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## A Civil Right to Counsel: Closer to Reality

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# A CIVIL RIGHT TO COUNSEL: CLOSER TO REALITY?

*Clare Pastore\**

*This is a promising time for an expansion of the right to counsel in civil cases. The bench and the bar concur that there is a need for greater access to counsel; some states have even created pilot projects to provide legal assistance in certain civil proceedings to litigants who could not otherwise afford it. Recent state legislation and state-court rulings have also supported the right to counsel in certain civil proceedings. Despite some setbacks, there is growing momentum for expanding the right to counsel in civil cases, and it is imperative that advocates of this right strategically build on the important progress that has already been made. Advocates should seize the moment and press legislatively for greater access to counsel, especially during the current foreclosure crisis. Media exposure and the amicus participation of judges can highlight the inequity that unrepresented litigants face in court and bolster the need for counsel. Although advocates for a “civil Gideon” should be attentive to systemic constraints and competing interests that could threaten access to justice, now is the time to strive to make it unthinkable for indigent litigants to be denied counsel in civil cases where critical rights or basic needs are at stake.*

## INTRODUCTION

By any measure, now is a time of great ferment on the issue of whether publicly funded counsel should be more widely available to litigants in civil cases who cannot afford to hire attorneys. As discussed below, scholarship, conferences, bar association resolutions, test cases, empirical research, legislative proposals, and other initiatives supporting an expanded right to counsel have

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proliferated in recent years. In this Article, I propose to explain why I believe an expansion of the right to counsel in civil cases looks more promising now than at perhaps any time since just before the Supreme Court's dreadful *Lassiter v. Department of Social Service*<sup>1</sup> decision in 1981. I describe a few strategies that could usefully be employed now to press for an expanded right to counsel and sound two cautionary notes about the implementation of a broader right to counsel.

Given the title of this Symposium ("Access to Justice: It's Not for Everyone"), I must note the robust and important debate about whether "access to justice" should be defined merely as the right to a lawyer (or some other assistance) when a problem reaches a legal forum, or as something much broader that involves access to the political and judicial processes that shape our conceptions and enforcement of rights and duties, and that encompasses assistance before problems become framed as legal disputes and reach adversarial forums. Deborah Rhode's<sup>2</sup> and Gary Blasi's<sup>3</sup> articles in this Symposium, like others published elsewhere,<sup>4</sup> make compelling arguments for a much broader conception of justice than mere access to attorneys. By focusing here on developments in the quest for a right to counsel in civil legal disputes, I do not in any way mean to imply that providing lawyers is always either necessary or sufficient to achieve access to justice. The issue is similar to the perennial legal services debate over whether resources should be concentrated on impact work or individual client "service" work.<sup>5</sup> Just as we must

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

2. Deborah L. Rhode, *Whatever Happened to Access to Justice?*, 42 LOY. L.A. L. REV. 869 (2009). See also DEBORAH L. RHODE, ACCESS TO JUSTICE (2004) (advocating, *inter alia*, simplification of court procedures, increase in pro bono work, relaxation of unauthorized practice of law and multidisciplinary practice rules, and tort law reform).

3. Gary Blasi, *Framing Access to Justice: Beyond Perceived Justice for Individuals*, 42 LOY. L.A. L. REV. 913 (2009).

4. E.g., Faisal Bhabha, Book Review, 24 WINDSOR REV. LEGAL & SOC. ISSUES 85, 88 (2008) (reviewing ACCESS TO JUSTICE AS A HUMAN RIGHT (Francesco Francioni ed., 2007)) (noting lack of uniform definition of access to justice and discussing various conceptions); see also David Luban, *Taking Out the Adversary: The Assault on Progressive Public-Interest Lawyers*, 91 CAL. L. REV. 209, 212 n.9 (2003).

5. See, e.g., Marc Feldman, *Political Lessons: Legal Services for the Poor*, 83 GEO. L.J. 1529, 1576-77 (1995); Gary Bellow & Jeanne Charn, *Paths Not Yet Taken: Some Comments on Feldman's Critique of Legal Services Practice*, 83 GEO. L.J. 1633, 1645-46 (1995); see also Deborah J. Cantrell, *A Short History of Poverty Lawyers in the United States*, 5 LOY. J. PUB. INT. L. 11 (2003).

assist individual clients with their legal problems and simultaneously work for systemic reform, we must work for an expanded right to counsel in legal proceedings as they are traditionally defined while simultaneously pressing for a broader conception of justice.

### I. RECENT DEVELOPMENTS IN THE MOVEMENT FOR A CIVIL RIGHT TO COUNSEL

This is indisputably a time of great attention to the need for greater access to counsel in civil cases for those who cannot afford counsel. Scholarship proposing doctrinal, empirical, and strategic arguments for a right to counsel has blossomed in recent years, with at least four major symposia held at law schools, and many important articles published just in the last five years.<sup>6</sup> Well over one hundred advocates now regularly participate in the National Coalition for a Civil Right to Counsel, founded in 2004.<sup>7</sup> The American Bar Association (“ABA”) unanimously passed a historic resolution in 2006 endorsing the provision of “counsel as a matter of right at public expense to low income persons in . . . adversarial proceedings where basic human needs are at stake, such as those involving shelter, sustenance, safety, health or child custody . . . .”<sup>8</sup> Numerous state and local bar associations have endorsed the ABA resolution.<sup>9</sup> In addition to lending whatever weight or prestige the ABA brings to

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6. In addition to this Symposium, see 2006 Edward v. Sparer Symposium, *Civil Gideon: Creating a Constitutional Right to Counsel in the Civil Context*, 15 TEMP. POL. & CIV. RTS. L. REV. 501 (2006) (containing twelve articles on right to counsel topics); *A Right to a Lawyer? Momentum Grows*, 40 CLEARINGHOUSE REV. 167–293 (2006) (containing seventeen articles on right to counsel topics); and *An Obvious Truth: Creating an Action Blueprint for a Civil Right to Counsel in New York State*, 25 TOURO L. REV. 1, 1–539 (2009) (containing twelve articles on right to counsel topics); see also Scott L. Cummings & Deborah L. Rhode, *Public Interest Litigation: Insights from Theory and Practice*, 36 FORDHAM URB. L.J. 603 (2009) (containing papers from the ABA Litigation Section’s December 2008 conference titled “Real People, Real Needs, Real Solutions—Access to Legal Representation in Civil Litigation”); Paul Marvy & Laura Klein Abel, *Current Developments in Advocacy to Expand the Civil Right to Counsel*, 25 TOURO L. REV. 131 (2009).

7. Debra Gardner, *Pursuing a Right to Counsel in Civil Cases: Introduction and Overview*, 40 CLEARINGHOUSE REV. 167, 168 (2006).

8. ABA House of Delegates Resolution 112A (Aug. 7, 2006), <http://www.abanet.org/legalservices/sclaid/downloads/06A112A.pdf>.

9. According to the National Coalition for a Civil Right to Counsel, the ABA’s resolution has been adopted by the bar associations of, *inter alia*, Colorado, Connecticut, the District of Columbia, Maine, Massachusetts, Minnesota, New York, Washington, Boston, Chicago, New York City, Philadelphia, King County (Washington), and Los Angeles County. National Coalition for a Civil Right to Counsel, [http://www.civilrighttocounsel.org/resources/bar\\_resolutions](http://www.civilrighttocounsel.org/resources/bar_resolutions) (last visited Mar. 12, 2009).

the public and legislative debates, the ABA's resolution also provides the necessary predicate for the nation's most influential group of lawyers to file amicus briefs in appropriate cases, as it did recently in *Office of Public Advocacy v. Alaska Court System*, an important right to counsel case recently heard by the Alaska Supreme Court.<sup>10</sup> State and local bar associations have likewise joined the call for greater access to counsel as of right. The New York State and Boston bar associations have recently issued substantial reports analyzing the need and potential for expansion of the right to counsel in their states.<sup>11</sup> The Boston bar is also spearheading a pilot project to provide counsel to certain tenants in eviction proceedings in two Boston-area courts.<sup>12</sup>

Encouraging legislative developments have occurred as well. As Laura K. Abel<sup>13</sup> discusses in this Symposium, seven states have recently enacted laws expanding the right to counsel in certain civil cases. A bill is currently pending before the New York City Council to provide counsel as of right to low-income seniors facing eviction or foreclosure,<sup>14</sup> and a separate effort is underway in the New York State Assembly to provide counsel more broadly to homeowners facing mortgage foreclosures.<sup>15</sup> In October 2009, California enacted the Sargent Shriver Civil Counsel Act, establishing a six-year pilot program (to begin in 2011), funded at approximately \$11 million per year, to test the effects and feasibility of expanding access to counsel

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10. See *infra* notes 21–23 and accompanying text.

11. See BOSTON BAR ASSOCIATION TASK FORCE ON EXPANDING THE CIVIL RIGHT COUNSEL, *GIDEON'S NEW TRUMPET: EXPANDING THE CIVIL RIGHT TO COUNSEL IN MASSACHUSETTS* (Sept. 2008), available at [http://www.bostonbar.org/prs/nr\\_0809/GideonsNewTrumpet.pdf](http://www.bostonbar.org/prs/nr_0809/GideonsNewTrumpet.pdf). Likewise, the Hawai'i Justice Foundation and state bar in 2007 recommended specific steps toward a broader right to counsel. HAWAI'I STATE BAR ASSOCIATION, *THE COMMUNITY-WIDE ACTION PLAN: TEN ACTION STEPS TO INCREASE ACCESS TO JUSTICE IN HAWAI'I BY 2010* (Nov. 2007), available at <http://www.hsba.org/resources/1/Documents/Access%20to%20Justice.pdf>.

12. Boston Bar Proposal to Prevent Homelessness Gets Grant from Boston Foundation, (Jan. 7, 2009), [http://www.bostonbar.org/prs/nr\\_0809/BostonFoundationGrant010709.htm](http://www.bostonbar.org/prs/nr_0809/BostonFoundationGrant010709.htm).

13. Laura K. Abel, *Keeping Families Together, Saving Money, and Other Motivations Behind New Civil Right to Counsel Laws*, 42 LOY. L.A. L. REV. 1087 (2009).

14. *Provision of Legal Services in Eviction, Ejectment and Foreclosure Proceedings*, Int. No. 648, available at <http://legistar.council.nyc.gov/LegislationDetail.aspx?ID=451623&GUID=CAD2F1A6-C518-49E1-BB75-40C8B2CC1624> (last visited Mar. 12, 2009).

15. See Assem. B. No. A00464 (N.Y. 2009), available at <http://assembly.state.ny.us/leg/?bn=A00464>.

in cases involving housing, domestic violence and other harassment, conservatorships and guardianships, elder abuse, and child custody.<sup>16</sup>

Likewise, there have been some successes in the courts. Several state courts have held that when a state statute requires appointment of counsel for parents in state-initiated proceedings to terminate parental rights, equal protection requires such appointments in privately-initiated termination cases.<sup>17</sup> More recently, in January 2009, the Washington State Court of Appeals held unanimously in *Bellevue School District v. E.S.* that children have a due process right to counsel in truancy proceedings.<sup>18</sup> While the court decided only that due process requires counsel in truancy proceedings, its language suggests an opportunity to apply the decision in other contexts: "For purposes of due process, the issue is whether the party has the mental capacity to represent his or her interests before the court."<sup>19</sup> This framing certainly also implicates due process concerns for litigants whose mental capacity precludes effective self-representation even if they are not juveniles.<sup>20</sup> In 2007, building on prior state case law holding that an indigent in a custody dispute is entitled to counsel when facing an opponent with a publicly funded

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16. CAL. GOV. CODE § 68650 et seq. Pilot programs must be collaborative efforts between a court, a lead legal services agency, and other legal services providers in each jurisdiction which successfully competes for pilot funds. *Id.* § 68651(b)(4). In its legislative findings, the new statute draws heavily upon the work of a multi-year task force which I co-chaired, and which was charged by California's Access to Justice Commission with drafting a model statute establishing a civil right to counsel. See Clare Pastore, *The California Model Statute Task Force*, 40 CLEARINGHOUSE REV. 176 (2006), for more information about the process and the model statutes.

17. See *Zockert v. Fanning*, 800 P.2d 773 777-778 (Or. 1990); In re S.A.J.B., 679 N.W.2d 645, 650 (Iowa 2004); In re Adoption of K.L.P., 763 N.E.2d 741, 751 (Ill. 2002); Matter of Adoption of K.A.S., 499 N.W.2d 558, 565 (N.D. 2004); see also In re K.L.J., 813 P.2d 276, 279 (Alaska 1991) (finding that due process requires appointment of counsel in private termination cases).

18. 199 P.3d 1010, 1017 (Wash. 2009) (finding that because "[a] child's interests in her liberty, privacy, and right to education are in jeopardy at an initial truancy hearing, and she is unable to protect these interests herself," due process requires the appointment of counsel). The case is now pending before the Washington Supreme Court. 210 P.3d 1019 (2009) (table) (granting review).

19. *Bellevue*, 199 P.3d. at 1015.

20. Indeed, even prior to *Bellevue School District*, a lower court in Washington reached the conclusion that counsel was necessary in a truancy proceeding for a student with disabilities, based on the reasonable accommodation requirements of Washington's court rule implementing the Americans with Disabilities Act. In re Truancy of H.P., No. 00-7-02872-1 (Wash. Sup. Ct. Mar. 28, 2008); see also Lisa Brodoff et al., *The ADA: One Avenue to Appointed Counsel Before a Full Civil Gideon*, 2 SEATTLE J. SOC. JUST. 609 (2004) (discussing arguments for the appointment of counsel as a reasonable accommodation for litigants with disabilities).

lawyer,<sup>21</sup> an Alaska trial court held that there is also a state constitutional right to counsel for a parent in a custody action when the other parent is represented by private counsel.<sup>22</sup> The case was appealed to the Alaska Supreme Court, where briefs supporting the appointment of counsel were filed by the ABA and retired Alaska judges, among others.<sup>23</sup>

Of course, the landscape includes setbacks as well, most notably perhaps the failure of the 2007 test case *King v. King*<sup>24</sup> in Washington, in which the state supreme court rejected claims for counsel in a child custody proceeding based on state constitutional guarantees of due process, equal protection, and open courts.<sup>25</sup> Other test cases have resulted in courts refusing to address arguments for counsel.<sup>26</sup>

Despite the uneven landscape, there is undeniably growing momentum on this issue. Some of the most important progress so far is progress of the imagination, but more must be made: just as it is now unthinkable to imagine the criminal process without attorneys

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21. *Flores v. Flores*, 598 P.2d 893 (Alaska 1979).

22. Order Granting Defendant's Motion for Appointment of Counsel, *Gordanier v. Jonsson*, No. 3AN-06-8887 CI, (Alaska Super. Ct. Aug. 14, 2007), available at <http://74.54.211.93/pdfs/Gordanier%20v%20Jonsson%20-%20Order%20Appointing%20Counsel.pdf>.

23. The briefs are available on the National Coalition for a Civil Right to Counsel's Web site at <http://www.civilrighttocounsel.org/advocacy/litigation/> (last visited Mar. 21, 2009) (click on the links under "Office of Public Advocacy v. Alaska Court System" to access the briefs). In August 2009, the Alaska Supreme Court dismissed the appeal as moot. Office of Public Advocacy v. Washington Court System, No. S-12999, Order Dismissing Appeal (August 20, 2009). The Supreme Court noted that neither the court system nor the Office of Public Advocacy, which had been ordered to and did provide representation to the indigent litigant, had appealed the finding that due process requires representation, although the Office of Public Advocacy ("OPA") sought to contest whether it should have been the entity required to provide that representation. *Id.*

24. 174 P.3d 659 (Wash. 2007).

25. *Id.* at 668–69.

26. See, e.g., *Kelly v. Warpinski*, No. 04-29999-OA (Wis. Apr. 26, 2005), available at <http://wscca.wicourts.gov/caseDetails.do?caseNo=2004AP002999&cacheId=A3BF90DD74D3B9D642D8473C4F773262&recordCount=1&offset=0> (original writ in state supreme court seeking appointment of counsel for defendants in civil suits, denied without opinion Apr. 26, 2005); *Mitchell v. O'Brien*, No. 072633 (Va. Sup. Ct. Feb. 13, 2009), available at <http://208.210.219.132/solar/precaseinq.jsp?jsessionid=0000FQISURSLOFYVAOIBQZO3TVA:ulfnluq> (unpublished decision dismissing on procedural grounds appeal from father seeking appointment of counsel to oppose adoption of his child) (Feb. 13, 2009). The Maryland test case of *Frase v. Barnhart*, 840 A.2d 114 (Md. 2003), likewise did not produce the hoped-for articulation of a right to counsel in custody cases. The issue remains open in Maryland, however, because—over an impassioned dissent by three of the seven justices—the court declined to reach the counsel issue after ruling for the formerly unrepresented litigant on the merits. *Id.* at 129.

for both sides, so must it become unthinkable for indigent litigants to be denied counsel in civil cases where critical rights or basic needs are at stake. The legislative and judicial successes we have seen so far do much to encourage that change of attitude about what is and is not acceptable. Therefore, in a spirit of optimism, and in an effort to help push the debate forward, I offer the following thoughts on strategies.

## II. STRATEGIES TO ADVANCE THE RIGHT TO COUNSEL IN CIVIL CASES

### A. *Seize the Moment*

At this moment, the nation's attention is focused intently on the economic crisis, and in particular, on the rising tide of home foreclosures. At the same time, many have called for holding the new administration to its promises of greater adherence to the rule of law and principles of fairness.<sup>27</sup> While the crisis may seem to bode ill for any new expenditures, it and the President's promises of greater fairness also offer opportunities to illustrate the need for, and press legislatively for, greater access to counsel. Surely many Americans can relate to the unfairness, difficulty, and complexity of defending against a foreclosure or illegal foreclosure-driven eviction without counsel. A recent study by the Brennan Center for Justice found that between 60 percent and 92 percent of foreclosure defendants in certain jurisdictions were unrepresented.<sup>28</sup> New York State's pending bill to provide counsel in certain mortgage foreclosures is one example of a legislative initiative addressing this high-profile, newsworthy problem.<sup>29</sup>

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27. See, e.g., Adam Cohen, *Democratic Pressure on Obama to Restore the Rule of Law*, N.Y. TIMES, Nov. 14, 2008, at A32, available at <http://www.nytimes.com/2008/11/14/opinion/14fri4.html?ref=opinion>.

28. Melanca Clark & Maggie Barron, *Foreclosures; A Crisis in Representation* (2009), available at [http://brennan.3cdn.net/a5bf8a685cd0885f72\\_s8m6bevkk.pdf](http://brennan.3cdn.net/a5bf8a685cd0885f72_s8m6bevkk.pdf).

29. See A.B. A00464, 232d Assem., Reg. Sess. (N.Y. 2009), available at <http://assembly.state.ny.us/leg/?bn=A00464>. The New York State Bar President, Bernice K. Leber, recently wrote about how tough economic times make the arguments for a broader right to counsel even more compelling, both because help is even more widely needed and because the failure to fund legal services now can have devastating consequences in terms of later public service costs. Bernice K. Leber, *And Justice for All*, N.Y. ST. B. ASS'N J., Oct. 2008, at 5, available at <http://www.nysba.org/AM/Template.cfm?Section=Home&TEMPLATE=/CM/ContentDisplay.cfm&CONTENTID=20978>. Notably, the federal economic recovery legislation provided significant funds for legal assistance to homeowners in foreclosure, but created no



Other events in the public eye may offer similar opportunities. For instance, the media periodically expose the practices of some managed healthcare companies of canceling or denying coverage in outrageous circumstances. One example is the controversy in California in 2006 over disclosures that Blue Shield of California and Kaiser Permanente had retroactively denied coverage to patients after they became seriously ill.<sup>30</sup> Advocates can use these types of examples to highlight the power imbalance in court between an ordinary person and a large, well-funded private interest, to demonstrate the connection between procedural fairness and the rule of law, and to press legislatively for an incremental increase in the availability of counsel.

*B. Use the Increasingly Sophisticated and  
Persuasive Body of Research Regarding  
the Effects of Counsel or Its Absence*

Rarely is there a call for a civil right to counsel that does not quote Justice Black's stirring language in *Gideon v. Wainwright*:<sup>31</sup> "[R]eason and reflection require us to recognize that in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him. This seems to us to be an obvious truth."<sup>32</sup> Today, however, the proposition that an unrepresented litigant is unlikely to secure a fair trial is not only obvious but is supported by an ever-greater empirical showing that the outcomes for those with and without access to counsel are far from equal,<sup>33</sup> and a related body of

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entitlement or right to such assistance. Housing and Economic Recovery Act of 2008, 110 P.L. 289 § 2305 (allocating \$30 million to hire attorneys to assist homeowners who have legal issues directly related to the homeowner's foreclosure, delinquency or short sale). See also Press Release, Corp. for Nat'l and Cmty. Serv., National Service Agency Announces 10,000 New Americorps Positions Funded by Recovery Act (May 14, 2009), available at [http://www.national.service.gov/about/newsroom/releases\\_detail.asp?tbl\\_pr\\_id=1341](http://www.national.service.gov/about/newsroom/releases_detail.asp?tbl_pr_id=1341) (noting \$1.2 million grant to Equal Justice Works to assist victims of foreclosure crisis in five states).

30. See Lisa Girion, *Kaiser's Retroactive Denial of a Twenty-Year Patient*, L.A. TIMES, Oct. 19, 2006, at C1, available at [http://www.pnhp.org/news/2006/october/kaisers\\_retroactive.php](http://www.pnhp.org/news/2006/october/kaisers_retroactive.php); Lisa Girion, *Blue Cross Faces Fine for Voiding Policy*, L.A. TIMES, Sept. 22, 2006, at C1, available at <http://articles.latimes.com/2006/sep/22/business/fi-revoke22>.

31. 372 U.S. 335 (1963).

32. *Id.* at 344.

33. See, e.g., Russell Engler, *Connecting Self-Representation to Civil Gideon: What Existing Data Reveal About when Counsel Is Most Needed*, 36 FORDHAM URB. L.J. (forthcoming 2009) (collecting studies).

research regarding the extensive judicial resources required for cases in which one or both parties are pro se.<sup>34</sup> These studies should be central to any advocacy efforts on right to counsel issues, and further empirical work should be encouraged.

Empirical data regarding the economic and social benefits of providing counsel, as well as the costs of failing to do so, is another important piece of the strategic puzzle. The National Legal Aid and Defender Association has collected more than a dozen studies including cost-savings and economic-benefit analyses from Florida, Massachusetts, Minnesota, Nebraska, New Hampshire, New York, and Wisconsin.<sup>35</sup> A recent study from Texas concluded that for every dollar spent on indigent civil legal services, the state economy gained \$7.42.<sup>36</sup> Likewise, the New York City Department of Social Services concluded in 1990 that “every dollar spent on indigent representation in eviction proceedings saves four dollars in costs related to homelessness.”<sup>37</sup> Homelessness and health advocacy organizations have likewise documented the costs to the public of homelessness or lack of health care.<sup>38</sup> Such studies have obvious

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34. See, e.g., Brief for Retired Alaska Judges as Amici Curiae Supporting Appellees, Office of Public Advocacy v. Alaska Court System (Alaska 2008) (No. S-12999), available at <http://www.civilrighttocounsel.org/pdfs/Alaska%20Retired%20Judges%20Amicus%20Brief.PDF> (citing studies); see also Brief for Eleven County Judges as Amici Curiae Supporting Petition Requesting Supreme Court Take Jurisdiction of Original Action, Kelly v. Warpinski (Wis. 2004) (No. 04-2999-OA), available at <http://www.povertylaw.org/poverty-law-library/case/55800/55816/55816C.pdf>.

35. See National Legal Aid & Defender Association, Economic Benefit of Meeting Civil Legal Needs, [http://www.nlada.org/Civil/Civil\\_Library/document\\_browse](http://www.nlada.org/Civil/Civil_Library/document_browse) (follow “Civil Resources” hyperlink; then follow “Economic Benefit of Meeting Civil Legal Needs” hyperlink) (last visited Sept. 1, 2009).

36. THE PERRYMAN GROUP, THE IMPACT OF LEGAL AID SERVICES ON ECONOMIC ACTIVITY IN TEXAS: AN ANALYSIS OF CURRENT EFFORTS AND EXPANSION POTENTIAL 3 (2009), available at <http://www.texasatj.org/FINAL%20Econ%20Impact%20Study%202002-12-09.pdf>.

37. Leber, *supra* note 29, at 5 (citing NEW YORK CITY DEP’T. OF SOCIAL SERVICES, THE HOMELESSNESS PREVENTION PROGRAM: OUTCOMES AND EFFECTIVENESS (1990)).

38. For example, the National Alliance to End Homelessness collects and summarizes numerous studies documenting the lengthier hospital stays and consequently greater costs typically incurred by homeless patients than by housed ones and the losses in future educational achievement incurred by homeless children. See National Alliance to End Homelessness, The Cost of Homelessness, available at <http://www.endhomelessness.org/section/tools/tenyearplan/cost> (last visited Mar. 31, 2009). The Los Angeles County Homeless Services Authority and the Economic Roundtable’s recent Homeless Cost Avoidance Study finds that the average public cost for impaired homeless adults decreases 79 percent when housed, from a monthly average of \$2897 to \$605, with most savings coming from reduced healthcare expenditures, especially hospital and emergency room usage. Where We Sleep: Costs When Homeless and Housed in Los Angeles (November 2009), available at <http://www.lahsa.org/docs/Cost-Avoidance-Study/Where-We-Sleep-Final-Report.pdf>. For a

implications for arguments about the cost-effectiveness of providing legal assistance to avoid homelessness.

### C. Cultivate New Allies, Especially Among the Judiciary

The advocacy effort for an expanded civil right to counsel depends heavily, and appropriately, on the “usual suspects”: legal services attorneys and directors, private bar pro bono leaders, access to justice commissions, academic commentators, clients whose stories reach legislators and judges, and advocates in substantive areas such as health care or housing whose clients need attorneys. And certainly a small number of judges have been calling for a “civil Gideon” for decades,<sup>39</sup> while a much larger number regularly call for greater pro bono efforts by the private bar.<sup>40</sup> Some, such as California’s Chief Justice Ronald George, have supported legislative efforts to expand the availability of counsel as a right in certain cases.<sup>41</sup>

However, an unusual and promising new development in some of the recent litigation over a right to counsel in civil cases is the amicus participation of retired—and in some cases sitting—judges. Sixteen retired Washington state court judges filed an amicus brief

provocative critique of calculations of the benefits of legal services and suggestions for improvement, see J.J. Prescott, *The Challenges of Calculating the Benefits of Providing Access to Legal Services*, 36 FORDHAM URB. L.J. (forthcoming 2009).

39. Indeed, the term “civil Gideon” was coined by a sitting judge in a 1997 lecture, later expanded and published in the *Yale Law and Policy Review*. Hon. Robert W. Sweet, *Civil Gideon and Confidence in a Just Society*, 17 YALE L. & POL’Y REV. 503 (1998). Likewise, Justice Earl Johnson, recently retired from the California Court of Appeal, has been a tireless voice for a civil right to counsel for decades. See, e.g., Earl Johnson, Jr., *Toward Equal Justice: Where the United States Stands Two Decades Later*, 5 MD. J. CONTEMP. LEGAL ISSUES 199 (1994); Earl Johnson, Jr., *Will Gideon’s Trumpet Sound a New Melody? The Globalization of Constitutional Values and Its Implications for a Right to Equal Justice in Civil Cases*, 2 SEATTLE J. SOC. JUST. 201 (2003); cf. Quail v. Mun. Court, 217 Cal. Rptr. 361, 366 (Ct. App. 1985) (Johnson, J., concurring and dissenting) (calling for recognition of right to counsel for indigent tenant defending unlawful detainer).

40. See, e.g., Robert A. Katzmann, *Themes in Context*, in THE LAW FIRM AND THE PUBLIC GOOD 1, 2 (1995) (printing excerpts from Justice Sandra Day O’Connor, Pro Bono Work—Good News and Bad News, Remarks at Pro Bono Awards Assembly Luncheon of the ABA in Atlanta, Georgia (Aug. 12, 1991) (“While lawyers have much we can be proud of, we also have a great deal to be ashamed of in terms of how we are responding to the needs of peoples who can’t afford to pay our services.”)).

41. Jeff Bleich, *The Neglected Middle Class*, CAL. B.J. (June 2008), available at [http://www.calbar.ca.gov/state/calbar/calbar\\_cbj.jsp?sCategoryPath=/Home/Attorney%20Resources/California%20Bar%20Journal/June2008&MONTH=6&YEAR=2008&sCatHtmlTitle=Opinion&sJournalCategory=YES](http://www.calbar.ca.gov/state/calbar/calbar_cbj.jsp?sCategoryPath=/Home/Attorney%20Resources/California%20Bar%20Journal/June2008&MONTH=6&YEAR=2008&sCatHtmlTitle=Opinion&sJournalCategory=YES) (noting the Chief Justice’s support for California civil representation pilot project).

supporting the arguments for counsel in the Washington test case of *King v. King*,<sup>42</sup> as did eleven sitting or retired Wisconsin circuit court judges in *Kelly v. Warpinski*.<sup>43</sup> Ten retired Alaska judges (identified in the brief as having “more than 90 collective years of distinguished service on the bench”) filed a brief in the recent Alaska litigation supporting the trial judge’s ruling that an indigent litigant was constitutionally entitled to counsel in custody proceedings when the other side was represented.<sup>44</sup> These judicial officers are uniquely qualified to bear witness and draw judicial and public attention to the plight of unrepresented litigants, the burdens they pose on courts, and the threat to equal justice that is posed by lack of representation.

The retired judges’ brief in Washington State’s *King* case employed two of the types of empirical data discussed above, reviewing studies supporting the argument that unrepresented litigants receive less favorable outcomes and briefly noting the effects of custody determinations and parent-child relations on children’s school achievement and life outcomes.<sup>45</sup> The retired judges’ brief in the recent *Office of Public Advocacy* litigation in Alaska focused on several effects of pro se litigation in contested custody cases including the unfavorable outcomes for the litigants, the difficulties faced by judges presiding over such cases, the costs in time and efficiency to the judicial system, and the deleterious effects on public confidence in the integrity of the system.<sup>46</sup> The *Warpinski* judges’ brief focused on the effects of pro se litigants on the courts.<sup>47</sup> Judges should be encouraged to speak out even more about the deleterious effects of the lack of representation on justice, and to lend their amicus participation when their unique perspective is relevant to a court’s assessment of the need for counsel.

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42. Brief for Retired Washington Judges as Amici Curiae Supporting Appellant, *King v. King*, 174 P.3d 659 (Wash. Ct. App. 2007) (No. 57831-6-1), available at [http://brennan.3cdn.net/a6906665ac25a77b80\\_ym6by9qg.pdf](http://brennan.3cdn.net/a6906665ac25a77b80_ym6by9qg.pdf).

43. Brief for Eleven County Judges, *supra* note 34.

44. Brief for Retired Alaska Judges, *supra* note 34, at 1.

45. Brief for Retired Washington Judges, *supra* note 42.

46. Brief for Retired Alaska Judges, *supra* note 34, at 4–23.

47. Brief for Eleven County Judges, *supra* note 34.

*D. Consider Arguments Based on the Court's  
Inherent Power to Do Justice*

The increasing and welcome involvement of judges in saying out loud that justice is rarely achieved when one side is unrepresented also suggests an additional legal argument for appointed counsel, one based on the court's inherent power and duty to do justice. Advocates have worked tirelessly and creatively to develop doctrinal arguments for a right to counsel derived from sources other than the federal constitutional provisions rejected in *Lassiter*, including state constitutional due process, equal protection, and open courts provisions.<sup>48</sup> As I have suggested elsewhere,<sup>49</sup> a potentially fruitful additional area for research and advocacy is the scope of a court's inherent powers. Many courts have held, or have noted in passing, that they inherently possess the power to appoint counsel where necessary to fulfill the function of dispensing justice, although actual appointments are admittedly rare.<sup>50</sup> A few courts have flirted with state constitutional provisions or statutes granting all necessary powers to courts in aid of jurisdiction,<sup>51</sup> or with the court's inherent "duty to ensure judicial proceedings remain truly

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48. See, e.g., *King v. King*, 174 P.3d 659, 691–96 (Wash. 2007) (discussing the due process, equal protection, and open courts provisions of the Washington Constitution); *Frase v. Barnhart*, 840 A.2d 114 (Md. 2003) (citing equal access to the courts, adoption of the English right to counsel, due process, and separation of powers under the Maryland Declaration of Rights). Cf. *Quail v. Mun. Court*, 217 Cal. Rptr. 361, 366 (Ct. App. 1985) (Johnson, J., concurring and dissenting) (calling for recognition of right to counsel based, *inter alia*, on the California constitution's incorporation of English common law).

49. Clare Pastore, *Life After Lassiter: An Overview of State Court Right-to-Counsel Decisions*, 40 CLEARINGHOUSE REV. 186, 192 (2006).

50. E.g., *Vick v. Dep't of Corr.*, 1986 WL 8003, at \*2 (Del. Super. Ct. Apr. 14, 1986) (finding that the court has inherent power to appoint counsel, but denying appointment to prisoner because no showing that meaningful access to court in that instance was denied without counsel); *Cox v. Slama*, 355 N.W.2d 401, 402 (Minn. 1984) (holding that the court's supervisory powers to ensure fair administration of justice allow for appointment of counsel for indigent facing child support contempt action, but only when incarceration is a real possibility); *In re Smiley*, 330 N.E.2d 53, 90 (N.Y. 1975) (holding that courts have authority to appoint but not to compensate counsel); *Caron v. Betit*, 300 A.2d 618, 619 (Vt. 1972) (stating that the court has inherent "power to require attorneys to serve and protect vital interests of uncounselled litigants where circumstances demand it"); *Piper v. Popp*, 482 N.W.2d 353 (Wis. 1992) (explaining that although under *Lassiter* there is no right to counsel for a prisoner in a tort case, the court has inherent authority to appoint counsel in civil cases in order to ensure meaningful opportunity to be heard).

51. See, e.g., *State ex rel. Johnson*, 465 So. 2d 134, 138 (La. Ct. App. 1985) (citing LA. CONST. art. V, § 2 as authority for payment of appointed counsel ("A judge may issue writs of habeas corpus and all other needful writs, orders, and process in aid of the jurisdiction of his court"))).

adversary”<sup>52</sup> as possible justification for appointing or paying counsel. But, again courts rarely choose to exercise the power they proclaim.

One of the strongest and most detailed discussions of the court’s inherent power to appoint counsel came from the Wisconsin Supreme Court in 1996, in a case overturning a state law that prohibited the appointment of counsel for parents in child neglect proceedings.<sup>53</sup> The state high court held that the statute violated the separation of powers principle inherent in the state constitution, because it intruded on the judiciary’s inherent power to “appoint counsel in furtherance of the court’s need for the orderly and fair presentation of a case.”<sup>54</sup> The court noted that such a case might arise when a parent is “poorly educated, frightened, and unable to fully understand and participate in the judicial process, thus . . . obviously [in need of] assistance of counsel to ensure the integrity of the [neglect] proceeding.”<sup>55</sup>

The retired judges also urged consideration of an inherent powers argument in the recent Alaska litigation. In a section titled “The Court Has the Authority and Responsibility to Determine Whether the Proper Administration of Justice Requires Appointment of Counsel in Certain Cases,” the judges outlined the court’s duty to assure that litigants receive a fair trial, and linked that duty to cases in which the court has invalidated funding restrictions that threatened the independence or functioning of the court.<sup>56</sup> Likewise, advocates

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52. *Travelers Indem. Co. of Conn. v. Mayfield*, 923 S.W.2d 590, 594 (Tex. 1996). Here, the Texas Supreme Court noted:

[W]e have never held that a civil litigant must be represented by counsel in order for a court to carry on its essential, constitutional function. Indeed, thousands of cases each year are prosecuted by pro se litigants. Nevertheless, we recognize that in some exceptional cases, the public and private interests at stake are such that the administration of justice may best be served by appointing a lawyer to represent an indigent civil litigant.

*Id.* (internal citations omitted).

While several Texas cases cite this standard, only one reported case has actually used it to appoint counsel, only to be reversed on appeal. *Tolbert v. Gibson*, 67 S.W.3d 368, 372–73 (Tex. App. 2001), rev’d, 102 S.W.3d 710 (Tex. 2003).

53. *Joni B. v. State*, 549 N.W.2d 411 (Wis. 1996).

54. *Id.* at 414.

55. *Id.* at 414–15. The court went on to hold the statute unconstitutional under the Federal Constitution as well, because it precluded the appointment of counsel even when due process as construed in *Lassiter* required it. *Id.* at 415–16.

56. Brief for Retired Alaska Judges, *supra* note 34, at 23.

in *Frase v. Barnhart* argued that the separation of powers provision of Article 8 of the Maryland Declaration of Rights, which had previously been construed to encompass the judiciary's inherent right and obligation in the administration of the judicial process, supported the court's power to appoint counsel where necessary.<sup>57</sup> A similar argument was advanced in the Wisconsin case *Kelly v. Warpinski*.<sup>58</sup> Further development of this line of argument is surely warranted.

### E. Do More with Lassiter

My final strategic suggestion may seem counterintuitive to those committed to establishing a broad and categorical right to counsel, and indeed may be controversial among right to counsel advocates. The suggestion is to embrace the Supreme Court's direction in *Lassiter v. Department of Social Services* that the need for counsel be evaluated on a case-by-case basis, and use it to seek appointment of counsel in individual cases.

Advocates and scholars typically, and rightly, view the Supreme Court's 1981 decision in *Lassiter* as a terrible blow to the effort to achieve a broad right to counsel in civil cases under a federal due process framework.<sup>59</sup> In *Lassiter*, applying the familiar three-part test for due process enunciated in *Mathews v. Eldridge*,<sup>60</sup> the Court held that the Constitution does not require appointment of counsel as a matter of right in state-initiated proceedings to terminate parental rights.<sup>61</sup> Worse, the Court announced a "presumption that an indigent litigant has a right to appointed counsel only when, if he loses, he may be deprived of his physical liberty."<sup>62</sup>

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57. John Nethercut, *Maryland's Strategy for Securing a Right to Counsel in Civil Cases: Frase v. Barnhart and Beyond*, 40 CLEARINGHOUSE REV. 238, 242 (2006) (describing arguments in *Frase v. Barnhart*, 840 A.2d 114 (Md. 2003)).

58. John Ebbott, *To Gideon via Griffin: The Experience in Wisconsin*, 40 CLEARINGHOUSE REV. 223 (2006) (describing *Kelly v. Warpinski*, No. 04-2999-OA, (Wis. Nov. 17, 2004), litigation).

59. See, e.g., Bruce A. Boyer, *Justice, Access to the Courts, and the Right to Free Counsel for Indigent Parents: The Continuing Scourge of Lassiter v. Department of Social Services of Durham*, 36 LOY. U. CHI. L.J. 363 (2005); Debra Gardner, *Justice Delayed Is, Once Again, Justice Denied: The Overdue Right to Counsel in Civil Cases*, 37 U. BALT. L. REV. 59 (2007).

60. 424 U.S. 319, 335 (1976). The *Mathews* factors are (1) the private interests at stake; (2) the risk of erroneous deprivation through the procedures used and probable value of the safeguards sought; and (3) the government's interest, including fiscal and administrative burdens. *Id.*

61. *Lassiter v. Dep't of Soc. Servs.*, 452 U.S. 18, 31 (1981).

62. *Id.* at 26-27.

Notably, however, the Court did not hold in *Lassiter* that due process *never* requires the appointment of counsel when parental rights may be terminated. Instead, it held that due process does not *always* require it. The Court noted that “the complexity of the proceeding and the incapacity of the uncounseled parent *could be*, but would not always be, great enough to make the risk of an erroneous deprivation of the parent’s rights insupportably high.”<sup>63</sup> Thus, the Justices specifically declined to “formulate a precise and detailed set of guidelines to be followed in determining when the providing of counsel is necessary to meet the applicable due process requirements,”<sup>64</sup> and instead left the appropriateness of appointment in any individual case “to be answered in the first instance by the trial court, subject, of course, to appellate review.”<sup>65</sup>

It is remarkable that almost no published decisions show lower courts actually taking up that challenge. In 2006, Paul Marvy of the Northwest Justice Project and I read every one of the approximately 500 published state court decisions citing *Lassiter* and dealing with requests for counsel.<sup>66</sup> Strikingly, only in Tennessee do the courts seem to have taken seriously *Lassiter*’s invitation to determine on a case-by-case basis the need for counsel.<sup>67</sup> After discussing the *Mathews* factors, the Tennessee Court of Appeals held in 1990 that in termination of parental rights (“TPR”) cases, “the chance that the failure to appoint counsel will result in an erroneous decision becomes the main consideration.”<sup>68</sup> The court listed seven factors that bear on the question of whether counsel is necessary in any individual TPR case:

- (1) whether expert medical and/or psychiatric testimony is presented at the hearing;
- (2) whether the parents have had uncommon difficulty in dealing with life and life situations;
- (3) whether the parents are thrust into a distressing and

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63. *Id.* at 31 (emphasis added).

64. *Id.* at 32 (internal quotation omitted).

65. *Id.*

66. A full account of our analysis is found at Clare Pastore, *Life After Lassiter: An Overview of State Court Right-to-Counsel Decisions*, 40 CLEARINGHOUSE REV. 186 (2006).

67. The infrequency of *Lassiter* hearings in termination of parental rights proceedings in most states has been noted in William Wesley Patton, *Standards of Appellate Review for Denial of Counsel and Ineffective Assistance of Counsel in Child Protection and Parental Severance Cases*, 27 LOY. U. CHI. L.J. 195, 201–02 (1996).

68. *Tennessee v. Min*, 802 S.W.2d 625, 626–27 (Tenn. Ct. App. 1990).



disorienting situation at the hearing; (4) the difficulty and complexity of the issues and procedures; (5) the possibility of criminal self-incrimination; (6) the educational background of the parents; and (7) the permanency of potential deprivation of the child in question.<sup>69</sup>

Rigorous application of these factors would certainly seem to suggest that counsel should be granted in many if not all TPR cases, and indeed, several Tennessee appellate courts have reversed or remanded TPR decisions where there is no record of the trial court's consideration of these factors, or where the trial court did not advise indigent parents of their right to request counsel, even while describing facts that make the termination of rights seem a foregone conclusion.<sup>70</sup>

There is no apparent reason why advocates elsewhere cannot secure the same serious application of the *Lassiter* requirements as Tennessee courts have required.<sup>71</sup> A strategy, perhaps implemented by special appearances of counsel arguing only the appointment issue, could aim at actually forcing courts to hold hearings, develop a list of factors to consider, and make determinations of whether *Lassiter* requires counsel in any given individual case. While it would not establish a categorical right to counsel (and for this reason is controversial among right to counsel advocates), this strategy could secure counsel for many litigants who are currently

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69. *Id.* at 627.

70. See, e.g., *In re M.E.*, No. M2003-00859-COA-R3-PT, 2004 WL 1838179, at \*11 (Tenn. Ct. App. Apr. 16, 2004) (holding that right to counsel presumptively continues until court finds parent no longer indigent); *In re Adoption of J.D.W.*, No. M2000-00151-COA-R3-CV, 2000 WL 1156628, at \*7 (Tenn. Ct. App. Aug. 16, 2000) (“[A] parent’s failure to request a court appointed attorney prior to trial does not relieve the court of the obligations to inform the parent of his right to be represented and to determine whether due process requires the appointment of counsel where the parent is indigent.”); *In re Valle*, 31 S.W.3d 566, 572 (Tenn. Ct. App. 2000) (finding that failure to inform parent of right to request counsel requires reversal); *State Dep’t of Human Servs. v. Taylor*, No. 03A01-9609-JV-00286, 1997 WL 122242, at \*2 (Tenn. Ct. App. Mar. 19, 1997) (finding reversible error because the trial court failed to inform parent of his right to an attorney and failed to consider factors set forth in *Tennessee v. Min* before denying counsel); *Adoption of Howson*, No. 03A01-9302-CV-00072, 1993 WL 258783, at \*2 (Tenn. Ct. App. July 12, 1993) (applying *Min* standards to privately initiated TPR and finding mother entitled to counsel under *Min*’s seven-factor test).

71. Texas advocates recently tried just such a strategy, seeking certiorari at the U.S. Supreme Court for a case alleging that due process was violated by, *inter alia*, a Texas state court’s failure to conduct a *Lassiter* inquiry into the need for appointment of counsel in one parental rights termination case. *Rhine v. Deaton*, 2009 WL 1866256 (June 25, 2009). The petition for certiorari was denied. 2010 WL 250544 (Jan. 25, 2010).

unrepresented, would likely create a body of cases documenting the difficulties that pro se litigants face which could be useful both for litigation and legislation, and might enlighten judges and the public as to the quality of justice to be expected by unrepresented litigants.<sup>72</sup> Moreover, if advocates explored a strategy of entering limited appearances for the sole purpose of seeking appointment of counsel, courts of appeals might one day face the “innumerable post verdict challenges to the fairness of particular trials” that helped persuade the Court to overturn *Betts v. Brady*’s case-by-case approach to the need for counsel in criminal cases in favor of *Gideon v. Wainwright*’s categorical approach.<sup>73</sup>

### III. TWO CAUTIONARY NOTES

While the flood of recent legislative, advocacy, scholarly, and court developments regarding the civil right to counsel is encouraging, some caution is also in order. One cautionary note is prompted by the phrase “civil *Gideon*” itself, the other by the wariness of some legal services advocates about civil right to counsel initiatives.

#### A. *Be Careful What We Wish For*

To advocates contemplating the current landscape of spotty and unpredictable availability of civil counsel and the wide “justice gap” between the legal needs of the poor and the resources available to address those needs,<sup>74</sup> the criminal defense model holds a certain appeal. Yet the use of the term “civil *Gideon*,” with its implicit adoption of the public defender model as an aspirational goal, masks some deep flaws in the public defender system. Advocates for a civil right to counsel must be attentive to systemic constraints that threaten access to justice in the criminal defense system, and take

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72. It is important to note that this strategy is not without risks. As Justice Blackmun’s dissent in *Lassiter* discusses, an uncounseled parent is unlikely to be able to make the sort of evidentiary record of entitlement to counsel under the case-by-case standard that would require reversal on appeal if a trial judge denies counsel. *Lassiter v. Dep’t of Soc. Servs.*, 452 U.S. 18, 50–51 (1981) (Blackmun, J., dissenting).

73. *Id.* at 51 (Blackmun, J., dissenting) (citing *Betts v. Brady*, 316 U.S. 455 (1942) and *Gideon v. Wainwright*, 372 U.S. 335 (1963)).

74. HELAINE M. BARNETT, LEGAL SERVICES CORP., PREFACE TO DOCUMENTING THE JUSTICE GAP IN AMERICA: THE CURRENT UNMET CIVIL LEGAL NEEDS OF LOW-INCOME AMERICANS (2005), available at <http://www.lsc.gov/justicegap.pdf> (estimating that 80 percent of the legal needs of the poor go unmet).

care not to replicate them on the civil side. Perhaps the most significant of these constraints is caseloads that are sometimes too high to allow adequate representation, a subject of frequent lamentation, study, and even litigation.<sup>75</sup> Funding, manner of appointing counsel, delivery system, and minimum standards of competence are all critical factors in determining the success of publicly funded counsel.<sup>76</sup> Collaboration between “civil *Gideon*” advocates and experienced public defenders, judges, and bar leaders is essential to avoid some of the problems plaguing the public criminal defense system.

*B. Be Attentive to the Potential for Conflicting  
Interests Among Access to Justice Advocates*

The prospect of increased representation for the indigent is certainly a welcome one for advocates, clients, and judges. Yet the actual implementation of a broader right to counsel is complicated. For example, many judges, especially those who preside over family law dockets clogged with pro se litigants,<sup>77</sup> are eager for a place where they can refer these litigants for assistance, without necessarily distinguishing between cases where both parties are unrepresented and those where one side has an attorney, or

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75. See Erik Eckholm, *Citing Workload, Public Lawyers Reject New Cases*, N.Y. TIMES, Nov. 9, 2008, at A1 (describing litigation and advocacy in Arizona, Florida, Kentucky, Maryland, Minnesota, New York, and Tennessee over public defender caseloads). In September 2008, a Florida judge ruled that Miami-Dade County public defenders could refuse new lesser felony cases so that the attorneys could competently handle the cases already on their docket. Order Granting in Part and Denying in Part Public Defender’s Motion to Appoint Other Counsel in Unappointed Noncapital Felony Cases, *In re* Reassignment and Consolidation of Public Defender’s Motions to Appoint Other Counsel in Unappointed Noncapital Felony Cases, No. 3D08-2272 (11th Cir. Sept. 3, 2008), available at [http://www.pdmiami.com/Order\\_on\\_motion\\_to\\_appoint\\_other\\_counsel.pdf](http://www.pdmiami.com/Order_on_motion_to_appoint_other_counsel.pdf). The order is now before the Florida Supreme Court. Most recently, a Michigan court allowed a similar case to proceed. *Duncan v. State*, 774 N.W.2d 89 (2009). The decision is now under review at the state supreme court. 775 N.W.2d 745 (Mich. 2009).

76. For a thoughtful discussion of the cautions that *Gideon* may hold for a civil right to counsel, see Laura K. Abel, *A Right to Counsel in Civil Cases: Lessons from Gideon v. Wainwright*, 15 TEMP. POL. & CIV. RTS. L. REV. 527, 538 (2006). Deborah Rhode’s piece in this Symposium issue also catalogs the criticisms. Rhode, *supra* note 2, at 879–80.

77. Recent estimates in California put the pro per rate of family law litigants at 72 percent in large counties and 67 percent in small counties. JUDICIAL COUNCIL OF CALIFORNIA, STATEWIDE ACTION PLAN FOR SERVING SELF-REPRESENTED LITIGANTS 11 (2003), available at [http://www.courtinfo.ca.gov/programs/cfcc/pdf/Full\\_Report\\_comment\\_chart.pdf](http://www.courtinfo.ca.gov/programs/cfcc/pdf/Full_Report_comment_chart.pdf). In 2005, New York’s Office of Court Administration estimated that 75 percent of litigants in New York City Family Court and 90 percent in Housing Court appeared without an attorney. Leber, *supra* note 29, at 5.

prioritizing cases in which the presence of an attorney is likely to make a great difference in the outcome. However, legal services programs may not consider streamlining the judicial process or relieving the burden on the courts, especially in cases where neither side is represented, as their top priority. In part, this is because many legal services programs have missions that go well beyond simply handling individual legal disputes, even though that function is critical. For example, the stated mission of one of California's largest legal services programs is to "provide[] quality legal services that empower the poor to identify and defeat the causes and effects of poverty."<sup>78</sup> Mission statements from other legal services programs often contain a similar focus on alleviating poverty or empowering clients, not just assisting in the litigation of disputes.<sup>79</sup>

Related to this anti-poverty mission is the ability of local legal services programs to set their own priorities and determine locally whether and when to adopt an impact strategy, even if it means turning down some individual cases. Local priority setting is required for programs receiving federal funds from the Legal Services Corporation,<sup>80</sup> and the ability to do impact work is often a highly valued part of a program's portfolio. Thus, advocates sometimes fear that a legislative or court-ordered mandate to serve all indigent clients in a particular subject area (for example, child custody or evictions), will swamp these important law reform

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78. Legal Services of Northern California, Mission Statement, <http://www.lsncc.org/Mission%20Statement> (last visited Feb. 22, 2009).

79. See, e.g., Legal Aid Society of Greater Cincinnati, Mission Statement, <http://www.lasnet.org/lasgc%20statement.htm> (last visited Feb. 22, 2009) ("The Legal Aid Society of Greater Cincinnati is a nonprofit law firm dedicated to reducing poverty and ensuring family stability through legal assistance."); Legal Aid Society of San Diego, Inc., Mission Statement, <http://www.lasdd.org/mission%20statement.htm> (last visited Feb. 22, 2009) ("The Legal Aid Society of San Diego, Inc. is . . . dedicated to providing equal access to justice for poor people through aggressive, quality legal services. As legal advocates we will redress our clients' legal problems, empower our clients to access and effectively participate with the legal, governmental and social system and encourage self-empowerment in the fight against poverty and injustice."); Coast to Coast Legal Aid of South Florida, Mission Statement, <http://www.legalaid.org/coasttocoast/> (last visited Feb. 22, 2009) ("The mission of Coast to Coast Legal Aid of South Florida is to improve the lives of low income persons in our community through advocacy, education, representation and empowerment."); Legal Aid of North Carolina, Mission Statement, [https://www.legalaidnc.org/Public/Learn/about\\_us/Mission\\_Statement\\_LANC\\_Dec\\_12\\_03.aspx](https://www.legalaidnc.org/Public/Learn/about_us/Mission_Statement_LANC_Dec_12_03.aspx) (last visited Feb. 22, 2009) ("Legal Aid of North Carolina is a statewide, nonprofit law firm that provides free legal services in civil matters to low-income people in order to ensure equal access to justice and to remove legal barriers to economic opportunity.").

80. Public Welfare Priorities in Use of Resources, 45 C.F.R. § 1620.5(a) (2008).

functions, or will threaten or eliminate resources for areas of law where the right does not exist. The concern is especially acute if a mandate seems unlikely to be accompanied by the substantial funding needed to staff all cases of a particular type.

California's 2007 experience with a proposed pilot project to expand representation in certain civil cases provides an illustration of the potential for this type of tension among access to justice players.<sup>81</sup> The pilot (proposed by Governor Schwarzenegger) would have provided \$5 million per year to fund representation as of right for indigent litigants in certain civil cases in three counties.<sup>82</sup> Many judges, especially some who sit in family court, enthusiastically supported the pilot proposal. However, some legal services directors were much more cautious. Indeed, the executive director of one of California's largest programs spoke emphatically at a national meeting about his disinclination to apply for funds under the pilot program precisely because a mandate to serve so many new clients might jeopardize the program's ability to conduct impact advocacy and respond to local priorities, and might threaten the program's ability to choose categories of clients based on other social justice concerns,<sup>83</sup> such as a desire to represent only alleged victims and not alleged perpetrators of domestic violence, or only tenants but not landlords. Another director expressed to me privately his concern that the pilot program was too focused on the concerns of judges and not enough on the goal of service providers to alleviate poverty and meet the needs of their clients.<sup>84</sup> The postponement of California's

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81. These observations are drawn from my experience and notes as a member of the Joint Advisory Task Force on the Legal Representation Pilot Program (sponsored by the Judicial Council of California, the California Commission on Access to Justice, and the Legal Aid Association of California), as a participant in a panel on civil right to counsel at a Directors of Litigation meeting sponsored by the National Legal Aid and Defender Association in San Francisco on June 23, 2008, as the facilitator of a right to counsel session at a California Commission on Access to Justice event in April 2008, and at similar events since 2006. Some of the Joint Task Force's recommendations are available at California Commission on Access to Justice, Joint Advisory Task Force on the Legal Representation Pilot Program: Recommendations, April 30, 2007, <http://www.calegaladvocates.org/library/attachment.103963>.

82. See California Department of Finance, Governor's Budget 2007-08, Proposed Budget Detail Judicial Branch, Major Program Changes, <http://2007-08.archives.ebudget.ca.gov/StateAgencyBudgets/0010/0250/department.html> (last visited Feb. 19, 2009).

83. Ramon Arias, Executive Dir., Bay Area Legal Aid, Remarks at the National Legal Aid & Defender Association Litigation Directors Conference: Implementation of a Civil Right to Counsel Workshop (June 23, 2008) (on file with author).

84. *Id.*

pilot program until 2011 has offered the access to justice community a new opportunity to make sure that working groups and strategists heed these concerns, and to think more carefully about how the right to counsel fits into the relationship between procedural and substantive justice.<sup>85</sup>

#### CONCLUSION

This is a promising time for advances who seek the availability of counsel as of right to low-income litigants. I am convinced that just as we now look back at the pre-*Gideon* landscape—less than fifty years ago—and are astonished that a criminal defendant could have been, in the not-very-distant past, charged, tried, convicted, and sent to prison without ever receiving assistance from a lawyer, we will before long look back at today and wonder how a person could lose her children, her home, her job, her subsistence income, or her health insurance without the aid of counsel. What is today routine injustice must become unthinkable, and symposia like this one are valuable steps on the way to achieving that new reality.

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85. Cf. Rhode, *supra* note 2, at 872–74 (discussing procedural and substantive justice concerns).

