A Right to Civil Counsel: Closer to Reality?
Clare Pastore[1]

Introduction

In this article, I propose to explain why I believe an expansion of the right to counsel in civil cases looks more promising now than at perhaps any time since just before the Supreme Court's dreadful *Lassiter* decision in 1981,[1] share a few thoughts on strategies that could usefully be employed now to press for an expanded right to counsel, and sound two cautionary notes.

Before beginning, I must note the robust and important debate about whether "access to justice" should be defined merely as the right to a lawyer (or some other assistance) when a problem reaches a legal forum, or as something much broader, involving access to the political as well as judicial processes that shape our conceptions and enforcement of rights and duties and encompassing assistance before problems become framed as legal disputes and reach adversarial fora. Deborah Rhode's work,[2] Gary Blasi and Lucie White's pieces in this symposium[3] and others[4] make compelling arguments for a much broader conception of justice than mere access to

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[1]. Professor of the Practice of Law, USC Gould School of Law, and Co-Chair, Right to Counsel Task Force of the California Commission on Access to Justice. B.A., Colgate University, J.D. Yale Law School. I am grateful for . the research assistance of Ryan McMonagle, USC Law Class of 2010.

[1]*Lassiter v Department of Social Services*, 452 U.S. 18 (1981).

[2]Deborah Rhode, Access to Justice (2004) (advocating, *inter alia*, simplification of court procedures, increasing pro bono work, relaxing unauthorized practice of law and multidisciplinary practice rules, and tort reform); *see also* Deborah Rhode, *Whatever Happened to Access to Justice?*, __ Loyola L.A.L.Rev. __ (2009)

[3]Gary Blasi, *Framing Access to Justice: Beyond Perceived Justice for Individuals*, __ Loyola L.A. L.Rev. __ (2009); Lucie White, *Access to Justice? Putting Lawyers in the Courtroom and Food on the Table*, __ Loyola L.A. L.Rev. __ (2009).

[4]See, e.g., Faisal Bhaba, Book Review, *Access to Justice as a Human Right*, 24

attorneys. By focusing here on developments in the quest for a right to civil counsel in legal disputes, I do not in any way mean to imply that providing lawyers is always either necessary or sufficient to achieve access to justice. It's a bit like the perennial legal services debate over whether resources should be concentrated on impact work or service work.[5] Of course, the answer is that we must do both: we must work for an expanded right to counsel in legal proceedings as they are traditionally defined while simultaneously pressing for a broader conception of justice.

I. Recent developments in the movement for a civil right to counsel

By any measure, now is a time of great ferment on the issue of access to justice for the poor. Scholarship proposing doctrinal, empirical, and strategic arguments for a right to counsel has blossomed in recent years, with at least four major symposia held, and many important articles published just in the last few years.[6] Well over a hundred advocates now regularly

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Wind.Rev.L& Soc. Issues 88 (2008) (noting lack of uniform definition of access to justice; discussing various conceptions); David Luban, *Taking Out the Adversary: The Assault on Progressive Public Interest Lawyers*, 91 Cal.L.Rev. 209 (2003) n.9.

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

[6]In addition to this Symposium, see *2006 Edward V. Sparer Symposium, Civil Gideon: Creating a Constitutional Right to Counsel in the Civil Context*, 15 Temple Pol. & Civ. Rts. L.Rev. 501 (2006) (12 articles on right to counsel topics); *A Right to A Lawyer? Momentum Grows*, 40 Clearinghouse Review 167-293 (July-August 2006) (17 articles); *An Obvious Truth: Creating An Action Blueprint for A Civil Right to Counsel in New York State*, 25 Touro Law Review Vol.1 (2009) (14 articles). Papers from the American Bar Association's December 2008 conference "Real People, Real Needs, Real Solutions–Access to Legal Representation in Civil Litigation" will be published in the Fordham Urban Law Journal in 2009. *See also* Paul Marvy

participate in the National Coalition for a Civil Right to Counsel, founded in 2004.[7] The American Bar Association unanimously passed a historic resolution in 2006 endorsing the provision of "counsel as a matter of right at public expense to low income persons in adversarial proceedings where basic human needs are at stake, such as those involving shelter, sustenance, safety, health, or child custody."[8] The ABA resolution has been endorsed by numerous state and local bar associations.[9] In addition to lending whatever weight or prestige the ABA brings to the public and legislative debate, the ABA's resolution also provides the grounding for the ABA to file amicus briefs in appropriate cases, as it has recently done in a right to counsel case, now pending in the Alaska Supreme Court.[10] State and local bar associations have likewise joined the call for greater access to counsel as of right, with the New York state and Boston bar associations recently issuing substantial reports analyzing the need and potential for expansion of the right to counsel in New York and Massachusetts.[11]

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and Laura Klein Abel, *Current Developments in Advocacy to Expand the Civil Right to Counsel*, 25 Touro L.Rev. __ (2009).

[7]See Debra Gardner, *Pursuing a Right to Counsel in Civil Cases: Introduction and Overview*, 40 Clearinghouse Review 167, 168 (July-Aug. 2006)

[8]The resolution and supporting report are available at http://www.abanet.org/legalservices/sclaid/downloads/06A112A.pdf (last viewed 2/20/09).

[9]According to the National Coalition for a Civil Right to Counsel, the ABA's resolution has been adopted by the bar associations of, *inter alia*, the District of Columbia, New York State, Connecticut, Minnesota, Colorado, Massachusetts, Maine, Washington State, New York City, Boston, Philadelphia, Los Angeles County, King County (Washington), and Chicago. *See* http://www.civilrighttocounsel.org/resources/bar_resolutions/ (last viewed 2/20/09).

[10]See *infra* notes 20-22 and accompanying text.

[11]See *Gideon's New Trumpet: Expanding the Civil Right to Counsel in Massachusetts*, http://www.bostonbar.org/prs/nr_0809/GideonsNewTrumpet.pdf
Likewise, the Hawaii Justice Foundation and state bar in 2007 recommended specific steps

Encouraging legislative developments have occurred as well. As Laura Abel's article in this collection discusses, seven states have recently enacted laws expanding the right to counsel in certain civil cases.[12] An effort is currently pending before the New York City Council to provide counsel as of right to low-income seniors facing eviction or foreclosure,[13] and a separate effort is underway in the New York State Assembly to provide counsel more broadly in mortgage foreclosures.[14] In 2007, Governor Arnold Schwarzenegger of California proposed a pilot program to fund a $5 million, three-county "Access to Justice Pilot Program" to provide representation as of right in certain civil matters.[15] The proposal was enthusiastically supported by the state's Chief Justice, long a proponent of legal services and access to justice.[16]

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toward a broader right to counsel. See *The Community-Wide Action Plan: Ten Action Steps to Increase Access to Justice in Hawai'i By 2010*, available at http://www.hsba.org/resources/1/Documents/Access%20to%20Justice.pdf (last viewed 2/19/09).

[12]Laura Abel, *Keeping Families Together, Saving Money, and Other Motivations Behind New Civil Right to Counsel Laws*, __ Loyola L.A. L.Rev. __ (2009).

[13]"Provision of Legal Services in Eviction, Ejectment, and Foreclosure Proceedings," Int. No. 648, available at http://webdocs.nyccouncil.info/textfiles/Int%200648-2007.htm?CFID=53320&CFTOKEN=83137828 (last viewed 2/21/09).

[14]*See* Assembly Bill No. A464, available at http://assembly.state.ny.us/leg/?bn=A00464 (last viewed 2/22/09).

[15]See California Department of Finance, Governor's Budget 2007-08, Proposed Budget Detail Judicial Branch, Major Program Changes, available at http://2007-08.archives.ebudget.ca.gov/StateAgencyBudgets/0010/0250/major_program_changes.html (last viewed 2/19/09).

[16]See Chief Justice Ronald M. George, Welcoming Comments at Access to Justice Symposium, San Francisco, March 18, 2008, at 3 (referring to ongoing work to achieve Civil Gideon pilot project), available at http://www.nlada.org/DMS/Documents/1215711719.09/CJ%20George-Access2Justice%204-08.doc (last viewed 2/19/09). California's Access to Justice Commission also sponsored a several-year effort, which I co-chaired, to draft two versions of a model statute which would guarantee a

Likewise, there have been some successes in the courts. In January, 2009, the Washington state Court of Appeals held unanimously that children have a due process right to counsel in truancy proceedings.[17] While the court decided only that due process requires counsel in truancy proceedings, its language suggests an opportunity to apply the decision in. other contexts: "For purposes of due process, the issue is whether the party has the mental capacity to represent his or her interests before the court."[18] This certainly suggests a solicitude under the due process clause for non-juvenile litigants whose mental capacity precludes effective self-representation.[19] In 2007, building on prior caselaw holding that an indigent in a custody dispute is entitled to counsel when facing an opponent with a publicly-funded lawyer,[20] an

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right to civil counsel. The "Basic Rights Act" would guarantee counsel in limited circumstances corresponding to those in the ABA Resolution, while the State Equal Justice Act would provide a broader right applicable to most civil actions. The two statutes are available at http://www.civilrighttocounsel.org/advocacy/legislation/ (last viewed 2/23/09). For more information about the process and the resulting model statutes, see Clare Pastore, *The California Model Statute Task Force*, 40 Clearinghouse Review 176 (July-Aug. 2006).

[17]*Bellevue School District v. E.S.*, 199 P.3d 1010 (2009). Reversing a 1999 case which rejected a claim for counsel in identical circumstances without invoking the *Mathews v. Eldridge* test, the court in *Bellevue School District* found that because "[a] child's interests in her liberty, privacy, and right to education are in jeopardy at an initial truancy hearing, and she is unable to protect these interests herself," due process required the appointment of counsel. *Id.* at 1017.

[18]*Id.* at 1015.

[19]Indeed, prior to *Bellevue v. E.S.*, a lower court in Washington had reached the conclusion that counsel was necessary in a truancy proceeding for a student with disabilities, based on the reasonable accommodation requirements of Washington's court rule implementing the Americans with Disabilities Act. *In re Truancy of H.P.*, Superior Court of Washington for Snohomish County, No. 00-7-02872-1 (March 28, 2008) (order and supporting materials on file with author). Arguments for the appointment of counsel as a reasonable accommodation for litigants with disabilities are outlined in Brodoff, McClelland and Anderson, *The ADA: One Avenue to Appointed Counsel Before a Full Civil Gideon*, 2 Seattle J.Soc.Just. 609 (2004).

[20]*Flores v. Flores*, 598 P.2d 893 (Alaska 1979).

Alaska trial court held that there is a state constitutional right to counsel for a parent in a custody action when the other parent is represented by private counsel.[21] The case is currently pending in the Alaska Supreme Court, where briefs supporting the appointment of counsel have been filed by the ABA and retired Alaska judges, among others.[22]

Of course, the landscape includes setbacks as well, most notably perhaps the failure of the 2007 test case *King v King* in Washington, in which the state supreme court rejected claims for counsel in a child custody proceeding based on state constitutional guarantees of due process, equal protection, and open courts.[23] Other test cases have resulted in courts refusing to address arguments for counsel.[24] Likewise, California's promising pilot proposal was swallowed by the state's budget deficit,[25] although a bill reviving the pilot.has recently been introduced in the state

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[21]Order Granting Defendant's Motion for Appointment of Counsel, Gordanier v. Jonsson, No. 3AN-06-8887 CI (8/14/07). The decision is available at http://74.54.211.93/pdfs/Gordanier%20v%20Jonsson%20-%20Order%20Appointing%20Counsel.pdf (last viewed 2/21/09).

[22]The briefs are available on the National Coalition for a Civil Right To Counsel's website at http://www.civilrighttocounsel.org/advocacy/litigation/ (last viewed 2/21/09).

[23]162 Wash.2d 378, 174 P.3d 659 (2007).

[24]*See, e.g. Kelly v. Warpinski*, Wisc. Sup. Ct. No. 04-29999-OA (original writ in state Supreme Court seeking appointment of counsel for defendants in civil suits, denied without opinion 4/26/05)(available at http://wscca.wicourts.gov/caseDetails.do?caseNo=2004AP002999&cacheId=A3BF90DD74D3B9D642D8473C4F773262&recordCount=1&offset=0) (last viewed 2/20/09); *Mitchell v. O'Brien*, Va.Sup.Ct. Record No. 072633 (affirmed without opinion 2/13/09) (available at http://208.210.219.132/scolar/precaseinq.jsp;jsessionid=0000FQI5URSLOFYVAOIBQZO3TVA:ulnfn1uq) (last viewed 2/23/09). The Maryland test case of *Frase v Barnhart* likewise did not produce the hoped-for articulation of a right to counsel in custody cases. *Frase v. Barnhart*, 379 Md. 100, 129, 840 A.2d 114, 131 (2003). The issue remains open in Maryland, however, because (over an impassioned dissent by three of the seven justices), the court declined to reach the counsel issue after ruling for the formerly unrepresented litigant on the merits. *Id.* at 129.

[25]See Legal Aid Association of California, "Significant Changes to Governor's Legal

Assembly.[26]

Despite the uneven landscape and the setbacks, there is undeniably growing momentum on this issue. Some of the most important progress we have seen so far is progress of the imagination: just as it is now unthinkable to imagine the criminal process without attorneys for both sides, so must it become for civil cases. The legislative and judicial successes we have seen so far do much to help encourage that change of attitude about what is and is not acceptable. Therefore, in a spirit of optimism, and in an effort to help push the debate forward, I offer the

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Representation Pilot Projects in Assembly Budget Process" (May 31, 2007) (describing reduction of pilot from $5 million to $2.5 million and allocation to self-help centers rather than representation) (available at http://www.calegaladvocates.org/search/item.146248-Significant_Changes_to_Governors_Legal_Representation_Pilot_Projects_in_Ass?tab=pane_search-results-1&print=1 (last viewed 2/19/09).

[26].*See* AB 590 .(Feb. 25, 2009), available at http://www.leginfo.ca.gov/pub/09-10/bill/asm/ab_0551-0600/ab_590_bill_20090225_introduced.pdf (last viewed 3/24/09). As currently introduced, the bill has little detail regarding where and how these "locally controlled pilot programs" would be run, but does indicate that they should be "designed to test and evaluate new methods for the fair and cost-efficient resolution of legal disputes, and the comprehensive enforcement of vital legal rights, with respect to basic human needs." *Id. at 2.*

following thoughts on strategies.

II. Strategies to advance the right to counsel in civil cases

(A) Do more with *Lassiter*

Advocates and scholars typically, and rightly, view the Supreme Court's 1981 decision in *Lassiter* as a terrible blow to the effort at achieving a broad right to counsel under a due process framework in civil cases involving fundamental rights.[27] In that case, applying the familiar three-part test for due process enunciated in *Mathews v. Eldridge*,[28] the Court held that the Constitution does not require appointment of counsel as a matter of right in proceedings to terminate parental rights.[29] Worse, the Court announced a "presumption that an indigent litigant has a right to appointed counsel only when, if he loses, he may be deprived of his physical liberty."[30]

Notably, however, the Court did not hold in *Lassiter* that due process *never* requires the appointment of counsel when parental rights may be terminated. Instead, it said that due process doesn't *always* require it, or doesn't require it across the board. The Court noted that "the complexity of the proceeding and the incapacity of the uncounseled parent *could be*, but would

[27]See, e.g., Bruce Boyer, *Justice, Access to the Courts, and the Right to Free Counsel for Indigent Parents: The Continuing Scourge of Lassiter v. Department of Social Services of Durham*, 36 Loyola U.Chicago L.J. 363 (2005); Debra Gardner, *Justice Delayed is, Once Again, Justice Denied: The Overdue Right to Counsel in Civil Cases*, 37 U.Balt.L.Rev. 59 (2007).

[28]424 U.S. 319 (1976). The *Mathews* factors are (1) the private interests at stake; (2) the risk of erroneous deprivation through the procedures used and probable value of the safeguards sought; and (3) the government's interest, including fiscal and administrative burdens. *Id.* at 335.

[29]452 U.S. at 31.

[30]*Id.* at 26-27.

not always be, great enough to make the risk of an erroneous deprivation of the parent's rights insupportably high."[31] Thus, the Justices specifically declined to "formulate a precise and detailed set of guidelines to be followed in determining when the providing of counsel is necessary to meet the applicable due process requirements"[32] and instead left the appropriateness of appointment in any individual case "to be answered in the first instance by the trial court, subject, of course, to appellate review. "[33]

It is remarkable that almost no published decisions show lower courts actually taking up that challenge. In 2006, Paul Marvy of the Northwest Justice Project and I read every one of the 500 published state court decisions citing *Lassiter* and dealing with requests for counsel.[34] Strikingly, only in Tennessee do the courts seem to have taken Lassiter's invitation to case by case determinations of the need for counsel seriously.[35] There, the Court of Appeals held in 1990 that in termination of parental rights ("TPR") cases, the third part of the *Mathews v. Eldridge* test, which it termed "the chance that the failure to appoint counsel will result in an erroneous decision— becomes the main consideration. . . ."[36] The court set forth a list of seven

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[31] *Id.* at 31 (emphasis added).

[32] *Id.* at 32 (internal quotation omitted, emphasis added).

[33] *Id.*

[34] A full account of our analysis is found at Clare Pastore, *Life After Lassiter: An Overview of State Court Right-to-Counsel Decisions*, 40 Clearinghouse Review 186 (July-August 2006).

[35] *See also* William Wesley Patton, *Standards of Appellate Review for Denial of Counsel and Ineffective Assistance of Counsel in Child Protection and Parental Severance Cases*, 27 Loy.U.Chi.L.J. 195, 201-202 (1996) (discussing the infrequency of *Lassiter* hearings).

[36] *State of Tennessee v. Min*, 802 SW 2d 625, 627 (Tenn.App. 1990).

factors that bear on the question of whether counsel is necessary in any individual case: "(1) whether expert medical and/or psychiatric testimony is presented at the hearing; (2) whether the parents have had uncommon difficulty in dealing with life and life situations, (3) whether the parents are thrust into a distressing and disorienting situation at the hearing; (4) the difficulty and complexity of the issues and procedures; (5) the possibility of criminal self-incrimination; (6) the educational background of the parents; and (7) the permanency of potential deprivation of the child in question."[37]

Rigorous application of these factors would certainly seem to suggest that counsel should be granted in many cases, and indeed, several Tennessee decisions have reversed or remanded TPR decisions where there is no record of the trial court's consideration of these factors, or where the court did not advise indigent parents of their right to request counsel, even while describing facts that make the termination of rights seem a foregone conclusion.[38]

There is no apparent reason that advocates elsewhere can't put teeth into the *Lassiter* requirements just as the Tennessee courts have. A strategy, perhaps fueled by special

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[37]802 S.W.2d at 627.

[38]*See, e.g., State Dep't of Human Servs. v. Taylor*, 1997 WL 122242, at *2 (Tenn. Ct. App. 1997) (reversible error for trial court to fail to inform parent of his right to an attorney and to fail to consider *Min* factors before denying counsel); *In re* M.E., 2004 WL 1838179, at *11 (Tenn. Ct. App. 2004) (same; also holds that right to counsel presumptively continues until court finds parent no longer indigent); *In re* Valle, 31 S.W.3d 566, 571 (Tenn. Ct. App. 2000) (failure to inform parent of right to request counsel renders judgment reversible); *In re* Adoption of J.D.W., 2000 WL 1156628, at *7 (Tenn. Ct. App. 2000) ("a parent's failure to request a court appointed attorney prior to trial does not relieve the court of the obligations to inform the parent of his right to be represented and to determine whether due process requires the appointment of counsel where the parent is indigent"); Adoption of Howson, 1993 WL 258783 (Tenn. Ct. App. 1993) (*Min* standards applied to privately-initiated TPR; appellate court applies seven-factor test and finds mother entitled to counsel);

appearances of counsel arguing only the appointment issue, aimed at actually forcing courts to hold hearings, develop a list of factors to consider, and make determinations of whether *Lassiter* requires counsel in individual cases could potentially be useful to secure counsel for more litigants, and to create a body of cases documenting the difficulties that pro se litigants face. Such documentation could in turn be used in legislative advocacy or public education, as well as in pressing for a categorical right to counsel where .appropriate.2

(B) Seize the moment

At this moment, the nation's attention is focused heavily on the economic crisis and in particular on the rising tide of home foreclosures. At the same time, many have called for holding the new administration to its promises of a greater adherence to the rule of law and principles of fairness.[39] While the two may seem unrelated, and the crisis may seem to bode ill for any new expenditures, it also offers opportunities to illustrate the need for and press legislatively for the right to counsel. Surely many Americans can relate to the difficulty and complexity of defending against a foreclosure or illegal foreclosure-driven eviction without counsel. New York state's pending bill to provide counsel in certain mortgage foreclosures is

2 It is important to note that this strategy is not without risks. As Justice Blackmun's dissent in *Lassiter* discusses, an uncounseled parent is unlikely to be able to make the sort of evidentiary record of entitlement to counsel under the case by case standard which would require reversal on appeal. 452 U.S. at 50-51 (Blackmun, J., dissenting). But if advocates explored a strategy of entering limited appearances for the sole purposes of seeking appointment of counsel, courts of appeals might one day face the "**Error! Main Document Only.**innumerable post verdict challenges to the fairness of particular trials" that helped persuade the Court to overturn *Betts v. Brady's* case by case approach to the need for counsel in criminal cases in favor of *Gideon's* categorical approach. *See Lassiter*, 452 U.S. at 51 (Blackmun, J., dissenting).

[39]See, e.g., Adam Cohen, *Democratic Pressure on Obama to Restore the Rule of Law* New York Times (Nov. 14, 2008), available at http://www.nytimes.com/2008/11/14/opinion/14fri4.html?ref=opinion (last viewed 2/21/09).

one example.[40]

Other events in the public eye may offer similar opportunities. For example, stories periodically emerge in the press detailing the practices of some health insurance companies in cancelling or denying coverage in outrageous circumstances. The controversy in California in 2006 over disclosures that Blue Shield and Kaiser had retroactively denied coverage to patients after they became ill is an example.[41] Advocates can use these sorts of examples to highlight the power imbalance in court between an ordinary person and a large, well-funded private interest, to make the connection between fairness and the rule of law, and to press legislatively for an incremental increase in the availability of counsel.[42]

(C) Use the increasingly sophisticated and persuasive body of research regarding the effects of ounsel and its lack

Rare is the call for a right to civil counsel which does not quote Justice Black's stirring language in *Gideon v. Wainwright* regarding the need for counsel: "Reason and reflection require us to recognize that in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him. This

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[40]*See* Assembly Bill No. A464, available at http://assembly.state.ny.us/leg/?bn=A00464 (last viewed 2/22/09). Counsel for a defendant facing foreclosure was sought in the Ohio Supreme Court in *Hill v. Myers*, No. 08-114, but the court denied the petition without opinion.

[41]See Lisa Girion, *Kaiser's Retroactive Denial of a Twenty-Year Patient*, Los Angeles Times, October 23.2006, available at http://www.pnhp.org/news/2006/october/kaisers_retroactive.php (last viewed 2/21/09); Lisa Girion, *Blue Cross Faces Fine for Voiding Policy*, Los Angeles Times, Sept. 22, 2006, available at http://articles.latimes.com/2006/sep/22/business/fi-revoke22 (last viewed 2/21/09).

[42]For obvious reasons, I do not urge that current events be used as a basis for litigation, unless an argument suggested by, for example, the foreclosure crisis, happens to build naturally and incrementally upon existing caselaw in a state.

seems to us to be an obvious truth."[43] Today, however, the proposition that an unrepresented litigant is unlikely to secure a fair trial is not only "obvious," but supported by an ever-greater empirical showing that the outcomes for those with and without access to counsel are far from equal,[44] and a related body of research regarding the extensive judicial and court time required to handle cases in which one or both parties are pro se.[45] Use of these studies should be central to any advocacy on right to counsel issues, and further empirical work should be encouraged.

Less well-developed so far than the empirical data about outcomes is that regarding the economic and social benefits of providing counsel, and the costs of failing to do so. The National Legal Aid and Defender Association has collected some studies including cost savings and economic benefit analyses from Massachusetts, Minnesota, and Nebraska.[46] Organizations focused on homelessness or healthcare have likewise documented the costs of homelessness or lack of healthcare,[47] but much more remains to be done.

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[43]372 U.S. 335, 355 (1963).

[44]*See, e.g.*, Russell Engler, *Connecting Self-Representation to Civil Gideon: What Existing Data Reveal About When Counsel is Most Needed*, 36 FORDHAM URB. L. J. ___ (2009) (forthcoming) (collecting studies).

[45]*See, e.g.*, Brief of Retired Alaska Judges as Amici Curiae in Support of Appellee Jonsson, *Office of Public Advocacy v. Alaska Court System (Gordanier)*, NO. S-12999 (available at http://www.civilrighttocounsel.org/pdfs/Alaska%20Retired%20Judges%20Amicus%20Brief.PDF) (last viewed 2/23/09) (citing studies). *See also Judges' Views of Pro Se Litigants' Effect on Courts*, 40 Clearinghouse Review 228 (July-August 2006) (reprinting *Warpinski* brief which cites studies of effects of pro se litigants on courts).

[46]*See* http://www.nlada.org/DMS/Index/000000/000050/document_browse#topics (last viewed 2/15/09).

[47]For example, the National Alliance to End Homelessness collects and summarizes numerous studies documenting the lengthier hospital stays and consequently greater costs typically incurred by homeless patients and the losses in future educational achievement incurred

(D) Cultivate new allies, especially among the judiciary

Certainly the advocacy effort for an expanded right to civil counsel depends heavily, and appropriately, on the "usual suspects": clients whose stories reach legislators and judges; legal services attorneys and directors; private bar pro bono leaders; Access to Justice commissions; academic commentators; and advocates in substantive areas such as healthcare or housing whose clients need attorneys. And a small number of judges have been calling for a civil *Gideon* for decades,[48] while a much larger number regularly calls for greater pro bono efforts by the private

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by homeless children. See National Alliance to End Homelessness, *The Cost of Homelessness*, (undated), available at http://www.endhomelessness.org/section/tools/tenyearplan/cost. The Maine State Housing Authority recently completed a study of the costs and benefits of permanent supportive housing in Portland, Maine, estimating a net savings of over $93,000 in inpatient and emergency care when homeless mental health patients were housed and received outpatient services. *See* Melany Mondello et. al., *Cost of homelessness: Cost Analysis of Permanent Supportive Housing, State of Main-Greater Portland* 2, (2007), available at http://www.mainehousing.org/Documents/HousingReports/CostOfHomelessness.pdf (last viewed 2/22/09). Such studies have obvious implications for arguments about the cost-effectiveness of providing legal assistance to avoid homelessness. For a provocative critique of calculations of the benefits of legal services and suggestions for improvement, see J.J. Prescott, *The Challenges of Calculating the Benefits of Providing Access to Legal Services*, ___ Ford.Urb.L.J. __ (forthcoming 2009).

[48]Indeed, the term "civil *Gideon*" was coined by a sitting judge in a 1997 lecture, later expanded and published in the Yale Law and Policy Review. Hon. Robert Sweet, *Civil Gideon and Confidence in a Just Society*, 17 YLLPR 503 (1998). Likewise, Justice Earl Johnson, recently retired from the California Court of Appeal, has been a tireless voice for a civil right to counsel for decades. *See, e.g.*, Earl Johnson, *Toward Equal Justice: Where the United States Stands Two Decades Later,* 5 Md. J. Contemp. Legal Issues 1994; Earl Johnson, *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); c.f. *Quail v. Municipal Court*, 171 Cal.App.3d 572, 577 (1985) (concurring and dissenting opinion of Justice Johnson calling for recognition of right to counsel for indigent tenant defending unlawful detainer).

bar.[49] Some, such as California's Chief Justice Ronald George, have supported legislative efforts to expand the availability of counsel as of right in certain cases.[50]

However, an unusual and promising development in some of the modern advocacy for a right to counsel in civil cases is the direct involvement of retired and in some cases even sitting judges. Sixteen retired Washington state court judges filed an amicus brief in the Washington test case of *King v. King*,[51] as did eleven sitting or retired Wisconsin superior court judges in *Kelly v. Warpinski*.[52] Ten retired Alaska judges (identified in the brief has having "more than 90 collective years of distinguished service on the bench") have filed a brief supporting the trial judge's ruling as to the constitutional necessity of counsel in the pending Alaska litigation.[53] These judicial officers are uniquely qualified to bear witness and draw judicial and public attention to the plight of unrepresented litigants, the burdens they pose on courts, and the threat to equal justice that is posed by lack of representation.

The retired judges' brief in the Washington state *King v. King* case employed two of the

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[49]*See, e.g.*, Justice Sandra Day O'Connor, "Pro Bono Work – Good News and Bad News" (remarks at Pro Bono Awards Assembly Luncheon of the American Bar Association, Atlanta, Georgia, August 12, 1991) (unpublished).

[50]Jeff Bleich, *The Neglected Middle Class*, California Bar Journal (June 2008), available at http://www.calbar.ca.gov/state/calbar/calbar_cbj.jsp?sCategoryPath=/Home/Attorney%20Resources/California%20Bar%20Journal/June2008&MONTH=June&YEAR=2008&sCatHtmlTitle=Opinion&sJournalCategory=YES (last viewed 2/23/09) (noting Chief Justice's support for pilot).

[51]The brief is available at http://www.civilrighttocounsel.org/pdfs/King%20-%20Amicus%20Brief%20Retired%20Judges.pdf (last viewed 2/23/09).

[52]The brief is reprinted at *Judge's Views of Pro Se Litigants' Effect on Courts*, 40 Clearinghouse Review 228 (July-August 2006).

[53]*See* Brief of Retired Alaska Judges, *supra* note 45.

types of empirical data discussed above, reviewing studies supporting the argument that unrepresented litigants receive less favorable outcomes and briefly noting the effects of custody determinations and parent-child relations on children's school achievement and life outcomes.[54] The Alaska retired judges' brief in the pending *Gordanier* litigation focuses on several effects of pro se litigation in contested custody cases: the poor outcomes for the litigants, the difficulties faced by judges presiding over such cases, the costs in time and efficiency to the judicial system, and the deleterious effects on public confidence in the integrity of the system.[55] The *Warpinksi* judges' brief focused on the effects of pro se litigants on the courts.[56] Judges should be encouraged to speak out more about the deleterious effects of lack of representation on justice, and to participate as appropriate in cases.

(E) Consider arguments based on court's inherent power to do justice

Related to the welcome involvement of judges in saying out loud that justice is not achieved in many instances where one side is unrepresented is a legal argument based on the court's power and duty to do justice. Advocates have worked tirelessly and creatively to develop doctrinal arguments for a right to counsel derived from sources other than the federal constitutional provisions rejected in *Lassiter*, including state constitutional due process, equal

[54]See Brief Amicus Curiae of Retired Washington Judges in Support of Appellant, available at http://www.civilrighttocounsel.org/pdfs/Alaska%20Retired%20Judges%20Amicus%20Brief.PDF (last viewed 2/21/09).

[55]*See* Brief of Retired Alaska Judges, *supra* note 45, at 4-23.

[56]*See Judges' Views of Pro Se Litigants' Effects on Courts*, *supra* note 52.

protection, and open courts provisions.[57] As I have suggested elsewhere, a potentially fruitful additional area for research and advocacy is courts' inherent powers.[58] Many courts have held that they inherently possess the power to appoint counsel where necessary to fulfill the function of dispensing justice, or have so assumed in passing, although actual appointments are rare.[59] A few courts have flirted with constitutional provisions or statutes granting all necessary powers to courts in aid of jurisdiction, or the court's inherent "duty to ensure judicial proceedings remain truly adversary" as possible bases for the appointment or payment of counsel, although again courts rarely choose to exercise the power they proclaim.[60]

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[57]*See, e.g.*, *King v. King*, 162 Wash.2d 378, 174 P.3d 659 (2007) (due process, equal protection and open courts provisions of Washington Constitution); *Frase v. Barnhart*, 379 Md. 100, 840 A.2d 114 (2003) (equal access to the courts, adoption of the English right to counsel, due process, and separation of powers under Maryland Declaration of Rights). *C.f. Quail v. Municipal Court*, 171 Cal.App.3d 572, 577 (1985) (concurring and dissenting opinion of Johnson, J., calling for recognition of right to counsel based, *inter alia*, on California constitution's incorporation of English common law).

[58]*See* Clare Pastore, *Life After Lassiter: An Overview of State Court Right to Counsel Decisions*, 40 Clearinghouse Review 186, 192 (2006).

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

[60]*See State ex rel. Johnson*, 465 So. 2d 134, 138 (La. Ct. App. 1985) *citing* La. Const. art. V, § 2 ("A judge may issue writs of habeas corpus and all other needful writs, orders, and process in aid of the jurisdiction of his court") as authority for payment of appointed counsel; *Travelers Indem. Co. of Connecticut v. Mayfield, 923 S.W.2d 590, 594* (Tex. 1996). In *Travelers*

One of the strongest and most detailed discussions of the court's inherent power to appoint counsel came from the Wisconsin Supreme Court in 1996, in a case overturning a state law which prohibited the appointment of counsel for parents in child neglect proceedings.[61] The state high court held that the statute violated the separation of powers principle inherent in the state constitution, because it intruded on the judiciary's inherent power to "appoint counsel in furtherance of the court's need for the orderly and fair presentation of a case."[62] The court noted that such a case might arise with a parent who is "poorly educated, frightened, and unable to fully understand and participate in the judicial process" and who "obviously needs assistance of counsel to ensure the integrity of the [neglect] proceeding. . . . "[63]

The brief of the retired Alaska judges in the *Gordanier* case also contains an inherent powers argument. In a section entitled "The Court Has the Authority and Responsibility to Determine Whether the Proper Administration of Justice Requires Appointment of Counsel in Certain Cases," the judges outline the courts' duties to assure that litigants receive a fair trial, and

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Indemnity, the Texas Supreme Court noted that despite its "duty to ensure judicial proceedings remain truly adversary.. . .we have never held that a civil litigant must be represented by counsel in order for a court to carry on its essential, constitutional function. Indeed, thousands of cases each year are prosecuted by pro se litigants. Nevertheless, we recognize that in some exceptional cases, the public and private interests at stake are such that the administration of justice may best be served by appointing a lawyer to represent an indigent civil litigant." *Id.* While several Texas cases cite this standard, only one reported case has actually used it to appoint counsel, only to be reversed on appeal. *Tolbert v. Gibson*, 67 S.W.3d 368, 372-73 (Tex. App. 2001), *rev'd*, 102 S.W.3d 710 (Tex. 2003

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

[62] *Id.* at 414.

[63] *Id.* at 415. The court went on to hold the statute unconstitutional under the federal constitution as well, because it precluded the appointment of counsel even when due process as set forth in *Lassiter* required it. *Id.* at 415-16.

link that duty to cases in which the court has invalidated funding restrictions that threatened the independence or functioning of the court.[64] Likewise, advocates in *Frase v. Barnhart* argued that the separation of powers provision of Article 8 of the Maryland Declaration of Rights, which had previously been construed to encompass an inherent right and obligation of the judiciary in the administration of the judicial process, supported the court's power to appoint counsel where necessary.[65] A similar argument was advanced in the Wisconsin case, *Kelly v. Warpinski*.[66] Further development of this line of argument is surely warranted.

III. Two cautionary notes

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

(A) Be careful what we wish for

To advocates contemplating the current landscape of spotty and unpredictable availability of civil counsel and the wide "justice gap" between the legal needs of the poor and the resources

[64]Brief of Retired Alaska Judges as Amici Curiae in Support of Appellee Jonsson at 23-24 (available at http://www.civilrighttocounsel.org/pdfs/Alaska%20Retired%20Judges%20Amicus%20Brief.PDF) (last viewed 2/22/09).

[65]*See* John Nethercut, *Maryland's Strategy for Securing A Right to Counsel in Civil Cases: Frase v. Barnhart and Beyond*, 40 Clearinghouse Review 238, 242 (July-Aug 2006) (describing *Frase* arguments).

[66]*See* John Ebbott, *To Gideon via Griffin: The Experience in Wisconsin*, 40 Clearinghouse Review 223 (July-Aug. 2006) (describing *Warpinski* litigation).

available to address those needs,[67] the criminal defense model holds a certain appeal. Yet the use of the term "civil *Gideon*" with its implicit adoption of the public defender model as an aspirational goal, masks some deep flaws in the public defender system. Civil counsel advocates must be attentive to systemic constraints that threaten access to justice in the criminal defense system, and take care not to replicate them on the civil side. Perhaps the most significant of these is caseloads that are sometimes too high to allow adequate representation, a subject of frequent lamentation, study, and even litigation.[68] Funding, manner of appointing counsel, delivery system, and minimum standards of competence are all critical factors in determining the success of publicly-funded counsel.[69] Collaboration between civil *Gideon* advocates and experienced public defenders, judges, and bar leaders is essential to avoid some of the problems plaguing the public criminal defense system.

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[67]*See, e.g., Documenting the Justice Gap In America: The Current Unmet Civil Legal Needs of Low-Income Americans, A Report of the Legal Services Corporation* (September 2005)(available at: http://www.lsc.gov/justicegap.pdf (last viewed 2/20/09) (estimating that 80% of the legal needs of the poor go unmet).

[68]*See* Erik Eckholm, *Citing Workload, Public Lawyers Reject New Cases*, New York Times, 11/9/08 (describing litigation and advocacy in Kentucky, Florida, Tennessee, Minnesota, Maryland, Arizona, and New York over public defender caseloads). In September, 2008, a Florida judge ruled that Miami-Dade County public defenders could refuse new lesser felony cases so that its attorneys could competently handle the cases already on their docket. The order is available at http://www.pdmiami.com/Order_on_motion_to_appoint_other_counsel.pdf. The order is now before the Florida Supreme Court (Case # 3D08-2272) with oral argument set for March 30, 2009.

[69]For a thoughtful discussion of the lessons of *Gideon* for a civil right to counsel, see Laura K. Abel, *A Right to Counsel in Civil Cases: Lessons from Gideon v. Wainwright*, 15 Temple Pol. & Civ. Rts. L.R. 527, 538 (Summer 2006). Deborah Rhode's piece in this collection also catalogs the criticisms. Deborah Rhode, *Whatever Happened to Access to Justice?*, __ Loyola L.A. L.Rev. __ (2009).(notes 1-2-109 and accompanying text).

(B) Be attentive to the potential for conflicting interests among different players and undesired changes in the role of legal services programs

The prospect of increased representation for the indigent is certainly a welcome one for advocates, clients, and judges. Yet the actual implementation of a broader right to counsel is complicated. For example, many judges, especially those who preside over family law dockets clogged with pro per litigants,[70] are eager for a place where they can refer pro pers for assistance, without necessarily distinguishing between cases where both parties are unrepresented and those where one side has an attorney, or cases in which the presence of an attorney is likely to make a great difference to the outcome. However, legal services programs may not see relieving the burden on the courts, especially in cases where neither side is represented, as their top priority. In part, this is because many legal services programs have missions that go well beyond simply handling individual legal disputes, as critical as that function is. For example, the stated mission of one of California's largest legal services programs is to "provide[] quality legal services that empower the poor to identify and defeat the causes and effects of poverty."[71] Mission statements from other legal services programs often contain a similar focus on the alleviation of poverty or the empowerment of clients, not just assistance in litigating disputes.[72]

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[70]Recent estimates in California put the pro per rate of family law petitioners at 72 percent in large counties and 67 percent in small counties. Judicial Council of California, *Statewide Action Plan for Serving Self-Represented Litigants* (2003) at 11 (available at http://www.courtinfo.ca.gov/reference/documents/selfreplitsrept.pdf) (last viewed 2/23/09).

[71]See Mission Statement, Legal Services of Northern California, available at http://www.lsnc.info/Mission%20Statement (last viewed 2/22/09).

[72]*See, e.g.*, http://www.lasnet.org/lasgc%20statement.htm (last viewed 2/22/09) ("The Legal Aid Society of Greater Cincinnati is a nonprofit law firm dedicated to reducing poverty and ensuring family stability through legal assistance");

Related to this type of anti-poverty mission is the ability of local legal services programs to set their own priorities and determine locally whether and when to adopt an impact strategy, even if means turning down some individual cases. Local priority setting is required for programs receiving federal Legal Services Corporation funds,[73] and the ability to do impact work is often a highly valued part of programs' portfolio. Advocates sometimes fear that a legislated or court-ordered mandate to serve all indigent clients in a particular subject area (eg, child custody or evictions), particularly if not accompanied by funding well beyond what seems politically feasible, will swamp these important functions, or that a mandate for counsel in certain cases will threaten or eliminate resources for areas of law where the right does not exist. California's recent experience with the 2007 proposed pilot project to expand representation in certain civil cases provides an illustration of the potential for this type of tension among access to justice players.[74] Many judges, especially some who sit in family court, enthusiastically supported the

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http://www.lassd.org/mission%20statement.htm ("The Legal Aid Society of San Diego, Inc. . . . [is] dedicated to providing equal access to justice for poor people through aggressive, quality legal services. As legal advocates we will redress our clients' legal problems, empower our clients to access and effectively participate with the legal, governmental and social system and encourage self-empowerment in the fight against poverty and injustice"); http://www.legalaid.org/coasttocoast/ ("The mission of Coast to Coast Legal Aid of South Florida is to improve the lives of low income persons in our community through advocacy, education, representation and empowerment "); https://www.legalaidnc.org/Public/Learn/about_us/Mission_Statement_LANC_Dec_12_03.aspx (last viewed 2/22/09) ("Legal Aid of North Carolina is a statewide, nonprofit law firm that provides free legal services in civil matters to low-income people in order to ensure equal access to justice and to remove legal barriers to economic opportunity").

[73]45 C.F.R. § 1620.5(a).

[74]The observations in this paragraph are drawn from my experience and notes as a member of the Joint Advisory Task Force on the Legal Representation Pilot Program (sponsored by the Judicial Council of California, the California Commission on Access to Justice, and the Legal Aid Association of California), as a participant in a panel on civil right to counsel at a

pilot. Some legal services directors were much more cautious, however. Indeed, the Executive Director of one of California's largest programs spoke emphatically at a national meeting about his disinclination to apply for funds under the pilot precisely because a mandate to serve so many new clients might threaten the program's ability to conduct impact advocacy and respond to local priorities, and might threaten the program's ability to choose categories of clients based on other justice concerns (for example, only alleged victims and not alleged perpetrators of domestic violence, or only tenants and not landlords).[75] Another director expressed to me his concern that the pilot was too focused on the concerns of judges and not enough on the goal of alleviating poverty and meeting the needs of clients and service providers.[76] The postponement of California's pilot has offered the access to justice community a new opportunity to make sure that working groups and strategists heed these concerns and to think more carefully about the relationship between procedural and substantive justice and how a right to counsel fits in.3

Conclusion

This is a promising time for advances in the availability of counsel as of right to low-income litigants. I am convinced that just as we now look back at the pre-*Gideon* landscape– a

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Directors of Litigation meeting sponsored by the National Legal Aid and Defender Association in San Francisco on June 23, 2008, as the facilitator of a right to counsel session at a California Commission on Access to Justice event in April 2008, and at similar events since 2006. Some of the Joint Task Force's recommendations are available at http://www.calegaladvocates.org/library/item.146200 and www.calegaladvocates.org/library/attachment.103963(last viewed 2/23/09).

[75]Remarks of Ramon Arias, Executive Director, Bay Area Legal Aid, made at NLADA Litigation Directors conference, Implementation of a Civil Right to Counsel workshop, June 23, 2008 (San Francisco) (Notes on file with author).

[76]Notes of conversation on file with author.

3 C.f. Deborah Rhode, *Whatever Happened to Access to Justice*, supra, *at notes 10-23 and accompanying text*

mere 45 years ago– and are astonished that a criminal defendant could in that not very distant past be charged, tried, convicted, and sent to prison without a lawyer, we will before long look back at this time and wonder how a person could lose her children, her home, her job, or her health insurance, all without the aid of counsel. What is today routine injustice must become unthinkable, and symposia like this one are valuable steps on the way to that new reality.

(discussing procedural and substantive justice concerns).