 15 TEMP. POL. & CIV. RTS. L. REV. 697, 703–04 (2006). This tendency has been well documented in criminal cases, where the National Right to Counsel Committee describes "a preference for attorneys known to resolve cases without litigation." NAT'L RIGHT TO COUNSEL COMM., JUSTICE DENIED: AMERICA'S CONTINUING NEGLECT OF OUR CONSTITUTIONAL RIGHT TO COUNSEL 80–84 (2009), *available at* http://www.constitutionproject.org/pdf/139.pdf (describing ability of judges in one Texas county "to favor some attorneys with political or judicial connections," and of judges in Nebraska who have "paid [indigent-defense] attorneys back for too many trials or other offenses by not appointing them again").

[57] *See* Engler, *supra* note 56, at 706 ("Unrepresented litigants are perceived to be a problem because they take up court and attorney time.").

[58] This concern about attorney general self-interest is precisely why LSC was set up as an independent entity instead of ensconced in the Justice Department. Molly McDonough, *A New Kind of Justice Department*, A.B.A. J. E-REP. (MAY 27, 2005), http://www.ncdsv.org/images/ANewKindJusticeDepartmentThisIndianaCity.pdf.

Congress prohibited LSC grantees from suing to challenge welfare reform laws, and in 1987, when Maryland's governor attempted, unsuccessfully, to condition a grant of state civil legal aid funding on an agreement that the recipient would not sue state agencies.[59]

And civil legal aid programs themselves have a stake in ensuring their own continued existence.[60] This may color their appraisal of the best way to allocate funding within their state. For instance, in Maine, a core group of civil legal aid providers argued that eligibility for funding from both the Maine Bar Foundation and appropriations from the state's general fund should be limited to organizations whose sole mission was to provide civil legal aid for the poor. That resulted in the exclusion of organizations that provided civil legal aid but also provided other social services. The legal aid providers had solid reasons for their position, including a belief that dividing funding between too many different programs would result in duplicative programs and excessive administration costs. But certainly, their own self-interest colored their position, too.[61]

B. Rational Decision Making Through Access to Information and Expertise

Protection from outside political influence and from decision makers' self-interest is a necessary component of a functioning civil legal aid allocation system, but it is not enough. In order for decision makers to make rational decisions about who should receive what sort of legal assistance, they need information about who has what type of legal needs. As Section II.B.1 discusses, civil legal aid providers and judges each encounter only a slice of the population having legal needs. For this reason, any civil legal aid allocation process must include input from both civil legal aid providers and the court system. Civil legal aid decision makers also need sufficient expertise to determine the best way to meet the legal needs they have identified. As Section II.B.2 discusses, social scientists have not yet developed a body of research on which such decisions can be based. As a result, decisions must be based on observation and experience. Civil legal aid providers and judges each have valuable perspectives on the efficacy of different types of legal assistance, so any civil legal aid allocation system should take their perspectives into account.

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[59] *See, e.g.*, Legal Servs. Corp. v. Velazquez, 531 U.S. 535, 537 (2001) (describing welfare reform restriction); Kuehn & McCormack, *supra* note 55, at 64–69.

[60] *See, e.g.*, Lipez, *supra* note 33, at 588 ("Dedicated though they were, the providers were not immune to the complacency or protective instincts that can affect any organization."); Tremblay, *supra* note 27, at 2479 ("[T]he interests and preferences, personal as well as political, of the staff cannot serve as legitimate ingredients in their allocation schemes.").

[61] Lipez, *supra* note 33, at 590–92, 600.

1. *Data Gathering: Who Has What Type of Legal Problems*

According to a recent American Bar Foundation study, "in no state does there exist an entity that routinely gathers the information necessary to identify current public [legal] needs."[62] This is unfortunate because if you do not know the extent and type of need, you cannot make a rational decision about what sorts of services to provide to meet the need.

Determining who has what type of legal problems requires familiarity with the low-income communities in that jurisdiction. Thus, the American Bar Association's (ABA) *Principles of a State System for the Delivery of Civil Legal Aid* requires that the system "engage[ ] with clients and populations eligible for civil legal aid services in . . . obtaining meaningful information about their legal needs."[63] Lawyers must be involved with this process because their expertise is required to determine which problems are amenable to a legal resolution.[64] For this reason, civil legal aid lawyers are often viewed as having the most relevant knowledge: they know the communities they serve, and they know which of the problems the communities encounter have legal implications. This is one reason that LSC funding is distributed to local civil legal aid providers, who must work with their client communities to set priorities that will determine who gets served and for what type of problem.[65]

However, many civil legal aid providers encounter only a slice of the legal needs in their communities. Civil legal aid programs are persistently underfunded, turning away at least one person for each person they serve.[66] Many people with legal problems never talk with a civil legal aid attorney because they do not perceive their problems as legal in nature, they do not know that legal aid might be available, they know that many people are turned away, or they are put off by long waiting times or other obstacles.[67] This might not matter if the people assisted by civil legal aid programs were a representative cross section of the community. But they are not: populations less likely to obtain civil legal aid include the elderly, the disabled, the more poorly educated, and people with limited English proficiency, as well as those people who live far away from civil legal aid offices.[68]

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[62] SANDEFUR & SMYTH, *supra* note 4, at 24; *see also infra* p. 25.

[63] AM. BAR ASS'N, PRINCIPLES OF A STATE SYSTEM FOR THE DELIVERY OF CIVIL LEGAL AID 2 (2006).

[64] *See* Sandefur, *supra* note 2, at 76–77 (contrasting nonlawyers' "poor skills when it comes to figuring out what their peculiarly legal problems are" with lawyers' expertise in identifying the legal component of a problem).

[65] *See* RHODE, *supra* note 48, at 108.

[66] Russell Engler, *Reflections on a Civil Right to Counsel and Drawing Lines: When Does Access to Justice Mean Full Representation by Counsel, and When Might Less Assistance Suffice?*, 9 SEATTLE J. SOC. JUST. 97, 99 (2010).

[67] Sandefur, *supra* note 2, at 52–54 (describing focus group participants' tragic lack of awareness that serious life issues could be solved through the legal system).

[68] Sandefur, *supra* note 2, at 70 (theorizing that people who seek out civil legal aid "may have greater facility with English, or be more organized, more persistent, or better at communicating information to legal professionals than litigants who do not seek out attorneys or

Courts are another source of information about legal problems in the community. They encounter every litigant, pro se or represented. The length and quality of those encounters, and the ability of the court to learn about the individual's legal problems, vary widely. In many courts, those encounters are quick, and there are many obstacles to the court learning about the range of legal problems that court users experience: judges spend just a few minutes on each case, court users do not know how to explain their problems in written submissions or in open court, and limited English proficiency individuals struggle to communicate when interpreters are not available.[69]

But sometimes the encounters allow for more of an exchange of information: staff in a court-based self-help office may have the time and skills to elicit important information, a judge trained in how to deal with pro se litigants may ask probing questions, and a court user with education and courage may manage to make his needs known. A difficulty is how to capture this information—courts are set up to process cases, not to gather information from court users. Some court-based self-help programs have gathered information on the people they serve, which should be essential reading for civil legal aid planners.[70] However, most courts do not even aggregate the basic information that they have in case files: how many people appear pro se, in which types of cases, and what the outcomes of those cases are (e.g., how many defaults, how many settlements, how many trials).[71] More deliberate aggregation of this information would be extremely helpful to civil legal aid planners.

Like legal aid programs, courts encounter a nonrepresentative sample of the population of people with legal needs. Studies show that people are more likely to go to court for family issues and less likely to go for problems involving employment and personal finances.[72] And, many of the same people who find it difficult to consult a civil legal aid lawyer are likely to find it difficult to get to court, including the elderly, people with disabilities, people

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cannot secure representation when they do"); RHODE, *supra* note 48, at 107 (noting that "immigrants or those living in rural poverty" are less likely to seek out civil legal aid).

[69] LAURA ABEL, LANGUAGE ACCESS IN STATE COURTS 1 (2009) (describing difficulty limited English proficiency individuals have communicating with courts when no interpreters are available); RHODE, *supra* note 48, at 83–85.

[70] *See, e.g.*, CAL. ADMIN. OFFICE OF THE COURTS, CTR. FOR CHILDREN, FAMILIES, AND THE COURTS, CALIFORNIA COURTS SELF-HELP CENTERS: REPORT TO THE CALIFORNIA LEGISLATURE (2007), *available at* http://www.courts.ca.gov/partners/documents/rpt_leg_self_help.pdf.

[71] *See* MELANCA CLARK & DANIEL OLMOS, ACCESS TO JUSTICE INITIATIVE, U.S. DEP'T OF JUSTICE, FORECLOSURE MEDIATION: EMERGING RESEARCH AND EVALUATION PRACTICES, A REPORT FROM THE MARCH 7, 2011 WORKSHOP 17 (2011), *available at* http://www.justice.gov/atj/foreclosure-mediation.pdf (suggesting that courts collect data on pro se status, case outcome, and other issues in foreclosure cases involving mediation); Memorandum from Madelynn Herman (Sept. 25, 2006), *available at* http://www.ncsconline.org/WC/Publications/Memos/ProSeStatsMemo.htm ("While national statistics on the numbers of self-represented litigants are not available, several states and many jurisdictions keep track of the numbers of self-represented litigants in their courts.").

[72] Sandefur, *supra* note 2, at 60.

with little or no education, people with limited proficiency in English, and those who live far away.[73]

Since civil legal aid programs and courts encounter overlapping but not identical slices of low-income communities, people and entities deciding how to allocate civil legal aid resources would do well to incorporate information from each. However, many people never make it to court and never encounter a civil legal aid program.[74] To learn about their legal problems, it may be necessary to use surveys and focus groups asking whether people have faced a particular set of problems, a methodology known as a "legal needs" study.[75]

2. *Developing a Knowledge Base: What Type of Legal Assistance Will Resolve the Problem Most Effectively and Efficiently*

Once the number, type, and distribution of legal needs are known, civil legal aid allocators must determine the best way to meet those needs. Should they provide full representation? Representation at some but not all stages of a proceeding (a practice commonly known as "unbundling")?[76] Advice only? Help filling out forms? For which clients and problems is which type of assistance appropriate?

Ideally, decision makers would be guided by a knowledge base that is grounded in solid empirical research. The decision would be made in the same way as a public health administrator consults medical journals to determine which medical interventions are appropriate for which epidemics, or a school district superintendent consults education journals to determine what curricula work best for the topics the school wants to teach.

Unfortunately, there is not a sufficient evidence base concerning the relative efficacy of the various types of civil legal assistance for resolving various types of legal problems confronted by various types of clients in various types of tribunals. Most studies that have been performed have serious methodological flaws.[77] There are too few studies that have used sophisticated methods such as random assignment and statistical analysis to enable a civil legal aid planner to draw conclusions beyond the particular attorneys, case types, and tribunals examined by those studies.[78] As this author and

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[73] Jennifer Maloney, *RV Takes Justice to the Streets*, WALL ST. J., Dec. 15, 2011, at A25 ("Illegal immigrants might be afraid to walk into a courthouse. Parents may be unable to find child care. Residents of some neighborhoods may live far from public transportation.").

[74] Sandefur, *supra* note 2, at 51, 59–60 ("Most Americans' civil justice problems are never taken to lawyers for advice nor are they pursued in courts or tribunals.").

[75] *See id.* at 56–57.

[76] Jeanne Charn, *Legal Services for All: Is the Profession Ready?*, 42 LOY. L.A. L. REV. 1021, 1039, 1047–48 (2009).

[77] D. James Greiner & Cassandra Wolos Pattanayak, *Randomized Evaluation in Legal Assistance: What Difference Does Representation (Offer and Actual Use) Make?*, 121 YALE L.J. 2118, 2125–26 (2012).

[78] *See, e.g.*, *id.* (discussing "dearth of credible, quantitative information").

many others have warned, expanding the evidence base is essential if the civil legal aid allocation system is to be improved.[79]

In the absence of an empirical evidence base, civil legal aid allocators are forced to rely on custom and experience. It is reasonable to assume that a lawyer with significant experience providing many different types of assistance will have a good sense of which type of assistance is likely to be most effective for which clients. A trial court judge may also have observed the results of enough different types of assistance to have a sense of which works best when. However, judges are unlikely to know the many facts that never come out in court. For example, a judge hearing a child custody case will not know whether there was domestic violence in the household if the parties choose not to disclose that fact. Without a careful allocution, a judge cannot know whether a tenant really understands a stipulation.[80] Moreover, judges are unlikely to know what happens to people when they leave the court. Was a tenant who signed a stipulation able to pay the back rent she promised to pay, or was she evicted after all?

Appellate judges are in an even worse position to decide what sort of legal assistance is appropriate. They hear a smaller volume of cases, have little or no personal contact with the litigants, and are unlikely to know what sort of legal assistance the litigants have received. Given their lack of a knowledge base, they should not attempt to determine what sort of legal assistance is appropriate for particular types of litigants in particular types of cases. Thus, the Supreme Court was ill advised to decide, in *Turner v. Rogers*, that full representation was not necessary to provide meaningful court access to parents facing incarceration as the result of civil contempt charges. The question had not been presented to the trial court, so there was no record on which to base the Court's opinion.[81] And, none of the Justices in the majority had ever presided over a state trial court, much less a state civil contempt hearing.[82] Thus, they had no experience on which to base their conclusion that the parent could obtain meaningful access if he were provided with notice of the critical issues in his case, a form asking about his ability to pay child support, a hearing at which he could answer questions, and a written order from the court.

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[79] Engler, *supra* note 66, at 115–116; *see also* RHODE, *supra* note 48, at 106–108; Laura K. Abel, *Evidence-Based Access to Justice*, 13 U. PA. J.L. & SOC. CHANGE 295, 300–03 (2010). *See generally* Jeffrey Selbin et al., *Service Delivery, Resource Allocation, and Access to Justice: Greiner and Pattanayak and the Research Imperative*, 122 YALE L.J. ONLINE 45 (2012).

[80] *See* Russell Engler, *And Justice for All—Including the Unrepresented Poor: Revisiting the Roles of the Judges, Mediators, and Clerks*, 67 FORDHAM L. REV. 1987, 2019, 2029 (1999).

[81] *See* 131 S. Ct. 2507, 2524 (2011) (Thomas, J., dissenting) (" 'The record is insufficient' regarding alternative procedures because '[t]hey were raised for the very first time at the merits stage here; so, there's been no development.' " (quoting Transcript of Oral Argument at 49, 43)).

[82] *See* Press Release, The White House, Judge Sonia Sotomayor (May 26, 2009), *available at* http://www.whitehouse.gov/the_press_office/Background-on-Judge-Sonia-Sotomayor/ (noting that Justice Sotomayor, who previously served as a judge in the U.S. District Court in New York, is the only Supreme Court Justice to have presided over a trial court).

III. Solutions

A. Buffers Against Political Influence

This section proposes several possible solutions to the problems identified above. First, there is a need for buffers against political influence. One possible tactic is to educate voters about the importance of civil legal aid in protecting values they hold dear: the integrity of the courts, the enforcement of laws they care about (such as those barring domestic violence), or the ability of civil legal aid programs to save government money (for example, by forestalling evictions). It might also be possible to bring new interest groups into the mix, in order to reduce the influence of the groups that oppose civil legal aid programs in court. For instance, the success of medical-legal partnerships has created the possibility that the medical profession might go to bat for civil legal aid programs. In such partnerships, civil legal aid lawyers work on the premises of a hospital or medical clinic.[83] Doctors "prescribe" legal assistance for conditions such as asthma, so that attorneys can help patients combat asthma-inducing conditions such as cockroach infestations.[84] Doctors come to see legal assistance as necessary for the health of their patients.[85] Perhaps doctors will begin to put their considerable political muscle behind civil legal aid funding.

Another way to reduce undue political influence would be to transfer civil legal aid funding decisions from the legislature to a decision maker that is impervious to capture by outside interest groups. A judiciary with sufficient protections from political pressure might be able to play this role. That is one of the virtues of the decision of New York's Chief Judge, Jonathan Lippman, to include funding for civil legal aid in the state judiciary's budget.[86] This solution can shield civil legal aid funding from political influence most effectively in states in which the legislature votes on the judiciary budget as a whole and in which neither the executive nor the legislature can strike out line items.[87] However, in states in which the judges on the high court (the ones who generally set policy for the judicial branch) are subject to election, the judiciary is just as vulnerable as the legislature to interest

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[83] Elizabeth Tobin Tyler, *Allies Not Adversaries: Teaching Collaboration to the Next Generation of Doctors and Lawyers to Address Social Inequality*, 11 J. Health Care L. & Pol'y 249, 278–79 (2008).

[84] Ariel Modrykamien et al., Abstract, *A Retrospective Analysis of the Effect of Environmental Improvement Brought About by Legal Interventions in Poorly Controlled Inner-City Asthmatics*, 130 CHEST 83S (2006).

[85] *See* Tyler, *supra* note 83, at 279–80.

[86] *See* Jonathan Lippman, State of the Judiciary 2011: Pursuing Justice 5 (Feb. 15, 2011), *available at* http://www.courts.state.ny.us/admin/stateofjudiciary/SOJ-2011.pdf.

[87] *See* Nat'l Ctr. for State Courts, Principles for Judicial Administration 12 (Draft 2011), *available at* http://www.abajournal.com/files/Judicial_Administration_Prinicples_v7_1-7-11.pdf ("Judicial Branch budget requests should be considered by the legislature as submitted by the judiciary.").

group pressure.[88] In fact, an elected judiciary may be *more* vulnerable to such pressure. The states have fewer high court judges than legislators, making it less expensive to capture a judiciary than to capture a state legislature. Furthermore, many judicial decisions about what types of civil legal aid to fund happen outside of the public's knowledge, so that the public is even less able to monitor those decisions than it is to monitor legislative funding decisions.

The vulnerability of at least some state judiciaries to political capture is evident from the instances in which state judiciaries have attempted to curb civil legal representation for low-income people. In Louisiana, for instance, the state supreme court issued restrictive new student practice rules in response to pressure by companies upset that Tulane Law School's environmental law clinic was representing community groups opposing the siting of a petrochemical plant in their neighborhood.[89]

A judicial declaration of a civil right to counsel is another way to insulate funding decisions from political capture: if the judiciary says that funding for civil legal assistance is constitutionally required, special interests cannot induce the legislature to defund it. This works best when the right to counsel ruling is categorical because the legislature can then calculate during the budgeting process how many cases are likely to require counsel in the coming year. It works less well when judges decide on a case-by-case basis whether to appoint counsel because a legislature cannot know at budgeting time in how many cases courts will appoint counsel. And, of course, there have been many instances in which legislatures have provided insufficient funding for counsel despite a judicial right to counsel ruling.[90]

But most types of civil cases have not been the subject of civil right to counsel rulings.[91] For those cases, it may be impossible to completely remove political interests from the decisions about funding levels. However, it may be possible to do a better job of insulating decisions about how civil legal aid funding should be allocated by transferring that decision from the legislature to a group of nonelected stakeholders. In commentary to the Model Access Act, the ABA notes that "most nations with advanced legal aid programs—including the United States—have chosen to establish some

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[88] *See* ADAM SKAGGS ET AL., THE NEW POLITICS OF JUDICIAL ELECTIONS: 2009–10, at 1 (2011), *available at* http://brennan.3cdn.net/23b60118bc49d599bd_35m6yyon3.pdf (describing "a coalescing national campaign that seeks to intimidate America's state judges into becoming accountable to money and ideologies instead of the constitution and the law"); *cf.* Stephen Bright, *Elected Judges and the Death Penalty in Texas: Why Full Habeas Corpus Review by Independent Federal Judges is Indispensable to Protecting Constitutional Rights*, 78 TEX. L. REV. 1805, 1806 (2000) (describing the vulnerability of elected judges to political pressure).

[89] Kuehn & McCormack, *supra* note 55, at 64.

[90] Cara H. Drinan, *The Third Generation of Indigent Defense Litigation*, 33 N.Y.U. REV. L. & SOC. CHANGE 427, 439 (2009).

[91] *See* John Pollock, *Where We've Been, Where We're Going: A Look at the Status of the Civil Right to Counsel, and Current Efforts*, MIE J., Summer 2012, at 29, 30, *available at* http://www.nlada.org/DMS/Documents/1342803913.27/MIE%20CRTC%20articles%205-16-12.pdf.

form of independent or semi-independent body to administer their public legal aid systems."[92] The United States body to which the ABA refers is LSC, whose members are nominated by the President and confirmed by the Senate.[93]

One method to try to minimize the threat of political capture is to give the communities served by civil legal aid programs a seat at the table. LSC does that when it requires that at least one-third of the board members of each program it funds must come from the client community.[94] Note, though, that the ABA and others have expressed concern about the viability of including client communities in the decision-making process, since there are so many different groups that need legal services representation.[95]

Alternatively, the state bar association or other cross sections of the legal community could be given responsibility for allocating funds. Lawyers have a professional obligation, enforced by ethics rules, to ensure that low-income communities are able to access legal assistance and the courts.[96] Accordingly, the ABA and state bar associations have been strong advocates for civil legal aid funding.[97] It is presumably for this reason (and also because of lawyers' expertise, as discussed below) that the ABA's Model Access Act recommends that states establish a "State Access Board" with authority over public funding for representation of low-income people in civil cases, and that a majority of the members of the board must be lawyers.[98] Similarly, responsibility for allocating IOLTA funds and even legislative civil legal aid funding is often delegated to state bar associations.

B. Protections Against the Influence of Self-Interest

Whenever possible, decisions about the allocation of civil legal aid should be made by people or entities without a large stake in how the resources are allocated: legal aid program directors should not decide whether they or their competitors receive funding, trial judges should not decide

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[92] MODEL ACCESS ACT § 4 cmt. (2010).

[93] However, LSC may not be the best example: during the Reagan years, its board was captured by civil legal aid opponents, many of whom advanced the interest of companies that had repeatedly been sued by civil legal aid programs. The result was a set of restrictions on LSC-funded attorneys representing farmworkers, a paradigmatically vulnerable group subject to frequent wage and hour violations.

[94] 45 C.F.R. § 1607.3(c) (2012).

[95] *See* ABA Resource Center for Access to Justice Initiatives, *State Access to Justice Tools Best Practices: Twelve Lessons From Successful State Access to Justice Efforts*, MGMT. INFO. EXCHANGE J., SPRING 2008, 46, 48–49, *available at* http://www.americanbar.org/content/dam/aba/migrated/legalservices/sclaid/atjresourcecenter/downloads/general.authcheckdam.pdf; Tremblay, *supra* note 27, at 2479 ("Concerns associated with self-interestedness, logistics of polling preferences, and doubtfulness about representativeness all combine to make any explicit community-based scheme illusory and unworkable.").

[96] *See* MODEL RULES OF PROF'L CONDUCT R. 6.1. (2012).

[97] Kilwein, *supra* note 51, at 50. However, as Robert Kuehn has demonstrated, the organized bar has sometimes been complicit in imposing restrictions on civil legal aid providers. *See* Kuehn, *supra* note 54, at 1041.

[98] *See* MODEL ACCESS ACT § 4 cmt. (2010).

whether the particular types of cases they hear should receive funding, and attorneys general should not choose which specific programs should receive funding (to avoid the danger that they might favor programs that refrain from suing the state).

However, self-interested people and entities cannot be removed from the allocation process altogether because some of them have essential knowledge about legal needs, the delivery system, and what sort of legal assistance works best in any given situation. When it is not possible to entirely remove self-interested entities from the decision-making process, buffers could include open acknowledgement of the participants' self-interest (so that the self-interest is less likely to unconsciously influence the participants' decisions) and agreement on neutral allocation principles at the beginning of the process.

Additionally, it might be preferable to involve certain decision makers at some stages of the process but not others. Civil legal aid program directors should weigh in on the extent of the need and what types of services should be provided, but they should not make the final decisions about which programs get funded. An attorney general might make the decision to direct settlement funds to civil legal aid and then delegate to the state bar association or Access to Justice Commission the choice of which programs should get the funding.[99] This is what Arkansas's Attorney General did when he directed a portion of the proceeds from a mortgage fraud case to the state's Access to Justice Commission, instead of to an individual civil legal aid program.[100]

C. Mechanisms to Maximize the Information and Expertise That Are Brought to Bear on Allocation Decisions

As described above, judges, civil legal aid programs, and a variety of funders all need information about legal needs and the capacity of the delivery system. The web may be the best place to make the information available to each of them. In some states, Access to Justice Commissions, IOLTA programs, and bar associations gather some of this information and make it publicly available. My organization, the National Center for Access to Justice, is working to support their efforts by building a web-based "Justice Index" that will make information available, on a state-by-state basis, concerning factors such as the number of pro se litigants, the capacity of the

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[99] Access to Justice Commissions do a wide variety of work, including, according to the American Bar Foundation, "identifying public legal needs, or envisioning state access to civil justice policy, or strategizing ways to increase civil legal assistance in the state." SANDEFUR & SMYTH, *supra* note 4, at 21. They now exist in more than half of all states. *State Access to Justice Commissions: Lists and Links*, AM. B. ASS'N, http://www.americanbar.org/groups/legal_aid_indigent_defendants/initiatives/resource_center_for_access_to_justice/state_atj_commissions.html (last visited Dec. 20, 2012).

[100] Russo, *supra* note 7.

state's civil legal aid programs, and the types of cases in which there is a civil right to counsel.[101]

Each allocation system also needs access to information about the types of legal assistance that can most effectively, and most efficiently, meet legal needs of different types of clients in different types of cases. The lack of a body of empirical information adequate to inform these decisions demands two solutions: the creation of such a body of information over the long term and a mechanism for making allocation decisions now.

1. *Long Term: Create a Body of Empirical Information About the Types of Civil Legal Aid That Best Meet the Needs of Different Types of Clients in Different Types of Cases*

For the long-term goal of creating a body of empirical information on which to base allocation decisions, Access to Justice Commissions can aggregate information and coordinate evaluations better than individual civil legal aid programs can. A national body would have access to even more information and economies of scale. A number of leading academics have called for the creation of a national research institute and have also urged their peers in the legal academy to focus their research on these questions.[102] Additionally, civil legal aid attorneys can pool their knowledge through conferences and in publications such as the *Management Information Exchange* and *Clearinghouse Review*. Indeed, the ABA's *Principles of a State System for the Delivery of Civil Legal Aid* urges civil legal aid planners to "work with their counterparts in other states to learn from their experiences in improving the provision of civil legal assistance."[103]

Given our lack of a solid empirical base for determining what types of legal assistance work best for which clients and which types of legal problems, the diversity of civil legal aid funders and programs might be viewed as an asset: it allows the use of many different approaches, which might eventually generate a knowledge base. As Robert Goodin explains, "insofar as we are counting on trial-and-error, learning-by-doing processes to perfect our institutional arrangements, we ought [to] embrace as a central principle of design a desire for *variability* in our institutional arrangements."[104] However, the lucky accident of "experimentation with different structures in different places" will provide a knowledge base only if it is

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[101] *See* Laura Abel & David Udell, *The Justice Index: Measuring Access to the Courts*, MIE J., Fall 2012, 48, 48, *available at* http://ncforaj.files.wordpress.com/2012/09/abel-udell-mie-justice-index-article-2012.pdf.

[102] Jeffrey Selbin et. al., Ctr. for Am. Progress, Access to Evidence: How an Evidence-Based Delivery System can Improve Legal Aid for Low- and Moderate-Income Americans (2011), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1868626; Charn, *supra* note 76, at 1049–51; Deborah L. Rhode, *Access to Justice: An Agenda for Legal Research*, J. Legal Educ. (forthcoming), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1903769.

[103] Am. Bar Ass'n, *supra* note 63, § 10 cmt.

[104] Robert E. Goodin, *supra* note 9, at 42.

accompanied by "reflection upon the lessons from elsewhere and a willingness to borrow those lessons where appropriate."[105] Of course, reflection requires deliberate effort; careful empirical assessment requires even greater foresight and allocation of assets.

Thus, the exciting variability in civil legal aid delivery methods will lead to better allocation of civil legal aid funding only if there is some structure in place to conduct that empirical assessment. This is where the multiplicity of civil legal aid funders hurts: with each one funding just a little bit of the pie, no one funder has access to information about how all of the different delivery systems work.[106] Additionally, small funders will recognize less of an economy of scale from using the results of any evaluation. While a large funder might be able to absorb the cost of a study by using the information gained to make improvements in hundreds of different programs, a smaller funder would have only a few programs that might benefit from the information.

2. *Short Term: Convene a Committee of Experts*

Institutional design theorists Karen Hult and Charles Walcott note that in situations like this, where the goals are clear but the technical solutions are not, "collegial-consensual structures that encourage collaboration among experts" are warranted.[107] Examples include teams of experts convened by the Food and Drug Administration to evaluate applications for new pharmaceutical drugs, and committees of scientists, engineers, and lawyers who act as "standing masters" in complex environmental litigation.[108] In the civil legal aid context, a team of experts might include civil legal aid program directors, trial judges, and social scientists. Access to Justice Commissions and other types of civil legal aid funders might want to consider convening such committees to inform their decision making.

IV. Conclusion

This article identifies a wide range of people and entities that frequently decide who should get what type of civil legal aid: civil legal aid programs, judges, and many different civil legal aid funders. It then discusses the extent to which these decision makers' allocation processes are vulnerable to improper influence, self-interest, and insufficient information and expertise. Finally, it proposes a number of solutions to these problems. To reduce the role of improper political pressure, increase the role of the judiciary when it can be insulated from political pressure, or place allocation decisions in the hands of a cross section of the legal community. To reduce the influence of

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[105] *Id.*
[106] Charn, *supra* note 76, at 1041.
[107] Hult & Walcott, *supra* note 41, at 73.
[108] *Id.*

self-interest, openly acknowledge the participants' self-interest, agree on neutral allocation principles, and involve certain decision makers at some stages of the process but not others. To maximize the role of information and expertise, create a body of empirical data over the long term, and in the short term, place allocation decisions in the hands of a committee of experts.

Access to Justice Commissions, IOLTA funds, and state bar associations have the potential to play many of these roles, particularly if they involve members of the judiciary who are shielded from political pressure, a cross section of the legal community, the heads of the local civil legal aid programs, and social scientists. They must also take care to remove participants from the stages of the decision-making process at which their self-interest is the greatest, while involving participants in the stages during which they have the most relevant knowledge. Most importantly, they must have the power to actually make allocation decisions, which many Access to Justice Commissions do not yet have.[109]

Much work remains to be done on each of these fronts. The effort is worth it, though. As Reginald Heber Smith wrote a century ago, a well-funded, well-administered civil legal aid system is

> of direct concern not only to the fair administration of justice, but to the well-being of the nation. It is of high importance that such developments be encouraged and supported, not for the sake of the legal aid organizations themselves, . . . but because in them, with all their faults and weaknesses, is contained our best immediate hope for a realization of our ideal of such an equal administration of the laws that denial of justice on account of poverty shall forever be made impossible in America.[110]

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[109] SANDEFUR & SMYTH, *supra* note 4, at 22 (characterizing Access to Justice Commissions as possessing "a variety of mandates, but typically limited powers: they can exhort and consult with stakeholders such as providers and funders of civil legal assistance, but they typically cannot direct these parties to do anything, nor do they control funding for civil legal assistance").

[110] REGINALD HEBER SMITH, JUSTICE AND THE POOR 249 (1971).