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COMMENTS

SEARCHING FOR THE "CIVIL *GIDEON*": PROCEDURAL DUE PROCESS AND THE JUVENILE RIGHT TO COUNSEL IN TERMINATION PROCEEDINGS

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I. INTRODUCTION

More than forty years after the United States Supreme Court first guaranteed the right to counsel to criminal defendants in both state and federal courts,[1] the need for a civil right to counsel has risen to the forefront of legal discourse. From the American Bar Association's Resolution on the Civil Right to Counsel in 2006 to the passage of the Sargent Shriver Civil Counsel Act in California in the fall of 2009, the call for a civil right to counsel is mounting.[2] Yet the Supreme Court has not yet interpreted the Constitution to guarantee this right in cases where physical liberty is not at stake. Indeed, in its last significant consideration of the issue, *Lassiter v. Department of Social Services*, the Court held that indigent parents do not have a constitutionally guaranteed right to counsel in termination of parental rights proceedings.[3]

Although the *Lassiter* decision was a setback for the movement toward a civil right to counsel, advocates need not give up on the Supreme Court's ability to enforce this right constitutionally.[4] The Supreme Court is still the only forum that can determine constitutional rights on a nation-wide basis.[5] Although impact litigation in the

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1 Gideon v. Wainwright, 372 U.S. 335, 344 (1963) (holding that extending the right to counsel to those who cannot afford to pay for a lawyer is fundamental to a fair trial).

2 *See infra* Part III.B.

3 452 U.S. 18, 31–32 (1981).

4 Indeed, several recent court decisions have upheld the right to counsel. *See infra* Part III.C.2 (discussing judicial gains in this area).

5 *See, e.g.*, Brown v. Bd. of Educ., 347 U.S. 483, 495 (1954) ("We conclude that in the field of public education the doctrine of 'separate but equal' has no place. . . . Therefore, we hold that the plaintiffs . . . are, by reason of the segregation complained of, deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment.").

courts is no longer seen as holding the same promise as during the 1960s, when *Gideon v. Wainwright* was decided, the courts can still be a catalyst for change.

Indeed, several factors suggest that the time is right for the Court to reconsider the *Lassiter* decision. Many of the conditions that preceded *Gideon* are in place, including considerable litigation concerning the right, academic disapproval of the Court's previous decision regarding the right, and numerous state provisions to provide the right.[6] Moreover, the need for counsel is growing—low income litigants are facing eviction, foreclosure, and denial of government benefits without the aid of an attorney.[7] The Court need not overturn *Lassiter,* nor extend the right to counsel to every civil case. Even a narrow holding will open the door to extending the right to other civil situations.

A promising test case for a "civil *Gideon*"[8] would revisit the *Lassiter* decision by arguing that the child in termination of parental rights proceedings has a right to counsel even if the parent does not. There is a strong procedural due process argument for a right to counsel for juveniles in termination proceedings.[9] The liberty interests at stake in these proceedings are crucial and deserve protection.[10] Children are less likely than adults to have the ability to effectively communicate their needs and wishes to a judge;[11] if the judge makes an erroneous decision, the child will either be unnecessarily separated from his or

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6 *See infra* Part IV.B (delineating conditions that paved the way for the *Gideon* decision); *see also* Laura K. Abel, *A Right To Counsel in Civil Cases: Lessons from* Gideon v. Wainwright, 15 TEMP. POL. & CIV. RTS. L. REV. 527, 531–32 (2006) (discussing the conditions that led to the demise of *Betts v. Brady*, 316 U.S. 455 (1942), in the *Gideon* decision).

7 *See infra* Part IV (discussing the need for a civil right to counsel).

8 The "civil *Gideon*" is the symbolic case that will persuade the Supreme Court to extend the right to counsel to civil matters. *See, e.g.*, Steven D. Schwinn, *Faces of the Open Courts and the Civil Right to Counsel*, 37 U. BALT. L. REV. 21, 22–25 (2007) (discussing the pursuit of civil *Gideon* and civil *Gideon* litigation strategies).

9 For the purposes of this article, "termination proceedings" include all types of proceedings where parental rights and/or relationships may be terminated by the state, including abuse and neglect, termination of parental rights, and dependency proceedings.

10 *See, e.g.*, LaShanda Taylor, *A Lawyer for Every Child: Client-Directed Representation in Dependency Cases,* 47 FAM. CT. REV. 605, 607 (2009) (noting that "[a]fter performing the [due process] balancing test, one must conclude that the enormity of the child's interests involved in abuse and neglect proceedings and the high risk of erroneous deprivation require the appointment of legal representation for children in every case, at every hearing"); Jacob Ethan Smiles, Essay, *A Child's Due Process Right to Legal Counsel in Abuse and Neglect Termination Proceedings*, 37 FAM. L.Q. 485, 502 (2003) (arguing that the due process balancing test weighs strongly in favor of appointing counsel to children at termination hearings).

11 *See* Taylor, *supra* note 10, at 606 (observing that children's voices are often not heard in courtrooms).

her family or sent back to an abusive or neglectful environment;[12] and the financial hurdles to providing this right would not be insurmountable.[13]

Because of the robust support for a civil *Gideon* and the compelling interests at stake, it is time for the Court to take the first step toward a civil right to counsel by guaranteeing the right for juveniles involved in termination proceedings.[14] This Comment will explore the importance of the civil right to counsel as well as significant recent developments of the right around the United States and will ultimately conclude that guaranteeing counsel for juveniles in termination proceedings is both constitutionally required and a sound policy decision. Part II of this Comment discusses the modern right to counsel as determined by United States Supreme Court precedent. Part III outlines legal advocacy for the civil right to counsel as well as the current state of the right, including recent judicial and legislative gains. Part IV provides an overview of the importance of providing counsel in civil cases, discusses the reasons a Supreme Court case is a promising avenue to pursue civil right to counsel, and argues that this is a promising time for a civil *Gideon*. Part V delineates the current right to counsel for juveniles in termination proceedings as well as the due process and policy arguments for the juvenile right to counsel.

II. THE MODERN RIGHT TO COUNSEL: UNITED STATES SUPREME COURT PRECEDENT

The concept of a constitutional right to counsel is defined by extensive United States Supreme Court precedent. Under current case law, the right is guaranteed only in criminal proceedings when a defendant is tried for any crime for which imprisonment might be im-

12 *See* Kenny A. *ex rel.* Winn v. Perdue, 356 F. Supp. 2d 1353, 1358–59 (N.D. Ga. 2005).

13 *See* Laura K. Abel & Max Rettig, *State Statutes Providing for a Right to Counsel in Civil Cases*, CLEARINGHOUSE REV. J. POVERTY L. & POL'Y 245 (July–Aug. 2006) (outlining current right to counsel statutes for children in termination hearings and other civil right to counsel statutes); *see also* Mathews v. Eldridge, 424 U.S. 319, 334–35 (1976) (laying out the balancing test by stating that "the specific dictates of due process generally requires consideration of three distinct factors: 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").

14 *See infra* Part III.B (discussing of the support for a civil *Gideon*).

posed.[15] In all other court proceedings,[16] the right to counsel is governed by a patchwork of state and federal laws, or decided on a case-by-case basis by the trial court.[17] The right has significantly expanded over the past fifty years, and the evolution of this right through Supreme Court cases provides useful lessons for the potential of a single civil *Gideon* to afford a more comprehensive right to counsel in civil cases.

A. *Criminal Trials*

The Sixth Amendment to the United States Constitution provides criminal defendants with the right to the assistance of counsel.[18] The Supreme Court has found that the right to counsel is guaranteed to all persons in most court proceedings that are criminal in nature.[19] Through a series of cases, the constitutional right has developed and expanded over time to apply to certain pretrial proceedings, to any proceeding where actual liberty is at stake, and to adjudications in the juvenile justice system.[20] The "vast majority of [criminal] defendants" now have a constitutionally guaranteed right to counsel.[21]

In the foundational *Gideon* decision, the Court held that the right to counsel in criminal cases is a fundamental provision of the Bill of Rights under the Sixth Amendment[22] and is applicable to the states through the Fourteenth Amendment.[23] Although the Court did not

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

16 For the purposes of this paper, the phrase "right to counsel" refers to a guaranteed right to appointed counsel for indigent litigants.

17 *See, e.g.*, Dennis A. Kaufman, *The Tipping Point on the Scales of Civil Justice*, 25 TOURO L. REV. 347, 351 (2009) (noting that "[p]atchwork recognition [of the civil right to counsel] and implementation by legislatures form a fragile and uneven safety net").

18 U.S. CONST. amend. VI.

19 *See* Gideon v. Wainwright, 372 U.S. 335, 341–43 (1963).

20 *See, e.g.*, Alabama v. Shelton, 535 U.S. 654, 658 (2002) ("[A] suspended sentence that may 'end up in the actual deprivation of a person's liberty' may not be imposed unless the defendant was accorded 'the guiding hand of counsel' in the prosecution for the crime charged.") (citation omitted); Coleman v. Alabama, 399 U.S. 1, 9 (1970) (holding that the defendant had a right to counsel at a preliminary hearing even if nothing at that hearing would be used in trial); United States v. Wade, 388 U.S. 218, 226 (1967) (finding a right to counsel at a pretrial line-up).

21 Mary Sue Backus & Paul Marcus, *The Right to Counsel in Criminal Cases: A National Crisis*, 57 HASTINGS L.J. 1031, 1038 (2006).

22 *Gideon*, 372 U.S. at 342–43. The Court overruled *Betts v. Brady*, where the Court had declined to extend the right to counsel to state felony proceedings, 316 U.S. 455, 471–72 (1942) ("[The United States Supreme Court is] unable to say that the concept of due process incorporated in the Fourteenth Amendment obligates the States, whatever may be their own views, to furnish counsel in every such case.").

23 *Gideon*, 372 U.S. at 342–43.

clarify the contours of the right, Justice Black, writing for the majority, described the importance of the right to counsel in sweeping language, stating that "any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him,"[24] and "[t]he right to be heard would be . . . of little avail if it did not comprehend the right to be heard by counsel."[25]

The impact of the *Gideon* decision was extensive.[26] The Court soon extended the right beyond the trial itself to a variety of proceedings.[27] Four years after *Gideon*, the Court broadened the right to counsel to juvenile criminal defendants in *In re Gault*.[28] The Court held that, despite differences between the juvenile and the adult court system, due process mandated that juveniles be provided assistance of counsel during delinquency hearings.[29] In the same term, the Court extended the right to any "critical stage" of prosecution, including pre-trial line-ups.[30] In 1970, the Court held in *Coleman v. Alabama* that criminal defendants are entitled to counsel at the preliminary hearings required by Alabama law, even though the use of any verbal communications made in those hearings was prohibited at trial when the accused had no lawyer during the proceeding.[31]

Three years later, in *Argersinger v. Hamlin*, the Court forcefully reaffirmed the right to counsel in all state and federal proceedings where there is a potential loss of liberty, even if the crime is classified as petty, a misdemeanor, or a felony.[32] Justice Douglas, writing for the majority, reiterated the importance of counsel by emphasizing that lawyers are "necessities, not luxuries."[33] Concurring opinions noted

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24 *Id.* at 344.

25 *Id.* at 344–45 (quoting Powell v. Alabama, 287 U.S. 45 (1932)).

26 Backus & Marcus, *supra* note 21, at 1038 (noting that the *Gideon* decision was broad because "[i]t was held to have full retroactive impact, the violation of the rule can never be deemed harmless error, and the right to counsel was extended well beyond the trial itself soon after the Court's decision").

27 *Id.*

28 387 U.S. 1 (1967).

29 *Id.* at 13–20, 30.

30 United States v. Wade, 388 U.S. 218, 236–37 (1967).

31 399 U.S. 1, 9–10 (1970). Specifically, counsel is required at any "critical stage" of a proceeding. *Id.* at 8–9. "The determination whether the hearing is a 'critical stage' requiring the provision of counsel depends, as noted, upon an analysis 'whether potential substantial prejudice to defendant's rights inheres in the . . . confrontation and the ability of counsel to help avoid that prejudice.'" *Id.* at 9 (alteration in original) (citing *Wade*, 388 U.S. at 227).

32 407 U.S. 25, 30–33 (1972).

33 *Id.* at 32 ("That government hires lawyers to prosecute and defendants who have the money hire lawyers to defend are the strongest indications of the widespread belief that lawyers in criminal courts are necessities, not luxuries.").

that providing this right would be difficult because states were unlikely to have the necessary resources to provide the right, but found that the right is constitutionally guaranteed even in the face of these problems.[34]

Thirty years later, the Court extended the right again in *Alabama v. Shelton* to provide counsel to any defendant who is threatened with imprisonment, even if the sentence is suspended.[35] A defendant may not be deprived of liberty if he or she is not afforded the assistance of counsel at trial.[36] Together, the progress of the criminal right to counsel cases illustrates that even a narrow original decision like *Gideon*, which arguably only covered felony criminal trials, can evolve to provide a more extensive right.

B. Civil Trials

Despite the Court's support for, and consistent reiteration of, the importance of the right to counsel, the Court has never extended the right to civil proceedings. In *Lassiter v. Department of Social Services*, the Court addressed for the first time whether the due process clause requires states to provide an indigent parent with court-appointed counsel in a proceeding to terminate his or her parental rights.[37] The Court held that it does not.[38]

The facts of *Lassiter* were not ideal for a civil *Gideon*. In 1975, the District Court of Durham County found that Mrs. Lassiter had not provided her son William with adequate medical care, and transferred him to the custody of the Department of Social Services.[39] The next year, Ms. Lassiter was convicted of second degree murder and sentenced to twenty-five to forty years of imprisonment.[40] Two years later, in 1978, the Department of Social Services petitioned the court to terminate Ms. Lassiter's parental rights because she had not con-

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34 *Id.* at 44 (Burger, J., concurring) ("The holding of the Court today may well add large new burdens on a profession already overtaxed, but the dynamics of the profession have a way of rising to the burdens placed on it."); *id.* at 55 (Powell, J., concurring) ("It is doubtful that the States possess the necessary resources to meet this sudden expansion of the right to counsel."); *see also id.* at 37 n.7 (recognizing "Justice Powell's doubt that the Nation's legal resources are sufficient to implement the rule we announce today," but estimating that there would be enough lawyers to fill the need).

35 535 U.S. 654, 658 (2002).

36 *Id.*

37 452 U.S. 18, 24–27 (1981).

38 *Id.* at 33–34.

39 *Id.* at 20.

40 *Id.*

tacted her child nor tried to remove him from state care.[41] At trial, Ms. Lassiter asked that William be placed with her mother if he could not be with her.[42] The court denied this request and found that Ms. Lassiter had willfully failed to maintain contact with William and terminated her status as his parent.[43]

Ms. Lassiter appealed the decision, arguing that she should have been afforded counsel at the termination proceeding.[44] The North Carolina Court of Appeals held that "[w]hile this State action does invade a protected area of individual privacy, the invasion is not so serious or unreasonable as to compel us to hold that appointment of counsel for indigent parents is constitutionally mandated."[45] Ms. Lassiter petitioned the United States Supreme Court for certiorari in 1980.[46]

Justice Stewart's opinion for five members of the Court began by noting that the Court's previous decisions had recognized a right to counsel "only where the litigant may lose his physical liberty if he loses the litigation."[47] The Court recognized that a parent's right to custody of his or her children is a "commanding" interest that indisputably warrants deference and observed that "[i]nformed opinion has clearly come to hold that an indigent parent is entitled to assistance of appointed counsel."[48] Yet the Court declined to extend a per se right to counsel to parents in termination proceedings.[49] The Court stated that "as a litigant's interest in personal liberty diminishes, so does his right to appointed counsel," and it found that "the Court's precedents speak with one voice about what 'fundamental fairness'

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41 *Id.* at 20–21.

42 *Id.* at 23.

43 *Id.* at 23–24.

44 *Id.* at 24.

45 *Id.* (alteration in original).

46 By this point, Ms. Lassiter was represented by attorneys from the North Central Legal Assistance Program, Durham, North Carolina; East Central Community Legal Services, Raleigh, North Carolina; the National Center for Youth Law, San Francisco, California; and North State Legal Services, Pittsboro, North Carolina. Brief for Petitioner at i, Lassiter v. Dep't of Soc. Servs., 452 U.S. 18 (1981) (No. 79-6423).

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

48 *Id.* at 27, 33–34. The Court cites to multiple sources to exemplify "informed opinion," including the "IJA-ABA Standards for Juvenile Justice, Counsel for Private Parties 2.3 (b) (1980); Uniform Juvenile Court Act § 26(a), 9A U. L. A. 35 (1979); National Council on Crime and Delinquency, Model Rules for Juvenile Courts, Rule 39 (1969); U.S. Dept. of HEW, Children's Bureau, Legislative Guide for Drafting Family and Juvenile Court Acts § 25(b) (1969); [and] U.S. Dept. of HEW, Children's Bureau, Legislative Guides for the Termination of Parental Rights and Responsibilities and the Adoption of Children, Pt. II, § 8 (1961)." *Id.*

49 *Id.* at 33–34.

has meant when the Court has considered the right to appointed counsel"—a litigant has a right to counsel only when his physical liberty is at stake.[50]

The Court held that in situations where physical liberty is not at stake, trial courts should determine on a case-by-case basis whether existing procedures are constitutionally adequate by balancing the due process elements laid out in *Mathews v. Eldridge*.[51]

Justice Blackmun, joined by Justices Brennan and Marshall, dissented. Justice Blackmun stated that the Court's opinion avoided the "obvious conclusion that due process requires" a right to counsel for an indigent parent and instead "revive[d] an ad hoc approach thoroughly discredited nearly [twenty] years ago in *Gideon v. Wainwright*."[52] Justice Stevens also dissented, recognizing that deprivation of parental rights may be more grievous than being sent to jail and that "[t]he plain language of the Fourteenth Amendment commands that both deprivations must be accompanied by due process of law," including the appointment of counsel.[53] Justice Stevens wrote that any policy fears of the majority were unfounded because the right to counsel is the "essence" of due process, and any slippery slope problems can be dealt with without difficulty.[54] Despite continuing debates regarding the suitability of the *Lassiter* decision, the Court has not spoken on the civil right to counsel in cases not involving a deprivation of liberty since.[55]

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50 *Id.* at 26–27.

51 424 U.S. 319 (1976) (holding that while individuals have a property right in social security benefits that implicates the need for due process in order to terminate such rights, termination of such benefits does not require a pre-termination hearing to satisfy due process). Courts must consider (a) the private interest affected by the government action; (b) the risk of incorrect action because of the procedures used, and the probable value of additional safeguards; and (c) the government's interest. *Id.* at 334–35.

52 *Lassiter*, 452 U.S. at 35 (Blackmun, J., dissenting).

53 *Id.* at 59 (Stevens, J., dissenting).

54 Robert Hornstein, *The Right to Counsel In Civil Cases Revisited: The Proper Influence of Poverty and the Case for Reversing* Lassiter v. Department of Social Services, 59 CATH. U. L. REV. 1057, 1091 (2010).

55 *See* Kaufman, *supra* note 17, at 350–51. On November 1, 2010, the Supreme Court granted certiorari in the case *Turner v. Rogers*, which involved the appointment of counsel in civil contempt cases. Price v. Turner, 691 S.E.2d 470 (S.C. 2010), *cert. granted* 131 S. Ct. 504, 504 (2010). The Court will determine whether the right to counsel applies in situations where incarceration is coercive rather than punitive. *See* Adam Liptak, *Justices to Weigh Broader Right to Legal Aid*, N.Y. TIMES, Nov. 2, 2010, at A22. Even if the Court determines that defendants in these cases do have a right to assistance of counsel, this case would not be a "civil *Gideon*," because the right to counsel will still only apply in cases involving incarceration, or the "deprivation of physical liberty" on which the Court relied in *Lassiter*, 452 U.S. at 26–27.

III. THE CIVIL RIGHT TO COUNSEL BEFORE AND AFTER *LASSITER*

The ideal of a civil right to counsel did not begin or end with *Lassiter*. The civil right to counsel has existed in England since the middle ages and is reflected in at least one state constitution.[56] Even after *Lassiter*, the right is championed by lawyers and bar associations across the country, with support growing especially strong since the fortieth anniversary of *Gideon* in 2003.[57] States seem to be responding to the movement as well—many have recently legislatively or judicially expanded right to counsel in civil cases, especially for child custody issues.[58] The momentum is increasing, but the civil right to counsel is still far from comprehensive, which is why a Supreme Court decision on the right is so vital.[59]

A. *The Civil Right to Counsel Internationally*

Although the United States does not yet consistently guarantee the civil right to counsel, the right is widely recognized internationally as fundamental to national legal systems.[60] As the American Bar Association ("ABA") has noted, "[m]ost European and Commonwealth countries have had a right to counsel in civil cases for decades or even centuries, entitling all poor people to legal assistance when

56 *See, e.g.*, ABA, *Resolution on a Civil Right to Counsel*, 15 TEMP. POL. & CIV. RTS. L. REV. 507, 514 (2006) (noting that several American colonies imported an English statute which granted indigent litigants a right to counsel in civil cases); Debra Gardner, *Justice Delayed Is, Once Again, Justice Denied: The Overdue Rule to Counsel in Civil Cases*, 37 U. BALT. L. REV. 59, 60–61 (2007) (noting that the notion of a civil right to counsel did not begin with *Gideon* or the ABA Resolution on Right to Counsel, but rather "[a]mong its earliest tracings is a Tudor codification"); Wade Henderson, *Keynote Address: The Evolution and Importance of Creating a Civil Right to Counsel*, 25 TOURO L. REV. 71, 79–80 (2009) ("As early as the 1200s, the English courts provided free legal assistance for the poor. . . . [The civil right to counsel] principle is reflected in the State of Maryland's constitution, and many other states."); Alan Houseman, *Civil* Gideon*: The Right to Counsel in Civil Cases*, 25 CORNERSTONE 14 (2003), *available at* http://www.nlada.org/DMS/Documents/1075736245.67/civilgideon.pdf ("When Maryland became a state it adopted all English law that was effective on July 4, 1776 which included a provision on right to counsel in civil cases.").

57 Deborah L. Rhode, *Whatever Happened to Access to Justice?*, 42 LOY. L.A. L. REV. 869, 892 (2009) ("In 2003, the fortieth anniversary of the Supreme Court's landmark decision *Gideon v. Wainwright* sparked a resurgence of interest in extending that ruling's guarantee of counsel in criminal cases to civil cases." (footnotes omitted)).

58 *See infra* Part III.C (discussing recent expansions of the right to counsel around the country).

59 Clare Pastore, *A Civil Right To Counsel: Closer To Reality?*, 42 LOY. L.A. L. REV. 1065, 1065 (2009) ("[T]here is growing momentum for expanding the right to counsel in civil cases.").

60 *See* ABA, *supra* note 56, at 514.

needed."[61] France has had the right since 1852, Italy since 1865, and Germany codified the right when it became one state in 1877.[62] Nearly all other European countries codified the right in the late nineteenth or early twentieth century.[63] Today, over fifty countries provide attorneys as a matter of right in many civil cases, including countries recently freed from oppressive regimes, such as Poland and South Africa.[64]

English courts appointed attorneys for indigent litigants beginning in the thirteenth century, and the English Parliament codified the right in 1495.[65] This history is especially significant for the United States because English common law is the basis for American law. Indeed, some colonies chose to adopt all English law that was effective on July 4, 1776, including the existing provision on civil right to counsel.[66] The fact that this right persevered over five hundred years of English common law illustrates that guaranteeing counsel is a basic tenet of the legal system on which ours is founded.[67] Further, international practices of civil right to counsel are important because of the Supreme Court's willingness in recent years to refer to international norms as authority when interpreting the United States Constitution.[68]

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61 *Id.* at 510.

62 *Id.* at 514 ("France created such a statutory right in 1852, Italy did so when Garibaldi unified the country in 1865, and Germany followed suit when it became a nation in 1877.").

63 *Id.*

64 Henderson, *supra* note 56, at 79 ("Today, more than fifty foreign countries provide legal representation in cases as a matter of right. . . . Poland, recently freed from Communism [recognizes the right]. So does South Africa, recently freed from apartheid.") (footnotes omitted).

65 ABA, *supra* note 56, at 514 ("As early as the 13th and 14th centuries English courts were appointing attorneys for such litigants, a right that Parliament codified in 1495.").

66 *See, e.g.*, Houseman, *supra* note 56, at 14 ("The Maryland constitutional argument [for a civil right to counsel] is somewhat unique though possibly relevant to other states that were one of the original 13 colonies. When Maryland became a state it adopted all English law that was effective on July 4, 1776 which included a provision on right to counsel in civil cases."); *see also* ABA, *supra* note 56, at 514 ("The common law has a long history of granting indigent litigants a right to counsel in civil cases. As early as the 13th and 14th centuries English courts were appointing attorneys for such litigants, a right that Parliament codified in 1495. Several American colonies imported this statute and its right to counsel as part of the common law they adopted from the mother country and, it has been argued, this nascent right continues to the current day.").

67 ABA, *supra* note 56, at 514 ("[A]t a minimum the venerable age and persistence of [the civil] right [to counsel] in the common law tradition suggests the fundamental importance that tradition, which is the basis of American law, accords guaranteeing poor people equality before the law and furnishing them the lawyers required to make that guarantee a reality.") (footnote omitted).

68 *See, e.g.*, Roper v. Simmons, 543 U.S. 551, 575 (2005) ("[T]he Court has referred to the laws of other countries and to international authorities as instructive for its interpretation

B. Legal Opinion

The fortieth anniversary of *Gideon* generated interest in finally ensuring the civil right to counsel in the United States.[69] Advocates formed coalitions to coordinate strategies, and the ABA created the Task Force on Access to Civil Justice.[70] In 2006, the ABA adopted the Task Force's proposed resolution urging federal and state governments to provide counsel as a matter of right and free of charge to low income persons involved in proceedings "where basic human needs are at stake, such as those involving shelter, sustenance, safety, health or child custody."[71]

State bar associations also advocate locally for the civil right to counsel. In 2009, the New York State Bar Association released a report calling for an expansion of the civil right to counsel in New York State.[72] The Minnesota State Bar Association[73] and the Boston Bar As-

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of the Eighth Amendment's prohibition of 'cruel and unusual punishments.'"); Lawrence v. Texas, 539 U.S. 558, 576–77 (2003) (citing to several cases from the European Court of Human Rights and noting that "[t]he right the petitioners seek in this case has been accepted as an integral part of human freedom in many other countries"); Atkins v. Virginia, 536 U.S. 304, 316 n.21 (2002) (referring to international norms and standards when barring execution of mentally disabled defendants); *see also* Josh Hsu, *Looking Beyond the Boundaries: Incorporating International Norms into the Supreme Court's Constitutional Jurisprudence*, 36 N.M. L. REV. 75, 75–77 (2006) (discussing the Court's usage of international norms in constitutional jurisprudence).

69 *See* Rhode, *supra* note 57, at 892 (2009) ("In 2003, the fortieth anniversary of the Supreme Court's landmark decision *Gideon v. Wainwright* sparked a resurgence of interest in extending that ruling's guarantee of counsel in criminal cases to civil cases.") (citations omitted).

70 One such coalition was the National Coalition for a Civil Right to Counsel, which was founded in 2004 after a workshop on the civil right to counsel held at the National Legal Aid and Defender Association's annual conference. *See* Nat'l Coal. for a Civil Right to Counsel, *About the Coalition: Coalition Basics*, http://www.civilrighttocounsel.org/about_the_coalition/coalition_basics/ (last visited Mar. 27, 2011) (providing basic information about the Coalition); *see also* Rhode, *supra* note 57, at 892 ("[After the fortieth anniversary of *Gideon*,] [a]dvocates formed the National Coalition for a Civil Right to Counsel and coordinated litigation and legislative strategies. The ABA created the Task Force on Access to Civil Justice and, in 2006, adopted its proposed resolution supporting a 'civil *Gideon*.'").

71 Rhode, *supra* note 57, at 892; *see also* ABA, *supra* note 56, at 508 (urging "federal, state and territorial governments to provide legal counsel as a matter of right at public expense to low income persons in those categories of adversarial proceedings where basic human needs are at stake, such as those involving shelter, sustenance, safety, health or child custody"). Twelve state and local bar associations co-sponsored the resolution. Laura K. Abel, *Toward a Right to Counsel in Civil Cases in New York State: A Report of the New York State Bar Association*, 25 TOURO L. REV. 31, 35 (2009).

72 Abel, *supra* note 71, at 33–37 ("A core goal of the New York State Bar Association ("NYSBA") is to ensure that the justice system works, and that it works for all New Yorkers. To that end, NYSBA promotes several measures aimed at ensuring that all New Yorkers, regardless of income, have access to lawyers to meet their important civil legal

sociation have formed task forces on the right.[74] The California Conference of Delegates of California Bar Associations,[75] Massachusetts Bar Association,[76] Pennsylvania Bar Association,[77] and Alaska Bar Association[78] have each passed civil right to counsel resolutions. These resolutions urge state governments to expand or establish the civil right to counsel in order to provide legal assistance to low income litigants in many civil cases.

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needs. . . . Since the early 1970s, New York State has had the broadest right to counsel in family cases of any state.") (citation omitted).

73 *See* Dorsey & Whitney L.L.P., *The Right to Civil Counsel Under Minnesota Law: A White Paper Presented to the Minnesota State Bar Association's Civil* Gideon *Task Force*, at 3–4 (Sept. 11, 2008), *available at* http://www.mnbar.org/committees/CivilGideon/MaterialsReports/Civil%20Gideon%20White%20Paper%20-%20Dorsey-Whitney.pdf (discussing the potential for expanding the right to court-appointed counsel). For a list of state bar Civil *Gideon* resolutions, see Abel, *supra* note 71, at 36.

74 *See* Task Force on Expanding the Civil Right to Counsel, Boston Bar Ass'n, *Gideon's New Trumpet: Expanding the Civil Right to Counsel in Massachusetts*, at 2 (Sept. 2008), http://www.bostonbar.org/prs/reports/GideonsNewTrumpet.pdf (reporting "the Task Force's recommendations to establish starting points for an expanded civil right to counsel").

75 *See* Cal. Conference of Delegates of Cal. Bar Ass'ns, *Right to Counsel Resolution* (Oct. 2006), *available at* http://www.calconference.org/pdfs/R2006/01-06-06.pdf ("All people shall have a right to the assistance of counsel in cases before forums in which lawyers are permitted. Those who cannot afford such representation shall be provided counsel when needed to protect their rights to basic human needs, including sustenance, shelter, safety, health, child custody, and other categories the Legislature may identify in subsequent legislation.").

76 *See* Mass. Bar Ass'n, *House of Delegates Unanimously Supports Principle of Civil* Gideon, LAWYERS E-JOURNAL (May 23, 2007), http://www.massbar.org/for-attorneys/publications/e-journal/2007/may/523/hod ("[T]he House of Delegates voted unanimously . . . to support a civil *Gideon* resolution, urging the state to provide legal counsel to low income people in civil matters involving basic human needs.").

77 *See* Access to Justice Comm., Pa. Bar Ass'n, *Resolution to Cosponsor the American Bar Association's Resolutions to Adopt the Proposed ABA Model Access Act and ABA Basic Principles of a Right to Counsel in Civil Legal Proceedings* (June 25, 2010), *available at* http://www.pabar.org/public/committees/lspublic/Resolutions/Resolution%20to%20Cosponsor%20ABA%20Model%20Act%20approved%20_2_.pdf ("Resolved, [t]hat the Pennsylvania Bar Association urges the Commonwealth of Pennsylvania to provide legal counsel as a matter of right to low income persons in those categories of adversarial proceedings where basic human needs are at stake, such as those involving shelter, sustenance, safety, health or child custody.").

78 *See* Pro Bono Comm., Alaska Bar Ass'n, *Resolution in Support of Recognizing a Right to Counsel for Indigent Individuals in Certain Civil Cases* (2008), *available at* http://civilrighttocounsel.org/pdfs/alaska_bar_resolution_9_2_2008.pdf ("[T]he Alaska Bar Association urges the State of Alaska to provide legal counsel as a matter of right to low income persons in those categories of adversarial proceedings where basic human needs are at stake.").

C. Civil Right to Counsel: Expansion of State-Based Rights

Although access to counsel is nowhere near comprehensive,[79] much ground work has already been laid for a civil right to counsel in certain situations. Legislative gains in this area have been promising: in some jurisdictions, lawyers are available by right in cases involving child custody, involuntary commitment and guardianship, orders of protection, and civil contempt.[80] Judicial gains have also been steady, particularly in the child custody arena. Although these gains have not been sufficient, they demonstrate that opinion favors expansion of the right.

1. Legislative Gains

The most extensive civil right to counsel exists in California, where the legislature adopted a bill to provide a right to counsel through partnerships between courts and legal service agencies.[81] In September 2009, the California legislature passed Assembly Bill No. 590, the Sargent Shriver Civil Counsel Act. The Act provides that the state will implement model pilot projects to ensure that "[l]egal counsel . . . [is] appointed to represent low-income parties in civil matters involving critical issues affecting basic human needs."[82] "Basic human needs" include "housing-related matters, domestic violence and civil harassment restraining orders, probate conservatorships, guardianships of the person, elder abuse, or actions by a parent to obtain sole legal or physical custody of a child."[83] Although these categories seem expansive, they cover only a fraction of total civil litiga-

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79 *See, e.g.*, Kaufman, *supra* note 17, at 350–51 ("The gains in right to counsel in civil matters have thus far been legislative, and while significant, adoption has been slow, less than cohesive or thematic, and inconsistent across the country. Patchwork recognition and implementation by legislatures form a fragile and uneven safety net.").

80 *See* Kaufman, *supra* note 17, at 351 ("Lawyers are available for appointment in some jurisdictions for matters such as child custody, orders of protection, civil contempt, involuntary commitment, and guardianship.").

81 *See, e.g.*, Recent Legislation, *Access to Justice—Civil Right to Counsel—California Establishes Pilot Programs to Expand Access to Counsel for Low-Income Parties*, 123 HARV. L. REV. 1532, 1534 (2010) (outlining the requirements of Assembly Bill 590).

82 *See* Sargent Shriver Civil Counsel Act, CAL. GOV'T CODE § 68651(a) (West 2010) (quoting portion of the act discussing civil legal representation for low-income parties).

83 *See id.* at ch. 2.1 68651(b)(1) (enumerating some examples of basic human needs). California already mandates appointment of counsel for children in termination hearings and appeals, so the Act will not affect that right. *See* Whytni Kernodle Frederick & Deborah L. Sams, *A Child's Right to Counsel: First Star's National Report Card on Legal Representation for Children*, at 12 (2007) (summarizing that California mandates legal representation for children), *available at* http://www.firststar.org/documents/FIRSTSTARReportCard07.pdf.

tion, so the bill does not create an all-encompassing civil right to counsel.[84] Some commentators have argued that the Act will "result in more waste in the court system,"[85] but others have hailed the bill as "unprecedented," "cost-effective," and "innovative."[86]

The right to counsel in civil cases in other states is by no means as comprehensive, but is growing steadily.[87] Since the civil *Gideon* movement gained momentum in the early twenty-first century, nine states have enacted new laws expanding the right to counsel around the country, particularly in custody cases.[88]

Alabama and Louisiana extended the right to counsel to parents in termination proceedings brought by both the state and private

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84 *See* Sargent Shriver Civil Counsel Act, CAL. GOV'T CODE § 68651(a) (West 2010); Recent Legislation, *Access to Justice—Civil Right to Counsel—California Establishes Pilot Programs to Expand Access to Counsel for Low-Income Parties*, 123 HARV. L. REV. 1532, 1533 (2010) ("Since these categories cover[] only a small fraction of total civil litigation . . . the legislation did little to address the formation of a serious nation-wide 'justice gap' between what was needed to meet the civil legal needs of the poor and the total amount of services actually available.").

85 Tamara Audi, *'Civil* Gideon*' Trumpets Legal Discord*, WALL ST. J., Oct. 27, 2009, at A3 (explaining new California law that gives low-income residents the right to an attorney in civil matters).

86 Editorial, *(Penny) Wise Justice for California*, L.A. TIMES, Sept. 25, 2009, at A30 (describing the bill as a smart, cost-effective way to provide civil case legal counsel to those who cannot afford counsel); Editorial, *Waiting in California*, N.Y. TIMES, Oct. 5, 2009, at A22 ("Two innovative bills recently approved by the California Legislature are on Gov. Arnold Schwarzenegger's desk. One would make the state's justice system fairer and more efficient. The other would improve public safety. Neither would add to California's fiscal woes, and both would set a worthy example for the nation."); Carol J. Williams, *California Gives the Poor a New Legal Right*, L.A. TIMES, Oct. 17, 2009, at A8 ("California is embarking on an unprecedented civil court experiment to pay for attorneys to represent poor litigants who find themselves battling powerful adversaries in vital matters affecting their livelihoods and families.").

87 *See* Paul Marvy & Laura Klein Abel, *Current Developments in Advocacy to Expand the Civil Right to Counsel*, 25 TOURO L. REV. 131, 132–33 (2009) (discussing legislation expanding the civil right to counsel in Louisiana, New York, and Florida); *see also* 2005 Fla. Sess. Law. Serv. 245 (codified at FLA. STAT. ANN. § 39.5075(5) (West 2008)) (requiring legal representation for children who may be eligible for special immigrant status); 2008 La. Sess. Law Serv. 778 (West) (enacted July 7, 2008), *available at* http://www.legis.state.la.us/billdata/streamdocument.asp?did=50 2952 (affording a right to counsel to certain parents facing termination of their parental rights); 2006 N.Y. Sess. Laws 538 (McKinney) (codified at N.Y. JUD. LAW § 35.8 (McKinney 2008)) (expanding the right to counsel in child custody cases); Brennan Center for Justice, *California Recognizes Civil Right to Counsel and Creates Pilot Program,* BRENNAN CENTER FOR JUSTICE, Oct. 13, 2009, http://www.brennancenter.org/content/resource/californiaab590/ (describing codification of the historic Sargent Shriver Civil Counsel Act).

88 *See, e.g.*, Laura K. Abel, *Keeping Families Together, Saving Money, and Other Motivations Behind New Civil Right to Counsel Laws*, 42 LOY. L.A. L. REV. 1087, 1088–89 (2009) (discussing expansion of civil right to counsel laws in Alabama, Louisiana, Arkansas, Montana, Texas, Hawaii, Montana, Florida, and New York).

parties.[89] Arkansas, Montana, and Texas expanded the right to counsel to parents in the early stages of dependency proceedings.[90] Arkansas, Connecticut, Hawaii, and Montana all took measures to improve the quality of representation to parents in dependency cases.[91] Florida passed a statute requiring the state to provide an attorney to file a petition to adjust the immigration status of eligible children.[92] Finally, New York now provides counsel as a matter of right to parents involved in child custody proceedings pending in both family court and in New York trial courts of general jurisdiction.[93] Although these laws are limited, they demonstrate a willingness on the part of states to provide counsel as of right in certain situations, particularly in family law matters.

2. *Judicial Gains*

Litigation around the country has also been successful at expanding the right to counsel.[94] The California Court of Appeals found a right to counsel for non-custodial parents in contested adoption proceedings in 1983.[95] The Supreme Court of Alaska rejected *Lassiter*'s case-by-case approach in 1991 and instead extended a bright line right to counsel to indigent parents in termination proceedings.[96] That court found that a case-by-case approach is unfair, time consuming, and burdensome for the trial court.[97]

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89 *See* ALA. CODE § 12-15-305 (2008) (expanding the right to counsel to parents in dependency proceedings); LA. CHILD. CODE ANN. art. 1245.1 (2008).

90 *See* ARK. CODE ANN. § 9-27-401(d) (2008); MONT. CODE ANN. § 41-3-425 (2007); TEX. FAM. CODE ANN. §§ 107.013, 107.015 (2007).

91 *See* ARK. CODE ANN. § 9-27-401(d) (2008); CONN. GEN. STAT. § 46b-123c (2008); HAW. REV. STAT. § 571-87 (2008); MONT. CODE ANN. § 47-1-104, 47-1-202 (2007).

92 *See* FLA. STAT. ANN. § 39.5075(5) (2005).

93 N.Y. JUD. L. 35(8) (Consol. 2009).

94 *See, e.g.*, Russell Engler, *Pursuing Access to Justice and Civil Right to Counsel in a Time of Economic Crisis*, 15 ROGER WILLIAMS U. L. REV. 472, 490–91 (2010) (discussing various civil right to counsel suits).

95 *See* Jay v. Scott, 197 Cal. Rptr. 672, 678 (Ct. App. 1983) ("[D]ue process requires appointment of counsel for indigent noncustodial parents accused of neglect in stepparent adoption proceedings, if indigency is demonstrated and appointment of counsel is requested.").

96 *See In re* K.L.J., 813 P.2d 276, 282 n.6 (Alaska 1991) ("[W]e reject the case-by-case approach set out by the Supreme Court in *Lassiter*. Rather, our view comports more with the dissent. . . . [T]he due process balancing in the abstract favors a bright line rule where 'the private interest [is] weighty, the procedure devised by the state fraught with risks of error, and the countervailing governmental interest insubstantial.' Moreover, we agree with Justice Blackmun's explanation of the benefits of 'procedural norms,' and his caution about reviewability of case-by-case decision making.") (citations omitted) (third alteration in original).

97 *Id.*

A federal district court in Georgia ruled that the Georgia state constitution and a state statute mandate the right to counsel for children involved in dependency proceedings involving a charge of abuse or neglect.[98] In 2007, the Seventh Circuit overturned a narrow interpretation of access to pro bono counsel by prisoners.[99] The Massachusetts Supreme Court extended the right to counsel in 2008 to parents at the initial phase of Child in Need of Services proceedings brought by the state whenever custody of the child could be removed from the parent.[100] A Texas case, *Rhine v. Deaton*, petitioned the United States Supreme Court for certiorari to determine whether Texas denied equal protection by providing counsel in state-initiated termination proceedings, but not proceedings initiated by private parties.[101] The Court showed interest in the case by taking the unusual step of inviting the Texas Attorney General to submit a brief,[102] but it eventually denied certiorari.[103]

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98 *See* Kenny A. *ex rel.* Winn v. Perdue, 356 F. Supp. 2d 1353, 1359–61 (N.D. Ga. 2005) (determining that after applying the *Mathews* balancing test, "it is in the state's interest, as well as the child's, to require the appointment of a child advocate attorney").

99 *See* Pruitt v. Mote, 503 F.3d 647, 661 (7th Cir. 2007) (en banc) (holding that the district court abused its discretion when it failed to make an initial determination that the prisoner was competent to litigate his claims); *see also* Engler, *supra* note 95, at 490–91 ("Judge Korcoras noted at the Access to Justice Symposium the important *en banc* decision by the Seventh Circuit that overturned a narrow interpretation of a prisoner's access to pro bono counsel in a proceeding alleging that he was sexually assaulted by a prison guard.").

100 *See In re* Hilary, 880 N.E.2d 343, 352 (Mass. 2008); *see also* Engler, *supra* note 95, at 491 ("The Massachusetts Supreme Judicial Court extended the right to counsel to parents at the dispositional phase of a CHINS (children in need of services) proceeding if the judge is considering awarding custody to the Department of Social Services.").

101 Petition for Writ of Certiorari, Rhine v. Deaton, 130 S. Ct. 1281, 1281 (2010) (No. 08-1596).

102 Although *Rhine* was a setback, the denial of certiorari should not be seen as instructive as to the Court's views on right to counsel in termination proceedings. The case was not a promising "civil *Gideon*" because lower courts did not have the chance to pass upon the federal issues. The Texas Attorney General urged the Court not to grant certiorari because of this reason and also argued that the petitioner's claims were insubstantial. Brief for the State of Texas as Amicus Curiae at 6, Rhine v. Deaton, 130 S. Ct. 1281 (2010) (No. 08-1596) ("Petitioner presents two questions of federal law. By her own admission, however, neither was pressed in state court . . . . This Court's longstanding rule . . . has been to refuse to upset state-court judgments on federal grounds never raised or resolved below. Because petitioner has no basis for departing from this traditional rule or its controlling rationale, her petition should be denied."); *see also* Steven D. Schwinn, *ABA President Calls for Civil* Gideon, CONSTITUTIONAL LAW PROF BLOG (Oct. 22, 2009), http://lawprofessors.typepad.com/conlaw/2009/week43/index.html ("Earlier this month, in a highly unusual move, the Court asked the Texas Solicitor General for views at the cert. stage on *Rhine v. Deaton*.").

103 *See* Rhine v. Deaton, 130 S. Ct. 1281 (2010).

IV. WHY DO WE NEED A CIVIL RIGHT TO COUNSEL?

Recent expansions of the civil right to counsel have created a sizable foundation from which to expand the right around the country, but low income families and poor individuals are still consistently denied vital civil legal services. These unrepresented litigants are less likely to obtain a fair outcome in court than those who have counsel, and legal services organizations can serve only a fraction of litigants who need legal services.[104] Even a narrow Supreme Court ruling on the issue would open the door to a more expansive right to counsel throughout the United States. Many of the factors that informed the *Gideon* decision are in place today for the civil right to counsel, and the time is right for the Court to issue a decision on this matter. The right to counsel is essential to a just legal system and, despite the possibility of high costs and administrative burdens, is too important to deny.

A. *Legal Representation Makes a Difference*

The need for a civil right to counsel is not simply an honorable vision of liberal lawyers—legal representation makes a major difference in whether a party wins or loses a case.[105] As the Court recognized in *Gideon*, the average citizen is ill-equipped to defend him-or herself in most complex adversarial proceedings.[106] The ABA has declared that "when litigants cannot effectively navigate the legal system, they are denied access to fair and impartial dispute resolution, the adversarial

104 *See* Rhode, *supra* note 57, at 869 ("Litigants who remain unrepresented are less likely to obtain a fair outcome in court."); s*ee also* Task Force on Expanding the Civil Right to Counsel, *supra* note 74 (citing two studies finding that 70% to 90% of poor people's legal needs are not met).

105 *See, e.g.*, Barbara Bezdek, *Silence in the Court: Participation and Subordination of Poor Tenants' Voices in the Legal Process*, 20 HOFSTRA L. REV. 533, 539–40 (1992) (analyzing Baltimore's rent court and finding that "each of the enumerable constraints impeding poor tenants' court access is a substantial barrier to the assertion of claims by an appreciable numbers of tenants"); Carroll Seron et al., *The Impact of Legal Counsel on Outcomes for Poor Tenants in New York City's Housing Court: Results of a Randomized Experiment*, 35 LAW & SOC'Y REV. 419, 420 (2001) ("[L]ow-income tenants with legal representation experience significantly more beneficial outcomes than their counterparts who do not have legal representation, independent of the merits of the case."). *See generally* ABA, *supra* note 56, at 517–18 (2006) ("Not surprisingly, studies consistently show that legal representation makes a major difference in whether a party wins in cases decided in the courts.").

106 *See* Gideon v. Wainwright, 372 U.S. 335, 344–45 (1962) ("[A]ny person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him. . . . Even the intelligent and educated layman has small and sometimes no skill in the science of law."(internal quotation marks omitted)).

process itself breaks down[,] and the courts cannot properly perform their role of delivering a just result."[107]

Yet, in the United States, access to wealth is still a great determinate of access to legal services,[108] and the reality is that low income persons have the greatest need for civil legal services.[109] Low income individuals may face eviction, foreclosure, predatory lending, and consumer debt without the aid of an attorney to navigate the legal system.[110] A person who is unjustly denied eligibility for government benefits is denied a form of livelihood with no guarantee of an attorney to aid her.[111] Still, the vast majority of poor people do not obtain legal help for these serious problems;[112] fewer than 20% of low income litigants will obtain the legal services they need.[113]

Many civil cases involve complicated issues that pro se parties cannot easily handle without help.[114] Parties without lawyers are much more likely to lose their case because of procedural errors.[115] For ex-

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107 *See* ABA, *supra* note 56, at 518.

108 *See* Hornstein, *supra* note 54, at 1059 ("[A]ccess to legal representation in civil cases in the United States continues to turn largely on the random and irrational calculus of wealth.").

109 *See* Task Force on Expanding the Civil Right to Counsel, *supra* note 74, at 2, 11, 15–17, 19–20, 23–24; Henderson, *supra* note 56, at 77 (finding that low income families have a civil legal problem about once a year on average); *see also* Russell Engler, *Connecting Self-Representation to Civil* Gideon*: What Existing Data Reveal About When Counsel is Most Needed*, 37 FORDHAM URB. L.J. 37, 39 (2010) (reviewing current studies on the impact of representation in civil cases).

110 *See* Henderson, *supra* note 56, at 77 ("The fact is, being poor is terribly expensive.").

111 *See* Hornstein, *supra* note 54, at 1058 ("Whether a person is facing homelessness from foreclosure or eviction, is wrongfully denied eligibility for Supplemental Security Income benefits, is erroneously denied coverage under the federal Medicaid statute for a life-sustaining medical treatment or medication, is arbitrarily denied unemployment benefits, or is faced with an abusive consumer-collection suit, access to legal representation in civil cases in the United States continues to turn largely on the random and irrational calculus of wealth.").

112 *See, e.g.*, Task Force on Expanding the Civil Right to Counsel, *supra* note 74, at 4 (citing two studies finding that 70% to 90% of poor people's legal needs are not met); *see also* Henderson, *supra* note 56, at 77 (citing studies showing "nationally, on average, low income families had civil legal problems about once a year," and that 70% of indigent litigants do not obtain legal help for serious legal problems).

113 Legal Servs. Corp., *Documenting the Justice Gap in America: The Current Unmet Civil Legal Needs of Low Income Americans* 13, 18 (2007), http://www.lsc.gov/JusticeGap.pdf ("The recent state legal needs studies confirm earlier research and reveal that conservatively less than one in five—20 percent—of those requiring civil legal assistance actually receive it."); *see also* Henderson, *supra* note 56, at 78.

114 *See, e.g.*, Michelle Lore, *The Push for Civil '*Gideon*' Gaining Ground*, MINNLAWYER.COM (Apr. 23, 2007), http://www.dakotalegal.org/Documents/MinnesotaLawyerPushforCivilGideon.pdf.

115 Gardner, *supra* note 56, at 71 ("Parties without lawyers are far more likely to fall prey to procedure."); Seron et al., *supra* note 106, at 429 ("The findings from this experiment clearly show that when low-income tenants in New York City's Housing Court are pro-

ample, litigants who are unrepresented in housing court are much more likely to default on their claims.[116] In contested proceedings, lawyers use more of the procedural mechanisms, such as filing motions and requesting discovery, that are the key to success in many cases.[117] The chances of a litigant prevailing against a represented party drop by about half when the litigant is pro se.[118] Perhaps most importantly, litigants need an attorney's knowledge and ability to raise the substantive claims and defenses that can win their cases.[119] For example, 83% of applications for domestic violence protection orders filed by a lawyer are granted, while only 32% of applicants who file their own orders succeed.[120]

Lawyers acknowledge this problem and have released numerous resolutions, studies, and scholarly articles arguing the issue.[121] Though their statements could arguably be colored by professional self interest, judges who preside over civil proceedings also acknowledge this reality. A judge who served on the California Court of Appeals observed that the countless cases he reviewed where a pro se party argued against a lawyer left him with serious doubts as to

vided with legal counsel, they experience significantly more beneficial procedural outcomes than their *pro se* counterparts.").

116 Gardner, *supra* note 56, at 71 ("[U]nrepresented parties have much higher rates of default."); Seron et al., *supra* note 106, at 427 ("Notably, while approximately 28% of the control cases [without counsel] show defaults or failure to appear in Housing Court, only about 16% of treatments [with counsel] do so."); Steven Gunn, Note, *Eviction Defense for Poor Tenants: Costly Compassion or Justice Served?*, 13 YALE L. & POL'Y REV. 385, 414, Tab. 18 (1995) ("[L]egal services tenants were far less likely to default on the terms of their settlement agreements—for example, by failing to make required use and occupancy payments or by failing to vacate on time—than unrepresented tenants. Only twelve percent of the legal services tenants who related settlement agreements with their landlords defaulted, while thirty-four percent of the unrepresented tenants defaulted.").

117 Gardner, *supra* note 56, at 71 ("During contested proceedings, parties with lawyers make much greater use of procedural mechanisms that are key to success in civil litigation than do parties without. Those with lawyers are, for example, more likely than those without to file motions (73% compared to 8%), request discovery (62% compared to 0%), and receive continuances (35% compared to 3%)." (citation omitted)).

118 *Id.* at 71–72 ("A party who is unrepresented but faces a lawyer on the other side is at a significant disadvantage. Her chances of prevailing drop by approximately half." (citation omitted)).

119 *Id.* at 72 ("Perhaps obviously, lawyers' knowledge of and ability to raise substantive claims and defenses has also been found substantially to improve outcomes for their clients. . . . [R]aising substantive claims and defenses . . . greatly increases represented litigants' chances of achieving outcomes that reflect the underlying merits of their cases.").

120 *Id.* ("Applicants for domestic violence protection orders with lawyers succeed 83% of the time, while only 32% of applicants without lawyers obtain such orders."). This statistic may be skewed by the fact that civil attorneys can pick and choose clients, and they may only choose to represent those litigants with the most promising cases.

121 *See supra* Part III.B (providing an overview of legal opinion on the topic).

whether pro se litigants obtain fair hearings.[122] This is true even despite the fact that courts hold pro se filings to less stringent standards than attorney filings.[123] Many of these pro se litigants need the assistance of an attorney in order to obtain the fair hearing that is their constitutional right,[124] but our current system leaves them to fend for themselves.

B. *The Role of the United States Supreme Court: The Need for a "Civil* Gideon*"*

Although advocacy for the civil right to counsel has experienced incremental gains, if the Supreme Court held that the right to counsel is constitutionally guaranteed in even one civil situation, the legal scenery would immediately change.[125] Litigation provides advocates with a unique possibility to ensure the right nationally.[126] A single "civil *Gideon*" could speed up years of state-by-state legislative reforms and ensure that every state provides a right to counsel in certain civil cases.[127]

A Supreme Court ruling would officially recognize what the Court has been hinting at since its decision in *Gideon*, that the right to counsel is a fundamental right beyond criminal proceedings.[128] Even a narrow decision would open the door to further claims to create a more expansive right, as did *Gideon*. Although *Lassiter* creates an ob-

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122 *See* Earl Johnson, *"And Justice for All": When Will the Pledge Be Fulfilled?*, 47 JUDGES' J. 5 (2008) ("I can't count the number of cases I reviewed as an appellate judge in which a pro se party went *mano a mano* against a skilled or even a neophyte lawyer and left me with serious doubts about whether the pro se party got a fair hearing or whether the trial court made the right decision. The trial judges in those cases would have had to have felt equally uncomfortable about the distinct possibility that they were delivering injustice, rather than justice, in those cases.").

123 *See* Haines v. Kerner, 404 U.S. 519, 520 (1972) (observing that the Court holds pro se complaints to "less stringent standards than formal pleadings drafted by lawyers").

124 *See* U.S. CONST. amend. V ("No person shall . . . be deprived of life, liberty, or property, without due process of law . . . .").

125 *See* Kaufman, *supra* note 17, at 351 ("[A] singular holding by the Supreme Court identifying a right to appointed counsel in civil matters in the United States Constitution would change the landscape in an instant. The question in the states would turn from 'why' to 'how,' as implementation of the right would be the order of the day."); *see also* Sargent Shriver Civil Counsel Act, CAL. GOV'T CODE § 68651(a) (West 2010); *supra* Part III.C (outlining recent legislative and judicial gains).

126 *See* Kaufman, *supra* note 17, at 351 (observing that once the Court passes a civil *Gideon*, "[t]he question in the states would turn from 'why' to 'how,' as implementation of the right would be the order of the day").

127 *Id.*

128 *See id.* ("[A] singular holding by the Supreme Court identifying a right to appointed counsel in civil matters in the United States Constitution would change the landscape in an instant.").

stacle for the civil right to counsel movement, *Gideon* and recent Court decisions serve as a reminder that the doctrine of *stare decisis* is not absolute.[129] When the Court is faced with a decision or constitutional axiom that no longer stands "in light of its full development and its present place in American life throughout the Nation,"[130] the doctrine will yield.[131]

Looking to *Gideon* for inspiration, it is now appropriate for the Court to reconsider *Lassiter*. Scholars have noted that conditions that contributed to the reversal of *Betts v. Brady*[132] in *Gideon* are now present on the civil side.[133] Previous litigation concerning a right often paves the way for so-called "landmark" decisions.[134] The civil right to counsel has been frequently litigated in both state and federal courts.[135] Anthony Lewis has suggested that pervasive academic dis-

129 *See, e.g.*, Citizens United v. FEC, 130 S. Ct. 876, 912 (2010) ("[T]he relevant factors in deciding whether to adhere to the principle of *stare decisis* include the antiquity of the precedent, the reliance interests at stake, and of course whether the decision was well reasoned."(internal quotation marks omitted)); Montejo v. Louisiana, 129 S. Ct. 2079, 2082, 2088, 2090–91 (2009) ("We do not think that *stare decisis* requires us to expand significantly the holding of a prior decision—fundamentally revising its theoretical basis in the process—in order to cure its practical deficiencies."); Pearson v. Callahan, 129 S. Ct. 808, 816–18 (2009) ("Although [the U.S. Supreme Court] approache[s] the reconsideration of our decisions . . . with the utmost caution, *stare decisis* is not an inexorable command." (citation omitted) (internal quotation marks omitted)); *see also* Hornstein, *supra* note 54, at n.301 (noting that several recent Court decisions have not followed *stare decisis*).

130 Brown v. Bd. of Educ., 347 U.S. 483, 492–93 (1954).

131 Hornstein, *supra* note 54, at 1107–08 ("The Court's willingness in *Gideon* to revisit and overrule its prior decision in *Betts* [*v. Brady*] reminds us that the doctrine of stare decisis . . . will yield when confronted with a poorly reasoned decision or a dated constitutional axiom that, when considered 'in the light of its full development and its present place in American life,' no longer enjoys the continued currency of truth or constitutional validity." (quoting *Brown*, 347 U.S. at 492)).

132 316 U.S. 455, 471 (1942) (denying a right to counsel to indigent defendants prosecuted by the state).

133 *See, e.g.*, Abel, *supra* note 6, at 531–32 ("Some of the conditions that contributed to the reversal of *Betts* are already in place on the civil side.").

134 *See, e.g.*, Johnson v. Zerbst, 304 U.S. 458, 467 (1938) (holding that defendant Johnson had a right to counsel at his federal trial); Powell v. Alabama, 287 U.S. 45, 71 (1932) (finding that the Scottsboro boys did not receive effective assistance of counsel). These cases preceded *Gideon* by nearly thirty years. Many education cases also preceded *Brown*. *See* Sweatt v. Painter, 339 U.S. 629, 634–36 (1950) (holding that plaintiff Sweatt must be allowed to attend University of Texas Law School because the historically black law school was not equal in prestige or quality); Sipuel v. Bd. of Regents of Univ. of Okla., 332 U.S. 631, 632-33 (1948) (holding that the state must provide the black petitioner with "secure legal education afforded by a state institution").

135 *See supra* Part III.C.2 (discussing civil right to counsel litigation); Termination of Parent-Child Relationship of I.B. v. Ind. Dep't of Child Servs., 933 N.E.2d 1264, 1270–71 (Ind. 2010) (holding that parents in termination proceedings have a right to counsel on appeal); *In re* D.L., 937 N.E.2d 1042, 1046 (Ohio 2010) (finding a right to counsel for juvenile defendants in civil protection order proceeding); *In re* E.H., 243 P.3d 160, 164–65

approval of *Betts* may have contributed to the Court's choice to overrule that decision.[136] *Lassiter* is similarly criticized by legal scholars, attorneys, and judges.[137] Deborah Rhode, a leading legal ethics and public policy scholar, writes that *Lassiter* undercuts the "legitimacy of the justice system" because it fails to guarantee representation even in cases "where crucial interests are at issue, legal standards are imprecise and subjective, proceedings are formal and adversarial, and resources between the parties are grossly imbalanced."[138] The Honorable Robert W. Sweet wrote pointedly in 1998 that "[t]he time has come to reverse *Lassiter* and provide counsel in civil litigation just as the Supreme Court in *Gideon* in 1963 reversed its holding in *Betts v. Brady* twenty-one years earlier and found for a right to counsel in all criminal proceedings."[139]

Yet there are downsides to pursuing the right to counsel through litigation. Litigation is inherently uncertain. The Supreme Court grants certiorari in fewer than 1% of the cases appealed to the Court, so there is no guarantee that the Court would ever agree to consider a potential "civil *Gideon*."[140] If the Court does grant certiorari and the case fails, the Court could deny the right to counsel in an even stronger opinion than *Lassiter*. Nevertheless, there is little to lose in this area and much to gain. If the Court denies that this is a fundamental right, advocates will not be foreclosed from pursuing the rights through other means. State courts can still find that the civil right to counsel is a fundamental right under state constitutions, and

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(Wash. 2010) (holding that parents had statutory right to appointed attorney in nonparental custody action); *see also* Nat'l Coal. for a Civil Right to Counsel, *Litigation*, http://www.civilrighttocounsel.org/advances/litigation/ (last visited Mar. 27, 2011) (discussing the *I.B.* case).

136 ANTHONY LEWIS, GIDEON'S TRUMPET 117–18 (1964) (noting that scholarly criticism of *Betts* may have influenced the *Gideon* Court); *see also* Abel, *supra* note 71, at 531 (2006) ("[W]idespread academic condemnation for the Court's ruling in *Betts* may have been among the factors leading to that decision's demise.").

137 *See* Abel, *supra* note 71, at 531 (noting that "[m]any highly respected academics and judges have . . . roundly condemned *Lassiter*"); Bruce A. Boyer, *Justice, Access to the Courts, and the Right to Free Counsel for Indigent Parents: The Continuing Scourge of* Lassiter v. Department of Social Services of Durham, 36 LOY. U. CHI. L.J. 363, 379–80 (2005) (citing several articles that criticize *Lassiter*).

138 Deborah L. Rhode, *Access to Justice*, 69 FORDHAM L. REV. 1785, 1799 (2001); *see also* Abel, *supra* note 71, at 531–32 (quoting Rhode).

139 Robert W. Sweet, *Civil* Gideon *and Confidence in a Just Society*, 17 YALE L. & POL'Y REV. 503, 506 (1998).

140 The Court receives over ten thousand petitions for certiorari each year, and grants about seventy-five to eighty of those petitions. SUPREMECOURT.GOV, *Frequently Asked Questions*, http://www.supremecourt.gov/faq.aspx (last visited Mar. 27, 2011).

state legislators can continue to expand the right statutorily.[141] But if the Court extends the right to counsel to even one civil situation, the door will be open for more expansions of the right.

If the Court does reach a favorable decision, implementing that civil *Gideon* will face obstacles.[142] Opponents of the right to counsel argue that the cost of providing the right would be too great, and line-drawing to determine which cases should receive counsel would be too difficult.[143] It is true that even in a thriving economy, finding money to fund civil legal services has been a struggle.[144] Line-drawing will also be an issue, as it was after *Gideon*,[145] and some cases will likely end up before the Supreme Court.[146]

But these logistical and financial concerns do not undercut the need for counsel. All of these issues were equally important in *Gide-*

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141 There is a danger that a decision by the Supreme Court denying this right could slow down gains in other arenas. However, states are free to provide protections above and beyond those provided in the Constitution. For example, some states choose to provide more expansive Fourth Amendment protections. *See, e.g.*, State v. Askerooth, 681 N.W.2d 353, 362 (Minn. 2004) (establishing the Supreme Court of Minnesota conclusion "that there was a principled basis for interpreting . . . [Minn. Const. art. I, § 10] as providing greater protection than the Fourth Amendment" and declining to follow the Supreme Court, adhering instead to its "longstanding rule that a seizure occurs when a reasonable person in the defendant's shoes would not feel free to leave, thereby maintaining the reasonableness requirement in a wider range of circumstances"); State v. Brown, 792 N.E.2d 175, 177 (Ohio 2003) ("[Ohio Constitution article I, § 14] provides greater protection than the Fourth Amendment . . . against warrantless arrests for minor misdemeanors."). Further, the *Lassiter* decision did not prevent states and courts from taking the steps outlined *supra* Part III.C to provide a civil right to counsel in certain situations.

142 Thomas Burke, *A Civil* Gideon*? Let the Debate Begin*, 65 J. MO. B. 5, 5–6 (2009) ("Obviously, the idea of a civil *Gideon* . . . faces enormous challenges and hurdles, not the least of which include who should get counsel and in what types of cases, how much such a program would cost, and a source of funding.").

143 Lore, *supra* note 115 ("The primary arguments against the right to counsel in civil cases are the cost and the difficulty in drawing a line as to which cases the right would apply.").

144 Audi, *supra* note 86 ("In 2006, the American Bar Association issued a statement backing civil *Gideon*. But finding the money for it, even when the economy was booming, has been difficult.").

145 *See, e.g.*, Alabama v. Shelton, 535 U.S. 654, 658 (2002) ("[A] suspended sentence that may end up in the actual deprivation of a person's liberty may not be imposed unless the defendant was accorded the guiding hand of counsel in the prosecution for the crime charged."(citation omitted) (internal quotation marks omitted)); Coleman v. Alabama, 399 U.S. 1, 9–10 (1970) (holding that the defendant had a right to counsel at a preliminary hearing even if nothing at that hearing would be used in trial); United States v. Wade, 388 U.S. 218, 237 (1967) (finding a right to counsel at a pretrial line-up); *see also* Scott v. Illinois, 440 U.S. 367, 373 (1979) (holding that actual imprisonment, rather than fines or the threat of imprisonment, is requisite for a constitutional right to counsel).

146 *See* Lore, *supra* note 115 ("[T]here will be some grey areas that will likely end up before the Supreme Court, but . . . that's not a reason to avoid implementation of the civil right to counsel."(internal quotation marks omitted)).

on, but the Court still recognized the right to counsel.[147] In *Argersinger*, concurring opinions noted that expanding *Gideon* would be complicated for states to implement, especially since they were already having difficulty providing effective counsel under *Gideon*, but the Court chose to extend the right to counsel notwithstanding these problems.[148] In a civil context, the costs of not extending the right are of equal importance to those the Court recognized in *Argersinger*.[149] The lack of a right to counsel in situations where critical human needs are at stake undermines our legal system.[150] The Supreme Court has recognized that the "right to sue and defend . . . is the right conservative of all other rights[,] . . . lies at the foundation of orderly government . . . [, and] is one of the highest and most essential privileges of citizenship."[151] Yet without a civil right to counsel, the reality is that the right to sue and defend is based in large part on wealth.[152] America has the highest concentration of attorneys in the

147 Abel, *supra* note 6, at 535–36 ("The fact that the *Gideon* Court was undaunted by [line-drawing and financial] difficulties demonstrates that awareness of similar obstacles in the civil context need not doom a litigation initiative to establish a right to counsel in civil cases.").

148 Argersinger v. Hamlin, 407 U.S. 25, 44 (1971) (Burger, J., concurring) ("The holding of the Court today may well add large new burdens on a profession already overtaxed, but the dynamics of the profession have a way of rising to the burdens placed on it."); *id.* at 55 (Powell, J., concurring) ("It is doubtful that the States possess the necessary resources to meet this sudden expansion of the right to counsel."); *see also id.* at 37 n.7 (observing "Justice Powell's doubt that the Nation's legal resources are sufficient to implement the rule we announce today," but expecting that there would actually be enough lawyers); Abel, *supra* note 6, at 536–37 ("Notably, the Supreme Court has continued to expand the scope of the right to counsel in criminal cases, notwithstanding the Court's clear recognition of the difficulties states have encountered in implementing *Gideon*. In *Argersinger v. Hamlin* . . . [c]oncurring opinions discussed the high volume of cases that would be affected, noted that the states were already having difficulty providing competent counsel for all felony defendants, and predicted that the states would find implementing *Argersinger* even more difficult. Nevertheless, the Court did not shy away from its duty to correctly interpret the Constitution in the face of these difficulties.").

149 Burke, *supra* note 143, at 5–6 ("Though the costs and commitment would be significant, the greater cost, both individually and collectively, is in failing to provide counsel in cases involving housing, healthcare and child custody.").

150 Rhode, *supra* note 139 ("The rationale for subsidized representation seems particularly strong in cases like *Lassiter*, where crucial interests are at issue, legal standards are imprecise and subjective, proceedings are formal and adversarial, and resources between the parties are grossly imbalanced. Under such circumstances, opportunities for legal assistance are crucial to the legitimacy of the justice system.").

151 Chambers v. Balt. & Ohio R.R., 207 U.S. 142, 148 (1907); *see also* Rhode, *supra* note 139, at 1799 ("[The right to sue and defend] affirms interests of human dignity that are core democratic ideals.").

152 *See supra* Part IV.A (noting the role wealth plays in access to counsel); Hornstein, *supra* note 54, at 1065–72 (discussing wealth and lack of access to counsel).

world, but it still does not provide counsel in cases where litigants' basic human needs are at stake.[153] We can do better.

V. THE RIGHT TO COUNSEL IN TERMINATION PROCEEDINGS: A PROMISING CIVIL *GIDEON* FOR JUVENILES

A promising situation to fulfill the hopes of a civil *Gideon* would be to argue *Lassiter* from the child's perspective instead of the parent's. The *Lassiter* Court did not consider whether due process would mandate that the state appoint counsel for William Lassiter, and all other children who are the subject of any type of termination, abuse and neglect, or dependency proceedings brought by the state.[154] Just as was true before *Gideon*, a legal framework, however inadequate, is already in place to provide this right, and the due process arguments for the right are persuasive.[155] A case in which a child was not represented by counsel and was erroneously removed from his or her family or returned to an abusive home would present serious due process issues that could convince the Court to extend a bright line right to counsel for children in termination proceedings.

A. Existing Right to Counsel in Juveniles Termination Proceedings

A large number of right to counsel statutes already concern juveniles who are subject to some type of custody proceeding, such as abuse and neglect, dependency, or termination proceedings. This is in part because the Child Abuse Prevention and Treatment Act ("CAPTA") requires that states receiving federal funds under the Act appoint a representative for juveniles involved in abuse or neglect

153 Rhode, *supra* note 57, at 869 ("'Equal justice under law' is a principle widely embraced and routinely violated. Although the United States has the world's highest concentration of lawyers, it fails miserably at making their assistance accessible to those who need it most."); *see generally* Terrence J. Brooks, *New Concepts in Equal Access to Justice: Recent State Developments Regarding Civil Right to Counsel*, 47 JUDGES' J. 28 (2008) (discussing implementation of the ABA resolution for civil right to counsel and where that right stands now).

154 *See generally* Taylor, *supra* note 10 (noting that "[a]fter performing the [*Mathews*] balancing test, one must conclude that the enormity of the child's interests involved in abuse and neglect proceedings and the high risk of erroneous deprivation require the appointment of legal representation for children in every case, at every hearing"); Smiles, *supra* note 10, at 487 (arguing that the *Mathews* balancing test weighs strongly in favor of appointing counsel to children at termination hearings).

155 *See supra* Parts III–IV (discussing the current right to counsel in civil cases).

proceedings.[156] Still, despite this nation-wide mandate for representation, the right to counsel varies from state to state.[157]

All fifty states require some type of representation for children in termination proceedings.[158] Thirty-four states and the District of Columbia mandate the appointment of a lawyer for juveniles in termination proceedings.[159] Other states leave the appointment of counsel for juveniles to the discretion of the judge.[160] The child is considered a party to all proceedings in thirty-eight states and the District of Columbia.[161] A child has a right to counsel on appeal in twenty-nine states and the District of Columbia.[162]

Although these statutes are widespread, they do not ensure that counsel will always be appointed in child custody proceedings, even in proceedings where a child may be permanently removed from his or her home.[163] The right to counsel may or may not include repre-

156 Child Abuse Prevention and Treatment Act, 42 U.S.C. § 5106a(b)(2)(A)(xiii); *see also* Laura K. Abel & Lora J. Livingston, *The Existing Civil Right To Counsel Infrastructure*, 47 JUDGES' J. 24, 25 (2008).

157 There is no requirement under CAPTA that the child's representative be an attorney, but many states chose to supplement the requirements of the Act with that protection. Still, almost twenty states choose not to do so, leaving children in those states with fewer safeguards than children in the rest of the country. *See* Frederick & Sams, *supra* note 84.

158 *See id.*; *see also* Abel & Rettig, *supra* note 13 (outlining current right to counsel statutes for children in termination hearings and other civil right to counsel statutes).

159 Frederick & Sams, *supra* note 84, at 12–13. *See, e.g.*, CAL. WELF. & INST. CODE § 366.26(f) (West 2010) (guaranteeing appointment of counsel for juveniles in state-initiated termination-of-parental-rights proceedings and guardianship proceedings for dependent children); GA. CODE ANN. § 15-11-98(a) (West 2009) ("In any proceeding for terminating parental rights . . . the court shall appoint an attorney to represent the child as the child's counsel."); MD. CODE ANN., CTS. & JUD. PROC. § 3-813 (West 2010) (providing a right to counsel in children-in-need-of-assistance proceedings for all parties who are younger than eighteen).

160 *See, e.g.*, ALA. CODE § 12-15-63 (2008) ("The court shall . . . appoint counsel for the child in termination cases where there is an adverse interest between parent and child or where the parent is . . . under the age of 18 years or counsel is otherwise required in the interests of justice."); ARIZ. REV. STAT. ANN. § 8-872(D) (2010) ("In a [termination] proceeding for permanent guardianship. . . [t]he court may also appoint one for the child if a guardian ad litem has not already been appointed."); NEV. REV. STAT. § 128.100 (2009) ("In any proceeding for terminating parental rights, or any rehearing or appeal thereon, the court may appoint an attorney to represent the child as his counsel."); *see also* Abel & Rettig, *supra* note 13.

161 Frederick & Sams, *supra* note 84.

162 *Id.*

163 *See, e.g.*, NEV. REV. STAT. *supra* note 161 ("In any proceeding for terminating parental rights, or any rehearing or appeal thereon, the court *may* appoint an attorney to represent the child as his counsel."(emphasis added)); Meredith Larson, *Child Custody, Visitation & Termination of Parental Rights*, 10 GEO. J. GENDER & L. 713, 747 (2009); *see also* Abel & Rettig, *supra* note 13; Kaufman, *supra* note 17, at 351 (noting that the "[p]atchwork recognition [of the civil right to counsel] and implementation by legislatures form a fragile and uneven safety net").

sentation during preliminary termination proceedings, even though these proceedings can effectively determine where a child will live.[164] Sixteen states still leave appointment of counsel at the discretion of the trial judge.[165] In twelve states, a child is not even considered a party to the proceedings that will determine where he or she will live.[166] The interests at stake in these proceedings are fundamental, so the right to appointed counsel should be guaranteed in all fifty states.

B. Children Have a Strong Procedural Due Process Interest in Appointed Counsel in Termination Proceedings

When a termination proceeding begins, the state has already alleged that the child has experienced abuse, neglect or abandonment.[167] If the judge presiding over the proceeding makes an erroneous decision, the child could be returned to an abusive home and face injury or death, or be wrongly separated from her family.[168] Because of the important matters at stake, procedural due process requires that children have a right to counsel at termination proceedings.

Due process constrains any official governmental action which deprives an individual of "liberty" or "property" interests within the meaning of the Due Process Clause of the Fifth and Fourteenth Amendments.[169] Courts determine whether due process mandates

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164 Frederick & Sams, *supra* note 84.

165 *Id.* at 12–13.

166 *Id.*

167 *See* Meridith Sopher, *Giving the Children a Meaningful Voice: The Role of the Child's Lawyer in Child Protective, Permanency and Termination of Parental Rights Proceedings*, 223 PRAC. LAW INST. LITIG. & ADMIN. PRAC. SERIES CRIM. L. & URB. PROBS. 63, 65 (2010) (discussing termination proceedings). *See generally* Taylor, *supra* note 10, at 606 ("By the time a child's case enters the dependency court system, he is alleged to have experienced abuse, neglect, or abandonment by a parent or caregiver on whom he should have been most able to rely. He is removed from all that is familiar to him, including family, home, friends, and school.").

168 *See infra* Part V.B.1 (discussing the child's interests at stake in a termination proceeding).

169 Mathews v. Eldridge, 424 U.S. 319, 332 (1976) ("Procedural due process imposes constraints on governmental decisions which deprive individuals of 'liberty' or 'property' interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment."). In dependency proceedings, a child has a liberty interest in not being forcibly separated from her family by the state. The Supreme Court has not established whether due process protections apply to children who are subject to state-initiated termination proceedings, but the Court has established that procedural due process applies to juveniles in other situations. *See, e.g.*, *In re* Gault, 387 U.S. 1, 41 (1967) (finding that Gault had a right to counsel in a criminal proceeding in the juvenile courts); *see also* Smiles, *supra* note 10, at 485–86 ("The Court has not established, however, whether similar due

the appointment of counsel on a case-by-case basis.[170] Courts must balance three factors: (1) the private interest affected by the official action; (2) the risk of an erroneous deprivation of that interest; and (3) the government's interest.[171] In termination proceedings, each of these factors weighs toward the appointment of counsel for juveniles.[172]

1. The Private Interests at Stake

The private interests at stake in termination proceedings are powerful. In these proceedings the state seeks to end the relationship between parent and child, and, if successful, the state "will have worked a unique kind of deprivation" of familial ties.[173] The Court has "made plain beyond the need for multiple citation" that a parent's right to raise his or her own children is a commanding interest that indisputably warrants protection.[174] Yet the child's interests at stake in termination proceedings are even greater than the parent's because of the child's distinctive position as dependant and juvenile.[175]

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process protections attach in juvenile dependency proceedings when a state brings an action to protect a child from abuse or neglect, even though dependency courts often decide where and with whom a child will reside."). Lower federal courts have determined that children have a liberty interest at stake in termination proceedings and are, therefore, given due process protections. *See* Duchesne v. Sugarman, 566 F.2d 817, 825 (2d Cir. 1977) ("This right to the preservation of family integrity encompasses the reciprocal rights of both parent and children. It is the interest of the parent in the 'companionship, care, custody and management of his or her children,' and of the children in not being dislocated from the 'emotional attachments that derive from the intimacy of daily association' with the parent." (citations omitted)); Nicholson v. Williams, 203 F. Supp. 2d 153, 235 (E.D.N.Y. 2002) (finding that the liberty "interest in not being forcibly separated by the state is shared by parents and children").

170 Lassiter v. Dep't of Soc. Servs., 452 U.S. 18, 31–32 (1981) ("We . . . leave the decision whether due process calls for the appointment of counsel for indigent parents in termination proceedings to be answered in the first instance by the trial court, subject, of course, to appellate review.").

171 *Mathews*, 424 U.S. at 334–35.

172 For alternative applications of the *Mathews* test to juveniles in termination, dependency, and abuse and neglect proceedings, see generally Erik Pitchal, *Children's Constitutional Right to Counsel in Dependency Cases*, 15 TEMP POL. & CIV. RTS. L. REV. 663 (2006); Taylor, *supra* note 10; Smiles, *supra* note 10.

173 *Lassiter*, 452 U.S. at 27.

174 *Id.*

175 *See* Pitchal, *supra* note 173, at 676 ("Children have a greater liberty interest at stake . . . than their parents . . . because the risk of harm they face is irreparable."); Smiles, *supra* note 10, at 495 (noting that, in termination hearings, "the interest of the child is even greater than that of a parent").

During termination proceedings, a judge makes vital decisions about a child's future, decisions that can affect the rest of a child's life. These include where a child will be placed if removed from his or her home, permanency of that placement, and visitation rights of parents and relatives.[176] The child has a strong interest in either being removed from an abusive environment or, if the home environment is not abusive, in retaining ties with his or her family.[177] A child who is returned to an abusive environment can suffer extreme consequences, including long-term disabilities, such as mental retardation or physical handicap, or even death.[178] A child who is erroneously removed from his or her home will not only lose ties with his or her family but will also face the "well-known risks of long-term foster care: [P]oor educational progress, poor health, deteriorating health, deteriorating mental health, and, ultimately as young adults, unemployment, homelessness, and disconnection from society."[179] A child has a powerful interest in his or her own future, health, safety, well-being, and the companionship and care of his or her biological or adoptive parents.[180]

2. *The Risk of Erroneous Decision Without Safeguards*

The risk of an incorrect decision without additional safeguards is insupportably high in termination proceedings. An erroneous decision that a child should not be removed from his or her home can have a destructive effect on a child leading to abuse, neglect, or even death.[181] An erroneous judgment that a child should be removed

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176 Taylor, *supra* note 10 (discussing the possible outcome of court hearings while a child is in the termination system).

177 *See* Smiles, *supra* note 10, at 496 ("[T]he child may . . . have a strong interest in being removed from his home because . . . the child's safety may be at risk.").

178 *See, e.g.*, *id.*; Deshaney v. Winnebago Cnty. Dep't of Soc. Servs., 489 U.S. 189 (1989).

179 Pitchal, *supra* note 173, at 664.

180 *See* Smiles, *supra* note 10, at 495 n.59 (declaring that a child has an interest in the companionship and care of his parents); *see also* Taylor, *supra* note 10, at 607 (observing that a child's liberty interests include "safety, health, and well-being, as well as an interest in maintaining the integrity of the family unit and in having a relationship with biological parents").

181 Kenny A. *ex rel.* Winn v. Perdue, 356 F. Supp. 2d 1353, 1360 (N.D. Ga. 2005) ("On the one hand, an erroneous decision . . . that parental rights should not be terminated can have a devastating effect on a child, leading to chronic abuse or even death. On the other hand, an erroneous decision that a child is deprived or that parental rights should be terminated can lead to the unnecessary destruction of the child's most important family relationships.").

from his or her home can lead to unnecessary isolation and destruction of a child's familial relationships.[182]

The risks of an erroneous decision are compounded by the procedures used in termination proceedings. The Unites States Supreme Court has acknowledged the high likelihood of risk associated with these procedures in the past. In *Santosky v. Kramer*, the Court held that due process mandates that a state prove neglect or abuse allegations using clear and convincing evidence because in termination proceedings:

> [N]umerous factors combine to magnify the risk of erroneous factfinding . . . . [Termination] proceedings employ imprecise substantive standards that leave determinations unusually open to the subjective values of the judge . . . . [T]he court possesses unusual discretion to underweigh probative facts that might favor the parent. Because parents subject to termination proceedings are often poor, uneducated, or members of minority groups, such proceedings are often vulnerable to judgments based on cultural or class bias.[183]

Because of this high risk, the additional safeguard of guaranteed counsel is invaluable. The presence of counsel to represent the interests of the child can help to check the discretion given to judges in these proceedings, to ensure that bias against indigent families does not play a part in the court's decision, and to ensure that the child's voice is heard.[184]

Guaranteed counsel is uniquely important for children at termination hearings because of their position as juveniles in a courtroom. Compared with adults, most children lack maturity and are vulnerable to outside pressures.[185] These differences mean that a child may feel uncomfortable and fearful in a courtroom and may be unwilling to speak up in front of their parents or a judge. A parent, or a parent's attorney, cannot be assumed to speak for the child because the parent may have different interests than the child—it may be in a

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182 *Id.*

183 455 U.S. 745, 762–63 (1982) (citations omitted).

184 *Id.* (noting that parental termination proceedings are susceptible to judgments based on class bias). Even if an attorney's presence cannot compel a judge to make a decision without bias, the attorney may serve as an additional witness to that bias in an appeal of a court's decision, similarly to the position of an attorney who is present at a flawed criminal line-up.

185 *See, e.g.*, Roper v. Simmons, 543 U.S. 551, 569 (2005) ("Three general differences between juveniles under 18 and adults demonstrate that juvenile offenders cannot with reliability be classified among the worst offenders. First, . . . [a] lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults and are more understandable among the young . . . . [S]econd . . . juveniles are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure." (internal quotation marks and citations omitted)).

parent's interest to lie to the court in order to keep the child despite abusive or neglectful conditions in the home. The child's voice is therefore crucial for allowing a judge to make an informed decision,[186] and in a courtroom, attorneys typically control what information reaches the judge.[187] The presence of an attorney to represent the child will thus help to guarantee that the judge receives necessary information about the child's home situation and expressed interests.[188] The risk of erroneous decisions is high, and children need additional procedural safeguards in order to ensure that the outcome of any termination proceeding is both correct and fair.

3. *The Government's Interest*

A bright line rule for appointed counsel in termination proceedings will also protect government interests. Government interests include "the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail."[189] In termination proceedings, the two primary interests of the state are a "*parens patriae* interest in preserving and promoting the welfare of the child and a fiscal and administrative interest in reducing the cost and burden of such proceedings."[190] The right to counsel for juveniles in termination proceedings will safeguard both of these interests.

The state's *parens patriae* interest is only at issue when a child is being abused or neglected; the state has no interest in intervening otherwise.[191] The state's *parens patriae* interest is therefore "best promoted by procedures that enhance the court's fact-finding ability, enabling courts to reach a result most in line with the best interests of

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186 *See* Taylor, *supra* note 10, at 608 ("The absence of the child's voice means that the court does not have all relevant information to make the best decision.").

187 *See Implementation of the Adoption and Safe Families Act: Hearing Before the Subcomm. on Human Res. of the H. Comm. on Ways and Means*, 108th Cong. 63 (2003) (statement of Mark Hardin, Dir., Nat'l Child Welfare Res. Ctr. on Legal & Judicial Issues, Am. Bar Ass'n ("Attorneys largely control the flow of information to the judge. Attorneys decide what witnesses, evidence, and arguments to present. . . . Without complete relevant information, judges' decisions may well be ill informed or even tragically mistaken.").

188 *See* Taylor, *supra* note 10, at 608 ("Without attorneys to advocate for the child's expressed interests and present information that would not otherwise be offered, there is a high risk that children will be placed in foster care unnecessarily or will remain in the system longer than required to ensure their safety. In the alternative, it is also possible that, when the child's views and wishes are ignored, he will be returned to an abusive environment.").

189 Mathews v. Eldridge, 424 U.S. 319, 334–35 (1976).

190 Santosky v. Kramer, 455 U.S. 745, 766 (1982).

191 *See* Taylor, *supra* note 10, at 608 ("The state has no interest in intervening in the family when there is not proper justification supported by evidence.").

the child."[192] Counsel for a child involved in a termination proceeding will aid the court in correct and speedy fact-finding because attorneys know the rules and procedures of the court and can communicate directly with the child and his or her parent(s).[193] A judge can only perform a limited fact-finding investigation from the bench. Counsel can complete a more in-depth investigation into a child's home life, can converse directly with a child in a less formal environment than a courtroom, and can communicate relevant information to a judge in an easily understandable and unbiased manner.

A bright line rule to appoint counsel should lower the state's administrative burden because bright line rules are generally less complicated to administer than case-by-case determinations. In an amicus brief to the *Gideon* Court, twenty-three states urged the Court to adopt a bright line rule for right to counsel, noting that a categorical right is more even-handed and easier to administer.[194] The Supreme Court of Alaska rejected *Lassiter*'s case-by-case framework because "the case-by-case approach adopted by the [Court in *Lassiter*] does not lend itself practically to judicial review . . . . [It is] also time consuming and burdensome on the trial court."[195] A categorical right to counsel for children in termination proceedings will save courts the considerable effort involved in balancing the *Mathews* factors and dealing with appeals for cases where children were not afforded counsel, while also aiding judicial fact-finding.

Finally, the state's fiscal interests are unlikely to be severely harmed by a constitutional guarantee of appointed counsel for juveniles. Many states already guarantee this right, which will lower the

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192 Smiles, *supra* note 10, at 498.

193 Taylor, *supra* note 10, at 608.

194 Brief for the State Government as Amici Curiae Supporting Petitioner, Gideon v. Wainwright, 372 U.S. 335, at 3 (1963) (No. 155) ("The rule of *Betts v. Brady* does not make it possible to conduct a trial fairly within the meaning of the advocacy system. For that system, depending as it does on presentation of all considerations on both sides of the case, demands the presence of counsel . . . . Consequently, the rule has been, and is being, inconsistently and confusingly applied, and the appellate decisions are contradictory and almost invariably marked with sharp dissents."). Alaska, Colorado, Connecticut, Georgia, Hawaii, Idaho, Illinois, Iowa, Kentucky, Maine, Massachusetts, Michigan, Minnesota, Missouri, Nevada, North Dakota, Ohio, Oregon, Rhode Island, South Dakota, Washington, and West Virginia filed an amicus brief urging the overruling of *Betts v. Brady*. *Id.*; *see also* Gardner, *supra* note 56, at 74 ("As the [twenty-three] amic[i] states told the Court in *Gideon*, a categorical right is far easier to administer, and to administer fairly.").

195 *In re* K.L.J., 813 P.2d 276, 282 n.6 (Alaska 1991) (quoting Note, Lassiter v. Department of Social Services: *A New Interest Balancing Test for Indigent Civil Litigants*, 32 CATH. U. L. REV. 261, 282–83 (1982)).

overall financial cost of providing counsel.[196] And a bright line rule for counsel may save states money. Studies conducted since *Gideon* have documented that civil cases reach more cost-effective outcomes when litigants are represented by attorneys.[197] Recent expansions of the right to counsel seem to have been based on the belief that providing counsel would both decrease the number of children removed from their homes and speed the return of children to their families, thereby saving the government money.[198] Many states have expanded the right to counsel even in times of financial strain, suggesting that legislators anticipated financial savings.[199] But even if the state's fiscal interests are harmed, the Court has observed that "though the State's pecuniary interest is legitimate, it is hardly significant enough to overcome private interests as important as those [of indigent parents in termination proceedings]."[200]

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196 *See supra* Part V.A (discussing the current right to counsel in this area). All fifty states require some type of representation for children in termination hearings, although those rights can vary widely. *See* Frederick & Sams, *supra* note 84. The fact that so many states already guarantee the right also suggests that doing so has not been fiscally impossible and should not be unattainable for most states. *See generally* Abel & Rettig, *supra* note 13 (outlining current right to counsel statutes for children in termination hearings and other civil right to counsel statutes).

197 Carol J. Williams, *California Gives the Poor a New Legal Right*, L.A. TIMES, Oct. 17, 2009, at A8 ("Over the four-plus decades since the *Gideon* ruling, legal researchers have documented that when litigants have lawyers in civil cases, more just and cost-effective outcomes are reached."); *(Penny) Wise Justice for California*, *supra* note 87 (noting that the Sargent Shriver Act will not add to California's fiscal woes). *But see* D. James Greiner & Cassandra Wolos Pattanayak, *What Difference Representation?* (Working Paper, Nov. 2010), *available at* http://ssrn.com/abstract=1708664 (reporting that a series of studies showed that representation in unemployment benefits cases inflicted harm on litigants and did not increase probability of a favorable outcome).

198 Abel, *supra* note 89, at 1110 ("The Arkansas, Montana, and Texas expansions of the right to counsel for parents in dependency cases apparently were premised on a belief that providing parents with counsel would decrease the number of children taken from their parents and speed the return of children to their parents, thus benefiting individual children and saving the government money.").

199 *Id.* at 1111 ("Expectations of financial savings may explain why the civil right to counsel has been expanded in states with tight budgets, and even in states that have had to increase their spending on other kinds of mandated representation . . . . Arkansas expanded its right to counsel for parents in dependency cases at a time when tax revenues were $23 million lower than had been anticipated. Similarly, Montana expanded its right to counsel for parents in abuse and neglect cases at the same time it set up a potentially expensive statewide public defender system in response to an ACLU lawsuit . . . . Finally, Texas expanded the right to counsel for parents in abuse and neglect cases four years after it revamped its county-funded indigent defense system to provide, for the first time, some state funding for appointed counsel in criminal cases.").

200 Lassiter v. Dep't of Soc. Servs., 452 U.S. 18, 28 (1981).

4. *Fundamental Fairness*

Combined, the *Mathews* factors powerfully weigh toward appointment of counsel, and the basic tenet of due process—fundamental fairness—also commands that children have a right to counsel in termination proceedings. The Court has long held that due process is a malleable concept that changes with time. In *Lassiter*, the Court recognized that "[u]nlike some legal rules . . . due process is not a technical conception with a fixed content unrelated to time, place, and circumstances. Rather, the phrase expresses the requirement of fundamental fairness, a requirement whose meaning can be . . . opaque."[201]

In determining what is "fundamentally fair," the Court has considered the number of states that guarantee a right. For example, in *Powell v. Alabama*, Justice Sutherland noted that every state provided some type of right to counsel in capital cases, and stated that, "[a] rule adopted with such . . . accord reflects, if it does not establish, the inherent right to have counsel appointed . . . and lends convincing support to the conclusion" that counsel is constitutionally required.[202] Currently, upwards of thirty-four states guarantee the right to counsel to children in terminations proceedings, almost exactly the same number of states that provided a right to counsel in criminal cases before *Gideon*.[203] The Court itself recognized almost twenty years ago that "[i]nformed opinion has clearly come to hold that an indigent parent is entitled to assistance of appointed counsel," and states have come to the same conclusion for children.[204] The combination of this fact with the balance of the *Mathews* factors demonstrates that juveniles in termination proceedings should be afforded counsel as of right.

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201 *Id.* at 24–25 (internal quotations omitted).

202 Powell v. Alabama, 287 U.S. 45, 73 (1932). For example, the Court has adjusted its concept of due process to accord with evolving due process standards in the context of cruel and unusual punishment. *See* Roper v. Simmons, 543 U.S. 551, 569 (2005) (holding that executing juveniles violates the Eighth Amendment because it is cruel and unusual); Atkins v. Virginia, 536 U.S. 304, 321 (2002) (invalidating state laws that allow execution of defendants with mental retardations because those laws violate the Eighth Amendment's ban on cruel and unusual punishment).

203 *See* Brief for the State Government as Amici Curiae Supporting Petitioner, Gideon v. Wainwright, 372 U.S. 335, at 2, 10 (1963) (No. 155) ("[T]hirty-five states now require the appointment of counsel in non-capital cases . . . . Such a solid majority of the states, in endorsement of the non-capital assigned counsel principle, indicates that the principle is indeed a fundamental part of the concept of due process of law.").

204 *Lassiter*, 452 U.S. at 33–34.

VI. CONCLUSION

The time is right for a civil *Gideon*, and the call for the civil right to counsel is mounting across the United States. Attorneys and legislatures have begun to address the necessity for the right through litigation, legislation, and advocacy groups.[205] And the need for counsel is greater than ever—low income families are facing eviction, foreclosure, predatory lending, and consumer debt without the aid of an attorney.[206] Still, fewer than twenty percent of low income litigants get the legal services they need.[207]

The right to counsel is fundamentally important to our legal system, but it is not universally guaranteed. State legislatures have begun to recognize the problem, but their efforts are not enough. Test case litigation is one promising route to finally guarantee this right on a nation-wide basis. The case of a child who was denied counsel at a termination proceeding presents serious due process issues that could at long last provide the Court with a civil *Gideon*.

Children involved in termination proceedings have such powerful interests at stake that due process mandates additional procedures to protect them—namely, appointed counsel. Although a holding that children are guaranteed counsel in termination proceedings will not grant as sweeping a right to civil counsel as *Gideon* did for criminal counsel, that holding would protect an important and fundamental right—the right to a fair hearing when commanding interests are at risk—and would open the door to further civil right to counsel claims. The civil right to counsel is essential to a fair legal system, and it is time for the Court to address this reality and extend the right to certain civil situations.

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205 *See* Pastore, *supra* note 59, at 1065 ("This is a promising time for an expansion of the right to counsel in civil cases. The bench and the bar concur that there is a need for greater access to counsel; some states have even created pilot projects to provide legal assistance in certain civil proceedings to litigants who could not otherwise afford it. Recent state legislation and state-court rulings have also supported the right to counsel in certain civil proceedings.").

206 *See* Henderson, *supra* note 56, at 77 ("The fact is, being poor is terribly expensive.").

207 Legal Servs. Corp., *Documenting the Justice Gap in America: The Current Unmet Civil Legal Needs of Low Income Americans*, at 18 (2007), http://www.lsc.gov/JusticeGap.pdf ("The recent state legal needs studies confirm earlier research and reveal that conservatively less than one in five—20 percent—of those requiring civil legal assistance actually receive it."); *see also* Henderson, *supra* note 56, at 78.