JUSTICE DELAYED IS, ONCE AGAIN, JUSTICE DENIED:[1] THE OVERDUE RIGHT TO COUNSEL IN CIVIL CASES

Debra Gardner†

On August 7, 2006, Michael Greco, then-President of the American Bar Association (ABA), called upon its House of Delegates to address one of the most pressing contemporary problems facing the justice system in this country:[2] "[W]hen litigants cannot effectively navigate the legal system, they are denied access to fair and impartial dispute resolution, the adversarial process itself breaks down and the courts cannot properly perform their role of delivering a just result."[3] The House of Delegates unanimously answered this call by resolving that:

> [T]he American Bar Association urges federal, state, and territorial governments to provide legal counsel as a matter of right at public expense to low income persons in those categories of adversarial proceedings where basic human

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† Debra Gardner has served as Legal Director of the Public Justice Center (PJC) since 2000, where she engages in civil rights and poverty litigation and other advocacy. Before joining the PJC, she worked in poverty law at the Legal Aid Bureau in Maryland for more than fifteen years. Gardner obtained a J.D. in 1982 from Northeastern University School of Law and an A.B. in 1979 from Mount Holyoke College. Among her duties at the PJC, she pursues a judicial recognition of a civil right to counsel under the Maryland Declaration of Rights and coordinates the National Coalition for a Civil Right to Counsel.

1. Inspiration for this title is of course drawn from the letter composed by Dr. Martin Luther King, Jr., on April 16, 1963, after being arrested for participating in numerous civil rights demonstrations in Birmingham, Alabama. Imprisoned in the Birmingham City Jail, King wrote of the desperate need for equal rights for all individuals. Letter from Martin Luther King, Jr. (April 16, 1963), *in* A TESTAMENT OF HOPE: THE ESSENTIAL WRITINGS OF MARTIN LUTHER KING, JR. 289, 292 (James Melvin Washington ed., 1986) ("We must come to see with the distinguished jurist of yesterday that 'justice too long delayed is justice denied.'").
2. Michael S. Greco, President, American Bar Association, Remarks to the House of Delegates at the American Bar Association Annual Meeting 6–7 (Aug. 7, 2006) (transcript available at http://www.abanet.org/op/greco/speeches/aba_greco_hod_final_remarks.doc).
3. American Bar Association Task Force on Access to Civil Justice, *ABA Resolution on Right to Counsel*, 15 TEMP. POL. & CIV. RTS. L. REV. 507, 518 (2006), *available at* http://www.abanet.org/legalservices/sclaid/downloads/06A112A.pdf [hereinafter ABA Task Force].

> needs are at stake, such as those involving shelter, sustenance, safety, health or child custody, as determined by each jurisdiction.[4]

This brief article attempts to answer the questions:

> How did we[5] arrive at this historic moment?
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> What came before?
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> Where are we now?
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> And, what happens next?[6]

The notion of a civil right to counsel did not begin with the ABA Resolution.[7] While it is often referred to colloquially as Civil Gideon,[8] for the landmark case of *Gideon v. Wainwright*,[9] which provided for appointed counsel for indigent defendants in criminal matters,[10] it did not begin with *Gideon* either.[11] Among its earliest tracings is a Tudor codification.[12] This English law provided that "the Justices . . . shall assigne to the same pou psone or psones Councell lerned by their discrecions which shall geve their Councelles nothing taking for the same, and in like wise the same Justices shall appoynte attorney and attorneies for the same pou

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4. *Id.* at 508.
5. By "we" the author refers to all those in the United States who pursue access to justice for the poor and hopes the reader counts herself or himself in that legion.
6. This is by no means intended as an exhaustive recitation of historical developments that are relevant to the evolution of a civil right to counsel, but merely as a brief overview.
7. *See, e.g.*, Paul Marvy, *Thinking About a Civil Right to Counsel Since 1923*, 40 CLEARINGHOUSE REV. J. POVERTY L. & POL. 170 (2006).
8. ABA TASK FORCE, *supra* note 3, at 515.
9. 372 U.S. 335 (1963).
10. *Id.* at 344–45.
11. Marvy, *supra* note 7, at 170.
12. 11 HEN. 7, ch. 12 (1495), *reprinted in* 2 STATUTES OF THE REALM 578 (1816), *microformed on* Microcard No. 55E53 (Matthew Bender & Co.) [hereinafter 11 HEN. 7, ch. 12]. It has also been argued that the right to counsel in civil cases goes back even farther, deriving from Chapter 40 of the Magna Carta of 1215. MAGNA CARTA ch. 40, *reprinted in* WILLIAM SHARP MCKECHNIE, MAGNA CARTA: A COMMENTARY ON THE GREAT CHARTER OF KING JOHN 395 (2d ed. 1914) ("To no one will we sell, to no one will we refuse or delay, right or justice."). *See, e.g.*, John MacArthur Maguire, *Poverty and Civil Litigation*, 36 HARV. L. REV. 361, 363–64 (1923).

psone or psones . . . ."[13] As described elsewhere,[14] this statute has been incorporated into the common law of Maryland through Article V of the Maryland Declaration of Rights.[15] It has likewise been incorporated by many if not most other states.[16] However, it is safe to say that such a common law right has been little known or exercised in modern times,[17] and poor litigants await contemporary judicial acknowledgement of its vitality.[18]

More recently, scholars, jurists, and advocates have theorized and written about the need for, and various doctrinal bases for, a civil right to counsel since at least early in the last century.[19] They were no doubt motivated by the gaping, unmet need for legal advocacy for the poor, which they would have observed in their courtrooms, legal aid offices, law firms, and communities on a daily basis over many decades, and which continues unabated.[20]

All the while, the right to appointed counsel in criminal cases was evolving.[21] The Supreme Court had said in *Betts v. Brady*,[22] that whether there was a right to counsel, under the due process clause of the Fourteenth Amendment to the U.S. Constitution, for an indigent criminal defendant in state court should be determined on a case-by-case basis.[23] In reaching that result, the Court surveyed constitutional and statutory provisions for a categorical right in the various states and concluded that "in the great majority of the States, it has been the considered judgment of the people, their representatives and their courts that appointment of counsel is not a

13. 11 HEN. 7, ch. 12.
14. Stephen H. Sachs, *Seeking a Right to Appointed Counsel in Civil Cases in Maryland*, 37 U. BALT. L. REV. 5, 17 (2007).
15. MD. CONST. DECL. OF RTS. art. V.
16. *See* Wilson v. Arkansas, 514 U.S. 927, 933 (1997).
17. *See, e.g.*, Robert W. Sweet, *Civil Gideon and Confidence in a Just Society*, 17 YALE L. & POL'Y REV. 503, 504 (1998).
18. *See, e.g.*, Frase v. Barnhart, 379 Md. 100, 126–29, 840 A.2d 114, 129–30 (2003) (where a narrow majority of the court declined to reach the issue of right to counsel, including the incorporation of 11 HEN. 7, ch. 12 through article V).
19. *See* Marvy, *supra* note 7, at 170.
20. *See* LEGAL SERVICES CORPORATION, DOCUMENTING THE JUSTICE GAP IN AMERICA 6–7 (2005), http://www.lsc.gov/press/documents/LSC%20Justice%20Gap_FINAL_1001.pdf.
21. *See, e.g.*, Yale Kasimar et al., *Gideon at 40: Facing the Crisis, Fulfilling the Promise*, 41 AM. CRIM. L. REV. 135, 136–39 (2004).
22. 316 U.S. 455 (1942).
23. *Id.* at 462. Scholars of local legal history will be interested to note that *Betts* arose in Carroll County, Maryland. *Id.* at 456.

fundamental right, essential to a fair trial."[24] The Court found only nine states to have a broad right to counsel commensurate with that provided in federal courts by the Sixth Amendment.[25]

Just twenty-one years later, in 1962, the Court decided *Gideon* and overruled *Betts*.[26] The *Gideon* Court suggested the *Betts* Court had read its older precedents, which were "sounder we believe than the new," too narrowly.[27] The Court was speaking primarily of *Powell v. Alabama*,[28] in which it had said ten years before *Betts*:

> The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence.[29]

For purposes of this discussion of the evolution of recognition of rights, it is especially noteworthy that twenty-two states took the extraordinary step of filing an amicus brief on behalf of an accused robber against the state government, urging that *Betts* be overruled, while only two supported Florida's view that *Betts* should not be disturbed.[30]

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24. *Id.* at 471.
25. *Id.* at 467–68. These states were Georgia, Iowa, Louisiana, Michigan, Minnesota, New Jersey, North Carolina, Rhode Island, and West Virginia. *Id.* at 468 n.21.
26. Gideon v. Wainwright, 372 U.S. 335, 345 (1963).
27. *Id.* at 344.
28. 287 U.S. 45 (1932).
29. *Id.* at 68–69.
30. *Gideon*, 372 U.S. at 336, 345. Alaska, Colorado, Connecticut, Georgia, Hawaii, Idaho, Illinois, Iowa, Kentucky, Maine, Massachusetts, Michigan, Minnesota, Missouri, Nevada, North Dakota, Ohio, Oregon, Rhode Island, South Dakota, Washington, and West Virginia filed an amicus brief urging the overruling of *Betts*. *See* Brief for the State Government as Amici Curiae Supporting Petitioner, Gideon v. Wainwright, 372 U.S. 335 (1963) (No. 155). Alabama, joined by North Carolina,

For those who thought this progression might cross over to the civil side of the courts, hopes were dashed another two decades later when the Court issued its decision in *Lassiter v. Department of Social Services.*[31] The case involved a civil proceeding focusing on the termination of parental rights.[32] Instead of heeding the lesson of *Gideon* and embracing the right as fundamental,[33] along with the ease of administration of a categorical right, the Court returned to the premise that whether counsel was necessary to satisfy due process should be determined case by case.[34] Worse, it announced a presumption that there is no right to counsel in a civil case unless the litigant faces a loss of physical liberty,[35] defined narrowly as confinement.[36]

The ruling is particularly disturbing,[37] because Justice Potter Stewart, writing for a five-member majority, recognized "that a parent's desire for and right to 'the companionship, care, custody[,] and management of his [or her] children' is an important interest that 'undeniably warrants deference and, absent a powerful countervailing interest, protection,'"[38] and termination of parental rights constitutes "a unique kind of deprivation," and "therefore a commanding one."[39] It is all the more disturbing for the majority's recognition that thirty-three states already provided for appointed counsel in such proceedings.[40] Lamenting that the U.S. Constitution does not require a higher standard,[41] Justice Stewart applauded "the standards

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filed on the other side. *See* Brief for the State of Alabama as Amici Curiae Supporting Respondent, Gideon v. Wainwright, 372 U.S. 335 (1963) (No. 155).

31. 452 U.S. 18 (1981).
32. *Id.* at 21.
33. *Gideon*, 372 U.S. at 343.
34. *Lassiter*, 452 U.S. at 31–32.
35. *Id.* at 26–27.
36. *Compare id.* ("[A]n indigent litigant has a right to appointed counsel only when . . . he may be deprived of his physical liberty.") *with id.* at 40 (Blackmun, J., dissenting) ("I do not believe that our cases support the presumption . . . that physical confinement is the only loss of liberty grievous enough to trigger a right to appointed counsel . . . .").
37. The reader will perhaps indulge the author a moment's personal reflection that she was entering her third year of law school and preparing for a lifelong career in civil legal services for the poor when *Lassiter* came down—a foreboding portend to be sure.
38. *Lassiter*, 452 U.S. at 27 (alteration of original to reflect quotations) (internal quotation marks added) (quoting Stanley v. Illinois, 405 U.S. 645, 651 (1972)).
39. *Id.*
40. *Id.* at 34.
41. *Id*. at 33–34.

increasingly urged by informed public opinion and now widely followed by the States [as] enlightened and wise."[42]

Predictably, *Lassiter* all but shut the door to progress on achieving a broad civil right to counsel, at least for a time.[43] It has generated upwards of five hundred appellate court decisions around the country discussing some aspect of its analysis of a constitutional right to counsel on the civil side, which can easily be described as all over the map.[44] Nonetheless, it appears usually to have resulted in a denial of counsel.[45]

The attention of those who strive for equal justice for the poor was captured, virtually by force, for the next two decades by ideological and financial attacks on civil legal services for the poor.[46]

Every creative and innovative effort has been brought to bear to replace dwindling federal financial support for legal services, including Interest on Lawyers' Trust Accounts (IOLTA) programs, civil filing fee surcharges, bar dues surcharges, and aggressive private fundraising.[47] In addition, resources have been stretched as far as they will go through programs providing limited advice to those who are forced to represent themselves, internet-accessed and other legal educational materials, and other forms of so-called "unbundled" legal services.[48] The result of all of these efforts: the

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42. *Id.* at 34.

43. Alan W. Houseman, Commentary, *Future Changes and Prospects for Legal Aid and Public Defender Organizations*, 24 QUINNIPIAC L. REV. 557, 575 (2006).

44. *See generally* Clare Pastore, *Life After* Lassiter*: An Overview of State-Court Right-to-Counsel Decisions*, 40 CLEARINGHOUSE REV. J. POVERTY L. & POL. 186 (2006).

45. *Id.* at 186. One bright spot in this landscape is that virtually all states now provide by statute for counsel in termination of parental rights proceedings. *See* Laura K. Abel & Max Rettig, *State Statutes Providing for a Right to Counsel in Civil Cases*, 40 CLEARINGHOUSE REV. J. POVERTY L. & POL. 245, 252–60 (2006).

46. *See generally* ALAN W. HOUSEMAN & LINDA E. PERLE, CENTER FOR LAW AND SOCIAL POLICY, SECURING EQUAL JUSTICE FOR ALL: A BRIEF HISTORY OF CIVIL LEGAL ASSISTANCE IN THE UNITED STATES 29–46 (2007), http://www.clasp.org/publications/legal_aid_history_2007.pdf (tracing the history of federal funding cuts and political restrictions placed on civil legal services from the Reagan era to the present). *See also* Phillips v. Wash. Legal Found., 524 U.S. 156, 159–60 (1998) (holding that Interest on Lawyers' Trust Accounts (IOLTA), a funding scheme for civil legal aid created by states in response to federal funding cuts, is private property for purposes of the Fifth Amendment's prohibition against government taking without just compensation). *But see* Brown v. Legal Found. of Wash., 538 U.S. 216, 220, 240 (2003) (holding that funding civil legal services is a public use, that IOLTA programs do not involve a regulatory taking, and that no compensation is required because such programs do not occasion any financial loss to property owner).

47. HOUSEMAN & PERLE, *supra* note 46, at 34, 44.

48. *Id.* at 45–46. An attorney provides unbundled legal services when she performs specific, individual tasks for a client rather than performing the full range of services

poor, overall, have barely held their ground.[49] Steady increases in the poverty population and continued stagnation of federal funding have offset the gains made by equal access to justice advocates throughout the nation.[50] Studies continue to show the same level of unmet need for legal services among those who cannot afford to hire a lawyer.[51]

It is not surprising then that some poor litigants and their advocates persevered in seeking recognition of a right to counsel, despite the setback of *Lassiter*. One notable early example is the case of *Donaldson v. State of New York*,[52] where low-income tenants in New York brought an action arguing for a right to counsel in eviction cases.[53] Although the case was dismissed on procedural grounds,[54] conventional wisdom indicates that it helped to create the impetus for a substantial increase in local funding for civil legal aid in eviction cases.

The turn of the century marked a true revival of the effort to obtain recognition of a right to counsel in civil cases.[55] In both Washington and Maryland, among others, research had begun on potential legal claims for a right to counsel under state constitutions.[56] Appeals were mounted in cases involving poor litigants who could not navigate the legal proceedings in which they found themselves embroiled without a lawyer.[57]

Unfortunately, these early cases did not result in a ruling squarely on the issue. The case of *Smith v. City of Moses Lake*[58] involved a low-income senior citizen seeking to protect his self-built home of

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she ordinarily would when retained by a client. Forrest S. Mosten, *Unbundling of Legal Services and the Family Lawyer*, 28 FAM. L. Q. 421, 422–23 (1994).

49. LEGAL SERVICES CORPORATION, *supra* note 20, at 8, 14, 19.

50. Dennis Archer, Comments at the Georgetown Journal of Legal Ethics Symposium: Access to Justice: Does it Exist in Civil Cases? (2004), *in* 17 GEO. J. LEGAL ETHICS 455, 457–58 (2004).

51. LEGAL SERVICES CORPORATION, *supra* note 20, at 7–8.

52. 548 N.Y.S.2d 676 (App. Div. 1989).

53. *Id.* at 676–77.

54. *See id.*

55. *See generally* John Nethercut, *"This Issue Will Not Go Away": Continuing to Seek the Right to Counsel in Civil Cases*, 38 CLEARINGHOUSE REV. J. POVERTY L. & POL. 481 (2004).

56. For more detailed descriptions of the preparation and development underlying the effort in Maryland, *see* Sachs, *supra* note 14. *See also* Nethercut, *supra* note 55, at 481–82.

57. Nethercut, *supra* note 55, at 481–82.

58. No. 21783-3-III (Wash. Ct. App. May 21, 2003).

fifty years from condemnation.[59] Mr. Smith died while his appeal was pending, and the case was dismissed as moot.[60] *In re Custody of Halls*[61] and *Frase v. Barnhart*,[62] both custody disputes, were decided on other grounds favorable to the unrepresented parent.[63] In *Frase*, however, three members of the seven-member Court of Appeals of Maryland filed a concurring opinion indicating that they would have reached the issue and would have found a right to counsel under the Maryland Declaration of Rights.[64]

While these renewed efforts were taking shape, it happened that the annual conference of the National Legal Aid and Defender Association[65] was taking place in Seattle in November of 2003.[66] Local hosts and organizers included Deborah Perluss, General Counsel to the Northwest Justice Project, Washington's largest civil legal services program.[67] Ms. Perluss spearheaded the inclusion of a workshop on a civil right to counsel in the annual conference agenda.[68] At the time, the *Frase* case had been argued just a month before—and would be decided the month after.[69] Panelists included the author who described the development of the *Frase* appeal and the legal theories for a right to counsel under the Constitution of Maryland.[70]

What shortly became the National Coalition for a Civil Right to Counsel (NCCRC or the Coalition) was born during that workshop, when the author circulated a sign-up sheet, promising to set up a

59. *See id.*
60. *See id.*
61. 109 P.3d 15 (Wash. Ct. App. 2005).
62. 379 Md. 100, 840 A.2d 114 (2003).
63. *Frase*, 379 Md. at 102, 840 A.2d at 115; *Halls*, 109 P.3d at 17.
64. 379 Md. at 141, 840 A.2d at 138.
65. The National Legal Aid and Defender Association is the nation's oldest and largest non-profit membership association, "devoting 100 percent of its resources to serving the broad equal justice community." About the NLADA, http://www.nlada.org/About/About_Home (last visited Jan. 14, 2008).
66. Paul Marvy, *"To Promote Jurisprudential Understanding of the Law": The Civil Right to Counsel in Washington State*, 40 CLEARINGHOUSE REV. J. POVERTY L. & POL. 180, 183 (2006).
67. *See id.* The Northwest Justice Project is a nonprofit statewide organization that provides free legal services annually to "more than 18,000 people in need of critical legal assistance" throughout Washington. About the Northwest Justice Project, http://www.nwjustice.org/about_njp/index.html (last visited Jan. 14, 2008).
68. Marvy, *supra* note 66, at 183.
69. *Frase*, 379 Md. at 100, 840 A.2d at 114.
70. Marvy, *supra* note 66, at 183.

listserv and host a national conference call in early 2004.[71] Today, the NCCRC is a broad-based association of 150 individuals and organizations from over thirty-five states committed to ensuring meaningful access to the courts for all.[72] Its mission is to encourage, support, and coordinate advocacy to expand recognition and implementation of a right to counsel in civil cases.[73] Its participants include legal services advocates and supporters from the public interest and private bars, academy, state and local bar associations, national organizations, and others.[74] It continues to be hosted by the Public Justice Center in Baltimore, Maryland.[75]

Participants in the NCCRC rely on each other for technical support, legal research and advice, strategic thinking, and other information-sharing and networking.[76] Through monthly conference calls and the private, secure listserv, advocates all over the country keep abreast of developments and share their work.[77] In some states, as noted, litigation appears to be the best approach to gaining a civil right to counsel.[78] In others, an expansion of statutory rights through legislative advocacy may prevail.[79] In others, enforcement of statutory rights that exist on paper but appear to go unnoticed by the courts is a logical first step.[80]

During one of the earliest brainstorming sessions of the Coalition, several participants suggested exploring whether the ABA had ever taken a position on a civil right to counsel and what its views might be at this time.[81] Not long afterwards, under the auspices of Michael

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71. Debra Gardner, *Pursuing a Right to Counsel in Civil Cases: Introduction and Overview*, 40 CLEARINGHOUSE REV. J. POVERTY L. & POL. 167, 168 (2006).
72. *Id.*
73. Paul Marvy & Debra Gardner, *A Civil Right to Counsel for the Poor*, 32 HUM. RTS. 1, 9 (2005).
74. Gardner, *supra* note 71, at 168.
75. *See* About the Public Justice Center, http://www.publicjustice.org/about-us/index.cfm (last visited Jan. 14, 2008) ("The Public Justice Center pursues progressive, widespread and lasting social change by giving a legal voice to people who have been shut out of or ignored by society.").
76. Marvy & Gardner, *supra* note 73, at 8–9.
77. Cynthia Di Pasquale, *"Civil Gideon" Spreads its Wings*, MD. DAILY REC., Mar. 10, 2006, at B1.
78. *See supra* notes 52–57 and accompanying text.
79. ABA TASK FORCE, *supra* note 3, at 519–20.
80. *See* Abel & Rettig, *supra* note 45, at 245.
81. Marcia Palof, *How to Start Advocating a Right to Counsel in Civil Cases in Your State: A Look at Ohio*, 40 CLEARINGHOUSE REV. J. POVERTY L. & POL. 231, 234 (2006). Although others certainly contributed to this early discussion, three women deserve credit for the inspiration and the ability to start a conversation with the ABA:

Greco's Presidential Task Force on Access to Justice, the ABA Resolution was crafted and presented to the ABA House of Delegates for its unanimous approval.[82]

The ABA was in a good position to speak with authority on this issue.[83] Its first two goals are promoting "improvements in the American system of justice" and "meaningful access to legal representation and the American system of justice for all persons regardless of their economic or social condition."[84] It has played a critical role in creating, funding, and preserving civil legal services from the beginning.[85] Its first standing committee, created in 1920, was the Standing Committee on Legal Aid and Indigent Defendants (SCLAID),[86] which signaled the ABA's permanent commitment to the realization of access to justice for the poor.[87] Notably, this commitment resulted in the ABA filing an amicus brief in *Lassiter* urging recognition of a right to counsel in civil termination of parental rights proceedings as a matter of federal due process.[88]

With its historic Resolution, the ABA has once again fundamentally rejected the approach taken by the Supreme Court in *Lassiter* as a viable framework for ensuring access to justice in civil proceedings for indigent persons.[89] The Resolution was carefully crafted to address the kinds of legal proceedings that have the greatest impact on individual rights and basic human needs.[90]

Jayne Tyrrell, Executive Director of the Massachusetts IOLTA Committee, Mary Lavery Flynn, Director of Legal Services Outreach for the California Bar, and Mary Schneider, Executive Director of Legal Services of Northwest Minnesota.

82. *See* Russell Engler, *Shaping a Context-Based Civil Gideon from the Dynamics of Social Change*, 15 TEMP. POL. & CIV. RTS. L. REV. 697, 700 (2006). In addition to former President Greco, others who played key roles in the adoption of the ABA Resolution must be acknowledged, including the Honorable Howard Dana, Chair of the Task Force and retired Justice of the Maine Supreme Judicial Court, William Whitehurst, former Chair of the ABA Standing Committee on Legal Aid and Indigent Defense (SCLAID), and Terrence Brooks, Staff Counsel to SCLAID.

83. *See* American Bar Association, History of the American Bar Association, http://www.abanet.org/about/history.html (last visited Jan. 14, 2008).

84. *See id.*

85. ABA TASK FORCE, *supra* note 3, at 508–12.

86. *Id.* at 508.

87. *See id.* at 508–10.

88. Brief of the American Bar Association as Amicus Curiae Supporting Petitioner, Lassiter v. Dep't of Soc. Servs., 452 U.S. 18 (1981) (No. 79-6423).

89. ABA TASK FORCE, *supra* note 3, at 517–18.

90. *Id.* at 521 ("The categories contained in this resolution are considered to involve interests so fundamental and critical as to require governments to supply lawyers to low income persons who otherwise cannot obtain counsel."). The fundamental nature of these basic human needs is also reflected in international human rights law.

There are those who might question the inclusion of child custody disputes, especially cases between private parties, among the basic human needs to which a civil right to counsel should be afforded.[91] But the ABA did not shy away from a bold statement that such cases are among those most requiring lawyers for those who cannot afford to hire them.[92]

A parent's right to an unfettered relationship with her child has been called even "more precious . . . than the right of life itself."[93]

> This interest occupies a unique place in our legal culture, given the centrality of family life as the focus for personal meaning and responsibility. "[F]ar more precious . . . than property rights," parental rights have been deemed to be among those "essential to the orderly pursuit of happiness by free men," and to be more significant and priceless than "liberties which derive merely from shifting economic arrangements."[94]

Private custody disputes utilize the machinery of the state and the courts to alter the family relationship. The purportedly private nature of these cases is rendered less and less significant where trial courts access their own experts to conduct evaluations and studies of the parties, appoint guardians ad litem or counsel for the children, or even participate in questioning during trial.[95] An indigent unrepresented parent can easily face an array of resources and adversaries every bit as formidable as might exist in a state-initiated

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See International Covenant on Economic, Social & Cultural Rights, art. 10, Dec. 16, 1966, 963 U.N.T.S.14531.

91. *Cf.* ABA TASK FORCE, *supra* note 3, at 508, 522 (resisting Civil Gideon in private child custody disputes by courts led the ABA to include support for the right in its resolution advocating counsel for low-income people in civil cases "where basic human needs are at stake").

92. *Id.* at 522. Besides the high stakes and the complexity of the proceedings, discussed *infra*, contested custody represents the area of greatest unmet need for civil legal services. *See* GLORIA DANZIGER, CENTER FOR FAMILIES, CHILDREN & THE COURTS, UNIVERSITY OF BALTIMORE SCHOOL OF LAW, MODEL CHILD CUSTODY REPRESENTATION PROJECT EVALUATION REPORT 1 (2003), *available at* http://www.mlsc.org/ChildCustodyEval.final.pdf.

93. *In re* Welfare of Myricks, 533 P.2d 841, 842 (Wash. 1975) (en banc) (quoting *In re* Gibson, 483 P.2d 131, 135 (Wash. Ct. App. 1971)).

94. Lassiter v. Dep't of Soc. Servs., 452 U.S. 18, 38 (1981) (Blackmun, J., dissenting) (alteration in original) (citations omitted).

95. *See* Frase v. Barnhart, 379 Md. 100, 121, 840 A.2d 114, 126 (2003).

parental rights termination proceeding.[96] Further, the consequences of the judicial process are highly invasive and the impacts of potential error reach not only the parent, but the future lives of young children.[97] The notion that a loss of custody is not a permanent and severe intrusion into the parent-child relationship does not withstand scrutiny.[98] Circumstances under which a parent can move for modification of a custody decree are, under most states' jurisprudence, entirely outside that parent's control and may never occur.[99] For these reasons, the right to counsel should flow from the potential loss of custody, rather than from the public or private nature of the adversary.

The ABA Resolution also focuses on adversarial proceedings, because such matters are inherently complex and lack of lawyer representation for indigent persons poses the greatest concern in this context.[100] The ABA Report emphasizes the level of training and expertise required of attorneys and states that "[w]ith rare exceptions, non-lawyers lack the knowledge, specialized expertise and skills to [represent themselves] and are destined to have limited success no matter how valid their position may be . . . ."[101]

The presence of lawyers in a civil case makes a substantial difference to the outcome of the proceedings,[102] which is why those who can afford lawyers hire them. Research bears this out.[103] Parties without lawyers are far more likely to fall prey to

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96. *See, e.g., id.* at 138, 840 A.2d at 136 (Cathell, J., concurring) (expressing fear that, in private custody battles, "affluent third parties, by reason of the quality of the legal representation their affluence brings them, may be able to simply overwhelm poor parents who cannot afford counsel in a civil adversarial system that is not permitted to fully ensure equality in the presentation of cases.").

97. *See id.* at 140–41, 840 A.2d at 138 (Cathell, J., concurring).

98. *In re* Welfare of Myricks, 533 P.2d 841, 842 (Wash. 1975).

99. *See, e.g.*, McCready v. McCready, 323 Md. 476, 481–82, 593 A.2d 1128, 1130–31 (1991).

101. ABA TASK FORCE, *supra* note 3, at 517–18, 521.

101. *Id.* at 517. It should be remembered that, in many states, including Maryland, unrepresented litigants are held to exactly the same standards in the courtroom as parties with lawyers. *See, e.g.*, Tretick v. Layman**,** 95 Md. App. 62, 619 A.2d 201 (1993). It has also been suggested that trial courts cannot be required to give any particular consideration to a litigant's poverty and limited access to legal assistance when determining such matters as whether to grant the litigant a continuance so that a pro bono attorney with a schedule conflict can represent her, even for a contested custody trial. *See* Touzeau v. Deffinbaugh, 394 Md. 654, 677–78, 907 A.2d 807, 820–21 (2006).

102. ABA TASK FORCE, *supra* note 3, at 517–18.

103. 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, 419 (2001).

procedure.[104] This is ironic because modern procedural reform was intended to foster resolution of cases on their merits rather than on technicalities.[105] There was also a clear intent to close the gap between poor litigants and others.[106] While procedural reforms may have resulted in better correspondence of outcome and merit for those with the legal expertise to use them, studies continue to show that unrepresented litigants find outcomes based on merit difficult to achieve because of those same procedures.[107] For instance, at the most basic level, unrepresented parties have much higher rates of default.[108]

During contested proceedings, parties with lawyers make much greater use of procedural mechanisms that are key to success in civil litigation than do parties without.[109] Those with lawyers are, for example, more likely than those without to file motions (73% compared to 8%), request discovery (62% compared to 0%), and receive continuances (35% compared to 3%).[110] A party who is unrepresented but faces a lawyer on the other side is at a significant

104. *See id.* at 427.

105. Arthur R. Miller, *Confidentiality, Protective Orders, and Public Access to the Courts*, 105 HARV. L. REV. 427, 447 (1991).

106. Kathleen L. Blaner et al., *Federal Discovery: Crown Jewel or Curse?*, 24 LITIG., Summer 1998, at 8.

107. *See, e.g.*, Barbara Bezdek, *Silence in the Court: Participation and Subordination of Poor Tenants' Voices in Legal Process*, 20 HOFSTRA L. REV. 533, 535, 552, 589–90 (1992).

108. Seron et al., *supra* note 103, at 427 (indicating that an experiment showed only 16% of represented parties default versus 28% of unrepresented); *see also* Steven Gunn, Note, *Eviction Defense for Poor Tenants: Costly Compassion or Justice Served?*, 13 YALE L. & POL'Y REV. 385, 414, Tab. 18 (1995) (indicating a default rate of 0% for parties with lawyers, 19% for those without).

109. *See* Anthony J. Fusco, Jr. et al., *Chicago's Eviction Court: A Tenant's Court of No Resort*, 17 URB. L. ANN. 93, 115 (1979); Gunn, *supra* note 108, at 411–12; *see also* Russell Engler & Craig S. Bloomgarden, Summary Process Actions in the Boston Housing Court: An Empirical Study and Recommendations for Reform 7 (May 20, 1983) (unpublished manuscript, on file with the University of Baltimore Law Review).

110. Fusco, Jr. et al., *supra* note 109, at 115 (continuances); Gunn, *supra* note 108, at 412, Tab. 16 (motions); Engler & Bloomgarden, *supra* note 109, at 17, Tab. 10 (discovery).

disadvantage.[111] Her chances of prevailing drop by approximately half.[112]

Perhaps obviously, lawyers' knowledge of and ability to raise substantive claims and defenses has also been found substantially to improve outcomes for their clients.[113] First, represented litigants far more frequently raise such issues.[114] Second, raising substantive claims and defenses, as would be expected, greatly increases represented litigants' chances of achieving outcomes that reflect the underlying merits of their cases.[115] Applicants for domestic violence protection orders with lawyers succeed 83% of the time, while only 32% of applicants without lawyers obtain such orders.[116] Representation can also ease the burden on the courts.[117] Parties with lawyers are much more likely to achieve settlement than those without.[118]

For these and other reasons, the ABA is not the first, but is among the most powerful, to suggest that, eventually, *Lassiter* should be overruled.[119] One commentator has asserted that "civil litigants are arguably at a greater disadvantage without counsel than are criminal defendants without counsel" and that the doctrines of *Gideon* and *Lassiter* are "irreconcilable."[120]

Gideon's recognition that the lack of counsel distorts the adversary process is no less true in the civil context, at least in cases that

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111. *See, e.g.*, Robert H. Mnookin et al., *Private Ordering Revisited: What Custodial Arrangements are Parents Negotiating?*, *in* DIVORCE REFORM AT THE CROSSROADS 37, 64 (Stephen D. Sugarman & Herman Hill Kay eds., Yale Univ. Press, 1990).

112. *Id.* at 64; *see also* Jane W. Ellis, *Plans, Protections, and Professional Intervention: Innovations in Divorce Custody Reform and the Role Of Legal Professionals*, 24 U. MICH. J.L. REFORM 65, 132 (1990); Engler & Bloomgarden, *supra* note 109**,** at 53–58.

113. *See* Marilyn Miller Mosier & Richard A. Soble, *Modern Legislation, Metropolitan Court, Miniscule Results: A study of Detroit's Landlord-Tenant Court*, 7 U. MICH. J.L. REFORM 9, 35, 44–45 (1973).

114. *Id.* at 44, Fig. 17 (83% of represented litigants raised available defenses compared to 30% of unrepresented); Engler & Bloomgarden, *supra* note 109, at 19, Tab. 11 (80% versus 2%).

115. Gunn, *supra* note 108, at 413–14, Tab. 18.

116. Jane C. Murphy, *Engaging With the State: The Growing Reliance on Lawyers and Judges to Protect Battered Women*, 11 AM. U.J. GENDER SOC. POL'Y & L. 499, 511–12 (2003).

117. Seron et al., *supra* note 103, at 427.

118. Mosier & Soble, *supra* note 113, at 47, Fig. 18 (17% versus 0.1%).

119. ABA TASK FORCE, *supra* note 3, at 513.

120. Joan Grace Ritchey, *Limits on Justice: The United States' Failure to Recognize a Right to Counsel in Civil Litigation*, 79 WASH. U. L.Q. 317, 336 (2001).

implicate fundamental rights or basic human needs.[121] *Gideon*'s "obvious truth" that "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,"[122] applies with equal force to a custody case or eviction matter, for two examples.[123] Lawyers, in these and other civil matters involving basic human needs, "are necessities, not luxuries."[124] The stakes for indigent civil litigants in such cases may be as great, or even greater, than those for the criminal defendant.[125] The loss of custody of one's child is a life-shattering event more profound than the prospect of thirty days in jail.[126] The homelessness that may result from eviction could have consequences far more devastating for an entire family than a short jail term for one family member.[127]

As numerous commentators have urged, the reasoning of *Gideon* applies with equal force in civil cases, and meaningful access to justice requires the appointment of counsel for indigent civil litigants.[128] In sum, as Justice Black, the author of *Gideon*, observed in the civil context: "[T]here cannot be meaningful access to the judicial process until every serious litigant is represented by competent counsel."[129]

Due process should protect more than physical liberty—it should also protect one's "freehold, liberties or privileges" and "life, liberty or property."[130] Limiting the due process right to counsel to protection only of physical liberty creates an artificial and illogical distinction.[131] Given what is at stake in many civil cases, the failure to provide counsel "offends a sense of justice [that] impairs the

121. Roger C. Cramton, *Promise and Reality in Legal Services*, 61 CORNELL L. REV. 670, 676–78 (1976).
122. Gideon v. Wainwright, 372 U.S. 335, 344 (1963).
123. *See* Cramton, *supra* note 121, at 676–77.
124. *Gideon*, 372 U.S. at 344; *see* Cramton, *supra* note 121, at 676–77.
125. *See* Cramton, *supra* note 121, at 676.
126. *See* Ritchey, *supra* note 120, at 338.
127. *See id.*
128. *See, e.g.*, Simran Bindra & Pedram Ben-Cohen, *Public Civil Defenders: A Right to Counsel for Indigent Civil Defendants*, 10 GEO. J. ON POVERTY L. & POL'Y 1, 15–16, 36 (2003); Justice Earl Johnson, Jr., *Equal Access to Justice: Comparing Access to Justice in the United States and Other Industrial Democracies*, 24 FORDHAM INT'L L.J. S83, S110 (2000).
129. Meltzer v. C. Buck LeCraw & Co., 402 U.S. 936, 959 (1971) (Black, J., dissenting).
130. MD. CONST. DECL. OF RTS. art. XXIV.
131. Note, *The Right to Counsel in Civil Litigation*, 66 COLUM. L. REV. 1322, 1330, 1332–33 (1966).

fundamental fairness of the proceeding."[132] Thus, *Lassiter*'s presumption against appointment of counsel in civil matters should be abandoned.

Another significant problem with *Lassiter* is its relegation of this critical right to a case-by-case determination.[133] As the amicus states told the Court in *Gideon*, a categorical right is far easier to administer, and to administer fairly.[134] The need for fairness of administration cannot be overemphasized. A categorical right to counsel avoids arbitrarily uneven outcomes.[135] It also avoids the paradox of providing counsel to only those unrepresented parties who are fortunate or sophisticated enough to be able to articulate the nature of their rights and their need for counsel well enough to meet the relevant test.[136] Justice Blackmun recognized this in his dissent in *Lassiter*, where he articulated:

> The flexibility of due process, the Court has held, requires case-by-case consideration of different decisionmaking *contexts*, not of different *litigants* within a given context. In analyzing the nature of the private and governmental interests at stake, along with the risk of error, the Court in the past has not limited itself to the particular case at hand. Instead, after addressing the three factors as generic elements in the context raised by the particular case, the Court then has formulated a rule that has general application to similarly situated cases.[137]

The provision of a categorical right to counsel as defined by the Court also promotes judicial efficiency by obviating the need for appellate review of individual cases based on distorted and misleading records.[138] As Justice Blackmun also wrote in his *Lassiter* dissent, "it is difficult, if not impossible, to conclude that the typical case has been adequately presented."[139]

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132. Sites v. State, 300 Md. 702, 717, 481 A.2d 192, 200 (1984).
133. *See* Lassiter v. Dep't of Soc. Servs., 452 U.S. 18, 31–32 (1981).
134. *See* Brief for the State Government, *supra* note 30, at 335.
135. *See id.* (referencing numerous virtually identical pairs of cases in which counsel had been appointed in one and not the other).
136. *See* Bruce A. Boyer, *Justice, Access to the Courts, and the Right to Free Counsel for Indigent Parents: The Continuing Scourge of Lassiter v. Department of Social Services of Durham*, 36 LOY. U. CHI. L.J. 363, 379 (2005).
137. *Lassiter*, 452 U.S. at 49 (Blackmun, J., dissenting).
138. *See id.* at 50–51 n.19.
139. *See id.* at 51.

At least one state court has openly rejected *Lassiter* when deciding the parameters of due process under its own constitution.[140] The court wrote simply that it "reject[s] the case-by-case approach set out by the Supreme Court in *Lassiter*," reasoning that "loss of custody is often recognized as 'punishment more severe than many criminal sanctions' . . . ."[141]

Such a reversal of fortune as the overruling of *Lassiter* is far from unprecedented. The Court overruled *Betts* in *Gideon*.[142] Other modern inspirations include *Lawrence v. Texas*[143] and *Roper v. Simmons*.[144] However, as the history of these cases reflects, much ground work must be laid before such an approach could succeed.[145] Fortunately, the momentum for this effort has increased exponentially with the adoption of the ABA Resolution.[146]

Currently, advocates of equal justice for the poor are pursuing a broad spectrum of approaches, each fashioned according to local strategic considerations.[147] Poor litigants in Washington recently suffered a setback when, in *King v. King*,[148] the Washington Supreme Court rejected claims for a civil right to counsel under the Washington Constitution in custody disputes.[149] However, local advocates were heartened somewhat by the two-judge dissent, which included the following:

> Ms. King's struggle to represent herself in this case demonstrates the legal hurdles that arise every day in

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140. *See In re* K.L.J., 813 P.2d 276, 282 n.6 (Alaska 1991).

141. *Id.* at 282, 283 (quoting Joel E. Smith, Annotation, *Right of Indigent Parent to Appointed Counsel in Proceeding for Involuntary Termination of Parental Rights*, 80 A.L.R. 3d 1141, 1145 (1977); *see also* Frase v. Barnhart, 379 Md. 100, 138, 840 A.2d 114, 136 (2003) (Cathell, J., concurring) ("I am drawn more to the well reasoned dissents in *Lassiter*, as a guide to how this Court should consider these issues under our State Constitutional provisions in these evolving times.").

142. Gideon v. Wainwright, 372 U.S. 335, 339 (1963).

143. 539 U.S. 558, 578 (2003) (decriminalizing private consensual homosexual relations and overruling *Bowers v. Hardwick*, 478 U.S. 186 (1986)).

144. 543 U.S. 551, 574 (2005) (prohibiting the death penalty for minors and overruling *Stanford v. Kentucky*, 492 U.S. 361 (1989)).

145. These cases each overturned decisions that were controlling precedent for nearly twenty years prior to being overruled. *See Bowers*, 478 U.S. at 189 (upholding Georgia statute criminalizing sodomy); *Stanford*, 492 U.S. at 380 (permitting minors to be subject to the death penalty).

146. *See supra* notes 3–4 and accompanying text.

147. Russell Engler, *Toward a Context-Based Civil Right to Counsel Through "Access to Justice" Initiatives*, 40 CLEARINGHOUSE REV. J. POVERTY L. & POL. 196, 197 (2006).

148. No. 79978-4, 2007 WL 4259926 (Wash. Dec. 6, 2007).

149. *Id.* ¶ 34–39.

> courtrooms across Washington, showing the importance of counsel to a parent in a dissolution proceeding seeking to secure her fundamental right to parent her children. The majority's decision does not begin to address the obstacles an indigent parent encounters when she is unrepresented by counsel, nor does it realistically assess the loss she faces.[150]

The access to justice community in Washington now turns its attention to developing other strategies to expand representation for poor litigants, including possible other approaches to securing a right to counsel. In other states, including Maryland, there will be future appeals involving similar constitutional claims.[151] And in yet others, more incremental litigation is underway. One example is the recent Alaska Superior Court decision in *Gordonier v. Jonsson*,[152] extending an existing right to counsel in cases where representation is provided by a publicly funded agency to cases where there is private representation on the other side.[153]

Policy advocacy runs the gamut as well. A task force initiated by the California Commission on Access to Justice has created a model civil right to counsel statute that any state might consider adopting.[154] Entitled the "State Equal Justice Act,"[155] it offers a plan for implementing and administering a right to counsel in a broad array of civil matters.[156] The same group is currently at work on a model statutory framework for a narrower right to counsel focused on civil matters involving fundamental interests and basic human needs. In many states, bar leaders are forming study groups to determine their next logical step in advancing the right.[157] Others have begun to think ahead about the challenges of implementation of a civil right to counsel, so that we are not doomed to repeat the mistakes of the

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150. *Id.* ¶ 65 (Madsen, J. dissenting).

151. *See generally*, John Nethercut, *Maryland's Strategy for Securing a Right to Counsel in Civil Cases:* Frase v. Barnhart *and Beyond*, 40 CLEARINGHOUSE REV. J. POVERTY L. & POL. 238 (2006) (discussing current civil right to counsel cases in Maryland).

152. Case No. 3AN-06-8887 CI (3d D. Alaska Super. Ct. Aug. 14, 2007).

153. *Id.* at 10–16.

154. *See* Clare Pastore, *The California Model Statute Task Force*, 40 CLEARINGHOUSE REV. J. POVERTY L. & POL. 176, 176 (2006).

155. The California Model Statute Task Force, State Equal Justice Act, *available at* http://www.brennancenter.org/dynamic/subpages/download_file_38656.pdf (last visited Jan. 14, 2008).

156. *Id.* at 1.

157. *See, e.g.*, Al Driver, *Access to Justice in Civil Cases: A Right Whose Time Has Come*, METROPOLITAN CORP. COUNSEL, Aug. 22, 2007, at 60 (featuring an interview with President-Elect Anthony Doniger of the Boston Bar Association in which he describes his plans for such a task force).

past.[158] Still others have begun to explore what implementation of the right might cost.[159] Regardless of where the effort to achieve a right to counsel in civil cases begins, it is clear that every sector of society will play a role in achieving victory. If a state court recognizes a right under its constitution, that state's legislature will have to provide the funds to implement the right.[160] Success of that effort will require significant public education.[161] Education is not needed to convince people that there should be a right to counsel in civil cases.[162] Education will be needed only to persuade some that spending for such a right must be a priority for a society that promises equal justice for all.

158. *See, e.g.*, Laura K. Abel, *A Right to Counsel in Civil Cases: Lessons from* Gideon v. Wainwright, 40 CLEARINGHOUSE REV. J. POVERTY L. & POL. 271, 271 (2006); James Neuhard, Gideon *Redux: A Defender's View*, 28 CORNERSTONE 5 (2006), *available at* http://www.nlada.org/DMS/Documents/1164033041.51/Fall%2006%20Cornerston%20Small.pdf.

159. ABA TASK FORCE, *supra* note 3, at 523 (suggesting that the cost might be approximately five times current expenditures for civil legal assistance). *But see* ACCESS TO JUSTICE STUDY COMMISSION OF THE WISCONSIN BAR ASSOCIATION, BRIDGING THE JUSTICE GAP: WISCONSIN'S UNMET LEGAL NEEDS 9 (2007), http://www.wisbar.org/am/template.ctn?template=/cm/contentdisplay.cfm&contentid=63639 (indicating that every dollar spent on civil legal assistance may save as much as nine dollars in other social costs).

160. Nethercut, *supra* note 151, at 240.

161. ALAN W. HOUSEMAN, CIVIL LEGAL AID IN THE UNITED STATES: AN UPDATE FOR 2007, at 24 (2007), http://www.clasp.org/publications/civil_legal_aid_2007.pdf (discussing various Access to Justice Commission activities designed to expand public awareness and educate legislators).

162. *See, e.g.*, STATE BAR OF CALIFORNIA, STATE BAR REPORT: BAR SURVEY REVEALS WIDESPREAD LEGAL ILLITERACY, *in* CAL. LAW., June 1991, at 68, 68–69 (noting more than two-thirds of Californians believe such a right already exists).