

Clearinghouse REVIEW

July–August 2006
Volume 40, Numbers 3–4

Journal of
Poverty Law
and Policy



INSIDE:

Right to Counsel in Civil Cases
The Scholarship
A Model Statute
Overcoming the Supreme Court's
Lassiter Ruling
Advocacy in
Maryland
Ohio
Washington
Wisconsin
Canada
Disparate Impact of
Lack of Counsel
Judges on Impact of
Unrepresented Litigants
Existing Right-to-Counsel Statutes
The Defender Experience
International Human Rights Law

A RIGHT TO A LAWYER? MOMENTUM GROWS



SHRIVER
CENTER

Sargent Shriver National Center on Poverty Law



Toward a Context-Based Civil Right to Counsel Through “Access to Justice” Initiatives

By Russell Engler

Russell Engler
Professor and Director of
Clinical Programs

New England School of Law
46 Church St.
Boston, MA 02116
617.451.0574
rengler@nesl.edu

The fortieth anniversary in 2003 of the U.S. Supreme Court’s landmark decision in *Gideon v. Wainwright* coincided with a revitalization of initiatives to achieve a “civil Gideon” right, that is, a right to counsel in civil cases.¹ Recent articles and conferences increasingly support the call for a civil right to counsel in various formulations.² Advocates in three states filed litigation to create an expanded right to counsel in certain civil contexts.³ Other advocates joined the strategizing through civil Gideon initiatives in other states and the newly formed National Coalition for a Civil Right to Counsel.⁴

The renewed focus on establishing a right to counsel in civil cases arose against two important backdrops. First, recent studies document the increasing incidence of unmet legal needs, leading to enormous numbers of litigants appearing in court in civil cases without counsel. Second, during the past few years state “access to justice” commissions—formed to develop, coordinate, and oversee initiatives to respond to

¹*Gideon v. Wainwright*, 372 U.S. 335 (1963) (establishing the right to appointed counsel in criminal cases).

²For a list of some recent articles, see Civil Gideon Fundamentals: Basic Resources on the Right to Counsel in Civil Cases, in this issue. Conferences across the country included panels on a civil right to counsel as part of the broader discussion of access to justice in civil cases. E.g., the 2002 Washington State Access to Justice Conference included a civil Gideon panel, and the keynote speaker for New York’s 2001 Access to Justice Conference was Justice Earl Johnson Jr., who dedicated his remarks to the topic of a civil Gideon right (conference materials on file with Russell Engler). In March 2006 the annual Edward V. Sparer Symposium topic was Civil Gideon: Making the Case, with resulting articles scheduled to be published this winter in the *TEMPLE POLITICAL AND CIVIL RIGHTS LAW REVIEW*.

³*Frase v. Barnhart*, 840 A.2d 114 (Md. 2003) (Clearinghouse No. 55,347) (discussed in III.B; see also John Nethercut, *Maryland’s Strategy for Securing a Right to Counsel in Civil Cases: Frase v. Barnhart and Beyond*, in this issue); *Kelly v. Warpinski*, No. 04-2999-OA (Wis. filed Nov. 17, 2004) (Clearinghouse No. 55,816) (discussed in III.B; see also John F. Ebbott, *To Gideon via Griffin: The Experience in Wisconsin*, in this issue); and three cases in Washington State: *Halls v. Arden*, 109 P.3d 15 (Wash. Ct. App. 2005) (Clearinghouse No. 55,807) (see also Paul Marvy, “To Promote Jurisprudential Understanding of the Law”: *The Civil Right to Counsel in Washington State*, in this issue); *City of Mose Lake v. Smith*, No. 01-2-00766-8 (Wash. Super. Ct. filed March 2002) (Clearinghouse No. 54,642); *Machado v. Ashcroft*, No. CS-02-0066-FVS (E.D. Wash. filed June 18, 2002) (Clearinghouse No. 54,528).

⁴To find out more about or to join the National Coalition for a Civil Right to Counsel, contact the coordinator, Debra Gardner, at gardnerd@publicjustice.org.

the civil legal needs of low-income people—rapidly expanded.

In this article I connect the threads of a civil right to counsel, access to justice, and the treatment of unrepresented litigants in civil proceedings. Rather than focus on doctrinal justifications for a civil right to counsel, I focus on contexts, allies, and power dynamics in framing a three-pronged strategy for achieving a context-based civil right to counsel.⁵

First, the court system’s key players, including judges, court-connected mediators, and clerks, should be required to assist unrepresented litigants as necessary to ensure that these litigants do not forfeit rights due to the absence of counsel. Second, programs assisting—short of representation by a lawyer in court—unrepresented litigants should supplement the expanded roles of the court system’s key players. A rigorous evaluation of those assistance programs to identify which are successful in stemming the forfeiture of rights in particular contexts and which simply relieve pressure on the courts without altering case outcomes must accompany this second step. Third, a civil right to counsel should attach where the expanded roles of the key players and assistance programs cannot stem the forfeiture of rights of unrepresented litigants.

Because the need for counsel varies from state to state and court to court, the right to counsel should be context-based. The strategy that I discuss in this article nonetheless involves features common to the various contexts. I outline the backdrop for this right: the flood of unrepresented litigants in the courts, unmet legal needs, and the expansion of “access to

justice” commissions. I articulate the three prongs of the context-based strategy. I discuss promising starting points for establishing a right to counsel in civil cases and reassess recent civil right-to-counsel cases in light of the analysis described here. And I present strategies for responding to predictable objections, developing allies, and neutralizing opponents and targeting self-interest.

I. The Backdrop: Unrepresented Litigants, Unmet Legal Needs, and “Access to Justice” Commissions

Despite the complexity of this country’s legal system, enormous numbers of litigants appear in court in civil cases without counsel.⁶ Reports from across the country consistently show that 70 percent to 90 percent of the legal needs of the poor go unaddressed.⁷ The flood of unrepresented litigants has caused a reexamination of the operation of many courts. Often the focus is on the problems that unrepresented litigants create for the smooth operation of the court. Dealing with unrepresented litigants causes difficulties for judges, court-connected mediators, court clerks, and opposing lawyers.⁸

As the problems involving unrepresented litigants have gained attention, the number of state “access to justice” commissions has increased rapidly.⁹ Commission members—who come from the courts, organized bar, civil legal aid organizations, and law schools—have “a broad charge to engage in ongoing assessment of the civil legal needs of low-income people in the state and to develop, coordinate, and oversee initia-

⁵For discussions of doctrinal justifications, see especially Clare Pastore, *Life after Lassiter: An Overview of State-Court Right-to Counsel Decisions*, and Laura K. Abel, *A Right to Counsel in Civil Cases: Lessons from Gideon v. Wainwright*, in this issue.

⁶See, e.g., JONA GOLDSCHMIDT ET AL., *MEETING THE CHALLENGE OF PRO SE LITIGATION: A REPORT AND GUIDEBOOK FOR JUDGES AND COURT MANAGERS* (1998). For data regarding unrepresented litigants in family law, housing, and bankruptcy courts, see Russell Engler, *And Justice for All—Including the Unrepresented Poor: Revisiting the Role of Judges, Mediators, and Clerks*, 67 *FORDHAM LAW REVIEW* 1987 (1999).

⁷See, e.g., LEGAL SERVICES CORPORATION, *DOCUMENTING THE JUSTICE GAP IN AMERICA: THE CURRENT UNMET CIVIL LEGAL NEEDS OF LOW-INCOME AMERICANS* (2005), www.lsc.gov/press/documents/LSC%20Justice%20Gap_FINAL_1001.pdf.

⁸See, e.g., GOLDSCHMIDT ET AL., *supra* note 6; Engler, *supra* note 6.

⁹For more information, see National Legal Aid and Defender Association, Access to Justice Support Project, www.atjsupport.org/SPAN_Library/SPAN_Report (last visited April 27, 2006).

tives to respond to those needs.”¹⁰ An expanded civil right to counsel is one component of a coordinated range of initiatives designed to achieve access to justice. Key stakeholders in states without commissions similarly struggle with the problems that flow from having large numbers of unrepresented litigants in the courts.

II. Articulating the Three-Pronged Strategy

The primary problem that flows from the flood of unrepresented litigants is not that those working in the legal system are burdened and that unrepresented litigants clog the system. Rather, it is that litigants routinely forfeit rights due to the absence of counsel. A system of justice in which large numbers of people forfeit rights because they are unrepresented rather than because the facts of the cases or the governing law dictate their cases’ outcomes is unacceptable. Access-to-justice initiatives seeking to assist unrepresented litigants must target the forfeiture of rights due to the absence of counsel.

A. Prong 1: Revisiting the Roles of Judges, Mediators, and Clerks

I have discussed elsewhere the need to revise our understanding of the proper roles of judges, court-connected mediators, and clerks in cases involving unrepresented litigants.¹¹ The primary reasons to revise their roles flow from the underlying goal of the adversary system to be fair and just. The ethical rules shaping the roles of the players in that system imply that unrepresented litigants are the exception. Given the realities of many of our courts, our traditional understanding of the roles frustrates rather than furthers the goal of fairness

and justice. As between abandoning the goal and changing the roles, we should change the roles.

The focus on fairness and justice, in substance and not simply appearance, requires shifting the approach to cases involving unrepresented litigants. We must revise our understanding of what it means to be impartial.¹² We can no longer accept the idea that impartiality equals passivity. A system that favors those with lawyers over those without lawyers, without regard to the applicable law and the facts of a case, is a partial rather than an impartial system. To eliminate a system that penalizes those without lawyers requires the courts to play an active role to maintain the system’s impartiality.

The concept that an active role is consistent with maintaining impartiality is easier to accept where all sides are unrepresented and is more challenging where the case involves a lawyer and an unrepresented party. Yet the latter is the scenario in which the active role of the court players is more important. As long as the court system is prepared to help all sides equally as needed, the problem is not one of impartiality. At most, the problem is the perception of impartiality, and, by explaining to the litigants the need for the active roles to preserve the overall impartiality of the legal system and achieve fair results, this perceived problem can be overcome.

Focusing on case outcomes also requires revisiting the traditional notion of voluntariness. Courts often assume that those without counsel are “choosing” to “self-represent.”¹³ Because of the shortage of lawyers for the poor in civil cases, a more accurate assumption would be that a litigant’s appearance without

¹⁰Robert Echols, *The Rapid Expansion of “State Access to Justice” Commissions*, MANAGEMENT INFORMATION EXCHANGE JOURNAL, Summer 2005, at 41, www.nlada.org/DMS/Documents/1125688879.69/MIE%20Journal%20summer%2005-ATJ%20article.pdf.

¹¹Engler, *supra* note 6, at 2021–27.

¹²See, e.g., Russell G. Pearce, *Redressing Inequality in the Market for Justice: Why Access to Lawyers Will Never Solve the Problem and Why Rethinking the Role of Judges Will Help*, 73 FORDHAM LAW REVIEW 969, 977 (2004); Jona Goldschmidt, *The Pro Se Litigant’s Struggle for Access to Justice: Meeting the Challenge of Bench and Bar Resistance*, 40 FAMILY COURT REVIEW 36 (2002).

¹³See, e.g., Engler, *supra* note 6, at 2013 nn.122–24 & 2016 n.139.

counsel is compelled, not voluntary. A similar assumption applies to other decisions made by litigants, such as whether to settle or go to trial, what witnesses and evidence to produce, or what settlement terms to accept. Courts typically view the decisions as "voluntary" if they are understood by litigants and not the product of coercion. Yet most non-defaulting cases settle, and settlements involving unrepresented litigants often are the result of pressured, unmonitored negotiations, underscoring the flaws in courts' standard assumptions.¹⁴ Courts should use a standard of "informed consent" and accept as voluntary only the choices made by unrepresented litigants who are aware of their options and the advantages and disadvantages of those options.¹⁵

The principles that I discussed in the preceding paragraphs should guide the revision of the roles of the key players in the court system. We permit judges to preside over cases involving unrepresented litigants without holding these judges accountable for the fairness of the outcomes of the proceedings, particularly with settlements and defaults. To achieve meaningful access to justice, we should revise our notions of the proper role of judges and require judges to assist unrepresented litigants as necessary to ensure that all relevant information is before the court and unrepresented litigants do not forfeit rights due to the absence of counsel.¹⁶

We should similarly revise the roles of other court personnel, including court-connected mediators and clerks.¹⁷ In a world full of unrepresented litigants, the roles of mediators and clerks should permit and even require them to assist

unrepresented litigants to avoid the unknowing waiver of rights that routinely occurs. Developing guidelines and conducting training sessions for mediators and clerks, as well as judges, will assist them in their active roles.

Another key role in the legal system is that of the lawyer pitted against the unrepresented litigant. Lawyers routinely violate ethical rules in their negotiations with unrepresented litigants.¹⁸ Far from curtailing or reporting such misconduct, courts instead promote the behavior by sending unrepresented parties into the hallway to negotiate with lawyers in unmonitored settings; courts exacerbate the problem by rubber-stamping the resulting agreements without conducting a detailed inquiry into either the fairness of the provisions or the process that led to the agreement. Solutions to the problem include enforcing existing ethical rules, drafting additional ethical rules, and increasing court oversight of interactions between lawyers and unrepresented litigants.¹⁹

Philosophical and practical objections sometimes emerge in response to the proposal to revise the roles of judges, mediators, and clerks in cases involving unrepresented litigants. Judges' objections include a belief that court assistance is inconsistent with the court's duty to remain impartial, a belief that unrepresented parties should be held to the same standards as represented ones, and a sense that revising the role of judges would unduly burden scarce judicial resources. Concerns about expanding the roles of nonjudicial court personnel include not only impartiality and scarcity of resources but also the need to avoid the unauthorized practice of law.²⁰

¹⁴See *id.* at 2018–19 nn.151–57.

¹⁵See MODEL RULES OF PROF'L CONDUCT R. 1.0(e) (2002) (defining "informed consent").

¹⁶Engler, *supra* note 6, at 2011–31.

¹⁷*Id.* at 1992–98, 2007–11, 2031–40.

¹⁸See Russell Engler, *Out of Sight and Out of Line: The Need for Regulation of Lawyers' Negotiations with Unrepresented Poor Persons*, 85 CALIFORNIA LAW REVIEW 79 (1997).

¹⁹See *id.*; see also Nancy Kaufman, *Can We Talk: Communicating with Unrepresented Litigants*, www.state.ma.us/obcbo/talk.htm (last visited May 15, 2006) (guidance published by the Massachusetts Office of Bar Counsel, charged with prosecuting ethical misconduct by attorneys).

²⁰See Engler, *supra* note 6, at 1992–98, 2002–11.

These objections and concerns do not overcome the justifications for expanding the roles. Moreover, available evidence indicates that judges and other court personnel throughout the country vary considerably in how they handle unrepresented litigants.²¹ An examination of the recommended techniques for handling unrepresented litigants reveals a shift over the past decade as the chains of passivity that hinder judges and clerks loosen across the country.²²

The salient point for the civil right-to-counsel discussion is that expanding the roles of those in the court system is one prong of an integrated strategy for preventing the forfeiture of rights due to the absence of counsel. The second prong involves using, but also carefully evaluating, programs that give unrepresented litigants assistance short of representation by a lawyer in court.

B. Prong 2: Using, But Also Evaluating, Assistance Programs

Innovative programs across the country now assist unrepresented litigants in the courts. These programs include telephone hotlines, self-help centers, *pro se* offices, advice-only clinics, and court-annexed limited legal services programs.²³ Advocates working to increase access to justice should support such programs but should also carefully evaluate them. They should identify which

programs help stem the forfeiture of rights and which only help the courts run more smoothly, without affecting case outcomes. Programs not affecting case outcomes may still be worthwhile, but they are not a solution to the problem of the forfeiture of rights due to the absence of counsel.

Evaluation efforts lag behind the creation of assistance programs. Although the body of evaluation materials is growing, we still lack answers to basic questions.²⁴ Do assistance programs make a difference? If so, what factors lead to that conclusion? Many evaluation initiatives rely on “customer satisfaction” inquiries: the extent to which the users believe they were helped or that others in the legal system believe the program is beneficial.²⁵ Without minimizing the importance of how unrepresented litigants feel about their experiences, advocates for the poor should focus on programs that do the best job in affecting case outcomes.

As difficult as the evaluation process may be, it is essential because it will shed light on how to allocate scarce resources. Such evaluation efforts should be familiar to legal aid advocates because they are similar to those that they should be undertaking to evaluate the quality of their programs: “In an era of scarce resources, advocates must assure the provision of high-quality help.”²⁶ Focusing evaluations of assistance

²¹See GOLDSCHMIDT ET AL., *supra* note 6, at 47–62.

²²Compare *id.* at 52–61 (discussing judicial attitudes and strategies for handling cases involving at least one *pro se* litigant) with CYNTHIA GRAY, REACHING OUT OR OVERREACHING: JUDICIAL ETHICS AND SELF-REPRESENTED LITIGANTS 51–57 (2005) (listing “Proposed Best Practices for Cases Involving Self-Represented Litigants”).

²³See Engler, *supra* note 6, at 1998–2007 (discussing programs that assist unrepresented litigants inside and outside the courthouse); MODEL RULES OF PROF’L CONDUCT R. 6.5 (2002) (“Nonprofit and Court-Annexed Limited Legal Services Programs”).

²⁴See, e.g., Paula Hannaford-Agor & Nicole Mott, *Research on Self-Represented Litigation: Preliminary Results and Methodological Considerations*, 24 JUSTICE SYSTEM JOURNAL 163 (2003), www.findarticles.com/p/articles/mi_qa4043/is_200301/ai_n9198377#continue; JOHN ROMAN ET AL., URBAN INSTITUTE, ESTIMATING COSTS AND BENEFITS OF PRO SE LITIGANTS (2003); Carroll Seron et al., *The Impact of Legal Counsel on Outcomes for Poor Tenants in New York City’s Housing Court: Results of a Randomized Experiment*, 35 LAW AND SOCIETY REVIEW 419 (2001), www.findarticles.com/p/articles/mi_qa3757/is_200101/ai_n8942109.

²⁵See, e.g., Bonnie Rose Hough, *Evaluation of Innovations Designed to Increase Access to Justice for Self-Represented Litigants*, 7 JOURNAL OF THE CENTER FOR FAMILIES, CHILDREN AND THE COURTS (forthcoming 2006) (discussion draft at 5, on file with Russell Engler), www.courtinfo.ca.gov/programs/cfcc/resources/publications/journal/; JESSICA PEARSON & LANAE DAVID, CENTER FOR POLICY RESEARCH, THE HOTLINE OUTCOMES ASSESSMENT STUDY: FINAL REPORT—PHASE III: FULL-SCALE TELEPHONE STUDY 5 (2002), www.nlada.org/DMS/Documents/1037914822.9/hlexec.pdf. But for a critique challenging the hotline evaluation tools in Pearson and David’s report, see Ross Dolloff, *Let’s Talk About Values, Not Systems*, MANAGEMENT INFORMATION EXCHANGE JOURNAL, Summer 2003, at 38.

²⁶Jeanne Charn & Randi Youells, *A Question of Quality*, 3 EQUAL JUSTICE MAGAZINE 33, 34 (2004), www.ejm.lsc.gov/Winter2004/quality2.htm.

programs on those that do the best job in affecting case outcomes should yield crucial data necessary for shaping the right to counsel.

Unbundled legal services and expanded use of lay advocates, depending on the structure and setting, are also ways of assisting—short of full representation by lawyers—those without counsel. The evaluation applies to assessing the effectiveness of the expanded roles here as well.

Where litigants receive the help that they need either from the expanded roles of those within the court system or from assistance programs, full representation by a lawyer may not be necessary.

C. Prong 3: The Expanded Right to Appointed Counsel

When revising the roles of judges, mediators, and clerks and using assistance programs are insufficient, we can no longer accept the routine forfeiture of rights as an acceptable outcome. In those instances, we must recognize and establish a right to appointed counsel in civil cases.

As I explain in III.A, the most promising starting points for expanding the civil right to counsel involve subsets of categories of cases rather than entire categories such as eviction or custody cases. However, regardless of the starting point selected, the context-based approach faces two fundamental issues in its implementation. The first is whether it is any different from the case-by-case evaluation that the U.S. Supreme Court mandated in *Lassiter v. Department of Social Services*.²⁷ The second is whether the trigger for appointing counsel in civil cases should be a risk of error set forth in *Mathews v. Eldridge* and applied in *Lassiter*; the risk of suffering substantial

injustice, as Michael Greco, the American Bar Association president, articulated; or some other formulation.²⁸

For the right to have any efficacy, the flawed approach enunciated in *Lassiter* must be abandoned. A system that requires the most vulnerable litigants to prove that they are likely to prevail guarantees that the right will be illusory. In each category of cases for which the right to counsel attaches, *Lassiter*'s presumption must be reversed, so that effective access requires appointment of counsel absent proof that a particular forum can prevent the forfeiture of rights in a given case without the appointment of counsel.²⁹ The threshold factual inquiries should involve the search for the categories of cases in which the absence of counsel is likely to cause the requisite level of harm. The categories having been identified, unrepresented indigent litigants in those categories would be entitled to appointed counsel and would not have to prove the likelihood of harm in their case.

In defining the subcategories of cases where to establish a right to counsel, acknowledging the differing implications from the choice in terminology for the trigger is more important than selecting a particular means of measurement. Depending on the context, the type of case that may succeed in initially helping establish a civil right to counsel may differ from advocates' preferred ultimate articulation of the right, which may be broader. For example, although most unrepresented litigants might benefit from the appointment of counsel, each litigant does not stand an equal risk of suffering a substantial injustice due to the absence of counsel. Nor does each case involving a risk of substantial

²⁷*Lassiter v. Department of Social Services*, 452 U.S. 18 (1981) (Clearinghouse No. 29,118).

²⁸The *Lassiter* Court relied on the three elements articulated in *Mathews v. Eldridge*: “the private interests at stake, the government's interest, and the risk that the procedures used will lead to erroneous decisions.” *Lassiter*, 452 U.S. at 27 (citing *Mathews*, 424 U.S. 319, 335 (1976)). Those elements are to be balanced against the presumption against a right to appointed counsel unless “the indigent, if he is unsuccessful, may lose his personal freedom.” *Id.* Regarding the risk of suffering substantial injustice, see Michael Greco, *Court Access Should Not Be Rationed: Defined Right to Counsel in Civil Cases Is an Issue Whose Time Has Come*, ABA JOURNAL, Dec. 2005, at 6.

²⁹See, e.g., Earl Johnson Jr., *Will Gideon's Trumpet Sound a New Melody? The Globalization of Constitutional Values and Its Implications for a Right to Equal Justice in Civil Cases*, 2 SEATTLE UNIVERSITY JOURNAL FOR SOCIAL JUSTICE 201, 220 (2003) (arguing that the globalization of constitutional values and a right to equal justice require the provision of free counsel for indigent litigants in many civil cases).

injustice run an equal risk of erroneous decision, depending on how those terms are defined. The presence of counsel may protect unrepresented litigants and prevent harm or injustice even where the absence of counsel cannot demonstrably lead to an erroneous outcome.

Thus distinguishing between what might be sound policy and what might be a compelling test case for the civil right to counsel is crucial. For example, to the extent that the provision of counsel for all unrepresented tenants would lead to a reduction in homelessness, the provision of counsel is not simply humane but a wise use of resources. However, despite the soundness of the policy, the cases in which eviction would be erroneous due to the absence of counsel would be a smaller subset of those cases. To the extent that political realities prohibit the adoption of a broader-based right to counsel, the narrower subset of cases is the place to start.

For the purpose of identifying starting points for establishing the right to counsel, particularly for litigation, the existing data and the record in the case must temper the preferred formulation of the right. A strategic decision to focus on the narrower group initially might give a foothold to obtain broader relief in implementing the right to appointed counsel.

III. Targeting Contexts: Forums, Subject Areas, and Litigants

Without belaboring the precise wording, the target for implementing a civil right to counsel remains the cases in which unrepresented litigants forfeit rights or suffer a substantial injustice due to the

absence of counsel. In the formulation that Greco articulated, when a legal problem threatens a poor person’s family, sustenance, health, or housing, the justice system should provide the necessary legal assistance.³⁰ The necessary legal assistance becomes appointed counsel where other forms of assistance fail to prevent the substantial injustice.

A. Starting Points

The likely starting points for establishing a civil right to counsel remain areas of family law (e.g., custody proceedings), eviction, and immigration cases. Advocates have targeted these areas due to the compelling nature of the underlying rights at stake. Unrepresented litigants dominate the family and housing courts, and these categories are most prevalent in studies identifying unmet legal needs.³¹ Family law and housing cases are areas in which a wide range of assistance programs operates.³²

The strategy that I urge here suggests that the prospects for successfully establishing a right to counsel in civil cases improve if the target is subsets of cases within these broad categories. A first narrowing of the categories should involve cases that pit an unrepresented party against a represented one. Courts are more willing to help if they are doing so equally to both sides, and cases in which both sides are without counsel do not presumptively favor one side over the other, absent data to the contrary. By contrast, cases pitting unrepresented litigants against represented ones illustrate the ultimate breakdown of the adversary system and are presumptively unfair.³³ Cases pitting unrepresented parties against represented ones are one form of power imbalance where the risk of an erroneous outcome is high. A sec-

³⁰Michael S. Greco, President-Elect, American Bar Association, Fellows of the Alabama Law Foundation Annual Dinner 8 (Jan. 28, 2005) (on file with Russell Engler).

³¹See, e.g., LEGAL SERVICES CORPORATION, *supra* note 7; Engler, *supra* note 6, at 2047–52, 2057–69.

³²See Engler, *supra* note 6, at 2047–52, 2057–69; Hough, *supra* note 25, discussion draft at 1–5.

³³See, e.g., BOSTON BAR ASSOCIATION, REPORT OF THE BBA [BOSTON BAR ASSOCIATION] TASK FORCE ON UNREPRESENTED LITIGANTS 26 (1998), www.bostonbar.org/prs/reports.htm (“[T]he judges ... worry over potential unfairness to both sides in a case where one of the litigants is unrepresented.”); GOLDSCHMIDT ET AL., *supra* note 6, at 52–53 (stating that judges found maintaining their impartiality difficult where one litigant was unrepresented); Jona Goldschmidt, *Pro Se Litigation: How Are Courts Handling the Self-Represented?*, 82 JUDICATURE 13, 17–18 (1998) (“Some judges have experienced some agonizing moments during the course of trials where one party is represented and one is pro se.... Some judges expressed concern regarding the conduct of attorneys toward pro se litigants.”).

and form of power imbalance is present in cases involving domestic violence. Even where both parties are “equally” without counsel, the dynamic of domestic violence, with the resulting power imbalance, increases the risk of an erroneous outcome.

Factors beyond the legal claims suggest that certain custody proceedings may be a stronger place to start to advocate a civil right to counsel than eviction proceedings. Because custody cases that pit unrepresented litigants against lawyers are a smaller percentage of the overall docket than eviction cases that do, appointing counsel will require fewer resources, and thus the appointment of counsel will affect less of the court’s operation. On the one hand, focusing on custody cases, including domestic violence cases, affords the opportunity to cultivate as allies those who advocate on behalf of domestic violence victims. On the other hand, focusing on eviction cases likely will mobilize the landlord and real estate lobbies in opposition to the right-to-counsel initiative.

Other factors, such as characteristics of litigants, may reveal other starting points that are legally or politically different. For example, advocates in Washington State have explored the possibility of a right to counsel for litigants with disabilities. In New York State, advocates are exploring the feasibility of starting a right-to-counsel initiative for elderly tenants. The American Bar Association’s Commission on Immigration urged the bar association to support the “due process right to counsel for all persons in removal proceedings”; in so doing, it cited the complexity of the proceedings, the disparity in case out-

comes depending on whether the asylum seeker has legal representation, the hardships facing those seeking asylum, the systemic costs involved due to the lack of representation, and the potentially small number of persons eligible for relief.³⁴

Careful evaluation of potential case outcomes may suggest other starting points. While litigants may fare better in custody and visitation cases when they have counsel, in which categories of those cases does the absence of counsel produce the highest risk of erroneous outcomes? When does counsel not simply affect the outcome but prevent the forfeiture of rights or prevent substantial harm? Is it in the cases in which power imbalances exist or other types of cases? If it is in other types of cases, what factors help identify those cases? If it is the cases in which power imbalances exist, what data support that conclusion? If it depends more on the characteristics of litigants than the nature of the claim, what are the characteristics, and what is the connection between those characteristics and the risk of erroneous case outcomes? To what extent does having counsel, as opposed to some other form of legal assistance, prevent the forfeiture of rights?

Evaluation data may show that housing cases differ from family law cases in articulation of power imbalances that affect outcomes. In the housing context, providing counsel to the tenant is a crucial factor affecting case outcomes and preventing eviction.³⁵ Yet studies also show that landlords typically prevail against unrepresented tenants—and they do so with shocking speed—whether or not the landlord is represented.³⁶ The

³⁴AMERICAN BAR ASSOCIATION COMMISSION ON IMMIGRATION, REPORT TO THE HOUSE OF DELEGATES: RECOMMENDATION 1, 307 (2006), www.abanet.org/publicserv/immigration/107b_comprehensive_immig_reform.pdf. However, because the proposal seems to call simply for the right to appear with counsel, rather than to have counsel appointed at public expense, the proposal provides limited guidance.

³⁵See Chester Hartman & David Robinson, *Evictions: The Hidden Housing Problem*, 14 HOUSING POLICY DEBATE 461, 485 (2003), www.fanniemaefoundation.org/programs/hpd/pdf/hpd_1404_hartman.pdf; Seron et al., *supra* note 24, at 420; Russell Engler & Craig S. Bloomgarden, Summary Process Actions in Boston Housing Court: An Empirical Study and Recommendations for Reform 5 (May 20, 1983) (unpublished manuscript, on file with Russell Engler).

³⁶The titles themselves are disturbing and revealing. See, e.g., WILLIAM E. MORRIS INSTITUTE FOR JUSTICE, INJUSTICE IN NO TIME: THE EXPERIENCE OF TENANTS IN MARICOPA COUNTY JUSTICE COURTS 8 (2005), www.lawhelp.org/documents/254951Injustice%20In%20No%20Time1_final10-10-05.pdf?stateabbrev=AZ/ (87 percent of landlords represented); LAWYER’S COMMITTEE FOR BETTER HOUSING, NO TIME FOR JUSTICE: A STUDY OF CHICAGO’S EVICTION COURT 13 (2003), www.lcbh.org/pdf/full_report.pdf (53 percent of landlords represented); CITY WIDE TASK FORCE ON HOUSING COURT, 5 MINUTE JUSTICE OR “AIN’T NOTHING GOING ON BUT THE RENT!”: A REPORT OF THE MONITORING SUBCOMMITTEE OF THE CITY WIDE TASK FORCE ON HOUSING COURT (1986).

underlying strategy of analyzing contexts and uncovering power imbalances that data can capture remains a key component of identifying starting points for a civil right-to-counsel strategy. The power imbalances may differ from context to context, and advocates accordingly must tailor the framing of claims and relief.

B. Reassessing Recent Cases

Reviewing and reassessing recent cases is instructive in light of this discussion on starting points. *Frase v. Barnhart*, a custody case, reached the Maryland Court of Appeals on, among other issues, a civil right to counsel.³⁷ Although three justices produced a powerful concurring opinion supporting such a claim, the majority declined to reach the issue.³⁸

The lower court imposed impermissible conditions on Ms. Frase’s right to custody of her son in a contested proceeding in which she was unrepresented, while the Barnharts, caretakers of her son, had counsel. Not only was Ms. Frase unable to represent herself effectively, but also the Barnharts’ lawyer successfully portrayed his clients as “good Samaritans” and Ms. Frase as a homeless alcohol and drug abuser. Ms. Frase’s own direct testimony was unstructured, and the opposing lawyer’s aggressive cross-examination proceeded without objection. The judicial master provided Ms. Frase minimal assistance and referred her instead to “the *pro se* clinic.” Ms. Frase spent countless hours trying to prepare her case and sought assistance from a variety of *pro se* legal assistance programs.³⁹ Evaluation of those programs revealed that they were inadequate to protect the rights of *pro se* litigants in contested cases, particularly where the other side

had representation.⁴⁰ Only when Ms. Frase obtained representation at the appellate court level to pursue a range of claims, including the right to appointed counsel, did the court overturn the custody decision—a dynamic wholly familiar to advocates for the poor.

The analysis presented here suggests that narrowing the requested relief in the initial test case may be necessary for the civil right-to-counsel claim to command a majority. In framing the problem, the advocates for Ms. Frase hammered on the fundamental unfairness of cases pitting unrepresented litigants against represented parties.⁴¹ However, in seeking the solution, advocates sought a broader articulation of the right to counsel than that subset of custody cases. The appellants’ brief closed with:

Discussion and debate about the details, and the costs, of a suitably enhanced Maryland program of legal services to the poor are subjects for another day in another place. They should be conducted, however, against a judicial finding that a right to counsel inheres in the Maryland constitution. As Ms. Frase has demonstrated, she is entitled to such a finding here.⁴²

The amici ended by encouraging the court to “consider the inadequacy of services in Maryland in family law disputes ... [and] require the State to afford *pro se* litigants like Ms. Frase full legal representation in order to protect the fundamental rights at issue.”⁴³ Petitioners in *Kelly v. Warpinski* sought an even broader formulation of the right to counsel in Wisconsin; they asked the Wisconsin Supreme Court to “determine whether the Wisconsin Constitution

³⁷*Frase*, 840 A.2d 114.

³⁸*Id.* at 131 (Cathell, J., concurring).

³⁹See Brief of Appellant Deborah Frase at 5, 6, & 29–32, *Frase*, No. 6 (Clearinghouse No. 55,347D).

⁴⁰Brief of Amici Curiae in Support of Petitioner Deborah Frase, filed by the University of Baltimore Family Law Clinic and the Women’s Law Center of Maryland, at 21–28, *id.* (Clearinghouse No. 55,347A) (examining the available assistance programs).

⁴¹See *id.*

⁴²Brief of Appellant Deborah Frase at 59, *id.*

⁴³Brief of Amici Curiae in Support of Petitioner Deborah Frase at 29, *id.*

accords the right to counsel in civil cases.”⁴⁴

The tailored relief should also mesh more closely with the evidence in the record. The brief that the amici curiae filed in *Frase* referred to the inadequacy of the limited assistance programs in protecting the rights of certain *pro se* litigants.⁴⁵ Where existing data reveal who the *pro se* litigants are that are likely to suffer harm absent counsel, articulating the relief in relation to that evidence would strengthen the case. If the data do not demonstrate the vulnerabilities of particular categories of unrepresented litigants, the development of such data to strengthen the record should precede the next test case. Although narrowing the reach of the right to counsel at the outset may be distressing to counsel, that step may be necessary to persuade the courts that the claim of a right to counsel is no more expansive than necessary to prevent the forfeiture of rights.

IV. Responding to Objections, Developing Allies, and Neutralizing Opponents and Targeting Self-Interest

Framing the right to counsel in civil cases as part of a comprehensive strategy to stem the forfeiture of rights by those without counsel helps anticipate objections to the civil right-to-counsel initiative, identify and mobilize allies, and neutralize opponents and target self-interest.

A. Responding to Objections

Anticipating resistance to right-to-counsel initiatives and preparing responses to objections and concerns of both supporters and skeptics are a critical aspect of the strategy for establishing a right to counsel in civil cases.

1. Drawing the Line

One concern is where to draw the line. That no current civil Gideon proposal calls for appointed counsel for all parties in every civil case underscores the reality that the question is not whether, but where, to draw the line. Skeptics, let alone cautious supporters, will seek reassurances that the right, once established, will not apply to the majority of civil cases involving unrepresented litigants.

Articulating the civil right to counsel as one component of a more comprehensive strategy to prevent the forfeiture of rights of unrepresented litigants responds to these concerns.⁴⁶ A civil right to counsel does not mean that a lawyer must be provided in every case in which poor persons believe themselves to be aggrieved. Where revising the roles of key court personnel stems the forfeiture of rights, that step alone is sufficient. Where that step falls short, if legal assistance programs, either separately or in conjunction with the revised roles of court personnel and changes in the procedural rules, prevent the improper forfeiture of rights, there still may be no need for appointed counsel. But where those steps cannot prevent substantial injustice, a civil right to counsel must be recognized.

Drawing the line there might raise an objection from proponents of a broad-based civil right to counsel, proponents who fear that drawing the line too narrowly might undercut the broader claim rather than be the first step toward achieving the broader claim. Yet drawing lines and making hard choices in the civil right-to-counsel context is not new. Even the earliest articles on this subject struggled with this problem. For example, Prof. Thomas Grey’s classic 1967 article explored distinctions based on competence of the litigant and complexity of the case, the type of

⁴⁴Memorandum in Support of Petition Requesting that the Supreme Court Take Jurisdiction of an Original Action for Declaratory Judgment at 23, *Kelly*, No. 04-2999-OA (Clearinghouse No. 55,816B) (for case abstract, see 38 CLEARINGHOUSE REVIEW 769 (March–April 2005)).

⁴⁵See Brief of Amici Curiae in Support of Petitioner Deborah Frase at 21–28, *Frase*, No. 6.

⁴⁶See Alan W. Houseman, *Civil Legal Assistance for Low-Income Persons: Looking Back and Looking Forward*, 29 FORDHAM URBAN LAW JOURNAL 1213 (2002) (calling for “a comprehensive integrated system” to ensure “equal justice under the law for low-income persons”).

civil case, whether the case was in state or federal court, distinctions based on the role of the state as a party, the costs and effectiveness of counsel in particular courts, and the strength of the legal claim.⁴⁷ Even in the criminal context defendants are not entitled to appointed counsel in all cases.

2. Philosophical Objections to Revising the Roles of Court Personnel

Incorporating a civil right to counsel as part of a more comprehensive strategy neutralizes a second objection: that judges, mediators, and clerks should not assist unrepresented litigants more than they currently do. I have described above the justifications for expanding their roles. The extent to which the roles expand directly affects the scope of a civil right to counsel.

With judges, for example, wherever we draw the line, judges will not be permitted to take certain actions. Where the prohibited actions are necessary to prevent the forfeiture of rights, others must act. Context matters, and the roles of the players are interrelated. If nonjudicial court personnel are permitted to play an expansive role, or if evaluation tools demonstrate that assistance programs for unrepresented litigants are sufficient, the more active role of judges may be unnecessary. The key is not that judges must take certain actions but that the legal system as a whole must be structured to provide justice for those without counsel.

The more that the combination of judges, court-connected mediators, clerks, and assistance programs succeeds in stemming the forfeiture of rights, the narrower the scope of a civil right to counsel needs to be. Some states may interpret their ethical rules in a manner that permits different behavior among those within the court system. Some may encourage more active involvement of lawyers through increased use of unbundled legal services, more widespread acceptance of lay advocacy, or more *pro bono* initiatives. In other states or courts, formal and informal rules may

preclude the players’ extensive help, assistance programs may be sparse or ineffective, and the pool of volunteer lawyers may be negligible. Under these conditions, the right to appointed counsel needs to be broader.

3. Resources

Developing a civil right to counsel as part of a larger strategy responds to cost concerns. Seeking resources for a subset of cases, rather than for counsel for all unrepresented litigants in certain types of cases, results in a lower price tag. Moreover, the need for counsel becomes minimal to the extent that the other components of the strategy are effective. Revising the roles of the players is the most cost-effective response to the problem because it involves modifying roles for existing players rather than creating new resources. Similarly the assistance programs short of appointing a lawyer are likely to be less expensive than full representation. The appointment of counsel is necessary only where the less expensive options are ineffective.

This strategy also helps assess whether proposals involving new resources are wise ones. There will be calls to fill the justice gap with more court personnel: judges, mediators, *pro se* clerks. Before supporting calls for new personnel, we must question their roles. Unless their roles are structured to cure the problems of the forfeiture of rights of unrepresented litigants, this allocation of resources is a poor one. If only counsel can truly help, new resources must go toward providing counsel and not into ineffective alternatives.

We must compare any cost to the price of inaction. As we develop data on case outcomes, we must also develop data capturing the cost of the evictions that appointment of counsel could have prevented, the harm to parents and children from wrongful custody decisions, and the inefficiencies in the court system due to the presence of unrepresented litigants. These figures may demonstrate that appointed counsel, in some contexts, is less expensive than the costs that result from the failure to appoint counsel.

⁴⁷Note, *The Indigent’s Right to Counsel in Civil Cases*, 76 YALE LAW JOURNAL 545, 552–62 (1967).

4. Legal Arguments

The strategy advocated here strengthens the legal arguments in favor of appointed counsel. The constitutional arguments used in the civil right-to-counsel context invariably are framed in terms of the three factors set forth in *Mathews v. Eldridge* and applied in *Lassiter*: private interest at stake, governmental interest, and risk of erroneous deprivation.⁴⁸

The private-interest factor remains a strong argument under this strategy because the likely categories of cases for an expanded right to counsel, as in past challenges, will involve the potential loss of shelter or custody. When the combination of the private-interest and risk-of-error factors defines the pool of cases, the risk of erroneous outcomes dramatically increases. Any claims that courts make about their treatment of those without counsel evaporate when the cases are sorted on the basis of the risk of error in the first place. The third factor, that of the government’s interest, is at least as strong under this strategy as in past challenges, and, as the risk of erroneous outcomes and unfairness increases, this factor becomes stronger.

Some variation of the *Mathews/Lassiter* factors will permeate the analysis of the legal claims whether or not the challenge is framed on state or federal grounds. In some instances, states explicitly adopted the *Lassiter* test.⁴⁹ This strategy similarly bolsters due process claims based on fundamental fairness, raised in the *Frase* litigation, and First Amendment and due process claims focused on access.⁵⁰ Moreover, as one commentator has warned, “[l]urking in any constitutional calculus will be some notion of cost, not only in the direct sense of financial burden on the state or on the noncompensated appointed attorney, but also with

regard to the broader concern of relative allocation of legal resources.”⁵¹ A strategy that targets cases in which the risk of error is highest, uses existing resources, and frames the right to counsel as a last resort is one designed to overcome objections both inside and outside the courtroom.

B. Identifying and Mobilizing Allies

The discussion in III.A identifies types of cases involving power imbalances as a starting point for an expanded right to counsel. A different power dynamic applies to the development of allies. Where those with power in the legal system oppose a civil right to counsel, that right will be difficult to achieve, but where those with power can be persuaded or forced to support it, the prospects are more promising.⁵² Viewed in this light, the most instructive aspect of *Gideon* itself might be that attorneys general from twenty-three states joined amicus briefs supporting Clarence Gideon’s petition.

The search for powerful allies underscores the political nature of the enterprise and the importance of the “access to justice” commissions. Formed pursuant to state supreme court rules, the commissions derive their members from the courts, organized bar, civil legal aid organizations, and law schools. Imagining a successful civil right-to-counsel campaign that these key players do not support is difficult, even for jurisdictions that have not formed commissions.

The need to cultivate powerful allies is another reason to insist on the rigorous data collection described in II.B. The legal and political struggle for an expanded right to counsel would be easier to press

⁴⁸*Mathews*, 424 U.S. at 335; *Lassiter*, 452 U.S. at 27.

⁴⁹See, e.g., *In re K.L.P.*, 763 N.E.2d 741, 749–53 (Ill. 2002).

⁵⁰*Frase*, 840 A.2d at 129; see also, e.g., *In re Smiley*, 330 N.E.2d 53, 57 (N.Y. 1975) (citing Note, *A First Amendment Right of Access to the Courts for Indigents*, 82 YALE LAW JOURNAL 1055, 1066–67 (1973)).

⁵¹William S. McAninch, *A Constitutional Right to Counsel for Divorce Litigants*, 14 JOURNAL OF FAMILY LAW 509, 511 (1976).

⁵²I explore elsewhere the importance of understanding the civil Gideon initiative as an exercise in effectuating social change rather than framing legal claims. See my *Shaping a Context-Based Civil Gideon from the Dynamics of Social Change*, 15 TEMPLE POLITICAL AND CIVIL RIGHTS LAW REVIEW (forthcoming 2006).

if the reports from the past decade included data showing where lawyers were necessary to prevent erroneous case outcomes. While we cannot change the past, we can ensure that the efforts of the newly formed “access to justice” commissions and related entities do not similarly fall short. The measurement of case outcomes must be a consistent feature of future examinations of the operation of particular courts, assistance programs, and unmet legal needs.

Cultivating powerful allies extends beyond the “access to justice” commissions. Greco issued powerful statements supporting a civil right to counsel and appointed a Task Force on Access to Civil Justice charged to expand the network of state “access to justice” initiatives and to consider “the issues of a defined right to counsel in certain serious civil matters such as those that threaten the integrity of one’s family, shelter or health.”⁵³ In Wisconsin’s *Kelly v. Warpinski* eleven sitting and retired judges filed an amicus brief in support of the civil right-to-counsel litigation; they argued that “*pro se* litigants represent a significant and growing burden on a judicial system which is not well-equipped to deal with them.”⁵⁴ Targeting custody cases involving domestic violence affords the opportunity to build bridges with mobilized allies fighting to achieve justice and safety for victims of domestic violence more generally.

C. Neutralizing Opponents and Targeting Self-Interest

Along with identifying and mobilizing allies comes the need to identify those with a self-interest in the status quo and develop strategies to change their self-interest so that they favor the provision of counsel. The extent to which many judges, mediators, clerks, lawyers, and litigants benefit from a system with so many unrepresented litigants should not

be underestimated. Despite the widespread complaints about the difficulties that unrepresented litigants cause, the absence of counsel allows the dockets to operate swiftly with minimal judicial oversight per case in high-volume courts. Most nondefaulting cases in courts handling family and housing matters settle, and they settle quickly. In this sense, the system “works” for many of the “repeat players.”⁵⁵

The strategy outlined here recognizes the need to change the self-interest of those who might otherwise resist the expansion of a right to counsel in civil cases. The primary justification for the first prong—expanding the roles of the judges, mediators, and clerks—is the need to provide fair outcomes for those without counsel. This prong also should increase the likelihood that these players prefer the appointment of counsel. To prevent the unrepresented poor from forfeiting their rights, a more careful handling of cases will require court personnel to allocate more resources per case. Opposing lawyers currently face no repercussions for unethical behavior in the hallways as they press for settlements with unrepresented litigants. Lawyers who understand that overreaching has ramifications in terms of discipline, reputation, and speed in the handling of their cases will have an easier time transacting business if the other side has representation.

V. Nonnegotiable Bottom Line

I do not intend to suggest here that a strategy focused on a context-based civil right to counsel will yield immediate success. Rather, the strategy is designed to respond to the flood of unrepresented litigants in the courts and the advent of “access to justice” commissions. A coherent “access to justice” movement articulates an overarching goal of obtaining jus-

⁵³Greco, *supra* note 28, at 6.

⁵⁴Brief of Amicus Curiae of Eleven County Judges in Support of Petition Requesting Supreme Court Take Jurisdiction of Original Action at 2, *Kelly*, No. 04-2999-OA.

⁵⁵See, e.g., Marc Galanter, *Why the “Haves” Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW AND SOCIETY REVIEW 95, 149 (1974) (describing relative success of repeat players versus one-shot players in court).

tice for all, including those without lawyers in civil cases. An expanded civil right to counsel is one component of a coordinated range of initiatives to achieve access to justice.

The nonnegotiable bottom line must be that those without counsel may not forfeit rights due to the absence of counsel. Narrowing the scope of the right to counsel and collecting data to demonstrate the risk of erroneous outcomes in these cases will hasten the gathering momentum for an expanded right to counsel. Cases pitting unrepresented

litigants against represented ones present the greatest challenge to those involved. They also are a potential source of embarrassment to the legal system because they expose the difficulties in achieving fairness. A disciplined focus on these cases will shift the self-interest of the players wedded to the status quo and move them toward a consensus for change. Where the articulated right-to-counsel claim is the least intrusive way to solve a problem that will not go away, the call for a civil Gideon might finally be answered.