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FACES OF OPEN COURTS AND THE CIVIL RIGHT TO COUNSEL

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> Most state bills of rights are longer than the first ten Amendments, containing rights and guarantees not found in the Federal Constitution. The most widespread and important of these unique state provisions is probably the guarantee of a right of access to the courts to obtain a remedy for injury.[1]

"It has long been recognized that equal access to the courts, and modes of procedure therein, constitute basic and fundamental rights. The courts must be open to all on the same terms without prejudice."[2]

I. INTRODUCTION

The quest to establish a civil right to counsel, or "Civil Gideon,"[3] is largely defined in relation to *Lassiter v. Department of Social Services*.[4] In that case, the United States Supreme Court held that an indigent parent subject to a state-initiated termination-of-parental-rights proceeding was not entitled to court-appointed counsel under the due process clause of the Fourteenth Amendment.[5] The *Lassiter* Court ruled that other, future indigent civil litigants *may* be entitled to court-appointed counsel, but only if they can show that the balance of the familiar three-part procedural due process test in *Mathews v.*

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1. Thomas R. Phillips, *The Constitutional Right to a Remedy*, 78 N.Y.U. L. REV. 1309, 1310 (2003).
2. Thayer v. Phillips Petroleum Co., 613 P.2d 1041, 1044–45 (Okla. 1980).
3. "Civil Gideon" refers to the categorical constitutional right to appointed counsel in a civil case, comparable to that same right in a criminal trial under *Gideon v. Wainwright*, 372 U.S. 335 (1963).
4. 452 U.S. 18 (1981).
5. *Id.* at 31, 33.

Eldridge[6] outweighs the newfangled, Court-created "presumption" against appointment of counsel, except in cases where physical liberty is at stake.[7]

The upshot of *Lassiter* is that Civil Gideon instigators must show, on a case-by-case basis, some combination of a very important personal interest at stake in the litigation, a very unimportant governmental interest at stake (or a governmental interest that aligns with the personal interest, as in the best interest of the child in a custody proceeding), and a very high likelihood of an erroneous decision if the court fails to appoint counsel.[8] Even then, an indigent litigant must show that the balance of these *Mathews* factors outweighs the *Lassiter* "presumption" against counsel, except in cases where physical liberty is at stake.[9] Only then will an indigent litigant succeed in gaining court-appointed counsel under Fourteenth Amendment procedural due process.[10]

Against this backdrop, Civil Gideon litigation strategies fall into two camps. The first includes litigation that attempts to work *through Lassiter*. In these cases, indigent litigants attempt to show that the *Mathews* factors in their case overcome the *Lassiter* "presumption."[11] Thus litigants attempt to show that their personal interest in parenthood, housing, or personal safety, among others, is very high—as close as possible to the privileged interest in physical liberty. Next, they try to show that the governmental interest is merely financial, or that it aligns with their personal interest.[12] And finally, they attempt to show that the complexity of their case is such that mistakes will be made if they lack legal representation.[13]

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6. 424 U.S. 319, 334–35 (1976).
7. *Lassiter*, 452 U.S. at 31 ("If, in a given case, the parent's interests were at their strongest, the State's interests were at their weakest, and the risks of error were at their peak, it could not be said that the [*Mathews*] factors did not overcome the presumption against the right to appointed counsel, and that due process did not therefore require the appointment of counsel.").
8. *See id.* at 37.
9. *See id.* at 27.
10. Professor Bruce Boyer aptly describes *Lassiter* as a "scourge" for this and other reasons. 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, 15 TEMP. POL. & CIV. RTS. L. REV. 635, 636 (2005).
11. *See infra* note 14.
12. Beverly Balos, *Domestic Violence Matters: The Case for Appointed Counsel in Protective Order Proceedings*, 15 TEMP. POL. & CIV. RTS. L. REV. 557, 588 (2006).
13. *See, e.g.*, *id.* at 557 (arguing that plaintiffs in domestic violence cases satisfy the *Lassiter* test). The American Bar Association has taken a position similar to this approach. The ABA House of Delegates adopted a policy resolution on access to civil justice that calls for "legal counsel as a matter of right at public expense to low

This camp has seen some success,[14] but it has two shortcomings. First, this camp will never achieve a categorical constitutional right to court-appointed counsel in civil cases—a true Civil Gideon—unless the United States Supreme Court overrules *Lassiter*.[15] *Lassiter* has established a case-by-case approach, and any victories are therefore necessarily limited to that case. The civil doctrinal landscape under *Lassiter* is thus precisely the same as the criminal landscape before *Gideon v. Wainwright*.[16] Under *Betts v. Brady*,[17] *Gideon*'s precursor, indigent criminal defendants had to show on a case-by-case basis that

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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, as determined by each jurisdiction." American Bar Association Task Force on Access to Civil Justice, *ABA Resolution on Right to Counsel*, 15 TEMP. POL. & CIV. RTS. L. REV. 507, 508 (2006), *available at* http://www.abanet.org/legalservices/sclaid/downloads/06A112A.pdf [hereinafter ABA Task Force] (emphasis added).

14. *See, e.g.*, Garramone v. Romo, 94 F.3d 1446, 1449–50 (10th Cir. 1996) (holding that petitioner had a due process right to counsel in a deprivation-of-parental-rights proceeding); Kenny A. *ex rel.* Winn v. Perdue, 356 F. Supp. 2d 1353, 1357 (N.D. Ga. 2005) (holding that children have a due process right to counsel in deprivation and termination-of-parental-rights proceedings, based upon their interests at stake); S.C.D. v. Etowah County Dep't of Human Res., 841 So. 2d 277, 279 (Ala. Civ. App. 2002) (finding that due process entitled parents to the right of counsel in a permanent child deprivation proceeding); *In re* O.S., 102 Cal. App. 4th 1402, 1407 (2002) (finding that a parent has a constitutional right to counsel); *In re* Powers, 624 N.W.2d 472, 477–78 (Mich. Ct. App. 2001) (holding that a parent in a termination proceeding has the right to counsel); *In re* Welfare of Luscier, 524 P.2d 906, 908 (Wash. 1974) (holding that appointment of counsel was constitutionally required in permanent deprivation proceedings for indigent parents); Marathon County Dep't of Soc. Servs. v. I.H., 476 N.W.2d 26, 31 (Wis. Ct. App. 1991) (finding the parent was entitled to counsel under the due process clause of the federal constitution). *But see, e.g.*, *In re* Travarius O., 799 N.E.2d 510, 517 (Ill. App. Ct. 2003) (finding that petitioner had no right to new counsel on a fourth occasion); *In re* Adoption of K.L.P., 735 N.E.2d 1071, 1079 (Ill. App. Ct. 2000) (holding that petitioner had no due process right to counsel in a termination proceeding, but the same petitioner had an equal protection right to counsel because similarly situated individuals under a different statutory scheme had a statutory right to counsel); K.D.G.L.B.P. v. Hinds County Dep't of Human Servs., 771 So.2d 907, 911 (Miss. 2000) (holding that petitioner had no due process right to counsel in a termination proceeding).

15. *But c.f.* Balos, *supra* note 11, at 591–96 (2006) (arguing that domestic violence cases categorically satisfy the *Lassiter* test); Erik Pitchal, *Children's Constitutional Right to Counsel in Dependency Cases*, 15 TEMP. POL. & CIV. RTS. L. REV. 663, 670–82 (2006) (tracing the litigation that established the right to counsel for children in dependency cases under Georgia's Due Process Clause and arguing that this litigation stands for the proposition, following from an analysis of the *Mathews* factors, that these children have a procedural due process right to counsel).

16. 372 U.S. 335 (1963).

17. 316 U.S. 455 (1942), *overruled by Gideon*, 372 U.S. 335.

they were entitled to court-appointed counsel,[18] and any victory was therefore purely personal, limited to each defendant's case. *Gideon* overruled *Betts* and held that indigent defendants subject to incarceration in state criminal prosecutions have a categorical due process right to counsel.[19]

The other problem with this strategy is that litigants must always deal in personal interests. Litigants must try to elevate or equate their personal interests in their cases with the privileged interest in physical liberty in order to overcome the "presumption" in *Lassiter*.[20] Because no personal interest has ever equated with physical liberty in the Court's procedural due process jurisprudence,[21] this is a very difficult task to say the least. It is also risky. In making the claim, Civil Gideon instigators risk a decision that situates the pertinent personal interest significantly *lower* on the hierarchy than they wished. This may set them back in other, unexpected ways, such as claiming that the same interest is "fundamental" in a future, unrelated case.

The second camp attempts to avoid these shortcomings by working *around Lassiter*. This set of strategies seeks to dodge the first camp's inevitable focus on personal interests by looking to alternative constitutional arguments to establish Civil Gideon. Litigants have thus turned to state constitutional arguments based on state due process clauses that reject *Lassiter*'s approach[22] and state equal

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18. *Id.* at 471–72 ("[W]e are 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 [criminal case]. Every court has power, if it deems proper, to appoint counsel where that course seems to be required in the interest of fairness.").

19. *Gideon*, 372 U.S. at 339.

20. Professor Douglas Besharov poignantly illustrated one problem with *Lassiter*'s focus on interests and its priority of physical liberty: "*Lassiter*, for all practical purposes, stands for the proposition that a drunken driver's night in the cooler is a greater deprivation of liberty than a parent's permanent loss of rights in a child." Douglas J. Besharov, *Terminating Parental Rights: The Indigent Parent's Right to Counsel After* Lassiter v. North Carolina, 15 FAM. L.Q. 205, 221 (1981).

21. *See* ABA Task Force, *supra* note 13, at 513 (discussing the "additional presumption against appointed counsel where there is no risk of loss of physical liberty[,]" and stating that "[i]t is to be hoped that the U.S. Supreme Court will eventually reconsider the cumbersome *Lassiter* balancing test and the unreasonable presumption that renders that test irrelevant for almost all civil litigants."); Phillips, *supra* note 1, at 1318 n.34 (stating that the Supreme Court has not yet incorporated a remedy guarantee into the Due Process Clause).

22. For examples of state courts' rejections of *Lassiter* under their respective state constitutions, *see* K.P.B. v. D.C.A. (*In re* J.L.B.), 685 So. 2d 750, 752 (Ala. Civ. App. 1996) (rejecting *Lassiter* under the state constitution, and holding that an indigent

protection clauses that ignore *Lassiter*'s approach altogether.[23] Other arguments in this camp seek to move toward a full Civil Gideon indirectly, via an intermediate doctrinal step,[24] or through judicial strategies other than litigation.[25]

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parent had a state constitutional right to counsel in a termination proceeding); *In re* K.L.J., 813 P.2d 276, 278, 282 (Alaska 1991) (rejecting *Lassiter* under the state constitution, and holding that a parent had a state constitutional right to counsel in a termination proceeding); *In re* Jay R., 150 Cal. App. 3d 251, 260–62 (1983) (rejecting *Lassiter* under the state constitution, and holding that an indigent parent had a state constitutional right to counsel in a termination proceeding); *In re* A.S.A., 852 P.2d 127, 129–30 (1993) (holding that a parent had a state constitutional due process right to appointed counsel in a proceeding to terminate parental rights); *see also* Michael Millemann, *The State Due Process Justification for a Right to Counsel in Some Civil Cases*, 15 TEMP. POL. & CIV. RTS. L. REV. 733, 746–57 (2006) (arguing that state due process clauses provide a path to Civil Gideon in certain cases).

23. *See, e.g.*, *In re* Adoption of K.L.P., 735 N.E.2d 1071, 1078–80 (Ill. App. Ct. 2000) (holding that a litigant under the state Adoption Act, which did not provide for appointed counsel, had a state constitutional equal protection right to counsel, where a similarly situated litigant under the Juvenile Court Act would have had a statutory right to counsel), *aff'd*, 763 N.E.2d 741 (Ill. 2002); *In re* Adoption of K.A.S., 499 N.W.2d 558, 561, 566 (N.D. 1993) (holding that a litigant under the state Adoption Act, in which the right to counsel was uncertain, had a state constitutional equal protection right to counsel, where a similarly situated litigant under the Juvenile Court Act or the Parentage Act had a certain statutory right to counsel). *But see, e.g.*, *In re* Curtis S., 25 Cal. App. 4th 687, 692–93 (1994) (holding that an appellant who appealed a termination order in a private action had no equal protection right to counsel, even though a similarly situated appellant in a state-initiated termination case would have a statutory right to counsel), *abrogated by In re* J.W., 57 P.3d 363, 371–72 (Cal. 2002) (holding that an appellant who appealed a termination order in a private action had no statutory right to counsel, but declining to address the argument that failure to appoint counsel in this situation violated the appellant's constitutional right to equal protection of the law).

24. JOHN F. EBBOTT, KEVIN G. MAGEE & JACK W. EBBOTT, TOWARD A CIVIL *GRIFFIN* IN WISCONSIN: EQUAL JUSTICE UNDER THE WISCONSIN CONSTITUTION 67–71 (2005) [hereinafter TOWARD A CIVIL *GRIFFIN*] (arguing for Civil Gideon via the equal justice principle in *Griffin v. Illinois*, 351 U.S. 12 (1956), which held that when a criminal defendant has a state-created right to appeal, the state may not deny this appeal solely because the defendant is unable to afford a trial transcript). The equal justice principle means "if the state makes a court-access remedy available, it cannot deny that remedy to indigents solely because of their lack of means." *Id.* at 69. *See also* Steven D. Schwinn, *The Right to Counsel on Appeal: Civil Douglas*, 15 TEMP. POL. & CIV. RTS. L. REV. 603 (2005) (arguing for a constitutional civil right to counsel on appeal as a step toward achieving Civil Gideon); Mary Helen McNeal, *Toward a "Civil Gideon" Under the Montana Constitution: Parental Rights as the Starting Point*, 66 MONT. L. REV. 81, 83 (2005) (arguing for Civil Gideon based on Montana's open courts provision).

25. *See, e.g.*, Russell Engler, *Shaping a Context-Based Civil Gideon from the Dynamics of Social Change*, 15 TEMP. POL. & CIV. RTS. L. REV. 697, 703–05 (2005) (arguing

This article explores another state constitutional strategy within this second camp: Civil Gideon under state constitutional "open courts" provisions.[26] In essence, open courts provisions guarantee that state courts will remain "open," that anyone harmed will have access to the courts to seek a remedy for the harm, and that courts shall dispense justice freely, fully, and speedily.[27] Maryland's open courts provision, one of the earliest, is typical:

> That every man, for any injury done to him in his person or property, ought to have remedy by the course of the Law of the land, and ought to have justice and right, freely without sale, fully without any denial, and speedily without delay, according to the Law of the land.[28]

Forty state constitutions contain an express open courts provision.[29] There are 32 different versions of the text,[30] but they fall into two broad categories.[31] The first is represented by Maryland's provision, quoted above. The second version is represented by Justice Phillips's composite "[t]hat all courts shall be open, and every person, for an injury done him in his person, property or reputation, shall have remedy by the due course of law."[32]

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for a civil right to counsel by appealing to the administrative and bureaucratic interests of the judiciary and its personnel).

26. *See, e.g.*, Deborah Perluss, *Washington's Constitutional Right to Counsel in Civil Cases: Access to Justice v. Fundamental Interest*, 2 SEATTLE J. FOR SOC. JUST. 571, 573–74 (2004) (arguing for Civil Gideon based on Washington's open courts provision).

27. *See* JENNIFER FRIESEN, STATE CONSTITUTIONAL LAW: LITIGATING INDIVIDUAL RIGHTS, CLAIMS, AND DEFENSES §§ 6-2 to 6-6 (4th ed. 2006).

28. MD. CONST. art. XIX.

29. Phillips, *supra* note 1, at 1310; Paul Marvy & Debra Gardner, *A Civil Right to Counsel for the Poor*, 32 HUM. RTS., Summer 2005, at 8, 9 ("At least forty states have similar open courts provisions.").

30. > Professor Jennifer Friesen has counted 27 state constitutions that require courts to be open, 36 that require justice to be administered promptly, 27 that require justice to be administered without purchase or sale, 34 that require justice to be granted completely and/or without denial, and 11 that require justice to be delivered freely. Additionally, 35 states provide a right to a remedy, of which 21 require the remedy to be by due process or due course of law.

Phillips, *supra* note 1, at 1310 n.7 (citing 1 JENNIFER FRIESEN, STATE CONSTITUTIONAL LAW: LITIGATING INDIVIDUAL RIGHTS, CLAIMS, AND DEFENSES app. 6 §§ 6-65 to 6-67 (3d ed. 2000)) (citations omitted).

31. *Id.* at 1310–11.

32. *Id.* at 1311.

These clauses all derive from the open courts provisions in Magna Carta,[33] and many later-entering states adopted their open courts provision directly from the open courts provisions in earlier state constitutions.[34] There is little recorded history of the adoption of these provisions, however.[35] And in the case of later-entering states, there is often no history—just the text, copied verbatim from the constitution of an earlier-entering state.[36] Thus, courts are left with the bare text of these provisions and their historical roots in Magna Carta in applying them.

And in applying open courts clauses, court rulings have been nearly incomprehensible. Justice Phillips described the state of open courts jurisprudence as follows:

> These disparate results [among the courts' applications of open courts provisions] are essentially inexplicable. They cannot be harmonized by reliance on textual distinctions among the states. There is no correlation between the words of a particular guarantee and how expansively the courts of that state have applied it. Nor can these different outcomes be explained by historical, social, political, or cultural variations among the states. . . . [S]ome state courts defer unhesitatingly to legislative choices, while others routinely strike down any statutes that impede access to the courts or impair recovery under traditional theories. Finally, these distinctions cannot be explained by divergent intentions among the particular framers and ratifiers of the individual state constitutions. In most states, there is almost no historical record to explain what the framers and ratifiers thought the provision would accomplish.[37]

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33. *See infra* notes 51–86 and accompanying text.
34. Phillips, *supra* note 1, at 1315, 1323–24.
35. *Id.* at 1315.
36. *See, e.g.*, Smothers v. Gresham Transfer, Inc., 23 P.3d 333, 346 (Or. 2001) (describing how Oregon's open courts provision was based on Indiana's earlier open courts provision, which itself was based on yet earlier open courts provisions from Ohio and Kentucky).
37. Phillips, *supra* note 1, at 1314–15; *see, e.g.*, Daniel W. Halston, *The Meaning of the Massachusetts 'Open Courts' Clause and its Relevance to the Current Court Crisis*, 88 MASS. L. REV. 122 (2004); Jonathan M. Hoffman, *Questions Before Answers: The Ongoing Search to Understand the Origins of the Open Courts Clause*, 32 RUTGERS L.J. 1005 (2001); Jonathan M. Hoffman, *By the Course of the Law: The Origins of the Open Courts Clause of State Constitutions*, 74 OR. L. REV. 1279 (1995); David Schuman, *The Right to a Remedy*, 65 TEMP. L. REV. 1197 (1992).

Notwithstanding the courts' incoherence in applying open courts provisions to specific cases, some broad themes emerge from the jurisprudence, which may be helpful in moving toward Civil Gideon under open courts provisions.[38]

For convenience in outlining these themes, I have divided open courts provisions into two components: the "right to a remedy" and the "access to justice."

The right-to-remedy component by its plain terms guarantees a remedy in law for every wrong or harm.[39] Litigants use this component to challenge restrictions on remedies, such as statutory caps on remedies, immunities of parties or potential parties, and statutes of limitations.[40] Two themes seem to emerge from these cases. First, courts that consider open courts challenges to *absolute* deprivations of causes of action look to the history of open courts provisions, including their roots in Magna Carta, to determine whether a restriction violates rights that were in existence when the particular state's open courts provision was adopted and, if so, whether the legislature has provided a meaningful alternative.[41] Second, courts that consider open courts challenges to *partial* deprivations of causes of action (such as damage caps or procedural prerequisites) use a highly deferential means-ends test.[42]

In contrast to the right-to-remedy component, the access-to-justice component of open courts guarantees "open" courts and free, full, and speedy justice. Litigants use this component to challenge technical impediments to court access, such as filing fees and attorney's fees.[43] Two themes also emerge from these cases. First, courts that consider fee barriers or judicial restraints on access usually adopt some form of a means-ends test and seem to privilege

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38. Phillips, *supra* note 1, at 1343–45.

39. *See supra* note 32 and accompanying text.

40. Phillips, *supra* note 1, at 1311–12. *See also* Strahler v. St. Luke's Hosp., 706 S.W.2d 7, 11–12 (Mo. 1986) (finding statutory limitation period unconstitutional, as applied to minors); Oien v. City of Sioux Falls, 393 N.W.2d 286, 290–91 (S.D. 1986) (finding statutes granting sovereign immunity for municipalities in construction, maintenance, and operation of parks unconstitutional); Lucas v. United States, 757 S.W.2d 687, 688–89, 691 (Tex. 1988) (invalidating statutory cap on medical malpractice damages).

41. *See Smothers*, 23 P.3d at 357–62.

42. *See, e.g.*, Adams v. Children's Mercy Hosp., 832 S.W.2d 898, 905–06 (Mo. 1992) (finding statutes that placed cap on noneconomic damages in malpractice action did not violate open courts provision of state constitution).

43. Phillips, *supra* note 1, at 1312. *See also* Crocker v. Finley, 459 N.E.2d 1346, 1351 (Ill. 1984) (holding that imposing fee in excess of court filing fee is unconstitutional).

an interest in judicial efficiency.[44] Second, courts that consider fee-shifting or attorney's fee statutes use a varying means-ends test depending on the nature of the statute.[45] The test privileges an interest in *equal* access in those cases involving an asymmetrical fee-shifting statute.[46]

These trends—or the "faces" of open courts—are fodder for arguments in favor of Civil Gideon. More particularly, some combination of an historical argument (based on those right-to-remedy cases involving a complete deprivation of a cause of action), an equal access argument (based on those access-to-justice cases involving attorney's fees), and a judicial efficiency argument (based on those access-to-justice cases involving fee barriers and judicial restraints on court access) provides a comprehensive open courts argument for Civil Gideon.

This article first traces the history of open courts clauses.[47] Next, it reviews the trends described above, looking at the trends in the right-to-remedy cases[48] and then in the access-to-justice cases.[49] Finally, it provides some thoughts on arguments based on these trends that move toward an open courts Civil Gideon.[50]

One important cautionary note: because open courts jurisprudence across states (and even within individual states) is sometimes unintelligible and incoherent, it is difficult to make any generalizations about it. This article certainly makes no claim to finding a grand theory of open courts rulings that reconcile them across jurisdictions. Nor does the article claim to provide a comprehensive analysis of open courts jurisprudence in any single jurisdiction, or across all states. Instead, this article merely attempts to sketch what appear to be some very broad trends in the open courts jurisprudence with the hope that instigators might build upon and use some of this analysis in their own work toward Civil Gideon.

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44. *See, e.g.*, *Crocker*, 459 N.E.2d at 1352; Zamarron v. Pucinski, 668 N.E.2d 186, 190–91 (Ill. App. Ct. 1996).
45. *See, e.g.*, Florida Patient's Comp. Fund v. Rowe, 472 So.2d 1145, 1149 (Fla. 1985) (upholding post-litigation claims for attorney's fees because they encourage, rather than deter, the pursuit of medical malpractice claims).
46. *See, e.g.*, Thayer v. Phillips Petroleum Co., 613 P.2d 1041, 1043–45 (Okla. 1980) (the intent of an Oklahoma "statute imposing attorney fees on the defendant if the plaintiff prevails is to preserve the . . . accessibility of the . . . court").
47. *See infra* Part II.
48. *See infra* Part III.A.
49. *See infra* Part III.B.
50. *See infra* Part IV.

II. HISTORY

The state constitutional rights to a remedy and to open courts originated with Magna Carta in June 1215, when King John agreed to meet with rebellious barons at Runnymede to address their grievances related to the King's abuse of power and infringement upon their feudal jurisdiction.[51] In order to win back the barons' loyalty, King John agreed to Magna Carta.[52]

Magna Carta simply delineated the fundamental rights of landowners of the time. It did not set down new rights; instead, it defined existing rights, under the common law and ancient practices, which had previously only been vaguely understood.[53] Thus, Magna Carta merely restored the customary constraints on the King's authority.[54]

One of the barons' complaints involved King John's abuse of the judicial process, including, among other abuses, the practice of selling writs—the ticket for admission to the royal courts—at inconstant prices in accordance with the value of the underlying

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51. A.E. DICK HOWARD, THE ROAD FROM RUNNYMEDE: MAGNA CARTA AND CONSTITUTIONALISM IN AMERICA 7, 220 (1968) [hereinafter THE ROAD FROM RUNNYMEDE]. Many outstanding sources trace this history of Magna Carta. *See, e.g.*, *id.* at 10–13 (tracing the influence of Magna Carta in Anglo-American political thought and its restatement in U.S. federal and state constitutions); A.E. DICK HOWARD, MAGNA CARTA: TEXT AND COMMENTARY 3–8 (1964) [hereinafter TEXT AND COMMENTARY] (providing a broad overview of the origins of Magna Carta, outlining its seminal provisions and charting its ultimate incorporation into American jurisprudence); WILLIAM SHARP MCKECHNIE, MAGNA CARTA: A COMMENTARY ON THE GREAT CHARTER OF KING JOHN vii–viii, 48–122 (2d ed. 1914) (analyzing the sixty-three chapters of Magna Carta in the context of the legal, political, economic, and social life in thirteenth-century Great Britain); FAITH THOMPSON, MAGNA CARTA: ITS ROLE IN THE MAKING OF THE ENGLISH CONSTITUTION 1300–1629, at 3–6 (1948) (tracing the evolution of Magna Carta from the close of the reign of Edward I to the death of Sir Edward Coke). This section draws substantially from two other excellent histories and the respective sources cited therein. William C. Koch, Jr., *Reopening Tennessee's Open Courts Clause: A Historical Reconsideration of Article I, Section 17 of the Tennessee Constitution*, 27 U. MEM. L. REV. 333, 364–66 (1997); *Smothers v. Gresham Transfer, Inc.*, 23 P.3d 333, 341–42 (Or. 2001).

52. TEXT AND COMMENTARY, *supra* note 51, at 8, 34–36.

53. *See* EDWARD COKE, *A Proeme to the Second Part of the Institutes*, *in* THE SECOND PART OF THE INSTITUTES OF THE LAWS OF ENGLAND (London, E. & R. Brooke 1797). The 1225 version of Magna Carta "was for the most part declaratory of the principall grounds of the fundamentall laws of *England*, and for the residue it is additionall to supply some defects of the Common Law; and it was no new declaration: for King *John* in the 17 yeare of his raigne had granted the like, which also was called *Magna Charta*, as appeareth by a Record before this Great Charter made by the King H.3." *Id.* (alteration of original).

54. THE ROAD FROM RUNNYMEDE, *supra* note 51, at 7.

claim or the wealth of the person seeking the writ.[55] For King John, writs were a source of revenue;[56] for would-be litigants, they represented an illegitimate exercise of royal authority and a potential barrier to the courts.

Chapters 39 and 40 of Magna Carta addressed the King's abuses of judicial power.[57] Chapter 39 read: "No freeman shall be taken or [and] imprisoned or disseised or exiled or in any way destroyed, nor will we go upon him nor send upon him, except by the lawful judgment of his peers or [and] by the law of the land."[58] Chapter 40 specifically addressed the abuses in the writ system; it read: "To no one will we sell, to no one will we refuse or delay, right or justice."[59]

A mere nine weeks after Magna Carta became law, King John persuaded Pope Innocent II to annul it.[60] It reemerged under King Henry III in 1216 and again in 1217 and 1224, each time with significant revisions.[61] But Chapters 39 and 40 remained substantially intact, even if merged into a new Chapter 29:

> No freeman shall be taken, or imprisoned, or be disseised of his freehold, or liberties, or free customs, or be outlawed, or exiled, or any otherwise destroyed; nor will we not pass upon him, nor condemn him, but by lawful judgment of his peers, or by the law of the land. We will sell to no man, we will not deny or defer to any man either justice or right.[62]

This provision gained its relevance for U.S. constitutional law in Sir Edward Coke's interpretation in his treatise, *The Second Part of the Institutes of the Laws of England* (the "*Second Institute*")[63] first published in 1641, seven years after Coke's death.[64] Relying on historical records, Coke's *Second Institute* traced the history of Magna Carta since 1225 and explained its contemporary meaning—not the meaning in 1225.[65] He wrote this about Chapter 29:

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55. MCKECHNIE, *supra* note 51, at 89, 395–96.
56. *Id.* at 72, 396–97.
57. *Id.* at 375–77, 395–96.
58. MAGNA CARTA ch. 39, *reprinted in* MCKECHNIE, *supra* note 51, at 375.
59. MAGNA CARTA ch. 40, *reprinted in* MCKECHNIE, supra note 51, at 395.
60. THEODORE F.T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 23 (5th ed. 1956).
61. GOLDWIN SMITH, CONSTITUTIONAL AND LEGAL HISTORY OF ENGLAND 136 (1955).
62. Smothers v. Gresham Transfer, Inc., 23 P.3d 333, 340–41 (Or. 2001). *See also* COKE, *supra* note 53, at 45.
63. *See generally*, COKE, *supra* note 53.
64. THE ROAD FROM RUNNYMEDE, *supra* note 51, at 121.
65. THOMPSON, *supra* note 51, at 355.

> This is spoken in the person of the king, who in judgement of Law, in all his Courts of Justice is present, and repeating these words, Nulli vendemus, &c.
>
> And therefore, every Subject of this Realme, for injury done to him in bonis, terris, vel persona, by any other Subject, be he Ecclesiasticall, or Temporall, Free, or Bond, Man, or Woman, Old, or Young, or be he outlawed, excommunicated, or any other without exception, may take his remedy by the course of the Law, and have justice, and right for the injury done to him, freely without sale, fully without deniall, and speedily without delay.[66]

As one court wrote: "Coke asserted that the common law of England had come to guarantee every subject a legal remedy for injury to goods, lands, or person caused by any other subject."[67]

Coke's *Second Institute* was the primary source of understanding Magna Carta in eighteenth century colonial America and thus influenced early American constitutional thought.[68] It was not, however, the only source. In 1687, William Penn published *The Excellent Priviledge of Liberty & Property Being the Birth-Right of the Free-Born Subjects of England.*[69] Penn's comments drew from Coke's work,[70] but he added this passage of his own, reflecting his great enthusiasm for Chapter 29:

> The 29th Chapter, NO FREE-MAN SHALL BE TAKEN, &c. Deserves to be written in Letters of Gold; and I have often wondred the Words thereof are not Inscribed in Capitals on all our Courts of Judicature, Town-Halls, and most publick Edifices; they are the *Elixer* of our *English Freedoms*, the Store-house of all our Liberties.[71]

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66. COKE, *supra* note 53, at 55–56 (alteration of original).
67. *Smothers*, 23 P.3d at 341.
68. *See* HOWARD, *supra* note 51, at 121–22.
69. WILLIAM PENN, THE EXCELLENT PRIVILEDGE OF LIBERTY & PROPERTY BEING THE BIRTH-RIGHT OF FREE-BORN SUBJECTS OF ENGLAND (1687), *reprinted in* MAGNA CARTA IN AMERICA 31 (David V. Stivison ed., 1993). *See also* THE ROAD FROM RUNNYMEDE, *supra* note 51, at 124.
70. Suzanne L. Abram, *Problems of Contemporaneous Construction in State Constitutional Interpretation*, 38 BRANDEIS L.J. 613, 629–30 (2000).
71. PENN, *supra* note 69, at 61 (alteration of original). *See also* THE ROAD FROM RUNNYMEDE, *supra* note 51, at 63 (quoting DANIEL DULANY, THE RIGHTS OF THE INHABITANTS OF MARYLAND TO THE BENEFIT OF THE ENGLISH LAWS 14 (1728) ("The 29th chapter . . . is not long, and ought to be read by every Body, and (in my humble Opinion,) taught to Children, with their first Rudiments . . . .")).

In 1721, Henry Care published *English Liberties* in the colonies.[72] Care also drew from Coke on the second sentence of Chapter 29,[73] but added this:

> [F]or Justice must have three Qualities, it must be *Libera*, free; for nothing is more odious than Justice set to sale: *Plena*, full, for Justice ought not to limp, or be granted by piece-meal: And *Celeris*, speedy: *Quia Dilatio est quedam negatio*, Delay is a kind of denial: and when all these meet, it is both Justice and Right.[74]

Finally, Sir William Blackstone's *Commentaries on the Laws of England*, first published in England in the 1760s,[75] also influenced American understanding of Magna Carta and, therefore, American constitutional theory of the time.[76] Like Care and Penn, Blackstone quoted Coke on Chapter 29 of Magna Carta[77] and added this:

> A third subordinate right of every Englishman is that of applying to the courts of justice for redress of injuries. Since the law is in England the supreme arbiter of every man's life, liberty, and property, courts of justice must at all times be open to the subject, and the law be duly administered therein.[78]

For Blackstone, the "subordinate" right of access to the judiciary meant only that access secured other substantive fundamental rights. As one court summarized:

> Blackstone echoed Coke in stating that it would be "in vain" for the law to recognize rights, if it were not for the remedial part of the law that provides the methods for restoring those rights when they wrongfully are withheld or invaded. To Blackstone, the guarantee of legal remedy for injury "is what we mean properly, when we speak of the protection of the law." Hence, the maxim of English law,

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72. HENRY CARE, ENGLISH LIBERTIES, OR THE FREE-BORN SUBJECT'S INHERITANCE (5th ed., Boston 1721).
73. *Id.* at 25–26.
74. *Id.* at 26 (alteration of original).
75. 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND (Oxford, Clarendon Press 1765–1769).
76. PLUCKNETT, *supra* note 60, at 287.
77. 1 BLACKSTONE, *supra* note 75, at 137.
78. *Id.* (alteration of original).

> *Ubi jus, ibi remedium*: "for every right, there must be a remedy."[79]

American colonists saw themselves as Englishmen[80] and therefore claimed to have brought the rights of Englishmen with them to the colonies.[81] Magna Carta and the commentaries by Coke, Penn, Care, and Blackstone were highly influential in their understanding of their rights and the development of early American constitutions.[82] Penn himself borrowed from Magna Carta, including Chapter 40 of the 1215 version, in drafting the Fundamental Law of West New Jersey in 1676 and the Frame of Government of Pennsylvania in 1682.[83]

Six of the original thirteen state constitutions contained provisions derived from Chapter 40 of the early versions of Magna Carta or from Chapter 29 of the 1225 version.[84] Like other provisions in early declarations and bills of rights, these early open courts provisions were adopted to protect the new Americans from all abuses of power, not merely abuses by the English Crown or Parliament.[85] Today forty state constitutions contain some form of the open courts clause modeled on these early provisions and ultimately derived from Magna Carta.[86]

In tracing this history, courts have made clear that open courts provisions do not grant new rights. Instead, open courts provisions protect rights that existed at the time of the adoption of the state's open courts provision, or under the common law at the time. The clauses protect against legislative infringement upon those ancient rights, unless the legislature adopts a reasonable alternative to protect those rights. Thus, the Supreme Court of Connecticut wrote:

> We generally have held that [our open courts provision] prohibits the legislature from abolishing or significantly limiting common law and certain statutory rights that were redressable in court as of 1818, when the constitution was

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79. Smothers v. Gresham Transfer, Inc., 23 P.3d 333, 343 (Or. 2001) (citations omitted).
80. *Id.*
81. THE ROAD FROM RUNNYMEDE, *supra* note 51, at 15–16.
82. *Id.* at 119–25; *Smothers*, 23 P.3d at 344 ("By the end of 1776, several of the colonies—now states—had adopted constitutions and had prefaced them with declarations or bills of rights that stated 'in dogmatic form all of the seminal principles of the English constitutional system.'") (quoting C. ELLIS STEVENS, SOURCES OF THE CONSTITUTION OF THE UNITED STATES 34, 38 n.1 (1894)).
83. Koch, *supra* note 51, at 365–66.
84. *Id.* at 367.
85. *See Smothers*, 23 P.3d at 344 (citing WILLI PAUL ADAMS, THE FIRST AMERICAN CONSTITUTIONS 145 (Rita Kimber & Robert Kimber trans., 1980)).
86. *See supra* note 29 and accompanying text.

> first adopted, and which were incorporated in that provision by virtue of being established by law as rights the breach of which precipitates a recognized injury . . . . The legislature is precluded, therefore, from abolishing or substantially modifying any such right unless it enacts a reasonable alternative to the enforcement of that right.[87]

III. TWO COMPONENTS OF OPEN COURTS: THE RIGHT TO REMEDY, AND THE ACCESS TO JUSTICE

Courts have read two components in state open courts provisions: a "right to remedy" component, guaranteeing a remedy in law for every wrong or harm; and an "access to justice" component, guaranteeing open, free, full, and speedy access to the courts. This section looks at these two components in turn.

A. The Right to Remedy

Cases under the right-to-remedy component fall into two categories: those cases involving a complete abolition of a cause of action; and those cases involving a partial abolition, or even a restructuring, of a cause of action.

In the former category, some courts look to the history of the open courts provision, including its roots in Magna Carta, to hold that the legislature may not completely abolish a cause of action that existed at the time of the state's adoption of its open courts provision, unless the legislature also created a reasonable alternative.[88] Using this historical approach, courts seem to privilege the state of the law at the time of the adoption of the open courts provision over government interests in wholly abolishing the remedy.[89]

In contrast to the historical approach, courts in the latter category seem to apply a means-ends analysis—rational basis, or "middle tier" review—to determine whether the restriction on available remedies is

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87. Binette v. Sabo, 710 A.2d 688, 691 (Conn. 1998) (citations and quotations omitted). *See also* Christianson v. Pioneer Furniture Co., 77 N.W. 174, 175 (Wis. 1898) ("[T]he right thus obtained as a concession from sovereign power has come down to us through the centuries that have passed, and been preserved in all its integrity in substantially all state constitutions. They do not grant the right, but guaranty the preservation of one that existed under the constitution of England."); *Smothers*, 23 P.3d at 352 ("Consistent with the foregoing observations, this court for many years held that the purpose of the remedy clause 'is to save from legislative abolishment those jural rights which had become well established prior to the enactment of our Constitution.'") (quoting Stewart v. Houk, 271 P. 998, 999 (Or. 1928)).

88. *See Binette*, 710 A.2d at 691.

89. *See id.*

sufficiently related to the legitimate purpose of the legislature.[90] Using this means-ends approach, courts seem to privilege the interests of the legislature (which is sometimes even unstated) in enacting the restriction on the remedy.[91]

There appears to be no necessary correlation between one approach or the other and success for the challenger. As argued below, however, the historical approach probably offers stronger support to Civil Gideon.

1. Complete Abolition of Right

Courts in several states have adopted a principle that the legislature may not abolish common law rights that existed at the time of the adoption of the state's open courts provision without providing a reasonable alternative.[92] Courts applying this principle look to the state of the common law at the time of the adoption of their open courts provisions to determine whether the right existed.[93] For example, the Supreme Court of Oregon overturned the exclusive remedy provision in the state's workers' compensation law, because that provision abolished the historical common law negligence cause of action that was available to workers prior to the workers' compensation system.[94] The law left injured workers without a remedy, unless they could show that their work was a *major* cause of their injuries.[95]

In analyzing the question, the court looked to the common law at the time that Oregon adopted its open courts provision.[96] It determined that a negligence cause of action—and, more particularly, a negligence cause of action by an employee against an employer for

90. Trovato v. DeVeau, 736 A.2d 1212, 1214 (N.H. 1999).

91. *See id.* at 1214–15.

92. *See* Gentile v. Altermatt, 363 A.2d 1, 22 (Conn. 1975) (holding courts must provide alternate remedies if abolishing rights and remedies); Kluger v. White, 281 So. 2d 1, 4 (Fla. 1973) (holding the legislature may not abolish a statutory or common law right without providing a reasonable alternative); *Smothers*, 23 P.3d at 362 (holding an Oregon statute unconstitutional because it left no remedy for one which existed at common law); Sax v. Votteler, 648 S.W.2d 661, 667 (Tex. 1983) (holding a Texas statute unconstitutional for abolishing a common law remedy without providing a reasonable alternative).

93. *See, e.g.*, *Smothers*, 23 P.3d at 360.

94. *Id.* at 362. *See also* Mulder v. Acme-Cleveland Corp., 290 N.W.2d 276, 284 (Wis. 1980) (upholding a workers' compensation statute that operated to prevent a third-party tortfeasor from suing the employer for contribution, because "the denial of [the third-party's] claim was conformable to the law, for under the well established law of Wisconsin no right of contribution against the employer exists").

95. *Smothers*, 23 P.3d at 357.

96. *Id.*

failing to maintain a safe workplace—existed at the time of the adoption of the open courts provision.[97] Therefore, the workers' compensation system's abolition of this right ran afoul of the open courts provision.

At least one court recognizing this principle has ruled that it does not necessarily operate to *establish* a cause of action to protect rights that may have existed at common law at the time the state enacted its open courts provision. The Supreme Court of Connecticut, in *Binette v. Sabo*,[98] declined to recognize a private right of action against state officers for constitutional torts under its open courts clause (although it did establish the right of action under other provisions in its constitution).[99] The court reasoned:

> [T]he doctrine that, [under the open courts provision], the legislature may not diminish pre-1818 common-law or statutory rights without enacting reasonable alternatives[] does not necessarily imply, as the plaintiffs and amicus assume, that [the open courts provision], embodies a private cause of action for pre-1818 "fundamental" common-law rights.[100]

2. Partial Abolition of Right

In contrast to the principle applied when the law wholly abolishes a cause of action that existed at the time of the adoption of the open courts provision, courts seem to apply some form of means-ends test when legislation merely limits recovery or changes the nature of the claim.[101] For example, the Supreme Court of New Hampshire upheld a damage cap that limited a tort plaintiff's recovery against a governmental unit to $50,000.[102] The court applied a very deferential rational basis test,[103] not even bothering to speculate as to the legislative purpose.

The same court overturned a wrongful death damage cap that limited the amount of damages where the death was caused by the injury of which the plaintiff complained, but did not limit damages where the death was caused by unrelated factors.[104] The court

97. *Id.* at 358–59.
98. 710 A.2d 688 (1998).
99. *Id.* at 692–93.
100. *Id.* at 692 (citations omitted).
101. *See infra* notes 102–09.
102. Estate of Cargill v. City of Rochester, 406 A.2d 704, 709 (N.H. 1979).
103. *Id.* at 707.
104. Trovato v. DeVeau, 736 A.2d 1212, 1217 (N.H. 1999).

applied "middle tier" review to determine whether the damage cap had a "fair and substantial" relation to the purpose of the cap.[105] The court was "unable to discern the legislature's intent in imposing a cap" and therefore ruled the cap unconstitutional.[106]

Finally, the Supreme Court of Idaho upheld a law that established procedures for claims that public schools and the state failed to meet their obligations under the "Education Article" of the Idaho Constitution.[107] The law limited claims to specified persons and required plaintiffs to exhaust certain other claims before suing the state.[108] The court applied a very deferential standard of review, focusing on the reasonableness of the scheme and on the alternative means to a remedy that the scheme preserved.[109]

B. Access to Justice

Cases involving the access to justice component of open courts provisions seem to rely on some form of means-ends analysis. In those cases involving fee barriers to access, courts seem quite deferential to the legislature, and they seem to privilege legislative interests in recouping court costs and judicial efficiency. Similarly, in those cases involving judicial restraints on access, courts seem to privilege interests in judicial efficiency.

In contrast, cases examining attorney's fee provisions as an impediment to access fall along a continuum. In those cases involving post-litigation claims for attorney's fees, courts often reject the open courts claim. This is hardly surprising, given that post-litigation the parties clearly enjoyed at least some minimal access (i.e., they were at least present in the courtroom). In those cases involving pre-litigation attorney's fees, courts seem much more likely to find an open courts violation. In these cases, the courts seem to privilege access over any interests of the legislature or adverse parties. In those cases involving asymmetrical attorney's fees—where one party, but not the other, is entitled to attorney's fees—courts seem especially concerned with *equal* access.

As argued below, it is this third category of attorney's fee cases that may provide the best fodder for Civil Gideon, although all the access cases provide at least some support.

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105. *Id.* at 1214.
106. *Id.* at 1217.
107. Osmunson v. State, 17 P.3d 236 (Idaho 2000).
108. *Id.* at 238.
109. *Id.* at 239–40.

1. Fee Barriers

In cases involving fee barriers to access, courts have applied some form of rational basis review (or moderately heightened rational basis review), upheld fees and restrictions that are reasonably tailored to serve the efficient administration of the judiciary, and overturned those that are not so tailored. Courts have thus upheld fees and restrictions that are tailored to off-set court costs or otherwise promote the efficiency of the judiciary;[110] on the other hand, courts have overturned restrictions or fees that sweep more broadly than necessary to promote the interest in judicial economy.[111]

The Illinois courts have perhaps most thoughtfully explored these principles in a line of cases dealing with court fees under that state's open courts provision. In *Ali v. Danaher*,[112] for instance, the Illinois Supreme Court upheld a $1 litigation fee for the maintenance and operation of the county law library, even though the challengers did not use the library.[113] The court ruled that the library facilities were "available to him and his attorney and anticipating their use is not unreasonable."[114] Moreover, "it is clear that the presence of such facilities is conducive to a *proper and even improved administration of justice*, which benefits every litigant."[115] In contrast, in *Crocker v. Finley*,[116] the same court struck down a $5 tax imposed on litigants in a marriage dissolution case to be used to fund a domestic violence shelter program.[117] The court ruled that the purpose of the tax (to fund the shelter) was too remotely related either to the marriage dissolution or to an efficient judiciary.[118]

The Illinois lower courts applied these principles in a line of cases that further illustrated and explained them. The court in *Lee v. Pucinski*[119] upheld photocopying fees, where the fees served only to off-set court costs, not for purposes unrelated to the efficient operation of the judiciary: the reproduction fees "satisfy the requirements of free access to justice because they are imposed only for purposes relating to the service provided, not for the purpose of

110. *See infra* notes 112–30.
111. *See id.*
112. 265 N.E.2d 103 (Ill. 1970).
113. *Id.* at 107.
114. *Id.* at 106.
115. *Id.* (emphasis added).
116. 459 N.E.2d 1346 (Ill. 1984).
117. *Id.* at 1351.
118. *Id.*
119. 642 N.E.2d 769 (Ill. App. Ct. 1994).

raising general revenue."[120] The court in *Zamarron v. Pucinski*[121] upheld civil filing fees and a filing surcharge for automation of the criminal and quasi-criminal courts,[122] because they promoted the "overall administration of justice."[123] The court in *Mellon v. Coffelt*[124] upheld a surcharge on all litigants to fund court-annexed mandatory arbitration in the overall interest of an efficient judiciary, even though the challengers did not use the court-annexed arbitration system.[125] The court ruled that "the existence and proper functioning of the [arbitration] System may benefit the overall administration of justice."[126]

Other courts have relied upon the interest to recoup court costs or to promote judicial efficiency[127] to uphold a fee for the clerk's record charged to appellant in a criminal case,[128] a filing fee in an inmate's civil action,[129] and a jury fee in a civil action, even where the plaintiff had an independent state constitutional right to a jury trial, and where the fee was non-refundable if the plaintiff elected to forego that right.[130]

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120. *Id.* at 773.

121. 668 N.E.2d 186 (Ill. App. Ct. 1996).

122. *Id.* at 192.

123. *Id.* at 191.

124. 730 N.E.2d 102 (Ill. App. Ct. 2000).

125. *Id.* at 108.

126. *Id.* at 111.

127. The Wisconsin Supreme Court relied upon this distinction in upholding a probate court fee (which the court called a "tax") against an equal protection challenge. Treiber v. Knoll, 398 N.W.2d 756, 761 (Wis. 1987) ("[The probate fee] seeks to make the probate system substantially self-sustaining and paid for by those who use it rather than by total funding from general tax revenues drawn from the public at large."). The court relied instead on the history of its open courts provision in upholding the fee under an open courts challenge. *Id.* The court thus ruled that the fee here was not "a species of official exactions made as the price of delaying or expediting justice" that the open courts provision was designed to prohibit. *Id.* As described above, the Wisconsin Supreme Court's reasoning in this case—using the historical purpose of its open courts provision, not the overarching concern for off-setting court costs and efficiency within the judiciary—appears to be somewhat anomalous in the context of fee barrier cases.

128. State v. Harrold, 750 P.2d 959, 965–66 (Idaho Ct. App. 1988) ("The constitutional prohibition against 'sale' of justice is not implicated by the collection of a reasonable fee from a person who is able to pay."). Key to the court's decision here was that the appellant never claimed she was indigent or unable to pay the fee. Such a claim would have authorized the lower court to waive the fee under state law. *Id.* at 965.

129. Longval v. Superior Court Dep't of Trial Court, 752 N.E.2d 674 (Mass. 2001).

130. Barzellone v. Presley, 126 P.3d 588, 592 (Okla. 2005) ("By 1932, it was recognized that the right to reasonable court fees was so generally accepted that its discussion seemed unnecessary. Rather, the imposition of such fees was determined not to be a denial or sale of justice within the meaning of [the open courts provision] provided

2. Judicial Restrictions on Access to the Courts

Courts have privileged this same interest in judicial efficiency when considering judicial restrictions on access to the courts. Thus, for example, the Colorado Supreme Court enjoined a litigant from proceeding pro se as a plaintiff in the state courts, where the litigant had initiated numerous meritless civil lawsuits in the state without the assistance of counsel.[131] The court indicated that the litigant's numerous suits unnecessarily burdened the taxpayers who pay for the costs of court administration.[132] In addition, other judges had to be transferred into the county to hear the litigant's suits against the district judge.[133] The court noted that this was "not only a waste of money and judicial time, but [that it] also interfere[d] with the dockets in the jurisdiction from which the transferred judges must come."[134] The litigant's proliferation of meritless suits not only inhibited judicial efficiency, but also interfered with the rights of other litigants by crowding the courts with suits stemming from the complaints of one person.[135] "In a proper case, then, the right of free access to our courts must yield to the rights of others and the efficient administration of justice."[136]

But the court also ruled that it lacked jurisdiction to impose similar restrictions on litigation in the federal courts, because the petitioner's abusive suits had been limited only to the state courts.[137] This holding illustrates that the means-ends test in these cases is important: the interest in judicial efficiency may yield to the litigant's interest in access when the restriction attempts to proscribe behavior that has not interfered with an efficient judiciary.

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they were uniform, reasonable and related to the services provided. The language of the constitutional provision was deemed to mean simply that justice could not be bought, nor that litigation expenses, in the nature of costs and disbursement, be so exorbitant and onerous as to virtually close the courthouse door.") (citations omitted). *But see* Zeier v. Zimmer, Inc., 152 P.3d 861, 873 (Okla. 2006) (overturning a statutory requirement that would-be medical malpractice claimants file an "affidavit of merit" prior to initiating suit, because the requirement "closes the court house doors to those financially incapable of obtaining" the affidavit and was not because of the court's interest in judicial efficiency).

131. People v. Spencer, 524 P.2d 1084, 1086–87 (Colo. 1974).
132. *Id.* at 1086.
133. *Id.*
134. *Id.*
135. *Id.*
136. *Id.*
137. *Id.*

The Nebraska Supreme Court more recently upheld litigation restrictions imposed by a lower court on an abusive litigant using the same reasoning.[138] Considering the interest in judicial efficiency against the claimant's open courts challenge, the court wrote:

> Our state courts and appellate system do not possess unlimited resources, and therefore, [the claimant's] petitions and appeals consume valuable time and money. Clearly, [the claimant's] actions restrict access to other persons who may have nonfrivolous cases and who do not seek to flood the courts with nonmeritorious actions. Thus, the district court was justified in limiting the number of pleadings which [the claimant] could file.[139]

Even when courts overturn judicially-imposed litigation restrictions, the efficient operation of the court system counterbalances the claimant's rights under the open courts provision.[140] But in these cases, the restrictions were not sufficiently tailored to serve that interest. Thus, the court in *Mathena v. Haines*[141] overturned a lower court order that enjoined an inmate from filing any motions, letters, or communications to the lower court, unless the documents were signed by an attorney, because the order was not "designed to preserve [the inmate's] right to adequate, effective, and meaningful access, while protecting the court from abuse."[142] The court held that litigation restrictions would survive an open courts challenge, if they were based on a judicial finding of the inmate's "clear intent[] to obstruct the administration of justice," and if they were "designed to preserve his right to adequate, effective, and meaningful access to [the] courts."[143]

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138. State *ex rel.* Tyler v. Douglas County Dist. Court, 580 N.W.2d 95, 98–99 (Neb. 1998).

139. *Id.* at 99.

140. *Id.*

141. 633 S.E.2d 771 (W. Va. 2006).

142. *Id.* at 776 (citing Bounds v. Smith, 430 U.S. 817, 822 (1977)).

143. *Id.* at 778; *see also* Vest v. Vest, No. 2040332, 2006 WL 3457614, at *1, *3–4 (Ala. Civ. App. Dec. 1, 2006) (overturning a lower court's order limiting a litigant's ability to seek post-judgment relief to a period of 45 days following the entry to judgment, because it was not tailored to achieve the court's objective "to resolve all such disputes expeditiously" while preserving the litigant's meaningful access to the courts); Sieverding v. Colo. Bar Ass'n, 469 F.3d 1340, 1345 (10th Cir. 2006) (upholding filing restrictions on a litigant within the federal circuit where the litigant filed frivolous lawsuits, but overturning filing restrictions in other federal circuits, based on the interest in "restrict[ing] further abusive filings" by the litigant).

3. Attorney's Fees as a Restriction on Access

There are three categories of cases which deal with open courts challenges to attorney's fees. Those cases considering challenges to post-litigation claims for attorney's fees seem to defer to legislative judgments about which litigants ought to be entitled to attorney's fees in what kinds of claims.[144] Those cases considering challenges to pre-litigation claims for attorney's fees move toward recognition that attorney's fees—even if opposing party's attorney's fees—represent a real and meaningful barrier to litigation for those who cannot pay.[145] Finally, those cases considering challenges to asymmetrical fee-shifting statutes (which authorize attorney's fees for one party in an action, but not to the other under similar circumstances) privilege an interest in equal access.[146]

a. Post-litigation claims for attorney's fees

Courts have granted great deference to legislation conferring, limiting, or otherwise defining the scope of attorney's fee awards against challenges under state open courts provisions, when the challenge succeeds the underlying litigation.[147] Courts have upheld statutes granting attorney's fees, imposing caps on attorney's fees, and otherwise limiting claims for attorney's fees, usually under some form of rational basis review, post-judgment.[148] This makes some sense: where a litigant has *actually* gained access to the courts, that litigant is hard-pressed to argue that he or she was denied access to the courts because of a post-hoc attorney fee award (one way or the other). In these cases, statutes providing for attorney's fees or appointment of counsel need only allow a litigant reasonable access to the courts (and not foreclose access altogether) in order to comport with open courts provisions.[149] In other words, courts will uphold a fee-shifting statute or a legislative restriction on attorney's fees as long as it allows some opportunity or alternative for the litigants to gain some access—even if not the litigant's preferred access—to the courts.[150] This standard is never hard to meet *after* the underlying

144. *See infra* Part III.B.3.a.
145. *See infra* Part III.B.3.b.
146. *See infra* Part III.B.3.c.
147. *See infra* notes 152–84 and accompanying text.
148. *Id.*
149. *Id.*
150. *Id.*

litigation, because then it is a truism that all parties had at least some access to the court.[151]

For example, the Supreme Court of Florida in a pair of typical fee-shifting cases, *Florida Patient's Compensation Fund v. Rowe*[152] and *State Farm Mutual Automobile Ins. Co. v. Nichols,*[153] upheld fee-shifting statutes against attack under the state's open courts provision after the underlying litigation came to an end.[154] In *Florida Patient's*, the court equated attorney's fees with other costs of litigation commonly assessed against the losing party and thus upheld a statute granting attorney's fees to the prevailing party in a medical malpractice claim.[155] Similarly, the court in *State Farm* upheld an "offer of judgment" statute that granted attorney's fees to an insurer, where the insurer filed an offer or judgment that was not accepted by the plaintiff within thirty days in a suit for benefits under a personal insurance agreement.[156] In both cases, of course, the challenger had literal access to the courts, as evidenced by the actual litigation: in *Florida Patient's*, the challenger went to court and lost the case;[157] and in *State Farm*, the challenger went to court and won.[158] In the former, the challenger simply had to pay the prevailing party's attorney's fees;[159] in the latter, the challenger received attorney's fees less than the parties agreed upon.[160] The Florida court thus gave these challenges scant analysis, deferring to the legislation in both cases,[161] and was quite clear in its position on attorney's fees and open courts: "fee-shifting statutes generally do not deny access to the courts."[162]

Courts have similarly upheld statutory caps on attorney's fees against open courts challenges after the underlying litigation ceased. For example, the court in *Lundy v. Four Seasons Ocean Grand Palm*

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151. *Id.*
152. 472 So. 2d 1145 (Fla. 1985).
153. 932 So. 2d 1067 (Fla. 2006).
154. *Florida Patient's*, 472 So. 2d at 1149; *State Farm*, 932 So. 2d at 1077.
155. *Florida Patient's*, 472 So. 2d at 1149; *see also* Capellen v. Capellen, 888 S.W.2d 539, 546 (Tex. App. 1994) ("[T]he award of reasonable attorney's fees is no more a limitation on a party's right to seek redress . . . than is the high cost of litigation and the danger of being assessed costs, attorney's fees and damages, including punitive damages, an unconstitutional limitation on a party's right to seek relief or to defend in a suit involving a common law cause of action.").
156. 932 So. 2d at 1076.
157. *Florida Patient's*, 472 So. 2d at 1145.
158. 932 So. 2d at 1067.
159. *Florida Patient's*, 472 So. 2d at 1145.
160. *State Farm*, 932 So. 2d at 1067.
161. *Florida Patient's*, 472 So. 2d at 1148; *State Farm*, 932 So. 2d at 1075–76.
162. *State Farm*, 932 So. 2d at 1077.

Beach[163] upheld and enforced a statutory cap on attorney's fees that a successful workers' compensation claimant could receive from his employer, because the cap bore "a reasonable relationship to the state's interest in regulating fees so as to preserve the benefits awarded to the claimant."[164] The court ruled that the claimant failed to show that the cap "abolished or unduly burdened [his] right to obtain benefits"[165] and that the cap therefore did not deny his access to the courts.[166] The court thus applied something like rational basis review, merely requiring that the cap bear a "reasonable relationship to the state's interest" and demanding that the claimant show that the cap wholly abolished or "unduly burdened" his access.[167] Indeed, these were high standards, for a claimant who had already won his case and underscored the claimant's burden to show something more than a partial denial of access to the courts in order to succeed on an open courts challenge to an attorney's fees statute.[168]

Other courts have upheld restrictions on attorney's fees (and even on representation) using a similarly deferential approach after the underlying litigation ended. Thus, the court in *Quackenbush v. Superior Court*[169] upheld a voter proposition that limited non-economic damages resulting from certain automobile accidents.[170] Plaintiffs claimed that the proposition impaired their access to the courts, because attorney's contingency fees normally came from non-economic damages, not compensatory damages.[171] The court rejected that argument, ruling that affected plaintiffs will be able to obtain counsel and thus achieve access by arrangements other than contingent fee agreements based on non-economic damages.[172]

In a similar vein, the Supreme Court of Colorado in *Hartley v. Hartley*[173] upheld a statute allowing a court to appoint counsel to a dependent child in a custody dispute, but rejected the child's claim that Colorado's open courts provision entitled him to counsel of his choice after the court awarded custody to his father.[174] The court

163. 932 So. 2d 506 (Fla. Dist. Ct. App. 2006).
164. *Id.* at 510.
165. *Id.*
166. *Id.*
167. *Id.*
168. *Id.* at 509–10.
169. 70 Cal. Rptr. 2d 271 (Ct. App. 1997).
170. *Id.* at 273.
171. *Id.* at 279.
172. *Id.*
173. 886 P.2d 665 (Colo. 1994).
174. *Id.* at 675.

ruled that the open courts provision did not create a substantive right; instead, it "guarantee[d] access to the courts when an individual ha[d] a viable claim for relief."[175] Because the child claimed a substantive right—the right to counsel of his choice—the open courts provision gave him no help.[176]

Thus any access, even if not the claimant's preferred access, satisfies the open courts provision.[177] And when considered after the underlying litigation, it is hardly surprising that courts find that claimants actually had *some* access (of course they did)—and uphold a fees statute against open courts challenges.

One case deserves special mention because of the strong underlying interest at stake. *Doe v. State*[178] involved a class-action challenge to Connecticut's restrictions on payments for abortions for patients receiving state medical assistance.[179] Although the class of indigent women prevailed on the merits, the Supreme Court of Connecticut denied their claim for attorney's fees under the state's open courts provision.[180] The court ruled that it was the plaintiffs' indigency, not their successful constitutional challenge against the state funding restriction, that gave rise to their claim for attorney's fees.[181] But the court had "never recognized a rule that indigency alone require[d] the state to waive the fees and costs, and bear the entire financial burden of litigation itself."[182] Moreover, "it [was] clear that, in this instance, [the Connecticut courts] were 'open,' and that the plaintiffs had 'access' to them."[183] Of course the class did: they retained counsel, put on their case, and won.

Thus, even when the underlying claim rises to constitutional dimensions, courts seem to honor the trend that costly, inconvenient, or disagreeable access is nevertheless constitutionally sufficient access under open courts provisions. Only those fee statutes that

175. *Id.*
176. *Id.* at 675–76.
177. *Id.*
178. 579 A.2d 37 (Conn. 1990).
179. *Id.* at 38–39.
180. *Id.* at 45.
181. *Id.* ("Rather, it is the plaintiffs' indigency which becomes the keystone of their argument. . . . Their current claim is that, as prevailing *indigents*, they are entitled to attorneys' fees, not that the constitutional violation from which they suffered a cognizable injury has not been redressed.").
182. *Id.* at 44.
183. *Id.*; *see also* Kiddie v. Kiddie, 563 P.2d 139, 142 (Okla. 1977) (ruling that a husband had no right to appointed counsel in a divorce proceeding and that his lack of funds to employ counsel "technically [did] not deny [him] access to the courts").

result in some greater denial of access—an *absolute* denial of access—will violate open courts provisions.[184]

b. Pre-litigation attorney's fees

When attorney's fees serve to bar access absolutely, courts have found a violation of the open courts provision with little analysis. For example, the courts in *Community Hospital of the Palm Beaches, Inc. v. Guerrero*[185] and *In re Flores*[186] both found a violation of the open courts provisions when litigants were ordered to pay the opposing party's attorney's fees up front, prior to the litigation. In *Community Hospital*, the court overturned a provision that required healthcare professionals, when contesting discipline or lost privileges, to post security in the amount of opposing parties' potential attorney's fees prior to initiating suit.[187] In *Flores*, the court ruled that any court order to strike a trial, on the basis that the opposing party failed to pay interim attorney's fees, was unconstitutional.[188] In each case, attorney's fees provisions cut off access before the underlying trial began. In both instances, the courts did not hesitate to find an open courts violation.

c. Asymmetrical attorney's fees

In certain civil actions, courts have been more concerned with equality of access to the judiciary when considering fee-shifting statutes that permit attorney's fees for one party but not the other. This type of fee-shifting statute is often designed to equalize access between parties in cases where one party is at some sort of an inherent disadvantage, or to encourage litigants to bring certain socially desirable claims that they might not otherwise bring for fear of incurring insurmountable litigation costs. Courts in these cases often subject these statutes to a higher level of scrutiny because they treat parties differently for attorney's fee purposes and consider the statutes' role in equalizing access between otherwise unequal litigants, thus taking seriously the imperative of equal access to justice. The courts consider the relative abilities of the parties to secure access in the underlying litigation, the purpose of the fee-shifting provision in equalizing access between the parties, and the

184. *See infra* notes 185–88 and accompanying text.
185. 579 So. 2d 304 (Fla. Dist. Ct. App. 1991).
186. 135 S.W.3d 863 (Tex. App. 2004).
187. 579 So. 2d at 305 (Anstead, J., dissenting) (citing Guerrero v. Humana, Inc., 548 So. 2d 1187 (Fla. Dist. Ct. App. 1989)).
188. *Flores*, 135 S.W.3d at 865.

nature of the underlying case. These factors often trump any concerns about disparate treatment between the parties on the face of an asymmetrical fee-shifting statute.

An Oklahoma Supreme Court case, *Thayer v. Phillips Petroleum Co.*,[189] provides an excellent example of these principles. In *Thayer*, the court upheld a fee-shifting statute that authorized attorney's fees for a prevailing plaintiff, but not for the defendant when he removed a case from small claims court to district court.[190] The court reaffirmed that "equal access to the courts, and modes of procedure therein, constitute basic and fundamental rights,"[191] and that "[w]here fundamental rights and liberties are involved, classifications which might restrain them must be strictly scrutinized."[192]

Notwithstanding its strict scrutiny analysis, the court nevertheless upheld the asymmetrical fee-shifting provision based on broader considerations of equal access to justice.[193] The court's reasoning is worth quoting at length:

> The obvious intent of the statute imposing attorney fees on the defendant if the plaintiff prevails is to preserve the viability and accessibility of the small claims court. The exegesis behind the small claims court is to open the courts to the citizenry. . . . The small claims court provides redress for the ordinary person.
>
> . . . .
>
> The plaintiff who attempts to recover a nominal sum in district court is likely to be intimidated by the judicial process, and the employment of counsel becomes a necessity rather than an option. The litigants are treated equally so long as the case remains within the ambit of the small claims court. It is only when the defendant elects to transfer the case that attorney fees are impressed on the defendant, should he lose.
>
> . . . The statute is obviously imposed as an incentive to prompt settlement of small but well-founded claims, to foster the legislative policy of summary, informal

189. 613 P.2d 1041 (Okla. 1980).
190. *Id.* at 1045.
191. *Id.* at 1044.
192. *Id.* at 1045.
193. *Id.*

> disposition of small claims, and as a deterrent to groundless defenses.[194]

Thus the court's two broader concerns—equalizing access between otherwise unequal litigants (by providing the one, but not the other, with counsel), and affecting the purposes of the small claims court (to "open the courts to the citizenry")—justified the asymmetrical fee-shifting provision, despite its facially disparate treatment of the litigants.[195]

Similarly, in *Alford v. Garzone*[196] the court upheld a fee-shifting statute that authorized attorney's fees to prevailing plaintiffs securing protective orders under Oklahoma's Protection from Domestic Abuse Act, but not to defendants who were successful in avoiding protective orders.[197] The court ruled that ready access to courts is a fundamental right irrespective of the underlying claim, thus triggering strict scrutiny.[198] But when the court applied strict scrutiny to the fee-shifting provision, it nevertheless upheld it in the broader interest of equalizing access between parties in very different situations and encouraging victims of domestic violence to bring claims.[199] The court reasoned: "[the fee-shifting statute] is rationally based and concerns a compelling state interest. It encourages victims to pursue their legal remedies in court without the threat of attorney fees being awarded should an order not be entered."[200]

Other courts have upheld asymmetrical fee-shifting statutes using similar reasoning. The court in *Westfield Centre Serv., Inc. v. Cities*

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194. *Id.* at 1043 (footnote omitted).

195. The Oklahoma Supreme Court followed the spirit of this ruling in *Professional Credit Collections, Inc. v. Smith*, 933 P.2d 307 (Okla. 1997). In that case, the court overturned a lower court's denial of attorney's fees to a dismissed defendant in a collection action by a creditor. *Id.* at 309. The lower court denied fees based on a statute that authorized fees only for "prevailing" parties. *Id.* at 309, 310 n.1. The court ruled that the defendant was a prevailing party for the purpose of the fee-shifting statute, and that the open courts provision demanded that the dismissed defendant qualify for attorney's fees where the plaintiff creditor, if successful, would have qualified for attorney's fees under the fee-shifting statute. *Id.* at 311.

196. 964 P.2d 944 (Okla. Civ. App. 1998).

197. *Id.* at 948.

198. *Id.* at 947 (citing Thayer v. Phillips Petroleum Company, 613 P.2d 1041, 1045 (Okla. 1980)). In *Thayer*, the court found "that equal access to the courts . . . constitute[s] basic and fundamental rights" and that "[w]here fundamental rights and liberties are involved, classifications which might restrain them must be strictly scrutinized." 613 P.2d at 1044–45.

199. *Alford*, 964 P.2d at 948.

200. *Id.*

Serv. Oil Co.[201] upheld, under rational basis review, a provision that authorized attorney's fees for a franchisee, but not a franchisor, in a franchise dispute.[202] The court ruled that the statute was a legitimate attempt to equalize access between parties with unequal resources, stating, "The Legislature may well have determined that the comparable economic positions of the parties were such that free access to the courts for the franchisee could only be guaranteed if counsel fees could be awarded to successful plaintiffs."[203]

The Vermont Supreme Court in *Fleury v. Kessel/Duff Construction Co.*[204] upheld a statute authorizing attorney's fees to a prevailing employee, but not a prevailing employer, in a workers' compensation case.[205] The court's analysis was admittedly sparse, but it was clearly based on its concern for ensuring equal access as between litigants with unequal resources. It stated, "Indeed, we have come to recognize as a society that a denial of the right to recover attorney's fees, or alternatively, publicly subsidized counsel, will prevent many individuals including workers' compensation claimants from having access to justice."[206]

And finally, the court in *Bayfront Medical Center, Inc. v. Ly*[207] upheld, under rational basis review, a statute that required unsuccessful, non-indigent plaintiffs—but not unsuccessful, indigent plaintiffs—to pay the attorney's fees of the prevailing defendant.[208] The court reasoned that "[t]he legislature has the power to exempt indigent litigants from the ambit of the statute. Such an exemption does not affect a solvent litigant's right of access to the court, but rather, *protects an indigent party's right of access to the courts*."[209]

Thus in considering asymmetrical fee-shifting statutes, courts seem to privilege the broader interest of equal access as between litigants who are otherwise unequal (because of resources, or because of their relative role in the claim) over the facial disparate treatment under the statute, whatever level of scrutiny the courts apply. In other words, courts' overriding consideration in these cases is equal access to justice for *all* parties, not just the party claiming that an asymmetrical fee-shifting statute impedes its access to the courts. And courts

201. 392 A.2d 243 (N.J. Super. Ct. Div. 1978).
202. *Id.* at 247.
203. *Id.* at 248.
204. 543 A.2d 703 (Vt. 1988).
205. *Id.* at 703, 705.
206. *Id.*
207. 465 So. 2d 1383 (Fla. Dist. Ct. App. 1985).
208. *Id.* at 1384.
209. *Id.* at 1384 (emphasis added).

therefore interpret the open courts provision to ensure that asymmetrical fee-shifting statutes provide equal access to all, notwithstanding the fact that these statutes by their nature yield a facially disparate result.

IV. OPEN COURTS AND CIVIL GIDEON

Based on this analysis of selected open courts cases, the open courts case for Civil Gideon may be best made by combining an historical argument (drawing on those cases analyzing a complete abolition of a right of action, discussed *supra*)[210] with an equal access argument (drawing on the attorney's fees cases, discussed *supra*).[211] An argument based on judicial efficiency (based on the fee-access and judicial restraint cases, discussed *supra*)[212] may offer some additional support, but the low-tier means-ends test (in those cases considering a partial restraint on a cause of action, and in some other cases) offers nothing positive toward Civil Gideon.

This section provides some thoughts on each of these arguments, save the last, in their likely order of usefulness in establishing Civil Gideon. Because the historical argument, the equal access argument, and the judicial efficiency argument are rooted in very different approaches to open courts provisions, their combination offers perhaps the most comprehensive approach under open courts to achieve Civil Gideon.

A. The Historical Argument

As described more fully above, the historical analysis looks to rights of action that existed at the time of the adoption of the open courts provision to determine whether a statutory restraint violates the open courts provision. If the rights existed at the time of adoption, a complete denial, without a meaningful alternative, is likely to be overturned.[213]

Civil Gideon existed in the statutory and common law as early as 1494, well before any state enacted an open courts provision.[214] The

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210. *See supra* Part III.A.

211. *See supra* Part III.B.1.

212. *See supra* Part III.B.2.

213. Attorneys for appellant Deborah Frase (including Stephen H. Sachs and Debra Gardner, both of whom participated in this Symposium) presented substantially this same argument to the Court of Appeals of Maryland in *Frase v. Barnhart*, 379 Md. 100, 840 A.2d 114 (2003). *See* Brief of Appellant at 32–36, *Frase*, 379 Md. 100, 840 A.2d 114 (No. 6).

214. *Id.* at 32–36; *see infra* notes 216–17 and accompanying text.

English Parliament, in order to "carry the poor man through the ins and outs of an action at common law,"[215] enacted 11 Hen. VII, ch. 12, which read in part:

> [T]he Justices [] shall assigne to the same pou psone or psones Councell lerned by their discrecions which shall geve their Councelles nothing taking for the same, and in like wise the same Justices shall appoynte attorney and attorneies for the same pou psone and psones and all other officers requisite and necessarie to be hadde for the spede of the seid sutes to be hadde and made which shall doo their duties without any rewardes for their Councelles help and besynes in the same . . . .[216]

The English courts extended this right to counsel to civil defendants as a matter of common law in 1668 in *Wait v. Farthing*.[217] Thus, the right to court-appointed counsel for indigent civil plaintiffs and defendants had deep historical roots by the time the first states adopted open courts provisions. According to an historical analysis, state open courts provisions adopted when English statutory and common law recognized a right to appointed counsel also sought to protect this right.[218]

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215. John MacArthur Maguire, *Poverty and Civil Litigation*, 36 HARV. L. REV. 361, 373 (1923).

216. 11 HEN. 7, ch. 12 (1495), *reprinted in* 2 STATUTES OF THE REALM 578 (1816), *microformed on* Microcard No. 55E53 (Matthew Bender & Co.). *See also* Maguire, *supra* note 215, at 373–74 (quoting the Henry VII statute and commenting that "[i]f the rules of law be complicated, [the poor] are to have the aid of lawyers gratuitously"). This statute remained on the books until 1883. A rule sometime prior to 1744, however, probably somewhat circumscribed the practical application of this right to counsel. This rule required that a person seeking *in forma pauperis* status (and thus appointed counsel) should "have a Counsel's Hand to his Petition." *Id.* at 377 (quoting LILLY'S REG., ed. 1745, 851, tit. Forma Pauperis). Maguire notes that the "rule itself is one of the best imaginable illustrations to a vicious circle. An applicant comes to court for gratuitous legal service because he cannot beg or pay for a lawyer's services; he finds that he must beg or pay for a lawyer's certificate before the court will hear him; and so his suit ends without ever beginning." *Id.* When the statute was revoked in 1883, new court rules "liberalized the practice in important respects," but left the requirement "of an opinion from counsel and affidavit from a solicitor" to "get these vital documents." *Id.* at 380.

217. 84 Eng. Rep. 237 (K.B. 1668).

218. This argument may receive additional support under those state constitutions that contain an incorporation clause explicitly providing the benefits of English statutes on a particular date to the citizens of the state. *See, e.g.*, Brief of Appellant, *supra* note 213, at 32–33. Maryland's incorporation clause reads as follows:

> That the Inhabitants of Maryland are entitled to the Common Law of England, and the trial by Jury, according to the course of

It is not clear that courts would apply an historical analysis to a claim for Civil Gideon, however. Courts seem to have applied an historical analysis in those cases involving a statutory deprivation of a cause of action, not an assertion of particular affirmative procedural or substantive rights.[219] But there appears to be no good reason not to apply an historical analysis to a claim for Civil Gideon. At least, the historical evidence would buttress arguments based on equal access and judicial efficiency.

B. The Equal Access Argument

This argument is based upon the privileged interest in *equal* access to the courts under the attorney's fees cases. These cases are particularly relevant to Civil Gideon, because attorney's fees and fee-shifting statutes are closely related to the right to counsel.

Attorney's fees and fee-shifting statutes provide free or reduced-cost legal representation to the party to whom the court grants attorney's fees, usually the winning party.[220] From the winning party's financial perspective, this fee-shifting is the functional equivalent to receiving appointed counsel[221] (The only difference is that the opposing party, not the court, pays the costs of representation. But this makes no difference to the winning party).[222] Fee-shifting provisions thus yield the same result as a court appointing counsel; but the triggering characteristic for many fee-shifting provisions is not poverty or indigence, but rather victory in

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> that Law, and to the benefit of such of the English statutes as existed on the Fourth day of July, seventeen hundred and seventy-six; and which, by experience, have been found applicable to their local and other circumstances, and have been introduced, used and practiced by the Courts of Law or Equity . . . subject, nevertheless, to the revision of, and amendment or repeal by, the Legislature of this State.

MD. CONST. DECL. OF RTS. art. V.

219. *See supra* notes 88–89 and accompanying text.

220. *See supra* Part III.B.3.a. *See, e.g.*, 42 U.S.C. § 1988(b) (2006) ("[T]he court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee as part of the costs."); ARIZ. REV. STAT. § 49-262(D) (1956) ("The court . . . may award costs of litigation, including reasonable attorney . . . fees, to any substantially prevailing party . . . ."); MD. CODE ANN., CORR. SERVS. § 6-213(C) (LEXISNEXIS 1999) ("[T]he prevailing party shall be awarded all costs of such litigation including reasonable attorney's fees.").

221. *See supra* note 13 (noting that appointed counsel is at the public's expense and thus free to indigent persons).

222. *See supra* Part III.B.3.a. (citing cases that state the opposing party pays the cost of litigation); *see supra* note 220.

the underlying suit.[223] Some fee-shifting statutes are designed to encourage meritorious or socially desirable claims.[224] These statutes authorize the award of attorney's fees to a victorious plaintiff in order to encourage (or, rather, not to discourage) certain socially desirable litigation.[225] But these do not change the underlying similarity between fee-shifting statutes and court orders appointing counsel: the successful party in either situation receives free legal counsel. Fee-shifting statutes thus have much in common with courts appointing counsel, especially from the vantage point of the litigant who receives attorney's fees or court-appointed counsel.

Judicial deference to the legislature in the line of cases ruling on awards of attorney's fees after the underlying litigation, discussed more fully above, teach only that the courts respect the legislature's judgment as to which cases and which litigants deserve a given level of representation paid for by the opposing party. For Civil Gideon purposes, these cases suggest that the courts would *uphold* a statute awarding attorney's fees to a victorious indigent civil litigant, but they certainly do not suggest that open courts (or any other constitutional provision) would *compel* attorney's fees or appointment of counsel.

The line of cases involving attorney's fees imposed *prior* to litigation gets us a step closer to Civil Gideon. Courts in these cases seem to recognize that attorney's fees pose a real barrier to the courts for those who cannot afford them. To be sure, these cases involve requirements to pay the *other party's* attorney's fees up front. Nevertheless, courts in these cases have not hesitated to overturn the requirement under an open courts challenge. The principle behind these cases seems to be that attorney's fees—anyone's attorney's fees—create a meaningful barrier to access. So too with indigent civil litigants haled into court against their will or with indigent civil litigants pressing a claim in order to protect their rights: their full access to the judiciary—i.e., access with representation by counsel—is meaningfully impeded by their inability to pay their own attorney's fees.[226]

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223. *See supra* Part III.B.3.a.

224. Frances Kahn Zemans, *Fee Shifting and the Implementation of Public Policy*, 47 LAW & CONTEMP. PROBS. 187, 190 (1984) (discussing the policy behind fee-shifting statutes).

225. *Id.*

226. This is especially true in those cases involving basic human needs—not because the personal interest is high, but because indigent litigants may have a harder time finding counsel to represent them on a contingent-fee basis.

Combining these cases with the cases involving asymmetrical attorney's fees provisions, we come yet closer to Civil Gideon. As described more fully above, those cases add an interest in *equality* to the interest in access, sometimes even heightening the level of scrutiny. But under any level of scrutiny, courts in this line privilege the interest in equality as between the litigants, especially otherwise unequal litigants, so that each may obtain counsel. Thus, as described more fully above, courts have upheld asymmetrical fee-shifting provisions against open courts challenges based on the broader interest of promoting equality in litigation as between parties with unequal access to counsel. In other words, any access barriers in asymmetrical fee-shifting statutes will yield to broader interests in equality in litigation. The narrow holding in these cases is that legislative efforts to equalize parties' access by authorizing attorney's fees to one party, but not the other, withstand an open courts challenge. But the *principle* behind these holdings is that meaningful access to the courts requires counsel when the opposing party has access to counsel. This principle, even if not the strict, narrow holdings in these fee-shifting cases, puts us at the doorstep of Civil Gideon.

C. The Judicial Efficiency Argument

This argument builds on the interest behind those cases involving fee barriers and judicial restraints on access to the courts.[227] As described more fully above, courts in these cases seem to privilege the interests in recouping costs of litigation and in overall judicial efficiency.[228] The claim for Civil Gideon appeals strongly to the latter.

Unrepresented litigants can often impede judicial efficiency in their own cases and in the courts in general, because court personnel need to expend additional time and resources to ensure that they receive as fair an access as possible. The judges and clerks must take time to help unrepresented litigants through a process that is often entirely foreign to them: helping them to prepare court filings, to understand court rules and other rules of procedure, and even to present their case, all within the bounds of maintaining a neutral judiciary. Depending on the case and the litigant, this can result in significant time and effort on the part of court personnel, drawing judicial resources away from other cases and impeding speed and efficiency

227. *See supra* Part III.B.1–2.
228. *See supra* Part III.B.1.

in the unrepresented litigant's own case. Professor Engler writes that other players within the court system in an attempt to foster change

> have developed creative practices to help those without counsel achieve justice; these individuals are more in need of the backing of court administrators, additional resources, or even philosophical justifications to support their work. Moreover, the process is dynamic, not static, as conferences, trainings and reports have caused a detectable shift in attitudes. Behavior [assisting unrepresented litigants] that was impermissible a decade ago is becoming more acceptable today.
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> . . . Unrepresented litigants are perceived to be a problem because they take up court and attorney time.[229]

Moreover, litigation with an unrepresented party may result in additional errors that an attorney could easily have avoided. Correcting these errors—especially if the correction requires an appeal—draws on judicial resources that could be used in other cases.

Frase v. Barnhart,[230] the 2003 Maryland Civil Gideon case, provides an excellent example of misallocated judicial resources to correct gross errors at trial that an attorney almost certainly would have prevented. In that case, Ms. Frase involuntarily appeared *pro se* to defend against a private petition for custody of her children.[231] The list of her litigation mistakes at a hearing before a special master is (understandably) long; it includes some fundamental errors that any litigating attorney (or even upper-level law student) would have avoided.[232] The special master "addressed Ms. Frase reprovingly" and cut her off in her questioning,[233] behavior that skewed the fact-finding at the hearing and that an attorney certainly would have challenged. In addition, the special master had been retained by Ms. Frase's mother—an adverse witness in the case—ten years earlier in her own custody case against Ms. Frase, resulting in a likely violation of a rule of judicial ethics.[234] A competent attorney certainly would have discovered this earlier in the case and moved to remove the master from the case. Finally, in a blatantly procedurally flawed

229. Russell Engler, *Shaping a Context-Based Civil Gideon from the Dynamics of Social Change*, 15 TEMP. POL. & CIV. RTS. L. REV. 697, 705–06 (2006) (citations omitted).

230. 379 Md. 100, 840 A.2d 114 (2003).

231. Brief of Appellant, *supra* note 213, at 29.

232. *Id.* at 29–32.

233. *Id.* at 7.

234. *Id.* at 14–19; *see also Frase*, 379 Md. at 126, 840 A.2d at 129 (reversing the circuit court's ruling and holding the issue was moot, thereby not addressing it).

ruling,[235] the circuit court entered untenable conditions on its award of custody to Ms. Frase that were also substantively flawed on their face.[236]

In order to correct these problems—many of which a competent attorney would have avoided in the first place—Ms. Frase's case went all the way to Maryland's highest court, the Court of Appeals of Maryland.[237] The court, in a lengthy and divisive opinion reflecting the significant and unnecessary judicial resources expended in this case, reversed the lower court's ruling and remanded without addressing Ms. Frase's claimed right to counsel.[238] Unfortunately, Ms. Frase's case is not even the worst example of the many cases involving misuse of judicial resources to correct problems that an attorney would easily have avoided.[239]

Thus, the cases dealing with fees and judicial restraints on litigation, i.e., the cases that take seriously the interest in judicial efficiency, lend support to Civil Gideon, because court-appointed counsel for otherwise unrepresented individuals often enhances judicial efficiency (or, stated differently, avoids gross inefficiencies).

The larger challenge to any of these three arguments—and the challenge that litigants must be prepared to face—is that courts rarely use open courts provisions to recognize or grant affirmative rights, like the right to counsel. Rather, courts use open courts provisions overwhelmingly to protect a negative right—the right against interference by the state to the courts. As anyone who has represented low-income individuals knows, this is a false dichotomy; an indigent individual's poverty is every bit as much a barrier to the

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235. *Frase*, 379 Md. at 120, 840 A.2d at 125–26 ("[W]e note our disagreement with the procedure employed by the court, of purporting to decide the custody case, on exceptions from the master's report and recommendations, and yet setting conditions inconsistent with the custody awarded and subjecting Ms. Frase to periodic review hearings. The very thing that makes the order immediately appealable also erodes its validity.").

236. *Id.* at 125, 840 A.2d at 129 ("Having found Ms. Frase to be a fit parent in her existing circumstances and having found no exceptional circumstances that would make her custody of Brett detrimental to his best interest, the court had no more authority to direct where she and the child must live than it had to direct where the child must go to school or what religious training, if any, he should have, or what time he must go to bed.").

237. *Id.* at 100, 840 A.2d at 114.

238. *Id.* at 128–29, 840 A.2d at 131.

239. *Id.* at 134, 840 A.2d at 134 ("The facts in the present custody related case are not even as egregious as many we see. In many cases a poor, sometimes undereducated and unsophisticated, parent is faced with the full might of the State, an entity that itself seeks to deprive the parent of his or her children.") (Cathell, J., concurring).

courts as a statutory or judicial restriction on access. Now we need to persuade the courts of this truth.

V. CONCLUSION

The jurisprudential disarray among state courts in interpreting their open courts provisions makes any generalization about open courts difficult. But despite often inconsistent and incoherent rulings among the states, certain larger patterns seem to emerge from these cases and lend support to Civil Gideon.

This article attempted to draw on some of those patterns to begin to develop a more comprehensive open courts argument for Civil Gideon. I hope that Civil Gideon instigators can build upon and apply some of these patterns in the context of the open courts jurisprudence of their own state courts and thus move in the direction of Civil Gideon.