

Could 2021 Be The Year Of Civil Justice Reform?

By Cara Bayles

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The pandemic and economic downturn have drawn more attention to civil justice issues like eviction proceedings. Here, protesters advocate in August for extending New York City's eviction moratorium. (Photo by Michael M. Santiago/Getty Images)

In early 2020, Ruy Arango and his fellow housing advocates in Boulder, Colorado, began campaigning for a referendum that could provide rent relief money and publicly funded attorneys to tenants facing eviction.

Then, the coronavirus hit. The pandemic presented a safety challenge in gathering the 3,336 signatures needed to get the question on the ballot, but it also sparked a sense of urgency.

"We had to do it," Arango said. "There was already an eviction epidemic happening in this country, and we understood that COVID was going to make it way, way worse."

And so, decked out in protective gear, the activists collected the signatures. In November, their ballot question passed with 58% of the vote. Arango said he thinks the referendum would have succeeded regardless, but he admitted the pandemic brought housing insecurity to the fore — an "unhappy coincidence."

Now, any tenant in Boulder, regardless of means, can get an attorney to represent them in housing court for free. While a handful of other cities like New York and San Francisco offer similar programs, there is no universal right to an attorney in eviction cases.

Justice advocates are hoping that could change. COVID-19, they say, has drawn attention to access to justice issues that have plagued civil proceedings for years. They hope the tragedies of 2020 can fuel reform in 2021.

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Martha Bergmark
Executive director
Voices for Civil Justice

"COVID left no doubt that the most vulnerable Americans, especially people of color, are just one crisis away from a conflict that involves the civil courts," said Martha Bergmark, executive director of Voices for Civil Justice, a civil legal aid advocacy group. "We've seen more than ever before that the civil justice system plays a key role in determining who gets to stay in their home or who's going to face eviction in housing court, who's going to get legal help navigating a besieged unemployment system."

"COVID has really made sure that there's a spotlight on the role of civil justice," she added, "and now it's going to be up to us advocates to keep that spotlight there."

Criminal justice issues have stood center stage in recent years, thanks to decades of work by activists who've used both scholarship and popular culture to cast policing, sentencing and prison reforms as essential for racial equality.

Attorney-scholars like Michelle Alexander traced the historical thread tying drug policies that targeted communities of color to the discriminatory laws enacted after the Civil War. Alexander's 2010 book, "The New Jim Crow," spent over a year on the bestseller list. Bryan Stevenson, director of the Equal Justice Initiative and the subject of the 2019 film "Just Mercy," has called the death penalty "the stepchild of lynching."

The criminal justice reform movement has also used data and analysis to show the racial disparities and cost inefficiencies of imprisonment. It's highlighted the error rate in convictions, and the injustices that follow.

Those efforts "ought to be completely replicated on the civil justice side," according to David Udell, executive director of the National Center for Access to Justice at Fordham Law.

"The civil justice reform movement has some of these elements, and is ramping up an understanding of the place of race bias in decisions, the costs to communities of erroneous outcomes, the urgent need for expanded data collection," he said. But while criminal justice advocates crafted "a powerful message that has educated millions," civil justice advocates haven't reached the same audience, he said.

The general public doesn't realize the urgency of disparities in the civil justice system, in part because of the misconception that criminal cases carry more serious outcomes, said John Pollock, coordinator of the National Coalition for a Civil Right to Counsel.

"It's quite easy to get incarcerated in a civil case," Pollock said. "All you have to do is not pay child support, not be able to pay a fee or fine that comes out of a criminal proceeding, or be in an immigration matter. It shocks people to learn this can happen. And it happens with regularity."

The line between civil and criminal cases is also "fluid," Pollock said.

In Arkansas, for example, there is a criminal eviction statute, and in Texas, until recently, truancy was a misdemeanor. Those arbitrary distinctions have real consequences for access to justice. If a case is criminal, the defendant is entitled to an attorney. That's not typically true for civil defendants accused of the same thing.

"You've got civil proceedings that are treated as criminal and criminal ones that are treated as civil, and there's no real difference between them. It's just wherever the legislature chooses to place it," Pollock said. "And yet that choice determines so much of what rights attach."

The civil and criminal spheres often overlap and intersect as well, according to Lauren Sudeall, faculty director of the Center for Access to Justice at Georgia State University. For example, a person who is evicted in a civil proceeding and becomes homeless may get arrested for violating criminal statutes that bar "camping" in cities.

"While in the legal field we silo our courts into those two categories, that's often not how the people impacted by these systems understand or experience them," Sudeall said. "Failing to acknowledge the way these two systems overlap probably exacerbates this sense that the criminal is this very scary, dramatic sphere, while the civil is just this other thing that we don't have to worry much about."

But like the criminal justice system, civil court can have a disproportionate effect on low-income communities and people of color. Black communities face higher rates of eviction, debt judgments and child welfare cases than their white counterparts.

Race in Civil Cases

by the numbers

32.7%

of all eviction defendants are Black, though Black tenants make up 19.9% of renters.

2x

Debtors from predominantly Black communities are two times as likely as those from white Census tracts to be subject to a judgment and 20% more likely to get a court order sending their income or property to creditors.

33%

of children in foster care are Black, though only 15% of U.S. children are Black and studies indicate that abuse and neglect is more common among white families.

Sources: Sociological Science, ProPublica, and the National Conference of State Legislators

Those disparities haven't drawn as much public outcry as the disproportionate imprisonment of people of color, Sudeall said, but "who's to say one day in jail is any more harmful than being deported or losing custody of your children?"

Those consequences are different, but they can be just as dire, Bergmark said.

"We need to be just as outraged when someone is locked out of their home by a wrongful eviction as when they are wrongly locked up because of mass incarceration," she said.

But public awareness of the ways civil courts can leave people locked out has grown over the past year, due to the economic downturn brought on by the coronavirus.

Six months into the pandemic, millions of Americans had fallen behind on rent. One statistic that civil justice advocates have known for years became apparent — that while 90% of landlords have legal counsel in eviction proceedings, only 10% of tenants do.

Racial disparities have persisted in the COVID-19 era. According to a September Census survey, renters of color were more likely to report that their household was not caught up on rent: 25% of Black renters, 24% of Asian renters and 22% of Latino renters reported being behind on payments, compared with 12% of white renters. That may reflect the pandemic's disparate effects on the job market. As of June, the job loss rate among Black and Latino workers had grown by 12% since February, compared with a 7.5% increase for white workers, according to a University of New Hampshire study.

"The pandemic is shedding a light on the fact that racial disparities exist in every sector of our society," said Jo-Ann Wallace, president of the National Legal Aid & Defenders Association. "Civil legal solutions are critical to dismantling the racism built into systems such as housing, employment and health care."

Debt collection lawsuits already doubled over the two decades leading up to 2013, and those suits are now the single most common type of civil court case, according to Erika Rickard of the Pew Charitable Trusts. But as more families face financial distress because of the pandemic, those numbers could skyrocket.

"We're beginning to see what a lot of court leaders feared, which is an increase in debt collection lawsuits being brought in the wake of the pandemic as well as increased efforts to collect on older debt," Rickard said.

The pandemic has also revealed problems in the family law system, especially child protective services, said Erin Miles Cloud, a former family defense attorney with the Bronx Defenders who is now co-president of Movement for Family Power, an activist group seeking to shrink the child welfare system.

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Jo-Ann Wallace

President, National Legal Aid & Defenders Association

During the pandemic, she said, parents caught up in that system were unable to work due to quarantine restrictions, or were laid off. Instead of providing a safety net, she said, child welfare services around the country cut off parents' visitation rights.

"They didn't say, 'We all need to get to the table and figure out how to get kids home, figure out how to make visits happen' — all the things they say are their priorities," she said. "What happened was an abrupt stopping of visitation, of reunification, of parents' access to courts."

The activities deemed risky by public officials seemed absurd, Cloud said, noting, "People could go golfing. They could go bowling. But they still couldn't have visitation with their children."

Activists are trying to keep outrage at the front of people's minds.

A billboard erected in Harlem last week by the activist group JMacForFamilies reads, "Some cops are called case workers," and calls to abolish New York's child welfare system — a nod to the nationwide protests sparked by the police killing of George Floyd.

"Defund the police accelerated peoples' imaginations around why we allocate resources this way," Cloud said.

Media coverage of the pandemic has touched many aspects of civil justice, too, from evictions leaving more people homeless to domestic violence in the age of stay-at-home orders to the byzantine unemployment system that civil legal aid lawyers often help their clients navigate.

As public attention to these issues grew, there was also "an increase in the number of people who need legal assistance and are eligible for civil legal aid," Wallace said, and that "increases the burden on already under-resourced civil legal aid advocates."

Courts and lawmakers have already implemented stopgap measures. Some judges and state lawmakers put restrictions in place preventing debt collection agencies from seizing federal stimulus checks, according to Rickard. A federal eviction moratorium remains in effect until the end of March.

But activists hope to see a slew of more long-term reforms now, too.

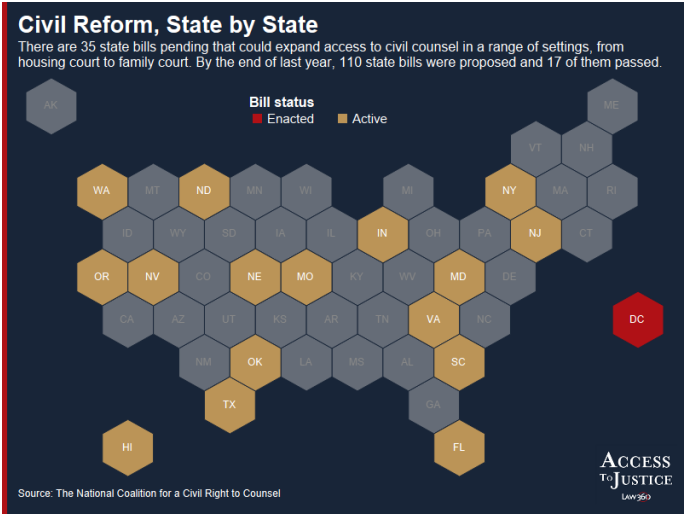
Those could include an expansion of nonlawyer navigator programs, which pair defendants with people who guide them through the nonintuitive paperwork and bureaucracies of civil court.

Georgetown law professor Mary McClymont likened nonlawyer navigators to the nurses and technicians who assist patients so doctors "can operate at the top of their license."

"We need lawyers, but not for everything," she said. "There are many tasks that are really what we often call 'legal information' — helping people translate their documents, helping people fill out their forms, helping people get around the courthouse, helping people stand up in court, and being there by their side as an emotional support."

The pandemic has garnered more interest in those programs, she said.

Policy changes could also alleviate civil courts, Bergmark said. She is hoping the Biden administration will bring back the Office for Access to Justice, which helped improve civil legal aid and sought to address excessive court fines and fees that draw people who can't afford to pay them back into the justice system.



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Legislation could get a jump-start in 2021 as well. Last year, federal lawmakers proposed a slew of bills aiming to increase access to counsel for immigrants in removal proceedings, people with disabilities in need of long-term service, defendants in civil forfeiture cases and tenants facing eviction.

One of those bills was co-sponsored by Vice President Kamala Harris — then a California senator — as well as Reps. Rosa DeLauro, D-Conn., and Ayanna Pressley, D-Mass.

"Housing justice is racial and economic justice," Pressley said in a statement about one of these bills. "As workers and families across our country confront an unprecedented financial cliff, Congress must act with the urgency needed to prevent mass evictions."

None of the various federal bills seeking to expand or fund civil legal aid passed last session, nor did any bills proposed in state legislatures, according to a database maintained by the National Coalition for Civil Right to Counsel.

But Pollock remains optimistic. He noted that the federal coronavirus aid package passed in December included \$20 million for free legal assistance to low-income tenants, a line item inspired by legislation proposed earlier in the year by Rep. James Clyburn, D-S.C.

"That's the first time I know of that they've ever appropriated money outside of the Legal Services Corp. specifically for that purpose," Pollock said.

One local measure authorizing courts in Washington, D.C., to appoint attorneys for juveniles in cases involving a protective order passed earlier this month. And the ballot measure that passed in Boulder may spur similar campaigns elsewhere. At least four activists have reached out to Arango for advice on how to guarantee tenants counsel in their cities.

"In 2020, everyone was just desperate to survive. We were focused for a while on just trying to keep the courts closed, not right to counsel. Our point was, we need to keep these moratoria in place so that there are no hearings," Pollock said.

"Now that there's rent relief coming down the pike, now that there's a federal moratorium in place, there's a chance to revisit all of these campaigns."

--Editing by Aaron Pelc.

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