THE PRIORITIZATION OF CRIMINAL OVER CIVIL COUNSEL AND THE DISCOUNTED DANGER OF PRIVATE POWER

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ABSTRACT

This Article seeks to make two contributions to the literature on the role of counsel. First, it brings together civil Gideon *research and recent studies of collateral consequences. Like criminal convictions, civil judgments result in far-reaching collateral consequences, and these should be included in any evaluation of the private interests that civil lawyers protect. Second, this Article argues that the prioritization of criminal defense counsel over civil counsel reflects a mistaken view of lawyers' primary role as a shield against government power. Lawyers also serve a vital role in checking the power of private actors. As private actors increasingly take over public functions, their ubiquity in civic life and power over the lives of individuals grows, and the need to check that power deserves increased attention.*

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INTRODUCTION

The fiftieth anniversary of *Gideon v. Wainwright*[1] renewed debates regarding the absence of a right to counsel in civil cases.[2] Just a few years earlier, the Supreme Court's decision in *Turner v. Rogers* reaffirmed the Court's divergent approaches to the appointment of criminal and civil counsel.[3] Although the Court had previously indicated that the criminal defendant's liberty interest was the key factor animating the right to counsel,[4] when faced with a civil litigant presenting a liberty interest, the majority shifted course and ruled that there would still be no bright-line guarantee of counsel in civil cases.[5] The decision to back away from physical liberty as the litmus test presents an opportunity to consider more carefully the values that do and should animate the appointment of counsel.

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1. Gideon v. Wainwright, 372 U.S. 335, 339-40 (1963) (recognizing the right to state-appointed counsel for criminal defendants).

2. *See, e.g.*, Russell Engler, Turner v. Rogers *and the Essential Role of the Courts in Delivering Access to Justice*, 7 HARV. L. & POL'Y REV. 31, 36-37 (2013) (describing the civil right to counsel movement and recent advocacy); Earl Johnson Jr., *50 Years of* Gideon, *47 Years Working Toward a "Civil* Gideon," 47 CLEARINGHOUSE REV. 47, 48-49 (2013). While recognizing that many advocates distinguish between a "civil right to counsel" and "Civil Gideon," *see* NAT'L COAL. FOR A CIVIL RIGHT TO COUNSEL, Gideon v. Wainwright *and Civil Right to Counsel*, civilrighttocounsel.org/about/criminal_and_civil_rights_to_counsel, this Article will use the terms interchangeably.

3. Turner v. Rogers, 131 S. Ct. 2507, 2516 (2011). This Article uses the term "criminal counsel" to refer to attorneys representing criminal defendants and the term "civil counsel" to refer to attorneys for plaintiffs and defendants in civil matters. For a discussion of the importance of counsel representing civil plaintiffs, see *infra* pp. 934-36.

4. Lassiter v. Dep't of Soc. Servs., 452 U.S. 18, 25 (1981) ("[I]t is the defendant's interest in personal freedom, and not simply the special Sixth and Fourteenth Amendments right to counsel in criminal cases, which triggers the right to appointed counsel . . . ."); Scott v. Illinois, 440 U.S. 367, 373 (1979) ("[A]ctual imprisonment is a penalty different in kind . . . and warrants adoption of actual imprisonment as the line defining the constitutional right to appointment of counsel.").

5. The *Turner* majority highlighted several factors that influenced its decision. *Turner*, 131 S. Ct. at 2517-19. It included three factors previously laid out in *Mathews v. Eldridge*, 424 U.S. 319 (1976), as determinative of the procedural safeguards fundamental fairness generally requires: "(1) [T]he nature of the private interest that will be affected, (2) the comparative risk of an erroneous deprivation of that interest with and without additional or substitute procedural safeguards, and (3) the nature and magnitude of any countervailing interest in not providing additional or substitute procedural requirement[s]." *Turner*, 131 S. Ct. at 2517-18 (quoting *Mathews*, 424 U.S. at 335) (internal quotation marks omitted). The *Turner* majority also emphasized three new factors: (1) the complexity of the proceeding, 131 S. Ct. at 2519 (asserting that the "question [at issue] . . . in many . . . cases is sufficiently straightforward to warrant determination prior to providing a defendant with counsel") (punctuation omitted); (2) the identity of the opposing party and the absence of opposing counsel—two factors which ought to be distinguished, *see infra* Part III, but which the *Turner* majority blended, 131 S. Ct. at 2519 ("[T]he person opposing the defendant at the hearing is not the government represented by counsel but the custodial parent unrepresented by counsel.") (punctuation omitted); and (3) the availability of "substitute procedural safeguards" that could meet due process requirements in lieu of appointed counsel, *id.* (quoting *Mathews*, 424 U.S. at 335). For critiques of the Court's application of these factors, see sources cited *infra* notes 91-93.

This Article examines the relative importance assigned to civil and criminal counsel and asks whether this assignment appropriately reflects the role of counsel in a system of justice. Although it reviews the constitutional law framework as background, this Article does not propose an extension of the doctrine or articulate a new theory of interpretation. Neither does it advocate specific law reform. This Article, instead, offers a critique of the terms of the debate. In particular, it critiques two elements.

First, it suggests that civil *Gideon* advocates and criminal justice scholars should consider the collateral consequences of civil judgments. Courts and scholars have recently begun to recognize the significance of collateral consequences of criminal convictions. This Article highlights that civil judgments, too, result in far-reaching collateral consequences. These consequences should be considered in any comparison of the interests that civil and criminal lawyers protect.

Second, it argues that the prioritization of criminal over civil counsel reflects a mistaken view of lawyers' primary role as a shield against government power. Lawyers also serve a vital role in checking the power of private actors. While previous scholarship has argued for and against a right to appointed civil counsel,[6] most have agreed that the appointment of counsel depends on the weight of the private interests at stake,[7] and a focal point of the discussion has been the comparative value of the private interests.[8] This Article,

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6. *See, e.g.*, Benjamin H. Barton, *Against Civil* Gideon *(and for* Pro Se *Court Reform)*, 62 FLA. L. REV. 1227 (2010); Benjamin H. Barton & Stephanos Bibas, *Triaging Appointed-Counsel Funding and* Pro Se *Access to Justice*, 160 U. PA. L. REV. 967, 991 (2012) ("Some exceptional civil cases may merit counsel, either because they are particularly complex or because they are otherwise especially important or meritorious. But these determinations demand case-by-case judgments, not blanket constitutional rules."); Gene R. Nichol, Jr., *Judicial Abdication and Equal Access to the Civil Justice System*, 60 CASE W. RES. L. REV. 325, 335 (2010); John Pollock & Michael S. Greco, Response, *It's Not Triage if the Patient Bleeds Out*, 161 U. PA. L. REV. ONLINE 40, 41-44 (2012), http://www.pennlawreview.com/online/161-U-Pa-L-Rev-PENNumbra-40.pdf (critiquing case-by-case approach to appointment in civil cases); DAVID UDELL & REBEKAH DILLER, BRENNAN CTR. FOR JUSTICE, ACCESS TO JUSTICE: OPENING THE COURTHOUSE DOOR (2007), *available at* http://www.brennancenter.org/sites/default/files/legacy/d/download_file_48493.pdf.

7. *See, e.g.*, Barton & Bibas, *supra* note 6, at 970 ("Given the importance of the liberty interest in *Turner*, the Court's decision leaves little room for advocates to insist that a lesser liberty interest qualifies for *Gideon*'s protections."); AM. BAR ASS'N, RESOLUTION 112A (2006) [hereinafter ABA RES.], *available at* http://abanet.org/leadership/2006/annual/onehundredtwelvea.doc (recommending counsel in adversarial proceedings regarding shelter, sustenance, safety, health, and child custody). *Cf.* Peter L. Markowitz, *Deportation Is Different*, 13 U. PA. J. CONST. L. 1299, 1354-56 (2011) (arguing that a "hard [constitutional] floor" for right to counsel in immigration proceedings should turn on factors of liberty and stigma interests as well as potential for bias).

8. A small literature has also tackled questions of efficiency, asking what activities lawyers actually perform and whether substitutes, such as paralegals or technology for pro se parties, would result in comparable outcomes. *See* Catherine R. Albiston & Rebecca L. Sandefur, *Expanding the Empirical Study of Access to Justice*, 2013 WIS. L. REV. 101, 111-13 (collecting literature). Yet much of that literature does not address interests beyond

however, shifts the emphasis from the private interests at stake to the presence of an adversary with the potential for abuse of power. The doctrine on the appointment of counsel reflects not only what kinds of private interests we value but also concern with regard to the dangers posed by one adversary in particular: the State. The prioritization of criminal counsel reflects a judgment that the State is the primary adversary that people face and that the State's role in people's lives is primarily as an adversary. Within this framework, the most noble, important work a lawyer can do is ward off the intrusions of the government.

Yet this Article will argue that lawyers serve an equal, if not greater, societal role protecting people against private actors. The emphasis on government power, and the prioritization of lawyers protecting against the State, neglects the significance of private power and the ways in which lawyers guard against its abuse. Private actors control access to essential goods and services as well as information and communication mechanisms that facilitate participation in democratic society.[9] Private entities have also taken over aspects of the criminal justice system, including policing and incarceration.[10] The power of these private actors, like the power of government actors, is subject to abuse when left unchecked. As private actors' control over civil society grows,[11] lawyers serve an increasingly vital role in checking private power.

This Article proceeds as follows. Part I lays out the landscape of federal constitutional rights governing appointment of counsel. It explains how the rights for criminal defendants and civil litigants developed along different tracks, with the former defined by rules and the latter left to discretionary standards. In the criminal context, appointment of counsel depends on the nature and stage of proceedings. While nuanced, the rule provides a definite trigger for appointment. In contrast, in the civil context, appointment of counsel depends on a case-by-case assessment of costs and benefits. While criminal counsel has been recognized as a necessity of a functioning and legitimate justice system, civil counsel is treated as an added benefit to be provided if a legislature or court is so inclined.[12] After excavating the

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individual case outcomes, such as dignitary interests, collateral consequences of proceedings, or broader societal implications. *See id.* (arguing for definition of "effectiveness" that includes more than individual case outcomes).

9. *See infra* notes 234-37 and accompanying text.

10. *See infra* notes 238, 252-55 and accompanying text.

11. *See, e.g.*, Gillian E. Metzger, *Privatization as Delegation*, 103 COLUM. L. REV. 1367, 1371-73 (2003) (highlighting the "new reality of privatized government" and collecting related literature). For a discussion of privatization, see *infra* notes 248-55 and accompanying text.

12. This Article focuses on rights recognized under the United States Constitution. Some state courts and legislatures have recognized and created more expansive rights

doctrinal underpinnings of the right to counsel, this Article sets them aside. It takes a step back from discussions of the *right* to counsel and explores the *role* that counsel serves. The main of this Article examines and critiques the values that underlie the prioritization of criminal over civil counsel.[13]

The comparative weight of the private interests at stake in criminal and civil proceedings is the most common rationale for the difference in treatment. Part II therefore compares these private interests. While recognizing that the importance of life and liberty is difficult to overstate, Part II.A builds on previous work that questions the categorical prioritization of physical liberty over all interests at stake in civil proceedings.

This Article then deepens the comparative analysis of private interests by introducing new research on collateral consequences, which previous discussions of civil counsel have not considered. Growing research suggests that the civil collateral consequences of criminal convictions—such as exclusions from housing and employment—have been increasing in number and scope and that the impact of such collateral consequences may have eclipsed that of incarceration.[14] Even the Supreme Court has taken note of this phenomenon and of attorneys' expanding obligations to advise accordingly. The recognition of civil collateral consequences has interesting implications for discussions of the role of civil counsel. First, to the extent that there is increasing recognition of the importance of counsel's assistance in dealing with civil consequences collateral to criminal proceedings, it raises the question of whether counsel's assistance is equally important in proceedings that address these interests directly. That is, if persons need lawyers to negotiate the immigration, em-

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under state constitutions, statutes, and court rules, so a litigant may have a broader right to counsel depending on where he or she is located. *See* Laura K. Abel & Max Rettig, *State Statutes Providing for a Right to Counsel in Civil Cases*, 40 CLEARINGHOUSE REV. 245 (2006); Clare Pastore, *Life After* Lassiter*: An Overview of State-Court Right-to-Counsel Decisions*, 40 CLEARINGHOUSE REV. 186 (2006); John Pollock, *The Case Against Case-by-Case: Courts Identifying Categorical Rights to Counsel in Basic Human Needs Civil Cases*, 61 DRAKE L. REV. 763, 813-15 (2013) (describing state courts finding a broad right to counsel under state constitutions). For a discussion of local pilot projects expanding the right to counsel, see Engler, *supra* note 2, at 49-50.

13. *See* Engler, *supra* note 2, at 52 ("The right to appointed counsel must reflect our societal values, rights, and interests. The proper response to scarcity is not to draw artificial lines based on unstated value systems such as a presumption that a criminal case is always more important than a custody or eviction case, but to have an explicit conversation as to which types of issues or interests are most important and why, paired with careful analysis of what levels of intervention are necessary to protect those interests."); John Griffiths, *Ideology in Criminal Procedure or a Third "Model" of the Criminal Process*, 79 YALE L.J. 359, 359-60 (1970) ("American thought about criminal procedure is confined within a prevailing ideology . . . [but analysis will] illustrate that our present assumptions are not the inevitable truths they often seem to be.") (footnote omitted).

14. *See infra* notes 152-64, 184-85 and accompanying text.

ployment, or housing consequences of criminal convictions, might they need lawyers in immigration, employment or housing proceedings? Second, and even more significantly, not only criminal convictions but also civil judgments result in collateral consequences. Empirical evidence suggests that civil judgments result in economic exclusion and social stigma with far-reaching effects. Further research would be needed to make a comparative assessment of the collateral consequences of criminal and civil proceedings. In any case, the recent emphasis on collateral consequences at least partially undercuts the assumption that criminal and civil cases are categorically different.

Part III suggests that a crucial factor animating the prioritization of criminal over civil counsel is a concern with checking State power. An imbalance of power between adversaries can undermine the functionality and legitimacy of the adversarial system, and in a criminal proceeding, the adversary of the individual is the State. There are two ways to interpret the danger posed by the State in this context. First, pitting a prosecuting attorney against an unrepresented layperson necessarily creates an imbalance. Yet lawyers are routinely pitted against unrepresented laypersons in civil litigation as well; the fact that the government adversary is represented does not sufficiently distinguish it from a private adversary. A second interpretation appears more robust: the concern with counter-balancing government power reflects a political view that such power poses unique dangers. Part III concludes that the prioritization of criminal over civil counsel reflects a view of lawyers as primarily defenders against government power.

Part IV, however, challenges the accuracy of this perspective and the wisdom of the prioritization. While lawyers are indeed needed to check government power, disproportionate emphasis on this function creates an incomplete portrait. It neglects other vital functions that lawyers serve, namely that of checking the power of private actors. Part IV.A highlights dynamics between private adversaries, showing that imbalances of power are not confined to interactions with the State. On the contrary, patterns of unequal relationships between private parties abound. As private entities increasingly take over public functions, the scope of their power grows. So does the need for lawyers to check that power. Part IV.B calls attention to the potential function of the State as more than a prosecutor: the State can also serve to provide protection and support that private individuals cannot obtain on their own in civil society. The State can regulate power imbalances that would otherwise exist between private parties, and lawyers can play a crucial role in enforcing such regulation.

Part V suggests that more attention should be devoted to this role. Lawyers serve to balance inequalities of power not only between the people and the State but also between the people and other private

actors. Devaluation of the importance of counsel in civil cases undercuts the role of lawyers who check private power. Part V emphasizes lawyers' participation in affirmative litigation as one means of checking abuses of power and concludes with a modest recommendation to broaden the impact of such work.

I. DIVERGENT DOCTRINE ON CRIMINAL AND CIVIL COUNSEL

As is mentioned regularly in popular culture, criminal defendants unable to afford counsel will be provided with counsel at the expense of the State.[15] This principle was first confirmed with respect to federal defendants in *Johnson v. Zerbst*[16] and then with respect to state defendants in the now-famous case of *Gideon v. Wainright*.[17] In broad language, the Supreme Court has explained that "[t]he right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel,"[18] and "reason and reflection require us to recognize that in our adversary system of criminal justice" the necessity of counsel for a "fair trial" is "an obvious truth."[19] This commitment to the necessity of criminal defense counsel is a bright-line rule that applies even if the jail time is as short as one day.[20]

With respect to counsel for civil litigants, however, the Supreme Court has expressed far more ambivalence.[21] It is not that counsel may never be appointed in civil cases but that, in federal constitutional jurisprudence, there is a presumption against appointment, and overcoming that presumption depends on a case-by-case balancing of costs and benefits. While the provision of counsel in criminal matters is governed by bright-line rules, in civil cases it is left to discretionary standards, if it is addressed at all.

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15. *See* Ronald Steiner et al., *The Rise and Fall of the* Miranda *Warnings in Popular Culture*, 59 CLEV. ST. L. REV. 219, 222-31 (2011). Research suggests Americans also mistakenly believe that civil litigants are entitled to counsel. *See* Earl Johnson, Jr., *Will* Gideon's *Trumpet Sound a New Melody? The Globalization of Constitutional Values and Its Implications for a Right to Equal Justice in Civil Cases*, 2 SEATTLE J. FOR SOC. JUST. 201, 241 n.95 (2003) (collecting empirical sources); Deborah L. Rhode, *Access to Justice*, 69 FORDHAM L. REV. 1785, 1792 (2001).

16. 304 U.S. 458, 463 (1938).

17. 372 U.S. 335, 339-40, 342 (1963).

18. Powell v. Alabama, 287 U.S. 45, 68-69 (1932).

19. *Gideon*, 372 U.S. at 344.

20. Scott v. Illinois, 440 U.S. 367, 369 (1979) (ruling that the right to counsel is triggered by sentence of imprisonment); Argersinger v. Hamlin, 407 U.S. 25, 37 (1972) (ruling that misdemeanor charges, with jail time of less than one year, trigger the right to appointed counsel).

21. *See* Brooke D. Coleman, *Prison Is Prison*, 88 NOTRE DAME L. REV. 2399, 2418 (2013).

A. Counsel for Criminal Defendants

In criminal cases, the cost-benefit approach to appointment of counsel was considered but ultimately rejected. In 1932, the Supreme Court in *Powell v. Alabama*[22] found a need for the appointment of counsel based on the particular facts of the case.[23] The Court ruled that "in a capital case, where the defendant is unable to employ counsel, and is incapable adequately of making his own defense because of ignorance, feeble mindedness, illiteracy, or the like,"[24] appointment of counsel is a "necessary requisite of due process of law."[25] Six years later, in *Johnson v. Zerbst*,[26] the Court moved towards a bright-line approach, ruling that, pursuant to the dictates of the Sixth Amendment, counsel must be appointed in federal cases without any case-specific inquiry.[27] Noting that Mr. Johnson "conducted his defence [sic] about as well as the average layman usually does in cases of a similar nature,"[28] the Court determined that the Sixth Amendment "embodies a realistic recognition of the obvious truth that the average defendant does not have the professional legal skill to protect himself when brought before a tribunal with power to take his life or liberty, wherein the prosecution is presented by experienced and learned counsel."[29] The Court concluded that a federal court cannot "deprive an accused [defendant] of his life or liberty unless he has or waives the assistance of counsel."[30]

Just four years later, however, in *Betts v. Brady*,[31] the Court ruled that the Due Process Clause of the Fourteenth Amendment does not always mandate a bright-line rule for the appointment of counsel.[32] Mr. Betts had been indicted for robbery, and when he requested appointment of counsel, the trial judge denied the request because the case did not involve rape or murder.[33] The Supreme Court ruled that the Sixth Amendment applies only in federal courts,[34] and, while the deprivation of counsel could be found to constitute a due process violation on a case-by-case basis,[35] the appointment of counsel was not

22. *Powell*, 287 U.S. at 45.
23. *Id.* at 71.
24. *Id.*
25. *Id.*
26. 304 U.S. 458, 463 (1938).
27. *Id.*
28. *Id.* at 461.
29. *Id.* at 462-63.
30. *Id.* at 463.
31. 316 U.S. 455 (1942).
32. *Id.* at 471.
33. *Id.* at 456-57.
34. *Id.* at 461.
35. *Id.* at 462-64.

necessarily required of the states.[36] To hold otherwise, the majority reasoned, "would be to impose . . . a requirement without distinction between criminal charges of different magnitude or in respect of courts of varying jurisdiction."[37] The majority explained, "The question we are now to decide is whether due process of law demands that in every criminal case, whatever the circumstances, a State must furnish counsel to an indigent defendant. Is the furnishing of counsel in all cases whatever dictated by natural, inherent, and fundamental principles of fairness?"[38] The majority decided that it is not.[39]

Even the dissenting opinion shrank from professing an absolute rule.[40] Although it urged a different result, it grounded its conclusion in the particular facts of the case.[41] It highlighted that the petitioner was "a farm hand"[42] and "a man of little education,"[43] who faced charges of a serious crime.[44] Though his dissent included broader language,[45] Justice Black specified that he reached his conclusion "in view of the nature of the offense and the circumstances of his [the defendant's] trial and conviction."[46]

For two decades following *Betts v. Brady*, appointment of criminal defense counsel was provided on a bright-line basis in federal courts but a case-by-case basis in state courts.[47] Then *Gideon v. Wainwright*[48] arrived and changed the landscape. Although the Court found no special circumstances,[49] it concluded that Mr. Gideon's due

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36. *Id.* at 471-72.

37. *Id.* at 473. The majority went on to state, "[A]s the Fourteenth Amendment extends the protection of due process to property as well as to life and liberty, if we hold with the petitioner, logic would require the furnishing of counsel in civil cases involving property." *Id.*

38. *Id.* at 464.

39. *Id.* at 473.

40. *See id.* at 474 (Black, J., dissenting) ("To hold that the petitioner had a constitutional right to counsel in this case does not require us to say that no trial for any offense, or in any court, can be fairly conducted and justice accorded a defendant who is not represented by counsel. This case can be determined by a resolution of a narrower question: whether in view of the nature of the offense and the circumstances of his trial and conviction, this petitioner was denied the procedural protection which is his right under the Federal Constitution. I think he was.") (internal quotation marks omitted).

41. *Id.* at 474-76.

42. *Id.* at 474.

43. *Id.*

44. *See id.* at 476.

45. *See id.* at 475-77.

46. *Id.* at 474.

47. The exception was where states chose to mandate appointment of counsel by statute. *See* Gideon v. Wainwright, 372 U.S. 335, 345 (1963) (referencing different states' approaches).

48. *Id.* at 339.

49. *See id.* at 337 (noting that Mr. Gideon "conducted his defense about as well as could be expected from a layman"); *see also id.* at 351 (Harlan, J., concurring) ("The Court

process rights had been violated because the aid of counsel is "fundamental" to a "fair trial."[50] The Court held that the fairness and due process principles of the Fourteenth Amendment incorporated the protections of the Sixth Amendment,[51] and the bright-line guarantee of appointed counsel *did* apply to the states.[52] *Betts v. Brady* was overruled.[53] Following *Gideon*, the approach to appointment of counsel became more like that with which the public is familiar today: a bright-line guarantee.[54]

The rule governing the right to counsel operates with an automatic trigger,[55] and applies regardless of costs and other factors.[56] The appointment does not turn on judicial discretion or an assessment of the underlying facts of the particular case. The merits of potential defenses will not be considered. Neither will the expense of the appointment, nor the individual defendant's capacity to represent himself or herself pro se. The criminal defendant's right to counsel has an "absolute" value in the sense that it necessarily outweighs any value on the opposite side of the ledger.

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has come to recognize . . . that the mere existence of a serious criminal charge constituted in itself special circumstances requiring the services of counsel at trial.").

50. *Id.* at 343-44.

51. *Id.* at 340-41.

52. *Id.* at 342.

53. *See id.* at 343-44.

54. *See id.* at 351 (Harlan, J., concurring) ("The special circumstances rule has been formally abandoned in capital cases, and the time has now come when it should be similarly abandoned in noncapital cases, at least as to offenses which, as the one involved here, carry the possibility of a substantial prison sentence.").

55. The right is triggered during custodial interrogations, Escobedo v. Illinois, 378 U.S. 478, 490-91 (1964); Miranda v. Arizona, 384 U.S. 436, 442 (1966), at preliminary hearings, Coleman v. Alabama, 399 U.S. 1, 9 (1970), and after formal charges have been filed, Massiah v. United States, 377 U.S. 201, 205 (1964). It applies on a first appeal, Douglas v. California, 372 U.S. 353, 357 (1963), but not subsequent, discretionary appeals, Ross v. Moffitt, 417 U.S. 600, 610 (1974), and not for civil, post-conviction petitions. Murray v. Giarratano, 492 U.S. 1, 3-4 (1989). Notably, the right is limited to cases involving imprisonment. *See* Scott v. Illinois, 440 U.S. 367, 369 (1979).

56. *See Scott*, 440 U.S. at 372-73 ("In *Argersinger* the Court rejected arguments that social cost or a lack of available lawyers militated against its holding . . . [and] conclu[ded] that incarceration was so severe a sanction that it should not be imposed as a result of a criminal trial unless an indigent defendant ha[s] been offered appointed counsel to assist in his defense, regardless of the cost to the States implicit in such a rule." (citing Argersinger v. Hamlin, 407 U.S. 25, 32, 33, 37 n.7, 41 (1972))). *But cf.* John D. King, *Beyond "Life and Liberty": The Evolving Right to Counsel*, 48 HARV. C.R.-C.L. L. REV. 1, 4-5 (2013) (arguing that judges and prosecutors have the discretion not to pursue incarceration and, therefore, the incarceration rule of *Scott*, 440 U.S. 367, allows them to undercut the right to counsel).

B. Counsel for Civil Litigants

In civil matters there is no federal constitutional guarantee of appointed counsel.[57] There is only a right to judicial consideration of such appointment on an individualized, case-by-case basis.[58] This approach reflects the relatively lower status the Court has accorded to civil counsel.

The Supreme Court addressed the question of appointment of counsel for civil litigants two decades after *Gideon*.[59] In *Lassiter v. Department of Social Services of Durham County*,[60] the state of North Carolina had threatened to permanently terminate a mother's parental rights but appointed no attorney to represent her at the proceeding where the decision would be made.[61] The mother was left to defend herself, and the sufficiency of her mothering, on her own.[62] Ms. Lassiter lost the case, along with all ties to her child.[63] On appeal, Ms. Lassiter's advocates challenged the termination in the absence of counsel, presenting procedural due process arguments grounded in the Fourteenth Amendment.[64] The majority of the Court was not convinced.[65]

In analyzing the right to counsel, the *Lassiter* majority did not apply *Gideon*[66] or its precedent.[67] Instead, the Justices looked to

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57. *See, e.g.*, Turner v. Rogers, 131 S. Ct. 2507, 2516 (2011) ("This Court has long held that the Sixth Amendment grants an indigent defendant the right to state-appointed counsel in a *criminal* case . . . [b]ut the Sixth Amendment does not govern civil cases. . . . [T]he Fourteenth Amendment's Due Process Clause allows a State to provide fewer procedural protections than in a criminal case.") (citations omitted).

58. *See id.* at 2517 (citing Mathews v. Eldridge, 424 U.S. 319, 335 (1976)); *see also id.* at 2520. The argument for counsel for civil parties has focused on the Due Process Clause of the Fourteenth Amendment; equal protection theories of court access have met little success. *See* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 1461-63 (2d ed. 1988); Jack B. Weinstein, *The Poor's Right to Equal Access to the Courts*, 13 CONN. L. REV. 651 (1981).

59. Lassiter v. Dep't of Soc. Servs., 452 U.S. 18 (1981); *see also* Walters v. Nat'l Ass'n of Radiation Survivors, 473 U.S. 305, 332-34 (1985) (ruling that statute barring attorneys' fees over ten dollars for veterans seeking disability benefits did not violate veterans' due process rights because cases did not necessarily require representation by counsel); Bounds v. Smith, 430 U.S. 817, 828 (1977) ("[The] right of access to the courts requires prison authorities to assist inmates in the preparation and filing of meaningful legal papers by providing prisoners with adequate law libraries or adequate assistance from persons trained in the law.").

60. 452 U.S. at 18.

61. *Id.* at 20-22.

62. *See id.* at 23.

63. *Id.* at 24.

64. *Id.*

65. *Id.* at 32-33.

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

67. *Lassiter*, 452 U.S. at 25.

Mathews v. Eldridge,[68] a case concerning the termination of social security payments.[69] Decided five years before *Lassiter*, *Mathews* had ruled that a person receiving social security disability payments was not entitled to an evidentiary hearing prior to termination of payments.[70] The majority in *Mathews* had determined that "the benefit of an additional safeguard to the individual affected . . . and to society in terms of increased assurance that the action is just, may be outweighed by the cost."[71]

Unlike *Gideon* and related authority, which were based in broad principles of fundamental rights in an adversary system,[72] *Mathews* approached due process as a balance between private interests and those of governmental institutions.[73] The *Mathews* decision set forth the following three factors to determine the level of process due before the deprivation of a private interest:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.[74]

The *Lassiter* majority applied these *Mathews* factors but added a new twist.[75] In considering the first factor, *Lassiter* acknowledged the "unique"[76] importance of a "parent's desire for and right to 'the companionship, care, custody, and management of his or her children.' "[77] Nonetheless, the majority ruled that the significance of that interest did not match the criminal defendant's interest in physical liberty, and the Court added the absence of a threat to physical liberty as a

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68. 424 U.S. 319 (1976).

69. *Id.* at 323.

70. *Id.* at 349.

71. *Id.* at 348. For criticisms of the *Mathews v. Eldridge* approach to due process, see TRIBE, *supra* note 58, at 714-15 (describing "overtly utilitarian interest-balancing" as a relatively recent approach to due process and one which is at odds with core purposes of the clause); Jerry L. 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, 46, 47 n.61 (1976) (identifying equality and dignity as values of due process beyond accuracy).

72. *See* Gideon v. Wainwright, 372 U.S. 335, 343-44 (1963).

73. *Mathews*, 424 U.S. at 334-35.

74. *Id.* at 335.

75. Lassiter v. Dep't of Soc. Servs., 452 U.S. 18, 27-31 (1981); *see id.* at 42 n.9 (Blackmun, J., dissenting) (criticizing distortion of *Mathews* test).

76. *Id.* at 27.

77. *Id.* (citing Stanley v. Illinois, 405 U.S. 645, 651 (1972)).

fourth factor, which weighed against the appointment of counsel.[78] The Court described physical liberty as an exception that translates the right to counsel into the right to *appointed* counsel.[79] While due process might require lower courts to appoint counsel in some parental termination proceedings on a case-by-case basis, there was to be no absolute right.

After *Lassiter*, lower courts recognized physical liberty as the line in the sand.[80] The *Lassiter* decision underscored that physical liberty was exceptional and suggested that no other interest would justify the appointment of counsel. Some advocates therefore abandoned federal constitutional arguments, turning instead to state constitutions or state legislatures for recognition of a right to appointed counsel in civil cases.[81] Others accepted the physical liberty distinction of *Lassiter* but used it affirmatively, drawing attention to civil cases with a physical liberty interest at stake.[82]

This latter argument was tested in the Supreme Court in 2011.[83] *Turner v. Rogers* involved a father ordered to pay child support and then found guilty of civil contempt after he failed to pay.[84] The lower court sentenced Mr. Turner to a jail term of one year.[85] On appeal from the contempt order, he argued that the denial of appointed counsel at the contempt hearing violated his right to due process.[86]

The majority ruled in his favor, but not on the grounds some advocates had hoped.[87] In spite of the liberty interest at stake, the Court applied the balancing test of *Mathews v. Eldridge*, and it refused to

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78. *See id.* at 30-31.

79. *See id.* at 25.

80. *See* Pollock, *supra* note 12, at 765 n.5 (collecting court decisions that interpreted *Lassiter* to create a presumption for appointment in cases involving a threat to physical liberty).

81. A number of these efforts were successful, and the majority of states now provide counsel to indigent parents facing parental termination proceedings. *See supra* note 12 and sources cited therein. More recently, a number of states and localities have begun pilot projects, broadening the provision of counsel to other categories of cases. *See* Engler, *supra* note 2, at 49-50 (describing pilot projects).

82. *See, e.g.*, Michael Kaufman, Note, *Detention, Due Process, and the Right to Counsel in Removal Proceedings*, 4 STAN. J. C.R. & C.L. 113, 134-35, 138-40 (2008).

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

84. *Id.* at 2513.

85. *Id.* Mr. Turner served this one-year term in its entirety, and that was only the latest in a string of six civil contempt findings due to failures to pay the same child support order. *Id.* at 2513-14. Three of the previous orders resulted in prison sentences, two for several days each because he was released after paying, and another for six months, which he served in full. *Id.* By the time the Supreme Court issued its decision related to his additional, one-year incarceration, Mr. Turner had been found guilty of civil contempt a seventh time, had served an additional six months in prison, and was scheduled to appear for an eighth contempt hearing. *Id.* at 2515.

86. *See id.* at 2514.

87. *Id.* at 2512.

issue any bright-line rule for the appointment of counsel in civil cases.[88] The decision interpreted *Lassiter* not as mandating appointment of counsel where liberty is at stake, but merely indicating that the absence of a liberty interest creates a presumption against appointment.[89] The *Turner* majority also injected the analysis of the right to civil counsel with new considerations, all of which, it concluded, weighed against a bright-line rule[90]: (1) the question at issue was "sufficiently straightforward to warrant determination prior to providing a defendant with counsel";[91] (2) the "person opposing the defendant at the hearing [wa]s not the government represented by counsel but the custodial parent unrepresented by counsel";[92] and (3) "substitute procedural safeguards" were available to meet due process requirements.[93] The majority explained that its holding, denying a bright-line right to counsel to civil litigants facing imprisonment, was limited by application of these factors.[94]

Despite its refusal to recognize any guaranteed right to civil counsel, the majority reversed the decision below because insufficient "procedural safeguards" had been made available to Mr. Turner.[95] The decision suggested that safeguards might have included: notice that ability to pay is a major focus of the contempt proceeding; a form to elicit relevant financial information; an opportunity to respond to questions about his financial status; an express finding by the court that the defendant has the ability to pay; or assistance of a "neutral social worker" or other appropriate layperson.[96] Here, the family court order pursuant to which Mr. Turner was incarcerated failed

88. *Id.* at 2517-18.

89. *Id.* at 2516.

90. *Id.* at 2518.

91. *Id.* at 2519 (punctuation omitted). *But see* Laura K. Abel, Turner v. Rogers *and the Right of Meaningful Access to the Courts*, 89 DENV. U. L. REV. 805 (2012) (questioning the Court's assumptions about the lack of complexity and highlighting contrary evidence in the record).

92. *Turner*, 131 S. Ct. at 2519 (punctuation omitted). The mother of Mr. Turner's child had initiated the child support proceeding, and her father pursued it at the Supreme Court, having later gained custody of the child. *Id.* at 2513, 2519. As Judith Resnik has highlighted, however, the government had a significant role in the case. *See* Judith Resnik, *Fairness in Numbers: A Comment on* AT&T v. Concepcion, Wal-Mart v. Dukes, *and* Turner v. Rogers, 125 HARV. L. REV. 78, 97-98 (2011) (explaining that state and federal legislation compelled the mother, as a recipient of welfare benefits, to pursue Mr. Rogers, and a representative of the Department of Social Services appeared at least once in the underlying proceeding).

93. *Turner*, 131 S. Ct. at 2519 (quoting Mathews v. Eldridge, 424 U.S. 319, 335 (1976)). *But see* Abel, *supra* note 91 (arguing that the Court should have used empirical evidence to evaluate the adequacy of alternatives).

94. *Turner*, 131 S. Ct. at 2520.

95. *Id.* at 2521.

96. *Id.* at 2519.

even to articulate whether he was able to pay, a basic prerequisite to a contempt finding.[97]

The Supreme Court's reversal was based not on a broad right to counsel when liberty is at stake but on the particular inadequacies of the lower court's findings.[98] Not one of the nine Justices voted to recognize a bright-line right to civil counsel.[99] *Turner* downplayed not only the importance of physical liberty[100] but, even more, the necessity of civil counsel.[101]

C. Constitutional Mandate

One might argue that the divergence in approaches to civil and criminal counsel flows from the plain language of the U.S. Constitution. Civil cases regarding the right to counsel are analyzed with the balancing test of *Mathews v. Eldridge*[102] because the Fourteenth Amendment has been interpreted as the only available Constitutional hook for civil litigants, while criminal defendants avoid such weighing of costs and benefits because they enjoy the clearer guarantee of the Sixth Amendment. This argument appears plausible at first blush.

The Sixth Amendment provides:

> In all *criminal prosecutions, the accused shall enjoy the right* to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and *to have the Assistance of Counsel for his defence* [sic].[103]

This language refers explicitly to criminal prosecutions. The text confers no right to civil parties.[104]

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97. *Id.* at 2510; *see also* Hicks v. Feiock, 485 U.S. 624, 638 n.9 (1988) (ruling that the court may not impose punishment in civil contempt proceeding where the defendant is unable to comply with the order).

98. *Turner*, 131 S. Ct. at 2520.

99. *See id.* at 2520.

100. For a discussion of the importance of physical liberty, see *infra* Part II.A.

101. Some might reasonably argue that this is part of a broader loss of interest in the role of counsel, *see generally* Judith Resnik, *Failing Faith: Adjudicatory Procedure in Decline*, 53 U. CHI. L. REV. 494 (1986), but recent cases demonstrate that, at least in its rhetoric, the Court continues to uphold the important role of criminal counsel as vital to the American justice system. *See* Lafler v. Cooper, 132 S. Ct. 1376, 1384 (2012); Missouri v. Frye, 132 S. Ct. 1399, 1407 (2012); Padilla v. Kentucky, 559 U.S. 356 (2010).

102. 424 U.S. 319, 335 (1976).

103. U.S. CONST. amend. VI (emphasis added).

104. *Turner*, 131 S. Ct. at 2516.

Yet this argument overlooks an important part of how the right to counsel has developed. The right to counsel for criminal defendants, too, is dependent on and limited by the Fourteenth Amendment.[105] The authority for applying the Sixth Amendment to the states depends on the Fourteenth Amendment and a determination of the fundamental liberties included therein.[106] To make the guarantee apply equally to the states as to the federal government, a determination had to be made that it was required by due process.[107]

The reliance on the Fourteenth Amendment is especially clear for criminal defendants' right to *appointed* counsel.[108] There is no question that the language of the Sixth Amendment guarantees some form of a right to counsel.[109] Yet to make that promise an affirmative obligation, which requires the government not only to permit defendants to hire counsel but also to provide it for those unable to do so, involves something more. The Court chose to find something more.

The Supreme Court's decision in *Gideon v. Wainright* was grounded in a broad view of the role of counsel as essential to an adversarial system of justice.[110] No consideration was given to the possibility of counsel in civil proceedings, so the Court did not distinguish between criminal and civil contexts. However, the foundation of *Gideon* applies equally to both. The decision emphasized the "fundamental nature of the right to counsel" and that "reason and reflection" demonstrate the necessity of appointment of lawyers in an adversary system where the other side is represented.[111]

D. Bright-Line Rules or Discretionary Standards

As the foregoing review of constitutional doctrine has shown, the criminal defendant's access to counsel has been governed by a set of bright-line rules, while the civil litigant's access to counsel has depended on weighing costs and benefits. The method of analysis that the Court has applied when considering the right to counsel for civil litigants presumes that a bright-line guarantee is not even an option.[112] Balancing tests are useful in providing flexibility, but bright-line rules serve other social goals, such as ensuring certainty and

105. *See supra* Part I.A. (discussing development of right to criminal defense counsel).

106. *See* Gideon v. Wainwright, 372 U.S. 335, 340-41 (1963).

107. *Id.*

108. *See* Powell v. Alabama, 287 U.S. 45, 71 (1932).

109. U.S. CONST. amend. VI.

110. 372 U.S. at 344; *see also Powell*, 287 U.S. at 68-69 ("The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel.").

111. *Gideon*, 372 U.S. at 343-44.

112. *Cf.* Lassiter v. Dep't of Soc. Servs., 452 U.S. 18, 49 (1981) (Blackmun, J., dissenting) ("The flexibility of due process, the Court has held, requires case-by-case consideration of different decisionmaking *contexts*, not of different *litigants* within a given context.").

constraining the whims and biases of individual actors.[113] These factors do not explain why we ought to take one approach to appointment of criminal counsel and another to appointment of civil counsel.[114]

II. COMPARING PRIVATE INTERESTS AND INCLUDING COLLATERAL CONSEQUENCES

The traditional rationale for the categorical distinction between criminal and civil cases is the private interests at stake for the criminal defendant.[115] The criminal charge presents the possibility of a loss of extraordinary social value, specifically the loss of life or physical liberty.[116] This Part will consider whether the interests at stake for criminal defendants are categorically of higher value than the inter-

113. *See* Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1688-89 (1976). Some commentators would argue that certain rights are too important to be subjected to cost-benefit analysis because, by definition, their sacrifice fundamentally threatens the very fabric of and reason for maintaining a functioning society. *See* Markowitz *supra* note 7, at 1351, 1354 (suggesting that *Mathews*-style balancing is "intuitively appealing" but noting that rights of criminal defendants require static rules). This approach, however, begs the question of what value the interests have and assumes that the benefits of protecting the interests necessarily exceed any costs. *See* MICHAEL J. SANDEL, DEMOCRACY'S DISCONTENT 39-47 (1996) (describing the view of constitutional rights as trump cards).

114. One might argue that arbitrariness raises special constitutional problems in the criminal context, but this depends on the presumption of privileging certain constitutional values and does not answer the deeper question. With respect to the issue of bias, despite the common assumption, there is no evidence that judges are biased against criminal defendants any more than against poor people generally. *See* Marc Galanter, *Afterword: Explaining Litigation*, 9 LAW & SOC'Y REV. 347, 347-48 (1975) (highlighting how certain classes of civil parties are "repeat players" who benefit from regular interactions with the courts, while "one-shotters" who interact with the courts on an episodic basis are disadvantaged). *Compare, e.g.*, Markowitz, *supra* note 7, at 1354 ("We are concerned that we cannot trust courts . . . to strike an optimum balance because of two types of bias: bias against politically disfavored criminal defendants and bias in favor of criminal justice actors (prosecutors and police) who are regular collaborators with the court in the administration of justice."), *with* Barbara Bezdek, *Silence in the Court: Participation and Subordination of Poor Tenants' Voices in Legal Process*, 20 HOFSTRA L. REV. 533, 540-41 (1992) (describing bias against poor litigants), *and* Mark H. Lazerson, *In the Halls of Justice, the Only Justice Is in the Halls*, *in* THE POLITICS OF INFORMAL JUSTICE 119, 150 (Richard L. Abel ed., 1982) (describing judges' biases against tenants and in favor of landlords).

115. Providing counsel when there is an extraordinary interest at stake could reflect a special devotion to obtaining an accurate decision in such cases, but it might also serve to thwart a uniquely horrendous outcome regardless of innocence or guilt. *See* MONROE H. FREEDMAN, LAWYERS' ETHICS IN AN ADVERSARY SYSTEM 2-3 (1975) (suggesting that the purpose of the criminal trial is to protect individual rights, not to seek truth); Herbert L. Packer, *Two Models of the Criminal Process,* 113 U. PA. L. REV. 1, 17 (1964) (describing "guilt-defeating doctrines" of due process model).

116. *See* Scott v. Illinois, 440 U.S. 367, 372-73 (1979) ("[I]ncarceration [i]s so severe a sanction that it should not be imposed as a result of a criminal trial unless an indigent defendant ha[s] been offered appointed counsel to assist in his defense, regardless of the cost to the States implicit in such a rule." (citing Argersinger v. Hamlin, 407 U.S. 25, 32-33, 37, 41 (1972))).

ests of civil litigants.[117] Although this comparison has been touched upon by other authors, this Article will inject into the discussion fresh insights drawn from research regarding collateral consequences of criminal and civil proceedings.[118] It will suggest that this new research gives us reason to question the prioritization of criminal counsel.

A. Liberty

A criminal conviction could result in a defendant's loss of physical liberty or even his or her life. Scholars of constitutional law and ethics often quite reasonably presume that their readers will agree on the significance of this loss, and they rely on it without belaboring the point.[119] Because this Article questions the prioritization of counsel for criminal defendants, and may appear to question the primacy of the liberty interests such counsel protect, it is necessary first to consider carefully why one might safely assume the importance of the liberty interests at stake in a criminal trial. This brief discussion will not attempt to do justice to the philosophical, religious, or political treatments of life and liberty, but merely to inform the discussion that follows with a reminder of the gravity of the subject at issue.

A person's interest in his or her life is indeed substantial. Most societies consider life to be sacred.[120] Its loss is unique and not correctable if an error is made.[121] Many prominent scholars and activists have pushed for the complete abolition of the death penalty.[122] The Supreme Court first recognized a right to appointed counsel in a capital case, perhaps in part because of an appreciation that the stakes for the defendant were profound.[123]

Because death is a very uncommon punishment, however, it has not been the primary consideration in most discussions of the right to counsel. Most scholars believe that the right should extend beyond

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117. Economists have sought to evaluate the market value of physical liberty. *See, e.g.*, David S. Abrams & Chris Rohlfs, *Optimal Bail and the Value of Freedom: Evidence from the Philadelphia Bail Experiment*, 49 ECON. INQUIRY 750, 756, 769 (2011) (finding that 90 days of freedom is roughly equivalent in value to $1,000).

118. *See* Michael Pinard, *Consequences of Criminal Convictions*, 85 N.Y.U. L. REV. 457, 460 (2010).

119. *See* Packer, *supra* note 115, at 16; Murray L. Schwartz, *The Zeal of the Civil Advocate*, *in* THE GOOD LAWYER: LAWYERS' ROLES AND LAWYERS' ETHICS 150, 156 (David Luban ed., 1983).

120. *See* Ronald Dworkin, *Life Is Sacred. That's the Easy Part.*, N.Y. TIMES MAG., May 16, 1993, at 36.

121. *See* Gardner v. Florida, 430 U.S. 349, 357-58 (1977) ("[Death] is different in both its severity and its finality.").

122. *E.g.*, AUSTIN SARAT, WHEN THE STATE KILLS: CAPITAL PUNISHMENT AND THE AMERICAN CONDITION 246-60 (2001).

123. Powell v. Alabama, 287 U.S. 45, 46 (1932).

capital charges.[124] The infrequency of capital punishment prevents it from explaining the need for counsel in the vast majority of cases. The remainder of this Subpart will therefore focus on the interest more often at stake: the loss of liberty occasioned by incarceration.

The importance of a loss of physical liberty is undeniable.[125] Incarceration necessarily involves a physical intrusion and loss of privacy.[126] It includes a loss of independence, autonomy, and dignity.[127] It occasions, though not a complete loss of life, a loss of some portion of a life; it sacrifices the opportunity to choose where and how to occupy one's days for all the time in prison.[128] Additionally, given the conditions of many prisons, exposure to physical and mental harms can fairly be recognized as likely consequences of incarceration.[129]

Yet the loss of liberty provides no clear distinction between criminal and civil cases. In immigrant removal, civil commitment, and civil contempt proceedings, a loss of physical liberty is also at stake. Hearings regarding revocation of parole or probation violations, too, are classified as civil, though if the individual loses, she will go to prison.[130] Even the Supreme Court has recognized that the civil-criminal dichotomy is an unreliable indicator of whether liberty is at stake.[131]

Setting aside the doctrinal inconsistency in the application of the liberty rationale for the appointment of counsel, the rationale suffers from deeper problems. As weighty as the loss of physical liberty may be, it is not self-evident that this interest is more significant than all other interests at risk in adversary proceedings. Missing out on years

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124. *Cf.* Darryl K. Brown, *Rationing Criminal Defense Entitlements: An Argument From Institutional Design*, 104 COLUM. L. REV. 801, 818 (2004) (proposing that criminal defense counsel should prioritize "clients who have the most at stake or are likely to gain the greatest life benefit").

125. Foucha v. Louisiana, 504 U.S. 71, 80 (1992) ("Freedom from bodily restraint has always been at the core of the liberty protected by the Due Process Clause from arbitrary governmental action." (citing Youngberg v. Romeo, 457 U.S. 307, 316 (1982))). For a discussion of the special value of liberty, see Kaufman, *supra* note 82.

126. *See* Sharon Dolovich, *Cruelty, Prison Conditions, and the Eighth Amendment*, 84 N.Y.U. L. REV. 881, 887-89 (2009).

127. *See* Jonathan Simon, Editorial, *Mass Incarceration on Trial*, 13 PUNISHMENT & SOC'Y 251, 251 (2011).

128. *See* Sharon Dolovich, *Creating the Permanent Prisoner*, *in* LIFE WITHOUT PAROLE: AMERICA'S NEW DEATH PENALTY 96 (Charles J. Ogletree, Jr. & Austin Sarat eds., 2012), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1845904 (describing physical, psychological, and social destruction imposed by long-term incarceration).

129. This can include harms caused by guards, other prisoners, or the physical environment. *See* Dolovich, *supra* note 126, at 887-89 (describing that prisons pose health and safety threats); *id.* at 887 n.21 (collecting literature on physical and sexual abuse of prisoners).

130. Gagnon v. Scarpelli, 411 U.S. 778, 781 (1973) (citing Morrissey v. Brewer, 408 U.S. 471 (1972)).

131. *In re* Gault, 387 U.S. 1, 41 (1967) (ruling that juveniles must be appointed counsel despite civil classification of delinquency proceedings).

of a person's ordinary life is undeniably significant. Yet the right to counsel attaches for crimes with a jail sentence as short as one day.[132] Therefore, to justify the contrast of this absolute right with the case-by-case approach in civil matters, one must show that there is something about freedom from incarceration that is qualitatively different and necessarily more significant than all other interests.

A large literature disputes that this is possible.[133] The American Bar Association in 2006 adopted a resolution advocating the appointment of counsel in civil matters where "basic human needs" are at stake.[134] The resolution defined basic human needs to include five categories: shelter, sustenance, safety, health, and child custody.[135] It is difficult to deny that these needs are compelling. Can we categorically determine that physical liberty is more important than all of them?

Let us examine more closely the example of shelter.[136] A home can be a place of safety and security, a retreat from the dangers and pry-

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132. Argersinger v. Hamlin, 407 U.S. 25, 37 (1972).

133. *See* Pollock & Greco, *supra* note 6, at 44-46 (collecting literature). When evaluating removal from daily life, what kind of life it is should also be considered. *See* JOAN C. TRONTO, CARING DEMOCRACY: MARKETS, EQUALITY, AND JUSTICE ix (2013) (noting that some liberal democracies offer "mere life"). If a person's ordinary existence includes homelessness, a night in jail might take on a different character than it does for a person with a warm bed of his or her own. Some people deprived of shelter or healthcare would be willing to go to prison to obtain access to these basic needs; research demonstrates that people have committed crimes for this purpose. *See* Nicholas Kristof, *Inside a Mental Hospital Called Jail*, N.Y. TIMES, Feb. 8, 2014, http://www.nytimes.com/2014/02/09/opinion/sunday/inside-a-mental-hospital-called-jail.html?_r=0 ("Some people come here to get medication . . . . They commit a crime to get in." (quoting superintendent of women's jail)); KESIA REEVE WITH ELAINE BATTY, CTR. FOR REG'L ECON. & SOC. RESEARCH, THE HIDDEN TRUTH ABOUT HOMELESSNESS (2011), *available at* http://www.crisis.org.uk/data/files/publications/HiddenTruthAboutHomelessness_web.pdf (finding that 28% of homeless persons admitted committing a minor crime in the hope of being taken into custody overnight, and 20% reported avoiding bail or committing "an imprisonable offence with the express purpose of receiving a custodial sentence as a means of resolving their housing problems"). *But see* Abbe Smith, *The Difference in Criminal Defense and the Difference It Makes*, 11 WASH. U. J.L. & POL'Y 83, 130 (2003) ("No one who knows the slightest thing about criminal prosecution would choose it over civil litigation."); *id.* at 131-35 (describing negative impact of imprisonment and arguing that "[t]he price of criminal punishment is unparalleled").

134. ABA RES., *supra* note 7.

135. The ABA Resolution identifies the following five core interests: (1) shelter; (2) sustenance, defined as income from various sources including benefits from government agencies and wages from private employment; (3) safety; (4) access to healthcare; and (5) child custody and parental rights. *Id.* at 13.

136. *Compare* Barton & Bibas, *supra* note 6, at 972 ("It is far more important to fund appointed lawyers in serious felony cases than it is to provide them in, say, housing court."), *with* 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, 700-01 (2006), *and* Andrew Scherer, Gideon's *Shelter: The Need to Recognize a Right to Counsel for Indigent Defendants in Eviction Proceedings*, 23 HARV. C.R.-C.L. L. REV. 557, 564 (1988).

ing eyes of public spaces.[137] Home can be, and is in the minds of many, a place to go at the end of the day, where you know your neighbors and they know you. Important feminist work has challenged the public-private dichotomy and revealed that, given the prevalence of domestic violence and child abuse, home is not actually safe for all.[138] Yet home continues to be a place where people spend years of their lives, build memories, and come to define their sense of being.[139] For many families, the home is their largest financial investment, as well as a symbol of the life they have spent working towards that investment, or one that they hope to build in the future.[140]

The loss of a home is a significant displacement. Evictions often lead to homelessness,[141] which means sleeping on public streets or in homeless shelters, both of which are likely to expose persons to physical and mental harms comparable to those experienced in prison, namely physical and sexual assault, illness, and unsanitary conditions.[142] Research also demonstrates that homeless persons face particular challenges in building and maintaining social and professional networks.[143]

Another of the "basic human needs" identified by the American Bar Association is parental rights.[144] Of supreme importance to al-

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137. Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957, 978, 997 (1982) (highlighting privacy interests in the home).

138. *See* Jennifer Koshan, *Sounds of Silence: The Public/Private Dichotomy, Violence, and Aboriginal Woman*, *in* CHALLENGING THE PUBLIC/PRIVATE DIVIDE: FEMINISM, LAW, AND PUBLIC POLICY 87, 88-94 (Susan B. Boyd ed., 1997) (summarizing literature and related advocacy).

139. *See* Radin, *supra* note 137, at 991-92.

140. *See* TRONTO, *supra* note 133, at 3 (highlighting the common view of the home as an economic asset); Radin, *supra* note 137, at 972, 987 n.104; Louis S. Rulli, *On the Road to Civil* Gideon: *Five Lessons from the Enactment of a Right to Counsel for Indigent Homeowners in Federal Civil Forfeiture Proceedings*, 19 J.L. & POL'Y 683, 712 n.126 (2011).

141. NAT'L LAW CTR. ON HOMELESSNESS & POVERTY & NAT'L COAL. FOR THE HOMELESS, HOMES NOT HANDCUFFS: THE CRIMINALIZATION OF HOMELESSNESS IN U.S. CITIES 8 (2009), *available at* http://www.nationalhomeless.org/publications/crimreport/CrimzReport_2009.pdf.

142. BEN ROEBUCK, INST. FOR THE PREVENTION OF CRIME, HOMELESSNESS, VICTIMIZATION, AND CRIME 15-17 (2008), *available at* http://homeless.samhsa.gov/ResourcFiles/Homelessness,%20Victimization%20and%20Crime%20%20Knowledge%20and%20Actionable%20Recommendations.pdf.

143. *See* NAT'L COAL. FOR THE HOMELESS, EMPLOYMENT AND HOMELESSNESS 1-4 (2009), *available at* http://www.nationalhomeless.org/factsheets/Employment.pdf (describing the relationship between homelessness and employment); Julia C. Torquati & Wendy C. Gamble, *Social Resources and Psychosocial Adaptation of Homeless School Aged Children*, 10 J. SOC. DISTRESS & HOMELESS 305, 305-07 (2001).

144. *Compare* ABA RES., *supra* note 7, at 13 (recommending appointment where parental rights are at stake), *with* Lassiter v. Dep't of Soc. Servs., 452 U.S. 18, 27-31 (1981) (denying categorical right to counsel where parental rights are at stake). Since *Lassiter*, the majority of states have passed legislation providing appointed counsel whenever the State threatens to terminate a parental status. *See* Abel & Rettig, *supra* note 12, at 252-60 (summarizing statutes).

most any parent is the relationship with his or her child.[145] A termination proceeding threatens to end a parent's legal and experienced relationship with the child.[146] If termination occurs, the result is permanent and irrevocable. The result can remove a fundamental piece of the parent's identity and deprive him or her of a lifetime of experiences with the child.[147]

Shelter and custody are just two of the interests identified by the ABA as important enough to necessitate the protection of counsel. This Article does not adopt the ABA Resolution as the only or best formulation of the interests that should animate the appointment of counsel.[148] Yet this formulation demonstrates that important interests are devalued when criminal counsel is prioritized over civil counsel.

Not only does the prioritization of criminal counsel implicitly value liberty over all other interests, but, moreover, it implies a limited definition of liberty.[149] In deportation proceedings, the outcome can deprive an immigrant of the freedom to pursue life in the United States.[150] After an eviction proceeding, one can lose access to one's home and be left without a private place to raise one's family.[151] To define the deprivation of liberty as incarceration, but not eviction or deportation, is to assume the priority this Article seeks to evaluate.

B. Collateral Consequences & Stigma

Advocates of a right to civil counsel have focused primarily on the weight of the interests at stake in civil proceedings. This Article will suggest that private interests are only half of the story. But first it fleshes out the comparative analysis by highlighting private interests that have not previously informed the discussion: collateral conse-

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145. *See generally* Mary Helen McNeal, *Toward a "Civil* Gideon*" Under the Montana Constitution: Parental Rights as the Starting Point*, 66 MONT. L. REV. 81 (2005); Michele R. Forte, Note, *Making the Case for Effective Assistance of Counsel in Involuntary Termination of Parental Rights Proceedings*, 28 NOVA L. REV. 193 (2003).

146. *See Lassiter*, 452 U.S. at 39 (Blackmun, J., dissenting).

147. *See infra* note 193 and sources cited therein.

148. One might argue that the language of "needs" instead of "rights" frames the appointment of counsel as charity. *See* Deborah M. Weissman, *Law as Largess: Shifting Paradigms of Law for the Poor*, 44 WM. & MARY L. REV. 737, 828 (2002) (challenging the treatment of legal services for the poor as charity rather than rights).

149. *See* Owen M. Fiss, *Why the State?*, 100 HARV. L. REV. 781, 781 (1987) (critiquing anti-regulatory views under which "[l]iberty [i]s reduced to limited government"); *see also* SANDEL, *supra* note 113, at 321 (critiquing a "voluntarist conception of freedom"). For further discussion of the limits of this definition of liberty, see *infra* pp. 932-33.

150. *See generally* Daniel Kanstroom, *The Right to Deportation Counsel in* Padilla v. Kentucky*: The Challenging Construction of the Fifth-and-a-Half Amendment*, 58 U.C.L.A. L. REV. 1461 (2011) (analyzing the constitutional status of deportation).

151. *See* Radin, *supra* note 137, at 991-93 (highlighting that individuals, including residential tenants, have liberty and autonomy interests connected to their homes).

quences and stigma. Collateral consequences of criminal convictions have recently received increased attention.[152] Explorations of the role of defense counsel in mitigating collateral consequences offer interesting lessons for civil cases, which this Part will address. Stigma is not generally recognized as a formal collateral consequence but is indeed a significant consequence of criminal conviction and will therefore be considered as well. A comparison of the stigma of criminal and civil judgments is overdue.

1. Collateral Consequences

Commentators use the term "collateral consequences" to refer to negative civil consequences that follow a criminal conviction.[153] These include consequences for employment, housing, education, parental rights, immigration status, and other civil rights and benefits. Collateral consequences have expanded significantly in recent decades.[154]

As Alexandra Natapoff has highlighted, while a misdemeanor conviction can result in a maximum jail term of one year or less, the collateral consequences of such a conviction can follow a person for a lifetime.[155] On the aggregate level, the collateral consequences of misdemeanor convictions exclude vast numbers of people, disproportionately poor people of color, from civil society.[156] Jenny Roberts has suggested that "collateral consequences often overshadow the direct penal sentences in criminal cases."[157] Given the size of the affected population, the long duration, and the breadth of the social and economic exclusion imposed, the significance of collateral consequences may have eclipsed that of incarceration.

Given the "scope, severity, and ubiquity"[158] of collateral consequences, John King has argued that counsel should be appointed in criminal cases regardless of whether incarceration is at stake.[159] Even the Supreme Court, while not embracing a right to counsel based on collateral consequences, has recognized the role of counsel in advising persons facing collateral consequences. In *Padilla v. Ken-*

152. *See, e.g.*, Padilla v. Kentucky, 559 U.S. 356, 356-62 (2010); MARGARET COLGATE LOVE ET AL., COLLATERAL CONSEQUENCES OF CRIMINAL CONVICTIONS: LAW, POLICY AND PRACTICE (2013).

153. *See* King, *supra* note 56, at 2 n.2.

154. *See* Michael Pinard, *Reflections and Perspectives on Reentry and Collateral Consequences*, 100 J. CRIM. L. & CRIMINOLOGY 1213, 1214-15 (2010); King, *supra* note 56, at 24 (describing reasons for expansion of collateral consequences).

155. Alexandra Natapoff, *Misdemeanors*, 85 S. CAL. L. REV. 101, 113-16 (2012).

156. *Id.* at 158.

157. Jenny Roberts, *Ignorance is Effectively Bliss: Collateral Consequences, Silence, and Misinformation in the Guilty-Plea Process*, 95 IOWA L. REV. 119, 119 (2009).

158. King, *supra* note 56, at 2.

159. *Id.* at 6.

tucky,[160] the Court ruled that misadvising a client regarding near-certain immigration consequences of a plea constituted deficient performance of counsel.[161] The question of appointment was not before the Court, but some scholars have suggested that the decision supports extension of the right to counsel to the context of pleas.[162] Notably, the function that counsel was expected to serve in that particular plea context was to provide advice and counsel on civil collateral consequences.

The growing recognition of the role of criminal defense counsel in mitigating collateral consequences carries interesting implications for the discussion of the role of civil counsel. If collateral consequences necessitate the assistance of counsel,[163] the underlying logic suggests a need for counsel in civil cases too. This is for two independent reasons.

First, if indirect consequences for civil interests trigger a need for counsel, events directly affecting those interests must trigger the same result. Categories of collateral consequences that have received particular attention include employment,[164] housing,[165] and immigra-

160. Padilla v. Kentucky, 559 U.S. 356, 356 (2010).

161. *Id.* at 371-75.

162. *See* Josh Bowers, *Two Rights to Counsel*, 70 WASH. & LEE L. REV. 1133 (2013); Jenny Roberts, *Effective Plea Bargaining Counsel*, 122 YALE L.J. 2650 (2013). The Supreme Court has begun to recognize that today's appointed criminal defense attorney handles the vast majority of her cases not by presentation of a narrative at trial, but through negotiation that ends in a plea agreement. *See* Lafler v. Cooper, 132 S. Ct. 1376, 1383 (2012); Missouri v. Frye, 132 S. Ct. 1399, 1407 (2012); *Padilla*, 559 U.S. at 371. This acknowledgement carries an additional implication for the right to civil counsel. For decades, the majority of civil litigation has ended in settlement, and a great deal of civil litigation has involved bargaining rather than trials. *See, e.g.*, Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 459, 461-84 (2004) (collecting literature on the number of trials that occur in the U.S. per year); *see also* Elizabeth Warren, *Vanishing Trials: The Bankruptcy Experience*, 1 J. EMPIRICAL LEGAL STUD. 913, 917 (2004). The newly recognized predominance of bargaining in criminal defense underscores the increasing similarities in the roles performed by civil and criminal counsel. *Compare* Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1073-75 (1984) (describing movement away from civil litigation and towards development of negotiation and mediation skills), *with Padilla*, 559 U.S. at 372-75 (emphasizing that the vast majority of criminal convictions result from negotiated pleas and that "negotiation of a plea bargain is a critical phase of litigation for purposes of the Sixth Amendment right to effective assistance of counsel").

163. King, *supra* note 56, at 23 ("Counsel has an important but often overlooked role to play in making these hidden consequences known to the defendant charged with a low-level crime."); *see also* Natapoff, *supra* note 155, at 128 ("For this adversarial theory to function there are two requirements: first, counsel must be appointed, and second, counsel must test the government's case.").

164. *See generally* Bruce Western et al., *The Labor Market Consequences of Incarceration*, 47 CRIME & DELINQUENCY 410 (2001) (discussing the effects of incarceration on employment opportunities post-release).

165. *See* Pinard, *supra* note 154, at 1214 (noting that collateral consequences can include ineligibility for "government-assisted housing").

tion status.[166] If the employment consequences of criminal convictions deserve weight, employment interests must be weighty themselves. Why should the employment implications of a criminal conviction necessitate criminal defense counsel, who could protect these interests indirectly, but not civil counsel, who could pursue them directly?[167]

Second, as an empirical matter, criminal convictions are not the only court decisions that routinely and predictably result in negative consequences: civil judgments bring their own automatic consequences for participation in civil society. Take the example of housing.[168] A judgment of possession can disqualify a tenant from future housing subsidies.[169] It can also mark the individual as undesirable on a nationwide, privately-controlled "blacklist"[170] that property owners use to screen potential renters.[171] Like the consequences of criminal convictions, the collateral consequences of an eviction systematically block access to future shelter.

Sweeping still more broadly, any civil judgment will damage the defendant's credit,[172] and a person's credit score in the U.S. economy is one of his or her most valuable possessions.[173] A damaged score can threaten access to employment,[174] housing,[175]

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166. *Padilla*, 559 U.S. at 356-61.

167. Direct pursuit could include, for example, litigation regarding unemployment benefits, unpaid wages, or employment discrimination.

168. *See* Hous. Auth. v. Lamothe, 627 A.2d 367, 371 (Conn. 1993) (recognizing that the judgment had "potentially prejudicial collateral consequences" to the tenant); Mary Spector, *Tenant Stories: Obstacles and Challenges Facing Tenants Today*, 40 J. MARSHALL L. REV. 407, 415-16 (2007) (discussing collateral consequences of evictions).

169. 42 U.S.C. § 13661 (2012); 24 CFR § 982.553 (2014).

170. Rudy Kleysteuber, *Tenant Screening Thirty Years Later: A Statutory Proposal to Protect Public Records*, 116 YALE L.J. 1344, 1349 n.20 (2007); *see id.* at 1346 (noting that roughly 650 companies provide consolidated tenant lists).

171. *Id.* at 1356-64 (describing the tenant screening process and its deficiencies).

172. CONSUMER FIN. PROT. BUREAU, KEY DIMENSIONS AND PROCESSES IN THE U.S. CREDIT REPORTING SYSTEM: A REVIEW OF HOW THE NATION'S LARGEST CREDIT BUREAUS MANAGE CONSUMER DATA 17 (2012) [hereinafter KEY DIMENSIONS], *available at* http://files.consumerfinance.gov/f/201212_cfpb_credit-reporting-white-paper.pdf; *see also* CHI CHI WU ET AL., NAT'L CONSUMER LAW CTR., FAIR CREDIT REPORTING 625 (8th ed. 2013) (describing dramatic growth in the use of credit reports).

173. *See* Earl "Butch" Graves Jr., *Your Credit Score Is Your GPA for Life*, BLACK ENTERPRISE, Oct. 2012, at 12, *available at* http://www.blackenterprise.com/blogs/executive-memo/your-credit-score-is-your-gpa-life/ ("Even though education remains a vital factor in securing a life filled with options, there's another measure that's equally crucial: your credit score. Having a poor credit score can severely limit or eliminate your access to virtually every aspect of the American dream . . . .").

174. *See generally* Sharon Goott Nissim, *Stopping a Vicious Cycle: The Problems with Credit Checks in Employment and Strategies to Limit Their Use*, 18 GEO. J. ON POVERTY L. & POL'Y 45 (2010) (exploring employers' use of credit checks to evaluate potential and current employees).

175. *See* KEY DIMENSIONS, *supra* note 172, at 5 (noting the impact of credit report on eligibility for mortgages and rental housing).

education,[176] transportation,[177] and insurance.[178] A low score can lock a person out of the mainstream economic market.[179] It is well-established that the use of credit scores disproportionately harms people of color.[180] A low credit score can also threaten family ties and mating opportunities.[181] Financial credentials influence custody determinations and the right to parent one's children.[182]

In the criminal context, Wayne Logan has suggested that informal collateral consequences of convictions can have equal if not greater effects than consequences arising by formal operation of law.[183] He has highlighted informal effects of criminal convictions on housing, employment, and mental and physical health, and he has explained how not only the individual defendant but also third parties, including family members, suffer from collateral consequences.[184] Similar patterns can be seen in the civil context, where one loss can lead to another, sending a person into a downward spiral.[185] If the threat of negative collateral consequences mandates a need for legal representation and protection, numerous civil matters must also require it.

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176. *See Credit Scores*, FINAID, http://www.finaid.org/loans/creditscores.phtml (last visited July 24, 2015).

177. Credit influences access to auto loans and auto insurance. *See* CHI CHI WU, NAT'L CONSUMER LAW CTR., CREDIT SCORING AND INSURANCE: COSTING CONSUMERS BILLIONS AND PERPETUATING THE ECONOMIC RACIAL DIVIDE 4 (2007) [hereinafter INSURANCE], *available at* http://www.cej-online.org/NCLC_CEJ_Insurance_Scoring_Racial_Divide_0706.pdf.

178. *See* WU, INSURANCE, *supra* note 177, at 4-8.

179. *See id.* at 3 ("A bad credit score is a financial 'Scarlet Letter' ostracizing a person from the land of reasonably priced credit, good jobs and . . . insurance coverage."); Shweta Arya et al., *Anatomy of the Credit Score*, 95 J. ECON. BEHAV. & ORG. 175, 175 (2013) ("In these days of easy access to information, a negative credit event . . . can haunt a consumer . . . .").

180. *See* GEOFF SMITH & SARAH DUDA, WOODSTOCK INST., BRIDGING THE GAP: CREDIT SCORES AND ECONOMIC OPPORTUNITY IN ILLINOIS COMMUNITIES OF COLOR (2010), *available at* http://www.woodstockinst.org/sites/default/files/attachments/bridgingthegapcreditscores_sept2010_smithduda.pdf.; WU, INSURANCE, *supra* note 177, at 12-17 (collecting literature on racial disparate impact of credit scoring systems); Ashlyn Aiko Nelson, *Credit Scores, Race, and Residential Sorting*, 29 J. POL'Y ANALYSIS & MGMT. 39, 40 (2010).

181. *See* Arya et al., *supra* note 179, at 175 (noting that some dating websites limit the pool of potential partners for participants with low credit scores).

182. *See* Pauline Gaines, *Should the Richer Parent Get Custody?*, HUFFINGTON POST (Sep. 28, 2012, 12:21 PM), http://www.huffingtonpost.com/pauline-gaines/should-the-richer-parent-_b_1905815.html.

183. Wayne A. Logan, *Informal Collateral Consequences*, 88 WASH. L. REV. 1103, 1117 (2013).

184. *Id.* at 1107-09.

185. *See* Albiston & Sandefur, *supra* note 8, at 111-12 (describing negative consequences of civil judgments, particularly for mental and physical health).

2. *Stigma*

Though not a formal collateral consequence,[186] stigma is indeed a negative consequence of criminal conviction.[187] Beyond economic and social ostracism, stigma may be understood to include the shame and guilt of moral opprobrium.[188] The record of a criminal conviction has historically received recognition as a special marker of disgrace.[189] It is a particular badge of a person deemed to have transgressed the moral code of the community.[190]

Yet stigma is not unique to criminal convictions.[191] Termination of parental rights or a denial of custody constitutes a determination that one is not a fit parent; many understand this as the ultimate judgment of moral failure.[192] A finding of civil liability for the inabil-

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186. *See* MARGARET COLGATE LOVE ET AL., COLLATERAL CONSEQUENCES OF CRIMINAL CONVICTIONS: LAW, POLICY AND PRACTICE 23-26 (2013).

187. *See* Reno v. ACLU, 521 U.S. 844, 872 (1997) (noting that criminal sanctions include the "opprobrium and stigma of a criminal conviction"); Rutledge v. United States, 517 U.S. 292, 302 (1996) (pointing to the "societal stigma accompanying any criminal conviction" (quoting Ball v. United States, 470 U.S. 856, 865 (1985))); Packer, *supra* note 115, at 16 ("The combination of stigma and loss of liberty that is embodied in the end result of the criminal process is viewed as being the heaviest deprivation that government can inflict on the individual.").

188. *See* Eric Rasmusen, *Stigma and Self-Fulfilling Expectations of Criminality*, 39 J. L. & ECON. 519, 521 (1996).

189. *See* Aaron Xavier Fellmeth, *Challenges and Implications of a Systemic Social Effect Theory*, 2006 U. ILL. L. REV. 691, 695 (2006) ("[A]s a general rule, crimes tend to convey an aura of reprobation not usually attributable to violations of civil duties."); John P. Reed & Dale Nance, *Society Perpetuates the Stigma of a Conviction*, FED. PROBATION, June 1972, at 27, 27 ("[T]he criminal may be deprived of some or most of his civil rights (called 'civil disability' and sometimes 'civil death'). . . . The convicted offender returns to the community *sans* a full status and *sans* his respectability. The law keeps his life in bondage for his past misdeeds.").

190. *See, e.g.*, Lawrence v. Texas, 539 U.S. 558, 575 (2003) (noting that even a low-level misdemeanor "remains a criminal offense with all that imports for the dignity of the persons charged"); Reed & Nance, *supra* note 189, at 27 ("The unintended effects of registration [as a sex offender] are to broadcast his conviction and preserve his criminal stigma.").

191. *See* Vitek v. Jones, 445 U.S. 480, 492 (1980) ("It is indisputable that commitment to a mental hospital can engender adverse social consequences to the individual and that [w]hether we label this phenomena stigma or choose to call it something else . . . we recognize that it can occur and that it can have a very significant impact on the individual.") (alterations in original) (quoting *Addington v. Texas*, 441 U.S. 418, 425-26 (1979)) (internal quotation marks omitted).

192. *See* S. Kielty, *Similarities and Differences in the Experiences of Non-Resident Mothers and Non-Resident Fathers*, 20 INT'L J.L. POL'Y & FAM. 74, 86 (2006) (collecting literature suggesting that "where mothers feel unable to fulfill the duties they associate with motherhood . . . their moral self comes under threat as 'good mother' tends to be synonymous with 'good person' ") (internal quotation marks omitted). One commentator described this experience of moral judgment as follows:

> When a noncustodial mother [(NCM)] tells someone that her kids do not live with her, she braces for the reaction. Perhaps it is silence. Perhaps there is a fleeting sour expression or an abrupt end to the conversation. New friends may back away. . . . [E]ven the best reactions are tainted by the unspoken assumption that she must have done something wrong. . . . NCMs routinely expe-

ity to pay one's debts can also impose shame.[193] Not only does the finding damage one's credit and cut off avenues to the economy, but it also imposes a public condemnation of one's incapacity to meet one's responsibilities.[194]

Is the stigma of a criminal conviction categorically more severe than the stigma of unemployment[195] or homelessness?[196] Empirical research has not reached this question.[197] The consequences of civil proceedings provide an important area for further study. In the meantime, a difference in the weight of the interests cannot be assumed.

III. IDENTITY OF ADVERSARY: THE STATE

While the private interests at stake cannot fully explain the divergent approaches to criminal and civil counsel, another argument can be made based on the identity of the criminal defendant's adversary: the State.[198] This Part of the Article lays out the view that the State is an adversary whose presence justifies appointment of coun-

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> rience harsh judgment and the assumption that they are unfit mothers. Many have lost friends or found new friendships cut short. Others have lost family members or job opportunities. Still more common are the difficult interactions with schools, sports teams, and medical offices. NCMs have been denied access to school and medical records. And they are marginalized in interactions involving their children's extracurricular activities.

Jackie Krasas, *Mothers Without Custody: Some 2 Million Women Feel the Stigma*, VITAMINW (Mar. 23, 2012), http://vitaminw.co/society/mothers-without-custody-some-2-million-women-feel-stigma.

193. *See* Albiston & Sandefur, *supra* note 8, at 112-13 (describing that "[s]ocial stigma similarly attaches to the failure to pay debts"); Arya, *supra* note 179, at 176 (collecting literature on the correlation between "trustworthiness" and credit score); WU, INSURANCE, *supra* note 177, at 4 (describing how insurers "put forth a moral person hypothesis . . . they argue that a person who is reckless with credit may also be reckless with driving or irresponsible about maintaining a home") (internal punctuation omitted). *See generally* Brent T. White, *Underwater and Not Walking Away: Shame, Fear, and the Social Management of the Housing Crisis*, 45 WAKE FOREST L. REV. 971 (2010) (suggesting that homeowners choose not to default to avoid the shame associated with foreclosure).

194. *See supra* note 193 and sources cited therein.

195. *See* Joel F. Handler & Ellen Jane Hollingsworth, *Stigma, Privacy, and Other Attitudes of Welfare Recipients*, 22 STAN. L. REV. 1, 1 (1969) ("All believed that the failure to earn a living was a sign of moral decay . . ."); *see also* Jennifer Sherman, *Bend to Avoid Breaking: Job Loss, Gender Norms, and Family Stability in Rural America*, 56 SOC. PROBS. 599, 600 (2009) ("Job loss can have destructive effects on men's self-esteem, with results that range from authoritarian stances within the family, to drinking and substance abuse, to domestic violence.") (citations omitted).

196. *See supra* notes 141-43 and sources cited therein; *see also* Kristof, *supra* note 133.

197. Economists have studied the stigmatizing effects of criminal convictions, but I know of no comparable studies in the civil context. *See, e.g.*, Jeffrey R. Kling, *Incarceration Length, Employment, and Earnings* 1-3 (Nat'l Bureau of Econ. Research, Working Paper No. 12003, 2006), *available at* http://www.nber.org/papers/w12003 (collecting literature on stigmatization resulting from criminal convictions).

198. *See, e.g.*, FREEDMAN, *supra* note 115 (articulating the role of criminal defense counsel when the adversary is the State).

sel in criminal cases. Part III.A will explain how the disproportionate power of the State threatens to distort the adversarial process in the absence of a counterweight to even the playing field. Part III.B will consider whether the source of the imbalance is the mismatch between a lawyer and a pro se party but will conclude that such lawyer-pro se mismatches systematically occur in cases between private parties as well. Part III.C will entertain the possibility that government power is uniquely dangerous. It will identify a narrative that depicts the State as a dangerous entity whose power must be checked and will suggest that the basic reason for the prioritization of criminal over civil counsel is a view of lawyers as professional shields against government intrusion. Parts IV and V will argue, however, that this perspective is mistaken, and will offer a more positive interpretation of the lawyer's role.

A. Imbalance of Adversaries

In a contest between the State and an unrepresented individual, the imbalance of power between the two parties appears stark.[199] Such a dynamic, if uncorrected, would threaten our notion of procedural fairness, as well as our faith in the accuracy and legitimacy of the substantive outcome.[200] Defense counsel must be installed, the argument goes, to even the playing field.

The State has far more power and expertise than the criminal defendant to investigate and present a case.[201] It has a police force to track down witnesses and physical evidence. Its investigators and forensic experts are trained in interviewing witnesses and analyzing evidence. The State has the power to compel witnesses to cooperate. Through the force of law, and with physical force, witnesses can be made to divulge information and potentially even provide false testimony to aid the State's position.[202] These resources and dynamics combine to support a prosecutor's efforts to assemble and present the strongest case for conviction.

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199. *See id.* at 4-5.

200. *See* Strickland v. Washington, 466 U.S. 668, 691-92 (1984) ("The purpose of the Sixth Amendment guarantee of counsel is to ensure that a defendant has the assistance necessary to justify reliance on the outcome of the proceeding."); Herring v. New York, 422 U.S. 853, 862 (1975) ("The very premise of our adversary system of criminal justice is that partisan advocacy on both sides of a case will best promote the ultimate objective that the guilty be convicted and the innocent go free."); *see also* SANDEL, *supra* note 113, at 25-54 (critiquing reliance on procedural rights and inattention to substantive outcomes); Alexandra Natapoff, Gideon *Skepticism*, 70 WASH. & LEE L. REV. 1049, 1060 (2013) (challenging dependence on "the right to counsel [as] a procedural substitute for substantive underlying accuracy concerns").

201. *See* David Luban, *Are Criminal Defenders Different?*, 91 MICH. L. REV. 1729, 1731-36 (1993).

202. *See* ALICE GOFFMAN, ON THE RUN: FUGITIVE LIFE IN AN AMERICAN CITY 55-72 (2014) (describing pressures on witnesses).

None of these advantages is available to a defendant. If he or she has been arrested, the physical restraint poses a direct impediment on the ability to investigate. Even if free, an ordinary individual has no army of foot soldiers to conduct research. One might not know what to do with such agents if they were available. The individual may not appreciate which facts will be considered most relevant to a judge, jury, or prosecutor and which would be better to omit. A lay-person is unlikely to understand the rules of procedure and evidence, let alone how best to use them in mounting a defense. One might be unaware of legal rights one possesses or lack the experience and training needed to recognize a violation of them. Should one intuit that some aspect of the process is improper, one might lack the skill to articulate and challenge the impropriety.

This inequality between the parties is particularly troubling in an adversarial system of justice like that in the United States.[203] In an adversarial system, the development and presentation of the case is the responsibility of the parties. The parties conduct factual investigations and legal research, and they choose how to frame the case.[204] They make claims and articulate defenses that they select. They bear responsibility for procedural arguments and evidentiary objections. Throughout, they maintain primary responsibility for identification and articulation of the issues that the court will address.

The judge and jury, in contrast, take a neutral and relatively passive role.[205] The judge generally does not conduct fact-finding nor direct the investigations performed by the parties. The judge may limit the evidence to be admitted or the time devoted to particular matters, but this is in the spirit of serving as an umpire and maintaining rules of fair play, not guiding the substance of the case. The judge may request that the parties prepare briefs on questions that require further study, but even then the court relies on the parties to bring the material to the court's attention. Judges may conduct legal research beyond that which the parties provide, but courts generally rule on

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203. The adversarial system generally distinguishes American courts from those of nations that take an inquisitorial approach. For a comparison, see W. Bradley Wendel, *Lawyers as Quasi-Public Actors* 7-13 (Cornell Law Sch. Legal Studies Research Paper Series, Paper No. 08-012), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1024309 (comparing common law with civil law systems); *see also* DAVID LUBAN, LAWYERS AND JUSTICE: AN ETHICAL STUDY 69-77 (1988) (suggesting that comparison reveals flaws in the American system).

204. *See, e.g.*, FED R. CIV. P. 26-37, 45(a)(3) (defining the rules of discovery and granting attorneys power to issue and sign subpoenas as officers of court).

205. *See* Marc Galanter, *Why the "Haves" Come Out Ahead: Speculation on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95, 119-20 (1974).

the arguments presented. If judges raise new issues *sua sponte*, they may be criticized for straying from their position of neutrality.[206]

One of the basic rationales for an adversarial system of justice is that a contest between opposing parties, before an impartial tribunal, will allow an accurate picture of events to emerge.[207] Each side has the opportunity to test and poke holes in the theories of the other.[208] The combined effort should ferret out the truth and help the decision-maker reach the right decision.[209]

If the State can overwhelm the criminal defendant, however, the defendant might not succeed in producing an effective challenge to the State's perspective. The jury might hear one theory that is persuasive and another that is inarticulate. Without the benefit of fully-developed presentations on both sides, the fact-finder could reach the wrong conclusion.[210]

The potential imbalance of adversaries is a key rationale for the appointment of counsel in criminal cases. Yet there are still two possible versions of this rationale. One version posits that the State is likely to enjoy representation by counsel, and therefore an even playing field requires counsel for the individual on the other side. Another version suggests that there is something unique about the State as a party such that, even beyond the mismatch between a lawyer and a pro se party, counsel for the State's adversaries serves a special role. The next two Subparts will address these issues in turn.

B. Pro Se v. Lawyer

The potential for pairing a represented party with an unrepresented party is significant in the criminal justice context. The prosecutor will be an attorney; the criminal defendant will usually be a layperson. The mismatch between a pro se party and a lawyer

206. A growing body of literature argues that judges can and should take a more active role to protect the rights of unrepresented parties while maintaining neutrality. *See* Engler, *supra* note 2, at 46 n.110 (collecting literature supporting the active judicial role).

207. *See* United States v. Nobles, 422 U.S. 225, 230 (1975).

208. *See, e.g.*, FREEDMAN, *supra* note 115, at 4.

209. Some point out that rules of procedure and evidence block truth from reaching the forum. While rules based on individual rights and notions of fairness do regularly trump the need for truth, their presence does not necessarily disprove the role of truth as a motivating factor for the design of the system. As just one example, the privilege against self-incrimination may function to exclude a confession from court, but perhaps the underlying rationale, beyond a notion of due process, dignity, or the potential burden, is a concern about coerced confessions by innocent parties. *See id.* at 3-4 (describing truth as a basic value the adversary system is designed to serve but also identifying "higher values" that may occasionally supplant the search for truth).

210. The unjust outcome might merit special concern given the high value of the potential loss for the defendant. *See supra* Part II (analyzing the significance of the interests at stake).

threatens the functionality and legitimacy of the legal process and its results.

Nonetheless, it must be recognized that the routine, systemic pairing of pro se parties against lawyers is not a threat unique to criminal litigation between private parties and government actors. Broad categories of civil litigation suffer from the same dynamic. Consumers and debtors routinely appear pro se against represented adversaries.[211] Studies of housing court show that roughly ten percent of tenants are represented while roughly ninety percent of landlords are represented.[212] The vast majority of these cases involve direct and predictable mismatches.[213]

Such mismatches exacerbate other asymmetries in the litigation process. As Marc Galanter has demonstrated, certain categories of private actors, because of their economic position and the subject matter of the lawsuits in which they are involved, are "repeat players" in the courts; repeat players enjoy a variety of advantages and are generally more likely to be represented by sophisticated counsel.[214] For example, large employers, product manufacturers, and insurance companies are repeat players. Such repeat players hire attorneys as general counsel or retain outside counsel on a continuing basis.[215] In contrast, most natural persons are not repeat players. Most natural persons retain counsel, if at all, on a "one-shot" basis when faced with particular litigation. Most natural persons cannot afford to retain counsel and, in civil matters, often forgo their claims

211. *See* Richard L. Abel, *Why Does the ABA Promulgate Ethical Rules?*, 59 TEX. L. REV. 639, 681 (1981) ("In the vast majority of transactions in every consumer sales or loan contract . . . one party is unrepresented."); Russell Engler, *Out of Sight and Out of Line: The Need for Regulation of Lawyers' Negotiations with Unrepresented Poor Persons*, 85 CALIF. L. REV. 79, 118 (1997) (describing the mismatch between represented creditors and unrepresented debtors).

212. COMTY. TRAINING & RES. CTR. & CITY-WIDE TASK FORCE ON HOUS. COURT, INC., HOUSING COURT, EVICTIONS AND HOMELESSNESS: THE COSTS AND BENEFITS OF ESTABLISHING A RIGHT TO COUNSEL iv (1993), *available at* http://cwtfhc.org/wp-content/uploads/pdf/donaldson.pdf.

213. *See id.*

214. *See* Galanter *supra* note 205, at 97-100.

215. *See* Galanter *supra* note 114, at 361 ("Legal professionals in the United States can be roughly dichotomized into those who service OSs ["one-shotters"] on an episodic basis and those who serve RPs ["repeat-players"] on a continuing basis."). Notably, repeat players not only shape the common law that will govern their actions but also benefit from economies of scale in retaining representation. *Id.* at 361-62.

or appear pro se, mostly as defendants.[216] Repeat players routinely fare better than "one-shotters" in courts.[217]

One-shotters and repeat players intersect on a regular basis as part of daily life. For example, intersections occur between: tenants and landlords; employees and employers; and consumers and product manufacturers. Disputes between such parties arise in the ordinary course of dealing, and such disputes end up in court with some regularity.[218] As a result, the occurrence of an unrepresented one-shotter facing off against a represented repeat player is common.[219]

The unrepresented individual facing a represented private party in a civil matter will be stuck in a layperson-versus-lawyer dynamic like that of an unrepresented criminal defendant facing a prosecutor. In the civil context, such dynamics systemically recreate the imbalance of adversaries that the appointment of counsel in the criminal context sought to avoid. If, in the interest of a functional, truth-seeking, legitimate adversary system, legal representation for one party necessitates representation for the other, it is unclear why this logic should not apply in civil matters between private parties.

If the mismatch between represented parties and unrepresented parties is not unique to the criminal context, this leaves unanswered the question of what makes criminal defense counsel especially important. The next Subpart will explore the view that the State is a uniquely dangerous adversary whose power must be checked by counsel.

C. Danger of State Power

Scholars have asserted that the enormity and uniqueness of the power of the State distinguish criminal defense from all other spheres of practice. As William Simon has observed, even ethicists who question the ideal of lawyers as neutral, zealous partisans[220]

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216. *See* David C. Vladeck, In re Arons*: The Plight of the "Unrich" in Obtaining Legal Services, in* LEGAL ETHICS STORIES 255, 261, 284-86 (Deborah L. Rhode & David Luban eds., 2006).

217. *See* Galanter, *supra* note 114, at 360-61 (advantages for repeat players include specialized expertise, economies of scale, bargaining credibility, and ability to play for rules instead of individual results).

218. *See* Galanter, *supra* note 205, at 97.

219. *See id.*

220. *See* LUBAN, *supra* note 203, at 62-63; William H. Simon, *The Ideology of Advocacy: Procedural Justice and Professional Ethics*, 1978 WIS. L. REV. 29, 36-37 (1978); *cf.* William H. Simon, *Ethical Discretion in Lawyering*, 101 HARV. L. REV. 1083 (1988) (arguing that lawyers should have ethical discretion to consider whether assisting a client would further justice).

carve out an exception for criminal defense attorneys on the theory that the zeal of these lawyers carries a special purpose.[221]

Part of the value placed on the role of counsel in criminal cases depends on the idea that government power is intrinsically dangerous and special steps must be taken to protect against the possibility of tyranny.[222] David Luban has summarized the reasoning as follows:

> We want to handicap the state in its power even legitimately to punish us, for we believe as a matter of political theory and historical experience that if the state is not handicapped or restrained *ex ante,* our political and civil liberties are jeopardized. Power-holders are inevitably tempted to abuse the criminal justice system to persecute political opponents, and overzealous police will trample civil liberties in the name of crime prevention and order.[223]

Theorists have argued that, even beyond the search for truth, the adversary system of justice serves to protect individual dignity.[224] Criminal defense counsel serves not simply to even the playing field to help the court reach the right substantive outcome but also to protect the integrity of the adversary system.[225] Without criminal de-

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221. *See* William H. Simon, Commentary, *The Ethics of Criminal Defense*, 91 MICH. L. REV. 1703, 1703-04 (1993); *see also* LUBAN, *supra* note 202, at 58-66; Deborah L. Rhode, *Ethical Perspectives on Legal Practice*, 37 STAN. L. REV. 589, 605 (1985); Richard Wasserstrom, *Lawyers as Professionals: Some Moral Issues*, 5 HUM. RTS. 1, 12 (1975).

222. *See* Stephen Ellmann, *Lawyering for Justice in a Flawed Democracy*, 90 COLUM. L. REV. 116, 142 n.51 (1990) (reviewing DAVID LUBAN, LAWYERS AND JUSTICE: AN ETHICAL STUDY (1988)) (describing the importance of countering states' power for tyranny); Griffiths, *supra* note 13, at 363-64 (citing HERBERT L. PACKER, THE LIMITS OF THE CRIMINAL SANCTION (1968)).

223. LUBAN, *supra* note 203, at 60. Herbert Packer offers another formulation of this perspective:

> [Criminal] processes . . . are in themselves coercive, restricting, and demeaning. Power is always subject to abuse, sometimes subtle, other times, as in the criminal process, open and ugly. Precisely because of its potency in subjecting the individual to the coercive power of the state, the criminal process must, on this model, be subjected to controls and safeguards that prevent it from operating with maximal efficiency. According to this ideology, maximal efficiency means maximal tyranny. And, while no one would assert that minimal efficiency means minimal tyranny, the proponents of the Due Process Model would accept with considerable equanimity a substantial diminution in the efficiency with which the criminal process operates in the interest of preventing official oppression of the individual.

Packer, *supra* note 115, at 16.

224. *See, e.g.*, FREEDMAN, *supra* note 115, at 3-4 (describing human dignity as among the "higher values" to which even truth-seeking may be subordinated).

225. *Id.* at 24 ("[Z]ealous and effective advocacy is essential to the adversary system, . . . a precious safeguard that any one of us may have occasion to call upon if we should come to need our own champion against a hostile world."); Abbe Smith, *Too Much Heart and Not Enough Heat: The Short Life and Fractured Ego of the Empathetic, Heroic Public Defender*, 37 U.C. DAVIS L. REV. 1203, 1208-11 (2004) ("Defenders uphold the political philosophy underlying the American system of justice and safeguard the dignity of each member of society no matter how low he or she has fallen.").

fense counsel to challenge it, the State might imprison and kill citizens arbitrarily.[226] The danger of allowing the State to go toe to toe with an unrepresented defendant is that the process would be subject to the government's abuse of power, and the people's rights before, during, and after would be trampled.[227] Particularly given that the State has the special power to exert legitimized force, defense counsel is needed to obstruct the application of that force.[228]

Of course it must be recognized that the State's power as an adversary is not limited to criminal prosecution. Termination of parental rights, eviction from public housing, and restriction of social security income provide examples of proceedings that pit an unrepresented individual against the State. Criminal defense is not the only form of litigation through which people challenge the power of the State. Arguably, affirmative civil rights litigation presents more direct challenges to government power than does criminal defense.[229] In civil litigation regarding police brutality, substandard prison conditions, and many other constitutional and statutory claims, the State is a party, and the aim of counsel for the individual is indistinguishable from that of many criminal defense attorneys: to "police the police, to audit the government, [and] . . . fight for fairness."[230] The criminal case is not unique in presenting a scenario whereby a potentially vulnerable individual fights the State over deeply important interests and counsel for that individual serves to check the State's power.

Moreover, the depiction of the State as a massive behemoth is in some cases more mythical than real. Some government coffers are relatively strained.[231] In white collar criminal defense, the defendant, rather than the prosecutor, could have the larger arsenal at his or her disposal.[232] Securities litigation is just one field in which private actors' litigation budgets dwarf that of the government agency charged with enforcement.[233] While the cases of wealthy private defendants do not involve appointment of counsel, they nonetheless il-

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226. *See* LUBAN, *supra* note 203, at 60; Packer, *supra* note 115, at 16.

227. *See* Packer, *supra* note 115, at 14.

228. *See* LUBAN, *supra* note 203, at 62.

229. On the flip side, in many cases the State protects civil rights by serving as the prosecutor, such as when the Department of Justice or the Equal Employment Opportunity Commission initiates proceedings.

230. Abbe Smith, *Defending Defending: The Case for Unmitigated Zeal on Behalf of People Who Do Terrible Things*, 28 HOFSTRA L. REV. 925, 957 n.158 (2000) (citation omitted); *see* Andrew J. Mathern, Note, *Federal Civil Rights Lawsuits and Civil* Gideon*: A Solution to Disproportionate Police Force?*, 15 J. GENDER RACE & JUST. 353 (2012).

231. *See* Rhode, *supra* note 221, at 607.

232. *See* LUBAN, *supra* note 203, at 65; Rhode, *supra* note 221, at 607.

233. *See* James B. Stewart, *As a Watchdog Starves, Wall St. Is Tossed a Bone*, N.Y. TIMES, July 15, 2011, at A1, *available at* http://www.nytimes.com/2011/07/16/business/budget-cuts-to-sec-reduce-its-effectiveness.html?_r=0.

lustrate the point that imbalances of power do not categorically favor the State.

Relatedly, inequality between adversaries is not restricted to cases in which the State is one of the parties. As discussed above in Part III.B, in particular categories of litigation between private parties, one side is routinely pro se while the other is routinely represented by counsel, and these mismatches exacerbate other asymmetries in the litigation process. The prioritization of criminal over civil counsel rests on a perceived need to counterbalance State power, but, as the following Part will argue, government power is not the only form of power that must be restrained. Private actors wield substantial power over the lives of ordinary people, and civil lawyers play a vital role in checking the limits of that power as well.

IV. PRIVATE POWER

Individuals often experience stark imbalances of power in their interactions with private actors. Private actors control access to the resources essential for life[234]—such as food, shelter, and medicine[235]—and those essential for participation in democratic society—information,[236] communication,[237] and, increasingly, physical safety.[238] The private actors who control this access also exercise disproportionate power in the litigation process where that access can be contested.[239] Part IV.A will highlight the potential dangers of private power. Part IV.B will then suggest that, beyond its position as prosecutor, the State can and does serve a vital function as a regulator of private power. Part V will turn to the role of lawyers as professional enforcers of such regulation.

A. Danger of Private Power

A sharp difference in resources can occur between two private parties, and empirical evidence demonstrates that such inequality in fact routinely occurs in systematic and predictable ways.[240] In custody disputes between men and women, the former tend to be wealthier,

234. *See* Metzger, *supra* note 11, at 1377-94, 1396.

235. *See id.* (describing private control over welfare, Medicare, Medicaid, and care for prisoners).

236. *See* Fiss, *supra* note 149, at 787-90 (highlighting the power of corporate media to shape public debate).

237. *Id.*

238. *See* Sharon Dolovich, *State Punishment and Private Prisons*, 55 DUKE. L.J. 437 (2005); Clifford J. Rosky, *Force, Inc.: The Privatization of Punishment, Policing, and Military Force in Liberal States*, 36 CONN. L. REV. 879 (2004); David A. Sklansky, *The Private Police*, 46 UCLA L. REV. 1165 (1999).

239. *See* Galanter, *supra* note 114, at 347-48; Galanter, *supra* note 205, at 95-104.

240. *See* Galanter, *supra* note 205, at 97.

and this influences the gathering of evidence and ultimate outcomes.[241] In employment disputes, where the discovery process can require scouring extensive records and conducting complex depositions, employers regularly outspend their adversaries, causing workers to settle for relatively small sums or not to raise claims in the first place.[242]

To be sure, there are cases where private parties are evenly matched. The mismatch is not certain to occur in either the private-private or the private-government dynamic. But there are certain social relationships where the mismatch is more likely than not, and these relationships do occur with regularity and predictability in the private sector.[243]

Private parties with power can also be arbitrary or abusive and can use their power to threaten or cajole.[244] A supervisor at work, with control over a subordinate's duties, hours, pay, and job security, can make the subordinate's "life a living hell."[245] Landlords, too, enjoy power over their tenants' lives,[246] and abuse of that power occurs.[247]

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241. *See* Gaines, *supra* note 182; Martha A. Field, *Surrogate Motherhood, in* PARENTHOOD IN MODERN SOCIETY: LEGAL AND SOCIAL ISSUES FOR THE TWENTY-FIRST CENTURY 223, 230 (John Eekelaar & Petar Sarcevic eds., 1993); *Gender Bias Study of the Court System in Massachusetts*, 24 NEW ENG. L. REV. 745, 764 (1990) ("Family law experts believe that women are unrepresented more often than men and that the outcomes they obtain suffer as a result."); *see also* Richard L. Abel, *Socializing the Legal Profession: Can Redistributing Lawyers' Services Achieve Social Justice?*, 1 L. & POL'Y Q. 5, 14 (1979) (arguing that most litigation involving poor people cannot redistribute advantages "except, significantly, between men and women").

242. Samuel Estreicher, *Saturns for Rickshaws: The Stakes in the Debate Over Predispute Employment Arbitration Agreements*, 16 OHIO ST. J. ON DISP. RESOL. 559, 563 (2001).

243. *See* Galanter, *supra* note 205, at 114.

244. *See* Metzger, *supra* note 11, at 1396.

245. Vance v. Ball State Univ., 133 S. Ct. 2434, 2460 (2013) (Ginsburg, J., dissenting) (quoting Whitten v. Fred's Inc., 601 F.3d 231, 236 (4th Cir. 2010)) (internal quotation marks omitted). *See id.* at 2456-57 (describing how power imbalance keeps an employee captive during a supervisor's harassment); *id.* at 2457-60 (providing examples of supervisors abusing their power to alter conditions of the workplace).

246. *See* Kleysteuber, *supra* note 170, at 1349 (describing tenant blacklist abuse whereby tenant's future ability to rent is damaged permanently based on landlord's allegation alone). The potential for abuse is exemplified in the following threatening letter sent by a landlord to a tenant:

> [W]e now subscribe to a service that records all filings on [eviction] actions. As this service is used by landlords, it will be impossible, in the future, to rent an apartment if you have been served a legal action. We are advising you of this, as the failure to pay your rent on time[] will result in your name being placed in the file, and you will be unable to secure any apartment in the future.

Id. (quoting Robert W. Benson & Raymond A. Biering, *Tenant Reports as an Invasion of Privacy: A Legislative Proposal*, 12 LOY. L.A. L. REV. 301, 301 (1979)).

247. *See, e.g.*, Theresa Keeley, *Landlord Sexual Assault and Rape of Tenants: Survey Findings and Advocacy Approaches*, 40 CLEARINGHOUSE REV. J. POVERTY L. & POL'Y 441, 442-43 (2006) (collecting empirical studies of sexual abuse by landlords); *Introductory Outline on Sexual Harassment in Housing*, NAT'L HOUS. LAW PROJECT, http://nhlp.org/node/436 (last visited July 24, 2015) ("Due to the ever-growing demand for decent, affordable hous-

In recent decades, a large scholarly literature has documented the expanded privatization of public services.[248] As is common knowledge, private entities control access to electricity,[249] water,[250] and the Internet.[251] Private entities also run prison facilities,[252] police forces,[253] and national security operations.[254] David Sklansky has aptly described the ubiquity of private forces:

> Uniformed private officers guard and patrol office buildings, factories, warehouses, schools, sports facilities, concert halls, train stations, airports, shipyards, shopping centers, parks, government facilities—and, increasingly, residential neighborhoods. On any given day, many Americans are already far more likely to encounter a security guard than a police officer . . . .
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> . . . .
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> . . . [G]overnment agencies are hiring private security personnel to guard and patrol government buildings, housing projects, and public parks and facilities, and a small but growing number of local governments have begun to experiment with broader use of private police.[255]

As private entities increasingly take over common public functions, their power over ordinary people grows.

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ing, landlords hold increased power over whom they rent to and under what circumstances. As a result of this power imbalance, many tenants are subjected to sexual harassment by housing providers and their agents.").

248. *See* Metzger, *supra* note 11, at 1371-73 (highlighting the "new reality of privatized government" and collecting related literature).

249. *Cf.* Jackson v. Metro. Edison Co., 419 U.S. 345, 353 (1974) (ruling that utility services are "not traditionally the exclusive prerogative of the State").

250. *See* Craig Anthony Arnold, *Water Privatization Trends in the United States: Human Rights, National Security, and Public Stewardship*, 33 WM. & MARY ENVTL. L. & POL'Y REV. 785, 791-93 (2009) (describing the trend of privatizing water).

251. *See* Jim Dwyer, *For Those in the Digital Dark, Enlightenment is Borrowed from the Library*, N.Y. TIMES, July 9, 2014, at A17, *available at* http://www.nytimes.com/2014/07/09/nyregion/for-those-in-the-digital-dark-enlightenment-is-borrowed-from-the-library-.html?_r=0 ("For most of the city, two companies, Time Warner and Verizon, provide broadband access, at an annual cost of close to $1,000 per home. For many houses, that means no access at all."); *see also* Margaret Jane Radin & R. Polk Wagner, *The Myth of Private Ordering: Rediscovering Legal Realism in Cyberspace*, 73 CHI.-KENT L. REV. 1295, 1298-1306 (1998) (describing the development of private trademark rights with respect to domain names).

252. *See Developments in the Law—The Law of Prisons*, 115 HARV. L. REV. 1838 (2002).

253. *See generally* Sklansky, *supra* note 239 (describing the private security industry).

254. *See* Jonathan Fahey & Adam Goldman, *NSA Leak Highlights Key Role of Private Contractors*, HUFFINGTON POST (June 10, 2013, 11:00 PM), http://www.huffingtonpost.com/2013/06/10/nsa-leak-contractors_n_3418876.html; *see also* Hepting v. AT&T Corp., 439 F. Supp. 2d 974, 992-93 (N.D. Cal. 2006) (describing wiretapping by AT&T Corporation).

255. Sklansky, *supra* note 238, at 1175-77 (footnote omitted).

Given the scope of private control and potential for private abuses of power, it is unclear whether the presence of a government adversary should be the indicator of a need for counsel. For many people, the influence that private parties exert over their lives is as ubiquitous and significant as that exerted by the State. Relatedly, where there are imbalances between ordinary people and the private actors that control vital resources, the role of the State is not necessarily as the adversary of the people but may be as their protector. In these contexts, the lawyer might serve not to thwart the State but to assist it.

B. The State as Regulator of Private Power

If we tend to discount the danger of private power, it may be because we focus so intently on the State as the danger. The dangers of State power inform the very structure of the U.S. government's design.[256] Yet the State is not only a danger. In the natural world and the market, power inequalities exist between private parties, and one role of the State is to protect the less powerful. The design of our government also reflects this protective purpose.[257]

A core function of government is to provide collectively that which individuals cannot obtain on their own.[258] This includes creating and enforcing rules of the road for interactions between private parties. While government agents must be checked to prevent abuse of power, they must also be strong enough to check private actors from abusing one another.[259]

As legislator, adjudicator, and enforcer, the State can support and limit the conduct of private parties to equalize power imbalances that would exist in the natural world.[260] The State can prevent private parties from using their physical and economic power in ways that could lead to unjust harm or chaos. The State can also offer fora for the peaceful and just resolution of disputes.[261]

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256. *See* Griffiths, *supra* note 13, at 380-81.

257. *See* Fiss, *supra* note 149, at 788 ("The purpose of the state is not to supplant the market (as it would under a socialist theory), nor to perfect the market (as it would under a theory of market failure), but rather to supplement it.").

258. *See* MAXINE EICHNER, THE SUPPORTIVE STATE 8-12 (2010).

259. *See* Fiss, *supra* note 149, at 781-83 (describing efforts to limit state power and advocating for "the necessity of an activist state").

260. *See* Martha Albertson Fineman, *The Vulnerable Subject: Anchoring Equality in the Human Condition*, 20 YALE J.L. & FEMINISM 1, 7 (2008).

261. The role of the State permeates all civil and criminal proceedings, from creating and maintaining the governing laws to adjudicating and enforcing them. In the criminal proceeding, the State serves as prosecutor and judge, but even in cases between two private parties, the State plays a role. As just one example, if a landlord brings a successful eviction proceeding against a tenant, a judge issues the judgment of possession, and it is the marshal or sheriff, not the landlord, who will forcibly remove the tenant if she attempts to remain on the premises after that judgment. Although the state action doctrine has sought to distinguish between levels of state involvement, scholars have demonstrated the

Governmental actors routinely mediate power imbalances between private parties through the passage of legislation. The Fair Labor Standards Act prevents employers from pressuring employees to accept pay rates below a set minimum.[262] Consumer protection laws prevent sellers from engaging in fraud or deception.[263] Environmental statutes protect the public's supply of clean water by restricting the actions of private actors who would pollute it.[264] Housing statutes prevent landlords from arbitrarily ejecting tenants from their homes.[265] Indeed, legislation limits private actors' imposition of collateral consequences after criminal convictions[266] and civil judgments.[267] It affirmatively promotes access to employment and housing by prohibiting discrimination against protected classes[268] and against persons with criminal records[269] or eviction histories.[270]

The State is more than a criminal prosecutor, and the justice system includes more than the criminal justice system. Lawyers have a role not only in checking State power, but also in helping people to obtain State support and helping to enforce the State's regulation of power inequalities between private parties.

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inherent difficulty with resting rights on such a project. *See* Erwin Chemerinsky, *Rethinking State Action*, 80 NW. U. L. REV. 503, 505-07 (1985) (arguing that the state action requirement is incoherent and undesirable and should be abandoned); Metzger, *supra* note 11, at 1371-73 n.6-10 (collecting literature on the state action doctrine).

262. 29 U.S.C. § 206 (2012).

263. *See generally* COMPTROLLER OF THE CURRENCY ADM'R OF NAT'L BANKS, OTHER CONSUMER PROTECTION LAWS AND REGULATIONS (2009), *available at* http://www.occ.gov/publications/publications-by-type/comptrollers-handbook/other.pdf, for a summary of federal consumer protection laws.

264. See generally DAVID M. BEARDEN ET AL., CONG. RESEARCH SERV., ENVIRONMENTAL LAWS: SUMMARIES OF MAJOR STATUTES ADMINISTERED BY THE ENVIRONMENTAL PROTECTION AGENCY (2013), *available at* http://www.fas.org/sgp/crs/misc/RL30798.pdf, for a summary of federal environmental laws.

265. *See, e.g.*, N.Y. REAL. PROP. ACTS. LAW § 853 (McKinney 2014) (providing right of action to challenge forcible or unlawful exclusion from property).

266. *See* King, *supra* note 56, at 47 n.273 (listing state legislation prohibiting employment discrimination against persons with criminal convictions).

267. *E.g.*, N.Y.C. ADMIN. CODE §§ 20-807 to -811 (2014) (providing protections against tenant blacklisting); *see Proposed State Legislation Would Safeguard Tenants' Rights in Foreclosure*, 40 HOUSING L. BULL. 131, 134 (2010) (listing state legislation that requires sealing of eviction records).

268. 42 U.S.C. § 3604 (2012) (prohibiting housing discrimination).

269. *See* King, *supra* note 56, at 47 n.273.

270. § 3604.

V. ROLE OF LAWYER

How well the State regulates power imbalances between private parties depends in part on the distribution of lawyers.[271] Many categories of civil laws are underenforced because of the unavailability of counsel to represent the individuals with claims.[272] At the same time, other categories are overenforced because, routinely, plaintiffs retain counsel while defendants cannot.[273] The imbalance in representation has the potential to stymie the protection of individual rights and also to thwart the rule of law.[274] Part V will explore the roles that counsel can serve to protect the rule of law and to promote their clients' equal participation in and access to the fruits of civil society.

A. Protector of Rule of Law and Check on Use of Force

The classic rationale for the appointment of criminal defense counsel is that her participation is essential to protect procedural and substantive legal rights against governmental overreach or abuse.[275] The U.S. Constitution supplies the criminal defendant with a handful of protections from the State, but she needs a lawyer to bring them to life.[276] She cannot invoke her rights without legal assistance. Lawyers serve to ensure that clients' rights are protected and the rule of law is maintained.[277]

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271. *See* David Luban, *Taking Out the Adversary: The Assault on Progressive Public-Interest Lawyers*, 91 CALIF. L. REV. 209, 213 (2003) (arguing that hobbling advocates undermines the legitimacy of the adversary system).

272. *See* Vladeck, *supra* note 216, at 284-86.

273. *See supra* notes 211-19 and accompanying text.

274. *See* Albiston & Sandefur, *supra* note 8, at 113; Fiss, *supra* note 164, at 1085; Kathryn A. Sabbeth & David C. Vladeck, *Contracting (Out) Rights*, 36 FORDHAM URB. L.J. 803, 830-32 (2009); *see also* Complaint at 1, People v. JPMorgan Chase & Co., No. BC508466, 2013 WL 1915821 (L.A. Cnty., Cal. Super. Ct. May 9, 2013) (describing "massive debt collection mill" whereby JPMorgan "flooded . . . courts with collection lawsuits against defaulted credit card borrowers based on patently insufficient evidence—betting that borrowers would lack the resources or legal sophistication to call Defendants' bluff"), *available at* http://oag.ca.gov/system/files/attachments/press_releases/Complaint_0.pdf?; Peter A. Holland, *The One Hundred Billion Dollar Problem in Small Claims Court: Robo-Signing and Lack of Proof in Debt Buyer Cases*, 6 J. BUS. & TECH. L. 259, 262 (2011) (describing widespread consumer abuse resulting from the "debt buyer litigation model . . . characterized by a sophisticated business represented by a skilled lawyer suing an unsophisticated, unrepresented consumer in which no formal rules of evidence are applied, and rank hearsay is rampant").

275. *See* Kaley v. United States, 134 S. Ct. 1090, 1114 (2014) (Roberts, C.J., dissenting); *see also* Vincent Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. B. FOUND. RES. J. 521, 542 (1977) ("[P]rofessional critics are necessary to check government misconduct.").

276. *See* Kaley, 134 S. Ct. at 1107 (citing United States v. Cronic, 466 U. S. 648, 653-54 (1984)).

277. *See* Weissman, *supra* note 148, at 743-49 (describing the role of lawyers in protecting the rule of law).

The violation of an individual's rights threatens the stability of democratic society more broadly. If the process is not maintained in one case, deterrence of bad conduct may be diminished. A lawyer not only protects the client from having improperly seized evidence used at trial but also protects the citizenry from a world in which improper seizures are commonplace. The recognized need for counsel reflects a suspicion that the State would abuse its power and violate the rights of the people if not for vigilant guardians to protect them.[278] The lawyer's obligation is to defend the integrity of the process.[279] By safeguarding the safeguards, the lawyer serves to ensure a society governed by the rule of law rather than the rule of might.

The lawyer also protects the client's substantive rights. She protects the otherwise vulnerable client from a harsh outcome.[280] She wards off the State's use of force, preventing, mitigating, or at least delaying it.[281] A major impetus for the structure of the adversarial trial, and the role of the criminal defense lawyer within it, is to create a barrier between the individual and the coercive force of the State.[282] The lawyer serves not only as the guarantor of fair play but, more fundamentally, as the buffer between the client and the State's acts of force.[283]

If criminal defense lawyers safeguard rights and the rule of law,[284] lawyers in the civil context serve a comparable function. Lawyers representing civil defendants ensure that substantive and procedural laws are maintained and protect civil defendants against plaintiffs

278. *See* Johnson v. Zerbst, 304 U.S. 458, 463 (1938).

279. *See* MONROE H. FREEDMAN & ABBE SMITH, UNDERSTANDING LAWYERS' ETHICS 22 (2002).

280. Note the nexus between the private interests at stake and the identity of the adversary. The criminal defense lawyer serves to keep the State from imposing imprisonment or death. *See supra* Part II.A.

281. *See* LUBAN, *supra* note 203, at 62 (describing the criminal adversarial process and the lawyer's role within it as creating an obstacle course for the State); *see also* Packer, *supra* note 115, at 13 ("If the Crime Control Model resembles an assembly line, the Due Process Model looks very much like an obstacle course. Each of its successive stages is designed to present formidable impediments to carrying the accused any further along in the process.").

282. *See* Griffiths, *supra* note 13, at 387 ("The defendant's interest is *only* to resist the imposition on himself of any State power.").

283. *See* Natapoff, *supra* note 155, at 1352 ("[T]he focus on punishment and cost omits other core values served by criminal adjudication—the standard ones being legality, evidentiary accuracy, and fair process.").

284. Some scholars have challenged the portrait of lawyers safeguarding rights and the rule of law. *See, e.g.*, Erica J. Hashimoto, *The Price of Misdemeanor Representation*, 49 WM. & MARY L. REV. 461, 489-94 (2007). Particularly given the predominance of pleas rather than trials, this portrait may be viewed as romantic more than real. *See* Natapoff, *supra* note 201, at 1066-70. However, others have responded that, particularly in a climate of bargains influenced more by the power of the adversary than the shadow of the law, the presence of counsel is as critical as ever for combatting that power. *See* Bowers, *supra* note 162, at 1142-44, 1150.

who would use the public courts to impose their will. For example, the tenant's attorney in an eviction case checks whether the basis for the proceeding is meritorious, as opposed to a careless error, an act of retaliation, or mere exertion of will. The lawyer defends by using the tools at his or her disposal to check the system.

In both criminal and civil contexts, if the civil plaintiff or criminal prosecutor short-circuits the process, the defense lawyer can challenge the violation of law. If police officers seize evidence without a warrant or exception, criminal defense counsel can move to have the evidence excluded. If a landlord ejects a tenant from a home without a judgment of possession, the tenant's lawyer can challenge this extralegal use of force.

Lawyers check not only physical but also economic power. Economic power plays a significant role in ordinary life,[285] and civil lawyers have an important role to play in protecting against its unbridled application. Numerous laws serve to check the abuse of economic power,[286] and such laws are not self-enforcing: they tend to be complex and require lawyers' assistance.[287] Lawyers can counterbalance inequalities of power between private actors. They can prevent private actors with greater economic power from abusing those with less. In so doing, they not only maintain the rule of law but also protect the dignity of the economically weaker members of society.[288]

B. Lawyering for Justice Beyond the Civil-Criminal Divide

The communities of persons unable to afford counsel in civil and criminal proceedings overlap substantially. Both are disproportionately poor people of color, and their criminal justice and civil justice needs are interrelated.[289] Lawyers have a role to play in supporting

285. *See supra* notes 239-44, 248-51 and accompanying text.

286. *See supra* Part IV.

287. It is for this reason that many of the laws protecting against private abuses of power specifically provide for the loser to pay attorneys' fees when plaintiffs prevail. *See, e.g.*, 42 U.S.C. § 1988(b) (2012); S. REP. NO. 94-1011, at 2 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5908, 5910 (1976) ("[I]f those who violate the Nation's fundamental laws are not to proceed with impunity, then citizens must have the opportunity to recover what it costs them to vindicate these rights in court."); *see also* Kathryn A. Sabbeth, *What's Money Got to Do with It? Public Interest Lawyering and Profit*, 91 DENV. U. L. REV. 441, 465-71, 488-92 (2014) (arguing that litigation pursuant to fee-shifting statutes is a form of public interest lawyering).

288. *See* FREEDMAN, *supra* note 115, at 24 ("[Z]ealous and effective advocacy is essential to the adversary system, . . . a precious safeguard that any one of us may have occasion to call upon if we should come to need our own champion against a hostile world."). For a common portrait of criminal defense attorneys protecting individual dignity, see also Smith *supra* note 225, at 1210 ("Defenders uphold the political philosophy underlying the American system of justice and safeguard the dignity of each member of society no matter how low he or she has fallen.").

289. The key difference between the populations may be one of gender: most civil legal services clients are female, while most clients of appointed criminal defense counsel are

their clients' equal participation in, and access to the resources of, civil society. The prioritization of criminal over civil counsel exaggerates the divide between the functions these lawyers serve and neglects the significance of accessing economic and political resources for both client populations. Further, it falsely suggests that the most valuable work of a lawyer is to ward off the intrusion of regulation, rather than to support its robust and equal application.[290]

In the criminal case, the best outcome from the perspective of the individual appears, at least at first blush, to be freedom from State interference.[291] In the civil case, sometimes the best outcome may be framed as freedom from State interference, but other times it can be access to basic economic necessities, freedom from discrimination, or

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male. *Compare* LEGAL SERVS. CORP., LEGAL SERVICES CORPORATION BY THE NUMBERS: THE DATA UNDERLYING LEGAL AID PROGRAMS 25 (2013), *available at* http://www.lsc.gov/sites/default/files/LSC/LSC2013BTN.pdf (71.2% of clients of civil legal aid offices supported by Legal Services Corporation were female); Bezdek, *supra* note 114, at 535, 540 nn.21-22 (observing that 71% of the defendant tenants in Baltimore were female and 87% were black, while 13% were white); *see also* Steven Gunn, *Eviction Defense for Poor Tenants: Costly Compassion or Justice Served?*, 13 YALE L. & POL'Y REV. 385, 393 (1995) (finding that in New Haven, Connecticut, nearly 80% of the defendant tenants in eviction cases were women); Ken Karas, *Recognizing a Right to Counsel for Indigent Tenants in Eviction Proceedings in New York*, 24 COLUM. J.L. & SOC. PROBS. 527, 534 (1991) (asserting that in New York, two-thirds of defendant tenants in the housing court are single women), *with* THOMAS H. COHEN & TRACEY KYCKELHAHN, U.S. DEP'T OF JUSTICE, FELONY DEFENDANTS IN LARGE URBAN COUNTIES, 2006, at 31 (2010), *available at* http://www.bjs.gov/content/pub/pdf/fdluc06.pdf (82.4% of felony defendants were male in 75 of the largest population counties in the U.S.); David S. Abrams & Albert H. Yoon, *The Luck of the Draw: Using Random Case Assignment to Investigate Attorney Ability*, 74 U. CHI. L. REV. 1145, 1162 (2007) (81% of clients of public defender's office were male). While beyond the scope of this Article, the gender gap in treatment of the two populations provides yet another reason to interrogate more carefully the valuation of criminal over civil counsel. *See* LISA ADDARIO, NAT'L ASS'N OF WOMEN & THE LAW, GETTING A FOOT IN THE DOOR: WOMEN, CIVIL LEGAL AID AND ACCESS TO JUSTICE (1998), *available at* http://docs.escr-net.org/usr_doc/Lisa_Addario_-_footinthedoor_e.pdf; Mary Jane Mossman, *Gender Equality and Legal Aid Services: A Research Agenda for Institutional Change*, 15 SYDNEY L. REV. 30, 46 (1993) (highlighting gender inequality in prioritizing criminal defense over civil representation). *Compare* OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, BUDGET OF THE UNITED STATES GOVERNMENT, FISCAL YEAR 2013, at 55 (2012), *available at* http://www.gpo.gov/fdsys/pkg/BUDGET-2013-APP/pdf/BUDGET-2013-APP.pdf (annual federal funding for Federal Defenders Services was approximately $1,063,517,000), *with id.* at 1355 (annual federal funding for indigent civil legal services was approximately $402,000,000).

290. *See* ROBIN L. WEST, TEACHING LAW: JUSTICE, POLITICS, AND THE DEMANDS OF PROFESSIONALISM 112 (2013) ("If a lawyer is an admirable person and in an admirable profession, then it cannot possibly be by virtue of his or her association with lawmakers; it must rather be by virtue of having helped someone victimized by lawmakers ward off the effect of silly, misguided, overly invasive, stupidly or wrongly misapplied law."); *id.* at 111 (describing a portrait of legislation as "an unwarranted bureaucratic intrusion on what would otherwise be either a ruggedly individualistic or a bucolic communitarian existence").

291. *See* Packer, *supra* note 115, at 2-3. *But see generally* Nicole Martorano Van Cleve, *Reinterpreting the Zealous Advocate: Multiple Intermediate Roles of the Criminal Defense Attorney*, *in* LAWYERS IN PRACTICE: ETHICAL DECISION MAKING IN CONTEXT 293 (Leslie C. Levin & Lynn Mather eds., 2012) (describing other goals of zealous advocacy).

the security of various other interests. In the criminal proceeding, the goal is to limit the State's use of force; in the civil proceeding, sometimes it may also be to limit such force, but other times it can be to utilize the power of the law to protect against other forms of extralegal force. When we assume that the outcomes at stake in the criminal proceeding are necessarily weightier, we suggest that what we most want from the State is to be left alone. The right to be left alone, this perspective tells us, is necessarily more valuable and worthy of protection than any other right.[292]

The prioritization of the right to be left alone has limits. As scholars writing in the area of criminal justice have begun to highlight, formal procedural justice in the courtroom may not be what criminal defendants need most. Criminal defendants function in a broader social context. A fair and equal justice system requires not only representation in individual proceedings but also institutional work on social welfare policies.[293] The lawyer may be most effective when working in these other arenas.[294]

The role of the lawyer, both criminal and civil, is not only to protect the individual from intrusions by the State but also to obtain State support. This can take the form of helping people stay out of the criminal justice system or advocating for them when they reenter civil society. It might mean pursuing housing subsidies, educational programs, or job training, while also lobbying for statutes to prohibit employers, landlords, and lenders from discriminating against persons with convictions. Just as traditional criminal defense lawyering seeks to equalize power, so do these kinds of activities: they seek to equalize economic access and participation in civic life.

In many cases, such lawyering is at least as important as representation in criminal proceedings. The availability of legal counsel to improve access to housing and employment could ultimately have a larger impact on criminal defendants, individually and in the aggregate—including both actual defendants and potential defendants—than counsel in criminal proceedings. Scholars have posited that affirmative legal services might more fundamentally change the struc-

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292. Yet, even in the criminal context, the logic of this prioritization breaks down. The right to be left alone requires assistance for its enforcement. In criminal defense, the right to be left alone depends on the safeguards of the rule of law, which, in turn, depend on the availability of counsel. Before the State leaves the individual alone, the State must provide her with counsel to support her rights. *See* Stephanos Bibas, *Regulating the Plea-Bargaining Market: From Caveat Emptor to Consumer Protection*, 99 CALIF. L. REV. 1117, 1148 (2011).

293. *See* Natapoff, *supra* note 200, at 1075-76.

294. *See* Robin Steinberg, *Heeding* Gideon's *Call in the Twenty-First Century: Holistic Defense and the New Public Defense Paradigm*, 70 WASH. & LEE L. REV. 961, 962-63, 975-77, 989-1000 (2013).

ture of society than defensive representation,[295] and today this may be increasingly the case.[296]

C. *Affirmative Lawyering*

Advocates of a right to civil counsel have achieved important victories in areas of defensive lawyering, but increasing the availability of affirmative lawyering ought also to be a priority. Checking economic abuse often involves affirmative litigation.[297] In the void left by the Supreme Court, a healthy number of state and local governments have stepped in to provide counsel in civil proceedings,[298] but most have focused on counsel for civil *defendants*. This focus recognizes that the State ought not to drag people into court without providing guidance in the process. Yet the emphasis on defensive lawyering discounts the importance of lawyers' role in affirmatively enforcing limits on the abuse of power. The appointment of counsel to represent civil defendants will not be sufficient to check the power of private actors. Beyond reactive lawyering, counsel must protect people through proactive efforts.

Admittedly, defining the limit for appointment of counsel might be more complex if the right extended beyond named defendants to plaintiffs and potential plaintiffs, but at least one initial step is available. A modest method of increasing the availability of counsel in affirmative litigation would be to shore up already-existing legislation that, in certain categories of cases, approves payment of prevailing plaintiffs' attorneys, using funds from losing defendants. In contrast to the general rule that each party pays the costs of hiring civil counsel,[299] Congress has passed more than 150 laws authorizing the shifting of fee payments from defendants to prevailing plaintiffs in a defined category of cases—including unpaid wages, housing discrimination, consumers' rights, and environmental protections, among

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295. *See* Gary Blasi, *Framing Access to Justice: Beyond Perceived Justice for Individuals*, 42 LOY. L.A. L. REV. 913, 930 (2009); *see also* Robert Lefcourt, *Lawyers for the Poor Can't Win*, *in* LAW AGAINST THE PEOPLE 123, 130, 134 (1971) (arguing that subsidized defense lawyers legitimize the enforcement of poor people's obligations).

296. *See supra* notes 152-62, 184-85 and accompanying text (highlighting the increasing importance of collateral consequences); *see also supra* notes 248-55 (highlighting increasing private control over delivery of previously public services).

297. *See* Blasi, *supra* note 295 (framing access to justice to include affirmative litigation and non-litigation activities). Affirmative representation might do more than defensive representation to shift, or at least check the abuse of, power. *See* Lefcourt, *supra* note 295.

298. *See supra* note 13.

299. *See* Judith Resnik, *Money Matters: Judicial Market Interventions Creating Subsidies and Awarding Fees and Costs in Individual and Aggregate Litigation*, 148 U. PA. L. REV. 2119, 2130-37 (2000) (highlighting "unaided access" as a premise of the U.S. civil justice system).

others.[300] These statutes support the work of counsel who represent persons unable to pay the lawyers themselves. Fee-shifting statutes remain technically in force today, but the Supreme Court has sharply narrowed their effects, by approving tactics that avoid defendants' obligation to cover the costs of plaintiffs' counsel.[301] Relatively straightforward legislation could counteract the Court's decisions and strengthen the existing mechanisms for payment of plaintiffs' counsel.[302]

Although enhanced fee-shifting legislation is not a complete solution to expanding the availability of counsel, this approach offers important advantages. First, given that it would build on existing legislation, it does not require further debates on the substance of the legislation: it would simply improve the payment provisions in the areas already recognized for their public importance.[303] Second, this approach draws on market mechanisms and does not require any additional government expenditures. This may be crucial in a time of budget cuts. Finally, the number of relevant statutes means that strengthening these seemingly minor provisions could provide counsel for quite a large number of people.

This approach to the unavailability of counsel has received less attention from advocates of a right to civil counsel, who have focused largely on State-funded solutions. In addition to directly funding representation, however, the State can also serve the function of enacting legislation that supplements the market. While the direct funding model may work well for defensive lawyering, the supplemental approach may be more effective for affirmative work. As discussed above, providing counsel for affirmative matters is particularly important in combatting abuses of private power. As scholars and policymakers continue to debate if and when civil counsel should be ap-

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300. *See, e.g.*, 42 U.S.C. § 1988(b) (2012); *see also* Marek v. Chesney, 473 U.S. 1, 43-51 (1985) (Brennan, J., dissenting) (Appendix) (collecting federal statutory fee-shifting provisions).

301. *See* Buckhannon Bd. & Care Home, Inc. v. West Virginia, 532 U.S. 598, 600 (2001) (ruling that serving as a catalyst for change in a defendant's behavior is not sufficient to obtain payment for lawyers); Evans v. Jeff D., 475 U.S. 717, 728 (1986) (ruling that defendants may condition a settlement for full injunctive relief on waiver of all fees for plaintiffs' counsel); *Marek*, 473 U.S. at 10 (holding that a Rule 68 offer of judgment could cut off entitlement to fees); Jeffrey S. Brand, *The Second Front in the Fight for Civil Rights: The Supreme Court, Congress, and Statutory Fees*, 69 TEX. L. REV. 291 (1990); Samuel R. Bagenstos, *Thurgood Marshall, Meet Adam Smith: How Fee-Shifting Statutes Provide a Market-Based System for Promoting Access to Justice (Though Some Judges Don't Get It)* 4-5 (Wash. Univ. Sch. of Law Pub. Law & Legal Theory, Working Paper No. 09-06-01, 2009), *available at* http://ssrn.com/abstract=1407275.

302. I hesitate even to reference a legislative solution, as I do not want to distract from the broader point regarding the vital role of lawyers checking private power. My intention in this Article is to serve as a legal critic, not a reformer. *See* WEST, *supra* note 291, at 160-62 (distinguishing legal critic from legal reformer).

303. For a more detailed argument that litigation pursuant to fee-shifting statutes is a form of public interest lawyering, see Sabbeth, *supra* note 287, at 488-92.

pointed, increased attention should be devoted to private power and the role of lawyers who check it.

CONCLUSION

This Article sought to make two unique contributions to the literature on the role of counsel. First, it brought together different bodies of research that had not previously been in dialogue: literature on the right to counsel in civil proceedings and studies of the civil collateral consequences of criminal convictions. The Supreme Court has joined criminal justice scholars in taking note of the growth of collateral consequences and of the need for criminal defense attorneys to advise clients accordingly. This Article observed that recognition of the need for counsel to protect clients against civil consequences of criminal convictions—for example consequences for employment, housing, or immigration status—may underscore an equal or greater need for counsel in the proceedings that address those civil interests directly. Additionally, social science research demonstrates that civil judgments, not only criminal convictions, result in collateral consequences. Given the economic exclusion and social stigma that can flow from civil judgments, any valuation of the interests that civil lawyers protect should account for these collateral consequences.

Moving beyond the individual private interests at stake in civil and criminal proceedings, the second, and more fundamental, contribution of this Article concerns the function of lawyers as a check on the excesses of power. This Article argued that the prioritization of criminal defense counsel reflects a preoccupation with the dangers of State power and a corresponding disregard for the dangers of private power. The prioritization of criminal over civil counsel assumes that the most valuable work of a lawyer is to ward off the intrusion of the State. Yet this portrait of the State as overly intrusive and lawyers as anti-regulation bulwarks is flawed.

Private actors control access to many of the basic resources essential for life and participation in democratic society—food, shelter, medicine, information, communication, and physical safety. The actors who control such access enjoy tremendous power over the individuals who depend on it. A function of the State is to protect against the abuse of such power through legislation and adjudication. Lawyers can serve as shields against State power, but they can also support the just and equal application of the State's laws. Lawyers serve a vital role in checking the power of private actors. Proponents of a civil right to counsel might consider devoting increased attention to lawyering against private parties. As private actors increasingly take over public functions, their power over the lives of ordinary people grows, and the need for lawyers to check that power intensifies.