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Pursing Access to Justice and Civil Right to Counsel in a Time of Economic Crisis

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INTRODUCTION

In January 2008, the United States District Court for the District of Rhode Island hosted a "Civil Gideon" panel as part of its "Access to Justice Symposia" commemorating the Courthouse Centennial. In the words of panelist Judge Charles P. Kocoras, a senior U.S. District Judge for the Northern District of Illinois:

> Any system of justice, to be worthy of respect and emulation, must be reasonably available to all of our citizens, whether rich or poor, bright or ignorant, wise or foolish.[1]

Judge Korcoras discussed programs in his court designed to provide assistance to those appearing without counsel. A second panelist, Judge Herbert P. Wilkins, retired Chief Justice of the Supreme Judicial Court of Massachusetts and Chair of the Massachusetts Access to Justice Commission, described initiatives in Massachusetts designed to increase access, including limited representation programs, assistance by lay advocates, and simplification of courts forms.

I was the panel's third speaker, pressing for an Access to Justice Strategy that included an expanded civil right to counsel,

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1. Edward Fitzpatrick, *Should Taxpayers Provide Lawyers For Needy in Civil Cases?*, PROVIDENCE J., Jan. 27, 2008, at B1, *available at* 2008 WL 1693562.

or "Civil Gideon,"[2] as an integral component. I argued that Access to Justice efforts must target the forfeiture of rights due to the absence of counsel, as reflected in a coordinated, three-pronged approach: (1) revising the roles of the key players, such as the judges, mediators and clerks; (2) using, but also evaluating, robust and effective assistance programs; and (3) expanding access to full representation where basic human needs are at stake and lesser forms of assistance cannot protect those basic needs.

While neither the panelists nor speakers questioned the need or justification for an expanded right to counsel, the comments and questions reflected skepticism as to the feasibility of such an approach. Lawyer Howard A. Merten, who moderated the panel discussion, wondered how the initiatives would be paid for, observing that Rhode Island was teetering on the brink of financial disaster according to its Governor's State of the State Address. Judge Kocoras noted that "the case that lawyers for poor parties in civil cases should be paid for by the government competes with funding for health care, housing needs, transportation needs of every stripe, the plights of farmers, the funding of wars and a thousand more causes." Justice Wilkins called a 2006 American Bar Association supporting a civil right to counsel "a noble cause," but continued that he did not believe that the cause was realistic at this time; "there is a funding problem here."[3]

If there was skepticism in January 2008, events since that time might render the concept of a civil right to counsel even more of a pipe-dream. The worst recession since the Great Depression has dramatically increased the number of Americans whose basic human needs are at issue in legal proceedings, and need counsel.[4]

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2. Gideon v. Wainright, 372 U.S. 335 (1963) (establishing a right to counsel in criminal cases).

3. Fitzapatrick, *supra* note 1.

4. LEGAL SERVICES CORP., DOCUMENTING THE JUSTICE GAP IN AMERICA: THE CURRENT UNMET CIVIL LEGAL NEEDS OF LOW-INCOME AMERICANS, AN UPDATED REPORT OF THE LEGAL SERVICES CORPORATION, at 5 (Sept. 2009), http://www.lsc.gov/pdfs/documenting_the_justice_gap_in_america_2009.pdf [hereinafter THE JUSTICE GAP, UPDATED REPORT] ("The current economic crisis, with its attendant problems of high unemployment, home foreclosures and family stress has resulted in legal problems relating to consumer credit, housing, employment, bankruptcies, domestic violence and child support, and

Yet, the same funding crisis that expands the numbers of those needing help has decimated the ability of legal services offices to provide assistance.[5] Offices relying on money from Interest on Lawyers Trust Accounts (IOLTA) have faced devastating cutbacks with plummeting interest rates and the collapse of the real estate market.[6] Offices dependent on aid from state and local governments have faced cutbacks with the fiscal crises facing governments.[7] Lay-offs and retrenchment seem more likely than an expanded right to counsel.

While these events might suggest a tabling of an agenda to expand the provision of counsel, I believe instead the scenario underscores the need to pursue a Civil Gideon as a component of an overarching Access to Justice strategy. This Article will briefly review the structure of the proposed approach and practical steps to move ahead. Developing our understanding of precisely the scenarios in which counsel is most needed becomes more essential the scarcer the resources. The Article will then explore opportunities to move the agenda forward despite the current political and economic realities. In some states, task forces focused on Civil Gideon and Access to Justice Commissions are moving ahead on the agenda to expand the civil right to counsel. In other instances, the expansion of the right involves litigation.

An Access to Justice strategy must also include initiatives to decrease the need for counsel where possible. Changes in the operation of particular courts and agencies might reduce the need for counsel in certain eviction, debt collection, immigration and

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has pushed many families into poverty for the first time.").

5. *See e.g.*, David Riley, *Free legal services suffering as demand rises*, METROWEST DAILY NEWS, June 28, 2009, *available at* http://www.metrowestdailynews.com/news/x768070132/Free-legal-services-suffering-as-demand-rises (describing increased demand for legal services, combined with cutbacks affecting legal services offices in Massachusetts, including MetroWest Legal Services); Jimmie E. Gates, *Legal Program for Poor May See Layoffs, Cutbacks*, THE CLAIRION-LEDGER, June 29, 2009, at A5 (describing a similar impact to a program in Mississippi).

6. THE JUSTICE GAP, UPDATED REPORT, *supra* note 4, at 6 ("While a long-term trend of increased state funding for civil legal aid has continued, budget crises have put this funding at risk in some states. Revenues from state Interest on Lawyers' Trust Accounts (IOLTA) programs rose in some states with new revenue enhancement techniques, but have recently fallen precipitously in many states as a result of low interest rates and the declining economy, reducing trust account deposits.").

7. *See id.* at 6-7.

benefits cases. Finally, we should seize the political moments that emerge, identifying opportunities to expand the provision of counsel from sources we might not have anticipated. Examples include the governmental response to the foreclosure crisis, national attitudes toward immigration proceedings that may be shifting, and the increased availability of pro bono resources.

I. CIVIL GIDEON AND THE ACCESS TO JUSTICE FRAMEWORK

Revising the roles of judges, mediators and clerks, and using of an array of limited assistance programs are essential to a broad Access to Justice strategy that includes the increased use of lay advocates and an expanded civil right to counsel.[8] The initiatives described by Judge Kocoras and Chief Justice Wilkins illustrate how consideration of an expanded civil right to counsel cannot be separated from a discussion of Access to Justice strategies.

A. Prong 1: Revising the Roles of the Judges, Court-Connected Mediators and Clerks

Prong 1 of an overarching Access to Justice approach involves revising the roles of the key players in the legal system to ensure that they provide the full extent of assistance ethically permissible. I have explored elsewhere the need and justification for a revision of the roles of the key players.[9] The rules that implicate the analysis are general. Consistent with the Code of Judicial Conduct, judges must perform their duties "impartially, competently and diligently;"[10] they must perform their duties "fairly and impartially" and "without bias or prejudice," while remaining "patient, dignified and courteous."[11] Clerks are prohibited from giving legal advice, since they are prohibited from practicing law, and must remain impartial.[12] Mediators similarly

8. For a more detailed exploration of this thesis, *see* Russell Engler, *Towards a Context-Based Civil Gideon Through Access to Justice Initiatives*, 40 CLEARINGHOUSE REV. 196 (July-August 2006).

9. Russell Engler, *And Justice for All–Including the Unrepresented Poor: Revisiting the Role of Judges, Mediators, and Clerks*, 67 FORDHAM L. REV. 1987 *passim* (1999).

10. MODEL CODE OF JUDICIAL CONDUCT Canon 2 (2007) (formerly Canon 3).

11. *See id.* at R. 2.2, 2.3(A) and 2.8(B).

12. Engler, *supra* note 9, at 1992, 1992 n.25.

must remain impartial and neutral, and are prohibited from giving legal advice.[13]

The standard application of the rules to fact patterns that confront court personnel daily depends on the custom established in court, not the text of the rules. Since the Judicial Canons and Commentary do not address cases involving unrepresented litigants, they provide little direct guidance as to how active or passive judges should be.[14] The difference between legal information and legal advice challenge clerks and mediators, leading to a trend toward lists of "do's" and "don'ts" for clerks' office personnel.[15] While judges and clerks historically viewed their roles toward unrepresented litigants passively, the past decade has seen a shift in attitudes. Conferences, trainings, Access to Justice Resolutions, and the work of state Access to Justice Commissions accelerated the trends.[16]

The need to revise the roles of key players flows from needs of the litigants—consumers of the courts—appearing without counsel in vast numbers.[17] The underlying goal of our justice system is to be fair and just. The ethical rules shaping the roles of the players in the adversary system imply that unrepresented litigants are the exception. Given the realities of many of our courts, our traditional understanding of their roles frustrates rather than furthers the goal of fairness and justice. As between abandoning the goal and changing the roles, we should change the roles.

The focus on fairness and justice, in substance and not simply appearance, requires shifting the approach to cases involving unrepresented litigants. We must revise our understanding of what it means to be impartial, rejecting the idea that impartiality

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13. *Id.*, at 2007, 2007 n.95, 2008, 2008 n.96.

14. The exception is the recent addition of Comment 4 to Model Code of Judicial Conduct R. 2.2: "It is not a violation of this Rule, however, for a judge to make reasonable accommodations to ensure pro se litigants the opportunity to have their matters fairly heard." MODEL CODE OF JUDICIAL CONDUCT R. 2.2 cmt. 4 (2007).

15. *See e.g.*, John M. Greacen, *"No Legal Advice from Court Personnel" What Does that Mean?*, 34 JUDGES' J. 10, (Winter 1995).

16. *See* Russell Engler, *Ethics in Transition: Unrepresented Litigants and the Changing Judicial Role* 22 NOTRE DAME J. L. ETHICS & PUB. POL'Y 367 (2008).

17. *Id.* at 367-68 nn.1, 5. For a compilation of recent data across the country, see THE JUSTICE GAP, UPDATED REPORT, *supra* note 4, at 23-26.

equals passivity.[18] A system favoring those with lawyers, without regard to the law and facts, is a partial, not impartial, system. To avoid penalizing those without lawyers, courts must play an active role to maintain the system's impartiality.

These principles require revising our notions of the proper role of judges, requiring them to assist unrepresented litigants to ensure that all relevant information is before the court and unrepresented litigants do not forfeit rights due to the absence of counsel.[19] We should similarly revise the roles of other court personnel, including court-connected mediators and clerks.[20] With courts full of unrepresented litigants, the roles of mediators and clerks should permit and even require them to assist unrepresented litigants to avoid the unknowing waiver of rights.

Justice Wilkins' description of the Access to Justice initiatives in Massachusetts included not only the work of his Commission, but also the Massachusetts Supreme Judicial Court's Steering Committee on Self-Represented Litigants (SJC Steering Committee).[21] The SJC Steering Committee's work relates directly to the Prong 1 analysis, including a focus on judicial guidelines and training, guidelines and training for court staff, and user friendly courts among its six major areas of inquiry.[22]

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18. *See, e.g.*, Jona Goldschmidt, *The Pro Se Litigant's Struggle for Access to Justice: Meeting the Challenge of Bench and Bar Resistance,* 40 FAM. CT. REV. 36 (2002).

19. Engler, *supra* note 9, at 2012-14.

20. *Id.* at 2031-40.

21. The MA Access to Justice Commission has recognized the connections between its work and the work of both the SJC Steering Committee and the Boston Bar Association's Task Force on Expanding the Right to Civil Counsel Third Annual Report of the Massachusetts Access to Justice Commission. *See* MASSACHUSETTS ACCESS TO JUSTICE COMMISSION, THIRD ANNUAL REPORT 5-8 (June 2008) [hereinafter MA AJC THIRD REPORT].

22. Press Release, Supreme Judicial Court Steering Committee on Self-Represented Litigants Presents Final Report and Recommendations to Justices (Jan. 21, 2009), *available at* http://www.bostonbar.org/pub/bw/0809/011209/sjc1.pdf. The other three major areas were expanding access to legal representation through limited assistance representation (sometimes referred to as "unbundling" of legal services); resource and referral guide for self-represented litigants; and technology initiatives. *Id.* The full report of the Massachusetts Supreme Judicial Court's Steering Committee on Self-represented Litigants, titled: ADDRESSING THE NEEDS OF SELF-REPRESENTED LITIGANTS IN OUR COURTS: FINAL REPORT AND RECOMMENDATIONS (November 21, 2008) [hereinafter ADDRESSING THE NEEDS] is available at:

The Steering Committee's final recommendations included:

> . . . (2) further guidance to judges on ethical conduct and useful courtroom techniques in cases involving self-represented litigants;
>
> (3) additional simplified forms and self-help materials for self-represented litigants;
>
> (4) educational programs for court staff;
>
> (5) expanded use of technology;
>
> (6) experimentation with court service centers in courthouses, particularly in those that have multiple court departments; . . . and
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> (8) establishment of a senior-level position with the Administrative Office of the Trial Court to direct courtbased policy and programs relating to Access to Justice or, alternatively, an appointment of a judge in each Trial Court Department to serve as the coordinator of services for selfrepresented litigants.[23]

The Steering Committee's recommendations further the overall strategy of expanding the roles of the key players and operation of the courts to increase access to those without counsel. Simplified forms, better technology, experimentation with court service centers and the creation of a senior level judicial position to coordinate services are all part of the effort to create "self-help friendly" courts.[24] The Steering Committee's call for "educational programs for court staff" was endorsed by the Access to Justice Commission as a "welcome change."[25]

In 2006, the SJC Steering Committee promulgated the landmark Judicial Guidelines for Civil Hearings Involving Self-Represented Litigants, thus highlighting the importance of revising the judge's role and judicial training to ameliorate the

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http://www.mass.gov/courts/sjc/docs/self-rep-final-report.pdf.

23. ADDRESSING THE NEEDS, *supra* note 22.

24. *See e.g.*, RICHARD ZORZA, NAT'L CENTER FOR STATES COURTS, THE SELF-HELP FRIENDLY COURT: DESIGNED FROM THE GROUND UP TO WORK FOR PEOPLE WITHOUT LAWYERS (2002), http://www.lri.lsc.gov/pdf/03/030111_selfhelpct.pdf.

25. MA AJC THIRD REPORT, *supra* note 21, at 6.

problems regarding unrepresented litigants in court. The Guidelines apply to all phases of the court's operation.[26] At the pre-hearing stage, the Guidelines encourage judges to make reasonable efforts to insure litigants understand the trial process, and authorize judges to explain the elements of claims and defenses as they would to a jury.[27] At trial, judges may provide self-represented litigants with the opportunity to present their cases meaningfully, and may ask questions to elicit general information and obtain clarification; where all parties are self-represented, judges may have the parties stipulate to proceed informally.[28] Finally, in approving settlements:

> Judges should review the terms of settlement agreements, even those resulting from ADR, with the parties. Judges should determine whether the agreement was entered into voluntarily. If there are specific provisions through which a self-represented litigant waives substantive rights, judges should determine, to the extent possible, whether the waiver is knowing and voluntary. [29]

B. Prong 2: Assistance Short of Full Representation

Prong 2 of the analysis captures an array of assistance programs beyond the work of court personnel and short of full representation by counsel. Programs across the country, including

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26. The Massachusetts Court System, Judicial Guidelines for Civil Hearings Involving Self-Represented Litigants, http://www.mass.gov/courts/judguidelinescivhearingstoc.html (last visited Dec. 5, 2009). The Massachusetts Guidelines are the first new set of state guidelines or protocols to appear in a decade. The Supreme Judicial Court of Massachusetts cited the Massachusetts Guidelines with approval in *Cater v. Lynn Housing Authority*, 880 N.E.2d 778, 786 n.17 (Mass. 2007).

27. Massachusetts Guidelines, *supra* note 26, at § 2.1; *see also id.* at § 2.1 cmt.

28. *Id.* at § 3.2; *see also* § 3.2 cmt.

29. *Id.* at § 3.4. The commentary provides that, when assessing whether a waiver of substantive rights is "knowing and voluntary," the judge may consider how the phrase is used "in the context of informed consent, i.e., the agreement by a person to a proposed course of conduct after receiving adequate information and explanation about the material risks and reasonably available alternatives to the proposed course of conduct." *Id.* at § 3.4; *see also* § 3.4 cmt. (citing MODEL RULES OF PROF'L CONDUCT 1.0(e) (2003)).

telephone hotlines, self-help centers, pro se offices, advice-only clinics and court-annexed limited legal services programs now assist unrepresented litigants in the courts.[30]

Many of the initiatives described by Judge Korcoras and Chief Justice Wilkins fall squarely within Prong 2 of the strategy. Tracking the ideas from the Access to Justice Commission Reports, Chief Justice Wilkins discussed not only videos, simplified forms and written instructions, but permitting "a well-trained supervised lay person to speak in the courtroom" on behalf of indigent clients, and relaxing the prohibitions against ghostwriting, thereby permitting lawyers to prepare legal documents for litigants without being obligated to thereafter appear in the proceeding.[31]

In a similar vein, Judge Korcoras described his District Court's pro se help desk program, designed to provide assistance in court to those without counsel. Illustrating the potential for innovation, but also the blurring of lines as "limited" assistance approaches representation, each judge described programs in which the assistance becomes representation, although for only part of the case. In Judge Korcoras' United States District Court, volunteer attorneys represent pro se plaintiffs in settlement conferences to help the court resolve employment discrimination claims; the appointment expires after the settlement conference whether or not the case is resolved.[32] Massachusetts launched a pilot limited representation program in family law matters, allowing attorneys to provide representation in parts of the case without being obligated to appear in all aspects of the proceeding. Both the Access to Justice Commission and the Steering Committee laud the program, which has proven to be popular with clients, attorneys, and judges.[33] The Steering Committee urged

30. *See* Engler, *supra* note 9, at 1999-2001.

31. MASS. ACCESS TO JUSTICE COMM'N, BARRIERS TO ACCESS TO JUSTICE IN MASSACHUSETTS: A REPORT WITH RECOMMENDATIONS TO THE MASSACHUSETTS SUPREME JUDICIAL COURT 11 (June 2007) [hereinafter MA AJC FIRST REPORT]; *see also* Fitzpatrick, *supra* note 1.

32. JAMES D. WASCHER, U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS' SETTLEMENT ASSISTANCE PROGRAM: A FOLLOW-UP *3-4*, http://www.clccrul.org/article.html?&rls_article_id=69 (click on "Read the full article (.pdf)").

33. ADDRESSING THE NEEDS, *supra* note 22, at 12-23; MASS. ACCESS TO JUSTICE COMM'N, FOURTH ANNUAL REPORT, 5 (Jun. 2009),

its continuation and expansion to all counties in the state.[34]

The innovative programs provide an important component in the strategy to increase access to justice. Yet, a comprehensive Access to Justice strategy requires as well that we evaluate the programs carefully. Evaluation tools must identify which programs help stem the forfeiture of rights and allow the courts to run more smoothly, without affecting case outcomes.[35] Programs not affecting case outcomes may be worthwhile but are not a solution to the problem of the forfeiture of rights due to the absence of counsel.

C. Prong 3: The Expanded Right to Appointed Counsel

When revising the roles of judges, mediators, and clerks and using assistance programs short of full representation proves insufficient, we can no longer accept the denial of access and routine forfeiture of rights as acceptable outcomes. In those instances, we must recognize and establish a right to appointed counsel in civil cases. The next section offers an approach to identifying the types of cases that are the most important starting point for an expanded right to counsel.

Three important realities shape the discussion. First, the scope of the right to counsel is directly dependent on the effectiveness of the first two prongs in the Access to Justice Program. Where steps short of full representation succeed in protecting litigants from the devastating outcomes that might occur where their basic human needs are at stake, appointment of counsel might not be needed. As a result, the more that judges,

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http://www.mass.gov/courts/sjc/docs/self-rep-final-report.pdf [hereinafter MA AJC FOURTH REPORT].

34. ADDRESSING THE NEEDS, *supra* note 22, at 12-23; MA AJC FOURTH REPORT, *supra* note 33, at 4-6.

35. The body of evaluation materials is growing. *See, e.g.*, Paula Hannaford-Agor and Nicole Mott, *Research on Self-Represented Litigation: Preliminary Results and Methodological Considerations*, 24 JUST. SYS. J. 163 (2003); Carroll Seron et al., *The Impact of Legal Counsel on Outcomes for Poor Tenants in New York City's Housing Court: Results of a Randomized Experiment*, 35 LAW & SOC'Y REV. 419 (2001). Many evaluation initiatives rely on "customer satisfaction" inquiries: the extent to which the users believe they were helped or others in the legal system believe the program is beneficial. *See, e.g.*, Bonnie Rose Hough, *Evaluation of Innovations Designed to Increase Access to Justice for Self-Represented Litigants*, 7 JOURNAL OF THE CENTER FOR FAMILIES, CHILDREN AND THE COURTS (2006).

mediators, clerks, and assistance programs are effective in stemming the forfeiture of rights due to the absence of counsel, the smaller will be the pool of cases in which counsel is needed. Where nothing short of full representation can provide the needed assessment, the right to counsel must attach.

Second, many reports from across the country explore the impact of counsel in various settings that handle civil cases. The data show that the greater the imbalance of power between the parties, the more likely it will be that extensive assistance will be necessary to impact the case outcome. The power or powerlessness can derive from the substantive or procedural law, the judge, and the operation of the forum. Disparities in economic resources, barriers such as those due to race, ethnicity, disability, and language, and the presence of counsel for only one side can affect the calculus as well. The greater the imbalance of power, the greater the need for a skilled advocate with expertise in the forum to provide the needed help.[36]

Finally, the *status quo* is not an option. Those familiar with the courts in which high volumes of unrepresented litigants appear know that, in at least some cases, litigants forfeit important rights not due to the law and facts involved, but due to the absence of counsel.[37] We may not know exactly how large or small that pool of cases is, or how to identify it, but we know that the pool exists, and the consequences of inaction are devastating for the unrepresented litigants and their communities.

II. STRATEGIES FOR MOVING FORWARD

A. Identifying a Process for Starting Points

The analysis above reveals the importance of moving forward on the representation component of Access to Justice strategies.

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36. *See generally* Russell Engler, *Connecting Self-Representation to Civil Gideon: What Existing Data Reveal About When Counsel is Most Needed*, 37 FORDHAM URB. L. J. 37 (2010).

37. *Id.* The article discusses many studies of courts and case outcomes, analyzing the impact of representation in proceedings. Unrepresented litigants get tripped up at every stage of the proceeding, having difficulties with procedural requirements, failing to understand the substantive law, and proving unable to present to the court the law and facts that might entitle them to prevail.

The process, however, can be daunting. Legal needs studies reveal an enormous gap in our delivery system, and many compelling areas, cases, and clients in need of assistance.[38] Implementation issues, including the pros and cons of various delivery mechanisms, the way in which the expansion will interface with existing systems, and issues of cost, can stall momentum for change before it begins.

As with any daunting task, breaking the enterprise down into more manageable components is often a way to move forward and avoid getting stuck. I suggest below a seven-step approach for working through the process of identifying which cases were most important and how we could expand representation. Two givens loom large over the exercise. First, we must accept as a given that it is an essential component of Access to Justice that, where important rights are at stake, and nothing short of counsel will do the trick, that litigants must be represented by counsel. A related "given" is that, despite the heroic work of many in the public and private sector, the level of unmet needs is high enough so that we must assume that an expansion of existing resources will be necessary.

1. *Identify likely areas in which counsel is most needed.* A likely starting point is the 2006 American Bar Association resolution urging the provision of "legal counsel as a matter of right at public expense to low income persons in those categories of adversarial proceedings where basic human needs are at stake, such as those involving shelter, sustenance, safety, health, or child custody, as determined by each jurisdiction."[39]

2. *Review available data.* Studies and reports shed light on the impact of counsel in various types of legal proceedings.[40] The reports and related analysis provide a wealth of information that provide starting points, while at the same time suggesting

38. *See generally* THE JUSTICE GAP, UPDATED REPORT, *supra* note 4, at 21-22.

39. AMERICAN BAR ASSOCIATION TASK FORCE ON CIVIL JUSTICE ET AL., REPORT TO THE HOUSE OF DELEGATES (Aug. 7, 2006), *available at* http://www.abanet.org/legalservices/sclaid/downloads/06A112A.pdf.

40. My recent article analyzed and organized close to one hundred such accounts in the areas of housing, family law, consumer/small claims, social security, unemployment, immigration and other forms of administrative proceedings. *See* Engler, *supra* note 36.

methodological shortcomings that might illustrate the need for further research.

3. *Put 1 and 2 together.* A discussion of starting points is necessarily controversial because it suggests that some worthy candidates move away from the front of the line. Yet, if one really is looking for places to start, prioritizing areas in which basic human needs are at stake, and there is evidence that counsel has a significant impact in the outcomes of the proceeding, would be a likely starting point. Some areas, such as small claims cases, in which counsel has a big impact, may drop back, due to the interest at stake. Others, such as eviction cases and custody cases, may move forward, but not necessarily for the entire docket, absent evidence that power imbalances seem to be extreme across the board. The analysis will be complicated where the reports indicating the impact of counsel compare full representation to no assistance at all, as opposed to full representation to more limited forms of assistance.

4. *Identify areas of consensus.* However compelling the case for full representation may be on moral or abstract legal grounds, the reality is that decisions of this ilk often have a political component. Where consensus exists, as opposed to where powerful interests disagree about the need or advisability of counsel, focusing on the former areas might allow initiatives to gain momentum.

5. *Obtain estimates as to the volume of cases involved.* Where right to counsel proposals appear unlimited in scope and separated from Access to Justice strategies, the opposition based on cost can derail movement forward before there is even evidence of movement. As a result, it is crucial to obtain accurate information as to the number of cases involved. An initiative in the family law area that focuses on all custody cases, regardless of how contentious the custody battle is and whether both sides are without counsel, will involve the need for counsel in vastly more cases than where the starting point is limited to cases pitting a represented party against an unrepresented, indigent party. Housing proposals that target a subset of litigants, such as the elderly or disabled, or a subset of cases, such as those involving rent regulations, public subsidies or some other feature, will similarly involve fewer resources than those reaching all cases.

6. *Identify existing resources.* At least at the brainstorming

level, identifying the full array of legal services offices, private attorneys, pro bono resources, lay advocates, and social services agencies can be important in minimizing cost. Well-trained lay advocates are effective in many administrative proceedings, as well as courts in which they are permitted to appear.[41] Pro bono attorneys may be more available in areas in which the private bar has a presence, such as family law and immigration, than it will be in other areas.

7. *Identify the best delivery mechanism where new resources are needed.* Without minimizing the hurdles facing any initiative that seeks an expansion of a right to counsel, the steps above might yield opportunities that would not have been evident at the outset of a daunting task seeking to expand the right to counsel. In particular, consensus might emerge on the staffing of a pilot project without the need to resolve the harder question of what a comprehensive delivery system might look like. For example, a pilot project in the area of eviction defense might focus on a legal services staff model due to the nature of the cases and legal services expertise. Given the prevalence of private lawyers in the family law area, an army of pro bono lawyers in coordination with legal services offices may be sufficient to provide representation to indigent parents facing represented parties at a reasonable price tag. A similar approach might make headway in representing unaccompanied minors in immigration cases or unrepresented elders facing guardianship proceedings. Where progress can be made as a "first step," expansion can move forward without resolving the ultimate question of what should be the scope of the right to counsel in custody cases or immigration cases, and who should provide representation.

Nothing in the articulation of these steps should suggest that the process will be easy. At every turn, it will be important to underscore the notion that the search is for starting points, to get the ball rolling. The difficult process of drawing lines and setting priorities carries with it the danger that momentum for issues left off the list of starting points might be impeded by the process. As with many challenging issues, the calculus will need to consider whether more progress will by achieved by moving forward incrementally to get the ball rolling or working at a slower pace to

41. Engler, *supra* note 36, at 23-31 (2008 manuscript).

achieve a longer list of starting points.

B. An Illustration: Work of the Boston Bar Association Task Force

The work of the Boston Bar Association Task Force on Expanding the Civil Right to Counsel illustrates the extent to which utilizing a process such as the one outlined above can yield progress in moving forward. Created in 2007 and including members from key statewide stakeholders, the Task Force followed a process similar to the one I outlined above. The Task Force's Report, titled *Gideon's New Trumpet: Expanding the Civil Right to Counsel in Massachusetts*,[42] describes the Justice Gap in Massachusetts, the Task Force's process, the work of the Committees, and Committee reports and recommendations.[43] The process of identifying subject areas through pairing basic human needs with evidence of the impact of counsel yielded starting points in the areas of Housing, Family, Juvenile and Immigration Law.[44]

The Report ultimately identified nine pilot projects across the four substantive areas that the Task Force recommended as starting points. The logic behind using pilot projects was to allow greater insight into the effectiveness of the tools proposed, the scope of the problem in terms of the actual numbers of cases involved, and the extent of the representation needed to yield the protections aimed at preserving basic human needs. With more accurate information regarding caseload, cost per case, and effective delivery mechanisms, the seeds for a statewide proposal, with evidence of its effectiveness and potential cost savings, would be in place.[45]

The final section of the Report underscored the extent to which the approach focused on starting points as a way of gaining traction. Titled "Next Steps in Expanding the Civil Right to Counsel," the Report discussed the need to secure resources to

42. BOSTON BAR ASSOCIATION, GIDEON'S NEW TRUMPET: EXPANDING THE CIVIL RIGHT TO COUNSEL IN MASSACHUSETTS (2008), *available at* http://www.bostonbar.org/prs/nr_0809/GideonsNewTrumpet.pdf [hereinafter GIDEON'S NEW TRUMPET].

43. *Id.* at 3-7.

44. *Id.* at 7-25.

45. *Id.* at 1-3, 25-28.

move the pilot projects forward.[46] Yet, the report also made clear the extent to which the pilot projects were starting points and a piece of an overall Access to Justice strategy. The Report cautioned that "[t]he pilot projects discussed in this report are not meant to be a complete list of types of cases in which a civil right to counsel is needed; rather they are starting points."[47] The Report added that in some areas, such as health and foreclosures, the issue of the lack of counsel might be so intertwined with the need for changes in the substantive and procedural law that the proposals might be more effective as part of a more extensive overhaul of the area of law.[48]

The Report thereby underscored the connection between the scope of the right to counsel and other factors in terms of the substantive rights and operation of a forum.[49] Some ideas might lead to a reduction of the need for counsel, rather than an expansion, depending on the effectiveness of the changes. The Report further noted that pilot projects were not proposed in other areas, such as in certain administrative proceedings, not due to the lack of need for counsel, but because the importance of counsel had been proven sufficiently by prior studies; areas in which there was more to learn should be prioritized as starting points for study.[50] Finally, the Report acknowledged the need for additional and ongoing research to help refine the initiatives over time.[51]

III. OPPORTUNITIES FOR MOVING FORWARD IN DIFFICULT ECONOMIC TIMES

With the concept of Civil Gideon tied firmly to Access to Justice and basic human needs, the idea that we should table the concept is far more shocking than the notion that we should find ways to press ahead. While incremental steps may seem less glamorous than sweeping court decisions or comprehensive legislation, the desperate political and fiscal realities should compel us to achieve steady progress at a minimum. This part identifies four interrelated avenues: (1) the work of state task

46. *Id.* at 27-28.
47. *Id.* at 25.
48. *Id.*
49. *Id.* at 25-26.
50. *Id.* at 26.
51. *Id.* at 28.

forces and Access to Justice Commissions; (2) litigation; (3) reforming institutions; and (4) seizing the political moment. Identifying tangible steps, even if incremental, should be seen as furthering, rather than undermining, the larger struggle for fairness and justice for our clients.

A. The Work of State Task Forces and Access to Justice Commissions

Massachusetts provides one example of moving forward despite the difficult economic times. The release of *Gideon's New Trumpet* coincided with the advent of the devastating recession that plunged greater numbers of Massachusetts residents in desperate economic circumstances, while at the same time causing severe cutbacks in legal services programs. Despite the bleak picture, proposals urged by the Task Force moved forward, even if more slowly than hoped. Task Force leaders obtained funding to launch Civil Gideon eviction defense pilot projects in Quincy District Court and the Northeast Housing Court; since a staff-based model was selected for the pilots, the project had the dual effect of launching the first pilot projects and cushioning further legal services lay-offs.[52] In the area of family law, the Task Force's work coincided with reforms of the guardianship laws that included the establishment by statute of a right to counsel for elderly persons where a petition has been filed seeking a court-appointed guardian;[53] without the appointment of a guardian, elders "are at risk of losing their independence and control of their financial affairs, as well as significant personal and civil rights."[54] In the custody area, data collection was key to moving the ball

52. *See* Press Release, Boston Bar Association, Boston Bar Proposal to Prevent Homelessness Gets Grant from Boston Foundation (Jan. 7 2009), *available at* http://www.bostonbar.org/prs/nr_0809/BostonFoundationGrant 010709.htm.

53. *See* 2008 Mass. Legis. Serv. Ch. 521, § 5-106(a) (H.B. 1633) ("After filing of a petition for appointment of a guardian, conservator or other protective order, if the ward, incapacitated person or person to be protected or someone on his behalf requests appointment of counsel; or if the court determines at any time in the proceeding that the interests of the ward, incapacitated person or person to be protected are or may be inadequately represented, the court shall appoint an attorney to represent the person, giving consideration to the choice of the person if 14 or more years of age.").

54. GIDEON'S NEW TRUMPET, *supra* note 42, at 13.

forward. Informal analysis of the dockets in two Probate and Family Courts suggested that the number of custody cases pitting an indigent, unrepresented party against a represented one was smaller than anticipated. This revelation has led to renewed planning for a pilot project for this subset of custody cases. In the area of immigration, the private pro bono project "KIND" (Kids in Need of Defense), supported by Microsoft, has collaborated with Greater Boston Legal Services to provide representation for unaccompanied minors in deportation proceedings.[55] Data collection and evaluation are an important component in each of the projects to shed light on future endeavors.

Beyond Massachusetts, evidence of activity abounds as well.[56] In California, where advocates drafted a Model Statute providing for an Expanded Civil Right to Counsel, Assemblyman Mike Feuer championed a bill to provide funding for the launching of pilot projects.[57] New York advocates convened a day-long Symposium in March 2008, designed to create a blueprint for a Civil Right to Counsel in their state.[58] In April 2009, the Philadelphia Bar

55. Articles describing the KIND project are available on the project's website, at http://www.supportkind.org/ (last visited Dec. 16, 2009). The project involves a collaboration between, among others, Microsoft and Angelina Jolie. *See, e.g., 'Kids in Need of Defense' (KIND) Launched by Microsoft, Angelina Jolie, Major Law Firms and Corporate Legal Departments, available at* http://www.hispanicbusiness.com/pr_newswire/2008/10/17/kids_in_need_of_defense_kind.htm (last visited Dec. 16, 2009).

56. *See, e.g.,* Tresa Baldas, *Civil Right to Counsel Urged: Suits, Legislation Grow Across U.S.,* THE NAT'L L. J., September 15, 2008, p.1. The National Coalition for a Civil Right to Counsel provides periodic updates of activities around the country. The June 2009 update is available online at http://www.civilrighttocounsel.org/pdfs/CRC%20Update%20no.4%20June%202009.pdf (last visited Dec. 16, 2009).

57. *See* Carol J. Williams, *California gives the poor a new legal right,* L.A. TIMES, October 17, 2009, at A8, *available at* http://www.latimes.com/news/local/la-me-civil-gideon17-2009oct17,0,7682738.story. Assembly Bill 590, creating the pilot projects, was signed into law by Governor Schwarzenegger on October 11, 2009. *See* Official California Legislative Information, Bill Information, http://leginfo.ca.gov/bilinfo.html (search for bill number "AB 590") (last visited Dec. 16, 2009). The Model Statute, titled the State Basic Access Act, was distributed in March 2008. *See* Brennan Center for Justice, State Basic Access Act (CA), http://www.brennancenter.org/content/resource/state_basic_access_act/ (last visited Dec. 16, 2009).

58. The proceedings, and related articles, are published in the Symposium volume, *An Obvious Truth: Creating an Action Blueprint for a Civil Right to Counsel in New York State,* 25 TOURO L. REV. 1-539 (2009)

Association joined the list of organizations that adopted resolutions calling for an expanded right to counsel, and this list has continued to grow.[59] Efforts to raise awareness and increase support include a steady stream of articles, speeches and conferences.[60] Finally, as efforts in Massachusetts illustrate, the work of expanding a civil right to counsel is often coordinated with, and bolstered by, the work of state Access to Justice Commissions. Sixteen states created Commissions between 2003 and 2008.[61] The work of the Commissions typically involves recommendations bolstering each of the three prongs described above, and includes efforts to expand funding for civil legal services and increase pro bono work among lawyers.[62]

B. Litigation

While many of the initiatives around the country are new and innovative, the concept of expanding access to counsel through

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[hereinafter *An Obvious Truth*].

59. PHILADELPHIA BAR. ASS'N, RESOLUTION CALLING FOR THE PROVISION OF LEGAL COUNSEL FOR INDIGENT PERSONS IN CIVIL MATTERS WHERE BASIC HUMAN NEEDS ARE AT STAKE, (Apr. 30, 2009), *available at* http://www.pabar.org/public/probono/PhiladelphiaBarCivil%20Gideon%20Resolution4-30-09.pdf.

60. For a summary of the proceedings at the New York State Conference, discussed above, *see An Obvious Truth*, *supra* note 58. The Symposium, *Legal Representation and Access to Justice: Breaking Point or Opportunity to Change*, jointly sponsored by the Korematsu Center for Justice and Seattle University School of Law, is scheduled for February 19 and 20, 2010. Justice Johnson's speech, delivered at the Pathways to Justice Conference in Los Angeles, June 7, 2008, was published in Clearinghouse Review: *Three Phases of Justice for the Poor: from Charity to Discretion to Right*, 43 CLEARINGHOUSE REV. 486 (Jan.-Feb. 2009). *See also* Robert J. Derocher, Access *to Justice: Is Civil Gideon a Piece of the Puzzle?*, AM. B. ASS'N, BAR LEADER, (July-Aug. 2008).

61. Karla M. Gray & Robert Echols, *Mobilizing Lawyers,* Judges *and Communities: State Access to Justice Commissions,* 17 JUDGES' J. 33-37 (2008). For a listing of the states that have most recently created Access to Justice Commissions, *see id.* at 35-36. Links to the websites of existing commissions are available on the American Bar Association's Resources Center for Access to Justice Initiatives, http://www.abanet.org/legalservices/sclaid/atjresourcecenter/atjmainpage.html (last visited January 20, 2010). While Rhode Island has not created an Access to Justice Commission, the Rhode Island Bar Association Committee on Legal Services is listed on the ABA's website under the heading of "Bar-Based Committees with Broad Access to Justice Leadership Charge. *Id.*

62. *Id. See also* Derocher, *supra* note 60, at 11.

litigation has not remained dormant nor been dictated by the economic forecast of the day. Judge Korcoras noted at the Access to Justice Symposium the important *en banc* decision by the Seventh Circuit that overturned a narrow interpretation of a prisoner's access to pro bono counsel in a proceeding alleging that he was sexually assaulted by a prison guard.[63] In Michigan, advocates filed an *amicus* brief in a case involving the denial of counsel to an incarcerated father in hearings that terminated his parental rights. The brief urges the state to abandon the flawed reasoning of *Lassiter v. Department of Social Services*,[64] and follow its own path in finding a constitutional right to counsel under state law.[65] The Massachusetts Supreme Judicial Court extended the right to counsel to parents at the dispositional phase of a CHINS (children in need of services) proceeding if the judge is considering awarding custody to the Department of Social Services.[66] In Alaska, litigation that led to the appointment of counsel for an indigent parent in a private custody dispute is wending its way through the appellate courts.[67] A Texas case raising the issue of termination of parental rights through an adoption proceeding, ostensibly private, as opposed to one resulting from a state-initiated termination proceeding, appeared headed toward the United States Supreme Court, until the Court recently denied certiorari.[68]

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63. Pruitt v. Mote, 503 F.3d 647, 649 (7th Cir. 2007) (en banc) (interpreting 28 U.S.C. § 1915(e)(1), which provides in part that in proceedings in forma pauperis, "[t]he court may request an attorney to represent any person unable to afford counsel").

64. Lassiter v. Department of Social Services, 452 U.S. 18 (1981).

65. *See* Brief of Amicus Curiae Nat'l Lifers of Am., Inc., *In re* McBride, No. 136988, 2009 WL 1023218 (Mich. April 3, 2009). The brief critiqued the analysis as flawed for a number of reasons, including the fact that the *Lassiter* presumption created too high a bar to appointment of counsel, that the decision understated the risk of erroneous deprivation, and that the case-by-case analysis was unworkable. *Id.* at *12-20.

66. In the Matter of Hilary, 880 N.E.2d 343 (Mass. 2008). Under the statute, children involved in CHINS proceedings are entitled to counsel, but for parents, while they are entitled to notification, "there is no explicit concomitant right to counsel . . . ." *Id.* at 348.

67. Gordanier v. Jonsson, No. 3AN-06-8887 CI (Alaska Sup. Ct. Aug. 14, 2007), *available at* http://civilrighttocounsel.org/news/recent_developments/2/ (follow "click here" hyperlink).

68. Mary Alice Robbins, *Cert Sought Over Right to Counsel in Parental-Rights Termination Case,* TEXAS LAW., July 13, 2009, at 5, *available at* 2009

C. Reforming Institutions

Discussions of the need for a right to counsel necessarily implicate not only the basic human need at stake, but the features of the forum that will adjudicate the rights. In the words of Justice Earl Johnson, a tireless proponent of an Expanded Civil Right to Counsel:

> The overarching test? . . . [A]ll disputants are entitled to effective access to the court or other dispute-resolving forum. The presumption: Virtually the opposite of the presumption the U.S. Supreme Court majority announced in Lassiter: a presumption that effective access requires the government to supply free representation by a lawyer, or a non-lawyer representative where sufficient, to those who are unable to afford their own representation . . . .[69]

According to Justice Johnson, this presumption may only be overcome where a court can legitimately certify that a particular forum deciding the dispute can and does provide a fair and equal opportunity for justice to those who lack representation.[70]

A focus on the forum and the institutions suggests that institutional reforms could reduce the need for counsel, or, alternatively, provide leverage for the push for expansion in the face of institutional resistance. For example, in traditional areas of legal services representation, eviction defense is a well-documented area in which the absence of counsel has devastating consequences. A recent study from Cambridge, Massachusetts reveals that a high percentage of evictions are brought by the Cambridge Housing Authority, often for nonpayment of amounts less than $1000.[71] One response to this problem is to expand the provision of counsel for tenants. Alternatively, housing authority practices could be modified to place the emphasis on keeping

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WLNR 21592898. *See* In re J.C., 250 S.W.3d 486 (Tex. App. 2008), *cert. denied*, 78 U.S.L.W. 3015 (U.S. Jan. 25, 2010) (No. 08-1596).

69. Hon. Earl Johnson, Jr., *Will Gideon's Trumpet Sound A New Melody? The Globalization of Constitutional Values and its Implications for a Right to Equal Justice in Civil Cases*, 2 SEATTLE U. J. FOR SOC. JUST. 201, 220 (2003).

70. *Id.*

71. Jennifer Greenwood et al., *Tenancy at Risk: Leveling the Playing Field*, Northeastern University School of Law Legal Skills in Social Context Community Lawyering Program (May 2008) (unpublished report on file with author).

tenants in their homes and reducing the use of eviction proceedings. Where the authorities receive federal funding, oversight and regulation from the federal government can impact the calculus; the role of state governments is similarly implicated for state-funded authorities.

Similarly, the basic human need of sustenance is at stake in Social Security or other benefits cases. An expanded right to representation might be designed to reach claimants in administrative or court appeals. Alternatively, modifications to the substantive law, the appeal process, or the agency's handling of claims initially can reduce the need for representation. Lisa Brodoff recently explored the burdens facing public assistance recipients in administrative hearings, calling for institutional reform.[72] Stephen Loffredo and Don Friedman's analysis in the context of welfare cases leads to their call for a qualified right to counsel in welfare hearings.[73] We can perform a similar analysis for each of the problems that bring clients to law offices or leave them unrepresented in the courts, working back to the government and institutional policies that could be modified to reduce the need for counsel.

The example of the Small Claims Courts in Massachusetts illustrates not only the interrelationship between the operation of the institutions and Access to Justice strategies, but the manner in which a potential category for an expanded right to counsel can shift along the priority list. In the seven-step analysis for starting points described in Part II, I suggested that Small Claims Courts might seem unlikely targets due to the interests at stake in the proceeding, despite the wealth of studies showing the dramatic impact of counsel. Small Claims Courts would seem to be particularly odd candidates in light of their stated goals of being accessible to litigants without the need of counsel. Yet, study after study has shown that institutional plaintiffs use the courts for debt collection cases, steamrolling unrepresented defendants in the process through high default rates and unfair

72. Lisa Brodoff, *Lifting Burdens: Proof, Social Justice, and Public Assistance Administrative Hearings*, 32 N.Y.U. REV. L. & SOC. CHANGE 131, *passim* (2008).

73. Stephen Loffredo & Don Friedman, *Gideon Meets Goldberg: The Case for a Qualified Right to Counsel in Welfare Hearings*, 25 TOURO L. REV. 273, 329-39 (2009).

settlements.[74]

The assumption that debt collection cases are less likely to implicate basic human needs bears watching. Recent data suggest that medical debt has become the single largest source of bankruptcy.[75] The accumulation of debt, particularly medical debt, so devastates families and individuals that advocates must closely watch whether the basic human needs not only of health, but of shelter and sustenance may increasingly be involved as well. That would return the focus to the fairness of the process absent counsel. In Massachusetts, a four-part Boston Globe Spotlight Series, aptly titled *Debtors' Hell,* portrayed a small claims court system in the Greater Boston area in which the dignity and rights of debtors are streamrolled by proceedings titled toward creditors.[76] The negative press galvanized an ongoing reform process, leading to the recent announcement of a series of reforms designed to curb the abuses.[77] Whether reforms to the debt collection process or the health care system reduce or increase the need for counsel in debt collection proceedings remains to be seen.

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74. Engler, *supra* note 36 at 20-23 (2008 draft).

75. *See, e.g.,* Physicians for a National Health Program, *Illness, medical bills linked to nearly two-thirds of bankruptcies: Harvard study,* June 4, 2009, http://www.pnhp.org/news/2009/june/illness_medical_bil.php.

76. *Debtors' Hell,* Parts I-IV, THE BOSTON GLOBE, July 30-Aug. 2, 2006, *available at* http://www.boston.com/news/special/spotlight_debt/part1/page1.html. For a comparison to a 1972 study shows that little had changed in the intervening decades, *see* CENTER FOR AUTO SAFETY, LITTLE INJUSTICES: SMALL CLAIMS COURTS AND THE AMERICAN CONSUMER (1972) (on file with author).

77. Beth Healy and Michael Rezendes, *SJC toughens rules for debt collectors: New protections for consumers over small claims,* THE BOSTON GLOBE, Aug. 7, 2009, at 1 (Metro section), *available at* http://www.boston.com/news/local/massachusetts/articles/2009/08/07/sjc_toughens_rules_for_debt_collectors. The Press Release announcing the changes is available at: Press Release, Massachusetts Court system, Supreme Judicial Court Approves Amendments to Trial Court Small Claims Rules; Major Impact on Debt Collection Cases (Aug. 6, 2009), *available at* http://www.mass.gov/courts/press/pr080609.html. For the text of the modified rules, *see* Supreme Judicial Court, Uniform Small Claims Rules, http://www.mass.gov/courts/sjc/docs/Rules/trial-court-rule-III-new.pdf.

D. Seizing the Political Moment

Keeping in mind the notion that out of crisis comes opportunity, the dismal economic times might themselves provide opportunities to move the right to counsel agenda forward. For example, the devastating collapse of the housing market has led to a wave of foreclosures across the country.[78] The government, in turn, has devised strategies attempting to address the problem. Advocates in legal services offices have increasingly focused on foreclosure prevention efforts to preserve the basic human need of shelter for their clients.[79] Ironically, or perhaps predictably, the first wave of federal money for legal assistance involving foreclosures included the restriction that the money could not be used for litigation, the very tool most likely to be effective.[80] Where future efforts include money to prevent foreclosures, and the money can include meaningful representation, the path toward a right to counsel in this area can advance.[81]

78. Accounts of the foreclosure crisis are all over the news. For an excellent summary at the national level, *see* Melanca Clark with Maggie Barron, *Foreclosures: A Crisis in Legal Representation,* Brennan Center for Justice, 1-2 (2009), *available at* http://www.brennancenter.org/content/resource/foreclosures.

79. *Id.* at 36-39. The right to counsel legislation filed by advocates in New York City would provide counsel for eligible senior citizens subject not only to eviction and ejectment, but also in foreclosure proceedings. *See* Laura K. Abel, *Toward a Right to Counsel in Civil Cases in New York State: A Report of the New York State Bar Association,* 25 TOURO L. REV. 31, 41-3 (2009). In Rhode Island, state and city officials planned to use $7 million in federal stimulus money to participate in the Homelessness Prevention and Rapid Re-Housing Program, Paul Davis, *R.I., Cities will use stimulus money to help homeless,* PROVIDENCE J., October 5, 2009, *available at* http://newsblog.projo.com/2009/10/state-and-cities-will-help-the.html (last visited January 20, 2010).

80. *Foreclosures: A Crisis in Legal Representation, supra* note 78, at 29. Restrictions on organizations receiving Legal Services Corporation monies similarly restrict the offices from participating in class actions, seeking attorneys' fees and engaging in legislative advocacy, three tools that would help in the advocacy. *Id.* at 30-35. In contrast, banks that receive bail-out or "TARP" funds are not barred from using their own "*other* funds" to lobby congress. *Id.* at 35.

81. For the Brennan Center's summary of the Obama Administration's efforts generally to ease legal services restrictions, *see* http://www.brennancenter.org/content/pages/lsc_national_campaign (last visited January 20, 2010).

A second political opportunity involves the area of immigration. Following 9/11, the hysteria and prejudice against foreigners would have made the cause of immigrants an unlikely area to target. Yet, data and publicity increasingly have shown the arbitrariness of the immigration process and the decisions of many immigration judges, the importance of counsel in the proceeding and the devastating impact of the absence of counsel.[82] Many watched with horror as the details unfolded from the highly-publicized raids targeting undocumented workers, reviving sympathy for the many victims trapped in the process.[83] The bar has increased its calls for fairness in the proceedings.[84] The KIND project described above is designed to provide counsel at least in the area of unaccompanied minors.[85] Accounts of the

82. *See, e.g.*, Jaya Ramji-Nojales, Andrew Schoenhotz & Philip Schrag, *Refugee Roulette: Disparities in Asylum Adjudication*, 60 STANFORD L. REV. 295, 384 (2007); Donald Kerwin, *Charitable Legal Programs for Immigrants: What They Do, Why They Matter, and How They Can Be Expanded*, IMMIGRATION BRIEFINGS, No. 04-06 (June 2004); Andrew I. Schoenholtz & Jonathan Jacobs, *The State of Asylum Representation: Ideas for Change*, 16 GEO. IMMIGR. LJ. 739, 740 (2002).

83. *See, e.g.*, Alexandra Marks and Cristian Lupsa, *After New Bedford Immigration Raid, Voices Call For Mercy and Justice*, CHRISTIAN SCIENCE MONITOR, Mar. 16, 2007, at 1, *available at* 2007 WL 4914702. In Rhode Island, thirty-one workers employed by contractors for the state judiciary were arrested in July, 2008, at six state courthouses in raids by state police and federal immigration officers. Andrea Panciera, *Court raids nab 31 on immigration violations*, PROVIDENCE J., July 16, 2008, *available at* http://newsblog.projo.com/2008/07/no-comment-from.html (last visited January 20, 2010).

84. REPORT TO THE HOUSE OF DELEGATES, AMERICAN BAR ASSOCIATION COMMISSION ON IMMIGRATION, THE QUEST TO FULFILL OUR NATION'S PROMISE OF LIBERTY AND JUSTICE FOR ALL: ABA POLICIES ON ISSUES AFFECTING IMMIGRANTS AND REFUGEES (Feb. 2006), *available at* http://www.civilrighttocounsel.org/pdfs/ABA%20Resolution%20on%20Counsel%20in%20Immigration%20Proceedings.pdf (Commission on Immigration urged the ABA to support the "due process right to counsel for all persons in removal proceedings," citing the complexity of the proceedings, the disparity in case outcomes depending on whether the asylum-seeker has legal representation, the hardships facing those seeking asylum, the systemic costs involved due to the lack of representation, and the potentially small number of persons eligible for relief). For the ABA's Immigration Agenda, *see* AMERICAN BAR ASSOCIATION, ENSURING FAIRNESS AND DUE PROCESS IN IMMIGRATION PROCEEDINGS, *available at* http://www.abanet.org/poladv/transition/2008dec_immigration.pdf.

85. *See* The KIND Project's Website, *supra* note 55.

Obama Administration's review of immigration procedures[86] hold out hope that the desperate need for counsel in this area might be at least somewhat ameliorated.

Finally, a different by-product of the difficult economic times—the employment prospects for lawyers—can impact the calculus as well. The economy has led to widely-publicized lay-offs, early retirement of lawyers, and deferral of highly-paid associates at the large firms.[87] The utilization of associates by public interest offices is simply one creative illustration of the larger dynamic—the supply of underutilized lawyers has dramatically increased with the collapse of the economy. To the extent the problems that create the need for a civil right to counsel involve a mismatch between need among potential clients and available lawyers, the increase of the lawyer pool creates opportunities for brainstorming. Individual lawyers or firms might be more willing to accept pro bono cases. New lawyers, law graduates or law students might be more available for court watching and data collection. Each of these realities provides opportunities for moving right to counsel initiatives forward where the resources can be captured and connected to the Access to Justice and right to counsel agendas. While the available resources might seem to be temporary, one cause of their loss would be the improvement of the economy that in turn creates demand for paid legal services. When we move into that reality, the premise for this Article—that we need a strategy to expand a civil right to counsel in difficult economic times—can give way to a revised strategy that adapts to sunnier economic realities.

86. *See e.g.*, Matter of Compean, Bangaly & J-E-C, 25 I&N Dec. 1, 2 (A.G. 2009), *vacating* 24 I&N Dec. 710 (A.G. 2009) (standing for the proposition that immigrants in deportation hearings have no right to effective legal counsel). The Attorney General's revocation of the original *Compean* case reinstates the standard for effective assistance of counsel held in Matter of Lozada, 19 I&N Dec. 637 (BIA 1988).

87. *See, e.g.*, Stephanie Chen, *For Jobless Lawyers, Plan B Includes Good Works*, CNN.COM, http://www.cnn.com/2009/CRIME/03/16/lawyer.layoff. public/index.html; Equal Justice Works, *Laid off Lawyers Explore Public Service Option*, Mar. 16, 2009, http://equaljusticeworks.wordpress.com/2009/03/16/laid-off-lawyers-explore-public-service-options.

CONCLUSION

Tabling the concept of an expanded right to counsel turns an essential component of a fair judicial system into a luxury item. If we concede that the concept must await a day when coffers are bursting and the fiscal picture is rosy, we consign those who desperately need legal services to preserve their basic human needs to a legal system they must continue to navigate with minimal assistance. The bleak fiscal and political realities might slow the pace of, or lengthen the road toward, such an expansion. Yet, the imperative of providing representation to indigent clients where basic human needs are at stake and nothing short of representation can provide the needed assistance they need can never be "tabled."