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Appointment of Counsel for Civil Litigants: A Judicial Path to Ensuring the Fair and Ethical Administration of Justice

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In 2015, a pro se litigant named Aikiam Floyd brought a race discrimination claim in federal court against his former employer.[1] However, his claim faced a motion to dismiss for being allegedly time barred. Jack Weinstein, who has been a federal judge in the Eastern District of New York since 1967, asked Floyd "a series of leading questions" to elicit the facts demonstrating the claim was not in fact time barred.[2] Judge Weinstein then sua sponte recused himself, stating, "[T]he judge has intervened on plaintiff's behalf. While no partiality could be construed in rejecting defendant's motion for summary judgment based on timeliness, recusal now is desirable to avoid the appearance of partiality by the undersigned judge in future decisions in the case."[3] He expressed his frustration succinctly by commenting, "In many cases, pro se justice is an oxymoron."[4] The judge's actions were so notable that they received a writeup in the *New York Law Journal*.[5]

Judge Weinstein's dramatic step reflects the seeming ethical dilemma in which many state court trial judges find themselves. On the one hand, providing justice is a primary responsibility of all judges: as noted by Resolution 5 of the Conference of Chief Justices and Conference of State Court Administrators, "The promise of equal justice is not realized for individuals and families who have no meaningful access to the justice system and [] the Judicial Branch has the primary leadership responsibility to ensure access for those who face impediments they cannot surmount on their own...."[6] On the other hand, judges must remain "fair and impartial",[7] which limits the assistance they can directly provide to a pro se litigant. While the American Bar Association's Model Code of Judicial Ethics has been modified to loosen this restriction to some degree,[8] many judges might be uncomfortable following Judge Weinstein's lead of trying to guide a pro se party in this fashion.

However, Judge Weinstein's opinion also suggested the way out of this dilemma: "Without representation by counsel, it is probable, to some degree, that adequate justice cannot be served in this case."[9] He quoted Supreme Court Justice Hugo Black's words that "[T]he fundamental importance of legal representation in our system of adversary justice is beyond dispute," then cataloged some of the efforts to advance the right to counsel in civil cases in different jurisdictions, calling them "important, continuing efforts to fill the void."[10] Such efforts include work towards a "civil right to counsel" (or, previously, "civil *Gideon,*" referring to *Gideon v. Wainwright,*[11] the case establishing a right to counsel in criminal cases) and focus on the right to counsel for indigent litigants in civil cases involving basic human needs—such as housing, child custody, domestic violence, and civil incarceration.

This article describes the need and justification for appointment of counsel in some civil cases, including how such appointments fit within the judicial obligation to ensure access to justice. It then explores a number of sources of law, some well known and some less so, that require or authorize state trial judges to

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Footnotes

1. Floyd v. Cosi, 78 F. Supp. 3d 558, 561 (E.D.N.Y. 2015).
2. *Id.* at 561.
3. *Id.* at 561-62.
4. *Id.*
5. Andrew Keshner, *Judge Who Guided Pro Se Plaintiff Recuses Himself Sua Sponte*, N.Y. L.J., Jan. 14, 2015, *available with subscription at* https://www.law.com/newyorklawjournal/almID/1202715093562/judge-who-guided-pro-se-plaintiff-recuses-himself-sua-sponte/. See also Richard Zorza, *A Fascinating Opinion by Judge Jack Weinstein (EDNY) Raises New Questions and Opportunities About the Relationship between Civil Gideon and Judicial Engagement,* Access to Justice Blog, Jan. 31, 2015, *available at* https://accesstojustice.net/2015/01/31/a-fascinating-opinion-by-judge-jack-weinstein-edny-raises-new-questions-and-opportunities-about-the-relationship-between-civil-gideon-and-judicial-engagement/.
6. Conference of Chief Justices & Conference of State Court Administrators, *Resolution 5: Reaffirming the Commitment to Meaningful Access to Justice for All* (2015), *available at* https://www.ncsc.org/~/media/Microsites/Files/access/5%20Meaningful%20Access%20to%20Justice%20for%20All_final.ashx.
7. American Bar Association, Model Code of Judicial Ethics Rule 2.2.
8. Rule 2.2, governing impartiality and fairness, was amended to add Comment [4], which states: "It is not a violation of this Rule for a judge to make reasonable accommodations to ensure pro se litigants the opportunity to have their matters fairly heard." American Bar Association, Model Code of Judicial Conduct (2014), *available at* https://www.americanbar.org/groups/professional_responsibility/publications/model_code_of_judicial_conduct/model_code_of_judicial_conduct_canon_2/rule2_2impartialityandfairness/commentonrule2_2/.
9. *Id.*
10. *Id.* at 561-63.
11. 372 U.S. 335 (1963).

appoint counsel where needed. Finally, it looks at how various judicial actors at all levels have advanced this vital access-to-justice issue. In the end, establishing a right to counsel and/or utilizing existing authorization on appointment of counsel can provide the judiciary with the tools necessary to dispense actual justice in their courts, removing judges from the discomfiting (and at times unethical) position of remaining quiet even when fundamental fairness is at risk. Ultimately, judges will need to play a key role in helping to ensure that counsel is provided where it is necessary to avoid miscarriages of justice.

WHAT IS THE CURRENT LANDSCAPE FOR PRO SE CIVIL LITIGANTS, AND HOW DOES APPOINTING COUNSEL HELP JUDGES ENSURE ACCESS TO JUSTICE?

The consequences of many types of civil proceedings are dramatic and severe, and can include:

- Eviction.
- Hospitalization due to domestic violence.
- Incarceration or other loss of liberty.
- Permanent loss of child custody.
- Complete loss of autonomy due to the imposition of a guardianship.

Indeed, it was U.S. Supreme Court Justice Neil Gorsuch who recently pointed out that litigants in civil cases often face consequences as dire as those faced in criminal cases:

> [I]f the severity of the consequences counts when deciding the standard of review, shouldn't we also take account of the fact that today's civil laws regularly impose penalties far more severe than those found in many criminal statutes? Ours is a world filled with more and more civil laws bearing more and more extravagant punishments. Today's "civil" penalties include confiscatory rather than compensatory fines, forfeiture provisions that allow homes to be taken, remedies that strip persons of their professional licenses and livelihoods, and the power to commit persons against their will indefinitely. Some of these penalties are routinely imposed and are routinely graver than those associated with misdemeanor crimes—and often harsher than the punishment for felonies. And not only are "punitive civil sanctions . . . rapidly expanding," they are "sometimes more severely punitive than the parallel criminal sanctions for the same conduct."[12]

"[C]ivil litigants routinely face these life-altering consequences without counsel."

Moreover, many civil cases frequently implicate multiple basic needs at one time. For instance, an evicted tenant stands to lose not just her home, but also potentially her employment, access to her children, and if subjected to homelessness, her belongings, physical liberty (due to arrest), and physical health.

Yet civil litigants routinely face these life-altering consequences without counsel. The National Center for State Courts (NCSC), which has studied the "landscape" of civil litigation,[13] has pointed out that "The traditional view of the adversarial system assumes the presence of competent attorneys zealously representing both parties," but at the same time, "[o]ne of the most striking findings in the Landscape dataset ... was the relatively large proportion of cases (76 percent) in which at least one party was unrepresented, usually the defendant."[14] The NCSC concluded that "The idealized picture of the adversarial system in which both parties are represented by competent attorneys who can assert all legitimate claims and defenses is, more often than not, an illusion."[15] Moreover, pro se litigants are ill equipped to proceed *alone*. In the case previously described, Judge Weinstein pointed out Mr. Floyd's limitations (which are common to most pro se litigants): he did not know the rules of civil procedure, he lacked a college degree or any law training, and he was completely unfamiliar with the procedural or substantive aspects of his claim (in this case, time barring of Title VII claims), including the technical rules of discovery.[16]

Additionally, the risk to fundamental fairness is substantially worsened in cases where the other side has counsel, as was the situation in Mr. Floyd's case. In a study of Virginia litigants, the NCSC found that when only plaintiffs are represented in civil cases, their win rate is 60 percent, but when both parties are represented, that figure drops to 20 percent, demonstrating that the asymmetry of representation is almost determinative.[17] Where such asymmetry exists, not only is there a massive power imbalance, but also a specific risk that the side with counsel will use the Rules of Evidence to block the pro se litigant's attempts to try her case.[18] Worsening the problem is that this asymmetry is present in so many critical civil cases: for instance, in housing court, tenants are typically represented less than 10 percent of the time,

12. Sessions v. Dimaya, 138 S. Ct. 1204 (2018) (Gorsuch, J., concurring) (citation omitted).
13. Civil Justice Initiative, The Landscape of Civil Litigation in State Courts (National Center for State Courts 2016), *available at* https://www.ncsc.org/~/media/Files/PDF/Research/CivilJusticeReport-2015.ashx.
14. National Center for State Courts, Call to Action: Achieving Civil Justice for All: Recommendations to the Conference of Chief Justices by the Civil Justice Improvements Committee (2016), at 9, *available at* https://www.ncsc.org/~/media/microsites/files/civil-justice/ncsc-cji-report-web.ashx.
15. *Id.* at 10.
16. *Id.*
17. John E. Whitfield, Summary Report on the Findings of the Virginia Self-Represented Litigant Study, National Center for State Courts (April 4, 2018), available at http://brls.org/wp-content/uploads/2018/03/Summary-Report-on-the-Findings-of-the-Virginia-Self-Represented-Litigant-Study-rev.pdf
18. See e.g. Cynthia Grey, *Reaching Out or Overreaching: Judicial Ethics and Self-Represented Litigants*, 27 J. Nat'l Ass'n Admin. L. Judiciary Iss. 1, 144 (2007), *available at* https://digitalcommons.pepperdine.edu/naalj/vol27/iss1/4/ (describing incidents where Rules of Evidence where used as "weapons"). In a number of states, recent modifications to the Guidelines for Civil Hearings Involving Self-Represented Litigants may address this concern, because they specify, "Judges shall adhere to the applicable rules of evidence, but may use their discretion, when permissible, to provide self-represented litigants the opportunity to meaningfully present their cases." *See*

"[A] litigant with a lawyer was up to 14 times more likely to prevail than a litigant proceeding pro se..."

compared to over 90 percent for landlords,[19] while in immigration cases, the government is always represented while fewer than half of immigrants have counsel.[20]

Providing counsel as a way of avoiding the negative consequences described by Justice Gorsuch and addressing the representational imbalance is buttressed by decades of empirical data demonstrating the effectiveness of counsel in ensuring accurate outcomes. For instance, a 2015 meta study compiled the results of dozens of previous studies and found that even in cases with below-average procedural complexity, a litigant with a lawyer was up to 14 times more likely to prevail than a litigant proceeding pro se, and for cases of average procedural complexity, 148 times more likely.[21] The study concluded:

> The findings of the meta-analysis are striking ... they reveal a potentially very large impact of lawyer representation on case outcomes. Under three different assumptions about how cases are matched with representation, a synthesis of available evidence reveals that expanding access to attorneys could radically change the outcomes of adjudicated civil cases. This potential impact is notable when lawyers' work is compared to that of nonlawyer advocates ..., and spectacular when compared to lay people's attempts at self-representation.

Similarly, many studies have been done demonstrating that providing counsel can save money by avoiding negative consequences.[22] Just recently, a study by a major corporate financial analysis company in New York City concluded that the City would realize $320 million in net savings by providing a right to counsel in eviction cases (through avoided shelter use, retention of affordable housing, and avoidance of unsheltered homelessness costs tied to law enforcement and healthcare),[23] and Philadelphia would see $45 million in savings via a $3.5 million investment.[24] That said, while cost considerations are relevant to a due-process right-to-counsel analysis,[25] they are not a determinative factor.[26] In fact, courts that have recognized a categorical right to counsel have not attempted to determine how much funding is necessary or where it will come from, leaving that question to be answered by their state legislatures (which typically respond soon afterwards by codifying the right and providing funding allocations).

While the basic human needs at stake, the proven efficacy of representation, and the potential for avoided consequences are justification enough, providing counsel also improves the administration of justice: it ensures more accurate decision making by having full information provided from both sides, and eliminates the headaches for judges and court staff caused by the waves of pro se questions and inadequate filings. Thus, appointment of counsel meets the needs and obligations of the judiciary, as well as the pro se litigants.

THE JUDICIARY'S DUTY TO ACT TO PROTECT PRO SE LITIGANTS

Section IV of this article outlines a number of different appointment-of-counsel powers potentially available to state courts, and gives many examples of where courts have utilized these powers to increase access to justice. In doing so, these courts have responded to the U.S. Supreme Court's strong suggestion that trial courts have an affirmative obligation to ensure justice and not simply wait for a litigant to raise an access issue. While the Court in *Turner v. Rogers* declined to recognize a right to counsel in the particular context of civil contempt proceedings

e.g., the guidelines in Delaware (Rule 4.3, https://courts.delaware.gov/Supreme/AdmDir/ad178guidelines.pdf) and Massachusetts (Rule 3.2, https://www.mass.gov/guides/judicial-guidelines-for-civil-hearings-involving-self-represented-litigants-with-commentary#-3.-guidelines-for-conducting-hearings-with-commentary-). See also Blair v. Maynard, 324 S.E.2d 391, 396 (W. Va. 1984). ("The fundamental tenet that the rules of procedure should work to do substantial justice, . . . commands that judges painstakingly strive to insure that no person's cause or defense is defeated solely by reason of their unfamiliarity with procedural or evidentiary rules. . . . The court should strive [] to ensure that the diligent pro se party does not forfeit any substantial rights by inadvertent omission or mistake. Cases should be decided on the merits, and to that end, justice is served by reasonably accommodating all parties, whether represented by counsel or not.")

19. *See, e.g.,* Brian Gilmore, *Opinion: Give Tenants Lawyers*, N.Y. TIMES, Oct. 9, 2018, *available at* https://www.nytimes.com/2018/10/09/opinion/evictions-homelessness-legal-aid.html (noting these statistics in the District of Columbia).
20. American Immigration Council, Access to Counsel in Immigration Cases, Sept. 28, 2016, *available at* https://www.americanimmigrationcouncil.org/research/access-counsel-immigration-court. See also NCSC, LANDSCAPE, at 31 ("While plaintiffs remained overwhelmingly represented by counsel [92%] in the *Landscape* dataset, the average representation for defendants was 26 percent...").
21. Rebecca Sandefur, *Elements of Professional Expertise: Understanding Relational and Substantive Expertise through Lawyers' Impact*, 80 AM. SOC. REV., 909-933 (2015), *available for purchase at* http://asr.sagepub.com/content/80/5/909.abstract.
22. *See, e.g.,* Laura Abel and Susan Vignola, *Economic and Other Benefits Associated with the Provision of Civil Legal Aid,* 9 SEATTLE J. SOC. JUST., 139 (2010) (meta study analyzing other studies), *available at* shttps://digitalcommons.law.seattleu.edu/sjsj/vol9/iss1/5/.
23. Stout Risius Ross, The Financial Cost and Benefits of Establishing a Right to Counsel in Eviction Proceedings Under Intro 214-A (Mar. 16, 2016), *available at* https://www2.nycbar.org/pdf/report/uploads/SRR_Report_Financial_Cost_and_Benefits_of_Establishing_a_Right_to_Counsel_in_Eviction_Proceedings.pdf.
24. *Economic Return on Investment of Providing Counsel in Philadelphia Eviction Cases for Low-Income Tenants,* PHILADELPHIA BAR ASS'N. NEWS, Nov. 13, 2018, *available at* https://philadelphiabar.org/page/NewsItem?appNum=2&newsItemID=1001829.
25. 452 U.S. at 28.
26. For instance, while *Lassiter* ruled against the right to counsel for termination of parental rights, the Court commented that the government's fiscal interest, while "legitimate," was "hardly significant enough to overcome private interests as important as those here." *Id.*

initiated by a private party, it considered "what specific safeguards the Constitution's Due Process Clause requires in order to make a civil proceeding fundamentally fair".[27] It then ultimately held that courts had to employ "substitute procedural safeguards" in civil contempt proceedings to ensure such fairness, such as ensuring the defendant understood what issues were critical.[28] This holding was not only an encouragement for state courts to look proactively at the fairness of civil proceedings, but was itself a proactive action on the Court's part: as noted by Justice Thomas's dissent, "Although the Court agrees that appointed counsel was not required in this case, it nevertheless vacates the judgment of the South Carolina Supreme Court on a different ground, which the parties have never raised" and which was "outside the question presented."[29]

Courts around the country have recognized this duty and harmonized it with the judicial rules of ethics. Model Rule 2.2, governing impartiality and fairness, was amended to add Comment [4], which states: "It is not a violation of this Rule for a judge to make reasonable accommodations to ensure pro se litigants the opportunity to have their matters fairly heard."[30] In 2013, the Indiana Court of Appeals relied on this change to sua sponte protect the rights of a vulnerable litigant through appointment of counsel.[31] In the case, after a company appealed a small-claims ruling in favor of a pro se plaintiff, the small-claims court sua sponte set a hearing to determine whether [plaintiff] needed the court to appoint appellate counsel. The company objected, arguing on appeal that the Indiana statute permitting discretionary appointment of counsel in any civil case[32] requires the party seeking counsel to request counsel and demonstrate efforts to find counsel. But the appellate court replied:

> We summarily reject KOA's suggestion that our small claims courts cannot sua sponte set a hearing to determine the propriety of appointing counsel for a small claims litigant who is faced with the daunting task of moving from the informal small claims forum to the complexities of appellate law. Here, the court held a hearing to address whether Matheison had sufficient means to defend the appeal. This hearing was informal, of course, but that is in the nature of all small claims proceedings.... As recognized below by the small claims court, Rule 2.2 of our Code of Judicial Conduct provides: "A judge shall uphold and apply the law, and shall perform all duties of judicial office fairly and impartially." Comment 4 to this rule explains further: "It is not a violation of this Rule for a judge to make reasonable accommodations to ensure pro se litigants the opportunity to have their matters fairly heard." This was precisely the course taken by the small claims court, which acted within its discretion by appointing appellate counsel. Finally, we are compelled to observe the obvious fact that KOA suffered no cognizable harm by the appointment of counsel. This equitable action by the court simply allowed KOA's opponent to be fairly heard on appeal.[33]

"[C]ourts have acted affirmatively to appoint counsel in order to protect the needs of particularly vulnerable litigants."

At other times, courts have acted affirmatively to appoint counsel to protect the needs of particularly vulnerable litigants. For example, a New Jersey Superior Court first held that a minor plaintiff in a domestic violence case was entitled to appointment of a guardian ad litem pursuant to various New Jersey court rules.[34] But then it went further to state that "Given plaintiff's age and status as a legal minor, this court sua sponte raised the issue of whether the court should implement any special procedures at final hearing in order to provide plaintiff with adult representation in the courtroom."[35] The court ultimately held that where such minor plaintiff was opposed by an adult defendant represented by counsel, the guardian ad litem had to be an attorney. To bolster its holding, the court explained:

> Family court is a court of equity. This court cannot and will not turn a blind eye to the inherent inequity of requiring an unrepresented minor to conduct a domestic violence hearing by herself against a represented adult. Parens patriae is the power of the State of New Jersey, by its judicial branch, to protect the interests of those who are incapable of protecting themselves. . . . The common law doctrine of parens patriae imposes upon the state the affirmative duty to protect the interests of minors.[36]

27. 564 U.S. at 444.
28. *Id.* at 447-48.
29. *Id.* at 450, 455 (Thomas, J., dissenting).
30. American Bar Association, Model Code of Judicial Conduct (2014), *available at* https://www.americanbar.org/groups/professional_responsibility/publications/model_code_of_judicial_conduct/model_code_of_judicial_conduct_canon_2/rule2_2impartialityandfairness/commentonrule2_2/.
31. KOA Properties LLC v Matheison, 984 N.E.2d 1255 (Ind. App. 2013).
32. Ind. Code § 34-10-1-2.
33. See also In re Appeal in Yavapai County Juvenile Action No. J-8545, 680 P.2d 146 (Ariz. 1984) (holding that due process required appointment of independent attorney for child in a particular case involving temporary custody and dependency, then adding that "the trial court shall appoint independent counsel, upon request of an interested party or sua sponte, where such counsel would contribute to promoting the child's best interest by serving an identifiable purpose such as advocating the child's position in the dispute or ensuring that the record be as complete and accurate as possible, or it shall state why such appointment is unnecessary"); In re Williams, 779 N.W.2d 286, 298 (Mich. Ct. App. 2009) (per curiam) (taking up question sua sponte of trial court's failure to appoint counsel for nonoffending parent in termination-of-parental-rights case as required by statute, and noting that "we cannot ignore a process that casts serious doubt on the integrity of the proceedings and would risk substantial injustice if allowed to stand unexamined").
34. 29 A.3d 752 (N.J. Super. Ch. 2010).
35. *Id* at 754.
36. *Id* at 756.

"[A] number of state courts have already declined to follow *Turner* under their state constitutions..."

The Supreme Court of New Jersey appeared to approve of this ruling, as it cited to it in support of the proposition that "Certain categories of litigants in civil, probate, and family court matters, such as minors or persons determined to be mentally incapacitated, are afforded special protections which may include appointment of counsel and/or a fiduciary."[37]

TOOLS FOR ACTION: SOURCES FOR MANDATORY AND DISCRETIONARY APPOINTMENT OF COUNSEL

The law provides more guarantees and authorization of appointed counsel than is commonly known among members of the bench and bar. This section covers the current status of the right to counsel (or authorization of appointment of counsel) across the 50 states and delves into the sometimes-surprising source of those rights. As a way of ensuring that trial court judges are aware of all of the situations in which they already must, can, and cannot appoint counsel for civil litigants, the American Bar Association (with support from the National Coalition for a Civil Right to Counsel) issued the *Directory of Law Governing Appointment of Counsel in Civil Cases*.[38] The Directory contains a separate entry for each state and is divided up by subject area for easy reference. For types of cases where the existing caselaw and statutory law is silent, trial court judges may find guidance by looking at how some sister states have handled the issue.

A. A RIGHT TO COUNSEL PURSUANT TO THE DUE PROCESS CLAUSE

In *Gideon v. Wainwright*,[39] the U.S. Supreme Court held that indigent criminal defendants in state court felony cases have a categorical right to appointed counsel, replacing the Court's previous rule from *Betts v. Brady*[40] that had made appointment of counsel a case-by-case determination. Although not explicitly mentioned in *Gideon*, the Court was apparently heavily influenced by the fact that, as Supreme Court Justice Byron White put it, "a succession of cases had steadily eroded the old rule and proved it unworkable."[41]

The Court has been less receptive to the idea of a right to counsel in civil cases, ruling against such a right for both termination-of-parental-rights cases (*Lassiter*, 1981)[42] and privately initiated child support civil contempt proceedings leading to incarceration (*Turner v. Rogers*, 2011).[43] However, state courts and legislatures have done much to fill in the gap. Indeed, *Lassiter* was roundly rejected by state courts, which *en masse* have recognized such a right post-*Lassiter* pursuant to their state constitutions due to their recognition of the seriousness of permanent severance of parental rights.[44] And while it is too soon to know what the overall national response to *Turner* will be, a number of state courts have already declined to follow *Turner* under their state constitutions or have recognized a right in situations outside the scope of *Turner* (i.e., where the government is the plaintiff).[45]

Moreover, it is the norm in most states to guarantee counsel (either by statute or state constitution) for parents in child welfare and termination-of-parental-rights proceedings, civil contempt, adults in guardianship cases, and those facing civil commitment due to mental health issues.[46] Additionally, as detailed by Russell

37. In re Civil Commitment of D.Y., 95 A.3d 157 (N.J. 2014).
38. See *infra* note 46.
39. 372 U.S. 335 (1963).
40. 316 U.S. 455 (1942).
41. Miranda v. Arizona, 384 U.S. 436, 532 (1986) (White, J., dissenting).
42. Lassiter v. Dep't of Soc. Servs., 452 U.S. 18 (1981).
43. Turner v. Rogers, 131 S. Ct. 2507 (2011).
44. John Pollock, *The Case Against Case-By-Case: Courts Identifying Categorical Rights to Counsel in Basic Human Needs Civil Cases,* 61 DRAKE L.J., at 781-83 (2013). Since this article was published, other state courts have followed suit. *See, e.g.,* In re T.M., 319 P.3d 338 (Hawaii 2014).
45. *See, e.g.,* Moore v. Moore, 11 N.E.3d 980 (Ind. Ct. App. 2014) (relying on In re Marriage of Stariha, 509 N.E.2d 1117 (Ind. Ct. App. 1987) to reaffirm right to counsel in civil contempt cases); DeWolfe v. Richmond, 76 A.3d 1019, 1029 (Md. 2013) (relying on Rutherford v. Rutherford, 464 A.2d 228 (Md. 1983), which had found right to counsel in civil contempt proceedings under Maryland Constitution, and stating that "[t]he principle set forth in *Rutherford*, that the due process right to counsel under Article 24 of the Declaration of Rights is broader than the right to counsel under Article 21 or the Sixth Amendment has been reaffirmed by the Court on numerous occasions"); State v. Churchill, 454 S.W.3d 328 (Mo. 2015) (citing to State ex rel. Family Support Div.-Child Support Enforcement v. Lane, 313 S.W.3d 182, 186 (Mo. App. 2010), for proposition that "for purposes of triggering a defendant's right to counsel under the due process clause, the distinction between a 'criminal' and a 'civil' proceeding is irrelevant if the outcome of the civil proceeding is imprisonment"); Commonwealth v. Diaz, 2018 Pa. Super. LEXIS 417 (Pa. Super. 2018) (holding that defendants facing incarceration for failure to pay court-imposed fees/fines have right to appointed counsel; court relied on caselaw from other jurisdictions, distinguished *Turner v. Rogers* since government was plaintiff, and noted that defendant was 'at risk of immediate incarceration"): In re McCoy-Jacien, 2018 VT 116 (2018) (stating "Respondent has a right to represented by an attorney at this hearing and if she cannot afford an attorney, she has the right to request that an attorney be appointed for her by this Court," and citing to Russell v. Armitage, 166 Vt. 392, 397 (1997)); State v. Stone, 268 P.3d 226 (Wash. App. 2012) (holding that due process requires appointment of counsel for those with legal financial obligations (LFOs) stemming from criminal convictions at LFO enforcement proceedings if incarceration is possibility, and extending Tetro v. Tetro, 544 P.2d 17, 19 (Wash. 1975), which had found right to counsel in civil contempt proceedings). *See also* Ashley Robertson, *Revisiting* Turner v. Rogers, 69 STAN. L. REV. 1541, 1552, 1555-56 (2017), *available at* https://review.law.stanford.edu/wp-content/uploads/sites/3/2017/04/69-Stan-L-Rev-1541.pdf (noting that twelve states provide right to counsel pursuant to statute or state constitutional law, while sixteen states had pre-*Turner* decisions recognizing federal constitutional right to counsel, and many of those are still in force).
46. For a survey of the right to counsel in many types of civil cases, see Pollock, *supra.* n. 44. For the latest status in all 50 states, visit http://www.civilrighttocounsel.org/map (click the "Right to Counsel Status" view). And for a bench-book-type guide outlining appointment of counsel laws for each state, see the American Bar Association's DIRECTORY OF LAW GOVERNING APPOINTMENT OF COUNSEL IN CIVIL CASES, available at http://ambar.org/civilrighttocounsel.

Engler's article in this issue, there have been recent groundbreaking decisions recognizing a constitutional right to counsel in proceedings such as private child guardianships, involuntary adoptions, and dependency/termination-of-parental-rights cases. And in 2019, a state trial court in New Jersey recognized a constitutional right to counsel for those facing driver's license suspension due to inability to pay child support, holding that suspension of a driver's license was a "consequence of magnitude such that "[B]oth due process and fundamental fairness" required appointed counsel.[47] This was the first court anywhere to recognize a right to counsel in the driver's license suspension context.

B. RULEMAKING AUTHORITY: A HIGH COURT TOOL FREQUENTLY USED TO ESTABLISH NEW RIGHTS TO COUNSEL IN CRITICAL CIVIL CASES

State high courts have the rulemaking authority, and frequently have used such authority, to establish a right to counsel where such right does not already exist by virtue of statute or constitutional decision.[48] Some rights to counsel established in this manner, such as those established in Michigan, New Jersey, Pennsylvania, Tennessee, and Utah, are somewhat limited in scope or impact.[49] But the rights established in five particular states are powerful examples of how this power can be used to correct the asymmetry of representation in critical types of civil cases, and the story of how these some of rules have been funded should provide encouragement to other courts looking to pursue a similar path.

"[T]he Delaware Supreme Court in 2002 modified its Rules of Family Court to provide for appointment of counsel independency and termination-of-parental-rights cases."

- In Delaware, the Delaware Supreme Court in 2002 modified its Rules of Family Court to provide for appointment of counsel in dependency and termination-of-parental-rights cases. Rule 206 required the court to "notify parents in writing that they may be represented by counsel," while Rule 207 added, "[a] parent determined by the Court to be indigent may have counsel appointed by the Court during the parent's initial appearance on a petition, or such other time as deemed appropriate by the Court." While this language might seem to have made appointment discretionary, the high court clarified, "In 2002, the Family Court Civil Procedure Rules were amended to provide for mandatory appointment of an attorney in the case of an indigent party if so requested by that party...."[50] Creation

47. Kavadas v. Martinez, No. MER-L-1004-15 (N.J. Super. Ct. 2019), *analysis and linked opinion at* http://civilrighttocounsel.org/major_developments/1363.
48. *See, e.g.,* Schoenvogel ex rel. Schoenvogel v. Venator Grp. Retail, Inc., 895 So. 2d 225, 234 (Ala. 2004) (recognizing authority derived from Alabama Constitution "to make and promulgate rules governing the administration of all courts and rules governing practice and procedure in all courts," but noting that power is shared with Legislature); Ariz. Const., Art. V, §5, Cl. 5 ("the Supreme Court shall have . . . power to make rules relative to all procedural matters in any court"); Turner v. Kentucky Bar Ass'n, 980 S.W.2d 560, 562 (Ky. 1998) ("[T]he making of rules and practice in courts, as well as out of courts, in matters pertaining to the rights of individuals under the law, is currently possessed by courts and judges").
49. For instance, in Michigan, while M.C.L.A. § 722.904(2)(e) provides that a court must appoint "an attorney or guardian ad litem" for minors seeking a judicial waiver of the parental consent requirement to have an abortion, Mi. R. Spec. P. MCR 3.615(F) and (G) provides for the right to appointment of both an attorney and a guardian ad litem upon request by the minor. According to Legal Services of South Central Michigan (LSSCM), typically only one lawyer is appointed. In New Jersey, N.J. R. Ch. Div. Fam. Pt. R. 5:8A states, "In all cases where custody or parenting time/visitation is an issue, the court may, on the application of either party or the child or children in a custody or parenting time/visitation dispute, or on its own motion, appoint counsel on behalf of the child or children." The rule adds, "Counsel may, on an interim basis or at the conclusion of the litigation, apply for an award of fees and costs with an appropriate affidavit of services, and the trial court shall award fees and costs, assessing same against either or both of the parties." The Comment to the rule states, "These rules are not intended to expand the circumstances when such appointments are to be made," but no statute providing a similar appointment mechanism for children could be located. In Pennsylvania, Pa. R. Civ. P. No. 1915.11(a) provides that in actions for custody, partial custody, or visitation of children, "[t]he court may on its own motion or the motion of a party appoint an attorney to represent the child in the action. The court may assess the cost upon the parties or any of them or as otherwise provided by law." In Texas, Tex. R. Civ. P. 308a permits a court to appoint an attorney to represent a person claiming violation of an order "for child support or possession of or access to a child." The fee for the attorney is a discretionary matter for the court, and is adjudged against the party who violated the order. In Tennessee, Tn. R. Juv. P. Rule 36(b) specifies that a right to counsel at "all stages of the proceedings" includes the appellate stage. Additionally, Tn. R. S. Ct. Rule 13 § 1(d)(2)(C) and (d)(2)(D) refer to appointing a guardian ad litem for children in abuse/neglect and termination proceedings. Both sections of this rule go on to say, "The child . . . shall not be required to request appointment of counsel," which is a likely reference to the requirement that the GAL is an attorney, as Tenn. R. Juv. P., Rule 2 specifies that a GAL is a "lawyer appointed by the court." In private custody proceedings, Tenn. Sup. Ct. Rule 40A(3)(a) provides that "the court may appoint a guardian ad litem when the court finds that the child's best interests are not adequately protected by the parties and that separate representation of the child's best interests is necessary. Such an appointment may be made at any stage of the proceeding." Section 40A(1)(c) defines "guardian ad litem" as "a licensed attorney appointed by the court to represent the best interests of a child or children in a custody proceeding." Finally, in Utah, Utah R. Juv. P. Rule 60(c) provides that for judicial bypass of the parental consent requirement for a minor to have an abortion, the court shall "consider appointing an attorney under Utah Code Section 78A-6-1111 and/or the Office of Guardian ad Litem under Section 78A-6-902. If the court appoints an attorney, it may also appoint the Office of Guardian ad Litem."
50. However, in 2015, the Court amended the rules again, this time to state in Rule 206 that

    > (a) A parent, determined by the Court to be indigent, may have counsel appointed by the Court during the parent's initial appearance on a petition, or at such other time as deemed appropriate by the Court.
    > (b) In considering the appointment of counsel, the Court shall

"[Delaware's] small size made it easier for the judiciary, legislature, executive branch, and bar to all work together."

of such a rule inevitably leads to questions about how the appointed attorneys are compensated. According to a staff attorney for the Delaware Family Court, family court judges saw the need for appointment of counsel prior to the termination phase and spoke to justices on the Delaware Supreme Court. The Delaware Supreme Court spoke to the Delaware Bar Foundation, which began funding appointments of counsel. A year or so later, the General Assembly began to provide funding as part of the Judiciary budget, apparently in conjunction with the passing of the court rule. The staff attorney commented the state's small size made it easier for the judiciary, legislature, executive branch, and bar to all work together.[51]

- In Idaho, a statute governing Child Protective Act proceedings states, "If the parent or guardian is without counsel, the court shall inform them of their right to be represented by counsel and to appeal from any disposition or order of the court."[52] This statute provides only a right to privately retained counsel.[53] However, the Idaho Court of Appeals has noted that "Idaho Juvenile Rule 37 grants the parent a right to court-appointed counsel if the parent is financially unable to pay for legal representation during the CPA proceedings."[54] According to Legal Counsel for the Idaho Supreme Court, appointments are the responsibility of the local public defender that contracts with each county, and the counties have always been on board with the idea that they are responsible for the costs of "court personnel."[55]
- In Kentucky, a court rule provides that in a civil suit against a prisoner, "If for any reason the prisoner fails or is unable to defend an action, the court shall appoint a practicing attorney as guardian ad litem, and no judgment shall be rendered against the prisoner until the guardian ad litem shall have made defense or filed a report stating that after careful examination of the case he or she is unable to make defense."[56] According to the Kentucky Office of General Counsel, an attorney-guardian ad litem appointed pursuant to the rule is paid depending on the type of action initiated against the prisoner. If it is a type of action for which there is a statutory provision for attorney's fees (like a dependency or termination of parental rights), then that statute governs. If there is no governing statute, then Ky. Stat. 453.060(2) specifies the fee is taxed as costs and paid by the plaintiff.[57]
- In Rhode Island, a court rule specifies that upon a filing of a petition for termination of parental rights, "A preliminary hearing shall be held on said petition for the court to: ... Appoint an attorney to represent the parent(s) and any person having such care or custody of such child when said parent(s) or custodian are unable to afford such representation.…"[58] The Rhode Island Supreme Court has noted the "lack of a constitutional mandate" to provide counsel for parents, but has pointed out the court rule guarantees appointed counsel for the parent.[59]
- Finally, in Washington State, there is no absolute right to counsel for minors in dependency proceedings. However, King County,[60] Hell's Canyon Circuit,[61] and Benton/Franklin County[62] provide for mandatory appointment of counsel for some children in dependency cases. These rules codified what had been an existing practice that grew over time, with the support of the counties paying for the appointed counsel.[63]

C. SUPERVISORY AUTHORITY: ANOTHER STATE SUPREME COURT POWER TO ESTABLISH A RIGHT TO COUNSEL TO "ADMINISTER JUSTICE"

Called at various times "supervisory authority,"[64] "superintending power,"[65] or "administrative authority,"[66] all state supreme courts have power to administer the affairs of the court system.[67] As with rulemaking authority, this power is broad and

consider: the degree to which the loss of parental rights are at stake; the risk of an erroneous deprivation of those rights through the dependency proceedings; and the interest of DSCYF as to the ultimate resolution.

(c) In the event a parent is entitled to appointment of counsel and declines court appointed counsel, such waiver shall be noted on the record or in the Court's Order.

This change obviously makes appointment of counsel discretionary, not mandatory. For more on this issue in Delaware, see John Pollock, *The Guiding Hand of Counsel: An Examination of Right-to-Counsel Law in Delaware*, Delaware Law., Summer 2019, *available at* http://civilrighttocounsel.org/uploaded_files/252/Guiding_Hand_of_Counsel__Pollock_-_Delaware_Lawyer_.pdf.

51. Email from Ellie Torres, Director of Legal Affairs, Family Court of the State of Delaware, to John Pollock (Aug. 6, 2013) (on file with author).
52. Idaho Code Ann. § 16-1613(1).
53. In re Doe, 365 P.3d 420, 426 (Ida. App. 2015).
54. *Id*.
55. Phone conversation with Michael Henderson, Legal Counsel, Idaho Supreme Court (Aug. 20, 2013).
56. Ky. R. Civ. P. 17.04.
57. Phone conversation with Marc Theriault, Kentucky Office of General Counsel (Oct. 6, 2011).
58. R.I. R. Juv. P. Rule 18(c)(4).
59. In re Bryce T., 764 A.2d 718, 721 (R.I. 2001).
60. King County LJu 2.4 (children 12 and over).
61. Hell's Canyon Circuit HCCLR 24 .
62. Benton/Franklin LJuCR 9.2(A)(1)(e) (children 9 and over who are not appointed a guardian ad litem).
63. See Hells Canyon Circuit, Resolution and Order Adopting HCCLR 24, Appointing Counsel to All Abused and Neglected Children (June 27, 2013) (on file with author) (stating that judges in years prior adopted policy of appointing counsel for all children "with the support of the Board of County Commissioners").
64. State v. Thurman, 846 P.2d 1256, 1266 (Utah 1993 ("[i]n Utah, the supreme court has, in addition to common law power, . . . inherent supervisory authority over all courts of this state.")
65. *See, e.g.,* S.D. Const. Article V, sec. 12 ("The Supreme Court shall have general superintending powers over all courts").
66. *See, e.g.,* Pa. Const. Art. V, § 10 ("The Supreme Court shall exercise general supervisory and administrative authority over all the courts and justices of the peace").
67. In some cases, the authority may derive from somewhere other than the state constitution. For instance, the Oregon Supreme Court has observed that "Although Article VII (Original), section 5, of the Ore-

can be used to address the crisis of pro se litigants by providing counsel even where the legislature has not acted. Minnesota is a prime example of judicial supervisory authority providing the civil right to counsel.

Minnesota courts have construed Article III (the separation-of-powers provision of the Minnesota Constitution), together with the description of judicial powers outlined in Article VI, to include the grant of a strong supervisory power to the Minnesota Supreme Court.[68] The state's highest court has described its supervisory power in the following manner:

> The fundamental functions of the court are the administration of justice and the protection of the rights guaranteed by the constitution. . . . It follows that the court has not only the power, but the responsibility as well, to make any reasonable orders, rules or regulations which will aid in bringing this about.[69]

In 1979,[70] the Minnesota Supreme Court first flexed this supervisory power to hold there is a right to counsel for indigent defendants in paternity suits. The defendant, an eighteen-year-old indigent high school student without legal representation, signed an agreement with the county attorney that admitted his paternity, waived his rights as the father, and consented to future adoption.[71] According to the defendant, the county attorney told him that unless he signed this agreement, he would be charged with forcible rape.[72] Upon reaching the Minnesota Supreme Court, the issue presented was "whether an indigent defendant in a paternity action is entitled to court-appointed counsel where the complainant mother is represented by the county attorney."[73] The court answered in the affirmative, holding that counsel must be provided to indigent defendants in all paternity adjudications when the complainant is represented by the county attorney.[74]

Although the defendant argued that due process and/or equal protection required the appointment of counsel in these paternity cases, the court declined to decide the constitutional issues, finding that its conclusion in the case "renders resolution of such a dubious contention unnecessary."[75] The court instead relied on its supervisory power, the purpose of which is "to ensure the fair administration of justice."[76] The court found that justice could only be served in these types of paternity cases if it exercised its supervisory power to require appointed counsel, stating that "absent . . . a legislative approach and solution, it appears . . . that the accurate determination of paternity, given the present adversary nature of the proceeding, is best promoted by a system that ensures the competent representation of both sides to the controversy."[77] Although the court did not apply *Lassiter*, it essentially relied on the *Lassiter* factors (from *Matthews v. Eldridge*, 424 U.S. 319, 96 S. Ct. 893 (1976)) in finding a right to counsel: the significant risk of erroneous deprivation, the strength of the interest of the child and putative father (including a risk of incarceration for the latter), and the pressure on the state to establish paternity to avoid losing federal funding.

"[C]ounsel must be provided to indigent defendants in all paternity adjudications when the complainant is represented by the county attorney"

Importantly, the state supreme court rejected the argument that the right to counsel could not exist in paternity actions due to their classification as civil proceedings.[78] Conceding that paternity actions are civil in nature, the court nevertheless stated, "We are not persuaded, however, that the 'civil' label attached to paternity adjudications dictates that the appointment of defense counsel be denied."[79] The court turned to its own jurisprudence, stating that in recent years it had given "increased attention to the right to counsel in noncriminal proceedings," especially those like driver's license revocations in which important constitutional rights could be lost through an adversarial proceeding.[80] Applying that reasoning to paternity actions, the court found that the defendant's substantial interests in a paternity action weigh in favor of finding that a right to counsel should apply.[81] The court pointed to the multitude of different interests at stake:

> The paternity defendant, of course, has a substantial interest in the accuracy of the adjudication. He has a direct financial interest, for as an adjudicated father he will be ordered to contribute to the support of the child throughout its minority. Similarly, in light of recent case law, the adjudicated father's estate can also be burdened by the child's claims to inheritance, workers' compensation benefits, and insurance proceeds.... In addition to his financial

gon Constitution, establishes the office of the Chief Justice of the Supreme Court, it does not specify the Chief Justice's duties." Smith v. Washington County, 180 Or.App. 505, 518 (Ct. App. 2002). However, Or. Rev. Stat. § 1.002 lays out the various rulemaking powers of the Supreme Court of Oregon. It states that the Chief Justice shall "exercise administrative authority and supervision over the courts of this state consistent with applicable provisions of law and the Oregon Rules of Civil Procedure," and that the court can "make rules and issue orders appropriate to that exercise." Or. Rev. Stat. Ann. § 1.002(1)(a).

68. Gary E. O'Connor, *Rule(make)r and Judge: Minnesota Courts and the Supervisory Power*, 23 WM. MITCHELL L. REV. 605, 606-7, 626-27 (1997), *available at* http://open.mitchellhamline.edu/cgi/viewcontent.cgi?article=1997&context=wmlr.
69. In re Petition for Integration of Bar of Minn., 12 N.W.2d 515, 518 (Minn. 1943).
70. Hepfel v. Bashaw, 279 N.W.2d 342, 348 (Minn. 1979).
71. *Id.* at 343.
72. *Id.*
73. *Id.*
74. *Id.* at 348.
75. *Id.* at 344.
76. *Id.* at 348.
77. *Id.* at 347.
78. *Id.* at 344.
79. *Id.* at 344.
80. *Id.*
81. *Id.* at 345–46.

"[T]he right to counsel applies to an indigent person facing a civil contempt charge for failure to make child support payments."

interests, the defendant, if found to be the father, is also indirectly threatened with loss of liberty, since incarceration may be imposed for criminal nonsupport under § 609.375.... Finally, the social stigma resulting from an adjudication of paternity cannot be ignored.[82]

The court did remind that its holding "in no way affects the right of indigent defendants in other civil actions to court-appointed counsel."[83]

Although the Minnesota Supreme Court did not address compensation for appointed attorneys, it clearly expected the Legislature to respond to its ruling. For instance, it stated, "Assuming that the legislature in addressing the questions presented to us in these cases determines that the adversary system for determining paternity should be retained and that counsel should be provided for indigent defendants, the question of establishing standards of eligibility for appointment of counsel in these noncriminal proceedings is, we acknowledge, clearly a legislative function."[84] And indeed a statute that went into effect one year after this case was decided provides that the public defender represents defendants in these cases.[85]

Five years later, the Minnesota Supreme Court used its supervisory authority to hold that the right to counsel applies to an indigent person facing a civil contempt charge for failure to make child support payments.[86] As with the prior case on paternity, the court held that "we do not deem it necessary" to rule on the due process right to counsel.[87] The court reiterated the reasoning from the paternity case that given the adversarial nature of the proceedings, the right to counsel established the best method to protect the important interests at hand.[88] Furthermore, it noted that "[an] indigent facing civil contempt has a greater need for a court-appointed attorney than a paternity defendant."[89] It also said that "the reasoning applies equally as well to those cases where the custodial parent has private counsel as to where the county attorney represents such parent."[90] The court again did not address compensation, but simply said, "The local units of government shall determine how to provide such counsel in accordance with local practice."[91]

D. DISCRETIONARY APPOINTMENT STATUTES/ CASELAW: A BROAD AUTHORITY TO APPOINT COUNSEL WHERE JUSTICE REQUIRES IT

Statutes in Illinois,[92] Indiana,[93] Kentucky,[94] Missouri,[95] New

82. *Id.*
83. *Id.*
84. *Id.* at 348.
85. Minn. Stat. § 257.69.
86. Cox v. Slama, 355 N.W.2d 401, 403 (Minn. 1984).
87. *Id.* at 403.
88. *Id.*
89. *Id.*
90. *Id.*
91. *Id.* at 404.
92. 735 ILCS § 5/5-105(g) ("A court, in its discretion, may appoint counsel to represent an indigent person, and that counsel shall perform his or her duties without fees, charges, or reward.").
93. Ind. Code Ann. § 34-10-1-2 is the lengthiest discretionary appointment statute by far:

> "(a) This section may not be construed to prohibit a court from participating in a pro bono legal services program or other program that provides legal services to litigants:
> (1) without charge; or
> (2) at a reduced fee.
> (b) If the court is satisfied that a person who makes an application described in section 1 [IC 34-10-1-1] of this chapter does not have sufficient means to prosecute or defend the action, the court:
> (1) shall admit the applicant to prosecute or defend as an indigent person; and
> (2) may, under exceptional circumstances, assign an attorney to defend or prosecute the cause.
> (c) The factors that a court may consider under subsection (b)(2) include the following:
> (1) The likelihood of the applicant prevailing on the merits of the applicant's claim or defense.
> (2) The applicant's ability to investigate and present the applicant's claims or defenses without an attorney, given the type and complexity of the facts and legal issues in the action.
> (d) The court shall deny an application made under section 1 of this chapter if the court determines any of the following:
> (1) The applicant failed to make a diligent effort to obtain an attorney before filing the application.
> (2) Applicant is unlikely to prevail on the applicant's claim or defense.
> (e) All officers required to prosecute or defend the action shall do their duty in the case without taking any fee or reward from the indigent person.
> (f) The reasonable attorney's fees and expenses of an attorney appointed to represent an applicant under section 1 of this chapter shall be paid from the money appropriated to the court:
> (1) appointing the attorney, if the action was not transferred to another county; or
> (2) from which the action was transferred, if the action was transferred to another county."

94. Ky. Stat. § 453.190(1) ("A court shall allow a poor person residing in this state to file or defend any action or appeal therein without paying costs, whereupon he shall have any counsel that the court assigns him").
95. Mo. Stat. Ann. § 514.040 ("[I]f any court shall . . . be satisfied that the plaintiff is a poor person, and unable to prosecute his or her suit, and pay all or any portion of the costs and expenses thereof . . . the court may assign to such person counsel, who, as well as all other officers of the court, shall perform their duties in such suit without fee or reward as the court may excuse; but if judgment is entered for the plaintiff, costs shall be recovered, which shall be collected for the use of the officers of the court.") In terms of the definition of a "poor person," "Aged, infirm, lame, blind or sick persons, who are unable to support themselves, and when there are no other persons required by law and able to maintain them, shall be deemed poor persons." Mo. Ann. Stat. § 205.590.

York,[96] Tennessee,[97] Texas,[98] and Virginia[99] provide trial courts with the broad authority to appoint counsel in any civil case. These statutes are generally part of a state's *in forma pauperis* provisions, and are a leftover from English statutory law that guaranteed appointment of counsel for indigent plaintiffs.[100] The statutes do not create a right to appointed counsel, and the case-by-case approach has serious flaws.[101] Nonetheless, these statutes provide opportunities for judges to intervene where a litigant stands little chance to receive justice without counsel.

The statutes themselves, and interpretive caselaw, provide some minimal guidance as to when appointments are appropriate. In Virginia, the consideration is whether a party would be "unconstitutionally be denied either access to the Court system or a significant civil right,"[102] whereas in Missouri, the court should "examine the plaintiff's petition to see if it is patently and irreparably frivolous or malicious on its face."[103] In Indiana, those seeking appointed counsel must demonstrate "exceptional circumstances"[104] (an extremely high bar for a pro se litigant to meet) and are denied if they are "unlikely to prevail" in the case.[105] The factors a court may consider in Indiana include: "(1) The likelihood of the applicant prevailing on the merits of the applicant's claim or defense. (2) The applicant's ability to investigate and present the applicant's claims or defenses without an attorney, given the type and complexity of the facts and legal issues in the action."[106] In New York, the power to appoint is "broad … in the proper case,"[107] and a "proper case" is one where "indigent civil litigants face grievous forfeiture or loss of a fundamental right."[108] A finding of merit in New York "does not call for a showing of substantial probability of success," but instead requires that court be satisfied a claim is not frivolous.[109] Finally, in Texas, "Some courts of appeals ... have concluded that the discretionary boundary of section 24.016 is similar to a court's inherent power to appoint counsel—counsel may be appointed in cases in which exceptional circumstances exist."[110]

"The statutes themselves... provide some minimal guidance as to when appointments are appropriate."

One question that has arisen is compensation for the attorneys appointed pursuant to these statutes, and specifically whether

96. N.Y. C.P.L.R. § 1102(a) ("The court in its order permitting a person to proceed as a poor person may provide an attorney.") Additionally, N.Y. C.P.L.R. § 3408 provides that any foreclosure defendant appearing pro se at the mandatory conference is presumed to have filed a motion for appointment of counsel under § 1102.
97. Tenn. Code Ann. § 23-2-101 ("At the return term of the process, the court may appoint counsel for the plaintiff in actions prosecuted in the manner prescribed for paupers, and also for the defendant, if the defendant makes an oath that, owing to the defendant's poverty, the defendant cannot employ counsel.").
98. Tex. Govt. Code § 24.016 ("A district judge may appoint counsel to attend to the cause of a party who makes an affidavit that he is too poor to employ counsel to attend to the cause"); Tex. Govt. Code Ann. § 26.049 ("The county judge may appoint counsel to represent a party who makes an affidavit that he is too poor to employ counsel.").
99. Va. Code Ann. §17.1-606 ("[A] poor person may be allowed by a court to sue or defend a suit therein, without paying fees or costs, whereupon he shall have, from any counsel whom the court may assign him, and from all officers, all needful services and process, without any fees, except what may be included in the costs recovered from the opposite party.").
100. Scott F. Llewellyn and Brian Hawkins, *Taking the English Right to Counsel Seriously in American "Civil Gideon" Litigation*, 45 U. MICH. J.L. REFORM 635, 641, 649-650 (2012), *available at* https://repository.law.umich.edu/mjlr/vol45/iss3/4/ (describing 11 Hen. 7, c. 12, the English statute guaranteeing counsel for "paupers," and its connection to U.S. state statutes). Pennsylvania courts have suggested the statute is still in force in that state in a discretionary manner. In 1985 the Court of Common Pleas for Berks County held that the Act of 11, Henry VII, chapter 12 "remains in effect as a part of the Common Law of Pennsylvania," and that the statute "requires us, sitting with the discretionary power in this limited area of a Chancellor of England, to determine whether or not he should have free counsel appointed for him." Zerr v. Scott, 39 Pa. D. & C.3d 459, 461 (Ct. Com. Pl. 1985) (citing *Report of the Judges*, 3 Binney 617 (1808)). While acknowledging that "there may be some question as to whether the above-mentioned statute meets our present day concepts of constitutionality (it concerns itself with poor plaintiff's [sic] but ignores poor defendants, for example)," the court identified the progression of legislative and judicial determinations that keep this English chapter in force in Pennsylvania and concluded that it was, in fact, still effective. The court accepted that it was "fundamental that no lay person can adequately represent himself pro se in civil litigation. For a lay person to have meaningful access to our courts, he must have a skilled lawyer to represent him." *Id.* at 462. *See also* Thompson v. Garden Court, Inc., 419 A.2d 1238, 1240 (PA. Super. 1978) (11 Hen. 7 "is part of the common law of Pennsylvania"); *In re Community Legal Services, Inc.*, 43 Pa. D. & C.2d 51 (1967) ("The right to appointed counsel in civil cases was hallowed at common law. Henry VII's Statute of 1495, 11 Henry VII, c. 12, established the right of poor civil plaintiffs to proceed without prepayment of costs or security and with appointed counsel. That statute was adopted by the Colonies. See e.g., the Papers of Thomas Jefferson, II, 628.320, 658-61, and was respected in their courts, e.g., Morris, Select Cases of the Mayor's Court of New York City, 1674-1784, pp. 176-77 (1935). Indeed, the statute has been adopted in Pennsylvania: Report of the Judges, 3 Binney 593, 617 (1808); Roberts, Digest of British Statutes in Force in Pennsylvania, pages 116- 17 (2d ed., 1847)").
101. In fact, this author wrote an article about such flaws. See Pollock, *supra.* n. 44.
102. Com. ex rel. McDonnell v. Financing Alternatives, Inc., 79 Va. Cir. 14 (Va. Cir. Ct. 2009).
103. State ex rel. Coats v. Lewis, 689 S.W.2d 800, 806 (Mo. Ct. App. 1985).
104. Ind. Code § 34-10-1-2(b).
105. Ind. Code § 34-10-1-2(d)(2).
106. Ind. Code § 34-10-1-2(c).
107. Matter of Smiley, 330 N.E.2d 53, 58 (N.Y. 1975).
108. Morgenthau v. Garcia, 561 N.Y.S.2d 867, 869 (N.Y. Sup. Ct. 1990).
109. Application of Romano, 438 N.Y.S.2d 967, 970 (N.Y. Sur. Ct. 1981).
110. Gibson v. Tolbert, 102 S.W.3d 710, 712-13 (Tex. 2003).

"In Kentucky, uncompensated appointments in criminal cases are unconstitutional..."

they can be compelled to serve without compensation. Three states provide for the possibility of payment: Indiana (from the court system),[111] Missouri (from the defendant, if the plaintiff prevails),[112] and Virginia (from the opposing side, if successful).[113] The Illinois Supreme Court has observed in the criminal case context that appointed attorneys cannot necessarily expect compensation:

> The defense of indigents is one of the traditional services that members of the bar have provided upon court request, for to defend the indigent is to assist the court in the business before it and is therefore an obligation and a duty of those in the profession to both the court and the public. On this basis or the related ground that acceptance of a license to practice law includes consent to appointment and uncompensated service to indigents, a large majority of courts have held attorneys appointed to represent indigents have no right to compensation in the absence of a statute or court rule requiring compensation.[114]

However, the court noted that it had previously provided for compensation in "the unusual circumstances of [a] case where appointed counsel were suffering extreme hardships from loss of private practice and income, and were compelled to expend large out-of-pocket sums in the course of the trial."[115] In Kentucky, uncompensated appointments in criminal cases are unconstitutional (although there is no apparent ruling on appointments under the discretionary civil appointment statute),[116] and in Missouri, the high court has said that "The courts of this state have no inherent power to appoint or compel attorneys to serve in civil actions without compensation."[117] Conversely, in Tennessee, counsel is not entitled to payment because "Where a lawyer takes his license he takes it burthened with these honorary obligations."[118] Finally, New York has conflicting caselaw on whether the court can compensate appointed counsel.[119]

Beyond these statutes authorizing appointment for any civil case, a number of states have statutes or court rules granting discretion[120] in certain circumstances. These include Alaska (indigent parent of child with a disability),[121] California (any case where military service member is party and does not appear or does not have counsel),[122] Delaware (for state employees when they are defendants in cases related to their employment),[123] Minnesota (complainants in discrimination cases),[124] and New Jersey (any case where military service member is party and does not appear or does not have counsel).[125]

111. Ind. Code Ann. § 34-10-1-2(f) ("(f) The reasonable attorney's fees and expenses of an attorney appointed to represent an applicant under section 1 of this chapter shall be paid from the money appropriated to the court: (1) appointing the attorney, if the action was not transferred to another county; or (2) from which the action was transferred, if the action was transferred to another county."). Requiring the court to compensate the appointed attorney creates a serious conflict of interest, since courts will not want to often dip into their own budget.
112. Mo. Stat. Ann. § 514.040 (attorney "shall perform their duties in such suit without fee or reward as the court may excuse; but if judgment is entered for the plaintiff, costs shall be recovered, which shall be collected for the use of the officers of the court.").
113. Va. Code Ann. §17.1-606 (no fees paid by indigent person for attorney services "except what may be included in the costs recovered from the opposite party.").
114. People v. Sanders, 317 N.E.2d 552 (Ill. 1974).
115. *Id*.
116. Bradshaw v. Ball, 487 S.W.2d 294 (Ky. 1972).
117. State ex rel. Scott v. Roper, 688 S.W.2d 757 (Mo. 1985).
118. House v. Whitis, 64 Tenn. 690 (1875).
119. Compare People v. Richardson, 603 N.Y.S.2d 700 (1993) ("The inherent power of the court to assign counsel to indigent persons includes the power to assign counsel with or without compensation") with *Garcia*, 561 N.Y.S.2d 867, 868-69 ("[W]hile the court has discretion to assign counsel under CPLR 1102, if it were to assign such counsel in this civil action, there is no mechanism by which the court may direct the county, the state or any other agency to pay his fee.").
120. There are a few statutes that require appointment for certain categories of litigants. For instance, Md. R. 2-202 and 3-202 require a circuit court and district court, respectively, to appoint counsel when a person under disability is sued and has no guardian or." In West Virginia, W. Va. R. Civ. P. Rule 17(c) requires a court to "appoint a discreet and competent attorney at law as guardian ad litem for an infant, incompetent person, or convict not otherwise represented in an action, or shall make such other order as it deems proper for the protection of the infant, incompetent person, or convict." Finally, as mentioned earlier, a Kentucky court rule, Ky. R. Civ. P. 17.04, requires the appointment of an attorney ad litem in any civil suit against a prisoner where the prisoner fails or is unable to defend an action.
121. Alaska Stat. § 44.21.410(a)(10). Given that "child with a disability" is defined in this provision as having the "meaning given in AS 14.30.350," and given that AS 14.30.350 is within an article on education for children with disabilities, it is possible that this discretion is limited to educational matters.
122. Cal Mil & Vet Code § 402(d).
123. 10 Del. C. § 3925 ("Any public officer or employee, in a criminal or civil action against the person arising from state employment, shall be entitled to petition the court for a court-appointed attorney to represent the person's interests in the matter. If the judge, after consideration of the petition, examination of the petitioner and receipt of such further evidence as the judge may require, determines that the petition has merit, the judge shall appoint an attorney to represent the interests of such public officer or employee. The court-appointed attorney shall represent such person at all stages, trial and appellate, until the final determination of the matter, unless the attorney is earlier released by such person or by the court. The court may first appoint an attorney from the Department of Justice. If the court determines that the Department is unable to represent such public officer or employee, the court may appoint an attorney from the Office of Defense Services in criminal actions only, and in civil actions may appoint an attorney licensed in this State. This section shall also apply to all federal courts within this State.").
124. Minn. Stat. § 363A.33 Subd. 4.
125. N. J. Stat. Ann. § 38:23C-6.

E. INHERENT AUTHORITY TO APPOINT: A WELL-ESTABLISHED POWER FOR TRIAL COURT JUDGES TO ENSURE JUSTICE FOR INDIVIDUAL LITIGANTS

While not every state supreme court has explicitly spoken on whether a court has inherent authority to appoint civil counsel, those that have taken up the question have generally found that trial courts have such inherent power to promote the administration of justice—although they may differ on whether courts can appoint unwilling attorneys or compensate appointed attorneys from state funds. As with the discretionary appointment statutes, trial courts exercising their inherent power do so on a case-by-case basis and do not create a right to counsel, but in theory this can nonetheless be useful in addressing the need in individual cases involving basic human needs.

- The Utah Supreme Court clarified the scope of this power in 2005.[126] It referred to *Bothwell v. Republic Tobacco Co.*,[127] a well-known federal district court case, to provide a thorough analysis of the inherent authority possessed by courts to appoint counsel and the manner in which that general authority relates specifically to the appointment power. *Bothwell* had commenced its analysis by outlining three separate categories of inherent judicial authority: "(1) powers necessary to maintain independence from other branches of government, (2) powers necessary to exercise all other vested powers, and (3) powers to ensure 'the pursuit of a just result.'"[128] *Bothwell* then concluded that, although the power to appoint counsel falls most readily into the third category, the appointment power actually furthers all of the functions covered by the three categories.[129] *Bothwell* then made the broad pronouncement that, while there may not be a constitutional right to counsel in the context of a civil dispute, "counsel nevertheless may be necessary in a particular civil proceeding to ensure fairness and justice in the proceeding and to bring about a fair and just outcome."[130] The Utah Supreme Court cited the above reasoning outlined in *Bothwell* with approval, and went on to hold that a court may appropriately appoint counsel to represent even an absent *non*-indigent civil defendant.[131]
- The Wisconsin Supreme Court has held "a circuit court possesses inherent authority to appoint counsel for indigent litigants ... circuit courts possess the inherent power to appoint counsel for the representation of indigents and that the power of appointment 'is not tied to any constitutional right that the indigent may have to counsel.'"[132]
- The Montana Supreme Court recently reminded trial courts of this power where a mother whose child was subject to a permanent guardianship proceeding sought appointed counsel. The trial court refused on the grounds that it lacked statutory authority.[133] The Montana Supreme Court first ordered the trial court to respond to the petitioner's arguments that there is a due-process right to counsel. When the trial court failed to do so, the high court ordered the trial court to appoint pro bono counsel for the mother and reminded the trial court that it always has the inherent authority to appoint pro bono counsel in appropriate cases.[134]

"[A] court may appropriately appoint counsel to represent even an absent non-indigent civil defendant."

- The Louisiana Supreme Court touched on inherent authority in a case about whether a family court had authority to order the Department of Health and Human Resources to pay the attorneys' fees to an indigent parent's attorney:

> Among the purposes for which inherent judicial power may be exerted are the issuance of needful orders in aid of a court's jurisdiction and the regulation of the practice of law. In aid of these purposes, a court has the inherent power to require an attorney to represent an indigent, with or without compensation, as an obligation burdening his privileges to practice and to serve as an officer of court. The court's power to furnish counsel for indigents necessarily includes the power, when reasonably necessary for effective representation, to issue an order requiring the state, its appropriate subdivision, department, or agency, to provide for the payment of counsel fees and necessary expenses.
>
> Consequently, even in the absence of legislative or executive authorization, a court may, when reasonably necessary, appoint counsel for an indigent and award the attorney a reasonable fee to be paid from a source which the court deems appropriate. In deciding whether the state or one of its subdivisions, departments, or agencies should pay the fee, a court must act with comity toward the other branches of government and with sensitive regard for the concepts of functional differentiation and the checks and balances implied by the separation of powers doctrine. Important considerations for a court taking such action include the following: the structure and scheme of existing legislation which may be applied by analogy, the ability of an entity to budget and finance such expenditures, the entity's responsibility for incurring the need for legal services or for administering the program out of which the need arises, and the existence of any custom or informal practice regarding the payment of such fees.[135]

- In a case before it, the Supreme Court of California found that an indigent prisoner deprived of both personal attendance and representation by counsel in a suit threatening his property interest was essentially denied access to the courts.[136] The court then addressed the remedies available to secure the

126. Burke v. Lewis, 122 P.3d 533, 538-539 (Utah 2005).
127. 912 F. Supp. 1221 (D. Neb.1995).
128. Bothwell v. Republic Tobacco Co., 912 F. Supp. 1221, 1226 (D. Neb.1995) (citation omitted).
129. *Id.* at 1227.
130. *Id.* (citation omitted).
131. *Burke,*122 P.3d at 539.
132. Piper v. Popp, 482 N.W.2d 353 (Wis. 1992).
133. Couturier v. Thirteenth Judicial District, 363 Mont. 416 (2011).
134. *Id.*
135. In re Johnson, 475 So. 2d 340, 341-42 (La. 1985).
136. Payne v. Superior Court, 17 Cal. 3d 908 922- 23 (Cal. 1976).

"The court recognized that appointment of counsel might be the only solution in some instances."

right of access to the court and held that the trial court has discretion to determine how access should be achieved in a particular case.[137] The court recognized that appointment of counsel might be the only solution in some instances.[138] The court then provided guidelines to explain how the trial court should proceed in determining when to appoint counsel:

> The access right . . . comes into existence only when a prisoner is confronted with a bona fide legal action threatening his interests. If a prisoner is merely a nominal defendant with nothing of consequence at stake, no need emerges for an appointed attorney. Thus, before appointing counsel for a defendant prisoner in a civil suit the trial court should determine first whether the prisoner is indigent. If he is indigent and the court decides that a continuance is not feasible, it should then ascertain whether the prisoner's interests are actually at stake in the suit and whether an attorney would be helpful to him under the circumstances of the case. The latter determination should be comparatively simple: if the prisoner is not contesting the suit against him, or any aspect of it, there is no need for counsel; but if he plans to defend the action and an adverse judgment would affect his present or future property rights, an attorney should be appointed.[139]

Six years later, the Supreme Court of California revisited this issue in considering the right of an indigent prisoner to court-appointed counsel to defend him in a wrongful death action.[140] After reaffirming the guidelines previously established, the court addressed whether the prisoner had a threatened interest given that he had no assets to pay any judgment for damages.[141] The court recognized that interpreting the guidelines to include the expectation of remote future property interests would significantly expand the right to appointed counsel.[142] However, it held that a trial court must nevertheless consider whether the defendant's future economic fortunes would be affected by a judgment against him.[143] In addition, the court found that, in considering the ability of counsel to be helpful to the prisoner, the court must look to the issue of damages, not just liability.[144] Thus, the court concluded that the trial court should not have ignored that the codefendants, jointly and severally liable, would likely attempt to assign all responsibility on the prisoner.[145] Given these findings, the court returned the matter to the trial court for reconsideration of the question of the prisoner's access to the courts.[146]

- The Arizona Supreme Court has held that the court "has authority to require a lawyer's services, even on a pro bono basis, to assist in the administration of justice,"[147] although it added in a later opinion that "a county is not liable for fees and disbursements to counsel assigned to [an indigent party] in the absence of statute regulating such compensation."[148]
- The Oklahoma Supreme Court commented in the context of a divorce case that "A trial court may certainly appoint counsel to represent an indigent in a civil matter if it sees fit, but it is entirely discretionary."[149] Despite this supportive language, no decisions appeared to expound on a court's discretion in this area, and it is unclear whether the court was referring to the power to appoint pursuant to due process or inherent authority.
- Finally, the Arkansas Supreme Court has held that it will appoint counsel "in those cases where the appellant is able to make a substantial showing that he is entitled to relief and that he cannot proceed without counsel."[150] Arkansas courts have subsequently considered the appointment of counsel in cases involving parole and prisoner's rights violations, although all the cases are unpublished and lack precedential value.[151] In a later case, the Arkansas Court of Appeals recognized a trial court's inherent authority to appoint an attorney ad litem in a guardianship case (the litigant had her own retained counsel, but the trial court appointed a separate attorney ad litem due to a belief that her retained attorney might have a conflict of interest) to "command an orderly, efficient, and effective administration of justice."[152]

Additionally, there are several instances where intermediate courts have passed on the question of inherent authority:

> The South Carolina Court of Appeals held that "Courts have the inherent power to do all things reasonably necessary to insure that just results are reached to the fullest extent possible. Accordingly, we hold that this power must

137. *Id.* at 924.
138. *Id.*
139. *Id.* (citations omitted).
140. Yarbrough v. Superior Court, 216 Cal. Rptr. 425 (1985).
141. *Id.* at 587-88.
142. *Id.*
143. *Id.* at 588.
144. *Id.*
145. *Id.*
146. *Id.*
147. Scheehle v. Justices of the Supreme Court of the State of Arizona, 120 P.3d 1092, 1102 (Ariz. 2005).
148. McDaniels v. State, 158 P.2d 151, 156 (Ariz. 1945).
149. Kiddie v. Kiddie, 563 P.2d 139, 143 (Okla. 1977).
150. Virgin v. A.L. Lockhart, 702 S.W.2d 9 (Ark. 1986) (per curiam).
151. *See, e.g.,* Munson v. Ark. Dep't of Corr. Sex Offender Screening & Risk Assessment, 2008 WL 4277403 (Ark. 2008) (unpublished) (denying counsel in sex-offender-assessment matter); Pitts v. Heffley, 1998 WL 84061 (Ark. 1998) (unpublished) (denying counsel in prison disciplinary matter); Yisrayl v. Huckabee, 1998 WL 746566 (Ark. 1999) (unpublished) (in prison religious-freedom case, court denies counsel and notes that "A showing of substantial merit requires the appellant to set forth facts upon which the claim or cause is based in such a manner that it can be objectively determined by this court that there is substantial merit in the cause appellant seeks to further.").
152. Kuelbs v. Hill, 379 S.W.3d 47, 51 (Ark. App. 2010).

necessarily include the power to appoint lawyers to serve without compensation where it appears reasonably necessary for the courts to do justice."[153] The case involved two attorneys who were appointed to represent an inmate in a state penitentiary who had raised several civil actions against the state concerning his incarceration. The attorneys contested their appointment by claiming, first, that the inmate did not enjoy the right to counsel as a matter of law, and second, that the court could not require the attorneys to represent an indigent civil plaintiff without compensation. The attorneys claimed that the court appointment deprived them of constitutional rights pursuant to the Fifth and Fourteenth Amendments of the United South Carolina Constitution. In rejecting these claims, the South Carolina Court of Appeals further noted that the appointed lawyers may "be compensated from public funds, thus transferring the burden to the state where it belongs."[154]

The Michigan Court of Appeals, rejecting due process and equal protection as legitimate bases for a trial court to appoint counsel for a prisoner in the prosecutor's appeal of a parole board's decision to grant parole, turned to inherent power to appoint counsel.[155] After noting the statute governing the parole appellate process was silent on appointment of counsel for the prisoner, the court held that

> [A] circuit court has broad authority to facilitate the fair and orderly disposition of cases and controversies [such that] it has discretion to appoint counsel for indigent inmates responding to an appeal of a Parole Board decision. . . . Included within a court's inherent discretionary powers is the power to appoint counsel to represent indigent litigants to render justice in the face of exceptional circumstances. . . . As noted, a circuit court has broad authority to manage its own affairs in order to achieve the orderly and expeditious disposition of cases. . . . An exercise of the court's inherent power may be disturbed only upon a finding that there has been a clear abuse of discretion. . . . The circuit court in this case did not abuse its discretion by exercising its authority to appoint appellate counsel for Hill. . . . [T]he circuit court found that appointing appellate counsel to represent Hill was important for the administration of justice. While no single factor is outcome-determinative when deciding whether to appoint counsel in such cases, in this case the circuit court noted that Hill was involved in a complex parole proceeding. The complexity of the parole proceeding required review of an extensive Department of Corrections file dating back to 1998 that included multiple reports. The appeal also required the circuit court to determine whether the Board adhered to the constitution, statutes, and a myriad of administrative rules and regulations. . . . . Moreover, this case involved an inmate who had a learning disability. It was therefore a reasonable and proper exercise of the circuit court's discretion to conclude that appointing appellate counsel would facilitate the efficient and fair administration of justice.[156]

"The Americans with Disabilities Act (ADA) requires courts to provide reasonable accommodations for litigants with disabilities."

F. THE AMERICANS WITH DISABILITIES ACT: A REQUIREMENT FOR APPOINTED COUNSEL WHERE NECESSARY TO ACCOMMODATE VULNERABLE LITIGANTS

The Americans with Disabilities Act (ADA) requires courts to provide reasonable accommodations for litigants with disabilities.[157] With regard to litigants with cognitive, intellectual, or developmental disabilities, the ADA in some situations requires the appointment of counsel as a reasonable accommodation.

The ADA's definition of "disability" is extremely broad: a "person with a disability" is defined as someone who "(1) has a physical or mental impairment that substantially limits that person in one or more major life activities of such individual; (2) has a record of such a physical or mental impairment; or (3) is regarded as having such a physical or mental impairment."[158] Title II of the ADA then provides that no disabled individual shall be excluded from participation in services, programs, or activities of a public entity based upon his or her disability,[159] and the definition of "public entity" includes "any state or local government, any department, agency, special purpose district, or other instrumentality of the state or states or local government."[160] All state court systems, as state governmental agencies, must ensure all of their services, programs, and activities are available to qualified individuals with disabilities.[161]

To prove that a public program or service violated the ADA, a person need only show that (1) she is a "qualified individual with a disability," (2) she was either excluded from participation in or denied the benefits of a public entity's services, programs, or activities, or was otherwise discriminated against by the public entity, and (3) such exclusion, denial of benefits, or discrimination was by reason of her disability.[162] Upon receiving a request for accommodation, the public entity is required to undertake a fact-specific investigation to determine what constitutes a reasonable accommodation, and "Mere speculation that a suggested accommodation is not feasible falls short of the reasonable accommodation requirement; the Acts create a duty to gather sufficient informa-

153. Dibble v. State, 310 S.E.2d 440, 442 (S.C. App. 1983).
154. *Id.* at 443.
155. In re Parole of Hill, 827 N.W.2d 407, 419 (Mich. App. 2012).
156. *Id.* at 422.
157. 42 U.S.C § 12132; Tennessee v. Lane, 541 U.S. 509 (2004).
158. 42 U.S.C. §§ 12102(1).
159. 42 U.S.C § 12132.
160. 42 U.S.C.A. 12131(1).
161. Galloway v. Superior Court of District of Columbia, 816 F. Supp. 12, 19 (D.D.C. 1993). A trial is undoubtedly a service, program, or activity within the meaning of Title II of the ADA. Shotz v. Cates, 256 F.3d 1077, 1080 (11th Cir. 2001).
162. 42 U.S.C. § 12132 (§202).

"[A] California federal court held that all immigration detainees with cognitive disabilities are entitled to appointment of a 'qualified representative'..."

tion from the disabled individual and qualified experts as needed to determine what accommodations were necessary."[163]

The ADA regulations require furnishing "auxiliary aids and services" where necessary to afford an individual with a disability an equal opportunity to participate in, and enjoy the benefits of, a service, program, or action conducted by a public entity.[164] In fact, the regulation provides, "a public entity shall furnish appropriate auxiliary aids and services where necessary to afford an individual with a disability an *equal opportunity to participate in*, and *enjoy the benefits of*, a service, program, or activity conducted by a public entity" (emphasis added).[165]

The only exceptions to the ADA's reasonable accommodation requirements are where compliance would result in a "fundamental alteration" or an "undue burden."[166] Given that courts in all states appoint counsel for some classes of civil litigants (the most common being parents in child welfare cases and individuals facing civil commitment or guardianship for mental health issues), it is hard to construe appointment of counsel as a "fundamental alteration" or the imposition of the cost of one attorney as an "undue burden." Additionally, some federal courts have held that "although budgetary concerns are relevant to the fundamental alteration calculus, financial constraints alone cannot sustain a fundamental alteration defense."[167] And in addressing cost issues in the employment context under Title I of the Rehabilitation Act, "courts have focused on the big picture, namely the overall costs to society stemming from lack of funding, rather than simply the dollars required to pay for legal services."[168]

One federal court has rejected cost considerations specifically in the context of appointing legal representation as a reasonable accommodation. In 2013, a California federal court held that all immigration detainees with cognitive disabilities are entitled to appointment of a "qualified representative" under the Rehabilitation Act, which is the equivalent of the ADA that is applicable to federal courts.[169] In its ruling, the court explicitly rejected the concept that provision of such was either a "fundamental alteration" or an "undue burden":

> [T]he plaintiffs argued, and Judge Gee agreed, that legal representation would not be a "fundamental alteration" to a removal proceeding because attorneys already practice in immigration court.... Although having appointed counsel would offer immigrants with mental disabilities an advantage over immigrants without mental disabilities, *U.S. Airways, Inc. v. Barnett* demonstrates that preferences are sometimes necessary to achieve the "basic equal opportunity goal" of the Rehabilitation Act, and "[b]y definition any special 'accommodation' requires the employer to treat an employee with a disability differently, i.e. preferentially."
>
> [T]he government also argued that finding and paying for qualified representatives for immigrants with severe mental disabilities would create an undue burden on the government. Even if the cost of appointing counsel were great, however, the Ninth Circuit found that under the ADA, when "[f]aced with[ ] a conflict between financial concerns and preventable human suffering, we have little difficulty concluding that the balance of hardships tips decidedly in plaintiffs' favor." Furthermore, the number of immigrants who are incompetent due to mental disabilities is small compared to the overall population of immigrants in removal proceedings. Therefore, appointment of counsel for this vulnerable group would constitute only a "small fraction of [the agency's] annual expenditures." Also, providing qualified representatives could make removal proceedings more efficient, and thus save the government money.[170]

The above statutory law, regulations, and caselaw notwithstanding, the states of California,[171] Connecticut,[172] Florida,[173] Hawaii,[174]

163. Duvall v. Kitsap, 260 F.3d 1124, 1139 (9th Cir. 2001), citing Wong v. Regents of the University of California, 192 F.3d 807, 818 (9th Cir. 1999).
164. 28 C.F.R. 35.160.
165. 28 C.F.R. 35.160(b)(1).
166. 28 C.F.R. § 35.130(b) (7) (stating that public entity has burden of proving these exceptions apply).
167. Pashby v. Delia, 709 F.3d 307, 323-24 (4th Cir. 2013) (joining Third, Ninth, and Tenth Circuits).
168. Lisa Brodoff et al., *The ADA: One Avenue to Appointed Counsel Before a Full Civil Gideon*, 2 SEATTLE J. FOR SOC. JUST. 609, 621 (2004), *available at* http://digitalcommons.law.seattleu.edu/cgi/viewcontent.cgi?article=1459&context=sjsj.
169. Franco-Gonzalez v. Holder, CV 10-02211, 2013 U.S. Dist. LEXIS 186258 (C. D. Cal. 2013).
170. Leslie Wolf, *After* Franco-Gonzalez v. Holder: *The Implications of Locating a Right to Counsel Under the Rehabilitation Act*, 23 S. CAL. REV. L. & SOC. JUST. 329 (2014), *available at* https://gould.usc.edu/students/journals/rlsj/issues/assets/docs/volume23/Winter2014/5.Wolf.pdf.
171. *See* http://www.courts.ca.gov/14362.htm ("[T]he court cannot provide free legal counsel as a medical accommodation."). *See also* Access and Fairness Advisory Committee, Judicial Council of California, *Questions and Answers About Rule of Court 1.100 for Court Users, available at* http://www.courts.ca.gov/documents/access-fairness-QandA-for-persons-with-disabilities.pdf ("[T]he court cannot provide free legal counsel as a medical accommodation. (For specific cases, free legal counsel is mandated by law to provide legal assistance, but it is not an accommodation for a disability.)").
172. *See* https://jud.ct.gov/ADA/ADA_Accomm_Request_Procedure.pdf ("the ADA does not require the Judicial Branch to provide services or devices of a personal nature, such as . . . legal representation").
173. *See* http://www.flcourts.org/core/fileparse.php/243/urlt/ADA-Model-Request-Form.pdf ("Examples of aids or services the Florida State Courts System cannot provide as an accommodation under Title II of the Americans with Disabilities Act include: . . . Legal counsel or advice.").
174. *See* http://www.courts.state.hi.us/services/ada/ada_accommodations ("Required accommodations do not include . . . attorney services or legal research and advice.").

Michigan,[175] New York,[176] Tennessee,[177] Utah,[178] and Wisconsin[179] have taken the position on their ADA webpages that counsel will never be appointed as a reasonable accommodation. These blanket refusals to consider appointment of counsel are arguably a facial violation of the ADA, since there has been no consideration of "the particular individual's need when conducting its investigation into what accommodations are reasonable."[180] California's law was challenged on this very ground in federal court, although the Ninth Circuit ultimately dismissed the case on mootness grounds.[181]

Conversely, the Washington State court system has adopted a rule that explicitly authorizes state trial courts to appoint counsel as a reasonable accommodation,[182] the Washington Administrative Office of the Courts has promulgated guidance as to the rule,[183] and the Washington State Office of Administrative Hearings has adopted a similar rule to cover administrative proceedings.[184] Additionally, federal courts have articulated standards for when to appoint counsel under the ADA.[185] Finally, in Oregon, the Attorney General was asked, "In determining whether a 'process interpreter' accommodation is required, may the court consider whether the party is represented by counsel in the matter?" In response, the Attorney General opinion stated:

> Depending on the facts related to a request for a "process interpreter," a court may determine that representation by counsel is a reasonable accommodation. The individualized nature of an accommodation request cannot be avoided, however, by adopting a blanket policy of appointing legal counsel in all cases where a "process interpreter" is requested …
>
> Historically, the appointment of qualified legal counsel has been sufficient to assist individuals in understanding and participating in the judicial proceedings. Counsel serves the function of advising clients about the judicial process …
>
> Because of the significant role of attorneys in advising clients with mental impairments about judicial proceedings as well as the legal and ethical obligations on attorneys who represent impaired clients, appointment of counsel (at no cost to the unrepresented party) may provide "other effective means of communication," see *Motto v. City of Union City*, 177 FRD at 309-310, or an appropriate "modification of policies and procedures" in cases where the mentally impaired party does not appear to be able to understand the judicial proceedings.[186]

"These blanket refusals to consider appointment of counsel are arguably a facial violation of the ADA..."

175. A PowerPoint posted on the Michigan State Court Administrative Office website (http://courts.mi.gov/Administration/SCAO/Offices Programs/Documents/access/ADA-PowerPoint.pdf) has a slide that states, "Services the Court Is Not Required to Provide . . . : Legal counsel or advice."
176. *See* https://www.nycourts.gov/accessibility/courtusers_guidelines.shtml ("Some examples of aids and services the court system cannot provide as an ADA accommodation include such things as legal counsel or legal advice").
177. *See* https://www.tncourts.gov/administration/human-resources/ada-policy ("The Tennessee judicial branch ADA program cannot provide assistance that would change the basic nature of the judicial system. . . . The appointment of an attorney to represent a party to a civil case cannot be required.").
178. *See* https://www.utcourts.gov/admin/ada/ ("The court cannot disregard the law to grant a request for an accommodation. For example, the court cannot extend the statute of limitations for filing an action for a person with a disability. The court also cannot provide a free attorney as an accommodation.").
179. *See* https://wicourts.gov/services/public/docs/faqs.pdf ("Required accommodations do not include: attorney services or legal research and advice").
180. *Duvall* 260 F.3d at 1139.
181. In Sidiakina v. Bertoli, No. 12-17235 (9th Cir. 2014), a pro se litigant denied counsel sued the California Judicial Council in federal court, then appealed to the Ninth Circuit after the district court dismissed the case on abstention grounds, but after the Ninth Circuit appointed counsel for the litigant so that she could argue her case before that court, the Ninth Circuit ultimately dismissed the case due to mootness.
182. Wash. Gen. R. 33(a)(1).
183. Washington Administrative Office of the Courts, *Frequently Requested Accommodations*, *available at* http://www.courts.wa.gov/content/publicUpload/ADA%20Access%20and%20Accommodation%20Program/Frequently%20Requested%20Accommodations.docx.
184. Chapter 10-24 WAC: Access to OAH Facilities and Services, *available at* https://apps.leg.wa.gov/wac/default.aspx?cite=10-24.
185. *See, e.g.,* Taylor v. Team Broadcast, 2007 U.S. Dist. LEXIS 29581 (D.D.C. 2007) (unpublished) (plaintiff argued defendant company violated ADA by firing him when he had sleep apnea; court denies summary judgment for defendant based on genuine dispute of fact, then says relevant factors for appointment of counsel, which it borrows from Title VII appointment standards, are "(1) the ability of the plaintiff to afford an attorney; (2) the merits of the plaintiff's case; (3) the efforts of the plaintiff to secure counsel; and (4) the capacity of the plaintiff to present the case adequately without aid of counsel"); Cole v. Orleans Parish Sheriff's Office, 2011 U.S. Dist. LEXIS 125141 (E.D. La. 2011) (also borrowing from Title VII standard); Blatch v. Hernandez, 360 F.Supp.2d 595 (S.D.N.Y. 2005) ("Where . . . the tenant is incapable of representing himself or herself competently, comprehending the proceedings or securing appropriate representation for himself or herself, the Constitution requires that NYCHA do more than make the deprivation determination on the basis of its Law Department's one-sided presentation. At a minimum, NYCHA is obligated to investigate appropriately the question of whether the tenant's mental faculties are sufficient to enable the tenant, personally or by a representative secured by the tenant, to present the tenant's side of the issue. Where that investigation indicates that the tenant lacks such ability, due process requires that NYCHA reach out to a suitable representative, possibly including a competent family member, or appoint or seek judicial appointment of an advocate or guardian, before conducting the hearing and proceeding to a determination adverse to the tenant.").
186. Oregon Department of Justice, General Counsel Division, *Opinion Request OP 1998-7* (Nov. 12, 1998), *available at* http://www.doj.state.or.us/wp-content/uploads/2017/06/op1998-7.pdf.

"Supporting the principle of a right to counsel is not equivalent to stating that there is a constitutional right to such representation."

OTHER OPPORTUNITIES FOR THE JUDICIARY TO ADVANCE THE APPOINTMENT OF COUNSEL

A. JUDGES SUPPORTING RIGHT TO COUNSEL IN THE PUBLIC DISCOURSE

Besides issuing rulings and enacting court rules on the subject of right to counsel, Judges and justices at all levels of state courts have been frequent commentators on the issue of access to counsel, and the right to counsel, for indigent civil litigants. While judges have at times laid out their beliefs about right to counsel within a case opinion,[187] this section focuses on situations where judges and justices have spoken out in other fora. Such work is part of "improvement of the law," which is activity encouraged by the Model Code of Judicial Conduct[188] and is no different from working to address such systemic problems as overly high filing fees, the need for interpreters, or access to justice in rural areas.

As a threshold matter, it is necessary to dispense with the suggestion that speaking out on right to counsel risks "prejudging" an issue that may come before a court (i.e., the constitutional right to counsel) is based on a misunderstanding of what endorsing a right to counsel means. Supporting the principle of a right to counsel is not equivalent to stating that there is a constitutional right to such representation. And in fact, judges who remain on the sidelines while at the same time witnessing the grave injustice of pro se litigants being deprived of basic human needs due primarily to their opponents being represented by counsel may be unwittingly aiding that injustice: "impartiality" must not become a shield against the responsibility of judges to ensure the proper administration of justice.

It is also worth understanding what is meant in modern times by the term "civil right to counsel," because a misunderstanding of its actual scope and approach might raise concerns. The current national movement to establish a right to appointed counsel in civil cases has three basic prongs: 1) a focus on basic human needs cases, with the determination of what constitutes a "basic human need" resting with stakeholders in each jurisdiction;[189] 2) a focus on indigent litigants; and 3) an incremental approach that seeks to establish new rights one at a time in one jurisdiction at a time.[190] This nuanced, three-prong aspect of the civil-right-to-counsel movement is the reason advocates have largely eschewed the term "civil Gideon," a term that evokes the desire to establish a right to counsel for all civil cases everywhere all at once.

Additionally, contrary to what some might believe, pursuing a right to counsel is not antithetical to exploring other types of legal reforms, such as simplification of court processes and forms, the establishment of self-help centers, authorization of nonlawyer advocates, or the use of technology.[191] New England Law/Boston Professor Russell Engler, who also contributes to this issue of *Court Review*, has written frequently about how all of these different approaches, including the right to counsel, fit along an access-to-justice "continuum."[192] Some judges/justices

187. For instance, Russell Engler's article in this issue addresses the powerful concurrence in Frase v. Barnhart, 840 A.2d 114 (Md. 2003), which was joined by then-Chief Judge Robert Bell. He also notes that sixteen retired Washington State judges filed an amicus brief supporting a right to counsel in King v. King, 174 P.3d 659 (Wash. 2007) (en banc).
188. The American Bar Association's Model Code of Judicial Conduct Rule 3.7(A) specifies, "Subject to the requirements of Rule 3.1, a judge may participate in activities sponsored by organizations or governmental entities concerned with the law, the legal system, or the administration of justice." The Commentary to Rule 3.1 adds, "To the extent that time permits, and judicial independence and impartiality are not compromised, judges are encouraged to engage in appropriate extrajudicial activities. Judges are uniquely qualified to engage in extrajudicial activities that concern the law, the legal system, and the administration of justice, such as by speaking, writing, teaching, or participating in scholarly research projects."
189. The focus on basic human needs cases is consistent with the American Bar Association's 2006 resolution calling for states and local governments to establish a right to counsel in such cases. American Bar Association, *Resolution 112A* (Aug. 2006), *available at* http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_06A112A.authcheckdam.pdf. As examples of basic human needs it listed shelter, safety, sustenance, health, and child custody, but there are others that would fit this description, such as education, immigration, and civil incarceration (such as what can occur when a person is unable to pay court fees/fines or child support). One reason that Resolution 112A did not mention civil incarceration is because it was assumed that the U.S. Supreme Court's prior decision in Lassiter v. Dep't of Soc. Servs., 452 U.S. 18 (1981) provided the basis for a federal constitutional right to counsel when physical liberty is at stake. However, that notion was partially dispelled by *Turner v. Rogers*, 564 U.S. 431 (2011) (declining to find right to counsel for parent incarcerated for civil contempt due to inability to pay child support, where government did not initiate contempt). So, in 2018 the ABA enacted another resolution calling for a right to counsel whenever physical liberty is at stake regardless of the nature of the proceeding or the plaintiff. American Bar Association, *Resolution 114* (2018), *available at* https://www.americanbar.org/content/dam/aba/images/abanews/mym2018res/114.pdf.
190. For more on this incremental approach, see John Pollock and Michael Greco, *It's Not Triage if the Patient Bleeds Out*, 161 U. PENN. L.R. 40, 50-53 (2012), *available at* https://scholarship.law.upenn.edu/penn_law_review_online/vol161/iss1/11/. Also, to see the most current expansion efforts, which will demonstrate the types of cases currently focused on and the scope of eligible litigants, visit http://www.civilrighttocounsel.org/map (click the "Recent Activity " view).
191. However, it is critical to ensure that these alternatives are subjected to the same rigorous testing as full representation to ensure that they actually deliver meaningful results. The fact that they are cheaper and can serve many people should not be the end of the inquiry.
192. Professor Engler's articles include *Toward a Context-Based Civil Right to Counsel Through Access to Justice Initiatives*, 40 CLEARINGHOUSE REV. J. OF POVERTY L. AND POL'Y 196-209 (2006), *available at* https://www.povertylaw.org/clearinghouse/articles/toward-context-based-civil-right-counsel-through-access-justice-initiatives; *Connecting Self-Representation to Civil Gideon: What Existing Data Reveal about When Counsel Is Most Needed*, 37 FORDHAM URB. L.J. 37

have written about this as well.[193] The need for a continuum is clear. For one, the right-to-counsel movement, even if completely successful, will for the most part[194] only meet the needs of indigent litigants, and many litigants who are not technically "indigent" are nonetheless priced out of the legal market. Additionally, there will always be some types of civil matters that will fall outside the auspices of "basic human needs." Services along the continuum may help meet these needs.

Turning to examples of judicial leadership in the public fora, it is a little-known fact that it was a judge, Robert W. Sweet of the Southern District of New York, who reignited the modern civil right-to-counsel movement with a groundbreaking law review article in 1998.[195] In his article, Judge Sweet coined the term "civil *Gideon,*" and laid out many of the basic principles that drive modern efforts. For instance, Judge Sweet quoted his colleague, Judge Jack Weinstein, for the principle that "Accessibility to the courts on equal terms is essential to equality before the law. If we cannot provide this fundamental protection through the courts, most of the rest of our promises of liberty and justice of [sic] all remain a mockery for the poor and oppressed."[196] He also observed how a civil right to counsel already exists in many of our European counterpart countries and commented that he "believe[d] there is a constitutional requirement to meet what appears to be an almost universal right among developed nations. Such representation will guarantee the diversity of interests that are essential to a fully developed justice system."[197] Finally, he demonstrated the broad public support by pointing out that at the time, 71% of Americans favored using tax dollars to fund a right to counsel (as well as the fact that 79% believed such a right already existed). Judge Sweet ended by calling for the reversal of *Lassiter*, "just as the Supreme Court in *Gideon* in 1963 reversed its holding in *Betts v. Brady* twenty-one years earlier and found for a right to counsel in all criminal proceedings."[198]

"71% of Americans favored using tax dollars to fund a right to counsel..."

Yet Judge Sweet's article was not the earliest judicial support for a right to counsel. Justice Earl Johnson, Jr., who served on the California Court of Appeals, wrote a famous concurrence/dissent in 1985 that made constitutional and common-law arguments supporting a right to counsel in civil cases.[199] He has continued to write frequently on the subject for decades, often pointing out how the United States lags behind its European counterparts with respect to a civil right to counsel.[200] That fact has been a powerful tool for right-to-counsel advocacy across the country. Furthermore, many other judicial leaders at the state supreme court,[201]

(2010), *available at* https://ir.lawnet.fordham.edu/ulj/vol37/iss1/2/; and *Reflections on a Civil Right to Counsel and Drawing Lines: When Does Access to Justice Mean Full Representation by Counsel, and When Might Less Assistance Suffice?*, 9 SEATTLE J. FOR SOC. JUST. 97 (2010), *available at* https://digitalcommons.law.seattleu.edu/sjsj/vol9/iss1/4/.

193. *See, e.g.,* Jon D. Levy, Associate Justice, Supreme Judicial Court of Maine, *The World Is Round: Why We Must Assure Equal Access to Civil Justice*, 62 ME. L. REV. 561, 575 (2010), *available at* https://digitalcommons.mainelaw.maine.edu/cgi/viewcontent.cgi?article=1227&context=mlr ("A spectrum approach to civil legal assistance is responsive to two fundamental realities. First, public financial support for civil legal assistance is critically important and should be invested in targeted ways that account for the degree of legal assistance that is needed to effectively respond to the legal problem that is presented. Second, the public's failure to adequately invest in civil legal assistance will, over the long-term, result in increased social and economic costs for everyone.").
194. The right to counsel established for San Francisco tenants facing eviction has no income limit. See http://sfelections.sfgov.org/sites/default/files/Documents/candidates/Legal_Text_No_Eviction_Without_Representation.pdf. However, this is by far the exception to the rule.
195. Robert W. Sweet, *Civil Gideon and Confidence in a Just Society*, 17 YALE L. & POL'Y REV. 503 (1998), *available at* https://digitalcommons.law.yale.edu/ylpr/vol17/iss1/21/.
196. *Id.* at 506 (quoting Jack B. Weinstein, *The Poor's Right to Equal Access to the Courts*, 13 CONN. L. REV. 651, 655 (1981)).
197. *Id.* at 504-5.
198. *Id.*
199. Quail v. Municipal Court, 217 Cal.Rptr. 361, 364 (Cal. Ct. App. 1985) (Johnson, J., concurring and dissenting) (describing history of civil right to counsel).
200. *See, e.g., Equal Access to Justice: Comparing Access to Justice in the United States and Other Industrial Democracies*, 24 FORDHAM INT'L L.J. S83 (2000), *available at* https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=1780&context=ilj; *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. FOR SOC. JUST. 201 (2003), *available at* https://digitalcommons.law.seattleu.edu/cgi/viewcontent.cgi?article=1440&context=sjsj; *Equality Before the Law and the Social Contract: When Will the United States Finally Guarantee Its People the Equality Before the Law the Social Contract Demands?*, 37 FORDHAM URB. L.J. 157 (Feb. 2010), *available at* http://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=2326&context=ulj; *50 Years of Gideon, 47 Years Working Toward a "Civil Gideon,"* 47 CLEARINGHOUSE REV. J. OF POVERTY L. AND POL'Y 35 (May-June 2013), *available at* https://www.povertylaw.org/clearinghouse/articles/50-years-gideon-47-years-working-toward-%E2%80%9Ccivil-gideon%E2%80%9D.
201. Remarks of the Honorable Ronald D. Castille, Chief Justice, Supreme Court of Pennsylvania, to the Senate Judiciary Committee (May 23, 2013), *available at* https://www.palegalaid.net/sites/default/files/2013-05-23%20Chief%27s%20Testimony.pdf ("Realistically, how can a person effectively defend himself or herself in the face of often complicated legal challenges in the usually unfamiliar and daunting environment of a courtroom before a sitting judge? How can that person effectively assert his or her legal rights without a skilled advocate, learned in the law, who will assert those rights for them in the court system? And what consequences can flow from self-representation? This combined effort by the Legislature and organized attorney associations will explore what has often been referred to as 'Civil Gideon.'"); Jess H. Dickinson, Presiding Justice, Mississippi Supreme Court, *A Look at Civil Gideon: Is There a Constitutional Right to Counsel in Certain Civil Cases?*, 37 U. ARK. LITTLE ROCK L. REV. 543, 547 (2015), *available at* https://lawrepository.ualr.edu/cgi/viewcontent.cgi?article=1964&context=lawreview ("I believe that when one person uses the law, the government, its facilities, and its power in an attempt to take away an indigent person's life, liberty, or property—which includes children, shelter, livelihood, and the basic right to dignity—that indigent person is constitutionally entitled to have a lawyer

"There are also some notable examples where judicial leaders have become actively involved in civil right to counsel efforts."

appellate,[202] and trial level[203] have taken up the clarion call from Judges Johnson and Sweet for equal access to justice through the recognition of a right to counsel in civil cases.

There are also some notable examples where judicial leaders have become actively involved in civil-right-to-counsel efforts. For instance, New York Chief Judge Jonathan Lippman, who had written frequently about the need for a right to counsel in civil cases,[204] testified in support of New York City's bill to provide the first-ever right to counsel in housing court,[205] and worked behind the scenes to support the bill. Additionally, one year after the new law went into effect, a number of New York City housing court judges testified in support, and Judge Jean Schneider, the citywide supervising judge of the New York City Housing Court, stated at the hearing that "our court is improving by leaps and bounds."[206] Similarly, in 2019, bills were introduced in Massachusetts to establish a statewide right to counsel in eviction cases, and Supreme Judicial Court Chief Justice Ralph Gants pub-

appointed, just as they are in a criminal case"); Justice Denise Johnson, Vermont Supreme Court, *Bridging the Gap*, APP. JUDGES NEWS (2006) (discussing access-to-justice gap and suggesting that to bridge the gap, "First, as judges, we must recognize that some cases should not proceed without legal counsel"; article notes that ABA resolution calls on right to counsel where basic human needs at stake and "This is an important normative step and one that the judiciary should endorse"); Margaret H. Marshall, Chief Justice, Supreme Judicial Court of Massachusetts, *Provide Legal Support to Those Most Vulnerable*, B. GLOBE (Oct. 29, 2011), *available at* https://www.bostonglobe.com/opinion/2011/10/28/provide-legal-support-those-most-vulnerable/ehPE1k6C0CRP6cpjpOxZ9M/story.html ("Access to justice is best secured by—and perhaps requires—a lawyer"; while right to counsel exists for criminal cases, "there is no similar guarantee of representation for thousands of our most vulnerable residents confronted with non-criminal civil actions in which their most basic rights are also at stake. We do not provide lawyers for example, to families threatened with wrongful eviction, or to battered women seeking restraining orders, or to senior citizens who challenge the improper denial of Medicare benefits. They are often on their own, left to fend themselves without legal assistance in a complex adversarial system in which the party with a lawyer has the clear advantage. These impoverished litigants need the help of lawyers just as much as those accused of committing a crime"); Hon. Richard B. Sanders, Washington Supreme Court, "Access to Justice": A Noble Principle in Beggar's Rags, 1999 Washington State Access to Justice Conference (June 25-27, 1999), *available at* http://www.justice sanders.com/writings/ATJ062599.htm ("If it is a legitimate role of the government to build courthouses and hire judges, is it not only a difference in degree, not kind, to assure litigants adequate representation so they may properly present their case when they go to court? Indeed, is not legal representation a practical necessity that those knowledgeable in the law would have to admit: that the man who represents himself has a fool for a client? . . . [I]t is a contradiction of the access to justice principle to guarantee the right of counsel to indigent criminal defendants on the one hand while refusing to recognize a sometimes equally important, if not paramount, interest to legal representation in civil matters.").

202. Hon. Anna Blackburne-Rigsby, Associate Judge, District of Columbia Court of Appeals, *Ensuring Access to Justice for All: Addressing the "Justice Gap" Through Emphasis on Attorney Professionalism and Ethical Obligations in the Classroom and Beyond*, GEO. J. L. ETHICS (2014), *available at* https://abaatj.files.wordpress.com/2015/01/9448b-judgeblackburne-rigsbygjlearticle-ensuringaccesstojusticeforall.pdf (arguing for inclusion of access to justice in professional responsibility courses because "access to justice issue is not simply a problem for a select few to grapple with; rather, it is our shared duty as legal professionals," and noting that while there is no civil right to counsel that corresponds to *Gideon*, "civil cases deal with many matters that we hold perhaps just as dear as our own personal freedom, including custody of our children, our physical safety, our ability to work, and our need for shelter.").

203. Judge Mark Juhas, Los Angeles Superior Court, *On the Anniversary of Gideon, an Argument for Free Civil Representation*, L.A. LAW. (2013), *available at* https://www.lacba.org/docs/default-source/lalback-issues/2013-issues/september-2013.pdf#page=46 (noting in support of right to counsel in eviction cases that "most judges would prefer a contested case in which the adversaries are skilled professionals who can spot and frame the real issues in the case, as compared with a case in which one party is almost totally clueless about legal procedures and legal rights. Cases involving pro se litigants often take much more court time than cases staffed by attorneys. An unrepresented party's unfamiliarity with court procedures tends to clog court calendars, leading to much less efficient courtrooms"); Judge Emily Jane Goodman, New York State Supreme Court, *Facing Evictions—Without the Right to Counsel,* GOTHAM GAZETTE, June 30, 2008, *available at* https://www.gothamgazette.com/index.php/development/4014-facing-evictions-%20without-the-right-to-counsel (postulating that it is safer to be accused of crime and face prison than to be tenant facing eviction, because "all criminal defendants have a right to legal representation and tenants do not"). Judge Leonard Edwards, Santa Clara Superior Court (ret.), *Engaging Fathers in the Child Protection Process: The Judicial Role*, JUV. & FAM. CT. J. 15-16 (2009), *available at* http://www.judgeleonardedwards.com/docs/EdwardsEngagingfathersJournal09.pdf (urging courts to appoint counsel for fathers in child protection cases because "Appointing counsel for the father is critical to his involvement in the court process. Counsel can help identify and locate the father. Counsel can take the time to explain in detail the father's rights, the consequences of the proceedings, and the urgency of taking timely action with regard to services. Counsel can inform the court about problems the father is experiencing that otherwise would escape the court's notice. Counsel can facilitate communication between the father and the caseworker, and ensure that the father's rights are upheld. The earlier the court makes the appointment, the more valuable counsel's contributions will be to the father and to the court process"); Judge David J. Dreyer, Marion Superior Court, *Deja Vu All Over Again:* Turner v. Rogers *and the Civil Right to Counsel*, 61 DRAKE L.R. 639, 664 (2013), *available at* https://lawreviewdrake.files.wordpress.com/2015/06/irvol61-3_dreyer.pdf ("We are delaying due process because of purported practical realities. But if practical realities were weighed when Gideon was decided, indigent criminal defendants would be no better off today than indigent civil litigants. Hopefully, new efforts to establish reliable, empirical evidence can show the widespread dire consequences of denied advice and representation in even the so-called simplest matters"); Judge Jed S. Rakoff, District Judge for the Southern District of New York, *Why You Can't Get Your Day in Court (It's a New America)*, N.Y. REV. BOOKS, Nov. 24, 2016, *available at* https://www.nybooks.com/articles/2016/11/24/why-you-wont-get-your-day-in-court/ ("Indi-

licly endorsed the bills.[207] And in 2009, Supreme Court of California Chief Justice Ronald George publicly declared his support for a right to counsel in civil cases implicating basic human needs, then successfully advocated for then-Governor Schwarzenegger to sign legislation (known as the Shriver Civil Counsel Act) establishing statewide pilots to expand civil representation.[208]

Finally, in 2015, Connecticut Supreme Court Chief Justice Chase Rogers charged the Connecticut Access to Justice Commission with studying the right to counsel in civil cases. In support of this, she noted the high percentage of those who represented themselves, and asked,

> Is there less at stake if someone faces jail over child support payments? Is there less at stake if litigants face domestic violence or risk losing their home? The civil Gideon question of whether litigants in certain types of non-criminal matters should have court-appointed attorneys paid for by the state is an issue that we now need to confront.[209]

B. JUDICIAL ACCESS-TO-JUSTICE COMMISSIONS AS KEY CONTRIBUTORS

Another key judicial player in right to counsel work has been access-to-justice commissions. Although quasi-independent, these entities are typically court-created, operated by judiciary staff, and feature judges as members of the commission. While many of the commissions focus on raising funding for legal services organizations, some have gone further to explore or support the right to counsel in civil cases. For example, the access to justice commissions in Arkansas,[210] Maryland,[211] Massachusetts,[212] North Carolina,[213] and Wisconsin[214] have endorsed the 2006 ABA Resolution calling for a right to counsel in civil cases implicating basic human needs, while the commissions in Arkansas, California, Connecticut, Hawaii, Maryland, New Mexico, North Carolina, South Carolina, Texas, and Wisconsin have had civil-right-to-counsel subcommittees at one point or another in their histories.

"'Is there less at stake if litigants face domestic violence or risk losing their home?'"

Some access-to-justice commissions have taken on the task of mapping out how a right to counsel would work in their jurisdictions:

- In 2012, the Maryland Access to Justice Commission issued a report mapping out an implementation plan for a full right to counsel in the state.[215] The Commission also produced a cost/benefit analysis that found legal services generated $9.9 million in direct federal benefits for clients (yielding $12.6

viduals not represented by lawyers lose cases at a considerably higher rate than similar individuals who are represented by counsel. In mortgage foreclosure cases, for example, you are twice as likely to lose your home if you are unrepresented by counsel. Or to give a different kind of example, if you are a survivor of domestic violence, your odds of obtaining a protective order fall by over 50% if you are without a lawyer. While hard statistics are not available for every kind of case, surveys of state and federal judges repeatedly show that they are quite certain that parties unrepresented by counsel fare far worse than those who are represented by counsel, even when the judge tries to compensate for counsel's absence.").

204. *See, e.g., Equal Justice at Risk: Confronting the Crisis in Civil Legal Services*, 15 N.Y.U. J. LEGIS. & PUB. POL'Y 247 (2012), *available with subscription at* https://heinonline.org/HOL/LandingPage?handle=hein.journals/nyulpp15&div=11&id=&page= ("Litigants in civil proceedings should receive representation in keeping with the ethos of the Supreme Court's decision almost fifty years ago in the landmark case of *Gideon v. Wainwright*, a case that was not just about the constitutional right to counsel for criminal defendants, but also a clarion call to recognize our societal obligation to give legal assistance to human beings facing life transforming crises in our courts"). Judge Lippman later authored *Shifting the Landscape on Access to Justice*, 38 CARDOZO L. REV. 1159 (Feb. 2017), *available at* http://cardozolawreview.com/wp-content/uploads/2018/08/LIPPMAN.38.3.pdf.
205. Steven Wishnia, *NYC Council Kicks Off Hearing on Free Counsel for Poor Tenants*, GOTHAMIST, Sept. 27, 2016, *available at* https://gothamist.com/news/nyc-council-kicks-off-hearings-on-free-counsel-for-poor-tenants.
206. Dan M. Clark, *Increasing Tenants' Access to Counsel Has Raised Court Efficiency, Fairness, Judges Say*, N.Y. L.J., Sept. 24, 2018, *available at* https://www.law.com/newyorklawjournal/2018/09/24/increasing-tenants-access-to-counsel-has-raised-court-efficiency-fairness-judges-say/.
207. Shira Schoenberg, *SJC Chief Justice Ralph Gants Endorses Right to a Lawyer for Tenants and Landlords in Eviction Cases*, MASSLIVE, Oct. 30, 2019, *available at* https://www.masslive.com/news/2019/10/sjc-chief-justice-ralph-gants-endorses-right-to-a-lawyer-for-tenants-and-landlords-in-eviction-cases.html.
208. Kevin G. Baker & Julia R. Wilson, *Stepping Across the Threshold: Assembly Bill 590 Boosts Legislative Strategies for Expanding Access to Civil Counsel*, 43 CLEARINGHOUSE REV. J. OF POVERTY L. AND POL'Y 550, 552 (2010).
209. *See* http://civilrighttocounsel.org/major_developments/939 for a transcript of the key comments from Justice Rogers's speech.
210. Arkansas Access to Justice Commission, *Resolution in Support of Recognizing a Right to Counsel for Indigent Individuals in Certain Civil Cases* (2008).
211. Maryland Access to Justice Commission, Implementing a Civil Right to Counsel in Maryland (2011), *available at* http://mdcourts.gov/mdatjc/pdfs/implementingacivilrighttocounselinmd2011.pdf.
212. Massachusetts Access to Justice Commission, Barriers to Access to Justice in Massachusetts: A Report, with Recommendations, to the Supreme Judicial Court (June 2007), *available at* http://www.bostonbar.org/prs/nr_0708/accesstojustice101607.pdf.
213. North Carolina Equal Access to Justice Commission, Initial Report (May 2008), *available at* https://www.nccourts.gov/assets/inline-files/executivesummaryreport.pdf?f5LLhIM7cjlvYr7D.N8Ey.cEbAk1UrXd.
214. Wisconsin Access to Justice Commission, Commission Supports a Civil Right to Counsel (June 16, 2011), available at http://wisatj.org/support-for-civil-right-to-counsel.
215. Maryland Access to Justice Commission, *Implementing a Civil Right to Counsel in Maryland* (2011), *available at* http://mdcourts.gov/mdatjc/pdfs/implementingacivilrighttocounselinmd2011.pdf. *See also* Pamela Ortiz, *The Grasshopper and the Ant: Maryland's Effort to Imagine a Civil Right to Counsel*, 26 MIE J. 45 (2012), *available at* http://civilrighttocounsel.org/uploaded_files/19/Maryland_s_effort_to_imagine_CRTC__Ortiz_.pdf.

"[A] 2014 legislative task force on civil right to counsel that led to a report recommending... a right to counsel in domestic violence cases."

million in economic stimulus), saved the state $3.6 million in averted shelter costs through eviction prevention work, and saved the state at least $1.3 million in medical and other costs by preventing domestic violence.[216] The Commission then staffed a 2014 legislative task force on civil right to counsel that led to a report recommending, among other things, a right to counsel in domestic violence cases.[217]

- In California, the Access to Justice Commission

> authorized the creation of a task force to draft a model statute providing for a right to counsel in civil cases for those too poor to afford private counsel: a civil *Gideon*. The commission created the task force not with the idea that such a statute would become law or even be introduced in the legislature anytime soon but with the commitment to begin thinking through the issues so that if and when the opportunity arises—in California or elsewhere—to expand the rights of indigent litigants by statute, advocates can hit the ground running. The task force set out to consider the large and small questions that must be answered if the legislature were ever to enact a civil *Gideon*.[218]

This led to the production of two documents suggesting different paths for implementing a civil right to counsel (the Basic Access Act and the Equal Justice Act),[219] which in turn led to the passage of the aforementioned Shriver Civil Counsel Act.

- In Arkansas, the Access to Justice Commission established a "civil right to counsel initiative" in 2011 whose purpose was "To identify cases in which the lack of counsel denies the constitutional rights of equal protection and due process to pro se litigants and to advocate for judicial recognition of and/or legislation that establishes a civil right to counsel in such situations." The initiative identified adoption as an area in need of counsel, and the subsequent year the Commission supported pro bono attorney recruitment for litigation to establish a right to counsel in adoption cases.[220]
- In North Carolina, the Equal Access to Justice Commission proposed legislation in 2010 that would have given state trial judges broad discretion to appoint counsel in any civil case and provided grants to three judicial districts to determine the most efficient way to provide counsel to those who needed it. Although the legislation, HB 1915, did not advance, the Commission has remained active on the subject, and at present lists "establish the right to counsel in civil matters affecting basic human needs" as a priority on its webpage.[221]
- Finally, in Illinois, the Access to Justice Commission sponsored statewide legislation in 2013 to create pilot projects for tenant representation in eviction cases. Such pilots are a key step on the way toward right to counsel, as they provide critical data about the effectiveness of full representation and potential cost savings. The bill, HB3111,[222] enacted by the legislature and signed by Governor Quinn, provided more than $4 million in funding for the pilots through an increase in filing fees.[223] However, due to separation of powers concerns, the legislation "encourage[d]" rather than required the Illinois Supreme Court to develop the pilots, the Court elected not to institute the collection of the fees, and the pilots were never funded or initiated.

C. COURTS INCREASING THE NUMBER OF ATTORNEYS AVAILABLE FOR APPOINTMENT

The inherent authority section of this article discusses what state courts have had to say about appointing attorneys without compensation. However, there are other ways to incentivize attorneys to participate as volunteers.

Similar to the state-level discretionary statutes mentioned earlier, a federal statute, 28 U.S.C. § 1915, authorizes federal courts to "request"[224] counsel in any civil proceeding. However, while the state statutes have gone largely unutilized due to the lack of funding and volunteers, most of the federal district courts have affirma-

216. Maryland Access to Justice Commission, Economic Impact of Civil Legal Services in Maryland (Jan. 1, 2013), *available at* https://www.mdcourts.gov/sites/default/files/import/mdatjc/pdfs/economicimpactofcivillegalservicesinmd201301.pdf.
217. Maryland Task Force to Study Implementing a Right to Counsel in Maryland, Report (Oct. 1, 2014), *available at* http://www.mdcourts.gov/mdatjc/taskforcecivilcounsel/pdfs/finalreport201410.pdf.
218. Clare Pastore, *The California Model Statute Task Force*, 40 CLEARINGHOUSE REV. J. OF POVERTY L. AND POL'Y 176 (2006), *available at* http://civilrighttocounsel.org/uploaded_files/82/CA_model_statute_task_force.pdf.
219. The California Model Statute Task Force, State Basic Access Act (Feb. 8, 2008), State Equal Justice Act (Nov. 3, 2006).
220. Lucas v. Jones, 2012 Ark. 365 (2012) (declining to review denial of counsel on the merits based on court's position that mother failed to preserve issue of denial of counsel at the trial court level). Although the Commission did not officially appear in the case, it lent its support to the petitioner behind the scenes.
221. North Carolina Equal Access to Justice Commission homepage (last accessed Oct. 27, 2019), *available at* https://www.nccourts.gov/commissions/north-carolina-equal-access-to-justice-commission.
222. *See* http://www.ilga.gov/legislation/BillStatus.asp?DocNum=3111&GAID=12&DocTypeID=HB&SessionID=85&GA=98.
223. Chicago Appleseed Fund for Justice, The Illinois Access to Justice Act (Aug. 21, 2013), *available at* http://www.chicagoappleseed.org/our-blog/the-illinois-access-to-justice-act/. *See also* Chelsea McDougall, *Bill Would Give Some Legal Aid for Civil Cases*, NW. HERALD (June 29, 2013), *available at* https://www.nwherald.com/2013/06/28/bill-would-give-some-legal-aid-for-civil-cases/ann6qm9/?page=2.
224. A federal court does not have the power under the statute to "appoint" an attorney; rather, the court can only "request" that an attorney represent the indigent person. Mallard v. U.S. District Court for Southern District of Iowa, 490 U.S. 296 (1989) (contrasting "may request an attorney" language with statutes from 12 states that speak of "appointment" or "assignment" of counsel). However, federal courts often use "request" and "appoint" interchangeably, which contributes to the confusion.

tively developed pro bono plans so as to better ensure attorneys are available when necessary. The Eighth Circuit has stated:

> Even if funds are not available, "we think it incumbent upon the chief judge of each district to seek the cooperation of the bar associations . . . to obtain a sufficient list of attorneys practicing throughout the district so as to supply the court with competent attorneys who will serve in pro bono situations . . . ." We reemphasize that the chief judge for each district must be resourceful in finding competent attorneys for pro bono or contingency basis cases by working with bar associations, establishing a pro bono expense fund or making other appropriate arrangement to assist those prisoners having a claim arising under federal statute or constitution. The district court may not shift the burden to indigent prisoners who by definition do not have the resources or other skills necessary to obtain counsel on their own.[225]

These plans use a variety of creative methods to recruit attorneys, such as formally recognizing these volunteers at events,[226] requiring attorneys to volunteer to access certain court-offered training services,[227] reimbursing attorneys for out-of-pocket costs,[228] or offering limited-scope representation opportunities to reduce the burden of volunteering.[229] Additionally, some district courts have required that attorneys admitted to practice in the court accept pro bono assignments.[230] State courts could look to these plans to develop ideas for how to make attorneys available when using one of their powers to appoint counsel that is not accompanied by funding (such as the discretionary appointment statutes, inherent authority, or rulemaking authority).

CONCLUSION

The plight of pro se litigants in the United States should concern all quarters of the legal community, including members of the judiciary. As this article outlines, there are opportunities for judges at the state high court, appellate court, and trial court level to improve the administration of justice through the promotion or provision of access to counsel, whether through joining the public discourse, establishing new rights to counsel through rulemaking, being aware of and exercising the existing requirements or powers to appoint counsel for indigent litigants, or working with state access-to-justice commissions to figure out how best to advance the issue in one's own jurisdiction. Only with the participation of all stakeholders, including the judiciary, will the basic human needs of all litigants be fully protected.

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225. Reynolds v. Foree, 771 F.2d 1179, 1181 (8th Cir. 1985).
226. *See, e.g.,* Eastern District of Wisconsin Pro Bono Program, https://www.wied.uscourts.gov/pro-bono-attorney-recognition.
227. *See, e.g.,* District of Ohio General Order #261 (Amended Pro Bono Program) ("Volunteer lawyers will be eligible to attend CLE/training courses on litigating civil rights cases in the federal courts at no cost.").
228. *See, e.g.,* Western District of Texas, Pro Bono Appointments, https://www.txwd.uscourts.gov/for-attorneys/pro-bono-civil-appointments/index.html ("Litigation expenses may be reimbursed upon application up to $1,500.00. Attorney fees, however, are available only to prevailing parties and recovery may be further limited by statute depending on the claims in issue.").
229. *See, e.g.,* Central District of California Pro Bono Limited-Scope Representation Pilot Program, https://www.cacd.uscourts.gov/attorneys/pro-bono/pro-bono-limited-scope-representation-pilot-program.
230. *See, e.g.,* W.D. N.Y. Loc. R. Civ. P. 83.1(f) ("Every Member of the bar of this Court who maintains, or whose firm maintains, an office in this District, shall be available upon the Court's request for appointment to represent or assist in the representation of indigent parties"); SDIL-LR 83.1(i) ("In testimonial proceedings arising out of matters pending before this Court, every member of the bar of this Court, as defined in subparagraph (a) of this rule, shall be available for appointment by the Court to represent or assist in the representation of those who cannot afford to hire an attorney. Appointments shall be made in such a manner that no member of the bar of this Court shall be required to accept more than one appointment during any twelve month period"); D.C. LR 83.10 ("Attorneys who are members in good standing of the Bar of this Court shall be required to assist or represent the needy in civil matters before this Court whenever requested by the Court and, if necessary, without compensation and to accept appointments under the Criminal Justice Act unless exempted by rule or statute"); E.D & W.D. Ark. L.R. 83.7 ("These appointments shall be mandatory;"); E.D. Mo. L.R. 12.01(I) ("Attorneys who are members in good standing of the bar of this Court will be required to represent without compensation indigent parties in civil matters when so ordered by a judge of this Court. . . . Statutory fees and expenses may be awarded as provided by law to an attorney appointed under this rule;"); Ct. L.R. 83.10 (requiring all attorneys who have appeared as counsel in at least one case since Jan. 1, 2015 to be included in "assignment wheel," with some exceptions).