
IT'S NOT TRIAGE IF THE PATIENT BLEEDS OUT

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In response to Benjamin H. Barton & Stephanos Bibas, *Triaging Appointed-Counsel Funding and Pro Se Access to Justice*, 160 U. PA. L. REV. 967 (2012).

INTRODUCTION

In their article, *Triaging Appointed-Counsel Funding and Pro Se Access to Justice*, Professors Benjamin Barton and Stephanos Bibas articulate their belief that the civil right to counsel movement (also called “civil *Gideon*”¹) is about “giving everyone a lawyer” in the same vein as *Gideon v. Wainwright*.² They argue not only that the issues at stake in criminal litigation are “more important” than those at stake in civil proceedings,³ but also that pursuit of a civil right to counsel will deepen the scarcity of legal resources available to indigent criminal defendants while replicating “*Gideon*’s shortcomings in the criminal context.”⁴

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¹ Many of us in the movement prefer the term “civil right to counsel” over “civil *Gideon*” because the latter term can mislead people into thinking we seek a right to counsel in civil cases that is identical to the right established by *Gideon v. Wainwright*, 372 U.S. 335 (1963), in which the Court held that the Fourteenth Amendment requires state courts to provide counsel to defendants in felony cases if they cannot afford one. Indeed, Barton and Bibas appear to suffer from this confusion.

² Benjamin Barton & Stephanos Bibas, *Triaging Appointed-Counsel Funding and Pro Se Access to Justice*, 160 U. PA. L. REV. 967, 971 (2012).

³ *Id.* at 970.

⁴ *Id.* at 968.

Barton and Bibas therefore enthusiastically applaud the Supreme Court's decision in *Turner v. Rogers* that the Constitution does not create a categorical right to counsel for child support obligees in civil contempt cases where the opponent is neither the state nor represented by counsel.⁵ Barton and Bibas argue that *Turner* prevented intrusive impositions on the states and "steered future developments toward more sustainable pro se court reform."⁶ They believe *Turner* dealt a "death blow" to a constitutional right to counsel, and that such a result should be "cheer[ed]."⁷

As former President of the American Bar Association and current Coordinator of the National Coalition for a Civil Right to Counsel (NCCRC), we reject the position taken by Barton and Bibas. In response to their Article, we first examine whether the case-by-case approach to appointing counsel that Barton and Bibas espouse for indigent civil litigants⁸ would work any better in civil cases than it did in pre-*Gideon* criminal cases, and we conclude that it would not. We then examine Barton and Bibas's belief that providing fewer procedural protections in civil cases is justified by alleged "lesser" interests or "simpler" procedures in civil cases,⁹ or by study data about the impact of counsel.¹⁰ We find that neither justification supports Barton and Bibas's position. Finally, we articulate the actual scope of the civil right to counsel advanced by advocates (which is considerably narrower than Barton and Bibas claim), and we set forth reasons why neither the current economic crisis nor the problems with indigent criminal defense justify inadequate protection of fundamentally important legal rights in civil cases.

I. THE STRUCTURAL PROBLEMS THAT NECESSITATED THE CATEGORICAL RIGHT TO COUNSEL IN *GIDEON* ALSO EXIST IN CIVIL CASES

Barton and Bibas believe that "[a]ppointment of counsel in civil cases must be selective and discretionary, used only for the most complex and most meritorious cases."¹¹ However, this case-by-case approach failed in criminal cases due to structural problems also present in civil cases.

In *Betts v. Brady*, the Supreme Court held that the right to counsel in criminal cases should be determined on a case-by-case basis.¹² But by the

⁵ 131 S. Ct. 2507, 2512 (2011).

⁶ Barton & Bibas, *supra* note 2, at 971.

⁷ *Id.* at 970-71.

⁸ *See id.* at 971.

⁹ *See id.* at 970.

¹⁰ *See id.* at 991.

¹¹ *Id.* at 971.

¹² 316 U.S. 455, 473 (1942).

time the Court revisited the question in *Gideon* twenty-two years later, “a succession of cases had steadily eroded the [*Betts*] rule and proved it unworkable.”¹³ Indeed, *Betts* “had repeatedly resulted in messy and friction-generating factual inquiries into every case.”¹⁴ As a consequence, even before *Gideon* was argued, the Court had already “beg[un] to carve out certain exceptions to the *Betts* case-by-case approach.”¹⁵ Twenty-two states joined an amicus brief in *Gideon* urging the Court to abandon the case-by-case approach adopted in *Betts* and arguing that “the rule has been, and is being, inconsistently and confusingly applied, and the appellate decisions are contradictory and almost invariably marked with sharp dissents.”¹⁶

Ultimately, the Court found that *Betts* had become “a continuing source of controversy and litigation in both state and federal courts.”¹⁷ As a result, it held that indigent defendants charged with felonies have a categorical right to counsel, abandoning the *Betts* case-by-case approach.¹⁸ The Court later extended this categorical right in *Argersinger v. Hamlin*, when it held that a criminal defendant charged with a misdemeanor may not be imprisoned unless he or she was provided with counsel.¹⁹

Why is the case-by-case approach in civil cases so problematic? Justice Blackmun gave one reason in his dissent in *Lassiter v. Department of Social Services*.²⁰ He argued that a case-by-case approach in a termination of parental rights case requires the court to “determine *in advance* what difference legal representation might make. . . . [The trial judge must] examine the State’s documentary and testimonial evidence *well before the hearing* so as to reach an informed decision about the need for counsel in time to allow adequate preparation of the parent’s case.”²¹ And because “it will not always be possible for the trial court to predict accurately, in advance of the proceedings, what facts will be disputed, the character of

¹³ *Miranda v. Arizona*, 384 U.S. 436, 532 (1966) (White, J., dissenting) (citing *Gideon v. Wainwright*, 372 U.S. 335 (1963)).

¹⁴ Kevin W. Shaughnessy, Note, *Lassiter v. Department of Social Services: A New Interest Balancing Test for Indigent Civil Litigants*, 32 CATH. U. L. REV. 261, 282 (1982).

¹⁵ *Id.* at 266.

¹⁶ Brief for the State Government Amici Curiae at 3, *Gideon v. Wainwright*, 372 U.S. 335 (1963) (No. 155), 1962 WL 75209, at *3.

¹⁷ *Gideon*, 372 U.S. at 338.

¹⁸ *See id.* at 342-45.

¹⁹ 407 U.S. 25, 36-37 (1972).

²⁰ *See Lassiter v. Dep’t of Soc. Servs.*, 452 U.S. 18, 32-34 (1981) (holding in a 5-4 Court decision that the Fourteenth Amendment guaranteed no categorical right to counsel for parents in termination of parental rights cases).

²¹ *Id.* at 51 n.19 (Blackmun, J., dissenting) (emphasis added). Although Justice Blackmun addressed termination of parental rights cases, his arguments apply generally to all types of civil cases, as well as to criminal cases.

cross-examination, or the testimony of various witnesses,”²² the risk that a judge will erroneously deny counsel is greatly elevated. The indigent litigant will be of little help to the judge in these situations, as he or she will not know how to make legal arguments or marshal the relevant facts in support of the request for an attorney. Put simply, the indigent person needs a lawyer to effectively make his or her case for why a lawyer is needed.

Another problem with Barton and Bibas’s case-by-case approach is that it requires courts to “develop pretrial procedures and standards in order to determine properly the need for counsel,” and “[t]here is no guarantee that these standards will produce equitable decisions in every case.”²³ Courts in different parts of a state, faced with nebulous tests such as “fundamental fairness” or “risk of error,” will likely develop different standards and thus arrive at different conclusions in cases that are substantially similar.

Indeed, as the amicus brief on behalf of twenty-two states in *Gideon* pointed out, “Obviously there can be no semblance of uniformity in the conduct of such proceedings, for the very matter which will shock the conscience of one judge will fail to penetrate the repose of another.”²⁴ The *Gideon* amici gave an example of three pairs of cases where “each set [] contained within itself substantially similar fact situations, [but] the right to appointed counsel was denied in the first case of each pair, [and] upheld in the second—clearly a consequence of the vague standard of ‘denial of fundamental fairness’ which *Betts* has advanced.”²⁵

Finally, when a trial court errs in deciding whether to appoint counsel, the error may never be reviewed on appeal because the indigent litigant may concede liability at trial due to her belief that she cannot litigate the matter without legal assistance. Federal courts have recognized this risk in the context of civil rights cases.²⁶ Even if the defendant appeals, “[s]ome [appellate] courts refuse to reach the counsel issue because unrepresented litigants fail to request appointment of counsel or otherwise present the issue directly and do not preserve the issue properly for appeal.”²⁷ Additionally,

²² Shaughnessy, *supra* note 14, at 283.

²³ *Id.*

²⁴ Brief for the State Government Amici Curiae, *supra* note 16, at 18.

²⁵ *Id.* at 20.

²⁶ See, e.g., *Robbins v. Maggio*, 750 F.2d 405, 412-13 (5th Cir. 1985) (cautioning that where litigant is denied counsel, “there remains a great risk that a civil rights plaintiff may abandon a claim or accept an unreasonable settlement in light of his own perceived inability to proceed with the merits of his case, resulting in the loss of vital civil rights claims” (footnote omitted)); *Caston v. Sears, Roebuck & Co.*, 556 F.2d 1305, 1308 (5th Cir. 1977) (“[A] layman unschooled in the law in an area as complicated as the civil rights field . . . likely has little hope of successfully prosecuting his case to a final resolution on the merits.”).

²⁷ Clare Pastore, *Life After Lassiter: An Overview of State-Court Right-to-Counsel Decisions*, 40 CLEARINGHOUSE REV. J. POVERTY L. & POL’Y 186, 187 (2006).

because the record available on appeal will have been developed without the aid of counsel, it will often be shaped in ways unfavorable to the pro se litigant and will ineluctably lead appellate courts that apply a “harmless error” test to conclude that the presence of counsel would not have made a difference.²⁸

II. THE NEEDS AND COMPLEXITY OF CIVIL CASES DO NOT JUSTIFY LESSER PROTECTIONS

If we are correct that a case-by-case approach will lead to errors, are the stakes really so much lower in civil cases such that these risks are justified? Barton and Bibas claim that recognizing a civil right to counsel would “siphon time and resources from felony cases, which are typically more important and more complex.”²⁹

It is an oversimplification, and incorrect, to suggest that felony cases are per se “more important” than civil ones. Would not many parents, forced to choose between even a lengthy time in jail or losing their children forever, choose the former? Is the threat of jail more serious than improper confinement to a mental health facility and forced unwanted medical treatment? Is the suffering of a woman who constantly faces domestic violence that threatens her life and deprives her of access to her home and children any less important than the defense of the man who beats her? Did Barton and Bibas consider such issues in concluding that felony cases are “more important” than civil cases?

As another, more specific example, Barton and Bibas claim it is “far more important to fund appointed lawyers in serious felony cases than it is to provide them in, say, housing court.”³⁰ But it is not uncommon for an eviction or foreclosure to lead to homelessness, joblessness, and encounters with the criminal justice system.³¹ And for many families, these travails can

²⁸ See *State ex rel. Adult and Family Servs. Div. v. Stoutt*, 644 P.2d 1132, 1137 (Or. Ct. App. 1982) (applying a harmless error test, but conceding that “it is circular to look to the record to determine whether counsel could have affected the result, when one of the principal missions of counsel in any litigation is to develop the record”).

²⁹ Barton & Bibas, *supra* note 2, at 970. Curiously, their argument omits misdemeanor cases, and it is unclear whether they believe misdemeanor cases also unwisely siphon resources and are less important or complex.

³⁰ *Id.* at 972.

³¹ See NAT’L COAL. FOR THE HOMELESS, EMPLOYMENT AND HOMELESSNESS 1-4 (2009), available at <http://www.nationalhomeless.org/factsheets/Employment.pdf> (describing the relationship between homelessness and employment); NAT’L COAL. FOR THE HOMELESS ET AL., FORECLOSURE TO HOMELESSNESS 2009: THE FORGOTTEN VICTIMS OF THE SUBPRIME CRISIS 5 (2009), available at <http://www.nationalhomeless.org/advocacy/Foreclosure-toHomelessness0609.pdf> (providing a survey of direct service providers that concluded an average of nineteen percent of their clients became homeless as result of foreclosure); NAT’L LAW CTR.

lead to still deeper problems. Would Barton and Bibas feel differently about housing cases in light of a 2001 study that found that homeless children are fifty percent more likely to die before their first birthday than housed poor children?³²

Nor is it accurate to generalize felony cases as “more complex” than civil cases. In his recent study of eviction cases, Harvard Professor James Greiner commented that such cases often “implicate[] multiple sources of law, include[ing] state statutes, state common law, state regulations, federal statutes, and federal regulations; they implicate[] multiple provisions or doctrines within each source of law; and they require[] evidence from third parties such as housing inspectors, contractors, public utilities, and/or financial institutions.”³³

Other types of civil cases similarly involve complex matters on a regular basis. Foreclosure proceedings routinely entail a confusing interplay between federal and state law, not to mention difficult questions regarding the movant’s standing to foreclose in the first place. And immigration cases are often so complicated that even attorneys with years of experience in the field struggle to keep up with a labyrinthine maze of laws and regulations. Indigent litigants in these complex proceedings are no less bewildered, lost, and vulnerable than criminal defendants, as they typically possess little education and no legal experience or expertise maneuvering through the court system. And many civil litigants, just like criminal ones, face additional barriers, from illiteracy to mental disabilities.

ON HOMELESSNESS & POVERTY & NAT’L COAL. FOR THE HOMELESS, HOMES NOT HANDCUFFS: THE CRIMINALIZATION OF HOMELESSNESS IN U.S. CITIES 8-11 (2009), available at <http://www.nlchp.org/content/pubs/2009HomesNotHandcuffs2.pdf> (explaining the link between evictions and homelessness, as well as the uptick in laws criminalizing aspects of homelessness, such as begging, camping, and loitering); N.Y. STATE DEP’T OF SOCIAL SERVS., THE HOMELESSNESS PREVENTION PROGRAM: OUTCOMES AND EFFECTIVENESS 2 (1990), available at <http://www.nlada.org/DMS/Documents/1195250846.92/NYSDeptofSS%20%20Homelessness%20Prevention%20Pram%20Outcomes%20%26%20Effect.pdf> (finding that legal services intervention in 3576 eviction cases avoided 797 homelessness stints); Chester Hartman & David Robinson, *Evictions: The Hidden Housing Problem*, 14 HOUSING POL’Y DEBATE 461, 468-69 (2003), available at <http://content.knowledgeplex.org/kp2/cache/kp/10950.pdf> (“[N]early two out of five homeless persons who use homeless assistance programs came to be homeless via involuntary displacement”); John Pollock, *Lassiter Norwithstanding: The Right to Counsel in Foreclosure Actions*, 43 CLEARINGHOUSE REV. J. POVERTY L. & POL’Y 448, 450-51 (2010) (explaining that housing is a basic human need and describing the importance of providing counsel to protect this arguably fundamental right).

³² See Julia C. Torquati & Wendy C. Gamble, *Social Resources and Psychosocial Adaptation of Homeless School Aged Children*, 10 J. SOC. DISTRESS & HOMELESS 305, 306 (2001).

³³ D. James Greiner, Cassandra Wolos Pattanayak & Jonathan Hennessy, *The Limits of Unbundled Legal Assistance: A Randomized Study in a Massachusetts District Court and Prospects for the Future*, 126 HARV. L. REV. (forthcoming Feb. 2013) (manuscript at 30) (footnote omitted), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1948286.

Moreover, the power imbalance in felony cases referenced by Barton and Bibas (which “pit individual defendants against experienced, professional police and prosecutors wielding the power of the state”³⁴) is often mirrored in civil cases. Litigants in many types of civil cases (including foreclosure, private and public housing eviction, quarantine, immigration, and abuse/neglect) routinely face either the government or opponents represented by counsel, both of which profit from superior experience and access to information. Indeed, the *Turner* Court held that some types of cases involving the government as plaintiff might require counsel, since “[t]he average defendant does not have the professional legal skill to protect himself when brought before a tribunal with power to take his life or liberty, wherein the prosecution is presented by experienced and learned counsel.”³⁵

III. EXISTING DATA DOES NOT SUPPORT PROVIDING LESSER PROTECTIONS FOR CIVIL CASES

Barton and Bibas argue that current research suggests a right to counsel is not really necessary in civil cases.³⁶ They cite the alleged shortage of randomized studies and the existence of one randomized unemployment study (which found no significant difference in success rates of unemployment benefits hearings between defendants who were offered representation by a Harvard Law School clinic and those who were not) to conclude that “there seems to be little benefit to providing lawyers across the board, especially in simple cases.”³⁷

However, Barton and Bibas point to no body of data in *support* of their argument that counsel provides “little benefit.”³⁸ Moreover, the unemployment

³⁴ Barton & Bibas, *supra* note 2, at 991.

³⁵ *Turner v. Rogers*, 131 S. Ct. 2507, 2520 (2011) (quoting *Johnson v. Zerbst*, 304 U.S. 458, 462-63 (1938)).

³⁶ See Barton & Bibas, *supra* note 2, at 987-89 (summarizing “more sustainable” pro se reforms).

³⁷ *Id.* at 992. The authors also cite Erica J. Hashimoto, *The Price of Misdemeanor Representation*, 49 WM. & MARY L. REV. 461, 496 (2007), in support of their idea that “lawyers appear to add less value in simple misdemeanor cases than in more complex and serious cases.” Barton & Bibas, *supra* note 2, at 992. However, the authors ignore the explicit, substantial caveats included in that study:

The biggest flaw is that the data concern only federal cases, and no comparable data are available for state courts. Because the vast majority of misdemeanor defendants are prosecuted in state courts, this gap in data is significant. Outcomes of federal misdemeanor defendants, moreover, may not accurately represent outcomes of state court misdemeanants. In particular, because there are relatively few pro se federal court misdemeanor defendants, it is entirely possible that federal judges make more accommodations to ensure that the rights of those defendants are protected.

Hashimoto, *supra*, at 494 (footnote omitted).

³⁸ Barton & Bibas, *supra* note 2, at 992.

study they rely on expressly warns that “[i]t would be a mistake to overgeneralize the results of our study to conclude that offering free legal assistance is not worth the cost or time, or even that offers of representation make no difference in Massachusetts first-level appeals.”³⁹ In other words, the study itself advises against the very generalization for which Barton and Bibas rely on it for support. Further, there are other reasons to approach this particular study’s findings with caution.⁴⁰

Barton and Bibas also praise “less intrusive” alternatives like pro se assistance,⁴¹ but point to no evidence that these alternatives are effective at closing the justice gap. In fact, several recent studies have examined a few limited assistance programs (like “lawyer for a day” or clinic support) and found them wanting. For example, one study of California eviction cases discovered that a group of civil litigants given limited assistance fared no better than a group without assistance for all substantive results (possession, time to move out, rent owed to landlord, money beyond rent owed to the landlord), while the group with full representation did substantially better.⁴² And a study of one Boston court’s eviction cases discovered that cases with full representation outperformed their limited assistance counterparts by two to one.⁴³

³⁹ D. James Greiner & Cassandra Wolos Pattanayak, *Randomized Evaluation in Legal Assistance: What Difference Does Representation (Offer and Actual Use) Make?*, 121 YALE L.J. 2118, 2175 (2012).

⁴⁰ There are several reasons why the study results must be approached with caution, including: 1) the forum studied was one that the state’s legal services programs had worked to reform for many years, which may be why even those in the study who were not offered assistance did significantly better than the statewide average, *id.* at 2173-74, 2199; 2) the study did not compare represented and unrepresented litigants, but rather those who were offered counsel versus those who were not, *id.* at 2127-28; 3) nearly half of those not offered counsel by the study received counsel elsewhere, which may have blunted the difference in results between the groups offered or not offered counsel, *id.* at 2172-73; and 4) the study was structured in such a way that it would only pick up larger differences in results between the studied groups, *id.* at 2124-25, 2149. For more discussion of the study and its limitations, see *Archive for the ‘Symposium (What Difference Representation)’ Category*, CONCURRING OPINIONS, <http://www.concurringopinions.com/archives/category/representation-symposium> (last visited Nov. 14, 2012).

⁴¹ Bibas & Barton, *supra* note 2, at 984-85.

⁴² See Jessica K. Steinberg, *In Pursuit of Justice? Case Outcomes and the Delivery of Unbundled Legal Services*, 18 GEO. J. ON POVERTY L. & POL’Y 453, 482 (2011).

⁴³ See Greiner et al., *supra* note 33 (manuscript at 28-29) (finding that thirty-four percent of occupants with traditional attorney-client relationship lost their housing units, compared to sixty-two percent of those without an attorney). Another eviction study carried out simultaneously by the same study designers but of a different Boston court found that the limited assistance and full representation groups fared similarly. See D. James Greiner, Cassandra Wolos Pattanayak & Jonathan Hennessy, *How Effective Are Limited Legal Assistance Programs? A Randomized Experiment in a Massachusetts Housing Court 36-40* (Sept. 1, 2012) (unpublished manuscript), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1880078. However, even the fully represented group in that study did only as well as the limited assistance group of the first study, suggesting significant differences either between the courts studied or in the nature of the full representation provided in the two studies. *Id.* at 41-45.

Our intent is neither to denigrate the creative solutions developed by advocates and courts to assist pro se litigants, nor to suggest that a civil right to counsel can fix all problems. In fact, a number of proponents of a civil right to counsel have stressed that the best solution will involve both a right to counsel as well as pro se reform.⁴⁴ The point is that everyone should be careful not to stretch the data to say more (or less) than the findings allow. And all solutions, not just the right to counsel, ought to be studied to determine their effectiveness; if pro se assistance is ineffective in a given situation, it is not the right solution merely because it costs less.

IV. NEITHER EXISTENCE OF A FINANCIAL CRISIS NOR PROBLEMS WITH INDIGENT CRIMINAL DEFENSE JUSTIFY INADEQUATE PROTECTIONS IN BASIC HUMAN NEEDS CIVIL CASES

A central premise of Barton and Bibas's article is that given the chronic underfunding of indigent criminal defense, it would be foolhardy to create new rights to counsel that would further tax the limits of existing resources.⁴⁵ Despite their claim that civil right to counsel advocates "rarely acknowledge[] the tension between their competing goals in the criminal and civil contexts,"⁴⁶ the National Coalition for a Civil Right to Counsel (NCCRC), which has over 240 participants from 35 different states, addressed this concern in a public informational memorandum.⁴⁷ There, the NCCRC explained that research may be the key to addressing the tension between indigent criminal defense and civil right to counsel: "[A]dvocates are presently investigating best ways to demonstrate how a civil right to counsel can be cost effective by saving money in the long run. Insofar as the civil right to counsel can be shown to save funds, pressure may be reduced to cut funding elsewhere to finance the right."⁴⁸

⁴⁴ See e.g., Russell Engler, *Reflections on a Civil Right to Counsel and Drawing Lines: When Does Access to Justice Mean Full Representation by Counsel, and When Might Less Assistance Suffice?*, 9 SEATTLE J. FOR SOC. JUST. 97, 112-115 (2010) (outlining a three-prong approach as the best means to achieve equal access to justice and a civil right to counsel); Steve Eppler-Epstein, *The Fight for Legal Aid Funding and Right to Counsel Advocacy: An Incremental Approach and an Overarching Message*, 26 MGMT. INFO. EXCHANGE J. 41, 43 (2012) (explaining the benefits of pro se reform but warning that it is not replacement for a lawyer).

⁴⁵ See Barton & Bibas, *supra* note 2, at 972.

⁴⁶ *Id.*

⁴⁷ Memorandum from David Udell & Laura Abel, Nat'l Coal. for a Civil Right to Counsel, Info. for Civil Justice Sys. About Civil Right to Counsel Initiatives (June 9, 2009), available at <http://www.civilrighttocounsel.org/pdfs/NCCRC%20Informational%20Memo.pdf>.

⁴⁸ *Id.* at 9.

To this end, rather than simply accepting the Barton and Bibas assumption that civil right to counsel would “stretch[] limited resources further,”⁴⁹ advocates are engaging in research to determine the cost savings (to states, municipalities, and to courts) of appointing counsel—savings that might significantly reduce or entirely offset the cost of the appointments. One example of an attempt to test this assumption is the California Legislature’s decision in 2009 to fund civil right to counsel pilot programs at roughly \$9.5 million a year for six years.⁵⁰ The legislature’s bill stated that “[t]here are significant social and governmental fiscal costs of depriving unrepresented parties of vital legal rights affecting basic human needs;” that these costs significantly affect “indigent parties, including the elderly and people with disabilities;” and that “[t]he fair resolution of conflicts through the legal system offers financial and economic benefits by reducing the need for many state services and allowing people to help themselves.”⁵¹ The legislature found that “these costs may be avoided or reduced by providing the assistance of counsel where parties have a reasonable possibility of achieving a favorable outcome.”⁵²

In addition, Barton and Bibas propose a false dilemma by suggesting we have to choose between indigent defense and civil right to counsel. If courts and legislatures begin to recognize a civil right to counsel, it is possible to provide counsel to both criminal and civil litigants through careful advance planning and coordination and the identification of new funding streams. This is not a Pollyannaish expectation: To our knowledge, as state legislatures and courts have added or identified a right to counsel over the years, the expansions have not explicitly or implicitly drawn funding away from indigent defense or any existing civil rights to counsel.⁵³ In any case, research demonstrating the cost benefits of providing counsel will help address this concern.

Regardless of what the research may show, however, it is a dangerous precedent, and unacceptable in a civilized society, to suggest, as Barton and Bibas seem to do, that fundamental rights should be protected only when money is available. Rather, the importance of what is at stake should be driving the conversation. Even the *Lassiter* Court acknowledged that in the context of the termination of parental rights, “though the State’s pecuniary interest is legitimate, it is hardly significant enough to overcome private

⁴⁹ Barton & Bibas, *supra* note 2, at 980.

⁵⁰ See JUDICIAL COUNCIL OF CAL., FACT SHEET: SARGENT SHRIVER CIVIL COUNSEL ACT (AB 590) (FEUR) 2 (2011), available at <http://www.courts.ca.gov/documents/AB-590.pdf>.

⁵¹ 2009 Cal. Legis. Serv. Ch. 457 § 1(d) (A.B. 590) (West).

⁵² *Id.*

⁵³ Unfortunately, no one has published definitive studies on this issue. Thus, we must rely on our extensive, but anecdotal, knowledge.

interests as important as those here.”⁵⁴ The indigent defense community historically has supported the expansion of criminal rights to counsel even when money was tight. The NCCRC memorandum observes that despite the serious problems with caseloads, training, and administrative support on the indigent criminal defense side, “few champions of . . . indigent defense services[] would willingly jettison *Gideon* in favor of the pre-*Gideon* system of according counsel on a case-by-case basis.”⁵⁵ Nor did indigent defense advocates “argue against extending the *Gideon* right to misdemeanor defendants in *Argersinger* on the ground that felony defendants were receiving inadequate legal assistance.”⁵⁶ Some in the indigent defense world have argued that the strong interests at stake in both criminal and civil cases, and the intertwining of those interests, require support for the right to counsel in both contexts. As one prominent public defender put it, “The lack of basic human services creates communities of crime, criminal behavior and risky lifestyles. . . . [I]mplementing a civil *Gideon* . . . offers the opportunity to look at common problems and combined solutions for the clients of both civil and defender programs.”⁵⁷

V. THE FINANCIAL IMPACT OF THE CIVIL RIGHT TO COUNSEL MUST BE EVALUATED IN LIGHT OF THE NARROWER SCOPE OF THE RIGHT BEING PROPOSED

Barton and Bibas misrepresent the nuanced goals of the civil right to counsel movement by suggesting that proponents “favor[] appointing counsel in civil cases just as *Gideon v. Wainwright* required appointing counsel in criminal cases.”⁵⁸ To the contrary, the civil right to counsel movement’s official documents expressly rebut the notion that the right being sought is “just like” the *Gideon* right.

For example, the American Bar Association’s (ABA) 2006 policy on a right to counsel in civil proceedings supports a right to counsel only “where basic human needs are at stake.”⁵⁹ This is not a call for appointed counsel in *all* civil cases, or for *all* indigent persons, in the way that *Gideon* and *Argersinger* created a right for *all* felony and misdemeanor defendants.

⁵⁴ *Lassiter v. Dep’t of Soc. Servs.*, 452 U.S. 18, 28 (1981).

⁵⁵ Udell & Abel, *supra* note 47, at 11.

⁵⁶ *Id.* We also have not heard calls to replace existing categorical rights to counsel in parental rights, civil commitment, paternity, or civil contempt cases with a case-by-case approach.

⁵⁷ James Neuhard, *Gideon Redux: A Defender’s View*, CORNERSTONE, Fall 2006, at 5, 31.

⁵⁸ Bibas and Barton, *supra* note 2, at 968.

⁵⁹ AM. BAR ASS’N, REPORT TO THE HOUSE OF DELEGATES, RESOLUTION 112A, at 1 (2006) [hereinafter ABA RESOLUTION 112A], available at http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_06A112A.authcheckdam.pdf.

In fact, the 2006 ABA policy carefully limits the right to civil proceedings to rights that protect only five specific human needs: shelter, sustenance, safety, health, and child custody.⁶⁰

Several civil right to counsel models have also contemplated a merit test factor, which further limits the right. In 2010, the ABA developed and issued a Model Access Act for use by states wishing to implement a right to counsel in civil matters.⁶¹ It includes merit tests applied by a State Access Board to determine whether full representation by a lawyer should be provided.⁶² For instance, a plaintiff must have a “reasonable possibility of achieving a successful outcome,” while a defendant must have a “non-frivolous defense.”⁶³ Even where the merit tests are met, the Model Act permits the State Access Board to provide limited scope representation instead of full representation in certain circumstances, and to weigh the absence of counsel on the other side in making this determination.⁶⁴

In 2011, the Maryland Access to Justice Commission released a civil right to counsel implementation plan that specifies that the level of service provided should be “undifferentiated” and allows “[t]he [legal services] provider . . . to exercise discretion, based solely on the client’s needs, the merits of the action, and ethical considerations.”⁶⁵ The plan states that the provider should be able to “determine the level of legal service necessary to assist the client effectively, which may include a determination of merit, much as any attorney would do.”⁶⁶ Further, both the ABA Model Access

⁶⁰ *Id.*

⁶¹ AM. BAR ASS’N, REPORT TO THE HOUSE OF DELEGATES, RESOLUTION 104, at 4-5 (2010) [hereafter ABA MODEL ACCESS ACT], available at http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_104_revised_final_aug_2010.authcheckdam.pdf.

⁶² *Id.* at 8. The State Access Board is “established as a statewide body, independent of the judiciary, the attorney general, and other agencies of state government, responsible for administering the public legal services program defined by and funded pursuant to this Act.” *Id.* at 3.

⁶³ *Id.*

⁶⁴ *Id.* at 6. The Model Act would permit

if under standards established by the Board, and under the circumstances of the particular matter, the Board deems a certain type and level of limited scope representation is sufficient to afford fair and equal access to justice and is sufficient to ensure that the basic human needs at stake in the proceeding are not jeopardized due to the absence of full representation by counsel (however, limited scope representation shall be presumed to be insufficient when the opposing party has full representation)[.]

Id.

⁶⁵ MD. ACCESS TO JUSTICE COMM’N, IMPLEMENTING A CIVIL RIGHT TO COUNSEL IN MARYLAND 3 (2011) [hereinafter MARYLAND PLAN], available at <http://www.mdcourts.gov/mdatjc/pdfs/implementingacivilrighttocounselinmd2011.pdf>.

⁶⁶ *Id.* at 4.

Act and the Maryland Access to Justice Commission's plan articulate that the right to counsel on appeal should be subject to merit tests.⁶⁷

It is important to note that the provision of undifferentiated services or application of merit tests by a legal services provider or State Access Board do not suffer from the same structural problems as the *Betts*-type case-by-case approach utilized by judges.⁶⁸ Unlike legal service providers, judges do not typically possess the time or resources to fully investigate a litigant's case, nor necessarily the in-depth expertise in the various civil subject matters. Even if judges had both the time and the expertise, it would be impossible for them to investigate a litigant's case to flesh out any claims or defenses while at the same time maintaining the judge's impartiality, a problem not faced by service providers.

Additionally, judges are required to utilize a nebulous due process standard that does not lend itself well to equity when applied by different judges across the state,⁶⁹ and the particular due process test used most frequently in the right-to-counsel context considers only three prongs: the nature of the personal interest, the state's interest, and the risk of erroneous deprivation.⁷⁰ A provider system can utilize more transparent and consistent guidelines for appointment, and can consider any additional relevant factors.

A right-to-counsel system that is limited to basic human needs cases and that includes merit tests or provider discretion to determine level of service

⁶⁷ Compare ABA MODEL ACCESS ACT, *supra* note 61, at 5 (allowing for full representation for appellants on appeal available where there is "reasonable probability of success on appeal under existing law or when there is a non-frivolous argument for extending, modifying, or reversing existing law or for establishing new law," and full representation for appellees "unless there is no reasonable possibility the appellate court will affirm the decision of the trial court or other forum that the opposing party is challenging in the appellate court"), with MARYLAND PLAN, *supra* note 65, at 4 ("An appellant should have a right [to counsel] if the appeal has merit in the eyes of the provider.").

⁶⁸ Besides the inherent, structural problems, there are many on-the-ground problems with the current case-by-case approach. For example, a judge who determines a particular case merits counsel may find that there is no statutory funding mechanism, requiring the judge to either appoint an attorney without pay or draw money from her own judicial budget. Additionally, some courts have neglected to apply even the case-by-case test and have simply ruled there is no right to counsel in any civil case. *See, e.g.,* Goodin v. Dep't of Human Servs., 772 So. 2d 1051, 1055 (Miss. 2000) ("[T]his Court has held that the right[] to appointed counsel . . . [does] not apply in civil proceedings."); Schwarz v. Duncan, 2000 WL 33250572, at *1 (Utah Ct. App. 2000) (unpublished) (per curiam) ("The appellant also is incorrect in her assertion that she was entitled to court-appointed counsel, as there is no right to counsel in a civil case").

⁶⁹ As the Court in *Lassiter* said, "For all its consequence, due process has never been, and perhaps can never be, precisely defined. . . . [D]ue 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 as opaque as its importance is lofty." *Lassiter v. Dep't of Soc. Servs.*, 452 U.S. 18, 24 (1981) (alteration in original) (internal quotation omitted).

⁷⁰ *Id.* at 27 (citing *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976)).

is hardly analogous to the right provided in *Gideon* and *Argersinger*, which provide a right to full representation that is universal and unqualified unless waived.⁷¹ In fact, the misstatement that Barton and Bibas make about the movement seeking a right just like the right provided in *Gideon*⁷² is precisely why many in the movement prefer the term “civil right to counsel” rather than “civil *Gideon*.” The former term underscores that the limited civil right being sought is *not* equivalent to the broad rights protected under *Gideon*.

CONCLUSION

Barton and Bibas suggest that *Gideon* is a “1963 solution” that is inconsistent with “2012 court problems.”⁷³ We, on the other hand, believe that the Supreme Court correctly decided *Gideon*, and that it is still correct today. And when the interests at stake in civil proceedings threaten rights just as fundamental as those protected under *Gideon*, a right to counsel in those cases is also the appropriate response.

Fortunately, even in the face of our nation’s ongoing economic struggles, the movement to establish a right to counsel in civil cases is gathering strength.⁷⁴ *Turner* was not a “death blow” to the progress of the civil right to counsel movement, as Barton and Bibas believe.⁷⁵ Rather, the *Turner* decision should be viewed as more of a footnote because the battleground for the expansion of these rights had already long since shifted from the federal theater to the state courts when that case came down.

For example, eleven of the states that provided a federal constitutional right to counsel in termination of parental rights prior to *Lassiter* relocated that right to their state constitutions after *Lassiter*.⁷⁶ In addition, recently,

⁷¹ See *Gideon v. Wainwright*, 372 U.S. 335, 340 (1963) (“[I]n federal courts counsel must be provided for defendants unable to employ counsel unless the right is . . . waived.”).

⁷² See Barton & Bibas, *supra* note 2, at 968.

⁷³ *Id.* at 988.

⁷⁴ For examples of some of the nationwide activities other than the ones listed in this article, see John Pollock, *Where We've Been, Where We're Going: A Look at the Status of the Civil Right to Counsel, and Current Efforts*, 26 MGMT. INFO. EXCHANGE J. 29 (2012), available at <http://www.nlada.org/DMS/Documents/1342803913.27/MIE%20CRTC%20articles%205-16-12.pdf>.

⁷⁵ Barton & Bibas, *supra* note 2, at 970.

⁷⁶ See *K.P.B. v. D.C.A.*, 685 So. 2d 750, 752 (Ala. Civ. App. 1996) (construing *Ex Parte Shuttleworth*, 410 So. 2d 896 (Ala. 1981), to require counsel in termination of parental rights cases under the state constitution); *In re E.H.*, 609 So.2d 1289, 1290 (Fla. 1992) (reaffirming *In re D.B.*, 385 So.2d 83 (Fla. 1980), which recognized a constitutional right to appointed counsel where proceedings can result in permanent loss of parental custody); *State ex rel. Johnson*, 465 So. 2d 134, 138 (La. Ct. App. 1985) (reaffirming *State ex rel. Howard*, 382 So. 2d 194 (La. Ct. App. 1980), which held that due process requires the appointment of counsel where parents are faced with charges of neglect and the possibility of removal of their child from their custody for an indefinite or prolonged period of time); *Petitions of Catholic Charitable Bureau of Archdiocese of Boston Inc. to Dispense with Consent to Adoption*, 490 N.E.2d 1207, 1213 n.6 (Mass. App. Ct.

states have recognized new state constitutional rights to counsel for parents in contested adoptions in Massachusetts⁷⁷ and Illinois,⁷⁸ for foster children abuse or neglect proceedings in Georgia,⁷⁹ and for parents in Alaska custody proceedings facing an opponent represented by a pro bono attorney,⁸⁰ just to name a few. New York Court of Appeals Chief Judge Jonathan Lippman has also announced an ambitious plan to provide counsel for all defendants in foreclosure proceedings in New York.⁸¹ And in California, the city of San Francisco passed an ordinance declaring its intention to become the first “Right to Civil Counsel City.”⁸²

Opponents of the right to counsel in civil cases such as Barton and Bibas cavalierly recite the *assumed* cost of the right as if doing so constitutes an open-and-shut case. This assumption does not reflect an understanding of the actual scope of the right to counsel sought, reveals insensitivity to protecting the basic rights of human beings, and ignores

1986) (relying upon *Department of Public Welfare v. J. K. B.*, 393 N.E.2d 406 (Mass. 1979), which held that indigent parents have a right to counsel in a contested proceeding to terminate parental rights); *In re A.S.A.*, 852 P.2d 127, 129-30 (Mont. 1993) (quoting approvingly from Justice Blackmun’s dissent in *Lassiter*); N.J. Div. of Youth and Family Servs. v. R.B., No. 13-58-04, 2005 WL 2860832, at *5 (N.J. Super. Ct. App. Div. Nov. 2, 2005) (unpublished) (reaffirming *Crist v. N.J. Division of Youth & Family Services*, 320 A.2d 203 (N.J. Super. Ct. Law Div. 1974), in explaining that principles of due process and fundamental fairness require that indigent parents receive court appointed counsel in termination of parental rights cases); *In re Evan F.*, 815 N.Y.S.2d 697, 699 (App. Div. 2006) (reaffirming *In re Ella R.B.*, 285 N.E.2d 288 (N.Y. 1972), which provided a right to counsel where the state seeks to remove child from indigent parents); *In re Johnson*, No. C-810516, 1982 WL 8498 (Ohio Ct. App. Apr. 28, 1982) (citing *State ex rel. Heller v. Miller* 399 N.E.2d 66 (Ohio 1980), and commenting that *Heller* relied upon the Ohio Constitution as well as the Fourteenth Amendment, therefore “its impact . . . is not diminished, if it might otherwise be thought to be, by . . . *Lassiter*”); *In re D.D.F. & S.D.F.*, 801 P.2d 703, 706 (Okla. 1990) (reaffirming *In re Chad S.*, 580 P.2d 983 (Okla. 1978), and holding that “although the federal [C]onstitution does not require that counsel be appointed in all termination proceedings, we believe that the rights at issue are those which are fundamental to the family unit and are protected by the due process clause of the Oklahoma Constitution”); *In re J.M.*, 125 P.3d 245, 249-50 (Wash. Ct. App. 2005) (relying upon *In re Luscier*, 524 P.2d 906 (Wash. 1974), which recognized a due process right to state appointed counsel in a parental termination proceeding); *King v. King*, 174 P.3d 659, 662 n.3 (Wash. 2007) (noting that court had favorably cited to *Luscier* even after *Lassiter*); *In re Lindsey C.*, 473 S.E.2d 110, 122 & n.12 (W. Va. 1995) (reaffirming *State ex rel. LeMaster v. Oakley*, 203 S.E.2d 140 (W. Va. 1974) on state constitutional grounds, and thus rejecting argument that *Lassiter* “relieves this State of compliance with one or more of these protections which have been recognized in West Virginia as constitutionally mandated”).

⁷⁷ *Adoption of Meaghan*, 961 N.E.2d 110, 112-13 (Mass. 2012).

⁷⁸ *In re Adoption of L.T.M.*, 824 N.E.2d 221, 231-32 (Ill. 2005).

⁷⁹ *Kenny A. ex rel Winn v. Perdue*, 356 F. Supp. 2d 1353, 1360-61 (N.D. Ga. 2005).

⁸⁰ *In re Alaska Network on Domestic Violence and Sexual Assault*, 264 P.3d 835, 836 (Alaska 2011).

⁸¹ David Streitfeld, *New York Courts Vow Legal Aid in Housing*, N.Y. TIMES, Feb. 16, 2011, at B1.

⁸² S.F., CAL., ADMINISTRATIVE CODE § 58.1 (2011), available at <http://www.sfbos.org/ftp/uploadedfiles/bdsuprvrs/committees/materials/rls111189tdr.pdf>. This ordinance also established a pilot program to work towards a goal of guaranteed right to counsel in civil proceedings. *Id.* § 58.2.

the innovative and ongoing efforts to measure the true costs and benefits of providing counsel in civil cases.

We also believe that even if providing a right to counsel will require a substantial economic investment, in a civilized society, the protection of rights relating to basic human needs should not depend solely on economic terms, nor should such rights be subjected to lesser levels of due process. While it will be a challenge to protect these basic human needs while also providing needed legal services to indigent criminal defendants, the suggestion that society should choose one over the other is a false dilemma. The right to counsel movement is up to the challenge, notwithstanding the misguided analysis of some, and we look forward to continued study on how best to effectively protect the rights of all in society.

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